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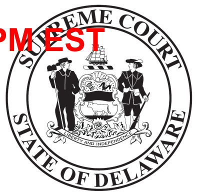

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS IN SUPPORT OF APPELLANTS

Dated: December 26, 2024

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INTRODUCTION

This appeal presents an issue of critical importance to directors and officers of Delaware corporations: whether a D&O insurer can deny coverage to a policyholder while simultaneously preventing the policyholder from suing to enforce performance under the contract of insurance until the policyholder has incurred a judgment or agreed to a settlement of the claim against it. Should the Superior Court's decision be affirmed, that could well destabilize the corporate insurance landscape in this State. That is because directors and officers of Delaware corporations often face non-indemnifiable claims such as derivative actions, and they therefore are dependent on other sources of payment, especially "Side A" D&O insurance, to resolve such claims. If, after a denial of coverage by their D&O insurers, directors and officers of Delaware corporations are forced either to fund the settlement of non-indemnifiable claims through their own resources (which many, if not most, directors and officers are not likely to be able to do) or go to trial (which, if unsuccessful, could eliminate coverage and result in financial ruin) – which are the only options that the Superior Court left open to directors and officers after a denial of coverage – many individuals are likely to be reluctant to serve as directors or officers of Delaware corporations. The ruling below also threatens to upend standard and well-accepted rules of insurance contract construction and performance in Delaware.

For the reasons set forth below, this Court should reverse the Superior Court's ruling on the first issue presented in this appeal, concerning the "No Action" clause, and hold that if an insurer denies coverage or otherwise breaches the contract of insurance, an insured has standing to sue the insurer in the Delaware courts.[1]

BACKGROUND

To protect the individuals who serve as directors and officers of the company from personal losses if they are sued as a result of actions taken in their capacity as company leaders, Appellant Origis USA LLC purchased a tower of "claims made" directors and officers liability (D&O) insurance policies every year, with the "2021-2022 Tower" of D&O insurance the tower relevant to the issue addressed in this *amicus curiae* brief. (Opening Br., Ex. A, at 10.) As Chief Executive Officer of Origis, Guy Vanderhaegen was an "Insured" under the 2021-2022 Tower for purposes of claims made against him alleging "Wrongful Acts" in the course of his duties as an officer of Origis. (*Id*. at 7, 10.) As the "Named Insured," Origis likewise was an "Insured" under the Tower for, among other things, its obligation to hold Mr. Vanderhaegen harmless. (A00067.)

The very risk contemplated by the D&O coverage arose when Origis and Vanderhaegen (referred to here as "the Insureds") faced litigation—still pending in

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[1] This *amicus curiae* brief only addresses the "No Action clause" issue. UP takes no position on the second issue that Appellants raise in this appeal.

the Southern District of New York—brought by former investors in Origis's former parent company, and naming Vanderhaegen and Origis as defendants. (A00076-77.)

The Insureds incurred substantial Defense Costs in defending against the underlying lawsuit and they plead that they will incur additional expense in the event of a settlement or adverse judgment. (*Id.*) The Insureds provided timely notice of the claim to their D&O insurers but the primary insurer, Great American Insurance Company, and the various excess insurers in the Tower denied coverage, claiming *inter alia* that the damages sought are not a "covered loss." (A00067.)[2] Following this denial, the Insureds filed an insurance coverage action in the Superior Court, asserting claims for declaratory judgment and breach of contract. (A00066-83.)

The D&O policies issued by the excess insurers follow form to—i.e., adopt the terms and conditions of—the Great American primary policy. (A00956.) Thus, it is Great American's Policy that contains the controlling language, including the "No Action" clause at issue here. The No Action clause in the Great American Policy provides that:

> With respect to any Liability Coverage Part, no action shall be taken against the Insurer unless, as a condition precedent thereto, there has been full compliance with all the terms of this Policy, and until the Insured's obligation to pay has been finally determined by an

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[2] Great American denied coverage after tender, but the other insurers in the tower did not respond after many months, which Origis pleaded was the equivalent of a coverage denial. (A00078-79.) Moreover, in this litigation, they all have taken the position that they provide no coverage or have moved to dismiss.

> adjudication against the Insured or by written agreement of the Insured, claimant and the Insurer.

(A00111; Great American Policy, General Terms and Conditions § XI.A.)

Great American and one of the excess insurers, Markel, moved to dismiss on the ground that the "No Action" clause precludes an insured from suing its insurer until the underlying lawsuit has concluded by settlement or final judgment. The Superior Court agreed and dismissed the insurance coverage case. (Opening Br., Ex. A.) For the reasons discussed below and in Origis's Opening Brief, the Superior Court erred and this Court accordingly should reverse.

ARGUMENT

I. An Insurer That Denies Coverage Cannot Enforce Conditions Precedent in the Insurance Policy Like the "No Action" Clause to Avoid Insurance Coverage Litigation Brought by Its Insured

The "No Action" clause at issue appears in the primary policy's "General Terms and Conditions" section (A00111) and purports to impose conditions that must be satisfied before an insured can obtain a recovery. Perhaps the most fundamental error that the Superior Court committed is that it enforced the "No Action" clause even though the primary insurer had breached the contract—and breached it materially— by denying coverage, a position subsequently echoed by the excess insurers.

It is black letter law in Delaware, and, indeed, across the country, that a party that has materially breached a contract cannot insist upon performance by the

counterparty to the contract. *See* Allan D. Windt, *Insurance Claims and Disputes: Obligations of Insured Following Notice of Claim* § 3:10 (2019) ("It is a basic principle of contract law that once one party to a contract breaches the agreement, the other party is no longer obligated to continue performing his or her own contractual obligations") (citing cases). Indeed, this rule is a foundational principle of contract law: "Where a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused." *Restatement (Second) of Contracts* § 245 (1981); *see also* 4 Arthur Corbin, *Corbin on Contracts* § 977, at 920-22 (1951) ("A repudiation or other total breach by one party enables the other to get a judgment for damages or for restitution without performing acts that would otherwise have been conditions precedent.").

To take a simple example, if a manufacturer informs a customer that the manufacturer will not be delivering the goods that the manufacturer contracted to provide, the manufacturer cannot enforce the customer's contractual obligation to pay for the goods.

This general rule is echoed in many Delaware decisions. *See, e.g., Ainslee v. Cantor Fitzgerald, L.P.*, No. 9436-VCZ (Del. Chan. Jan. 4, 2023) ("A material breach entitles the nonbreaching party to damages and relieves it of its obligations to perform under the agreement."); *Snow Phipps Grp., LLC v. Kcake Acquisition, Inc.,* 2021 WL 1714202, at *52 (Del. Ch. Apr. 30, 2021) (under the "Prevention

Doctrine," a party that prevents or hinders the occurrence of a condition cannot benefit from its non-occurrence); *Optical Air Data Sys., LLC v. L-3 Commc'ns Corp.*, Del. Super. Ct., C.A. No.: N17C-05-619 EMD CCLD (Dec. 5, 2019), at 61 ("Substantial failure to live up to the material terms of a valid contract nullifies that contract."); *Preferred Inv. Servs., Inc. v. T&H Bail Bonds, Inc.*, 2013 WL 3934992, at *11 (Del. Ch. July 24, 2013) ("A party is excused from performance under a contract when the other party materially breaches that contract."); *Estate of Mark Buller v. Montegue*, No. S18C-11-007-RHR (Del. Super. Mar. 4, 2022) (same; failure to purchase insurance policy); *Carey v. Est. of Myers,* 2015 WL 4087056, at *20 (Del. Super. July 1, 2015) ("Material breach acts as a termination of the contract going forward, abrogating any further obligations to perform by the non-breaching party.").

This rule applies with full force in the insurance context. Courts across the country have held that when an insurer has denied coverage, it cannot enforce insurance policy conditions such as the "notice," "cooperation," or "consent to settle" conditions. *See Windt*, *supra* § 3:10 (collecting cases). An insurer's denial of coverage is a statement that the insurer will not pay a claim. Assuming that the insurance policy in fact provides coverage, that denial of coverage is a breach, indeed, a material breach, since payment of claims is typically the insurer's most important obligation in the insurance policy. Moreover, when an insurer has denied

coverage, conditions precedent—typically imposing obligations on the insured to provide notice and cooperation in connection with claims—lose their intended purpose. "[T]he insurance company's initial repudiation of the contract in denying liability under the policy relieves the insured of strict performance of those provisions intended for the protection of the insurer …." *Apalucci v. Agora Syndicate*, 145 F.3d 630, 633 (3d Cir. 1998) (quoting *Brakeman v. Potomac Ins. Co.*, 472 Pa. 66, 371 A.2d 193 (Pa. 1977)). In other words, because the insurer's refusal to defend "cut at the very root of the mutual obligation, [it] put an end to its right to demand further compliance with the ... term of the contract." *Id. Apalucci* noted that this result "comports with elementary principles of fairness and equity" because "[a]s a general rule, when one party to a contract unilaterally prevents the performance of a condition upon which his own liability depends, the culpable party may not then capitalize on that failure." *Id.* That rule makes perfect sense: if the insurer is not going to pay, the policyholder should not be required to undertake the expense of complying with obligations under the insurance policy when such compliance would achieve nothing.

II. The Superior Court's Holding Undermines the Purpose of D&O Insurance

Directors and officers of Delaware corporations bear substantial fiduciary responsibilities and face a complex web of regulatory and legal standards. Litigation

against directors and officers—whether well-founded or meritless—can arise suddenly and carry massive defense and settlement costs.

In response to these concerns, the Legislature enacted 8 *Del. C.* § 145 to "permit[] Delaware corporations to provide broad indemnification and advancement rights to their directors and officers and to purchase D&O policies to protect them even where indemnification is unavailable…." *RSUI Indem. Co. v. Murdock*, 241 A.3d 887, 901 (Del. 2021). Most D&O policies have three principal insuring agreements: Side A, to protect directors and officers against non-indemnifiable liabilities; Side B, to protect a corporation against its obligation to indemnify its directors and officers; and Side C, to protect a corporation against securities claims. *See XL Spec. Ins. Co. v. WMI Liquidating Trust*, 93 A.3d 1208, 1212 & n.11 (Del. 2014). In fact, "[w]ith rare exceptions, companies that can otherwise self-insure (or use a captive for D&O insurance) will nevertheless purchase Side A [D&O] insurance because Side A can respond when a claim is not indemnifiable."[3]

The hallmark of D&O insurance is the peace of mind it provides. Corporations pay substantial premiums to ensure coverage in the event of claims alleging Wrongful Acts, thereby enabling corporate decision-makers to focus on the enterprise's best interests rather than the specter of personal financial ruin.

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[3] https://woodruffsawyer.com/insights/five-derivative-suits-types-massive-settlements.

But if the Superior Court were right when it held that the No Action clause requires that the underlying litigation against the insured be terminated by settlement or final judgment before the insured can sue its insurer, notwithstanding the insurer's material breach of the contract of insurance by denying coverage, Delaware corporations that are named as defendants in securities actions or that must hold their directors and officers harmless are forced into a Hobson's choice: they must bear the expense of litigation and settlement or litigate until final judgment before they can find out whether the D&O insurers provide coverage. Some Delaware corporations can afford to bear that risk, but many cannot; either way, few want to bear the burden of litigation and the stigma and expense of a potentially significant adverse verdict.

Far worse, however, is the Hobson's choice facing directors and officers of a Delaware corporation when the corporation either is financially unable to pay for their defense and settlement or the directors and officers are named as defendants in a non-indemnifiable claim, such as a derivative action.[4] In that scenario, the directors and officers either must fund a settlement (and, for insolvent corporations, a defense) out of their own pockets—an expense that many directors and officers cannot afford to bear—or they must roll the dice and hope for a favorable outcome at trial, notwithstanding the possibility that that the trier of fact may find the directors and officers liable for immense sums or may make findings that deprive the insured of

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[4] *Id*.

coverage, hence the reason why "the vast majority of derivative actions settle…."[5] Few individuals would be willing to bear this risk as the price for serving as a director or officer of a Delaware corporation. Thus, the deterrent effect on corporate service could well be profound, undermining Delaware's longstanding public policy favoring robust corporate governance and the recruitment of highly qualified individuals to leadership roles. Indeed, even the Superior Court acknowledged "the hardship that delayed relief might impose." *Origis USA LLC v. Great Am. Ins. Co.*, 2024 WL 2078226, at *5 (Del. Super. Ct. May 9, 2024).

Moreover, if insurers are permitted to deny coverage at the outset and still hide behind conditions precedent, they would gain a significant strategic advantage. Insurers could routinely deny coverage out of the box, discouraging insureds from pressing insurance claims due to the daunting expense and uncertainty of first resolving a substantial underlying case. Such a precedent would undermine not only the insured's rights but the efficient functioning of the insurance market itself. Insurance contracts would become less reliable because the insured could never be sure that "conditions" wouldn't be turned against them after a denial. Recognizing a waiver of conditions precedent in this circumstance preserves the equitable balance of the contractual relationship and discourages insurers from engaging in gamesmanship.

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[5] *Id*.

III. The Superior Court's Holding is Inconsistent with the Intended Purpose of No Action Clauses and the Weight of Delaware and Out of State Authority

The Superior Court was not troubled by the consequences of its ruling because, it reasoned, the only Delaware case to address the issue—and allowing the insured to sue immediately—dated back many years. The Superior Court failed to appreciate the vast weight of authority contrary to its ruling.

a. *Wright Construction* is The Strongest Delaware Authority Despite the Superior Court Paying It Short Shrift

The first Delaware court that directly addressed the question of whether a No Action clause bars an insured from bringing suit against its insurer was *Wright Construction Company v. St. Lawrence Fluorspar, Inc.*, 254 A.2d 252 (Del. Super. Ct. 1969). *Wright* involved a No Action clause in an insurance policy issued by Great American, the same insurer whose No Action clause is at issue in the present case. In *Wright*, the Court squarely rejected the same argument by Great American, which sought to obtain a dismissal of an insurance coverage action filed after a denial of coverage based on the argument that its No Action clause prevents it from being impleaded into a claim against its insured "where no judgment has been entered against the insured." *Id.* at 253-54. The Superior Court rejected Great American's position, holding that "consideration of the authorities convinces this Court that a 'no action' clause in a liability policy will not prevent a defendant insured from

impleading his insurer as a third-party defendant, even though no judgment has been taken against the insured." *Id.*

In the proceedings below, the Superior Court set *Wright* aside as "unpersuasive" because (1) it did not quote the language of the No Action clause at issue, and (2) it is a relatively old case that Delaware courts had not subsequently cited for this particular holding. Neither of these reasons undermines *Wright's* persuasiveness. First, while *Wright* did not directly quote the No Action clause at issue, it did characterize the language as "a standard 'no action' clause" in a policy issued by the same insurer involved in the present case and its analysis of the clause makes it evident that the material terms were identical to the clause at issue in the present appeal. *Id.* at 253. Second, *Wright* framed the question as whether the insurer could be sued even though "no judgment has been taken against the insured." *Id.* at 254. This is the same operative question at issue in this case. The Insurers here sought a dismissal in order to prevent the Insureds from pursuing a judicial determination about the Insurers' obligations when they denied coverage while the underlying action was still pending.

With respect to the age of the *Wright* decision, the fact that it has stood virtually uncontested for more than 50 years in no way casts doubt on the accuracy of its analysis. Quite the opposite—that no newer controlling Delaware authority has so much as cast doubt on Wright's core holding even though No Action clauses are

standard form insurance policy provisions suggests that parties have treated *Wright* as settled law for purposes of navigating No Action clauses in insurance contracts. *See Noranda Alum. Holding Corp. v. XL Ins. Am., Inc.*, 269 A.3d 974, 981 (Del. 2021) ("the decisions of our State's trial courts … are entitled to special weight when they establish a longstanding interpretation").

It strains credulity to assume that No Action clauses have not appeared in insurance contracts in the past half-century, or that insurers have not had the opportunity to raise the defense that Great American and Markel assert here. Instead, the far more likely conclusion is that insurers have understood that if they deny coverage for a claim or fail to respond to a tender for many months, they are subject to an insurance coverage action, and they thus have chosen to focus their attention and resources on questions that have not been unambiguously disposed of by the Superior Court. The absence of contrary precedent therefore serves to underscore *Wright's* continued validity and acceptance in Delaware insurance law and practice.

b. The Intended Purpose of No Action Clauses and the Weight of Out of State Authority Support Reversal

As several courts have recognized, the principal purpose of No Action clauses is to preclude third parties alleging that they were injured by an insured tortfeasor from directly suing the tortfeasor's insurer before their claim against the insured is resolved. These clauses are not intended, as the Superior Court assumed, to preclude the insured from bringing claims against its own insurer after a denial of coverage

prior to resolution of the underlying matter. *See, e.g., Paul Holt Drilling, Inc. v. Liberty Mut. Ins. Co.*, 664 F.2d 252, 254 (10th Cir. 1981) (collecting cases supporting its holding that the No Action clause does not apply to an insured's suit against the insurer); *Fight Against Coercive Tactics Network, Inc. v. Coregis Ins. Co.*, 926. F. Supp. 1426, 1435 (D. Colo. 1996) (noting that "courts have held a 'no action clause' does not apply to a suit an insured brings asserting the insurer is withholding benefits due under the policy, but rather to claims by a third party alleging the insured is responsible for the third party's injuries or claims."). The reason for this rule is that the insurer is contractually obligated to indemnify the insured for legal liability established by judgment in an action in which the insurer had an opportunity to defend or participate in the settlement determination.

A No Action clause cannot preclude insurance coverage actions brought by the policyholder after an insurer's breach, *see, e.g.,* Windt, *supra*, § 8.06 n.41 (collecting cases holding that No Action clause does not bar an insured's declaratory judgment action instituted before the underlying claim is resolved), just as any contracting party is subject to suit after a material breach of contract. A contrary holding would undermine Delaware public policy, as discussed above, and would up the balance of incentives when an insured is relying on defense and coverage from its insurer.

To take a few of many examples, in *Potomac Insurance Co. v. Wilkins Co.*, 376 F.2d 425, 429 (10th Cir. 1967), the Court of Appeals held that the insurer could not assert that a "no action" clause barred a bad faith action against the insurer where the insurer refused in bad faith to settle with the claimant. Similarly, in *Traders & General Insurance Co. v. Rudco Oil & Gas Co.*, 129 F.2d 621, 625, 627 (10th Cir. 1942), the Court held that where an insurer refused in bad faith to settle a claim that was likely to result in an excess judgment against the insured, the insurer could not assert that the "no action" clause in the policy of insurance barred a bad faith suit. And in *Twin City Fire Ins. Co., Inc. v. Ohio Cas. Ins. Co., Inc.*, 480 F.3d 1254, 1258 (11th Cir. 2007), the Court of Appeals explained that "when an insurer has a right to defend its insured, receives notice of settlement negotiations, and refuses to participate, the insurer waives the right to assert the no-action clause in a later suit to determine coverage." These cases rest on the same foundational concept, discussed in Section III, *infra*, that once an insurer has breached its fiduciary duties under the policy it may not hide behind the "No Action" clause to avoid—or delay—accountability.

IV. At a Minimum, Dismissal Was Inappropriate Because Ambiguities Exist In the Interpretation of the No Action Clause At Issue.

Both the standard governing motions to dismiss and canons of interpretation specific to insurance contracts dictate that inferences be drawn in the insureds favor. Indeed, the Insureds contend that the clause was *not intended* to deprive them of

their right to pursue an insurance coverage action after a denial of coverage. At a minimum, this contention merits a more detailed inquiry with the benefit of party discovery.

Moreover, an accepted canon of insurance contract construction requires the construction of ambiguities in favor of the insured. Delaware courts widely agree that "[w]hile [insurance] coverage provisions will be read broadly, exclusion provisions are construed narrowly in favor of coverage." *McCallister v. Arch Ins. Co.,* 2022 WL 909802, at *3 (Del. Super. Ct. Mar. 18, 2022); *see also RSUI Indem.*, 248 A.3d at 906; *Arch Ins. Co. v. Murdock*, 2019 WL 2005750, at *9 (Del. Super. Ct. May 7, 2019) (while "[c]overage language is interpreted broadly to protect the insured's objectively reasonable expectations . . . [e]xclusionary clauses, on the other hand, are 'accorded a strict and narrow construction'") (citation omitted); *Restatement of the Law of Liability Insurance* §32 (2018). Since many courts have limited the scope of the No Action clause to third party lawsuits against the defendant's insurer, and the court below assumed that the clause do not have that application, it is reasonable to conclude that the clause is ambiguous and must be construed in favor of the insured and against the insurers as the drafters of the contract.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* United Policyholders respectfully requests that this Court reverse the judgment of the Superior Court and hold that the No Action clause does not bar a lawsuit against an insurer that has denied coverage or failed to respond to the tender of a claim.

Respectfully submitted,

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Dated: December 26, 2024

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

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