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IN THE

# Supreme Court of the State of Delaware

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| ACE AMERICAN INSURANCE COMPANY, *et al.*,<br><br>Defendants Below/Appellants,<br><br>v.<br><br>RITEAID CORPORATION, *et al.*,<br><br>Plaintiffs Below/Appellees. | **No. 339, 2020**<br><br>COURT BELOW:<br><br>SUPERIOR COURT OF THE STATE OF DELAWARE,<br>C.A. NO.: N19C-04-150 EMD [CCLD] |

# APPELLANTS' REPLY BRIEF

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## INTRODUCTION

RiteAid's response brief ("RB") admits that a duty to defend arises only if the complaint's allegations, taken as true, would establish liability covered by the policy. RB10. But RiteAid does not take that standard seriously. As shown in Chubb's opening brief, the Counties' complaints cannot lead to covered bodily-injury liability because they nowhere allege that RiteAid is legally liable to any individual for bodily injuries, and because the undifferentiated, aggregated injuries they instead allege first manifested and were known to RiteAid long before commencement of the 2015 Policy. Rather than accepting the Counties' pure economic-loss claims as actually pleaded, RiteAid tries to rewrite them into derivative "person-by-person" bodily-injury claims, ignoring that the complaints do not merely omit such claims, but *expressly disclaim* them. RiteAid likewise misconstrues straightforward policy terms and settled Pennsylvania precedent. Despite its efforts, RiteAid cannot manufacture coverage where none exists.

## ARGUMENT

### I. CHUBB HAS NO DUTY TO DEFEND BECAUSE THE COUNTIES' PURE ECONOMIC-LOSS CLAIMS DO NOT TRIGGER BODILY-INJURY COVERAGE

As Chubb's opening brief ("AOB") showed, liability coverage for suits seeking damages "because of" "bodily injury" encompasses only suits by injured plaintiffs for their own bodily injuries, or suits by others with derivative rights to seek damages for another's bodily injuries. That rule precludes coverage here: the Counties suffered no bodily injuries themselves, and they explicitly disclaim any theory of derivative liability for injuries suffered by county residents. Their complaints do "not seek damages for death, physical injury to person, emotional distress, or physical damages to property," but instead seek to recover budgetary losses that "can only be suffered by [the Counties]" and "are not based upon or derivative of the rights of others." A455, A822-23. The Counties' express disclaimer confirms that they assert only claims for their *own* purely economic losses. And as courts have consistently recognized, such pure economic-loss claims are not subject to bodily-injury coverage even if they are causally connected to third-party bodily injuries.

RiteAid's response brief largely ignores those decisions, instead relying heavily on a provision in the 2015 Policy clarifying the timing applicable to certain *derivative* economic-loss claims. But the Counties' disclaimer of any derivative

claims precludes reliance on that provision—which is doubtless why RiteAid fails to mention the disclaimer, let alone explain why it does not defeat RiteAid's coverage argument.

### A. Bodily-Injury Coverage Applies Only To Direct And Derivative Liability For Bodily Injury, Not To Purely Economic Damage Allegedly Caused By Bodily Injuries To Non-Parties

RiteAid first argues that the phrase "because of" by itself means that even if the plaintiff suffered only economic or emotional damage, her claim triggers bodily-injury coverage so long as her damage is somehow "causally related" to bodily injuries suffered by other persons. RB12.[1] Not so.

A wide body of judicial precedent has rejected bodily-injury coverage for economic- and emotional-damage claims even when such damage is directly caused by bodily injuries to other persons. For example, in "bystander" liability cases, a plaintiff must show a direct causal connection between her emotional injuries and bodily injury suffered by a family member, but that causal connection does not establish bodily-injury coverage—courts uniformly reject such coverage unless the *plaintiff herself* suffered bodily injuries. AOB13-14. RiteAid makes no effort to reconcile its "causal connection" theory with those precedents.

[1] Chubb does not argue that "for bodily injury" means something narrower than "because of bodily injury." In this context, they are equivalent. AOB12 n.1.

