

ALEX BROWN MANAGEMENT SERVICES, INC., et al.
Plaintiffs

*

IN THE

*

CIRCUIT COURT

v.

*

FOR

RUPERT VILLIERS, et al.
Defendants

*

BALTIMORE CITY

*

CASE NO.: 24-C-08-003597

*

*

*

*

*

*

*

*

*

*

*

*

*

MEMORANDUM OPINION

I. INTRODUCTION

On June 13, 2008, Plaintiffs Alex Brown Management Service, Inc. (“ABMS”), Deutsche Bank Trust Corporation (formerly known as Bankers Trust Corporation), Deutsche Bank Trust Company Americas (formerly known as Bankers Trust Company), Deutsche Bank Securities, Inc. (d/b/a Deutsche Banc Alex.Brown), and Deutsche Bank AG filed the present action in this Court. The Defendants include one individual underwriter and eight insurers that insured Plaintiffs under “The Bankers Trust Run-Off Program.”

The Bankers Trust Run-Off Program consists of a primary “Level A” policy (the “Policy”) and an excess “Level B” policy. The “Level A” Policy is a “claims-made” policy that covers certain professional risks of Bankers Trust, its subsidiaries, and its directors and officers. The Policy is a “manuscripted” document, with the parties having negotiated the terms of the document. The “Level A” Policy provides coverage for Plaintiffs under two clauses: (1) the “Insured Persons Corporate Reimbursement Coverage Insurance Clause”; and (2) the “Organization Liability Coverage Insuring Clause.”

The Policy, as originally issued, has a three-year policy period that commenced on July 1, 1998 and terminated on July 1, 2001. In contemplation of Deutsche Bank's June 4, 1999 acquisition of Bankers Trust and its respective subsidiaries and affiliates, the Defendants agreed to provide six years of "run-off" coverage from and after the June 4, 1999 acquisition date through June 4, 2005. The terms and conditions of the "run-off" coverage are set forth in Endorsement Number 5 of the Policy. Additionally, the Policy has a \$100 million limit of liability in the annual aggregate for all "Loss." The Coverage Section A, Insuring Clause A.II. (Organizational Liability Coverage), is subject to a \$25 million retention for each Loss regarding "Professional Services."

II. THE COMPLAINT

The Plaintiffs filed the Complaint giving rise the present proceeding on June 12, 2008. The events included in the Complaint involve extensive litigation regarding well-know corporate entities to which investment-banking services were provided. The Plaintiffs were often named as co-defendants in the underlying lawsuits. All of those lawsuits have either been dismissed, settled, or are pending as of the date of the filing of the Complaint in this proceeding.

In their Complaint, Plaintiffs allege that Defendants are responsible for paying Plaintiffs' Defense Costs (in excess of the applicable retention) and the settlement proceeds in those actions. Plaintiffs have organized their alleged losses into five groups: (1) The Exchange Fund Loss; (2) The Enron Loss; (3) The Tax Claims Loss; (4) The Boston Chicken Loss; and (5) The Initial Public Offering Loss.

The Complaint contains fourteen causes of action.¹ With the exception of the causes of action related to the Boston Chicken Claim, each of the five groups of losses contained in the Plaintiffs' Complaint (i.e., Exchange Funds, Enron, Tax Claims, Boston Chicken, and IPO Claims) include three causes of action, namely: (1) breach of fiduciary duty to pay defense costs; (2) breach of duty to pay settlements; and (3) declaratory relief regarding defendants' duty to pay losses.²

III. PROCEDURAL HISTORY

After the filing of the Complaint, this case was designated for the Business and Technology Case Management Program. On September 28, 2008 the Court conducted a status conference on the record, and after consultation between the parties, the Court issued a Case Management Order on October 9, 2008.

In the October 9, 2008 Case Management Order, the Court addressed only the first phase of this litigation. During Phase I of this proceeding, the Court afforded each party the opportunity to present "legal issues that it believe[d] could be resolved without discovery and which would lead to a more efficient resolution of the action." *See* Case Management Order No. 1 at 3.

The Case Management Order dictated that the Court would entertain potentially dispositive motions on the Exchange Fund Claims and the Boston Chicken Claim and the application of the June 4, 1999 run-off date on the Tax **or** the IPO Claims.

¹ Plaintiffs have recited in Counts I–III damages arising from services provided in connection with investments made by claimants in "Exchange Funds" that were managed by Plaintiff Alex Brown and other former members of its management committee; Counts IV–VI involve causes of action related to the "Enron Claims"; Counts VII–IX relate to causes of action related to various "Tax Claims"; Counts X–XI relate to the Defendants alleged Breach of Fiduciary Duty associated with the "Boston Chicken Claim"; and Counts XII–XIV relate to the allegations pertaining to the "IPO Claims."

² Plaintiffs' do not include a request for declaratory relief with regard to the "Boston Chicken" Claim.

Thereafter, the court received motions for summary judgment and cross motions for summary judgment from both Plaintiffs and Defendants relating to the Exchange Fund Claims, the Boston Chicken Claim, and the Tax Strategy Claims. In that context, the following motions are presently before this Court and are ripe for consideration:

1. Plaintiffs' Motion for Partial Summary Judgment with Respect to Defense Costs Incurred on Account of the Exchange Fund Claims (Pleading No. 15);
2. Defendants' Cross Motion for Summary Judgment as to the Exchange Fund Claims (Pleading No. 23);
3. Defendants' Motion for Partial Summary Judgment as to Plaintiffs' Tenth and Eleventh Causes of Action Pertaining to Coverage for the Boston Chicken Action (Pleading No. 25);
4. Plaintiffs' Cross Motion for Partial Summary Judgment with Respect to Coverage for the Boston Chicken Claim (Pleading No. 28);
5. Defendants' Motion for Partial Summary Judgment with Respect to 68 Tax Strategy Complaints (Pleading No. 26); and
6. Plaintiffs' Cross Motion for Partial Summary Judgment with Respect to Defense Costs Incurred on Account of the Tax Claims (Pleading No. 27).

Oral argument on the extant motions was held on April 1, 2009. Based upon counsels' agreement, argument was presented on the following issues:

1. Whether, and to what extent, Exclusion (b) applies to bar or limit coverage for the Exchange Fund and Boston Chicken matters.
2. The scope of coverage afforded under Endorsement No. 5 and its impact on the Plaintiffs' claims for coverage for the Exchange Fund and Tax matters, including whether and how the interrelated wrongful acts definition, the single loss and the allocation provision apply to these matters.
3. Whether there are conditions precedent to coverage, including without limitation the timely notice of claims, satisfaction of applicable retention, consent requirements and cooperation duties, that have not been met by the insured or over which there are factual disputes, and, if so, whether, and to what extent, any such failure or dispute impacts the Plaintiffs' motions for summary judgment.
4. Whether, and to what extent, the insurers are obligated to pay Defense Costs in connection with the Exchange Fund, Tax and Boston Chicken matters, including

whether the parties must allocate between covered and uncovered matters and covered and uncovered parties.

IV. LEGAL STANDARD

A. Cross-Motions for Summary Judgment

Before this Court are the parties cross motions for summary judgment (both partial and complete). Maryland Rule 2-501 governs summary judgment, and it provides in pertinent part:

(a) Motion. Any party may file at any time a motion for summary judgment on all part of an action on the ground that there is no dispute as to any material fact and that the party is entitled to judgment as a matter of law.

....

(f) Entry of Judgment. The court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

Md. Rule 2-501.

While summary judgment is not a substitute for trial and a summary judgment procedure will not resolve material disputes of fact, the Court of Appeals has recognized that mere general allegations which do not show material disputes of fact in detail and with precision are insufficient to prevent summary judgment. *See Beatty v. Trailmaster*, 330 Md. 726, 738 (1993) (citing *Lynx, Inc. v. Ordinance Products*, 273 Md. 1, 7–8 (1974)). The Court of Appeals has further noted that a party opposing summary judgment “cannot merely allude to the existence of a document and thereby hope to raise the specter of dispute over material fact which would defeat a Motion for Summary Judgment.” *Id.* (citing *Brown v. Suburban Cadillac, Inc.*, 260 Md. 252, 256–57 (1971)).

In *Trailmaster*, the Court of Appeals adopted the analysis of three Supreme Court cases addressing the above principles. *Id.*; *see also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith*

Radio Corp., 475 U.S. 574 (1986). The Court of Appeals, following venerable authority of the Supreme Court, recognized that “the mere existence of some alleged factual dispute will not defeat an otherwise properly supported summary judgment but rather there must be a genuine issue of material fact.” *Beatty*, 330 Md. at 738. The Court of Appeals stated that “in other words, the mere existence of a scintilla of evidence in support of the plaintiff’s claim is insufficient to preclude the grant of summary judgment; there must be evidence upon which the jury could reasonably find for the plaintiff.” *Id.* at 738–739 (citing *Anderson*, 477 U.S. at 252); *see also Seaboard Sur. Co. v. Richard F. Klein*, 91 Md. App. 236, 244 (1992).

Moreover, the Court of Appeals has recognized that while a court must resolve all inferences in favor of the party opposing summary judgment, such inferences must be reasonable ones. *Beatty*, 330 Md. at 739. In order to defeat a motion for summary judgment, the opposing party must advance material facts that would be admissible in evidence. *See Shaffer v. Lohr*, 264 Md. 397, 404 (1972); *Melbourne v. Griffith*, 263 Md. 486, 491 (1971). The opposing party must show with “some precision” that there is a genuine dispute as to material fact. *See King v. Bankerd*, 303 Md. 98, 112 (1985); *Washington Homes, Inc. v. Interstate Land Dev. Co.*, 281 Md. 712, 717 (1978).

The Court must ask “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson*, 477 U.S. at 251–52. Indeed, “the plain language of the [summary judgment rule] mandates that the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *See Celotex*, 477 U.S. at 322.

In this proceeding, both parties have moved for summary judgment before entertaining any discovery. Accordingly, both parties claim there are issues of law that are ripe for this Court's resolution at this time. Indeed, plaintiffs suggest that this Court may wish to proceed under Maryland Rule 2-502 and decide the issues presented by the parties at this time. Maryland Rule 2-502 provides that:

If at any stage of an action a question arises that is within the sole province of the court to decide, whether or not the action is triable by a jury, and if it would be convenient to have the question decided before proceeding further, the court, on motion or on its own invitation, may order that the question be presented for decision in the manner the court deems expedient.

It is well settled that “[a] decision under Rule 2-502 is a trial on the merits, with respect to the issues decided.” *Bender v. Schwartz*, 172 Md. App. 648, 662 (2007). This Court declines counsel's overture to utilize Md. Rule 2-502 in deciding the issues presented at this time in this proceeding.³ Instead, the issues have been briefed extensively, and this Court is capable of addressing the legal issues under the conventional standard applied under Md. 2-501.

B. Declaratory Judgment Actions

The Plaintiffs have requested declaratory relief with respect to four counts in their Complaint.⁴

Pursuant to the Declaratory Judgment Act, this Court possesses jurisdiction to “declare rights, status, and other legal relations whether or not further relief is or could be claimed.” Md. Code Ann., Cts. & Jud. Proc. §3-403(a). The Act also provides that “[a]ny person interested under a . . . written contract . . . may have determined any question of construction or validity

³ By this ruling, the Court is not foreclosing the possibility—at some time in the future—of entertaining proceedings under Md. Rule 2-502 after an appropriate period of discovery in this case.

