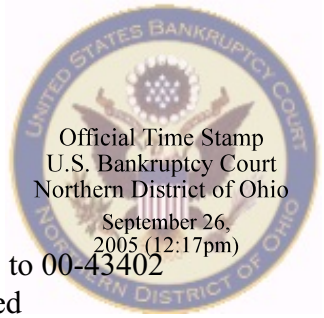
THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:	)	Case No. 00-43394 to 00-43402
	)	Jointly Administered
PITTSBURGH-CANFIELD	)	
CORPORATION, et al.,	)	Chapter 11
	)	
Debtors.	)	Judge Pat E. Morgenstern-Clarren[1]
	)	
	)	**MEMORANDUM OF OPINION**

National Union Fire Insurance Co. of Pittsburgh and related companies[2] (collectively, National Union) filed multiple claims against the debtors[3] arising out of an insurance program provided to Wheeling-Pittsburgh Steel Corporation (WPSC) and related debtors. The insurance program began on January 1, 1986 during the course of an earlier chapter 11 case and expired on June 1, 1998. Some part of the total amount which National Union claims is due relates to insurance coverage provided by National Union during the first chapter 11.

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[1] This contested matter was transferred to the undersigned when Judge Woods recused herself. *See* docket 2609, 2614.

[2] The proofs of claim state creditor's name as "National Union Fire Insurance Company of Pittsburgh, Pa., Lexington Insurance Company, American International South Insurance Company, Birmingham Fire Insurance Company, American Home Assurance Company, Illinois National Insurance Company, Insurance Company of the State of Pennsylvania, and Certain Other Entities Related to American International Group, Inc."

[3] The objecting debtors are Wheeling-Pittsburgh Steel Corporation, Wheeling Pittsburgh Corporation (WPC) and PCC Survivor Corporation, formerly known as Pittsburgh Canfield Corporation. The other debtors in these jointly administered cases are Consumers Mining Co, Wheeling-Empire Co., Mingo Oxygen Co., WP Steel Venture Corp., W-P Coal Co., and Monessen Southwestern Railway Co.

The debtors objected to the claims.[4] National Union filed two motions in response. First, National Union moves to dismiss the objections on the merits or to compel the debtors to arbitrate the claims dispute and stay the objection proceeding until the arbitration is concluded.[5] Second, National Union moves for partial summary judgment that no part of its claim was discharged in the first bankruptcy proceeding.[6] WPSC opposes both motions.[7]

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(B) and (O).

FACTS

Stipulated Facts[8]

1. The Pittsburgh Canfield Corporation and its affiliated entities, including WPSC, filed voluntary petitions for reorganization under chapter 11 of Title 11 of the United States Code . . . on November 16, 2000.

2. On June 18, 2003, the Debtors' Third Amended Plan of Reorganization (the "Plan") was confirmed by the United States Bankruptcy Court for the Northern District of Ohio.

3. The Effective Date of the Plan was August 1, 2003.

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[4] Docket 2045.

[5] Docket 2466, 2467, 2636, 2649.

[6] Docket 2635, 2648.

[7] Docket 2493, 2640, 2642.

[8] Docket 2666.

4. Paragraph 40 of the Order Confirming the Debtors[’] . . . Plan . . . states: “Pursuant to Section 1123(b)(2) of the Bankruptcy Code and Section 8.2 of the Plan, except as provided for in Section 8.1.1 of the Plan or Schedule I to the Plan, as of the Effective Date, all executory contracts and unexpired leases to which the Debtors are party shall be deemed rejected by the Reorganized Debtors unless such contracts or leases were either (a) expressly assumed prior to the Confirmation Date or (b) are the subject of a pending motion by the debtors to assume on the Confirmation date.”

5. Prior to the November 16, 2000 petitions for reorganization, WPSC and various related entities filed voluntary petitions for reorganization under Chapter 11 of the Bankruptcy Code on April 16, 1985 (the “1985 Bankruptcy proceedings”) in the United States Bankruptcy Court for the Western District of Pennsylvania.

