COVERAGE FOR CONSUMER AND SIMILAR NON-FIDUCIARY CLAIMS UNDER D&O POLICIES

Marion B. Adler[1]
RACHLIS DUFF ADLER PEEL & KAPLAN, LLC
542 South Dearborn St., Suite 900
Chicago, Illinois 60605
direct dial: 312-733-3957
madler@rdaplaw.net

Most policyholders and their coverage attorneys think of their Directors and Officers policies in terms of providing protection from claims brought by shareholders and others to whom the fiduciary duties are owed for the malfeasance or misfeasance of corporate managers, officers, and/or directors.[2] Especially for privately-held insureds, however, their D&O policies may be sufficiently expansive to provide coverage for claims brought by customers and others outside the fiduciary relationship, unrelated to issues of corporate governance.

For example, courts have upheld corporations' rights to coverage under their D&O policies for claims arising under state consumer protection statutes,[3] real estate and construction transactions,[4] franchisor-franchisee disputes,[5] and investment

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[1] Marion Adler regularly represents commercial policyholders in coverage disputes. The views expressed in this paper are solely those of Ms. Adler and do not represent the views her firm or clients.

[2] We use the term "corporation" in this article interchangeably with "entity" to refer to the business that is the Named Insured on the D&O policy. Such named insureds include other organizational structures, such as limited liability companies and limited liability partnerships but, for simplicity's sake, they are referred to as "corporations" in this article.

[3] *See 24 Hour Fitness USA, Inc. v. National Union Fire Ins. Co.*, CV 11-8088-GHK (RZx) Mem. Op. at 10-11 (C.D. Cal. March 21, 2013) (class action under consumer protection statutes for allegedly misleading statements that allegedly induced plaintiff class to enter into gym memberships) (copy included in Tab D of Addendum); *Integra Telecom, Inc. v. Twin City Fire Ins. Co.*, Civ. No. 08-906-AA, 2010 WL 1753210 (D. Or. Apr. 29, 2010) (claims brought under state consumer protection statute for overbilling of customers).

[4] *See Corky McMillin Constr. Svc., Inc. v. U.S. Specialty Ins. Co.*, 597 Fed. Appx. 925 (9th Cir. 2015) (class action claims by home buyers against real estate broker for misrepresentations and omissions in marketing material); *S.J. Amoroso Constr. Co. v. Exec. Risk Indem., Inc.*, 325 Fed. Appx. 548, 2009 WL 1154202 (9th Cir. Apr. 30, 2009), *rev'g,* No. C 06-2572 SBA, 2007 WL 3231741 (N.D. Cal. Oct. 7, 2007) (misrepresentations by construction company that induced developer to consent to assignment of construction contract).

[5] *See Cousins Submarines, Inc. v. Federal Ins. Co.*, No. 12–CV–387–JPS, 2013 WL 494163 (E.D. Wis. Feb. 28, 2013) (insofar as franchisor's settlement with franchisees compensated for damages incurred before parties entered into the franchise agreements, settlement was covered by D&O policy).

relationships.[6] This article addresses the coverage opportunities and obstacles that arise in these situations.

First some clarifying points:

- Oftentimes insurers sell package policies that may be generically referred to as "D&O" policies but may also include additional coverage parts for Employment Practices Liability Insurance, Fiduciary Liability Coverage (for claims arising out of the management and administration of employment benefits plans), and other assorted coverages. This article is limited to discussing coverage available under the D&O portion only of such package policies – what is sometimes labeled the "Management Liability" coverage.

- The Insuring Agreement of the standard D&O policy provides three distinctive types of coverage: (a) coverage available directly to individual persons for claims brought against them arising from their acts and omissions in executing their duties as officers, directors, or employees of the corporation; (b) coverage payable to the corporation for sums incurred by the corporation to indemnify such officers, directors, or employees for such claims; and (c) coverage for the corporate entity, itself, for claims brought directly against it. This last category of coverage is referred to as "Entity" coverage and is the focus of this article.

- The scope of this paper is limited to claims involving economic harm, not "bodily injury" or "property damage." Not only do D&O policies invariably exclude coverage for the latter types of claims, but insureds facing such claims should be seeking coverage under their CGL policies.

