No. 2020-1134

IN THE SUPREME COURT OF OHIO

Appeal from the Court of Appeals
First Appellate District
Hamilton County, Ohio
Case No. C190176

ACUITY,

Plaintiff-Appellant,

v.

MASTERS PHARMACEUTICAL, INC.,

Defendant-Appellee.

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF APPELLEE MASTERS PHARMACEUTICAL, INC. AND AFFIRMANCE

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INTEREST OF *AMICUS CURIAE*

Effectuating the purpose of insurance and interpreting insurance contracts requires special judicial handling. United Policyholders ("UP") respectfully seeks to assist this Court in fulfilling this important role. UP is a unique non-profit, tax-exempt, charitable organization founded in 1991 that provides valuable information and assistance to the public concerning insurers' duties and policyholders' rights. UP monitors legal developments in the insurance marketplace and serves as a voice for policyholders in legislative and regulatory forums. UP helps preserve the integrity of the insurance system by educating consumers and advocating for fairness in policy sales and claim handling. Grants, donations and volunteers support the organization's work. UP does not accept funding from insurance companies.

UP assists Ohio businesses and residents through three programs: Roadmap to Recovery™ (disaster recovery and claim help), Roadmap to Preparedness (preparedness through insurance education), and Advocacy and Action (judicial, regulatory and legislative engagements to uphold the reasonable expectations of policyholders). UP hosts a library of informational publications and videos related to personal and commercial insurance products, coverage, and the claims process at www.uphelp.org. UP communicates with the Director of the Ohio Department of Insurance, Judith French, on a regular basis during meetings of the National Association of Insurance Commissioners, where UP's Executive Director Amy Bach, Esq. serves as an official consumer representative.

In furtherance of its mission, UP cautiously chooses cases and regularly appears as *amicus curiae* in courts nationwide to advance the policyholder's perspective on insurance cases likely to have widespread impact. UP has been advocating for policyholders' rights in the courts for decades and has submitted *amicus* briefs in more than 500 cases. For instance, UP's *amicus* brief was cited in the U.S. Supreme Court's opinion in *Humana Inc. v. Forsyth*, 525 U.S. 299,

119 S.Ct. 710, 142 L.Ed.2d 753 (1999). In addition, UP has submitted *amicus* briefs in many cases before this Court,[1] as well as before the First District Court of Appeals in this very case.

UP seeks to fulfill the classic role of *amicus curiae* by supplementing the efforts of counsel and drawing the Court's attention to law that may have escaped consideration. As commentators have stressed, an *amicus* is often in a superior position to focus the court's attention on the broad implications of various possible rulings. R. Stern, E. Greggman & S. Shapiro, *Supreme Court Practice*, 570–71 (1986) (quoting Bruce J. Ennis, *Effective Amicus Briefs*, 33 Cath.U.L.Rev. 603, 608 (1984)).

SUMMARY OF THE ARGUMENT

UP is concerned with the insurance industry's recent efforts to reshape insurance coverage law in Ohio and elsewhere as it applies to commercial general liability ("CGL") policies and government suits against policyholders. With increasing frequency governments have sought damages against policyholders in numerous industries by asserting public-nuisance claims alleging bodily injuries to the governments' citizens. From firearms to lead paint to opioids, state governments and political subdivisions contend they have provided treatment, care,

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[1] *See, e.g.*, *Garrett Well LLC v. The Frick-Gallagher Mfg. Co.*, No. 2021-0249 (Ohio Supreme Court); *Neuro-Communication Servs., Inc. v. The Cincinnati Ins. Co.*, No. 2021-0130 (Ohio Supreme Court); *Motorists Mut. Ins. Co. v. Ironics, Inc. and Owens-Brockway Glass Container, Inc.*, No. 2020-0306 (Ohio Supreme Court); *World Harvest Church v. Grange Mut. Cas. Co.*, 148 Ohio St.3d 11, 2016-Ohio-2913, 68 N.E.3d 738; *The Lincoln Elec. Co. v. Travelers Cas. and Sur. Co.*, No. 2013-1088 (Ohio Supreme Court); *Pennsylvania Gen. Ins. Co. v. Park-Ohio Industries, Inc.*, et al., 126 Ohio St.3d 98, 2010-Ohio-2745, 930 N.E.2d 800; *Pilkington N. Am. v. Travelers Cas. and Sur. Co.*, 112 Ohio St.3d 482, 2006-Ohio-6551, 861 N.E.2d 121; *Goodyear Tire and Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835. A listing of all cases in which UP has filed *amicus* briefs is at https://uphelp.org/amicus-briefs/. All URLs last visited March 18, 2021.

and services to residents with medical needs, and through public-nuisance suits seek to recover their costs from policyholders for such treatment, care, and services as damages.[2]

CGL policies were written to cover the type of damages claimed in these government entity public-nuisance suits. CGL policies cover "all" suits seeking "bodily injury" damages. And the standard form CGL policies, including those at issue here, define bodily injury damages to include the costs organizations incur for "care, loss of services, or death" resulting from bodily injuries. Applying this straightforward policy language, courts routinely hold that CGL policies cover suits by government entities seeking to recover for injuries to their citizens related to firearms, lead paint, and opioids. The same result should hold here.

Acuity attempts to avoid its defense obligation by advancing arguments that, if accepted, would have far-reaching negative consequences for Ohio consumers and corporate policyholders alike. First, Acuity invents a coverage limitation with no grounding in policy language by arguing that CGL policies should only be required to defend the policyholder in situations where the plaintiff in the lawsuit for which coverage is sought suffers the "bodily injury" in question. But CGL policies contain no such limitation. In fact, the Acuity Policies and other standard form CGL policies expressly cover bodily injury suits asserted by individuals and organizations claiming damages resulting from bodily injuries suffered by third parties. The policies define bodily injury damages to include claims for the costs an "organization" incurs for caring for individuals and claims for "loss of services," both of which by definition are claims that can only be asserted by a plaintiff that has not directly suffered any bodily injury. Indeed, CGL policies have never specified that coverage is dependent on the claimant being the party that suffered the

[2] To be sure, these suits rest on controversial legal theories. The fact remains, however, that courts have not dismissed or granted summary judgment on these actions as a matter of course. And, in any event, when it comes to liability insurance, the merits of the underlying claims are irrelevant. CGL policies specifically cover all allegations, even those that are false, fraudulent, or unfounded.

"bodily injury." To the contrary, CGL coverage has always focused on protecting the policyholder against "bodily injury" suits regardless of details outside the policyholder's control, such as who is bringing the claim or what theories or causes of action are asserted.

Acuity further attempts to dodge its defense obligation by arguing that an exclusion contained in its policy—the known-loss exclusion—should be read as a known-risk exclusion. Acuity contends that a pharmaceutical distributor's alleged knowledge of the general risks of opioids is sufficient to trigger a CGL policy's known-loss exclusion and deprive the policyholder of a defense in cases where the plaintiffs allege injuries stemming from opioids. This expansive reading is not possible under the plain language of the policy, as courts have correctly recognized. Further, such an interpretation would strike at the heart of the very purpose of insurance. Insurance is designed to protect both corporate and individual policyholders from the known risk of liability or other loss. Every policyholder—from an individual purchasing insurance against the risk of a house fire to a corporation purchasing insurance against the risk of liability to its directors for a derivative lawsuit—knows of a risk when it purchases insurance. That is why they purchase insurance in the first place: to protect themselves should a known risk manifest into a claim or loss.

