FLORIDA SUPREME COURT

CASE NO. SC05-1725
DCA No. 3D04-1202

CERTAIN UNDERWRITERS AT
LLOYD'S, LONDON,

Petitioner,

Third District Court of Appeal
Case No. 3D04-1202

vs.

T. ALEC RIGBY,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

This discretionary appeal is from a decision of the Third District Court of Appeal involving the applicability of a coverage exclusion that is included in most directors and officers liability insurance policies. Because the Statement of Facts supplied by Petitioner omits important facts, Rigby provides this Statement of Facts.

Rigby is a former officer and director of Atlas Environmental, Inc. ("Atlas"), and its eleven subsidiaries which went through an unsuccessful period under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101-1174, operating as a "debtor-in-possession." Rigby brought this action seeking a declaratory judgment that he was entitled to indemnity coverage under a policy of directors and officers liability insurance sold by Lloyds to Atlas, for a damage judgment against him in favor of the Trustee in bankruptcy for Atlas. (R. 2-45).[1] The trial court concluded that what is commonly referred to as the "insured v. insured" exclusion in the directors and officers liability insurance policy barred indemnity coverage for the damage judgment against Rigby. (R. 184-187). The Third District Court of Appeal reversed.

[1] The record has not yet been prepared by the Clerk of the Third District Court of Appeal; therefore references are to the Third District record on appeal.

Atlas and its affiliates were in the business of owning, operating, building and demolishing landfill facilities. Through subsidiaries, Atlas was engaged also in the business of providing petroleum soil decontamination and trucking services, excavation and restoration of petroleum contaminated sites, petroleum storage tank removal and general hauling services. (R. 2-45). Rigby was the president and a member of the board of directors of Atlas, which was a public company. He served as such prior to and during the time that Atlas was operating as debtor-in-possession under the protection of Chapter 11 of the Bankruptcy Code, 11 U.S.C. § §1101-1174 (R. 113-117). After filing the voluntary petition for protection under Chapter 11 the Debtors remained in Chapter 11 for eighteen months without confirming a Plan of Reorganization. (R. 113-117).

On October 16, 1998, the United States Bankruptcy Court Southern District of Florida entered an Order Denying Confirmation of the Debtors' Second Amended Plan of Reorganization and Directing Appointment of Chapter 11 Trustee. (R. 113-117). On October 20, 1998, the Bankruptcy Court approved the appointment of Soneet Kapila ("Mr. Kapila") as trustee ("Trustee"), and clarified the appointment on November 17, 1998. On August 11, 1999 the Chapter 11 cases were all converted to Chapter 7. (R. 113-117).

Lloyd's initially issued and delivered to Atlas and its affiliated entities, a policy of Directors and Officers and Company Reimbursement Indemnity

Insurance (the "D&O Policy") for the period June 1, 1996 to June 1, 1997, on Policy Form DOCR92 (Tr-Depo. 82). This preceded the petition in bankruptcy, which was filed on January 14, 1997.

Lloyds issued renewals of the D&O Policy for the years June 1, 1997 to 1998 (Tr-Depo. 85). and 1998 to 1999. (Tr-Depo. 87). Lloyds was aware of the Chapter 11 Petition prior to its decision to renew the D&O Policy for the year June 1, 1997 to 1998. (Tr-Depo. 85). Despite the absence of a Plan of Reorganization, Lloyds also renewed the D&O Policy for the year 1998 to 1999. (Tr-Depo. 87). However, Lloyds amended the D&O Policy effective May 28, 1998 to exclude claims brought by or on behalf of Waste Masters, Inc. (Tr-Depo. 87). This allowed Lloyds to continue coverage despite a change in ownership. (Tr-Depo. 81-83).

Despite the Chapter 11 Petition and continuously during the course of the bankruptcy case until the Trustee was appointed, Rigby caused Atlas to pay all required premiums and the D&O Policy was renewed and continued in full force and effect. (R. 113-117).

