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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

REPLY BRIEF ON APPEAL OF DEFENDANTS-BELOW/APPELLANTS

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NATURE OF PROCEEDINGS

The Insurers' answering brief is based on the premise that they purportedly know what the *Rite Aid* Court *meant* to say, and what the underlying plaintiffs *meant* to allege. That is not how an insurer's duty to defend is measured. CVS's appeal is grounded in what the *Rite Aid* Court *actually* said, what the underlying plaintiffs *actually* allege, and what Delaware law *actually* holds.

The Insurers do not dispute that Delaware's duty to defend standard mandates the triggering of coverage based on any single, potentially covered allegation in an underlying complaint. This requires analysis of the actual allegations—not how the Insurers interpret and purport to summarize them. Nor do they dispute that any ambiguity or doubt in this regard must be resolved in favor of coverage. Yet, their answering brief evinces a diametrically opposed approach. They disregard many of the potentially covered allegations cited by CVS. Instead, they direct this Court to other allegations (or individually selected words and phrases within other allegations) they assert are not potentially covered. The Insurers arguing that one, many or even most of the underlying allegations are not potentially covered does not entitle them to an affirmance of the Superior Court's decisions. In contrast, CVS's citation to even *one* potentially covered allegation mandates reversal.

The Insurers disregard or attempt to restyle allegations of bodily injury damages in the form of "costs" to "treat patients" as "budgetary impacts." That is not what the hospital, medical provider, and representative suits allege. Subsequent court orders in those cases confirm that, in fact, the underlying plaintiffs seek damages in the form of unreimbursed medical costs, by patients. This is another example of something that "can come about" which triggers the duty to defend and the potential duty to indemnify, even under "indemnity only" policies. In any event, even the inclusion of a "budgetary impact" allegation would not allow the Insurers to avoid their defense duty because the underlying actions also seek reimbursement of the costs to provide medical care and have been ordered to produce documents proving those damages.

The Insurers also disregard or attempt to restyle allegations of property damage as "economic damages." That is not what the underlying plaintiffs allege, and the Insurers make no mention of the Delaware law cited in CVS's moving brief that specifically prohibits them from interpreting them as such.

Further, there are now three confirmed interpretations of the Druggist and Pharmacist Liability endorsements: (i) the Superior Court's holding that they "change nothing;" (ii) the Insurers admission that they "broaden" coverage but not "in any relevant way" (although they fail to explain the irrelevant way that coverage is broadened); and (iii) CVS's interpretation that they broaden coverage

to cover the damages claimed in these underlying suits. Two, let alone, three reasonable interpretations render them ambiguous and any ambiguity must be resolved in favor of CVS as a matter of law.

Finally, the notion that an insurer cannot have a duty to indemnify if it does not have a duty to defend only applies to policies that potentially impose a defense obligation. The Delaware law that the Insurers disregard and the same treatise they cite in their opposition brief confirms this. The duty to indemnify under "indemnity only" policies was not ripe when the Superior Court twice granted the Insurers summary judgment. The Superior Court did so based on a prediction that "nothing can come about" to change that outcome. That prediction has already proven incorrect. For the reasons discussed herein and in CVS's moving brief, this Court should reverse the Superior Court's granting of summary judgment to the Insurers. Doing so would not disrupt *Rite Aid*.

ARGUMENT

I. COVERAGE IS TRIGGERED UNDER *RITE AID* FOR THE HOSPITAL, MEDICAL PROVIDER AND THIRD-PARTY PAYOR SUITS

The Insurers' concessions referenced above; the *Rite Aid* Court's conclusion that a hospital seeking "damages for providing care to an injured individual" "would most likely" trigger coverage; and at least one potentially covered allegation in each of the hospital and medical provider suits alleging damages for providing medical care leaves the Insurers in an untenable position. To circumvent that position, the Insurers virtually ignore the underlying allegations CVS cites in its moving brief and afford no weight to *Rite Aid*. Instead, they assert what they believe the Court "purported" to mean and posit that the hospital and medical provider suits seek only "program and budgetary costs" (Answering Br. at 38, 40) or "operating costs." Answering Br. at 41. Both arguments are easily dispensed with.