⁴ The Plaintiffs have not requested declaratory relief with respect to the Boston Chicken Claims (Counts X and XI).

arising under the . . . contract . . . and obtain a declaration of rights, status, or other legal relations under it.” *Id.* at §3-406. Where a controversy concerning insurance coverage exists apart from the “tort” issues, an insurer can assert a claim against a plaintiff under the Declaratory Judgment Act. *Nationwide Mut. Ins. Co. v. Webb*, 291 Md. 721, 743 (1981).

In *Megonnell v. United Services*, 368 Md. 633, 642 (2002), the Court of Appeals noted that “[w]hile it is permissible for trial courts to resolve matters of law by summary judgment in declaratory judgment actions, the trial court must still declare the rights of the parties.” *See also Beale v. Risk Retention Group*, 379 Md. 643, 650 (2004).

The Maryland appellate courts “have stated repeatedly that judgments rendered under the Declaratory Judgment Act may not be oral, but must be made in writing.” *Union United Methodist Church, Inc. v. Burton*, 404 Md. 542, 549 (2008). As the Court of Appeals has reiterated recently:

[W]hen a declaratory judgment action is brought and the controversy is appropriate for resolution by declaratory judgment, the court must enter a declaratory judgment and that judgment, defining the rights and obligations of the parties or the status of the thing in controversy, *must be in writing*. It is not permissible for the court to issue an oral declaration *When entering a declaratory judgment, the court must, in a separate document, state in writing its declaration of the rights of the parties Although the judgment may recite that it is based on the reasons set forth in an accompanying memorandum, the terms of the declaratory judgment itself must be set forth separately*

Id. at 549 (emphasis added) (quoting *Bowen v. City of Annapolis*, 402 Md. 587, 608–09 (2007)).

As the Court recently held in *Lovell Land, Inc. v. State Highway Administration*, No. 92, Sept. Term 2008, slip op. at 14 (Md. Apr. 9, 2009), the requirement of a writing is applicable even if the action is not decided in favor of the party seeking the declaratory judgment. *See also Ashton v. Brown*, 339 Md. 70, 87 (1995).

V. DISCUSSION

In view of the complexity of the myriad of issues associated with the six motions (three motions and three cross motions) presently before this Court, this Memorandum Opinion will be structured in the following manner. Section A will set forth the legal principles that guide this Court's interpretation of the Policy. Section B will outline this Court's interpretation of Exclusion (b) and set forth what affect, if any, the analysis has on the outstanding motions. Section C will outline this Court's interpretation of the scope of Endorsement No. 5 and set forth what affect, if any, the analysis has on the outstanding motions. Section D will identify any conditions precedent to Policy coverage and set forth what affect, if any, the conditions precedent have on the outstanding motions. Finally, Section E will analyze the interrelationship between the Defendants' duty to pay Defense Costs and the issue of allocation.

A. Governing Law

It is well established that Maryland courts interpreting insurance contracts, absent a choice of law provision, apply the doctrine of *lex loci contractus* to determine the applicable law. *See Am. Motorists Ins. Co. v. ARTRA Group, Inc.*, 338 Md. 560, 573 (1995); *Continental Cas. Co. v. Kemper Ins. Co.*, 173 Md. App. 542, 548 (2007). The doctrine of *lex loci contractus* requires "that the construction and validity of a contract be determined by the law of the place of making of the contract." *Am. Motorists Ins. Co.*, 338 Md. at 570 (citing *Allstate Ins. Co. v. Hart*, 327 Md. 526, 529 (1990) ("In deciding questions of interpretation and validity of contract provisions, Maryland courts ordinarily should apply the law of the jurisdiction where the contract was made. This is referred to as the principle of *lex loci contractus*.")). In the case *sub judice*, the Policy, as set forth on the Declaration Page, was issued to Bankers Trust at its New York address—130 Liberty Street, New York, New York 10006. As such, the doctrine of *lex loci*

contractus mandates the application of New York law to the “construction and validity” of the Policy.⁵

The Court of Appeals of New York has recently announced that:

A fundamental tenet of contract law is that agreements are construed in accordance with the intent of the parties and the best evidence of the parties’ intent is what they express in their written contract. “Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms,” without reference to extrinsic materials outside the four corners of the document.

Goldman v. White Plains Ctr. for Nursing Care, LLC, 896 N.E.2d 662, 664 (N.Y. 2008) (citations omitted) (quoting *Greenfield v. Philles Records*, 780 N.E.2d 166, 171 (N.Y. 2002)).

The Court of Appeals of New York has also held that the question of “[w]hether a contract is ambiguous is a question of law and extrinsic evidence may not be considered unless the document itself is ambiguous.” *S. Road Assocs., LLC v. Int’l Bus. Machs. Corp.*, 826 N.E.2d 806, 809 (N.Y. 2005). Moreover, New York case law makes it clear that a contract must be read and considered “as a whole to ensure that excessive emphasis is not placed upon particular words or phrases.” *Id.*

B. Policy Construction: Interpretation and Applicability of Exclusion (b)

1. The critical Policy language

Before this Court can endeavor to begin its analysis of the applicability of Exclusion (b), it must first set forth the portions of the Policy relevant to its interpretation of Exclusion (b). Paragraph II of the General Terms and Conditions of the Policy sets forth the following definitions, which define the entities and persons to whom insurance coverage is afforded under Section A:

⁵ There is no dispute among the parties as to the applicability of New York law to the Court’s interpretation of the Policy.

Insured Organization means the entity named in Item 1 of the Declaration [Bankers Trust Corporation].

....

Interrelated Wrongful Act means any **Wrongful Act** which arises from the same, related or common nexus of facts or circumstances or any other causally connected **Wrongful Act**.

....

Organization means the **Insured Organization** and any **Subsidiary**.

....

Subsidiary means any entity in respect of which the **Insured Organization** either directly or indirectly: controls the composition of the board; or controls more than 50% of the voting power; or holds 50% or more of the issued share capital unless the **Insured Organization**, in its sole discretion, deems such entity to be an **Affiliate**.

“Controlled” for the purposes of the above definition is defined to be the ability to direct the management of the entity.

(Policy 8–10.)

Additionally, the coverage clauses of the Policy are set forth in Section A, Liability Policy Section, and provide as follows:

A.I. Insured Persons Corporate Reimbursement Coverage Insuring Clause:

The Insurer shall pay on behalf of the **Organization** all **Loss** for which the **Organization** indemnifies each **Insured Person** and which the **Insured Person** has become legally obligated to pay on account of any **Claim** made against such **Insured Person**, individually or collectively, for a **Wrongful Act** by such **Insured Person** before or during the **Policy Period**.

A.II. Organization Liability Coverage Insuring Clause:

The Insurer shall pay on behalf of the **Organization** all **Loss** for which the **Organization** has become legally obligated to pay on account of any **Claim** made against the **Organization**, for a **Wrongful Act** by the **Organization** or an **Insured Persons** before or during the **Policy Period**.

(Policy 18.) The coverage granted pursuant to the foregoing clauses is subject to multiple exclusions. (See Policy 18–21.) However, Exclusion (b) is the only exclusion relevant to this Court’s analysis, and it provides that:

The insurer shall not be liable to make any payment for **Loss** in connection with that portion of any **Claim** made against any **Insured Person** or the **Organization**:

. . . .

- (b) based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any **Wrongful Act** of any entity merged with, purchased or otherwise acquired by an **Organization** or of any **Insured Person** of such entity, if such **Wrongful Act** took place prior to the date of such merger, purchase or acquisition; unless specifically agreed by endorsement hereon.

(Policy 19–20.) The final provision of the Policy that is critical to this Court’s analysis is the Changes in Exposure provision. The Changes in Exposure provision provides, in relevant part:

Acquisition of Another Entity:

If the **Organization** (a) acquires securities or voting rights in another entity, which as a result of such acquisition become a **Subsidiary**, or (b) acquires any entity by merger into or consolidation with the **Organization**, coverage shall automatically apply to the **Insured Persons** of such entity and such entity but only with respect to: under Section A, **Wrongful Acts** committed, attempted, or allegedly committed or attempted after such acquisition

(Policy 13.)

2. Construction of Exclusion (b)

The Defendants maintain that Exclusion (b) indisputably applies to Plaintiffs’ claims. Thus, Defendants argue that coverage is limited to Wrongful Acts of ABMS, and/or any Insured Person(s) thereof, that occurred after September 1, 1997, i.e., after Bankers Trust’s acquisition of Alex. Brown Incorporated. Mainly, Defendants contend that when the Policy is read in its entirety, it is clear that the purpose and intent of Exclusion (b) is to preclude coverage for actions

filed against an entity that became a Subsidiary before the inception of the Policy for conduct by that entity before it became under the control of Bankers Trust. Furthermore, Defendants' contend that the Changes in Exposure provision, or more specifically, the Acquisition of another Entity clause, of the Policy governs coverage for an entity that became a Subsidiary after the inception of the Policy.⁶

In contrast, the Plaintiffs contend that Exclusion (b), by its clear and unmistakable language, has prospective application only. That is, Plaintiffs contend that Exclusion (b) precludes coverage for an entity that became a Subsidiary after the inception of the Policy for conduct by that entity before it became a Subsidiary. Plaintiffs further argue that Exclusion (b) must be read in conjunction with the Changes in Exposure provision. Specifically, the Plaintiffs maintain that the Changes in Exposure provision serves as a coverage grant, whereas Exclusion (b) serves as an exclusion, or a bar, to coverage.⁷

In view of the fact that New York law governs the construction of the Policy, this Court must adhere to the well established New York principle that:

[W]henever an insurer wishes to exclude certain coverage from its policy obligations, it must do so "in clear and unmistakable" language. Any such exclusions or exceptions from policy coverage must be specific and clear in order to be enforced. They are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction.

⁶ The Court acknowledges that Defendants presented extensive written filings and devoted a significant amount of time at oral argument developing the alternative argument that limited discovery is needed to resolve the ambiguity associated with Exclusion (b). Namely, Defendants argue that if Exclusion (b) is deemed ambiguous, discovery is required to generate the parol evidence that will establish the parties' actual intent. For the reasons discussed more fully in this Memorandum Opinion, this Court finds that the Defendants alternative argument is moot.

⁷ The Court acknowledges that Plaintiffs presented extensive written filings and devoted a significant amount of time at oral argument developing the alternative argument that their interpretation of Exclusion (b) is, at a minimum, reasonable, and therefore, Exclusion (b) is ambiguous. In that context, the Plaintiffs maintain that if Exclusion (b) is deemed ambiguous, then it must be construed in favor of the policyholder, i.e., the Plaintiffs. For the reasons discussed more fully in this Memorandum Opinion, this Court finds that the Plaintiffs' alternative argument is moot.

