2008 Ann. Surv. of Bankr.Law 9

Norton Annual Survey of Bankruptcy Law September 2008

Volume 2008, Issue 2008

Norton's Annual Survey of Bankruptcy Law

Part I. Commercial Bankruptcy

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Director and Officer Insurance Policies and Proceeds

I. INTRODUCTION

Trustees, debtors in possession, and plan proponents, in their never-ending quest to find sources of funds to pay creditors, often look to insurance policy proceeds. In corporate bankruptcy cases, the insurance policies can include officer and director policies (D&O policies). This article looks at whether D&O policy proceeds qualify as property of a bankruptcy estate. The cases that have examined this issue have reached varying results, based upon the fact-intensive nature of this question.

II. PROPERTY OF THE ESTATE

When a bankruptcy petition is filed, the commencement of the bankruptcy case creates an estate that consists of, among other things, all of the legal and equitable interests of the debtor in property as of the beginning of that case.[1] The debtor's property can be located anywhere, and includes intangible or contingent interests as well as intangible property itself.[2] It also includes the proceeds, products, offspring, rents, or profits of or from property of the estate.[3]

The scope of property of the estate is given a very broad interpretation. This is reflected in both a Supreme Court decision and the intent of Congress in the applicable legislative history.[4] Nevertheless, property of the estate does have limitations.[5] Prepetition, the estate's legal or equitable interests do not rise above that of the debtor.[6] When a bankruptcy petition is filed, this does not enlarge, shrink, or otherwise modify a debtor's interest in an asset. It just changes the party who is responsible and holds that interest. Whatever rights that a debtor has in property at the beginning of a bankruptcy case continues in that case, more or less.[7] The purpose of the Bankruptcy Code[8] is to place the property of the estate, wherever it is, under the control of the court, so that there can be an equal distribution to creditors.[9]

The trustee has the initial prima facie burden to show that the debtor has an ownership interest in property. Afterwards, the burden of proving that property is removed from the estate under § 541(d) is on the party claiming the equitable interest.[10]

III. INSURANCE POLICIES AND THEIR PROCEEDS

A. Insurance Policies

Insurance policies that have been purchased and paid for by a debtor are considered to be property of the estate.[11] This is considered to be the majority view.[12] The basis for this position is that the payment and ownership of the policies themselves qualify those policies as estate property.[13]

The insurance policy at issue in *Robins* was a products liability policy that insured the debtor against the claims made by consumers.[14] The 9th Circuit adopted the rationale in *Robins* and applied it to an insurance policy that insures the debtor against claims by officers and directors. In the case of *In re Minoco Group of Companies, Ltd.*,[15] the court determined that since the estate was worth more money with those policies than without them, they qualified as property of the estate. Those insurance policies insured the debtor for any indemnity claim against it by its officers and directors, as well as insuring the directors and officers against third-party claims. The court reasoned that the "all-inclusive" purpose of § 541(a) required all interests of the debtor in property, even interests that were contingent or not yet realized, to become subject to the reorganization process.[16]

With a typical liability insurance policy, the corporate purchaser obtains primary coverage from lawsuits.[17] A D&O policy, on the other hand, is a hybrid animal. Those policies usually provide direct coverage to a corporation's directors and officers. However, indirect coverage is also given to the corporation for losses incurred indemnifying its principals, and some D&O policies provide direct protection to the company, sometimes referred to as "entity coverage" for certain kinds of claims, such as violations of securities laws.[18]

Many insurance policies, D&O policies included, are known as "wasting policies" or "burning candle policies." For these insurance policies, as the litigation proceeds, the amount available to a successful plaintiff is being diminished by the costs of defense of the litigation. In many instances, due to the size of defense costs, it is likely that the limits of those policies are eaten up before the claims are fully litigated.[19]

Although, for the most part, the courts are not split as to whether insurance policies are property of the estate, the same cannot be true with respect to insurance proceeds. As to insurance proceeds, the courts are split on this question.[20]

B. Insurance Proceeds—The Minority View

A minority of cases have held that the proceeds of a D&O policy are not estate property. In some of these cases, courts have held that if a debtor does not have a direct interest in the insurance proceeds, the proceeds are not property of the debtor's estate.[21] In *Louisiana World Exposition*, the creditors' committee sought an injunction and enforcement of the automatic stay barring further payments to the directors and officers under the prevailing D&O policy. The policy at issue included director and officer liability and corporate reimbursement coverage with an aggregate limit of $20 million. The creditors' committee argued that if it succeeded against the directors and officers, it would be entitled to the liability proceeds, which would have been diminished due to the payment of the directors' and officers' legal defense costs. The court ruled that the policy was not property of the estate because it only benefited the directors and officers, not the corporation, either by covering directly the officers and directors or indirectly by reimbursing the corporation for its indemnification of the expenses incurred by the officers and directors.[22]

In the case of *In re Spaulding Composites Co., Inc.*,[23] the court held that while certain insurance policies were property of the estate, the proceeds of those policies were not. The insurance company had brought a state court declaratory judgment lawsuit seeking to determine the rights of the nondebtor co-insureds in the policy proceeds. The issue in front of the court was whether that declaratory judgment action violated the automatic stay as the debtor was also an insured under the policy. The court held that the commencement of the state court action did not violate the automatic stay because the debtor was not named in the declaratory judgment action, and also because of the failure to demonstrate that the insurance company's payment of claims brought by the nondebtor insureds would impair the insurance company's ability to satisfy its obligations to the debtor under the policy.[24]

In *In re First Central Financial Corporation*,[25] a Chapter 7 case where the debtor had a theoretical right to entity coverage but where no claims that would trigger such coverage had been filed, the court ruled that the estate lacked a sufficient material interest in the D&O policy proceeds to warrant considering such proceeds to be property of the estate.[26] Similarly, in *Youngstown*, the court came down with a comparable ruling:

> D&O policies are obtained for the protection of individual directors and officers. Indemnification coverage does not change this fundamental purpose. There is an important distinction between the individual liability and the reimbursement portions of a D&O policy. The liability portion of the policy provides coverage directly to officers and directors, insuring the individuals from personal loss for claims that are not indemnified by the corporation. Unlike an ordinary liability insurance policy, in which a corporate purchaser obtains primary protection from lawsuits, a corporation does not enjoy direct coverage under a D&O policy. It is insured indirectly for its indemnification obligations. In essence and at its core, a D&O policy remains a safeguard of officer and director interest and not a vehicle for corporate protection.[27]

Likewise, in the case of *Matter of Vitek, Inc.*,[28] the court noted that, at one end of the spectrum, where a debtor corporation owns a D&O policy that only covers its directors and officers, the proceeds of that policy are not part of the bankruptcy estate and, at the other extreme, when there is a policy that covers the corporation's own liability vis-à-vis third parties, the proceeds would be estate property."[29]

In *In re Allied Digital Technologies, Corp.*,[30] the officers and directors of a corporate Chapter 7 debtor, each of whom had been named as a defendant in a cause of action brought by the trustee for damages associated with a leveraged buyout, moved for an order authorizing the reimbursement of defense or judgment or settlement amounts under the debtor's directors and officers liability policy. The court held, inter alia, that the proceeds of the debtor's D&O liability policy were not included in property of the estate; however, even assuming that those proceeds were property of the estate, the court would lift the automatic stay to allow those officers and directors to obtain payment of their defense and other costs under the policy.

The insurance policy in question had a $15 million limit of liability and $5,000 retention for director or officer for nonidentifiable loss, subject to a maximum of $50,000 for such loss. The policy provided coverage to the directors and officers for liability and defense costs, indemnification coverage to the debtor, and coverage to the debtor for securities claims. The policy had a single limit for all three types of claims. As the court pointed out, the problem plaguing the case was that both the trustee, as the plaintiff, and the individual defendants sought to be paid from the same wasting policy. Every dollar spent on defense costs would lessen the pot available for the trustee if the trustee prevailed in the litigation. In addition, any effort by the trustee to limit the amount paid to defense counsel potentially harmed the individual defendants' bargained for rights to defend themselves against claims brought by the trustee.

In holding as it did, the court pointed out that, normally, when insurance policies provide direct coverage to directors and officers, the proceeds of the insurance policy are not property of the bankruptcy estate because those proceeds are payable to the directors and officers and not to the estate.[31] The insurance policy in *Allied Digital* provided direct coverage to the directors and officers for any judgment or settlements in connection with a covered claim, as well as defense costs, but only if Allied Digital had indemnified the directors and officers. If the indemnified claims were paid, then Allied Digital would be entitled to reimbursement of the indemnified amounts. In either event, the coverage followed the liability, meaning that the party who was obligated to pay would get the coverage.

The parties agreed that the D&O policy provided direct coverage to the debtor for securities claims first made against the debtor but that the coverage to the debtor no longer existed because all securities claims had already been adjudicated or were barred by applicable statutes of limitations. This enabled the court to rule that if the debtor was no longer covered by the D&O policy, then the policy proceeds were not property of the bankruptcy estate.

The court went on to hold that when a liability insurance policy provides direct coverage to the debtor as well as to the directors and officers, the general rule is that since the insurance proceeds may be payable to the debtor, they are the property of the debtor's estate. However, in cases where the D&O liability insurance policy provides only indemnification coverage to the

company, the courts disagree on whether the proceeds from the policy are property of the estate.[32] Further, the court pointed out that when a suit is brought on behalf of the debtor, the courts generally hold that the debtor is just an indirect insured, and the proceeds are not property of the estate.[33]

In the end, the court held that the policy in question provided direct coverage to the directors and officers for claims and defense costs, which were real, and indemnification coverage to the company for amounts paid to the directors and officers, which happened to be hypothetical. The trustee made no credible showing that the direct coverage to the debtor for securities claims had any continuing viability. The trustee's concern was that payment of defense costs might impact his rights as a plaintiff seeking to recover from the D&O policy rather than as a potential defendant seeking to be protected by that policy. In this way, the trustee was no different than any third-party plaintiff suing defendants covered by a wasting policy. No one suggested that such a plaintiff would be entitled to an order limiting the covered defendants' rights to reimbursement of their defense costs.