A. The Hospital and Medical Provider Suits Are Within *Rite Aid's* Third Class of Plaintiffs Covered by General Liability Policies

The *Rite Aid* Court held that the three "classes of plaintiffs" within the scope of general liability coverage include "organizations that directly cared for or treated the person injured." *ACE American Insurance Co. v. Rite Aid Corp.*, 270 A.3d 239, 241 (Del. 2022). The Court then held that "an objectively reasonable third party would read" this category "to mean damages directly resulting from the

[bodily injury]—damages for providing care to an injured individual." *Id.* at 253-54. Thus, there is no "hospital exception" to create because the hospital and medical providers sued CVS "to recover their actual, demonstrated costs of treating bodily injuries caused by opioid overprescription[.]" *Id*. Their interpretation of this Court's holding as merely "illustrating what a covered claim *might* look like" is of no moment. Answering Br. at 38 (emphasis in original). The *Rite Aid* Court held that plaintiffs seeking recoupment of damages for providing medical care is what a covered claim *does* look like. *Id.* at 254.

Moreover, this argument highlights where *Rite Aid* and this case materially differ. The *Rite Aid* Court held that Track One counties did not allegedly provide care for or treat bodily injury and did not "seek to recover" "costs incurred in caring for bodily injury." *Id.* at 252. This appeal involves hospitals and medical providers that, in fact, provided care for bodily injury and seek to recover the costs they incurred doing so. It is therefore unclear why the Insurers consider the "next sentence" in *Rite Aid* to be supportive of their position. Answering Br. at 38. In that next sentence, the Court held that a different result would have been required had the Track One counties alleged damages that "depend on proof of bodily injuries." *Rite Aid,* 270 A.3d at 252.

This appeal involves hospitals and medical providers with claims dependent on proof of bodily injuries because their alleged damages are the costs incurred to

treat those bodily injuries. That fact is confirmed by, for example, two separate court orders in underlying litigation. One, titled the Case Management Order for Hospital Bellwether Case specifically contemplates hospitals "seek[ing] damages related to any patients it treated" and how the parties would "identify in a deidentified format those patients" in discovery. AR010 at § F.2. In another, titled the Order Governing Production of Medical and Pharmacy Claims Data in Third-Party Payor Plaintiff Bellwethers – Tracks 16-19, because the plaintiffs are seeking costs of providing medical care, they were directed that they "must produce certain medical and pharmacy claims data" in a manner that would protect confidentiality but would also "permit prescription and medical claims to be linked by individual patient . . . for each individual patient." AR003 at ¶ 2.

Therefore, this appeal mandates a different result than, but does not disrupt, *Rite Aid.*

B. The Hospital and Medical Provider Allegations Belie How The Insurers Purport To Interpret Them

Delaware's duty to defend standard is based on the actual allegations in the underlying complaint as plead by the underlying plaintiff. It is not measured by how insurance counsel (mis)characterizes, portrays, or selectively quotes them. The Insurers' interpretations to the contrary, the underlying allegations are not limited to damages in the form of "program expenses and budgetary costs." Answering Br. at 40. If they were, the Insurers would have addressed the

allegations cited in CVS's moving brief. They did not do so because those allegations trigger coverage. For example, the Insurers provide no response to CVS's citation of these allegations, each of which allege damages stemming from the provision of medical care and none of which mention program expenses or budgetary costs:

- *Dallas County Hospital District*'s allegation of damages for the "treatment of patients" and "costs for providing healthcare and medical care." Opening Br. at 14.
- *Bunkie General Hospital* allegations of damages for "services and treatment" because it "treated, and continues to treat, numerous patients for opioid-related conditions." Opening Br. at 15.
- *Lester E. Cox* allegations of "injury related to the diagnosis and treatment of opioid-related conditions." Opening Br. at 17.
- *Clinch County* allegations of damages including "costs for providing" "medical care" and "treatment." Opening Br. at 22.

