

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In re:

HAVEN TRUST BANCORP, INC.,

Debtor.

CERTAIN FORMER OFFICERS AND
DIRECTORS OF HAVEN TRUST
BANCORP, INC.,

Movants,

v.

CATHY L. SCARVER, THE CHAPTER 7
TRUSTEE,

Respondent.

Case No. 09-64497-MGD

CHAPTER 7

CONTESTED MATTER

**UNOPPOSED MOTION FOR RELIEF FROM THE AUTOMATIC STAY, IF
APPLICABLE, TO ALLOW THE TRAVELERS COMPANY, INC. TO
ADVANCE AND/OR PAY DEFENSE COSTS**

Those certain former Directors and/or officers (the “Movants”) of Haven Trust Bancorp, Inc. (the “Debtor”) referenced in that certain Audit Result, Report No. AUD-09-017 (the “Audit Result”),¹ filed by the Federal Deposit Insurance Company (the “FDIC”) in August 2009, by and through their undersigned counsel, hereby submit this *Unopposed Motion for Relief from the Automatic Stay, if Applicable, to Allow The Travelers Company, Inc. to Advance and/or Pay Defense Costs* (the “Motion”).² In support of its Motion, the Movants shows as follows:

¹ The Audit Result is attached hereto as Exhibit A.

² The Movants reserve all objections to the exercise by this Court of jurisdiction over any claims which the Debtor or any party may assert against any of them. This Motion is brought before this Court only because 28

I. PRELIMINARY STATEMENT

1. Policy proceeds required to satisfy the Defense Costs³ requirement contained in that certain Insurance Policy No. EC06801037, dated March 1, 2008 (the “Policy”)⁴ are not property of the estate under Section 541 of Title 11 of the United States Code (the “Bankruptcy Code”). Accordingly, the commencement of the Debtor’s bankruptcy case should have no effect on the ability of The Travelers Company, Inc.’s (the “Insurer”) to continue funding the Movants’ reasonable Defense Costs.

2. To the extent any proceeds from the Policy, including the Insurer’s obligation to advance proceeds to satisfy Defense Costs, are property of the Debtor’s estate, the Movants request relief from the automatic stay pursuant to Section 362(d)(1) of the Bankruptcy Code to provide the Movants with immediate access to the Policy proceeds to satisfy the Defense Costs incurred. If the Insurer is unable to advance the Defense Costs necessary to facilitate Movants defense of the Actions (defined below), the Movants will suffer irreparable harm because the Movants will be unable to protect their legal interests. Moreover, the relief sought in this motion will inure to the benefit of the Debtor’s estate by using nonestate funds to minimize the likelihood that the Movants will assert indemnification claims against the estate.

U.S.C. § 1334(e) and § 362 of Title 11 of the United States Code require that such motions be addressed to this Court, and solely to obtain the relief to which the Movants are entitled, as contemplated by 11 U.S.C. § 362(d)(1).

³ The Policy defines “Defense Costs” as “that part of Loss consisting of reasonable costs, charges, fees (including attorneys’ fees, experts’ fees, and mediators’ or arbitrators’ fees) and expenses (other than regular or overtime wages, salaries or fees of the directors, trustees, members of the board of managers, officers or employees of the Insurer, Company or Plan) incurred in defending or investigating a Claim.” Capitalized terms not otherwise defined herein shall have the meanings accorded to them in the Policy.

⁴ A true and correct copy of the Policy is attached hereto as Exhibit B.

II. FACTUAL BACKGROUND

A. The Policy

3. On or about March 1, 2008, the Debtor purchased the Policy. The Policy has a maximum liability limit of \$6,000,000 per each policy year for Loss resulting from “any error, misstatement, misleading statement, act, omission, neglect, or breach of duty actually or allegedly committed or attempted by any Insured Person in their capacity as such, or in an Outside Position or, with respect to the Company Liability Coverage, by the Company.” Policy at 5-6.

