IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

VERIZON COMMUNICATIONS INC., VERIZON FINANCIAL SERVICES LLC, and GTE CORPORATION,	)	
Plaintiffs,	)	
v.	)	C.A. No. N14C-06-048 WCC CCLD
ILLINOIS NATIONAL INSURANCE COMPANY, et. al.,	)	**PUBLIC VERSION**
Defendants.	)	

Submitted: October 7, 2016
Decided: March 2, 2017

Plaintiffs' Renewed Motion for Partial Summary Judgment on Defense Costs - GRANTED
Defendants' Motion for Summary Judgment - DENIED

MEMORANDUM OPINION

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CARPENTER, J.

Before the Court are cross motions for summary judgment and several cross motions in *limine*.[1] In this litigation, Verizon Communications, Inc. ("Verizon"), Verizon Financial Services LLC ("VFS"), and GTE Corporation ("GTE") (collectively, "Plaintiffs") have sought declaratory relief and damages for breach of contract and anticipatory breach of contract in relation to the defendant insurance carriers' (collectively, "Defendants" or "Insurers")[2] obligations under executive and organization liability policies to pay, among other things, all defense costs, settlements, and judgments incurred by Plaintiffs with respect to four underlying legal actions. The instant motions pertain to one of those actions in particular, which the parties refer to as the "*U.S. Bank* Action." Plaintiffs seek to recover defense costs in excess of $48 million in connection with *U.S. Bank*. In accordance with the following opinion, Plaintiffs' Renewed Motion for Partial Summary Judgment on Defense Costs is GRANTED and Defendants' Motion for Summary Judgment is DENIED. The issues presented by the parties' Motions in *Limine* are thereby rendered moot.

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[1] Defendants' Motion to Preclude the Expert Report and Testimony of Larry Goanos, Defendants' Motion to Preclude the Expert Report and Testimony of William Allen, Plaintiffs' Cross Motion to Preclude the Report and Testimony of Lawrence Hamermesh , Plaintiffs' Cross Motion to Strike the Declaration of Paul Shiavone and the Reports and Testimony of Dan Bailey.

[2] The primary insurer Defendants are Illinois National Insurance Company ("Illinois National"), an affiliate of American International Group, Inc. ("AIG"), and National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union"). The excess insurer Defendants include XL Specialty Insurance Company, Twin City Fire Insurance Company, and U.S. Specialty Insurance Company.

I. FACTUAL & PROCEDURAL BACKGROUND

This lawsuit arises out of Verizon's 2006 "spin-off" of its print and electronic directories business into a standalone company: Idearc, Inc. ("Idearc"). Verizon filed a Form 10 Registration Statement with the Securities and Exchange Commission in connection with the spin-related transactions on November 1, 2006.[3] On November 17, 2006, Verizon transferred the directories business to Idearc in exchange for: (a) 146 million shares of Idearc common stock, (b) $2.85 billion in 8% senior unsecured promissory notes, and (c) a portion of a senior secured term loan facility. Verizon distributed all outstanding shares of the Idearc common stock to Verizon shareholders,[4] and transferred the Idearc notes and portion of the term loan to J.P. Morgan Ventures Corporation and Bear Stearns & Co., Inc. (collectively, "Investment Banks") in exchange for Verizon debt securities the banks had purchased in the open market. [5] The Investment Banks then sold the Idearc debt securities to previously solicited purchasers and lenders.[6]

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[3] Hartmann Aff. ¶ 9, Ex. 3.

[4] *Id.* ¶ 12, Ex. 5 (noting that fractional shares were sold on the open market with proceeds delivered to Verizon shareholders who would otherwise have received those shares).

[5] *Id.* ¶ 7.

[6] *Id.* ¶¶ 13-14. Leading up to the spin, the Investment Banks apparently collaborated with future Idearc management to promote interest and locate purchasers for Idearc's anticipated debt obligations, distributing a preliminary offering memorandum for the unsecured notes and soliciting lender commitments for the secured syndicated term loan. The sale of the notes was effected pursuant to Rule 144A and Regulation S of the Securities Act of 1933.

In anticipation of the spin-off, Verizon and Idearc purchased primary and excess Executive and Organizational Liability Policies to insure against litigation risks and potential liabilities arising from the transactions ("Idearc Runoff Policies" or "Policies"). Defendant Illinois National, an affiliate of AIG, issued the primary policy.[7] The excess policies, which follow-form and incorporate the provisions of the primary policy, were issued by Defendants XL Specialty Insurance Company, Zurich American Insurance Company, and Twin City Fire Insurance Company.[8] Verizon also separately purchased its own Executive and Organization Liability Policies to address, among other things, exposure to liability arising from the spin-off ("Verizon Policies").[9]

The Idearc Runoff Policies provide coverage for liability resulting from claims first made during the six-year policy period, which spanned from November 17, 2006 to November 17, 2012. The Policies proclaim to cover "Organizations," Idearc, Verizon, and their subsidiaries, and "Insured Persons," certain executives and employees of the insured Organizations. Endorsement No. 3 names Verizon as a covered "Organization," although "solely for Wrongful Acts alleged against [Verizon] arising from the divestiture of [the directories business]

[7] *Id.*, Ex. 7.
[8] *Id.*, Exs. 8-10.
[9] McKenna Aff. ¶¶ 6-8, Exs. 1-2. It is Verizon's position that the Verizon Policies provide "contingent coverage" for any Securities Claim arising out of the spin-off transaction to the extent coverage is unavailable under the Idearc Runoff Policies . *Id.* ¶¶ 9-10.

from [Verizon], and inclusive of all component steps as reflected in the Distribution Agreement…filed as an exhibit to the Form 10."[10]

Endorsement No. 7 to the Policies provided that "notwithstanding any other provision of th[e] policy (including any endorsement…)," no coverage would be provided for losses sustained by an Organization due to Claims made against the Organization for its Wrongful Acts. Rather, coverage for Organizations would be limited to losses "arising from a Claim made against an *Insured Person*…for any Wrongful Act of such Insured Person, but only to the extent such Organization has indemnified such Insured Person."[11] "Wrongful Acts" is defined as any actual or alleged "breach of duty" as well as any "misstatement, misleading statement, omission or act."[12] Endorsement No. 7 also set forth a "Preset Allocation" framework allowing 100% coverage for "any Loss,"[13] including "Defense Costs,"[14]

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[10] Hartmann Aff., Ex. 7 at End't 3.

[11] *Id.*, Ex. 7 at End't 7 (emphasis added).

[12] *Id.*, Ex. 7 § 2(aa), End't 7 § 3.

