IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

HLTH CORPORATION and EMDEON PRACTICE SERVICES, INC.,	)	
	)	C.A. No. 07C-09-102 RRC
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.	)	
Defendants.	)	

Submitted: August 7, 2009
Decided: August 31, 2009

On Defendant National Union Fire Insurance Company of Pittsburgh, PA, Fireman's Fund Insurance Company, RSUI Indemnity Company, Old Republic Insurance Company, and Axis Reinsurance Company's "Motion for Summary Judgment Based Upon Application of Prior Acts Exclusion." **DENIED**.

On Plaintiffs' "Cross Motion for Partial Summary Judgment to Enforce the Duty to Advance Defense Costs." **GRANTED**.

MEMORANDUM OPINION

John D. Balaguer, Esquire, Wilmington, Delaware, and Lawrence J. Bistany, Esquire, White and Williams, LLP, Philadelphia, Pennsylvania, Attorney *pro hac vice* for Defendant National Union Fire Insurance Company of Pittsburgh, PA.

J.R. Julian, Esquire, Law Offices of J.R. Julian, Wilmington, Delaware, Barry T. Bassis, Tressler, Soderstrom, Maloney & Priess, LLP, New York, New York, Attorney *pro hac vice* for Defendant Fireman's Fund Insurance Company.

Robert J. Katzenstein, Esquire and Etta R. Wolfe, Esquire, Smith, Katzenstein & Furlow, LLP, Wilmington, Delaware, Joan M. Gilbride, Esquire and Robert A. Benjamin, Esquire, Kaufman Borgeest & Ryan, LLP, Valhalla, New York, Attorneys *pro hac vice* for Defendant RSUI Indemnity Company.

Neal J. Levitsky, Esquire and Seth A. Niederman, Esquire, Fox Rothschild, LLP, Wilmington, Delaware, Michael Goodstein, Esquire and Matthew J. Burkhart, Esquire, Bailey Cavalieri, LLC, Columbus, Ohio, Attorneys *pro hac vice* for Defendant Old Republic Insurance Company.

Robert J. Katzenstein, Esquire, Smith, Katzenstein & Furlow, LLP, Wilmington, Delaware, William E. Smith, Esquire, Wiley Rein, LLP, Washington, D.C., Attorney *pro hac vice* for Defendant Axis Reinsurance Company.

David J. Baldwin, Esquire, W. Harding Drane, Esquire and Jennifer C. Wasson, Esquire, Potter Anderson & Corroon, LLP, Wilmington, Delaware, William G. Passannante, Esquire and Alex D. Hardiman, Esquire, Anderson Kill & Olick, P.C., New York, New York, Attorneys *pro hac vice* for Plaintiffs HLTH Corporation and Emdeon Practice Services, Inc.

COOCH, J.

I. INTRODUCTION

This motion for summary judgment filed April 30, 2009 by Defendant National Union Fire Insurance Company of Pittsburgh, PA ("National Union"), joined by Fireman's Fund Insurance Company, RSUI Indemnity

Company, Old Republic Insurance Company, and Axis Reinsurance Company (collectively "Defendants"), asserts that a "Prior Acts Exclusion" in the applicable insurance contract bars claims by Plaintiffs HLTH Corporation and Emdeon Practice Services, Inc. (collectively "HLTH" or "Plaintiffs") for the advancement and reimbursement of defense costs.[1] The Prior Acts Exclusion at issue in the motion *sub judice* is included in each Defendant's Directors' and Officers' ("D&O") liability insurance policy in the tower of insurance maintained by Emdeon for the year commencing on September 13, 2005, and ending on September 13, 2006 (hereinafter "Emdeon 2005-2006 Tower"). All Defendants' D&O policies follow form to National Union, and all have similar Prior Acts Exclusions. In its cross motion for summary judgment, filed June 3, 2009, HLTH seeks coverage under its D&O policies with Defendants for the advancement of defense costs.

HLTH in this lawsuit is seeking insurance coverage for the indemnification of defense costs and expenses of its former directors and officers

[1] S*ee generally* the "FACTS" section of this opinion, at 5-32, *and HLTH Corp. v. Agricultural Excess & Surplus Ins. Co.*, 2008 WL 3413327 (Del. Super. July 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), *and HLTH Corp. v. Clarendon Nat. Ins. Co.*, 2009 WL 2215126 (Del. Super. July 15, 2009) (holding that an exclusionary provision in Defendant Old Republic Insurance Company's insurance contract acted as a bar to recovery where HLTH's claims arose out of Wrongful Acts committed after the cut-off date provided in the exclusionary provision). A companion decision, *HLTH Corp. v. Fireman's Fund Ins. Co. et al.*, C.A. No. 07-09-102 RRC, issued today, August 31, 2009, on Fireman's Fund Insurance Company's "Motion for Summary Judgment Based Upon the Prior Notice Provision of the Primary Policy," relies on the same stipulation of facts.

currently under indictment by the Federal Government in the District of South Carolina. The Government alleges that Plaintiffs' former directors and officers engaged in a scheme to commit securities, mail, and wire fraud, beginning in 1997 and continuing through 2003, and a money laundering conspiracy that began in 1997 and continued through 2004. To date, the defense costs incurred by Plaintiffs' former directors and officers in the South Carolina criminal litigation are enormous, totaling about $110,000,000. A trial is apparently scheduled for January 2010.

Before this Court is Defendants' "Motion for Summary Judgment Based Upon Application of Prior Acts Exclusion," and HLTH's subsequent "Cross Motion for Partial Summary Judgment to Enforce the Duty to Advance Defense Costs." The issue presented is whether a Prior Acts Exclusion set forth in the Emdeon 2005-2006 Tower, and included in each Defendants' policy, acts as a complete bar to coverage for all claims where any one such claim alleges any Wrongful Act that occurred prior to February 10, 1999. All parties agree that there are no genuine issues of material fact.

For the reasons set forth below, this Court finds that the Prior Acts Exclusion does not bar HLTH's claims for coverage. Thus, Defendants' "Motion for Summary Judgment Based Upon Application of Prior Acts Exclusion" is **DENIED** and HLTH's "Cross Motion for Partial Summary Judgment to Enforce the Duty to Advance Defense Costs" is **GRANTED**.

II. FACTS[2]

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

2. On July 23, 1999 Old Medical Manager was acquired by Synetic, Inc. ("Synetic"), which assumed the name Medical Manager Corporation ("New MMC") and changed the name of its wholly-owned subsidiary Older Medical Manager to Medical Manager Health Systems, Inc. The following year, on September 12, 2000, Synetic/New MMC was acquired by Healtheon WebMD Corporation ("WebMD"), which was subsequently renamed Emdeon Corporation ("Emdeon") and most recently changed its name to HLTH Corporation ("HLTH"). In September 2006, HLTH sold Old Medical Manager (then known as Emdeon Practice Services, Inc.) to Sage Software, Inc.

3. Each of the companies, Old Medical Manager, Synetic and Emdeon, had its own program of D&O insurance, referred to here as a "tower." The tower of insurance purchased by Old Medical Manager, as a stand-alone company, is referred to herein as the "MMC Tower." The tower of insurance purchased by Synetic as a stand-alone company in 1997 (the "1997 Synetic Policies") and the run-off coverage (the "Run-Off Coverage") later purchased by WebMD, the surviving corporation of the merger between Synetic and WebMD Corporation (which later changed its name to Emdeon and then HTLH) that became effective simultaneous with the close of such merger, are collectively referred to herein as the "Synetic Tower."

4. At the time that Synetic purchased the 1997 Synetic Policies, Synetic did not own, was not owned by, and was not under common control with either Medical Manager or Emdeon. Effective with its acquisition of Synetic, WebMD, as the surviving corporation, purchased the Run-Off Coverage, which extended the period during which claims may be reported under the 1997 Synetic Policies for a

[2] The factual background of this case has been taken nearly verbatim from the "Joint Statement of Undisputed Facts of Plaintiffs and Defendants, National Union Fire Insurance Company of Pittsburgh, PA, Fireman's Fund Insurance Company, RSUI Indemnity Company, Old Republic Insurance Company, and Axis Reinsurance Company," Docket 189, submitted at the request of the Court by Plaintiffs and Moving Defendants on August 7, 2009.

period of six years following the merger until September 12, 2006. The Run-Off Coverage states in part:

ENDORSEMENT # 15

* * *

Issued to MEDICAL MANAGER CORPORATION f/k/a SYNETIC, INC.

* * *

I.

The Section of the policy entitled INSURING AGREEMENTS is deleted in its entirety and Replaced by the following:

INSURING AGREEMENTS

* * *

COVERAGE B: CORPORATE LIABILITY INSURANCE

This policy shall pay the Loss of the Company, or in the event that Company no longer exists as a legal entity, the HEALTHEON WEBMD CORPORATION arising from a:

(i) Securities Claim first made against the Company, or

(ii) Claim first made against the Directors or Officers,

during the Policy Period or the Discovery period (if applicable) and reported to the Insurer pursuant to the terms of this Policy for any actual or alleged Wrongful Act occurring on or prior to the Effective Time, but, in the case of (ii) above, only when and to the extent that the Company, or **HEALTHEON WebMD CORPORATION**, has indemnified the Directors or Officers for such Loss pursuant to law, common or statutory, or contract, or the Merger Agreement or the charter or by-laws of the Company or **HEALTHEON WebMD CORPORATION**, or any Subsidiary or affiliate thereof duly effective under such law which determined and defines such rights of indemnity. The Insurer shall, in accordance with and subject to the section of this policy entitled DEFENSE COSTS, SETTLEMENTS, JUDGMENTS (INCLUDING THE ADVANCEMENT OF DEFENSE COSTS), advance Defense Costs of such Claim prior to its final disposition.

* * *

III.

It is further understood and agreed that the Section of the policy entitled DEFENSE COSTS, SETTLEMENTS, JUDGMENTS (INCLUDING THE ADVANCEMENT OF DEFENSE COSTS), in its entirety, is amended by deleting the term "Company" wherever it appears and substituting in lieu thereof the terms, "Company, or **HEALTHEAON WebMD CORPORAION**, or any Subsidiary or affiliate thereof";

IV.

It is further understood and agreed that paragraph (i) of the Section of the policy entitled EXCLUSIONS is amended as follows:

(1) The term "Company" is hereby deleted wherever it appears and replaced by the term, "Company, or **HEALTHEON WebMD CORPORATION**, or any subsidiary thereof.

