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IN THE SUPREME COURT FOR THE STATE OF DELAWARE

ORIGIS USA LLC, and GUY VANDERHAEGEN, Plaintiffs-Below/Plaintiffs, v. GREAT AMERICAN INSURANCE COMPANY, AXIS INSURANCE COMPANY, MARKEL AMERICAN INSURANCE COMPANY, BRIDGEWAY INSURANCE COMPANY, RSUI INSURANCE COMPANY, ASCOT SPECIALTY INSURANCE COMPANY, ENDURANCE ASSURANCE COMPANY, BERKSHIRE HATHAWAY SPECIALTY INSURANCE CORPORATION, IRONSHORE INDEMNITY, INC., and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA Defendants-Below/Appellees.	C.A. No. 461, 2024 Court Below - Superior Court of the State of Delaware C.A. No. N23C-07-102 SKR

ANSWERING BRIEF OF APPELLEE BRIDGEWAY INSURANCE COMPANY

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NATURE OF PROCEEDINGS

Plaintiffs Origis USA, LLC ("Origis") and Guy Vanderhaegen, brought this declaratory judgment action against Bridgeway seeking insurance coverage for an Underlying Lawsuit[1] brought by former investors in Origis. The investors allege they were defrauded in connection with the sale of their interests in Origis and its parent company, which took place before November 18, 2021 and is referred to by Plaintiffs as the "cut-off" date.

Plaintiffs sued two distinct insurance coverage "towers" in this action: the pre-November 18, 2021 tower and the post-November 18, 2021 tower. The post-November 18, 2021 tower, which includes Bridgeway as the primary insurer, only provides coverage for Loss arising from a suit for Wrongful Acts that took place *after* the cut-off date of November 18, 2021.

In their Complaint in this action, Plaintiffs did not identify *any* facts demonstrating the Underlying Lawsuit was for post-November 18, 2021 conduct. In response, Bridgeway moved to dismiss the Complaint pursuant to Superior Court Civil Rule 12(b)(6) for failure to state a claim upon which relief can be granted; or, in the alternative, for a more definite statement pursuant to Rule 12(e).

[1] Despite drafting a heading in their Opening Brief entitled "The Insurers Breach Their Coverage Obligations," Plaintiffs seek only declaratory relief against Bridgeway and the rest of the post-cutoff tower. Appellants' Opening Brief at p. 11 ("Opening Br.").

In opposing Bridgeway's motion, Plaintiffs identified, for the first time, three paragraphs out of the 252 in the Amended Complaint in the Underlying Lawsuit alleging that Plaintiffs failed to respond to information requests after November 18, 2021. Therefore, Plaintiffs argued, the suit was also for that conduct.

In granting Bridgeway's motion to dismiss, the Superior Court correctly held in its May 9, 2024 opinion that the allegations pointed to by Plaintiffs "are little more than an aside in a lengthy complaint that brings plenty of proper Claims—but only Claims for pre-November 2021 Wrongful Acts. In context with the rest of the Underlying Complaint, Paragraphs 158 through 160 reflect that the Investors merely wished to explain that there could be additional information that would support their action." Memorandum Opinion and Order at p. 18, Ex. A to Appellant's Opening Br. This appeal followed.

SUMMARY OF ARGUMENT

1. Denied. The Bridgeway policy undisputedly provides coverage only for lawsuits for post-November 18, 2021 conduct. The Superior Court properly concluded that the Amended Complaint in the Underlying Action was only for pre-November 18, 2021 conduct.

2-7. The arguments set forth in paragraphs 2 through 7 of Plaintiffs' Opening Brief are directed to other parties to the appeal but not to Bridgeway.

8. Denied. The Underlying Lawsuit is clearly for pre-November 18, 2021 conduct. The three paragraphs of the 252 in the Amended Complaint in the Underlying Lawsuit relied upon by Plaintiffs do not transform the suit into one for pre-November 18, 2021 conduct. The investors allege their information rights were breached only to assert that "But for these breaches, Plaintiffs would be able to set forth their claims with even more particularity." (A00582, ¶160). The claims referred to are those for pre-November 18, 2021 conduct, set forth in detail in the other 249 paragraphs of the Amended Complaint.

