EFiled: Apr 23 2024 10:57AM EDT
Filing ID 72805592
Case Number 21,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HERTZ GLOBAL HOLDINGS, INC., Appellant, v. ALTERRA AMERICA INSURANCE COMPANY N/K/A PINNACLE NATIONAL INSURANCE COMPANY, Appellee.	C.A. No. 21, 2024 Court Below – Superior Court of the State of Delaware C.A. No. N22C-01-153 PRW CCLD [redacted] PUBLIC VERSION

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Date: April 17, 2024

Public Version Dated: April 23, 2024

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NATURE OF THE PROCEEDINGS

This appeal concerns a dispute over insurance coverage for legal fees and expenses that Appellant Hertz Global Holdings, Inc. ("Hertz") paid in responding to an investigation by the Securities and Exchange Commission ("SEC") into Hertz's restatement of certain financial statements (the "SEC Investigation"). The SEC Investigation involved a letter requesting information that the SEC sent to Hertz in June 2014 (the "June 2014 SEC Letter") and an Order Directing Private Investigation and Designating Officers to Take Testimony that the SEC issued in September 2014 (the "Investigation Order"). Appellee Alterra America Insurance Company n/k/a Pinnacle National Insurance Company ("AAIC") issued an excess directors and officers liability policy to Hertz for the period of November 16, 2013 to November 16, 2014 (the "AAIC Policy"), which provides coverage excess of a primary policy issued by National Union Fire Insurance Company of Pittsburgh, Pa. (the "Primary Policy") and a first-excess policy issued by U.S. Specialty Insurance Company (the "USSIC Policy"). The AAIC Policy follows form to the Primary Policy and it is undisputed that "the substantive coverage terms governing the AAIC Policy . . . are found in the [Primary] Policy." A0062 n.2.

Prior to the commencement of this action, the coverage question now at issue was conclusively adjudicated against Hertz in an action that Hertz brought against the two underlying insurers in the U.S. District Court for the Southern District of New York (the "Related Coverage Action"). The Related Coverage Action was dismissed with prejudice for failure to state a claim because the terms of the Primary Policy – to which the AAIC Policy follows form – do not provide coverage for the SEC Investigation. In particular, the court ruled that: (1) the SEC Investigation is not a **Securities Claim**,[1] as defined in the Primary Policy, against Hertz; (2) the SEC Investigation is not a **Claim**, as defined in the Primary Policy, against any **Insured Person**; and (3) even if Hertz had shown that the SEC did make a **Claim** against an **Insured Person**, Hertz's breach of contract claim would still fail due to Hertz's failure to give the insurers notice of any **Claim** made against any **Insured Person**.

In a textbook case of forum shopping, Hertz filed this action against AAIC in Delaware in an attempt to obtain an inconsistent ruling concerning the exact same policy terms that were addressed by the court in the Related Coverage Action. Hertz's Complaint asserts a single cause of action against AAIC for breach of contract and purports to seek coverage under the AAIC Policy for legal fees and

[1] Terms in bold are defined in the Primary Policy.

expenses that Hertz allegedly paid in connection with the SEC Investigation. Following extensive written and document discovery, Hertz moved for partial summary judgment and AAIC cross-moved for summary judgment.

Both parties sought summary judgment on the issues of whether the SEC Investigation constitutes: (1) a **Securities Claim** that potentially triggers entity coverage for alleged loss incurred by Hertz in funding its own response to the SEC Investigation; and (2) a **Claim** against any **Insured Person** that potentially triggers coverage for alleged loss incurred by Hertz in funding such **Insured Person's** response to the SEC Investigation. AAIC also contended that: (1) Hertz is collaterally estopped from re-litigating the question of coverage for the SEC Investigation; (2) Hertz's failure to comply with the notice provision – which is an express condition precedent to coverage – operates as another independent basis to vitiate coverage; and (3) there is no coverage under the AAIC Policy for the independent reason that the underlying limits of liability have not been exhausted through payment of covered "loss under the Underlying Insurance."

On December 18, 2023, the Superior Court (Judge Paul R. Wallace) issued a Memorandum Opinion and Order denying Hertz's motion for partial summary

judgment and granting AAIC's motion for summary judgment. Hertz Ex. A.[2] The Superior Court correctly determined that the AAIC Policy does not cover any aspect of the SEC Investigation because: (1) based on the order and judgment in the Related Coverage Action, Hertz is collaterally estopped from contending that the SEC Investigation is a **Securities Claim** against Hertz (*id*. at 20); and (2) the SEC Investigation is not a **Claim** against any **Insured Person** (*id*. at 25). In addition, the Superior Court correctly rejected Hertz's argument that, even if the SEC Investigation is not a **Securities Claim** or a **Claim**, the legal fees and expenses in dispute should still be covered since certain work done in responding to the SEC Investigation was allegedly also necessary to the defense of the so-called *Ramirez* and *Ansfield* private-plaintiff securities class actions. *Id*. at 27.

Hertz now appeals the denial of its motion for partial summary judgment and the grant of AAIC's motion for summary judgment. In its Opening Brief, Hertz only challenges the Superior Court's ruling that the Investigation Order is not a **Claim** against an **Insured Person** and rejection of Hertz's coverage theory based on *Ramirez* and *Ansfield*. Not only does Hertz fail to identify error in either of those rulings, but it also cannot run the table on the three alternative grounds for summary

[2] "Hertz Ex. A" refers to Exhibit A attached to Appellant's Opening Brief.

judgment that AAIC presented below and again raises herein (as Hertz must do to prevail on appeal). This Court should affirm.

SUMMARY OF ARGUMENT

1. Denied. The Superior Court correctly held that the SEC Investigation does not trigger Insuring Agreement B(ii) in the Primary Policy, to which the AAIC Policy follows form, because the SEC Investigation does not constitute a **Claim** against an **Insured Person**.[3] Clause 2(b)(6) in the Primary Policy defines **Claim** to mean an "administrative or regulatory investigation . . . of an **Insured Person** . . . after the . . . entry of a formal order of investigation . . . upon such **Insured Person**." Here, the Investigation Order – which is captioned "In the Matter of *Hertz Global Holdings, Inc.*" and does not name any specific Hertz director, officer or employee – does not evidence an investigation "of an **Insured Person**" and was not entered upon any **Insured Person** (only Hertz). Because the Investigation Order is not a **Claim** against an **Insured Person**, it does not trigger Insuring Agreement B(ii) and the AAIC Policy does not cover any alleged loss incurred by Hertz in funding any **Insured Person's** response to the SEC Investigation.

[3] In its Opening Brief, Hertz limits its challenge to that ruling to the argument that the Investigation Order is a **Claim** against an **Insured Person** under Clause 2(b)(6) in the Primary Policy. As a result, any other challenge to the Superior Court's ruling has been waived and is not properly before this Court.

[redacted]

(a) Denied. Hertz contends that the Investigation Order was directed at **Insured Persons** because it contains references to unidentified "officers, directors and employees." In rejecting that same argument, the court in *Office Depot, Inc. v. National Union Fire Insurance Co. of Pittsburgh, Pa.* found that, although an SEC formal order of investigation referenced "the conduct of Office Depot's officers, directors and employees as participants in 'possible violations' of the securities laws," the formal order was not against any insured person since it did "not identify any specific officer or director as a wrongdoer by name." 734 F. Supp. 2d 1304, 1319-20 (S.D. Fla. 2010), *aff'd*, 453 Fed. Appx. 871 (11th Cir. 2011). Not only does Hertz ignore *Office Depot* in its Opening Brief, but it also fails to identify any authority to support its suggestion that an Investigation Order directed at the Hertz entity constitutes a **Claim** against an unnamed group of **Insured Persons**.

(b) Denied. There is no material difference between the Investigation Order's generic references to "officers, directors and employees" and its generic references to the "principal executive officer or officers and principal financial officer or officers of Hertz Global and/or Hertz Corp., or persons performing similar functions." The Investigation Order does not evidence an "investigation of" an

[redacted]

Insured Person because it fails to "identify any specific officer or director as a wrongdoer by name." *Office Depot, Inc.*, 734 F. Supp. 2d at 1319-20.

(c) Denied. Contrary to Hertz's assertions, a formal order of investigation is not "a **Claim** by itself" under the Primary Policy. The **Claim** definition explicitly requires Hertz to show both that the SEC initiated an investigation "*of* an **Insured Person**" *and* that a formal order of investigation was entered "upon *such* **Insured Person**" (*i.e.*, the specific director, officer or employee under investigation). A0105 (Cl. 2(b)(6)) (emphasis added). Here, the Investigation Order does not meet those requirements since it does not evidence an investigation "of an **Insured Person**" (as both the Superior Court and the court in the Related Coverage Action found) and because it was entered upon Hertz and not upon any **Insured Person**. Thus, in relying solely upon the Investigation Order, Hertz has failed to establish that the SEC made a **Claim** against any particular director, officer or employee of Hertz.

