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

VERIZON COMMUNICATIONS INC., VERIZON FINANCIAL SERVICES LLC, and GTE CORPORATION, Plaintiffs, v. ILLINOIS NATIONAL INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, ACE AMERICAN INSURANCE COMPANY, ARCH INSURANCE COMPANY, AXIS INSURANCE COMPANY, CAROLINA CASUALTY INSURANCE COMPANY, NATIONAL SPECIALTY INSURANCE COMPANY, NORTH RIVER INSURANCE COMPANY, RSUI INDEMNITY COMPANY, ST. PAUL MERCURY INSURANCE COMPANY, TWIN CITY FIRE INSURANCE COMPANY, U.S. SPECIALTY INSURANCE COMPANY, WESTCHESTER FIRE INSURANCE COMPANY, XL SPECIALTY INSURANCE COMPANY, and ZURICH AMERICAN INSURANCE COMPANY, Defendants.	)	C.A. No. N14C-06-048 WCC CCLD

Submitted: December 4, 2014
Decided: March 20, 2015

Plaintiffs' Motion for Partial Summary Judgment on Defense Costs -DENIED
Defendants' Rule 56(f) Motion - GRANTED

MEMORANDUM OPINION

David J. Baldwin, Esquire, Jennifer C. Wasson, Esquire, Michael Rush, Esquire, Potter Anderson & Corroon LLP, 1313 N. Market Street, Wilmington, DE 19801; Robin L. Cohen, Esquire, Keith McKenna, Esquire, Michelle R. Migdon, Esquire, Kasowitz, Benson, Torres & Friedman LLP, 1633 Broadway, New York, New York, 10019. Attorneys for Plaintiffs.

Edward M. McNally, Esquire, Megan A. Adams, Esquire, Morris James LLP, 500 Delaware Avenue, Suite 1500, P.O. Box 2306, Wilmington, DE 19899. Attorneys for Defendants Illinois National Insurance Company and National Union Fire Insurance Company of Pittsburgh, PA.

John C. Phillips, Jr., Esquire, David A. Bilson, Esquire, Phillips, Goldman & Spence, P.A., 1200 N. Broom Street, Wilmington, DE 19806. Attorneys for Defendants Ace American Insurance Company, RSUI Indemnity Company, Westchester Fire Insurance Company, and U.S. Specialty Insurance Company.

Joel Friedlander, Esquire, Christopher M. Foulds, Esquire, Benjamin P. Chapple, Esquire, Friedlander & Gorris, P.A., 222 Delaware Avenue, Suite 1400, Wilmington, DE 19801. Attorneys for Defendant Twin City Fire Insurance Company.

Bruce E. Jameson, Esquire, J. Clayton Athley, Esquire, Prickett, Jones & Elliot, P.A., 1310 King Street, P.O. Box 1328, Wilmington, DE 19899. Attorneys for Defendant XL Specialty Insurance Company.

Bruce W. McCullough, Esquire, Bodell Bove LLC, 1225 N. King Street, Suite 1000, P.O. Box 397, Wilmington, DE 19899. Attorneys for Defendant Zurich American Insurance Company.

Raymond W. Cobb, Esquire, Raymond W. Cobb, LLC, Brandywine Plaza East, 1523 Concord Pike, Suite 200, Wilmington, DE 19803. Attorney for Defendant Carolina Casualty Insurance Company.

Herbert W. Mondros, Esquire, Gerald J. Hager, Esquire, Margolis Edelstein, 300 Delaware Avenue, Suite 800, Wilmington, DE 19801. Attorneys for Defendant National Specialty Insurance Company.

Mark L. Reardon, Esquire, Peter S. Murphy, Esquire, Eckert Seamans Cherin & Mellott, LLC, 222 Delaware Avenue, 7th Floor, Wilmington, DE 19801. Attorneys for Defendant North River Insurance Company.

CARPENTER, J.

Before the Court is Plaintiffs' Motion for Partial Summary Judgment on Defense Costs and Defendants' Rule 56(f) Motion. For the foregoing reasons, the Court will deny Plaintiffs' Motion for Summary Judgment and grant Defendants' Rule 56(f) Motion.

FACTUAL AND PROCEDURAL POSTURE

This action arises out of Plaintiff Verizon Communications' ("Verizon") "spin-off" of its domestic print and online directories business into Idearc, a stand-alone company.[1] The transaction, which was completed in November 2006, involved the transfer of the business directory company from Verizon to Idearc in exchange for cash and shares of Idearc common stock, Idearc Notes, and a term loan delivered to Verizon by Idearc.[2] Verizon then distributed Idearc stock to its shareholders and transferred the Idearc Notes and a portion of the term loan to investment banks, in exchange for Verizon debt securities that the investment banks had previously purchased in the open market.[3]

In connection with this transaction, Verizon purchased a series of insurance policies (the "Idearc Runoff Policy") to cover liability that might arise from the "spin-off" of Idearc.[4] Defendant Illinois National Insurance Company ("Illinois

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[1] *See* Plaintiffs' Opening Br. at 4.
[2] *See id*. at 10.
[3] *See id*.
[4] *See id*. at 1-4.

