NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

KAYNE ANDERSON CAPITAL ADVISORS, L.P. et al. Plaintiffs and Appellants, v. AIG SPECIALTY INSURANCE COMPANY et al., Defendants and Respondents.	B324066 (Los Angeles County Super. Ct. No. 21STCV03202)

APPEAL from a judgment of the Superior Court of Los Angeles County, Carolyn B. Kuhl, Judge. Affirmed.

Reed Smith, Kim M. Watterson, Benjamin R. Fliegel and John N. Ellison for Plaintiffs and Appellants.

Kaufman Dolowich & Voluck and Andrew J. Waxler for Defendant and Respondent AIG Specialty Insurance Company.

Wiley Rein, Daniel J. Standish, Joseph W. Gross; Sinnott, Puebla, Campagne & Curet and Randolph P. Sinnott for Defendant and Respondent Catlin Specialty Insurance Company.

Bailey Cavalieri, Darius Kandawalla; Cozen O'Connor and Valerie D. Rojas for Defendant and Respondent Freedom Specialty Insurance Company.

Ropers Majeski, Stephen J. Erigero and Timothy J. Lepore for Defendant and Respondent Starr Indemnity and Liability Company.

This case is a dispute over the scope of insurance coverage. Plaintiffs and appellants Kayne Anderson Capital Advisors, L.P. and Kayne Anderson Fund Advisors, LLC (collectively Kayne), an investment adviser specializing in the energy sector, purchased professional liability coverage from defendant and respondent AIG Specialty Insurance Company (AIG). Kayne also purchased excess insurance from defendants and respondents Catlin Specialty Insurance Company (Catlin), Freedom Specialty Insurance Company (Freedom), and Starr Indemnity & Liability Company (Starr).[1] Each insurance policy in the tower provided $5 million in coverage for liability "aris[ing] from any [c]laim made against [Kayne] for a [w]rongful [a]ct by or on behalf of [it] in the performance of or failure to perform [i]nvestment [a]dvisory [s]ervices."

In 2014, Energy Intelligence Group, Inc. (EIG) filed suit against Kayne in federal court (the copyright action), alleging that Kayne violated EIG's copyrights by making unauthorized copies of EIG's publication, *Oil Daily*. Kayne submitted a claim to AIG, asserting that the suit was covered by its insurance policy

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[1] We refer to Catlin, Freedom, and Starr collectively as the excess insurers.

because Kayne used *Oil Daily* as an essential tool in providing investment advice to its clients. AIG disagreed and denied coverage. After several years of litigation in which Kayne asserts it incurred more than $7 million in legal expenses, Kayne settled the case, agreeing to pay EIG $15 million.

AIG and the excess insurers refused to reimburse Kayne for either its defense expenditures or the settlement costs, and Kayne filed the instant case seeking to compel them to do so. The trial court granted the insurers' motion for summary judgment, concluding that the insurers owed no duty to defend or indemnify Kayne in the copyright action. Kayne now appeals that ruling, arguing that the court misinterpreted the relevant insurance policies. We disagree and affirm.

FACTS AND PROCEEDINGS BELOW

A. The Facts Underlying the Copyright Action

The United States Court of Appeals for the Fifth Circuit summarized the facts underlying the copyright action in its opinion in that case, *Energy Intelligence Grp. v. Kayne Anderson Capital* (5th Cir. 2020) 948 F.3d 261: "[Kayne partner James] Baker started working for [Kayne] in 2004 and began subscribing to *Oil Daily* shortly thereafter. At the time, approximately four other professionals worked in Baker's office. Baker initially accessed *Oil Daily* by logging in to EIG's website with a username and password, which he shared with his co-workers so that they could also access the publication.

"*Oil Daily* was always marked with copyright notices and warnings compliant with the notice requirements of [title] 17 [United States Code section] 401. Each newsletter contained a copyright notice on the front cover and masthead.

"In January 2007, [Kayne] employee Ron Logan had trouble accessing Baker's EIG account. On January 3, 2007, Baker's assistant Diana Lerma emailed EIG representative Deborah Brown for assistance, forwarding a [Kayne] internal email stating, 'Ron . . . was not able to access your [Baker's] [O]il [D]aily.' Brown noticed the reference to 'Ron' accessing Baker's account. She testified in her deposition that this 'would send up a red flag that more than the authorized user was accessing it' and recalled that she 'probably escalated the issue' to her supervisors at EIG.

