IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

TELLIGEN, INC., Plaintiff, v. ATLANTIC SPECIALTY INSURANCE COMPANY, Defendant.	**No. 4:18-cv-00261-RGE-SBJ** **ORDER RE: CROSS MOTIONS FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Defendant Atlantic Specialty Insurance Company (ASIC) issued claims-made insurance policies with fiduciary liability coverage to Plaintiff Telligen, Inc. In 2015, Telligen received a letter from the U.S. Department of Labor requiring Telligen to make documents related to its Employee Stock Ownership Plan available for inspection. In 2016, a former Telligen employee filed a lawsuit related to Telligen's Employee Stock Ownership Plan. In 2017, the Department of Labor sent Telligen a letter alleging violations of Telligen's fiduciary duties related to the Employee Stock Ownership Plan. Telligen sought coverage from ASIC for expenses related to the former employee's lawsuit. ASIC denied coverage, contending that the 2015 Department of Labor letter was a fiduciary claim Telligen failed to report to ASIC and that the lawsuit was related to the unreported fiduciary claim. Subsequently, Telligen brought this action, seeking, among other relief, a declaration that it is entitled to coverage for expenses related to the lawsuit. ASIC and Telligen have filed cross motions for summary judgment.

The 2015 Department of Labor letter was not a fiduciary claim under the policies. The letter did not allege Telligen committed a wrongful act, it did not identify any specific bad acts or actors, and at the time Telligen received the letter, Telligen did not have the information required

to report a fiduciary claim to ASIC under the terms of the policies. Therefore, and for the reasons addressed below, ASIC's motion for summary judgment is denied. Telligen's cross motion for partial summary judgment is granted to the extent it seeks a declaration that the 2015 Department of Labor letter was not a fiduciary claim under the policies. Because the parties represented the status of the 2015 letter to be a threshold issue, and because the parties have not fully briefed ASIC's coverage obligations related to the lawsuit and the 2017 letter, the Court does not address issues of coverage beyond this limited holding.

II. BACKGROUND

The following facts are undisputed. *See* Pl.'s Resp. Def.'s Statement Material Facts Supp. Def.'s Mot. Summ. J., ECF No. 26-5; Def.'s Resp. Pl.'s Statement Material Facts Supp. Pl.'s Mot. Partial Summ. J., ECF No. 29; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587−88 (1986).

A. The Policies

As relevant here, ASIC issued two insurance policies to Telligen: one in effect from December 31, 2014, to January 1, 2016, and one in effect from January 1, 2016, to January 1, 2017. ECF No. 26-5 ¶¶ 1–2. The two policies were substantially the same. *See id.* ¶¶ 3–14. The policies included coverage for fiduciary claims made against Telligen or against "any person for whose **Wrongful Acts** [Telligen is] legally responsible." *Id.* ¶4; *see id.* ¶ 3–5.[1]

The policies were claims-made policies, meaning that under the policies, ASIC agreed to "pay, on behalf of [Telligen], **Loss** from any **Fiduciary Claim** first made against [Telligen]

[1] The policies use capitalization and boldface to indicate defined terms. *See, e.g.*, Def.'s Ex. 1, Def.'s App. Supp. Def.'s Mot. Summ. J., ECF No. 24 at 4–130. In setting out the policy language, the Court retains the policies' use of capitalization and boldface. Elsewhere in this Order, the Court retains the policies' capitalization of defined terms, but omits the boldface.

during the **Policy Period** or applicable Extended Reporting Period, . . . provided, that such **Fiduciary Claim** is reported to [ASIC] in accordance with" the policies' reporting provision. *Id.* ¶ 4.

As relevant here, Telligen was required to report to ASIC any Fiduciary Claim against Telligen, which the policies defined to include "a written notice of commencement of a fact-finding investigation by the U.S. Department of Labor . . . against an **Insured** for a **Wrongful Act**." *Id.* ¶ 5. The policies defined Wrongful Act as, with respect to Telligen's Employee Stock Ownership Plan:

> (1) any breach of the responsibilities, duties or obligations imposed by **ERISA** upon fiduciaries of the **Sponsored Plan** committed or allegedly committed by an **Insured** in the **Insured's** capacity as such;
>
> (2) any negligent act, error or omission in the **Administration** of any **Plan** committed or allegedly committed by an **Insured** in the **Insured's** capacity as such; or
>
> (3) any other matter claimed against an **Insured** solely by reason of the **Insured's** service as a fiduciary of any **Sponsored Plan**.

