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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 2012-2705 BLS 2

CROSBY VALVE, LLC, PENTAIR VALVES & CONTROL US LP,  
And FMC CORPORATION

vs.

ONEBEACON AMERICA, INSURANCE COMPANY, et al.

MEMORANDUM OF DECISION AND ORDER ON  
DEFENDANT INSURERS' MOTION TO COMPEL

This action concerns the coverage obligations of various insurers in connection with asbestos-related litigation against plaintiff Crosby Valve LLC (Crosby). Pursuant to a 2015 Tracking Order, the discovery is being conducted in phases, with Phase One limited to discovery concerning: 1) the existence and contents of the relevant insurance policies; and 2) plaintiffs' right to assert claims for coverage under those policies. In April 2016, this Court ruled that this included discovery concerning Crosby's corporate history as well as indemnification, assignment and contribution agreements entered into by the plaintiffs. See Memorandum of Decision dated April 4, 2016. In so holding, the Court noted that, as to plaintiff FMC Corporation (FMC), its entitlement to coverage arose only as a result of its obligation to indemnify certain other parties. Thus, defendants were entitled to discovery on those indemnification obligations.

Now before the Court is Defendants' Insurers' Motion to Compel Answers to Interrogatories and Production of Documents which have been directed to Crosby and FMC. These discovery requests concern documents and communications relating to a Settlement Agreement between Crosby and FMC in connection with litigation between the two in Texas.

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Crosby and FMC have refused to produce this material on the grounds that the Settlement Agreement was confidential and discussions leading up to it are privileged from discovery. This Court concludes that the Motion must be ALLOWED as to the Settlement Agreement itself but otherwise DENIED.

### BACKGROUND

Crosby has operated a manufacturing business in southeast Massachusetts since the late 1800s. Some of its products contained asbestos, and that has made it the target of thousands of claims over the last two decades. This lawsuit seeks a determination as to which of its product liability insurers is responsible for covering those claims. This has been complicated by the fact that Crosby has not been a stand-alone company since 1981; rather it has been owned by a series of parent companies. Each time it was sold, the parties had to decide how to allocate Crosby's pre-existing liabilities as between the buyer and the seller.

One such transaction took place in 1998 when plaintiff FMC sold Crosby to Tyco. In that transaction, FMC promised to indemnify Tyco and its affiliates against any asbestos related costs. In the instant action, FMC contends that, although not a named insured under the policies, it has a right to coverage because of this indemnification agreement. In 2012, Tyco sold Crosby to plaintiff Pentair, and FMC took the position that its indemnity obligation ceased. Crosby instituted litigation in United States District Court in Texas. Crosby Valve, LLC v. FMC Corporation, Civ. No. 2014-02790 (Northern District, Houston Division). The federal court agreed with FMC, concluding that its indemnity obligation ended on September 28, 2012 when Crosby ceased to be an affiliate of Tyco. Crosby appealed.

Before that appeal could be heard, Crosby and FMC entered into a Settlement Agreement, pursuant to which Crosby dismissed its appeal and FMC assigned to Crosby and

Pentair all rights that FMC had to seek insurance coverage for costs that FMC had incurred in connection with Crosby's asbestos products. This Assignment of Rights has already been provided to defendant insurers in the instant case. The Settlement Agreement which resulted in the Assignment has not been turned over, nor have any of the parties' communications concerning it. The Settlement Agreement contains a confidentiality provision.

