UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re:	)	Chapter 7
	)	
BURTON DOUGLAS MORRISS	)	Case No.: 12-40164-659
	)	
Debtor.	)	
	)	

APPLICATION FOR ORDER PURSUANT TO 11 U.S.C. SECTION 327 OF THE BANKRUPTCY CODE AUTHORIZING EMPLOYMENT AND RETENTION OF THE ASHCROFT LAW FIRM, LLC AS COUNSEL FOR DEBTOR *NUNC PRO TUNC* TO JANUARY 20, 2012 OR, ALTERNATIVELY, A RULING THAT THE RETENTION OF THE ASHCROFT LAW FIRM, LLC IS BEYOND THE SCOPE OF THE DEBTOR'S ESTATE

The Ashcroft Law Firm, LLC, d/b/a Ashcroft Hanaway, for its application to be retained and employed by Debtor Burton Douglas Morriss ("the Debtor"), respectfully states as follows:

1. After this bankruptcy case was filed, The Ashcroft Law Firm, LLC, d/b/a Ashcroft Hanaway ("Ashcroft Hanaway"), was retained to represent the Debtor in two related matters -- a civil action filed on January 17, 2012 by the Securities and Exchange Commission against the Debtor and other parties ("SEC Case"), and a related criminal investigation being conducted by the Office of the United States Attorney, Eastern District of Missouri ("USAO Criminal Investigation").

2. Ashcroft Hanaway has not been paid for its services to the Debtor. Ashcroft Hanaway wishes to continue its representation of the Debtor in the SEC Case and the USAO Criminal Investigation. In addition, the Debtor is currently being investigated by the Internal Revenue Service, the Federal Bureau of Investigation, and the Postal Inspection Service, and he seeks representation in those matters as well by Ashcroft Hanaway.

3. Ashcroft Hanaway therefore seeks an order under 11 U.S.C. Section 327 authorizing its employment and retention as counsel for the Debtor *nunc pro tunc* to January 20,

2012. As described more fully in the accompanying Memorandum, Ashcroft Hanaway anticipates that its fees and expenses can be paid by the proceeds for the sale of an asset held by an irrevocable trust and a D&O insurance policy, both of which are beyond the scope of the Debtor's estate, upon information and belief. In the alternative, Ashcroft Hanaway seeks a ruling that its retention by the Debtor is beyond the scope of the Debtor's estate.

WHEREFORE, for the reasons set forth in the accompanying Memorandum in support of this application, Ashcroft Hanaway requests an entry of an Order authorizing the Debtor to employ and retain Ashcroft Hanaway, including the retention of such experts and services as will be required to adequately defend the case (including but not limited to forensic accountants and document imaging and management services), effective January 20, 2012, or, alternatively, to find that the terms of the engagement of Ashcroft Hanaway are beyond the bankruptcy estate of the Debtor, and granting the Debtor and Ashcroft Hanaway such other and further relief as this Court deems just and proper.

Respectfully Submitted,

ASHCROFT HANAWAY, LLC

By: /s/ Catherine L. Hanaway_____

Catherine L. Hanaway, # 41208MO
222 S. Central Avenue, Suite 110
St. Louis, MO 63105
Phone: (314) 863-7001
Fax: (314) 863-7008
chanaway@ashcroftlawfirm.com

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on February 21, 2012, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all counsel of record.

/s/ Catherine L. Hanaway

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re:	)	Chapter 7
	)	
BURTON DOUGLAS MORRISS	)	Case No.: 12-40164-659
	)	
Debtor.	)	
	)	

MEMORANDUM IN SUPPORT OF APPLICATION FOR ORDER PURSUANT TO 11 U.S.C. SECTION 327 OF THE BANKRUPTCY CODE AUTHORIZING EMPLOYMENT AND RETENTION OF THE ASHCROFT LAW FIRM, LLC AS COUNSEL FOR DEBTOR *NUNC PRO TUNC* TO JANUARY 20, 2012 OR, ALTERNATIVELY, A RULING THAT THE RETENTION OF THE ASHCROFT LAW FIRM, LLC IS BEYOND THE SCOPE OF THE DEBTOR'S ESTATE