(d) Denied. While Hertz suggests that the Primary Policy simply does not require the specific identification of an **Insured Person** against whom a **Claim** was made, this is yet another misreading of the Primary Policy. By defining **Claim** to mean an investigation of an **Insured Person** "after the . . . entry of a formal order of investigation . . . upon *such* **Insured Person**," the Primary Policy necessarily

[redacted]

requires the identification of the specific director, officer or employee under investigation (and limits a **Claim** to only that individual). Likewise, Insuring Agreement B(ii) – under which Hertz purports to seek coverage – requires Hertz to establish the amount that it has paid to indemnify a specific director, officer or employee against whom a **Claim** was made.

2. Denied. The Superior Court correctly rejected Hertz's argument that, even if the SEC Investigation is not a **Securities Claim** or a **Claim**, the $27.2 million in legal fees and expenses at issue – which Hertz admittedly incurred "to defend against" the SEC Investigation – should still be covered because they were allegedly necessary to the defense of *Ramirez* and *Ansfield*. Regardless of whether any of the SEC Investigation legal fees or expenses were "necessary" to the defense of *Ramirez* or *Ansfield*, those amounts are not covered for either of two separate reasons: (1) as the Superior Court found, the legal fees and expenses at issue do not qualify as **Defense Costs** as defined in the Primary Policy – and thus do not constitute covered **Loss** – since they did not "result[ ] solely from" the defense of a **Claim** (*i.e.*, *Ramirez* or *Ansfield*); and (2) as AAIC also argued below, the legal fees and expenses at issue do not constitute **Loss** "arising from" either a **Securities Claim** or a **Claim** (*i.e.*, *Ramirez* or *Ansfield*), as required by the Insuring Agreements.

[redacted]

(a) Denied. Hertz should not be permitted to advance its larger settlement rule contention on appeal since Hertz did not fairly present the issue to the trial court and the interests of justice do not require this Court to review it. And even assuming *arguendo* that Hertz has not waived its argument, the larger settlement rule simply does not apply here since allocation between covered and uncovered loss is not at issue. For either of the reasons discussed in the directly-above paragraph, *none* of the legal fees and expenses at issue come within the coverage provided by the AAIC Policy in the first place. Since Hertz has not established that any of the amounts in dispute are covered, there is no issue of allocation to which the larger settlement rule could possibly apply.

(b) Denied. Contrary to Hertz's contentions, applying the definition of **Defense Costs** in accordance with its plain meaning (as Delaware law requires) neither renders the allocation provision in the Primary Policy "illusory or meaningless" nor creates any conflict with the allocation provision. First, the Primary Policy's requirement that legal fees and expenses must result solely from a **Claim** to qualify as **Defense Costs** does not "entirely negate the allocation provision," as Hertz argues. Second, the allocation provision only applies to **Defense Costs** (as defined in the Primary Policy) and the Superior Court found that

[redacted]

the legal fees and expenses at issue here do not meet the definition of **Defense Costs**. The fact that the allocation provision is inapplicable where, as here, none of the amounts at issue are covered in the first place is not a conflict at all.

3. Even if the Investigation Order is a **Claim** against an **Insured Person** (and it is not), the Superior Court's grant of summary judgment to AAIC and denial of summary judgment to Hertz should still be affirmed because the AAIC Policy does not cover any alleged loss incurred by Hertz in funding any **Insured Person's** response to the SEC Investigation for any of three alternative reasons that AAIC also raised below. First, Hertz failed to comply with a condition precedent to coverage requiring written notice to AAIC "no later than 60 days after the end of the **Policy Period**" by first providing notice of an alleged **Claim** against an **Insured Person** no earlier than four years after the end of the **Policy Period**. Second, Hertz cannot establish that the full amount of the underlying limits of liability have been paid "as loss under the Underlying Insurance," as required to trigger coverage under the AAIC Policy. Lastly, Hertz is collaterally estopped from relitigating the issue of whether the SEC Investigation is a **Claim** against an **Insured Person** based on the March 30, 2021 order and judgment in the Related Coverage Action.

STATEMENT OF FACTS

I. THE RELEVANT INSURANCE POLICIES

A. The Primary Policy

National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union") issued primary Executive and Organization Liability Insurance Policy No. 01-592-47-41 to Hertz, with a **Policy Period** of November 16, 2013 to November 16, 2014 and a $15,000,000 limit of liability. A0100-01. The Primary Policy affords specified coverage for both the **Organization** and **Insured Persons**. A0104. The term **Organization** is defined to include the **Named Entity** (Hertz) and each **Subsidiary** thereof. A0114 (Cl. 2(v)); A0100 (Declarations, Item 1). The term **Insured Person** is defined to include any **Executive** or **Employee** of an **Organization**. A0111 (Cl. 2(q)).

Although the Primary Policy contains multiple Insuring Agreements, only Insuring Agreement B(ii) is relevant to this appeal:

> **COVERAGE B: ORGANIZATION INSURANCE**
>
> ***
>
> (ii) *Indemnification of an **Insured Person***: This policy shall pay the **Loss** of an **Organization** arising from a **Claim** made against an **Insured Person** . . . for any **Wrongful Act**, but only to the extent that such **Organization** has indemnified such **Insured Person**.

[redacted]

A0104 (Cl. 1.B(ii)). Accordingly, any alleged **Loss** incurred by Hertz in funding any **Insured Person's** response to the SEC Investigation does not fall within Insuring Agreement B(ii) unless the SEC Investigation qualifies as a **Claim** against "such **Insured Person**."

The Primary Policy defines the term **Claim**, in relevant part, to include:

> (6) a civil, criminal, administrative or regulatory investigation (including, but not limited to, an SEC, DOJ, state attorney general, Equal Employment Opportunity Commission ('EEOC'), grand jury investigation or any self-regulatory organization) of an **Insured Person**:
>
> (i) once such **Insured Person** is identified in writing by such investigating authority as a person against whom a proceeding described in Definition (b)(2) may be commenced; or
>
> (ii) in the case of an investigation by the SEC or a similar federal, state or foreign government authority, after the service of a subpoena, entry of a formal order of investigation, or Wells Notice . . . upon such **Insured Person** . . . .

A0105-06 (Cl. 2(b)).

The Primary Policy defines the term **Loss** to include, *inter alia*, **Defense Costs**. A0111 (Cl. 2(s)). The term **Defense Costs** is defined, in pertinent part, to mean "reasonable fees (including but not limited to legal fees and experts' fees), costs and expenses consented to by the **Insurer** such consent not to be unreasonably

[redacted]

withheld . . . resulting solely from the investigation, adjustment, defense and/or appeal of a **Claim** against an **Insured**." A0107 (Cl. 2(e)) (emphasis added).

The Primary Policy requires that "as a condition precedent to the obligations of the **Insurer**," the **Insureds** must "give written notice to the **Insurer** of a **Claim** made against an **Insured** as soon as practicable . . . but in all events no later than 60 days after the end of the **Policy Period**." A0123 (Cl. 7(a)).

Lastly, the Primary Policy provides that the **Insurer** does not have any duty to defend and, instead, only has a duty to advance covered **Defense Costs** prior to the final disposition of a **Claim**. A0100; A0125 (Cl. 8).

B. The AAIC Policy

AAIC issued the AAIC Policy to Hertz for the period of November 16, 2013 to November 16, 2014, with a $15,000,000 limit of liability excess of $30,000,000 in underlying limits of liability provided by the Primary Policy and the USSIC Policy. A0167 (Declarations); A0170 (End. No. 1). The AAIC Policy generally follows form to the wording of the Primary Policy, provided that coverage under the AAIC Policy attaches only after both the Primary Policy and the USSIC Policy have been exhausted by actual payment of losses thereunder. A0171 (End. No. 2).

As a result of payments made by National Union in respect of matters other than the SEC Investigation, the Primary Policy's limit of liability has been exhausted. A0326. It is also undisputed that the insurer of the underlying first-excess USSIC Policy has paid a total of $12,539,238.78 in respect of certain matters and will never pay the full amount of the USSIC Policy's $15 million limit of liability. B000082-83.

