

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
MET-COIL SYSTEMS (f/k/a MET-COIL)	Case No. 03-12676 (MFW)
SYSTEMS CORPORATION),)	
)	
Debtor.)	Hearing Date: June 27, 2005 at 4:00 p.m. (ET)
_____)	Objection Deadline: June 23, 2005 by agreement

**THE ACE COMPANIES' LIMITED OBJECTION TO
MOTION TO ENFORCE THE TERMS OF THE FOURTH
AMENDED CHAPTER 11 PLAN AND CONFIRMATION ORDER OR,
IN THE ALTERNATIVE, FOR RELIEF FROM THE CONFIRMATION ORDER
Regarding Docket Number 1516**

Pacific Employers Insurance Company and Westchester Fire Insurance Company (collectively, the “**ACE Companies**”), by their counsel, respond to the Motion To Enforce The Terms Of The Fourth Amended Chapter 11 Plan And Confirmation Order Or, In The Alternative, For Relief From The Confirmation Order (the “**Motion**”), as follows:

Preliminary Statement

1. The Motion seeks to improperly assert a direct cause of action against the ACE Companies. It is well-established by the applicable state law that non-insureds, such as the Movants,¹ cannot maintain a direct action against an insurer for damages allegedly caused by an insured. While the ACE Companies take no position with respect to the Movants’ argument that they are entitled to payment from the Trust, the Motion should be limited to that consideration. To the extent the Motion seeks authority for a direct action against the ACE Companies, it is in direct contravention of the law and should be denied.

¹ Capitalized terms shall have the meanings ascribed in the Motion unless otherwise defined herein.

Relevant Background

2. Prior to the Petition Date, the ACE Companies issued policies of insurance to the Debtor (the “**Policies**”). The Debtor became involved in several lawsuits over the alleged release of trichloroethylene (“**TCE**”) into the soil at its facility in Lisle, Illinois (the “**Lisle Facility**”).

3. The ACE Companies were party to the *Travelers Casualty & Surety Co. v. Met-Coil Systems Corp.* matter pending in the United States District Court for the Northern District of Iowa (the “**Lawsuit**”).

4. On July 19, 2004, the Debtor, Mestek, Formtek, Inc. (“**Formtek**”) and the ACE Companies entered that certain settlement agreement that resolved, *inter alia*, their respective claims in the Lawsuit and disputes over insurance coverage provided by the Policies for the lawsuits involving the alleged release of TCE at the Lisle Facility (the “**Settlement Agreement**”).² On July 28, 2004, this Court approved the Settlement Agreement.

5. Without disclosing the confidential terms of the Settlement Agreement, the Settlement Agreement provides for the ACE Companies to make a cash payment to the Debtor in consideration for which the ACE Companies, on the one hand, and the Debtor, Mestek and Formtek, on the other hand, have agreed to a mutual release with regard to the Lawsuits and the Policies, and the ACE Companies are to receive the benefits of the release, discharge and channeling injunction as set forth in the Plan. The effectiveness of the Settlement Agreement was conditioned upon, among other things, entry of a final non-appealable confirmation order in form satisfactory to the Debtor, Mestek and the ACE Companies which contains, among other things, approval of the TCE Channeling Injunction.

² The terms of the Settlement Agreement are confidential and general reference to the Settlement Agreement herein shall not waive such confidentiality.

6. On September 14, 2004, the United States District Court for the District of Delaware approved this Court's Proposed Findings of Fact and Conclusions of Law and the TCE Channeling Injunction, the release of Protected Parties and the release of Recovery Actions. *See* District Court Docket Number 3. The District Court's approval of the TCE Channeling Injunction, release of Protected Parties and release of Recovery Actions was *without objection*.

7. The ACE Companies honored their monetary obligation in the Settlement Agreement. Accordingly, the ACE Companies are Protected Parties and are afforded the protection of the TCE Channeling Injunction.

Relief Requested

8. The ACE Companies take no position with respect to the Movants' request for payment from the Trust. However, the ACE Companies request that this Court deny the Motion to the extent the Movants seek authority to bring a direct cause of action against the ACE Companies.

Analysis

9. The Movants' request to bring a direct cause of action is governed by the law of the State of Illinois.³ It is well established that the public policy of the State of Illinois "prohibits an injured party from recovering personal injury damages against an insurance carrier on account of the negligence of its insured prior to obtaining a judgment against the insured." *Richardson v. Economy Fire and Cas. Co.*, 485 N.E.2d 327, 329-30 (Ill. 1985)(citations omitted). The prohibition against direct actions is prescribed by Illinois statute, which provides in relevant part:

³ *See, e.g., In re United States Brass Corp.*, 110 F.3d 1261, 1268 (7th Cir. 1997) (reasoning that "the right to insurance coverage is a creation of state contract law and one that could be vindicated in an ordinary breach of contract suit if the insured were not a bankrupt"). Here the alleged tortious conduct occurred in Illinois, involves an Illinois company and insurance policies issued in Illinois. Accordingly, this Court must look to the law of the State of Illinois when considering whether the Movants may bring a direct cause of action against the ACE Companies.