### DISCUSSION

In resolving this discovery dispute, this Court looks beyond Rule 26, Mass.R.Civ. P., which requires only that the information sought be relevant and reasonably calculated to lead to the discovery of admissible evidence. Because defendants seek information related to the settlement of litigation, this Court must balance the need for this information against the public policy that favors settlement. That policy is an important one: a negotiated compromise of a dispute avoids costly and time consuming litigation, preserves scarce judicial resources, and recognizes the autonomy of the parties to shape their own solution to a controversy rather than having one judicially imposed on them. In furtherance of that policy, courts recognize and enforced confidentiality provisions that are part of settlement agreements.<sup>1</sup> That is because it is generally understood that the promise of confidentiality induces parties to temper or change their positions in ways that they would otherwise be unwilling to do if the agreements they reached were discoverable by others seeking to use it to their own advantage. See e.g. In re New York County Data Entry Worker Product Liability Litigation, 162 Misc.2d 263, 269, 616 N.Y.S.2d 424, 428 (N.Y.Sup.Ct. 1994) (nonsettling defendants could not discover terms of confidential settlement agreements entered into between plaintiffs and co-defendants); see also Chemical Bank v. Arthur Andersen & Co., 143 Misc.2d 823, 541 N.Y.S.2d 327, 330-331 (N.Y.Sup.Ct.

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<sup>1</sup> The Settlement Agreement at issue here is governed by New York law, so this Court cites New York cases. But there is no indication that Massachusetts courts are any different on this issue.

1989) (denying discovery of expert's report prepared in separate litigation where the parties' stipulation that it would be confidential was a significant inducement to settling that action). Still, there are times when this policy is outweighed by the need for the information: where the information is not only relevant but also material to a party's ability to assert or defend against a claim, the public policy must give way.

Certainly, the Assignment of Rights is relevant to this action since it allows Crosby and plaintiff Pentair to claim coverage for Crosby products during that period of time that Crosby Valve was owned by FMC. The insurers argue that they should be entitled to "see behind the curtain" of this assignment and to review the Settlement Agreement which resulted in that assignment. That agreement, they contend, could shed light on the nature of FMC's indemnity obligation and the understanding of each party as to the scope of that obligation: it is not only relevant but material. This Court is persuaded by these arguments. For example, the Settlement Agreement could impose certain conditions on the Assignment of Rights or set forth circumstances under which it would not apply. Similarly, if the Settlement Agreement acknowledged in some fashion that FMC had an obligation to indemnify Crosby for all costs related to Crosby's asbestos products, not just for those net of insurance, then that would be important for the defendants in the instant case to know. Plaintiffs rely on the Texas Action and the resulting assignment in seeking coverage from the defendant insurers in the instant action. That means, however, that defendants should have the opportunity to evaluate and defend fully against this position. In short, this Court concludes that at least with respect to the Settlement Agreement, the public policy of promoting settlement and thus keeping the agreement confidential is outweighed by the interests of fairness to the individual litigant – here, the defendant insurers.

This Court reaches a different conclusion as to the communications that led up to the Settlement Agreement, including drafts of the agreement that were not adopted. Parties to litigation must be able to speak freely and take positions in negotiating a resolution which may or may not be ultimately adopted in the final analysis. It is therefore one thing to allow the defendants to see the end result of those negotiations, i.e. the Settlement Agreement. It is quite another to permit defendants to discover the substance of the negotiations themselves and then use those communications conducted during that process against those who participated in it. If the content of settlement discussions were discoverable, then that could very well discourage others from seeking compromise or from speaking with candor in an effort to reach agreement. Thus, in balancing the need for this information against the public policy in favor of promoting settlement, this Court concludes that the balance must be struck in favor of the latter.

As to the Settlement Agreement, plaintiffs' counsel did raise one additional point at the motion hearing, which is that one paragraph of that document concerns matters entirely collateral to this litigation but which involves one of the defendants; if disclosed, this information would give that defendant an unfair advantage on an issue that is not related to the instant action. Plaintiffs' counsel asked to be able to redact that paragraph and, if defendants continue to seek to have that information turned over, to have the unredacted version submitted to this Court for in camera review. Defense counsel at the hearing appeared to agree to this suggestion, so long as the remainder of the Settlement Agreement is turned over. The Settlement Agreement can therefore be produced redacting this paragraph.

**SO ORDERED.**

  
Janet L. Sanders  
Justice of the Superior Court

Dated: July 18, 2018