Additionally, the AAIC Policy prescribes the specific manner in which notice must be provided to AAIC. The AAIC Policy states that notice to AAIC "shall be given at the [ ] address shown in Item 5 of the Declarations" and that any notice to an underlying insurer "shall not constitute notice to [AAIC] unless also given to [AAIC] as provided above." A0168 (§ III.D).

II. THE SEC INVESTIGATION

From at least February 2012 through March 2014, Hertz's public filings materially misstated pretax income due to accounting errors. A0269. As a result, Hertz was required to restate its financial statements for multiple reporting periods. *Id*. By letter dated June 11, 2014, the SEC informed Hertz that it was "conducting an inquiry . . . to determine whether there have been any violations of the federal

securities laws." A0179. The June 2014 SEC Letter requests that Hertz provide certain information on a voluntary basis. *Id*.

On September 8, 2014, the SEC issued the Investigation Order pursuant to 17 C.F.R. § 202.5(a), which grants the SEC discretion to "make such formal investigations and authorize the use of process as it deems necessary to determine whether" a violation of the federal securities laws has been committed. A0189-93. The Investigation Order is captioned "In the Matter of *Hertz Global Holdings, Inc.*" A0189. The Investigation Order states that the SEC "has information that tends to show" that Hertz, its subsidiary Hertz Corp., and/or other unidentified entities or individuals "may have" engaged in certain acts or practices in "possible violation" of the federal securities laws. A0189-93. The Investigation Order directs that "a private investigation be made to determine whether any persons or entities have engaged in" such acts or practices and authorized SEC officials to issue subpoenas for witnesses and documents. A0192-93.

Throughout the investigation, Hertz voluntarily cooperated with the SEC in meeting with staff members and providing information. A0277. The evidentiary record in this action does not contain any subpoena or other compulsory process issued by the SEC to any individual or entity.

[redacted]

Between February 2017 and September 2018, Hertz entered into tolling agreements with the SEC. B000006-21. The tolling agreements state, *inter alia*, that: (1) the SEC has notified Hertz that the SEC was "conducting an investigation . . . to determine whether there have been violations of certain provisions of the federal securities laws"; and (2) the running of any statute of limitations applicable to any future "action or proceeding against Hertz arising out of the [SEC] investigation" shall be tolled. *Id*. No Hertz director, officer or employee was a party to or otherwise referenced in any of the tolling agreements. *Id*.

On December 14, 2018, Hertz submitted an offer of settlement to the SEC "in anticipation of cease-and-desist proceedings to be instituted against it by the" SEC. A0268. The offer of settlement – which identified Hertz and an affiliated entity as the "Respondents" – was not made on behalf of any Hertz director, officer or employee. A0268-85. Ultimately, "as an alternative to the SEC filing formal charges," Hertz entered into a settlement agreement with the SEC and paid a $16 million civil penalty to resolve the SEC Investigation into Hertz. B000038 (¶ 37). Hertz "is not seeking coverage for any amount paid under any settlement with the SEC." A0363.

Hertz alleges that it expended over $27.2 million in legal fees and expenses in connection with the SEC Investigation, which includes amounts "incurred directly" by Hertz and amounts paid by Hertz "for the indemnification of its directors, officers, and employees." A0359. Hertz provided indemnification to "many" of its non-officer/director employees "for their costs and expenses incurred in relation to the SEC [Investigation] (including for their legal representation in responding to the SEC's inquiries and providing testimony to the SEC) . . . as part of Hertz's own defense and response to the SEC [Investigation]." A0313-14.

III. THE COVERAGE DISPUTE

On July 10, 2014, Hertz purported to provide notice of the June 2014 SEC Letter under the AAIC Policy and the underlying insurance policies. B000038 (¶ 39); A0490-91. By letter dated July 28, 2014, National Union informed Hertz that the June 2014 SEC Letter does not implicate coverage under the Primary Policy since it is not a **Claim** or a **Securities Claim**. A0197. Hertz provided a copy of National Union's July 28, 2014 letter to AAIC in August 2014. B000050-51. Hertz thereafter did not contact AAIC about the SEC Investigation until September 2018 – which was *four years* after the SEC entered the Investigation Order.

[redacted]

Hertz alleges that it put AAIC and its other insurers on notice of the SEC's September 2014 Investigation Order through an update letter from its defense counsel dated September 5, 2018. A0345. By letter dated January 17, 2019, Hertz purported to make a formal demand for AAIC and the underlying insurers to participate in a mediation pertaining to, *inter alia*, the issue of coverage for legal fees and expenses incurred in response to the SEC Investigation. B000053-54. By letter dated February 6, 2019, AAIC informed Hertz that the AAIC Policy does not cover any legal fees or expenses incurred in connection with the SEC Investigation and otherwise reserved all of its rights. A0506-09.

In July 2019, Hertz commenced the Related Coverage Action against underlying insurers National Union and U.S. Specialty Insurance Company in the U.S. District Court for the Southern District of New York under Case No. 1:19-cv-06957. *Hertz Global Holdings, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 530 F. Supp. 3d 447, 452 (S.D.N.Y. 2021). Hertz asserted claims for breach of contract against the underlying insurers based on their declinations of coverage for the SEC Investigation under the respective Primary and USSIC Policies. *Id*. Although AAIC was not a party to the Related Coverage Action, "the substantive

[redacted]

coverage terms governing the [AAIC] Policy . . . are found in the [Primary] Policy" that was at issue in the Related Coverage Action. A0062 n.2.

Important here, on March 30, 2021, the court in the Related Coverage Action granted the underlying insurers' motion to dismiss for failure to state a claim, dismissed the Related Coverage Action with prejudice, and entered Judgment in favor of the underlying insurers. *Hertz Global Holdings, Inc.*, 530 F. Supp. 3d at 460; B000056. First, the court declined to make a choice-of-law determination since "New York and Delaware apply the same general principles of contract interpretation" and there was "no variation in the states' laws that would impact the analysis." *Hertz Global Holdings, Inc.*, 530 F. Supp. 3d at 453. Next, the court found that the SEC Investigation is not covered under the terms of the Primary Policy because it does not qualify as a **Securities Claim** against Hertz or as a **Claim** against an **Insured Person**. *Id*. at 454.[4] The court also found that, even if Hertz had shown that the SEC did make a **Claim** against an **Insured Person**, Hertz's breach of

[4] In making that determination, the court considered the Investigation Order since it was attached to and referenced throughout Hertz's pleading. *Hertz Global Holdings, Inc.*, 530 F. Supp. 3d at 451.

contract claims would still fail due to Hertz's failure to sufficiently allege that it gave the insurers notice of a **Claim** made against any **Insured Person**. *Id*. at 459.[5]

Despite the decision in the Related Coverage Action and even though the underlying insurance has not been exhausted, on October 18, 2021, Hertz requested that AAIC agree to pay certain legal fees and expenses incurred in connection with the SEC Investigation. B000058-59. By letter dated October 26, 2021, AAIC maintained its determination that the AAIC Policy does not cover any legal fees or expenses incurred in connection with the SEC Investigation. B000061-62.

Subsequently, Hertz commenced this action against AAIC on January 21, 2022. B000023. The Complaint asserts a single cause of action against AAIC for breach of contract and purports to seek coverage under the AAIC Policy for legal fees and expenses that Hertz allegedly paid "as a result of the SEC [Investigation]," up to the AAIC Policy's $15,000,000 limit of liability. B000039 (¶ 38); B000043 (¶55); B000046-47 (¶¶ 62-70). Nowhere does the Complaint allege that Hertz is

[5] Hertz filed an appeal of the judgment in the Related Coverage Action with the U.S. Court of Appeals for the Second Circuit (Case No. 22-853). In August 2023, before the appeal was argued or decided, Hertz and the insurer of the underlying USSIC Policy entered into a settlement that resulted in the Related Coverage Action being voluntarily dismissed with prejudice. Thus, the trial court's March 30, 2021 order and judgment in the Related Coverage Action cannot and will not be disturbed.

seeking coverage for any legal fees or expenses incurred in connection with *Ramirez* or *Ansfield*.[6] Rather, as Hertz confirmed in sworn interrogatory responses, the alleged damages sought in its Complaint consist of legal fees and expenses that Hertz incurred "in response to the SEC [Investigation]." A0317; A0359.

IV. THE SUPERIOR COURT'S OPINION

On December 18, 2023, the Superior Court issued its opinion denying Hertz's motion for partial summary judgment and granting AAIC's motion for summary judgment. Hertz Ex. A. First, the Superior Court held that, based on the March 30, 2021 order and judgment in the Related Coverage Action, Hertz is collaterally estopped from contending that the SEC Investigation is a **Securities Claim** that triggers entity coverage for amounts incurred by Hertz to fund its own response to the SEC Investigation. *Id*. at 15-21.[7] "Hertz does not challenge this holding" on appeal. Appellant's Opening Brief ("Opening Brief" or "Hertz Br.") at 17 n.1.