The known-loss exclusion has no application here. Even if Masters Pharmaceutical, Inc. ("MPI") knew generally that "addiction to prescription opioids" was a real-world phenomenon, that fact is not relevant to the coverage analysis. It is well known that opioids are Schedule II controlled substances under the federal Controlled Substances Act;[3] by definition, a Schedule II controlled substance is one that "has a high potential for abuse[,]" which "may lead to severe

[3] Under federal law, opioids generally are Schedule II controlled substances. *See*, *e.g.*, "Drug Scheduling," https://www.dea.gov/drug-scheduling (identifying as Schedule II drugs: "Combination products with less than 15 milligrams of hydrocodone per dosage unit (Vicodin), cocaine, methamphetamine, methadone, hydromorphone (Dilaudid), meperidine (Demerol), oxycodone (OxyContin), fentanyl, Dexedrine, Adderall, and Ritalin").

psychological or physical dependence." 21 U.S.C. § 812(b)(2)(A), (C). The mere fact that a manufacturer or distributor knows of a risk associated with a product's use—especially a risk widely known and acknowledged by all—does not equate to knowledge of a specific loss caused by that specific policyholder's product.

In order for the insurance market to function insurers who collect premiums must live up to their end of the bargain. Policyholders pay substantial premiums for CGL policies, and are entitled to rely on promises contained in the plain language of those policies, especially the promise to provide the funds necessary for the policyholder to defend itself against substantial liability claims. Courts have consistently—and appropriately—held insurers to those promises and precluded them from rewriting their policies after a lawsuit manifests. This Court should do the same.

STATEMENT OF FACTS

As has been widely reported in the media, hundreds of states, counties, cities, and other government entities have sued various participants in the pharmaceutical supply chain alleging that prescription opioids manufactured, distributed, or dispensed by those defendants caused bodily injury (including death) to their citizens, requiring the government entities to pay for medical care and treatment, among other expenses.[4] As of March 15, 2021, 2,975 pending actions filed in virtually every state in the country had been transferred to, and consolidated in, the United States District Court for the Northern District of Ohio in the multidistrict litigation captioned *In Re: National Prescription Opioid Litigation*, N.D.Ohio No. 1:17-md-02804-DAP.[5]

[4] "MDL 2804," https://bit.ly/3v6EHkb.

[5] Judicial Panel on Multidistrict Litigation, Pending MDLs, https://bit.ly/2PMqGrI.

Pharmaceutical distributors such as MPI are defendants in hundreds of opioid suits filed by government entities, though they play a very different role than other participants in the pharmaceutical supply chain. Distributors do not manufacture medicines or make clinical decisions as to who should receive a medicine or what medicine is best for a particular patient. Instead, distributors are logistics experts that purchase prescription medicines directly from pharmaceutical manufacturers for storage in distribution centers. Licensed pharmacies, hospitals, and healthcare providers then place orders with distributors for the products they need, which the distributors process and deliver daily.[6]

Government entities allege that distributors maintained inadequate systems to monitor for "suspicious" orders of opioids from these pharmacies, hospitals, and healthcare providers and/or failed to halt shipments of suspicious opioid orders,[7] and that this led to bodily injury to the plaintiffs' citizens, requiring the plaintiffs to pay for medical care and treatment. *See*, *e.g.*, Acuity Supp. 293, *Berkeley County Council v. Purdue Pharmaceutical Products, LP et al.*, N.D.W.Va. No. 1:17-op-45171 (seeking "[a]n award of damages caused by the opioid epidemic, including without limitation: (A) costs for providing medical care, additional therapeutic, and prescription drug purchases, and other treatments/services for patients suffering from opioid-related addiction or disease, including overdoses and deaths; (B) costs for providing treatment, counseling, rehabilitation services; (C) costs for providing treatment of infants born with opioid related-medical conditions; (D) costs associated with law enforcement and public safety relating to the opioid epidemic; and (E) any other expenses or damages caused by the Defendants' diversion of opioids.").

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[6] Healthcare Distribution Alliance, About, Pharmaceutical Distributors: Understanding Our Role in the Supply Chain, https://bit.ly/3eoK34i.

[7] "Suspicious orders include orders of unusual size, orders deviating substantially from a normal pattern, and orders of unusual frequency." 21 C.F.R. § 1301.74(b).

Facing potentially crippling defense costs and claims for billions of dollars in damages, defendants in the opioid litigation—including MPI—have sought defense and indemnity coverage from their CGL insurers. Insurers have resisted their coverage obligations and, as a result, coverage litigation is pending in multiple jurisdictions around the country to address the issue of whether CGL policies cover government opioid cases. These coverage cases are of great significance because they will determine whether insurance assets are available to help finance settlements and verdicts in these opioid cases.[8]

MPI sought coverage for opioid claims from Acuity, which insured MPI under successive commercial package policies from July 26, 2010 to July 26, 2018 (the "Policies" or "Acuity Policies"). The Acuity Policies state that Acuity "will pay those sums that [MPI] becomes legally obligated to pay as damages because of *bodily injury* or *property damage* to which this insurance applies." Acuity Supp. 166 (emphasis in original). Acuity defined bodily injury damages to include damages "claimed by any person or organization for care, loss of services or death resulting at any time from the *bodily injury*." *Id.* (underline added). The Acuity Policies also contain an exclusion—on which Acuity bears the burden of proof—stating that "[t]his insurance applies to *bodily injury* and *property damage* only if: … [p]rior to the policy period, no insured … knew that the *bodily injury* or *property damage* had occurred, in whole or in part." *Id.* (emphasis in original).

Acuity agreed to defend MPI in the opioid litigation subject to a reservation of rights, but also commenced a declaratory judgment action, seeking a ruling that it owed no coverage. The trial court held that there was no duty to defend or indemnify under the Acuity Policies. The

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[8] Public reports state that there are ongoing settlement negotiations between pharmaceutical distributors and government entities regarding these cases. *See* Jeff Overley, *Teva 'Not Optimistic' About Sealing $23B Opioid Deal Soon*, Law360 (Feb. 10, 2021), https://bit.ly/3cskooH; Emily Field, *$26B Opioid Deal Offer to Include $2B in Atty Fees*, Law360 (Nov. 5, 2020), https://bit.ly/38D86Jb.

Court of Appeals reversed, holding that "the policies expressly provide for a defense where organizations claim economic damages, as long as the damages occurred because of bodily injury" (as they did in the opioid litigation), and that the known-loss exclusion did not operate to bar coverage. Appx. 9, 14, 22–23.

ARGUMENT

I. Proposition of Law No. 1: CGL coverage for suits seeking bodily injury damages includes all liability arising from the bodily injury.

This case presents a straightforward question of contract interpretation. As explained below: (A) CGL policies cover all liability arising from bodily injury; (B) case law confirms that policies covering suits for bodily injury damages cover all liability arising from bodily injury; (C) the CGL policies' coverage grant does not change when a government entity seeks bodily injury damages; and (D) Acuity's coverage defenses are nothing more than an attempt to rewrite its Policies after the fact to avoid its clear liability.

A. CGL policies cover all liability arising from bodily injury.

Like all standard form CGL policies, the Acuity Policies state that Acuity "will pay those sums that [MPI] becomes legally obligated to pay as damages because of *bodily injury* or *property damage* to which this insurance applies." Acuity Supp. 166.[9] (emphasis in original).