9. Denied. The Superior Court properly compared the plain allegations of the Amended Complaint against the undisputed terms of the Bridgeway policy and correctly held that the Underlying Lawsuit was for pre-November 18, 2021 conduct. The Superior Court correctly noted that "In context with the rest of the Underlying Complaint, Paragraphs 158 through 160 reflect that the Investors merely wished to explain that there could be additional information that would support their action" for pre-November 18, 2021 conduct.

STATEMENT OF FACTS

A. The Bridgeway Policy

The relevant insuring agreements of the Bridgeway Policy provide in pertinent part that:

> A. Individual Non-Indemnified Liability
>
> The Insurer shall pay on behalf of an Insured Person, Loss arising from a Claim first made against an Insured Person during the Policy Period, or Extended Reporting Period, if purchased, provided that such Loss is not indemnified by the Company.
>
> B. Individual Indemnified Liability
>
> The Insurer shall pay on behalf of a Company, Loss arising from a Claim first made against the Insured Person during the Policy Period, or the Extended Reporting Period, if purchased, provided that the Company indemnifies the Insured Person for such Loss as permitted or required by law.
>
> C. Company Liability
>
> The Insurer shall pay on behalf of the Company, Loss arising from a Claim first made against the Company during the Policy Period, or the Extended Reporting Period, if purchased.

(A00724).[2]

> A Claim, in relevant part, means any:
>
> 1. Written demand first received by an Insured for monetary, non-monetary, declaratory or injunctive relief;

[2] All references to the record are to the Appendix of Appellants.

2. Civil proceeding commenced by the service of a complaint or similar pleading;

….

against an Insured for a Wrongful Act.

(A00276, Section VI- Definitions, A.).

Wrongful Act means any actual or alleged error, misstatement, misleading statement, act omission, neglect, or breach of duty committed or attempted by:

1. Any Insured Person while acting in his or her capacity as such;

2. Any matter claimed against any Insured Person solely by reason of his or her status as such; or

3. Any Company, for purposes of coverage under Insuring Agreement C – Company Liability.

(A00278-279, N.).

The Prior Acts Exclusion states:

The Insurer shall not be liable for Loss arising out of any Claim:

Prior Acts

For any Wrongful Act occurring prior to the Prior Acts Date shown in the Schedule of this endorsement.

The Prior Acts Date shown in the Schedule is November 18, 2021.[3]

(A00319).

[3] Plaintiffs include extraneous "facts" in their Opening Brief that are not relevant to the appeal. Bridgeway includes only those facts necessary for the Court to address the issue at hand.

B. The Underlying Lawsuit

The Underlying Lawsuit was brought by former investors in Origis and another entity associated with Origis. The investors allege that Mr. Vanderhaegen exercised significant control over Origis prior to it being sold to a third party on November 18, 2021. (A00532, ¶¶1-33). They further allege that, prior to the November 18, 2021 sale, Plaintiffs engaged in breaches of their fiduciary duties to the investors, including deceitful conduct, that induced the investors to redeem their ownership interests in Origis in a manner that caused them economic damage. *Id.* In sum, it is alleged that Plaintiffs perpetrated a fraudulent scheme to acquire the investors' majority interest in Origis for a price far below its true value, before turning around and selling it for hundreds of millions of dollars in profit.

In their Amended Complaint, the investors noted that they would have been able to allege those claims "with even more particularity" had the Plaintiffs responded to their requests for information made after November 18, 2021. Those three paragraphs out of the 252 in the Amended Complaint are as follows:

> 158. In conjunction with the Indemnity Notice, Plaintiffs demanded access to the information from Origis necessary to carry out a complete investigation of their claims. Plaintiffs had the right to this information pursuant to Section 8.4 of the SRA.
>
> 159. Defendants produced only a small portion of the information Plaintiffs requested. Rather than a complete production, Defendants proposed a list of search terms, to which Plaintiffs proposed revisions. But then Defendants refused to produce all documents responsive to their own proposed search terms. Defendants instead produced the Antin transaction documents as well as an overwhelming amount of

> irrelevant technical information from the Antin data room. Beyond that, Defendants produced only certain documents expressly relating to discussions with investment bankers and the financing of the buyout and largely did so from the email account of a single custodian—Vanderhaegen. Defendants also failed to provide access to Origis employees for interviews as provided for in the SRA.
>
> 160. The failure to provide all information necessary for Plaintiffs to investigate their claims breached Plaintiffs' information access rights in the SRA. But for these breaches, Plaintiffs would be able to set forth their claims with even more particularity.[4]

(A00582).

