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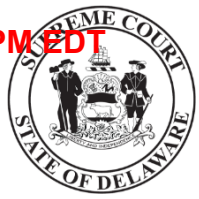

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ACE AMERICAN INSURANCE COMPANY, *et al.*, *Defendants—Below, Appellants,* v. RITE AID CORPORATION, *et al.*, *Plaintiffs—Below, Appellees.*	No. 339, 2020 Court Below: Superior Court of the State of Delaware C.A. No.: N19C-04-150 EMD [CCLD]

CORRECTED RITE AID APPELLEES' ANSWERING BRIEF ON APPEAL

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NATURE OF PROCEEDINGS

This interlocutory appeal concerns whether Chubb has a duty to defend Rite Aid in suits alleging Rite Aid acted negligently in distributing and dispensing prescription opioids, resulting in damages claimed by governmental entities, including costs of medical care for opioid addicted individuals and for overdose deaths ("Opioid Lawsuits"). This appeal also concerns whether the Opioid Lawsuits arise from one occurrence, because the 2015 Chubb Policy ("Policy") required Rite Aid to satisfy a $3,000,000 per-occurrence retention before Chubb had to defend.

These are insurance policy interpretation issues. Under applicable law, the sole "facts" considered to resolve these issues are the policy terms and the underlying Opioid Lawsuit complaints. Only plaintiffs' allegations matter—even if they are groundless or contestable.

Rite Aid filed this action after Chubb denied its policy obligations. Rite Aid moved for partial summary judgment on Chubb's duty to defend the "Track One" bellwether Opioid Lawsuits ("Bellwether suits") and all suits alleging similar and consistent claims. Chubb filed a cross-motion that it owed no policy obligations. On September 22, 2020, the Superior Court granted Rite Aid's motion and denied Chubb's. Chubb appealed.

SUMMARY OF ARGUMENT

All four issues Chubb raises concern its duty to defend. Under that duty, if a complaint's allegations potentially fall within coverage, Chubb must defend. Similarly, allegations of a sole proximate cause equate to one occurrence. Here, the Opioid Lawsuits allege potentially covered claims from one occurrence—improper distribution and dispensing of opioids.

The Insureds' Answer to Chubb's Summary of Arguments on Appeal

1. Denied. The Policy covers "damages" "because of" "personal injury," meaning "bodily injury," and promises Chubb will "defend the insured against any 'suit' seeking those damages." It expressly "include[s]," within the meaning of "damages" "because of" "bodily injury," damages claimed by an "organization" for "care" and "death" resulting from "bodily injury." The Bellwether suits expressly seek such damages. Chubb's Policy lacks any language precluding "non-derivative," "economic" damages because of bodily injury. Chubb ignores Pennsylvania and Delaware authority, including precedent holding that governmental damages for abating third-party harm are covered.

2. Denied. The Policy applies when "any" "person['s]" injury (not only the first person's injury) from an occurrence takes place during the policy period. Additionally, the Bellwether suits—in the duty to defend context—allege "latent" injuries supporting the multiple, or continuous, trigger application under this

Policy's language. Most importantly, under any test—including Chubb's "first manifestation of first injury" theory—the Bellwether suits allege bodily injury "potentially" during the policy period.

3. Denied. The Bellwether suits do not unconditionally allege any Rite Aid prior knowledge. Additionally, the Policy only precludes coverage for particular bodily injuries known before the policy period, not other injuries. Finally, the Policy only applies to bodily injury caused by a Rite Aid "occurrence." General awareness of bodily injury due to others' misconduct is not "prior knowledge" of bodily injury to which the Policy applies.

4. Denied. The Bellwether suits allege one proximate cause and, thus, one occurrence. Accordingly, by paying more than $3,000,000 defending those suits well before filing its motion, Rite Aid exhausted the Policy's per-occurrence retention. Chubb generated no dispute of material fact that Opioid Lawsuits similarly alleging improper distribution and dispensing of opioids allege the same occurrence. The court properly exercised its discretion in so declaring.

STATEMENT OF FACTS

Rite Aid has been sued in hundreds of lawsuits claiming damages for, *inter alia*, the costs of individuals' medical care and deaths from Rite Aid's distribution and dispensing of opioids. B3-4. Most of those suits have been, or will be, consolidated into the multidistrict litigation action, *In re: Nat'l Prescription Opiate Litig.*, No. 17-md-2804 (N.D. Ohio) ("MDL"). *Id.* In April 2018, three MDL suits—*Summit County, Cuyahoga County*, and *Cleveland*—were designated "Track One" bellwether suits and Rite Aid became a defendant. B6-7. Rite Aid has paid millions of dollars to defend the Bellwether suits. B9-12.

The Bellwether suits allege negligence, common law public nuisance, and other claims against opioid "supply chain" entities (including Rite Aid) based on their alleged failure to prevent diversion and oversupply of opioids. Op. at 9; A147; A492. Rite Aid is named as a "National Retail Pharmacy," a group of defendants that are a subset of "Distributor Defendants," but that only distributed opioids to (and dispensed opioids from) their own pharmacies. A170, A175; A514, A519. The suits allege that Distributor Defendants' actions and inaction caused a "public health epidemic" of "addiction, abuse, overdose and death," proximately causing Counties' "costly responses" including emergency services, medical care, and morgue operations. Op. at 9; A149-50, A362; A495-96, A704.

The suits allege the pharmacies "knew or reasonably should have known" that their actions and omissions were causing diversion of opioids, citizens' injuries and deaths, and the Counties' resulting damages for responding to those harms. Op. at 14-15; A149-50, A299, A338, A362-63; A495-96, A647, A686-87, A704. The negligence counts allege that:

- Defendants lacked adequate controls in "distributing[] and selling opioids" leading to illicit diversion;
- "Defendants had control over their conduct in Plaintiffs' communities" by "control[ing] the system they developed to prevent diversion";
- "As a **direct** and **proximate result of Defendants' negligence**," Plaintiffs "have suffered … economic damages including … significant expenses for … emergency, health, … and other services";
- "Defendants' misconduct is "**ongoing** and persistent"; and
- Defendants' conduct "does **not** concern a **discrete event** or discrete emergency."

Op. at 9-10 (emphases added); A457-58, A461; A824-26, A828-29. The common law public nuisance counts depend on the same allegations. A451, A453-54; A819-22.

Rite Aid's dispositive motions in the Bellwether suits were denied. But no trial against Rite Aid has commenced, nor has Rite Aid settled any suit.

In April 2018, Rite Aid began tendering the Opioid Lawsuits to its insurers, including under the Policy. B4. The Policy's insuring agreement provides that

upon Rite Aid's payment of a $3,000,000 per-occurrence "Retained Limit," Chubb will "pay those sums that the insured becomes legally obligated to pay as damages because of 'personal injury' or 'property damage' to which this insurance applies." B33. The Policy states "[d]amages because of 'personal injury' include damages claimed by any … organization for care, loss of services or death resulting at any time from the 'personal injury.'" B34. Chubb also promises to "defend the insured against any 'suit' seeking those damages." B33.

The Policy "applies" to "personal injury" that (i) "occurs during the policy period" (including injury that continues thereafter), and (ii) "is caused by an 'occurrence.'" *Id.* "Personal injury" includes "bodily injury," defined as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." B46, B49. An "occurrence" is "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." B49.

Initially, Chubb equivocated about coverage, acknowledging that "the governmental plaintiffs claim they directly and foreseeably sustained economic damages related to provision of medical care for people of all ages, including infants born addicted to opioids, … and morgues." B185-86.[1] Chubb stated it had

[1] Chubb repeated this position in its responses to subsequent tenders because each Opioid Lawsuit makes "identical or substantially the same" claims and allegations. B203; B397-98; B405-06; B412.

no "current" obligation to defend and would not "unless and until" the "applicable retained limit or limits of underlying insurance" were exhausted. B184, B189.

