IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

HEALTH CORPORATION and EMDEON PRACTICE SERVICES, INC., Plaintiffs, v. CLARENDON NATIONAL INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, GULF INSURANCE COMPANY N/K/A THE TRAVELERS INDEMNITY COMPANY, OLD REPUBLIC INSURANCE COMPANY, SAFECO COMPANY OF AMERICA, ZURICH AMERICAN INSURANCE COMPANY, NEW HAMSPHIRE INSURANCE COMPANY, AXIS REINSURANCE COMPANY, FIREMAN'S FUND INSURANCE COMPANY, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, and RSUI INDEMNITY COMPANY.	)	C.A. No. 07C-09-102 RRC

Submitted: June 23, 2009
Decided: July 15, 2009

On Plaintiffs' "Motion to Enforce, or Alternatively, for Partial Summary Judgment to Enforce, This Court's July 31, 2008 Order to Advance Defense Costs Against Zurich American Insurance Company and Old Republic Insurance Company." **DENIED.**

On Defendant Old Republic's Cross Motion for Summary Judgment. **GRANTED**.

MEMORANDUM OPINION

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COOCH, J.

I. INTRODUCTION

This motion arises from Defendant Old Republic Insurance Company's (hereinafter "Old Republic" or "Defendant") failure to advance and reimburse defense costs to Plaintiffs HLTH Corporation and Emdeon Practice Service, Inc. (hereinafter "HLTH" or "Plaintiff") pursuant to a Directors' and Officers' liability insurance policy.[1] HLTH is seeking insurance coverage for the indemnification of its directors and officers currently under indictment by the Federal Government in the District of South Carolina. To date, HLTH's officers' and directors' criminal defense costs have collectively exceeded $100,000,000. Before this Court is HLTH's "Motion to Enforce, or Alternatively, for Partial Summary Judgment to Enforce, This Court's July 31, 2008 Order to Advance

[1] For an overview of this case, *see generally* the "FACTS" section of this opinion, at p. 3-9, and *HLTH Corp. v. Agricultural Excess & Surplus Ins. Co.*, 2008 WL 3413327 (Del. Super. Jul. 31, 2008) (denying defendant insurance companies' motion seeking an allocation of insurance liability across multiple towers of insurance and multiple layers of insurance contained therein).

Defense Costs Against Zurich American Insurance Company and Old Republic Insurance Company" and Old Republic's Cross Motion for Summary Judgment. The issue raised by the parties is whether claims for coverage under their insurance contract arise out of Wrongful Acts occurring after September 12, 2000, and whether those claims are therefore barred in their entirety pursuant to an exclusionary provision in the contract.

For the reasons set forth below, this Court finds that Old Republic's claims are not procedurally barred and that, pursuant to the terms and conditions of the Directors' and Officers' liability insurance policy, HLTH is not entitled to the advancement and reimbursement of its defense costs. Thus, HLTH's "Motion to Enforce, or Alternatively, for Partial Summary Judgment to Enforce, This Court's July 31, 2008 Order to Advance Defense Costs Against Zurich American Insurance Company and Old Republic Insurance Company" is **DENIED** and Old Republic's Cross Motion for Summary Judgment is **GRANTED**.

II. BACKGROUND

A. FACTS[2]

1. Medical Manager Corporation ("MMC") was formed in July 1996, and, prior to July 23, 1999, was an independent, publicly-traded company. MMC's primary business was the development and sales of computer software to assist healthcare providers in managing their healthcare practices.

[2] The factual background of this case has been taken nearly verbatim from the "Joint Statement of Undisputed Facts of Plaintiffs and Defendant Old Republic Insurance Company," (hereinafter "Joint Statement of Facts"), Docket 124, submitted at the request of the Court by Plaintiffs and Defendant on February 23, 2009.

2. On July 23, 1999, MMC was acquired by Synetic, Inc. ("Synetic"), which assumed the name Medical Manager Corporation ("New MMC") and changed the name of its wholly-owned subsidiary MMC to Medical Health Systems, Inc. The following year, on September 12, 2000, Synetic/New MMC was acquired by Healtheon WebMD Corporation, which was subsequently renamed Emdeon Corporation ("Emdeon") and most recently changed its name to HLTH Corporation.

3. Each of the companies, MMC, Synetic and Emdeon, had its own program of D&O insurance, referred to here as a "tower." The tower of insurance maintained by MMC, as a stand alone company, is referred to herein as the "MMC Tower" and the policies which make up the MMC Tower are referred to herein as the "MMC Policies." The tower of insurance maintained by Synetic is referred to herein as the "Synetic Tower" and the insurance policies which make up the Synetic Tower are referred to herein as the "Synetic Policies." The tower of insurance maintained by Emdeon is referred to herein as the "Emdeon Tower" and the policies which make up the Emdeon Tower are referred to herein as the "Emdeon Policies."

4. The MMC Tower provides a total of $20 million in coverage.

5. The MMC Policies state:

> If during the Policy Period (i) the Parent Company [MMC] is acquired by merger into or consolidation with another entity, or (ii) another entity, or person or group of entities and/or persons acting in concert acquires securities or voting rights which result in ownership or voting control by the other entity(ies) or person(s) of more that 50% of the outstanding securities representing the present right to vote for the election of directors of the Parent Company, then coverage under this Policy shall continue until termination of the Policy Period, but only with respect to Claims for Wrongful Acts taking place prior to such merger, consolidation or acquisition.

Synetic's acquisition of MMC occurred on July 23, 1999.

6. The Synetic Tower provides a total of $100 million in coverage.

7. The Synetic Policies state that "[i]n all events, coverage as is afforded under this policy with respect to any Claim made against a Subsidiary or any Director or Officer thereof shall only apply for Wrongful Acts committed or allegedly committed after the effective time that such Subsidiary became a Subsidiary and prior to the time that such Subsidiary ceased to be a Subsidiary." (National Union Policy 486-93-02 (hereinafter "National Union Policy") at ¶ 2(1)). MMC became a Subsidiary, as that term is defined in the Synetic policies on July 23, 1999.

8. The Synetic Polices also state that, if Synetic "(a). . . shall consolidate with or merge into, or sell all or substantially all of its assets to any other person or entity, or group of persons and/or entities acting in concert . . . herein referred to as the Transaction . . . then this policy shall continue in full force and effect as

to Wrongful Acts occurring prior to the effective time of the Transaction, but there shall be no coverage afforded by any provision of this policy for any actual or alleged Wrongful Act occurring after the effective time of the Transaction." (National Union Policy at ¶ 12). Synetic was acquired by Emdeon on September 12, 2000.

9. The period during which claims may be reported under the Synetic Tower commenced on December 14, 1997 and initially ended on December 14, 2000, but HLTH purchased an endorsement to the Synetic policies when it acquired Synetic (and MMC) that extends the period during which claims may be reported for a period of six years following the merger until September 12, 2006. The endorsement to the National Union policy in the Synetic Tower states in part:

> RUN-OFF ENDORSEMENT (SELLER/BUYER MERGER)
> In consideration of the additional premium of $241, 552 it is hereby understood and agreed that as of the time and date designated as the effective time of the merger or acquisition (hereinafter the "Effective Time") in the merger agreement of plan of merger or similarly titled contract executed by and between MEDICAL MANAGER CORPORATION f/k/a SYNETIC, INC. and HEALTHEON WebMD CORPORATION, dated as of September 12, 2000 including any amendments or revisions thereto, (hereinafter the "Merger Agreement") the following provisions shall apply and be added to the policy:
>
> * * * * *
>
> RUN-OFF COVERAGE CLAUSE
> The Named Corporation shall have the right to a period of time Six (6) years commencing on the Effective Time (herein referred to as the Discovery Period or Run-Off Coverage) in which to give written notice to the Insurer of any Claim(s) first made against any Insured(s) during said Run-off Coverage for any Wrongful Act(s) occurring on or prior to the Effective Time and otherwise covered by this policy.
>
> * * * * *
>
> The section of the policy entitled CHANGE IN CONTROL OF NAMED CORPORATION, is deleted in its entirety. (National Union Policy Endorsement 15, ¶ V, VII).

