## *II. Seventh Circuit Denies Motion to Intervene by Non-Party Secondary Insurance Provider in Bankruptcy Proceedings:* In re C.P. Hall Co.

### A. Introduction

On April 24, 2014 the Seventh Circuit decided *In re C.P. Hall Co.*[1] Writing for the court, Judge Posner ruled that the debtor's secondary insurer was not a "party in interest" with standing to intervene in bankruptcy proceedings where the parties were the debtor and the debtor's primary insurer.[2] Secondary—also known as excess—insurance is "an agreement to indemnify against any loss that exceeds the amount of coverage under another policy."[3] The Columbia Casualty Company ("Columbia"), which was C.P. Hall's secondary insurance provider, sought to intervene in the settlement agreement reached between C.P. Hall and its primary insurance company, Integrity Insurance Company ("Integrity").[4] Columbia worried that C.P. Hall would turn around after the parties finalized their settlement to seek indemnity by Columbia for the remainder of C.P. Hall's asbestos-based liabilities.[5] However, the court held that Columbia was too far removed from the proceedings and did not have the direct pecuniary interest in the settlement agreement necessary to establish standing to intervene in the case as a non-party.[6]

This Article analyzes the Seventh Circuit's decision in *C.P. Hall* and discusses the implications the holding could have for insurance companies issuing secondary policies if these companies find themselves in a situation similar to that of Columbia's. Part B discusses the relevant statute in the Bankruptcy Code that defines a party in interest and the various case law interpreting the statute by the Seventh Circuit and her sister courts. Part C details the Seventh Circuit's legal analysis with a particular focus on the policy reasons behind its decision not to allow Columbia to intervene. Next, Part D looks at praise and criticism of the *C.P. Hall* holding. Part E offers possible solutions aimed at clarifying the issue of who constitutes a party in interest in bankruptcy proceedings, and finally, Part F concludes by

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[1] 750 F.3d 659, 659 (7th Cir. 2014).
[2] *Id.* at 660–61.
[3] BLACK'S LAW DICTIONARY 922 (10th ed. 2014).
[4] *C.P. Hall*, 750 F.3d at 659–60.
[5] *Id.* at 660.
[6] *Id.* at 663.

discussing the importance of *C.P. Hall* as the decision stands now and how it could affect insurance companies' behavior moving forward.

### B. How Is a "Party in Interest" Defined under the Bankruptcy Code and How Have the Circuit Courts Interpreted This Definition?

Under 11 U.S.C. § 1109(b) of the Bankruptcy Code, "A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under [Chapter 11]."[7] Attaining standing under the Bankruptcy Code is more difficult than achieving Article III standing on its own.[8] Although Columbia does not qualify as one of any of the types of parties enumerated in 11 U.S.C. § 1109(b), under the Bankruptcy Code the word "including" is not a limiting term, and therefore "party in interest" is not confined to the list of illustrative examples provided in section 1109(b).[9] However, the Seventh Circuit declined to extend to Columbia, as C.P. Hall's secondary insurer, the right to appear and be heard as a "party in interest" in *C.P. Hall* because the court found Columbia's position "too remote" to allow the company to intervene.[10]

Circuit courts have ruled a number of times that potential third parties do not have the proper standing to intervene in bankruptcy proceedings, including when a third party was: a potential debtor of a

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[7] 11 U.S.C. § 1109(b) (2012).

[8] *C.P. Hall*, 750 F.3d at 660; *See* U.S. CONST. art. III, § 2, cl.1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."); Massachusetts. v. EPA, 549 U.S. 497, 526 (2007) (stating that a risk of harm, even though remote, that is nevertheless real is sufficient to establish Article III standing); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (holding that Article III standing requires the plaintiff's "'injury [in fact]' to be . . . fairly traceable to the challenged action of the defendant . . . [and] likely . . . [to] be 'redressed by a favorable judicial decision.'") (internal citations omitted).

[9] 11 U.S.C. § 102(3) (2012) ("In this title . . . "includes" and "including" are not limiting."); *In re* Amatex Corp., 755 F.2d 1034, 1042 (3d Cir. 1985) ("Section 102(3) of the Code, part of the rules of construction of the Code, states that 'including' is not a limiting term. And courts have not viewed the examples of parties in interest as being exhaustive.").

