United States Bankruptcy Court
Northern District of Illinois
Eastern Division

Transmittal Sheet for Opinions

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Bankruptcy No. 15 B 27062

Adversary Caption:

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United States Bankruptcy Court
Northern District of Illinois
Eastern Division

In re: Oakfabco, Inc., Debtor.	Bankruptcy No. 15 B 27062 Chapter 11

OPINION ON DEBTOR'S MOTION TO APPROVE ASSUMPTION OF A SETTLEMENT AGREEMENT AND RELEASE BETWEEN OAKFABCO, INC. AND NEW ENGLAND REINSURANCE CO. [DKT. NO. 67]

Debtor moved for approval of a settlement with New England Reinsurance Company ("New England") (Dkt. No. 67) which was objected to by the Asbestos Claimants' Committee, (Dkt. No. 338.) New England and the Debtor filed responses in favor of the settlement. (Dkt. Nos. 274 & 354.) Debtor's motion was amended to offer $4.5 million. For reasons stated below, Debtor's motion will be granted by separate Order entered this date.

JURISDICTION

Jurisdiction lies under 28 U.S.C. §§ 157 and 1334. Venue is proper under 28 U.S.C. §§ 1408 and 1409. It is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and the standing referral order under District Court for the Northern District of Illinois Internal Operating Procedure 15(a). The requested relief is based on Bankruptcy Rule 9019(a) and 11 U.S.C. §§ 363 and 365.

BACKGROUND

This Chapter 11 case was filed by Debtor Oakfabco, Inc., a company that made boilers that were sold nationwide. Though operations ceased, the consequences of asbestos use in its manufacturing posed issues, as it became apparent that insurance to protect against resulting asbestos claims was inadequate to cover those claims.

On September 11, 2015, the Debtor filed a Motion for the Court to approve a pre-petition settlement agreement negotiated between the Debtor and New England to settle Debtor's claims against available insurance (the "Settlement Agreement").

(Debtor's Motion to Assume, Dkt. No. 67, [Dr's Mtn.].) The Settlement Agreement provided that the Debtor will sell New England's insurance policy (the "1983 Policy") back to New England pursuant to section 363 (f) & (m) originally for $3 million. The settlement amount increased to $3.5 million, (New England's Reply, Dkt. No. 354 [NE Reply], p. 2), and has reached a total of $4.5 million, (New England's Memorandum in Support of Amendments to Proposed Settlement, Dkt. No. 512, [NE Memo], p. 2.). In return, New England and the Debtor agreed to release causes of action between one another. Also, the Debtor agreed that its Chapter 11 plan will include a third party injunction that bars assertion against New England for any asbestos claims or released claim, including direct actions claims. The Debtor must receive court approval of the assumption of the Settlement Agreement.

The Asbestos Claimants' Committee ("ACC") appointed by the United States Trustee objected to the Settlement Agreement. (ACC's Amended Objection, Dkt. No. 338, [ACC Am. Obj.].) The ACC's objection to approval of the Settlement Agreement is based on two arguments. First, the ACC believes that the Debtor does not have a valid business justification for entering into the Settlement Agreement. At the time of negotiations, the Debtor lacked information and was in a financially compromised position. As a result, the negotiations were not fair and the Debtor should withdraw from the Settlement Agreement. The ACC also argues that the Debtor lacks a valid business justification, because the Settlement Agreement amount is too low. Specifically, the ACC puts forth that two documents in relation to the 1983 Policy warrant upwards of $20 million in additional coverage. The documents are the binder (the "Binder") and the renewal certificate (the "Renewal Certificate"). Second, the ACC argues that the releases, injunctions, and indemnifications in the Settlement Agreement for New England and the Debtor are too broad to grant approval.

New England moved for partial summary judgment to establish that the Binder was terminated and superseded by the Renewal Certificate, and the Binder does not

provide insurance coverage to the Debtor. (Dkt. No. 339.) The partial summary judgment motion was denied by Memorandum Opinion on June 29, 2017. (Dkt. No. 459 (later amended by Dkt. No. 490).)

The motion as it then stood was taken under advisement. (Dkt. No. 509.)

On July 24, 2017, New England submitted a Memorandum in Support of Amendments to Proposed Settlement stating that the settlement offer has been increased to a total of $4.5 million. (Dkt. No. 512.)

UNDISPUTED FACTS

While the Motion for Partial Summary Judgment was denied, work on it produced Findings of Undisputed Facts:

1. On August 7, 2015, the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq*., in the United States Bankruptcy Court for the Northern District of Illinois, which was assigned bankruptcy case No. 15-27062. (Dkt. No. 1.)
2. The Debtor, Oakfabco, Inc. is an Illinois corporation that was formerly known as Kewanee Boiler Corporation. (Dr's Mtn., at ¶ 7.)
3. The Debtor continues in the management of its property as a debtor-in-possession pursuant to §§ 1107(a) and 1108 of the Bankruptcy Code. (*Id*., at ¶ 2.)
4. On August 27, 2015, the United States Trustee appointed the ACC pursuant to § 1102(a)(l) of the Bankruptcy Code. (Dkt. No. 51.)
5. New England issued the 1983 Policy to Kewanee Boiler Corporation. (Dr's Mtn., at ¶ 12.)
6. The 1983 Policy's declarations page identifies the Policy Period as extending "From: March 1, 1983 To: March 1, 1984." (*Id*.; ACC Am Obj., Ex. A., at p. 1.)

