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IN THE SUPREME COURT OF THE STATE OF DELAWARE

HERTZ GLOBAL HOLDINGS, INC. and THE HERTZ CORPORATION, Plaintiffs Below, Appellants, v. NATIONAL FIRE & MARINE INSURANCE COMPANY; STEADFAST INSURANCE COMPANY; AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY; GREAT AMERICAN INSURANCE CO. OF NEW YORK; QBE INSURANCE CORPORATION; NAVIGATORS SPECIALTY INSURANCE COMPANY; ENDURANCE ASSURANCE CORPORATION; SWISS RE CORPORATE SOLUTIONS ELITE INSURANCE CORPORATION, F/K/A NORTH AMERICAN ELITE INSURANCE COMPANY; SWISS RE CORPORATE SOLUTIONS AMERICA INSURANCE CORPORATION, F/K/A NORTH AMERICAN SPECIALTY INSURANCE COMPANY; and GREAT AMERICAN SPIRIT INSURANCE COMPANY, Defendants Below, Appellees.	No. 106,2025 Court Below – Superior Court of the State of Delaware C.A. No. N22C-05-130 SKR (CCLD) **PUBLIC VERSION**

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

Each year from 2014 through 2016, Hertz, a global rental car company, paid substantial premiums to the insurers at issue ("Insurers") to purchase insurance policies collectively providing $200 million in annual general liability ("GL") coverage, in excess of $10 million annual retentions.[1] As the high-dollar retentions and limits indicate, Hertz purchased this coverage for substantial tort liabilities arising from corporate policies, practices, and operations, not for the risk of individual claims posing less than $10 million in exposure.[2]

Consistent with this objective, Hertz purchased "occurrence"-based insurance policies, which "base coverage on the *underlying circumstances* (or occurrences) that *result[] in* the claims for damages" they insure against—not on the "individual"

[1] "Hertz" refers, collectively, to Appellants Hertz Global Holdings, Inc. and The Hertz Corporation.

[2] Hertz pursues this appeal only in respect to its GL policies from 2014-2016 and only against Appellee-Insurers ("Insurers") that issued such policies. Because the coverage terms and limits of each of the 2014-2016 policies are materially the same and more than sufficient to cover Hertz's full claim if Hertz's position herein is correct, it is immaterial whether the Superior Court also erred in its ruling with respect to Hertz's 2017-2020 policies. Accordingly, Hertz advised all parties that it will stipulate to dismiss this appeal, with prejudice, in regard to its 2017-2020 policies and against insurers who only issued such policies. For the avoidance of doubt, the Insurers that issued the 2014-2016 policies and against which this appeal is pursued are: (i) Swiss Re Corporate Solutions Elite Insurance Corporation ("Swiss Re"); (ii) National Fire & Marine Insurance Company; (iii) Steadfast Insurance Company; (iv) Navigators Specialty Insurance Company; (v) QBE Insurance Corporation; (vi) American Guarantee & Liability Insurance Company; and (vii) Great American Insurance Company of New York.

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incidents or claims themselves. *Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co.*, 996 A.2d 1254, 1258 (Del. 2010) (emphasis added). Hertz's policies, moreover, contain a so-called "Deemer Clause," which provides that "*[a]ll damages* that arise from the same act ... or general conditions are *considered* to arise out of the same 'occurrence,' *regardless of* the frequency or repetition thereof ... or the number of claimants." Under this clause, all damages arising from a common Hertz policy, practice, or operation are considered to arise out of the same "occurrence." This Deemer Clause is why Hertz purchased policies with self-insured retentions of $10 million per "occurrence"—i.e., was willing to bear $10 million in liability for any "occurrence" before coverage kicks in: a retention this high only makes commercial sense where, as here, the policies aggregate "all damages" allegedly arising from a common source into one "occurrence."

This case involves exactly the sort of contractually aggregated corporate liability for which Hertz purchased this coverage. Hertz recently faced a multi-claimant lawsuit and several follow-on claims alleging "systemic" failures in Hertz's nationwide corporate theft-prevention policies and practices. The claimants—all represented by the same plaintiffs' firm—universally alleged that Hertz's theft-prevention policies and practices repeatedly led to improper arrests and prosecutions of customers. In particular, they generally alleged that Hertz "systemically" either failed to follow Hertz corporate policy "W7-02," which governs Hertz's theft-

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prevention process, or that "W7-02" was inherently flawed—and that these failures caused their arrests (and, sometimes, prosecutions). Although Hertz vigorously denied these allegations, it settled nearly [redacted] false arrest claims for approximately [redacted] million following a global mediation. Each claim settled for less than [redacted] on average, and the largest payment was for less than [redacted].

Despite its nine-figure loss, when Hertz sought indemnification, Insurers wrongly denied coverage. Misreading the first sentence of the policies' governing "occurrence" definition, and ignoring altogether the second sentence (the Deemer Clause) and Delaware law, Insurers contended that each *individual act* of false arrest constitutes a separate "occurrence." And because no *single* arrest resulted in more than $10 million in liability, Insurers claimed they owed nothing, given the policies' $10 million per-"occurrence" retentions.

On May 20, 2022, Hertz sued Insurers in the Superior Court, seeking damages and declaratory relief arising from their denials of coverage. On October 9, 2024, that court granted summary judgment for Insurers and against Hertz, *see* Ex. A, *Hertz Global Holdings, Inc. v. ACE Am. Ins. Co.*, at 2 (Del. Super. Oct. 9, 2024), and on February 10, 2025, it entered final judgment, *see* Ex. B. Hertz timely appealed.

The Superior Court was wrong to accept Insurers' coverage-eviscerating interpretation. Under the policies' "occurrence" definition and governing Delaware law, "all" of Hertz's approximately [redacted] damages liability is contractually

[redacted]

"considered" (i.e., deemed) to arise out of a single "occurrence," and thus, subject to one $10 million per-"occurrence" retention. And because that "occurrence" was committed during each policy period, each "occurrence"-based policy at issue is triggered, and each covers all of Hertz's liability, up to its respective policy limits. The Superior Court's contrary interpretation—that each individual false arrest constitutes a separate occurrence, with a separate $10 million retention—"would render meaningless the excess insurance purchased by [Hertz] and deprive [Hertz] of the protection for which it paid." *Stonewall*, 996 A.2d at 1258. This Court should reverse.

[redacted]

SUMMARY OF ARGUMENT

I. Under the plain policy language and Delaware law, all damages that Hertz incurred in settling the underlying false arrest claims allegedly caused by its corporate theft-prevention policies and practices are contractually "considered" to arise from one "occurrence."

A. The first sentence of the insurance policies' governing "occurrence" definition states that "[o]ccurrence" means "a covered offense." The policies identify "[f]alse arrest, detention or imprisonment" as "a covered offense." The parties agree that the underlying false arrest claims involve "a covered offense" and thus, an "occurrence."

B. The second sentence of the "occurrence" definition (a "deemer clause," in insurance parlance) aggregates all damages for "personal and advertising injury" arising from a common cause. It provides that "[a]ll damages" that "arise" from "the same act" *or* the "same … general conditions" shall be "considered" (i.e., contractually deemed, regardless of how such damages might be treated *absent* the Deemer Clause) "to arise out of the same 'occurrence.'" As applied here, the Deemer Clause thus aligns with, and expressly effectuates, the "cause" test, the well-established principle of Delaware insurance law that "occurrence"-based policies determine the number of occurrences (for purposes of policy retentions and limits)

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by the underlying cause, not by individual incidents, claims, or the individualized effects that arise therefrom.