National") issued the primary policy with a $15,000,000 limit of liability subject to a self-insured $7,500,000 deductible or retention ("Idearc Primary Policy").[5] Verizon also purchased additional policies providing an additional $80,000,000 in coverage ("Idearc Excess Policy"), which incorporate by reference the coverage provisions of the Idearc Primary Policy.[6] Generally these policies provide coverage for defense costs or other forms of loss associated with the conduct of the officers and directors of Idearc and Verizon.

After the transaction in November 2006, Idearc operated as an independent company with publicly traded stock and debt instruments freely tradeable between qualified purchasers.[7] On March 31, 2009, Idearc filed an action for Chapter 11 bankruptcy in the U.S. Bankruptcy Court for the Northern District of Texas.[8] The Bankruptcy Plan, entered by the Bankruptcy Court, established a Litigation Trust Agreement to pursue claims relating to the "spin-off".[9] On September 15, 2010, the Trustee, U.S. Bank National Association, filed a complaint naming Verizon Communication, Verizon Financial Services and GTE Corporation as defendants (the "U.S. Bank Action").[10] Also named as a defendant in the complaint filed in the U.S. Bank Action, was John Diercksen, Idearc's sole director at the time of the

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[5] *See id*. at 5.
[6] *See* Plaintiffs' Opening Br. at 5.
[7] *See id*. at 11.
[8] *See id*.
[9] *See id*.
[10] *See id*.

spin-off. Verizon, Verizon Financial Services ("VFS"), GTE Corporation ("GTE") and Mr. Diercksen mounted a joint defense and on June 18, 2013, after motion practice and a bench trial, the United States District Court for the Northern District of Texas entered judgment for Verizon, VFS, GTE and Mr. Diercksen.[11]

In connection with the U.S. Bank Action, Plaintiffs have incurred significant expense, the exact amount of which remains at issue in this case.[12] Plaintiffs have attempted to recover their defense costs in connection with the U.S. Bank Action from the Idearc Primary Policy holder, Illinois National. However, Illinois National disputes that Plaintiffs have coverage under the Primary Policy asserting that the U.S. Bank Action was not a securities claim covered by the Idearc Primary Policy.

On June 4, 2014, Plaintiffs filed their complaint in the instant action against Illinois National and the issuers of the Idearc Excess Policy. On September 24, 2014, Plaintiffs filed their Motion for Partial Summary Judgment and Defendants filed their responses on October 30, 2014. Prior to filing their response, Defendants Illinois National and National Union Fire Insurance Company of Pittsburgh, PA ("National Union") filed their First Request for Production of Documents to Plaintiffs and filed a Rule 56(f) Motion to allow time for discovery.

[11] *See id*. at 13-16.
[12] *See id*. at 16-17; See Illinois National's Response at 9-10.

The Court held oral argument on all outstanding motions on December 4, 2014 and this decision follows. The docket also reflects that discovery by all parties has continued since the oral argument.

STANDARD OF REVIEW

In reviewing a motion for summary judgment pursuant to Rule 56, the Court must determine whether any genuine issues of material fact exist.[13] Specifically, the moving party bears the burden of showing that there are no genuine issues of material fact so that he is entitled to judgment as a matter of law.[14] Further, the Court must view all factual inferences in a light most favorable to the non-moving party.[15] Therefore, summary judgment will not be granted if it appears that there is a material fact in dispute or that further inquiry into the facts would be appropriate.[16]

DISCUSSION

While the Court has decided to deny summary judgment at this point, there are a few matters that are clear and worth emphasizing. The Idearc Runoff Policy is a directors and officers coverage policy intended to cover damages, settlement and defense costs for which a director or officer may have liability. It is not a policy intended to generally cover the losses of Plaintiffs or Idearc. In fact, at oral

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[13] *See* Super. Ct. Civ. R. 56(c); *Wilm. Trust Co. v. Aetna*, 690 A.2d 914, 916 (Del. 1996).
[14] *See Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
[15] *See Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361 (Del. 1990).
[16] *See Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. Super. 1962), *rev'd in part* on procedural grounds and *aff'd in part*, 208 A.2d 495 (Del. 1965).

argument, Plaintiffs conceded that under Endorsement No. 7(e)(ii), if a claim is brought solely against Plaintiffs, and not against them and Mr. Diercksen, Verizon would have no coverage for the claim under the policy.[17]

That said, the policy does appear to recognize that there are occasions when it is difficult to distinguish between the costs associated with defending the corporation and those for directors or officers. Therefore, to avoid a dispute in this area, the policy allows for payment for defense costs when the underlying claim is jointly maintained against both the company and its directors and/or officers. When this occurs, the policy allows for 100% coverage of the defense costs, but, only when the underlying claim is a "securities claim" as defined in the policy. It is unclear why this limitation exists, but it is the dispute that brings this matter to the Court. That is, whether the U.S. Bank Action litigation is considered a securities claim under the policy.

