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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

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TABLE OF CONTENTS

Page

NATURE OF PROCEEDINGS 1

SUMMARY OF ARGUMENT 2

STATEMENT OF FACTS 7

A. The Underlying Plaintiffs Seek to Recoup the Costs of Addressing the Opioid Crisis 7

B. CVS's Policies, Like Rite Aid's, Cover Damages Because of Bodily Injury or Property Damage 8

C. The Superior Court First Granted Summary Judgment to Insurers for Nine Governmental Opioid Lawsuits 9

D. The Superior Court Granted Insurers' Second Motion for Summary Judgment on the Remaining Entity Lawsuits 11

ARGUMENT 15

I. The Threshold Coverage Requirement in CVS's Policies is Identical to the Provision Interpreted in Rite Aid 15

A. Question Presented 15

B. Scope of Review 15

C. Merits of Argument 15

1. Under *Rite Aid*, CVS's policies provide coverage only if the underlying suit seeks damages because of personal injury, independently proven, and shown to be caused by CVS 16

2. The Pharmacist Liability and Druggist Endorsements do not affect the threshold requirement of "damages because of 'bodily injury'" 18

II. The Insurers Have No Duty to Defend CVS for the Government Suits Under *Rite Aid* 22

A. Question Presented 22

B. Scope of Review 22

C. Merits of Argument 22
1. The government suits do not allege "damages because of 'bodily injury'" 23
2. The government suits are not derivative actions 29
3. The government suits do not allege "damages because of 'property damage'" 33
a. The policies require the same causal connection for "damages because of bodily injury" and "damages because of property damage" 33
b. The Opioid Lawsuits are not based on damage to any specific property 34
III. The Insurers Do Not Have a Duty to Defend CVS in the Hospital and Third-Party Payor Suits Under *Rite Aid* 37
A. Question Presented 37
B. Scope of Review 37
C. Merits of Argument 37
1. The hospital and third-party payors do not seek to recover actual, demonstrated costs of treating bodily injuries 37
a. Hospital Suits 38
b. Third-party payor suits 43
2. CVS's other arguments regarding the hospital and third-party payor suits are unavailing 46
IV. The Insurers Have No Duty to Indemnify CVS 49
A. Question Presented 49
B. Scope of Review 49
C. Merits of Argument 49
CONCLUSION 55

TABLE OF AUTHORITIES

Cases **Page(s)**

ACE Am. Ins. Co. v. Rite Aid Corp.,
270 A.3d 239 (Del. 2022) ..... *passim*

Acuity v. Masters Pharm., Inc.,
205 N.E.3d 460 (2022) 17, 27, 28, 29, 34

Allied Prop. & Cas. Ins. Co. v. Bloodworth Wholesale Drugs, Inc.,
727 F. Supp. 3d 1404 (M.D. Ga. 2024) 18, 45, 46

Banner Bank v. First Am. Title Ins. Co.,
916 F.3d 1323 (10th Cir. 2019) 53

Burns v. Architectural Doors & Windows,
19 A.3d 823 (Me. 2011) 47

Capstone Bldg. Corp. v. Am. Motorists Ins. Co.,
308 Conn. 760 (Conn. 2013) 53

Cent. Ill. Light Co. v. Home Ins. Co.,
821 N.E.2d 206 (Ill. 2004) 52

Certain Underwriters at Lloyd's of London v. Super. Ct.,
24 Cal. 4th 945 (2001) 49, 50

Charles E. Brohawn & Bros., Inc. v. Emps. Com. Union Ins. Co.,
409 A.2d 1055 (Del. 1979) 49

Cincinnati Ins. Co. v. H.D. Smith, L.L.C.,
829 F.3d 771 (7th Cir. 2016) 31

ConAgra Foods, Inc. v. Lexington Ins. Co.,
21 A.3d 62 (Del. 2011) 15

Dolan v. Altice USA, Inc.,
2019 WL 2711280 (Del. Ch. June 27, 2019) 47

E. Me. Med. Ctr. v. Walgreen Co.,
—A.3d—, 2025 WL 410303 (Me. Feb. 6, 2025) 42

Guaranteed Rate, Inc. v. ACE Am. Ins. Co.,
2022 WL 4088596 (Del. Super. Ct. Aug. 24, 2022) 51, 52

Harleysville Mut. Ins. Co. v. Sussex Cty., Del.,
831 F. Supp. 1111 (D. Del. 1993) 36

Health Care Indus. Liab. Ins. Program v. Momence Meadows Nursing Ctr., Inc.,
566 F.3d 689 (7th Cir. 2009).....50

Health First, Inc. v. Capitol Specialty Ins. Corp.,
747 F. App'x 744 (11th Cir. 2018).....50

In re AmerisourceBergen Corp. (n/k/a Cencora) Del. Ins. Litig.,
2024 WL 5203047 (Del. Super. Ct. Dec. 23, 2024)..... 18, 54

Kaady v. Mid-Continent Cas. Co.,
790 F.3d 995 (9th Cir. 2015) 34

King Const., Inc. v. Plaza Four Realty, LLC,
976 A.2d 145 (Del. 2009).....35

Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Com. Union Ins. Co.,
908 A.2d 888 (Pa. 2006).....50

Lenning v. Comm. Union Ins. Co.,
260 F.3d 574 (6th Cir. 2001) 34

Luria Bros. & Co. v. Alliance Assurance Co., Ltd.,
780 F.2d 1082 (2d Cir. 1986) 51

N.A.A.C.P. v. Acusport Corp.,
253 F. Supp. 2d 459 (E.D.N.Y. 2003).....32

New Castle Cty. v. Harford Acc. & Indem. Co.,
933 F.2d 1162 (3d Cir. 1991) 35, 36

Premcor Refin. Grp., Inc. v. Matrix Serv. Indus. Contractors, Inc.,
2009 WL 960567 (Del. Super. Ct. Mar. 19, 2009) 50, 51

Publix Super Mkts., Inc. v. ACE Prop. & Cas. Ins. Co.,
2024 WL 4605991 (M.D. Fla. Oct. 29, 2024)..... 17, 18

Tyson Foods, Inc. v. Allstate Ins. Co.,
2011 WL 3926195 (Del. Super. Ct. Aug. 31, 2011) 36

Walmart Inc. v. ACE Am. Ins. Co.,
2023 WL 9067386 (Ark. Cir. Dec. 29, 2023) 32

Westfield Nat'l Ins. Co. v. Quest Pharms., Inc.,
57 F.4th 558 (6th Cir. 2023) 17, 34, 45

Zogenix, Inc. v. Federal Ins. Co.,
2021 WL 6058252 (N.D. Cal. Nov. 2, 2021) 31

Other Authorities

Allan D. Windt,
Insurance Claims and Disputes § 6:31 (6th ed. 2024) 53

NATURE OF PROCEEDINGS

CVS Health Corporation has been sued in thousands of lawsuits brought by governments and private entities arising out of the opioid crisis (the "Opioid Lawsuits"). CVS demanded defense and indemnity from its insurers under commercial liability policies that provide coverage only if (among other requirements) the underlying lawsuits allege damages "because of 'bodily injury.'" This Court interpreted and applied the same provision in *ACE American Insurance Co. v. Rite Aid Corp.*, 270 A.3d 239 (Del. 2022).

The Superior Court twice granted summary judgment to the insurers, applying *Rite Aid* to CVS's coverage claim. First, the Superior Court ruled on nine representative Opioid Lawsuits brought by government entities, including the Track One suits addressed in *Rite Aid*. CVS then agreed, by stipulation, that the decision applied to an additional 2,142 government suits. Second, the Superior Court granted summary judgment on the remaining suits—brought by governments, hospitals, and third-party payors—as to which the parties disagreed whether the first ruling applied. In both decisions, the Superior Court held that, under *Rite Aid*, CVS's policies do not provide coverage because the Opioid Lawsuits do not seek damages because of any specific person's bodily injury or damage to any specific property.

The parties stipulated to partial final judgment under Superior Court Rule of Civil Procedure 54(b).

SUMMARY OF ARGUMENT

1. Denied. CVS's coverage claim is indistinguishable from the one rejected in *Rite Aid*. There, this Court held that a national retail pharmacy chain was not entitled to coverage for lawsuits brought by local governments in response to the opioid crisis under policies that cover damages "because of 'bodily injury.'" 270 A.3d 239 (Del. 2022). Three classes of claims, this Court reasoned, fall within the scope of that contractual phrase: claims brought by (1) the person injured; (2) those recovering on behalf of the person injured; and (3) people or organizations that directly cared for or treated the person injured. *Id.* at 241. To satisfy the third category, the underlying suit must seek to prove, and obtain compensation for, the cost of treating a specific person's bodily injury. *Id.* Because the opioid lawsuits *Rite Aid* addressed did not bring claims based on the injuries of any individual, but instead sought to recoup the aggregate economic costs incurred to abate the opioid crisis, this Court held those suits were not covered. Here, CVS is another national retail pharmacy chain sued in materially identical lawsuits—including the same two lawsuits addressed in *Rite Aid*—and is seeking coverage under insurance policies with the same threshold requirement interpreted in *Rite Aid*. The same result must follow.

2. Denied. CVS posits alleged issues "of first impression" to evade *Rite Aid* that are, in reality, matters *Rite Aid* already addressed, irrelevancies, or

distinctions without any difference. CVS cites endorsements that do not change the policies' threshold requirement that the underlying suits allege "damages because of 'bodily injury.'" CVS also emphasizes that some of the underlying plaintiffs are healthcare systems rather than governments, but what matters is the nature of the claims and the relief sought, not the plaintiff's identity. All of the Opioid Lawsuit complaints make clear that, just as in *Rite Aid*, each plaintiff seeks to recover its own economic costs incurred in responding to the opioid epidemic at large—not damages based on any particular person's bodily injury. Accordingly, there can be no defense or indemnity coverage.

