

"Trustee's Response"). Certain asbestos personal injury creditors represented by Goldberg, Persky, Jennings & White; Silber Pearlman, LLP; Baron & Budd, PC; Kelley & Ferraro, LLP; Climaco, Lefkowitz, Peca, Wilcox & Garofoli; R. G. Taylor II, P.C. & Associates; and Bevan Associates, LPA (collectively, the "Asbestos Creditors") filed an Objection to Motion of Excess Group for an Order Establishing a Bankruptcy Court-Sanctioned Mediation and for an Order Entering Temporary Injunction to Facilitate Mediation (the "Asbestos Creditors' Objection"). A hearing on the Excess Group Motion and the responses thereto was held on March 29, 2005. Each of the individual insurance companies comprising the Excess Group was represented at the hearing. Also present were counsel and special asbestos counsel for the Trustee and counsel for the Asbestos Creditors.

BACKGROUND

This case has had a somewhat troubled history. The under-lying chapter 7 bankruptcy petition was filed on September 4, 2002. Bankruptcy protection was sought subsequent to the sale, on or about June 30, 2002, of all of Debtor's operating assets to CastPowder LLC for Six Hundred Sixty-Four Thousand Dollars (\$664,000.00) in cash and the assumption of Debtor's liability to National City Bank, which held a first priority security interest in all of Debtor's assets. At the time that the bankruptcy petition was filed, Debtor was a named defendant in more than

30,000 lawsuits alleging injury as a result of exposure to asbestos and asbestos containing products.¹ During the course of the chapter 7 proceeding, on or about July 25, 2003, the Motion for Relief from Stay of Asbestos Claimants Represented by Kelley & Ferraro (the "Kelley & Ferraro Motion") was filed. On August 19, 2003, the Trustee filed a Response opposing the Kelley & Ferraro Motion. On October 21, 2003, the Court entered an Agreed Order Granting Motion for Relief from Stay on Behalf of the Kelley & Ferraro Asbestos Claimants (the "Kelley & Ferraro Relief Order"). The Kelley & Ferraro Relief Order provided, in part, that "no payment may be made to any of the Movants from any applicable proceeds of insurance, either with respect to any settlement achieved or any judgment rendered in any of the Movants' respective Lawsuits, without a further Order of this Court authorizing or approving such payment."

On May 25, 2004, the Trustee initiated this adversary proceeding by filing a complaint against eight insurance companies, including the Excess Group, and 40 law firms and/or attorneys allegedly representing more than 36,000 plaintiffs with lawsuits against Debtor asserting asbestos related injuries (the "Asbestos Claimants"). Although the caption of the adversary proceeding lists as a "defendant" "Approximately 36,297 Asbestos Claimants and

¹At the hearing, special counsel for the Trustee stated that there are currently pending 34,190 asbestos related cases against Insul Company, Inc. She also stated that numerous of these cases are set for trial in April, May and June in Ohio, Pennsylvania, West Virginia and Indiana.

Claims Represented by the Following Lawyers or Law Firms," none of the Asbestos Claimants is named (although the Trustee evidently has the names of the approximately 36,297 plaintiffs and/or claimants). No attempt was made to serve any of the Asbestos Claimants. Only the lawyers and law firms were served in their own names. Part of the relief sought by the Trustee in the adversary proceeding was an injunction against the Asbestos Claimants represented by Kelley & Ferraro from prosecuting their lawsuits in any other court pending resolution of the adversary proceeding.