Courts have also consistently rejected coverage for claims seeking recovery for non-derivative economic losses caused by bodily injuries to non-parties. AOB14-19. For example, courts have denied coverage for claims by an employer seeking compensation for economic losses incurred because non-party employees suffered bodily injuries from insured's defective HVAC system, *see Diamond State Ins. Co. v. Chester-Jensen Co.*, 611 N.E.2d 1083, 1087-88 (Ill. App. 1993), and by a restaurant seeking compensation for economic losses incurred because patrons suffered food poisoning from the insured's product, *see Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Ready Pac Foods, Inc.*, 782 F. Supp. 2d 1047, 1056-57 (C.D. Cal. 2011). These and other economic-loss cases confirm that liability insurance properly covers only claims seeking compensation for the bodily injuries themselves, not compensation for all the downstream economic losses such injuries may—and often do—cause to others. RiteAid offers no limiting principle on its "causal connection" coverage theory, nor does it explain how, absent one, insurers can accurately underwrite insurance for downstream economic losses. AOB19-20.[2]

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[2] RiteAid cites one case asserting that, under Illinois law, coverage for claims seeking damages "because of" property damage reflects a "causal, 'but for'" concept that does not limit coverage to "lawsuits brought by the owners of the damaged property." *Great Am. E&S Ins. Co. v. Power Cell, LLC*, 356 F. Supp. 3d 730, 743, 745 (N.D. Ill. 2018). The court's discussion of Illinois law overlooks *Chester-Jensen*, which rejected the court's "causal connection" coverage theory,

RiteAid tries to distinguish the economic-loss precedents on the ground that they did not involve "express policy language" specifically covering damages for "care" and "death." RiteAid's misunderstanding of that language is addressed below, *infra* at 10-11, but suffice to say for now that RiteAid's argument effectively concedes that *absent* such language, bodily-injury coverage does *not* apply to claims for pure economic loss, even when allegedly caused by bodily injuries to non-parties.

While ignoring all the bystander-liability cases and most of the economic-loss precedents, RiteAid does passingly address *Medmarc Casualty Insurance Co. v. Avent America, Inc.*, 612 F.3d 607 (7th Cir. 2010), and *Health Care Industry Liability Insurance Program v. Momence Meadows Nursing Center, Inc.*, 566 F.3d 689 (7th Cir. 2009), asserting that the economic-loss claims in those cases did not require proof of specific bodily injuries. RB17, 19. Exactly right—and the same is true here. In *Medmarc* and *Momence*, plaintiffs' alleged economic losses were causally connected to non-party bodily injuries, but the underlying claims did not require proof of the insured's liability to the non-parties for those bodily injuries. Likewise here, the Counties' theory of budgetary harms is based on overdoses and

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*see* 611 N.E.2d at 1087. On that untenable theory, if the insured's negligence caused an office building to burn down, coverage would apply not only to the building-owner's suit, but also to economic-loss suits by nearby stores claiming that the building's destruction caused them lost business.

addictions suffered by non-party county residents, but the Counties do not allege, and need not prove, that RiteAid is liable to any resident for such harms. Rather, allegations about opioid-related injuries "merely provide context explaining the economic loss to the State." *Travelers Prop. Cas. Co. of Am. v. Anda, Inc*., 90 F. Supp. 3d 1308, 1315 (S.D. Fla. 2015), *aff'd*, 658 F. App'x 955 (11th Cir. 2016); *see Cincinnati Ins. Co. v. Richie Enters., LLC*, 2014 WL 3513211, at *5 (W.D. Ky. July 16, 2014) (West Virginia did "not need to prove that persons were injured by prescription drugs" to prevail in opioid lawsuit).

Citing an unpublished Fifth Circuit decision, RiteAid asserts that if bodily-injury coverage were intended to apply only when the plaintiff herself suffered bodily injuries, then the policy would have "explicitly limited coverage to 'claims for damages incurred because of bodily injury *to the plaintiff seeking damages*.'" RB16 (emphasis added) (quoting *Scottsdale Ins. Co. v. Nat'l Shooting Sports Found., Inc.*, 2000 WL 1029091, at *2 (5th Cir. July 11, 2000)). But such additional language could preclude coverage for derivative economic-damages claims, where a plaintiff who did *not* suffer bodily injury asserts a claim based on the insured's liability to someone who did. The existing formulation allows coverage for both derivative and direct claims for bodily injury, but not for pure economic loss claims untethered to liability for particular bodily injuries. AOB11-13.