10. Endorsement 5 of the Old Republic Policy, titled Conversion to Run-Off, provides:

> In consideration of the premium charged it is understood and agreed:
>
> (1) That the Insurer shall not be liable to make any payment for Loss in connection with any claim made against the Directors or Officers for Wrongful Acts taking place on or after July 14, 1999.

(2) The run-off premium paid in connection with this endorsement is deemed to be fully earned at Inception of this endorsement and non-refundable.

(3) Paragraph (A) of Clause V., Extended Reporting Period, is deleted in its entirety.

(4) That the Insurer's maximum liability for all Loss in connection with all claims first made during the period June 4, 1999 to September 12, 2006 shall be $10,000,000.

11. The Synetic Policies define "Wrongful Act" to mean "any breach of duty, neglect, error, misstatement, misleading statement, omission or act by the Directors and Officers of the Company in their respective capacities as such, or any matter claimed against them solely by reason of their status as Directors or Officers of the Company." (National Union Policy at ¶ Section 2 (m)).

12. The Synetic Policies state that ". . . except as hereinafter stated, the Insurer shall advance, at the written request of the Insured, Defense Costs prior to the final disposition of a Claim. Such advanced payments by the Insurer shall be repaid to the Insurer by the Insureds or the Company severally according to their respective interests, in the event and to the extent that the Insureds or the Company shall not be entitled under the terms and conditions of this policy to payment of such Loss." (National Union Policy, ¶ 8).

13. The Emdeon Tower provides a total of $70 million in coverage.

14. The Emdeon policies state that "[i]n all events, coverage as is afforded under this policy with respect to a Claim made against any Organization and/or any Insured Person thereof shall only apply for Wrongful Acts committed or allegedly committed after the effective time such Organization became an Organization and such Insured Person became an Insured Person, and prior to the effective time that such Organization ceases to be an Organization or such Insured Person ceases to be an Insured Person." (Nation Union Policy 493-76-85, ¶ 12 (d)).

15. On December 15, 2005, a federal grand jury returned a first superseding indictment against ten former MMC directors and officers for allegedly participating in a conspiracy to inflate fraudulently MMC's earnings between 1997 and 2001 and for money laundering.

16. On February 27, 2007, the grand jury returned a Second Superseding Indictment, which omitted one defendant, Maxie L. Juzang (the "Indictment"). The Indictment includes many of the same substantive facts and charges as the first superseding indictment, including allegations of a conspiracy to commit securities, mail, and wire fraud between February 1997 and at least 2003 (Count 1) and a money laundering conspiracy between 1997 and at least 2004 (Count 2).

17. The Indictment named nine defendants all of whom were directors or officers of MMC (Maxie Juzang was dismissed from the case) and contains seven counts. Subsequently, charges against one of the defendants, Lee A. Robbins, were dismissed after his death. Count One alleges that the defendants

conspired to commit wire fraud, mail fraud and securities fraud, in violation of 18 U.S.C. §371, by fraudulently inflating the earnings of MMC and WebMD and concealing their fraudulent conduct by making false statements in public filings and to auditors. Count Two alleges a money laundering conspiracy, 18 U.S.C. § 1956(h), in that the defendants agreed to engage in monetary transactions with proceeds from sales of MMC stock made at fraudulently inflated prices. Counts Three through Seven allege substantive money laundering crimes, in violation of 18 U.S.C. § 1957. All nine defendants are charged in the first two counts, and only defendant John Sessions is charged in the five substantive money laundering counts. There is also a forfeiture allegation against all nine defendants, which seeks disgorgement of $34, 346, 974 "representing the total proceeds from the conspiracy . . . alleged in Count 1."

18. The Indictment remains pending and counsel for the indicted former officers and directors of MMC recently has informed the parties that a trial date of May 4, 2009 has been set. Each of the MMC officers has expressly denied any wrongdoing and has entered a plea of "Not Guilty" with respect to each and every count of the Superseding Indictment and the Second Superseding Indictment. To date, there has been no adjudication of any wrongdoing alleged in the Indictment.

19. HLTH is indemnifying each of the MMC officers for their costs in defending the Indictment. The Wrongful Acts allege in the Indictment implicate the MMC Tower, the Synetic Tower and the Emdeon Tower, subject to the terms and conditions of the policies in each of the foregoing towers, and HLTH has provided notice to the insurers under each of these three towers. In this litigation, HLTH asserts claims for coverage under the MMC Tower, the Synetic Tower and the Emdeon Tower. The limits of the policies in the MMC Tower are no longer available as a result of (a) payment of the $5 million in limits under the primary policy issued by Rock River Insurance Company in the MMC Tower; (b) payment of the $5 million in limits under the first layer excess policy issued by TIG Insurance Company in the MMC Tower; (c) a settlement by HLTH with Zurich American Insurance Company ("Zurich"), the carrier providing the third layer of $5 million in coverage in the MMC Tower; and (d) a settlement by HLTH with Agricultural Excess & Surplus Insurance Company ("AESIC"), the carrier providing the top layer of $5 million in coverage in the MMC Tower. HLTH's remaining claims in this action are directed only against certain insurers in the Synetic Tower and the insurers in the Emdeon Tower.

20. National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union") issued the primary policy in the Synetic Tower with $10 million in coverage. National Union paid the full limits of liability of its insurance policies in the Synetic Tower by paying such amount in legal currency on account of Loss as defined in the policy.

21. On January 11, 2008, HLTH entered into a settlement agreement AESIC, the third level excess insurer in the MMC Tower and a settlement agreement with Great American Insurance Company ("Great American"), the second level excess insurer in the Synetic Tower.

22. Under the terms of the settlement agreement with AESIC, AESIC paid less than $5 million.

23. Under the terms of the settlement agreement with Great American, Great American paid $10 million.

24. On April 1, 2008, by a stipulation between HLTH and Zurich and "so ordered" by the Court, Zurich was dismissed with prejudice from this Lawsuit as to its policy in the MMC Tower and without prejudice as to its policy in the Synetic Tower. On November 17, 2008, the Court granted HLTH's motion to file a Second Amended Complaint which, among other things, asserts claims against Zurich as a defendant in this Lawsuit with respect to its policy issued in the Synetic Tower.

25. The defense costs incurred to date in defending the Indictment exceed the limits of the insurance purchased in the MMC Tower.

26. On July 31, 2008 the Court issued an order, as corrected on October 3, 2008, (the "Defense Costs Order"), granting HLTH's "Motion for Partial Summary Judgment on the Defendant Insurance Companies Duty to Advance And Reimburse Defense Costs." The Motion was directed at: (a) Federal Insurance Company ("Federal"), the second level excess insurer in the Synetic Tower; (b) Travelers Indemnity Company ("Travelers"), the third level excess insurer in the Synetic Tower; (c) Clarendon National Insurance Company ("Clarendon"), the forth level excess insurer in the Synetic Tower; and (d) Certain Underwriters at Lloyd's, London, ("Lloyd's) the fifth level excess insurers in the Synetic Tower.

27. The Motion was not made against Old Republic because, at the time of the filing of the Motion, HLTH did not believe that Defense Costs (as that term in defined in the Synetic Policies) incurred in connection with the Indictment would reach the Old Republic policy in the Synetic Tower. At the time the Motion was made no demand for payment of Defense Costs has been made against Old Republic under the policy at issue in this motion by HLTH, and HLTH did not at that time expect to make such a demand.

