

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION  
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In re: Case Nos. 8:13-bk-06864-CED,  
et al.  
Chapter 7

Able Body Temporary Services, Inc., et al.,  
Debtors.

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**ORDER DENYING  
TRUSTEE'S MOTION TO  
APPROVE COMPROMISE WITH  
AMERICAN CASUALTY INSURANCE  
COMPANY OF READING, PENNSYLVANIA  
AND CNA CLAIMS PLUS, INC.**

THIS CASE came before the Court for hearing on January 7, 2020, to consider *Trustee Herendeen's Motion to Approve Stipulation for Compromise and Settlement Between Trustee, Christine L. Herendeen, as Chapter 7 Trustee for the Debtors Estates and American Casualty Insurance Company of Reading, Pennsylvania and CNA Claims Plus, Inc.*<sup>1</sup> (the "Compromise Motion") and the objection to the Compromise Motion (the "Objection") filed by Regions Bank ("Regions").<sup>2</sup>

CNA Insurance Companies filed claims in each of the above-captioned bankruptcy cases; the Trustee objected to the claims in fifteen of the sixteen cases.<sup>3</sup> In the Compromise Motion, the Trustee asks the Court to approve her proposed settlement with American Casualty Insurance Company of Reading, Pennsylvania and CNA Claims Plus, Inc. (together, "CNA"). The proposed settlement provides for the allowance of CNA's

claims in each of Debtors' cases in an amount that is significantly greater than that stated on CNA's proofs of claim.

Having carefully considered the Compromise Motion and the Objection, the Court finds that the proposed settlement is not in the best interests of the estates and does not meet the minimum level of reasonableness required under the *Justice Oaks* standard. Accordingly, the Compromise Motion is denied.

**A. The Bankruptcy Cases**

In 2011, Frank Mongelluzzi filed a Chapter 11 case, which was later converted to a Chapter 7 liquidation case.<sup>4</sup> Angela Welch was appointed as the Chapter 7 Trustee in Mr. Mongelluzzi's case. On May 24, 2013, Trustee Welch filed Chapter 7 bankruptcy cases on behalf of the above-captioned debtors ("Debtors"), sixteen corporate entities owned by Frank Mongelluzzi and his wife, Anne Mongelluzzi. Christine Herendeen is the Chapter 7 Trustee in Debtors' cases. Debtors' cases are not jointly administered and have not been substantively consolidated.

**B. CNA's Claims**

On September 23, 2013, CNA filed identical proofs of claim in each of the sixteen Debtors' cases (the "Claims").<sup>5</sup> The Claims, filed as unsecured claims, state that they are based on a settlement agreement (the "2008 Settlement Agreement") and promissory note dated August 1, 2008 (the "2008 Note"), copies of which were attached to the Claims.

The parties to the 2008 Settlement Agreement were CNA, Debtor Professional Staffing – A.B.T.S., Inc.,<sup>6</sup> and non-debtor Safe Harbor Employee Services, Inc. ("Safe Harbor") (together,

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<sup>1</sup> Doc. No. 230. In this Order, all references to the docket will be to documents filed in the case of Able Body Temporary Services, Inc., Case No. 8:13-bk-06864-CED.

<sup>2</sup> Doc. No. 233.

<sup>3</sup> The Trustee did not object to the claim filed in Professional Staffing – A.B.T.S., Inc., Case No. 8:13-bk-06866-CED.

<sup>4</sup> Case No. 8:11-bk-01927-CED.

<sup>5</sup> For example, CNA's claim in Case No. 8:13-bk-06864-CED (Able Body Temporary Services, Inc.) was filed as Claim 23-1.

<sup>6</sup> The Debtor in Case No. 8:13-bk-06866-CED.

referred to in the 2008 Settlement Agreement as “ABTS”).

The 2008 Settlement Agreement includes the following recitals: (1) ABTS was in the business of providing temporary labor services to its clients, (2) CNA provided worker’s compensation insurance and claims handling services to ABTS for the period between December 1, 2001, and December 1, 2004, (3) CNA filed an arbitration claim against ABTS in 2007, (4) ABTS filed a response and counterclaim in the arbitration proceeding, and (5) the 2008 Settlement Agreement was entered to resolve the arbitration claim and counterclaim.<sup>7</sup>

The 2008 Settlement Agreement provided for (1) ABTS’s assignment to CNA of any rights that ABTS or any of its affiliates, as defined, had to certain premium fund accounts, (2) ABTS’s agreement to execute the 2008 Note, (3) Frank Mongelluzzi and Anne Mongelluzzi’s execution of a guaranty of the 2008 Note, (4) ABTS’s agreement to cooperate with CNA in defending any claims covered by the worker’s compensation policies, and (5) the mutual release of claims among CNA, ABTS, and their “Related Persons” as defined in the 2008 Settlement Agreement.<sup>8</sup>

