UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Appellate Case No. 18-3392

EMMIS COMMUNICATIONS CORPORATION,	)	
Plaintiff–Appellee,	)	Appeal from the United States District Court for the Southern District of Indiana
v.	)	Case No. 1:16-cv-0089-WTL-DML
ILLINOIS NATIONAL INSURANCE COMPANY,	)	District Judge William T. Lawrence
Defendant–Appellant.	)	

APPELLEE'S BRIEF

Steven C. Shockley, Counsel of Record
Richard A. Kempf
Thomas F. O'Gara
Taft Stettinius & Hollister LLP
One Indiana Square, Suite 3500
Indianapolis, Indiana 46204
Phone: 317.713.3500

Attorneys for Appellee,
Emmis Communications Corporation

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-3392

Short Caption: Emmis Communications Corporation v. Illinois National Insurance Company

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Emmis Communications Corporation

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Taft Stettinius & Hollister LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: /s/ Steven C. Shockley Date: February 21, 2019

Attorney's Printed Name: Steven C. Shockley

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No

Address: One Indiana Square, Suite 3500
Indianapolis, Indiana 46204

Phone Number: 317.713.3510 Fax Number: 317.713.3699

E-Mail Address: sshockley@taftlaw.com

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-3392

Short Caption: Emmis Communications Corporation v. Illinois National Insurance Company

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Emmis Communications Corporation

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Taft Stettinius & Hollister LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: /s/ Richard A. Kempf Date: February 21, 2019

Attorney's Printed Name: Richard A. Kempf

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes _____ No X

Address: One Indiana Square, Suite 3500
Indianapolis, Indiana 46204

Phone Number: 317.713.3609 Fax Number: 317.713.3699

E-Mail Address: rkempf@taftlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Jurisdictional Statement

The jurisdictional summary in Appellant's Brief ("Br.") is complete and correct. [Br. 1.]

Statement of the Issues

1. Is the Reported Claim Exclusion—which eliminates coverage for Claims "as reported" to Emmis's prior insurer—ambiguous as to the time a Claim must be reported, and therefore to be construed in favor of coverage under Indiana law?

2. Under Indiana's narrow construction of the operative term used in the "Arising-From" Exclusion to mean that one thing must be the "efficient and predominating cause" of another, did the district court correctly decide the COF Suit did not arise from the Shareholder or Alden Suits?

3. Did the district court correctly construe the Related Facts Exclusion—which purports to eliminate coverage if the COF Suit was "in any way related … to … related facts" alleged in the Shareholder or Alden Suits—to require related "operative" facts, where literal application of the Exclusion would lead to absurd results?

4. Did the district court correctly conclude that the Wrongful Acts Exclusion does not apply, because the COF Suit did not allege "Wrongful Acts that are the same or that are related to" those alleged in the Shareholder or Alden Suits?

5. As an alternative ground for affirmance, would the Indiana Supreme Court agree with the overwhelming majority of jurisdictions that analyze the

duty to advance defense costs the same as the duty to defend and hold that the Securities Claims in the COF Suit alleging negligence triggered INIC's duty to advance?

Statement of the Case

1. Origins of the dispute

In September 2011, Emmis paid INIC $181,180 for $10,000,000 of liability insurance covering "Claims," including "Securities Claims," first made during the policy period of October 1, 2011, through October 1, 2012 ("Policy"). [Doc. 1-1 at 26, 30, 46.][1] Emmis also accepted an enhanced "Securities Claim Retention" of $1,000,000 under the Policy. [*Id.* at 26.] The Policy required INIC to advance to Emmis, on a current basis after exhaustion of the retention amount, covered "Defense Costs" Emmis incurred in defending covered Claims and Securities Claims. [*Id.* at 38.]

On April 16, 2012, Corre Opportunities Fund and four other holders of Emmis's Preferred Stock ("Shareholder-Plaintiffs") sued Emmis, its officers, and its directors for injunctive and declaratory relief in the United States District Court for the Southern District of Indiana ("COF Suit"), alleging violations of federal securities law, Indiana corporation law, and Indiana common law. [Doc. 54-6.][2]

---

[1] In citations to the record, "Doc." refers to the document number in the district court's civil docket, and the page number refers to the "PageID#".

[2] The Shareholder-Plaintiffs filed an amended complaint on May 18, 2012. [Doc. 54-2 at 676–735.] It is identical to the original, except it adds a sentence in paragraph 20 and inserts a new Count VII, renumbering the counts that follow. [*Compare* Doc. 54-6 at 880, ¶20 and *id.* at 920–29, ¶¶173–233 *with* Doc. 54-2, ¶¶20, 173–244.] So Emmis will sometimes cite the amended complaint to include the original.

Two days later, Emmis's insurance broker ("Marsh") notified INIC (and other insurers covering policy periods preceding INIC's) of the COF Suit. [Doc. 54-2 at 737–40.]

INIC did not make any coverage determination until 15 months later, on June 10, 2013. [Doc. 60-5 at 1001.] By then, Emmis had successfully defeated the Shareholder-Plaintiffs' motion for preliminary injunction because they failed to demonstrate a likelihood of success on the merits of their claims. *See Corre Opportunities Fund, LP v. Emmis Commc'ns Corp.*, 892 F.Supp.2d 1076, 1086–1100 (S.D. Ind. 2012). The Shareholder-Plaintiffs had also filed a materially different second amended complaint in October 2012. [Doc. 54-5]. INIC refused to advance or reimburse Emmis's Defense Costs based on an exclusion added as Endorsement #28 to the Policy ("Exclusion"). [Doc. 60-5 at 1003–04.] INIC denied coverage relying on the allegations of the original complaint and asserting the COF Suit arose from and was related to "Events" described in the Exclusion. [*Id.*] There is no dispute those Events are the "Shareholder Suits" and the "Alden Suit" [*see* Br. 20], described next.

2. The Shareholder Suits

In April 2010, Jeff Smulyan—Emmis's founder, largest shareholder, board chairman, and CEO—formed an entity, JS Acquisition, LLC ("JSA"), to acquire all outstanding shares of Emmis's Class A common stock in a "go-private"

'transaction ("Go-Private Attempt").[3] [Doc. 54-2 at 538–39, ¶58.] JSA entered a contract with Alden Global ("Alden") to finance the transaction. [*Id.*]

The proposed transaction called for JSA to pay a premium over market price for Emmis's common stock. [*Id.*] Among other conditions, the transaction required the holders of two-thirds of the Preferred Stock to exchange their shares for subordinated notes and consent to amendment of the terms of the Preferred Stock to eliminate the right of redemption upon a go-private transaction and to convert Preferred Stock of dissenting shareholders to common stock. [*Id.*; *id.* at 541, ¶64.] Seven class action complaints were filed by Emmis shareholders seeking to enjoin the go-private transaction ("Shareholder Suits"). [Doc. 54-2 at 501–02.] Two of those complaints are in the record below.

The first, *Ross v. Emmis*, filed in Indiana state court on April 27, 2010 [Doc. 54-2 at 455–72 ("Ross Suit")], sought certification of a class of Emmis's common shareholders. [*Id.* at 465, ¶39.] The Ross Suit did not assert any claims under federal law. Count I alleged Emmis's officers and directors breached their fiduciary duties by failing to maximize the common-share price in the go-private transaction and to disclose all material information necessary for shareholders to cast an informed vote on the transaction. [Doc. 54-2 467–69, ¶¶41–45.] Count II alleged Emmis, JSA, and Alden knowingly aided those breaches of fiduciary duty. [*Id.* at 469–70, ¶¶46–49.] The Ross Suit sought to enjoin the Go-Private Attempt and requested declaratory and monetary relief. [*Id.* at 470–71.]

[3] Smulyan had unsuccessfully attempted to take Emmis private in 2006. [Doc. 54-5 ¶14.]

The other Shareholder Suit complaint in the record, *Frank v. Emmis*, filed in Indiana state court on June 4, 2010 [Doc. 54-2 at 527–58 ("Frank Suit")], sought certification of separate classes of Emmis's common and preferred shareholders. [*Id.* at 527, ¶1.] The Frank Suit also did not assert any federal claims. **Count I** alleged Emmis's directors breached fiduciary duties by failing to maximize payment for class members' stock and failing to disclose information material to the go-private transactions. [Doc. 54-2 at 552–55, ¶¶97–108.] **Count II** alleged Smulyan, JSA, and Alden aided and abetted the directors' breaches of fiduciary duties. *Id.* at 555–56, ¶¶109–15.] The Frank Suit sought injunctive, declaratory, and monetary relief. [*Id.* at 556–57.]

In August 2010, however, Alden withdrew its support for the Go-Private Attempt. [Doc. 54-2 at 574, ¶14.] Alden's decision terminated the Attempt, because the transactions required consent of holders of two-thirds of the Preferred Stock, and Alden controlled 42%. [Doc. 54-2 at 537, ¶50; *id.* at 538–40, ¶58.] All seven Shareholder Suits were voluntarily dismissed. [Br. 8.] Emmis's defense costs in the Shareholder Suits were covered by a directors-and-officers liability policy issued by Chubb Insurance Company ("Chubb") for the period October 1, 2009 to October 1, 2010 ("Chubb Policy"). [Br. 7.]

3. The Alden Suit

In September 2010, JSA sued Alden for breach of contract for backing out of the go-private transaction ("JSA Suit"). [Doc. 54-2 at 571–75.] To finance the litigation, JSA allegedly borrowed $200,000 from Emmis with approval of the directors. [*Id.* at 582, ¶2.]

In response, in February 2011, Alden filed a derivative action in New York State court ("Alden Suit"). [Doc. 52-4 at 581–602.] **Counts I through III** alleged Emmis's directors breached their fiduciary duties by approving the purported loan to JSA. [*Id.* at 594–98, ¶¶40–50.] **Count IV** alleged that JSA, as Smulyan's alter-ego, breached fiduciary duties by securing and approving the loan. [*Id.* at 598–99, ¶¶51–53.] **Count V** alleged Emmis's directors and JSA conspired to facilitate the breaches of fiduciary duty. [*Id.* at 599–600, ¶¶54–56.] The Alden Suit sought rescission of the loan, injunctive relief, a constructive trust, and damages. [*Id.* at 600–01.] Although the Alden Suit was filed outside the Chubb Policy coverage period, Chubb paid Emmis's defense costs, because the Alden Suit was related to the Shareholder Suits. [Br. 10.]

