

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re : Chapter 11
:
BLITZ U.S.A., INC., *et al.*, : Case No. 11-13603 (PJW)
:
Debtors. : Jointly Administered
:
: Related to Docket No. 574, 618, 695
: Hearing Date: September 11, 2012, at 9:30 a.m.
: Objection Deadline: September 10, 2012,
: by 12:00 Noon

**LIMITED OBJECTION AND RESERVATION OF RIGHTS OF
LIBERTY SURPLUS INSURANCE CORPORATION, ET AL. TO DEBTORS'
MOTION PURSUANT TO 11 U.S.C. §§ 105(a), 363, AND 365 AND
BANKRUPTCY RULES 2002, 6004, AND 6006 FOR (I) ENTRY OF AN
ORDER (A) ESTABLISHING BIDDING AND AUCTION PROCEDURES
RELATED TO THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS;
(B) ESTABLISHING PROCEDURES FOR APPROVAL OF RELATED BID
PROTECTIONS; (C) SCHEDULING AN AUCTION AND SALE HEARING;
(D) ESTABLISHING NOTICE PROCEDURES FOR DETERMINING CURE
AMOUNTS FOR EXECUTORY CONTRACTS AND LEASES TO BE ASSIGNED;
(E) GRANTING RELATED RELIEF; AND (II) ENTRY OF AN ORDER
(A) APPROVING THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS'
ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES
AND INTERESTS; (B) AUTHORIZING THE ASSUMPTION AND ASSIGNMENT
OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES**

Liberty Surplus Insurance Corporation and Liberty Insurance Underwriters Inc.,
(and possibly other related insurance companies, collectively, "Liberty"), by their attorneys, sets
forth their limited objection and reservation of rights to *Debtors' Motion Pursuant To 11 U.S.C.*
§§ 105(a), 363 And 365, And Bankruptcy Rules 2002, 6004, And 6006 For (I) Entry Of An Order
(A) Establishing Bidding And Auction Procedures Related To The Sale Of Certain Of The
Debtors' Assets; (B) Establishing Procedures For Approval Of Related Bid Protections;
(C) Scheduling An Auction And Sale Hearing; (D) Establishing Notice Procedures For



Determining Cure Amounts For Executory Contracts And Leases To Be Assigned; (E) Granting Related Relief; And (II) Entry Of An Order, (A) Approving The Sale Of Substantially All of The Debtors' Assets Free And Clear Of All Liens; Claims, Encumbrances And Interests; And (B) Authorizing The Assumption And Assignment Of Certain Executory Contracts And Unexpired Leases (the "Sale Motion"), as follows:

Background¹

1. Without concession as to such matters, and fully reserving all of its rights and defenses, Liberty issued certain insurance policies for various policy periods (collectively, the "Policies") that may provide insurance coverage in connection with claims asserted against Debtors. Liberty is a party to certain other agreements relating to the Policies (together with the Policies, collectively, the "Liberty Agreements"). The Liberty Agreements are executory contracts within the meaning of section 365 of the Bankruptcy Code.

2. The Liberty Agreements prohibit their assignment without the express consent of Liberty. Moreover, applicable non-bankruptcy law precludes the assignment of insurance policies, other than pursuant to certain confirmed plans, without the consent of the insurer. As a result, the Liberty Agreements cannot be assigned without Liberty's consent.²

¹ Capitalized terms not otherwise defined herein refer to the terms as defined in the Sale Motion and/or the Asset Purchase Agreement.