4. The Policy is a claims-made policy that was effective between March 1, 2008, through March 1, 2009.

5. The Policy provides that “the Insurer shall advance, on behalf of the Insureds, Defense Costs which the [Movants] have incurred in connection with Claims made against them, before disposition of such Claims, provided that to the extent that it is finally established that any such Defense Costs are not covered under this Policy, the [Movants], severally according to their respective interests, agree to repay the Insurer such Defense Costs.” Policy at 12.

6. The Policy also provides that “Defense Costs shall be part of, and not in addition to, the Policy Year Total Limit of Liability set forth in the Declarations, and Defense Costs shall reduce and may exhaust such Policy Year Total Limit of Liability.” Policy at 12.

7. In addition, pursuant to the Order of Payments Endorsement to the Policy, Defense Costs are paid first, as part of the Loss covered.

In the event of Loss arising from a covered Claim for which payment is due under the provisions of the Management Liability Insuring Agreement made part of this Policy, then the Insurer shall in all events:

(a) first, pay Loss [including Defense Costs] for which coverage is provided under the Directors and Officers Individual Coverage; and then

(b) only after payment of Loss has been made pursuant to subsection (a) above, with respect to whatever remaining amount of the Limit of Liability is available after such payment, at the written request of the chief executive officer of the Company, either pay or withhold payment of such other Loss for which coverage is provided under the Company Indemnification Coverage; and then

(c) only after payment of Loss has been made pursuant to subsections (a) and (b) above, with respect to whatever remaining amount of the Limit of Liability is available after such payment, at the written request of the chief executive officer of the Company, either pay or withhold payment of such other Loss for which coverage is provided under the Company Liability Coverage.

B. Claims

8. On December 12, 2008, the Georgia Department of Banking closed Haven Trust Bank (Haven) of Duluth, Georgia, and named the FDIC as receiver.

9. Thereafter, the FDIC performed an audit to determine the causes of Haven Trust Bank's failure and the projected loss resulting therefrom.

10. On or about April 24, 2009, the Movants provided notice of potential claims (the "Claims") relating to the closure of Haven Trust Bank (Haven) of Duluth, Georgia. The potential claims are accurately summarized in the Audit Report.

11. After receiving notice of the potential Claims, the Insurer agreed that the Defense Costs related thereto are covered by Policy.

C. Bankruptcy Filing

12. On February 23, 2009, the Debtor commenced its bankruptcy case under Chapter 7 of Bankruptcy Code before this Court.

13. Because of the bankruptcy filing, the automatic stay of Section 362 of the Bankruptcy Code stayed the Actions, but only as to claims against the Debtor. The automatic stay did not stay claims against nondebtors, such as the Movants.

14. On or about September 29, 2009, certain of the Movants received subpoenas (the “Subpoenas”) issued by counsel to the Federal Deposit Insurance Company (the “FDIC”) regarding of the FDIC’s investigation of certain matters relating to the failure of Haven Trust Bank.

15. In connection with the “Claims” noticed and the Subpoenas, the Movants have incurred and are still incurring Defense Costs.

16. Although the Insurer has agreed that the Defense Costs are covered by Policy and should be advanced, the Insurer has advised the Movants that it will not advance the Defense Costs without an order from this Court either (A) authorizing the Insurer’s advancement of Defense Costs or (B) finding that the automatic stay does not preclude the Insurer from advancing the Defense Costs.

17. Cathy L. Scarver, in her capacity as Chapter 7 Trustee for the Estate of Haven Trust Bancorp, Inc., does not oppose the relief requested herein.

III. REQUESTED RELIEF

18. The Movants have a direct and immediate right to the Policy proceeds to cover any Defense Costs arising out of the Actions. *See* Policy at 12. If the Movants cannot exercise their right to receive the Policy proceeds to cover the Defense Costs incurred in connection with the Actions, the Movants will suffer irreparable harm. By this Motion, to the extent the automatic stay applies, Movants request that this Court modify the automatic stay to allow the Insurer to advance Defense Costs.

