SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

COMPLEX CIVIL LITIGATION

ONYX PHARMACEUTICALS INC.,

Plaintiff,

vs.

OLD REPUBLIC INSURANCE CO; et al.,

Defendants.

_____/

And RELATED CROSS-ACTIONS

_____/

Case No. CIV 538248

Assigned for All Purposes to Hon. Marie S. Weiner, Dept. 2

FINAL STATEMENT OF DECISION AFTER PHASE ONE COURT TRIAL ON DECLARATORY RELIEF CLAIMS

This matter came on for Court Trial in Department 2 of this Court before the Honorable Marie S. Weiner. Cary Lerman, E. Martin Estrada, Laura Lin, and Samuel Diaz of Munger Tolles & Olson LLP appeared on behalf of Plaintiff and Cross-Defendant Onyx Pharmaceuticals Inc.; Michael Goodstein of Bailey Cavalieri and Enrique Marinez of Ropers Majeski Kohn Bentley PC appeared on behalf of Old Republic Insurance; Jane Byrne, Ryan Stevens and Linda Brewer of Quinn Emanuel Urquhart & Sullivan LLP appeared on behalf of Allied World Assurance; William Smith

and John Howell of Wiley Rein LLP and Michael Prough of Morison & Prough LLP appeared on behalf of RLI Insurance.

The Phase One Court Trial was to adjudicate the claims for declaratory relief, which claims involved interpretation of the subject insurance policies. A Tentative Decision was previously issued, and a Proposed Statement of Decision. Objections to the Proposed Statement of Decision were submitted.

Upon due consideration of the briefs and evidence presented, and the oral argument of counsel for the parties, and objections to the Proposed Statement of Decision,

IT IS HEREBY ORDERED as the Court's Final Statement of Decision on the Phase One Court Trial, as follows:

The Court finds that the Loss Exclusion aka "Bump-Up Provision" under the Definition of Loss contained in the National Union Broad Form Management Liability Insurance Policy issued to Onyx Pharmaceuticals Inc. **does** have the effect of excluding insurance coverage under Insuring Agreement B for Onyx Pharmaceuticals Inc.'s payment of approximately $26 million out-of-pocket for settlement of the underlying shareholders' class action of *Onyx Pharmaceuticals Inc. Shareholder Litigation*, Master File CIV523789, paid by Onyx to indemnify its Directors and Officers sued as Defendants in that class action lawsuit. Accordingly, the claims for Declaratory Relief are adjudicated in favor of the Defendants and Cross-Complainants, and against Plaintiff and Cross-Defendant Onyx Pharmaceuticals Inc.

Counsel for the parties shall meet and confer regarding a procedural path for adjudication of all remaining causes of action that were not the subject of the Phase One Court Trial on insurance coverage.

A Complex Case Management Conference is set for **Tuesday, February 28, 2023 at 2:00 p.m.** in Department 2 of this Court. Appearances remotely using Zoom is strongly encouraged.

THE COURT FINDS as follows:

Claims in Dispute

Pursuant to CMC Orders #5 and #7 and the stipulation of counsel for the parties, the Phase One Court Trial is limited to adjudication of the insurance coverage claims for declaratory relief, a portion of which was adjudicated by motion for summary adjudication of issues as to the causes of action for declaratory relief only. Thus the causes of action at issue are Plaintiff Onyx Pharmaceuticals Inc.'s first cause of action for Declaratory Judgment alleged in the Second Amended Complaint filed February 16, 2017, and the cause of action for Declaratory Relief alleged in each of the Cross-Complaints filed by Defendants Old Republic Insurance Company, RLI Insurance Company, Allied World Assurance Company (U.S.) Inc. (sometimes referred to as the Excess Insurers herein).

This is an insurance coverage (and insurance bad faith) lawsuit by an insured, Onyx Pharmaceuticals Inc., seeking coverage under layers of excess liability policies. Specifically, the primary D&O liability policy was issued by National Union Fire Insurance Company of Pittsburgh, PA, a Broad Form Management Liability Insurance Policy for $10 million (with a $1.5 million deductible), and the totality of that

$10 million in coverage was paid by National Union for defense of the underlying defendant directors and officers of Onyx (or more specifically indemnity of Onyx for its payment of defense fees of its directors and officers) and the remainder was paid as part of the settlement funds to the plaintiffs and certified class in the underlying class action of *In re Onyx Pharmaceuticals, Inc. Shareholder Litigation*, San Mateo County Superior Court Case No. CIV523789 – over which case this same Court presided. The rest of the $30 million settlement paid to the class action plaintiffs – approximately $26 million[1] -- was paid out-of-pocket by Onyx, and Onyx seeks reimbursement from its excess liability insurance carriers.

Each of these Excess Insurer Defendants (Old Republic, RLI, and Allied World) herein issued "follow the form" D&O Excess Liability Insurance policies, which provided additional layers of insurance coverage over and above that of the primary carrier National Union, i.e., on condition that if it was a covered claim under the National Union primary policy then it also would be covered under their excess policies. In particular, Old Republic provided $10 million excess as the first level, then RLI provided $10 million excess as the second level, and Allied World provided $5 million in excess as the third level. Thus the focus of the declaratory relief claims is the language of the National Union policy.

Factual Background of the Shareholders Class Action Lawsuit

Onyx Pharmaceuticals Inc. was in the business of developing and marketing cancer drug products. According to the trial testimony of Matthew Fust, the former Chief Financial Officer of Onyx, acquisitions were common in the pharma industry, and Onyx

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1 $26,859,437.91

even retained a mergers and acquisitions financial consultant, Centerview Partners LLC, in January 2010 (Trial Exhibit #136) in preparation and anticipation of any future proposal for the sale of Onyx (as none were pending).

In August 2013, Amgen made an unsolicited offer to purchase Onyx for $125 per share, which was ultimately consummated.

In the case of *In re Onyx Pharmaceuticals Inc. Shareholder Litigation*, Master File No. CIV523789, plaintiffs who were shareholders of Onyx sued Onyx and members of Onyx's Board of Directors and its President and CEO, for breach of fiduciary duties, arising from Amgen's acquisition of Onyx in an all cash transaction whereby the Onyx shareholders received $125 per share pursuant to an Agreement and Plan of Merger. The result of this transaction was that Amgen acquired all ownership of Onyx stock, the Onyx shareholders received $125 per share, and Onyx became a wholly-owned subsidiary of Amgen. The Class Action Complaint alleged that Onyx and its Board of Directors failed in their duty "to seek the highest price for Onyx shareholders in its sale process", by selling to Amgen for $125 per share when the market price was higher, analysts priced it higher, and another suitor Company D had offered to pay more.

Onyx itself was dismissed as a named defendant pursuant to the sustaining of a demurrer, and thus at the time of the settlement of the underlying class action, the only defendants were the Onyx Directors/Officers.

The Court agrees with Defendants and Cross-Complainants, and so finds, that the allegations of the operative Complaint in the underlying shareholders' class action (CIV523789), asserted claims that the directors and officers of Onyx violated their fiduciary duties to the Onyx shareholders by failing to take efforts to maximize the tender offer price for Onyx shareholders; in that those underlying defendants overly favored and

gave preference to Amgen as a bidder to acquire Onyx, while shutting out or subverting any other potential bidders, particularly Company D. The transaction was a takeover, and the key claim in the underlying class action was that the officers and directors of Onyx failed to maximize the price paid per share to the Onyx shareholders once Onyx made the business decision to proceed with a tender offer or other transaction to sell Onyx.