Seaboard Sur. Co. v. Gillette Co., 476 N.E.2d 272, 275 (N.Y. 1984) (citations omitted); *see also Continental Cas. Co. v. Rapid-American Corp.*, 609 N.E.2d 506, 512 (N.Y. 1993) (“To negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case.”); *Roofers Joint Training, Apprentice & Ed. Comm. Of Western N.Y. v. General Acc. Ins. Co. of Am.*, 713 N.Y.S.2d 615, 617 (N.Y. App. Div. 2000). After having reviewed all of the written filings and the Policy itself—in the context of the above standard—and having entertained lengthy oral argument, this Court concludes that the language of Exclusion (b) is clear and unambiguous on its face. Accordingly, it is clear to this Court that Exclusion (b) is susceptible to but one reasonable interpretation. Therefore, this Court must apply, or enforce, Exclusion (b) only when doing so would be in accordance with its express terms.

This Court finds that the plain, clear, and unambiguous language of Exclusion (b) makes it clear that it is only to be applied prospectively. Thus, Exclusion (b) only works to bar coverage for pre-acquisition Wrongful Acts when the entity alleged to have committed the Wrongful Acts became an Organization after the Policy incepted. Exclusion (b) provides, in relevant part, that the Defendants:

[S]hall not be liable to make any payment for **Loss** in connection with that portion of any **Claim** made against . . . the **Organization** . . . based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any **Wrongful Act** of any entity merged with, purchased or otherwise acquired by an **Organization** . . . , if such Wrongful Act took place prior to the date of such merger, purchase or acquisition

(Policy 19–20) (emphasis added). Exclusion (b) unequivocally and purposefully makes use of both the defined term “Organization” and the undefined term “entity.” In that context, this Court concludes that Exclusion (b) contemplates that an “entity” is something other than an Organization. On the date the Policy incepted, a company fell into one of two categories.

Namely, on July 1, 1998, a company either (1) qualified as a Subsidiary and, hence, was an Organization, or (2) did not qualify as a Subsidiary and, therefore, was merely an entity.

Indeed, the explicit language of the coverage clauses of the Policy lends further support to the foregoing analysis. Specifically, both coverage clauses state that coverage extends to an Organization “for a **Wrongful Act** . . . *before* or during the Policy Period.” (Policy 18) (emphasis added). Thus, there is but one interpretation of the Policy’s coverage clauses: If an entity qualified as an Organization on July 1, 1998, coverage extended to that Organization for all prior Wrongful Acts. Therefore, contrary to Defendants’ argument, it would be nonsensical to interpret Exclusion (b) as precluding from coverage the precise Wrongful Acts that the coverage clauses expressly afford coverage. *See Cty. of Columbia v. Continental Ins. Co.*, 634 N.E.2d 946, 950 (N.Y. 1994) (holding that “[a]n insurance contract should not be read so that some provisions are rendered meaningless”); *Bretton v. Mut. of Omaha Ins. Co.*, 492 N.Y.S.2d 760, 763 (N.Y. App. Div. 1985) (holding that “a policy’s terms should not be assumed to be superfluous or to have been idly inserted”).

As a result, this Court finds that the clear and unambiguous language of Exclusion (b) prescribes that the term entity refers to a company that was not an Organization at the inception of the Policy. Rather, the term entity refers to a company that might have become an Organization at some time during the life of the Policy. Indeed, any other interpretation would be unreasonable and render the terms “entity”—a generic, undefined term—and “Organization”—a specifically defined term—synonymous. Inasmuch as Bankers Trust acquired Alex. Brown Incorporated on September 1, 1997, ABMS qualified as an Organization under the Policy at its inception, July 1, 1998. Accordingly, ABMS cannot be deemed to be an “entity,” as the term is used in Exclusion (b).

The above interpretation of Exclusion (b) is consistent with—not duplicative of—the Changes in Exposure provision of the Policy. The Changes in Exposure provision provides, in relevant part:

Acquisition of Another Entity:

If the **Organization** (a) acquires securities or voting rights in another entity, which as a result of such acquisition become a **Subsidiary**, or (b) acquires any entity by merger into or consolidation with the **Organization**, coverage shall automatically apply to the **Insured Persons** of such entity and such entity but only with respect to: under Section A, **Wrongful Acts** committed, attempted, or allegedly committed or attempted after such acquisition

(Policy 13.) The Changes in Exposure provision, by its express terms, is a coverage grant. As such, the Changes in Exposure provision extends Policy coverage to an entity that became a Subsidiary/Organization during the life of the Policy for Wrongful Acts that occurred *after* the acquisition. (See Policy 13.) Conversely, Exclusion (b), by its express terms, bars coverage to an entity that became a Subsidiary/Organization during the life of the Policy for Wrongful Acts that occurred *prior* to the date of acquisition. (See Policy 19–20.)

Accordingly, this Court concludes that Bankers Trust acquired Alex. Brown Incorporated on September 1, 1997. Further, Exclusion (b) is only applicable to acquisitions that transpired after July 1, 1998. Consequently, Exclusion (b) does not operate to bar coverage for actions brought against ABMS for Wrongful Acts alleged to have occurred prior to September 1, 1997.

3. The effect of the inapplicability of Exclusion (b) on the motions presently before this Court

a. The Boston Chicken Claim

Inasmuch as this Court finds that Exclusion (b) does not bar coverage, as a matter of law, for actions filed against ABMS for Wrongful Acts that occurred prior to September 1, 1997, Defendants cannot deny coverage for the Boston Chicken Claim merely because the Claim arises

exclusively out of Wrongful Acts of ABMS, and/or any Insured Person(s) thereof, that predate September 1, 1997. As such, Defendants' Motion for Partial Summary Judgment as to Plaintiffs' Tenth and Eleventh Causes of Action Pertaining to Coverage for the Boston Chicken Action is denied. Conversely, Plaintiffs' Cross-Motion for Partial Summary Judgment with Respect to Coverage for the Boston Chicken Claim is granted.⁸

b. The Exchange Fund Claims

To the extent that the Exchange Fund Claims seek coverage for Wrongful Acts of ABMS, and/or any Insured Person(s) thereof, that pre-date September 1, 1997, Exclusion (b) is not a bar, as a matter of law, to the potential recovery of those portions of the Claims. As a result, Defendants' Cross Motion for Partial Summary Judgment with Respect to Defense Costs Incurred on Account of the Exchange Funds Claims is denied to the extent that Defendants seek to deny, as a matter of law, coverage for pre-September 1, 1997 Wrongful Acts. Conversely, Plaintiffs' Motion for Partial Summary Judgment with Respect to Defense Costs Incurred on Account of the Exchange Fund Claims is granted to the extent that Plaintiffs seek, as a matter of law, coverage for pre-September 1, 1997 Wrongful Acts.⁹

⁸ It is this Court's understanding that the granting of Plaintiffs' Cross-Motion for Partial Summary Judgment with Respect to Coverage for the Boston Chicken Claim is completely dispositive of the issue of Policy coverage for Counts X and XI of Plaintiffs' Complaint filed June 12, 2008. This Court is cognizant of the argument Defendants set forth pertaining to the additional allegations contained in the underlying Boston Chicken complaint. (*See* Defendants' Memorandum of Law in Support of Their Motion for Partial Summary Judgment as to Plaintiffs' Tenth and Eleventh Causes of Action Pertaining to Coverage for the Boston Chicken Action, pp. 16–19.) Namely, Defendants contend that the allegations lodged against Deutsche Bank Securities, Inc. (as successor to Alex. Brown) for the return of \$1,029,809.22 in transfers allegedly made within the ninety-day period preceding Boston Chicken's bankruptcy filing do not implicate coverage under the Policy. (*Id.* at 16.) Inasmuch as the Plaintiffs' Complaint does not seek recovery for the foregoing losses, the issue of whether the aforesaid Transfers implicate Policy coverage is not properly before this Court. Rather, that issue is more appropriate in the context of the allocation of the Loss Plaintiffs sustained in connection with the Boston Chicken Claim.

⁹ The Court's ruling with regard to Exclusion (b) is dispositive only of a portion of the issues associated with the Exchange Funds Claims. As such, the remaining issues associated with the Exchange Funds Claims will be addressed in the remainder of this Memorandum Opinion.

C. Policy Construction: Interpretation of the Scope of Endorsement Number 5

1. *The critical Policy language*

The following portions of the Policy are relevant to this Court's interpretation of the scope of Endorsement Number 5, also referred to by the parties as the "run-off" or "tail" policy.

In relevant part, Endorsement Number 5 provides:

[I]t is further understood and agreed that the Policy period hereon shall include the Extended Reporting Period and is amended to expire six years subsequent to the date of acquisition of Bankers Trust Corporation by Deutsche Bank on 4th June 1999. . . .

In accordance with GENERAL TERMS AND CONDITIONS VI. Changes In Exposure, coverage afforded under this Policy shall continue but only:

- 1) in respect of Section A, for Claims for Wrongful Acts committed, attempted, or allegedly committed or attempted, prior to the date of acquisition

(Policy 42.) Paragraph II of the General Terms and Conditions of the Policy sets forth the following definitions:

Wrongful Act(s) means any actual or alleged **Employment Practices Violation**, error, misstatement, misleading statement, misrepresentation, act, omission, neglect, or breach of duty that is committed, or attempted, by an **Insured Person**, individually or collectively in their respective capacities as such or serving in an **Outside Capacity**, or by the **Organization**. **Wrongful Act** also means any matter claimed against an **Insured Person** who is a director or officer of the **Organization** solely by reason of his serving in such capacity.

As respects Section A., **Wrongful Act** also includes the rendering or failure to render Professional Services.

. . . .

Interrelated Wrongful Act means any **Wrongful Act** which arises from the same, related or common nexus of facts or circumstances or any other causally connected **Wrongful Act**.

Loss means:

- (1) under Section A the total amount which any **Insured Person** or the **Organization** becomes legally obligated to pay on account of each **Claim** and for all **Claims** in each **Policy Period** and the **Extended Reporting Period**, if exercised, made against them for **Wrongful Acts** including, but not limited to, damages, judgments, settlements, and Defense Costs.

....

- (4) under Section A and Section B and Section C

All **Loss** arising out of the same **Wrongful Act** and all **Interrelated Wrongful Acts** of any **Insured Persons** or the **Organization** shall be deemed one **Loss**, and such **Loss** shall be deemed to have originated in the earliest **Policy Period** in which a **Claim** is first made against any **Insured Person** or the **Organization** or in which notice of circumstance is provided to the insurer from which a **Claim** subsequently arises alleging any such **Wrongful Act** or **Interrelated Wrongful Acts**.

(Policy 9.)

2. Construction of Endorsement Number 5

The Plaintiffs maintain that Endorsement Number 5 does not contain language that excludes from coverage a Loss comprised of both (1) Wrongful Acts that occurred prior to June 4, 1999; and (2) Interrelated Wrongful Acts committed after June 4, 1999. Rather, Plaintiffs contend that the Policy explicitly telescopes all Loss arising from Interrelated Wrongful Acts within the purview of the Policy. Principally, Plaintiffs argue that if the initial Wrongful Acts were committed before June 4, 1999, then all Interrelated Wrongful Acts are covered—regardless of the date of occurrence. In other words, Plaintiffs argue that Wrongful Acts that are a continuation of and interrelated with those Wrongful Acts that occurred prior to June 4, 1999 are covered under the Policy. As such, Plaintiffs assert that, under the terms of the Policy, all Defense Costs associated with the subject Wrongful Acts as well as all Interrelated Wrongful Acts, must be aggregated as a single Loss.