6. On December 18, 1990, the United States Bankruptcy Court for the Western District of Pennsylvania entered an Order (the “1990 Confirmation Order”) confirming WPSC’s Amended Joint Plan of Reorganization dated October 18, 1990 (the “1990 Bankruptcy Plan”).

7. Pursuant to the 1990 Confirmation Order, the Effective Date of the 1990 Bankruptcy Plan was January 3, 1991.

8. Section VI of the 1990 Bankruptcy Plan provides:

> Except as otherwise provided in the Amended Plan or in the Confirmation Order, substantial consummation of the amended Plan and substantial distribution of the consideration provided for under the Amended Plan, will discharge any and all Claims against and interests in each of the Debtors, or any of their assets or properties that arose at any time before the entry of the Confirmation Order, pursuant to § 1141(d)(1) of the Bankruptcy Code. In addition, the substantial consummation of the Amended Plan pursuant to the Confirmation Order acts as a discharge effective as of the Effective Date, as to each Person receiving or entitled to receive any Distribution under the Amended Plan of any direct or indirect right

or Claim such Person had or may have had against any Debtor or any Debtor Subsidiary or any Debtor affiliate based on a Claim of such Debtor against any of the other Debtors based on any Claim against any of the Debtors held by an entity that is a Subsidiary or affiliate of any other Debtor; . . . The discharge of the Debtors shall be effective as to each Claim, regardless of whether a proof of claim therefor was filed, whether the Claim is an Allowed Claim, or whether the holder thereof votes to accept the Amended Plan. On and after the Effective Date, as to every discharged Claim and interest, every holder of a Claim and every interest holder shall be precluded from asserting against any Debtor formerly obligated with respect to such Claim or interest, or against such Debtor's assets or properties, any other further Claim or interest based upon any document, instrument, or act, omission, transaction, or other activity of any kind or nature that occurred prior to the Confirmation Date.

9. Section X of the 1990 Bankruptcy Plan provides:

A. EXECUTORY CONTRACTS AND EXPIRED LEASES
1. Except as provided in Section X.A.2., executory contracts and unexpired leases of the Debtors shall be assumed pursuant to the provisions of §§ 365 and 1123 of the Bankruptcy Code . . . . (C033).

10. Section III A. of the 1990 Bankruptcy Plan provides:

a. CLASS 1A ADMINISTRATIVE EXPENSES

Each holder of a Class 1A Claim shall receive on account of such Claim payment in full in Cash in the allowed amount of such Claim on the Effective Date, or on any date agreed to by such holder. (CO15).

11. During the years of 1986 through 1998, National Union provided insurance coverage to WPSC and certain of its affiliated entities pursuant to an insurance program (the "Program").

12. The Program is governed, in part, by an Indemnity Agreement effective January 1, 1986.

13. A copy of the Indemnity Agreement was submitted as Exhibit A to National Union's Motion for Summary Judgment (the Indemnity Agreement as well as other applicable agreements are numbered beginning with number A001)[.]

14. The Indemnity Agreement contains the following arbitration clause:

> All disputes or differences arising out of the interpretation of this Agreement shall be submitted to the decision of two (2) Arbitrators, one to be chosen by each party, and in the event the Arbitrators fail to agree, to the decision of an Umpire to be chosen by the Arbitrators.

15. The Indemnity Agreement provides the term "Gross Program Premium" shall mean as of any specified date a dollar amount equal to the sum of:

> 1. Profit and Administration fee; 2. Excess premium charges; 3. Claims Administration fee; 4. Insurance related expenses; 5. Taxes, Board Charges, Bureau Charges, Residual Market Charges; 6. Estimated Ultimate Losses within the retention agreed to herein (Loss Provision); and 7. Any other charges, fees or premiums made hereunder.

16. The Indemnity Agreement provides:

> Both parties retain the right to initiate the arbitration process in the event of a dispute concerning the amount of the Loss Provision.

