

# Ain't No Easy Answers: D&O Insurance Proceeds in Bankruptcy

By Jason S. Brookner\* and Lydia R. Webb\*\*

## INTRODUCTION

*Ain't no saying what will be, it's always been that way  
Only thing I know for sure, someone got to pay  
Easy answers  
Ain't no easy answers, is what I got to say.<sup>1</sup>*

As insolvency practitioners know, maximizing value for, and returns to, creditors is one of the primary responsibilities of trustees and debtors in possession. A director and officer liability insurance policy (“D&O insurance” or “D&O policy”) often represents an untapped, additional asset that can be used to enhance distributions to creditors. But at the same time, it also represents a source of payment of legal costs for corporate directors and officers (“Ds&Os”) who have been named as defendants in litigation. Who has the rights to the policy proceeds, and whether some or all of the proceeds are available to satisfy claims against the estate, can be the subject of fierce debate and will ultimately depend on multiple factors, including the actual language of the insurance policy, the nature of the claims and causes of action being asserted and to whom such claims belong. Questions regarding who has rights in the D&O insurance proceeds can arise during the course of a case — usually when there is a pending action against some or all of the current or former Ds&Os — and after a Chapter 11 plan has been confirmed, when a post-confirmation litigation vehicle and individual claimants are both competing for access to, and recoveries from, the D&O policy.

This article explores how there “ain't no easy answers” to who may access D&O insurance proceeds in bankruptcy and under what circumstances.<sup>2</sup>

### I. WHAT IS D&O INSURANCE?

D&O insurance protects Ds&Os, and sometimes the corporation itself, from individual financial liability for claims based on wrongful acts of the Ds&Os. For instance, D&O insurance often covers claims alleging viola-

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\*Partner and head of the Corporate Restructuring and Bankruptcy Group, Gray Reed & McGraw LLP. Jason received his J.D. in 1994 from Hofstra University School of Law (n/k/a The Maurice A. Deane School of Law at Hofstra University).

\*\*Associate in the Corporate Restructuring and Bankruptcy Group, Gray Reed & McGraw LLP. Lydia graduated cum laude from Baylor University School of Law in 2012.

tions of securities laws or mismanagement of corporate funds. The typical D&O policy provides a specific amount of coverage, and claims for D&O defense costs are deducted from, and reduce, the remaining available coverage. This type of policy is commonly referred to as a “wasting” policy.

### A. Types of Coverage

D&O insurance differs from one policy to the next, but the most common types of coverage are referred to as Side A, Side B and Side C. Ds&Os are directly protected by Side A coverage and indirectly protected by Side B coverage. Companies are directly protected by Side C coverage although, traditionally, many companies have chosen to self-insure and have opted out of Side C coverage. D&O policies can include any combination of the different coverage types. Under the standard D&O policy with multiple types of insuring agreements, Side A, B, and C coverage share the same aggregate limits of liability; therefore, payment of a Side B or Side C claim reduces the amount of proceeds available for Side A claims and vice versa.<sup>3</sup>

1. Side A Coverage. Side A coverage protects the individual Ds&Os from personal liability when the corporation, or entity, is unable to indemnify them.<sup>4</sup>

2. Side B Coverage. Side B coverage protects a company by reimbursing it for indemnifying its Ds&Os. A company’s obligation to indemnify its Ds&Os arises from contract, corporate governance documents, or state law.<sup>5</sup> However, Side B coverage is not triggered if the company is not required, or is unable, to indemnify its Ds&Os.<sup>6</sup> Although Side B coverage reimburses the company, it is intended to benefit the Ds&Os as an alternative source of recovery for losses.<sup>7</sup>

3. Side C Coverage. Unlike Side A and Side B, Side C coverage protects against loss incurred by the company itself as opposed to loss incurred by the Ds&Os. Side C coverage is commonly referred to as “entity” coverage, and it is triggered when claims are made against the company. Therefore, Side C coverage may be triggered regardless of whether claims are made against the Ds&Os. For publicly traded companies, Side C coverage typically protects the company against losses arising from the violation of securities laws.<sup>8</sup>

### B. Additional Provisions Impacting Coverage

In addition to insuring agreements, most D&O policies include provisions that further establish the extent and scope of coverage. Many of these provisions are designed to limit coverage, while others set forth the manner in which proceeds are to be allocated between insured parties.<sup>9</sup> Although D&O policies are not one size fits all, most will nonetheless include one or more of the provisions discussed below, all of which become especially important in the bankruptcy context.

1. Insured v. Insured Exclusion. The “Insured v. Insured” exclusion is a common provision in D&O policies. This particular exclusion is designed to preclude coverage for collusive claims by and against insured parties. For example, if a policy includes Side C coverage as well as Side A or Side B coverage, then the Insured v. Insured exclusion would prevent the company

from recovering on the D & O Policy for the wrongful acts of its Ds&Os.<sup>10</sup>

The Insured v. Insured exclusion becomes particularly relevant in bankruptcy as, despite the underlying intent to bar collusive claims, insurers have nonetheless relied on the exclusion to deny coverage for non-collusive claims (that is, claims by a debtor in possession, trustee or post-confirmation estate representative against the Ds&Os). There is a split in authority as to whether claims brought by a debtor in possession or a bankruptcy trustee fall within the Insured v. Insured exclusion.<sup>11</sup> Some courts have held that the exclusion bars coverage for a bankruptcy trustee's claims against Ds&Os because the trustee "stands in the shoes" of the debtor.<sup>12</sup> Other courts have recognized that some bankruptcy trustees, particularly court-appointed Chapter 7 or 11 trustees, are separate and distinct legal entities from the debtor, and thus determined that the exclusion did not apply.<sup>13</sup>

Often the issue is one of draftsmanship. For example, language such as "coverage shall be denied for any claims filed on behalf of the Insured Organization" is more likely to result in the denial of coverage for a trustee's claims than the language used in the example above (that is, the insurer is not liable for "any claim made against any director or officer by any director or officer or by the insured institution . . ."). That is because insurers would rely on the fact that a trustee's claims are filed *on behalf of* an insured party, namely, the debtor. The opposing argument is that the trustee represents the debtor's *estate* rather than the prepetition company *itself*. Accordingly, the trustee represents the interests of non-debtor constituents such as the creditors and shareholders, which is why bankruptcy courts usually decline to apply the exclusion in this context. Typically, courts find either (a) the language is ambiguous and should be interpreted against the insurer or (b) the language is unambiguous but the exclusion does not apply because the trustee is not an insured party.<sup>14</sup>

To be safe and avoid the potential for this dilemma, D&O policies may include an express carve-out from the exclusion to insure coverage for claims brought by, among others, a bankruptcy trustee or a creditors' committee. Insurers commonly agree to include the carve-out language because it does not conflict with the purpose underlying the Insured v. Insured exclusion, which is to protect against collusive lawsuits.<sup>15</sup>

2. Bankruptcy Exclusion. D&O policies may also contain what are commonly referred to as "bankruptcy exclusions," which expressly exclude from coverage a bankruptcy trustee's claims against individual Ds&Os. In effect, the bankruptcy exclusion is the opposite of a carve-out from the Insured v. Insured exclusion.<sup>16</sup>

When a debtor in possession, trustee, committee (standing in the debtor's shoes) or post-confirmation estate representative sues Ds&Os, some insurers may attempt to deny coverage in reliance upon the bankruptcy exclusion (in addition to, or in lieu of, the Insured v. Insured exclusion). Some courts have refused to enforce bankruptcy exclusion provisions, while other courts have enforced them.<sup>17</sup>

After acknowledging that a trustee's claim was technically subject to the bankruptcy exclusion, one court held that the bankruptcy exclusion was nonetheless unenforceable under section 541(c)(1)(B) of the Bankruptcy Code.<sup>18</sup> Section 541(c)(1)(B) provides that a debtor's property "becomes property of the estate . . . notwithstanding any provision in an agreement . . . that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title . . . and that effects a . . . termination of the debtor's interest in property."<sup>19</sup> According to the *Yessenow* court, the bankruptcy exclusion was an invalid *ipso facto* clause because, if given effect, it would have precluded coverage that arose from a property interest protected by section 541(c).<sup>20</sup>

In contrast, another court analyzing the same issue held that the bankruptcy exclusion was enforceable.<sup>21</sup> There, the court concluded that as of the petition date, the debtor owned the policy itself but not the proceeds.<sup>22</sup> Instead, the bankruptcy estate's right to the proceeds arose postpetition under section 541(a)(6),<sup>23</sup> and section 541(c)(1) does not invalidate an *ipso facto* clause unless it impacts an interest in property held by the debtor on the petition date.<sup>24</sup> Thus, the court found the *ipso facto* clause was enforceable and the trustee's claims were excluded from coverage.<sup>25</sup>