In contrast, the Defendants contend that Endorsement Number 5 affords coverage for Loss on account of Claims made in the six-year period following June 4, 1999, but only for Wrongful Acts actually or allegedly committed or attempted prior to June 4, 1999. Moreover, Defendants argue that, an Interrelated Wrongful Act determination requires the employment of a two-step analysis. Initially, Defendants argue that it must be shown that the alleged act itself constitutes a Wrongful Act by satisfying the definition set forth in the Policy. Once that is established, Defendants maintain that it must then be demonstrated that the alleged Wrongful Act is “interrelated” to some other earlier Wrongful Act. In that context, Defendants argue that after June 4, 1999, no company could have committed a Wrongful Act or an Interrelated Wrongful Act because all insured companies ceased to exist upon Deutsche Bank’s acquisition of Bankers Trust. Additionally, the Defendants aver that the single Loss provision of the Policy (1) serves to assist in calculating the applicable limit of liability and number of retentions, and (2) governs the determination of the Policy Period in which a Claim(s) will be deemed first made. As such, Defendants’ argue that neither of the foregoing considerations has a bearing on whether Wrongful Acts committed after June 4, 1999 are covered.

Preliminarily, this Court notes that it is undisputed that if coverage exists for the Claims underlying the present motions, it is only pursuant to Endorsement Number 5.¹⁰ In that regard, this Court must focus on Endorsement Number 5 for its determination of the whether the Policy extends coverage to Plaintiffs’ Claims. After a careful review of the Policy as a whole, this Court finds Endorsement Number 5 to be clear and unambiguous. As such, Endorsement Number 5 is susceptible to but one reasonable interpretation. This Court must, therefore, apply Endorsement Number 5 in accordance with its express terms.

¹⁰ Plaintiffs’ Complaint alleges and Defendants agree through their memoranda that both the Exchange Fund Claims and the Tax Strategy Claims were first made within the coverage period of Endorsement Number 5.

This Court finds that the plain, clear, and unambiguous language of Endorsement Number 5 makes it clear that it affords coverage for Claims made during the extended reporting period—June 4, 1999 through June 4, 2005—but only if the Wrongful Act(s) and any Interrelated Wrongful Act(s) underlying each individual Claim predate Deutsche Bank’s acquisition of Bankers Trust. Indeed, Endorsement Number 5 expressly states that the “Policy period . . . shall include the Extended Reporting Period and is . . . to expire six years subsequent to the date of acquisition of Bankers Trust Corporation by Deutsche Bank on 4th June 1999.” (Policy 42.) Moreover, Endorsement Number 5 narrows the breadth of its coverage by explicitly providing that coverage “shall continue but only . . . in respect of Section A, for Claims for Wrongful Acts committed, attempted, or allegedly committed or attempted, *prior to the date of acquisition.*” (Policy 42) (emphasis added). Therefore, Endorsement Number 5 unequivocally contemplates coverage only for Wrongful Acts that occurred prior to June 4, 1999.

Paragraph IV of the General Terms and Conditions of the Policy, the Reporting and Notice provision, provides that:

Under Section A of this Policy:

The **Insured Persons** and/or the **Organization** shall, as a condition precedent to exercising their rights under this Policy, give to the **Insurer** written notice as soon as practicable after an officer with the title of Vice President or higher with responsibility for the administration of insurance programs . . . or Vice President or higher in the corporate General Counsel’s office is made aware of a Claim which at such time appears reasonably likely to exceed \$5,000,000, but in no event later than thirty (30) days after the termination of the **Policy Period** or the **Extended Reporting Period**, if applicable.

(Policy 11.) Thus, in the absence of Endorsement Number 5, the coverage afforded under the Policy would have terminated, at the latest, on July 1, 2001 at 12:01 a.m.¹¹ Consequently,

¹¹ The Changes in Exposure provision of the Policy provides that:

(continued . . .)

according to the reporting and notice provision of the Policy, Plaintiffs would have been required to submit written notice of all Claims by approximately July 31, 2001 in order for them to have been considered for coverage. (See Policy 11.) Endorsement Number 5, however, serves to extend the coverage period, albeit in a very limited regard, of the Policy from June 4, 1999 until June 4, 2005, thereby extending the period within which a Claim could have been reported until July 4, 2005. (See Policy 11, 42.) Essentially, Endorsement Number 5, by its plain and unambiguous terms, affords coverage for an additional six years beyond June 4, 1999, but only for Wrongful Acts actually or allegedly committed or attempted prior to June 4, 1999.

This Court's analysis, however, is not complete. The Plaintiffs' contend that the Claims that are the subject matter of the extant motions assert that the Wrongful Acts alleged to have taken place after June 4, 1999 are a continuation of and interrelated with Wrongful Acts that took place before that date. In support of their argument, Plaintiffs rely exclusively upon the Interrelated Wrongful Act definition and the single Loss provision of the Policy. After having reviewed all of the filings and having entertained oral argument, this Court disagrees with Plaintiffs' position.

The term Interrelated Wrongful Act is defined as "any Wrongful Act which arises from the same, related or common nexus of facts or circumstances or any other causally connected Wrongful Act." (Policy 9.) Accordingly, the express language of the Policy prescribes that

If the **Insured Organization** merges into or consolidates with another organization and the **Insured Organization** is not the surviving organization . . . coverage afforded under this Policy shall continue until termination of this Policy, but only with respect to coverage afforded under Section A, **Claims for Wrongful Acts** committed, attempted, or allegedly committed or attempted, prior to such merger, consolidation, acquisition, cessation or takeover

(Policy 13.) According to the original terms of the Policy, one of the events triggering termination was the "expiration of the Policy Period," i.e., July 1, 2001 at 12:01 a.m. (Policy 4, 15.) Therefore, under the original terms of the Policy, following Deutsche Bank's June 4, 1999 acquisition of Bankers Trust, Policy coverage extended only to July 1, 2001 for Wrongful Acts predating the acquisition. As such, if the Wrongful Act(s) underlying the Claim(s) occurred before the acquisition and the Claim(s) was reported before July 31, 2001, then the Policy would have potentially afforded coverage.

before an act can be deemed an Interrelated Wrongful Act, the act itself must first constitute a covered Wrongful Act. It is only at that point that a determination of interrelatedness becomes pertinent. In other words, the express language of the Interrelated Wrongful Act definition contemplates the existence of at least two covered Wrongful Acts. As was established previously, if coverage exists for Plaintiffs' Claims, then it is only by way of Endorsement Number 5. Furthermore, it was established that Endorsement Number 5 only affords coverage for "Wrongful Acts committed, attempted, or allegedly committed or attempted" prior to June 4, 1999. (Policy 42.) In that context, even assuming *arguendo* that an act that fits the Policy definition of a Wrongful Act was committed after June 4, 1999, Endorsement Number 5 does not afford coverage for such an act.¹² Therefore, it would be an impermissible extension of coverage—beyond that which the parties bargained for—for this Court to adopt the Plaintiffs' interpretation of the Policy and, in essence, bootstrap otherwise uncovered acts with covered Wrongful Acts under the guise of constituting Interrelated Wrongful Acts.¹³ *See CBS, Inc. v. Continental Cas. Co.*, 753 F. Supp. 525, 528 (S.D.N.Y. 1991). Furthermore, inasmuch as this Court finds that acts that occurred after June 4, 1999 are not covered under Endorsement Number 5, any Loss Plaintiffs sustained as a result of said acts cannot be aggregated and treated as a single Loss under the single Loss provision of the Policy.¹⁴

¹² This Memorandum Opinion should not be read to suggest that a Wrongful Act could in fact have been committed after June 4, 1999. Rather, this Court is merely stating that if a Wrongful Act was committed after June 4, 1999, coverage does not exist pursuant to Endorsement Number 5.

¹³ Under this Court's interpretation of the Policy, in the context of Endorsement Number 5, the Interrelated Wrongful Act provision only becomes relevant when there are at least two covered Wrongful Acts, i.e., each Wrongful Act predates June 4, 1999. If such a situation exists, then the two acts could be deemed interrelated and, thus, constitute a single Loss.

¹⁴ The single Loss provision of the Policy would only be triggered if there were a question about the applicable retention, the limit of liability, or the timeliness of a Claim.

In that respect, this Court concludes that, insofar as Endorsement Number 5 only affords extended coverage for Wrongful Acts that predate June 4, 1999, acts committed after June 4, 1999—regardless of whether they satisfy the definition of a Wrongful Act—fall outside the bounds of Endorsement Number 5 and cannot be brought within by way of the Interrelated Wrongful Act and the single Loss provisions of the Policy.

4. The effect of the foregoing interpretation on the motions presently before this Court

a. The Exchange Fund Claims

To the extent that the Exchange Fund Claims seek coverage for acts of ABMS, and/or any Insured Person(s) thereof, that occurred after June 4, 1999, Endorsement Number 5 does not, as a matter of law, afford coverage for such acts. As a result, Plaintiffs Motion for Partial Summary Judgment with Respect to Defense Costs Incurred on Account of the Exchange Fund Claims is denied to the extent that it seeks coverage for acts that occurred after June 4, 1999. Conversely, Defendants' Cross Motion for Partial Summary Judgment with Respect to Defense Costs Incurred on Account of the Exchange Funds Claims is granted to the extent that it seeks to deny coverage for acts that occurred after June 4, 1999.

b. The Tax Strategy Claims¹⁵

Before this Court can address the effect of its interpretation of the scope of Endorsement Number 5 on the Tax Strategy Claims Motions, two additional issues must be addressed. The

¹⁵ This portion of the Memorandum Opinion pertains exclusively to the 68 Tax Strategy complaints upon which Defendants filed their Motion captioned "Motion for Partial Summary Judgment with Respect to 68 Tax Strategy Complaints." Plaintiffs' Cross-Motion for Partial Summary Judgment with Respect to Defense Costs Incurred on Account of Tax Claims raises, for the first time, "Federal Claims" associated with the Tax Strategy Claims, defined to include: (1) grand jury investigations conducted by the Department of Justice, (2) a U.S. Senate Investigation conducted by the Permanent Subcommittee on Investigations, and (3) administrative proceedings brought by the United States Internal Revenue Service; and "Private Party Claims" associated with the Tax Strategy Claims, defined to include 204 additional claims or claimants. The issues associated with the foregoing additional Tax Strategy Claims will be addressed in Part V.D. of this Memorandum Opinion.

first issue stems from Defendants' argument that 68 out of the 74 Tax Strategy complaints that triggered the Plaintiffs' Tax Strategy Claims do not name an insured as a defendant.¹⁶ Mainly, Defendants aver that the 68 complaints name Deutsche Bank entities and employees of those entities as defendants and that Deutsche Bank entities are not insureds under the terms of the