Except as otherwise provided by Run-Off Coverage endorsement, the term "Company" in the 1997 Synetic Policies means Synetic and any Subsidiary thereof, as further defined therein. In this action, HLTH seeks coverage pursuant to the Run-Off Coverage endorsement to the 1997 Synetic Policies.

5. The named insured in the MMC Tower policies is Old Medical Manager, and the MMC Tower policies have a policy period of January 30, 1999 to July 23, 2005.

6. At the time that Old Medical Manager purchased the MMC Tower in 1999, Old Medical Manager did not own, was not owned by, and was not under common control with either Synetic, Inc. or Emdeon Corporation. Subsequent to Old Medical Manager's purchase of the MMC Tower, Old Medical Manager remained a separate and distinct corporate entity as a wholly-owned subsidiary of Synetic, WebMD, Emdeon and HLTH, respectively.

7. By July 21, 2005, the date notice of this matter was first provided to the MMC Tower, Synetic had acquired Old Medical Manager as a subsidiary in 1999, and Synetic had been merged into WebMD in 2000, with Old Medical Manager continuing as WebMD's subsidiary. In 2005, WebMD was renamed Emdeon. In September

2006, HLTH sold Old Medical Manager but has full power of attorney to assert claims and recover proceeds on Old Medical Manager's behalf.

8. Emdeon purchased directors and officers liability insurance policies from Nation Union Fire Insurance Company of Pittsburgh, PA. (the "National Union 2003-2004 Policy"), Chubb Group of Insurance Companies, Fireman's Fund Insurance Company, RSUI Indemnity Company, C.N.A Insurance Company, Allied World Assurance Company, Old Republic Insurance Company and Axis Reinsurance Company, each with a policy period commencing on September 13, 2003, and ending on September 13, 2004 (collectively the "Emdeon 2003-2004 Tower").

9. An email (the "Emdeon Email") sent on behalf of Plaintiffs by their broker to Defendant Nation Union on September 10, 2003 stated:

> We just had one point of clarification for the renewal quote stemming from the 'no notice of circumstance for the 2002-2003 policy' verbiage on the quote. We assume that by foregoing notice to the expiring policy that we are not jeopardizing our ability to notice the 2003-2004 policy if appropriate. We assume the answer is yes as you are protecting yourself from having two aggregates exposed, but just looking for confirmation.

An email sent on behalf of Defendant National Union to Plaintiffs' broker on September 10, 2003 in response to the Emdeon Email stated:

"Yes, we are not excluding the claims from the on-going policy."

10. The other insurers who had issued insurance policies as part of the Emdeon Towers are not identified on the emails referred to in the preceding paragraph as being copied on such emails. There was no bar to Emdeon providing a notice of circumstances under the 2004-2005 Emdeon Tower.

11. Upon expiration of the Emdeon 2003-2004 Tower, Emdeon purchased directors and officers liability insurance policies from National Union Fire Insurance Company of Pittsburgh, PA. (the "National Union 2004-2005 Policy"), Federal Insurance Company, Fireman's Fund Insurance Company, RSUI Indemnity Company, Old Republic Insurance Company and Axis Reinsurance Company, each with a policy period commencing on September 13, 2004 and ending on September 13, 2005 (collectively the "Emdeon 2004-2005 Tower"). The National Union 2004-2005 Policy states, amongst other things:

> If during the **Policy Period** or during the **Discovery Period** (if applicable) an **Organization** or an **Insured** shall become aware or any circumstanced which may reasonably be expected to give rise to a **Claim** being made against an **Insured** and shall give written notice to the **Insurer** of the circumstances, the **Wrongful Act** allegations anticipated and the reasons for anticipating such a **Claim**, with full particulars as to dates, persons and entities involved, then a **Claim** which is subsequently made against such **Insured** and reported to the **Insurer** alleging, arising out of, based upon or attributable to such circumstances or alleging any **Wrongful Act** which is the same as or related to any **Wrongful Act** alleged or contained in such circumstances, shall be considered made at the time such notice of such circumstances was given.

12. Upon expiration of the Emdeon 2004-2005 Tower, Emdeon purchased directors and officers liability insurance policies from National Union Fire Insurance Company of Pittsburgh, PA. (the "Emdeon Tower Nation Union Policy"), Federal Insurance Company, Fireman's Fund Insurance Company (the "Emdeon Tower FFIC Policy", RSUI Indemnity Company (the "Emdeon Tower RSUI Policy"), Old Republic Insurance Company (the "Emdeon Tower Old Republic Policy") and Axis Reinsurance Company (the "Emdeon Tower Axis Policy"), each with a policy period commencing on September 13, 2005 and ending on September 13, 2006 (collectively "the Emdeon 2005-2006 Tower"). Notice of the insurance claim at issue in the pending motions for which this stipulation is submitted was provided under the Emdeon 2005-2006 Tower of which the insurance policies listed in this paragraph form a part.

13. The Emdeon Tower National Union Policy states that it "was issued in reliance upon the Application and the statements therein which form a part of this policy." The term "Application is defined in part as:

> [E]ach and every signed application, any attachments to such applications, other materials submitted therewith or incorporated therein and any other documents submitted in connection with the underwriting of this policy or the underwriting of any other directors and officers (or equivalent) liability policy issued by the Insurer, or any of its affiliates, of which this policy is a renewal, replacement or which it succeeds in time; and any public documents filed by an **Organization** with the Securities and Exchange Commission (SEC) (or any similar federal, state, local or foreign regulatory agency), including, but not limited to, the **Organization's** Annual Report (s), 10Ks, 10Qs, 8Ks and proxy

statements and certifications relating to the accuracy of the foregoing.

ALL OTHER TERMS, CONDITIONS AND EXCLUSIONS REMAIN UNCHANGED.

15. The Emdeon Tower National Union Policy states:

1. Insuring Agreements

With respect to Coverage A, B and C, solely with respect to Claims first made against an Insured during the Policy Period or the Discovery Period (if applicable) and reported to the Insurer pursuant to the terms of this policy, and subject to the other terms, conditions and limitations of this policy, this policy affords the following coverage:

* * *

COVERAGE B: ORGANIZATION INSURANCE

* * *

(ii) *Indemnification of an* ***Insured Person****:* This policy shall pay the **Loss** of an **Organization** arising from a **Claim** made against an **Insured Person** (including an **Outside Entity Executive**) for any **Wrongful Act** of such **Insured Person**, but only to the extent that such **Organization** has indemnified such Insured **Person**.

15. The Emdeon Tower Nation Union Policy provides the first $10 million of insurance in the Emdeon Tower, subject to a $5 million retention for all claims except "Securities Claims That Contain a Medical Manager Claim, which such claims are subject to a $10 million retention."

16. Endorsement number 13, entitled "Amend Retention", of the Emdeon Tower National Union Policy states:

In consideration of the premium charged, it is hereby understood and agreed that, notwithstanding any other provision of this policy (including any endorsement attached hereto whether such endorsement precedes or follows this endorsement in time or sequence), this policy is hereby amended as follows:

1. Item 4. of the Declarations, entitled RETENTION is deleted in its entirety and replaced with the following:

RETENTION: Not applicable to **Non-Indemnifiable** Loss and certain **Defense Costs** (See Clause 6 for details.)

4(a) **Securities Claims** (other than **Securities Claims** that contain a Medical Manager **Claim**):
$5,000,000

4(b) **Employment Practices Claims**: $5,000,000

4(c) **Securities Claims** that contain a **Medical Manager Claim**: $10,000,000

4(d) All other **Claims**: $5,000,000

2. Clause 6. RETENTION CLAUSE is amended . . .

* * *

For purposes of this endorsement, "**Medical Manager Claim**" means any **Claim** alleging, arising out of, based upon, attributable or related to the investigation of the **Organization** conducted by the United States Attorney for the District of South Carolina and the formal investigation of the **Organization** conducted by the SEC, as referenced in the **Organization's** 10-Q for the period ended June 30, 2004, principally regarding issues of financial reporting for Medical Manager Corporation, a predecessor of the **Organization** (by its merger into the **Organization** in September 2000), and the **Organization's** Medical Manager Health Systems subsidiary.

ALL OTHER TERMS, CONDITIONS AND EXCLUSIONS REMAIN UNCHANGED.

17. The Organization's 10-Q for the period ended June 30, 2004, referenced in the definition of "Medical Manager Claim," states with regard to the investigation that:

> *The ongoing investigations by the United States Attorney for the District of South Carolina and the SEC could negatively impact our company and divert management attention from our business operations*.

> The United States Attorney for the District of South Carolina is conducting an investigation of our company. Based on the information available to WebMD as of the date of this Quarterly Report, we believe that the investigation relates principally to issues of financial reporting for Medical Manager Corporation, a predecessor of WebMD (by its merger into WebMD in September 2000), and our Medical Manager Health Systems subsidiary; however, we cannot be sure of the investigation's exact scope or how long it may continue. In addition, WebMD understands that the SEC is conducting a formal investigation into this matter. Adverse development in connection with the investigations, if any, including as a result of matters that the authorities or WebMD may discover, could have a negative impact on our company and on how it is perceived by investors and potential investors and customers and potential customers. In addition, the management effort and attention required to respond to the investigations and any such developments could have a negative impact on our business operations. WedMD intends to continue to fully cooperate with the authorities in this matter. While we are not able to estimate, at this time, the amount of the expenses that we will incur in connection with the investigations, we expect that they may continue to be significant.

18. Prior to being amended by Endorsement 13 of the Emdeon Tower National Union Policy, Item 4 of the Declarations provided as follows:

> RETENTION: Not applicable to **Non-Indemnifiable** Loss and certain **Defense Costs** (See Clause 6 for details.)
>
> 4(a) **Securities Claims**: $5,000,000
>
> 4(b) **Employment Practices Claims**: $5,000,000
>
> 4(c) All other Claims: $5,000,000

19. The 2003-2004 National Union Policy included an across-the-board $10 million retention, or specifically the following retention amounts: **Securities Claims**: $10,000,000; Employment **Practices Claims**: $10,000,000; and All Other **Claims**: $10,000,000. The premium assessed for the 2003-2004 National Union Policy was $1,320,000 with a New Jersey surcharge of $3,300.

20. The 2004-2005 National Union Policy was the first National Union Policy issued to Emdeon to incorporate the Amend Retention Endorsement with the same retentions set forth in the Amend

Retention Endorsement to the Emdeon National Union Policy, that is, a retention of $5 million each for **Securities Claims**, **Employment Practices Claims** and All Other **Claims** and a &10 million retention for **Securities Claims** that contain a **Medical Manager Claim**. The premium assessed for the 2004-2005 National Union Policy was $1,060,500 with a New Jersey surcharge of $10,605.

