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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE FAIRPOINT INSURANCE COVERAGE APPEALS	No. 478,2022 No. 479,2022 No. 480,2022 Court Below—Superior Court of the State of Delaware C.A. No. N18C-08-086 EMD (CCLD)

APPELLEES VERIZON COMMUNICATIONS INC., NYNEX LLC, VERIZON NEW ENGLAND INC., AND VERIZON INFORMATION TECHNOLOGIES LLC'S CORRECTED ANSWERING BRIEF ON APPEAL

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NATURE OF THE PROCEEDINGS

This appeal involves Appellants' ("Insurers") ongoing attempt to evade coverage under two sets of insurance policies (the "Policies") that Appellees (collectively, "Verizon") purchased to cover the very risks Insurers seek to avoid. These Policies promised to cover Verizon for any "Securities Claim" arising out of a Deal between Verizon, its subsidiary, Northern New England Spinco Inc. ("Spinco"), and FairPoint Communications, Inc. ("FairPoint"), and broadly defined "Securities Claim" to include any Claim "brought derivatively on the behalf of an Organization by a security holder of such Organization." They also identified Spinco as an insured "Organization" and promised that the bankruptcy of any Organization would not affect the coverage provided. Applying the plain language of these policy provisions, the Superior Court (the "Court") correctly held that an underlying lawsuit (the "FairPoint Action")[1] brought by a bankruptcy-appointed litigation trustee (the "Trustee") was a covered "Securities Claim," because the Trustee was standing in the shoes of debt securities holders and asserting causes of action belonging to Spinco to recover property that Spinco transferred in the Deal.

Insurers' attempt to avoid their coverage obligations fails for two main reasons. *First*, Insurers wrongly try to limit the Policies' "Securities Claim"

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[1] *FairPoint Commc'ns, Inc. et al. Litig. Tr. v. Verizon Commc'ns, Inc. et al.*, C.A. No. 3:11-cv-00597 (W.D.N.C.).

coverage to the *non-bankruptcy* context (*i.e.*, shareholder derivative actions). That position is inconsistent with the Policies' terms, which are not limited to "shareholder" claims, expressly contemplate coverage in both *non-bankruptcy* and *bankruptcy* situations, and promise that an Organization's bankruptcy will not affect the Policies' coverage.

Under *In re Wilton Armetale, Inc.*, 968 F.3d 273 (3d Cir. 2020) ("*Wilton*") and other case law, the causes of action that the Trustee asserted against Verizon were "derivative," because they alleged pre-bankruptcy general harm to Spinco (*i.e.*, they alleged fraudulent transfers of Spinco assets to Verizon in the Deal) and only indirect harm to Spinco's debt securities holders (*i.e.*, the inability of the entity resulting from the Deal (the "Spinco/FairPoint Entity") to pay the Spinco Notes and other obligations because of those transfers). The Trustee also qualified as a "security holder" because it was standing in the shoes of Spinco's unpaid debt securities holders by operation of bankruptcy law. A claim brought by someone "standing in the shoes of" another person is legally equivalent to a claim by that other person.

In the same vein, Insurers' attempt to analogize the Policies currently before this Court to those at issue in *Idearc*[2] is baseless. The *Idearc* policies limited their "Securities Claim" coverage to lawsuits alleging violations of statutes and rules

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[2] *In re Verizon Ins. Coverage Appeals*, 222 A.3d 566 (Del. 2019) ("*Idearc*").

"regulating securities." As noted above, the definition of "Securities Claim" in the Policies at issue here is much broader and covers derivative claims like those asserted in the FairPoint Action.

Second, Insurers erroneously conflate the Trustee's derivative claims with the Spinco debt securities holders' individual claims. Although any recoveries obtained in the FairPoint Action ultimately would benefit the unpaid Spinco debt securities holders, the causes of action that the Trustee pursued did not "belong to" them. They were pre-bankruptcy claims of Spinco that became property of the Spinco/FairPoint Entity created in the Deal and that passed to that entity's bankruptcy estate and then to the litigation trust by operation of law.

Further, if a bankruptcy trustee cannot be deemed "a security holder" for purposes of the Securities Claim definition, then the Policies' coverage for derivative claims would vanish upon an Organization's bankruptcy filing, in contravention of the Policies' express promise that the bankruptcy of an Organization will *not* affect the coverage available. Insurers concede that derivative claims can be brought by "other security holders" like "creditors" when an entity is insolvent. Corrected Joint Opening Brief of Appellants (Trans. ID 69268051) ("Ins. Br.") at 27. And this Court has recognized that creditors can take the place of shareholders in the insolvency context. Simply because the Bankruptcy Code transfers derivative standing to a trustee or a debtor-in-possession upon a bankruptcy filing does not change the

derivative nature of the underlying claim. Under applicable bankruptcy law, none of the unpaid Spinco debt securities holders could have asserted Spinco's derivative claims. Only the debtor-in-possession or an appointed trustee had the right to assert derivative claims that passed to the debtor's estate in bankruptcy.

Insurers' fallback defense—that even if the FairPoint Action qualifies as a derivative suit, it should be deemed brought on behalf of and by securities holders of FairPoint, not Spinco—also fails. The undisputed record showed all parties to the Policies understood that Spinco would qualify as an Organization for Deal-related claims. It also showed that the unpaid debt securities at issue in the FairPoint Action were Spinco debt securities issued as part of the Deal, and that the Trustee was expressly asserting Spinco's causes of action to recover Spinco's assets transferred in the Deal. Thus, the Court correctly held that the Trustee was acting on behalf of Spinco and standing in the shoes of Spinco securities holders.

For these and other reasons set forth below, the Court correctly found coverage for the FairPoint Action under the Policies. Insurers should be held to the promises they made, and the Court's final judgment should be affirmed.

ANSWER TO INSURERS' SUMMARY OF ARGUMENTS

1. Denied. The Court correctly held that the FairPoint Action was "brought derivatively on the behalf of an Organization by a security holder of such Organization" and thus constituted a "Securities Claim" under the Policies.

a. The FairPoint Action was "brought derivatively on the behalf of an Organization." Under well-established case law, a fraudulent transfer claim is derivative if it attached before the bankruptcy was filed and the damages sought would revert to the debtor's estate for distribution to the general creditor body. Here, Spinco was an "Organization" under the Policies, and the Trustee was asserting pre-bankruptcy Spinco causes of action for the benefit of debt securities holders and other unsecured creditors generally.

b. The FairPoint Action was "brought . . . by a security holder." In bringing the FairPoint Action, the Trustee was standing in the shoes of Spinco's unpaid debt securities holders by operation of bankruptcy law. A claim brought by someone "standing in the shoes of" another person is legally equivalent to a claim by that other person.

2. Denied. The Court correctly held that the FairPoint Action was "brought derivatively on the behalf of an Organization by a security holder of such Organization" under the Verizon Policies.

a. The FairPoint Action was "brought derivatively on the behalf of [Spinco]." The Court correctly held that "Spinco's causes of action" passed to the Spinco/FairPoint Entity in the merger and then to the Trust as a result of that entity's bankruptcy. Notwithstanding Insurers' insistence that a lawsuit could not be brought on behalf of Spinco because it "dissolved in a merger," the Trustee expressly maintained that "[a] bankruptcy trustee of a merged entity may bring fraudulent transfer claims for pre-merger transfers made *by the non-surviving entity*." Further, the Trustee asserted at trial that Spinco was the relevant debtor and that the Trustee was seeking to recover Spinco's assets. Thus, the FairPoint Action was brought on behalf of Spinco.

b. Spinco was an "Organization" under the Verizon Policies for purposes of the FairPoint Action. Under the Verizon Policies, "Organization" includes Verizon and any "Subsidiary," which includes any entity of which Verizon had Management Control "on or before" the policy period starting October 31, 2009. As Verizon had Management Control of Spinco until March 31, 2008, Spinco is a "Subsidiary." Though the "Other Organizational Changes" provision states "an Organization ceases to be an Organization when [Verizon] no longer maintains Management Control of [it]," it also makes clear that such entity will still be treated as an Organization for Wrongful Acts allegedly occurring *while* the entity was a Verizon Subsidiary. The "ceases to be an Organization" language here does not

mean wholesale removal of an entity's "Subsidiary" status. Other provisions of the Policies, including the Deal-specific endorsements, further confirm the contemplated coverage for Spinco for any claims alleging Deal-related Wrongful Acts prior to the spinoff.

c. The FairPoint Action was "brought . . . by a security holder of [Spinco]." Because the Spinco Notes were undisputedly issued by Spinco, holders of those Notes were holders of Spinco debt securities. Ex. B at 16.[3] After the Deal closed, liability for payment on the Spinco Notes simply transferred to the Spinco/FairPoint Entity. The Trustee expressly alleged that, as a result of the Deal, "one or more creditors of *Spinco, FairPoint, and/or the Combined Entity*" had allowable claims, which passed to the Trustee in bankruptcy. As the Court recognized, the Trustee held "the exclusive right" to prosecute all derivative claims that the Noteholders could have pursued outside of bankruptcy, and thus was standing in their shoes when it pursued the FairPoint Action. Further, Insurers' contention that Verizon is judicially estopped from contending that the FairPoint Action was brought by Spinco securities holders is baseless. That has been Verizon's position from the outset of this case. Verizon opposed Insurers' motion

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[3] Exhibit references ("Ex.") refer to exhibits annexed to Insurers' opening brief.

for judgment on the pleadings with respect to the Verizon Policies on that exact basis.

STATEMENT OF FACTS

A. The Deal

The FairPoint Action arose out of a series of corporate transactions resulting in the spinoff of Spinco, a wholly-owned Verizon subsidiary, and an immediate subsequent merger of Spinco into FairPoint on March 31, 2008 (the "Deal"). Ex. B at 6. Insurers acknowledge that as part of the Deal, in March 2008, Verizon caused the transfer of certain of its landline telephone assets to Spinco in exchange for cash, Spinco stock, and more than $500 million in senior, interest-bearing debt securities issued by Spinco (the "Spinco Notes"). Ins. Br. at 9; Ex. C at 6-7; B84-B86; Ex. B at 6; B893 (7:15-25).