The 2008 Note, in the amount of \$5,635,675.62, was payable to American Casualty Company of Reading, Pennsylvania and was signed on behalf of Debtor Professional Staffing – A.B.T.S., Inc., and Safe Harbor as the obligors. The 2008 Note was payable in monthly installments beginning on August 15, 2008, and continuing through February 15, 2012.<sup>9</sup> In the event of default, the 2008 Note provided for the unpaid balance to bear interest at a rate of 6% per annum and for ABTS to pay CNA’s reasonable attorney’s fees and costs in collecting the amounts due.<sup>10</sup> In addition, Frank Mongelluzzi and Anne Mongelluzzi executed a continuing unconditional guaranty of the 2008 Note (the “Guaranty”).<sup>11</sup>

CNA’s Claims were filed in each case in the amount of \$2,797,508.00. And in each case, an attachment to the Claim states that “[a]s of May 11, 2010, the Debtor and its affiliates, to the extent liable, owed CNA \$2,797,508.00” pursuant to the 2008 Settlement Agreement and 2008 Note, and that the “Claim is partially unliquidated as it does not include interest, attorneys’ fees and costs owing to CNA” under the 2008 Settlement Agreement and 2008 Note.<sup>12</sup>

### **C. The Trustee’s Objections to Claims**

On January 27, 2017, the Trustee filed her First Omnibus Objections to Claims<sup>13</sup> in fifteen of Debtors’ cases—all of the cases except for Professional Staffing – A.B.T.S., Inc. In her objections to the Claims, the Trustee asserted that CNA’s Claims were duplicative of the Claim filed by CNA in the Professional Staffing – A.B.T.S., Inc., case, and that the documentation attached to the Claims evidenced that they should not have been filed in any case other than in the case of Professional Staffing – A.B.T.S., Inc.

By agreement with the Trustee, CNA did not file a response to the Trustee’s objections to the Claims, and the Trustee’s objections were not set for hearing.

### **D. The Compromise Motion**

On October 31, 2019—nearly three years after the Trustee filed her objections to the Claims—the Trustee filed the Compromise Motion.<sup>14</sup> The Trustee asserts that she has independently evaluated CNA’s Claims, reviewed the 2008 Settlement Agreement, and conferred with Anne Mongelluzzi regarding the intent of the parties to the 2008 Settlement Agreement. After concluding her analysis, the Trustee entered into a stipulation with CNA, a copy of which is attached to the Compromise Motion (the “Stipulation”).

<sup>7</sup> Group Exhibit A to Claim 23-1, 2008 Settlement Agreement, ¶¶ A-C.

<sup>8</sup> *Id.* at ¶¶ 1-5.

<sup>9</sup> Group Exhibit A to Claim 23-1, Promissory Note, ¶ 1.

<sup>10</sup> *Id.* at ¶ 4.

<sup>11</sup> Group Exhibit A to Claim 23-1, Continuing Unconditional Guaranty.

<sup>12</sup> Attachment to Claim 23-1 titled “Proof of Claim,” ¶ 3.

<sup>13</sup> Doc. No. 206.

<sup>14</sup> Doc. No. 230.

The Stipulation recites that Anne Mongelluzzi “confirmed that it was the Debtors’ intent that the [2008] Settlement Agreement and the liability therein would be binding upon the Debtors.”<sup>15</sup> The Stipulation then provides that “the CNA Claim shall be an allowed claim in each of the Debtors’ cases, jointly and severally, in the amount of \$3,347,964.67” —i.e., \$550,456.67 more than stated in the Claims—as general unsecured claims. The Stipulation states that the agreed upon amount of the Claims “includes the amount set forth in CNA’s proofs of claim in addition to costs, attorneys’ fees, and interest due to CNA under the [2008] Settlement Agreement and related additional documents up to the Debtors’ petition dates.”<sup>16</sup>

### **E. Standard for Approval of a Compromise**

Under Federal Rule of Bankruptcy Procedure 9019, the court may approve a compromise or settlement on motion by the trustee and after notice and hearing.<sup>17</sup> “It is a fundamental tenet of bankruptcy jurisprudence that the proponent of a settlement, such as the trustee in this case, bears the burden of demonstrating that the proposal is both reasonable and in the best interests of the bankruptcy estate.”<sup>18</sup>