RiteAid also cites cases finding coverage for government suits seeking reimbursement for response costs under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). RB15-16. In CERCLA suits, RiteAid contends, the government seeks economic damages (cleanup costs) causally connected to property damage suffered by non-parties, which RiteAid analogizes to the Counties' suits seeking economic damages (budgetary outlays) causally connected to residents' bodily injuries. The analogy is misplaced.

To start, some cases reject coverage for CERCLA claims on the ground that "response costs are an economic loss." *Mraz v. Canadian Universal Ins. Co.*, 804 F.2d 1325, 1329 (4th Cir. 2009); *see Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d 16, 18 n.3 (Me. 1990). And cases that do allow coverage apply a principle inapplicable here, reasoning that government plaintiffs in CERCLA cases actually claim damage to their *own property rights*, because the "State's interest in protecting its natural resources is a form of property right," such that "injury to these resources constitutes 'property damage' within the meaning of the policies." *C.D. Spangler Constr. Co. v. Indus. Crankshaft & Eng'g Co.*, 388 S.E.2d 557, 565 (N.C. 1990); *see A.Y. McDonald Indus., Inc. v. Ins. Co. of N. Am.*, 475 N.W.2d 607, 622-23 (Iowa 1991) (finding duty to defend CERCLA action based on government's property "interest independent of and behind the titles of its citizens in all the air and earth (that is, its natural resources) within [its] domain"); *Minn.*

*Mining & Mfg. Co. v. Travelers Indem. Co.*, 457 N.W.2d 175, 182 (Minn. 1990). The Counties claim no analogous property interest in their residents' bodily integrity.

CERCLA actions also can be understood as derivative claims: the government's claim for cleanup costs is derived from the insured's liability for damage to identifiable property, i.e., the government can prevail only by establishing the insured's liability for property damage. In addition, the statute makes the government essentially the litigation representative of private injured persons, who may seek damages and remediation only to the extent not encompassed by the government's action. *See* 42 U.S.C. § 9607 (empowering government to pursue "all costs of removal or remedial action" in first instance). If a successful CERCLA action remediates all private property damage, then private parties have no claims of their own.

CERCLA claims are nothing like the Counties' budgetary claims, which seek no recovery for the Counties' own bodily injuries, no derivative recovery for residents' bodily injuries, and no damages that could be pursued by residents. The Counties' non-derivative, pure economic-loss claims thus differ fundamentally from CERCLA claims based on liability for damage to identifiable property.[3]

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[3] The Counties' claims also differ from the property-damage cases RiteAid cites. RB12. Unlike here, the underlying plaintiffs in those cases *did* suffer

Finally, RiteAid insists its position is supported by *American & Foreign Insurance Co. v. Jerry's Sport Center, Inc.*, 2 A.3d 526 (Pa. 2010). It is not. Both lower courts in that case rejected bodily-injury coverage for a claim by the NAACP seeking a fund to educate gun dealers based on bodily injuries to NAACP members. AOB17-18. The Pennsylvania Supreme Court did not reverse that holding, emphasizing that the issue was "not before us for review." 2 A.3d at 593 n.4. According to RiteAid, the court *implicitly* found a duty to defend because it held that the insurer was not entitled to reimbursement of defense costs it had paid voluntarily. Not so. The insurer in *Jerry's Sport* had voluntarily agreed to defend, then sought reimbursement of its defense costs after the trial court ruled that it had no duty to defend. The Pennsylvania Supreme Court rejected the reimbursement claim on the *sole basis* that once an insurer voluntarily provides a defense, it cannot obtain reimbursement absent express contractual authorization, because the insurer might manipulate the defense and thus "benefit[] unfairly" before recouping its expenditures. *Id.* at 539, 543. That holding has nothing to do with

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covered property damage—the "causal connection" question was whether other damage suffered *by the plaintiffs* was "because of" the same property damage. *See Mattiola Constr. Corp. v. Commercial Union Ins. Co.*, 2002 WL 434296, at *2-3 (Pa. Ct. C.P. Mar. 8, 2002); *Imperial Cas. & Indem. Co. v. High Concrete Structures, Inc.*, 858 F.2d 128, 135-36 (3d Cir. 1988). There was no holding that pure economic-loss claims were covered because they were causally connected to property damage suffered by *other persons*.