After his appointment as Trustee, Mr. Kapila requested that Lloyds list him in his individual capacity as an insured under the D&O Policy. Lloyds accomplished this with Endorsements numbered 14 and 18, by amending the definition of "Directors and Officers" in Clause II Definitions G. (R. 36 & 40). In June 1999 Lloyds sold and delivered an Optional Extended Reporting Period for

the D&O Policy in exchange for a premium in the amount of $34,203.75, which was an amount acceptable to Lloyds. The Optional Extended Reporting Period Coverage is reflected in Endorsements 15 and 16 to the D&O Policy attached as Exhibit "A" to the Complaint. (R. 113-117).

The Trustee brought suit against Rigby in the United States Bankruptcy Court for the Southern District of Florida (Case No. 00-2255-BKC-RBR-A), on behalf of and for the benefit of the creditors of Atlas, alleging that Rigby was negligent and that he breached his fiduciary duty to Atlas' creditors. This action resulted in a judgment against Rigby for damages for Wrongful Acts covered by the D&O Policy. The Wrongful Acts for which Rigby was sued and for which the judgment against him was subsequently entered were committed while he was acting within the scope of his duty as a director and officer of Atlas. (R. 10).

Rigby and the Trustee notified Lloyds of the claims before and after they were filed against Rigby. Rigby demanded that Lloyds provide a defense to the claims asserted by the Trustee, in his capacity as representative of the creditors of Atlas, and to indemnify Rigby for damages resulting from these claims. (R. 10).

Directors and officers liability insurance policies often contain an exclusion from coverage for causes of action asserted by one insured (such as a company) against another insured (such as an officer of that company). The D&O Policy here contains such exclusion. Lloyds relied on that exclusion to deny its otherwise

clear obligation to indemnify Rigby for the claim brought against him by the Trustee in bankruptcy for the Atlas companies. The exclusion provides:

> III. Exclusions
> Underwriters shall not be liable to make any payment in connection with any Claim…
>
> F. by, on behalf of, or at the direction of any of the Assureds, except and to the extent such Claim is brought derivatively by a security holder of the Company who, when such Claim is first made, is acting independently of all of the Assureds…

Lloyds declined to indemnify Rigby. (R. 113-117). Following entry of the judgment for damages against him by the Bankruptcy Court, Rigby filed this action for declaratory judgment asking the court to determine that he was entitled to indemnification under the D&O Policy. The trial court concluded that the D&O Policy was not ambiguous, that Lloyds intended to exclude claims by the Trustee under the policy and that it did so. (R. 185-86). It granted Lloyds' motion for summary judgment and denied Rigby's motion for summary judgment and entered final judgment in favor of Lloyds. (R. 195). Rigby appealed. (R. 153-157).

The Third District Court of Appeal reversed, holding that Mr. Kapila's endorsement as an officer or director did not detract from his statutory duty as Trustee, pursuant to 11 U.S.C. §§ 704(1) and 704(4), to collect and reduce to money the property of the debtor's estate for the benefit of the debtor's creditors.

Rigby v. Underwriters at Lloyds, London, 907 So.2d 1187 (Fla. 3rd DCA 2005). This Court accepted jurisdiction of the petition for conflict certiorari review.

SUMMARY OF ARGUMENT

The decision of the Third District does not conflict with any decision of this Court or of any other Florida appellate court. No appellate court in Florida has previously held that an "insured v. insured" exclusion in a directors and officers liability insurance policy applies to bar claims by a trustee in bankruptcy brought for the benefit of the debtor's creditors against a former officer or director of the debtor corporation. This Court's Order accepting jurisdiction was improvidently granted. *See Fla. R. App. P.* 9.030(a) (2) (A) (iv) and *Mancini v. State*, 312 So.2d 732 (Fla. 1975). The Order should be withdrawn. *See, e.g., Kennedy v. Kennedy*, 641 So. 2d 408 (Fla. 1994).

If this Court has jurisdiction, it should affirm the decision of the Third District Court of Appeal. The plain language of the subject policy does not compel application of the "insured v. insured" exclusion to the claim brought by the Trustee in bankruptcy pursuant to powers granted by the Bankruptcy Act to collect and reduce to money the property of the debtor's estate for the benefit of the debtor's creditors.

