

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:

**IN PROCEEDINGS UNDER CHAPTER 11
(Jointly Administered)**

LEVEL PROPANE GASES, INC., ET AL.

CASE NO.: 02-16172

Debtors.

JUDGE RANDOLPH BAXTER

MEMORANDUM OF OPINION AND ORDER

The matter before the Court is Walter Himmelman's (Himmelman) motion for relief from stay pursuant to 11 U.S.C. § 362(d) to permit reimbursement of defense costs, inclusive of attorneys fees, expenses, and costs, in the adversary proceeding styled *Level Propane Gases, Inc., et al. v. William Maloof, et al.* (Adv. Pro. 04-1300). Level Propane Gases, Inc. (Debtors) and the Unsecured Creditor's Committee (Creditor's Committee), co-plaintiffs in the adversary proceeding, both object to the relief sought. The Court acquires core jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(a) and (b), 28 U.S.C. § 1334, and General Order Number 84 of this District. Following a duly-noticed hearing, the following findings and conclusions are made:

Prepetition, National Union Fire Insurance Company of Pittsburgh ("National Union") issued a certain insurance policy providing director and officer liability coverage on claims made and reported for the policy period of July 31, 2001 to July 31, 2002. (See Exh. 1). Pursuant to the insurance policy's terms and conditions, Coverage A provides liability coverage directly to directors and officers (past and present) to the extent the Debtors have not indemnified those directors and officers for the claims.

Himmelman, a co-defendant in the above-referenced adversary proceeding seeks

reimbursement of his defense costs under the director and officer liability insurance policy. Himmelman is a former officer of one or more of the affiliated debtors.

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The Court must determine whether the director and officer (D & O) liability insurance policy issued by National Union is property of the Debtors' estate pursuant to section 541(a)(1) of the Bankruptcy Code, [11 U.S.C. § 541], and, if so, whether cause exists under 11 U.S.C. § 362(d) for stay relief to be granted.

Himmelman contends that the D & O policy is either not property of the estate or, in the alternative, it is property of the estate and cause exists under § 362(d) to allow stay relief for him to seek reimbursement of the costs to defend against the adversary complaint. Specifically, Himmelman contends that the D & O policy and its proceeds are not property of the estate in that the Debtors have no right to the insurance proceeds since it is contractually designated for other parties, i.e. the directors and officers. Alternatively, Himmelman argues that if the court finds the proceeds are property of the estate, then adequate cause exists for stay relief because he would suffer substantial and irreparable harm if prevented from exercising his right to seek reimbursement under the policy.

The Debtors and the Creditors Committee (herein referred collectively as "Objectants") jointly object to Himmelman's motion. Objectants argue that the insurance policy proceeds are property of the bankruptcy estate under § 541 of the Bankruptcy Code and that no cause exists under § 362(d) for stay relief. They further argue the proceeds are estate property because the policy includes entity coverage, as well as director and officer coverage. Objectants further contend that, under applicable

law, the proceeds are estate property when a debtor's estate is worth more with the insurance proceeds. Debtors claim that their estate is worth more with the D & O policy as part of the estate. Objectants further argue that no cause exists for stay relief, under § 362(d). They contend that their creditors will suffer a hardship because there will be less of a pay out to their creditors. Objectants believe the likelihood of a decreased payout to creditors outweighs the potential hardship to Himmelman. Lastly, the Objectants argue the insurance carrier, National Union, has not consented to payment of the defense costs. They contend the policy defines defense costs as costs consented to by the insurer (i.e. National Union).

Section 541(a)(1) of the Bankruptcy Code provides that property of the estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). The Supreme Court has interpreted § 541(a)(1) broadly. *See United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204-05, 103 S.Ct. 2309, 76 L.Ed.2d 515 (1983). The majority view is that insurance policies are property of the bankruptcy estate. *See e.g. In re Edgeworth, M.D.*, 993 F.2d 51, 55 (5th Cir. 1993) ("insurance policies are property of the estate because, regardless of who the insured is, the debtor retains certain contract rights under the policy itself"); *MacArthur Co. v. Johns-Mansville Corp. (In re Johns-Mansville Corp.)*, 837 F.2d 89, 92 (2d Cir. 1988), *In re Davis*, 730 F.2d 176, 184 (5th Cir. 1984).

Courts are in disagreement as to whether insurance proceeds are property of the estate. Some 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. *See Louisiana World Exposition, Inc. v. Federal*

Ins. Co. (In re Louisiana World Exposition, Inc.), 832 F.2d 1391, 1400-01 (5th Cir. 1987); *Youngstown Osteopathic Hospital Ass'n v. Ventresco, Jr. (In re Youngstown Osteopathic Hosp. Ass'n)*, 271 B.R. 544, 551 (Bankr. N.D. Ohio 2002); *In re Imperial Corp. of America*, 144 B.R. 115, 119 (Bankr. S.D. Cal. 1992) (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); *In re Daisy Syst. Sec. Litig.*, 132 B.R. 752, 755 (N.D.Cal. 1991) ("the proceeds of the [D & O] policies in this case are not simply assets of [the company's] bankruptcy estate to be divided among creditors according to bankruptcy law"); *Zenith Laboratories Inc. v. Sinay (In re Zenith Labs., Inc.)*, 104 B.R. 659, 665 (D.N.J. 1989).