28. As the seventh level excess insurer in the Synetic Tower, Zurich issued policy number DOC 3561126 00 which provides $10 million in coverage (the "Zurich Synetic Policy").

29. On September 9, 2008, Zurich denied coverage under the Zurich Synetic Policy for HLTH's indemnification of each of the MMC officers for their costs in defending the Indictment.

30. For its denial, Zurich relied on a "Run-Off" Endorsement 4 of the Zurich Policy which provides, in part, that:

> [Zurich] shall not be liable for Loss on account of any Claim based upon, arising out of, or attributable to any Wrongful Acts where all or any part of such acts were committed, attempted or allegedly committed or attempted subsequent to September 12, 2000.

The parties agree that the copy of the Zurich Policy provided to the Court is a true and accurate copy of the Zurich policy in issue. None of the carriers in the Synetic Tower who issued policies below Zurich included Run-Off Endorsement 4 as part of their respective policies.

31. As the eighth level excess insurer in the Synetic Tower, Old Republic issued policy number CUG 25835 (the "Old Republic Synetic Policy") which provides $10 million in coverage.

32. On February 4, 2009, Old Republic denied coverage under the Old Republic Synetic Policy for HLTH's indemnification of each of the MMC officers for their costs in defending the Indictment based on Endorsement 4 of the Zurich Policy in the Synetic Tower and the policy provision of the Old Republic Policy quoted in the next paragraph of this Stipulation.

33. The Old Republic Policy (at § I.) in the Synetic Tower, in relevant part, that:

> [Old Republic] agrees to provide to the Insured Persons and, if applicable, the Company, insurance coverage for Claims first made during the Policy Period, including the Extended Reporting Period if exercised against the Insured Persons for Wrongful Acts. Such coverage shall be in accordance with and subject to the same warranties, terms, conditions, exclusions and limitations (except as regards the premium, the amount and limits of liability, the policy period, the extended reporting period, and except as otherwise provided herein) as are contained in or as may be added to the Primary Policy and, to the extent coverage is further limited or restricted thereby, to any other Underlying Policy. In no event shall this policy grant broader coverage than would be provided by any of the Underlying Policies.

34. The Zurich Policy in the Synetic Tower is listed in the Old Republic policy as an Underlying Policy to the Old Republic Policy in the Synetic Tower.

B. BRIEF PROCEDURAL HISTORY

On July 25, 2007, Plaintiffs filed a complaint stemming from this dispute for declaratory relief and breach of contract in the New Castle County Court of Chancery. The complaint named Agricultural Excess and Surplus Insurance Company n/k/a Great American E&S Insurance Company, Certain Underwriters at Lloyd's, London ("Lloyd's), Clarendon National Insurance Company, Federal Insurance Company, Great American Insurance Company,

Travelers Indemnity Company ("Travelers"), Old Republic Insurance Company, Safeco Company of America ("Safeco"), and Zurich American Insurance Company ("Zurich"). The matter was transferred to this Court in September 2007 by stipulation and Order pursuant to 10 Del. C. § 1902. In October 2007, Old Republic filed its answer to Plaintiffs' complaint. This Court granted Plaintiffs leave to file an amended complaint in January 2008 in order to join New Hampshire Insurance Company ("New Hampshire") as a defendant. Apart from the addition of New Hampshire as a defendant, the allegations in the Amended Complaint are substantially similar to the allegations in the original Complaint. Various other defendants originally named have since been dismissed from this action.

In January 2008, Federal filed a "Motion for Partial Summary Judgment on Allocation" (hereinafter "Allocation Motion"). Old Republic joined the Allocation Motion.[3] In February 2008 Plaintiffs filed a "Motion for Partial Summary Judgment to Enforce [Certain Defendant Insurance Companies'] Duty to Advance and Reimburse Defense Costs." Old Republic was not a named party to Plaintiffs' motion, and Old Republic did not join in the opposition to it. This Court issued a memorandum opinion on July 31, 2008 (corrected October 2, 2008) (hereinafter "Defense Costs Order") denying Federal's request for allocation of defense costs between affected insurers and granting Plaintiffs' motion.

[3] *See* Docket 31 ("Notice of Joinder of Defendant Old Republic Insurance Company in Federal Insurance Company's Motion for Summary Judgment on Allocation"). In addition to Old Republic, Travelers, SAFECO, and Lloyd's also joined Federal's motion.

In February 2009, Plaintiffs filed the instant "Motion to Enforce, or Alternatively, for Partial Summary Judgment to Enforce, This Court's July 31, 2008 Order to Advance Defense Costs Against Zurich American Insurance Company and Old Republic insurance Company." Old Republic filed a Cross Motion for Summary Judgment in April 2009. Although HLTH's motion was originally also directed at Zurich, HLTH and Zurich have since settled their dispute. Zurich has been dismissed with prejudice from this lawsuit by stipulation and Order. Oral argument was heard before this Court on June 9, 2009, followed by supplemental briefing, and the matter is now ready for a decision.

III. THE CONTENTIONS OF THE PARTIES

A. THE PROCEDURAL CONTENTIONS

1. Law of the Case Doctrine

HLTH argues that Old Republic is barred by the law of the case doctrine from denying coverage based on Run-Off Endorsement 4.[4] HLTH argues that Old Republic has repeated the same argument otherwise settled by this Court in its Defense Costs Order, i.e., whether the "September 12, 2000 Cut-Off Provisions" limit or otherwise negate Old Republic's contractual obligation to advance defense costs. According to HLTH, "Old Republic now makes the same argument" it made in the Allocation Motion since it argues that certain acts in the

[4] *See supra* FACTS ¶ 30. Throughout this opinion, the term "Run-Off Endorsement 4" refers specifically to the following language: "[Zurich] shall not be liable for Loss on account of any Claim based upon, arising out of, or attributable to any Wrongful Acts where all or any part of such acts were committed, attempted or allegedly committed or attempted subsequent to September 12, 2000."

Indictment[5] are alleged to have occurred after September 12, 2000.[6] In support of its argument, HLTH relies in part on this Court's holding in the Defense Costs Order that "since Defendants have conceded that their respective towers of coverage have all been triggered, Defendants now cannot demonstrate that all of the allegations in the indictment fall outside of the coverage periods of their respective towers and therefore must advance defense costs."[7]

In response, Old Republic argues that the law of the case doctrine does not apply because Run-Off Endorsement 4 and the Federal Exclusion[8] at issue in the Defense Costs Order are "fundamentally different."[9] Old Republic agrees that the Defense Costs Order applies to it, but argues that the Defense Costs Order did not consider Run-Off Endorsement 4. Thus, Old Republic argues, the "law of the case" doctrine cannot bar it from asserting a claim it has not previously asserted.

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[5] *See supra* FACTS ¶ 16. Throughout this opinion, the term "Indictment" refers specifically to the February 27, 2007 Second Superseding Indictment unless stated otherwise.

[6] Pls.' Reply at 8.

[7] *HLTH Corp. v. Agricultural Excess & Surplus Ins. Co.*, 2008 WL 3413327, at *13 (Del. Super. Jul. 31, 2008).

[8] *See supra* FACTS ¶ 8. Throughout this opinion, the term "Federal exclusion" refers to the language in paragraph 8 of the FACTS section. This language is entitled "Federal exclusion" because it was relied on by Federal Insurance Company in its motion seeking an allocation of insurance liability across multiple towers of insurance and multiple layers of insurance contained therein. This motion is referred to as the "Allocation Motion" throughout this opinion.

