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Upon the declaration of Chapter 11 bankruptcy, a debtor's property becomes part of an estate under the exclusive jurisdiction of the bankruptcy court and is immediately protected from the collection efforts of creditors by the automatic stay.[1] The debtor's property, his assets, will then be distributed to creditors as per a court-approved plan designed to satisfy two goals: to be as fair as possible to all creditors and, at the same time, to give the debtor a chance at a "fresh start" with an opportunity to emerge from bankruptcy in a state of financial health and an ability to resume business operations.[2]

In order to accomplish those goals, the Bankruptcy Code's definition of a debtor's "property" is designed to be as inclusive as possible. "Property of the estate" is defined in section 541 of the Code as "all legal or equitable interests of the debtor in property of the estate as of the commencement of the case."[3] It encompasses "all kinds of property, including both tangible and intangible property."[4] Subsection (a) contains six sections which clarify the breadth of the definition of property by including future assets as proceeds or profits from property of the estate, and any property interest that the estate acquires after commencement of the case.[5] In contrast, subsection (b) lists only five very narrowly tailored exceptions to the property definition including, for example, an ex-

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1. 11 U.S.C. § 362(a) (1998) provides that once an entity files for bankruptcy, that filing "operates as a stay, applicable to all entities." As per § 362(a)(3) the stay applies to "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate."

2. 15 COLLIER ON BANKRUPTCY P 541.01 (Lawrence P. King ed., 15th ed. 2004).

3. 11 U.S.C. § 541(a)(1) (1994).

4. Adelphia Comms. Corp. v. Assoc. Elec. & Gas Ins. Serv. (*In re* Adelphia Comms. Corp.), 285 B.R. 580, 590 (Bankr. S.D.N.Y. 2002), *vacated by* 298 B.R. 49 (S.D.N.Y. 2003).

5. 11 U.S.C. § 541(a).

ception for certain interests in "liquid or gaseous hydrocarbons."[6] "Because of the broad language in subsection (a), anything not specifically excluded under subsection (b) should be included as property of the estate."[7]

It is well established that insurance policies paid for by the corporation are normally considered property and, therefore, part of a debtor's estate in bankruptcy proceedings.[8] But the issue raised in the ongoing Chapter 11 case of Adelphia Communications Corp. was whether unrealized directors and officers ("D&O") insurance policy *proceeds* should also be considered property of the estate.[9]

Generally, there is no need in bankruptcy cases to distinguish between an insurance policy and its proceeds.[10] A debtor corporation's property interest in the proceeds of a typical insurance policy is a given because the debtor who holds the policy is also usually the beneficiary of its proceeds.[11] But in the case of a D&O policy, the distinction between the policy and the proceeds must be explored because while the debtor corporation owns the policy, the proceeds are paid to the directors and officers themselves as individuals.[12] Thus, some courts have held, unlike the policy, which is clearly the property of the debtor corporation and so part of the bankruptcy estate, that the proceeds of a D&O policy should not be considered

6. 11 U.S.C. § 541(b)(3).

7. 15 COLLIER ON BANKRUPTCY P 541.01, *supra* note 2.

8. *See In re* Adelphia Comms. Corp., 298 B.R. 49, 52-53 (Bankr. S.D.N.Y. 2003) (citing MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89 (2d Cir. 1988) and *In re* La. World Exposition, 832 F.2d 1391, 1399 (5th Cir. 1987)).

9. A D&O insurance policy is

> commonly obtained to afford officers and directors protection from adverse claims, and is often included in executive benefit packages as an incentive for employment. In general terms, the typical D&O Policy . . . provides liability coverage directly to the officers and directors of a corporation for claims asserted against them for wrongful acts, errors, omissions, or breaches of duty. Frequently, legal expenses are included in this coverage, with defense costs often paid on an ongoing basis . . . . [P]ayment under the policy is normally provided on a first-come, first-served basis and each such payment reduces the total amount of coverage available to pay claims.

Ochs v. Lipson (*In re* First Cent. Fin. Corp.), 238 B.R. 9, 13 (Bankr. E.D.N.Y. 1999).

10. *See* Morris v. Nat'l Union Fire Ins. Co. (*In re* Eastwind Group), 303 B.R. 743, 746.