"Just a few hours later that day, EIG employee Peter Buttrick called Lerma to discuss [Kayne]'s subscription. After the call, Buttrick indicated by email to Mark Hoff, EIG's Vice President of Sales, that he had just spoken with Lerma '[o]n the copyright issue—I discussed the severity of the issue and advised her to schedule a call with her boss, Jim Baker[,] . . . and I as soon as possible to discuss options.' On [Kayne]'s side, Lerma emailed Baker:

" 'One hiccup: they want to know how many users we have. They said that we need to confirm that you'd be the only [*sic*] accessing the information; otherwise we would be "sharing" and that is against their policy. Each additional user is $1554 annually. They have recently found multiple users on one account and then gone back to charge that company for the excess. So they want to give us a heads up to avoid this happening to us. What do you propose? Say [three] users so that you can continue your access and then add myself and Ron? Or just you and I and just tell the others not to go online to avoid tracking anything back to us via the email addresses.'

"Baker instructed Lerma to '[h]ave them [EIG] email the document to me on a daily basis. No web-based access. Please forward the document to the rest of the group.' Thereafter, Baker began receiving *Oil Daily* as an emailed PDF, which his assistants regularly forwarded to other [Kayne] employees.

"[Kayne] upgraded its subscription in 2013 to allow five authorized users and continued subscribing to *Oil Daily* through 2014. However, the number of [Kayne] employees accessing *Oil Daily* far exceeded five. By 2014, 20 people in the office regularly received the newsletter.

"Besides sharing *Oil Daily* internally within [Kayne], Baker's assistants also sometimes forwarded *Oil Daily* to third party non-subscribers. For example, [Kayne] employee Jennifer Rodgers regularly emailed copies of *Oil Daily* to a company called Crestwood Midstream Partners. In doing so, she named each file '123,' seemingly at both Lerma's instruction and Crestwood's request to avoid detection by EIG. By contrast, when EIG emails *Oil Daily* as a PDF to its subscribers, the PDF is named in the format 'DE' followed by the date in YYMMDD format. At trial, EIG identified 425 instances where [Kayne] had sent *Oil Daily* files named '123' to other entities.

"On February 5, 2014, in response to a request for information by EIG, [Kayne] employee Ana Pope ingenuously informed EIG Account Manager Derrick Dent,

" 'The Oil Daily is sent to one person in the office, Jim Baker. He usually gets it the night before it is published for and forwards it to me that night. When I get into the office that next morning the first thing I do, around 7:40am, is email it out to the 20 or so people in the office who have elected to receive the [O]il [D]aily every morning.'

"EIG did not immediately reply. On February 21, 2014, Pope emailed Dent again, requesting, 'Would you mind sending the [O]il [D]aily that usually goes to James Baker directly to me today? James is out of town on the Pacific coast and probably won't wake up for another few hours.' Dent then responded,

" 'According to Kayne Anderson's site license agreement, only five employees are granted access to *Oil Daily* as Authorized Users. The agreement states that it is not permissible to forward our publications to anyone who is not an Authorized user. This kind of activity is in violation of our license agreements and of our copyrights.'

"[Kayne] continued its normal practice of sharing *Oil Daily* until May 2014, when EIG formally sent [Kayne]'s general counsel a letter complaining of infringement." (*Energy Intelligence Grp. v. Kayne Anderson Capital*, *supra*, 948 F.3d at pp. 266-267, fn. omitted.)

B. Litigation with EIG

EIG filed suit in federal court in July 2014 alleging that Kayne had infringed its copyrights by making unauthorized copies of *Oil Daily* beginning in 2004. EIG subsequently amended its complaint to add an allegation that Kayne violated the Digital Millennium Copyright Act (DMCA) by changing the names of the PDF files of *Oil Daily* to make it more difficult for EIG to detect its copying.[2] In its complaint, EIG demanded

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[2] The DMCA "provide[s] copyright owners protection against unauthorized users or distributors who attempt to circumvent security features designed to protect access to the copyrighted work." (*Microsoft Corp. v. EEE Business Inc.* (N.D.Cal. 2008) 555 F.Supp.2d 1051, 1056.)

actual and statutory damages, and also asked that Kayne "be required to account for and disgorge to [p]laintiffs all gains, profits, and advantages derived from its copyright infringement." By the time of trial, EIG no longer sought disgorgement of profits.