A. The Policy Proceeds Are Not Property of the Debtor’s Estate.

19. The Policy proceeds are not property of the estate under Section 541 of the Bankruptcy Code. Specifically, because the Movants’ rights to the Policy proceeds to satisfy Defense Costs attached the moment the Defense Costs were incurred and exist regardless of the

Debtor's bankruptcy, the Debtor's estate does not have an interest in those amounts. *See Wedtech Corp. v. Fed. Ins. Co.*, 740 F. Supp. 214, 221 (S.D.N.Y. 1990) (insurance company's obligation to reimburse directors attaches as soon as attorneys' fees are incurred).

20. Under Section 541 of the Bankruptcy Code, a bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the bankruptcy case." 11 U.S.C. § 541(a)(1). Courts generally agree that insurance policies are property of the bankruptcy estate; however, proceeds of insurance policies, as distinguished from the policies themselves, are not necessarily property of the estate. *Ford Motor Credit Co. v. Stevens (In re Stevens)*, 130 F.3d 1027, 1029 (11th Cir. 1997) (stating that "[t]he fact that the insurance policy is property of the bankruptcy estate, however, does not necessarily mean that the proceeds from that policy are also property of the estate. In some circumstances, a creditor or beneficiary other than the debtor may be entitled to proceeds distributed pursuant to an insurance policy that is property of the bankruptcy estate."); *In re CHS Elecs., Inc.*, 261 B.R. 538 (Bankr. S.D. Fla. 2001) (granting motion for approval to use director and officer ("D&O") liability policy proceeds because such proceeds were not property of the debtor's estate).

21. For insurance proceeds to constitute property of the estate, the Debtor must have a direct and material interest in such proceeds. *See Adelpia Commc'ns Corp. v. Associated Elec. & Gas Ins. Servs., Ltd. (In re Adelpia Commc'ns Corp.)*, 285 B.R. 580, 590 (Bankr. S.D.N.Y. 2002) (hereinafter "Adelpia I"), *vacated and remanded on other grounds*, 298 B.R. 49 (S.D.N.Y. 2003). By contrast, if the Debtor's claim to proceeds of a D&O liability policy is hypothetical, speculative, or unmaturing, then the proceeds are not property of the estate. *See, e.g., In re CHS Elecs., Inc.*, 261 B.R. 538; *In re Allied Digital Techns., Corp.*, 306 B.R. 505 (Bankr. D. Del. 2004); *Maxwell v. Megliola (In re marchFIRST, Inc.)*, 288 B.R. 526, 530 (Bankr.

N.D. Ill. 2002); *Imperial Corp. of Am. v. Milberg, Weiss, Bershad, Specthrie & Lerach (In re Imperial Corp. of Am.)*, 144 B.R. 115, 118-119 (Bankr. S.D. Cal. 1992).

22. To determine whether the Policy proceeds are property of the estate, the Court must analyze the facts of each case. *In re Cybermedica*, 280 B.R. 12, 16 (Bankr. D. Mass 2002); *In re Sfuzzi, Inc.*, 191 B.R. 664, 668 (Bankr. N.D. Tex. 1996) (stating that “insurance policies are property of the estate . . . but the question of whether the *proceeds* are property of the estate must be analyzed in light of the facts of each case.”).

The overriding question when determining whether insurance proceeds are property of the estate is whether the debtor would have a right to receive and keep those proceeds when the insurer paid on the claim. When a payment by the insurer cannot inure to the debtor’s pecuniary benefit, then that payment should neither enhance nor decrease the bankruptcy estate.

Santa Fe Minerals, Inc. v. BEPCO, L.P. (In re 15375 Mem’l Corp.), 382 B.R. 652, 687 (Bankr. D. Del. 2008), *on reconsideration*, 386 B.R. 548 (Bank. D. Del. 2008), *reversed on other grounds*, 400 B.R. 420 (D. Del. 2009).

