

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In re:

WESTMORELAND COAL COMPANY, *et al.*,¹

Debtors.

Chapter 11

Case No. 18-35672 (DRJ)

Jointly Administered

**OBJECTION OF THE CHUBB COMPANIES TO THE JOINT PLAN OF
LIQUIDATION FOR THE WMLP DEBTORS**

ACE American Insurance Company, Westchester Surplus Lines Insurance Company, ACE Property & Casualty Insurance Company, Westchester Fire Insurance Company, Illinois Union Insurance Company, ACE Insurance Company of Texas, Federal Insurance Company and Great Northern Insurance Company (and together with each of their affiliates and successors, the “Chubb Companies”), by and through their undersigned counsel, hereby file this objection (the “Objection”) to the *Joint Plan Of Liquidation For The WMLP Debtors* [Docket No. 1612] (the “WMLP Plan”)² and in support of the Objection, the Chubb Companies respectfully state as follows:

¹ Due to the large number of debtors in these chapter 11 cases, which are jointly administered, a complete list of the debtors and the last four digits of their tax identification, registration, or like numbers is not provided herein. A complete list of such information may be obtained on the website of the Debtors’ proposed claims and noticing agent in these chapter 11 cases at www.donlinrecano.com/westmoreland. Westmoreland Coal Company’s service address for the purposes of these chapter 11 cases is 9540 South Maroon Circle, Suite 300, Englewood, Colorado 80112.

² All capitalized terms used herein but not defined shall have the meanings ascribed to them in the WMLP Plan.

BACKGROUND

I. The Insurance Programs

1. On October 9, 2018 (the “Petition Date”), Westmoreland Coal Company and certain of its affiliates (collectively, the “Debtors” each filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code” in the United States Bankruptcy Court for the Southern District of Texas, Houston Division (the “Court”).

2. Prior to the Petition Date, the Chubb Companies issued certain insurance policies (as renewed, amended, modified, endorsed or supplemented from time to time, collectively, the “Policies” to one or more of the Debtors as named insureds.

3. The WMLP Debtors are first named insureds under certain Policies and may be insured under certain of the other Policies.

4. Pursuant to certain Policies (together with any agreements related thereto, the “ACE Insurance Program”, ACE American Insurance Company, Westchester Surplus Lines Insurance Company, ACE Property & Casualty Insurance Company, Westchester Fire Insurance Company, Illinois Union Insurance Company and ACE Insurance Company of Texas provide, *inter alia*, umbrella excess, domestics, process mining, fire, professional liability, specialty program, health & company, property owners and other insurance for specified policy periods subject to certain limits, deductibles, retentions, exclusions, terms and conditions, as more particularly described therein and the insureds, including one or more of the Debtors, are required to pay to the Chubb Companies certain amounts including, but not limited to, insurance premiums (including audit premiums, deductibles, funded deductibles, expenses, taxes, assessments and surcharges, as more particularly described in the ACE Insurance Program (the “ACE Program Obligations”).

5. Pursuant to other Policies (together with any agreements related thereto, the “Chubb Insurance Program”, and collectively with the ACE Insurance Program, the “Insurance Programs”),³ Federal Insurance Company and Great Northern Insurance Company provide, *inter alia*, directors’ and officers’ liability, crime, employment practices liability, export, fiduciary liability, automobile liability, general liability, package, umbrella, pollution and other insurance for specified policy periods subject to certain limits, deductibles, retentions, exclusions, terms and conditions, as more particularly described therein, and the insureds, including one or more of the Debtors, are required to pay to the Chubb Companies certain amounts including, but not limited to, insurance premiums (including audit premiums), deductibles, funded deductibles, expenses, taxes, assessments and surcharges, as more particularly described in the Chubb Insurance Program (the “Chubb Program Obligations,” and collectively with the ACE Program Obligations, the “Obligations”).

6. The Obligations are payable over an extended period of time and are subject to future audits and adjustments.

II. The Bankruptcy Cases

A. The WLB Plan and Chubb Assumption Agreement

7. On February 28, 2019, the WLB Debtors filed the WLB Plan.

8. Pursuant to the WLB Plan and the Sale Transaction Documentation (as defined in the WLB Plan), the WLB Debtors agreed to the Sale Transaction (as defined in the WLB Plan) pursuant to which the WLB Debtors agreed to sell, transfer and convey to the WLB Stalking Horse

³ The descriptions of the Insurance Programs set forth herein are not intended to, and shall not be deemed to amend, modify or waive any of the terms or conditions of the Insurance Programs. Reference is made to the Insurance Programs for a complete description of their terms and conditions.