3. Denied. The Superior Court correctly applied *Rite Aid* to CVS's coverage claim.

4. Denied. CVS begins by pointing out that some of the Opioid Lawsuits are brought by hospitals. But the hospitals allege that their costs of operating increased because of the opioid crisis, which CVS allegedly exacerbated, and they seek to recover *those* aggregate budgetary impacts. Such claims do not require, any more than the government Opioid Lawsuits do, proof that the hospital treated an individual with an injury, how much that treatment cost, and that CVS caused the injury. The hospital suits therefore "do not depend on proof of bodily injuries," and the hospitals do not seek "to recover their actual, demonstrated costs of treating bodily injuries caused by opioid overprescription." *Rite Aid*, 270 A.3d at 253-54.

5. Denied. Backtracking to address the language of its policies, CVS argues that certain endorsements distinguish its coverage claim from the one rejected in *Rite Aid*. Not so. The Pharmacist Liability Endorsement in certain Chubb policies broadens the types of injury-causing *incidents* that could potentially give rise to a covered claim. But it does not alter the separate requirement that the underlying suit seek "damages because of 'bodily injury'"; on the contrary, the endorsement restates that requirement. *See* A02145.

6. Denied. Nor does the Druggist Endorsement in certain AIG policies affect the threshold requirement that only "damages because of 'bodily injury'" are covered. Instead, that endorsement broadens coverage by providing that "bodily injury" arising out of pharmacist services "shall be deemed to be caused by an '*occurrence*.'" A02233. The endorsement thus addresses only the "occurrence" requirement.

7. Denied. Returning to the underlying allegations, CVS raises a grab-bag of issues, but none makes the Opioid Lawsuits here meaningfully different from those addressed in *Rite Aid*—indeed, two of them are *exactly the same*. CVS has not cited a single allegation that shows the underlying plaintiffs' theory of relief is based on individualized personal injury. That utter lack of support is unsurprising because the Opioid Lawsuits, unlike personal-injury suits, seek to recover the plaintiffs' aggregate economic costs to redress the opioid crisis, just like the

underlying suits in *Rite Aid*. CVS observes that only some Opioid Lawsuits specifically disclaim personal injury damages, but such disclaimers merely illustrate what the pleadings otherwise reflect. Nor do generic references to property damage supply an alternative route to coverage for CVS. Just as the Opioid Lawsuits do not seek to prove any individual's bodily injury or that any such injury was caused by CVS, they also do not seek to prove damage caused by CVS to any particular piece of property. Accordingly, the plaintiffs do not allege "damages because of … 'property damage'" any more than they allege "damages because of 'bodily injury.'"

8. Denied. Because the insurers have no duty to defend the Opioid Lawsuits, there can be no duty to indemnify. The duty to defend is broader than the duty to indemnify, meaning a decision that the underlying claims do not allege "damages because of 'bodily injury' [or] 'property damage'" is determinative of both duties, because "nothing can come about that will transmute or transform the[se] … claims into those for bodily injury or property damage covered by the Policies." Ex. A to Opening Br. ("SJ Order I") at 45. Contrary to CVS's conclusory assertions, the National Settlement agreement and the Ohio Supreme Court's recent decision are not so transformative. Settlements between policyholders and claimants do not retroactively create a duty to defend when the allegations in the underlying complaints do not otherwise establish such duty, and the National Settlement here, if anything, supports the insurers' position. Finally, CVS fails to explain how the

Ohio Supreme Court's decision that CVS could *not* be liable for common-law public nuisance in two Opioid Lawsuits would mean the insurers *are* liable for indemnity coverage.

STATEMENT OF FACTS

A. The Underlying Plaintiffs Seek to Recoup the Costs of Addressing the Opioid Crisis.

The opioid epidemic that has plagued the country for years has driven entities in the public and private sectors to respond, costing them money—*i.e.*, as a result of the epidemic, it became more expensive to provide government services or operate a healthcare system. To recover those increased budgetary expenditures and to abate what they describe as a public nuisance, thousands of these entities have sued opioid manufacturers, distributors, and retailers for the alleged over-distribution that led to the opioid crisis.

The Opioid Lawsuits against CVS are of this type. The plaintiffs seek to recover aggregate economic costs to redress the impact of the opioid crisis on their operational budgets. *See, e.g.*, A00136. They do not bring claims on behalf of any injured individuals or to recover costs they incurred in treating any particular individual injured by CVS. There are, indeed, *other* lawsuits against CVS brought by individuals to recover for their specific opioid-related harms. *See, e.g.*, B245-52. But those suits are not at issue here.

On January 10, 2022, this Court decided *Rite Aid*, in which it analyzed whether commercial liability policies cover the sort of opioid lawsuits at issue. 270 A.3d 239. In fact, this Court addressed two suits—the "Track One Suits"—that name CVS as a defendant alongside Rite Aid and for which CVS seeks coverage

here. Those suits, brought by Summit and Cuyahoga Counties in Ohio, were selected as bellwethers by the federal court overseeing the MDL in which most Opioid Lawsuits have been consolidated. *Id.* at 242. This Court held that those representative lawsuits did not allege damages "because of 'bodily injury'" as required by Rite Aid's policies. *Id.* at 247.

B. CVS's Policies, Like Rite Aid's, Cover Damages Because of Bodily Injury or Property Damage.

CVS's policies contain the same requirement. The undersigned insurers (the "Insurers") sold CVS annual commercial liability policies from 1996 to 2018 (the "Policies"). With some immaterial differences, all the Policies cover amounts that CVS "becomes legally obligated to pay as damages" "for" or "because of 'bodily injury' [or] 'property damage' ... to which this insurance applies." *See* A00096-110 (identifying the Policies at issue and the relevant language). Generally, "bodily injury" is defined as "bodily injury, sickness or disease sustained by a person," and "property damage" means "[p]hysical injury to tangible property." *E.g.*, A02104, A02107. The Policies cover CVS's obligation to pay sums "as damages because of 'bodily injury' [or] 'property damage'" only if the "bodily injury" or "property damage" is "caused by an 'occurrence,'" which is defined as "an accident." *E.g.*, A02090, A02106.

Certain of the Chubb Policies contain a Pharmacist Liability Endorsement, which expands coverage to "damages because of 'bodily injury' arising out of a

'pharmacist liability incident.'" A02145. A "pharmacist liability incident" is defined as "an actual or alleged negligent act, error or omission … in the performance of a 'pharmacist professional service,'" *i.e.*, "[t]he preparation, selling, handling, or distribution of drugs, medicine, medical or healthcare-related products." A02146.

Similarly, certain of the AIG Policies contain a Designated Professional Services Druggist Liability ("Druggist") Endorsement, which provides that "'[b]odily injury' or 'property damage' arising out of the rendering of or failure to render professional health care services as a pharmacist shall be deemed to be caused by an 'occurrence.'" A02233. Neither the Druggist Endorsement nor the Pharmacist Liability Endorsement alters the separate, threshold requirement that the underlying suit seek "damages because of 'bodily injury' [or] 'property damage.'" In addition, several AIG Policies, including all of those with a Druggist Endorsement, also contain a Self-Insured Retention endorsement specifying that AIG "will have the right but not the duty to defend" any suit seeking "damages because of 'bodily injury.'" A02247.

C. The Superior Court First Granted Summary Judgment to Insurers for Nine Governmental Opioid Lawsuits.

In December 2022, the Insurers moved for summary judgment on the same Track One Suits that *Rite Aid* held were not covered, as well as seven "Additional Representative Suits": (i) the "Track Three Suits," MDL bellwether suits brought

by Lake and Trumbull Counties in Ohio; (ii) two suits brought by Nassau and Suffolk Counties in New York; and (iii) suits brought by the Cherokee Nation, the city of Philadelphia, and the State of Florida. *See* A00072. These nine suits—representative of Opioid Lawsuits brought by entity plaintiffs—generally allege that the defendant retail pharmacies and distributors, including CVS, have contributed to the opioid crisis and seek to recoup money spent to abate the crisis. *See, e.g.*, A00136 (*Summit* ¶ 14); A00700 (*Cuyahoga* ¶ 699).

The Insurers argued, and the Superior Court agreed, that *Rite Aid* precluded coverage to CVS for the Opioid Lawsuits for at least three reasons. First, the same law that governed in *Rite Aid*—Delaware law—governs here.[1] Second, the pertinent policy language—damages "because of 'bodily injury'"—is the same. Third, the allegations in the Track One and Additional Representative Suits are materially (or literally, for the Track One Suits) identical to those addressed in *Rite Aid*. *See generally* A00061-110. On August 25, 2023, the Superior Court granted the Insurers' motion, holding that the Policies do not impose a duty to defend or indemnify CVS for the Track One and Additional Representative Suits because those suits seek to recover aggregate expenses incurred in responding to the opioid crisis. *See generally* SJ Order I.

[1] The parties in *Rite Aid* agreed that the policies would be governed by Pennsylvania law if there were a conflict with Delaware law. 270 A.3d at 244. This Court held that there was no conflict and cited cases from both jurisdictions. *Id.* at 244-45.

Following the Superior Court's decision, Insurers and CVS conferred regarding its application. On March 15, 2024, the parties stipulated that the decision resolved CVS's claim for coverage for 2,142 additional government suits with substantively identical allegations (subject to CVS's right to appeal). B184-240. The parties also agreed that 293 opioid-related suits *brought by or on behalf of individuals* were *not* subject to the order. *See* B962, 969-79. The parties disagreed, however, whether the order applied to 218 suits—156 brought by hospitals and so-called third-party payors and 62 brought by government entities.

