IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

AT&T CORP.,	)	
	)	
Plaintiff,	)	
v.	)	C.A. No. 04C-11-167 (JRJ)
	)	
CLARENDON AMERICA	)	
INSURANCE CO., et al.	)	
Defendants.	)	

Date Submitted: September 20, 2005
Date Decided: April 13, 2006

OPINION

Upon Defendant Continental Casualty Co.'s Motion for Partial Summary Judgment for a Declaration That There is No Coverage for the Williamson Fiduciary and Leykin Actions Under the Excess Run-Off and 2001 Continental Policies (D.I. 65/E-File 109) – **GRANTED**

Upon Defendant Zurich American Ins. Co.'s Motion for Summary Judgment and Joinder in Defendant Federal Ins. Co.'s Motion for Partial Summary Judgment as to the 2001-2007 AT&T Run-Off Policies (D.I. 66/E-File 110) – **GRANTED**

Upon Defendant National Union Fire Ins. Co.'s Motion for Partial Summary Judgment and/or Judgment on the Pleadings (D.I. 69/E-File 113) – **GRANTED**

Upon Defendant Federal Ins. Co.'s Motion for Partial Summary Judgment as to the 2001-2007 AT&T Run-Off Policies (D.I. 72/E-File 117) – **GRANTED**

Upon Defendant Gulf Ins. Co.'s Joinder in Continental Casualty Co.'s Motion for Partial Summary Judgment for a Declaration That There is No Coverage for the Williamson Fiduciary and Leykin Actions Under the Excess Run-Off and 2001 Continental Policies (D.I. 73/E-File 118) – **GRANTED**

Upon Defendant Gulf Ins. Co.'s Joinder in Federal Ins. Co.'s Motion for Partial Summary Judgment for a Declaration That There is No Coverage for the Underlying Litigation Under the AT&T Run-Off Policy Tower (D.I. 75/E-File 120) – **GRANTED**

Upon Defendant Twin City Fire Ins. Co.'s Joinder in Motions for Partial Summary Judgment Filed in Connection With the Williamson Fiduciary and Leykin Actions (D.I. 81/Lexis 130) – **GRANTED**

Upon Defendant Faraday Capital Limited's ("Lloyd's") Joinder in Federal Ins. Co.'s Motion for Partial Summary Judgment (D.I. 82/E-File 135) – **GRANTED**

Appearances:

John E. James, Esquire and Sarah DiLuzio, Esquire of Potter Anderson & Corroon, 1313 North Market Street, Wilmington, Delaware, 19801, and Jeffery M. Johnson, Esquire (*Argued*), Deborah Goldstock Ringel, Esquire, Ryan S. Luft, Esquire, Jason D. Wallach, Esquire, B. Haven Walling, Jr., Esquire and Karen L. Bush, Esquire (*Pro Hac Vice*) of Dickstein, Shapiro Morin & Oshinsky, 2101 L Street, N.W., Washington, D.C. 20037 and Alexander D. Widell, Esquire (*Pro Hac Vice*) of Dickstein, Shapiro, Morin & Oshinsky, 1177 Avenue of the Americas, New York, New York 10036, Attorneys for the Plaintiff AT&T Corp.

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David A. Denham, Esquire of Bifferato Gentilotti Biden & Balick, 1308 Delaware Avenue, Wilmington, Delaware, 19899, and Martin J. Flannery, Jr., Esquire and David A. Richman, Esquire (*Pro Hac Vice*) of Pattison & Flannery, 111 Broadway, 20th Floor, New York, New York, 10006, Attorneys for the Defendants Faraday Capital Limited, Individually and as Representative of those Underwriters at Lloyd's.

Anthony G. Flynn, Esquire, Timothy Jay Houseal, Esquire, and Martin S. Lessner, Esquire of Young, Conaway, Stargatt & Taylor, 1000 West Street, 17th Floor, Wilmington, Delaware, 19899, and David Newmann, Esquire (*Argued*) and Michelle A. Kisloff, Esquire (*Pro Hac Vice*) of Hogan & Hartson, 555 Thirteenth Street, N.W., Washington, D.C. 20004, Attorneys for the Defendant Federal Ins. Co.

Carmella P. Keener, Esquire of Rosenthal, Monhait & Goddess, 919 North Market Street, Suite 1401, Wilmington, Delaware, 19801, and Leslie Ahari, Esquire (*Argued*) and Marc E. Rindner, Esquire (*Pro Hac Vice*) of Ross, Dixon & Bell, 2001 K Street, N.W., Washington, D.C. 20006, Attorneys for the Defendants Columbia Casualty Co. and Continental Casualty Co.

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Jurden, J.

I. *INTRODUCTION*

A. Procedural Posture

This is a vast insurance coverage case involving Directors and Officers and Company ("D&O") Liability policies purchased by two corporations, the Plaintiff AT&T Corp. ("AT&T") and At Home Corp. ("At Home"). Procedurally, the litigation is shifting from Phase 1 into Phase 2.[1] This Opinion addresses the first of three sets of dispositive motions, and AT&T's opposition thereto, filed pursuant to Phase 1 of Case Management Order No. 1.[2] It contains the Court's determination of counterclaims raised by the Defendant Insurers,[3] who issued policies to AT&T and its directors and officers. Thus, beyond presenting relevant underlying facts and California case law, this Opinion addresses potential coverage under the AT&T Programs but not the At Home Towers.[4]

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[1] *See AT&T Corp. v. Clarendon Am. Ins.*, Del. Super., C.A. No. 04C-11-167, Jurden, J. (Apr. 27, 2005) (ORDER) (D.I. 61/E-File 103). The Court notes that discovery has commenced in preparation for the Phase 2 dispositive motions. *See AT&T Corp. v. Clarendon Am. Ins.*, Del. Super., C.A. No. 04C-11-167, Jurden, J. (Jan. 9, 2006) (ORDER) (D.I. 192).

[2] *AT&T Corp. v. Clarendon Am. Ins.*, Del. Super., C.A. No. 04C-11-167, Jurden, J. (Apr. 27, 2005) (ORDER) (D.I. 61/E-File 103).

[3] *See infra* text accompanying notes 6, 14. However, given the Court's forthcoming decision on issues related to AT&T's rights as an assignee to any coverage potentially available to its own directors and officers under the 2002 National Union 9th Excess Policy, this Opinion does not address counterclaims made under the separate terms of that Excess Policy. *See* National Union Fire Ins. Co. Op. Br. in Supp. Mot. for Part. Summ. J. and/or J. on the Plea. at 20-22, *AT&T Corp. v. Clarendon Am. Ins.*, D.I. 69/E-File 113 (June 2, 2005); Reply Br. in Supp. Mot. by Nat'l Union for J. on the Plea. and/or Part. Summ. J. at 14-19, *AT&T Corp. v. Clarendon Am. Ins.*, D.I. 133/E-File 200 (Sept. 2, 2005).

[4] Due to the Court's pending determination of AT&T's rights as an assignee or equitable subrogee of the directors and officers of At Home Corp., under policies issued by the Defendants the At Home Insurers and National Union, this Opinion does not address any counterclaims made under the At Home Towers. *See* Op. Br. of the At Home Insurers in Supp. of their Mot. for Part. Summ. J. on Pl.'s Claims for Coverage for the *Williamson Fiduciary & Leykin* Actions Under the 2001 At Home Program, *AT&T Corp. v. Clarendon Am. Ins.*, D.I. 68/E-File112 (June 2, 2005); Nat'l Union Op. Br., D.I. 69/E-File 113; Def. Clarendon Am. Ins. Co.'s Notice of Joinder in Mot. for Part. Summ. J. Filed in Connection With the *Williamson Fiduciary & Leykin* Actions, *AT&T Corp. v. Clarendon Am. Ins.*, D.I. 77/E-File122 (June 7, 2005); Reply Br. by Nat'l Union, D.I. 133/E-File 200.

B. Phase I Motions for Partial Summary Judgment

The Insured, AT&T, seeks coverage in connection with several underlying shareholder suits brought against it, and certain directors and officers of AT&T and At Home Corp. To that end, it seeks indemnity and payment of defense fees, costs, settlements or judgments resulting from these suits under various D&O Liability insurance policies purchased from the Defendant Primary and Excess Insurers (referred to collectively as "the Defendants" or "the Insurers").[5]

As part of the Phase I briefing, the Defendants timely filed the multiple dispositive motions and joinders presently before the Court, in which they assert that AT&T's claims fall outside the scope of coverage afforded under the D&O policies. Subsequently, on August 15, 2005, AT&T filed its answering briefs and its First Amended Complaint. The Defendants responded on September 2, 2005.[6] On September 20, 2005, the Court heard oral argument on the Defendants' individual motions. For the reasons that follow, the Defendants' Motions are **GRANTED.**.

C. Background - AT&T's Complaint and the D&O Policies

Given the complex circumstances that bring this matter before the Court, a recitation of the pertinent events, party relationships and D&O policies is in order before discussing the substance

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[5] The Defendant Primary Insurers issuing policies under the AT&T Programs are Certain Underwriters at Lloyd's, London ("Lloyd's") and National Union Fire Insurance Company ("National Union"). The Defendant Excess Insurers for these Programs are Columbia Casualty Company ("Columbia"), Continental Casualty Company ("Continental"), Federal Insurance Company ("Federal"), National Union, Gulf Insurance Company ("Gulf"), Twin City Fire Insurance Company ("Twin City"), and Zurich American Insurance Company ("Zurich"). However, the excess insurers ACE Bermuda Ltd. and Starr Excess Insurance Company are not parties in this action because their policies contain ADR clauses. *See* Certification of Houseal in Supp. of Defs. Phase I Mots. at 5, 6, 11-12, 17-19, *AT&T Corp. v. Clarendon Am. Ins.*, D.I. 70/E-File 114 (June 2, 2005). The Defendant Excess Insurer Columbia did not file a motion for summary judgment as to the *Williamson Fiduciary* or *Leykin* Actions.

[6] Except for National Union's claims pertaining to its 2002 AT&T Primary, 5th, and 9th Excess Policies, which are addressed in this Opinion, other matters related to AT&T's First Amended Complaint and the Defendants' pending motions to dismiss, argued on November 17, 2005, are the subject of a forthcoming opinion.

of the Defendants' Motions. Through this action, AT&T seeks damages and declaratory judgment as to its rights and the Defendants' obligations under a number of D&O policies for liability it incurred or may incur, as a result of various shareholder lawsuits.[7]

At various points in time, both the now bankrupt At Home Corp. and its primary shareholder, AT&T, purchased D&O insurance "Programs" or "Towers" from the Defendants. All of the D&O policies at issue are "Claims made" policies and each Program or Tower consists of a primary policy and multiple excess policies. Once the underlying primary policy limits are exhausted by a covered loss, this type of policy structure operates to provide further coverage under each of the excess policies *seriatim*. Under such a structure, an excess insurer's coverage obligations are not triggered until the preceding or underlying excess policy is exhausted.[8] Likewise, and except as otherwise provided by their terms, excess policies generally follow the form of and provide coverage in conformance with the terms, conditions and exclusions of an underlying insurance policy.[9] In this case, the excess policies incorporate the terms, conditions and limitations of the Primary Policies and other underlying excess insurance policies.[10]

In this case, the Defendants Lloyd's, National Union and Genesis[11] issued the underlying

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[7] *See* Compl., *AT&T Corp. v. Clarendon Am. Ins.*, D.I. 1/E-File 1 (Nov. 16, 2004).

[8] A thorough description of the D&O policies, with a color coded chart depicting the AT&T Programs, can be found in the Certification of Houseal, D.I. 70/E-File 114, at 1-12.

[9] *See* Certification of Houseal, D.I. 70/E-File 114, at 1-12.

[10] *See* Gulf Ins. Co. Joinder in Cont'l Cas. Co. Mot. for Part. Summ. J. for Decl. There is No Coverage for the *Williamson Fiduciary* & *Leykin* Actions Under Excess Run-Off & 2001 Cont'l Policies at ¶ 5, *AT&T Corp. v. Clarendon Am. Ins.*, D.I. 73/E-File 118 (June 6, 2005).

[11] For clarity and future reference, the group of insurers collectively referred to as the "At Home Insurers" issued the policies that comprise the At Home Towers. This group is composed of the Defendants Clarendon America Insurance Company, Genesis Insurance Company, North American Specialty Insurance Company, Faraday Capital Limited (individually and as Representative of the Underwriters at Lloyd's) and XL Specialty Insurance Company.

Primary Policies, while the other Defendant Insurers together with National Union provided excess coverage.[12] The following four Policy Programs[13] purchased by AT&T are at issue in the present action:[14]

1. The "1997 AT&T Program" was issued for the July 1, 1997 to July 1, 2001 policy period. It is composed of a Lloyd's Primary Policy and seven excess policies.[15]

2. The "2001 AT&T Program" was issued for the July 9, 2001 to July 9, 2002 policy period. It is composed of a Lloyd's Primary Policy and seven excess policies.[16]

3. The "2002 AT&T Program" was issued for the July 31, 2002 to July 31, 2003 policy period. It is composed of a National Union primary policy and twelve excess policies.[17]

4. The "2001 AT&T Run-Off Program" was issued for the July 9, 2001 to July 9, 2007 policy period. It is composed of a Lloyd's Primary Policy and eight excess policies.[18]

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[12] *See* Compl., D.I. 1/E-File 1, at ¶¶ 23-26; First Am. Compl. at ¶¶ 24-29, *AT&T Corp. v. Clarendon Am. Ins.*, D.I. 101/E-File 164 (Nov. 15, 2005). Not all excess insurers issuing policies under the AT&T Programs are parties to this action. *See supra* note 5.

[13] *See supra* text accompanying notes 3-4. Although not specifically addressed in this Opinion, the following three Policy Towers issued to At Home Corp. are also at issue in this coverage case:

1. The "1999-2000 At Home Tower" issued for the policy period of July 1999 to July 2000. It is composed of a National Union primary policy and two excess policies.
2. The "2000-2001 At Home Tower" issued for the policy period of July 2000 to July 2001. It is composed of a National Union primary policy and one excess policy.
3. The "2001-2002 At Home Tower" issued for the July 8, 2001 to July 8, 2002 policy period. It is composed of a Genesis Primary policy and four excess policies. *See* Op. Br. of the At Home Insurers, D.I. 68/E-File 112, at 1, 3 n.2; Nat'l Union Op. Br., D.I. 69/E-File 113, at 3, 4-5, 23-25; Reply Br. by Nat'l Union, D.I. 133/E-File 200, at 1 n.1, 2, 5.

[14] Initially, only three AT&T Policy Programs were at issue. However, in its August 15, 2005 First Amended Complaint, filed after National Union's Opening Brief in support of its summary judgment motion, AT&T asserted for the first time claims for coverage against National Union policies under the 2002 AT&T Program. National Union responded to these new claims in its Reply Brief. *See* First Am. Compl., D.I. 101/E-File 164; Reply Br. by Nat'l Union, D.I. 133/E-File 200, at 1 n.2.

[15] *See* Certification of Houseal, D.I. 70/E-File 114, at 3-7.

[16] *Id.* at 9-12.

[17] *Id.* at 22-23.

[18] *Id.* at 16-19.

D. The Underlying Shareholder Litigation: The *At Home* Litigation

The lawsuit *sub judice* stems from AT&T's acquisition of At Home Corp. stock in March, 2000.[19] On March 28, 2000, AT&T, At Home Corp. ("At Home"), Comcast Corporation ("Comcast") and Cox Communications ("Cox") entered into an agreement whereby AT&T acquired 25% of the total outstanding shares of At Home's common stock and approximately 74% of At Home's voting power. In the wake of this agreement, AT&T's acquisition, and At Home's subsequent demise, shareholders filed suit in Delaware, California and New York challenging the propriety of the March 2000 Transactions.

Because the timing and nature of the allegations made in these shareholder actions is crucial to determining which policies, under what Programs, are implicated at this stage of the proceedings, a brief overview of the underlying shareholder suits is necessary.

1. Delaware - The *Pittleman* Action

The *Pittleman* derivative action was filed on October 19, 1999, in the Court of Chancery of the State of Delaware, by an At Home shareholder against AT&T, At Home, and certain directors and officers of both companies. AT&T gave notice of this Action to certain of its insurers, which that issued policies as part of the 1997 AT&T Program.[20]

The *Pittleman* plaintiff asserted that the proposed March 2000 Transactions would be detrimental to At Home because, if effectuated, the Transactions would substantially increase AT&T's control over At Home and would give AT&T, an At Home direct competitor, power to

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[19] This acquisition is referred to in the underlying lawsuits and this Opinion as the "March 2000 Transactions" or the "March 2000 Transaction."

[20] *See* Certification of Houseal, D.I. 70/E-File 114, at ¶ 67.

control At Home for its own self-interests.[21] Therefore, he sought to enjoin the March 2000 Transactions and to direct the defendants to account to At Home for damages and profits. To that end, the *Pittleman* plaintiff alleged, *inter alia*, that: (a) At Home was controlled by[22] and its business depended on AT&T;[23] (b) AT&T competed with At Home[24] and "conflicts of interest" were "inherent . . . in [these] business relationships;"[25] (c) the March 2000 Transactions would eliminate "checks and balances" on AT&T's control;[26] (d) through the March 2000 Transactions, "AT&T will have the power to control At Home in its own self-interest to the detriment of At Home and its public shareholders, free of [those] checks and balances[;]"[27] and (d) the March 2000 Transactions would give cable companies "more favorable distribution arrangements," "reduce [At Home's] share of subscriber fees," and make it easier for Cox and Comcast to terminate exclusivity.[28]

Further, the plaintiff in *Pittleman* alleged that the March 2000 Transactions would:

> eradicate any protections that currently exist to protect At Home and its public shareholders from complete domination by the conflicted majority shareholder, AT&T.... Lacking independence, At Home will be unable to enter into agreements or engage in enterprises with third parties without heeding AT&T's wishes to which it will be subservient. As a result, At Home will lose valuable opportunities and be forced to accord AT&T and its allies advantageous terms which would be unwarranted if At Home were free

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[21] *See* Certification of Houseal, D.I. 70/E-File 114, Joint Defense Ex. 24, Amended Compl., *Pittleman v. At Home Corp.,* C.A. No. 17474 NC (Del. Ch. Aug. 2, 2000) (hereinafter "J.D. Ex.").

[22] *See* J.D. Ex. 24, Amended Compl. at ¶ 4. (hereinafter "*Pittleman"*).

[23] *See id*. ¶¶ 19, 20.

[24] *See id*. ¶ 22.

[25] *Id*. ¶ 26.

[26] *Id*. ¶¶ 26, 31.

[27] *Id*. ¶ 30.

[28] *Id*. ¶¶ 20, 33.

to conduct its business unfettered by AT&T's dominance and directives.[29]

The *Pittleman* Action was dismissed, without prejudice, in June 2001.[30]

2. California - Cases Consolidated Into the *At Home Stockholders* Litigation

a. *Schaffer*

Schaffer, a class action for breach of fiduciary duties and injunctive relief, was filed on May 26, 2000, in the Superior Court of the State of California for the County of San Mateo, against AT&T, At Home, and certain directors and officers of AT&T and At Home.[31] AT&T gave notice of the *Schaffer* action to those insurers that issued policies under the 1997 Run-Off Program.[32]

b. *Yourman*

Yourman, a class action for breach of fiduciary duties and injunctive relief, was filed on May 30, 2000, in the same court, against AT&T, At Home, and certain directors and officers of both companies.[33] In addition to being filed by the same attorneys in the same court against the same parties, the allegations made in the *Yourman* complaint are identical to those made in the

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[29] *Id.* ¶ 36. At argument, the Defendant Insurers referred to this particular allegation as the *"Pittleman* Prophecy." Tr. Oral Argument on Mots. for Summ. J. at 26, *AT&T Corp. v. Clarendon Am. Ins.*, D.I. 161 (Sep. 20, 2005).

[30] *See* Certification of Houseal, D.I. 70/E-File 114, at ¶ 68.

[31] *See* J.D. Ex. 26, *Schaffer v. At Home Corp*, Case No. 413094 (Cal. Super. Ct., San Mateo Co. May 26, 2000) (hereinafter "*Schaffer*").

[32] *See* Mem. in Supp. of Fed. Ins. Mot. for Part. Summ. J., D.I. 72/E-File 117, at 11; *see* Nat'l Union Op. Br., D.I. 69/E-File 113, at 7.

[33] *See* J.D. Ex. 28, *Yourman v. At Home Corp.*, Case No. 413115 (Cal. Super. Ct., San Mateo Co. May 30, 2000) (hereinafter "*Yourman*").

Schaffer complaint.[34] AT&T noticed *Yourman* to the insurers that issued policies under the 1997 Run-Off Program.[35]

c. *Ward*

Ward, a class action for breach of fiduciary duties and injunctive relief, was filed in the same court as the *Yourman* and *Schaffer* actions on September 6, 2001, against AT&T, At Home, and certain directors and officers of both companies.[36] The *Ward* action involves the same parties, the same attorneys, and the same allegations as *Schaffer* and *Yourman.* It was also noticed to appropriate insurers.[37]

3. California - The *San Mateo* Action

Eventually, *Schaffer, Yourman and Ward* were all consolidated in the Superior Court under the caption: *In re At Home Stockholders Litigation* (Master File No. 413094) (hereinafter the "*San Mateo* Action"). On October 23, 2000, the plaintiffs in the *San Mateo* Action filed their First Amended Consolidated Complaint for Breach of Fiduciary Duties and Injunctive Relief on behalf of all At Home shareholders as of March 28, 2000, against AT&T, At Home, and certain directors

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[34] *See* Certification of Houseal, D.I. 70/E-File 114, ¶ 73, at 26.

