IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

LAWRENCE P. CIRKA, EDWIN M. CRAWFORD, ROBERT N. ELKINS, KENNETH M. MAZIK, ROBERT A. MITCHELL, CHARLES W. NEWHALL, III, TIMOTHY F. NICHOLSON, JOHN L. SILVERMAN and GEORGE H. STRONG,	:	
Plaintiffs,	:	
v.	:	**C.A. No. 20250-NC**
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,	:	
Defendant.	:	

MEMORANDUM OPINION

Date Submitted: October 21, 2003
Date Decided: August 6, 2004

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NOBLE, Vice Chancellor

This case involves a dispute over insurance coverage under two directors' and officers' liability insurance policies (the "Policies") issued by Defendant National Union Fire Insurance Company of Pittsburgh, PA ("National Union" or the "Defendant") and purchased by Integrated Health Services, Inc. ("IHS," together with its subsidiaries, the "Debtors"). Plaintiffs Lawrence P. Cirka, Edwin M. Crawford, Kenneth M. Mazik, Robert A. Mitchell, Charles W. Newhall III, Timothy F. Nicholson, John L. Silverman, George H. Strong (collectively, the "non-Elkins Plaintiffs"), and Robert N. Elkins ("Elkins") (together with the non-Elkins Plaintiffs, the "Plaintiffs"), as insureds under the Policies, are seeking coverage for potential liability arising out of a lawsuit (the "Underlying Action")[1] by the Official Committee of Unsecured Creditors of IHS (the "Committee"). In that lawsuit, the Committee alleges that the Plaintiffs (defendants in the Underlying Action) breached various fiduciary duties owed to IHS in their approval of certain compensation arrangements.

National Union has taken the position that coverage is excluded under the "Insured v. Insured" exclusion (the "IVI Exclusion") of the Policies. National Union argues that in bringing the Underlying Action, the Committee has necessarily brought an action "on behalf of" the debtor in possession of IHS (the "Debtor in Possession"). The Plaintiffs contend that the Underlying Action was not brought "on behalf of" the Debtor in Possession, but, instead, "on behalf of"

[1] Complaint, Official Comm. of Unsecured Creditors of Integrated Health Servs., Inc. v. Elkins, C.A. No. 20228 (Del. Ch. filed Apr. 2, 2003) ("Underlying Action Complaint"), *submitted in* Transmittal Aff. of Tiffany L. Geyer ("Geyer Aff.").

the estate of Debtors (the "Estate"). Alternatively, the Plaintiffs argue that the Committee was acting as a trustee in bringing the Underlying Action and, thus, the Underlying Action falls within an exception to the IVI Exclusion (the "Trustee Exception").

In this decision on Plaintiffs' and Defendant's Cross-Motions for Partial Summary Judgment, I conclude that the Committee's action was a derivative action brought on behalf of the Estate only and that the Plaintiffs are not deprived of coverage under the Policies by the IVI Exclusion. I thus do not reach the Plaintiffs' Trustee Exception argument.

I. FACTUAL AND PROCEDURAL BACKGROUND

The relevant factual background is not in dispute.

A. The Policies

The Plaintiffs are all current or former directors of IHS. IHS, prior to filing for bankruptcy, operated a large chain of nursing homes. Consistent with 8 *Del. C.* § 145(g), § 5.8 of IHS's bylaws allowed IHS to "purchase and maintain insurance on behalf of any person who is or was a director [or] officer . . . of [IHS] . . . against any liability asserted against him or her and incurred by him or her in any such capacity, . . ."[2]

Pursuant to this bylaw provision, IHS purchased two insurance policies. The first, a directors' and officers' policy (the "D&O Policy"), provided $35 million in primary coverage. The second, an excess insurance policy (the "XS

[2] Aff. of Thomas Hall in Supp. of Mot. for Partial Summ. J. ("Hall Aff.") Ex. F.

Policy"), provided a limit of liability of $15 million excess of $75 million subject to the exclusions of the D&O Policy. Both policies covered claims made from April 4, 1999 to April 4, 2001.[3] The Plaintiffs are all insureds under the Policies.

The Policies provide coverage for the "Loss of each and every Natural Person Insured(s) arising from a Claim . . . for any actual or alleged Wrongful Act in their respective capacities as Natural Person Insured(s), except when and to the extent that the Company has indemnified the Natural Person Insureds."[4] This

[3] Both policies are "claims made" policies. Thus, in examining whether exclusions under the policies apply, I must analyze the relation of the exclusion and the claim at the time the claim was made. *See Cigna Ins. Co. v. Gulf USA Corp.*, 1997 WL 1878757, at *3 (D. Idaho Sept. 11, 1997) ("Under a claims made policy, the insured v. insured exclusion is triggered at the time the claim is made."). Accordingly, I do not reach arguments concerning recent approval of a plan of liquidation.

[4] "Loss" in the Policies is defined to include damages, judgments, settlements, and defense costs. It excludes civil or criminal fines imposed by law, punitive damages, and taxes. "Natural Person Insured" means, in the context of this case, any director or officer. "Claim" includes a civil proceeding for monetary relief commenced by service of a complaint. "Wrongful Act" includes the breaches of duty alleged in the Underlying Action. Finally, "Company" includes IHS and its subsidiaries, as well as the Debtor in Possession if a bankruptcy proceeding is initiated.