23. Regarding the Insurer’s payment of the Movants’ Defense Costs, the Debtor does not have a right to receive and keep those proceeds. Accordingly, the proceeds necessary to satisfy the Defense Costs are not property of the Debtor’s estate. Instead, pursuant to the Policy, the Insurer is required to “advance, on behalf of the Insureds, Defense Costs which the Insureds have incurred in connection with Claims made against them, before disposition of such claims.” Policy at 12. Thus, the Policy proceeds that are related to the Defense Costs would not go directly to the Debtor or the other Insureds, but rather would be used to pay counsel retained to defend the Actions. Such payments are not analogous to payments from a casualty or fire insurance policy, in which the debtor directly receives the insurance proceeds as merely a change in the form of preexisting estate property. Thus, proceeds used to satisfy Defense Costs are not part of the bankruptcy estate.

24. Furthermore, the “estate’s interest in the proceeds is defined by the terms of the [Policy] and in no way superior to the interest of other, non-debtor parties intended to be benefited by the [Policy].” *In re 15375 Mem’l*, 382 B.R. at 689; *see also Appleton v. Gagnon (In re Gagnon)*, 26 B.R. 926, 928 (Bankr. M.D. Pa. 1983) (“[T]he estate’s legal and equitable interest in property rise no higher than those of the debtor.”). Consequently, the owner of an insurance policy should not obtain more rights to the proceeds of an insurance policy than it would otherwise have under the policy by merely filing a bankruptcy petition. *Jones v. GE Capital Mortgage Co. (In re Jones)*, 179 B.R. 450, 455 (Bankr. E.D. Pa. 1995) (citing *First Fidelity Bank v. McAteer*, 985 F.2d 114, 117 (3d Cir. 1993)). For that reason, “the debtor’s rights to the proceeds of his policy are inevitably subject to the contractual restrictions in his insurance policy.” *Id.* Here, those “restrictions” include the Insurer’s right to compel the Insureds to retain counsel to defend Claims covered by the Policy and the Insurer’s obligation to advance Defense Costs.

25. Here, the Policy proceeds are unlike a bank account to which the Debtor has unrestricted access. Instead, the Policy requires that before the Insurer pays any proceeds, the Insureds must retain counsel to defend against the Claim. Conversely, if the Debtor were solvent, it obviously would not have the right to possess the Policy proceeds that were supposed to be directed towards the payment of legal fees related to the defense of a Claim. Rather, the Insurer would make payments under the Policy to the counsel defending the Action. The estate is, therefore, subject to the same conditions and limitations and does not have a claim of ownership in the Policy proceeds.

26. Although the Policy provides coverage to the Debtor if it is found liable for claims asserted against it, this is not determinative under a property of the estate analysis under

Section 541. For example, in *First Central Fin. Corp.*, the court rejected the notion that inclusion of entity coverage in a D&O policy required a finding that the proceeds of the policy are property of the estate. *Ochs v. Lipson (In re First Cent. Fin. Corp.)*, 238 B.R. 9 (Bankr. E.D.N.Y. 1999). The court concluded that “if entity coverage is hypothetical and fails to provide some palpable benefit to the estate, it cannot be used by a trustee to lever himself into a position of first entitlement to policy proceeds.” *Id.* at 18. In reaching its conclusion, the court noted the unique nature of D&O insurance, stating that “[i]n essence and at its core, a D&O policy remains a safeguard of officer and director interests and not a vehicle for corporate protection” and that “[i]ndemnification coverage does not change this fundamental purpose.” *Id.* at 16. Other courts have recognized the unique aspects of D&O policies and are reluctant to deprive directors and officers of their contractual rights to have defense costs paid. *See, e.g., Adelpia I*, 285 B.R. at 598; *In re Cybermedica*, 280 B.R. at 16-17.

27. Moreover, as the District Court for the Northern District of Georgia recently recognized *Jordan E. Lubin, Chapter 7 Trustee v. Cincinnati Insurance Co.*, Civ. A. No. 09-11563-RWS, Docket No. 42, Order Granting Motion to Dismiss (N.D. Ga. Nov. 30, 2009),⁵ that all derivative actions that the Trustee could bring against the Movants belong to the FDIC. *Id.* at 11. For the Trustee to have standing to sue the Movants, the Trustee would need to contend that Movants’ actions caused the Debtor direct and unique harm separate and distinct from the claims being investigated by the FDIC that serve the basis of the claims already noticed to the Insurer. *Id.* at 12. Although the Trustee may be able to articulate a direct and unique claim, because the notice period for the Policy has expired, that claim may not be covered by the Policy.

