

THE STATE OF TEXAS,

Plaintiff,

V.

WEBB COUNTY TITLE
& ABSTRACT COMPANY, INC.,

Defendant.

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IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

201ST JUDICIAL DISTRICT

FIDELITY NATIONAL TITLE INSURANCE COMPANY'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR RELIEF FROM INJUNCTION AND AUTOMATIC STAY AS TO SPECIFIC CLAIMS, TO THE EXTENT SUCH CLAIMS ARE COVERED BY LIABILITY INSURANCE

TO THE HONORABLE JUDGE OF SAID COURT:

FIDELITY NATIONAL TITLE INSURANCE COMPANY, Movant, submits its Reply Brief in Support of its Motion for Relief from Injunction and Automatic Stay as to Specific Claims, to the Extent Such Claims are Covered by Liability Insurance. Terms which are defined in Fidelity's opening Brief have the same meaning herein.

Procedural Background

1. On March 7, 2008 Fidelity filed its Motion to for Relief from Injunction and Automatic Stay as to Specific Claims, To the Extent Such Claims are Covered by Liability Insurance.

2. On August 18, 2008 Fidelity filed its Brief in Support of its Motion for Relief from Injunction and Automatic Stay as to Specific Claims, to the Extent Such Claims are Covered by Liability Insurance.

3. On August 27, 2008 the Special Deputy Receiver, on behalf of Webb County and the Texas Title Insurance Company Association (the "Association") each filed their Objections to Fidelity's Motion for Relief from Injunction and Automatic Stay.

Relief Sought

4. Fidelity has requested that the Court lift the permanent injunction and the automatic stay provided in the Liquidation Order, for the sole purpose of allowing Fidelity to pursue the claims it has asserted in the Lawsuit, to the extent (and only to the extent) that such claims are covered by liability insurance. In this connection, Fidelity acknowledges that it will not be entitled to pursue collection of any judgment it might obtain in the Lawsuit from the assets of Webb County and that it must look exclusively to insurance coverage to satisfy any such judgment. To be clear, the action would continue against Webb County in name only, would be defended by the insurer and would not seek recovery from any source other than the liability insurance provided in the Policy.

Argument

5. The Special Deputy Receiver opposes Fidelity's Motion based on assertions that (1) Fidelity's proof does not meet the clear and convincing standard and (2) to grant such relief would be a preference of Fidelity over other creditors.¹ Respectfully, the Special Deputy Receiver is mistaken. Fidelity has carried its burden and a grant of the requested relief could not be a preference.

6. The Association objects on the alleged grounds that (1) any potential recovery under the Policy would be an asset of the estate subject to equitable distribution among its creditors, and (2) that allowing the suit to move forward would tie up the resources of the estate. These contentions are likewise unfounded. Further, the bankruptcy related cases cited by Fidelity in its opening brief do not rely the timing of the stay in relation to previously filed litigation, as implied by the Association.

7. Each of these objections is addressed herein.

¹ Special Deputy Receiver's Response in Opposition at p. 1.
FIDELITY NATIONAL TITLE INSURANCE COMPANY'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR RELIEF FROM INJUNCTION AND AUTOMATIC STAY AS TO SPECIFIC CLAIMS, TO THE EXTENT SUCH CLAIMS ARE COVERED BY LIABILITY INSURANCE

A. Fidelity has met the clear and convincing standard.

8. As the Special Deputy Receiver points out, section 443.008 of the Insurance Code specifically authorizes a court to lift a stay in a receivership proceeding as to any property that the party in receivership does not have equity in and is not necessary to an effective rehabilitation plan. TEX. INS. CODE § 443.008(h)(2). "Property" is defined in the Insurance Code as "all right, title, and interest of the insurer in property, whether legal or equitable, tangible or intangible, choate or inchoate, and includes choses in action, contract rights, and any other interest recognized under the laws of this state." TEX. INS. CODE § 443.004(20). By its express terms, the definition of "property" includes intangibles. Webb County's rights under the Policy qualifies under this definition of "property."

9. Additionally, Fidelity has satisfied the requirements of subsection (j) which require proof of these elements by clear and convincing evidence. The Policy is before the Court and its terms are not in dispute. It is also undisputed that Webb County has no "equity" in the Policy. Further, there is no viable argument that Webb County's rights in the Policy as regards Fidelity's claim against the Policy is somehow necessary for an effective rehabilitation of Webb County. Indeed, Webb County is in liquidation, so no attempt to rehabilitate it is being made.

10. Webb County was required to obtain the Policy for the benefit of Fidelity. It is a "claims made" policy that covers claims first made and reported during the Policy Period. The Policy expired approximately six months ago. The estate has not identified any claims that could implicate the Policy. Moreover, the limits of insurance are \$1,000,000 per occurrence, so there would be coverage for other claims are identified and timely made.

11. It is not Fidelity's burden to prove that the receivership estate does not have a claim under the policy. However, as a practical matter, the estate could never have a claim against the Policy because the Policy does not cover claims made by Webb County against

itself. The facts are clear and undisputed—the Policy exists; it is a claims made policy; Fidelity has the only known claims against the Policy. Fidelity made the first claim against the Policy prior to the receivership; and neither the Special Deputy Receiver nor the Association has raised any fact that shows how money recovered under the Policy could benefit the receivership estate. Therefore, this Court should lift the stay for the limited purpose of allowing Fidelity to pursue the Policy proceeds.

B. Lifting the stay as to the policy will not be a preference and any insurance proceeds would not be available for a pro rata distribution.

