IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

No. ED113635

OPIOID MASTER DISBURSEMENT TRUST II,

Plaintiff/Appellant,

v.

ACE AMERICAN INSURANCE CO., et al.,

Defendants/Respondents.

Appeal from the Circuit Court for the County of St. Louis
Case No. 22SL-CC02974
Hon. Richard Stewart

BRIEF FOR APPELLANT OPIOID MASTER DISBURSEMENT TRUST II

GILBERT LLP
Kami E. Quinn
(admitted *pro hac vice*)
Richard J. Leveridge
(admitted *pro hac vice*)
Daniel I. Wolf
(admitted *pro hac vice*)
Michael B. Rush
(admitted *pro hac vice*)
700 Pennsylvania Avenue, SE
Suite 400
Washington, DC 20003
(202) 772-2200 (telephone)

DOWD BENNETT LLP
James F. Bennett, #46826
Elizabeth C. Carver, #34328
7676 Forsyth Blvd., Suite 1900
St. Louis, Missouri 63105
(314) 889-7300 (telephone)

Attorneys for Plaintiff/Appellant
Opioid Master Disbursement Trust II

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JURISDICTIONAL STATEMENT

Plaintiff/Appellant Opioid Master Disbursement Trust II (the "Trust") is a statutory trust created by the bankruptcy reorganization plan of Mallinckrodt and related companies (together, "Mallinckrodt" or the "debtors") to pursue insurance coverage specifically for the benefit of individuals and governmental and other entities harmed by Mallinckrodt's role in the opioid crisis here in Missouri and nationwide. The Trust filed a petition seeking, among other relief, a declaratory judgment that each of the defendant insurers is obligated to provide coverage, under certain insurance policies the defendants issued to the debtors, for Mallinckrodt's liability for certain opioid-related tort claims. Those tort claims included allegations that an "unbranded" marketing campaign undertaken by Mallinckrodt, which did not reference any Mallinckrodt product, harmed Trust beneficiaries by deceptively encouraging the use of opioids generally as safe and effective for long-term use.

The Trust brings this appeal from the trial court's Judgment and Order Granting Certain Insurers' Motions for Summary Judgment on the "Products-Completed Operations Hazard" Endorsements (the "Order"), entered on March 10, 2025. D541; App.1. The Order ruled on motions or cross-motions for summary judgment or partial summary judgment filed by the Trust and by various defendant insurance companies, regarding the scope of certain endorsements in the defendants' insurance policies. The court held that claims alleging Mallinckrodt was liable based on the unbranded marketing campaign that did not reference Mallinckrodt products were barred from coverage based on a policy exclusion intended to exclude coverage for claims alleging bodily injury "arising out of" Mallinckrodt's products.

The Trust filed a motion on April 8, 2025, asking the circuit court to amend the Order under Missouri Rule 74.01(b) to certify it as a final judgment for purposes of appeal. D542. The Trust's motion, which defendants did not oppose, stated that the Order "resolved all claims" against defendants Aspen Insurance UK Ltd. ("Aspen") and Old Colony State Insurance Company ("Old Colony"), "and resolved a distinct judicial unit of claims arising from a distinct set of insurance policies" against defendants ACE American Insurance Company ("ACE"), American Guarantee and Liability Insurance Company ("AGLIC"), National Union Fire Insurance Co. of Pittsburgh, Pa. ("National Union"), and American Home Assurance Company ("American Home") (all six defendants referred to collectively as the "Insurers" or "Defendants"; National Union and American Home sometimes referred to collectively as the "AIG Insurers"). D542, pp.1-2.

The Trust filed an amended motion (the "Motion") on April 23, 2025, to clarify that "the Order resolved *all* claims against ACE," not merely a distinct judicial unit. D544, p.2 n.2 (emphasis original). The Trust's Motion explained that the distinct judicial unit disposed of by the Order consists of "claims that arise from insurance policies that contain exclusions for the 'Products Hazard,' or follow form to policies that contain that exclusion and thus are deemed to contain the exclusion." D544, p.4. Following the circuit court's Order, the only remaining unresolved claims "involv[e] distinct different coverage,"" *i.e.,* they "arise from separate insurance policies that do not contain 'Products Hazard' exclusions." D544, p.4.

The circuit court granted the Trust's Motion in an order dated June 2, 2025, finding "that the Order is eligible for certification as a final judgment because it resolved all claims

against ACE, Aspen and Old Colony, and resolved a distinct judicial unit of claims arising from a distinct set of insurance policies against AGLIC, and the AIG insurers including National Union." D545, p.2. The court further determined that "no just cause for delay of an appeal" existed because the "Order effectively dismisses ACE, Aspen, and Old Colony" and the claims "that remain in the trial court arise out of separate insurance policies" from the claims subject to the Order. D545, p.2. "As a result, the Trust cannot obtain similar relief through both sets of claims, resolving the remaining claims in the trial court will not necessarily moot the claims subject to the Order, and the factual underpinning of both sets of claims is not intertwined." D545, p.2. In response to this Court's September 22, 2025 Order, the trial court re-entered its June 2, 2025 Order on September 26, 2025, properly denominated as a Judgment in compliance with Rule 74.01(a). D552, App.6.

The Trust timely filed its Notice of Appeal to this Court on June 10, 2025. D546. Jurisdiction lies in this Court because the Circuit Court for the County of St. Louis is within the boundaries of this appellate district, and this action presents none of the issues subject to the exclusive jurisdiction of the Supreme Court under Article V, §3 of the Missouri Constitution.

INTRODUCTION

Mallinckrodt was the largest manufacturer of prescription opioids in the United States (larger than the notorious Purdue Pharma). D504, p.3 (¶2); D506, p.20 (¶33). As numerous lawsuits against it have alleged, for years Mallinckrodt also deceptively promoted opioids to doctors and other prescribers nationwide as generally safe and

effective for long-term use, without reference to its own manufactured products. *E.g.,* D414, pp.4-5 (¶9.d); D416, p.59 (¶132). According to the lawsuits, that promotional campaign activated and exacerbated the dramatic proliferation of opioid use, abuse, diversion, and addiction, first to prescription opioids and later, illicit opioids like heroin and fentanyl. D414, p.2 (¶¶4-5), p.8 (¶14.b); D415, p.34 (¶77); D418, p.20 (¶76). The lawsuits alleged that because Mallinckrodt's unbranded marketing efforts led to increased production of and demand for legal and illegal opioids, Mallinckrodt was liable for bodily injuries sustained regardless of whether the injured person used opioids manufactured by Mallinckrodt. *E.g.,* D414, p.2 (¶¶4-5), p.14 (¶19.p); D415, p.34 (¶77);D419, p.110 (¶473).

After having been named in thousands of lawsuits related to their manufacture, marketing, and/or distribution of opioid pharmaceuticals, D414, p.2 (¶¶2, 4, 5); D415, p.7 (¶12), p.34 (¶77), certain affiliates of Mallinckrodt commenced voluntary bankruptcy proceedings in 2020, D414, p.2 (¶2); D415, p.4 (¶5), meaning these claimants could not recover from Mallinckrodt itself. The Trust was created by the debtors' reorganization plan for the benefit of individuals (including personal-injury victims) and entities (including states, counties, municipalities, tribal governments, hospitals, and third-party payors such as treatment centers) harmed by the debtors' role in creating and perpetuating the nationwide opioid crisis. D398, p.3; D400, pp.6, 34, 69-76, 95, 97, 100, 102, 103-05, 110, 142; D401, pp.53, 103. The reorganization plan authorized the Trust, among other things, to assume the debtors' rights to insurance coverage for opioid-related claims in order to obtain recovery for claimants that was not available from Mallinckrodt itself. D401, pp.11-12, 36, 95, 102-03. The Trust filed the underlying lawsuit to pursue its assigned rights to

insurance coverage and obtain insurance proceeds. D398, pp.3-4, 6-7. Should the Trust ultimately prevail in this litigation, any insurance proceeds the Trust recovers will be distributed to states, counties, municipalities, tribal governments, and hospitals to fund abatement programs, D400, pp.8, 10, 11, 12, 26, 32, 34, 36, 42, 44, 51, 91, 103-04, and to individual victims of the opioid crisis, which may include family members of some of the more than 25,400 Missourians who, since 2000, have lost their lives due to an overdose.[1] Neither Mallinckrodt nor any of its affiliates are parties to this litigation.