INTRODUCTION

The Ashcroft Law Firm, LLC, d/b/a Ashcroft Hanaway ("Ashcroft Hanaway"), respectfully requests that the Court authorize its retention and employment by Debtor Burton Douglas Morriss ("the Debtor"). After this bankruptcy case was filed, The Ashcroft Law Firm, LLC, d/b/a Ashcroft Hanaway, was retained to represent the Debtor in two related matters -- a civil action filed on January 17, 2012 by the Securities and Exchange Commission against the Debtor and other parties ("SEC Case"), and a related criminal investigation being conducted by the Office of the United States Attorney, Eastern District of Missouri ("USAO Criminal Investigation").

Ashcroft Hanaway has not been paid for its services to the Debtor. Ashcroft Hanaway wishes to continue its representation of the Debtor in the SEC Case and the USAO Criminal Investigation. In addition, the Debtor is currently being investigated by the Internal Revenue Service, the Federal Bureau of Investigation, and the Postal

Inspection Service, and he seeks representation in those matters as well by Ashcroft Hanaway.

Ashcroft Hanaway therefore seeks an order under 11 U.S.C. Section 327 authorizing its employment and retention as counsel for the Debtor *nunc pro tunc* to January 20, 2012. As described below, Ashcroft Hanaway anticipates that its fees and expenses can be paid by the proceeds for the sale of an asset held by an irrevocable trust and a D&O insurance policy, both of which are beyond the scope of the Debtor's estate, upon information and belief. In the alternative, Ashcroft Hanaway seeks a ruling that its retention by the Debtor is beyond the scope of the Debtor's estate.

STATEMENT OF FACTS

1. On January 9, 2012, the Debtor filed his voluntary bankruptcy petition in this case under Chapter 11. Doc. # 1.

2. On January 20, 2012, Ashcroft Hanaway was retained to represent the Debtor in two related matters. First, the SEC Case was filed on January 17, 2012 by the Securities and Exchange Commission against the Debtor and other parties. *Securities and Exchange Commission v. Morriss, et al.*, Case No. 4:12-cv-80-CEJ (E.D. Mo.). On that same date, Claire M. Schenk was appointed as receiver for Acartha Group, LLC and other defendants (not including Morriss) in the SEC Case. The second matter is the related USAO Criminal Investigation.

3. On January 31, 2012 the U.S. Trustee moved to convert Debtor's Chapter 11 proceeding to a Chapter 7 proceeding or in the alternative to dismiss the Chapter 11 case. Doc. # 22. That motion is still pending, and set for hearing on March 5, 2012. Doc. # 38.

4. On February 6, 2012, Claire M. Schenk, as receiver in the SEC Case, filed a Motion to Appoint a Trustee or, in the alternative, to convert the Chapter 11 proceeding to a Chapter 7 proceeding. Doc. # 30, # 39.

5. On February 13, 2012, the Court converted this case to a Chapter 7 proceeding and appointed a trustee. Doc. # 49.

6. The proceedings in the SEC Case are not, according to the SEC's pleadings, subject to the automatic stay which would normally freeze all litigation against the Debtor. *See* Doc. 43, at p.2 n.1 ("The Commission's continued prosecution of the District Court Action against Morriss during the pendency of this bankruptcy case is as an action by a governmental unit to enforce such governmental unit's police or regulatory power, in accordance with the exception to the automatic stay provided in Section 362(b)(4) of the Bankruptcy Code, 11 U.S.C. § 362(b)(4). In its January 17 and 27, 2012 Orders, the District Court ruled that continuation of the enforcement action against Morriss does not violate the automatic stay.").

7. Absent approval by this Court for the Debtor to retain and compensate counsel through some means, the Debtor will be unrepresented in the SEC Case, which is clearly a precursor to and factually closely related to the USAO Criminal Investigation. In addition, the Debtor is currently being investigated by the Internal Revenue Service, the Federal Bureau of Investigation, and the Postal Inspection Service.