² See 11 U.S.C. § 365(c)(1)(A)(debtor cannot assume or assign an executory contract if applicable law excuses non-debtor from accepting performance from entity other than debtor); *Employers Mut. Liab. Ins. Co. v. Michigan Mut. Auto. Ins. Co.*, 300 N.W. 2d 682, 684-85, 101 Mich. App. 697, 702 (Mich. Ct. App. 1980)(assignment in violation of anti-assignment clause violated coverage under policy); *Allied Corp. v. Frola*, 1992 WL 281114 (D.N.J. 1992)(Wolin, J.)(finding that policies were not unilaterally assignable either as executory contracts or as non-executory contracts and discussing authority); *Century Indem. Co. v. Aero-Motive Co.*, 318 F. Supp. 2d 530, 537-38 (W.D. Mich. 2003) ("The law . . . cannot impose a contractual insurance relationship between an insurer and a stranger to the insurance contract.") (internal quotation marks omitted and quoting *General Accident Ins. Co. v. Superior Court*, 64 Cal. Rptr. 2d 781, 788, 55 Cal. App. 4th 1444, 1454-55 (Cal. Ct. App. 1997)), *aff'd*, 2005 U.S. App. LEXIS 24683 (6th Cir. Nov. 17, 2005); *Henkel Corp. v. Hartford Accident & Indem. Co.*, 62 P.3d 69, 75, 129 Cal. Rptr. 2d, 828, 836 (Ca. 2003) ("If both assignor and assignee were to claim the right to defense, the insurer might effectively be forced to undertake the burden of defending both parties. In view of the potential for such increased burdens, it is reasonable to

3. On November 9, 2011 (the “Filing Date”), Debtors filed their voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code (the “Bankruptcy Code”).

4. On June 29, 2012, Debtors’ filed the Sale Motion, seeking entry of an Order approving, *inter alia*: (i) certain bidding and auction procedures; and (ii) the sale of substantially all of Debtors’ assets free and clear of liens, claims, encumbrances and other interests.

5. On August 23, 2012, Debtors filed a *Notice Of “Stalking Horse” Bidder And Hearing To Approve Proposed Bidding Protections With Respect To Stalking Horse Bidder* (the “Notice”). Along with the Notice, Debtors filed an Asset Purchase Agreement by and between certain Debtors and Scepter Holdings, Inc. (“Purchaser”) (the “Asset Purchase Agreement”), pursuant to which Debtors propose to sell substantially all of their assets to Purchaser, subject to higher and better offers.

6. The Asset Purchase Agreement states that insurance policies will not be transferred to Purchaser as part of the sale transaction. Specifically, section 2.2(m) of the Asset Purchase Agreement defines Retained Assets to include:

(m) all insurance policies or rights to proceeds thereof to the assets, properties, business or operations of Sellers, except as provided in Section 2.1(l).

Asset Purchase Agreement, § 2.2(m).

7. Pursuant to the Asset Purchase Agreement, however, the proposed treatment of insurance proceeds is less than clear. Indeed, although section 2.2(m) states that insurance

uphold the insurer’s contractual right to accept or reject an assignment.”). *Touchet v. Guidry*, 550 So. 2d 308, 313 (La. App.3d Cir. 1989) (“[S]ince insurance is a personal contract between the insurer and the named insured and on behalf of others specifically provided for, coverage terminates when contract is assigned or transferred without the consent, permission, and approval of both contracting parties.” (citations omitted)).

proceeds will be retained by Debtors, an exception was made for certain insurance proceeds that relate to the Purchased Assets. Section 2.1(l) defines Purchased Assets to include:

(l) all rights to insurance proceeds to the extent related to the Purchased Assets, including but not limited to the Purchase Real Property.

Asset Purchase Agreement, 2.1(l). Reading sections 2.1(l) and 2.2(m) together is ambiguous, at best.

Limited Objection And Reservation Of Rights

8. As an initial matter, to the extent that Debtors intend to assign the Liberty Agreements as part of this transaction, they should expressly clarify their intentions to do so, and how they propose to provide Liberty with adequate notice of: (i) the proposed treatment of the Liberty Agreements; (ii) the identity of the new insured under the Liberty Agreements; and (iii) whether Liberty is being forced to assume any different, greater, additional or competing risks than for which they originally bargained for or for which they were paid a negotiated premium. Until such clarification is provided, Liberty will be prejudiced because it will not be able to make an informed decision on whether its rights and interests under the executory Liberty Agreements are being affected by the proposed sale transaction. This fundamental deficiency also precludes a finding of adequate notice as required under section 363(a) of the Bankruptcy Code, *see* 11 U.S.C. §§ 102(1); 363(a), and the lack of meaningful notice of an adverse effect on its rights and interests would deprive Liberty of due process.