Kayne did not deny that it had infringed EIG's copyrights, and it ultimately conceded its infringement was willful. Baker testified at trial that he instructed other Kayne employees to make copies of *Oil Daily* every day, despite knowing by no later than 2007 "that we could not share the subscription."

Given this concession of willful infringement, Kayne based its defense on a theory of entrapment and a failure to mitigate damages. Kayne argued that, rather than taking measures to track and prevent copying of *Oil Daily*, EIG knowingly allowed its subscribers to continue making illegal copies for years before finally suing them and seeking enormous damages.

Kayne's strategy met with some initial success. The district court agreed with Kayne that the failure to mitigate damages was a valid defense, such that Kayne would not be liable for copyright infringement if EIG could have prevented the infringement by exercising reasonable diligence. At trial, the jury found that Kayne copied 1,646 editions of *Oil Daily* between 2004 and 2014, but found that EIG "could . . . have avoided" 1,607 of these occurrences "if [it] had used reasonable diligence to mitigate [its] damages." The district court accordingly awarded EIG statutory damages for only the 39 instances of copyright infringement that EIG could not have prevented. At a rate of $15,000 per act of infringement, this amounted to $585,000 in damages. The jury also determined that Kayne had violated the DMCA 425 times by changing the names of the PDF files of *Oil*

Daily editions in order to prevent EIG from discovering its illicit copying, but found that EIG could have prevented all of these violations by exercising diligence. The court accordingly awarded EIG no damages for these violations. In addition to the copyright infringement damages, the district court ordered Kayne to pay EIG $2,611,579.88 in attorney fees and costs.

On appeal, the Fifth Circuit held in 2020 that the district court erred by treating the failure to mitigate damages as an absolute defense to statutory damages under the Copyright Act and the DMCA. (*Energy Intelligence Grp. v. Kayne Anderson Capital*, *supra*, 948 F.3d at pp. 274-276.) The court entered judgment in favor of EIG for $1,062,500 for the DMCA violations, and vacated the judgment as to copyright infringement (*id.* at pp. 280-281) with instructions on remand "to determine the proper statutory damages for each of the 1,646 infringed works." (*Id.* at p. 280.)

The district court ordered a new trial to determine the amount of copyright infringement damages, but before a new trial could take place, the parties settled the case in April 2021. Rather than risk a potentially enormous judgment for copyright infringement,[3] Kayne agreed to pay EIG $15 million. Shortly thereafter, the district court dismissed the case with prejudice.

C. The Insurance Policies

At the time EIG filed the copyright action, Kayne had obtained insurance policies providing $5 million in "[i]nvestment

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[3] A defendant who willfully commits copyright infringement is liable for up to $150,000 per violation. (See 17 U.S.C. § 504(c)(2).)

[a]dviser [p]rofessional [l]iability [c]overage" from each of the four principal defendants in this case.

Kayne's primary policy was with AIG. The portion of the insurance policy most relevant to this case was section I.A, under the heading, "Investment Advisor Professional Liability Coverage." It provided that AIG would reimburse Kayne for any "[l]oss of an [i]nvestment [a]dviser or [i]nsured [p]erson that arises from any [c]laim made against such [i]nsured for a [w]rongful [a]ct by or on behalf of such [i]nsured in the performance of or failure to perform [i]nvestment [a]dvisory [s]ervices." The policy defined "[w]rongful [a]ct" as "any actual or alleged breach of duty, neglect, error, misstatement, misleading statement, omission or act," and defined "[i]nvestment [a]dvisory [s]ervices" in relevant part as "financial, economic or investment advice or investment management services (including the selection and oversight of investment advisers and/or outside service providers) provided to others for consideration and pursuant to a written contract."