But after Rite Aid advised Chubb that it exhausted the retention, B215, Chubb denied any obligations to defend suits brought by governmental entities or other third-party payors of medical care, asserting that, because these claimants "did not sustain any bodily injury" themselves, their claimed "damages" were not 'because of' or 'for' 'bodily injury,'" B393-94. This lawsuit followed.

In July 2019, Rite Aid moved for partial summary judgment seeking declarations that:

- the Bellwether suits and all similarly pled suits allege one occurrence under the Policy;
- they allege potentially covered claims under that Policy;
- the $3,000,000 per-occurrence retention was satisfied; and
- accordingly, Chubb had a duty to defend the Bellwether suits and all similar Opioid Lawsuits.

Op. at 19-20.

Rite Aid supported its motion with the affidavit of Ron Chima, its in-house counsel overseeing the opioid litigation, which attached the Policy, the Bellwether complaints, and Rite Aid and Chubb correspondence.

Before opposing Rite Aid's motion, though other discovery was denied, Chubb received all discovery it told the Superior Court it "needed" concerning

which Opioid Lawsuits Rite Aid contended arise from one occurrence and which allegations support that contention. B459, B523-25; B540-41; B545; B550-53.

ARGUMENT

I. THE BELLWETHER SUITS SEEK DAMAGES BECAUSE OF BODILY INJURY

A. Question Presented

Did the Superior Court correctly determine that the Bellwether suits seek damages because of bodily injury potentially covered under the Chubb Policies?

B. Standard of Review

Rulings on summary judgment and issues of contract interpretation are reviewed *de novo*. *See ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 68 (Del. 2011).

Although the parties agree that Pennsylvania law controls if there is a conflict, the Superior Court correctly determined that Pennsylvania and Delaware law do not materially differ on the issues adjudicated.

C. Merits of the Argument

Chubb broadly promised to cover Rite Aid's liability for "damages because of" bodily injury, including amounts "claimed by any … organization for care, loss of services or death resulting at any time from the 'personal injury,'" and to defend suits seeking to impose that liability. The Superior Court correctly found that the Bellwether suits implicate Chubb's defense obligation, because they allege that Rite Aid is (i) liable for "damages" (ii) "because of" bodily injuries suffered by opioid users, specifically the costs incurred by the Counties for medical care,

morgues, and other responses to citizens' opioid-related injuries. These Counties' allegations, taken as true, fall squarely within Chubb's insuring agreement and therefore implicate its duty to defend.

Chubb's response is to read its standard coverage language constrictively to preclude coverage of governments' "non-derivative," "economic" damages because they do not compensate injured individuals directly. Those distinctions are absent from Chubb's Policy and flout fundamental rules of contract interpretation. Indeed, **decades** of authority—including Pennsylvania and Delaware environmental coverage precedent—confirm coverage for governmental damages for abating harm to third parties.

1. The Duty to Defend Requires Chubb to Accept Even Groundless Claims as True and Challenge Plaintiffs' Claims Only in Rite Aid's Defense.

Chubb's duty to defend is "broader than its duty to indemnify" damages. *Am. and Foreign Ins. Co. v. Jerry's Sport Ctr., Inc.*, 2 A.3d 526, 540-41 (Pa. 2010) ("*Jerry's*") (citations omitted). "[T]he duty to defend is triggered 'if the factual allegations of the complaint on its face encompass an injury that is actually or **potentially** within the scope of the policy." *Erie Ins. Exch. v. Moore*, 228 A.3d 258, 265 (Pa. 2020) (citation omitted). This inquiry turns on the Bellwether complaints' "four corners," which must be "taken as true and liberally construed in favor of the insured." *Id.* at 261 n.2, 265.

If the policy terms are "ambiguous in the presently alleged factual context" or the complaints' allegations "do not make crystal clear" that they "preclude the possibility" of covered damages, Chubb must defend. *Moore*, 228 A.3d at 265-67.

Importantly, Chubb must defend even if the Bellwether suits are "groundless." *Jerry's*, 2 A.3d at 541. Chubb's contentions as to the attenuated nature of the Counties' theories of causation and damages are to be made in defense of its insured, not to escape coverage. *Id.* at 545 (confirming insurer "protect[s] itself against potential indemnity exposure" by defending insured).

2. The Policy's Plain Language Covers the Counties' Alleged Damages—Including for Medical Care and Morgues—"Because Of" Injuries to Their Citizens.

a. "Because of" Means "Causally Related," In the Same Sense as in an Underlying Liability Suit.

The Policy's affirmative coverage grant promises payment for damages "because of"—**not** "for"—"personal injury," meaning "bodily injury." B33. It further promises that Chubb will defend Rite Aid "against any 'suit' seeking those damages." *Id.* Chubb apparently argues that the Policy's provision referencing "damages for" bodily injury concerning the suits that it will "not" defend, *id.*, means the Policy equates "because of" with "for," thus "because of" must be construed narrowly. Chubb has it backwards. "Because of" appears in the policy's coverage grant, which must be "interpreted as providing broad coverage to align with the insured's reasonable expectations." *RSUI Indem. Co. v. Murdock*, --- A.3

----, 2021 WL 803867, at *13 (Del. Mar. 3, 2021). "For" appears in a coverage limitation, which must be "construed narrowly in favor of coverage." *Mut. Benefit Ins. Co. v. Politsopoulos*, 115 A.3d 844, 852 n.6 (Pa. 2015). If the Policy equates "because of" with "for," it does so in the broadest sense, favoring coverage.

In the liability insurance context, the words "because of" "connote the same sort of causal, 'but for' meaning it carries in tort law," which "include[s] a broad array of consequential damages, not simply those that constitute a measure of the injury to the [person].'" *See Great Am. E&S Ins. Co. v. Power Cell, LLC*, 356 F. Supp. 3d 730, 743-44 (N.D. Ill. 2018) (citation omitted); *see also Mattiola Constr. Corp. v. Commercial Union Ins. Co.*, 2002 WL 434296, at *3 (Pa. Ct. C.P. Mar. 8, 2002) (finding the "most sensible reading of … 'damages because of'" covers economic damages "causally related to" injury defined by the policy) (citation omitted). The duty to defend thus applies if the complaint "alleges the requisite causal link" connecting injury to the damages claimed. *Imperial Cas. and Indem. Co. v. High Concrete Structures, Inc.*, 858 F.2d 128, 135-36 (3d Cir. 1988) (Pennsylvania law).

b. Damages "Because of" Bodily Injury Expressly Includes Damages Claimed for Costs of Others' Medical Care and Deaths.

The insuring agreement confirms Chubb's intended breadth of coverage by stating that "[d]amages **because of** 'personal injury' **include[s] damages claimed**

by <u>any</u> … <u>organization</u> for care, loss of services **or death** resulting at any time from the 'personal injury.'" B34 (emphases added). This makes explicit what is inherent: among "damages" necessarily "because of" bodily injury are costs of "care" for such injury and "death," even when shouldered by an "organization" that cannot sustain bodily injury. This language's "plain meaning" "is to provide coverage when a claim is made" by governments or other entities "seeking the costs of providing care" for individuals injured by the insured, "and for the loss of their services" or their deaths. *SIG Arms Inc. v. Emp'rs Ins. of Wausau*, 122 F. Supp. 2d 255, 260 & n.4 (D.N.H. 2000).

Chubb's unsupportable interpretation is itself "surplusage" (*cf.* Chubb Br. at 25-26) because it reads this clause as a narrowly tailored **expansion** of cabined "because of" coverage—reading "damages because of 'personal injury' **include[s]**" out of the Policy.

c. The Counties Seek Damages "Because of" Bodily Injuries to Their Citizens.

