UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In Re:	)	Chapter 11
	)	
	)	
FLEMING COMPANIES, INC., ET. AL.	)	Case No. 03-10945 (MFW)
	)	(Jointly Administered)
Debtor.	)	
	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN IN SUPPORT OF MOTION TO MODIFY THE AUTOMATIC STAY TO PERMIT A DETERMINATION OF COVERAGE UNDER A DIRECTORS AND OFFICERS LIABILITY INSURANCE CONTRACT

COMES NOW Greenwich Insurance Company ("Greenwich"), by its undersigned counsel, and in support of its motion to modify the automatic stay to permit a determination of coverage for certain claims made under a directors and officers liability insurance policy issued by Greenwich to Fleming Companies, Inc. ("Fleming"), states to the Court as follows:

I. SUMMARY OF RELIEF REQUESTED.

Greenwich issued a directors and officers liability insurance policy to Fleming. During the policy period, Home Depot U.S.A., Inc. ("Home Depot") filed suit against Ronald B. Griffin ("Griffin"), then an officer of Fleming, in the Delaware Chancery Court (the "Home Depot Action"). Home Depot eventually amended the complaint in that action to include Fleming as a defendant. Several months after that, Greenwich was notified, on behalf of Fleming, of the Home Depot Action as a claim under the Greenwich policy. Greenwich contends that the tardy notice bars coverage and, in any event, other policy terms and conditions limit or bar coverage altogether. Nevertheless, Griffin and Fleming have demanded coverage for the Home Depot Action and dispute Greenwich's position.

As a result of this dispute over the availability of coverage under the Policy for the Home Depot Action, Greenwich is, contemporaneously with the filing of this Motion, initiating a declaratory judgment action against Griffin in the United States District Court for the Northern District of Texas (the "Declaratory Judgment Action"). Greenwich has not named Fleming as a defendant in the Declaratory Judgment Action because of the automatic stay.[1] However, Fleming's participation in the Declaratory Judgment Action is necessary to ensure that Fleming is bound by the result of that coverage determination in the event that Griffin seeks indemnification from Fleming for loss he incurs as a result of the Home Depot Action and Fleming seeks coverage under the policy for that loss. By this Motion, Greenwich seeks to modify the automatic stay to permit Greenwich to add Fleming as a party to the Declaratory Judgment Action. As demonstrated below, cause exists for this Court to provide relief from the automatic stay for Greenwich to add Fleming as a party to the Declaratory Judgment Action in order to permit a comprehensive adjudication of the rights and obligations of Griffin, Greenwich and Fleming with respect to the Home Depot Action.

[1] Because the Declaratory Judgment Action in based on the Home Depot Action, and the Amended Complaint in the Home Depot Action was filed under seal by Home Depot, Greenwich has filed a motion in the Northern District of Texas seeking leave to file the Declaratory Judgment Action under seal. Contemporaneously with the filing of this Motion, Greenwich has also filed with this Court a motion for leave to file the Exhibits to this Motion under seal ("Motion to File Under Seal") in order that the Complaint in the Declaratory Judgment Action and the Amended Complaint in the Home Depot Action may be included as Exhibits to this Motion and the Court may have an opportunity to review them. In the event that the Motion to File Under Seal is granted, the Complaint in the Declaratory Judgment will be Exhibit A to this Motion.

II. JURISDICTION.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This motion for relief from the automatic stay is a core proceeding under 28 U.S.C. § 157(b)(2)(G). Venue in this matter is proper under 28 U.S.C. § 1408.

III. BACKGROUND AND BASIS FOR RELIEF REQUESTED.

1. Greenwich issued Management Liability and Company Reimbursement Insurance Policy No. ELU 83018-02 (the "Policy") to Fleming for the period from February 5, 2002 through February 5, 2003 (the "Policy Period"). A copy of the Policy is attached hereto as Exhibit B. The Policy has a limit of liability of $15,000,000 in the aggregate for the Policy Period. *See* Policy, Declarations, Item 3.

2. The Policy provides specified coverage to Insured Persons for Claims for Wrongful Acts first made against them during the Policy Period. Policy, Section I.(A). The Policy also affords specified coverage to Fleming for Loss for which Fleming is required or permitted to indemnify Insured Persons for Claims for Wrongful Acts first made against those Insured Persons during the Policy Period. Policy, Section I.(B). The Policy has a $1.5 million Retention applicable to Claims for which Fleming is indemnifying one of its officers. Policy, Declarations, Item 4. However, the Retention does not apply if Fleming is not indemnifying that officer as a result of financial insolvency. *See* Policy, Section IV.(D).