21. The premium assessed for the Emdeon Nation Union Policy, that is in effect for the 2005-2006 Emdeon Tower policy period, was $975,000 with a New Jersey surcharge of $17, 063.

22. The 10-K for the year ended December 31, 2004, filed by Emdeon Corporation and part of the Application for each insurance policy in the Emdeon 2005-2006 Tower included in part the following information under the heading "Item 3. Legal Proceedings:

> **Investigations by United States Attorney for the District of South Carolina and the SEC**
>
> As previously disclosed, the United States Attorney for the District of South Carolina is conducting an investigation of our company, which we first learned about on September 2, 2003. On that date, Federal Bureau of Investigation and Internal Revenue Service agents executed search warrants at our corporate headquarters in Elmwood Park, New Jersey and the offices of Medical Manager Health Systems, currently known as WebMD Practice Services, Inc. (a subsidiary of WebMD Corporation), in Tampa, Florida and Alachua, Florida and delivered subpoenas for documents and financial records. Based on the information available to us, we believe that the investigation relates principally to issues of financial accounting improprieties for Medical Manager Corporation, a predecessor of WebMD (by its Merger into WebMD in September 2000), and our WebMD Practice Services subsidiary; however, we cannot be sure of the investigation's exact scope or how long it will continue. Included among the materials removed or subject to subpoena are records relating to $5.5 million restatement of revenue by Medical Manager Corporation in August 1999 and to acquisitions by our WebMD Practice Service subsidiary of other companies, most of which were dealers of Medical Manager products and services.
>
> In connection with this matter, WebMD has uncovered evidence that, prior to Medical Manager's acquisition by WebMD Corporation in September 2000, Medical Manager's dealer acquisition program was improperly used to artificially inflate the

revenue, earnings and goodwill of Medical Manager. Also, as we have stated in the past, WedMD has evidence of kickback payments by former dealers to certain former employees of Medical Manager who were responsible for the acquisition program. WebMD has commenced lawsuits against two of those former employees. These kickback payments appear to have continued until sometime 2002.

It is our understanding the investigation by the U.S. Attorney's Office also relates to allegations of improper revenue recognition practices in connection with system sales in the Medical Manager business. WebMD has identified evidence that some employees has in the past engaged in practices to improperly recognize revenue in connection with system sales.

The United States Attorney for the District of South Carolina announced on January 10, 2005, that three former employees of WebMD Practice Services, Inc. have each agreed to plead guilty to one count of tax evasion for acts committed while they were employed by WebMD Practice Services, Inc. and its predecessor. The three former employees include a Vice President of WebMD Practice Services responsible for acquisitions who was terminated for cause in January 2003; an executive who served in various accounting roles at WebMD Practice Services until his resignation in March 2002; and a former independent Medical Manager dealer who was a paid consultant to Medical Manager until the termination of his services in 2002.

According to the Informations (sic), Plea Agreements and Factual Summaries filed by the Untied States Attorney in, available from, the District Court for the District of South Carolina-Beaufort Division, on January 7, 2005, the three former employees and other, as yet unnamed co-schemers were engaged in schemes between 1997 and 2002 that included . . . fraudulent accounting practice to inflate artificially the quarterly revenues and earnings of WebMD Practice Services, Inc., when it was an independent public company called Medical Manager Corporation from 1997 through 1999, when and after it became acquired by Synetic, Inc in July, 1999 and when and after it became a subsidiary of WebMD Corporation in September 2000. Medical Manager Corporation ceased being a separate public company on September 12, 2000 and filed its last quarterly report with the Securities and Exchange Commission for the quarter ended March 31, 2000.

23. In the application for the Emdeon 2005-2006 policies, Emdeon did not inform the insurers that it had given a notice of circumstance of the Singer Investigation to the MMC Tower by letter dated July 21, 2005.

24. The Emdeon Tower National Union Policy states:

> the **Insurer** shall not be liable to made any payment for **Loss** in connection with: (i) any of the **Claim(s)**, notices, events, investigations or actions referred to in any of items (1) through (4) below; (hereinafter "**Events**"); (ii) the prosecution, adjudication . . . or defense of: (a) any **Event (s)**; or (b) any **Claim(s)** arising from any **Event(s)**; or (iii) any **Wrongful Act**, underlying facts, circumstances, acts or omissions in any way relating to any **Event(s)**.
>
> EVENTS
>
> (1) Larry Ackerman v. WebMD – Claim #367-002573-001
> (2) Gary Werschmidt v. WebMD – Claim#367-002629-001
> (3) Porex Mammory Implant Litigation
> (4) Envoy Securities Litigation

25. The Emdeon National Union Policy Declarations state in part as follows:

> NOTICE: THE INSURER DOES NOT ASSUME ANY DUTY TO DEFEND. THE INSURER MUST ADVANCE DEFENSE COSTS, EXCESS OF THE APPLICABLE RETENTION, PURSUANT TO THE TERMS HEREIN PRIOR TO THE FINAL DISPOSTION OF A CLAIM.

26. The Emdeon Tower National Union Policy also states:

> 8. DEFESNSE COSTS, SETTELEMENTS, JUDGMENTS (INCLUDING THE ADVANCEMENT OF DEFENSE COSTS)
>
> Under Coverages A, B and C of this policy, except as hereinafter stated, the **Insurer** shall advance, excess of any applicable retention amount, covered **Defense Costs** no later than ninety (90) days after the receipt by the **Insurer** of such defense bills. Such advance payments by the **Insurer** shall be repaid to the Insurer by each and every **Insured** or **Organization**, severally according to their respective interests, in the event and to the extent that any such **Insured** or **Organization** shall not be entitled under this policy to payment of such **Loss**.

27. Endorsement number 3 to the Emdeon Tower National Union Policy, entitled "Prior Acts Exclusion", states:

> In consideration of the premium charged, it is hereby understood and agreed that the **Insurer** shall not be liable to make any payment for **Loss** in connection with any **Claim** made against an Insured alleging any **Wrongful Act** which occurred prior to February 10, 1999. This policy only provides coverage for **Wrongful Acts** occurring on or after February 10, 1999 and prior to the end of the **Policy Period** and otherwise covered by this policy. **Loss** arising out of the same or related **Wrongful Act** shall be deemed to arise from the first such same or related **Wrongful Act**.
>
> ALL OTHER TERMS, CONDITIONS AND EXCLUSIONS REMAIN THE SAME.

28. The 2003-2004 and the 2004-2005 National Union Policies incorporated the Prior Acts Exclusion with a February 10, 1999 date.

29. "Loss" is defined to include "Defense Costs."

30. The Emdeon Tower National Union Policy defines "Wrongful Act" in part as:

> (aa) "Wrongful Act" means:
>
> (1) any actual or alleged breach of duty, neglect, error, misstatement, misleading statement, omission or act or any actual or alleged **Employment Practices Violation**.
>
> (i) with respect to any **Executive** of an **Organization**, by such **Executive** in his or her capacity as such or any matter claimed against such **Executive** solely by reason of his or her status as such;

31. The Emdeon Tower National Union Policy also states, amongst other things:

> 4. **EXCLUSIONS**
>
> The **Insurer** shall not be liable to make any payment for **Loss** in connection with any **Claim** made against an **Insured**:

* * *

(d) alleging, arising out of, based upon or attributable to the facts alleged, or to the same or related **Wrongful Acts** alleged or contained in any **Claim** which has been reported, or in any circumstances of which notice has been given, under any policy of which this policy is a renewal or replacement or which it may succeed in time; . . .

32. The Emdeon Tower FFIC Policy states:

The insurance coverage afforded by the Policy shall apply in conformance with the definitions, terms, conditions, limitations, warranties and exclusions of the Primary Policy, except as otherwise provided in the definition, terms, conditions, limitations, warranties and exclusions in this Policy.

33. The Emdeon Tower RSUI Policy states, among other things:

This policy shall provide the Insured with insurance during the Policy Period excess of all applicable Underlying Insurance. Except as specifically set forth in the provisions of this policy, the insurance afforded hereunder shall apply in conformance with the provisions of the applicable Primary Policy or, to the extent coverage is further limited or restricted thereby, any other applicable Underlying Insurance.

* * *

Except as otherwise provided herein, this policy is subject to the same warranties, terms, conditions, exclusions and definitions as are contained in or as may be added to the Primary Policy and/or any other Underlying Insurance.

34. The Emdeon Tower RSUI Policy also states, amongst other things:

The Insurer shall not be liable to make any payment in connection with any claim made against any Insured alleging, arising out of, based upon or attributable to, directly or indirectly, the same or essentially the same facts underlying or alleged in any matter which, prior to the inception date of this policy, has been the subject of notice to any insurer of a claim, or a potential or threatened claim, or an occurrence or circumstances that might

give rise to a claim under any policy of which this insurance is a renewal or replacement of which it may succeed in time.

35. The Emdeon Tower Old Republic Policy states:

The Insurer 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, 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.

36. The Emdeon Tower Old Republic Policy also states:

In consideration of the premium charges it is understood and agreed the Insurer shall not be liable to make payment for Loss in connection with any Claim based upon, arising out of or in any way related to any fact, circumstance, Wrongful Act or claim which had been the subject of a written notice under any other policy which incepted prior to the inception of the Policy Period under this Policy.

37. The Emdeon Tower Axis Policy states:

With respect to each Insurance Product, the Insurer shall provide the Insureds with insurance during the Policy Period excess of all applicable Underlying Insurance. Except as specifically set forth in the provisions of this Policy, the insurance afforded hereunder shall apply in conformance with the provisions of the applicable Primary Policy and, to the extent coverage is further limited or restricted thereby, to any other applicable Underlying Insurance. In no event shall this Policy grant broader coverage than would be provided by the most restrictive policy constituting part of the applicable Underlying Insurance.

The insurance afforded under the Policy shall apply only after all applicable Underlying Insurance with respect to an Insurance Product has been exhausted by actual payment under such

> Underlying Insurance, and shall only pay excess of any retention or deductible amounts provided in the Primary Policy and other exhausted Underlying Insurance.

38. The Emdeon Tower Axis Policy also states:

> PRIOR NOTICE EXCLUSION . . .
>
> In consideration of the premium charged, it is agreed that the Insurer shall not be liable for any amount from any Claim which is based upon, arising from, or attributable to or in [] consequence of any fact, circumstance or situation which has been the subject of any written notice given under any other policy of insurance.