The Bellwether suits explicitly seek damages from Rite Aid "because of" bodily injury. As Chubb repeatedly acknowledged before litigation, the Counties allege that they "directly and foreseeably sustained economic damages related to provision of medical care … and morgues." Op. at 17-18. Rite Aid allegedly "proximately caused" those bodily injuries and the Counties' damages, which are "not the normal or typical burdens of government." *Id.* at 9, 14, 26. These

allegations self-evidently require "evidence" of "causation" linking citizens' bodily injuries to the Counties' damages. B421-23.

If the Counties can prove that requisite causal link to establish Rite Aid's liability for their costs of medical "care" and "death" because of opioid-related injuries (which Rite Aid disputes), then Chubb's coverage necessarily follows. Thus, for so long as plaintiffs' claims survive, Chubb must defend.

3. Decades of Precedent Refutes Chubb's Claim that Its Standard Language Cannot Cover Governments' "Economic" Damages Caused by Others' Injuries.

In the face of this policy language and canons of interpretation that require liberal construction and resolving doubts in favor of coverage, this Court should reject Chubb's effort, "untethered to any language in the policy," to constrict the coverage it promised. *Cincinnati Ins. Co. v. H.D. Smith, LLC*, 829 F.3d 771, 774 (7th Cir. 2016). Chubb maintains that "[u]nder the policy's language and structure, coverage applies only when the 'damages' sought are for or because of 'bodily injury' to the *plaintiff*," therefore Chubb "has no duty to defend because the Counties' complaints seek compensation for economic loss, not for bodily injury." Chubb Br. at 10-11. This is a false dichotomy.

Branding damages "economic" fails to contend with whether they are caused by bodily injury—the Policy's requirement for coverage. To illustrate, Ohio law (which governs the Counties' claims) regarding "economic loss" tracks the

Policy's language and confirms Chubb's clear error: "economic loss" **includes** "expenditures for medical care or treatment … [and] [a]ny other expenditures as a result of an injury, death, or loss to person." Op. at 26-27 (quoting Ohio Rev. Code Ann. § 2307.011(C)).

Indeed, courts historically have recognized that the "language and structure" of general liability insurance policies like Chubb's cover governmental "economic losses" because of harm to others. For example, governmental agencies traditionally have sought reimbursement for environmental response costs due to **property damage** to other parties, much as the Counties here seek recovery for their expenditures arising from opioid-inflicted **bodily injuries** to other parties. Such claims by environmental authorities are covered because they seek damages "because of … property damage," whether or not it was the **government's** property that suffered that damage. *See* 1 ENVTL. INS. LITIG.: L. AND PRAC. § 4:12 (2020) (collecting cases and noting futility of insurer arguments "[i]n the early years of environmental coverage litigation" that such response costs are uninsured "economic injury.").

Courts in Delaware and Pennsylvania have adhered to this principle, rejecting the exact argument Chubb advances here:

> The Insurers also contend that a government suit for response costs under CERCLA is not covered by the policies because the government did not suffer "property damage." … To trigger coverage under the policies, the

> Federal Government ... need not allege that it suffered property damage. Under the terms of the policy, the underlying claim need only require the insured "to pay damages *because of* … property damage."

New Castle Cnty. v. Hartford Acc. and Indem. Co., 673 F. Supp. 1359, 1367 (D. Del. 1987); *accord Harleysville Mut. Ins. Co., Inc. v. Sussex Cnty., Del.*, 831 F. Supp. 1111, 1122-23 (D. Del. 1993), *aff'd* 46 F.3d 1116 (3d Cir. 1994); *Consol. Rail Corp. v. Certain Underwriters at Lloyd's*, 1986 WL 6547, *4-5 & n.3 (E.D. Pa. June 5, 1986) ("The expenditures which Conrail has undertaken at the direction of the DER and EPA to clean up the chloroform spill … to protect the person and property of others are recoverable under the policy.") (applying *Leebov v. U.S. Fid. & Guar. Co.*, 165 A.2d 82 (Pa. 1960), and its progeny); *Sunoco, Inc. v. Illinois Nat'l Ins. Co.*, 2007 WL 127737, at *2-6, 11 (E.D. Pa. Jan. 11, 2007).

Decades of precedent bely Chubb's suggestion that the risk of such governmental claims seeking damages because of bodily injury or property damage to others is beyond underwriters' expectations. If Chubb thought decisions interpreting its policy language misstated its intent, then it could have "explicitly limited coverage to 'claims for damages incurred because of bodily injury to the plaintiff seeking damages,' but it did not." *Scottsdale Ins. Co. v. Nat'l Shooting Sports Found.*, 2000 WL 1029091, at *2 (5th Cir. July 11, 2000); *see also* Op. at 8 (Chubb failed to exclude pre-2018 coverage). Consequently, the Opioid Lawsuits remain potentially covered.

4. Chubb Cannot Distinguish Overwhelming Authority Applying Its Policy Language.

The environmental coverage decisions' rationale has also affirmed coverage for governmental claims for damages because of harms from firearms, lead paint, and, now, opioids. *See AmerisourceBergen Drug Corp. v. ACE Am. Ins. Co.*, 2020 W.V. Cir. LEXIS 3, at *19 (W. Va. Cir. Ct. Nov. 23, 2020) (collecting cases and finding duty to defend opioid lawsuit under Pennsylvania law).

With one discredited exception, the only cases to have addressed coverage for governmental claims from the opioid epidemic under Chubb's policy language have rejected Chubb's "economic loss" argument and found a duty to defend. *See H.D. Smith,* 829 F.3d at 774-75; *Acuity v. Masters Pharmaceutical, Inc.*, 2020 WL 3446652, at ¶¶17-30 (Ohio Ct. App. June 24, 2020), *appeal pending*, 159 N.E.3d 277 (Ohio 2020); *Giant Eagle, Inc. v. Am. Guar. and Liab. Ins. Co.*, --- F. Supp. 3d ----, 2020 WL 6565272, at *14-15 (W.D. Pa. Nov. 9, 2020) (finding duty to defend Bellwether suits under Pennsylvania law). The lone exception is bad law after *H.D. Smith*. *Compare Cincinnati Ins. Co. v. Richie Enters., LLC*, 2014 WL 3513211, at *3-5 (W.D. Ky. July 16, 2014) (relying extensively on *Medmarc Cas. Ins. Co. v. Avent America, Inc.*, 612 F.3d 607 (7th Cir. 2010)), *with H.D. Smith*, 829 F.3d at 774-75 (finding *Medmarc* "readily distinguishable" because "there was 'no claim of bodily injury in any form.'").

As *Acuity* put it, *Richie* and the few other trial court opinions from 2014 and 2015 that Chubb relies on (Chubb Br. at 21) represent "a web of case law that is either no longer good law, has been distinguished as relating to opioid cases, or has been declined to be followed." *Acuity*, 2020 WL 3446652, at ¶¶23-25; *see* Op. at 27-33.

Importantly, *H.D. Smith* and *Acuity* each found a duty to defend under policies like Chubb's that covered the insured's liability for "damages because of" bodily injury and explicitly included damages sought by any "organization for care, loss of services or death resulting at any time from the bodily injury" within its coverage grant. *H.D. Smith*, 829 F.3d at 773-74; *Acuity,* 2020 WL 3446652, at ¶¶17-30. These cases only confirm that Chubb's argument "ignores the explicit language" of its insuring agreement containing the same language. *SIG Arms*, 122 F. Supp. 2d at 260 (holding identical language compels defense of municipalities' suit for costs of caring for firearms injuries); *accord Scottsdale*, 2000 WL 1029091, at *2.