[35] *See* Mem. in Supp. of Fed. Ins. Mot. for Part. Summ. J., D.I. 72/E-File 117, at 11; *see* Nat'l Union Op. Br., D.I. 69/E-File 113, at 8.

[36] *See* J.D. Ex. 30, *Ward v. At Home Corp.*, Case No. 418233 (Cal. Super. Ct., San Mateo Co. Sept. 6, 2001) (hereinafter "*Ward*").

[37] *See* Nat'l Union Op. Br., D.I. 69/E-File 113, at 9. The parties do not dispute that the *Ward* action alleges claims that are interrelated with, the same as, or related to the *Pittleman*, *Schaffer*, and *Yourman* actions. Thus, AT&T does not seek coverage for the *Ward* Action in the present case. *See* AT&T Corp.'s An. Br. in Opp'n to Nat'l Union's Mot. for Part. Summ. J. and/or J. on the Plea. at 14, *AT&T Corp. v. Clarendon Am. Ins.*, D.I. 126/E-File 175 (Aug. 15, 2005); Reply Br. by Nat'l Union, D.I. 133/E-File 200, at 4.

and officers of AT&T and At Home.

The First Amended Consolidated complaint in the *San Mateo* Action contains one "cause of action" against all the named defendants for breach of the fiduciary duties of care, candor and loyalty.[38] The *San Mateo* plaintiffs also alleged, *inter alia*, that: (a) on March 28, 2000, as part of the March 2000 Transactions, At Home announced an agreement between itself, AT&T, Comcast and Cox whereby AT&T would acquire 25% of At Home's total outstanding shares of common stock and approximately 74% of At Home voting power, effectively giving AT&T sole control over At Home;[39] (b) "At Home will be under the complete control and domination of AT&T[;][40] (c) AT&T now has the ability to receive more favorable distribution agreements...with At Home[;]"[41] (d) "Due to the...[March 2000 Transaction] At Home has become subject to both board and stockholder voting control by AT&T[;]" and (e) "the Purchase price of At Home's assets was not the result of arm's-length negotiations but was unilaterally set by AT&T, Cox, Comcast, and At Home and agreed to by defendants as part of a scheme to allow AT&T to obtain complete control of At Home's business at the lowest possible price[.]"[42]

In September 2002, for reasons outlined below, the Bankruptcy Court for the Northern District of California enjoined the *San Mateo* Action in favor of an action to be pursed by a litigation trust created during the bankruptcy proceedings.

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[38] *See In re At Home Corp. Stockholders' Litigation* First Am. Consol. Compl., J.D. Ex. 31, at 12.

[39] *See* J.D. Ex. 31, First Am. Consol. Compl. at ¶¶ 3, 36, 37, *In re At Home Corp. Stockholders' Litigation*, Master File No. 413094 (Cal. Super. Ct., San Mateo Co. Oct. 23, 2000).

[40] *Id.* ¶ 6.

[41] *Id.*

[42] *See id.* ¶ 46.

4. California - The At Home Bankruptcy and Dismissal of the *San Mateo* Action

On September 28, 2001, At Home filed for Chapter 11 bankruptcy protection in the United States Bankruptcy Court for the Northern District of California.[43] The Bankruptcy Court appointed Richard Williamson as Trustee of the At Home Bondholders' Liquidating Trust. On June 28, 2002, At Home's Unsecured Bondholders filed a Motion to Enforce an Automatic Stay of the *San Mateo* Action, alleging that the claims asserted therein were derivative and therefore property of At Home's Bankruptcy Estate.[44] On August 19, 2002, AT&T joined the Unsecured Bondholders in filing a Motion to Enforce the Automatic Stay and Prevent Prosecution of Derivative Claims of the *San Mateo* Action.[45] The Bankruptcy Court granted this motion on September 10, 2002.

The Bankruptcy Court ordered dismissal of the *San Mateo* Action on the ground that the claims asserted in that Action belonged to the debtor and should be prosecuted by the Bondholders' Trustee, Richard Williamson.[46] It found:

> [t]he gravamen of the San Mateo Action is that the March 2000 Agreement represented a decision by the majority shareholders to break up the corporation, close its business and sell its assets. Shareholders style the wrong embodied in this act as the majority shareholders' failure to disclose the effects of the Agreement to minority shareholders, the majority shareholders' breach of their duty to the minority shareholders to maximize value recovered upon breakup of the corporation. These allegations state a claims for damages, however, only to the extent that the March 2000 Agreement harmed the corporation (and hence the value of the minority shares). Thus, the harm claimed by Shareholders in the San Mateo Action is

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[43] *See* Certification of Houseal, D.I. 70/E-File 114, ¶ 90, at 29.

[44] *See id.* ¶ 91, at 29.

[45] *See id.* ¶ 92, at 29.

[46] *In re At Home Corp.*, Bankr. N.D. Cal., Bankr. Case No. 01-3-2495-TC, Carlson, T. (Sept. 10, 2002) (Order) (J.D. Ex. 32).

> closely intertwined with the harm suffered by the corporation and its creditors from the same transaction.... Under the confirmed plan, all causes of action of the corporation against the controlling shareholders pass to the Bondholders Liquidating Trust... The plan requires the Trust to prosecute an action against the same defendants for the same acts alleged in the San Mateo Action.[47]

Consequently, the Bankruptcy Court enjoined "the prosecution of the San Mateo Action to prevent interference with the action to be brought by the corporation."[48]

On November 13, 2002, the Bondholders' Liquidating Trust filed an action asserting the derivative claims of At Home against the defendants, including AT&T and certain of it and At Home's Board of Directors.[49] The *San Mateo* plaintiffs appealed the Bankruptcy Court's September 10, 2002 Order to the U.S. District Court for the Northern District of California. In its January 8, 2003 response to that appeal, AT&T urged the U.S. District Court to affirm the Bankruptcy Court's Order, arguing that "permitting duplicative litigation in multiple jurisdictions would cause confusion and necessarily prejudice the non-bankrupt defendants, including AT&T Corp."[50]

On September 29, 2003, the U.S. District Court affirmed the Bankruptcy Court's September 10, 2002 Order,[51] prompting the *San Mateo* plaintiffs to appeal that decision to the U.S. Court of Appeals for the Ninth Circuit. AT&T urged the Ninth Circuit to affirm the lower courts' decisions based on the existence of "substantial overlap" between the *San Mateo* and the Bondholders'

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[47] *In re At Home Corp.*, Bankr. N.D. Cal., Bankr. Case No. 01-3-2495-TC, Carlson, T. (Sept. 10, 2002) (Mem.) at 5, 7. (J.D. Ex. 32) (emphasis added).

[48] *In re At Home Corp.*, N.D. Cal., No. 02-04767 JSW, White, J. (Sept. 29, 2003) (ORDER) (J.D. Ex. 34).

[49] *See* Certification of Houseal, D.I. 70/E-File 114, ¶ 96, at 30.

[50] J.D. Ex. 33, AT&T Corp.'s Resp. to San Mateo Pls.' Appeal of the Bankr. Ct.'s Sep. 10, 2002 Order at 2, *In re At Home Corp.*, Civ. Case No. C 02-4767 CW (N.D. Cal. Jan. 8, 2003).

[51] *In re At Home Corp.*, N.D. Cal., No. C 02-04767 JSW, White, J. (Sep. 29, 2003) (ORDER) (J.D. Ex. 34).

Actions:[52]

> [t]he purported "direct" claim to be pursued in state court and the purported "derivative" claim previously asserted in the San Mateo Action and now sought by the Bondholders to be pursued in an action filed in Santa Clara Superior Court involve identical allegations of fact, an identical claim for breach of fiduciary duty, and identical prayers for relief. Were the two cases allowed to proceed simultaneously, the substantial overlap between them would create a serious risk of conflicting rulings of fact and law.... And obviously, it would be a wasteful and inefficient use of scarce judicial and party resources to allow duplicative claims to go forward in two courts at once.[53]

The *San Mateo* plaintiffs' appeal to the Ninth Circuit is still pending.

5. California - The *Williamson Fiduciary* Action

On November 7, 2002, the Trustee for the Bondholders' Liquidating Trust, Richard Williamson, filed the initial complaint in *Williamson v. AT&T Corp., et al.* (the "*Williamson Fiduciary* Action") against AT&T, At Home, and certain directors and officers of AT&T and At Home.[54] In the First Amended Complaint, filed on June 20, 2003,[55] Williamson alleges that: (a) the defendants breached their fiduciary duties to At Home based on AT&T's having resolved all conflicts of interest between it and At Home in AT&T's own self-interest over a two-year period, beginning with its taking complete control of At Home in the March 2000 Transactions;[56] (b)

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[52] J.D. Ex. 35, Br. of Def.-Appellee AT&T Corp. at 5, *In re At Home Corp.*, No. 03-17085 (9th Cir. Mar. 29, 2004) (emphasis added).

[53] *Id.* at 5-6 (emphasis added).

[54] *See* J.D. Ex. 36, Compl. & Demand for Jury Trial, *Williamson v. AT&T Corp.*, Case No. CV 812506 (Cal. Super. Ct., Santa Clara Co. Nov. 7, 2002).

[55] *See* J.D. Ex. 37, First Am. Compl. & Demand for Jury Trial, *Williamson v. AT&T Corp.*, Case No. CV 812506 (Cal. Super. Ct., Santa Clara Co. June 20, 2003).

[56] *See id.* ¶¶ 1-7.

"[p]ursuant to...the March 2000 Transactions, [1] AT&T gained complete control of At Home's Board ... [2] Cox and Comcast received, among other things, the ability at a later date to 'put' some or all of the At Home shares to AT&T, which ultimately allowed them to realize more than $3 billion from AT&T;"[57] (c) AT&T, Cox and Comcast received " an unfair split of the revenue generated from customers of the At Home service;"[58] (d) in connection with the March 2000 Transactions, "AT&T and the other defendants contravened every cardinal principle of corporate governance upon which our system depends. For two years, AT&T exercised a stranglehold on the Board of Directors of now bankrupt At Home Corporation[;]"[59] (e) as a direct result of the March 2000 Transactions "At Home receives nothing for losing critical leverage over Cox and Comcast. And AT&T extends its contracts with At Home on terms that continue to be uneconomical for At Home[;]"[60] (f) the March 2000 Transactions resulted in giving AT&T sole control over At Home and in exchange for giving AT&T control, Cox and Comcast were given a $3 billion pay-off for which At Home received nothing;[61] (g) AT&T did not follow the "basic precepts of corporate governance," and that at every turn, "[i]n derogation of their fiduciary duties to At Home, defendants did what was in AT&T's best interests, even when it meant damaging At Home[;]"[62] (h) the March 2000 Transactions were entirely unfair to At Home and plaintiffs were damaged as a result of the March 2000 Transactions;[63] and (i) "as part of the March 2000 Transactions, Cox and Comcast jointly agreed to waive most of their

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[57] *Id.* ¶ 42.

[58] *Id.*

[59] *Id.* ¶ 2.

[60] *Id.* ¶ 5(a).

[61] *See id.* ¶¶ 5(a), 40-46.

[62] *Id.* ¶ 6.

[63] *See id.* ¶¶ 146-154.

rights under the Stockholders' Agreement, including their right to elect Cox and Comcast designees to the Board. The Cox and Comcast directors resigned from the At Home Board on August 28, 2000. From that date until after the bankruptcy filing in September 2001, AT&T at all times exercised complete control over the At Home Board."[64]

In support of its January 10, 2003 Motion to Dismiss or Stay for *Forum Non Conveniens*[65] filed in the *Williamson Fiduciary* Action, AT&T summarized a portion of the allegations in that Action as follows:

> Plaintiff alleges, *inter alia*, (1) that the defendants breached their fiduciary duties to At Home causing At Home to enter into certain allegedly unfair agreements with Cox and Comcast in March 2000, permitting At Home's cash situation to deteriorate, misappropriating At Home's proprietary technology, engaging in an unfair strategy either to buy At Home at a cheap price or to build out its own network for providing high-speed Internet access, and generally managing and operating At Home in AT&T's, as opposed to At Home's interest (Cmplt. ¶¶ 121-59); (2) that AT&T breached certain contractual obligations to At Home (*id.* ¶¶ 160-68); (3) that AT&T operated At Home as its alter ego (*id.* ¶¶ 169-71); (4) that AT&T, Eslambolchi, and Burns misappropriated At Home's proprietary technology and trade secrets through their "in depth access to [At Home's] Trade Secrets by virtue of Project 90" (*id.* ¶¶ 172-84); (5) that AT&T, Eslambolchi and Burns breached At Home's confidence by using At Home's proprietary technology for AT&T's own purposes (*id.* ¶¶ 185-98); (6) that AT&T engaged in unfair competition in violation of California Business & Professions Code Sections 17200 *et seq*. (*id.* ¶¶ 199-202); and (7) that AT&T has been unjustly enriched by its conduct vis-à-vis At Home (*id.* ¶¶ 203-04).[66]

On November 15, 2002, the Bondholders' Liquidating Trust brought a separate action in the

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[64] *Id.* ¶ 43.

[65] J.D. Ex. 38, Def. AT&T Corp.'s Mem. of P.& A. in Supp. of Mot. to Dismiss or Stay for *Forum Non Conveniens*, *Williamson v. AT&T Corp*., Case No. CV 812506 (Cal. Super. Ct., Santa Clara Co. Jan. 10, 2003).

[66] *Id*. at 3.

U.S. District Court, Northern District of California, captioned *Williamson v. AT&T Corp.* (the "*Williamson Patent* Action").[67] In this action, Williamson alleged that AT&T infringed on an At Home patent.[68] Again, in support of its Motion to Dismiss or Stay for *Forum Non Conveniens*, AT&T represented that the *Williamson Patent* Action "is related to the trade secret misappropriation and breach of confidence claims in [the *Williamson Fiduciary* Action]."[69]

On May 3, 2005, AT&T announced its settlement of both the *Williamson Fiduciary* Action and the *Williamson Patent* Action for $340 million.[70] Pursuant to the terms of the settlement agreement, AT&T and Comcast agreed to relinquish claims to approximately $60 million being held in reserve by the At Home Bankruptcy Estate to satisfy AT&T's pending claims against At Home.[71]

6. New York - Cases Consolidated Into the *Leykin v. AT&T, et al.* Litigation

a. *Leykin*

Leykin is a securities class action suit, filed on March 5, 2002, in the United States District Court for the Southern District of New York against AT&T, and certain directors and officers of AT&T and At Home.[72]

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[67] *See* J.D. Ex. 41, Compl. for Patent Infringement, *Williamson v. AT&T Corp.,* Case No. C 02 5442 (N.D. Cal. Nov. 15, 2002).

[68] On July 22, 2005, the parties stipulated to the dismissal of AT&T's coverage claims for the *Williamson Patent* Action. Thus, this action is not at issue in the present case. *See* AT&T An. Br. in Opp'n to Nat'l Union's Mot. for Part. Summ. J., D.I. 126/E-File 175, at 14-15; Reply Br. by Nat'l Union, D.I. 133/E-File 200, at 4.

[69] J.D. Ex. 38, Def. AT&T Corp.'s Mem. of P. & A., at 5.

[70] *See* Certification of Houseal, D.I. 70/E-File 114, ¶ 111, at 34; Press Release, AT&T, AT&T Settles Legal Claims Related to the At Home Corp. Bankr. (May 3, 2005) (J.D. Ex. 39). On May 5, 2005, the Bondholders Liquidating Trust moved for approval of the May 3, 2005 settlement. *See* J.D. Ex. 41, Mot. of Bondholders' Liquidating Trust for Approval of Compromise With AT&T Corp. & the AT&T Defs. Pursuant to Bankr. R. 9019 at 1, *In re At Home Corp.*, Case No. 01-32495-TC (Bankr. N.D. Cal. May 5, 2005). AT&T entered this settlement agreement without the consent of the Defendant Insurers.

[71] *See* Certification of Houseal, D.I. 70/E-File 114, ¶ 111, at 34; Press Release, AT&T, *supra* note 75.

[72] *See* J.D. Ex. 42, Class Action Compl., *Leykin v. AT&T Corp.*, Case No. 02 CV 1765 (S.D.N.Y. Mar. 5, 2002).

b. *Unger*

Unger is a securities class action suit, filed on March 11, 2002, in the United States District Court for the Southern District of New York against AT&T and certain of it and At Home's directors and officers.[73]

c. *Eksler*

Eksler is a securities class action suit filed in the United States District Court for the Southern District of New York on March 14, 2002, with a complaint virtually identical to the *Unger* complaint, against AT&T and certain of it and At Home's directors and officers.[74]

d. *James*

James is a shareholder class action suit, filed on July 3, 2003, in the United States District Court for the Southern District of New York against AT&T and certain of both companies directors and officers.[75] The *James* plaintiffs alleged violations of §§10(b) and 20(a) of the Securities and Exchange Act of 1934 and Rule 10b-5. *James* was filed by the same plaintiffs' attorneys as *Leykin* and the complaint is nearly identical to the *Leykin* Consolidated Complaint. Ultimately, finding the *James* Action "duplicative" of *Leykin*, the District Court dismissed it without prejudice.[76]

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[73] *See* J.D. Ex. 43, Class Action Compl., *Unger v. AT&T Corp.*, Case No. 02 CV 1978 (S.D.N.Y. Mar. 11, 2002).

[74] *See* J.D. Ex. 44, Class Action Compl., *Eksler v. AT&T Corp.*, Case No. 02 CV 2078 (S.D.N.Y. Mar. 14, 2002).

[75] *See* J.D. Ex. 45, Class Action Compl., *James v. AT&T Corp.*, Case No. 03 CV 4985 (S.D.N.Y.Jul. 3, 2003).

[76] *See* J.D. Ex. 46, *James v. AT&T Corp.*, 334 F. Supp. 2d 410, 412-13 (S.D.N.Y. 2004).

e. The *Leykin* Action

On November 7, 2002, *Leykin*, *Eksler*, and *Unger* were consolidated under the caption, *Leykin v. AT&T Corp., et al.* (the "*Leykin* Action").[77] The consolidated *Leykin* Action is a putative class action suit, filed on behalf of At Home's public shareholders during the period from March 28, 2000[78] to September 28, 2001. The *Leykin* plaintiffs allege both securities and common law fraud, and breach of fiduciary duty by AT&T, its directors and officers, certain of At Home's directors and officers, and others.

In the First Amended Consolidated Complaint the *Leykin* plaintiffs' allege the following: (a) AT&T developed the "Steamboat Project"[79] in February 2000, and that during this project, AT&T allegedly copied, took and converted to its own possession, benefit and use At Home's proprietary technology; (b) the "plan, the subsequent conversion and its material adverse consequences for At Home were never revealed to the public until partial revelations of the consequences (but not of the plan nor of the conversion) began to occur during 2001;"[80] and (c) "[a]s part of such plan, on March 28, 2000, At Home entered into a series of agreements with AT&T, Cox and Comcast"[81] and "an important purpose" for AT&T in entering these agreements was to ensure that AT&T could execute its plan "to copy and convert At Home's proprietary technology to AT&T's own possession, use and benefit" and make AT&T independent from At Home and its need for At Home's services.[82]

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[77] *See* J.D. Ex. 47, Consol. Class Action Compl., *Leykin v. AT&T Corp.*, Case No. 02 CV 1765 (LLS) (S.D.N.Y. Nov. 8, 2002).

[78] According to the *Leykin* plaintiffs, the March 2000 Transactions were announced on March 28, 2002.

[79] J.D. Ex. 48, First Am. Consol. Class Action Compl. at ¶ 60, *Leykin v. AT&T Corp.*, Case No. CV 02-CV-1765 (LLS)(S.D.N.Y. Feb. 24, 2004).

[80] *Id.*

[81] *Id.* ¶ 61(a).

[82] *Id.* ¶¶ 66, 137.

The *Leykin* plaintiffs further assert that "AT&T had, by March 28, 2000 at the latest, a plan to copy and convert At Home's proprietary technology" and that "[a]n important purpose of transactions therein which required shareholder approval was to 'ensure that AT&T could execute its plan to copy and convert At Home's technology.'"[83] They claim that "after the March 28, 2000 agreements were signed, AT&T personnel began asking for, and were given, unique and unfettered access to At Home's proprietary technology, intellectual property and know-how."[84]

The First Amended Consolidated Complaint also alleges: (a) AT&T converted and used At Home's formerly proprietary technology to build and deploy a parallel network that would compete with At Home as soon as AT&T was not bound by its exclusivity obligations to At Home[;][85] (b) "AT&T dominated and controlled At Home's finances and strategic relationships such that At Home management could not exercise independent judgment, and At Home could neither access the capital markets nor align with an appropriate strategic partner[;]"[86] (c) the defendants violated the securities laws and committed fraud, *inter alia*, by failing to disclose AT&T's plan to convert At Home's proprietary technology and artificially inflating the market price of and demand for At Home common stock[;][87] (d) At Home's directors breached their fiduciary duties of candor, due care, loyalty and good faith to At Home shareholders between March 28, 2000 and the end of the class period, when At Home filed for bankruptcy;[88] and (e) "AT&T, as a controlling and dominant

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[83] *Id.* ¶ 136(a),(b).