[9] Def's. Reply at 12.

2. Judicial Estoppel

HLTH claims that Old Republic is judicially estopped from asserting that Run-Off Endorsement 4 bars all coverage because this argument is inconsistent with Old Republic's position in the Allocation Motion. There, Old Republic argued that the Synetic Tower is liable for 23% of Plaintiffs' defense costs because, according to Old Republic, 23% of the allegations in the Indictment occurred during the time covered by the Synetic Tower. HLTH asserts that since Old Republic conceded that the Synetic Tower has been "triggered," it cannot now claim that it has no duty to advance defense costs. In support of its argument, HLTH relies on this Court's holding in the Defense Costs Order:

> Importantly, Defendants do not dispute that the claim stemming from Plaintiff's former directors' and officers' criminal defense implicates all three towers of coverage; they only dispute the extent to which their coverage is implicated. Indeed, Defendants acknowledge, simply from the nature of their request for allocation, that all three towers of insurance have some amount of contractually viable claims that have triggered them.[10]

In response, Old Republic argues that judicial estoppel does not bar its arguments because it has been consistent in its legal position during this litigation, and the Court simply did not accept its position in the Allocation Motion. Moreover, Old Republic claims that applying judicial estoppel as a procedural bar to its arguments would be tantamount to the Court creating insurance coverage by estoppel.

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[10] Pls.' Reply at *22 (quoting *HLTH Corp.*, 2008 WL 3413327, at *12).

3. Waiver

HLTH argues that Old Republic has waived its right to deny coverage pursuant to Run-Off Endorsement 4 because it failed to advance this argument when it joined the Allocation Motion. Old Republic's failure to raise Run-Off Endorsement 4 when it joined the Allocation Motion, HLTH asserts, was a voluntary and intentional relinquishment of its known right to assert coverage defenses. In its submission pursuant to this Court's request at oral argument for supplemental briefing on the effect, if any, of Old Republic's joinder in the Allocation Motion, HLTH argues for the first time that Old Republic should have filed a motion for reargument after the Defense Costs Order. HLTH argues that Old Republic's failure to do so bars it from asserting Run-Off Endorsement 4.

Old Republic responds that it never voluntarily and intentionally waived its right to deny coverage pursuant to Run-Off Endorsement 4. Old Republic points to a footnote in the Allocation Motion that, it asserts, expressed its desire to reserve the right to later raise coverage defenses. The footnote states, "Federal's motion for summary judgment on allocation is made without prejudice to and in the context of its express reservation of the right to assert all other defenses to coverage that may be available in accordance with the terms of coverage and under applicable law."[11]

[11] Def.'s Reply at 3.

4. Declaratory Judgment

HLTH asserts that Old Republic should have sought a declaratory judgment when it joined the Allocation Motion. HLTH argues that because Old Republic did not seek a declaratory judgment at the outset of this litigation, it waived its ability to assert coverage defenses. Old Republic responds that it was under no obligation or duty to seek a declaratory judgment, and, at that stage in the litigation, it was still relying on HLTH's assertion that HLTH's costs would not be high enough to invoke Old Republic's policy.

5. Motion for Reargument

HLTH argues that Old Republic should have filed a motion for reargument after the Court issued the Defense Costs Order if it thought that Run-Off Endorsement 4 barred coverage to HLTH's claims. According to HLTH, the proper procedural way for Old Republic to assert coverage defenses subsequent to the Defense Costs Order was for Old Republic to file a motion for reargument. Old Republic's failure to do so, HLTH argues, amounts to a waiver of such coverage defenses.

In response, Old Republic argues that it could not have asserted the applicability of Run-Off Endorsement 4 in a motion for reargument after the Court issued the Defense Costs Order because, at that time, Run-Off Endorsement 4 was not at issue. Old Republic argues that its failure to file a motion for reargument has no bearing on its ability to assert coverage defenses at this time.

6. Mend-the-Hold Doctrine

HLTH asserts that the "mend-the-hold" doctrine should apply in order to prevent Old Republic from asserting Run-Off Endorsement 4.[12] The "mend-the-hold" doctrine, HLTH claims, prevents Old Republic from asserting a contract defense and then, after that defense fails, asserting another contractual defense during the course of the same litigation. HLTH argues that Old Republic is acting in bad faith because it has changed defenses to its contractual obligations during the course of this litigation. HLTH asserts that Old Republic joined the Allocation Motion, and then, only after that motion was denied, refused to advance defense costs on the separate basis of Run-Off Endorsement 4. According to HLTH, this amounts to a change in Old Republic's position.

Old Republic argues in response that the "mend-the-hold" doctrine is inapplicable here because the Allocation Motion asserted a legitimate defense that

[12] The "mend-the hold" doctrine "bars a party who rejects a contract on certain specified grounds from changing position after litigation is filed when those grounds for rejection do not pan out." *Liberty Prop. Ltd. Partnership v. 25 Mass. Ave. Prop., LLC.*, 2008 WL 1746974, at *14 (Del. Ch. Apr. 7, 2008) (quoting *Railway Co. v. McCarthy*, 96 U.S. 258, 267, 24 L.Ed. 693 (1878) ("Where a party gives a reason for his conduct and decision touching any thing involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it ...."); *see also Harbor Ins. Co v. Continental Bank Corp.*, 922 F.2d 357, 363 (7th Cir. 1990) (Posner, J.) (observing that the doctrine overlaps with the implied covenant of good faith because when "[a] party ... hokes up a phony defense to the performance of his contractual duties and then when that defense fails (at some expense to the other party) tries on another defense for size [he] can properly be said to be acting in bad faith.")). The phrase "mend-the-hold" originates from "a nineteenth century wrestling term, meaning to get a better grip (hold) on your opponent." *Harbor Ins. Co.*, 922 F.2d at 362-63 (discussing the origins of the "mend-the-hold" doctrine).

is consistent with its current position. Further, Old Republic asserts that since the Allocation Motion included a footnote that Old Republic contends expressly reserved all coverage defenses, it is free to assert the Run-Off Endorsement 4 defense at this time. Finally, Old Republic argues that HLTH has chosen to prosecute this litigation in a "piecemeal fashion" and consequently, its piecemeal response was in effect invited by HLTH.

B. THE SUBSTANTIVE CONTENTIONS REGARDING THE APPLICABILITY OF RUN-OFF ENDORSEMENT 4

1. Old Republic's Contentions

Old Republic argues that it does not have to advance defense costs to HLTH because the express terms of Run-Off Endorsement 4 bar coverage. Old Republic acknowledges that Run-Off Endorsement 4 is not included in its policy; however, Old Republic contends that it cannot provide coverage broader than the coverage provided by any underlying policy. Since the Zurich policy[13] is an underlying policy and it contains Run-Off Endorsement 4, Old Republic claims that Run-Off Endorsement 4 applies to its policy.

Seeking to describe the scope of Run-Off Endorsement 4, Old Republic argues that it is a "broad-form exclusion" that bars coverage because, quoting from Run-Off Endorsement 4, "the Underlying Action is based upon, arises out of, or is attributable to Wrongful Acts where 'all or part of such acts'

[13] *See generally* ¶¶ 28-34 in the FACTS section of this opinion for background on Zurich's policy.

were committed after September 12, 2000."[14] Old Republic further claims that HLTH has stipulated that the acts described in the Indictment allegedly took place both before and after September 12, 2000. Old Republic argues that HLTH's stipulation that it asserted claims for coverage under the Emdeon Tower "[n]ecessarily" means that HLTH conceded that the Wrongful Acts were allegedly committed or attempted in whole or in part after September 12, 2000, because the Emdeon Tower only covers Wrongful Acts that occurred after that date.[15]

Old Republic asserts that Run-Off Endorsement 4 is substantially broader than the Federal exclusion, and therefore, the Court does not need to determine when coverage starts and stops. Rather, Old Republic argues that it is asking the Court to enforce the specific language of Run-Off Endorsement 4. Thus, Old Republic argues that the Defense Costs Order does not control the applicability of Run-Off Endorsement 4.

