Coverage for Corruption

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A comparison of insurance policy issues arising from the US FCPA and likely to arise under the UK Bribery Act 2010 by White and Williams LLP[1] *and RPC*

D&O and E&O insurers were forced to reassess the coverage offered for defending regulatory investigations and liabilities incurred in relation to alleged corporate criminal activity and individual corruption when the UK Bribery Act came into force on July 1, 2011. In this article, leading insurance lawyers White and Williams LLP in the United States and RPC of London describe the US experience under the US Foreign Corrupt Practices Act (FCPA) and compare the likely position under the UK's Bribery Act.

ANTI-CORRUPTION LEGISLATION

The FCPA was a world leader in anti-corruption legislation, specifically targeting the bribery of foreign officials since 1977. Over the past five years, the number of FCPA enforcement actions have skyrocketed, as have the amount of investigation costs incurred and penalties assessed. Responding to international pressure and the consensus reached amongst the OECD, World Bank, the UN, the Council of Europe, G8, G20 and a number of NGOs, the UK has now introduced a further reaching anti-corruption law to codify and strengthen its pre-existing common law regime. The Bribery Act makes bribing and receiving bribes an offense (creating an “active” and a ”passive” offense), in both the public and private sectors, anywhere in the world by anyone with a ”close connection” with the UK. Corporate criminal liability is imposed where an ” associated person” bribes for the business' advantage, subject to the corporate establishing a defense of having "adequate procedures" to prevent such conduct.

Under the FCPA, non-regulated, *de minimis,* “facilitation payments” aimed at expediting routine governmental action are permitted but the Bribery Act prohibits even these. UK Ministry of Justice guidance suggests prosecution for small facilitation payments will, however, be unlikely until global behavioral changes are inculcated sufficiently to require that even facilitation payments stop.

In its application to the private sector, both within the jurisdiction as well as its global territorial reach, the scope of the Bribery Act goes broader and deeper than the FCPA or common law. By introducing a strict liability corporate offense, it also circumvents the familiar problems of attribution of corporate liability by which a controlling mind and will of the company must be shown responsible.

Against this background, the Bribery Act is likely to have a significant impact on UK corporates and lessons from the US experience with the FCPA will be valuable to UK insurers. For what the UK might lack in litigious culture it more than makes up with a comparably tougher piece of criminal legislation.

WHITE AND WILLIAMS' EXPERIENCE OF THE FCPA

The primary insurance issue concerns the payment of defense costs. In the US, it is understood generally that D&O policies do not provide coverage for the fines and penalties resulting from FCPA violations. But defense costs and expenses can be huge – even exceeding $100 million, depending on the breadth of the allegations and the number of individuals targeted, each of whom would likely retain separate counsel. We find that insureds fervently pursue coverage for defense costs because of the significant costs attendant to the defense and settlement of FCPA-related claims, and can be surprised by the limitations placed on investigation cover in the typical D&O policy.

Trigger of Coverage

A common D&O issue in the United States is whether a company's defense costs are covered if the costs are incurred prior to a formal proceeding or Claim being made, as a result of an informal or internal investigation (or both). In recent years, corporate insureds have proactively initiated internal investigations upon learning of potential FCPA violations perpetrated by their officers or employees. The practice of voluntary compliance stands in stark contrast to the more reactionary position assumed by corporate insureds during the latter part of the 20th century. The rationale behind voluntary compliance is that it may persuade the SEC or the DOJ not to prosecute, or may result in a reduced fine or penalty levied on the corporate insured in exchange for the corporate insured's cooperation in the government's prosecution of the allegedly culpable officers and employees.

An outgrowth of the rise of internal investigations is that many of the costs may be shifted to the "pre-Claim" phase. Indeed, Avon Corporation has reportedly incurred in excess of $200 million in legal costs[2] in connection with its internal investigation into potential FCPA violations by its employees.[3] Given the amount of costs incurred in connection with internal investigations, corporate insureds have increasingly pressured D&O insurers to provide coverage for such costs on the ground that they are "reasonably related to" or "redound to the benefit of" a covered Claim (*i.e.,* a related shareholder derivative action or securities class action). The "reasonable relatedness" argument has not generally been a fruitful avenue for finding coverage for pre-Claim costs.[4]

Thus the question is whether an insurer is required to begin paying for the defense when the insured first begins to incur costs, by for example, producing documents or participating in an interview by the DOJ or the SEC, or, when the insured actually has a formal "Claim" made against it. The answer often depends on the breadth of the definition of "Claim" in the policy. Although the definition of "Claim" varies, the general trend among courts in the United States is that only a "formal" regulatory investigation is a "claim."[5] Another common triggering point for a "Claim" is the point at which the SEC or DOJ identifies individual(s) as targets of the investigation.