8. Ashcroft Hanaway seeks to have this Court approve the retention of Ashcroft Hanaway as counsel effective as of January 20, 2012, the first date on which Ashcroft Hanaway rendered services to the Debtor, or, alternatively, to have this Court

rule that the retainer and legal fees and expenses to be paid to Ashcroft Hanaway are beyond the scope of the bankruptcy estate of the Debtor.

9. Ashcroft Hanaway has not yet received payment of any fees or expenses with respect to its representation of the Debtor.

10. Ashcroft Hanaway has been promised the proceeds from the sale of a membership interest in Malinmor Land Company, LLC as a retainer. On information and belief, this membership interest is valued at $143,000, and is held by an irrevocable trust -- the Burton Douglas Morriss Irrevocable Trust (the "Trust") dated March 6, 1996 -- that is outside the scope of these proceedings. On information and belief, the membership interest was transferred to the Trust by Barbara and Rueben Morriss in 1996. During the Debtor's lifetime, he has a beneficiary interest in income and principal from the Trust, and any distribution of income or principal is to be made at the sole and absolute discretion of the trustees. As of the date of this writing, the Trust has two co-trustees, the Debtor and Dixon Brown. Dixon Brown has expressed his intention to resign as co-trustee very soon and likely before the membership interest is sold and the proceeds transferred to Ashcroft Hanaway as a retainer. Therefore, the transfer will be executed by the Debtor as sole trustee.

11. Ashcroft Hanaway anticipates the remainder of its fees to be paid from the proceeds of a D&O insurance policy purchased by Acartha Group, LLC. The policy (number 8207-6676) was written by the Federal Insurance Company ("Federal"). A copy of the policy is attached hereto as Exhibit A.

12. Federal has indicated its intent to advance defense costs under the policy, subject to a reservation of rights and the satisfaction of other Policy conditions. In

particular, it has consented to the Debtor's representation by Ashcroft Hanaway in connection with the SEC's civil complaint. Federal has also agreed to advance allocated defense costs incurred by counsel on behalf of the Debtor "on a current basis," as provided for in the policy. A copy of Federal's February 13, 2012 coverage letter is attached hereto as Exhibit B.[1]

13. Partners, associates and of counsel attorneys, paralegals and legal assistants from Ashcroft Hanaway and partners, associates, paralegals and legal assistants from the Graves, Bartle, Marcus and Garrett law firm ("GBMG"), who has contracted with Ashcroft Hanaway to provide joint defense in this matter, will also provide services to the Debtor in the above-described representation.

14. Ashcroft Hanaway and GBMG do not hold or represent any interest adverse to the Debtor's estate in the matters upon which Ashcroft Hanaway and GBMG are to be employed, and Ashcroft Hanaway and GBMG are "disinterested" as such term is defined in section 101(14) of the Bankruptcy Code. Neither Ashcroft Hanaway nor GBMG nor its professionals have any connection with the Debtor, the creditors or any other party in interest.

[1] Federal had previously been notified of two related claims. First, before the SEC filed the SEC Action, it had issued a 9/15/11 SEC Order Directing a Private Investigation and Designating Officers to Take Testimony (the "SEC Investigation"). Second, Federal was notified of a 11/29/11 lawsuit brought by Ron Nixon, as Co-Trustee of the Bailey Quin Daniel 1991 Trust, and others against Morriss, Acartha, and a related entity in Missouri state court (the "Nixon litigation"). (The Nixon litigation has been stayed as to Morriss because of the present bankruptcy case.) Federal responded to these notices by letters dated 11/23/11 and 12/20/11 respectively (copies attached as Exhibits C and D). Federal accepted the SEC Investigation and the Nixon litigation as related claims against Morriss and other insureds, and agreed to begin advancing an allocated portion of defense costs, in excess of the deductible, incurred on their behalf.