[13] "Loss" is defined as:

> [D]amages, settlements, judgments (including pre/post-judgment interest on a covered judgment), Defense Costs and Crisis Loss; however, "Loss" (other than Defense Costs) shall not Include: (1) civil or criminal fines or penalties; (2) taxes; (3) punitive or exemplary damages; (4) the multiplied portion of multiplied damages; (5) any amounts for which an insured is not financially liable or which are without legal recourse to an insured; and (6) matters which may be deemed uninsurable under the law pursuant to which this policy shall be construed.
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> Notwithstanding the foregoing paragraph, Loss shall specifically include (subject to this policy's other terms, conditions and limitations, Including but not limited to exclusions relatingrto profit or advantage, deliberate fraud or deliberate criminal acts)…solely with respect to Securities Claims, punitive, exemplary and multiplied damages. Enforceability

"incurred while a Securities Claim…is jointly made and maintained against both [an] Organization and one or more Insured Person(s)."[15]

The term "Securities Claim" is defined under the Policies as "a Claim made against any Insured Person:"

> (1) alleging a violation of any federal, state, local or foreign regulation, rule or statute regulating securities (including, but not limited to, the purchase or sale or offer or solicitation of an offer to purchase or sell securities) which is:
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> (a) brought by any person or entity alleging, arising out of, based upon or attributable to the purchase or sale or offer or solicitation of an offer to purchase or sell any securities of an Organization; or
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> (b) brought by a security holder of an Organization with respect to such security holder's interest in securities of such Organization; or
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> (2) brought derivatively on the behalf of an Organization by a security holder of such Organization, relating to a Securities Claim as defined In subparagraph (1) above.[16]

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of this paragraph shall be governed by such applicable law that most favors coverage for such penalties and punitive, exemplary and multiple damages.

Id., Ex. 7 § 2(p).

[14] "Defense Costs" means "reasonable and necessary fees, costs and expenses consented to by the Insurer…resulting solely from the Investigation, adjustment, defense and/or appeal of a Claim against an Insured, but excluding any compensation of any insured Person or any Employee of an Organization." *Id.*, Ex. 7 § 2(f). *See also id.*, Ex. 7 § 2(b) (defining Claim to include a Security Claim).

[15] *Id.*, Ex. 7 at End't 7 § 8(e)(iii)-(iv).

[16] *Id.*, Ex. 7 at End't 7 § 2. "Claim" is defined as:

> (1) a written demand for monetary, non-monetary or injunctive relief;
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> (2) a civil, criminal, administrative, regulatory or arbitration proceeding for monetary, non-monetary or injunctive relief which is commenced by:
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> (I) service of a complaint or similar pleading;
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> (II) return of an indictment, information or similar document (in the case of a criminal proceeding); or
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> (Ill) receipt or thing of a notice of charges; or
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> (3) a civil, criminal, administrative or regulatory Investigation of an Insured Person:
>
> (I) once such Insured Person Is identified in writing by such Investigating authority as a person against whom a proceeding described in Definition (b)(2)

In essence, these provisions allow Verizon to recover "Defense Costs" only in cases where a Securities Claim is brought against both Verizon and an Insured Person and a joint defense is maintained. Under such circumstances, the Insurers agreed to advance "covered Defense Costs no later than ninety (90) days after the receipt by the Insurer of such defense bills."[17] The Policies nevertheless obligated the Insureds to repay the Insurers for sums received "in the event and to the extent that any such Insured…shall not be entitled under this policy to payment of such Loss."[18]

Following the spin-off, Idearc operated as an independent company, with its stock publicly traded and its debt instruments freely tradable among qualified purchasers.[19] Idearc ultimately defaulted on the notes, however, and was forced to file a petition for Chapter 11 bankruptcy in March 2009. Soon thereafter, a number of suits were filed against Verizon and others alleging liability in connection with the spin-off. Individual shareholder actions were filed in Texas ("*Talbot* Action") and Pennsylvania ("*Barnard* Action") alleging the transactions improperly off-loaded debt onto purchasers of Idearc stock and notes through, among other things,

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may be commenced; or
(II) in the case of an Investigation by the SEC or a similar state or foreign government authority, after the service of a subpoena upon such Insured Person.

Id., Ex. 7 § 2(b) (stating also that the term "shall Include any Securities Claim").

[17] *Id.*, Ex. 7 at End't 7 § 8(a).

[18] *Id.* (obligating Insured to repay "severally according to [the Insureds'] respective interests").

[19] Compl. ¶ 50.

material misrepresentations and omissions in public filings concerning Idearc's solvency.[20] Of most relevance here, the *U.S. Bank* Action was filed on September 15, 2010 in the U.S. District Court for the Northern District of Texas by U.S. Bank National Association ("U.S. Bank"), the entity appointed Litigation Trustee in Idearc's bankruptcy, to recover funds for the benefit of Idearc debt securities holders and other creditors.[21]

U.S. Bank demanded approximately $14 billion in damages from Verizon, VFS, GTE, and John Diercksen ("Diercksen"), a Verizon executive and Idearc's sole director at the time of the spin-off. [22] According to the complaint, as amended, U.S. Bank sought recovery under a variety of legal theories including: (1) promoter liability and breach of fiduciary duty in connection with Verizon and Diercksen's orchestration of the transactions underlying the spin-off which left Idearc insolvent; (2) payment of an unlawful dividend in violation of Delaware General Corporation Law ("DGCL"), 8 Del. C. §§ 170, 173, 174; and (3) fraudulent transfer in violation of the U.S. Bankruptcy and Texas statutes.[23]

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[20] McKenna Aff. ¶¶ 15-16, Exs. 5-6. Both the *Talbot* and *Barnard* Actions were eventually dismissed.

[21] The plan of reorganization entered by the U.S. Bankruptcy Court for the Northern District of Texas involved, among other things, the assignment of any claims arising from the spin-off to a litigation trust. It appears U.S. Bank was already serving as Indenture Trustee for the holders of the Idearc notes in connection with the spin-off.

[22] Hartmann Aff., Ex. 21.