To the limited extent the Insurers referred to CVS's cited allegations, the Insurers only highlight those certain words and phrases that fit their narrative. It cannot be argued that all *Bristol Bay* allegations are "untethered" to bodily injury (and not even potentially covered) when the complaint specifically seeks damages for "treating patients" and "providing medical and therapeutic care." Answering

Br. at 40. Nor can it be argued that all *Bon Secours* allegations are "untethered" to bodily injury (and not even potentially covered) when that complaint specifically seeks damages for "their provision of care to individuals who have been impacted by the opioid epidemic" including "treatment of patients." *Id.* *Fayetteville* references "operational costs" but also alleges, as damages, the amounts it incurred to provide medical care and treat opioid-related conditions for which it was not paid or reimbursed. *Id.* *Family Practice Clinic of Booneville* may refer to regulatory compliance and lost opportunity costs, but it also seeks as damages, the costs of providing treatment to patients for opioid-related conditions. Opening Br. at 23.

Yet, with no factual or legal support, the Insurers maintain that the hospital and medical provider suits do not allege "damages because of bodily injury" "any more than the [Track One] suits do." Answering Br. at 38. The hospital and medical provider suit allegations CVS cited are potentially covered under Delaware law generally; satisfy the *Rite Aid* Court's "damages for providing care" standard specifically; and fit expressly within the third class of covered plaintiffs. Any one of CVS's cited allegations trigger the duty to defend even if not all the underlying allegations do.

The Insurers then claim that the "special injury" alleged in some of these cases confirms that they are not claims for covered bodily injury. Answering Br. at

41-42. The opposite is true. The "special injury, different from that suffered by governmental entities [such as Track One is that they] . . . incurred costs by providing uncompensated [medical] care for patients." Opening Br. at 14; Answering Br. at 41. The pleading of this "special injury" and the subsequent court orders mandating production of individual patient data confirms that hospitals and medical providers, unlike the Track One counties, provided medical care and treatment to patients with opioid-related conditions and seek, as damages, reimbursement of the costs of that treatment.

Finally, reliance on the February 2025 unpublished decision in *Eastern Maine* is misplaced. Answering Br. at 42. The defense duty in a general liability policy is considered "litigation insurance" because it is broader than the duty to indemnify; is not contingent upon the outcome of the underlying claim; and is measured by the allegations in the pleading at the time of filing. *See Liggett Grp. Inc. v. Affiliated FM Ins. Co*., 2001 WL 1456774, at *3 (Del. Super. Ct. Sept. 12, 2001), *aff'd sub nom. Liggett Grp., Inc. v. Ace Prop. & Cas. Ins. Co*., 798 A.2d 1024 (Del. 2002) (citations omitted). Dismissal of a complaint four years after it is filed ends an insurer's duty to defend ***as of that date*** and resolves its duty to indemnify. Otherwise, insurers would routinely take a "wait and see" approach, withholding defense coverage in the hopes that the underlying case ultimately gets dismissed. The *Rite Aid* Court reaffirmed this, holding that an insurer is not

absolved of its defense obligation for the costs incurred to achieve dismissal. 270 A.3d at 245 (the defense obligation is triggered "even if an insured is ultimately found not be not liable"); *id.* ("[I]t is the claim which determines the insurer's duty to defend; and it is irrelevant that the insurer may get [information] from the insured, or from anyone else, which indicates, or even demonstrates, that the injury is not in fact 'covered.'"); *id*. at 246 ("it is the duty of the insurer to defend until such time as the claim is confined to a recovery that the policy does not cover.").

C. The Third-Party Payor Suits Are Covered For The Same Reasons

The Insurers' response to the third-party payor suits suffers from the same flaws discussed above. They interpret the alleged damages as "operational costs" and "budgetary outlays" (Answering Br. at 43) when the underlying complaints actually allege, as damages, "costs for opioid addiction treatment" amounting to "millions of dollars for health care costs." Opening Br. at 20. Their assertion is belied by the actual damages claimed and related discovery demanded in those cases. *See* AR001-AR005 (requiring patient-specific discovery from the third-party payors).