2. HLTH's Contentions

HLTH argues that Run-Off Endorsement 4 cannot bar coverage of its claims because there is no "material difference" between Run-Off Endorsement 4 and the Federal exclusion. HLTH claims that both provisions apply to "Wrongful Acts" and that term "can only be interpreted as to mean complete Wrongful Acts."[16] According to HLTH, "[i]f part of the act is not completed the act has not yet been committed. Thus if an act was partially committed prior to

[14] Def.'s Reply at 2-3.
[15] Def.'s Cross M. Summ. J. at 9; Def. Reply at 6.
[16] Pls.' Reply at 11.

September 12, 2000 and partially committed after, the act would not have been committed prior to September 12, 2000 and would be treated the same under [both provisions]."[17] HLTH, therefore, asserts that Run-Off Endorsement 4 cannot exclude coverage because, per the Defense Costs Order, the Court cannot hold that the allegations in the indictment fall outside Old Republic's coverage period. According to HLTH, the Defense Costs Order determined that the Federal exclusion does not bar coverage based upon the dates of the overt acts alleged in the Indictment. HLTH further claims that both provisions are materially indistinguishable as having the same effect, since they both seek to permit or exclude claims based upon when the underlying acts occurred.

HLTH further argues that Old Republic is asking this Court to do exactly what the Court said it would not do in the Defense Costs Order: equate overt acts alleged in the Underlying Action with Wrongful Acts. HLTH claims that Old Republic's argument relies on equating overt acts from the Indictment allegedly occurring after September 12, 2000, with Wrongful Acts.

Since the Indictment includes a conspiracy charge, HLTH argues that there is no way to determine when its directors and officers entered into or left the conspiracy. Thus, HLTH argues Run-Off Endorsement 4 cannot bar its claims because that would require the Court to equate Wrongful Acts in the policy with overt acts alleged in the Indictment.

[17] *Id.*

In support of its argument, HLTH submitted an affirmation by Professor Paul Shechtman.[18] In the affirmation, HLTH argues through Professor Shechtman that Run-Off Endorsement 4 cannot operate as a bar to coverage because that would assume that each defendant joined the conspiracy in 1997 and remained active in it until 2003 or 2004.[19] HLTH further argues that the indictments do not "speak to when any one defendant joined the conspiracy or left it."[20] HLTH notes that the indictments themselves are not determinative of the specific dates each defendant entered and/or left the conspiracy. Moreover, HLTH argues that dates of the alleged conspiracies in the first and second counts in the Indictment do not necessarily correlate with the dates of the "Wrongful Acts" which, HLTH argues, trigger its D&O policy with Old Republic.[21]

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[18] Professor Paul Shechtman is a licensed attorney in New York and Pennsylvania, and is an adjunct professor at Columbia Law School. He is also a partner at the New York City law firm Stillman, Friedman & Shechtman.

[19] Affirmation of Paul Shechtman at ¶ 10.

[20] Pls. Reply at 13.

[21] Professor Shechtman offers a hypothetical to buttress HLTH's argument:

> Assume A, B, and C agree in 1997 to inflate the revenues of company X, for which they are officers; that C severs his ties with the criminal scheme in August 2000 and leaves the company; that D joins the company and the conspiracy in October 2000; and that the scheme continues into 2003. On such facts, an indictment would allege a conspiracy from 1997 to 2003 and name A,B, C, and D as defendants. Yet C's Wrongful Acts (his participation in the conspiracy) run from 1997 to August 2000, and D's Wrongful Acts from October 2000 to 2003. Put simply, the dates of the conspiracy count do not correspond to the dates of any one defendant's wrongdoing.

Affirmation of Paul Shechtman at ¶ 11.

HLTH argues that the term "Wrongful Act" is not defined in the Zurich Policy, and therefore, is ambiguous and susceptible to multiple interpretations. HLTH argues that the ambiguity of the term "wrongful act" makes it "unclear whether 'Wrongful Act' refers to a claim, cause of action, an indictment, an overt act, an agreement or something else."[22] HLTH further contends that Run-Off Endorsement 4 is ambiguous because the word "alleged" is undefined. HLTH argues that Old Republic uses the word "allege" to mean both a formal criminal charge and an assertion by the government which need not be proven. Due to the ambiguity of the terms in Run-Off Endorsement 4, HLTH argues it must be construed in its favor.

HLTH also argues that public policy considerations should persuade the Court to deny Old Republic's motion. HLTH claims that if the Court holds that Run-Off Endorsement 4 bars coverage, it will effectively grant prosecutors the power to deny a policyholder coverage based solely on how the prosecutor structures the indictment. This, HLTH claims, would give prosecutors the ability to "pressure" criminal defendants by denying them the ability to have their defense costs covered.[23]

[22] Pls.' Reply at 19.
[23] *Id*. at 17 n. 7.

IV. STANDARD OF REVIEW

"Upon cross motions for summary judgment, this Court will grant summary judgment to one of the moving parties."[24] No genuine issues of material fact exist as a matter of law where opposing parties have each sought summary judgment. Superior Court Civil Rule 56(h) provides:

> Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.

The questions before this Court are questions of law, not of fact, and the parties by filing cross motions for summary judgment have in effect stipulated that the issues raised by the motions are ripe for a decision on the merits.

V. DISCUSSION

A. OLD REPUBLIC IS NOT PROCEDURALLY BARRED FROM ASSERTING THAT THE RUN-OFF ENDORSEMENT 4 PRECLUDES COVERAGE

1. Law of the Case Doctrine

The law of the case doctrine does not preclude Old Republic from asserting that Run-Off Endorsement 4 precludes coverage because the Defense Costs Order did not consider the application of the Run-Off Endorsement 4. The law of the case doctrine is applicable "when a specific legal principle is applied to an issue presented by facts which remain constant throughout the subsequent

[24] *Scottsdale Ins. Co. v. Lankford*, 2007 WL 4150212, at *3 (Del. Super. Nov. 21, 2007).

course of the same litigation."[25] Thus, "once a matter has been addressed in a procedurally appropriate way by a court, it is generally held to be the law of that case and will not be disturbed by that court unless compelling reason to do so appears."[26] "The law of the case does not have the finality of *res judicata* since it only applies to litigated issues and does not reach issues which could have been but were not litigated."[27] The Court, therefore, "is not without some discretion in determining the applicability of the 'law of the case' doctrine."[28]

Here the law of the case doctrine does not apply because the applicability of the Run-Off Endorsement 4 was not addressed by this Court in the Defense Costs Order. The scope and effect of Run-Off Endorsement 4 has not been litigated or addressed until now. Thus, the law of the case doctrine has no bearing on whether Run-Off Endorsement 4 bars coverage to HLTH's claims.

HLTH argues that Old Republic conceded that its policy was implicated and relies on this Court's holding that "Defendants have conceded that their respective towers of coverage have all been triggered."[29] HLTH misreads this holding, as this was not a finding that each of the individual defendant's policies had been implicated in a manner that requires coverage. Rather, the Court held that the parties' concessions were limited to their "respective towers of

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[25] *Kenton v. Kenton*, 571 A.2d 778, 784 (Del. 1990).
[26] *May v. Bigmar, Inc.*, 838 A.2d 285, 288 n.8 (Del. Ch. 2003).
[27] *Ins. Corp. of America v. Barker*, 628 A.2d 38, 41 n.5 (Del. 1993) (internal quotations omitted).
[28] *Taylor v. Jones*, 2006 WL 1510437, at * 6 (Del. Ch. May 25, 2006).
[29] *HLTH Corp.*, 2008 WL 3413327, at *13.

coverage."[30] Importantly, the Court's holding did not reach whether each individual Defendant's policy had been triggered in a manner that required advancement of defense costs.