A. Claims by Consumers and Similar Persons Typically Fall within the Insuring Agreement of D&O Entity Coverage.

As with any coverage analysis, the starting point for seeking coverage under a D&O policy is the coverage grant – i.e., "Insuring Agreement" – of the policy. The Insuring Agreement for Entity Coverage under the typical D&O policy issued to a privately held company is very broadly worded and will generally encompass virtually any type of claim brought by a consumer or customer. For example:

[6] *See Great American Ins. Co. v. Geostar Corp.*, No. 09-123888-BC, 2010 WL 845953 at *12 (E.D. Mich. Mar. 5, 2010) (investors in tax-advantaged mare lease program); *Westchester Fire Ins. Co. v. Rosenthal Collins Group, LLC*, No. 2013 CH 01508 (Ill. Cir. Ct. Cook Cty. July 3, 2014) (copy included in Tab E of Addendum) (claims by investors against futures commission merchant that cleared trades by self-dealing financial advisor who squandered underlying plaintiffs' funds), *vacated pursuant to settlement.*

- Chubb's form (no. 14-02-13781 (02/2008)) provides in relevant part:

  > The Company shall pay, on behalf of an **Organization**, **Loss** which such **Organization** becomes legally obligated to pay on account of any **Claim …** for a **Wrongful Act** by the **Organization ….**[7]

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- AIG's form (no. 95727 (9/07) states in relevant part:

  > This **D&O Coverage Section** shall pay the **Loss** of the **Company** arising from a:
  > (i) **Claim** made against the **Company …**,
  > for any **Wrongful Act** ….

- ACE's form (no. PF15193 (12-08)) states in relevant part:

  > The **Insurer** shall pay the **Loss** of the **Company** which the **Company** becomes legally obligated to pay by reason of a **Claim …**
  > for any **Wrongful Act ….**

Thus, there are four key defined terms within each of these Insuring Agreements: **Company/ Organization, Loss, Claim,** and **Wrongful Act**. The term "**Company**" or "**Organization**" is typically defined to encompass the Named Insured, as well as subsidiaries and affiliated companies in which the Named Insured has a direct or indirect majority stake.

The term "**Loss**" encompasses monetary sums incurred in responding to the claim, *including defense costs*, but often with specified exceptions such as fines or penalties. The AIG definition is illustrative:

> "**Loss**" means damages, judgments, settlements, pre-judgment and post-judgment interest, **Crisis Management Loss** and **Defense Costs**; provided, however, **Loss** shall not include: (i) civil or criminal fines or penalties imposed by law; (ii) taxes; (iii) any amounts for which an **Insured** is not financially liable or which are without legal recourse to an **Insured**; or (iv) matters which may be deemed uninsurable under the law pursuant to which this policy shall be construed. **Defense Costs** shall be provided for items specifically excluded from **Loss** pursuant to

[7] Specimen forms from AIG, Chubb, and Ace, as obtained from their websites, are included in the Addendum to this article.

subparagraphs (u)(i) through (u)(iv) above of this Definition, subject to the other terms, conditions and exclusions of this policy.

Loss shall specifically include, subject to the other terms, conditions and exclusions of this **D&O Coverage Section**, including, but not limited to, exclusions 4(a), 4(b) and 4(c) of this **D&O Coverage Section**, punitive, exemplary and multiple damages …. The enforceability of the first sentence of this paragraph shall be governed by such applicable law which most favors coverage for punitive, exemplary and multiple damages.

The term "**Claim**" encompasses, not just lawsuits and similar formal proceedings, but typically, also includes pre-suit written demands. Here is the most relevant portion of the AIG definition:

(i) a written demand for monetary or non-monetary relief (including any request to toll or waive any statute of limitations);
(ii) a civil, criminal, administrative, regulatory or arbitration proceeding for monetary or non-monetary relief which is commenced by:
(1) service of a complaint or similar pleading;
(2) return of an indictment, information or similar document (in the case of a criminal proceeding); or
(3) receipt or filing of a notice of charges ….

This broadened definition of a "claim" is necessitated by the "claims-made" nature of D&O coverage, as discussed in Section C, below. As a consequence of this broadened definition, however, an insured has stronger bases for obtaining coverage for pre-suit attorneys' fees and even pre-suit settlements compared to the language of CGL policies, for example.