National Union argues that since Elkins entered into an agreement by which the monetary damages for which he may be found liable is limited to coverage under the Policies, he cannot be said to be subject to a "Loss" as defined in the Policies. National Union relies on language excluding from "Loss" "any amount for which the Insureds are not financially liable or which are without legal recourse to the Insureds." This language is simply inapplicable here. While Elkins may be exonerated from any liability from claims which exceed the amount paid under the Policies, he is not exonerated from all liability for those claims. That is, while National Union may be the sole source to which the Committee may look for recovery, Elkins is still very much a defendant in these claims and subject to judgment against him. In other words, Elkins was not exonerated from all liability; rather, he was exonerated from liability exceeding liability covered under the Policies.

coverage, however, is subject to certain exclusions listed in section 4 of the D&O Policy.[5]

Section 4(i) of the D&O Policy is the IVI Exclusion:

> The Insurer shall not be liable to make any payment for Loss in connection with a Claim made against an Insured: (i) *which is brought by or on behalf of any Insured or the Company*; or which is brought by any security holder or member of the Company, whether directly or derivatively, unless such security holder's or member's Claim is instigated and continued totally independent of, and totally without the solicitation of, or assistance of, or active participation of, or intervention of, any Director or Officer or the Company;. . .[6]

That section continues with the Trustee Exception:

> [T]his exclusion shall not apply to: (4) in any bankruptcy proceeding by or against the Named Corporation or any Subsidiary thereof, any Claim brought by the Examiner or Trustee of the Company, if any, or any assignee of such Examiner or Trustee.

Company is defined to include, in the event of a bankruptcy proceeding, the Debtor in Possession. Thus in a bankruptcy proceeding, if any action is brought by a person or an entity other than an Examiner or Trustee on behalf of the Debtor in Possession, the IVI Exclusion excludes coverage.

B. IHS's Bankruptcy and Formation of the Committee

Due to changes to the Medicare payment system caused by the Balanced Budget Act of 1997, IHS's business suffered and IHS eventually commenced a voluntary proceeding under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy

[5] The XS Policy incorporates the terms, conditions, exclusions, and limitations of the D&O Policy.

[6] Emphasis added.

Court") on February 2, 2000. On February 15, 2000, the United States Trustee formed the Committee. The Committee consists of eight members: two representatives of the trade vendor community, three representatives of IHS's public debt, and three representatives of IHS's bank debt.[7]

IHS has remained in control of the management and operation of its business as Debtor in Possession. No trustee or examiner has been appointed.

C. Events Leading to the Underlying Action

On September 2, 2001, Debtors and the Committee entered into a Protocol of Joint Review.[8] Pursuant to this Protocol, the Committee undertook an investigation of IHS's compensation agreements. Following the Committee's investigation, by letter dated December 21, 2001, the Committee demanded that IHS allow the Committee to bring suit against the Plaintiffs.[9] IHS refused to do so, and the Committee then sought leave from the Bankruptcy Court to commence a suit against the Plaintiffs on behalf of the Estate.

Over the objection of Plaintiff Charles W. Newhall, III,[10] the Bankruptcy Court granted the Committee's motion on January 24, 2002 (the "Jan. 24 Order").[11] Among other things, the Bankruptcy Court stated that it appeared that "the relief requested in the Motion is in the best interests of the Debtors, their

[7] Underlying Action Complaint ¶ 1.
[8] Geyer Aff. Ex. G ("Order Establishing Protocol of Joint Review").
[9] Hall Aff. Ex. C.
[10] *Id.* Ex. D.
[11] *Id.* Ex. E.

Estates, creditors and interest holders,"[12] and that "[t]he Committee is a proper party to assert the Claims on behalf of the Estates."[13] It then authorized the Committee to "commence an action . . . *on behalf of the Estates* asserting any and all claims or causes of action of the Estates, whether derivative or otherwise,"[14] with "recoveries from [those] claims [to] be held [and] used solely for distribution to creditors."[15] Importantly, this order was issued pursuant to Sections 105, 1103(c)(5) and 1109(b) of the Bankruptcy Code.

On January 31, 2002, the Committee filed a complaint in the Bankruptcy Court asserting claims for breaches of the Plaintiffs' fiduciary duties of loyalty and due care, as well as waste of corporate assets. In a March 25, 2003 opinion, the Bankruptcy Court abstained from exercising jurisdiction over those claims in favor of this Court. On April 2, 2003, the Committee then filed its complaint in the Underlying Action in this Court. That complaint contains the same claims as the complaint submitted to the Bankruptcy Court.

D. Events Leading to the Motions for Summary Judgment

After National Union informed the Plaintiffs it intended to deny coverage under the Policies based on the IVI Exclusion, the parties entered into prelitigation mediation. As a result of the prelitigation mediation, the parties agreed[16] that the

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[12] *Id.*
[13] *Id.* ¶ E.
[14] *Id.* ¶ 2 (emphasis added).
[15] *Id.* ¶ 4.
[16] The agreement is Exhibit I to the Geyer Aff. It states: "Within 30 days of service of the complaint, the Director-Insureds will serve a motion for partial

Plaintiffs would file a complaint in this Court and then move for partial summary judgment on the applicability of the IVI Exclusion. It was also agreed that National Union would cross-move for partial summary judgment on that same exclusion.