Determining whether an investigation by the SEC is a "Claim" fits relatively neatly within the existing legal framework because the SEC may issue a "formal" order of investigation to the corporate insured and/or a Wells Notice[6] to the individual directors, officers or employees who are under investigation. These actions ordinarily constitute a Claim, and trigger the Policy. On the other hand, when the SEC issues a "Notice of Inquiry," which requests information from a company but states that the Notice should not be interpreted as an indication that the SEC believes that a crime was committed, then this is not a Claim, unless the definition of "Claim" is written to include inquiries or investigations.

Under standard D&O policies there is typically no cover for the company's own costs incurred in undertaking an internal investigation regarding a possible FCPA violation, nor is there cover for responding to informal investigations by regulators unless an individual is targeted in writing, and then only for the costs incurred by that particular individual. In the context of a criminal investigation by the DOJ, courts have split on the issue of whether a subpoena issued by a grand jury is a "Claim" under a D&O policy, although as always the actual policy language is key.[7] Even if the SEC issues a subpoena to a director and officer, that subpoena may simply seek to obtain information and documents from the director and officer as a witness and does not necessarily mean that the SEC is targeting that individual or is alleging that the individual committed any wrongdoing. D&O insurers face similar uncertainty in the context of an investigation by the Financial Services Authority or other non-US regulator investigating allegations of bribery.

As the need for investigation cover has grown, some D&O insurers have expanded the definition of "Claim" to include coverage for early stages of regulatory investigations – even where the particular director or officer may not be a target of the investigation.[8] Alternatively, some D&O policies now offer coverage for "Pre-Claim Inquiry" costs incurred by "Insured Persons" in connection with interviews and/or requests to produce documents as part of a regulatory or internal investigation.[9] Moreover, one major insurer has released a separate policy that covers costs incurred in responding to an SEC investigation of any securities violation, and the policy also covers FCPA investigations if the FCPA extension is purchased.[10] A major insurance broker also has created a policy that covers legal, accounting, auditing and consulting costs associated with FCPA and Bribery Act investigations.[11] The broker reports that interest in the product is strong, although there are pricing issues. We note that a stand-alone policy makes sense for insureds who are concerned that the policy limits may be exhausted by governmental investigations without anything left for the D&Os.

Conduct Exclusions

The intentional acts and/or personal profit exclusions in D&O policies (the Conduct Exclusions) may provide a basis for an insurer to deny coverage, and potentially recoup the costs advanced to the directors and officers that pleaded guilty or were convicted of a criminal offense under the FCPA. The application of the Conduct Exclusions is typically limited by a clause that requires that the conduct underlying the particular exclusion be established by a "final adjudication." Because of the "final adjudication" limitation, D&O insurers typically advance defense costs under a reservation of rights to insureds named as defendants in an FCPA-related criminal prosecution by the DOJ, a civil proceeding brought by the SEC, a securities class action, and/or a shareholder derivative action arising from the insured's false and misleading public statements regarding FCPA compliance.

Recent developments may cause the conduct exclusion to be invoked more frequently in connection with FCPA claims. Historically, the SEC has agreed to resolve most actions without the defendant admitting or denying the allegations. In such cases the conduct exclusions will never be triggered. However, in October 2011, a US federal judge rejected the practice, refusing to approve a $285 million settlement in a securities fraud case in which the defendant did not admit or deny the allegations.[12] The SEC is appealing this decision, and Congress has called for hearings on the issue, but this could mean that more defendants have to admit to wrongdoing in order to settle the case. In addition, in 2010, as part of its Enforcement Cooperation Initiative, the SEC amended its Enforcement Manual to make it easier to provide immunity to defendants in exchange for cooperation. This may cause more defendants to plead guilty in order to avoid jail time. US courts have held that either a guilty plea by an insured is a "final adjudication" that triggers the exclusion,[13] or that a final adjudication occurs after the insured is sentenced.[14] In civil cases, courts have held that a settlement is not sufficient, and a judgment establishing the underlying intentional or profiteering conduct must be obtained against the insured to trigger the exclusion.[15]