ARGUMENT

I. THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY COURT OF APPEAL, EITHER AS TO THE RULE OF LAW OR THE APPLICATION OF A RULE OF LAW TO THE FACTS OF THE CASE

When this Court grants discretionary review pursuant to Rule 9.030(a)(2)(A)(iv) and subsequently concludes that review was improvidently granted, it has the authority to withdraw the grant of jurisdiction and remand the case to the court of appeal for further proceedings. *See, e.g.*, *Kennedy v. Kennedy,* 641 So.2d 408 (Fla. 1994)(conflicting opinion below was not majority but rather only a plurality of court of appeal); *State v. Brown,* 476 So.2d 660 (Fla. 1985)(holding that when the proper statutory construction was applied, the perceived conflict did not exist because of distinguishable facts). When the facts set forth herein are considered, it becomes apparent that the decision of the Third District Court of Appeal, based on the fact that the judgment against Mr. Rigby was obtained by a bankruptcy trustee, does not conflict with any prior authority of this Court or any district court of appeal.

Petitioner asserted and this Court accepted certiorari review based on Petitioner's contention that the Third District's decision is "contrary" to the

decisions of this Court in *Travelers Indem. Co. v. PCR Inc.*, 889 So.2d 779 (Fla. 2004); *Swire Pacific Holdings, Inc. v. Zurich Ins. Co.*, 845 So.2d 161 (Fla. 2003); and *Deni Assoc. of Florida, Inc. v. State Farm Fire & Cas. Ins. Co.* 711 So.2d 1135 (Fla. 1998).

The decision of the Third District is not contrary to the cited authority. The Third District decision announced no rule of law. Rather, it specifically cited, in footnote 1 of its decision, the very authority provided by Petitioner for the applicable rule of law. Relying on *Sphinx Int'l, Inc. v. National Union Fire Ins. Co.*, 226 F. Supp.2d 1326 (M.D. Fla. 2002) and *Thomas v. Prudential Prop. & Cas. Co.*, 673 So.2d 141 (Fla. 5th DCA 1996), the Third District gave the words used in the subject policy their plain and ordinary meanings.[2] The court merely disagreed with Petitioner as to the plain and ordinary meaning of the words. With the full presentation of facts provided, it is clear that the Third District properly held the judgment entered against Mr. Rigby is in favor of the bankruptcy trustee

[2] Although the court of appeal did not base its decision upon the existence of ambiguity in the language of the subject policy exclusion, it could have done so. As Rigby argued below, the failure to include the word "trustee" following Mr. Kapila's name in endorsements 14 & 18 to the D & O Policy created an ambiguity as to the scope of the exclusion, which ambiguity must be interpreted against Petitioner. *See, e.g., Prudential Property & Cas. Ins. Co. v. Swindal,* 622 So. 2d 467 (Fla. 1993) (holding that intentional injury exclusion would not exclude coverage for bodily injuries relying in part on the principle that ambiguity in the language of an exclusion must be interpreted against the insurer). 622 So. 2d at 470-71

for Atlas, based solely on the statutory authority granted to all bankruptcy trustees. *Rigby*, 907 So. 2d at 1188-89.

The Third District decision thus does not conflict with the decision in *PCR*, 889 So.2d at 779 that an "intentional acts" exclusion did not apply to a tort claim against an employer based on ambiguity; the holding in *Swire Pacific*, 845 So.2d at 161 that a "design defect" exclusion in a builder's risk insurance policy was not made ambiguous by the lack of a definition of the terms "loss or damage" in the exclusion of coverage for loss or damage caused by fault, defect, error, or omission in design or plan; nor with the holding in *Deni Assoc.*, 711 So.2d at 1135 that a "pollution exclusion" was applicable based on the determination that it was not ambiguous.

Moreover, the Third District decision did not apply the "doctrine of reasonable expectations of the insured" in order to reach its decision. Thus, it does not conflict with *Deni Assoc.* on that basis either. The court of appeal did not rewrite the D&O Policy. It simply looked to the judgment that was entered against Mr. Rigby to determine whether Mr. Rigby was entitled to indemnification under the policy and concluded that it was not entered in favor of any "assured" under the language of this policy. Rather, it was entered in favor of a bankruptcy trustee, for the benefit of the creditors of the Atlas entities.

In light of the absence of conflict, this Court should withdraw its Order

accepting jurisdiction and remand without further opinion to the court of appeal.