4. The COF Suit

A. The original and amended complaints

On April 16, 2012—two years after the Ross Suit was filed in the Shareholder Suits and 14 months after the Alden Suit was filed—the COF Suit was filed against Emmis and its officers and directors. [Doc. 54-6.] In that complaint, and the amended complaint filed May 18, 2012 [*see* note 2, above], the Shareholder-Plaintiffs asserted Securities Claims for violations of federal securities law, Indiana corporation law, and Indiana common law based on three sets of transactions (described below) by which Emmis gained control over the vote of two-thirds of its outstanding Preferred Stock. [Doc. 54-2 at 697–731, ¶¶61–244.] The Shareholder-Plaintiffs sought to enjoin Emmis from directing

the vote to amend the rights of the Preferred Stock, set out in Emmis's articles of incorporation, in a way that would devalue it. [*Id.* at 731–33.]

(1) Total Return Swap Transactions

The COF Suit alleged that in October 2011, without filing any proxy-solicitation or tender-offer statements with the Securities Exchange Commission ("SEC"), Emmis approached some of its largest preferred shareholders about repurchasing Preferred Stock via (i) total return swap transactions ("TRS Transactions"), by which Emmis would pay for the Preferred Stock, but title would remain in the seller's name so it would continue to be outstanding and able to vote, and (ii) voting agreements ("TRS Voting Agreements"), which would give Emmis irrevocable proxies to direct the vote of the Preferred Stock. [Doc. 54-2 at 685, ¶¶29–30.]

In November 2011, Emmis filed two reports with the SEC on Form 8-K, disclosing that it had entered TRS Transactions and TRS Voting Agreements with owners of almost 57% of the outstanding shares of Preferred Stock. [*Id.* at 687–88, ¶¶ 34–35.]

(2) Dutch Auction Tender Offer

On December 1, 2011, Emmis filed a tender-offer statement with the SEC, disclosing a modified "Dutch Auction Tender Offer" to purchase outright (not by TRS Transactions) up to $6,000,000 in Preferred Stock. [*Id.* at 690, ¶¶41–42.] The filing also disclosed that if Emmis succeeded in obtaining voting control over two-thirds of the Preferred Stock, Emmis "may" elect to amend its terms.

[*Id.* at 691, ¶44.] Emmis made these same disclosures in SEC filings on January 5 and 30, 2012, announcing it had purchased and retired 164,400 shares in the tender offer and an additional 25,700 shares. [*Id.* at 691–92, ¶¶45, 47.]

In the January 30 filing, Emmis disclosed that the total of authorized but unissued shares of Preferred Stock had reached 452,680, and that if 390,604 shares were reissued to a third-party with a voting agreement allowing Emmis to direct the vote, it would have voting control over two-thirds of the Preferred Stock. [*Id.* at 692, ¶49.] Emmis again disclosed that, if it were able to acquire voting control, it "may" elect to amend the terms of the Preferred Stock. [*Id.* ¶50.]

(3) The Trust and Trust Voting Agreement

On March 13, 2012, Emmis filed a preliminary proxy statement that disclosed the company had created an employee-benefit-plan trust ("Trust") to which it would (and after shareholder approval, did) issue 400,000 shares of Preferred Stock subject to a voting agreement ("Trust Voting Agreement") allowing the trustee (Smulyan) to direct the vote of those shares. [*Id.* at 693, ¶51.] This transaction gave Emmis control over the vote of more than two-thirds of the Preferred Stock. [*Id.* at 694, ¶53.] The March 13 preliminary proxy statement also announced plans for a special meeting of shareholders to vote on proposed amendments to Emmis's articles of incorporation to eliminate certain

rights of the Preferred Stock that would, according to the Shareholder-Plaintiffs, render it "worthless." [*Id.* at 693–94, ¶¶51 –53.][4] They filed the COF Suit alleging Securities Claims (as defined in INIC's Policy) against Emmis, its officers, and its directors, seeking to enjoin the vote on the proposed amendments to the terms of the Preferred Stock. [*Id.* at 696–97, ¶60.]

(4) Claims alleged in the original and amended complaints

Counts I through VI of the amended complaint alleged defendants violated federal securities law (the Securities Exchange Act of 1934 and related SEC regulations) by failing to make required filings in connection with the repurchase of Preferred Stock, and that the filings that were made failed to provide complete and accurate disclosures of Emmis's plan to acquire control over the vote of two-thirds of the Preferred Stock to amend its terms. [*Id.* at 697–720, ¶¶61–172.] The Shareholder-Plaintiffs alleged the violations in Counts I through III were "at least negligent, if not reckless or deliberate." [*Id.* at 698, 701, 707, ¶¶68, 82, 113.] **Count VII** (which was added in the amended complaint) alleged Emmis violated Indiana law by repurchasing Preferred Stock while dividends remained in arrears, contrary to limitations in the Articles of Incorporation. [*Id.* at 720–22, ¶¶173–83.] **Count VIII** alleged that under Indiana corporation law, the Preferred Stock subject to the TRS Transactions and Voting Agreements had been extinguished and therefore could not be voted. [*Id.*

[4] In the March 13 preliminary proxy statement quoted in the complaint [Doc. 54-6, ¶56], Emmis's directors endorsed the amendments, because they would "have a positive effect on the overall capital structure of Emmis, which will have a beneficial impact on the holders of the Common Stock." [Doc. 54-2 at 642 (quoting proxy statement); *see also* Doc. 60-1 at 963.]

at 722–24, ¶¶184–200.] **Count IX** alleged that issuance of 400,000 shares of Preferred Stock to the Trust, with the Trust Voting Agreement that gave Emmis control of two-thirds of the vote, violated Emmis's articles of incorporation, and that those shares were not validly issued and could not be voted under Indiana corporation law. [*Id.* at 724–27, ¶¶201–16.] **Count X** alleged the employee benefit plan and Trust were a sham created to give Emmis control over the vote of the Preferred Stock, and therefore the shares issued to the Trust could not be voted under Indiana corporation law. [*Id.* at 727–28, ¶¶217–225.] **Counts XI and XII** alleged Emmis's directors and Smulyan breached their fiduciary duties under Indiana law by approving the transactions that gave Emmis voting control over the Preferred Stock. [*Id.* at 728–31, ¶¶226–44.]

On August 31, 2012, Judge Barker denied the Shareholder-Plaintiffs' motion for preliminary injunction, because they failed to establish a likelihood of success on the merits of their claims. *Corre,* 892 F.Supp.2d at 1086–1100. On September 4, Emmis held the vote on the amendments to the terms of the Preferred Stock, which were approved. [Doc. 54-5 at 857–58, ¶¶54–55.] On October 18, the Shareholder-Plaintiffs filed their second amended complaint in the COF Suit. [Doc. 54-5.]

B. The second amended complaint

The second amended complaint was materially different than the original and amended complaints. Most obviously, although it still alleged Securities Claims against Emmis, it dropped the individual officers and directors as defendants. [*See* Doc. 54-5.]

In addition, unlike the first two complaints, the second amended complaint demanded money damages to compensate the Shareholder-Plaintiffs for the decline in value of the Preferred Stock after amendment of its terms. [*Id.* at 872.] The Shareholder-Plaintiffs alleged they owned a combined 809,771 shares of Preferred Stock, and that the market value of those shares declined by about $12 per share as a result of the amendments. [*Id.*, ¶¶6–10, 60–61.] Thus, Emmis faced exposure to damages of at least $9,717,252. [*See id.*, ¶61.]

Finally, though immaterial to the Securities Claims alleged, the original and amended complaints had alleged the failure of the Go-Private Attempt. [Doc. 54-2 at 683–84, ¶¶25–27.] They then speculated that Smulyan had a particular motivation and intent for the transactions in 2011–12:

> Frustrated by his inability to take Emmis private in 2010, Smulyan hatched a brazen scheme in 2011 to eliminate all the rights and privileges of the Preferred Stock, most notably the right to accrued and future dividends and the Take Private Put Right, by attempting to gain voting control of the Preferred Stock through sham derivative and related party transactions and voting to eliminate the rights and preferences contained in the [articles of incorporation]. Elimination of these rights and preferences would render the Preferred Stock essentially worthless and pave the way for Mr. Smulyan to "take Emmis private" at a time of his choosing.

[Doc. 54-2 at 684, ¶28 (the "Motive/Intent Allegations").]

By contrast, however, the second amended complaint omitted the Motive/Intent Allegations. It merely alleged that Smulyan had tried unsuccessfully to take Emmis private in 2006 and 2010, that he could have profited from the 2010 Go-Private Attempt, and that it failed because two-thirds of the Preferred Stock did not vote for it. [Doc. 54-5, ¶¶14–16.]

The second amended complaint alleged Securities Claims in eight counts. **Counts I through III** alleged Emmis violated federal securities law by making misrepresentations and omissions in its securities filings. [*Id.*, ¶¶62–86.] Count I alleged Emmis's failure to disclose was "at least negligent, if not reckless or deliberate." [*Id.*, ¶68.] **Count IV** alleged the shares of Preferred Stock subject to the TRS Transactions and Voting Agreements had been reacquired, extinguished, and rendered incapable of being voted under Indiana corporation law. [*Id.*, ¶¶87–102.] **Count V** alleged that, under Indiana corporation law, Emmis could not vote the shares of Preferred Stock issued to the Trust, because it was a sham created solely to enable Emmis to control the vote. [*Id.* at 866–67, ¶¶103–11.] **Count VI** alleged Emmis violated Indiana law and the Articles of Incorporation by repurchasing Preferred Stock while dividends remained in arrears. [*Id.* at 868–69, ¶¶112–21.] **Count VII** alleged that in violation of Indiana contract law, Emmis breached the terms of its articles of incorporation by amending the terms of the Preferred Stock without consent of other preferred shareholders. [*Id.* at 869–70, ¶¶122–28.] **Count VIII** alleged Emmis breached its fiduciary duties to the Shareholder-Plaintiffs by making material misrepresentations and omissions to acquire voting control and amend the terms of the Preferred Stock. [*Id.* at 870–71, ¶¶129–32.]

On February 28, 2014, Judge Barker granted Emmis summary judgment on Counts I through VII of the second amended complaint and judgment on the pleadings on Count VIII. [Doc. 54-2 at 29–74.] On appeal, this Court affirmed. *Corre Opportunities Fund, LP v. Emmis Commc'ns Corp.*, 792 F.3d 737 (7th Cir.

2015). In its successful defense of the COF Suit, Emmis incurred and paid Defense Costs totaling over $4,100,000 (or $3,100,000 in excess of the $1,000,000 Securities Claim Retention). [Doc. 60-1 at 967.]