7. Montgomery & Collins, Inc. of Illinois, as general agent for New England and as its surplus lines broker, issued the Binder dated March 6, 1984. (ACC Am. Obj., Ex. B.) New England does not allege that it objected to issuance of the Binder.
8. The Binder identifies the Insurer as New England Reinsurance Corp. and references the full name of the 1983 Policy, "Policy/Certificate No(s) 688013." (*Id.*)
9. The Binder identifies the Binder Period as "From: March 1, 1984 To: May 1, 1985" and states that "This binder will be terminated and superseded upon delivery of formal policy(ies)/certificate(s) issued to replace it." (*Id.*)
10. The Binder identifies the "Policy Period" as "From: March 1, 1984 To: May 1, 1985." (*Id.*)
11. The Binder states: "Forms applicable are subject in all respects to the terms, conditions and limitations of the policy(ies)/certificate(s) in current use by the insurer(s) unless otherwise specified." (*Id.*)
12. Under "Conditions" the Binder provides for payment of a premium to Montgomery & Collins, Inc. of Illinois. Debtor paid the premium set forth in the Binder. (*Id.*)
13. Under "Other Conditions" the Binder states "Renewal continuation of present policy." (*Id.*)
14. New England issued and delivered a document titled "RENEWAL CERTIFICATE" to the Policy, previously defined as the Renewal Certificate. (*Id.*, at Ex. C.)
15. The Renewal Certificate states as follows:

> In consideration of an Additional Premium of $17,650., it is agreed that this policy is extended to expire March 1, 1985.
>
> It is further agreed that the Company's liability, as stated as the annual aggregate limit in Item 3-II of the Declarations, shall apply as an Additional Limit during the Policy Period 3/1/84 to 3/1/85 for those coverages that are subject to an annual aggregate Limit of Liability.

All other terms and conditions remain unchanged.
Policy No: 688013
Issued to: Kewanee Boiler Corporation

(*Id*.)

16. As of August 7, 2015, the date of the Debtor's bankruptcy filing, there were approximately 3,400 active asbestos claims and over 30,000 inactive asbestos claims against the Debtor. (*Id.*, at p. 3.)

Additional pertinent facts are set forth in the Discussion that follows:

DISCUSSION

It is to be determined whether the Settlement Agreement should be rejected or approved. Bankruptcy Rule 9019 provides, in relevant part, "On motion by the [debtor in possession] and after notice and a hearing, the court may approve a compromise or settlement." Fed. R. Bankr. P. 9019(a). The ACC objects to approval of the Settlement Agreement for two reasons: (1) the Debtor's business justifications for approval of the Settlement Agreement are not valid and (2) the Settlement Agreement improperly includes third-party releases, injunctions, and indemnification obligations that are neither narrowly tailored nor essential to a reorganization. (ACC Am. Obj., pp. 6-17.)

A. Settlement Agreement Standards

A bankruptcy court should approve a settlement agreement if it is in the best interest of the bankruptcy estate. *In re Holly Marine Towing, Inc.* (*Holly Marine Towing*), 669 F.3d 796, 801 (7th Cir. 2012).

The court should consider "the litigation's probability of success, complexity, expense, inconvenience, and delay, 'including the possibility that disapproving the settlement will cause wasting of assets.'" *In re Doctors Hosp. of Hyde Park, Inc.* (*Hyde Park Doctors Hosp.*), 474 F.3d 421, 426 (7th Cir. 2007) (quoting *In re Am. Reserve*, 841 F.2d 159, 161 (7th Cir. 1987)). When a settlement amount falls within "the reasonable range of

possible litigation outcomes," it passes "the best interests" test. *Hyde Park Doctors Hosp.*, 474 F.3d at 426.

"The value of the settlement must be reasonably equivalent to the value of the claims surrendered." *In re Energy Co-op. Inc.*, 886 F.2d 921, 927-29 (7th Cir. 1989). "[L]itigation outcomes cannot be predicted with mathematical precision" and as long as the settlement does not fall below the low end of possible litigation outcomes, it will pass "the reasonable equivalence standard." *Hyde Park Doctors Hosp.*, 474 F.3d at 426. As a policy matter, settlements are generally favored due to their expediency, finality, and cost-effective results. *Fogel v. Zell*, 221 F.3d 955, 960 (7th Cir. 2000).

When a settlement involves a sale of bankruptcy assets, the debtor in possession must satisfy the business judgment standard by articulating a sound business purpose for doing so. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984); *In re Schipper*, 933 F.2d 513, 515 (7th Cir. 1991). Courts have recognized that insurance policies are property of a debtor's estate, which may be sold with court approval under section 363 of the Bankruptcy Code. *See, e.g., MacArthur Co. v. Johns-Manville Corp.* (*In re Johns-Manville Corp.*), 837 F.2d 89, 92-93 (2d Cir. 1988).

