

Insured's Agreement to Lift Automatic Stay Does Not Violate Cooperation Clause

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The United States District Court for the Eastern District of New York, applying New York law, has held that an insured did not violate an insurance policy's cooperation clause when it agreed, without providing advance notice to the insurer, to lift the automatic bankruptcy stay with respect to certain personal injury actions filed against it. *Admiral Ins. Co. v. Grace Indus., Inc.*, 2009 WL 2222369 (E.D.N.Y. July 23, 2009).

The insured filed for chapter 11 bankruptcy protection in December 2004. At the time of the bankruptcy filing, the insured was a defendant in several personal injury lawsuits. Although those lawsuits were subject to the automatic bankruptcy stay of 11 U.S.C. § 362, the insured agreed to lift the automatic stay in several of the lawsuits on the condition that the plaintiffs agree to restrict their recovery, if any, to the insured's available insurance coverage.

The insurer filed an adversary proceeding in bankruptcy court seeking, among other things, a declaration that the insured violated the policy's cooperation clause by agreeing to lift the stay without providing the insurer with advance notice of this decision. The policy's cooperation clause specified that the insured must "cooperate with [the insurer] in the investigation or settlement of the claim or defense against the 'suit.'" The bankruptcy court concluded that the insured's decision to lift the stay, without notifying the insurer, did not violate the cooperation clause. The insurer appealed to the district court.

On appeal, the district court noted that, to disclaim coverage on the ground of an insured's lack of cooperation, the insurer must show:

- That it acted diligently in seeking to secure the insured's cooperation,
- That the efforts employed by the insurer were reasonably calculated to obtain the insured's cooperation, and
- That the attitude of the insured, after his cooperation was sought, was one of willful and avowed obstruction.

The court observed that the insurer had not alleged that it ever sought the insured's cooperation with respect to the stayed claims and had also failed to show that the insured's attitude was one of "willful and avowed obstruction." The court also opined that the insured did not acknowledge liability or set any recovery amounts and thus did not obstruct the insurer's effort to defend the litigation. Accordingly, the court affirmed the bankruptcy court's conclusion that the insured had not violated the policy's cooperation clause.