IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

VERIZON COMMUNICATIONS INC., NYNEX LLC, VERIZON NEW ENGLAND INC., VERIZON INFORMATION TECHNOLOGIES LLC,	)	
Plaintiffs,	)	
v.	)	C.A. No. N18C-08-086 EMD CCLD
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, XL SPECIALTY INSURANCE COMPANY, NATIONAL SPECIALTY INSURANCE COMPANY, U.S. SPECIALTY INSURANCE COMPANY, AXIS INSURANCE COMPANY, AND ST. PAUL MERCURY INSURANCE COMPANY	)	
Defendants.	)	

Submitted: June 22, 2022
Decided: October 18, 2022

Upon Defendants National Union Fire Insurance Company of Pittsburgh, Pa., U.S. Specialty Insurance Company, AXIS Insurance Company, and St. Paul Mercury Insurance Company's Motion for Summary Judgment,
DENIED

Upon Defendant National Specialty Insurance Company's Motion for Summary Judgment,
DENIED

Upon Plaintiffs' Cross-Motion for Summary Judgment on National Specialty Insurance Company's Duty to Indemnify Verizon for the FairPoint Settlement,
GRANTED

Upon Plaintiffs' Cross-Motion for Summary Judgment on Certain Defendants' Duty to Indemnify Verizon for the FairPoint Settlement,
GRANTED

Jennifer C. Wasson, Esq., Carla M. Jones, Esq., Potter Anderson & Corroon LLP, Wilmington, Delaware, *Counsel for Plaintiffs Verizon Communications Inc., NYNEX LLC, Verizon New England Inc., and Verizon Information Technologies LLC*

John C. Phillips, Jr., Esq., David A. Bilson, Esq., Phillips, McLaughlin & Hall, P.A., Wilmington, Delaware, *Counsel for Defendant U.S. Specialty Insurance Company*

Bruce E. Jameson, Esq., John G. Day, Esq., Pricket, Jones & Elliott, P.A., Wilmington, Delaware, *Attorneys for Defendant XL Specialty Insurance Company*

Robert J. Katzenstein, Esq., Eve H. Ormerod, Esq., Smith Katzenstein & Jenkins LLP, Wilmington, Delaware, *Counsel for Defendants National Specialty Insurance Company, AXIS Insurance Company and St. Paul Mercury Insurance Company*

Aaron M. Nelson, Esq., Kurt M. Heyman, Esq., Heyman Enerio Gattuso & Hirzel LLP, Wilmington, Delaware, *Counsel for Defendant National Union Fire Ins. Co. of Pittsburg, Pa.*

DAVIS, J.

I. INTRODUCTION

This is an insurance coverage dispute assigned to the Complex Commercial Litigation Division of this Court. On August 10, 2018, Plaintiffs Verizon Communications Inc. ("Verizon"), NYNEX, LLC, Verizon New England, Inc., and Verizon Technologies, LLC (collectively, the "Insureds") filed a Complaint against Defendants National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union"), XL Specialty Insurance Company ("XL Specialty"), National Specialty Insurance Company ("National Specialty"), U.S. Specialty Insurance Company ("US Specialty"), AXIS Insurance Company ("Axis"), and St. Paul Mercury Insurance Company ("St. Paul") (collectively, the "Insurers"). The Insureds contend that the Insurers wrongfully denied them coverage for expenses incurred from a fraudulent transfer lawsuit (the "FairPoint Action") prosecuted by a bankruptcy trustee.

In the Complaint, the Insureds allege the Insurers breached their insurance policies when they failed to honor the indemnification and defense obligations of the policies. The Insureds also seek declaratory relief for indemnification and defense costs.

On February 11, 2022, National Union, U.S. Specialty, AXIS, and St. Paul moved for summary judgment on the Insureds' remaining causes of actions ("National Union's Motion"), and National Specialty filed a separate motion for summary judgment ("National Specialty's Motion"). On March 25, 2022, the Insureds responded with separate cross-motions for summary judgment (the "Insureds' Cross-Motions").

For the reasons set forth below, the National Union and National Specialty Motions are **DENIED**. The Insureds' Cross-Motions are **GRANTED**.

II. FACTUAL BACKGROUND[1]

A. THE INSURANCE POLICIES

Two insurance policies (collectively, the "Policies") are relevant to this dispute: (i) a primary policy sold by National Union for the Policy Period of October 31, 2009 to October 31, 2010 (the "Verizon Policy") and (ii) a primary policy sold by National Union for the policy Period of March 31, 2008 to March 31, 2014 (the "FairPoint Policy"). U.S. Specialty, Axis, and St. Paul Mercury issued the Insureds excess coverage that follows form to the primary Verizon Policy. XL Specialty and National Specialty issued the Insureds excess coverage that follows form to the primary FairPoint Policy. The Policies were negotiated, in part, to reduce the Insureds' exposure to liabilities arising from the transactions (described below) by and between

[1] The Court has drawn its factual recitations from the record submitted with the parties' motions and the reasonable inferences permitted by that record. Where appropriate, the Court cites to the record directly. The Court otherwise assumes the parties are familiar with the case's background, including the background outlined the opinion dated February 23, 2021.[1] *See* D.I. 132; *see also Verizon Commc'ns Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 2021 WL 710816 (Del. Super. Feb. 23, 2021)("Verizon I").