Proponents of a settlement bear the burden to establish that it is in the best interest of the estate, and the objectors must produce evidence to support its objection. *LaSalle Bank Nat. Ass'n v. Doctors Hosp. of Hyde Park, Inc.*, No. 04 C 4319, 2005 WL 1766370, at *9 (N.D. Ill. July 21, 2005); *In re Del Grosso*, 106 B.R. 165, 168 (Bankr. N.D. Ill. 1989). Evidence was presented here by reference to exhibits and documents, which have not been challenged as to their authenticity or completeness of the references.

On review, a bankruptcy court's approval of a settlement will not be disturbed unless the approval constitutes an abuse of discretion. *Holly Marine Towing*, 669 F.3d at 799. "[The] standard is highly deferential since the bankruptcy court is in the best position to consider the reasonableness of a particular settlement." *Id.*

i. The Settlement Agreement is in the Best Interest of the Estate

Prior to the Debtor's bankruptcy, New England reported to the Debtor that the 1983 Policy of $10 million was exhausted. (Dr's Mtn., at ¶ 12.) The Debtor believed that there was an additional $10 million available in the 1983 Policy due to the Renewal Certificate. (*Id.*, at ¶ 13.) After continued negotiations and analysis of Illinois precedent, however, the Debtor determined that the prospect of a court finding that the 1983 Policy had additional money to fund asbestos claims was slim. (*Id.*, at ¶ 14.) New England explained that although it believed that no additional funds were available in the insurance policy, it decided to engage in settlement discussions because the bankruptcy settlement offered finality. (NE Reply, p. 2.) The Debtor accepted the settlement offer (recently increased to $4.5 million) in exchange for releases and injunctions in favor of New England. (*Id.*)

> The purpose of entering into the Settlement Agreement for the Debtor was to:
>
> resolve and thereby eliminate the dispute between the Debtor and New England over the accessibility of additional coverage for Asbestos Claims under the 1983 Policy. It makes the settlement more immediately accessible than had the Debtor litigated with New England or awaited the normal delays attendant to the tort system, and facilitates the fair and efficient distribution of proceeds to the Debtor's asbestos creditors.

(Dr's Mtn., at ¶ 25.) In regards to the actual amount, the Debtor believes:

> [t]he . . . payment from New England . . . will enable the Debtor to arrange for an orderly distribution of those monies . . . to the [Asbestos Claimants], while avoiding the costs of litigating or otherwise resolving the parties' dispute over the availability of any coverage for Asbestos Claims under the [Policy].

(*Id.*, at ¶ 15.) The Debtor also stated it decided to enter into the Settlement Agreement, because there was no "realistic" possibility of receiving additional coverage from New England. (*Id.*, at ¶ 24.)

The first step to determine whether to approve the Settlement Agreement is to weigh the costs and benefits of settling versus litigation—factoring delay, complexity, expense, and the claim's likelihood of success. *Hyde Park Doctors Hosp.*, 474 F.3d at 426. The Debtor could have withdrawn from negotiations and litigated the dispute to seek additional coverage under the 1983 Policy against New England. The Debtor would thereby have certainly incurred litigation expenses and delayed administration of the bankruptcy. These factors would favor the decision to settle. To further support approval of the settlement, the potential litigation dispute between New England and the Debtor is not a simple case, as it centers on insurance policy interpretation from documents that are over thirty years old.

The claim's likelihood of success is the remaining factor at issue. The ACC says that the Settlement Agreement should be rejected, because ACC contends that Debtor has a strong likelihood of success against New England.

To the contrary, Debtor claimed in its Motion that it accepted the original Settlement Agreement, because there stood a realistic chance that litigating the matter could result in a court ruling that the 1983 Policy was completely exhausted—meaning that New England would owe nothing to the Debtor. (Dr's Mtn., at ¶ 24.)

The Debtor's conclusion that litigation posed a realistic chance of failure was, and remain, sound. Both parties cite to Illinois caselaw and presumably agree that Illinois law controls.

"A contract of insurance is established if one of the parties to such a contract proposes to be insured and the other party agrees to insure, and the subject, the amount, and the rate of insurance are ascertained or understood and the premium paid if demanded." *Zannini v. Reliance Ins Co. of Illinois*, 590 N.E.2d 457, 464 (Ill. 1992) (internal quotation marks and citations omitted). In Illinois, a binder is intended to provide temporary insurance until the insurer decides to reject or extend coverage. *Ins. Co. of Ill. v. Brown*, 734 N.E.2d 964, 969 (Ill. App., 1st Dist. 2000). Illinois courts have not

spoken as to whether a binder terminates upon extension or refusal. That uncertainty would lend itself to settling. To further the point, two state courts have concluded that a binder terminates upon extension or refusal. *See, e.g.*, *Peele v. Atl. Exp. Transp. Grp., Inc.*, 840 A.2d 1008, 1011 (Sup. Ct. Pa. 2003); *Springer v. Allstate Life Ins. Co. of N.Y.*, 731 N.E.2d 1106, 1108 (N.Y. App. 2000). Indeed, the Binder involved here itself stated that it "will be terminated and superseded upon delivery of formal policy(ies)/certificate(s) issued to replace it." (ACC Am. Obj. Ex. B, p. 1.) Although it is a question as to whether the Renewal Certificate supersedes and terminates the Binder, it was sound for the Debtor to believe that a court could find that the Renewal Certificate did in fact do so.