Most critically, these policies employ a wide-open definition of the term "Wrongful Act" that is broad enough to reach virtually any type of misconduct, act, or omission, including acts of intentional wrongdoing, as illustrated by the AIG definition, which defines the term, with respect to Entity coverage as:

any breach of duty, neglect, error, misstatement, misleading statement, omission or act by a **Company**

Cases arising in the context of coverage for consumer claims have specifically interpreted this definition of a "Wrongful Act" to encompass claims alleging that the insured corporation engaged in intentionally misleading or deceptive practices.[8]

[8] *See, e.g., 24 Hour Fitness USA,* Mem. Op. at 10-11 (because the definition encompasses "'*any* breach of duty, neglect, error, misstatement, *misleading statement*, omission or act by the Company.' …. an objectively reasonable insured would not expect a limitation on the Policy's coverage that is commonly

Indeed, this broad interpretation of the term "Wrongful Act" is well-recognized in other D&O coverage disputes too, where the courts have read the term as reaching allegations of intentional and even criminal misconduct by officers and directors.[9]

In short, the language defining "claim," "loss," and "wrongful act" in the typical D&O policy is broad enough to reach almost any consumer claim asserted against an insured entity.

B. The Typical D&O Policy Exclusions Significantly Reduce the Availability of Coverage for Consumer Claims.

While the Insuring Agreement is thus extraordinarily broad in the typical D&O policy, these policies are rife with exclusions that significantly cut back on the actual scope of coverage. The exclusions that present the most significant obstacles when coverage is sought for claims brought by consumers and similar claimants include the "contractual liability," "anti-trust" or "unfair trade practices," and "professional services" exclusion.

1. The contractual liability exclusion.

D&O policies typically include an exclusion – which applies only to the Entity prong of coverage – that bars claims arising out of "contractual liability." The AIG exclusion, for example, excludes Entity coverage for claims:

> alleging, arising out of, based upon or attributable to any actual or alleged contractual liability of the **Company** or any other **Insured** under any express contract or agreement; provided, however, this exclusion shall not apply to liability which would have attached in the absence of such express contract or agreement.

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included in express terms, such as a term limiting coverage to 'accidental occurrences,' but was left out here.") (emphasis in original).

The author was lead counsel for the insured in *24 Hour Fitness.*

[9] *See, e.g., Wintermute v. Kansas Bankers Sur. Co.*, 630 F.3d 1063, 1065, 1069 (8th Cir. 2011) (criminal indictment charging director with bank fraud and filing false statements involved "Wrongful Acts" under definition identical to AIG policy form); *Nat'l Union Fire Ins. Co. v. Brown*, 787 F. Supp. 1424, 1428-29 (S.D. Fla. 1991) (director's scheme to defraud homeowners within definition of "Wrongful Act" similar to definition quoted above).

Similar definitions of "Wrongful Acts" within Errors & Omissions policies have likewise been held to encompass intentional misconduct. *See, e.g., PMI Mortg. Ins. Co. v. American Internat'l Specialty Ins. Co.*, 394 F.3d 761, 764 (9th Cir. 2005) (kickback scheme fell within similar definition of "wrongful act" in E&O policy).

The breadth of this may impede D&O coverage for many consumer type claims.[10]

Not all claims that arise out of contractual relationships, however, are necessarily excluded from D&O coverage as a result of the contractual liability exclusion. Even where a contractual relationship undergirds the transaction, the exclusion has been held inapplicable to underlying claims arising from pre-contractual misrepresentations.[11] So too, if the contract did not run between the underlying plaintiffs and the insured, some courts will not allow the exclusion to bar coverage even where the dispute does arise from a contractual relationship between one of those parties and some other person or entity.[12]

2. The "anti-trust" or "unfair trade practices" exclusion.

Some D&O policies contain an exclusion – generally called the "anti-trust" or "unfair trade practices" – that bars coverage for claims:

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[10] *See, e.g., Fed. Ins. Co. v. KDW Restr. & Liq. Svc., LLC*, 889 F. Supp. 2d 694, 708 (M.D. Pa. 2012) (exclusion barred coverage for tort claims that purchasers of convenience marts were induced by sellers' misrepresentations to purchase stores regardless that claims did not sound in breach of contract; the claims fit within the exclusion's bar for claims "'based upon, arising from, or in consequence of any actual or alleged liability' under the contracts"); *Medill v. Westport Ins. Corp.*, 143 Cal. App. 4th 819, 49 Cal. Rptr. 3d 570 (2006), (claims by bondholders against issuer that defaulted on municipal bonds barred by contractual liability exclusion because the parties' relationship was contractual in nature, even though underlying suit asserted claims sounding in tort, not breach of contract).