Verizon, FairPoint Communications, Inc. ("FairPoint"), and Northern New England Spinco Inc. ("Spinco").

1. Definition of a "Securities Claim"

The Policies define a Security Claim to include "a Claim," except for administrative or regulatory proceedings maintained against or investigations of "Organization," "made against any Insured" under two situations described therein. The only situation relevant to the pending motions is the second: "brought derivatively on the behalf of an Organization by a security holder of such Organization."

2. Relevant Coverage Definitions

The Policies define "Insured" to include an "Organization, but only with respect to a Securities Claim." The Policies define "Loss" to include damages, settlements, judgments, and "Defense Costs." And the Policies define "Defense Costs" to include "reasonable and necessary fees, cost and expenses . . . resulting solely from the investigation, adjustment, defense and/or appeal of a Claim against any Insured."

The Policies differ slightly in their definition of "Organization." The FairPoint Policy defines "Organization" to include Verizon, FairPoint, and their subsidiaries that exist "on or before" the Policy Period. Conversely, the Verizon Policy defines "Organization" to include Verizon and its subsidiaries that exist "on or before" the Policy Period. Specifically, the Verizon Policy defines "Organization" to include "each Subsidiary,"[2] and Endorsement 7 defines "Subsidiary" in relevant part as "any for-profit entity of which [Verizon Communications] has Management Control ('Controlled Entity') on or before the inception of the Policy period either directly or indirectly through one or more other Controlled Entities."[3] "Management Control" is

[2] *Id.*, Ex. 1, Ex. C at § 2(t).
[3] *Id.*, Ex. 1, Ex. C at End. #7.

defined in relevant part as the power to designate a majority of a corporation's board of directors.[4] A provision entitled "Other Organizational Changes" then provides that "[a]n Organization ceases to be an Organization when [Verizon Communications] no longer maintains Management Control of an Organization either directly or indirectly through one or more of its Subsidiaries."[5]

Furthermore, the definition of Loss in the FairPoint Policy differs slightly from the definition in the Verizon Policy. Clause 2(p) of the FairPoint Policy originally defined Loss as follows:

> "Loss" means damages, settlements, judgments (including pre/post-judgment interest on a covered judgment), Defense Costs and Crisis Loss; however, "Loss" (other than Defense Costs) shall not include:
>
> . . .
>
> (6) matters which may be deemed uninsurable under the law pursuant to which this policy shall be construed.[6]

But Endorsement No. 13 to the FairPoint Policy modifies that definition as follows:

> [I]t is hereby understood and agreed that Clause 2. DEFINITIONS, paragraph (p) "Loss," is amended by deleting subparagraph (6) thereof in its entirety and replacing it with the following:
>
> (6) matters which may be deemed uninsurable under the law pursuant to which this policy shall be construed, including but not limited to damages or settlements which are in the nature of restitution, disgorgement or the return of ill-gotten gains.[7]

3. Bankruptcy-Related Terms

The Policies exclude Loss incurred from certain Claims brought by an Organization. The Policies state that the Insurers "shall not be liable . . . for Loss in connection with any Claim

[4] *Id.*, Ex. 1, Ex. C at § 2(q).
[5] *Id.*, Ex. 1, Ex. C at § 12(d).
[6] *Id.*, Ex. 1, Ex. A at § 2(p).
[7] *Id.*, Ex. 1, Ex. A at End. #13.

made against any Insured: which is brought by or on behalf of an Organization[;]" or "which is brought by any security holder . . . of an Organization, whether directly or derivatively, unless the security holder's . . . Claim is instigated and continued totally independent of . . . any Organization." The Policies also state that this exclusion does not apply "in any bankruptcy proceeding by or against an Organization" or "any Claim brought by the . . . trustee . . . of such Organization." Consistent with the carve-out for bankruptcy, the Policies declare that "[b]ankruptcy or insolvency of any Organization . . . shall not relieve the Insurer[s] of any of [their] obligations" under the Policies.

B. THE TRANSACTION

On March 31, 2008, Verizon executed a tax-free merger and asset transaction using the "reverse Morris trust" technique (the "Transaction").[8] The Transaction involved Verizon, Spinco, and FairPoint, and took several steps. Verizon formed Spinco, a wholly owned subsidiary.[9] Verizon then sold to Spinco a telecommunications portfolio.[10] In exchange, Spinco issued corporate debt notes to Verizon.[11] Verizon divested Spinco by spinning out its stock to Verizon's stockholders.[12] Fairpoint also wanted to acquire Verizon's telecommunications portfolio.[13]

Spinco and FairPoint merged, with FairPoint as the surviving entity.[14] Spinco and FairPoint agreed that "all the property, rights, privileges, powers and franchises of [FairPoint] and Spinco shall vest in [FairPoint], and all debts, liabilities, duties and obligations of [FairPoint]

[8] National Union's Mot. for S.J., Nelson Decl., Ex. A at ¶¶ 36, 102–13.
[9] *Id.*, Nelson Decl., Ex. C at 1.
[10] *Id.* at 1–2.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*

and Spinco shall become the debts, liabilities, duties and obligations of [FairPoint]."[15] Spinco's stock was cancelled and converted to "new" FairPoint stock.[16] FairPoint's outstanding equity split post-closing comprised a stake for both Verizon-Spinco and pre-merger FairPoint stockholders.[17]

