RECENT DEVELOPMENTS AFFECTING PROFESSIONALS', OFFICERS', AND DIRECTORS' LIABILITY INSURANCE

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I. Directors and Officers Liability 596
A. Professional Services Exclusion 596
B. Cyber Disclosure Obligations and Liability 598
C. M&A Challenges on the Wane 601
D. Coverage for Government Investigations 604
II. Developments in Accounting Malpractice 606
A. Accounting Malpractice Insurance: Reinstatement Endorsement, A Cautionary Tale 607
B. *In Pari Delicto* Defense: When Is the Plaintiff "in Equal Fault"? 609
C. Varying Applications of the "Ongoing Representation Rule" 612
III. Developments in Agents and Brokers Liability 613
A. Special Relationship 613
B. "Duty to Read" 616
C. Ripeness 618
D. Proving Damages 618
E. Economic Loss Rule 619

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F. Personal Liability of Owner for Conduct in Capacity as Broker Employee 620
G. Conclusion 620

The first part of this article addresses developments in directors and officers insurance coverage over the past year, including the narrowing of the professional services exclusion in the context of service-related claims; the junction between cyber insurance and D&O insurance for responding to potential data breach claims or regulatory investigations; the wane of pre-merger challenges that may leave more D&O resources available for other claims against merging companies; and trends in coverage for governmental investigations. The second part turns to developments over the past year in the specific area of malpractice claims against accounting firms. These decisions have broad implications for professional insurance because they focus largely on the level of fault that a claimant must prove to establish claims against its accountant, which in turn may affect whether the professional may obtain insurance coverage for the claims or will be barred by a conduct-based exclusion. The third and final part discusses developments in the specific area of insurance broker and agent liability and considers varied topics, including when a "special" relationship exists between a policyholder and its agent or broker that imposes fiduciary or similar duties on the agent or broker, the application of the economic loss rule in broker liability cases, and the interplay of statutes of limitations with the policyholder's duty to read its policy.

I. DIRECTORS AND OFFICERS LIABILITY

The D&O arena consistently generates changes and challenges for managements and their insurers, and this past year was no exception. This survey examines one significant change and three rising challenges deemed by the authors to be especially noteworthy: (1) disputes involving the scope of the professional services exclusion in D&O policies, (2) cyber disclosure obligations, (3) waning merger/acquisition lawsuits, and (4) coverage expectations for government investigations under D&O policies.

A. *Professional Services Exclusion*

This past year, federal courts in Maryland and Illinois furthered the trend of clarifying the narrow application of the professional services exclusion in D&O policies by highlighting the distinction between actual professional services and other acts that are merely related to the professional service. Insurers traditionally apply the professional services exclusion broadly as a means to avoid liability that could or should be covered under an errors and omissions insurance policy. On the other hand,

D&O insureds—with some support in the common law, including the two cases discussed below—apply a very narrow definition to the term professional service.

The first case for discussion is *Education Affiliates Inc. v. Federal Insurance Co.*,[1] in which a Maryland court rejected the insurer's broad application of the professional services exclusion in the context of a series of claims against for-profit post-secondary educational institutions. Policyholder Education Affiliates received a subpoena issued by the Florida attorney general's office, which subsequently became a complaint alleging that it used deceptive marketing and sales practices. Later, two groups of former students filed civil complaints alleging the insured's marketing and advertising contained false statements concerning accreditation, quality of education, cost, and job prospects following graduation.

The insurer denied coverage under a D&O policy issued to the insured due in part to the professional services exclusion, which provided that there is no coverage "for" any actual or alleged error, misstatement, act, etc. "in connection with the rendering of, or actual or alleged failure to render, any professional services for others by any person or entity otherwise entitled to coverage under this Coverage Section . . ."[2] The insured filed a declaratory judgment action in Maryland federal court challenging the denial.