[6] [redacted]

[7] The Superior Court declined to hold that Hertz is collaterally estopped from re-litigating whether the SEC Investigation is a **Claim** against an **Insured Person** since the court in the Related Coverage Action set forth two independent grounds for its conclusion that there is no coverage for any amounts incurred by Hertz in funding any **Insured Person's** response to the SEC Investigation. Hertz Ex. A at 19-20.

[redacted]

Second, the Superior Court held that the AAIC Policy does not cover any alleged loss incurred by Hertz in funding any **Insured Person's** response to the SEC Investigation since the SEC Investigation is not a **Claim** made against any **Insured Person**. Hertz Ex. A at 22-25. In particular, the Superior Court found that neither the June 2014 SEC Letter nor the Investigation Order constitutes a **Claim** – as defined in the Primary Policy – against any **Insured Person**. *Id*. In its Opening Brief, Hertz bases its challenge to this ruling solely on the Investigation Order and does not argue that the June 2014 SEC Letter is a **Claim** against an **Insured Person**.

Third, the Superior Court rejected Hertz's "last-ditch" argument that, even if the SEC Investigation is not a **Securities Claim** or a **Claim**, the legal fees and expenses incurred in connection with the SEC Investigation should still be covered since certain of the work done was allegedly "equally reasonable and necessary to the defense of the Ramirez and Ansfield" class actions. *Id*. at 25-27. In this regard, the Superior Court found that:

> [**Defense Costs**], as defined by the Primary Policy, are 'reasonable fees resulting *solely* from the investigation, adjustment, defense and/or appeal of a **Claim** against an **Insured**.' So for the defense costs incurred during the SEC [Investigation] to be covered, those costs must have resulted solely from 'the investigation, adjustment, defense and/or appeal' of the Ramirez or Ansfield claims. Hertz does not argue the costs resulted solely from that investigation nor does the record reasonably support any such conclusion.

[redacted]

Id. at 26-27.

Having determined that the AAIC Policy does not cover the SEC Investigation for the reasons noted above, the Superior Court did not rule on AAIC's contentions that: (1) Hertz's failure to comply with the notice provision operates as an independent basis to vitiate coverage; and (2) there is no coverage under the AAIC Policy for the independent reason that the underlying limits of liability have not been exhausted through payment of covered "loss under the Underlying Insurance."

ARGUMENT

I. THERE IS NO COVERAGE UNDER INSURING AGREEMENT B(ii) BECAUSE THE SEC INVESTIGATION IS NOT A CLAIM AGAINST ANY INSURED PERSON

A. Question Presented

Did the Superior Court correctly determine that the SEC Investigation does not constitute a **Claim**, as defined in the Primary Policy to which the AAIC Policy follows form, made against any **Insured Person**?

AAIC argued below that the SEC Investigation does not constitute a **Claim** against any **Insured Person**. A0246-53; A0531-33.

B. Standard Of Review

"This Court reviews a grant or denial of a motion for summary judgment *de novo*." *In re Solera Ins. Coverage Appeals*, 240 A.3d 1121, 1130 (Del. 2020). Further, "[t]he merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal." Del. Supr. Ct. R. 14(b)(vi)(A)(3).

C. Merits Of Argument

1. The Superior Court Correctly Determined That The SEC Investigation Order Does Not Constitute A Claim Against An Insured Person

[redacted]

Insuring Agreement B(ii) in the Primary Policy, to which the AAIC Policy follows form, provides coverage for "the **Loss** of an **Organization** arising from a **Claim** made against an **Insured Person** . . . to the extent that such **Organization** has indemnified such **Insured Person**." A0104. As the Superior Court correctly held, Insuring Agreement B(ii) is not triggered because the SEC Investigation does not constitute a **Claim** made against an **Insured Person**. Hertz Ex. A at 22-25. Thus, the AAIC Policy does not provide coverage for any alleged loss incurred by Hertz in funding any **Insured Person's** response to the SEC Investigation.

As an initial matter, the Superior Court found that neither the June 2014 SEC Letter nor the Investigation Order is a **Claim** against an **Insured Person** under any subsection of the **Claim** definition. *Id*. at 22-25. In its Opening Brief, Hertz limits its challenge to that ruling to the argument that the Investigation Order is a **Claim** against an **Insured Person** under Clause 2(b)(6) in the Primary Policy. Any other challenge to the Superior Court's ruling that the SEC Investigation is not a **Claim** against an **Insured Person** has been waived and is not properly before this Court. Del. Supr. Ct. R. 14(b)(vi)(A)(3).

The Investigation Order does not qualify as a **Claim** against any **Insured Person** under Clause 2(b)(6). That provision defines **Claim**, in relevant part, to

[redacted]

mean an "administrative or regulatory investigation . . . of an **Insured Person** . . . after the . . . entry of a formal order of investigation . . . upon such **Insured Person**." A0106. By its own terms, the Investigation Order – which was captioned "In the Matter of *Hertz Global Holdings, Inc.*" – launched a formal investigation into Hertz and did not name any specific Hertz director, officer or employee as the target of the investigation. As the court in the Related Coverage Action rightly explained in reaching the same conclusion as the Superior Court did here, Clause 2(b)(6) requires an "SEC investigation *of* an **Insured Person**" and the Investigation Order does not "demonstrate that the SEC was investigating an **Insured Person**." *Hertz Global Holdings, Inc.*, 530 F. Supp. 3d at 458.

2. Hertz's Arguments To The Contrary Are Without Support In The Plain Language Of The Primary Policy, The Undisputed Facts, And The Law

Contrary to Hertz's suggestions, a formal order of investigation is not "a **Claim** by itself" under the Primary Policy. *See* Hertz Br. at 3, 6, 20, 29. In fact, the relevant subsection of the **Claim** definition explicitly requires Hertz to show both that the SEC initiated an investigation "*of* an **Insured Person**" *and* that a formal order of investigation was entered "upon *such* **Insured Person**" (*i.e.*, the specific director, officer or employee under investigation). A0105 (Cl. 2(b)(6)) (emphasis

[redacted]

added).[8] Here, the Investigation Order does not meet those requirements since it does not evidence an investigation "of an **Insured Person**" and because it was entered upon Hertz and not upon any **Insured Person**. Thus, in relying solely upon the Investigation Order, Hertz has failed to meet its burden of proving that the SEC made a **Claim** against any particular director, officer or employee of Hertz.

While Hertz also proclaims that the Primary Policy simply does not require the specific identification of an **Insured Person** against whom a **Claim** was made (*see* Hertz Br. at 2, 6-7), this is yet another misreading of the Primary Policy. By defining **Claim** to mean an investigation of an **Insured Person** "after the . . . entry of a formal order of investigation . . . upon *such* **Insured Person**," the Primary Policy necessarily requires the identification of the specific director, officer or employee under investigation (and limits a **Claim** to only that individual). Moreover, Insuring Agreement B(ii) – under which Hertz purports to seek coverage – only applies to **Loss** "arising from a **Claim** made against *an* **Insured Person** . . . to the extent that [Hertz] has indemnified *such* **Insured Person**." A0104 (emphasis added). Insuring

[8] Hertz bears the burden of establishing this essential element of its claim for coverage. *Zurich Am. Ins. Co. v. Syngenta Crop Protection, LLC*, 2020 WL 5237318, at *5 (Del. Super. Aug. 3, 2020) ("The insured bears the burden of proving that a claim is covered by an insurance policy."); *Nassau Gallery, Inc. v. Nationwide Mut. Fire Ins. Co.*, 2003 WL 21223843, at *2 (Del. Super. Apr. 17, 2003) (same).

[redacted]

Agreement B(ii) thus requires Hertz to establish the amount that it has paid to indemnify a specific director, officer or employee against whom a **Claim** was made.

Unable to identify any particular **Insured Person** against whom a **Claim** was made, Hertz contends that the Investigation Order was directed at **Insured Persons** because it contains references to unidentified "officers, directors and employees." *See, e.g.,* Hertz Br. at 2, 5-6, 20-27. In rejecting that same argument, the court in *Office Depot, Inc.*, *supra*, found that, although an SEC formal order of investigation referenced "the conduct of Office Depot's officers, directors and employees as participants in 'possible violations' of the securities laws," the formal order was not against any insured person since it did "not identify any specific officer or director as a wrongdoer by name." 734 F. Supp. 2d at 1319-20; *see also Am. Sec. Bank & Tr. Co. v. Progressive Cas. Ins. Co.*, 2011 WL 2531311, at *5 (M.D. Tenn. June 24, 2011) (complaint that alleged breach of fiduciary duty by company's executives, but did not include any executives as named defendants, was not a claim against the executives under a D&O policy). As the plain terms of the Primary Policy and the relevant case law show, Hertz cannot meet its burden of establishing coverage for

[redacted]

the legal fees and expenses at issue by arguing that an Investigation Order directed at the Hertz entity is a **Claim** against an unnamed group of **Insured Persons**.[9]

Nor does *National Stock Exchange v. Federal Insurance Co.*, 2007 WL 1030293 (N.D. Ill. Mar. 30, 2007), dictate a contrary result. Although the court in that case did find that an SEC investigation order was against an insured person, it only did so because an earlier letter from the SEC specifically defined the scope of the investigation to include an insured entity and its present and former officers. 2007 WL 1030293, at **4, 5. Here, by contrast, the Investigation Order was not preceded by any communication in which the SEC specifically defined the scope of the SEC Investigation to include any director, officer or employee of Hertz. Rather, as the Superior Court correctly observed in distinguishing *National Stock Exchange*,

[9] The two generic references in the Investigation Order to the "principal executive officer or officers and principal financial officer or officers of Hertz Global and/or Hertz Corp., or persons performing similar functions," (A0191), do not prove otherwise. There is simply no meaningful difference between such references and references to "officers, directors and employees." Either way, the Investigation Order fails to "identify any specific officer or director as a wrongdoer by name." *Office Depot, Inc.*, 734 F. Supp. 2d at 1319-20.

the June 2014 SEC Letter that preceded the Investigation Order here "did not define Hertz beyond its corporate identity." Hertz Ex. A at 24.[10]

Hertz also incorrectly argues that the relevant terms in the Primary Policy should be read in light of Hertz's purported "reasonable expectations" rather than in accordance with their plain meaning. *See* Hertz Br. at 19, 26. As this Court has instructed, the reasonable expectations doctrine "applies only after a determination that an insurance contract is ambiguous." *Stoms v. Federated Serv. Ins. Co.*, 125 A.3d 1102, 1108 (Del. 2015); *see also First Solar, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 274 A.3d 1006, 1013 (Del. 2022) ("[A]bsent ambiguity, Delaware courts interpret contract terms according to their plain, ordinary meaning.") (internal quotation marks omitted). Here, because Hertz never contended in its Opening Brief or in the proceedings below that the **Claim** definition is ambiguous, Hertz has waived any such argument. Del. Supr. Ct. R. 8 & 14(b)(vi)(A)(3). And, in any event, the **Claim** definition is capable of only one reasonable interpretation and is

[10] *National Stock Exchange* is also inapposite because it involved policy language that differed materially from that of Insuring Agreement B(ii) and the **Claim** definition at issue here. *See* 2007 WL 1030293, at **1, 5 (policy covered claims made "against *any* Insured Person" and defined "claim" to mean "a formal administrative or regulatory proceeding commenced by the filing of a . . . formal investigative order") (emphasis in original).

[redacted]

not ambiguous. *See Monzo v. Nationwide Prop. & Cas. Ins. Co.*, 249 A.3d 106, 118 (Del. 2021). Thus, the "reasonable expectations doctrine" has no application here.

Because the SEC Investigation does not constitute a **Claim** against an **Insured Person**, the AAIC Policy does not cover any alleged loss incurred by Hertz in funding any **Insured Person's** response to the SEC Investigation. The Superior Court thus correctly granted AAIC's motion for summary judgment and denied Hertz's motion for partial summary judgment. This Court should affirm.

II. THE SUPERIOR COURT CORRECTLY REJECTED HERTZ'S COVERAGE THEORY BASED ON *RAMIREZ* AND *ANSFIELD*

A. Question Presented

Did the Superior Court correctly reject Hertz's contention that, even if the SEC Investigation does not trigger the Insuring Agreements, the legal fees and expenses that Hertz incurred "as a result of the SEC Investigation" are nevertheless covered under the AAIC Policy because such amounts were allegedly "necessary" to the defense of the separate *Ramirez* and *Ansfield* class actions?

AAIC argued below that, regardless of whether any of the legal fees and expenses at issue were "necessary" to the defense of *Ramirez* or *Ansfield*, they are not covered. A0533-36; B000118-19.

B. Standard Of Review

"This Court reviews a grant or denial of a motion for summary judgment *de novo*." *In re Solera Ins. Coverage Appeals*, 240 A.3d at 1130. Further, "[o]nly questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented." Del. Supr. Ct. R. 8.

C. Merits Of Argument

1. Regardless Of Whether Hertz's Defense Of The SEC Investigation Was Also "Necessary" To The Defense Of *Ramirez* or *Ansfield*, The Amounts In Dispute Are Not Covered Under The Terms Of The Policy

Unable to establish that the SEC Investigation is a **Claim** against an **Insured Person**, Hertz attempts to evade its burden to do so by arguing that the legal fees and expenses that it incurred "to defend against the SEC [Investigation]" are covered because they were allegedly necessary to the defense of *Ramirez* and *Ansfield*. Hertz Br. at 7, 33-41. Just like the court in the Related Coverage Action, the Superior Court correctly rejected this "last-ditch" argument because it is belied by the plain terms of the Primary Policy. Hertz Ex. A at 25-27; *Hertz Global Holdings, Inc.*, 530 F. Supp. 3d at 457-58. This Court should do the same.

Coverage under the Insuring Agreements in the Primary Policy is limited to **Loss** "arising from" a **Securities Claim** against an **Organization** or a **Claim** against an **Insured Person**. A0104 (Cl. 1.B.). The term **Loss** is defined to include **Defense Costs**, which are in turn defined as "reasonable fees . . . costs and expenses . . . *resulting solely from* the investigation, adjustment, defense and/or appeal of a **Claim** against an **Insured**." A0111 (Cl. 2(s)); A0107 (Cl. 2(e)) (emphasis added).

Regardless of whether Hertz's defense of the SEC Investigation was necessary to the defense of *Ramirez* or *Ansfield*, the legal fees and expenses that

[redacted]

Hertz incurred in connection with the SEC Investigation are not covered for either or both of two separate reasons. First, as the Superior Court rightly concluded, such legal fees and expenses do not qualify as **Defense Costs** as defined in the Primary Policy since they did not "result[ ] solely from" the defense of a **Claim** (*i.e.*, *Ramirez* or *Ansfield*). Hertz Ex. A at 26-27. Indeed, Hertz has admitted that it incurred all $27.2 million in legal fees and expenses at issue "in response to," "as a result of" and "to defend against" the SEC Investigation, which is not a **Claim**. A0317; B000039 (¶ 38); Hertz Br. at 7. And "Hertz would have had to expend [such costs] regardless of whether [ ] *Ramirez* [or *Ansfield*] had been filed." *Hertz Global Holdings, Inc.*, 630 F. Supp. 3d at 457. Because the legal fees and expenses at issue do not qualify as **Defense Costs**, they do not constitute **Loss** and thus do not come within the scope of coverage provided by the AAIC Policy in the first instance.[11]

Second, as AAIC also contended below (A0535-36), the legal fees and expenses that Hertz incurred in connection with the SEC Investigation do not

[11] The Superior Court did not read an exclusion into the definition of **Defense Costs**, as Hertz repeatedly suggests. Hertz Br. at 3-4, 37, 40, 41. Rather, the Superior Court gave the unambiguous terms of the **Defense Costs** definition their plain meaning and found that the legal fees and expenses sought by Hertz are not covered under the Insuring Agreements. There was no need to rely on any purported exclusion since those amounts are not within the AAIC Policy's coverage to begin with.

[redacted]

constitute **Loss** "arising from" either a **Claim** or a **Securities Claim** (*i.e.*, *Ramirez* or *Ansfield*), as required by the Insuring Agreements. The plain meaning of the term "arising out of" is "'originating from,' 'having its origin in,' 'growing out of,' or 'flowing from.'" *Goggin v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 2018 WL 6266195, at *5 (Del. Super. Nov. 30, 2018). Here, there is not a shred of evidence showing that the SEC initiated its investigation because of *Ramirez* or *Ansfield*, or that those lawsuits "in any way influenced the SEC's decision-making, let alone that the SEC Investigation would not have happened had *Ramirez* [or *Ansfield*] not been filed." *Hertz Global Holdings, Inc.*, 630 F. Supp. 3d at 457. To the contrary, Hertz would have incurred the legal fees and expenses at issue regardless of *Ramirez* or *Ansfield*. Because such amounts did not originate from, have their origin in, grow out of, or flow from *Ramirez* or *Ansfield*, they do not "arise from" a **Claim** or a **Securities Claim**. Accordingly, irrespective of whether any of the amounts that Hertz incurred in responding to the SEC Investigation were "necessary" to the defense of *Ramirez* or *Ansfield*, they are not covered under the AAIC Policy.