In the Eleventh Circuit, bankruptcy courts consider four factors, commonly referred to as the *Justice Oaks* factors, to determine the “fairness, reasonableness and adequacy”<sup>19</sup> of a proposed compromise:

- (a) the probability of success in the litigation;
- (b) the difficulties, if any, to be encountered in the matter of collection;
- (c) the complexity of the litigation involved, and the expense, inconvenience and delay

necessarily attending it; (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.<sup>20</sup>

In evaluating the *Justice Oaks* factors, courts generally do not decide the specific legal and factual issues presented, but instead canvas the issues the determine whether the compromise falls below the lowest point in the range of reasonableness.<sup>21</sup> For example, in *In re Gibson*, the Court denied a motion to compromise where the circumstances did not demonstrate that the proposal was in the best interests of the estate or that it met the “minimum level of reasonableness” required under the *Justice Oaks* standard.<sup>22</sup>

### **F. The Parties’ Positions**

#### *The Trustee’s Basis for the Compromise Motion*

In the Stipulation between CNA and the Trustee, CNA asserts that its Claims should be allowed in all of the sixteen Debtors’ cases “because each of the Debtors benefitted from the [2008] Settlement Agreement, and are jointly and severally liable pursuant to section 9(a)(i) of the [2008] Settlement Agreement.”<sup>23</sup>

Section 9(a)(i) of the 2008 Settlement Agreement provides that it will be “binding upon and inure to the benefit of” the parties and the “Related Persons subject to the releases set forth above.”<sup>24</sup> “Related Persons” are defined as “with respect to any Party, . . . affiliates (including parent entities, subsidiaries and divisions), . . . and any Person whose Claim or liability arises out of or derives from any relationship with a Party

<sup>15</sup> Exhibit A to Doc. No. 230, Stipulation, ¶ 6.

<sup>16</sup> *Id.* at ¶ 8.

<sup>17</sup> Fed. R. Bankr. P. 9019(a).

<sup>18</sup> *In re Vazquez*, 325 B.R. 30, 35 (Bankr. S.D. Fla. 2005)(quoted in *In re Gibson*, 2017 WL 7795950, at \*6 (Bankr. M.D. Fla. June 22, 2017)).

<sup>19</sup> *In re Chira*, 567 F.3d 1307, 1312-13 (11th Cir. 2009)(quoting *In re A & C Properties*, 784 F.2d 1377, 1381 (9th Cir. 1986)).

<sup>20</sup> *In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1549 (11th Cir. 1990)(quoting *In re A & C Properties*, 784 F.2d at 1381).

<sup>21</sup> *In re Pullum*, 598 B.R. 489, 492 (Bankr. N.D. Fla. 2019)(quoting *In re W.T. Grant Company*, 699 F.2d 599, 608 (2d Cir. 1983)).

<sup>22</sup> *In re Gibson*, 2017 WL 7795950, at \*10.

<sup>23</sup> Exhibit A to Doc. No. 230, Stipulation, ¶ 7.

<sup>24</sup> Group Exhibit A to Claim 23-1, 2008 Settlement Agreement, § 9(a)(i).

hereto.”<sup>25</sup> The term “affiliate” is defined as including “any other Person directly or indirectly, controlling, controlled by, or under common control with, such Person.”<sup>26</sup> Based on these provisions and the Trustee’s representation of Anne Mongelluzzi’s statement regarding the parties’ intent in entering in to the 2008 Settlement Agreement, CNA and the Trustee agreed that each of the Debtors is liable for the debts owed under the 2008 Settlement Agreement and 2008 Note.

The Trustee and CNA further contend that the Claims should be allowed in the amount of \$3,347,964.67; they take the position that the \$550,456.67 increase from the Claims as originally filed constitutes interest, attorney’s fees, and costs due CNA under the 2008 Settlement Agreement and 2008 Note.

#### Regions’ Objection to the Compromise Motion

Regions is a claimant in Debtors’ bankruptcy cases, having filed unsecured claims in an unliquidated amount and unsecured claims in the amount of \$2,786,354.07 in each of Debtors’ cases.<sup>27</sup> Regions is also a defendant in sixteen adversary proceedings filed by the Trustee to avoid allegedly fraudulent transfers from Debtors to Regions.<sup>28</sup>

Regions objects to the Compromise Motion on the following grounds:

First, Regions contends that CNA’s Claim should not be allowed in any of Debtors’ bankruptcy cases other than Professional Staffing – A.B.T.S., Inc.’s. Specifically, Regions asserts that the 2008 Settlement Agreement and 2008 Note reflect that Professional Staffing – A.B.T.S., Inc. is the only Debtor with any liability to CNA and that Florida’s statute of frauds “prohibits the imposition

of liability on any Debtor which did not sign” the 2008 Settlement Agreement and 2008 Note.<sup>29</sup>