In reference to the Renewal Certificate, it was also reasonable for the Debtor to believe that the Renewal Certificate did not add more coverage to cover asbestos claims. Illinois precedent would suggest that use of asbestos in manufacturing and production of products amounts to a single occurrence for insurance coverage. *See, e.g.*, *U.S. Gypsum v. Admiral Ins. Co.*, 643 N.E.2d 1226, 1258-59 (App. Ill., 1st Dist. 1994) (considering asbestos use a single occurrence when calculating deductibles); *Cont'l Cas. Co. v. Borgwarner Inc.*, No. 04 CH 01708, Order (Cook City. Cir. Ct., Flynn, J., Feb. 14, 2012); *John Crane Inc. v. Admiral Ins. Co.*, No. 04 CH 8266, 2006 WL 1010495, *26 (Ill. Cir. Ct., April 12, 2006); *see also Nicor, Inc. v. Associated Elec. & Gas Ins. Services Ltd.*, 860 N.E.2d 280, 294-95 (Ill. 2006). The "per occurrence" limit for the 1983 Policy is $10 million and has been exhausted according to New England. (Dr's Mtn., at ¶ 12.) Because Illinois courts would appear to rule that the Debtor's asbestos-use constitutes a single occurrence, the Renewal Certificate would need to increase the "per occurrence" limit for there to be any remaining coverage to handle asbestos claims. The Renewal Certificate does not state that anywhere. (ACC Am. Obj, Ex. C.) It seems realistic that a court could find the Renewal Certificate simply extended the 1983 Policy for another year without adding more coverage to its "per occurrence" limit. In all, it was of sound

discretion for the Debtor to believe that litigating the dispute had a low probability of success.

Although litigating might result in recovery of additional coverage, the Debtor believed that it had a low likelihood of success. In lieu of litigating and potentially losing out on any payment from New England, the Debtor settled. By accepting the Settlement Agreement, and selling the 1983 Policy, the Debtor will provide the bankruptcy estate with $4.5 million. The $4.5 million offer would go to the bankruptcy estate and end the dispute with New England. It has a sound business justification.

The potential litigation outcomes for the 1983 policy at the time of negotiations realistically ranged from no coverage to an additional $10 million of coverage. The Settlement Agreement of $4.5 million falls within this range. Accordingly, the Settlement Agreement amount is a reasonable equivalent to the claim surrendered. *Hyde Park Doctors Hosp.*, 474 F.3d at 426.

In the best interest of the estate, and in turn in the best interest of asbestos claimants, the Debtor chose the settlement to guarantee funds, as opposed to gambling it all in a battle for more coverage. The Debtor exercised a sound business decision by accepting the Settlement Agreement to sell the 1983 Policy, and the Settlement Agreement as amended will be approved.

ii. The ACC's Objections to Debtor's Business Justifications

The ACC believes that the Debtor's justifications are not valid and should not be subject to deference. These arguments, however, are not enough to overcome the Debtor's decision to settle.

a. Debtor's Ability to Negotiate

First, the ACC objects to the Settlement Agreement, because it believes the Debtor lacked both knowledge and the necessary funds to resolve the coverage issue with New England. (ACC Am. Obj., p. 6.) These two issues "impaired" the CEO of the Debtor Mr. Stein's ability to negotiate with New England. (*Id.*) Prior to the bankruptcy

filing, New England, along with other insurance companies, provided the Debtor $2 million to fund the bankruptcy. (*Id.*) The ACC alleges New England was able to manipulate the Debtor's position because of its "compromised financial condition." Also, during the pendency of the bankruptcy and after negotiations of the Settlement Agreement, the Binder for the 1983 Policy appeared. The ACC believes that the Binder warrants an additional $10 million to the 1983 Policy. Because of this, the Settlement Agreement is said to be undervalued and the Debtor should withdraw from the Settlement Agreement to resume negotiations.

To bolster its contention about the Binder, the ACC draws a parallel between this case and *In re Budd Co., Inc.*, Bankr. No. 14-11873 (Bankr. N.D. Ill. 2014) (Schmetterer, J.). In *Budd*, the debtor entered into a pre-petition settlement. During the bankruptcy proceeding, documents were discovered and new information developed, which showed that the settlement was significantly undervalued. (*Budd* Dkt. No. 1134, pp. 14-18.) As a result, the debtor voluntarily withdrew from the settlement to renegotiate with the opposing party. (*Id.*) The ACC argues the Debtor should do the same.

Because of the Debtor's financial condition and prior ignorance of the Binder, the ACC contends the Debtor did not exercise a sound business decision by entering into the Settlement Agreement. (ACC Am. Obj., p. 9.) Therefore, it is argued that the Settlement Agreement should be rejected.

There is some support for the ACC argument in the fact that the parties have continued negotiations with some increase in the offer even while the Motion was pending. However, that increase only supports the reasonableness of settlement.