3. Order of Payments. An "Order of Payments" provision is commonly included in D&O policies to govern the priority of payments when amounts are due under more than one insuring agreement. The typical Order of Payments provision requires the insurer to pay Side A claims before paying claims covered by Side B or Side C coverage.<sup>26</sup> This language is most beneficial to Ds&Os when the policy includes Side C coverage.<sup>27</sup>

The Order of Payments provision becomes particularly important in the bankruptcy context for two reasons. First, the practical reality is that most, if not all, corporate debtors are unable to indemnify Ds&Os for losses. If a policy includes Side A and Side C insuring agreements and existing claims are covered by both, then the Order of Payments provision dictates the order in which those claims are to be paid. In other words, this provision applies when the insurer must pay both the company and its Ds&Os. Second, the Order of Payments is critical in the bankruptcy context because it may control whether insured parties (Ds&Os) will be able to access proceeds, or whether the proceeds will be "off limits" as property of the bankruptcy estate.<sup>28</sup> Where the Order of Payments provision gives priority to Ds&Os, bankruptcy courts are more likely to find that the proceeds do not constitute property of the estate.<sup>29</sup> This finding, of course, allows Ds&Os to access the proceeds to fund defense costs, but in a wasting policy scenario, reduces the amount of proceeds available to a trustee or post-confirmation trust.

For example, in *Downey Financial Corp.*, the policy provided that available limits would fund Side A, Side B and Side C claims, in that order.<sup>30</sup> Before concluding that the proceeds were not property of the estate, however, the court commented on the Order of Payments provision and noted that a determination the proceeds were property of the estate would effectively grant the estate rights it would not otherwise have.<sup>31</sup> As the court explained:

“[s]ection 541(a) ‘is not intended to expand [a] debtor’s rights against others beyond what rights existed at the commencement of the case.’”<sup>32</sup> Because the policy provided that Side B and C claims were junior to Side A claims, treating the proceeds as property of the estate would elevate the estate’s interest in the Side B and C coverage “to become at least equal to the Insureds’ interest in [Side] A [coverage] . . . .”<sup>33</sup>

On the other hand, if the language does not clearly place Ds&Os at the front of the line, then bankruptcy courts may be more willing to limit Ds&Os’ access to defense costs.<sup>34</sup> In *Allied Systems*, the creditors’ committee argued that the proceeds were property of the bankruptcy estate because the Order of Payments provision gave priority treatment to the claims of the individual Ds&Os only if losses, in the aggregate, exceeded the policy limits.<sup>35</sup> Because there had been no showing that was the case, the creditors’ committee objected to the motion of the Ds&Os to advance defense costs, and asked the court to restrict D&O access to proceeds by imposing reporting requirements.<sup>36</sup> Although the court did not find the proceeds were property of the estate, it did require the Ds&Os to satisfy particular reporting requirements.<sup>37</sup> Specifically, the court required the insured parties to submit written quarterly reports detailing the amounts disbursed and incurred, as well as the amount of remaining coverage.<sup>38</sup> Other courts have also implemented reporting requirements, or have limited the amount of legal fees payable to Ds&Os without further court approval.<sup>39</sup>

## II. ARE D&O INSURANCE PROCEEDS PROPERTY OF THE BANKRUPTCY ESTATE?

Bankruptcy is a common setting for disputes over D&O insurance proceeds to play out. After a company files bankruptcy, Ds&Os are more likely to need the proceeds to defend lawsuits based on their prior actions (or inactions), but they may be surprised to learn the proceeds are not immediately available because the proceeds may constitute property of the bankruptcy estate. In addition to potentially competing with one another for policy proceeds, Ds&Os may also find themselves competing for the policy proceeds with a fiduciary of the bankruptcy estate. And, because most D&O insurance policies are “wasting” policies, the competition for proceeds during bankruptcy can be (and often is) fierce.

To determine whether, and to what extent, Ds&Os may access D&O insurance proceeds during a bankruptcy, courts are faced with the following issues: (1) whether the proceeds are property of the estate and, if so, (2) whether the automatic stay should be lifted to allow the Ds&Os to access the proceeds anyway. In analyzing these issues, courts consider the language of the policy, including the insuring agreements and other provisions, as well as the facts of the case.<sup>40</sup> It is generally accepted and established that D&O insurance *policies themselves* constitute property of the estate, but there is a lack of consensus regarding the policy proceeds.<sup>41</sup>

### A. Proceeds Are Not Property of the Estate

The determination of whether D&O proceeds constitute property of the

estate usually hinges on the identity the named insured.<sup>42</sup> If the policy provides coverage only to Ds&Os (i.e., Side A coverage), then the proceeds are likely not property of the estate.<sup>43</sup> If the policy provides coverage exclusively and directly to the debtor (i.e., Side C coverage) then the proceeds of the policy would likely constitute property of the estate.<sup>44</sup> If, however, the policy directly covers both the corporate debtor and its Ds&Os (i.e., some combination of Sides A, B, and C coverage), then the proceeds constitute property of the estate only if “depletion of the proceeds would have an adverse effect on the estate to the extent the policy actually protects the estate’s other assets from diminution.”<sup>45</sup> Moreover, courts generally hold that D&O proceeds are not property of the estate where the policy includes entity coverage, but there are no covered entity claims outstanding.<sup>46</sup>

In *In re Louisiana World Exposition, Inc.*, the Fifth Circuit emphasized the distinction between owning the *policy* and owning the *proceeds*.<sup>47</sup> Critical to the court’s analysis was that the policy in question included only Side A and Side B coverage, and lacked Side C coverage.<sup>48</sup> The court distinguished the facts before it from other cases where policies provided the corporation with direct protection against losses.<sup>49</sup> In those other cases, the Fifth Circuit explained, the “estate owns not only the policies, but also the proceeds designated to cover corporate losses or liability.”<sup>50</sup> In addition, the court focused on the plaintiff’s identity and purpose for suing, which was a creditors’ committee attempting to enlarge the debtor’s estate.<sup>51</sup> Because the suit was initiated on behalf of the estate, as opposed to a third-party plaintiff, the court concluded that allowing the Ds&Os to access proceeds would not increase the estate’s exposure to risk.<sup>52</sup> Further, the court found that the proceeds were not property of the estate and permitted the same to be distributed to the Ds&Os, thereby rejecting the notion that proceeds must be property of the estate if the policy is property of the estate.<sup>53</sup>

In *In re Allied Digital Technologies*, the bankruptcy court recognized the “conundrum” of when the bankruptcy trustee, as plaintiff, and the Ds&Os, as defendants, seek to be paid from the same wasting D&O policy.<sup>54</sup> There, the court ultimately authorized the insurer to pay D&O defense costs because it determined that the proceeds were not property of the bankruptcy estate.<sup>55</sup> However, the court noted that even if it had not determined that the proceeds were property of the estate, it would have lifted the automatic stay to allow funds to be advanced the Ds&Os for defense costs because the Ds&Os had shown that cause existed to do so.<sup>56</sup> Specifically, the court stated that “[w]ithout funding, the Individual Defendants would be prevented from conducting a meaningful defense to the Trustee’s claims and may suffer substantial and irreparable harm,” and they “bargained for this coverage.”<sup>57</sup> Additionally, the court pointed out that the trustee offered no evidence of any claims that “would require direct coverage” and “any payment of defense costs [would] remove any indemnification claim the Individual Defendants would have . . .”<sup>58</sup>

In *In re Adelphia Communications Corp.*, the bankruptcy court treated D&O proceeds as property of the estate, but modified the automatic stay to

allow insurers to pay “up to \$300,000 per insured for defense costs.”<sup>59</sup> The Ds&Os charged with corporate fraud sought reimbursement of legal defense costs but were unable to access the proceeds without relief from the automatic stay.<sup>60</sup> Although the bankruptcy court “granted partial relief from the stay,” on appeal, the district court determined that the proceeds were not property of the debtors’ estates for two reasons.<sup>61</sup> First, no indemnification payments had been made nor were any expected to be made, so Side B coverage had not been triggered.<sup>62</sup> Second, despite the existence of entity coverage, no actual Side C claims existed.<sup>63</sup> Under these circumstances, the court described the debtors’ alleged interest as “akin to a car owner with collision coverage claiming he has the right to proceeds from his policy simply because there is a prospective possibility that his car will collide with another tomorrow, or a living person having a death benefit policy, and claiming his beneficiaries have a property interest in the proceeds even though he remains alive.”<sup>64</sup>