⁵ Attached hereto as Exhibit C.

B. Even if this Court Determines that the Policy Proceeds are Property of the Debtor's Estate, Cause Exists to Lift the Automatic Stay Because the Nondebtor Movants Have a Distinct Interest in Such Proceeds that Does Not Become Property of the Estate.

28. To the extent that the Policy proceeds necessary to satisfy Defense Costs are property of the Debtor's estate, cause exists to lift the automatic stay because the Movants will suffer irreparable harm if they cannot exercise their rights to receive Defense Cost payments, whereas the harm to the debtor is purely speculative because there are no present covered claims against the Debtor. Section 362(d)(1) of the Bankruptcy Code provides for relief from the automatic stay "for cause, including the lack of adequate protection." 11 U.S.C. § 362(d)(1). The Bankruptcy Code does not define the term "cause." Thus, courts make the determination of cause on a case-by-case basis. *E.g. E.g. Fazio v. Growth Dev. Corp. (In re Growth Dev. Corp.)*, 168 B.R. 1009, 1017 (N.D. Ga. 1994). Because the term "cause" is such an "intentionally broad and flexible inquiry," multitudes of cases exist, all of which offer no precise standards to determine when cause exists to successfully obtain relief from the stay. *In re Bell*, 215 B.R. 266, 275 (Bankr. N.D. Ga. 1997); *accord Baldino v. Wilson (In re Wilson)*, 116 F.3d 87, 90 (3d Cir. 1997). Bankruptcy courts are therefore guided by "the particular circumstances of the case and . . . considerations that under the law make for the ascertainment of what is just to the claimants, the debtor and the estate." *Foust v. Munson S.S. Lines*, 299 U.S. 77, 83 (1936). Procedurally, after the movant makes a prima facie showing that cause exists, the ultimate burden shifts to the nonmovant—here, the Trustee—to prove that cause does not exist to lift the automatic stay. *In re Simmons*, No. 05-52298-JDW, 2008 WL 3069666, at *1 (Bankr. M.D. Ga. July 31, 2008). Factors to consider in determining whether "cause" exists include (i) whether the bankruptcy estate will sustain great prejudice if relief from the stay is granted and (ii) whether the hardship on the nondebtor party from the continuation of the stay considerably outweighs the hardship to the

debtor if the stay is lifted. *Egwineke v. Robertson (In re Robertson)*, 244 B.R. 880, 882 (Bankr. N.D. Ga. 2000).

29. Courts recognize that a nondebtor coinsured retains its separate and distinct interest in proceeds of an insurance policy, despite the intervention of the debtor's bankruptcy. *See, e.g., Liberty Mut. Ins. Co. v. Official Unsecured Creditors' Comm. of Spaulding Composites Co. (In re Spaulding Composites Co.)*, 207 B.R. 899 (B.A.P. 9th Cir. 1997); *Adelphia I*, 285 B.R. at 590.

30. In *Spaulding*, the Ninth Circuit Bankruptcy Appellate Panel recognized the separate property rights of nondebtor coinsureds. There, Liberty Mutual Insurance Company ("Liberty") issued a number of general liability policies that provided coverage to Spaulding and Spaulding's two corporate shareholders. *Spaulding*, 207 B.R. at 901. Spaulding filed for Chapter 11 bankruptcy, and various claims were filed against the estate seeking compensation for pollution remediation costs associated with the cleanup of hazardous waste on facilities operated by Spaulding. *Id.* The nondebtor coinsured shareholders did not file bankruptcy. *Id.* Liberty filed a declaratory judgment action against the nondebtor coinsured shareholders to establish Liberty's liability, if any, under the insurance policies. *Id.* at 901-902. In response to Liberty's suit, the Unsecured Creditors Committee in Spaulding's bankruptcy filed an adversary complaint against Liberty, seeking a declaration that Liberty's declaratory judgment action violated the automatic stay because Spaulding had an interest in the insurance policies. *Id.* at 902. The court disagreed, holding that Liberty did not violate the automatic stay by filing the declaratory judgment action. The court refused to characterize the nondebtor coinsured shareholders' interests in the Liberty policies as property of the bankruptcy estate, stating