Purchaser and the WLB Stalking Horse Purchaser agreed to purchase, assume and acquire all of WLB Debtors' right, title and interest in and to certain Transferred Assets (as defined in the WLB Plan and to assume and assign certain Assumed Liabilities (as defined in the WLB Plan to the WLB Stalking Horse Purchaser, as described more fully under the Sale Transaction Documentation.

9. In accordance therewith, the WLB Plan provided that, aside from the Chubb/WLB D&O Policies (as defined in the WLB Plan, the balance of the Insurance Programs could be transferred to the WLB Stalking Horse Purchaser pursuant to the Sale Transaction upon the agreement, in writing, of the WLB Debtors, the WLB Stalking Horse Purchaser, and the Chubb Companies through the execution of an assumption and assignment agreement, in form and substance satisfactory to each of the parties thereto. *See* WLB Plan Article V.E.(iii)(a

10. As to the Chubb/WLB D&O Policies (as defined in the WLB Plan, a subset of the Insurance Program, the WLB Debtors assumed such Chubb/WLB D&O Policies in their entirety and became and shall remain liable in full for any and all now existing or thereafter arising obligations, liabilities, terms, provisions and covenants of any of the WLB Debtors under such Chubb/WLB D&O Policies. *See* WLB Plan Article V.E.(i

11. The Court entered the WLB Confirmation Order on March 2, 2019, confirming the terms of the WLB Plan.

12. In accordance with the terms of the confirmed WLB Plan, the WLB Debtors, the WLB Staking Horse Purchaser, the WMLP Debtors and the Chubb Companies proceeded to negotiate and consummate the transfer of the relevant portions of the Insurance Programs pursuant to the terms of that certain Assumption Agreement dated as of March 14, 2019, by and among (i the Chubb Companies, (ii the WLB Stalking Horse Purchaser, (iii WLB, on behalf of itself and

each of the WLB Debtors, and (iv) WMGP, on behalf of itself and each of the WMLP Debtors (the “Chubb Assumption Agreement”).

13. Per the Chubb Assumption Agreement, the WLB Stalking Horse Purchaser and certain of its subsidiaries agreed to: (i) accept and assume from the WLB Debtors and the WMLP Debtors all currently existing and thereafter arising rights, claims, title and interest in, to, under, in connection with or relating to the Policies and any agreements transferred thereby (collectively, the “Assigned Contracts”; and (ii) observe, pay, perform, satisfy, fulfill and discharge, any and all now existing or thereafter arising duties, terms, provisions, covenants, obligations and liabilities of the WLB Debtors and the WMLP Debtors, or any of them under the Assigned Contracts, including, without limitation, any and all liabilities and obligations to pay losses and expenses within the deductibles, pay premium to the Chubb Companies, and pay service fees.

14. The Assigned Contracts did not include (collectively, the “Excluded Contracts”: (i) the Chubb/WLB D&O Policies (*i.e.*, D&O Excess Policy No. 68022924 issued by Federal Insurance Company for all policy periods, Fiduciary Liability Policy No. 68022927 issued by Federal Insurance Company for all policy periods and D&O Policy No. 82420635 issued by Federal Insurance Company for all policy periods; and (ii) EPL Policy No. 82223426 issued by Federal Insurance Company for all policy periods.

15. The Excluded Contracts may provide coverage to the WMLP Debtors and various of their assets.

16. As provided in the Chubb Assumption Agreement, the WMLP Debtors (i) requested that the Chubb Companies consent to the assumption and assignment of the Insurance Programs to the WLB Stalking Horse Purchaser; (ii) represented, warranted and acknowledged that the Chubb Assumption Agreement is authorized by the WLB Confirmation Order and/or is

permitted in the ordinary course by the Bankruptcy Code without necessity for further order of the Bankruptcy Court, and that the WMLP Debtors have the authorization and ability to enter into such an agreement; and (iii) agreed to waive and release any and all rights to object to or otherwise contest the Amendment (as defined in the Chubb Assumption Agreement) (*i.e.*, the amendment to the Policies in order to effectuate the Chubb Assumption Agreement).

B. The WMLP Plan

17. On March 15, 2019, the WMLP Debtors filed the WMLP Plan.

18. As to certain contracts and leases entered into by the WMLP Debtors after the Petition Date, the WMLP Plan provides:

Contracts and leases entered into or assumed by a WMLP Debtor after the Petition Date (other than the Intercompany Settlement Order, the WMLP Committee Settlement Order, and the WMLP TSA) that are not assigned to the Oxford Purchaser, the Kemmerer Purchaser or the Liquidation Trust shall be considered repudiated by the applicable WMLP Debtor as of the Effective Date, and the counterparties to such contracts, if they believe that such repudiation constitutes a breach of such contract or lease, must File a Claim within 30 days of the Effective Date in accordance with this Plan or have their rights forever waived and released. For the avoidance of doubt, the Intercompany Settlement Term Sheet, the WMLP Committee Settlement Term Sheet, and the WMLP TSA shall not be repudiated as of the Effective Date and shall remain in full force and effect.