In *In re Downey Financial Corp.*, the court determined proceeds were not property of the estate and that the Ds&Os could access the proceeds.<sup>65</sup> Here, eleven of the former Ds&Os sought an order (i) declaring that the automatic stay did not preclude them from using the proceeds to defend securities actions and, alternatively (ii) granting relief from the automatic stay.<sup>66</sup> With respect to the policy’s entity coverage, the court concluded it was not “protecting the estate’s other assets from diminution” because no Side C claims existed.<sup>67</sup> Although a securities class action had been filed against the debtor, among others, it had been dismissed and terminated, and the derivative action against the debtor was stayed.<sup>68</sup> Thus, like the debtor in *Allied Digital*, the debtor in *Downey* “no longer enjoy[ed] any direct entity coverage.”<sup>69</sup> With respect to the indemnification coverage, the court concluded that it was not actually protecting the estate’s other assets from diminution because indemnification was “hypothetical or speculative,” and “would not deplete the Policy’s proceeds.”<sup>70</sup>

The *Downey* court’s analysis did not end with determining the proceeds were not property of the estate. Instead, the court took the analysis a step further by adding that it would have lifted the stay even if the proceeds had constituted property of the estate.<sup>71</sup> Among other things, the court found the debtor’s interest in the proceeds, if any, was insufficient to outweigh the prejudice the Ds&Os would suffer by imposition of the automatic stay.<sup>72</sup> Moreover, the court noted the Ds&Os had “likely incurred all or nearly all the defense costs that they [would] ever incur in the Securities Class Action.”<sup>73</sup>

### **B. Proceeds Are Property of the Estate**

Some courts have determined that D&O proceeds are property of the estate when policy language is clear that the debtor has a direct interest in those proceeds by virtue of Side B or Side C coverage. Other courts have been willing to hold that D&O proceeds are property of the estate based on the general proposition that a bankruptcy estate includes any assets that increase

the estate's value. But even when a court finds that proceeds are property of the estate, it may nevertheless grant the Ds&Os relief from the automatic stay to access the proceeds.

In *In re Circle K Corp.*, the court treated the proceeds as property of the estate because the policies in question included indemnification coverage, but no entity coverage.<sup>74</sup> The court placed great weight on the fact that the debtor could possibly “make a claim for reimbursement for indemnification claims paid.”<sup>75</sup> In reaching its decision, the court found that the policies protected against “diminution of estate assets” since the debtor’s assets would be at risk if the insurer failed to pay Side A claims owing to Ds&Os.<sup>76</sup> Based on this finding, the court granted the debtor’s request for an injunction against the “prosecution of . . . security litigation affect[ing] the debtor’s property interests in a valuable estate asset in violation of the automatic stay.”<sup>77</sup>

In *Matter of Vitek, Inc.*, the court acknowledged the law was unclear in the Fifth Circuit with respect to whether proceeds constitute property of the estate when (1) a policy provides direct coverage to the debtor and the Ds&Os; (2) the rights of the additional insured parties “are *not* merely derivative of the rights of one primary named insured” party (such as, for example, where an insured vendor’s rights are completely derivative of the primary insured’s rights);<sup>78</sup> and (3) the “aggregate potential liability substantially exceeds the aggregate limits of available insurance coverage.”<sup>79</sup> The court, however, left the issue unresolved.<sup>80</sup> Instead, the court decided the case on a different basis, sidestepping the issue altogether.<sup>81</sup> The Fifth Circuit found the district court misapplied “what [the district court] perceived to be a broad, general principle of insurance law” but what the Fifth Circuit doubted as valid.<sup>82</sup> However, in dicta, the court seemed to suggest that that if it had reached the issue, it would have held that the proceeds were property of the estate because the policy included Side C coverage.<sup>83</sup> Specifically, the court stated that “[t]he policies [in *Louisiana World*] did *not* afford the debtor corporation any direct coverage for liability to third-party claims,” and in that “narrow, factual context, we concluded that the debtor corporation’s ownership of the policies was not enough to render the proceeds of those policies property of the corporation’s bankruptcy estate.”<sup>84</sup>

In *In re Jasmine, Ltd.*, the bankruptcy court held that proceeds were property of the estate because the policy provided indemnification coverage.<sup>85</sup> The trustee sought court approval to settle with the insurer after the insurer tried to rescind the D&O policy due to misrepresentations made in the policy renewal application.<sup>86</sup> The Ds&Os objected to the trustee’s motion, arguing, *inter alia*, that the trustee lacked authority to extinguish their rights to the proceeds because the proceeds were not property of the estate.<sup>87</sup> In ruling that the proceeds were property of the estate, the *Jasmine* court seemed to place greater emphasis on the interest of the bankruptcy estate versus those of the Ds&Os. Like the trustee, the court was concerned that allowing Ds&Os to continue litigating against the insurer would cause the estate to suffer because the litigation costs would likely have outweighed any value



realized.<sup>88</sup> Although the court recognized “the unfortunate circumstance befalling the directors and officers of being denied access to \$2 million in insurance coverage,” it explained, “those proceeds would not be available anyway under a Policy that was deemed void as a result of material misrepresentations on the Policy application.”<sup>89</sup> Ultimately, the court agreed with the trustee that “given the likelihood of success on the merits, the proposed settlement of \$125,000 represent[ed] the maximum value that the estate could [have] realize[d].”<sup>90</sup>

In *In re CyberMedica, Inc.*, the court determined that the proceeds were property of the estate but lifted the automatic stay to allow defense costs to be paid.<sup>91</sup> After discussing different holdings from a number of cases, including *Louisiana World*, the court “adopted the logic of the cases holding that D&O Insurance proceeds are property of the estate.”<sup>92</sup> Ultimately, the court applied a “fundamental test” established by the Ninth Circuit and found that the proceeds were property of the estate because “the estate [was] worth more with [the D&O policy] than without it because it insures the Debtor against indemnity and entity claims.”<sup>93</sup> The automatic stay was lifted after the court weighed the harm that would be suffered if claims for defense costs were denied in light of the fact that no Side B or Side C claims existed.<sup>94</sup> In response to the trustee’s argument “that there [would] be indemnification claims,” the court noted notwithstanding, “the Debtor [would] not be harmed because the claims . . . being paid for defense costs are among the claims for which the Debtor is ultimately obligated to indemnify the directors and officers.”<sup>95</sup> Therefore, the court lifted the stay and allowed payments to be made on claims for defense costs.<sup>96</sup>

### **C. Not Necessary to Determine Whether Proceeds are Property of the Estate**

The more recent trend appears to be courts granting relief from the automatic stay to allow Ds&Os to access policy proceeds, thereby bypassing the determination of whether the proceeds are property of the estate altogether.<sup>97</sup>

The foundation for this approach is a trio of opinions arising out of the *MF Global Holdings* bankruptcy in the Southern District of New York. In *In re MF Global Holdings, Ltd.* (“*MF Global I*”), the court made no determination as to whether the proceeds were property of the estate because it found, regardless of whether the proceeds were property of the estate, the stay should be lifted to allow the Ds&Os to access up to \$30 million for defense costs.<sup>98</sup> When the insurer sought court authorization to advance defense costs to Ds&Os, certain class action plaintiffs objected.<sup>99</sup> Because the policy was a wasting policy and claims for defense costs totaling approximately \$8.3 million had already been made, the class action plaintiffs argued the proceeds were property of the debtor’s estate and asked the court to deny relief from the automatic stay.<sup>100</sup> The court rejected the plaintiffs’ arguments and held that cause for relief existed because the Ds&Os needed access to the proceeds for payment of their defense costs and the debtor’s needs, if

any, were minimal in comparison, given that the debtors were not defendants in the case.<sup>101</sup>

In reaching its decision to lift the stay, the court explained that the overall purpose of D&O insurance is to protect Ds&Os and there was little risk of litigation exposure to the debtors in this case, especially since securities claims had not been filed directly against the debtors.<sup>102</sup> In other words, the court found the Ds&Os' immediate need for defense "far outweigh[ed] the Debtors' hypothetical or speculative need for coverage."<sup>103</sup> The court also addressed the associated equitable concerns and found it would be unjust if plaintiffs could prosecute claims against the Ds&Os, without interference from the automatic stay, while using the stay to prevent non-debtor Ds&Os from accessing proceeds to cover defense cost claims.<sup>104</sup> The court ultimately limited the amount of proceeds available for defense costs to a "soft cap" of \$30 million.<sup>105</sup>