The court ultimately found the professional services exclusion did not apply. The court cited to a Fourth Circuit case holding "practices that are 'common to most businesses' and do not require 'specialized knowledge separate and apart from that required in *any* business' are not professional services."[3] Significantly, the *Education Affiliates* court pointed out that under the Fourth Circuit case, if routine services qualified as professional services, coverage "would be practically eviscerated."[4]

The *Education Affiliates* court agreed with the insured that the *marketing* of professional services does not constitute the *rendering* of professional services.[5] Moreover, marketing is for the insured's own benefit, not the benefit of others, as required by the exclusion. The court stated "[t]he fact that the marketing relates to the professional services to be rendered to others cannot be said to conflate the two because, in light of the fact [the insured's] core business is the rendering of educative services to others, such conflation would provide an evisceration of coverage here."[6]

1. No. 15-CV-1624, 2016 WL 4059159 (D. Md. July 28, 2016).
2. *Id.* at *2.
3. *Id.* (quoting Liberty Life Ins. Co. v. Travelers Indem. Co. of Ill., No. 98-1674, 1999 WL 417436, at *2 (4th Cir. May 5, 1999)).
4. *Id.* (citing *Liberty Life*, 1999 WL 417436, at *3).
5. *Id.* at *2.
6. *Id.*

For the professional services exclusion to apply under the *Education Affiliates* analysis, thus, the professional service itself, not other routine business or administrative activities that are ancillary to the professional service, must be at the root of the claim. Notably, the policy at issue in *Education Affiliates* did not use the more expansive "arising out of, related to, or in any way involving" language in its preamble, instead using the more limited "for." Based on the court's opinion, though, it does not appear that the decision turned on that distinction. Allowing a more expansive preamble to exclude the claim in that case would still run counter to the court's coverage evisceration rationale—insureds that provide professional services would find it difficult to ever obtain coverage under a D&O policy if non-professional services connected to the professional service were excluded.

An Illinois federal court echoed the same sentiment in *Caveo, LLC v. Citizens Insurance Co. of America, Inc.*[7] In that case, a consulting company was accused of using a competitor's copyrighted material in a public webinar. The insurer asserted its professional services exclusion and denied coverage. The U.S. District Court for the Northern District of Illinois ruled against the insurer, finding "Caveo is not an advertising company; it is a consulting company. Its solicitation of customers [by participating in a webinar] . . . did not constitute the provision of a professional service."[8] Therefore, as in *Education Affiliates*, the court focused on the professional service offered by the insured and analyzed whether the alleged acts concerned the actual professional service or were merely an ancillary act.

Education Affiliates and *Caveo* highlight the continuing tension between insureds and insurers regarding the professional services exclusion. For now, it appears that only a claim that focuses more on the insured's services and less on tasks incidental to that service will likely trigger the exclusion. Nonetheless, directors and officers should carefully review their entire policy, including the professional services exclusion, to see whether it might impede D&O coverage for claims related to the insured's business operations. If so, other insurance options may be prudent to consider for responding to these risks.

B. *Cyber Disclosure Obligations and Liability*

As data breaches become more and more common across companies of all types and sizes, the line between cyber coverage and D&O coverage continues to blur. Although there are innumerable ways in which a claim could trigger both policies, one type of claim that has repeatedly threatened to rear its ugly head over the past several years are claims against

7. No. 15-CV-6200, 2016 WL 5477537 (N.D. Ill. Sept. 29, 2016).
8. *Id.* at *4 (citing Standard Mut. Ins. Co. v Lay, 2 N.E.3d 1253 (Ill. App. Ct. 2014)).

a company for failure to report "material" breaches or cyber incidents. The recent Yahoo breach may be the impetus for regulators to sharpen their focus on such failures to report. Currently, we think of disclosure obligations as being a "D&O" issue, while we see breaches as a "cyber" issue. Where do we park the hybrid?