[10] *C.P. Hall*, 750 F.3d at 661.

party's debtor;[11] an interest holder in a creditor;[12] a litigation participant related to the parties' settlement;[13] or a purchaser of interest in the debtor's property.[14] In *C.P. Hall*, Columbia argued that despite these cases the Seventh Circuit should allow Columbia to intervene in light of decisions in *In re Global Industrial Technologies, Inc.*[15] and *In re Thorpe Insulation Co.*[16] In *Global*, the Third Circuit concluded that insurers of the debtor were entitled to object to a settlement,[17] and in *Thorpe Insulation* the Ninth Circuit reached the same conclusion.[18]

### C. Legal Analysis of and Policy Reasons behind the Seventh Circuit's Decision in *C.P. Hall*

In rejecting Columbia's argument that the court should allow Columbia to intervene in *C.P. Hall*, the Seventh Circuit first distinguished *Global* and *Thorpe Insulation* from the case at bar.[19] In *Global*, the debtor sought a settlement by which it would redirect claims against the debtor to a trust to which the debtor's insurance provider would be liable.[20] The Third Circuit found that the third party insurance companies had the right to intervene in the bankruptcy proceedings because the settlement was neither "insurance neutral"[21] nor arising out of proper motives as the settlement involved an underhanded debtor/creditor arrangement designed to make the insurance companies the "victims of a scheme."[22] On this basis, the Third Circuit held that the third party insurers' claims in *Global* were not too speculative to be recognized and therefore the court allowed the third party insurance companies to intervene.[23]

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[11] *In re* Teligent, Inc., 640 F.3d 53, 61 (2d Cir. 2011).
[12] *In re* Refco Inc., 505 F.3d 109, 119 (2d Cir. 2007).
[13] *In re* Alpex Computer Corp., 71 F.3d 353, 356 (10th Cir. 1995).
[14] *In re* Kaiser Steel Corp., 998 F.2d 783, 788 (10th Cir. 1993).
[15] *In re* Global Indus. Techs., Inc., 645 F.3d 201 (3d Cir. 2011).
[16] *In re* Thorpe Insulation Co., 677 F.3d 869 (9th Cir. 2012).
[17] *Global Indus. Techs.*, 645 F.3d at 216.
[18] *Thorpe Insulation*, 677 F.3d at 887.
[19] *In re* C.P. Hall Co., 750 F.3d 659, 662 (7th Cir. 2014).
[20] *Id.*
[21] *Global Indus. Techs.*, 645 F.3d at 212 (defining an insurance-neutral settlement as one where the settlement will not "materially alter" the amount of liability that insurers would be forced to absorb).
[22] *C.P. Hall*, 750 F.3d at 662.
[23] *Global Indus. Techs.*, 645 F.3d at 213–14.

In *Thorpe Insulation*, the third party insurance companies sought to intervene because they alleged that the debtor's bankruptcy reorganization plan materially changed the contractual obligations between the insurance companies and the debtor.[24] The Ninth Circuit agreed with the third party insurance companies and allowed intervention, and the Seventh Circuit a bit impatiently agreed that "[o]f course taking away someone's contractual rights in a bankruptcy proceeding is an injury to which the victim should be allowed to object in the proceeding."[25] However, the Seventh Circuit reasoned that there was "nothing like" any type of *Global* targeted scheme or *Thorpe Insulation* threat to contractual rights present in *C.P. Hall*, and accordingly declined to give *Global* or *Thorpe Insulation* any weight in these respects when deciding *C.P. Hall*.[26]

Instead, the Seventh Circuit chose to rely on its own previous ruling in *In re James Wilson Assocs.*[27] In *James Wilson*, the Seventh Circuit held that a "party in interest" is "[a]nyone who has a legally protected interest that could be affected by a bankruptcy proceeding."[28] By refusing to recognize a legally-protected interest of Columbia's in *C.P. Hall*, the Seventh Circuit found that Columbia instead was simply "just a firm that may suffer collateral damage from a bankruptcy proceeding" and should not be afforded standing in the bankruptcy proceedings between C.P. Hall and Integrity that concluded with the parties' settlement agreement.[29] In fact, the court recognized that Columbia possibly could have received a much less favorable result than the settlement itself if C.P. Hall and Integrity had litigated their dispute to its full disposition and the district court had held that Integrity had no liability to C.P. Hall whatsoever.[30]

The Seventh Circuit's careful use of the term "collateral damage" was in line with much of the rest of the opinion—the court made clear that it did not wish to be overly expansive when deciding which non-parties may have standing as a party in interest in bankruptcy proceedings.[31] The court referred to Columbia as an