> The bottom line is that the trustee seeks to protect the amount he may receive in his suit against the directors and officers while limiting coverage for the defense costs of the directors and officers. This is not what the directors and officers bargained for. In bringing the action against the directors and officers, the trustee knew that the proceeds could be depleted by legal fees and he took that chance. The law does not support the trustee's request to regulate defense costs.[34]

The court pointed out that it was not uncommon for courts to grant stay relief to allow payment of defense costs or settlement costs to directors and officers, especially when there was no evidence that direct coverage of the debtor would be necessary.[35]

A similar decision was reached in the case of *In re Medex Regional Laboratories*.[36] There, the Chapter 11 debtor's officers and directors moved for a determination that proceeds of the debtor's D&O liability policy were not included in property of the estate or, in the alternative, for relief from the automatic stay so that proceeds could be used to pay the officers' and directors' defense costs. The bankruptcy court held that the proceeds of the corporate Chapter 11 debtor's D&O liability policy were not included in property of the estate and were not protected by the automatic stay, although the policy provided coverage not only to the debtor's officers and directors but also to the debtor for any securities claims that were made during policy and discovery periods or for any indemnification claims.

There was no dispute that the policy expressly provided direct coverage to the movants for their costs in defending all claims, including the adversary proceeding, resulting from their positions with the debtor except for any costs that the debtor actually paid for indemnification. The debtor had not made any payments to the movants for indemnification, and it had not agreed or committed itself to paying any indemnification except as required. The parties agreed that, pursuant to an operating agreement, the movants were not entitled to indemnification for acts and omissions that constitute gross negligence or willful misconduct.[37]

With respect to the debtor, the policy provided indemnification coverage only to the extent that the debtor was required or permitted by law to indemnify the movants. However, under the terms of the operating agreement, the movants were not entitled to indemnification for all costs of defense by the debtor unless they were found liable for gross negligence or willful misconduct. In the adversary proceeding, the committee had alleged that the movants were grossly negligent in their duties as governors or directors of the debtor. Accordingly, even though the movants had all asserted affirmative defenses in their respective answers concerning indemnification, and five of the movants had filed proofs of claim in the bankruptcy case to that effect, the fact remained that the debtor might not be required to pay indemnification to any of the movants if the committee successfully proved gross negligence on the part of the movants.[38]

The policy also provided direct coverage to the debtor for any securities claim made during the policy period or a discovery period. However, those periods had expired, and the parties stipulated that the insurance company had not received any notices,

claims, or demands against the debtor regarding such claims. Accordingly, the debtor no longer had any direct "entity coverage" under the policy. The court pointed out that, as in the *Allied Digital* case, the movants had "real" defense costs while the debtor had only "hypothetical" indemnification costs.[39]

Since the debtor had not provided any indemnification to the movants, and since any such indemnification was hypothetical or speculative, the court determined that the policy proceeds were not property of the debtor's estate and, as such, were not covered by the automatic stay under § 362(a). The insurance company was therefore not precluded by the automatic stay from disbursing the costs of defense directly to the movants in accordance with the terms of the insurance policy. However, because the insurance policy was a wasting policy under which any payment to the movants under the liability coverage reduced the amounts of the potential indemnification claims to the same extent that the policy amounts available for indemnification were reduced, payment of defense costs, by definition, reduced liability coverage.[40]

C. Insurance Proceeds—The Majority View

These decisions ruling that D&O policy proceeds are not property of the estate are to be contrasted with other decisions that hold just the opposite. In *CyberMedica*,[41] officers and directors of a corporate Chapter 7 debtor, who had been named as defendants in an adversary proceeding brought by the trustee, moved for relief from the automatic stay in order to seek the payment of defense costs under the debtor's D&O liability policy. The court held, inter alia, that the proceeds available under that policy, which not only provided direct coverage to the debtor's officers and directors but also provided coverage to the debtor for indemnity and third-party claims, were included within property of the estate but that the officers and directors were entitled to relief from the automatic stay to seek the payment of defense costs under the policy.

The insurance policy in question had coverage under which the insurance company would pay on behalf of: (1) the directors and officers, for a loss resulting from any claim first made against the directors and officers during the certificate period for a wrongful act; (2) the assured organization, for a loss that the assured organization was required or permitted to pay as indemnification to any of the directors and officers resulting from any claim first made against the directors and officers during the certificate period for a wrongful act; and (3) the debtor, for a loss resulting from any claim first made against the debtor during the certificate period for a wrongful act.[42]

The insurance policy in *CyberMedica* provided for direct coverage to the directors and officers for defense costs and coverage to the debtor for both indemnification of its directors and officers and for claims against the debtor by third parties. The court's analysis pointed out that there are a number of cases which have held that if a debtor does not have a direct interest in the insurance proceeds, the proceeds are not property of the debtor's estate.[43]

The *CyberMedica* court distinguished *Louisiana World Exposition* and its progeny from a number of other cases that have held that when a D&O policy provides liability coverage to a debtor itself, the proceeds were property of the debtor's estate.[44] Reliance was placed on the case of *Circle K*,[45] where the debtor requested a preliminary injunction against continued litigation of securities fraud actions against the debtor, its officers, and its directors. The court found that the debtor's insurance policies, which provided liability coverage for the debtor's officers and indemnification coverage for the debtor, were property of the debtor's estate. The court reasoned that the insurance policies, which covered reimbursement to the debtor of the officers' litigation expenses, would become depleted through ongoing litigation, and the debtor's exposure and other litigation would increase as the policy limits were exhausted.[46]

The court in *CyberMedica* cited to those cases that held that where a liability insurance policy provides broad coverage directly to a debtor for liability arising from the acts or omissions of the debtor's directors and officers, proceeds from that policy are property of the bankruptcy estate.[47] Agreeing with those cases, the court cited the fundamental test and adopted the logic of those cases holding that a D&O policy's insurance proceeds are property of the estate based upon whether the debtor's estate

is worth more with them than without them[48] and found that the D&O policy was of benefit to the estate since the estate was worth more with it than without it because it insured the debtor against indemnity and entity claims.

Nevertheless, the court lifted the automatic stay to enable the officers and directors to be paid their defense costs since those individuals were in need of those funds then and there and could be substantially and irreparably harmed if that relief was not granted. Harm to the debtor was found to be speculative given the fact that there were no claims for indemnification nor entity coverage made, and therefore, there did not appear to be an immediate risk of the D&O policies being depleted. Although the trustee argued that there would be indemnification claims, the debtor would not be harmed because the claims being paid for defense costs were among those claims for which the debtor ultimately was obligated to indemnify the directors and officers.

On this issue, the court relied on the decision of *In re Boston Regional Medical Center, Inc.*,[49] where an insurance company filed a motion for an order authorizing the payment of reasonable expert costs. The court looked at the motion as one for a preliminary injunction and found that the directors and officers needed the insurance proceeds in order to retain experts and that they would be irreparably harmed if those proceeds were not distributed in time to conduct their defense. The court concluded that the harm to the debtor was uncertain and less severe than the opposing harm and probably not irreparable. The court reasoned that the proposed payment was small in comparison to the policy limits and that there would be no harm at all if claims against the policy did not exceed those limits. Accordingly, the court granted leave from the automatic stay for the purpose of making the payments of expert costs not to exceed $600,000. Such leave was granted even though the aggregate claims by the officers, directors, and trustee for coverage of defense costs and liabilities may have substantially exceeded the policy's $20 million coverage limit.

A case that holds similarly to *CyberMedica* is *Arter & Hadden*,[50] where the officers and directors who had been named as defendants in a cause of action brought by the trustee of a corporate debtor's Chapter 7 estate moved for an order permitting the payment of their defense costs from the D&O liability insurance policy purchased by the debtor. The court held, inter alia, that the officers and directors failed to overcome the trustee's prima facie showing that the insurance proceeds were included in property of the estate and that cause existed to lift the automatic stay to permit the debtor's officers and directors to obtain payment under the D&O liability policy of the costs that they incurred in defending the trustee's claim. The court, in order to protect the estate's interest in the policy proceeds, required that payment of the attorney's fees of the officers and directors be subject to court approval on applications filed by the officers and directors.

The subject policy was not a policy that expressly limited coverage solely for the directors and officers or a policy that only included director and officer liability coverage and indemnity coverage. The policy did not segregate the policy limitations on the basis of whether the covered entity is a director or officer, the indemnity obligation of the debtor, or the debtor itself. If a direct claim was made against the debtor, that claim would compete for available coverage under the policy limits. Under that type of a policy, a debtor's interest in the proceeds would require protection from depletion and override the interest of the directors and officers.[51]

The court held that the executive and management committee could have overcome the trustee's prima facie case by showing that the debtor's entity coverage no longer provided a benefit to the estate. Also, in certain circumstances, the entity coverage provided by a D&O liability insurance policy may, pragmatically, no longer provide a benefit to the debtor because, in those circumstances, it has been held that the proceeds of such a policy are not property of the estate. However, the executive and management committee of the debtor did not offer any reason why a direct suit against the debtor was either practically or procedurally untenable. There was no showing of any evidence why the terms of the policy in question were no longer operative or that the debtor's entity coverage was merely hypothetical. It was the executive and management committee's burden of proof, not the trustee's, to show that the debtor's entity coverage provided the debtor with no benefit.[52]

Despite this ruling, the court found that cause existed to lift the automatic stay because the executive and management committee members might suffer substantial and irreparable harm if prevented from exercising their rights to defense payments to fund their defense of the trustee's complaint.[53] The court also found that the harm to the debtor if relief from the automatic stay

was granted to be speculative since there had been no identified claims for indemnification or entity coverage. In addition, the trustee did not oppose that relief.[54]

D. Insurance Proceeds—The *Adelphia* View

The split of authority in the decisions on whether D&O insurance proceeds are property of the estate is most dramatically seen in three published *Adelphia* opinions. Adelphia Communications Corporation (ACC) is the former parent of Adelphia Business Solutions, Inc. (ABIZ). In January 2002, ABIZ was spun off from ACC in a transaction under which ACC distributed its equity interests in ABIZ to the shareholders of ACC. Before all of the debtors' Chapter 11 petitions, and before ABIZ was spun off, the subject D&O policies originally were issued to ACC. As a result of the spin-off, ABIZ paid three separate premiums to the insurers in exchange for an agreement that ABIZ and its directors and officers would continue to have coverage under the D&O policies that ACC had first purchased.[55]

The three D&O policies, each of which had a policy period of December 31, 2000 through December 31, 2003, consisted of the following: (1) a "claims made" D&O policy that provided a primary layer of coverage in the amount of $25 million; (2) an excess policy that provided excess coverage of up to $15 million in excess of the $25 million primary coverage; and (3) a second excess policy that provided coverage in amounts up to $10 million in excess of the $40 million total coverage. Therefore, the D&O policies provided primary and excess coverage aggregating $50 million.[56]