9. Notwithstanding the anti-assignment provisions expressly set forth in the Liberty Agreements, the Sale Motion and Asset Purchase Agreement indicate that insurance proceeds from the Liberty Agreements may be assigned to Purchaser without Liberty's consent. Liberty submits this Limited Objection in order to clarify Debtors' intentions with respect to the assignment of insurance proceeds and, to the extent that Debtors intend to assign such proceeds

without Liberty's consent, to advise the parties, as well as this Court, of Liberty's objections to any such assignment.

10. The Asset Purchase Agreement is ambiguous as to which insurance proceeds will purportedly be transferred to Purchaser as part of this sale transaction, and it is entirely unclear as to which proceeds would be "related to the Purchased Assets." As such, once the sale is consummated, Liberty will not be in a position to determine which entity is entitled to proceeds on any claim and may be subjected to the assertion of competing claims by Purchaser, who is not a named insured under the Liberty Agreements, and Debtors and/or their successors under any confirmed plan of reorganization or liquidation.

11. In addition to the ambiguity as to which entity is entitled to claim rights to the finite amount of proceeds that may be available under the Liberty Agreements, neither the Asset Purchase Agreement nor the Sale Motion make any provision to ensure that (i) any payments of proceeds to Purchaser will effectively reduce the aggregate limits available under the Liberty Agreements; and (ii) Purchaser or Debtors, as applicable, will be responsible for satisfying the insured's various continuing reciprocal contractual obligations *vis-a-vis* the respective claims including, without limitation, the payment of any deductibles or self-insured retention relating to any such claims.

12. Accordingly, Liberty submits this Limited Objection in order to obtain adequate protection of its interests in the Liberty Agreements, as well as formal assurances that:

(i) neither the Liberty Agreements nor any rights thereunder are being assumed, assigned or otherwise transferred in connection with this proposed sale transaction; (ii) the relief requested in the Sale Motion will not violate Liberty's contractual rights and/or release Debtors from any ongoing reciprocal contractual obligations under the Liberty Agreements; (iii) the effect of this

sale transaction will not impair, degrade or otherwise prejudice Liberty's rights under the Liberty Agreements or otherwise by forcing it to assume different, greater, additional and/or competing risks than it originally bargained for, or for which it was paid a negotiated premium; and (iv) any insurance proceeds that have been assigned to any asset purchaser are explicitly and specifically identified prior to the hearing on the Sale Motion and that Debtors and any asset purchaser will expressly agree that payment of such proceeds will be made in accordance with the terms and conditions of the Liberty Agreements.

13. In the event that any of the Liberty Agreements or any rights thereunder will be assigned, transferred or otherwise affected in connection with this proposed sale transaction, Liberty objects and reserves all rights to expressly consent to any such assignment or transfer as well as to insist on Debtors' or any asset purchaser's full compliance with the requirements of sections 365(b) and 365(f) of the Bankruptcy Code and/or all terms of the Liberty Agreements.

14. Moreover, in the event that the Liberty Agreements are identified as executory contracts that will be assumed and assigned in connection with this proposed sale transaction or in connection with any confirmed plan, Liberty reserves its rights to assert claims for any presently unliquidated amounts for any obligations due and owing under the Liberty Agreements, including, without limitation, the right to receive adequate assurance of future performance, whether or not such obligations may be considered as cure costs. Provided that Liberty expressly consents in the first instance, any and all obligations of Debtors, as the insureds under the Liberty Agreements, must be expressly assumed by any asset purchaser in connection with any assumption, assignment and/or transfer of the Liberty Agreements or any rights thereunder.