Immediately following this exchange, (1) Verizon distributed all of its Spinco stock to Verizon shareholders; (2) Verizon transferred the Spinco Notes to investment banks in exchange for certain Verizon debt securities; (3) the investment banks resold the Spinco Notes to pre-arranged public purchasers; and (4) Spinco merged into FairPoint, creating the Spinco/FairPoint Entity,[4] which assumed liability for payment on the Spinco Notes. Ex. C at 6; Ex. B at 6-7; A340-43 (¶¶ 107-112); A349 (¶ 138); *see also* A1030 (authorizing the Issuer or Trustee to supplement

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[4] Insurers' assertion that Spinco "ceased to exist" is entirely incorrect. The merger agreement provides that "Spinco shall be merged with and into [FairPoint]" thus creating the Spinco/FairPoint Entity, and that the "*separate* existence of Spinco shall cease[.]" Ins. Br. at 9 (quoting A558) (emphasis added).

the Indenture "to provide for the assumption of any of the Issuer's or any Guarantor's obligations to Holders in the case of a merger"); A1072 (adding "new" FairPoint as an additional party and obligor on the Spinco Notes). As a result of the merger, Verizon/Spinco shareholders received FairPoint common stock. Ex. C at 6; A341 (¶ 109); B935 (1972:13-14). Spinco released certain claims against Verizon in the Distribution Agreement but specifically *did not release* any claims for liabilities arising from the Merger Agreement, the Distribution Agreement, or other transaction agreements—which provided the bases for the Trustee's assertion of Spinco causes of action in the FairPoint Action. Ex. B at 7 (citing B229).

B. The Policies

The Policies at issue in this appeal include the Runoff Policies (which Insurers refer to as the "Transaction Policies") and the Verizon Policies. Verizon and FairPoint purchased the Runoff Policies specifically to cover claims arising from the Deal. They consist of a primary policy sold by National Union Fire Insurance Company of Pittsburgh, Pa ("National Union") ("Primary Policy") and excess policies issued by XL Specialty Insurance Company and National Specialty Insurance Company. A1695-A1769; B405-B426. The excess policies "follow form" to the terms of the Primary Policy, subject to their separate policy limits and attachment points. Ex. C at 4; Ex. B at 3; B405-B426.

Verizon separately purchased the Verizon Policies from National Union, U.S. Specialty Insurance Company, AXIS Insurance Company, and St. Paul Mercury Insurance Company (A1770-A1968) to provide excess coverage for liability arising out of the Deal, as well as primary coverage for other liabilities. The Policies are virtually identical with respect to the coverages at issue here and include terms that National Union specifically drafted to cover claims arising from the Deal. Ex. C at 4; Ex. B at 3-4.

1. "Securities Claim" Coverage

The Policies provide "Organization Liability" coverage. That coverage pays for "the Loss of any Organization arising from a Securities Claim made against such Organization for any Wrongful Act of such Organization." A1762; A1779.

As Insurers correctly acknowledge, the Policies contain identical definitions of "Securities Claim." Ins. Br. at 15. Importantly, this definition differs materially from the "Securities Claim" definition at issue in *Idearc*. In *Idearc*, both prongs of the "Securities Claim" definition required an alleged violation of a regulation, rule or statute regulating securities to qualify as a Securities Claim. *Idearc*, 222 A.3d at 572-73. Here, in contrast, the second prong of the Policies' "Securities Claim" definition broadly covers "a Claim . . . made against any Insured . . . (2) brought derivatively on the behalf of an Organization by a security holder of such Organization." A1706; A1783. The Policies define "Insured" to include an

"Organization" for purposes of a "Securities Claim." A1705; A1782; Ex. C at 5; Ex. B at 4.

2. Bankruptcy-Specific Terms

The Policies make clear an Organization's bankruptcy does not affect the scope of coverage that otherwise would be available. The Policies provide that the "[b]ankruptcy . . . of any Organization . . . shall not relieve the Insurer[s] of any of [their] obligations" under the Policies. A1716; A1793 (the "Bankruptcy Coverage Section")[5]. In addition, "Organization," as used in the definition of "Securities Claim," is defined to include the "Named Entity," its "Subsidiaries" and "in the event a bankruptcy proceeding shall be instituted . . . the resulting debtor-in-possession." A1706; A1783. Further, the Policies' "Insured v. Insured Exclusion" specifically does not apply to claims brought against an Insured by the "trustee" of an Organization in bankruptcy. A1708; A1832; Ex. B at 5-6.

3. Deal-Specific Endorsements

Critically, [redacted]

[redacted] As Insurers note, the Runoff Policies include a "Deal Specific Runoff Multiparty Coverage" endorsement that provides coverage for Claims, including

[5] Similarly, the Policies' Order of Payments provision provides that the "bankruptcy or insolvency of any Organization . . . shall not relieve the Insurer of any of its obligations to prioritize payment of covered Loss[.]" A1717; A1794.

Securities Claims, for Wrongful Acts "in connection with or relating to the Deal." A1761-62; Ins. Br. at 12. This endorsement expressly includes "*Spinco*" as a Named Insured and states that "[t]his policy *and the policies that are written as specific excess over this policy* are intended to provide coverage which is primary to any directors and officers, executive or organization management liability insurance program issued to Verizon, *Spinco* or FairPoint or any of their Subsidiaries." A1763-64 (emphases added); Ins. Br. at 13.

The Verizon Policies likewise include Endorsement 34, titled "Excess to Deal Specific Program FairPoint and Verizon," which provides that "[i]n the event of a Claim involving acts, errors or omissions in connection with or relating to the Deal, coverage as is afforded by *this policy shall be specifically excess of*" coverage provided by the Runoff Policies. A1845 (emphasis added). As Insurers acknowledge, Endorsement 34 defines "Deal," for purposes of coverage, as the March 2008 "merger of FairPoint . . . with . . . Spinco[], *currently a subsidiary* of Verizon," confirming that, despite its spinoff a year and a half prior to policy issuance, Spinco was considered a subsidiary of Verizon for purposes of any Deal-related claims. A1845 (emphasis added); Ins. Br. at 12; Ex. B at 19. Indeed, this endorsement was first added to Verizon's coverage during the 2007-08 policy period when Spinco was a Verizon subsidiary.

4. Covered "Organization"

The main differences between the Policies concern which entities are insured for Deal-related claims. The Runoff Policies define "Organization" to include FairPoint, Verizon, and Spinco, and any entities that were subsidiaries "on or before" the policy period. A1706, A1761.

Endorsement 7 amended the definition of "Subsidiary" in the Verizon Policies to include, among other things, "any for-profit entity of which the Named Entity 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." A1810.[6] Thus, only Verizon and its subsidiaries that existed "on or before" the Policy Period qualified as "Organizations" under the Verizon Policies. A1783, A1810; Ex. B at 4.

C. The FairPoint Action

In October 2009, the Spinco/FairPoint Entity and its then-subsidiaries filed for Chapter 11 bankruptcy. Ex. B at 8; A349 (¶ 138). In January 2011, the United

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[6] As discussed further in § II.C.2, the Policies state that a Verizon subsidiary will cease to be covered under the Policies after Verizon no longer has management control over the entity, but that applies only to Wrongful Acts taking place from that point forward. Ins. Br. at 14-15.

States Bankruptcy Court for the Southern District of New York confirmed the Bankruptcy Plan, which created the Litigation Trust to which the debtors' claims against Verizon were assigned, and appointed the Trustee to pursue those claims. B755-B758; Ex. B at 8; A349-50 (¶¶ 139-41); A2000-A2166; A2167-A2209. The Trustee was a successor of the debtors and a representative of their estates. Ex. B at 8; Ex. C at 7; A313-356 (¶¶ 4, 16, 142, 154-59); A2046; A2173-A2174. The Trustee was "vested with exclusive authority to manage property of the estate, including causes of action belonging to the debtor and its creditors." Ex. C at 24. The Trustee was thus authorized to pursue causes of action on behalf of the post-Deal Spinco/FairPoint Entity that were transferred to the debtors' estates—including Spinco causes of action. Ex. C at 24; Ex. B at 8; A2046; A2173-A2174.[7]

In October 2011, the Trust brought the FairPoint Action against Verizon seeking more than $2 billion in damages. Ex. B at 8; A312-13 (¶ 1). In its Second Amended Complaint (the "SAC"), the Trust alleged, among other things, that creditors of "Spinco, FairPoint, and the Combined Entity" could pursue fraudulent conveyance claims because, as a result of Spinco's transfers of cash and Spinco Notes to Verizon, "Spinco, FairPoint, and the Combined Entity were left insolvent,"

[7] Insurers' assertion that the entity which filed for bankruptcy did "not include[e] Spinco, which did not exist" (Ins. Br. at 16) does not take into account that Spinco's rights and liabilities passed to the Spinco/FairPoint Entity.

and Verizon and Spinco knew this would be the result before the transfers took place but hid that fact "to hinder, delay, or defraud then existing or future creditors of Spinco, FairPoint, the Combined Entity, and/or its subsidiaries." A320-356 (¶¶ 31, 51, 102, 107, 112-113, 142, 154-59); *see also* Ex. B at 8-9. As the Court recognized, "[t]he Trustee was authorized to pursue FairPoint's creditors' causes of action," which "included Spinco causes of action." Ex. C at 7 (citing A313-356 (¶¶ 4, 142, 154-59)); Ex. B at 8, 17. It used that authority to pursue causes of action for actual and constructive fraudulent transfers under the Bankruptcy Code and North Carolina fraudulent transfer law and to seek damages and/or avoidance of the securities transfers that took place as part of the Deal, among other relief. Ex. B at 8-9; A312-356 (¶¶ 1, 4, 113, 153, 159); Ins. Br. at 18. The Trustee's allegations repeatedly delineated the conduct of Spinco, "old" FairPoint, and the post-Deal Spinco/FairPoint Entity, which it referred to as the "Combined Entity." Ex. B at 9; Ex. C at 8; *see also* A353-356 (¶¶ 150-59).