Verizon and Spinco executed a Distribution Agreement in connection with the Transaction. Under the Distribution Agreement, Spinco agreed to "release[] and forever discharge" Verizon from certain causes of action Spinco might assert against Verizon.[18] However, the release did not apply to "any Liabilities or other obligations (including Liabilities with respect to payment, reimbursement, indemnification or contribution) under the Merger Agreement, this Agreement or the other Transaction Agreements or any contracts (as defined therein) . . . ."[19] The Distribution Agreement defined the "Merger Agreement" as the "Agreement and Plan of Merger" entered into by Verizon, Spinco, and FairPoint, "pursuant to which . . . Spinco will merge with and into [FairPoint], with [FairPoint] continuing as the surviving corporation."[20] Delaware state records show that Spinco dissolved at 9:01 A.M on March 31, 2008—the "Non-Survivor" of a "Merger."[21]

After the Transaction, FairPoint's balance sheet contained: (1) the assets Spinco had purchased; (2) joint liabilities FairPoint incurred with Spinco from drawing on a revolving credit facility to capitalize the new company; and (3) liabilities on Spinco's own notes that it used to finance the initial transfer with Verizon. Verizon sold those Spinco notes to investment banks in

[15] *Id.*, Nelson Decl., Ex. E at § 2.4.
[16] *Id.* at § 3.1.
[17] *Id.* at § 3.2.
[18] *Id.*, Nelson Decl., Ex. F at § 7.2.
[19] *Id.*
[20] *Id.* at 1.
[21] *Id.*, Nelson Decl., Ex. H.

exchange for outstanding Verizon commercial paper. In turn, the investment banks sold the notes to third-party buyers on the secondary market.[22]

The original terms of the Notes were contained in an Indenture executed by Spinco during the Spinoff, but, that same day, FairPoint executed a Supplemental Indenture and became the sole obligor on the Notes.[23] According to Verizon's proposed findings in the FairPoint Action, Spinco "was . . . the obligor on the Notes for a matter of minutes on the day the Transaction closed"—roughly "10 minutes."[24]

The Transaction left FairPoint with considerable debt as it attempted to expand its business in the New England market. The Transaction also meant that Verizon had eliminated underperforming landlines and paid off its own lenders with the proceeds from FairPoint's debts.

C. THE FAIRPOINT ACTION[25]

FairPoint was unable to service the syndicated debt and the Spinco notes. On October 26, 2009, FairPoint filed for Chapter 11 bankruptcy. FairPoint confirmed a plan of reorganization that created a trust with an appointed trustee (the "Trustee"). The Trustee was "a successor to [FairPoint] and a representative of [its] estate[.]" The plan vested any causes of action "in [FairPoint's] estate" in the trust. The plan of reorganization empowered the Trustee to pursue litigation on behalf of the trust. The Trustee was authorized to pursue FairPoint's creditors' causes of action. Those causes of action included Spinco causes of action.

On October 25, 2011, the Trustee brought an action against Verizon that asserted federal and state law causes of action. The Trustee sought to avoid purported actual and constructive

[22] *Id.*, Nelson Decl., Ex. J.
[23] *Id.*, Nelson Decl., Exs. K, L, M.
[24] *Id.*, Nelson Decl., Ex. B at ¶¶ 43, 45.
[25] *See generally Verizon I*, 2021 WL 710816, at *3.

fraudulent transfers connected to the Transaction. The Trustee contended that FairPoint was insolvent at the time of the Transaction. The Trustee repeatedly delineated the conduct of Spinco, "old" FairPoint, and the post-Transaction FairPoint. The Trustee sought to avoid the transfers by and between Verizon, Spinco, and FairPoint.

As early as October 4, 2010, the Insureds provided notice to the Insurers regarding coverage for a tax dispute between the Insureds and FairPoint's bankruptcy estate. On December 6, 2010, National Union declined coverage. National Union claimed that the tax disputes was a Securities Claim. Once the FairPoint Action was filed, the Insureds provided additional notice to the Insurers regarding coverage. In a January 11, 2012 letter, National Union reiterated its position that the FairPoint Action did not state a Securities Claim. The other Insurers adopted National Union's positions. Nevertheless, the Insureds continued to update the Insurers on the FairPoint Action.

The FairPoint Action proceeded to a 10-day bench trial in December 2013. By that time, the Trustee's only cause of action against Verizon was the fraudulent transfer claim. The parties reached a settlement in principle in May 2014, before the trial judge rendered any decision. Verizon paid the Trustee $95 million and incurred approximately $24 million in defense fees. The Insureds had been sending the Insurers invoices for these amounts during the FairPoint Action. The Insurers did not pay any defense costs or otherwise indemnify the Insureds.

The parties engaged in a compulsory mediation on June 11, 2018, which failed to resolve the dispute. As a result, the Insureds sued the Insurers in this Court.