2. Hertz Failed To Preserve Its "Larger Settlement Rule" Argument For Appeal And That Contention Is Without Merit In Any Event

[redacted]

While Hertz complains that the Superior Court "did not address the larger settlement rule" (Hertz Br. at 35), that is because Hertz did not fairly present the issue below. Hertz could have and should have raised its larger settlement rule argument in its opposition to AAIC's motion for summary judgment, but it failed to do so. *See* A0370-426.[12] Instead, Hertz belatedly raised the larger settlement rule issue in a post-hearing supplemental brief that was supposed to be limited to choice-of-law and exhaustion issues. A0554-56. AAIC argued below that Hertz's improper larger settlement rule argument should be stricken and disregarded because it exceeded the scope of the supplemental briefing directed by the Superior Court. B000116-17. Given that the issue was not properly raised below and that the interests of justice do not require this Court to review it, Hertz should not now be permitted to advance its larger settlement rule contention on appeal. Del. Supr. Ct. R. 8; *see Smith v. Del. State Univ.*, 47 A.3d 472, 479 (Del. 2012) (waiver may be

[12] Hertz mischaracterizes the record in suggesting that its larger settlement rule argument was "directly presented" in its opposition to AAIC's summary judgment motion. *See* Hertz Br. at 35 (citing A0424-25). Nowhere does Hertz's opposition brief even use the phrase "larger settlement rule," much less fairly present the contention that Hertz now advances on appeal. *See* A0370-426.

excused only if the trial court committed an error "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process").[13]

Even assuming *arguendo* that Hertz has not waived its argument, the larger settlement rule simply has no bearing here since allocation between covered and uncovered loss is not at issue. *Calamos Asset Mgmt., Inc. v. Travelers Cas. & Sur. Co. of Am.*, 2021 WL 1721661, at *3 (D. Del. Apr. 30, 2021) (the larger settlement rule applies only where there is a dispute "as to the allocation of covered and uncovered" loss). Here, as shown above in Point II.C.1., *none* of the legal fees and expenses at issue come within the coverage provided by the AAIC Policy in the first place since those amounts: (1) do not qualify as **Defense Costs** and thus do not constitute covered **Loss** (as the Superior Court held); and/or (2) do not constitute **Loss** "arising from" a **Securities Claim** or a **Claim**. Because Hertz has failed to establish that any of the amounts in dispute are covered under the AAIC Policy, there is no issue of allocation to which the larger settlement rule could possibly apply.

While the absence of an allocation issue is, by itself, fatal to Hertz's contention, Hertz has also failed to establish that the "defense resolve[d], at least in

[13] Nor does Hertz's Opening Brief "state why the interests of justice exception to Rule 8 may be applicable," as Supreme Court Rule 14(b)(vi)(A)(1) requires where a party did not preserve a question in the trial court.

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part, insured claims." *Clover Health Invs., Corp. v. Berkley Ins. Co.*, 2023 WL 1978227, at *10 (Del. Super. Feb. 6, 2023). Hertz argues, without any citation to the record, that this requirement has been met because there was supposedly a "common defense" of the SEC Investigation and *Ramirez*/*Ansfield*. Hertz Br. at 3, 34, 36. But it is undisputed that all of the legal fees and expenses at issue were incurred "to defend against" the SEC Investigation (*id*. at 7) and, even if the SEC Investigation was "related to" *Ramirez*/*Ansfield* as Hertz suggests, there is no evidence in the record to support the existence of a "common defense." Insofar as any such evidence does exist, only Hertz can be blamed for its absence from the record given Hertz's failure to properly raise the larger settlement rule issue below.

Hertz also proclaims that AAIC "owes Hertz for the full amount of Defense Costs that 'solely' resulted from [*Ramirez* and *Ansfield*], consistent with the larger settlement rule." Hertz Br. at 38. Not only is that contention easily dispensed with due to the inapplicability of the larger settlement rule, but it is also defeated by Hertz's own admissions that it incurred all $27.2 million in legal fees and expenses at issue "in response to," "as a result of" and "to defend against" the SEC Investigation. A0317; B000039 (¶ 38); Hertz Br. at 7; *see also* Hertz Ex. A at 27 ("Hertz does not argue the costs resulted solely from [*Ramirez* or *Ansfield*] nor does

the record reasonably support any such conclusion."). And Hertz's contention is entirely disingenuous since Hertz's Complaint does not purport to seek coverage for (or even mention) *Ramirez* or *Ansfield* and [redacted]

3. Applying The Plain Terms Of The Defense Costs Definition Does Not Render Any Policy Provision Illusory, Or In Conflict With Any Other Provision, Or Ambiguous

Contrary to Hertz's contention, applying the definition of **Defense Costs** in accordance with its plain meaning (as Delaware law requires) does not render the allocation provision at Clause 8 of the Primary Policy "illusory or meaningless." *See* Hertz Br. at 39-40. The allocation provision applies to, *inter alia*, "**Defense Costs** jointly incurred by . . . any **Organization** and any **Insured Person** in connection with any **Claim** other than a **Securities Claim**." A0126. So, for example, a class action lawsuit brought against Hertz and its officers on behalf of customers would be a "**Claim** other than a **Securities Claim**" that potentially implicates coverage for the officers but not for the Hertz entity. If Hertz and the officers were defended by the same law firm, all of that firm's fees and expenses would qualify as **Defense Costs** because they "result[ed] solely from" the defense of a **Claim** and such jointly

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incurred **Defense Costs** would be subject to an allocation under Clause 8 of the Primary Policy. Thus, the Primary Policy's requirement that legal fees and expenses must result solely from a **Claim** to qualify as **Defense Costs** does not "entirely negate the allocation provision," as Hertz argues. Hertz Br. at 40.

Despite conceding that the allocation provision is "not at issue here," Hertz also argues that the Superior Court's ruling somehow creates a conflict between the **Defense Costs** definition and the allocation provision. Hertz Br. at 40-41. That is incorrect. The allocation provision only applies to **Defense Costs** (as defined in the Primary Policy) and the Superior Court found that the legal fees and expenses at issue here do not meet the definition of **Defense Costs**. The fact that the allocation provision is inapplicable where, as here, none of the amounts at issue are covered in the first place is not a conflict. *See Calamos Asset Mgmt., Inc.*, 2021 WL 1721661, at *5 (declaring that questions of coverage "are distinct from allocation questions").

Lastly, Hertz again resorts to the erroneous suggestion that the relevant terms in the Primary Policy should be read in light of Hertz's purported "reasonable expectations" rather than in accordance with their plain meaning. *See* Hertz Br. at 8, 38, 40. Again, the reasonable expectations doctrine "applies only after a determination that an insurance contract is ambiguous." *Stoms*, 125 A.3d at 1108.

[redacted]

Hertz proclaims that an ambiguity exists due to a purported conflict between the definition of **Defense Costs** and the allocation provision in the Primary Policy (Hertz Br. at 41), but, as established directly above, there is no such conflict. And the **Defense Costs** definition is capable of only one reasonable interpretation and is not ambiguous. As such, the "reasonable expectations doctrine" is inapplicable.

III. NO COVERAGE IS AVAILABLE UNDER INSURING AGREEMENT B(ii) FOR ANY OR ALL OF THREE ADDITIONAL INDEPENDENT REASONS THAT AAIC RAISED IN THE PROCEEDINGS BELOW

A. Question Presented

Whether the Superior Court's grant of summary judgment to AAIC and denial of summary judgment to Hertz should be affirmed because the AAIC Policy does not cover any alleged loss incurred by Hertz in funding any **Insured Person's** response to the SEC Investigation for any of the following alternative reasons:

1. Hertz failed to comply with a condition precedent to coverage requiring written notice to AAIC "no later than 60 days after the end of the **Policy Period**" by first providing notice of an alleged **Claim** against an **Insured Person** no earlier than four years after the end of the **Policy Period**;

2. Hertz cannot establish that the full amount of the underlying limits of liability have been paid "as loss under the Underlying Insurance," as required to trigger coverage under the AAIC Policy; and/or

3. Hertz is collaterally estopped from relitigating the issue of whether the SEC Investigation is a **Claim** against an **Insured Person** based on the March 30, 2021 order and judgment in the Related Coverage Action

In the Superior Court, AAIC preserved the notice question at A0253-60 and A0536-41, the exhaustion question at A0259-60, A0518-19, B000091-96 and B000108-14, and the collateral estoppel question at A0256-58 and A0541-44.