Rather than acknowledge that its agreement to defend suits seeking damages for others' "**care**" and "**death**" reaches Opioid Lawsuits that it agrees seek damages for "**medical care** … and **morgues**," Op. at 17-18, Chubb invokes disparate cases in "other contexts" to argue that "liability coverage" generally is inapplicable to "non-derivative economic-loss claims" even if they have some

attenuated connection to injuries, Chubb Br. at 13-19. Chubb's argument exaggerates the outer bounds of coverage under "damages because of" language for effect. More to the point, that periphery is irrelevant here because **Chubb's** "liability coverage" expressly covers the precise damages claimed in the Opioid Lawsuits. Other than the disfavored *Jerry's* trial court opinion, discussed *infra*, none of Chubb's "other" cases fit that bill because they do not involve suits seeking damages for costs of others' "care" or "death" subject to express policy language like Chubb's covering those exact damages.

Even when Chubb cites cases considering the plain words "damages because of," it repeatedly relies on inapposite authority. *See, e.g.*, *Health Care Indus. Liab. Ins. Program v. Momence Meadows Nursing Ctr., Inc.*, 566 F.3d 689, 694-95 (7th Cir. 2009) (noting injuries "need not be proven" for False Claims Act damages).

5. Chubb Ignores Pennsylvania Precedent Because It Is Fatal to Chubb's Argument.

Despite contending Pennsylvania law applies, the body of Chubb's argument omits **all** relevant Pennsylvania authority in lieu of the disfavored lower court decisions in *American and Foreign Insurance Co. v. Jerry's Sport Center, Inc.*, 2003 WL 25884676 (Pa. Ct. C.P. Feb. 25, 2003), *aff'd*, 852 A.2d 1241 (Pa. Super. Ct. 2004). Initially, Chubb's reliance on this trial court opinion and the unpublished, non-citable Superior Court decision affirming it is improper. 210 Pa. Code § 65.37(B). In a later proceeding in *Jerry's*, the Pennsylvania Supreme

Court labeled the decision "suspect," 2 A.3d at 531 n.4, and left no doubt it would find Chubb owes a duty to defend the Bellwether suits were the issue before it.

The *Jerry's* insured was a firearms "wholesaler-distributor" that had been sued by the NAACP for "the negligent creation of a public nuisance by virtue of the industry's failure to distribute firearms reasonably and safely." *Id.* at 529. Like the Counties here, the NAACP alleged the insured "caused bodily injury to their members" but expressly disavowed damages "to compensate individual members injured by defendants' actions." *Id.* Instead, the NAACP sought "monetary damages to establish a fund for the education, supervision and regulation of gun dealers." *Id.*

The policy at issue in *Jerry's* covered "damages because of 'bodily injury.'" *Id.* at 529 n.2. The insurer defended the NAACP suit but separately filed for declaratory relief that it owed no duty to defend. Just as Chubb urges here, the trial court found no duty to defend because the "education" fund remedy sought by the NAACP did not compensate anyone for their "physical condition." *Id.* at 531. The insurer then successfully recouped its costs of defending the suit from the policyholder in the trial court.

On the subsequent appeal of the recoupment issue, the Pennsylvania Supreme Court criticized the trial court's declaration ceasing the insurer's duty to defend as "suspect," but technically not "before [it] for review." *Id.* at 531 & n.4.

Nevertheless, the substance of the duty to defend ruling was presented to the Pennsylvania Supreme Court in the insurer's "first argument" supporting recoupment: that the NAACP suit had "never triggered its duty to defend" to begin with. *Id.* at 533.

The Pennsylvania Supreme Court rejected this argument because it "was immediately apparent … that the [NAACP] claim might potentially be covered," therefore a defense was owed. *Id.* 543 & n.15.

Chubb incorrectly dismisses the *Jerry's* analysis as "dicta." Chubb Br. at 18 n.3. "Where a decision rests on two or more grounds equally valid," none is "dictum." *Pa. Tpk. Comm'n v. Commonwealth*, 899 A.2d 1085, 1098 (Pa. 2006). The court's determination that the NAACP complaint was "potentially covered" was an independent basis for rejecting the insurer's recoupment claim and, thus, not dicta. Regardless, high court dicta is properly considered in assessing how that court would rule on an issue. *See, e.g.*, *Coco v. Vandergrift*, 611 A.2d 299, 301 (Pa. Super. Ct. 1992).

The Pennsylvania Supreme Court's analysis in *Jerry's* confirms that the Bellwether complaints allege "potentially covered" claims, triggering Chubb's duty to defend under Pennsylvania law. The court ratified that an organization's allegations of widespread injuries and deaths to others caused by a policyholder's purportedly negligent distribution of dangerous products, coupled with a "non-

derivative" demand for "monetary damages" to rectify and abate harm, are potentially covered as "damages because of 'bodily injury.'"

These findings apply equally to the Bellwether suits, so Chubb must defend.

II. THE BELLWETHER SUITS ALLEGE BODILY INJURY POTENTIALLY TAKING PLACE DURING THE POLICY PERIOD

A. Question Presented

Did the Superior Court correctly determine that the Bellwether suits allege bodily injury potentially taking place during the Policy's 2015 policy period?

B. Standard of Review

Review of all issues is *de novo*. *See supra* at 9.

C. Merits of the Argument

On this question, the Superior Court ruled for Rite Aid on two independent grounds: First, the Superior Court relied on Pennsylvania law that a multiple trigger applies in latent injury cases and recognized that the bodily injuries alleged in the Opioid Lawsuits include "injuries [that] may not manifest themselves until a considerable time after the initial exposure causing injury occurs." Op. at 39 (citation omitted). Second, the Superior Court relied on the Policy's plain language, which states that it applies to "a person['s]" bodily injury taking place during the policy period, to conclude that as long as certain persons' injuries from an occurrence took place during the policy period, coverage would be triggered. *Id.* at 39-40.

Most importantly, the Superior Court correctly concluded that the Bellwether suits do not specifically allege when any (much less every) person's bodily injuries allegedly caused by Rite Aid occurred. *Id.* at 39. Whether

plaintiffs prove Rite Aid injured anyone, much less when, is undetermined. Thus, Chubb must defend under any test—including Chubb's "first manifestation of first injury" theory.

1. The Policy Language as Applied to Opioid Lawsuit Allegations—Not a "First Manifestation Rule"—Controls.

Chubb relies on "Pennsylvania's 'first manifestation' trigger rule," Chubb Br. at 8, to argue that coverage applies under a policy in effect when the first of many bodily injuries caused by one occurrence manifests. But this argument is neither based on nor supported by the Policy's language, and the Policy—not an abstract "trigger rule"—applies.

The Policy "applies" to "bodily injury sustained by **a** person" during the policy period that also is "caused by an occurrence." B33, B46, B49 (insuring agreement; "personal injury," "bodily injury" definitions) (emphasis added). Because the Policy expressly "applies" to bodily injury on a person-by-person basis, if the insured caused "a" person's bodily injury that takes place in 2015, the Policy applies to that bodily injury, even if earlier injuries to other "person[s]" were caused by the same occurrence. *Seagrave Fire Apparatus, LLC v. CNA*, 2017 WL 2972887, at *4 (Pa. Ct. C.P. June 28, 2017) (finding "a person" language meant each firefighter's bodily injury allegedly caused by insured's negligence constituted distinct "bodily injury" for coverage purposes), *aff'd*, 2018 WL 1465154 (Pa. Super. Ct. Mar. 26, 2018), *appeal denied*, 195 A.3d 564 (Pa. 2018).

Buttressing this interpretation, the Policy expressly contemplates Chubb paying for claims involving bodily injuries caused by the **same** "occurrence" under the Policy **and** policies it issued for prior policy periods, stating that:

> the Each Occurrence Limit is the most we will pay for the damages under Coverage A because of **all** "personal injury" **arising out of any one** "occurrence." If one "occurrence" causes "bodily injury" … **during this policy period and during the policy period of** one or more **prior and/or future policy(ies)** that include(s) a commercial general liability coverage form issued to you by us, then this policy's Each Occurrence Limit will be reduced by the amount of each **payment made by us under the policy(ies) because of such "occurrence**."