3. In addition to the coverages described above, the Policy affords coverage to Fleming for Securities Claims, as that term is defined in the Policy. Policy, Sections I.(C) and II.(Q). Because the Home Depot Action is not a Securities Claim, there is no coverage for Fleming for the claim made against it in the Home Depot Action.

4. On May 24, 2002, Home Depot initiated its lawsuit against Griffin. *See Home Depot U.S.A., Inc. v. Griffin and Fleming Companies, Inc.*, C.A. No. 19649 NC (Del. Ch. Ct. 2002). On November 12, 2002, Home Depot amended the complaint in that action ("Amended Complaint") to include Fleming as a defendant.[2] On December 30, 2002, seven months after the initial complaint was filed and six weeks after the Amended Complaint was filed, Greenwich was notified for the first time of the initial complaint filed against Griffin in the Home Depot Action on December 30, 2002. On February 12, 2003, Greenwich was notified, on behalf of Fleming, of the claim made against Fleming in the Amended Complaint in the Home Depot Action.

5. The day after Greenwich was provided with notice of the Amended Complaint in the Home Depot Action, but unbeknownst to Greenwich, Griffin and Home Depot participated in a mediation in an attempt to resolve the Home Depot Action. The mediation was conducted without the knowledge or consent of Greenwich. Though the matter was not resolved during the mediation, the parties eventually reached an agreement in principle to settle the Home Depot Action for $1.3 million.

6. On April 1, 2003, Fleming filed for bankruptcy protection under Chapter 11. As a result of Fleming's bankruptcy, Fleming no longer was indemnifying Griffin in connection with the Home Depot Action and the Retention referred to above was no longer applicable to the Home Depot Action.

7. Greenwich has received demands that it fund a settlement of the Home Depot Action.

[2] As indicated above, Home Depot filed the Amended Complaint under seal, and movant has therefore not attached the Amended Complaint as an Exhibit to this Motion. Greenwich has filed a separate motion with this Court seeking leave to file the Exhibits to this Motion under seal in order that the Court may have the opportunity to review them. To the extent that the Motion to File Under Seal is granted, the Amended Complaint will be Exhibit C to this Motion.

8. In light of Greenwich's numerous coverage defenses, Greenwich filed the Declaratory Judgment Action. That action seeks a declaration that coverage for the Home Depot Action is barred by the late notice provided to Greenwich; that the Policy affords no coverage for the alleged acts of Griffin committed in his capacity as an officer of Home Depot; that the Policy affords no coverage for the disgorgement sought by Home Depot of certain amounts to which Griffin was allegedly not legally entitled; and that to the extent coverage is not otherwise precluded, any loss attributable to the Home Depot Action is subject to an allocation as required by the Policy.

9. Because Fleming provided notice of the Home Depot Action to Greenwich and sought coverage, and in light of Fleming's potential claim for coverage for amounts which it may be required indemnify Griffin, s*ee* Policy, Section I.(B), the stay should be modified to permit a final and complete adjudication of the rights of the parties to the insurance contract, including Fleming.

IV. LEGAL ARGUMENT.

The purpose of the automatic stay is "to prevent certain creditors from gaining a preference for their claims against the debtor; to forestall the depletion of the debtor's assets due to legal costs in defending proceedings against it; and, in general, to avoid interference with the orderly liquidation or rehabilitation of the debtor." *Izzarelli v. Rexene Prods. Co. (In re Rexene Prods. Co.)*, 141 B.R. 574, 576 (Bankr. D. Del. 1992) (citations omitted). The automatic stay, however, "is not meant to be indefinite or absolute, and in appropriate instances, relief may be granted." *Id.* (citation omitted). Accordingly, the Bankruptcy Code provides creditors and other interested parties with a mechanism for obtaining relief from that stay under 11 U.S.C. § 362(d).