Onyx argued that the class action plaintiffs also alleged that the Onyx directors breached their duty of candor and disclosure to the Onyx shareholders, and engaged in concealment of material facts or made misrepresentations. But this theory was inextricably tied to the claims for breach of duty of loyalty, duty of good faith, and duty to maximize the tender offer price to the shareholders – and the damages/remedy is identical. This was *not* a situation where the class action plaintiffs asserted a misrepresentation/nondisclosure theory in order to obtain an injunction against the tender offer in the first place. This was *not* a situation where the class action plaintiffs pursued a remedy of obtaining revised disclosures to the shareholders for their consideration prior to consummation of the tender offer. So, at the time of settlement, there was no true independent claim based upon duty of candor that was separate from the duty to obtain the best price for the shareholders through fair competitive bidding – because either the "candor" claim yields zero damages or the "candor" claim yields the same damages because the minority shareholders accepted the tender offer (under allegedly false pretenses) at the tender price (which the class action plaintiffs claimed as unfairly low).

Onyx also argued that one of the allegations of the class action plaintiffs was that the CEO and Director Coles engaged in personal aggrandizement to unfairly and personally obtain profits from the transaction, not available to other shareholders. Although this could constitute a breach of duty by a "controlling shareholders" to the

"minority" shareholders, under corporate law, and also go to the element of "conflict of interest" in determining whether he fulfilled his fiduciary obligations to the shareholders, the actual secret profits or ill-gotten benefits by an officer or director are subject to disgorgement/restitution to the *corporation* as a derivative claim, *not* a disgorgement directly to individual shareholders. So this theory still did not provide a separate damages claim or claim for relief to the class action plaintiffs at the time of settlement, but rather was evidence of the alleged wrongful conduct of that defendant in the transaction.

According to Onyx CFO Matthew Fust, the shareholders class action lawsuit was tendered to the D&O carriers, but all of the Excess Insurers denied coverage – which was a surprise to Fust and Onyx, as they thought this was a "securities case" under the Securities Claim coverage; and they thought that Mergers & Acquisitions was covered. But Fust testified that this belief was not based upon anything that the insurance company underwriters had said. Dr. Coles, the President and Chief Executive Officer of Onyx testified that the denial of coverage was "outrageous' and "not logical", as he "absolutely" expected there would be insurance coverage for the M&A class action lawsuit.

After settlement of the class action and entry of judgment, Onyx sued its Excess Insurers for indemnification of the funds it spent to settle the lawsuit.

Operative Language of the Insurance Policies

Onyx Pharmaceuticals Inc. purchased an "Executive Edge" Broad Form Management Liability Insurance Policy from AIG subsidiary National Union Fire Insurance Company of Pittsburgh PA, Policy No. 02-420-66-63, for the policy period

May 15, 2013 to May 15, 2014. (Trial Exhibit #17.) The National Union Policy was a "claims made" insurance policy with a limit of liability of $10 million, with a "retention" (like a deductible) of $1.5 million for "Securities Retention" or otherwise a $500,000 retention. The premium for one year of coverage was $338,886.

Insuring Agreement B of the National Union Policy provides as follows:

> B. *Indemnification of Insured Person Coverage*
>
> This policy shall pay the **Loss** of an **Organization** that arises from any:
>
> (1) **Claim** (including any **Insured Person Investigation)** made against any **Insured Person** (including any **Outside Entity Executive)** for any **Wrongful Act** of such **Insured Person**, and
>
> (2) **Pre-Claim Inquiry** to the extent that such **Loss** is either **Pre-Claim Inquiry Costs** or **Liberty Protection Costs**
>
> but only to the extent that such **Organization** has indemnified such **Loss** of, or paid such **Loss** on behalf of, the **Insured Person.**

The term **Wrongful Act** is defined as follows:

> **Wrongful Act** means:
>
> (1) any actual or alleged breach of duty, neglect, error, misstatement, misleading statement, omission or act . . .
>
> (i) with respect to any **Executive** of an **Organization** by such **Executive** in his or her capacity as such or any matter claimed against such executive solely by reason of his or her status as such; . . . or
>
> (2) with respect to an **Organization,** any actual or alleged breach of duty, neglect, error, misstatement, misleading statement,

omission or act by such **Organization** but solely in regard to a **Securities Claim**.

The term **Executive** is defined as including past and present directors and officers of a corporation.

The term **Claim** is defined in the National Union Policy as follows:

> **Claim** means:
>
> (1) a written demand for monetary, non-monetary or injunctive relief, including, but not limited to, any demand for mediation, arbitration or any other alternative dispute resolution process;
>
> (2) a civil, criminal, administrative, regulatory or arbitration proceeding for monetary, non-monetary or injunctive relief which is commenced by: (i) service of a complaint or similar pleading; (ii) return of an indictment, information or similar document (in the case of a criminal proceeding); or (iii) receipt or filing of a notice of charges.
>
> (3) an **Insured Person Investigation**
>
> (4) a **Derivative Demand**
>
> (5) an official request for **Extradition** of any **Insured Person** or the execution of a warrant for the arrest of an **Insured Person** where such execution is an element of **Extradition**.
>
> **"Claim"** shall include any **Securities Claim** and any **Employment Practices Claim**.

The term **Insured** is defined as "any (1) **Insured Person** or (2) **Organization**." The term **Insured Person** is defined as "any (1) **Executive** of an **Organization** (2) **Employee** of an **Organization** or (3) **Outside Entity Executive**". The term **Organization** is

defined as "(1) the **Named Entity**, (2) each **Subsidiary** and (3) in the event a bankruptcy proceeding shall be instituted by or against any of the foregoing entities, the resulting debtor-in-possession (or equivalent status outside the United States of America), if any." As stated on the Declarations page of the National Union Policy, the "Named Entity" is Onyx Pharmaceuticals Inc.

The focus of this lawsuit is upon the definition of **Loss**. Under the National Union Policy, the term **Loss** "means damages, settlements, judgments (including pre/post-judgment interest on a covered judgment), Defense Costs, Crisis Loss, Derivative Investigation Costs, Liberty Protection Costs, and Pre-claim Costs". The provision also includes other language regarding inclusions and exclusions which are not important here. The dispute pertains to the last paragraph of the definition of **Loss**, which states in full:

> In the event of a **Claim** alleging that the price or consideration paid or proposed to be paid for the acquisition or completion of the acquisition of all or substantially all of the ownership interest in or assets of an entity is inadequate, **Loss** with respect to such **Claim** shall not include any amount of any judgment or settlement representing the amount by which such price or consideration is effectively increased; provided, however, that this paragraph shall not apply to **Defense Costs** or to any **Non-Indemnifiable Loss** in connection therewith.

(Section 13, definition of Loss, page 22, hereinafter referred to as the Loss Exclusion.)

National Union did not contest coverage and paid the full $10 million limits of liability (less the $1.5 million deductible) on behalf of Onyx in the underlying shareholders lawsuit. The Excess Insurer Defendants are contesting coverage *under the*

National Union Policy, because *their* excess liability insurance policies are based upon the terms and conditions of that primary liability insurance policy.

Old Republic Insurance Company issued a Directors and Officers Liability Insurance Excess Policy No. CUG 35877 to Onyx Pharmaceuticals Inc. for the policy period May 15, 2013 to May 15, 2014 with a limit of liability of $10 million. (Trial Exhibit #18.) For this "first layer" of "claims made" excess coverage, Onyx paid premiums of $212,123. The operative terms of the Old Republic Excess Policy are basically one page, and incorporates the terms and definitions of the "underlying policy". The Declarations Page identifies the National Union Policy as the "Underlying Policy". The Insuring Agreement states as follows:

> **I. INSURING AGREEMENT**
>
> Except as otherwise stated in this Policy, the Insurer shall provide the **Insureds** with insurance in accordance with the terms, conditions, warranties and exclusions set forth in the **Primary Policy** and, to the extent coverage is further limited or restricted thereby, in any other **Underlying Policy**. Liability shall attach to the Insurer only after the insurers of the **Underlying Policies**, the **Insureds**, any excess "difference-in-conditions" insurer or any other sources pay in legal currency loss covered under the **Underlying Policies** equal to the full amount of the **Underlying Limit**. The Insurer's maximum aggregate liability for all **Loss** covered under this Policy shall be the aggregate Limit of Liability as stated in Item 3, of the Declarations.

In the insurance industry, this is known as a "follow the form" excess liability policy, as it provides an additional layer of limit of liability (i.e., insurance proceeds), based upon

the terms and conditions of a primary liability policy, but does not provide any additional breadth of insurance coverage itself.

The next "layer" of excess coverage was provided by RLI Insurance Company under its Excess Liability Policy EPG0011533, providing a limit of liability of $10 million on top of, and excess to, the National Union Policy and the Old Republic Excess Policy. (Trial Exhibit #58.) For the policy period May 15, 2013 to May 15, 2014, Onyx paid premiums of $134,490.

The third "layer" of excess coverage was provided by Allied World Assurance Company (U.S.) Inc. under its Excess Directors & Officers Liability Insurance Following Form Policy No. 0304-6343, providing a limit of liability of $5 million on top of, and excess to, the National Union Policy, the Old Republic Excess Policy, and the RLI Excess Policy. (Trial Exhibit #8.) For the policy period May 15, 2013 to May 15, 2014, Onyx paid premiums of $60,000.

History of Onyx D&O Insurance Negotiations

In a prior policy year, May 8, 2008 to May 15, 2009, Onyx had primary D&O coverage with National Union, then called the AIG Executive and Organization Liability Insurance Policy. (Trial Exhibit #236,) It had a primary limit of $10 million for premiums of $397,052. The Loss Exclusion had the following language:

> In the event of a **Claim** alleging that the price or consideration paid or proposed to be paid for the acquisition or completion of the acquisition of all or substantially all the ownership interest in or assets of an entity is inadequate, **Loss** with respect to such **Claim** shall not include any amount of any judgment or settlement representing the amount by which such

price or consideration is effectively increased; provided, however, that this paragraph shall not apply to **Defense Costs** or to any **Non-Indemnifiable Loss** in connection therewith.

As can be seen, the Loss Exclusion language of the National Union D&O policy back in 2008 was *identical* to the Loss Exclusion of the National Union Policy issued in 2013, which is the subject of this lawsuit. As discussed below, it is this *same* language that Onyx's insurance broker *unsuccessfully* attempted to have amended in their negotiation for renewal in 2009 – to make it clear that the Loss Exclusion only applied if Onyx was the acquirer/purchaser.

In its presentation to Onyx on February 12, 2009, Onyx's insurance broker Wells Fargo Insurance Services discussed with Onyx's Audit Committee of the Board of Directors their "Directors and Officers Liability Renewal Strategy Presentation," as presented by Rod Sockolov, Winnie Van and Yen Tanega. (Trial Exhibit #237.) This was the time of the Great Recession. The parent company of AIG was having serious financial problems, including the need for a federal government bail-out. (#237 at page 11.) On the other hand, its insurance company subsidiaries, including National Union, were represented to still be in good financial condition. (Id.) Historically, AIG/National Union had been the D&O primary carrier for Onyx since at least 2006. (#237 at page 14.) The Loss Exclusion was not part of the presentation, and was not something on the list of insurance coverage provisions to be negotiated. (#237 at page 18 "Select Coverage Goals for Renewal".)

Back in 2009, Onyx's insurance broker was negotiating with competing carriers for D&O primary coverage. There were email communications between Michael Donnelly (who was an underwriter for AIG), Oanh Le and Paula Choy of Carpenter

Moore, and Yen Tanega of Wells Fargo Insurance Services. (Trial Exhibits #231, #232, and #238.) Wells Fargo Insurance Services was the insurance broker (representing the insured) for Onyx and was the contact between Onyx and the insurance industry. Carpenter Moore was an insurance wholesaler which was the contact with the insurance marketplace (representing insurance companies). The competition was narrowed down to being between AIG (National Union) and AWAC (Allied World) for primary D&O coverage. In that regard, Carpenter & Moore Insurance Services, at the request of Onyx's representative WFIS, inquired of AIG (National Union) regarding amendment/modification of the definition of Loss.

These inquiries included the subject Loss Exclusion:

"10. Amend the Bump Up Exclusion to match AWACs language which is as follows 'any amounts that represent, or are substantially equivalent to, an increase in the price of consideration paid, or proposed to be paid, by the Company in connection with the purchase of its securities or assets'. **What exclusion does this refer to**?"

(Trial Exhibit 231, email dated April 30, 2009.)

"#10 – we're letting AIG know that you are referring to Section 2(p) Def of Loss, last paragraph and will advise"

(#231, email dated April 30, 2009)

"Please see the response we received from AIG in bold below regarding clarification for the following: . . .

"#10 -- we're letting AIG know that you are referring to Section 2(p) Def of Loss, last paragraph and will advise **[AIG is checking with legal]**

. . .

In terms of the excess pricing (over the revised AIG premium of $330,321), the excess carriers (Old Republic, RLI, and Monitor) have agreed to keep their pricing the same over either program. AWAC has agreed to match Old Republic's pricing on the 5x25 at $58,000. Please let me know if you need anything else."

(Trial Exhibit 3231, email dated May 1, 2009)

"Did AIG advise about the bump up provision?"

(Trial Exhibit #232, email dated May 12, 2009)

"Yen, AIG has confirmed they cannot amend the policy language for Bump-ups to match AWAC. Thanks, Oanh"

(#232, email dated May 12, 2009.)

"Regarding the bump up, instead of matching AWAC's language, please see if AIG is willing to amend their language as follows:

'In the event of a Claim alleging that the price or consideration paid or proposed to be paid for the acquisition or completion of the acquisition of all or substantially all the ownership interest in or **securities of another company** ~~assets of an entity~~ is inadequate, Loss shall not include any amount of any judgment or settlement representing the amount by which such price or consideration is effectively increased; provided, however, that this paragraph shall not apply to Defense Costs or to any Non-Indemnification Loss in connection therewith.'"

(#232, email dated May 12, 2009)

"Oanh/Paula, Effective May 15, 2009, please renew coverage as follows: AIG #10M at $330,321 . . ."

(Trial Exhibit #238, email dated May 12, 2009 from Yen Tanega)

"Thanks for the renewal order. We'll hold off on putting the order in for AIG since we're waiting to hear back from them on the amendment for the Bump-up exclusion. . . ."

(#238, email dated May 12, 2009)

"AIG is not willing [sic] amend their language as requested below for the bump up."

(#232, email dated May 14, 2009)

"Thanks for the response from AIG."

(#232, email dated May 14, 2009.)

Clearly, the result was the actual language of the National Union Policy issued in May 2009 (Trial Exhibit #5), which did *not* match the AWAC Loss provision language, and *did not* contain the requested amendment to make clear that the Loss Exclusion did *not* apply unless Onyx was the acquirer/purchaser of another company. It is also clear that Onyx had a choice in the marketplace and chose to purchase from National Union – albeit a choice made through its own insurance agent.

According to Winnie Van, none of this (regarding the Loss Exclusion) was told to the Onyx Board. Yen Tanega testified at trial that WFIS did not tell Onyx about their efforts to amend the Loss Exclusion – and that she certainly did not personally. There is no evidence that it was ever conveyed to CFO Fust or anyone else at Onyx itself. There is no evidence that Onyx's insurance broker ever had any direct communications with

AIG regarding the Loss Exclusion – and Yen Tanega testified that there was no such direct communication with AIG.