B41 (emphases added). This "Limits of Insurance" provision ensures that if one occurrence causes bodily injuries during multiple policy periods (thus triggering them all), the combined recovery for judgments and settlements for that occurrence under **all** policies does not exceed one "Each Occurrence Limit."

This provision would be surplusage if, as Chubb suggests, one occurrence does **not** trigger multiple Chubb policies when it causes bodily injuries to different persons during different Chubb policy periods. Courts "do not permit" surplusage "if any reasonable meaning consistent with other parts can be given to it." *Clarke v. MMG Ins. Co.*, 100 A.3d 271, 276 (Pa. Super. Ct. 2014). "[I]f the court is 'forced to choose between two competing interpretations of an insurance policy," it is "bound, as a matter of law, to choose the interpretation" that "give[s] effect to all of the policy's language." *Id.* Chubb's construction fails to give meaning to the

Policy's "a person" and Limits of Insurance provisions, violating this interpretive canon.

Chubb does not ground its argument in policy language, and no case Chubb cites to support the proposition that only the very first manifestation of injury to **any** person from an **entire occurrence** can trigger coverage involves multiple persons' injuries and the "a person" and "Limits of Insurance" provisions. Nor do Chubb's cases involve underlying lawsuits alleging bodily injuries to multiple persons caused by multiple defendants without definitively alleging the timing of injuries caused by each defendant or attendant duty to defend issues.

The Pennsylvania Supreme Court's *St. John* decision was a "duty to indemnify" case—**after** the insurer defended—that turned on the trial court's determination of when the **singular** "property damage" at issue **actually** first manifested. *See Pennsylvania Nat'l Mut. Cas. Ins. Co. v. St. John*, 106 A.3d 1, 4, 13 (Pa. 2014) (concerning herd of cows constituting "property damage," not multiple persons' bodily injuries).

D'Auria is also inapplicable because it resolved an insurer's obligation to defend a doctor in a lawsuit by **one** patient that **unequivocally** alleged the doctor first injured the patient before the first policy period. *D'Auria v. Zurich Ins. Co.*, 507 A.2d 857, 859-60 (Pa. Super. Ct. 1986).

Neither case supports Chubb's theory that a "first manifestation of the first injury" trigger can override the Policy's language confirming that it, and Chubb policies covering other periods, applies if an occurrence causes multiple people bodily injury during multiple policy periods.

2. The Policy Language and Complaints' Injury Allegations Reinforce the Superior Court's Multiple Trigger Holding.

The Superior Court's multiple (or "continuous") trigger holding is equally well supported—particularly in the duty to defend context—by the Policy's language and the complaints' allegations.

The Policy's coverage expressly applies when an occurrence causes bodily injury before the policy period without the insured's knowledge, and that bodily injury continues "during" and "after the end of the policy period." B33-34 (Section I.1.b.-d.); *see also* INS. COVERAGE OF CONSTR. DISPUTES §6:50 (2d ed. 2020) (discussing this provision's intent to stop years-long continuous coverage triggering in year latent injury becomes known). The language recognizes that "bodily injury" to a person could trigger an earlier policy by "occurring" unknowingly during its policy period, and also trigger the Policy by continuing to "occur" and becoming known during its policy period. *See Johnson Matthey, Inc.*, 160 A.3d 285, 291-93 (Pa. Commw. Ct. 2017) (clarifying a latent continuous injury triggers all policy periods through date when injury manifests, consistent with policy language), *appeal quashed*, 188 A.3d 396 (Pa. 2018).

Chubb's argument that coverage requires injury first manifest during the policy period is refuted by the Policy language. Allegations that a harmed opioid user's injuries may not be discoverable until well after initial injurious opioid implicates the language. *See* Op. at 13-14, A179-80, A523 (describing allegations that opioid users develop tolerance and pain-resistance that can result in "progressively" higher doses that may lead to overdose, or withdrawal symptoms "after" opioid use stops).

3. The Bellwether Complaints Allege Bodily Injury Potentially Taking Place During 2015 Under Any Theory.

An insurer must defend a suit whenever its allegations "might or might not" fall within coverage. *Jerry's*, 2 A.3d at 541. "If coverage (indemnification) **depends upon the existence or nonexistence of undetermined facts outside the complaint**, until the claim is narrowed to one patently outside the policy coverage," the insurer must defend. *Stidham v. Millvale Sportsmen's Club,* 618 A.2d 945, 953-54 (Pa. Super. Ct. 1992) (emphasis added).

The Bellwether claims do not specifically allege (much less "prove") when, if ever, **each** defendant's alleged actions **actually** caused any bodily injuries. *Cf. St. John*, 106 A.3d at 13 (confirming trigger for indemnification involves "mixed issues of law and fact" requiring precise findings on timing of injuries insured caused). Because the complaints do not exclude the possibility that bodily injuries

allegedly caused by Rite Aid took place during the 2015 policy period, Chubb must defend them under any trigger theory.

As another court recently held in finding a duty to defend the Bellwether suits, whether the "first manifestation" theory applies is irrelevant "in the duty to defend context" because the Bellwether suits' allegations make it impossible to determine precisely which bodily injuries a particular distributor caused and when they took place. *Giant Eagle*, 2020 WL 656272, at *18.

These principles apply "even in an action that is groundless or likely to later be deemed not covered by the policy." *Babcock & Wilcox Co. v. Am. Nuclear Insurers*, 131 A.3d 455, 456 (Pa. 2015). To be clear, Rite Aid contends that the suits **are** groundless and has argued in its defense that the Counties cannot produce evidence of "**any** injury traced to any diversion from **any** suspicious order shipped by Rite Aid." B492 (emphases added).[2] This argument only reflects what is clear from the complaints: they do not pinpoint any specific bodily injury that Rite Aid caused, much less allege the specific timing of such injury.

As the duty to defend contemplates, Rite Aid may establish the Opioid Lawsuits are groundless because it never injured anyone. Alternatively, there may be judgments or settlements that are "deemed not covered by the [P]olicy" based on facts determined through trials or otherwise. *Babcock*, 131 A.3d at 456.

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[2] The motion was denied, leaving the contested causation issue for trial.

Presently, however, there are no judgments nor settlements, and plaintiffs' claims have not been "narrowed to one[s] patently outside" of coverage. *Stidham,* 618 A.2d at 953-54.

The Bellwether suits do not allege (much less prove) when any or all bodily injuries caused by Rite Aid occurred. This is true under either (i) Chubb's "first manifestation of first injury" theory, or (ii) the Policy's plain language that coverage applies if some persons' injuries took place (under either a manifestation or continuous trigger theory) during the policy period. Op. at 39-40. Accordingly, under each test, the suits allege bodily injury "potentially" during the policy period, thus, Chubb must defend them.

III. THE PRIOR KNOWLEDGE PROVISION DOES NOT RELIEVE CHUBB OF ITS DUTY TO DEFEND

A. Question Presented

Did the Superior Court correctly determine that the "prior knowledge" provision in the Policy does not relieve Chubb of its duty to defend?

B. Standard of Review

Review of all issues is *de novo*. *See supra* at 9.

C. Merits of the Argument

Chubb argues that the Policy's "prior knowledge" provision relieves it of its defense obligations. To support its argument, Chubb relies on (i) the Bellwether complaints' allegations and (ii) the assertion that, regardless of the allegations, Rite Aid "certainly" was "aware," before 2015, of opioid-related injuries.

Both arguments are meritless. The complaints leave open whether Rite Aid had knowledge of **any** injury it supposedly caused—they allege Rite Aid "knew **or** should have known"—and knowledge cannot be inferred from purported awareness of unidentified injuries that many other actors may have caused.