[23] *Id.*

Verizon, VFS, GTE, and Diercksen jointly defended the action for nearly five years. They sought and obtained dismissal of a number of the claims asserted against them and, following a bench trial in October 2012, judgment was entered in their favor on all remaining counts. The Texas court's ruling was later affirmed by the Fifth Circuit in 2014.[24]

In the course of successfully defending the *U.S. Bank* Action, Plaintiffs incurred significant legal expenses. In accordance with the terms of the Idearc Runoff Policies, Plaintiffs gave notice of *U.S. Bank* to the Insurers. On June 21, 2011, the claims administrator for the primary Idearc Runoff Policy issued a coverage position letter indicating, in relevant part, that Diercksen's defense costs would be covered, subject to the $7.5 million policy retention, but that the costs incurred in Verizon's defense would not be paid because "the *U.S. Bank* Complaint does not constitute a Securities Claim."[25]

Following this response, Verizon made a number of unsuccessful requests for a more complete explanation throughout August 2012 to January 2014 as to Illinois National's basis for its coverage position.[26] Illinois National responded on February 7, 2014 that it did not believe Count 9, "th[e] claim for promoter liability

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[24] *Id.*¶¶ 39-46.
[25] *Id.* ¶¶ 53-54, Ex. 26.
[26] *Id.* ¶¶ 55-57, Exs. 27-28.

and breach of fiduciary duty," alleged "a violation of any federal, state, local or foreign regulation, rule or statute regulating securities" as required by the policy's definition of Securities Claim.[27] Verizon sought additional clarification on March 3, 2014, namely with regard to Illinois National's position in light of the several other counts asserted in the complaint, but received no response.[28]

To date, no Insurer has paid anything toward the defense of the *U.S. Bank* Action, including for amounts spent defending Diercksen.[29] As a result, Plaintiffs commenced the instant litigation on June 4, 2014, claiming, among other things, that they are entitled to $48 million in defense costs relating to the *U.S. Bank* Action.[30] Plaintiffs first moved for partial summary on the issue of defense costs in September 2014. The Insurers opposed summary judgment and filed a motion to allow time for discovery under Superior Court Civil Rule 56(f). A hearing was held before this Court on December 4, 2014, during which Defendants conceded that, if *U.S. Bank* fit within the Policy's definition of "Securities Claim," Plaintiffs would be entitled to defense costs.[31]

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[27] *Id.*, Ex. 29.
[28] *Id.* ¶¶ 58-60, Ex. 30.
[29] *Id.* ¶ 63.
[30] This action seeks insurance coverage under the Idearc Runoff Policies and Verizon Polices for $50 million in costs incurred in four underlying actions. The majority of those costs relate to *U.S. Bank*. The Verizon Policies are purportedly excess to the Idearc Runoff Policies and are not at issue in these motions.
[31] Dec. 4, 2014 Hearing Tr. at 6:4-11.

Pursuant to its March 20, 2015 decision, this Court denied Plaintiffs' pre-discovery motion and granted the Insurers' Rule 56(f) motions.[32] The Court reasoned:

> First, this case is in its infancy and only recently has discovery been compounded. It is simply too early in the litigation to make the decision requested since to a large degree whether the underlying action fits the definition of a securities claim will resolve the litigation. As such, allowing some discovery is not only fair, but may actually prove beneficial to the Court's decision. Secondly, the Court finds that there is a sufficient ambiguity in the language of the policy such that prior communications and the dealings between the parties may become relevant. At this early juncture, no one can reasonably assert that there is "uncontested" evidence regarding how the contract should be interpreted. The issue has not been presented in cross motions for summary judgment, and if the Court was to grant Plaintiffs' Motion, it would be tantamount to a directed verdict in their favor. The Court is simply not prepared, without discovery occurring, to take such a dramatic action at this juncture of the litigation. Using the language of the Delaware Supreme Court, it would be difficult to find reasonable minds do not differ in regards to this contract language.[33]

Predicting it would again be confronted with the "Securities Claim" dispute, the Court instructed the parties to focus their discovery "on the negotiations and communications that occurred regarding the formation of the Idearc Runoff policy and the nature of the underlying *U.S. Bank* litigation."[34] The Court's Case

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[32] *Verizon Commc'ns Inc. v. Illinois Nat'l Ins. Co.*, 2015 WL 1756423 (Del. Super. Ct. Mar. 20, 2015).

[33] *Id.* at *3.

[34] *Id.* ("The Court understands that this issue will not go away and at some point in the litigation it will again be asked to make a decision as to whether the underlying U.S. Bank Action fits within the definition of a securities claim. However, by allowing the litigation to move reasonably forward, no one will be able to complain they did not have an opportunity to fully explore this area before the Court ruled.").

Management Order further explained that discovery should "address issues of policy underwriting, drafting, interpretation and intent, so as to aid the Court in determining 'whether the underlying U.S. Bank Action fits within the definition of a securities claim[.]'"[35]

The parties have since engaged in substantial fact and expert discovery. On May 20, 2016, Plaintiffs filed this Renewed Motion for Partial Summary Judgment on Defense Costs. According to Plaintiffs, discovery "wholly confirms" their assertion that the Idearc Runoff Policies "cover 100% of the costs of defending against the *U.S. Bank* Action."[36] Defendant Insurers likewise moved for summary judgment on May 23, 2016, arguing that, to the contrary, discovery reveals that *U.S. Bank* is not a Securities Claim as that term is defined under the Policies. Each party filed its opposition to the other's motion, and the Court has heard argument on the motions. This is the Court's decision.

II. STANDARD OF REVIEW

The Court will grant summary judgment pursuant to Delaware Superior Court Civil Rule 56 "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

[35] Case Management Order No. 1, May 5, 2015, § I ¶ 2 (Trans. ID 57184940).
[36] Pls.' Renewed Mot. for Partial Summ. J. at 11-12.

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[37] In reviewing a Rule 56 motion, the Court must consider the facts in a light most favorable to the non-moving party.[38] The Court will deny summary judgment where the record before it "reasonably indicates that a material fact is in dispute or 'if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.'"[39] This well-established standard is not altered where, as here, the parties have filed cross-motions for summary judgment.[40] "When cross-motions for summary judgment are presented to the Court, neither party's motion will be granted unless no genuine issue of material fact exists and one of the parties is entitled to judgment as a matter of law."[41]

III. DISCUSSION

As the parties acknowledge, whether *U.S. Bank* states a Securities Claim is inextricably linked to Defendants' duty to advance defense costs under the Idearc

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[37] Super. Ct. Civ. R. 56(c).
[38] *See Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361 (Del. 1990).
[39] *See Comet Sys., Inc. S'holders' Agent v. MIVA, Inc.*, 980 A.2d 1024, 1029 (Del. Ch. 2008) (quoting *Ebersole v. Lowengrub,* 180 A.2d 467, 470 (Del.1962)).
[40] *See Capano v. Lockwood*, 2013 WL 2724634, at *2 (Del. Super. Ct. May 31, 2013) (citing *Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043, 1050 (Del. Super. Ct. 2001)).
[41] *Nat'l Union Fire Ins. Co. of Pittsburgh, PA. v. Rhone-Poulenc Basic Chems. Co.*, 1992 WL 22690, at *5 (Del. Super. Ct. Jan. 16, 1992) (quoting *Empire of Am. Relocation Servs., Inc. v. Commercial Credit Co.,* 551 A.2d 433, 435 (Del. 1988)), *aff'd sub nom, Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192 (Del. 1992).