The Ds&Os quickly exhausted the soft cap and petitioned the court to increase access to the D&O proceeds ("*MF Global II*").<sup>106</sup> The court initially denied the Ds&Os' request due to a pending appeal in the Second Circuit, but after the appeal was dismissed, it increased the soft cap to \$43.8 million.<sup>107</sup> Thereafter, the Ds&Os asked the Court to answer the question it had declined to address in *MF Global I* — whether the D&O proceeds were property of the estate.<sup>108</sup> The *MF Global II* court held that D&O proceeds were not property of the estate because it was now clear that the debtor did not have a property interest in the proceeds.<sup>109</sup> Applying the holding from *Allied Digital*, the court explained that when the policy "provides the debtor with indemnification coverage but indemnification either has not occurred, is hypothetical, or speculative, the proceeds are not the property of the bankruptcy estate."<sup>110</sup> Although certain Ds&Os had filed \$13.06 million in indemnification claims against the debtor, no indemnification payments had been made at the time of the court's ruling.<sup>111</sup> As a result, the court set aside a \$13.06 million reserve for the debtor, noting that the Ds&Os would not be prejudiced in light of the "substantial unused amounts" available under the policies.<sup>112</sup>

Similarly, in *DeAngelis. v. Corzine (In re MF Global Holdings, Ltd. Inv. Litig.) ("MF Global III")*, the district court considered a class action filed on behalf of former shareholders of the debtor and agreed with the bankruptcy court's determination that the D&O policy proceeds were not the property of the estate.<sup>113</sup> In *MF Global III*, the class action plaintiffs sought approval of a proposed settlement with the Ds&Os.<sup>114</sup> The Chapter 11 plan administrator and post-confirmation litigation trustee objected to the proposed settlement, contending that the settlement would cause the loss of the top layer of \$25 million in D&O policies reserved for the independent directors reducing the amount that would otherwise be available for recoveries by creditors of the bankruptcy estate.<sup>115</sup> The court ultimately found that the plan administrator and post-confirmation litigation trustee did not have standing to object to the settlement because the policy proceeds were not property of the estate.<sup>116</sup> All indemnification claims had been resolved, and the \$13.06 million reserve

was not impacted by the proposed settlement.<sup>117</sup> As a result, the class action settlement was approved.<sup>118</sup>

### III. D&O PROCEEDS IN POST-CONFIRMATION LITIGATION BETWEEN TRUSTEE AND FORMER EQUITY HOLDERS

Another context in which disputes over access to D&O proceeds can arise is when the debtors' former equity holders and the post-confirmation litigation trust, as successor to the debtor, initiate competing litigation against Ds&Os. The procedural mechanism for resolving this dispute is often a motion to enforce the injunction contained in a confirmed Chapter 11 plan, wherein the post-confirmation trustee asks the court to determine whether the claims asserted by former equity are derivative (and thus, property of the estate that can only be asserted by the trustee)<sup>119</sup> or direct (and thus, non-derivative and personal to the claimant).<sup>120</sup>

The key decisions in this area arose out of the SemCrude bankruptcy.<sup>121</sup> In *SemCrude*, the litigation trust formed under the debtor's Chapter 11 plan sued the debtor's co-founder and former president and CEO (Kivisto) for, among other things, breach of fiduciary duty.<sup>122</sup> After the litigation trust settled with Kivisto, a group of former SemGroup limited partners sued Kivisto and others in Oklahoma state court (the "Subsequent Oklahoma Action") alleging breach of fiduciary duty, negligent misrepresentation and fraud.<sup>123</sup> Kivisto filed a motion in the bankruptcy court seeking to enjoin prosecution of the Subsequent Oklahoma Action, contending that the claims asserted by the former equity holders therein were derivative and belonged to the litigation trust.<sup>124</sup> After reviewing both Oklahoma and Delaware law, the bankruptcy court granted the motion, finding all of the claims asserted in the Subsequent Oklahoma Action to be derivative because the injury complained of was the same as the injury suffered by the debtor.<sup>125</sup> On appeal, the district court reversed in part and remanded, finding that certain of the claims asserted in the Subsequent Oklahoma Action were potentially direct rather than derivative.<sup>126</sup> On direct appeal back to the Third Circuit following the remand to the bankruptcy court, the Third Circuit — interpreting Oklahoma law — reversed, finding that the bankruptcy court in *SemCrude I* "got it right the first time."<sup>127</sup>

In the bankruptcy court, district court and the Third Circuit, the plaintiffs in the Subsequent Oklahoma Action contended that Kivisto "actively misrepresented SemCrude's financial health and stability in order to induce them to invest additional capital or retain their investments in SemCrude."<sup>128</sup> Further, the plaintiffs contended these representations were made to them by Kivisto "during shareholders' meetings, 'informative unitholder meetings' and other meetings — both formal and informal."<sup>129</sup> In reliance on these representations by Kivisto, the Oklahoma plaintiffs alleged they contributed millions of dollars to the debtor and that Kivisto was "particularly aggressive in his efforts to induce [the Oklahoma] Plaintiffs to make their 2006 capital contributions."<sup>130</sup> The Oklahoma plaintiffs in *SemCrude* contended they acted or did not act as a result of their personal dealings with Kivisto

and in reliance upon his misrepresentations and omissions, and that the claims were therefore direct rather than derivative because “Kivisto’s misrepresentations were made specifically to them.”<sup>131</sup>

Despite this claim of “direct injury” and Kivisto’s alleged personal interactions and representations, the Third Circuit nonetheless found that, pursuant to Oklahoma law, the plaintiffs in the Subsequent Oklahoma Action failed to show they incurred any loss in addition to SemCrude’s loss.<sup>132</sup> Thus, their claims “derived from” the claims transferred to the SemCrude litigation trust and were barred.<sup>133</sup>

The Third Circuit started its analysis with the rule that “[i]f the plaintiff has sustained no loss in addition to the loss to the corporation, the action cannot be maintained as an individual even though the wrongful acts were done with the specific intent of injuring the plaintiff.”<sup>134</sup> Turning to the allegations of loss due to Kivisto’s alleged individualized face-to-face representations, the Third Circuit agreed with Kivisto that all of the debtor’s limited partners suffered the same loss of capital as a result of his alleged misconduct, on a *pro rata* basis. Therefore, the amount of the plaintiffs’ losses differed only in amount, not in kind.<sup>135</sup> Indeed, the Third Circuit found “[i]t is well settled that an injury done to the stock and capital of a corporation by the negligence or misfeasance of its officers and directors is an injury done to the whole body of stockholders in common, and not an injury for which a single stockholder can sue.”<sup>136</sup> As a result, to the extent the Oklahoma plaintiffs’ claims were “masked claims for a diminution in value . . . as a result of Kivisto’s mismanagement, their claims are derivative . . . .”<sup>137</sup>

The Third Circuit then went one step further, and found that even assuming the Oklahoma plaintiffs in the Subsequent Oklahoma Action were uniquely harmed, they were nonetheless still precluded from bringing their claims directly, because they had no right to recover the losses they asserted.<sup>138</sup> That was because any such recoveries “would be considered equity in SemCrude’s estate, which belongs to the Litigation Trust.”<sup>139</sup> Thus, the Oklahoma plaintiffs were not able to access the D&O policy proceeds.

Similar circumstances were present in *In re Palmaz Scientific Inc.*<sup>140</sup> In *Palmaz*, the debtor’s principal and post-confirmation litigation trustee joined forces against two sets of investors, seeking to enjoin the investors’ state court suits against the debtor’s Ds&Os on the basis that the confirmed plan gave the trustee sole control of the D&O policy.<sup>141</sup> The court held that the plan injunction, while vesting the trustee with the right to control the D&O policy, did not act as a bar to any direct claims brought by the investors against former Ds&Os.<sup>142</sup> The court found that the investors’ claims relating to D&O misconduct in soliciting money from those particular investors were direct, were not impaired by the plan injunction, and thus, may potentially be satisfied by the D&O proceeds.<sup>143</sup> However, claims for fraud and breach of fiduciary duty that arose after investment were common to all investors, were derivative, and thus, could only be asserted by the trustee.<sup>144</sup>

#### IV. CONCLUSION

An overwhelming majority of courts have held that D&O policies

purchased by debtors constitute property of the estate, but courts differ with respect to whether the actual proceeds are property of the bankruptcy estate. With traditional policies, which include Side A and Side B coverage but no Side C coverage, courts disagree. The Fifth Circuit examined this issue in its seminal *Louisiana World* decision, and drew a distinction between owning the proceeds and owning the policy. Other courts, such as the *Jasmine* court, disagree with the Fifth Circuit's analysis. Instead, these courts hold that the indemnification (Side B) coverage provides the debtor with a sufficient interest to make the proceeds property of the estate. With respect to nontraditional policies that include Side C coverage, courts also differ in their analyses. However, most courts acknowledge that these policies present the most troubling scenario with respect to the proceeds issue. In *Adelphia Communications*, the court held that the proceeds were not property of the estate even though the policy included entity coverage because no Side C claims existed, but the *Vitek* court seemed to suggest that the inclusion of Side C coverage would be sufficient to bring the proceeds into the estate.

