IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	)	Chapter 11
	)	
ERICKSON RETIREMENT COMMUNITIES, LLC, et al.,	)	Case No. 09-37010 (SGJ)
	)	
	)	Jointly Administered
Debtors	)	
	)	

LIMITED OBJECTION OF THE ACE GROUP OF COMPANIES TO THE DEBTORS' FOURTH AMENDED JOINT PLAN OF REORGANIZATION UNDER CHAPTER 11 OF THE BANKRUPTCY CODE

Creditors Illinois Union Insurance Company, Westchester Fire Insurance Company, ACE Fire Underwriters Insurance Company and other members of the ACE Group of companies (collectively "ACE"), by and through their undersigned attorneys, hereby file this Limited Objection to the Debtors' Fourth Amended Joint Plain of Reorganization under Chapter 11 of the Bankruptcy Code ("Plan"), and in support thereof, aver as follows:

I. INTRODUCTION

1. On October 19, 2009 (the "Petition Date"), Erickson Retirement Communities LLC and its affiliated companies (the "Debtors") filed voluntary petitions for relief pursuant to Chapter 11 of the United States Bankruptcy Code. The cases are jointly administered under the above caption.

2. ACE and the Debtors are parties to certain pre-petition and post-petition insurance policies. In addition, one of the Debtors is a principal under a performance bond issued by ACE, and ACE and the Debtors are parties to a related indemnity agreement with ACE.

3. The Debtors have submitted the Plan for confirmation by the Court.

4. On or about March 8, 2010, the Court approved the Disclosure Statement with respect to the Plan.

5. ACE objects to the Plan because it does not contain adequate information about the proposed treatment of the insurance policies and the indemnity agreement entered into by ACE and the Debtors. To the extent that ACE can ascertain, no document filed of record to date discloses whether the Debtors intend to include these insurance policies and the indemnity agreement into the assets that are being sold by the Debtors and, if so, whether the Debtors intend to assume and assign those policies and the agreement to the purchaser of their assets.

6. ACE objects to the Plan because Debtors purport to assume and assign the performance bond issued by ACE, in violation on the applicable bankruptcy law.

7. ACE also objects to the Plan because it contains other terms that potentially violate the Bankruptcy Code.

8. For these reasons, as more fully explained below, the proposed Plan should not be approved by the Court unless these Limited Objections are fully addressed.[1]

II. BACKGROUND

A. The ACE Policies, Bonds, and Agreements

9. Prior to the Petition Date, ACE issued several Builder's Risk and Excess Builder's Risk Policies to the Debtors.

10. After the Petition Date, ACE (specifically, Illinois Union Insurance Company) issued Excess Commercial Property Policy No. D37372717 001 for a policy term of November 14, 2009 - October 15, 2010.

[1] ACE has previously objected to the Debtors' proposed Disclosure Statement on substantially the same grounds. By the agreement with the Debtors, at the March 5, 2010 hearing, ACE expressly reserved its objections for purposes of the confirmation of the Plan.

11. Collectively, all the policies described above shall be referred to as the "ACE Policies."

12. Debtors have on-going obligations under the ACE Policies, including without limitation, providing and maintaining primary coverages under the excess policies, providing notices of losses, making records available, preserving ACE's subrogation rights, and numerous other obligations.

13. By their terms, the ACE Policies prohibit assignment or transfer of any legal right or interest in the ACE Policies without ACE's written consent.

14. Prior to the Petition Date, ACE issued a construction performance bond No. K07621899 (hereinafter, the "ACE Bond") naming the Debtors as principals and Concord Township, Pennsylvania as the obligee. The ACE Bond pertains to the construction of a retirement community campus in the Concord Township.

15. As a condition for ACE issuing the ACE Bond and other surety bonds, the Debtor Erickson Retirement Communities, LLC ("ERC") signed an indemnity agreement (the "Indemnity Agreement"), pursuant to which ERC agreed to indemnify ACE for any liability and losses under the surety bonds issued by ACE on behalf of ERC and any of its subsidiary or affiliate.