C. Nor does the Deemer Clause stop there. It confirms that aggregation of damages is required "*regardless of* [i] the frequency or [ii] repetition [of such act or conditions] … *or* [iii] the number of claimants." Again, aligning with Delaware law, these three "aggregators" expressly disclaim any limitation on aggregation based on (a) time (i.e., the "frequency" of the underlying acts or general conditions), (b) the number of allegedly offending acts or incidents (i.e., "repetition"), or (c) the "number of claimants" alleging damages.

D. The Deemer Clause directly applies here in two independent ways. Hertz seeks coverage for "all damages" (arising from the "covered offense" of "false arrest") which allegedly "arise out of" (1) the "general conditions" of Hertz's theft-prevention policies and practices or, independently, (2) the repeated "act" of reporting a vehicle theft causing an arrest pursuant to those policies and practices. Under the policy language, such damages "are considered" to "arise out of the same 'occurrence,'" even though Hertz allegedly caused the underlying act or general conditions *frequently, repeatedly,* and *in respect to hundreds of claimants*.

E. This result is mandated by the policy language and harmonizes it with applications of the well-established "cause" test, under which this Court (like others) has determined the number of occurrences in the liability insurance context based

[redacted]

on the underlying cause of the claimed injuries, not on whether there are widespread injuries or many claimants affected by that cause.

F. Aggregating all damages arising from Hertz's corporate theft-prevention policies and practices also accords with the parties' reasonable expectations. The GL policies cover Hertz's liabilities, so it is appropriate to assess the number of occurrences based on the conduct of *Hertz* that allegedly caused the claimed injuries (i.e., its challenged theft-prevention policies and practices, including its vehicle theft reports pursuant thereto), not on individual incidents of arrest by police. Further, the policies' $10 million per-"occurrence" retentions only make commercial sense if the policies aggregate damages arising from a single source of corporate liability within Hertz's control.

G. In holding that each false arrest constitutes a separate "occurrence," the Superior Court reversibly erred. It inserted into the policies a limitation they do not contain: that the underlying "act" or "general conditions" must "be the covered offense or comprise the covered offense." That limitation would render the Deemer Clause meaningless: it would mean that the damages from each "act" or set of "conditions" arise from a separate "occurrence" and thus, are *not* aggregated even though the Deemer Clause expressly says the opposite. Further, in equating "occurrence" with an individual act of arrest, the Superior Court gave no effect to the Deemer Clause's three "aggregators" regarding frequency, repetition, and

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number of claimants, which expressly contradict the court's conclusion that the damages from each arrest must be treated as arising from a separate "occurrence." Its holding also conflicts with governing Delaware law endorsing and applying the "cause" test.

II. The single "occurrence," encompassing "all damages" that Hertz incurred for false arrest claims arising out of its theft-prevention policies and practices, was committed, and occurred continuously, in each policy period from 2014 through 2016, and thus, triggers each policy at issue during these years.

A. The 2014-2016 policies expressly provide that they are triggered if "the 'occurrence' was committed during the 'policy period.'" It is undisputed that, in each "policy period" at issue, the frequent and repeated "act" of reporting a vehicle theft to law enforcement under Hertz's theft-prevention policies and practices resulting in false arrest was committed, and that the "general conditions" of Hertz's theft-prevention policies and practices remained continuously in place. Thus, under the policies' "occurrence" definition, under which "all damages" resulting from the alleged false arrests are deemed to arise from one "occurrence," the single, damages-aggregating "occurrence" here "was committed" repeatedly and continuously across all three years, triggering coverage for "all damages" that Hertz became obligated to pay.

[redacted]

B. Given the Deemer Clause, there is no basis for limiting the covered sums to anything less than "all damages" resulting from the single "occurrence." "All" means "all."

C. The Superior Court's contrary conclusion rested on its erroneous holding that each individual arrest constituted its own "occurrence." The Superior Court also failed to appreciate, as this Court (and others) have long held, that what *triggers* coverage under a given GL policy (here, the commission of a continuous, multi-year "occurrence" within the policy period) does not define the *scope* of coverage under the policy (here, "all damages" arising from the *entire* "occurrence"). And nothing in the policy language or Delaware law supports the Superior Court's suggestion that coverage is limited to the period when the "occurrence" was *first* committed. The Superior Court's contrary holding was thus reversible error.

[redacted]

STATEMENT OF FACTS

A. Hertz's Theft-Prevention Policies and Practices

Hertz rents tens of millions of cars each year. To protect its fleet from late returns and theft, Hertz maintains internal corporate policies and procedures concerning overdue rentals, stolen and missing vehicles, and inventory management. During the years at issue, as alleged by the underlying claimants, "Hertz policy W7-02 govern[ed] its theft reporting process" and set forth Hertz's operating procedures and practices for missing or overdue vehicles—including investigating the circumstances, compiling a checklist of vehicle and renter details, and, in some instances, filing theft reports with police. A0683-84.

B. The Underlying False Arrest Claims

On May 21, 2020, one day before Hertz commenced Chapter 11 proceedings in Delaware, twenty plaintiffs filed a complaint against Hertz in Delaware. *See Ayoub v. Hertz Global Holdings, Inc.*, No. N20C-05-189 (Del. Super.) (the "Ayoub Action"). The Ayoub Action alleged that Hertz's "broken" theft-prevention policies and practices led Hertz to report innocent customers to police for car theft in dozens of jurisdictions, causing those customers to be wrongly arrested and, at times, wrongly prosecuted. A0516-20, A0582-602. The same plaintiffs' counsel later filed additional lawsuits against Hertz in Delaware, Pennsylvania, and Florida, and

[redacted]

hundreds of proofs of claim in Hertz's since-resolved Delaware bankruptcy proceeding—all asserting substantially similar allegations. *See* A0668-1164.

The claimants alleged that for several years (including throughout 2014-2016), Hertz failed to maintain necessary safeguards and implemented defective company-wide policies to manage inventory, identify missing vehicles, and report vehicle theft. *See, e.g.*, A0539, A0605-24. In particular, the claimants alleged that Hertz either "systemically" failed to follow Hertz corporate policy W7-02, or that W7-02 itself was inherently flawed. *See, e.g.*, A0537-38; A0683-84; A0832; A0885; A0977-78; A1055-56. As asserted in the Ayoub complaint, which every filed proof of claim incorporated by reference, "W7-02 is severely flawed in both its language, intent, purpose, and execution"; "[t]hese flaws with W7-02 and Hertz's related policies and procedures have directly and proximately led to the Plaintiffs being wrongfully reported to the police, and wrongfully detained, arrested, imprisoned, and prosecuted." A0537-38; *see also* A1101-02.

For example, the claimants alleged that, due to W7-02, Hertz created theft reports containing systemically false payment information. *See, e.g.*, A0521, A0583. According to the claimants, W7-02(D) mandated that each theft report falsely inform police that the customer had not paid for a rental, even though at the time the theft report was prepared, the customer had not yet been billed. *See, e.g.*, A0523-25. The claimants asserted that this error infected virtually all of Hertz's theft reports. *See,*

[redacted]

e.g., A0520-21, A0525; A1168-69. The claimants also alleged that Hertz systemically failed to comply with W7-02(a)(4), which required completing a checklist cataloging certain vehicle information as a precondition to any theft report. *See, e.g.*, A0538; A0684; A0832-33; A0978; A1056.