[11] *See 24 Hour Fitness*, Mem. Op. at 6-8, 11 (claims arising under RICO and federal Electronics Fund Transfer Act were barred by contractual liability exclusion because they were based on allegations that insured's electronic transfer of funds exceeded insured's contractual rights; however, consumer protection claims for alleged pre-contractual misrepresentations that induced plaintiffs to purchase gym memberships were not barred by exclusion); *Cousins*, 2013 WL 494163 at *8 (contractual liability exclusion barred all post-contractual damages incurred by franchisees but did not bar coverage of components of settlement representing damages incurred before the franchisees entered in franchise agreements such as "fees to financial analysts, seeking advice on opening Cousins franchises[, … or] travel expenses to meet with Cousins representatives").

[12] *See S.J. Amoroso*, 325 Fed. Appx. at 549:

> … Mauna Kea Properties alleged that Amoroso made negligent or intentional misrepresentations that induced Mauna Kea Properties to contract *with DAP*. This theory of liability in the Mauna Kea litigation depends on the fact that Amoroso was not a party to the construction contract and, therefore, did not have liability under the contract (when Mauna Kea allegedly thought that Amoroso would). To that extent, Amoroso's liability is not liability under a contract or agreement, and Executive Risk may not rely on Exclusion III(C)(2) to deny coverage.

(Italics in original; underlining added.) *See also Lifespan Corp. v. Nat'l Union Fire Ins. Co.,* 59 F. Supp. 3d 427, 448 (D.R.I 2014) (claims brought by state Attorney General against hospital for breaching fiduciary duties in negotiating insurance contracts for its subsidiaries were not barred by contractual liability exclusion because hospital and Attorney General had no contractual relationship).

> for any actual or alleged violation of any law, whether statutory, regulatory or common law, respecting any of the following activities: anti-trust, business competition, *unfair trade practices* or tortious interference in another's business or contractual relationships.

(Quoting AIG form; emphasis added.) Unlike other policy language, for which various D&O insurers all have similarly worded provisions, the presence of an anti-trust and unfair trade practices exclusion is not as uniform, however. Neither the Chubb nor Ace D&O jackets that are included in the Addendum contain such an exclusion – which does not rule out the possibility that those insurers might, at least under certain circumstances, endorse such exclusions onto their D&O policies.

At first blush, the bar for coverage for claims involving "unfair trade practices" may be perceived as an almost insurmountable hurdle to obtaining coverage for claims brought under state or federal consumer protection statutes. Indeed, this may seem self-evident given that the words "unfair trade practices" or similar terminology are often contained within the very name of the statute and the statutes impose liability against businesses that engage in "unfair practices."[13]

Courts construing such exclusions, however, generally do *not* interpret the phrase "any law … respecting … unfair trade practices" to include the entirety of the law of consumer protection. Rather, because the term "unfair trade practices" is among a larger listing of a claims relating to the law of competitive injury, courts often rely upon the doctrine of *noscitur a sociis* – i.e., that "a word is given more precise content by the neighboring words with which it is associated"[14] – as well as the maxim that all ambiguities in policy exclusions are construed against the insurer, to hold that only *anti-competitive* "unfair trade practices" are within the scope of this exclusion.[15] The same rationale has been applied to similarly-worded "unfair trade practices" exclusions found in errors and omissions policies to limit their scope to claims involving competitive injury.[16] Where "unfair trade practices" exclusions have

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[13] *See, e.g.*, Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 5/1 *et seq.*, which creates liability for engaging in" unfair or deceptive acts or practices." *Id.* § 505/2. *See also* Oregon Unlawful Trade Practices Act, ORS § 646.605 *et seq.*, which identifies a variety of prohibited activities as "an unlawful practice" when committed "in the course of the persons' business, vocation or occupation." *Id.* § 646.07, § 646.08.