Runoff Policies. Thus, the issue presented by the summary judgment motions is whether the term "Securities Claim," as defined in the Policies, encompasses the *U.S. Bank* Action, such that Plaintiffs are entitled to recover the costs of defending that litigation. At the September 2016 hearing on the motions, the parties represented to the Court that no factual disputes exist for submission to the jury and the Court's decision will be dispositive of the litigation.[42]

A. Duty to Advance Defense Costs

As an initial matter, the parties disagree as to the proper standard for determining Defendants' obligation to pay defense costs. Plaintiffs maintain that, under both New York and Delaware law, an insurer must "provide a complete defense" so long as any of the allegations in the underlying complaint "*potentially* fall within the coverage of the policy."[43] According to Plaintiffs, this determination is made based on the *facts alleged* in the underlying complaint, rather than by simply looking to the labels or discrete causes of action asserted. Defendants respond that the "potential for coverage" standard is reserved for cases where an insurer assumes a "duty to defend," which the Idearc Runoff Policies expressly disclaim. Because the Policies agree only to advance "covered Defense Costs," Defendants argue Plaintiffs are required to establish that *U.S. Bank* states a

[42] Sept. 8, 2016 Hearing Tr. at 69, 73.
[43] Pls.' Renewed Mot. for Partial Summ. J. at 24-25 (emphasis added).

covered Securities Claim. Further, given that Securities Claim is defined as a Claim "alleging a violation," Defendants contend the particular violation asserted is determinative coverage, not merely the "recitation of facts."[44]

It is true, under Delaware law, that where an insurer assumes a duty to defend, that duty is triggered if "the factual allegations in the underlying complaint potentially support a covered claim."[45] It is clear, under the Policies at issue here, however, that the Insurers disclaimed any "duty to defend." Rather, the Policies expressly obligate *the Insureds* to "defend and contest any Claim made against them,"[46] with the Insurers agreeing only to "advance …*covered* Defense Costs" within ninety days of receiving "such defense bills."[47] Defense Costs are defined as "reasonable and necessary fees, costs and expenses consented to by the Insurer…resulting solely from the Investigation, adjustment, defense and/or appeal of a Claim," including a Securities Claim,[48] "against an Insured." [49]

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[44] Defs.' Reply Br. at 6.
[45] *See Virtual Bus. Enters., LLC v. Maryland Cas. Co.,* 2010 WL 1427409, at *4 (Del. Super. Ct. Apr. 9, 2010).
[46]Hartmann Aff., Ex. 7 at 1, End't 7 § 8(b).
[47] *Id.*, Ex. 7 at End't 7 § 8(a) (emphasis added). The declarations page of the Policies displays in bold font: "THE INSURER MUST ADVANCE DEFENSE COSTS…PURSUANT TO THE TERMS HEREIN PRIOR TO THE FINAL DISPOSITION OF A CLAIM." *Id.*, Ex. 7 at 1 (emphasis in original).
[48] *See id.*, Ex. 7 § 2(b) (defining Claim to include a Securities Claim).
[49] *Id.*, Ex. 7 § 2(f) (excluding "any compensation of any insured Person or any Employee of an Organization"). *See also id.*, Ex.7 at End't 7 § 8(a) (noting that insurer's consent was not to be unreasonably withheld).

The Court recognizes that a number of jurisdictions, including New York, distinguish between an insurer's duty to defend and its duty to pay defense costs.[50] Courts in New York characterize the duty to defend as the broader of the two, requiring advancement of defense costs even when only a portion of underlying litigation concerns "covered claims."[51] Where an insurer is obligated, not to defend the policy holder, but only to advance defense expenses, New York courts have acknowledged that the insurer is entitled to "differentiate between covered and non-covered claims."[52] Like in Delaware, New York courts nevertheless recognize that both duties arise "whenever the underlying complaint alleges facts

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[50] Defendants cite a decision by a California district court, *Jeff Tracy, Inc. v. U.S. Specialty Ins. Co.*, in which the Court found the duty to defend standard inapplicable to a policy that provided only for payment of defense costs. 636 F. Supp. 2d 995, 1004 (C.D. Cal. 2009). Rather, the burden was placed on the insured to establish entitlement to coverage. *See id.* *Jeff Tracy* was cited in at least one New York case, which acknowledged that courts in New York look to California law "in developing its current duty to advance defense costs doctrine." *See QBE Americas Inc. v. ACE Am. Ins. Co.*, 2014 WL 4250089, at *7 n.7 (Sup. Ct. N.Y. Cty. Aug. 27, 2014) (citing *Fed. Ins. Co. v. Kozlowski*, 792 N.Y.S.2d 397 (N.Y. App. Div. 2005) ("The obligation to defend is readily understood and its requirement is clear.... The obligation to pay defense expenses, on the other hand, is not as easily defined or applied. Under this type of defense coverage, the insurer is entitled to differentiate between covered and non-covered claims.")). *See also In re Viking Pump, Inc.*, 2016 WL 4771312, at *25 n.163 (Del. Sept. 12, 2016) (announcing Delaware Supreme Court's belief "that, under New York law, an insurer's duty to pay defense costs and its duty to defend are separate and distinct" and that "the New York Court of Appeals, like the courts of other jurisdictions, would embrace this notion") (citing *In re WorldCom, Inc. Sec. Litig.*, 354 F.Supp.2d 455, 464 n.11(S.D.N.Y. 2005)); *Petroterminal De Panama v. Houston Cas. Co.*, 2016 WL 4703898, at *3 (2d Cir. Sept. 8, 2016).

[51] *See QBE Americas Inc.*, 2014 WL 4250089, *5-6 (citing *Kozlowski*, 792 N.Y.S.2d at 402-04).