Section 362(d) of the Bankruptcy Code provides that at the request of an interested party, the court shall grant relief from the automatic stay "for cause." *See* 11 U.S.C. § 362(d)(1). The Bankruptcy Code does not define cause, but courts are given broad discretion to provide appropriate relief from the automatic stay based upon the "totality of the circumstances in each particular case." *Baldino v. Wilson (In re Wilson)*, 116 F.3d 87, 90 (3d Cir. 1997) (citation omitted); *see also Izzarelli*, 141 B.R. at 576 ("'Cause' is not defined in the Code; it must be 'determined on a case-by-case basis.'") (citations omitted); *accord Claughton v. Mixson*, 33 F.3d 4, 5 (4th Cir. 1994); *In re Robbins*, 964 F.2d 342, 345 (4th Cir. 1992) (citing *In re MacDonald*, 755 F.2d 715, 717 (9th Cir. 1985)); *Nationsbank, N.A. v. LDN Corp*. (*In re LDN Corp*.), 191 B.R. 320, 323 (Bankr. E.D. Va. 1996); *In re Murray Indus., Inc.*, 121 B.R. 635 (Bankr. M.D. Fla. 1990).

Courts have developed a number of factors to be considered in deciding whether "cause" exists to grant relief from the automatic stay. This Court has identified three criteria that courts should consider in determining whether to grant relief from the automatic stay:

> 1. Whether any great prejudice to either the bankrupt estate or the debtor will result from continuation of the civil suit;
>
> 2. Whether the hardship to the non-bankrupt party by maintenance of the stay considerably outweighs the hardship to the debtor; and
>
> 3. The probability of the creditor prevailing on the merits.

Save Power Ltd. v. Pursuit Athletic Footwear, Inc. (In re Pursuit Athletic Footwear, Inc.), 193 B.R. 713, 718 (Bankr. D. Del. 1996) (citing *Izzarelli*, 141 B.R. at 576); *see also Levitz Furniture Inc. v. T. Rowe Price Recovery Fund, L.P. (In re Levitz Furniture Inc.)*, 267 B.R. 516, 523 (Bankr. D. Del. 2000)

(same); *Am. Airlines v. Cont'l Airlines, Inc. (In re Cont'l Airlines, Inc.)*, 152 B.R. 420, 424 (D. Del. 1993) (same). Application of these three factors to the circumstances here reveals that cause exists to modify the stay to permit Greenwich to add Fleming as a party to the Declaratory Judgment Action. In addition, the purposes of the automatic stay are not advanced by denying Greenwich's request for relief.

A. Resolution of an Insurance Coverage Dispute has been held to Justify Modifying the Automatic Stay

In a case involving an insurance coverage dispute, *Peerless Insurance Co. v. Rivera*, 208 B.R. 313 (D.R.I. 1997), the court determined that the automatic stay was properly modified to permit a determination of coverage under an insurance policy issued to the debtor in a Chapter 11 proceeding. That court examined four factors to determine that the insurer should be afforded relief from the automatic stay: (i) "the harm to the party seeking relief from the stay . . . if the stay is not lifted;" (ii) "the harm to the debtor . . . if the stay is lifted;" (iii) "the interests of creditors;" and (iv) "the effect on the fair and efficient administration of justice." *Id.* at 315. These factors appear to encompass the same criteria identified by this Court in its own decisions regarding the propriety of modifying the automatic stay.

In *Peerless*, an insurer brought a declaratory judgment action in Rhode Island Superior Court seeking a determination that an insurance policy issued to a debtor in a Chapter 11 case provided no coverage for a car accident. *Id.* at 314. On the eve of trial of the declaratory judgment action, the debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code. *Id.* Thereafter, the insurer filed a motion for relief from the automatic stay in the debtor's bankruptcy case, seeking to pursue the trial of the declaratory judgment action. *Id.* The bankruptcy court denied the motion. *Id.* However, on appeal, and based upon an analysis

of the four factors described above, the district court found cause for relief from the automatic stay. *Id.* at 318.

In reversing the bankruptcy court's decision, the district court found that the insurer would suffer harm if it did not grant relief from the stay. *Id.* at 316. The harm to the insurer, according to the court, could be eliminated by permitting the "the coverage dispute to be resolved in a single proceeding and in a way that binds all parties." *Id.*

Turning to the second factor, the district court also found that the harm to the insurer was not offset by any material prejudice to the debtor. *Id.* at 316-17. In so holding, the district court rejected the argument that the debtor would be prejudiced by its inability to defend itself adequately in the declaratory judgment action due to its lack of resources. *Id.* at 316. The court determined that there was no evidence supporting the debtor's contention that it lacked "sufficient assets to bear the relatively modest cost of trying the declaratory judgment action." *Id.* Moreover, even if the debtor lacked the requisite financial resources, the court concluded that other parties to the coverage dispute would vigorously contest the insurer on the issue of coverage. *Id.* at 317.