The murky categorization of a failure to report claim for insurance purposes tracks the murkiness of the reporting obligation itself. The SEC Division of Corporate Finance issued its Disclosure Guidance on Cybersecurity on October 13, 2011, but this is neither an official rule nor guidance officially adopted by the SEC.[9] Rather, it is simply a forceful suggestion for companies on how, when, and what to report to regulators when they experience a breach or cyber incident. Indeed, the Disclosure Guidance themselves recognize the Catch-22 inherent in disclosing information about cyber incidents. On the one hand, the Disclosure Guidance recommends that companies disclose to regulators certain risk factors associated with cyber incidents, which can include aspects of the business, outsourced functions, or prior cyber incidents that could give rise to material cybersecurity risks; risks related to cyber incidents that may remain undetected for long periods of time; and descriptions of relevant insurance. The Disclosure Guidance notes these disclosures are particularly important when they are the significant factors "that make an investment in the company speculative or risky."[10] On the other hand, "detailed disclosures could compromise cybersecurity efforts[11] . . . and we emphasize that disclosures of that nature are not required under the federal securities laws."[12]

Perhaps recognizing it is difficult for a company to walk the thin line between whether a disclosure is "material" and whether the disclosure will impede the company's own cybersecurity efforts (or law enforcement efforts in investigating a breach), the SEC has yet to bring a regulatory enforcement action against a company for failure to disclose a cyber incident.[13] However, a regulatory enforcement action seems inevitable. At a recent cybersecurity conference, SEC Commissioner Luis Aguilar em-

9. SEC Division of Corporation Finance, *CF Disclosure Guidance: Topic No. 2*, Oct. 13, 2011, https://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm.

10. *Id.*

11. It is not common for companies to file a disclosure with the SEC if a breach is deemed immaterial. For example, Sony never filed a notice with the SEC for its 2014 breach.

12. *CF Disclosure Guidance: Topic No. 2*, *supra* note 9.

13. Although this article focuses on potential SEC enforcement actions, the Federal Trade Commission notably brought suit against Wyndham Hotels and Resorts, alleging that Wyndham's lack of cybersecurity was an unfair trade or business practice that exposed consumer payment information in a data breach. Wyndham agreed to settle the action in December 2015 with the proposed court order requiring Wyndham to submit to annual security audits for the next twenty years. *See* Fed. Trade Comm'n v. Wyndham Worldwide, 799 F.3d 236 (3d Cir. 2015); *see also* Press Release, Federal Trade Comm'n, Wyndham Settles FTC Charges It Unfairly Placed Consumers' Payment Card Information At Risk,

phasized that in light of the frequency of cyber incidents involving companies of "all shapes and sizes," "ensuring the adequacy of a company's cybersecurity measures needs to be a critical part of a board of director's risk oversight responsibilities."[14] The buzz in the legal community is that there will be an increase in class actions filed to address companies' lack of disclosure for cyber incidents and the regulatory enforcement action floodgates may also soon open; at least one senator has called for an investigation of Yahoo after a September 2016 announcement of a massive data breach.[15]

The Yahoo breach may be the bellwether for regulatory investigation and follow-on insurance coverage disputes. The breach occurred in late 2014. Although it is not clear yet exactly when the breach was discovered, Yahoo officially announced the breach on September 22, 2016.[16] Yahoo believes the attack was carried out by a state-sponsored actor, affecting at least 500 million accounts, and that the stolen account information may have included names, email addresses, telephone numbers, dates of birth, and encrypted passwords, but not unprotected passwords, payment card data, or bank account information.[17]

What makes the Yahoo breach the perfect test case for whether the SEC will file a regulatory action is the pending $4.8 billion acquisition of Yahoo by Verizon.[18] With the enormous deal on the horizon, and with even Verizon's general counsel questioning whether the breach was a material event[19] (implying that Yahoo failed to disclose the breach in order to allow the acquisition to go forward with Yahoo's value inflated), it may raise red flags at the SEC. Yahoo is also already facing several class action lawsuits from consumers for failure to protect their data and information and particularly for taking so long to discover and disclose the breach.[20]

Dec. 9, 2015, https://www.ftc.gov/news-events/press-releases/2015/12/wyndham-settles-ftc-charges-it-unfairly-placed-consumers-payment.

14. Kim Holmes, *Data Breach and Due Diligence: Why Boards Need to Get Involved with Cyber Insurance*, ID EXPERTS, Sept. 19, 2016, https://www2.idexpertscorp.com/blog/single/data-breach-due-diligence-why-boards-need-to-get-involved-cyber-insurance.