II. IF THIS COURT HAS JURISDICTION, IT SHOULD AFFIRM THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL, WHICH PROPERLY HELD THAT THE INSURED V. INSURED EXCLUSION CONTAINED IN THE LLOYDS D&O POLICY ISSUED TO ATLAS DID NOT EXCLUDE FROM COVERAGE A JUDGMENT FOR DAMAGES AGAINST RIGBY IN FAVOR OF THE TRUSTEE IN BANKRUPTCY FOR THE BENEFIT OF THE CREDITORS OF ATLAS

The applicability of an "insured v. insured" exclusion in director and officer liability insurance policies to indemnify former officers and directors for damage judgments based on claims brought by a trustee in bankruptcy is an issue that has been addressed by various courts around the country. The more recent and better reasoned decisions hold that such exclusions do not apply to claims by bankruptcy trustees on behalf of the creditors of insured companies.

Directors and officers liability insurance policies customarily contain such exclusions from coverage for causes of action asserted by one insured (such as a company) against another insured (such as an officer of that company), though the precise method by which such exclusions are accomplished and the language employed varies considerably. The subject insurance policy contains such an exclusion, which Petitioner incorrectly relied on to deny Rigby's request for indemnification under the Policy.

The Third District recognized the distinction between the individual, Mr. Kapila and the bankruptcy trustee with respect to the exclusion in this policy. If this Court concludes that it should retain jurisdiction, then it should affirm the decision of the Third District.

A. The Trustee's Action Against Rigby on Behalf of the Creditors of Atlas Was Not Excluded by the Plain Language of the Insured v. Insured Exclusion in Lloyds' Policy

The determination of whether coverage exists under the terms of a liability insurance policy requires analysis of the underlying facts giving rise to the judgment for which indemnification is sought under the terms of that policy. *Hagen v. Aetna Cas. Surety Co.*, 675 So. 2d 963, 965 (Fla. 5th DCA 1996) In this case, Petitioner cannot question that the policy would provide indemnification against damages resulting from the Wrongful Acts for which Rigby was sued by the Trustee in the absence of the insured v. insured exclusion. Under the language of this policy the exclusion only applies to claims brought "by, on behalf of, or at the direction of any of the Assureds." That exclusion does not apply to the judgment against Rigby.

The style of the adversary complaint against Rigby in the bankruptcy court was *In Re: Atlas Environmental, Inc.; Soneet R. Kapila, **as Trustee** v. T. Alec Rigby* [emphasis added]. The suit against Rigby was brought on behalf of Atlas' creditors and was based upon the Trustee's statutorily created duty under 11 U.S.C.

§§ 704(1) & (4), to collect and reduce to money the property of the debtor's estate for the benefit of the debtor's creditors. (R. 113-117). Mr. Kapila had no standing to bring an adversary claim against Rigby. It was only his appointment as a United States Bankruptcy Trustee under the laws of the United States that gave him standing to bring suit against Rigby for malfeasance while Rigby served as a fiduciary to the creditors of Atlas.

The Wrongful Acts for which Rigby was sued and for which the judgment against him was subsequently entered are such that application of the insured v. insured exception is particularly inappropriate. The acts were committed, in large part, while he was acting within the scope of his heightened duty as a director and officer of Atlas under the protection of Chapter 11. He permitted waste and diversion of assets of the debtor-in-possession. Thus, the right to recover damages for these Wrongful Acts belonged to creditors of Atlas during the 18-month period it was a debtor-in-possession, not to any former equity interests of Atlas or to the estate itself. Prior to the conversion of the bankruptcy case from Chapter 11 to Chapter 7 with the appointment of the trustee, these creditors could have brought the same claims against Rigby as an adversary action in bankruptcy.

Petitioner simply ignores the fact that the judgment is owned by a bankruptcy trustee. Petitioner relies entirely on Endorsements 14 and 18 to the Policy to support its contention that the plaintiff in the Adversary Complaint and

the holder of the judgment against Rigby is an "assured" under the policy. Consequently, it is necessary to carefully analyze the language of the policy as it applies to the facts of this case.