1. The Duty to Defend Permits No Unalleged "Inference" of Knowledge.

Again, Chubb must defend if a complaint alleges any "potentially" covered claim, even if the suit may later be found "groundless" or "not covered." *Babcock*, 131 A.3d at 456. The "allegations are to be 'taken as true and liberally construed

in favor of the insured,'" including when potential coverage turns on the insured's mental state. *Moore*, 228 A.3d at 265 (citation omitted). "[I]f any doubt or ambiguity exists, it must be resolved in favor of coverage." *Id.*

For example, in *Moore*, the Pennsylvania Supreme Court considered whether a complaint alleged conduct that would bar coverage under an "expected or intended" injury exclusion. The underlying complaint alleged that the insured intentionally shot his ex-wife and then shot her boyfriend "negligently" during a fight, before committing suicide. *Id.* at 266.

"[T]aken as true," these allegations "present[ed] a factual scenario that potentially comes within the definition of a covered 'occurrence'" to which the "exclusion for bodily injury 'expected or intended' by the insured does not apply." *Id.* The complaint "did not make crystal clear that [the insured] shot [the boyfriend] on purpose, or that he expected or intended to cause [the boyfriend's] bodily injuries." *Id.* And the court refused to "provide this inference." *Id.*

Here, the duty to defend is implicated unless the complaints make "crystal clear," without alternative, that Rite Aid had actual prior knowledge of all bodily injuries to which the Policy applies. The Policy states it "applies" to "personal injury," which is defined as including "bodily injury sustained by **a** person" that (i) took place "during the policy period"; and (ii) was "caused by an occurrence." B33, B46, B49 (emphasis added).

The Policy is inapplicable to "bodily injury" if the insured knew before the policy period that "such" person's bodily injury had begun to occur: "[I]f … [an] insured … knew, prior to the policy period, that **the** 'personal injury' … occurred, then any continuation, change or resumption of **such** 'personal injury' … during or after the policy period will be deemed to have been known prior to the policy period." B33 (emphases added). The Policy also states that a "[p]ersonal injury" is "deemed to have been known to have occurred at the earliest time when [an] insured … [b]ecomes aware … that 'personal injury' … has occurred or has begun to occur." B34.

The Bellwether complaints do not unconditionally allege any prior knowledge by Rite Aid. As to **all** alleged bodily injuries, the complaints allege Rite Aid "knew **or** reasonably **should have known**" its conduct would result in bodily injuries to the Counties' citizens. Op. at 14-15 (citations omitted) (emphases added).

Thus, the complaints do not make "crystal clear" that Rite Aid knew of any alleged bodily injuries. Instead, the complaints expressly acknowledge the possibility of bodily injury that Rite Aid "should have known" of but did not.

The complaints do not allege Rite Aid's definitive knowledge of bodily injury it caused, and a court "may not provide" this "inference." *Moore*, 228 A.3d

at 266. Chubb's prior knowledge argument should be rejected on these grounds alone.

2. The Policy Only Precludes Coverage for Particular Bodily Injuries Known Before the Policy Period.

The Policy "applies" to each **separate** person's bodily injury occurring during the policy period. B33, B46. The "prior knowledge" provision's reference to "the" or "such" bodily injury (or property damage) similarly "particularizes" it such that the claimed injury during the policy period "must be the same as the [prior] known [injury]." *Kaady v. Mid-Continent Cas. Co.*, 790 F.3d 995, 998-99 (9th Cir. 2015).

Thus, even if the complaints made "crystal clear" allegations that Rite Aid knew of some bodily injuries it caused before 2015, such allegations would not preclude coverage for other alleged bodily injuries to other persons taking place in 2015. *See Seagrave*, 2017 WL 2972887, at *4 ("[Insured's] knowledge of one firefighter's pre-Policies injury does not bar it from claiming coverage for any other firefighters' injuries").

These principles were applied in *Sheehan*, where the court found a prior knowledge provision barred coverage with respect to only **one** home out of a class of construction defect claims, because letters incorporated into the complaint showed pre-policy period notification of damage to only **that** home. *Westfield Ins. Co. v. Sheehan Const. Co., Inc.*, 580 F. Supp. 2d 701, 716 & n.9 (S.D. Ind. 2008).

Thus, even if the complaints specifically alleged that Rite Aid had knowledge of some persons' injuries before the policy period, the duty to defend would still be triggered.

3. General Awareness People Get Hurt Does Not Preclude Coverage.

Chubb ventures outside the complaints' four corners to insist that Rite Aid was aware that people overdosed on opioids before 2015 because "*everyone* was aware of the opioid crisis." Chubb Br. at 34. According to Chubb, vague awareness that bodily injury exists in the world before an insured purchases insurance means the Policy's "prior knowledge" provision precludes coverage for later claims involving a bodily injury category, "even if the insured was unaware of its potential liability for [such] injury." *Id.* at 33.

But the Policy and its conditions "apply" to bodily injury "only if" it is caused by an occurrence. It is **inapplicable** to any "bodily injury" that is **not** caused by a Rite Aid "occurrence." Accordingly, generalized "knowledge" that some injury(ies) happened—for example, due to **others'** misconduct—is not knowledge of "the" bodily injury(ies) to which the Policy applies. It is not knowledge of bodily injury(ies) "caused by an occurrence."

4. If a Complaint's Four Corners Are Unclear, There Is a Duty to Defend, Not a "Factual Dispute."

Chubb inverts duty to defend principles by suggesting it was Rite Aid's burden to introduce extrinsic evidence to disprove Chubb's bald assertion of "prior knowledge." Chubb Br. at 33 (suggesting Rite Aid's denials create a "factual dispute"). The only "facts" that matter to the duty to defend are the underlying complaints' allegations.

Chubb's sole authority for this argument is *Tower Ins. Co. v. Dockside Assocs. Pier 30 LP,* 834 F. Supp. 2d 257 (E.D. Pa. 2011). *Tower* found no duty to defend based on the underlying complaint. *Id.* at 267. It then stated, in *dicta*, that the known-loss doctrine also would have precluded a defense because of a letter extrinsic to the complaint. *Id.* To the extent the decision endorses considering extrinsic evidence to resolve a duty to defend issue, *Tower* is wrong as a matter of law.

And courts reject this reading of *Tower*. The Connecticut Supreme Court, for example, denounced *Tower* as "inconsistent" with the "four corners" rule. *Travelers Cas. and Sur. Co. v. Netherlands Ins. Co.*, 95 A.3d 1031, 1055-56 & n.30 (Conn. 2014). Other courts properly heed the "four corners" rule in this context. *See Cincinnati Ins. Cos. v. Pestco, Inc.*, 374 F. Supp. 2d 451, 457, 462-63 (W.D. Pa. 2004); *Nat'l Union Fire Ins. Co. v. Rhone-Poulenc Basic Chem. Co.*, 1992 WL 22690, at *17 (Del. Super. Ct. Jan. 16, 1992) (rejecting "known loss"

defense where complaint omitted "when … 'known carcinogens' became 'known'").

Like other aspects of the duty to defend, the prior knowledge defense turns entirely on the complaint's allegations. Because the complaints do not make "crystal clear" that Rite Aid had prior knowledge of all injuries it allegedly caused, Chubb's duty to defend was triggered.

IV. THE BELLWETHER SUITS AND SIMILARLY PLED LAWSUITS ALLEGE ONE OCCURRENCE

A. Question Presented

Did the Superior Court properly and correctly declare that the Bellwether suits and similarly pled Opioid Lawsuits alleging Rite Aid improperly distributed and dispensed opioids allege one occurrence?

B. Standard of Review

Before opposing Rite Aid's motion, part of Chubb's Delaware Superior Court Rule 56(f) motion for discovery beyond the underlying complaints' four corners on the number of occurrence issue was denied. Chubb did not appeal that legally correct ruling. If appealed, denial of such a motion is reviewed for abuse of discretion. *Rhudy v. Bottlecaps Inc.*, 830 A.2d 402, 408 & n.23 (Del. 2003).