The Trust moved for summary judgment against National Union on a purely legal issue: whether the "Products Hazard Exclusion" in several of the subject insurance policies barred coverage for the claims at issue here. D409. That provision bars coverage for bodily injury included within the "Products Hazard," which is limited to bodily injury arising out of "your product"—i.e., the insured's products (here, Mallinckrodt's). The Trust argued that claims alleging injuries caused not by the use of Mallinckrodt products but by Mallinckrodt's campaign encouraging the prescribing of opioids as a category, including non-Mallinckrodt products, fell outside the Products Hazard and the Products Hazard Exclusion. In response, National Union cited no factual disputes, but opposed the Trust's motion and, along with other Insurers, filed cross-motions for summary judgment arguing that the claims at issue here are within the Products Hazard and are therefore excluded from coverage under the Products Hazard Exclusion, or that they did not qualify for coverage

[1] *See* Missouri Department of Mental Health, Missouri Opioid Settlements, *National Opioid Settlements Brief Background* (available at https://moopioidsettlements.dmh.mo.gov/Settlement/SettlementBackground at 1 (last visited November 23, 2025).

under an effectively similar policy endorsement, the Products Hazard Endorsement. D491, D496, D502, D520.

This appeal arises from the circuit court's Order declaring that the Trust is not entitled to coverage under Defendants' policies because the claims at issue fall within the Products Hazard, even though the underlying petitions specifically alleged injuries based on Mallinckrodt's promotion of opioids generally, not those it manufactured or distributed, and the injuries are not tied to the use of Mallinckrodt's products. D541, pp.2-4, App.2-4. The court held that the Products Hazard Exclusion barred coverage for claims based on a marketing campaign that made no mention of Mallinckrodt's products but for which claims Mallinckrodt is responsible because it encouraged the use of opioids in general, including those made by other companies. D541, p.3, App.3.

As the Court is aware, the principles governing interpretation of insurance contracts—which, among, other things, favor coverage, require construing ambiguities against insurers, and prohibit the rewriting of contractual terms—are well-settled and stated in a legion of Missouri appellate opinions. These maxims are routinely pronounced and applied, but the trial court simply disregarded them, instead resolving the parties' summary judgment motions in contravention of those established standards. In particular, the circuit court ignored that the subject policies define "your product" narrowly, to include only (a) the insured's products, and (b) the insured's representations and warranties regarding *those* products. The court determined that because Mallinckrodt's "motive" in undertaking the unbranded campaign was to sell more of its products, statements made during the campaign fit within the "your product" definition. "Motive," however, is not in the policy text. It is

undisputed that the campaign alleged in the underlying claims did not mention Mallinckrodt's products.

In addition, the court reasoned that "unbranded representations about the safety and efficacy of opioids in general encompass Mallinckrodt's products." D541, p.3, App.3. The court cited no authority for this statement, which lacks any basis in the policy language or the law. The trial court's disregard for the plain and narrow language of the "your product" definition led it to an overly broad interpretation of an insurance policy exclusion it was required to strictly construe against the Insurers. It erred as a matter of law in interpreting the Products Hazard, the Products Hazard Exclusion, and the Products Hazard Endorsement, and its grant of summary judgment in favor of the Insurers should be reversed.

STATEMENT OF FACTS

A. Mallinckrodt and the creation of the Trust.

The Plaintiff and Appellant in this case is the Trust, a statutory trust created by the Fourth Amended Plan of Reorganization (the "Plan") of debtor Mallinckrodt.[2] D400, p.95; D401, pp.53, 103. From at least 1995, certain Mallinckrodt entities—principally Mallinckrodt LLC, Mallinckrodt APAP LLC, Mallinckrodt Enterprises LLC, SpecGx LLC, and SpecGx Holdings LLC—developed, manufactured, promoted, and distributed

[2]The United States Bankruptcy Court for the District of Delaware confirmed the Plan on March 2, 2022, effective June 16, 2022. D398, p.2, n.2; D401; D415, p.2 & n.1, p.200. A list of the debtors is available at http://restructuring.ra.kroll.com/Mallinckrodt (last visited November 23, 2025). D415, p.2 & n.1.

branded and generic opioid pharmaceuticals, as well as active pharmaceutical ingredients ("APIs") that were included in opioid pharmaceuticals manufactured by those and other entities. D414, p.2 (¶1); D415, p.2 (¶2), 17-18 (¶¶39-42), 31 (¶72 & n.11), 110 (¶286). As alleged in lawsuits against it, Mallinckrodt also encouraged the prescription of opioids generally, without regard to who manufactured them. *See, e.g.,* D414, p.10 (¶17.b); P419, p.31 (¶109). By early 2020, Mallinckrodt had been named as a defendant in more than 3,000 lawsuits brought by (a) individuals alleging bodily injuries due to opioid pharmaceuticals manufactured by Mallinckrodt or others or illicit opioid drugs or (b) state or local governmental or other entities alleging that they incurred costs because of the bodily injuries of such individuals (collectively, the "Opioid Mass Tort Claims"). D414, p.2 (¶¶2-5), p.5 (¶9.f), pp.8-9 (¶¶14.a, 14.c), p.16 (¶21.e), pp.23-26 (¶¶23-25); D415, p.7 (¶12), p.8 (¶15), p.34 (¶77); D416, p.230 (¶599); D417, p.15 (¶21); D418, p.3 (¶3), p.81 (¶232); D420, p.5 (¶9), p.18 (¶45), p.26 (¶¶79-80), p.29 (¶¶87-88), p.30 (¶¶90-91), pp.31-32 (¶¶98-99).

After spending more than $100 million defending Opioid Mass Tort Claims, D415, p.7 (¶12), Mallinckrodt commenced voluntary bankruptcy proceeding in the Bankruptcy Court on October 12, 2020, under Chapter 11 of the United States Bankruptcy Code. D414, p.2 (¶2); D415, p.4 (¶5). Among other things, the Plan discharged Mallinckrodt from liability for Opioid Mass Tort Claims and all other claims "arising out of, relating to, or in connection with any opioid product or substance" (the "Opioid Claims"); created the Trust; and transferred Mallinckrodt's rights to insurance coverage for Opioid Claims (the "Assigned Insurance Rights") to the Trust. D400 pp.6, 34, 69-76, 95, 97, 100, 102-05,

110,142. The Plan empowered and obligated the Trust to (1) "preserve, hold, collect, manage, maximize, and liquidate" its assets—which included the Assigned Insurance Rights—"for use in resolving Opioid Claims" and (2) "initiate, prosecute, defend and resolve … legal actions … in respect of the Assigned Insurance Rights." D400, pp.95, 103. The Plan further obligates the Trust to distribute proceeds of the Assigned Insurance Rights to the claimants who brought the Opioid Claims. D400, pp.95, 102.

B. Allegations regarding Mallinckrodt's unbranded promotional campaign.

The Opioid Mass Tort Claims alleged two separate theories for Mallinckrodt's opioid liability. D413, pp.9, 13; January 31, 2025 Motion Hearing Transcript ("Tr."), p.9:1-11. The first basis—that opioids manufactured or sold by Mallinckrodt caused bodily injury—is not at issue with regard to any of the insurance policies at issue in this appeal. *See, e.g.,* Tr.9:1-11. Rather, the Trust's demand for coverage here involves claims alleging the second theory: that Mallinckrodt was responsible for bodily injury caused in whole or in part by the use of *other* manufacturers' opioid pharmaceuticals or illicit opioid drugs, due to Mallinckrodt's "unbranded" advertising campaign to promote opioid use generally, touting the safety and efficacy of opioids as a class (the "Claims").[3] *See, e.g.,* D414, p.2 (¶¶4-5), p.3 (¶9.a), p.5 (¶9.e), p.7 (¶9.i), p.22 (¶21.r); D415, p.34 (¶77); D416, p.13 (¶7), p.100 (¶234), p.263 (¶662.f-g); ¶D417, p.126 (¶385), D420, p.29 (¶¶87-88), p. 30 (¶¶90-

[3] "Claimants" herein refers to some or all of the plaintiffs named in the Claims.