39. The Emdeon Tower Axis Policy further states that "[t]his Policy does not provide coverage for any Claim not covered by the Underlying Insurance . . ."

40. The "Underlying Action," captioned United States of America v. Michael Singer, et al., Criminal No. 9:05-928 (D.S.C.), was commenced by an initial indictment returned by a federal grand jury on September 1, 2005, which indictment was sealed.

41. On December 15, 2005, a federal grand jury returned a First Superseding Indictment against ten former Old Medical Manager directors and officers.

42. On February 27, 2007, the grand jury returned a Second Superseding Indictment (the "Indictment") against nine former directors and officers of Old Medical Manager (omitting one, Maxie L. Juzang, who was dismissed from the case." The "underlying defendants" to the Indictment were Mickey Singer, John Kang, John Sessions, Lee Robbins, Charlie Hutchinson, David Ward, Rick Karl, Frank Krieger, and Ted Dorman. Charges against one of the defendants, Lee A. Robbins, were dismissed after his death.

43. The Indictment includes many of the same facts and charges as the first superseding indictment, including charges 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).

44. The Indictment charges the following seven counts: Count 1 – Conspiracy, 18 U.S.C. § 371; Count 2 – Conspiracy to

Launder Monetary Instruments, 18 U.S.C. § 1956(h); and Counts 3 -7 – Money Laundering.

45. The first two counts of the Indictment were charges against all nine defendants, while only defendant John Sessions was charged in the five substantive money laundering counts.

46. Counts Three through Seven charge substantive money laundering crimes in violation of 18 U.S.C. § 1957.

47. There is also a forfeiture allegation against all nine defendants, which seeks disgorgement of $34, 346, 974 "representing the total amounts of proceeds from the conspiracy . . . alleging in Count 1."

48. Count One asserts the defendants engage in a wire fraud, mail fraud and securities fraud conspiracy (in violation of 18 U.S.C. § 371) between February 1997 and at least 2003, "the exact dates being unknown," by fraudulently inflating the earnings of Old Medical Manager and WebMD and concealing their fraudulent conduct by making false statements in public filings and to auditors.

49. Count Two asserts a money laundering conspiracy, in violation of 18 U.S.C. § 1956(h), which took place between 1997 and at least 2004, "the exact dates being unknown," and pursuant to which the defendants agreed to engage in monetary transactions with proceeds from sales of Old Medical Manger stock made at fraudulently inflates prices. [3]

50. The Indictment states amongst other things:

> Beginning in or about February 1997, and continuing through at least 2003, the exact dates being unknown to the grand jury, . . . defendants . . . did knowingly and willfully conspire and agree with each other . . . to devise a scheme and artifice to defraud holders of Medical Manager and WebMD securities, members of the investing public and others . . ."

51. The Indictment states amongst other things that "the principal purposes of the conspiracy" included:

[3] By Order dated August 10, 2009, the United States District Court for the District of South Carolina dismissed Count 2 of the Second Superseding Indictment without prejudice. Docket 190 (Letter to the Court from David J. Baldwin dated August 10, 2009).

(a) to manipulate the revenue and earnings of Medical Manager in order to fraudulently inflate the market price of Medical Manager and WebMD stock;

(b) to make Medical Manager an artificially attractive acquisition target:

(c) to use the fraudulently inflated price of Medical Manager stock to facilitate the acquisition of target companies by Medical Manager which in turn would enable further fraudulent inflation of Medical Manager's earnings;

(d) to conceal such fraud by

(i) making false statements to Medical Manager and WebMD executive, outside auditors, and investigators;

(ii) concealing evidence of their and their conspirators' misconduct from Medical Manager and WebMD executive, investigators, and outside auditors; and

(iii) continuing to meet analyst expectations through fraudulent means; and,

(e) to personally enrich the defendants and others through various means including, but not limited to, salary, bonuses, stock option grants, and capital appreciation of their Medical Manager and WebMD stock.

52. The Indictment further states amongst other things: "the manner and means by which the defendants carried out the purposes and objects of the conspiracy included, but were not limited to, the following: . . . types of fraud:

(a) Fraudulent Roundtrip Transactions

(b) 'Loaded-Up Acquisitions': Deferred Revenue and Accrued Liabilities

(c) False Statements About Revenue Recognition

(d) False Statements and Concealment of the Fraud

53. The Indictment further states amongst other things:

it was a purpose of the conspiracy to enrich the defendants and others through such monetary transactions by transferring to themselves and others proceeds from the conspiracy alleged in Count 1 . . . The defendants and others received Medical Manager stock and stock options as a reward for their past participation in the conspiracy alleged in Count 1 . . . and as an incentive for their continued participation in that conspiracy.

54. Count 2 of the Indictment states in part:

From in or about 1997, through at least 2004, the exact dates being unknown to the grand jury . . . defendants . . . did knowingly and willfully conspire and agree with each other to: knowingly engage in a monetary transaction by, through, and to a financial institution, . . . in criminally derived property, . . . that is, the transfer of funds by wire and monetary instruments, such property having been derived from specified unlawful activity, specifically mail and wire fraud, . . . and fraud in the sale of securities, as described in Count 1

55. The Indictment further states amongst other things:

To avoid detection, defendants and their conspirators would disguise their fraudulent transactions . . . they would create separate agreements, use different company names, and make entries in the books of separate divisions of the Company . . . In public filings and when making statements to auditors and others, defendants and their conspirators would make false statements . . . and purposely omit material information.

56. The Indictment further states amongst other things that:

To conceal the Loaded-Up Acquisitions, defendants and their conspirators would monitor the Company's fraudulent accrued liability and deferred revenue entries but not disclose them to outside auditors or the investing public.

57. The Indictment states amongst other things:

On or about August 3, 1998, KANG sent a fax to SINGER and KARL, concerning a transaction with Medical Systems, Inc., ("MSI"), noting "some interesting benefits to this deal which I would like to discuss further."

On or about August 17, 1998, SINGER, KANG, KRIEGER, and Davids caused Medical Manager to increase the amount it paid to

acquire all assets of MSI by approximately $125,000 in Roundtrip Money.

On or about August 19, 1998, ROBBINS, HUTCHINSON and David caused owner of MSI to return the $125,000 in Roundtrip Money to Medical Manager using a sister company, "MSO Billing Services, Inc." ("MSO Billing"), a shell company without significant assets.

On or about August 31, 1998, ROBBINS and HUTCHINSON caused Medical Manager to record approximately 27 phony entries related to MSO Billing in its accounting system, totaling $125,000.

On or about September 30, 1998, SINGER, KANG, SESSIONS, ROBBINS, HUTCHINSON, AND KRIEGER caused Medical Manager to falsely report as revenue the $125,000 in Roundtrip Money in Medical Manager's reported earnings for the quarter ending that same day.

58. The Indictment states amongst other things that:

On or about January 28, 1999, ROBBINS and HUTCHINSON caused $1.275 million in fraudulent revenue from the ProMed Transaction to be recorded in the Company's accounting system.

59. The Indictment further states, among other things:

In or about July 1997, SINGER, KANG and SESSIONS directed Davids to effect changes to the financial statements of The Computer Clinic, Inc. ("Computer Clinic") in order to artificially inflate revenue and earnings of Medical Manager.

On or about July 1997, ROBBINS, HUTCHINSON and Davids caused Medical Manager to inflate unjustifiably Computer Clinic's accrued liability account by $604, 860 before the financial statements of Medical Manager and Computer Clinic were combined.

On or about September 30, 1997, SESSIONS, ROBBINS, and HUTCHINSON caused Medical Manager to improperly decrease the accrued liability account by $440, 704, thereby increasing Medical Manager's earnings for the quarter ending that same day.

60. The Indictment further states among other things:

MSO Billing Roundtrip

103. On or about December 17, 1998, SESSIONS, KREIGER, and Davis agreed to acquire the "assets" of MSO Billing (and MSI) for approximately $185,000 and in exchange MSO Billing would return an additional $90, 000 in Roundtrip Money to Medical Manager.

104. On or about December 30, 1998, SINGER, KANG, SESSIONS, ROBBINS, HUTCHINSON and KRIEGER caused Medical Manager to improperly include in Medical Manager's reported revenue and earnings the $90,000 in Roundtrip Money for the quarter ending December 31, 1998.

Premier Roundtrip

105. On or about March 31, 1998, SINGER, KANG, SESSIONS and Davids caused the owner of MSI and MSO Billing to use yet another shell company, "Premier," from which Medical Manager could generate additional Roundtrip Money.

106. On or about March 31, 1998, SINGER, KANG and SESSIONS caused approximately $750,000 to be transferred to the owner of Premier, and in exchange, Medical Manager obtained approximately $500,000 in bogus "revenue" related to a phony Premier customer.

107. On or about March 31, 1998, SINGER, KANG, SESSIONS, ROBBINS, HUTCHINSON and KRIEGER caused approximately $500,000 in bogus revenue from the Premier transaction to be included in Medical Manager's reported earnings for the quarter ending that same day.

61. The Indictment further sates among other things:

On or about April 25, 1998, DORMAN sent an email to SESSIONS in which he explained a particular improper revenue recognition matter, stating: "I believe we basically slammed the system in, duped the customer into signing off, took the revenue based on the customer's sign off, fully knowing very littler of the work had been accomplished. We did take all the revenue in 1997.

62. The Indictment further states among other things:

On or about September 30, 1998, ROBBINS, HUTCHINSON, WARD and others caused Medical Manager to record improperly approximately $170,000 in revenue relating to the sale of Medical Manager software and training . . . when they knew of the sale did not qualify for the recognition of revenue because it was not sufficiently probable that the customer would pay.

64. The Indictment further states among other things:

LLBC Enterprises, Inc.,

113. In or about September 1998, SINGER, KANG, and SESSIONS directed Davids to effect changes to the financial statements of LLBC Enterprises, Inc. ("LLBC") in order to artificially inflate revenue and earnings of Medical Manager.

114. On or about September 30, 1998, ROBBINS, HUTCHINSON and Davis caused Medical Manager to reclassify $182,573 in previously recognized revenue on the books of LLBC, to "deferred revenue" when it was placed on the books of Medical Manager.

115. On or about September 30, 1998, SESSIONS, ROBBINS and HUTCHINSON caused Medical Manager to recognize as revenue $103, 315 in Medical Manager's reported revenue and earnings for the quarter ending that same day.