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[24] *In re* Thorpe Insulation Co., 677 F.3d 869, 882 (9th Cir. 2012).
[25] *C.P. Hall*, 750 F.3d at 662.
[26] *Id.*
[27] 965 F.2d 160 (7th Cir. 1992).
[28] *Id.* at 169.
[29] *C.P. Hall*, 750 F.3d at 661.
[30] *Id.* at 660.
[31] *Id.* (quoting Shakespeare in part from *King Lear*, Judge Posner states "That way madness lies—settlements made impossible by crowds of objectors"

"accidental victim" of the settlement agreement reached between C.P. Hall and Integrity, as opposed to the result in *Global* where the parties specifically preyed upon the debtor's third party insurers.[32] Collectively, the circuit courts put heavy emphasis on a bankruptcy party's insurer having a direct pecuniary interest in the proceedings, instead of simply alleging a speculative harm in order to allow insurers standing; the Seventh Circuit is no exception.[33]

Judge Posner himself has openly struggled with the possibility of increased litigation arising from case decisions, so it is of little surprise that he is reluctant to expand the base of potential parties in interest in bankruptcy proceedings or, for that matter, any form of litigation.[34] To endorse such expansion of the gray areas would reduce the ease of administration of 11 U.S.C. § 1109(b) and make for a more difficult and varied interpretation of the statute, which all courts should be eager to avoid.[35] In fact, Judge Posner touched along these lines when Columbia attempted to show that *Global* and *Thorpe Insulation* were inconsistent with *James Wilson* and that unless the Seventh Circuit overruled *James Wilson*, the court would "decide to split with its sister circuits on the proper rule for bankruptcy court standing."[36] Judge Posner wryly responded to Columbia's counsel that if, *arguendo*,

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where Posner will "go mad" if he and the Seventh Circuit are to adopt a reasoning or standard under which any party that suffers any harm from a settlement would be allowed to intervene in bankruptcy proceedings. Interestingly, *In re C.P. Hall Co.* is not the first opinion in which Posner has used this quote from *King Lear*. *See* Great W. Cas. Co. v. Mayorga, 342 F.3d 816, 818 (7th Cir. 2003)).

[32] *Id*. at 662.

[33] *See generally* Jonathan W. Young et al., *Selected Topics from the Intersection of Insurance and Insolvency Law*, EDWARDS WILDMAN PALMER LLP 7–10 (May 28, 2014), http://www.edwardswildman.com/files/uploads/Insurance/Selected%20Topics%20from%20the%20Intersection%20of%20Insurance%20and%20Insolvency%20Law%20Presentation.pdf, *archived at* http://perma.cc/P9NM-YL59.

[34] *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 315 (1996) ("Today's caseloads make it a question of some moment whether judges legitimately may consider caseload effects when deciding a case. If the question is one of standing to sue . . . judicial economy will inevitably, and justifiably, be one of the weights that judges put in the balance in making their decisions. And the heavier the caseload is, the heavier this weight will be.").

[35] *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1688 (1976).

[36] *C.P. Hall*, 750 F.3d at 663.

the Third Circuit's decision in *Global* was inconsistent with *James Wilson*, the Third Circuit would be responsible for creating a circuit split, not the other way around.[37]

Moreover, the Seventh Circuit expressed another reason for declining to allow Columbia to intervene—if the company had been more diligent, it could have avoided finding itself in the unenviable position of being at the mercy of the settlement between C.P. Hall and Integrity.[38] Judge Posner again displayed a preference for keeping parties out of court when at all possible when he cautioned that "[i]t is better to leave matters to private contracting where that is feasible than to permit parties, especially sophisticated parties like Columbia, to ask a court to ride to its rescue from an oversight."[39] Although the decision in *C.P. Hall* is now past its infancy, the case has yet to be cited for its non-party bankruptcy intervention reasoning and it remains to be seen how the Seventh Circuit's sister courts will treat the decision.[40] However, one would expect that in a future case with the appropriate facts, a decision written by the most frequently cited legal scholar of the twentieth century[41] will be afforded its due weight.