15. *This Senator Is Calling for an Investigation of Yahoo's Security Practices*, FORTUNE, Dec. 15, 2016 (citing Sen. Mark Warner (D-VA) "who called the hacks 'deeply troubling'").

16. Bob Lord, *An Important Message About Yahoo User Security*, YAHOO, Sept. 22, 2016, https://yahoo.tumblr.com/post/150781911849/an-important-message-about-yahoo-user-security.

17. *Id.*

18. Thomas Gryta & Deepa Seetharaman, *Verizon Puts Yahoo on Notice After Data Breach*, WALL ST. J., Oct. 13, 2016, http://www.wsj.com/articles/verizon-sees-yahoo-data-breach-as-material-to-takeover-1476386718.

19. *Id.*

20. Steven Trader, *Yahoo Battered With Class Action Over 2014 Data Breach*, LAW360, Sept. 23, 2016, http://www.law360.com/articles/843922/yahoo-battered-with-class-actions-over-2014-data-breach.

Yahoo does not seem to consider the data breach as "material" for potential investors because its September 9, 2016, SEC filing stated it was not aware of any third-parties alleging security breaches or "unauthorized access or unauthorized use" of personal information that could significantly impact its business.[21] Specifically, Yahoo officials stated they consider the cyber incident to have been low risk, implying that the incident was not "material" for regulatory purposes because all stolen passwords were encrypted and because of the low likelihood that the supposed state-sponsored hacker would be interested in consumers' financial data.[22]

The Yahoo breach comes at a critical turning point in the insurance world as cyber breaches become more and more frequent, but regulators have yet to establish a pattern of filing enforcement actions for failure to disclose material information in connection with such cyber incidents. Whether spurred on by Yahoo or the next headline-grabbing breach, increased activity by the SEC and other regulators seems inevitable. Insurance coverage disputes are equally certain to follow. The sheer cost of responding to regulators, monitoring credit for affected customers, defending multiple litigations, and resolving liability claims could be mind-boggling and will spur insurers to evaluate all possible coverage and exclusionary arguments for data breach regulatory claims.

C. *M&A Challenges on the Wane*

Over the last decade, merger objection suits became an almost inherent part of doing business in the mergers and acquisitions world. Beginning in the mid-2000s, and peaking in 2013, shareholders challenged nearly every merger. Typically, shareholders would file suit shortly after the announcement of a merger, alleging a broad range of technical misgivings or breaches of fiduciary duties and attempting to enjoin the transaction. In an effort to move forward, the merger parties frequently settled such cases through what became known as disclosure-only settlements. These settlements arguably yielded little value to shareholders. The settlement consideration was typically limited to additional disclosure and proxy amendments. Financial consideration was generally limited to a fee awarded to plaintiffs' counsel.

The recent decision by Delaware Chancellor Andre Bouchard in *In re Trulia, Inc. Stockholder Litigation*,[23] however, suggests that rampant merger objection suits may be on the way out. *Trulia* rejected a proposed disclosure-only settlement arising out of Zillow's acquisition of Trulia. Chancellor Bouchard took the opportunity in his opinion to solidify a

21. Yahoo Schedule 14A, Exhibit A thereto, Paragraph 2.16(p) (Sept. 9, 2016), https://investor.yahoo.net/secfiling.cfm?filingID=1193125-16-706578&CIK=1011006.
22. Gryta & Seetharaman, *supra* note 18.
23. 129 A.3d 884 (Del. Ch. 2016).

seemingly growing trend in Delaware of discouraging disclosure-only settlements. The court identified a number of concerns generally with merger objection suits, which in the court's view "optimally should be adjudicated outside the context of a proposed settlement."[24] However, Chancellor Bouchard noted that should suits continue to be filed in search of disclosure-only settlements, practitioners should expect "increase[ed] vigilan[ce]" regarding the "reasonableness of the 'give' and 'get' of such settlements" and cautioned that supplemental disclosures associated with these settlements must "address a plainly material misrepresentation or omission."[25] In other words, absent a truly meaningful additional disclosure, the court was signaling the end of the award of significant plaintiffs' fees.