Under these insurance policies, the directors and officers were covered for "ultimate net loss" that they were legally obligated to pay on account of any "claim" for a "wrongful act" as those terms were defined in the policies, subject to policy exclusions. "Ultimate net loss" was defined to cover the two types of loss that most commonly are covered in policies of this character, defense costs and actual liability for allegedly wrongful conduct. The D&O policies provided indemnification coverage, indemnifying the debtors for payments that they made for covered matters to their officers and directors, under the corporate charter, bylaws, etc. They also provided for "entity coverage" with respect to liability of ACC or ABIZ for violations of federal securities laws. These policies did not have a "priority of payments" endorsement providing that payments on account of the defense costs of the directors and officers come ahead of payments for indemnification coverage or entity coverage.[57]

It was never argued that any of the debtors had made any payments for which they would be entitled to indemnification coverage or that any such payments were even thought of. The debtors had not made or committed themselves to payments using their entity coverages either. The court noted, however, that ACC, which had enough potential value to warrant the appointment of an official committee of equity security holders, might be able to pay its creditors in full or otherwise make distributions to equity and might ultimately wish to use that coverage.[58]

The court also noted that the D&O policies were wasting policies and that, for all payments made by the insurers on behalf of the insureds, each dollar paid out for attorney's fees, settlements, judgments, or indemnification on behalf of any insured person or entity left one dollar less for other payments under the D&O policies. This was important to ABIZ, which did not have litigation pending against its officers and directors (except for the Rigas insureds, who had been sued with respect to their conduct at ACC) and which needed D&O coverage on a continuing basis to keep its independent directors and to reorganize. ABIZ had told the court that its outside directors would not continue to serve if ABIZ did not have D&O insurance, especially in the current legal environment with numerous shareholder actions pending against the former ACC directors. ABIZ had been unable to find another insurance carrier that would underwrite a claims made D&O insurance policy for ABIZ that provided coverage similar to what it already had. This problem was aggravated by the fact that ABIZ had limited financing available with which to indemnify its outside directors if they incurred losses from claims related to their actions as ABIZ's directors.[59]

ABIZ initiated an adversary proceeding against ACC for a declaration that carved out for the benefit of ABIZ and its officers and directors 18.5% of the total D&O policy coverage, which is the proportion of the total premium for the D&O policies that

ABIZ paid to secure D&O policy coverage for its people. The bankruptcy court denied ACC's motion to dismiss that adversary proceeding.[60]

The U.S. Department of Justice began criminal proceedings against the Rigas insureds: John, Timothy. and Michael Rigas, James Brown, and Michael Mulcahey. John, Timothy. and Michael Rigas were arrested. They were indicted. and the 24-count indictment included charges of conspiracy, securities fraud, wire fraud, and bank fraud. The Securities and Exchange Commission also filed a lawsuit against ACC and the same five former officers seeking, among other things, disgorgement of allegedly ill-gotten gains and civil monetary penalties.[61]

When ABIZ and its subsidiaries filed their bankruptcy petitions, those cases were assigned to the bankruptcy court. Thereafter, ACC and about 200 other subsidiaries filed their Chapter 11 petitions as well. The Rigas family filed pleadings before the bankruptcy court seeking relief from the automatic stay, to the extent applicable, to allow payment or advancement of defense costs under the D&O policies. Mr. Brown followed suit.[62]

One of the underlying insurance carriers thought to rescind its policy and sent notices of rescission. This was followed by the two other insurance companies doing the very same thing. Thereafter, the insurers brought a declaratory judgment action against each of the directors and officers to whom the insurers sought rescission. In the alternative, the insurers sought a declaration that their policies did not provide coverage for any lawsuits brought against those individuals relating to the mismanagement and "looting" of ACC.[63]

ACC then began an adversary proceeding in its bankruptcy case by filing a complaint against the insurers, seeking to enjoin the continued prosecution of claims in the declaratory judgment action. It also sought an order staying the continuation of the declaratory judgment action under §§ 362 and 105(a).[64]

In the first *Adelphia* decision, the debtor and former parent's chief executive officer and other directors and officers moved for relief from the automatic stay in order to make claims against the three D&O insurance policies for their defense costs in connection with the criminal and civil allegations made against them and to litigate the propriety of the insurers' refusal to pay defense costs. The insurers sought stay relief, seeking to provide the debtors with notices of rescission of the D&O policies and to name the debtors as additional defendants in the declaratory judgment action concerning the applicability of insurance policy exclusions. The debtor's former parent also sought injunctive relief, enforcing or extending the automatic stay to enjoin prosecution of the declaratory judgment action. The bankruptcy court held, inter alia, that: (1) litigation to cancel or rescind a D&O insurance policy requires request for stay relief; (2) under the facts of the cases, proceeds of the D&O policies were estate property, and requests by the insureds to draw down on the proceeds required a request for stay relief; (3) stay relief to engage in civil litigation with respect to insurance coverage was inappropriate during the pendency of criminal proceedings against some of the insureds; (4) as to the former officers' and directors' requests for payments under the D&O policies, the court would grant stay relief to permit them to request, and to authorize the insurers to pay, up to $300,000 per insured on account of defense costs, without prejudice to further requests, and without prejudice to the parties' rights to later litigate use of alternative mechanisms to allocate policy proceeds; and (5) the declaratory judgment action would be stayed at that time, subject to reconsideration at the conclusion of the criminal proceedings.

The court concluded that a request for relief from the automatic stay was required to obtain the D&O policy proceeds under the facts present. Where the debtor had a material interest in the D&O policy proceeds for its own economic exposure, such as with the reimbursement for any indemnification payments that it might make, or for "entity coverage" to satisfy issuer obligations on account of securities fraud liability, courts have recognized the interest of the debtor in the policy proceeds as well as the policy itself with the result that the policy proceeds are considered to be property of the debtor's estate.[65]

The parties that were objecting to the Rigas insured's request for relief from the automatic stay, ACC, ABIZ, the creditors' committee and the equity committee in ACC, and the creditors' committee in ABIZ, pointed out that the D&O policies provided

at least two benefits with respect to the policy proceeds to the debtors in addition to the debtors' officers and directors. The D&O policies provided "entity coverage" protecting each bankruptcy estate on account of its exposure to securities law claims and also reimbursed each estate to the extent that the estate advanced funds by reason of indemnification obligations under their charter or bylaws. These objectors claimed that this was the type of showing that had to be made to prove that the policy proceeds were property of the estate.[66]

The court concurred but also pointed out that there was another factor that was significant in causing the court to determine that relief from the automatic stay was necessary to access the policy proceeds. It was very important to ABIZ that, in order to obtain independent directors and officers who were willing to serve, just having a D&O policy was critical for any company wishing to reorganize. Also, the ability to obtain policy proceeds by some insureds under the policies could result, pragmatically speaking, in the total depletion of the policies, with the result that they would no longer be available to give directors and officers the comfort that they need to serve or continue to serve. This problem was exacerbated by the fact that ABIZ had sought and failed to obtain a new D&O policy and had to make use of the existing ones.[67]

Therefore, a motion to lift stay was necessary to obtain the D&O policy proceeds for defense costs because the D&O policy proceeds were, in and of themselves, property of the debtors' estates. However, the court did factor in another variable when calculating this equation. In doing this, the court pointed out that a severe depletion of the D&O policy proceeds might well result in the policy itself evaporating and thereby deprive the debtor, while trying to reorganize, from having an asset that it might need to secure independent directors. This would be an injury to the debtor itself. The court understood, and made note of, the fact that this type of an argument could go too far and that courts should be very careful before adopting it in every case because, in any number of bankruptcy cases, a debtor might not have a substantial and continuing need for coverage. On the other hand, there could be cases, and the court said that this case might be one of them, where the distinction between policy proceeds and the policy itself are not altogether clear and where resorting to policy proceeds may have the affect of destroying the practical value of the insurance policy itself. Where that is a risk, a request for relief from the automatic stay to secure those proceeds is important.[68]

This is a variant of the rationale that a debtor's estate may be worth more with a D&O policy than without it. Here, the court reasoned that the ACC estate was worth more with the D&O policy than without it by reason of the entity coverage and that the ABIZ estate was worth more with the D&O policy by reason of the totality of the entity coverage and the need for the policy itself in order to have independent directors. Under those facts, the court concluded that the proceeds of the D&O policies, like the policies themselves, were property of the debtors' estates, and requests by the insureds to draw down on the policy proceeds did require motions for relief from the automatic stay.[69]

The bankruptcy court decision was appealed and, at the district court level, was vacated and remanded. The district court held that: (1) while the debtors had potential claims under the D&O policy, to the extent that they advanced funds to their officers and directors pursuant to indemnification obligations imposed by the bylaws, they did not, prior to having made any such advances, have a property interest in the policy proceeds such that those proceeds were included in property of the estate and protected by the automatic stay; and (2) speculation by the bankruptcy court as to the adverse affects on Chapter 11 estates of litigation between the debtors' principals and the insurers provided an insufficient basis for an extension of the automatic stay to prevent such litigation from proceeding.

In reaching its conclusion that ACC did not have a property interest in the D&O policy proceeds, the court noted that, although the D&O policies reimbursed each estate to the extent that the estate paid out funds because of the indemnification obligations in ACC's charter or bylaws, there was no suggestion that any of the debtors had made any payments for which they would be entitled to indemnification coverage or that those types of payments were being thought of. None of the debtors had made or committed themselves to making payments using their entity coverage. For the debtors to claim to have a property interest in those proceeds "makes no sense at this juncture."[70]

> Such argument would be akin to a car owner with collision coverage claiming he has the right to proceeds from his policy simply because there is a prospective possibility that his car will collide with another tomorrow, or a living person having a death benefit policy, and claiming his beneficiaries have a property interest in the proceeds even though he remains alive. No cognizable, equitable and legal interest in the proceeds from the D&O policies has arisen here. Without legal and equitable interest in the proceeds, Adelphia's estate cannot be ascribed to hold a property interest in those proceeds.[71]

On remand, the bankruptcy court held that: (1) exercise of the bankruptcy court's equitable power was warranted to stay the declaratory judgment action; (2) stay of discovery and the declaratory judgment action were warranted; and (3) the officers and directors were permitted to seek an order in the declaratory judgment action to require the insurers to advance D&O liability insurance policy proceeds before the propriety of their conduct had been determined in the related criminal proceeding. The bankruptcy court pointed out that the district court's rulings were binding upon it.

What makes this second bankruptcy court decision so interesting is the issue that it took with the district court's rationale. The bankruptcy court stated that courts in the future looking at this issue may want to consider (1) whether the district court's conclusion that ACC did not have a property interest in the proceeds of the insurance policies "yet" is consistent with existing caselaw; and (2) that the district court did not address the language of § 541. The bankruptcy court pointed out that there were a "fair number" of decisions of the Supreme Court and the Second Circuit that have held that property of the estate, under § 541, does not depend on whether enjoyment of the property is contingent or must be postponed, is determined as of the commencement of the bankruptcy case, and is not influenced by postpetition events.[72]

The bankruptcy court even went as far as to refer to a commentator that disagreed with the district court decision.