[84] *Id.* ¶ 63(b).

[85] *See Id.* ¶ 79.

[86] *Id.* ¶ 103.

[87] *See Leykin* First Am. Consol. Class Action Compl., J.D. Ex. 48, ¶¶ 120-33, at 47-51; *Leykin* Consol. Class Action Compl., J.D. Ex. 47, at ¶¶ 120-37.

[88] *See Leykin* First Am. Consol. Class Action Compl., J.D. Ex. 48, ¶ 138-47, at 52-55.

shareholder, owed fiduciary duties to the other shareholders of At Home. These duties included a fiduciary duty of entire fairness to minority shareholders.... AT&T breached this fiduciary duty of entire fairness and full candor."[89]

AT&T represented in its January 10, 2003 Motion to Dismiss or Stay for *Forum Non Conveniens,*[90] filed in the *Williamson Fiduciary* Action, that the *Williamson Fiduciary* Action "implicate[s] many of the same issues already being litigated" in the *Leykin* Action.[91] On February 11, 2003, AT&T moved to dismiss the *Leykin* Action asserting in part that "a large portion of the [*Leykin* Consolidated] Complaint centers around plaintiffs' wholly unsubstantiated allegations that AT&T had formulated by March 28, 2000 – and later carried out – a 'secret plan' to convert At Home's proprietary technology to its own use."[92] The U.S. District Court for the Southern District of New York certified a class in the *Leykin* Action but dismissed the Action on March 23, 2006.[93]

E. The Coverage Action -*AT&T Corp. v. Clarendon Am. Ins., et. al.*

In the present action, AT&T asserts that it is entitled to coverage for losses arising from the *Williamson Fiduciary* and *Leykin* Actions under the AT&T Programs and At Home Towers, which cover several policy periods, spanning the year 1997 through the year 2007. The Defendants counter that coverage, if any exists at all, is limited by the terms of their policies to the 1997 AT&T Program and is barred under other Program.

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[89] *Leykin* Consol. Class Action Compl., J.D. Ex. 47, ¶ 143, at 51.

[90] *See also* discussion of *Williamson Fiduciary* Action allegations *supra* at pp. 17-18.

[91] AT&T Mem. of P.& A. in Supp. Mot. to Dismiss or Stay for *Forum Non Conveniens*, J.D. Ex. 38, at 1.

[92] J.D. Ex. 49, Mem. in Supp. of Mot. to Dismiss of Defs. AT&T Corp., C. Michael Armstrong, Frank Ianna, Hohan Gyani, Charles H. Noski, Daniel H. Sommers, Mufit Cinali, John C. Petrillo, Raymond Liguori, & Hossein Eslambolchi at 5, *Leykin v. AT&T Corp.*, Case No. CV 02-CV-1765 (LLS)(S.D.N.Y. Feb. 11, 2003).

[93] *Leykin v. AT&T Corp.*, S.D.N.Y., 02 Civ. 1765 (LLS), Stanton, L. (Mar. 23, 2006) (Op. And Order.)

II. STANDARD OF REVIEW

A. Summary Judgment

"Summary Judgment may only be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law."[94] To make this determination, the Court considers the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits.[95] In evaluating motions for summary judgment, the Court must view all facts in the light most favorable to the non-moving party.[96] Thus, the moving party bears the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law.[97] Consequently, if the moving party establishes "there is no genuine issue of material fact regarding the dispute ... that party is entitled to judgment as a matter of law, [and] summary judgment should be granted."[98] Finally, "[t]o the extent that the case's facts are not in dispute and the insurance policies are not ambiguous, the Court will decide coverage issues through ... a motion for summary judgment" pursuant to Superior Court Civil Rule 56.[99]

B. Rules of Construction for Contracts of Insurance

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[94] Super. Ct. Civ. R. 56(c); *Viad Corp. v. MCII Holdings, Inc.*, 2003 WL 22853414, at *3 (Del. Super.), *citing In Re Asbestos Litigation,* 673 A.2d 159, 163 (Del. 1996).

[95] Super. Ct. Civ. R. 56(c).

[96] *Viad*, 2003 WL 22853414, at *3; *Cirka v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2004 WL 1813283, at *3 (Del. Ch.).

[97] *Viad*, 2003 WL 22853414, at *3.

[98] *Cirka*, 2004 WL 1813283, at *3.

[99] *Hercules Inc. v. AIG Aviation Inc.*, 776 A.2d 550, 558 (Del. Super. Ct. 2000), *aff'd* 760 A.2d 162 (Del. 2000).

As a preliminary matter, the Court recognizes the parties' disagreement as to whether the insurance policies at issue should be interpreted in accordance with New York, New Jersey or California law.[100] However, the parties agreed during the September 20, 2005 Hearing that resolution of the pending motions does not require the Court to decide the issue at this time.[101] Thus, because "neither the Court nor the parties believes there are significant conflicts on any of the relevant legal principles," the Court "need not determine which state law controls and will set forth the guiding legal principles of insurance policy construction" applicable in all three states.[102] In so doing, the Court recognizes that it is delaying the inevitable, in that the resolution of future interpretation and construction questions in this case will necessitate a determination of the

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[100] Tr. Oral Argument on Mots. for Summ. J. at 105-106, 215, *AT&T Corp. v. Clarendon Am. Ins.*, D.I. 161 (Sep. 20, 2005); Cont'l Cas. Co. Mem. of Law in Supp. of its Mot. for Part. Summ. J. For a Decl. There is No Coverage for the *Williamson Fiduciary* & *Leykin* Actions Under the Excess Run-Off & Cont'l Policies at 9 n.4, *AT&T Corp. v. Clarendon Am. Ins.*, D.I. 65/E-File 109 (June 2, 2005); Nat'l Union Op. Br., D.I. 69/E-File 113, at 17 n.10 (arguing that California law applies to their policies); Op. Br. of the At Home Insurers in Supp. of Their Mot. for Part. Summ. J. on Pl.'s Claims for Coverage for the *Williamson Fiduciary* & *Leykin* Actions Under the 2001 At Home Program, D.I. 68/E-File112, at 14-15 n.4; AT&T Corp.'s Consol. An. Br. in Opp'n to: (1) Fed. Ins. Co.'s Mot. for Part. Summ. J. as to 2001-2007 AT&T Run-Off Policies; (2) Cont'l Cas. Co.'s Mot. for Part. Summ. J. for a Decl. There is No Coverage for the *Williamson Fiduciary* & *Leykin* Actions Under th Excess Run-Off & 2001 Cont'l Policies; & (3) Zurich Am. Ins. Co.'s Mot. for Summ. J. at 40 n.22, *AT&T Corp. v. Clarendon Am. Ins.*, D.I. 124/E-File 173 (Aug. 15, 2005); AT&T An. Br. in Opp'n to Nat'l Union's Mot. for Part. Summ. J., D.I. 126/E-File 175, at 16-21.

[101] At oral argument AT&T asserted that, while New Jersey law applies, the Court can follow *Alstrin v. St. Paul Mercury Ins. Co.*, 179 F. Supp. 2d 376, 388 (D. Del. 2002) because, based on the Defendants arguments, no apparent conflict of law exists between New York and New Jersey. Tr. Oral Argument at 105-106. Later, AT&T conceded California law applies, but asserted that the At Home Insurers did not reveal "any differences" in California law that "would … mean … New York or New Jersey law would hold any differently." *Id.* at 106-107. Finally, Federal argued that New York law applies, but agreed "it doesn't matter for purposes of this motion." *Id.* at 215.

[102] *Alstrin v. St. Paul Mercury Ins. Co.*, 179 F. Supp. 2d 376, 388 (D. Del. 2002). *Cf. Int'l Bus. Mach. Corp. v. Liberty Mut. Ins. Co.*, 363 F.3d 137, 143 (2d Cir. 2004) (applying New York and California law to determine insurer's duty to defend against employee toxic tort suits as "[c]hoice of law does not matter, … unless the laws of the competing jurisdictions are actually in conflict."); *FileNet Corp. v. Chubb Corp.*, 735 A.2d 1203, 1207 (N.J. Super. Ct. Law Div. 1997) (finding "[o]n the issue of interpretation of the insurance contract, New Jersey and California law are not in conflict".

"threshold issue" of which law applies to these policies.[103]

In New York, New Jersey and California, as in Delaware, determining whether insurance contract language is ambiguous is a question of law for the Court to decide.[104] As a general rule, these courts interpret insurance policy language according to the general rules of contract interpretation.[105] Thus, in the absence of ambiguity, these courts construe insurance policies by giving the policy language its "common," "plain," and "ordinary" meaning,[106] unless used by the

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[103] 15 Appleman on Insurance § 112.1 (2d ed. 2005).

[104] *K. Bell & Assocs, Inc. v. Lloyd's Underwriters*, 97 F.3d 632, 637 (2d Cir. 1996); *Zunenshine v. Executive Risk Indem., Inc.*, 1998 WL 483475, at *3 (S.D.N.Y.); *Tomco Painting & Contracting, Inc. v. Transcontinental Ins. Co.*, 801 N.Y.S.2d 819, 820 (N.Y. App. Div. 2005); *2619 Realty, LLC v. Fid. & Guar. Ins. Co.*, 756 N.Y.S.2d 564, 566 (N.Y. App. Div. 2003); *Bd. of Managers of Yardarm Condo. II v. Fed. Ins. Co.*, 669 N.Y.S.2d 332, 333 (N.Y. App. Div. 1998). *See Haggerty v. Fed. Ins. Co.*, 32 Fed. Appx. 251, 253 (9th Cir. 2002); *Church Mut. Ins. Co. v. U.S. Liab. Ins. Co.*, 347 F. Supp. 2d 880, 883 (S.D. Cal. 2004); *Town of Harrison v. Nat'l Union Fire Ins. Co.*, 675 N.E.2d 829, 832 (N.Y. 1996); *Waller v. Truck Ins. Exch., Inc.,* 900 P.2d 619, 627 (Cal. 1995); *N. Am. Phillips Corp.*, 1995 WL 628444, at *7 (Del. Super.) (applying New York law); *Nat'l Union Fire Ins. Co. v. Transp. Ins. Co.*, 765 A.2d 240, 243 (N.J. Super. Ct. App. Div. 2001); *Powell v. Alemaz, Inc.,* 760 A.2d 1141, 1144 (N.J. Super. Ct. App. Div. 2000). *Accord Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 489 (Del. 2001); *Rhone-Poulenc Basic Chems. Co. v. Am. Motorist Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992); *AT&T Wireless Serv. Inc. v. Fed. Ins. Co.*, 2006 WL 267135, at *4 (Del. Super.).

[105] *Abner, Herman & Brock, Inc.,* 308 F. Supp. 2d 331, 335 (S.D.N.Y. 2004); *Lefrak Org., Inc. v. Chubb Custom Ins. Co.*, 942 F. Supp. 949, 952 (S.D.N.Y.1996); *State v. Am. Mfrs. Mut. Ins. Co.*, 593 N.Y.S.2d 885, 886 (N.Y. App. Div. 1993) (relying on *Loblaw Inc. v. Employers' Liab. Assur. Corp.*, 456 N.Y.S.2d 40, 442 (N.Y.1982)); *Powerine Oil Co., Inc. v. Super. Ct.*, 118 P.3d 589, 597 (Cal. 2005); *Montrose Chem. Corp. v. Admiral Ins. Co.*, 913 P.2d 878, 888 (Cal. 1995); *Bank of the West v. Super. Ct.*, 833 P.2d 545, 552 (Cal. 1992); *Rosario v. Haywood*, 799 A.2d 32, 38 (N.J. Super. Ct. App. Div. 2002). *Cf. as to clear and unambiguous policies Hebela v. Healthcare Ins. Co.*, 851 A.2d 75, 80-82 (N.J. Super. Ct. App. Div. 2004) (citing *Kampf v. Franklin Life Ins. Co.*, 161A.2d 717, 720-21 (N.J. 1960)). *Accord New Castle County v. Hartford Acc. & Indem. Co.*, 970 F.2d 1267, 1270 (3d Cir. 1992); *E.I. duPont de Nemours & Co. v. Allstate Ins. Co.*, 879 A.2d 929, 938 (Del. Super. Ct. 2004) (relying on *Rhone-Poulenc,* 616 A.2d 1192, 1196 (Del.1992)); *compare Progressive Cas. Ins. Co. v. Hurley*, 765 A.2d 195, 201 (N.J. 2001) (stating in a UM coverage case that "New Jersey courts consistently have recognized that insurance policies are contracts of adhesion and, as such, are subject to special rules of interpretation.").

[106] *Zunenshine*, 1998 WL 483475, at *3 (S.D.N.Y.) (stating that "[w]hen a contract is not ambiguous, the court 'should assign the plain and ordinary meaning to each term and interpret the contract without the aid of extrinsic evidence.'" (citation omitted)); *Escobar v. Colonial Indem. Ins. Co.*, 804 N.Y.S.2d 360, 361-62 (N.Y. App. Div. 2005); *Physicians' Reciprocal Insurers v. Abraham*, 757 N.Y.S.2d 330, 331 (N.Y. App. Div. 2003) (stating that clear and unambiguous provisions in an insurance policy should be "given their plain and ordinary meaning, and courts should refrain from rewriting the agreement ...."(citing *Gov't Employees Ins. Co. v. Kligler*, 366 N.E.2d 865 (N.Y. 1977))); *Montrose Chem.*, 913 P.2d 878, 888 (Cal. 1995) (applying California's statutory rule of contract construction, which requires that the "clear and explicit" meaning of these provisions, interpreted in their "ordinary and popular sense," controls judicial interpretation unless "used by the parties in a technical sense, or unless a special

parties "in a technical sense" or where "a special meaning is given to them by usage."[107] Accordingly, as a general rule,[108] policy language found to be clear and unambiguous should be interpreted and enforced as written.[109]

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meaning is given to them by usage.'"); *Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.*, 855 P.2d 1263, 1270 (Cal. 1993); *Cunningham v. Universal Underwriters*, 120 Cal. Rptr. 2d 162, 168 (Cal. Ct. App. 2002) (reversing and remanding summary judgment after finding no coverage under commercial general liability (CGL) for tenant claim against insured and explaining "[i]f the policy provision is unambiguous ... it must be interpreted according to this plain meaning."(citing *Ray v. Valley Forge Ins. Co.*, 92 Cal. Rptr. 2d 473, 476 (Cal. Ct. App. 1999))); *President v. Jenkins,* 853 A.2d 247, 254 (N.J. 2004) (explaining "[w]hen interpreting an insurance policy, courts should give the policy's words 'their plain, ordinary meaning.'" (citing *Zacarias v. Allstate Ins. Co.,* 775 A.2d 1262, 1265 (N.J. 2001))). *See Gibson v. Callaghan*, 730 A.2d 1278, 1282 (N.J. 1999) (stating that "well-established rules for interpreting insurance policies have developed .... the words of an insurance policy are to be given their plain, ordinary meaning .... [i]n the absence of any ambiguity, courts 'should not write for the insured a better policy of insurance than the one purchased.'"(quoting *Longobardi v. Chubb Ins. Co.,* 582 A.2d 1257, 1260 (N.J. 1990))); *N. Am. Phillips Corp.*, 1995 WL 626036, at *2 (Del. Super.) (explaining that under New York law "[a]n unambiguous policy provision must be accorded its plain and ordinary meaning."). *Cf. Church Mut.*, 347 F. Supp. 2d 880, 884 (S.D. Cal. 2004) (stating "[w]here possible, the court looks solely to the terms of the policy; the clear and explicit meaning of the policy terms, understood in their ordinary and popular sense, will govern the interpretation."); *ML Direct, Inc. v. TIG Specialty Ins. Co.*, 93 Cal. Rptr 2d 846, 850 (Cal. Ct. App. 2000) (explaining in context of declaratory judgment action against D&O insurer that the "fundamental goal of contract interpretation is to give effect to the parties' intentions, which, ... should be inferred solely from the written terms of the policy."); *Cooper Companies v. Transcon. Ins. Co.*, 37 Cal. Rptr. 2d 508, 512 (Cal. Ct. App. 1995) (explaining that the California Supreme Court "'clarified' the rules for interpreting allegedly ambiguous insurance policies [citations omitted] as follows: 'If contractual language is clear and explicit, it governs.'" (citing *Bank of the West*, 833 P.2d 545 (Cal. 1992))). *Accord Rhone-Poulenc*, 616 A.2d 1192, 1195 (Del. 1992).

[107] *Int'l Bus. Mach. Corp.*, 363 F.3d 137, 147 (2d Cir. 2004) (applying shared New York and California principles of insurance contract interpretation), *citing McGrail v. Equitable Life Assur. Soc. of U.S.*, 55 N.E.2d 483 (N.Y. 1944) and *Vandenberg v. Super. Ct.*, 982 P.2d 229, 244-45 (Cal. 1999)). *See Montrose Chem. Corp.*, 913 P.2d 878, 888 (Cal. 1995) (stating that the "'clear and explicit' meaning ... interpreted in ... 'ordinary and popular sense,' controls judicial interpretation unless 'used by the parties in a technical sense, or unless a special meaning is given to them by usage.'"); *Bay Cities Paving & Grading, Inc.*, 855 P.2d 1263, 1270 (Cal. 1993); *Cooper Companies*, 37 Cal. Rptr. 2d 508, 511-12 (Cal. Ct. App. 1995) (explaining California's three-step framework for insurance policy interpretation in the context of an appeal from a ruling for a liability insurer in context of underlying breast implant cases). *Accord U.S. Mineral Products Co. v. Am. Ins. Co.*, 792 A.2d 500, 509 (N.J. Super. Ct. App. Div. 2002) (recognizing, in the context of asbestos manufacturer's declaratory judgment action, that a court's "function on review is to search broadly for the probable intent of both parties in an effort to find the reasonable meaning in maintaining the express general purposes of the policy."); *Sears Roebuck & Co. v. Nat' Union Fire Ins. Co.*, 774 A.2d 526, 532 (N.J. Super. Ct. App. Div. 2001) (interpreting general liability policies (GLC) in consolidated personal injury suits); *Hercules, Inc.*, 784 A.2d 481, 489-90 (Del. 2001), *citing Rhone-Poulenc*, 616 A.2d 1192, 1195-96 (Del. 1992).

[108] *Compare infra* text accompanying notes 121-125.

[109] *See Fed. Ins. Co. v. Campbell Soup Co.*, 885 A.2d 465, 468 (N.J. Super. Ct. App. Div. 2005) (explaining that "[w]hen the express language of an insurance policy is clear and unambiguous, it must be enforced as written" in the context of declaratory judgment action arising from underlying actions involving exchange between parent and subsidiary of securities); *Nav-Its, Inc. v. Selective Ins. Co. of Am.*, 869 A.2d 929, 933 (N.J.

Generally, an insured's burden is to establish that a claim falls within the basic scope of coverage, while an insurer's burden is to establish that a claim is specifically excluded.[110] Courts

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2005) (explaining if "the policy language is clear, the policy should be interpreted as written."); *President*, 853 A.2d 247, 254 (N.J. 2004) (interpreting a "claims made" professional liability policy and explaining that "[i]f the policy terms are clear, courts should interpret the policy as written and avoid writing a better insurance policy than the one purchased."); *Liberty Surplus Ins. Corp. v. Segal Co.*, 2004 WL 2102090, at *1 (S.D.N.Y. 2004) (declaratory judgment action by excess liability insurer to determine its duty to indemnify against suit by county); *Richards v. Princeton Ins. Co.*, 178 F. Supp. 2d 386, 392 (S.D.N.Y. 2001) (explaining that New Jersey law holds "where the language of an insurance policy is clear, a court must enforce its terms as written" in the context of a declaratory judgment action to determine if a CGL policy provides coverage for personal injury action); *Andy Warhol Found. for Visual Arts, Inc. v. Fed. Ins. Co.*, 189 F.3d 208, 215 (2d Cir. 1999) (explaining if "the language of the insurance contract is unambiguous, we apply its terms" in the context of a declaratory judgment action against a liability insurer arising from a copyright infringement action); *Oot v. Home Ins. Co. of Indiana*, 676 N.Y.S.2d 715, 718 (N.Y. App. Div. 1998) (stating that where "'the provisions of an insurance contract are clear and unambiguous, they must be enforced as written.'"(quoting *Hartford Ins. Co. of Midwest v. Halt*, 646 N.Y.S.2d 589, 596 (N.Y. App. Div. 1996))). *Cf. Powerine Oil Co., Inc.*, 118 P.3d 589, 598 (Cal. 2005); *Bank of the West*, 833 P.2d 545, 552 (Cal. 1992) (stating that if "contractual language is clear and explicit, it governs."); *Physicians' Reciprocal Insurers*, 757 N.Y.S.2d 330, 331 (N.Y. App. Div. 2003) (stating that "[c]lear and unambiguous provisions in an insurance policy should be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement...."); *Mongelli v. Chicago Ins. Co.*, 2002 WL 32096578, at *3 (E.D.N.Y. 2002) (granting professional liability insurer's motion for summary judgment); *North River Ins. Co. v. Town of Grand Island*, 1995 WL 250391, at *4 (W.D.N.Y. 1995) (granting declaratory judgment in favor of Public Officials and Employees Liability insurer). *Accord* E.I. duPont de Nemours & Co., 879 A.2d 929, 938 (Del. Super. Ct. 2004), *citing Rhone-Poulenc*, 616 A.2d 1192, 1196 (Del.1992).