B. Standard Of Review

[redacted]

"This Court reviews a grant or denial of a motion for summary judgment *de novo*." *In re Solera Ins. Coverage Appeals*, 240 A.3d at 1130. Further, this Court may affirm the trial court's judgment on any "alternative ground, fairly raised below." *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 67 (Del. 1995); *Haley v. Town of Dewey Beach*, 672 A.2d 55, 58-59 (Del. 1996).

C. Merits Of Argument

1. Hertz's Failure To Comply With The Notice Provision Operates As An Independent Basis To Bar Coverage

AAIC contended below that, even if the Investigation Order were a **Claim** against an **Insured Person** (it is not), the AAIC Policy still would not provide any coverage under Insuring Agreement B(ii) since Hertz failed to comply with the notice provision in the Primary Policy. A0253-60; A0536-41. The Superior Court did not, and did not need to, reach this issue in granting summary judgment to AAIC and denying summary judgment to Hertz. This Court may nevertheless affirm on the alternative ground that Hertz's failure to comply with the notice provision vitiates coverage. *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d at 67; *Haley*, 672 A.2d at 58-59.

The notice provision requires as a "condition precedent" to coverage that the **Insured** must give "written notice" to AAIC "of a **Claim** made against an **Insured**

as soon as practicable . . . but in all events no later than 60 days after the end of the **Policy Period**." A0123 (Cl. 7(a)). The **Policy Period** ended on November 16, 2014 and, thus, the 60-day period to provide notice of **Claims** concluded on January 13, 2015. The Investigation Order was issued during the **Policy Period** (A0189) and Hertz has admitted in sworn interrogatory responses that it did not notify AAIC of the Investigation Order any earlier than September 5, 2018 (A0345).[14] Thus, it is uncontestable that Hertz failed to comply with the condition precedent to coverage that written notice must be given "no later than 60 days after the end of the **Policy Period**."

Moreover, because the AAIC Policy is a claims-made policy that requires timely notice within a fixed period as a condition precedent to coverage, Delaware law does not require AAIC to show prejudice to vitiate coverage based on Hertz's failure to comply with the notice provision. *Georgian Am. Alloys, Inc. v. Axis Ins. Co.*, 2022 WL 3971584, at *2 (3d Cir. Aug. 31, 2022) (under Delaware law, an insurer of a claims-made policy "need not show prejudice to enforce the notice requirement"); *Homsey Architects, Inc. v. Harry David Zutz Ins., Inc.*, 2000 WL

[14] Nor did Hertz ever provide AAIC with written notice of any other purported **Claim** against an **Insured Person**.

973285, at **12-13 (Del. Super. May 25, 2000) (under Delaware law, an "insurer does not have to show prejudice when it denies coverage under a claims-made policy" for late notice); *Devon Park Assocs., L.P. v. Fed. Ins. Co.*, No. 18-2011-LPS (D. Del. Aug. 2, 2019) (D.E. 29, p. 54, Lns. 13-15).[15] Thus, even if the Investigation Order were a **Claim** against an **Insured Person**, the AAIC Policy still would not cover any alleged loss incurred by Hertz to fund any **Insured Person's** response to the SEC Investigation because Hertz failed to comply with the notice provision.

In the Superior Court, Hertz relied on Clause 7(b) in the Primary Policy to contend that it was not required to provide notice of the Investigation Order because it relates to the same facts and circumstances as *Ramirez*/*Ansfield* or because Hertz reported the June 2014 SEC Letter. This reliance is misplaced. Clause 7(b) states that any "**Claim** which is subsequently made against an **Insured** *and reported to the* ***Insurer*** alleging, arising out of, based upon or attributable to the facts alleged in the **Claim** for which such notice has been given . . . shall be considered related to the first **Claim** *and made* at the time such notice was given." A0124 (emphasis added). Moreover, insofar as Hertz relies on its notice of the June 2014 SEC Letter, its

[15] Pursuant to Supreme Court Rule 14(b)(vi)(B)(2), a copy of the *Devon Park Associates, L.P.* transcript is attached to this filing as Exhibit A.

[redacted]

contention also fails because Clause 7(b) only applies where "notice of a **Claim** has been given to the **Insurer**" and the June 2014 SEC Letter is not a **Claim** (as Hertz does not dispute on appeal).

Hertz also argued that, since the June 2014 SEC Letter constitutes a "notice of circumstances" under Clause 7(c), the Investigation Order is "deemed to have been reported to" AAIC when the June 2014 SEC Letter was reported. Regardless of whether the June 2014 SEC Letter is a "notice of circumstances," Hertz's argument fails because, like Clause 7(b), Clause 7(c) explicitly requires that any **Claim** made against an **Insured** subsequent to a notice of circumstances must also be "reported" to the **Insurer** for Clause 7(c) to apply. A0124.

2. Coverage Is Not Available Because The AAIC Policy Has Not Been Triggered By Exhaustion Of The Underlying Limit

In the proceedings below, AAIC also contended that Hertz cannot maintain its claim for breach of contract because the AAIC Policy has not been triggered by exhaustion of the Underlying Limit. A0259-60; A0518-19; B000091-96; B000108-114. Although the Superior Court did not reach the issue, this Court may nevertheless affirm on this alternative ground. *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d at 67; *Haley*, 672 A.2d at 58-59.

Liability under the AAIC Policy attaches only after "the full amount of the Underlying Limit" has been paid "as loss under the Underlying Insurance." A0171. Here, it is undisputed that the insurer of the underlying first-excess USSIC Policy has paid only $12,539,238.78 and will never pay the full amount of its policy's $15 million limit. B000082-83. Although the AAIC Policy does permit the Insureds to pay the $2,460,761.22 difference between the USSIC Policy's limit and the amount paid by the insurer of that policy, the exhaustion requirement can only be satisfied by loss that is *covered under the Underlying Insurance*. *Pfizer Inc. v. U.S. Specialty Ins. Co.*, 2020 WL 5088075, at *6 (Del. Super. Aug. 28, 2020). Hertz attempts to demonstrate exhaustion by arguing that it has incurred legal fees and expenses associated with the SEC Investigation that exceed the amount remaining on the USSIC Policy's limit. But those legal fees and expenses cannot be applied toward exhaustion of the Underlying Limit since the court in the Related Coverage Action has ruled that the Underlying Insurance policies – including the USSIC Policy – do not cover those amounts. As principles of full faith and credit, *res judicata* and comity dictate, the ruling in the Related Coverage Action precludes exhaustion of the USSIC Policy under these facts.

After the issue was fully litigated, the Court in the Related Coverage Action indisputably ruled and entered final judgment to the effect that Hertz's SEC Investigation defense costs are not covered under the Underlying Insurance policies (including the USSIC Policy). As a matter of *res judicata*, Hertz is precluded from relitigating that issue against the underlying insurers. Hertz cannot now come to Delaware and argue that the SEC Investigation defense costs constitute covered loss under the Underlying Insurance policies or that Hertz's payment of such uncovered amounts somehow exhausted the amount remaining on the USSIC Policy's limit.

Moreover, regardless of how a Delaware court might have decided the issues as an original matter, full faith and credit must be given to the judgment from the Related Coverage Action brought by Hertz. *See* U.S. Const., art. IV, § 1; *Pyott v. Louisiana Mun. Police Employees' Ret. Sys.*, 74 A.3d 612, 616 (Del. 2013); *E.R.G. v. Soda Rental Serv., Inc.*, 1988 WL 22346, at *2 n.1 (Del. Super. Mar. 4, 1988) ("The Full Faith and Credit Clause requires that courts of Delaware recognize and support judgments of other states even though they could not be obtained under Delaware law."). Again, the Southern District of New York's judgment precludes Hertz from re-litigating the issue of coverage under the Underlying Insurance for the SEC Investigation defense costs against the underlying insurers. That judgment,

[redacted]

which must be given the same force and effect to which it would be entitled in the rendering court, also precludes exhaustion of the USSIC Policy in this case.