[9] The Acuity Policies use the clauses "because of bodily injury" and "for bodily injury." Both clauses cover the damages asserted by the governments here. *See AmerisourceBergen Drug Corp. v. ACE Am. Ins. Co.*, W.Va.Cir.Ct. No. CC-03-2017-C-36, ¶ 55 (Nov. 23, 2020) (holding that insurer had duty to defend under policy covering damages "for bodily injury" where government sought costs of providing medical treatment to residents suffering from opioid addiction); *Bliss Sequoia Ins. & Risk Advisors, Inc. v. Allied Prop. & Cas. Ins. Co.*, D.Or. No. 6:30-cv-00256, 2020 U.S. Dist. LEXIS 184487, at *9–10 (Oct. 5, 2020) ("These opioid cases do not turn on an expansive reading of the phrase 'because of,' . . . but rather on a common sense understanding of interrelated events. . . . [A]lthough the plaintiffs in the underlying litigation were seeking damages for economic harms, those harms were causally connected to bodily injuries.").

"Damages because of *bodily injury* include damages claimed by any person or organization for care, loss of services or death resulting at any time from the *bodily injury*." *Id.* (emphasis in original).

Acuity contends that the plaintiff in the underlying suit must be the one to incur the "bodily injury" for coverage to apply. The Policies, however, do not include this restriction. To the contrary, the Policies reject any such limitation. The Policies provide coverage for suits seeking "damages claimed by any person or organization for care, loss of services or death resulting at any time from the *bodily injury*." Acuity Supp. 166 (underline added). This provision—included in all standard form CGL policies—expressly covers claims that cannot be asserted by an individual who has directly suffered bodily injuries. In particular,

- A claim for "care" is not asserted by an injured party; it is asserted by the party caring for that individual. *See Hutchings v. Childress*, 119 Ohio St.3d 486, 2008-Ohio-4568, 895 N.E.2d 520, ¶ 19 (noting that Ohio courts "have recognized a parent's right to recover damages for the value of the care they provided their injured child").

- A claim for "loss of services" can only be asserted by a family member who has lost the services of an injured person. *See Fleming v. Wallace*, 7th Dist. Belmont No. 01-BA-64, 2002-Ohio-6003, ¶ 18 ("The injured person would not assert damages for loss of services. A spouse, child, or family member would bring such a claim.").

- A death action is a claim brought by a next of kin for their own independent damages caused by the death of a loved one—as opposed to a survival action, which is asserted to vindicate the decedent's direct harms. *See Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 2007-Ohio-4787, 873 N.E.2d 1258, ¶ 7 ("[A] survival action brought to recover for a decedent's own injuries before his or her death is independent from a wrongful-death action seeking damages for the injuries that the decedent's beneficiaries suffer as a result of the death….").

- And it should go without saying that an "organization" itself cannot suffer bodily injury. The only bodily injury damages an organization could seek are damages due to the cost of caring for third parties who suffer some bodily injury. Those are exactly the type of claims at issue here.

Acuity responds that the government opioid cases include public-nuisance claims seeking economic damages. This is pure misdirection. The Acuity Policies do not exclude coverage for

public-nuisance suits. Nuisance is a tort, and it is undisputed that the Acuity Policies cover damages claimed for "bodily injury" under tort theories.

Nor do the Acuity Policies exclude coverage for economic damages. To the contrary, coverage for economic damages such as costs of medical care is a cornerstone of the coverage that policyholders expect to receive from CGL policies. *See* 20-129 Appleman on Insurance Law & Practice Archive, Section 129.2 (2nd 2011) ("[C]ommon understanding would hold that 'damages' [under a CGL policy] include those sums of money that the law imposes as compensation—for example, medical and funeral expenses, loss of services, lost wages, and pain and suffering resulting from bodily injury."). Again, CGL policies expressly cover damages for bodily injury claimed by "organizations." An organization's "bodily injury" damages are necessarily limited to economic losses flowing from bodily injuries.

Coverage for economic damages is hardly surprising. Economic damages resulting from "bodily injury" are a common form of tort recovery. Indeed, they are often the principal element of damages in a bodily injury tort case, and insurers routinely pay those damages under CGL policies without objection. *E.g.*, *Cooper v. Moran*, 11th Dist. No. 2010-L-141, 2011-Ohio-6847 ¶ 17 (noting that in a personal injury action a jury could award "only economic damages for medical bills" and withhold an award of non-economic damages); *Mensch v. Fisher*, 11th Dist. No. 2002-P-0055, 2003-Ohio-5701, ¶¶ 6, 27 (affirming a jury award of economic medical expenses in a bodily injury case).

Acuity's post-hoc attempt to exclude these common damages from the scope of coverage would upend how CGL coverage functions and would violate the promise Acuity and other insurers made to Ohio consumers who expect their liability insurance policies to defend and protect them against claims for all damages resulting from bodily injuries, including alleged economic harms flowing from bodily injuries.

B. Case law confirms that coverage for suits seeking bodily injury damages includes all liability arising from bodily injury.

Courts in Ohio and around the country have consistently held that standard form CGL policies covering suits seeking bodily injury damages, such as the Acuity Policies, obligate an insurer to cover all liability arising out of the bodily injury.[10]

For example, in *Cincinnati Insurance Co. v. Robert W. Setterlin & Sons*, the Ohio Tenth District Court of Appeals addressed the same CGL policy language that is at issue here. 10th Dist. Franklin No. 07AP-47, 2007-Ohio-5094. There, a subcontractor's employee fell through a roof, and the subcontractor sued the general contractor policyholder for the increased premiums the subcontractor had to pay because of the employee's injury. Although the subcontractor (a corporation) did not itself experience the bodily injury, the court held that the insurer was obligated to defend the general contractor against the subcontractor's suit because the CGL policy stated that the insurer would "pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury" and the "policy does not specify who must suffer the bodily injury." ¶¶ 14, 23 (emphasis added).

Likewise, in *Sherwin-Williams Co. v. Certain Underwriters at Lloyd's London*, government entities sued Sherwin-Williams for the costs incurred by the governments to pay judgments to third-party plaintiffs in lead-pigment cases and to monitor and abate lead-paint hazards. 813 F.Supp. 576, 580 (N.D.Ohio 1993). Again, although the government entities suing Sherwin-Williams (the policyholder) did not themselves experience any bodily injury, the court (applying Ohio law) held that there was coverage under the CGL policy for the defense against

[10] Although "bodily injury" is the focus of this action, standard CGL policies, including the Acuity Policies at issue, cover suits seeking "bodily injury and property damage" recoveries. Acuity Supp. 166 (emphasis added). Thus, cases discussing the scope of CGL coverage sometimes involve situations in which the underlying claim is for property damage rather than bodily injury. The rationale used in these cases is equally applicable here.

the government entities' claims, because the policy's coverage for suits seeking "damages for bodily injury" was "broad enough to encompass situations in which Sherwin-Williams, because of an obligation under the law, ultimately must reimburse plaintiffs for amounts paid to third parties." *Id.* at 586.[11]

Courts outside of Ohio also conclude that the plain text of standard form CGL policies, like the Acuity Policies, which provide coverage for suits seeking damages for bodily injury (or property damage), cover all liability arising from such injury or damage including losses claimed by organizations due to injuries suffered by third parties, for example:

- *AmerisourceBergen Drug Corp. v. ACE Am. Ins. Co.* et al., W.Va.Cir.Ct. No. CC-03-2017-C-36, ¶ 55 (Nov. 23, 2020) (holding that West Virginia Attorney General lawsuit against pharmaceutical distributor seeking costs of providing medical treatment to residents suffering opioid addiction sought damages for "bodily injury" under CGL policy);

- *Giant Eagle, Inc. v. American Guar. & Liab. Ins. Co.*, W.D.Pa. No. 2:19-CV-00904-RJC, --- F.Supp.3d ---, 2020 WL 6565272, at *5, 15 (Nov. 9, 2020) (holding that government suits seeking costs of providing medical treatment to residents suffering opioid addiction triggered insurer's duty to defend under CGL policy);