11. *Id.* at 746.

12. *Id.* at 746-47.

in the same light.[13] Complicating matters is the fact that some D&O policies are designed not only to afford financial protection directly to the directors and officers, but to also offer protection to the debtor corporation.[14] This protection can cover payouts a corporation might be forced to make, for example, for violations of securities laws (sometimes called "entity coverage") and can also include coverage that indemnifies the corporation for payments it might make to its directors and officers for matters covered in its charter or by-laws (sometimes called "indemnification coverage").[15] Thus, in these cases, the question of who has an interest in the proceeds — the debtor corporation or the directors and officers, or both — becomes blurred, thus also blurring the question of whether the proceeds from that type of D&O policy should be considered property of the bankruptcy estate.[16]

In the *Adelphia* case, the Bankruptcy Court of the Southern District of New York held that the D&O policy proceeds were property of the estate.[17] In a comprehensive decision, the court not only proposed a method by which to analyze such policies, but also discussed the far-reaching policy implications of finding that D&O insurance policy proceeds were not property of the estate, thus

13. *First Cent. Fin. Corp.* 238 B.R. at 16 (referring to La. World Exposition v. Fed. Ins. Co. (*In re* La. World Exposition), 832 F.2d 1391, 1401 (5th Cir. 1987): "Differentiating liability coverage under D&O policies from other forms of liability insurance, where the debtor is both the name insured and a direct beneficiary of the policy, the *Louisiana World* court held that D&O policies more closely resembled situations in which the owner of an insurance policy assigns the proceeds to a third party. These proceeds belong to the assignee or beneficiary and not to the policy owner's bankruptcy estate.")

14. *Id.* at 17.

15. *Eastwind Group*, 303 B.R. at 746.

16. One might wonder why D&O policies which benefit both the debtor corporation and the directors and officers cannot be bifurcated, with only that part benefiting the director being included as property of the estate. The answer can be found in the nature of D&O policies as "wasting policies," *In re* Allied Digital Technologies Corp., 306 B.R. 505, 509, (Bankr. D. De. 2004). The policies are basically administered on a first-come, first-serve basis. Also, "D&O Policies are subject to an 'aggregate limit,' which includes all payments made by the Insurers on behalf of the insureds. Each dollar paid out of the D&O Policies for attorney's fees, settlements, judgments or indemnification on behalf of any insured person leaves one dollar less for other payments under the D&O Policies." Adelphia Comms. Corp. v. Assoc. Elec. & Gas Ins. Serv. (*In re* Adelphia Comms. Corp.), 302 B.R. 439, 444 (Bankr. S.D.N.Y. 2003). The policies are basically administered on a first-come, first-serve basis.

17. *Adelphia*, 285 B.R. at 588.

removing them from the protection of the automatic stay.[18] The District Court for the Southern District, however, overturned this finding and remanded the question to the bankruptcy court with instructions to consider alternative means to bring the proceeds under the protection of the court.[19] The district court's decision virtually ignored the bankruptcy court's analysis.[20] Instead, its decision rested on an assumption about the timing of policy claims that seems to contradict the very definition of property of the estate.[21]

Adelphia Communications Corporation ("ACC") was a small family-owned cable TV company, founded in a small Pennsylvania town by the son of Greek immigrants, that grew into one of the largest communications corporations in the country.[22] As quickly as ACC rose, however, it fell due to a virtually nonexistent division between the company's property and the property of its directors.[23] Corporate jets were used for shopping trips, a golf course was built, and millions of dollars were invested in a financially strapped pro hockey team of which one of the directors happened to be a fan.[24] According to the Securities and Exchange Commission, ACC's collapse represents "one of the most extensive financial frauds ever to take place at a public company."[25]

In March 2002, ACC and its subsidiary, Adelphia Business Solutions ("ABIZ") filed for Chapter 11 bankruptcy.[26] Four members of the Rigas family, who founded the company, and two other managers ("the Rigas Insureds") resigned from the Board of Directors of both ACC and ABIZ and were subsequently arrested under a twenty-four-count indictment that included charges of conspiracy, securities fraud, wire fraud and bank fraud.[27] They were also sued by the Securities and Exchange Commission, which sought dis-

18. *Id.* at 598-99.