116. On or about December 31, 1998, SESSIONS, ROBBINS and HUTCHINSON caused Medical Manager to recognize as revenue $79, 258 in Medical Manager's reported revenue and earnings for the year ending that same day.

64. The Indictment further states among other things:

D. Filing Fraudulent Financial Statements

133. On or about the filing dates set forth below, the defendants, their conspirators, and others caused Medical Manager to file with the SEC materially false financial statements as described below:

Date of Filling Form, Period and Signatures

134. 08/14/97 Form 10-Q for the quarter ending 06/30/97 signed by ROBBINS

135. 11/06/97 Form 10-Q for the quarter ending 09/30/97 singed by ROBBINS

136. 03/12/98 Form 10-K for the year ending 12/31/97 signed by SINGER, ROBBINS, KANG, and KARL

137. 04/08/98 Form S-3 for the registration and sale of common stock signed by SINGER, ROBBINS, KANG and KARL

138. 05/15/98 Form 10-Q for the quarter ending 03/31/98 signed by ROBBINS

139. 08/06/98 Form 10-Q for the quarter ending 06/30/98 signed by ROBBINS

140. 11/13/98 Form 10-Q for the quarter ending 09/30/ 98 Signed by ROBBINS

65. The Indictment remains pending, and all of the defendants have pleaded not guilty and deny all of the claims asserted against them.

66. By a letter dated July 21, 2005, Joanna Shally, Esq. at Shearman & Sterling, LLP, mailed to each of the insurers on the Medical Manager Tower a letter (the "July 21, 2005 MMC Notice of Circumstances"). The first sentence of the July 21, 2005 MMC Notice of Circumstances reads as follows: "We represent WebMD Practices Services, Inc., formerly known as Medical Manager Health Systems, Inc., and before that, Medical Manager Corporation, the entity names as the Parent Company and an Insured under the above-captioned Policy (hereinafter referred to as the "Company"). The July 21, 2005 Notice of Circumstances also states: "The Company is now a subsidiary of WebMD Corporation ("WebMD") by virtue of the Company's former parent (f/k/a Synetic, Inc.) having been acquired by and merged into WebMD in September 2000. In accordance with Section IV (C) of the Policy, we hereby give notice of Claims and advise you that we are aware of Wrongful Acts that may reasonably be expected to give rise to Claims against an insured Person or the Company." The Insured Persons

identified in the letter included Michael Singer, John Kang, John Sessions, Lee Robbins, Charles Hutchinson, David Ward, Frederick Karl, Franklyn Krieger, Ted Dorman and Maxis Juzang. The letter also states that "All capitalized terms have the meanings ascribed to them in the Policy."

The MMC Tower policies define "Insured Persons" in part as:

Any one or more persons who were, now are or shall be duly elected directors or duly elected or appointed officers of the Company, or, with respect to a Subsidiary incorporated outside the United States, their functional equivalent.

The term "Company" in the MMC Tower Policies means Old Medical Manager and its subsidiaries, as further defined therein.

67. The MMC Tower policies have a policy period of January 30, 1999 to July 23, 2005. Section IV(C) of the MMC Tower policies provides in part:

> If during the Policy Period the Insureds become aware of a specific Wrongful Act that may reasonably be expected to give rise to a Claim against any Insured Person or, with respect to Insuring Clause C (if purchased), the Company and if the Insureds report such Wrongful Act to the Insurer in writing with particulars as to the reasons for anticipating such a Claim . . . then any Claim subsequently arising from such duly reported Wrongful Act shall be deemed under this Policy to be a Claim made during the Policy year or Discovery period in which the Wrongful Act is first duly reported to the Insurer.

68. Emdeon did not deliver a written document with regard to the Singer investigation to the Emdeon 2004-2005 Tower pursuant to section 7(c) of the Emdeon 2004-2005 Tower primary policy. Section 7(c) states:

> 7. NOTICE/CLAIM REPORTING PROVISIONS
>
> Notice hereunder shall be given in writing to the Insurer named in item 8 of the Declarations at the address indicated in item 8 of the Declarations. If mailed, the date of mailing shall constitute the date that such notice was given and proof of mailing shall be sufficient proof of notice

* * *

> (c) If during the **Policy Period** or during the **Discovery Period** (if applicable) an **Organization** or an **Insured** shall become aware of any circumstances which may reasonably be expected to give rise to a **Claim** being made against an **Insured** and shall give written notice to the **Insurer** of the circumstances, the **Wrongful Act** allegations anticipated and the reasons for anticipating such a **Claim**, with fully particulars as to dates, persons, and entities involved, then a **Claim** which is subsequently made against such Insured and reported to the **Insurer** alleging, arising out of, based upon, or attributable to such circumstances or alleging any **Wrongful Act** which is the same as or related to any **Wrongful Act** alleged or contained in such circumstances, shall be considered made at the time such notice of such circumstances was given.

69. The Emdeon 2004-2005 Tower policies contained the identical endorsement entitled "Amend Retention" as Endorsement 13 in the Emdeon Tower National Union Policy covering the 2005-2006 period and quoted in paragraph 17 below.

70. Emdeon Corporation had a D&O insurance tower with an aggregate limit of liability of $75 million in effect for claims made between September 13, 2004 and September 13, 2005, subject to all of the terms and conditions of the policies in that tower. Of the $75 million, $5 million was Side-A coverage. Side-A coverage provides coverage to directors and officers for their Wrongful Acts where the corporation does not indemnify them.

71. Subject to their respective terms and conditions, the policies in the Emdeon Tower in effect form September 13, 2005 through September 13, 2006 had a combined aggregate limit of liability of $90 million. Of the $90 million, $20 million was Side-A coverage.

72. By a letter dated December 22, 2005, (the "MMC Notice of Claim") Joanna Shally, Esq. at Shearman & Sterling LLP, mailed to each of the insurers on the Medical Manager Tower a letter stating that the Indictment related back to the July 21, 2005 MMC Notice of Circumstances. The first two sentences of each such letter are as follows: "We represent Emdeon Practice Services, Inc., formerly known (in reverse chronological order) as WebMD Practice Services, Inc., Medical Manager Health Systems, Inc., and Medical Manager Corporation. Medical Manager Corporation is the entity names as the Parent Company and an insured under the above-captioned policy (hereinafter referred to as the "Company").

73. The MMC Notice of Claim states in part:

> By letter dated July 21, 2005 to Hooghuis, Inc., we gave notice of "Wrongful Acts that may reasonably be expected to give rise to Claims against an Insured Person of the Company." In that Notice, we advised that the United States Attorney for the District of South Carolina (the "US Attorney") has been conducting an investigation of the Company and certain of its officers, directors and other employees, relating to financial improprieties in the areas of revenue recognition and improper accounting relating to dealer acquisitions during the period April 1997 to December 2002. You acknowledged our Notice by letter dated August 25, 2005.
>
> Please be advised that on December 15, 2005, the US Attorney commenced criminal proceedings by return of indictments against the following Insured Persons alleging Wrongful Acts committed during the Policy Period: Michael A. Singer, John H. Kang, John P. Sessions, Lee A. Robbins, Charles L. Hutchinson, David A. Ward, Frederick B. Karl, Jr., Franklin M. Krieger, Ted W. Dorman, and Maxie L. Juzang. Each of these individuals was identified as a potential Insured Person in our July 21, 2005 notice letter. In light of the return of indictments, and in accordance with Subsection IV.C of the Policy, we hereby give notice of Claims against all of the aforementioned Insured Persons. A copy of the Indictment is enclosed.

74. Subsequent to the MMC Notice of Claim, the limits of the MMC Tower policies were exhausted by the MMC Tower insurance companies' payment of the claim under the MMC Tower relating to the Indictment.

75. On December 22, 2005, Joanna Shally, Esquire, sent a letter to one of the insurers in the Synetic Tower that states as follows:

> We represent Emdeon Corporation, formerly known, in reverse chronological order, as WebMD Corporation, Medical Manager Corporation and Synetic, Inc. Synetic is the Named Corporation under the above-captioned policy . . . we hereby give notice of Claims against all of the aforementioned Insured Persons.
>
> The "aforementioned Insured Persons" were Michael Singer, John Kang, John Sessions, Lee Robbins, Charles Hutchinson, David Ward, Frederick Karl, Franklyn Krieger, Ted Dorman and Maxie Juzang. The 1997 Synetic Policies state that, with respect to Coverages A and B(ii), the terms "Director(s) and Officer(s)" or "Insured(s)" mean "any past, present or future duly elected of

appointed directors or officers of the Company." In part, the Run-Off Coverage provides as follows:

ENDORSEMENT #15

* * *

I.

The Section of the policy entitled INSURING AGREEMENTS is deleted in its entirety and replaced by the following:

INSURING AGREEMENTS

* * *

COVERAGE B: CORPORATE LIABILITY INSURANCE

This policy shall pay the Loss of the Company, or in the event the Company no longer exists as a legal entity, the HEALTHEON WEBMD CORPORATION arising from a:

(i) Securities Claim first made against the Company, or

(ii) Claim first made against the Directors or Officers,

during the Policy Period or the Discovery Period (if applicable) and reported to the Insurer pursuant to the terms of this Policy for any actual or alleged Wrongful Act occurring on or prior to the Effective Time, but, in the case of (ii) above, only when and to the extent that the Company, or **HEALTHEON WebMD CORPORATION**, has indemnified the Directors or Officers for such Loss pursuant to law, common or statutory, or contract, or the Merger Agreement or the charter or by-laws of the Company or **HEALTHEON WebMD CORPORATION**, or any Subsidiary or affiliate thereof duly effective under such law which determines and defines such rights of indemnity. The Insurer shall, in accordance with and subject to the Section of this policy entitled DEFENSE COSTS, SETTLEMENTS, JUDGMENTS, (INCLUDING THE ADVANCEMENT OF DEFENSE COSTS), advance Defense Costs of such Claim prior to its final disposition.

* * *

III.

> It is further understood and agreed that the Section of the policy entitled DEFENSE COSTS, SETTLEMENTS, JUDGMENTS (INCLUDING THE ADVANCEMENT OF DEFENSE COSTS), in its entirety, is amended by deleting the term "Company" wherever it appears and substituting in lieu thereof the terms, "Company, or **HEALTHEAON WebMD CORPORATION**, or any Subsidiary or affiliate thereof";
>
> IV.
>
> It is further understood and agreed that paragraph (i) of the Section of the policy entitled EXCLUSIONS is amended as follows:
>
> (1) The term "Company" is hereby deleted wherever it appears and replaced by the term, "Company, or **HEALTHEON WebMD CORPORATION**, or any Subsidiary thereof.