Even the cases cited by the Insurers (in lieu of addressing the allegations cited in CVS's moving brief) do not advance their argument. In *Louisiana Assessors' Insurance Fund v. Amerisourcebergen Drug Corp.*, the plaintiff demands, as "damages," the amounts that it "paid" "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, treatment of infants born with opioid-related medical conditions[.]" B256 ¶ 3; *see* Answering Br. at 43. Like the hospital suits, *Louisiana Assessors*' "injuries" include "costs for" (i) "providing healthcare and medical care, additional therapeutic, and prescription drug purchases, and other treatments for patients suffering from opioid-related addiction or disease, including overdoses and deaths"; (ii) "providing mental-health services, treatment, counseling, and rehabilitation services to victims of the opioid epidemic and their families"; and (iii) "providing treatment of infants born with opioid-related medical conditions, or born dependent on opioids due to drug use by mothers during pregnancy." B303 ¶ 182.

In the face of these underlying allegations, the Insurers argue that *Louisiana Assessors* "incorporated" allegations from Track One suits. Answering Br. at 45. Thus, according to the Insurers, CVS is not entitled to coverage because *Louisiana Assessors* "fit[s] the mold" of Track One. *Id*. As discussed above, there is no "mold"—only an analysis of each individual complaint's allegations and whether at least one allegation is potentially covered.

Laborers Local 235 Welfare Fund v. Purdue Pharma L.P. alleges that the plaintiff "pays significant costs for opioid addiction treatment for covered members

and beneficiaries." B545 ¶ 777; *see* Answering Br. at 43. "These costs include, *e.g.*, addiction counseling, rehabilitation costs (inpatient and outpatient), overdose costs (ambulance and emergency room visits), and costs to treat infants born with NAS." B545 ¶ 777. The damages sought include amounts that third-party payors have paid and continue to pay for "long-term opioid treatment" and "the additional costs of providing and using opioids long-term to treat chronic pain." B569 ¶¶ 861-62.

The Insurers make no reference to the allegations in *Southern Tier* cited by CVS. Opening Br. at 20. Thus, they have no retort to the allegations there that the plaintiffs 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." *Id.*

Their reliance on cases outside Delaware also misses the mark. *See* Answering Br. at 45. *Westfield National Insurance Co. v. Quest Pharmaceuticals, Inc.*, 57 F.4th 558 (6th Cir. 2023), applying Kentucky law, did not hold that there was no potential for coverage for hospitals and third-party payors as the Insurers contend. *Allied Property Casualty Insurance Co. v. Bloodworth Wholesale Drugs, Inc.*, 2024 WL 1313844 (M.D. Ga. Mar. 27, 2024), applying Georgia law, suffers from the same fatal factual distinctions as *Quest*.

D. The Insurers' Responses to "Other Arguments" Are Legally Unsupportable Assertions of Counsel

The Insurers now concede that coverage is afforded for hospital and medical provider suits whether based on the treatment of one patient or many patients. Answering Br. at 46. Thus, they pivot by arguing that the duty to defend CVS in hospital and medical provider suits can only be triggered if those complaints identify the "specific patients." *Id.* They provide no legal support for that assertion because that is not the law. Alleged treatment of unidentified patients triggers the defense duty because that allegation is *potentially* covered by CVS's policies. The identification of a specific patient, the nature and cost of the treatment, and the liability of the defendant for requiring that treatment might be required to trigger an insurer's duty to indemnify. But that is precisely why the standards for triggering the two duties are markedly different, with the former being exceedingly broad and broader than the latter.

Yet, the Insurers proclaim to know, with certainty, that the hospitals and medical providers "would *never* have to prove" that "because the *nature* of the claims does not require such proof." Answering Br. at 46-47 (emphasis in original). Once again, their self-serving predictions about what must and must not, and what will and will not be proven at an underlying trial is entirely unsupported. This is precisely why the duty to defend is exceedingly broad. The Insurers conclude this section of their brief with the self-serving, legally and factually

unsupportable statement that the hospital and medical providers "are not seeking to recover" that which the *Rite Aid* Court held is covered. The pleadings tell a different story.