The Complaint filed contains five causes of actions: (1) injunctive relief for advancement of defense costs; (2) specific performance for advancement of

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summary judgment on the cause(s) of action addressing the insured-vs.-insured exclusion." Defendants' motion for partial summary judgment limits itself to this issue. In their motion for partial summary judgment, the non-Elkins Plaintiffs moved beyond this issue, seeking a declaratory judgment as to coverage in general. In their Reply Brief, however, these plaintiffs state, "Contrary to National Union's assertion that this motion 'goes beyond the parties' agreement to present the insured-vs.-insured issue by way of summary judgment,' . . . this motion is consistent with the parties' agreement, . . ." Reply Br. of Pls. Lawrence P. Cirka, Edwin M. Crawford, Kenneth M. Mazik, Robert A. Mitchell, Charles W. Newhall, III, Timothy F. Nicholson, John L. Silverman and George H. Strong in Further Support of their Mot. for Partial Summ. J. and Answering Br. in Opp'n to Defs.' Cross-Motion, at 3 n.4. Moreover, the briefs filed by the non-Elkins Plaintiffs are titled as supporting a motion for *partial* summary judgment.

Elkins was not a party to the agreement. His motion for partial summary judgment is unclear as to its scope. It initially seeks partial summary judgment for the reasons contained in the non-Elkins Plaintiffs' brief. To the extent the non-Elkins Plaintiffs agreed not to move for partial summary judgment beyond the IVI Exclusion, I read this wording of the Elkins motion for partial summary judgment to be limited to the same extent. Further, while in paragraph 3 of his motion Elkins states he is entitled to coverage, paragraph 4 reads, "As a result of the foregoing, and for the reasons set forth in the Plaintiffs' Brief, this motion for partial summary judgment should be granted in its entirety *and this Court should declare that the insured-vs.-insured* exclusion is inapplicable to bar coverage as to Elkins with respect to the Action and the Defense Costs incurred in connection therewith." As with the non-Elkins Plaintiffs' briefs, Elkins's briefs are titled as seeking *partial* summary judgment. The Court reads Elkins's motion as seeking a declaration as to the IVI Exclusion's preclusive effects.

National Union, in its briefs, appears to be raising issues of collusion in a way that goes beyond the application of the IVI Exclusion. Because the scope of this Memorandum Opinion is limited, it only addresses issues of collusion to the extent necessary to apply the terms of the IVI Exclusion.

defense costs; (3) declaratory judgment that the IVI Exclusion does not apply; (4) declaratory judgment that additional exclusions to the Policies do not apply; and (5) declaratory judgment that there is coverage under the Policies.

All parties have moved for partial summary judgment. This Memorandum Opinion addresses those motions.

II. STANDARD

In evaluating a motion for summary judgment, the Court must view all facts in the light most favorable to the nonmoving party.[17] If, in doing so, the Court finds that the moving party has established there is no genuine issue of material fact regarding the dispute, and that that party is entitled to judgment as a matter of law, summary judgment should be granted.[18] This statement holds equally true when considering cross-motions for summary judgment, which "are not the procedural equivalent of a stipulation of decision on a paper record."[19]

In the context of interpreting an exclusion to an insurance policy, the Court takes into account that "[t]he burden of proving the applicability of any exclusions or limitations on insurance coverage lies with the insurer . . . ."[20] Moreover, any ambiguity in the language of an exclusion to insurance coverage must be "strictly construe[d] . . . against the insurer and in favor of the insured in situations where

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[17] *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996).
[18] *Id.*; Ct. Ch. R. 56(c).
[19] *Motorola, Inc. v. Amkor Tech., Inc.*, 849 A.2d 931, 935-36 (Del. 2004).
[20] *Alstrin v. St. Paul Mercury Ins. Co.*, 179 F. Supp. 2d 376, 388 (D. Del. 2002); s*ee also Cerberus Int'l Ltd. v. Apollo Mgmt. L.P.*, 794 A.2d 1141, 1148-49 (Del. 2002) (holding that a trial court should take the substantive evidentiary standard into consideration when ruling on a summary judgment motion).

the insurer drafted the language that is being interpreted regardless of whether the insured is a large sophisticated company."[21]

III. ANALYSIS

A. The Language of the Policy Frames the Issue

As both sides have noted, insured v. insured exclusions have a long history of litigation. Over time, the exact language of insured v. insured exclusions has been modified. The IVI Exclusion in this case is different from the ones other courts have considered in that the D&O Policy, contemplating bankruptcy proceedings, defines Company to include the Debtor in Possession and excludes coverage for claims brought not only "by," but also "on behalf of" the Company (the Debtor in Possession).[22]

The wording of the D&O Policy narrows the scope of this Memorandum Opinion. Because the policy contains terms relating directly to bankruptcy

[21] *Alstrin*, 179 F. Supp. 2d at 390.

