IN THE CIRCUIT COURT OF BENTON COUNTY, ARKANSAS
CIVIL DIVISION

WALMART INC. **PLAINTIFF**

v. **CASE NO: 04CV-22-2835-4**

ACE AMERICAN INSURANCE COMPANY, ET AL. DEFENDANTS

MEMORANDUM OPINION AND ORDER

I. Introduction

1. Before the Court are motions for partial summary judgment filed by Walmart Inc. ("Walmart"), AIG,[1] and certain other defendants (the "Excess Insurers").[2] These motions address the threshold legal question of whether a sample of the thousands of opioid-related lawsuits brought against Walmart (the "Representative Suits")[3] assert allegations that are potentially within the coverages of a sample of commercial general liability ("CGL") insurance policies (the "Sample Policies"), and thus trigger the duty to defend or pay defense costs. There

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[1] "AIG" refers to American Home Assurance Company and National Union Fire Insurance Company of Pittsburgh, PA.

[2] "Excess Insurers" refers to ACE American Insurance Co.; ACE Property & Casualty Insurance Co.; Allianz Global Risks US Insurance Co.; American Guarantee & Liability Insurance Co.; Arrowood Indemnity Co.; Chicago Insurance Co.; Continental Insurance Co.; Federal Insurance Co.; General Security Indemnity Co. of Arizona; Great American Alliance Insurance Co.; Great American Insurance Co. of New York; Great American Spirit Insurance Co.; Indemnity Insurance Co. of North America; Liberty Insurance Underwriters, Inc.; The Ohio Casualty Insurance Co.; St. Paul Fire & Marine Insurance Co.; Starr Indemnity & Liability Co.; TIG Insurance Co.; The Travelers Indemnity Co.; and XL Insurance America, Inc. AIG, together with the "Excess Insurers," are the referred to herein as the "Insurers."

[3] The Representative Suits are (1) *Yoakum v. McKesson Corp.*, Case No. 1-21-op-45107-DAP (N.D. Ohio); (2) *Florida Health Sciences Center Inc., v. Sackler,* Case No. 19-018882 (Cir. Ct., Broward Cty. FL, 17th Jud. Dist.); (3) *Pulaski Cty., AR, v. Walmart, Inc.*, Case No. 35CV-22-2 (Cir. Ct., Jefferson Cty., Ark.); (4) *Cty. of Suffolk v. Purdue Pharma L.P.,* Index No. 400001/2017 (Sup. Ct., Suffolk Cty., NY); (5) *Cty. of Lake v. Purdue Pharma, L.P.*, No.: 18-op-45032-DAP (N.D. Ohio); (6) *State of West Virginia ex rel. Morrisey v. Walmart, Inc.*, Case No. CC-40-2020-C-132 (Cir. Ct. Putnam Cty., W. Va); (7) *Cty. of Summit, Ohio v. Purdue Pharma, L.P.*, No. 18-op-45090 (N.D. Ohio); (8) *Jefferson Cty. Comm'n v. Purdue Pharma. Prods., L.P.*, No. 1:17-op-45170 (N.D. W. Va.); (9) *Bon Secours Health System, Inc. v. Purdue Pharma, L.P.*, No. 1:18-op-45819 (N.D. Ohio); and (10) *Schuyler Cty., Mo. v. Purdue Pharma, L.P.*, No. 1:19-op-45408 (E.D. Mo.).

are two coverages at issue in these motions: "wrongful acts coverage" in two primary insurance policies issued by AIG and bodily injury/property damage coverage in all the Sample Policies. The motions present two legal issues that are dispositive of all three motions. The first issue is whether the Representative Suits allege an "occurrence," which is a requirement for most of the coverages.[1] If the Representative Suits allege an "occurrence," the defense obligations of the wrongful acts coverages in AIG's primary policies are triggered. The second issue is whether the Representative Suits seek damages because of bodily injury or property damage. If the answer to this question also is yes, then the defense obligations of the separate bodily injury/property damage coverages are also triggered.

2. Also before the Court is QBE Insurance Corporation's ("QBE") Motion to Compel Arbitration in connection with two excess insurance policies that QBE issued to Walmart (the "QBE Policies").[5]

3. For the reasons stated below, the Court finds that the Representative Suits trigger AIG's defense obligation because they allege an "occurrence," and also because they seek damages because of bodily injuries or property damage. The Court also finds that QBE is not entitled to arbitrate this dispute.