> Given the pre-petition nature of the policy and the rights derived from it, it is difficult to determine why the court concluded that the debtor did not have any rights under the policy "yet" because it had not made any payments for which it would be entitled to reimbursement at the time the directors sought to draw on the proceeds. It suggests that whether or not policy proceeds qualify as estate property hinges on post-petition events, an idea which contradicts traditional analysis.[73]

The bankruptcy court also made a point of distinguishing the cases relied upon by the district court. The bankruptcy court pointed out that the cases that the district court relied upon did not have indemnification or entity coverage. For example, *Louisiana World Exposition*, the 1987 Fifth Circuit decision was later distinguished by the Fifth Circuit in its *Vitek* decision.[74] *Sacred Heart* distinguished *Louisiana World Exposition* in the same way.[75] The bankruptcy court additionally noted that other cases that the district court relied upon either did not concentrate on the policy/proceeds distinction or lacked entity coverage.[76]

IV. APPLICATION OF AN EQUITABLE STAY

The automatic stay precludes any act to obtain possession of property of the estate.[77] To the extent that insurance proceeds qualify as property of a bankruptcy estate, the litigation proceedings to the extent that they seek monetary judgments or reach monetary settlements payable from those proceeds would be acts to obtain property of the estate. Furthermore, to the extent any of the third-party defendants in that litigation request reimbursement of defense costs from those proceeds, such requests would also constitute acts to obtain property of the estate. Naturally, the estate would be protected from those acts by § 362(a).[78]

The general rule in bankruptcy cases is that the automatic stay of § 362(a)(1) and (3) is only available to debtors and not to third-party defendants or codefendants. In some instances, this general rule has been expanded by some courts to include circumstances where a potential judgment against the individual insured under a D&O policy may effectively be a judgment against the debtor due to existing indemnification provisions contained within the insurance policies.[79] Along these lines, some courts have expanded the protection of the automatic stay in situations where collection actions against nondebtor parties create an "identity of interest" with the debtor, such that a judgment against the nondebtor defendants becomes, in effect, a claim against the debtor itself for indemnification.[80] In some cases, § 362(a)(3) has been employed to stop actions against a debtor's partners to prevent parties from proceeding in an action that indirectly impacts the debtor's property interest or tries to obtain possession of property of the estate.[81]

This expansion comes through § 105(a), which provides, in pertinent part, that the "court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[82] However, for a bankruptcy court to have jurisdiction to enjoin a proceeding against nondebtor parties, the bankruptcy court must have the necessary jurisdiction to do so. Bankruptcy court jurisdiction is restricted to proceedings that arise under, arise in, or are related to a bankruptcy case.[83] Proceedings that are "related to" a bankruptcy case include: (1) causes of action owned by the debtor that become property of the estate pursuant to § 541; and (2) suits between third parties that have an effect on the bankruptcy estate.[84]

> We agree with the views expressed by the Court of Appeals for the Third Circuit in *Pacor, Inc. v. Higgins,* 743 F.2d 984 (1984), that Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate, and that the "related to" language of § 1334(b) must be read to give district courts and (bankruptcy courts under § 157(a)) jurisdiction over more than simply proceedings involving the property of the debtor of the estate. We also agree with the court's observation that a bankruptcy court's "related to" jurisdiction cannot be limitless.[85]

The Supreme Court in *Celotex* observed in a footnote that numerous courts of appeals had adopted a broad test for determining the existence of "related to" jurisdiction of whether the outcome of a civil proceeding could conceivably have any impact on the estate being administered for bankruptcy.[86] The Seventh Circuit has adopted a test that is somewhat different. Under this test, a matter is related to a bankruptcy case when the dispute affects the amount of property for distribution or the allocation of property among creditors.[87]

In determining whether to issue an equitable stay under § 105(a), there is no requirement for the court to evaluate the four factors that typically are considered in a decision to issue an injunction. A bankruptcy court can enjoin proceedings, and other courts, when it is satisfied that those proceedings would defeat or impair its jurisdiction over the case before it. This means that the court does not need to demonstrate an inadequate remedy at law or irreparable harm.[88] The moving party still has to prove a likelihood of success on the merits, and the public interest is always considered.[89]

In *Fisher v. Apostolou*, the principals of Lake States Commodities, Inc. ran a scheme where they defrauded hundreds of commodities investors. Actions were begun in the district court for the Northern District of Illinois by some of the investors against the principals of the corporation as well as against Gelderman, Inc., a legitimate, registered futures commission merchant through which the Lakes States principals conducted their trades. The investors alleged violations of securities and commodities laws and common-law fraud.

Eventually, Gelderman was the only entity from which anyone could recover damages.[90] Involuntary Chapter 11 bankruptcy petitions were filed against Lakes States and one of its principals. The cases were administratively consolidated, and orders for relief were entered. In the bankruptcy case that followed, the trustee filed an adversary proceeding. The complaint argued

that the district court claims were property of the estate or, alternatively, that the district court claims were sufficiently "related to" those of the trustee to support a § 105 injunction against the district court plaintiffs, staying their lawsuits until the trustee completed his pursuit of the same defendants. The bankruptcy court issued an injunction against further prosecution of the district court cases.

In the order, the bankruptcy court concluded, among other things, that the "trustee had satisfied the requirements for injunction under § 105, finding that both parties were pursuing the same dollars from the same defendants to address the same harm."[91] The district court, to which the judgment was appealed, dissolved the injunction. The Seventh Circuit then heard the case, reversed the district court, and reinstated the injunction.

The problem to be resolved, according to the Seventh Circuit, was that the investors were not suing the debtors but, instead, "third Parties who are not in bankruptcy, who allegedly committed various acts of fraud against them—non-debtor tortfeasors."[92] The court determined that "the investors' claims [were] sufficiently related to the property of the estate that their pursuit should be stayed pursuant to § 105 until the bankruptcy court had disposed of the trustee's claims based on the same underlying transactions."[93]

The Seventh Circuit has also held that, in certain instances, a trustee is entitled to temporarily block adjudication of claims that are not property of the estate by petitioning the bankruptcy court to enjoin that other litigation if it is sufficiently "related to" the trustee's own work on behalf of the estate. The jurisdiction of the bankruptcy court to stay actions in other courts extends beyond claims by and against the debtor to encompass suits to which the debtor need not be a party but which may affect the amount of property in the bankruptcy estate or the allocation of property among creditors.[94]

In *marchFIRST*, a Chapter 7 trustee sought to enjoin the prosecution of claims against a debtor's officers and directors. The bankruptcy court held, inter alia, that while the D&O liability policies that were purchased by the debtor corporation providing not only liability coverage to officers and directors but indemnification coverage to the debtor were included in property of the estate, the proceeds of those policies, in which the debtor had no interest unless the terms of the policies were satisfied, were not included and were not protected by the automatic stay; however, the shareholders' prosecution of the securities fraud claims against the debtor's officers and directors, and especially their attempt to recover from limited proceeds available under the D&O liability policies, threatened to impact the bankruptcy estate and therefore were enjoined.

Prior to the debtor's bankruptcy case, nine shareholder actions were filed against marchFIRST and certain of its directors and officers. Once marchFIRST's bankruptcy case was commenced, the debtor had to be dropped as a party defendant. The trustee in the debtor's bankruptcy case also filed an adversary complaint against some of those very same officers and directors. The court pointed out that the trustee and the defendants sought to satisfy potential judgments by pursuing, in addition to the assets of the directors and officers, the proceeds of the D&O liability insurance policies maintained by the debtor, totaling $15 million. Coverage A of the primary policy obligated the insurance company to pay the debtor's directors and officers for losses that they sustained while acting in their capacities while Coverage B obligated the insurance company to pay the loss of the debtor arising from securities claims brought directly against the debtor during the policy period and to reimburse the debtor for any amounts paid to the directors and officers on account of indemnifiable claims made against them.[95]

Relying upon the line of cases that includes *Louisiana World Exposition*, the court held that insurance proceeds were not property of the debtor's estate.[96] Nevertheless, a temporary injunction was placed on the nonbankruptcy court litigation.

> The magnitude of the harm is also not the issue. The purpose of a bankruptcy is to stop the clock and to gather up the property of the estate, every claim against the debtor, and every proceeding "related to" the case. 28 U.S.C. § 1334(b). Section 105 of the Bankruptcy Code and the Seventh Circuit require this Court to enjoin any related proceeding which may have an affect on the bankruptcy case. There is no question that a judgment in the District Court action could have a significant effect on this bankruptcy estate. If the judgment is $100 million, the insurance

> policies maintained by the Debtors would be wiped out, leaving no insurance proceeds for the Trustee to recover. Because the amount of damages are not delineated in the shareholder complaint, the possibility exists that all of the proceeds of the insurance policies would be used to satisfy such a judgment.[97]

In the end, the plaintiffs in the nonbankruptcy court action were enjoined from pursuing a judgment, but only preliminarily, and as soon as the trustee had completed its action, the defendants were entitled to proceed with the district court action.[98] This decision was affirmed on appeal.[99]

There are cases, however, where a request to impose relief under § 105(a) has been denied. In the case of *Enivid*, the trustees of a liquidating trust established under the debtors' confirmed Chapter 11 plan moved for a preliminary injunction to prevent shareholders from entering into settlement of their own fraud claims against the debtors' officers and directors, on the theory that settlement, to the extent payable from D&O liability policies purchased by the debtors, might affect the trustees ability to recover on their own claims. The bankruptcy court held, inter alia, that the court could exercise "related to" jurisdiction over the trustees' request for a preliminary injunction but that the trustees were not entitled to that injunction.