91.[4] Mallinckrodt's unbranded promotional activities did not identify Mallinckrodt's own or any other specific branded or generic opioid product, nor did they mention that Mallinckrodt was behind the promotion of opioid drugs generally. D414, p.4 (¶9.c), p.22 (¶21.r), p.25 (¶¶25.f-25.i); D416, p.59 (¶¶131-32); D417, p.126 (¶385); D420, p.29 (¶¶87-88), p.30 (¶¶90-91), p.31 (¶94). *See also* D417, p.127 (¶386) (alleging pharmaceutical companies used "'unbranded advertising' to generally tout the benefits of opioids without specifically naming a particular brand-name opioid drug."); D418, p.29 (¶105) (defendants used "unbranded marketing and industry-funded front groups" and other efforts "to reverse the popular and medical understanding of opioids and their risks.").[5]

As the State of Mississippi alleged, "unbranded marketing refers not to a specific drug, but more generally to a disease state or treatment." D414, p.4 (¶9.c); D416, p.59 (¶131); *see also* D417, p.126 (¶385) ("unbranded advertising is usually framed as 'disease awareness'—encouraging consumers to 'talk to your doctor' about a certain health condition without promoting a specific product"). The lack of references to Mallinckrodt's

[4]The Opioid Mass Tort Claims named multiple opioid manufacturers and distributors as defendants in addition to Mallinckrodt, largely attributing the same conduct to all defendants. *See, e.g.,* D416 (naming 18 defendants, including two Mallinckrodt entities); D417 (naming 33 defendants, including two Mallinckrodt entities). For ease of reference, the Trust refers to allegations in the Claims that are not specific as to any defendant as if they were directed solely against Mallinckrodt.

[5]Because this appeal addresses only whether Claims based on Mallinckrodt's unbranded promotional campaign fall within the Products Hazard definition and thus are excluded from coverage under the Policies' Products Hazard Exclusion or are subject to the "claims-made-and-reported" requirements in the Products Hazard Endorsement (described in Section C, *post*), the Trust provides context for that legal issue by reciting representative allegations regarding that campaign.

own products was intentional, the Claimants acknowledged, to "sidestep the extensive regulatory framework … governing branded communications." D414, p.4 (¶9.c); D416, p.59 (¶131); *see also* D414, pp.4-5 (¶9.d); D416, pp.59-60 (¶132) (Defendants presented misleading information through unbranded promotional campaign "knowing that unbranded materials typically are not submitted to or reviewed by the FDA."); *see also* D414, p.22 (¶21.r); D417, p.126 (¶385) ("Through unbranded materials, the [defendants] expanded the overall acceptance of and demand for chronic opioid therapy without the restrictions imposed by regulations on branded advertising."); D414, p.25 (¶25h-¶25.i); D420, pp.29-30 (¶¶90-91).

Indeed, the Claimants alleged that Mallinckrodt executed its unbranded marketing through a network of third-party "key opinion leaders" or "KOLs"—"doctors who were paid … to promote their pro-opioid message"—and "Front Groups," the latter defined as "seemingly neutral and credible professional societies and patient advocacy groups." D414, p.3 (¶9.a), p.4 (¶9.b, ¶9.d), p.5 (¶9.e), p.10 (¶17.b), p.18 (¶21.j), p.30 (¶33.d), p.32 (¶38.f), p.36 (¶42.f); D416, p.13 (¶7), p.59 (¶132), p.100 (¶234); D417, p.94 (¶292); D419, p.31 (¶109); D422, p.15 (¶54); D423, p.26 (¶95); D424, p.26 (¶95). As the Claimants alleged, Mallinckrodt "used third-party, unbranded advertising to create the false appearance that the negligent messages came from an independent and objective source." D414, p.30 (¶33.c), p.36 (¶42.f); D422, p.15 (¶52); D424, p.26 (¶95).

The purpose of the unbranded promotional campaign, the Claimants alleged, was to change the medical community's prevailing practices regarding the use of opioid drugs generally to treat chronic pain, and to change the perception of the risks posed by that use.

See, e.g., D414, p.2 (¶¶4-5), p.3 (¶9.a), p.5 (¶¶9.e-f); D415, p.34 (¶77) (Claimants alleged that Mallinckrodt's "misleading marketing … overstated the benefits of opioid products and understated their risks," causing "health care providers to prescribe opioids inappropriately, increasing addiction, misuse, and abuse."); D416, p.13 (¶7), p.100 (¶234), p.230 (¶599). According to the Claimants, Mallinckrodt and its "KOLs and Front Groups were able to change prescriber perceptions," particularly with respect to the risk of addiction and abuse, thereby "extending the market for opioids to new patients and chronic conditions." D414, p.5 (¶9.e), p.7 (¶9.i); D416, p.100 (¶234), p.263 (¶662.f).

The "deceptive promotion of opioids over safer and more effective drugs" caused opioid prescriptions to increase, Claimants alleged. *See, e.g.*, D414, p.8 (¶¶14.a, 14.c), p.13 (¶17.m); D418, p.3 (¶3), p.81 (¶232) (As the defendants' "efforts to expand the market for opioids increase," "through their deceptive and illegal marketing of opioids," "so have the rates of prescription and sales of their products"); D419, p.98 (¶417). The overprescribing led in turn to excessive use and abuse of and addiction to opioids generally, including opioids sold by other manufacturers and illicit (and less expensive) opioids, such as heroin and fentanyl. D414, pp.5-6 (¶9.f-g), p.7 (¶9.i), p.9 (¶14.d), p.16 (¶21.e), p.24 (¶25.d), p.27 (¶28.c); D416, p.230 (¶599), p.263 (¶662.f-g); D417, p.15 (¶21); D418, p.82 (¶238); D420, p.26 (¶79); D421, p.18 (¶71). And the increased use of opioids, licit and illicit, led to overdoses and death, according to the Claimants. D414, p.6 (¶9.g), p.8 (¶14.b-c), pp.9-10 (¶17.a); D416, p.244 (¶622); D418, p.20 (¶76), p.81 (¶232); D419, p.21 (¶69).

Mallinckrodt was sued not only for bodily injuries suffered by opioid users, *see, e.g.*, D414, pp.23-26 (¶25), pp.27-29 (¶28.a-g); D420, p.5 (¶9), p.18 (¶45), p.32 (¶99);

D421, p.7 (¶14), p.8 (¶16), p.18 (¶71), p.34 (¶¶117-18), p.58 (¶¶240, 248), but for those suffered by children whose mothers used opioids while pregnant. *See, e.g.,* D414, p.29 (¶¶30-31), p.30 (¶¶35-36), p.34 (¶¶39-40); D422, p.2 (¶2); D423, p.4 (¶2); D424, p.4 (¶2). Claimants contended that the increased use of opioids caused by Mallinckrodt's unbranded promotional campaign led to neonatal abstinence syndrome (NAS), "a consequence of the abrupt discontinuation of chronic fetal exposure to substances that were used or abused by the mother during pregnancy." *e.g.*, D414, p.29 (¶¶30-33), p.30 (¶¶35-36), p.34 (¶¶39-40), p.36 (¶42.d-f); D422, p.2 (¶2), p.3 (¶5), p.15 (¶¶51, 52, 54); D423, p.3 (¶1), p.4 (¶2), p.26 (¶¶92, ¶93, 95); D424, p.4 (¶2), p.26 (¶¶92-93).

The governmental entities alleged variously that Mallinckrodt's push to increase opioid prescriptions despite the associated risks caused them to incur the expense of "long-term prescriptions of opioids"—Mallinckrodt's own and those manufactured by others, D414, p.5 (¶9.f); D416, p.230 (¶599)—as well as the cost of "combat[ing] the opioid epidemic," including the expense of addiction treatment, hospital services, and other healthcare. *See, e.g.*, D414, p.16 (¶21.e); D417, p.15 (¶21) (costs of responding to opioid crisis include "arrests, adjudications, and incarceration, treating opioid-addicted newborns in neonatal intensive care units, burying the dead, and placing thousands of children in foster care").

C. Policy provisions at issue.

The Insurers' Policies at issue here are standard-form policies drafted by the Insurance Services Office, Inc. (ISO). *E.g.*, D414, p.47 (¶¶51-52); D431, p.13 (footer), App.13. ISO is an insurance industry organization that "is the almost exclusive source of

support services in this country for CGL [commercial general liability] insurance." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 772 (1993) (ISO is association of approximately 1,400 domestic property and casualty insurers); *see also* D414, p.47 (¶¶51-53). Most CGL insurance policies in the U.S. are written on "standard policy forms" that ISO developed and "file[d] or lodge[d]" with insurance regulators in each state. *Hartford Fire*, 509 U.S. at 772.

The Policies provide coverage for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' …." *E.g.,* D414, p.47 (¶51); D431, p.13; App.13. The Policies, however, exclude coverage for "'bodily injury' … included within the 'products-completed operations hazard'" (the "Products Hazard Exclusion"). D414, p.48 (¶54); D431, p.37, App.17. The Policies define "products-completed operations hazard" ("Products Hazard" or PCOH) to include, in relevant part, "all 'bodily injury' … arising out of 'your product' or 'your work.'" D414, p.48 (¶55); D431, p.27 (¶16), App.15 (¶16); D492, p.3 (¶8); D517, p.34 (¶J.1).