It is well settled under Delaware law, that the "interpretation of contract language is treated as a question of law."[18] The scope of the policy's coverage is prescribed by the language of the policy.[19] "[W]hen the language of an insurance contract is clear and unequivocal, a party will be bound by its plain meaning;" but,

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[17] Endorsement No. 7(e)(ii) to the Idearc Primary Policy, attached as Exhibit 7 to Affidavit of Steven Hartmann, states "for any Loss incurred while a Securities Claim is made and maintained solely against the Organization and not an Insured Person, this policy shall not provide any coverage for such loss."
[18] *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 745 (Del. 1997).
[19] *See id.*

"[i]f ambiguity exists in the contract, it 'is construed strongly against the insurer, and in favor of the insured, because the insurer drafted the language that is interpreted.'"[20] When there is a dispute over the proper interpretation of a contract, summary judgment may not be awarded if the language is ambiguous and the moving party has failed to offer uncontested evidence as to the proper interpretation.[21] When this occurs "extrinsic evidence, such as prior communications and course of dealing, must be considered by the factfinder to resolve the ambiguity. . ."[22] In other words, where reasonable minds could differ as to the contract's meaning, a factual dispute results and the factfinder must consider admissible extrinsic evidence making summary judgment improper.[23]

At the moment, the Court is unwilling to grant summary judgment for several reasons. First, this case is in its infancy and only recently has discovery been compounded. It is simply too early in the litigation to make the decision requested since to a large degree whether the underlying action fits the definition of a securities claim will resolve the litigation. As such, allowing some discovery is not only fair, but may actually prove beneficial to the Court's decision. Secondly, the Court finds that there is a sufficient ambiguity in the language of the policy such that prior communications and the dealings between the parties may

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[20] *Id.* (*quoting Hallowell v. State Farm Mut. Auto. Ins. Co.,* 443 A.2d 925, 926 (Del. 1982).
[21] *GMG Capital Investments, LLC v. Atheniam Venture Partners*, 36 A.3d 776, 784 (Del. 2012).
[22] *See id.*
[23] *See id.*

become relevant. At this early juncture, no one can reasonably assert that there is "uncontested" evidence regarding how the contract should be interpreted. The issue has not been presented in cross motions for summary judgment, and if the Court was to grant Plaintiffs' Motion, it would be tantamount to a directed verdict in their favor. The Court is simply not prepared, without discovery occurring, to take such a dramatic action at this juncture of the litigation. Using the language of the Delaware Supreme Court, it would be difficult to find reasonable minds do not differ in regards to this contract language.

Finally, while the Court is sure the parties would like to put this dispute behind them, it has taken nearly five years to get to this point and there is no overwhelming need to resolve the dispute expeditiously. The cost and fees here have already been incurred and Verizon has paid them. While the amount is significant, Verizon will not go out of business tomorrow if the Court's decision is delayed for the purposes of discovery.

The Court understands that this issue will not go away and at some point in the litigation it will again be asked to make a decision as to whether the underlying U.S. Bank Action fits within the definition of a securities claim. However, by allowing the litigation to move reasonably forward, no one will be able to complain they did not have an opportunity to fully explore this area before the Court ruled.

While the Court will deny the summary judgment, the Court is concerned that discovery will get bogged down in what was done by counsel in defending the U.S. Bank litigation and how to divide the litigation costs between Plaintiffs and Mr. Diercksen. The Court would request that the initial discovery focus on the negotiations and communications that occurred regarding the formation of the Idearc Runoff policy and the nature of the underlying U.S. Bank litigation. In other words, focus discovery on the evidence that may actually assist the Court in resolving the issue raised in the summary judgment motion and put aside for the moment how the costs should be divided. The Court suggests this occur not only because the Court thinks it will be beneficial to its decision, but if the Court was to rule in Plaintiffs' favor, the issue of allocation would appear to be moot. Based upon the above, Plaintiffs' Motion for Summary Judgment is hereby denied and Defendants' Rule 56(f) Motion is granted.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.