In reaching that result, the court noted that, although § 105(a) does grant the bankruptcy court wide ranging power to issue any order that is considered to be necessary or appropriate to carry out the provisions of Title 11, it is an "extraordinary exercise of discretion" to use that power to stay a third party action not involving the debtor.[100]

The court pointed out that the liquidating trustees had failed to satisfy the test for the entry of injunctive relief under § 105(a). They had failed to show that there would be an adverse effect on the administration of the bankruptcy estates. The automatic stay was no longer in place, and the assets of those estates had been transferred to liquidating trusts established pursuant to the confirmed Chapter 11 plans of reorganization two years prior. The debtors' assets and the examiners' rights vested in the liquidation trust, and the bankruptcy estates had ceased to exist, having been succeeded by the liquidating trust. The unsecured creditors' committee had been disbanded.[101]

That case, as well as others, rejected requests for injunctive relief where there have been confirmed liquidating plans and where there appears to require little more than resolution of adversary proceedings and the indemnification claims of directors and officers.[102]

In *In re Reliance Acceptance Group*, the district court reversed the decision of the bankruptcy court and held that it was error to enjoin a shareholder class action against directors and officers for violations of securities laws, even though the estate representative under the debtors' confirmed plan of reorganization was prosecuting claims for injunctive relief and fraud related to a stock split-off transaction.[103] The court, citing to the claims originally advanced by the debtors, rejected the debtors' argument that the shareholders' litigation, if permitted to progress, would diminish the funds available under the D&O liability insurance policies for the reasons that the funds available through the policies would be diminished as they are paid out to reimburse officers and directors for the costs of defending that litigation and because there is a risk that, if the shareholders are successful, they will obtain the amounts available under the policies and increase the amount of the claims for indemnification.[104] The district court distinguished the decision in *Fisher* from that case. The court reasoned that the *Fisher* decision holds that while a creditor may have a separate cause of action against a corporation's agents for injury suffered as a result of their fraud, where the trustee brings a similar action for all creditors and that action is based on the same transaction and seeks to recover the same damages, the creditor's case is sufficiently related to the trustee's case so that it should be stayed under § 105 while the bankruptcy case proceeds. However, here, the shareholders were not bringing litigation as creditors, and their damages, if they suffered any, will not be decreased by amounts that they received for claims that they filed in the bankruptcy case. *Fisher*, therefore, does not support the debtor's position that the shareholders' claims should be enjoined.[105]

The court in *Reliance* pointed out that the directors' limited resources did, in fact, present a risk of harm in that, if the shareholders were permitted to go forward, they might recover their damages—money that might otherwise be able to go to the bankruptcy estate. While this is the sort of harm that a court of equity would take into account, the problem was that the debtors could not specify a right to the relief, and without that right, the court would not issue the requested injunction.[106]

In *CHS*, shareholders who had filed a class action involving securities fraud claims against the directors and officers of the debtor moved for the entry of an order approving a proposed settlement to be funded with the proceeds of two D&O insurance policies.[107] The liquidating trustee under the liquidating plan that had been confirmed in the debtor's Chapter 11 case opposed the motion on the ground that if his potential claims against the debtor's former officers and directors were successful, the judgment might be greater than the remaining insurance proceeds if the class action settlement was funded.[108] The liquidating trustee's request was denied. The court reasoned that the trustee's attempts to protect enough insurance proceeds to satisfy what he thought would be a large enough judgment against the debtor's former officers and directors was consistent with a general policy in favor of maximizing the size of a bankruptcy estate; however, the trustee could not find, nor could the bankruptcy court locate, any Bankruptcy Code section or case authority that would entitle a bankruptcy trustee to any status other than a nonbankruptcy plaintiff with an unliquidated claim against third parties that may be covered by insurance proceeds about to be used to settle or satisfy a judgment entered in favor of other plaintiffs.[109]

To these cases, it is an important distinction that the postconfirmation jurisdiction of the debtor entity is limited. While § 1334 does not, just by reading the language of that provision, make a distinction between preconfirmation and postconfirmation jurisdiction, a number of courts have found a need to restrict the span of "related to" jurisdiction in the postconfirmation context so that the bankruptcy court jurisdiction does not go on forever.[110]

The logic behind these cases is that a debtor that has gone through the reorganization process is freed by the confirmation of its plan of reorganization. It goes through bankruptcy and re-enters the economic marketplace. In this way, the debtor is like any other marketplace participant and must protect its interests like any of its counterparts.[111] As a result of the expansive notion of "related to" jurisdiction, applying "related to" jurisdiction postconfirmation could result in a bankruptcy court having jurisdiction of virtually any case impacting the reorganized debtor going forward into the future. This would result in an unforeseen expansion of federal court jurisdiction and give reorganized debtors an unfair advantage by allowing them to have all of their litigation in one federal court, the bankruptcy court.[112]

V. THE PAYMENT OF LEGAL FEES AND EXPENSES

In cases where a debtor's officers and directors are being sued, those officers and directors will want their legal fees and expenses to be paid from the D&O insurance proceeds. Again, with respect to a wasting policy, every dollar that is paid for such legal fees and expenses reduces what will be available in a settlement or a judgment. Also, to the extent that the policy proceeds are property of the bankruptcy estate, they are protected by the automatic stay provisions of the Bankruptcy Code. With this in mind, two issues typically arise: whether a motion to lift the automatic stay should be filed for the payment of those proceeds for defense costs and expenses and whether the officers and directors should also file fee applications.

A. Whether to Seek Stay Relief

When the D&O policy proceeds are property of the estate, the automatic stay does need to be lifted. Courts will grant relief from the automatic stay to permit payment of defense costs or settlement costs to the directors and officers, especially in those cases where there is no evidence that direct coverage of the debtor will be necessary.[113] For example, in *CHS*, the subject policy provided direct coverage to the directors and officers, in addition to indemnification coverage, and direct coverage to the debtor for securities claims.[114] The court held that the bankruptcy estate had no property interest in the proceeds available for the coverage of the claims against the directors and officers. The direct coverage to the debtor was no longer a basis for

treating the proceeds as property of the estate since all of the covered claims that could be brought against the debtor had been discharged. Also, to the limited extent that proceeds could be considered property of the estate to satisfy the debtor's indemnification claims, the automatic stay would apply; but the court would grant relief from the stay for cause because the trustee could collect indemnification claims from the remaining proceeds.[115]

In *CyberMedica*, the liability insurance policy provided direct coverage to the directors and officers, including defense costs, and coverage to the debtor for indemnification and third-party claims. The court applied "a fundamental test that has been used in determining whether or not property belongs to the estate … whether the debtor's estate is worth more with them than without them" and decided that the proceeds were property of the estate.[116] The court determined that there was cause to lift the automatic stay because the directors and officers would "suffer substantial and irreparable harm if prevented from exercising their rights to defense payments." In addition, the debtor would not be harmed because the defense costs being paid were ultimately the obligation of the debtor to indemnify the officers and directors.[117]

> This court further finds that there is cause to lift the automatic stay because Dr. Hotchkiss and Dr. Vilar may suffer substantial and irreparable harm if prevented from exercising their rights to defense payments. Dr. Hotchkiss and Mr. Vilar are in need *now* of their contractual right to payment of defense costs and may be harmed if disbursements are not presently made to fund their defense of the Trustee's Complaint. Additionally, the harm to the debtor if relief from stay is granted is speculative given the fact that there are presently no claims for indemnification nor entity coverage, therefore, there does not appear to be an immediate risk of the D&O's two million dollars being depleted … Although the Trustee argues that there will be indemnification claims, the Debtor will not be harmed because the claims now being paid for defense costs are among the claims for which the debtor is ultimately obligated to indemnify the directors and officers.[118]

This reliance on the officers and directors suffering substantial and irreparable harm was carried forward in *Allied Digital* where the court ruled, inter alia, that although the D&O policy proceeds were not property of the debtor's estate, even if they were, the court would lift the automatic stay to allow the officers and directors to obtain payment of their defense and other costs under the policy. In that case, the policy provided direct coverage to the directors and officers for claims and defense costs, which the court considered to be real, and indemnification coverage to the company for amounts paid to the directors and officers, which was thought to be hypothetical. The court ruled that the trustee had made no credible showing that the direct coverage of the debtor for securities claims had any continuing life. The trustee's real concern was that the payment of defense costs may impact his rights as a plaintiff to recover from the policy rather than as a potential defendant seeking to be protected by the policy. Therefore, the trustee was like any other third-party plaintiff suing defendants under a wasting policy. A plaintiff in that position was not entitled to an order limiting the covered defendants' rights to reimbursement of their defense costs.

> The bottom line is that the trustee seeks to protect the amount he may receive in his suit against the directors and officers while limiting coverage for the defense costs of the directors and officers. This is not what the directors and officers bargained for. In bringing the action against the directors and officers, the trustee knew that the proceeds could be depleted by legal fees and he took that chance. The law does not support the trustee's request to regulate defense costs.[119]

Courts will also authorize the payment of legal fees and expenses when the amount being requested will not have any impact on future recoveries. In *GB Holdings*, the court permitted such payment where the requested authorization of $75,000 was considered to be relatively inconsequential when compared to the $15 million cap on recoveries under the insurance policy.[120]

B. Whether to File Fee Applications

The courts are split on whether fee applications should be filed and granted before such defense costs are paid. For example, in *Arter & Hadden*, the court authorized that procedure, reasoning that it had the authority to impose the necessary conditions for the relief of the automatic stay.[121] The court also based its decision on Bankruptcy Rule 2016(a), which provides that an entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate is to file a fee application that sets forth a detailed statement of: (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested.[122]

However, in the case of *In re Tom's Foods, Inc.*,[123] the court reached the opposite decision, finding the following argument of the directors and officers persuasive:

> The R.O.'s [responsible officers] request that the court require the D&O Parties [movants] to submit their counsel's invoices to the R.O. for approval, and if the R.O. does not consent to advancement of defense costs, to the court, is unnecessary and fundamentally unfair … The insurer … will monitor and review all defense costs requests and will only pay reasonable costs. The insurer clearly has incentive to minimize the costs it pays, and any additional review of defense invoices by the R.O. or this Court is unnecessary and wasteful. But, if the R.O.'s proposal is granted, this Court's review of the invoices would likely be unavoidable because the R.O. is adverse to the D&O Parties, whose defense bills contain privileged information, which would have to be redacted before submission to the R.O. and thus most likely result in this Court having to review all bills submitted. Requiring such review of defense costs incurred, when the insurer will already be closely monitoring the bills, thus results in an unnecessary additional review of defense costs and a waste of scarce judicial resources.[124]

The court in *CyberMedica* reached a similar result but did not give a reason.[125]

VI. CONCLUSION

With the multiplicity of variables involved in any decision on whether D&O policy proceeds are property of a debtor's estate, the only thing that can be certain is that the court will look long and hard at the facts before making its decision.

Research References:

Bankruptcy Service, L. Ed. §§ 19:227, 19:344, 29:174; Norton Bankr. L. & Prac. 3d §§ 61:12, 61:13; Norton Bankr. L. & Prac. 3d 11 U.S.C. § 541

West's Key Number Digest, Bankruptcy 2535, 2535(1), (2), 2549, 2558

Footnotes

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1 See 11 U.S.C.A. § 541(a)(1). In re Arter & Hadden, L.L.P., 335 B.R. 666, 671 (Bankr. N.D. Ohio 2005); In re CyberMedica, Inc., 280 B.R. 12, 15, 39 Bankr. Ct. Dec. (CRR) 215, 48 Collier Bankr. Cas. 2d (MB) 734 (Bankr. D. Mass. 2002); In re marchFIRST, Inc., 288 B.R. 526, 530 (Bankr. N.D. Ill. 2002), aff'd, 293 B.R. 443 (N.D. Ill. 2003).