Another provision of the insurance policy, section I.C, under the heading "Investment Adviser Management Liability Coverage," provided coverage for "[l]oss [suffered by] an [i]nvestment [a]dviser . . . [¶] . . . that arises from any [c]laim made against such [i]nvestment [a]dviser for a [w]rongful [a]ct by such [i]nvestment [a]dviser." The coverage under this section was broader than that in section I.A, in that it included no requirement that the wrongful act occur "in the performance of or failure to perform [i]nvestment [a]dvisory [s]ervices."[4] But unlike

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[4] Indeed, the coverage under section I.C explicitly excluded coverage in connection with "the performance of or failure to

section I.A, coverage under section I.C was subject to an exclusion for claims "alleging, arising out of, based upon or attributable to any actual or alleged plagiarism, misappropriation, infringement or violations of copyright, patent, trademark, trade secrets or any other intellectual property rights." Kayne alleges that its copying of *Oil Daily* fell within the coverage of section I.A, not I.C.

The policy did not obligate AIG to defend Kayne in litigation covered by the policy, but did require AIG to pay Kayne's defense costs on an ongoing basis once Kayne notified it of a claim under the policy.

The excess insurers provided policies subject to the same terms and conditions as the underlying AIG policy,[5] except that each excess insurer's obligations began only if the underlying policy or policies had been exhausted. Thus, Catlin was obligated to respond and provide coverage only if Kayne's losses exceeded the $5 million limit of the AIG policy. Freedom would be obligated to pay only if Catlin's policy was also exhausted, and Starr would follow after Freedom.

D. Litigation with the Insurers

Kayne notified AIG and the excess insurers of the copyright action in September 2014, within two months of the filing of

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perform [i]nvestment [a]dvisory [s]ervices or any other professional service to a customer or a client."

[5] Because the excess insurers' policies provided the same substantive terms as the underlying policy, aside from the exhaustion requirements, for the sake of convenience, we refer to all four policies as a single policy when analyzing the scope of their coverage.

EIG's complaint. In 2017, AIG formally denied coverage, and the excess insurers followed AIG's lead. In the spring of 2021, Kayne informed the insurers that it was negotiating a settlement with EIG and asked the insurers to reconsider their coverage denials, but the insurers did not change their positions.

In June 2021, following the settlement of the copyright action, Kayne filed the operative first amended complaint alleging causes of action for breach of contract, tortious breach of the implied covenant of good faith and fair dealing, and declaratory judgment. Kayne asserted that its copyright infringement of *Oil Daily* was covered under its policies with the insurers, and that the insurers wrongly denied Kayne's claim for coverage. Kayne claimed that it had incurred more than $10 million in defending the copyright action. When added to the $15 million settlement, this was enough to exhaust all four $5 million insurance policies.[6]

Kayne filed a motion for partial summary adjudication, and the insurers filed a motion for summary judgment or summary adjudication. On July 25, 2022, the trial court granted the insurers' motion and denied Kayne's motion. The court found that "there never was a potential for coverage of the [copyright action] under . . . the AIG . . . [p]olicy" because that action was "based on unauthorized copying and distribution of a copyrighted work, not on using the content of that work in giving investment advice. If Kayne . . . had purchased subscriptions to *Oil Daily* for all of its investment advisers and the investment advisers had

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[6] Kayne subsequently revised its claimed total defense costs to $7,355,361.70, but even at this reduced figure, Kayne's total claims were sufficient to exhaust all four insurance policies.

referred to the content of the publication in formulating investment advice, no copyright violation could have been alleged. . . . The decision to copy *Oil Daily* without permission rather than purchase multiple subscriptions, whether that decision was made by a clerical employee, a manager, or an investment adviser, was not done in performing investment advice; it was a decision about how to run the business operations of Kayne."

DISCUSSION

Kayne contends the trial court erred in granting summary judgment in favor of the insurers because the court incorrectly viewed the policy as a traditional malpractice or professional services insurance contract when, according to Kayne, the policy provided much broader coverage. At a minimum, Kayne argues that the insurers had a duty to fund Kayne's legal defense because there was at least a possibility that the copyright action was covered by the policy.