In the event of a “final adjudication” establishing intentional or profiteering conduct, the insurer may be entitled to recoup the defense costs advanced to the insured. Many D&O policies also confer upon the insurer the right to recoup defense costs if it is later determined that coverage is not available. Even if the D&O policy does not expressly provide the insurer the right to recoup, some US jurisdictions allow an insurer to recoup defense and indemnity payments advanced to an insured based on the common law principle of unjust enrichment.[16]

In practice, a D&O insurer’s ability to recoup defense costs advanced to an individual insured depends on the individual’s financial ability to repay. Further, the specific severability language will dictate the extent to which a guilty plea by an individual insured may provide a basis for a D&O insurer to deny coverage for defense costs incurred by other individual insureds.

RPC'S EXPECTATIONS OF THE BRIBERY ACT

In 2011, D&O and E&O insurers saw significant changes to their exposures, particularly from firms and individuals in the financial services regulated sector which account for a substantial part of the claims experience. The introduction of the Bribery Act and, with it, the equivalent of a requirement for all corporates to have "adequate procedures" to prevent corruption introduces the same burdens faced by regulated firms since the creation of the Financial Service Authority (FSA) in 2001 to have adequate anti-financial crime systems and controls. The regulated sector therefore not only represents a substantial source of regulatory defense costs claims in its own right, but also provides rare insight into the likely interpretation of the Bribery Act and its "adequate procedures" defense. The US experience is instructive and the UK can expect similar issues even if not quite the level of costs expenditure.

The FSA is focusing particularly on senior management, directors and even non-executive directors; thereby exposing the D&O insurers who cover them. In preparation for the "shadow split" in the FSA from April 2012, the regulator has been talking up the conduct role of the Financial Conduct Authority (FCA), including a revival of the "treating customers fairly" agenda and particularly the increasing burden to be placed on NEDs as "consumer champions" within firms.

There has reportedly been a manifold increase in the numbers of skilled person reports (known as s.166 reports) required by the FSA into apparent breaches of rules or regulatory principles. These often lead to enforcement action.

The FSA sent a direct message to the insurance sector itself by fining Willis[17] almost £6.9m for failing adequately to counter the risks of bribery and corruption associated with making payments to overseas third parties who assisted in winning business from clients in high-risk jurisdictions.

Recent figures produced by RPC confirm the FSA trend towards focusing on senior managers and imposing individual responsibility in order to press home its "credible deterrence" message. The average fine last year against individuals was up 100%.

Coupled with the introduction of the Bribery Act 2010 in July 2011, the potential exposures for directors and officers in the UK is at an all time high, emphasizing the need for company executives to take out D&O insurance. Legal costs cover for regulatory investigations is an increasing demand on the D&O product for directors of UK companies[18]. Higher demand may give rise to higher premiums or amended policy terms. It is therefore an opportune time for insurers to review their insureds' operations, particularly their "adequate procedures," so as to avoid the worst exposures.

Trigger of Coverage

As in the US, the trigger point for D&O coverage is often uncertain. In response, policies are increasingly drafted with precise definitions of "Claim" to include formal investigations and investigation expenses.

The service on a regulated firm of a ‘Requirement Notice’ obliging them to commission a s.166 report is a formal step, but (at least in principle) only a supervisory measure, not intended to represent the start of adversarial proceedings. The FSA's Notice of Appointment of Investigators is a far clearer line in the sand when a "Claim" or "Investigation" (for policy purposes) is likely to have been made. However, firms will often conduct substantial voluntary investigative work and incur legal and mitigation costs long before even a s.166 report is required. Given the regulatory obligation to self-report anything the regulator would reasonably expect to know,[19] policy wordings that include cover for legal and mitigation costs of dealing with a notified circumstance that may (or, even is likely) to give rise to a claim under the policy are likely to expose insurers far sooner than their underwriters might have imagined when writing the risk.

The Serious Fraud Office (SFO), the agency with primary responsibility for investigations and prosecutions under the Bribery Act, might be assumed to trigger defence costs cover when they carry out dawn raids and arrest directors. However, depending on the policy wording, even such overt and extreme action might not be sufficient to trigger the definition of "Claim."