2 In re Metropolitan Mortg. & Securities Co., Inc., 325 B.R. 851, 855, 54 Collier Bankr. Cas. 2d (MB) 757 (Bankr. E.D. Wash. 2005).

3 See 11 U.S.C.A. § 541(a)(6). In re GB Holdings, Inc., 2006 WL 4457350 *1 (Bankr. D. N.J. 2006) (GB Holdings).

4 U.S. v. Whiting Pools, Inc., 1983-2 C.B. 239, 462 U.S. 198, 103 S. Ct. 2309, 76 L. Ed. 2d 515, 10Bankr. Ct. Dec. (CRR) 705, 8 Collier Bankr. Cas. 2d (MB) 710, Bankr. L. Rep. (CCH) P 69207, 83-1 U.S. Tax Cas. (CCH) P 9394, 52 A.F.T.R.2d 83-5121 (1983). S. Rep. No. 95-989, 95th Cong., 1st Sess. 82 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5868. CyberMedica, 280 B.R. at 15; In re Medex Regional Laboratories, LLC, 314 B.R. 716, 720, 43 Bankr. Ct. Dec. (CRR) 178, 52 Collier Bankr. Cas. 2d (MB) 1591 (Bankr. E.D. Tenn. 2004); In re Adelphia Communications Corp., 285 B.R. 580, 590, 40 Bankr. Ct. Dec. (CRR) 123 (Bankr. S.D. N.Y. 2002), order vacated, 298 B.R. 49 (S.D. N.Y. 2003). GB Holdings, 2006 WL 4457350 at *1.

5 marchFIRST, 288 B.R. at 530, citing In re ANR Advance Transp. Co., Inc., 247 B.R. 771, 774, 35 Bankr. Ct. Dec. (CRR) 267 (Bankr. E.D. Wis. 2000).

6 Medex, 314 B.R. at 720, citing In re Louisiana World Exposition, Inc., 832 F.2d 1391, 1399, 17 Collier Bankr. Cas. 2d (MB) 1291, Bankr. L. Rep. (CCH) P 72124 (5th Cir. 1987) (Louisiana World Exposition).

7 marchFIRST, 288 B.R. at 530, citing Matter of Sanders, 969 F.2d 591, 593, 23 Bankr. Ct. Dec. (CRR) 440, Bankr. L. Rep. (CCH) P 74804 (7th Cir. 1992), and Moody v. Amoco Oil Co., 734 F.2d 1200, 1213, 11 Bankr. Ct. Dec. (CRR) 1310, 11 Collier Bankr. Cas. 2d (MB) 1, Bankr. L. Rep. (CCH) P 69872 (7th Cir. 1984).

8 All of the statutory references in this article, unless otherwise indicated, are to the Bankruptcy Code.

9 CyberMedica, 280 B.R. at 16, citing Straton v. New, 283 U.S. 318, 320–321, 51 S. Ct. 465, 466, 75 L. Ed. 1060 (1931).

10 Arter & Hadden, 335 B.R. at 671, citing In re Doug Baity Trucking, Inc., 54 Collier Bankr. Cas. 2d (MB) 1646, 2005 WL 1288018 *2 (Bankr. M.D. N.C. 2005); In re Tri-River Trading, LLC, 329 B.R. 252, 263, 45 Bankr. Ct. Dec. (CRR) 49 (B.A.P. 8th Cir. 2005), decision aff'd, 452 F.3d 756, 46 Bankr. Ct. Dec. (CRR) 191 (8th Cir. 2006); and In re Spivey, 1998 WL 34066138 *2 (Bankr. S.D. Ga. 1998).

11 In re World Health Alternatives, Inc., 369 B.R. 805, 809, 48 Bankr. Ct. Dec. (CRR) 129 (Bankr. D. Del. 2007), citing Acands, Inc. v. Travelers Cas. and Sur. Co., 435 F.3d 252, 45 Bankr. Ct. Dec. (CRR) 243, Bankr. L. Rep. (CCH) P 80447 (3d Cir. 2006), cert. denied, 547 U.S. 1159, 126 S. Ct. 2291, 164 L. Ed. 2d 833 (2006); and Estate of Lellock v. Prudential Ins. Co. of America, 811 F.2d 186, 189, Bankr. L. Rep. (CCH) P 71619 (3d Cir. 1987); marchFIRST, 288 B.R. at 529; In re Eastwind Group, Inc., 303 B.R. 743, 746, 42 Bankr. Ct. Dec. (CRR) 118 (Bankr. E.D. Pa. 2004), citing A.H. Robins Co., Inc. v. Piccinin, 788 F.2d 994, 1001, 14 Bankr. Ct. Dec. (CRR) 752, 15 Collier Bankr. Cas. 2d (MB) 235, Bankr. L. Rep. (CCH) P 71094 (4th Cir. 1986) (rejected by, Algemene Bank Nederland, N.V. v. Hallwood Industries, Inc., 133 B.R. 176 (W.D. Pa. 1991)) and (rejected by, In re PTI Holding Corp., 346 B.R. 820 (Bankr. D. Nev. 2006)) (Robins); In re Davis, 730 F.2d 176, 184, Bankr. L. Rep. (CCH) P 69857 (5th Cir. 1984); In re Johns-Manville Corp., 40 B.R. 219, 230–231, 10 Collier Bankr. Cas. 2d (MB) 643, Bankr. L. Rep. (CCH) P 69600, 39 Fed. R. Serv. 2d 556 (S.D. N.Y. 1984); Adelphia, 285 B.R. at 590.

12 CyberMedica, 280 B.R. at 16; In re Allied Digital Technologies, Corp., 306 B.R. 505, 509, 42 Bankr. Ct. Dec. (CRR) 204 (Bankr. D. Del. 2004); Medex, 314 B.R. at 721 ("overwhelming majority").

13 Eastwind, 303 B.R. at 746.

14 Robins, 788 F.2d at 1001; In re Youngstown Osteopathic Hosp. Ass'n, 271 B.R. 544, 547–548, 47 Collier Bankr. Cas. 2d (MB) 971 (Bankr. N.D. Ohio 2002).

15 In re Minoco Group of Companies, Ltd., 799 F.2d 517, 519, 14 Bankr. Ct. Dec. (CRR) 1399, 15 Collier Bankr. Cas. 2d (MB) 1277 (9th Cir. 1986).

16 Minoco, 799 F.2d at 519; Youngstown, 271 B.R. at 548; Metropolitan Mortgage, 325 B.R. at 855. See also Adelphia, 285 B.R. at 590 (D&O insurance policies are property of the estate under § 541).

17 In re Mahoney Hawkes, LLP, 289 B.R. 285, 294 n.7 (Bankr. D. Mass. 2002), citing CyberMedica, 280 B.R. at 17.

18 Eastwind, 303 B.R. at 746–747; GB Holdings, 2006 WL 4457350 at *2.

19 Metropolitan Mortgage, 325 B.R. at 853–854; In re Enivid, Inc., 364 B.R. 139, 143–144, 48 Bankr. Ct. Dec. (CRR) 16 (Bankr. D. Mass. 2007).

20 In re Adley, 333 B.R. 587, 611 (Bankr. D. Mass. 2005), citing CyberMedica, 280 B.R. at 16.

21 Louisiana World Exposition, 832 F.2d at 1400–1401; In re Daisy Systems Securities Litigation, 132 B.R. 752, 755, Bankr. L. Rep. (CCH) P 74223, Fed. Sec. L. Rep. (CCH) P 96190 (N.D. Cal. 1991); In re Zenith Laboratories, Inc., 104 B.R. 659, 665 (D.N.J. 1989); Youngstown, 271 B.R. at 551; In re Imperial Corp. of America, 144 B.R. 115, 119, 23 Bankr. Ct. Dec. (CRR) 511, Fed. Sec. L. Rep. (CCH) P 97012 (Bankr. S.D. Cal. 1992). See also CyberMedica, 280 B.R. at 16.

22 Louisiana World Exposition, 832 F.2d at 1394. See also CyberMedica, 280 B.R. at 16.

23 In re Spaulding Composites Co., Inc., 207 B.R. 899, 37 Collier Bankr. Cas. 2d (MB) 1610 (B.A.P. 9th Cir. 1997).

24 Spaulding, 207 B.R. at 899. See also Metropolitan Mortgage, 325 B.R. at 856.

25 In re First Cent. Financial Corp., 238 B.R. 9, 17–18, 34 Bankr. Ct. Dec. (CRR) 1210, 42 Collier Bankr. Cas. 2d (MB) 1410, Bankr. L. Rep. (CCH) P 77996 (Bankr. E.D. N.Y. 1999).

26 First Central, 238 B.R. at 17–18. See also Adelphia, 285 B.R. at 591.

27 Youngstown, 271 B.R. at 550, citing First Central, 238 B.R. at 16.

28 Matter of Vitek, Inc., 51 F.3d 530, 535, Bankr. L. Rep. (CCH) P 76485 (5th Cir. 1995).

29 Vitek, 51 F.3d at 535. See also Adelphia, 285 B.R. at 591 n.11.

30 In re Allied Digital Technologies, Corp., 306 B.R. 505, 42 Bankr. Ct. Dec. (CRR) 204 (Bankr. D. Del. 2004).

31 Allied Digital, 306 B.R. at 510, citing Louisiana World Exposition, 832 F.2d at 1399 (the debtor has no ownership interest in proceeds from a liability policy where the obligation of the insurance company is only to the directors and officers who are the named and the only insureds); and Daisy, 132 B.R. at 755 (the court held that when the directors' and officers' liability insurance policy provides direct coverage to the directors and officers, the proceeds are not property of the estate to be divided among the debtor's creditors).

32 Allied Digital, 306 B.R. at 511–512, citing In re Jasmine, Ltd., 258 B.R. 119–128 (D.N.J. 2000) (the court held that the debtor's duty of indemnification was established and not merely speculative, thus entitling the debtor to the insurance proceeds; therefore, the proceeds were the property of the debtor's estate); In re Circle K Corp., 121 B.R. 257, 261–262, 21 Bankr. Ct. Dec. (CRR) 66, 24 Collier Bankr. Cas. 2d (MB) 917, Bankr. L. Rep. (CCH) P 73740 (Bankr. D. Ariz. 1990) (Circle K) (the court stayed a securities action against the directors and officers because the debtor could be required to reimburse the directors and officers if the insurer did not pay them, and there was a possibility of future indemnification claims); Adelphia, 302 B.R. at 448 (on remand, the court held that the directors' and officers' liability insurance policy proceeds were not property of the bankruptcy estate because, although the policy provided indemnification coverage

to the debtors, it was not shown that any of the debtors made payments for which they would be entitled to indemnification coverage, such payments were not contemplated, and the debtors had not committed themselves to payments using their coverage); Imperial, 114 B.R. at 118–119 (although the D&O liability policy provided indemnification coverage to the debtor, the court, following Louisiana World Exposition, held that the proceeds of the liability policy were not property of the estate because the debtor's exposure was capped by the debtor's confirmation).