[52] *See id. See also Kozlowski*, 792 N.Y.S.2d at 403 ("[T]he insurer is entitled to differentiate between covered and non-covered claims, despite the fact that a promise to pay defense costs has been construed to require contemporaneous payment.").

that fall within the scope of coverage" and construe both duties "broadly in favor of the policyholder."[53]

Plaintiffs, as the insureds, ultimately "bear[] the burden of proving that a claim is covered by an insurance policy," and if satisfied, "the burden shifts to the [I]nsurer[s] to prove that the event is excluded under the policy."[54] Where defense costs are concerned, the Court must look to the allegations of the underlying complaint in order to determine whether the action states a claim covered by the policy.[55] "The Court is not bound by the narrow language in a complaint filed against an insured," nor is its examination "limited to the plaintiff's unilateral characterization of the nature of [its] claims," as Defendants appear to suggest.[56] Rather, the test is whether the allegations of the complaint, when read as a whole, assert "a risk within the coverage of the policy."[57]

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[53] *See Kozlowski*, 792 N.Y.S.2d at 401-03.
[54] *See Virtual Bus. Enters., LLC,* 2010 WL 1427409, at *4.
[55] *See Cont'l Cas. Co. v. Alexis I. duPont Sch. Dist.*, 317 A.2d 101, 103 (Del. 1974).
[56] *See Blue Hen Mech., Inc. v. Atl. States Ins. Co.*, 2011 WL 1598575, at *2 (Del. Super. Ct. Apr. 21, 2011) ("The Court may review the complaint as a whole, considering all reasonable inferences that may be drawn from the alleged facts."), *aff'd,* 29 A.3d 245 (Del. 2011).
[57] *See Cont'l Cas. Co.,* 317 A.2d at 103, 105 ("We do not suggest that the plaintiff necessarily must have couched his claim in the technical verbiage peculiar to an action for defamation in order to bring it within the purview of the policy, but we are convinced that his complaint, read as a whole, does not charge any offense insured against under the terms of the policy.").

B. *U.S. Bank* Action

U.S. Bank's Amended Complaint sought damages in connection with the spin-off under a variety of legal theories including: (1) promoter liability and breach of fiduciary duty; (2) payment of an unlawful dividend in violation of Del. Code Ann. tit. 8 §§ 170, 173, 174; and (3) fraudulent transfers under the U.S. Bankruptcy Code and Texas version of the Uniform Fraudulent Transfer Act. [58]

U.S. Bank alleged that the spin-off transaction involved the transfer of "fraudulent consideration" to Verizon in that its value was much more than the assets received by Idearc and that Verizon deliberately "took advantage of a distorted capital market to shift…billions…[in] debt obligations from itself to Idearc and Idearc's creditors." Verizon allegedly designed and implanted this scheme through Diercksen, given his then dual-role as an officer of Verizon and Idearc's sole director. In this regard, Diercksen was alleged to have violated his fiduciary duties to Idearc and its creditors by conceiving and approving the spin-off solely for Verizon's benefit and by authorizing an unlawful dividend to Idearc's shareholders when Idearc lacked a surplus or net profits.[59]

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[58] Hartmann Aff., Ex. 21.

[59] *Id.* ¶¶ 45, 77. U.S. Bank sought to hold Verizon jointly and severally liable for Diercksen's conduct in this regard, claiming Verizon aided and abetted Diercksen's breach of fiduciary duties throughout the planning and implementation of the spin-off. *Id.* ¶ 48. Verizon was likewise alleged to have violated Delaware's Dividend Statutes by receiving the dividends, "directly and indirectly, in bad faith and with knowledge of the facts indicating the dividends were unlawful." *Id.* ¶ 78.

In addition, Verizon and Diercksen were both claimed to have breached fiduciary duties owed to Idearc and to future shareholders as "promoters" of the newly formed corporation by engaging in the allegedly fraudulent transfers and by committing "fraud on the market."[60] According to U.S. Bank, Verizon knew its directories business would continue to decline and designed the spin-off solely to convert billions of its own debt into commercial paper for "purchase[] in the market place by investment banks to facilitate a 'tax free' debt-for-debt exchange."[61] Verizon was alleged to have intentionally disguised the spin-off as a legitimate business transaction in order to generate financial market interest.[62] In particular, U.S. Bank claimed Verizon structured its "promotional scheme" so it only had to file a Form 10 under the 1934 Securities Act, purportedly "easing the path for…private placement of Idearc's highly questionable Unsecured Notes" which could then be marketed "without strict adherence to [Generally Accepted Accounting Principles]."[63] Verizon also allegedly manipulated financial information in its Form 10 and advertising materials in order to make Idearc appear

[60] *Id.* ¶¶ 110-11.
[61] *Id.* ¶ 82.
[62] *Id.* ¶¶ 87-89.
[63] *Id.* ¶ 88.

like a "profitable, growing business" and intentionally misrepresented that the spin-off would be approved following the transaction by an independent board.[64]

As part of their defense in the *U.S. Bank* Action, Verizon and Diercksen's attorneys argued, among other things, that § 546(e) of the Bankruptcy Code precluded U.S. Bank's fraudulent transfer allegations. Section 546(e) provides a "safe harbor" against liability for "settlement payments" made to complete a securities transaction if such payments were made by, to, or for the benefit of a financial institution. The U.S. Bank court found the safe harbor provision applicable to certain payments since the case involved a "securities transaction, because the…Idearc stock[] and Idearc debt are all securities."[65] Following the October 2012 bench trial, the *U.S. Bank* court found Idearc's business was solvent at the time of the spin-off and entered judgment in favor of Verizon and Diercksen.

C. "Securities Claim"

With the foregoing, the Court must decide whether *U.S. Bank* presents a claim covered under the Idearc Runoff Policies. The parties agree that, in order for Verizon to recover Defense Costs under the Policies, the *U.S. Bank* Action must

[64] *Id.* ¶¶ 89, 109.
[65] *U.S. Bank Nat'l Ass'n v. Verizon Commc'ns Inc.*, 892 F. Supp. 2d 805, 815 (N.D. Tex. 2012).

fall within the Policies' definition of "Securities Claim." Again, the Policies define "Securities Claim" as "a Claim made against any Insured Person:"

> (1) alleging a violation of any federal, state, local or foreign regulation, rule or statute regulating securities (including, but not limited to, the purchase or sale or offer or solicitation of an offer to purchase or sell securities) which is:
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> (a) brought by any person or entity alleging, arising out of, based upon or attributable to the purchase or sale or offer or solicitation of an offer to purchase or sell any securities of an Organization; or
>
> (b) brought by a security holder of an Organization with respect to such security holder's interest in securities of such Organization; or
>
> (2) brought derivatively on the behalf of an Organization by a security holder of such Organization, relating to a Securities Claim as defined in subparagraph (1) above.[66]

Thus, the Court must determine whether *U.S. Bank* alleged "a violation of any…regulation, rule or statute regulating securities," and whether U.S. Bank, as litigation trustee, qualified as a proper "Securities Claim" plaintiff.

1. ***Applicable rules of contract interpretation***

As with other contracts, the interpretation of an insurance policy is a question of law.[67] In attempting to resolve a dispute regarding the proper construction of an insurance policy, "a court should first seek to determine the parties' intent from the language of the insurance contract itself."[68] If the language

[66] Hartmann Aff., Ex. 7 at End't 7 § 2.

[67] *See Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 745 (Del. 1997).