D. The Superior Court Granted Insurers' Second Motion for Summary Judgment on the Remaining Entity Lawsuits.

The parties then cross-moved for summary judgment on the 218 disputed Opioid Lawsuits. The Insurers argued that these suits did not allege "damages because of 'bodily injury' [or] 'property damage'" for the same reasons the Track One and Additional Representative Suits did not. A02625-26. CVS argued that the hospital and third-party payor suits were different because the plaintiffs were not governments, and that the remaining government suits asserted more robust allegations of property damage. A03538-39.

Each side identified a set of "exemplar lawsuits" for briefing purposes. The Insurers' exemplar hospital suits included *Bon Secours (Kentucky)*, brought by hospital systems primarily in Kentucky; *Booneville*, brought by health systems in Appalachia; and *Eastern Maine*, brought by hospital operators in Maine. The

Insurers identified two exemplar suits brought by third-party payors (*e.g.*, pensions and insurance benefit funds): *Louisiana Assessors*, brought by the insurance fund for the assessors' union in Louisiana (and a bellwether in the MDL for third-party payor claims), and *Laborers Welfare Fund*, brought by an employee benefit plan for construction trade workers. To represent the remaining government suits, Insurers cited *Fresno* and *Clinch County*. *See generally* A02603-45.

In its cross-motion for summary judgment, CVS identified *Clinch County*, one of the Insurers' government exemplars, as a hospital exemplar. CVS's other hospital exemplars included *Dallas County Hospital District*, *Bunkie General Hospital*, *Bristol Bay*, *Lester E. Cox*, *Bon Secours (Maryland)*, and *Fayetteville*. CVS identified *Southern Tier* as a third-party payor exemplar, and, like the Insurers, used *Fresno* as an exemplar government suit. *See generally* A03510-44.

Just like the Track One and Additional Representative Suits, the remaining entity suits allege that CVS's over-distribution of prescription opioids created a public health crisis, imposing economic costs on the entities to abate the crisis, and seek to recover for that budgetary impact. None connects CVS's conduct to any particular person's bodily injury or damage to any specific property, and none seeks compensation based on any such bodily injury or property damage. *See, e.g.*, A04334 (*Bristol Bay*, ¶ 21) ("The diversion of funding to address a public health crisis like the opioid epidemic, including associated overhead and administrative

costs, can have devastating impacts on the ability of the Plaintiff to provide an adequate level of basic health care and other needed specialty care in these areas."); A04204 (*Bunkie*, ¶ 800) ("Plaintiff brings this civil action to recover monetary losses that have been incurred as a direct and proximate result of Defendants' false, deceptive, and unfair marketing of prescription opioids."). The Superior Court agreed that the allegations in the remaining suits were materially indistinguishable from the Track One and Additional Representative Suits, and again ruled for Insurers on both the duty to defend and the duty to indemnify. *See generally* Ex. B to Opening Br. ("SJ Order II").

Following the second summary judgment order, the parties stipulated to entry of partial final judgment under Rule 54(b) in Insurers' favor regarding all government, hospital, and third-party payor Opioid Lawsuits. A06453-61. Pending resolution of this appeal, the parties agreed to stay the litigation with respect to suits brought by or on behalf of individuals. B960-B979.

* * *

CVS does not contest, as it did below, that Delaware law governs. Accordingly, CVS has waived any argument that Delaware law, including *Rite Aid*, does not apply. Del. Sup. Ct. Rule 14(b)(vi)(A)(3).

Logically, the next question is whether the controlling policy language here is the same as that interpreted in *Rite Aid*. Therefore, although CVS orders the issues

differently in its brief, Insurers start with the question presented related to the policy language, then progress to questions of how *Rite Aid* applies to the Opioid Lawsuits against CVS, and finally address CVS's argument that the duty to indemnify cannot be resolved at this stage.

ARGUMENT

I. The Threshold Coverage Requirement in CVS's Policies is Identical to the Provision Interpreted in Rite Aid.

A. Question Presented

Did the Superior Court correctly determine that CVS's policies include the same threshold requirement to coverage—"damages because of 'bodily injury' [or] 'property damage'"—that this Court applied in *Rite Aid*? Preserved at A00084-85. (Responsive to Opening Br. Section II.)

B. Scope of Review

This Court reviews the Superior Court's interpretation of the policy language *de novo*. *See, e.g.*, *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 68 (Del. 2011).

C. Merits of Argument

Rite Aid forecloses CVS's claim for coverage. CVS attempts to evade that decision by citing certain policy endorsements that CVS argues provide "broader" coverage than Rite Aid's policies did. But the *relevant* policy language is the same. Even in policies that contain the Pharmacist fLiability Endorsement or Druggist Endorsement, the underlying lawsuit must seek "damages because of 'bodily injury' [or] 'property damage.'" That is the provision this Court applied in *Rite Aid*.

1. Under *Rite Aid*, CVS's policies provide coverage only if the underlying suit seeks damages because of personal injury, independently proven, and shown to be caused by CVS.

In *Rite Aid*, this Court interpreted the plain meaning of the policy's insuring agreement, which provided coverage for those "sums that the insured becomes legally obligated to pay as damages because of 'personal injury' or 'property damage.'" 270 A.3d at 243. "Personal injury" was defined to include "bodily injury," and "bodily injury" was in turn defined as "bodily injury ... sustained by a person." *Id.* This Court held that for a claim to assert "damages because of 'bodily injury,'" it must fall into one of three categories:

(1) when the plaintiff itself is "the person injured";

(2) when the plaintiff is suing to "recover[] on behalf of the person injured"; or

(3) suits by "people or organizations that directly cared for or treated the person injured," so long as the underlying plaintiff "must prove the costs of caring for the individual's personal injury."

Id. at 241. In short, the alleged damages must "depend on proof of bodily injuries." *Id.* at 254. Regarding the third category of covered claims, the underlying complaint must include allegations that would "show that [the plaintiff] treated an individual with an injury, how much that treatment cost, and that the injury was caused by the insured." *Id.* at 252.

Accordingly, this Court held that the phrase "because of 'bodily injury'" does *not* encompass "any injuries 'causally related' to personal injury." *Id.* at 250. Rather, "[t]here must be more than some linkage between the personal injury and

damages to recover 'because of' personal injury: namely, bodily injury to the plaintiff, and damages sought because of that specific bodily injury." *Id.* The bodily injuries referenced in a complaint must do more than "explain and support" economic loss the plaintiff suffered—they must be "the basis of the claims." *Id.* Otherwise, coverage would be effectively boundless, engulfing all downstream expenditures with "some linkage" to physical injury—risks the insurers could not have evaluated when underwriting the policies. *Id.*

Since *Rite Aid*, courts nationwide have followed its reasoning. In *Acuity v. Masters Pharmaceutical, Inc.*, the Ohio Supreme Court held that underlying opioid lawsuits were not covered because "damages because of bodily injury" "requires more than a tenuous connection between the alleged bodily injury sustained by a person and the damages sought." 205 N.E.3d 460, 472 (2022). For a plaintiff "organization that directly suffered harm because of another person's injury ... the existence and cause of the injury must be proved." *Id.* at 473. Likewise, in *Westfield National Insurance Co. v. Quest Pharmaceuticals, Inc.*, the Sixth Circuit, applying Kentucky law, held that opioid lawsuits were not covered, because the underlying claims must "predicate[] recovery on a particular person's bodily injury." 57 F.4th 558, 567 (6th Cir. 2023). Recently, the Middle District of Florida also held that opioid lawsuits brought by entities were not covered because "the causal connection between the specific injuries alleged and the damages the underlying plaintiffs seek

in the opioid lawsuits is too attenuated to constitute damages 'because of bodily injury.'" *Publix Super Mkts., Inc. v. ACE Prop. & Cas. Ins. Co.*, 2024 WL 4605991, at *13 (M.D. Fla. Oct. 29, 2024); *see also Allied Prop. & Cas. Ins. Co. v. Bloodworth Wholesale Drugs, Inc.*, 727 F. Supp. 3d 1404, 1414 (M.D. Ga. 2024) ("[T]he Court does not find that the economic losses sought in the underlying opioid lawsuits fall within the provision 'because of "bodily injury,"' as those economic losses are unconnected to an occurrence involving bodily injury to an identified person(s)."); *In re AmerisourceBergen Corp. (n/k/a Cencora) Del. Ins. Litig.*, 2024 WL 5203047, at *10 (Del. Super. Ct. Dec. 23, 2024) (holding no coverage for the same Track One and Additional Representative Suits addressed in SJ Order I).

The Policies here have "nigh-on identical language" to that addressed in *Rite Aid* (and the other decisions applying *Rite Aid*). SJ Order I at 33; *see supra* pp. 8-9 (summarizing policy language).

2. The Pharmacist Liability and Druggist Endorsements do not affect the threshold requirement of "damages because of 'bodily injury.'"

CVS argues that the Pharmacist Liability Endorsement and the Druggist Endorsement "broaden" coverage to create a different outcome than this Court reached in *Rite Aid*. But those endorsements do not broaden coverage in any relevant way, because they do not modify the threshold "damages because of 'bodily injury'" requirement. Accordingly, *Rite Aid* applies with full force.

Among other requirements, the Policies cover "damages because of 'bodily injury'" only if "the *'bodily injury' ... is caused by an 'occurrence,'*" which is defined as an "accident." *E.g.*, A02090, A02106 (emphasis added). The Pharmacist Liability Endorsement and Druggist Endorsement expand what can "cause" "bodily injury" within the scope of coverage.

