11 U.S.C. § 108
11 U.S.C. § 1107
Insurance
Workers' compensation

Northwest Liberty Insurance Co. v. U & R Express, Inc.
Civ. No. 94-6046-H
In re U & R Express, Case No. 693-62125-psh11

4/25/94 D.Ct. (Hogan, J.) rev. AER unpublished

Liberty Northwest Insurance Company (Liberty) issued a workers compensation policy covering the debtor in possession's (U & R's) workers. American Insurance Credit Corporation (AICCO), a premium finance company, paid the entire annual premium. U & R was to reimburse AICCO on a monthly basis and gave AICCO the authority to cancel the policy should U & R default.

U & R defaulted and AICCO directed Liberty to cancel the policy. On April 20, 1993 Liberty sent notice to U & R that the policy would terminate on May 23, 1993. U & R filed its chapter 11 petition on May 21, 1993 together with a motion for an order extending the policy coverage under § 108(b). The bankruptcy judge granted the motion ruling that the policy coverage was extended under § 108(b) for 60 from the date of the petition.

On appeal, the district court found that U & R did not have a right to cure its default and therefore reversed and held that neither applicable non-bankruptcy law nor any agreement fixed a period which did not expire by the time of the bankruptcy filing and during which U & R had the opportunity to assert a vested right.

PSH ✓
This is AER's decision
& Gary should do
summary & distribute

c-H

& Entered

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
FILED

APR 25 1994

TERENCE H. DUNN, CLERK
BY _____ DEPUTY

NORTHWEST LIBERTY INSURANCE CO.,

Appellant,

v.

Civil No. 94-6046-H
(93-62125-H11)

U & R EXPRESS INC.,

Appellee.

JUDGMENT

The May 26, 1993 order of the bankruptcy court extending workers compensation coverage under the Liberty Northwest Ins. Company policy for 60 days is reversed. This proceeding is remanded to the Bankruptcy Court for further proceedings.

Dated: April 25, 1994

Donald M. Cinnamond, Clerk

by Lea Force
Lea Force, Deputy

JUDGMENT

DOCUMENT NO: _____

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

In re: U & R EXPRESS, INC. an Oregon Corporation Debtor-in-Possession,	Civil No. 94-6046-HO
LIBERTY NORTHWEST INSURANCE CORPORATION, Plaintiff/Appellant, v. U & R EXPRESS, INC., Defendant/Appellee.	ORDER

Appellant U & R Express (U & R) is a debtor-in-possession in a chapter 11 bankruptcy proceeding filed May 21, 1993. This appeal from a bankruptcy judge order concerns a workers compensation insurance policy issued by appellant Liberty Northwest Insurance Company (Liberty). American Insurance Credit Corporation (AICCO), a third party premium finance

company, paid Liberty the entire estimated annual premium[1] for workers compensation coverage on behalf of U & R, and U & R agreed to make monthly payments to AICCO. U & R conferred powers of attorney upon AICCO, granting AICCO the authority to direct Liberty to cancel the policy should U & R default. Appellant's Brief, p. 2.

U & R defaulted, and AICCO directed Liberty to cancel the policy. On April 20, 1993, Liberty sent notice to U & R that the policy would terminate on May 23, 1993. On May 21, 1993, U & R filed a bankruptcy petition along with an ex parte motion for an order extending the policy coverage pursuant to 11 U.S.C. §108(b). The bankruptcy judge issued an Order Preventing Cancellation of Workers' Compensation Insurance (Excerpt of Record, p. 1) on May 26, 1993, allowing Liberty an opportunity to respond at a later time. Liberty filed a motion to reconsider, and the bankruptcy court heard argument on June 8, 1993 (Excerpt, p. 40), and June 14, 1993 (Excerpt, p. 73). On June 21, 1993, the bankruptcy court denied Liberty's motion to reconsider and vacate *nunc pro tunc* the order preventing cancellation of workers' compensation insurance. Excerpt, p. 3. Liberty appeals pursuant to 28 U.S.C. § 158(a).