17. The Indemnity Agreement provides:

> Client will indemnify the Company [National Union] against liability that the Company may incur as described in paragraphs A (up to and not in excess of the amounts specified therein)[,] B, C, D, E and F of the Article by reason of the issuance of the policies . . . ."

18. Subsequent to the execution of the Indemnity Agreement, WPSC and National Union executed the following agreements which are listed in chronological order of their execution:

(I) Renewal Addendum to January 1, 1986 Indemnity Agreement (numbered A022)

(ii) Extension Addendum (numbered A028)

(iii) Renewal Agreement to January 1, 1986 Indemnity Agreement (numbered A033)

(iv) Renewal Addendum to the January 1, 1986 Indemnity Agreement (numbered A044)

(v) Renewal Addendum to the January 1, 1986 Agreement (numbered A055)

(vi) Renewal Addendum to the January 1, 1986 Agreement (numbered A065)

(vii) Deductible Addendum to Indemnity Agreement (numbered A074)

(viii) Addendum #1 to the Indemnity Agreement (numbered A077)

(ix) Renewal Addendum to the January 1, 1986 Agreement (numbered A082)

(x) Deductible Addendum to Indemnity Agreement (numbered A092)

(xi) Renewal Addendum to the January 1, 1986 Agreement (numbered A095)

(xii) Deductible Addendum to Indemnity Agreement (numbered A106)

(xiii) Renewal Addendum to the January 1, 1986 Agreement (numbered A1095)

(xiv) Deductible Addendum to Indemnity Agreement (numbered A120)

(xv) Addendum #1 to the Indemnity Agreement (numbered 126)

(xvi) Addendum #2 to the Indemnity Agreement (numbered 131)

(xvii) Renewal Addendum to January 1, 1986 Indemnity Agreement (numbered A l34)

(xviii) Addendum #6 to Indemnity Agreement (numbered A 145)

(xix) Addendum #1 to June 1, 1995 Renewal Addendum to January 1, 1986 Indemnity Agreement (numbered A 147)

(xx) Addendum #2 to June 1, 1995 Renewal Addendum to January 1, 1986 Indemnity Agreement (numbered A 151)

(xxi) Addendum #6a to Indemnity Agreement (numbered A154)

(xxii) Renewal Addendum to January 1, 1986 Indemnity Agreement (numbered A156)

(xxiii) Renewal Addendum to January 1, 1986 Indemnity Agreement (numbered A165)

WPSC and National Union executed all of the above documents on the dates indicated thereon.

19. On or about May 16, 2001, National Union filed the following proofs of claim (which were attached to National Union's Motion to Compel Arbitration):

(a) 2169 against Monessen South West RailRoad Company, unliquidated - no amount of claim was specified

(b) 2170 against W-P Coal Company unliquidated, no amount of claim was specified

(c) 2171 against WP Steel Venture Corporation unliquidated, no amount of claim was specified

(d) 2172 against Mingo Oxygen Company unliquidated, no amount of claim was specified

(e) 2173 against Wheeling-Empire Company, unliquidated, no amount of claim was specified

(f) 2174 against Consumer Mining Company, unliquidated, no amount of claim was specified

(g) 2175 against Wheeling-Pittsburgh Steel Corporation unliquidated, no amount of claim was specified

(h) 2176 against Wheeling-Pittsburgh Corporation unliquidated, no amount of claim was specified

(I) 2177 against Pittsburgh-Canfield Corporation against Wheeling-Pittsburgh Steel Corporation unliquidated, no amount of claim was specified.

20. On May 5, 2003, subsequent to the proof of claim bar date, National Union filed proof of claim No. 2477 in the amount of $2,203,278.00 ($796,417.00 secured $1,406,861.00

unsecured). National Union asserts that this claim was a timely filed amendment to its prior filed proofs of claim.