33 Allied Digital, 306 B.R. at 512, citing First Central, 238 B.R. at 18–21. The court held that if the entity coverage is hypothetical and fails to provide some palpable benefit to the estate, it cannot be used by the trustee to leverage himself into a position of first entitlement to policy proceeds. Therefore, the court was unwilling to divest the directors and officers of liability protection and payment of legal fees because the policy was for their protection and not a vehicle for corporate protection. See also Zenith, 104 B.R. at 665 (An insurance policy purchased by a debtor is only an asset to the extent that it increases the debtor's worth or diminishes its liabilities. Since the debtor was not required to indemnify the directors and officers, the proceeds of the insurance policy were not property of the bankruptcy estate).

34 Allied Digital, 306 B.R. at 513.

35 Allied Digital, 306 B.R. at 512, citing In re CHS Electronics, Inc., 261 B.R. 538, 540–542, 37 Bankr. Ct. Dec. (CRR) 221 (Bankr. S.D. Fla. 2001), and CyberMedica, 280 B.R. at 17.

36 Medex, 314 B.R. at 716.

37 Medex, 314 B.R. at 721–722.

38 Medex, 314 B.R. at 722.

39 Medex, 314 B.R. at 722, citing Allied Digital, 306 B.R. at 512–513.

40 Medex, 314 B.R. at 722–723, citing Louisiana World Exposition, 832 F.2d at 1400.

41 CyberMedica, 280 B.R. at 12.

42 CyberMedica, 280 B.R. at 14.

43 CyberMedica, 280 B.R. at 16, citing Louisiana World Exposition, 832 F.2d at 1400; Daisy, 132 B.R. at 755; Zenith, 104 B.R. at 665; Youngstown, 271 B.R. at 551; Imperial, 144 B.R. at 119 (neither the liability proceeds of the D&O policy nor the corporation's indemnification of the sued directors' and officers' litigation expenses constituted property of the estate).

44 CyberMedica, 280 B.R. at 17, citing In re Sacred Heart Hosp. of Norristown, 182 B.R. 413, 419–420, 27 Bankr. Ct. Dec. (CRR) 284 (Bankr. E.D. Pa. 1995) (The proceeds available for the debtor's liability exposure are not segregated from the proceeds available to the directors and officers. Thus the debtor is indeed an insured and has a sufficient interest in the proceeds as a whole to bring them into the estate).

45 Circle K, 121 B.R. at 260.

46 Circle K, 121 B.R. at 258–261; CyberMedica, 280 B.R. at 17.

47 CyberMedica, 280 B.R. at 17, citing Vitek, 51 F.3d at 530; In re Leslie Fay Companies, Inc., 207 B.R. 764, 784 (Bankr. S.D. N.Y. 1997); and Sacred Heart, 182 B.R. at 413.

48 CyberMedica, 280 B.R. at 17, citing Minoco, 799 F.2d at 519.

49 In re Boston Regional Medical Center, Inc., 285 B.R. 87, 48 Collier Bankr. Cas. 2d (MB) 1369 (Bankr. D. Mass. 2002).

50 Arter & Hadden, 335 B.R. at 666.

51 Arter & Hadden, 335 B.R. at 672–673, citing First Central, 238 B.R. at 18 ("In such situations, the debtor's entity coverage competes for proceeds with the officer and director liability portion of the insurance policy. For every dollar paid out to the officers and directors, there is one less dollar of coverage protecting the debtor's estate").

52 Arter & Hadden, 335 B.R. at 673.

53 Arter & Hadden, 335 B.R. at 674, citing Allied Digital, 306 B.R. at 514 ("Without funding, the individual defendants will be prevented from conducting a meaningful defense to the trustee's claims and may suffer substantial and irreparable harm. The directors and officers bargained for this coverage"); CyberMedica, 280 B.R. at 18.

54 Arter & Hadden, 335 B.R. at 674.

55 Adelphia, 285 B.R. at 586.

56 Adelphia, 285 B.R. at 586.

57 Adelphia, 285 B.R. at 586–587.

58 Adelphia, 285 B.R. at 587.

59 Adelphia, 285 B.R. at 587.

60 Adelphia, 285 B.R. at 587.

61 Adelphia, 285 B.R. at 588.

62 Adelphia, 285 B.R. at 588.

63 Adelphia, 285 B.R. at 588–589.

64 Adelphia, 285 B.R. at 589.

65 Adelphia, 285 B.R. at 591, citing Vitek, 51 F.3d at 535; Leslie Fay, 207 B.R. at 785; CyberMedica, 280 B.R. at 16–17; and Sacred Heart, 182 B.R. at 419–420.

66 Adelphia, 285 B.R. at 591–592.

67 Adelphia, 285 B.R. at 592.

68 Adelphia, 285 B.R. at 592–593.

69 Adelphia, 285 B.R. at 593, citing CyberMedica, 280 B.R. at 17.

70 In re Adelphia Communications Corp., 298 B.R. 49, 53 (S.D. N.Y. 2003) (Adelphia Communications).

71 Adelphia Communications, 298 B.R. at 53–54.

72 Adelphia Communications Corp., 302 B.R. at 454 n.38, citing Whiting Pools (the "House and Senate Reports on the Bankruptcy Code indicate that section 541(a)(1)'s scope is broad"); In re Prudential Lines Inc., 928 F.2d 565, 573, 21 Bankr. Ct. Dec. (CRR) 838, 24 Collier Bankr. Cas. 2d (MB) 1503, Bankr. L. Rep. (CCH) P 73863, 92-2 U.S. Tax Cas. (CCH) P 50491, 67 A.F.T.R.2d 91-972 (2d Cir. 1991) (Congress wished to "bring anything of value that the debtors have into the estate"), quoting H.R. Rep. No. 95-595, 95th Cong., 2d Sess., U.S. Code Cong. & Admin. News 1978, pp. 5963, 6136; Segal v. Rochelle, 382 U.S. 375, 379, 86 S. Ct. 511, 515, 15 L. Ed. 2d 428, 66-1 U.S. Tax Cas. (CCH) P 9173, 17 A.F.T.R.2d 163 (1966) ("[t]he term

'property' has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed"); Segal v. Rochelle, 382 U.S. at 380 ("postponed enjoyment does not disqualify an interest as property"); In re Mid-Island Hosp., Inc., 276 F.3d 123, 238, 38 Bankr. Ct. Dec. (CRR) 268 (2d Cir. 2002) (this definition of property of the estate under § 541 is broad and includes even strictly contingent interests).

73 Adelphia Communications Corp., 302 B.R. at 454 n.38, citing Douglas, D&O Policy Proceeds Not Estate Property, 2 Bus. Restructuring Rev. 4,8 (October 2003).

74 Adelphia, 302 B.R. at 454 n.38, citing Vitek, 51 F.3d at 535.

> [O]n one extreme, when a debtor corporation owns a liability policy that exclusively covers it directors and officers we know from Louisiana World Exposition that the proceeds of that D&O policy are not part of the debtor's bankruptcy estate. On the other extreme, when a debtor corporation owns an insurance policy that covers its own liability vis a vis third parties-like almost all of the courts that have considered the issue—declare or at least imply that both the policy and the proceeds are property of the debtor's bankruptcy estate.

75 Adelphia Communications Corp., 302 B.R. at 454 n.38, citing Sacred Heart, 182 B.R. 419–420 ("the LWE case is quite easily distinguished from the case at bar … more important, however, is the fact that the debtor's own liability exposure is also covered by the D&O policy").

76 Adelphia Communications Corp., 302 B.R. at 454 n.38, citing Zenith, 104 B.R. at 665–666 (an early case, predating Vitek, which did not focus on the policy-proceeds distinction and which indeed held that the policy itself was not property of the estate—a view rejected in the district court decision and in substantially all of the cases); Daisy, 132 B.R. at 755 (no entity coverage and possibility of indemnification payments that would entitle estate to reimbursement was remote); CHS, 261 B.R. at 543 (noting "there is in actuality no entity coverage here" and holding that the automatic stay did apply by reason of indemnity coverage —"to the limited extent that the proceeds necessary to satisfy the debtor's indemnification claims could be considered property of the estate, the automatic stay would apply"—but then granting relief from the automatic stay); Youngstown, 271 B.R. at 550 ("there is no entity coverage") and at 551 ("this court makes no legal conclusions regarding entity coverage other than to find that [Debtor] YOH had none and that the existence of entity coverage could change this court's analysis").

77 11 U.S.C.A. § 362(a)(3).

78 Metropolitan Mortgage, 352 B.R. at 855. See also Arter & Hadden, 335 B.R. at 671 ("[t]he automatic stay provision of the Bankruptcy Code applies to proceeds of the policy if they are deemed to be property of the estate"); Medex, 314 B.R. at 720; Allied Digital, 306 B.R. at 509; CyberMedica, 280 B.R. at 15; Youngstown, 271 B.R. at 547–548.

79 Metropolitan Mortgage, 325 B.R. at 856, citing Robins, 788 F.2d at 994; In re Eagle-Picher Industries, Inc., 963 F.2d 855, Bankr. L. Rep. (CCH) P 74574 (6th Cir. 1992).

80 Metropolitan Mortgage, 325 B.R. at 856, citing In re Family Health Services, Inc., 105 B.R. 937, 19 Bankr. Ct. Dec. (CRR) 1724, 21 Collier Bankr. Cas. 2d (MB) 1377 (Bankr. C.D. Cal. 1989); and Robins, 788 F.2d at 994.

81 Metropolitan Mortgage, 325 B.R. at 856; citing In re Bialac, 712 F.2d 426, 11 Bankr. Ct. Dec. (CRR) 230, 8 Collier Bankr. Cas. 2d (MB) 1395, Bankr. L. Rep. (CCH) P 69314, 36 U.C.C. Rep. Serv. 1467 (9th Cir. 1983).That case involved a debtors undivided 1/6th interest in a promissory note. The analysis concentrated on the debtor's right to redeem the note after the creditor foreclosed on the 5/6th interest in the note held

by nondebtors. The conclusion of the court was that the right to redeem, while intangible and of unknown value, constituted property of the estate.