B. <u>Relevant Provisions in the Plan</u>

16. Pursuant to the Plan, the Debtors seek to sell substantially all of their assets to Redwood-ERC Senior Living Holdings, LLC and its affiliated Acquisition Companies (collectively "Redwood"). *See* Plan at ¶ 6.1.

17. The Plan provides that certain insurance policies will be included in the assets being purchased by Redwood. *See* Plan at ¶ 6.1.1(viii).

18. The Plan further contemplates that some insurance policies might be assumed and assigned to Redwood, while other insurance policies might be rejected. *See* Plan at ¶¶ 10.1; 10.4.

19. The Plan fails to disclose the proposed treatment of the ACE Policies, *i.e.*, to the extent that ACE can ascertain, no document filed of record to date discloses whether the Debtors intend to include the ACE Policies into the assets that are being sold to Redwood and, if so, whether the Debtors intend to assume and assign those policies to Redwood.

20. Similarly, the Plan fails to provide any information on the proposed treatment of the Indemnity Agreement.

21. In particular, the Plan provides that only "*certain* contracts ... used by the Company in the Business" are included among the Purchased Assets. *See* Plan at ¶ 6.1.1(ii) (emphasis added).

22. The Plan further provides that a complete list of assumed and assigned executory contracts will be provided in the future, and that such a list may be further supplemented after the Effective Date of the Plan. *See* Plan at ¶¶ 10. 1 and 10.4.

23. The Debtors, however, have already indicated that they intend to assume the ACE Bond, even though the Bond is not even an executory contact that might be assumed by the Debtors. *See* Debtors' Notice of (I) Possible Assumption of Executory Contracts and Unexpired Leases, (II) Fixing of Cure Amounts, and (III) Deadline to Object Thereto filed on March 25, 2010.

24. Purportedly, the Debtors intend to assign the ACE Bond to Redwood once the Plan is approved by the Court. *See* Plan at ¶ 10.4.

25. The Plan also contains a number of provisions that might effect upon the insurers' and the Debtors' rights and obligations under the insurance policies, any related

agreements, and applicable non-bankruptcy law. *See, e.g.*, Plan at ¶¶ 6.44 (Trustee has the authority to settle any and all causes of action); 12.2 (Injunction); 12.5 and 12. 6 (Releases).

III. OBJECTIONS TO THE PLAN

26. ACE incorporates the foregoing paragraphs as if fully set forth herein.

27. ACE objects to the Plan because it fails to disclose the proposed treatment of the ACE Policies.

28. In the event that the Debtors propose to include the ACE Policies in the Purchased Assets and assume and/or assign them to Redwood, ACE objects to such an assignment on the grounds that the ACE Policies are not assignable without ACE's consent, and ACE does not have sufficient information to determine whether to consent to the assignment.

29. In particular, ACE is without sufficient knowledge or information to determine whether the proposed assignee of the ACE Policies has the financial resources to perform the obligations of the insured under those policies.

30. ACE further objects to the Plan on the additional and independent basis that it does not include any provisions that require the assignee of the assumed and/or assigned contracts to perform the obligations of the assignor under those contracts.

31. An assignment of an executory contract without any assurance of performance by the assignee constitutes an improper attempt to reap the benefits of an executory contract while rejecting its burdens. *Schokbeton Industries, Inc. v. Schokbeton Products Corp.*, 466 F.2d 171, 175 (5th Cir. 1972) (it is a "universally recognized rule that a trustee cannot accept the benefits of an executory contract without accepting the burdens as well.").

32. ACE also objects to the Plan to the extent that it is not "insurance neutral," *e.g.* to the extent that the Plan impairs the rights and obligations of the insurers that issued insurance

policies to the Debtors. As such, the Plan jeopardizes the Debtors' insurance coverage, and should not be confirmed.

33. ACE further objects to the Plan because it fails to disclose the Debtors' proposed treatment of the Indemnification Agreement.

34. ACE further objects to any purported assumption or assignment of the ACE Bond because it is not an executory contract under 11 U.S.C. §365. *See In re Maxon Engineering Services, Inc.*, 324 B.R. 429, 432 (Bank. D. P.R. 2005) (holding that surety bonds are not executory contracts).