Moreover, the Court's Defense Costs Order, holding that "Defendants now cannot demonstrate that all of the allegations in the indictment fall outside of the coverage periods of their respective towers and therefore must advance defense costs," is distinguishable from the matter currently before the Court.[31] In the Defense Costs Order, the Court considered the applicability of the Federal exclusion for the purposes of allocating liability across all three towers of insurance. Here, the Court considers the applicability of Run-Off Endorsement 4 for the purpose of assessing liability under the express terms and conditions of Old Republic's policy. Thus, the law of the case doctrine does not apply as that issue was not previously litigated.

2. Judicial Estoppel

Old Republic is not judicially estopped from raising the Run-Off Endorsement 4 defense because this defense is not inconsistent with any previous arguments advanced by Old Republic and adopted by the Court. "Judicial estoppel acts to preclude a party from asserting a position inconsistent with a position previously taken in the same or earlier legal proceeding."[32] Judicial estoppel "also prevents a litigant from advancing an argument that contradicts a

[30] *HLTH Corp.*, 2008 WL 3413327, at *13.
[31] *Id*.
[32] *Motorola Inc. v. Amkor Tech.*, 958 A.2d 852, 859 (Del. 2008).

position previously taken that the court was persuaded to accept as the basis for its ruling."[33] Judicial estoppel, therefore, "operates only where the [litigant] contradicts another position that the litigant previously took *and* the Court was successfully induced to adopt in a judicial ruling."[34]

Judicial estoppel does not prevent Old Republic from asserting that Run-Off Endorsement 4 bars coverage because this argument does not contradict Old Republic's position in the Allocation Motion. Asserting that the insurance liability should be proportionally allocated among the various policies in the three insurance towers is different from asserting that Run-Off Endorsement 4 bars coverage. The former contention was that 23% of the total liability for the defense costs was attributable to the Synetic tower based on the alleged dates of the underlying Wrongful Acts. The later contention posits that Run-Off Endorsement 4 bars liability to Old Republic specifically, irrespective of the total amount of coverage liability within the Synetic tower. It is consistent for Old Republic to argue, on the one hand, that some degree of liability is associated with the Synetic Tower, in so far as allocation is concerned in this motion, while arguing that coverage under its policy within the Synetic Tower is bared by a specific provision in the policy.

Moreover, the Court denied the Allocation Motion. Thus, even if Old Republic's arguments were inconsistent, judicial estoppel would not be a

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[33] *Id*.

[34] *Id*. at 859-60 (quoting *Siegman v. Palomar Med. Techs., Inc*., 1998 WL 409352, at *3 (Del. Ch. Jul. 13, 1998) (emphasis in original)).

procedural bar because the Court did not adopt Old Republic's position. Old Republic is not advancing inconsistent positions and the Allocation Motion was denied. Thus, judicial estoppel does not operate as a procedural bar here.[35]

3. Waiver

Old Republic has not waived its right to assert coverage defenses because it never intentionally and voluntarily relinquished its right to assert defenses. Importantly, HLTH's earlier Motion to Enforce was not directed at Old Republic, and Old Republic relied on HLTH's assertion that its defense costs would not be great enough to trigger Old Republic's policy. In the Joint Statement of Facts and during oral argument, HLTH conceded that it did not direct its earlier Motion to Enforce at Old Republic because at the time it believed that it would not need the coverage provided by Old Republic's policy.[36]

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[35] *Id*.

[36] The Joint Statement of Facts states:

> The Motion was not made against Old Republic because, at the time of the filing of the Motion, HLTH did not believe that Defense Costs (as that term in defined in the Synetic Policies) incurred in connection with the Indictment would reach the Old Republic policy in the Synetic Tower. At the time the Motion was made no demand for payment of Defense Costs has been made against Old Republic under the policy at issue in this motion by HLTH, and HLTH did not at that time expect to make such a demand.

Joint Statement of Facts at ¶ 27.

Waiver of a contractual right only applies where there is a "voluntary and intentional relinquishment of a known right."[37] "[Waiver] implies knowledge of all material facts and an intent to waive, together with a willingness to refrain from enforcing those contractual rights. The facts relied upon to prove waiver must be unequivocal."[38]

Here, the facts do not unequivocally prove that Old Republic voluntarily and intentionally waived its right to assert coverage defenses. Old Republic reasonably relied on HLTH's assertion that it did not anticipate invoking coverage under Old Republic's policy, and because HLTH's Motion to Enforce was not directed at Old Republic, it had no reason to respond. Moreover, the fact that Old Republic joined the Allocation Motion does not have a preclusive effect on Old Republic's ability to assert coverage defenses at this stage in the litigation. The Court does not find that Old Republic voluntarily and intentionally waived its right to assert all contract defenses when it joined the Allocation Motion.

4. Declaratory Judgment

Although it appears that Old Republic could have sought a declaratory judgment, it was not obligated to have done so.[39] The elements necessary for a party to seek declaratory relief are:

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[37] *Areoglobal Capital Mgmt., LLC v. Cirrus Indus., Inc*., 871 A.2d 428, 444 (Del. 2005) (quoting *Realty Growth Investors v. Council of Unit Owners*, 453 A.2d 450, 456 (Del. 1982)).
[38] *Id*.
[39] *See* Super. Ct. Civ. R. 57.

> 1) [There] must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; 2) [there] must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; 3) the controversy must be between parties whose interests are real and adverse; 4) the issue involved in the controversy must be ripe for judicial determination.[40]

Had Old Republic brought a motion for declaratory judgment at the time it joined the Allocation Motion, the motion might not have been ripe for judicial determination since HLTH's Motion to Enforce was not directed at Old Republic and HLTH affirmatively asserted that it was not likely to invoke its policy with Old Republic.

5. Motion for Reargument

Old Republic was also not required to have filed a motion for reargument pursuant to Super. Ct. Civ. R. 59(e) because Run-Off Endorsement 4 was not at issue in the Allocation Motion. Rule 59(e) is appropriate where the Court has "overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision."[41] Since Run-Off Endorsement 4 was not at issue in the Allocation Motion, a motion for reargument would not have been appropriate after the Court issued the Defense Costs Order.

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[40] *Moore v. Stango*, 1992 WL 114062, at *2 (Del. Super. May 08, 1992) (quoting *Schick Inc., v. ACTWU*, 533 A.2d 1235, 1238 (Del. Ch. 1987)).
[41] *Reid v. Hindt*, 2008 WL 2943373, at *1 (Del. Super. July 31, 200*).

6. Mend-the-Hold Doctrine

The "mend-the-hold" doctrine "bars a party who rejects a contract on certain specified grounds from changing position after litigation is filed when those grounds for rejection do not pan out."[42] Thus, the "mend-the-hold" doctrine is an equitable doctrine intended to prevent a party from asserting grounds for repudiating contractual obligations and then, in bad faith, asserting different grounds for repudiation once litigation has commenced and it becomes apparent the original grounds for repudiation will not work.[43] Assuming, without deciding, that the "mend-the-hold" doctrine is recognized in Delaware, it does not bar Old Republic from asserting that Run-Off Endorsement 4 precludes coverage because that assertion is not inconsistent from the Allocation Motion.