- *Rite Aid Corp. v. ACE Am. Ins. Co.*, Del.Super.Ct. No. CVN19C04150, 2020 WL 5640817, at *2, 4, 16 (Sept. 22, 2020) (appeal pending) (holding that government suits seeking costs of providing medical treatment to residents suffering opioid addiction triggered insurer's duty to defend under CGL policy);

- *Cincinnati Ins. Co. v. Discount Drug Mart, Inc.*, Cuyahoga C.P. No. CV-19-913990, 2020 WL 6706791, at *6–10 (Sept. 9, 2020) (holding that government suits seeking costs of providing medical treatment to residents suffering opioid addiction triggered insurer's duty to defend under CGL policy);

[11] *See also American Home Assur. Co. v. Libbey-Owens-Ford Co.*, 786 F.2d 22, 26 (1st Cir.1986) (Ohio law) (recognizing that CGL coverage grant for suits seeking property damage includes "consequential losses attributable to such property damage" and "an insurance company wishing to exclude consequential damages should use specific language to that effect"); *Parker Hannifin Corp. v. Steadfast Ins. Co.*, 445 F.Supp.2d 827, 834–35 (N.D.Ohio 2006) (Ohio law) (same).

- *Cincinnati Ins. Co. v. H.D. Smith*, 829 F.3d 771, 772, 774 (7th Cir.2016) (holding that West Virginia's suit against pharmaceutical distributor seeking costs of providing medical treatment to residents suffering opioid addiction triggered insurer's duty to defend under CGL policy; on remand, trial court held the policy also required the insurer to indemnify the policyholder for the settlement of that lawsuit);

- *N.A.A.C.P. v. Acusport Corp.*, 253 F.Supp.2d 459, 463 (E.D.N.Y.2003) (holding that civil rights organization suit against firearms distributor for public nuisance triggered duty to defend under CGL policy because although "[t]he claimed injury arises from exposure to allegedly general harmful conditions … there is a connection, however remote, between injuries to persons and liability for that injury of the insured");

- *SIG Arms Inc. v. Employers Ins. of Wausau*, 122 F.Supp.2d 255, 260 (D.N.H.2000) (holding that municipality's suit against firearms manufacturer for costs incurred due to manufacturer's unreasonably dangerous products triggered insurer's duty to defend under CGL policy);

- *Beretta U.S.A. Corp. v. Fed. Ins. Co.*, 117 F.Supp.2d 489, 492, 496 (D.Md.2000) ("The [CGL] Policies provide that 'Damages because of bodily injury include damages claimed by any person or organization for care, loss of services, or death resulting at any time from the bodily injury.' This is sufficient to cover the cities' claims for costs spent in providing medical care to victims of violence arising out of guns manufactured by Beretta and for the additional funds spent on emergency services.");

- *Scottsdale Ins. Co. v. Nat'l Shooting Sports Found*., 226 F.3d 642, 2000 WL 1029091, at *2 (5th Cir.2000) (Table) (holding that city's claims against shooting sports foundation for the cost of increased emergency medical care resulting from gun violence triggered insurer's duty to defend and that CGL policies do not "require[] that the plaintiff seeking damages be the one who suffered the bodily injury");

- *A.Y. McDonald Indus., Inc. v. Ins. Co. of N. Am.*, 475 N.W.2d 607, 624 (Iowa 1991) ("We construe such [CGL] provision to include damages because of property damage in general, regardless of by whom it is suffered.");

- *Lowenstein Dyes & Cosmetics, Inc. v. Aetna Life & Cas. Co.*, 524 F.Supp. 574, 578 (E.D.N.Y.1981) (holding that CGL insurer was obligated to defend "even where the property damage or bodily injury is not suffered by the plaintiff suing the insured");

- *American Econ. Ins. Co. v. Commons*, 552 P.2d 612, 613 (Or.Ct.App.1976) (holding that CGL policy covering property damage applied to government costs of suppressing a fire on non-government land); and

- *Globe Indem. Co. v. State of California*, 118 Cal.Rptr. 75, 77, 79 (Cal.Ct.App.1974) (holding CGL policy covering property damage applied to government costs of suppressing a fire on non-government land).

The wealth of case law confirms what the plain language of the Acuity Policies already establishes: CGL policies cover all liability that arises from bodily injury without regard to the party that happens to be bringing the suit.

C. The coverage grant does not change when a government entity seeks bodily injury damages.

Acuity argues that its Policies do not apply when, as here, governments sue policyholders to recover damages incurred because of bodily injury to their citizens. Acuity Br. at 15, 22–23. Acuity has not identified any language in the policies—nor does any exist—that would support this manufactured interpretation. To the contrary, as explained above, the language of the Acuity Policies shows otherwise. Moreover, courts have consistently recognized that a duty to defend under standard CGL policies (such as Acuity's) is triggered when governments bring suit against policyholders to recover for the increased costs of providing government services to their residents who have suffered bodily injuries or property damage. This is true not only in the context of opioid liabilities, but also in various other contexts, including firearms, fire damage, and lead paint.

1. Government suits for damages allegedly caused by opioids and bodily injury to third parties

In an increasing number of prescription opioid cases exactly like this one, courts have required CGL insurers to defend their policyholders in lawsuits filed by government entities seeking to recover as damages the costs of providing medical care and treatment to residents suffering from opioid addiction. It is critical to policyholders that this Court secure Ohio consumers' and business' ability to rely on an insurance company's promise to fund their defense when these claims are raised.

For instance, in *Cincinnati Insurance Co. v. H.D. Smith*, the United States Court of Appeals for the Seventh Circuit held that the insurer was obligated to defend a pharmaceutical

distributor sued by the State of West Virginia for its alleged role in contributing to an epidemic of prescription drug abuse. 829 F.3d 771, 772 (7th Cir.2016). Like Acuity, the insurer argued the suit was not covered because "West Virginia seeks its own damages, not damages on behalf of its citizens." *Id.* at 774. The Seventh Circuit responded to that argument by asking, "But so what?" *Id.* The court explained that the insurer's argument, the exact argument Acuity makes here, was "untethered to any language in the policy." *Id.* The court analogized West Virginia's costs to the costs a parent incurs to care for an injured child, and held the policy's coverage for care resulting from bodily injury—the same coverage afforded by the Acuity Policies—extended to costs a government incurs to provide medical care to injured residents:

> Suppose a West Virginian suffers bodily injury due to his drug addiction and sues H.D. Smith for negligence. Cincinnati's counsel acknowledged that such a suit would be covered by its policy. Now suppose that the injured citizen's mother spent her own money to care for her son's injuries. Cincinnati's counsel acknowledged that her suit would be covered too—remember the policy covers "damages claimed by any person or organization for care . . . resulting . . . from the bodily injury."
>
> The mother's suit is covered even though she seeks *her own* damages (the money she spent to care for her son), not damages on behalf of her son (such as his pain and suffering or money he lost because he missed work). Legally, the result is no different merely because the plaintiff is a state instead of a mother.

Id. (emphasis and ellipses in original). On remand, the trial court held that the insurer was also obligated to indemnify the policyholder for the cost of its settlement with the State of West Virginia. *See Cincinnati Ins. Co. v. H.D. Smith Wholesale Drug Co.*, 410 F.Supp.3d 920, 923 (C.D.Ill.2019).

Other cases have followed *H.D. Smith*'s holding or reached the same conclusion independently. In *Cincinnati Insurance Co. v. Discount Drug Mart, Inc.*, the Ohio Court of Common Pleas, Cuyahoga County, considered whether local governments' claim in the opioid litigation "for economic losses they allegedly sustained as a result of the 'opiate epidemic'"

triggered a CGL insurer's defense obligations. Cuyahoga C.P. No. CV-19-913990, 2020 WL 6706791, at *1 (Sept. 9, 2020). Applying the same standard CGL policy language at issue here, the court concluded the local governments were "seeking 'damages' for 'bodily injury' as those terms have been interpreted by Ohio courts." *Id.* at *5.