II. Background and Procedural History

A. The Representative Suits

4. The Representative Suits allege that Walmart knowingly, recklessly, or negligently contributed to an opioid "epidemic" by failing to effectively monitor, detect, investigate, and

[1] The requirement that there be an "occurrence" does not appear in the AIG policy for the 2012-2013 policy period. [5] The QBE Policies are the excess policies issued by QBE for the policy years 2013-14 and 2014-15.

report suspicious orders of prescription opioids, resulting in opioid diversion, addiction, injury and/or death to thousands of individuals.[2]

5. The plaintiffs in the Representative Suits seek money damages and related relief as compensation for the amounts they have expended and will expend in connection with opioid addiction treatment, care, and related services for those injured.[7] Certain of these lawsuits also seek damages for alleged property damage.[3]

6. In 2022, Walmart began settling many of the opioid-related lawsuits brought by governmental entities, including a "National Settlement" that resolved most of those suits as well as most of the Representative Suits.[4] The National Settlement releases, among other things, claims for the government plaintiffs' own direct costs for treating bodily injuries and property damage, but also claims that were brought and could have been brought by the government entities *derivatively* and in their *parental capacity*.[5] These settlements, including the National Settlement, also make clear that the settlement funds will be used to, among other things, treat and care for injured individuals.[6]

B. The Coverage Dispute and Motions

7. The Insurers sold Walmart CGL policies (the "Policies") from 1995-2019.[7] Walmart sought defense and indemnity coverage from the Insurers under the Policies in connection with the opioid-related lawsuits. The Insurers denied coverage on various grounds including, as

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[2] Walmart Exs. W, X. ("Walmart Ex.," "AIG Ex." and "Excess Ins. Ex." refer to exhibits supporting Walmart's, AIG's, and the Excess Insurers' motions for partial summary judgment, respectively.) [7] *See generally* Walmart Ex. W.
[3] Walmart Ex. W at 13, 18, 22, 23.
[4] *See generally* Walmart Ex. V.
[5] Walmart Ex. V, at 3-4, 8-9.
[6] Walmart Ex. V, at E-1, E-2, E-4, E-5, E-6, E-9, E-10.
[7] A list of these policies is appended as Exhibit A to Walmart's complaint in this action.

relevant here, that the opioid-related lawsuits do not allege an "occurrence" and do not seek damages "because of bodily injury or property damage."

8. **First,** Walmart moves for partial summary judgment that, subject to any applicable retention or deductible, AIG owes Walmart a defense obligation for the Representative Suits under two primary insurance policies (the "AIG Primary Policies"), and one umbrella policy that AIG sold to Walmart.[8] Although Walmart initially moved for summary judgment on six of the Representative Suits,[9] AIG added four additional suits in its cross-motion,[10] and these suits implicate the same general allegations and legal issues as the suits on which Walmart has moved.[11] Therefore, the Court addresses these suits collectively as the "Representative Suits," and the Court's holdings apply to all Representative Suits at issue in Walmart's and AIG's respective motions.

9. AIG's defense obligation under the AIG Primary Policies is triggered if a lawsuit against Walmart alleges an "occurrence" [12] and *either* (1) alleges a "wrongful act"[13] *or* (2) seeks "damages because of bodily injury or property damage" during the policy period. Walmart contends that because each of the Representative Suits, including the lawsuits added in AIG's

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[8] Walmart initially moved only on the 2001-02 Primary Policy, 2012-13 Primary Policy, and 2008-09 Umbrella Policy. In its cross-motion, AIG added the 1998-2002 Umbrella Policy. These policies are referred to collectively herein as the "AIG Policies").

[9] This subset of the Representative Suits is comprised of the following lawsuits: (1) *Yoakum v. McKesson Corp.*, Case No. 1-21-op-45107-DAP (N.D. Ohio); (2) *Florida Health Sciences Center Inc., v. Sackler,* Case No. 19018882 (Cir. Ct., Broward Cty. FL, 17th Jud. Dist.); (3) *Pulaski Cty., AR, v. Walmart, Inc.*, Case No. 35CV-22-2 (Cir. Ct., Jefferson Cty., Ark.); (4) *Cty. of Suffolk v. Purdue Pharma L.P.*, Index No. 400001/2017 (Sup. Ct., Suffolk Cty., NY); (5) *Cty. of Lake v. Purdue Pharma, L.P.*, No.: 18-op-45032-DAP (N.D. Ohio); and (6) *State of West Virginia ex rel. Morrisey v. Walmart, Inc.*, Case No. CC-40-2020-C-132 (Cir. Ct. Putnam Cty., W. Va).

[10] These additional Representative Suits are: (1) *Cty. of Summit, Ohio v. Purdue Pharma, L.P.*, No. 18-op-45090 (N.D. Ohio); (2) *Jefferson Cty. Comm'n v. Purdue Pharma. Prods., L.P.*, No. 1:17-op-45170 (N.D. W. Va.); (3) *Bon Secours Health System, Inc. v. Purdue Pharma, L.P.*, No. 1:18-op-45819 (N.D. Ohio); and (4) *Schuyler Cty., Mo. v. Purdue Pharma, L.P.*, No. 1:19-op-45408 (E.D. Mo.).

[11] AIG's Cross-MPSJ at 5, 35-37; Walmart Opp. to AIG's Cross-MPSJ at 1-4.