[110] *See Harris v. Gulf Ins. Co.*, 297 F. Supp. 2d 1220, 1225 (N.D. Cal. 2003) (interpreting "insured versus insured" exclusion in D&O liability policy); *Fisher v. Geico Gen. Ins. Co.*, 378 F. Supp. 2d 444, 447 (S.D.N.Y. 2005) (interpreting auto insurance policy in personal injury action); *Zunenshine*, 1998 WL 483475, at *4 (S.D.N.Y.) (stating that the"insurer bears the burden of proving that the policy's exclusions 'clearly and unmistakably' apply to the insured's claims." (citation omitted)); *MacKinnon v. Truck Ins. Exch.*, 73 P.3d 1205, 1213 (Cal. 2003) (interpreting pollution exclusion in a CGL policy); *Consol. Edison Co. of New York, Inc. v. Allstate Ins. Co.*, 774 N.E.2d 687, 690-92 (N.Y. 2002) (interpreting general liability policies in the context of environmental pollution issues); *Villa Enterprises Mgmt. Ltd. v. Fed. Ins. Co.*, 821 A.2d 1174, 1188 (N.J. Super. Ct. Law Div. 2002) (explaining, in an action against general liability insurer arising from underlying unfair competition and advertising injury litigation, that "[o]nce coverage has been established, the burden shifts to the insurer to show that the claim falls within the exclusionary provisions of the policy."(citing *Sears Roebuck & Co.*, 774 A.2d 526, 532 (N.J. Super. Ct. App. Div. 2001))); *Rosario*, 799 A.2d 32, 37 (N.J. Super. Ct. App. Div. 2002) (explaining that in "a dispute over the interpretation of an insurance contract, it is the insured's burden 'to bring the claim within the basic terms of the policy.' On the other hand, where the insurance carrier claims the matter in dispute falls within exclusionary provisions of the policy, it bears the burden of establishing that claim." (quoting *Reliance Ins. Co. v. Armstrong World Indus., Inc.*, 678 A.2d 1152 (N.J. Super. Ct. App. Div.1996) and *Hartford Acc. & Indem. Co. v. Aetna Life & Cas. Ins. Co.*, 483 A.2d 402 (N.J. 1984))). *See also Seaboard Sur. Co. v. Gillette Co.*, 476 N.E.2d 272, 275 (N.Y. 1984) (explaining, in the context of a libel, slander, and copyright liability policy, that "before an insurance company is permitted to avoid policy coverage, it must satisfy the burden ... of establishing that the exclusions or exemptions apply...."); *Lapierre, Litchfield & Partners v. Cont'l Cas. Co.*, 297 N.Y.S.2d 976, 979 (N.Y. Sup. Ct. 1969) (applying these rules to interpret a professional liability policy: "plaintiff has the burden of proof to establish that the claim comes within the provisions of the agreement.... The clause at issue is not an exclusion clause on which the insurer has the burden of proof." (citations omitted)). *Cf. Health-Chem Corp. v. Nat'l Union Fire Ins. Co.*, 559

determine an insurer's coverage obligations by comparing the allegations made in a complaint with the terms of the policy.[111] Coverage language is interpreted broadly to protect the objectively reasonable expectations of the insured.[112] Conversely, exclusionary clauses are "accorded a strict

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N.Y.S.2d 435, 438 (N.Y. Sup. Ct. 1990) (examining the issue of allocation of expenses under a D&O liability policy); *N. Am. Philips Corp.*, 1995 WL 628442, at *3-4 (Del. Super.) (applying New York law). *Accord E.I. du Pont de Nemours & Co.*, 711 A.2d 45, 53 (Del. Super. Ct.1995).

[111] *Steadfast Ins. Co. v. Stroock & Stroock & Lavan LLP*, 277 F. Supp. 2d 245, 251 (S.D.N.Y. 2003) (interpreting exclusions under claims-made professional liability policy to determine duty to defend or indemnify); *Holman v. Transamerica Ins. Co.*, 616 N.E.2d 499, 500 (N.Y. 1993); *Tartaglia v. Home Ins. Co.*, 658 N.Y.S.2d 388, 390 (N.Y. App. Div. 1997) (affirming summary judgment after finding professional liability insurer owed no obligation to defend or indemnify); *Voorhees v. Preferred Mut. Ins. Co.*, 607 A.2d 1255, 1259 (N.J. 1992) (considering whether insurer owed duty to defend under homeowner's policy); *Fed. Ins. Co. v. Campbell Soup Co.*, 885 A.2d 465, 468 (N.J. Super. Ct. App. Div. 2005) (considering whether liability insurer owed duty to defend against litigation arising from securities transaction); *Hebela*, 851 A.2d 75, 79 (N.J. Super. Ct. App. Div. 2004); *Rosario*, 799 A.2d 32, 40 (N.J. Super. Ct. App. Div. 2002); *Powell,* 760 A.2d 1141,1144 (N.J. Super. Ct. App. Div. 2000); *Hayward v. Centennial Ins. Co.*, 430 F.3d 989, 991 (9th Cir. 2005) (explaining, in the context of suit against CGL insurer, that in "California, an insurer has a duty to defend its insured when, comparing the allegations in the third party complaint with the terms of the policy as well as considering extrinsic facts, there is '*any* potential for liability under the policy.'"(citation omitted)); *Scottsdale Ins. Co. v. MV Transp.*, 115 P.3d 460, 466 (Cal. 2005); *Montrose Chem. Corp. v. Admiral Ins. Co.*, 861 P.2d 1153, 1157 (Cal. 1993). *Cf. Belt Painting Corp. v. TIG Ins. Co.*, 795 N.E.2d 15, 17 (N.Y. 2003) (stating that as the court has "repeatedly held, an insurer has a duty to defend if the allegations state a cause of action that gives rise to the reasonable possibility of recovery under the policy."); *Hampton Med. Group, P.A. v. Princeton Ins. Co.*, 840 A.2d 915, 920 (N.J. Super. Ct. App. Div. 2004) (explaining that when"the allegations in a complaint correspond with the language of the policy, the duty to defend arises, irrespective of the claim's actual merit."). *Accord Brosnahan Builders, Inc. v. Harleysville Mut. Ins. Co.*, 137 F. Supp. 2d 517, 525-26 (D. Del. 2001); *Harleysville Mut. Ins. Co., Inc. v. Sussex County*, 831 F. Supp. 1111, 1130 (D. Del. 1993).

[112] *Harris*, 297 F. Supp. 2d 1220, 1224-25 (N.D. Cal. 2003); *MacKinnon*, 73 P.3d 1205, 1213 (Cal. 2003); *AIU Ins. Co. v. Super. Ct.*, 799 P.2d 1253, 1264-65 (Cal. 1990). *See Hampton Med. Group, P.A.*, 840 A.2d 915, 920 (N.J. Super. Ct. App. Div. 2004) (stating that the "[p]rinciples of insurance contract interpretation 'mandate [a] broad reading of coverage provisions, [a] narrow reading of exclusionary provisions, [the] resolution of ambiguities in the insured's favor, and [a] construction consistent with the insured's reasonable expectations.'" (quoting *Search EDP, Inc. v. Am. Home Assur. Co.*, 632 A.2d 286, 289 (N.J. Super. Ct. App. Div. 1993))). *Cf. Jeffer v. Nat'l Union Fire Ins. Co.*, 703 A.2d 316, 319 (N.J. Super. Ct. App. Div. 1997) (stating that exclusionary clauses in liability insurance policies "must be strictly construed in favor of the insured, with any doubt as to the existence of coverage resolved in a manner that affords coverage to the insured."); *Sinopoli v. North River Ins. Co.*, 581 A.2d 1368, 1370 (N.J. Super. Ct. App. Div. 1990) (stating that "the language of liability insurance policies should be construed liberally in favor of the insured and strictly against the insurer, and in such manner as to provide full coverage of the indicated risk rather than to narrow protection."(citations omitted)); *Lefrak Org., Inc.*, 942 F. Supp. 949, 953 (S.D.N.Y. 1996) (explaining that the "purpose of an insurance policy is to provide protection to the insured. To give effect to that purpose, limitations on coverage must be construed narrowly."); *Snyder v. Nat'l Union Fire Ins. Co.*, 688 F. Supp. 932, 938 (S.D.N.Y. 1988) (observing that a "corollary principle [to *contra proferentem*] is that exclusions are to be narrowly construed so that the scope of coverage remains as broad as possible."); *Fed. Ins. Co. v. Kozlowski*, 792 N.Y.S.2d 397, 402 (N.Y. App. Div. 2005) (explaining, in the context of interpreting a D&O liability policy, "'an insurer's duty to defend and to pay defense costs under liability insurance policies must be

and narrow construction."[113] Even so, courts give effect to such exclusionary language where it is found to be "specific," "clear," "plain," "conspicuous"[114] and "not contrary to public policy."[115]

This is because insurance contracts are contracts of adhesion,[116] so policy language found to

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construed broadly in favor of the policyholder.'"(citation omitted)); *30 West 15th Street Owners Corp. v. Travelers Ins. Co.*, 563 N.Y.S.2d 784, 786 (N.Y. App. Div. 1990) (explaining that "it is well settled that an insurer's duty to defend is broader than its duty to indemnify and that a contract of insurance will be strictly construed in favor of the insured."); *Fed. Ins. Co. v. Tyco Intern. Ltd.*, 2004 WL 583829, at *6 (N.Y. Sup. Ct.) (observing that "the duty to defend or pay defense costs is construed liberally and any doubts about coverage are resolved in the insured's favor.").

[113] *Napoli, Kaiser & Bern, LLP*, 295 F. Supp. 2d 335, 343 (S.D.N.Y. 2003); *Holman v. Transamerica Ins. Co.*, 616 N.E.2d 499, 500 (N.Y. 1993); *Seaboard Sur. Co. v. Gillette Co.*, 476 N.E.2d 272, 275 (N.Y. 1984); *Oot*, 676 N.Y.S.2d 715, 720 (N.Y. App. Div. 1998); *Nav-Its, Inc.*, 869 A.2d 929, 934 (N.J. 2005); *Princeton Ins. Co. v. Chunmuang,* 698 A.2d 9, 16-17 (N.J. 1997); *Hampton Med. Group, P.A.*, 840 A.2d 915, 920 (N.J. Super. Ct. App. Div. 2004). *Accord Church Mut. Ins. Co.*, 347 F.Supp.2d 880, 884 (S.D. Cal. 2004); *Harris*, 297 F. Supp. 2d 1220, 1224 (N.D. Cal. 2003); *MacKinnon*, 73 P.3d 1205, 1213 (Cal. 2003); *N. Am. Phillips Corp.*, 1995 WL 626036, at *2 (Del. Super.).

[114] *Napoli*, 295 F. Supp. 2d 335, 343 (S.D.N.Y. 2003); *Holman*, 616 N.E.2d 499, 500 (N.Y. 1993); *Seaboard Sur. Co.*, 476 N.E.2d 272, 275 (N.Y. 1984); *Oot*, 676 N.Y.S.2d 715, 720 (N.Y. App. Div. 1998); *Nav-Its, Inc.*, 869 A.2d 929, 934 (N.J. 2005) (explaining an exclusion that is "'specific, plain, clear, prominent, and not contrary to public policy,'... will be enforced as written."(citation omitted)); *Princeton Ins. Co.*, 698 A.2d 9, 17 (N.J. 1997) (stating that "exclusions are presumptively valid and will be given effect if 'specific, plain, clear, prominent, and not contrary to public policy.'"(citations omitted)); *Hampton Med. Group, P.A.*, 840 A.2d 915, 920 (N.J. Super. Ct. App. Div. 2004); *Church Mut. Ins. Co.*, 347 F. Supp.2d 880, 884 (S.D. Cal. 2004); *Harris*, 297 F. Supp. 2d 1220, 1224-25 (N.D. Cal. 2003); *MacKinnon*, 73 P.3d 1205, 1213 (Cal. 2003); *ML Direct, Inc.*, 93 Cal. Rptr 2d 846, 850 (Cal. Ct. App. 2000). *Cf. Zunenshine*, 1998 WL 483475, at *4 (S.D.N.Y.) (stating that "the insurer bears the burden of proving that the policy's exclusions 'clearly and unmistakably' apply to the insured's claim." (citation omitted)).

[115] *Burns v. Int'l Ins. Co.*, 709 F. Supp. 187, 190 (N.D. Cal. 1989); *Nav-Its, Inc.*, 869 A.2d 929, 934 (N.J. 2005); *Princeton Ins. Co.*, 698 A.2d 9, 17 (N.J. 1997); *compare Am. Home Assur. Co. v. Levy*, 686 N.Y.S.2d 639, 646-48 (N.Y. Sup. Ct. 1999) (finding a sexual misconduct provision limiting coverage under a professional liability insurance policy did not violate public policy).

[116] *Nav-Its, Inc.*, 869 A.2d 929, 933 (N.J. 2005) (explaining that because of the "complex terminology used ... and because the policy is in most cases prepared by the insurance company experts, we recognize that [it] is a "'contract[ ] of adhesion between parties who are not equally situated.'"); *Shaw v. City of Jersey City*, 811 A.2d 404, 410 (N.J. 2002) (stating that "[i]nsurance contracts typically are contracts of adhesion, prepared unilaterally by the insurer."); *Sparks v. St. Paul Ins. Co.*, 495 A.2d 406, 412 (N.J. 1985) (stating insurance contracts are "contracts of adhesion, prepared unilaterally by the insurer, and have always been subjected to careful judicial scrutiny to avoid injury to the public."); *Fireman's Funds Ins. Co. v. Fibreboard Corp.*, 227 Cal. Rptr. 203, 206 (Cal. Ct. App. 1986) (explaining, in the context of a declaratory judgment action arising from asbestos litigation, that "[i]n the typical situation, the policy represents a contract of adhesion 'entered into between two parties of unequal bargaining strength, expressed in the language of a standardized contract, written by the more powerful bargainer to meet its own needs, and offered to the weaker party on a "take it or leave it" basis....'" (quoting *Gray v. Zurich Ins. Co.*, 419 P.2d 168 (Cal. 1966))). *Cf. Ogden Corp. v. Travelers Indem. Co.*, 681 F. Supp. 169, 174 (S.D.N.Y. 1988) (construing any ambiguities in CGL policy in corporate insured's favor "[a]lthough [insured] did in fact negotiate

be ambiguous is construed against the drafter,[117] in favor of coverage[118] and the insured's reasonable

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with [insurer], it cannot be said that [insured] completely drafted the provisions in question so as to cause the Court to apply a limited exception to the general rule by construing ambiguities in favor of the insurer."); *Eagle Star Ins. Co., Ltd. v. Int'l Proteins Corp.*, 360 N.Y.S.2d 648, 650 (N.Y. App. Div. 1974) (explaining in the context of maritime insurance breach of contract case, that insurance contracts "have been referred to as 'Contracts of Adhesion' in view of the disadvantageous bargaining position which generally exists between the parties ...."). *Accord New Castle County v. Nat'l Union Fire Ins. Co.*, 243 F.3d 744, 755-56 (3d Cir. 2001); *Alstrin*, 179 F. Supp. 2d 376, 389 (D. Del. 2002) (explaining the reason behind the "contra-insurer" rule).

[117] *Werner Indus. v. First State Ins. Co.*, 548 A.2d 188, 190-92 (N.J. 1988) (agreeing with the trial court's finding that the umbrella liability policy terms were "plain" and "not 'inconsistent with public expectations [and] commercially accepted standards'" rendering the reasonable expectation doctrine inapplicable); *Sparks*, 495 A.2d 406, 412 (N.J. 1985) (stating that the "recognition that insurance policies are not readily understood ... impelled courts to resolve ambiguities ... against ... insurance companies."); *Lavanant v. Gen. Acc. Ins. Co. of Am.*, 595 N.E.2d 819, 823 (N.Y. 1992) (explaining, in the context of a CGL policy declaratory judgment action, arising from personal injury suit against insured landlord, that "where there is ambiguity as to the existence of coverage, doubt must be resolved in favor of the insured and against the insurer."(citations omitted)); *Breed v. Ins. Co. of N. Am.*, 385 N.E.2d 1280, 1282 (N.Y. 1978) (recognizing, in a coverage action involving a homeowners' policy, the general rule "that ambiguities in an insurance policy are to be construed against the insurer, particularly when found in an exclusionary clause."(citation omitted)). *Cf. Powerine Oil Co., Inc.*, 118 P.3d 589, 598 (Cal. 2005) (explaining ambiguity "'not eliminated by the language and context of the policy, ... are generally construed against the party who caused the uncertainty to exist ... i.e., the insurer ...'"); *Montrose Chem. Corp.*, 913 P.2d 878, 888 (Cal. 1995) (explaining that ambiguity is resolved by "interpreting the ambiguous provisions in the sense the ... insurer ... believed the promisee understood them at the time of formation. If application of this rule does not eliminate the ambiguity, ambiguous language is construed against the party who caused the uncertainty to exist." (citations omitted)). *Accord New Castle County v. Nat'l Union Fire Ins. Co.*, 174 F.3d 338, 343 (3d Cir. 1999); *Swfte Int'l, Ltd. v. Selective Ins. Co. of Am.*, 1994 WL 827812, at *5 (D. Del.); *contra AIU Ins. Co.*, 799 P.2d 1253, 1265 (Cal. 1990) (stating that "where the policyholder does not suffer from lack of legal sophistication or a relative lack of bargaining power, and where it is clear that an insurance policy was actually negotiated and jointly drafted, we need not go so far in protecting the insured from ambiguous or highly technical drafting."); *Fireman's Funds Ins. Co. v. Fibreboard Corp.*, 227 Cal. Rptr. 203, 206-07 (Cal. Ct. App. 1986) (holding "the general rule of strict construction" inapplicable where "two large corporate entities, each represented by specialized insurance brokers or risk managers, negotiated the terms of the insurance contracts."). *See also Diamond Shamrock Chems. Co. v. Aetna Cas. & Sur. Co.*, 609 A.2d 440, 460-61 (N.J. Super. Ct. App. Div. 1992) (discussing application of the sophisticated insured exception in the context of CGL policy pollution exclusion); *but see Alstrin*, 179 F. Supp. 2d 376, 388, 389-90 (D. Del. 2002).

[118] *Church Mut. Ins. Co.*, 347 F. Supp.2d 880, 884 (S.D. Cal. 2004) (explaining that if "'the policy is ambiguous because it is reasonably susceptible to more than one interpretation, the ambiguity is construed in favor of coverage.'" (quoting *Smith Kandal Real Estate v. Cont'l Cas. Co.*, 79 Cal. Rptr. 2d 52 (Cal. Ct. App. 1998))); *AIU Ins. Co.*, 799 P.2d 1253, 1264 (Cal. 1990) (stating that in "the insurance context, [the Courts] generally resolve ambiguities in favor of coverage."). *Cf. Hugo Boss Fashions, Inc. v. Fed. Ins. Co.*, 252 F.3d 608, 615 (2d Cir. 2001) (applying "New York's well-established *contra proferentem* rule, pursuant to which unresolvable ambiguities in insurance contracts are construed in favor of the insured."); *Lavanant*, 584 N.Y.S.2d 744, 747 (N.Y. 1992) (explaining that "where there is ambiguity as to the existence of coverage, doubt must be resolved in favor of the insured and against the insurer."); *Nav-Its, Inc.*, 869 A.2d 929, 933 (N.J. 2005) (stating that if "the policy is ambiguous, [it] will be construed in favor of the insured."); *President*, 853 A.2d 247, 254 (N.J. 2004) (explaining that "ambiguous language in an insurance policy is often construed in favor of the insured."). *Accord New Castle County*, 174 F.3d 338, 343 (3d Cir. 1999); *Swfte Int'l, Ltd.*, 1994 WL 827812, at *5 (D. Del.).

expectations.[119] However, these courts do not employ the rule of *contra proferentem* unless ambiguity exists.[120]

The Court recognizes that, due to insurance policies not being "readily understood"[121] and

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[119] *Nav-Its, Inc.*, 869 A.2d 929, 934 (N.J. 2005) (recognizing "the importance of construing contracts of insurance to reflect the reasonable expectations of the insured in the face of ambiguous language..."); *President*, 853 A.2d 247, 254 (N.J. 2004) ("when an ambiguity exists within an insurance contract, courts should 'interpret the contract to comport with the reasonable expectations of the insured.'"(quoting *Zacarias v. Allstate Ins. Co.*, 775 A.2d 1262, 1264 (N.J. 2001))); *Powerine Oil Co., Inc.*, 118 P.3d 589, 598 (Cal. 2005); *Bank of the West*, 833 P.2d 545, 552 (Cal. 1992) ("In summary, a court ... faced with an argument for coverage based on ... ambiguous policy language must first attempt to determine whether coverage is consistent with the insured's objectively reasonable expectations. In so doing, the court must interpret the language in context, with regard to its intended function in the policy."); *Cunningham*, 120 Cal. Rptr. 2d 162, 168 (Cal. Ct. App. 2002) ("[I]f a provision is ambiguous, the ambiguous terms 'are resolved in the insureds' favor, consistent with the insureds' reasonable expectations.'" (quoting *Safeco Ins. Co. v. Robert S.*, 28 P.3d 889 (Cal. 2001))). *See AIU Ins. Co.*, 799 P.2d 1253, 1264 (Cal. 1990) (discussing the California approach to resolving ambiguity and explaining that the Court "generally interpret[s] the coverage clauses of insurance policies broadly, protecting the objectively reasonable expectations of the insured."); *Belt Painting Corp.*, 795 N.E.2d 15, 17 (N.Y. 2003) ("We read an insurance policy in light of 'common speech' and the reasonable expectations of a businessperson.... It follows that policy exclusions are given a strict and narrow construction, with any ambiguity resolved against the insurer."(citations omitted)). *Cf. U.S. Underwriters Ins. Co. v. Affordable Housing Found., Inc.,* 256 F. Supp. 2d 176, 180-81 (S.D.N.Y. 2003) (construing a CGL policy and explaining that if "a term can be reasonably interpreted in two ways, a court must construe the language in accordance with the reasonable expectations of the average insured individual, reading the policy and employing common language skills."); *Oot*, 676 N.Y.S.2d 715, 718 (N.Y. App. Div. 1998) ("'[W]here the meaning of a policy of insurance is in doubt or is subject to more than one reasonable interpretation, all ambiguity must be resolved in favor of the policyholder and against the company which issued the policy....' This rule is enforced even more strictly when the language at issue purports to limit the company's liability.'"(citations omitted)). *Accord Swfte Int'l, Ltd.*, 1994 WL 827812, at *5 (D. Del.).