C. Hertz's Underlying Settlements

On December 1, 2022, following a global mediation with the plaintiffs' firm prosecuting these claims, Hertz settled with 364 false arrest claimants for approximately $168 million. A0230-31. [redacted] A0231. Each claim settled for less than [redacted] on average, and no single claim settled for more than [redacted]. A1201-10.

D. Hertz's General Liability Policies

From 2014 through 2016, Hertz paid its GL Insurers millions of dollars in premiums to purchase a company-wide program of per-"occurrence" commercial general liability insurance policies (the "Policies"). A0482-84. The program includes primary, umbrella, and excess policies, collectively providing up to $200 million in annual coverage, in excess of $10 million annual retentions. A0226.[3] The

[3] Hertz also purchased GL coverage from 2017 through 2020. But the $200 million annual limits of the 2014-2016 GL program more than cover Hertz's full loss under any single year from 2014 through 2016 in excess of one per-"occurrence" retention.

[redacted]

primary policies are so-called "fronting" policies whose limits are equivalent to their deductibles; the umbrella policies contain the core policy language at issue here. Ex. A, at 3-5.

Swiss Re issued the 2014-2016 umbrella policies. A0233-480. Each Swiss Re umbrella policy contains substantially the same terms and conditions, and the excess policies "follow form" to the umbrella policies, generally incorporating their terms and conditions. Ex. A, at 3.

The Policies cover, in relevant part, "those sums" that Hertz becomes obligated to pay as damages because of "personal and advertising injury." A0240. Coverage applies where "the 'personal and advertising injury' is caused by an 'occurrence' that takes place in the 'coverage territory' arising out of [Hertz's] business, but only if the 'occurrence' was committed during the 'policy period.'" *Id.* "Personal and advertising injury" means "injury, including consequential 'bodily injury,' arising out of one more of the following offenses: 1. false arrest, detention or imprisonment; 2. malicious prosecution;" or other enumerated offenses. A0258. Additionally, "[o]ccurrence" is defined as follows:

> [1] With respect to "personal and advertising injury," a covered offense. [2] All damages that arise from the same act, publication or general conditions are considered to arise out of the same "occurrence," regardless of the frequency or repetition thereof, the number or kind of media used or the number of claimants.

Id.

[redacted]

The Policies' retentions (i.e., the amount for which Hertz is responsible) and limits (i.e., the amount for which Insurers are responsible) apply both annually and per-"occurrence," regardless of the number of underlying claims. A0244.

E. The Insurers' Coverage Denial

Hertz kept Insurers apprised of its defense and settlement of the false arrest claims. *See* A0228-31. But Insurers declined to pay any of the resulting damages. Notwithstanding the claims' common gravamen, Insurers asserted that each claimant's arrest "stemm[ed] from different circumstances," and was thus a separate "occurrence" subject to its own $10 million retention, which the damages for no individual claim exceeded. *E.g.*, A1175, A1179. Insurers accordingly refused to pay any defense costs or to indemnify Hertz for any sum. *Id.*

F. The Ruling Below

On May 20, 2022, Hertz sued Insurers in the Superior Court, seeking damages and declaratory relief arising from their denials of coverage.[4]

On October 9, 2024, the Superior Court granted summary judgment for Insurers and against Hertz under Delaware law. Ex. A. Based on the first sentence of the "occurrence" definition, the court held that an "occurrence" is "a covered

[4] Hertz settled its claims with several insurers both before and after the Superior Court's ruling. Hertz proceeds here only against those insurers who issued Policies in the 2014-2016 period. *See supra* n.2.

[redacted]

offense," which it interpreted to mean "each arrest of the individual." *Id.* at 14-15, 19-20, 23. The court then concluded that the second sentence of the "occurrence" definition (the Deemer Clause) did not require—and further, that Delaware law did not support—aggregation of "all damages," except where all damages arise from the same individual arrest because, in the court's judgment, "the 'same act … or general conditions' must either be the covered offense or comprise the covered offense." *Id.* at 19; *see also id.* at 19-20. Finally, the court held that each "underlying offense"—again, meaning each individual arrest—"must occur during a policy's coverage period to trigger coverage for that policy." *Id.* at 15, 21. The combined result of these holdings was that Hertz cannot access *any* of its $200 million in general liability coverage, because while "all damages" at issue exceed [redacted] in the aggregate, no single claimant's damages exceed an annual $10 million per-"occurrence" retention.

On February 10, 2025, the Superior Court entered final judgment. *See* Ex. B. This appeal now follows.

[redacted]

ARGUMENT

I. Under the Policies' Plain Language and Delaware Law, "All Damages" Arising from Hertz's Theft-Prevention Policies and Practices Are Aggregated and "Considered" to Arise out of the "Same 'Occurrence.'"

A. Question Presented

Whether all damages (approximately [redacted]) that Hertz paid to settle false arrest claims arising from allegedly systemic failures in Hertz's nationwide theft-prevention policies and practices arise out of the same "occurrence," where: (1) the insurance policy language provides that "[a]ll damages that arise from the same act … or general conditions are considered to arise out of the same 'occurrence,' regardless of the frequency or repetition thereof … or the number of claimants"; and (2) even in the absence of such explicit language, Delaware law presumptively "base[s] coverage on the underlying circumstances (or occurrences) that result[] in the claims for damages," not on the "individual" incidents or claims themselves. *Stonewall*, 996 A.2d at 1258. Hertz preserved this issue for appeal by raising it below in, among other places, its summary judgment motion. A0189, A0206-16.

B. Scope of Review

"The interpretation of an insurance contract is a question of law subject to *de novo* review." *Zurich Am. Ins. Co. v. Syngenta Crop Prot. LLC*, 314 A.3d 665, 674

[redacted]

(Del. 2024). This Court "review[s] *de novo* the Superior Court's grant or denial of summary judgment." *Stonewall*, 996 A.2d at 1256.

"Where the contract language is clear and unambiguous, the parties' intent is ascertained by giving the language its ordinary and usual meaning." *AT&T Corp. v. Faraday Cap. Ltd.*, 918 A.2d 1104, 1108 (Del. 2007). But "[w]here the language is ambiguous, the contract is to be construed most strongly against the insurance company that drafted it." *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 905 (Del. 2021) (quotation marks and citation omitted). "Stated differently, if there is more than one reasonable interpretation of an insurance policy, Delaware courts apply the interpretation that favors coverage." *Monzo v. Nationwide Prop. & Cas. Ins. Co.*, 249 A.3d 106, 118 (Del. 2021).

C. Merits of Argument

1. The Policy Language and Delaware Law Mandate that "All Damages" Arising from a Common Underlying Cause Be "Considered" to Arise from One "Occurrence."

The Policies are clear. Under the first sentence of the two-sentence "occurrence" definition, so long as "a covered offense" occurs during the policy period, there is a coverage-triggering "occurrence." The very first of the enumerated "covered offenses" that the Policies specify is: "1. false arrest, detention or imprisonment"—precisely the offense alleged in the underlying claims.

[redacted]

The definition's second sentence—the Deemer Clause—contractually aggregates all damages into a single "occurrence" in certain circumstances. Specifically, the Deemer Clause provides that "[a]ll damages that arise from the same act … *or* general conditions [i.e., the same cause] are *considered* to arise out of the same 'occurrence,' *regardless of* [i] the frequency or [ii] repetition thereof, … or [iii] the number of claimants." Here, "all damages" from the false arrest claims allegedly arose from (a) "the same act," which was committed frequently, repeatedly, and in respect to hundreds of claimants (i.e., the report of a vehicle theft) *or* (b) the "same … general conditions," which prevailed throughout the relevant period and precipitated all claims and damages at issue (i.e., Hertz's theft-prevention policies and practices—specifically, the alleged flaws embedded in, or Hertz's alleged systemic non-compliance with, W7-02).