19. *Adelphia*, 298 B.R. at 52-53.

20. *Id.*

21. *See id.*

22. For a recap of the collapse of ACC and ABIZ, see Roger Lowenstein, *The Fall of the House of Rigas: How Powerlust and Boom Times Led a Small-Time Cable Business to Family Scandal and Financial Ruin*, N.Y. TIMES MAG. Feb. 1, 2004, at 27.

23. *Id.* at 29.

24. *Id.*

25. *Id.*

26. *Adelphia*, 285 B.R. at 588.

27. *Id.*

gorgement of allegedly ill-gotten gains and civil monetary penalties.[28]

In Bankruptcy Court, a total of five motions were brought by the Rigas Insureds and the three insurance companies who provided their D&O policies.[29] Both parties requested relief from the automatic stay imposed by the bankruptcy court in order to pursue legal action concerning the D&O policies.[30] The Rigas Insureds wanted to make claims against the policies to recoup defense costs.[31] If the three insurance companies ("the Insurers") resisted, the Rigases also wanted to be able to proceed with litigation to force them to pay.[32] The Insurers, meanwhile, disclaimed liability for what they claimed was the Rigas Insureds' "looting" of the two companies and sought a declaratory judgment to exempt defense costs from the D&O policies.[33]

ABIZ was not named as party in these actions, but it had a clear interest in the proceedings because its own D&O coverage was tied to ACC's.[34] Prior to its spin-off from ACC, ABIZ purchased a "tail" coverage provision under ACC's D&O policies that would keep it (ABIZ) covered until December 31, 2005.[35] If either the Insurers or the Rigas Insureds were successful in lifting the stay, the D&O policies would be, respectively, either rescinded or drained, and the efforts by ABIZ to obtain a "fresh start" under Chapter 11 protection would be endangered.[36]

As a threshold matter to deciding the applicability of the stay to the various claims on the D&O policies, the Bankruptcy Court had to first determine whether the D&O Policy proceeds were property of the estate, and as such were subject to the protection of the stay.[37] The court concluded that "whether the proceeds of a D&O liability insurance policy is property of the estate must be ana-

28. *Id.* at n.10.
29. *Adelphia*, 285 B.R. at 583.
30. *See In re* Adelphia Comms. Corp., 298 B.R. 49.
31. *Id.* at 51.
32. *Adelphia*, 285 B.R. at 584.
33. *Id.* at 589.
34. *Adelphia*, 302 B.R. at 444-45.
35. *Id.* at 445.
36. *Id.*
37. *Adelphia*, 285 B.R. at 589.

lyzed in light of the facts of each case."[38] The court went on to propose two contrasting categories into which D&O insurance policies might fall.[39] These categories depended on how much the policies might benefit the debtor corporation itself, as opposed to the directors and officers.[40] The court noted that if the debtor corporation held a policy that was exclusively devoted to covering the directors and officers, then the proceeds were independent from the corporation and so were not to be considered property of the corporation.[41] But if the policy benefited or covered the corporation as well, then the proceeds could be considered property of the bankruptcy estate.[42] In other words, where the debtor had "a material interest in the proceeds of D&O policy for its own economic exposure — e.g., by way of reimbursement for any indemnification payments it might make, or for 'entity coverage,' satisfying issue obligations on account of securities fraud liability" — then the court recognized the interest of the debtor corporation in the policy proceeds, with the result that the proceeds are held to be property of the estate.[43]

The Insurers argued that the proceeds of the Rigas Insureds' D&O policies provided at least two benefits to the debtor corporation in addition to their officers and directors, and therefore

38. *Id.* (citing *In re* CyberMedica, 280 B.R. 12, 16-17 (Bankr. D. Mass. 2002)).

39. *Adelphia*, 285 B.R. at 591 (citing Homsy v. Floyd (*In re* Vitek), 51 F.3d 530, 535 (5th Cir. 1995); *In re* Leslie Fay Co., 207 B.R. 764, 785 (Bankr. S.D.N.Y. 1997); *In re* Cybermedica, 280 B.R. 12, 16-17 (Bankr. D. Mass. 2002); *In re* Sacred Heart Hosp. of Norristown, 182 B.R. 413, 419-20 (Bankr. E.D. Pa 1995)).