[68] *See Alstrin v. St. Paul Mercury Ins. Co.*, 179 F. Supp. 2d 376, 388 (D. Del. 2002). *See also Emmons*, 697 A.2d at 745 ("The scope of an insurance policy's coverage…is prescribed by the language of the policy.") (citing *Rhone–Poulenc Basic Chems. Co.*, 616 A.2d at 1195–96)); *Playtex FP, Inc. v. Columbia Cas. Co.*, 622 A.2d 1074, 1076–77 (Del. Super. Ct. 1992) (citing

is "clear and unequivocal," the Court will read the terms of the policy in accordance with their plain meaning.[69] In reviewing the terms of an insurance policy, the Court considers "the reasonable expectations of the insured at the time of entering into the contract to see if the policy terms are ambiguous or conflicting, contain a hidden trap or pitfall, or if the fine print takes away that which has been provided by the large print."[70] An insurance policy is ambiguous "when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[71] In the event of ambiguity, "the doctrine of *contra proferentum* requires that the language of an insurance contract be construed most strongly against the insurance company that drafted it."[72]

Defendants ask that the Court refrain from applying *contra proferentum* to the extent ambiguities exist in the language of the Idearc Runoff Policies. Defendants characterize application of the doctrine as a "last resort" and

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E.I. du Pont de Nemours v. Shell Oil Co., 498 A.2d 1108, 1113 (Del. 1985)).

[69] *See E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, 1996 WL 111205, at *2 (Del. Super. Ct. Jan. 30, 1996) (quoting *Hallowell v. State Farm Mut. Auto. Ins. Co.,* 443 A.2d 925, 926 (Del. 1982)).

[70] *See id.* (citing *Hallowell,* 443 A.2d at 927). *See also Steigler v. Ins. Co. of N. Am.,* 384 A.2d 398, 401 (Del.1978) ("[A]n insurance contract should be read to accord with the reasonable expectations of the purchaser so far as the language will permit.") (quoting *State Farm Mutual Auto. Ins. Co. v. Johnson*, 320 A.2d 345 (Del. 1974)).

[71] *See Rhone-Poulenc Basic Chems. Co.*, 616 A.2d at 1196 (citing *Steigler,* 384 A.2d at 400).

[72] *See id.*

unnecessary where highly-negotiated contracts between sophisticated parties are involved.[73] Even if the record before the Court demonstrated that Plaintiffs bargained for certain terms in the policy, there is no indication Plaintiffs had any role in drafting the language at issue in this case.[74] On the contrary, it appears undisputed that the definition of "Securities Claim" represents standard-form language, drafted unilaterally by the Insurers. The Court thus sees no reason to depart from the well-settled principle dictating that any ambiguities in an insurance policy be construed in favor of the insured and against the insurer.[75]

2. *"Regulation, rule, or statute regulating securities"*

In order for Verizon to recover its defense costs in connection with *U.S. Bank*, the litigation must have alleged violations of "regulations, rules or statutes

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[73] Defs.' Br. in Opp'n to Pls.' Renewed Mot. for Partial Summ. J at 9.

[74] *See Alstrin*, 179 F. Supp. 2d at 390 ("Generally speaking, however, Delaware…courts continue to strictly construe ambiguities within insurance contracts against the insurer and in favor of the insured in situations where the insurer drafted the language that is being interpreted regardless of whether the insured is a large sophisticated company.").

[75] *See id.* (stating that "in determining whether to…construe ambiguities against National Union, the court must determine whether National Union unilaterally drafted the ambiguous portions of the policy" and finding case was not an instance "where applying the contra-insurer rule would be inappropriate" because the documentary record demonstrated that the insured "had no substantial role in drafting the National Union policy form, on which the four exclusions relied upon by National Union to deny coverage were standard boilerplate terms"); *Rhone-Poulenc Basic Chems. Co.*, 1992 WL 22690, at *8 ("AMICO argues that the doctrine of *contra proferentem* should not be applied…because Defendant is a sophisticated commercial insured, with its own insurance and legal departments, represented by a sophisticated insurance brokerage company. I disagree. Application of the doctrine turns not on the size or sophistication of the insured, but rather on the fact that the policy language *at issue* is drafted by the insurer and is not negotiated.") (emphasis added).

regulating securities." The Policies do not provide further clarification or definitions with respect to this language and, unsurprisingly, the parties disagree as to its meaning and scope.

Under Plaintiffs' interpretation, the definition of Securities Claim is sufficiently broad to encompass the allegations of *U.S. Bank.* According to Plaintiffs, the Court should adhere to the plain meaning of undefined terms and find the word "rule," as used in the "Securities Claim" definition, capable of including "judicial rule[s] of law or common law rule[s]," such as those governing the conduct of fiduciaries.[76] Plaintiffs urge the Court to find that a law "regulates securities" "if it must be followed to properly engage in a securities transaction," such that "failure to do so could be used as a basis to enjoin or avoid the transaction or impose sanctions."[77]

Defendants disagree, advancing a more narrow construction of the term "Securities Claim."[78] Defendants urge the Court to embrace a more technical

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[76] Pls.' Renewed Mot. for Partial Summ. J. at 31.

[77] Pls.' Reply Br. at 3; Pls.' Renewed Mot. for Partial Summ. J at 23 (citing McKenna Aff., Ex. 69 (Deposition of William T. Allen) at 81:21-25, 82:1-7)). Former Chancellor Allen opined that fraudulent transfer rules, unlawful dividend statutes, and fiduciary duties of officers, directors, and controlling shareholders each may constitute rules regulating securities. McKenna Aff., Ex. 50 ¶¶ 11, 13, 15-16, 18-20, 23-25. He thus concluded that the allegations of *U.S. Bank* "allege a violation of any 'rule or statute' 'regulating securities' as defined in the Policies." *Id.*, Ex. 50 ¶ 3.

[78] Defs.' Reply Br. at 14 ("Defendants need not prove what may or may not be a Securities Claim in different hypothetical facts and circumstances—it is sufficient to demonstrate that U.S. Bank does not assert a violation of a regulation, rule, or statute regulating securities and thus is not a Securities Claim.").

reading of the definition's undefined terms, arguing that "rules" and "regulations" are generally understood in the "securities context" as including only those laws "issued pursuant to an administrative action of a legislative or executive body."[79] According to Defendants, "regulating securities" limits the scope of "Securities Claim" to regulations, rules, and statutes "specifically designed and focused on regulating securities, rather than laws of general application that merely touch upon securities in an ancillary fashion."[80] Essentially, in Defendants' view, Securities Claims are limited to those expressly alleging violations of federal securities and state Blue Sky laws.