15. Ashcroft Hanaway will calculate its fees for professional services based on its customary hourly billing rates, which in the normal course of business are subject to revision. For the Court's information, the range of billing rates that Federal has agreed to pay Ashcroft Hanaway for this matter are: Partners $300 -- $555; Of Counsel $300-$495; Associates $150-$245; Paralegals, Legal Assistants and Staff $50-$135. *See* 1/25/12 email from D. Topol, Counsel for Federal, to C. Hanaway, a copy of which is attached hereto as Exhibit E. No bills will be submitted directly by GMBG, whose attorneys will serve as "of counsel" to Ashcroft Hanaway. Anticipated expenses include the retention of such experts and services as will be required to adequately defend the case (including but not limited to forensic accountants and document imaging and management services). All billings will be submitted to Federal directly from Ashcroft Hanaway for payment in accordance with the provisions set forth above, with copies sent to the Debtor. As they are earned and billed, Federal intends to pay defense costs to Ashcroft Hanaway and not to the Debtor.

16. No previous application for the relief sought herein has been made by Ashcroft Hanaway or GMBG to this or any other Court.[2]

ARGUMENT

I. The Policy Proceeds Are Not Part of the Bankruptcy Estate

The D&O policy issued by Federal was purchased by Acartha Group, LLC to provide coverage for the Debtor and other directors and officers, as well as Acartha

[2] Ashcroft Hanaway has also filed a motion in the SEC Case seeking a ruling that the receivership and asset freeze orders in that case do not prohibit the advancement of defense costs from the Federal policy. If granted, that Motion will allow Federal to advance costs, but does not reach the issue of whether the defense costs can be "received" by the debtor. Counsel has informed the Eastern District of their intent to file the present motion with this Court as well.

Group, LLC. Since the Debtor is not the policyholder, but merely a covered insured, the policy itself is clearly not property of the Debtor's bankruptcy estate.[3] Whether or not the policy *proceeds* are part of a debtor's estate depends on the specific facts of each case. *See, e.g., In re CyberMedica, Inc.*, 280 B.R. 12, 16 (Bankr. D. Mass. 2002) ("Whether the proceeds of a D & O liability insurance policy is property of the estate must be analyzed in light of the facts of each case."); *In re Sfuzzi, Inc.*, 191 B.R. 664, 668 (Bankr. N.D. Tex. 1996) ("[T]he question of whether the proceeds [or an insurance policy] are property of the estate must be analyzed in light of the facts of each case.").

In this case, the policy proceeds at issue are being sought to pay the attorneys who have been representing the Debtor. None of these funds would be available to the Debtor personally. Courts have often distinguished between first-party insurance coverage – such as life or property insurance – where the insurance proceeds are paid directly to the insured, and D&O and other types of liability coverage, where the proceeds are not paid to the debtor. *See, e.g., In re Sfuzzi, Inc.*, 191 B.R. at 668 ("Unquestionably, proceeds from collision, life, and fire insurance policies are property of the estate when the proceeds are made payable to the debtor rather than to a third party, such as a creditor.") In the case of D&O coverage, as in this case, "the question to be answered is whether the debtor would have a right to receive and keep those proceeds when the insurer paid on the claim: (1) if the answer to that question is 'yes,' then the proceeds of the liability insurance policy are property of the estate; (2) if the answer is 'no,' then the proceeds are

[3] If anything, the policy itself is property of Acartha, which is presently in receivership. *See Securities and Exchange Commission v. Morriss, et al.*, Case No. 4:12-cv-80-CEJ (E.D. Mo.).

not property of the estate and they cannot enhance the bankruptcy estate for other creditors." *Id.*[4]

In this case, the facts do not support treating the policy proceeds as part of the bankruptcy estate. Other than the defense costs at issue in this motion (and those related claims listed in footnote 1), any potential claim against the bankruptcy estate, or indeed the policy, is entirely speculative at this point. In the analogous situation where officers of a bankrupt corporation seek access to D&O coverage for defense costs, the courts often hold that the policy proceeds are not part of the bankruptcy estate merely because there might in the future be other claims made against the policy. This is especially true when there is a priority of payments clause, as here, where coverage of defense costs for individual insureds is payable before any coverage for claims against the corporate policyholder. *See* Policy Endorsement #11. As one court explained:

> [T]he Court believes the depletion of proceeds to pay the Costs of Defense does not diminish the protection afforded the estate's assets under the terms of the Policy. The Policy's "Priority of Payments Endorsement" specifically requires that the proceeds be used *first* to pay non-indemnifiable loss for which coverage is provided under Coverage A of this Policy, which coverage includes the Costs of Defense. Then, only after such payments are made, and only if proceeds remain after payment of such Costs of Defense, will the Trustee or the estate be paid any proceeds. Thus, under the language of the Policy itself, the estate has only a contingent, residual interest in the Policy's proceeds; and, payment of the proceeds in accordance with the "Priority of Payments Endorsement" does not diminish the protection the Policy affords the estate, as such protection is only available after the Costs of Defense are paid.

[4] The *Sfuzzi* court added that in some cases, courts have found that "the proceeds from liability insurance policies are property of the bankruptcy estate, but these courts were usually dealing with cases that involved mass torts or cases in which the major asset was the insurance policy." *Id.* There is no evidence that this is the type of situation involved in this case. Indeed, other than the SEC lawsuit, the only case filed against Morriss is a state court action which has been stayed pending the outcome of the SEC Case. *See Nixon, et al. v. Morriss, et al.*, Case No. 11SL-CC04718 (Mo. Cir. Ct. St. Louis Co.).

In re Laminate Kingdom, LLC, 2008 WL 1766637, *3 (Bankr. S.D. Fla. Mar. 13, 2008) (emphasis in original) (not reported in B.R.). In other words, even if there were other claims against the insurance policy, Federal is contractually bound by the policy's terms to cover the Debtor' claim for defense costs first.

II. Even if the Policy Proceeds Are Part of the Bankruptcy Estate, the Insurer Should Be Permitted to Advance Defense Costs for Payment to Debtor's Counsel

Thus, the policy proceeds should not be treated as part of the bankruptcy estate in this case. However, even if they are considered to be part of the estate, this Court should grant relief from the stay to allow for the payment of defense costs to the Debtor's counsel. Many courts have authorized D&O carriers to fund defense costs notwithstanding the bankruptcy of one of the insureds. (Typically, this situation arises because the corporate insured is in bankruptcy, but the courts' reasoning in these cases is equally applicable here.)

There exists good cause for the Court here to authorize payment of the Debtor's defense costs by the insurer. First, as a practical matter, his ability to mount an effective defense against any claims will inure to the benefit of the bankruptcy estate. The Debtor has no other means of funding his defense of the SEC action or the criminal investigation. If he is prevented from having counsel assist in his defense, there is obviously a much greater risk of an adverse judgment, which would diminish the estate and/or the policy limits. Since the basis of the USAO's criminal investigation is the SEC Case, the Debtor will be greatly prejudiced in his ability to defend against any criminal charges that may be brought, if during the prosecution of the SEC's case, he is unrepresented by counsel.

Courts have often stressed that coverage of defense costs is governed largely by the policy terms themselves, and that when a priority of payments clause is present, it should be honored. In the *Laminate Kingdom* case, for example, the court held that even if the policy were to be considered estate property, the court found there was cause to grant relief from the stay, because the very essence of D&O insurance policies was at stake:

> In the present case, "cause" exists for granting relief from the stay to permit Carolina to advance the Defense Costs to Laminate's Directors and Officers under the Policy. As stated by the New York Bankruptcy Court: "D & O policies are obtained for the protection of individual directors and officers .... in essence and at its core, a D & O policy remains a safeguard of officer and director interests and not a vehicle for corporate protection." *In re First Central Financial Corp.*, 238 B.R. 9, 16 (Bankr. E.D.N.Y. 1999).