Under the DEFINITIONS section of the Policy, Lloyds defines "Assureds" to mean (1) "the Company" and (2) "the Directors and Officers." When defining "Directors and Officers" the Policy language specifically includes "their estates, heirs, legal representatives or assigns in the event of death, incapacity or bankruptcy." No such language is included in the definition of "Company." Instead, the Policy defines "Corporate Takeover" to include "the appointment of a conservator, receiver or administrator to manage the affairs of the Parent Company." By this means, the Policy includes the bankruptcy estate of a "director or officer" within the definition of "Assureds" for purposes of the "insured v. insured" exclusion. However, it does not include the bankruptcy trustee of "the Company" within the definition of "Assureds" for the same purpose.

Thus, the policy definitions themselves require a distinction between an individual assured and that same individual in the role of a bankruptcy trustee. The Third District Court of Appeal understood and applied that distinction.

Petitioner is frustrated with the fact that the Third District relied directly upon the only cited decision, a federal court decision applying Florida law, that actually addressed an "insured v. insured" exclusion, *Sphinx Int'l, Inc. v. National*

Union Fire Ins. Co., 226 F. Supp.2d 1326 (M.D. Fla. 2002), *aff'd* 412 F.3d 1224 (11th Cir. 2005). In *Sphinx*, the federal court applied an "insured v. insured" exclusion contained in that directors and officers liability insurance policy to deny coverage for a claim initiated by a former officer and director of Sphinx against the company several years after he was terminated by Sphinx, finding that under the plain language of that policy, the exclusion applied to the claim being pursued against that insured.

The Third District ***followed*** the rule announced in *Sphinx.* It simply applied the plain meaning of the words in this policy to the facts of this case and concluded that they did not apply to the claim brought against Rigby by the bankruptcy trustee for the benefit of creditors. Neither the language of the policy exclusions, nor the controlling facts of the disputes in these two cases are substantially similar.

B. The Unique Role of Bankruptcy Trustees as Recognized by Alstrin v. St. Paul Mercury Insurance Company Compels Rejection of the Insured v. Insured Exclusion to Claims by the Trustee

The better-reasoned and more recent decisions that have addressed the insured v. insured exclusion in the bankruptcy setting do not apply the exclusion to claims by a bankruptcy trustee. In *Alstrin v. St. Paul Mercury Insurance Company,* 179 F. Supp. 2d 376 (U.S.D.C. Del. 2002), the district court in Delaware confronted the precise issue faced by this Court, evaluated prior decisions, and

came to the conclusion that the insured v. insured exclusion did not apply to a claim brought by a bankruptcy estate representative.

> The court agrees with the D&O plaintiffs, and the Estate Representative that the "insured v. insured" exclusion should not apply to claims brought by a bankruptcy Estate Representative against the former directors and officers of the Debtor where the Debtor is the insured entity, because the Debtor's Estate Representative (the RAG Estate) and the Debtor (RAG) are separate entities. *See In Re Buckeye Countrymark, Inc.*, 251 B.R. (Bkrtcy. S.D. Ohio 2000); *Pintlar Corp. v. Fidelity and Cas. Co. of N.Y. (In Re Pintlar Corp.)* 205 B.R. 945 (Bankr. D. Idaho 1997); *but see Reliance Co. of Illinois v. Weis,* 148 B.R. 575, 581-82 (E.D. Mo. 1992)(finding identity between estate and Debtor in evaluating applicability of an insured v. insured provision because claims could have been brought by the company).
>
> In *In Re Buckeye,* the court rejected an argument that claims for breach of fiduciary duties brought by a bankruptcy trustee against the debtor's former officers and directors were barred by an insured v. insured provision that excluded claims brought "by" or "on behalf of" the Debtor against its directors, officers, and managers. The court finds the reasoning of *Buckeye* particularly applicable to its [sic] explain why it now determines that the claims made by the Estate Representative against the D&O plaintiffs in this case do not fall within the National Union policy's insured v. insured exclusion. Simply put, the court finds that claims brought "by" the Estate Representative are not the same as claims brought "by" the Debtor under the exclusionary provision. As the *Buckeye* court explained:
>
> > "the very purpose of the an [sic] 'insured v. insured' exclusion does not apply to adversarial claims brought by the Trustee against the Debtor's directors and officers and managers. The intent behind the 'insured v. insured' exclusion in a [D&O] Policy is to protect the insurance companies against collusive suits between the insured corporation and its insured officers and directors. [citation omitted] When the plaintiff is not the corporation but a bankruptcy trustee acting as a genuinely adverse party to the

> defendant officers and directors, there is no threat of collusion. 251 B.R. at 840-41."