Second, Regions points out that the Compromise Motion is not supported by Anne Mongelluzzi’s affidavit or declaration regarding the parties’ intent that all Debtors would be bound by the 2008 Settlement Agreement, and that the Trustee’s representation of Anne Mongelluzzi’s statement is contradicted by her deposition testimony.<sup>30</sup>

Third, Regions contends that CNA provided worker’s compensation insurance to ABTS from December 2001 to December 2004, but only two of the Debtors— Professional Staffing – A.B.T.S., Inc., and Able Body Temporary Services, Inc.— were in existence when the insurance agreements were entered. Four of the Debtors were formed in 2003, more than half-way through the coverage period, and ten of the Debtors were not formed until *after* the coverage period had ended. In fact, three Debtors were not formed until *after* CNA and Professional Staffing – A.B.T.S., Inc., entered the 2008 Settlement Agreement.<sup>31</sup> To support its contentions, Regions asks the Court to take judicial notice of Debtors’ corporate records from Florida’s Department of State, Division of Corporations, and North Carolina’s Department of the Secretary of State.<sup>32</sup> Based on these records, which the Trustee does not dispute, Regions asserts that none of the Debtors other than Professional Staffing – A.B.T.S., Inc., had any obligation to CNA under the 2008 Settlement Agreement and 2008 Note.<sup>33</sup>

Fourth, Regions contends that CNA’s Claims should not be allowed in an amount greater than that set forth in the Claims because the allowance of the additional, unclaimed amount—more than \$550,000.00—is not based on any evidence presented to the Court and will harm creditors that

<sup>25</sup> *Id.* at § 8(d).

<sup>26</sup> *Id.* at § 8(a).

<sup>27</sup> For example, Claim No. 21-2 and Claim No. 22-2 in Case No. 8:13-bk-06864-CED.

<sup>28</sup> Adv. Pro. Nos. 8:15-ap-111-CED, 8:15-ap-112-CED, 8:15-ap-113-CED, 8:15-ap-114-CED, 8:15-ap-115-CED, 8:15-ap-116-CED, 8:15-ap-117-CED, 8:15-ap-118-CED, 8:15-ap-119-CED, 8:15-ap-120-CED, 8:15-

ap-121-CED, 8:15-ap-122-CED, 8:15-ap-123-CED, 8:15-ap-124-CED, 8:15-ap-125-CED, 8:15-ap-126-CED.

<sup>29</sup> Doc. No. 233, pp. 6-7(quoting Fla. Stat. § 725.01).

<sup>30</sup> See Doc. No. 233, p. 5.

<sup>31</sup> Doc. No. 233, pp. 4-5.

<sup>32</sup> Doc. Nos. 234, 239.

<sup>33</sup> Doc. No. 233, p. 7.

hold valid claims against the fifteen Debtors other than Professional Staffing – A.B.T.S., Inc.<sup>34</sup>

And finally, Regions argues that if the Court grants the Compromise Motion, its order should be without prejudice and not binding on Regions in other matters pending before this Court, particularly the pending adversary proceedings.

### **G. Application of the *Justice Oaks* Factors**

The Court has applied the *Justice Oaks* factors to the Compromise Motion and finds that the Trustee’s settlement with CNA should not be approved.

#### *Probability of Success in the Litigation*

The Court finds that the Trustee has a reasonable chance of success on her objections to CNA’s Claims. CNA’s Claims are based on the 2008 Settlement Agreement and 2008 Note, which were not signed by any Debtor other than Professional Staffing – A.B.T.S., Inc.

First, under Florida’s statute of frauds, no action may be brought to enforce an agreement to pay the debt of another person “unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith.”<sup>35</sup> Generally, the purpose of the statute of frauds is evidentiary, “to provide reliable evidence of the existence and terms of the contract,” and “the statute should be strictly construed to prevent the fraud it was designed to correct.”<sup>36</sup>

Second, although the Trustee and CNA argue that all Debtors received the benefit of the 2008 Settlement Agreement because they are included in the definition of “Related Parties” that were covered by the release provisions of the 2008 Settlement Agreement, the Court does not find this argument to be persuasive. First, virtually every competently drafted settlement agreement includes

a mutual general release that provides the benefit of the release to related third parties such as those included in the definition of “Related Parties.” For example, in *Eastern Atlantic Realty and Inv. Inc. v. GSOMR LLC*, the court discussed a proposed mutual general release that included the following language:

. . . in favor of the other, including their respective officers, director [sic], employees, affiliated companies, parents, subsidiaries, successors, predecessors, attorneys, accountants and agents, for any and all claims, including claims for attorney’s fees and costs, arising out of the matters which are the subject of this action.<sup>37</sup>

If CNA had wanted the “Related Parties” as defined under the 2008 Settlement Agreement to be obligated under the 2008 Note, CNA would have arranged for them to be signatories to the 2008 Note or to sign the Guaranty. After all, when CNA wanted Mr. and Mrs. Mongelluzzi to be obligated under the 2008 Note, it required them to execute the Guaranty.

