UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

In re:	§	**Chapter 11**
	§	
BRIGGS & STRATTON CORPORATION, *et al.*,	§	**Case No. 20-43597-339**
	§	
	§	**(Jointly Administered)**
Debtors.	§	

CERTAIN INSURERS' OBJECTION TO PLAN

Century Indemnity Company, Transportation Insurance Company, Inc., Continental Casualty Company, American Home Assurance Company, Nationwide Indemnity Company, and Employers Insurance of Wausau (collectively, the "Insurers") hereby object to confirmation of Debtors' proposed chapter 11 plan filed on November 6, 2020 [Dkt. No. 1211] (the "Plan").

The Insurers issued liability policies to debtor Briggs & Stratton Corp. ("Briggs") that were in effect, collectively, from December 31, 1940, to December 31, 1979. Prepetition, the Insurers defended, resolved, and (where appropriate) paid asbestos lawsuits brought against Briggs. The Plan here is not a section 524(g) plan that establishes a trust mechanism to pay such asbestos claims. Rather, the Plan essentially allows asbestos claims to pass through the bankruptcy, to be defended, resolved, and (where appropriate) paid by the Insurers post-confirmation, in the same manner that such claims were handled by the Insurers prepetition. This is not a point of contention between the Insurers and the Debtors; rather, the Insurers have advised the Debtors that they are willing to handle asbestos claims post-confirmation the same way they handled such claims pre-petition.

The issue is how to implement this consensus. The Insurers have proposed to Debtors a simple way of proceeding, consistent with the insurance policies and applicable nonbankruptcy law. Under the Insurers' proposed approach, they would determine, after reviewing the claim and

the policies, whether to defend the claim; if the Insurers agreed to defend the claim, they would have the right (without interference from Briggs, the Plan Administrator, or anyone else) to settle the claim or litigate it to conclusion in the tort system; and if a settlement was reached, or a judgment entered, the Insurers would pay the claim, subject to their policies' limits of liabilities and other coverage issues and defenses. That is exactly what happened prior to Debtors' commencement of these chapter 11 cases.

There is always the prospect that a particular claim might fall outside coverage. For example, an asbestos claimant might allege that he or she was first exposed to Briggs' asbestos-containing products after the expiration of the last of the policies issued by any of the Insurers. In that circumstance, the Insurers would likely deny coverage and decline to defend the claim. It would be appropriate in that circumstance for the Plan Administrator to then step in and settle or litigate the claim, so the claimant would receive a recovery through the Plan. If the Plan Administrator disputed the Insurers' coverage determination, he could seek to recover from the Insurers any amounts the Plan Administrator paid to the claimant following the Insurers' denial of coverage. Again, this is all consistent with applicable nonbankruptcy law.

What the Plan cannot allow, however, is for the Plan Administrator to attempt to take over control of a claim the Insurers have agreed to handle, litigate or resolve that claim, and then stick the Insurers with the bill. *See In re Thorpe Insulation Co.*, 677 F.3d 869, 885-86 (9th Cir. 2012) ("If the [insurers] *may* be bound … it would be hard to see how that would not have a real impact…." (emphasis in original)). This is because the same policies that obligate the Insurers to defend and pay claims within policy coverage also gives them the right to control settlement and litigation of any claim they agree to defend. A Plan cannot purport to require insurers to pay claims if it strips the insurers of their right to control the defense and settlement of the claims. *See id.* at

887 (reversing confirmation of a plan that "allows direct actions against" insurers, "allows … indemnification" from insurers where the insurers did not participate in liquidation of the claims, and "affects the nature of [insurers'] contracts with" the debtors); *see also In re Combustion Eng'g, Inc.*, 391 F.3d 190, 218 (3d Cir. 2004) (restoring "super-preemptory" insurance neutrality language "that made clear that any pre-petition contractual rights remained unaltered").

The Debtors' current Plan and subsequent modifications proposed to the Insurers by the Debtors fail to adhere to these principles. The Plan purports to allow the Plan Administrator to assume control of the defense and settlement of claims that the Insurers have agreed to handle. That would be acceptable if, and only if, the Plan also then exempted Insurers from having to pay any claim controlled or settled by the Plan Administrator. *See, e.g.*, *Wilson v. Career Educ. Corp.*, 729 F.3d 665, 679 (7th Cir. 2013) ("A court may not rewrite a contract to suit one of the parties but must enforce the terms as written.") (citation omitted); *In re Coupon Clearing Serv., Inc.*, 113 F.3d 1091 (9th Cir. 1997) (noting that a debtor's estate has "no greater rights in property than those held by the debtor prior to the bankruptcy"). The Plan contains no such language, however.

Debtors have advised that, in their view, the Plan must allow the Plan Administrator to take over control of claims in his discretion so he can set a proper claims reserve; otherwise, the Debtors say, the Plan Administrator could be hamstrung in making distributions to non-asbestos claimants and creditors. As noted, the Insurers do not object to the Plan Administrator taking over control of asbestos claims – but if he does so, the Plan cannot also purport to give him the right to ask the Insurers to pay for such claims, because such a request is inconsistent with the Insurers' contractual rights, which must be fully respected if the Insurers are to be expected to pay under their policies. *See Thorpe Insulation*, 677 F.3d at 885-86 (observing that a plan taking determination of claim values out of the hands and control of insurers "has a monetary impact in the real world of

insurance, and is not insurance neutral"); *Combustion Eng'g*, 391 F.3d at 218 (rejecting alteration of plan language in a way adverse to insurers' contractual rights).

The foregoing concepts are not complex. The Insurers proposed modest modifications to Plan language and arranged a call to walk the Debtors through their concerns before the Thanksgiving holiday, and those discussions continued as recently as this morning. Each of the Insurers' proposals have expressly provided for the Insurers to fully to honor their contractual obligations under the policies, but only subject to the condition that their contractual rights also be fully respected. However, agreement on plan language has, so far at least, been elusive.

Accordingly, the Debtors gave the Insurers an extension until 11 a.m. Central Time on Monday, December 14, 2020, to file these objections while discussions continue, but unfortunately the Insurers believe that some of the Debtors' most recent proposals would make the Plan worse for the Insurers. Thus, the parties have not yet reached an agreement, and the Insurers are forced to file these objections to preserve their rights.

The Insurers are nonetheless committed to continuing to discuss these issues with Debtors in hopes of reaching an agreement. If the parties do not reach agreement, the Plan on file should be denied confirmation because it inaccurately purports to be insurance neutral but would actually impermissibly impair the Insurers' rights under their insurance contracts and applicable nonbankruptcy law. Therefore, the Plan fails to comply with 11 U.S.C. § 1129(a)(3) because it is internally inconsistent, fails to comply with state law and, as such, is not proposed in good faith.

It will not take much in the way of language modifications to bring the Plan into compliance with applicable nonbankruptcy law. If the parties can negotiate acceptable changes to the Plan, the Insurers will withdraw these objections. But otherwise, and absent an agreement between Debtors and the Insurers, the Plan cannot be, and should not be, confirmed.

WHEREFORE, the Insurers respectfully request denial of confirmation of the Plan; and such other and further relief as the Court deems just and proper.

Dated: December 14, 2020

Respectfully submitted,

/s/ David C. Christian II

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 14, 2020, the foregoing *Certain Insurers' Objection to Plan* was filed with the Clerk of the Court using the CM/ECF system, and that a copy of the objection was served electronically on all parties registered with the CM/ECF system to receive notices for this case.

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