Similarly, in *Rite Aid Corp. v. ACE American Insurance Co.*, the Delaware Superior Court held that government claims "seek[ing] to recover billions in governmental and economic costs allegedly incurred in providing a wide array of public services in response to the influx of opioids into their communities," including "costs of medical care for addicted individuals and for opioid overdose deaths" triggered defense obligations under a CGL policy. Del.Super.Ct. No. CVN19C04150, 2020 WL 5640817, at *2, 4 (Sept. 22, 2020). The court held that the insurer had a duty to defend because the government sought damages resulting from a "bodily injury." *See id.* at *16 ("The Court agrees with the reasoning set out in *Acuity* and *H.D. Smith* …. The Court has analyzed the allegations in the Track One Lawsuits and finds that some of the economic losses sought by the governmental entities are arguably because of bodily injury.").

Additionally, in *Giant Eagle, Inc. v. American Guarantee & Liability Insurance Co.*, the United States District Court for the Western District of Pennsylvania considered whether defense obligations under a CGL policy were triggered by local government suits "seeking damages allegedly caused by Giant Eagle's alleged wrongful conduct in distributing and dispensing prescription opioids," including damages for "emergency medical treatment, detoxification and addiction treatment, and recovery services related to opioid use of the County plaintiffs' citizens." W.D.Pa. No. 2:19-CV-00904-RJC, --- F.Supp.3d ---, 2020 WL 6565272, at *5 (Nov. 9, 2020). The court concluded that these claims triggered a duty to defend because "[d]espite the fact that the plaintiffs in the County lawsuits do not allege that *they* suffered bodily injury or property damage, they do seek damages *because* of bodily injury." *Id.* at *15 (emphasis in original).

Most recently, in *AmerisourceBergen Drug Corp. v. ACE Am. Ins. Co.*, the West Virginia Circuit Court, Boone County, addressed the scope of coverage under a CGL policy for the State of West Virginia's lawsuit seeking as damages the State's costs associated with providing necessary medical care, facilities, and services for treatment of West Virginia's residents. W.Va.Cir.Ct. No. CC-03-2017-C-36, ¶ 55 (Nov. 23, 2020). Applying a textual analysis, the Court considered the same economic-loss argument Acuity makes here and concluded that "the relevant question under the general liability insurance coverage section of the St. Paul Policy is not whether the damages sought were 'economic' but rather whether the damages sought resulted from bodily injuries." *Id.* ¶ 114. The Court held that the damages sought by the State of West Virginia "resulted from bodily injuries, especially to the extent the damages represent sums of money expended by the State of West Virginia in an effort to provide care and cure to persons affected by the disease of opioid addiction," and "are, therefore, properly treated as damages 'for' 'bodily injury.'" *Id.* ¶ 121.

2. Government suits for damages allegedly caused by firearms and bodily injury to third parties

The rationale employed by these courts is not unique to opioid cases. For example, courts have repeatedly held that the standard CGL coverage grant for suits seeking damages for "bodily injury or property damage" triggers a duty to defend firearm manufacturers and distributors against suits brought by government entities seeking to recover the costs of police, emergency medical care, and other government services alleged to have arisen from bodily injuries caused by firearms.

In addressing this issue in *Scottsdale Insurance Co. v. National Shooting Sports Foundation*, the United States Court of Appeals for the Fifth Circuit considered whether a municipality's suit seeking to "recoup significant expenses associated with the manufacture, marketing, promotion, and sale of firearms which are unreasonably dangerous," including "the

cost of increased police force [and] increased emergency medical care," triggered an insurer's duty to defend under a standard form CGL policy. 226 F.3d 642, 2000 WL 1029091, at *2 (5th Cir.2000) (Table). The court "reject[ed] [the insurer's] contention that the 'because of bodily injury' provision requires that the plaintiff seeking damages be the one who suffered the bodily injury." *Id.* The court explained that the insurer "could have explicitly limited coverage to 'claims for damages incurred because of bodily injury to the plaintiff seeking damages,' but it did not." *Id.* Accordingly, the court held that these claims triggered the defense coverage under the CGL policy. *Id.*

Similarly, in *SIG Arms Inc. v. Employers Insurance of Wausau*, the United States District Court for the District of New Hampshire held that a CGL insurer had a duty to defend a firearms manufacturer that had been sued by municipalities seeking "the costs of providing enhanced police protection, emergency services, police pension benefits, medical care, health care, social services, and correction rehabilitation services," resulting from firearm injuries. 122 F.Supp.2d 255, 257 (D.N.H.2000). The court rejected the insurer's argument that the CGL policy did "not cover claims for economic losses incurred because of bodily injury to a third person"—the same argument Acuity makes—and instead held that the "plain meaning" of the CGL policy's definition of bodily injury damages triggered the insurer's defense obligation for claims "seeking the costs of providing care for shooting victims and for the loss of their services." *Id.* at 260.

Additionally, the United States District Court for the District of Maryland reached the same conclusion in *Beretta U.S.A. Corp. v. Federal Insurance Co.*, 117 F.Supp.2d 489, 490 (D.Md.2000). The underlying lawsuits, brought by government entities, asserted public-nuisance and negligence claims and sought "expenses allegedly incurred in treating and caring for people who have suffered gunshot injuries." *Id.* at 492. Applying the same definition of bodily injury damages as is present in the Acuity Policies, the court held the policy's coverage for "damages claimed by any person or organization for care, loss of services, death resulting at any time from the bodily injury" as "sufficient to cover the cities' claims for costs spent in providing medical

care to victims of violence arising out of guns manufactured by Beretta and for the additional funds spent on emergency services." *Id.* at 496.

3. Government suits for damages allegedly caused by fires and property damage to non-government land

Courts have employed this same rationale in cases where the underlying suit involved government efforts to seek reimbursement for the costs of fighting fires on non-government land.

For instance, in *American Economy Insurance Co. v. Commons*, the Oregon Court of Appeals addressed an insurance dispute arising from a fire on the policyholder's farm, which the State Fire Marshal had to extinguish. 552 P.2d 612, 613 (Or.Ct.App.1976). The State brought an action against the policyholder to recover the State's costs of fighting the fire, and the policyholder sought coverage under a CGL policy. *Id.* The court held that these costs were due to "bodily injury or property damage" regardless of whether the party bringing suit suffered damages to its own property. *Id.*

The California Court of Appeal reached the same conclusion in *Globe Indemnity Co. v. State of California*, 118 Cal.Rptr. 75 (Cal.Ct.App.1974). Like *Commons*, there was a fire on the policyholder's property, and the State sued the policyholder to recover the fire-suppression costs it incurred in putting out the fire. *Id.* at 77. The court recognized that the policies did not limit coverage to situations where the claimant in the underlying suit suffered property damage itself and held that "these costs should be considered a sum recoverable under the policies." *Id.* at 79.