The Superior Court's decision to issue a declaratory judgment that Opioid Lawsuits alleging claims similar to the Bellwether suits allege the same occurrence—particularly after permitting all Rule 56(f) discovery Chubb requested to oppose **this** aspect of Rite Aid's motion—is reviewed for abuse of discretion. *IDT Corp. v. U.S. Specialty Ins. Co.*, 2019 WL 413692, at *15 (Del. Super. Ct. Feb. 15, 2019) (citations omitted).

All other issues are reviewed *de novo*. *See supra* at 9.

C. Merits of the Argument

The Superior Court correctly determined that the Bellwether complaints allege one occurrence. It properly declared that other Opioid Lawsuits similarly alleging liability for improper controls in distributing and dispensing opioids allege the same occurrence.

1. Courts Routinely Declare Whether All Suits Alleging Similar Claims Arise From One Occurrence.

When there is an "actual controversy," as here, a Delaware court may "liberally exercise" its discretion to issue a declaratory judgment "so that the remedial purpose [of a declaration of rights and obligations] may be well served." *IDT*, 2019 WL 413692, at *15 (citations omitted). Chubb describes the Superior Court's "similar suits" declaration as "legally meaningless dicta." Chubb Br. at 43. But Chubb's application for interlocutory review recognized, correctly, that the question "matters" because Chubb's policies include a per-occurrence retention that Rite Aid must pay for an occurrence before a policy responds. Dkt. No. 2, Ex. B at 11.

Under Delaware's Declaratory Judgments Act, "[t]he question of liability under insurance contracts has proved to be particularly susceptible to declaratory adjudication." *IDT*, 2019 WL 413692, at *16 n.173 (citation omitted). Additionally, "determining the number of occurrences … is not a factual issue," rather "it involves the interpretation of policy language that is generally a question

of law for the court." *Stonewall Ins. Co. v. E.I. DuPont de Nemours & Co.*, 996 A.2d 1254, 1258-59 (Del. 2010). Courts routinely declare whether thousands of pending and future underlying suits alleging similar and consistent claims arise from one occurrence. *See id.* at 1257-58 (holding 469,000 underlying product suits involve one occurrence); *ConAgra*, 21 A.3d at 66, 72-73 (finding retention satisfied and duty to defend applied where insured settled 2,000 claims and alleged 20,000 more would be filed for injuries from tainted food); *Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 418 F.3d 330, 334-35 (3d Cir. 2005) ("thousand[s]" of suits alleged one occurrence: "the manufacture and sale of the asbestos-containing products").

2. For the Duty to Defend, the Number of Occurrences Is Resolved by Considering Whether Underlying Complaints Allege a Sole Proximate Cause of Liability.

Under Pennsylvania law, in the duty to defend context—when no occurrence caused by the insured is proven—the underlying "complaint is the sole guide to the facts" for resolving the number of occurrences. *D'Auria*, 507 A.2d at 860. Pennsylvania law determines that number by applying the "cause test" based on the underlying plaintiffs' allegations. *Donegal Mut. Ins. Co. v. Baumhammers*, 938 A.2d 286, 288-89, 294-96 (Pa. 2007) (finding one occurrence alleged by underlying complaints). If the complaint alleges but "one proximate, uninterrupted and continuing cause which result in all of the injuries and damages," it arises from

one occurrence. *Sunoco, Inc. v. Illinois Nat'l Ins. Co.*, 226 Fed. App'x. 104, 107-08 (3d Cir. 2007).

The number of occurrences does not turn on the legal soundness of plaintiffs' proximate cause theory. In *Baumhammers*, both the majority's opinion and Justice Cappy's separate opinion emphasized that the number of occurrence issue turns on the underlying suits' allegations, leaving "for another day" issues such as "whether [defendants actually] owed a duty of care to plaintiffs." *Baumhammers*, 938 A.2d at 297 (Cappy, J. concurring and dissenting in part); *accord id.* at 291 n.3 (majority).

For duty to defend purposes, defense **arguments** in the underlying suits are irrelevant to the number of occurrences. The number turns solely on underlying **plaintiffs'** framing of their claims and whether they allege a sole proximate cause of liability against the insured. If they do, there is one occurrence.

3. Chubb Had the "Sole Guide to the Facts" to Contest the "One Occurrence" Declaration.

Rite Aid's motion sought a declaration that the Bellwether suits (and all similar Opioid Lawsuits) arise from the same "occurrence." Op. at 19. It supported its motion with Mr. Chima's affidavit, which attested that the Opioid Lawsuits pending against Rite Aid alleged similar and consistent claims and attached Chubb correspondence admitting that fact. Op. at 17-18; B3-B12 (¶¶7-11, 13-16, 22, 28-31); B185-86; B203; B393; B397-98; B405-06; B412 (Chubb

admissions). Chima averred that 1,101 of the 1,143 pending Opioid Lawsuits tendered to Chubb had been or likely would be consolidated into the MDL. B4. MDL suits necessarily share factual questions regarding opioid supplying. *See, e.g.*, *In re: National Prescription Opiate Litig.*, 290 F. Supp. 3d 1375, 1378 (J.P.M.L. 2017) (Transfer Order).

The Opioid Lawsuits allege Rite Aid improperly distributed opioids to its own pharmacies. Some such suits allege liability for that distribution and Rite Aid's subsequent dispensing of opioids to patients. Rite Aid contends all suits allege the same occurrence as **plaintiffs allege** "dispensing" is part of the "distribution" process. B691-93 (Chima Dep. Tr. at 22:5-24:10).

Chubb responded to Rite Aid's motion by moving for Rule 56(f) discovery. B459. Chubb admitted it had "all" the complaints but argued it needed to know whether Rite Aid contended that suits alleging "dispensing" in addition to "distributing" opioids alleged the same occurrence and, if so, demanded that Rite Aid "identify the similar claim[s]" in each suit. B502.

The Superior Court granted the discovery. B522-24; B503. Rite Aid complied. To support its "one occurrence" contention, Rite Aid identified "similar and/or consistent" allegations of improper distribution and/or dispensing of opioids in every Opioid Lawsuit pending as of its motion's filing. B545; B550-53.

Thus, before Chubb opposed Rite Aid's motion, it had the Opioid Lawsuit complaints—"the sole guide to the facts" for resolving the number of occurrences—and Rite Aid's contentions supporting its legal argument.

4. Suits Alleging Insured Is Liable for Negligent Inaction and Inadequate Actions Causing Bodily Injuries Allege One Occurrence.

There is one occurrence when, as here, an insured's alleged liability is premised on its negligent action and/or inaction that permits others' intervening conduct to result in harm. *Baumhammers*, 938 A.2d at 294-96.

In *Baumhammers*, the insureds, parents of a man who shot six people at five locations, were faulted for three **different** omissions:

> (1) failure to procure adequate mental health treatment for Baumhammers, (2) failure to take Baumhammers' handgun away from him, and (3) failure to notify the appropriate authorities of the fact that Baumhammers possessed a handgun.

Id. at 288-89

Applying the "cause test," the court concluded that the complaints alleged the parents' inaction—describing alternative failures—was a single cause of injuries to different victims and thus the alleged negligence was "one occurrence":

> Parents[']liability … is premised on their negligence in **failing** to confiscate Baumhammers' weapon **and/or** notify law enforcement **or** Baumhammers' mental health care providers of his unstable condition. Because coverage is predicated on Parents' **inaction**, and the resulting injuries to the several victims stem from that

> one cause, we hold that Parents' alleged single act of negligence constitutes one accident and one occurrence.

Id. at 295 (emphases added).