The Pharmacist Liability Endorsement replaces the "caused by an occurrence" requirement with the language on which CVS focuses. Specifically, it provides that coverage applies to sums that CVS "shall become legally obligated to pay as [1] damages because of 'bodily injury' [2] arising out of a 'pharmacist liability incident.'" A02145. A "pharmacist liability incident" includes "an actual or alleged negligent act, error or omission … in the performance of a 'pharmacist professional service.'" A02146. Accordingly, under the endorsement, to come within the scope of coverage, an underlying claim need not necessarily allege bodily injury caused by an "occurrence" (*i.e.*, an "accident"); coverage may attach if the alleged bodily injury "aris[es] out of" "an actual or alleged negligent act, error or omission … in the performance of a 'pharmacist professional service.'" *Id.* That modification does not change the applicability of *Rite Aid* because the threshold requirement remains undisturbed: the underlying claim must seek "damages because of 'bodily injury.'"

The Druggist Endorsement operates similarly. The endorsement states, "'bodily injury' or 'property damage' arising out of the rendering of or failure to

render professional health care services as a pharmacist *shall be deemed to be caused by an 'occurrence.'*" A02233 (emphasis added). Once again, the "arising out of" language that CVS fixates on modifies only the "occurrence" requirement. Therefore, "the Druggist Endorsement is and acts no differently than the Pharmacist Liability Endorsement," SJ Order I at 38, and the threshold "damages because of 'bodily injury'" requirement is unaffected.

CVS is thus incorrect that the Superior Court rendered the endorsements "illusory" or held that they impose an "additional requirement." Opening Br. at 29. The Superior Court merely observed the obvious—the endorsements do not affect the "damages because of 'bodily injury'" requirement.

CVS is also incorrect that these endorsements were not at issue in *Rite Aid*—the policy there in fact included the same Druggist Endorsement as the one here. B79. No party there brought it up, presumably because no one thought it mattered. What's more, CVS fails to mention that the AIG Policies with a Druggist Endorsement also contain an SIR endorsement that disclaims any duty to defend. *See, e.g.*, A02247. That CVS nevertheless continues to insist that the Druggist Endorsement triggers the Insurers' duty to defend reveals the weakness of its position.

Rather than advance CVS's position, the endorsements emphasize *Rite Aid*'s applicability. For example, the Pharmacist Liability Endorsement states that the

"'retained limit' shall apply *separately* to *each and every* 'pharmacist liability incident,'" and "all related acts, errors or omissions in the furnishing of 'pharmacist professional services' … to *any one person* … will be considered a *single* 'pharmacist liability incident.'" A02146 (emphasis added). Likewise, the Druggist Endorsement states that "any act or omission together with all related acts or omissions in the furnishing of these services to *any one person* will be considered one 'occurrence.'" A02233 (emphasis added). Thus, the endorsements further confirm the Policies respond only to claims of individual bodily injury.

II. The Insurers Have No Duty to Defend CVS for the Government Suits Under *Rite Aid*.

A. Question Presented

Did the Superior Court correctly conclude that the Insurers do not have a duty to defend CVS in the government Opioid Lawsuits because they do not allege "damages because of 'bodily injury' or 'property damage'"? Preserved at A00084-94, A02626-30. (Responsive to Opening Br. Section III.)

B. Scope of Review

This Court's review is *de novo*. *See supra* p. 15.

C. Merits of Argument

Rite Aid held the Track One Suits were not covered. CVS nevertheless insists that the Track One Suits satisfy the "damages because of 'bodily injury'" requirement—though it points to no allegations against it that meaningfully differ from those against Rite Aid. Nor could it. The allegations in the Track One Suits are asserted against the "National Retail Pharmacies"—a defined term that includes *both* Rite Aid and CVS. Why then does CVS not make the inescapable concession that there is no coverage for the Track One Suits? Because the relevant allegations in the Track One Suits are indistinguishable from those in the other Opioid Lawsuits.

The other government suits, like the Track One Suits, seek to recover the plaintiffs' aggregate economic losses from responding to the opioid crisis, and do not seek damages based on any particular individual's injury or damage to any

particular piece of property. These are the critical parallels for coverage purposes. The Superior Court properly held as much regarding the Track One and Additional Representative Suits in its initial summary judgment decision. Then, after CVS stipulated that the ruling applied to 2,142 additional government suits, the Court properly held the same about the few remaining government suits as to which CVS would not stipulate. CVS's challenges to these holdings fail.

1. The government suits do not allege "damages because of 'bodily injury.'"

In *Rite Aid*, this Court held that the Track One Suits did not bring "personal injury damage claims for or on behalf of individuals who suffered or died from the allegedly abusive prescription dispensing practices." 270 A.3d at 246. Rather, they sought "recovery for direct injuries suffered by the Plaintiffs themselves," *i.e.*, "their own economic damages from Rite Aid's alleged contribution to a 'public health crisis' of opioid addiction." *Id.* at 247. Cuyahoga County, for example, "claims the opioid crisis 'saddled [it] with an enormous economic burden,' with 'several departments [incurring] direct and specific response costs that total tens of millions of dollars[,]' including costs in the areas of medical treatment and criminal justice." *Id.* at 246 (citing *Cuyahoga*); *see also* A00138 (*Summit* ¶¶ 20-21).

The government Opioid Lawsuits, including (of course) the Track One Suits, assert substantively identical allegations against CVS. Consider the following examples:

- "The costs are borne by Plaintiff and other governmental entities. These necessary and costly ***responses to the opioid crisis*** include the handling of emergency responses to overdoses, providing addiction treatment, handling opioid-related investigations, arrests, adjudications, and incarceration, treating opioid-addicted newborns in neonatal intensive care units, burying the dead, and placing thousands of children in foster care placements, among others." A00845 (*Lake Cty.* ¶ 15) (emphasis added); A01140 (*Trumbull Cty.* ¶ 15); *compare* A00138 (*Summit* ¶¶ 20-21).

- "Plaintiff has suffered and will continue to suffer ***economic damages*** including, but not limited to, significant expenses for police, emergency, health, prosecution, corrections, rehabilitation, and other services." A01037 (*Lake Cty.* ¶ 640) (emphasis added); A01338 (*Trumbull Cty.* ¶ 640); *compare* A00809 (*Cuyahoga* ¶ 1067).

- "Plaintiffs have been forced to expend exorbitant amounts of money ... ***due to what is commonly referred to as the 'opioid epidemic'*** and as a direct result of the actions of Defendants." A01353 (*NY Consol. Compl.* ¶ 4) (emphasis added); *compare* A00703 (*Cuyahoga* ¶ 707).

- "The Retail Chain Pharmacies' conduct directly caused a ***public health and law-enforcement crisis*** across this country, including in New York." A01639 (*Suffolk Short Form* ¶ 150) (emphasis added); A01707 (*Nassau Short Form* ¶ 150); *compare* A00410 (*Summit* ¶ 903(h)).

- "Cherokee Nation has sustained economic harm by spending substantial ***sums trying to fix the societal harms*** caused by Defendants' nuisance-causing activity, including costs to the healthcare, criminal justice, social services, welfare, and education systems." A01120 (*Cherokee* ¶ 332) (emphasis added); *compare* A00459 (*Summit* ¶ 1112).

- "The City brings this civil action to redress ***the hazard to public health and safety caused by the opioid epidemic***, to abate the nuisance in the City, and to recoup City monies that have been spent as a result of Defendants' unlawful diversion of prescription opioids .... Such ***economic damages*** were foreseeable to Defendants …." A01739 (*Philadelphia* ¶ 1) (emphasis added); *compare* A00804 (*Cuyahoga* ¶ 1042).

- "The foreseeable result of Defendants' decision to continue selling, distributing, and dispensing vast quantities of opioids ... was

widespread addiction, overdoses, death, harms to the State of Florida, and ***the societal and economic harms*** that flow from prescription opioid abuse." A01998 (*Florida* ¶ 163) (emphasis added); *compare* A00457 (*Summit* ¶ 1100).

- "Plaintiffs seek ***economic damages*** from the Defendants to pay for the cost to permanently eliminate the ***hazards to public health and safety*** and abate the temporary public nuisance." A05491 (*Fresno* ¶ 342) (emphasis added); *compare* A00809 (*Cuyahoga* ¶ 1067).

CVS cites a handful of allegations of costs related to services provided in connection with opioid-related injuries and deaths. *See* Opening Br. at 32-34. But CVS cannot identify a single allegation in which the government plaintiffs allege that a particular person was injured, that such a person was injured by CVS, or that the government incurred specific costs to treat that person. Accordingly, the government suits contain no allegations of "damages because of 'bodily injury.'" *See Rite Aid*, 270 A.3d at 250-51.

Instead, the allegations merely illustrate the plaintiffs' economic losses. The very allegations CVS quotes in its brief make the point:

- "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) (Opening Br. at 33) (emphasis added).

- "[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) (same) (emphasis added).

- "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) (same) (emphasis added).

None of these references to treatments and responses to death shows that the claims are based on identifiable bodily injuries. Instead, these references demonstrate the impact of the opioid crisis on the government plaintiffs.

