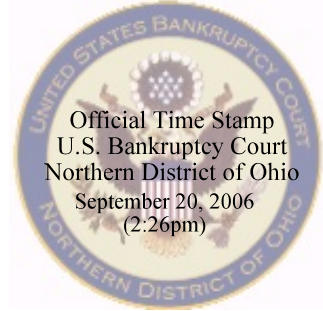


THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:	)	Case No. 04-25167
)	
KISMET PRODUCTS, INC.,	)	Chapter 11
)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
_____)	
)	
KISMET PRODUCTS, INC.,	)	Adversary Proceeding No. 05-1465
)	
Plaintiff,)	
)	
v.	)	<u>MEMORANDUM OF OPINION</u>
)	
HCC BENEFITS CORPORATION, et al.,)	
)	
Defendants.)	

This opinion addresses whether this adversary proceeding is a core proceeding within the meaning of 28 U.S.C. § 157(b).¹ The court raised this issue on its own motion following the district court’s entry of an order denying the defendants’ motion to withdraw the reference without prejudice and remanding the matter.² *See Kismet Products, Inc. v. HCC Benefits Corp., et al.*, case no. 1:05MC88 (N.D. Ohio May 19, 2006).

DISCUSSION

The plaintiff-debtor argues that this adversary proceeding falls within the definition of a core proceeding,³ while the defendants HCC Benefits Corp. and HCC Life Insurance Co. contend

¹ The bankruptcy court has the power to hear and determine whether a cause of action is a core proceeding. *See* 28 U.S.C. § 157(b)(3).

² Docket 34.

³ Docket 43, 46.

that it is a non-core, related proceeding.⁴ The bankruptcy court has jurisdiction in either case;⁵ the difference is the extent of the jurisdiction. In a core proceeding, the bankruptcy court enters a final order or judgment. *See* 28 U.S.C. § 157(b)(1). In a non-core, related proceeding, the bankruptcy court may enter a final judgment if the parties consent. Absent consent, the bankruptcy court submits proposed findings of fact and conclusions of law to the district court and the district court enters the appropriate final judgment. *See* 28 U.S.C. § 157(c).

Factual and Procedural Background

The complaint filed by the plaintiff-debtor Kismet Products, Inc. names HCC Benefits Corp., HCC Life Insurance Co., and Travelers Casualty and Surety Co. of America as defendants. The debtor alleges that the defendants are liable to it under excess loss and management liability policies and requests declaratory relief and damages based on these allegations:

Plaintiff Kismet manufactured rubber products in Perry, Ohio and Blue Ridge, Georgia. Kismet closed its Ohio plant in July 2003. After that, all Kismet employees worked in Georgia. In October 2003, Kismet adopted a qualified self-insurance health and medical plan (the “Plan”) for its employees Third party administrator North American Benefits Network processed claims for reimbursement.

Kismet purchased an Excess Loss Policy from Defendants HCC Benefits and HCC Life covering catastrophic incidents in October 2003. The excess policy had a \$35,000 deductible. For the 2003-2004 term, Kismet did not pay its full premiums to HCC Benefits and HCC Life under the excess policy.

⁴ Docket 42. Defendant Travelers Casualty and Surety Co. was given an opportunity to take a position on this issue and has not done so. *See* order, docket 34 (setting briefing schedule on the jurisdiction issue).

⁵ Jurisdiction is not at issue because HCC Benefits Corp. and HCC Life have acknowledged that the adversary proceeding is (at a minimum) related to the chapter 11 case. *See Michigan Employment Sec. Comm. v. Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1141 (6th Cir. 1991) (noting that to determine bankruptcy jurisdiction, “it is only necessary to determine whether a matter is at least ‘related to’ the bankruptcy.”).

Kismet also purchased a Management Liability Policy from defendant Travelers Casualty and Surety Co. to insure against breaches of employment covenants and ERISA violations by Kismet management. The term of the management policy was from July 1, 2004 through June 30, 2005. Kismet paid the full premiums for the management policy.

Kismet reimbursed Plan participants for claims totaling \$323,000 through June 30, 2004. Kismet failed to reimburse as much as \$600,000 in claims submitted by approximately 90 participants. Six Plan participants incurred claims exceeding \$35,000 during that term. The excess insurers reimbursed one of those participants \$23,845. Kismet estimates that the remaining unpaid excess claims exceed \$250,000.