### D. Praise and Criticism of the *C.P. Hall* Decision

The Seventh Circuit's non-party intervention holding in *C.P. Hall*, although thus far uncited in court opinions, has not completely escaped criticism.[42] One author[43] has pointed out that simply because

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[37] *Id.* at 662–63; *see* Dru Stevenson, *How NOT to Argue That a Court Should Avoid Creating a Circuit Split*, CIRCUIT SPLITS BLOG (May 13, 2014, 8:19 AM), http://www.circuitsplits.com/2014/05/index.html, *archived at* http://perma.cc/735G-FHDP.

[38] *Excess Insurer Lacked Standing to Object in Policyholder's Bankruptcy Case*, INS. RECOVERY L. (ManattJones Global Strategies, LLC, New York, N.Y.), May 21, 2014, http://www.manatt.com/ThreeColumn.aspx?pageid=194075&id=690797#Article3, *archived at* http://perma.cc/SNC5-8UMC.

[39] *C.P. Hall*, 750 F.3d at 662.

[40] According to Westlaw and Lexis, *C.P. Hall* has not been cited for its non-party intervention reasoning as of September 29, 2014.

[41] Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL STUD. S1, 424 (Jan. 2000) (showing Judge Posner as the most-cited legal scholar with 7,981 citations and the second most-cited legal scholar of the twentieth century, Ronald Dworkin, with only 4,488 in comparison).

[42] *See, e.g.*, Dan Schechter, *Excess Insurer Is Not "Party in Interest" and Cannot Object to Chapter 11 Debtor's Settlement with Primary Carrier*,

insurance companies can draft their contracts specifically to avoid finding themselves in positions like Columbia's in *C.P. Hall*, this does not mean that the court's reasoning was correct based solely on the fact that insurance companies can effectively circumvent the way courts have typically interpreted 11 U.S.C. § 1109(b).[44] Arguably, an approach such as this one by the Seventh Circuit is too hands off and fails to act on an opportunity when a court should properly intervene to resolve a contractual dispute between litigants.[45]

Judge Posner also made an analogy to drive home his point about "crowds of objectors" coming forth to object to settlement agreements arising from bankruptcy proceedings—he compared Columbia's attempt to intervene to that of a hypothetical Columbia employee's attempt to intervene in proceedings because the employee could, theoretically, lose his job if Columbia was eventually forced to make a large indemnity payment to C.P. Hall.[46] This analogy may not be on point because the effect of the settlement agreement between C.P. Hall and Integrity on Columbia is really only one step removed—all C.P. Hall must do after it settles with Integrity is then submit its claim to Columbia—from harming Columbia as a company.[47] In the employee scenario, however, a much greater trickledown effect would likely need to occur within Columbia's own business operations before any employee would personally feel the repercussions of any settlement.[48] In fact, a review of Columbia's financial data shows that

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COMMERCIAL FIN. NEWSLETTER (Westlaw Weekly Newsletter, Eagan, Minn.), May 5, 2014.

[43] Professor Dan S. Schechter of Loyola Law School, Los Angeles, California, is a Professor of Law and Bankruptcy and the author of the COMMERCIAL FINANCE NEWSLETTER, a weekly column published by Westlaw. The views expressed by Professor Schechter, an expert in commercial finance and insolvency, are solely his own. For Professor Schechter's professional biography, see his personal page *available at* http://www.lls.edu/aboutus/facultyadministration/faculty/facultylists-z/schechterdans/, *archived at* http://perma.cc/AD4M-2DK2.

[44] Schechter, *supra* note 42.

[45] Telephone Interview with Dan S. Schechter, Professor, Loyola Law School (Oct. 14, 2014) [hereinafter Schechter Interview] (analogizing the Seventh Circuit's "cavalier" approach to the "free marketeering" approach, which surmises that the governing rules bear very little importance simply because contractual parties are able to draft around them).

[46] *In re* C.P. Hall Co., 750 F.3d 659, 661 (7th Cir. 2014).

[47] *Id.*

[48] Schechter, *supra* note 42.

from 2012 to 2013 the company increased its assets, capital, and surplus while decreasing its liabilities, so on first impression Columbia likely could have absorbed any indirect hit from *C.P. Hall* without having to have laid off any employees, weakening Judge Posner's argument.[49]

Moreover, although the Seventh Circuit clearly believed that the settlement agreement in *C.P. Hall* did not infringe upon any contractual right of Columbia's—distinguishing *C.P. Hall* from *Thorpe Insulation*—case law from a sister circuit indicates otherwise.[50] In *Guaranty*, the Ninth Circuit observed that when an insurance company issues a secondary policy, that secondary insurance company typically forms its own policies while relying on the exhaustion of obligations of the policyholder's primary insurance coverage before the secondary insurance provider's obligations would ever kick in.[51] Consistent with this viewpoint, some scholars equate allowing primary insurers to redirect policyholders' claims against it to a secondary insurer by virtue of a settlement agreement with "changing the rules of the game after the game's begun."[52]