The financial position of the Debtor at the time of negotiations and prior ignorance of the Binder should not compel the Debtor to withdraw from the Settlement Agreement. The ACC relies on the fact that the Debtor received $2 million from the insurance companies in order to help it file for bankruptcy, but this fact does not suggest that the Debtor's judgment was compromised. The Debtor maintains that there

was "nothing inappropriate" about its motivations and negotiated in the best interest of the estate. (Dr's Resp., p. 3.) There is nothing to show that the Debtor was manipulated or in a compromised condition when negotiating the Settlement Agreement.

The discovery of the Binder does not affect the Settlement Agreement. Although the Binder presented new information regarding the 1983 Policy, it appears to lack any significant effect on the 1983 Policy. Described above, Illinois caselaw holds that a binder for an insurance policy is temporary, *Brown*, 734 N.E.2d at 969, and it is at best unclear under Illinois whether a binder is superseded by a renewal of the insurance policy, *but see Peele*, 840 A.2d at 1011; *Springer*, 731 N.E.2d at 1108. It was plausible for the Debtor to believe the Renewal Certificate would be found to supersede the Binder and it was not worth withdrawing from the Settlement Agreement. However, it appears from the increased settlement offer that Debtor continued negotiations with some success. This case is distinguished in *Budd*, in that the debtor in *Budd* received not only new information regarding the settlement but that the new information materially affected its reasoning for entering into the settlement agreement. (*Budd* Dkt. No. 447, pp. 1-2; Dkt. No. 1134, pp. 14-18.)

Circumstances here continue to support Debtor's justification for settling.

b. The Settlement Agreement Amount

The ACC's next major objection is the amount of the Settlement Agreement. The ACC argues that the Settlement Agreement is too low, because the Debtor has a strong likelihood of success in litigation, and therefore Settlement Agreement should be rejected. According to the ACC, the Settlement Agreement should be much larger because of two documents in relation to the 1983 Policy: the Binder and Renewal Certificate. (ACC Am. Obj., p. 7.) Together, these documents are said to warrant an additional $20 million of coverage in the 1983 Policy. The ACC's arguments in this regard, however, do not receive strong support from current Illinois precedent.

The ACC argues that the Renewal Certificate warrants an additional $10 million to the 1983 Policy in two ways.[1] It first argues that the renewal period of the Renewal Certificate affords another $10 million for the 1983 Policy. The 1983 Policy has a coverage period form March 1, 1983 to March 1, 1984. (ACC Am. Obj., Ex. A, at p. 1.) The Renewal Certificate provides, "[T]he Company's liability, as stated as the annual aggregate limit in Item 3-11 of the Declarations, shall apply as an Additional Limit during the Policy Period 3/1/84 to 3/1/85 for those coverages that are subject to an annual aggregate Limit of Liability. All other terms and conditions remain unchanged." (*Id.*, at Ex. C.) Because there are two policy periods, ACC argues there is an additional limits of $10 million. A new set of limits are said to occur because of the new period, for four reasons argued by the ACC:

- First, the Coverage section insures "all sums which the Insured shall be obligated to pay ... because of ... Personal Injury ... caused by an Occurrence." Insuring Agreements, I Coverage.
- Second, the Limits Of Liability section states that "the total limit of the Company's liability ... from any one Occurrence shall not exceed the amount specified in Item 3 I of the declarations." Insuring Agreements, III Limits Of Liability.
- Third, Item 3 I of the Declarations states that "[t]he limit of the Company's liability shall be ... $10,000,000 Single limit any one Occurrence." Item 2 of the Declarations defines the Policy Period as March 1, 1983 to March 1, 1984. Accordingly, a "$10,000,000 Single limit any one Occurrence" applies to the Policy Period March 1, 1983 to March 1, 1984. In other words, the $10 million "Single limit any one Occurrence" in Item 3 I is tied to the "Policy Period" in Item 2. The "Single limit any one Occurrence" applies to the "Policy Period", whatever the policy period may be.
- Fourth, the Policy defines Occurrence with specific reference to the policy period. Occurrence means "an accident or event including continuous repeated exposure to conditions, which results, during the policy period, in Personal Injury." (Definitions, H Occurrence.) "Personal Injury" also is tied to the policy period: "Personal Injury ...

[1] The ACC in its initial objection made an argument not repeated in its amended Objection. (*See* Dkt. No. 268.) As a result, the omitted argument will not be addressed.

> means ... bodily injury ... which occurs during the policy period." Definitions, I Personal Injury.

(ACC Am. Obj., p. 10.) As a result, the renewal period of the Renewal Certificate is claimed to create an additional $10 million of coverage, bringing the possible recovery to $20 million.

Although the Renewal Certificate references an "additional" limit of $10 million, the more pressing issue is whether the Renewal Certificate adds to the "per occurrence" limit available for coverage towards asbestos claims. Although not definitive, Illinois caselaw suggests that asbestos use for manufacturing and production of products equates to only a single occurrence. *See, e.g., U.S. Gypsum*, 643 N.E.2d at 1258-59 (considering asbestos-use a single occurrence when calculating deductibles); *Cont'l Cas. Co.*, No. 04 CH 01708; *John Crane Inc.*, 2006 WL 1010495, at *26; *see also Nicor, Inc.*, 860 N.E. at 294-95. The 1983 Policy provides a $10 million per occurrence limit, which has already been exhausted. (Dr's Mtn, at ¶ 12.) Therefore, the only way the 1983 Policy could have an additional $10 million of coverage for the asbestos claims would be if the Renewal Certificate added to the "per occurrence" limit of the 1983 Policy. The Renewal Certificate does not offer any language to suggest that was done. Further, the Renewal Certificate states that aside from providing the additional limit of $10 million, "All other terms and conditions remain unchanged." (ACC Am. Obj., Ex. C.). Accordingly, the "additional limit" argument lacks weight and does not increase the likelihood of success in litigating the matter.