Except as otherwise provided by the Run-Off Coverage endorsement, the term "Company" in the 1997 Synetic Policies means Synetic and any Subsidiary thereof, as further defined therein.

76. On December 22, 2005, Joanna Shally, Esquire, sent a letter to the insurers in the Emdeon 2005-2006 Tower states as follows:

> We represent Emdeon Corporation, the Named Insurer under the above captioned policy . . . we hereby give notice of Claims against all of the aforementioned Insured Persons.

The "aforementioned Insured Persons" were Michael Singer, John Kang, John Sessions, Lee Robbins, Charles Hutchinson, David Ward, Frederick Karl, Franklyn Krieger, Ted Dorman, and Maxie Juzang. The letter further states that:

> All capitalized terms referenced herein have the meanings ascribed to them in the Underlying Primary Policy issued by National Union Fire Insurance Company of Pittsburgh, PA.

The Emdeon Tower National Union Policy states in part:

> "**Insured Person**" means any:
>
> (1) Executive of an Organization;
>
> * * *

> "**Executive**" means any:
>
> (1) past, present and future duly elected or appointed director, officer, trustee or governor of a corporation . . .
>
> The term "Organization" in the Emdeon Tower Nation Union Policy means Emdeon and each Subsidiary, as further defined therein.

III. CONTENTIONS OF THE PARTIES

A. Defendants' Contentions

National Union's argument, which all Defendants incorporate and adopt, is that insurance coverage under Plaintiffs' D&O policy is barred because of a Prior Acts Exclusion.[4] National Union's argument can be summarized as follows: at least some of the alleged Wrongful Acts occurred before February 10, 1999, the cut-off date in the Prior Acts Exclusion; the Underlying Action concerns a common plan or scheme to defraud; and all the alleged Wrongful Acts are related to each other as part of that common plan or scheme; therefore, the plain language of the Prior Acts Exclusion bars all of Plaintiffs' claims for coverage relating to the Underlying Action.

[4] The Prior Acts Exclusion is set forth in full in the "FACTS" Section of this opinion at ¶ 27. Defendants' arguments are set forth in full in the memoranda of law in support of National Union Fire Insurance Company of Pittsburgh, PA's "Motion for Summary Judgment Based Upon Application of Prior Acts Exclusion." The arguments set forth in those memoranda have been adopted in full by Fireman's Fund Insurance Company, RSUI Indemnity Company, Old Republic Insurance Company, and Axis Reinsurance Company. The Prior Acts Exclusions in each of Defendants' policies are substantially similar. Thus, the arguments in relation to the Prior Acts Exclusions set forth by the parties are applicable to the Prior Acts Exclusions within each Defendants' policy.

Defendants argue that HLTH's claims for coverage are based upon the same wrongful acts, or wrongful acts that are related to each other as part of a common scheme, where the first of those wrongful acts allegedly occurred prior to February 10, 1999.[5] Defendants assert that the seven Counts in the Indictment all allege acts engaged in by Plaintiffs' former directors and officers that began in 1997, and that Counts One and Two specifically allege that the Plaintiffs' former directors and officers began their illicit activities in 1997. [6]

Defendants claim that the acts alleged in the Indictment are all related or "tied together" by the united goal of conspiring to defraud.[7] Defendants assert that the Wrongful Acts are related in that they are logically connected as part of a common plan or goal to defraud, and that "as a matter of law" Wrongful Acts that make up a conspiracy are related to one another.[8] Defendants also highlight assertions made by Plaintiffs relating to nature of a conspiracy as a "unitary" crime elsewhere in this litigation that, Defendants argue, amount to a concession on the part of the

[5] National Union Opening B. at 15.

[6] *Id*. at 17-18; *see also supra* "FACTS" section ¶¶ 48-50, 54.

[7] National Union Opening B. at 21.

[8] *Id*. at 18.

Plaintiffs that the alleged Wrongful Acts are all based upon related wrongdoing.[9]

National Union further argues in the alternative that even if the alleged Wrongful Acts are grouped together by the types of fraud alleged in the Indictment, the Prior Acts Exclusion would still preclude coverage because the Wrongful Acts undertaken in connection with each type of fraud allegedly first occurred before February 10, 1999. First, Defendants argue that the Roundtrip Transactions alleged in the Indictment should be barred because they allegedly began in 1997.[10] Next, Defendants claim that the "Loaded-Up Acquisitions, Deferred Revenue, and Accrued Liabilities" alleged in the Indictment should be barred because they allegedly began in 1997.[11] Third, Defendants assert that the improper revenue recognition alleged in the Indictment should be barred because it allegedly occurred in 1997 and 1998.[12] Finally, Defendants argue that the false financial statements alleged in the Indictment should be barred because they also allegedly began in 1997.[13]

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[9] *Id* at 21-24; National Union Reply B. at 6-10.

[10] National Union Reply B. at 27; *see supra* "FACTS" section at ¶ 57.

[11] *Id*. at 28; *see supra* "FACTS" section at ¶59.

[12] *See supra* "FACTS" section at ¶ 61.

[13] *See supra* "FACTS" section at ¶ 64.

Defendants further contend that they need not wait until the final disposition of the Underlying Action in order to assert the Prior Acts Exclusion as a defense to coverage. The Prior Acts Exclusion, Defendants argue, bars Plaintiffs' claims based upon the underlying allegations, not what may be ultimately adjudicated.[14] Defendants conclude that because the Indictment alleges wrongful acts that occurred before February 10, 1999, the Prior Acts Exclusion bars the advancement of defense costs.

National Union also argues that Endorsement 13, entitled "Amend Retention," of the Emdeon 2005-2006 Tower[15] does nothing more than amend retention amounts and has no bearing on whether HLTH's claims are covered. National Union argues that Endorsement 13 "was not an undertaking or promise of coverage, nor was it, moreover, a form of coverage for which a premium was collected."[16] Thus, National Union asserts, they it not, as Plaintiffs argue, provide illusory coverage.

Defendants also allege that nothing occurred during the underwriting negotiations between the parties suggested an intention on their part to provide complete coverage for conjectural future claims. Defendants claim they became aware that the United States Government

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[14] National Union Reply B. at 4.

[15] *See supra* "FACTS" section at ¶ 16.

[16] National Union Reply B. at 11.

began investigating Plaintiffs' financial reporting during their negotiations with Plaintiffs for the 2003-2004 policy. [17] During those negotiations, Defendants claim that they told Plaintiffs' insurance broker that they were not attempting to exclude claims arising from the investigation from being noticed. However, Defendant asserts they never promised to provide unlimited coverage for claims arising from the findings of the investigation.

Defendants assert that they never had knowledge that HLTH was going to pursue claims for Wrongful Acts alleged as far back as 1997. Defendants argue that the Form 10-K, which is part of the 2005-2006 D&O policies, merely made reference to a federal criminal investigation and provided no knowledge of the allegations ultimately set forth in the Indictment. Further, Defendants argue that there are no specific dates in the Form 10-K or Form 10-Q which were available to them; therefore, Defendants did not know what the claims would be when the parties amended their policies to include Endorsement 13. Thus, Defendants argue, they included the Prior Acts Exclusion to limit their potential liability.

Finally, Defendants argue that HLTH has not demonstrated the requisite elements necessary for a waiver or estoppel argument.

[17] *Id*. at 14.

Defendants claim that HLTH cannot point to any conduct by Defendants that intimates that they were "promising coverage for claims arising out of what was still an ongoing investigation."[18] Moreover, Defendants argue that the reasonable expectations doctrine is inapplicable here because there is no ambiguity in the terms of their D&O insurance policies.

B. Plaintiffs' Contentions

HLTH argues in its cross-motion that the Defendants must advance defense costs because its claim relates to Wrongful Acts that allegedly "may have occurred during the policy period;" therefore, there is no basis for denying all claims.[19] Moreover, HLTH contends that the Defendants' motion is untimely, asserting that this Court should wait until the final disposition of the Underlying Action in order to determine when the Wrongful Acts alleged in the Indictment actually occurred for the purposes of applying those acts to the Prior Acts Exclusion.

HLTH further argues that Defendants have failed to meet their burden of establishing that the Prior Acts Exclusion applies as a complete bar to all of HLTH's claims for coverage. In support of its argument, HLTH asserts that Endorsement 13 supersedes the Prior Acts

[18] *Id*. at 18.

[19] HLTH Opening B. at 9.

Exclusion because it states that "'notwithstanding any other provision of this policy' the policy will provide coverage for 'Securities Claims that contain a Medical Manager Claim.'" [20] Therefore, HLTH argues, the terms of Endorsement 13 control whether HLTH's claims for the advancement of defense costs are covered by their D&O policies. HLTH argues that its SEC filings form a part of the Emdeon 2005-2006 Tower; therefore, Endorsement 13 specifically includes Medical Manager Securities Claims, even if such claims implicate Wrongful Acts that allegedly occurred prior to February 10, 1999.

HLTH also alleges that the Prior Acts Exclusion specifically includes coverage for the Underlying Action because despite its exclusionary terms, "all other terms, conditions and exclusions remain the same."[21] Thus, HLTH concludes, the Prior Acts Exclusion is subservient to Endorsement 13 because Endorsement 13 amends the entire policy "notwithstanding any other provision of this policy."[22] HLTH further argues that Endorsement 13 "specifically created a new category of insured claims with their own retention."[23] HLTH contends that before the policy was amended to include Endorsement 13, there were three

[20] *Id*. at 11.

[21] *Id*. at 12.

[22] *Id*.

[23] HLTH Reply B. at 4.

category of claims, but Endorsement 13 specifically included a forth category of claims, i.e. "Securities Claims that contain a Medical Manager Claim."[24]

HLTH further argues that if the parties had intended to exclude claims in their entirety based upon the Underlying Action, they could have simply included such claims in the list of excluded litigation claims. HLTH contends that this was feasible because the parties knew at the time of drafting the specific litigation exclusions that the government was investigation conduct that occurred as far back as 1997.[25] Thus, HTLH asserts, Defendants should have expressed its desire to exclude claims in their entirety relating to the Underlying Action at the time the parties drafted the specific litigation exclusions.