179 F. Supp. 2d at 404.

A similar distinction has been recognized by scholarly publications. *See, e.g.*, Collen, Bankruptcy and D&O Insurance, 11 *J. Bankr. L. & Prac.* 121, 151 (2002).

> However, the most important factor in determining the applicability of the I v. I is correctly analyzing who, prior to bankruptcy, owned the cause of action that is now sought to be asserted by the debtor, trustee, committee, or litigation trust. Was the cause of action owned by the debtor company or its creditors? This distinction is crucial because if the cause of action could have been brought pre-petition by creditors, the I v. I would not have applied. It would be absurd for the mere act of filing a bankruptcy to turn an action covered by D&O insurance into one that is not covered. Such a result confers a gratuitous exclusion on insurers to the prejudice of the estate.

In this case, Petitioner was fully aware of the bankruptcy proceedings. It renewed the D&O Policy during the period within which Atlas was operating as a debtor-in-possession, with heightened fiduciary obligations to creditors. In fact, Petitioner issued renewals of the D&O Policy for the years June 1, 1997 to 1998 and 1998 to 1999. The Debtors remained in Chapter 11 for eighteen months. The underwriter examined the impact of the bankruptcy proceedings. Despite the absence of a Plan of Reorganization during that extensive period, Petitioner renewed the D&O Policy and Rigby served in the capacity as director and officer of the debtor-in-possession.

It was in part during this period, when Rigby had a heightened fiduciary obligation to the creditors of Atlas as debtor-in-possession under the protection of the Bankruptcy Code, that he committed the most serious acts of negligence and breaches of fiduciary duty as determined by the bankruptcy court in its judgment against Rigby. The law is clear that so long as a debtor in reorganization remains in possession, it bears a fiduciary obligation to creditors. *Wolf v. Weinstein*, 372 U.S. 633 (S.Ct. 1963), *reaffirmed* in *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343 (1985). Rigby breached that fiduciary obligation and was held liable in damages for conduct while he was serving as an officer and director of Atlas and Atlas was a debtor-in-possession.

The creditors could have brought the same claims against Rigby in the bankruptcy court during the time Atlas was a debtor-in-possession. It would be inappropriate for the mere act of transforming a Chapter 11 case into a Chapter 7 case and the appointment of a trustee, to turn an action for breach of the fiduciary duty owed by the debtor-in-possession's officers to its creditors, which would clearly have been a covered claim not subject to the exclusion, into a non-covered claim simply because the Trustee brings it for the benefit of those same creditors.

Petitioner has made multiple attempts to distinguish *Alstrin*. In the Third District, Petitioner argued that the "insured v. insured" policy exclusion in *Alstrin*

precluded claims by or on behalf of the "Company" while the Policy in this case excluded claims by or on behalf of the "Assureds." In this Court, Petitioner attempts a new argument in footnote 2, at p. 11 of its Brief on the Merits, claiming that because it chose to provide Mr. Kapila with liability coverage in his individual capacity by defining him as an "officer or director" this differentiates this case from *Alstrin.*

Both arguments suffer from circular reasoning. In both arguments, Petitioner claims that since it added Mr. Kapila by endorsement to the Policy as an "Officer or Director," he is therefore an "Assured" as defined in the Policy and is *ipso facto* included within the "insured v. insured" exclusion. However, Petitioner's arguments beg the very question addressed in *Alstrin* and its progeny.

Again, reference to the DEFINITIONS section of the Policy is instructive. The Policy defines "Assureds" to mean (1) "the Company" and (2) "the Directors and Officers." The Policy includes the bankruptcy estate of a "director or officer" within the definition of "Assureds" for purposes of the "insured v. insured" exclusion. However, it does not include the bankruptcy estate of "the Company" within the definition of "Assureds" for the same purpose.