With a small team and budget, the SFO's express aim is to rely largely on competitors, self-reporting and whistle-blowers within corporates to expose corrupt practices. In a recent high profile case[20] involving a parent entity repaying ill-gotten profits under the Proceeds of Crime Act (POCA), the SFO emphasized the importance of self-reporting by corporates; creating a tension between obligations under insurance policies and commercial considerations as to whether to investigate and self-report in the hope of avoiding worse if found out.

The SFO has said that firms that self-report will face civil rather than criminal proceedings. Corporates are advised to approach SFO when there is a "real issue" requiring remedial action. In its guidance, the SFO suggests that in deciding when this point has been reached, corporates ought to consult with their legal advisers. In fact, it sees them having "a key role".[21]

This creates dilemmas: firstly, whereas a firm or individual may be unlikely to recover defense costs under a policy until the SFO initiates proceedings, failing to self-report leaves open the risk of much costlier subsequent criminal proceedings (which are likely to be covered, at least until an adverse "final adjudication"). Secondly, self-reporting in itself might breach policy terms prohibiting the invitation of a claim. Corporates and their senior managers are therefore increasingly likely to notify insurers of the circumstances in the hope of triggering coverage sooner or, at least, preventing issues arising in the future.

Insurers may consider relying on terms allowing them discretion over whether dealing with circumstances might prevent or mitigate a future civil liability. Policies that provide stand alone legal expenses cover will be more likely to respond at an earlier stage. Voluntary or pre-emptive mitigation measures may be covered by specific language or a separate section but the balance between protecting an insured's brand or regulatory reputation and meeting anticipated or established civil liabilities remains a moot point in insurance law.

Under typical "final adjudication" wordings, insurers will not simply be able to exclude any notification relating to potentially criminal matters under the Bribery Act (without express terms to that effect). The trigger issues experienced in the US (and already in the UK in respect of regulatory investigations) will become key. Although the policy wording will always be determinative of the issue, there are oddities in English law that might cause confusion and thereby generate disputes.

For instance, when considering the point at which litigation is reasonably in contemplation for the purposes of triggering litigation privilege, it was held by the House of Lords in *Re L* that litigation privilege would not arise at all in certain types of investigations which were not adversarial.[22] Whilst the duty to cooperate with the regulator might make it less obvious when FSA action is sufficiently adversarial to trigger cover for defense or mitigation costs under a policy, a Bribery Act investigation ought to be more clear cut but perhaps only once charges have been laid.

Further, an indemnity against civil or criminal liability resulting from the deliberate commission of a crime is not enforceable by the criminal or his representatives.[23] However, a recent case arising out of the UK "phone hacking" scandal stated that the mischief to which this rule of public policy is directed does not include agreements concluded after the criminal event in relation to civil proceedings arising out of it. In *Mulcaire*, the court upheld an agreement by which News Group Newspapers covered the defense costs of the convicted private detective, Glen Mulcaire, for civil proceedings arising out of his "hacking."[24] Composite policies are already structured so as to be likely to cover, say, the entity for civil liabilities arising from the proven criminal conduct of an employing found guilty of a Bribery Act offense, even if that employee's cover is declined thereafter by a conduct exclusion.

In striking contrast, in *Coulson* it was held that the termination agreement between News Group and Andrew Coulson did not cover his legal costs on his arrest because, firstly, he had not yet been charged by the police, and therefore "proceedings" had not commenced, and, secondly, because the termination agreement only covered proceedings arising out of his activities as Editor. The precedent of treating the moment of charge as the trigger for an indemnity might alarm those with tightly worded D&O policies who would expect protection for the costly pre-charge phase of an investigation. The ongoing police investigation into Coulson was into his personal conduct, and because neither party to the proceedings had submitted that his "job entailed the commission of the alleged, or any, criminal offences,"[25] his conduct was deemed to fall outside the indemnity granted. This is reflected in the D&O context where the presumption of innocence until guilt is proven enables cover for defense costs to be advanced in respect of criminal proceedings so long as the Insured acted in a capacity covered by the policy – *i.e.* as a director or officer.

As ever, the insurance market is already adapting, with regulatory and reputational risk products available or in development and on-going consideration of wordings that respond effectively to corporate criminal investigations such as those anticipated under the Bribery Act.