Next, the ACC contends that the increase of the renewal premium of the Renewal Certificate creates an additional $10 million limit. Because the Debtor's premium increased from $12,250 to $17,650, the Renewal Certificate is said to have created a new $10 million of coverage. The ACC relies on *Berg v. New York Life Ins. Co.*, 831 F.3d 426, 429-30 (7th Cir. 2016), which requires courts to read the policy in light of the insureds reasonable expectations of coverage. The ACC also points to Endorsement

#4 of the 1983 Policy, which amends the premium payment to $47,250. (ACC Am. Obj., Ex. A.) These increases in payments therefore are said to establish $10 million more in coverage of the 1983 Policy for asbestos claims.

The ACC's argument, however, fails to consider other factors that might cause a premium increase, such as: "the Debtor's loss history, the addition of coverage under the policy for additional companies with their own risks and loss history, other factors in the marketplace, or simply that the policy included an additional agreement limit." (NE Reply, p. 10.); *see UNR Industries, Inc. v. Cont'l Ins. Co.*, 1988 WL 121574, *3 (N.D. Ill. Nov. 9, 1988) (explaining reasons why a premium could increase). Because of these varying reasons why a premium would increase, it would not be reasonable for the Debtor to assume that the Renewal Certificate increased the "per occurrence" limit coverage of the 1983 Policy. *Berg*, 831 F.3d at 429-30. The premium increase does not by itself increase the likelihood of success in litigation.

In addition, ACC argues that the Binder warrants $10 million more in coverage for the 1983 Policy to pay for asbestos claims. The Binder period went from March 1, 1984 to May 1, 1985, which extended two months past the Renewal Certificate period. (ACC Am. Obj., Ex. B, at p. 1.) The Binder, according to ACC, created a fresh set of $10 million limits based on the extended two months or the "stub period." Although the Binder stated that it "will be terminated and superseded upon delivery of formal policy(ies)/certificate(s) issued to replace it," the ACC argues that the Renewal Certificate makes no mention of the Binder. It is also unclear whether the Renewal Certificate equated to a "formal certificate." Because of ambiguity regarding the Renewal Certificate, ACC claims that the Binder tacks on an additional $10 million to the 1983 Policy.

Illinois caselaw holds that a binder for an insurance policy is temporary, *Brown*, 734 N.E.2d at 969, and it is at best unclear under Illinois whether a binder is superseded by renewal of the insurance policy, *but see Peele*, 840 A.2d at 1011; *Springer*, 731 N.E.2d at

1108. Further, the ACC points to no Illinois precedent showing that a binder creates a new "per occurrence" limit. The issue of whether the Renewal Certificate actually supersedes the Binder is a question of fact. It is possible that a court hearing the dispute could find that the Renewal Certificate did so. As a result, the Binder does not increase the likelihood of success in litigation.

The ACC's arguments do not establish that the Debtor failed to exercise a sound business decision when entering into the Settlement Agreement. Even if the arguments put forth by the ACC showed a greater chance of success in litigation than the Debtor believed, all other factors suggest that settling was the proper action. *See In re Teknek, LLC*, 402 B.R. 257, 261 (Bankr. N.D. Ill. 2009).

B. Settlement Agreement's Releases, Injunctions, and Indemnifications

The last issue to address is the objection from the ACC asserting that the Settlement Agreement imposes unreasonable burdens on nonparty asbestos claimants. The ACC specifically takes issue with the indemnification obligations, third-party injunctions, and releases that "provide [New England] with blanket immunity." (ACC Am Obj, p. 14.)

The ACC takes issue with several provisions of the Settlement Agreement:

- The mandatory disclosure of Asbestos Claimants' confidential claim information (§ 4.5; Exhibits 3 and 4, ¶ 9);
- The inclusion of a non-Debtor injunction in any Chapter 11 plan proposed by the Debtor that would provide New England with blanket immunity against Asbestos Claimants' prepetition claims (§ 3.9);
- The requirement that Asbestos Claimants execute releases providing New England with blanket immunity against prepetition claims (§ 3.8); and
- The requirement that Asbestos Claimants indemnify New England to the extent of any payment of their claims, from claims arising from the Medicare Secondary Payer Act and regulations thereunder (Exhibits 3 & 4, ¶ 7).

(*Id.*)

The ACC cites to *In re Airadigm Commc'ns, Inc.*, 519 F.3d 640,657 (7th Cir. 2008), claiming that proper releases, injunctions, and indemnifications must be narrowly tailored and essential to reorganization. *See also, In re Ingersoll, Inc.*, 562 F.3d 856, 865 (7th Cir. 2009). Because the Debtor is liquidating its remaining assets, the plan confirmation here will not reorganize the business, thereby making all releases unessential. The ACC also cite to a series of other cases in which third-party releases were stricken because the chapter 11 plan was a liquidating plan or the releases were too broad. *In re GAC Storage El Monte, LLC*, 489 B.R. 747 (Bankr. N.D. Ill. 2013); *In re Draiman*, 450 B.R. 777 (Bankr. N.D. Ill. 2011); *In re Berwick Black Cattle Co.*, 394 B.R. 448, 461 (Bankr. C.D. Ill. 2008).