[120] *Hugo Boss Fashions, Inc.*, 252 F.3d 608, 616 (2d Cir. 2001) (applying New York law in coverage case against liability insurer arising from a trademark infringement action); *Endicott Johnson Corp. v. Liberty Mut. Ins. Co.*, 928 F. Supp. 176, 182 (N.D.N.Y. 1996) (explaining, in context of a CGL policy declaratory judgment action, that "[o]nly 'after all aids to construction have been employed but have failed to resolve the ambiguities' should the Court apply the maxim that ambiguities are to be construed against the insurer."(citation omitted)); *U.S. v. Gen. Reinsurance Corp.*, 949 F.2d 569, 573-74 (N.Y. 1991) (explaining, in a suit between excess liability insurers, that New York law holds *contra proferentem* applies only "'as a matter of last resort after all aids to construction have been employed but have failed to resolve the ambiguities in the written instrument.'"(citations omitted)); *Breed*, 46 N.Y.2d 351, 355 (N.Y. 1978) (holding that "[o]bviously, before the rules governing the construction of ambiguous contracts are triggered, the court must first find ambiguity in the policy."); *Am. White Cross Lab., Inc. v. Cont'l Ins. Co.*, 495 A.2d 152, 157 (N.J. Super. Ct. App. Div. 1985) (observing that the trial judge's use of *contra proferentem* to interpret a products liability policy "overlooked the obvious fact that only 'genuine ambiguities' engage the so-called 'doctrine of ambiguity.'"(citing *Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 788, 794-95 (N.J. 1979))); *Montrose Chem. Corp.*, 913 P.2d 878, 888 (Cal. 1995) (stating that ambiguity "'is resolved by interpreting the ambiguous provisions in the sense the ... insurer ... believed the promisee understood them at the time of formation....' Only if this rule does not resolve the ambiguity do we then resolve it against the insurer."); *Bank of the West*, 833 P.2d 545, 552 (Cal. 1992). *Accord New Castle County*, 243 F.3d 744, 752 n.6 (3d Cir. 2001).

[121] *Sparks*, 495 A.2d 406, 412 (N.J. 1985).

inequality in bargaining positions among contracting parties,[122] case law exists that permits judicial application of the reasonable expectation doctrine to fulfill an insured's expectations even where those expectations contravene the unambiguous, plain meaning of exclusionary clauses.[123] For purposes of these Motions, however, the Court defers consideration of whether application of this "exception to the rule of strict construction of policy terms" is appropriate in the case at bar, which involve commercial policies, some of which contain "amendatory endorsements."[124] At this point,

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[122] *Gerhardt v. Cont' Ins. Cos.*, 225 A.2d 328, 332 (N.J. 1966).

[123] *See* AT&T Corp.'s Consol. An. Br. in Opp'n, D.I. 124/E-File 173, at 47; AT&T An. Br. in Opp'n to Nat'l Union's Mot. for Part. Summ. J., D.I. 126/E-File 175, at 34; Reply Br. by Nat'l Union, D.I. 133/E-File 200, at 17-18; Joint Reply Br. in Supp. Mot. for Part. Summ. J. by Cont'l Cas. Co., Zurich Am. Ins. Co., Gulf Ins. Co. & Twin City Fire Ins. Co. for Decl. There is No Coverage for *Williamson Fiduciary* & *Leykin* Actions Under Run-Off & 2001 Policies at 5 n.4, *AT&T Corp. v. Clarendon Am. Ins.*, E-File196 (Sep. 2, 2005). *See Voorhees*, 607 A.2d 1255, 1260 (N.J. 1992) (applying the reasonable expectations doctrine to a homeowner's policy and explaining that "'if an insured's "reasonable expectations" contravene the plain meaning of a policy, even its plain meaning can be overcome."(citation omitted)); *Sparks*, 495 A.2d 406, 412 (N.J. 1985) (stating that "recognition that insurance policies are not readily understood ... impelled courts to resolve ambiguities ... against the insurance companies....[and] has also led courts to enforce unambiguous insurance contracts in accordance with the reasonable expectations of the insured."); *Gerhardt*, 225 A.2d 328 (N.J. 1966) (construing homeowner's policy to provide workers' compensation coverage over express language of an exclusion); *Kievit v. Loyal Protective Life Ins. Co.*, 170 A.2d 22 (N.J. 1961) (declining to limit individual insured's coverage in spite of pre-existing condition under disability insurance policy). *Accord McGrail*, 55 N.E.2d 483, 486 (N.Y. 1944) (examining a total disability policy and explaining that "resort to a literal construction may not be had where the result would be to thwart the obvious and clearly expressed purpose which the parties intended to accomplish or where such a construction would lead to an obvious absurdity or place one party at the mercy of the other." (citations omitted)).

[124] Joint Reply Br. in Supp. Mot. for Part. Summ. J. by Cont'l Cas. Co., Zurich Am. Ins. Co., Gulf Ins. Co. and Twin City Fire Ins. Co., E-File196, at 5 n.4. *See Zacarias*, 775 A.2d 1262, 1268 (N.J. 2001) (considering the reasonable expectations doctrine, "we discern two rules .... First, in enforcing an insurance policy, courts will depart from the literal text and interpret it in accordance with the insured's understanding, even when that understanding contradicts the insurer's intent, if the text appears overly technical or contains hidden pitfalls, cannot be understood without employing subtle or legalistic distinctions, is obscured by fine print, or requires strenuous study to comprehend. Second, the plain terms of the contract will be enforced if the 'entangled and professional interpretation of an insurance underwriter is [not] pitted against that of an average purchaser of insurance,' or the provision is not so 'confusing that the average policyholder cannot make out the boundaries of coverage.'" (citations omitted)); *Bromfeld v. Harleysville Ins. Cos.*, 688 A.2d 1114, 1121 (N.J. Super. Ct. App. Div. 1997) (explaining the reasonable expectations doctrine applies to "insurance policies with private individuals."); *Nunn v. Franklin Mut. Ins. Co.*, 644 A.2d 1111, 1114-15 (N.J. Super. Ct. App. Div. 1994) (explaining that "the type of [non-commercial] policy being scrutinized" as well as the type of non-commercial individual insured distinguishes New Jersey cases where judicial interpretation found unambiguous policies "inconsistent with public expectations [and] commercially accepted standards").

any determination of whether the exception applies is premature because the issue is not fully briefed and the choice of law question remains in dispute.[125]

New York, New Jersey and California courts use similar standards to ascertain the existence of ambiguity,[126] and all find ambiguity where language in an insurance policy is "reasonably susceptible to more than one interpretation."[127] The mere suggestion that there are two conflicting

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[125] *Werner Indus.*, 548 A.2d 188, 190-93 (N.J. 1988) (remanding to determine whether the policy terms were understood and bargained for, after agreeing with the trial court that those terms were "plain" and not "'inconsistent with public expectations [and] commercially accepted standards.'"); *Sparks*, 495 A.2d 406, 416 n.6 (N.J. 1985) (noting that "on remand the trial court should not be precluded from considering evidence tending to prove that the terms of this policy were specifically understood and bargained for [by previous attorney insured] ...").

[126] In *Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 788, 795 (N.J. 1979), the Supreme Court of New Jersey found that "genuine ambiguity" arises "where the phrasing of the policy is so confusing that the average policyholder cannot make out the boundaries of coverage." *See Richards v. Princeton Ins. Co.*, 178 F. Supp. 2d 386, 392 (S.D.N.Y. 2001); *Fed. Ins. Co. v. Campbell Soup Co.*, 885 A.2d 465, 468 (N.J. Super. Ct. App. Div. 2005); *Rosario*, 799 A.2d 32, 38 (N.J. Super. Ct. App. Div. 2002); *U.S. Mineral Products Co. v. Am. Ins. Co.*, 792 A.2d 500, 509 (N.J. Super. Ct. App. Div. 2002). New York courts employ several forms of the common speech and reasonable insured test. *See Nat'l Union Fire Ins. Co. v. Farmington Casualty Co.*, 765 N.Y.S.2d 763, 766 (N.Y. Sup. Ct. 2003) (The "test to determine whether an insurance contract is ambiguous focuses on the reasonable expectations of the average insured upon reading the policy ... and employing common speech."(quoting *Mostow v. State Farm Ins. Cas. Co.*, 668 N.E.2d 392, 423-24 (N.Y. 1996))). *See also* Assoc. Mut. Ins. Coop. v. Bader, 805 N.Y.S.2d 275, 277 (N.Y. Sup. Ct. 2005); *Belt Painting Corp.*,795 N.E.2d 15, 17 (N.Y. 2003); *N. Am. Phillips Corp.*, 1995 WL 628444, at *7 (The "tests to be applied in construing an insurance policy are 'common speech ... and the reasonable expectation and purpose of the ordinary businessman.'" (citing *Ace Wire & Cable Co. v. Aetna Cas. & Sur. Co.*, 457 N.E. 2d 761, 764 (N.Y. 1983))). *Cf. Zunenshine*, 1998 WL 483475, at *3 (S.D.N.Y.) ("Contract terms are ambiguous if they suggest 'more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.'" (citation omitted)). Finally, as in Delaware, California courts look for policy language that "is reasonably susceptible to more than one interpretation." *Church Mut. Ins. Co.*, 347 F. Supp.2d 880, 884 (S.D. Cal. 2004), *citing Smith Kandal Real Estate v. Cont'l Cas. Co.*, 79 Cal. Rptr. 2d 52 (Cal. Ct. App. 1998); *Powerine Oil Co., Inc.*, 118 P.3d 589, 598 (Cal. 2005); *MacKinnon*, 73 P.3d 1205, 1213 (Cal. 2003); *Cunningham*, 120 Cal. Rptr. 2d 162,168 (Cal. Ct. App. 2002). *Accord New Castle County*, 243 F.3d 744, 750 (3d Cir. 2001); *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 288 (Del. 2001), *citing Rhone-Poulenc*, 616 A.2d 1192, 1196 (Del. 1992).

[127] *Am. Cas. Co. v. Resolution Trust Corp.*, 839 F. Supp. 282, 290 (D.N.J. 1993), *citing Allen v. Metro. Life Ins. Co.*, 208 A.2d 638 (N.J. 1965); *Byrd v. Blumenreich*, 722 A.2d 598, 600 (N.J. Super. Ct. App. Div. 1999); *citing Hunt v. Hosp. Serv. Plan of N.J.*, 162 A.2d 561, 563 (N.J. 1960) (holding "[w]herever possible the phraseology must be liberally construed in favor of the insured; if doubtful, uncertain, or ambiguous, or reasonably susceptible of two interpretations, the construction conferring coverage is to be adopted."); *U.S. Underwriters Ins. Co.*, 256 F. Supp.2d 176, 180-81 (S.D.N.Y. 2003), *citing Haber v. St. Paul Guardian Ins. Co.*, 137 F.3d 691, 695 (2d Cir. 1998); *Zunenshine*, 1998 WL 483475, at *3 (S.D.N.Y.); *Home Ins. Co. of Ill. v. Spectrum Info. Tech., Inc.*, 930 F. Supp. 825, 844 (E.D.N.Y. 1996); *K. Bell & Assocs, Inc.*, 97 F.3d 632, 637 (2d Cir. 1996); *Harrington v. Am. Mut. Ins. Co.*, 645 N.Y.S.2d 221, 224 (N.Y. App. Div. 1996) (finding New York law "closely parallels New Jersey

interpretations for the same policy language does not create ambiguity.[128] The courts in all three states are in agreement that a court is not required to find ambiguity where an interpretation advocated by a litigant "would strain the language of the contract beyond its reasonable and ordinary meaning."[129] Again, both interpretations must reflect a reasonable reading of the contractual

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law" in construing ambiguity in the context of homeowner's coverage); *N. Am. Phillips Corp.*, 1995 WL 628444, at *7 (applying New York law); *Powerine Oil Co., Inc.*, 118 P.3d 589, 598 (Cal. 2005); *Church Mut. Ins. Co.*, 347 F. Supp.2d 880, 884 (S.D. Cal. 2004), *citing Smith Kandal Real Estate*, 79 Cal. Rptr. 2d 52 (Cal. Ct. App.1998); *MacKinnon*, 73 P.3d 1205, 1213 (Cal. 2003). *See President*, 853 A.2d 247, 254 (N.J. 2004). *Cf. Powell*, 760 A.2d 1141, 1147 (N.J. Super. Ct. App. Div. 2000) ("An insurance policy is not ambiguous merely because two conflicting interpretations of it are suggested by the litigants rather both interpretations must reflect a reasonable reading of the contractual language."); *Liberty Surplus Ins. Corp. v. Segal Co.*, 2004 WL 2102090, at *1 (S.D.N.Y. 2004) ("An unambiguous contract provision is one with 'a definite and precise meaning, unattended by danger of misconception in the purpose of the [contract] itself, and concerning which there is no reasonable basis for a difference of opinion.'"(citation omitted)); *Hugo Boss Fashions, Inc.*, 252 F.3d 608, 617 (2d Cir. 2001); *Cunningham*, 120 Cal. Rptr. 2d 162,168 (Cal. Ct. App. 2002) ("If the policy provision is unambiguous, i.e., has only one reasonable construction, it must be interpreted according to this plain meaning."(citing *Ray v. Valley Forge Ins. Co.*, 92 Cal. Rptr. 2d 473, 475-76 (Cal. Ct. App. 1999))). *Accord O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 288 (Del. 2001), *citing Rhone-Poulenc*, 616 A.2d 1192, 1196 (Del. 1992).

[128] *Fed. Ins. Co. v. Campbell Soup Co.*, 885 A.2d 465, 468 (N.J. Super. Ct. App. Div. 2005); *Rosario*, 799 A.2d 32, 38 (N.J. Super. Ct. App. Div. 2002); *Powell*, 760 A.2d 1141, 1147 (N.J. Super. Ct. App. Div. 2000), *citing James v. Fed. Ins. Co.*, 73 A.2d 720, 721 (N.J. 1950); *Abner, Herrman & Brock, Inc.*, 308 F. Supp. 2d 331, 336 (S.D.N.Y. 2004); *Checkrite Ltd., Inc. v. Illinois Nat'l Ins. Co.*, 95 F. Supp. 2d 180, 189 (S.D.N.Y. 2000) (interpreting errors and omissions liability policy); *Zunenshine*, 1998 WL 483475, at *3 (S.D.N.Y.); *Home Ins. Co. of Illinois v. Spectrum Info.*, 930 F. Supp. 825, 846 (E.D.N.Y. 1996) (interpreting "claims made" D&O policy); *Mount Vernon Fire Ins. Co. v. Creative Housing Ltd.*, 668 N.E.2d 404, 406 (N.Y. 1996) (interpreting liability insurance policy assault and battery exclusion); *Powerine Oil Co., Inc.*, 118 P.3d 589, 598 (Cal. 2005); *Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co.*, 959 P.2d 265, 272 (Cal. 1998) (interpreting comprehensive general liability policy); *Lockheed Corp. v. Cont'l Ins. Co.*, 35 Cal. Rptr. 3d 799, 805 (Cal. Ct App. 2005). *Accord Woodward v. Farm Family Cas. Ins. Co.*, 796 A.2d 638, 642 (Del. 2002); *Rhone-Poulenc Basic Chems. Co. v. Am. Motorist Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992).

[129] *Checkrite Ltd., Inc.*, 95 F. Supp. 2d 180, 189 (S.D.N.Y. 2000); *Zunenshine*, 1998 WL 483475, at *3 (S.D.N.Y.). *Cf. Longobardi,* 582 A.2d 1257, 1260 (N.J. 1990)) ("[T]he words of an insurance policy should be given their ordinary meaning, and in the absence of an ambiguity, a court should not engage in a strained construction to support the imposition of liability."); *Zurich Am. Ins. Co. v. Pennsylvania Mfrs. Ass'n Ins. Co.*, 2003 WL 23095605, at *6 (N.J. Super. Ct. App. Div. 2003) (interpreting comprehensive general liability policy); *Rosario*, 799 A.2d 32, 38 (N.J. Super. Ct. App. Div. 2002); *Physicians' Reciprocal Insurers v. Abraham*, 757 N.Y.S.2d 330, 331 (N.Y. App. Div. 2003); *Waller v. Truck Ins. Exchange, Inc.*, 900 P.2d 619, 627 (Cal. 1995) ("But language in a contract must be interpreted as a whole, and in the circumstances of the case, and cannot be found to be ambiguous in the abstract. Courts will not strain to create an ambiguity where none exists."(citations omitted)); *ML Direct, Inc.*, 93 Cal. Rptr 2d 846, 850 (Cal. Ct. App. 2000) ("We will not adopt a strained or absurd interpretation to create an ambiguity where none exists. The policy terms must be construed in the context of the whole policy and the circumstances of the case and cannot be deemed ambiguous in the abstract."). *Cf. Schiff v. Fed. Ins. Co.*, 779 F. Supp. 17, 21 (S.D.N.Y. 1991) (holding in context of office building package policy that "[w]here there is no ambiguity, this Court is unwilling to enlarge the liability of the insurer beyond the express terms of the

language before ambiguity will be found.

Further, absent any ambiguity, the law in these states provides that a court should not write or rewrite a policy for an insured to make it "better" than the policy purchased.[130] Thus, if the disputed language is found unambiguous, the court should give the policy terms their plain and ordinary meaning,[131] and enforce the contract according to those terms.[132]

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contract between insurer and insured."). *Accord New Castle County*, 243 F.3d 744, 750 (3d Cir. 2001); *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 288 (Del. 2001); *citing Rhone-Poulenc*, 616 A.2d 1192, 1196 (Del. 1992).

[130] *Morgan, Lewis & Bockius LLP v. Hanover Ins. Co.*, 929 F. Supp. 764, 774 (D.N.J. 1996) (finding, in the context of construing a liability insurance policy, that the "court cannot rewrite the contract for the parties, nor it is empowered to alter the terms of the same."); *President*, 853 A.2d 247, 254 (N.J. 2004); *Voorhees v. Preferred Mut. Ins. Co.*, 607 A.2d 1255, 1260 (N.J. 1992); *Hebela*, 851 A.2d 75, 80 (N.J. Super. Ct. App. Div. 2004); *Rosario*, 799 A.2d 32, 38 (N.J. Super. Ct. App. Div. 2002); *Powell*, 760 A.2d 1141,1143, 1147 (N.J. Super. Ct. App. Div. 2000); *Schiff*, 779 F.Supp. 17, 21 (S.D.N.Y. 1991); *Breed*, 385 N.E.2d 1280, 1282 (N.Y. 1978) ("This court may not make or vary the contract of insurance to accomplish its notions of abstract justice or moral obligation, since '[e]quitable considerations will not allow an extension of the coverage beyond its fair intent and meaning in order to do raw equity and to obviate objections which might have been foreseen and guarded against.'"); *Escobar*, 804 N.Y.S.2d 360, 361-62 (N.Y .App. Div. 2005); *Physicians' Reciprocal Insurers*, 757 N.Y.S.2d 330, 331 (N.Y. App. Div. 2003); *Lancer Ins. Co. v. Utica Nat'l Ins. Group*, 721 N.Y.S.2d 782 (N.Y. App. Div. 2001); *Johnson v. Home Indem. Co.*, 601 N.Y.S.2d 347, 348 (N.Y. App. Div. 1993), *citing Gov't Employees Ins. Co.*, 366 N.E.2d 865, 866 (N.Y. 1977); *Certain Underwriters at Lloyd's of London v. Superior Court,* 16 P.3d 94, 108 (Cal. 2001) (stating, in context of interpreting comprehensive general liability policy, that "we do not rewrite any provision of any contract, including the standard policy underlying any individual policy, for any purpose."); *Blumberg v. Guarantee Ins. Co.*, 238 Cal. Rptr. 36, 41 (Cal. Ct. App. 1987) (explaining in the context of interpreting a professional liability policy, that "[c]ourts may not rewrite the insurance contract or force a conclusion to exact liability where none was contemplated."). *Cf. Bay Cities Paving & Grading, Inc.*, 855 P.2d 1263, 1271 (Cal. 1993). *Accord E.I. duPont de Nemours & Co.*; 879 A.2d 929, 938 (Del. Super. Ct. 2004).

