E-FILED
Transaction ID: 1-23-0841
File Date: 8/24/2023 4:07 PM
Thomas D. Palella
Clerk of the Appellate Court
APPELLATE COURT 1ST DISTRICT

No. 1-23-0841

In the
Appellate Court of Illinois
First Judicial District

HARTFORD FIRE INSURANCE COMPANY,

Plaintiffs-Appellees

v.

MEDLINE INDUSTRIES, INC., BECTON, DICKINSON & COMPANY, and C.R. BARD, INC.

Defendants-Appellants

Appeal from the Circuit Court of Cook County, Illinois
Case No. 2022 L 008735
The Honorable Neil H. Cohen, Judge Presiding

UNITED POLICYHOLDERS' MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT MEDLINE INDUSTRIES, LP

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Counsel for Amicus Curiae

Pursuant to Illinois Supreme Court Rule 345(a), *Amicus Curiae* United Policyholders ("UP") respectfully requests leave of this Court to file an *amicus* brief in support of Appellant Medline Industries, LP. In support of this motion, UP respectfully submits as follows:

Effectuating the purpose of insurance and interpreting insurance contracts requires special judicial handling. 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 Illinois businesses and residents through three programs: Roadmap to RecoveryTM (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's Executive

Director Amy Bach, Esq. serves as an official consumer representative for the National Association of Insurance Commissioners.

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. UP *amicus* briefs have been cited with approval by the U.S. Supreme Court, *see Humana Inc. v. Forsyth*, 525 U.S. 299 (1999), and recently the Illinois Supreme Court, *see Sproull v. State Farm Fire & Cas. Co.*, 2021 IL 126446 ¶ 53 (2021). In addition, UP seeks to fulfill the classic role of *amicus curiae* by supplementing the efforts of counsel and drawing courts' attention to law that may have escaped consideration.

UP has filed amicus curiae briefs on behalf of policyholders in numerous cases before the United States Court of Appeal for the Seventh Circuit and the courts of the State of Illinois. *See*, *e.g.*, *Sandy Point Dental, P.C. v. The Cincinnati Insurance Company, Inc.*, No. 21-1186 in the United States Court of Appeals for the Seventh Circuit; *TJBC, Inc. v. The Cincinnati Insurance Company, Inc.*, No. 21-1186 in the United States Court of Appeals for the Seventh Circuit; *Big Onion Tavern Group, LLC v. Society Insurance, Inc.*, No. 20-cv-02005 in the United States District Court for the Northern District of Illinois; *Sproull v. State Farm Fire and Casualty Co.*, No. 126446 in the Supreme Court of Illinois; *Country Mutual Insurance Company v. Livorsi*

Marine, No. 99807 in the Supreme Court of Illinois; *AAA Disposal Systems, Inc. v. Aetna*, No. 99680 in the Supreme Court of Illinois; *Avery v. State Farm Mutual Automobile Insurance Company*, No. 91494 in the Supreme Court of Illinois; *West Bend Mutual Insurance Company v. New Packing Company, Inc.*, No. 11-1507 in the Illinois Appellate Court, First District; *Employers Insurance of Wausau v. City of Waukegan*, Nos. 2-97-0606, 2-97-0901 in the Illinois Appellate Court, Second District; *Board of Education of Township High School District No. 211 v. International Insurance Company*, No., 98-0084 in the Illinois Appellate Court, First District; *Benoy Motor Sales, Inc. v. Universal Underwriters Insurance Company*, No. 96-0536 in the Illinois Appellate Court, First District; *Maremont Corporation v. Chesire*, No. 96-0146 in the Illinois Appellate Court, First District; *Firebirds International, Inc. v. Zurich American Insurance Company*, No. 2020-CH05360 in the Chancery Division, Circuit Court of Cook County, Illinois.

This appeal raises the highly important question of whether a liability insurer has a duty to defend an underlying lawsuit alleging only willful and intentional wrongdoing by the insured defendant – here, alleged Lanham Act violations, arguably made to augment the amount of recoverable damages – even though liability could be established by proof of non-intentional, accidental conduct. The trial court incorrectly answered this question "no" despite multiple decisions from federal courts applying the law of Illinois and elsewhere that correctly have answered this question "yes" in disputes over

coverage for alleged intentional violations of the Lanham Act.

This particular question has not previously been addressed in any reported decisions of the Illinois Appellate Court or Illinois Supreme Court. UP accordingly respectfully submits this *amicus* brief to educate this Court about the numerous courts and prominent insurance law scholars and commentators recognizing that an insurer has a duty to defend underlying lawsuits alleging only intentional misconduct where liability could be established based on non-intentional conduct or a "lesser included offense." The consensus reached by these authorities on this issue is consistent with long-established principles of Illinois law that broadly and liberally determine an insurer's duty to defend in favor of coverage. UP therefore respectfully seeks leave to file a merits brief as *amicus curiae* to provide this Court with additional authority and perspective on this important issue impacting insurance policyholders in the State of Illinois.

By bringing the full background surrounding these issues before the Court, UP seeks to fulfill the established role of prospective *amici curiae*, in a case of general public interest, by supplementing the efforts of counsel, and drawing the Court's attention to law that may otherwise escape consideration. This is an appropriate role for *amicus curiae*. As commentators have often 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 Ennis, *Effective*

Amicus Briefs, 33 Cath. U.L. Rev. 603, 608 (1984)).

UP and the nationwide policyholders whose interests it represents have a vital interest in this proceeding. Because of its unique perspective on insurance issues, UP's proposed *amicus curiae* brief will assist the Court in weighing considerations that are relevant to the disposition of this case.

WHEREFORE, UP respectfully moves this Court to grant it leave to file the proposed *amicus curiae* brief in support of Appellant Medline Industries LP, submitted herewith.

Dated: August 24, 2023

Respectfully submitted,

UNITED POLICYHOLDERS

By: */s/ Evan Thomas Knott*
One of Its Attorneys

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NOTICE OF FILING AND PROOF OF SERVICE

PLEASE TAKE NOTICE that, on August 24, 2023, the foregoing **UNITED POLICYHOLDERS' MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT MEDLINE INDUSTRIES, LP** was filed electronically via the Odyssey efileIL system with the Appellate Court, First Judicial District. Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. The undersigned further certifies that, in accordance with Supreme Court Rule 12(b)(2), an electronic PDF copy of the foregoing document was served upon the attorneys of record of all parties to the above-styled case by serving same via email and the Odyssey efileIL system to such attorneys at their e-mail address:

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*/s/ Evan T. Knott*_____

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PROPOSED ORDER

Upon consideration of the Motion of *Amicus Curiae* United Policyholders' ("UP") Motion for Leave to File *Amicus Curiae* Brief in Support of Appellant Medline Industries, LP in this appeal, it is hereby ORDERED that the Motion is ALLOWED / DENIED.

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BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT MEDLINE INDUSTRIES, LP

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE* UNITED POLICYHOLDERS

United Policyholders ("UP") respectfully submits this brief as *amicus curiae* in support of Appellant Medline Industries, LP ("Defendant") and urges that this Court reverse the trial's court ruling granting judgment on the pleadings to Appellee Hartford Fire Insurance Company ("Plaintiff").

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, including numerous cases before the United States Court of Appeal for the Seventh Circuit and the courts of the State of Illinois. UP's *amicus* briefs have been cited with approval by the U.S. Supreme Court, *see Humana Inc. v. Forsyth*, 525 U.S. 299 (1999), as well as

the Illinois Supreme Court, *see Sproull v. State Farm Fire & Cas. Co.*, 2021 IL 126446 ¶ 53 (2021). UP seeks to fulfill the classic role of *amicus curiae* by supplementing the efforts of counsel and drawing courts' attention to law that may have escaped consideration.

This appeal raises the highly important question of whether a liability insurer has a duty to defend an underlying lawsuit alleging only willful and intentional wrongdoing by the insured defendant – here, alleged Lanham Act violations, arguably made to augment the amount of recoverable damages – even though liability could be established by proof of non-intentional, accidental conduct. The trial court incorrectly answered this question "no" despite multiple decisions from federal courts applying the law of Illinois and elsewhere that correctly have answered this question "yes" in disputes over coverage for alleged intentional violations of the Lanham Act.

This question has not previously been addressed in any reported decisions of the Illinois Appellate Court or Illinois Supreme Court. UP accordingly respectfully submits this *amicus* brief to educate this Court about the numerous courts and leading insurance law scholars and commentators recognizing that an insurer has a duty to defend underlying lawsuits alleging only intentional misconduct where liability could be established based on non-intentional conduct or a "lesser included offense." The consensus reached by these authorities on this issue is consistent with long-established principles of Illinois law that broadly and liberally determine an insurer's duty to defend in

favor of coverage.

Illinois law recognizes that the starting point for making this determination is to examine the allegations of the underlying lawsuit complaint. But an insurer cannot evade its duty to defend simply by pointing to allegations of intentional misconduct, as the trial court erroneously ruled. On the contrary, an insurer has a duty to defend under Illinois law unless the underlying allegations demonstrate that the claimant will not be able to prove the insured liable, under any theory supported by the complaint, without also proving facts triggering an exclusion or limitation to coverage in the policy.

The trial court's ruling in favor of Plaintiff deviates from the general principles under Illinois law for determining an insurer's duty to defend, as well as the numerous courts that have enforced the insurer's duty to defend under circumstances similar to those at issue here. UP therefore respectfully requests that this Court reverse the trial court's ruling in favor of Plaintiff.

ARGUMENT

I. Illinois Law Broadly and Liberally Construes the Duty to Defend and Imposes Stringent Burdens on Insurers to Avoid Defending Their Policyholders.

As this Court rightly observed, "[t]he duty to defend has been referred to as litigation insurance." *Ill. Tool Works Inc. v. Travelers Cas. & Sur. Co.*, 2015 IL App (1st) 132350, ¶46 (citing *Perdue Farms, Inc. v. Travelers Casualty & Surety Co. of America*, 448 F.3d 252, 258 (4th Cir. 2006)). "It is difficult to overstate the breadth of an insurer's duty to defend." 3-17 *Appleman on*

Insurance §17.01. This broad duty serves public policy because the "state has an interest in having an insured adequately represented in the underlying litigation." *Cincinnati Cos. v. West Am. Ins. Co.*, 183 Ill. 2d 317, 329 (1998(). Indeed, "an insurer's duty to defend under a liability insurance policy is so fundamental an obligation that a breach of that duty constitutes a repudiation of the contract." *Employers Ins. v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 151 (1999).

The duty to defend is broader than and separate from the duty to indemnify, and "flows in the first instance from the allegations in the underlying complaint…." *Pekin Ins. Co. v. Wilson*, 237 Ill. 2d 446, 456, 461 (2010). It arises whenever the allegations of a complaint on their face are potentially covered:

> If the complaint ***alleges facts within or potentially within the policy coverage***, the insurer is obliged to defend even if the allegations are groundless, false or fraudulent.

Thornton v. Paul, 74 Ill. 2d 132, 144 (1979) (*overruled on other grounds, American Family Mut. Ins. Co. v. Savickas*, 193 Ill. 2d 378 (2000)) (emphasis added); *Int'l. Ins. Co. v. Rollprint Packaging Prods., Inc.*, 312 Ill. App. 3d 998, 1007-09 (1st Dist. 2000) (same).

Thus, the "threshold for pleading a duty to defend is low." *Metropolitan Prop. and Cas. Ins. Co. v. Stranczek*, 2012 IL App. (1st) 103760, ¶ 12; *see also Amer. Economy Ins. Co. v. DePaul Univ.*, 383 Ill. App. 3d 172, 178 (1st Dist. 2008). Importantly, the duty to defend

> does not require that the complaint allege or use language affirmatively bringing the claims within the scope of the policy. The question of coverage should not hinge on the draftsmanship skills or whims of the plaintiffs in the underlying action.

Illinois Emasco Ins. Co. v. Nw. Nat'l Cas. Co., 337 Ill. App. 3d 356, 361 (1st Dist. 2003) (quoting *Rollprint Packaging Prods.*, 312 Ill. App. 3d at 1007).

Rather, the duty is triggered if the policy potentially "covers the liability on ***any set of facts consistent with the allegations needed to support recovery on any theory raised in the complaint***…." *Illinois Emasco Ins. Co.*, 337 Ill. App. 3d at 360 (emphasis added). Stated differently:

> The … insurer has the duty to defend unless the allegations of the underlying complaint demonstrate that the plaintiff in the underlying suit will not be able to prove the insured liable, under any theory supported by the complaint, without also proving facts that show the loss falls outside the coverage of the insurance policy.

Am. Access Cas. Co. v. Novit, 2018 IL App (1st) 171048, ¶ 16 (quoting *Illinois Emasco Ins. Co.*, 337 Ill. App. 3d at 361). In that regard, Illinois courts "determine whether the alleged conduct ***arguably falls within at least one of the categories of wrongdoing listed in the policy***." *Santa's Best Craft, LLC v. St. Paul Fire & Marine Ins. Co.,* 611 F.3d 339, 346 (7th Cir. 2010) (emphasis added).

Thus, the ground rules governing the duty to defend are applied in favor of coverage, and both the underlying complaint and the policy must be construed in favor of the insured with all doubts resolved in the insured's favor. *Ehlco Liquidating Trust*, 186 Ill. 2d at 153; *United States Fid. & Guar. Co. v.*

Wilkin Insulation Co., 144 Ill. 2d 64, 74 (1991).

The burden for an insurer to avoid its duty to defend under this framework is stringent. "An insurer may not justifiably refuse to defend an action against its insured unless it is *clear* from the face of the underlying complaints that the allegations fail to state facts which bring the case within, or potentially within, the policy's coverage." *Wilkin*, 144 Ill. 2d at 73 (emphasis in original). *See also Novak v. Insurance Admin. Unlimited, Inc.*, 91 Ill. App. 3d 148, 151 (2d Dist. 1980) ("Absent absolute clarity on the face of the complaint that a particular policy exclusion applies, there exists a potential for coverage and an insurer cannot justifiably refuse to defend.").

Illinois law thus demands clarity to *avoid* a duty to defend, not to trigger one, and insurers must provide their policyholders a defense whenever the underlying lawsuit allegations – liberally construed in the insured's favor – demonstrate a mere potential for coverage. The trial court's ruling that Plaintiff has no duty to defend Defendant, however, is contrary to these long-recognized principles of Illinois insurance law and should be reversed for each of the reasons that follow.

II. Numerous Courts Applying the Law of Illinois and Elsewhere Correctly Have Held That Intentional Injury Exclusions Do Not Negate an Insurer's Duty to Defend Under Similar Circumstances

Courts applying the law of Illinois and elsewhere correctly have held that so-called "intentional injury" exclusions do not automatically abrogate an insurer's duty to defend a lawsuit simply because the underlying complaint

alleges that the insured's injurious conduct was intentional. Consistent with the ground rules for determining an insurer's duty to defend that favor a finding of coverage under Illinois law, these decisions examine whether the underlying claims allege facts that at least arguably or potentially could fall within the insurance policy's coverage. These authorities are directly applicable here and strongly favor a determination that Plaintiff owed Defendant a duty to defend.

A. Decisions Finding a Duty to Defend Lanham Act Claims Where Intentional Wrongdoing is Alleged

UP is not aware of any Illinois state court decisions addressing this exact issue. Numerous federal courts applying Illinois law, however, consistently and correctly have held that an insurer has a duty to defend a lawsuit alleging violations of the Lanham Act notwithstanding the fact that the insured's conduct was alleged to be "intentional." *Blue Sky Bio, LLC v. Fed. Ins. Co.*, No. 10 C 4612, 2010 WL 5288160 (*4 (N.D. Ill. Dec. 17, 2010); *Capitol Indem. Corp. v. Elston Self Serv. Wholesale Groceries, Inc.*, 551 F. Supp. 2d 711, 726 (N.D. Ill. 2008), *aff'd* 559 F.3d 616 (7th Cir. 2009) (intentional conduct exclusion did not relieve insurer of its duty to defend underlying trademark infringement complaint); *Allied Ins. Co. v. Bach*, No. 05 C 5945, 2007 WL 627635, *2 (N.D. Ill. Feb. 7, 2007) (granting summary judgment to policyholder that insurer had duty to defend despite allegations of willful and intentional Lanham Act violations); *Cent. Mut. Ins. Co. v. StunFence, Inc.*, 292 F. Supp. 2d 1072, 1082 (N.D. Ill. 2003) (granting summary judgment to policyholder that insurer had duty to defend);

Sun Elec. Corp. v. St. Paul Fire & Marine Ins. Co., No. 94-C-5846, 1995 WL 270230, *7 (N.D. Ill. May 4, 1995).

The rationale underlying these decisions is simple: the Lanham Act does not uniformly require that alleged infringements be committed with knowledge in order for a plaintiff to recover damages for trademark infringement. *Bach*, 2007 WL 627635, at *2 ("the Lanham Act provides a cause of action for any violation of a copyright by marketing counterfeit goods ***regardless of intent or knowledge***," and the "issue of willfulness is limited to the issue of damages") (emphasis added); *Creation Supply, Inc. v. Selective Ins. Co.,* 2018 U.S. Dist. LEXIS 234977, *10 (N.D. Ill. Dec. 20, 2018) ("Lanham Act can be violated without proof that the infringement was knowing or intentional" and "there is established case law that even allegations of intentional conduct under the Lanham Act do not fall under the knowledge exclusion"); *StunFence, Inc.,* 292 F. Supp. 2d at 1081-82 ("Knowing Violation" and "Knowledge of Falsity" exclusions did not preclude insurer's duty to defend because "assertions of intentional and willful conduct … need not have been proved for [plaintiff] to recover damages for trademark infringement").

Not surprisingly, an underlying plaintiff often will allege intentional conduct in order to seek treble damages and maximize its potential recovery under the Lanham Act, "but if it failed to prove those charges, single damages would still [be] available to it." *Id.*, at 1082 n.8; *see also E. Atl. Ins. Co.*, 260 F.3d at 746 (allegations of intentional conduct likely a "pitch for punitive

damages" and did not preclude coverage). Where, as here, a claimant could state a claim for alleged Lanham Act violations regardless of its alleging or proving that the defendant acted willfully or intentionally, an insurer cannot avoid its duty to defend pursuant to policy exclusions based on the insured's knowledge or intentional conduct.

Courts outside Illinois determining an insurer's duty to defend suits alleging intentional violations of the Lanham Act are in accord. In *Aearo Corp. v. American Intern. Specialty Lines Ins. Co.*, 676 F. Supp. 2d 738 (S.D. Ind. 2009), the district court rejected the insurer's argument that a "knowledge of falsity" exclusion in the policy relieved it from defending an underlying lawsuit alleging that the insured's trademark infringement was "knowing and willful." In so ruling, the district court reasoned:

> When a plaintiff can prove knowing or willful infringement of a trademark, that additional proof can support additional remedies, including punitive damages …. But (the plaintiff) could have recovered on its trademark infringement claims without proving that Aero acted with knowledge of falsity …. ***Aearo was thus exposed to liability for trademark infringement even if could prove it lacked any intent to infringe …. That exposure to liability triggered (the insurer's) duty to defend.***

Id. at 748 (emphasis added).

In *Union Insurance Co. v. Knife Co., Inc.*, 897 F. Supp. 1213 (W.D. Ark. 1995), the district court likewise held that the insurer had a duty to defend an underlying lawsuit for trademark infringement even though the complaint alleged solely intentional wrongdoing and the policy contained a "knowledge of

falsity" exclusion. As in *StunFence* and *Aearo Corp.*, the district court in *Knife Co.* reasoned that "[s]ince intent is not a required element of trademark infringement, there could be a finding of liability against (the insured) even if the infringement were innocent," and therefore the insurer's duty to defend was triggered "despite the allegation of willfulness." *Id.* at 1217.

Here, to the extent the Bard Lawsuit alleges purportedly "intentional" conduct, there was at least a potential that facts could be adduced at trial showing Defendant's alleged conduct was not intentional, thus rendering the exclusion inapplicable. As in *StunFence,* the "Knowing Violation" and "Knowledge of Falsity" exclusions should not relieve Plaintiff from defending Defendant if the underlying complaint at issue alleged that Plaintiff "acted intentionally and with knowledge that it was violating [plaintiff's] rights," because Section 1114 of the Lanham Act "does not uniformly require that infringements be committed with knowledge." *StunFence*, 292 F. Supp. 2d at 1081. Likewise, the underlying claimant here presumably alleged intentional conduct in order to seek treble damages, but such assertions "need not have been proved for [the underlying claimant] to recover damages for trademark infringement —and that being so, the [knowledge] exclusions do not apply" to defeat Defendant's duty to defend. *Id.* at 1082.

B. Numerous Courts Enforce the Duty to Defend Suits Alleging Other Intentional Torts Where Recovery Potentially is Available For Non-Intentional Wrongdoing

Other decisions applying Illinois law also imposed a duty to defend on

an insurer where, similar to the alleged intentional Lanham Act violations at issue here, the underlying lawsuit alleged only intentional wrongdoing by the insured but the claimant could recover for non-intentional conduct. For example, in *Cincinnati Ins. Co. v. E. Atl. Ins. Co*., 260 F.3d 742 (7th Cir. 2001), the Seventh Circuit held that an insurer had a duty to defend an underlying counterclaim that was "replete with allegations of deliberate misconduct" by the insured in support of its tortious interference claims, even though such claims were not explicitly covered under the policy. *E. Atl. Ins. Co.*, 260 F.3d at 746. In so ruling, the Court looked past the underlying allegations of intentional misconduct, reasoning that:

> They are much more likely to have been intended as a pitch for punitive damages than as a limitation of the claim – a limitation because merely negligent defamation is actionable in Illinois when the victim is not a public figure…. Such a limitation would be foolish; why would Midwest commit itself to abandon its claim for defamation merely because of inability to prove facts inessential to such a claim, though helpful in jacking up damages? Proof of deliberateness would merely be the icing on the cake. It is also possible that Midwest is describing as deliberate misconduct a case in which deliberate *disparagements* are made even if the disparager is merely negligent with regard to their truth. Unless he *knows* that his disparagements are false, he is not within the basic policy's exclusion.
>
> So Cincinnati had a duty to defend both Eastern and Integrity under the basic policy.

Id. at 745-46 (emphasis supplied).

Similarly, the Seventh Circuit applying Illinois law in *Tews Funeral Home, Inc. v. Ohio Casualty Ins. Co.*, 832 F.2d 1037 (7th Cir. 1987) likewise

emphasized that an insurer is obligated to defend if there is any possible basis for coverage, even though the underlying lawsuit explicitly asserted noncovered claims based on alleged intentional wrongdoing by the insured.

The claimant in *Tews* asserted statutory antitrust claims, statutory unfair trade practices claims, and common law business tort claims against the insured defendant. In support of these claims, the underlying complaint alleged that the insured "willfully … provided consumers with 'false and misleading information' disparaging plaintiffs' goods, services and business." *Tews*, 832 F.2d at 1044. The underlying complaint also alleged that these willfully false statements were published in various advertisements, which the Court determined could therefore "state a cause of action for libel *per se*, libel *per quod* and tortious interference with contractual relationships." *Id.* Although the underlying complaint did not explicitly assert any libel claims against the insured, the insurer's policy at issue "explicitly insure[d] for damages arising from claims for 'libel, slander, defamation … [and] unfair competition ... arising out of Tews advertising activities." *Id.* The Seventh Circuit thus held that the insurer had a duty to defend, looking beyond the labels of antitrust violations and other noncovered claims alleged in the complaint, because such allegations were "potentially covered" under the insurer's policy. *Id.*

The Seventh Circuit in *Solo Cup v. Federal Ins. Co.*, 619 F.2d 1178 (7th Cir. 1980), similarly held that an insurer had a duty to defend an EEOC

complaint that alleged the insured employer had "intentionally engaged in unlawful employment practices." *Solo Cup*, 619 F.2d at 1187. In so ruling, the Court reasoned that a disparate impact claim did not require proof of discriminatory motive. *Id.*; *see also Utica Mut. Ins. Co. v. David Agency Ins., Inc.*, 327 F. Supp. 2d 922, 927 (N.D. Ill. 2004) (insurer could not avoid duty to defend underlying lawsuit alleging insured made knowingly false statements where insured could be found liable even if its defamatory statements had not been knowingly false when made).

Numerous courts in other jurisdictions consistently have enforced the insurer's duty to defend similar underlying lawsuits, holding that allegations of willful and intentional conduct by the insured are not dispositive where, as here, the insured could be held liable for non-intentional conduct. *See, e.g., Auto Europe, LLC v. Connecticut Indem. Co.*, 321 F.3d 60, 67-68 (1st Cir. 2003) (rejecting insurer's argument that it had no duty to defend pursuant to exclusion for willfully dishonest or fraudulent acts where underlying complaint alleged only intentional fraud because Maine's Unfair Trade Practices Act permitted liability in absence of intent to deceive); *Aetna Cas. & Sur. Co. v. Sunshine Corp.*, 74 F.3d 685, 688 (6th Cir. 1996) (Tennessee law) (duty to defend based on underlying allegations "does not mean that a particular choice of adjectives by the draftsman of a complaint against the insured can deprive the insured of its contractual right to an insurer-provided defense in a situation where the plaintiff could recover a judgment for damages against the insured

even if the adjective should prove ill-chosen"); *Bowie v. Home Ins. Co.*, 923 F.2d 705, 709 (9th Cir. 1991) (California law) (insurer "is obligated to defend even claims not covered by the policy so long as conduct, the nature and kind of which ordinarily would be covered, has occurred so that the complaint conceivably could be amended to allege covered conduct"); *Napoli, Kaiser & Bern, LLP v. Westport Ins. Corp.*, 295 F. Supp. 2d 335, 340-41 (S.D.N.Y. 2003) (insurer had duty to defend underlying suit alleging only intentional defamation because insured could have been found liable for unintentional defamation); *Safeguard Scientifics, Inc. v. Liberty Mut. Ins. Co.*, 766 F. Supp. 324, 329-30 (E.D. Pa. 1991) (insurer had duty to defend underlying defamation suit alleging only intentional slander because making alleged intentionality determinative would "turn the issue of coverage over to the vagaries of an opponent's pleading"), *judgment aff'd in part, rev'd in part*, 961 F.2d 209 (3d Cir. 1992); *Smith v. St. Paul Guardian Ins. Co.*, 622 F. Supp. 867, 875 (W.D. Ark. 1985) (insurer had duty to defend alienation of affection claim despite allegations in underlying complaint that insured "'unlawfully and maliciously, by means of devious wiles, manifestations of affections and misrepresentation, did lessen and wean the affections of Mrs. Asta' from Mr. Asta" because neither "'malice'" nor "'devious wiles'" were "a necessary element of alienation of affections" and it "remain[ed] possible that [insured] did not intend to do so"); *Allstate Ins. Co. v. Novak*, 313 N.W.2d 636, 640–41 (Neb. 1981) (insurer had duty to defend despite fact that underlying lawsuit for assault and battery

alleged only intentional wrongdoing, because insured could have been found liable for mere negligence); *Monroe Guar. Ins. Co. v. Monroe*, 677 N.E.2d 620, 623–24 (Ind. Ct. App. 1997) (insurer must defend complaint alleging solely intentional wrongdoing unless it conducts an investigation and determines that insured could not be found liable for negligence).

C. Prominent Insurance Law Commentators and Treatises Recognize That Insurers Must Defend Lawsuits Alleging Intentional Torts Where a "Lesser Included Offense" Would be Covered.

Consistent with the authorities summarized *supra*, prominent insurance law commentators recognize that liability insurers must defend their insureds against underlying lawsuits alleging only willful or intentional misconduct if the claimant ultimately could recover regardless of the insured's knowledge or intent. As Professor Jeffrey Stempel of the University of Nevada Las Vegas Law School instructs in his treatise, "if a 'lesser included offense' would be covered by the duty to indemnify, the insurer has the obligation to mount a defense." *See* STEMPEL AND KNUTSEN ON INSURANCE COVERAGE, § 1.06[B][1][h] (4th ed. 2023-2 Supp.) (citing *Abrams v. Gen. Star Indem. Co.*, 335 Ore. 392 (Ore. 2003) (conversion claim)).

In *Abrams*, the Ninth Circuit certified to the Oregon Supreme Court the issue of whether an "intentional acts" exclusion relieves an insurer of its duty to defend where the underlying lawsuit alleges the insured subjectively intended to cause harm but the claim could be proven through unintentional conduct. The Oregon Supreme Court held that the insurer had a duty to

defend, reasoning that the allegations of intentional conversion encompassed allegations of ordinary conversion, a tortious act that was covered under the insurer's policy. *Id.* at 400.

Allan Windt, the author of another prominent insurance law treatise,[1] likewise observes:

> [A] duty to defend should exist if … a policy affords coverage for negligence, but not intentional wrongdoing, and although only intentional wrongdoing is alleged, the insured could be found liable for negligence….
>
> * * *
>
> There is authority … holding that the insurer's defense obligation should be determined solely from the complaint, but such authority is unreasoned and consists merely of a blind adherence to the general rule in a situation in which the general rule was never intended to apply.
>
> * * *
>
> A more controversial situation arises when the complaint unambiguously alleges that the insured is guilty of behavior that is not entitled to coverage, but the plaintiff would be entitled to relief even if the insured were guilty of some less heinous behavior that would be entitled to coverage. The commonest example of this is when the complaint alleges that the insured is guilty of intentional wrongdoing, but the acts complained of could, if the pleadings were

[1] Mr. Windt frequently is engaged by insurers as an expert witness in complex insurance coverage litigation. As one federal court recently found, Mr. Windt has "substantial experience adjusting claims in a variety of jurisdictions, and drafting insurance policies for insurance companies," and also is "'a prominent insurance law commentator … who has lectured and published extensively on the subject of insurance claim adjudication.'" *See United States Fid. & Guar. Co. v. Ulbricht*, 576 F. Supp. 3d 850, 856 (W.D. Wash. 2021).

> amended, also support a verdict of negligence. The preferable, though minority, rule under those circumstances is that the insurer normally has a duty to defend even though the policy contains an exclusion for intentional wrongdoing.
>
> * * *
>
> If, contrary to the allegations of the complaint filed against it, the insured is not guilty of intentional wrongdoing, there is no public policy reason for the defense cost coverage that it purchased to be voided. Accordingly, the insurer should be obligated to provide the purchased policy benefits unless and until the insured is found guilty of conduct that renders the coverage against public policy.

See ALLAN D. WINDT, INSURANCE CLAIMS & DISPUTES, REPRESENTATION OF INSURERS AND INSUREDS, § 4.2 (6th ed. 2013 & Supp. 2021).

Mr. Windt cites *Ferguson v. Birmingham Fire Ins. Co.*, 460 P.2d 342 (Ore. 1969), to summarize the rule adopted by courts holding that an insurer has a duty to defend if the complaint, without amendment, could result in a judgment covered by the policy even though the claim actually alleged is not compassed by the policy:

> The duty to defend will also arise under some circumstances when the complaint contains only one count which, on its face, falls within a policy exclusion. If the complaint, without amendment, may impose liability for conduct covered by the policy, the insurer is put on notice of the possibility of liability and it has a duty to defend.
>
> For example, in an action of trespass brought against the insured, if the complaint alleges a willful entry (in order to support a claim for punitive damages), the plaintiff could, without amending the complaint, recover ordinary damages for a nonwillful entry. The insurer, therefore, would

> [despite a policy exclusion for intentional wrongdoing] have the duty to defend. The innocent trespass may be treated as a "lesser included offense" by analogy to the criminal law.

See WINDT, INSURANCE CLAIMS & DISPUTES, § 4.2 (quoting *Ferguson*, 460 P.2d at 347). As further support for this proposition, the Windt treatise cites this Court's decision in *Travelers Ins. Companies v. P.C. Quote, Inc.*, 211 Ill. App. 3d 719, 729 (1st Dist. 1991) ("The factual allegations of the complaint rather than the legal theory under which the action is brought will determine whether there is a duty to defend…. The mere fact that the complaint is presented as a [noncovered] breach of contract action does not protect Travelers from liability, for the court must look to the conduct alleged in the language of the complaint to consider potential liability under an insurance policy").

Both the Stempel and Windt treatises point to the California Supreme Court's landmark decision in *Gray v. Zurich Insurance Co.*, 65 Cal. 2d 263 (Cal. 1966) as laying the foundation for this important principle of insurance coverage law. STEMPEL AND KNUTSEN ON INSURANCE COVERAGE, § 1.06[B][1][h]; WINDT, INSURANCE CLAIMS & DISPUTES, § 4.2. In *Gray*, the policyholder sought coverage for a lawsuit alleging that he "wilfully, maliciously, brutally and intentionally assaulted" the claimant. Although the policyholder contended he had acted in self-defense, his insurer denied coverage pursuant to an exclusion for "bodily injury or property damage caused intentionally by or at the direction of the insured." The Court held that despite allegations of intentionally caused injury, the underlying lawsuit "presented

the potentiality of a judgment based upon nonintentional conduct," thereby triggering the insurer's duty to defend. *Gray*, 65 Cal. 2d at 276.

In so ruling, *Gray* reasoned:

> [D]espite [claimant's] pleading of intentional and wilful conduct, he could have amended his complaint to allege merely negligent conduct. Further, [claimant] might have been able to show that in physically defending himself, even if he exceeded the reasonable bounds of self-defense, he did not commit wilful and intended injury, but engaged only in nonintentional tortious conduct.

Id. at 277. As the California Supreme Court aptly observed in a subsequent decision, *Gray* "establishes the rule that the insurer must defend in some lawsuits where liability under the policy ultimately fails to materialize; this is one reason why it is often said that the duty to defend is broader than the duty to indemnify." *See Montrose Chemical Corp. v. Super. Ct.*, 861 P.2d 1153, 1160 (Cal. 1993).

D. The Trial Court's Ruling Deviates From Illinois' Principles Broadly Interpreting an Insurer's Duty to Defend and the Position of Numerous Courts and Commentators Recognizing That the Duty to Defend Can be Triggered Under Circumstances Similar to Those at Issue Here

Although no Illinois state courts previously have addressed the particular issue raised in this appeal, a long line of decisions from Illinois state and federal courts have broadly interpreted and applied a liability insurer's duty to defend and devised well-established ground rules for determining the duty to defend in a manner that favors coverage. The trial court's granting judgment on the pleadings in favor of Plaintiff and fixating only on the

allegations of intentional wrongdoing in the Bard Lawsuit deviates from these established principles. It also is directly at odds with the long-established and better reasoned decisions applying the law of Illinois and elsewhere summarized *supra* recognizing that the duty to defend should be triggered under circumstances like those at issue here. As these authorities instruct, the allegations that Defendant's purported Lanham Act violations were committed willfully and intentionally are not dispositive of Plaintiff's duty to defend. Indeed, Illinois law has long held that the "question of coverage should not hinge exclusively on the draftsmanship skills or whims of the plaintiff in the underlying action." *See Travelers Ins. Co. v. Penda Corp.*, 974 F.2d 823, 827 (7th Cir. 1992); *Rollprint Packaging Prods.*, 312 Ill. App. 3d at 1007 (same).

Plaintiff cannot hide behind the allegations in the Bard Lawsuit of Defendant's purported intentional misconduct to deny coverage "unless it is *clear* from [its] face … that the allegations fail to state facts which bring the case within, or potentially within, the policy's coverage." *Wilkin*, 144 Ill. 2d at 73 (emphasis in original). The Bard Lawsuit complaint does not clearly preclude the underlying claimant from establishing liability for alleged Lanham Act violations absent a finding that Defendant acted willfully or intentionally. Indeed, the "Lanham Act provides a cause of action for any violation … ***regardless of intent or knowledge***." *See Bach*, 2007 WL 627635, at *2 (emphasis added); *Creation Supply, Inc.,* 2018 U.S. Dist. LEXIS 234977, at *10 ("Lanham Act can be violated without proof that the infringement was

knowing or intentional" and "there is established case law that even allegations of intentional conduct under the Lanham Act do not fall under the knowledge exclusion"); *StunFence, Inc.,* 292 F. Supp. 2d at 1081-82 ("Knowing Violation" and "Knowledge of Falsity" exclusions did not preclude insurer's duty to defend because "assertions of intentional and willful conduct … need not have been proved for [plaintiff] to recover damages for trademark infringement").

The Bard Lawsuit thus alleged a claim for purported Lanham Act violations falling "potentially within the policy coverage," which is all that Illinois law requires to trigger an insurer's duty to defend, notwithstanding the allegations of intentionality contained in the underlying complaint. *Thornton*, 74 Ill. 2d at 144; *Rollprint Packaging Prods., Inc.*, 312 Ill. App. 3d at 1007-09; *see also Hartford Fire Ins. Co. v. Whitehall Convalescent and Nursing Home, Inc.*, 321 Ill. App. 3d 879, 889 (1st Dist. 2001) (where insurance policy provided the possibility of covering fraudulent scheme as a "medical incident," insurer had a duty to defend). This Court's reversing the trial court's granting judgment on the pleadings to Plaintiff not only would be consistent with Illinois' long-recognized principles for determining an insurer's duty to defend, but also the authority from numerous courts applying the law of Illinois and elsewhere enforcing an insurer's duty to defend lawsuits under circumstances similar to those at issue here.

III. CONCLUSION

For each of the foregoing reasons, UP respectfully requests that this

Court reverse the trial court's granting judgment on the pleadings to Plaintiff and enter an order granting judgment on the pleadings to Defendant and finding that Plaintiff had a duty to defend the Bard Lawsuit.

Dated: August 24, 2023

Respectfully submitted,

UNITED POLICYHOLDERS

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RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 22 pages or 5,388 words.

/s/ Evan Thomas Knott
Evan Thomas Knott

CERTIFICATE OF SERVICE

I, Evan Thomas Knott, an attorney, hereby certify that, on the 24th day of August, 2023, I caused to be electronically filed the foregoing **Brief of *Amicus Curiae* United Policyholders' in Support of Appellant Medline Industries, LP** with the Clerk of the Appellate Court of Illinois, First District, by using the Odyssey eFileIL system, copying the following counsel of record:

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Additionally, upon its acceptance by the Court's electronic filing system, the undersigned will mail 5 copies of the brief to the Clerk of the Appellate Court of Illinois, First District, 160 North LaSalle Street, Chicago, IL 60601.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

/s/ *Evan Thomas Knott*
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