21. Each proof of claim filed by National Union, including the amended proof of claim, contains the following provision:

> The filing of this Proof of Claim is not intended to waive any right to arbitration. Claimant(s) expressly reserve the right to seek arbitration of any dispute arising in connection with this claim. To the extent of any pre-existing arbitration agreement, this court's jurisdiction to resolve disputes should be limited to referring such disputes to arbitration and enforcing any arbitration award.
>
> In executing and filing this proof of claim, Claimant: (I) does not submit itself to the jurisdiction of this court for any purpose other than with respect to said claim. . . .

22. On December 20, 2002, WPSC filed Debtor Wheeling-Pittsburgh Corporation's First Omnibus Objection To Claims And Request For An Order Disallowing And Reclassifying Claims (the "First Omnibus Objection").

23. In the First Omnibus Objection, WPSC objected to National Union's Claim No. 2176 as "not being due per books and records."

24. On February 10, 2003 this Court entered an Order Resolving, Disallowing and Reclassifying Certain Claims Against Wheeling-Pittsburgh Corporation and Continuing Objection Date and Preliminary Hearing as to Certain Other Claims in which National Union's claim against WPC was disallowed.

25. On May 30, 2003 WPSC and its related debtors filed their Fifth Omnibus Objection to Claims and Request for an Order Disallowing and Reclassifying Claims (the "Fifth Omnibus Objection").

26. In the Fifth Omnibus Objection, WPSC objected to the proofs of claim filed by National Union.

27. WPSC objected to Claim No. 2477 in the amount of $2,203.278.80 as being late and as being not due per books and records.

28. WPSC objected to Claims No. 2169, 2170, 2171, 2172, 2173, 2174, 2175 and 2177 as being duplicate claims filed in different cases.

29. On March 15, 2004 National Union filed its Motion to Compel.

30. On July 2, 2003, Debtor's counsel wrote a letter (the "July 2 Letter") to National Union's counsel setting out certain points of disagreement. The letter is attached as an exhibit to National Union's Motion for Summary Judgment and is numbered D00l and D002.

Additional Facts

31. National Union attached to claims no. 2169, 2170, 2171, 2172, 2173, 2174, 2175 and 2177 statements that the debtors are indebted to National Union "for premiums, deductibles, and other related fees, expenses and obligations" for insurance coverage provided under the Program and for surety bonds and state that the claim components include: (a) an unliquidated amount for the Insurance Program; (b) an amount for other insurance or services; (c) bond obligations; (d) quantum meruit; (e) joint liability should it be established that any of the debtors has liability on the obligations of any of the other debtors; and (f) other. These claims also assert the right of recoupment.

32. Claim no. 2477, filed in the WPSC case, states that it "amends/replaces the prior proof of claim filed by Claimant on May 14, 2001." The claim asserts that the debtor is liable to National Union for insurance coverage provided under the Program and for surety bonds and

states that it includes these components: (a) a liquidated claim for not less than $2,203,278 for the insurance Program; (b) an unliquidated amount for the insurance policies; (c) a contingent claim for failure to exhaust underlying coverage; (d) other insurance or services; (e) bond obligations; (f) quantum meruit; (g) joint liability should it be established that any of the debtors has liability on the obligations of any of the other debtors; and (h) other.

33. Under the Indemnity Agreement, "[t]he term 'Loss Provision'. . . [means] the sum of money deposited in cash by the client pursuant to this Agreement. Thus, the term 'Loss provision' as used herein shall mean the sum of money represented by the following formula:

The larger of (A-C) or (B-C) = Loss Provision

Where A= Loss provision as shown in Article III(1)
B= Incurred Losses
C= Ultimate Loss actually paid by Client to Company."

THE ISSUES

The debtors' objection, National Union's response, and the debtors' reply raise several issues that are addressed in an intertwined fashion in the motions and the related briefs.

The Debtors' Objections to National Union's Claims

The debtors object to claim no. 2477 on the ground that it is late filed, part of the amount claimed was discharged in the 1985 bankruptcy case, and National Union failed to provide documentation to support the amount claimed to be owed.

The debtors also object to claims no. 2169, 2170, 2171, 2172, 2173, 2174, 2175, and 2177 as duplicate claims filed in different cases.