II. CVS'S INTERPRETATION OF THE PHARMACIST LIABILITY AND DRUGGIST-BROADENED COVERAGE ENDORSMENTS IS REASONABLE; EVEN THE INSURERS CONCEDE THAT THEY BROADEN COVERAGE

The Insurers admit that the Pharmacist Liability and Druggists – Broadened Coverage Endorsements broaden coverage—just not in "any relevant way." Answering Br. at 18. They then provide this Court with their interpretation of how they believe them to "operate" without articulating how coverage is broadened (other than the way CVS interprets them). *Id.* at 18-19. They do not even attempt to argue that their interpretation is the *only* reasonable one; that it is consistent with the mutual intent of the parties at the time of contracting; or that, when strictly and narrowly construed against them, their interpretation is clear, plain and conspicuous. In fact, the Superior Court's conclusion that these endorsements are "of no moment" and "changes nothing" (Opening Br. at 29) is markedly different from the Insurers' interpretation that they broaden coverage, just not "in any relevant way." Answering Br. at 18. CVS's third reasonable interpretation can only mean that the endorsements are, at a minimum, ambiguous and that the ambiguity must be resolved in favor of coverage.

Moreover, given their acknowledgement that these endorsements broaden coverage in some way, the central issue, which the Insurers fail to address, is how. The assertion that they simply "expand what can 'cause' bodily injury within the scope of coverage" defies logic because the scope of the bodily injury coverage,

irrespective of the endorsements, is already sufficiently broad to include pharmacist- and druggist-related occurrences. *Id.* at 19. "'Occurrence' means an accident, including continuous or repeated exposure to substantially the same general harmful conditions." A02231. By definition, a druggist or pharmacist liability incident is already an occurrence. Adding an endorsement solely to confirm that these particular incidents are "occurrences" is unnecessary and the Insurers' interpretation reflects a potential reduction of coverage as opposed to a broadening of it.

Other text in the endorsements themselves further confirms that they do not simply "expand what can 'cause'" injury. The Druggist Endorsement confirms that there is "**coverage** provided by this endorsement." A02233 (emphasis added). Thus, it is not simply an expansion of what can cause coverage-triggering injury under the original coverage grant. The Insurers' arguments are also inconsistent. They first argue that the endorsements "operate[] similarly" despite the fact that the Pharmacist Liability Endorsement removes the "caused by an occurrence" requirement while the Druggist Endorsement keeps, but modifies, the "occurrence" requirement. The Insurers then argue that references to "any one person" in the endorsement's coverage grant means that coverage applies "only to claims of individual bodily injury." Answering Br. at 20-21. The policies do not support that interpretation. Several AIG policies include a Bodily Injury Definition Extension

endorsement which specifically amends the definition of "bodily injury" to remove the phrase "sustained by a person." Opening Br. at 7. The Pharmacist Liability Endorsement in the Chubb policies reference "any one person **except as provided in the definition of 'pharmacist liability incident**[.]" A02145-47 (emphasis added). Indeed, the definition of "pharmacist liability incident" in that endorsement only makes reference to "claimants" and makes no reference to "persons." *Id.* Insurance policies are to be construed to give each word meaning, so "persons" and "claimants" cannot mean the same thing. *See RSUI Indemnity Co. v. Murdock*, 248 A.3d 887, 905-06 (Del. 2021) (internal citations omitted). Therefore, even following the Insurers' logic, the hospital and medical provider plaintiffs are "claimants."

Their remaining assertions are equally without merit. The notion that *Rite Aid* did not raise this issue "because no one thought it mattered" is self-serving speculation. Answering Br. at 20. The fact that AIG policies with an SIR endorsement do not include a defense duty is a red herring because CVS does not seek defense coverage under policies with no contractual defense obligation. *Id*. At most for the Insurers, these endorsements are ambiguous and the Insurers do not dispute that the allegations cited in CVS's moving brief otherwise trigger coverage.