This Court has already reached this conclusion. It held in *Rite Aid* that generalized allegations of "medical care" are insufficient to trigger coverage for damages "because of 'bodily injury.'" 270 A.3d at 252; *see* Opening Br. at 34 (citing similar "medical care" allegations). As this Court explained: "Although some of [the Track One plaintiffs' alleged] costs *involve medical care*, when an organization seeks to recover its costs incurred in caring for bodily injury, it must show that it *treated an individual with an injury, how much that treatment cost, and that the injury was caused by the insured.*" *Rite Aid*, 270 A.3d at 252 (emphasis added). "That is not what the plaintiffs seek to recover here." *Id.*

Nor do the plaintiffs in the other government suits. Even the most specific allegations CVS points to are still illustrations of budgetary impact, *not* support for a theory of relief based on individual injury. For example, *Philadelphia*, which CVS cites repeatedly, alleges that "[t]he City administered nearly 10,000 doses of

naloxone in 2015" and "pays approximately $37 per dose for naloxone." A01921 (¶ 606) (Opening Br. at 32). But the Track One Suits analyzed in *Rite Aid* included materially identical allegations. *Summit* alleged that "Ohio EMS personnel administered naloxone (or Narcan) more than 44,500 times in 2017 alone," A00352 (¶ 730), and *Cuyahoga* alleged that its local "EMS has had to administer ... 1,903 doses of naloxone in 2015, 5,100 doses in 2016, and 6,643 doses in 2017," A00712 (¶ 739). This Court reasoned that such allegations of aggregate costs did not transform the government suits into personal injury claims, and the outcome should be no different here. "[A] close examination of the allegations," the Superior Court reasoned, "reveals that the most particularized allegations are intended *only to illustrate the economic losses suffered by the counties*." SJ Order I at 34 (emphasis added).

Courts outside of Delaware have endorsed *Rite Aid*'s analysis. The Ohio Supreme Court in *Acuity* carefully explained why similar allegations of aggregate costs do not seek "damages because of 'bodily injury'":

> It is true that some of the complaints include allegations that the governments' citizens sustained opioid-related injuries and that the damages sought by the governments include costs for providing medical care and treatment services. But the governments' theories of relief in the underlying suits are not that specific opioid-related injuries sustained by their citizens occurred because of Masters's alleged failure to prevent the improper diversion of prescription opioids and that the damages sought flow from the care of those specific opioid-related injuries. For instance, Lansing, Michigan does not claim that Masters's allegedly negligent conduct proximately caused 243 Lansing citizens' overdoses in 2015, which required the fire department to administer

> 243 doses of Naloxone, and Saginaw County does not claim that the conduct proximately caused 116 Saginaw County citizens' hospitalizations in 2013. Nor do the counties seek recovery for the medical care provided for those specific opioid-related injuries.
>
> Rather, the governments' theories of relief are that Masters's alleged failure to prevent the improper diversion of prescription opioids was a 'direct and proximate cause of the opioid epidemic' and the 'economic damages' sought are based on that public-health crisis. Stated differently, the governments seek damages for their own aggregate economic injuries caused by the opioid epidemic and not for any particular opioid-related bodily injury sustained by a citizen as a direct result for Masters's alleged failures.

2022 WL 4086449, at *6. Thus, allegations like those CVS cites do not trigger coverage because "[t]he basis of each underlying claim … is not 'connected to [] personal injury, independently proven, and shown to be caused by the insured.'" SJ Order I at 36.

The federal MDL court recently confirmed that descriptions of bodily injury in the government complaints merely serve to illustrate the extent of the plaintiffs' economic losses. In denying a distributor's motion for summary judgment in *Tarrant County* (another MDL bellwether, and one of the suits CVS stipulated was subject to the first summary judgment order), the court noted that "Tarrant County ***is not seeking relief for injuries to its citizens***." B981 (emphasis added). "While it is true that Plaintiff's complaint alleges harms suffered by the people of Tarrant County," the court explained, in language that mirrors the *Acuity* opinion, "those allegations merely serve as a description of the alleged public nuisance .... They are

not allegations of the injuries for which Tarrant County seeks compensation." *Id.* (emphasis added). Just so.

Finally, many of the Opioid Lawsuits, like the Track One suits, "specifically disclaim recovery for personal injury or any specific treatment damages." *Rite Aid*, 270 A.3d at 241; *see, e.g.*, A01038 (*Lake Cty.* ¶ 648) ("Plaintiff is asserting [its] own rights and interests and Plaintiff's claims are not based upon or derivative of the rights of others."); A01941 (*Philadelphia* ¶ 683) ("The City has suffered and continues to suffer special harm that is different in kind and degree from that suffered by individual residents of the City."). As the Superior Court found, even where the government complaints do not specifically disclaim that they seek to recover on behalf of others, "the nature of the allegations and the specific damages they seek again impart that they are seeking to recover generalized economic losses in responding to the opioid crisis." SJ Order I at 35. Nevertheless, the disclaimers further reflect the nature of the relief sought.

2. The government suits are not derivative actions.

Attempting to avoid the straightforward conclusion outlined above, CVS invokes a few cursory allegations to argue that the government suits are in fact "derivative" suits that satisfy *Rite Aid*'s second category of covered claims ("a person recovering on behalf of the person injured"). 270 A.3d at 247. For example, CVS cites allegations from *Florida* that CVS's actions "injured the State of Florida

and its citizens"; that the public nuisance imposed "costs on the State of Florida, *its residents*, and communities"; and that "Florida, acting on its own behalf *and on behalf of its residents*, therefore seeks monetary relief from [CVS]." A02049 (¶ 415); A02062 (¶ 472); A02064 (¶ 482) (Opening Br. at 35) (emphases added). Similarly, in the Track One *Summit* complaint, CVS identifies an allegation that the plaintiff "in the name of the State of Ohio and/or on behalf of the municipal corporation *and its residents*, also brings this claim pursuant to their statutory authority." A00433 (¶ 978) (same) (emphasis added).

But these generic proclamations of state authority do not convert a state's claims for its "own aggregate economic injury" (*Rite Aid*, 270 A.3d at 253) into personal injury claims. Contrary to CVS's assertions, the Superior Court did not reject that the government suits were derivative claims because CVS cited only "a single allegation." Opening Br. at 38. Rather, the Superior Court explained, none of the allegations CVS cites "demonstrate[s] that those exemplative claims actually rely on proof of any individual's bodily injury." SJ Order I at 35 n.191.

Indeed, *Rite Aid* rejected CVS's position outright, holding that the Track One Suits "seek compensation for [Summit and Cuyahoga Counties'] economic losses, *not derivatively for the bodily injuries suffered by Ohioans in the opioid crisis*." 270 A.3d at 248 (emphasis added). It again reveals the weakness in CVS's position that it advances this argument with respect to *Summit*, which *explicitly* states that its

claims "are not based upon or derivative of the rights of others." A00443 (¶ 1033). CVS cannot show that *Florida*—or any other government suit—is different.

This Court also rejected characterizing the government suits as derivative when it rejected the hypothetical advanced by *Cincinnati Ins. Co. v. H.D. Smith, L.L.C.*, 829 F.3d 771 (7th Cir. 2016), the principal case upon which Rite Aid relied. In *H.D. Smith*, the Seventh Circuit analogized an opioid lawsuit brought by a state to one brought by a mother to recover her own costs incurred while treating her injured child. The analogy fails because, as this Court explained, the latter is a true derivative claim and the former is not: Unlike the Track One claims, the "mother's claim *depends on proof of personal injury to her child*"—*i.e.*, "the mother must demonstrate that her child was injured by the product and that her costs were incurred because of those injuries." *Rite Aid*, 270 A.3d at 253 (emphasis added). CVS fails to explain how the government suits here could advance derivative claims akin to the hypothetical mother's claim, while the Track One Suits in *Rite Aid* did not.

Nor can CVS eke any support from its citations to Chubb's statements in a separate litigation, *Zogenix, Inc. v. Federal Insurance Co.*, 2021 WL 6058252 (N.D. Cal. Nov. 2, 2021). In *Zogenix*, Chubb observed that, in a true derivative claim like "a hospital's subrogation claim for medical expenses paid on behalf of an injured claimant" or a "suit[] for medical expenses paid on behalf of an injured spouse or

child," the hospital or the parent or spouse steps into the shoes of the injured person. A2382. That is quite unlike the government suits. Not only do the government plaintiffs *not* step into the shoes of injured individuals, such individuals have brought their own personal-injury suits against CVS, which the Insurers do *not* argue fail to seek "damages because of 'bodily injury.'" *See supra* p. 11.

CVS ultimately gives the game away by inviting this Court to follow an Arkansas trial court decision (currently on appeal) in another opioid coverage action. *See Walmart Inc. v. ACE Am. Ins. Co.*, 2023 WL 9067386 (Ark. Cir. Dec. 29, 2023). The *Walmart* court *explicitly departed* from this Court's *Rite Aid* decision. *Id.* at *9. It also relied on *H.D. Smith* and other cases (which CVS now too invokes) that construe the policy language in precisely the way *Rite Aid* rejected. *Id.* at *7-8. For example, CVS cites *N.A.A.C.P. v. Acusport Corp.*, which declared that a suit seeks "damages because of 'bodily injury'" whenever "there is a connection, however remote, between injuries to persons and liability for that injury of the insured." 253 F. Supp. 2d 459, 463 (E.D.N.Y. 2003); *see* Opening Br. at 37. *Rite Aid* held the opposite, reasoning that "[t]here must be more than some linkage between the personal injury and damages to recover 'because of' personal injury." 270 A.3d at 250. That CVS resorts to cases so divergent from *Rite Aid* illustrates that its position has no support in Delaware law.

3. The government suits do not allege "damages because of 'property damage.'"

Continuing its search for a way around *Rite Aid*, CVS argues that even if the government suits do not seek "damages because of bodily injury," they allege "damages because of property damage." This argument, too, fails.

a. The policies require the same causal connection for "damages because of bodily injury" and "damages because of property damage."

