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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE: CVS OPIOID INSURANCE LITIGATION	No. 482, 2024 ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE, Consolidated C.A. No. N22C-02-045 PRW CCLD

CORRECTED OPENING BRIEF ON APPEAL OF DEFENDANTS-BELOW/APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

NATURE OF PROCEEDINGS

This insurance coverage dispute arises from thousands of lawsuits filed against CVS seeking damages stemming from widespread opioid abuse. The Insurers twice sought summary judgment on their duties to defend and indemnify CVS based on this Court's decision in *ACE American Insurance Co. v. Rite Aid Corp.*, 270 A.3d 239 (Del. 2022) ("*Rite Aid*"). The first motion related to the two "Track One" suits considered in *Rite Aid* and seven "Representative Suits" selected by the Insurers. The Insurers argued that the latter were examples of suits similar to Track One. The second motion related to other governmental and non-governmental suits (including those brought by hospitals).

CVS simultaneously sought partial summary judgment on the Insurers' duty to defend the underlying suits brought by public and private hospitals; medical providers; benefit plans suing for medical costs incurred to treat its members; and municipalities alleging damages resulting from opioid addiction and abuse.

The Superior Court granted the Insurers' motions and denied CVS's motion. Relying on *Rite Aid* it held that the Insurers have no contractual obligations under any of the hundreds of general liability policies CVS purchased for tens of millions of dollars. The Superior Court subsequently So-Ordered a joint stipulation for entry of partial judgment under Rule 54(b).

SUMMARY OF ARGUMENT

1. Like Rite Aid, CVS is named in thousands of underlying opioid lawsuits and seeks defense and indemnity coverage from its general liability insurers. The similarities with *Rite Aid* end there. The *Rite Aid* Court held that Chubb did not have a duty to defend Rite Aid in two Track One lawsuits under one insurance policy because neither alleged "damages because of" bodily injury.

2. The Superior Court erroneously applied that holding to thousands of underlying lawsuits and hundreds of insurance policies with markedly different and broader coverage. This case presents legal and factual issues of first impression not before the *Rite Aid* Court. It also involves coverage for hospitals suing to recover costs associated with treating opioid overprescription. The Superior Court denied coverage for those claims despite the *Rite Aid* Court's holding that they "most likely" trigger coverage. Without disturbing *Rite Aid*, this Court can reverse the Superior Court's Orders on multiple, independent grounds; declare that CVS's insurers have a duty to defend in connection with the underlying lawsuits; and remand the issue of indemnity pending resolution of the underlying lawsuits.

3. The Superior Court erred in five material respects:

4. The *Rite Aid* Court held that coverage "would most likely be triggered" in the then-hypothetical scenario of hospitals seeking to "recover their actual, demonstrated costs of treating bodily injuries caused by opioid

overprescription." It is no longer a hypothetical. CVS was sued by public and private hospitals and medical providers seeking to recover those damages. Yet, the Superior Court granted summary judgment to the Insurers, holding that the complaints are not sufficiently "individualized" and merely seek damages in the form of "aggregate financial strain." The Superior Court deviated from *Rite Aid* by holding that these underlying lawsuits do not potentially allege "damages because of 'bodily injury.'"

5. Unlike the Chubb policy in *Rite Aid*, CVS policies include a Pharmacist Liability Endorsement. This endorsement broadened coverage to specifically cover bodily injury "arising out of" a "pharmacist liability incident"—defined as the "preparation, selling, handling or distribution of drugs[.]" Delaware law interprets "arising out of" more broadly than "because of" (the phrase in the *Rite Aid* policy). The Pharmacist Liability Endorsement and application of the phrase "arising out of" was not before the *Rite Aid* Court and, thus, an issue of first impression. The Superior Court erroneously held that Chubb's inclusion of this broadened coverage is "of no moment" and "changes nothing." As a matter of law, that cannot be correct.

6. Also unlike *Rite Aid*, AIG policies sold to CVS include a "Druggist-Broadened Coverage" endorsement covering bodily injury and property damage "arising out of the rendering or failing to render . . . services as a pharmacist[.]" As

above, this endorsement broadens coverage for the liabilities and underlying damages alleged here. It cannot "change nothing."

7. An insurer's "broad" defense obligation is triggered by one "potentially" covered underlying allegation. Any doubt or ambiguity in this regard must be resolved in favor of coverage. The underlying lawsuits, including the Track One lawsuits and Representative Suits, allege damage resulting from opioid addiction or abuse. The *Rite Aid* Court held that Chubb had no duty to defend two Track One lawsuits brought by Ohio counties. It reasoned that the counties did not fall within one of the "three classes of plaintiffs . . . within the scope" of coverage because they "sought to recover only their own economic damages, specifically disclaiming recovery for personal injury or any specific treatment damages." The Superior Court applied that holding to CVS's underlying suits even in the absence of a disclaimer and where the plaintiffs, in fact, seek "specific treatment damages." The Superior Court also granted summary judgment to the Insurers, holding that they only allege "economic" damages untethered to their own property. In fact, they allege that individual opioid addiction and abuse, allegedly facilitated by CVS, impacted their property. Allegations of bodily injury resulting in property damage were not before the *Rite Aid* Court. The Insurers must defend the entirety of all underlying lawsuits, including the Track One and Representative Suits

because they allege both bodily injury and property damage arising from that bodily injury.

8. Some of the subject policies impose a duty to defend while others are "indemnity only." The standards for triggering those duties are markedly different, particularly where a policy does not contemplate providing a defense. The Superior Court erroneously held that an indemnity-only insurer can have no coverage obligation if it would not have a defense obligation (assuming one existed in the policy). Indemnity obligations are not adjudicated until the underlying facts are established. The Superior Court acknowledged that not all underlying facts are established, but predicted that no future fact could impact or alter that prediction. Several facts and events have and continue to develop. They include an underlying settlement agreement confirming that the "Alleged Harms" for which CVS would pay damages are because of bodily injury ("those expenditures that have allegedly arisen as a result of the physical and bodily injuries sustained by individuals suffering from opioid-related addiction, abuse, death, and other related diseases and disorders, and that have allegedly been caused by CVS"). Also, in December 2024, the Ohio Supreme Court held that CVS (and others) could not be liable for a $650 million judgment obtained by the counties of Lake and Trumbull—two of the Insurers' "Representative Suits."

STATEMENT OF FACTS

A. The Primary Policies

Chubb and AIG sold approximately 62 primary, umbrella, and excess liability insurance policies to CVS for which CVS paid millions of dollars in premiums. A02177; *see, e.g.*, A02077-A02157 and A02210-A02267.

The Chubb Policies

The Chubb policies obligate Chubb to "pay . . . those sums . . . that the 'insured' becomes legally obligated to pay as damages because of 'bodily injury', 'property damage', or 'personal and advertising injury.'" A02090 § I(A).

"Property damage" means: (1) "[p]hysical injury to tangible property, including all resulting loss of use of that property"; and (2) "[l]oss of use of tangible property that is not physically injured." A02107 § VII(U).

"Bodily injury" includes "damages claimed by any person or organization for care, loss of services or death resulting at any time from the 'bodily injury.'" A02091 § I(D). "Bodily injury" also includes "bodily injury, sickness or disease sustained by a person[.]" A02104 § VII(C).

The coverage grants are broadened by the "Pharmacist . . . Liability Endorsement (Defense in Addition to the Limit)." A02145-A02147. It obligates Chubb to also "pay . . . all sums . . . that the 'insured' become[s] legally obligated to pay as damages because of 'bodily injury' arising out of a 'pharmacist liability

incident[.]" A02145. "Pharmacist liability incident" is "an actual or alleged negligent act, error or omission . . . in the performance of a 'pharmacist professional service.'" A02146. "Pharmacist professional service" includes "[t]he preparation, selling, handling or distribution or drugs [or] medicine." A02146.

The AIG Policies

The AIG policies obligate AIG to "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage[.]'" A02161 § I(1)(a); A02219 § I(1)(a). Like Chubb, this coverage "include[s] damages claimed by any person or organization for care, loss of services or death resulting at any time from the 'bodily injury'" (A02161 § I(1)(e); A02219 § I(1)(e)), and "bodily injury, sickness or disease sustained by a person[.]" A02162 § V(3); A02229 § V(3).

The AIG policies are broadened by the "Druggists – Broadened Coverage" endorsement ("Druggist Endorsement"). A02233. This endorsement extends coverage to "'[b]odily injury' or 'property damage' arising out of the rendering of or failure to render professional health care services as a pharmacist[.]" A02233.

Several AIG policies include a Bodily Injury Definition Extension endorsement amending the definition to remove the phrase "sustained by a person." A02513; A02462 § V(3).

B. The Superior Court's Decisions

The two summary judgment decisions raise four issues of policy interpretation:

1. The Hospital, Medical Provider and Third-Party Payor Suits

The Superior Court acknowledged underlying allegations against CVS "that specify the number of people the city treated with opioid disorders year-over-year; the number of doses of naloxone administered and the approximate cost per dose; and the cost per person per month for certain drugs[.]" Ex. A at 36. Thus, the Superior Court confirmed that hospitals allegedly incurred "actual, demonstrated costs of treating bodily injuries caused by opioid overprescription." *Rite Aid*, 270 A.3d at 253-54. Yet, citing *Rite Aid*, the Superior Court characterized them as uncovered "allegations of aggregate costs." Ex. A at 36.

The Superior Court subsequently held that no underlying hospital or medical provider suit identified "any one specific individual's injury" and, instead, "seek[] recompense for generalized, economic losses[.]" Ex. B at 7-8. It further found no "individualized allegations of damage," concluding that the alleged damages are "aggregate financial strain." *Id*. at 15. The Superior Court held that *Rite Aid's* holding regarding a hospital's demand for treatment costs merely "elaborates on potential claims that could be brought under category (c)," *Id*. at 8 n.33; "people or

organizations that directly cared for or treated the person injured." *Rite Aid*, 270 A.3d at 241.

The Superior Court acknowledged that the third-party payor plaintiffs allege "specific damages" including "opioid addiction treatment." Ex. B at 15. It held that those allegations are merely "generalized economic harm caused to its members." In fact, the alleged harm are the costs incurred by the payors to treat the bodily harm suffered by its members. *Id*.

2. Application of the Pharmacist Liability and Druggist-Broadened Coverage Endorsements

The Superior Court held that the policy considered in *Rite Aid* "is substantively identical to the policy language at issue here." Ex. A at 32. It did not include the Pharmacist Liability or Druggist-Broadened Coverage endorsement—both of which extend CVS's liability coverage to injury or damage "arising out of" an array of pharmacy-related acts and conduct.

The Superior Court noted that it "first should 'seek to determine the parties' intent from the language of the insurance contract itself—the 'mutual intent at the time of contracting.'" *Id.* at 30-31. The Superior Court did not consider the parties' intent and drew no inference from the inclusion of these expansive coverage grants. To the contrary, the Superior Court effectively held that these coverage-broadening endorsements are exclusions and reduce the coverage from the original coverage grants. It gave no weight to the plain language of the

endorsements or that the Insurers further extended the insuring agreements by promising to defend suits alleging bodily injury and property damage "arising out of" these additional incidents and occurrences.

3. Damages "Because of Bodily Injury" Resulting in Covered Harms and Derivative Claims

The Superior Court found "no substantial differences" between the Track One and Representative Suits. *Id.* at 35. However, the Court acknowledged that they did not all include disclaimers and some included more "particularized" allegations of bodily injury than others.[1] *Id*. at 36 n.192. Even "the most particularized" allegations including "the number of people the city treated with opioid disorders year-over-year; the number of doses of naloxone administered and the approximate cost per dose; and the cost per person per month for certain drugs Philadelphia provided" (*id*. at 36) did not "move the needle" towards a potentially covered allegation according to the Superior Court. *Id*.

The Superior Court held that these suits did not potentially allege derivative claims, despite underlying allegations that they are brought "on behalf of" their "residents" and "citizens." The Superior Court made this finding because CVS cited a "single allegation." *Id.* at 35 n.191. Even a "single allegation" is sufficient.

[1] The Superior Court referred to them as "particularized facts" but they are only allegations.

Finally, the Superior Court may be correct that the "bodily injury" and "property damage" coverages "appear side-by-side" in the coverage grants. Ex. A at 41. Given the pertinent policy endorsements discussed below, the Superior Court erroneously concluded that the same "causal relationship" triggers both coverages. The Superior Court held that there can be no duty to defend allegations of bodily injury arising from individual opioid addiction and abuse that allegedly gives rise to property damage if there is no duty to defend bodily injury allegations. The Superior Court also erroneously held that allegations of CVS causing individuals to abuse and/or become addicted to opioids, resulting in damage to property—"seek nothing more than economic damages that relate to but do not directly implicate the covered injury of property damage" and, thus, was not the "basis of the claims." *Id*. at 42. The Superior Court later deemed these allegations "generalized" and "not based on any damage to a specific piece of property." Ex. B at 7. Instead, it characterized the allegations as "broadly describ[ing] how the opioid crisis strained healthcare systems and eroded the quality of underlying municipal infrastructure[.]" *Id*. at 9.

4. The Duty to Indemnify

Some of CVS's policies are "indemnity-only" policies. The Superior Court acknowledged an insurer's broad duty to defend, distinct from any subsequent indemnity obligation. Yet, it concluded that "the development of allegations

illustrating the extent of the opioid crisis will not change the fact that the plaintiffs in these underlying complaints have asserted claims for general, economic losses to respond to the opioid epidemic, not personal injury claims." *Id.* at 45. It then predicted that "nothing can come about that will transmute or transform the various governmental claims into those for bodily injury or property damage covered by the Policies." *Id*. Thus, according to the Superior Court, even with respect to indemnity-only policies, "because there is no duty to defend, . . . there is also no corresponding duty to indemnify." *Id*.

ARGUMENT

I. THE *RITE AID* COURT SPECIFICALLY CONTEMPLATED COVERAGE FOR THE HOSPITAL AND MEDICAL PROVIDER SUITS

A. Question Presented

Do the hospital and medical provider suits seek to recover actual costs incurred to treat bodily injury caused by opioid overprescription which the *Rite Aid* Court held would likely trigger coverage? Preserved on appeal at A03515-A03516, A06003-A06007.

B. Standard of Review

"This Court reviews questions of law, including the Superior Court's grant of summary judgment, *de novo*." *Certain Underwriters at Lloyd's, London v. Chemtura Corp.*, 160 A.3d 457, 464 (Del. 2017) (citations omitted).

C. Merits of the Argument

The *Rite Aid* Court held that general liability policies "would most likely be triggered" where hospitals sought "to recover their actual, demonstrated costs of treating bodily injuries caused by opioid overprescription." 270 A.3d at 253-54. The *Rite Aid* Court further held that organizations directly caring for or treating injured persons are within the classes of plaintiffs covered by general liability policies. *Id.* at 241.

1. Exemplar Public Hospital Suits

a. *Dallas County Hospital District*

Dallas County Hospital District was brought by a political subdivision of the State of Texas—a county-wide public hospital district. A03615-A03963. It allegedly "suffered a special injury," different from that suffered "by governmental entities, namely that Plaintiffs incurred costs by providing uncompensated care for patients suffering from opioid-related conditions." A03938 ¶ 1071. It claims to be "at the forefront of the opioid epidemic in Texas[,]" including developing a program "to combat Neonatal Abstinence Syndrome (NAS), a group of problems that occur in infants exposed to" opioids in utero. A03655 ¶¶ 86-87.

It allegedly treats "numerous patients for opioid-related conditions, including: (1) opioid overdose; (2) opioid dependence; . . . (4) neonatal treatment in its NICU for babies born opioid-dependent, for which treatment is specialized, intensive, complex, lengthy and highly expensive; (5) psychiatric and related treatment for patients with opioid dependence who present in need of mental health treatment programs." A03648 ¶ 56. It allegedly incurs substantial unreimbursed costs for the "treatment of patients with opioid-related conditions" (A03648 ¶ 57) including "unreimbursed costs for providing healthcare and medical care" and "treatment of infants born with opioid-related medical conditions, or born

dependent on opioids because of drug use by mother during pregnancy." A03910-A03911 ¶ 967.

Patients with opioid-related conditions allegedly seek treatment "as a proximate result of the opioid epidemic created and engineered by" CVS. A03648 ¶ 57. The need for this treatment and associated costs is allegedly because "CVS distributed prescription opioids throughout the United States, including in Texas." A03688 ¶ 219.

b. *Bunkie General Hospital*

Bunkie General Hospital was brought by a political subdivision in Louisiana that operates a public hospital. A03964-A04319. It alleges that opioid-related treatment "costs are being passed down to, and absorbed by, hospitals and other medical and healthcare providers who are obligated to treat addicted persons and do not receive full or any financial reimbursement for their services and treatment." A04191 ¶ 747. It allegedly "treated, and continues to treat, numerous patients for opioid-related conditions, including opioid overdose and opioid addiction." A04202 ¶ 790. Its alleged damages, in the form of monetary losses, stem from the treatment of these patients and is allegedly proximately caused by CVS. A04202 ¶ 791.

c. *Bristol Bay*

Bristol Bay was brought by a tribal health organization providing health care services to American Indians, Alaska Natives, and other eligible individuals. A04320-A04508. It allegedly "suffered substantial loss of resources" and increased costs in responding to the opioid epidemic, proximately caused by CVS (A04330 ¶ 9), including: (i) providing medical and therapeutic care; (ii) treating patients suffering from opioid addiction or disease, overdose, or death, including unreimbursed costs; (iii) counseling, treatment, and rehabilitation services; and (iv) treatment of infants born with opioid-related medical conditions, among other expenses. A04332 ¶ 14.

These alleged "damages have been suffered and continue to be suffered directly by the Plaintiff, which is specifically responsible for the provision of health care and related services[.]" A04332 ¶ 14.

2. Exemplar Hospital and Medical Provider Suits

a. *Lester E. Cox*

Lester E. Cox was brought by operators of hospitals throughout Missouri (A04509-A04872) alleging:

> As a result of the opioid dependence epidemic, . . . opioid-dependent patients routinely occupy beds in hospitals, including hospitals operated by Plaintiffs. Opioid-dependent mothers and babies routinely present themselves for admission at ERs and occupy beds

> in the NICUs, including those operated by Plaintiffs. Many of those patients do not have insurance and do not pay for their care.

A04548 ¶ 43.

They allege "substantial reimbursement shortages when they have continued to treat opioid-dependent patients with opioid-related conditions or comorbidities." A04552 ¶ 60. The damages allegedly caused by CVS include "injury related to the diagnosis and treatment of opioid-related conditions. Plaintiffs have incurred massive costs by providing uncompensated care as a result of opioid-related conditions." A04852-A04853 ¶ 533.

b. *Bon Secours*

Bon Secours was filed by a group of hospitals and medical providers. A04873-A05027. They allegedly "incurred substantial expenditures, for which they have not received compensation or reimbursement, in connection with their provision of care to individuals who have been impacted by the opioid epidemic being perpetuated by" CVS. A04883 ¶ 7. They seek compensatory damages stemming from the provision of care and treatment to their patients. A05020 ¶¶ 427, 429. They allege that CVS "foreseeably caused damages to Plaintiffs including . . . unreimbursed and/or uncompensated costs incurred for the:

- "treatment of patients who suffer from conditions related to or caused by opioid use";

- "treatment of patients, whose conditions are managed through the prescribing of long-term opioid use and the complications suffered by those patients as a result of long term use of opioids";

- "treatment and management of patients under the influence of opioids or suffering complications as a result of opioid use or misuse";

- "treatment of patients including children whose medical conditions and complications may be caused by or exacerbated by the use of opioids by others";

- "provision of laboratory and other diagnostic testing for the treatment and/or management of patients using opioids or undergoing therapeutic interventions to address opioid use or misuse";

- "emergency treatment of patients with opioid-related addiction, disease, or dependency, including but not limited to emergency healthcare services provided for opioid overdose or for patients seeking treatment with opioids due to addictions, dependencies, and/or misuse"; and

- "treatment with life support-related healthcare services to prevent death in certain instances of opioid overdose, including but not limited to treatment for babies born with addictions and dependencies."

A04884-A04885 ¶ 8.

c. *Fayetteville*

Fayetteville was brought by a group of hospital operators (A05028-A05373) alleging that opioid-dependent individuals seek treatment, "claiming to have illnesses and medical problems in an effort to obtain opioids." A05057 ¶ 57. They allegedly incurred "operational costs related to the time and expenses in diagnosing, testing, and otherwise attempting to treat these individuals." A05057 ¶ 57. They also allegedly "incurred massive costs by providing uncompensated care

as a result of opioid-related conditions." A05353 ¶ 807. They seek compensatory damages (A05354 ¶ 809) and allege a "special injury, different from that suffered by the general public at large by individual users and by governmental entities, namely that Plaintiffs have incurred costs by providing uncompensated care for patients suffering from opioid related conditions." A05356 ¶ 823.

The Superior Court acknowledged the alleged "special injury" but held that these allegations amount to "misconduct in causing damages in the form of 'unreimbursed and/or uncompensated' and increased medical care related to opioid misuse." Ex. B at 15. It further held that no allegation was sufficiently "individualized," concluding that they only sought "damages for the aggregate financial strain placed on their health systems[.]" *Id*. This was erroneous for three fundamental reasons.

First, damages in the form of "unreimbursed and/or uncompensated" medical care costs incurred to treat opioid overprescription is precisely what the *Rite Aid* Court held would likely trigger coverage. 270 A.3d at 253-54. Second, as discussed herein, an insurer cannot avoid its defense duty by classifying damages as "economic losses." In any event, the Superior Court's classification of these damages as "financial strain" is effectively synonymous with the plaintiffs' allegations—damages in the form of incurred and unreimbursed costs to treat opioid addiction. Finally, the *Rite Aid* Court did not contemplate a hospital

identifying "an individual injury" or injured person in the complaint to trigger coverage. The Health Insurance Portability and Accountability Act prevents plaintiffs from doing so. 45 C.F.R. § 164.502(a) (2024) ("A covered entity or business associate may not use or disclose protected health information[.]").

An insured does not forfeit coverage when an underlying plaintiff is not required to, and, in fact, is not permitted to, plead the specific details that it later will prove at trial (e.g., name, drug, date, amount). This does not mean that the underlying plaintiff does not know that information. The evidence of why, when, how, and for whom it incurred its damages is proven at trial, not in the complaint. Hence, the duty to defend is based only on the complaint's allegations.

3. The Third-Party Payor Suits Potentially Trigger Coverage Under *Rite Aid*

CVS was also sued by third-party payors/providers of health insurance coverage and welfare benefit plans to participating members and their dependents. A05700-A05997. They allegedly paid "significant costs for opioid addiction treatment for covered members and beneficiaries," including "addiction counseling, rehabilitation costs (inpatient and outpatient), overdose costs (ambulance and emergency room visits), and costs to treat infants born with NAS." A05897 ¶ 777. They also allegedly paid for "medical care needed to treat opioid side effects." A05897 ¶ 778. These payments were in the "millions of dollars for health care costs that stem from opioid dependency created by the Defendants'

wrongful acts and omissions," including "unnecessary and excessive opioid prescriptions; substance abuse treatment services; emergency response services; hospital services and other medical costs; lost productivity costs; education and prevention program costs; costs for children and youth services; and other human services; among others." A05899 ¶ 786; A05938 ¶ 941.

For purposes of the duty to defend analysis, these suits are effectively no different from the hospital and medical provider suits because they seek, as damages, actual costs incurred for treating opioid addiction. Moreover, *Rite Aid*, citing *Cincinnati Insurance Co. v. H.D. Smith, L.L.C.*, 829 F.3d 771, 773 (7th Cir. 2016), discussed an insurer's concession that a liability policy "would cover a mother's cost of 'care' for her son's opioid-related injuries, though those are 'her own' damages." 270 A.3d at 253. There is no distinction (and neither the *Rite Aid* nor *H.D. Smith* Courts drew a distinction) between a mother who incurs costs for her son's medical care and a third-party payor that incurs costs for its member's medical care.

Nevertheless, the Superior Court deemed these claimed damages as "generalized economic harm caused to its members in the form of increased prescription purchases and related opioid addiction treatment." Ex. B at 15. In fact, the alleged specific harm is caused to the payors in the form of amounts incurred to treat its member's opioid addiction.

4. The Insurers' Exemplar Cases Potentially Trigger Coverage

The cases selected by the Insurers include allegations contemplated by the *Rite Aid* Court. *Clinch County Hospital Authority v. Amerisourcebergen Drug Corp.* involves a county-run hospital authority (1:18-op-45453-DAP (N.D. Ohio), (A02653 ¶ 6), with alleged damages, including "costs for providing":

- "medical care, additional therapeutic, and prescription drug purchases, and other treatments for patients suffering from opioid-related addiction or disease, including overdoses and deaths;"
- "treatment, counseling, and rehabilitation services;" and
- "treatment of infants born with opioid-related medical conditions[.]"

A02654 ¶ 9.

E. Me. Med. Ctr. v. Teva Pharms. USA, Inc. specifically seeks damages including the "costs" for:

- "providing medical care such as emergency room visits and hospitalization to patients suffering from opioid-related addiction or disease";
- "prescription drugs used to treat addiction";
- "providing mental healthcare, treatment, rehabilitation, specialized facilities, and social services to victims of the opioid epidemic and their families"; and
- "treating infants born with opioid-related medical conditions[.]"

A03153-A03154 ¶ 607.

Eastern Maine further alleges, as damages, the costs "incurred, including treating patients with opioid-related conditions, extra costs of providing extended

inpatient care to individuals with opioid use disorders and increased operational costs in responding to the conditions created by the opioid epidemic." A03479-A03480 ¶ 1791.

Family Practice Clinic of Booneville allegedly "treated, and continues to treat, thousands of patients for opioid-related conditions" including:

- "opioid addiction, disease, and/or dependency";
- "related medical and/or physiological issues arising from opioid addiction, disease, and/or dependency";
- "related psychiatric and/or mental health issues arising from opioid addiction, disease, and/or dependency";
- "opioid overdose and/or required post-overdose care"; and
- "neonatal issues for babies born opioid addicted because their mothers were opioid addicts or dependents, for which treatment is intensive, complex, and lengthy."

A02921 ¶ 243.

It seeks, as damages, "non-reimbursed and/or uncompensated cost of providing":

- "medical care, additional therapeutic and prescription drug purchases, and other treatments for patients suffering from opioid-related addiction, disease, or dependency, including but not limited to overdoses, disabilities, and deaths"; and
- "counseling and rehabilitation services, physical therapy services, urine drug screening services, diagnostic services, and general laboratory services[.]"

A02921-A02922 ¶ 244, A02973 ¶ 421.

These allegations are not "direct[ed] . . . to a public health crisis." Ex. B at 15-16. They would unarguably trigger defense coverage if brought for reimbursement of one individual's care and treatment. That they are for reimbursement for the care and treatment of many does not alter the analysis or conclusion.

II. THE SUPERIOR COURT ERRED IN FINDING THAT CVS'S PHARMACIST LIABILITY AND DRUGGIST-BROADENED COVERAGE ENDORSMENTS PROVIDE NO BROADER COVERAGE THAN THE *RITE AID* POLICY

B. Question Presented

Did the Superior Court err in holding that the inclusion of Pharmacist Liability and Druggist-Broadened Coverage "arising out of" an array of pharmacy-related incidents and conduct "changes nothing"? Preserved on appeal at A02186-A02188.

C. Standard of Review

Review of all issues is *de novo*. *See supra* at 13.

D. Merits of the Argument

The "principles that guide [this Court's] review" are well-settled:

> "Insurance contracts, like all contracts, 'are construed as a whole, to give effect to the intentions of the parties.'" Proper interpretation of an insurance contract will not render any provision "illusory or meaningless." If the contract language is "clear and unambiguous, the parties' intent is ascertained by giving the language its ordinary and usual meaning." Where the language is ambiguous, the contract is to "be construed most strongly against the insurance company that drafted it." . . .
>
> Insurance contracts should be interpreted as providing broad coverage to align with the insured's reasonable expectations. "Generally, an insured's burden is to establish that a claim falls within the basic scope of coverage, while an insurer's burden is to establish that a claim is specifically excluded." Courts will interpret exclusionary clauses with "a strict and narrow construction ... [and] give effect to

> such exclusionary language [only] where it is found to be 'specific,' 'clear,' 'plain,' conspicuous,' and 'not contrary to public policy.'"

RSUI Indemnity Co. v. Murdock, 248 A.3d 887, 905-06 (Del. 2021) (internal citations omitted).

The Court interprets policy language "in the same manner as it would be understood by an objective, reasonable third party." *Rite Aid*, 270 A.3d at 245 (citation omitted). "'A court should first seek to determine the parties' intent form the language of the insurance contract itself'—the 'mutual intent at the time of contracting.'" *Id* (citations omitted).

"Endorsements often add additional insureds or risks[.]" 3 New Appleman on Insurance Law Library Edition § 21.02 (2024). "Endorsements are also often issued to modify or remove the effect of existing terms or exclusions contained in the policy form. In these instances, such an endorsement will supersede the term or exclusion in question." *Id*. "[R]ules of construction have developed to meet the situation where an endorsement has been added to the general policy. If there is a conflict between the terms of the endorsement and those in the body of the main policy, then the endorsement prevails, particularly when it favors the insured." *St. Paul Fire & Marine Ins. Co. v. U.S. Fire Ins. Co.*, 655 F.2d 521, 524 (3d Cir. 1981) (citations omitted). "But when a specific form of insurance is provided by an endorsement tailored to meet the particular needs of the insured and the company, that language must be followed to carry out the intentions of the parties." *Id*.

1. The Significance of Insuring Damage "Arising Out of" Pharmacy-Related Liabilities

Delaware law holds that "arising out of" is broad and should be construed broadly. *See, e.g*, *Goggin v. Nat'l Union Fire Ins. Co.*, 2018 WL 6266195, at *4 (Del. Super. Ct. Nov. 30, 2018) ("Arising out of" is broad and means "originating from," "having its origin in," "growing out of," "flowing from," or "incident to, or having connection with")*; Pac. Ins. Co. v. Liberty Mut. Ins. Co.*, 956 A.2d 1246, 1257 (Del. 2008) ("arising out of" is broadly construed to require only "some meaningful linkage between the two conditions imposed in the contract"). "Arising out of"—the phrase in both endorsements, is broader than "because of"—the phrase in the original insuring agreement.

2. The Pharmacist Liability Endorsement

Chubb's Pharmacist Liability Endorsement "modifies [the] insurance provided" to include "additional provisions" to the "insuring agreements." A02145. Thus, along with coverage for "damages because of 'bodily injury' [and] 'property damage,'" the endorsement "amended" the Chubb policies to add an additional coverage grant for "damages because of 'bodily injury' arising out of a 'pharmacist liability incident.'" A02090 § I(A), A02145.

Coverage is triggered by potentially covered allegations of bodily injury arising out of "the preparation, selling, handling or distribution of drugs [or]

medicine." A02146. The Track One and Representative Suits allege bodily injury arising from that insured conduct:

- "CVS sold and shipped unreasonable quantities of opioids into Florida, including to many red-flag pharmacies in Florida, and continued to do so despite extensive and blatant evidence of diversion at many facilities in Florida." A02044-A02045 ¶ 394.

- "CVS violated the standard of care for a distributor by failing to: (a) control the supply chain; (b) prevent diversion; (c) report suspicious orders; and (d) halt shipments of opioids in quantities it knew or should have known could not be justified and signaled potential diversion." A01823 ¶ 296.

- "[CVS was] lacking slight care and diligence with respect to [its] special responsibilities as [a] distributor[] of highly dangerous controlled substances (and for . . . CVS—indifference to [its] responsibilities as [a] dispenser[], too)." A01089 ¶ 164.

3. The Druggists – Broadened Coverage Endorsement

The AIG insuring agreement requires AIG to broadly cover "damages because of 'bodily injury' or 'property damage.'" A02219 § I(1)(a). That bodily injury or property damage must also be "caused by an 'occurrence[.]'" A02219 § I(1)(b)(1). The Druggist Endorsement is added to that insuring agreement and provides that "'bodily injury' or 'property damage' arising out of the rendering of or failure to render professional healthcare services as a pharmacist shall be deemed to be caused by an 'occurrence.'" A02233.

The Track One and Representative Suits allege bodily injury and related harm arising from that insured conduct:

- CVS "failed to fulfill [its] legal duties and instead, routinely distributed and/or dispensed controlled substances while ignoring red flags of diversion and abuse. The unlawful conduct by these Defendants is a substantial cause for the volume of prescription opioids and the public nuisance plaguing the County." A00882 ¶ 156.

- CVS's "failure . . . to effectively monitor and report suspicious orders of prescription opioids at the retail level and to implement measures to prevent diversion through improper prescriptions greatly contributed to the vast increase in opioid overdose and addiction." A01639 ¶ 149; A01707 ¶ 149.

The Superior Court held that the addition of these amendments "is of no moment" and "changes nothing." Ex. A at 37-38. That is incorrect because the policies must be read as a whole, giving meaning to every provision generally and these endorsements specifically. The Superior Court reasoned that these endorsements merely "modif[y] the 'occurrence' requirement" and do not "expand the scope" of coverage. *Id*. at 38. If they do not expand the scope of coverage, they either reduce the scope of coverage or do not impact coverage at all. Neither scenario is legally plausible.

The policies unarguably cover damages because of bodily injury so any additional requirement that it also "arise out of" a pharmacy-related incident would reduce coverage (despite the explicit representation that it operates to "broaden" coverage). If so, Chubb and AIG were obligated to prove, that even under a strict and narrow construction, the endorsements are specific, clear, plain and conspicuous such that there is no second reasonable interpretation of them or expectation of coverage from them. Alternatively, the endorsements are illusory

and they provide no coverage for damages "arising out of" "pharmacist liability incidents" and "services as a pharmacist."

Given the potential for coverage and broad duty to defend; the two reasonable interpretations (confirming ambiguity that must be resolved in favor of coverage); no evidence of the mutual intent of the parties; and the possibility that this coverage is illusory as interpreted by the Superior Court, granting summary judgment to the Insurers was in error.

III. THE SUPERIOR COURT ERRED IN HOLDING THAT THE REPRESENTATIVE SUITS DO NOT ALLEGE DAMAGES BECAUSE OF BODILY INJURY AND OTHER COVERED HARMS.

A. Question Presented

Did the Superior Court err in holding that none of the underlying actions allege bodily injury and resulting harm sufficient to potentially trigger the broad defense obligation? Preserved on appeal at A02174-A02177.

B. Standard of Review

Review of all issues is *de novo*. *See supra* at 13.

C. Merits of the Argument

1. The Duty to Defend Standard

"The duty to defend is broad." *Rite Aid*, 270 A.3d at 246. "'[A] court typically looks to the allegations of the complaint to decide whether the third party's action against the insured states a claim covered by the policy, thereby triggering the duty to defend.'" *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 73 (Del. 2011) (citation omitted). "An 'insurer has an obligation to defend its insured . . . whenever the complaint … may *potentially* come within the coverage of the policy.'" *Rite Aid*, 270 A.3d at 246 (citation omitted; emphasis added). The duty is triggered "even when the complaint has only 'one allegation that falls within the scope of the policy's coverage … [and] even if an insured is ultimately found to be not liable.'" *Id.* (citation omitted).

Delaware applies these principles: (1) "where there is some doubt as to whether the complaint against the insured alleges a risk insured against, that doubt should be resolved in favor of the insured," (2) "any ambiguity in the pleadings should be resolved against the carrier," and (3) "if even one count or theory alleged in the complaint lies within the policy coverage, the duty to defend arises." *ConAgra*, 21 A.3d at 73 (citation omitted); *Pac. Ins. Co.*, 956 A.2d at 1257 ("any doubt must be resolved in favor of the insured").

2. Representative Suit Allegations Exceed the *Rite Aid* Threshold of Alleging Treatment and Costs Proximately Caused by CVS

The *Rite Aid* Court held that coverage is triggered if an organization alleges that "it treated an individual with an injury, how much that treatment cost, and that the injury was caused by the insured." 270 A.3d at 252. The Track One and Representative Suits include those allegations against CVS. A01921 ¶ 606 ("The City administered nearly 10,000 doses of naloxone in 2015 . . . The City pays approximately $37 per dose for naloxone.").

Philadelphia allegedly treated thousands of people for "opioid-use disorder via its publicly-funded health system[.]" A01915 ¶ 590. Its complaint provided specific numbers of residents treated in its clinics, the medication provided, the number of doses, and the cost per dose:

- Allegedly treating 17,500, 16,844 and 15,561 people for opioid-use disorder in 2019, 2018 and 2017 respectively, while incurring "significant increased costs for these services during this period[.]" A01915-A01916 ¶ 590.

- "The City administered nearly 10,000 doses of naloxone in 2015 . . . The City pays approximately $37 per dose for naloxone." A01921 ¶ 606.

- The City provided Suboxone, "which costs approximately $450 per month per person." A01917 ¶ 595.

- The City provided Vivitrol "which costs approximately $1,000 per month per person." A01918 ¶ 596.

The Superior Court held that this only alleged "aggregate costs" and that bodily injury was not the basis of any claim. Ex. A at 36.

The Track One and Representative Suits seek, as damages, costs incurred to treat injuries and care for the deceased:

- "Opioid-related deaths generally require an autopsy and toxicology screen[ing] . . . The number of autopsies at the Medical Examiner's office has risen about 20 percent in three years . . . The increase, largely due to opioid deaths, required a doubling in the budget for supplies and materials (body bags, safety equipment, gowns, etc.) and the hiring of a new assistant medical examiner. There were also increased costs for toxicology tests. These costs are funded by the City." A01920 ¶ 603.

- "[T]he Summit County Medical Examiner's Office has faced increased costs of overtime, laboratory, toxicology and other costs [for death investigators]. Between 2012 and 2016, there was a 47% increase in autopsies, a 436% increase in toxicology lab costs to identify new drugs, mostly synthetic opioids that have swept up individuals already addicted to opioids, and a 100% increase in the costs to transport the bodies." A00351 ¶ 728.

- "The State of Florida is expending extraordinary resources to address these [deaths] and other social problems resulting from the opioid crisis and will continue to expend resources addressing these problems." A02052 ¶ 425.

- The additional costs include "burying the dead." A00845 ¶ 15; A01140 ¶ 15; A00138 ¶ 20; A00484 ¶ 19.

Cherokee alleged bodily injuries, including: (i) "the costs of . . . medical care, therapeutic and prescription drugs, and other treatments for patients suffering from opioid-related addiction, overdoses, or disease;" and (ii) "opioid-related counseling and rehabilitation services." A01050 ¶ 14. The *Suffolk* and *Nassau* complaints alleged that they: (i) spent "millions of dollars each year to provide and pay for health care, services, pharmaceutical care and other necessary services and programs on behalf of residents[.]" (A01353 ¶ 2); (ii) "created a host of services to assist people suffering from opioid addiction and reduce overdose deaths" (A01359 ¶ 26); and (iii) "have incurred and continue to incur costs related to opioid addiction and abuse, including, but not limited to, health care costs[.]" A01364 ¶ 44; *see also* A01564 ¶ 707. *Suffolk* and *Nassau* alleged that CVS's conduct forced the plaintiffs to create "opioid treatment programs [and] Substance Alternative Clinics . . . that provide a comprehensive treatment program for persons addicted to heroin or other opioids" and "[i]n addition to intense counseling, many treatment programs prescribe additional drugs to treat opioid addiction." A01567 ¶¶ 719, 720. Both complaints sought "compensatory damages in an amount sufficient to fairly and completely compensate Plaintiffs for all damages." A01590.

3. Track One and Representative Suit Allegations Exceed The *Rite Aid* Threshold of Asserting Derivative Claims

The *Rite Aid* Court held that a derivative action brought on behalf of individuals suffering bodily injury constitutes covered damages "because of" bodily injury. 270 A.3d at 241 (including "those recovering on behalf of the person injured" as one of the "three classes of plaintiffs").

Florida, for example, was specifically brought on behalf of its residents:

- CVS's "actions dramatically increased inappropriate opioid prescribing and use nationwide and in Florida and injured the State of Florida and its citizens." A02049 ¶ 415;
- "The public nuisance created by [CVS] has imposed severe economic costs on the State of Florida, its residents, and its communities." A02062 ¶ 472 ;
- "The State of Florida, acting on its own behalf and on behalf of its residents, therefore seeks monetary relief from [CVS]." A02062 ¶ 472.
- Alleging "damages suffered by the State of Florida ***and its citizens***[.]" A02064 ¶ 482 (emphasis added).

Florida was therefore a derivative claim brought against CVS on behalf of its citizens because of bodily injuries. A01953-A02076. *Philadelphia* alleged that it wanted CVS "to pay for" care and treatment for "every resident in the City currently suffering from opioid addiction attributable to prescription opioids." A01746 ¶ 20. *Summit* sued "on behalf of the municipal corporation *and its residents*." A00433 ¶ 978 (emphasis added).

Chubb confirmed this in *Zogenix, Inc. v. Fed. Ins. Co.*, 2021 WL 6058252 (N.D. Cal. 2021), where it made these arguments: (i) coverage is triggered "if the claimant seeks compensation . . . for injuries suffered by that claimant or for injuries suffered by another person on whose behalf the claimant has the right to seek recovery;" (ii) "coverage extends to certain *derivative claims* 'resulting … from … bodily injury' such as … a hospital's subrogation claim for medical expenses paid on behalf of an injured claimant"; and (iii) "suits for medical expenses paid on behalf of an injured spouse or child ***are*** derivative." A02382.

Courts around the country routinely find coverage for claims brought by governmental organizations for costs incurred to treat the bodily injuries of their citizens. Most recently, the court in *Walmart Inc. v. ACE American Insurance Co.* analogized "public nuisance claims . . . under CGL policies in a wide range of contexts." 2023 WL 9067386, at *7 (Ark. Cir. Ct. Dec. 29, 2023). It first considered suits by municipalities against gun manufacturers "seeking damages for the costs the expended on medical care." *Id.* (citing *SIG Arms Inc. v. Emps. Ins.*, 122 F. Supp. 2d 255, 260 n.4 (D.N.H. 2000) (duty to defend claims by municipalities against firearms manufacturer for "police, medical, and emergency services" to respond to shootings and to care for those injured or killed; damages claimed by an organization for "care" include health and medical services, as well as "similar municipal benefits"); *Scottsdale Ins. Co. v. Nat'l Shooting Sports*

Found., Inc., 2000 WL 1029091, at *2 (5th Cir. 2000) (rejecting contention that "because of" bodily injury requires plaintiff seeking damages to have suffered bodily injury); *Beretta U.S.A., Corp. v. Fed. Ins. Co.*, 117 F. Supp. 2d 489, 496 (D. Md. 2000), *aff'd*, 17 F. App'x 250 (4th Cir. 2001) ("damages claimed by any . . . organization for care, loss of services, or death resulting at any time from the bodily injury" covers cities' claims for medical costs for victims of violence related to guns manufactured by the insured); *N.A.A.C.P. v. Acusport Corp.*, 253 F. Supp. 2d 459, 462-63 (E.D.N.Y. 2003) (claims for public nuisance against gun manufacturer for "indirectly contributing to conditions in society making injury or death more likely" constituted a lawsuit seeking damages "because of bodily injury"). It "reached the same conclusion" based on cases involving lead-based paint. *Walmart*, 2023 WL 9067386, at *7 (citing *Certain Underwriters v. NL Indus., Inc.*, 164 N.Y.S.3d 607, 609 (N.Y. App. Div. 2022)).

Walmart "decline[d] to follow" *Rite Aid*, holding that this Court "did not address insurance policies with terms and conditions that demonstrate a broader scope of coverage" and "did not consider the settlements in many of the opioid-related lawsuits, such as the National Settlement, which show that the amounts paid in settlement will be paid to cover the costs of care, treatment, and related services for injured individuals." *Id.* at *9. According to *Walmart*, those

settlements "confirm that these opioid related lawsuits potentially sought damages because of such injuries." *Id*.

The Superior Court acknowledged the existence of underlying derivative allegations and that claims were brought "on behalf of" residents and citizens. Ex. A at 35 n.191. Yet, the Superior Court still denied any defense obligation on the ground that it was "a single allegation" in *Florida* and *Summit* without any "additional explanation" by CVS. *Id*. One single allegation in any underlying case is sufficient. *Rite Aid*, 270 A.3d 239 at 246. Moreover, to the extent that a Delaware court wants to consider extrinsic evidence, there is no "additional explanation" that a court would deem proper, appropriate or admissible.

The Superior Court here afforded no weight to the broader scope of coverage sold to CVS as compared to Rite Aid, or the National Settlement confirming payment of damages because of bodily injury.

4. The Underlying Actions are Potentially Covered Because They Allege That CVS Facilitated Individual Opioid Addiction and Abuse, And Other Covered Harms

Delaware courts routinely hold that an insurer's duty to defend is triggered based on underlying allegations of property damage. *See e.g*., *Nat'l Union Fire Ins. Co. of Pittsburgh, PA. v. Rhone-Poulenc Basic Chemicals Co*., 1992 WL 22690, at *13 (Del. Super. Ct. Jan. 16, 1992), *aff'd sub nom. Rhone-Poulenc Basic Chemicals Co. v. Am. Motorists Ins. Co*., 616 A.2d 1192 (Del. 1992) (duty to

defend underlying action seeking "to impose monetary liability for the costs of repairing property damage resulting from the migration of contaminants."); *DynCorp v. Certain Underwriters at Lloyd's, London*, No. 2009 WL 3764971, at *1 (Del. Super. Ct. Nov. 9, 2009) (duty to defend underlying action alleging "property damage and damage to natural resources as a result of the aerial spraying operations.").

a. Track One and Representative Suits

The Track One Suits allege that bodily injury arising from individual opioid addiction and abuse allegedly caused by CVS. A00120-A00833. Both assert claims under Ohio's Injury Through Criminal Acts statute, allowing "civil action" "damages" for that property damage. A00455 ¶ 1092; A00823 ¶ 1135. *Cuyahoga* alleges that a result of opioid-related bodily injuries "include[d] . . . [c]osts associated with extensive clean-up of public parks, spaces and facilities of needles and other debris and detritus of opioid addiction[.]" A00798 ¶ 1015(k).

These allegations fit within the policies' definition of "property damage," which broadly includes both "[p]hysical injury to tangible property, including all resulting loss of use of that property" and "[l]oss of use of property that is not physically injured." A02231.

Florida alleges that CVS's "conduct has contributed to . . . property damage[.]" A02052 ¶¶ 425-426. *Cherokee* similarly alleges that "[d]amages

suffered by Cherokee Nation include . . . property damage . . . caused by opioids." A001050 ¶ 14. *Lake* and *Trumbull* both allegedly suffered "property damage" stemming from opioid-related bodily injury. A01037 ¶ 641; A01338 ¶ 641. The Cherokee Nation sought compensatory and punitive damages for CVS's "callous indifference" to the "property of Cherokee Nation" caused by opioid-related bodily injury. A01050 ¶ 16, A01119 ¶ 326, A01123 ¶ 346.

b. Municipal Suits

Municipal suits brought by counties and cities allege that CVS caused individuals to abuse and/or become addicted to opioids, resulting in damage to their property. A05374-A05699. These suits seek costs associated with having to repair and remake their own "infrastructure, property and systems that have been damaged by Defendants' actions," including "property and systems to treat addiction and abuse, to respond to and manage an elevated level of crime, to treat injuries, and to investigate and process deaths in Plaintiffs' Community." A05383 ¶ 10(6). "These damages have been suffered, and continue to be suffered, directly by the Plaintiffs." A5384 ¶ 10.

The municipal plaintiffs allege that they suffered damages to their infrastructure, all requiring retrofitting and repair because of CVS's actions in allegedly facilitating opioid addiction and abuse. This includes "repairing and

upgrading" "jail facilities" and "hospital and treatment facilities[.]" A05512-A05513 ¶ 444.

The municipal plaintiffs allege that they own, manage, maintain, and otherwise have interests in real and business personal property that was injured, damaged, or affected by CVS's alleged facilitation of opioid abuse by individuals in their communities. A05513-A05514 ¶ 445. Such conduct allegedly resulted in damage to buildings, offices, cells, beds, supplies, resources, materials, equipment, and other property. A05513-A05514 ¶ 445. They allege that CVS's actions "were, at the least, a substantial factor causing the harm to The County and its property" stemming from opioid-related bodily injury. A05515 ¶ 453. That harm includes "injury to the property and systems" of the County and related "property costs." A05515 ¶ 459.

All told, "[t]he County has suffered and continues to suffer damages to its property requiring investigation, repair, remediation, and other costs to be determined at trial." A05515 ¶ 456. These allegations claim bodily-injury related property damage "to the plaintiff, and damages sought because of that specific" property damage to the plaintiff's own property. *Rite Aid*, 270 A.3d at 250-51.

The Superior Court did not dispute that these plaintiffs allegedly sustained damage to their own property. Instead, it found no alleged "damage to a specific piece of property." Ex. B at 9. Each of these underlying cases (i) alleges that the

plaintiff sustained damage to its own property proximately caused by opioid-related bodily injury; (ii) seeks, as damages, the plaintiff's costs to remediate that damage; and (iii) specifies that the property allegedly includes parks; municipal buildings; hospital, treatment and penal facilities; and personal property on or in that real property (beds, offices, supplies). These allegations exceed the "potential for coverage" standard and provide more specificity than Delaware courts require to trigger the defense duty. *See, e.g.*, *Rhone-Poulenc,* 1992 WL 22690 at *3 (damage to "soil" and "groundwater"); *DynCorp,* 2009 WL 3764971 at *1 (damage to "natural resources").

The Superior Court also held that these allegations allege generic economic loss, concluding that they merely "broadly describe how the opioid crisis strained healthcare systems and eroded the quality of underlying municipal infrastructure[.]" Ex. B at 9.

Delaware courts routinely reject insurer attempts to avoid their defense obligation by classifying damages as "purely economic losses" as opposed to "compensation for property damage." *New Castle Cnty. v. Hartford Acc. & Indem. Co*., 933 F.2d 1162, 1191 n.57 (3d Cir. 1991) ("EPA . . . sought to recover . . . sums necessary to remedy damage to neighboring property[.]" "The County's ultimate liability in that action thus is quite literally 'because of . . . property damage.'"); *see also Harleysville Mut. Ins. Co. v. Sussex Cnty*., *Del.*, 831 F. Supp.

1111, 1123 (D. Del. 1993), *aff'd*, 46 F.3d 1116 (3d Cir. 1994) (rejecting assertion that cleanup costs "are mere economic losses and do not constitute third party property damage within the meaning of a CGL policy."); *New Castle Cnty. v. Hartford Acc. & Indem. Co*., 673 F. Supp. 1359, 1366 (D. Del. 1987), *aff'd in part, rev'd in part and remanded*, 933 F.2d 1162 (3d Cir. 1991), *on remand*, 778 F. Supp. 812 (D. Del 1991), *rev'd on other grounds*, 970 F.2d 1267 (3d Cir. 1992) (complaint covered that "states claims for remedial action to remedy property damage, in this case harm to surface and ground waters."); *Tyson Foods, Inc. v. Allstate Ins. Co*., 2011 WL 3926195, at *7 (Del. Super. Ct. Aug. 31, 2011) ("surface water, groundwater, and drinking water").

Alleging damage to a park "on City property" resulting from opioid addiction and abuse and seeking the costs to clean that park is a potentially covered allegation of damage. Thus, it is sufficiently specific to trigger the policies.

IV. THE SUPERIOR COURT ERRED IN GRANTING SUMMARY JUDGMENT UNDER "INDEMNITY-ONLY" POLICIES BEFORE THAT ISSUE IS RIPE

A. Question Presented

Did the Superior Court err in granting summary judgment under "indemnity only" policies by applying the duty to defend standard and a presumption that "nothing can come about" in the underlying actions to trigger an indemnity obligation? Preserved on appeal at A06003-A06007.

B. Standard of Review

Review of all issues is *de novo*. *See supra* at 13.

C. Merits of the Argument

An insurer's duty to indemnify is determined after "the facts in that claim are actually established." *Commerce Associates, LP v. Hanover Ins. Co.*, 2022 WL 539000, at *7 (Del. Super. Ct. Feb. 22, 2022). Until then, "an indemnification claim is not yet ripe" because entering a declaratory judgment "may have no real-world impact if no liability arises in the underlying litigation." *Ham v. LinQuest Corp.*, 2024 WL 1850518, at *7 (Del. Super. Ct. Apr. 18, 2024) (quoting *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 198 (Del. 2009)); *Molex Inc. v. Wyler*, 334 F.Supp.2d 1083, 1085 (N.D. Ill. 2004) (citing *Scharf v. Edgcomb Corp.*, 864 A.2d 909, 919 (Del. 2004) ("Generally, the matter on which the claim for

indemnification is premised may be said to have been resolved with certainty only when the underling investigation or litigation is definitively resolved.")).

In *Premcor Refin. Grp., Inc. v. Matrix Serv. Indus. Contractors, Inc.*, the court held that the fact that an insurer did not have a duty to defend does not mean that it might not ultimately have a duty to indemnify. 2009 WL 960567, at *12 (Del. Super. Mar. 19, 2009). The manner in which a case is tried can result in a judgment that could not have been predicted from the face of the complaint. Allan D. Windt, 2 *Insurance Claims & Disputes* § 6:10 (6th ed. Mar. 2024 Update). Thus, "the actual facts, not the pleadings, control the right to indemnification." *Pike Creek Chiropractic Ctr., P.A. v. Robinson*, 637 A.2d 418, 422 (Del. 1994).

As the Illinois Supreme Court explained: "When only indemnification is contracted for, making a duty to indemnify contingent on the existence of a duty to defend is illogical and defeats the purpose of the policy." *Cent. Ill. Light Co. v. Home Ins. Co.*, 821 N.E.2d 206, 212, 216 (Ill. 2004) (an insurer's duty to indemnify under indemnity-only policy "cannot be predicated on the duty to defend because under no circumstances will these policies impose a duty to defend").

Furthermore, when suits against an insured settle before trial, an insured need not prove that there were actual injuries or covered claims. For indemnity coverage, need only show "the existence of a potential liability on the facts known

to [it] . . . , culminating in a settlement in an amount reasonable in view of the size of possible recovery and degree of probability of claimant's success against the insured." *Guaranteed Rate, Inc. v. Ace Am. Ins. Co.,* 2022 WL 4088596, at *5 (Del. Super. Ct. Aug. 24, 2022) (quoting *Premcor Refin. Grp., Inc.*, 2013 WL 6113606 at *3). *See also Luria Bros. & Co. v. All. Assur. Co.,* 780 F.2d 1082, 1091 (2d Cir. 1986) (same).

Nevertheless, during the pendency of underlying litigation for which CVS seeks coverage, the Superior Court concluded that "nothing can come about that will transmute or transform the various governmental claims into those for bodily injury or property damage covered by the Policies." Ex. A at 45. The National Settlement is one transformative document. It provides a resolution of "Alleged Harms," defined to include "those expenditures that have allegedly arisen as a result of the physical and bodily injuries sustained by individuals suffering from opioid-related addiction, abuse, death, and other related diseases and disorders, and that have allegedly been caused by CVS." A06036 § I(E). It further contemplates "Opioid Remediation," defined as "care, treatment, and other programs and expenditures . . . designed to remediate Alleged Harms, including to (1) address the misuse and abuse of opioid products, (2) treat or mitigate opioid use or related disorders, or (3) mitigate other alleged effects of, including on those injured as a result of, the opioid epidemic." A06041-A06042 § I(VV).

This agreement is one example of evidence that CVS has, in fact, been sued for "damages because of 'bodily injury.'" Ex. A at 25 ("The Court views the facts and draws all reasonable inferences in the light most favorable to the non-movant."). The Superior Court acknowledged that it "provides for resolution of alleged harms and provision of opioid remediation[.]" Ex. B at 17. Without more, the Court held that, as a matter of law, it does "not transform the Opioid Lawsuits into claims for [bodily] injury." *Id*.

The Superior Court's distinction of *Premcor* by differentiating the potential liability of a "refinery operator" as compared to the "contractor" is a distinction without a difference. Ex. A at 43. Until an underlying adjudication, "the Court cannot definitely state that [any insurer] is free of any duty to indemnify . . . under any circumstances." *Liberty Ins. Corp. v. Korn*, 210 F. Supp. 3d 612, 619 (D. Del. 2016) (citing *Deakyne v. Selective*, 1998 WL 437138, at *1 (Del. Super. Ct. Apr. 29, 1998) ("[I]t is at least theoretically possible that the underlying tort claim might be resolved on some . . . basis which would raise the possibility of indemnification. Since this possibility exists the court cannot now rule that the plaintiff is not under any circumstances entitled to indemnification.")).

The rule is even more pronounced here with respect to "indemnity-only" policies. Delaware courts routinely reject the assertion that a finding of no defense duty mandates a finding of no indemnity obligation because the former is broader

than the latter. There is no precedent for applying the duty to defend standard—based only on the underlying allegations—to an indemnity-only policy where coverage is measured by the ultimate outcome. The outcome is uncertain, given the December 2024 decision by the Ohio Supreme Court.

CONCLUSION

CVS respectfully requests that this Court reverse or vacate the Superior Court's judgments and remand the matter for further proceedings.

Respectfully submitted,

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