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[1]The total annual premium is based on the annual payroll paid to employees. It is estimated until the policy is terminated and an audit is performed.

DISCUSSION

The issue on appeal is whether the Bankruptcy Court properly applied 11 U.S.C. § 108(b) in extending the policy coverage. I review questions of law *de novo*. In re Global Western Development Corp., 759 F.2d 724 (9th Cir. 1985).

Section 108(b) provides in relevant part as follows:

> if applicable nonbankruptcy law. . .or an agreement fixes a period within which the debtor. . .may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the latter of-
>
> (1) the end of such period. . . ; or
>
> (2) 60 days after the order for relief.

The benefits of section 108(b) extend to debtors-in-possession as well as trustees. 11 U.S.C. § 1107. The Bankruptcy Court extended the policy coverage 60 days from the date of the bankruptcy filing.

Rights Conferred by the Agreement

U & R contends that its agreement with Liberty provided the right to file a "proof of claim or loss" during the 30-day cancellation period and that this right, because it was cut off by the bankruptcy filing, was sufficient to invoke section 108. Appellee's Brief, pp. 6-7. In essence, U & R's position is that section 108(b) effects up to a sixty-day extension of coverage when a policy that has been canceled is still in

effect at the time of a bankruptcy filing.

In applying section 108(b), however, courts generally have extended only those rights which vested in the debtor prior to the bankruptcy filing. *See, e.g.,* Johnson v. First National Bank of Montevideo, 719 F.2d 270, 278 (8th Cir. 1983) (extension of statutory period for redemption of mortgaged property); In re Sullivan, 128 B.R. 7 (Bktcy.D.Mass. 1990) (extension of contractual right to cure default on insurance policy); In re Econo-Therm Energy Systems Corp., 80 B.R. 137, 140 (Bktcy.D.Minn. 1987) (extension of contractual "grace period" for curing default on insurance policy); In re Marker Eighty, Inc., 69 B.R. 561 (Bktcy.M.D.Fla.1987) (extension of escrow agreement); In re G-N Partners, 48 B.R. 462 (Bktcy.D.Minn. 1985) (extension of option agreement). In all of these cases, the debtor retained the immediate opportunity to assert its right on the date a bankruptcy petition was filed.

Conversely, courts have generally declined to extend coverage when the agreement does not permit the insured to assert a vested right, such as the right to cure a default. *see, e.g.,* In re Sullivan, *supra.* The right to file a claim or proof of loss is distinguishable from the right to cure a default because the right to file a claim depends on a contingent event: the injury of a covered employee. Accordingly, section 108(b) "does not, by itself, extend the insurance coverage." In re Econo-Therm, 80 B.R. at 140.

The legislative history of section 108(b) justifies the condition that a right must vest prior to the bankruptcy filing in order to invoke it. The Senate Judiciary Committee noted:

> Subsections (a) and (b) . . . permit the trustee . . . an extension of time for filing an action or doing some other act that is required to preserve the debtor's rights. . . . Subsection (b) gives the trustee two months to take other actions. . . such as filing a . . . proof of claim or loss (such as an insurance claim). . . . (parenthetical in original).

S.Rep.No. 989, 95th Cong., 2d Sess. 30, *reprinted in*, 1978 U.S. Code Cong. & Admin.News 5787, 5816. The purpose of section 108 is neither to create rights nor to preserve assets. Rather, it was designed to "preserve the debtor's rights." Allowing a debtor-in-possession 60 days to file claims which did not exist at the time a bankruptcy petition was filed may preserve the assets of an estate, but it would do so by creating, rather than preserving, rights. I find, therefore, that the existence of coverage at the time of the bankruptcy filing does not by itself warrant an extension of coverage under 11 U.S.C. § 108(b).