[14] *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 (2012) (providing the quoted English translation for the Latin doctrine).

[15] *See, e.g., Integra*, 2010 WL 1753210 at *4-6; *Cousins*, 2013 WL 494163 at *11-*12; *24 Hour Fitness*, Mem. Op. at 12-13.

[16] *See Beyer v. Heritage Realty Inc.*, 251 F.3d 1155, 1557-58 (7th Cir. 2001).

been held to bar coverage for consumer claims, the underlying suits have typically involved allegations of anti-competitive behavior.[17]

3. The "professional services" exclusion.

Not infrequently, D&O policies also contain an exclusion for claims involving "professional services," which is sometimes referred to as an "E&O exclusion." For example the attached Chubb form excludes claims:

> based upon, arising from, or in consequence of performing or the failure to perform any professional service; provided this Exclusion … shall not apply to any **Claim** brought by or on behalf of a securityholder of the **Organization** in his or her capacity as such.

Neither the attached AIG nor Ace jackets include a professional service exclusion. The absence of such an exclusion from the policy jacket does not preclude the possibility that the insurer may endorse such an exclusion onto the policy, especially where the insured is primarily in the business of furnishing services entailing specialized training or experience. Thus, the Ace policy issued to the insured in *Rosenthal Collins* – which was a regulated "futures commission merchant" in the business of clearing the trades of options (see footnote 6) – was endorsed with a professional services exclusion banning coverage for claims:

> alleging, based upon, arising out of, attributable to, directly or indirectly resulting from, in consequence of, or in any way involving the rendering or failing to render professional services. Provided, however, this exclusion shall not apply to any **Claim(s)** brought by a security holder of the **Company** in the form of a securities holder class, individual or derivative action alleging failure to supervise those who performed or failed to perform such professional services, provided that such securities holder action is instigated and continued totally independent of, and totally without the solicitation of, or assistance of, or active

[17] *See Welch Foods, Inc. v. Nat'l Union Fire Ins. Co.*, 659 F.3d 191, 193 (1st Cir. 2011), *aff'g*, Civ. No. 09–12087–RWZ, 2010 WL 3928704 (D. Mass. Oct. 1, 2010) (unfair trade practice exclusion barred coverage for consumer class claims that fruit juice manufacturer had used deceptive marketing to increase its market share vis-à-vis its competition). *See also* National Union's appellate brief, which describes the underlying claims as arising from "competition" between the insured and its competitor "for market share in the consumer market for pomegranate products." (Case No. 10-2261, Doc. 00116208936, Page 26, Filed: 05/16/2011 Entry ID: 5550698).

> participation of, or intervention of the **Company** and/or any **Insureds.**[18]

Where the policy does not specifically define the term "professional services," the general rule is that:

> The term is not limited to services performed by persons who must be licensed by a governmental authority in order to practice their professions. Rather, it refers to *any business activity conducted by the insured which involves specialized knowledge, labor, or skill, and is predominantly mental or intellectual as opposed to physical or manual in nature*.[19]

(Emphasis added.) Although this formulation originally developed to interpret professional services exclusions contained in general liability policies, the same formulation is typically used where the term is used, but not defined, in an exclusion to a D&O policy.[20]

As the court in *Geostar* recognized, the entire nature of the coverage afforded under a D&O policy is "designed specifically to protect directors and officers from liability arising from negligence or misconduct in managing a business,"[21] – i.e., activity that, by its nature is "predominantly mental or intellectual as opposed to physical or manual." Therefore a professional services exclusion in a D&O policy "must be interpreted more narrowly to avoid negating the entire coverage scheme through the operation of an overly broad exclusion."[22]

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[18] The author was lead counsel for the policyholder in *Rosenthal Collins*. The court's quote of the exclusion at page 3 of its opinion omits the entirety of the exception to the exclusion for claims brought by a "security holder."

[19] *See, e.g., State St. Bk & Tr. Co. v. INA Ins. Co.,* 207 Ill. App. 3d 961, 967, 567 N.E.2d 42, 47 (1991), *citing American Fellowship Mut. Ins. Co. v. Ins. Co. of N.A.*, 90 Mich. App. 633, 282 N.W.2d 425 (1979), and *Multnomah Cty. v. Oregon Auto. Ins. Co.*, 256 Or. 24, 470 P.2d 147 (1970).