Id. ¶ 6.

Under the policies, Telligen was obligated, "as a condition precedent to any right to coverage," to report claims, including any Fiduciary Claim, made against Telligen to ASIC. *Id.* ¶ 14. The policies required:

> Such notice shall give full particulars of the **Claim**, including, but not limited to: a description of the **Claim** and **Wrongful Act**; the identity of all potential claimants and any **Insureds** involved; a description of the injury or damages that resulted from such **Wrongful Act**; information on the time, place and nature of the **Wrongful Act**; and the manner in which the **Insureds** first became aware of such **Wrongful Act**.

Id.

B. Factual Background

Telligen is a privately held for-profit corporation headquartered in West Des Moines, Iowa. ECF No. 29 ¶ 35. On December 31, 2013, all shares of Telligen were sold to the Telligen, Inc. Employee Stock Ownership Plan (the Plan). *Id.* ¶ 36. The Plan provides retirement benefits to Telligen employees and is governed by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001–1461. *Id.* ¶¶ 38–39. Bankers Trust Company of South Dakota served as the original trustee of the Plan. *Id.* ¶ 37.

On March 19, 2015, Telligen received a letter from the Department of Labor. *Id.* ¶ 40; *see also* Def.'s Ex. 10, Def.'s App. Supp. Def.'s Mot. Summ. J., ECF No. 24 at 323–24. The two-page letter stated the U.S. Department of Labor, Employee Benefits Security Administration, "has responsibility for administration and enforcement of Title I" of ERISA and that "Title I establishes standards governing the operation of employee benefit plans such as the Telligen, Inc. Employee Stock Ownership Plan." ECF No. 24 at 323. The letter went on to describe the Secretary of Labor's investigative authority:

> Investigative authority is vested in the Secretory of Labor by Section 504 of ERISA, 29 U.S.C. 1134, which states in part: "The Secretary shall have the power, in order to determine whether any person has violated or is about to violate any provision of this title or any regulation or order thereunder to make an investigation, and in connection therewith to require the submission of reports, books, and records."

Id. The 2015 letter notified Telligen that the Department of Labor intended to conduct an on-site examination. *Id.* Finally, the letter requested Telligen make available for inspection documents related to the Plan's formation, finances, and administration and requested a Plan or corporate official be available for an "initial background interview." *Id.* at 324; ECF No. 29 ¶ 40. Telligen produced the documents requested by the Department of Labor, and after the on-site examination, Telligen had "a few brief communications later in 2015" with the Department of Labor.

ECF No. 29 ¶ 45; *see id.* ¶ 44. Telligen did not notify ASIC of the 2015 letter in 2015 or 2016. *See* ECF No. 26-5 ¶ 29.

On December 27, 2016, Deborah Innis, a former Telligen employee, brought a lawsuit against Bankers Trust on behalf of the Plan and on behalf of similarly situated Plan participants. *Id.* ¶ 15; *see* Compl., *Innis v. Bankers Trust Co. S. Dakota*, No. 4:16-cv-00650-RGE-SBJ (S.D. Iowa Dec. 27, 2016), ECF No. 1. Innis alleged claims under ERISA related to the December 31, 2013 sale of shares of Telligen to the Plan. ECF No. 26-5 ¶ 17; Compl. ¶¶ 5–8, 14–25, 26–37, No. 4:16-cv-00650, ECF No. 1. Telligen notified ASIC of the Innis lawsuit on December 29, 2016. ECF No. 26-5 ¶ 26. Telligen alleges it is obligated to defend and indemnify Bankers Trust under the terms of the Telligen, Inc. Employee Stock Ownership Trust, which Telligen and Bankers Trust entered into in connection with the December 31, 2013 sale. *Id.* ¶ 18. Telligen alleges it has paid, in accordance with the terms of the Trust, defense costs incurred by Bankers Trust in the Innis lawsuit. *Id.* ¶ 19.

On October 6, 2017, Telligen received a letter from the Department of Labor reporting the conclusion of the Department of Labor's investigation and Telligen's possible breach of fiduciary obligations to the Plan and violation of ERISA. ECF No. 26-5 ¶ 28; *see also* Def.'s Ex. 8, ECF No. 24 at 315–21. Telligen notified ASIC of the 2017 letter on October 9, 2017. ECF No. 26-5 ¶ 28. On October 25, 2017, Telligen notified ASIC of the 2015 letter. *See id.* ¶ 29.