Rights Conferred by Applicable Nonbankruptcy Law

U & R contends that "applicable nonbankruptcy law" gave U & R the right to cure its default and restore coverage, thus invoking section 108(b). Appellee's Brief, pp. 8-13. Section 108(b) allows the debtor-in-possession an additional 60 days

to cure a default if "applicable nonbankruptcy law. . .fixes a period within which the debtor. . . may cure a default. . . and such date has not expired before the date of the filing of the petition. . . ." Where applicable nonbankruptcy law provides that coverage shall be in effect during the option to cure period, the coverage period must be extended to coincide with the extended cure period. *See, e.g.* In re Sullivan, *supra*, p. 2 (extending coverage under section 108(b) where contract provided that coverage would coincide with grace period; declining to extend coverage under other policies where such concurrence of rights is not "afforded by statute.").

An extension of coverage pursuant to section 108(b) must be based on "applicable" nonbankruptcy laws. ORS 746.505, entitled "Cancellation of policy by premium finance company; notice required; effective date of cancellation," applies "[w]hen a premium finance agreement contains a power of attorney enabling the premium finance company to cancel any insurance policy. . . ." ORS 746.505(1). In the case at bar, AICCO caused the policy to be canceled. Therefore, ORS 746.505 applies.

Under ORS 746.505(2), the premium finance company is required to give the insured 10 days' notice of its intent to cancel the policy unless the default is cured within the ten-day period. The premium finance company can cancel the policy after this ten-day period by mailing notice of the

cancellation to the insurer. ORS 746.505(3). U & R had a right to cure its default during this ten-day period; however, the ten-day period lapsed before bankruptcy was filed, making 11 U.S.C § 108(b) inapplicable.

ORS 746.505(3) provides that "the insurance policy shall be canceled as if such notice of cancellation had been submitted by the insured. . . ." Because the insured is an employer in this case, § 656.423, "Cancellation of coverage by employer," becomes applicable. Section 656.423(1) requires the insured to give written notice to the insurer. It does not require the insurer to give notice to the insured employer and does not give the insured any right to cure its default. I find that U & R did not have a right to cure its default or perform a similar act under either ORS 746.505 or ORS 656.423.

U & R argues that ORS 746.485 governs the cancellation procedure. That provision is entitled "Regulation of service charge for premium financing; method of computation; prepayment." It allows the insured to

> . . . prepay the full amount of the premium finance agreement in full at any time before the due date of the final payment. In such event the unearned interest shall be refunded. The amount of any such refund shall be the total amount of interest earned to the installment date nearest the date of payment, computed by applying the actuarial method based on annual percentage rate set forth on the premium finance agreement.

U & R contends that it had the right to pay the full amount of the premium at any time up to the effective date of cancellation, and that payment in full would create "an

implied obligation for the premium finance company to rescind the cancellation." Appellee's Brief, p. 14. ORS 746.485, however, allows an insured to recover interest charges by paying the premium in full. The statute explicitly contemplates payment "before the due date of the final payment." When a policy has been canceled and the insured has no right to cure its default, there is no final payment due. ORS 746.485, therefore, does not apply to the facts at bar.

U & R contends cancellation in this case was governed by ORS 656.427, "Termination of guaranty contract or surety bond liability *by the insurer*." Appellee's Brief, p. 8-12. Under ORS 746.505, however, "the insurance policy shall be canceled as if such notice of cancellation had been submitted by the insured. . . ." ORS 656.427 is, therefore, inapplicable.

I find that cancellation of the insurance policy was governed by ORS §§ 746.505 and 656.423 and that U & R did not have a right to cure its default or do a similar act under either provision. Therefore, neither applicable nonbankruptcy law nor an agreement provided a basis for extending coverage under section 108(b).

CONCLUSION

Neither applicable nonbankruptcy law nor any agreement fixed a period which did not expire by the time of the bankruptcy filing and during which U & R had the opportunity to assert a vested right. Therefore, the May 26, 1993 order

of the bankruptcy court extending workers compensation coverage under the Liberty Northwest Insurance Company policy for 60 days is reversed. This proceeding is remanded to the Bankruptcy Court for further proceedings consistent with this order.

DATED this 20th day of April, 1994

/s/ Michael L. Hogan

UNITED STATES DISTRICT JUDGE