[20] *See, e.g., Geostar*, 2010 WL 845953 at *10; *Rosenthal Collins*, Mem. Op. at 3.

[21] *Geostar*, 2010 WL 84593 at *12.

[22] *Id. Accord Federal Ins. Co. v. Hawaiian Elec. Indus., Inc.*, No. 94-125 HG, 1997 U.S. Dist. LEXIS 24129 at*33-*34 (D. Haw. Dec. 23, 1997):

> The definition of professional service … as "one calling for specialized skill and knowledge in an occupation or vocation[,]" *Ministers Life, 483 N.W.2d at 91*, is *not readily transferrable from the general liability policy context to the D&O policy context without* modification. Otherwise, claims arising from any services or acts performed by officers or directors calling for specialized skill or knowledge in the performance of their duties as officers or directors, would be excluded from coverage. Such an expansive interpretation is *not reasonable because it would have the effect of vitiating virtually all of the coverage provided by a D&O policy,* the purpose of which is to cover

Accordingly, the better-reasoned cases interpreting professional services exclusions in D&O policies issued to policyholders in the business of providing professional services recognize that the exclusion should only be applied to claims directly involving the insured's furnishing of a professional service. Thus, in *Geostar*, the court held that the exclusion barred coverage for claims asserting that the defendant investment advisor provided "negligent tax or investment advice" but did not extend to the entirety of the fraudulent "mare lease" scheme by which certain of the defendant's rogue employees had leased the same thoroughbred mare to multiple clients.[23] In the same vein, *Rosenthal Collins* held that, regardless that some of the complaint allegations asserted failings by the insured in the performance of its duties as a future commissions merchant, other allegations – to wit, that the insured had allegedly "aided and abetted" the miscreant investment advisor in "his scheme to defraud the plaintiff investors and itself participated in such fraudulent activities" – were outside the scope of the professional services exclusion.[24]

Similarly, the Illinois Appellate Court declined to interpret a professional services exclusion – albeit in a CGL, not D&O – policy issued to a real estate brokerage firm so broadly so as to negate the coverage available to the policyholder under the "advertising injury" coverage for TCPA claims stemming from unsolicited fax advertising.[25] The insurer argued that the exclusion applied because the faxes advertised a commercial property listing and therefore were sent in furtherance of insured's professional services; the Appellate Court disagreed, observing that the insured "was a real estate agency, not an advertising company."[26] Because the gravamen of the underlying claims was *not* "incorrectly performed real estate services" but rather improper fax advertising, "the *claim was based on [the insured]'s tortious conduct ancillary to the performance of real estate services,*" and therefore not barred by the professional services exclusion.[27] Otherwise, the exclusion "would read

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> any wrongful act committed by an officer or director in their capacity as an officer or director.

(Emphasis added.) *See also Prosper Marketplace, Inc. v. Greenwich Ins. Co.*, A132967, 2012 WL 2878121 at *7-*8 (Cal. App. 1st Dist. July 16, 2012) ("close connection between the provision of professional services and the underlying claim" is necessary because a broad interpretation of the exclusion "would effectively vitiate the coverage provided by the D&O policy").

[23] 2010 WL 845953 at *9.

[24] As noted in footnote 6, the opinion in *Rosenthal Collins* was vacated as part of the settlement of the case, following the court's grant of the policyholder's motion for summary judgment. It thus has no precedential value but is included in this discussion merely to illustrate the types of arguments and situations that may arise in this area of the law.

[25] *See Standard Mutual Ins. Co. v. Lay*, 2014 IL App (4th) 110527-B, 2 N.E.3d 1253.

[26] *Id.* ¶¶ 27-28.

[27] *Id.* ¶ 28 (emphasis added).

the coverage of the policy for advertising injuries entirely out of the policies despite the fact that such coverage is specifically available under the policies."[28]

When insurers have prevailed in barring D&O coverage pursuant to a professional services exclusion often either (a) the policy contains a definition of "professional services" that provides more guidance as to the types of activities within the term's scope,[29] or (b) the acts or omissions of the insured upon which the claim is based involve performance of core professional services.[30]

C. Miscellaneous Caveats and Pointers, especially for Readers Primarily Familiar with Liability Policies Written on an Occurrence Basis.