5. The Coverage Suit

Emmis filed the complaint in this action ("Coverage Suit") on January 11, 2016. [Doc. 1.] Count I alleged INIC's denial of coverage under the Policy was a breach of contract, and Count II alleged the denial breached INIC's duty of good faith and fair dealing. [Doc. 1 at 17–20, ¶¶90–12.] On cross-motions for summary judgment [Doc. 53, 54, 60–62, 64], the district court, on March 21, 2018, granted Emmis a partial summary judgment of liability on Count I, and granted INIC summary judgment on Count II [Doc. 72 ("Order")].

On October 10, 2018, the parties stipulated to entry of final judgment for Emmis in the amount of $3,500,000 (including pre-judgment interest) on Count I, and judgment for INIC on Count II. [Doc. 94.] The district court entered the final judgment on October 11. [Doc. 96 ("Judgment").] INIC timely filed its notice of appeal on November 7. [Doc. 97.]

Summary of the Argument

The Reported Claims Exclusion eliminates coverage for Claims "as reported" to Chubb. This language is ambiguous, because it could mean "as reported to Chubb at any time," or "as previously reported to Chubb, before the effective date of INIC's Policy." Indiana law interprets ambiguous language in an exclusion in favor of coverage. Therefore, this Exclusion was not triggered when, after INIC's policy took effect, Marsh prudently reported the COF Suit to Chubb

and other insurers that might conceivably provide coverage for Emmis's multi-million dollar exposure.

Indiana law narrowly construes the operative term in the "Arising-From" Exclusion. It means that one thing must be the "efficient and predominating cause" of something else. The Shareholder and Alden Suits were not the efficient and predominating cause of the COF Suit. It was caused by the TRS Transactions, the Dutch Auction Tender Offer, the issuance of Preferred Stock to the Trust, and Emmis's threatened exercise of voting rights pursuant to those transactions, plus the Shareholder-Plaintiffs' belief that those transactions violated applicable law. Therefore, the Arising-From Exclusion did not eliminate Emmis's coverage under the Policy.

Literally applied, the Related Facts Exclusion—which incorporates the first definition of "Interrelated Wrongful Act"—would exclude virtually all coverage, because facts that would trigger it need not be "wrongful," merely related. For example, the Shareholder Suits alleged that Emmis had both common stock and preferred stock, which would assure exclusion of coverage of all future Securities Claims under the Policy because, by definition, they are brought by holders of Emmis's common or preferred stock. Under these circumstances, the Indiana Supreme Court held in *American States v. Kiger*, an exclusion requires interpretation. The Related Facts Exclusion is ambiguous, because the definition of "Interrelated Wrongful Act" does not require a wrongful act, and because the Exclusion's "related to related facts" formulation has no practical boundary. As in *Kiger*, this Exclusion must be construed in favor of coverage.

Literal application of the Related Facts Exclusion would also lead to absurd and inconsistent results. If related but not wrongful alleged facts exclude coverage, then coverage depends on alleged facts chosen according to the whim or drafting strategy of plaintiffs' counsel. To avoid such results, the Indiana Supreme Court held in *USA Life v. Nuckolls*, a court may carefully modify the grammatical and ordinary sense of the words used in an exclusion. The district court did so, construing the Related Facts Exclusion to apply only when **operative** facts are related. The operative facts of the COF Suit (acquiring voting control of the Preferred Stock and failing to disclose plans to amend its terms) are unrelated to the operative facts of the Shareholder Suits (failing to maximize shareholder value) and the Alden Suit (approving a loan to fund the JSA Suit). Therefore, the Related Facts Exclusion, properly construed, does not eliminate coverage.

The Wrongful Acts Exclusion applies if the Wrongful Acts—breaches of duty, statutory or common law—alleged in the COF Suit were related to those alleged in the Shareholder or Alden Suits. They were not. The COF Suit alleged violations of federal securities law and Indiana corporation law in acquiring the vote of the Preferred Stock to amend its terms, and breaches of fiduciary duty in approving those transactions in 2011 and 2012. The Shareholder Suits alleged breaches of fiduciary duty in failing to maximize shareholder value in the 2010 Go-Private Attempt. The Alden Suit alleged breaches of fiduciary duty in approving the JSA loan in 2010. Therefore, the Wrongful Acts Exclusion did not eliminate Emmis's coverage.

As alternative grounds to affirm, given the overwhelming weight of supporting authority from other jurisdictions, this Court may comfortably conclude the Indiana Supreme Court would analyze INIC's duty to advance Defense Costs under the Policy consistent with Indiana law governing an insurer's duty to defend. That duty is triggered when a complaint alleges facts that might create coverage and requires a defense of the entire suit if just one claim might be covered. The complaints in the COF Suit each alleged at least one Securities Claim that Emmis might have violated federal law by negligent conduct. Those allegations are necessarily incompatible with the allegations of intentional misconduct in the Motive/Intent Allegations that are central to INIC's arguments for application of the Exclusions. So even if those Allegations triggered exclusion of some causes of action in the COF Suit, they could not trigger exclusion of the negligence claims. Under Indiana law, that means INIC would have had a duty to defend—and under this analysis, that it did have a duty to advance Defense Costs—for all Securities Claims in the COF Suit.

Argument

Standard of Review

A. Review of summary judgments

The construction of language in an insurance policy according to applicable state law is a question of law, appropriately decided on a motion for summary judgment, which this Court reviews *de novo*. *Burgess v. J.C. Penny Life Ins. Co.*, 167 F.3d 1137, 1139 (7th Cir. 1999). The same standard applies to cross-motions for summary judgment, and this Court construes all facts and draws all

reasonable inferences in favor of the party against whom the motion under consideration was filed. *Evans v. Portfolio Recover Assocs., LLC*, 889 F.3d 337, 343 (7th Cir. 2018). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). This Court may affirm the grant of summary judgment on grounds different from the district court if the alternative grounds have adequate support in the record and the law. *Peters v. City of Mauston*, 311 F.3d 835, 842 (7th Cir. 2002).

B. Indiana law governing interpretation of insurance policies

Under Indiana law, which controls in this case, *Nautilus Ins. Co. v. Don's Guns & Galleries, Inc.*, 2000 WL 34251061 at *3 (S.D. Ind. Jan 26, 2000), the duty to provide defense coverage under a policy of insurance is determined solely by the nature of the complaint. *Transamerica Ins. Servs. v. Kopko*, 570 N.E.2d 1283, 1285 (Ind. 1991). One exception to this general rule is that evidence extrinsic to the complaint—including, for example, "an insured's self-serving testimony denying intent"—may be considered when that evidence favors coverage. *Ind. Farmers Mut. Ins. Co. v. N. Vernon Drop Forge, Inc.*, 917 N.E.2d 1258, 1269 (Ind. Ct. App. 2009) (citing *Auto-Owners Ins. Co. v. Harvey*, 842 N.E.2d 1279, 1291 (Ind. 2006)); *see also Drop Forge*, 917 N.E.2d at 1269 ("'[T]he insured is entitled to rely upon facts outside the complaint to favor a coverage position ...." (quoting 9 Couch on Insurance § 126:3 (3d ed. 2008)).

The interpretation of an insurance contract is a question of law for the courts, even if the policy contains ambiguity that must be resolved. *USA Life*

One Ins. Co. v. Nuckolls, 682 N.E.2d 534, 538 (Ind. 1997). A policy is ambiguous if susceptible to more than one interpretation, such that reasonable people might honestly differ about its meaning. *Meridian Mut. Ins. Co. v. Auto-Owners Ins. Co.*, 698 N.E.2d 770, 773 (Ind. 1998).

When policy language is ambiguous, it must be strictly construed in favor of the insured, "especially … where the language in question purports to exclude coverage." *State Farm Auto. Mut. Ins. Co. v. Jakubowicz*, 56 N.E.3d 617, 619 (Ind. 2016) (citing *Nuckolls*, 682 N.E.2d at 538); *see also Meridian*, 698 N.E.2d at 773 (citing *Am. States Ins. Co. v. Kiger*, 662 N.E.2d 945, 947 (Ind. 1996)). "Where provisions limiting coverage are not clearly and plainly expressed, the policy will be construed most favorably to the insured, to further the policy's basic purpose of indemnity." *Meridian*, 698 N.E.2d at 773. The insurer bears the burden of proving the applicability of an exclusion by demonstrating that it "clearly and unmistakably bring[s] within its scope the particular act or omission that will give rise to the exclusion … and coverage will not be excluded or destroyed … unless such clarity exists." *Keckler v. Meridian Sec. Ins. Co.*, 967 N.E.2d 18, 22–23 (Ind. Ct. App. 2012) (citations omitted).

When policy language is unambiguous, it should generally be given its plain and ordinary meaning. *Nuckolls*, 682 N.E.2d at 538. "However, if the plain and ordinary meaning 'would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument,' then 'the grammatical and ordinary

sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further.'" *Id.* at 539 (quoting *Haworth v. Hubbard*, 44 N.E.2d 967, 968 (Ind. 1942) (emphasis deleted)).

1. The Reported Claim Exclusion does not eliminate coverage.

Clause (i) of the Exclusion—the "Reported Claim Exclusion"—and the relevant "Event" incorporated in it, provide that INIC

> shall not be liable to make any payment for Loss in connection with: …
>
> (i) any of the Claim(s), notices, events, investigations or actions listed under EVENT(S) below …
>
> EVENT(S)
>
> * * *
> 2) All notices of claim or circumstances as reported under policy number 8181-0668 issued to Emmis Corporation by Chubb Insurance Companies.

[Doc. 1-1 at 87.]

INIC argues the COF Suit became "an Event #2" excluded by this Exclusion because, "[o]n April 18, 2012, Emmis's broker, Marsh, reported the COF Suit to Chubb." [Br. 32.] INIC argues this Exclusion unambiguously applies because the definition of Event #2 does not use "the simple past tense 'reported,'" but instead "uses the adverbial phrase 'as reported,' meaning 'when considered in a specific form or relation.'" [Br. 32–33 (citing Merriam-Webster's Collegiate Dictionary 71 (11th ed. 2004)).]

This definition is no help in determining whether the words "as reported" refer "to any claim that is reported under the Chubb Policy at any time, as urged by INIC," or "to any claims that had been reported under the Chubb Policy at

the time the INIC Policy went into effect, October 1, 2011, as urged by Emmis." [Doc. 72 at 1173.] Nor would Emmis's interpretation "effectively remove[] the word 'as' before the word 'reported,'" as INIC contends. [Br. 32.] Either way, Event #2 could reasonably be read to refer to claims "reported" or "as reported" to Chubb before the INIC Policy took effect.