. . . Approximately 90 participants submitted claims against Kismet in the bankruptcy proceeding. The 90 claims total approximately \$600,000. No party filed an objection to any claim made by any Plan participant.

Near July 18, 2005, Kismet gave notice of the claims to the defendants in this action and requested indemnity, reimbursement and defense under the excess and management policies. The defendants denied Kismet's demand

Kismet Products, Inc. v. HCC Benefits Corp., et al., case no 1:05MC88 (N.D. Ohio May 19, 2006).

All defendants filed answers in which they decline to consent to the entry of a final order by this court. Travelers filed a counterclaim seeking a declaratory judgment that the policy it issued does not provide coverage for the claims of Kismet employees for medical benefits.

Is this Adversary Proceeding a Core Proceeding?

Under 28 U.S.C. § 1334, district courts have original but not exclusive jurisdiction over all civil proceedings arising under title 11 of the United States Code or arising in or related to cases under title 11. 28 U.S.C. § 1334(b). District courts may refer this jurisdiction to the bankruptcy courts in their district and the District Court for the Northern District of Ohio has done so. *See* 28 U.S.C. § 157(a) and General Order No. 84. Proceedings referred to a bankruptcy court are either core or non-core.

Section 157(b)(2) does not define the term “core proceeding,” but instead sets forth a non-exhaustive list of proceedings that are considered core. Under § 157(b)(2):

‘[a] core proceeding either invokes a substantive right created by federal bankruptcy law or one which could not exist outside of the bankruptcy.’ *Sanders Confectionary Prods., Inc. v. Heller Financial, Inc.*, 973 F.2d 474, 482 (6th Cir. 1992) (holding that an action was a core proceeding where ‘a successful action on the [] plaintiffs’ part could have affected the outcome of the bankruptcy proceeding’); *see also In re DeLorean Motor Co.*, 155 B.R. 521, 525 (B.A.P. 9th Cir. 1993) (holding that even if a claim fits within the literal language of § 157(b)(2), it will not be considered a core proceeding ‘if it is a state law claim that could exist outside of bankruptcy and is not inextricably bound to . . . a right created by the Bankruptcy Code.’) (interpreting *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed.2d 598 (1982)).

Lowenbraun v. Canary (In re Lowenbraun), 453 F.3d 314, 320 (6th Cir. 2006). The distinction between core and non-core proceedings is required by the jurisdictional concerns addressed in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). *See Cain P’ship, Ltd. v. Pioneer Inv. Servs. Co. (In re Pioneer Inv. Servs. Co.)*, 946 F.3d 445, 449 at n.3 (6th Cir. 1991) (noting that a lessor’s motion which was “based on rights which could have been brought in state court had there been no title 11 bankruptcy case file was properly characterized as a non-core proceeding, as required by a strict reading of *Marathon*.”). To determine whether a matter is a core proceeding, a court must look to both its form and substance. *Wolverine Radio Co.*, 903 F.2d at 1144. The “determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.” 28 U.S.C. § 157(b)(3).

The complaint requests a declaratory judgment that the defendants are liable under excess loss and management liability policies for claims which the debtor’s employees have made under the debtor’s health benefits plan. This states a contract cause of action that is governed by state law. The claims which the debtor asserts against each of the defendants could have existed

outside of the chapter 11 case. The claims are not founded on any substantive provision of the bankruptcy code, nor are they inextricably bound to any of its provisions. Consequently, this is not a core proceeding under Sixth Circuit precedent. *See Lowenbraun*, 453 F.3d at 320. *See also, G-I Holdings, Inc. v. Hartford Accident and Indem. Co. (In re G-L Holdings, Inc.)*, 278 B.R. 376 (Bankr. D. N.J. 2002) (deciding that a debtor's lawsuit for a determination of insurance coverage was not a core proceeding).

Conversely, these claims do appear to be non-core. As the district court noted in the opinion and order on remand, a non-core proceeding is a proceeding which: (1) is not *specifically* identified as a core proceeding under § 157(b)(2)(B) through (N); (2) existed prior to the filing of the bankruptcy case; (3) would continue to exist independent of the provisions of title 11; and (4) involves rights and obligations which are not significantly affected as a result of the bankruptcy filing. *See Hughes-Bechtol, Inc. v. Ohio (In re Hughes-Bechtol, Inc.)*, 141 B.R. 946, 948-49 (Bankr. S.D. Ohio 1992) (emphasis in original).