> "Your product" is defined in turn to "[m]ean[]:
>
> (1) Any goods or products, … manufactured, sold, handled, distributed, or disposed of by:
>
> (a) You;
>
> (b) Others trading under your name; or
>
> (c) A person or organization whose business or assets you have acquired ….

D414, p.48 (¶56); D431, p. 28 (¶21), App.16 (¶21). In addition, "[y]our product" includes "[w]arranties or representations made at any time with respect to the fitness, quality, durability, performance or use of 'your product,'" as well as the "providing of or failure to

provide warnings or instructions." D490, p.76 (¶66); D431, p.28 (¶21.b), App.16 (¶21.b). The Products Hazard Exclusion thus excludes coverage for bodily injury "arising out of" goods or products manufactured or sold by "You"—the insured (here, Mallinckrodt)—or certain warranties or representations made with respect to such goods or products. D414, p.48 (¶¶55-56); D431, p.27 (¶16), p.28 (¶21), App.15 (¶16), App.16 (¶21). The Exclusion does not apply to marketing or promotional activities outside of those specific warranties or representations.

Certain of the Policies contained a Products-Completed Operations Hazard Claims Made Retained Limit Endorsement (the "Products Hazard Endorsement"), which provided coverage for claims included within the products hazard—*i.e.,* claims for bodily injury arising out of Mallinckrodt's products or from certain warranties or representations about those products—if the claims were made and reported to the Insurer during the Policy period. *See, e.g.,* D492, p.2 (¶5); D477, pp.49-50; D517, pp.20-21, App.20-21. As explained further in Section D.2, certain of the Insurers moved for summary judgment on the ground that the Endorsement barred coverage because claims had not been made or reported within the required timeframe.

D. Proceedings below.

1. The Petition and the Insurers' denial of coverage.

The Trust commenced the underlying declaratory judgment action, D397, p.20, in St. Louis County Circuit Court on June 16, 2022, the effective date of the Plan, followed by an amended petition a month later (the "Petition"). D398, p.2, n.2. The Petition named as defendants the Insurers and 14 other insurance companies who had issued certain

insurance policies identified in Exhibit A to the Petition (collectively, the "Insurance Policies" or "Policies"; individually, the "Insurance Policy" or the "Policy").[6] D398, pp.1-2; D399. The Petition alleged in relevant part that the Insurers could not meet their burden to establish that the Products Hazard Exclusion barred coverage for the Opioid Mass Tort Claims because those claims seek to hold Mallinckrodt liable not only for bodily injuries allegedly caused by its products, but also for those allegedly caused by Mallinckrodt's "conduct in creating and fueling the nationwide opioid crisis and by the opioid products of other manufacturers and illicit narcotics." D398, p.56 (¶134); *see also* D398, p.3.

The Petition further described the Claims as alleging Mallinckrodt

> to be jointly and severally liable with other manufacturers and distributors for injuries caused by opioids that are not [Mallinckrodt's] products. These injuries do not arise out of [Mallinckrodt's] own products, but instead are alleged to arise out of [Mallinckrodt's] extensive use of unbranded promotional activities to change the way the medical community and the public perceived, prescribed, and used opioids in general, and their concomitant or resulting use of other manufacturers' opioid products and illicit opioids. These injuries are therefore not within the products-completed operations hazard exclusions.

D398, p.56 (¶134). The Petition sought a declaration that each Insurer was obligated under its Policy or Policies to provide coverage for Mallinckrodt's liability for the Claims, subject to applicable "attachment points" and "limits of liability." D398, p.59 (¶141).

Before the Trust was created and the Petition was filed, National Union denied, through its claims administrator, that coverage existed under National Union's Policies for

[6]The Trust also named Doe Defendants, explaining that it did not "know the identities of all of the insurers that issued insurance policies as to which the Plan transferred rights to the trust," D398, p.3, n.6. The Petition substituted two insurers in place of Doe Defendants named in the original pleading. D398, p.18 n.10, p.22 n.11.

opioid-related lawsuits pursuant to the Products Hazard Exclusion. D429, p.4. In response to the Trust's allegations in paragraph 134 of the Petition, summarized above, National Union and American Home stated in relevant part: "To the extent this paragraph of the Petition relates to the AIG Insurers, the AIG Insurers deny the allegations contained in this paragraph." D402, pp.55-56; *see also* D403, p.54 (Ace); D404, pp.51-52 (Aspen); D408, p.52 (¶116) (AGLIC).

2. The summary judgment motions.

The Trust moved for partial summary judgment against National Union on April 16, 2024, seeking "a declaration that products hazard exclusions contained in National Union's policies do not apply to liability of Mallinckrodt … because of bodily injury that arose in whole or in part from non-Mallinckrodt opioid drugs." D409, pp.1-2; *see also* D413, p.23 ("The Trust is asking the Court only to determine whether National Union's products hazard exclusions, which by their express terms only exclude coverage for liability arising out of 'your [Mallinckrodt's] product,' apply to Mallinckrodt's liability (joint and several or otherwise) because of bodily injury caused in whole or in part by other manufacturers' opioid products or illicit opioid drugs that Mallinckrodt did not manufacture or sell."). The Trust's briefing emphasized that it was "not seeking a ruling on whether any particular opioid claims against Mallinckrodt, or any particular quantum of Mallinckrodt's opioid liability, were outside the products hazard exclusion," or any factual finding "with respect to any particular opioid claim against Mallinckrodt." D413, p.8.

In response, the AIG Insurers—National Union and American Home—opposed the Trust's motion, arguing alternatively that the motion was not ripe and that the Products

Hazard Exclusion barred coverage because Mallinckrodt's liability "arises out of" its products and out of its "work." D487, pp.22-43. In addition, the AIG Insurers filed a separate cross-motion for summary judgment, likewise arguing that the Products Hazard Exclusions in thirteen National Union policies and an American Home policy barred coverage. D496, p.2.

The Insurers all moved for summary judgment on the Products Hazard Endorsement. D491, pp.1-3 (AGLIC); D496, pp.2-3 (AIG Insurers' cross-motion); D502, pp.1-2 (Aspen and ACE's joint motion); D520 (Old Colony joinder in Aspen and ACE's motion). The Products Hazard Endorsement provides coverage for claims that fall within the Products Hazard, but only on a "claims-made" basis, *i.e.*, if (a) the claim was made against Mallinckrodt during the policy period and (b) Mallinckrodt provided written notice of the claim to the Insurer during that same period. *See, e.g.,* D492, pp.2-3 (¶5); D517, pp.20-21. The Insurers argued that the Claims for which the Trust sought coverage fell within the scope of the Products Hazard Endorsement in their respective Policies, but were not eligible for coverage because the Claims were neither made nor reported to the Insurers during the subject policy periods. D491, pp.1-2 (AGLIC); D496, pp.2-3 (AIG Insurers); D502, p.2 (Aspen and ACE); D520, pp.1-3 (Old Colony).

In opposing the Insurers' summary judgment motions on the Products Hazard Endorsement, the Trust did not dispute that the Policies' "'claims-made-and-reported requirements' for coverage" had not been met. D524, pp.33-34 ("claims-made requirements … are irrelevant"); D541, p.3 (¶4); App.3. Rather, consistent with its position on the Product Hazard Exclusion, the Trust argued that the claims for which it was seeking

coverage did not fall within the Products Hazard because the bodily injuries at issue did not arise out of Mallinckrodt's products, but were instead caused in whole or in part by other manufacturers' opioid products or illicit opioid drugs. D524, p.11, 33-34; D525, pp.2-3; D526, pp.1-2. In addition to opposing the Insurers' motions, the Trust moved for partial summary judgment against AGLIC, Aspen, ACE, and Old Colony on the grounds that the Products Hazard Endorsement does not apply to Mallinckrodt's liability "because of bodily injury that arose in whole or in part from non-Mallinckrodt opioid drugs."[7] D525, p.3; D526, pp.3-4.