When the entity and its Ds&Os are both directly protected by the policy there is the least amount of consensus among the courts, and it gets even more uncertain in cases where the suit is filed as a derivative action. Post-confirmation litigation trustees are generally understood to be the only party that has standing to bring derivative claims (and, therefore, potentially access the D&O proceeds to satisfy claims against the estate). However, investors and former equity in some debtors are attempting to gain a piece of the D&O proceed pie as well by asserting "direct" claims against Ds&Os.

At the end of the day, there just "ain't no easy answer" to who gets the proceeds of D&O policies in bankruptcy.

## NOTES:

<sup>1</sup>The Grateful Dead, Easy Answers (live from The Palace at Auburn Hills, June 9, 1993), available at <https://www.youtube.com/watch?v=UE5iIo1r9TE>.

<sup>2</sup>The views expressed herein are those of the authors only, and should not be attributed to Gray Reed or any of its current or former clients.

<sup>3</sup>A variation of Side A coverage is independent direct liability ("IDL") policies. IDL policies extend coverage only to outside or independent directors and, thus, are not subject to dilution by claims against typical Ds&Os. See Gary Lockwood, Law of Corp. Officers & Dir.: Indem. & Ins. § 4.51 (Nov. 2016). And, because IDL policies do not provide coverage to the company, they are not subject to the automatic stay.

<sup>4</sup>Sample Side A language is as follows:

Insured Person Coverage: This policy shall pay the Loss of any Insured Person that no Organization has indemnified or paid, and that arises from any: (1) Claim (including any Insured Person Investigation) made against such Insured Person (including any Outside Entity Executive) for any Wrongful Act of such Insured Person . . .

<sup>5</sup>See, e.g., *Witco Corp. v. Beekhuis*, 38 F.3d 682, 691, 39 Env't. Rep. Cas. (BNA) 1545, 25 Env'tl. L. Rep. 20007 (3d Cir. 1994) (recognizing that section 145(c) of the Delaware General Corporation Law requires a corporation to indemnify any D&O "[t]o the extent that" he was successful "on the merits or otherwise," in defense of any threatened, pending, or

completed action, suit or proceeding in which he was a party by reason of the fact that he is or was a D&O of the corporation).

<sup>6</sup>See *Directors & Officers Liability Ins. Deskbook* ch. 6 (Am. Bar Assoc., 4th ed. 2016).

<sup>7</sup>Elina Chechelnitzky, *D&O Insurance in Bankruptcy: Just Another Business Contract*, 14 *Fordham J. Corp. & Fin. L.* 825, 830 (2009) (noting that both Sides A and B benefit Ds&Os). Sample Side B language is as follows:

Indemnification of Insured Person Coverage: This policy shall pay the Loss of an Organization that arises from any: (1) Claim (including any Insured Person Investigation) made against any Insured Person (including any Outside Entity Executive) for any Wrongful Act of such Insured Person . . .

<sup>8</sup>Sample Side C language is as follows:

Organization Coverage: This policy shall pay the Loss of any Organization: (1) arising from any Securities Claim made against such Organization for any Wrongful Act of such Organization; (2) incurred as Derivative Investigation Costs, subject to \$250,000 aggregate sublimit of liability; or (3) incurred by an Organization or on its behalf by any Executives of the Organization (including through any special committee) as Defense Costs in seeking the dismissal of any Derivative Suit against an Insured.

<sup>9</sup>See, e.g., *Zucker for BankUnited Financial Corporation v. U.S. Specialty Insurance Company*, 856 F.3d 1343 (11th Cir. 2017) (holding that prior acts exclusion in D&O policy barred fraudulent transfer claims against debtor’s officers because transfers arose out of misconduct that took place before the policy period, even though such misconduct was a significant contributing cause of the debtor’s insolvency).

<sup>10</sup>An Insured v. Insured exclusion might read as follows:

The insurer shall not be liable to make any payment for loss which is based upon, or attributable to, any claim made against any director or officer by any director or officer or by the insured institution as defined in the policy, except for a shareholder derivative action brought by a shareholder of the insured institution which is instigated and continued totally independent of, and totally without the solicitation, assistance, active participation, or intervention of, any director or officer or the insured institution.

<sup>11</sup>In *re Central Louisiana Grain Co-op., Inc.*, 467 B.R. 390, 394–96, *Bankr. L. Rep. (CCH) P 82228* (Bankr. W.D. La. 2012) (recognizing split and collecting cases).

<sup>12</sup>See, e.g., *Biltmore Associates, LLC v. Twin City Fire Ins. Co.*, 572 F.3d 663, 677, 51 *Bankr. Ct. Dec. (CRR)* 235 (9th Cir. 2009) (holding that the “insured versus insured exclusion bars coverage for claims brought as the assignee of the debtor in possession”); *Indian Harbor Insurance v. Zucker*, 553 B.R. 633 (W.D. Mich. 2016) *aff’d*, 860 F.3d 373 (6th Cir. 2017) (holding that claims brought by trustee of post-confirmation liquidation trust against debtor’s officers fell within the insured v. insured exclusion because there was a direct connection between the debtor and the liquidation trust); *National Union Fire Ins. Co. of Pittsburgh v. Olympia Holding Corp.*, 1996 WL 33415761 at \*7 (N.D. Ga. 1996) (stating that “there is no legal distinction . . . between [the debtor] and . . . Trustee for the bankruptcy estate” and holding that “any claims brought by . . . [the] Trustee fall within the exclusion clause”).

<sup>13</sup>See, e.g., *Cent. Louisiana Grain Co-op.*, 467 B.R. at 398 (holding that exclusion did not apply to Chapter 7 trustee because trustee was separate legal entity from debtor); *In re Laminare Kingdom, LLC d/b/a Floors Today*, 49 *Bankr. Ct. Dec. (CRR)* 197, 2008 WL 704396 at \*3 (Bankr. S.D. Fla. 2008) (holding that claims brought by trustee were not subject to the insured v. insured exclusion); *In re County Seat Stores, Inc.*, 280 B.R. 319, 327 (Bankr. S.D. N.Y. 2002) (same); *In re Molten Metal Technology, Inc.*, 271 B.R. 711, 732 (Bankr. D. Mass. 2002) (same).

<sup>14</sup>See, e.g., *Unified Western Grocers, Inc. v. Twin City Fire Ins. Co.*, 457 F.3d 1106, 1116–17, 22 *A.L.R.6th* 769 (9th Cir. 2006) (construing the exclusion against the insurer because it was ambiguous); *Yessenow v. Executive Risk Indem., Inc.*, 2011 IL App (1st) 102920, 352 *Ill. Dec.* 194, 953 *N.E.2d* 433, 443–44 (App. Ct. 1st Dist. 2011) (finding that

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“where a court appointed trustee is working on behalf of creditors and under the authority of the bankruptcy court, . . . the trustee and the debtor . . . are not the same entity for purposes of the insured versus insured exclusion”); *In re Laminate Kingdom, LLC d/b/a Floors Today*, 49 Bankr. Ct. Dec. (CRR) 197, 2008 WL 704396 at \*3–4 (Bankr. S.D. Fla. 2008) (same); *In re County Seat Stores, Inc.*, 280 B.R. at 324–27 (holding that the exclusion was unambiguous but inapplicable because the trustee was distinct from the company or an insured).

<sup>15</sup>A carve-out provision might read as follows:

The [Insured v. Insured Exclusion] does not apply to: (1) a Claim by the Examiner, Trustee, Receiver, Liquidator, or similar official appointed for the Insured Organization (or any assignee thereof); or (2) a Claim by a Creditors' Committee, Bondholders' Committee, Equity Committee, Noteholders' Committee, or similar committee established for the Insured Organization (or any assignee thereof).

<sup>16</sup>A bankruptcy exclusion might read as follows:

Bankruptcy Exclusion: (1) In the event that a bankruptcy or equivalent proceeding is commenced by or against the Insured Entity, no coverage will be available under this Policy for any Claim brought by or on behalf of: (a) the bankruptcy estate or the Insured Entity in the capacity as Debtor-in-Possession; or (b) any trustee, examiner, receiver, liquidator, rehabilitator, conservator or similar official appointed to take control of, supervise, manage or liquidate the Insured Entity, or any assignee of any such official (including, but not limited to, any committee of creditors or committee of equity security holders).