"Under Indiana law, an insurance policy is ambiguous if reasonable persons may honestly differ as to the meaning of the policy language. Reasonable persons might differ if the term is susceptible to more than one interpretation." *Farmers Ins. Exch. v. Smith*, 757 N.E.2d 145, 149 (Ind. Ct. App. 2001) (internal quotation marks omitted) (citing *Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467, 470 (Ind. 1985); *Meridian*, 698 N.E.2d at 773). There is simply no difference between "reported" and "as reported" that renders the definition of Event #2 susceptible to only one interpretation. The district court reasonably and correctly concluded the Reported Claim Exclusion is ambiguous. [Doc. 72 at 1173.]

Under Indiana law, "courts construe ambiguous terms in an insurance policy in favor of the insured, **especially** where those terms limit or exclude coverage." *Smith*, 757 N.E.2d at 148–49 (emphasis added) (citing *Meridian*, 698 N.E.2d at 773). This rule of construction does not necessarily rest on the identity of the draftsman (*contra proferentem*) [*see* Doc. 72 at 1174–75] or the sophistication of the insured[5] [*see* Br. 33–34]. Rather, "[c]onstruing ambiguous

[5] In this regard, the district court correctly distinguished the case INIC recites here. [Br. 24 (citing *WellPoint Inc. v. Nat'l Union Fire Ins. Co.*, 29 N.E.3d 716, 725 (Ind. 2015)); *see* Doc. 72 at 1174–75 n.5.]

terms in favor of the insured promotes the policy's basic purpose of indemnity." *Id.* INIC's interpretation of the Reported Claim Exclusion would defeat this purpose simply because a broker prudently notified all insurers who might conceivably provide coverage to protect Emmis from the multi-million dollar claims alleged in the COF Suit. [*See* Doc. 54-2 at 737–40.]

Construing the ambiguous term of the Reported Claim Exclusion in favor of coverage, the district court correctly concluded that Event #2 "refers only to those claims that had been reported under the Chubb Policy as of the effective date of the INIC policy," October 1, 2011. [Doc. 72 at 1175.] The COF Suit was not filed or reported to Chubb until April 2012, so the Reported Claim Exclusion does not eliminate Emmis's coverage. The district court should be affirmed.

2. The Arising-From Exclusion does not eliminate coverage.

Part (b) of clause (ii) of the Exclusion—the "Arising-From Exclusion"—provides that INIC

> shall not be liable to make any payment for Loss in connection with: …
>
> (ii) the prosecution, adjudication, settlement, disposition, resolution, or defense of: …
>
> (b) any Claim(s) arising from any Event(s) ….

[Doc. 1-1 at 87.] Emmis seeks payment for Defense Costs (a type of "Loss" as defined in the Policy [*id.* at 50]) "in connection with … the … defense of …

Claim(s)." More specifically, Emmis seeks payment of its Defense Costs in connection with its successful defense of the "Securities Claims"[6] in the COF Suit. The Policy defines "Securities Claim" as:

> [A] Claim … alleging a violation of any law, rule or regulation, whether statutory or common law (including … the purchase … or solicitation of an offer to purchase … securities), which is … brought by a security holder[7] … with respect to such securities holder's … interest in securities of an Organization.[8]

[Doc. 1-1 at 80, Endorsement #21.] The "Events" incorporated in the Arising-From Exclusion are the Shareholder Suits under Event #1, and both the Shareholder Suits and the Alden Suit under Event #2. [Br. 20.] Therefore, the only issue in the Arising-From Exclusion is whether the COF Suit alleges Securities Claims "arising from" the Shareholder Suits or the Alden Suit. The answer is no.

To meet its burden of demonstrating the Arising-From Exclusion "clearly and unmistakably" excludes coverage, *Keckler*, 967 N.E.2d at 22–23, INIC argues "the COF Suit grew out of or flows from" the Shareholder and Alden Suits

---

[6] The Policy's definition of "Claim" includes "Securities Claim." [Doc. 1-1 at 46.]

[7] The Shareholder-Plaintiffs in the COF Suit were holders of Emmis's Preferred Stock. [Doc. 54-5, ¶¶6–10.]

[8] All counts in the COF complaints alleged violations of federal securities law, Indiana corporation law, and Indiana common law with respect to the Shareholder-Plaintiffs' interests in Emmis's Preferred Stock, so all are "Securities Claims." [*See* Doc. 54-2 at 697–731, ¶¶61–244; Doc. 54-5, ¶¶62–132.]

because the complaints in all Suits alleged acts, circumstances, and claims regarding the Go-Private Attempt, Smulyan's frustration with its failure, and improper attempts to strip preferred shareholders' rights. [Br. 29.]

INIC's analysis improperly imports from other jurisdictions a broad interpretation of "arising from" that has been rejected under controlling Indiana law. Under Indiana's narrower interpretation, the Arising-From Exclusion does not apply, because the Shareholder and Alden Suits were not the efficient and predominating cause of the Securities Claims in the COF Suit.

A. Under Indiana law, the term "arising from" is narrowly interpreted.

As INIC has conceded [Doc. 72 at 1171], interpretation of the language used in the Arising-From Exclusion is governed by Indiana law. *See Don's Guns*, 2000 WL 34251061 at *3. INIC nevertheless relies on cases decided under the laws of Mississippi, New Hampshire, Florida, and Missouri for a broad interpretation of "arising from," representing to the Court that it "found no Indiana cases addressing the language set forth in" the Arising-From Exclusion. [Br. 28–29.] To the contrary, however, INIC concedes the terms "arising from" and "arising out of" are synonymous [Br. 28], and Indiana courts have clearly, and narrowly, interpreted that language.

"In Indiana, the phrase 'arising out of' as used in insurance policies long has been construed to mean that one thing must be the 'efficient and predominating' cause of something else." *Keckler*, 967 N.E.2d at 23 (citing *Ind. Lumbermens Mut. Ins. Co. v. Statesman Ins. Co.*, 291 N.E.2d 897, 899 (Ind. 1973); *Sharp v. Ind. Union Mut. Ins. Co.*, 526 N.E.2d 237, 240 (Ind. Ct. App. 1988),

trans. denied); *see also Barga v. Ind. Farmers Mut. Ins. Co.*, 687 N.E.2d 575, 578–79 (Ind. Ct. App. 1997) (Kirsch, J.) ("While we recognize that the present case, unlike *Lumbermens*, involves a policy exclusion, the phrase 'arising out of' must have the same meaning as it did with the coverage provision at issue in *Lumbermens*. That is, the 'efficient and predominating cause' of the accident must have been an auto business operation in order for coverage to be excluded." (footnotes omitted)).[9]

Indiana courts have consciously interpreted the language of the Arising-From Exclusion more narrowly than other jurisdictions. In *Shelter Mutual Insurance Company v. Barron*, 615 N.E.2d 503 (Ind. Ct. App. 1993), *trans. denied*, the policy excluded coverage for "bodily injury … arising out of the ownership, maintenance [or] use … of … any land motor vehicle." *Id.* at 506. The insurer—which, like INIC, relied on out-of-state cases—argued coverage was excluded if there was "any nexus between the vehicle and the injury sustained." *Id.* The Indiana Court of Appeals rejected the insurer's construction, because "[i]n this state a more narrow construction has been given to the phrase 'arising out of the ownership, maintenance or use' of a vehicle than that suggested by [the insurer] and the cases it cites." *Id.* The court primarily relied on the Indiana Supreme Court's holding in *Lumbermens* to conclude that "the efficient and predominating cause of the accident in this case did not arise from the

[9] In *Barga*, Judge Sullivan concurred in the result, opining that "the test, more accurately stated in the case before us, is whether the **efficient and predominating cause**, i.e. the negligent driving of the vehicle, arose out of the auto business operation." 687 N.E.2d at 580 (Sullivan, J., concurring) (emphasis added).

use" of a motor vehicle. *Id.* (citing *Lumbermens*, 291 N.E.2d at 899; *Sharp*, 526 N.E.2d at 240; *State Farm Mut. Auto. Ins. Co. v. Spotten*, 610 N.E.2d 299, 301–02 (Ind. Ct. App. 1993)).

INIC argues the holding in *Lumbermens* is inapplicable because it "involved a coverage dispute regarding a truck liability policy where the court was interpreting the specific phrase 'arising out of the ownership, maintenance or use' of the truck as applied to unnamed insureds," rather than "any Claim(s) arising from any Event(s)," as in the Arising-From Exclusion. [Br. 28.] If this argument depends on a distinction between a coverage provision and an exclusion, *Barga* held "the phrase 'arising out of' must have the same meaning" in both types of provisions. *Barga*, 687 N.E.2d at 578–79; *id.* at 580 (Sullivan, J., concurring).

If INIC's distinction relies on some difference between a vehicle liability policy, as in *Lumbermens*, and the D&O policy issued by INIC, the decisive language in both policies is "arising out of," or its synonym, "arising from." This language simply describes a required relationship between two things, whether an accident and the use of a vehicle, or a Claim and an Event. The Indiana Court of Appeals has recognized that Indiana's narrow interpretation of "arising out of" applies generally "as used in insurance policies." *Keckler*, 967 N.E.2d at 23; *see Nautilus Ins. Co. v. Sunset Strip, Inc.*, 2015 WL 4545876 at *13 (S.D. Ind. July 28, 2015) (Dinsmore, Mag. J.) (applying "efficient and predominating cause" to exclusion for "claims 'arising out of work performed by any contractor or subcontractor'").

B. The Shareholder and Alden Suits were not the efficient and predominating cause of the COF Suit.

INIC admits that Event #1 is the Shareholder Suits and Event #2 is the Shareholder and Alden Suits. [Br. 8, 20.] And as described above, the word "Claims" in the Arising-From Exclusion includes the Securities Claims that all counts of the COF Suit alleged. So the only issue under the Arising-From Exclusion is whether the Shareholder Suits and the Alden Suit were the efficient and predominating cause of the Securities Claims in the COF Suit. Again, the answer is no.

The cause of the Securities Claims in the COF Suit was the TRS Transactions, the Dutch Auction Tender Offer, Emmis's issuance of Preferred Stock to the Trust, and Emmis's threatened exercise of voting rights pursuant to those transactions, as well as the Shareholder-Plaintiffs' (incorrect) belief that those transactions violated federal securities law and Indiana corporation and common law. INIC has not demonstrated that the Shareholder Suits or Alden Suit **caused** the Securities Claims or COF Suit, as they might have, for example, if the COF Suit had been filed to collect a judgment entered in one of the prior cases. Rejecting the same argument INIC makes practically verbatim on appeal [*compare* Doc. 72 at 1177 *with* Br. 29]), the district court correctly held:

> The plaintiffs in the COF Suit did not sue Emmis *because of* the Shareholder Litigation or *because of* the Alden Action. Those previous *cases* simply were not the cause of the COF Action. The fact that the complaints in the cases include some of the same factual allegations is simply irrelevant to the inquiry of whether the earlier cases were a *cause* of the COF Action.