And, even if not mandated by the Full Faith and Credit Clause, this Court should still recognize and enforce the Southern District of New York's ruling in the Related Coverage Action as a matter of comity. The issue of coverage for the SEC Investigation defense costs under the terms of the Primary Policy – to which the AAIC and USSIC Policies follow form – was fully litigated and conclusively adjudicated against Hertz in the Related Coverage Action. It is impossible for this Court to find that the Underlying Insurance has been exhausted without issuing an inconsistent ruling concerning the exact same policy terms that would operate as a de facto reversal of the Southern District of New York's decision. This risk of "inconsistent rulings[ ] present[s] an irreconcilable conflict that principles of comity are intended to avoid." *Nokia Sols. & Networks Oy v. Collision Commc'ns, Inc.*, 2020 WL 2095829, at *6 (Del. Super. Apr. 30, 2020); *see Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. FedEx Corp.*, 2023 WL 4623626, at *8 (Del. Super. July 18, 2023) ("[T]he doctrine of comity is important and courts should try to avoid issuing conflicting rulings on the same issue."); *In re Oracle Corp.*, 867 A.2d 904, 925 (Del. Ch. Ct. 2004) (declining to examine issue that was decided by a California court in

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a related case since it would "violat[e] principles of comity and invit[e] inter-state judicial conflicts that present a real threat of inconsistent rulings").

Below, Hertz purported to rely on the "*Stargatt* rule" to argue that its August 2023 settlement with the Insurer of the USSIC Policy "triggered Hertz's right to seek coverage" from AAIC under Delaware law. This reliance is unavailing. Under the *Stargatt* rule, an excess policy attaches where the total *covered loss* incurred by an insured reaches the underlying policy limits, irrespective of "whether the insured *collected* the full amount of the" underlying limits from the underlying insurers. *Pfizer Inc.*, 2020 WL 5088075, at *3. Here, while it is true that Hertz has not "collected" the full amount of the Underlying Limit from the underlying insurers, this is not the problem for Hertz from an exhaustion standpoint. Rather, long before Hertz entered into its settlement with the insurer of the USSIC Policy, the court in the Related Coverage Action ruled that the SEC Investigation costs are not covered under the Underlying Insurance policies and that ruling cannot and will not be undone. Thus, the Underlying Limit is not exhausted – and the *Stargatt* rule is inapplicable – because Hertz has failed to establish that it even *incurred* an amount of *covered* loss that would reach the attachment point of the AAIC Policy.

[redacted]

Because the AAIC Policy has not been triggered by exhaustion of the Underlying Limit, there is no coverage available under the AAIC Policy and Hertz cannot maintain its claim for breach of contract against AAIC. For this reason alone, the Superior Court's award of summary judgment to AAIC was correct.

3. Collateral Estoppel Also Bars Hertz From Relitigating The Issue Of Whether A Claim Was Made Against An Insured Person

AAIC contended below that, based on the March 30, 2021 order and judgment in the Related Coverage Action, the doctrine of collateral estoppel precludes Hertz from relitigating whether the SEC Investigation is covered under the terms of the Primary Policy (to which the AAIC Policy follows form). A0256-58; A0541-44. The Superior Court correctly held that Hertz is collaterally estopped from contending that the SEC Investigation is a **Securities Claim** against Hertz (which Hertz does not contest on appeal), but declined to hold that Hertz is collaterally estopped from relitigating the issue of whether the SEC Investigation is a **Claim** against an **Insured Person**. Hertz Ex. A at 20. As demonstrated below, because the latter ruling is based on a misapprehension of New York law, this Court may affirm

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on the alternative ground that Hertz is collaterally estopped from contending that the SEC Investigation is a **Claim** against an **Insured Person**.[16]

"Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity." *Reid v. Reid*, 157 N.Y.S.3d 52, 54 (App. Div. 2021). Under New York law, "only two requirements must be satisfied" to invoke collateral estoppel: (1) "the identical issue was necessarily decided in the prior action and is decisive in the present action"; and (2) the party sought to be precluded had "a full and fair opportunity to contest the prior determination." *D'Arata v. N.Y. Cent. Mut. Fire Ins. Co.*, 76 N.Y.2d 659, 664 (1990). It is well-established that "[o]nly the party against whom the doctrine is invoked must be bound by the prior proceeding." *Rojas v. Romanoff*, 128 N.Y.S.3d 189, 195 (App. Div. 2020). Thus, collateral estoppel "can be raised by one who was not a party or in privity in the first suit." *Id*.

[16] As the Superior Court found, New York law governs the issue of whether Hertz's claims against AAIC are precluded by collateral estoppel. Hertz Ex. A at 15 (citing *Asbestos Workers Local 42 Pension Fund v. Bammann*, 2015 WL 2455469, at *16, *16 n.129 (Del. Ch. May 21, 2015)).

[redacted]

The doctrine of collateral estoppel squarely applies here. First, the issue decided in the Related Coverage Action was identical to the decisive issue in this action: whether the same SEC Investigation is a **Claim** against an **Insured Person** under the terms of the same Primary Policy (to which the AAIC Policy follows form in all material respects). Indeed, both the Related Coverage Action and this action center on the exact same policy provisions (including the definition of **Claim**), there are no provisions unique to the AAIC Policy that impact this analysis and, as the court found in the Related Coverage Action, there is "no variation in the [ ] laws [of New York and Delaware] that would impact the analysis." *Hertz Global Holdings, Inc.*, 530 F. Supp. 3d at 453. Second, Hertz had a full and fair opportunity to contest these issues in the Related Coverage Action and it cannot prove otherwise. *D'Arata*, 76 N.Y.2d at 664 ("The burden is on the party attempting to defeat the application of collateral estoppel to establish the absence of a full and fair opportunity to litigate."). Thus, Hertz is estopped from relitigating the issue of whether the SEC Investigation is a **Claim** against an **Insured Person** in this action.

Relying on *Tydings v. Greenfield, Stein & Senior, LLP*, 11 N.Y.3d 195 (2008), the Superior Court erroneously concluded that collateral estoppel does not apply to the **Claim** against an **Insured Person** issue since the court in the Related Coverage

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Action also found that Hertz failed to give its insurers notice of any **Claim** made against an **Insured Person**. Hertz Ex. A at 20. As *Tydings* itself shows, New York law does not categorically preclude a finding of collateral estoppel whenever a judicial decision rests on multiple independent grounds. *Id*. at 199 (an alternative ruling has preclusive effect where the court addressed the issue with "unhurried and painstaking care").[17] Rather, "a trial court's alternative rulings have preclusive effect if they are neither casual nor of any lesser quality than had the outcome . . . depended solely on the alternative issue." *Travelers Indem. Co. v. Northrop Grumman Corp.*, 2021 WL 4255073, at *5 (S.D.N.Y. Sept. 17, 2021) (internal quotation marks omitted). The court's thorough and well-reasoned decision in the Related Coverage Action certainly meets that standard. To hold otherwise "would result in the exact duplication of effort, inefficiency and potential for conflicting decisions that the doctrine [of collateral estoppel] is designed to avoid." *Id*.

Further, AAIC anticipates that Hertz will argue that collateral estoppel does not apply where the issue sought to be precluded is a "pure question of law." But

[17] In *Tydings*, the Court held only that "collateral estoppel does not prevent relitigation of a ruling that was an alternative basis for a trial-level decision[ ] where an *appellate court* affirmed the decision without addressing that ruling." 11 N.Y.3d at 197 (emphasis added). That holding has no application here, where Hertz elected not to pursue its appeal in the Related Coverage Action through a decision.

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the cases actually hold more broadly that collateral estoppel – which is synonymous with issue preclusion – bars re-litigation of "issues," including both issues of fact and issues of law. *See, e.g., Dittmer v. State*, 528 N.Y.S.2d 876, 877 (App. Div. 1988) ("[C]ollateral estoppel applies to both issues of fact and law."); *Siddiqui v. Smith*, 173 N.Y.S.3d 23 (App. Div. 2022); *Nicotra v. CNY Family Care, LLP*, 125 N.Y.S.3d 213, 216 (App. Div. 2020) ("The doctrine of collateral estoppel[ ] bars the relitigation of *an issue of fact or law* actually litigated and resolved in a valid court determination essential to the prior judgment.") (emphasis added). In any event, as the Superior Court correctly found, the interpretation of the insurance contract here is "not a pure question of law" since it "involves the application of rules of contract interpretation to particular terms and facts." Hertz Ex. A at 18-19.

CONCLUSION

For the foregoing reasons, AAIC respectfully requests that this Court affirm the Superior Court's December 18, 2023 Memorandum Opinion and Order granting AAIC's Motion for Summary Judgment and denying Hertz's Motion for Partial Summary Judgment, and grant such other and further relief as the Court may deem just and proper.

Dated: April 17, 2024

Public Version Dated: April 23, 2024

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