WMLP Plan Article IV.D.

19. Furthermore, regarding the treatment of insurance contracts providing coverage to the WMLP Debtors, the WMLP Plan provides:

All rights of the WMLP Debtors under the WMLP Insurance Policies shall automatically become vested in the Liquidation Trust as of the Effective Date without necessity for further approvals or orders. . . Unless otherwise determined by the Bankruptcy Court pursuant to a Final Order or agreed upon by the parties prior to the Effective Date, no payments shall be required to cure any defaults existing as of the Confirmation Date with respect to any WMLP Insurance Policy assumed and assigned to the Liquidation Trust

pursuant to this Section IV.E. Each applicable insurance company is prohibited from, and the Confirmation Order shall include an injunction against, denying, refusing, altering or delaying coverage on any basis regarding or related to these Chapter 11 Cases, this Plan or any provision within this Plan, including the treatment or means of liquidation set out within this Plan for any insured Claims or Causes of Action.

WMLP Plan Article IV.E.

20. The WMLP Insurance Policies are defined to include “all insurance policies under which a WMLP Debtor is an insured party (including all related insurance agreements other than, solely with respect to coverage for insurance claims arising after the WLB Plan Effective Date, any insurance policies transferred to the WLB Stalking Horse Purchaser pursuant to the WLB Plan that by the terms of such policies no longer cover the WMLP Debtors for claims arising after the WLB Plan Effective Date.” *See* WMLP Plan Article I.A.172.

21. Accordingly, the WMLP Debtors appear to intend to include the Excluded Contracts or benefits thereof in the term “WMLP Insurance Policies.”

SUMMARY OF OBJECTION

22. The Chubb Companies object to the WMLP Plan on the grounds, that: (I the WMLP Plan cannot repudiate or otherwise alter, amend or modify the terms of the Chubb Assumption Agreement and must otherwise comport with the terms of the WLB Plan; and (II while it appears that the WMLP Debtors seek to obtain the benefits of a portion of the Insurance Program, including the Excluded Contracts (*see, e.g.*, Plan Art. IV.E., the WMLP Plan does not address the fact that in order to do so, the WMLP Debtors (or their successors must remain liable for the WMLP Debtors’ Obligations thereunder, regardless of whether such Obligations were incurred before or after the Petition Date.

OBJECTION

I. The WMLP Plan Cannot Repudiate Or Otherwise Alter, Amend Or Modify The Terms Of The Chubb Assumption Agreement And Must Comport With The WLB Plan.

23. Pursuant to the terms of the Assumption Agreement, the WMLP Debtors agreed to waive and release any and all rights to object to or otherwise contest the Amendment.

24. That agreement notwithstanding, the WMLP Plan proposes to repudiate all contracts entered into after the Petition Date, unless otherwise expressly excepted from such repudiation. *See* WMLP Plan Article IV.D.

25. This provision of the WMLP Plan is clearly inconsistent with the waiver and release the WMLP Debtors assented to in the Chubb Assumption Agreement, and runs contrary to the WMLP Debtors' and other parties' stated intentions thereunder.

26. Nevertheless, the WMLP Debtors now propose the WMLP Plan that not only contradicts the Chubb Assumption Agreement, but also, as currently drafted, is inconsistent with the terms of the WLB Plan as well. *See, e.g.*, WLB Plan Article V.E.

27. Indeed, the Chubb Assumption Agreement is an integral facet of the Sale Transaction (as defined in the WLB Plan), and, as a condition precedent to the WLB Plan going effective, the Sale Transaction had to close.

28. By proposing to repudiate the Chubb Assumption Agreement, the WMLP Plan contradicts the WLB Plan and undermines the Sale Transaction which was essential thereto.

29. Accordingly, the WMLP Plan should be revised to expressly except the Chubb Assumption Agreement from any purported repudiation by the WMLP Debtors of contracts entered into after the Petition Date in order to make the WMLP Plan consistent with the terms of

the Chubb Assumption Agreement, the representations made by the WMLP Debtors therein, and the WLB Plan.

II. The Successor to the WMLP Debtors Cannot Continue To Receive The Benefits Of Any Portion Of The Insurance Programs Without Remaining Liable For The WMLP Debtors' Obligations Thereunder.