Here, the Court does not find that Old Republic has acted in bad faith nor has it changed reasons for refusing to pay a claim during this litigation. The Allocation Motion did not repudiate contractual obligations or assert coverage defenses, rather it sought to allocate contractual liability based upon the dates of overt acts alleged in the underlying Indictment. Old Republic now asserts a coverage defense that is separate and unique from the position it took in the Allocation Motion. Old Republic's current claim is based on specific contractual language, Run-Off Endorsement 4, that was not at issue in the Allocation Motion.

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[42] *Liberty Prop. Ltd. Partnership*, 2008 WL 1746974, at *14.
[43] *Harbor Ins. Co.*, 922 F.2d at 363.

B. RUN-OFF ENDORSEMENT 4 BARS COVERAGE FOR THE ADVANCEMENT OF DEFENSE COSTS

Run-Off Endorsement 4 applies to Old Republic's policy even though Run-Off Endorsement 4 is not contained in it. Old Republic argues, and HLTH does not dispute, that coverage under its policy extends only as far as coverage is granted in underlying policies.[44] Old Republic's policy states, in part, that "[i]n no event shall this policy grant broader coverage than would be provided by any of the Underlying Policies."[45] Run-Off Endorsement 4 is contained in the Zurich Policy. Within the Synetic Tower, the Zurich policy provides $10 million in coverage in excess of $80 million in the Synetic Tower and Old Republic's policy provides $10 million in coverage in excess of $90 million in the Synetic Tower. Thus, Run-Off Endorsement 4 applies to Old Republic's policy.[46]

Old Republic argues that Run-Off Endorsement 4 is an exclusion within the policy. Thus, Old Republic bears the burden of establishing that Run-Off Endorsement 4 bars coverage.[47] If any of the terms of Run-Off Endorsement 4 are ambiguous, the ambiguity must be resolved against the party seeking to

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[44] Joint Statement of Facts at ¶ 33.

[45] *Id*.

[46] *See Fed Ins. Co. v. Raytheon Co.*, 426 F.3d 491 (1st Cir. 2005) (holding that where an exclusionary provision bars coverage in an underlying policy, it will also bar coverage in an excess policy).

[47] *Deakyne v. Selective Ins. Co. of America*, 728 A.2d 569, 571 (Del. Super. 1997) (holding that once the insured shows that the alleged loss is within the coverage provisions of the insurance policy, "it then becomes the duty of the insurer to show that one of the policy exclusions apply.").

invoke the exclusion.[48] Moreover, "an exclusion clause in an insurance contract is construed strictly to give the interpretation most beneficial to the insured."[49]

HLTH argues that Old Republic failed to establish that Run-Off Endorsement 4 bars coverage because, HLTH asserts, there is no material difference between Run-Off Endorsement 4 and the Federal exclusion[50] at issue in the Defense Costs Order, which states, in relevant part, "[T]here shall be no coverage afforded by any provision of this policy for any actual or alleged Wrongful Act occurring after the effective time of the Transaction."[51] Run-Off Endorsement 4 states, in relevant part, "[The Underwriter] shall not be liable for Loss on account of any Claim based upon, arising out of, or attributable to any Wrongful Acts where all or any part of such acts were committed, attempted or allegedly committed or attempted subsequent to September 12, 2000."[52]

HLTH correctly observes that both provisions have a similar effect since both provisions provide cut-off dates that limit claims. Whatever similarity exists between the provisions, however, is substantially outweighed by the difference in the scope and reach of the exclusionary provisions. The Federal

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[48] *See, e.g., Penn Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146, 1150 (Del. 1997) (holding that the doctrine of *contra proferentem*, a rule of contract interpretation that states ambiguous terms in a contract must be construed against the party who proffers or puts forward those terms, must be applied to insurance contracts); *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 745 (Del. 1997) (holding that if "ambiguity exists in the contract, it is construed strongly against the insurer, and in favor of the insured, because the insurer drafted the language that is interpreted.").

[49] *Sun-Times Media Group, Inc. v. Royal & Sunalliance Ins. Co. of Canada*, 2007 WL 1811265, at * 11 (Del. Super. June 20, 2007).

[50] *See supra* FACTS ¶ 8.

[51] Joint Statement of Facts, at ¶ 7; *HLTH Corp.*, 2008 WL 3413327, at *3.

[52] Joint Statement of Facts, at ¶ 30.

exclusion applies only to claims "for any actual or alleged" Wrongful Acts occurring after the cut-off date, while Run-Off Endorsement 4 applies to claims "based upon, arising out of, or attributable to any Wrongful Acts where all or any part of such acts were committed, attempted or allegedly committed or attempted" after the cut-off date. Thus, the Federal exclusion only bars claims where the entire Wrongful Act is completed after the cut-off date. Run-Off Endorsement 4, however, requires no such complete action and may bar claims even where the underlying Wrongful Act was not entirely completed after the cut-off date.

In support of its broad reading of Run-Off Endorsement 4, Old Republic cites two federal cases. In *Bainbridge Mgmt., LP v. Travelers Cas. & Sur. Co. of Am*. the plaintiff sought coverage under a directors' and officers' liability insurance policy after the plaintiff pled guilty and admitted that it had engaged in a scheme to defraud beginning in 1995 and continuing until December, 2000.[53] The insurance policy in *Bainbridge* contained an exclusionary provision that excluded losses "arising out of or in any way related to any Wrongful Act committed or alleged to have been committed, in whole or in part, prior to October 6, 1998."[54]

The plaintiff insured in *Bainbridge* argued, notwithstanding the exclusionary provision, that it had wrongful act coverage from October 6, 1998 through December, 2001. The Court, on cross motions for summary judgment,

[53] 2006 WL 978880 (N.D. Ind. Apr. 10, 2006).
[54] *Id.* at *3.

disagreed with the insured and barred all coverage, even for the Wrongful Acts that occurred after the cut-off date in the policy.[55] The Court held that "the policy provides no independent coverage of Wrongful Acts that occur on or after October 6, 1998, and excludes coverage for Claims, in their entirety, that arise from or are related to any Wrongful Acts that occurred before that date."[56]

HLTH attempts to distinguish *Bainbridge* by arguing that, unlike the plaintiff in *Bainbridge*, it has not admitted when the Wrongful Acts occurred. HLTH's argument is not persuasive because the Court's holding in *Bainbridge* did not turn on the admission, but the language of the policy itself. The exclusionary provision in *Bainbridge* barred all claims "in their entirety" arising out of the scheme to defraud that was partially committed before the cut-off date regardless of whether there were certain acts committed in furtherance of the scheme to defraud after the cut-off date.[57] Similarly here, Run-Off Endorsement 4 contains clear language that excludes claims "arising out of" Wrongful Acts committed or allegedly committed, at least partially after September 12, 2000, regardless of whether certain acts in furtherance of the underlying conspiracy were committed before the cut-off date.