On July 21, 2004 - before any Summons was issued in the adversary proceeding - the Trustee filed a Motion to Compromise a Controversy, to Sell Insurance Policies Free of any Interest of any Entity Other than the Estate; to Establish a Claims Administration Process for Certain Asbestos Claims and Other Relief (the "Travelers Compromise Motion"). In the Travelers Compromise Motion, the Trustee requests, among other things, approval of a settlement agreement with Travelers Casualty & Surety Company ("Travelers"), Debtor's primary insurance carrier, which would involve a compromise of the insurance coverage for asbestos related claims, and a purchase price for Travelers to buy back the insurance policies from Debtor. The settlement agreement is specifically contingent upon this Court granting a permanent injunction enjoining any claims against Travelers with respect to asbestos bodily injury claims or other claims and an order finding

that all available limits of liability per occurrence, aggregate or otherwise, under the policies have been and are deemed to be exhausted.² The Travelers Compromise Motion has not been noticed for hearing and no action has been taken to obtain a hearing date.

On July 22, 2004, this Court held a hearing on the Trustee's request for an injunction against the Asbestos Claimants represented by Kelley & Ferraro. At the conclusion of that hearing, the Court denied the request for injunction on the basis that the Trustee had not served any of the Asbestos Claimants and that an injunction was not appropriate because those parties were not before the Court. On August 6, 2004, this Court entered an Order Denying Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction, in which the Court held that the Motion was denied because (a) due to the failure to serve the individual asbestos claimants, notice of the Motion was insufficient; and (b) the Trustee failed to satisfy the test for the issuance of a preliminary injunction.

Subsequent to the issuance of the August 6, 2004 Order,

²The Excess Group Motion argues that the relief it seeks in the instant motion is appropriate because "state court-ordered mediations . . . offer the Excess Group no final resolution whatsoever" whereas the Excess Group states that "Bankruptcy Court-sanctioned mediation will . . . provide the Excess Group with the protections afforded it by the Bankruptcy Code." See page 8 of the Excess Group Motion. The Excess Group does not specify what "protections" it believes the Bankruptcy Code affords them, but it is the Court's belief that the Excess Group hopes to obtain a settlement similar to the one that Travelers has reached with the Trustee, which includes a permanent injunction enjoining any claims against Travelers with respect to asbestos bodily injury claims. This Court has concerns that any such injunction can be ordered. See *In re Combustion Eng'g, Inc.*, 391 F.3d 190 (3rd Cir. 2004).

the Trustee entered into two additional agreed orders providing relief from stay for (1) the Asbestos Claimants represented by Goldberg, Persky & White (the "GPW Relief Order" entered October 25, 2004) and (2) the Asbestos Claimants represented by Baron & Budd and Silber Pearlman, LLC (the "Baron & Budd Relief Order" entered on November 18, 2004). Both of these agreed orders contained the same restriction on payment from applicable insurance proceeds that was contained in the Kelley & Ferraro Relief Order. Also during this time period, several of the defendants filed motions to dismiss, which were granted, dismissing them from this adversary proceeding.³

The Excess Group has moved to withdraw the reference regarding this adversary proceeding. On September 17, 2004, the Motion of United States Fire Insurance Company, Crum & Forster Indemnity Co., Cincinnati Insurance Company, Zurich American Insurance Company (as Successor-in-Interest to Zurich Insurance Company, U.S. Branch, by Operation of Law), and Firemen's Fund Insurance Company to Withdraw the Reference (the "Motion to Withdraw the Reference") was filed. These parties also filed a Memorandum in Support thereof. On December 10, 2004, Commercial Union Insurance Company filed a Joinder in the Motion to Withdraw

³Goldberg, Persky & White, P.C.; Baron & Budd, P.C. and Silber Pearlman, LLC; and RiverStone PPA were dismissed by Orders entered November 29, 2004. Ryan A. Foster & Associates, PLLC; Grenfell, Sledge & Stevens, PLLC; Dulin & Dulin LTD; and Brent Coon & Associates, P.C. were dismissed by Orders entered December 17, 2004. Kelley & Ferraro was dismissed by Order entered December 21, 2004.

the Reference. The Motion to Withdraw the Reference remains pending in the District Court.