On the other hand, where the debtor is entitled to indemnification for reimbursement costs paid to directors and officers, the courts typically hold that the policy is property of the estate such that the automatic stay will apply to bar directors and officers from seeking reimbursement against such policy. *In re Sacred Heart Hosp. of Norristown*, 182 B.R. 413, 420 (Bankr. E.D. Pa. 1995) ("We think that that such an indemnification interest in proceeds is sufficient to bring those proceeds into the estate."). See also *Circle K Corp. v. Marks (In re Circle K Corp.)*, 121 B.R. 257 (Bankr. D. Ariz. 1990) (D&O policy that provided for indemnification of debtor's expenses was property of the bankruptcy estate). Likewise, several courts have held that interests are "property of the estate" if "the debtor's estate is worth more with them than without them." See *In re Minoco Group of Companies, Ltd.*, 799 F.2d 517, 519 (9th Cir. 1986); *In re Pintlar Corp.*, 124 F.3d 1310, 1313 (9th Cir. 1997); *In re CyberMedica, Inc.*, 280 B.R. 12, 15 (Bankr. D. Mass. 2002).

The most often cited case on this issue is the Fifth Circuit's *Louisiana World* case. In that

case, the D&O insurance policy provided for direct payment to the directors and officers for reimbursement of defense costs. The directors and officers sought payment from the D&O insurance policy, and the creditors' committee brought suit to enjoin the payment as violative of the automatic stay. The Fifth Circuit rejected the argument that the estate had any property interest in proceeds of the insurance policy.

Based on the foregoing case law, a determination as to whether the proceeds of a directors and officers' liability insurance policy are estate property is made by a fact-based analysis. *In re CyberMedica, Inc.*, 280 B.R. at 16. The outcome usually hinges on who is the named insured under the liability insurance policy because liability policies are held by insureds as protection against claims that may be asserted against them. *See In re Minoco Group of Companies, Ltd.*, 799 F.2d 517, 519 (9th Cir. 1986); *In re Allied Digital Technologies, Corp.* 306 B.R. 505, 509 (Bankr. D. Del. 2004)(construing D & O policies in a Chapter 7 case).

A review of the subject policy reveals that it covers both the directors and officers (past and present) and the debtors. It is undisputed that the Debtors have no pending claim for indemnification against the insurance policy. Notwithstanding, pursuant to applicable case law, and the broad interpretation of § 541 of the Code, this Court finds that the Debtors' indemnification interest in the proceeds is sufficient to bring the proceeds into the Debtors' estate. Thusly, the subject insurance D & O policy and proceeds are property of the estate. Having determined that the D & O policy and proceeds are estate property, it must be determined whether stay relief under § 362(d) is warranted.

Section 362 of the Bankruptcy Code stays "any act to obtain possession of property of the

estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3); *In re RCS Engineered Products Co., Inc.*, 102 F.3d 223 (6th Cir. 1996). Its purpose is to "prevent dismemberment of the estate, ensure orderly liquidation, and grant the [debtor-in-possession] time to familiarize himself with the various rights and interests involved and the property available for distribution." *In re Granite Partners, L.P.*, 194 B.R. 318, 336 (Bankr. S.D. N.Y. 1996)(citing S.Rep. No. 95-989, 95th Cong., 1st Sess. 82 (1978), reprinted in 1978 U.S.C.C.A.N. 5787). See *In re Allied Digital Technologies, Corp.* 306 B.R. 505, 509 (Bankr. D. Del. 2004). Section 362(d)(1) allows the court to lift the stay for cause. 11 U.S.C. § 362(d)(1). The decision to lift the automatic stay is left to the discretion of the bankruptcy court. *In re Dairy Mart Convenience Stores, Inc.*, 351 F.3d 86 (2d Cir. 2003).

It is well settled that insurance policies are covered by the automatic stay. See *MacArthur Co. v. Johns-Mansville Corp.*, 837 F.2d 89 (2d Cir. 1988); *AH Robbins Co., Inc. v. Piccinin*, 788 F.2d 994, 1001 (4th Cir. 1986). D & O policies have also been regarded as property of the estate subject to the automatic stay. See *CyberMedica*, 280 B.R. at 17. Courts have been inclined to grant stay relief to allow payment of defense costs or settlement costs to directors and officers, especially when there is no evidence that direct coverage of the debtor will be necessary.

For example, in *In re CyberMedica*, the D&O insurance policy provided for both direct coverage and indemnification. That court ruled that the automatic stay would be lifted to allow the debtors' directors to recover defense costs. The court reasoned that the harm to the debtor was "speculative" as there were no present claims for indemnification or entity coverage, and thus "there does not appear to be an immediate risk" of depletion of the policy. See also *In re Republic*

Technologies Int'l, LLC, 275 B.R. 508, 518 (Bankr. N.D. Ohio 2002) (holding that the facts of each particular case must be analyzed to determine whether or not payment of insurance proceeds could alter the value of the bankruptcy estate at issue).

This Court concurs with the holding in *CyberMedica*. Here, the subject insurance policy provides for defense costs for directors and officers' and indemnification to the Debtors. (*See* Exhibit 1. The Debtors negotiated the terms and conditions of the subject policy prepetition to protect its directors and officers from liability. Furthermore, it is unrefuted that there are no present claims for entity coverage or indemnification. Without being able to seek reimbursement of his defense costs, Himmelman will be prevented from conducting a meaningful defense to the adversary complaint and may suffer substantial and irreparable harm as a result. The Objectants' concern that creditors will suffer a hardship upon an assumption there will be less of a pay-out to creditors is unsubstantiated and is therefore without merit.

Accordingly, Himmelman's motion for stay relief is granted. The subject insurance policy and its proceeds are property of the estate under 11 U.S.C. § 541(a). Cause exists for stay relief under 11 U.S.C. § 362(d) to allow Himmelman to prosecute his reimbursement claim for defense costs to the affected insurer. Each party is to bear its respective costs.

IT IS SO ORDERED.

**Dated this 3 day of
December, 2004**

/s/ Randolph Baxter

**RANDOLPH BAXTER
CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT**