

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

WESTCHESTER FIRE INSURANCE
COMPANY,

Plaintiff,

v.

NICHOLAS S. SCHORSCH, EDWARD
M. WEIL, JR., WILLIAM KAHANE,
PETER M. BUDKO, BRIAN S. BLOCK,
and RCAP HOLDINGS, LLC,

Defendants.

Index No.:

**COMPLAINT FOR
DECLARATORY JUDGMENT**

Plaintiff, Westchester Fire Insurance Company (“Westchester”), by this Complaint for Declaratory Judgment under NY CPLR § 3001 against Nicholas S. Schorsch, Edward M. Weil, Jr., William Kahane, Peter M. Budko, Brian S. Block, and RCAP Holdings, LLC (collectively, the “Defendants”), alleges and states as follows:

INTRODUCTION

1. Westchester seeks a declaration that there is no insurance coverage for Defendants’ claim under an excess insurance policy that Westchester issued to RCS Capital Corporation (“RCAP”) in 2014. Westchester’s excess policy follows form to a primary policy issued by XL Specialty Insurance Company (“XL”).

2. Defendants Nicholas S. Schorsch, Edward M. Weil, Jr., William Kahane, Peter M. Budko, and Brian S. Block are former RCAP officers and/or directors (collectively, the “Individual Defendants”). The Individual Defendants control Defendant RCAP Holdings, LLC (“RCAP Holdings”), an RCAP-affiliate. RCAP Holdings and each Defendant is an insured under the Westchester excess policy.

3. In the wake of an accounting scandal at a related company, RCAP filed for bankruptcy in January 2016 and emerged from bankruptcy in May 2016. RCAP remained a debtor-in-possession during its reorganization.

4. As part of RCAP's voluntary plan of reorganization, RCAP and other insureds created the "RCS Creditor Trust" for the purpose of, among other things, pursuing claims belonging to RCAP against Defendants. The RCAP debtors transferred to the RCS Creditor Trust all rights, title, and interest in RCAP's litigation claims. Accordingly, the RCS Creditor Trust stands in RCAP's shoes, possessing RCAP's same rights and subject to the same defenses.

5. Defendants have given notice to Westchester in connection with an action that the RCS Creditor Trust filed in the Delaware Chancery Court against Defendants and others in March 2017, *RCS Creditor Trust v. Schorsch, et al.*, C.A. No. 2017-0178-SG (the "Creditor Trust Action"). The RCS Creditor Trust filed the Creditor Trust Action after receiving substantial cooperation and assistance from RCAP and other insureds. Indeed, a former RCAP director (an insured) was appointed as an RCS Creditor Trust trustee. As the RCS Creditor Trust has explained in its litigation pleadings, RCAP is its "predecessor-in-interest" and the claims against Defendants are brought "on behalf of RCAP and its subsidiaries."

6. Westchester now seeks a declaration from this Court that the Creditor Trust Action is not covered under the policy's "Insured vs. Insured Exclusion." The Insured vs. Insured Exclusion bars coverage for claims against insureds brought "by, on behalf of, or at the direction of" RCAP or any other insured person. Here, because the RCS Creditor Trust is standing in the shoes of RCAP and has asserted claims against other insureds on behalf of RCAP, the exclusion bars Defendants' claim. Alternatively, as explained more fully below,

there are other policy provisions that limit coverage for the Defendants with respect to the Creditor Trust Action.

7. Westchester pursues this matter now because its purported coverage obligation has become ripe for consideration. XL's primary policy and nearly all other layers of excess insurance below Westchester's policy have been exhausted due to payment of amounts in connection with separate lawsuits arising out of the same events, including payment of a \$31 million securities class action settlement. Westchester had no obligation to contribute to those losses because its obligations could only arise upon exhaustion of all underlying policy limits. The policy directly underlying Westchester's policy will also soon exhaust its remaining limit. Accordingly, Westchester seeks an order establishing applicability of the Insured vs. Insured Exclusion or, in the alternative, other policy limitations.

THE PARTIES

8. Westchester is a corporation organized under the laws of Pennsylvania, with its principal place of business located at 436 Walnut Street, Philadelphia, PA.

9. RCAP Holdings is a Delaware limited liability company with its principal place of business located at 405 Park Avenue, New York, NY.

10. Nicholas S. Schorsch, until his resignation on December 30, 2014, was Executive Chairman of RCAP's Board of Directors. RCAP was a Delaware corporation with its principal place of business in New York. Mr. Schorsch also serves as Chairman, Chief Executive Officer, co-founder, and, through his 56.02% membership interest, controlling owner of AR Capital, LLC ("AR Capital"). In addition, he served as Chief Executive Officer of American Realty Capital Partners, Inc. ("ARCP") (now known as "VEREIT, Inc.") from 2010 until October 1, 2014.

11. Edward M. Weil was a member of RCAP's Board of Directors, and served as RCAP's Chief Executive Officer from September 22, 2014 until November 17, 2015. He also served as President and Chief Operating Officer of AR Capital, and as President, Chief Operating Officer, Executive Vice President, Director, and Treasurer of ARCP at various intervals from 2012 through 2014. He has a 3.51% membership interest in AR Capital.

12. William Kahane served as RCAP's original Chief Executive Officer until he resigned from that position on September 21, 2014. He also served on the RCAP Board of Directors until his resignation on December 30, 2014. He is a co-founder of AR Capital and holds a 13.5% membership interest. He also served on the ARCP Board of Directors until June 24, 2014.

13. Peter M. Budko was a member of RCAP's Board of Directors, and Executive Vice President and Chief Investment Officer of AR Capital. He also served as Chief Investment Officer and Executive Vice President of ARCP from 2010 to 2014. He holds a 16.4% membership interest in AR Capital.

14. Brian S. Block was a member of RCAP's Board of Directors and served as RCAP's Chief Financial Officer from February 2013 until July 2014. He also served as Executive Vice President and Chief Financial Officer of AR Capital. As of June 2014, Mr. Block held a 3.03% membership interest in AR Capital. He served as Chief Financial Officer of ARCP from its formation in December 2010 and was appointed Treasurer and Secretary in December 2013. He was asked to resign from ARCP on October 28, 2014, and was convicted of conspiracy, securities fraud and related crimes following a trial in the United States District Court for the Southern District of New York in June 2017.

JURISDICTION AND VENUE

15. For the time periods relevant to the allegations in this complaint, RCAP, AR Capital, ARCP and RCAP Holdings all had a principle place of business in New York, New York.

16. Upon information and belief, the Individual Defendants were directors or officers of RCAP at various times relevant to this action. Certain of the Individual Defendants are domiciled or reside in New York. All of the Individual Defendants engaged in regular and frequent business activities in New York, and are alleged to have committed acts in New York out of which this action arises. The Court has personal jurisdiction over the Individual Defendants pursuant to CPLR §§ 301 and 302.

17. Venue is proper in this county pursuant to CPLR § 503 because, among other reasons, defendant RCAP Holdings has its principal place of business in New York County, and the insurance policy at issue was delivered to RCAP in New York County.

FACTUAL BACKGROUND

The Westchester Excess Policy

18. Westchester issued to RCAP Excess Liability Insurance Policy Number G27447594 001 (the “Excess Policy”), a claims-made policy with a Policy Period from April 29, 2014 to April 29, 2015. A copy of the Excess Policy is attached hereto as Exhibit 1.

19. The Excess Policy was issued to RCAP at 405 Park Avenue, New York, NY.

20. Except as specifically set forth therein, coverage under the Excess Policy is subject to the terms, definitions, conditions, exclusions and limitations of Management Liability and Company Reimbursement Insurance Policy Number ELU134102-14 issued by XL Specialty Insurance Company (the “Followed Policy”). A copy of the Followed Policy is attached hereto as Exhibit 2.

21. Subject to all of its terms, definitions, conditions, exclusions and limitations, the Excess Policy's Limit of Liability is excess of the applicable retention and \$35 million of Underlying Policy Limits provided by the insurers of the Underlying Policies. *See* Ex. 1, Declarations, Items 6-7. In no event does the Excess Policy afford broader coverage than that provided by the Followed Policy. *Id.*

22. Under the Excess Policy, Westchester does not have an obligation to pay a Loss until after the Underlying Policy Limits are exhausted by payment of covered Loss by the insurers of the Underlying Policies and/or the Insureds. *See* Ex. 2 at Section II.

The Followed Primary Policy

23. Subject to all of its provisions, the Followed Policy affords coverage for a Loss resulting from a Claim against Insured Persons and/or the Company for a Wrongful Act. *See* Ex. 2 at Section I.

24. The Followed Policy defines Loss to include "damages, judgments, settlements, pre-judgment and post-judgment interest or other amounts (including punitive, exemplary or multiple damages, where insurable by law) and Defense Expenses in excess of the Retention that the Insured is legally obligated to pay." *See id.* at Section II(M), as amended by Endorsement Nos. 10 and 11. Loss expressly does not include "matters which are uninsurable under the law pursuant to which this Policy is construed." *See id.*

25. The Followed Policy defines a Claim to include "any civil proceeding in a court of law or equity." *See id.* at Section II(C)(2).

26. The Followed Policy defines Insured Person to include "Committee Members" and "any past, present or future director or officer, or member of the Board of Managers, of the Company." *See id.* at Section II(J), as amended by Endorsement No. 24.

27. The Followed Policy defines Company to mean RCAP and “any Subsidiary created or acquired on or before” the policy’s inception date of April 29, 2014 or during the policy period. *See id.* at Section II(D).

28. The Followed Policy defines Wrongful Act to include: “any actual or alleged act, error, omission, misstatement, misleading statement, neglect, or breach of duty by any Insured Person while acting in his or her capacity as an ... Insured Person of the Company or a person serving in a functionally equivalent role for the Parent Company or any Subsidiary,” or “any matter asserted against an Insured Person solely by reason of his or her status as a director or officer of the Company.” *Id.* at Section II(S), as amended by Endorsement No. 20.

29. The Followed Policy provides that “[a]ll Claims arising from the same Interrelated Wrongful Acts shall be deemed to constitute a single Claim and shall be deemed to have been made at the earliest of the time at which the earliest such Claim is made” *Id.* at Section VI(B). Interrelated Wrongful Acts are defined to include any “Wrongful Act [or] Company Wrongful Act ... based on, arising out of, directly or indirectly resulting from, [or] in consequence of, or in any way involving any of the same or related facts, series of related facts, circumstances, situations, transactions or events.” *Id.* at Section II(K).

30. Section III(G) of the Followed Policy (the “Insured vs. Insured Exclusion”) provides:

The Insurer shall not be liable to make any payment for Loss in connection with any Claim made against an Insured Person, or with respect to Insuring Agreement (C), the Company: by, on behalf of, or at the direction of the Company or Insured Person, except and to the extent such Claim:

- (i) is brought by a security holder of the Company who, when such Claim is made and maintained is acting independently of, and without the active solicitation, assistance, participation or intervention of an Insured Person, other than individuals who are Insured Persons solely due to Section II Definitions (J)(2) of the Policy, or the Company;

- (ii) is brought by the Bankruptcy Trustee or Examiner of the Company, or any assignee of such Trustee or Examiner, any Receiver, Conservator, Rehabilitator, or Liquidator or comparable authority of the Company;
- (iii) is in the form of a crossclaim, third party claim or other claim for contribution or indemnity by an Insured Person which is part of or results directly from a Claim which is not otherwise excluded by the terms of this Policy;
- (iv) is an Employment Practices Claim;
- (v) is brought and maintained in a non-common law jurisdiction outside the United States of America, including its territories and possessions;
- (vi) is brought and maintained by an Insured Person:
 - (a) who has not served as a director, officer, member of the Board of Managers, or employee of the Company for at least two (2) years prior to the date such Claim is first made; and
 - (b) who is acting independently of, and without the solicitation, assistance, participation or intervention of an Insured Person or the Company; or
- (vii) is brought by an employee of the Company pursuant to any federal or state whistleblower protection statute or any rule or regulation promulgated thereunder;
- (viii) is brought by a creditors committee of the Company in the event such Company files for relief under Title 11 of the United States Code.

Id. at Section III(G), as amended by Endorsement No. 8.

31. The Followed Policy also excludes coverage for Loss in connection with a Claim “based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving an Insured Person acting in their capacity as a[n] Insured Person of any entity other than the Company, Non-Profit Entity or Joint Venture.” *Id.* at Section III(I).

32. The Followed Policy provides: “All Loss payable under this Policy will be specifically excess of and will not contribute with any other valid and collectible insurance,

including but not limited to any insurance under which there is a duty to defend, unless such other insurance is specifically excess of this Policy. This Policy will not be subject to the terms of any other insurance policy.” *Id.* at Section VI(C)(1), as amended by Endorsement No. 17.

ARCP Collapses, Leading to RCAP’s Bankruptcy and a Wave of Lawsuits

33. RCAP and its subsidiaries were part of an integrated real estate enterprise consisting of dozens of companies directly or indirectly owned by Defendants (and others), including traded and non-traded REITs, a wholesale broker-dealer, retail broker-dealers, and an investment banking and advisory business.

34. Before filing for bankruptcy, RCAP operated as the publicly traded, wholesale marketing and distribution arm of AR Capital. RCAP sold ownership interests in non-traded REITS sponsored by AR Capital and also advised AR Capital, usually in connection with transactions involving other entities controlled by Defendants.

35. ARCP, a publicly-traded REIT, provided liquidity events for AR Capital’s non-traded REITS (for example, by acquiring them) and retained RCAP to advise it in connection with such events.

36. Until 2015, RCAP derived most of its revenues from transactions involving entities controlled by Defendants. For example, in 2013, more than 80% of RCAP’s revenues came from selling interests in non-traded REITs sponsored by AR Capital. Similarly, in 2013 and 2014, most of RCAP’s investment banking and transaction management fees came from performing services for such non-traded REITs.

37. On October 29, 2014, ARCP disclosed that financial information reported in its public filings had been misstated. By the end of the next day, ARCP’s stock price had fallen 19%, and continued to fall in the wake of news that the Department of Justice had opened a criminal investigation into the accounting irregularity. RCAP’s stock price also plummeted.

38. News of the accounting scandal resulted in a wave of lawsuits. Naming RCAP and its officers and directors among other defendants, various plaintiffs filed a putative class action captioned *Weston, et al. v. RCS Capital Corp., et al.*, No. 14-cv-10136 (S.D.N.Y.), and several other putative class actions consolidated under the caption *In re American Realty Capital Properties, Inc. Litigation*, No. 15-mc-00040 (S.D.N.Y.). These lawsuits alleged, among other things, that Defendants managed and operated the many companies they controlled in an integrated fashion for their own personal enrichment. Defendants provided notice of these lawsuits to their insurers, including Westchester, during the Policy Period. In late March 2017, the parties to the *Weston* action agreed to a settlement of approximately \$31 million.

39. The accounting scandal also led to the criminal convictions of two former ARCP employees, Brian Block and Lisa McAlister. On June 29, 2016, Ms. McAlister pled guilty to conspiracy to commit securities fraud, securities fraud, making false filings with the Securities Exchange Commission, and making false statements to federal investigators.

40. Mr. Block, who was also a director and Chief Financial Officer of RCAP, took his case to trial. On June 30, 2017 a jury convicted Mr. Block on all counts: conspiracy to defraud the United States, manipulative and deceptive devices, false periodical and other reports, and failure to certify financial reports. He was sentenced in November 2017 to 18 months in prison. On February 8, 2018 the Securities Exchange Commission obtained a final judgment against Mr. Block, banning him from serving as an officer or director.

RCAP Establishes the RCS Creditor Trust in Pre-Packaged Bankruptcy

41. By the fall of 2015, RCAP was trying to sell or restructure part or all of its business.

42. In November 2015, RCAP hired David Orlofsky as Chief Strategy Officer to lead RCAP's efforts to sell or restructure part or all of its business.

43. Mr. Orlofsky and a majority of disinterested RCAP directors negotiated and approved an agreement with RCAP's creditors that resulted in a plan for RCAP to file for bankruptcy and to create a litigation trust to pursue causes of action belonging to RCAP.

44. Mr. Orlofsky, on behalf of RCAP and its subsidiaries (collectively, the "Debtors"), formally entered into this "Restructuring Support Agreement" (the "RSA") on January 29, 2016.

45. On or about January 31, 2016, the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in United States Bankruptcy Court for the District of Delaware.

46. The bankruptcy court did not appoint a bankruptcy trustee or examiner, allowing RCAP's board and management to maintain control of RCAP as a debtor-in-possession.

47. Mr. Orlofsky became RCAP's Chief Restructuring Officer on or about January 17, 2016, and shortly thereafter also became RCAP's interim Chief Financial Officer.

48. During the bankruptcy proceeding, Mr. Orlofsky testified that, before commencing the bankruptcy proceeding, the Debtors (led by an RCAP Board of Directors composed of a majority of disinterested directors), certain lien holders, and Luxor engaged in an extensive negotiation and planning process to develop a framework for a restructuring. To accomplish those goals, the Debtors, certain lien holders, and RCAP's largest creditor, Luxor Capital Partners ("Luxor"), entered into the RSA, which set forth the general outline of the plans and the course to be pursued during [the] Chapter 11 cases.

49. The RSA included a Creditor Trust Term Sheet, which provided that a board of trustees would oversee the trust and would "direct the litigation strategy of the [RCS Creditor Trust] (including determinations regarding retention of litigation counsel)."

50. Kramer Levin Naftalis & Frankel LLP, litigation counsel for the RCS Creditor Trust, participated in the RSA negotiations on behalf of Luxor.

51. The Creditor Trust Term Sheet specifies that “[t]he Creditor Trust Agreement...shall be in form and substance satisfactory to the Company and Luxor.”

52. Two Luxor appointees served on the RCAP Board of Directors when the RSA was negotiated and approved: Michael Conboy, who was also Chairman of RCAP’s Executive Committee, and Jeffrey Brown.

53. In May 2016, the bankruptcy court approved Debtors’ Fourth Amended Joint Plan of Reorganization (the “Plan”). The Plan became effective on May 23, 2016.

54. In its order confirming the Plan, the bankruptcy court made clear that “[o]n and after the Effective Date, the Reorganized Debtors . . . and the Creditor Trust (with respect to the Litigation Assets) shall have, retain, reserve and be entitled to assert all such claims, Causes of Action, rights of setoff, and other legal or equitable defenses which the Debtors had immediately prior to their Petition Dates fully as if the Chapter 11 Cases had not been commenced.” Plan Confirmation Order ¶ 31.

55. In accordance with the Plan and under the “Creditor Trust Agreement,” the RCS Creditor Trust was created in May 2016.

56. The Creditor Trust Agreement specifies that “the Creditor Trust shall be the successor-in-interest to the Debtors with respect to any Creditor Trust Causes of Action,” which include certain causes of action RCAP held against the Individual Defendants. Creditor Trust Agreement, Section 2.3(a).

57. The RCS Creditor Trust is managed by the “Creditor Trust Board,” which is comprised of three trustees. Mr. Conboy was one of the three original trustees of the Creditor

Trust Board and, upon information and belief, remains one of the three trustees of the Creditor Trust Board. Mr. Conboy, as trustee, signed the Creditor Trust Agreement with RCAP.

58. The Creditor Trust Agreement authorized the trustees and the RCS Creditor Trust to “investigate, prosecute, settle, liquidate, dispose of, and/or abandon the Creditor Trust Assets, including the Creditor Trust Causes of Action and other Litigation Assets, and to direct the Creditor Trust Administrator in respect of the Litigation Assets.” Creditor Trust Agreement, Section 5.4(b)(viii).