On October 22, 2004, the Trustee filed a motion to approve compromise and settlement of various asbestos-related claims and actions and authorizing payment of settlement amounts. A hearing on this motion was held on November 30, 2004. On December 6, 2004, the Court entered an Order approving the compromise and settlement of 29 asbestos-related claims, as set forth in the Trustee's motion, but denying authorization to pay such claims pending further order of the Court.

The Court held a status conference in this adversary proceeding on January 26, 2005. The day prior to the status conference, the Excess Group filed a status conference memorandum, in which they said that they intended to file, on or before February 18, the Motion presently before the Court. At the status conference, this Court cautioned counsel for the Excess Group that they needed to present a very compelling reason to reimpose a stay on the state court proceedings because the stay had been consensually modified by the Trustee. The instant motion was filed on February 19, 2005 and requests the Court to establish a bankruptcy court-sanctioned mediation and to impose an injunction on the Asbestos Claimants prohibiting them from prosecuting their state court proceedings until the mediation is resolved.

REQUEST FOR TEMPORARY INJUNCTION

The Excess Group has moved this Court for an "Order Establishing a Court-Sanctioned Mediation and Entering a Temporary Injunction to Facilitate Mediation." The Court inquired of the parties at the hearing whether the Excess Group would request Court-sanctioned mediation absent the issuance of a temporary injunction enjoining the Asbestos Claimants from prosecuting their claims and lawsuits in state courts. The insurance companies that comprise the Excess Group did not speak with one voice on this issue, although most of them said that they would proceed with mediation even if the state court asbestos injury lawsuits were not enjoined.⁴ Both the Trustee and the Asbestos Creditors oppose the request for the temporary injunction, although they base their opposition on different reasons.

The Excess Group requests the issuance of a "temporary section 105(a) injunction enjoining the asbestos personal injury actions that are being forced to mediation or trial by the Principal Asbestos Claimant Firms." See page 11 of the Excess Group Motion. The Excess Group maintains that "[i]f a temporary injunction is not issued, the Trustee's attention will be diverted from the mediation, additional expenses will be incurred by defense

⁴Counsel for U.S. Fire Insurance Company and Crum & Forster; Cincinnati Insurance Company, and Zurich American Insurance Company all stated that their clients would not be opposed to going forward without issuance of an injunction. Counsel for Commercial Union Insurance Company stated that his client considered the injunction to be vital to the mediation and, although it would go forward with mediation absent an injunction, it would want the option, in that case, to be able to withdraw at will from the mediation and proceed with litigation. Counsel for Firemen's Fund Insurance Company did not indicate his client's position on this issue.

counsel, and the financial and other resources of the Estate will be depleted by the substantially-increasing trial calendar in the asbestos personal injury actions."⁵ *Id.* First, it should be noted that, although the Excess Group is purportedly asking for the temporary injunction in order to aid the Trustee, the Trustee opposes the temporary injunction. The Trustee states that he "does not believe that this request [for a temporary injunction] is proper as those [Asbestos C]laimants are no longer parties to this proceeding and because *such a request is not in the interest of the estate.*" (Emphasis added.) See Page 1 of the Trustee's Response. The Asbestos Creditors also oppose imposition of a temporary injunction, but this Court notes that they are no longer defendants in the adversary proceeding.⁶ As a consequence, the

⁵It is difficult to understand how the Excess Group can make this argument since the Estate has no assets other than the "potential" recovery on certain insurance policies. The Trustee has no money to pursue the Adversary Proceeding or pay counsel to prosecute this action. The Trustee currently has no money or other resources that can or will be depleted whether or not the mediation goes forward. Although the Excess Group states that Travelers is prepared to put "non-refundable funds into the Estate" to "satisfy the Estate's administrative expenses through mediation" (see page 9 of the Excess Group Motion), the Court finds this assertion troubling because there does not appear to be any consideration to Travelers for the deposit of such funds and it appears that there may be collusion on the part of the plaintiff and the insurance company defendants with regard to this adversary proceeding. Indeed, in answer to the Court's question about why Travelers would fund the Trustee's participation in the mediation, counsel for the Trustee conceded that the mediation between the Trustee and the Excess Group would benefit Travelers.