[Doc. 72 at 1177 (emphasis the court's) (footnote omitted).]

Likewise, the COF Suit did not "arise from" the Go-Private Attempt or "Smulyan's alleged frustration" with its failure. [Br. 29.] Those things were not the efficient and predominating cause of the COF Suit; the securities transactions that gave Emmis control of Preferred Stock voting rights were.[10]

INIC has failed to carry its burden of demonstrating the Arising-From Exclusion "clearly and unmistakably" applies to exclude coverage of the Defense Costs Emmis incurred in its successful defense of the COF Suit. *Keckler*, 967 N.E.2d at 22–23. The district court should be affirmed.

3. The Related Facts Exclusion does not eliminate coverage.

By incorporating the two definitions of "Interrelated Wrongful Act" in the Exclusion, clause (iii) creates two separate exclusions. Substituting the first definition for the defined term, the first exclusion[11]—the "Related Facts Exclusion"— provides that INIC

> shall not be liable to make any payment for Loss in connection with: …
>
> (iii) any Claim alleging, arising out of, based upon, attributable to or in any way related directly or indirectly, in whole or in part to …
>
> (i) the same or related facts, circumstances, situations, transactions or events alleged in any of the [Shareholder Suits and the Alden Suit] ….

[10] INIC's further argument—that the "alleged Wrongful Acts in the COF Suit also 'arise from' the Shareholder Litigation and the Alden Action" [Br. 30]—is irrelevant to the Arising-From Exclusion, because it does not use the term "Wrongful Acts." [*See* Doc. 72 at 1177.] Emmis addresses INIC's argument in section 4, below, addressing the Wrongful Acts Exclusion.

[11] The second exclusion created by clause (iii)—the "Wrongful Acts Exclusion"—is discussed in section 4, below.

[Doc. 1-1 at 87.]

The district court observed:

> If Section (iii) were to be applied literally, it would mean that *any* factual allegation would be sufficient to trigger the [Related Facts E]xclusion, including the allegation that Emmis is a publicly traded corporation, or even simply that Emmis does business in Indiana. "'[A] contract will not be interpreted literally if doing so would produce absurd results, in the sense of results that the parties, presumed to be rational persons pursuing rational ends, are very unlikely to have agreed to seek.'" [Citations omitted.] [Emmis and INIC] are unlikely to have intended [the Related Facts Exclusion] to be applied literally, as doing so would lead to the exclusion of virtually any lawsuit filed against Emmis.

[Doc. 72 at 1178 (quoting *Beanstalk Group, Inc. v. AM General Corp.*, 283 F.3d 856, 860 (7th Cir. 2002) (citing, e.g., *Nuckolls*, 682 N.E.2d at 539; *Haworth*, 44 N.E.2d at 970.]

INIC claims the district court erred by refusing to apply the arguably "plain language" of the Related Facts Exclusion literally [Br. 19, 23], but the court's refusal was well supported by controlling precedent of the Indiana Supreme Court: *American States Insurance Company v. Kiger*, 662 N.E.2d 945 (Ind. 1996), and *USA Life One Insurance Co. v. Nuckolls*, 682 N.E.2d 534, 539 (Ind. 1997).

A. *American States v. Kiger*

In *Kiger*, American States issued garage-insurance policies to the owner of a gasoline station, Kiger. When the Indiana Department of Environmental Management sued Kiger for the cost of cleaning up gasoline contamination, he filed a third-party complaint against American States for a declaration of coverage.

The trial court decided American States owed Kiger coverage, despite a "pollution exclusion" in Kiger's post-1987 policies. *Kiger*, 662 N.E.2d at 946–47. On appeal, the Indiana Supreme Court accepted emergency transfer and affirmed. *Id.* at 949.

The pollution exclusion eliminated coverage for property damage "arising out of the actual, alleged or threatened discharge of 'pollutants,'" defined to mean "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, fumes, acids, alkalis, chemicals and waste." *Id.* at 948. "Clearly," the Supreme Court said, "this clause cannot be read literally as it would negate virtually all coverage. … Accordingly this clause requires interpretation." *Id.*

The Court was "troubled by the interpretation offered by American States, as it makes it appear that Kiger was sold a policy that provided no coverage for a large segment of the gas station's business operations." Interpreting the pollution exclusion, the Court found the term "pollutants" ambiguous, because it "does not obviously include gasoline," and concluded:

> If a garage policy is intended to exclude coverage for damage caused by the leakage of gasoline, the language of the contract must be explicit. This follows the more general rule of construing exclusions strictly against the insurer and in favor of coverage. In this case that requires that coverage for the gasoline contamination which occurred be available under the post–1987 policies.

Id. at 949 (citation omitted).

As in *Kiger*, the Related Facts Exclusion requires interpretation, because it too would negate virtually all coverage if applied literally. As the district court noted, the allegations in the Shareholder Suits and the Alden Suit, that Emmis

is an Indiana corporation with its principal place of business in Indiana [Doc. 54-2 at 531, ¶15; *id.* at 584, ¶ 8], would ensure application of the Related Facts Exclusion to any federal case based on diversity jurisdiction, which would necessarily allege "the same or related facts … alleged" in the Shareholder and Alden Suits. [Doc. 72 at 1179.]

In addition, the Shareholder Suits allege facts concerning both Emmis's common stock (which JSA sought to acquire in the Go-Private Attempt) and its Preferred Stock (which would have been converted to subordinated debt or common stock in the go-private transaction). [Doc. 54-2 at 528, ¶2; *id.* at 541, ¶64.] Those allegations would ensure exclusion of coverage in any future case alleging a "Securities Claim." The Policy defines "Securities Claim" as "a Claim … alleging violation of any law … brought by a [common or preferred] security holder … with respect to such security holder's … interest in [common or preferred] securities of [Emmis]." [Doc. 1-1 at 80.] Thus, if literally applied, the Related Facts Exclusion would always eliminate the coverage for Securities Claims for which Emmis paid a premium and agreed to an enhanced retention amount of $1,000,000. [Doc. 1-1 at 26, 54.]

Like the pollution exclusion in *Kiger*, the Related Facts Exclusion is ambiguous, for at least two reasons. First, despite incorporating the first definition of "Interrelated Wrongful Act," it doesn't require that any of the alleged or related "facts, circumstances, situations, transactions or events" be "wrongful" to exclude coverage. Reasonable people could honestly differ on whether the description of the acts defined to be "Interrelated Wrongful Acts" incorporates the

modifier of the "Acts" it describes. Thus, the Related Facts Exclusion, and the definition it incorporates, are ambiguous. *Smith*, 757 N.E.2d at 149.

Second, the Related Facts Exclusion is extremely broad. It purports to exclude any Claim "in any way **related** … to … the same **or related** facts, circumstances, situations, transactions or events" alleged in the Shareholder Suits or Alden Suit. And, as if "related to related facts" weren't broad enough, INIC argues the term "related," presumably in both places it appears in this Exclusion, "'covers a **very broad** range of connections, both causal and logical.'" [Br. 19 (quoting *RLI Ins. Co. v. Conseco, Inc.*, 543 F.3d 384, 391 (7th Cir. 2008) (emphasis added); Br. 25–27 (citing federal court decisions applying law of Puerto Rico, California, Delaware, and Massachusetts for broad interpretation of language "similar" to Related Facts Exclusion).][12] The practically boundless scope of the Related Facts Exclusion is compounded by the garbled syntax that results from substituting the definition of "Interrelated Wrongful Acts" for the defined term. What does it mean for a Claim to be "in any way related … to … related facts … alleged in" other cases?

[12] INIC cites two "new" cases, from Puerto Rico and California, to support application of the Related Facts Exclusion [Br. 26–27 (citing *UBS Fin. Servs. Inc. v. XL Specialty Ins. Co.*, 289 F.Supp.3d 335 (D.P.R. 2018); *Landmark Am. Ins. Co. v. Navigator Ins. Co.*, 2018 WL 6591620 (N.D. Cal. Dec. 14, 2018).] They are distinguishable on the same grounds the district court distinguished the cases INIC cited below. [*See* Doc. 72 at 23–35.] In both *UBS* and *Landmark*, the operative facts alleged in the later, excluded actions were the **same** operative facts alleged in the earlier ones; there was no issue about whether the facts were merely **related enough** to exclude coverage. *See UBS*, 289 F.Supp.3d at 346–49; *Landmark*, 2018 WL 6591620 at *4.

In *American Home Assurance Company v. Allen*, 814 N.E.2d 662 (Ind. Ct. App. 2004) the Indiana Court of Appeals held the term "**interrelated**" to be ambiguous, because it "can be interpreted as elastic and without practical boundary." *Id.* at 669 (footnote omitted). The same is true of the Related Facts Exclusion, which incorporates the first definition of "**Interrelated** Wrongful Acts" and purports to exclude "Claims … in any way related … to … related facts … alleged in" the Shareholder or Alden Suits.

"[A]n exclusion in an insurance policy must clearly and unmistakably bring within its scope the particular act or omission that will give rise to the exclusion in order to be effective, and coverage will not be excluded or destroyed by an exclusion or condition unless such clarity exists." *Keckler*, 967 N.E.2d at 22–23. INIC bears the burden of proving the applicability of the Related Facts Exclusion, *id.* at 23, but because of its ambiguity, the "general rule of construing exclusions strictly against the insurer and in favor of coverage" applies, *Kiger*, 662 N.E.2d at 949. For this reason alone, the district court should be affirmed.

B. *USA Life v. Nuckolls*

Even if the Related Facts Exclusion were not ambiguous, the district court's refusal to apply its literal language is supported by a second precedent of the Indiana Supreme Court, *USA Life v. Nuckolls* (cited in *Beanstalk Group*, 283 F.3d at 860 (quoted in Doc. 72 at 1178)). In *Nuckolls*, the insured ("Robert") was covered by a life insurance policy with a rider that paid additional benefits if his death was accidental, but excluded "death resulting directly or indirectly

from … taking of poison or gas, whether voluntary or involuntary, accidental or otherwise ….” 682 N.E.2d at 537. Robert died when he became inebriated, fell asleep in his car while smoking a cigarette, and was burned beyond recognition. Two separate autopsies concluded Robert died from carbon monoxide poisoning before his body was burned. *Id.* When Robert’s beneficiaries sued to recover the accidental death benefit, the insurer moved for summary judgment based on the “poison or gas” exclusion, but the trial court denied the motion. *Id.* at 536. The Court of Appeals reversed, holding the autopsies proved the death benefit was excluded by the unambiguous language of the exclusion. *Id.* at 538.