Many practitioners speculated that *Trulia* could have a dramatic impact on the rate merger challenges were filed.[26] That speculation was confirmed on August 2, 2016, when Cornerstone Research released the results of its shareholder litigation study. Merger litigation for deals valued over $100 million had already fallen from 93 percent in 2014 to 84 percent in 2015.[27] However, that decline accelerated in the first half of 2016 following *Trulia* dropping to an eight-year low of 64 percent.[28]

The reduction in filing rates was especially pronounced in Delaware. In the first three quarters of 2015, almost 61 percent of all deal challenges were filed in Delaware.[29] By the end of the first quarter 2016 following *Trulia*, that number plunged to 26 percent.[30] Delaware had shored up shareholder litigation at home; but had it simply compelled litigants to file their challenges elsewhere?[31] The question (or concern) was, would other states follow Delaware's lead?

For now, other states appear to be more hospitable than Delaware to disclosure-only settlements,[32] but that may be a short-lived distinction.

24. *Id.* at 887.
25. *Id.* at 898.
26. Kevin LaCroix, *Delaware Chancellor Rejects Disclosure-Only Settlement, Signals What's Next for Merger Objection Suits*, D&O Diary, Jan. 26, 2016, http://www.dandodiary.com/2016/01/articles/shareholders-derivative-litigation/delaware-chancellor-rejects-disclosure-only-settlement-signals-whats-next-for-merger-objection-suits/.
27. *Shareholder Litigation Involving Acquisition of Public Companies: Review of 2015 and 1H 2016 M&A Litigation*, Cornerstone Research, at 1, https://www.cornerstone.com/Publications/Reports/Shareholder-Litigation-Involving-Acquisitions-2016.
28. *Id.*
29. *Id.* at 3.
30. *Id.*
31. Kevin LaCroix, *Cornerstone Research: Since Trulia, Merger Objection Lawsuit Filings Have Plunged*, D&O Diary, Aug. 2, 2016, http://www.dandodiary.com/2016/08/articles/director-and-officer-liability/cornerstone-research-since-trulia-merger-objection-lawsuit-filings-have-plunged/.
32. In its report, Cornerstone noted that "[e]arly anecdotal evidence indicates that it is possible" that other courts will continue to approve disclosure-only settlements. However, Cornerstone also noted this evidence was based upon "a small number of disclosure-only set-

There is some evidence of the creeping influence of the *Trulia* decision to other jurisdictions, most notably the *Hayes v. Walgreen Co. (In re Walgreen)* case in the Seventh Circuit.[33]

In *Walgreen*, Judge Richard Posner of the Seventh Circuit issued a scathing opinion that cited heavily to *Trulia*, expounded upon it, and concluded that disclosure-only settlements are a "racket":

> The type of class action illustrated by this case—the class action that yields fees for class counsel and nothing for the class—is no better than a racket. It must end. No class action settlement that yields zero benefits for the class should be approved and a class action that seeks only worthless benefits for the class should be dismissed out of hand.[34]

The *Walgreen* decision is not necessarily the death knell for disclosure-only settlements, but it shows that the *Trulia* analysis has been adopted outside of Delaware and could eventually become a majority rule, particularly when considering the influence and stature of Judge Posner, who already concurred.

If *Trulia* and *Walgreen* are the new normal, the number of merger lawsuits should continue to fall. Most corporations and their D&O insurers will likely applaud this result. Yet some commentators wonder if a world without disclosure-only settlements might prove worse—that disclosure-only settlements are a necessary evil that prevents post-merger litigation, which can drag on for years and prove much more costly.[35] So, which is it? Should the impending death of disclosure-only settlements be cheered or feared? At the end of the day, the result is not likely to be binary or mutually exclusive. As the Cornerstone study showed, *Trulia* and its progeny will likely contribute to the continued decline of merger challenge suits and thus a reduction in claims against corporate defendants and their insurers. This in turn may increase the rate of post-closure litigation because it will become increasingly difficult to reach an approved settlement prior to the finalization of a merger deal.