Although Spaulding claims an interest in many of the policies, [the nondebtor coinsured shareholders] also claim coverage under those policies. That two

separate property interests might exist in a single policy was a point recognized by the Fifth Circuit.

Here, [the nondebtor shareholders] are both coinsured with the debtor. Additionally, their property rights are not merely derivative of Spaulding's rights; [the nondebtor coinsured shareholders] assert their own independent rights to coverage. . . . True, Spaulding asserts an interest in the policies, but, as the Seventh Circuit has stated, a "debtor's interest in a portion of property does not subject the entire property to § 541. Nor does a debtor's claim to property mean that the entire property is part of the bankruptcy estate."

Id. at 906-907 (citing *In re Carousel Int'l Corp.*, 89 F.3d 359, 362 (7th Cir. 1996)).

31. A court's recognition of separate and distinct property rights of nondebtor coinsureds comports with the doctrine that the "owner of an insurance policy cannot obtain greater rights to the proceeds of that policy . . . by merely filing a bankruptcy petition." *In re Denario*, 267 B.R. 496, 499 (Bankr. N.D.N.Y. 2001); *see also Butner v. United States*, 440 U.S. 48, 55 (1979) (stating that "[u]nless some federal interest requires a different result, there is no reason why [property] interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.").

32. As the *Spaulding* Court held, the Movants clearly have a distinct and separate interest in the Policy proceeds. Outside the bankruptcy context, the Movants would have the right to draw on the Policy proceeds, regardless of the Debtor's interest in the Policy and regardless of whether other claims might be made against the proceeds in the future. *See, e.g., Scharnitzki v. Bienenfeld*, 534 A.2d 825, 827 (Pa. Super. Ct. 1987) ("[T]he majority rule holds that where several claims arise from a single insured event but where judgments for those claims were or are to be obtained against an insured in different actions, the insurance company may distribute the proceeds on a first-come-first-served basis according to priority of judgment, even if the insurer's maximum liability under the policy is inadequate to compensate all claimants.").

33. Allowing the automatic stay to prevent the Movants from drawing on the Policy proceeds would improperly grant the Debtor greater rights in the Policy and the proceeds than the Debtor would have outside the bankruptcy context. The courts that have considered the issue before this Court have granted relief from the automatic stay (to the extent the stay applies at all) and have permitted nondebtor coinsureds to draw on insurance proceeds to pay for defense costs. *See, e.g., In re Tom's Foods*, No. 05-40683 RFH at Docket Nos. 1316-17 (granting Motion for Order Authorizing Insurers to Advance Defense Costs or, In the Alternative, Motion for Relief from Automatic Stay"); *In re CyberMedica, Inc.*, 280 B.R. 12 (Bankr. D. Mass. 2002); *Adelphia I*, 285 B.R. at 580; *In re Enron Corp.*, No. 01-16034 (AJG), 2002 WL 1008240 (Bankr. S.D.N.Y. May 17, 2002).

34. In *CyberMedica*, the debtor maintained a D&O insurance policy that provided coverage to CyberMedica's directors and officers (individual coverage), as well as coverage directly to CyberMedica itself (entity coverage). *CyberMedica*, 280 B.R. at 14. CyberMedica's Chapter 7 Trustee filed a complaint against two former directors of CyberMedica based on alleged fraudulent transfers and other claims. The former directors sought payment of defense costs from the D&O policy. *Id.* The Trustee responded that the former directors did not have a right to payment of defense costs because such payment would deplete the funds available to the debtor under the policy. *Id.* at 14-15. The court rejected the Trustee's position, stating:

This Court further finds that there is cause to lift the automatic stay because [the former directors] may suffer substantial and irreparable harm if prevented from exercising their rights to defense payments. [The former directors] 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.