4. Government suits for damages allegedly caused by lead paint and bodily injury to third parties.

Insurance disputes arising from government lead paint claims follow this same trend: the claims are covered under CGL policies, even though the plaintiffs did not suffer bodily injury themselves. For example, in *Sherwin-Williams Co. v. Certain Underwriters at Lloyd's London*,

the United States District Court for the Northern District of Ohio addressed CGL coverage for government suits against the policyholder seeking "damages covering the cost of paying judgments obtained in lead pigment cases filed against the City," as well as costs of "inspecting, testing, monitoring, and abating lead paint hazards; the costs of screening, testing and diagnosing children exposed to lead paint; and the costs associated with educating city residents." 813 F.Supp. 576, 580 (N.D.Ohio 1993). Applying Ohio law, the court concluded that "[t]he policy language governing the London Market Insurers' duty to indemnify Sherwin-Williams is broad enough to encompass situations in which Sherwin-Williams, because of an obligation under the law, ultimately must reimburse plaintiffs for amounts paid to third parties." *Id.* at 586.[12]

D. Acuity's coverage defenses are nothing more than an attempt to rewrite its Policies after the fact to avoid its clear liability.

The underlying, and unstated, fact is this: Acuity is unhappy with the potential liability that government opioid claims present and is now desperately inventing arguments to avoid that liability. This is nothing new. In the 1980s and 1990s, state and federal courts were flooded with asbestos suits. The insurance industry attempted to avoid those liabilities, resulting in a slew of cases on whether insurance coverage was available under CGL policies for asbestos-related liabilities. *See* Jeffrey W. Stempel, *Assessing the Coverage Carnage: Asbestos Liability and Insurance After Three Decades of Dispute*, 12 Conn.Ins L.J. 349, 349–50 (2005). In response to court decisions holding that coverage applied to asbestos liability, the insurance industry created new exclusions barring coverage for claims arising from asbestos to be included in all CGL

[12] In addition to these past examples, CGL policies will continue to be essential when it comes to payments for government claims in the future, including with respect to government claims based on bodily injury and property damage allegedly incurred by citizens due to climate change. *See, e.g.*, *Mayor and City Council of Baltimore v. BP P.L.C. et al.*, Md.Cir.Ct. No. 24C18004219; *State of Delaware ex rel. Kathleen Jennings v. BP America Inc. et al.*, D.Del. No. 1:20cv1429.

policies—an acknowledgment that such liabilities were covered under the existing policies as written, absent the express exclusion. *See id.* at 464.

The same is occurring here. The insurance industry sees a massive potential liability associated with opioid claims of all stripes. Recognizing the increase in opioid claims against policyholders, insurers responded by amending their CGL policies to include express exclusions for opioid liabilities. *See* Swiss Reinsurance Company, *Opioid Crisis: Insurers on the Defense* (2018) ("Insurers are also crafting and delivering opioid exclusions into the marketplace. Some are applying opioid exclusions to manufacturers and distributors, but not pharmacies (which often benefit from substantial case law regarding standards for duty to warn). Other insurers are applying exclusions across all potentially exposed risks.");[13] Daniel S. Brettler, *Protecting Your Firm from the Growing Opioid MDL: The Role of Insurance & Risk Management*, Conner Strong & Buckelew (July 2018) ("[S]ome carriers have taken immediate, decisive action to insert outright exclusions for opioids and governmental actions into their policies. Others are attempting to exclude allegations involving opioid addiction.");[14] Clay Segrest & Tom Levin, *Opioid Crisis Risks Rising for Healthcare Industry*, CRC Group (2019) ("To limit future liabilities, more insurers are adding opioid exclusions to a variety of policies.").[15]

The specific exclusions added in response to the opioid crisis include an "Absolute Opioid Exclusion Endorsement," stating: "In consideration of the premium charged, it is hereby understood and agreed that the Insurer shall have no liability to make any payment for loss arising out of, based upon or attributable to any Opioid Activity." *See* Illinois National Insurance Company and National Union Fire Insurance Company of Pittsburgh, Pa., District of Columbia

[13] https://bit.ly/3cAkaf9.

[14] https://bit.ly/3kyV445.

[15] https://bit.ly/2MBLpxb.

Filing.[16] Insurers also introduced an "Opioid Misuse Exclusion Endorsement," stating: "In consideration of the premium charged, it is hereby understood and agreed that the Insurer shall not be liable to make any payment under this policy in connection with any claim(s) made against any insured(s), or for any loss, alleging, arising out of, based upon or attributable to the misuse, abuse, overuse, addiction, diversion or overprescription of Opioids." *Id.*

As with the asbestos claims of the 1980s and 1990s, the reason for these new exclusions is clear: the existing policies, in the absence of a specific exclusion, cover these liabilities.

Importantly, the Acuity Policies do not contain any opioid exclusion. Ultimately, in this appeal Acuity is not describing the policies it actually wrote and for which MPI paid substantial premiums. Instead, Acuity is describing a policy it wishes, with the benefit of hindsight, that it had written. This Court has always rejected such efforts. *See Motorists Mut. Ins. Co. v. Tomanski*, 27 Ohio St.2d 222, 226, 271 N.E.2d 924 (1971) ("This court has refused to change the meaning of language contained in an insurance contract when that wording is directly applicable to the facts under consideration, and will not read into a contract meaning which was not placed there by an act of the parties."). When insurers accept premiums, they accept the risk that a loss, and potentially a very large loss, will arise. Acuity is not entitled to rewrite its Policies because it is required to defend more cases than it allegedly anticipated.

II. Proposition of Law No. 2: Any potential overlap in coverage between multiple policies can be resolved through contractual allocation provisions.

The Ohio Insurance Institute, appearing as *amicus curiae*, argues that a separate "directors and officers liability" ("D&O") policy might be a better fit to cover the costs at issue in this case. OII Amicus Br. at 29. Acuity did not advance this argument below or in its brief to this Court. Therefore, the argument is not properly considered. *See State ex rel. Citizen Action v.*

[16] https://bit.ly/3rT4oCH.

Hamilton Cty. Bd. of Elections, 115 Ohio St.3d 437, 2007-Ohio-5379, 875 N.E.2d 902, ¶ 26 ("[*A*]*mici curiae* are not parties to an action and may not, therefore, interject issues and claims not raised by parties.") (quotation marks omitted). The argument also fails on the merits.

Only one type of policy is before this Court: the CGL policies issued by Acuity. MPI paid a premium under the Policies, and MPI is therefore entitled to the Policies' coverage. CGL policies exist precisely for this situation and, as demonstrated above, the Acuity Policies apply to this case by their plain terms. No further analysis is required.

Moreover, the Ohio Insurance Institute's invitation to void MPI's CGL coverage because some other hypothetical D&O policy might respond to the same risk is both inappropriately speculative and ignores how the policies themselves deal with such scenarios.[17] Overlapping coverage is not unusual. In fact, the insurance industry created "other insurance" provisions to address that exact situation. 3 New Appleman on Insurance Law Library Edition, Section 22.02 (2020). One common example of when an "other insurance" clause is implicated is when a single policyholder is "a named insured under multiple policies in effect at the same time, for example where the insured has purchased different types of policies, such as a general liability policy and an errors and omissions policy." *Id.* Indeed, the Acuity Policies have such a provision. *See* Acuity Supp. 176 (the "Other Insurance" provision, setting out Acuity's obligations "[i]f other valid and collectible insurance is available"). Thus, the answer to the question of what to do when multiple policies might respond to a loss is not, as the Ohio Insurance Institute would have this Court believe, to void coverage for which the policyholder paid premiums. Rather, the answer is to apply the policy provision that explains how those multiple insurance policies share the responsibility for the risk.

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[17] The Ohio Insurance Institute also fails to acknowledge that a D&O policy is a wasting asset with limits of liability that are eroded by payments of defense costs as well as settlements and judgments. Given the sheer number of pending opioid cases, no individual policy could have sufficient limits to fully protect a policyholder defending against these massive liabilities.

III. Proposition of Law No. 3: The fact that the governments are advancing a questionable legal theory is not a reason to deny coverage.