<sup>17</sup>See *infra* notes 18–25 and accompanying text.

<sup>18</sup>See *Yessenow v. Executive Risk Indem., Inc.*, 2011 IL App (1st) 102920, 352 Ill. Dec. 194, 953 N.E.2d 433, 440–41 (App. Ct. 1st Dist. 2011) (holding that the bankruptcy court did not err in finding that the bankruptcy exclusion was “unenforceable under section 541(c)” because it “is conditioned on the commencement of [a] bankruptcy case”).

<sup>19</sup>11 U.S.C.A. § 541(c)(1)(B).

<sup>20</sup>*Yessenow*, 953 N.E.2d. at 441.

<sup>21</sup>See *In re Fort Worth Osteopathic Hosp., Inc.*, 387 B.R. 706, 710, 49 Bankr. Ct. Dec. (CRR) 283, 59 Collier Bankr. Cas. 2d (MB) 1019 (Bankr. N.D. Tex. 2008).

<sup>22</sup>*Fort Worth Osteopathic Hosp.*, 387 B.R. at 715.

<sup>23</sup>Section 541(a)(6) provides that property of the bankruptcy estate includes “[p]roceeds, product, offspring, rents, or profits of or from property of the estate . . .” 11 U.S.C.A. § 541(a)(6).

<sup>24</sup>*Fort Worth Osteopathic Hosp.*, 387 B.R. at 713–14.

<sup>25</sup>*Fort Worth Osteopathic Hosp.*, 387 B.R. at 715.

<sup>26</sup>But see *In re Health Diagnostic Laboratory, Inc.*, 551 B.R. 218, 234 (Bankr. E.D. Va. 2016) (holding that order of payments provision applied only if actual loss exceeded policy limits and did not affect fact that, until actual loss exceeded policy limits, Corporate debtor had equal right with its Ds&Os to payment of proceeds under D&O policy); *In re Licking River Mining, LLC*, 75 Collier Bankr. Cas. 2d (MB) 1277, 2016 WL 3251890 at \*9 (Bankr. E.D. Ky. 2016) (same).

<sup>27</sup>In a policy that includes Side A, Side B and Side C coverage, the provision might read as follows:

Order of Payments: In the event of Loss arising from a covered Claims(s) and/or Pre-Claim Inquiry(ies) for which payment is due under the provisions of this policy, the Insurer shall in all events:

(1) First, pay all Loss covered under Insuring Agreement A. *Insured Person Coverage*.

(2) Second, only after payment of Loss has been made pursuant to subparagraph

(1) above and to the extent that any amount of the Limit of Liability shall remain available, at the written request of the chief executive officer of the Named Entity, either pay or withhold payment of Loss covered under Insuring Agreement B. *Indemnification of Insured Person Coverage*; and

(3) Lastly, only after payment of Loss has been made pursuant to subparagraphs (1) and (2) above and to the extent that any amount of the Limit of Liability shall remain available at the written request of the chief executive officer of the Named Entity, either pay or withhold payment of Loss covered under Insuring Agreement C. *Organization Coverage*.

<sup>28</sup>See, e.g., *In re Downey Financial Corp.*, 428 B.R. 595, 607 (Bankr. D. Del. 2010) (“Courts generally closely examine the debtor’s rights under the terms of the liability insurance policy . . . in order to determine whether holding that the policy proceeds are property of the estate would improperly ‘expand the debtor’s rights against others beyond what rights existed at the commencement of the case’ ”).

<sup>29</sup>See, e.g., *In re World Health Alternatives, Inc.*, 369 B.R. 805, 811, 48 Bankr. Ct. Dec. (CRR) 129 (Bankr. D. Del. 2007) (stating that the Order of Payments provision was an obstacle that the Trustee would have to overcome to recover from the policy).

<sup>30</sup>*In re Downey Financial Corp.*, 428 B.R. 595 (Bankr. D. Del. 2010).

<sup>31</sup>*Downey Financial Corp.*, 428 B.R. at 608.

<sup>32</sup>*Downey Financial Corp.*, 428 B.R. at 607 (quoting *In re Bake-Line Group, LLC*, 359 B.R. 566, 47 Bankr. Ct. Dec. (CRR) 217 (Bankr. D. Del. 2007)).

<sup>33</sup>*Downey Financial Corp.*, 428 B.R. at 608.

<sup>34</sup>See *In re Allied Sys. Holdings, Inc.*, No. 1:12-11564-CSS [Docket No. 1248] (Bankr. D. Del. June 4, 2013).

<sup>35</sup>*In re Allied Sys. Holdings, Inc.*, No. 1:12-11564-CSS [Docket No. 1225] (Bankr. D. Del. May 31, 2013).

<sup>36</sup>*In re Allied Sys. Holdings, Inc.*, No. 1:12-11564-CSS [Docket No. 1196] (Bankr. D. Del. May 28, 2013).

<sup>37</sup>*In re Allied Sys. Holdings, Inc.*, No. 1:12-11564-CSS [Docket No. 1248] (Bankr. D. Del. June 4, 2013).

<sup>38</sup>*In re Allied Sys. Holdings, Inc.*, No. 1:12-11564-CSS [Docket No. 1248] (Bankr. D. Del. June 4, 2013).

<sup>39</sup>See, e.g., *In re Beach First Nat. Bancshares, Inc.*, 451 B.R. 406, 411–12, 54 Bankr. Ct. Dec. (CRR) 182 (Bankr. D. S.C. 2011) (cautioning the parties that the recipient of any defense costs that are unreasonable or unnecessary could be subject to disgorgement, and requiring insurer to review defense counsel’s fees for reasonableness and to notify the trustee of the amounts being paid); *In re Laminate Kingdom, LLC*, 2008 WL 1766637 at \*5 (Bankr. S.D. Fla. 2008) (requiring defense counsel to file a fee application); *In re Arter & Hadden, L.L.P.*, 335 B.R. 666, 674 (Bankr. N.D. Ohio 2005) (same). See also discussion *infra* at notes 98–105.

<sup>40</sup>*In re Medex Regional Laboratories, LLC*, 314 B.R. 716, 720, 43 Bankr. Ct. Dec. (CRR) 178, 52 Collier Bankr. Cas. 2d (MB) 1591 (Bankr. E.D. Tenn. 2004) (“In making its determination, the court must analyze the facts of each particular case, focusing primarily upon the terms of the actual policy itself”).

<sup>41</sup>See, e.g., *Beach First Nat’l Bancshares*, 451 B.R. at 408 (recognizing divergent treatment of D&O insurance proceeds).

<sup>42</sup>*In re Allied Digital Technologies, Corp.*, 306 B.R. 505, 509–10, 42 Bankr. Ct. Dec. (CRR) 204 (Bankr. D. Del. 2004).

<sup>43</sup>*Allied Digital Techs.*, 306 B.R. at 510 (citing *In re Louisiana World Exposition, Inc.*, 832 F.2d 1391, 1400–01, 17 Collier Bankr. Cas. 2d (MB) 1291, Bankr. L. Rep. (CCH) P



72124 (5th Cir. 1987)).

<sup>44</sup>Allied Digital Techs., 306 B.R. at 511.

<sup>45</sup>Allied Digital Techs., 306 B.R. at 512; see also *In re Downey Financial Corp.*, 428 B.R. 595, 604 (Bankr. D. Del. 2010) (holding that “the proceeds will be property of the estate if depletion of the proceeds would have an adverse effect on the estate, but only to the extent that the Policy’s indemnification coverage or entity coverage actually protects the estate’s other assets from diminution”); *Beach First Nat’l Bancshares*, 451 B.R. at 408–10 (holding that proceeds were property of the estate because the policy in question was a wasting policy and if the “defense costs exhaust[ed] the policy limit, then [the] Debtor could be forced to use other assets of its bankruptcy estate to satisfy any potential claims”).

<sup>46</sup>*Downey Fin. Corp.*, 428 B.R. 595 at 604.

<sup>47</sup>*In re Louisiana World Exposition, Inc.*, 832 F.2d 1391, 1400–01, 17 Collier Bankr. Cas. 2d (MB) 1291, Bankr. L. Rep. (CCH) P 72124 (5th Cir. 1987).

<sup>48</sup>*Louisiana World*, 832 F.2d at 1398–1401.

<sup>49</sup>*Louisiana World*, 832 F.2d at 1399.

<sup>50</sup>*Louisiana World*, 832 F.2d at 1400.

