

# Trustee Is an Entity Distinct from the Debtor for Purposes of the I v. I Exclusion

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The United States Bankruptcy Court for the Southern District of New York recently concluded that a trustee is an entity separate and distinct from the debtor for purposes of the insured versus insured exclusion in a directors and officers liability policy. *In re County Seat Stores, Inc.*, 280 B.R. 319 (Bankr. S.D.N.Y. 2002).

The trustee of a corporation in bankruptcy under Chapter 11 commenced an adversary proceeding against seven former directors and officers of the debtor company, seeking damages in excess of \$100 million. National Union denied coverage on the grounds that the trustee stands in the shoes of the debtor, and the exclusion for claims by one insured against another therefore bars coverage. The trustee and the directors and officers argued that the I v. I exclusion did not "extend to trustees in bankruptcy, in part because the trustee is not the same entity as the pre-petition company and also because the purpose of the [I v. I] clause-to prevent collusive suits-is not implicated." The trustee further argued that because the I v. I exclusion did not specifically define the term "insured" to include bankruptcy trustees, the exclusion was ambiguous.

The court first found that the I v. I language was not ambiguous since the "crucial language in the exclusion is 'brought by' which focuses solely on the identity of the party asserting the claim. If the trustee is asserting the claim, the exclusion is not triggered because he is not the company or an insured."

The court further agreed with the trustee in finding that it is a legal entity separate and distinct from the debtor: "When the trustee commences an action therefore, he is doing so on behalf of the estate in furtherance of his duty [under the Bankruptcy Code]. The fact that the claims that compromise the estate may have arisen pre-petition in favor of the debtor is inconsequential."

The court also noted that had the debtor not been in bankruptcy and had brought these same claims, "without doubt, the insured v. insured exclusion would apply to bar the claim because [the debtor] is an insured under the policy and is the 'Company' identified in the policy." However, the trustee is "an independent entity, acting as a genuinely adverse party to the defendant, officers and directors, [so] there is no threat of collusion."

The court further rejected National Union's assertion that trustees are akin to assignees and successors-in-interests, whose claims would be barred by the I v. I exclusion, reasoning that the trustee's position as an officer of the court and statutory entity did not implicate similar fears of collusion.