12. Again, the Special Deputy Receiver and the Association each argue that somehow the proceeds of the Policy would be an asset of Webb County that could be distributed to all the creditors based on priority, i.e., the proceeds could be paid to the Association to cover administrative expenses.² This completely ignores the reality that the only method of recovering under the Policy is to make a claim for professional liability, and the only party with a claim is Fidelity. Webb County is not entitled to the proceeds of a successful claim against the Policy by Fidelity or any other entity that might have a claim that is covered by the Policy. This is simply not how professional liability insurance policies work.

C. The timing of the stay is irrelevant.

13. Bankruptcy courts routinely entertain and grant motions for the type of relief that is sought by Fidelity in the Motion, and the timing of the stay relative to the filing of a previously filed lawsuit has never been the reason for grant or denial of relief. See, e.g., *Matter of Holtkamp*, 669 F.2d 505, 508-509 (7th Cir. 1982); *Owaski v. Jet Florida Sys., Inc. (In re Jet Florida Sys., Inc.)*, 883 F.2d 970, 974-75 (11th Cir. 1989) (per curiam); *First Jersey Nat'l Bank v. Brown (In re Brown)*, 951 F.2d 564, 570 (3d Cir. 1991); *Green v. Welsh*, 956 F.2d 30, 34 (2d Cir. 1992); *In re Greenway*, 126 B.R. 253 (E.D. Tex. 1991) (Beaumont Div.); *In re Fowler*, 259 B.R. 856 (E.D. Tex. 2001).

² See Association's Objection to Fidelity's Motion at p. 2.

14. The true rationale behind these decisions is that: "The debtor is not prejudiced by exposure to the liability claim because '[t]he Debtor and his property are not subject to any risk and maintenance of the suit does not frustrate the policy of the Bankruptcy Code" *In re Jet Florida Sys., Inc.*, 883 F.2d at 974; (citing *Wimmer v. Mann (In re Mann)*, 58 B.R. 953, 958 (W.D.Va. 1986)). Likewise, the maintenance of Fidelity's suit against Webb County to pursue the liability insurance does not frustrate any policy of the Texas Insurance Code.

15. *In re Jet Florida Sys., Inc.* also recognized the practical and economic reality that the insurance company will be required to defend any suit allowed to move forward. *Id.* at 976 (citing *Holtkamp*, 669 F.2d at 508-09). This Court is not required to speculate as the Eleventh Circuit did, because the insurer has already acknowledged the existence of the Policy and has engaged attorneys, at its expense, to represent and defend Webb County in the Lawsuit.

16. Like the Insurer Receivership Act, the purpose of the bankruptcy laws, and § 524(a) stay, are merely aimed at protecting the debtor, and these principles did not preclude a suit tailored solely to determine the debtor's liability as a precondition for recovery against the debtor's liability insurer. *Green v. Welsh*, 956 F.2d 30, 34 (2d Cir. 1992) (citing *In re Jet Florida Sys, Inc.*, 883 F.2d at 972). Both the Second and Eleventh Circuits have noted the important policy rationale that the discharge and stay rules were not designed to immunize third parties such as insurers who may be liable on behalf of the debtor, and that "the insurer should not gain a benefit that had not figured in the calculation of the premium for the policy." *Id.* at 34 (citing *In re Jet Florida Sys, Inc.*, 883 F.2d at 975). Likewise, there is no viable rationale that Webb County's liability insurer should be insulated from a valid claim simply because Webb County is in receivership.

17. These decisions have been adopted in the Texas federal district courts as well. *See e.g., In re Greenway*, 126 B.R. 253 (E.D. Tex. 1991).

18. Acceptance of the Association's blanket allegation that Fidelity should be required to file a "proof of claim like all other creditors in this matters"³ would actually work against the estate. In such event, Fidelity would be seeking to share in the assets of the estate, when it would not seek to do so if its Motion is granted. Thus, granting the Motion will eliminate a potential burden on the estate.

D. Lifting the stay as to the policy will not encumber the estate's resources.

19. Both the Special Deputy Receiver and the Association claim to be concerned that lifting the stay would be a drain on the estate's resources. Certainly the Special Deputy Receiver and the Association are not claiming that it would be a more judicious use of the receivership's assets for Fidelity to file a proof of claim, and require the claim to be adjudicated at the estate's expense.

20. In any event, the possibility that the Special Deputy Receiver may have to gather a limited number of documents in response to discovery requests can be easily remedied by an appropriate order of this Court. For example, this Court could presumably direct Fidelity to reasonably compensate the Special Deputy Receiver for any time and energy expended in discovery.

21. Any alleged concern that Webb County will be held corporately liable in the Lawsuit is frivolous, since Fidelity has made it abundantly clear that it is only seeking to collect from the insurer and not from Webb County corporately. There is no scenario under Fidelity's tailored request whereby Webb County could become liable for damages or costs associated with the Lawsuit.

22. The granting of the Motion will potentially allow Fidelity to satisfy the subject claims from the insurance coverage that it required Webb County to carry under the Agency Agreement. The granting of the Motion, however, will not interfere with the orderly liquidation of

³ See Associations Objection to Fidelity's Motion at p.3.

Webb County under the Liquidation Order and will not cause the Liquidator to incur any expenditures of time, money or other resources that he would not otherwise incur.

Prayer

WHEREFORE, PREMISES CONSIDERED, Fidelity prays that its Motion be granted and that an appropriate order be entered.

Respectfully submitted,

MUNSCH HARDT KOPF & HARR, P.C.

By: 

D. Ronald Reneker
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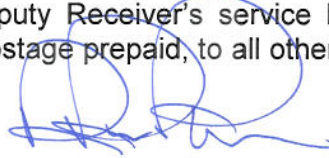
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ATTORNEYS FOR PLAINTIFF

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Brief has been sent via e-mail to all persons and entities on the Special Deputy Receiver's service list where e-mail addresses were provided, and via First Class Mail, postage prepaid, to all others, on this 5th day of September, 2008.



D. Ronald Reneker