No policy of insurance against liability or indemnity for loss or damage to any person other than the insured, or to the property of the any person other than the insured, for which any insured is liable, shall be issued or delivered in this State after July 1, 1937, by any company subject to this Article unless it contains in substance a provision that the insolvency or bankruptcy of the insured shall not release the company from the payment of damages for injuries sustained or death resulting therefrom, or loss occasioned during the term of such policy, and stating that in case a certified copy of a judgment against the insured is returned unsatisfied in any action brought by the injured person or his or her personal representative in case death resulted from the accident because of such insolvency or bankruptcy, then an action may be maintained by the injured person or his or her personal representative against such company under the terms of the policy and subject to all of the conditions thereof for the amount of the judgment in such action not exceeding the amount of the policy.

215 ILCS 5/388 (West 2004) (the ‘**Illinois Anti-Direct Action Statute**’). Accordingly, only after judgment is obtained and execution of that judgment is returned unsatisfied may a non-insured bring a direct action against an insurer. *Air Plus Limited v. Transportation Distribution Services, Inc.*, 2004 WL 2359256 *2 (N.D.Ill. Oct. 19, 2004).

10. The Movants’ suggestion that they should be permitted a direct action because the insured, Met-Coil, is discharged in bankruptcy is unavailing. That same argument was considered and rejected in *Mar San v. Insurance Company of North America*, 407 N.E.2d 969 (App.Ill. 1980) where the court held that the insured’s intervening bankruptcy does not absolve the claimant’s obligation to obtain a judgment under the Illinois Anti-Direct Action Statute. In *Mar San*, the claimant’s goods were lost in transit by the shipper. 407 N.E.2d at 969. The shipment was covered by a policy of insurance issued by shipper’s insurer. *Id.* After the goods were lost, but before a lawsuit was filed, the shipper filed for bankruptcy protection. *Id.* The claimant did not seek to lift the automatic stay to pursue a claim against the shipper’s estate. 407 N.E.2d at 971. Instead, the claimant filed an action directly against the shipper’s insurer. *Id.* at 969.

11. The *Mar San* court dismissed the claim against the insurer citing that the Illinois Anti-Direct Action Statute prohibited such action. 407 N.E.2d at 971. In so ruling, the *Mar San* court rejected the claimant's argument that it would in effect be left without a remedy because it could not secure a judgment against the discharged shipper and its claim in the bankruptcy was unsatisfactory. *Id.* The *Mar San* court reasoned that the proper course of action was for the claimant to seek to lift the automatic stay to pursue a claim against the shipper's estate. *Id.*

12. Here, the Movants' sole recourse is to seek to reopen the Debtor's case to pursue a claim against the Trust. The Debtor's bankruptcy does not give the Movants' the right to ignore the rules of procedure, turn years of established authority upside down and end run the Illinois Anti-Direct Action Statute – no matter how sympathetic the Movants' situations may be. Accordingly, to the extent it seeks authority to pursue a direct action against the ACE Companies, the Motion should be denied.

Reservation of Rights

13. The ACE Companies hereby object to the Bankruptcy Court's jurisdiction over the rights and obligations of non-debtor third parties, such as the Movants and the ACE Companies, under the Policies. By filing this Objection, the ACE Companies (i) do not submit to the Bankruptcy Court's jurisdiction over the Policies or any dispute arising thereunder relating to the Movants' claims against the Debtors, and (ii) does not waive any, and expressly reserves all, of its rights, claims and defenses under the Policies, at law or in equity. Any disputes arising out of the Policies must be adjudicated in a non-bankruptcy proceeding or court of competent jurisdiction.⁴

⁴ The ACE Companies further dispute that the relief sought in the Motion vis -à-vis the ACE Companies is a core proceeding. An action against a debtor to determine rights to insurance coverage under an insurance contract is not a core proceeding. See *In re Amatex Corp.*, 107 B.R. 856, 863 (E.D.Pa. 1989), *aff'd*, 908 F.2d 963 (3d Cir. 1991).

WHEREFORE, the ACE Companies respectfully request that the relief sought in the Motion be denied to the extent it seeks a direct action against the ACE Companies.

Dated: June 23, 2005

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CERTIFICATE OF SERVICE

I, Linda M. Carmichael, Esquire, certify that I am not less than 18 years of age, and that I caused service of *The ACE Companies' Limited Objection to Enforce the Terms of the Fourth Amended Chapter 11 Plan and Confirmation Order or, in the Alternative, for Relief from the Confirmation Order* to be made on June 23, 2005, to the parties listed in the manner so indicated and to all parties on the electronic service list:

<p><u>VIA HAND DELIVERY:</u> Eric D. Schwartz, Esquire Morris Nichols Arshnt & Tunnell 1201 North Market Street Wilmington, DE 19801</p>	<p><u>VIA HAND DELIVERY:</u> Margaret Harrison, Esquire The U.S. Trustee District of Delaware 844 North King Street, Room 2311 Lockbox 35 Wilmington, DE 19801</p>
<p><u>VIA HAND DELIVERY:</u> Richard Beck, Esquire Klehr, Harrison, Harvey, Branzburg & Ellers 919 N. Market Street, Suite 1000 Wilmington, DE 19801</p>	<p><u>VIA HAND DELIVERY:</u> Denise Seastone Kraft, Esquire Edwards & Angell LLP 919 N. Market Street, Suite 1500 Wilmington, DE 19801</p>
<p><u>VIA HAND DELIVERY:</u> Richard S. Cobb, Esquire Landis, Rath & Cobb LLP 919 N. Market Street, Suite 600 Wilmington, DE 19801</p>	

Under penalty of perjury, I declare that the foregoing is true and correct.

Dated: June 23, 2005

/s/ Linda M. Carmichael
Linda M. Carmichael