Ultimately, it remains to be seen whether decisions such as *Trulia* will truly be fiscally beneficial or require greater capital outlay from corporate defendants or their D&O insurers. But if the decline of disclosure-only settlements translates to a mere exchange of high-volume low severity claims (pre-merger settlements) for low-volume high severity claims

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tlements" approved after but reached before the *Trulia* decision was rendered. *Shareholder Litigation Involving Acquisition of Public Companies*, *supra* note 26.

33. 832 F.3d 718 (7th Cir. 2016).

34. *Id.* at 724 (citing Robert F. Booth Trust v. Crowley, 687 F.3d 314, 319 (7th Cir. 2012)).

35. Doug Greene, *The Decline of the Disclosure-Only Settlement: Will We Regret What We Wished For?*, D&O Diary, Aug. 17, 2016, http://www.dandodiscourse.com/2016/08/17/the-decline-of-the-disclosure-only-settlement-will-we-regret-what-we-wished-for/.

(post-merger settlements), it is quite possible that the overall financial impact may be fairly muted. Only one thing is certain: disclosure-only settlements are on their way out and the frequency of merger challenges should continue to fall.

D. *Coverage for Government Investigations*

Another fruitful area of common dispute between D&O insurers and their insureds is whether and when the D&O policy should respond to a government investigation. Numerous courts have weighed in on the subject, although few, if any, majority rules have emerged. Perhaps the disputes continue due to the absence of such rules. Or perhaps they continue (and always will) because investigations are amorphous by nature, resistant to a four-corners comparison under the ubiquitous D&O coverage trigger of "a claim for a wrongful act."

This article examines two recent decisions approaching coverage for regulatory and internal investigations in different ways. At first blush, the decision by the Ohio Court of Appeals in *Eighth Floor Promotions v. Cincinnati Insurance Cos.*[36] and the decision by the U.S. District Court for the District of Colorado in *Musclepharm Corp. v. Liberty Insurance Underwriters, Inc.*[37] are distinguishable. *Eighth Floor Promotions* focused on whether the internal investigation for which the policyholder sought coverage rose to the level of a "claim" under its policy. *Musclepharm*, in contrast, questioned whether a regulatory investigation accused the insured of a "wrongful act." Viewed together, however, these two cases suggest that there may be a tangible distinction between *responding* to an investigation and *defending* against one and that only the latter category of investigations should be covered under D&O insurance.[38]

By way of background, many courts have analyzed whether an investigation constitutes a "claim" as defined under the particular D&O policy, or, more specifically, whether an investigatory device in question (e.g., subpoena) is a "written demand for non-monetary relief." These decisions go both ways.[39] Fewer courts have considered whether an investigation or an

36. No. 10-15-19, 2016 WL 5900078 (Ohio Ct. App. Oct. 11, 2016).

37. No. 15-CV-00555-REB-KMT, 2016 WL 4179784 (D. Colo. Aug. 4, 2016).

38. For purposes of this article, we ignore public company D&O policies that include "pre-claim inquiry" coverage, along with "investigation policies" now available in the market.

39. *See, e.g.*, Polychron v. Crum & Forster Ins. Cos., 916 F.2d 461, 463 (8th Cir. 1990); Richardson Elecs., Ltd. v. Fed. Ins. Co., 120 F. Supp. 2d 698, 700–01 (N.D. Ill. 2000); Dan Nelson Auto. Grp., Inc. v. Universal Underwriters Grp., 2008 WL 170084, at *5 (D.S.D. Jan. 15, 2008); Joseph P. Bornstein, Ltd. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 828 F.2d 242, 244 (4th Cir. 1987); MBIA Inc. v. Fed. Ins. Co., 652 F.3d 152, 159 (2d Cir. 2011); Minuteman Int'l, Inc. v. Great Am. Ins. Co., 2004 WL 603482, at *3–4 (N.D. Ill. Mar. 22, 2004); Agilis Benefits Servs. LLC v. Travelers Cas. & Sur. Co. of Am., 2010 WL 8573372, at *7 (E.D. Tex. Apr. 30, 2010); Syracuse Univ. v. Nat'l Union Fire Ins.

investigatory device alleges a wrongful act in the first place. Those that have, however, also have reached disparate results.[40] Putting both of these approaches into play, *Eighth Floor Promotions* analyzes whether an investigatory device (e.g., subpoena) was a claim, i.e., a written demand for non-monetary relief. *Musclepharm* focuses instead on whether the investigatory device alleged a wrongful act. A close look at the two decisions, however, shows that they simply attacked the same problem from two different angles.