Matthew Fust testified that he was Chief Financial Officer of Onyx from January 2009 to early 2014, and that he handled the D&O insurance for Onyx (and for the pharmaceutical companies where he previously worked as CFO). He did so in conjunction with Onyx's General Counsel Suzanne Shema. Fust testified that Onyx wanted the "broadest coverage possible"; and that Onyx wanted D&O insurance coverage for the two significant risks for a pharma company, namely, M&A and stock market volatility (regarding products and sales). Fust expected Onyx and its directors and officers to be covered if there was any acquisition of Onyx.

Winnie Van, the insurance broker for Onyx, testified at trial that she expected that the "Bump Up Exclusion", i.e., Loss Exclusion, would not exclude coverage if Onyx was an acquisition target – but she also testified that National Union never explained the Loss Exclusion to her, or how it would work.

Jumping ahead to 2013, the team of people at Wells Fargo Insurance Services were now working for ABD Insurance & Financial Services – founded by Winnie Van in 2012. In their "Directors and Officers Liability Renewal Strategy Presentation" of February 2013, ABD told the Onyx Audit Committee (also attended by CEO Coles) that D&O insurance carriers were generally increasing their premiums and increasing their retention amounts (deductibles). (Trial Exhibit #143 at page 3.) They also told the Onyx Audit Committee that fewer insurance carriers were selling primary D&O insurance, due primarily to losses from mergers and acquisitions litigation. (Id.)

In the 2013 Presentation, its insurance broker told Onyx about the most common "allegations in securities fraud lawsuits" pertaining to "life science companies" such as

Onyx, and that the focus was upon misrepresentations regarding the company, its products, and status of the drug approval process. (#143 at page 13.) ABD extensively presented graphs and discussion of current typical amounts needed for settlement of shareholder lawsuits. (#143 at pages 15-20.) ABD also identified that the frequency of litigation regarding shareholders' "objections" to proposed mergers pertaining to public company was at approximately 47% to 50%. (#143 at page 14.) Yet, the "AIG Policy Key Coverage Highlights" and the "Coverage Goals for Renewal" said *nothing* about the Loss Exclusion for allegations of breach of fiduciary duty in the M&A context. (#143 at pp. 21-21.) Van admitted at trial that the Presentation does not discuss the "bump up" Loss Exclusion – and she testified that she does not recall ever discussing the Loss Exclusion with anyone at Onyx or at National Union or at the Excess Insurers. Accordingly, Onyx and its Directors and Officers had no reason to think that they were not protected under the D&O insurance policies for all aspects of M&A.

But these were not representations made to Onyx by National Union, or by any of the Excess Insurers – they were representations of the insurance broker who owed duties to its client Onyx. Further, the evidence reflects that the insurance broker for Onyx *knew* about the Loss Exclusion and that it might impair insurance coverage if Onyx became the target of an M&A transaction.

CFO Fust testified that he discussed with ABD that Onyx wanted continuity of insurance carriers, and discussed with its brokers that Onyx was a possible takeover target. Based upon the information and advice of ABD that most shareholders lawsuits settle for more than $20 million plus attorneys' fees and costs, Onyx purchased even more insurance coverage limits in 2013.

Dr. Coles also testified that he instructed Fust to "get the absolute best insurance company"; and that Onyx purchased expanded insurance company with increased limits of liability because Onyx was growing. Dr. Coles said that Onyx wanted the "Cadillac version of insurance" and wanted to be sure of coverage if Onyx were acquired. Dr. Coles testified that the insurance brokers (WFIS and ABD) never told them that there was no coverage if there was a lawsuit arising from acquisition of Onyx. Coles testified that ABD and Fust never discussed the Loss Exclusion with Onyx or its Audit Committee. Although he did personally read the insurance policies, he relied upon the representations of Onyx insurance brokers, and upon the experience and judgment of the Chief Financial Officer, that all good faith conduct by officers and directors (such as exercise of business judgment) would be covered under insurance if there was a shareholders lawsuit.

Fust and Van testified that it was Onyx's practice to have its *outside* counsel also review the proposed terms of D&O coverage.

Winnie Van testified that she knew Onyx wanted the "best terms at the lowest price". Van recommended in 2013 that Onyx purchase (or continue to purchase) its D&O primary coverage from AIG/National Union – even though it was more expensive than other primary providers. Van also testified that she knew Onyx wanted to be covered against exposure for shareholders class action lawsuits if it was acquired. Van expected coverage if there was an acquisition lawsuit. "That's why they buy insurance."

Fust testified at trial that he thought M&A lawsuits by shareholders were covered under the National Union Policy and the Excess Insurers policies, and that there would be coverage as "securities" cases under the Securities Claim[2] coverage. Fust admitted that

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[2] A **Securities Claim** under the National Union Policy means a Claim "alleging a violation of federal, state, local, or foreign regulation, rule or statute regulating securities (including but not limited to the purchase or sale or offer or solicitation of any offer to

this belief was not based upon any representation made by the insurance underwriters. Fust testified that he did read the National Union Policy. Fust testified that he never discussed the Loss Exclusion with Onyx Directors or with Onyx insurance brokers.

Fust testified that he personally did not negotiate any terms and conditions of any of the D&O insurance policies (primary or excess), and that Fust did not directly speak to any of the representatives of the Excess Insurers as to the terms and conditions of their excess policies.

Drafting and Underwriting History of the Loss Exclusion

The Court may properly consider drafting history in the interpretation of disputed insurance policy language. As the Supreme Court stated in Montrose:

> Most courts and commentators have recognized, however, that the presence of standardized industry provisions and the availability of interpretative literature are of considerable assistance in determining coverage issues. [Citation.] Such interpretative materials have been widely cited and relied on in the relevant case law and authorities construing standardized insurance policy language. As one court has suggested, "where two insurers dispute the meaning of identical standard form policy language – the meaning attached to the provisions by the insurance industry is, at minimum, relevant." [Citation.] On the other hand, as another court has observed, "while insurance industry publications are *helpful* in understanding the scope of coverage insurers

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purchase or sell securities) . . ." The underlying class action alleged common law claims for breach of fiduciary duty, and no securities claims under regulation, rule or statute. There is no claim in this coverage case that the "Securities Claim" provision applies.

> are *trying* to delineate in any given policy, they are by no means dispositive." [Citation.] In this case, we find the drafting history relevant in evaluating Admiral's argument that, from a public policy standpoint, the insurance industry will be harmed by the adoption of a continuous injury trigger that the industry assertedly never anticipated would be applied to these policies.

Montrose, 10 Cal.3th at pp. 670-671. "The history and purpose of the clause, while not determinative, may properly be used by courts as an aid to discern the meaning of disputed policy language. [Citation.]" MacKinnon v. Truck Insurance Exchange (2003) 31 Cal.4th 635. 653.

Ty Sagalow testified regarding the Loss Exclusion of the National Union Policy. Sagalow worked at AIG from 1983-2009, and specifically worked for its subsidiary National Union from 1986-2000. He has experience in underwriting, in claims, and as an in-house attorney, specifically as to D&O coverage. Sagalow testified at trial that he was involved in the drafting of the "bump up exclusion" or "exception to loss" provision, i.e., the Loss Exclusion, at National Union, and also approval of policy language in general. He testified that the Loss Exclusion was created back in the 1990's, and was designed to exclude *acquirer* bump-ups in the acquisition price, if the *insured* is the acquirer. He testified that he has been involved in the drafting of Loss Exclusions for National Union, for Zurich Insurance and others during the 2000s, and that he has "studied" all "bump ups" in the D&O insurance market.

Sagalow testified that there are three variations of Loss Exclusions in the D&O insurance market: (1) limited bump-up provision that only excludes leveraged buyouts,[3] management buyouts, freeze outs, and appraisal matters, (2) a "mid-way" bump-up provision (like the one here), and (3) an "absolute" clause that excludes all M&A transactions. Sagalow discussed the insurance industry history of the Loss Exclusion: In the 1980s, carriers tried using the absolute exclusion in response to M&A, but that did not work and did not last, as customers demanded M&A coverage – so the industry had to change and create new, more limited, exclusion language. The "bump up" provision was created in 1995, when National Union decided to rewrite its D&O policy, due to the decision in Safeway v. National Union (9th Cir. 1995) 64 F.3d 1282, involving a leveraged buyout. The purpose of that bump-up provision was to exclude a *Safeway* claim, including leveraged buyouts, management buyouts, and freeze outs. (E.g., Trial Exhibit #127, the 1995 AIG form of D&O policy).[4] Insureds and brokerages did not like the term "unfair", which was later deleted in 1996 using a policy endorsement.[5] (Trial Exhibit #128.) The bump-up provision, and indeed the form of D&O policy itself, was then redrafted in 1998 in anticipation of Y2K problems. This newer version is reflected in Trial Exhibit #129, which added back Coverage A insurance (which had been carved

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[3] Purchase of a company's stock or assets by using debt, i.e., taking out loans, using the assets of the acquired company as collateral.

[4] The 1995 version states: "Further, with respect to Coverage B only, Loss shall not include damages, judgments or settlements arising out of a Claim alleging that the Company paid an inadequate or unfair price or consideration for the purchase of its own securities or the securities of a Subsidiary."

[5] The 1996 amendment states: "Further, with respect to Coverage B only, Loss shall not include damages, judgments or settlements arising out of a Claim alleging that the Company paid an inadequate price or consideration for the purchase of its own securities or the securities of a subsidiary."

out back in 1995), and adds to the bump up provision (what he called) a "bump down" provision.[6] Sagalow opined that the focus of the 1998 Loss Exclusion was to exclude claims by acquirors, in using the term "any entity". He testified that he "could have done a better job of drafting this," in hindsight. He opined that an insured could reasonably expect coverage for claims against an acquired/sold/target company and its officers and directors for breach of fiduciary duty in the M&A context. The market reaction to the 1998 version was "adverse" so National Union changed the Loss Exclusion in its 2000 form of D&O – which form policy was being revised anyway because Y2K was over.

Sagalow testified that he oversaw the 2000 D&O revision issued February 2000, which he claimed was drafted and completed before he left AIG in December 1999 or January 2000. Major features of the changes to the Loss Exclusion between the 1998 version versus the 2000 version were (i) full carve out of Part A from the exclusion, (ii) deletion of the "bump down" (keeping only the "bump up"), (iii) deletion of "direct/indirect" phrase, (iv) change from "any entity" to "an entity", and (v) defense costs carved out of exclusion (i.e., would be covered). Sagalow testified that he cannot remember why the language was changed from "any entity" to "an entity", or what the intent was. Indeed, when asked, he testified that he had no opinion as to the difference or meaning.

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[6] The 1998 revision states: "In the event of a Claim alleging that the price or consideration paid or proposed to be paid for the acquisition or completion of the acquisition of all or substantially all of the stock issued by or assets owned by any entity is inadequate or excessive, Loss with respect to such Claim shall not include any amount of any judgment or settlement by which such price or consideration is increased or decreased, directly or indirectly; provided, however, that the foregoing shall not apply to any non-Indemnifiable Loss resulting from any judgment (other than a stipulated judgment) against a Natural Person Insured." (Trial Exhibit #129.)

Sagalow also testified to bump-up provisions in D&O insurance policies by other insurance carriers. He opined that other carriers did a better job of drafting language to make it clear whether or not there was a coverage distinction if the insured company was the acquiror or the acquiree. He also admitted that terms such as "price or consideration", "inadequate" and "effectively increased" were not defined in the National Union Policy, but he asserted that these were specialized terms. On cross-examination, in prior expert testimony on E&O (errors and omissions) coverage, Sagalow testified that undefined terms have common meaning, not specialized meaning.

Plaintiff's expert witness Steven Solomon opined that the terms used in the Loss Exclusion had specialized meaning in the M&A field. Although Professor Solomon has experience in teaching and research regarding M&A transactions and litigation, he does *not* have expertise in the field of *insurance*. Professor Solomon opined that the term "price or consideration" only refers to transactions where the majority shareholders "freeze out" the minority shareholders, and only refers to the amount paid directly to all shareholders, not a class action common fund situation. He also opined that the term "inadequate" only applies to a freeze-out transaction, and means "not fair" or "not fair value" such as not in the range of fair value. He also opined that the term "effectively increased" means an increase in the price of consideration paid directly to the shareholders or paid as dividends to shareholders, and does not include third party transactions.

Conversely, the Excess Insurers presented witnesses and experts regarding the Loss Exclusion. Lawrence Fine was a retired attorney and former employee of AIG. He unilaterally contacted Defendants' counsel to offer his services in testifying regarding interpretation of the Loss Exclusion in the National Union Policy. Fine testified that he

has knowledge of the underwriting intent of the 2000 D&O form policy because he was the Chief Technical Officer for Financial Lines **Claims**[7], was involved in the drafting of all new policies and major endorsements, had to authorize all new policies, and was briefed with the underwriters regarding the "radical changes and redraft" of the 2000 D&O policy.[8]

Fine testified that he and Robert Yellen drafted the 2010 revision of the National Union D&O Policy; and even though he was in Claims, he (Fine) was "acting as an underwriter" and was a "primary author" of the 2010 form Fine testified that he and Yellen decided to keep the Loss Exclusion the same as the 2000 language, and that the provision was intended to avoid paying additional money to shareholder plaintiffs in merger cases who complained that they didn't get enough money for their shares. He found the Loss Exclusion to be broad in scope.

Fine testified that he never discussed the Loss Exclusion or its language with Ty Sagalow, who originally drafted it. Fine testified at trial that there are no documents at AIG or National Union that disclose or explain the underwriting intent of the Loss Exclusion. He was never told what was the underwriting intent of the Loss Exclusion drafted originally in 2000. The bottom line is that Fine was never actually an underwriter, he did not draft the Loss Exclusion language originally, he kept the language the same in the D&O "revision" he was involved with, he had no information as to the original intent of the drafter, and there are no documents at AIG/National Union that

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[7] All of Fine's positions at AIG were in Claims, not underwriting. Even as of 2013, his position was Global Head of Claims for professional fiduciary policies (which did not include D&O).

[8] Ty Sagalow testified that Fine had no involvement at all in the drafting of the 2000 form D&O or its revised Loss Exclusion.

discuss or disclose the interpretation of the subject Loss Exclusion – and accordingly a lack of foundation for Fine's "interpretation".

Defendants presented Larry Goanos as an expert witness, who is a former attorney with his own consulting business regarding professional lines of insurance. He worked at AIG between January 1994 and November 1996 in underwriting, and was involved in drafting of policies. Thereafter he worked for insurance brokerages. Goanos was recruited back to AIG, where he worked from November 1998 to April 2002, handling underwriting for the Financial Institutions Group (which would *not* include D&O). Goanos testified that he helped draft the 2000 revision of the National Union D&O Policy, and trained underwriters regarding its terms and conditions. [At his deposition, Goanos testified that he did *not* participate in drafting the Loss Exclusion for the 2000 form, and that he doesn't know why, or doesn't recall why, the Loss Exclusion was revised in 2000. At his deposition, Goanos testified that he had no specific recollection of training given regarding the "bump up" provision.] Further evidence was given as to his work experience in the insurance field subsequent to AIG. He now serves as a forensic insurance expert, testifying over 130 times since 2010.

According to Goanos, there was no known M&A coverage in the insurance market, i.e., only an absolute exclusion, prior to the National Union revision in 2000 – which then *did* provide coverage for the individual directors and officers for non-indemnifiable claims and provide defense fees and costs coverage.

Goanos opined that undefined terms in a D&O insurance policy have their common meaning to the ordinary person – "natural plain English". Goanos testified that the underwriting concern reflected in the Loss Exclusion is that the insurance company "did not want to subsidize" "any purchase of securities or assets, whether they be by our

insured or anyone else." Its effect was not limited to the acquiror. His opinion was that he agreed with the position of the Excess Insurers here that there is no coverage. Yet, at his deposition, he stated that the Loss Exclusion would bar coverage of an Insured seeking reimbursement of the *Insured*'s purchase of shares, i.e., the Loss Exclusion applies where the acquiror is the insured. Goanos also wrote a book *D&O 101,* with all discussion and examples of the Loss Exclusion pertaining to the situation where the insured acquires another company, and never as the insured being the acquired/target company.

Defendants' counter M&A professor, Guhan Subramanian, testified that the undefined terms in the Loss Exclusion were not specialized terms or terms of art in M&A, but rather had their "plain and ordinary meaning". He also opined that the Loss Exclusion was not historically limited to freeze-out situations. He also stated that he was not an insurance expert, was not testifying regarding drafting history, and had no opinion on National Union's underwriting intent regarding the Loss Exclusion. Although he taught graduate programs at Harvard University regarding M&A, he never practiced law as an M&A attorney.

Although this Court considered the drafting history as to the issue of the objectively reasonable intent of the insured and the insurer, and the context thereof, the Court did not rely upon any "opinions" as to how this Court should actually interpret the language of the subject National Union D&O policy.

Coverage Analysis

Under the National Union Policy, Onyx is the Named Entity and is an Organization, as those terms are defined. Onyx and the Onyx directors and officers are

each an Insured Person under the terms of the policy. The shareholders class action is a Claim under the terms of the policy. The alleged breaches of fiduciary duties are Wrongful Acts under the terms of the policy. None of these things are disputed.

The National Union Policy contemplates that the Named Entity or Organization will indemnify its officers and directors for any defense or indemnity, including payment of a settlement, and then the insurance company will reimburse (indemnify) the company.

Onyx has sued the Excess Insurers, claiming the right to reimbursement for 100% of the $26 million it paid out-of-pocket to settle the underlying class action against its directors. The Excess Insurer Defendants have asserted as their defense, and asserted in their cross-complaint for declaratory relief, that they owe *zero* to Onyx under their insurance policies.

[The one potential "carve out" by Onyx was its assertion to characterize a portion of the settlement money as payment of "attorneys' fees", which this Court has previously rejected as contrary to the facts and the law, and previously issued an Order in that regard.][9]

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[9] The Court previously ruled on motion for summary adjudication:

> The Court agrees with Defendants and Cross-Complainants, and so finds, that the $9.67 million awarded to the Plaintiffs' attorneys in the underlying securities class action (CIV523789) are not reimbursable "fees" "paid" by Onyx, and thus are not *separately* "covered" under the defense or indemnity provisions of the subject excess liability insurance policies. The underlying case was *not* a shareholders' derivative action or other type of lawsuit where the underlying defendant Onyx *directly paid* attorneys' fees to the plaintiffs' attorneys as part of the settlement – now was it structured that way, regardless. Under the terms of the underlying Settlement Agreement and the ultimate Judgment and Order granting final approval of the class action settlement, the settlement money paid by Onyx was paid into a common settlement fund belonging to the shareholder class members. Out of that common fund, the Court then awarded attorneys' fees to the Plaintiffs' Class Counsel as part of the

The dispute is interpretation and application of the Loss Exclusion. This is an issue of law for adjudication by a court, not by a jury. See Croskey, et al., Insurance Litigation (Rutter Group 2021) Policy Interpretation ¶4:1; Equitable Life assurance Society v. Berry (1989) 212 Cal.App.3d 832, 836[10]; Appleton v. Waessil (1994) 27 Cal.App.4th 551, 554-555 (interpretation of a contract and determination of ambiguity are issues of law).

"The rules governing policy interpretation require us to look first to the language of the contract in order to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it. [Citations.]" Waller v. Truck Ins. Exchange Inc. (1995) 11 Cal.4th 1, 18.

> "Interpretation of an insurance policy is a question of law and follows the general rules of contract interpretation. . . . 'The fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the "mutual intention" of the parties. ". . . Such intent is to be inferred, if possible, solely from the written provisions of the contract. . . . The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless

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distribution and allocation of those funds – over which Onyx has no direct control, involvement, or obligation.

[10] "[T]he jury issue is a red herring. . . . "[T]he interpretation of a written instrument is essentially a judicial function. Where the trial court concludes, after considering extrinsic evidence, that a writing is not reasonably susceptible of a construction urged, there is no issue to be submitted to a jury. Thus, even if bifurcation had not been ordered, the trial court would have been required to hear the evidence bearing on the meaning of the instrument out of the presence of the jury, and the conclusion that the court arrived at would have terminated the case. Only if the court had made a contrary finding on the question of ambiguity would it have submitted the credibility of any conflicting evidence to the jury. Thus, . . . the determinative issue in this case is the court's finding that the policy does not lend itself to the construction urged by the plaintiff[s]".

'used by the parties in a technical sense or a special meaning is given to them by usage; . . . controls judicial interpretation."'" [Citation.] The goal is to give effect to the reasonable expectations of both the insured and the insurer. [Citations.]

D&O insurance is "a specialized form of coverage . . .Unlike general liability insurance, which is typically written on standard forms, D&O policy provisions often vary depending on a number of factors . . . Cases must therefore be reviewed in the context of the specific policy language at issue. . . . The availability of such insurance is important in attracting persons to serve as directors and officers of the corporations." [Citations.]

August Entertainment Inc. v. Philadelphia Indemnity Ins. Co. (2007) 146 Cal.App.4th 565, 573-574 (holding that D&O liability insurance does not provide coverage for breach of contract claims); see also Montrose Chemical Corp. v. Admiral Insurance Co. (1995) 10 Cal.4th 645, 666-667.

It is noteworthy that none of the parties have presented any **reported** case law decisions interpreting the subject policy language. The Court also conducted its own independent legal research and found no reported precedent. For the sake of thoroughness, the Court acknowledged the following "bump up" decisions:

One reported case regarding a "bump up exclusion", i.e., Loss Exclusion, namely, Genzyme Corp. v. Federal Insurance Company (1st Cir. 2010) 622 F.3d 62, involved a different D&O policy issued by a different carrier with different language, and also involving the key issue of allocation between claims against the corporation and claims against the directors and officers (which is not the situation here).

National Union, who issued the primary D&O policy for which the parties here are seeking declaratory relief and interpretation, **is not contesting its payments under that primary policy.** National Union paid its entire policy proceeds for defense costs of Onyx and its directors and officers, and for settlement of the class action lawsuit. There *is no* issue in our case as to whether National Union paid for covered or non-covered claims or persons, and National Union is not seeking any "allocation" or reimbursement from the Excess Insurers here.

There is also no issue of "allocation" between claims against Onyx and claims against its directors/officers. These declaratory relief actions don't really involve "allocation" between "covered" claims and "non-covered" claims, or "allocation" between "covered" persons and "non-covered" persons. Ultimately, after motions on the pleadings, the class action plaintiffs' complaint had only *one* cause of action, i.e., breach of fiduciary duty. Further, a demurrer was sustained without leave to amend against Onyx itself, so at the time of the settlement the *only* named defendants were the Onyx Directors/Officers.

There is no issue of "allocation" between settlement payments made to resolve "indemnifiable" versus "non-indemnifiable" conduct by the Onyx Directors. Onyx paid $26 million out of its pocket to indemnify its Directors against the claims of the class action plaintiffs. Onyx has *not* sued its Directors, demanding reimbursement for non-indemnifiable conduct.

Plaintiff asks this Court to consider the slip opinion of the Eastern District of Pennsylvania in Gardner Denver Inc. v. Arch Insurance Company (E.D.Pa. 2016) 2016 Westlaw 7324646. Again, the "bump up exclusion" is not the same as the language of the National Union policy in our case. Further, the Pennsylvania district court was

addressing the issue in the context of a motion to dismiss, i.e., a motion on the pleadings, not a trial or summary judgment.

In Gardner Denver, Gardner Denver Inc. originally had a primary D&O insurance policy that contained a coverage exclusion explicitly pertaining to only the situation where the insured "Company" was acquiring all of the stock of another entity. In other words, the insurance policy had an exclusion for the situation where the insured company was the acquiror, but not the acquiree. Id. at *3.

When it was time for Gardner Denver to renew their D&O coverage, a different carrier Arch Insurance was alleged to have represented to Gardner Denver that it would provide a primary D&O policy that provided coverage at least as broad as the expiring policy. Id., at *3. Unfortunately, it was not. The new primary D&O policy had a loss exclusion, that stated in pertinent part: ". . . amount representing, or substantially equivalent to, an increase in consideration paid or proposed to be paid in connection with any purchase of securities or assets of a Corporation, or any plaintiffs' counsel fees in any Claim alleging inadequate or unfair consideration." Id., at *4.

The district court, applying Pennsylvania law, held that the term "a Corporation" was ambiguous, and must be interpreted in light of the *insureds'* reasonable expectations. Id. at pp. *5 - *7. It was ambiguous because it used a capital C for "Corporation", thus indicating a defined term, yet used the article "a" as though a generic term.

Perhaps this might be instructive if the language of the National Union policy in our case used the term "an Entity", and thus create potential ambiguity, as indicating a defined term – but it does not. Our National Union policy uses common words, "an entity".

Further, in Gardner Denver, there were claims of fraud and breach of contract, not declaratory relief. The complaint alleged direct misrepresentations by the insurance carrier Arch that the new primary D&O policy would provide the same or greater coverage. The district court held that, on motion to dismiss, insured Gardner Denver may be entitled to recovery, regardless of the actual language of the insurance policy, because of reliance upon the misrepresentations of the defendant insurer. Id. at pp. *8 - *10. That is not the situation in our case.

Accordingly, the analysis and holdings in the unpublished decision of Gardner Denver do not assist this Court.

The Court itself has found three subsequent federal district court decisions – although none are precedent for this Court – that address the *identical Loss Exclusion* provision as here. Two of the three are unpublished, and all are presently on appeal. Interestingly, two of the three federal decisions cite this Court's Proposed Statement of Decision in our case as legal authority on the point.

In Joy Global Inc. v. Columbia Casualty Co. (E.D. Wisc. 2021) 555 F.Supp.3d 589, the district court, following Wisconsin law, held on motions for summary judgment that the Loss Exclusion was *unambiguous* and *excluded* coverage for settlement payments by Joy Global Inc. in multiple shareholders class actions alleging a misleading proxy statement to induce shareholders to vote in favor of a merger/acquisition and that price for the sale of their shares was inadequate.

As the Court does here, the Wisconsin district court held that the term "an entity" would include the insured company, and that the Loss Exclusion was unambiguous.[11] Id.

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[11] "The language of the provision is clear and unambiguous, and its effect is not uncertain. Because the language is unambiguous, a reasonable insured in the position of Joy Global would understand the language of the provision to exclude coverage for any

at p. 594. The Wisconsin district court also rejected the same argument made by Plaintiffs in our case that a portion of the claims asserted in the underlying shareholder class actions was based upon something other than inadequate consideration, and that there should be partial coverage. The Wisconsin district court held that if the lawsuit involved claims of inadequate consideration, the entire settlement was excluded under the Loss Exclusion.[12] Id. at p. 595.

Accordingly, if applicable, the Joy Global decision supports this Court's analysis and conclusion.

In the slip opinion in Towers Watson & Co. v. National Union Fire Ins. Co. (E.D.Va. 2021) 2021 Westlaw 4555188, the Virginia district court held on motion for summary judgment that there *was* insurance coverage for settlement of underlying class actions, and held that the Loss Exclusion did not bar coverage. In Towers Watson, the entire focus of the district court's attention and analysis was whether or not the underlying transaction was an "acquisition" or a "merger" – relying upon individual specifics and details of the nature and effect of the underlying transactions. The Virginia district court concluded, on the individual facts of that case, that the transaction was a "reverse triangular merger" and not an "acquisition"; and therefore concluded that the Loss Exclusion did not apply because it only references an "acquisition" not a "merger".

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amount of any settlement if: (1) the part of the Claim which was settled (2) alleges that the price or consideration paid or proposed to be paid for an acquisition transaction was inadequate, and (3) the proposed or completed transaction involved the acquisition of all or substantially all of the ownership interest in or assets of an entity." Joy Global, at p. 594.

12 "Once a part of a claim alleging inadequate consideration is settled, the entire settlement is excluded from the definition of loss and is not covered by the policies. Joy Global next argues the settlements are covered because the underlying claims alleged liability on the basis of misrepresentation in proxy statements, not on the basis of inadequate consideration. But this argument is a non-started because the claims do allege inadequate consideration." Joy Global, at p. 595.

The unpublished Towers Watson decision provides no guidance to this Court, as it is very individualized to the fact of that transaction *and* the parties in our case have never raised any dispute that the underlying transaction pertains to an "acquisition" under the Loss Exclusion. Indeed, no alleged distinction between an acquisition and a merger was ever raised by the parties as an interpretation issue – in fact, Plaintiffs repeatedly refer to the subject transaction as an "acquisition". The question was always whether the Loss Exclusion applied if the insured company was the acquiree, not the acquiror.

In the slip opinion in Ceradyne Inc. v. ELI Insurance Co. (C.D.Cal. 2022) 2022 Westlaw 16735360, the California district court, applying California law on motions for summary judgment, held that the Loss Exclusion was unambiguous and barred coverage for payment of class action settlements where the insured company was the acquiree. First, the California district court held that there was no coverage in the first place because the settlement funds were paid by 3M (which acquired Ceradyne via a subsidiary), *not* by the insured Ceradyne. As stated in Insuring Agreement B, as in the National Union policy in our case, the coverage is for reimbursement of indemnity paid by the insured company to settled claims against its directors and officers – not a settlement payment made by someone else. Id. at pp. *6 - *7. The district court noted that after the transaction Ceradyne still existed – though now a subsidiary of 3M – and thus "Ceradyne could have used its own funds to pay the settlement. It did not do so." Id., at *7.

Alternatively and independently, the California district court held that where the shareholders class action lawsuit alleges that the transaction was for an inadequate price, the Loss Exclusion applies whether the insured company is the acquiror or the acquiree. Id. at pp. *7 - *9.

> Ceradyne only contends that the Court should narrow the term "acquisition" to encompass only those transactions "where the insured was the party paying to acquire ownership or assets." [cite] However, the Exclusions' unambiguous language does not lend itself to such a narrow interpretation. If the policies were intended to exclude the specific type of acquisition Ceradyne proffers, the drafters would have done so. This interpretation conforms with the purpose of such Bump-Up Exclusions – carving out an exception for when a lawsuit results in the "effective increase" of the purchase price of an entity, whether the insured entity is the acquirer or the acquired. [Citation.]
>
> The Court reaches a similar conclusion with regard to Ceradyne's other textual arguments. Ceradyne argues that because the Exclusion does not modify the term "an entity" with "Named Entity," then it could not mean that Ceradyne could be the subject of an acquisition such that the Exclusion would apply. However, the intentional omission of the defined term "Named Entity" in this context, when it was used elsewhere, implies that this clause was intended to be read broadly and encompass not only the "Named Entity", but any other entity as well. [Citation.]

Id., at p. *9. Thus, the analysis and the holding in Ceradyne, if applied, would be consist with the conclusions by this Court here.

The Court finds that the Loss Exclusion is an **exclusion,** and should be treated as an exclusion in the interpretation of the National Union Policy, as there is coverage in the initial definition of Loss, only potentially limited by the subsequent Loss Exclusion.

"[C]ourts may look to the parties' reasonable expectations to reinforce its conclusion regarding the meaning of language it found to be unambiguous. [Citations.]" Croskey, et al., Insurance Litigation (Rutter 2017) ¶4:12, citing Waller v. Truck Insurance, 1 Cal.4th at pp. 27-28 and Powerline Oil Co. Inc. v. Superior Court (2005) 37 Cal.4th 377, 404.

> "If there is ambiguity . . . it is resolved by interpreting the ambiguous provisions in the sense the promisor (i.e., the insurer) believed the promise understood them at the time of formation. {C.C. §1649.) If application of this rule does not eliminate the ambiguity, ambiguous language is construed against the party who caused the uncertainty to exist. {Id., §1654.)" [Citation.] "This rule, as applied to a promise of coverage in an insurance policy, protects not the subjective beliefs of the insurer but, rather, 'the objectively reasonable expectations of the insured.' [Citation.] Only if this rule does not resolve the ambiguity do we then resolve it against the insurer." [Citations.]

Montrose, 10 Cal.4th at p. 667, quoting from AIU Insurance Co. v. Superior Court (1990) 51 Cal.3d 807, and from Bank of the West v. Superior Court (1992) 2 Cal.4th 1254.

Plaintiff Onyx presented extensive and substantive evidence that its Officers and Directors each and all expected that the D&O insurance coverage under the National Union Policy and under the Excess Policies would cover all lawsuits by shareholders against them in their capacity as officers and directors of the corporation. Indeed, that is why they purchased multiple layers of insurance coverage, and paid over $700,000 per year in premiums.

First and foremost, the terms of the National Union Policy *did* meet the reasonable expectations of the individual directors and officers – they got coverage! The attorneys' fees for their defense were paid by National Union. The settlement of claims against them were paid by Onyx, which was legally required to indemnify its directors and officers *or* was contractually obligations to indemnify under Section 12(A)(1) of the National Union Policy[13]. If Onyx had failed or refused to indemnify the individual directors and officers, then they would have received insurance coverage under Coverage A.[14] Thus, the only issue is whether **Onyx** is entitled to recover, under the terms of the National Union Policy, reimbursement for its settlement payments made on behalf of its directors and officers (not itself).

Second, Insuring Agreement B *does* provide coverage to Onyx for any actual indemnification paid on behalf of its officers and directors, in general. The issue is whether the Loss Exclusion applies to that generally broad definition of "Loss".

That Onyx and its directors and officers thought there was coverage for the settlement, and even if National Union's claims personnel thought there was coverage

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13 "The **Organizations** agree to indemnify the **Insured Persons** and/or advance **Defense Costs** to the fullest extent permitted by law."

14 A. *Insured Person Coverage*

> This policy shall pay the **Loss** of any **Insured Person** that no **Organization** has indemnified or paid, and that arises from any
>
> (1) **Claim** (including any **Insured Person Investigation**) made against such **Insured Person** (including any **Outside Entity Executive**) for any **Wrongful Act** of such **Insured Person**, or
>
> (2) **Pre-Claim Inquiry** to the extent that such **Loss** is either **Pre-Claim Inquiry Costs** or **Liberty Protection Costs.**

under its own National Union Policy[15], this does not bind the Excess Insurers with "follow the form" excess policies who may contest coverage under the language of the policy. See, Chatton v. National Union Fire Ins. Co. (1992) 10 Cal.App.4th 846, 865.

> Respondents' final argument that there was coverage for advertising injury under the terms of the CGL policy because National Union's employees themselves admitted the existence of such liability requires but a brief reply. It is well settled that the interpretation of an insurance policy is a *legal* rather than a *factual* determination. [Citations.] Consistent therewith, it has been held that opinion evidence is completely irrelevant to interpret an insurance contract. [Citations.]

Chatton, at p. 865, emphasis original.

The standard is not the subjective intent or understanding of the insured, but rather the reasonably objective understanding. Here that subjective expectation was *not* based upon the language of the National Union Policy; was *not* based upon any pre-purchase representations made by National Union itself; and was *not based* upon any pre-purchase representations made by Defendants Old Republic or RLI or Allied World.

The evidence presented at trial reflects that Onyx's **insurance broker** did not adequately inform the client Onyx and its directors and officers of the distinctions between policy language and policy coverage available in the D&O liability insurance market – and of their options in that regard. The client Onyx was also unaware and unsophisticated in regard to Loss Exclusions under D&O coverage – so Onyx had no basis upon which to affirmatively ask about such.

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[15] In response to Onyx making a claim under the National Union Policy for the Onyx class action lawsuit, AIG referenced the Loss Exclusion provision and indicated that it might ultimately apply to any judgment or settlement. (Trial Exhibit #241, at p. 8.)

Conclusion

The Court finds that the undefined terms in the Loss Exclusion should be given their common usage meaning. In regard to the underlying shareholders class action lawsuit for breaches of fiduciary duty, the primary allegation was that the Board of Directors failed to obtain the highest price for the sale of Onyx, particularly as there was another suitor willing to pay more, and thus the payment of $125 per share was inadequate. The Loss Exclusion unambiguously excludes coverage here, whether the insured company is the acquiror or the acquiree. Although there is a dispute between the parties as to whether the Loss Exclusion is ambiguous in regard to whether or not it would apply to this situation, the Court was unable to craft any superior insurance policy language to capture this concept, i.e., how to exclude such an M&A transaction – and thus finds it sufficient and unambiguous. Giving the terms of the Loss Exclusion their usual meaning, the claim of the Onyx shareholders alleged that the price paid by Amgen for the acquisition of 100% ownership of Onyx (which is "an entity') at $125 per share was inadequate, i.e., was less that the highest price that might reasonably be obtained, and thus the Claim for indemnity of Onyx for the settlement payment is not covered. It is reasonable that the insurance carriers did not want to have insurance proceeds be a means of funding the purchase of assets by a corporation – which, as pragmatic matter, would be the result if insurance funds were paid to Onyx, which is now wholly-owned by its acquirer Amgen. The insurance coverage met the reasonable expectations of the Insureds, here the individual officers and directors, who were not required to pay for their own defense fees and costs and who were not required to pay any of the settlement of the lawsuit. The corporation Onyx was obligated to indemnify its directors and officers, and did so. The Loss Exclusion excludes reimbursement to Onyx.

This conclusion is bolstered by the drafting history of the Loss Exclusion, which originally was drafted to preclude coverage for leveraged buyouts and for minority shareholder freeze-outs. The language of the Loss Exclusion in the National Union Policy (as of 2013) would still, as interpreted, exclude coverage for such situations.

The conclusion is also supported by the evidence that there were one or more *other* alternative D&O insurance policies that contained *different* Loss Exclusion language, which were more narrow and would have provided M&A coverage if *Onyx* itself was the acquisition target, but would exclude coverage if Onyx was the acquirer and made a purchase of another company for less that its worth. The evidence is that the insurance broker for Onyx *knew this* and *knew* that the National Union Loss Exclusion terms might bar M&A coverage – as reflected in the multiple emails with the insurance wholesaler and AIG back in 2009. That this coverage gap was not adequately communicated by the insurance broker to its customer Onyx is not the fault of National Union or the fault of the Excess Insurers -- and there is no evidence of misrepresentations or omissions by National Union, or by the Excess Insurers in this regard. Indeed, it was not a provision slipped into a policy unexpectedly, but rather the Loss Exclusion was a part of the primary D&O policy for several years prior to the subject Claim.

DATED: December 30, 2022

HON. MARIE S. WEINER
JUDGE OF THE SUPERIOR COURT