D. Insurers' Refusal to Provide Coverage

After the FairPoint Action was filed, Verizon sought insurance coverage from Insurers under the Policies. Ex. C at 8; Ex. B at 9. However, Insurers denied coverage for the FairPoint Action on the ground that the action was not a Securities Claim. B98-B106; B392; B943; Ex. C at 8; Ex. B at 9. As a result, Verizon was

forced to defend the action on its own and ultimately incurred more than $23 million in defense costs. Ex. C at 8-9; Ex. B at 9.

E. Basis for Verizon's Potential Liability in and Settlement of the FairPoint Action

The FairPoint Action proceeded to a 10-day bench trial in December 2013 where the only remaining cause of action against Verizon was the fraudulent transfer claim. Ex. B at 9. After the bench trial concluded and the parties submitted proposed findings of fact and conclusions of law (B762-B889; A359-A519), but before the court issued a decision, Verizon settled the FairPoint Action for $95 million. Although Insurers cite Verizon's proposed findings of fact and conclusions of law throughout their appeal brief, the *Trustee's evidence and allegations* formed the basis of Verizon's potential liability that was resolved by settlement (not the defenses Verizon asserted).

The dispute at trial centered on whether the relevant debtor should be considered "new" FairPoint or "Spinco." In its defense, Verizon argued that

However, the Trustee alleged [8]

While Insurers described Spinco as a "pass-through" entity in their briefing below and emphasize here that Verizon argued Spinco was "the obligor on the Notes for a matter of minutes" (Ins. Br. at 10 (citing A464)), the Trustee argued at trial that

Thus, the Trustee premised its case at trial on Spinco being the "debtor" whose property was wrongly transferred for purposes of its fraudulent conveyance claim.

In early 2014, Verizon notified Insurers that it was discussing a settlement with the Trust that implicated their layers of coverage. B18-B19; B942-B944. However, Insurers continued to deny coverage for any amounts paid in the FairPoint Action. B5-B27 (¶¶ 14, 53, 56, 63, 73, Second Affirmative Defense); B392.

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Consequently, Verizon finalized the settlement on its own and later filed this action. B937-B938; A2221-A2243.

F. Procedural History of This Action

1. The 2021 Decision

On February 23, 2021, the Court granted Verizon's pre-discovery motion for partial summary judgment on coverage for defense costs under the Runoff Policies (A180-A181) and denied Insurers' motion for judgment on the pleadings on both Policies (A216-A254). Ex. C. The Court held that the Trustee's claims in the FairPoint Action qualified as a "Securities Claim" under the Runoff Policies for several reasons. First, the Court held that the fraudulent conveyance claims were "brought derivatively" because they "attached before the bankruptcy was filed" and were general to the estate because "[a]ny recovery from avoidance actions 'reverts back to the estate,' *i.e.*, ultimately to the 'general creditor body.'" Ex. C at 21-22. Second, the Court held that the claims satisfied the "on the behalf of an Organization" requirement because "the Trustee's power to sue is derived from the corporate debtor," and the Trustee is authorized by bankruptcy law to represent the bankrupt estate and sue "on its behalf." Ex. C at 24-25. The Court recognized that the Trustee was vested with exclusive authority to bring causes of action belonging to the debtor and creditors, including "Spinco causes of action." Ex. C at 7, 29. The Court rejected Insurers' assertion that any distinction should be made between the

debtor and its estate given Insurers' contractual promise, found in Clause 19 of the Runoff Policies, that an Organization's bankruptcy would not affect the coverage available under the Policies. Ex. C at 27-28. Finally, the Court held that the Spinco Notes qualified as "securities" and that the FairPoint Action should be deemed brought "by a security holder" because, under bankruptcy law, the Trustee was standing in the shoes of Spinco Noteholders and held the exclusive right to prosecute Spinco's derivative causes of action. Ex. C at 17-21.

2. The 2022 Decision

After discovery, Insurers that issued the Verizon Policies moved for summary judgment on whether the settlement was covered under their Policies, and Verizon cross-moved for summary judgment under the Policies. Again, the central issue was whether the FairPoint Action constituted a "Securities Claim" under prong (2) of that term's definition applicable to Claims "brought derivatively on the behalf of an Organization by a security holder of such Organization."

On October 18, 2022, the Court granted Verizon's motion and denied Insurers' motion. Ex. B at 21. First, the Court concluded that the Trustee was a "security holder" because the Trustee held "the exclusive right to prosecute any claims of Spinco Note holders," and thus was standing in their shoes when it did so. Ex. B at 15-17. The Court rejected Insurers' argument that the Trustee was a security holder of FairPoint, not Spinco, because the Spinco Notes were issued by Spinco,

and thus holders of those Notes were holders of Spinco debt securities. Ex. B at 16. The Court recognized that this fact did not change simply because Spinco's merger into FairPoint made FairPoint legally responsible for liability on the Spinco Notes.

Second, the Court determined that the FairPoint Action was brought derivatively on Spinco's behalf. Ex. B at 17-18. In rejecting Insurers' argument that Spinco "ceased to exist" before the FairPoint Action, the Court recognized that Spinco's causes of action passed to the Spinco/FairPoint Entity after the merger, so the Trustee appointed in that entity's bankruptcy could assert those causes of action on Spinco's behalf. Ex. B at 17.

Third, the Court recognized that Spinco was an "Organization" for purposes of the FairPoint Action. Ex. B at 19-20. The Court noted that Insurers' argument on this issue was previously addressed and rejected in the 2021 Decision based on the Subsidiary definition and the Deal-specific endorsement. Ex. B at 19.

After the 2022 Decision was issued, the Court entered final judgment. Ex. A. One insurer—U.S. Specialty—settled its disputes, and the remaining Insurers filed the appeals that are now before this Court. A2298-A2314.[9]

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[9] Insurers only appealed the Court's "Securities Claim" rulings, yet their brief attempts to reserve the right to challenge other holdings in the future. *See* Ins. Br. at 20-21, n.2, n.3. Verizon objects to any future attempt by Insurers to challenge rulings not appealed here; those arguments have been waived.

ANSWERING ARGUMENT ON APPEAL

I. THE SUPERIOR COURT CORRECTLY HELD THAT THE FAIRPOINT ACTION WAS A SECURITIES CLAIM UNDER THE POLICIES

A. Counterstatement of the Question Presented

Did the Court correctly determine that the FairPoint Action, which was brought on behalf of the Spinco/FairPoint Entity's bankrupt estate by the Trustee standing in the shoes of Spinco's debt securities holders, constituted a claim "brought derivatively on the behalf of an Organization by a security holder of such Organization"? Yes. (Preserved at A207-A214, B60-B67, B147-160, B171-B183.)

B. Scope of Review

The meaning and application of insurance policy language is a question of law, which is reviewed *de novo*. *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 68 (Del. 2011). In reviewing decisions on cross-motions for summary judgment, a court will review the record and draw its own factual conclusions only "if the findings below are clearly wrong and if justice requires." *Fiduciary Tr. Co. of N.Y. v. Fiduciary Tr. Co. of N.Y.*, 445 A.2d 927, 930 (Del. 1982).

C. Legal Standards

There is no dispute that Delaware law controls here. Ex. C at 13-14; Ex. B at 14. It is well-established that "[u]nder Delaware law, the interpretation of

contractual language, including that of insurance policies, is a question of law."[10] Moreover, "[i]n determining meaning, [the] contract is to be read as a whole, with a court giving effect to every term therein. Individual terms should not be read to frustrate the parties' clear purpose."[11] In interpreting a policy, just like any other contract, a court will not interpret it in a manner that "produces an absurd result or one that no reasonable person would have accepted when entering the contract." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010). Coverage grants should be read broadly and exclusions read narrowly.[12]

Because this dispute turns on matters of contract interpretation, this Court must also consider whether the contractual language at issue "is plain and unambiguous." *Gore v. Al Jazeera Am. Holdings I, Inc.*, 2015 WL 4778339, at *6 (Del. Ch. Aug. 13, 2015). To whatever extent it is not, and "the provisions in controversy are [instead] reasonably or fairly susceptible to different interpretations or may have two or more different meanings," then this Court "should construe the language of the contract in favor of coverage and against" Insurers. *See Am. Legacy*

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[10] *IDT Corp. v. U.S. Specialty Ins. Co.*, 2019 WL 413692, at *7 (Del. Super. Ct. Jan. 31, 2019).

[11] *Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76, 90 (Del. Ch. 2009) (citation omitted).

[12] *Ferrellgas Partners L.P. v. Zurich Am. Ins. Co.*, 2020 WL 363677, at *13 (Del. Super. Ct. Jan. 21, 2020); *Arch Ins. Co. v. Murdock*, 2020 WL 1865752, at *6 (Del. Super. Ct. Jan. 17, 2020).

Found. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 640 F. Supp. 2d 524, 535 (D. Del. 2009). However, when ambiguity is found, language is construed in accordance with the reasonable expectations of the insured. *Bermel v. Liberty Mut. Fire Ins. Co.*, 56 A.3d 1062, 1070 (Del. 2012); *see also* Ins. Br. at 19.[13] The provisions in controversy must further be read within their overarching context: "contractual provisions" must be interpreted "in a way that gives effect to every term of the instrument, and that, if possible, reconciles all of the provisions of the instrument when read as a whole." *Council of Dorset Condominium Apartments v. Gordon*, 801 A.2d 1, 7 (Del. 2002).

D. Merits of the Argument

The Court correctly held that the FairPoint Action qualified as a "Securities Claim" under the Policies. That term includes any claim "brought derivatively on the behalf of an Organization by a security holder of such Organization."[14] The FairPoint Action met these criteria because the Trustee, standing in the shoes of the

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[13] As discussed below, Insurers do not dispute that discovery revealed Verizon's actual and reasonable expectation of coverage under the Verizon Policies.