[4] Contrary to Plaintiffs' characterization, the investors do not allege their "ability to effectively prosecute their claims" was impaired, only that they would have set them forth "with even more particularity." Opening Br. at 40.

ARGUMENT

A. Question Presented

Whether the Superior Court properly determined that the Underlying Lawsuit is for pre-November 18, 2021 conduct that is undisputedly not covered by the terms of the Bridgeway policy?

Bridgeway argued that the Underlying Lawsuit is clearly for pre-November 18, 2021 conduct only, which is not covered by the undisputed terms of the Bridgeway policy. (Preserved at A00911–A0093, A01182–A01198).

B. Scope of Review

The Superior Court's grant of Bridgeway's motion to dismiss is reviewed *de novo*. *See, e.g., First Solar, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 274 A.3d 1006, 1011 (Del. 2022), *as modified* (Mar. 22, 2022).

C. Merits of Argument

It is undisputed that the Bridgeway policy does not extend coverage to suits for pre-November 18, 2021 conduct. The requisite analysis in this case is a simple comparison of the terms of the Bridgeway policy and the Amended Complaint in the Underlying Lawsuit, which is clearly for pre-November 18, 2021 conduct. All 252 paragraphs of the Amended Complaint spell that out directly. Even the three paragraphs Plaintiffs rely upon to argue to the contrary explicitly state they were included to explain why the investors' claims for pre-November 18, 2021 fraud were not alleged with more specificity -- not that they are bringing an additional independent claim. Under these facts, the analysis need go no further.

Instead of acknowledging that the allegations in the Underlying Lawsuit fall outside the scope of the Bridgeway policy, Plaintiffs needlessly complicate the issue to try and force a finding of coverage under the post-cutoff tower. They do so by improperly attempting to read-in allegations and causes of action to the underlying Amended Complaint that do not exist and by pretending that the allegations are somehow unclear.

There is no support for any such machinations. A straightforward reading of the Amended Complaint in the Underlying Action and the undisputed terms of the Bridgeway policy are all that is required. Plaintiffs' misplaced criticism of the Superior Court's decision as including "very little analysis" misses this entire point. Not all cases are complex. Plaintiffs' attempt to muddy the waters of the straightforward examination required in this case should be rejected and the Superior Court's dismissal affirmed.

1. The Bridgeway Policy Undisputedly Provides Coverage Only for Suits for Post-November 18, 2021, Conduct.

The Bridgeway policy is a claims-made policy that provides coverage only for Loss arising from a Claim against an insured during the policy period. (A00272-00274). A Claim is defined as including a "Civil proceeding commenced by the service of a complaint or similar pleading…against an Insured for a Wrongful Act." (A00276). There is no dispute that the Underlying Lawsuit is a Claim first made during the policy period.

Critically, however, the Bridgeway policy includes a Prior Acts Exclusion stating that "The Insurer shall not be liable for Loss arising out of any Claim…For any Wrongful Act occurring prior to the Prior Acts Date…." (A00319). The Prior Acts Date is November 18, 2021, when Plaintiffs allegedly sold their controlling interest in Origis' parent company, which they refer to as the "Cut-Off Date". (*Id.*). It establishes a demarcation between coverage afforded by the post-cutoff tower of insurance that includes Bridgeway and the prior tower of insurance (which does not include Bridgeway) that Plaintiffs are also suing in this case.

Accordingly, while labeled as an exclusion, the effect of the provision is to modify the scope of the insuring agreement so that only suits for conduct that took place after that transactional cut-off date are potentially covered by the Bridgeway policy, subject to all other terms and conditions.[5]

2. The Underlying Lawsuit is For Pre-November 18, 2021 Conduct, Failing to Satisfy the Undisputed Terms of the Bridgeway Policy.