In December 2017, ASIC denied Telligen coverage for the Innis lawsuit and the 2017 letter. *Id.* ¶ 30; *see also* Def.'s Ex. 11, ECF No. 24 at 325–43. ASIC reaffirmed its denial of coverage in February 2018. ECF No. 26-5 ¶ 32; *see also* Def.'s Ex. 13, ECF No. 24 at 347–49.

C. Procedural Background

Telligen brought this action alleging claims of breach of contract and bad faith and seeking, among other relief, "a declaratory judgment that [ASIC] is obligated to provide Fiduciary Liability Coverage for amounts Telligen is legally obligated to pay as defense expenses of Bankers Trust of South Dakota in the [Innis lawsuit] . . . and for all other legal or equitable relief that is just." Am. Compl. ¶¶ 30–32, ECF No. 14. ASIC moves for summary judgment on all of Telligen's claims. ECF No. 23; *see also* Def.'s Br. Supp. Def.'s Mot. Summ. J., ECF No. 23-1. Telligen resists ASIC's motion and moves for partial summary judgment, seeking a declaration that Telligen "is entitled to coverage under the Policy for expenses paid to Bankers Trust arising from the [Innis lawsuit] and expenses paid responding to the [2017 letter]." ECF No. 26 at 3; *see also* Pl.'s Br. Resp. Def.'s Mot. Summ. J. & Supp. Pl.'s Cross Mot. Partial Summ. J., ECF No. 26-4. ASIC resists Telligen's cross motion for partial summary judgment. ECF No. 31. The motions came before the Court for hearing on February 28, 2019. Mot. Hr'g Mins., ECF No. 34. Attorneys John Lorentzen and Matthew McGuire appeared on behalf of Telligen. *Id.* Attorney Sean O'Brien appeared on behalf of ASIC. *Id.*

Additional facts are discussed below as necessary.

III. LEGAL STANDARD

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322−23 (1986). A genuine dispute of fact exists when the issue "may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). To preclude summary judgment, a genuine dispute must relate to a material fact—that is, a fact "that might affect the outcome of the suit under the governing law."

Id. at 248. "Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* When there is a genuine dispute of facts, those "facts must be viewed in the light most favorable to the nonmoving party." *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009) (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)). When no material facts are in dispute, "[i]nsurance disputes are particularly well suited for summary judgment because the proper construction of an insurance contract is always an issue of law for the court." *Chicago Ins. Co. v. City of Council Bluffs*, 713 F.3d 963, 969 (8th Cir. 2013) (quoting *Genesis Ins. Co. v. City of Council Bluffs*, 677 F.3d 806, 811 (8th Cir. 2012)).

A federal court sitting in diversity applies state substantive law. *See Hanna v. Plumer*, 380 U.S. 460, 465–66 (1965); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *see also Capitol Indem. Corp. v. Haverfield*, 218 F.3d 872, 875 (8th Cir. 2000). Here, Iowa law governs interpretation of the policies, which "is a legal question unless the interpretation depends on extrinsic evidence." *Hasbrouck v. St. Paul Fire & Marine Ins. Co.*, 511 N.W.2d 364, 366 (Iowa 1993). Under Iowa law, the "cardinal principle" in interpreting insurance contracts "is that the intent of the parties controls." *Grinnell Mut. Reinsurance Co. v. Jungling*, 654 N.W.2d 530, 536 (Iowa 2002). "Except in cases of ambiguity, that intent is determined by what the policy says." *Swainston v. Am. Family Mut. Ins.*, 774 N.W.2d 478, 481 (Iowa 2009).

In determining what the policy says, insurance policies "must be construed as a whole" and "[t]he words used must be given their ordinary, not technical, meaning to achieve a practical and fair interpretation." *Central Bearings Co. v. Wolverine Ins.*, 179 N.W.2d 443, 445 (Iowa 1970); *see also LeMars Mut. Ins. Co. v. Joffer*, 574 N.W.2d 303, 307 (Iowa 1998). And "while words are to be given their ordinary meaning, particular words and phrases in a contract are not to be interpreted in isolation." *Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*,

471 N.W.2d 859, 863 (Iowa 1991). Moreover, "an interpretation which gives a reasonable, lawful, and effective meaning to all terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect." *Id.*