Id. at 18 (italics in original).

35. The *CyberMedica* Court reasoned further that the debtor would not be harmed by payment of defense costs because the debtor ultimately would be obligated to indemnify the directors against those costs anyway. *Id.* at 18. As the court noted, “[I]n its essence and at its core, a D&O policy remains a safeguard of officer and director interest and not a vehicle for corporate protection.” *Id.* at 17; *see also Executive Risk Indem., Inc. v. Boston Reg’l Med Ctr., Inc. (In re Boston Reg’l Med. Ctr., Inc.)*, 285 B.R. 87, 96 (Bankr. D. Mass. 2002) (“If the costs of defense are not disbursed in time to provide the defense, a significant part of their value and of their function will have been lost.”); *see also In re Allied Digital Tech. Corp.*, 306 B.R. 505, 514 (Bankr. D. Del. 2004) (holding that although D&O policy proceeds were technically property of bankruptcy estate, cause existed under Section 362(d) of the Bankruptcy Code to lift stay to allow payment of coinsured directors’ defense costs because, “[w]ithout funding, the [directors] 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.”); *In re First Cent. Fin. Corp.*, 238 B.R. 9, 15 (Bankr. E.D.N.Y. 1999) (D&O policies are obtained for the protection of individual directors and officers).

36. In *In re Enron Corp.*, in response to motions filed by both the insurer and nondebtor coinsured directors and officers of Enron, the court simply lifted the automatic stay (to the extent it applied) to permit the parties to the D&O policies at issue to exercise whatever contractual rights they might have under the policies. *In re Enron Corp.*, 2002 WL 1008240, at *1. In other words, the coinsureds’ rights to the proceeds of the policies were to be determined outside the context of the bankruptcy.

37. As demonstrated by the foregoing cases, although courts rely on slightly varying theories, they ultimately all reach the same essential conclusion: nondebtor coinsured directors

and officers cannot be prohibited from exercising their contractual rights to draw on D&O proceeds to cover defense costs and thereby protect their legal interests. Under the *Spaulding* line of cases, the coinsured's distinct contractual interest in the policy proceeds does not even become property of the estate. Other courts find that, even if the stay applies, there is cause for relief under Section 362(d)(1) of the Bankruptcy Code because preventing individual insureds from defending their interests would impose a substantial and irreparable hardship. *See In re First Cent. Fin. Corp.*, 238 B.R. at 15.

38. Here, the Movants reasonably and properly have incurred Defense Costs to defend their personal interests. As described above, it has been, and will continue to be, necessary for the Movants to incur Defense Costs and other losses to safeguard their interests. That is precisely what the Policy covers. Preventing the Movants from exercising their contractual right to draw on the Policy proceeds will result in the Movants being without legal representation, a patently unjust result. Imposing a stay on the Policy proceeds would inflict dire harm on the Movants, who would be left to face the Actions "naked" of any defense funding, a right for which they bargained. By contrast, the Debtor and its creditors would suffer no harm if this Court lifted the stay to permit defense funding. Thus, the equities demand that relief be granted to permit funding of Defense Costs and other covered losses in the Actions and other related claims that may arise in the future.

WHEREFORE, the Movants respectfully request that, to the extent the automatic stay is applicable, this Court modify the stay to allow the advancement of Defense Costs by entering an Order substantially in the form of that attached hereto as Exhibit D.

Respectfully submitted, this 6th day of January 2010.

ALSTON & BIRD LLP

/s/David A. Wender

Robert Long (Ga. Bar No. 141546)
David A. Wender (Ga. Bar No. 748117)
1201 West Peachtree St.
Atlanta, Georgia 30309-3424
(404) 881-7000
david.wender@alston.com
robert.long@alston.com