Even *without* the Deemer Clause, though, Delaware law would require Insurers to treat all damages here as arising from one "occurrence." As this Court and the Third Circuit have explained, "occurrence-based policies," like the Policies here, are "intended to base coverage on the underlying circumstances (or occurrences) that resulted in the claims for damages" at issue (i.e., the "cause")—and *not* on "individual" events or "effects"—"though the injuries may be widespread in both time and place and may affect a multitude of individuals." *Stonewall*, 996 A.2d at 1257-58 & n.7 (holding that 469,000 liability claims involving leaky

[redacted]

plumbing systems arose from "only one single occurrence," because they shared the common underlying circumstance of the company's "production of an unsuitable product"); *see also Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 61 (3d Cir. 1982) (holding that several employees' discrimination claims arose from "a single occurrence"—namely, a corporation's "discriminatory employment policies"—even though the challenged policies had "multiple and disparate impacts on individuals"). Thus, whether one looks to the policy language or controlling Delaware law—and certainly when one looks to both—"all damages" that Hertz has incurred in settling the false arrest claims at issue are contractually "considered" to arise from the same, single "occurrence."

a) The Policies Define "Occurrence" to Include "All Damages" at Issue, Consistent With Delaware Law.

"The starting point for our analysis is the policy language." *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 745 (Del. 1997). The Policies define "occurrence" as follows:

> "Occurrence" means: …
>
> With respect to "personal and advertising injury," a covered offense. *All damages* that arise from the *same act … or general conditions* are considered to arise out of the *same "occurrence," regardless of* [i] *the frequency* [ii] *or repetition thereof … or* [iii] *the number of claimants*.

A0258 (emphasis added). Construing this definition "as a whole," *AT&T*, 918 A.2d at 1108, and giving meaning and effect to each clause as required, *see Murdock*, 248

[redacted]

A.3d at 905, all damages Hertz incurred as a result of the false arrest claims arising from its theft-prevention policies and practices are contractually deemed to arise from one "occurrence."

The first sentence of the "occurrence" definition identifies the *type* of conduct that constitutes an "occurrence": it states that, for purposes of the "personal and advertising injury" coverage at issue, "occurrence" means "a covered offense." A0258. The Policies in turn define "personal and advertising injury" to mean, in relevant part, "injury, including consequential 'bodily injury', arising out of one or more of the following offenses: 1. false arrest, detention or imprisonment." *Id.* In other words, "false arrest, detention or imprisonment" (not any individual *act* thereof) is a separately enumerated *category* of covered "offense," much as "fraud" or "embezzlement" might be a type of covered employee conduct in a corporate crime or fidelity policy.[5]

Because it is undisputed that the underlying claims alleged false arrest ("a covered offense"), the parties agree that there is an "occurrence." The question is whether "all damages" arising from the false arrest claims, given their common underlying alleged cause (Hertz's theft-prevention policies and practices, including vehicle theft reports pursuant thereto), must be aggregated into a *single*

[5] The policies also identify "2. malicious prosecution" (and not any individual *act* thereof) as a second enumerated category of covered "offense." A0258.

[redacted]

"occurrence," or whether, as Insurers contend, each *act* of false arrest and the resulting damages must be treated as a separate "occurrence."

The second sentence of the "occurrence" definition (the Deemer Clause) expressly repudiates Insurers' (and the Superior Court's) interpretation, as does controlling Delaware law. The Deemer Clause provides that "[a]ll damages" (without limitation) that "arise" from "the same act" <u>or</u> the "same … general conditions" shall be "considered" (i.e., contractually deemed) "to arise out of the same 'occurrence'"—"*regardless of* [i] the frequency or [ii] repetition thereof … or [iii] the number of claimants" (again, without limitation). *Id.* Thus, whatever one might otherwise contend upon reading the first sentence of the "occurrence" definition alone, the Deemer Clause mandates that *all* damages attributable to a covered offense that arise from a common cause—specifically, the same set of "general conditions" or "act"—be aggregated and considered to arise out of "the same" (i.e., one) "occurrence."

Moreover, the Deemer Clause is drafted in particularly broad causal terms. The clause provides, in part, that "[a]ll damages that *arise from* the same act … or general conditions are considered to *arise out of* the same 'occurrence.'" *Id.* (emphasis added). Under Delaware law, when used in a coverage-granting provision like this one, the phrase "arising out of" is "broadly construed" to require only "some meaningful linkage"—i.e., merely "some causal connection to the injuries

[redacted]

suffered"—not "proximate caus[ation]." *Pac. Ins. Co. v. Liberty Mut. Ins. Co.*, 956 A.2d 1246, 1256-57 & n.42 (Del. 2008) (citation omitted).[6] The "damages" at issue therefore need only bear "some meaningful linkage" to a common "act" or "general conditions," which likewise need only bear "some meaningful linkage" to the "covered offense" of false arrest, for "*all*" such damages to be aggregated and contractually "considered" the result of a single "occurrence."

Additionally, the Deemer Clause requires aggregation of all damages arising from a common "act" or set of "general conditions … regardless of [i] the *frequency* or [ii] *repetition* thereof … or [iii] the *number of claimants*." Those three "aggregators" further exude breadth. The "Repetition Aggregator" confirms that such damages must be aggregated even if they arise from multiple, different (i.e., repeated) incidents or iterations of the same "act" or the same "general conditions." The "Frequency Aggregator"—which must mean something different from the Repetition Aggregator to avoid being superfluous, *see Murdock*, 248 A.3d at 905—confirms that time and interval are irrelevant: aggregation is required even if the act or conditions at issue occur frequently (or infrequently) over an extended period of time. And the "Number-of-Claimants Aggregator" confirms that aggregation is

[6] While the Deemer Clause uses both "arise from" and "arise out of," in "the insurance context courts appear to be unanimous in interpreting the phrase 'arising out of' synonymously with the term 'arising from.'" *Penn-America Ins. Co. v. Lavigne*, 617 F.3d 82, 87 (1st Cir. 2010) (citation omitted).

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required even if the act or conditions at issue allegedly cause injury to many different claimants.

In fact, Delaware law would require the same claim-aggregating result even if the Policies *omitted* the Deemer Clause. As this Court explained in *Stonewall*, the number of "occurrences" in an occurrence-based GL policy is determined based on "the underlying circumstances" or "cause" of the injury or damages, *not* on the "individual accidents" that result. 996 A.2d at 1258. Thus, a single underlying cause will implicate "a single occurrence even though the injuries may be widespread in both time and place and may affect a multitude of individuals." *Id.* at 1257.