With respect to the first factor, the debtor argues that its claims come within § 157(b)(2)(E) which states that orders to turn over property of the estate are core proceedings. *See* 28 U.S.C. § 157(b)(2)(E). The debtor here, though, is asking for a determination of its insurance coverage, not for the turnover of an identifiable fund or res within the scope of § 157(b)(2)(E). *See Gertz v. Echo Rock Ventures, LLC (In re Arter & Hadden, LLP)*, 339 B.R. 445, 451-52 (Bankr. N.D. Ohio 2006); *Comm. Heat Treating of Dayton, Inc. v. Atlas Indus., Inc. (In re Comm. Heat Treating of Dayton, Inc.)*, 80 B.R. 880, 890 (Bankr. S.D. Ohio 1989). *See also, Camall Co. v. Steadfast Ins. Co. (In re Camall Co.)*, 16 Fed. Appx. 403 at *2 (6th Cir. July 31, 2001) (stating that a determination of rights to insurance proceeds is governed by contract

and is not appropriately decided in the context of a turnover proceeding) (unpublished opinion). Section 157(b)(2)(E) does not support the claim.

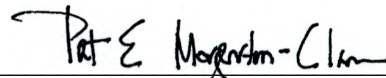
Looking to the second factor, the debtor's claims against HCC Benefits, HCC Life, and Travelers existed before the bankruptcy petition was filed because they involve insurance contract coverage for claims for the prepetition period of October 2003 through September 30, 2004. On the third point, the debtor's claims against the defendants are not bankruptcy causes of action and would continue to exist irrespective of the chapter 11 filing. And fourth, the parties' rights and obligations under the policies are governed by state law and there is no indication that those rights have been affected by the chapter 11 filing.

The debtor argues alternatively that this is a core proceeding under the general provisions of §§ 157(b)(2)(A) and (O). *See* 28 U.S.C. §§ 157(b)(2)(A) (defining "matters concerning the administration of the estate" as core proceedings) and 157(b)(2)(O) (defining "other proceedings affecting the liquidation of the assets of the estate or the adjudication of the debtor-creditor . . . relationship" as core proceedings). The debtor's causes of action may well fall within a broad reading of these subsections. The definition of a core proceeding, however, is always constrained by the *Marathon* decision in which "the plurality ruled that the bankruptcy court could not issue a final judgment in a state law contract case brought by a debtor." *Spieler v. Federated Dept. Stores, Inc. (In re Federated Dept. Stores, Inc.)*, 328 F.3d 829, 835 (6th Cir. 2003) (citing *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 63-87 (1982)). This court agrees that "the 'better reasoned view is that state law contract-type actions . . . which literally fall within the broad catchall language [of these provisions] are non-core, 'related' proceedings'." *Nat'l Century Fin. Enters., Inc. v. Gulf Ins. Co. (In re Nat'l Century Fin Enters.)*, 312 B.R. 344, 352 (Bankr. S.D. Ohio 2004) (quoting *In re United Sec. & Comms., Inc.*, 93 B.R.

945, 957 (Bankr. S.D. Ohio 2004). As this proceeding is essentially a state law contract case brought by the debtor, it is not a core proceeding under §§ 157(b)(2)(A) or (O).

CONCLUSION

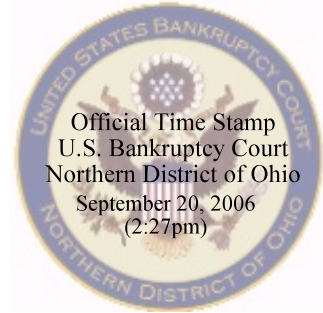
For the reasons stated, the court finds that this adversary proceeding is not a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). A separate order reflecting this decision will be entered.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

THIS OPINION NOT INTENDED FOR PUBLICATION

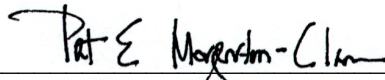
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:	)	Case No. 04-25167
)	
KISMET PRODUCTS, INC.,	)	Chapter 11
)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
_____)	
)	
KISMET PRODUCTS, INC.,	)	Adversary Proceeding No. 05-1465
)	
Plaintiff,)	
)	
v.	)	<u>ORDER</u>
)	
HCC BENEFITS CORPORATION, et al.,)	
)	
Defendants.)	

For the reasons stated in the memorandum of opinion entered this same date, the court determines that this adversary proceeding is not a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). (Docket 34).

IT IS SO ORDERED.



 Pat E. Morgenstern-Clarren
 United States Bankruptcy Judge