[22] Many Federal Courts have considered variations of the facts presented here and their application to other insured v. insured exclusions. Depending on policy wording, and parties in underlying actions, courts have considered, among other analogous issues, whether a debtor in possession is legally distinct from a prebankruptcy company, *Cigna Ins. Co.*, 1997 WL 1878757, at *3-*4, whether an Estate Representative and Debtor are distinct entities, *Alstrin*, 179 F. Supp. 2d 376, 404, whether a Trustee brings claims on behalf of creditors, as opposed to the Debtor itself, *Cohen v. Nat'l Union Fire Ins. Co.* (*In re County Seat Stores, Inc.*), 280 B.R. 319 (Bankr. S.D.N.Y. 2002); *Rieser v. Baudendistel* (*In re Buckeye Countrymark, Inc.*), 251 B.R. 835 (Bankr. S.D. Ohio 2000), whether a committee's claims are brought for debtors or creditors, *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., Inc.*, 267 F.3d 340 (3d. Cir. 2001), and whether claims brought on behalf of an estate are brought on behalf of a company, *Reliance Ins. Co. v. Weis*, 148 B.R. 575 (E.D. Mo. 1992). While these cases deal with similar issues, none applies the same insured v. insured exception language to a comparable set of facts.

proceedings, I principally address whether a creditors' committee, in the absence of a trustee or examiner, and in being authorized by a Bankruptcy Court to initiate an action that could have been brought by a debtor in possession, necessarily brings that action "on behalf of" the debtor in possession.[23]

B. The Nature of the Creditors' Committee's Standing in the Underlying Action

1. The Status of Entities Created in a Chapter 11 Filing

a. The Estate

Section 541 of the Bankruptcy Code[24] provides for the creation of the estate. As Elkins's counsel aptly described it, "the estate is like the corpus of a trust."[25] Section 541 of the Bankruptcy Code describes the property that fills this trust. Specifically, Section 541(a)(1) provides that the "estate is comprised of . . . all legal or equitable interests of the debtor in property as of the commencement of

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[23] National Union's motion for partial summary judgment illustrates the narrowness of the issue in stating, "[Defendant] hereby moves the Court for an order entering summary judgment in its favor on the grounds that there is no genuine issue with regard to the fact that the Committee is acting for and asserting claims of the Debtor-in-Possession in the underlying Action against the Directors . . . ." Def.'s Motion for Summ. J.

The Bankruptcy Court has already defined the Underlying Action as on behalf of the Estate. The Defendant is essentially asking this Court to view the Jan. 24 Order as meaning other than what it explicitly provides. The Defendant was not involved in the proceedings before the Bankruptcy Court and this is not a matter of collateral estoppel. This Memorandum Opinion proceeds through an analysis of whether the Jan. 24 Order could mean something other than what it explicitly states.

[24] 11 U.S.C. § 541 (2003).

[25] Oral Argument on Cross-Motions for Summ. J., Tr. 25.

the [bankruptcy] case."[26] This includes claims held by the prebankruptcy company.

Here, the claims in the Underlying Action are claims alleging breaches of fiduciary duty by IHS's then-current and former directors and officers. These claims belonged to IHS prebankruptcy and belong to the Estate postbankruptcy.[27]

b. The Debtor in Possession

The default position under the Bankruptcy Code is that the trustee is the representative of the estate.[28] However, the appointment of a trustee is unusual in a bankruptcy filed under Chapter 11.[29] In most Chapter 11 cases, the prebankruptcy manager of the corporation (here, the former Board of Directors) runs the company as the debtor in possession.

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[26] This is subject to certain exclusions not applicable here.

[27] *See Cigna Ins. Co.*, 1997 WL 1878757 at *4 ("Any claim that could have been brought pre-petition in a derivative action by shareholders or creditors becomes the property of the estate, and can only be asserted by the debtor-in-possession."). I pause to note that the District Court in this case was not considering the authority of a Bankruptcy Court to confer derivative standing on an entity other than the debtor in possession to bring suit on behalf of the estate, a question that was resolved in the affirmative in *Official Comm. Of Unsecured Creditors of Cybergenics Corp. ex rel Cybergenics v. Chinery*, 330 F.3d 548, 553 (3d Cir. 2003) ("*Cybergenics*").

[28] 11 U.S.C. § 323 (2003).

[29] Voluntary filings under Chapter 11 are typically undertaken for the purpose of corporate reorganization. Though this is not the typical case—IHS will end up in liquidation—the bankruptcy still remains a Chapter 11 bankruptcy. *See* Hall Aff. ¶ 21 (describing the plan of reorganization and stating, "IHS will be liquidated"); *id.* Ex. K (plan of reorganization); Geyer Aff. Ex. L. (Confirmation Order for Amended Plan of Reorganization filed with the Bankruptcy Court on May 12, 2003); *see also Cybergenics*, 330 F.3d at 553 ("[T]he traditional Chapter 11 case involves a business reorganization rather than a liquidation.").