In *Champlain Enterprises, Inc. v. Chubb Custom Ins. Co*. the insurer denied coverage for a lawsuit alleging breach of fiduciary duty under ERISA, removal of fiduciaries under ERISA's equitable relief provision, and state law

[55] *Id*. at *4.
[56] *Id*.
[57] *Id*.

claims of breach of fiduciary duty, unjust enrichment, and waste and diversion of corporate assets.[58] The state law claims originated, in part, from the purchase, storage, and renovation of four World War II-era airplanes. The insurer based its decision to deny coverage on an exclusionary provision in the insurance contract that stated that it "shall not be liable for Loss on account of any Claim . . . based upon, arising from, or in consequence of Wrongful Acts or Interrelated Wrongful Acts which were committed, attempted or allegedly committed or attempted in whole or in part prior to May 20, 1999."[59] The plaintiff insured argued, however, that it should be covered for the claims based upon the alleged improper storage and renovations of the airplanes that occurred after May 20, 1999. The Court disagreed, holding that "[a]ny portion of the alleged improper storage and renovation not explicitly covered by the exclusion most certainly arise from the portion that is covered."[60]

HLTH argues that *Champlain Enterprises, Inc.* is distinguishable because it involved discrete acts for which the dates of their occurrence was easily discernable while the underlying conspiracy in the Indictment contains no such easily discernable dates. HLTH's argument is similarly unpersuasive because the specific dates the airplanes were renovated and stored was not dispositive to the Court's holding in *Champlain Enterprises, Inc*. Rather, the Court's holding was premised on the fact that the claims "ar[o]se from" acts that occurred within the

[58] 316 F. Supp. 2d 123 (N.D.N.Y. 2003).
[59] *Id.* at 127.
[60] *Id*. at 129.

exclusionary period regardless of whether certain acts occurred outside the exclusionary period.[61] Moreover, *Champlain Enterprises, Inc.* is illustrative, not because of the underlying allegations at issue there, but because the Court there barred all claims, even those for Wrongful Acts occurring outside the exclusionary period, because the broad language in the exclusionary provision acted as a complete bar.

Exclusionary provisions including "arising out of" language, such as those *Bainbridge* ("arising out of") and *Champlain Enterprises, Inc.* ("arising from") can, in certain instances, be broader than exclusionary provisions without such language.[62] The Federal exclusion in this case did not contain the "arising out of" or "arising from" language and, consequently, only acted as a bar to coverage for Wrongful Acts that occurred in their entirety after the cut-off date. This Court noted such in the Defense Costs Order, holding that "since Defendants have conceded that their respective towers of coverage have all been triggered, Defendants now cannot demonstrate that *all* of the allegations in the indictment fall outside of the coverage periods of their respective towers and therefore must advance defense costs." (emphasis added).[63] Moreover, "under Delaware law, the

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[61] *Id*.

[62] *See* Joseph P. Monteleone, *Directors' and Officers' Liability Insurance*, 686 Practising Law Institute (2003)(stating that exclusions limiting claims "based upon, arising from, attributable to, or in any way related, whether directly or indirectly to [some act are]. . . typically referenced as 'absolute' and [are] intended to have more far reaching application then the 'for' wording").

[63] *HLTH Corp.*, 2008 WL 3413327, at * 13 (emphasis added).

term 'arising out of' is broadly construed to require some meaningful linkage between the two conditions imposed in the contract."[64]

Such meaningful linkage between can be established here despite HLTH's assertions that there is no correlation between the dates of the overt acts alleged in the Indictment and underlying Wrongful Acts. Run-Off Endorsement 4 is triggered where "any Claim based, *arising out of* or attributable to any Wrongful Acts where all or *any part* of such acts were committed, attempted, or allegedly committed or attempted subsequent to September 12, 2000."[65] The question, therefore, is not when each overt act in the Indictment began and/or ended, as it was in the Allocation Motion; rather, the question is whether the claim arises out of any Wrongful Act, as described in the insurance contract, that was alleged or committed in whole or in part after September 12, 2000.[66] Thus, the hypothetical in Professor Shechtman's affirmation is immaterial to the ultimate issue *sub judice* because the Court need not determine whether the overt acts alleged in the Indictment were in fact completed by the various criminal defendants after September 12, 2000.

Further, unlike the Allocation Motion, Old Republic's assertion here is based upon specific contractual language. The Allocation Motion asked the Court to equate overt acts in the Indictment with Wrongful Acts as the term is

[64] *Pac. Sun Ins. Co. v. Liberty Mut. Ins. Co.*, 956 A.2d 1246, 1257 (Del. 2008).
[65] Joint Statement of Facts at ¶ 30 (emphasis added).
[66] *HLTH Corp.*, 2008 WL 3413327, at *10 (stating that overt acts listed in the Indictment are not synonymous with Wrongful Acts as described in the insurance contract).

described in the insurance contracts for the purpose of an allocation scheme not provided for in the parties' insurance contract. In the absence of a contractual provision requiring such, the Court denied the Allocation Motion because it refused to make the "leap[] in logic" the parties asserted.[67] Here, Old Republic relies on specific contractual provisions bargained for by sophisticated parties that require the Court to construe the language of those provisions. The Court does not have to make a leap in logic here because the Court is guided by the specific terms and conditions of Old Republic's policy.

In determining whether Run-Off Endorsement 4 bars coverage to HLTH, the Court must next determine whether HLTH seeks a claim that arises out of any Wrongful Acts where all or part of such acts were committed or allegedly committed subsequent to September 12, 2000. HLTH argues that this inquiry is impossible to make at this stage in the litigation because the exact dates of the Wrongful Acts cannot be discerned until the underlying criminal action is completed. HLTH, however, has already stipulated that its claim arises out of Wrongful Acts committed, attempted, or allegedly committed or attempted, in whole or in part after September 12, 2000. HLTH stipulated that "[t]he Wrongful Acts in the Indictment implicate . . . the Emdeon Tower."[68] The Emdeon Tower covers Wrongful Acts occurring after September 12, 2000. Thus, by implicating

[67] *HLTH Corp.*, 2008 WL 3413327, at *10.
[68] Joint Statement of Facts at ¶ 19.

the Emdeon Tower, HLTH has in effect acknowledged that its claim arises out of Wrongful Acts allegedly committed or attempted after September 12, 2000.[69]

HLTH argues that it could not have made such a stipulation because the term "wrongful act" and the word "alleged" are not defined in the Zurich Policy. HTLH's argument with respect to the definition of "wrongful act" is unpersuasive as "wrongful act" is expansively defined in the Synetic Policies, and Zurich is part of the Synetic Tower.[70] Although the word "alleged" is not defined, its meaning is unambiguous.[71] Thus, the Court applies its ordinary meaning.[72]

Finally, HLTH contends that, as a matter of public policy, Run-Off Endorsement 4 cannot act as a bar to recovery because such a rule would effectively grant prosecutors the discretion to exclude insurance coverage, and thereby limit defendants' resources, based on how the prosecutor pled the indictments. HLTH's argument is unpersuasive. While a prosecutor could exclude coverage based on how the prosecutor pled the indictments, the prosecutor could, in other cases, invoke coverage based on the pleadings. Moreover, HLTH would have this Court presume that prosecutors would plead indictments based on whether the defendant's insurance coverage could be invoked rather than plead

[69] Given that HLTH has stipulated that its claim arises out of Wrongful Acts where all or part of such acts were allegedly committed or attempted after September 12, 2000, the Court need not recite the numerous examples of Wrongful Acts in the Indictment that the Government alleges occurred after September 12, 2000.
[70] Joint Statement of Facts at ¶¶ 11, 28.
[71] *See, e.g.*, BLACK'S LAW DICTIONARY 74 (8th ed. 2004) (defining "alleged" as "asserted to be true as described").
[72] *Pac. Ins. Co*., 956 A.2d at 1255 (holding that where a term is unambiguous the Court will "give that term its plain and ordinary meaning").

indictments based upon the prosecutor's good faith belief in the truth of the averments contained therein. The Court declines to indulge in such a presumption.

VI. CONCLUSION

For the forgoing reasons, Plaintiff HLTH Corporation's "Motion to Enforce, or Alternatively, for Partial Summary Judgment to Enforce, This Court's July 31, 2008 Order to Advance Defense Costs Against Zurich American Insurance Company and Old Republic Insurance Company" is **DENIED** and Defendant's "Cross Motion for Summary Judgment" is **GRANTED.**

IT IS SO ORDERED.

Richard R. Cooch

oc: Prothonotary