Stated otherwise, Delaware is a "cause" test jurisdiction, in which insurance law generally—like the Deemer Clause specifically—looks to "the original cause," rather than the injurious "effects" thereof, in "determining the number of occurrences in liability insurance coverage cases." *E.I. du Pont de Nemours & Co. v. Stonewall Ins. Co.*, 2009 WL 1915212, at *4 (Del. Super. Jan. 12, 2009), *aff'd*, 996 A.2d 1254 (Del. 2010); *Stonewall*, 996 A.2d at 1258 (noting that "the motion judge here correctly identified and applied the cause test" and rejecting insurer's reliance on cases that "did not apply the cause test"). Consistent with this "commonly accepted" background principle, *Stonewall*, 996 A.2d at 1257, Delaware courts have found "one occurrence pursuant to the 'cause' test" in policies "*without* a 'deemer clause,'" even where "the alleged injuries [were] widespread in time and

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geography," *Valley Forge Ins. Co. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 2012 WL 1432524, at *9 nn.107, 109 (Del. Super. Mar. 15, 2012) (emphasis added) (citation omitted). And Delaware is far from alone in applying this test: "most courts" around the country "have adopted the 'cause' test for determining the number of occurrences." *Stonewall*, 2009 WL 1915212, at *4 & n.7 (collecting cases).

Here, the underlying claimants alleged "systemic" deficiencies in Hertz's theft-prevention policies and practices, based on alleged flaws embedded in or widespread failures to comply with corporate theft-prevention policy W7-02. *See supra* at 11-12. These systemic deficiencies include allegedly requiring that "theft reports be filed ***before*** the customer is charged," *see* A0537 (discussing W7-02(D)); "routine and systemic mass reporting" of rental car theft "without verification or investigation" as required by W7-02(a)(17) and (a)(4), *see* A0517, A0538; and regular "destruction of rental information" in violation of records preservation requirements in W7-02(a)(19), *see* A0818. In turn, "[t]hese flaws with W7-02 and Hertz's related policies and procedures have" allegedly "led to the [claimants] being wrongfully reported to the police, and wrongfully detained, arrested, imprisoned, and prosecuted." A0538.

Hertz's liability arising from these claims falls squarely within the damages aggregation required by the Deemer Clause and settled Delaware law. Hertz seeks coverage for claims of false arrest (a "covered offense") that "arise out of" Hertz's

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allegedly faulty theft-prevention policies and practices ("the same … general conditions") and out of the same, frequently repeated act of reporting a potential theft to law enforcement officials pursuant to those policies and practices, yielding false arrests ("the same act"). A0258. Thus, "all damages" from these claims "are considered" to "arise out of the same 'occurrence,'" *regardless* of (i) the "repetition" of the challenged corporate policies and practices and theft reports pursuant thereto, causing arrests, (ii) the "frequency" with which those policies and practices, reports, and ultimately arrests recurred over time, or (iii) the "number of claimants" seeking relief. *Id.* And this result is the same one Delaware law would require even absent the Deemer Clause, because under the cause test, all damages flowing from the common "underlying circumstances" of Hertz's corporate policies and procedures are "deemed" to arise from "a single occurrence even though the injuries may be widespread in both time and place and may affect a multitude of individuals." *Stonewall*, 996 A.2d at 1257-58; *Valley Forge*, 2012 WL 1432524, at *7.

b) The Parties' Reasonable Expectations Require Aggregation of the Damages at Issue Into a Single "Occurrence."

Reading the Policies to compel aggregation of "all damages" arising from the claimants' false arrest claims also harmonizes the "occurrence" definition with the "reasonable expectations" of the parties and background principles of Delaware insurance law. *See Murdock*, 248 A.3d at 906 ("Insurance contracts should be

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interpreted as providing broad coverage to align with the insured's reasonable expectations.").

First, the Policies have $10 million annual per-"occurrence" retentions. As this Court has recognized, a retention that high in a corporate insurance policy only makes commercial sense if the policy aggregates damages arising from a single source of corporate liability. Hence, in *Stonewall*, a case involving nearly a half-million claims alleging leaky plumbing systems, this Court rejected the insurers' effort to treat "each separate claim" as "its own separate occurrence" under a policy with a $50 million per-occurrence retention. 996 A.2d at 1258. Doing so would have precluded *any* coverage for even "trillion[s]" of dollars of losses just because the losses were spread across multiple claimants, even if they arose from the same underlying conduct—an "absurd" and "unacceptable result" that would have "deprive[d] [the corporate policyholder] of the protection for which it paid." *Id.*

Likewise here, if each individual false arrest were a separate "occurrence," Hertz's coverage, purchased to protect against corporate-level liabilities, would be essentially worthless. No matter how many false arrests its theft-prevention policies and practices might allegedly cause, Hertz would be entitled to nothing, because each individual arrestee's alleged injuries would never exceed the $10 million threshold. Neither Hertz nor its Insurers contracted for such "meaningless" coverage. *Id.*

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Second, because the Policies cover Hertz, coverage under the Policies must be linked to *Hertz's* conduct, not the conduct of *the police*. In identifying occurrences, Delaware "courts look to the cause of the claimed injuries with a focus on *the insured's conduct*." *Valley Forge*, 2012 WL 1432524, at *11 & n.124 (emphasis added); *Stonewall*, 2009 WL 1915212, at *12 ("The proper focus for insurance coverage purposes … is the underlying cause of the [claimed] damage, *from the point of view of the insured*.") (emphasis in original).

Hence, in *Stonewall*, this Court held that the insured's "production of an unsuitable product" (defective plumbing resin) constituted a single occurrence, and declined to consider "the specific means by which injury occurred" *after* the product was sold and dispersed. 996 A.2d at 1258. Similarly here, the number of occurrences must be determined based on *Hertz's* causative theft-prevention policies and practices, not on arrests that third-party police officers *thereafter* performed. After all, Hertz is not a police department needing protection from arrest liability; it is a company being sued for its corporate theft-prevention policies and practices that allegedly *caused* those arrests and for which it unquestionably purchased GL coverage.

2. Abundant Case Law Confirms that Hertz's Damages Arose from a Single "Occurrence."

Courts in Delaware and elsewhere have regularly deemed widespread damages arising from common policies or practices to arise from a single

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"occurrence" for liability insurance purposes—particularly (*but not only*) where, as here, the policy language expressly aggregates damages flowing from repeated "acts" or "general conditions" into one "occurrence."

For example, in *Appalachian*—"a seminal case on the issue of the number of occurrences in the liability insurance context," *Stonewall*, 2009 WL 1915212, at *6—the Third Circuit held that a wide-ranging set of employment policies that caused numerous discrimination claims (i.e., personal injury claims) constituted one "occurrence." *Appalachian*, 676 F.2d at 61. There, the relevant insurance policy defined "occurrence" as "[a]n accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury … during the policy period." *Id.* at 59 n.8. The policy also contained a "deemer" clause stating that "[a]ll such exposure to substantially the *same general conditions* existing at or emanating from one premises location *shall be deemed one occurrence*." *Id.* (emphasis added).[7]

The Third Circuit read the "occurrence" definition to implicate the "general rule" that "an occurrence is determined by the cause or causes of the resulting injury." *Id.* at 61. "Applying th[is] general rule," the court held that "there was but

[7] The Deemer Clause in Hertz's Policies is broader: it does not contain a "one premises" limitation, and it includes the Repetition, Frequency, and Number-of-Claimants Aggregators.

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one occurrence for purposes of policy coverage"—namely, the policyholder's "discriminatory employment policies," which caused all the underlying claims. *Id.* It was immaterial that "there were multiple injuries and that they were of different magnitudes" and timings because the policy "contemplate[d] that one occurrence may have multiple and disparate impacts on individuals and that injuries may extend over a period of time." *Id.*

The same result follows even more clearly here. Hertz's Policies not only "contemplate," but expressly *require* that "all damages" arising from "the same act" or "general conditions" be contractually "considered to arise out of the same 'occurrence'"—"*regardless of the frequency or repetition thereof, … or the number of claimants*." A0258 (emphasis added). As in *Appalachian*, "an occurrence is determined by the cause or causes of the resulting injury," even if that means an "occurrence may have multiple and disparate impacts on individuals and that injuries may extend over a period of time." 676 F.2d at 61.