For instance, a secondary policy may be a "true excess policy" or a policy of "excess by coincidence."[53] In a "true excess policy," the second policy is sold based upon the secondary insurer's knowledge of the primary policy, while in a policy of "excess by coincidence," the two policies are both primary policies with one policy simply providing a higher dollar amount of coverage depends.[54] The distinction between the two scenarios therefore depends upon the policies themselves.[55] In the case of a dispute, both policies would necessarily need to be compared to determine whether the secondary policy was a "true excess policy."[56] In *C.P. Hall*, no dispute even existed as to Columbia's

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[49] *Financial Data for Columbia Casualty Company*, FLORIDA SURPLUS LINES SERVICE OFFICE, http://www.fslso.com/market/financials/findata.aspx?id=120 (last visited Sept. 28, 2014), *archived at* http://perma.cc/L8EL-SGHA (showing financial data for Columbia from 2008 through the second quarter of 2014).

[50] *See, e.g.*, Guaranty Nat'l Ins. Co. v. Am. Motorists Ins. Co., 981 F.2d 1108 (9th Cir. 1992).

[51] *Id.* at 1109; Hartford Accident & Indem. Co. v. Cont'l Nat'l Am. Ins. Cos., 861 F.2d 1184, 1187 (9th Cir. 1989).

[52] Schechter Interview, *supra* note 45.

[53] *Guaranty Nat'l Ins. Co.*, 981 F.2d at 1109.

[54] *Id.*

[55] *Id.*

[56] *Id.*

position as the "true excess" secondary insurance provider to C.P. Hall.[57] Therefore, under the view put forth in *Guaranty*, to deny intervention by a secondary insurance company is to deny that insurer its contractual rights.[58]

Finally, Professor Schechter has questioned whether the Seventh Circuit's reasoning in *James Wilson* where a "party in interest" under the Bankruptcy Code is a party with a "legally recognizable interest in the debtor's assets" in the proceedings is correct.[59] Under that interpretation, unsecured creditors would not have a legally recognizable interest in *C.P. Hall*, yet would still be allowed to intervene per the enumerated list given in 11 U.S.C. § 1109(b).[60] This distinction opens up a number of questions as to why an unsecured creditor should be recognized as a party in interest in bankruptcy proceedings while a secondary insurance company should not.[61] This results in a perverse scenario where parties with less on the line would be heard, while those parties with greater, more direct interests in bankruptcy proceedings would not be afforded a similar opportunity.[62]

Additionally, another argument compares secondary insurers with state surety statutes.[63] Secondary insurers are essentially the guarantors of primary insurers, but under most surety statutes, if the creditor enters into a settlement with the debtor without the consent of the guarantor, the guarantor is excused from possible liability.[64] Under these views, therefore, the Seventh Circuit failed in its role as a gatekeeper to the court when it denied Columbia, a directly affected non-party, the opportunity to intervene as a party in interest in *C.P. Hall*.[65]

Judge Posner and the Seventh Circuit, however, do not stand alone—other scholars[66] squarely agree with the logic put forth by Judge

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[57] Schechter, *supra* note 42.
[58] *Id.*
[59] *Id.*
[60] *See* 11 U.S.C. § 1109(b) (2012) (listing a debtor's creditors generally as examples of parties in interest in bankruptcy proceedings).
[61] Schechter, *supra* note 42.
[62] *Id.*
[63] Schechter Interview, *supra* note 45.
[64] *Id.*
[65] *Id.*
[66] Professor Maria O'Brien Hylton is a Professor of Law at Boston University School of Law. She currently teaches Contracts and Insurance Law, and her interests and areas of specialty include law and economics, employee benefits, and labor law. The views expressed by Professor Hylton, a noted labor and

Posner in the court opinion.[67] Professor Hylton believes that the Seventh Circuit actually took a rather "straightforward approach."[68] She believes that putting the burden on secondary insurance companies to properly draft contracts—rather than relying on the assistance of the courts—was the preferred way to avoid ending up in a position like Columbia's.[69] Insurance companies should expect this burden even more so when, as in *C.P. Hall*, all involved parties involved are highly sophisticated.[70]