Although edited out of the quoted language from the Insuring Agreements in Section A of this paper, D&O policies are invariably written on a "claims-made" basis. Several consequences flow from this form of policy:

- Most D&O policies are written on a "claims made and reported" basis. This means, not only must the "claim" – i.e., written demand, suit, or other event encompassed by the "claim" definition – take place during the policy period under which coverage is sought, notice of the claim must be "reported" to the insurer during that policy period (or, as to claims "made" during the last portion of the policy period, within the short grace period after the policy expires). Moreover, even as to jurisdictions that generally follow the "notice-prejudice" rule as to belatedly reported claims under "occurrence"-based coverage, failure to strictly comply with the notice provisions of a claims-made-and-reported policy often results in the voiding of coverage, even if the insurer sustained no prejudice. Therefore, it is important that a policyholder and its coverage counsel quickly analyze whether coverage is available under a D&O policy as soon as the policyholder learns of the claim and promptly give notice of the claim to the D&O insurer.

- The defense coverage under a D&O policy often differs from the defense coverage of an occurrence-based liability policy in two respects: Typically,

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[28] *Id.*

[29] *See MDL Capital Mgmt., Inc. v. Federal Ins. Co.*, No. 06–4815, 274 Fed. Appx. 169 2008 WL 876406 at *4-*5 (U.S. Ct. App. 3d Cir. 2008) (per curiam) (where policy explicitly defined term "professional services," to include services as "investment advisor" and "investment manager," exclusion barred coverage for (1) suit by firm client, accusing firm and its officers and directors of "derelictions as investment adviser and investment manager" and (2) investigation by SEC, arising out of firm's "providing of, or failure to provide, investment adviser or investment manager services").

[30] *See, e.g., Piper Jaffray Cos. v. National Union Fire Ins. Co.*, 967 F. Supp. 1148, 1151, 1156 (D. Minn. 1997) (professional services exclusion barred coverage for claims arising investment advisor's "alleged failure *prudently to manage the assets* of its investors") (emphasis added).

defense fees are treated as within the definition of "Loss," and erode policy limits. Also, many – but not all – D&O policies do not impose a "duty to defend" upon the insurer but only a duty to pay expenditures incurred in defense. In this latter regard, D&O policies sometimes have language specifically permitting the insurer to allocate defense costs between insured and uninsured claims, and only pay those fees incurred in defense of the insured claims. This differs from the standard interpretation of the duty-to-defend, which imposes a duty on the insurer to defend the entirety of any suit, including portions that are outside the scope of coverage. On the other hand, unless the D&O policy contains express language excusing the insurer from paying defense allocated to uninsured claims, the courts typically treat the insurer's duty to pay defense costs analogously to the duty to defend, imposing a duty to pay all defense costs even if only a subset are for defense of insured claims.[31]

- As noted in Section A above, because the Insuring Agreement of most D&O policies is based upon the alleged commission of "wrongful acts," rather than "occurrences," even allegations of intentional misconduct are within the scope of the covered claims. Indeed, the typical exclusion of coverage for "fraudulent" or "criminal" misconduct contains an explicit obligation for the insurer to fund the defense of such claims and *only* excuses the insurer from indemnifying settlements or judgments of such misconduct when there has been a "final adjudication" in the underlying action directly finding that the insured acted with the requisite level of intentional misconduct.

- Similarly, although most D&O policies have an exclusion that bars coverage for claims of unearned "profits" or "gains" – which insurers may argue bars coverage for claims where the relief sought is a refund of sums paid for the insured's goods or services – that exclusion likewise typically includes explicit language requiring the insurer to fund the defense of such claims, and bars indemnity only upon "final adjudication" in the underlying action establishing that the relief obtained by the underlying plaintiffs is within the scope of that exclusion.

M.B.A.

[31] *See, e.g., Amer. Chem. Soc. v. Leadscope, Inc.*, 2005-Ohio-2557 ¶¶ 17-22, 2005 WL 1220746 (Oh. App. 10th Dist. May 24, 2005).