National Union responded to the objection with these motions:

(1) National Union's Motion to Dismiss the Objection to its Claims, or in the alternative, to Stay the Objection and Compel the Debtors to Arbitrate the Present Dispute

In this motion, National Union first moves to dismiss the timeliness and duplicate filing objections on the ground that the latest claim was an amendment to a timely filed claim and the challenged filings are not duplicates because they are filed in different cases against different debtors and the cases have not been substantively consolidated. The debtors respond that National Union still has not presented any evidence that any amount is due and that issue is for the bankruptcy court, as opposed to one that should be referred to arbitration.[9]

Next, National Union moves in this motion to compel arbitration on all other aspects of the claims objection. The debtors respond that they did not agree to arbitrate these disputes under the contract language and that referring the matters to arbitration would conflict with the purpose of the bankruptcy code. National Union takes the contrary view.

(2) National Union's Motion for Partial Summary Judgment to Determine that No Part of its Claim was Previously Discharged

National Union argues in this motion that it is entitled to a summary judgment that no part of its claim was discharged in the 1985 bankruptcy case. In opposition, the debtors contend that certain amounts were due before January 3, 1991, the effective date of the 1985 bankruptcy proceedings, and that National Union still has not broken the claim amount down by year.[10]

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[9] Docket 2493 at 3-4.

[10] Docket 2493 at 3.

Thus, argues the debtors, there are genuine issues of material fact and National Union is not entitled to judgment as a matter of law.

DISCUSSION

I. National Union's Motion to Dismiss the Objection to its Claims or in the alternative, to Stay the Objection and Compel the Debtors to Arbitrate the Present Dispute

A. The Motion to Dismiss

National Union moves to dismiss the objection on the merits, arguing that claim no. 2477 is a timely filed amendment and the other claims are not duplicates. To understand what law applies to this part of the motion, it is necessary to step back and consider how the dispute arose. This round of filings began with the debtors objecting to National Union's claims. *See* FED. R. BANKR. P. 3007. A claims objection is a contested matter governed by bankruptcy rule 9014. *See* FED. R. BANKR. P. 9014. National Union moves to dismiss the objection to its claim. Motions to dismiss are governed by bankruptcy rule 7012, which does not apply in contested matters. *See* FED. R. BANKR. P. 9014(c). National Union did not identify a legal basis for its motion to dismiss and it appears to the court to be more in the nature of a motion for summary judgment. *See* FED. R. BANKR. P. 7056. The debtors, though, did not brief the issue on the merits of whether the claim is a timely amendment and whether the other claims are duplicates, instead briefing the issue of whether those issues are subject to arbitration. Several briefs later, National Union seems to agree that these are bankruptcy issues that should be decided by this

court rather than an arbitrator.[11] Because National Union did not address or argue the summary judgment standards with respect to this part of its claim, and because the debtors addressed it as a procedural issue rather than a substantive one, the motion to dismiss is simply not in a posture to be decided on the merits and it is denied.

B. The Motion to Compel Arbitration

In the balance of this same motion, National Union moves to require that the claims objection be submitted to arbitration under the terms of the Indemnity Agreement. In opposition, WPSC argues that the contract language does not provide for arbitration of this dispute. Alternatively, WPSC maintains that the dispute should not be arbitrated because such a result conflicts with the bankruptcy code. National Union suggests that the two bankruptcy issues (the discharge question and the amendment issue) be held in abeyance pending arbitration or decided by this court before arbitration, while WPSC argues that the existence of these issues weighs against arbitration.