The parties' high level of sophistication in *C.P. Hall* similarly detracts from the theory that secondary insurers should be able to argue that they relied on primary insurers' policies when drafting their own secondary policies for the common policyholder.[71] In the end, the Seventh Circuit's holding in *C.P. Hall* may best be understood as the court recognizing the need for a narrower definition of a party in interest in order to resolve bankruptcy proceedings as quickly and easily as possible or else face scenarios where so many parties seek to intervene that "proceedings . . . become so cumbersome that the likelihood of a settlement is almost impossible . . . in a reasonable amount of time."[72]

### E. A Possible Solution to Clarify a "Party in Interest" under the Bankruptcy Code

Is there an easier path to clarification than leaving to judicial interpretation which non-parties will have standing as a party in interest in bankruptcy proceedings? One proposal would involve a small amendment to 11 U.S.C. § 1109(b) by adding "as well as any other entity that would be directly affected by the resolution of that issue" to the end of the statute in order to include other "directly affected" non-

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benefits law specialist, are solely her own. For Professor Hylton's professional biography, see her personal page *available at* http://www.bu.edu/law/faculty/profiles/bios/full-time/hylton_m.html, *archived at* http://perma.cc/3N8Q-JTWJ.

[67] Telephone Interview with Maria O'Brien Hylton, Professor, Boston University School of Law (Oct. 14, 2014) [hereinafter Hylton Interview].

[68] *Id.*

[69] *Id.*

[70] *Id.* (indicating that a reliance argument is unavailing when the parties to a commercial relationship are a "primary/secondary carrier and a commercial, fairly sophisticated insured.").

[71] *Id.*

[72] *Id.*

parties.[73] According to Professor Schechter, this language would "only slightly enlarge the current scope of the statute. At the same time, it would avoid the problem of overbreadth."[74] However, the use of "directly affected" could continue to be problematic for judicial interpretation, considering the language of the "legally recognizable interest" test set out by the Seventh Circuit in *James Wilson*.[75] That test boils down to requiring a "direct" pecuniary interest, while the court's opinion in *C.P. Hall* held that Columbia's pecuniary interest was not itself "direct."[76]

### F. Conclusion

As *C.P. Hall* stands now, the case offers a few reinforcing lessons for bankruptcy attorneys—absent special circumstances like in *Global* and *Thorpe Insulation*, an insurer will not be found to be a "party in interest" entitled to intervene in bankruptcy proceedings.[77] Additionally, *C.P. Hall* illustrates how a party can have Article III standing due to "probabilistic harm" yet still not have the standing required by 11 U.S.C. § 1109(b) of the Bankruptcy Code to intervene in bankruptcy proceedings.[78] Ultimately, the effect of *C.P. Hall* is unsettled until the Supreme Court rules on whether a secondary insurer is a "party in interest" with the accompanying right to object to bankruptcy proceedings between a debtor and its primary insurer.[79] Of course, there is no guarantee that the Supreme Court will grant certiorari, and some believe that the Court will not grant certiorari.[80]

For now, however, secondary insurers would be well advised to follow Judge Posner's advice. Careful drafting of their insurance policies—limiting liability until the entirety of a policyholder's primary

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[73] Schechter, *supra* note 42.
[74] *Id.*
[75] *In re James Wilson Assocs.*, 965 F.2d 160, 169 (7th Cir. 1992).
[76] *In re* C.P. Hall Co., 750 F.3d 659, 662.
[77] Brittany N. Mills & C.R. "Chip" Bowles, Jr., *Stepping Past Standing: The Role of Excess Insurers in Environmental Cases*, 33 AM. BANKR. INST. J. 36, 93 (2014).
[78] *Id.*; *see C.P. Hall*, 750 F.3d at 660.
[79] Mills & Bowles, Jr., *supra* note 77.
[80] *E.g.*, Hylton Interview, *supra* note 67 (predicting that the Court is unlikely to grant certiorari take so long as the question presented is standing alone); Schechter Interview, *supra* note 45 (remarking that although the Court could use the opportunity to deliver guidance, the Court most likely bypassed that opportunity five years ago).

insurance coverage has been exhausted—will best help excess insurers avoid finding themselves exposed to liability in a situation similar to Columbia's.[81]

Eric Schlichte[82]

[81] *C.P. Hall*, 750 F.3d 659 at 663.
[82] Student, Boston University School of Law (J.D. 2016).