<sup>51</sup>*Louisiana World*, 832 F.2d at 1400.

<sup>52</sup>*Louisiana World*, 832 F.2d at 1400. See also *In Re Valley Forge Composite Technologies, Inc.*, 2015 WL 9412742 at \*1 (Bankr. M.D. Pa. 2015) (adopting conclusion of *Louisiana World* to hold that proceeds were not property of the estate and were payable to Ds&Os without the need for stay relief).

<sup>53</sup>*Louisiana World*, 832 F.2d at 1400, 1401.

<sup>54</sup>*In re Allied Digital Technologies, Corp.*, 306 B.R. 505, 508, 42 Bankr. Ct. Dec. (CRR) 204 (Bankr. D. Del. 2004).

<sup>55</sup>*In re Allied Digital Technologies*, 306 B.R. at 514. The court additionally held that when the policy provides the debtor company with Side B coverage but indemnification “has not occurred, is hypothetical, or speculative,” as was the case, “the proceeds are not property of the bankruptcy estate.” *Allied Digital Technologies*, 306 B.R. at 514.

<sup>56</sup>*Allied Digital Technologies*, 306 B.R. at 514.

<sup>57</sup>*Allied Digital Technologies*, 306 B.R. at 514.

<sup>58</sup>*Allied Digital Technologies*, 306 B.R. at 514; see also *In re World Health Alternatives, Inc.*, 369 B.R. 805, 48 Bankr. Ct. Dec. (CRR) 129 (Bankr. D. Del. 2007). In *World Health Alternatives*, the policy in question was a wasting policy, and although it provided the debtor with indemnification coverage, no indemnification claims had been made. *World Health Alternatives*, 369 B.R. at 809–11. The court permitted the Ds&Os to utilize the proceeds, thereby exhausting policy limits to settle actions pending outside of bankruptcy. *World Health Alternatives*, 369 B.R. at 811. Like the court in *Allied Digital*, the *World Health* court was unwilling to treat the trustee differently than any other “third party plaintiff suing defendants covered by a wasting policy.” Thus, if the “Trustee is seeking to recover for wrongs of the defendants in the Trustee’s Action pending in this Court, it is not entitled to preference over the settlement of the [outside action].” *World Health Alternatives*, 369 B.R. at 811. Or, put another way, because the trustee could have recovered only under the “more junior” Side B or Side C coverage, the trustee would not be permitted to access proceeds from Side A coverage.

<sup>59</sup>*In re Adelpia Communications Corp.*, 285 B.R. 580, 600, 40 Bankr. Ct. Dec. (CRR) 123 (Bankr. S.D. N.Y. 2002) (“*Adelpia I*”).

<sup>60</sup>*Adelpia I*, 285 B.R. at 584.

<sup>61</sup>*In re Adelpia Communications Corp.*, 298 B.R. 49, 51–53 (S.D. N.Y. 2003) (remanding and vacating with instructions to determine whether an injunction to “extend the automatic

stay” should be issued pursuant to section 105(a) of the Bankruptcy Code) (“Adelphia II”).

<sup>62</sup>Adelphia II, 298 B.R. at 51–53.

<sup>63</sup>Adelphia II, 298 B.R. at 51–53.

<sup>64</sup>Adelphia II, 298 B.R. at 51–53.

<sup>65</sup>In re Downey Financial Corp., 428 B.R. 595, 608 (Bankr. D. Del. 2010). Similar to the facts in most of the cases discussed above, this policy provided Sides A, B and C coverage, and was a wasting policy. Downey Fin. Corp., 428 B.R. at 600–601.

<sup>66</sup>Downey Fin. Corp., 428 B.R. at 598. The securities actions were ultimately dismissed with prejudice, but in state court, shareholder derivative actions were filed against the debtor and certain of its Ds&Os, which were stayed by the bankruptcy. In re Downey Fin. Corp., 428 B.R. at 601–602.

<sup>67</sup>Downey Fin. Corp., 428 B.R. at 605.

<sup>68</sup>In re Downey Fin. Corp., 428 B.R. at 604–05.

<sup>69</sup>Downey Fin. Corp., 428 B.R. at 605.

<sup>70</sup>Downey Fin. Corp., 428 B.R. at 606–607. The trustee attempted to show that indemnification was not “hypothetical or speculative” because actual indemnification of \$588,000 had been paid prepetition. Downey Fin. Corp., 428 B.R. at 606. The court disagreed, however, because the policy included a \$1 million retention. Therefore, as the court pointed out, “no indemnification for which the Debtor would [have been] entitled to coverage under the policy [had] occurred.” Downey Fin. Corp., 428 B.R. at 606. See also In Re Valley Forge Composite Technologies, Inc., 2015 WL 9412742 at \*2 (Bankr. M.D. Pa. 2015) (holding trustee’s right to policy proceeds under indemnification provision had not yet ripened because trustee’s right to make a claim for indemnification only arises upon the actual payment by an insured person of a covered loss).

<sup>71</sup>Downey Fin. Corp., 428 B.R. at 608.

<sup>72</sup>Downey Fin. Corp., 428 B.R. at 609. It was important to the court that the policy provided \$10 million in coverage and the Ds&Os were only requesting access to \$880,000 for defense costs. Downey Fin. Corp., 428 B.R. at 609.

<sup>73</sup>Downey Fin. Corp., 428 B.R. at 609.

<sup>74</sup>In re Circle K Corp., 121 B.R. 257, 260, 21 Bankr. Ct. Dec. (CRR) 66, 24 Collier Bankr. Cas. 2d (MB) 917, Bankr. L. Rep. (CCH) P 73740 (Bankr. D. Ariz. 1990). The policies provided Side A and Side B coverage, but no Side C coverage.

<sup>75</sup>Circle K Corp., 121 B.R. at 261.

<sup>76</sup>Circle K Corp., 121 B.R. at 261.

<sup>77</sup>Circle K Corp., 121 B.R. at 261. In justifying its decision and addressing the plaintiffs’ rights to “seek redress” for securities fraud claims, the court stated it was “convinced that . . . it would benefit [the] debtor, its estate and thousands of creditors not to divert management’s attention or resources into . . . complex issues involving securities law.” Circle K Corp., 121 B.R. at 262.

<sup>78</sup>See MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89, 92, 17 Bankr. Ct. Dec. (CRR) 293, 18 Collier Bankr. Cas. 2d (MB) 316, Bankr. L. Rep. (CCH) P 72180 (2d Cir. 1988).

<sup>79</sup>Matter of Vitek, Inc., 51 F.3d 530, 535, Bankr. L. Rep. (CCH) P 76485 (5th Cir. 1995).

<sup>80</sup>Vitek, 51 F.3d at 535.

<sup>81</sup>Vitek, 51 F.3d at 535.

<sup>82</sup>Vitek, 51 F.3d at 536–37.

<sup>83</sup>Vitek, 51 F.3d at 534.

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<sup>84</sup>Vitek, 51 F.3d at 534. (emphasis in original). See also *In re Sacred Heart Hosp. of Norristown*, 182 B.R. 413, 419–420, 27 Bankr. Ct. Dec. (CRR) 284 (Bankr. E.D. Pa. 1995) (discussing and distinguishing *Louisiana World* because the policy before it included Side C coverage, whereas the policy in *Louisiana World* did not). The *Sacred Heart* court added that it would have held the proceeds were property of the estate even if the policy had not included Side C coverage because the debtor could have “been required to indemnify” the Ds&Os. *Sacred Heart Hosp.*, 182 B.R. at 419–420. Unlike *Louisiana World*, the *Sacred Heart* court made no distinction between direct liability coverage to the entity and indemnification coverage, because, “such an indemnification interest in proceeds is sufficient to bring those proceeds into the estate.” *Sacred Heart*, 182 B.R. at 419–420.

<sup>85</sup>*In re Jasmine, Ltd.*, 258 B.R. 119 (D.N.J. 2000). The policy provided Side A and Side B coverage but not Side C coverage.

<sup>86</sup>*Jasmine*, 258 B.R. at 122.

<sup>87</sup>*Jasmine*, 258 B.R. at 128.

<sup>88</sup>*Jasmine*, 258 B.R. at 129.

<sup>89</sup>*Jasmine*, 258 B.R. at 129.

<sup>90</sup>*Jasmine*, 258 B.R. at 129.

<sup>91</sup>*In re CyberMedica, Inc.*, 280 B.R. 12, 17–19, 39 Bankr. Ct. Dec. (CRR) 215, 48 Collier Bankr. Cas. 2d (MB) 734 (Bankr. D. Mass. 2002). The policy in question provided Side A, B, and C coverage. *CyberMedica*, 280 B.R. at 14.