As the Superior Court aptly stated, "[t]he rationale in *Rite Aid* concerning the requirement to assert claims that seek recovery of damages because of bodily injury is the same when it comes to property damage." SJ Order I at 40-41. The plain language of the Policies supports reading the "bodily injury" and "property damage" coverages consistently. As is typical, the terms "'bodily injury' and 'property damage' appear side-by-side" in several provisions. SJ Order I at 41. For example, the Policies cover "those sums … that [CVS] becomes legally obligated to pay as damages because of 'bodily injury' [or] 'property damage." *E.g.*, A02090. Additionally, the Policies "appl[y] to 'bodily injury' and 'property damage' … but only if: a. The 'bodily injury' or 'property damage' is caused by an 'occurrence'; b. The 'bodily injury' or 'property damage' occurs during the 'policy period'; and c. Prior to the policy period, no 'insured' … knew that the 'bodily injury' or 'property damage' had occurred, in whole or in part." *E.g.*, *id.*

Given the parallel treatment of "bodily injury" and "property damage" in commercial liability policies like CVS's, courts often use cases interpreting coverage for one to apply to the other. Indeed, both the Sixth Circuit and Ohio Supreme Court, when following the rule set forth in *Rite Aid*, found decisions interpreting the phrase "damages because of property damage" to be persuasive. *See Quest*, 57 F.4th at 566 (analyzing *Lenning v. Comm. Union Ins. Co.*, 260 F.3d 574 (6th Cir. 2001)), which rejected a duty to defend for "purely economic damages that were related to but did not directly implicate the covered injury of property damage"); *Acuity*, 2022 WL 4086449 at *8 (citing *Kaady v. Mid-Continent Cas. Co.*, 790 F.3d 995, 999 (9th Cir. 2015), which related to "property damage").

b. The Opioid Lawsuits are not based on damage to any specific property.

The allegations of "property damage" in the government suits fall far short of the *Rite Aid* standard. At most, the allegations describe costs to upgrade or clean up property as part of the governments' responses to the opioid epidemic. For example, CVS cites allegations from *Cuyahoga* regarding "[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)) (Opening Br. at 39). *Fresno* likewise alleges costs associated with having to repair and remake "infrastructure, property and systems" 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)) (Opening Br. at 40). *Fresno* also alleges aggregate costs related to "repairing and upgrading" "jail facilities" and "hospital and treatment facilities." A05512-13 (¶ 444) (Opening Br. at 41). For several of the government exemplars, the best CVS can point to is passing references to unspecified "property damage." *See* Opening Br. at 39-40.

These allegations on which CVS relies do not rise to the level of actionable "property damage" at all. But even if they did, they lack anything approaching the specificity required by *Rite Aid*. Such generic references to "facilities" and "properties" illustrate the types of budgetary outlays the government plaintiffs incurred; they do not allege damage to any "[property], independently proven, and shown to be caused by [CVS]." *See Rite Aid*, 270 A.3d at 251.

CVS also suggests that because the Track One Suits plead claims under Ohio's Injury Through Criminal Acts statute, they are necessarily asserting claims "because of property damage." See Opening Br. at 39. CVS waived this argument by failing to raise it below. *King Const., Inc. v. Plaza Four Realty, LLC*, 976 A.2d 145, 155 (Del. 2009). Regardless, CVS does not explain why invoking a generic reference to "property damage" is sufficient to satisfy *Rite Aid*'s requirement that the underlying claims require proof of specific damage alleged to be caused by CVS.

By clear contrast, the cases CVS cites to support its property damage theory involve damage to specific properties. *See New Castle Cty. v. Harford Acc. &*

Indem. Co., 933 F.2d 1162 (3d Cir. 1991) (underlying lawsuits seeking clean-up costs for pollution from Tybouts Corner and Llangollen landfills); *Harleysville Mut. Ins. Co. v. Sussex Cty., Del.*, 831 F. Supp. 1111 (D. Del. 1993) (underlying lawsuit seeking costs connected to county's Landfill No. 5); *Tyson Foods, Inc. v. Allstate Ins. Co.*, 2011 WL 3926195 (Del. Super. Ct. Aug. 31, 2011) (underlying lawsuits seeking costs for contamination of Illinois River Watershed). Rather than support CVS's position, these cases demonstrate the kind of allegations the Opioid Lawsuits lack.

III. The Insurers Do Not Have a Duty to Defend CVS in the Hospital and Third-Party Payor Suits Under *Rite Aid*.

A. Question Presented

Did the Superior Court correctly conclude that the Insurers do not have a duty to defend CVS in the hospital or third-party payor suits because they do not allege "damages because of 'bodily injury'"? Preserved at A02630-2641. (Responsive to Opening Br. Section I.)

B. Scope of Review

This Court's review is *de novo*. *See supra* p. 15.

C. Merits of Argument

Just like the governmental suits, the hospital and third-party payor suits do not direct their allegations "to an individual injury but to a public health crisis." *Rite Aid*, 270 A.3d at 253. Indeed, many of them incorporate by reference hundreds of paragraphs from the Track One complaints analyzed in *Rite Aid*. *See, e.g.*, B898-913 (*Bon Secours (Kentucky)* Short Form). There is therefore no coverage for these suits under *Rite Aid*.

1. The hospital and third-party payors do not seek to recover actual, demonstrated costs of treating bodily injuries.

CVS's argument that the hospital and third-party payor suits warrant a different result relies entirely on the statement in *Rite Aid* that "[i]f the Counties ran public hospitals and sued Rite Aid on behalf of these hospitals to recover their actual, demonstrated costs of treating bodily injuries caused by opioid overprescription, the

2015 Policy would most likely be triggered." 270 A.3d at 253-54. But this remark did not purport to create a "hospital exception" to the requirement that an underlying lawsuit seek to recover for a specific bodily injury—in fact, the next sentence reiterated that requirement. *See id.* at 254 ("But the Counties' alleged damages do not depend on proof of bodily injuries."). Instead, this Court was illustrating what a covered claim *might* look like. As the Superior Court put it, "[w]hile *Rite Aid* held that organizations that directly care for or treat injured persons may be within the classes of plaintiffs covered by the policies' insurance, *Rite Aid* did not hold that membership in such a permitted plaintiff-class inexorably qualifies lawsuits that seek recovery for non-derivative economic loss into claims for personal injury." SJ Order II at 17. Here, "recovery for non-derivative economic loss" is all the hospitals and third-party payors seek.

a. Hospital Suits

The hospital Opioid Lawsuits do not seek "to recover [the plaintiffs'] *actual, demonstrated costs of treating bodily injuries*" (*Rite Aid*, 270 A.3d at 253 (emphasis added)) any more than the government suits do. Instead, they seek to recover "generalized damages in the form of increased … budgetary spending" in response to the opioid crisis. SJ Order II, at 17. The complaints are clear about this:

- "The unlawful diversion of prescription opioids is a direct and proximate cause of, and/or substantial factor leading to, the opioid epidemic, prescription opioid abuse, dependency, addiction, morbidity and mortality in the United States. This ***diversion and the epidemic*** are

direct causes of foreseeable harms to the Plaintiffs." B841 (*Bon Secours (Kentucky)* ¶ 234) (emphasis added); *see also* B839, B842 (*id.* ¶¶ 224, 240).

- "***This financial impact on Plaintiffs*** proceeds directly from Defendants' misconduct in ***driving inflated demand for and supply of prescription opioids in Maine***." A02995 (*Eastern Maine* ¶ 20) (emphasis added).

- "Defendants' misconduct alleged in this case ***does not concern a discrete event or discrete emergency*** of the sort a hospital would reasonably expect to occur and is not part of the normal and expected costs of a hospital's existence." A03155 (*Id.* ¶ 610) (emphasis added); *see also* A03149-51 (*id.* ¶¶ 591, 593, 599).

- In addition to "non-reimbursed and/or uncompensated cost of ... treatments for patients suffering from opioid-related addiction, disease, or dependency," plaintiffs "incur, or will incur, costs including but not limited to ... costs related to ***increased security and public safety concerns***; costs related to ***added regulatory compliance***; ***lost revenue*** attributable to the required discharge of addicted or dependent patients who are diverting and/or abusing opioids in a manner that does not comply with prescribed use; ***lost opportunity costs***; the ***diversion of assets from the provision of other needed health care***; increased ***human resources costs***, as well as loss of employee productivity; uncompensated cost and expense for the provision of non-opioid treatment alternatives in the future; and uncompensated cost and expense for the current and future provision of treatment to address the consequences of opioid addiction and dependency." A02921-922 (*Booneville* ¶ 244) (emphasis added); *see also* A02918 (*id.* ¶ 232).

- "As a direct result of Defendants' conduct, the Plaintiff and Plaintiff's Community have suffered actual injury and damages including, but not limited to, significant expenses for police, emergency, health, prosecution, corrections and other services. The Plaintiff here ***seeks recovery for its own harm***." A02764 (*Clinch Cty.* ¶ 302) (emphasis added).

The allegations CVS cites are no different. They illustrate the kind of program expenses and budgetary costs the hospital plaintiffs incurred in response to the opioid epidemic, untethered to any identifiable bodily injury.

Thus, CVS quotes allegations explicitly couched in terms of budgetary losses:

- *Bristol Bay* allegedly "suffered substantial ***loss of resources, economic damages, and increased costs in responding to the opioid epidemic***," including costs for "(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." A04330 (¶ 9), A04332 (¶ 14) (Opening Br. at 16) (emphasis added).

- *Bon Secours (Maryland)* alleged "***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," including various forms of "treatment of patients who suffer from conditions related to or caused by opioid use." A04883 (¶ 7), A04884 (¶ 8) (Opening Br. at 17) (emphasis added).

- *Fayetteville* alleged "***massive costs*** by providing uncompensated care as a result of opioid-related conditions," including "***operational costs*** related to the time and expenses in diagnosing, testing, and otherwise attempting to treat these individuals." A05057 (¶ 57), A05353 (¶ 807) (Opening Br. at 18-19) (emphasis added).