[12] The "wrongful acts" coverage under the 2012-13 Primary Policy does not expressly include the "occurrence" requirement.

[13] The "wrongful acts" coverage is only in the AIG Primary Policies.

motion, allege an "occurrence," AIG's defense obligation under the AIG Primary Policies is triggered. Walmart further contends that the Representative Suits seek damages because of bodily injury or property damage and thus also trigger AIG's defense obligation for that separate reason.

10. **Second,** AIG cross-moves for partial summary judgment that it does not owe Walmart a defense obligation under the AIG Policies for any of the Representative Suits because they do not allege an "occurrence." AIG also joins the Excess Insurers' argument that the Representative Suits do not seek damages because of bodily injury or property damage.

11. **Third,** the Excess Insurers move for partial summary judgment that they have no defense obligation because the Representative Suits do not seek damages because of bodily injury or property damage under the Sample Policies.

12. **Fourth,** QBE moves to compel arbitration under the QBE Policies.

13. The Court heard extensive oral argument on these motions on November 15, 2023.

III. Discussion

A. Legal Standards

14. Summary judgment should be granted when the "pleadings, depositions, answers to interrogatories and admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ark. R. Civ. P. 56(c). In ruling on a summary judgment motion, the court views the evidence in the light most favorable to the nonmoving party. *Laird v. Shelnut*, 348 Ark. 632, 641-42, 74 S.W.3d 206, 211 (2002). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof and demonstrate the existence of a material issue of fact. *Neal v. Sparks Reg. Med. Ctr.*, 2012 Ark. 328, at 7, 422 S.W.3d 116, 120 (2012).

15. Words in an insurance policy must be construed according to their ordinary meaning, as a whole, and "most strongly against the insurance company which prepared it." *Norris v. State Farm Fire & Cas. Co.*, 341 Ark. 360, 363, 16 S.W.3d 242, 244 (2000); *Arkansas Farm Bureau Ins. Federation v. Ryman,* 309 Ark. 283, 287, 831 S.W.2d 133, 135 (1992). Thus, "if a reasonable construction may be given to the contract which would justify recovery, it would be the duty of the court to do so." *Smith v. Prudential Prop. & Cas. Ins. Co.*, 340 Ark. 335, 340, 10 S.W.3d 846, 850 (2000).

16. In analyzing a CGL policy, Arkansas courts have recognized that insuring agreements in the policy grant coverage, exclusions take away coverage, and exceptions to exclusions "reinstate" coverage. *Columbia Ins. Grp., Inc. v. Cenark Project Mgmt Servs., Inc.,* 2016 Ark. 185, at 5-6, 491 S.W.3d 135, 138 (2016).

17. The Arkansas Supreme Court has recognized the "general rule that the [factual] allegations in the pleadings against the insured determine the insurer's duty to defend." *Murphy Oil USA, Inc.*

v. Unigard Sec. Ins. Co., 347 Ark. 167, 175-76, 61 S.W.3d 807, 812 (2001). "[T]he duty to defend is much broader than the duty to indemnify, and it exists if there is a possibility of coverage."

Watkins v. S. Farm Bureau Cas. Ins. Co., 2009 Ark. App. 693, at 10, 370 S.W.3d 848, 855 (2009). "[I]n testing the pleadings to determine if they state a claim within the policy coverage, [Arkansas courts] resolve any doubt in favor of the insured." *Unigard*, 347 Ark. at 178, 61 S.W.3d at 814.

18. Finally, in assessing a motion to compel arbitration, the "threshold" inquiry is "whether an agreement to arbitrate exists; that is, whether there has been mutual agreement, with notice as to the terms and subsequent assent." *Alltel Corp. v. Sumner*, 360 Ark. 573, 576, 203 S.W.3d 77, 80

(2005). To incorporate terms of a separate agreement by reference into a contract, "the reference must be clear and unequivocal." *Ingersoll-Rand Co. v. El Dorado Chem. Co.*, 373 Ark. 226, 233, 283 S.W.3d 191, 196 (2008). "[I]t must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms." *Id.* And any ambiguities as to whether a party assented to the allegedly incorporated provisions "are construed strictly against the drafter." *AT & T Corp. v. Clark Cty. ex rel. Tucker*, 2018 Ark. App. 207, at 16, 547 S.W.3d 697, 708 (2018).

B. The Representative Suits Allege an Occurrence, Triggering AIG's Defense Obligation

19. The parties dispute the extent to which Walmart's knowing and intentional distribution and dispensing of opioid medications can give rise to an "occurrence." AIG contends that intentional acts can give rise to an occurrence only if they result in unforeseeable harm.[14] AIG asserts that the Representative Suits do not allege an "occurrence" because the "true nature" of those suits is that Walmart intentionally failed to protect against the diversion of opioid medications, and the harm caused by that conduct was "reasonably foreseeable."[15] Walmart, in contrast, asserts that its distribution and dispensing activities can give rise to an occurrence if they result in unexpected or unintended harm.[16] Walmart asserts that because the Representative Suits are replete with allegations of negligence and allege harms that Walmart potentially did not "expect" or "intend," the Representative Suits allege an "occurrence" under Arkansas law.[22] The Court finds that Walmart's position is the one consistent with the terms of the AIG Policies and Arkansas law.