3. The trial court's Order.

On March 10, 2025, the trial court entered its five-page Order resolving the summary judgment motions and cross-motions. D541, App.1. The Order does not recite relevant facts or quote relevant policy provisions, nor does it acknowledge the general principles that govern the interpretation of insurance contracts under Missouri law. D541,

[7]Central to the Trust's and the Insurers' motions for summary judgment or partial summary judgment—whether based on the Products Hazard Exclusion or the Products Hazard Endorsement—is the proper interpretation of the Products Hazard. Specifically, the motions all raised the issue of whether claims for bodily injury caused in whole or in part by non-Mallinckrodt opioid drugs "arise out of your [Mallinckrodt's] products" and thus fit within the Products Hazard definition. This Court's ruling on that issue will result in either the reversal of summary judgment on both the Products Hazard Exclusion and the Products Hazard Endorsement, or the affirmance of summary judgment on both issues. Thus, for ease of reference, the Trust's argument herein addresses the proper interpretation of the Products Hazard and "your product" definition, and the impact of that interpretation on the applicability of the Products Hazard Exclusion, with the understanding that if the Claims at issue are not subject to the Exclusion, neither are they subject to the claims-made-and-reported requirements of the Products Hazard Endorsement.

App.1. The court confined its analysis of the Products Hazard definition to the following paragraphs:

> 1. Under Missouri law, the phrase 'arising out of,' when used in an insurance policy is interpreted broadly to mean 'originating from,' or 'having its origins in,' or 'growing out of,' or 'flowing from' and includes a much broader spectrum than the term 'caused by' or the concept of proximate causation. *See Schmidt v. Utilities Ins. Co.*, 182 S.W.2d 181, 183 (Mo. 1944). …
>
> 2. As such, the Court finds that Mallinckrodt faced liability concerning injury that "grew out of" or "originated from" and thus "arose out of" Mallinckrodt's opioid products, including the manner in which Mallinckrodt sold its opioids and opioid ingredients to the public, and the representations that Mallinckrodt made as part of its alleged effort to increase its sales of its opioid products and maintain its market position as a leading seller and manufacturer of opioids.
>
> 3. The definition of "Your product" in the policies expressly included not only "products" but also "representations" Mallinckrodt made about its products. Any alleged injuries caused by Mallinckrodt's "unbranded" representations arose out of Mallinckrodt's products, both because those unbranded representations were part of Mallinckrodt's efforts to boost its own opioid product sales and because unbranded representations about the safety and efficacy of opioids in general encompass Mallinckrodt's products.

D541, pp.2-3 (some citations omitted); App.2-3.

The Order also held that the Trust's claims fall "within the scope of the PCOH Claims-Made Endorsement under the umbrella and excess policies, for which the parties agree that the 'claims-made-and-reported' requirements for coverage are not satisfied." D541, p.3, App.3. The Order thus concluded that "the Trust presents claims for damage that fall within the scope of the PCOH Exclusion Endorsement that excludes coverage under the primary policies," and that "the opioid claims for which the Trust seeks coverage, are not covered under the primary policies issued by the AIG Insurers, the umbrella policies

issued by AIG Insurers, or the excess policies issued by Aspen, Old Colony, ACE, and AGLIC." D541, pp.3-4; App.3-4.

The court granted the Trust's Motion under Missouri Rule 74.01(b) to certify the Order as a final judgment for purposes of appeal on June 2, 2025, D545; D552 (properly denominating the June 2 certification order as a Judgment), App.6-7, and the Trust timely filed its Notice of Appeal to this Court on June 10, 2025. D546.

POINTS RELIED ON

I. The trial court erred in granting summary judgment to the Insurers and holding that Claims alleging Mallinckrodt was liable for bodily injury based on its unbranded promotional campaign fall within the Products Hazard and that the Policies therefore do not provide coverage for those Claims because bodily injuries caused by the use of opioid pharmaceuticals not manufactured or sold by Mallinckrodt or by the use of illicit opioid drugs did not "arise out of" Mallinckrodt's products in that the Policies define "your product" to include only Mallinckrodt's products themselves or representations or warranties about those products.

Burns v. Smith, 303 S.W.3d 505 (Mo. banc 2010);

Harrison v. Tomes, 956 S.W.2d 268 (Mo. banc 1997);

Henderson v. Mass. Bonding & Ins. Co., 84 S.W.2d 922 (Mo. Div. 1 1935);

Maher Bros., Inc. v. Quinn Pork, LLC, 512 S.W.3d 851 (Mo. App. E.D. 2017).

ARGUMENT

I. The trial court erred in granting summary judgment to the Insurers and holding that Claims alleging Mallinckrodt was liable for bodily injury based on its unbranded promotional campaign fall within the Products Hazard and that the Policies therefore do not provide coverage for those Claims because bodily injuries caused by the use of opioid pharmaceuticals not manufactured or sold by Mallinckrodt or by the use of illicit opioid drugs did not "arise out of" Mallinckrodt's products in that the Policies define "your product" to include only Mallinckrodt's products themselves or representations or warranties about those products.

A. Standard of review and preservation.

Because the Trust appeals from the trial court's grant of summary judgment and more specifically its interpretation of the terms of an insurance policy, this Court's review is *de novo*. *Doe Run Resources Corp. v. American Guarantee & Liab. Ins.*, 531 S.W.3d 508, 511 (Mo. banc 2017) (summary judgment rulings are reviewed *de novo*, and "[t]he interpretation of an insurance contract is a question of law and is given *de novo* review"); *see also Adams v. Certain Underwriters at Lloyd's of London*, 589 S.W.3d 15, 26 (Mo. App. E.D. 2019) (in interpreting insurance policy, "we give no deference to the trial court").

The Trust preserved the interpretation of the Products Hazard in its motions for partial summary judgment, D409, D413, D525, D526; and in its opposition to the summary

judgment motions of defendants National Union and American Home, Aspen, ACE, and Old Colony, and AGLIC.[8] D524, D525, D526.

B. Under governing Missouri law, insurance contracts are interpreted according to their plain terms and to provide coverage when reasonably possible.

"The cardinal rule of contract interpretation 'is that courts seek to determine the parties' intent and give effect to it." *Nooter Corp. v. Allianz Underwriters Ins. Co.*, 536 S.W.3d 251, 263 (Mo. App. E.D. 2017) (quoting *Chochorowski v. Home Depot U.S.A.*, 404 S.W.3d 220, 226 (Mo. banc 2013)). Missouri courts interpret insurance policies according to their plain language, employing the meaning that "would be attached by an ordinary person of average understanding," *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc 2007). Individual provisions must be read "'in the context of the policy as a whole,'" *Maher Bros., Inc. v. Quinn Pork, LLC*, 512 S.W.3d 851, 855 (Mo. App. E.D. 2017) (citation omitted), with the court striving "to give a reasonable meaning to every

[8]In its motion and cross-motions for partial summary judgment, the Trust sought a declaration that the Products Hazard Exclusion did not apply to claims against Mallinckrodt alleging "bodily injury that arose *in whole or in part* from non-Mallinckrodt opioid drugs." D409, pp.1-2 (emphasis added); *see also* D413, p.7-8, 10-11; D525, p.3 (¶6); D526, p.3(¶5). The trial court denied the Trust's motions and granted the Insurers' motions, holding that the Claims fit within the Products Hazard definition. Because the trial court did not reach the Trust's "concurrent cause" argument—that claims alleging bodily injury caused by both Mallinckrodt's own products and by the unbranded promotional campaign are outside the Products Hazard and are thus not subject to the Exclusion, *see, e.g.,* D524, pp.29-30—this brief addresses only whether claims alleging that Mallinckrodt was liable for bodily injury wholly caused by the unbranded promotional campaign are "included within the products hazard" and thus subject to the Exclusion. If this Court reverses the trial court's grant of summary judgment, it should direct that court to consider the Trust's "concurrent cause" argument on remand.

provision and to avoid an interpretation that renders some provisions trivial or superfluous." *Nooter Corp.*, 536 S.W.3d at 264.

Rules of interpretation adopted by Missouri courts reflect both the purpose of insurance and the control that insurers, as drafters of the policies, have over their terms. Thus, recognizing that "'an insurance policy is a contract to afford protection to the insured'"—in other words, to transfer risk from the insured to the insurer—the "Missouri rule" requires courts to interpret policies "if reasonably possible, to provide coverage." *Harrison v. Tomes*, 956 S.W.2d 268, 270 (Mo. banc 1997) (citation omitted). Insureds "are entitled to the broad measure of protection necessary to fulfill their reasonable expectations … and their policies should be construed liberally in their favor to the end that coverage is afforded to the full extent that any fair interpretation will allow." *Crossman v. Yacubovich*, 290 S.W.3d 775, 781 (Mo. App. E.D. 2009) (citation and internal quotation marks omitted).