[131] *Nav-Its, Inc.*, 869 A.2d 929, 933 (N.J. 2005); *Longobardi*, 582 A.2d 1257, 1260 (N.J. 1990); *Rosario*, 799 A.2d 32, 38 (N.J. Super. Ct. App. Div. 2002); *Lavanant*, 595 N.E.2d 819, 822 (N.Y. 1992); *Escobar*, 804 N.Y.S.2d 360, 361-62 (N.Y. App. Div. 2005); *Physicians' Reciprocal Insurers*, 757 N.Y.S.2d 330, 331 (N.Y. App. Div. 2003); *Lapierre, Litchfield & Partners v.* 302 N.Y.S.2d 370, 373 (N.Y. App. Div. 1969); *N. Am. Phillips Corp.*, 1995 WL 628444, at *8 (applying New York law); *Church Mut. Ins. Co.*, 347 F. Supp. 2d 880, 884 (S.D.Cal. 2004), *citing AIU Ins. Co.*, 799 P.2d 1253, 1253 (Cal.1990); *Cunningham*, 120 Cal. Rptr. 2d 162, 168 (Cal. Ct. App. 2002). *Cf. Morgan, Lewis & Bockius LLP*, 929 F. Supp. 764, 774 (D.N.J. 1996) ("The parties will be bound by the plain language of the contract."); *ML Direct, Inc.*, 93 Cal. Rptr 2d 846, 850 (Cal. Ct. App. 2000) (explaining that the "fundamental goal of contract interpretation is to give effect to the parties' mutual intentions, which, if possible, should be inferred solely from the written terms of the policy. If that language is clear and explicit, it governs."). *Accord New Castle County*, 970 F.2d 1267, 1270 (3d Cir. 1992).

[132] *Nav-Its, Inc.*, 869 A.2d 929, 933-34 (N.J. 2005); *Rosario*, 799 A.2d 32, 38 (N.J. Super. Ct. App. Div. 2002); *Richards v. Princeton Ins. Co.*, 178 F. Supp. 2d 386, 392 (S.D.N.Y. 2001) (applying New Jersey law); *Church Mut. Ins. Co.*, 347 F. Supp.2d 880, 884 (S.D. Cal. 2004), *citing AIU Ins. Co.*, 799 P.2d 1253, 1253 (Cal.1990); *K. Bell & Assoc., Inc.*, 97 F.3d 632, 637 (2d Cir. 1996). *Cf. Conduit & Found. Corp. v. Hartford Cas. Ins. Co.*, 746 A.2d 1053, 1058 (N.J. Super. Ct. App. Div. 2000) ("While we look for the probable intent of the

III. ***DISCUSSION***

The question before the Court at this juncture is whether AT&T is entitled to coverage for the *Williamson Fiduciary* and *Leykin* Actions under the 2001 AT&T Program, the 2001 AT&T Run-Off Program and/or the 2002 AT&T Program. Not surprisingly, the parties disagree about how the burden of proof should be allocated in this case.[133] Because the burden of proof is considered a procedural issue, the forum will apply its burden of proof unless the "'the primary purpose of the relevant rule of the state of the otherwise applicable law is to affect decision of the issue rather than to regulate conduct of the trial.'"[134] The Court finds the burden of proof question "is designed to affect the outcome at trial," and thus will not apply the rules of the forum state.[135] After reviewing the relevant case law of New York, New Jersey and California concerning the burden of proof in coverage cases, the Court is satisfied that regardless of how the burden is allocated, the result is the same under either parties' proposed method of allocation.

A. AT&T's Definition of "Claim"

In its effort to spread coverage for the Subsequent Actions[136] over multiple policy periods, AT&T alleges that each misrepresentation or omission averred in the underlying complaints is "the

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parties and their reasonable expectations in construing insurance policies and construe exclusionary clauses in strict fashion, when the language of an insurance policy is clear, we must enforce its terms as written."). *Cf. Morgan, Lewis & Bockius LLP*, 929 F. Supp. 764, (D.N.J. 1996); *ML Direct, Inc.*, 93 Cal. Rptr 2d 846, 850 (Cal. Ct. App. 2000) (explaining policy language that "is clear and explicit,...governs.").

[133] *See* discussion *supra* II, Part B. *See also* AT&T Corp.'s Consol. An. Br. in Opp'n, D.I. 124/ E-File 173, at 43; Mem. in Supp. of Fed. Ins. Mot. for Part. Summ. J., D.I. 72/E-File 117, at 20-21.

[134] *N. Am. Philips Corp. v. Aetna Cas. & Sur. Co.*, 1995 WL 628442, at *3 (Del. Super.), *quoting Monsanto Co. v. Aetna Cas. & Sur. Co.*, 1993 WL 563244, at *3 (Del. Super. 1993).

[135] *Id.*

[136] *See* discussion *supra* Part IC. For purposes of this Opinion, the *Williamson Fiduciary* and *Leykin* Actions are referred to as the "Subsequent Actions," while the *Pittleman, Schaffer*, *Yourman* and *San Mateo* Actions are collectively referred to as the "Prior Actions."

basis for a separate claim against the Directors...."[137] According to AT&T, the *Williamson Fiduciary* and *Leykin* Actions are not merely two "Claim." Rather, it maintains that "*Leykin* asserts at least fifteen separate alleged misrepresentations or omissions, each of which, standing alone, is sufficient to state an independent and distinct claim[,]..." and that "*Williamson* includes *numerous* Claims...."[138] Conversely, the Defendants argue that AT&T's assertion that the Subsequent Actions constitute in excess of fifteen individual "Claims" requires the Court to equate the policy term "Claim" with the policy term "Wrongful Act," a result that the Defendant Insurers argue ignores the clear and unambiguous definition of "Claim" as set forth in their policies.

Lloyd's Primary 2001 AT&T Run-Off Policy and Lloyd's Primary 2001 AT&T Policy define "Claim" as: " 1. any written or oral demand for damages or other relief against any of the Assureds, ... 2. any civil, criminal, administrative or regulatory proceeding initiated against any of the Assureds, including [a] any appeal therefrom; [b] any Securities Action Claim."[139] Meanwhile, "Wrongful Act" is defined as:

> 1. any actual or alleged act, error, omission, misstatement, misleading statement, neglect, or breach of duty by the Directors or Officers, individually or collectively, whilst acting in their respective capacities.
>
> 2. any actual or alleged act, error, omission, misstatement, misleading statement, neglect or breach of duty by the Company in the purchase or sale or offer to purchase or sell any securities of the Company or in preparing materials of the Company filed with the Securities and Exchange Commission or any similar state agency or in rendering any other public statements regarding the Company, which is alleged in

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[137] AT&T Corp.'s Consol. An. Br. in Opp'n, D.I. 124/E-File 173, at 36.

[138] *Id*. at 39 (emphasis added).

[139] J.D. Ex. 14, Lloyd's Primary AT&T 2001 Run-Off Policy, Endorsement No. 1 at ¶ 8, at 16. J.D. Ex. 8, Lloyd's Primary 2001 AT&T Policy Endorsement No. 1 at ¶ 6, at 16. Although not relevant in this case, Lloyd's Primary 2001 AT&T Policy, Endorsement No. 1 also includes proceedings of the EEOC or government body with jurisdiction over any employment practice violations in this definition.

any Securities Action Claim.[140]

This language is clear and unambiguous. Each alleged misrepresentation, omission, act or breach is a "Wrongful Act," and not a "Claim." The Court agrees with the Defendants that AT&T's "assertion that *Williamson* and *Leykin* 'Claims' may be subdivided into dozens of separate acts would impermissibly render meaningless the term 'Wrongful Act' as it is used in the Policies."[141] The Court also agrees with the Defendants Insurers that if the term "Claim" were so defined and then applied, it would have a "nonsensical impact" on the Insuring Clauses and would render the term "Wrongful Act" superfluous. As the Defendant Insurers correctly note, "[i]f 'Claim' were to mean each alleged misrepresentation, omission, act or breach by an insured, the Insuring Clause then would have to be read to state that coverage is provided for 'Loss resulting from any [misrepresentation, omission, act or breach] first made *against* the Directors and Officers during the policy period for a 'Wrongful Act.'"[142]

The Court finds that the clear and unambiguous language used to define "Claim" and "Wrongful Act" makes clear that these are two separate and distinct terms, which cannot be conflated. Moreover, contrary to AT&T's assertions, each misrepresentation, act, omission or breach does not constitute a "Claim" because, standing alone, it may never result in a loss or a demand for relief against the insureds.[143]

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[140] J.D. Ex. 14, Lloyd's Primary AT&T 2001 Run-Off Policy, Endorsement No. 1 at ¶ 16, at 18. J.D. Ex. 8, Lloyd's Primary 2001 AT&T Policy, Endorsement No. 1 at ¶ 12, at 18. Although not relevant in this case, Lloyd's Primary 2001 AT&T Policy, Endorsement No.1 also includes "Employment Practice Violation" by directors or officers at Cl. II, N (1).

[141] Joint Reply Br. in Supp. Mot. for Part. Summ. J. by Cont'l Cas. Co., Zurich Am. Ins. Co., Gulf Ins. Co. & Twin City Fire Ins. Co., E-File196, at 9 (citations omitted).

[142] *Id.* at 10.

[143] *See Dura Pharm., Inc. v. Broudo*, 125 S. Ct. 1627, 1631-33 (S. Ct. 2005).

Given the clear and unambiguous language of the policies at issue, the Court finds the cases offered on this point by AT&T unpersuasive.[144] Unlike the policies at issue in the cases on which AT&T relies, the Defendant Insurers' policies do not limit the definition of "Claim" to a demand for money including institution or service of a suit.[145] Instead, under these policies an entire civil proceeding constitutes a "Claim."[146] A plain reading of the clear and unambiguous definition of "Claim" compels the Court to conclude that the *Williamson Fiduciary* Action and the are each one "civil proceeding."

Another flaw in AT&T's argument that each alleged misrepresentation, omission, act or breach constitutes a "Claim," is that no party, including AT&T itself, can under AT&T's proposed definition of the term, tell the Court exactly how many "Claims" are allegedly covered by the policies. At oral argument, the Defendant Insurers informed the Court that:

> ... months and months into this litigation.... We still don't know how many claims AT&T thinks there are in this case. It's totally arbitrary. They offer no principal basis for delineating between the different allegations here to figure out what constitutes a claim.[147]

During that same argument, when specifically asked by the Court "[h]ow many claims are there?" AT&T could only respond that "[t]here are *at least* 17 claims...."[148]

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[144] *See* AT&T Corp.'s Consol. An. Br. in Opp'n, D.I. 124/E-File 173, at 39-42.

[145] *See Home Ins. Co. of Illinois*, 930 F. Supp. 825, 833 (E.D.N.Y. 1996); *Bay Cities Paving & Grading, Inc.*, 855 P.2d 1263, 1265 (Cal. 1993); *TIG Specialty Ins. Co. v. Pinkmonkey.com, Inc.*, 375 F.3d 365, 376 (5th Cir. 2004); *but see Cmty Found. for Jewish Educ. v. Fed. Ins. Co.*, 2001 WL 664205, at *4 (7th Cir. 2001) (recognizing that "Claim" as defined in cases like *Home Ins. Co.*, 930 F. Supp. 825 (E.D.N.Y. 1996) is "inapplicable" to policies that define a "civil proceeding" as a separate category of "Claim").

[146] J.D. Ex. 14, Lloyd's Primary AT&T 2001 Run-Off Policy, Endorsement No. 1 at ¶ 8, at 16. J.D. Ex. 8, Lloyd's Primary 2001 AT&T Policy, Endorsement No. 1 at ¶ 6, at 16.

[147] Tr. Oral Argument at 212.

[148] *Id.* at 256 (emphasis added).

The policy language is undeniable, clear and unambiguous. A civil proceeding equals a "Claim," while an alleged misrepresentation, omission, act or breach equals a "Wrongful Act." Because these terms are unambiguous, the Court need not look beyond them to make its determination.

B. The Insuring Clause and Single Claim Provisions

Having determined that the *Williamson Fiduciary* and *Leykin* Actions each constitute one "Claim," the Court turns to the Defendants' argument that any potential coverage is limited to "Claims" "first made" during the applicable policy periods. They assert that because the Subsequent Actions must be deemed "first made" at the time when the earlier suits[149] were filed, AT&T is only potentially entitled to coverage under the policies in effect at the time it notified them about the Prior Actions.[150] The Defendant Insurers base their argument on the Insuring Clause and the Single Claim Provision. The Insuring Clause in both the Lloyd's Primary 2001 Run-Off Policy and the Lloyd's Primary 2001 AT&T Policy provides:

> A. Underwriters shall pay on behalf of the Directors and Officers Loss resulting from any Claim first made against the Directors and Officers during the Policy Period for a Wrongful Act.
>
> B. Underwriters shall pay on behalf of the Company Loss which the Company is required or permitted to pay as indemnification to any of the Directors and Officers resulting from any Claim first made against the Directors and Officers during the Policy Period for a Wrongful Act.

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[149] *See* discussion of the *Pittleman* and *San Mateo* Actions *supra* Part I, D1 at 8-13.

[150] *See* discussion *supra* Part ID. For purposes of this Opinion, the *Pittleman, Schaffer*, *Yourman* and *San Mateo* Actions are collectively referred to as the "Prior Actions," while the *Williamson Fiduciary* and *Leykin* Actions are referred to as the "Subsequent Actions."

C. Underwriters shall pay on behalf of the Company Loss resulting from any Securities Action Claim first made against the Company during the Policy Period for a Wrongful Act.[151]

The Single Claim Provision found in Lloyd's Primary 2001 Run-Off Policy and Primary 2001 AT&T Policy provides:

> More than one Claim involving the same Wrongful Act or Interrelated Wrongful Acts shall be deemed to constitute a single Claim and shall be deemed to have been made at the earliest of the following times:
>
> 1. The time at which the earliest Claim involving the same Wrongful Act or Interrelated Wrongful Acts is first made, or
>
> 2. The time at which the Claim involving the same Wrongful Act or Interrelated Wrongful Acts shall be deemed to have been made pursuant to Clause VI.B.[152]

The National Union 2002 AT&T Primary Policy Notice/Reporting Provision provides:

> ...(b) if written notice of a Claim has been given to the Insurer pursuant to Clause 7(a) above, then a Claim which is subsequently made against an Insured and reported to the Insurer alleging, arising out of, based upon or attributable to the facts alleged in the Claim for which such notice has been given, or alleging any Wrongful Act which is the same as or related to any Wrongful Act alleged in the Claim of which such notice has been given, shall be considered related to the first Claim and made at the time such notice was given.[153]

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[151] J.D. Ex. 14, Lloyd's Primary AT&T 2001 Run-Off Policy, Cl. I. at 3, Endorsement 1 ¶ 6, at 16; J.D. Ex. 8, Lloyd's Primary 2001 AT&T Policy, Cl. I. at 3, Endorsement 1 ¶ 4, at 15-16.

[152] J.D. Ex. 14, Lloyd's Primary AT&T 2001 Run-Off Policy, Cl. IV. at 6, Endorsement 1 ¶ 28(C), at 22; J.D. Ex. 8, Lloyd's Primary 2001 AT&T Policy, Cl. IV. at 21, Endorsement 1 ¶ 25(C), at 21-22.

[153] J.D. Ex. 20, Nat'l Union Fire Ins. Co. Primary 2002 AT&T Policy § 7(b), at 10.

Additionally, the National Union 2002 AT&T Primary Policy also contains a New York Claims-Made Amendatory Endorsement that provides, in pertinent part:

> Claims reported to the Insurer alleging the same or related Wrongful Acts shall be considered reported to the Insurer at the time and during the policy period when the first such Claim was reported.[154]

Based on its reading of these provisions, the Court finds that the Insuring Clauses of Lloyd's Primary Policies limits coverage to "Claims" "first made" during the July 9, 2001 to July 9, 2007 policy period,[155] and to the time during which the earliest Claim, as interpreted above, involving the same "Wrongful Act" or "Interrelated Wrongful Acts" was "first made."[156]

"Wrongful Act" is defined as "any actual or alleged act, error, omission, misstatement, misleading statement, neglect or breach of duty[.]"[157] "Interrelated Wrongful Acts" are defined as "Wrongful Acts which have as a common nexus any fact, circumstance, situation, event, transaction or series of facts, circumstances, situations, events or transactions."[158] The Court finds the language of these definitions is clear and unambiguous,[159] and thus will give these policy terms their plain and ordinary meaning.[160]

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[154] *Id.* at Endorsement 2, ¶2, at 1.

[155] *See* J.D. Ex. 14, Lloyd's Primary AT&T 2001 Run-Off Policy, Cl. I. at 16; Lloyd's Primary 2001 AT&T Policy, Cl. I. at 15-16.

[156] J.D. Ex. 14, Lloyd's Primary AT&T 2001 Run-Off Policy, Cl. IV. C at 22; Lloyd's Primary 2001 AT&T Policy, Cl. IV. C at 21-22.

[157] J.D. Ex. 14, Lloyd's Primary AT&T 2001 Run-Off Policy, Cl. II. N at 18; Lloyd's Primary 2001 AT&T Policy, Cl. II. N at 18.

[158] J.D. Ex. 14, Lloyd's Primary AT&T 2001 Run-Off Policy, Cl. II. H at 4; Lloyd's Primary 2001 AT&T Policy, Cl. II. H at 4.

[159] *See e.g. Seneca Ins. Co. v. Kemper Ins. Co.*, 2004 WL 1145830 (S.D.N.Y.).

[160] *Gov't Employees Ins. Co. v. Kligler*, 366 N.E.2d 865, 866 (N.Y. 1977).

Clause IV.C of the Lloyd's Primary Policies applies when separate lawsuits involve the same "Wrongful Act" or "Interrelated Wrongful Acts." After carefully comparing the complaints in the Prior and Subsequent Actions, the Court finds that any claims arising from the *Williamson* and *Leykin* Actions must be deemed "first made" within the 1997 to 2001 policy period. This is because the Subsequent Actions involve the same "Wrongful Acts" and "Interrelated Wrongful Acts" as those that gave rise to the Prior Actions filed in 1999 and 2000.[161]

The "Wrongful Act" that spawned all of the underlying litigation in this case is the March 2000 Transaction, which among other things, resulted in AT&T gaining control of At Home. That "Wrongful Act" gave rise to the Prior Actions. Each of the complaints in Prior Actions advances the same questions of law and fact: (a) whether the Proposed March 2000 Transactions were grossly unfair to the public stockholders of At Home; (b) whether defendants involved with those ransactions failed to disclose all material facts relating to the Proposed Transactions, including the potential positive future financial benefits that they expect to derive from At Home; (c) whether those defendants willfully and wrongfully failed or refused to obtain or attempt to obtain a purchaser for the assets of At Home at a higher price than that given to Cox and Comcast; (d) whether plaintiffs and members of the Class would be irreparably damaged if the Proposed Transactions were consummated; (e) whether defendants breached or aided and abetted the breach of the fiduciary and other common law duties owed by them to plaintiffs and members of the Class; and (f) whether plaintiffs and members of the Class have been damaged and, if so, what is the

[161] *See Pittleman* and *San Mateo Actions*, respectively. J.D. Ex. 23, Compl., *Pittleman v. At Home Corp.*, C.A. No. 17474 NC (Del. Ch. Oct. 13, 1999); J.D. Ex. 31, First Am. Consol. Compl., *In re At Home Corp. Stockholders' Litigation*, Master File No. 413094 (Cal. Super. Ct., San Mateo Co. Oct. 23, 2000).

proper measure of those damages.

Thus, the Court finds the Prior and Subsequent Actions have, *inter alia*, the following "Interrelated Wrongful Acts" in common: (a) AT&T's relationship with At Home created conflicts of interest that the defendants improperly resolved in AT&T's favor;[162] (b) AT&T improperly used the March 2000 Transactions in a scheme to obtain complete control of At Home;[163] (c) the March 2000 Transactions were unfair to At Home and involved self-dealing by AT&T;[164] and (d) the March 2000 Transactions subjected At Home to disadvantageous distribution agreements, including an insufficient share of subscriber revenue and reduced exclusivity rights.[165]

Claims "share a sufficient factual nexus when they are 'based on the same agreement' or when they involve the 'same underlying circumstance.'"[166] A comparison of the underlying complaints in this case reveals that *Pittleman* and the *Leykin* Action, and *San Mateo* and *the Williamson Fiduciary* Action, have more in common than just the required "any fact" "common

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[162] *See e.g.*, *Pittleman* Compl., J.D. Ex. 23, at ¶¶ 21-32; *Pittleman* Am. Compl,. J.D. Ex. 24, at ¶ 26; *Williamson* Compl. & Demand for Jury Trial, J.D. Ex. 37, at ¶¶ 1-7, 88-92; *Leykin* First Am. Consol. Class Action Compl., J.D. Ex. 48, at ¶¶ 48-59.