The Underlying Lawsuit is only for pre-November 18, 2021 conduct. The allegations that Plaintiffs failed to turn over documents after that date are pled only

[5] While it is an insurer's burden to prove an exclusion applies, under the facts of this case, it is inconsequential. The practical effect of the prior acts provision is that it directly limits the scope of the insuring agreements to suits for Wrongful Acts that took place *after November 18, 2021*. Even if it is Bridgeway's burden to prove a negative, i.e. that the Underlying Lawsuit is not for post-November 18, 2021 conduct, the result is easily the same under the facts of this case.

to support those allegations. They do not transform the suit into one for the failure to produce documents.

The investors filed a lengthy Amended Complaint, setting forth the basis for their suit against Plaintiffs in great detail. (A00529-00610). In sum, they allegedly entered into a Share Redemption Agreement ("SRA") with Origis, pursuant to which they sold their shares back to the company in October 2020 and January 2021 for a combined $105 million. (A00539, A00569-00570). Origis then turned around and sold the shares to a third party for significantly more than what it had paid the investors. (A00484-485); (A00950) Coverage Compl. at ¶6 ("In the UAC, the Investors allege that, in November 2021, Antin Infrastructure Partners ('Antin') bought Origis Energy's ownership interests in Origis USA (the 'Antin Purchase') for more than ten times the combined $105 million paid to them pursuant to the SRA."). The investors allege they were misled as to the performance of the company and the value of their shares at the time they sold them -- all of which took place *before* November 18, 2021, which is the Prior Acts Date in the Bridgeway policy. The investors are seeking the lost value of their shares based upon that conduct, for which Plaintiffs sued the pre-cutoff date tower of insurance coverage.[6]

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[6] The Superior Court similarly summarized the Underlying Lawsuit as follows:

> The heart of the allegations is that Plaintiffs and their affiliates undersold the Investors on the value of the Investors' shares in Origis and Origis's parent company, Origis Energy NV. The alleged scheme began in early 2019, when Plaintiffs supposedly diminished the Investors' oversight of Origis. Then, in two transactions in October

The three paragraphs cited by Plaintiffs explain why there are limited details supporting the investors suit for pre-November 18, 2021 fraud. The investors allege that pursuant to the SRA, "Plaintiffs demanded access to the information from Origis necessary to carry out a complete investigation of their claims." (A00582, ¶158). They further complain that "Defendants produced only a small portion of the information Plaintiffs requested" and "failed to provide access to Origis employees for interviews as provided for in the SRA." (*Id.*, ¶159).

The final paragraph explicitly states the reason they are alleging the failure of Plaintiffs to comply with the information requests: "The failure to provide all information necessary for Plaintiffs to investigate their claims breached Plaintiffs' information access rights in the SRA. But for these breaches, Plaintiffs would be able to set forth their claims with even more particularity." (*Id.*, ¶160).

It does not require anything but a plain reading of those allegations to understand their purpose. Paragraph 158 directly explains that "Plaintiffs demanded access to the information from Origis necessary to carry out a complete investigation *of their claims.*" The claims they are referring to are obviously for the pre-November

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> 2020 and January 2021, Plaintiffs and their affiliates bought out the Investors' interest in Origis and Origis Energy for $105 million. Just a few months later, Plaintiffs sold Origis to a third party for $1.4 billion. The investors complain that they did not get their fair share of that payday.

(Ex. A. to Opening Br. at 5-6).

18, 2021 misrepresentations and fraud in connection with their sale of shares and Antin transaction. In paragraph 160, the underlying plaintiffs allege that "The failure to provide all information necessary for Plaintiffs to investigate their claims breached Plaintiffs' information access rights in the SRA. *But for these breaches, Plaintiffs would be able to set forth their claims with even more particularity*." (A00582) (emphasis added). Again, the reference to "their claims" clearly refers to the claims set forth in the other 249 paragraphs of the Amended Complaint, which are for pre-November 2021 conduct. It is patently nonsensical to conclude the investors were requesting documents to set forth their claims for the failure to produce the requested documents with more particularity.