A unanimous Indiana Supreme Court accepted transfer and, for two independent reasons, affirmed the trial court’s denial of the insurer’s summary judgment motion. *Id.* at 542. First, the Court held the exclusion was ambiguous as applied to Robert’s death and resolved the ambiguity in the insured’s favor. *Id.* at 539. But the Court also noted “a slightly different reason the exclusion does not apply here”:

> When interpreting the meaning of the words used in a contract, they should be given their plain, ordinary, and popularly accepted meanings. This proposition is true for insurance contracts as well. However, *if the plain and ordinary meaning would lead to some absurdity*, or some repugnance *or inconsistency* with the rest of the instrument, *then the grammatical and ordinary sense of the words may be modified*, so as to avoid that absurdity and inconsistency, but no further. Courts in Indiana have invoked this rule of construction when interpreting insurance contracts as well.

Id. (citations, internal quotation marks, and emphasis deleted; emphasis added).

The Court held this "rule of construction" applied, because the insurer's interpretation of the exclusion language—that "Robert's beneficiaries are denied coverage solely because he could not keep breathing long enough to be burned to death"—led to "an absurd result that is inconsistent with the intent of the parties and the purpose of the [insurance] agreement. For this reason also, we interpret the policy in [the beneficiaries'] favor." *Id.* at 539–40.

Here, the district court correctly identified the absurdity and inconsistency that would result from literal application of the "plain and ordinary meaning" of the Related Facts Exclusion. The court observed that plaintiffs' attorneys "often have strategic reasons for including far more than the necessary facts [in a complaint] … to give the reader context, or … to paint the defendant in a negative light or generate sympathy for the plaintiff." [Doc. 72 at 1179.] As the district court concluded: "It would be nonsensical to read [the Related Facts Exclusion] in such a way that whether Emmis had insurance coverage for a lawsuit filed against it would depend on the whim of the plaintiff's attorney who drafted the complaint in the lawsuit." [*Id.*]

This case demonstrates why application of an exclusion should not depend on the drafting decisions made by plaintiffs' counsel. To support application of the Related Facts Exclusion, INIC argues the Motive/Intent Allegations in the first two complaints tie the facts of the COF Suit to the facts of the Shareholder

and Alden Suits. [Br. 20–22; *id.* 21 (quoting Doc. 54-6, ¶28).][13] But in the second amended complaint, the Shareholder-Plaintiffs' counsel omitted the Motive/Intent Allegations. Instead, the second amended complaint merely alleged that Smulyan had unsuccessfully attempted to take Emmis private in 2006 and 2010, that he could have profited from the 2010 Go-Private Attempt, and that it failed, without speculation about any motivation Smulyan might have derived from the failure or any intent to take Emmis private in the future. [Doc. 54-5, ¶¶14–16.] Thus, the rule of construction the Indiana Supreme Court applied in *Nuckolls* applies here, so that application of the Related Facts Exclusion will not depend on the drafting strategies of plaintiffs' attorney in the COF Suit. [*See* Doc. 72 at 1179.] *See Drop Forge*, 917 N.E.2d at 1269 ("The question of coverage should not hinge on the draftsmanship skills or whims of the plaintiff in the underlying action." (Citation omitted.))

Where the literal language of an insurance contract would yield such absurd and inconsistent results, "'the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further.'" *Nuckolls*, 682 N.E.2d at 539 (quoting *Haworth*, 44 N.E.2d at 968 (emphasis deleted)). The district court properly applied this rule by reading the Related Facts Exclusion "to exclude only those claims [in the COF Suit] that share *operative facts* with the Shareholder Suits and/or the Alden action; that is,

[13] INIC also makes much of a supposed admission in paragraph 75 of Emmis's complaint in the Coverage Suit. [Br. 13, 15, 16, 17, 21–22, 29.] But all six times INIC quotes from paragraph 75, it quotes incompletely, with misleading results. [*See* Doc. 1, ¶ 75; *see also id.*, ¶ 77.]

facts that form the basis of the causes of action asserted in the lawsuits." [Doc. 72 at 1179 (emphasis the court's).][14] So, the Exclusion would eliminate coverage of the COF Suit for "Claims alleging … or in any way related … to … the same or related [*operative*] facts, circumstances, situations, or events alleged" in the Shareholder Suits or the Alden Suit. This modest modification of the Related Facts Exclusion is consistent with the defined term it incorporates; it puts the "wrongful" back in "Interrelated Wrongful Acts."

(1) The operative facts alleged in the COF and Shareholder Suits are not the same or related.

Assuming the word "related" in the first definition of Interrelated Wrongful Acts is unambiguous and "'covers a very broad range of connections, both logical and causal,'" [Br. 19 (quoting *RLI*, 543 F.3d at 391)], the operative facts alleged in the COF Suit are not related operative facts alleged in the Shareholder Suits.

The operative facts alleged in the COF Suit were the failure to file proxy and tender-offer statements making full disclosures about Emmis's plan to acquire voting control of the Preferred Stock to amend its terms; acquiring voting control by the use of the TRS Transactions and Voting Agreements, the creation of the Trust, the issuance of Preferred Stock to the Trust, and the use of the Trust

[14] INIC attempts to re-cast the district court's Order as an incorrect application of the law regarding "illusory coverage." [Br. 23–24.] As demonstrated, however, the district court correctly applied well-settled Indiana law of contract construction. INIC's attempt to make this issue about illusory coverage, with the burden of proof on Emmis [Br. 24], improperly seeks to avoid INIC's burden to prove that the Related Facts Exclusion "clearly and unmistakably" applies. *Keckler*, 967 N.E.2d at 22–23.

Voting Agreement; the purchase of Preferred Stock while accrued dividends remained outstanding; and the directors' approvals of all those transactions. [Doc. 54-2 at 697–731, ¶¶61–244.] All of this allegedly occurred between October 2011 and September 2012.

By contrast, the operative facts alleged in the Shareholder Suits were the Emmis directors' failure to obtain maximum value for class members' common and preferred shares in the Go-Private Attempt; their failure to disclose information material to the underlying go-private transactions; and acts committed under conflicts of interest. [Doc. 54-2 at 467–70, ¶¶41–49; *id.* at 552–56, ¶¶97–115.] All of this allegedly occurred in the spring of 2010. There is no logical or causal connection between the operative facts of the COF and Shareholder Suits that can satisfy INIC's burden to show that the Related Facts Exclusion "clearly and unmistakably" excludes coverage of Emmis's Defense Costs in the COF Suit. *See Keckler*, 967 N.E.2d at 22–23.

INIC nevertheless argues for application of this Exclusion by citing allegations in the COF and Shareholder Suits of "acts and claims related to the 2010 Go-Private Attempt and Smulyan's and Emmis's attempts to strip the preferred shareholders of their rights." [Br. 20.] But the few extraneous, overlapping allegations INIC plucks from the Shareholder Suits and the first two complaints in the COF Suit, including the later-abandoned Motive/Intent Allegations [Br. 20–21], did not "form the basis of the causes of actions alleged" in the COF Suit. [Doc. 72 at 1179.]

First, the Motive/Intent Allegations cannot be operative facts unless all defendants shared Smulyan's frustration and intent to take Emmis private, but that's not what the COF Suit alleges. [*See* Doc. 54-2 at 684, ¶28.] Further, Emmis's directors did not always share Smulyan's goals for the company. As Judge Barker found, his 2006 attempt to take Emmis private was thwarted by a committee of disinterested directors. [Doc. 54-2 at 630.] And even assuming Smulyan's intent in amending the terms of the Preferred Stock was to pave the way for another go-private attempt, Emmis's directors approved the amendments because they believed the amendments would "have a positive effect on the overall capital structure of Emmis, which will have a beneficial impact on the holders of the Common Stock." [*See* note 4, above.] Increasing the value of Emmis's common stock would only make another Smulyan go-private attempt more expensive.

In addition, INIC's argument ignores the second amended complaint's omission of the Motive/Intent Allegations that supposedly tie the COF and Shareholder Suits together. "It is well-established that an amended pleading supersedes the original pleading; facts not incorporated into the amended pleading are considered *functus officio*." *Kelley v. Crosfield Catalysts*, 135 F.3d 1202, 1204 (7th Cir. 1998) (citations omitted). Under Indiana law, an insurer's duty to provide defense coverage generally is determined solely by the nature of the complaint. *Kopko*, 570 N.E.2d at 1285. Here—especially because INIC delayed in denying coverage until eight months after the second amended complaint was filed—that should mean coverage depends solely on the allegations of the

second amended complaint. *Cf. Core Const. Servs. S.E., Inc. v. Crum & Forster Specialty Ins. Co.*, 2015 WL 8043940 at *2 n.2 (M.D. Fla. Dec. 7, 2015) ("In cases where pleadings are amended such that they supersede earlier filings, the amended allegations control the insurer's duty to defend." (citing *Nationwide Mut. Fire Ins. Co. v. Advanced Cooling & Heating, Inc.*, 126 So.3d 385, 387 (Fla. 4th DCA 2013))).

The second amended complaint alleged the failure of the 2010 Go-Private Attempt without alleging frustration as Smulyan's motive or taking Emmis private as his intent in 2011 and 2012. As the district court noted, the omission of the Motive/Intent Allegations from the second amended complaint demonstrates their irrelevance to the causes of action alleged in the COF Suit: "In other words, the legal basis for the COF Suit would have remained the same if the 2010 Go-Private Attempt never happened; the operative facts in the COF Suit were Emmis's actions and omissions in 2011 and 2012." [Doc. 72 at 1181.]

Likewise, the "improper attempts to strip the preferred shareholders of their rights" [Br. 20] alleged in the Shareholder and COF Suits were not logically or causally connected. The Shareholder Suits did not allege the amendments to the terms of the Preferred Stock proposed in 2010 were *per se* improper, or that it was wrong for JSA to ask the preferred shareholders to consent to those amendments. They alleged Emmis's directors failed to extract adequate consideration from JSA as consideration for that consent. [Doc. 54-2 at 541, ¶64; *id.* at 552–53, ¶¶101–02.] By contrast, the COF Suit did not allege Emmis sought

preferred shareholders' **consent** to the 2012 amendments. Instead it alleged **Emmis directed** the unlawfully-acquired vote of the Preferred Stock to make amendments that were wrong in themselves, because they rendered the Shareholder-Plaintiffs' remaining outstanding shares "essentially worthless" [Doc. 54-2 at 684, ¶28], or at least, substantially less valuable [Doc. 54-5, ¶¶59–61].

The COF and Shareholder Suits were brought by different plaintiffs alleging different operative facts in support of different causes of action for different injuries allegedly suffered at different times. The operative facts in the Suits are neither logically nor causally connected; they are not related; and they do not support application of the Related Facts Exclusion.

(2) The operative facts alleged in the COF and Alden Suits are not the same or related.

The facts alleged as the basis for the causes of action in the COF Suit—the securities filings, the acquisition of voting control, the purchases for Preferred Stock—are summarized above. In the Alden Suit, the operative facts were the Emmis directors' approval of the $200,000 "loan" to finance JSA's breach of contract action against Alden in the JSA Suit. [Doc. 54-2 at 594–600, ¶¶40–56.] None of the COF complaints make any reference at all to the loan or the directors' approval of it. INIC has failed to demonstrate any logical or causal connection between that approval and the multiple, complex securities transactions alleged in the COF Suit, so the Related Facts Exclusion was not triggered.

Under controlling Indiana law, the district court correctly refused to apply the literal language of the Related Facts Exclusion, because doing so would vir-

tually always eliminate coverage under the Policy. The district court also correctly applied the *Nuckolls* rule of insurance-contract construction to interpret this Exclusion as requiring related "operative" facts. INIC has failed to satisfy its burden proving the Exclusion clearly and unmistakably brought the COF Suit within its application. *Keckler*, 967 N.E.2d at 22–23. The district court should be affirmed.

4. The Wrongful Acts Exclusion does not eliminate coverage.

The Wrongful Acts Exclusion provides that INIC

> shall not be liable to make any payment for Loss in connection with: …
>
> (iii) any Claim alleging, arising out of, based upon, attributable to or in any way related directly or indirectly, in whole or in part to …
>
> > (ii) any Wrongful Act(s) that are the same or that are related to those that were alleged in any of the [Shareholder Suits or the Alden Suit].

[Doc. 1-1 at 87.] The Wrongful Acts Exclusion applies only if all three of the following conditions are satisfied: (1) Emmis seeks payment for Loss in connection with a Claim; (2) the Claim alleges or in any way relates to a Wrongful Act; and (3) that Wrongful Act is the same as, or related to, Wrongful Acts alleged in the Shareholder Suits or Alden Suit. The only issue is whether INIC has met its burden to demonstrate that the third condition clearly and unmistakably excludes coverage of Emmis's Defense Costs in the COF Suit. *See Keckler*, 976 N.E.2d at 22–23. Again, the answer is no.

A. The Wrongful Acts alleged in the COF and Shareholder Suits are not the same or related.

In the original and amended complaints in the COF Suit, the Wrongful Acts[15] alleged against Emmis and its officers and directors were: (i) violations of federal securities law by failing to file required disclosure statements and making misrepresentations and omissions in connection with the TRS Transactions and Voting Agreements and the Dutch Auction Tender Offer; (ii) violations of Indiana corporation law and breach of Emmis's articles of incorporation in connection with acquiring control over the vote of the Preferred Stock to amend its terms; and (iii) breaches of fiduciary duty in approving the transactions that put Emmis in position to direct the vote. [Doc. 54-2 at 697–731, ¶¶61–244.] In the second amended complaint, the Wrongful Acts were alleged against Emmis alone, and were essentially the same violations of federal securities law, Indiana corporation law, and fiduciary duty alleged in the amended complaint, but in connection with the actual amendments to the terms of the Preferred Stock. [Doc. 54-5, ¶¶62–132.]

By contrast, in the Shareholder Suits, the Wrongful Acts alleged against Emmis's directors were breaches of fiduciary duty for (i) failing to maximize the amount JSA would have to pay for Emmis's common stock in the Go-Private

[15] As applied to Emmis's "Executives," a "Wrongful Act" is "any actual or alleged breach of duty, neglect, error, misstatement, misleading statement, omission or act." [Doc. 1-1 at 49, 55.] As applied to Emmis, a Wrongful Act occurs "solely in regard to a Securities Claim," defined as a Claim alleging any violation of statutory or common law, brought by a "security holder … with respect to such security holder's … interest in [Emmis's] securities." [*Id.* at 26, 51, 55, 80.]

Attempt; (ii) failing to solicit competitive bids; (iii) failing to disclose information necessary to allow common shareholders to make an informed decision on whether to vote for the go-private transactions; and (iv) engaging in conflicts of interest. [Doc. 54-2 at 467–70, ¶¶41–49; *id.* at 552–56, ¶¶97–115.] The Wrongful Act alleged against Emmis was aiding and abetting the directors' breaches of fiduciary duties. [*Id.*]

Obviously, the Wrongful Acts alleged in the COF Suit, all of which took place between October 2011 and September 2012, are not the same as those alleged in the Shareholder Suits, which took place in the spring of 2010. Nor are they related, even using INIC's "logical or causal connection" interpretation of the term.

INIC has the burden of demonstrating the Wrongful Acts Exclusion clearly and unmistakably applies to the COF Suit. *Keckler*, 967 N.E.2d at 22–23. It attempts to meet its burden by arguing:

> The Wrongful Acts alleged in both the Shareholder Litigation and the COF Suit primarily consisted of the allegedly improper attempts to effectuate the same proposed amendments in part by controlling the voting power of Alden's 42% of the preferred shares to strip the preferred shareholders of their rights. Indeed, three plaintiffs in the COF Suit were among the preferred shareholders who blocked the 2010 Go-Private Attempt. Those plaintiffs sued Smulyan and Emmis in the COF Suit seeking to prevent the same alleged Wrongful Acts designed to strip the preferred shareholders of their rights and to obtain the ability to take Emmis private "at a time of Mr. Smulyan's choosing."

[Br. 22 (citing COF complaint, Doc. 54-6 at 10 [PageID#884]; COF amended complaint, Doc. 54-2 at 301 [PageID#684].) This argument fails, because the

Wrongful Acts alleged in the Shareholder Suits and the COF Suit are not as INIC represents.

First, the complaints in the Shareholder and COF Suits do not allege "the same proposed amendments" to the terms of the Preferred Stock. [*Compare* Doc. 54-2 at 460, ¶25 *with* Doc 54-2 at 695, ¶55 *and* Doc. 54-5 at 857–58, ¶55.] Even for those that overlap, the Shareholder Suits did not allege they were "Wrongful Acts;" the Wrongful Acts alleged were the Emmis directors' breaches of fiduciary duty by failing to obtain maximum price for shareholders' stock in the Go-Private Attempt. [Doc. 54-2 at 467–70, ¶¶ 41–49; *id.* at 552–56, ¶¶97–115.]

Second, the complaints in the COF Suit did not allege that "controlling the voting power of Alden's 42% of the preferred shares" was a Wrongful Act in pursuit of Emmis's strategy "to strip the preferred shareholders of their rights." In fact, although INIC repeatedly cites the complaint, amended complaint, and second amended complaint with regard to Alden [Br. 11–12, 14–15, 22, 30], none of the complaints in the COF Suit **even mentions** Alden.

Third, there is no allegation in the Shareholder Suits or the COF Suit that "three plaintiffs in the COF Suit were among the preferred shareholders who blocked the 2010 Go-Private Attempt." None of the complaints in the COF Suit alleges any of the Shareholder-Plaintiffs blocked the Go-Private Attempt. Even if they did, blocking the Attempt is not the same as alleging a Wrongful Act, so it could not satisfy the requirement of the Wrongful Acts Exclusion. Likewise, because none of the Shareholder-Plaintiffs in the COF Suit was a plaintiff in

any of the Shareholder Suits [*see* Doc. 54-2 at 501–02], they did not allege "Wrongful Acts" in those Suits. Therefore, the identity of the plaintiffs in the COF and Shareholder Suits cannot establish a logical or causal connection between the Wrongful Acts alleged in them.

Fourth, because the Wrongful Acts alleged in the Shareholder Suits and the COF Suit were not the same—if for no other reason than the gap of more than a year between them—the COF Suit did not seek "to prevent the same Wrongful Acts designed to strip the preferred shareholders of their rights." And as already noted, the Shareholder Suits did not allege the proposed amendments to the terms of the Preferred Stock were "Wrongful Acts."

Finally, unlike the first two complaints, the second amended complaint in the COF Suit did not allege that any Wrongful Acts were taken "to obtain the ability to take Emmis private 'at a time of [Smulyan's] choosing.'" The second amended complaint omitted the Motive/Intent Allegations and simply noted that Smulyan had unsuccessfully attempted to take the company private in 2006 and 2010 without speculating on his motives or goals for amending the terms of the Preferred Stock in 2012. [Doc. 54-5 at 849, ¶¶14–16.] In fact, in the preliminary proxy statement Emmis filed on March 13, 2012, as alleged in the COF complaint, Emmis's directors expressed their belief that the amendments would "have a positive effect on the overall capital structure of Emmis, which will have a beneficial impact on the holders of the Common Stock." [*See* note 4, above.] In any event, and as the district court below noted, "having a

goal—to gain the ability to take Emmis private—is not a 'wrongful act.'" [Doc. 72 at 1181.]

At every turn, INIC's argument misstates the Wrongful Acts—the violations of statutory or common law—actually alleged in the COF and Shareholder Suits. INIC fails to demonstrate the Wrongful Acts Exclusion clearly and unmistakably excludes coverage.

B. The Wrongful Acts alleged in the COF and Alden Suits are not the same or related.

The Wrongful Acts alleged in the Alden Suit were the Emmis directors' breaches of fiduciary duty in approving the $200,000 "loan" to fund the JSA Suit against Alden. [Doc. 54-2 at 594–600, ¶¶40–56.] The violations of federal securities law and Indiana corporation law alleged in the COF Suit had nothing to do with the directors' approval of the loan to JSA. Nor did the alleged breaches of fiduciary duty in the COF Suit, which were based on approval of the securities transactions that gave Emmis control over the vote of the Preferred Stock to amend its terms. [Doc. 54-2 at 728–29, ¶¶226–33.] The COF complaints make no allegations about the JSA Suit or the loan, and don't even mention Alden or the Alden Suit. Thus, all of the Wrongful Acts alleged in the COF Suit were independent of the Wrongful Acts alleged in the Alden Suit.

In its argument on the Arising-From Exclusion [*see* note 10, above], INIC asserts: "The COF Suit also alleged … the settlement of the Alden Action (including the Alden Swap) … constituted breaches of fiduciary duties and violations of federal securities laws and Indiana corporate law." [Br. 30.] This argument fails to demonstrate applicability of the Wrongful Acts Exclusion.