40. *Id.* at 591.

41. *Id.* at 591 n.11.

42. *Id.*

43. *Id.* The Bankruptcy Court suggested a simpler way of looking at the matter when it stated that

> an important factor is whether the estate is worth more with the D&O Policy than without it . . . Here the ACC estate is worth more with the D&O Policy than without it by reason of the entity coverage, and the ABIZ estate is worth more with the D&O Policy by reason of the amalgam of the entity coverage and the need for the policy itself to secure independent directors. Under the facts of these cases, then, the proceeds of the D&O policies are, like the policies themselves, property of the estate and requests by insureds to draw down on policy proceeds do indeed require motions for relief from the stay.

Id. at 593.

should be considered property of the estate.[44] First, the Insurers argued, the policies provided indemnification coverage, indemnifying the debtor corporations for payments they might make to their directors and officers for matters covered in its charter or bylaws.[45] Second, they provided entity coverage under which the Insurers would make payment for liability to the debtor corporations for violations of the federal security laws.[46]

The bankruptcy court agreed that as per these benefits, the proceeds in this case fell into the "material interest" category and were therefore property of the estate subject to the stay.[47] Nevertheless, the court granted the Rigas Insureds' request for relief from the automatic stay to the extent of permitting the Rigas Insureds to request, and permitting the Insurers to pay up to $300,000 per insured on account of defense costs.[48] Beyond that, however, the court declined to grant relief from the stay for the purpose of either allowing the Rigas Insured more access to their D&O Policies or for allowing either side to pursue D&O related litigation.[49]

The bankruptcy court acknowledged that policy considerations weighed heavily in its ruling that the proceeds were, in fact, part of the estate.[50] The most important of these policy considerations pertained to ABIZ: "the concern is that an excessive drain on D&O Policy proceeds could make a policy itself evaporate, and thereby deprive a debtor[,] trying to reorganize[,] of an asset that it needs to secure independent directors."[51] Maintaining the automatic stay provided the court "with a means to balance the competing needs and concerns" of the parties involved.[52]

44. *Id.* at 592.

45. *Id.*

46. *Id.*

47. *Id.* at 585.

48. *Id.*

49. *Id.*

50. *Id.* at 593.

51. *Adelphia*, 285 B.R. at 592.

52. *Id.* at 593. The court cautioned, however, that its action in limiting access to the D&O Policy in order to protect ABIZ should not be followed in every case, since D&O policies are essentially "a safeguard of officer and director interest and not a vehicle for corporate protection." *Id.* (citing *First Cent. Fin.*, 238 B.R. at 16).

The Rigases appealed the court's decision.[53] They argued that the court erred in finding that the proceeds constituted property of the estate, in staying all litigation related to the D&O insurance policies pursuant to the automatic stay, and in refusing to lift the automatic stay.[54]

The district court vacated the bankruptcy court's decision, holding that the D&O policy proceeds were not property of the estate.[55] The court seemed to sidestep the bankruptcy court's argument that whether the policy proceeds were property depended on whether the interest that the debtor corporation had in them could be classified as a material interest or not.[56] Instead, the court based its holding on an issue the bankruptcy court had not even raised: whether any claims against the indemnification or entity coverage of the D&O policies actually had been filed by the debtor corporation.[57] The court held that since no such claims had yet been made, the interests of the debtor corporation in the policies were more potential than actual, and therefore those policies did not constitute property.[58] "Claiming the debtors now have a property interest in those proceeds makes no sense at this juncture," the court stated.[59] "Such argument would be akin to a car owner with collision coverage claiming he has the right to proceeds simply because there is a prospective possibility that his car will collide with another tomorrow."[60] Since the debtor corporation had not yet made any claims, it had "no cognizable equitable and legal interest in the proceeds," and it was not valid to consider the proceeds to be property of the debtor's bankruptcy estate.[61]

But the court, mindful of the policy considerations raised by the bankruptcy court, noted that its finding that the automatic stay was inapplicable "does not render the bankruptcy court's decision to stay litigation between the Rigases and the insurers necessarily