Addressing the third factor, the *Peerless* court found that relief from the automatic stay would not harm the interests of the debtor's creditors. *Id.* With respect to the fourth factor, the district court found that granting relief from the stay would promote judicial economy and the ends of justice by permitting a swift resolution of the underlying coverage issue in a single forum. *Id.* at 317-18.

B. Cause Exists to Grant Relief from the Automatic Stay to Permit Greenwich to Add Fleming as a Party to the Declaratory Judgment Action

The *Peerless* analysis and the three-factor analysis articulated by this Court confirm that Greenwich's request for relief from the stay should be granted, and Greenwich should be permitted to add Fleming as a party to the Declaratory Judgment Action.

1. Granting Greenwich Relief From the Stay Would Not Harm the Debtor or the Estate.

Fleming will suffer no harm if relief from the automatic stay is granted. The issues presented by the Declaratory Judgment Action are primarily issues of law, surrounding the rights and obligations of the parties to an insurance contract. Therefore, resolution of that dispute will require minimal, if any, fact discovery. Indeed, discovery in the underlying Home Depot Action itself has already revealed many of the facts that may bear on the legal issues in the Declaratory Judgment Action. Thus, Fleming will not be called upon to participate in burdensome discovery to defend itself in the Declaratory Judgment Action if the stay is modified. *See Peerless*, 208 B.R. at 316.

In addition, the cost to Fleming in defending this action will be minimal. First, there is no dispute as to whether the Policy affords coverage for Fleming for the claim against it in the Home Depot Action. It does not. The Policy affords coverage to Fleming for Securities Claims, as that term is defined in the Policy, Policy, Sections I.(C) and II.(Q), and the Home Depot Action is not a Securities Claim. This question is not at issue in the Declaratory Judgment Action and Fleming will therefore not have to litigate this issue in the event the stay is modified. Second, though Fleming has an interest in the coverage dispute because it may seek coverage under the Policy for amounts for which it may have to indemnify Griffin, that potential claim implicates exactly the same Policy provisions as Griffin's claim for coverage under the Policy. Fleming's interest in the availability of coverage for the Home Depot Action is therefore coextensive with Griffin's.

Because Griffin is likely to vigorously dispute Greenwich's coverage position, Fleming's interests will be advanced and adequately represented through Griffin's participation in the Declaratory Judgment Action.

In analyzing this factor, courts have also considered the debtor's ability to fund litigation. *Id*. at 316-17. This consideration, too, weighs in favor of modifying the stay. As discussed above, the cost to Fleming will likely be minimal. In addition, Fleming itself recently initiated an adversary proceeding in this Court against Greenwich and several other insurers to resolve a coverage dispute over an unrelated claim under the same Policy. *See Fleming Companies, Inc. v. Greenwich Insurance Company, et. al*., Adv. No. 03-59474-MFW (filed November 9, 2003) (Bankr. D. Del.). Thus, Fleming's ability to fund coverage litigation has been clearly established.

Moreover, granting relief from the automatic stay will not adversely impact Fleming's creditors. The creditors presumably have an interest in ensuring that the coverage issues raised in the Declaratory Judgment Action are resolved as efficiently as possible. *See Peerless*, 208 B.R. at 316-17 (observing that creditors benefit in the prompt and efficient resolution of insurance coverage issues). Indeed, as observed in *Peerless*, creditors' interests are not affected by choice of the jurisdiction in which a coverage action takes place. *Id.* Because the adjudication of the availability of coverage for the Home Depot Action must occur at some juncture, allowing it to occur promptly in one action is efficient and in the interests of Fleming's creditors.

2. Greenwich Would Suffer Harm If It Is Not Granted Relief From the Stay.

For several reasons Greenwich will suffer considerable harm if it does not secure relief from the automatic stay to add Fleming to the Declaratory Judgment Action. Greenwich will not be able to obtain complete relief in the Declaratory Judgment Action unless Fleming can be added as a party. In the event

Griffin seeks indemnification from Fleming for amounts he may be required to pay in connection with the Home Depot Action, Fleming may seek coverage for those amounts under the Policy. If Fleming is not a party to the Declaratory Judgment Action, Greenwich will have to litigate again the very issues it seeks to resolve through the filing of that lawsuit. While the Declaratory Judgment Action will adjudicate the rights of Greenwich and Griffin, the absence of Fleming as a party would prevent Greenwich from obtaining a comprehensive adjudication of the rights with respect to the Home Depot Action of all of the relevant insureds under the Policy in a single action.