Conduct Exclusions

Similar issues to those described in respect of conduct exclusions and the FCPA arise already under D&O policies in respect of regulatory investigations and prosecutions. The Bribery Act is likely to highlight the difficulties and create novel and costly test cases in this respect.

The Bribery Act creates a corporate offense of failing to prevent bribery, subject to the defense of "adequate procedures." As noted above, this clearly overlaps (in the regulated sector) with systems and controls issues but that does not render it a purely civil matter. An insured could be prosecuted under the Bribery Act and investigated by the FSA for the same failures to prevent corruption. Although in practice the SFO has said it would likely cede to the FSA in such a situation, insurers may be faced with a very complex coverage issue: if the insured admits to systems and controls failures in the civil enforcement action, does that trigger the criminal conduct exclusion in respect of the Bribery Act claim?

Furthermore, insurers asked to cover an individual accused of criminal conduct and the firm facing the corporate offense will have to decide whether an admission by, or finding of guilt against the individual, is enough to decline the entity's cover. Theoretically, some might try to argue that evidence to the civil standard of inadequate procedures renders the firm criminally liable for the strict liability corporate offense of failing to prevent bribery and (assuming the adequacy of procedures was confirmed in the proposal) that this is therefore sufficient to avoid cover on grounds of non-disclosure of the moral hazard. More likely, the insurers will have to fund the defense of the firm as it tries to establish that it had "adequate procedures" and, even if insufficient as currently drafted, innocent non-disclosure language will likely adapt to excuse this sort of situation.

In any event, insurers are already well used to the increased costs involved where, as is typical with regulatory investigations, separate representatives are required for the firm and any number of its senior managers. The potential for conflict between directors and officers and the firm is obvious. And because the claims involve individuals, they tend to be hard fought. In the absence of claims control language, insurers can find themselves funding wide-ranging brand and reputation damage-control exercises or desperate appeal attempts with limited prospects of success.

Whilst defense costs alone can erode entire policy limits, the conflict between the entity's and its directors' interests in the available insurance cover is most pronounced when there are civil liabilities too. The recent case of *Bridgecorp*[26] in the High Court in Auckland offered a stark example and has already prompted a product innovation in Australia and New Zealand that is likely to be rolled out in other jurisdictions. Lloyd's reported[27] in January 2012 that a syndicate has launched the first ever D&O product to protect directors specifically for defense costs. Navigators syndicate spotted the opportunity following a judgment against the directors of Bridgecorp, a company that went bankrupt owing $500 million to creditors. Its directors were deprived of defense costs under the company's $20 million D&O policy, when the company successfully argued it had priority to claim the available indemnity. The directors were left without cover for their criminal defense costs.

Indemnifying Fines and Bribes

Whilst corporates can indemnify their staff and insurers can provide cover for defense costs, fines cannot be insured or recovered from the directors responsible. As noted above, public policy prohibits the indemnification of fines and the FSA's GEN 6 rule[28] prevents any regulated firm (*i.e.* an insurer) from providing cover in respect of any financial penalty the FSA might impose. In *Safeway*,the Court of Appeal held that companies that incurred fines through "quasi-criminal" proceedings such as those for breaches of competition rules could not recover from directors and employees whose actions had actually led to the breaches because it was the purpose of legislation imposing such obligations on companies that the company itself should be held personally responsible.[29] Companies cannot recover from directors and employees the cost of their own fines.

Another unanswered question thrown up by the Bribery Act is whether insurers can pay an indemnity in situations where a bribe is suspected. If, say, a local loss adjuster pays facilitation payments in a foreign jurisdiction or an insured claims bribe payments as defense or mitigation costs, insurers may need to report the circumstances to the Serious Organized Crime Agency (SOCA). The SFO's willingness to pursue recoveries of profits from a parent company shareholder (in the Mabey & Johnson case referred to above) suggests insurers might be exposed even if any bribery was committed unbeknownst to them.

CONCLUSIONS

Although the UK experience does not include the huge class action and securities claims against directors and officers that tend to follow regulatory action in the US, D&O insurance, legal defense cost covers and E&O policies with regulatory costs extensions will increasingly be required to meet legal and mitigation costs arising from regulatory investigations and prosecutions, including under the new Bribery Act, and corporations and their insurers will need to consider carefully how the policies respond. The traditional civil liability product with extensions is already adapting to changing demand and regulatory environment and there may need to be a number of test cases to provide reliable guidance on the issues set out above, amongst others. Given that the corporate offense under the Bribery Act has yet to be considered by the UK courts, these issues will probably remain live for some time to come.