[14] Under the Runoff Policies, "Organization" is defined to include (1) FairPoint, Verizon, and Spinco and (2) in the event of their bankruptcy, the resulting "debtor[s]-in-possession." A1706, A1761. Under the Verizon Policies, "Organization" includes Verizon and any Subsidiary, including Spinco. A1783, A1845; *see also infra* § II.C.2.

security holders, was pursuing derivative claims on behalf of Spinco that were transferred to the Spinco/FairPoint Entity and its estate.

When an Organization is solvent, shareholders generally have standing to bring derivative claims. Upon insolvency, however, debt securities holders and other creditors can "take the place of the shareholders" and bring a derivative suit on behalf of the corporation.[15] If the corporation files for bankruptcy, the Bankruptcy Code transfers this derivative standing to a trustee or a debtor-in-possession who is standing in the shoes of securities holders.[16] Throughout these scenarios, the derivative nature of the claim does not change.

Here, the Court properly concluded that, under *Wilton* and similar authority, the Trustee's fraudulent conveyance claims were "brought derivatively" because they "attached before the bankruptcy was filed" and were "general" to the estate. Ex. C at 21-22. The Court also properly determined that the claims were brought on behalf of an Organization because "the Trustee's power to sue [was] derived from the corporate debtor" and the Trustee was authorized to represent the bankruptcy estate and sue "on its behalf." Ex. C at 24-25. The Trustee constituted "a security

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15 *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 94, 101 (Del. 2007).

16 *Wilton*, 968 F.3d at 277-78.

holder" because it held the exclusive right to prosecute the claims of the Spinco/FairPoint Entity's securities holders. Ex. C at 19.

Insurers' contrary reading conflicts with the Policies' language. The Runoff Policies "both disable[] certain exclusions when an insured files for bankruptcy and totally prevent[] the Insurers from discriminating against coverage merely because an insured filed for bankruptcy." Ex. C at 23-24 (citing A1708, A1716). The same goes for the Verizon Policies. A1785, A1793. Insurers' interpretation would violate these terms and frustrate the insured's reasonable expectations. Ex. C at 20, 23-24.

The fundamental flaw in Insurers' arguments on appeal is that they promote a narrow reading of "Securities Claim," trying to limit it to the *non-bankruptcy* context, when the Policies expressly provide coverage in both bankruptcy and non-bankruptcy situations. Another key error is Insurers' conflation of (1) debt securities holders' individual claims and (2) claims asserted derivatively on behalf of a corporate entity by such securities holders or by a trustee or a debtor-in-possession standing in their shoes in the insolvency and bankruptcy-context. This case involves the second category of claims, which was addressed by *Wilton*. Insurers fail to meaningfully distinguish *Wilton*. Instead, they improperly attempt to restrict the Securities Claim definition to the concept of shareholder derivative actions when an entity is solvent. For these reasons and others set forth below, Insurers' contention that the FairPoint Action was not a "Securities Claim" should be rejected.

1. The Court Correctly Held That the FairPoint Action Was Brought "Derivatively" on Behalf of an "Organization."

a. The Plain Language of the Policies Contemplates Coverage Both In and Outside the Bankruptcy Context.

While conceding that derivative actions can be brought by "other security holders" like "creditors," Insurers attempt to limit the Securities Claim definition to claims brought derivatively *outside* of the bankruptcy context—*i.e.*, shareholder derivative actions. Ins. Br. at 27. This constrained view conflicts with the plain policy language.

Here, the Policies define a "Securities Claim" as a claim "brought derivatively on the behalf of an Organization by a security holder of such Organization." A1706; A1783. Although other parts of the Policies expressly refer to "shareholders," this definition uses the term "security holder," not "shareholder."[17] A1706; A1783. It follows that the plain meaning of "Securities Claim" encompasses more than just shareholder derivative actions within the confines of corporate and securities law. At a minimum, the definition reasonably includes claims brought derivatively by other securities holders in the insolvency context or by a trustee standing in the shoes

[17] The Policies refer to "shareholders" and "stockholders" specifically when only that type of security holder is intended. *See, e.g.*, A1707, A1784 ("stockholders"); A1757, A1851-A1852 ("shareholder").

of securities holders in the bankruptcy context. Thus, as a matter of law, that reasonable interpretation must be applied to the definition.

The availability of coverage in both bankruptcy and non-bankruptcy contexts is confirmed throughout the Policies. *See supra* Statement of Facts ("SOF") § B.2 (citing "Organization, which is defined to include "debtor[s]-in-possession" in bankruptcy; Bankruptcy Coverage Section, which makes clear that a policyholder's bankruptcy cannot affect the coverage contemplated by the Policies; and Insured v. Insured Exclusion, which carves out claims brought by a "trustee" in a bankruptcy-related proceeding like the FairPoint Action).

Despite the Policies' intent to preserve their coverages notwithstanding the bankruptcy of an Organization, Insurers argue that the Court erred in not limiting the "Securities Claim" definition to the non-bankruptcy context, citing *Idearc*. That position is meritless.

In *Idearc*, this Court stated, "the definition of a Securities Claim is aimed at . . . securities law." 222 A.3d at 574. But as Insurers acknowledge, the present case involves "a different part of the Securities Claim definitions" than those at issue in *Idearc*. Ins. Br. at 26. The Court correctly distinguished *Idearc* on that basis by noting that, unlike the policies in *Idearc*, the Runoff Policies did not tie all coverage to "a violation of any federal, state, local or foreign regulation or statute regulating securities." Ex. C at 15-16. Even so, the Court followed *Idearc*'s "interpretative

guidance." Ex. C at 16. Using the securities law context, for example, the Court determined that a Spinco Note is a "security." Ex. C at 17-18.

In fact, despite their repeated insistence that "context" matters in contract interpretation (Ins. Br. at 34), Insurers rebuff one of the key contexts of the Securities Claim definition: the policyholder's bankruptcy. Insurers contend that "[w]hile the policies contain some bankruptcy-specific provisions, the Securities Claim definitions are not among them." Ins. Br. at 35. But that is wrong. An "Organization" as used in the definition includes the "debtor-in-possession" in the Organization's bankruptcy. A1706; A1783. Further, the Bankruptcy Coverage Section and the Insured v. Insured Exclusion noted above expressly contemplate that a policyholder's bankruptcy should not affect coverage under the Policies.

The Court properly considered all the Policies' provisions and concluded that Insurers' narrow "Securities Claim" interpretation would nullify other provisions in the Policies contemplating that coverage would be unaffected by an Organization's bankruptcy. Ex. C at 20, 23-24. As the Court noted, absent a bankruptcy filing, unpaid debt securities holders would have had standing to bring a derivative action on behalf of the insolvent Organization. Ex. C at 23.[18] That action indisputably

[18] Insurers argue that the Court incorrectly suggested that, outside of bankruptcy, creditors can have derivative standing to bring claw back actions on behalf of a corporation when that corporation is insolvent. Ins. Br. at 36-37. Insurers are wrong.

would fall within the "Securities Claim" definition. Coverage is not defeated simply because bankruptcy law transferred that standing to a debtor-in-possession or trustee stepping into securities holders' shoes. Yet, Insurers' position—that the "Securities Claim" definition only encompasses "shareholder" derivative actions—would remove all coverage for derivative claims in the bankruptcy context, because shareholders lose standing to assert such claims in that context. Only a debtor-in-possession or a trustee has standing to assert derivative causes of action on behalf of the debtor and its estate when a bankruptcy is filed. Such a result is expressly prohibited by the Policies' promise that an Organization's bankruptcy would not affect coverage.

b. The Court Correctly Concluded That the FairPoint Action Was Brought "Derivatively" on Behalf of an Organization.

Recognizing the proper context, the Court thoroughly analyzed bankruptcy principles to determine whether the FairPoint Action was brought derivatively. The Court examined the impact of a company's bankruptcy on standing to bring claims on behalf of the company: once a company declares bankruptcy, only the debtor-in-possession or an appointed trustee has authority to pursue the debtor's causes of

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See, e.g., *Wilton*, 968 F.3d at 285 (opining that when a bankruptcy trustee abandons an "asset plundering" claim, it restores creditors' constitutional standing to bring such a claim). Insurers point to no case holding that creditors' derivative standing in the insolvency context is limited to breach of fiduciary duty cases.

action that become property of the debtor's estate when a bankruptcy is filed. Ex. C at 19, 24. In other words, claims that otherwise could have been brought on behalf of the debtor outside the bankruptcy context (whether by shareholders or unpaid debt securities holders) can now only be asserted by the trustee standing in their shoes. Ex. C at 19. Insurers do not challenge this basic bankruptcy principle.

On the issue of whether the FairPoint Action was brought "derivatively," the Court properly recognized that the reasoning in *Wilton* applies here. In that case, the Third Circuit addressed the issue of when a fraudulent conveyance claim should be deemed a "derivative" claim in the bankruptcy context. The court first explained that "a trustee manages the company's estate, including . . . creditors' asset-plundering claims." *Wilton*, 968 F.3d at 277. The court further clarified that under the Bankruptcy Code, *only* the trustee has the power to pursue (1) pre-petition causes of action that (2) the debtor could have asserted on its behalf. *Id.* at 282. The second prong, the court stated, "hinges on whether the claim is 'general' to the estate or 'personal' to a specific creditor." *Id.* The Third Circuit held that "[c]laims alleging that 'third parties . . . wrongfully deplete[d] the debtor's assets' [like the ones at issue in this case] are general or derivative." *Id.* That is because those claims are based on "an injury to the debtor's estate that creates *a secondary harm to all creditors* regardless of the nature of their underlying claim[s] against the debtor." *Id.* at 283 (emphasis added). The court held that, in the bankruptcy context, "a

creditor's derivative causes of action" become "property of the estate" that the trustee can prosecute, settle, or abandon. *Id.* at 283-84.