In concluding that multiple alleged failures constituted one occurrence, the court considered Pennsylvania decisions "to properly understand the cause of loss theory as interpreted and applied in Pennsylvania." *Id.* In *D'Auria*, the court was "asked to determine whether the failure of a physician to diagnose **and later** treat a condition … qualified as a single 'occurrence.'" *Id.* at 294 (emphasis added). *D'Auria* reasoned that because "the physician's misdiagnosis **and** mishandling of his patient was the cause of [injury]," one occurrence was alleged, so the court "**declin[ed] to divide** the doctor's **initial failure** to diagnose **and subsequent failure** to treat into multiple occurrences." *Id.* (emphases added); *see also Hollis v. Lexington Ins. Co.*, 180 F. Supp. 3d. 422, 430-31 (E.D. Va. 2016) (explaining that under Pennsylvania's cause test, courts "do not divide a proximate cause into each particularized but-for cause that contributed to the ultimate injury," avoiding "the trap of infinite regression" of making "artificial and arbitrary division[s]" of alleged ongoing negligence) (citations omitted); *Washoe Cnty. v. Transcon. Ins. Co.*, 878 P.2d 306, 308-10 (Nev. 1993) (finding one occurrence where liability premised on "one proximate cause" of alleged "inaction or inadequate action" in negligently licensing a daycare center during three years when an employee sexually abused children).

Where a complaint alleges injuries that "stem from one proximate cause[,] there is a single occurrence." *Sunoco*, 226 Fed. App'x. at 107 (citation omitted). "The number and magnitude of injuries and the number of plaintiffs do not affect the determination." *Id.* *Baumhammers* found that the proximate cause alleged in the underlying complaints was the parents' "negligence in failing to remove Baumhammers['s] weapon **and/or** alerting authorities as to his dangerous propensities." 938 A.2d at 296 (emphasis added). This alleged negligence was "the 'occurrence' that began the sequence of events that resulted in the eventual injuries to [several] Plaintiffs." *Id.*

Here, the Bellwether plaintiffs allege that "as **a** direct and proximate result" of Rite Aid's alleged "negligence," they "have suffered" damages including for significant health service expenses. Op. at 9-10 (emphasis added). They allege Rite Aid's "misconduct" was "ongoing and persistent" and "does not concern a discrete event." *Id.* Accordingly, the Superior Court correctly found that the Bellwether suits allege "one proximate, uninterrupted and continuing cause of injuries and damage" and, thus, one occurrence. Because Rite Aid spent more than $3,000,000 in defending these suits, the per-occurrence retention was satisfied and Chubb must defend.

5. Chubb Generated No Dispute of Material Fact that Opioid Lawsuits Alleging Improper Distribution and/or Dispensing Allege One Occurrence.

In opposing Rite Aid's contention that Opioid Lawsuits alleging improper distributing and/or dispensing opioids allege one occurrence, Chubb did not cite a single non-Bellwether complaint allegation. Rather, Chubb opposed Rite Aid's "one occurrence" contention by citing "dispensing claims" injected by "amendments by interlineation" ("Amendments") that the Bellwether plaintiffs filed after Rite Aid's motion. A1139-40, A1148-49. Chubb argued that the Amendments introduced a new "dispensing" occurrence into the Bellwether suits in addition to a "distribution" occurrence. *Id.*

Chubb's proffered evidence does not support its argument. The Opioid Lawsuits alleging improper distribution and dispensing of opioids allege the same occurrence as the Bellwether third amended complaints. The Amendments—which are now stricken, Op. at 10-11—reveal the suits continued to allege one sole proximate cause of Rite Aid's liability, and thus one occurrence.

To put the Amendments in context, they were filed **after** what was to be an October 2019 Bellwether trial. A1331-32. Before the scheduled trial, the National Retail Pharmacies sought summary judgment based on the lack of evidence that their "distribution [of opioids] to **their own pharmacies**" alone, to sit on their shelves, "caused Plaintiff Counties' asserted injuries." A1331 (emphasis added).

Plaintiffs, thereafter, severed the National Retail Pharmacies, except Walgreens, from the trial. *Id*. The manufacturers and wholesale distributors (not any National Retail Pharmacy) settled and trial was cancelled. A1331-32.

The Counties then sought to amend the Bellwether third amended complaints to add "specific discrete allegations" against the National Retail Pharmacies "concerning their conduct as dispensers of prescription opioids." B562. The district court permitted the Amendments. In that court's words, plaintiffs' theory was that "dispensing" is "merely" the "'final step' in the distribution process." A1370.

The amended complaints still alleged one sole proximate cause of liability: Rite Aid's alleged failures in distributing and dispensing opioids that resulted in all subsequent injuries. The Amendments were "'interlineated' such that they [were] part and parcel of the original [Bellwether] Third Amended Complaints." A1139; Op. at 10. Consequently, the suits continued to identify "the two primary causes of the opioid crisis," the marketing and supply chain sides, where on the supply side, defendants "failed to maintain effective controls over the distribution of prescription opioids." Op. at 11-12.

The new allegations merely alleged that Rite Aid, as "a vertically integrated distributor and dispenser of prescription opioids … knew or should have known that an excess volume of pills was being sold into [the Counties]." B573-74,

B599.[3] The amendments alleged that "[d]iscovery will reveal that Rite Aid knew or should have known that its pharmacies in Ohio" failed to prevent diversion and abuse of opioids despite the "information regarding red flags of diversion" that Rite Aid's "vertically integrated structure" afforded. B600-01. Thus, Rite Aid allegedly had "systemic failures to implement and adhere to adequate controls against diversion." B601.

The amendments "interlineated" "dispensing" allegations into the complaints including their public nuisance counts. *Compare* A448-49, A451-53, *with* B608-09, B611-13. The pleadings still alleged that Rite Aid's "tortious conduct" in "[d]istributing, dispensing, and selling opioids" was "a" "direct and proximate" cause of the ensuing bodily injuries and the Counties' damages. B611, B614. They still alleged that Rite Aid's "misconduct" was "ongoing and persistent" and "does not concern a discrete event." B614. Thus, they still alleged "one proximate, uninterrupted and continuing cause of injuries and damages" and, accordingly, one occurrence. *Sunoco*, 226 Fed. App'x. at 107. The Superior Court's ruling that Chubb failed to raise any disputed facts that such suits allege the same occurrence was legally correct.

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[3] Rite Aid cites Summit's Amendment herein; Cuyahoga's is "substantively identical," Op. at 10, and begins at B618.

6. Plaintiffs' Allegations—Not Defendants' Defenses—Dictate the Number of Occurrences.

Extrinsic evidence cannot disturb the Superior Court's legal ruling or otherwise create "factual disputes." *Cf.* Chubb Br. 42-46. **Plaintiffs' allegations** in the underlying complaints are "the sole guide to the facts" in resolving the number of occurrence issue in the duty to defend context. *D'Auria*, 507 A.2d at 860. Chubb ignores these allegations. Instead, Chubb erroneously points to Rite Aid's defense arguments to argue Rite Aid's **alleged failures in distributing** opioids to its pharmacies are a separate occurrence from its **alleged subsequent failures in dispensing** those opioids. But under the "cause" test, plaintiffs' allegations control and courts do not partition a series of alleged failures into multiple occurrences. *Id.* at 860-61.

7. The Superior Court Properly and Correctly Ruled that Opioid Lawsuits Alleging Improper Distribution and Dispensing Allege the Same Occurrence.

The Superior Court correctly declared that, for purposes of the duty to defend, the Bellwether claims allege a single occurrence and all Opioid Lawsuits alleging "similar" claims—*i.e.*, lawsuits similarly alleging that Rite Aid's distributing and dispensing opioids was a proximate cause of the resulting injuries and damages—were also part of that occurrence. Chubb fails to demonstrate any procedural or substantive error in this declaration.

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