⁶The Trustee filed a Notice of Voluntary Dismissal of Individual Asbestos Claimants on March 8, 2005. This Notice is effective to dismiss all of the individual asbestos claimants except those represented by Brookman, Rosenberg, Brown & Sandler, which filed an Answer on September 2, 2004, and Waters & Kraus, LLP, which filed a "Response" on September 1, 2004. With respect to these defendants, the Trustee will either have to obtain their consent, by stipulation to be "so ordered" by the Court, to the dismissal, or file a motion to dismiss them from the adversary proceeding.

Asbestos Creditors do not have standing to object to a motion filed in the adversary proceeding, absent a request to intervene. Nevertheless, this Court permitted counsel for the Asbestos Creditors to present their position. The Court also notes that the Asbestos Creditors correctly point out that "the Excess Group is asking this Court to re-impose the automatic stay⁷ because re-imposition of the stay is in the best interests of the Excess Group, not the creditors of the estate." See Page 4 of the Asbestos Creditors Objection.

The Excess Group sets forth the following as elements governing the entry of an injunction issued pursuant to Federal Rule of Civil Procedure 65: "(1) the likelihood of the movant's success on the merits; (2) whether the movant will suffer irreparable injury absent the issuance of the injunction; (3) the harm to others that will occur if the injunction is granted; and (4) whether the injunction would serve the public interest."⁸ See

⁷The temporary injunction requested is akin to re-imposition of the automatic stay even though the nomenclature and the procedure are different.

⁸The Excess Group states on page 14, footnote 10, of its Motion, that "[b]ecause the proposed mediation will not constitute a financial burden on the Estate, and given the Excess Group's willingness to participate in a structured mediation, there is also a likelihood that the Trustee will be able to definitely (and in a cost-effective way) determine its coverage claims, enter into a settlement with the Excess Group and bring payments into the Estate for distribution." This argument hinges completely on whether Travelers is willing and authorized by the Court to put "non-refundable funds" into the Estate to fund the expense of administration of the mediation. It is not at all clear (since no motion has been made for such authority and given the Court's initial observation about the potential for collusion) that Travelers will make such funds available. Even if Travelers is willing and authorized to fund the Trustee's participation in the mediation, it is not at all clear that a favorable outcome will be achieved.

page 13 of the Excess Group Motion. The Excess Group fails to meet any of these four criteria. Here, the Excess Group, as the movant, is asking the Court to impose an injunction that is opposed by both sides of the contro-versy to which the injunction would apply - the Trustee and the Asbestos Claimants. The Excess Group has no standing to request this temporary injunction; the Excess Group has no likelihood of prevailing on the merits because it isn't a party to the personal injury asbestos lawsuits to which the temporary injunction would apply. The Excess Group will not suffer irreparable harm if the injunction does not issue and, as a consequence, it is impossible to weigh that non-existent harm against any potential harm to others. The Excess Group's argument regarding public policy is negated because the very people that the Excess Group insists would benefit from the temporary injunction - i.e., the Asbestos Creditors - oppose such relief. The Excess Group maintains that if the temporary injunction is not issued, continuation of the personal injury actions will "thwart any attempt to mediate" the dispute between the Excess Group and the Trustee, but the Excess Group does not explain why or how continuation of the state court actions would or could "thwart" the mediation of other disputes.