And because the insurer, which typically offers policies on a take-it-or-leave-it basis, "is in the better position to remove ambiguity"—policy language that is "reasonably open to different constructions"—"[i]t is well-settled that any such ambiguity must be construed against the insurer." *Burns v. Smith*, 303 S.W.3d 505, 509, 511-12 (Mo. banc 2010) (tracing Missouri's adoption of the "canon *contra proferentem*"). *See also Henderson v. Mass. Bonding & Ins. Co.*, 84 S.W.2d 922, 924 (Mo. Div. 1 1935) ("[S]ince the policies are prepared by the insurer, the insured usually has no voice in the wording of his contract, but must, to a large extent, take it as it is written. … The insurer can always prevent the necessity of strict construction against it, or any construction at all, by stating

the terms of any provision so clearly, definitely, and specifically as to make its meaning so plain that no room is left for construction.") (citations omitted).

Therefore, when construing ambiguous insurance provisions, courts do not consider extrinsic evidence to determine which possible interpretation best reflects the parties' intent. Instead, courts resolve the ambiguity against the insurer as drafter. *Burns*, 303 S.W.3d at 512-13; *see also Seeck*, 212 S.W.3d at 132; *Maher Bros.*, 512 S.W.3d at 855, 857. Similarly, courts read policy exclusions "narrowly, to afford the greatest possible coverage.'" *Harrison*, 956 S.W.2d at 270 (quoting *Gibbs v. Nat'l Gen. Ins. Co.*, 938 S.W.2d 600 (Mo. App. 1997)). *See also Burns*, 303 S.W.3d at 510 ("Missouri … *strictly* construes exclusionary clauses against the drafter.") (emphasis original). When an insurer relies on an exclusion to avoid coverage, it bears the burden of proving that exclusion applies. *Burns*, 303 S.W.3d at 510; *Stark Liquidation Co. v. Florists' Mut. Ins. Co.*, 243 S.W.3d 385, 394 (Mo. App. E.D. 2007). Likewise, because the Endorsement restricts coverage, it operates like an exclusion, *see, e.g., In re Estate of Carroll*, 857 S.W.2d 848, 852-53 (Mo.App. W.D. 1993) (insurance policy "may restrict or confine the coverage of the policy by either an affirmative delimitation of or by an exception to the coverage"). It should be construed as such, with the Insurers bearing the burden of showing that the restrictions on coverage apply.

C. The bodily injuries in the Claims at issue here are not included within the Products Hazard and thus are not subject to the Products Hazard Exclusion.

The Policies broadly provide coverage for "those sums that the insured"—Mallinckrodt—"becomes legally obligated to pay as damages because of 'bodily injury.'"

D414, p.47 (¶51); D431, p.13, App.13. The Policies' Products Hazard Exclusion, however, excludes coverage for "'bodily injury' … [i]ncluded within the 'products-completed operations hazard.'" D414, p.48 (¶54); D431, p.20 (¶2.f), p.37, App.14, App.17.

The Policies define the Products Hazard in relevant part to "include[] all 'bodily injury' … arising out of 'your product' or 'your work.'" D414, p.48 (¶55); D431, p.27 (¶16), p.28 (¶21), App.15-16. "Your product" means, in relevant part, "any goods or products, … manufactured, sold, handled, distributed or disposed of ("manufactured or sold") by: (a) You; (b) Others trading under your name; or (c) A person or organization whose businesses or assets you have acquired." D414, p.48 (¶56); D431, p.28 (¶21), App.16. "Your product" also "[i]ncludes: "[w]arranties or representations made at any time with respect to the fitness, quality, durability, performance or use of 'your product,'" as well as the "providing of or failure to provide warnings or instructions." D490, p.76 (¶66); D431, p.28 (¶21.b), App.16.

Although "your product" is a defined term in the Policies, the word "You"—used to define "your product"—is not. To determine "'the ordinary meaning of a term [in an insurance policy], this Court consults standard English language dictionaries.'" *Exotic Motors v. Zurich Am. Ins. Co.*, 597 S.W.3d 767, 772 (Mo. App. E.D. 2020) (brackets original) (quoting *Farmland Indus., Inc. v. Republic Ins. Co.*, 941 S.W.2d 505, 508 (Mo. banc 1997)). Webster's Third New International Dictionary—which this Court has described as "especially well-suited to the task of determining plain meaning," *Exotic Motors*, 597 S.W.3d at 772—defines "you" in relevant part as follows: "**1a:** the one or ones

being addressed." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2653 (2002).

In the context of the Policies, the "one being addressed" is, of course, the insured, Mallinckrodt. Thus, under its plain terms, the Products Hazard Exclusion bars coverage only for claims for bodily injury arising out of (1) opioid products Mallinckrodt manufactured, sold, or distributed; or (2) warranties or representations about Mallinckrodt's own products. The Trust is not seeking coverage for claims for bodily injury arising solely out of Mallinckrodt's own opioid drugs or representations about those products. Rather, the Petition is focused on injuries alleged to arise out of Mallinckrodt's "unbranded promotional activities to change the way the medical community and the public perceived, prescribed, and used opioids in general, and their concomitant or resulting use of other manufacturers' opioid products and illicit opioids." D398, p.56 (¶134).

The Claims at issue here do not fall within the Products Hazard, and thus are not excluded from coverage by the Products Hazard Exclusion. Under Missouri's coverage-promoting rules of insurance-contract interpretation, the Insurers bear the burden of demonstrating that the Exclusion applies, *e.g., Stark Liquidation Co.*, 243 S.W.3d at 394, and any ambiguities are construed against them. *Burns*, 303 S.W.3d at 511-12. In other words, the Insurers must establish that their interpretation of the Products Hazard Exclusion is the only reasonable one.

The Insurers cannot meet their burden to show that the Exclusion, when read narrowly as required under Missouri law, may only be reasonably interpreted to bar

coverage for bodily injury arising from representations or warranties made during the unbranded promotional campaign which led to the abuse of non-Mallinckrodt opioids. That campaign was directed to opioids in general and intentionally refrained from mentioning Mallinckrodt's products to avoid the requirements of federal law. *See, e.g.,* D414, pp.4-5 (¶9.c-d), p.22 (¶21.r), p.25 (¶25.f-¶25.i); D416, pp.59 (¶¶131-32); D417, p.126 (¶385); D420, pp.29-30 (¶¶87-91). Moreover, Mallinckrodt used third parties, including KOLs and Front Groups, in executing its unbranded campaign to create an air of neutrality and independence. *See, e.g.*, D414, p.3 (¶9.a), p.4 (¶9.b, ¶9.d), p.5 (¶9.e), p.10 (¶17.b), p.18 (¶21.j), p.30 (¶¶33.c-d), p.32 (¶38.f), p.36 (¶42.f); D416, p.13 (¶7), p.59 (¶132), p.100 (¶234); D417, p.94 (¶292); D419, p.31 (¶109); D422, p.15 (¶¶52, 54); D423, p.26 (¶¶92, 95); D424, p.26 (¶95). The Insurers chose to define "your product" to mean only Mallinckrodt's own goods and products and representations and warranties about those products, with the narrow addition of products "traded under" Mallinckrodt's name or sold by a business that Mallinckrodt acquired. That "your product" is expanded to include only those two limited groups of products, if they exist,[9] reinforces the conclusion that no other products—let alone *all* opioids, legal and illegal—constitute or qualify as "your [Mallinckrodt's] product."

An "ordinary person of average understanding" reading the "plain language" of the "your product" definition would conclude that it includes only opioids manufactured or

[9]The Insurers have not alleged, let alone offered evidence, that non-Mallinckrodt entities traded under the Mallinckrodt name, or that Mallinckrodt acquired the business or assets of any other opioid manufacturer or distributor.

sold by Mallinckrodt and warranties or representations specific to those opioids, and that broader statements, made by third parties, about opioids in general without mentioning Mallinckrodt's products fall outside the definition. Likewise, the ordinary person reading the plain terms of the Products Hazard Exclusion, together with the referenced Products Hazard and "your product" definitions, would conclude that the Exclusion does not bar coverage for Claims that do not allege liability based on the ingestion of Mallinckrodt opioids or on warranties or representations about Mallinckrodt's opioids.

Even if the phrase "your products" could also be interpreted to include representations made in the unbranded promotional campaign, the Exclusion would be considered ambiguous. That ambiguity would have to be resolved against the Insurers and in favor of the Trust, as transferee of the insured, Mallinckrodt. *See, e.g., Burns*, 303 S.W.3d at 510.