Even assuming that Endorsement 13 did not supersede the Prior Acts Exclusion, HLTH argues, the plain terms of the Prior Acts Exclusion do not bar claims for coverage. HLTH contends that the nature of the alleged conspiracy is not, as Defendants argue, a chain of Wrongful Acts that initially began in 1997. Rather, HLTH asserts that the alleged conspiracy is an "unlawful agreement that took place at some point

[24] *Id.*

[25] *Id.* at 10.

between the flexible dates set forth in the Indictment."[26] Thus, HLTH contends, that the Prior Acts Exclusion cannot act as a complete bar to recovery because the Indictment does not allege the specific dates when each coconspirator entered into or left the alleged unlawful agreement.[27]

HLTH also argues that Defendants knew that the Government's investigation alleged dates preceding February 10, 1999, when they sold the 2005-2006 D&O policies to HLTH.[28] HLTH claims that the Form 10-K that was incorporated into the 2005-2006 D&O policy specifically stated that the Government was investigating fraudulent conduct dating back to 1997.[29] Thus, HLTH argues that Defendants knew that the government's investigation involved conduct relating back to 1997 when they sold Endorsement 13 to HLTH, and relying on the Prior Acts Exclusion at this time amounts to Defendants having sold "illusory" coverage.

Since Defendants knew that the Government was investigating conduct that occurred as far back as 1997, according to HLTH, Defendants should be equitably estopped from denying coverage. HLTH argues that it has satisfied the elements for equitable estoppel

[26] HTLH Opening B. at 18.

[27] *Id.*; HLTH Reply B. at 12.

[28] HLTH Opening B. at 14; HLTH Reply B. at 7-10.

[29] HLTH Reply B. at 8.

because it could not have known that Defendants would claim that the Prior Acts Exclusion acted as a complete bar to recovery, it relied on Defendants' conduct with respect to the sale of Endorsement 13, and Defendants' change of conduct is detrimental to HLTH.

HLTH also argues that the reasonable expectations doctrine should prevent Defendants from denying coverage. HLTH contends that the reasonable expectations doctrine prevents an insurer from denying coverage where, as here, the parties to an insurance contract reasonably expect certain events to be covered under the contract. HLTH alleges it knew when it purchased the Emdeon 2005-2006 Tower that Defendants knew about the Federal Government's investigation, but did not specifically exclude it from coverage.[30] Thus, HLTH argues it had no reason to believe coverage would subsequently be denied for claims related to the investigation, and its expectation of coverage was reasonable. Finally, HLTH argues that Defendants waived their right to rely on the Prior Acts Exclusion because they voluntarily relinquished their right on it when they sold HLTH Endorsement 13.[31]

[30] HLTH Opening B. at 15; HLTH Reply B. at 14.

[31] HLTH Opening B. at 16.

IV. STANDARD OF REVIEW

"Upon cross motions for summary judgment, this Court will grant summary judgment to one of the moving parties."[32] 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.

All parties agree that there are no genuine issues of material fact. 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.

"Insurance contracts, like all contracts, are construed as a whole, to give effect to the intentions of the parties."[33] Under Delaware law, because the Plaintiffs have established, and the parties do not dispute, that their loss is within the terms of the policies, Defendants, as insurers, bear the burden of establishing that the Prior Acts Exclusion bars coverage.[34] "[A]n exclusion clause in an

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

[33] *AT&T Corp. v. Faraday Capital Ltd.*, 918 A.2d 1104, 1108 (Del. 2007).

[34] *See, e.g., Deakyne v. Selective Ins. Co. of America*, 728 A.2d 569, 571 (Del. Super. 1997) ("In Delaware, the insured bears the initial burden of showing that the alleged loss is within the coverage provisions of the insurance policy. Once this burden is met, it then

insurance contract is construed strictly to give the interpretation most beneficial to the insured."[35] If any of the terms of an insurance contract "are ambiguous or unclear, the issue of coverage must be resolved in favor of the insured."[36] Under Delaware law, an insurer meets its burden of showing that a policy exclusion bars coverage if "every allegation of the underlying complaint [falls] 'solely and

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becomes the duty of the insurer to show that one of the policy exclusions apply."); *E. I. du Pont de Nemours & Co.v. Admiral Ins. Co.*, 1996 WL 111133, at *1 (Del. Super. Feb. 22, 1996) ("The undisputed application of Delaware law in an insurance coverage suit requires the insured . . . to prove initially, by a preponderance of the evidence, that the loss is within a policy's coverage provisions. Once the insured meets that burden, the burden shifts to the insurer to establish a policy exclusion applies."); *Tenneco Automotive, Inc. v. El Paso Corp*., 2004 WL 3217795, at *14 (Del. Ch. Aug. 26, 2004) ("In a typical coverage case, the insured must demonstrate the existence of a policy and that the claims fall within the terms of the policy, but the insurer would bear the burden of proving any limits or exclusions."); *State v. Nat'l Auto Ins. Co*, 290 A.2d 675, 678 (Del. Ch. 1972) ("Generally when a plaintiff has made a prima facie showing of insurance and has established that the claims fall within the general terms of the policy, the burden shifts to the insurer to come forward with evidence of an exclusion or other matters which limit its liability."); 17A *Couch on Insurance 3d* § 254:11, 254:12 (Lee R. Russ et al. eds., 2005) ("Generally speaking, the insured bears the burden of proving all elements of a prima facie case including the existence of a policy, payment of applicable premiums, compliance with policy conditions, the loss as within policy coverage, and the insurer's refusal to make payment when required to do so by the terms of the policy. . . The insurer bears the burden of proving the applicability of policy exclusions and limitations or other types of affirmative defenses, in order to avoid an adverse judgment after the insured has sustained its burden and made its prima facie case.").

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

[36] *Penn Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146, 1151 (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); *see also 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.").

entirely' within specific and unambiguous exclusions from coverage."[37] However, a term within the contract is not ambiguous merely because "the parties disagree on the meaning of the term . . . [r]ather, a contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible to different interpretations or may have two or more meanings."[38]

V. DISCUSSION

This Court finds that National Union has failed to meet its burden of establishing that the Prior Acts Exclusion acts as a "clear and unambiguous" bar to HLTH's claims for coverage because, bearing the burden, it has failed to satisfactorily reconcile the conflicting terms of the Prior Acts Exclusion and Endorsement 13. Defendants' argument that the Prior Acts Exclusion acts as a complete bar to coverage in spite of Endorsement 13 fails to give meaning to entirety of the Emdeon 2005-2006 Tower policies. Endorsement 13, entitled "Amend Retention," states:

> In consideration of the premium charged, it is hereby understood and agreed that, notwithstanding any other provision of this policy (including any endorsement attached hereto whether such endorsement precedes or follows this endorsement in time or sequence), this policy is hereby amended as follows:

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[37] *Capano Mgmt. Co. v. Transcontinental Ins. Co.*, 78 F. Supp. 2d 320, 324 (D. Del. 1999) (quoting *National Union Fire Ins. Co. of Pittsburgh, PA. v. Rhone-Poulenc Basic Chems. Co.*, 1992 WL 22690, at *8 (Del. Super. Jan. 16, 1992)).

[38] *AT&T Corp.*, 918 A.2d at 1108 (quoting *Rhone-Poulenc Basic Chem. Co. v. American Motorists Ins. Co.*, 616 A.2d 1192, 1996 (Del. 1992)).

1. Item 4. of the Declarations, entitled RETENTION is deleted in its entirety and replaced with the following:

RETENTION: Not applicable to **Non-Indemnifiable** Loss and certain **Defense Costs** (See Clause 6 for details.)

4(a) **Securities Claims** (other than **Securities Claims** that contain a Medical Manager **Claim**):
$5,000,000

4(b) **Employment Practices Claims**: $5,000,000

4(c) **Securities Claims** that contain a **Medical Manager Claim**: $10,000,000

4(d) All other **Claims**: $5,000,000

2. Clause 6. RETENTION CLAUSE is amended . . .

* * *

For purposes of this endorsement, "**Medical Manager Claim**" means any **Claim** alleging, arising out of, based upon, attributable or related to the investigation of the **Organization** conducted by the United States Attorney for the District of South Carolina and the formal investigation of the **Organization** conducted by the SEC, as referenced in the **Organization's** 10-Q for the period ended June 30, 2004, principally regarding issues of financial reporting for Medical Manager Corporation, a predecessor of the **Organization** (by its merger into the **Organization** in September 2000), and the **Organization's** Medical Manager Health Systems subsidiary.

ALL OTHER TERMS, CONDITIONS AND EXCLUSIONS REMAIN UNCHANGED.[39]

Defendants argue that Endorsement 13 does nothing more than amend the retention amounts from $5,000,000 to $10,000,000. HLTH argues that

[39] *Supra* "FACTS" section at ¶ 16.

Endorsement 13 "specifically includes coverage" for its claims for coverage.[40] Endorsement 13 states that the policy includes a retention for "Securities Claims that contain a Medical Manager Claim."[41] Medical Manager Claims are defined in Endorsement 13 as:

> any Claim alleging, arising out of, based upon, attributable or related to the investigation of the Organization conducted by the United States Attorney for the District of South Carolina and the formal investigation of the Organization conducted by the SEC, as referenced in the Organization's 10-Q for the period ended June 30, 2004, principally regarding issues of financial reporting for Medical Manager Corporation . . .[42]

Plaintiffs' 10-Q for the period ending on June 30, 2004, while not mentioning exact dates, makes specific reference to the Government's ongoing investigation.[43]

Prior to being amended, Endorsement 13 did not include a specific category of Medical Manager Claims.[44] Thus, during the negotiations for the Emdeon 2005-2006 Tower, the parties amended Endorsement 13 to specifically provide a retention for a category of claims relating to the acts being investigated by the Federal Government, and increased the retention for claims arising out of the investigation to $10,000,000 from $5,000,000 for other securities claims.

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[40] HLTH Opening B. at 12.

[41] *Id*.

[42] *Id*.

[43] *Id*. at ¶ 17. The 10-Q states among other things "[t]he ongoing investigations by the United States Attorney for the District of South Carolina and the SEC could negatively impact our company and divert management attention from our business operations."

[44] *Supra* "FACTS" section at ¶ 18.