The Excess Group argues as grounds for the temporary injunc-tion that "[t]he dynamics of the adversary proceeding have, however, changed since [the Court denied the Trustee's motion for

a preliminary injunction against the Kelley & Ferraro Asbestos Claimants in July 2004] and it has become increasingly clear that the motivation to lift the automatic stay was merely a tactic designed to force a series of unreasonable settlements." See page 15 of the Excess Group Motion. This argument is absurd. The reasoning behind lifting the automatic stay of litigation based on pre-petition conduct is always so that the case (or cases) can proceed to trial or settlement. Just because there are thousands of asbestos personal injury lawsuits at issue here does not change the fact that the Trustee knew that the plaintiffs in those suits would pursue their actions if and when the automatic stay was lifted. Despite that understanding, the Trustee not only entered into an agreed order with the Kelley & Ferraro law firm to modify the stay prior to the initiation of this adversary proceeding, but it also entered into the GPW Relief Order and the Baron & Budd Relief Order - both of which lifted the automatic stay for thousands of additional asbestos personal injury plaintiffs.⁹ Whether or not a temporary injunction would provide the Trustee with the ability to focus his attention on the mediation without the distraction of piecemeal state court actions is irrelevant to whether there is a basis - a change of facts or circumstances -

⁹Prior to approving the GPW Relief Order and the Baron & Budd Relief Order, the Court questioned the Trustee about whether he wanted to enter into these stipulations since they appeared inconsistent with the relief being sought in the adversary proceeding. The Trustee said that he acknowledged the inconsistency but wanted to go ahead with the agreed orders.

that would warrant this Court to impose such a temporary injunction on the Asbestos Claimants. This is especially true where, as here, the Trustee and the Asbestos Creditors oppose imposition of the temporary injunction.

Even if the Excess Group could meet the elements for an injunction (which it cannot), the Excess Group glosses over whether this Court has the authority to issue the injunction it requests by glibly relying solely on § 105(a) of the Bankruptcy Code. Section 105(a), standing alone, does not provide a basis for the imposition of the requested temporary injunction.

It is clear from the test of § 105(a), however, that a court's authority thereunder must derive from whatever (other) Code provision the § 105(a) order is designed to "carry out." As explained by the Fifth Circuit, § 105(a) "does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity."

In re Dow Corning Corp., 244 B.R. 721, 742 (Bank. E.D. Mich. 1999), quoting *United States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986) (footnote omitted). The Excess Group relies entirely on § 105(a) as the authority for this Court to issue the temporary injunction against the Asbestos Claimants and dismisses the Court's prior concerns about (i) due process and (ii) lack of authority to issue such an injunction.

This Court holds that it does not have the authority, under § 105(a), alone, to issue the temporary injunction that the

Excess Group has requested. Furthermore, the Asbestos Claimants were never made parties to this adversary proceeding and now have (for the most part) been dismissed; they cannot be enjoined without at least minimum due process.

REQUEST FOR MEDIATION

Even if the Excess Group would consider its request for mediation, standing alone without the temporary injunction, this Court cannot order such mediation without a complete understanding of how the Trustee would bear the costs of such mediation. In addition, this Court finds that at least one of the issues for which the Excess Group requests mediation is inappropriate. The Excess Group listed "the valuation and estimation of the claims of the Asbestos Claimants (and whether recently-enacted Ohio legislation mandates that certain of the asbestos claims are not valid)" as one of the topics for mediation. The Excess Group clarified at the hearing that they are not seeking to mediate the Asbestos Claimants' claims in the "bankruptcy sense" or in a way that would be binding upon the Asbestos Claimants; they assert that they merely want to assess the amount of the claims in order to settle the amount of the insurance companies' liability. The Court understands that any settlement that may be reached by and between the Excess Group and the Trustee is dependent not only upon the policy limits and years of coverage, but also the likely amount of the asserted claims for which the Trustee could be indemnified.

However, the Trustee and the Excess Group's assessment of the insurance companies' indemnification obligations is not the same as "valuation and estimation" of the claims of the Asbestos Claimants. "[V]aluation and estimation" of the Asbestos Claimants' claims are not appropriate topics for mediation by the Excess Group and the Trustee even if the Asbestos Claimants had not been dismissed from this adversary proceeding.

If the Excess Group wishes to pursue its request for mediation without a temporary injunction, the Court will consider such request only after the Trustee addresses how the Trustee's expenses will be borne.