¹⁶ The 68 Tax Strategy complaints upon which Defendants filed their Motion include: (1) *William F. Anderson, Jr. v. Deutsche Bank Ag*, (S.D. Mississippi); (2) *Daniel Eugene Berce v. Deutsche Bank Ag London*, (NASD); (3) *BFS Morgan Investors, LLC v. Deutsche Bank AG*, (Minnesota state court); (4) *Henry N. Camferdam, Jr. v. Ernst & Young Int'l, Inc.*, (Texas state court); (5) *David P. Cohen v. Deutsche Bank AG*, (California state court); (6) *Daniel O. Conwill IV v. Arthur Anderson, LLP*, (New York state court); (7) *John T. Crunk, St. v. BDO Seidman, L.L.P.*, (W.D. Tennessee); (8) *Raymond E. Davis v. Lincoln National Corporation d/b/a Lincoln Financial Group*, (Texas state court); (9) *Thomas Denney v. Jenkins & Gilchrist*, (S.D. New York); (10) *Ronald Doornink v. GSI Global Strategies, Inc.*, (C.D. California); (11) *Ducote Jax Holdings, L.L.C. v. Bank of Corporation*, (E.D. Louisiana); (12) *James Michael Dunigan v. RSM McGladrey, Inc.*, (Texas state court); (13) *Fledgling Partners v. CBIZ Accounting, Tax, and Advisory Services, LLC*, (California state court); (14) *Robert E. Gould v. Deutsche Bank Securities, Inc.*, (NASD); (15) *James Hickman Greer v. Deutsche Bank AG London*, (NASD); (16) *Todd Heller v. Deutsche Bank AG*, (E.d. Pennsylvania); (17) *Denis K. Hoasjoe v. Deutsche Bank AG London*, (NASD); (18) *Arless C. Hudson v. Deutsche Bank AG*, (Illinois state court); (19) *Mark Hutton v. Deutsche Bank AG*, (D. Kansas); (20) *James D. Ingstad v. Grant Thornton, LLP*, (North Dakota state court); (21) *Arthur R. Janes v. Deutsche Bank Securities, Inc.*, (NASD); (22) *Kathleen and Dean Janssen v. Bricolage Capital, L.L.C.*, (AAA); (23) *Michael L.E. King v. Deutsche Bank AG*, (District of Oregon); (24) *Michael Ling v. Deutsche Bank AG*, (Texas state court); (25) *Chris C. Maletis III v. Perkins & Company, P.C.*, (Oregon); (26) *Christopher McDonald v. Deutsche Bank AG*, (Georgia state court); (27) *John Mezzalingua v. Deutsche Bank AG*, (New York state court); (28) *Ivan Jack Miller v. Deutsche Bank AG*, (Texas state court); (29) *The MRB Westover Trust v. Banc One Investment Advisors Corporation*, (Texas state court); (30) *John R. Overturf v. Joe B. Garza*, (N.D. Texas); (31) *Pecan East Antonio Investors, Inc. v. KPMG LLP*, (W.D. Texas); (32) *Joseph Preston v. KPMG LLP*, (California state court); (33) *RA Investments I, LLC v. Smith & Frank Group Servs., Inc.*, (Texas state court); (34) *Clifton Robinson v. Deutsche Bank AG*, (Texas state court); (35) *William H. Seippel v. Ernst & Young LLP*, (AAA); (36) *Kevin Slatnick v. Deutsche Bank AG*, (California state court); (37) *David A. Smoller v. Deutsche Bank AG*, (Missouri state court); (38) *Tom Watson, et al. v. BDO Seidman LLP*, (Bankruptcy Court, N.D. Georgia); (39) *Donald R. Wilson Jr. v. Deutsche Bank AG*, (Illinois state court); (40) *Gerald Condon v. Deutsche Bank AG*, (Washington state court); (41) *Nicholas Hollingshad v. Deutsche Bank AG*, (Texas state court); (42) *Steven M. Kaplan v. Paul M. Daugerdas*, (Illinois state court); (43) *Thomas John Kissell v. Deutsche Bank AG*, (S.D. New York); (44) *Leslie J. Leff v. Deutsche Bank AG*, (N.D. Illinois); (45) *Amihai Miron v. BDO Seidman, L.L.P.*, (E.D. Pennsylvania); (46) *MLDX Investments, LLC v. David Parse*, (Utah state court); (47) *Terry Olson v. Jenkins & Gilchrist*, (N.D. Illinois); (48) *William O. Plyler v. BDO Seidman, L.L.P.*, (W.D. Tennessee); (49) *Trevor Tice v. BDO Seidman L.L.P.*, (C.D. California); (50) *Konstantinos Vadevoulis v. Deutsche Bank AG*, (N.D. Illinois); (51) *John d. Veleris v. Deutsche Bank AG*, (N.D. Illinois); (52) *Joseph H. Westbrook v. Jenkins & Gilchrist*, (E.D. North Carolina); (53) *Gary T. Armitage v. Deutsche Bank AG*, (California state court); (54) *William C. Barham v. Wachovia Bank*, (New Jersey state court); (55) *Robert L. Barron v. Deutsche Bank AG*, (California state court); (56) *Franklin W. Blythe v. Deutsche Bank AG*, (S.D. New York); (57) *Thomas Cantwell v. DBSI*, (Texas state court); (58) *Thomas O. Hansen v. Deutsche Bank AG*, (Florida state court); (59) *John C. Illingworth v. Deutsche Bank AG*, (N.D. Illinois); (60) *J. David Martin v. Jenkins & Gilchrist*, (Texas state court); (61) *William N. Melton v. Sidley Austin Brown & Wood, LLP*, (Virginia state court); (62) *Gerald Mercadante v. Wachovia Bank*, (New Jersey state court); (63) *Thomas Morris v. Wachovia Bank*, (Florida state court); (64) *James A. Simpson v. Deutsche Bank AG*, (California state court); (65) *Garret Snook v. Deutsche Bank AG*, (Texas state court); (66) *Richard W. Snyder v. Jenkins & Gilchrist, P.C.*, (Texas state court); (67) *Luis E. Valencia v. Deutsche Bank AG*, (California state court); and (68) *Allen R. Boudreaux v. Deutsche Bank AG*, (Louisiana state court).

Policy. The second issue stems from Defendants' argument that the 68 complaints do not allege to be based upon Wrongful Acts that occurred prior to June 4, 1999.

Well-established New York law guides this Court's resolution of the foregoing issues. The United States District Court for the Southern District of New York has stated, "It is well-established in New York that, as a general rule, 'nothing is lost by a merger . . . the company formed by the merger stands in the place of those merged, and any right which belonged to them can be asserted by it.'" *Gusmao v. GMT Group*, No. 06 Civ. 5113, 2008 U.S. Dist. LEXIS 58462, at *38 (S.D.N.Y. Aug. 1, 2008) (quoting *W.H. McElwain Co. v. Primavera*, 167 N.Y.S. 815, 816 (N.Y. App. Div. 1917)); *see also Chatham Corp. v. Argonaut Ins. Co.*, 334 N.Y.S.2d 959, 961 (N.Y. Sup. Ct. 1972) ("[N]othing is lost by a merger of corporations and that any right lawfully belonging to any of the constituent corporations merged together can be asserted by the surviving corporation."); *Walsh v. Fid. & Deposit Co. of Md.*, 227 N.Y.S. 96, 98 (N.Y. Sup. Ct. 1928) ("With reference to the effect of changing the corporate name, whether by a special act or under a general law, it may be said that it has no effect whatever, in theory of law, upon the identify of the corporation, or upon its property, rights, or liabilities."). Accordingly, Defendants' liabilities under the Policy remain enforceable by the successor company of any Organization's merger with or acquisition by another company, but only to the extent that the Organization, if it were still in existence, would have had the right to enforce the Policy. *See Gusmao*, No. 06 Civ. 5113, 2008 U.S. Dist. LEXIS 58462, at * 39.

Furthermore, it has been held in New York that the failure of a third-party plaintiff to include an insured "as a defendant in the third-party action or to name it in the pleadings is not fatal, provided it can be ascertained that [the insured], rather than some other party, is the subject of the complaint brought by the third-party plaintiff." *Chatham Corp.*, 334 N.Y.S.2d at 961. In

that context, it is not fatal, as a matter of law, that 68 of the 74 Tax Strategy complaints giving rise to the Plaintiffs' Tax Strategy Claims fail to explicitly name an insured Organization as a defendant.

This Court finds that a genuine dispute of material fact exists as to whether, although not named, an insured Organization is the subject of the 68 Tax Strategy complaints. Moreover, this Court finds that a genuine dispute of material fact exists as to whether, although not alleged, the Wrongful Acts underlying, at least a portion of, the 68 Tax Strategy complaints occurred prior to June 4, 1999. *Cf. Fitzgerald v. Am. Honda Motor Co.*, 575 N.E.2d 90, 93–94 (N.Y. 1991) (“[T]he duty to defend derives, in the first instance, not from the complaint drafted by third party, but rather from the insurer’s own contract with the insured. While the allegations in the complaint may provide the significant and usual touchstone for determining whether the insurer is contractually bound to provide a defense, the contract itself must always remain a primary point of reference. Indeed, a contrary rule making the terms of the complaint controlling ‘would allow the insurer to construct a formal fortress of the third party’s pleadings * * * thereby successfully ignoring true but unpleaded facts within its knowledge that require it * * * to conduct the * * * insured’s defense.’ Further, an insured’s right to a defense should not depend solely on the allegations a third party chooses to put in the complaint.”) (citations omitted); *American Mgt. Ass’n v. Atlantic Mut. Ins. Co.*, 641 N.Y.S.2d 802, 806 (N.Y. Sup. Ct. 1996) (holding, in the context of a duty to defend provision of an insurance contract, that “even if the language of the [third-party] complaint does not adequately state all the facts requisite to trigger coverage[,] ‘a policy protects against poorly or incompletely pleaded causes as well as those artfully drafted.’ As long as there is potentially a claim within the policy’s coverage an insurer is obligated to defend even though the complaint contains ambiguous or incomplete allegations that

do not clearly bring the case within coverage, if the insurer has knowledge of the facts which would bring the case within the policy's coverage.” (quoting *Ruder & Finn Inc. v. Seaboard Sur. Co.*, 422 N.E.2d 518 (N.Y. 1981))). Consequently, the granting of complete summary judgment—as Defendants request—with respect to the 68 Tax Strategy complaints is not appropriate at this time.

However, in light of this Court's interpretation of Endorsement Number 5, it is appropriate to grant Defendants' Motion for Partial Summary Judgment with Respect to the 68 Tax Strategy Complaints to the extent Defendants seek to deny coverage for any acts that occurred after June 4, 1999. Conversely, Plaintiffs' Cross-Motion for Partial Summary Judgment with Respect to Defense Costs Incurred on Account of Tax Claims is denied to the extent that Plaintiffs seek coverage for acts that occurred after June 4, 1999.

D. Conditions Precedent to Policy Coverage¹⁷

1. The Exchange Fund Claims

a. Satisfaction of applicable retention

¹⁷ Although counsel indicated in their March 30, 2009 letter to this Court that the conditions precedent to coverage that were going to argued included the consent requirements of the Policy, the parties presented little, if any, argument associated with said condition precedent. This Court understands the consent requirement to be relevant in the context of settling a Claim. Mainly, paragraph XVII of the General Terms and Conditions of the Policy, the Defense and Settlement provision, provides:

It shall be the duty of the **Insured Persons** and/or the **Organization** and not the duty of the Insurer to defend **Claims** made against the **Insured Persons** or the **Organization**. The **Insured Persons** and the **Organization** agree not to settle any **Claim** and legal proceedings or admit any liability with respect to any **Claim** and legal proceedings without the Lead Insurer's written consent, which consent shall not be unreasonably withheld or delayed. The Lead Insurer shall not be liable for any settlement or admission to which it has not consented.