59. Likewise, the Plan requires the Debtors to cooperate with the RCS Creditor Trust regarding any litigation the RCS Creditor Trust may bring, including providing documentation and access to employees for interviews, testimony, and/or other evidence for “as long as the Creditor Trust is in existence.” Creditor Trust Agreement, Section 6.6(a).

60. Upon information and belief, the Debtors and certain directors and officers of RCAP have provided such cooperation to the RCS Creditor Trust.

61. The Creditor Trust Agreement purports to extend all privileges and immunities held by the Debtors to the RCS Creditor Trust, and forbids the RCS Creditor Trust from waiving “the attorney-client privilege, work product, or other protection or immunity of any new information received from the Reorganized Debtors.” Creditor Trust Agreement, Section 2.5(d).

62. The RCS Creditor Trust is structured to provide disbursements to unsecured creditors and equity holders, including Defendants depending on the amount of overall recovery.

The RCS Creditor Trust Sues Defendants on Behalf of RCAP

63. In March 2017, the RCS Creditor Trust filed the Creditor Trust Action. A copy of the Verified Complaint filed in the Creditor Trust Action is attached hereto as Exhibit 3.

64. In the Creditor Trust Action, the RCS Creditor Trust, asserting as an assignee “claims and causes of action held by the Debtors or their estates,” alleges that the Individual

Defendants breached their fiduciary duties in connection with the events at issue in the 2014 Claim and by using their control over RCAP to engage in certain transactions and structure RCAP's business in a way that benefitted AR Capital (in which they had a larger ownership stake) at the expense of RCAP (in which they had a smaller ownership stake). Ex. 3.

65. The RCS Creditor Trust refers to RCAP in its complaint as "predecessor-in-interest to the RCS Creditor Trust." Similarly, the RCS Creditor Trust specifically represented to the court in its opposition to Defendants' motions to dismiss that it asserts its claims "on behalf of RCAP and its subsidiaries." Ex. 3.

66. In addition to asserting that the Individual Defendants breached their fiduciary duty to RCAP, the Creditor Trust Action also alleges that the Individual Defendants acted for the ultimate benefit of AR Capital and aided and abetted others in breaching their fiduciary duties.

67. The RCS Creditor Trust also asserts a cause of action for unjust enrichment and constructive trust against AR Capital, AR Global, and certain advisor defendants, none of whom are Insureds under the Excess Policy.

Defendants Seek Coverage for the Creditor Trust Action

68. Defendants notified their insurers that the RCS Creditor Trust had retained counsel to identify, investigate, and pursue claims against Mr. Schorsch and other "ARC Parties," and subsequently Defendants notified their insurers after the Creditor Trust Action was filed.

69. Pursuant to Section VI(B) of the Followed Policy, the Creditor Trust Action is a Claim that is deemed first made during the Policy Period of the Excess Policy. See Ex. 2.

70. Upon information and belief, exhaustion of the Underlying Policy Limits is imminent. All but one of the Underlying Policies exhausted its limits in payment of defense and indemnity costs, primarily relating to the March 2017 settlement of the *Weston* action for

\$31 million. The directly underlying policy will soon exhaust its remaining limit. Accordingly, Defendants will almost certainly pursue Westchester for payment of defense costs for the Creditor Trust Action.

71. Westchester notified Defendants that it had determined that the Excess Policy does not provide coverage for the Creditor Trust Action. The letter apprises Defendants of various coverage defenses, including those asserted herein, and reserves Westchester's rights to assert additional coverage defenses.