Id. at *4.[5]

Courts often hold that there is cause to lift an automatic bankruptcy stay when an individual insured faces the immediate need for coverage of defense costs, notwithstanding that the policy might in the future be needed to pay other claims. *See, e.g., Groshong v. Sapp (In re Mila, Inc.)*, 423 B.R. 537, 545 (B.A.P. 9th Cir. 2010) (affirming bankruptcy court's grant of relief from stay because "defense losses were clear, immediate, and ongoing, while Trustee could only show hypothetical or speculative indemnification claims"); *In re Taylor Bean & Whitaker Mortg. Corp.*, No. 3:09-bk-07047, 2011 WL 6014089 (Bankr. M.D. Fla. Oct. 11, 2011) (copy attached as Exhibit F) ("The Court is not obligated to postpone payments contractually owed to the former

[5] Any deprivation of Mr. Morriss's choice of counsel might implicate the Sixth Amendment's right to counsel. *See United States v. Stein*, 541 F.3d 130 (2d Cir. 2008) (accounting firm employees' Sixth Amendment rights were violated where government conduct caused employer to restrict advancement of legal fees to employees, and indictment had to be dismissed, even though state actor conduct occurred pre-indictment).

directors and officers based on mere hypothetical claims that may never be asserted and the possibility that coverage determinations may be reversed at some point in the future.")

One bankruptcy court in this Circuit was faced with a situation similar to this case, where an insurance policy covered both an individual insured and corporate entities. *See In re Petters Co., Inc*., 419 B.R. 369 (Bankr. D. Minn. 2009). In *Petters*, both the individual insured and the entities had competing claims for defense costs from a single policy. One insured was in receivership, while the others were in bankruptcy (In circumstances precisely opposite of the present case, the individual insured was in receivership while the entities were in bankruptcy). The court recognized that the bankruptcy estate and others might have rights against the policy at some point, but held that such a contingency could not justify freezing the entire policy amount in the meantime:

> [W]here there is a universe of potential claimants, a bankruptcy estate among them, and insured losses via the accrual of defense expenses are an ongoing process in intense legal proceedings, all insureds' future rights to the value of the coverage are completely indeterminate. Further, no insured's rights to a current payment are determinate until a claim is presented against an unexhausted balance of coverage. When the availability of reimbursement or indemnification is subject to a first-come, first-served order of distribution, as apparently is the case here [as the policy contained no priority of payments clause], the potential jeopardy to the bankruptcy estate's rights is obvious: it may have accrued but unpresented claims, or may accrue them shortly, in large amounts, against the unknown ripening of competitors' rights.
>
> But on the other hand, there is no way that the possibility of a right to payment in the bankruptcy estate, via some claim in some amount, can make the full balance of coverage property of the estate.

Id. at 378. The court therefore held that it would release the majority of the available policy proceeds to fund the insureds' defense costs. *Id.* at 380. *See also In re Boston*

Regional Medical Center, Inc., 285 B.R. 87, 94-98 (Bankr. D. Mass. 2002) (D&O coverage could be paid to individual insureds, who had no other means of funding immediately-needed defense costs, notwithstanding fact that payments would reduce amount available to estate of corporate debtor; any harm to bankruptcy estate was "uncertain, less severe than the opposing harm to the [individual insureds], and probably not irreparable").

WHEREFORE, Ashcroft Hanaway requests an entry of an Order authorizing the Debtor to employ and retain Ashcroft Hanaway as described above, including the retention of such experts and services as will be required to adequately defend the case (including but not limited to forensic accountants and document imaging and management services), effective January 20, 2012, or, alternatively, to find that the terms of the engagement of Ashcroft Hanaway are beyond the bankruptcy estate of the Debtor, and granting the Debtor and Ashcroft Hanaway such other and further relief as this Court deems just and proper.

Respectfully Submitted,

ASHCROFT HANAWAY, LLC

By: /s/ Catherine L. Hanaway

Catherine L. Hanaway, # 41208MO
222 S. Central Avenue, Suite 110
St. Louis, MO 63105
Phone: (314) 863-7001
Fax: (314) 863-7008
chanaway@ashcroftlawfirm.com

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on February 21, 2012, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all counsel of record.

/s/ Catherine L. Hanaway