1. The Federal Arbitration Act

The Federal Arbitration Act (the FAA) recognizes a strong federal policy favoring arbitration as a means to resolve disputes. *See* 9 U.S.C. § 1, et seq. "The FAA was designed to override judicial reluctance to enforce arbitration agreements, to relieve court congestion, and to provide parties with a speedier and less costly alternative to litigation." *Stout v. J.D. Byrider*,

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[11] "Debtors have identified two bankruptcy issues which they submit are not subject to arbitration, and thus Debtors contend this dispute should not be subject to arbitration. . . National Union does not dispute that each of these bankruptcy issues [discharge and claim amendment] may be decided by this Court, but that does not preclude the parties from otherwise proceding to arbitrate all other issues in controversy." Reply Memorandum in Support of Motion of Claimants National Union . . . to Dismiss . . . or to Arbitrate, at 2. (Docket 2636).

228 F.3d 709, 714 (6th Cir. 2000). Under the FAA, a written agreement to arbitrate is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

As instructed by the Sixth Circuit, when a trial court is asked to compel arbitration under the FAA, it must proceed in this fashion:

> [F]irst, it must determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be nonarbitrable; and fourth, if the court concludes that some, but not all, of the claims in the action are subject to arbitration, it must determine whether to stay the remainder of the proceedings pending arbitration.

Stout, 228 F.3d 709, 714 (6th Cir. 2000).

2. The Indemnity Agreement

National Union and the debtors contracted in the Indemnity Agreement to arbitrate certain disagreements as opposed to litigating them in court. The parties differ as to the scope of the arbitration agreement. To resolve such a dispute, the "[c]ourt[] [is] to examine the language of the contract in light of the strong federal policy in favor of arbitration . . . [and] any ambiguities in the contract or doubts as to the parties' intentions should be resolved in favor of arbitration." *Stout*, 228 F.3d 709, 714 (6th Cir. 2000) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)). However, "[i]n determining the arbitrability of a dispute, courts do not 'reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated'." *Alticor, Inc. v. Nat'l Union Fire Ins. Co.*, 411 F.3d 669, 673 (6th Cir. 2005) (quoting *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002)).

The Indemnity Agreement has three arbitration provisions.[12] National Union relies on two of them. The first states that "[a]ll disputes or differences arising out of the interpretation of th[e] Agreement" shall be submitted to arbitration. The second provides for arbitration of disputes "concerning the amount of the Loss Provision."

Both arbitration provisions relied on by National Union are limited provisions. The first sends to arbitration any dispute arising out of the interpretation of the agreement. National Union would have the court read this broadly to say that it covers "any dispute seeking to enforce the agreement."[13] This suggestion, however, would re-write the contract. If the parties intended to submit *all* disputes to arbitration then they could have said so by saying "all disputes arising out of the agreement" will go to arbitration instead of saying "all disputes arising out of the interpretation of the agreement" would go to arbitration. The court must assume that all of the words used mean something and here it logically means that the parties agreed to arbitrate only differences relating to contract interpretation.

The Sixth Circuit considered a similar argument in an unpublished case, *Associated Indem. Corp. v. Home Insur. Co.*, No. 93-1857, 1994 WL 59001 (6th Cir. Feb. 25, 1994), where the contract required the parties to arbitrate if "an irreconcilable difference of opinion [should] arise as to the interpretation of this contract." *Id.* at *2. The Circuit held that "[t]he liberal

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[12] In addition to the two cited by National Union, the agreement delineates each party's responsibility for the payment of an award of punitive or exemplary damages and provides that "either the Client or the Company may initiate an arbitration in accordance with Article VIII, ARBITRATION. Such arbitration will determine an equitable distribution of the award of punitive damages between the Client and the Company." Exhibit A at 010, National Union's Motion for Partial Summary Judgment. (Docket 2635).

[13] Docket 2636 at II.

federal policy is not so broad that it compels the arbitration of issues beyond those agreed to by the parties . . . [T]he arbitration clause in this case involves only the interpretation of the actual language of the contract and does not reach beyond that point." *Id.*

National Union does not identify any particular language in the contract that requires interpretation. Instead, to try to bring the dispute within this provision, National Union relies mainly on a letter written by debtors' counsel. National Union works backwards from this letter to link the statements made to contract provisions. For example, the letter discusses a "Loss Run" which National Union provided to support its claims and concludes that National Union failed to substantiate the different parts of its claim. The letter also refers to a dispute about whether any or all of the debt was discharged in the 1985 bankruptcy case and whether all of the liabilities asserted are WPSC's. This letter shows that the dispute (other than the bankruptcy issues) is over how to calculate National Union's claim, not over how to interpret any contract provision. In fact, the debtors have repeatedly explained that the gravamen of their objection is that National Union keeps saying that an amount is due, but has failed to provide documentation to support the number claimed.[14] The first arbitration provision does not, therefore, cover this dispute.