D. PROCEDURAL HISTORY

Verizon filed this lawsuit on August 10, 2018. Verizon seeks coverage for its settlement and defense costs in the FairPoint Action under the both the Verizon Policy and the FairPoint

Policy. On April 26, 2019, the Court denied Defendants' motion to dismiss or stay this action in deference to parallel litigation in New York.[26]

On March 6, 2020, Verizon moved for partial summary judgment on coverage for its defense costs under the FairPoint Runoff Policy and related excess policies.[27] On March 9, 2020, Defendants cross-moved for judgment on the pleadings.[28]

On February 23, 2021, the Court granted Verizon's motion and denied the Defendants' motion. The question the Court answered was whether "the FairPoint Action was brought derivatively on the behalf of an Organization by a security holder of such Organization," or, in other words, whether "Securities Claim" coverage was available under the FairPoint Policy and Verizon Policy.[29] The Court held the FairPoint Action qualified as a Securities Claim under the FairPoint Policy.[30] Because Verizon's partial summary judgment motion did not address coverage for the settlement, and there were genuine and material issues as to whether "Spinco's role in the Transaction [] create[d] any Spinco Securities Claim coverage under the Verizon Policy," the issue of coverage for the settlement under the Verizon Policy was left for later resolution.[31] The case proceeded to discovery.

After discovery, National Union moved for summary judgment on the grounds that the FairPoint Action is not a Securities Claim under the Verizon Policy.[32] Verizon cross-moved for summary judgment.[33] The central question in these motions is whether the Insurers breached their duty to pay for the settlement of the FairPoint Action under the Verizon Policy.

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[26] D.I. 62.
[27] D.I. 95.
[28] D.I. 100.
[29] *See Verizon I*, 2021 WL 710816, at *5.
[30] *See id.* at *8–*14.
[31] *See id.* at *15–*16.
[32] *See generally* National Union's Mot. for S.J.
[33] Verizon's Cross-Mot. for S.J. (D.I. 231) [*hereinafter*, "Verizon's Cross-Mot. against National Union"].

Separately, National Specialty moved for summary judgment on the grounds that the FairPoint Policy's definition of "Loss" excludes coverage for Verizon's settlement of the FairPoint Action.[34] Verizon cross-moved for summary judgment.[35] Thus, a total of four motions are pending before the Court.

III. PARTIES' CONTENTIONS

A. NATIONAL UNION'S MOTION AND VERIZON'S CROSS-MOTION

National Union argues Verizon cannot carry its burden to establish coverage under the Verizon Policy for two reasons. First, National Union claims the unambiguous policy language and the undisputed facts establish that the FairPoint Action is not a Securities Claim. National Union identifies three distinct reasons for this conclusion: (1) the FairPoint Action was not brought by a "security holder" of Spinco, but rather by security holders of FairPoint; (2) the FairPoint Action was not "brought derivatively" on Spinco's behalf; and (3) Spinco was not an "Organization" when the FairPoint Action was brought.[36] Second, National Union argues that Verizon cannot point to any evidence that it had a reasonable expectation of coverage for a lawsuit like the FairPoint Action.[37]

Verizon submitted an omnibus brief in opposition to National Union's motion and in support of its cross-motion for summary judgment. Verizon's arguments are inverse from those made by National Union. Moreover, Verizon argues that National Union's motion "attempts to retread ground that the Court already has covered and to relitigate whether the FairPoint Action

[34] *See generally* National Specialty's Mot. for S.J.
[35] Verizon's Cross-Mot. for S.J. (D.I. 233) [*hereinafter*, "Verizon's Cross-Mot. against National Specialty"].
[36] National Union's Mot. for S.J. at 20–30.
[37] *Id*. at 30–39.

was indeed brought by security holders of the combined Spinco/FairPoint estate on behalf of the combined Spinco/FairPoint entity."[38]

B. NATIONAL SPECIALTY'S MOTION AND VERIZON'S CROSS-MOTION

National Specialty argues that the FairPoint Policy's definition of "Loss" excludes coverage for Verizon's settlement of the FairPoint Action. The amended definition of "Loss" in the FairPoint Policy was:

> "Loss" means damages, settlements, judgments (including pre/post-judgment interest on a covered judgment), Defense Costs and Crisis Loss; however, "Loss" (other than Defense Costs) shall not include:
>
> . . .
>
> (6) matters which may be deemed uninsurable under the law pursuant to which this policy shall be construed, including but not limited to damages or settlements which are in the nature of restitution, disgorgement or the return of ill-gotten gains.[39]

The National Specialty policy followed form to the FairPoint Policy and thus incorporated this definition. According to National Specialty, Verizon's settlement of the FairPoint Action was a settlement "in the nature of . . . disgorgement" because the only remaining cause of action at the time of settlement was the fraudulent transfer claim, and "[n]umerous cases recognize that 'fraudulent transfer recovery is a form of disgorgement.'"[40] Thus, National Specialty argues that Verizon's settlement of the FairPoint Action was not a covered "Loss" under the terms of the FairPoint Policy.