In *Eighth Floor Promotions*, a software industry group issued a letter to the insured advising that the insured was using unlicensed or unauthorized copies of certain business software, compelling the insured to undertake an internal investigation to assess the infringing use. That is, the group offered the insured, in lieu of litigation, the opportunity to self-audit its computer systems to determine whether it held and was using the software. The D&O insurer denied coverage on the basis that the letter was not a claim, i.e., a written demand for relief, "because it only advised [the insured] that [the group] was investigating possible instances of copyright infringement and gave [the insured] an opportunity to conduct its own company-wide investigation to determine whether any copyright infringement had occurred."[41]

The court concluded that the letter rose to the level of a claim—a written demand for relief—because the letter offered the insured a self-auditing option as an alternative to litigation and stated that "senior management [of the insured] may not have had an opportunity to investigate or consider *the ramifications of using unlicensed software*."[42] To the court, this showed the group had already determined that violations had occurred and that it was merely investigating the extent of such violations. Accordingly, the court found the letter was "for relief" (i.e., it was a claim) because it accused the insured of wrongdoing and sought to enforce a corresponding right through the threat of litigation.[43]

In *Musclepharm*, the court never considered whether the SEC investigation at issue amounted to a claim. Instead, the court ended its inquiry when it concluded that the investigation did not allege a wrongful act, i.e., "any actual or alleged error, misstatement, misleading statement, act, omission, [etc.]"[44] The court based this conclusion on the fact that none of the SEC's correspondence alleged, or "asserted to be true," any-

Co. of Pittsburgh, PA, 2013 WL 3357812, at *3 (N.Y. Sup. Ct. Mar. 7, 2013); RSUI Indem. Co. v. Desai, 2014 WL 4347821, at *4 (M.D. Fla. Sept. 2, 2014).

40. *See, e.g.*, *Syracuse Univ.*, 2013 WL 3357812, at *3; Nat'l Stock Exch. v. Fed. Ins. Co., 2007 WL 1030293 (N.D. Ill. Mar. 30, 2007); Emp'rs Fire Ins. Co. v. ProMedica Health Sys., 524 F. App'x 241, 247 (6th Cir. 2013).

41. *Eighth Floor Promotions*, 2016 WL 5900078, at *8.

42. *Id.* at *9 (emphasis in original)

43. *Id.*

44. *Musclepharm*, 2016 WL 4179784, at *6.

thing.[45] The SEC's initial voluntary disclosure letter stated the inquiry "should not be construed as an indication that the [SEC] or its staff believes any violation of law has occurred," and a subsequent SEC order stated only that the SEC had information that "*if true* tends to show" various "*possible* violation[s]" of the securities laws which "*may have*" occurred.[46] To the court, the insured was not being accused of anything.

Neither *Eighth Floor Promotions* nor *Musclepharm* truly broke any new ground. What makes the cases worthy of discussion is how the courts tackled the same coverage dispute under two policy provisions by focusing on the same key inquiry—is the investigating body accusing the insured of wrongdoing, or is it simply trying to determine whether any wrongdoing has occurred?

Given the broad array of matters that fall within the ambit "investigations," it is highly unlikely the courts will ever create a rigid rule, such as "a subpoena for documents as part of an investigation is (never/always) a written demand for non-monetary relief and/or for a wrongful act." In the absence of such a rule, the collective focus of *Eighth Floor Promotions* and *Musclepharm* courts may be the single best predictor of coverage for investigations: is the insured *really* being accused of something?

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45. *Id.* at *4–6.
46. *Id.* at *4 (emphasis in original).