It is doubly apparent those allegations do not establish new independent claims when the Amended Complaint is read in its entirety, in which the relief sought has nothing to do with the alleged failure to produce information. *See, e.g., Liggett Grp. Inc. v. Affiliated FM Ins. Co.*, 2001 WL 1456811, at *3 (Del. Super. Ct. Sept. 12, 2001), *aff'd sub nom.*, *Liggett Grp., Inc. v. Ace Prop. & Cas. Ins. Co.*, 798 A.2d 1024 (Del. 2002) ("the Court will not accept an unreasonable interpretation of the allegations, but will adopt a fair construction of the allegations in light of their context and purpose in the underlying complaints."); *Ferrellgas Partners L.P. v. Zurich Am. Ins. Co.*, 319 A.3d 849, 874 (Del. 2024) (applying similar policy limitation to hold no duty to advance defense costs because, while underlying complaint alleged fraudulent inducement acts that occurred prior to the policy cut-off, when read as a whole, the complaint did not advance a claim for those acts which

were reasonably understood only to provide support for the counts actually brought).[7]

Accordingly, comparing the plain allegations of the Amended Complaint in the Underlying Lawsuit with the undisputed terms of the Bridgeway policy compels the conclusion the suit is for pre-November 18, 2021 conduct that is not covered by the post-cutoff insurance tower.

3. Plaintiffs' Machinations to Create Coverage Where None Exists Were Properly Rejected.

There is no reason to ignore the explicit allegations in the underlying Amended Complaint. But that is exactly what Plaintiffs do in their attempt to find coverage at all costs, stretching the rules of interpretation so thinly as to be unrecognizable.

Plaintiffs' argument is principally misguided because they focus on whether any post-cutoff acts are alleged, not whether the suit is actually for those acts. For example, they state "that many—if not most—of the Wrongful Acts alleged in the UAC are focused on fraud, misrepresentation and related conduct in inducing the Investors to enter into the SRA—all of which allegedly occurred prior to the Cut-Off Date." Opening Br. at 39 (referring to "separate and distinct set of Wrongful Acts focused on the Insureds' alleged breach of the SRA" and asserting "These alleged

[7] The Court's holding in *AT&T Corp. v. Faraday Cap. Ltd.*, 918 A.2d 1104 (Del. 2007) is of no consequence in this case. Regardless, the Underlying Lawsuit does not set forth a demand for relief for the failure to produce information.

Wrongful Acts plainly are distinct from the preceding Wrongful Acts alleged in the UAC…."); *id.* at 39 ("The Superior Court appropriately acknowledged that the Information Breach Claim at least possibly alleges one or more Wrongful Acts after the Cut-Off Date."). That approach completely misses the mark.[8]

The Bridgeway policy is a *claims-made* policy, not a wrongful acts policy. The insuring agreement pays for Loss arising from a [suit] first made against an insured during the Policy Period for a Wrongful Act. When read in conjunction with the Prior Acts provision, the Bridgeway policy provides coverage for Loss arising out of a [lawsuit] for any Wrongful Act occurring after November 18, 2021. Determining whether the Bridgeway policy applies does not rely upon simply identifying any allegation that an act took place after November 18, 2021. *See Ferrellgas Partners L.P.,* 319 A.3d at 874 (holding a similar argument "falls flat" because the policy was a claims-made policy). The only post-cutoff acts alleged here are entirely in service of the claims for pre-cut-off conduct, to which the Bridgeway policy does not apply.

Similarly, it is irrelevant that those acts are "pled in a separate section of the UAC [Underlying Amended Complaint]." Opening Br. at 39. The Amended Complaint must be read as a whole and those three paragraphs in context with the other 249. Reading those allegations in isolation to artificially enlarge them into an "independent claim" is improper and baseless, as is inventing a new label for them

[8] Referring to the volume of pre-cutoff acts alleged as being "many" or "most" is obviously an understatement. It is nearly 99% of the Amended Complaint.

that was not actually included in the Amended Complaint to enlarge their significance. Despite arguing that it is significant the three paragraphs were pled in their own section, what is notable is that there is no section in the sprawling Amended Complaint seeking redress for the failure to turn over documents.