[14] AIG's Cross-MPSJ at 21.
[15] AIG's Reply at 2, 6, 14-22.
[16] Walmart Opp. to AIG's Cross-MPSJ at 9-10, 12-13, n.9, 32. [22]
Walmart Opp. to AIG's Cross-MPSJ at 13-28.

20. The AIG Policies clearly anticipate covering intentional and foreseeable harm so long as the harm is not expected or intended. The AIG Policies define an "occurrence" as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions."[17] In addition, however, the Policies exclude bodily injury or property damage "expected or intended from the standpoint of the insured," and except from that exclusion the intentional use of reasonable force "to protect persons or property."[18] There would be no reason to exclude "expected or intended" harm if only unforeseeable harm is covered. And bodily injury from the intentional use of force to protect someone is foreseeable, and the AIG Policies expressly recognize it as covered. Further, the AIG Primary Policies cover "wrongful acts," defined to include "*liability* arising out of goods or products *including drugs or medicines* . . . compounded, prepared, sold, handled, or distributed by an Insured . . . ."[19] Coverage for liability arising out of the sale or distribution of drugs would be meaningless if foreseeable adverse consequences of ingesting such drugs were not covered. Further, this coverage excludes liability from a "willful violation of a penal statute,"[26] which would be superfluous if a willful violation of any statute already was outside coverage by virtue of the insuring agreements' "occurrence" requirement. *See, e.g., Philadelphia Indem. Ins. Co. v. Austin,* 2011 Ark. 283, at 7, 383 S.W.3d 815, 820 (2011) ("A construction that neutralizes any provision of a contract should never be adopted, if the contract can be construed to give effect to all provisions."). Therefore, Walmart's intentional distribution and dispensing of medications, even if it results in "repeated exposure

[17] Walmart Ex. A, § V.13; Ex. B. Arkansas Changes ("Occurrence" Definition Amended) Endt.; Ex. C. § VII.S.; *see also* AIG Ex. 10, § IV. H (defining "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in Bodily Injury or Property Damage neither expected nor intended from the standpoint of the Insured").
[18] Walmart Ex. A, § I.A.2.a; Ex. B, § I.A.2.a; Ex. C, § V.K; AIG Ex. 10, § V.O.
[19] Walmart Ex. A, § V.21.c (emphasis added); Ex. B, Endt. 4 (substantially same). [26]
Walmart Ex. A, § I.C.2; Ex. B, Endts. 4, 5.

to…harmful conditions," can give rise to an "occurrence" under the AIG Policies so long as the resulting harm was due to alleged negligence and was not expected or intended.

21. It is for this reason that the Arkansas Supreme Court has held that CGL policies with these terms cover intentional acts that are performed negligently and result in unexpected or unintended harms. *Cenark Project Mgmt.,* 2016 Ark. 185, at 7, 491 S.W.3d at 139 (defining an "occurrence" under a CGL Policy as "an event that takes place without one's foresight or expectation – an event that proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected"); *Talley v. MFA Mut. Ins. Co.*, 273 Ark. 269, 274, 620 S.W.2d 260, 263 (1981) (holding that even the "unintended result of an intentional act" constitutes an occurrence); *Norris,* 341 Ark. at 364-66, 16 S.W.3d at 244 -46 (reaffirming *Talley* and holding that CGL policy did "not exclude…unintended results of willful and malicious acts from coverage").

22. AIG's suggestion that its policies do not cover reasonably foreseeable harm is inconsistent with its own acknowledgment that CGL policies cover negligence[20] because reasonable foreseeability of harm is an essential element of negligence. *Ethyl Corp. v. Johnson*, 345 Ark. 476, 481, 49 S.W.3d 644, 648 (2001) ("To constitute negligence, an act must be one from which a reasonably careful person would foresee such an appreciable risk of harm to others"); *see also Pella Corp. v. Liberty Mut. Ins. Co.,* 221 F. Supp. 3d 1107, 1120 (S.D. Iowa 2016) ("To adopt [insurer's] interpretation that an injury is not caused by an accident because the injury is reasonably foreseeable would mean that only in a rare instance would the comprehensive general liability policy be of any benefit."); *Nationwide Assur. Co. v. Lobov,* 2009 Ark. App. 385, at 6, 309 S.W.3d 227, 230-31 (2009) (rejecting insurer's argument that any

[20] AIG's Cross-MPSJ at 17-18, 20-21.

willful act precipitating an injury—whether negligently caused or not—should trigger a willful act exclusion in an auto insurance policy including because that would "virtually make insured motorists uninsured motorists by reason of their own acts").