On the other hand, the bankruptcy trustee in Chapter 11 is responsible for operating the company. Yet the Trustee is not an officer or director. Given the exposure inherent in environmentally sensitive businesses, Mr. Kapila sought to be

sure that he would be personally covered for liability arising from operation of the company. Petitioner accepted the premiums and chose how to accomplish this. If endorsements 14 and 18 to the subject policies mean what Petitioner now claims they mean, they were superfluous. The Trustee already enjoyed protection under the policy.

The only logical interpretation, and that adopted by the Third District Court of Appeal, is that the endorsements were intended to provide Mr. Kapila coverage for potential personal liability as the operator of the Company. This Court should adopt the holding of *Alstrin*, 179 F. Supp. 2d 376, as the law of the State of Florida, recognizing this legal distinction between the individual and the bankruptcy trustee.

C. The Fact that Mr. Kapila Sought Coverage Individually Does Not Compel Application of the Insured v. Insured Exclusion to the Trustee's Claim

To fully understand the distinction between Mr. Kapila in his individual status and Kapila as Trustee, particularly as it relates to issues of liability insurance, it is helpful to analyze the basis for a bankruptcy trustee's liability and the extent of immunity granted to trustees for personal liability arising out of their conduct as trustee. In *Mosser v. Darrow*, 341 U.S. 267 (1951), the United States Supreme Court established that a bankruptcy trustee is "(a) not liable, in any manner, for mistake in judgment where discretion is allowed, (b) liable personally

only for acts determined to be willful and deliberate in violation of his duties and (c) liable, in his official capacity, for negligence." The Court, however, also stated: "The most effective sanction for good administration is personal liability for the consequences of forbidden acts, and there are ways by which a trustee may effectively protect himself against personal liability." 341 U.S. at 274.

Following *Mosser,* most of the circuit courts of appeal found trustees liable for negligence in their official capacity and liable for intentional misconduct personally. *See, e.g. In Re Hutchinson,* 5 F.3d 750 (4th Cir. 1993); *Connecticut General Life Ins. Co. v. Universal Ins. Co.,* 838 F.2d 612 (1st Cir. 1988); *In Re Chicago Pacific,* 773 F.2d 909 (7th Cir. 1985); *Ford Motor Credit Co. v. Weaver,* 680 F.2d 451 (6th Cir. 1982); and *Sherr v. Winkler,* 552 F.2d 1375 (10th Cir. 1977).

The Second and Ninth Circuits, however, extended this liability and held trustees personally liable for acts of negligence. *See, e.g., In Re Gorski,* 766 F.2d 723, 727 (2d Cir. 1985)("liability may attach as the result of negligent, as well as knowing or intentional breaches"); *In Re Cochise College Park, Inc.,* 703 F.2d 1339, 1357 (9th Cir. 1983)(trustee "is subject to personal liability for not only intentional but also negligent violations of duties imposed upon him by law.") The Eleventh Circuit has not squarely addressed the issue of trustee liability, but in *Red Carpet Corp. of Panama City Beach v. Miller,* 708 F.2d 1576, 1578 (11th Cir.

1983), the court in dicta stated that a bankruptcy trustee is liable for wrongful conduct or negligence and may be surcharged for such conduct.

As recently as 2000, a commentator wrote "despite increasing attention given to the subject for several years, the United States Bankruptcy Code has not yet been amended to provide protection from personal liability for trustees and debtors in possession." Allard, *Personal Liability of Trustees and Debtors in Possession: Review of the Varying Standards of Care in the United States,* 106 Commercial L. J. 415 (2000).

When Mr. Kapila was appointed to serve as Trustee of Atlas, the company was actively engaged in the hazardous business of owning and operating waste and landfill facilities. Through subsidiaries, Atlas was also engaged in the business of providing petroleum soil decontamination and trucking services, excavation and restoration of petroleum contaminated sites, petroleum storage tank removal and general hauling services. (R. 3-4). Given the uncertain status of the law regarding personal liability of trustees in bankruptcy, it was completely understandable that Mr. Kapila would insist on insurance coverage for personal liability for managing and operating such a hazardous business activity.