30. Pursuant to Article IV.E. of the WMLP Plan, the WMLP Debtors seek to have the WMLP Insurance Policies, including certain of the Excluded Contracts (or benefits thereof, vest with the Liquidation Trust such that the Liquidation Trust will receive the benefits thereof.

31. In addition to the WMLP Debtors' apparent intent to capture the Excluded Contracts under this defined term, such WMLP Insurance Policies would also necessarily include rights and claims under those Assigned Contracts transferred pursuant to the terms of the Chubb Assumption Agreement that accrued prior to the effective date of the WLB Plan Effective Date and/or the Chubb Assumption Agreement.

32. It is well-established that a party cannot receive the benefits of a contract without being liable for the obligations thereunder. *See Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1311 (5th Cir. 1985 (“Thus, the often-repeated statement that the debtor must accept the contract as a whole means only that the debtor cannot choose to accept the benefits of the contract and reject its burdens to the detriment of the other party to the agreement.”); *see also In re Univ. Med. Ctr.*, 973 F.2d 1065, 1075 (3d Cir. 1992, *superseded by statute on other grounds*; *Lightfoot v. Borkon (In re Lightfoot)*, 399 B.R. 141, 149 (Bankr. E.D. Pa. 2008 (stating “[a]ssumption of the executory contract requires the debtor to accept its burdens as well as permitting the debtor to profit from its benefits”); *Chrysler Corp. v. Monroeville Dodge (In re Monroeville Dodge)*, 166 B.R. 264, 267 (Bankr. W.D. Pa. 1994 (same; *In re Metro Transp. Co.*, 87 B.R. 338, 342 (Bankr. E.D. Pa. 1982 (stating “assumption or rejection of an executory contrary requires an all-or-nothing commitment going forward, and that hence a debtor cannot assume part

of an executory contract in the future while rejecting another part”); *In re Morande Enters.*, 335 B.R. 188, 192 (Bankr. M.D. Fla. 2005) (stating that the “law is clear that an executory contract may not be assumed in part and rejected in part”) (citation omitted); *In re TSW Stores of Nanuet, Inc.*, 34 B.R. 299, 304 (Bankr. S.D.N.Y. 1983) (stating “[i]t is settled law that a trustee or a debtor in possession ‘takes the contracts of the debtor subject to their terms and conditions. Contracts adopted by him are assumed *cum onere*’”) (citation omitted).

33. Accordingly, the Liquidation Trust cannot receive the benefits any portion of the Insurance Programs without remaining liable for the obligations thereunder, regardless of when they arise.

34. Moreover, the WMLP Plan contains provisions which provide for the release of claims and other causes of action, the vesting and transfer of assets in the Liquidation Trust free and clear of liens, releases of certain third-parties, and exculpation and injunctions against certain actions. *See, e.g.*, Plan Arts. III.B.2.; VII.F.4.-6.

35. Accordingly, the WMLP Plan must also clarify that nothing in the WMLP Plan, Plan Supplement or Confirmation Order, including, but not limited to, those provisions identified above, shall modify, alter or impair the Chubb Assumption Agreement, Insurance Programs, including the Excluded Contracts, and the terms of the WLB Plan.

III. Reservation Of Rights.

36. The Chubb Companies specifically reserve all of their rights with respect to the Insurance Programs and their right to assert additional objections to the WMLP Plan.

IV. Proposed Resolution Of Objection

37. In order to resolve this Objection, the Chubb Companies hereby request that certain provisions of the Plan be revised as set forth on **Exhibit “A”** hereto.⁴

⁴ The Chubb Companies also propose defined terms to be included in the “Defined Terms” section of the WMLP Plan to conform with the use of those terms in the language proposed in Exhibit A attached hereto. Exhibit A hereto is a comparison of the original language in the WMLP Plan and language that is acceptable to the Chubb Companies.

WHEREFORE, the Chubb Companies respectfully request that this Court (a) either (i) condition any confirmation of the WMLP Plan on inclusion of the modifications requested herein and included in **Exhibit A** hereto, or (ii) deny confirmation of the WMLP Plan; and (b) grant such other relief as the Court deems appropriate.

Dated: May 24, 2019

Respectfully submitted,

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Counsel for the Chubb Companies

Exhibit "A"

Proposed Resolution of Objection

I.A.??? “Chubb” means, collectively, the Federal Insurance Company, Great Northern Insurance Company, ACE American Insurance Company, Westchester Surplus Lines Insurance Company, and ACE Property & Casualty Insurance Company, together with each’s affiliate, predecessors and successors.