(Policy 16.) Inasmuch as the Plaintiffs are not seeking summary judgment with respect to the amount of monies expended on the settlement of any of the Claims, but rather are seeking partial summary judgment with respect to Defense Costs incurred on account of the Exchange Fund Claims and the Tax Strategy Claims and are seeking partial summary judgment with respect to the existence of coverage for the Boston Chicken Claim, this Court is unwilling to address the issue of consent, as the issue is not ripe.

Defendants argue that the coverage afforded under the Policy is subject to a \$25 million retention for each loss in respect of “Professional Services.” Moreover, in their memoranda, Defendants argue that the Plaintiffs have offered no evidence that the applicable retention has in fact been exceeded with respect to the Defense Costs incurred on account of the Exchange Fund Claims. In that context, Defendants argue that Plaintiffs’ Motion for Partial Summary Judgment with Respect to Defense Costs Incurred on Account of the Exchange Fund Claims is non-meritorious, as a condition precedent to coverage has not been satisfied.¹⁸

It is indisputable that Coverage Section A, Insuring Clause A.II. of the Policy, is subject to a \$25 million retention for each loss in respect of “Professional Services.” (Policy 8.) However, the Plaintiffs have represented, both in their memoranda and during oral argument, that invoices evidencing a Loss in excess of \$25 million in connection with Defense Costs incurred on account of the Exchange Fund Claims have been provided to the Defendants. In light of that fact, this Court finds, on this record, that the Plaintiffs have made a prima facie showing that the \$25 million retention has been satisfied.¹⁹

¹⁸ For reasons known to the Plaintiffs, and of which this Court can only speculate, the Plaintiffs have only moved for summary judgment with respect to the payment of Defense Costs incurred in connection with Exchange Fund Claims, not with respect to Defendants’ obligation to cover the settlement of any of the Exchange Fund Claims. Accordingly, this Court can and has only consider the amount of Defense Costs that have been incurred with regard to the Exchange Fund Claims in determining whether the applicable retention has been satisfied.

¹⁹ This Court is cognizant of the Affidavit of John W. Blancett, attached as Exhibit A to Defendants’ Reply in Support of Cross-Motion for Summary Judgment as to Exchange Funds Claims, that states the invoices for Defense Costs associated with the Exchange Funds Claims total \$25,143,987.55 and that several of the charges on said invoices relate to uncovered entities and uncovered acts. However, this Court is not in a position to decide which charges on the invoices can be “redlined,” as that determination is arguably factual and, thus, within the purview of the finder of fact. It may be, as Defendants contend, that certain charges on the invoices will be deemed uncovered and will, therefore, cause the total Defense Costs to ultimately slip below the applicable \$25 million retention. This is especially true in light of the other issues addressed in this Memorandum Opinion. At this juncture, however, the Plaintiffs have provided evidence that Defense Costs associated with the Exchange Funds Claims have exceeded \$25 million—the amount by which it has been exceeded is immaterial. As such, the Plaintiffs have preliminarily satisfied the \$25 million retention, which is a condition precedent to potential coverage.

b. The Other Insurance provision

Defendants argue that, pursuant to the Policy, a condition precedent to coverage is the nonexistence of other insurance coverage. (*See* Policy 13.) Defendants maintain that the Plaintiffs have failed to demonstrate that no other valid and collectible insurance exists with respect to the Exchange Fund Claims, i.e., that the alleged pre-September 1, 1997 acts are not covered under the Alex Brown insurance program and that the alleged post-June 4, 1999 acts are not covered under Deutsche Bank’s insurance program. Plaintiffs argue that the “Other Insurance” provision of the Policy applies only in the event that: (1) the relevant Loss is covered by both the Policy and some other policy; and (2) the other insurer has actually paid such Loss. Plaintiffs further assert that they are unaware of any other insurance issued to cover Alex. Brown prior to September 1, 1997—the date Bankers Trust acquired Alex. Brown.

Although the Defendants label the Other Insurance provision as a condition precedent to Policy coverage, this Court believes that it is more aptly labeled as a limit to the Defendants’ liability under the Policy. Paragraph V of the General Terms and Conditions of the Policy, captioned “Other Insurance,” provides:

If any **Loss** recoverable under this Policy is also insured under any other valid and collectible policy(ies), prior or current, then this Policy shall cover such **Loss**, subject to its limitations, conditions, provisions and other terms, only to the extent that the amount of such **Loss** is in excess of the amount of payment from such other insurance whether such other insurance is stated to be primary, contributory, excess, contingent or otherwise, unless such other insurance is written only as specific excess insurance over the Limits of Liability provided in this Policy.

If **Loss** arises from an **Insured Person** acting in an **Outside Capacity** this Policy shall afford coverage for such Loss excess of any insurance or indemnification provided by the **Outside Entity**.

(Policy 13.) It is clear to this Court that the Other Insurance provision, by its express language, only applies if there is another insurance policy *and* payment is received from the other

insurance policy. The Affidavit of Kevin Fenton (attached as Exhibit 1 to Plaintiffs' Reply Memorandum in Support of their Motion for Partial Summary Judgment with Respect to Defense Costs Incurred on Account of the Exchange Fund Claims) states that no other insurer has paid for any Defense Costs on account of the Exchange Funds Claims and that Plaintiffs are unaware of a professional liability insurance policy issued or providing coverage to ABMS and/or Alex. Brown prior to September 1997. (Fenton Aff. ¶¶ 6–7, Nov. 7, 2008.) Inasmuch as the Defendants have not presented any evidence to contradict Mr. Fenton's Affidavit, which represents that that no other insurer has paid for any Defense Costs, Defendants' argument that partial summary judgment may not be entered in favor of Plaintiffs because of the Other Insurance provision of the Policy fails.²⁰

2. The Boston Chicken Claim

a. Satisfaction of applicable retention

Similar to the argument made previously in connection with the Exchange Fund Claims, Defendants contend that the Plaintiffs have failed to offer any evidence that the \$25 million retention (which is a condition precedent to Policy coverage) has been exceeded in connection with the Boston Chicken Claim. Conversely, Plaintiffs argue that their share of the Boston

²⁰ This Court acknowledges Defendants' position that Plaintiffs have not stated whether they have made a claim for Loss to other insurers. Nevertheless, the lack of such a representation is not critical to this Court's analysis, as the relevant inquiries with regard to the Other Insurance provision are (1) the existence of other insurance and (2) the payment for Loss from the other insurer. In that context, it is irrelevant whether a claim has been made if payment for Loss has not been received. Additionally, this Court acknowledges Defendants' argument that they are entitled to discovery regarding other insurance potentially applicable to the Plaintiffs' Exchange Fund Claims. Defendants' base their argument on a March 31, 2006 letter indicating that an insurance policy, which is in German, was issued "that might provide" coverage to the Exchange Fund Claims. (Defendants' Reply in Support of Cross-Motion for Summary Judgment as to Exchange Fund Claims, Blancett Aff., Ex. 14.) The flaw in Defendants' argument, however, is that the mere existence of other insurance alone is not sufficient. There must also be payment for Loss from the other insurer. The Plaintiffs have represented that no other insurer has made any payments; therefore, at this time, the Other Insurance provision has not been triggered. Nevertheless, this Memorandum Opinion should not be read as foreclosing Defendants' right to seek discovery on the issues surrounding the potential applicability of the Other Insurance provision.

Chicken settlement, which is a matter of public record, was \$47.15 million. In that context, Plaintiffs contend that, even in the absence of Defense Costs invoices, the \$25 million retention has been exceeded. This Court finds that, inasmuch as there is evidence that the Plaintiffs' expended \$47.15 million in the settlement of the Boston Chicken case, the Plaintiffs have made a prima facie showing that the \$25 million retention has been satisfied.²¹

b. The Other Insurance provision

Just as they alleged previously with respect to the Exchange Fund Claims, Defendants contend that the Plaintiffs have failed to demonstrate that no other valid and collectible insurance exists with respect to the Boston Chicken Claim. Similarly, the Plaintiffs reassert their position that the "Other Insurance" provision of the Policy applies only in the event that: (1) the relevant Loss is covered by both the Policy and some other policy; and (2) the other insurer has actually paid such Loss. Moreover, the Plaintiffs aver that they are not aware of any other "professional liability" policy providing coverage to BT Alex. Brown prior to September 1, 1997.

Further, the Affidavit of Kevin Fenton (attached as Exhibit 2 to Plaintiffs' Reply Memorandum in Further Support of Plaintiffs' Cross Motion for Partial Summary Judgment with Respect to Coverage for the Boston Chicken Claim) states that no other insurer has made any payment for the Loss incurred on account of the Boston Chicken Claim and that Plaintiffs are unaware of a professional liability policy issued or providing coverage to BT Alex. Brown prior

²¹ This Court is cognizant of the argument that a portion of the Plaintiffs share of the Boston Chicken settlement and any Defense Costs associated therewith may be attributable to the allegations lodged against Deutsche Bank Securities, Inc. (as successor to Alex. Brown) in the Boston Chicken Complaint for the return of \$1,029,809.22 in transfers allegedly made within the ninety-day period preceding Boston Chicken's bankruptcy filing, which this Court has found are not part of Plaintiffs' Boston Chicken Claim, as alleged in Counts X and XI of Plaintiffs' Complaint. The allocation of the Boston Chicken Loss is arguably factual and, thus, within the purview of the finder of fact. At this juncture the Plaintiffs have provided evidence that they expended \$47.15 million in connection with the settlement of the Boston Chicken case. As such, the Plaintiffs have preliminarily satisfied the \$25 million retention, which is a condition precedent to potential coverage.

to September 1997. (Fenton Aff. ¶¶ 6–7, Mar. 16, 2009.) Inasmuch as the Defendants have not presented any evidence to contradict Mr. Fenton’s Affidavit, which represents that that no other insurer has made any payments, Defendants’ argument that partial summary judgment may not be entered in favor of Plaintiffs because of the Other Insurance provision of the Policy fails.²²

3. The Tax Strategy Claims

a. Satisfaction of applicable retention

Similar to the argument made previously in connection with Defense Costs incurred on account of the Exchange Fund Claims and the Boston Chicken Claim, Defendants contend that the Plaintiffs have failed to offer any evidence that the \$25 million retention (which is a condition precedent to Policy coverage) has been exceeded in connection with the Tax Strategy Claims. Plaintiffs have represented, in their memoranda, that invoices evidencing a Loss in excess of \$25 million in connection with Defense Costs incurred on account of the Tax Strategy Claims have been provided to Defendants. Accordingly, this Court finds, on this record, that the Plaintiffs have made a prima facie showing that the \$25 million retention has been satisfied.²³

²² This Court acknowledges Defendants’ argument that they are entitled to discovery regarding other insurance potentially applicable to the Plaintiffs’ Boston Chicken Claim. The flaw in Defendants’ argument, however, is that the mere existence of other insurance alone is not sufficient. There must also be payment for Loss from the other insurer. The Plaintiffs have represented that no other insurer has made any payments; therefore, at this time, the Other Insurance provision is not applicable. Nevertheless, this Memorandum Opinion should not be read as foreclosing Defendants’ right to seek discovery on the issues surrounding the potential applicability of the Other Insurance provision.