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[2] In its 2011 Annual Report, Avon disclosed that it spent approximately $93.3 million in 2011 on an internal investigation of possible violations of the FCPA. Avon incurred $95 million in connection with internal investigation in 2010 and and $59 million in 2009.

[3] Siemens AG reportedly incurred nearly $1 billion in legal costs in connection with its internal investigation into FCPA violations.

[4] *See Office Depot, Inc. v. National Union Fire Ins. Co. of Pittsburgh, P.A.,* 734 F.Supp.2d 1304, 1326(S.D.Fla. 2010), aff'd, 2011 WL 4840951 (11th Cir. 2011) (holding that pre-suit investigation costs, which may have "related to and benefited" Office Depot's defense of the Claim (*i.e.,* the securities lawsuits) were not covered "Loss"); *National Stock Exchange v. Federal Ins. Co.*, 2007 WL 1030293 (N.D. Ill. March 30, 2007) (holding that legal fees incurred before a matter ripens into a Claim are not covered, regardless of whether the legal fees are reasonably related to the defense of a Claim).

[5] *See e.g., Office Depot, Inc.*734 F. Supp. 2d at 1320 (examining "the normal meaning of the term" and holding that it "refers to formal legal action, such as the filing of a lawsuit or administrative complaint. or the conduct of a formal adjudicative hearing.")

[6] A Wells Notice is a notification from the SEC that it intends to recommend that enforcement proceedings be commenced against the prospective defendant or respondent. The Wells Notice may identify the violation that allegedly occurred and provides the respondent an opportunity to submit a written statement to the SEC. *See* June 1, 1972 Report of the SEC Advisory Committee on Enforcement Policies and Practices (Wells Committee Report).

[7] *See e.g. MBIA Inc. v. Federal Ins. Co. et al.*, 2011 WL 2583080, at *5-6 (2d Cir. July 1, 2011) (holding that a subpoena constituted a claim "because it is similar to other forms of investigative demands made by regulators" and is not merely a discovery device); *Diamond Glass Cos., Inc. v. Twin City Fire Ins. Co.*, 2008 WL 4613170, at *4 (S.D.N.Y. Aug. 18, 2008) (grand jury subpoenas cannot be considered a claim because they do not constitute "demand for non-monetary relief.")

[8] Some carriers are even providing limited coverage for certain FCPA fines and penalties. This may seem surprising given that it is generally against public policy in the US (and the UK) to insure intentional actions. However, the policies only cover civil penalties assessed under 2(g) 2(B) of the statute, which section does not require that the actions be wilful, and which limits fines to a maximum of $10,000.

[9] *See, e.g.,* Chartis Executive Edge, Policy Form 104123 (04/10): http://www.chartisinsurance.com/us-executive-edge_295_253434.html..

[10] "Investigation Edge" by Chartis Inc.: http://www.chartisinsurance.com/us-investigation-edge_295_328234.html.

[11] Johnson, Sarah. "A New Risk Strategy for Regulatory Probes," CFO.com. February 23, 2012. http://www3.cfo.com/Print/PrintArticle?pageId=16e1a434-f921-4419-83b3-15fcab24a014.

[12] *SEC v. Citigroup*, 11 Civ. 7387 (JSR). The SEC is appealing this decision, and Congress has called for hearings on the issue.

[13] *See, e.g., Herley Industries, Inc. v. Federal Ins. Cos., Inc.*, 2009 WL 2596072, at *10 (E.D. Pa. Aug. 21, 2009) ("a guilty plea is not distinct from a final adjudication on the merits"); *First Nat. Bank Holding Co. v. Fidelity and Deposit Co. of Maryland*, 885 F. Supp. 1533, 1538 (N.D. Fla. 1995) ("FNBHC's contention that Jernagan's criminal convictions are not a 'final adjudication,' apparently because they were based on guilty pleas, rather than a jury verdict, is equally frivolous.");

[14] *See e.g., Great American Ins. Co. v. Alfred Gross, et al.*, 2005 WL 1048752, at *6 (E.D. Va. May 3, 2005) ("The mere entry of [the defendants'] guilty pleas is not enough to bar entitlement to Policy benefits under the Fraud Exclusion."); *In re Enron Corp. Securities, Derivative & ERISA Litigation,* 391 F. Supp. 2d 541, 575 (S.D. Tex. 2005) (noting that "case law is clear that a criminal adjudication is not final until a sentence is imposed on the defendant" but holding that judicial estoppel relating to a guilty plea can trigger a conduct exclusion).