However, none of the foregoing cited cases involved approving a settlement agreement, but rather were in cases confirming a chapter 11 plan. At this point, the releases created by approval of the Settlement Agreement are only between the Debtor and New England. (*See* Dr's Mtn, Ex. B, at p. 2.) The Settlement Agreement itself does not create third-party releases but rather makes the Debtor responsible for including such releases in confirmation plan that would do so. The arguments here are thus more appropriate for objection to the Debtor's forthcoming chapter 11 plan. ACC has filed such Objection. (Dkt. No. 468.)

Finally, New England and the Debtor removed a provision in the proposed Settlement Agreement Order, which would require "each holder of an Asbestos Claim . . . [to] execute a release" in order to receive payment from the estate or the Debtor. (NE Reply, Ex 1, at p. 6.) Therefore, the Settlement Agreement itself does not grant New England a release by asbestos claimants or impose any obligations on the asbestos claimants.

CONCLUSION

The recent filing by the ACC (Dkt. No. 515) being reviewed, and the reasoning therein is considered responded to by the foregoing Opinion.

Accordingly, the ACC's objections are overruled, and the Settlement Agreement will be approved by separate order.

ENTER:

_____
Jack B. Schmetterer
United States Bankruptcy Judge

Dated this 4th day of August, 2017

Case No. 15 B 27062
In re: Oakfabco, Inc.
Updated: 8/4/17

CERTIFICATE OF SERVICE

I, Dorothy Clay, certify that on August 4, 2017, I caused to be served copies of the foregoing document to the following by either U.S. Mail or electronic mail to those who have consented to such service.

_____
Judicial Assistant/Deputy Clerk

Case No. 15 B 27062
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Vince Holajn, Interim Chairman, 406 Sierra Place, Gurnee, IL 60031 (Committee Appointee)

Affected Claimant to Objection

The California Franchise Tax Board
Bankruptcy Section MS A340
Franchise Tax Board
P.O. Box 2952
Sacramento, CA 95812-9252

United States Bankruptcy Court
Northern District of Illinois
Eastern Division

In re: Oakfabco, Inc., Debtor.	Case No. 15 B 27062 Chapter 11

ORDER GRANTING DEBTOR'S MOTION TO APPROVE ASSUMPTION OF A SETTLEMENT AGREEMENT AND RELEASE BETWEEN OAKFABCO, INC. AND NEW ENGLAND REINSURANCE CO. [DKT. NO. 67]

Pursuant to Opinion of this date, IT IS ORDERED, ADJUDGED, AND **DECREED**

THAT: The Motion is GRANTED and APPROVED in all respects pursuant to

Bankruptcy Rule 9019(a), and it is further ordered;

A. The Agreement as amended by the offer of $4.5 million and each of its terms and conditions are hereby approved in their entirety, and its assumption is authorized.

B. For reasons set forth in the Opinion of this date, all objections to the Motion and the relief requested therein and/or granted in this Order that have not been withdrawn, waived, or settled, and all reservations of rights included in such objections are overruled on the merits.

C. Oakfabco is authorized, empowered, and directed pursuant to 11 U.S.C. §§ 105(a) and 363(b) and other applicable provisions of the Bankruptcy Code, to sell, transfer, and convey the Policies to Hartford subject only to the terms and conditions specified in the Agreement, and such Policies shall be deemed so conveyed to Hartford upon the Approval Date. The sale of the Policies by Oakfabco to Hartford shall constitute a valid, legal and effective transfer, which shall vest Hartford with all right, title, and Interest in and to the Policies, free and clear of all Interests, including all Asbestos Claims, Direct Action Claims, and Claims by other insurers for contribution, indemnity, subrogation, or similar relief whether arising before or after commencement of this Chapter 11 Case and whether arising by agreement, understanding, law, equity, or otherwise.

D. This Order shall be binding upon Oakfabco, all creditors of and claimants against Oakfabco, all holders of Claims, including Asbestos Claims, against Oakfabco, all insurers who received notice of the Motion, co-defendants in pre-petition actions by Asbestos Plaintiffs against Oakfabco, and all other Persons and entities

receiving notice as set forth in paragraphs 7-8 supra, and each of their successors and assigns.

E. The remaining $4,050,000.00 of the $4,500,000.00 cash amount payable under the Agreement shall be paid by New England as provided in the Agreement.

F. The releases in the Agreement comply with the Bankruptcy Code and all applicable state laws. The Agreement terminates the Policies upon the Approval Date, and the Policies will be of no further force and effect, and be exhausted in all respects as to all coverages thereunder upon the Approval Date.

G. The sale of the Policies to Hartford under the Agreement will constitute transfer for reasonably equivalent value and fair consideration under the Bankruptcy Code and the laws of the State of Illinois.