Despite Defendants' arguments to the contrary, Endorsement 13 does more than merely amend the retention amounts for the various categories of claims. Endorsement 13 reflects the parties' knowledge that as a result of the Government's then ongoing investigation, claims for coverage were forthcoming. Thus, when Endorsement 13 was amended to specifically define Medical Manager Claims as a distinct category of claims and increased the retention amounts from $5,000,000 to $10,000,000, it signified that claims for coverage arising from the then ongoing Government's investigation were no longer conjectural, and that the parties expected claims relating to the investigation to follow. It is not reasonable to conclude that National Union would redefine and increase the retention of such claims if it did not have a reasonable expectation that such claims were imminent in the policy period. Moreover, in an email exchange on September 10, 2003, between National Union's agent and Plaintiffs, National Union recognized that Plaintiffs were likely going to file claims for coverage under preceding policies, which gives some indication of Defendants' reasons to amend the retention for those claims.

The Court finds that National Union knew that the Government was investigating Plaintiffs' former directors and officers, and that the investigation concerned activity that occurred as far back as 1997, when National Union sold Plaintiffs the Emdeon 2005-2006 Tower policy. The Form 10-K, which is incorporated in the Emdeon 2005-2006 Tower policy states, among other things, that at the time of filing, the Government was conducting an investigation into

"fraudulent accounting practice to inflate artificially the quarterly revenues and earnings of WebMD Practice Services, Inc., when it was an independent public company called Medical Manager Corporation from 1997 through 1999, when and after it became acquired by Synetic, Inc in July, 1999 and when and after it became a subsidiary of WebMD Corporation in September 2000."[45]

Furthermore, after the Defendants became aware of the Government's investigation, as HLTH argues, Defendants could have specifically excluded claims arising from the Underlying Action along with the other specific litigation exclusions. The Emdeon 2005-2006 Tower includes four specific litigation exclusions: 1) Larry Ackerman v. WebMD – Claim #367-002573-001; 2) Gary Werschmidt v. WebMD – Claim#367-002629-001; 3) Porex Mammory Implant Litigation;[46] and 4) Envoy Securities Litigation.[47] It is a fundamental

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[45] *Id*. at ¶ 22.

[46] Plaintiffs' counsel represented to the Court, and Defendants have not objected, that at the time the Emdeon 2005-2006 Tower policies were issued, there was no Porex mammory implant litigation pending, but it was nonetheless specifically excluded. Docket 190 (Letter to the Court from David J. Baldwin dated August 10, 2009).

[47] *Supra* "FACTS" section at ¶ 24. The Emdeon 2005-2006 Tower specific litigation exclusion states that:

> the **Insurer** shall not be liable to made any payment for **Loss** in connection with: (i) any of the **Claim(s)**, notices, events, investigations or actions referred to in any of items (1) through (4) below; (hereinafter "**Events**"); (ii) the prosecution, adjudication . . . or defense of: (a) any **Event (s)**; or (b) any **Claim(s)** arising from any **Event(s)**; or (iii) any **Wrongful Act**, underlying facts, circumstances, acts or omissions in any way relating to any **Event(s)**.
>
> EVENTS

principal of contract law that "[s]pecific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one."[48]

Here, the Prior Acts Exclusion is general while the specific litigation exclusion provision is specific. The fact that claims arising from the Underlying Action are not included within the specific litigation exclusions, despite National Union's knowledge that such claims were forthcoming, indicates that the parties could not have understood that the Prior Acts Exclusion would act as a complete bar to claims arising from the Underlying Action when the Emdeon 2005-2006 Tower policies were issued. Therefore, construing the Prior Acts Exclusion strictly to give it the interpretation most beneficial to the insured, the Prior Acts Exclusion does not act as a complete bar to HLTH's claims.

Defendants have also failed to meet their burden of reconciling the conflicting terms of the Prior Acts Exclusion and Endorsement 13. Defendants argue that the phrase "all other terms, conditions and exclusions remain unchanged" signifies that Endorsement 13 merely amends retention amounts and does not in any way "promise" or expand coverage.[49] However, as previously

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(1) Larry Ackerman v. WebMD – Claim #367-002573-001
(2) Gary Werschmidt v. WebMD – Claim#367-002629-001
(3) Porex Mammory Implant Litigation
(4) Envoy Securities Litigation

[48] *DCV Holdings, Inc. v. ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005).

[49] National Union Reply B. at 11.

discussed, and as HLTH has argued, Endorsement 13 creates a distinct category of claims (for which it increased the retention), "Securities Claims that contain a Medical Manager Claim," that specifically relate to claims arising out of the Government's investigation.[50] While Endorsement 13 does not "promise" coverage, it does define categories of claims. Thus, the phrase upon which Defendants rely has no bearing on Medical Manager Securities Claims.

Moreover, the Medical Manager Securities Claims were recognized "notwithstanding any other provision of this policy."[51] Given 1) this language; 2) the fact that Endorsement 13 was amended to include a category of claims arising out of the Underlying Action while charging double the retention; and 3) National Union's knowledge of the Government's ongoing investigation, Defendants have not demonstrated that the Prior Acts Exclusion "[un]ambiguous[ly] or []clear[ly]" was intended by the parties to act as a complete bar to claims for coverage arising from the Underlying Action.[52] Thus, the when viewing the contract as a whole, and considering that National Union bears the burden, National Union's Emdeon

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[50] National Union argues that the Medical Manager Securities Claims included in Endorsement 13 were claims that did not arise from the same or related Wrongful Acts predating February 10, 1999. Thus, National Union argued that Endorsement 13's only purpose is to amend the retention for such claims. However, if Defendants intended to limit the scope of Medical Manager Claims they would not have defined such claims as "any Claim alleging, arising out of, based upon, attributable or related to the [Government's] investigation." *Supra* "FACTS" section at ¶16.

[51] *Supra* "FACTS" section at ¶ 16.

[52] *Penn Mut. Life Ins. Co.*, 695 A.2d at 1151.

2005-2006 Tower policy is unclear and ambiguous, being susceptible to more than one interpretation, and therefore, must be read in a manner favorable to HLTH as the insured.[53]

Defendants' reliance on *Bainbridge Mgmt. LP v. Travelers Casualty & Surety Co. of America*[54] and *Gateway Group Advantage, Inc. v. McCarty*[55] in support of their contention that the Prior Acts Exclusion acts as a complete bar is misplaced. Both *Bainbridge* and *Gateway* involved prior acts exclusions where the Court granted the insurers' motions to dismiss. In both cases, the Court held the prior acts exclusions at issue acted as a complete bar to coverage because the wrongful acts committed by the insured were part of a scheme that extended beyond the policies' cut-off dates.

However, it is clear that in neither case was there a finding that the insurer likely knew that the insureds' wrongful conduct extended beyond the cut-off date in the policies prior to selling the policies. Further, in neither case were there competing provisions in the insurance contracts that the insurer failed to reconcile. Defendants' assertion that the Court could apply the Prior Acts Exclusion to the Wrongful Acts by grouping the types of fraud alleged in the Indictment into four groups is unavailing because the Emdeon 2005-2006 Tower

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[53] *Id.*

[54] 2006 WL 978880 (N.D. Ind. Apr. 10 2006).

[55] 300 F. Supp. 2d 236 (D. Mass. 2003).

policies must be applied to HLTH's claims for coverage in their entirety and as a whole.

National Union argues that the Wrongful Acts giving rise to HLTH's claims for coverage are related to each other as part of a common plan or scheme; therefore, National Union asserts the Prior Acts Exclusion bars all claims and that the Court need not await the final disposition of the Underlying Action to apply the Prior Acts Exclusion in such a manner. In support of its argument, National Union relies on *Continental Casualty Co v. Wendt.*[56] In that case the Court held that claims arising from a serious of acts in connection with the sale of promissory notes were "related," and therefore barred under the insurance contract, despite the Court's finding that "clearly this course of conduct involved different types of acts, [since] these acts were tied together because all were aimed at a single particular goal."[57] If this Court were merely applying the Prior Acts Exclusion to HLTH's claims for coverage, *Wendt* might provide some support. However, here, unlike in *Wendt*, the Court is faced with competing provisions in the insurance contract that create ambiguity which National Union has failed to put to rest. National Union's argument would in essence have this Court apply the Prior Acts Exclusion while ignoring the rest of the terms in the Emdeon 2005-2006 Tower policies.

[56] 205 F.3d 1258 (11th Cir. 2000).

[57] *Id*. at 1264.

The burden ultimately rests with Defendants to show that, taken as a whole, the Emdeon 2005-2006 Tower policies do not cover any claim related to the Underlying Action because the Prior Acts Exclusion acts as a "[un]ambiguous or []clear" bar to all of HLTH's claims for coverage.[58] Defendants have not met their burden. Moreover, the Defendants have failed to meet their burden of showing that "every allegation of the underlying complaint [falls] 'solely and entirely' within specific and unambiguous exclusions from coverage."[59] Consequently, the Prior Acts Exclusion must be construed against National Union because "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."[60]

Defendants have not demonstrated that the Prior Acts Exclusion clearly and unambiguously controls conflicting language in the specific litigation exclusion and Endorsement 13. Further, the Court finds that Defendants knew that the Government's investigation related back to conduct that allegedly occurred in 1997. Notably, Defendants could have included claims related to the Underlying Action in the list of specific litigation exclusions, but it did not. The fact that Defendants did not include claims arising from the Underlying Action within the

[58] *Penn Mut. Life Ins. Co.*, 695 A.2d at 1151.

[59] *Capano Mgmt. Co. v. Transcontinental Ins. Co.*, 78 F. Supp. 2d 320, 324 (D. Del. 1999) (quoting *National Union Fire Ins. Co. of Pittsburgh, PA. v. Rhone-Poulenc Basic Chems. Co.*, 1992 WL 22690, at *8 (Del. Super. Jan. 16, 1992)).

[60] *Emmons*, 697 A.2d at 745.

list of specific litigation exclusions despite the parties' knowledge of the Government's ongoing investigation, shows that the parties did not intend the Prior Acts Exclusion to be a complete bar to claims arising from the Underlying Action.[61]

VI. CONCLUSION

For the forgoing reasons, National Union's "Motion for Summary Judgment Based Upon Application of Prior Acts Exclusion," and joined by Fireman's Fund Insurance Company, RSUI Indemnity Company, Old Republic Insurance Company, and Axis Reinsurance Company is **DENIED** and HLTH's "Cross Motion for Partial Summary Judgment to Enforce the Duty to Advance Defense Costs" is **GRANTED** against National Union, Fireman's Fund Insurance Company, RSUI Indemnity Company, Old Republic Insurance Company, and Axis Reinsurance Company.

IT IS SO ORDERED.

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Richard R. Cooch

oc: Prothonotary

[61] The Court need not reach the other issues raised by Plaintiffs.