[15] *See e.g. AT&T v. Clarendon America Ins. Co.*, 2008 WL 2583007, at *7 (Del. Super. Ct. June 25, 2008) ("The Court agrees with AT&T that '[i]t would seem obvious that there has been no adjudication or finding of deliberate, dishonest, fraudulent or criminal conduct in a case whose merits *no finder of fact has ever decided*.'") (emphasis in the original); *Alexander Mfg., Inc. v. Illinois Union Ins. Co.*, 666 F. Supp. 2d 1185, 1200 (D. Or. 2009) ("The plain meanings of judgment and adjudication encompass both a decision that a judge renders in the course of a case as well as the final outcome in a case."); *Pendergest-Holt v. Certain Underwriters at Lloyd's of London,* 600 F.3d 562, 572 (5th Cir. 2010) ("When a D&O policy requires a 'final adjudication' to trigger an exclusion, courts have consistently held that the adjudication must occur in the underlying D&O proceeding, rather than in a parallel coverage action or other lawsuit"); *Wojtunik v. Kealy,* 2011 WL 1211529, at *8-9 (D. Ariz. March 31, 2011) ("the Court interprets the term 'final adjudication' in the exclusion as not applying to a settlement").

[16] *See Buss v. Superior Court*, 16 Cal.4th 35, 49-50, 939 P.2d 766 (1997); *Federal Ins. Co. v. Kozlowski,* 792 N.Y.S.2d 397, 403 (1st Dep't 2005) (where the insurer advances defense costs that are not covered under the policy, the right to reimbursement "runs against the person who benefits from 'unjust enrichment' and in favor of the person who suffers loss thereby."); *L.A. Sound USA, Inc. v. St. Paul Fire & Marine Ins. Co.*, 156 Cal.App.4th 1259, 1271 (Cal. App. 3rd Dist. 2007) (citing *Buss*, 16 Cal.4th at 49-50).

[17] FSA, Willis Limited Final Notice http://www.fsa.gov.uk/pubs/final/willis_ltd.pdf>

[18] One leading insurance law academic has written that careful "*analysis of the situations in which a director may face liability to the company show that most .... involve conduct on his part which is uninsurable as a matter of law. ... [A] D&O policy stripped of defence costs cover, ... is not worth the paper that it is written on*." Robert Merkin, “Directors’ and Officers’ Insurance and the Global Financial Crisis” *Journal of the British Insurance Law Association* (2009) (118), 2-42.

[19] FSA Principles for Businesses, Principle 11: "*A firm must deal with its regulators in an open and cooperative way, and must disclose to the FSA appropriately anything relating to the firm of which the FSA would reasonably expect notice.*"

[20] SFO press release re Mabey & Johnson, 13 January 2012 http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/shareholder-agrees-civil-recovery-by-sfo-in-mabey--johnson.aspx>

[21] SFO, 'The Serious Fraud Office's Approach to Dealing with Overseas Corruption'

[22] [1997] AC 16

[23] *Hardy v Motor Insurers’ Bureau* [1964] 2 QB 745 and *Churchill Insurance v Charlton* [2001] EWCA Civ 112

[24] *Mulcaire v News Group Newspapers* [2011] EWHC 3469 (Ch)

[25] *Coulson v Newsgroup Newspapers* [2011] EWHC 3482 (QB)

[26] *Steigrad v BFSL 2007 Ltd* (HC Auckland, CIV-2011-404-611, 15 Sep 2011, Lang J) (the Bridgecorp case)

[27] Lloyd's Market News, 25 January 2012 http://www.lloyds.com/News-and-Insight/News-and-Features/Market-news/Industry-News-2012/Navigators-first-of-a-kind-product-proves-popular>

[28] FSA Handbook, GEN 6.1.5: "*No firm may enter into, arrange, claim on or make a payment under a contract of insurance that is intended to have, or has or would have, the effect of indemnifying any person against all or part of a financial penalty*"

[29] *Safeway Stores Ltd v Twigger* [2010] EWCA Civ 1472, [2010] All ER (D) 245 (Dec)