In such a case, § 1107 of the Bankruptcy Code sets out the powers of the debtor in possession. Specifically, §1107(a) states:

> (a) Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, *a debtor in possession shall have all the rights*, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, *of a trustee serving in a case under this chapter*.[30]

Thus, with the exception of limitations not relevant to the issue before this Court,[31] the debtor in possession has all the powers and duties of, and acts as, an appointed trustee.

Importantly, § 323 of the Bankruptcy Code establishes that the trustee in any case under the Code is the representative of the estate, and that the trustee therefore has the capacity to sue and be sued. Section 1107 gives the debtor in possession these rights; so long as the debtor remains in possession, it becomes the representative of the estate, and may sue and be sued.[32]

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[30] Emphasis added.

[31] The referenced exceptions to the debtor in possession's power listed in this subsection include filing schedules and statements required under § 521(1) of the Bankruptcy Code and conducting an investigation of the acts, conduct, assets, liabilities, and financial condition of the debtor, or of any matter relevant to the formulation of a reorganization plan.

[32] *See* S. REP. NO 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5823 ("If the debtor remains in possession in a Chapter 11 case, section 1107 gives the debtor in possession these rights of the trustee: the debtor in possession becomes the representative of the estate, and may sue and be sued.").

c. Creditors' Committees

Once a firm files for bankruptcy, standard checks on managerial powers – equity options, default clauses in loan agreements, the stockholder franchise – no longer have the influence they did prebankruptcy. In order to ensure that the debtor in possession maximizes the value of the estate, instead of promoting the interest of any one constituency (or even itself), the Bankruptcy Code mandates the creation of a committee of unsecured creditors, and allows for the creation of committees of equity security holders.[33] These committees have the power,

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[33] Except as provided in paragraph (3), as soon as practicable after the order for relief under chapter 11 of this title, the United States trustee shall appoint a committee of creditors holding unsecured claims and may appoint additional committees of creditors or of equity security holders as the United States trustee deems appropriate.

11 U.S.C. § 1102 (a)(1) (2003).

Importantly, such a committee itself is not a security holder. As discussed in note 16, National Union makes much of so-called "collusion" between the Committee and the Plaintiffs, focusing on an agreement by which Elkins cannot be held liable for any damages exceeding those covered by the Policies. The parties' motions for partial summary judgment ask the Court to interpret the IVI Exclusion and the Court can therefore only consider allegations of collusion in this limited context. The only section of the IVI Exclusion that collusion would implicate provides that the Exclusion prevents coverage when an action

> is brought by any *security holder* or member of the Company, whether directly or derivatively, unless such security holder's or member's Claim is instigated and continued totally independent of, and totally without the solicitation of, or assistance of, or active participation of, or intervention of, any Director or Officer or the Company.

Emphasis added. This section is only implicated if a security holder (or member) brings an action. The Committee, however, is not a security holder. While it may be comprised of security holders (a dubious characterization given that it is made up, at least in part, of unsecured trade vendors), the Committee itself is an independent entity created by federal statute.

National Union, by defining "debtor in possession" in its policies, indicated its knowledge of entities created in a bankruptcy proceeding. It could have

among other things, (1) to consult with the debtor in possession concerning the administration of the case; (2) to investigate the acts, conduct, assets, liabilities, and financial condition of the debtor; (3) to participate in the formulation of a plan; (4) to request the appointment of a trustee or examiner; and (5) to perform other such services as are in the interest of those represented.[34] Further, § 1109 of the Bankruptcy Code gives creditors' committee (as well as an equity security holders' committee), the right to appear and be heard on any issue in a Chapter 11 case.[35]

Thus, the Bankruptcy Code sets up, in the absence of an appointed trustee, a two-player system. The debtor in possession, in officially representing the estate, essentially manages the corporation through the Chapter 11 bankruptcy. Its powers explicitly include the right to sue. Committees (including creditors' committees) are formed in order to keep the debtor in possession's interest in line with that of the estate. They are, in effect, the new checks on managerial discretion.

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defined security holders to include creditors' committees and it did not. This Court will not read an exclusion to an insurance policy in a manner that is broader than a clear reading of the policy. *See Alstrin*, 179 F. Supp. 2d at 388 ("The burden of proving the applicability of any exclusions or limitations on insurance coverage lies with the insurer"); *id.* at 390 (noting that any ambiguity in the language of an insured-vs.-insured exception must be "strictly construe[d] . . . against the insurer and in favor of the insured . . . regardless of whether the insured is a large sophisticated company."). Thus, this portion of the IVI Exclusion is simply not implicated in this case.

[34] 11 U.S.C. § 1103.

[35] *Id.* § 1109.

Nowhere in the Bankruptcy Code are committees designated as representatives of the estate, and nowhere in the Bankruptcy Code are they given an explicit right to sue. Yet, the Bankruptcy Court, in its Jan. 24 Order, gave the Committee standing to sue on behalf of the Estate. The question thus becomes, what is the nature of that standing? The Third Circuit, in *Cybergenics*, provides the answer to that question.