And CVS quotes contextual references to the scale and scope of the problems wrought by the epidemic:

- *Dallas County Hospital District* allegedly "provid[es] uncompensated care for ***patients suffering from opioid-related conditions***," "including ***developing a program*** 'to combat Neonatal Abstinence Syndrome.'" A03938 (¶ 1071), A03655 (¶¶ 86-87) (Opening Br. at 14) (emphasis added).

- *Bunkie General Hospital* allegedly "treated, and continues to treat, ***numerous patients*** for opioid-related conditions, including opioid overdose and opioid addiction." A04202 (¶ 790) (Opening Br. at 15) (emphasis added).

- The *Lester E. Cox* plaintiffs allege "substantial ***reimbursement shortages*** when they have continued to treat opioid-dependent patients with opioid-related conditions or comorbidities." A04552 (¶ 60) (Opening Br. at 17) (emphasis added).

Just like the references to treatment programs in the government complaints, such generic allegations of "treatment" and "care" for opioid-related injuries remain insufficient to trigger coverage. That a hospital's work involves treating patients does not mean that its bid to recoup its operating costs in response to a public health crisis is based on individualized bodily injury.

Moreover, CVS's quotation from the *Dallas County* complaint is conspicuously selective. *See* Opening Br. at 14. CVS omits a key part of the quoted paragraph: "As a result of Defendants' actions, Plaintiffs have suffered 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." A03938 (¶ 1071) (emphasis added). This kind of disclaimer is not unique. The *Fayetteville* complaint includes a verbatim allegation, A05356 (¶ 823), and other hospital exemplars contain similar language. *See* B891 (*Bon Secours (Kentucky)* ¶ 426) ("Plaintiff does not seek damages for wrongful death, physical

personal injury, or any physical damage to property caused by Defendants' actions."); A03154 (*Eastern Maine* ¶ 608) (similar); A02816 (*Clinch Cty.* ¶ 474) (similar). As with the disclaimers in the government complaints, these statements confirm what the absence of allegations of individualized injury plainly indicates—the hospital lawsuits are not claims for personal injury covered by the Policies.

If there were any doubt, the Supreme Court of Maine recently dispelled it in one of the exemplar suits. That court affirmed the dismissal of Eastern Maine's suit against CVS and other opioid sellers for failure to state a claim because "the losses for which the Hospitals seek compensatory damages are *purely economic*," and the hospitals' injuries were "not sufficiently particular" but were "instead part of the broad public injury resulting from increased opioid misuse." *E. Me. Med. Ctr. v. Walgreen Co.*, —A.3d—, 2025 WL 410303, at *4, *8 (Me. Feb. 6, 2025) (emphasis added). As part of its analysis, the court recognized that Eastern Maine's claims were not predicated on "alleg[ing] and prov[ing] on an individual basis … the facts supporting each patient's claim or claims against the Opioid Sellers," and distinguished Eastern Maine's claim from a derivative subrogation claim. *Id.* at *5-6. The court thus characterized *Eastern Maine* as exactly the kind of claim that *Rite Aid* held is *not* potentially covered.

b. Third-party payor suits

The third-party payor suits follow the same pattern. Just like the government and hospital suits, the third-party payors allege that CVS contributed to the opioid epidemic, which increased their operational costs, and they seek to recover those budgetary outlays:

- "Plaintiff brings this civil action against Defendants for operating a continuous criminal enterprise in violation of federal and state law, and to eliminate the hazard to public health and safety caused by the opioid epidemic, to abate its nuisance, and to ***recoup monies spent because of Defendants'*** false, deceptive, and/or unfair marketing and ***unlawful distribution of dangerous prescription opioids***." B256 (*Louisiana Assessors* ¶ 2) (emphasis added).

- "Defendants' conduct in promoting opioid use has had [] severe and far-reaching consequences .... ***The costs are borne by Plaintiff*** in its payments for treatment related to opioid misuse, addiction and/or overdose, emergency department visits and hospitalizations for opioid misuse, addiction, and/or overdose, medicines to treat HIV and/ or hepatitis C related to opioid misuse, addiction, and/or overdose, and payments for opioid overdose reversal medication .... The burdens imposed on Plaintiff by Defendants' conduct are not the normal or typical burdens of Plaintiff. Rather, ***these are extraordinary costs and losses that are directly related to Defendants' illegal actions***." B286 (*Id.* ¶¶ 95-96) (emphasis added).

- "The burdens imposed on Plaintiff ***are not the normal or typical burdens of providing services to its members***. Rather, these are ***extraordinary costs and losses that are directly caused by Defendants' illegal actions***. Defendants' conduct has created a ***public nuisance and a blight***. Governmental and non-governmental entities, and the services they provide their citizens, have ***been strained to the breaking point by this public health crisis***." B351 (*Laborers Welfare Fund* ¶ 20) (emphasis added).

- "As a direct and proximate result of Defendants' negligence and/or negligence *per se*, Plaintiff ***has suffered and will continue to suffer***

economic damages including, but not limited to, increased healthcare costs for its members and beneficiaries, as well as the ***diminishment of funds available to pay*** for their other health care needs." B575 (*Id.* ¶ 887) (emphasis added).

- "Plaintiff paid, and continues to pay, millions of dollars for health care costs that stem from prescription opioid dependency ***created by the Defendants' wrongful act and omissions***" "include[ing] 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***." A05899 (*Southern Tier* ¶ 786) (Opening Br. at 21) (emphasis added).

And just like in the government and hospital suits, allegations in the third-party payor suits of "treatment" and "medical care" serve as illustrations of the plaintiffs' economic losses. *See, e.g.*, A05897 (*Southern Tier* ¶ 777). There is no allegation of injuries to identifiable persons caused by CVS, and no indication that such injuries or the costs of treating them will be proven.

Even though the allegations in the third-party payor suits are substantively identical to those in the government (and hospital) suits, CVS again invokes *H.D. Smith*, but with a slight twist. Presumably understanding that this Court rejected *H.D. Smith*'s comparison of a mother's costs for treating her child's injuries to a government's costs for providing medical care to its citizens, CVS suggests that the comparison could work if it were between the hypothetical mother and "a third-party payor that incurs costs for its member's medical care." Opening Br. at 21. None of the third-party payors' claims, however, "depends on proof of personal injury," and

that distinction (still) makes the difference. *Rite Aid*, 270 A.3d at 253. And, just like the government and hospital suits, some of the third-party payor suits specifically disclaim that they seek damages for bodily injury. *See, e.g.*, B326 (*Louisiana Assessors* ¶ 281) ("Plaintiff does not seek damages for the wrongful death, physical personal injury, serious emotional distress, or any physical damage to property caused by Defendants' actions.").

The similarity between the hospital and third-party payor allegations and those of the government suits is striking, but not surprising. In adding CVS as a defendant, many of the hospital and third-party payor suits incorporated *hundreds of paragraphs* of allegations directly from the Track One *Summit* complaint analyzed in *Rite Aid*. *See, e.g.*, B330-43 (*Louisiana Assessors* Short Form); B898-913 (*Bon Secours (Kentucky)* Short Form); B914-29 (*Booneville* Short Form). By design, then, the hospital and third-party payor suits fit the mold of those this Court has already determined are not covered—*i.e.*, claims based on a public health crisis, seeking budgetary expenses untethered to specific injuries.

Indeed, multiple courts have followed *Rite Aid* and found no coverage for government, hospital, and third-party payor suits *without distinction*. *See, e.g.*, *Quest*, 57 F.4th at 560 (holding no coverage for "approximately 77 lawsuits brought by cities, counties, a county health department, private health clinics, and the state of Illinois"); *Bloodworth*, 2024 WL 1313844, at *1 (underlying plaintiffs included

"hospital organizations, and medical management companies"). CVS has identified no reason to draw such a distinction.

2. CVS's other arguments regarding the hospital and third-party payor suits are unavailing.

Finally, CVS attempts to find fault with the Superior Court's analysis on other specious grounds.

The claims are not based on personal injury, whether to one person or many. CVS implies the Superior Court held the hospital and third-party payor suits are not covered because they seek "reimbursement for the care and treatment of many" rather than for "one individual's care and treatment." Opening Br. at 24. Not so. Under *Rite Aid*, a hospital that treated multiple opioid-addicted individuals could bring a covered suit if it alleged it treated specific patients and its claims depended on proof of those patients' injuries, that the injuries were caused by CVS, and the actual demonstrated costs of treating the injuries. But none of the hospital or third-party payor suits include allegations of that sort.

Pleading standards are irrelevant. Contrary to CVS's assertions, the lack of individualized allegations of bodily injury in the hospital and third-party payor suits is not a result of pleading rules. CVS argues that "[t]he evidence of why, when, how, and for whom [plaintiff] incurred its damages is proven at trial, not in the complaint." Opening Br. at 20. That misses the point. If the hospital and third-party payor claims went to trial, they would *never* have to prove "the evidence of

why, when, how, and for whom," because the *nature* of the claims does not require such proof.

While notice pleading rules are liberal, a complaint must still provide "sufficient notice of the basis for the plaintiff's claim." *Dolan v. Altice USA, Inc.*, 2019 WL 2711280, at *6 (Del. Ch. June 27, 2019). To take another example, under Maine's notice-pleading standard—which CVS cited below—a complaint "must describe the essence of the claim." *Burns v. Architectural Doors & Windows*, 19 A.3d 823, 828 (Me. 2011).

Under *Rite Aid*, coverage requires that bodily injury be "the basis for the plaintiff's claim," and that basis would have to be apparent from the pleadings. The absence of any allegation identifying an injured individual or any claim for compensation for that individual's injuries confirms that the underlying plaintiffs will not offer such proof or seek such compensation.