Where, as here, an insurance policy does not define the language at issue, the rules of construction require the Court to refer to the terms' plain and ordinary meanings.[81] Black's Law Dictionary defines "rule" as "an established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation," which includes "[a] judicial order, decree, or

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[79] Defs.' Mot. for Summ. J at 15-16.
[80] *Id.* at 25.
[81] *See Virtual Bus. Enters., LLC*, 2010 WL 1427409, at *5-6 (relying on "ordinary and usual meanings" of undefined policy terms); *Rhone-Poulenc Basic Chems. Co.*, 1992 WL 22690, at *12 ("In the absence of such a definition, the applicable rules of construction require that the term be given its plain, ordinary meaning....").

direction; ruling."[82] To "regulate," according to Black's Law Dictionary, means "[t]o control (an activity or process) esp. through the implementation of rules."[83]

Nothing in the Policies' definition of Securities Claim purports to exclude common law rules or to limit coverage to only those Claims alleging violations of enumerated state or federal securities statues and regulations. In *Virtual Business Enterprises, LLC v. Maryland Casualty Co.*, when confronted with a liability policy that provided coverage "where a publication 'disparages a person's or organization's goods products or services'" and did not limit coverage "to only those instances of disparagement under the Delaware Deceptive Trade Practices Act," this Court emphasized that it was the burden of the *insurer* "to identify a distinction between disparagement as generally defined and disparagement under the Delaware Deceptive Trade Practices Act...."[84] Similarly, if the Insurers here sought to exclude claims alleging violations of common law rules, the policy language should have reflected this distinction. Thus, the Court refuses to adopt

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[82] RULE, Black's Law Dictionary (10th ed. 2014). *See also, e.g., Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006) ("Delaware courts look to dictionaries for assistance in determining plain meaning....").
[83] REGULATE, Black's Law Dictionary (10th ed. 2014).
[84] *See Virtual Bus. Enters., LLC*, 2010 WL 1427409, at *6-7 ("In this case, Maryland Casualty did not include such a distinction within the Policy.").

Defendants' technical interpretation to the extent it attempts to eliminate common law rules.[85]

That said, the term "rule," like "regulation" and "statute," is modified by the phrase "regulating securities." The Policies clarify only that such regulation includes, but is "*not limited to*," "the purchase or sale or offer or solicitation of an offer to purchase or sell securities."[86] Plaintiffs advance the interpretation that a rule or statute "regulates securities" "if it must be followed to properly engage in a securities transaction," such that non-compliance may supply "a basis to enjoin or avoid the transaction or impose sanctions." Defendants disagree and instead argue "regulating securities" pertains only to laws "specifically designed and focused on regulating securities, rather than laws of general application that merely touch upon securities in an ancillary fashion."[87] Defendants maintain that none of the rules and statutes alleged to have been violated in *U.S. Bank* "regulate securities," rather: (1) fiduciary duty rules regulate corporate governance; (2) Delaware's dividend statutes govern the distribution of corporate capital and "internal corporate affairs;" and (3) the relevant fraudulent transfer and Bankruptcy Code provisions are aimed

[85] *See Swfte Int'l, Ltd. v. Selective Ins. Co. of Am.*, 1994 WL 827812, at *7 n.3 (D. Del. Dec. 30, 1994) (finding argument that insured "could not reasonably expect…violations of the Lanham Act" to fall within coverage "not compelling" because neither "misappropriation of advertising ideas and style of doing business" or "unfair competition" had "clear definitions or limitations based on specific references to statutory offenses").
[86] Hartmann Aff., Ex. 7 at End't 7 § 2(1).
[87] Defs.' Mot. for Summ. J at 25.

at preventing debtors from improperly relocating assets beyond the reach of creditors.[88]

"In situations where the meaning of a contract is uncertain, Delaware law requires… [the Court] look beyond the contract itself in order to ascertain the parties' true intentions."[89] Having reviewed the evidence submitted by the parties, the Court finds Plaintiffs' construction of the Policies reasonable and that Defendants have failed to show that their interpretation is the only fair one. First, a review of the drafting history of the "Securities Claim" language at issue here belies Defendants' interpretation of the term's scope. The Policies at issue were based on the 2/2000 Form. Significantly, the previously used 1995 Form presents a more narrow definition of "Securities Claim," specifically limiting the term to rules and regulations promulgated under the 1933 and 1934 Securities Acts and state or foreign "securities laws." This is essentially the interpretation that Defendants ask the Court to adopt to limit coverage under the Policies here. Unfortunately for Defendants, however, a modified definition of "Securities Claim" was introduced in the 1998 Form, which more broadly defined the term as pertaining to alleged violations of "*any* law, regulation or rule, *whether statutory or common law*." Further, the marketing materials circulated in connection with the more recent

[88] Defs.' Mot. for Summ. J at 27-33; Defs.' Reply Br. at 18-24.
[89] *Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76, 101 (Del. Ch. 2009).

2/2000 Form, upon which the Policies here were based, characterize that form as an "expansion" of prior offerings in that it would provide, among other things, "enhanced coverage for securities liability...."[90]

In spite of Defendants' argument regarding the removal of the common law reference that was contained in the 1998 form, they are unable to provide a reasonable explanation as to why the insurers went from a clear unequivocal phrase limiting coverage in both the 1995 and 1998 form to the present language. The change had some purpose, and no one has asserted that the change in language was intended to further limit coverage. And if that is true, which the Court believes it was, what was the broader language intended to cover? Certainly it was not just that provided in the 1995 form which in essence is the argument asserted now by Defendants.

Moreover, Illinois National's prior coverage decisions appear inconsistent with the construction it advances here. A July 2009 letter was produced in this matter illustrating Illinois National's preliminary coverage position with respect to an action brought by shareholders of Celutel, Inc., a wholly owned subsidiary of Verizon, challenging the adequacy of consideration they received in connection

[90] McKenna Aff., Ex. 43. (AIG's February 2000 news release introduced the 2/2000 form as a new management liability policy that would provide enhanced coverage for securities liability and broaden the coverage that had been available under the 1998 form).

with the merger of Biloxi Cellular into Celutel and alleging breaches of fiduciary duties of loyalty and disclosure.[91] In the letter, the adjustor advises that the Celutel "Complaint appear[ed] to meet the Policy's definition of Securities Claim."[92] This undercuts Defendants' contention that Securities Claim was intended to cover only alleged violations of statutes or laws specifically and exclusively enacted to govern securities. It would also seem to demonstrate that Illinois National's focus in making its coverage determination with respect to *Celutel* was on the "Complaint," rather than merely on the labels affixed to each count set forth therein.