**FIRST CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Declaratory Judgment Pursuant to NY CPLR § 3001 – Insured vs. Insured Exclusion)**

72. Westchester restates the allegations set forth in paragraphs 1 through 71 as if fully stated herein.

73. The “Insured vs. Insured Exclusion” in the Followed Policy states:

The Insurer shall not be liable to make any payment for Loss in connection with any Claim made against an Insured Person, or . . . the Company . . . by, on behalf of, or at the direction of the Company or Insured Person, except and to the extent such Claim:

- (i) is brought by a security holder of the Company who, when such Claim is made and maintained is acting independently of, and without the active solicitation, assistance, participation or intervention of an Insured Person, other than individuals who are Insured Persons solely due to Section II Definitions (J)(2) of the Policy, or the Company;
- (ii) is brought by the Bankruptcy Trustee or Examiner of the Company, or any assignee of such Trustee or Examiner, any Receiver, Conservator, Rehabilitator, or Liquidator or comparable authority of the Company;
- (iii) is in the form of a crossclaim, third party claim or other claim for contribution or indemnity by an Insured Person which is part of or results directly from a Claim which is not otherwise excluded by the terms of this Policy;
- (iv) is an Employment Practices Claim;

- (v) is brought and maintained in a non-common law jurisdiction outside the United States of America, including its territories and possessions;
- (vi) is brought and maintained by an Insured Person:
 - (a) who has not served as a director, officer, member of the Board of Managers, or employee of the Company for at least two (2) years prior to the date such Claim is first made; and
 - (b) who is acting independently of, and without the solicitation, assistance, participation or intervention of an Insured Person or the Company; or
- (vii) is brought by an employee of the Company pursuant to any federal or state whistleblower protection statute or any rule or regulation promulgated thereunder;
- (viii) is brought by a creditors committee of the Company in the event such Company files for relief under Title 11 of the United States Code.

Ex. 2, Section III(G), as amended by Endorsement No. 8.

74. In the Creditor Trust Action, the RCS Creditor Trust asserts all counts against the Defendants on behalf of RCAP, i.e., the Company.

75. Further, upon information and belief, RCAP and certain Insured Persons formed the RCS Creditor Trust, assigned causes of action against Defendants to the RCS Creditor Trust and have cooperated with and assisted (and continue to cooperate with and assist) the RCS Creditor Trust in connection with the Creditor Trust Action.

76. Westchester requests a declaration from this Court pursuant to NY CPLR § 3001 that the Creditor Trust Action is excluded from coverage under the Excess Policy by the Insured vs. Insured Exclusion.

**ALTERNATIVE SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Declaratory Judgment Pursuant to NY CPLR § 3001 – Insured Capacity)**

77. Westchester restates the allegations set forth in paragraphs 1 through 76 as if fully stated herein.

78. The Followed Policy affords coverage to Insured Persons for a Wrongful Act. Ex. 2 at Section I(A) and I(B).

79. A Wrongful Act is limited to: “any actual or alleged act, error, omission, misstatement, misleading statement, neglect, or breach of duty by any Insured Person while acting in his or her capacity as an ... Insured Person of the Company or a person serving in a functionally equivalent role for the Parent Company or any Subsidiary;” or “any matter asserted against an Insured Person solely by reason of his or her status as a director or officer of the Company.” Ex. 2 at Section II(S), as amended by Endorsement No. 20.

80. Likewise, the Followed Policy excludes coverage for Loss in connection with a Claim “based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving an Insured Person acting in their capacity as a[n] Insured Person of any entity other than the Company, Non-Profit Entity or Joint Venture.” *Id.* at Section III(I).

81. According to the Creditor Trust Action, the Individual Defendants were all officers and/or directors of a number of companies, including RCAP, AR Capital, ARCP, RCAP Holdings, and other entity defendants in the Creditor Trust Action other than RCAP Holdings.

82. As defined in the Followed Policy, “Company” includes RCAP and RCAP Holdings.

83. As defined in the Followed Policy, “Company” does not include AR Capital, ARCP or other entity defendants in the Creditor Trust Action other than RCAP Holdings.

84. In the Creditor Trust Action, the RCS Creditor Trust alleges that the Individual Defendants acted in capacities other than as an officer or director of the “Company,” the only capacities for which the Individual Defendants could be covered under the Excess Policy,

including that they acted to benefit AR Capital (and ultimately themselves as owners of AR Capital) at the expense of RCAP.

85. Further, in the Creditor Trust Action, the RCS Creditor Trust also alleges that the Individual Defendants, as owners of AR Capital, were the ultimate beneficiaries of amounts diverted from and rightfully belonging to RCAP.