Consistent with *Wilton*, other courts have held that fraudulent transfer claims alleging plundering of a debtor's assets, like the Trust's claims here, constitute derivative claims because "the alleged injury is to the general creditor body and the recovery returns to the estate." *In re JMO Wind Down, Inc.*, 2018 WL 1792185, at *6-8 (Bankr. D. Del. Apr. 13, 2018); *see also In re Tronox, Inc.* 855 F.3d 84, 105-06 (2d Cir. 2017) (recognizing that fraudulent transfer actions asserting that the defendant "mismanaged and undercapitalized" the debtors are "the paradigmatic example of claims general to all creditors" and considering them "derivative"); *In re PWS Holding Corp.*, 303 F.3d 308, 314 (3d Cir. 2002) (rejecting argument that fraudulent transfer claims are "non-derivative" as "flaw[ed]").

Following this line of cases, the Court determined that the FairPoint Action was derivative because the causes of action it asserted (1) attached before bankruptcy and (2) were "general," intended to recover the debtors' assets and to "increase the pool of assets available to all creditors." Ex. C at 21-22. Here, it is undisputed that the Trust's causes of action arose before the bankruptcy filing, as they concern the property transfers between Verizon and Spinco that occurred as part of the Deal, months before the bankruptcy was filed. It is also indisputable that the asserted claims are general. The SAC did not allege injuries particularized to

any creditor; rather, it alleged generalized harm to Spinco and to the Spinco/FairPoint Entity. *See, e.g.*, A355 (¶ 156) ("Spinco intended to hinder, delay, or defraud then-*existing or future creditors* [as opposed to any specific creditors] of Spinco, FairPoint, the Combined Entity, and/or its subsidiaries."); B870 (seeking to avoid the transfer of "Spinco's Interest in the Proceeds of the Spinco Notes" to replenish assets that belonged to Spinco). Insurers do not point to any injury independent of Spinco's or the Spinco/FairPoint Entity's injuries. The Court therefore correctly held that the FairPoint Action was "derivatively" brought.

c. Insurers Misconstrue the Nature of the Claims Asserted in the FairPoint Action.

Despite the Court's well-reasoned analysis, Insurers insist that the FairPoint Action was not derivative. Notably, they do not and cannot meaningfully distinguish *Wilton*. Instead, they maintain that the Court should have applied the doctrinal tests developed in shareholder derivative action cases. There are several problems with Insurers' argument.

First, Insurers' position is inconsistent with the actual allegations of the Trustee in the FairPoint Action. To determine whether an action is direct or derivative, courts look to the underlying allegations and the asserted theory of

recovery.[19] As explained in the SAC, the Trustee's authority to file the FairPoint Action came from the Plan. A350-351 (¶ 142). The Plan makes it clear that the reason the Trustee had that authority was because the asserted fraudulent transfer claims were derivative claims that became property of the estate by operation of bankruptcy law. *See* A2021 (§ 1.81); A2046 (§ 8.12); A2173-A2174 (§ 1.2) (providing the Litigation Trust with a right to pursue "Causes of action which may be asserted by or *on behalf of* FairPoint or FairPoint's Estates against Verizon . . . in respect of matters arising in connection with [the Deal]" (emphasis added)).

Based on this authority, the Trustee filed the FairPoint Action stating that "[t]he creditor causes of action asserted herein [were] vested in the Debtors' Estate on the Petition Date and are now vested in [the Trustee]." A350-351 (¶ 142). While the SAC characterized the Trust's claims as "creditor" causes of action, in the context of the Plan, this necessarily meant creditors' *derivative* causes of action because their *individual* causes of action were never property of the Spinco/FairPoint Entity that became vested in that entity's estate when bankruptcy was filed.[20] The

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[19] *See Wilton,* 968 F.3d at 283 (examining the relevant allegations of the asset plundering claim to conclude that the claim was "derivative"); *see also Tooley v. Donaldson, Lufkin & Jenrette, Inc.,* 845 A.2d 1031, 1039 (Del. 2004) (holding that the "complaint" failed to allege a derivative claim because it did not assert any injury to the corporation).

[20] *See In re Tronox*, 855 F.3d at 99 (acknowledging that under bankruptcy law, a bankruptcy trustee is precluded from bringing a "particularized" individual creditor claim).

Trust's allegations reflect that in bringing these causes of action, the Trustee was asserting causes of action that were property of the Spinco/FairPoint Entity conveyed to that entity's estate when it filed for bankruptcy. *See, e.g.*, A313 (¶ 3) (alleging that "*[Spinco/]FairPoint and its subsidiaries' Estates[']* causes of action against Verizon" were conveyed to the Trust pursuant to the Plan" (emphasis added)); *see also* B870 (Trustee sought to replenish assets that belonged to Spinco, and then FairPoint).

Overlooking the applicable law and factual allegations at issue in the FairPoint Action, Insurers insist that a fraudulent transfer "belong[s]" to a creditor, primarily relying on *In re Cybergenics*, 226 F.3d 237 (3d Cir. 2000) ("*Cybergenics*"). The fatal flaw in Insurers' argument is that it improperly conflates (1) a security holder's individual claim with (2) a derivative claim that becomes property of the estate in bankruptcy.[21] *Cybergenics* addressed the former category. Specifically, the

[21] The distinction between a creditor's "individual" and "derivative" claims has been recognized by other courts. For example, *In re Tronox* explained:

> [E]very creditor in bankruptcy has an individual claim . . . against the debtor . . . . But often there are claims against third parties that wrongfully deplete the debtor's assets. Individual creditors may wish to bring claims against those third parties to seek compensation for harms done to them by the debtor and *secondary harms done to them by the third parties* in wrongfully diverting assets of the debtor that would be used to pay the claims of the individual creditor. *The fact that an individual creditor may seek to do so does not make those secondary claims particular to the creditor[.]*

Cybergenics court made clear that the "creditor's fraudulent transfer action" should not "be confused with the separate authority of a trustee or debtor in possession to pursue the prepetition debtor's causes of action that become property of the estate upon the filing of the bankruptcy petition." *Id.* at 243.[22] The Trustee's claims in the FairPoint Action, like those asserted in *Wilton*, fall into the latter category. As *Cybergenics* did not address that type of claim, it does not conflict with *Wilton*.[23]

Insurers also rely on cases stating that a representative of a bankruptcy estate stands in the shoes of the creditors. But "standing in the shoes" of someone does not mean the claim is brought "on behalf of" that person. Insurers' own argument confirms this. Outside the insolvency context, shareholders have standing to assert

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855 F.3d at 103 (emphases added).

[22] *Cybergenics*'s focus on a creditor's individual fraudulent transfer claim makes sense given that the case only concerned § 544(b) and no other contexts. The court underscored that § 544(b) is distinct "because a trustee or debtor in possession can use this power only if there is an unsecured creditor of the debtor that actually has the requisite nonbankruptcy cause of action." 226 F.3d at 243. So, the court had to resolve the threshold issue of whether any individual creditor claim remained after the sale of the debtor's "assets" upon which § 544 can be asserted. The court did not address pre-petition fraudulent conveyance claims that are property of the debtor transferred to the debtor's bankruptcy estate. *Wilton* did.

[23] Insurers cite to *Trenwick Am. Litig. Tr. v. Ernst & Young, L.L.P.,* 906 A.2d 168, 199 (Del. Ch. 2006) and *Quadrant Structured Prods. Co. v. Vertin*, 102 A.3d 155, 166 (Del. Ch. 2014) for the proposition that creditors have direct standing in fraudulent conveyance suits. Ins. Br. at 29. But these cases did not address derivative fraudulent transfer claims that a bankruptcy trustee controls as property of the debtor's estate.

derivative claims. For an insolvent corporation, creditors step into the shoes of *shareholders* and can bring a derivative claim on behalf of *the corporation*. *See* Ins. Br. at 27 (acknowledging that "[w]hen a corporation is insolvent, derivative actions . . . [in the corporation's name] can be brought by creditors, who 'take the place of the shareholders as the residual beneficiaries of any increase in value'" (citing *Gheewalla*, 930 A.2d at 101)). In both situations, the claims are still derivative regardless of who is asserting them.

Second, Insurers' argument that the FairPoint Action was "direct" under *Tooley* is equally unavailing. Ins. Br. at 31. The *Tooley* test developed in the shareholder derivative action context examines "who suffered the alleged harm" and "who would receive the benefit of any recovery or other remedy." 845 A.2d at 1033. What Insurers neglect to mention is that *Tooley* requires a direct claim to be "independent of any alleged injury to the corporation." *Id.* at 1039. In other words, if a claim depends on an injury to the corporation, like here, it is derivative. In the FairPoint Action, the Trustee could not, and did not, state any injuries "independent" of those suffered by Spinco or the Spinco/FairPoint Entity. *Cf.* A353-54 (¶ 151) (alleging that asset transfers at issue rendered "Spinco, FairPoint, the Combined

Entity and subsidiaries" insolvent). *Tooley* therefore does not support Insurers' position.[24]

Insurers also mistakenly focus on the fact that the proceeds from the FairPoint Action ultimately would be directed to the debt securities holders and other creditors, not the Spinco/FairPoint Entity. Ins Br. at 32. Who ultimately receives the proceeds of a debtor's claim as part of a negotiated bankruptcy plan has nothing to do with whether the claim itself is derivative for the benefit of the estate. *See* 11 U.S.C. § 550(a) ("[T]he trustee may recover, *for the benefit of the estate*, the property transferred, or . . . the value of such property[.]" (Emphasis added.)). While Insurers focus on the fact that Verizon made payment to the Trust (Ins. Br. at 33), that was simply because the bankruptcy plan documents transferred the estate's causes of action against Verizon to the Trust. A313 (¶ 3). If the proceeds were not estate property, the Trust would have had no right to them.