And third, there is little merit to the argument that Debtors who were not even in existence at the inception of the relationship between CNA and ABTS are somehow obligated under the 2008 Settlement Agreement and 2008 Note. There is even less merit to the Trustee’s contention that Debtors who were not in existence when the 2008 Settlement Agreement and 2008 Note were executed somehow have liability under them.

#### *Complexity of the Litigation Involved*

It appears that the liability of the fifteen Debtors other than Professional Staffing – A.B.T.S., Inc., may be determined as a matter of law without complex litigation. For example, the relevant legal and factual issues that may be determined by summary judgment include (1) whether the liability of any Debtor other than

<sup>34</sup> Doc. No. 233, pp. 8-9.

<sup>35</sup> Fla. Stat. § 725.01.

<sup>36</sup> *DK Arena, Inc. v. EB Acquisitions I, LLC*, 112 So. 3d 85, 92-93 (Fla. 2013)(quoting Restatement (Second) of

Contracts ch. 5, stat. note (1981), and *Yates v. Ball*, 181 So. 341, 344 (1937)).

<sup>37</sup> 14 So. 3d 1215, 1218 (Fla. 3d DCA 2009).

ABTS is prohibited by Florida's statute of frauds, and (2) whether any Debtors other than ABTS may be liable for the obligations under the 2008 Settlement Agreement if they were not formed until after the underlying insurance coverage had ended and, in some cases, after the 2008 Settlement Agreement was signed.

*Paramount Interest of Creditors*

The Court recognizes that Regions is the only creditor who has objected to the Compromise Motion. But this recognition is tempered by the fact that there has been little to no involvement in Debtors' cases by any members of the unsecured creditor body. And the Court is aware that the Trustee "benefits" if CNA holds valid claims in some of Debtors' cases. This is because the existence or non-existence of a "triggering creditor," namely a creditor with an allowable unsecured claim that could have sought avoidance of the challenged transfers under Florida law, is a required element of the Trustee's claims against Regions under 11 U.S.C. § 544.<sup>38</sup> If CNA's Claims are allowed in each of Debtors' cases, CNA may arguably serve as a "triggering creditor" for purposes of the Trustee's fraudulent transfer actions against Regions.<sup>39</sup>

In addition, the Court notes that the proposed compromise allows CNA's claims and then some; each of the Claims was filed in the amount of \$2,797,508.00, yet the Trustee has agreed to allowance of each Claim the amount of \$3,347,964.67, an unsubstantiated increase of \$550,456.67. The Trustee asserts that the increased amount represents costs, attorneys' fees, and interest—but CNA's Claims do not seek any amounts for breaches by ABTS under the 2008 Settlement Agreement or for any amounts other than payments under the 2008 Note. Simply stated, the increased amount for the allowed Claims is not supported by the record and may harm creditors who hold valid claims in Debtors' estates.

The Court concludes that Debtors' estates and their other creditors would have been better served if the Trustee had merely withdrawn her objections

to the Claims, rather than settling the Claims for more than CNA sought when it filed them. Viewing the proposed compromise in its entirety, the Court concludes that it is not fair or within the range of reasonableness.

Accordingly, it is

**ORDERED** that *Trustee Herendeen's Motion to Approve Stipulation for Compromise and Settlement between Trustee, Christine L. Herendeen, as Chapter 7 Trustee for the Debtors Estates and American Casualty Insurance Company of Reading, Pennsylvania and CNA Claims Plus, Inc.* is DENIED.

**DATED:** February 5, 2020.

/s/ Caryl E. Delano

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Caryl E. Delano  
Chief United States Bankruptcy Judge

<sup>38</sup> *In re Rollaguard Security, LLC*, 570 B.R. 859, 881 (Bankr. S.D. Fla. 2017).

<sup>39</sup> This issue has already been raised. *See, e.g.*, Adv. Pro. No. 8:15-ap-118-CED, Doc. No. 177, p. 9.