86. Therefore, even if the Insured vs. Insured Exclusion is not a complete bar to coverage for the Creditor Trust Action, Westchester seeks a declaration from this Court pursuant to NY CPLR § 3001 that the Individual Defendants are not covered under the Excess Policy for any conduct in any capacity for any entity other than RCAP and RCAP Holdings.

**ALTERNATIVE THIRD CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Declaratory Judgment Pursuant to NY CPLR § 3001 – Uninsurable Loss)**

87. Westchester restates the allegations set forth in paragraphs 1 through 86 as if fully stated herein.

88. The Followed Policy defines Loss to include “damages, judgments, settlements, pre-judgment and post-judgment interest or other amounts (including punitive, exemplary or multiple damages, where insurable by law) and Defense Expenses in excess of the Retention that the Insured is legally obligated to pay.” Ex. 2, Section II(M), as amended by Endorsement Nos. 10 and 11.

89. Loss expressly does not include “matters which are uninsurable under the law pursuant to which this Policy is construed.” Ex. 2, Section II(M), as amended by Endorsement Nos. 10 and 11.

90. The Followed Policy and the Excess Policy are to be construed under New York law.

91. In the Creditor Trust Action, the RCS Creditor Trust seeks relief that is uninsurable under New York law, including disgorgement, a constructive trust, and the return of allegedly ill-gotten gains.

92. Therefore, even if the Insured vs. Insured Exclusion is not a complete bar to coverage for the Creditor Trust Action, Westchester seeks a declaration from this Court pursuant to NY CPLR § 3001 that there is no indemnity coverage under the Excess Policy for the Defendants herein to the extent the Creditor Trust Action seeks disgorgement, a constructive trust, and/or the return of alleged ill-gotten gains that are uninsurable under New York law.

**ALTERNATIVE FOURTH CAUSE OF ACTION AGAINST ALL DEFENDANTS
(Declaratory Judgment Pursuant to NY CPLR § 3001 – Other Insurance)**

93. Westchester restates the allegations set forth in paragraphs 1 through 92 as if fully stated herein.

94. The Followed Policy provides: “All Loss payable under this Policy will be specifically excess of and will not contribute with any other valid and collectible insurance, including but not limited to any insurance under which there is a duty to defend, unless such other insurance is specifically excess of this Policy. This Policy will not be subject to the terms of any other insurance policy.” Ex. 2 at Section VI(C)(1), as amended by Endorsement No. 17.

95. Upon information and belief, the Defendants herein are covered for the Creditor Trust Action under valid and collectible insurance other than the Excess Policy, including, but not limited to, insurance policies issued to AR Capital.

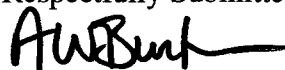
96. Therefore, even if the Insured vs. Insured Exclusion is not a complete bar to coverage for the Creditor Trust Action, Westchester seeks a declaration from this Court pursuant to NY CPLR § 3001 that the coverage available for the Defendants herein under the Excess Policy, if any, is excess of all other valid and collectible insurance.

WHEREFORE, Westchester requests that this Court:

- (1) Issue a declaration that the Excess Policy excludes the Creditor Trust Action from coverage by the Insured vs. Insured Exclusion;
- (2) Alternatively, issue a declaration that the Excess Policy excludes coverage for the Individual Defendants in the Creditor Trust Action to the extent they are alleged to have acted in capacities other than for RCAP and/or RCAP Holdings;
- (3) Alternatively, issue a declaration that the Excess Policy excludes coverage for the Defendants in the Creditor Trust Action for disgorgement, a constructive trust, and/or the return of alleged ill-gotten gains that are uninsurable under New York law;
- (4) Alternatively, issue a declaration that any coverage for the Creditor Trust Action under the Excess Policy is excess over any other insurance policy providing coverage for the Creditor Trust Action to the Defendants;
- (5) Award Westchester its costs, attorneys' fees, and such other relief as the Court deems just and proper.

New York, New York
Dated: March 2, 2018

Respectfully Submitted:



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