Reservation of Rights

15. Liberty expressly reserves, and does not waive, any and all of its rights, claims, defenses, limitations and/or exclusions in connection with its contractual rights, and Debtors' contractual obligations, under the Liberty Agreements, applicable law or otherwise. Liberty further reserves all rights to assert any and all such rights, claims, defenses, limitations and/or exclusions in any appropriate manner or forum whatsoever (including, without limitation, any of its rights to have any non-core matter relating to the interpretation of its contractual rights and Debtors' contractual obligations adjudicated by the United States District Court). Nothing contained in this Limited Objection shall be deemed to expand any coverage that may otherwise be available under any insurance policies or any rights to payment under any settlements.

16. Liberty further reserves all of its rights to raise any issues contained in this Limited Objection and any other related issues in any procedurally-appropriate contested matter and/or adversary proceeding including, without limitation, (i) objections to confirmation of any plan; (ii) a separate adversary proceeding requesting any appropriate declaratory and/or injunctive relief; (iii) or an objection to any subsequent motion seeking approval of an asset sale to any prospective asset purchaser with respect to any contractual rights that may be adversely affected by the Sale Motion or the confirmation of any plan.

17. Liberty further reserves all of its rights to object to any claim for coverage under any of the Liberty Agreements and/or any claim for payment and/or to seek declaratory and/or injunctive relief to the extent that treatment of its contractual rights, and Debtors' contractual obligations, under the Liberty Agreements violates any terms or conditions of any of the Liberty Agreements or gives rise to any claims and/or defenses on behalf of Liberty.

18. Nothing in this Limited Objection shall be construed as an acknowledgment that any of the Liberty Agreements cover or otherwise apply to any claims, losses or damages on account of any claims or otherwise, or that any such claims or causes of action are eligible for payment. Liberty reserves the right to seek an adjudication that Debtors, or any administrator or trustee appointed pursuant to a plan, or any asset purchaser, have waived or forfeited any available coverage under the Liberty Agreements.

19. Liberty reserves the right to join in any objection filed by any other party.

WHEREFORE, Liberty respectfully requests that, in the event the Liberty Agreements or any rights or proceeds thereunder are sought to be assumed, assigned or otherwise transferred by Debtors in connection with this proposed sale transaction or otherwise, this Court (i) condition any such assumption, assignment and/or transfer of the Liberty Agreements or any rights thereunder on first receiving Liberty's express consent thereto, on Liberty being provided with adequate protection of its interests in the Liberty Agreements, and on Debtors' or any asset purchaser's full compliance with the requirements of sections 365(b) and 365(f) of the Bankruptcy Code, especially with respect to any presently unliquidated obligations due and owing under the Liberty Agreements; and (ii) grant Liberty such other and further relief as may be just.

Dated: September 10, 2012

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By: /s/ John D. Demmy

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CERTIFICATE OF SERVICE

John D. Demmy hereby certifies that, in addition to the notice and service provided through the Court's CM/ECF system, true and correct copies of the foregoing *Limited Objection And Reservation Of Rights Of Liberty Surplus Insurance Corporation, Et Al. To Debtors' Motion Pursuant To 11 U.S.C. §§ 105(A), 363, And 365 And Bankruptcy Rules 2002, 6004, And 6006 For (I) Entry Of An Order (A) Establishing Bidding And Auction Procedures Related To The Sale Of Substantially All Of The Debtors' Assets; (B) Establishing Procedures For Approval Of Related Bid Protections; (C) Scheduling An Auction And Sale Hearing; (D) Establishing Notice Procedures For Determining Cure Amounts For Executory Contracts And Leases To Be Assigned; (E) Granting Related Relief; And (II) Entry Of An Order (A) Approving The Sale Of Substantially All Of The Debtors' Assets Free And Clear Of All Liens, Claims, Encumbrances And Interests; (B) Authorizing The Assumption And Assignment Of Certain Executory Contracts And Unexpired Leases*, were served on September 10, 2012, upon the parties listed below in the manner indicated and on the parties identified on the attached service list all via U.S. first class mail, postage prepaid.

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