Verizon submitted an omnibus brief in opposition to National Specialty's Motion and in support of its cross-motion for summary judgment. First, Verizon argues there is no evidence that the Trustee was seeking "disgorgement" in the FairPoint Action, let alone disgorgement as its sole

[38] Verizon's Cross-Mot. against National Union at 28.
[39] *See* National Specialty's Mot. for S.J., Ex. 1, Ex. A at § 2(p) (original definition of Loss); *see id.* at End. #13 (modifying the definition of Loss).
[40] *See* National Specialty's Mot. for S.J. at 11–16 (internal citations omitted).

remedy.[41] Verizon points out that the word "disgorgement" appears nowhere in the Second Amended Complaint of the FairPoint Action. Instead, the Trustee sought

> a monetary judgment against [Verizon] equal to the Fraudulent Consideration transferred or incurred by Spinco, FairPoint, the Combined Entity, and/or its subsidiaries to or for the benefit of [Verizon] in connection with the Transaction and TSA, plus pre- and post-judgment interest, costs, and attorneys fees at the maximum rate allowed by law, punitive damages and such further and other relief for which [the Trustee] may be justly entitled to recover.[42]

Verizon stresses that the court in the FairPoint Action never entered any order requiring Verizon to disgorge anything. Verizon adds that it explicitly denied all liability under the settlement agreement.

Second, Verizon argues that National Specialty fails to consider the full text of the exclusion. The exclusion applied to "matters which may be deemed uninsurable under the law pursuant to which this policy shall be construed, including . . . disgorgement." According to Verizon, "the exclusion only applies where the law applicable to the FairPoint Runoff Policies does not allow disgorgement to be insured."[43] Verizon claims that Delaware courts have held that coverage for disgorgement is insurable under Delaware law. "Because National Specialty has not even attempted to argue that disgorgement is uninsurable under Delaware law, and Delaware law is clear that it is, National Specialty has failed to meet its burden of showing that" Verizon's settlement of the FairPoint Action falls within the exclusion.[44]

Finally, Verizon contends that National Specialty waived its right to assert its disgorgement defense. "National Specialty never previously raised any defense against coverage of the Settlement based on the assertion that it constitutes 'disgorgement' and that its policy

[41] Verizon's Cross-Mot. against National Specialty at 11–15.
[42] *See id.* at 11–12 (internal citations omitted).
[43] *See id.* at 15–16.
[44] *Id*. at 21.

excludes disgorgement from the scope of 'Loss,' regardless of whether disgorgement is insurable under applicable law."[45] Verizon argues the Court should treat this as a waiver.

IV. ANALYSIS

Resolution of these motions turns on the application of the Policies. Delaware law governs the Policies.[46] Under Delaware law, the principles of insurance contract interpretation are well-established and are grounded in the parties' intent, as expressed through their contractual language:

> Insurance contracts, like all contracts, are construed as a whole, to give effect to the intentions of the parties. Proper interpretation of an insurance contract will not render any provision illusory or meaningless. If the contract language is clear and unambiguous, the parties' intent is ascertained by giving the language its ordinary and usual meaning. Where the language is ambiguous, the contract is to be construed most strongly against the insurance company that drafted it. A contract is not ambiguous simply because the parties do not agree on the proper construction. Rather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings. Insurance contracts should be interpreted as providing broad coverage to align with the insured's reasonable expectations. Generally, an insured's burden is to establish that a claim falls within the basic scope of coverage, while an insurer's burden is to establish that a claim is specifically excluded. Courts will interpret exclusionary clauses with a strict and narrow construction and give effect to such exclusionary language only where it is found to be specific, clear, plain, conspicuous, and not contrary to public policy.[47]

Summary judgment is an effective tool to resolve disputes involving unambiguous contracts because "there is no need to resolve material disputes of fact."[48]

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[45] *Id.* at 23.
[46] *Verizon I.*, 2021 WL 710816, at *6.
[47] *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 905-06 (Del. 2021); see also *Sycamore Partners Mgmt., L.P. v. Endurance Am. Ins. Co.*, 2021 WL 4130631, at *10 (Del. Super. Sept. 10, 2021) (internal citations omitted).
[48] *Id.*

The Court holds that the FairPoint Action was a "Securities Claim" under the Verizon Policy. Accordingly, National Union's Motion is **DENIED** and Verizon's Cross-Motion Against National Union is **GRANTED**. Concerning National Specialty's Motion and Verizon's Cross-Motion Against National Specialty, the Court holds that Verizon's settlement of the FairPoint Action is a covered "Loss" under the FairPoint Policy. Accordingly, National Specialty's Motion is **DENIED** and Verizon's Cross-Motion Against National Specialty is **GRANTED**.

A. NATIONAL UNION'S MOTION AND VERIZON'S CROSS-MOTION

In its previous opinion, the Court held that the FairPoint Action is a Securities Claim under the plain language of the FairPoint Policy.[49] Now, the question is whether the FairPoint Action is a Securities Claim under the Verizon Policy. The Court holds that it is a Securities Claim under the Verizon Policy.

1. The Trustee was a "Security Holder" of Spinco.

The Verizon Policy defines a Securities Claim as a "Claim . . . brought derivatively on the behalf of an Organization by a security holder of such Organization."[50] The first question is whether the Trustee brought the FairPoint Action as a "security holder" of Spinco.

In *Verizon I*, the Court held that the Trustee brought the FairPoint Action as a "security holder" of FairPoint because, by operation of bankruptcy law, it held the exclusive right to prosecute any claims of Spinco Note holders.[51] The Court reached this conclusion through its analysis of the definition of "Securities Claim" in the FairPoint Policy. Now, the Court reaches

[49] *Verizon I*, 2021 WL 1016445, at *7–14.
[50] Verizon's Mot. for S.J., McKenna Aff., Ex. E at § 2(y).
[51] *Verizon I*, 2021 WL 710816, at *9.

the same conclusion as to the Verizon Policy, which uses the same definition of "Securities Claim" as the FairPoint Policy.