Further, the record supports that the Insurers understood that the Policies were intended to cover the very risks presented by the *U.S. Bank* Action. The Insurers conditioned their provision of coverage on review of certain documents, including the SEC Form 10 setting forth the specifics of the spin transactions including several risk factors. Two of those risk factors were that the transactions could be alleged to involve an unlawful dividend or to constitute fraudulent transfers. Defendants agreed to provide coverage and specifically added Endorsement No. 3 making Verizon an Insured under the Policies solely in connection with liability "arising from the divestiture of [its directories

[91] *Id.*, Exs. 45, 47.
[92] *Id.*, Ex. 47.

business]...and inclusive of all component steps as reflected in the Distribution Agreement...filed as an exhibit to the Form 10."[93]

Defendants try to minimize the fact that they required receipt of the Form 10 prior to rendering their coverage decision, characterizing it as insignificant and a mere formality. The record before the Court simply does not support this characterization. In fact, one potential insurer refused to provide coverage after the Form was provided and it appears to have influenced the amount of coverage Defendants were willing to provide as well as how much that coverage would cost.

The Court thus finds Plaintiffs' interpretation of "Securities Claim" reasonable based on the above. It is "the obligation of the insurer to state clearly the terms of the policy."[94] Resolving any uncertainty in Plaintiffs' favor, the Court cannot read the words "regulating securities" as limiting Securities Claims under the Policies to those based on alleged violations of statutes, rules, or regulations specifically promulgated with the singular focus and effect of regulating securities, and securities alone. Rather, the Court will interpret those terms as pertaining to laws one must follow when engaging in securities transactions.

Further, the Court is not persuaded by Defendants' suggestion that this construction would broaden what it means to "regulate" securities to "anything that

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[93] Hartmann Aff., Ex. 7 at End't 3.
[94] *See, e.g., O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 288 (Del. 2001).

somehow involved securities" and thus encompass "any number of claims" clearly not covered by the Policies.[95] Defendants claim applying Plaintiffs' interpretation would make "all domestic relations laws…laws 'regulating securities' where the marital assets include securities."[96] This characterization ignores both the purpose of the Policies as well as express terms and provisions therein. When construing the language of an insurance policy, the Court "must rely on a reading of all of the pertinent provisions of the policy as a whole"[97] and bear in mind the overall purpose of the parties' agreement.[98] The Polices here were purchased with the narrow purpose of insuring against litigation risks arising from the Idearc spin-off, which contained a number of complex securities transactions. Coverage was purchased exclusively for Claims against an Insured Individual *in his or her capacity as a public company director or officer*. Coverage for Securities Claims is further limited to those brought by a defined class of potential plaintiffs and with regard to defined interests or transactions.[99] However, even if the Defendants' fears were somewhat founded, they control the language of the policies and have the ability to expressly limit coverage.

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[95] Defs.' Mot. for Summ. J at 26.
[96] *Id.* at 27.
[97] *See O'Brien.,* 785 A.2d 281 at 287.
[98] *See Playtex FP, Inc.,* 622 A.2d at 1076-77.
[99] Hartmann Aff., Ex. 7 at End't 7 § 2.

Here, it appears the financial incentive to sell these policies and obtain a marketing advantage by touting their more expansive coverage trumped the common sense, plain language approach to clearly articulating what was covered. Since the Court suspects that most of these policies are never activated by litigation and the costs to purchase coverage are considerable, it may have simply been seen as a risk worth taking.[100] Unfortunately, here, that decision results in significant financial consequences for the Insurers.

3. *"Securities Claim" plaintiff*

To constitute a covered Securities Claim, U.S. Bank must have brought the action as either (a) a "person or entity alleging, arising out of, based upon or attributable to the purchase or sale or offer or solicitation of an offer to purchase or sell any securities of an Organization," (b) "a security holder of an Organization with respect to such security holder's interest in securities of such Organization," or (c) "derivatively on the behalf of an Organization by a security holder of such Organization…."[101]

Defendants argue U.S. Bank does not qualify under any of categories because: (1) the spin-off did not involve the purchase or sale of securities and (2) U.S. Bank was brought "for the benefit of security holders" and not "*by* a security

[100] Verizon paid AIG a premium of $950,000 with a retention amount of 7.5 million.
[101] *See id.*

holder."[102] Plaintiffs, on the other hand, insist U.S. Bank could satisfy all three categories with respect to the identity of the claimant and subject of the claim.

U.S. Bank involved the sale of fractional shares of Idearc stock in the financial market, the Investment Bank's purchase of Verizon debt securities in the financial market, the exchange of Idearc debt securities in exchange for those Verizon securities, and the eventual resale of the Idearc debt securities to previously solicited purchasers and lenders. U.S. Bank alleged these transactions were integral to Verizon's scheme to offload debt onto unsuspecting purchasers. The language in subsection (a) here is so broad it would simply be inappropriate to find that U.S. Bank's claims did not either allege, arise from, or were based upon or attributable to "the purchase or sale or offer or solicitation of an offer to purchase or sell any securities of an Organization." Even if this were not the case, the Court cannot find Defendants' interpretation of the Policies reasonable. The *U.S. Bank* Action was brought derivatively with respect to Idearc's creditors interests in certain debt securities. As Plaintiffs point out, to accept Defendants' reasoning would essentially be to ignore that the Policies state that bankruptcy of an Organization "shall not relieve the Insurer of any of its obligations hereunder." This would relieve the Insurers of its obligation to pay claims that, prior to the

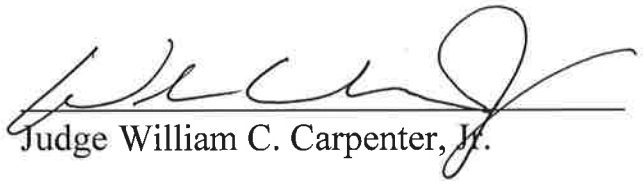
[102] Defs.' Reply Br. at 22-25 (emphasis added).

bankruptcy, could and would have been covered if brought directly by the holders of the Idearc Notes.

IV. CONCLUSION

This was not an easy decision. Counsel for all parties presented effective arguments and served as outstanding advocates for their clients. While the Court has decided to grant Plaintiffs' Motion for Partial Summary Judgment, it emphasizes that its ruling is based on the language contained in the Idearc Runoff Policies. This decision is not a statement of what the Court perceives should be the proper scope of coverage under such policies, nor is it intended to reflect a shift in our present law. The Court has no hesitation enforcing reasonable limitations on coverage, where the limiting language is clear and consistent with the terms of the policy. Unfortunately for Defendants, this was not the case with the Idearc Runoff Policies. Plaintiffs' Motion for Partial Summary Judgment is therefore GRANTED and Defendants' Motion for Summary Judgment is DENIED.

IT IS SO ORDERED.



Judge William C. Carpenter, Jr.