the lower courts' ruling that the NAACP's economic claim did not trigger bodily-injury coverage despite its causal connection to members' bodily injuries. As the caselaw makes clear, only *derivative* economic-damage claims are subject to bodily-injury coverage.[4]

### B. The Timing Provision For Certain Derivative Economic-Damage Claims Does Not Apply Here

In addition to its broad "causal connection" theory, RiteAid makes a narrower argument focused on a timing provision in the 2015 Policy that governs certain types of derivative economic-damage claims. That provision states that "[d]amages because of 'personal injury' include damages claimed by any person or organization for care, loss of services or death resulting at any time from the 'personal injury.'" A1016. According to RiteAid, the provision "expressly covers the precise damages claimed in the Opioid Lawsuits," because the Counties seek damages for costs of "care" or "death" resulting from opioid-related bodily injuries. RB19. RiteAid mischaracterizes both the provision and the Counties' lawsuits.

As Chubb has shown (AOB25-26), this provision alters the policy's default coverage timing rule: whereas the policy generally applies only to damage

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[4] Consistent with that rule, if there was coverage in *Jerry's Sport*, it was only because the NAACP asserted a *representative* claim *on behalf of* its injured members, as needed for the NAACP to establish standing in the case. AOB18 n.3.

incurred "during the policy period," the provision secures coverage for certain derivative economic damages incurred *after* the policy period. For example, if a person is injured during the policy period, but his mother pays his medical expenses after the policy expires, the mother's damages for those expenses would still be covered. But the provision does not broadly create coverage for all medical and funeral expenses with some causal connection to unspecified bodily injuries suffered by unknown non-parties. RiteAid reads the provision as if it referred to damages for "care" and "death" resulting from "*any* personal injury." But the timing provision applies only when such damages result from "*the* personal injury," i.e., the "bodily injury to a person" otherwise covered by the policy. The policy thus covers not only liability for the bodily injury itself, but also medical or funeral expenses incurred by another "person or organization" for "the" same bodily injury.

Such expenses are derivative economic damages. When a mother pays for her son's medical expenses, her claim to recover those expenses from the tortfeasor who injured her son is necessarily derivative of her son's claim against that tortfeasor—she will recover only by establishing the tortfeasor's liability *to her son*. *See, e.g.*, *T.H.E. Ins. Co. v. Est. of Booher*, 944 N.W.2d 655, 659, 665 (Iowa 2020); *Northland Cas. Co. v. T-N-T Ranch & Rodeo Co.*, 2013 WL 3212289, at *4 (W.D. Mo. June 24, 2013). Similarly, when a health organization pays medical

expenses for an injured member, the organization may become subrogated to the member's tort claim against the party that injured him. AOB22-23. Again, the organization's claim is derivative of the member's claim—it can prevail only by establishing the tortfeasor's liability to the injured member.

As shown, the Counties have expressly disclaimed any recovery of derivative "damages for death" or "physical injury to person," and instead assert economic-loss claims that "are *not* based upon or derivative of the rights of others." *Supra* at 2. Unlike derivative claims seeking recovery based on the insured's liability for "bodily injury to a person," the Counties' claims need not and do not allege that RiteAid is legally liable to anyone for bodily injury. The Counties instead seek to recover their own *independent* economic losses, as their disclaimer establishes. *Supra* at 2. Such pure economic-loss claims are not encompassed by the derivative-claim timing provision. *See Richie*, 2014 WL 3513211, at *6 (identical provision does not extend coverage to government claims seeking recovery of non-derivative, purely economic losses due to opioid epidemic).[5]

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[5] RiteAid cites *SIG Arms Inc. v. Employers Insurance of Wausau*, 122 F. Supp. 2d 255 (D.N.H. 2000), in support of its interpretation, but that case misquotes the provision—causing it to misconstrue the derivative-claim timing rule the same way RiteAid does, *see id.* at 260 (omitting "the bodily injury" and "at any time"). The court otherwise acknowledged precedents holding that the

RiteAid has no serious answer to Chubb's analysis of the timing provision, asserting only that Chubb's interpretation would somehow render the clause "surplusage." RB13. Obviously not: the clause extends the coverage period for specified derivative economic-damages claims. By contrast, RiteAid's construction *would* render the clause surplusage: according to RiteAid, the policy's coverage for damages "because of" bodily injury *already* encompasses all economic damages "causally related" to some bodily injury somewhere. On that reading, the derivative-claim timing clause serves no function. Only Chubb's interpretation gives full "effect to all contract provisions." *E.I. du Pont de Nemours & Co. v. Shell Oil Co*., 498 A.2d 1108, 1114 (Del. 1985).

The foregoing discussion exposes the error in *Cincinnati Insurance Co. v. H.D. Smith, L.L.C.*, 829 F.3d 771 (7th Cir. 2016), which relies entirely on the derivative-claim timing provision (and thus notably does *not* support RiteAid's broad "causal connection" theory based solely on the "because of" phrase). Like RiteAid, *H.D. Smith* fails to recognize either that the timing clause merely extends the coverage period for certain derivative economic-damage claims, or that budgetary-loss claims like the Counties' are *not* derivative claims based on legal liability for specific residents' bodily injuries. AOB22-23. Later cases relying on

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"because of" provision by itself "does not cover claims for economic losses incurred because of bodily injury to a third person." *Id.*

*H.D. Smith* all reiterate its errors, and thus provide no better precedent than *H.D. Smith* itself. AOB23 & n.7.

Because the Counties assert only claims for independent economic losses, and not derivative economic-damage claims, there is no potential for bodily-injury coverage and hence no duty to defend.

## II. PENNSYLVANIA'S FIRST-MANIFESTATION TRIGGER RULE PRECLUDES COVERAGE UNDER THE 2015 POLICY

Assuming the Counties' lawsuits potentially trigger bodily-injury coverage, Pennsylvania law permits coverage only under the policy in effect when the injuries first manifested. *See Pa. Nat'l Mut. Cas. Ins. Co. v. St. John*, 106 A.3d 1, 7, 15-23 (Pa. 2014); *D'Auria v. Zurich Ins. Co.*, 507 A.2d 857, 860 (Pa. Super. 1986). It is uncontested that the opioid-related injuries underlying the Counties' continuing economic losses began manifesting by at least the 1990s and early 2000s, as the Counties' complaints allege. A146, A359, A369, A491, A700, A708-09, A711-12; Op. 12-17. RiteAid accordingly cannot claim bodily-injury coverage under the 2015 Policy.

Pennsylvania courts have recognized only one exception to the first-manifestation rule: injuries caused by asbestos exposure. The exception exists because the decades-long latency period of asbestos-related disease allows insurers to "predict[] with near certainty" the future "existence and eventual manifestation" of asbestos injuries, and thus threatens "en masse cancellation of occurrence-based policies." *St. John*, 106 A.3d at 22-23. To avoid this problem, courts apply a "multiple" or "continuing" trigger allowing insureds to invoke any policy in effect during the latency period, before the first manifestation of asbestos disease. *See J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 507 (Pa. 1993). Pennsylvania courts have repeatedly rejected attempts to adopt continuous-trigger

rules outside the asbestos context. *See St. John*, 106 A.3d at 15-23; *Consulting Eng'rs, Inc. v. Ins. Co. of N. Am.*, 710 A.2d 82 (Pa. Super. 1998), *aff'd*, 743 A.2d 911 (Pa. 2000).

RiteAid's lone non-asbestos case recognizing a continuous trigger, *Pennsylvania Manufacturers' Ass'n Insurance Co. v. Johnson Matthey, Inc.*, 160 A.3d 285 (Pa. Commw. Ct. 2017), squarely *rejects* RiteAid's position. *Johnson Matthey* holds that undetected environmental contamination can trigger multiple policies in effect *before* first manifestation, *id.* at 291-93, while expressly recognizing that if policies commence *after* contamination first manifests, the insurer has no duty to defend, *id.* at 294. RiteAid here wants to trigger policies in effect after opioids-related injuries first manifested in the late 1990s and early 2000s—exactly the rule rejected in *Johnson Matthey*.

RiteAid proffers no persuasive justification for adopting a post-manifestation continuous-trigger exception even more radical than both *Johnson Matthey* and the *J.H. France* asbestos exception. According to RiteAid, a post-manifestation trigger rule is required here by language in the 2015 Policy. RiteAid is wrong. The first-manifestation trigger rule is *already* based on the policy language: the *St. John* court conducted a "close reading" of standard CGL language *identical to the 2015 Policy*, and announced a "general rule under Pennsylvania jurisprudence" that "the first manifestation rule governs a trigger of

coverage analysis for policies containing *standard CGL language*." 106 A.3d at 19, 23 (emphasis added).

Although the same standard language applies here, RiteAid contends that the provision covering "bodily injury sustained by *a* person" means the Policy applies "on a person-by-person basis," and thus the Policy is triggered so long as one person was injured in 2015, even if others were injured earlier. RB24. That argument might have force in a case involving multiple "person-by-person" bodily-injury claims, as in the case RiteAid cites, *Seagrave Fire Apparatus, LLC v. CNA*, 2017 WL 2972887, at *4 (Pa. Ct. C.P. June 28, 2017) (individual firefighter bodily-injury claims each independently trigger coverage), *aff'd*, 188 A.3d 559 (Pa. Super. 2018). This is not such a case: unlike in *Seagrave*, the Counties do not allege, and need not prove, RiteAid's liability for bodily injury on a "person-by-person" basis, or on any basis at all. Rather, like in *St. John*, RiteAid seeks coverage for what it says is a *single occurrence* of undifferentiated injuries to an aggregate population. In this situation, there is "coverage only under the policy or policies in effect at the time [the] occurrence first arises," which is "when bodily injury … first manifests in a way that becomes reasonably apparent." *St. John*, 106 A.3d at 21-22. If RiteAid's single-occurrence argument is correct, there is no coverage under the 2015 Policy, because the bodily injuries underlying that occurrence began manifesting long before 2015.

Contrary to RiteAid's submission, the Policy's Limit of Liability provision does not require ignoring *St. John* and applying a continuous trigger to the alleged single occurrence either. According to RiteAid, that provision includes language applicable only when a continuing occurrence triggers multiple polices, which would be surplusage if a single-trigger rule *always* applied. RB25. A single-trigger rule, however, does *not* always apply: in asbestos cases, a continuous trigger applies, and the language cited by RiteAid determines the limit available under each applicable policy. The language thus performs an essential function for *certain* continuing damage, but its existence does not mean that *all* continuing damage triggers multiple policies.

RiteAid also makes a puzzling argument based on the Policy's "prior knowledge" provision, which bars coverage when an insured knew about an injury before the policy commenced. According to RiteAid, that provision somehow shows that an unknown preexisting injury "could trigger an earlier policy." RB27. But the provision says nothing about earlier policies. It merely addresses coverage when the insured knew about an injury before policy commencement. Prior policies, if any, have no bearing.

Finally, RiteAid argues that even under *St. John*'s first-manifestation trigger, a duty to defend arises under the 2015 Policy because the Complaints "do not exclude the possibility that bodily injuries allegedly caused by Rite Aid took place

during the 2015 policy period." RB28-29. When an insured invokes a policy's coverage for a single continuing occurrence, however, the question under *St. John* is not whether the underlying injuries *continued* into the policy period—it is whether the injuries underlying the occurrence *became evident* during that period. The Counties' complaints answer that question: taken as true, their allegations establish that the injuries underlying RiteAid's claimed occurrence manifested long *before* 2015. *See supra* at 15. Those allegations are binding at the duty-to-defend stage, and they preclude any possibility of triggering the 2015 Policy.

## III. THE SUPERIOR COURT ERRED IN GRANTING RITEAID SUMMARY JUDGMENT ON THE "PRIOR KNOWLEDGE" REQUIREMENT OF CHUBB'S 2015 POLICY

Under the "prior knowledge" clause, coverage "applies to 'personal injury'" "only if … [p]rior to the policy period, no insured … knew that the 'personal injury' … had occurred, in whole or in part." A1015. If the opioid-related injuries described in the Counties' complaints trigger bodily-injury coverage, then the "prior knowledge" clause bars such coverage because the Counties' complaints establish that RiteAid was aware of those injuries before 2015. AOB33-34. RiteAid's response does not show otherwise.

RiteAid relies heavily on *Erie Insurance Exchange v. Moore*, 228 A.3d 258 (Pa. 2020), which involved a coverage exclusion for injuries the insured "expected or intended" to occur. *Id.* at 266. Because the underlying complaint alleged that the insured shot his victim "negligently," the court held that the "expected or intended" exclusion did not apply and the insurer had a duty to defend. *Id.* That analysis is irrelevant here. The "prior knowledge" clause applies when the insured knew about *preexisting* injuries when it *obtained* the policy. It has nothing to do with whether the insured "expected or intended" its *post*-policy conduct to cause injury *in the future*.

RiteAid next argues that even if it was aware of preexisting opioid-related injuries, it was not necessarily aware that the injuries were *caused by its*

*negligence*. RB35. Unlike the "known loss/loss-in-progress" doctrine, however, the "prior knowledge" provision does not require the insured to have been aware of its *potential liability* for a known injury. AOB32 (explaining distinction). Rather, coverage is barred if the insured knew about the injury *itself*, as in *Clarendon National Insurance Co. v. Philadelphia Indemnity Insurance Co.*, 954 F.3d 397 (1st Cir. 2020), where the insured knew about leaks in a roof, but did not know its negligence caused them, *id.* at 406. RiteAid makes no effort to address *Clarendon*.

This plain-text reading of the "prior knowledge" clause does not mean coverage is barred whenever an insured previously had "vague awareness that bodily injury exists in the world." RB35. It means that coverage is barred if the insured knew—"in whole or in part"—about the injuries *for which coverage is sought*, as in *Clarendon*. RiteAid's own cases—*Kaady v. Mid-Continent Casualty Co.*, 790 F.3d 995 (9th Cir. 2015); *Seagrave*, *supra*; and *Westfield Insurance Co. v. Sheehan Construction Co.*, 580 F. Supp. 2d 701 (S.D. Ind. 2008), *aff'd*, 564 F.3d 817 (7th Cir. 2009)—confirm the point: rather than following RiteAid's approach by asking whether the insured knew that its own negligence caused the relevant injury, the courts in these cases asked only whether the insured knew about the *injury itself* when it obtained the policy.

RiteAid also argues that the "prior knowledge" provision requires knowledge of the same "claimed injury" for which coverage is sought, and thus

allegations establishing RiteAid's knowledge of opioid-related bodily injuries *before* 2015 do not preclude coverage for claims asserting other bodily injuries that occurred *during* 2015. RB34. RiteAid, however, does not seek coverage for claims asserting individual bodily injuries that occurred during 2015. The Counties instead assert claims for *economic losses* that occurred during 2015, allegedly caused by *aggregate* opioid-related bodily injuries to an undifferentiated mass of persons that occurred at unspecified times. Because individual bodily injuries are irrelevant to the Counties' economic-loss claims, RiteAid's prior knowledge of individual bodily injuries is likewise irrelevant to coverage for those claims. What matters is RiteAid's knowledge of bodily injuries *relevant to the Counties' claims*, i.e., the *aggregate* opioid-related bodily injuries that allegedly caused the Counties' economic losses.

RiteAid's error on this point is exposed by its reliance on *Seagrave* and *Westfield*. As RiteAid's own discussion shows, both cases involved *individual* claims for bodily injury (*Seagrave*) or property damage (*Westfield*), and both courts held that the insured's prior knowledge of *one individual's* injury did not establish knowledge of all *other* persons' injuries as well. That analysis has no application to economic-loss claims that do not allege any individual bodily-injury claims, but instead solely claim budgetary losses connected in some way to undifferentiated opioid-related injuries. Because RiteAid was well aware of

opioid-related bodily injuries well before 2015, it cannot invoke bodily-injury coverage for the Counties' economic-loss claims.

## IV. RITEAID HAS NOT ESTABLISHED EXHAUSTION BECAUSE A GENUINE FACTUAL DISPUTE EXISTS REGARDING THE NUMBER OF OCCURRENCES

RiteAid raised the "number of occurrences" issue below for one reason: to establish that RiteAid exhausted the $3 million "per occurrence" retention needed to trigger Chubb's 2015 Policy. As RiteAid acknowledges, multiple injuries involve one "occurrence" under Pennsylvania law only when they all result from "one proximate, uninterrupted and continuing cause." RB40-41 (citation omitted). The Superior Court held that bodily injuries referenced in the Track One lawsuits all involve the same occurrence, which fully sufficed to resolve RiteAid's exhaustion motion. RiteAid offers no plausible defense of the court's decision to opine on whether *other* lawsuits involve the same occurrence, *without even reviewing those lawsuits*. AOB42-46. Nor does RiteAid justify the court's ruling the Track One lawsuits themselves involve one occurrence. AOB37-42.

### A. The Superior Court's Comments On "Other" Opioids Lawsuits Were Unnecessary, Unsupported, And Incorrect

"Delaware courts do not render advisory or hypothetical opinions." *XL Specialty Ins. Co. v. WMI Liquidating Tr.*, 93 A.3d 1208, 1217 (Del. 2014). RiteAid cites no authority justifying the Superior Court's advisory comments on non-Track-One lawsuits. RiteAid asserts only that Chubb's petition for review stated that the court's commentary "matters." RB39 (quoting Dkt. No. 2, Ex. B at 11). The petition said no such thing—it argued only that the *basic number-of-*

*occurrences question* matters, because it is relevant to RiteAid's exhaustion of its per-occurrence retention. Chubb did not argue that resolving exhaustion required the court to opine on non-Track-One lawsuits, especially without examining them.

RiteAid cites decisions finding that "thousands" of lawsuits involved a single occurrence. RB40. But the courts' findings in those cases were not dicta, and had adequate record support. The cases also differed fundamentally from this one: each involved a defective product that failed in the same way for all claimants. *See Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co.*, 996 A.2d 1254, 1258-59 (Del. 2010) (defective plumbing component caused leaks); *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 66 (Del. 2011) (salmonella in peanut butter from one factory); *Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 418 F.3d 330, 334-35 (3d Cir. 2005) (asbestos-containing products). The 1100+ lawsuits here do not all allege that opioids are "defective" in themselves or created harm in the same way for all users. That is, the problem is not the *product itself*—it is how RiteAid or others allegedly oversold, overdistributed, and overdispensed the product. Due to a wide array of asserted errors and omissions, RiteAid allegedly caused various kinds of injuries, including overdoses, addictions, deaths, fetal defects, and orphaned children, which in turn impacted various governmental budgets. The multifarious causation allegations in "other" opioids cases bear no comparison to a simple product-defect case.

RiteAid asserts that the Superior Court had adequate support for its commentary on other lawsuits, RB40-42, but RiteAid cites only two facially inadequate evidentiary bases: (1) a spreadsheet RiteAid submitted, which described only *nineteen* of the 1100+ other complaints (B550-53), and (2) the testimony of RiteAid's in-house lawyer, who reviewed only "five to ten" of them (A1170).

Regardless whether the number-of-occurrences question is legal, factual, or mixed, the Superior Court lacked an adequate record basis for answering the question as to "other" lawsuits, and lacked any reason even to try, given the absence of any consequences for the exhaustion issue RiteAid raised.

### B. The Superior Court Erred In Concluding That The Track One "Distribution" Lawsuits Arise From A Single Occurrence

Under the "cause" test, the Track One lawsuits cannot be deemed a single occurrence because the alleged injuries do not result from one uninterrupted cause. The Counties do not assert a simple uniform product-defect action. Nor do they allege simple negligent oversight, as in *Donegal Mutual Insurance Co. v. Baumhammers*, 938 A.2d 286 (Pa. 2007), and *Washoe County v. Transcontinental Insurance Co.*, 878 P.2d 306 (Nev. 1994), where a single inadequately supervised actor caused all injuries. AOB38-40. RiteAid observes that *Baumhammers* involved "three different" oversight omissions, RB43 (emphasis omitted), but all were closely interconnected and directly related to the parents' continuing

supervision of their son. 938 A.2d at 288-89. By contrast, the causation allegations here assert acts and omissions independent of each other, involving intervening conduct by various other actors, including manufacturers, distributors, doctors, national pharmacies, individual pharmacists, and even other states with lax regulations. AOB40-41.

RiteAid's only answer is to quote the Superior Court's observation that the alleged bodily injuries all arise from "negligence" that was "ongoing and persistent." RB45 (quoting Op. 9-10). The observation is a tautology: in a negligence case, injuries by definition arise from alleged negligence. What matters is whether the alleged negligence involves one uninterrupted and continuing act, or instead many distinct acts, with other intervening actors and forces contributing to the harm. Based on the Counties' allegations, the court erred in ruling as a matter of law that the Track One lawsuits involved a single occurrence.

## CONCLUSION

For the foregoing reasons, the judgment should be reversed, or vacated and remanded.

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