In the trial court, the Insurers argued that Missouri courts have accorded a "'very broad'" meaning to the phrase "arising out of" in the Products Hazard definition,[10] "'much broader than the words 'caused by.'" *E.g.,* D503, pp.18-19 (quoting *Fid. & Cas. Co. of N.Y. v. Wrather*, 652 S.W.2d 245, 251 (Mo. App. 1983)). But no matter how expansively this Court interprets "arising out of," that prepositional phrase is still tethered to its object: "your product." The Policies exclude coverage only if the alleged bodily injury arises out of *Mallinckrodt's* products, which by definition includes representations and warranties about *Mallinckrodt's* products alone. *Cf. Cook's Fabrication & Welding, Inc. v. Mid-*

[10]"[A]ll 'bodily injury' … arising out of 'your product' or 'your work.'" D431, p.27 (¶16), App.15.

Continent Casualty Co., 364 S.W.3d 639, 643-44 (Mo. App. E.D. 2012) (holding that exclusion of "[p]roperty damage to 'your work' arising out of it" was "limited to damage inflicted upon *a particular item or items*, namely, the 'work' performed by" the insured) (emphasis added).

Again, the Trust is not asserting that the Policies provide coverage for bodily injury occurring after the ingestion of Mallinckrodt's own opioid products or injury arising from representations or warranties specific to those products. Given that the Products Hazard Exclusion must be construed narrowly—regardless of how expansively the Court interprets the phrase "arising out of"—the Exclusion does not preclude coverage for bodily injuries that are allegedly due to warranties and representations made about all opioids as a class, with no mention of Mallinckrodt's products.

To conclude otherwise would be to rewrite the narrow "your product" definition in the Policies, for example, to include "[w]arranties or representations made at any time with respect to the fitness, quality, durability, performance or use of 'your product' or of the type, category, or class of goods or products to which 'your product' belongs." But Missouri courts do not "rewrite insurance policies to add language …. that is not there." *Jones v. Mid-Century Ins. Co.*, 287 S.W.3d 687, 691 & n.1 (Mo. banc 2009). Doing so would not only ignore the court's duty to read exclusions narrowly, but would excuse the Insurers' failure, as the parties that promulgated the form Policies, to state their terms as "clearly, definitely, and specifically" as necessary to avoid ambiguity. *Id.* n. 1 (quoting *Henderson*, 84 S.W.2d at 924-25); *see also Jones v. Columbia Mut. Ins. Co.*, 700 S.W.2d

187, 188 (Mo. App. S.D. 1985) ("It is incumbent upon an insurer to express its exclusions in clear and unambiguous terms.").

The Insurers chose not to define "your product" to make explicit that any warranties or representations about opioid products in general would come within the definition, and instead specified that only statements about the insured's products would do so. In construing policies in favor of the insured, Missouri courts have held time and again that an insurer's failure to use language that was sufficiently precise to avoid ambiguity weighs in favor of coverage. *See, e.g., Burns*, 303 S.W.3d at 513 ("Had Farmers intended to sell a policy containing an exclusion that applied to all trades, occupations or businesses without regard to where they were conducted, … it should have written the policy so."); *Columbia Mut. Ins. Co. v. Epstein*, 239 S.W.3d 667, 673 n.2 (Mo. App. E.D. 2007) ("If Columbia did not intend to cover such claims when insuring concrete layers, it might have considered using language directed to the particular hazards and risks of that business rather than boilerplate. It is appropriate to resolve doubtful questions of construction in favor of the insured."); *Maher Bros.*, 512 S.W.3d at 856 n.6 ("'It would have been a simple matter for the writer of the insurance contract to clearly state that care, custody or control of its insured, no matter how slight, would exclude coverage if that was the intent of the parties.'") (citation omitted).

Because the Insurers, as the drafters of the policies, could have avoided any potential ambiguity and worded the policies to ensure the limitation of coverage they now claim was intended, their failure to do so warrants reversal of the grant of summary judgment.

D. Ignoring well-established principles of Missouri law, the trial court impermissibly rewrote the Policies for the Insurers.

In concluding that the Policies excluded coverage for bodily injury claims based not on the use of Mallinckrodt's own opioid products but on unbranded representations regarding opioids in general, the trial court disregarded long-established principles of Missouri law favoring coverage, requiring narrow interpretation of policy exclusions, and precluding the rewriting of insurance contracts. The court ignored the canons of interpretation and instead focused, as the Insurers urged, *see, e.g.,* D487, p.31, on the phrase "arising out of" in the Products Hazard definition ("all 'bodily injury' … arising out of 'your product' or 'your work.'") D431, p.27 (¶16), App.15. The court stated that "[u]nder Missouri law, the phrase 'arising out of,' when used in an insurance policy, is interpreted broadly to mean 'originating from,' …" or 'having its origins in,' or 'growing out of,' or 'flowing from' and includes a much broader spectrum than the term 'caused by' or the concept of proximate causation." D541, p.2 (citations omitted), App.2.

Based on this expansive interpretation of "arising out of," the trial court found as follows:

> Mallinckrodt faced liability concerning injury that "grew out of" or "originated from" and thus "arose out of" Mallinckrodt's opioid products, including *the manner in which Mallinckrodt sold its opioids and opioid ingredients to the public*, and the representations that Mallinckrodt made as part of its alleged effort to increase its sales of its opioid products and maintain its market position as a leading seller and manufacturer of opioids."

D541, p.3 (emphasis added), App.3.

The court noted that the Policies define "your product" to include "not only 'products' but also 'representations' Mallinckrodt made about its products." D541, p.3,

App.3. It then gave two reasons for its conclusion that "[a]ny alleged injuries caused by Mallinckrodt's 'unbranded' representations arose out of Mallinckrodt's products": (1) because "those unbranded representations were part of Mallinckrodt's efforts to boost its own opioid product sales" and (2) because those "unbranded representations about the safety and efficacy of opioids in general encompass Mallinckrodt's products." D541, p.3, App.3.

Both reasons the trial court gave for holding that the injuries alleged in the Claims at issue "arose out of Mallinckrodt's products" ignored or misapprehended the definition of "your product"—the object of "arising out of." In holding that the injuries arose out of Mallinckrodt's products because the unbranded representations "were part of Mallinckrodt's efforts to boost its own opioid product sales," the court appears to have concluded—as National Union argued, D487, p.39—that because the *motive* behind Mallinckrodt's unbranded promotional campaign was to increase sales of its own products, any bodily injuries caused by the campaign "arose out of" Mallinckrodt's products. But the Policies enlarged the definition of "your product" to include, in addition to Mallinckrodt's products themselves, only four specific kinds of communications—warranties and representations "with respect to" Mallinckrodt's products, plus warnings and instructions. The Policies necessarily excluded from the definition all other kinds of communications about Mallinckrodt's products as well as any other business activities related to those products. *See Burns*, 303 S.W.3d at 510-11 (where policy defined "business" to mean two specific kinds of business activities and the injury at issue arose from a business activity

that did not fully meet the description of either activity, the injury was not excluded from coverage).

The unbranded promotional campaign intentionally avoided references to specific opioid products, *see, e.g.,* D414, p.25 (¶¶25.f-25.i), D420, pp.29-30 (¶¶87-88, 90-91), and the sales motive or business goals behind the campaign are irrelevant. By relying on "the manner in which Mallinckrodt sold its products," D541, p.3, App.3, to conclude the alleged injuries "arose out of" Mallinckrodt's products, the trial court improperly swept Mallinckrodt's marketing and sales "efforts" into the definition of "your products." Reading "your products" to include the entirety of Mallinckrodt's business activities that touch on its opioid products—or anything other than the four specified kinds of communications—impermissibly rewrites the definition. *See, e.g., Jones v. Mid-Century Ins. Co.*, 287 S.W.3d at 691.

Likewise, the court's second rationale for its holding—that "unbranded representations about the safety and efficacy of opioids in general encompass Mallinckrodt's products"—ignores both the nature of "unbranded representations" and the definition of "your product." Again, the unbranded promotional campaign steered clear of representations about or even any mention of Mallinckrodt's own products, and even the speakers and publications had no discernible link to Mallinckrodt. *See, e.g.,* D414, p.4 (¶9.d), p.10 (¶17.b); D416, p. 59 (¶132); D419, p.31 (¶109). Neither the insurers' briefing nor the trial court cited any cases to support an interpretation of "your product" to include not only representations and warranties about products "manufactured, sold, handled, distributed or disposed of by" the insured, but also general representations and warranties

about the class, category, or type of product at issue. In broadening the meaning of "your product" in that way, the court disregarded its duty to give policy terms the meaning that "would be attached by an ordinary person of average understanding," *Seeck*, 212 S.W.3d at 132. Again, had the Insurers intended that "your product" include representations about the Insured's own products as well as general representations about the class or category of those products, they easily could have done so.

Additionally, the circuit court's reliance on cases stating that "arising out of" should be interpreted broadly, D541, p.2, App.2, cannot compensate for the disconnect between, on the one hand, the Policies' definition of "your product," and on the other, Mallinckrodt's motives in undertaking the unbranded campaign and general representations made on its behalf regarding opioids as a class. In those cases, the facts on which an injury was held to have arisen out of the insured's conduct at issue are poles apart from the circumstances here. The object of "arising out of" in the policies in question was not as narrowly defined as "your product" in the Policies here, and the relationship between the alleged harm and the conduct covered or excluded by the policies was readily apparent.

The trial court cited two cases that did not involve coverage exclusions, as this case does, and therefore the appellate courts did not invoke the principle that exclusions must be read "narrowly," *Harrison*, 956 S.W.2d at 270. Instead, the courts defined "arising out of" expansively in line with "the established rules for the construction of insurance contracts … that a policy must be liberally construed in favor of the insured." *See Schmidt v. Utils. Ins. Co.*, 182 S.W.2d 181, 183 (Mo. Div. 1 1944).

In *Schmidt,* a coal company's policy insured against liability "arising out of use" of its automobiles, including "the loading and unloading thereof." *Id.* at 182-83. The Supreme Court held that the policy covered a claim for injuries to a pedestrian who tripped over blocks the insured's truck drivers left on the sidewalk after using them as ramps to unload coal. *Id.* at 182, 186. Observing the requirement that the policy had to be "liberally construed" in favor of coverage, the Court determined "we must hold that the policy …does not require that the injury be the direct and proximate result, in any strict legal sense of that term, of the use of the automobile." *Id.* at 183. Rather, the Court described its inquiry as "whether the negligent act and resulting injury was a natural and reasonable incident or consequence of the use of the trucks …, though not foreseen or expected; and whether … it was possible to trace the negligent acts and resulting injury as reasonably incident to, and closely connected with the use of the trucks." *Id.* at 184. *See also id.* ("Liability should not be extended to a result distinctly remote, although the chain of causation be not broken."). Because the use of the blocks, including the "disposition of them" on the sidewalk, was "directly connected with and necessarily incident to the operation and use of the trucks" in delivering coal, the pedestrian's injuries "arose out of the use of" the insured's trucks and the insurer was liable under the policy. *Id.* at 185, 186.

Colony Insurance Co. v. Pinewoods Enterprises, Inc., 29 F. Supp.2d 1079, 1082-84 (E.D. Mo. 1998), likewise did not involve interpretation of a policy exclusion. The insured leased a campground and its policy extended coverage to "liability arising out of your

operations or premises owned by or rented to you."[11] *Id.* at 1082. A deck on the leased premises collapsed, injuring a number of people whom the lessee had charged admission to use campsites. *Id.* at 1080, 1084. Noting that "'arising out of' has been interpreted by Missouri courts to be a very broad, general and comprehensive phrase to mean 'originating from, or 'having its origins in' or 'growing out of' or 'flowing from,'" the district court held the insurer was obligated to provide coverage for the lawsuit filed by the injured people because the collapse arose out of the insured's operations in admitting people to the campsites, and because the deck was part of the insured's leased premises. *Id.* at 1083.

Capitol Indemnity Corp. v. 1405 Associates, Inc., 340 F.3d 547, 550 (8th Cir.2003), is the only case the circuit court cited that involved the interpretation under Missouri law of a policy exclusion. The insured hotel's policy excluded coverage for personal injury "to … [a] person arising out of any … [t]ermination of that person's employment; or … [e]mployment related practices, policies, acts or omissions." *Id*. After its manager left the hotel's employ, the hotel owner reported to authorities that the manager had not turned over hotel receipts and she was arrested. *Id.* at 548. She sued the hotel alleging, among other things, false arrest and wrongful termination, and the hotel sought coverage for the lawsuit. *Id.* at 548-49. Noting that "'arising out of' may be established by a 'simple causal relationship … between the accident or injury and the activity of the insured,'" the Eighth

[11]As in *Schmidt*, the policy provision at issue in *Colony Insurance* extended coverage to "*liability* arising out of" the specified conduct of the insured, in contrast to the Policies here, which define the Products Hazard as "'*bodily injury*' … arising out of 'your product' or 'your work.'" *E.g.,* D431, p.27 (¶16), App.15.

Circuit found "such a relationship exists here, as the incidents of which [the manager] complains … all flow directly from [her] employment" with the insured. *Id.* at 550.

In all three cases, the courts applied the plain meaning of the policy language and came to the unremarkable conclusion that the insured's conduct came within the pertinent coverage provision or exclusion. In contrast, there is no "simple causal relationship"—or any causal relationship at all—between the bodily injuries alleged in the Claims and the relevant "activity of the insured" here: Mallinckrodt's products and its representations and warranties about those products. The court erred as a matter of law in concluding that Claims based on the unbranded promotional campaign arose out of Mallinckrodt's products because any communications or business activities other than Mallinckrodt's representations and warranties about its own products fall outside the "your product" definition and thus outside the Products Hazard and the Products Hazard Exclusion. This Court should reverse the grant of summary judgment in favor of the Insurers.

CONCLUSION

For the reasons stated, this Court should reverse the judgment in favor of Insurers. In addition, as the Supreme Court and this Court have recognized, "the overruling of a party's motion for summary judgment can be reviewed when its merits are intertwined completely with a grant of summary judgment in favor of an opposing party." *See, e.g., John Patty, D.O., LLC v. Mo. Prof'ls Mut. Physicians Prof'l Indem. Ass'n*, 572 S.W.3d 581, 593 (Mo. App. E.D. 2019) (quoting *Bob DeGeorge Assocs. v. Hawthorn Bank*, 377 S.W.3d 592, 596-97 (Mo. banc 2012)). The Trust's and the Insurers' summary judgment motions and cross-motions raised the same issue: whether Claims alleging bodily injury

due to Mallinckrodt's unbranded promotional campaign fall outside the Products Hazard and thus outside the Exclusion and the Endorsement's claims-made-and-reported requirements. Therefore, because the trial court erred in holding that the Claims were within the Products Hazard and granting the Insurers' summary judgment motions, the court likewise erred in denying the Trust's motions for partial summary judgment arguing that Claims alleging Mallinckrodt was liable based entirely on the unbranded campaign are outside the Products Hazard. *See John Patty, D.O.*, 572 S.W.3d at 594 ("The sole question before the trial court was how the Liability Limit clause in the Policy should be interpreted and applied to the undisputed facts of this case. … Therefore, our holding that the Policy provides for two Liability Limits establishes both that MPM-PPIA is not entitled to judgment as a matter of law and that Appellants are so entitled."). Accordingly, the Trust is entitled not only to vacatur of the summary judgment in favor of the Insurers, but entry of partial judgment in its favor holding that Claims based entirely on the unbranded campaign and non-Mallinckrodt opioid drugs fall outside the Products Hazard.

Should this Court hold that Claims based solely on the unbranded campaign fall outside the Products Hazard, it should direct the circuit court on remand to address all remaining issues, including the Trust's "concurrent cause" argument, *see* n.8, *ante*, *i.e.,* that Claims alleging that Mallinckrodt was liable for bodily injury caused by the use of both Mallinckrodt and non-Mallinckrodt products are likewise outside the Products Hazard.

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Respectfully submitted,

DOWD BENNETT LLP

By: /s/James F. Bennett
James F. Bennett, #46826
jbennett@dowdbennett.com
Elizabeth C. Carver, #34328
ecarver@dowdbennett.com
7676 Forsyth Blvd., Suite 1900
St. Louis, Missouri 63105
(314) 889-7300 (telephone)
(314) 863-2111 (facsimile)

and

GILBERT LLP
Kami E. Quinn
(admitted *pro hac vice*)
Richard J. Leveridge
(admitted *pro hac vice*)
Daniel I. Wolf
(admitted *pro hac vice*)
Michael B. Rush
(admitted *pro hac vice*)
700 Pennsylvania Avenue, SE
Suite 400
Washington, DC 20003
(202) 772-2200 (telephone)

Attorneys for Appellant
Opioid Master Disbursement Trust II

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that this Brief for Appellant includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and this Court's Local Rule 360. I further certify that this brief contains 10,728 words, excluding the cover, the tables, this certificate, the signature block, and the Appendix, as determined by the Word for Microsoft 365, Version 2019 word-counting system in Times New Roman with a typeface of 13 points.

/s/ *James F. Bennett*

CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2025, pursuant to Supreme Court Rule 103.08, I electronically filed the foregoing Brief for Appellant with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to all counsel of record.

/s/ *James F. Bennett*
Attorney for Appellant