53. *Adelphia*, 298 B.R. 49.
54. *Id.* at 52.
55. *Id.* at 55.
56. *Id.* at 53-54.
57. *Id.*
58. *Adelphia*, 298 B.R. at 53-55.
59. *Id.* at 53.
60. *Id.*
61. *Id.*

subject to reversal."[62] The court, *sua sponte*, raised the issue of whether a section 105 injunction could be applied to obtain the same ends and remanded for further findings to determine whether the stay under section 362 should be extended pursuant to its section 105 power.[63]

On remand, the bankruptcy court disputed the finding that the D&O proceeds were not property of the bankruptcy estate. The court contended that "certain basic principles of bankruptcy law . . . set the context for [its] factual findings" in the initial case, and that among those principles were the essential pre-petition nature of the definition of property.[64] Again, "property of the estate" is defined in section 541 of the Code as "all legal or equitable interests of the debtor in property of the estate *as of the commencement of the case*."[65] The court stated that the district court's focus on whether any claims actually had been made was inconsistent with section 541 of the bankruptcy code in that the definition of property therein "does not depend on whether enjoyment of the property is contingent or must be postponed."[66] Whether the proceeds were property or not, "is determined as of the commencement of the case and does not depend on post-petition events," such as whether, in this case, the debtor corporation actually makes a claim on the accounts.[67] The court cited a commentator critical of the district court's finding: "Given the pre-petition nature of the policy and the rights derived from it, it is difficult to determine why the [district] court concluded that the debtor did not have any rights under the policy 'yet'. . . . It suggests that whether or not policy proceeds

62. *Id.* at 54.

63. *Id.* at 55. *See also* 11 U.S.C. § 105 (a) (1994):

> The court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action of making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Id.

64. *Adelphia*, 302 B.R. at 444.

65. 11 U.S.C. § 541(a)(1) (emphasis added).

66. *Adelphia*, 302 B.R. at 454 n.38.

67. *Id.*

qualify as estate property hinges on post-petition events, an idea which contradicts traditional analysis."[68]

The district court supported its holdings with a string cite of numerous cases which have held that D&O policy proceeds are not to be considered property of the bankruptcy estate, but none of these cases discussed the fact, raised by the bankruptcy court, that property of the estate should be measured at the time of the commencement of the case.[69] Furthermore, only one of the cases specifically supported the finding by the district court that the classification of proceeds as property of the estate could be made based on the whether any payments have been made "yet" by the debtor corporations that would trigger obligations from the D&O policy.[70] In that single case, *In re First Central Financial Corp.*, the Bankruptcy Court for the Eastern District of New York held that because no claims had yet been filed against the debtor "which would implicate the narrow scope of the Policy's entity coverage" and because no such claims seemed likely to be filed, the debtor corporation could not show that it had an interest in the policy proceeds.[71] The court held that "[i]f entity coverage is hypothetical and fails to provide some palpable benefit to the estate, it cannot be used by a trustee [arguing that the proceeds were property of the estate] to lever himself into a position of first entitlement to policy

68. *Id.* (quoting Mark G. Douglas, *D&O Policy Proceeds Not Estate Property*, 2 BUSINESS RESTRUCTURING REV. 4, 8 (2003)). The Bankruptcy Court also disputed the District Court's suggestion that a § 105 injunction would be appropriate as an alternative means of protecting the D&O policies against depletion. Section 105 is worded in such a way as to appear to give the bankruptcy courts almost limitless powers in what they can do to control bankruptcy proceedings, but the fact is that courts have been wary of its being used to create "new substantive powers." *In re* Flores 291 B.R. 44, 25 (Bankr. S.D.N.Y. 2003). Courts have held that § 105 "does not . . . constitute a roving commission to do equity." United States v. Sutton, 786 F.2d 1305, 1308 (5th Cir. 1986). Nor does it "empower a court to create substantive rights that were otherwise unavailable under the Bankruptcy Code. We do not have 'free floating discretion' as a court of equity to rearrange rights in accordance with our own idiosyncratic view of what is fair and just, however enlightened our view may be." Eddy v. Nat'l Union Fire Ins. Co. of Pittsburg, PA (*In re* Medical Asset Mgmt.) 249 B.R. 659, 664 (Bankr. W.D. PA. 2000). The Supreme Court cautioned that the equitable powers granted to the court "must and can only be exercised within the confines of the Bankruptcy Code." Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988).