[163] *See e.g.*, *Pittleman* Am. Compl., J.D. Ex. 24, at ¶¶ 25-36; *In re At Home Corp. Stockholders' Litigation* First Am. Consol. Compl., J.D. Ex. 31, at ¶¶ 6, 10, 36-51; *Williamson* Compl. & Demand for Jury Trial, J.D. Ex. 36, at ¶¶ 39-44, 50-59; *Williamson* Compl. & Demand for Jury Trial, J.D. Ex. 37, at ¶¶ 1-7, 40-46, 151; *Leykin* Class Action Compl., J.D. Ex. 42, at ¶¶ 69-72; *Leykin* First Am. Consol. Class Action Compl., J.D. Ex. 48, at ¶¶ 55, 70, 103.

[164] *See e.g. Pittleman* Am. Compl,. J.D. Ex. 24, at ¶¶ 30-36; *In re At Home Corp. Stockholders' Litigation* First Am. Consol. Compl., J.D. Ex. 31, at ¶¶ 1-6, 36-46; *Williamson* Compl. & Demand for Jury Trial, J.D. Ex. 36, at ¶¶ 5, 39-44, 134-136; *Williamson* Compl. & Demand for Jury Trial, J.D. Ex. 37, at ¶ 1-7, 40-46, 141-143; *Leykin* First Am. Consol. Class Action Compl., J.D. Ex. 48, at ¶¶ 5-6, 61, 98, 103.

[165] *See e.g. Pittleman* Compl., J.D. Ex. 23, at ¶¶ 19-20; *Pittleman* Am. Compl,. J.D. Ex. 24, at ¶¶ 20, 33; *In re At Home Corp. Stockholders' Litigation* First Am. Consol. Compl., J.D. Ex. 31, at ¶ 6; *Williamson* Compl. & Demand for Jury Trial, J.D. Ex. 37, at ¶¶ 40-46, 77-79; *Leykin* First Am. Consol. Class Action Compl., J.D. Ex. 48, at ¶¶ 49, 60-61(c)-(e), 71-75, 108.

[166] *Seneca Ins. Co.*, 2004 WL 1145830, at *6 (S.D.N.Y.).

nexus."[167] These Actions have as their "common nexus" many facts, all originating from the March 2000 Transactions.[168] Thus, based on its comparison of the underling complaints, it is clear to the Court that the March 2000 Transactions, together with the facts, circumstances, and events constituting and attendant to them, tie together the Prior and Subsequent Actions rendering *Pittleman* and *Leykin* a single "Claim," and *San Mateo* and *Williamson* a single "Claim," as defined in the policies.

Therefore, by operation of the clear and unambiguous policy terms and as a matter of law, the Court finds that AT&T's claims arising from the Subsequent *Williamson Fiduciary* and *Leykin* Actions were "first made" during the July 1, 1997 to July 1, 2001 coverage period and fall outside the scope of coverage under the 2001 AT&T Program, the 2001 Run-Off Program and the 2002 AT&T Program.

C. The Prior Notice Exclusion

The Defendant Insurers advance another independent ground for denying AT&T coverage for the *Williamson Fiduciary* and *Leykin* Actions — the Prior Notice Exclusions.[169] They assert that as a matter of law, the Court should find the Prior Notice Exclusions operate to bar coverage for these Actions under the 2001 AT&T Program, the 2001 AT&T Run-Off Program, and the 2002 AT&T Program.

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[167] J.D. Ex. 14, Lloyd's Primary AT&T 2001 Run-Off Policy, Cl. II. H at 4; Lloyd's Primary 2001 AT&T Policy, Cl. II. H at 4.

[168] The Court notes that AT&T has acknowledged this common nexus of facts with respect to the *San Mateo* and *Williamson Fiduciary* Actions in its representation to the U.S. Court of Appeals for the Ninth Circuit that these two actions "involve identical allegations of fact, an identical claim for breach of fiduciary duty, and identical prayers for relief." Br. of Def.-Appellee AT&T Corp., J.D. Ex. 35, at 5.

[169] Def. Faraday Capital Ltd.'s ("Lloyd's") Joinder in Fed. Ins. Co.'s Mot. for Part. Summ. J. at 1-2, *AT&T Corp. v. Clarendon Am. Ins.*, D.I. 82/E-File135 (June 7, 2005).

The Prior Notice Exclusion contained in Lloyd's Primary 2001 AT&T Policy and Lloyd's Primary 2001 AT&T Run-Off Policy state:

> Underwriters shall not be liable to make any payment in connection with any Claim ... based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving:
>
> A. Any Wrongful Act or any fact, circumstance or situation which has been the subject of any notice given prior to the Policy Period under any other Directors and Officers liability policy, or
>
> B. Any other Wrongful Act whenever occurring, which, together with a Wrongful Act which has been the subject of such notice, would constitute Interrelated Wrongful Acts.[170]

The Exclusion applies to any "Claim ... based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving:"

> (1) any Wrongful Act or any fact, circumstance or situation which has been the subject of any notice given prior to the Policy Period under any other Directors and Officers liability policy, or
>
> (2) any other Wrongful Act whenever occurring, which, together with a Wrongful Act which has been the subject of such notice, would constitute Interrelated Wrongful Acts[.][171]

Similarly, the Defendant National Union 2002 Primary Policy contains a Prior Notice Exclusion that reads:

> The Insurer shall not be liable to make any payment of 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

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[170] J.D. Ex. 14, Lloyd's Primary AT&T 2001 Run-Off Policy, Cl. III, at 5, Endorsement No. 1 at ¶ 19, at 19; J.D. Ex. 8, Lloyd's Primary 2001 AT&T Policy, Cl. III, at 5, Endorsement No. 1 at ¶ 16, at 19.

[171] J.D. Ex. 14, Lloyd's Primary AT&T 2001 Run-Off Policy, Endorsement No. 1, Cl. III B, ¶ 19 at 19; J.D. Ex. 8, Lloyd's Primary 2001 AT&T Policy, Endorsement No. 1, Cl. III B, at ¶ 16, at 19.

> 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[.][172]

As explained above, Defendant Excess Insurers' policies apply in conformity with exclusions found in the Primary Policies.[173] Similarly, National Union's 5th and 9th Excess Policies apply subject to the exclusions and limitations found in its 2002 Primary Policy, which also contains the above Exclusion.[174]

The Court finds that the language of the Prior Notice Exclusions is clear, unambiguous, and undeniably broad.[175] As written, the language of this Exclusion encompasses not only any "Claims," whether "directly or indirectly" caused by a "Wrongful Act," but also any "Claims" that in any way involve any "Wrongful Act," fact, circumstance or situations alleged in the prior litigation."[176]

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[172] J.D. Ex. 20, Nat'l Union Fire Ins. Co. Primary 2002 AT&T Policy § 4(d), at 7. *See* AT&T An. Br. in Opp'n to Nat'l Union's Mot. for Part. Summ. J., D.I. 126/E-File 175, at 5-7.

[173] *See supra* Part IC; Certification of Houseal, D.I. 70/E-File 114, at 10-12, 14-15, 16-19, 21-22; Def. Zurich Am. Ins. Co.'s Mot. for Summ. J. and Joinder in Def. Fed. Ins. Co.'s Mot. for Part. Summ. J. as to 2001-2007 AT&T Run-Off Policies at 1-2, *AT&T Corp. v. Clarendon Am. Ins.*, D.I. 66/E-File 110 (June 2, 2005); Joint Reply Br. in Supp. Mot. for Part. Summ. J., E-File196, at 17 n.9; J.D. Ex. 18, Twin City Fire Ins. Co., 2001 AT&T Run-Off Policy, Endorsement No. 2; J.D. Ex. 12, Twin City Fire Ins. Co., 2001 AT&T Policy, Endorsement No. 4.

[174] *See* Certification of Houseal, D.I. 70/E-File 114, at 22-32; Nat'l Union Op. Br., D.I. 69/E-File 113, at 20-21; J.D. Ex. 20, Nat'l Union Fire Ins. Co. Primary 2002 AT&T Policy § 4(d), at 7; J.D. Ex. 21, Nat'l Union Fire Ins. Co. 2002 5th Excess Policy § I(a) and (b), at 1; J.D. Ex. 22, Nat'l Union Fire Ins. Co. 2002 9th Excess Policy § I(a) and (b), at 1.

[175] *See U.S. Underwriters Ins. Co. v. Congregation Kollel Tisereth, TZVI*, 2004 WL 2191051, at *6 (E.D.N.Y. 2004); *Zunenshine*, 1998 WL 483475, at *4 (S.D.N.Y. 1998); *U.S. Underwriters Ins. Co. v. Zeugma Corp.*, 1998 WL 633679, at *3 (S.D.N.Y. 1998); *citing N.H. Ins. Co. v. Jefferson Ins. Co.*, 624 N.Y.S.2d 392, 396 (N.Y. App. Div. 1995) (The "words 'arising out of' are hardly ambiguous. When used in an exclusion, they are deemed to be broad, general, comprehensive terms 'ordinarily understood to mean originating from, incident to, or having connection with ..."); *Aloha Pacific, Inc. v. California Ins. Guarantee Ass'n*, 93 Cal. Rptr. 2d 148, 162 (Cal. Ct. App. 2000) ("Courts in California and elsewhere have consistently given a broad interpretation to terms such as 'arising out of' in various kinds of insurance provisions."). *Cf. LaValley v. Va. Sur. Co.*, 85 F. Supp. 2d 740, 744-45 (N.D. Ohio 2000) (following *Zunenshine*, 1998 WL 483475)).

[176] *Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's London*, 2004 WL 2341388, *6 (Mass. Super.); *Foster v. Summit Med. Sys., Inc.*, 610 N.W.2d 350, 354 (Minn. App. 2000) (stating that "policies do not

Further, as "[n]othing in the policy requires that a claim involve precisely the same parties legal theories, 'Wrongful Act[s],' or requests for relief for [the Prior Notice exclusion] to apply," the Court finds that the allegations set forth in the *Williamson Fiduciary* and *Leykin* Actions are based upon, arise out of, directly and indirectly result from, and involve the same "Wrongful Act."[177] Moreover, it finds the "Wrongful Acts" alleged in both the Subsequent and Prior Actions are "Interrelated Wrongful Acts." The complaints in the underlying actions allege that the March 2000 Transactions led to, or would lead to, AT&T's domination and control of At Home. Thus, they have as a "common nexus" many of the same facts, circumstances, situations, events, transactions, or series of the same.

AT&T argues, as a matter of public policy, that the Court should not interpret the Prior Notice Exclusion so that AT&T's status as controlling shareholder of At Home becomes a triggering "fact, circumstance or situation."[178] It asserts that this interpretation would amount to a blanket exemption from D&O coverage for any future directors, officers or controlling shareholders after a single reference to that status — which occurs as a matter of course in shareholder actions alleging breach of duties — could be determined to interrelate to all ensuing Wrongful Acts.[179] Given the

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require that the 'Wrongful Acts' or 'Interrelated Wrongful Acts' be key to finding liability. Under the policies, coverage is excluded if the claim even 'indirectly result[s] from or [is] in consequence of, or in any way involve[s]' the wrongful acts…."). *Cf. N.H. Ins. Co.*, 624 N.Y.S.2d 392, 396 (N.Y. App. Div. 1995).

[177] *Zunenshine*, 1998 WL 483475, at *4, 5 (S.D.N.Y. 1998) (finding a D&O liability policy "'pending litigation' and 'prior notice' exclusions clear and unambiguous. By their terms, they exclude coverage for claims 'arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any fact, circumstance, situation, transaction, event or Wrongful Act' alleged in a pending lawsuit or made the subject of a prior notice given to another insurer."). *See Bensalem Twp. v. Int'l Surplus Lines Ins. Co.*, 1992 WL 142024 (E.D. Pa.), *rev'd on other grounds*, 38 F.3d 1303 (3d Cir. 1994).

[178] AT&T Corp.'s Consol. An. Br. in Opp'n, D.I. 124/E-File 173, at 47; Joint Reply Br. in Supp. Mot. for Part. Summ. J., E-File196, at 26.

[179] *Id.*

plain language of the policies and the allegations made in the Underlying Actions the Court finds this reasoning unpersuasive. It ignores the clear policy definition of "Interrelated Wrongful Acts," and the common nexus of facts among the Prior and Subsequent Actions (stemming from the 2000 Transactions) which gave rise to repeated allegations of AT&T's exercise and abuse of control over At Home.[180]

Therefore, the Court finds as a matter of law that AT&T is not entitled to coverage for the *Williamson Fiduciary* and *Leykin Actions.* The Prior Notice Exclusions bar coverage for these Subsequent Actions, because they involve the same and/or "Interrelated Wrongful Acts" as the *Pittleman* and *San Mateo* Actions.

D. The Prior Acts and The Prior and Pending Litigation Exclusions

1. The Prior Acts Exclusion

The Prior Acts Exclusion found in Lloyd's 2001 AT&T Primary Policy states that the "Underwriter shall not be liable to make any payment in connection with any Claim:

> L. based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving:
>
> > 1. any Wrongful Act actually or allegedly committed prior to 9:00 a.m. Eastern Standard Time on 9th July, 2001, or
> >
> > 2. any Wrongful Act occurring on or subsequent to 9:00 a.m. Eastern Standard Time on 9th July, 2001, which, together with a Wrongful Act occurring prior to such date would constitute Interrelated Wrongful Acts[.][181]

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[180] Joint Reply Br. in Supp. Mot. for Part. Summ. J., E-File196, at 26-27.

[181] J.D. Ex. 8, Lloyd's Primary 2001 AT&T Policy, Endorsement No. 1 at ¶ 24, at 21. *See* Cont'l Cas. Co. Mem. of Law in Supp. Mot. Part. Summ. J., D.I. 65/E-File 109, at 6; Certification of Houseal, D.I. 70/E-File 114, at ¶ 38.

As noted above, the Defendants' Excess Insurer policies apply in conformity with the Primary Policy exclusion.[182] Moreover, similar Prior Acts Exclusions also exist in the Defendants National Union, Zurich, Twin City, and Gulf excess policies, under the 2001 AT&T Program and AT&T 2001 Run-Off Program.[183]

Additionally, in their Joint Reply, the Defendants Zurich, Twin City, and Gulf represent that their Prior Acts exclusions are "substantially similar" to the Defendant Continental's Prior Acts Exclusion.[184] The Defendant Continental's 2001 Excess Policy provides that "any claim based upon, arising out of, relating to, directly or indirectly resulting from, or in consequence of, or in any way involving:"

> 4. any Wrongful Act (as that term is defined in the Primary Policy), occurring prior to 7/9/01, or any other Wrongful Act, (as that term is defined in the

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[182] *See* Certification of Houseal, D.I. 70/E-File 114, at 10-12, 14-15, 16-19, 21-22; Def. Zurich Am. Ins. Co.'s Mot. for Summ. J. and Joinder in Def. Fed. Ins. Co.'s Mot. for Part. Summ. J. as to 2001-2007 AT&T Run-Off Policies at 1-2, *AT&T Corp. v. Clarendon Am. Ins.*, D.I. 66/E-File 110 (June 2, 2005); Def. Gulf Ins. Co.'s Joinder in Cont'l Cas. Co.'s Mot. for Part. Summ. J. for Decl.There is No Coverage for the *Williamson Fiduciary* and *Leykin* Actions Under the Excess Run-Off and 2001 Continental Policies at 2, *AT&T Corp. v. Clarendon Am. Ins.*, D.I. 73/E-File 118 (June 6, 2005); Def. Gulf Ins. Co.'s Joinder in Fed. Ins. Co.'s Mot. for Part. Summ. J. for Decl.There is No Coverage for the Underlying Litigation Under the AT&T Run-Off Policy Tower at 3-4, *AT&T Corp. v. Clarendon Am. Ins.*, D.I. 75/E-File 120 (June 6, 2005); J.D. Ex. 19, Gulf Run-Off Policy; Def. Twin City Fire Ins. Co.'s Not. Joinder. in Mots. for Part. Summ. Ins. Co. Filed in Connection with *Williamson Fiduciary* & *Leykin* Actions at 2-3, *AT&T Corp. v. Clarendon Am. Ins.*, D.I. 81/E-File130 (June 7, 2005); Joint Reply Br. in Supp. Mot. for Part. Summ. J., E-File196, at 17 n.9; J.D. Ex. 18, Twin City Fire Ins. Co. 2001 AT&T Run-Off Policy, Endorsement No. 2; J.D. Ex. 12, Twin City Fire Ins. Co., 2001 AT&T Policy, Endorsement No. 4.

[183] *See* Nat'l Union Op. Br., D.I. 69/E-File 113, at 18; J.D. Ex. 9, Nat'l Union Fire Ins. Co. 2002 AT&T Primary Policy, Endorsement No. 2; Def. Zurich Am. Ins. Co.'s Mot. for Summ. J. and Joinder in Def. Fed. Ins. Co.'s Mot. for Part. Summ. J. as to 2001-2007 AT&T Run-Off Policies at 2, *AT&T Corp. v. Clarendon Am. Ins.*, D.I. 66/E-File 110 (June 2, 2005); J.D. Ex. 11, Zurich Policy; Endorsement 2; Def. Gulf Ins. Co.'s Joinder in Fed. Ins. Co.'s Mot. for Part. Summ. J. 3-4, D.I. 75/E-File 120; J.D. Ex. 19, Gulf Ins. Co. Run-Off Policy; Def. Twin City Fire Ins. Co.'s Not. Joinder. in Mots. for Part. Summ. Judg. Filed in Connection with *Williamson Fiduciary* & *Leykin* Actions at 2-3, *AT&T Corp. v. Clarendon Am. Ins.*, D.I. 81/E-File130 (June 7, 2005); Joint Reply Br. in Supp. Mot. for Part. Summ. J., E-File196, at 17 n.9; J.D. Ex. 18, Twin City Fire Ins. Co. 2001 AT&T Run-Off Policy, Endorsement No. 2; J.D. Ex. 12, Twin City Fire Ins. Co. 2001 AT&T Policy, Endorsement No. 4.

[184] Joint Reply Br. in Supp. Mot. for Part. Summ. J., E-File196, at 17 n.9; Twin City Fire Ins. Co.'s Not. Joinder, D.I. 81/E-File130, at 3.

> Primary Policy), occurring 7/9/01 which, together with a Wrongful Act occurring prior to 7/9/01, would be considered interrelated Wrongful Acts (as that term is defined in the Primary Policy).[185]

Similarly, the Prior Acts Exclusion found in the National Union 2002 AT&T Primary Policy reads:

> [T]he Insurer shall not be liable to make any payment for Loss in connection with a Claim made against an Insured alleging any Wrongful Act occurring prior to July 9, 2001 or after the end of the Policy Period. This policy only provides coverage for Wrongful Act occurring on or after July 9, 2001 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.[186]

National Union's 5th and 9th Excess Policies apply subject to the Prior Acts Exclusion found in its 2002 Primary Policy.[187] These policies "provide ... coverage in accordance with the same terms, conditions, exclusions and limitations as the Followed" 2002 AT&T National Union Primary Policy, which contains the above Exclusion.[188]

The Defendants urge that the Prior Acts Exclusions in the Primary and Excess Policies bar coverage for the *Williamson Fiduciary* and *Leykin* Actions because these Actions are based on, arise out of or are attributable to alleged "Wrongful Acts" that occurred, were committed or attempted, before July 9, 2001, and "Wrongful Acts" that occurred after July 9, 2001, which they assert share

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[185] J.D. Ex. 10, Cont'l Cas. Co. 2001 Excess Policy, Endorsement 4. *See* Cont'l Cas. Co. Mem. of Law in Supp. Mot. Part. Summ. J., D.I. 65/E-File 109.

[186] J.D. Ex. 20, Nat'l Union Fire Ins. Co. 2002 AT&T Primary Policy, Endorsement No. 11. *See* Nat'l Union Op. Br., D.I. 69/E-File 113, at 19.

[187] *See* Certification of Houseal, D.I. 70/E-File 114, at 22-32; Nat'l Union Op. Br., D.I. 69/E-File 113, at 20-21; J.D. Ex. 20, Nat'l Union Fire Ins. Co. Primary 2002 AT&T Policy § 4(d), at 7; J.D. Ex. 21, Nat'l Union Fire Ins. Co. 2002 5th Excess Policy § I(a) and (b), at 1; J.D. Ex. 22, Nat'l Union Fire Ins. Co. 2002 9th Excess Policy § I(a) and (b), at 1.

[188] J.D. Ex. 21, Nat'l Union Fire Ins. Co. 2002 5th Excess Policy § I, at 1; J.D. Ex. 22, Nat'l Union Fire Ins. Co. 2002 9th Excess Policy § I, at 1.

a common nexus with the pre-July 9, 2001 acts.[189] They further aver that the *Williamson Fiduciary* Action arose from "Wrongful Acts," occurring before the March 2000 Transactions and continuing through the September 2001 At Home Bankruptcy, and that all "Wrongful Acts" occurring after July 9, 2001, share a common nexus with those acts occurring before that date. Thus, they assert that the *Williamson Fiduciary* and *Leykin* Actions are not covered "Claims."