²³ Just as was stated for the Defense Costs associated with the Exchange Fund Claims, this Court is not in a position to decide which charges on the Tax Strategy Claims Defense Costs invoices can be “redlined” (particularly where, as here, the Court has not been provided with copies of the Tax Strategy Claims Defense Costs invoices) as that determination is arguably factual and, thus, within the purview of the finder of fact. It may be, as Defendants contend, that certain charges on the invoices will be deemed uncovered and will, therefore, cause the total Defense Costs to ultimately slip below the applicable \$25 million retention. This is especially true in light of the other issues addressed in this Memorandum Opinion. At this juncture, however, the Plaintiffs have provided evidence that Defense Costs associated with the Tax Strategy Claims have exceeded \$25 million. As such, the Plaintiffs have preliminarily satisfied the \$25 million retention, which is a condition precedent to potential coverage.

b. Timely notice and reporting of additional Claims

Plaintiffs' Cross-Motion for Partial Summary Judgment with Respect to Defense Costs Incurred on Account of Tax Claims raises, for the first time, "Federal Claims" associated with the Tax Strategy Claims, defined to include: (1) grand jury investigations conducted by the Department of Justice, (2) a U.S. Senate Investigation conducted by the Permanent Subcommittee on Investigations, and (3) administrative proceedings brought by the United States Internal Revenue Service; and 204²⁴ additional "Private Party Claims" associated with the Tax Strategy Claims. (Farber Affirm. ¶ 5, Ex. A, undated (attached as Exhibit 2 to Plaintiffs' Memorandum in Support of Plaintiffs Cross Motions for Partial Summary Judgment and in Opposition to Defendants' Motion for Partial Summary Judgment with Respect to Defense Costs Incurred on Account of the Tax Claims)). A review of Plaintiffs' Complaint reveals that paragraph 58 sets forth a specific list of 74 Tax Strategy complaints that form the bases of their Tax Strategy Claims against the Defendants. Inasmuch as Plaintiffs' Complaint does not allege that the Federal Claims and the additional Private Party Claims form the bases of its Tax Strategy Claims, this Court is unwilling to address whether the Plaintiffs complied with the notice and reporting provision of the Policy and/or whether the Defendants had notice, actual or constructive, of the additional Claims. Consequently, this Court lacks the authority to consider any motion for summary judgment filed in connection with the Federal Claims and/or additional Private Party Claims.

²⁴ The 204 additional Private Party Claims raised in Plaintiffs' Motion does not include the 74 Tax Strategy complaints originally alleged in Plaintiffs' Complaint as the bases of Plaintiffs' Claims.

E. Allocation and Defendants' Duty to Pay Defense Costs²⁵

1. *The critical Policy language*

The Policy sets forth the following definition of Loss:

[T]he total amount which any **Insured Person** or the **Organization** becomes legally obligated to pay on account of each Claim and for all Claims in each Policy Period and the **Extended Reporting Period**, if exercised, made against them for **Wrongful Acts** including, but not limited to, damages, judgments, settlements, and **Defense Costs**.

(Policy 9.) Furthermore, with regard to the duty to pay an Organization's Loss, the coverage clauses of the Policy set forth in Section A, Liability Policy Section, provide:

A.I. **Insured Persons Corporate Reimbursement Coverage Insuring Clause:**

The Insurer shall pay on behalf of the **Organization** all **Loss** for which the **Organization** indemnifies each **Insured Person** and which the **Insured Person** has become legally obligated to pay on account of any **Claim** made against such **Insured Person**, individually or collectively, for a **Wrongful Act** by such **Insured Person** before or during the **Policy Period**.

A.II. **Organization Liability Coverage Insuring Clause:**

The Insurer shall pay on behalf of the **Organization** all **Loss** for which the **Organization** has become legally obligated to pay on account of any **Claim** made against the **Organization**, for a **Wrongful Act** by the **Organization** or an **Insured Persons** before or during the **Policy Period**.

(Policy 18.) Lastly, the Policy contains an Allocation provision that provides:

If a Claim is made against the **Insured Persons** or **Organization** that includes both covered and uncovered matters, or includes allegations against persons not insured under this policy, the Insurer, the **Insured Persons** and the **Organization** shall use their best efforts to arrive at a fair and proper allocation of **Loss** covered by this Policy.

²⁵ The Court acknowledges the dispute as to whether New York has adopted the "relative exposure" rule or the "reasonably related" rule with respect to the allocation of defense costs. Inasmuch as this Court has not been asked to grant summary judgment on the final amount of Loss Plaintiffs sustained on account of the subject Claims, the foregoing dispute has no bearing on the Court's analysis regarding the existence of Policy coverage and the Defendants' duty to pay Defense Costs. Rather, the method of allocating loss is only relevant when determining the final amount Defendants' are liable for under the Policy.

(Policy 16.)

2. Who bears the burden of uncertainty regarding whether the Defense Costs are ultimately covered?

It is well-settled New York law that the same principles that guide the determination of whether an insurer's duty to defend obligation has been triggered guide the determination of whether an insurer's duty to pay defense costs has been triggered. *See Fed. Ins. Co. v. Kozlowski*, 792 N.Y.S.2d 397, 402–03 (N.Y. App. Div. 2005).²⁶ With regard to a duty to defend as opposed to a duty to pay defense costs, the *Kozlowski* court commented, “The effective difference between the two defense obligations is who chooses and pays the defense attorney, not whether a defense obligation lies with the insurer.” *Id.* at 403. In the case *sub judice*, Section A of the Policy, entitled “Liability Policy Section,” explicitly disavows any duty to defend. (*See* Policy 18) (“Coverage Section A of this Policy does not provide for any duty by the Insurer to defend the **Insured Persons** and/or the **Organization**.”). However, the Policy does provide as follows:

The Insurer shall pay on behalf of the **Organization** all **Loss** for which the **Organization** indemnifies each **Insured Person** and which the **Insured Person** has become legally obligated to pay on account of any **Claim** made against such **Insured Person**, individually or collectively, for a **Wrongful Act** by such **Insured Person** before or during the **Policy Period**.

. . . .

²⁶ Similar to the Policy language at issue in the case *sub judice*, in *Kozlowski*:

The ELI section of the policies requires Federal to pay “on behalf of” Tyco’s directors and officers (the insured persons) all “Loss” that any insured person “becomes legally obligated to pay on account of any Claim” made against him/her during the policy period for an alleged “Wrongful Act.” “Loss” is defined as “the total amount which any Insured Person becomes legally obligated to pay on account of each Claim and for all Claims in each Policy Period . . . made against them for Wrongful Acts for which coverage applies, including, but not limited to, damages, judg[]ments, settlements, costs and Defense Costs.”

Kozlowski, 792 N.Y.S.2d at 398–99 (alternation in original).

The Insurer shall pay on behalf of the **Organization** all **Loss** for which the **Organization** has become legally obligated to pay on account of any **Claim** made against the **Organization**, for a **Wrongful Act** by the **Organization** or an **Insured Persons** before or during the **Policy Period**.

(Policy 18.) The unambiguous language of the Policy provides coverage for “all Loss”—defined to include Defense Costs—that an Organization “has become legally obligated to pay.” Based upon the written filings and as explicated at oral argument, the parties are in agreement that the Policy affords coverage to an Organization for Wrongful Acts committed or attempted after September 1, 1997 and prior to June 4, 1999. Therefore, since “an insured [Plaintiffs,] becomes legally obligated to pay legal expenses as soon as the services are rendered, the insurer[s] [Defendants,] [are] required to pay defense expenses as incurred” on account of Wrongful Acts committed, attempted, or allegedly committed or attempted after September 1, 1997 and prior to June 4, 1999. *Kozlowski*, 792 N.Y.S.2d at 402. Under venerable New York case law, Defendants duty to pay defense costs was triggered by the inclusion of allegations in the third-party complaints that invoked Policy coverage. *See Id.* at 402–03; *Fed. Ins. Co. v. Tyco Int’l Ltd.*, No. 600507/03, 2004 NY Slip Op 50160U at *8 (N.Y. Sup. Ct. Mar. 5, 2004).

Pertinent to the issues raised in the extant motions, the fact that the third-party complaints underlying Plaintiffs Claims allege both covered and uncovered Wrongful Acts is immaterial to this Court’s analysis because under New York law the duty to pay defense costs remains. *Kozlowski*, 792 N.Y.S.2d at 402–04; *Tyco Int’l Ltd.*, 2004 NY Slip Op 50160U at *8. The *Tyco* court held that:

The duty [to pay defense costs] exists whenever a complaint against the insured alleges claims that may be covered under the insurer’s policy. If any portion of a complaint might result in coverage, the insurer must defend or pay defense expenses for all claims, both covered and non-covered. Conversely, the insurer has no duty if, as a matter of law, the allegations in the complaint could not give

rise to any obligation to indemnify, or the allegations fall within a policy exclusion.

2004 NY Slip Op 50160U at *8 (citations omitted); *see also Seaboard Surety Co. v. Gillette Co.*, 476 N.E.2d 272, 275 (N.Y. 1984) (“The duty is not contingent on the insurer’s ultimate duty to indemnify should the insured be found liable, nor is it material that the complaint against the insured asserts additional claims which fall outside the policy’s general coverage or within its exclusory provisions.”). Furthermore, the United States District Court for the Southern District of New York has held, “Generally, New York law provides that where coverage is disputed and a liability policy includes the payment of defense costs, ‘insurers are required to make contemporaneous interim advances of defense expenses . . . , subject to recoupment in the event it is ultimately determined no coverage was afforded.’” *Axis Reins. Co. v. Bennett*, 07 Civ. 9843, 2008 U.S. Dist. LEXIS 53921, at *7 (S.D.N.Y. June 27, 2008) (quoting *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Ambassador Group Inc.*, 556 N.Y.S.2d 549, 553 (N.Y. App. Div. 1990)); *see also Kozlowski*, 792 N.Y.S.2d at 404; *Trs. of Princeton Univ. v. Nat’l Union Fire Ins. Co.*, No. 650202/06, 2007 NY Slip Op 50753U at *6 (N.Y. Sup. Ct. Apr. 10, 2007). Accordingly, in light of this Court’s previous findings, portions of Plaintiffs’ Claims fall within Policy coverage and portions of the Claims fall outside Policy coverage. As a result, the Claims are not solely and entirely excluded from coverage. *See Axis Reins. Co.*, 2008 U.S. Dist. LEXIS 53921, at *5; *Trs. Princeton Univ.*, 2007 NY Slip Op 50753U at *5; *Tyco Int’l Ltd.*, 2004 NY Slip Op 50160U at *8. Therefore, the Defendants have a duty to contemporaneously pay all Defense Costs as incurred on account of Claims filed, which encompass both covered and uncovered allegations, subject to recoupment of factually determined uncovered expenses.