The Ohio Insurance Institute, as *amicus curiae*, also argues that a defendant is not liable for economic damages arising from a tort committed against a third party, and thus MPI cannot be liable to the government plaintiffs in the opioid litigation for economic damages arising from alleged torts against the governments' citizens. *See* OII Amicus Br. at 14 ("As a general rule, tort law prohibits plaintiffs from seeking damages because of bodily injury suffered by third persons—even when the plaintiff may have an economic interest in doing so."). Again, an argument made solely in an *amicus* brief is waived. *See State ex rel. Citizen Action v. Hamilton Cty. Bd. of Elections*, 115 Ohio St.3d 437, 2007-Ohio-5379, 875 N.E.2d 902, ¶ 26. Further, the argument is incompatible with the defense coverage provided by CGL policies, such as the Acuity Policies.

It is black-letter insurance law that the insurer's duty to defend its policyholder under CGL policies applies even when the plaintiff's suit is groundless, false, or fraudulent. *See City of Sharonville v. American Emplrs. Ins. Co.*, 109 Ohio St.3d 186, 2006-Ohio-2180, 846 N.E.2d 833, ¶ 13 ("An insurer has an absolute duty to defend an action when the complaint contains an allegation in any one of its claims that could arguably be covered by the insurance policy, even in part and even if the allegations are groundless, false, or fraudulent." (emphasis added)). The merits of the underlying plaintiff's claim are irrelevant. 3 New Appleman on Insurance Law Library Edition, Section 17.01 (2020) ("Neither the legal merits of a suit against the insured nor the likelihood that the insured will be held liable for covered damages has any bearing on whether a suit is 'seeking' covered damages from the insured.").

Policyholders—whether they are corporate policyholders purchasing CGL coverage or individuals buying liability coverage with their homeowner's policies—buy liability insurance "for the peace of mind that comes with knowing their insurer will defend them if they are sued." 3 New Appleman on Insurance Law Library Edition, Section 17.01 (2020); *see also Campbell v.*

Superior Court, 44 Cal.App.4th 1308, 1319 (Cal.Ct.App.1996) (noting the "desire to secure the right to call on the insurer's superior resources for the defense of third party claims is, in all likelihood, typically as significant a motive for the purchase of insurance as is the wish to obtain indemnity for possible liability."). If the government plaintiffs are advancing dubious claims, then Acuity must defend MPI and explain why the claims lack merit, but "before the merits are decided, the insurer must provide and pay for the insured's defense." 3 New Appleman on Insurance Law Library Edition, Section 17.01 (2020) (quoting *Miller v. Westport Ins. Corp.*, 200 P.3d 419 (Kan. 2009)).

IV. Proposition of Law No. 4: The known-loss provision is an exclusion that applies only to knowledge of actual injury caused by the policyholder, and it is not applicable here.

Acuity also relies on the known-loss exclusion to argue that it has no obligation to provide coverage. Acuity Br. at 27–31. The exclusion states, "[t]his insurance applies to *bodily injury* and *property damage* only if: … [p]rior to the policy period, no insured … knew that the *bodily injury* or *property damage* had occurred, in whole or in part." Acuity Supp. 166 (emphasis in original). The First District held that this exclusion is a prerequisite to establishing coverage, rather than an exclusion to coverage, and that MPI has the burden to show that it does not apply. Appx. 18. The First District, nonetheless, held that MPI met that burden because the "mere knowledge of this risk [that diversion of opioids could cause injury] is not enough to bar coverage under the loss-in-progress provision." Appx. 23.[18]

Although the First District's analysis on the known-loss exclusion's status as a prerequisite to coverage (rather than an exclusion) was mistaken, the First District reached the correct conclusion: MPI's mere knowledge of a risk of what could occur from diversion is not

[18] The First District referred to this provision as a "loss-in-progress" provision but acknowledged that it is also properly referred to as a "known-loss" provision. Appx. 16.

enough to bar coverage under a known-loss exclusion. As explained below, (A) the known-loss exclusion is an exclusion and not a prerequisite to establishing coverage; thus Acuity bears the burden of establishing it applies; (B) the known-loss exclusion requires knowledge of an actual injury caused by the policyholder's conduct, not mere knowledge of a risk; and (C) because the known-loss exclusion requires knowledge of actual injury, it does not apply here.

A. The known-loss exclusion is an exclusion and not a prerequisite to establishing coverage; thus Acuity bears the burden to show it applies.

The insurer bears the burden of establishing that a policy exclusion applies. *Cont'l Ins. Co. v. Louis Marx & Co.*, 64 Ohio St.2d 399, 401, 415 N.E.2d 315 (1980) ("A defense based on an exception or exclusion in an insurance policy is an affirmative one, and the burden is cast on the insurer to establish it."). A known-loss exclusion exists because insurance policies are designed to cover fortuitous events, not losses that are known to have already occurred. For example, the farmer cannot wait until he sees his barn on fire to obtain insurance for it.

A known-loss exclusion is irrelevant to the threshold question of whether the plaintiff in the underlying suit asserted a claim for "bodily injury" damages. Instead, it comes into play only after the coverage question is answered in the affirmative. The known-loss provision excludes coverage (for otherwise covered claims) when a policyholder had knowledge of the actual bodily injury raised in the underlying claim at the time they purchased the policy.

Ohio courts and courts applying Ohio law have properly treated known-loss provisions as exclusions. *See Ohio Cas. Ins. Co. v. Mansfield Plumbing Prod., L.L.C.*, 5th Dist. Ashland No. 2011-COA-009, 2011-Ohio-4523, ¶ 10 ("The second policy term in dispute is the 'loss in progress' exclusion." (emphasis added)); *Burlington Ins. Co. v. PMI Am., Inc.*, 862 F.Supp.2d 719, 734 (S.D.Ohio 2012) ("[T]he only appropriate avenue to introduce a loss in progress issue into an insurance dispute is when the policy at issue contains a loss in progress exclusionary endorsement." (emphasis added)); *Fifth Third Mortg. Co. v. Chi. Title Ins. Co.*, 758 F.Supp.2d

476, 484–85 (S.D.Ohio 2010) (rejecting the insurer's argument that "the exclusions for 'created loss' and/or 'known loss' apply").[19]

The First District, however, reasoned that the known-loss exclusion was a prerequisite to coverage, rather than an exclusion, because the Fourth District purportedly treated a similar provision as a prerequisite to coverage in an earlier case. Appx. 17–18 (citing *Lightening Rod Mut. Ins. Co. v. Southworth*, 2016-Ohio-3473, 55 N.E.3d 1174, ¶ 34 (4th Dist.)). But the Fourth District in *Lightening Rod* did not actually hold that the provision was a prerequisite to coverage. The court in *Lightening Rod* merely stated, "the relevant facts of the case are undisputed and the parties agree that the damages alleged in the Beattie lawsuit began before the policy period. Based on the plain language of the Policy, these claims do not fall within Policy coverage." 2016-Ohio-3473, 55 N.E.3d 1174, ¶ 34. This statement in *Lightening Rod* is as consistent with the known-loss provision being an exclusion as it is with the known-loss provision being a prerequisite to coverage.