However, the claims against Rigby were not brought by Mr. Kapila in his individual status, but rather in his status as Trustee, for the benefit of Atlas' creditors. (R. 7). Mr. Kapila had no standing to pursue such claims absent his

statutorily created obligation to pursue claims for the benefit of creditors. The fact that he sought protection against personal liability for operation of Atlas and its subsidiaries does not trigger application of the insured v. insured exclusion to the Trustee's claim against Rigby for the benefit of creditors of Atlas.

D. Petitioner's Reliance on the decision of the U.S. Court of Appeals for the Ninth Circuit in American Medical is misplaced

Petitioner continues to rely upon the decision in *American Medical Int'l., Inc. v. National Union Fire Ins. Co.,* 244 F.3d 715 (9th Cir. 2001), in which the Ninth Circuit, applying California substantive law, held that an insured v. insured exclusion in the directors and officers liability insurance policy there at issue precluded coverage for a damage claim brought by a former director and shareholder of the company, Dr. Lee Pearce. First and foremost, *American Medical* stands for the unremarkable proposition that in order to determine the applicability of an exclusion in an insurance policy, the court must consider the particular language of that policy contract in detail. 244 F.3d at 722.

The *American Medical* court thus looked first to the insuring clause of that policy and noted that it limited coverage to alleged "wrongful acts" by directors "acting in their official capacity." 244 F.3d at 722. Lloyds points out that the insuring clause language in the instant policy is the same. This is true.

However, the insured v. insured exclusion in the American Medical policy

differs significantly from the exclusion in the D & O Policy involved in this case. The American Medical policy barred coverage for any claim "brought against one or more past, present or future directors or officers, by the corporation, its subsidiaries or successors or by one or more past, present or future directors or officers." 244 F.3d at 721 In the subject D & O Policy, the insured v. insured exclusion prohibits claims brought "by, on behalf of, or at the direction of any of the Assureds, except and to the extent such Claim is brought derivatively by a security holder of the Company who, when such Claim is first made, is acting independently of all of the Assureds."

In *American Medical* the insured argued that because Dr. Pearce brought his damage claim as a shareholder and not as a director, the exclusion should not apply. The *American Medical* court held that in the absence of language that limited application of the exclusion to parties in their specific capacities (such as the language in the Lloyd's Policy carving out shareholder derivative claims), the language of that policy's exclusion was broad enough to include Dr. Pearce, a director, even though he had brought his damage claim as a shareholder.

Of far greater interest here is the case that the *American Medical* court distinguished in reaching its decision. American Medical cited another California decision, *Fidelity & Deposit Co. v. Zandstra*, 756 F. Supp. 429 (N.D. Cal. 1990), in support of its argument that the insured v. insured exclusion should not apply to

Dr. Pearce's claim against it. In *Zandstra,* another District Court, also applying California substantive law, had to decide whether an insured v. insured exclusion applied when an underlying suit was brought by the Federal Deposit Insurance Corporation as an assignee of the insured corporation. The *Zandstra* court held that the exclusion did not apply to exclude coverage for claims brought by the FDIC. It was the fact that *Zandstra* involved a federal agency as successor by virtue of federal law that the *American Medical* court relied upon to distinguish it.

While not precisely equivalent, the FDIC, as successor to an insured financial institution, is far more analogous to Kapila, as a bankruptcy trustee, than is Dr. Pearce in his dual roles as former director and shareholder of American Medical. The *American Medical* court specifically recognized that "dual capacity" arguments were not barred *per se* by California law. 244 F.3d at 722.

Florida should not bar such arguments either, particularly when the dual capacity is the creature of a federal statute.

CONCLUSION

For the foregoing reasons, Rigby respectfully requests this Court to deny Petitioner's request for certiorari review of the Third District's decision for lack of jurisdiction. Alternatively, Rigby respectfully requests that if this Court retains discretionary jurisdiction, it affirm the decision of the Third District and deny the petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 2nd day of February 2006, to: Christine Testaverde, Esq., DUANE MORRIS, LLP, 380 Lexington Ave., New York, NY 10168 and Eric Saida, DUANE MORRIS, LLP, 200 S. Biscayne Blvd., Miami, Florida, 33131.

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CERTIFICATE OF TYPE SIZE AND STYLE

Appellant certifies that this brief complies with the type-volume limitations and the font is in Time New Roman 14-point typeface, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

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