III. THE REPRESENTATIVE SUITS ARE ALSO IN THE THIRD CLASS OF PLAINTIFFS WITHIN THE SCOPE OF COVERAGE

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

As above, the representative and government suits allege damage for providing medical care. The Insurers' only retort is their interpretation that those allegations merely "illustrate economic losses" and do not even potentially allege costs to treat an individual. The Insurers presume, without more, that the *Rite Aid* Court was directed to paragraph 730 of the *Summit* complaint and held that it did not allege damages for providing medical care. Not so. Moreover, although *Summit* and *Cuyahoga* alleged how many doses of naloxone they administered, unlike *Philadelphia*, for example, they apparently did not allege how much each dose cost to administer. *Id.* at 27. Both also alleged that they sustained property damage. The Insurers' only response to that is the factually incorrect assertion that it was not argued before the Superior Court. *Id.* at 35.

Philadelphia, in contrast, alleged how many doses it administered and the cost per dose. This was more than sufficient at the pleading stage with only simple math required to determine this portion of *Philadelphia's* damages. The only factual information missing from the Insurers' checklist is the names of the individuals who received those doses. But that is not required to be in a complaint to trigger a defense duty.

The Insurers do not address any of the allegations cited by CVS in *Nassau* and *Suffolk* articulating what they incurred and spent to treat opioid-related conditions. Opening Br. at 34 (*Suffolk*, A01353 ¶ 2 (Plaintiffs 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[.]")). Instead, they cite one of their own for its generic reference to a "public health crisis." Answering Br. at 23.

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

The Insurers' argument boils down to the assertion that, if Track One is not derivative, then no underlying case against CVS can assert a derivative claim. Their protestations to the contrary, CVS can and did show that *Florida*, and other suits, are different. Opening Br. at 35; Answering Br. at 30-31. The Insurers know this to be true because they fail to address the allegations confirming so. *See* Opening Br. at 35. Those actual allegations, as opposed to how the Insurers interpret them, confirms this. As previously established, *Florida* alleges damages "suffered by the State of Florida and its citizens," and seeks damages "on its own behalf and on behalf of its residents." *Id.* The Insurers direct this Court to one *Summit* allegation claiming that it is not derivative (Answering Br. at 30-31) but fail to address another allegation in which *Summit* alleged that its suit was "on behalf of the municipal corporation and its residents." Opening Br. at 35.

The Insurers' discussion of *Zogenix* proves too much. Answering Br. at 31. First, the Insurers admit here as Chubb did there, that a hospital's claim for medical expenses paid on behalf of an injured claimant is a derivative claim to which coverage extends. A02382. Thus, the Insurers admit that the hospital and medical provider suits are covered. Second, whether and the extent to which "individuals have brought their own" suits against CVS is irrelevant. *Id.* at 32. Even assuming an individual brought suit against CVS and a county brought suit seeking reimbursement for that same individual, the claimed damages are different. The individual would be seeking damages for the pain and suffering allegedly sustained and the county would be seeking damages for the costs incurred to treat that pain and suffering.

Finally, CVS is not asking this Court to depart from *Rite Aid* and, instead, follow *Walmart*. *Id*. CVS asks this Court to recognize the material distinctions between the present case and *Rite Aid*. The *Rite Aid* Court did not have an opportunity to, and the Superior Court below "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." Opening Br. at 37.

3. The Policies Are Triggered By Allegations That CVS Facilitated Individual Opioid Addiction and Abuse, And Other Covered Harms

CVS is not in "search for a way around *Rite Aid*." Answering Br. at 33. CVS is entitled to the coverage bought and paid for and to which it is entitled under Delaware law. It is the Insurers that are searching for a way around *Rite Aid* as evidenced by their failure to address the allegations of property damage asserted by *Florida*, *Cherokee*, *Lake*, and *Trumbull*. Opening Br. at 39-42. They make no colorable argument because there is no colorable argument to make.

Instead, the Insurers conflate the issue of reading and interpreting policy language with applying that language to the underlying allegations. The "bodily injury" and "property damage" coverage may appear "side-by-side" in the policies (Answering Br. at 33) but they are different coverages with different allegations required to trigger them. There is no "parallel treatment of" these two coverage grants and the Insurers' reliance on cases interpreting "bodily injury" coverage from outside Delaware highlights the frailty of their argument. *Id*. at 34. They also ignore the Delaware cases cited by CVS discussing the duty to defend standard in the property damage context and the Delaware cases specifically holding that insurers cannot interpret property damage as "economic loss" in an effort to avoid their contractual obligations. Opening Br. at 38, 39, 42. That is precisely what the Insurers did here.