With a few exceptions, AT&T disputes the Defendants' contentions that the allegations made in the Subsequent Actions arise from the March 2000 Transactions and argue that the Defendants' exclusions are ambiguous.[190] Thus, AT&T maintains that the exclusions must be strictly construed in favor of coverage. Specifically, as to the Prior Acts Exclusions, AT&T admits that "certain of the Claims in *Leykin* and *Williamson* are based on "Wrongful Acts" allegedly committed prior to July 9, 2001."[191] However, it argues that other Claims took place after July 9, 2001, and that the Defendants present no undisputed evidence proving the "Wrongful Acts" alleged in the underlying complaints actually occurred.[192] Finally, it challenges the Defendants' "overly broad application of policy language," arguing their determination that the post July 9, 2001 "Wrongful Acts" are interrelated to the pre-July 9, 2001 "Wrongful Acts" is "'too tenuous.'"[193]

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[189] *See* Cont'l Cas. Co. Mem. of Law in Supp. Mot. Part. Summ. J. for Decl. There is No Coverage for *Williamson Fiduciary* & *Leykin* Actions Under Excess Run-Off & 2001 Cont'l Policies at 15-17, *AT&T Corp. v. Clarendon Am. Ins.*, D.I. 65/E-File 109 (June 2, 2005); Def. Zurich Am. Ins. Co.'s Mem. of P.& A. in Supp. Of Mot. for Summ. J. at 5-8, *AT&T Corp. v. Clarendon Am. Ins.*, D.I. 66/E-File 110 (June 2, 2005); Joint Reply Br. in Supp. Mot. for Part. Summ. J., E-File196, at 36-38.

[190] *See* AT&T Corp.'s Consol. An. Br. in Opp'n, D.I. 124/E-File 173, at 44-45, 51; AT&T An. Br. in Opp'n to Nat'l Union's Mot. for Part. Summ. J., D.I. 126/E-File 175, at 25.

[191] AT&T Corp.'s Consol. An. Br. in Opp'n, D.I. 124/E-File 173, at 67.

[192] *See* AT&T Corp.'s Consol. An. Br. in Opp'n, D.I. 124/E-File 173, at 66-68.

[193] *See* AT&T Corp.'s Consol. An. Br. in Opp'n, D.I. 124/E-File 173, at 68-69, *citing Cont'l Cas. Co. v. Wendt*, 205 F.3d. 1258, 1263 (11th Cir. 2000).

As with the Defendants' Prior Notice Exclusions, after careful comparison of the plain, unambiguous definition of "common nexus" and the allegations made in the Prior and Subsequent Actions,[194] the Court finds that the Prior Acts Exclusion bars coverage for the *Williamson Fiduciary* and *Leykin* Actions. Moreover, the Court does not find ambiguity in the phrases "same or related," "based upon" and "arising out of," even where such terms are not defined within these policies.[195] The Court agrees with the Defendant National Union that the mere absence of a definition for a term, by itself, does not render the undefined term ambiguous.[196] "Indeed, any rule that rigidly presumed ambiguity from the absence of a definition would be illogical and unworkable."[197] Therefore, as AT&T offers no reasonable alternative interpretation for the Prior Acts Exclusions, the Court finds its clear, unambiguous terms enforceable as written.[198]

2. The Pending and Prior Litigation Exclusion

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[194] *See* Cont'l Cas. Co. Mem. of Law in Supp. Mot. Part. Summ. J., D.I. 65/E-File 109, at 15-17; *Pittleman* Compl., J.D. Ex. 23; *In re At Home Corp. Stockholders' Litigation* First Am. Consol. Compl., J.D. Ex. 31; *Williamson* Compl. & Demand for Jury Trial, J.D. Ex. 36; *Leykin* Consol. Class Action Compl., J.D. Ex. 47.

[195] *See* Nat'l Union Op. Br., D.I. 69/E-File 113, at 8; Joint Reply Br. in Supp. Mot. for Part. Summ. J., E-File196, at 16; AT&T An. Br. in Opp'n to Nat'l Union's Mot. for Part. Summ. J., D.I. 126/E-File 175, at 5, 7, 10, 25-26. *See Zunenshine*, 1998 WL 483475, at * 4 (S.D.N.Y. 1998).

[196] *Bay Cities Paving & Grading, Inc.*, 855 P.2d 1263, 1270 (Cal. 1993).

[197] *Id.*

[198] *See Champlain Enters. v. Chubb Custom Ins. Co.*, 316 F. Supp. 2d 123, 129 (N.D.N.Y. 2003); *Hugo Boss Fashions, Inc. v. Fed. Ins. Co.*, 1999 WL 1072819, at *1 (S.D.N.Y. 1999) (enforcing prior acts exclusion because "[t]o hold otherwise would not only amount to adoption of an unreasonable interpretation of the policy, but would also amount to this Court impermissibly redrafting the contract in the plaintiffs' favor."); *New Hampshire Ins. Co. v. Jefferson Ins. Co.*, 624 N.Y.S.2d 392, 396 (N.Y. App. Div. 1995). *Accord Fed. Ins. Co. v. Learning Group Intern., Inc.*, 1995 WL 309047, at *2 (9th Cir. 1995) (declining to find language of a prior acts exclusion ambiguous in part and reiterating that "'[w]here contract language is clear and explicit and does not lead to an absurd result, we ascertain [the parties'] intent from the written provisions and go no further.'"); *Gateway Group Advantage, Inc. v. McCarthy*, 300 F. Supp. 2d 236, 241 (D. Mass. 2003). *Cf. Sinopoli v. The North River Ins. Co.*, 581 A.2d 1368, 1370 (N.J. Super. Ct. App. Div. 1990) (affirming summary judgment for home owner's liability insurer and stating the court is not "permitted, even under the guise of good faith and peculiar circumstances, to alter the terms of an otherwise unambiguous contract. If plainly expressed, the insurers are entitled to have liability limitations construed and enforced as expressed.").

Pending and Prior Litigation Exclusions are found in the 2001 AT&T Program, the 2001 AT&T Run-Off Programs, and the 2002 AT&T Program.[199] The Defendant Continental's Excess Policies, contain Pending and Prior Litigation Exclusions that provide:

> "any claim based upon, arising out of, relating to, directly or indirectly resulting from, or in consequence of, or in any way involving: 3a. Any fact, circumstance, situation, transaction or event underlying or alleged in any prior and/or pending litigation as of 7/9/01, regardless of the legal theory upon which such litigation is predicated.[200]

Likewise, the National Union 2001 AT&T Excess Policy Pending and Prior Litigation Exclusion states:

> Insurer shall not be liable for any Loss in connection with any Claim(s) made against any Insured(s): alleging, arising out of, based upon or attributable to any pending or prior litigation as of July 9, 2001 or alleging or derived from the same or essentially the same facts as alleged in such pending or prior litigation.[201]

The Defendant Insurers Zurich and Twin City, in their Joint Reply, represent that their Exclusions are "substantially similar" to the Continental Prior Litigation Exclusions.[202] These Defendants, together with Defendant Gulf, also state that their policies follow form, incorporate or apply subject to or in accordance with the terms, conditions, endorsements and exclusions of the

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[199] Cont'l Cas. Co. Mem. of Law in Supp. Mot. Part. Summ. J., D.I. 65/E-File 109, at 5.

[200] Cont'l Cas. Co. Mem. of Law in Supp. Mot. Part. Summ. J., D.I. 65/E-File 109, at 14; J.D. Ex. 10, Cont'l Cas. Co. 2001 Excess Policy § XII, Endorsement 1, at ¶ 3; J.D. Ex. 17, Cont'l Cas. Co. 2001 Run- Off Policy § XII, Endorsement 3, ¶ 3a.

[201] J.D. Ex. 9, Nat'l Union Fire Ins. Co. 2002 AT&T Primary Policy, Endorsement No. #3.

[202] *See* Joint Reply Br. in Supp. Mot. for Part. Summ. J., E-File196, at 17 n.9; Twin City Fire Ins. Co.'s Not. Joinder, D.I. 81/E-File130, at 2-3; Def. Zurich Am. Ins. Co.'s Mot. for Summ. J. and Joinder, D.I. 66/E-File 110, at 1-2; J.D. Ex. 11, Zurich Am. Ins. Co. 2001 AT&T Policy, Endorsement No. 1; J.D. Ex. 12, Twin City Fire Ins. Co., 2001 AT&T Policy, Endorsement No. 2.

underlying policies.[203]

A Prior Litigation Exclusion also exists in the National Union 2002 AT&T Primary Policy. It states:

> The Insurer shall not be liable to make any payment of Loss in connection with any Claim made against an Insured:...
>
> (e) alleging, arising out of, based upon or attributable to, as of the Continuity Date, any pending or prior: (1) litigation; or (2) administrative or regulatory proceeding or investigation of which an Insured had notice, or alleging or derived from the same or essentially the same facts as alleged in such pending or prior litigation or administrative or regulatory proceeding or investigation[.][204]

As noted above, the National Union 5th and 9th Excess Policies apply subject to the exclusions and limitations found in its 2002 AT&T Primary Policy, which contains the above Exclusion.[205]

The Defendants argue that the language of their Exclusions is "clear and enforceable according to their terms."[206] Therefore, the Defendants assert that this language plainly excludes the *Leykin* Action and *Williamson Fiduciary* Action Claims because these two Claims are "derived from [the] same or essentially the same facts,"[207] and are "based on, arising out of, relating to, directly or

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[203] *See* Twin City Fire Ins. Co.'s Not. Joinder, D.I. 81/E-File130, at 2-3; Def. Zurich Am. Ins. Co.'s Mot. for Summ. J. and Joinder, D.I. 66/E-File 110, at 1-2; J.D. Ex. 11, Zurich Am. Ins. Co. 2001 AT&T Policy, Endorsement No. 1; J.D. Ex. 12, Twin City Fire Ins. Co., 2001 AT&T Policy, Endorsement No. 2; Def. Gulf Ins. Co.'s Joinder, D.I. 73/E-File 118, at 4; Def. Gulf Ins. Co.'s Joinder, D.I. 75/E-File 120, at 3.

[204] J.D. Ex. 20, Nat'l Union Fire Ins. Co. Primary 2002 AT&T Policy § 4(e), at 7. *See* AT&T An. Br. in Opp'n to Nat'l Union's Mot. for Part. Summ. J., D.I. 126/E-File 175, at 5-7.

[205] *See* Certification of Houseal, D.I. 70/E-File 114, at 22-32; Nat'l Union Op. Br., D.I. 69/E-File 113, at 19-21; J.D. Ex. 20, Nat'l Union Fire Ins. Co. Primary 2002 AT&T Policy § 4(d), at 7; J.D. Ex. 21, Nat'l Union Fire Ins. Co. 2002 5th Excess Policy § I(a) and (b), at 1; J.D. Ex. 22, Nat'l Union Fire Ins. Co. 2002 9th Excess Policy § I(a) and (b), at 1.

[206] Cont'l Cas. Co. Mem. of Law in Supp. Mot. Part. Summ. J., D.I. 65/E-File 109, at 14-15; Nat'l Union Op. Br., D.I. 69/E-File 113, at 18.

[207] Nat'l Union Op. Br., D.I. 69/E-File 113, at 18.

indirectly resulting from, or in consequence of, or in any way involving" the same "facts, circumstances, situations, transactions or events" already alleged in the *Pittleman* and the *San Mateo* Actions, which were pending as of, or filed prior to July 9, 2001.[208]

After contesting the Defendants' arguments that the Subsequent Actions arise from the March 2000 Transactions and asserting that the Defendants' exclusions are ambiguous,[209] AT&T argues that public policy precludes "treat[ing]" its status as controlling shareholder as a "fact, circumstance or situation" sufficient to trigger the Prior Litigation Exclusion.[210] It asserts that the Defendants' proposed interpretation is "absurd," overly broad and would "eviscerate" coverage, thus rendering it "illusory."[211] AT&T maintains this exclusion must be strictly construed against the Defendant Insurers in favor of coverage.[212]

As explained above, based on its comparison of the underlying complaints and the plain and unambiguous policy language, the Court finds the pre-July 9, 2001 *Pittleman* and *San Mateo* Actions have a "common nexus" with the later filed *Leykin* and *Williamson* Actions based in the multiple shared facts, circumstances, and situations stemming from the March 2000 Transactions. The Pending and Prior Litigation Exclusion bars coverage because these Subsequent Actions involve the same and/or "Interrelated Wrongful Acts" as the Prior Actions, in that the allegations in the

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[208] Cont'l Cas. Co. Mem. of Law in Supp. Mot. Part. Summ. J., D.I. 65/E-File 109, at 14-15.

[209] *See* AT&T Corp.'s Consol. An. Br. in Opp'n, D.I. 124/E-File 173, at 44-45, 51; AT&T An. Br. in Opp'n to Nat'l Union's Mot. for Part. Summ. J., D.I. 126/E-File 175, at 25.

[210] AT&T Corp.'s Consol. An. Br. in Opp'n, D.I. 124/E-File 173, at at 44-46, 47; AT&T An. Br. in Opp'n to Nat'l Union's Mot. for Part. Summ. J., D.I. 126/E-File 175, at 25-26.

[211] AT&T Corp.'s Consol. An. Br. in Opp'n, D.I. 124/E-File 173, at 46-51; AT&T An. Br. in Opp'n to Nat'l Union's Mot. for Part. Summ. J., D.I. 126/E-File 175, at 25.

[212] *See* AT&T Corp.'s Consol. An. Br. in Opp'n, D.I. 124/E-File 173, at 44-45; AT&T An. Br. in Opp'n to Nat'l Union's Mot. for Part. Summ. J., D.I. 126/E-File 175, at 24.

underlying complaints concern AT&T's domination and control of At Home arising from the March 2000 Transactions.

Thus, the Court agrees with the Defendants that the *Leykin* and *Williamson Fiduciary* Action Claims fall within the scope of this Exclusion because these Actions derive from the "same or essentially the same facts" and are "based upon, arise out of, directly or indirectly result from, are in consequence of, and in any way involve" the "same facts, circumstances, situations, transactions or events" that underlie the Prior Actions.

AT&T's public policy argument as to its controlling shareholder status triggering the Pending and Prior Litigation Exclusion is unpersuasive for the reasons set forth above.[213] Further, the Court finds this clause is clear, unambiguous[214] and therefore "not against public policy to enforce ...."[215]

E. Consideration of the Allegations in the Underlying Suits Versus "Actual Facts"

AT&T contends that the Defendants improperly and exclusively relied on the allegations in underlying complaints, not "actual facts," to bar coverage for the *Williamson Fiduciary* and *Leykin* Actions. Therefore, it asserts that the Defendants fail to satisfy their burden on summary

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[213] *See supra* at Part IIIC.

[214] *Zunenshine*, 1998 WL 483475, at *4 (S.D.N.Y.); *Juszkiewicz v. Fed. Ins. Co.*, 1999 WL 1044330, at *2 (9th Cir.). *See, e.g., Seneca Ins. Co.*, 2004 WL 1145830, at *6 (S.D.N.Y.) (explaining that *Home Ins. Co. v. Spectrum Info.*, 930 F. Supp. 825, 833 (E.D.N.Y. 1996), on which AT&T relies, stands for the proposition that the "applicability of a provision ... that excludes from coverage loss 'in any way related to' a fact, circumstance, or situation that has been the subject of notice under a prior policy depends 'on whether there was a *sufficient factual nexus* for the exclusion to apply.'"). *See also Nat'l Union Fire Ins. Co. v. Willis*, 296 F.3d 336, 341-42 (5th Cir. 2002); *Comerica Bank v. Lexington Ins. Co.*, 3 F.3d 939, 942-44 (6th Cir. 1993). *Accord ML Direct, Inc.*, 93 Cal. Rptr 2d 846, 852-53 (Cal. Ct. App. 2000).

[215] *Juszkiewicz*, 1999 WL 1044330, at *2 (9th Cir.). *Cf. Zunenshine*, 1998 WL 483475, at *5; *ML Direct, Inc.*, 93 Cal. Rptr. 2d 846 at 853.

judgment.[216] In opposition, the Defendants argue that the Court "need not look beyond the complaints nor determine for itself the 'actual facts' in the underlying litigation," to resolve the coverage issues raised at this stage of the proceedings.[217] According to the Defendants, AT&T's submission in this case of thousands of pages of documents produced during discovery in the *Williamson Fiduciary* Action is a ploy "to preclude summary judgment" by creating "the appearance of some factual dispute."[218] AT&T disagrees, arguing that, in addition to the underlying shareholder allegations, the Court should consider the "actual facts" AT&T developed through discovery in the *Williamson Fiduciary* Action.[219] It offers this "amply supported record evidence" to show the existence of genuine issues of material fact as to whether the underlying claims in the Prior and Subsequent Actions are interrelated.[220] It maintains the Defendants "exclusive reliance on bald, unsupported allegations fails to satisfy their summary judgment burden to show that undisputed facts establish an interrelationship between all of the Claims asserted in" these Actions.[221]

In cases involving policies with similar single claim provisions, prior notice and/or prior litigation exclusions, courts determine coverage based on the allegations in the underlying complaints and not the "actual facts."[222] Moreover, as explained above, where policy language is

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[216] *See* AT&T An. Br. in Opp'n to Nat'l Union's Mot. for Part. Summ. J., D.I. 126/E-File 175, at 29-30.

[217] Joint Reply Br. in Supp. Mot. for Part. Summ. J., E-File196, at 19.

[218] *Id.* at 20.

[219] AT&T Corp.'s Consol. An. Br. in Opp'n, D.I. 124/E-File 173, at 51.

[220] AT&T Corp.'s Consol. An. Br. in Opp'n, D.I. 124/E-File 173, at 52-53.

[221] AT&T Corp.'s Consol. An. Br. in Opp'n, D.I. 124/E-File 173, at 52.

[222] *See*, *e.g.*, *Highwoods Properties, Inc. v. Executive Risk Indem., Inc.*, 407 F. 3d 917 (8th Cir. 2005) (affirming a decision of the United States District Court for the Western District of Missouri granting summary judgment to insurer based on the underlying complaints and the language of the claims made liability policy and not discovery.); *Zunenshine*, 1998 WL 483475 (S.D.N.Y.) (holding that where pending litigation or prior notice exclusions are at issue, and there is no judicial determination of liability in underlying suit, insurer may rely on

clear and unambiguous, it is given its plain meaning.

Unquestionably, there are factual disputes in the underlying shareholder suits. For example, AT&T vehemently denies it abused its control over At Home for its own benefit and maintains that it tried to help At Home.[223] However, in the present coverage action and, notwithstanding the voluminous exhibits proffered in support of its position, AT&T's denials of various allegations asserted against it in the underlying actions do not constitute factual disputes sufficient to defeat summary judgment. Further, by their present motions, the Defendants seek a determination as to whether the Subsequent Actions involve the same or "Interrelated Wrongful Acts." Moreover, it is undisputed that the terms of the policies at issue address "alleged" wrongful acts.[224] Therefore, the law requires that the Court decide these issues based on the allegations in the complaints and the relevant policy provisions.[225]

At this stage of the proceedings, it is not the Court's role to evaluate the validity or truth of allegations made in the underlying complaints by undertaking an analysis of the "actual facts" or extrinsic evidence offered to refute allegations made in those Actions. For purposes of these Motions, such evidence does not create genuine issues of material fact necessary to preclude summary judgment. AT&T's theory that this Court must, in essence, adjudicate the underlying

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allegations in a complaint to demonstrate an exclusion applies).

[223] See AT&T Corp.'s Consol. Ans. Br. in Opp'n, D.I. 124/E-File 173, at 18, 20.

[224] J.D. Ex. 14, Lloyd's Primary AT&T 2001 Run-Off Policy, Endorsement No. 1 at ¶ 16, at 18. J.D. Ex. 8, Lloyd's Primary 2001 AT&T Policy, Endorsement No. 1 at ¶ 12, at 18.

[225] *Steadfast Ins. Co.*, 277 F. Supp. 2d 245, 251 (S.D.N.Y. 2003); *Holman*, 616 N.E.2d 499, 500 (N.Y. 1993); *Tartaglia*, 658 N.Y.S.2d 388, 390 (N.Y. App. Div. 1997); *Voorhees*, 607 A.2d 1255, 1259 (N.J. 1992); *Fed. Ins. Co.*, 885 A.2d 465, 468 (N.J. Super. Ct. App. Div. 2005); *Hebela*, 851 A.2d 75, 79 (N.J. Super. Ct. App. Div. 2004); *Rosario*, 799 A.2d 32, 40 (N.J. Super. Ct. App. Div. 2002); *Powell,* 760 A.2d 1141,1144 (N.J. Super. Ct. App. Div. 2000); *Hayward*, 430 F.3d 989, 991 (9th Cir. 2005); *Scottsdale Ins. Co.*, 115 P.3d 460, 466 (Cal. 2005); *Montrose Chem. Corp.*, 861 P.2d 1153, 1157 (Cal. 1993). *Cf. Belt Painting Corp.*, 795 N.E.2d 15, 17 (N.Y. 2003); *Hampton Med. Group, P.A.*, 840 A.2d 915, 920 (N.J. Super. Ct. App. Div. 2004).

shareholder suits to determine the applicability of particular policy exclusions or coverage provisions is contrary to case law and the express terms of the policies. If such an approach were necessary to determine coverage obligations, it would be virtually impossible for insurers issuing "Claims made" policies to decide whether a particular lawsuit falls within an earlier policy period until all underlying allegations are proven or refuted. As the Defendants aptly note, "AT&T's theory would wreak havoc with the entire system of claims made insurance."[226]

IV. CONCLUSION

For the reasons set forth above, the Defendants' Motions for Partial Summary Judgment filed pursuant to Phase 1 of the Case Management Order are **GRANTED**.

IT IS SO ORDERED.

Jan R. Jurden, Judge

[226] Def. Fed. Ins. Co. Reply Br., D.I. 132/E-File 198, at 11.