Plaintiffs also rely upon a mishmash of legal standards to try and muddy the analytical waters. They assert the Superior Court was required to "draw all reasonable inferences from the UAC in favor of the Insureds" when deciding whether to grant Bridgeway's motion to dismiss. *Id.* at 41. That is not correct. The Court is to draw all reasonable inferences from the Appellant's coverage complaint in this action, not the Underlying Lawsuit. Bridgeway is not seeking to dismiss the Underlying Lawsuit. That standard is not transferred to the underlying pleadings. *See Century Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC*, 27 A.3d 531, 535 (Del. 2011) ("When considering a defendant's motion to dismiss, a trial court should accept all well-pleaded factual allegations in the Complaint as true…draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof."). There are no inferences to be drawn from the allegations in Plaintiff's Complaint that would make any difference to the outcome, nor have Plaintiffs identified any.

Plaintiffs further misapply the standard when asserting that dismissal of the coverage action should be granted "only if the UAC provides no reasonably conceivable basis to conclude that the Investors 'seek any relief'—monetary or non-

monetary—in connection with the Information Breach Claim." Opening Br. at 41. First, there is literally no "Information Breach Claim" alleged in the Amended Complaint in the Underlying Lawsuit. That is a rhetorical invention by Plaintiffs. Secondly, that standard is once again applicable to the allegations in their coverage complaint in this action. Thus, Plaintiffs' assertion that the Prayer for Relief in the Amended Complaint is not tied to any particular claims and therefore the investors "conceivably may be entitled" to relief, is misplaced. Opening Br. at 40.[9]

The question as to whether there is a "reasonably conceivable set of circumstances susceptible of proof" to support their suit against Bridgeway is answered by reading the plain allegations of the Amended Complaint. *See, e.g., IDT Corp. v. U.S. Specialty Ins. Co.*, 2019 WL 413692, at *10 (Del. Super. Ct. Jan. 31, 2019) (the key is "whether the allegations of the complaint, when read as a whole, assert 'a risk within the coverage of the policy.'"); *Virtual Business Enterprise v. Maryland Cas. Co.*, 2010 WL 1427409, *4 (Del. Super. Ct. April 9, 2010) ("The insurer's indemnity obligation exists only if the policyholder proves facts which establish the claim is covered."). Comparing the two documents is not an invitation to engage in a guessing game. The question is not whether the investors could

[9] Their assertion is also incorrect. The boiler-plate summation of relief is directly tied to the preceding allegations, which are clearly for pre-cutoff conduct. *See also Governor Wentworth Reg'l Sch. Dist. v. Hendrickson*, 201 F. App'x 7, 9 (1st Cir. 2006) (noting that the boilerplate request for "all such further relief as the Court may deem just and proper" in pleadings "does not operate to preserve a request for damages.").

conceivably have brought an additional independent claim, but whether the suit they actually brought is covered by the terms of the Bridgeway policy.

The Superior Court noted what is plain as day -- that the allegations of post-November 18, 2021 conduct were included in the Amended Complaint only "to explain that there could be additional information that would support their action" for pre-November 18, 2021 conduct. Ex. A to Opening Br. at 18. Plaintiffs' only response is to call that a "speculative conclusion." Opening Br. at 41. Paragraph 160 of the Amended Complaint states: "The failure to provide all information necessary for Plaintiffs to investigate their claims breached Plaintiffs' information access rights in the SRA. But for these breaches, Plaintiffs would be able to set forth their claims with even more particularity." (A00582). How Plaintiffs can read those allegations and characterize the Superior Court's reading of them as "speculative" is baffling.

CONCLUSION

The issue before the Court is directly resolved by a plain reading of the Bridgeway policy and the allegations in the Underlying Lawsuit. Speculating as to whether the Investors could conceivably be entitled to relief they did not ask for, for a cause of action they did not bring, is a baseless exercise not supported by the law or the clear facts of this case. The Superior Court's decision should be affirmed.

Respectfully submitted,

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