The cases cited by National Union do not require a different result. All of them reiterate the strong federal policy in favor of arbitration, which this court agrees is the overarching policy consideration. When it comes to the facts to which the courts applied that principle, however, the cases are not directly applicable. For example, in *Hays and Co. v. Merrill Lynch, Pierce,*

[14] The court is not suggesting that National Union lacks such support, just that it apparently has not been provided to date.

Fenner & Smith, Inc., 885 F.2d 1149 (3d Cir. 1989), the Third Circuit considered contract language that was quite broad: "[A]ny controversy between us arising out of your business or this agreement shall be submitted to arbitration[.]" The court did not have to address whether the contract language called for arbitration of the dispute at issue. The issues instead were whether the chapter 7 trustee was bound by this prepetition agreement and, if so, whether the district court had discretion to refuse to enforce it. *Id.* at 1153-55. In *In re Transport Assoc., Inc.*, 263 B.R. 531 (Bankr. W.D. Ky. 2001), a bankruptcy court considered an arbitration clause almost identical to the one here. The issues again, however, were different. The trustee argued that because the dispute arose in the context of a claims objection (a procedure created by the bankruptcy code), the court had discretion to refuse to refer the matter to arbitration. The parties seem to have agreed that their dispute came within the arbitration clause because the court first found without much factual discussion that "[t]he Trustee's objection to NU's claim concerns contract interpretation and accounting principles" which made the arbitration clause applicable. The court went on to hold in part that arbitration of the contract dispute would not directly conflict with the bankruptcy code but arbitration of equitable subordination issues would conflict. *Id.* at 535-36. Similarly, National Union relies on *Insurance Co. of N. Am. v. NGC Settlement Trust & Asbestos Claims Mgmt. Corp. (In re Nat'l Gypsum Co.*), 118 F.3d 1056 (5th Cir. 1997). There the Fifth Circuit defined the issue before it in this manner: ". . . this appeal concerns only the Bankruptcy Court's determination that, assuming the Wellington Agreement's arbitration provision can be read broadly enough to cover the present dispute, it nevertheless had discretion to decide not to

stay the adversary proceeding pending arbitration under the [FAA]." *Id.* at 1061 (emphasis added). The cases do not, then, support National Union on this particular point.

National Union also argues that a second arbitration provision applies here. This provision gives National Union a contractual right to "initiate the arbitration process in the event of a dispute concerning the amount of the Loss Provision." Again, National Union requests a broad interpretation of a narrow provision. It is clear that the present dispute does not involve determining the amount of the Loss Provision. Under the agreement, the Loss Provision is a sum of money which the client is required to pay National Union. The agreement provides for subsequent actuarial review and adjustment of the amount of the Loss Provision and (in that context) provides that the parties have a right to initiate arbitration concerning the amount of the Loss Provision. The terms of this provision do not extend beyond the adjustment of the Loss Provision to include the issues of WPSC's ultimate liability to National Union which are the subject of this claim dispute.

The Indemnity Agreement provides for arbitration in three specific situations, none of which exists here. National Union's motion to compel arbitration is, therefore, denied.[15]

II. National Union's Motion for Partial Summary Judgment

National Union moves for a summary judgment that no part of its claim was discharged in the 1985 bankruptcy case. Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c) (made applicable by FED. R. BANKR. P. 7056). *See also Celotex Corp. v.*

[15] In light of this disposition, the court does not need to consider the debtors' alternative argument that even if the contract requires arbitration, the court has and should exercise discretion to refuse to refer the matter to arbitration.