The Asbestos Creditors insist that they should be part of any such mediation because they are the "owners" of the insurance proceeds, citing *Youngstown Osteopathic Hospital Ass'n v. Ventresco (In re Youngstown Osteopathic Hospital Ass'n)*, 271 B.R. 544, 549-51 (Bankr. N.D. Ohio 2002) for this proposition.¹⁰ See Page 4 of the Asbestos Creditors' Objection. *Youngstown Osteopathic* is distinguish-able on many grounds. That case dealt with D & O (as opposed to liability) insurance, which was obtained for the benefit of the officers and directors of the debtor rather than for the

¹⁰The Trustee also appears to think that participation of the Asbestos Claimants in the proposed mediation may be proper because he states: "The Trustee's expectation was that the Asbestos Claimants would participate in the adversary proceeding as they presumably had an interest in determining the remaining coverage under the Policies." See page 4 of the Trustee's Response. However much the Asbestos Claimants might want to participate in determining the amount of coverage, that dispute is contractual and does not involve the Asbestos Claimants - no matter how numerous they are or how great the claims they assert.

debtor itself. More importantly, however, the dispute here between the Trustee and the Excess Group is contractual - it concerns the amount of coverage and the years for which coverage exists. The Asbestos Creditors do not have any right to participate in a mediation or any other process that concerns the determination of the contractual nature of the dispute between the Trustee and the Excess Group.

THE CASE MANAGEMENT ORDER

The Court has considered the case management order proposed by the Excess Group and at this time takes no position about it. As the parties are aware, the Court issued a Case Management Order in this adversary proceeding, which they chose to ignore. Since the dates for completion of discovery, as set forth in the Court's Case Management Order, have passed without any discovery having been taken, it is apparent that other dates will have to be agreed upon. However, if the Court is going to issue a new case management order, it would like to solicit the thoughts regarding timing from all parties to the adversary proceeding - not just the Excess Group.

CONCLUSION

Accordingly, the request for a temporary injunction enjoining the asbestos personal injury plaintiffs is denied and the request for mediation is held in abeyance, pending whether it will

be withdrawn by the Excess Group in light of the denial of the temporary injunction and, if not so withdrawn, upon the financial issues being addressed by the Trustee. If the Excess Group does not withdraw the motion within two weeks from the date of this Order, the Trustee shall submit, by April 28, 2005, a memorandum either supporting or opposing the request for mediation, but in any event, addressing how the Estate's mediation expenses will be paid. The request for a case management order will be considered after all parties have had an opportunity to provide input. The Court orders that, on or before April 28, 2005, all parties to this adversary proceeding file written statements setting forth their positions concerning a new case management order for the Court's consideration.

An appropriate Order will issue.

**HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE**

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

INSUL COMPANY, INC.,

Debtor.

ANDREW W. SUHAR, TRUSTEE,

Plaintiff,

vs.

TRAVELER'S CASUALTY AND SURETY
COMPANY, et al.,

Defendants.

CASE NUMBER 02-43909

ADVERSARY NUMBER 04-4100

O R D E R

For the reasons set forth in this Court's memorandum opinion entered this date, (i) the temporary injunction requested in the Motion of Cincinnati Insurance Company, Fireman's Fund Insurance Company, U.S. Fire Insurance Company, Crum & Forster Indemnity Company, Zurich American Insurance Company, as Successor-in-Interest to Zurich Insurance Company, U.S. Branch, by Operation of Law and Commercial Union Insurance Company (collectively, the "Excess Group") for an Order Establishing a Bankruptcy Court-Sanctioned Mediation and for an Order Entering a Temporary

Injunction to Facilitate Mediation or, in the Alternative, for the Entry of a Case Management Order (the "Excess Group Motion") is denied; and (ii) the request for mediation is held in abeyance.

IT IS SO ORDERED.

**HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE**