

**No. 22-16158**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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AIU INSURANCE COMPANY and NATIONAL UNION FIRE  
INSURANCE COMPANY OF PITTSBURGH, PA,

*Plaintiffs and Counterclaim Defendants – Appellee*

v.

McKESSON CORPORATION

*Defendant, Counterclaim Plaintiff, Third Party Plaintiff, and Third Party  
Counterclaim Defendant - Appellant*

v.

ACE PROPERTY AND CASUALTY INSURANCE COMPANY

*Third Party Defendant and Third Party Counterclaim Plaintiff - Appellee*

On Appeal from the United States District Court  
for the Northern District of California,

Hon. Jacqueline Scott Corley

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**BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS  
IN SUPPORT OF McKESSON CORPORATION**

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### INTEREST OF *AMICUS CURIAE*

Effectuating the purpose of insurance and interpreting insurance contracts require 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.

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, 314 (1999). In addition, UP has submitted *amicus* briefs in many cases before this Court.

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. *See* Fed. R App. P. 29(a)(4)(D). 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. Gressman & S. Shapiro, *Supreme Court Practice*, 570–71 (1986) (quoting Bruce J. Ennis, *Effective Amicus Briefs*, 33 *Cath. U. L. Rev.* 603, 608 (1984)).<sup>1</sup>

### PRELIMINARY STATEMENT

The district court held that McKesson was not entitled to coverage for the Exemplar Suits because the alleged underlying liability was traceable to McKesson’s “deliberate” business conduct. There is no dispute that the Exemplar Suits allege that McKesson was liable for various *omissions*: failure to monitor and report suspicious orders, failure to properly train employees, and failure to establish effective controls to prevent theft and diversion. But the district court held that these allegations were “secondary” to the real basis of liability—deliberate shipping activity—which the court held could not be an “accident” as a matter of California law. By reaching this conclusion, the district court held, in essence, that insurance coverage is unavailable for any liability arising out of a company’s day-to-day business.

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<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure 29(a)(2) and Circuit Rule 29-2(a), all parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no party or its counsel authored the brief in whole or in part, and no party or its counsel or any person contributed funds towards the preparation or submission of the brief.

This conclusion is contrary to the very purpose of insurance as it has developed over the course of many centuries. Beginning in the 17th century, policyholders have used insurance to transfer known risks inherent in their core business activities to risk-neutral parties, like insurers. For example, ship owners, aware of the dangers of transporting goods on the high seas, transferred their risk to underwriters at Lloyd's. This same basic practice continues to this day: the central function of general liability insurance is to provide broad protection for all non-excluded risks a policyholder may face. In fact, the Insurers here<sup>2</sup> expressly advertise that they offer insurance to protect businesses like McKesson from risks inherent in their daily business activities, including the distribution of products. If it weren't for known risks inherent in a company's core business, no entity would ever pay the substantial premiums necessary to procure insurance.

But the district court concluded that business risks are uninsurable—in particular, if the court's reasoning is to be accepted, risks inherent to the business of pharmaceutical distribution simply cannot be transferred to less risk-averse parties. This conclusion wipes out insurance coverage for nearly all negligence claims brought against corporate policyholders. Worse, the district court's conclusion has a cascade of negative effects: (i) it renders most general liability insurance worthless,

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<sup>2</sup> Throughout this brief, the term “Insurers” refers collectively to appellee ACE Property & Casualty Insurance Co. (“ACE”) and appellee National Union Fire Insurance Co. of Pittsburgh, Pa. (“AIG”).

burdening both large and small businesses with intolerable amounts of risk; (ii) it grants insurers like ACE and AIG a windfall; and (iii) it leaves tort victims vulnerable without a reliable means of seeking compensation for injuries.

Finally, the district court also concluded that the Exemplar Suits seek damages “for” or “because of” “bodily injury.” This holding was well-reasoned and reached the correct outcome.

## ARGUMENT

### **I. The district court’s decision undermines the purpose of general liability insurance.**

The district court held that McKesson was not entitled to insurance because the underlying lawsuits’ negligence claims were “based on alleged deliberate conduct.” 1-ER-21. The court wrote:

The exemplar suits’ negligence claims are based on alleged deliberate conduct. The claims allege McKesson breached the duty of care by its affirmative acts: “distributing[] and selling opioids.” (Dkt. No. 79-12 ¶ 1093.) The plaintiffs challenge McKesson’s manner of engaging in those acts: “Defendants were negligent by ... distributing[] and selling opioids *in a way* that created and fostered an illegal, secondary prescription opioid market...” (*Id.* (emphasis added).)

*Id.* (alterations in original).

The court acknowledged that the underlying claims also alleged negligent *omissions* by McKesson, not merely affirmative acts. But, according to the district

court, these alleged omissions were “secondary” to the deliberate act of distributing opioids:

While the claims additionally allege that McKesson failed to report and failed to halt suspicious orders, these allegations are secondary to the alleged injury-producing act of distributing opioids.... For this reason, none of the government plaintiffs could prevail on its negligence claim without proving that McKesson sold, distributed, and shipped opioids.

1-ER-22.

Under this reasoning, there is no coverage for any claims where liability arises out of any form of deliberate business activity, even where the liability arises from a failure to take action. As the court explained, coverage was barred because “the negligence claims allege that McKesson’s ‘injury-producing acts’ were deliberate: shipping and distributing opioids.” 1-ER-25. This whittles available coverage under general liability policies down to virtually nothing. The district court suggested that coverage would exist only in presumably very narrow circumstances, such as where “McKesson intended to ship opioids to one location but, printing the wrong packing label, shipped them to a different location” or where “McKesson intended to ship aspirin but, pulling the wrong box off the shelf, shipped opioids instead.” *Id.*

As explained below, the district court’s finding of no coverage for “deliberate ... shipping and distributing” activities undermines the very purpose of insurance as it developed over many centuries. First, as its history demonstrates, insurance was invented to transfer known risks from risk-averse parties to risk-neutral parties. In

fact, it was the awareness of risks inherent in deliberate business activities that have historically driven businesses to procure insurance. Second, insurers regularly provide insurance to cover liability arising out of deliberate business activities. For example, each year agricultural producers receive billions of dollars in insurance payments for losses directly resulting from the deliberate business activity of planting crops. Third, the Insurers here specifically advertised that their insurance products would cover risks inherent in McKesson’s day-to-day business, including its distribution activities.

**A. Insurance was invented to transfer known risks.**

The essence of insurance is risk transfer. *See* Kenneth S. Abraham, *Insurance Law and Regulation* 3 (5th ed. 2010) (describing insurance as a “risk-transfer from comparatively risk-averse to less risk-averse or risk-neutral parties”). This works by using “the law of large numbers to reduce uncertainty for risk-averse individuals.” Ronen Avraham, *The Economics of Insurance Law—A Primer*, 19 Conn. Ins. L.J. 29, 38 (“The first step in that process is risk transfer, by which the risk of a certain event is shifted from one party to another.”).

Without risk, no person or entity would buy insurance in the first place. Rather, it is only when perceiving risks that a party needs to obtain insurance:

An insurance contract involves, first and foremost, a transfer of risk. Thus, when an individual faces a risk that he wishes to transfer and which cannot be managed in another way, the individual will pay a premium to another party—the

insurer—to assume the risk and reimburse the individual for any loss suffered to the covered interest.

1 New Appleman on Insurance Law Library Edition § 1.03 (2022). Accordingly, insurance “expands the opportunities for all to enrich their lives” because it “vastly increases the opportunities of a society to enhance the lives and the positions of its citizens.” George L. Priest, *A Principled Approach Toward Insurance Law: The Economics of Insurance and the Current Restatement Project*, 24 Geo. Mason L. Rev. 635, 637-38 (2017). For example, “[c]ommercial entities in particular could not engage in risky activities providing valuable products and services to consumers without the availability of commercial general liability insurance.” *Id.* at 638. In other words, liability insurance is designed to allow entities to engage in activities with *known* risks.

This was in fact how modern insurance developed. In the late seventeenth century, ship owners began going to Lloyd’s in London as a way to reduce their financial risk in shipping cargo. Lloyd’s explains its own history this way: “Lloyd’s coffee house specialised in shipping information and was popular with ship owners and captains returning from overseas voyages. Lloyd’s began renting out ‘boxes’ (tables) where entrepreneurial businessmen took the opportunity to sell insurance to ship owners in the event their ship did not return.” *Coffee and commerce: Travels through our history*, <https://www.lloyds.com/about-lloyds/history/coffee-and->

commerce (last visited Dec. 13, 2022). This method of obtaining insurance quickly developed:

By 1688, it was customary for a person interested in obtaining insurance on a particular vessel or cargo to go to Lloyd's and circulate among those present a slip of paper upon which was written a description of a vessel or cargo, the identity or nature of the captain and crew, the voyage contemplated, and the amount of insurance desired. Anyone interested in insuring the vessel or cargo would write beneath the description their name or initials, followed by the amount for which that person was willing to be held liable in the event of a loss. The term "underwriter" evolved from this practice.

1 New Appleman on Insurance Law Library Edition § 1.02 (2022).

Shipping was unquestionably a deliberate act. Thus, the only reason insurance came into existence was to mitigate the known risks arising out of shipping—a deliberate business activity. A ship owner would have no exposure to loss but for the "deliberate" act of "shipping" goods. 1-ER-25. This is the same exact risk—loss arising out of the business of shipping—for which McKesson procured insurance. In fact, the purpose of insurance is to protect against risks "inherent in the business of the insured." 20-129 Appleman on Insurance Law & Practice Archive § 129.2 (2nd 2011) (explaining that it is "well settled" under the law of most jurisdictions "that if an insurer does not intend to insure against a risk which is likely to be *inherent in the business of the insured*, it should specifically exclude such risk from the coverage of the policy" (emphasis added)).

As insurance continued to develop, its core function was to provide broad coverage. Before the rise of general liability policies, “[f]rom roughly 1915 to 1940, Public Liability Insurance policies were refined to reflect the predominant form of liability risk, or ‘hazard,’ faced by the policyholder.” Kenneth S. Abraham, *The Rise and Fall of Commercial Liability Insurance*, 87 Va. L. Rev. 85, 88 (2001). This cumbersome approach required policyholders “to purchase individual policies separately ‘scheduling’ or covering elevator liability, products liability, premises liability, and any other hazards posed by its operations or activities.” *Id.* To simplify matters, insurers began selling “a general-purpose liability insurance policy that could be used by any business, to vary the premiums charged to take account of the risk level posed by the policyholder, and to encourage the purchase of special-purpose coverage where it was needed, by excluding identifiably special or unusual risks from coverage provided by the general liability insurance.” *Id.* at 89.<sup>3</sup> That is, general liability policies provide broad coverage and use exclusions to identify any risks that are *not* covered.

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<sup>3</sup> See also Jeffrey W. Stempel, *Rediscovering the Sawyer Solution: Bundling Risk for Protection and Profit*, 11 Rutgers J.L. & Pub. Pol’y 170, 184 (2013) (quoting the claimed “prime architect of the Comprehensive General Liability Policy,” Elmer Sawyer, as stating: “Whereas, in the past we have offered multiple separate liability covers, each excluding hazards within other covers and each being optional with the insured, and have insured only against hazards within the covers chosen by the insured, we now insure against all of the hazards within the scope of the insuring clause which are not specifically mentioned as excluded. Stated differently, instead of insuring against only enumerated hazards we now insure against all hazards not excluded”).

General liability policies were thought to benefit both businesses and insurers. “In addition to creating something closer to ‘one stop shopping’ for businesses, risk managers, and brokers, the CGL policy was also designed to help insurers manage their liability exposure and to accept risk transfer profitably.” Stempel, *supra*, at 185. These policies actually resulted in larger premiums for insurers, which explains in part why they began selling them:

Sale of the more expansive and bundled CGL policy required business policyholders, in many cases, to buy more insurance and pay more premiums than would otherwise have been the case. These greater premium receipts could be used by insurers to earn more money on investment of premium dollars. In the 1940s, as today, insurers made much of their profit on the “float” of holding premium dollars as investments for many years before they were typically required to pay claims.

*Id.* at 185-86.

The policies issued by ACE and AIG are general liability policies, which provide broad coverage. Any risks that ACE and AIG did not want to cover—such as coverage for distribution of prescription drugs—needed to be clearly spelled out in policy exclusions. Indeed, many insurers did precisely that, which explains several judicial decisions finding no coverage for opioid liabilities where risks were expressly excluded by an endorsement. In those cases, the insurers had taken the affirmative step of excluding coverage for claims arising out of the policyholder’s distribution and/or manufacturing activities—something the Insurers here could have done but did not do.

For example, the Eleventh Circuit held there was no coverage for underlying opioid suits where the relevant policies contained Products Exclusions. *Travelers Prop. Cas. Co. of Am. v. Anda, Inc.*, 658 F. App'x 955, 958 (11th Cir. 2016). The Eleventh Circuit panel explained that the “Travelers policy excludes coverage for injuries ‘arising out of’ ‘[a]ny goods or products ... manufactured, sold, handled, distributed[,] or disposed of by ... You’” and the “St. Paul policy states: ‘We won’t cover bodily injury or property damage that results from your products or completed work.’” *Id.* at 957. Likewise, the California Court of Appeal held that coverage was defeated by products exclusions that “exclude coverage for bodily injury ‘arising out of’ (Travelers Policies) or that ‘results from’ (St. Paul Policies) ‘[a]ny goods or products ... manufactured, sold, handled, distributed or disposed of by: [y]ou.’” *The Travelers Prop. Cas. Co. of Am. v. Actavis, Inc.*, 16 Cal. App. 5th 1026, 1044 (2017).<sup>4</sup> The court held that these exclusions barred coverage for several underlying claims relating to opioids. *Id.* (“The Claims Fall Within the Products Exclusions and Therefore Are Excluded from Coverage.”). The policies in *Anda* and *Actavis* provide examples of where insurers “specifically exclude ... risk[s] from the

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<sup>4</sup> The products exclusions in *Actavis* also excluded coverage for bodily injury that arose out of or resulted from “[w]arranties or representations made at any time, or that should have been made, with respect to the fitness, quality, durability, performance, handling, maintenance, operation, safety, or use of such goods or products.” *Id.*

coverage of the policy.” 20-129 Appleman on Insurance Law & Practice Archive § 129.2 (2nd 2011). But the policies here contain no such exclusion.

The district court’s interpretation of the Insurers’ policies thus runs contrary to the history of insurance generally and the role of general liability insurance in particular. A rule that precludes coverage for liability arising from deliberate distribution of products undermines the fundamental purpose of insurance. Moreover, had the Insurers wanted to exclude shipping and distribution activities, they could have (in fact, were required to) draft exclusions saying so before issuing the policies. *See Safeco Ins. Co. of Am. v. Robert S.*, 26 Cal. 4th 758, 763-64 (2001) (“Had [the insurer] wanted to exclude criminal acts from coverage, it could have easily done so.... Because [the insurer] chose not to have a criminal act exclusion ... we cannot read into the policy what [the insurer] has omitted. To do so would violate the fundamental principle that in interpreting contracts, including insurance contracts, courts are not to insert what has been omitted.”).

**B. Insurance covers known risks arising out of deliberate business activities.**

The development of insurance among niche markets also demonstrates that insurance is designed to transfer risks inherent to deliberate business activities. The most obvious example is crop insurance. “Farming is generally considered to be a financially risky activity.” 1 New Appleman on Insurance Law Library Edition § 56.02 (2022). An “agricultural producer’s risk is that the crop will fail to generate

the expected revenue,” either because the crop is “lost due to an event that destroys or damages the crop by preventing it from maturing and being harvested in the expected, normal manner in the growing cycle” or because “an unexpected and uncontrollable decline in the price of the agricultural product after planting,” the latter of which is known as “lost profit peril.” *Id.*

To protect themselves from these risks inherent in farming, agricultural producers began transferring the risks to insurers:

The origins of crop insurance are, not surprisingly, embedded in the desire of agriculture producers to protect themselves against the risks described in the prior section [damaged crops and lost profit peril] and the willingness of organizations, *i.e.*, insurance companies or groups of farmers organized as mutual associations, to create and sell a product through which the producers can transfer their risk to the organization which then assumes the risk and distributes it across a large number of similarly situated insureds, taking advantage of the law of large numbers to essentially disperse the risk in an organized market.

1 New Appleman on Insurance Law Library Edition § 56.03 (2022). Though most crop insurance is now written through federal government programs, agricultural producers still insure against the risk of hail, wind, and fire through private “crop-hail policies.” 1 New Appleman on Insurance Law Library Edition § 56.05 (2022).

Under crop-hail policies, coverage extends to crops or products lost as a result of perils insured against. *Id.* (“The language of an insuring agreement will promise to indemnify the insured against direct loss or damage caused by hail (or other specified perils) to growing crops.”).

Like the distribution of prescription pharmaceuticals, planting crops is always a deliberate activity. And yet, each year, billions of insurance dollars are paid out to cover damages to crops. *See* 1 New Appleman on Insurance Law Library Edition § 56.01 (2022) (“In 2012, a severe drought in the Plains and the Midwest staggered U.S. agricultural production, and over \$17.4 billion in crop insurance payments were made. Payments were smaller in 2013 and 2014, but nevertheless topped \$12 billion and \$8.4 billion respectively.”).

Insurance is also available to cover the known risks of hurricanes, wildfires, and floods. It is only because of the known risk of hurricane damage that a person obtains insurance against hurricanes. Homeowners in Nebraska do not buy hurricane insurance—those in Florida often do. It is the possibility of a hurricane that makes it necessary to buy insurance in the first place. Likewise, people living in the western United States buy insurance to protect against the known risk of wildfires. And people in deserts do not buy flood insurance. It is only by recognizing the possibility of a flood that one purchases flood insurance.

**C. The Insurers advertise that they cover business risks, including distribution.**

The breadth of commercial general liability insurance is made clear by the way insurers advertise such coverage. For instance, AIG and ACE both represent in the marketplace that they cover risks inherent to their policyholders’ businesses, *including distribution*. ACE (*i.e.*, Chubb) advertises that its commercial general

liability insurance “safeguards from the economic fallout of common incidents that happen while running just about any business.” *What Is Commercial General Liability (CGL) Insurance?*, <https://www.chubb.com/us-en/businesses/resources/what-is-commercial-general-liability-insurance.html> (last visited Dec. 13, 2022).

ACE explicitly advertises to commercial clients that its commercial general liability insurance products cover risks inherent in the distribution of products:

General liability is critical to have if:

- Anyone visits your place of business – whether it’s an office, retail store or factory.
- Your employees work off-site – such as at a construction site.
- You regularly advertise your business or promote it on social media.
- You manufacture, sell, or distribute a product.

*Id.*

Likewise, AIG’s website advertises that its Commercial General Liability policies cover “bodily injury or property damage ... as a result of your business operations.”

## What is covered?

Commercial General Liability covers legal liability of the insured due to bodily injury or property damage. These are some types of coverage provided:

- Broad Public/General Liability cover for bodily injury or property damage incurred on your premises and/or as a result of your business operations
- Products and Completed Operations Liability coverage for bodily injury or property damage incurred through the use of the product manufactured, distributed or sold
- Advertising Liability
- Automotive Liability (contingent basis)
- Care, Custody, and Control
- Indemnity to Principals
- Sudden and Accidental Pollution

Plus a broad range of selectable extensions

*Commercial General Liability*, <https://www.aig.sg/business/business-products-and-services/casualty/commercial-general-liability> (last visited Dec. 13, 2022).

The insurers thus advertise that their policies cover risks related to distribution of products—those risks that are part of McKesson’s business. But under the district court’s analysis, the only coverage that remains under these policies would be for presumably rare events, such as shipping materials to the wrong customers or mislabeling products. *See* 1-ER-25.

## **II. The district court’s decision negatively impacts California businesses, grants insurers a windfall, and leaves tort victims vulnerable.**

### **A. The decision renders most commercial general liability insurance worthless.**

The district court’s reasoning means that virtually no claims arising from a company’s core business activities can ever be covered. This renders most general liability coverage worthless. Policyholders pay substantial premiums for insurance

that will cover the risks inherent in their businesses. McKesson recognizes that it may be subject to lawsuits arising out of its distribution of pharmaceuticals. Under the district court’s decision, virtually none of these lawsuits would ever be covered

Most fundamentally, nearly all suits for negligence arising out of a policyholder’s core business would not be covered under the district court’s analysis. There is no dispute that the Exemplar Suits allege that McKesson was liable for various *omissions*: failure to “monitor and/or report suspicious orders of opioids”; failure to “reasonably and properly train its employees related to the distribution of opioids”; failure to put in place “effective controls and procedures for guarding against theft and diversion” of opioids by downstream actors;<sup>5</sup> and filling of “orders [it] knew or should have known were likely to be diverted.”<sup>6</sup> While the district court acknowledged these negligence allegations, the court nevertheless held that these “negligence claims rest on alleged deliberate conduct.” 1-ER-21. The court wrote:

While the claims additionally allege that McKesson failed to report and failed to halt suspicious orders, these allegations are secondary to the alleged injury-producing act of distributing opioids. Put differently, the complaints do not assert that failing to report suspicious orders constitutes negligence in the absence of McKesson filling those suspicious orders. To the contrary, the complaints assert that failing to report and halt suspicious orders facilitated McKesson’s “flooding” and “oversupplying” the opioids market.... For this reason, none of the government plaintiffs

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<sup>5</sup> 5-ER-975 (¶ 123).

<sup>6</sup> 5-ER-921 (¶1054).

could prevail on its negligence claim without proving that McKesson sold, distributed, and shipped opioids.

1-ER-22 (emphasis omitted). In other words, the district court held that McKesson’s liability for alleged omissions—failure to report and failure to halt suspicious orders—are outside coverage because they are traceable to deliberate action.<sup>7</sup>

But *every* negligent act has its roots in deliberate conduct. See James M. Fischer, *Accidental or Willful?: The California Insurance Law Conundrum*, 54 Santa Clara L. Rev. 69, 81 (“It is difficult to conceive of any act, ultimately characterized as negligent, that does not have its roots in intentional, deliberate conduct.”). For example, “[d]riving in excess of the speed limit, hitting an errant golf ball, creating a hazardous condition, or maintaining an attractive nuisance are all activities that are deliberate in origin yet yield consequences that are consistently deemed to be

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<sup>7</sup> The district court’s analysis also misunderstands the Exemplar Suits’ allegations. The underlying complaints do not allege that *all* shipments of opioids were unlawful or problematic. Nor could they, since the distribution of opioids is a necessary and vital business. *Liberty Mut. Fire Ins. Co. v. J M Smith Corp.*, 602 F. App’x 115, 121-22 (4th Cir. 2015) (“[T]he defendants here were engaged in the lawful activity of providing prescription drugs to pharmacies. They may not have been sufficiently careful about whose hands the drugs eventually reached, but that does not preclude finding accidental injury.”). Rather, the Exemplar Suits allege that McKesson’s conduct with respect to *some* opioid shipments was improper. *E.g.*, 5-ER-975 (¶ 123). The district court improperly accepted the Exemplar Suits’ allegations that McKesson and other distributors intentionally “flooded” the market with opioids and denied coverage on that basis. This fails to recognize that the policies provide coverage even where the allegations are “false, fraudulent, or groundless,” 1-ER-3-4 (quoting policy language), or that the Exemplar Suits alternatively allege only that McKesson “should have known” it was shipping quantities that “could not be justified” and constituted an oversupply, 3-ER-399 (¶502); 4-ER-765 (¶518); 5-ER-960 (¶60).

accidents.” *Id.* It is only by first engaging in activities consistent with its core business that McKesson could have been liable in the first place.

The district court’s ruling makes no sense when one considers the history and purpose of insurance. Return to the history of Lloyd’s. To make a claim, a ship owner would necessarily have to show that he deliberately sent his ship to the seas. Under the district court’s reasoning, such an admission would defeat coverage, even though that is precisely why the ship owner bought the insurance. Or consider a hypothetical involving wildfire insurance. If a person lives in a dry area, he or she might obtain wildfire insurance to protect against that known risk. But say the fire is started by a person blowing out a match and then tossing the still-hot match onto a patch of pine needles. The match, though extinguished, is hot enough to ignite the needles. The fire was clearly accidental, even though it was started by the deliberate act of tossing a match. The district court’s analysis would hold there is no coverage under the wildfire policy.

Under the district court’s reasoning, general liability insurance only remains for a presumably narrow set of circumstances. *See* 1-ER-25 (holding there is no coverage because the Exemplar Suits “do not allege that McKesson intended to ship opioids to one location but, printing the wrong packing label, shipped them to a different location” or “that McKesson intended to ship aspirin but, pulling the wrong box off the shelf, shipped opioids instead”). But as explained above, the purpose of

insurance is to transfer known risks inherent to a company’s business to a risk-neutral party (the insurer). The district court’s decision guts this fundamental purpose of insurance, leaving coverage only for rare (and likely small) liabilities. Companies like McKesson procure hundreds of millions of dollars in coverage—the policies here have limits of \$25 and \$45 million and sit above a \$5 million retention—and they do not buy such coverage to protect against fringe events like “printing the wrong packing label.” They buy it to transfer risks inherent in their core business.

The district court’s decision also makes no sense in light of how the insurance underwriting process works. Underwriting is “the process of screening and evaluating applications to determine the degree of risk posed by prospective insured.” Kenneth S. Abraham, *Insurance Law and Regulation* 7 (6th ed. 2015). Underwriters “classify insureds based on the degree of risk posed and set premium levels accordingly.” *Id.* To evaluate how risky an insured is, underwriters learn about the insured’s industry and business practices. Here, both ACE and AIG engaged in underwriting to evaluate McKesson’s business—*i.e.*, prescription drug distribution—and then issued broad general liability policies that extend to “false, fraudulent, or groundless” claims, as well as to novel theories of liability. The first prescription opioid lawsuit was filed by the West Virginia Attorney General in 2012, but since then, “a host of state agencies, counties, cities, hospitals, individuals, and

others” have filed thousands of similar suits nationwide. *St. Paul Fire & Marine Ins. Co. v. AmerisourceBergen Drug Corp.*, 868 S.E.2d 724, 735 (W. Va. 2021). The Insurers, having underwritten risks inherent to McKesson’s core business, cannot now seek to avoid coverage simply because a novel theory of liability has gained acceptance in courts across the country. Such risks are precisely why policyholders buy insurance.

Finally, the district court’s decision is likely to have the most severe impact on small businesses, which make up over 99% of California businesses. *2020 Small Business Profile*, U.S. Small Bus. Admin. Office of Advocacy, available at <https://cdn.advocacy.sba.gov/wp-content/uploads/2020/06/04142955/2020-Small-Business-Economic-Profile-CA.pdf> (last visited Dec. 13, 2022). Insurance plays a role in ensuring that businesses, particularly small businesses, can withstand potentially large losses. Small business owners almost certainly expect that the general liability insurance they have purchased is broader than what the district court articulated in its decision. For example, the “Small Business Guide to Commercial Insurance” on the California Department of Insurance’s website explains that “[o]ne of the key concepts of liability coverage is that it is comprehensive in nature.” *Commercial Insurance Guide*, Cal. Dept. of Ins., <http://www.insurance.ca.gov/01-consumers/105-type/95-guides/09-comm/commercialguide.cfm#top> (last visited Dec. 13, 2022). Under the district court’s decision, however, general liability

policies are far from comprehensive, thus undermining the reasonable expectations of small business owners. *AIU Ins. Co. v. Super. Ct.*, 51 Cal. 3d 807, 822 (1990) (California courts “generally interpret the coverage clauses of insurance policies broadly, protecting the objectively reasonable expectations of the insured”).

**B. The district court’s decision grants insurers a windfall.**

The district court’s decision does not merely deprive policyholders of insurance they paid for but also confers a windfall on insurers, who have collected premiums for decades and are now excused from performing their contractual obligations. As described above, the Insurers here specifically advertise that their general liability insurance products protect companies from risks inherent in operating their day-to-day business. ACE’s commercial general liability insurance “safeguards from the economic fallout of common incidents that happen while running just about any business,” including businesses, like McKesson, engaged in distribution of products. *What Is Commercial General Liability (CGL) Insurance?*, <https://www.chubb.com/us-en/businesses/resources/what-is-commercial-general-liability-insurance.html> (last visited Dec. 13, 2022). Likewise, AIG claims to provide coverage for “bodily injury or property damage ... as a result of your business operations.” *Commercial General Liability*, <https://www.aig.sg/business/business-products-and-services/casualty/commercial-general-liability> (last visited Dec. 13, 2022).

Despite these promises in the marketplace, the Insurers argued below that such risks are not covered because the act of distributing is “intentional.” For example, ACE argued that the underlying claims “specifically allege only *intentional* acts....” ACE Mot. Summary Judgment, ECF 115, at 24; *id.* at 25 (“McKesson argues that the Exemplar Suits allege an accident because they ‘repeatedly allege that McKesson “should have known” its acts or omissions in distributing opioids would lead to harm.’ But even as paraphrased by McKesson, those allegations refer only to *the harm* (or potential for harm) which resulted from McKesson’s intentional conduct.” (internal citation omitted)). These arguments undermine the purpose of the insurance the Insurers sold to McKesson, which—as advertised by the Insurers—was to protect McKesson from losses inherent in its business as a distributor.

**C. The district court’s decision undermines the ability of tort victims to seek compensation for injuries.**

The district court’s reasoning does not merely deprive corporate policyholders of insurance. It also has downstream effects on potential tort victims injured by corporate policyholders. In California, tort law ensures that innocent victims are compensated for injuries. *See Brown v. USA Taekwondo*, 11 Cal. 5th 204, 229 (2021) (Cuéllar, J., concurring) (explaining that tort law embodies “important, long-

standing values—allocating risks and costs to those who can avoid them, and ensuring just compensation”).

Insurance, in turn, guarantees that those tort victims will be able to collect on judgments against corporate tortfeasors. It is for this reason that many states, including California, have financial responsibility laws and compulsory insurance statutes. *See In re Michael S.*, 147 Cal. App. 4th 1443, 1453 (2007) (describing “the instances where public policy *encourages* people to obtain insurance precisely in order to assure that victims of torts will be compensated for their losses,” including “the financial responsibility law that requires all motorists obtain insurance” and “other statutes which have the direct or indirect effect of promoting the availability of liability insurance”); *Sandoval v. Mercury Ins. Grp.*, 229 Cal. App. 3d 1, 7 (1991) (recognizing “the important public policy in favor of providing monetary protection for tort victims”); 1 New Appleman on Insurance Law Library Edition § 2.07 (2022) (“The primary purpose of financial responsibility laws and other state statutes mandating liability insurance is to ensure that tort victims have a source of recovery.”); 18-126 Appleman on Insurance Law & Practice Archive § 126.2 (2nd 2011) (“Under state ‘financial responsibility laws’ as well as ‘compulsory insurance’ statutes, citizens are recognized as intended third-party beneficiaries. A financial responsibility statute is considered to be passed largely for the benefit of persons injured.”).

The district court’s decision undermines the public policy of ensuring that tort victims can obtain just compensation. As explained above, virtually no claims arising from a company’s core business activities, including most negligence claims, are covered by insurance under the district court’s decision. Without insurance, many corporate tortfeasors would be unable to compensate tort victims, meaning the burden of loss will ultimately be borne by the tort victims themselves. This is particularly true of small businesses (which make up over 99% of California businesses) that may not have the financial resources to pay potentially large judgments without insurance.

**III. The decision below correctly determined that the damages were “because of bodily injury.”**

The district court also ruled that the Exemplar Suits seek damages “for” or “because of” “bodily injury,” as defined by the policies. 1-ER-10-15.<sup>8</sup> The district court reviewed the underlying allegations and concluded that “[t]he exemplar suits allege opioid abuse, sickness, addictions, overdoses, and deaths.” 1-ER-11.

According to the district court, the Exemplar Suits “squarely allege ‘physical injury to the body’ by a substance ingested through the body, and thus at least potentially fall within the ‘plain and unambiguous’ meaning of bodily injury.” *Id.* at 10

(quoting *Chatton v. Nat’l Union Fire Ins. Co.*, 13 Cal. Rptr. 2d 318, 323 (Cal. Ct.

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<sup>8</sup> The policies define “bodily injury” as “bodily injury, sickness or disease sustained by any person, including death . . . resulting from any of these at any time.” 1-ER-3-4 (quoting policy language).

App. 1992)).

The district court also held that the Exemplar Suits “at least potentially seek damages ‘because of’ or ‘for’ those bodily injuries.” 1-ER-11. In particular, the court noted that, under the policies, “[d]amages 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.* (quoting policy language). The governmental plaintiffs in the Exemplar Suits “allege they bear costs to provide various services to address and mitigate the bodily injury suffered by people in their jurisdictions.” *Id.* The court found that the types of damages sought by the underlying governmental plaintiffs “could constitute reimbursement of the government plaintiffs’ asserted costs of responding to and providing care for the alleged bodily injury.” *Id.* Accordingly, “the requested relief at least potentially falls within the ‘plain and unambiguous meaning’ of ‘damages . . . for care, loss of services or death resulting at any time from the Bodily Injury.’” *Id.* (quoting policy language).

The court correctly rejected the Insurers’ argument that “the government plaintiffs *themselves* suffered no bodily injury,” explaining that this argument “contradicts the policies’ clearly defining ‘because of bodily injury’ to include damages ‘claimed by any person or organization.’” 1-ER-12. The court recognized that the Insurers’ argument was nonsensical in light of the express policy language:

Because bodily injury means harm to the corporeal body, and the policies specify that bodily injury is “sustained by a person” or “any person,” no “organization” can itself suffer bodily injury under the terms of the policies. The policies nevertheless provide that damages because of bodily injury can include damages claimed by an organization. Accordingly, nothing in the policies limits coverage to suits that seek damages for the plaintiff’s own bodily injury.

*Id.* (citations omitted).

The district court also rejected the Insurers’ argument that the “exemplar suit plaintiffs seek damages only for economic losses.” *Id.* While the court agreed that “[e]conomic expenditures for purely prophylactic measures, designed to prevent future losses, may not be recoverable,” it nevertheless held that the Exemplar Suits did not involve such a scenario. *Id.* (internals omitted). Rather, “the exemplar suits are readily distinguishable from the claims for prophylactic costs” because they “seek actual damages for the costs of responding to bodily injury that has already occurred.” 1-ER-13.

Finally, the district court rejected the Insurers’ reliance on the Delaware Supreme Court’s recent decision in *ACE American Insurance Co. v. Rite Aid Corp.*, 270 A.3d 239 (Del. 2022). “The *Rite Aid* court interpreted the policy language to cover damages for bodily injury ‘only when asserted by 1) the person injured, 2) a person recovering on behalf of the person injured, or 3) people or organizations that treated the person injured or deceased, who demonstrate the existence of and cause of the injuries.’” 1-ER-14 (quoting *Rite Aid*, 270 A.3d at 247). The district court

agreed with the dissenting opinion in *Rite Aid*, explaining that “[n]othing in the policies limits coverage to suits that seek damages for the plaintiff’s own bodily injury.” 1-ER-14. “Rather, the policies cover damages claimed by any organization for care resulting at any time from the bodily injury.” *Id.*

The district court correctly held that the Exemplar Suits seek damages “for” or “because of” “bodily injury.” The most persuasively reasoned decision addressing whether underlying opioid claims seek damages “because of bodily injury” was decided by the Seventh Circuit. *See Cincinnati Ins. Co. v. H.D. Smith, L.L.C.*, 829 F.3d 771 (7th Cir. 2016). In *H.D. Smith*, the insurer argued that the underlying opioid lawsuit, brought by the State of West Virginia, did not seek damages “because of bodily injury.” The Seventh Circuit disagreed, explaining, “West Virginia alleged that its citizens suffered bodily injuries and the state spent money caring for those injuries—money that the state seeks in damages. On its face, West Virginia’s suit appears to be covered by Cincinnati’s policy.” *Id.* at 774. The insurer argued that “West Virginia seeks its own damages, not damages on behalf of its citizens.” *Id.* The Seventh Circuit held that this argument “is untethered to any language in the policy.” *Id.* The court then analyzed a hypothetical:

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.* The district court here cited *H.D. Smith* with approval. *See* 1-ER-12, 14-15.

The district court’s decision on “bodily injury” is also consistent with California law. *See AIU Ins. Co.*, 51 Cal. 3d at 842–43 (“[T]he mere fact that the governments may seek reimbursement of response costs or injunctive relief without themselves having suffered any tangible harm to a proprietary interest does not exclude the recovery of cleanup costs from coverage under the ‘damages’ provision . . . . For similar reasons, in plain and ordinary terms such recovery is ‘because of’ property damage.”); *see also* 1-ER-11-15. In particular, the court rejected the Delaware Supreme Court’s holding in *Rite Aid*, explaining that it was “not persuaded that the California Supreme Court would agree with *Rite Aid*’s interpretation of the insurance policy language.” 1-ER-14. For these reasons, this Court should not disturb the district court’s holding on the issue of “bodily injury.”

## CONCLUSION

This Court should reverse the District Court's order insofar as it concludes the Exemplar Suits do not potentially allege an "accident." Alternatively, this Court should certify a question about the scope of the term "accident" to the California Supreme Court.

Date: December 14, 2022

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