Third, Insurers erroneously focus on the fact that the Trust made no attempt to comply with various requirements for derivative actions under Court of Chancery

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[24] The Court previously addressed Insurers' reliance on *Tooley*. *Verizon Commc'ns Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2021 WL 1016445, at *5 (Del. Super. Ct. Mar. 16, 2021). While acknowledging *Tooley*'s basic principles, the Court explained, it is more appropriate to "follow[] precedent related to claims brought by bankruptcy trustees to determine that the Trustee's claim is derivative" (*i.e.*, *Wilton*) because "this case concerns a claim brought by a bankruptcy trustee on behalf of a debtor's estate." *Id.*

Rule 23.1 and Federal Rule of Civil Procedure 23.1. Ins. Br. at 28, 33. But these rules govern derivative actions outside the bankruptcy context, not those asserted in the bankruptcy context. Insurers do not point to any statute or rule that imposes similar requirements for a trustee to bring an action derivatively on behalf of a bankruptcy estate. That is unnecessary because the trustee's derivative standing is granted by operation of the Bankruptcy Code.[25]

d. Insurers' Fallback Argument That the FairPoint Action Was Not "Derivative" Under Bankruptcy Principles Is Also Meritless.

Perhaps sensing that they cannot escape the relevant bankruptcy law, Insurers claim that even if bankruptcy principles apply here, the FairPoint Action is still not "brought derivatively on the behalf of an Organization." Ins. Br. at 37-42. Their argument falls short for several reasons.

First, Insurers' contention that the Trustee brought the FairPoint Action "directly" under bankruptcy law because "FairPoint transferred litigation authority

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[25] The notice and demand requirements for shareholder derivative actions "exist[] to preserve the primacy of board decision making regarding legal claims belonging to the corporation." *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 120 (Del. Ch. 2009). Other courts have opined that such requirements are rooted in "concerns about prevention of a multiplicity of lawsuits" and apprehensions that derivative actions will be misused by "'self-selected advocate[s] . . . bringing costly and potentially meritless 'strike suits.'" *Norman v. Nash Johnson & Sons' Farms, Inc.*, 537 S.E.2d 248, 253 (N.C. Ct. App. 2000). These concerns are not present in trustee avoidance suits because only the trustee can act on behalf of the estate, absent a court order stating otherwise.

to the Trust" lacks merit. Ins. Br. at 38. To support their position, Insurers cite *In re Adelphia Communications Corp.*, 544 F.3d 420, 425 (2d Cir. 2008) ("*Adelphia*"). Contrary to Insurers' suggestion, however, *Adelphia* did not hold that the "derivative" nature of a claim disappears when it is transferred to a litigation trust. Rather it confirmed that a bankruptcy trustee's claim is derivative by explaining that the Bankruptcy Code authorizes trustees and debtors-in-possessions to sue "on behalf of an estate," *i.e.*, derivatively. *Id.* at 423. *Adelphia* therefore proves Verizon's point: simply because the Plan transferred causes of action belonging to the estate to the Litigation Trust does not mean those causes of actions suddenly lost their nature as claims that could only be asserted derivatively.

Here, Insurers cursorily discuss *Wilton*. Ins. Br. at 38-39. While acknowledging that *Wilton* deemed the fraudulent transfer claims at issue there as "general" and derivative, Insurers argue "the fact that, under Chapter 7, fraudulent transfer actions generally must be brought by the bankruptcy trustee does not mean that such actions are always automatically 'brought derivatively.'" Ins. Br. at 39. Citing *Lenois v. Sommers as Trustee for Erin Energy Corp.,* 268 A.3d 220, 236 (Del. 2021), Insurers maintain that when a trustee sues on behalf of the estate, it proceeds "directly." Ins. Br. at 39. Though the *Lenois* court used the term "directly" for the sake of comparing a trustee's action with a shareholder's derivative action, the court was clear that the Trustee prosecuted claims "*on behalf of the estate*." *Lenois*, 268

A.3d at 222 (emphasis added). The "on behalf of the estate" language here reflects the court's understanding of the derivative nature of a bankruptcy trustee's claim. Thus, Insurers' reliance on *Lenois* is misplaced.

Second, contrary to Insurers' argument, the Court correctly determined that there is no practical difference between the "estate" and the "debtor" for purposes of applying the Securities Claim definition to the FairPoint Action. According to Insurers, the Trust Action was brought on behalf of the "estate," not FairPoint or Spinco. Ins. Br. at 39-40. This position, however, conflicts with the Trustee's allegations in the FairPoint Action. The SAC treats "estates" and "Debtors" (that is, Spinco, FairPoint, and the Spinco/FairPoint Entity and other related entities) interchangeably. *See* A316 (¶ 16) (stating that the Trustee is "a successor of the Debtors and a representative of their estates"); A350-351 (¶ 142) (characterizing the "causes of action asserted" as being asserted "on behalf of FairPoint or FairPoint's Estates"). The Trustee used "FairPoint" to encompass Spinco, and repeatedly stressed [redacted]

[redacted] In fact, that was the core issue at trial. *See generally id.*; *supra* SOF § E. And the Trustee was expressly seeking to avoid the transfer of "*Spinco's* Interest in the Proceeds of the Spinco Notes." B870 (emphasis added); *see supra* SOF § C.

The interplay between fraudulent conveyance and bankruptcy law also supports the Court's conclusion. A bankruptcy *estate* includes "all legal or equitable interest of the *debtor* in property," including fraudulent conveyance claims. 11 § U.S.C. 541(a)(1) (emphasis added). The purpose of an avoidance action is to avoid the transfer of "an interest of the *debtor* in property" that absent the transfer would have been part of the debtor's estate. 11 U.S.C. §§ 544(b), 548(a) (emphasis added). Given this close connection between the estate and the debtor, claims brought "derivatively on behalf of an Organization" reasonably include those on behalf of the Organization's estate, intended to recover an interest of a debtor Organization in property that belonged to the Organization before it was allegedly fraudulently transferred.

The Bankruptcy Coverage Section of the Policies supports this interpretation. *See supra* SOF § B.2. A fraudulent conveyance action could have been brought derivatively on behalf of the Spinco/FairPoint Entity pre-bankruptcy.[26] Simply because the cause of action was transferred to the estate in bankruptcy and then to a litigation trust does not change the nature of the claim. Denying coverage in that situation would violate the Bankruptcy Coverage Section because the only reason

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[26] Ex. C at 23; *see also Gheewalla*, 930 A.2d at 101 (acknowledging that when a corporation is insolvent, its creditors can bring derivative actions on behalf of the corporation).

the claim would not be covered is the Organization's bankruptcy. A1716; A1793. Insurers' position would also nullify the Insured v. Insured Exclusion. *See supra* SOF § B.2. If an "Organization" and its bankruptcy "estate" are distinguished, then the bankruptcy carve-out would never apply because a bankruptcy trustee's claims would always be deemed on behalf of the "estate," not the Organization. Such a result is again expressly prohibited by the Bankruptcy Coverage Section.[27]

Third, Insurers wrongly contend that the Court erred by holding that the fraudulent conveyance claims at issue here were for primary injury to the debtor and only secondary harm to creditors. Ins. Br. at 41. Insurers suggest that a fraudulent conveyance claim can never seek redress for injury to the debtor, because the debtor is a potential defendant in a fraudulent transfer action. But the cases cited herein make clear that position is baseless. Simply because injury to a debtor is allegedly due to the debtor's own self-sabotaging does not change the primary nature of the injury. Here, the Trustee alleged that, at Verizon's behest, Spinco fraudulently

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[27] Insurers also argue that the Court conflated "a Code-created bankruptcy trustee with a plan-created litigation trustee." Ins. Br. at 41. This position is also baseless. Insurers ignore that the plan-created litigation trustee's authority was derived from the Code-created bankruptcy trustee/debtor-in-possession's power. A350-351 (¶ 142) (seeking to recover "Spinco, FairPoint and/or the Combined Entity's interests in property" under 11 U.S.C. §§ 544(b), 548, and 550 and explaining that the Plan and the Trust Agreement empowered the Trustee to do so (A313 (¶ 4))). Without the Code-created power, the plan-created litigation trust could not have pursued the claims asserted against Verizon.

transferred property to Verizon, and, as a result, Spinco was unable to pay the debt security holders. Those allegations alleged general harm to Spinco, and only secondary harm to the debt securities holders.

2. The Court Correctly Held That the FairPoint Action Was Brought "by a Security Holder."

Insurers also wrongly claim that the FairPoint Action did not meet the "brought by a Security Holder" requirement, because it was asserted by the Trustee, and "the Trust did not possess any securities of FairPoint or Spinco." Ins. Br. at 42-43. This position has several flaws.

First, it is inconsistent with Insurers' own recognition that the Trust was "stand[ing] in the shoes" of the debt securities holders. Ins. Br. at 30. A claim brought by one "standing in the shoes of" a debt security holder is equivalent to a claim brought by that debt security holder. Indeed, that is precisely what the term means in litigation. *See, e.g.*, *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 97, n.5 (2013) (equating "stand[ing] in the shoes of another" with the legal "substitution of one person for another"); *In re Frescati Shipping Co.*, 886 F.3d 291, 309 (3d Cir. 2018) (same). Between a trustee and security holders, the substitution occurs by operation of law. *See Nagle v. Comm. Credit Bus. Loans, Inc.*, 102 F.R.D. 27, 31 (E.D. Pa. 1983) (substituting the trustee for the securities holder plaintiffs); *see also In re Downey Fin. Corp.,* 428 B.R. 595, 602 (Bankr. D. Del. 2010) ("The trustee, on behalf of the Debtor's estate, has subsequently been substituted as the real party in

interest in [a] Derivative Action."). Here, because the Trustee brought its claims while standing in the shoes of the debt securities holders, those claims are necessarily considered as claims brought by "a security holder."