We disagree. The language of the policy unambiguously limited coverage to wrongful acts in the performance of Kayne's professional investment advice services, and did not include wrongful administrative acts ancillary to such professional services such as the illegal copying of a subscription news periodical. Even if *Oil Daily* was an important resource to Kayne's employees, the manner in which Kayne accessed *Oil Daily* was not relevant to the investment advice it provided. In light of this conclusion, we need not consider the excess insurers' claim that Kayne is barred from recovering under the policy because the copyright infringement constituted a "wilful act" under Insurance Code section 533, and that Kayne's conduct fell

within a policy exclusion for "intentional or knowing violation of the law."

A. Standard of Review and Legal Principles

At the summary judgment stage, "the court must 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom ([Code Civ. Proc.], § 437c, subd. (c)), and must view such evidence [citations] . . . [citations], in the light most favorable to the opposing party." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) We review the court's decision to grant a motion for summary judgment de novo. (*Ryan v. Real Estate of Pacific, Inc.* (2019) 32 Cal.App.5th 637, 642.)

" '[I]nterpretation of an insurance policy is a question of law.' [Citation.] 'While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply.' [Citation.] Thus, 'the mutual intention of the parties at the time the contract is formed governs interpretation.' [Citation.] If possible, we infer this intent solely from the written provisions of the insurance policy. [Citation.] If the policy language 'is clear and explicit, it governs.' [Citation.]" (*Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1115; accord, *McMillin Homes Construction, Inc. v. National Fire & Marine Ins. Co.* (2019) 35 Cal.App.5th 1042, 1050.)

Because "the insurer-draftsman controls the language of the policy" (*Reserve Ins. Co. v. Pisciotta* (1982) 30 Cal.3d 800, 808), "an insurance policy's coverage provisions must be interpreted broadly to afford the insured the greatest possible protection." (*Regional Steel Corp. v. Liberty Surplus Ins. Corp.* (2014) 226 Cal.App.4th 1377, 1390.) This rule has limits, however, "and a court will not ' "indulge in a forced construction of the policy's insuring clause to bring a claim within the policy's

coverage." ' [Citation.]" (*Dua v. Stillwater Ins. Co.* (2023) 91 Cal.App.5th 127, 136.)

B. The Copyright Action Was Not Within the Scope of the Policy

In arguing that its copyright infringement was within the scope of its "[i]nvestment [a]dvisor [p]rofessional [l]iability [c]overage," Kayne seeks to avoid a longstanding limitation in professional services insurance—that it applies only to acts arising from the provision of professional services. As the court explained in *Bank of California, N. A. v. Opie* (9th Cir. 1981) 663 F.2d 977, "[a] professional obviously performs many tasks that do not constitute professional services. . . . [T]o be considered a professional service, the conduct must arise out of the insured's performance of his specialized vocation or profession. To take an extreme example, an attorney's failure to pay for office equipment constitutes a breach of contract, not an omission in professional services, regardless of how essential the equipment may be to the attorney's law practice. To be covered, the liability must arise out of the special risks inherent in the practice of the profession." (*Id.* at p. 981.)

Bank of America, N.A. v. Opie involved the application of Washington law, but the rule it describes is consistent with California law. Thus, under California law, a medical provider may not look to its professional liability coverage to protect it from claims of Medicare and Medicaid fraud. (See *Horizon West Inc. v. St. Paul Fire and Marine Ins.* (E.D. Cal. 2002) 214 F.Supp.2d 1074, 1078-1079, citing *Bank of America, N.A. v. Opie*, *supra*, 663 F.2d at p. 981.) A medical group may not seek reimbursement from its malpractice insurer for settling a wrongful termination suit brought by an employee even though

medical expertise was necessary to evaluate the employee's performance. (See *Inglewood Radiology Medical Group, Inc. v. Hospital Shared Services, Inc.* (1989) 217 Cal.App.3d 1366, 1370.) And a law firm's professional liability coverage does not apply to a suit brought by a partner over the firm's internal business. (See *Blumberg v. Guarantee Ins. Co.* (1987) 192 Cal.App.3d 1286, 1292-1293.)