2. *Cybergenics* and the Committee's Derivative Standing

a. Applicability of *Cybergenics*

Cybergenics followed a decision by the United States Supreme Court, *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, in which the Supreme Court decided that the term "the trustee may" in § 506(c) of the Bankruptcy Code precluded a creditors' committee (and anyone other than a trustee) from recovering administrative expenses ahead of secured claims.[36] In so holding, *Hartford Underwriters* was read by some to preclude standing for any party other than a party explicitly designated in the Bankruptcy Code to take a particular act.

In a footnote to *Hartford Underwriters*, however, the Court wrote, "We do not address whether a bankruptcy court can allow other interested parties to act in the trustee's stead in pursuing recovery under § 506(c)."[37] *Cybergenics* considered whether this language left open the allowance of committee prosecution of a

[36] 530 U.S. 1, 5-6 (2000).
[37] *Id.* at 13 n.5.

fraudulent transfer claim in accordance with § 544(b) of the Bankruptcy Code. And while the exact holding in *Cybergenics* was that *Hartford Underwriters* did not preclude Bankruptcy Court authorization of a fraudulent transfer claim by a committee, its characterization of such a suit is directly applicable here.[38]

b. Neither Section 1103(c)(5) nor Section 1109(b) of the Bankruptcy Code Creates a *Direct* Right of Creditors' Committees to Bring Suit

Hartford Underwriters, as interpreted by *Cybergenics*, prevented the commencement of a (direct) lawsuit by a party not given explicit authorization to bring such a suit in the Bankruptcy Code. This begs the question whether the Code provisions upon which the Jan. 24 Order is premised, §§ 105,[39] 1103(c)(5), and 1109(b), explicitly authorize a committee-commenced lawsuit.

Section 1103(c)(5) of the Bankruptcy Code empowers a committee to "perform such other services as are in the interest of those represented." One may be tempted to read this Section as allowing a direct claim by the Committee. However, the *Cybergenics* court found that "§ 1103(c)(5) does not confer the sort of blanket authority necessary for the Committee independently to initiate an adversarial proceeding . . ."[40] In so holding, that court noted that the powers granted to committees in § 1103(c)(1)-(4) are very specific and that given this, to

[38] Neither side has argued that the Bankruptcy Court was not authorized to grant the order allowing the Committee to bring the Underlying Action. The nature of that action is what is at issue, and what *Cybergenics* directly addresses.
[39] Section 105 covers powers of the court; it unquestionably does not authorize committee lawsuits.
[40] *Cybergenics*, 330 F.3d at 563.

interpret the (c)(5) catchall to allow direct actions would violate the canon of *ejusdem generis*. That canon teaches that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[41] Thus, in accord with *Cybergenics*, Section 1103(c)(5) does not grant committees a direct right to sue on behalf of the estate. Instead, it allows a bankruptcy court to "authorize a creditors' committee to represent the estate when the usual representative is delinquent."[42]

Further, Section 1109(b), which allows creditors' committees to "appear and be heard on any issue in a case under [Chapter 11]" does not provide an independent right for the Committee to bring suit. Specifically, the Supreme Court stated in *Hartford Underwriters*, "we do not read § 1109(b)'s general provision of a right to be heard as broadly allowing a creditor to pursue substantive remedies that other Code provisions make available only to other specific parties."[43]

c. The Standing Conferred on the Committee by the Jan. 24 Order is Derivative in Nature

Having decided that the Bankruptcy Code did not authorize committees to directly bring suit, *Cybergenics* next determined whether *Hartford Underwriters* prohibited the grant of derivative standing to Committees in cases where the Code

[41] *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001), *quoted in Cybergenics*, 330 F.3d at 562.
[42] *Cybergenics*, 330 F.3d at 563.
[43] *Hartford Underwriters*, 530 U.S. at 8.

grants other specific parties the right to bring such suits.[44] The Third Circuit answered this question in the negative, and allowed the commencement of a lawsuit by a creditors' committee. In doing so, it left no question as to the derivative nature of that creditors' committee's standing. "For all of the foregoing reasons, we are satisfied that the most natural reading of the Code is that Congress recognized and approved of derivative standing for creditors' committees."[45]

C. The Implications of the Committee's Derivative Standing

1. The Committee Is Not Bringing Suit "on Behalf of" the Debtor in Possession

Cybergenics clearly demonstrates that the Committee's standing in the Underlying Action is derivative. The question thus turns to the nature of this derivative standing. That is, does one who is granted derivative standing necessarily bring suit "on behalf of" the entity in which the right to bring suit rests?

Analogizing to derivative standing in the corporate context is helpful.[46]

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[44] *Cybergenics*, 330 F.3d at 561-62. In this case, § 323 grants the trustee (and, through § 1107, the Debtor in Possession) the capacity to sue and be sued on behalf of the Estate.

[45] *Id.* at 566.

[46] The Seventh Circuit has not only analogized the standing of creditors' committees in bankruptcy to that of stockholders in a stockholder's derivative action, it has gone so far as to compare the two actions themselves. "In [a bankruptcy court-authorized] suit, the creditor corresponds to the shareholder, and the trustee to management, in a shareholder derivative action." *Fogel v. Zell*, 221 F.3d 955, 966 (7th Cir. 2000).