23. Also unpersuasive is AIG's argument that the so-called "true nature" of the Representative Suits precludes a finding of an "occurrence." The cases AIG cites for this proposition all involved conduct that by its very character was so obviously intended to cause injury that negligence could not be claimed as a matter of law.[21]

24. Here, in contrast, the Representative Suits seek to hold Walmart liable, at least in part, based on allegations that Walmart negligently dispensed and/or distributed opioids over many years, resulting in injuries to thousands of individuals.[29] These lawsuits include causes of action for negligence and are replete with negligence-based allegations, including that Walmart failed to put in place adequate policies, training, and procedures to prevent improper diversion of opioids. Based on these allegations, there is certainly a "possibility" that Walmart could be held liable in the Representative Suits for alleged harms that it did not "expect" or "intend."

25. The Fourth Circuit's decision in *Liberty Mut. Fire Ins. Co. v. JM Smith Corp.*, 602 F.

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[21] AIG's Cross-MPSJ at 2-3, 20-21; AIG's Reply at 11-13. For example, in *Continental Ins. Co. v. Hodges*, the complaint alleged that the policyholder, after "pumping...water onto their lands for use in irrigating the rice crops, drained it into a ditch crossing their lands and cast it upon the lands of [a neighbor]." 259 Ark. 541, 544, 534 S.W.2d 765, 766 (1976). The court found there was no "accident" involved and therefore no "occurrence" because no "negligence" on the part of the policyholder was "charged or suggested" in the complaint. *Id.* at 543-44, 534 S.W.2d at 765-66. The same is true of the other cases AIG cites. *See, e.g., J.D. Ashley, Sr. Fam. Ltd. P'ship v. Valley Forge Ins. Co.*, No. 4:09CV00833 JMM, 2010 WL 1925839, at *3 (E.D. Ark. May 11, 2010) (all the harm in the complaint was alleged to be intentional, even though some "claims for relief" were "denominat[ed]" as "negligence" or "fraud[]"); *Fisher v. Travelers Indem. Co.*, 240 Ark. 273, 275-76, 398 S.W.2d 892, 893-94 (1966) (holding that complaint predicated solely on an alleged willful and intentional assault did not allege an "accident" simply because it used the word "negligently" once); *CNA Ins. Co. v. McGinnis*, 282 Ark. 90, 93, 666 S.W.2d 689, 691 (1984) (holding that the harm caused by the repeated sexual assault of a minor was expected or intended by the perpetrator even if perpetrator contended that he did not intend to harm the victim); *Travelers Home & Marine Ins. Co. v. Wilson*, 208 F. Supp. 3d 1002, 1006, 1011 (E.D. Ark. 2016) (opining that by shooting an individual's head "at close range," the insured expected or intended bodily harm). [29] Walmart Exs. W, X.

App'x 115, 120-22 (4th Cir. 2015), is persuasive. There, the Fourth Circuit, applying analogous South Carolina law, found that opioid-related lawsuits alleged an "occurrence" because "it is at least possible that the state court will find that the defendants did not take sufficient care to catch suspicious activity and therefore accidentally caused harm to prescription drug abusers and the state of West Virginia." *Id.*

26. AIG urges the Court to follow *AIU Ins. Co. v. McKesson Corp.*, 598 F. Supp. 3d 774, 795, 798 (N.D. Cal. 2022), in which a federal district court found that opioid-related lawsuits did not allege an "occurrence" under California law. But California and Arkansas law diverge on what constitutes an "occurrence" under a CGL policy. Under California law, "whether [the insured] intended to cause injury or mistakenly believed its deliberate conduct would not or could not produce injury is irrelevant to determining whether an insurable accident occurred." *The Travelers Prop. Cas. Co. of Am. v. Actavis, Inc.*, 16 Cal. App. 5th. 1026, 1041, 225 Cal. Rptr. 3d 5, 18 (Cal. Ct. App. 2017). That is the opposite of Arkansas law as reflected in *Talley*.

27. Accordingly, the Court finds that the Representative Suits allege an "occurrence" under the AIG Policies. The Court further finds that AIG owes Walmart a defense obligation in the Representative Suits.[22]

C. The Representative Suits Seek Damages Because of Bodily Injuries and/or Property Damage

28. Independent of the "wrongful acts" coverage in the AIG Primary Policies, all of the Sample Policies cover lawsuits seeking "damages because of bodily injury or property damage,"

[22] AIG has suggested there are potential fact issues regarding whether certain endorsements modify the terms of two out of the four AIG Policies. The parties agree that those issues do not bear on the Court's ability to decide the narrow legal issues raised by the parties' motions, which is whether the Representative Suits fall within the coverage of the Sample Policies, thereby triggering a defense obligation. The extent of that defense obligation given potential retentions and deductibles in the Sample Policies is not at issue in these motions.

which is defined to include "damages claimed by any person or organization for care, loss of services or death resulting at any time from the Bodily Injury."[23] The Arkansas Supreme Court has interpreted the words "because of" or "on account of" in a CGL policy to turn on the "nature or type of liability" faced by the policyholder in the underlying suit. *See Cenark Project Mgmt.*, 2016 Ark. 185, at 7-8, 9, 491 S.W.3d at 139, 140. Where the "basis of [the insured's] liability" "arise[s] from" alleged bodily injuries or property damage, the lawsuit is "because of" or "on account of" those bodily injuries or property damage. *Id.* (citing *Unigard,* 331 Ark. at 222, 962 S.W.2d at 740).

29. The Arkansas Supreme Court has distinguished between lawsuits that "arise" from bodily injuries and property damage and thus are "because of" or "on account of" those injuries or damage, on the one hand, and lawsuits sounding in breach of contract or some other independent breach, in which allegations of bodily injury and property damage are merely "lurking somewhere in the underlying case." *Unigard,* 331 Ark. at 222, 227, 962 S.W.2d at 740, 743. Only in the latter cases has the Arkansas Supreme Court held that the lawsuits did not seek damages "because of" bodily injuries or property damage.

30. Here, the Representative Suits allege that Walmart's dispensing and/or distribution of opioid medications was a direct proximate cause of bodily injuries to thousands of individuals and property damage.[24] These are not breach of contract cases or cases where allegations of bodily injuries and property damage are merely "lurking" in the background. Rather, they are

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[23] *See, e.g.*, Walmart Ex. A, § I.A.1.b; Walmart Ex. B, § I.A.1.e; Walmart Ex. C, § I.E; Complaint, Ex. D, § I.D; *see also* AIG Ex. 10, § III.A.3.

[24] *See, e.g.*, Excess Ins. Ex. A.1 at 320 (¶ 1065) ("As a direct and proximate result of Defendants' negligent . . . acts, omissions, misrepresentations and otherwise culpable acts, there is now a national opioid epidemic."); Ex. A.4 at 196 (¶ 653) ("Plaintiff's Community is experiencing excessive drug overdose and emergency room visit rates related to an excessive volume of prescription opiates in Plaintiff's Community, which is proximately caused by the wrongful conduct of the Defendants described and named herein.").

claims seeking damages, in part, to compensate the plaintiffs for the costs of treatment, care, and related services for the injured individuals. As reflected in the National Settlement, the settlement of many of those suits, including numerous of the Representative Suits, requires that Walmart pay money expressly earmarked for the costs of treatment, care, and related services for those injured individuals.

31. Therefore, the "nature or type of liability" Walmart faces in the Representative Suits is "because of" or "on account of" bodily injury or property damage under longstanding Arkansas law. This is consistent with the words "because of" as used in their "plain, ordinary, and popular sense," which this Court is obligated to enforce under Arkansas law. *Ohio Cas. Ins. Co. v. Union Pac. R.R. Co.*, 469 F.3d 1158, 1163 (8th Cir. 2006).

32. Numerous courts across the country have reached this same conclusion, holding that governmental public nuisance claims seek damages "because of" bodily injuries or property damages under CGL policies in a wide range of contexts. For example, more than twenty years ago in *SIG Arms Inc. v. Emps. Ins. of Wausau*, 122 F. Supp. 2d 255, 257 (D.N.H. 2000), municipalities filed suit against various gun manufacturers seeking damages for the costs they expended on medical care and other services because of the manufacturers' allegedly "negligent" manufacturing and sale of firearms. The insurers denied coverage, arguing that these lawsuits did not seek damages "because of" bodily injuries. *Id.* at 260. The court rejected that argument, finding that these lawsuits alleged that the policyholder caused the harm and sought damages to recover the costs of addressing that harm. *Id.* The court reached this conclusion even though the lawsuit did not identify a particular harm to a particular, identifiable plaintiff.[25] More recently,

[25] *See also Beretta, U.S.A., Corp. v. Fed. Ins. Co.*, 117 F. Supp. 2d 489, 496 (D. Md. 2000), *aff'd*, 17 F. App'x 250 (4th Cir. 2001) (holding that policy covering "damages claimed by any . . . organization for care, loss of services, or death resulting at any time from the bodily injury" covered governmental plaintiffs' claims for medical costs for

the court in *Certain Underwriters at Lloyd's, London v. NL Industries, Inc.*, 203 A.D.3d 595, 596, 164 N.Y.S.3d 607, 609 (N.Y. App. Div. 2022), reached the same conclusion, finding insurance coverage for a paint manufacturer accused of creating a public nuisance by selling lead-based paint.

33. Courts in West Virginia, Pennsylvania, California, and Illinois have recently reached this same conclusion in the opioid context, finding that the opioid-related lawsuits seek damages "because of bodily injury," even if their allegations do not specifically identify the particular individuals or properties that were injured. *See McKesson*, 598 F. Supp. 3d at 784-88; *Cincinnati Ins. Co. v. H.D. Smith, L.L.C.*, 829 F.3d 771, 775 (7th Cir. 2016); *AmerisourceBergen Drug Corp. v. ACE Am. Ins. Co.*, 2020 W.V. Cir. LEXIS 3, at *22-*25 (W. Va. Cir. Ct. Nov. 23, 2020); *Giant Eagle, Inc. v. Am. Guarantee & Liab. Ins. Co.,* 499 F. Supp. 3d 147, 166-67 (W.D. Pa. 2020), *opinion withdrawn and vacated on reconsideration on other grounds*, 2021 WL 6276267 (W.D. Pa. May 25, 2021).

34. The Insurers' argument that CGL policies, such as the Sample Policies here, are limited to personal injury claims brought by or on behalf of a particular, identifiable, injured person, for a specific, identifiable injury, is contrary to the terms of the Sample Policies and Arkansas law. If the Insurers wanted to limit their Policies to such circumstances, they could have said so expressly through an exclusion or by adding that limitation to the Policies' insuring clauses.

35. Additionally, when read as a whole, the Sample Policies suggest a broader scope of coverage. *Union Pac.*, 469 F.3d at 1163 ("Different clauses of an insurance contract are read

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victims of violence related to guns manufactured by the insured and funds spent on emergency services); *N.A.A.C.P. v. Acusport Corp.*, 253 F. Supp. 2d 459, 462–63 (E.D.N.Y. 2003) (holding that lawsuit asserting claims for public nuisance against a gun manufacturer for "indirectly contributing to conditions in society making injury or death more likely" constituted a lawsuit seeking damages "because of bodily injury" triggering insurer's duty to defend).

together to harmonize all parts[.]"); *see also Cont'l Cas. Co. v. Davidson*, 250 Ark. 35, 41, 463 S.W.2d 652, 655 (1971) ("Different clauses of a contract must be read together and the contract construed so that all of its parts harmonize[.]"). Rather than limit coverage to a lawsuit brought by or on behalf of a specific individual for a specific, identifiable injury, the Sample Policies define "damages because of bodily injury" broadly to include "damages claimed by any person or organization for care, loss of services or death resulting at any time from the Bodily Injury." Extending coverage to claims brought against "organization[s]" for "care" even "resulting at any time" from a bodily injury, is inconsistent with the Insurers' narrow construction.

36. Similarly, certain of the Sample Policies narrowly exclude coverage for governmental public nuisance claims *relating to firearms*.[26] This exclusion would be rendered superfluous if, as the Insurers argue, such claims are effectively excluded by virtue of the words "because of" in the Policy's insuring clause. This exclusion would also be meaningless if, as Insurers argue, the Sample Policies are limited to personal injury claims. Rather, because exclusions are understood to "take away" from coverage that the insuring agreement provides, the governmental lawsuit exclusions relating to firearms reflect that the insuring agreements here cover governmental public nuisance claims so long as they do not arise from firearms.

37. The Insurers' assertion that their interpretation is supported by the terms of the Sample Policies, such as the selective use of the definitive article "the" and the Sample Policies' notice provisions, is unpersuasive.[35] The Court declines to limit the Insurers' defense obligation based on inference and subtle implication. This is particularly true where the terms of the Sample Policies strongly suggest a broader scope of coverage.

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[26] *See, e.g.*, Walmart Ex. C, Endt. 25. [35]
Excess Insurers' MPSJ, at 25-28.

38. This Court recognizes that the courts in *ACE Am. Ins. Co. v. Rite Aid Corp.*, 270 A.3d 239 (Del. 2022) ("Rite Aid"), *Acuity v. Masters Pharm., Inc.,* 169 Ohio St.3d 387, 205 N.E.3d 460 (Ohio 2022) ("Acuity"), and *Westfield Nat'l Ins. Co. v. Quest Pharmaceuticals, Inc.,* 57 F.4th 558 (6th Cir. 2023) ("Quest"), reached a different conclusion. The Court declines to follow these decisions.

39. *Rite Aid, Acuity* and *Quest* did not apply Arkansas law and did not address insurance policies with terms and conditions that demonstrate a broader scope of coverage such as the exclusion for governmental public nuisance claims involving firearms. These decisions also did not consider the settlements in many of the opioid-related lawsuits, such as the National Settlement, which show that the amounts paid in settlement will be paid to cover the costs of care, treatment, and related services for injured individuals and thus confirm that these opioid related lawsuits potentially sought damages because of such injuries. And, notably, *Rite Aid* was persuasively distinguished in the more recent *McKesson* decision. There, the court cited favorably to the *Rite Aid* dissent and recognized that the limitations on coverage espoused in *Rite Aid* are not based on any language in the actual policies. *McKesson.*, 598 F. Supp. 3d at 787. The *McKesson* court held there was no duty to defend in that case based solely on California's minority view—rejected by the Arkansas Supreme Court—on what may constitute an "occurrence." *Id.* at 789, 799.