True personal injury complaints, by sharp contrast, make clear that the "basis of the claim" is an individual's injury. For example, the plaintiff in *Strickland v. Purdue Pharmaceutical Products, L.P.*—one of the individual suits to which the Insurers agreed the Superior Court's orders do not apply—alleges "a personal injury claim for injuries and damages sustained by Warren Clay Strickland as a result of the use and overuse of prescription pain medication" dispensed by CVS. B248 (¶ 4.1). Specifically, Strickland alleges that he suffered "severe injuries and extreme

physical pain, suffering and mental anguish," and that "CVS … [is] liable as the employer of the pharmacists who *dispensed the medication*" to him. B249 (¶¶ 6.1, 7.2) (emphasis added). No pleading rule shrouds the claim in mystery—the plaintiff explicitly asks to recover specific "necessary hospital and medical expenses" and damages tied to individualized "physical pain and suffering." B249, B250 (¶¶ 7.1, 7.3).

HIPAA is irrelevant. CVS also cannot attribute the lack of individualized allegations of bodily injury to restrictions imposed by HIPAA. *See* Opening Br. at 20. If the Opioid Lawsuits were predicated on recovering for an individual's injury, the plaintiffs could easily include allegations based on the individualized injury without violating confidentiality requirements, such as by redacting the patient names. Confidentiality is not the issue here. Rather, the fundamental, and ultimately dispositive, issue is that the hospital plaintiffs are not seeking to recover "actual, demonstrated costs of treating bodily injuries caused by opioid overprescription." *Rite Aid*, 270 A.3d at 253.

IV. The Insurers Have No Duty to Indemnify CVS.

A. Question Presented

Did the Superior Court correctly conclude that the Insurers do not have a duty to indemnify CVS because the Opioid Lawsuits do not seek "damages because of 'bodily injury' [or] 'property damage'"? Preserved at B173-74, B949-54. (Responsive to Opening Br. Section IV.)

B. Scope of Review

This Court's review is *de novo*. *See supra* p. 15.

C. Merits of Argument

It is well settled that "an insurer's duty to defend is broader than the substantive coverage afforded under its policies," meaning an insurer's duty to defend is broader than its duty to indemnify. *Charles E. Brohawn & Bros., Inc. v. Emps. Com. Union Ins. Co.*, 409 A.2d 1055, 1058 (Del. 1979). Thus, because the Insurers have no duty to defend CVS for the Opioid Lawsuits—meaning they do not even potentially come within the coverage of the Policies—it cannot be that CVS is entitled to indemnification for those suits. *See Rite Aid*, 270 A.3d at 252 ("The claims here are not personal injury claims and are ***not covered*** under the personal injury coverage provisions." (emphasis added)); *see also, e.g.*, *Certain Underwriters at Lloyd's of London v. Super. Ct.*, 24 Cal. 4th 945, 961 (2001) ("'It is ... well settled that because the duty to defend is broader than the duty to indemnify,' a

determination that 'there is no duty to defend automatically means there is no duty to indemnify.'" (citations omitted)).[2]

The Superior Court properly invoked this bedrock rule and held that, because Insurers have no duty to defend under *Rite Aid*, they cannot have a duty to indemnify: "[T]he 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." SJ Order I at 44-45. While in some cases "reserving a ruling for indemnification later in the proceedings ma[kes] some sense," the underlying suits here do not require such treatment. *Id.* at 44.

Citing *Premcor Refining Group, Inc. v. Matrix Service Industrial Contractors, Inc.*, 2009 WL 960567 (Del. Super. Ct. Mar. 19, 2009), CVS asserts that adjudication of the duty to indemnify is premature. Opening Br. at 45. But as the Superior Court explained, *Premcor* undercuts CVS's position. In *Premcor*, coverage depended on

[2] *See also, e.g.*, *Health First, Inc. v. Capitol Specialty Ins. Corp.*, 747 F. App'x 744, 750 (11th Cir. 2018) ("[T]he duty-to-defend test can be used to assess whether the underlying facts could possibly give rise to a duty to indemnify. A determination that there is no duty to defend, in other words, is also a determination that there is no duty to indemnify."); *Health Care Indus. Liab. Ins. Program v. Momence Meadows Nursing Ctr., Inc.*, 566 F.3d 689, 693 (7th Cir. 2009) ("Holding that an insurer has no duty to indemnify … follows inexorably from holding that an insurer has no duty to defend."); *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Com. Union Ins. Co.*, 908 A.2d 888, 896 n.7 (Pa. 2006) ("[B]ecause the duty to defend is broader, a finding that it is not present will also preclude a duty to indemnify.").

whether the injury was caused by an independent contractor's work. The court held there was no duty to defend because no allegations in the underlying complaints tied the contractor's work to potential liability, but denied summary judgment as to the duty to indemnify because later discovery could have clarified the *factual question* of the contractor's involvement. 2009 WL 960567, at *11-12.

By contrast, the Opioid Lawsuits are not outside the scope of coverage because of an unresolved factual issue. Rather, there is no coverage because none of the government, hospital, or third-party payor suits depends on proof of bodily injury or property damage, and there is no basis to suggest that they will transform from actions pursuing aggregate economic costs to actions proving specific costs tied to specific injuries.

CVS's citations to *Guaranteed Rate, Inc. v. ACE American Insurance. Co.*, 2022 WL 4088596 (Del. Super. Ct. Aug. 24, 2022) and *Luria Bros. & Co. v. Alliance Assurance Co., Ltd.*, 780 F.2d 1082 (2d Cir. 1986) are also unavailing. In *Luria Bros.*, just like in *Premcor*, the claims *could have* developed into covered claims as facts were revealed during discovery. 780 F.2d at 1092. Moreover, the court confirmed that, regardless of the insured's "potential liability," the policies still had to cover the *type* of liability. *Id.* at 1087. Here, the *type* of claim asserted in the Opioid Lawsuits is outside the scope of coverage. And the facts of *Guaranteed*

Rate—whether the insured had sufficient knowledge of a claim such that it could have been included in a settlement—are inapposite. 2022 WL 4088596, at *4.

CVS argues it is improper to "mak[e] a duty to indemnify contingent on the existence of a duty to defend" given that some of the Policies provide only indemnity coverage. Opening Br. at 45. For this, CVS cites only a single distinguishable Illinois case. There, the Illinois Supreme Court analyzed whether the insurers had a duty to indemnify where no adversarial proceeding had even been filed yet—hardly the situation here. *Cent. Ill. Light Co. v. Home Ins. Co.*, 821 N.E.2d 206 (Ill. 2004). Regardless, contrary to CVS's assertions, the Superior Court's finding that there is no duty to indemnify was not *contingent* on there being no duty to defend. It was simply a logical extension of the court's reasoning—if there is no duty to defend because the *type* of claim in the underlying actions is not covered by the policy, a duty to indemnify cannot arise. *See supra* note 2.

Without explaining how it renders the Superior Court's ruling premature, CVS also observes that the Ohio Supreme Court recently held CVS was not liable for a $650 million verdict in the *Lake County* and *Trumbull County* actions. Opening Br. at 5, 48. That decision held the causes of action had been abrogated under state law, which has no bearing on the plaintiffs' asserted theories of relief and, therefore, whether they sought "damages because of bodily injury." In fact, if the verdict had been upheld, CVS would have been found liable for "engag[ing] in intentional

and/or illegal conduct" that "was a substantial factor *in producing [a] public nuisance*" of "oversupply of legal prescription opioids." B12-13, B16-17 (emphasis added).

Finally, CVS again invokes its national settlement agreement, claiming that this development is "evidence that CVS has, in fact, been sued for 'damages because of "bodily injury."'" Opening Br. at 47. But characterizations in a settlement agreement between underlying plaintiffs and an insured are not binding on insurers. *See* 2 Allan D. Windt, *Insurance Claims and Disputes* § 6:31 (6th ed. 2024) ("The insurer should not, however, be bound by how the settlement is allocated by the insured/claimant or by what the agreement states is the reason the settlement money was paid."). This ensures that a policyholder cannot manufacture insurance coverage for an underlying claim by inserting self-serving statements into the settlement agreement that re-characterize the nature of the loss. *See, e.g.*, *Banner Bank v. First Am. Title Ins. Co.*, 916 F.3d 1323, 1328 (10th Cir. 2019) (rejecting that a settlement agreement demonstrated coverage and noting that "the parties certainly have an incentive to negotiate a settlement agreement that will create liability for the insurer, regardless of the true nature of the action."); *Capstone Bldg. Corp. v. Am. Motorists Ins. Co.*, 308 Conn. 760, 817 n.63 (Conn. 2013) (insurer should not "be bound by ... what the [settlement] agreement [stated was] the reason the settlement money was paid").

Delaware courts recognize this legal principle. In another opioid-lawsuit coverage dispute, the Superior Court refused to "blindly adopt" contentions in settlement agreements precisely because "[t]o do so would encourage litigants to manipulate settlement language to secure CGL insurance coverage where it would otherwise not exist." *In re AmerisourceBergen*, 2024 WL 5203047, at *10. The court instead applied *Rite Aid* to determine whether the claims sought "damages because of 'bodily injury.'" *Id.* at *11.

In any event, the language in the settlement agreement does not help CVS. At most, it shows that the settlement would fund a list of programmatic expenses to respond to the opioid epidemic. Moreover, the agreement expressly "does not release Claims by private individuals." A06044. In short, as the Superior Court found, while the settlement agreement "provides for resolution of alleged harms and provision of opioid remediation, such harms and opioid remediation *do not transform the Opioid Lawsuits into claims for personal injury*." SJ Order II at 17 (emphasis added).

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

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