<sup>92</sup>*CyberMedica*, 280 B.R. at 17.

<sup>93</sup>*CyberMedica*, 280 B.R. at 17; see also *In re Minoco Group of Companies, Ltd.*, 799 F.2d 517, 519, 14 Bankr. Ct. Dec. (CRR) 1399, 15 Collier Bankr. Cas. 2d (MB) 1277 (9th Cir. 1986).

<sup>94</sup>*CyberMedica*, 280 B.R. at 18.

<sup>95</sup>*CyberMedica*, 280 B.R. at 18.

<sup>96</sup>*CyberMedica*, 280 B.R. at 18. See also *In re Pasquinelli Homebuilding, LLC*, 463 B.R. 468, 470, 55 Bankr. Ct. Dec. (CRR) 274 (Bankr. N.D. Ill. 2012) (lifting the stay to allow Ds&Os to access proceeds to cover defense costs despite finding that proceeds were property of the estate).

<sup>97</sup>See, e.g., *In re Licking River Mining, LLC*, 75 Collier Bankr. Cas. 2d (MB) 1277, 2016 WL 3251890 at \*9 (Bankr. E.D. Ky. 2016) (holding that it was premature to make any determination that policy proceeds were property of the estate and instead finding cause existed to lift the stay to allow Ds&Os to access policy proceeds); *In re Hoku Corp.*, 2014 WL 1246884 at \*1 (Bankr. D. Idaho 2014) (declining to decide whether proceeds were property of the estate and instead finding cause to grant relief from the automatic stay).

<sup>98</sup>*In re MF Global Holdings Ltd.*, 469 B.R. 177, 181, 56 Bankr. Ct. Dec. (CRR) 96 (Bankr. S.D. N.Y. 2012), subsequently dismissed, 566 Fed. Appx. 81 (2d Cir. 2014) (“MF Global I”). The policy was a wasting policy, and it provided all three types of coverage. The policy coverage was \$70 million and \$120 million, in total, for the 2010–2011 and 2011–2012 policy periods, respectively.

<sup>99</sup>*MF Global I*, 469 B.R. at 181.

<sup>100</sup>*MF Global I*, 469 B.R. at 181–83.

<sup>101</sup>*MF Global I*, 469 B.R. at 191–93.

<sup>102</sup>*MF Global I*, 469 B.R. at 192.

<sup>103</sup>*MF Global I*, 469 B.R. at 196.

<sup>104</sup>*MF Global I*, 469 B.R. at 196.

<sup>105</sup>MF Global I, 469 B.R. at 197.

<sup>106</sup>In re MF Global Holdings Ltd., 515 B.R. 193, 60 Bankr. Ct. Dec. (CRR) 25 (Bankr. S.D. N.Y. 2014) (“MF Global II”).

<sup>107</sup>MF Global II, 515 B.R. at 196.

<sup>108</sup>MF Global II, 515 B.R. at 196.

<sup>109</sup>MF Global II, 515 B.R. at 203–04.

<sup>110</sup>MF Global II, 515 B.R. at 203 (citing In re Allied Digital Techs. Corp. 306 B.R. 505, 512 (Bankr. D. Del. 2014)).

<sup>111</sup>MF Global II, 515 B.R. at 203.

<sup>112</sup>MF Global II, 515 B.R. at 203. The court additionally held that since there was a priority of payment provision, the Ds&Os’ defense costs had to be paid in full prior to any other payment under the policy.

<sup>113</sup>DeAngelis v. Corzine, 151 F. Supp. 3d 356, 360, 93 Fed. R. Serv. 3d 118 (S.D. N.Y. 2015) (“MF Global III”).

<sup>114</sup>MF Global III, 151 F. Supp. 3d at 357.

<sup>115</sup>MF Global III, 151 F. Supp. 3d at 357–58.

<sup>116</sup>MF Global III, 151 F. Supp. 3d at 360.

<sup>117</sup>MF Global III, 151 F. Supp. 3d at 361.

<sup>118</sup>MF Global III, 151 F. Supp. 3d at 362.

<sup>119</sup>It is generally accepted that derivative claims are property of the estate that are enforceable by bankruptcy trustees. In re Ambac Financial Group, Inc., 487 Fed. Appx. 663, 665 (2d Cir. 2012) (holding that derivative claims become property of the estate upon bankruptcy filing), In re Ontos, Inc., 478 F.3d 427, 433, 47 Bankr. Ct. Dec. (CRR) 232, Bankr. L. Rep. (CCH) P 80859 (1st Cir. 2007) (derivative claim was property of the estate); In re At Home Corp., 154 Fed. Appx. 666, 668, 45 Bankr. Ct. Dec. (CRR) 177 (9th Cir. 2005) (“A bankruptcy court may enjoin a derivative claim brought by shareholders because the claim is the property of the bankrupt estate.”); In re RNI Wind Down Corp., 348 B.R. 286, 293, 46 Bankr. Ct. Dec. (CRR) 275 (Bankr. D. Del. 2006), subsequently aff’d, 359 Fed. Appx. 352 (3d Cir. 2010); In re WorldCom, Inc., 323 B.R. 844, 849, 54 Collier Bankr. Cas. 2d (MB) 161 (Bankr. S.D. N.Y. 2005).

<sup>120</sup>See, e.g. In re Palmaz Scientific Inc., 556 B.R. 770 (Bankr. W.D. Tex. 2016); In re GMX Resources, Inc., No. 13-11456 (Bankr. W.D. Okla. Dec. 11, 2014) [Docket No. 1258].

<sup>121</sup>In re SemCrude, L.P., 2011 WL 4711891 (Bankr. D. Del. 2011) (“SemCrude I”), and subsequently aff’d, 796 F.3d 310, 61 Bankr. Ct. Dec. (CRR) 115 (3d Cir. 2015) (“SemCrude III”).

<sup>122</sup>SemCrude I, 2011 WL 4711891, at \*1; SemCrude III, 796 F.3d at 313–14.

<sup>123</sup>SemCrude I, 2011 WL 4711891, at \*2; SemCrude III, 796 F.3d at 313–15.

<sup>124</sup>SemCrude III, 796 F.3d at 315.

<sup>125</sup>SemCrude I, 2011 WL 4711891, at \*5–7.

<sup>126</sup>SemCrude III, 796 F.3d at 315–16.

<sup>127</sup>SemCrude III, 796 F.3d at 319.

<sup>128</sup>SemCrude III, 796 F.3d at 313.

<sup>129</sup>SemCrude III, 796 F.3d at 313.

<sup>130</sup>SemCrude III, 796 F.3d at 313–14.

<sup>131</sup>SemCrude III, 796 F.3d at 314.

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<sup>132</sup>SemCrude III, 796 F.3d at 319.

<sup>133</sup>SemCrude III, 796 F.3d at 321.

<sup>134</sup>SemCrude III, 796 F.3d at 317(quoted *Dobry v. Yukon Elec. Co.*, 1955 OK 281, 290 P.2d 135, 137–38 (Okla. 1955), in turn quoting 12B Fletcher Cyc. Corp. § 5914) (internal quotation marks omitted)); see also *Dobry*, 290 P.2d at 137 (stating that it is “a well-established general rule that a stockholder . . . has no personal or individual right of action against third persons, including officers or directors . . . for a wrong or injury to the corporation that results in the destruction or depreciation of the value of his stock, since the wrong thus suffered by the stockholder is merely incidental to the wrong suffered by the corporation and affects all stockholders alike”).

<sup>135</sup>SemCrude III, 796 F.3d at 318.

<sup>136</sup>SemCrude III, 796 F.3d at 318. (quoting *Stuart v. Robertson*, 1926 OK 578, 118 Okla. 259, 248 P. 617, 619 (1926) (additional citations omitted)).

<sup>137</sup>SemCrude III, 796 F.3d at 318. (citing to and quoting, among others, *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004)).

<sup>138</sup>SemCrude III, 796 F.3d at 319.

<sup>139</sup>SemCrude III, 796 F.3d at 319.

<sup>140</sup>*In re Palmaz Scientific Inc.*, 562 B.R. 331, 63 Bankr. Ct. Dec. (CRR) 99 (Bankr. W.D. Tex. 2016).

<sup>141</sup>*Palmaz Scientific*, 562 B.R. at 334–36.

<sup>142</sup>*Palmaz Scientific*, 562 B.R. 562 B.R. at 337.

<sup>143</sup>*Palmaz Scientific*, 562 B.R. 562 B.R. at 340.

<sup>144</sup>*Palmaz Scientific*, 562 B.R. 562 B.R. at 341.