Second, any other conclusion is foreclosed by the bankruptcy-specific provisions of the Policies. *See supra* § I.D.1. Under applicable contract construction rules, the Securities Claim coverage afforded by the Policies must be read broadly and in the context of the Policies as a whole, giving effect to all of their terms.[28] The Court correctly followed these rules when it held that the "by a security holder" requirement is satisfied when a claim is brought by a bankruptcy-appointed trustee standing in the shoes of securities holders.

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[28] *Council of Dorset Condominium Apartments*, 801 A.2d at 7; *Zurich Am. Ins. Co. v. Syngenta Crop Prot., LLC*, 2020 WL 5237318, at *5 (Del. Super. Ct. Aug. 3, 2020).

II. THE SUPERIOR COURT CORRECTLY CONCLUDED THAT COVERAGE EXISTED UNDER THE VERIZON POLICIES.

A. Counterstatement of the Question Presented

Did the Court correctly determine that the FairPoint Action was brought derivatively on behalf of Spinco, which qualified as an insured under the Verizon Policies? Yes. (Preserved at A2277-96, B160-B163, B1129-B1150.)

B. Scope of Review

The meaning and application of insurance policy language is a question of law, which is reviewed *de novo*. *ConAgra Foods, Inc.,* 21 A.3d at 68. In reviewing decisions on cross-motions for summary judgment, a court will draw its own factual conclusions only "if the findings below are clearly wrong and if justice requires." *Fiduciary Tr. Co. of N.Y.,* 445 A.2d at 930.

C. Merits of the Argument

As a last grasp attempt to limit their coverage obligations, Insurers argue that the FairPoint Action cannot qualify as a Securities Claim under the Verizon Policies because the Verizon Policies do not cover FairPoint. They insist the Trustee's claims must be deemed to have been made on behalf of FairPoint, not Spinco, because Spinco ceased to exist as a separate entity when it merged into FairPoint. The Court properly rejected this argument as inconsistent with the allegations and claims at issue in the FairPoint Action and the language of the Verizon Policies.

1. The Court Correctly Concluded that the FairPoint Action was Brought on Behalf of Spinco.

Insurers first argue that the FairPoint Action could not have been brought derivatively on behalf of Spinco because Spinco ceased to exist as a separate entity before the FairPoint Action began. Ins. Br. at 48. According to Insurers, no one can sue on behalf of a dissolved entity. *Id.* However, this argument was properly rejected because, although Spinco dissolved upon the merger, "Spinco's causes of action" passed to the Spinco/FairPoint Entity, thereby allowing that entity (and later the Trustee) to assert the fraudulent conveyance claims "on Spinco's behalf." Ex. B at 17.

Moreover, while Insurers contend that the Trustee could not possibly have been acting on behalf of Spinco, that is *exactly* what the Trustee said it was doing. As noted above, [redacted] The Trustee expressly claimed the right to assert *Spinco's* pre-petition causes of action to recover *Spinco's* pre-petition assets that purportedly were fraudulently conveyed to Verizon. *See supra* SOF § C; B850 (asserting that "[a] bankruptcy trustee of a merged entity may bring fraudulent transfer claims for pre-merger transfers made by the *non-*

surviving entity" (emphasis added)).[29] That position had legal support. *In re Chipwich, Inc.*, for example, held that a merged entity as a debtor-in-possession can bring fraudulent transfer claims for pre-merger transfers made by the entity's "predecessor," *i.e.*, the non-surviving entity. 1993 WL 118000, at *1 (Bankr. S.D.N.Y. Mar. 31, 1993). The Trustee's allegations thus disprove Insurers' position that the FairPoint Action could not have been brought on behalf of Spinco.

Insurers' attempted reliance on the "continuous ownership rule" to suggest that the Trustee could not assert Spinco's causes of action is meritless. Ins. Br. 48-49. That rule only addresses shareholder standing to bring a derivative claim on behalf of an entity that merged into another entity outside the insolvency/bankruptcy context. Under the rule, a shareholder of the non-surviving company loses derivative standing, because it passes to the surviving corporation. Here, the Trustee's standing to prosecute the FairPoint Action was established by operation of bankruptcy law and was never disputed. Thus, the continuous ownership rule has no application here. If anything, the rule supports the Court's recognition that, as a result of its

[29] Insurers also argue that the causes of action asserted in the FairPoint Action belonged to creditors, and then to FairPoint as a debtor in possession and the Trustee, but never to Spinco. Ins. Br. at 49-50. As explained above, this position is wrong. As *Wilton* and other cases recognize, a cause of action for general, pre-petition harm to the debtor is property of the debtor that is transferred to the debtor's estate in bankruptcy. *See supra* § I.D.1.b.

merger into FairPoint, Spinco's causes of action passed to the Spinco/FairPoint Entity and then to that entity's estate in bankruptcy.

In short, under appliable law and the facts at issue here, there can be no legitimate dispute that the Trustee was asserting rights on behalf of "Spinco."

2. The Court Properly Determined that Spinco was an "Organization" for Purposes of the FairPoint Action.

Insurers' position that Spinco was not an Organization for purposes of the FairPoint Action improperly inserts a requirement that an entity qualifying as a Subsidiary must remain a Subsidiary when the underlying claim is made. Ins. Br. at 51-52. However, the Verizon Policies nowhere include such a requirement. Rather, they cover claims of Wrongful Acts that allegedly happened *while* an entity existed as Verizon's Subsidiary. A1791, A1810.

Insurers' interpretation would render several provisions of the Verizon Policy meaningless. ***First***, the Verizon Policy defines "Subsidiary" to include "any for-profit entity of which [Verizon] has Management Control . . . *on or before* the inception of the Policy Period" (October 31, 2009). A1810 (emphasis added). Insurers acknowledge that Verizon had Management Control of Spinco until March 31, 2008, before the policy's inception. Ins. Br. at 51. Thus, Spinco meets the definition of "Subsidiary."

Second, the Policies' "Deal-Specific" endorsements were added to ensure that the two sets of policies would work together to provide coverage for Deal-related

liabilities—the Runoff Policies on a primary basis and the Verizon Policies on an excess basis. A1764; A1845. The Deal endorsement in the Runoff Policies expressly includes "Spinco" as a Named Insured, even though all parties knew at the time that it was going to merge into FairPoint, and states that the "[Runoff] policy *and the policies that are written as specific excess over this policy* are intended to provide coverage which is primary to any directors and officers, executive or organization management liability insurance program issued to Verizon, *Spinco* or FairPoint or any of their Subsidiaries." A1764 (emphases added). The Deal endorsement on the Verizon Policies stated that "*this policy shall be specifically excess of*" the Runoff Policies, identified Spinco as a "current" subsidiary of Verizon, and extended coverage for any "acts, errors or omissions in connection with or relating to the Deal." A1845. These "Deal-Specific" endorsements expressly recognized Spinco as a Subsidiary at the time of the Deal.

To circumvent the contemplated coverage for Spinco, Insurers cling to one sentence in the "Other Organizational Changes" section of the Verizon Policy that states: "[a]n Organization ceases to be an Organization when [Verizon] no longer maintains Management Control of [it]." Ins. Br. at 52; A1791. Yet, defying their own contention that a policy must be read "as a whole" (Ins. Br. at 52), Insurers conveniently disregard the sentence immediately preceding the one highlighted by them. That sentence states: "coverage as is afforded under this policy . . . shall only

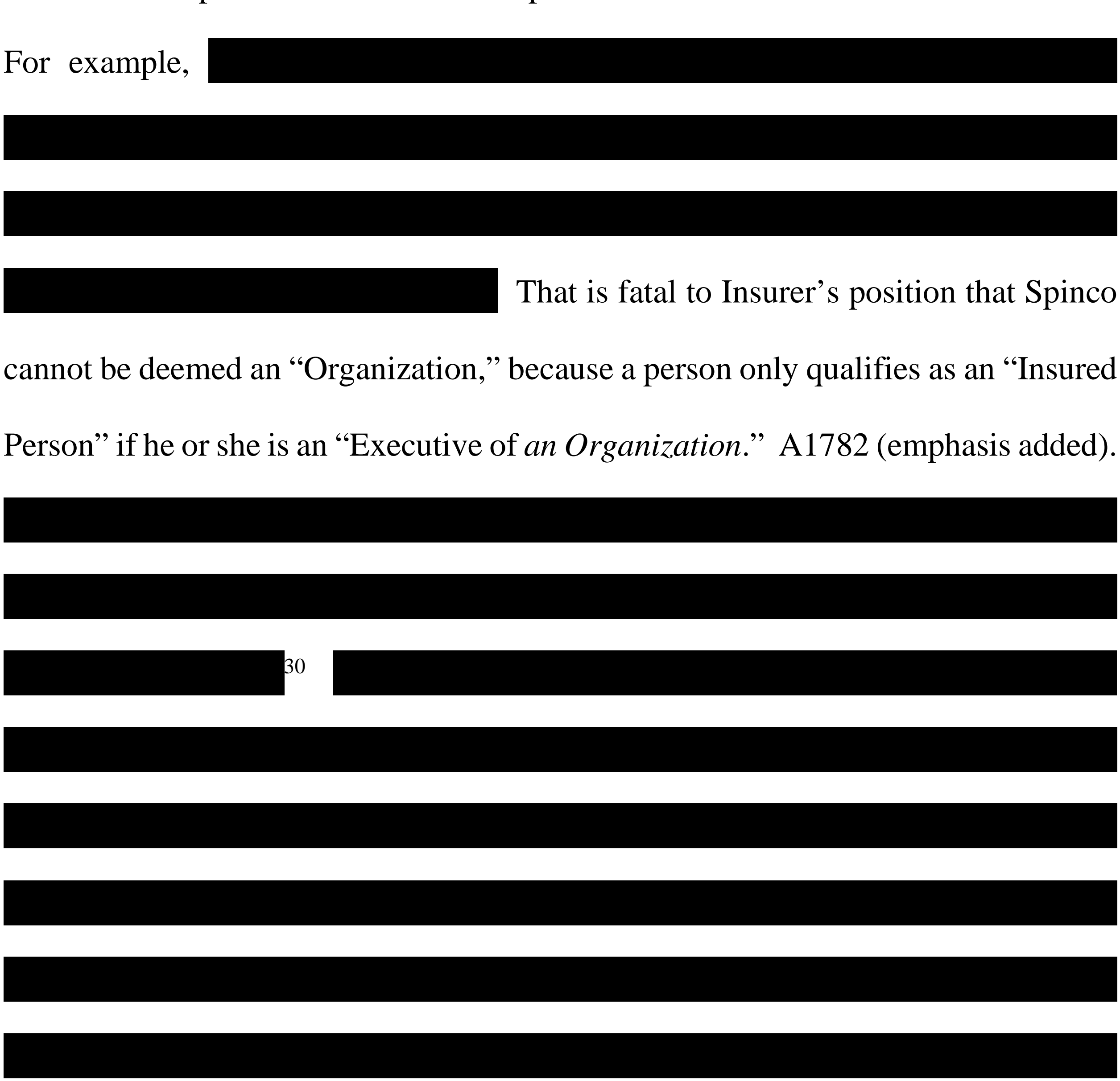
apply for [Claims alleging] Wrongful Acts committed or allegedly committed *after* the effective time such Organization became an Organization . . . *and prior* to the effective time that such Organization ceases to be an Organization." A1791 (emphases added). Put simply, the Policy recognizes an entity owned by Verizon "on or before" the policy period as a "Subsidiary" for coverage purposes, so long as an alleged Wrongful Act of the entity occurred *while* the entity was owned by Verizon. That is the case here. In this context, the "cease to be an Organization" sentence highlighted by Insurers simply indicates an intent not to cover any *post-spinoff* Wrongful Acts of an entity that occur after it is no longer under Verizon's ownership and control. It does not mean that an entity no longer qualifies as an "Subsidiary" for any purpose.