National Union also attempts a comparison of the Underlying Action and a stockholder's derivative action. "The plaintiff in such a case is essentially acting in the role of the corporation, just as the Committee in the Action here is acting in

The Supreme Court has recently described derivative actions as "enabl[ing] a stockholder to bring suit on behalf of the corporation for harm done to the corporation."[47] This form of action was developed "to enable stockholders to sue in the corporation's name where those in control of the corporation refused to assert a claim belonging to the corporation."[48] The underlying notion is that while the right to bring corporate claims originally is in the hands of the *directors*,[49] "the fundamental basis of a derivative stockholder's action . . . is to enforce a *corporate* right."[50]

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the role of Debtor-in-Possession on behalf of the Company." Def.'s Opening Br. at 23. National Union's analogy, however, does not comport with the Seventh Circuit's. The Committee, as in *Fogel*'s analogy, acts in the role of stockholder; the Debtor in Possession's role is that of management.

National Union argues that to the extent the Committee is bringing its action on behalf of the Estate, the Policies' wording "brought on behalf of any Insured or the Company" could never apply to a debtor. This is simply not true. The Debtor in Possession could have brought a suit. In such a case, the IVI Exclusion would apply to bar coverage. Here the Committee brought suit. If National Union desired an IVI Exclusion to apply in this case, it could have written the IVI Exclusion in a manner that would have barred coverage here (*e.g.*, defining Company to include IHS or the Estate). It did not.

[47] *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1036 (Del. 2004); s*ee also id.* ("Because a derivative suit is being brought on behalf of the corporation, the recovery, if any, must go to the corporation.").

[48] *Harff v. Kerkorian*, 324 A.2d 215, 218 (Del. Ch. 1974), *aff'd in part and rev'd in part on other grounds*, 347 A.2d 133 (Del. 1975).

[49] *See Good v. Getty Oil Co.*, 518 A.2d 973, 974 (Del. Ch. 1986) (noting that absent conditions of director disqualification, "management retain[s] control over corporate claims").

[50] *Taormina v. Taormina Corp.*, 78 A.2d 473, 476 (Del. Ch. 1951) (emphasis added).

This is what occurred in the Underlying Action. The Debtor in Possession was in control of the Estate's claims.[51] The Bankruptcy Court allowed the Committee to sue on behalf of the Estate. While one may view this case as one where the Committee is bringing an action that may also be brought by the Debtor in Possession, there is no doubt the Committee is not bringing the action "on behalf of" the Debtor in Possession. It is simply enforcing a right belonging to the Estate[52] that the Debtor in Possession *could have* itself enforced.

Indeed, a number of courts have found, in discussing derivative standing for a committee, that the committee would be bringing suit "on behalf of the estate."[53] And while the committee in *Cybergenics* characterized its claim as on

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[51] *Supra* note 32.

[52] The Estate, as suggested by the Bankruptcy Code, *see* 11 U.S.C. § 363(a) (referring to "the estate and an entity other than the estate"), and Collier, *see* 7 Collier on Bankruptcy ¶ 1109.05, *cited in Cybergenics*, 330 F.3d at 561 (noting that a party may commence litigation on behalf of the estate), is a separate entity from the Debtor in Possession.

[53] *Loudoun Leasing Dev. Co. v. Ford Motor Credit Co.* (*In re K&L Lakeland, Inc.*), 128 F.3d 203, 206 (4th Cir. 1997) ("We did leave open the possibility that 'a bankruptcy court could grant derivative standing to a claimant, allowing the claimant to prosecute a § 506(c) action on behalf of the estate.'") (citation omitted); *Liberty Mut. Ins. Co. v. Official Unsecured Creditors' Comm. of Spaudling Composites Co.* (*In re Spaudling Composites Co., Inc.*), 207 B.R. 899, 903 (B.A.P. 9th Cir. 1997) ("The Committee filed suit, not in its own right, but on behalf of the estate. Consequently, it asserts derivative standing."); *Canadian Pac. Forest Prods. Ltd. v. J.D. Irving, Ltd.* (*In re Gibson Group, Inc.*), 66 F.3d 1436, 1443 (6th Cir. 1995) (discussing a committee's derivative standing to bring fraudulent transfer claims and stating, "a creditor 'has a right to proceed on behalf of the estate,' with permission of the court, where the trustee 'defaults in the performance of any duty, such as seeking to set aside a fraudulent transfer.'") (citation omitted); *In re iPCS, Inc.*, 297 B.R. 283, 287 (Bankr. N.D. Ga. 2003) ("It is clear to the Court that, assuming the Debtors have standing to bring alter ego/instrumentality claims against the Sprint Companies, the Debtors, acting in

behalf of the debtor in possession,[54] the Third Circuit never explicitly adopted that characterization. Immediately following its acknowledgement of the committee's argument, the *Cybergenics* court writes, "There is precedent for this view. *Collier* explains that, 'consistent with the broad right of participation conferred by § 1109(b), the court may authorize a party in interest to commence litigation *on behalf of the estate* if certain conditions are satisfied.'"[55] The Bankruptcy Court here did just as Collier described: it authorized the Committee to commence litigation on behalf of the Estate.