69. *Adelphia*, 285 B.R. at 590.

70. *First Cent. Fin. Corp.*, 238 B.R. 17 (1999) (emphasis added).

71. *Id.*

proceeds."[72] This holding, however, has subsequently been criticized by at least one court. In *In re Jasmine* the district court for the District of New Jersey held that the indemnification interest of a debtor corporation in a D&O policy should not be measured by whether claims had actually been made, but by whether the duty itself actually existed. Because, in this case, the debtor corporation's "duty of indemnification was established and not merely speculative . . . [the debtor corporation] had an indemnification interest in the proceeds, and the proceeds are property of the estate and subject to the authority of the trustee under these circumstances."[73]

There is ample case support for the theory that the presence or absence of claims should have no bearing on whether the proceeds should be considered property of the estate. *In re Sacred Heart Hospital of Norristown* held that that the mere existence of entity coverage was sufficient to bring proceeds into the bankruptcy estate, notwithstanding the absence of claims against the debtor corporation.[74] *In re Circle K Corp.* also held that the existence of indemnity

72. *Id.* at 18. Of the other cases cited by the district court, only one, *In re Youngstown Osteopathic Hosp. Ass'n*, 271 B.R. 544, 550 (Bankr. N.D. Ohio 2002), implied that the absence of payments could be an influential factor, but only when considered against the type of coverage afforded by the policy. Where the policy includes indemnification coverage to the corporation, the court held that proceeds are not property of the estate where there is no proof of payments by corporation. However, the court stated that it "makes no legal conclusions regarding *entity* coverage other than to find that YOH had none and that the existence of entity coverage could change this Court's analysis." The other cases cited by the Court as holding that policy proceeds were not part of the estate all relied on other theories and, as a whole, reflected the Bankruptcy Court's holding that such a question should be decided according to the nature of the coverage of the policy in question, and how much that coverage benefited the debtor corporation as opposed to the directors and officers: *In re* La. World 832 F.2d at 1399 (5th Cir. 1987) (holding that the proceeds were not property of the estate because the directors and officers were the only beneficiaries); *In re* CHS Elec., 261 B.R. 538, 541 (Bankr. S.D. Fla. 2001) (holding that where the debtor owns the policies but has no interest in the proceeds, the proceeds are not property of the estate.); *In re* Daisy Sys. Sec. Litig. 132 B.R. 752, 755 (D.N. D. Cal., 1991) (holding that the proceeds were not property "because the officers and directors, not [the debtor corporation], are the primary beneficiaries of the policies."); *In re* Zenith Labs, 104 B.R. 659, 665 (D.N.J. 1989) (holding that "An insurance policy purchased by the debtor is only an asset to the extent that it increases the debtor's worth or diminishes its liabilities. If the policy, although paid for by the debtor, fails to meet this test, it cannot be said to be a debtor asset").

73. *In re* Jasmine, 285 B.R. 119, 128 (D.N.J. 1999).

74. 182 B.R. 413, 419-20 (Bankr. E.D. Pa. 1995).

coverage operated to bring proceeds into the bankruptcy estate, notwithstanding that the debtor had paid any such claims on behalf of principals.[75]

The discussion of whether D&O policy proceeds constitute property of the estate in a bankruptcy proceeding remains an open one. As discussed above, some courts have held that an examination of who would benefit from the proceeds — the debtor corporation or the directors and officers — could be determinative.[76] Other courts have focused on whether the debtor corporation has actually benefited from the policies, or even whether they are likely to benefit.[77] The bankruptcy court in this case added to the discussion the importance of keeping policy considerations in mind, as well as the fact that property of an estate is defined at the time of the bankruptcy petition. In its ruling, the district court had an opportunity to clarify which of these factors, if any, should take priority over the other, and how they might combine to form a workable standard by which D&O policy proceeds might be consistently categorized in bankruptcy proceedings. By ignoring the important issues raised by the bankruptcy court and by concentrating instead on a dubious standard that may even contradict the definition of bankruptcy estate property, the district court, at the very least, failed to move this discussion forward.

75. 121 B.R. 257 (Bankr. D. Ariz. 1991).
76. *See supra* notes 41 & 42.
77. *See supra* text accompanying note 70.