The Insurers then argue that the allegations cited by CVS do not meet "the *Rite Aid* standard." Answering Br. at 34. There is no "*Rite Aid* standard" for "damages because of property damage" because that issue was not before the *Rite Aid* Court. Then, as above, they interpret allegations of damage to the insured's own property as "costs to upgrade or clean up property" and "budgetary outlays." *Id*. at 34-35. This argument is flawed for several reasons.

First, the Policies define "property damage" to include both "[p]hysical injury to tangible property, including all resulting loss of use of that property" and "[l]oss of use of tangible property that is not physically injured." *See* A02107, A02231. Their unsupported protestations to the contrary, even the allegations cited by the Insurers—responding to only two of the underlying cases cited by CVS—fit within these definitions and are, at a minimum, potentially covered. Answering Br. at 34-35. An underlying plaintiff would not allege damages incurred to "repair" or to "clean-up" public spaces and facilities if the property did not sustain damage or lost use of it. *Id*.; *see Fresno,* A05515 ¶ 456 ("The County has suffered and continues to suffer damages to its property requiring investigation, repair, remediation, and other costs to be determined at trial.").

The Insurers restyle the same argument about the hospital and medical provider suits—that the allegations are not sufficiently specific. Answering Br. at 35-36 (comparing allegations of damage to a park or a building with damage to a

particularly enumerated landfill). They provide no legal or factual support for this contention or for the untenable contention that follows from it—that litigation choices by an underlying plaintiff, about how much detail to include in a complaint, dictates coverage. Notably, they do not address the cases cited by CVS where property damage coverage was triggered for generic damage to "natural resources." Opening Br. at 38-39. Nor do they reconcile that argument with their own citation to a case involving generic damage to a river watershed. Answering Br. at 36.

IV. THE DUTY TO INDEMNIFY UNDER "INDEMNITY-ONLY" POLICIES IS NOT BASED ON THE DUTY TO DEFEND STANDARD

The Insurers have no response to the Delaware law holding that an insurer's duty to indemnify is unripe until the underlying liability is established. Opening Br. at 44. Nor do the Insurers try to address the cases cited by CVS involving "indemnity only" policies. They maintain it "cannot be that CVS is entitled to indemnification" under indemnity only policies absent a duty to defend. Answering Br. at 49. That argument is squarely rejected in the same treatise cited in their answering brief. *Id.* at 53. It says as follows in that same treatise: **"[T]he fact that an insurer did not have a duty to defend does not mean that it might not ultimately have a duty to indemnify."** *See* 2 Allan D. Windt, *Insurance Claims and Disputes* § 6:10 (6th ed. Mar. 2024) (emphasis added).

They then try to distance themselves from the National Settlement, arguing that the provisions related to damages resulting from "physical and bodily injuries sustained by individuals" is "not binding on" them. Answering Br. at 53. Their suggestion that CVS may have tried to "manufacture insurance coverage . . . by inserting self-serving statements into the settlement agreement" is false for several reasons. *Id.* First, the Insurers could and should have been honoring their contractual obligations all along by defending CVS or associating in CVS's defense of the underlying cases. Had they done so, instead of abandoning their

insureds, they would have been directly involved in all aspects of the underlying litigation including all settlement negotiations and the drafting of the National Settlement. They were not involved because, in breach of the policies, they chose not to be. The Insurers cannot be heard to complain about being excluded from and affected by a process from which they voluntarily disassociated themselves.

Second, to even suggest that the National Settlement was crafted to manufacture insurance coverage is irresponsible. That complex and comprehensive agreement involves billions of dollars and was negotiated with the Settling States and their respective Attorneys General. The notion that CVS tried to, did, or would have been allowed to "insert self-serving statements" in order to secure coverage defies logic and does not warrant a further response. Erasing any doubt, the terms of National Settlement explicitly *require* the vast majority of the dollars to be dedicated to addressing opioid abuse, addiction, overdose, associated diseases, and related harms.

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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