To the extent that Fleming is not added as a party to the Declaratory Judgment Action, Greenwich may thus be constrained to pursue a second, duplicative action against Fleming. The costs and inefficiencies associated with pursuing a separate action against Fleming would waste not only judicial resources but would also increase unnecessarily the costs incurred by Greenwich to obtain the relief it seeks. The need to file a separate action also raises the specter of potentially inconsistent results in the two lawsuits.

Allowing Greenwich to include Fleming in Declaratory Judgment Action would alleviate all of these harms. By including Fleming in the Declaratory Judgment Action, Greenwich can obtain a swift, economical resolution of coverage issues relating to the Home Depot Action in a single forum.

3. Greenwich Has a High Probability of Prevailing on the Merits.

This Court has identified the "[t]he probability of the creditor prevailing on the merits" as relevant in determining whether to grant relief from the automatic stay. *Save Power Ltd.*, 193 B.R. at 718. Greenwich is not a creditor of Fleming and, accordingly, this factor does not appear to apply in this case. However, if Greenwich is analogized to a creditor for purposes of this analysis and this factor is deemed relevant here, it

also weighs in favor of modifying the stay because Greenwich has a strong basis for denying coverage for the Home Depot Action based on the plain language of the Policy and applicable law. Accordingly, Greenwich clearly meets the "slight" showing necessary to meet this criterion. *See Izzarelli*, 141 B.R. at 576 (observing that "the required showing" for the third criterion is "very slight"); *Levitz Furniture Inc.*, 267 B.R. at 523 (finding that the non-bankrupt party need only show that "their claim is not frivolous" to satisfy the third criterion).

C. The Automatic Stay's Purposes Do Not Apply To the Declaratory Judgment Action.

None of the automatic stay's three purposes applies to the Declaratory Judgment Action. The first purpose does not apply because Greenwich has no monetary claim against Fleming. The second purpose does not apply because Griffin should be responsible for his own litigation costs associated by the Declaratory Judgment Action, and Fleming's litigation costs should be minimal. Even if Fleming may have to incur some litigation costs, the mere prospect of litigation expenses is insufficient to justify continuation of the stay. *See Cont'l Airlines*, 152 B.R. at 425; *see also In re Peterson*, 116 B.R. 247, 250 (D. Colo. 1990); *In re Bock Laundry Mac. Co.*, 37 B.R. 564, 567 (Bankr. N.D. Ohio 1984). The third purpose does not apply because the resolution of the coverage dispute will not interfere with the orderly liquidation or rehabilitation of the Debtor. Moreover, the commencement of the Declaratory Judgment Action does not interfere with the Debtor's estate because Greenwich is not seeking relief to enforce any monetary judgment against the estate. *Cf. In re Todd Shipyards Corp.*, 92 B.R. 600, 604 (Bankr. D.N.J. 1988) (finding that continuation of litigation does not interfere with the bankruptcy proceedings because movants seek only to litigate their claims to judgment and do not seek to enforce any such judgment); *Bock Laundry*, 37 B.R. at 567 (explaining that

the automatic stay was never intended to preclude a determination of tort liability and damages but only to prevent a prejudicial dissipation of assets).

For the foregoing reasons, cause exists to grant relief from the automatic stay.

WHEREFORE, Greenwich respectfully seeks entry of an order by this Court: (i) determining that cause exists for relief from the automatic stay to permit Greenwich to prosecute the Declaratory Judgment Action against Fleming; and (ii) for such other and further relief as the Court deems just and proper.

Dated: January 2, 2004

Respectfully submitted,

By: /s/ Margaret M. Manning

Stuart M. Brown (Bar No. 4050)
Margaret M. Manning (Bar No. 4183)

BUCHANAN INGERSOLL PC
1201 N. Market Street
Suite 1501
Wilmington, Delaware 19801
(302) 428-5500
(302) 654-3996 (facsimile)

Of Counsel:

Daniel J. Standish
Valerie E. Green
WILEY REIN & FIELDING LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000
(202) 719-7049 (facsimile)

Attorneys for Plaintiff Greenwich Insurance Company