National Union argues that "[w]hen the FairPoint Action was brought in 2011 . . . the holders of the Notes were ***not*** security holders of Spinco," but rather "security holders of ***FairPoint***, which assumed all of Spinco's obligations, including the Notes, during the Spinoff in 2008."[52] Additionally, National Union claims that Verizon previously argued—and this Court previously held—that the Trustee "stands in the shoes" of the Note holders and there "was a 'Security Holder' ***of FairPoint***."[53] According to National Union, "[t]he Notes holders cannot possibly have been security holders of both FairPoint and Spinco simultaneously."[54]

National Union is attempting to revive an argument the Court rejected in its previous decision—that "only a Securities Claim brought by a true security holder qualifies for coverage."[55] The Court explained that "in bankruptcy, FairPoint's debt security holders could not pursue claims related to their notes. Only the Trustee could pursue those claims."[56] The same rationale applies here. The Spinco Notes were issued by Spinco. Thus, anyone holding the Spinco Notes were holders of Spinco debt securities. The effect of Spinco's merger into FairPoint is that the "new" FairPoint held Spinco assets and liabilities, including liability for payment on the Spinco Notes. The holders of the Spinco Notes went unpaid after the merged Spinco/FairPoint entity failed to sustain its debts load. As such, the Trustee sued Verizon to recover on creditors' Spinco-related fraudulent conveyance claims that passed to the estate in

[52] National Union's Mot. for S.J. at 22–23.
[53] *Id.*
[54] *Id.*
[55] *Verizon I*, 2021 WL 710816, at *9.
[56] *Id.*

bankruptcy. Only the Trust could bring those claims. Thus, the Trustee brought the FairPoint Action as a Spinco "security holder."

2. The FairPoint Action Was "Brought Derivatively" on Spinco's Behalf

The next issue is whether the FairPoint Action was "brought derivatively on the behalf of an Organization." Again, the answer is yes.

In *Verizon I*, the Court held that the FairPoint Action was "brought derivatively" for purposes of the Securities Claim definition in the FairPoint Policy.[57] First, the Court found that the claims at issue in the FairPoint Action had attached before the bankruptcy was filed. Second, the Court found that the claims were "general to the estate," as opposed to "personal to the creditor." Because the "timing element' and "type of claim element" were both satisfied, the FairPoint Action was "brought derivatively" for purposes of the FairPoint Runoff Policy.[58] The same rationale and conclusion apply to the Verizon Policy.

National Union argues the FairPoint Action was not brought derivatively on Spinco's behalf because, by that time, Spinco had ceased to exist and FairPoint had "succeed[ed] to and assume[d] all the rights, powers and privileges . . . of Spinco."[59] Thus, Spinco "lacked capacity to sue, or for anyone to sue on its behalf" when the FairPoint Action was brought in 2011.[60]

Spinco's causes of action automatically passed to "new" FairPoint in the Merger, so "new" FairPoint—and the Trustee later appointed in "new" FairPoint's bankruptcy—could assert those causes of action on Spinco's behalf.[61] In its previous decision, the Court explained that "Delaware courts have held that creditors possess derivative standing to bring clawback actions

[57] *Id.* at *10–11.
[58] *See id.* at *10–12.
[59] National Union's Mot. for S.J. at 23–24 (internal citations omitted).
[60] *Id.* at 24.
[61] *See Verizon I*, 2021 WL 710816, at *3.

on behalf of a corporation when that corporation is insolvent."[62] Here, Spinco was the original debtor on the Spinco Notes and then merged into FairPoint. Through the FairPoint Action, the Trustee sought to avoid the transfer of Spinco's "interest in the cash proceeds generated by the issuance of the Spinco Notes," to replenish assets that belonged to Spinco, and later belonged to the "new" FairPoint as the surviving entity.[63] These facts are sufficient to hold that the Trustee brought the FairPoint Action "derivatively" on Spinco's behalf.

National Union also claims that Spinco released any causes of action it might assert against Verizon, barring any lawsuit against Verizon by Spinco or on Spinco's behalf. Thus, according to National Union, "Spinco's causes of action against Verizon could not have 'existed as a bankruptcy law matter'" when the FairPoint Action was filed.[64]

National Union is correct that Spinco released certain claims against Verizon through the Distribution Agreement. However, the release did not apply to "any Liabilities or other obligations (including Liabilities with respect to payment, reimbursement, indemnification or contribution) under the Merger Agreement, this Agreement or the other Transaction Agreements or any contracts (as defined therein) . . . ."[65] The Distribution Agreement defined the "Merger Agreement" as the "Agreement and Plan of Merger" entered into by Verizon, Spinco, and FairPoint, "pursuant to which . . . Spinco will merge with and into [FairPoint], with [FairPoint] continuing as the surviving corporation."[66] It appears undisputed that Spinco's causes of action asserted by the Trustee in the FairPoint Action were based on the Merger Agreement,

[62] *Id.*, 2021 WL 710816, at *11 (internal citations omitted).
[63] Verizon's Cross-Mot. against National Union (citing Trust's Proposed Findings at 93).
[64] National Union's Motion for S.J. at 24–25.
[65] National Union's Mot. for S.J., Nelson Decl., Ex. F at § 7.2.
[66] *Id.* at 1.