"Ambiguity exists if, after the application of pertinent rules of interpretation to the policy, a genuine uncertainty results as to which one of two or more meanings is the proper one." *A.Y. McDonald Indus., Inc. v. Ins. Co. of N. Am.*, 475 N.W.2d 607, 618 (Iowa 1991). "[Iowa courts] interpret ambiguous policy provisions in favor of the insured because insurance policies are in the nature of adhesion contracts." *Jungling*, 654 N.W.2d at 536. Thus, "if words of an insurance policy are susceptible to two interpretations, the interpretation favoring the insured must be adopted." *Cincinnati Ins. v. Hopkins Sporting Goods, Inc.*, 522 N.W.2d 837, 839 (Iowa 1994). However, claims-made policies are unique in that the insured's report of a claim to the insurer invokes coverage, providing lower premiums to the insured and greater certainty to the insurer. *See generally Hasbrouck*, 511 N.W.2d at 366–68. Accordingly, reporting provisions of claims-made policies are strictly construed, even where a harsh outcome against the insured results. *Id.* at 368.

IV. DISCUSSION

The 2015 letter was not a Fiduciary Claim. Giving the words of the policies their ordinary meaning and reading the policies as a whole, the 2015 letter was not a notice of investigation "for a Wrongful Act." *See* ECF No. 26-5 ¶ 5. The 2015 letter was not a notice of investigation for "any breach of the responsibilities, duties or obligations imposed by ERISA upon fiduciaries." *See id.* ¶ 6. Nor was it a notice of investigation for "any other matter claimed against an Insured solely by reason of the Insured's service as a fiduciary." *See id.* The 2015 letter contained no allegation of an ERISA violation, it did not identify any specific bad acts or actors, and

Telligen would not have been able to comply with the policies' reporting requirements after receiving the letter.

Because the 2015 letter was not a Fiduciary Claim, ASIC may not deny coverage for other claims based on Telligen's failure to report the 2015 letter to ASIC. Moreover, because the 2015 letter was not a Fiduciary Claim, any other claims, including the Innis lawsuit, are not Related Claims under the policies. ASIC's motion for summary judgment is therefore denied. Telligen's cross motion for partial summary judgment seeking a declaration that the 2015 letter was not a Fiduciary Claim is granted. To the extent Telligen's motion seeks additional interpretation of the policies or a declaration of ASIC's specific coverage obligations, the motion is denied.

A. For a Wrongful Act

Giving the words of the policies their ordinary meaning and reading the policies as a whole, the 2015 letter was not a Fiduciary Claim because it was not a notice of investigation for a Wrongful Act. Under the policies' provisions relevant here, a Fiduciary Claim requires the following elements: 1) "a written notice of commencement of a fact-finding investigation by the U.S. Department of Labor"; 2) "against an Insured"; 3) "for a Wrongful Act." ECF No. 26-5 ¶ 5. The parties focus on the third element, whether the 2015 letter was for a Wrongful Act. *See* ECF No. 26-4 at 12; ECF No. 31 at 1 ("The parties dispute only whether the [Department of Labor] investigation was 'for a Wrongful Act.'"). As relevant here, a Wrongful Act includes a breach or an alleged breach of "the responsibilities, duties or obligations imposed by ERISA" or "any other matter claimed against an Insured solely by means of the Insured's service as a fiduciary." ECF No. 26-5 ¶ 6. Interpreting these provisions in context, the 2015 letter was not for a Wrongful Act because it was not for any such breach or for any other matter claimed against Telligen solely by means of Telligen's service as a fiduciary.

1. Breach of responsibilities, duties, or obligations imposed by ERISA

The 2015 letter was not a notice of investigation for a breach or alleged breach of Telligen's duties under ERISA. ASIC argues "the 2015 letter informed Telligen the [Department of Labor] intended to conduct an on-site examination, review records, and conduct interviews 'to determine whether any person has violated or is about to violate any provisions' of ERISA." ECF No. 23-1 at 13. The portion of the 2015 letter ASIC quotes is itself a quotation from the statutory grant of authority to the Secretary of Labor, and not a description of the purpose of the 2015 letter. Moreover, even if this quoted statutory language is read as the purpose of the letter, the language implies that the Department of Labor had not yet determined whether a breach of Telligen's duties occurred. Therefore, the letter was not for a breach or alleged breach of Telligen's duties under ERISA. *See* ECF No. 26-5 ¶ 6.