3. The effect of the foregoing analysis on the motions presently before this Court

a. The Exchange Fund Claims

It is this Court's understating that the Plaintiffs' Exchange Fund Claims are comprised of six third-party complaints. Namely, the Exchange Fund Claims consist of the following cases: (1) *DeVetter (a/k/a Compton) v. ABMS*, No. 24-C-03-007514 (Md. Cir. Ct.); (2) *Cabaniss v. DBSI*, No. 02-cvs-6822 (N.C. Super. Ct.); (3) *Switzer & Sons Family Partnership, L.P. v. DBSI*, No. 03-03347 (NASD Arbitration); (4) *Talbott and Patterson v. ABMS*, No. 21810 (Tex. Dist. Ct.); (5) *Albert v. ABMS*, No. 04C-05-250 PLA (Del. Super. Ct.), *Baker v. ABMS*, No. 04C-05-251 PLA (Del. Super. Ct.); and (6) *White v. ABMS*, No. GIC 842750 (Cal. Super. Ct.). Furthermore, it is this Court's understanding that save for the *White v. ABMS* case, all of the foregoing cases have been resolved. Therefore, it is impossible for the Defendants to contemporaneously pay the Defense Costs as incurred on account of those five cases. Nevertheless, Plaintiffs ask this Court to find, as a matter of law, that Defendants have a duty to retroactively pay the Defense Costs incurred on account of those cases because holding otherwise would in essence be rewarding the Defendants for their breach of the Policy.

Notably, the justification for the established New York rule that requires an insurer to make "contemporaneous interim advances of [both covered and uncovered] defense expenses subject to recoupment" of the ultimately uncovered costs is to safeguard the insureds' ability to defend the underlying action(s). *See Trs. Of Princeton Univ.*, 2007 NY Slip Op 50753U at *6 (citing *Kozlowski*, 792 N.Y.S.2d 397). Indeed, the Supreme Court of New York, New York County, has held that "the insurer is not entitled to apportion claims at the expense of the insureds' defense of the underlying action, and if the insurer cannot allocate during the underlying action, it must pay all defense costs as incurred subject to recoupment." *Id.* Here,

with respect to five out of the six actions underlying the Exchange Fund Claims, the concern that Plaintiffs' ability to defend those actions will be adversely affected in the absence of contemporaneous payments of Defense Costs is nonexistent, as they have already been defended and resolved.

On that backdrop, this Court concludes that, with respect to the five actions underlying the Exchange Fund Claims that have been resolved, the Defendants are not obligated to make payments for the Defense Costs incurred at this time. Rather, there must first be an allocation of covered and uncovered expenses. Therefore, Plaintiffs' Motion for Partial Summary Judgment with Respect to Defense Costs Incurred on Account of the Exchange Fund Claims is denied to the extent that it seeks payment of all Defense Costs, subject to recoupment, incurred on account of the third-party actions that have already been resolved. Moreover, Plaintiffs' Motion for Partial Summary Judgment with Respect to Defense Costs Incurred on Account of the Exchange Fund Claims is granted to the extent that it seeks contemporaneous payments of Defense Costs, subject to recoupment of factually determined uncovered expenses, incurred on account of the case of *White v. ABMS*, No. GIC 842750 (Cal. Super. Ct.), as it is still an ongoing matter.

b. The Boston Chicken Claim

Although both parties have fully developed the issue of allocation with regard to the Boston Chicken Claim, this Court is persuaded that the issue of allocation has been raised prematurely. The issue of allocation was raised in connection with Plaintiffs' Cross-Motion for Partial Summary Judgment with Respect to Coverage for the Boston Chicken Claim. In their Motion, Plaintiffs sought summary judgment on the issue of Defendants' "obligation to pay all Loss incurred on account of the Boston Chicken Claim." This Court previously found that Exclusion (b) of the Policy does not operate to bar coverage for actions filed against ABMS for

Wrongful Acts that occurred prior to September 1, 1997. Hence, the Boston Chicken Claim falls within the purview of Policy coverage. In that context, the Plaintiffs have not requested, and the Court has not granted, summary judgment with respect to the amount of Loss Plaintiffs incurred as a result of the Boston Chicken Claim. Rather, the Court has merely held that coverage exists for Plaintiffs' Boston Chicken Claim. Therefore, this Court finds that the parties arguments associated with allocation are better saved for another day, i.e., the point in this proceeding when evidence is presented as to the amount of Loss Plaintiffs incurred. Accordingly, the issue of allocation has no affect on this Court's prior determinations regarding the motions filed in connection with the Boston Chicken Claim.

c. The Tax Strategy Claims

In order to trigger the Defendants obligation to make contemporaneous payments of Defense Costs under New York law, there must first be a showing that the third-party complaint "alleges claims that may be covered under the . . . [P]olicy." *Tyco*, 2004 NY Slip Op 50160U at *8; *see also Axis Reins. Co.*, 2008 U.S. Dist. LEXIS 53921, at *5; *Kozlowski*, 792 N.Y.S.2d at 402. In light of the fact that this Court previously held that genuine disputes of material fact exist with respect to whether 68 of the 74 Tax Strategy complaints named an insured and alleged covered acts, it would be inappropriate, at this juncture, to require the Defendants to pay Defense Costs incurred on account of those 68 Tax Strategy complaints.²⁷

With regard to the remaining six Tax Strategy complaints, five have been resolved. More precisely, *Jack Riggs v. Jenkins & Gilchrist*, (Texas state court) has been dismissed and *John Williams v. Deutsche Bank AG*, (Texas state court); *Robert E. Moore v. Deutsche Bank AG*,

²⁷ Alternatively, to the extent that the any of the subject 68 Tax Strategy actions have been resolved, the Defendants are not obligated to make payments for the Defense Costs incurred at this time for the same reasons discussed in Part V.E.3.a. of this Memorandum Opinion.

(NASD); *Bartly L. Robertson v. Deutsche Bank AG*, (Texas state court); and *William F. and Alice Anderson v. Deutsche Bank AG*, (NASD) have been settled. In that context, just as this Court held with respect to the Exchange Fund Claims, the Defendants are not obligated to make payments for Defense Costs incurred on account of the foregoing actions at this time.²⁸ Rather, there must first be an allocation between covered and uncovered expenses. The only Tax Strategy complaint that is not part of the abovementioned 68 and has not been resolved is *Dr. John C. Shih v. Lee & Goddard, LLP*, (California state court). At this time and on this record, however, the Court lacks sufficient bases to determine whether Defendants are required to make contemporaneous payments for Defense Costs incurred on account of the case of *Dr. John C. Shih v. Lee & Goddard, LLP*, (California state court). Accordingly, Plaintiffs' Cross Motion for Partial Summary Judgment with Respect to Defense Costs Incurred on Account of the Tax Claims is denied at this time on this record.

VI. CONCLUSION

For the reasons set forth fully in this Memorandum Opinion, this Court concludes as follows:

1. Plaintiffs' Motion for Partial Summary Judgment with Respect to Defense Costs Incurred on Account of the Exchange Fund Claims is granted in part and denied in part. This Court finds that Exclusion (b) of the Policy does not bar coverage for actions filed against an Organization(s) for Wrongful Acts that occurred prior to September 1, 1997. Therefore, Plaintiffs' Motion is granted to the extent that it seeks coverage for pre-September 1, 1997 Wrongful Acts. Furthermore, this Court finds that Endorsement Number 5 only affords coverage for Wrongful Acts that predate June 4, 1999. Therefore, Plaintiffs' Motion is denied to the

²⁸ This Court's conclusion flows from the reasoning set forth in Part V.E.3.a. of this Memorandum Opinion.

extent that it seeks coverage for acts that occurred after June 4, 1999. Additionally, this Court finds that the Policy imposes a duty upon Defendants to contemporaneously pay all Defense Costs as incurred on account of the Exchange Fund Claims. However, with respect to the five actions underlying the Exchange Fund Claims that have been resolved, the Defendants are not required to make payments for the Defense Costs incurred on account of those actions at this time. Therefore, Plaintiffs' Motion is denied to the extent that it seeks payment of all Defense Costs incurred on account of the third-party actions that have already resolved. Lastly, this Court finds that, with regard to the one action underlying the Exchange Fund Claims that is still pending, *White v. ABMS*, No. GIC 842750 (Cal. Super. Ct.), the Defendants are obligated to make contemporaneous payments of Defense Costs incurred, subject to recoupment. As such, Plaintiffs' Motion is granted to the extent that it seeks payment of all Defense Costs incurred on account of the *White v. ABMS*, No. GIC 842750 (Cal. Super. Ct.) case.

2. Defendants' Cross Motion for Summary Judgment as to the Exchange Fund Claims is granted in part and denied in part. This Court finds that Exclusion (b) of the Policy does not bar coverage for actions filed against an Organization(s) for Wrongful Acts that occurred prior to September 1, 1997. Therefore, Defendants' Motion is denied to the extent that it seeks to deny coverage for pre-September 1, 1997 Wrongful Acts. Furthermore, this Court finds that Endorsement Number 5 only affords coverage for Wrongful Acts that predate June 4, 1999. Therefore, Defendants' Motion is granted to the extent that it seeks to deny coverage for acts that occurred after June 4, 1999.

3. Defendants' Motion for Partial Summary Judgment as to Plaintiffs' Tenth and Eleventh Causes of Action Pertaining to Coverage for the Boston Chicken Action is denied. This Court finds that Exclusion (b) of the Policy does not bar coverage for actions filed against

an Organization(s) for Wrongful Acts that occurred prior to September 1, 1997. Therefore, this Court finds that coverage exists for the Plaintiffs' Boston Chicken Claim. Accordingly, Defendants' Motion, which seeks to deny coverage for pre-September 1, 1997 Wrongful Acts, is denied.

4. Plaintiffs' Cross Motion for Partial Summary Judgment with Respect to Coverage for the Boston Chicken Claim is granted. This Court finds that Exclusion (b) of the Policy does not bar coverage for actions filed against Organizations for Wrongful Acts that occurred prior to September 1, 1997. Therefore, this Court finds that coverage exists for Plaintiffs' Boston Chicken Claim. Accordingly, Plaintiffs' Motion, which seeks a declaration as to the existence of coverage for pre-September 1, 1997 Wrongful Acts, is granted.

5. Defendants' Motion for Partial Summary Judgment with Respect to 68 Tax Strategy Complaints is granted in part and denied in part. This Court finds that Endorsement Number 5 only affords coverage for Wrongful Acts that predate June 4, 1999. Therefore, Defendants' Motion is granted to the extent that it seeks to deny coverage for acts that occurred after June 4, 1999. Moreover, this Court finds that there are genuine disputes of material fact regarding (1) whether the 68 Tax Strategy complaints name an insured; and (2) whether the 68 Tax Strategy complaints allege Wrongful Acts that predate June 4. Therefore, Defendants' Motion is denied to the extent that it seeks to deny any and all coverage for the named 68 Tax Strategy complaints.

6. Plaintiffs' Cross Motion for Partial Summary Judgment with Respect to Defense Costs Incurred on Account of the Tax Claims is granted in part and denied in part. This Court finds that Endorsement Number 5 only affords coverage for Wrongful Acts that predate June 4, 1999. Therefore, Plaintiffs' Motion is denied to the extent that it seeks coverage for acts that

occurred after June 4, 1999. Moreover, this Court finds that there are genuine disputes of material fact regarding (1) whether the 68 Tax Strategy complaints name an insured; and (2) whether the 68 Tax Strategy complaints allege Wrongful Acts that predate June 4, 1999. Therefore, Plaintiffs' Motion is denied to the extent that it seeks a declaration that coverage exists for the named 68 Tax Strategy complaints. Additionally, Plaintiffs' Motion is denied to the extent that it seeks payment, subject to recoupment, of all Defense Costs incurred on account of the Tax Claims.

June 1, 2009
Date

Stuart R. Berger
Judge, Circuit Court for Baltimore City