Distribution Agreement, and/or other transaction agreements. Thus, Spinco did not release those causes of action based on the plain language of the release.

3. Spinco was an "Organization" for Purposes of the FairPoint Action.

The third issue is whether Spinco was an "Organization" as that term is used in the definition of a Securities Claim. The Court finds that Spinco is an Organization as that term is used in the Securities Claim definition.

The Court has already considered this issue in some detail. Previously, the Insurers moved to oppose coverage for the FairPoint Action under the Verizon Policy. The Insurers argued that no coverage is available for any Spinco Securities Claims because Spinco ceased being a "Subsidiary" over which Verizon had "Management Control" by the time the Verizon Policy was purchased.[67] The Court rejected this argument. The Court recognized that "the Verizon Policy defines 'Subsidiary' to include entities over which Verizon has Management Control 'on or before . . . the Policy Period,'" and "Verizon owned 100% of Spinco 'before' the Policy Period."[68] Furthermore, the Deal-specific endorsement added to the Verizon Policy expressly recognizes Spinco as a subsidiary of Verizon at the time of the Deal and provided coverage for "a Claim involving acts, errors or omissions with or relating to the Deal."[69] The Court observed that "the parties intended this endorsement to expand coverage to liabilities incurred in the Transaction to a maximum extent."[70] The Court concluded that "the Insurers have not demonstrated as matter of law that Spinco's role in the Transaction does not create any Spinco Securities Claim coverage under the Verizon Policy."[71]

[67] *Verizon I*, 2021 WL 710816, at *15 (internal citations omitted).
[68] *Id.* (internal citations omitted).
[69] *Id.* (internal citations omitted).
[70] *Id.*
[71] *Id.*

Following discovery, the Court finds that it cannot be disputed that Spinco's role in the transaction was sufficient to trigger Spinco Securities Claim coverage. Spinco was a "Subsidiary" when the Deal-specific endorsement was first added to the Verizon Policy. The endorsement was added to ensure that Spinco's Deal-related liabilities would continue to be covered under Verizon's policies after the Deal, to the extent those liabilities exceeded coverage available under the FairPoint Policies. Verizon undisputedly controlled Spinco until the Transaction and all alleged Wrongful Acts took place on or before the Transaction. Thus, Spinco was a "Subsidiary" for purposes of the Spinco-related liabilities at issue in the FairPoint Action.

4. Verizon reasonably expected Spinco-related liabilities would be covered by the Verizon Policy.

In its previous decision, the Court held that "Verizon could have reasonably expected that any Spinco-related liabilities would be covered despite Spinco's divestiture and dissolution."[72] Now, National Union argues that "Verizon cannot point to any evidence that it had—let alone expressed—a reasonable expectation of coverage for a lawsuit like the FairPoint Action."[73] However, the foregoing discussion establishes that Verizon expected it had purchased coverage for Spinco's Deal-related acts and liabilities undertaken or incurred while Spinco was a Verizon subsidiary. Furthermore, the only witness who participated in the negotiation of the Verizon Policy testified that Verizon expected Spinco to be treated as a "Subsidiary" for any post-transaction Claims alleging liability in connection with the Deal.[74]

In conclusion, the Verizon Policy defined "Securities Claim" to include "a Claim . . . made against any Insured . . . brought derivatively on the behalf of an Organization by a security

[72] *Verizon I*, 2021 WL 710816, at *15.
[73] National Union's Mot. for S.J. at 30.
[74] Verizon's Cross-Mot. against National Union, McKenna Aff., Ex. EE at 59:13–18, 64:13–19.

holder of such Organization." The undisputed facts establish that the FairPoint satisfied every element of this definition as a matter of law. Consequently, Verizon is entitled to coverage for the FairPoint Action under the Verizon Policy. National Union's Motion is **DENIED** and Verizon's Cross-Motion Against National Union is **GRANTED**.

B. NATIONAL SPECIALTY'S MOTION AND VERIZON'S CROSS-MOTION

The main issue in National Specialty's Motion and Verizon's Cross-Motion against National Specialty is whether the FairPoint Policy excluded coverage for Verizon's settlement of the FairPoint Action. The Court holds that the settlement was a covered "Loss" under the FairPoint Policy.

As noted above, the National Specialty Policy followed form to the FairPoint Policy. The original definition of "Loss" in the FairPoint Policy excluded "matters which may be deemed uninsurable under the law pursuant to which the policy shall be construed.[75] Endorsement No. 13 modified the definition of "Loss" so that it excluded "matters which may be deemed uninsurable under the law pursuant to which this policy shall be construed, *including but not limited to damages or settlements which are in the nature of restitution, disgorgement or the return of ill-gotten gains*."[76]

In its motion, National Specialty argues that the FairPoint Runoff Policy excludes coverage for Verizon's settlement of the FairPoint Action because it was a "settlement[] . . . in the nature of . . . disgorgement." In response, Verizon contends that: (1) National Specialty has not shown that the FairPoint settlement was disgorgement; (2) the exclusion does not apply

[75] *See* National Specialty's Mot. for S.J., Ex. 1, Ex. A at § 2(p); *see id.* at End. #13 (modifying the definition of Loss).
[76] *See id.* at End. #13.

because disgorgement is insurable under Delaware law; and (3) National Specialty waived its right to assert its disgorgement defense.