The Sixth Circuit's analysis under Ohio law in *Employers' Fire Insurance Co. v. ProMedica Health System, Inc.*, is persuasive. 524 F. App'x 241 (6th Cir. Apr. 30, 2013) (unpublished). ASIC's argues the *ProMedica* analysis "is not necessary here" because the policy at issue in *ProMedica* "did not expressly define a 'fact-finding investigation' by the [Federal Trade Commission] as a claim." ECF No. 23-1 at 14. First, the policies at issue in this case do not define a fact-finding investigation as a claim. The policies define "a written notice of commencement of a fact-finding investigation . . . against an Insured *for a Wrongful Act*" as a Fiduciary Claim. ECF No. 26-5 ¶ 5 (emphasis added). Moreover, the policy at issue in *ProMedica* contemplated investigations, much like the policies at issue in this case: the "policies define 'claim' to mean: . . . a civil, criminal, administrative, regulatory or arbitration proceeding for monetary, non-monetary or injunctive relief commenced by: . . . the filing of a notice of

charges, formal investigative order or similar document, against an Insured for a Wrongful Act." 524 F. App'x at 243.

Second, and more importantly, the court's analysis in *ProMedica* focused on the requirement that the actions at issue be for a Wrongful Act, as the parties do here. *See id.* at 246–47. Under the policy at issue in *ProMedica*, "a 'Wrongful Act' is 'any actual or alleged' antitrust violation." *Id.* at 247. Similarly, here, a breach of a duty under ERISA "committed or allegedly committed" is a Wrongful Act. ECF No. 26-5 ¶ 6. And, like the policy at issue in *ProMedica*, the policies here do not define "allegedly." *See* 524 F. App'x at 247; *see also* Def.'s Ex. 1, ECF No. 24 at 4–130; Def.'s Ex. 2, ECF No. 24 at 131–254. The term is therefore given its ordinary meaning. *See LeMars*, 574 N.W.2d at 307. An act is "alleged" to have been committed when it is "accused but not proven or convicted," "asserted to be true," or "questionably true." Merriam–Webster Collegiate Dictionary 30 (10th ed. 1997).

The 2015 letter did not assert a violation of ERISA had occurred, nor did the letter accuse Telligen of violating ERISA. *See* ECF No. 24 at 323–24. The letter did not even say the Department of Labor suspected Telligen of violating ERISA. *Id.* The 2015 letter informed Telligen of the statutory authority for the Secretary of Labor's investigative power and notified Telligen of the Department of Labor's plan to conduct an on-site examination. *Id.* The 2015 letter did not notify Telligen that it violated ERISA or was alleged to have violated ERISA. *Cf. ProMedica*, 534 F. App'x at 248 (concluding the Federal Trade Commission alleged antitrust violations when "it commenced an administrative action against ProMedica, asserting that it '[had] reason to believe' that ProMedica's acquisition of St. Luke's violated Section 7 of the Clayton Act and describing specific ways that it believed the acquisition would impair competition") (alteration in original).

ASIC cites *Patriarch Partners, LLC v. Axis Insurance Co.* in support of its position that *ProMedica* is inapplicable. ECF No. 23-1 at 15 (citing No. 16-CV-2277 (VEC), 2017 WL 4233078 (S.D.N.Y. Sept. 22, 2017)). In *Patriarch Partners*, a private investment firm was investigated by the Securities and Exchange Commission. 2017 WL 4233078, at *1. There, the insurance policy at issue excluded any claim that was pending or existed before a particular date. *Id.* at *4. The court identified the "critical question" as "when the SEC investigation became a 'Claim,'" and concluded the "Subpoena, the Formal Order of Investigation, and the SEC's underlying investigation . . . constitute[d] a 'Claim' against an Insured that was pending before" the relevant date. *Id.* By the relevant date, the Securities and Exchange Commission had "explicitly sought documents related to three" particular funds, had obtained a subpoena for documents relating to those funds, and had met with Patriarch's attorneys and two former executives. *Id.* at *2–3. The 2015 letter did not provide Telligen comparable information—no specific bad acts or actors were identified, and although the letter indicated the Department of Labor would conduct "[a]n initial background interview," it did not require any particular Telligen representative to participate in the interview. ECF No. 24 at 324.