I.A.??? “Chubb Assumption Agreement” means that certain Assumption Agreement dated as of March 14, 2019, by and among Chubb, the WLB Stalking Horse Purchaser, WLB and WMGP.

I.A.172. "WMLP Insurance Policies" means, collectively, all insurance policies under which a WMLP Debtor is an insured party (including all related insurance agreements) other than, solely with respect to coverage for insured claims arising after the WLB Plan Effective Date, any insurance policies (and related agreements) transferred to the WLB Stalking Horse Purchaser pursuant to the WLB Plan and the Chubb Assumption Agreement.

Deleted: insurance

Deleted: that by the terms of such policies no longer cover the WMLP Debtors for claims arising after the WLB Plan Effective Date

H.G. Insurance

Notwithstanding anything to the contrary herein, if any Allowed Claim is covered by a WMLP Insurance Policy, such Claim shall first be paid from proceeds of such WMLP Insurance Policy subject to the terms and conditions thereof, with the balance, if any, treated in accordance with the provisions of this Plan governing the Class applicable to such Claim.

IV.D. Contracts and Leases Entered Into After the Petition Date

Contracts and leases entered into or assumed by a WMLP Debtor after the Petition Date (other than the Intercompany Settlement Order, the WMLP Committee Settlement Order, and the WMLP TSA) that are not assigned to the Oxford Purchaser, the Kemmerer Purchaser or the Liquidation Trust shall be considered repudiated by the applicable WMLP Debtor as of the Effective Date, and the counterparties to such contracts, if they believe that such repudiation constitutes a breach of such contract or lease, must File a Claim within 30 days of the Effective Date in accordance with this Plan or have their rights forever waived and released. For the avoidance of doubt, the Intercompany Settlement Term Sheet, the WMLP Committee Settlement Term Sheet, the Chubb Assumption Agreement and the WMLP TSA shall not be repudiated as of the Effective Date and shall remain in full force and effect.

NEW IV.F. WMLP Insurance Policies issued by Chubb

Notwithstanding anything to the contrary in the Disclosure Statement, the Plan (including, but not limited to, Article IV.A and IV.E), the Plan Supplement (including, but not limited to Exhibit IV.A), the Liquidation Trust Agreement, the Confirmation Order, any other document related to any of the foregoing or any other order of the Court (including, without limitation, any other provision that purports to be preemptory or supervening, grants an injunction or release, requires a party to opt out of any releases or confers Bankruptcy Court jurisdiction): (i) nothing alters or amends the terms and conditions of (a) the Chubb Assumption Agreement and (b) except as provided in the Chubb Assumption Agreement, WMLP Insurance Policies issued by Chubb, (ii) any injunction shall not enjoin Chubb from denying, refusing or altering coverage based on the terms of the Chubb Assumption Agreement and the Oxford Sale Order, (iii) except as provided in the Chubb Assumption Agreement, the Liquidation Trust shall be liable in full for all of the WMLP Debtors’ obligations under any of the WMLP Insurance

Policies issued by Chubb, whether issued before or after the Petition Date and regardless of when such obligations arise, without the need or requirement for Chubb to File a proof of Claim, Administrative Expense Claims or object to a Cure Amount Claim; provided, however, that the Liquidation Trust shall not be an insured thereunder.

V.P. 2. Claims Payable by Insurance

No Distributions shall be made on account of any Allowed Claim that is payable pursuant to a WMLP Insurance Policy until the Holder of such Allowed Claim has exhausted all remedies with respect to such WMLP Insurance Policy. To the extent that any of the WMLP Debtors' insurers agrees to satisfy in full or in part an Allowed Claim, then immediately upon such insurers' agreement, the applicable portion of such Claim may be expunged without an objection having to be Filed and without any further notice to or action, order or approval of the Bankruptcy Court.

Except as otherwise provided in this Plan, distributions to Holders of Allowed Claims shall be in accordance with and subject to the provisions of any applicable WMLP Insurance Policy. Nothing contained in this Plan shall constitute or be deemed a waiver of any Cause of Action that the WMLP Debtors or any other Entity may hold against any other Entity, including insurers under any policies of insurance, nor shall anything contained herein constitute or be deemed a waiver by such insurers of any rights and defenses, including coverage defenses, held by such insurers.

CERTIFICATE OF SERVICE

I certify that on May 24, 2019, I caused a copy of the foregoing document to be served on the parties listed below via U.S. Mail and e-mail. I further certify that all parties entitled to notice via the Court's electronic notification system were served at the time of electronic filing.

/s/ Corey M. Weideman
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