H. The Parties are each hereby authorized to take all actions and execute all documents and instruments that they deem necessary or appropriate to implement and effectuate the transactions contemplated by the Agreement.

I. Pursuant to 11 U.S.C. §§ 105(a) and 363(f), as provided by the Agreement and paragraph D, supra, the Policies shall be and hereby are, as of the Approval Date, transferred to Hartford, free and clear of all liens, encumbrances and other Interests of any Person, including, but not limited to, all rights and Interests of Oakfabco; any other Person claiming by, through, or on behalf of Oakfabco; any other insurer; any holder of an Asbestos Claim against Oakfabco, whether arising prior to or subsequent to the commencement of the Chapter 11 Case, and whether imposed by agreement, understanding, law, equity, or otherwise (including, without limitation, Interests in the Policies that purport to give to any party a right or option to effect any forfeiture, modification, or termination of the Interest of the Estate or Hartford, as the case may be, in the Policies).

J. Pursuant to Sections 105(a) and 363(f) of the Bankruptcy Code, all Persons who have held or asserted, who hold or assert, or who may in the future hold or assert, any Claim, including without limitation any Asbestos Claim (as that term is defined in the Agreement), or Interest of any kind or nature against or in the Estate, Oakfabco, the Policies, or Hartford relating to, based upon, arising under or out of, derived from or attributable to (i) activities of Oakfabco or any of its predecessors, or (ii) the Policies (including without limitation any Asbestos Claim, Insurance Coverage Claim or Direct Action Claim), whenever or wherever arising or asserted (whether in the nature of or sounding in tort,

contract, warranty or any other theory of law, equity or admiralty), shall be and hereby are permanently stayed, restrained and enjoined from asserting any such Claims or Interests against Hartford and from continuing, commencing, or otherwise proceeding or taking any action against Hartford to enforce such Interests or Claims or for the purpose of directly or indirectly collecting, recovering or receiving payments from Hartford with respect to any such Claim or Interest.

K. Hartford is a good faith purchaser of the Policies and is entitled to (and is hereby granted) all of the protections provided to good faith purchasers under 11 U.S.C. § 363(m). The transactions contemplated by the Agreement shall not be subject to avoidance under 11 U.S.C. § 363(n). All Persons are hereby enjoined from commencing or continuing an action seeking relief under 11 U.S.C. § 363(n) with respect to the Agreement and the transactions contemplated thereby.

L. Hartford is not, and shall not be deemed to be, a successor to Oakfabco by reason of any theory of law or equity or as a result of the consummation of the transactions contemplated in the Agreement. Hartford shall not assume any liabilities of Oakfabco.

M. Pursuant to Fed. R. Bankr. P. 9019, the releases in Section IV of the Agreement are expressly approved. All of the Claims released therein are hereby dismissed and forever released effective as upon the Approval Date.

N. Any chapter 11 plan proposed by Oakfabco shall provide for a third party injunction that bars assertion of Claims, including Asbestos Claims, against Hartford.

O. The Agreement is binding on any chapter 11 trustee for Oakfabco and on any liquidating or other trust or distribution vehicle established under a chapter 11 plan for Oakfabco, and on any chapter 7 trustee in the event the case is converted to a case under chapter 7. The transactions contemplated by the Agreement, including without limitation the sale of the Policies to Hartford free and clear of all Interests, are undertaken by Hartford in good faith, as that term is used in Section 363(m) of the Bankruptcy Code. Accordingly, the reversal or modification on appeal of the authorization to consummate the sale of the Policies and the transactions contemplated by the Agreement shall not affect the validity of the sale of the Policies to Hartford, unless such authorization is duly stayed pending such appeal. Hartford is a purchaser in good faith of the Policies

and shall be entitled to all of the protections afforded by Section 363(m) of the Bankruptcy Code.

P. This Court shall retain jurisdiction to interpret and enforce the provisions of the Agreement and this Order in all respects and further to hear and determine any and all disputes relating to the Agreement between the Parties or between a Party and any other Person; provided, however that in the event the Court abstains from exercising or declines to exercise such jurisdiction or is without jurisdiction with respect to the Agreement or this Order, such abstention, refusal, or lack of jurisdiction shall have no effect upon, and shall not control, prohibit, or limit the exercise of jurisdiction of any other court having competent jurisdiction with respect to any such matter. In the event this case has been closed, there shall be cause to have this case reopened upon motion or application for such purposes.

Q. All obligations of Oakfabco and claims of New England under the Agreement may be considered upon proper notice and motion to be administrative expenses of the Estate under Sections 503(b) and 507(a)(1) of the Bankruptcy Code.

R. This Order shall inure to the benefit of Hartford, Oakfabco, and their respective successors and assigns and shall be binding upon, without limitation, Oakfabco, all holders of Asbestos Claims, Hartford, Other Insurers, which are holders of Claims against, Oakfabco.

S. Each and every federal, state, and local governmental agency or department was accepted for filing, recording or otherwise any and all documents and instruments necessary and appropriate to consummate and/or evidence the transactions contemplated by the Agreement and this Order.

ENTER:

_____

Jack B. Schmetterer
United States Bankruptcy Judge

Dated this 4th day of August, 2017

Case No. 15 B 27062
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