Kayne's illicit copying of *Oil Daily* plainly was not "in the performance of . . . [i]nvestment [a]dvisory [s]ervices." We do not doubt that Kayne's employees found it helpful, or even necessary, to consult *Oil Daily* as a means of staying informed about the oil industry and better advising the firm's clients. The manner in which Kayne acquired its copies of *Oil Daily*, however, had nothing to do with Kayne's "performance of [its] specialized vocation or profession" or the "special risks inherent in the practice of the profession" of being an investment advisor. (*Bank of California, N. A. v. Opie*, *supra*, 663 F.2d at p. 981.) The advice to the clients would have been the same even if Kayne had paid for every copy of *Oil Daily* it used.

In the hope of escaping this limitation of professional services insurance, Kayne argues that its policy provides "far broader" coverage than typical malpractice or professional liability insurance. According to Kayne, the key is the policy's use of the phrase "[w]rongful [a]ct[s] . . . in the performance of . . . [i]nvestment [a]dvisory [s]ervices." In Kayne's view, this language signals that "coverage is not limited to claims *arising from* the 'professional services' the policyholder provided." (Bold omitted.) We disagree. Kayne's argument might be stronger if the policy covered wrongful acts "in connection with" or "related to" the performance of investment advisory services. But it does

not. The only reasonable way to interpret the language of the policy is that the wrongful acts must occur "in," that is as a part of, the special risks of providing investment advice and not administrative-type tasks, "regardless of how essential" such tasks may be to the investment professional. (*Bank of California, N. A. v. Opie*, *supra*, 663 F.2d at p. 981.)

Kayne's interpretation of "[w]rongful [a]ct[s] . . . in the performance of . . . [i]nvestment [a]dvisory [s]ervices" also fails to take into account the remainder of the policy. As the trial court noted, the policy contained a separate provision, section I.C, for "Investment Adviser Management Liability Coverage." This section covered "[w]rongful [a]ct[s]" by Kayne and its employees including claims against officers and directors of Kayne related to the firm's management, but it specifically excluded claims arising from "the performance of or failure to perform [i]nvestment [a]dvisory [s]ervices or any other professional service to a customer or a client." If section I.A of the policy extended as broadly as Kayne contends, there would be no need for section I.C. because the acts it purports to cover would already be covered by section 1.A.[7]

Kayne argues that the Ninth Circuit's decision in *PMI Mortg. Ins. v. American Intern.* (9th Cir. 2005) 394 F.3d 761 (*PMI*) supports its position. In that case, a mortgage insurance company, PMI, was the target of a putative class-action suit brought by its clients alleging kickbacks and a failure to disclose

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[7] As noted above, Kayne did not argue that its copyright infringement was covered under section I.C, presumably because that section was subject to an exclusion for claims arising from "infringement or violations of copyright."

financial arrangements with other parties regarding the pricing of insurance. PMI filed a claim under its professional services policy, but PMI's insurer denied coverage. Applying California law, the Ninth Circuit held that the suit was covered by the professional policy, which defined wrongful act as " 'any act, error or omission in the rendering of or failure to render [p]rofessional [s]ervices.' " (*Id.* at p. 763.) In reaching this conclusion, the court stated that "the PMI policy language is significantly broader than the language at issue in any . . . professional malpractice insurance cases," which "define 'professional services' narrowly, explicitly limiting coverage to acts performed by the insured *in its professional capacity*." (*Id.* at p. 767.)

We are not persuaded that *PMI* supports Kayne. First, the *PMI* court's statement regarding the breadth of the policy language was not necessary to its decision. The court held that PMI's conduct was covered by the policy because "the . . . policy defines '[p]rofessional [s]ervices' simply as '*those services of the* [*c*]*ompany permitted by law or regulation rendered by an* [*i*]*nsured . . . pursuant to an agreement with the customer or client*.' . . . From a strictly textualist perspective, PMI's alleged kickback scheme and the resulting [class] action clearly fall within this broad provision, as they resulted directly from PMI's provision of mortgage insurance 'services' under various (allegedly improper) 'agreements' with lender 'clients.' The plain meaning of the policy language thus does encompass PMI's alleged misconduct." (*PMI*, *supra*, 394 F.3d at pp. 764-765, fn. omitted.) Thus, the text of the policy alone compelled the conclusion that PMI was entitled to coverage, without regard to any analysis of the case law regarding professional liability insurance.