40. At the very least, Walmart has posited *a* reasonable interpretation of the words "because of" in the Sample Policies. Therefore, this Court has a "duty" to adopt that interpretation. *See Smith*, 340 Ark. at 340, 10 S.W.3d at 850.

41. Accordingly, the Court finds that the Representative Suits seek damages "because of" bodily injury and property damage under the Sample Policies.

D. QBE's Motion to Compel Arbitration

42. QBE seeks to compel arbitration under two excess insurance policies it sold to Walmart for the policy periods of September 15, 2013, to September 15, 2014, and September 15, 2014, to September 15, 2015. QBE contends that these policies adopt a mandatory arbitration provision found in other policies issued by Endurance Specialty Insurance Ltd. ("Endurance"). The Court finds that the QBE Policies do not incorporate an arbitration provision and, even if they did, the provision is unenforceable under Arkansas law.

43. Here, the QBE Policies do not clearly incorporate the arbitration provision in the Endurance policies by reference. The QBE Policies confirm that they only adopt the terms of the Endurance policies to the extent they "further limit or restrict coverage."[27] An arbitration provision is not a coverage term.

44. In any case, to the extent the QBE Policies adopt an arbitration provision from the Endurance policies, any such provision is unenforceable under Arkansas law that invalidates arbitration provisions in domestic insurance policies. *See* Ark. Code § 16-108-233; *S. Pioneer Life Ins. Co. v. Thomas*, 2011 Ark. 490, at 10, 385 S.W.3d 770, 776 (2011) (J. Henry, concurring) ("[S]ection 16–108–201 [the predecessor statute to Arkansas Code § 16-108-233] expresses the public policy of Arkansas that disputes relating to 'any insurance polic[ies]' are not arbitrable."). The New York choice of law provision in the Endurance policy does not change this result as (1) the question of arbitrability is procedural, not substantive, and therefore Arkansas law applies, and (2) even if it was substantive, Arkansas has a compelling interest in this dispute and in applying its public policy against arbitrability of domestic insurance contracts sufficient to override the parties' choice of New York law.

[27] QBE Ex. E, Endt. 2; Ex. F, Endt. 1. ("QBE Ex." refers to exhibits to its motion to compel arbitration.)

IV. Summary

45. For the reasons stated above, and for good cause shown, Walmart's Motion for Partial Summary Judgment is **granted,** AIG's Cross-Motion for Partial Summary Judgment is **denied,** the Excess Insurers' Motions for Partial Summary Judgment is **denied**, and QBE's Motion to Compel Arbitration is **denied**. Accordingly, AIG owes Walmart a defense obligation in the Representative Suits under the AIG Policies, subject to any applicable retentions and deductibles. Whether the Insurers have a duty to indemnify Walmart was not addressed in the respective motions, and is not resolved by this Order.

IT IS SO ORDERED

Date: December 29, 2023.

John R. Scott

HONORABLE JOHN R. SCOTT
CIRCUIT COURT JUDGE

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above partial summary judgment, the Court finds:

1. The Plaintiff's Complaint For Declaratory Judgment & Damages seeks the Court's declaration as to the Defendants' obligation to defend the Plaintiff's Representative Suits, and judgment against the Defendants for compensatory and consequential damages, plus 12% statutory interest, costs, and fees.

2. The parties acknowledge that the legal issues addressed in the competing motions for Partial Summary Judgment, duty to defend and arbitration, are different from the

Plaintiff's prayer for compensatory and consequential damages, 12% statutory interest, costs, and fees.

3. The Court has scheduled a jury trial, March 24, 2025 to April 17, 2025, to determine the Plaintiff's claims as to damages.

4. If the decision to grant Plaintiff's Motion For Partial Summary Judgment is determined to be incorrect, the jury trial will not be needed because the Plaintiff will not be entitled to judgment for any damages against the Defendants.

5. Judicial economy is best served by certification of the award of Partial Summary Judgment, because of the vast volume of litigation affected by the award of Partial Summary Judgment, and would be of great benefit to the parties and the Court. The award of Partial Summary Judgment results in Defendants defending against opioid claims made against the Plaintiff, pursuant to the parties' contract terms as the Court has determined.

6. For these reasons, the Court concludes that a compelling, discernable hardship would ensue if this case were not certified for appeal.

Upon the basis of the foregoing factual findings, the Court hereby certifies, in accordance with ARCP 54(b)(1), that it has determined that there is no just reason for delay of the entry of final judgment as to the Plaintiff's Partial Summary Judgment and that the Court has and does hereby direct that the above judgment granting Partial Motion For Summary Judgment be a final judgment as to the Defendants' duty to defend claims against the Plaintiff and all claims of QBE to arbitrate the parties' dispute.

Certified this 29th day of December, 2023.

HONORABLE JOHN R. SCOTT
CIRCUIT COURT JUDGE