This Court reached a similar "one-occurrence" result in *Stonewall*, which, like *Appalachian*, involved a "deemer" clause providing that "[a]ll such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence." *Stonewall*, 996 A.2d at 1257. The Court held that the clause implemented "the commonly accepted cause test," which holds that "where a single event, process or condition results in injuries, it will be deemed

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a single occurrence *even though* the injuries may be widespread in both time and place and may affect a multitude of individuals." *Id.* at 1257-58 (emphasis added; brackets omitted). *Stonewall* thus held that the mass "production and dispersal" of the defective product—the "underlying" cause of all claimants' injuries—constituted "a single 'occurrence,'" notwithstanding that the insured faced "469,000 plus liability claims" spanning several years of operations. *Id.*

Similarly, in *Valley Forge*, the Superior Court applied the cause test and held that the policyholder's "production and distribution of an unreasonably dangerous product" (allegedly flammable robes) "constitute[d] a single 'occurrence,'" notwithstanding that "the alleged injuries [we]re widespread in time and geography." 2012 WL 1432524, at *9-*10 & n.109. *Valley Forge* so held, even though the policy at issue *lacked* a deemer clause. *Id.* at *9 n.107. Likewise here, the underlying alleged cause of all Hertz's false arrest liabilities is Hertz's theft-prevention policies and practices. Under Delaware law, this common cause yields one "occurrence," notwithstanding that it led to hundreds of claims spanning multiple years.

In a footnote, the Superior Court below glossed over *Stonewall* and *Valley Forge*, noting that the policies there defined an "occurrence" as "an accident" or "a continuous or repeated exposure to conditions," whereas the Policies here define an "occurrence" as "a covered offense." Ex. A, at 17 n.69. But that is a distinction without a difference. Standing alone, the term "an accident" accommodates an

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aggregation of damages no more than the term "a covered offense." Further, the "occurrence" definition here does not stop with the term "covered offense" in the first sentence. Rather, as noted, the definition's second sentence—the Deemer Clause—*requires* aggregation of "all damages" arising from the "same act" or "general conditions," *regardless of* "the frequency and repetition thereof" or "the number of claimants." This Swiss Re language is facially broader and more explicit in requiring aggregation than the *Stonewall* and *Valley Forge* policies' references to "continuous or repeated exposure to conditions." *Stonewall*, 996 A.2d at 1257; *see also Valley Forge*, 2012 WL 1432524, at *2, *9 n.107. It is also more expansive than the *Stonewall* deemer clause, which lacks the three aggregators present in the Policies here. 996 A.2d at 1257. And, as noted, the *Valley Forge* court aggregated under the cause test even *absent* a deemer clause. 2012 WL 1432524, at *9 n.107.

Courts across the nation likewise have found a single "occurrence" in cases involving a series of related injurious acts—such as defamatory email campaigns,[8] a series of purportedly wrongful evictions,[9] and years-long embezzlement

[8] *E.g.*, *Farmers Ins. Exch. v. Hallaway*, 564 F.Supp.2d 1047, 1053-54 (D. Minn. 2008) ("defamatory e-mail scheme" constituted "one occurrence," under policy specifying that "[r]epeated or continuous exposure to the same general conditions is considered to be one occurrence").

[9] *E.g.*, *Lexington Ins. Co. v. St. Bernard Parish Gov't*, 548 F. App'x 176, 180 (5th Cir. 2013) ("multiple acts of condemnation and demolition" all subject to single retention applicable to individual "occurrence" or "series" of related occurrences,

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schemes.[10] Each of these cases involved multiple incidents or claimants, but one underlying and unifying cause. Their common theme is faithful judicial enforcement of broad "occurrence" definitions (often including deemer language) that aggregate multiple, dispersed injuries into a single "occurrence" where caused by a common set of policies or practices. Under this well-established law, as well as the express language of the Policies, "all damages" arising from Hertz's challenged theft-prevention policies and practices arise from one "occurrence."

3. The Decision Below Inserted Non-Existent Limitations into the Policy Language While Disregarding the Express Terms of the Deemer Clause.

The Superior Court concluded that "each arrest of [an] individual" constitutes a separate "occurrence." Ex. A, at 23. In so holding, the court impermissibly narrowed the policy language and negated the "occurrence" definition's aggregating Deemer Clause.

First, the Superior Court declared that, "[t]o aggregate damages as part of the same personal injury offense, the 'same act … or general conditions' must either *be*

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because acts "all resulted from [local] ordinance condemning those properties," and policies at issue "explicitly recognize[d] that acts can be related 'regardless of the frequency or repetition thereof'" or "the number of claimants").

[10] *E.g.*, *Reliance Ins. Co. v. Treasure Coast Travel Agency, Inc.*, 660 So.2d 1137, 1137 (Fla. Dist. Ct. App. 1995) ("'Occurrence' means all loss caused by, or involving, one or more 'employees,' whether the result of a single act or series of acts. Accordingly, although this employee's embezzlements occurred over a four year period, they constitute a single occurrence.").

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the covered offense or *comprise the covered offense*." *Id.* at 19 (emphasis added). The Policies simply do not include—and cannot bear—that limitation. The court thus erred in "[a]dding a limitation on coverage that [Insurers] failed to include." *Monzo*, 249 A.3d at 129; *see also Delmarva Health Plan, Inc. v. Aceto*, 750 A.2d 1213, 1214 (Del. Ch. 1999) (declining to insert unstated limitations into an insurance policy, because "where the policy limits coverage," it "does so explicitly").

Nothing in the "occurrence" definition specifically, or the policy language generally, equates an (aggregation-inducing) "act" or "general conditions" with the "covered offense." To the contrary, the words "act" and "offense" are different terms, with different meanings, serving different purposes in the "occurrence" definition. If Insurers had intended "act" and "offense" to have the same meaning, as the Superior Court concluded, they presumably would have used the same word. *See Lukk v. State Farm Mut. Auto. Ins. Co.*, 2014 WL 4247767, at *4 (Del. Super. Aug. 27, 2014) (use of "different words" in same policy definition reinforces that they bear "different meanings").

Read in context, "offense" refers to a category of covered conduct, whereas "act" refers to an action by the insured that was a cause of the offense. The Policies identify "1. false arrest, detention or imprisonment" as a category of "covered offense." And the Deemer Clause then mandates that the damages arising from any single or isolated "act" (or set of "general conditions") that causes a "covered

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offense" be aggregated with "all damages" arising from any other commission or iteration of "the same act" (or the same "general conditions"), "*regardless of* the frequency or repetition [of such act or conditions] … or the number of claimants."

Indeed, the Deemer Clause would have no meaning if, as the Superior Court concluded, its references to "act" and "general conditions" were synonymous or co-extensive with "a covered offense." On that reading, there would never be aggregation of damages, and the provision would be circular. Stated in the words of the Superior Court, if each "act" or set of "general conditions" effectuating "a covered offense" must "*either be … or comprise the covered offense*," then each such individual "act" or individual set of "general conditions" is the "covered offense" and, thus, a (separate) "occurrence." Substituting "occurrence" for the supposedly synonymous "act" and "general conditions," the "occurrence" definition would read:

> "Occurrence" means a covered offense. All damages that arise from the same ~~act … or general conditions~~ occurrence [i.e., covered offense] are considered to arise out of the same "occurrence," regardless of the frequency or repetition thereof … or the number of claimants.