Furthermore, even if the PMI policy were interpreted as an ordinary malpractice policy, the court concluded PMI would still be entitled to coverage. The court explained that "PMI is not engaged in one of the traditional 'professions' as that term is commonly understood, and it does not render the physical or intellectual acts of service one commonly associates with doctors or lawyers." (*PMI*, *supra*, 394 F.3d at p. 767.) The alleged kickback scheme that formed the basis of the class-action suit "goes to the heart of PMI's business. It implicates the way in which it finds and serves its customers, the business opportunities that it enjoys and the network of professional relationships through which it operates." (*Id.* at p. 768, fn. omitted.) Thus, "PMI *was* acting in its professional capacity as a mortgage [insurer],[8] and within the context of its specialized relationships with its lender-clients, when the alleged improper conduct occurred." (*Ibid.*)

Kayne's investment advisement business, on the other hand, is a traditional profession for which practitioners seek professional liability insurance. Kayne's clients place their trust in Kayne for financial advice in the same way a client seeks counsel from a lawyer or a patient seeks medical advice from a doctor. There was no need to include language limiting the application of the policy to acts in Kayne's professional capacity because the phrase "[w]rongful [a]ct[s] . . . in the performance of . . . [i]nvestment [a]dvisory [s]ervices" already indicates as much.

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[8] The text of the *PMI* opinion uses the term "lender" here, which appears to be a typographical error as the opinion consistently states elsewhere that PMI was a mortgage insurer selling products to mortgage lenders.

Furthermore, unlike the activity in *PMI* that went "to the heart of PMI's business" (*PMI*, *supra*, 394 F.3d at p. 768), the copyright infringement here was an ancillary administrative decision to dodge paying additional subscription fees. We thus find *PMI* inapposite to the facts before us.

C. The Insurers Did Not Owe a Duty to Defend Kayne

Kayne argues that, even if the insurers were not required to indemnify it for its settlement with EIG, they nevertheless owed a duty to fund Kayne's defense.[9] "[T]he duty to defend is broader than the duty to indemnify." (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295.) This is because " ' "the carrier must defend a suit which *potentially* seeks damages within the coverage of the policy." [Citation.]' " (*Ibid.*)

" 'The determination whether the insurer owes a duty to defend usually is made in the first instance by comparing the allegations of the complaint with the terms of the policy. Facts extrinsic to the complaint also give rise to a duty to defend when they reveal a possibility that the claim may be covered by the policy.' [Citations.] 'Conversely, where the extrinsic facts eliminate the potential for coverage, the insurer may decline to defend even when the bare allegations in the complaint suggest potential liability. [Citations.] This is because the duty to defend, although broad, is not unlimited; it is measured by the nature and kinds of risks covered by the policy.' [Citation.] The duty to defend arises under the facts alleged, and any doubts are

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[9] We agree with Kayne that the insurers' obligation to fund Kayne's defense of a covered claim on an ongoing basis was fundamentally identical to a duty to defend Kayne, and thus the law pertaining to the duty to defend applies to Kayne's policy.

resolved in favor of the insured. [Citation.]" (*Dua v. Stillwater Ins. Co.*, *supra*, 91 Cal.App.5th at pp. 136-137.)

The difference in the legal standard between the duty to defend and the duty to indemnify does not change our analysis. EIG's allegations against Kayne were essentially the same throughout the course of the copyright action. In its initial complaint, EIG alleged that Kayne "actively, fraudulently, and willfully concealed [its] regular and systematic reproduction and distribution of copies of" *Oil Daily*, and that this "constitute[d] willful infringement of [EIG's] . . . copyrights." Nothing in the complaint directly pertained to Kayne's provision of professional services to its clients. Because EIG never alleged misconduct by Kayne "in the performance of . . . [i]nvestment [a]dvisory [s]ervices," the insurers had no duty to fund Kayne's legal defense.

DISPOSITION

The judgment of the trial court is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED

WEINGART, J.

We concur:

CHANEY, J.

BENDIX, Acting P. J.