Moreover, in *Patriarch Partners*, the court noted, "[h]ad the parties in this case intended to exclude a subpoena where there was no assertion of civil or criminal liability from the definition of a 'Claim,' they could have done so by limiting coverage to demands for non-monetary relief that allege a 'Wrongful Act.'" 2017 WL 4233078, at *5. This is essentially what the parties have done here. Under the policies, to constitute a Fiduciary Claim, a notice of investigation must be for a Wrongful Act. ECF No. 26-5 ¶ 5. ASIC's reading of Fiduciary Claim asks the Court to ignore the requirement that a notice of investigation be for a Wrongful Act. The Court declines to ignore that requirement. *See Iowa Fuel & Minerals*, 471 N.W.2d at 863 (disfavoring interpretations that

leave some contract provisions with no effect). The 2015 letter was not a notice of a fact-finding investigation against Telligen for a breach of the responsibilities, duties, or obligations imposed by ERISA.

In support of its position that the 2015 letter was for a breach or alleged breach of the responsibilities, duties, or obligations imposed by ERISA, ASIC also cites *Bilyeu v. National Union Fire Insurance Co. of Pittsburgh*. ECF No. 23-1 at 13 (citing 184 So. 3d 69 (La. Ct. App. 2015)). In *Bilyeu*, the Court of Appeal of Louisiana stated in dicta that letters and subpoenas from the Department of Labor constituted a notice of claim under one of the insurance policies at issue in the case. 184 So. 3d at 78–79. *Bilyeu* is unhelpful in resolving this case. First, an opinion of the Court of Appeal of Louisiana interpreting an insurance contract "using the general rules of interpretation of contracts set out in the Civil Code" of Louisiana is not binding on this Court. *Id.* at 74. Second, the court's basis for its ruling in *Bilyeu* was the effective dates of the policies and when the alleged claims or wrongful acts had occurred. *See id.* at 75–78. The *Bilyeu* court's discussion of whether Department of Labor letters and subpoenas constituted a "notice of claim" under one of the policies was dicta. The court specifically noted:

> In light of our finding that the prior and pending, other organizational changes and ERISA exclusions in the National Union policies, and the pending or prior exclusion in the Federal policies, all apply to the instant claims, it is not really necessary to analyze whether the plaintiffs complied with the "claims made and reported" requirements of the policies.

Id. at 78. Finally, the structure of the policy discussed in dicta in *Bilyeu* was distinct from the policies at issue here in an important way. In the policy at issue in *Bilyeu*, "'Claim' is defined to include 'any fact-finding investigation by the U.S. Department of Labor.'" *Id.* at 75. "For a wrongful act" is not part of the definition. Therefore, the Court of Appeal of Louisiana's analysis

as to whether Department of Labor letters and subpoenas were a claim is of little relevance here, where the parties agree the essential question is whether the notice of investigation was *for a Wrongful Act*. *Bilyeu* does not undermine the conclusion that the 2015 letter was not a notice of investigation for a breach or alleged breach of Telligen's duties under ERISA.

2. Any other matter claimed

Similarly, the 2015 letter was not a notice of investigation for "any other matter claimed against an Insured solely by reason of the Insured's service as a fiduciary," an alternate provision of the policies' definition of Wrongful Act. ASIC argues the Court should read "claim" in this provision as "'to ask for' or 'to call for' and 'demand for something due or believed due.'" ECF No. 23-1 at 15–16. ASIC argues the 2015 letter "asked for" records and interviews and made a "demand" for an on-site examination. *Id.* at 16. Adopting ASIC's interpretation of "any other matter claimed" would require the Court to read portions of the policies in isolation, rather than considering the policies as whole. *See Cairns v. Grinnell Mut. Reinsurance Co.*, 398 N.W.2d 821, 825 (Iowa 1987) ("[W]e adhere to the proposition that 'a contract should be read and interpreted as an entirety rather than seriatim by clauses.'" (quoting *Archibald v. Midwest Paper Stock Co.*, 176 N.W.2d 761, 763 (Iowa 1970))); *see also Iowa Fuel & Minerals*, 471 N.W.2d at 863.

The other provisions of the policies' definition of a Wrongful Act as alleged in the petition and addenda Act must inform the Court's reading of "any other matter claimed." *See Maxim Techs., Inc. v. City of Dubuque*, 690 N.W.2d 896, 902 (Iowa 2005) (describing the rule of *ejusdem generis* as "where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase is to be held to refer to things of the same kind" and using the rule to interpret an indemnification clause (quoting *Hewitt v. Whattoff*, 100 N.W.2d 24, 26 (Iowa 1959)). The policies define a Wrongful Act as: 1) any breach of duties

imposed by ERISA committed or allegedly committed by an Insured; 2) any negligent act, error, or omission in Administration of any Plan committed or allegedly committed by an Insured; or 3) "any other matter claimed against an Insured solely by reason of the Insured's services as a fiduciary." ECF No. 26-5 ¶ 6. "[A]ny other matter claimed" therefore refers to things of the same kind as a breach of responsibility imposed by ERISA or a negligent act, error, or omission in the administration of a plan. The first two provisions refer to violations of a legal obligation. "[A]ny other matter claimed" must refer to other violations of legal obligations, not a notification of an on-site examination or a request to make documents available.