None of the complaints in the COF Suit even mentions Alden, so none of them alleges "the settlement of the Alden Action [or] the Alden Swap." INIC, no doubt, can cite authority from the Indiana Court of Appeals permitting an insurer to consider extrinsic evidence in making its coverage determination, *but see Kopko*, 570 N.E.2d at 1285 (defense coverage "is determined solely by the nature of the complaint"), but once INIC leaves the "eight corners" of the Policy and the COF complaint(s), it must acknowledge that, "[a]s a matter of law … the insurer has a duty to conduct a **reasonable** investigation into the facts underlying the complaint before it may refuse to defend the complaint." *Gallant Ins. Co. v. Oswalt*, 762 N.E.2d 1254, 1259 (Ind. Ct. App. 2002) (emphasis added, citations omitted).

Upon reasonable investigation beyond the allegations of the complaints, INIC would have discovered not only the Alden settlement, but also that the Emmis directors' did not approve amendment of the terms of the Preferred Stock to facilitate another Smulyan go-private attempt, as alleged in the Motive/Intent Allegations, but to improve the overall financial health of the company and to enhance the value of the common stock. [*See* note 4, above.] INIC also would have discovered that the Preferred Stock transactions in 2011 and 2012 were initiated by preferred shareholders seeking liquidity for their shares, and that Emmis agreed to repurchase their Preferred Stock at the offered discount to improve its credit rating and lower its debt service. [Doc. 60-1 at 963; *Corre*, 892 F.Supp.2d at 1081.] Instead of considering these easily discoverable facts, INIC chose to cling to the Motive/Intent Allegations to deny coverage,

even after the Shareholder-Plaintiffs abandoned the Allegations in the second amended complaint.

In any event, what the Wrongful Acts Exclusion requires is **not** a relationship between (i) a Wrongful Act in the COF Suit, and (ii) the Alden Suit or its settlement. It requires a relationship between (i) a Wrongful Act in the COF Suit, and (ii) a Wrongful Act in the Alden Suit. So even if the settlement of the Alden Suit via a TRS Transaction had been alleged in the COF Suit (it wasn't), and even if that Transaction had been a Wrongful Act (Judge Barker held that it wasn't, and this Court affirmed), that Transaction has no relationship to the Wrongful Acts alleged in the Alden Suit (breaches of fiduciary duty in approving Emmis's loan to JSA).

INIC has failed to meet its burden of demonstrating that the Wrongful Acts Exclusion clearly and unmistakably excludes coverage of the Defense Costs Emmis incurred in its successful defense of the COF Suit. *See Keckler*, 967 N.E.2d at 22–23. The district court should be affirmed.

5. As alternative grounds to affirm, the Indiana Supreme Court would agree with the overwhelming majority of jurisdictions that the negligence allegations in COF Suit triggered INIC's duty to advance defense costs.

This Court may affirm the grant of summary judgment on grounds different from the district court if the alternative grounds have adequate support in the record and the law. *Peters*, 311 F.3d at 842. In the district court, Emmis argued that INIC's duty to advance Defense Costs was not eliminated by the Exclusions because that duty is coextensive with a duty to defend an insured, given the terms of INIC's Policy [Doc. 1, ¶97; Doc. 61 at 1068–76; Doc. 64 at

1126–30]. The district court did not address the issue. [*See* Doc. 72.] Nor has the Indiana Supreme Court decided it, but because the overwhelming majority of courts that have decided the issue agree, this Court may safely predict the Indiana Supreme Court would analyze INIC's duty to advance as it does the duty to defend. *Erie Ins. Group v. Sear Corp.*, 102 F.3d 889, 892 (7th Cir. 1996). On this alternative ground as well, the district court should be affirmed.

The Policy provides that INIC "[s]hall advance, excess of any applicable Retention, covered Defense Costs … on a current basis," but requires repayment to INIC "in the event and to the extent such Insured Person or Organization shall not be entitled under this policy to payment of such Loss." [Doc. 1-1 at 38.] The overwhelming majority of courts that have considered policies with a duty to advance on a current basis and a right to repayment have held that, like a duty to defend, the duty to advance is triggered when any claims in a complaint are **potentially** covered. *See Maui Land & Pineapple Co. v. Liberty Ins. Underwriters Inc.*, 2018 WL 1613777 at *6–7 (D. Haw. April 3, 2018); *In re WorldCom, Inc. Securities Litigation*, 354 F.Supp.2d 455, 464-65 (S.D.N.Y. 2005); *Julio & Sons Co. v. Travelers Cas. & Sur. Co. of Am.*, 591 F.Supp.2d 651, 659-60 (S.D.N.Y. 2008); *Braden Partners, LP v. Twin City Ins. Co.*, 2017 WL 63019 at *5–6 (N.D. Cal. Jan. 5, 2017); *Dahner Wang v. Nat'l Union Fire Ins. Co.*, 2012 WL 12898404 at *2 n.2 (D.S.C. Mar. 16, 2012); *Am. Chem. Society v. Leadscope, Inc.*, 2005 WL 1220746 at *22-23 (Ohio Ct. App. May 24, 2005).

Likewise, other federal Circuit Courts have held the mere potential for coverage triggered the duty to advance defense costs under policies similar to INIC's,

based on the congruence between the duty to advance and the duty to defend, or on the language of the policy itself. *See Pendergest-Holt v. Certain Underwriters at Lloyd's*, 600 F.3d 562, 574 (5th Cir. 2010); *Liberty Mut. Ins. Co. v. Pella Corp.*, 650 F.3d 1161, 1170 (8th Cir. 2011); *Nat'l Union Fire Ins. Co. v. Brown*, 787 F.Supp. 1424, 1430 (S.D. Fla. 1991), *aff'd* 963 F.2d 385 (11th Cir. 1992); *Gon v. First State Ins. Co.*, 871 F.2d 863, 868 (9th Cir. 1989); *Little v. MGIC Indem. Corp.*, 836 F.2d 789, 793-94 (3d Cir. 1987).

Unlike the policies in some of the district court and circuit court cases just cited, INIC's Policy mirrors duty-to-defend policies, which typically permit the insurer to choose defense counsel, by requiring that Emmis's "choice" of counsel to defend Securities Claims "shall be made" from a list of law firms provided by INIC. [Doc. 1-1 at 39, 85.]

On the strength of this authority and the terms of INIC's Policy, the Court may conclude the Indiana Supreme Court would analyze INIC's duty to advance Defense Costs to Emmis consistent with Indiana law governing a duty to defend. As this Court has noted, under Indiana law, "the duty to defend is considerably broader than the duty to indemnify." *Fed. Ins. Co. v. Stroh Brewing Co.*, 127 F.3d 563, 566 (7th Cir. 1997) (citing *Seymour Mfg. Co. v. Commercial Union Ins. Co.*, 665 N.E.2d 891, 892 (Ind. 1996)). "The duty to defend is triggered when the complaint alleges facts that **might** fall within the coverage of the policy." *City of Gary v. Auto-Owners Ins. Co.*, 2018 WL 6694861 at *3 (Ind. Ct. App. Dec. 20, 2018) (emphasis added) (citing *Stroh Brewing*, 127 F.3d at 566). If just one claim in a lawsuit is covered by the duty to defend, the insurer

must defend the entire suit, even if it may not be responsible for all damages assessed. *Kopko*, 570 N.E.2d at 1285 (cited in *Aearo Corp. v. Am. Intern. Specialty Lines Ins. Co.*, 676 F.Supp.2d 738, 745 (S.D. Ind. 2009) ("Indiana follows the general rule that when one theory of liability in a suit against an insured is covered, the insurer's duty to defend … is triggered as to the entire lawsuit.")) Similarly, under Indiana law, an insurer cannot deny its insured a defense when an exclusion bars coverage for some but not all alleged claims. *Liberty Mut. Ins. Co. v. OSI Indus., Inc.*, 831 N.E.2d 192, 200 (Ind. Ct. App. 2005).

As discussed in sections 2, 3, and 4, above, INIC's argument that the Arising-From, Related Facts, and Wrongful Acts Exclusions eliminate coverage centers on the Motivation/Intent Allegations of the original and amended complaint. They alleged that Smulyan, frustrated by the failed Go-Private Attempt, hatched a "brazen scheme" to obtain control over the vote of the Preferred Stock to amend its terms and pave the way for a future go-private transaction. [Doc. 54-2 at 684, ¶28.] The Motive/Intent Allegations necessarily alleged intentional misconduct.

INIC's argument for application of the Exclusions fails when the pleadings are analyzed under a duty to defend analysis, because the COF complaints all alleged that Emmis **might** have violated federal securities law by **negligent** conduct. [Doc. 54-2 at 698, 701, 707, ¶¶68, 82, 113; Doc. 54-5, ¶68.] Indiana insurance law recognizes that negligence and intentional misconduct are mutually exclusive. *Sans v. Monticello Ins. Co.*, 676 N.E.2d 1099, 1102 (Ind. Ct. App. 1997). Thus, even if the Motive/Intent Allegations triggered exclusion of

some causes of action in the COF Suit, they could not trigger exclusion of the Securities Claims alleging Emmis's merely negligent violation of securities law. And because INIC would have had a duty to defend—and thus, under this analysis, a duty to advance Defense Costs—for **some** causes of action, the duty attached to **all**. *Kopko*, 570 N.E.2d at 1285; *OSI Indus.*, 831 N.E.2d at 200; *accord*, *Gon*, 871 F.2d at 868-69 (exclusion of claims involving personal gain and dishonesty did not affect duty to advance defense costs where complaint alleged negligence-based claims).

On this alternative ground as well, the district court should be affirmed.

Conclusion

The district court's Order and Judgment should be affirmed.

Respectfully submitted,

/s/ Steven C. Shockley
Steven C. Shockley, Counsel of Record
Richard A. Kempf
Thomas F. O'Gara
Taft Stettinius & Hollister LLP

Attorneys for Appellee,
Emmis Communications Corporation

Certificate of Compliance

This Appellee's Brief complies with the word limit of Circuit Rule 32(c) because, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f), this Brief contains 13,681 words.

This Appellee's Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because this Brief has been prepared in proportionally spaced typeface using Word version 10 in 12-point Bookman Old Style font.

/s/ Steven C. Shockley
Steven C. Shockley
Attorney for Appellee,
Emmis Communications Corporation
February 21, 2019

Certificate of Service

I certify that on February 21, 2019, I electronically filed this Appellee's Brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Steven C. Shockley
Steven C. Shockley
Attorney for Appellee,
Emmis Communications Corporation
February 21, 2019

24483613.1