Here, National Specialty moves for summary judgment on the grounds that the FairPoint Policy excludes coverage for Verizon's settlement of the FairPoint Action. Accordingly, National Specialty bears the burden to establish that the claim is specifically excluded. The Court must interpret the exclusionary clause with a "strict and narrow construction" and give effect to such exclusionary language "only where it is found to be specific, clear, plain, conspicuous, and not contrary to public policy."[77] National Specialty has moved for summary judgment; therefore, National Specialty must establish that its interpretation of the exclusion is the only reasonable interpretation as a matter of law.

As a threshold matter, several courts in other jurisdictions have observed the "well-established rule that fraudulent transfer recovery is a form of disgorgement."[78] When Verizon settled the FairPoint Action, the only remaining claim was for fraudulent inducement. The Court will therefore assume, for purposes of this analysis, that Verizon's settlement of the FairPoint Action was a "settlement[] . . . in the nature of . . . disgorgement." Even then, the exclusion unambiguously does not apply to the settlement.

The FairPoint Policy, by its plain language, did not exclude coverage for "settlements . . . in the nature of . . . disgorgement." Instead, the exclusion was for "*matters which may be deemed uninsurable under the law pursuant to which this policy shall be construed*, including but not limited to . . . settlements . . . in the nature of . . . disgorgement."[79] The Court must

[77] *Id.*
[78] *In re McCook Metals, L.L.C.*, 319 B.R. 570, 591 (Bankr. N.D. Ill. 2005); *D.A.N. Joint Venture III, L.P. v. Touris*, 2022 WL 488926, at *4 (N.D. Ill. Feb. 17, 2022) (citing *In re McCook Metals*, 319 B.R. at 591); *Freeland v. Enodis Corp.*, 540 F.3d 721, 740 (7th Cir. 2008) (also citing *In re McCook Metals*).
[79] *See* National Specialty's Mot. for S.J., Ex. 1, Ex. A at § 2(p); *see id.* at End. #13 (modifying the definition of Loss).

interpret the FairPoint Policy in a manner that will not render any provision illusory or meaningless. Here, that means interpreting the exclusion in a way that gives effect to the "may be deemed uninsurable" language.

This is a straightforward task. It appears the parties intended to exclude coverage for "matters which *may be* deemed uninsurable under the law pursuant to which this policy shall be construed." As examples of matters which "may be" deemed uninsurable, the parties created a non-exhaustive list that included "settlements . . . in the nature of . . . disgorgement." It stands to reason that they only intended to exclude "settlements . . . in the nature of . . . disgorgement" if such settlements "may be deemed uninsurable" under applicable law. However, the Court has held that settlements for disgorgement *are* insurable under Delaware law.[80] Thus, the exclusion does not apply to Verizon's settlement of the FairPoint Action—even if it was a settlement "in the nature of . . . disgorgement"—because such settlement is not a "matter which *may be* deemed uninsurable" under Delaware law.

National Specialty stresses the fact that the parties amended the definition of Loss to reference settlements in the nature of disgorgement. According to National Specialty, this amendment reflects the parties' "mutual expectation . . . that the FairPoint Policies would not provide coverage for settlements in the nature of disgorgement."[81] National Specialty's argument conflicts with the plain language of the FairPoint Policy. Again, the amended definition of Loss does not categorically exclude settlements in the nature of disgorgement. Instead, it excludes "matters which may be deemed uninsurable" under applicable law, with settlements in the nature of disgorgement simply being one example on a non-exhaustive list.

[80] *Sycamore Partners Mgmt.*, 2021 WL 761639, at *11–12; *see also RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 902 (Del. 2021).
[81] National Specialty's Mot. for S.J. at 11–12.

Thus, a settlement in the nature of disgorgement will not be excluded if is not a matter which may be deemed uninsurable under applicable law.

According to National Specialty, interpreting the FairPoint Policy to cover Verizon's settlement of the FairPoint action would make the amended definition of Loss a nullity, with no force or effect. The Court disagrees. Under the original definition of Loss, the parties agreed that matters which may be deemed uninsurable under applicable law would be excluded. The amended definition then provides examples of what such matters may include, depending on applicable law. Delaware law is clear that settlements in the nature of disgorgement are insurable, which means the amended definition simply does not apply.

In short, National Specialty cannot meet its burden of showing that Verizon's settlement of the FairPoint Action was specifically excluded as a matter of law. To the contrary, Verizon's settlement of the FairPoint Action was specifically not excluded because it was not a "matter[] which may be deemed uninsurable" under Delaware law. National Specialty's Motion is **DENIED**, and Verizon's Cross-Motion Against National Specialty is **GRANTED**.

V. CONCLUSION

National Union's Motion and National Specialty's Motion are **DENIED**. Verizon's respective cross-motions for summary judgment are **GRANTED**.

IT IS SO ORDERED

October 18, 2022
Wilmington, Delaware

/s/ Eric M. Davis
Eric M. Davis, Judge

cc: File&ServeXpress