ASIC cites *Polychron v. Crum & Forster Insurance Cos.*, in which the Eighth Circuit interpreted an insurance contract under Arkansas law, in support of its position that "a 'claim' in a liability insurance policy can include a demand for testimony and production of documents." ECF No. 23-1 at 16 (citing 916 F.2d 461, 463 (8th Cir. 1990)). The Eighth Circuit concluded a grand jury investigation and subpoena were a "claim . . . against the Insureds . . . for a Wrongful Act" under the *Polychron* policy, although the structure of the policy was different than the policies at issue here. 916 F.2d at 462; *see id.* at 461, 463. The court concluded the grand jury investigation and subpoena "constitute[d] a 'claim' against a party," and noted, "the grand jury's investigation and the questioning by the Assistant United States Attorney amounted, as a practical matter, to an allegation of wrongdoing." *Id.* at 463. The court went on to note "[t]he defendants' characterization of the grand-jury investigation as mere requests for information and an explanation underestimates the seriousness of such a probe." *Id.* Here, in contrast, the 2015 letter can fairly be described as a request for information. Unlike the investigation in *Polychron*, here, as discussed above, the 2015 letter did not allege any wrongdoing. *See id.* Thus, the 2015 letter is distinguishable from the grand jury investigation and subpoena at issue in *Polychron*. The

2015 letter was not a notice of investigation against Telligen for any other matter claimed against Telligen by reason of Telligen's service as a fiduciary.

Additionally, ASIC's own motion for summary judgment undermines its argument the 2015 letter was a notice of investigation for a Wrongful Act. In its motion, ASIC describes the letter as "the commencement of a fact finding investigation in 2015 by the United States Department of Labor *concerning Telligen's Employee Stock Ownership Plan*." ECF No. 23 ¶ 3 (emphasis added). ASIC describes the letter as concerning the Plan, not as concerning any breach of fiduciary duty, any other claim against Telligen, or any other bad acts. That the letter "concerned" Telligen's Plan suggests the letter was not a notice of investigation for a breach or alleged breach of Telligen's duties under ERISA or for any other matter claimed against Telligen. *See* ECF No. 26-5 ¶ 6.

B. The Policies as a Whole

A reading of the policies as a whole supports the conclusion that the 2015 letter was not a Fiduciary Claim. If the 2015 letter were a Fiduciary Claim, the policies' reporting requirement would be unreasonable. *See Iowa Fuel & Minerals*, 471 N.W.2d at 863 (preferring contract interpretations that give "reasonable, lawful, and effective meaning to all terms"). The 2015 letter identified no specific bad actions or bad actors and identified no harm caused by Telligen's actions. The reporting requirement, a critical component of a claims-made policy, required Telligen to "give full particulars of the Claim" when reporting a Fiduciary Claim to ASIC. ECF No. 26-5 ¶ 14. Specifically, the polices required the notification to include at least "a description of the Claim and Wrongful Act; the identity of all potential claimants and any Insureds involved; a description of the injury or damages that resulted from such Wrongful Act; information on the time, place and nature of the Wrongful Act; and the manner in which the Insureds first became aware of such

Wrongful Act." *Id.* Notably, this provision requires Telligen to provide a description not just of the Claim—a notice of a fact-finding investigation against Telligen for a breach of fiduciary duty, for example—but also to provide a description of the Wrongful Act that underlies the Claim. Under this provision, Telligen must identify potential claimants and the actors involved, describe the injury or damages, and identify the time, place, and nature of act. *See id.* This information cannot be discerned from the 2015 letter. Requiring Telligen to provide that information to ASIC upon receipt of the 2015 letter would make the reporting provision unreasonable. The Court will not interpret one provision of the policies in a way that renders another provision unreasonable.