That interpretation renders the Deemer Clause a meaningless "tautology," contrary to Delaware law. *See Coughlan v. NXP B.V.*, 2011 WL 5299491, at *11 n.84 (Del. Ch. Nov. 4, 2011).

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Second, Insurers' unduly narrow construction, which the Superior Court adopted, that aggregation is only required where *a single act* of arrest leads to multiple claimants ignores and negates critical language in the Deemer Clause, contrary to Delaware law. *Murdock*, 248 A.3d at 905. To be sure, the Superior Court's posited hypothetical—in which one arrest leads to claims from both the arrestee and distressed bystanders—offers *one* example of how the clause requires aggregation. Ex. A, at 19-20. But the court failed to recognize that the Deemer Clause aggregates damages not only "regardless of … the number of claimants," but also "regardless of the *frequency or repetition*" of the "act" or "general conditions" from which "all" of the claimed "damages" arise. On its face, this language forecloses *any* limitation on aggregation based on time, place, number of offending acts, duration (or repetition) of offending conditions, or number of claimants. The Deemer Clause thus expressly repudiates any suggestion that aggregation is limited to a single arrest scenario.

Third, the Superior Court's conclusion that aggregation is unwarranted because the false arrest claims ostensibly arise from an "amalgam of practices and policies at Hertz," *id.* at 19, disregards both (a) the Policies' aggregation of "all damages" arising from the same "*general conditions*" and (b) the underlying claimants' allegations.

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To start, the Deemer Clause does not require a *sole* or a *specific* liability-causing *condition*. Instead, the clause refers broadly to "*general conditions*," which can be frequently repeated and affect numerous claimants and still require aggregation. *See Stonewall*, 2009 WL 1915212, at *8 (emphasizing "use of the plural 'conditions' in the policy's unifying definitional provisions") (quotation marks and citation omitted).

Moreover, reading the number-of-occurrences analysis to turn on whether one or more corporate policies or practices is implicated violates this Court's express admonition to avoid "misguidedly" turning "the number-of-occurrences analysis into a number-of-conditions question." *Stonewall*, 996 A.2d at 1257. "Whether it was one condition or two" (or more) "is of no legal significance"; all that is required is a common set of underlying "general conditions." *Id.*

Further, the claimants' allegations themselves confirm that Hertz's theft-prevention policies and practices are not some incongruous "amalgam." Each underlying claim alleges flaws embedded in, or Hertz's systemic non-compliance with, an overarching general set of corporate policies—namely, "Hertz policy W7-02"—which "govern[ed] [Hertz's] theft reporting process" during the relevant period and purportedly led to each false arrest. A0683; *see also* A0538 ("W7-02 and Hertz's related policies and procedures have directly and proximately led to the Plaintiffs being wrongfully reported to the police, and wrongfully detained … and

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prosecuted."); A1167 (each claim included "commonalities" regarding "Hertz's policies and practices"); A1101 (each proof of claim "arise[s] from [Hertz's] systemically flawed theft reporting practices").

Hertz policy W7-02 and related policies and practices constitute "general conditions" warranting aggregation, as *Appalachian* confirms. There, the Third Circuit found a single "occurrence" arising from the policyholder's conduct under a set of allegedly discriminatory employment policies addressing multiple sub-issues: "hiring, promoting and compensating females," "pregnancy leave," and "disability benefits." *Appalachian*, 676 F.2d at 58 & n.4. As the court explained, the "occurrence" definition, which referred to exposure to "general conditions," confirmed that the "one occurrence" of allegedly wrongful corporate policies may implicate multiple, "disparate impacts" of "different magnitudes." *Id.* at 61. A different result here would disregard the Policies' "*general* conditions" language, and ignore the reality that corporate mass torts often involve an overarching set of challenged corporate policies rather than one isolated corporate procedure.

Fourth, the Superior Court erred in concluding that "Hertz's characterizations of its allegedly faulty and system-wide reporting issues as the single proximate cause to each [underlying] claim ignores the intervening acts and distinct circumstances surrounding each arrest of the individual." Ex. A, at 23. *Hertz* did not "characterize" its corporate policies and practices as the "proximate cause" of the claimants' false

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arrest; rather, *the claimants* did, in the underlying claims that Hertz settled. *E.g.*, A0538. And the Superior Court's focus on the circumstances particular to individual arrests gets Delaware law backward: in "occurrence"-based policies, coverage turns on "the *underlying* circumstances (or occurrences)" causing the arrests, not (as Insurers urge) on the "individual" incidents of arrest that result. *Stonewall*, 996 A.2d at 1258 (emphasis added).

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II. The "Occurrence" Triggers the Policies Because It Was "Committed During" Each Policy Period at Issue.

A. Question Presented

Whether each of the Policies at issue is triggered, and thus, covers Hertz for "all damages" it has incurred as a result of the "occurrence" in excess of the annual per-"occurrence" retentions and up to each policy's per-"occurrence" limit, because the "occurrence" was "committed during the 'policy period.'" Hertz preserved this issue for appeal by raising it below in, among other places, its summary judgment motion. A0189, A0216-20.

B. Scope of Review

"Proper construction of the policy language is a question of law that [this Court] review[s] de novo." *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 489 (Del. 2001). This Court construes an insurance policy "as a whole," interpreting all ambiguities "most strongly" against the insurer and "as providing broad coverage to align with the insured's reasonable expectations." *Murdock*, 248 A.3d at 905-06.

C. Merits of Argument

1. Each Policy Covers "All Damages" Arising Out of the Single "Occurrence" at Issue.

Coverage for "personal and advertising injury" is triggered under the Policies if the "occurrence" was "committed during the policy period":

> We will pay on behalf of [Hertz] those sums in excess of the 'retained limit' [i.e., the annual $10 million retention] that [Hertz] becomes legally obligated to pay as damages by

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> reason of liability imposed by law because of … 'personal and advertising injury' … caused by an 'occurrence' that takes place in the 'coverage territory' [i.e., "anywhere in the world" except where insurance is prohibited] arising out of [Hertz's] business, *but only if the 'occurrence' was committed during the 'policy period.'*"

A0240 (emphasis added). To be clear, the Policies do *not* say that they cover only "those sums" that Hertz becomes obligated to pay as damages *attributable to the specific arrests committed during the "policy period."* Rather, just as the "occurrence" definition aggregates "all damages" into a single "occurrence," the Policies' applicable insuring agreement treats Hertz's damages holistically. It requires the insurer to pay "those sums [Hertz] becomes legally obligated to pay as damages … because of … 'personal and advertising injury' … caused by an 'occurrence'"—i.e., all of Hertz's false-arrest damages exceeding the retention, up to the policy limit—provided that "the 'occurrence' *was committed* during the 'policy period.'"

There is no dispute that in each "policy period" from 2014 through 2016, the frequent and repeated "act" of a vehicle theft report under Hertz's policies and practices resulted in a false arrest, A1097-164, or that the "general conditions" of Hertz's theft-prevention policies and practices remained continuously in place, A0539. And as explained in Part I above, "all damages" for "a covered offense" (including false arrest) arising from the same underlying "act" or "general

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conditions" are contractually aggregated into a single "occurrence." Accordingly, the single damages-aggregating "occurrence" at issue "was committed," repeatedly and continuously, between 2014 and 2016, triggering each policy's obligation to indemnify (up to its limits) "those sums" Hertz became obligated to pay "as damages" because of that "occurrence"—namely, "all" of Hertz's [redacted] in false-arrest settlement "damages."[11]

Under the policy language, there is no basis for limiting Hertz's coverage, or a given Insurer's obligation, to less than "all damages" within the policy's limit. "*[A]ll* means *all*." *Eagle Force Holdings, LLC v. Campbell*, 187 A.3d 1209, 1233 (Del. 2018). Moreover, the Deemer Clause's three aggregators foreclose disaggregation of the damages arising out of the single "occurrence" at issue based on different theft reports, arrests, or claimants. *See supra* at 22-23.