2. The Committee Is Not an Assignee

National Union argues that "[h]aving received the Bankruptcy Court's permission to bring the underlying claims, the Committee has become the assignee of the Debtor-in-Possession in pursuing those claims."[56] If the Committee were

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their capacities as debtors-in-possession, would be authorized to bring these claims on behalf of the estates. The questions before the Court are: 1) whether derivative standing exists such that the Committee could bring these claims on behalf of the estate; and 2) if such standing exists, whether the Court should allow the Committee to exercise it by filing a complaint."); *Surf N Sun Apts., Inc. v. Dempsey*, 253 B.R. 490, 493 (M.D. Fla. 1999) ("Notwithstanding the lack of conferring language in section 548, some federal courts have crafted a limited exception allowing bankruptcy courts to grant 'derivative standing' to creditors institute avoidance actions on behalf of the estate upon 'showings of particularly extraordinary circumstances.'") (citation omitted). Although some of these cases discuss derivative standing under § 506(c), explicitly rejected by the Supreme Court in *Hartford Underwriters*, what is important is their *characterization* of such derivative standing.

[54] *Cybergenics*, 330 F.3d at 560.

[55] *Id.* at 561 (citation omitted) (emphasis added).

[56] Def.'s Opening Br. at 21. This argument essentially incorporates the "by" prong of the IVI Exclusion. That is, if the Committee is an assignee of the Debtor in

deemed an assignee, it would have brought the Underlying Action with "whatever limitations [the Underlying Action] had in the hands of the assignor."[57] This limitation would include the IVI Exception. The Committee, however, is not an assignee. It is a party with derivative standing granted by a bankruptcy court pursuant to its equity powers.

In *Niemuller v. National Union Fire Insurance Co. of Pittsburgh, PA*, a company filed suit against a former director and officer, Niemuller. Following this, the company entered into an asset purchase agreement which assigned its right and claims against Niemuller to the purchasers.[58] Niemuller then claimed coverage under a directors' and officers' policy which excluded claims brought "by the Company." Niemuller argued that this clause did not apply because the company had assigned its claims to third parties. The District Court held that the assignees "stepped into the shoes of the assignor," and took the claim subject to the limitations of the claim as it existed in the hands of the assignor.[59]

In support of his argument, Niemuller cited cases involving regulatory banking agencies. The court wrote that those agencies "are statutorily created

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Possession, it is "standing in the shoes" of the Debtor in Possession and the Underlying Action would be viewed as "brought by" the Debtor in Possession.

[57] *Niemuller v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 1993 WL 546678, at *3 (S.D.N.Y. Dec. 30, 1993).

[58] *Id.* at *1.

[59] *Id.* at *3.

entities charged by federal or state law with the obligation to pursue certain claims," and thus their rights were not analogous to those of the assignees.[60]

The current case has more in common with the cases cited by Niemuller than with Niemuller's case itself. First, creditors' committees are statutory creatures. Second, the Jan. 24 Order, which bestowed derivative standing on the Committee, is not an assignment in the conventional sense of the term. Section 105(a) of the Bankruptcy Code, which grants the Bankruptcy Court its broad jurisdiction, states:

> (a) 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 or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

This provision clearly illustrates the Bankruptcy Court's powers in equity.[61] "[T]he courts are able to craft flexible remedies that, while not expressly authorized by the Code, effect the result the Code was designed to obtain."[62] In doing so, the courts "have broad authority to modify creditor-debtor

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[60] *Id.* at *4.

[61] Collier on Bankruptcy at 105.1 (15th ed. Rev.) ("Section 105 of the Bankruptcy Code is an omnibus provision phrased in such general terms as to be the basis for a broad exercise of power in the administration of a bankruptcy case. The basic purpose of section 105 is to assure the bankruptcy courts power to take whatever action is appropriate or necessary in aid of the exercise of their jurisdiction.").

[62] *Cybergenics*, 330 F.3d, at 568.

relationships."[63] In granting the Committee derivative standing, the Bankruptcy Court did not transfer to the Committee all the limitations that would have surrounded the claims if brought by the Debtor in Possession. Instead, the Bankruptcy Court, using its equitable powers, conferred a distinct derivative right on the Committee to bring suit. While this right arises out of the Debtor in Possession's right to bring suit, it is not the exact same right.

Further, in *Niemuller*, the claim had already been brought by the company, and only later was it assigned. Here, the claim was made after the Committee was granted derivative standing. The Policies do not exclude coverage for claims that *could have been* brought by the Debtor in Possession; they exclude policies that *are* brought by the Debtor in Possession.

IV. CONCLUSION

For the foregoing reasons, the Court finds that a creditors' committee, authorized to sue derivatively by a bankruptcy court, brings suit on behalf of the estate, not on behalf of the debtor in possession. The Court, therefore, finds that the IVI Exclusion is not triggered. Plaintiffs' motions for partial summary judgment as to the meaning of the IVI Exclusion are granted, and Defendant's motion for partial summary judgment as to that same issue is denied.

Counsel are requested to submit, within ten days, a form of order to implement this Memorandum Opinion.

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[63] *United States v. Energy Res. Co.*, 495 U.S. 545, 549 (1990), *quoted in Cybergenics*, 330 F.3d 548 at 567.