Insurers' different approach to the spinoff at issue in the *Idearc* case is also instructive here. The Verizon Policy's Endorsement 15 provides that "the Definition of Subsidiary in this policy shall not include …[Idearc]," a Verizon Subsidiary that was spun-off from Verizon in 2006. A1821. Insurers would not have added this endorsement if, as Insurers now contend, coverage for a spun-off entity was nullified even for pre-spinoff conduct. Endorsement 15 thus shows that Insurers knew how to exclude a spun-off entity from the "Subsidiary" definition when it was their intent, yet did not do so for Spinco.

The *IDT Corp. v. U.S. Specialty Insurance Co*., 2019 WL 413692 (Del. Super. Ct. Jan. 31, 2019) case that Insurers cite actually supports Verizon's position, not Insurers'. Like the Verizon Policy, the IDT policy provided that coverage was available for a Subsidiary's "Wrongful Acts committed or allegedly committed after the effective time that such entity becomes a Subsidiary and prior to the time that such entity ceases to be a Subsidiary" and stated that an entity "ceases to be a Subsidiary" when IDT loses management control. *Id.* at *11. However, the fact that IDT spun off its subsidiary, Straight Path, before the underlying shareholder action began was not the reason that the court found no coverage for the entity in that case. Instead, the *IDT* court examined whether Straight Path was owned by IDT "during the relevant time period." *Id.* The court determined that the alleged wrongdoing in that case occurred in 2017, several years *after* IDT spun off Straight Path in 2013. *Id.* at *12. Based on these facts, the *IDT* court concluded Straight Path was not a Subsidiary for purposes of the underlying action. *Id.* Here, in contrast, the alleged Wrongful Acts—fraudulent transfers—happened pre-spinoff, *while* Spinco was undisputedly a Verizon Subsidiary.

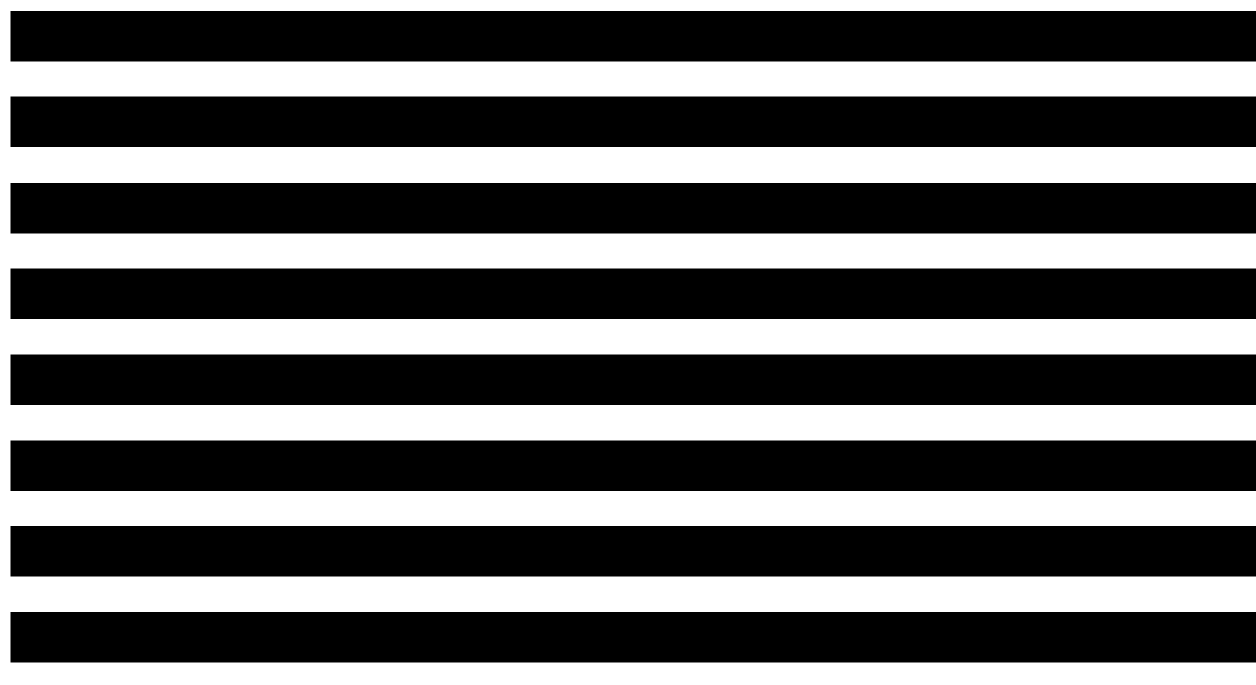
To the extent there is any doubt as to Spinco's insured status for any pre-spinoff Wrongful Acts, the parties engaged in discovery to resolve material issues as to whether "Spinco's role in the Transaction [] create[d] any Spinco Securities Claim coverage under the Verizon Policy." *See* Ex. C at 30; Ex. B at 10. Discovery

confirmed the parties' intent to cover Spinco for lawsuits like the FairPoint Action. For example,



That is fatal to Insurer's position that Spinco cannot be deemed an "Organization," because a person only qualifies as an "Insured Person" if he or she is an "Executive of *an Organization*." A1782 (emphasis added). [30]

[30] Insurers challenge the Court's discussion about Verizon's "reasonable expectation of coverage for a lawsuit like the [FairPoint] Action." Ins. Br. at 54-55. But the Court simply recognized that the Verizon Policy's plain terms were consistent with Verizon's reasonable expectation of coverage. Ex. B at 20. The Court's discussion adhered to the principle that courts consider "the reasonable expectations of the insured . . . to see if the policy terms are ambiguous or conflicting[.]" Ex. C at 13 (quoting *E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, 1996 WL 111205, at *2 (Del. Super. Ct. Jan. 30, 1996)).



Thus, the Court properly harmonized all of the Verizon Policy's terms in concluding that Spinco qualified as an Organization for purposes of the FairPoint Action.

3. The Court Correctly Deemed the Trustee a Security Holder of Spinco.

Finally, there is no merit to Insurers' contention that the FairPoint Action cannot be deemed brought by holder of Spinco securities, because only "new" FairPoint (*i.e.*, the Spinco/FairPoint Entity), was obligated to pay the Spinco Notes after Spinco merged into FairPoint. Ins. Br. at 56, 58. The Court properly rejected this argument, because the Spinco Notes were undisputedly issued by Spinco, and any holder of those Notes were holders of Spinco debt securities. Ex. B at 16. After the Deal closed, the only difference was that the Spinco/FairPoint Entity came to

hold Spinco's assets and liabilities, including liability for payment on the Notes. Though Insurers underscore that Spinco was only obligated to pay the Spinco Notes for a short period of time, the Trustee's entire case at trial was premised on that short period of time being sufficient to make Spinco the true "debtor" for purposes of the asserted fraudulent transfer claims. [redacted] As the Court recognized, the Trustee held "the exclusive right" to prosecute *Spinco's* derivative causes of action standing in the shoes of Spinco Noteholders. Ex. B at 15. Thus, there is no basis to distinguish between the "security holder" status of the Trustee under the Runoff Policies and the Verizon Policies. Both sets of Policies recognize "Spinco" as an insured Organization for purposes of the Deal, and the Trustee was standing in the shoes of Spinco Noteholders.[31]

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[31] Insurers are also incorrect that Verizon is somehow judicially estopped from arguing that the FairPoint Action was brought by a "Spinco" security holder. Ins. Br. at 57. The record clearly shows that, throughout the initial round of briefing, Verizon argued (and the Court found) that the FairPoint Action was brought by the Trustee on behalf of the Spinco/FairPoint Estate while standing in the shoes of the *Spinco* Noteholders. *See, e.g.*, B131; B138; B149; B158. Verizon's argument for coverage under the Verizon Policy is thus consistent with the arguments it made regarding the Runoff Policy. The Court correctly rejected Insurers' judicial estoppel argument as an extension of their mistaken view that "only a Securities Claim brought by a true security holder qualifies for coverage." Ex. B at 16.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court awarding Verizon coverage for its defense costs in and settlement of the FairPoint Action under the Policies should be affirmed.

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