35. In addition, Debtors cannot assume or assign the ACE Bond because it is not property of the Debtors' Estates. *See Matter of Lockard*, 884 F.2d 1171, 1177-78 (9th Cir. 1989) (citing *In re Mansfield Tire and Rubber Co.*, 660 F.2d 1108, 1115 (6th Cir. 1981); *Globe Construction Co. v. Oklahoma City Housing Auth.*, 571 F.2d 1140, 1143 (10th Cir. 1978); *In re Stanndco Developers, Inc.*, 534 F.2d 1050, 1052-53 (2d Cir. 1976)).

36. Even if the ACE Bond were an executory contract, it cannot be assumed or assigned because it is a non-assignable financial accommodation under 11 U.S.C. §365(c)(2).

37. Similarly, the Indemnity Agreement is a non-assignable financial accommodation under 11 U.S.C. §365(c)(2).

38. To the extent that the Plan contemplates that the ACE Bond and/or the Indemnity Agreement will be assigned by the Debtors, the Plan violates applicable bankruptcy law.

IV. <u>RESERVATION OF RIGHTS</u>

39. ACE expressly reserves, and does not waive, any and all of its rights, defenses, limitations and/or exclusions under the ACE Policies, the ACE Bond, and the Indemnity Agreement and applicable law. ACE further reserves all rights to assert any and all such rights,

defenses, limitations and/or exclusions in any appropriate manner or forum whatsoever (including, without limitation, arbitration, the United States District Court or any state court). Nothing contained in this Limited Objection shall be deemed to expand any coverage that may otherwise be available under the ACE Policies, or any rights to payment under any settlement.

40. ACE further reserves all of its rights to raise the issues contained in this Limited Objection and any other related issues in connection with any motion for sale of the Debtors' assets and/or approval of any agreement for sale.

41. ACE further reserves all of its rights to raise the issues contained in this Limited Objection and any other related issues in connection with any procedurally-appropriate contested matter and/or adversary proceeding including, without limitation, any separate adversary proceeding requesting any appropriate declaratory and/or injunctive relief with respect to any of the ACE Policies, the ACE Bond, or the Indemnity Agreement.

42. ACE further reserves all of its rights to object to any claim for coverage under any of the ACE Policies, or claims under the ACE Bond, and to seek declaratory and/or injunctive relief to the extent that the treatment of its rights under the ACE Policies, the ACE bond, or the Indemnity Agreement violates any terms or conditions thereof, or gives rise to any claims or defenses on behalf of ACE.

43. Nothing in this Limited Objection shall be construed as an acknowledgment that the ACE Policies, the ACE Bond, or the Indemnity Agreement cover or otherwise apply to any claims, losses or damages on account of any claims or otherwise, or that any such claims or causes of action are eligible for payment.

44. ACE reserves the right to seek adjudication that Debtors, individually or collectively, have waived, forfeited or discharged any available coverage under the ACE Policies and surety bonds.

45. ACE also reserves its rights to amend, modify or supplement this Limited Objection in response to, or as a result of any discovery being conducted in connection with modifications made to the proposed Plan and/or confirmation of the Plan and/or Definitive Agreement and/or any submission in connection with the Plan or these Chapter 11 Cases filed by any party-in-interest.

46. ACE also reserves the right to adopt any other objections to the proposed Plan filed by any other party.

CONCLUSION

47. For the reasons set forth above, the Plan should not be confirmed unless the objections raised herein are resolved.

WHEREFORE, for all the foregoing reasons, ACE respectfully requests that this Court not confirm the proposed Plan unless the Limited Objections raised herein are addressed, together with such further relief as the Court deems appropriate.

Respectfully submitted,

GLAST, PHILLIPS & MURRAY PC

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Dated: April 9, 2010

CERTIFICATE OF SERVICE

I certify that on this 9th day of April, 2010, I caused copies of the foregoing Limited Objection of the Ace Group of Companies to the Debtors' Fourth Amended Joint Plan of Reorganization under Chapter 11 of The Bankruptcy Code to be served upon the following individuals in the matter indicated below:

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