This understanding is compelled by the policy text. But it also happens to align with Delaware insurance law. In interpreting "occurrence"-based policies, this Court has consistently required an insurer to indemnify its insured for all damages, up to the policy limits, attributable to the policy-triggering "occurrence" in question—even as to injuries or damages occurring in part outside the policy period,

[11] The Policies apply equally to damages determined by settlement as to damages determined by judgment. A0255.

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or resulting in part from a cause commencing before the policy period, and even in the absence of a deemer clause.

For instance, in *Hercules*, this Court held (consistent with similar trigger decisions by courts nationwide) that, in connection with "a continuing occurrence" that occurred partly within and partly outside the policy periods at issue, the insured "is entitled to coverage for damages occurring after the insurer's time on the risk once a policy has been triggered" by that occurrence. 784 A.2d at 494. The Court therefore concluded that insurers whose policies were in effect during an ongoing and "long-term gradual pollution" process were "jointly and severally" liable for all damages "arising out of [that] continuing occurrence (subject … to the policy limits)." *Id.* at 489, 491, 494.

Similarly, in construing an "occurrence"-based policy in *Stonewall*, this Court held that each insurer is "wholly liable for damages that exceed the [policyholder's retention] and that occurred over multiple years (up to the limits of each individual policy)." 996 A.2d at 1259. The Court cited as an "example" a defective plumbing system "installed in 1983 and removed in 1985," explaining that "all insurers from 1983-1985 are jointly and severally liable for the covered damage that occurred over the three year time period"—i.e., even the 1985 insurers were liable for *all* of the insured's unreimbursed damages at issue, including those potentially attributable to prior years. *Id*.

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Likewise, in *Valley Forge*, the Superior Court held that an insurer that issued an "occurrence"-based policy was responsible for indemnifying "Robe Claims" challenging the insured's continuous distribution of flammable robes, "up to" the applicable coverage limit, notwithstanding that certain of the claims alleged robe-related deaths that transpired in 2005 and 2007 (i.e., before the 2008-2009 policy period in that case). 2012 WL 1432524, at *2-5, *11.

Here, too, Hertz is entitled to complete indemnification. Each Insurer is liable for "all damages" that Hertz must pay (i.e., for "those sums" that Hertz must pay "as damages") arising out of the single, continuing, coverage-triggering "occurrence" at issue, regardless of the frequency or repetition of the causal underlying act or general conditions, or the number of claimants affected by the "occurrence."

2. The Superior Court Erred in Holding that Each Policy Only Covers Damages from Individual Arrests During the Policy Period.

The Superior Court's conclusion that each policy covers only damages arising out of the particular false arrests occurring during the policy period conflicts with the policy language in several key respects.

First, the court's holding depended on its erroneous conclusion that each arrest is its own separate, coverage-triggering "occurrence." As explained in Part I above, that interpretation renders the Deemer Clause meaningless and ignores Delaware law. The "occurrence" definition does not limit an "occurrence" to each

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individual act of false arrest; it does the opposite. It dictates that "[a]ll damages" arising from Hertz's allegedly faulty theft-prevention policies and practices (the "same … general conditions") and ensuing theft reports to law enforcement, resulting in false arrests ("the same act") must be "considered" to arise from one, common "occurrence," irrespective of when, how many times, or to how many individuals those corporate policies and practices are applied. Thus, each individual arrest is not a separate "occurrence" within the meaning of the "personal and advertising injury" coverage grant. Instead, all of Hertz's false arrest damages are part of the same, continuing, multi-year "occurrence."

Second, the Superior Court's suggestion that coverage only applies when "the 'occurrence' first arise[s]," *see* Ex. A, at 18, once again "add[s] a limitation on coverage that [Insurers] failed to include." *Monzo*, 249 A.3d at 129; *see also Delmarva*, 750 A.2d at 1214. Nothing in the Policies restricts the scope of Hertz's coverage to the moment in time when the occurrence "first" arises.

Nor does *Appalachian*, on which the Superior Court partially relied on this issue, establish otherwise. *See* Ex. A, at 18. *Appalachian*'s holding that the policy there was triggered when injury first "manifested"—i.e., when the allegedly discriminatory corporate policies were instituted—was based on the specific policy language at issue in that case, which embedded within the "occurrence" definition a requirement of "*personal injury* … during the policy period." 676 F.2d at 59 n.8,

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62-63 (emphasis added). By contrast, Hertz's Policies require that, and only that, the causal "occurrence" *giving rise to* the covered "personal and advertising injury" be committed during the policy period, with "occurrence" defined to mean a "covered offense" (together with the aggregating Deemer Clause)—*not* in terms of "injury." Thus, while *Appalachian* is instructive for its guidance on the number of "occurrences," the textual basis present in *Appalachian* for limiting coverage to the initial policy period is expressly absent here. *See Emmons*, 697 A.2d at 745 ("an insurance policy's coverage obligation is prescribed by the language of the policy").

Third, the Superior Court failed to appreciate the fundamental proposition of insurance law that "the event which *triggers* coverage does not define the *scope* of coverage." *California Pacific Homes, Inc. v. Scottsdale Ins. Co.*, 83 Cal. Rptr. 2d 328, 332 (Cal. App. 1999) (emphasis added). This Court's decisions in *Stonewall* and *Hercules* illustrate this critical distinction: the Court held that the *trigger* of coverage in those cases was the happening during the policy period of a causal incident (the distribution of a faulty product or environmental contamination), whereas the *scope* of coverage extended to all damages for the continuing product-liability or environmental-contamination "occurrence" as a whole.

Here, each of the Policies has been *triggered* by the fact that the ongoing "occurrence" at issue "was committed during the policy period"—i.e., the fact that specific false arrests arising from Hertz's theft-prevention policies and practices took

[redacted]

place during each policy period. Yet the *scope* of coverage under each policy and its respective policy period expressly extends to *all* damages arising from the "occurrence" as a whole. *See Stonewall*, 996 A.2d at 1259 (each insurer "is wholly liable for damages that exceed the [retention] and that occurred over multiple years"); *Hercules*, 784 A.2d at 489, 494 (insured "is entitled to coverage for damages occurring after the insurer's time on the risk once a policy has been triggered").

[redacted]

CONCLUSION

Hertz respectfully requests that this Court reverse the Superior Court's rulings and order that judgment be entered for Hertz and against Insurers, declaring that (1) all damages that Hertz has incurred arising from the false arrest claims at issue (approximately [redacted]) are contractually considered to arise out of a single "occurrence" under the Policies, and thus, are subject to a single $10 million per-"occurrence" retention, and (2) each of the Policies in effect during the "occurrence" (specifically, each of the 2014-2016 policies at issue) is triggered, such that each Insurer is obligated to cover Hertz for "all" damages arising from the single "occurrence" at issue—subject to one $10 million per-"occurrence" retention—up to its respective policy limits.

[redacted]

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