82 11 U.S.C.A. § 105(a).

83 Megliola v. Maxwell, 293 B.R. 443, 447–448 (N.D. Ill. 2003), citing Celotex Corp. v. Edwards, 514 U.S. 300, 307, 115 S. Ct. 1493, 131 L. Ed. 2d 403, 27 Bankr. Ct. Dec. (CRR) 93, 32 Collier Bankr. Cas. 2d (MB) 685, Bankr. L. Rep. (CCH) P 76456, 31 Fed. R. Serv. 3d 355 (1995) (citing 28 U.S.C.A. §§ 1334(b) and 157(a).

84 Megliola, 293 B.R. at 447–448, citing Celotex, 514 U.S. at 307 n.5.

85 Celotex, 514 U.S. at 308 (citations and quotation marks omitted); Megliola, 293 B.R. at 448.

86 Celotex, 514 U.S. at 308–309 n.6; Megliola, 293 B.R. at 448.

87 Megliola, 293 B.R. at 448, citing Matter of FedPak Systems, Inc., 80 F.3d 207, 213–214, 35 Collier Bankr. Cas. 2d (MB) 934, 38 U.S.P.Q.2d 1411, Bankr. L. Rep. (CCH) P 76996 (7th Cir. 1996); Matter of Memorial Estates, Inc., 950 F.2d 1364, 1368, Bankr. L. Rep. (CCH) P 74389, 21 Fed. R. Serv. 3d 1089 (7th Cir. 1991); and Matter of Xonics, Inc., 813 F.2d 127, 131, 17 Collier Bankr. Cas. 2d (MB) 230, Bankr. L. Rep. (CCH) P 71695 (7th Cir. 1987) (rejected by, In re Fietz, 852 F.2d 455, Bankr. L. Rep. (CCH) P 72420 (9th Cir. 1988)).

88 marchFIRST, 288 B.R. at 530, citing Fisher v. Apostolou, 155 F.3d 876, 882, 33 Bankr. Ct. Dec. (CRR) 203, Bankr. L. Rep. (CCH) P 77802, Comm. Fut. L. Rep. (CCH) P 27416 (7th Cir. 1998) (Fisher).

89 marchFIRST, 288 B.R. at 531, citing Fisher, 155 F.3d at 882.

90 Megliola, 293 B.R. at 448. marchFIRST, 288 B.R. at 531; In re Lake States Commodities, Inc., 230 B.R. 602 (Bankr. N.D. Ill. 1999).

91 Megliola, 293 B.R. at 448–449; marchFIRST, 288 B.R. at 531; Fisher, 155 F.3d at 880.

92 Fisher, 155 F.3d at 879; Megliola, 293 B.R. at 449; marchFIRST, 288 B.R. at 531.

93 Fisher, 155 F.3d at 878; Megliola, 293 B.R. at 449; marchFIRST, 288 B.R. at 531.

94 marchFIRST, 288 B.R. at 531, citing Zerand-Bernal Group, Inc. v. Cox, 23 F.3d 159, 161–162, 25 Bankr. Ct. Dec. (CRR) 965, 30 Collier Bankr. Cas. 2d (MB) 1763, Bankr. L. Rep. (CCH) P 75862 (7th Cir. 1994); Matter of Memorial Estates, Inc., 950 F.2d 1364, 1368, Bankr. L. Rep. (CCH) P 74389, 21 Fed. R. Serv. 3d 1089 (7th Cir. 1991); Matter of Heath, 115 F.3d 521, 524, Bankr. L. Rep. (CCH) P 77399 (7th Cir. 1997); and Fisher, 155 F.3d at 882.

95 marchFIRST, 288 B.R. at 528–529.

96 marchFIRST, 288 B.R. at 529–530.

97 marchFIRST, 288 B.R. at 533.

98 marchFIRST, 288 B.R. at 533.

99 Megliola. 293 B.R. at 443.

100 Enivid, 364 B.R. at 149, citing In re G.S.F. Corp., 938 F.2d 1467, 1474, 25 Collier Bankr. Cas. 2d (MB) 113, Bankr. L. Rep. (CCH) P 74130 (1st Cir. 1991) ("[t]here must be some effect on the debtors' estates stemming from the action before there is bankruptcy court jurisdiction to enjoin").

101 Enivid, 364 B.R. at 149, citing In re Consolidated Pioneer Mortg. Entities, 248 B.R. 368, 376 (B.A.P. 9th Cir. 2000), aff'd, 264 F.3d 803, 38 Bankr. Ct. Dec. (CRR) 94, 46 Collier Bankr. Cas. 2d (MB) 1125, Bankr. L. Rep. (CCH) P 78504 (9th Cir. 2001) ("[i]n a typical reorganization, once a plan is confirmed, a reorganized debtor no longer owes a fiduciary duty to the estate because the estate ceases to exist"); In re AstroPower Liquidating Trust, 335 B.R. 309, 323, 45 Bankr. Ct. Dec. (CRR) 228 (Bankr. D. Del. 2005).

102 Enivid, 364 B.R. at 150, citing In re Reliance Acceptance Group, Inc., 235 B.R. 548 (D. Del. 1999); In re Phar-Mor, Inc. Securities Litigation, 164 B.R. 903, 908 (W.D. Pa. 1994); CHS, 261 B.R. at 544; First Central, 238 B.R. at 21; Leslie Fay, 207 B.R. 786; In re Granite Partners, L.P., 194 B.R. 318, 338, 35 Collier Bankr. Cas. 2d (MB) 1139 (Bankr. S.D. N.Y. 1996), corrected, (Apr. 16, 1996).

103 Reliance, 235 B.R. 548, 561–562 (D. Del. 1999); Enivid, 364 B.R. at 150.

104 Reliance, 235 B.R. at 556–557; Enivid, 364 B.R. at 150–151.

105 Reliance, 235 B.R. at 550; Enivid, 364 B.R. at 151.

106 Reliance, 235 B.R. at 561; Enivid, 364 B.R. at 151.

107 CHS, 261 B.R. at 539; Enivid, 364 B.R. at 152.

108 CHS, 261 B.R. at 539; Enivid, 364 B.R. at 152.

109 CHS, 261 B.R. at 544; Enivid, 364 B.R. at 152.

110 Enivid, 364 B.R. at 147 n.8, citing In re Boston Regional Medical Center, Inc., 410 F.3d 100, 122, 44 Bankr. Ct. Dec. (CRR) 243 (1st Cir. 2005); In re Pegasus Gold Corp., 394 F.3d 1189, 1193–1194, 44 Bankr. Ct. Dec. (CRR) 36, 53 Collier Bankr. Cas. 2d (MB) 705, Bankr. L. Rep. (CCH) P 80229 (9th Cir. 2005) (suggesting that postconfirmation bankruptcy court jurisdiction is necessarily more limited than preconfirmation jurisdiction); and In re Resorts Intern., Inc., 372 F.3d 154, 164–169, 43 Bankr. Ct. Dec. (CRR) 46 (3d Cir. 2004).

111 Boston Regional., 410 F.3d at 122; Enivid, 364 B.R. at 147 n.8, citing Pettibone Corp. v. Easley, 935 F.2d 120, 122–123, 21 Bankr. Ct. Dec. (CRR) 1326, 25 Collier Bankr. Cas. 2d (MB) 1, Bankr. L. Rep. (CCH) P 74033 (7th Cir. 1991).

112 Boston Regional, 410 F.3d at 106 and 122; Enivid, 364 B.R. at 147 n.8.

113 Allied Digital, 306 B.R. at 513.

114 CHS, 261 B.R. at 540; Allied Digital, 306 B.R. at 513.

115 CHS, 261 B.R. at 540–542; Allied Digital, 306 B.R. at 513.

116 CyberMedica, 280 B.R. at 17; Allied Digital, 306 B.R. at 513.

117 CyberMedica, 280 B.R. at 17; Allied Digital, 306 B.R. at 513.

118 CyberMedica, 280 B.R. at 18.

119 Allied Digital, 306 B.R. at 513. See also Arter & Hadden, 335 B.R. at 674 ("The court finds that there is cause to lift the automatic stay because the executive and management committee members may suffer substantial and irreparable harm if prevented from exercising their rights to defense payments to fund their defense of the trustee's complaint").

120 GB Holdings, 2006 WL 4457350 at *4. See also In re RC Liquidating Co., 2007 WL 329183 *2 (Bankr. M.D. N.C. 2007):

> One or more of the defendants are insureds under the policy and, as such, have contractual rights provided under the policy. Those contractual rights include the payment of defense costs related to claims covered by the policy. While there may be situations in which the preservation of the policy proceeds may outweigh the payment of ongoing defense costs, this case does not present such a situation. Taking into account the $1,000,000 policy limit, the nature and extent of the claims and counterclaims involved in the adversary proceeding and the manner in which such claims and the defense costs related to such claims are likely to impact the available insurance, the court is satisfied that there are no countervailing interests that outweigh the recognition and implementation of the contractual rights of the defendants under the policy regarding defense costs.

121 Arter & Hadden, 335 B.R. at 674–675, citing Eastern Refractories Co. Inc. v. Forty Eight Insulations Inc., 157 F.3d 169, 172, 33 Bankr. Ct. Dec. (CRR) 339, Bankr. L. Rep. (CCH) P 77813 (2d Cir. 1998) ("[b]ankruptcy courts have the plastic powers to modify or condition an automatic stay so as to fashion the appropriate scope of relief"); In re Lopez-Soto, 764 F.2d 23, 28, Bankr. L. Rep. (CCH) P 70584, 2 Fed. R. Serv. 3d 662 (1st Cir. 1985); Browning v. Navarro, 743 F.2d 1069, 1074 and 1084, 11 Collier Bankr. Cas. 2d (MB) 911, Bankr. L. Rep. (CCH) P 70329 (5th Cir. 1984) (the court has the authority and discretion to fashion relief according to the needs in a particular bankruptcy proceeding); and In re Chari, 262 B.R. 734, 736 (Bankr. S.D. Ohio 2001).

122 Arter & Hadden, 335 B.R. at 674.

123 In re Tom's Foods, Inc., 2006 WL 3593450, at *2 (Bankr. M.D. Ga. 2006).

124 Tom's Foods, 2006 WL 3593450 at *2.

125 CyberMedica, 280 B.R. at 19:

> The Trustee asks this court that in the event that the underwriters are authorized to advance defense costs and expenses they should be required to file and serve fee applications prior to payment for a determination that such fees and expenses are reasonable. The Trustee submits that the proceeds available to the estate under the D&O policy should be reduced only to the extent of reasonable fees and expenses. This Court declines to make such a requirement.

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