The First District also reasoned that the exclusion was a prerequisite to coverage, rather than an exclusion, because it appeared in the "Insuring Agreement" section of the policy, not the "Exclusions" section. Appx. 17. However, the touchstone for determining whether a provision is an exclusion is not its placement in the policy. Instead, it is the provision's "effect." *See, e.g.*, *Indiana Ins. Co. v. Kopetsky*, 14 N.E.3d 850, 852–53 (Ind.Ct.App.2014) (holding that "[d]espite the fact that [the known-loss] language is found in the coverage clause," the known-loss

[19] *See also Mesa Underwriters Specialty Ins. Co. v. Blackboard Ins. Specialty Co.*, 400 F.Supp.3d 928, 939–40 (N.D.Cal.2019) (describing the known-loss provision as an exclusion); *Greene v. Will*, 394 F.Supp.3d 849, 860 (N.D.Ind.2019), *aff'd sub nom. Greene v. Westfield Ins. Co.*, 963 F.3d 619 (7th Cir.2020) (same); *American Guar. & Liab. Ins. Co. v. United States Fire Ins. Co.*, 255 F.Supp.3d 677, 692 (S.D.Tex.2017), *aff'd sub nom. Satterfield & Pontikes Constr., Incr. v. United States Fire Ins. Co.*, 898 F.3d 574 (5th Cir.2018) (same).

provision's "effect is to exclude coverage under certain circumstances, so we too adopt the convention of referring to it as the known claim exclusion" (citations omitted)).

Adopting a rationale that focuses solely on placement within the policy, rather than a provision's effect, would have a significant negative impact on consumers by incentivizing insurers to scatter coverage limitations throughout the policy, making already complicated insurance policies even more difficult to understand. "If an insurer were able to distribute provisions limiting liability throughout a policy, with the expectation that its shouldering of the burden of proof would be limited to the single section entitled, 'Exclusions,' this would create considerable incentive to obfuscation and subterfuge." *Andover Newton Theological School, Inc. v. Cont'l Cas. Co.*, 964 F.2d 1237, 1243 (1st Cir.1992); *see also Carter-Wallace, Inc. v. Admiral Ins. Co.*, 154 N.J. 312, 331–32, 712 A.2d 1116, 1126 (1998) ("[E]xclusions do not shed their essential character when they are moved from one section of a policy and are crafted as part of that policy's grant of coverage").

With respect to the known-loss exclusion, the effect is clear: it operates to exclude coverage for losses that would otherwise fit within the coverage grant. It should, therefore, be treated as an exclusion on which the insurer bears the burden of proof. As explained below, Acuity did not, and cannot, meet that burden. And such an exclusion certainly cannot be invoked at this stage of the proceedings, when the issue before the court is whether the allegations of the underlying lawsuits triggered Acuity's duty to defend its policyholder.

B. The known-loss exclusion requires knowledge of an actual injury caused by the policyholder's conduct, not mere knowledge of a risk.

By its plain terms, the known-loss exclusion applies only if the policyholder has knowledge of actual injury caused by the policyholder, not mere knowledge of a risk of injury generally. The First District properly stated that the provision "is included in an insurance contract because insurance policies are only meant to cover fortuitous events, not losses that are

certain to occur" and "[t]he awareness that there is a risk that an insured's conduct might someday result in damages is not equivalent to knowledge of the damages." Appx. 22 (citations omitted).

This reasoning is consistent with settled law in Ohio. "[N]early all 'known loss' decisions differentiate between knowledge of a risk or a potential for loss and knowledge that a loss has actually occurred or is virtually certain to occur." *Buckeye Ranch, Inc. v. Northfield Ins. Co.*, 134 Ohio Misc.2d 10, 2005-Ohio-5316, 839 N.E.2d 94, ¶ 27 (C.P.) (emphasis added); *Tunnell Hill Reclamation, LLC v. Endurance Am., Specialty Ins. Co.*, S.D.Ohio No. 2:15-CV-2720, 2016 U.S. Dist. LEXIS 90207, at *16 (July 12, 2016) (Ohio law) ("[A]wareness by the [insured] of an act that might someday result in 'damages' is not equivalent to knowledge of damages.").

Ohio is not unique in this regard. For instance, a Connecticut state court reached the same conclusion in the context of opioids. In *Steadfast Insurance Co. v. Purdue Frederick Co.*, the insurers attempted to avoid paying the costs incurred in defending an opioid manufacturer because the manufacturer "had a significant amount of information at its disposal prior to the inception of the policies indicating actual and potential deleterious effects of OxyContin." Conn.Super.Ct. No. X08CV0219697S, 2006 WL 1149185, at *3 (Apr. 11, 2006). The court rejected this argument because the evidence failed to show that the manufacturer had a duty to pay damages at the time the manufacturer entered into the contract of insurance. *See id.* According to the court, the insurers' arguments were no better than the arguments against coverage in analogous asbestos cases, where an "insured knew before the inception of its insurance policies that its asbestos products risked asbestosis and cancer, and had received a large number of claims, yet the number of claims, particularly successful claims and the amount of ultimate losses were uncertain." *Id.* The court added that "[t]o expand the doctrine to encompass known risks would invite a plethora of new insurance coverage disputes as well as undercut the concept that insurance is a system of risk transfer." *Id.*

The decisions distinguishing between "known loss" and "known risk" are essential to the proper functioning of an insurance market. A "known-risk" rule—namely, a rule that mere knowledge of a risk of harm posed by one's product bars insurance coverage for injury caused by the product—would undermine the entire insurance market. Policyholders purchase insurance precisely because they know of risks. 1 New Appleman on Insurance Law Library Edition, Section 1.01 (2020) ("In situations where risk cannot be managed sufficiently through preventative measures or through steps that reduce the effects of loss, where assumption of the risk is not feasible, and where ignoring the risk is undesirable, people usually cope with risk by transferring it to someone else. The essence of insurance is a transaction where risk is transferred to another and then distributed across a pool of similarly situated persons or properties." (emphasis in original)).

If policyholders did not believe there were risks associated with their products or business, they would not need to purchase insurance in the first place. For example, people buy car insurance and homeowner's insurance precisely because they know there is a risk of a car accident or a slip-and-fall on the porch. The knowledge of these risks does not negate the coverage they purchased to protect against those risks. Nor should it here. Adoption of Acuity's "known-risk" rule would eliminate the need and incentive to purchase insurance at all—a result that is hardly in the interests of policyholders, insurers, or tort victims who often depend on the tortfeasor's insurer to pay their damages. *Sherwin-Williams Co.*, 813 F.Supp. at 585 ("If knowledge of certain risks posed by a product were sufficient to infer intent by a manufacturer to injure consumers, then no manufacturer would ever be able to seek coverage from an insurer because every product has certain known dangers and risks.") (Ohio law).

C. Because the known-loss exclusion requires knowledge of actual injury, it does not apply here.

The known-loss exclusion has no application here because there is no evidence that, prior to or at the time it purchased the Acuity Policies, MPI knew of any instance in which an opioid it distributed had been diverted outside the proper supply chain and resulted in bodily injury to a person. Acuity argues that if MPI were "aware … that opiate addiction had occurred or begun to occur in unidentified members of the public," that alone is enough for the provision to apply. Acuity Br. at 28. Not so.

It is insufficient that MPI generally knew about "addiction to prescription opioids" occurring in society. Indeed, this argument is Acuity's "known-risk" argument restated. The mere fact that a manufacturer or distributor knows of a risk associated with its product's use—especially a risk widely known and acknowledged by all—does not equate to knowledge of a specific loss caused by that product. Just as one does not lose their car insurance by driving home in a rainstorm (an inherently risky activity), one does not lose their CGL coverage for opioid liability merely because they are in the supply chain for a product that carries a warning regarding a known risk of addiction and harm. This Court should hold that the known-loss exclusion has no application here.

CONCLUSION

This case requires nothing more than the straightforward application of clear policy language. The CGL policies issued to MPI by Acuity cover suits seeking "bodily injury" damages, including the underlying government suits here. Under both the plain language of the policies and a wealth of case law from Ohio and elsewhere, Acuity has a duty to defend.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served this 18th day of March, 2021, via email, on the following:

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