Catrett, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986). The movant "always bears the initial responsibility of informing the [trial] court of the basis for the motion, and identifying those portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file' . . . that demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. at 323. The burden is then on the non-moving party to show the existence of a material fact which must be tried. *Id.* The non-moving party may oppose a proper summary judgment motion "by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves . . . ." *Celotex Corp. v. Catrett,* 477 U.S. at 324. All reasonable inferences drawn from the evidence must be viewed in the light most favorable to the party opposing the motion. *Hanover Ins. Co. v. American Eng'g Co.*, 33 F.3d 727, 730 (6th Cir. 1994). Summary judgment may be granted when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Northland Ins. Co. v. Guardsman Prods., Inc.,* 141 F.3d 612, 616 (6th Cir. 1998) (quoting *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992)).

National Union makes three alternative arguments against discharge. First, it argues that any part of its claim which is attributable to the 1985 bankruptcy case is not discharged because the plan in that case provided that the debtors would assume executory contracts and its administrative expense claim passed through the plan unaltered. Second, the obligations were subsequently assumed by the debtors for valid consideration. Third, National Union held security at the time of confirmation which it may apply to the pre-confirmation obligation. WPSC opposes summary judgment.

Summary judgment may not be granted on the discharge issue because National Union has not shown that there is no genuine issue of material fact leading it to be entitled to judgment as a matter of law. One factual issue is the content of the insurance policies. Although National Union argues that its contract passed through the 1985 bankruptcy case, the policies are not in evidence and National Union did not offer any evidence on that issue. Also, even if one accepts National Union's argument that it was not required to file an administrative claim in the 1985 case, there is no evidence that the debtors agreed to pay the claim at a later date, as National contends. Similarly, there is a genuine issue of material fact over whether the debtors assumed any obligations post-confirmation because the debtors deny that they knowingly and voluntarily waived discharge rights. Finally, summary judgment on the issue of whether National Union can apply its security to the discharged debt cannot be determined because National Union has not clearly articulated a legal theory for what it seeks to accomplish and the evidence on which it relies is at the moment insufficient. For example, National Union references Exhibit B006 as evidence that it held $481,923.40 of cash collateral at confirmation, but that document does not state that fact.

For these reasons, National Union has not proven that it is entitled to partial summary judgment on the discharge issue and the motion for that relief is denied.

CONCLUSION

For the reasons stated, National Union's motions to compel arbitration and for partial summary judgment are denied. Separate orders will be entered reflecting these decisions.

Date: 9/26/05

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center

THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 00-43394 to 00-43402
	)	Jointly Administered
PITTSBURGH-CANFIELD	)	
CORPORATION, et al.,	)	Chapter 11
	)	
Debtors.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**ORDER**

For the reasons stated in the memorandum of opinion filed this same date, National Union's Motion for Partial Summary Judgment to Determine that No Part of its Claim was Previously Discharged is denied. (Docket 2635).

IT IS SO ORDERED.

Date: 9/26/05

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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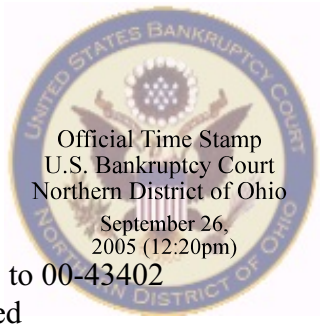
THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:	)	Case No. 00-43394 to 00-43402
	)	Jointly Administered
PITTSBURGH-CANFIELD	)	
CORPORATION, et al.,	)	Chapter 11
	)	
Debtors.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**ORDER**

For the reasons stated in the memorandum of opinion filed this same date, National Union's Motion to Dismiss the Objection to Its Claims, or in the alternative, to Stay the Objection and Compel the Debtors to Arbitrate the Present Dispute is denied. (Docket 2466).

IT IS SO ORDERED.

Date: 9/26/05

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center