ASIC is correct that "it is important that reporting requirements be strictly enforced in a claims-made policy." ECF No. 23-1 at 8. But an insured must be able to determine what constitutes a claim under the policy so that it can comply with reporting requirements and obtain its bargained-for coverage. In 2015, when Telligen received the 2015 letter, Innis had not yet filed her lawsuit, and Telligen therefore did not have notice of the factual allegations in her complaint. Additionally, in 2015, the Department of Labor had not yet sent the 2017 letter, which contained substantial factual information and specifically noted, "it appears that, as fiduciaries, you may have breached your fiduciary obligations to the Plan and violated several provisions of ERISA," and concluded, "[f]or the reasons cited above, you are in violation of ERISA and will remain so as long as these violations remain uncorrected." ECF No. 24 at 315, 320–21. If the 2015 letter were a Fiduciary Claim, the Court would strictly enforce the reporting requirements of the policies. *See Hasbrouck*, 511 N.W.2d at 368. But considering the limited information Telligen had at the time, the 2015 letter did not enable—or require—Telligen to report a Fiduciary Claim to ASIC. The letter was not a Fiduciary Claim, and Telligen did not fail to satisfy the policies' reporting requirements by not reporting the letter to ASIC.

C. Scope of Coverage

The Court does not address the scope of ASIC's obligations beyond concluding the 2015 letter was not a Fiduciary Claim. Because it was not a Fiduciary Claim, ASIC may not deny coverage based on Telligen's failure to notify ASIC of the 2015 letter. Moreover, because the 2015 letter was not a Fiduciary Claim, any other claims, including the Innis lawsuit, are not Related Claims under the policies. ASIC's motion for summary judgment is therefore denied.

Telligen's cross motion for partial summary judgment seeks a declaration that it "is entitled to coverage under the Policy for expenses paid to Bankers Trust arising from the [Innis lawsuit] and expenses paid responding to the [2017 letter]." ECF No. 26 at 3. It is not immediately clear whether this is within the scope of relief Telligen sought in its Amended Complaint, which did not specifically seek a declaration of coverage for the 2017 letter. *See* ECF No. 14 at 8 (seeking a declaratory judgment "that [ASIC] is obligated to provide Fiduciary Liability Coverage for amounts Telligen is legally obligated to pay as defense expenses of Bankers Trust of South Dakota in the [Innis lawsuit], in accordance with the terms and conditions of the Policy, for the costs of this action, and for all other legal or equitable relief that is just."). Moreover, ASIC requested "an opportunity to review Telligen's supporting documentation [about its claimed Loss] before taking a position on whether such expenses are reimbursable under the policy." ECF No. 31 at 9. At the hearing on these motions, the parties represented to the Court they believed such a review would be appropriate.

Accordingly, the Court's holding is limited to the conclusion the 2015 letter was not a Fiduciary Claim under the policies. The parties are instructed to comport themselves in accordance with that conclusion. The Court does not address issues of loss, indemnification, or the extent of ASIC's obligations under the policies. The parties suggested in their Proposed Scheduling

Order and Discovery Plan, ECF Nos. 19, 20, that they complete and submit a Proposed Scheduling Order and Discovery Plan within fourteen days of this Order. Prior to requiring submission of such a plan, the Court will require the parties to participate in a status conference with the United States Magistrate Judge assigned to this case.

V. CONCLUSION

The 2015 letter was not a Fiduciary Claim. The letter was not a notice of fact-finding investigation for "any breach of the responsibilities, duties or obligations imposed by ERISA upon fiduciaries" or for "any other matter claimed against an Insured solely by reason of the Insured's service as a fiduciary." *See* ECF No. 26-5 ¶ 6. The 2015 letter contained no allegation of a Wrongful Act, it did not identify any specific bad acts or actors, and Telligen would not have been able to comply with the policies' reporting requirements after receiving the letter. ASIC may not deny coverage on the basis of Telligen's failure to report the 2015 letter.

IT IS ORDERED that Defendant Atlantic Specialty Insurance Company's Motion for Summary Judgment, ECF No. 23, is **DENIED**, and Plaintiff Telligen, Inc.'s Cross-Motion for Partial Summary Judgment, ECF No. 26, is **GRANTED IN PART** as described above.

IT IS FURTHER ORDERED that parties participate in a status conference with the United States Magistrate Judge assigned to this case in accordance with a forthcoming scheduling order.

IT IS SO ORDERED.

Dated this 2nd day of August, 2019.

REBECCA GOODGAME EBINGER
UNITED STATES DISTRICT JUDGE