2022 WL 3007732 (C.A.7) (Appellate Brief)
United States Court of Appeals, Seventh Circuit.

JOY GLOBAL, INC., Plaintiff-Appellant,

v.

COLUMBIA CASUALTY COMPANY and Travelers Casualty and Surety Company of America, Defendants-Appellees.

No. 21-2695.
July 22, 2022.

Appeal from the United States District Court for the Eastern District of Wisconsin, No. 2:18-cv-02034-LA.
The Honorable Lynn Adelman, Judge Presiding.

Joint Brief of Defendants-Appellees

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***vii TABLE OF CONTENTS**

***x TABLE OF AUTHORITIES**

JURISDICTIONAL STATEMENT

The jurisdictional statement of the appellant is complete and correct

PRELIMINARY STATEMENT

Plaintiff-Appellant Joy Global, Inc. ("Joy Global") seeks coverage under primary and excess directors and officers liability insurance policies for amounts it paid to settle eight lawsuits brought by its shareholders (the "Securities Actions"). Those lawsuits alleged that Joy Global issued a misleading proxy statement to gain approval of its acquisition by another company

for an inadequate price. Joy Global also asserts a "bad faith" claim against Defendant-Appellee Columbia Casualty Company ("Columbia").

Under the policies, there is no coverage for "any amount" of "any settlement" of an Inadequate Consideration Claim. The dispositive issue, therefore, is whether the Claims Joy Global settled are Inadequate Consideration Claims, defined as "that part of any **Claim** alleging that the price or consideration paid or proposed to be paid for the acquisition or completion of the acquisition of all or substantially all of the ownership interest in or assets of an entity is inadequate." [1]

The parties take directly contrary approaches to determining how the Inadequate Consideration Claim provision applies here. Columbia and Defendant-Appellee Travelers Casualty and Surety Co. of America ("Travelers") (collectively, ***2** the "Insurers") focus on the language of the applicable policies, asking whether each element of the definition applies. The Insurers' analysis is straightforward:

1. *Are the Securities Actions "Claims" as defined in the policy?* Yes. Claim is defined to include (among other things) a civil action.

2. *Did the Securities Actions involve the acquisition of all or substantially all of the ownership interest in an entity?* Yes. Joy Global is "an entity" that was acquired in its entirety by another entity.

3. *Did the Securities Actions allege that the price paid or proposed to be paid for the acquisition was inadequate?* Yes. The Securities Actions alleged that the proposed acquisition price for Joy Global's shares was too low. Every cause of action included those inadequate consideration allegations as an essential element of the claim. The underlying plaintiffs' sole damages theory was that the acquisition price was inadequate.

Based on this common-sense application of the unambiguous policy language to undisputed facts, the Insurers conclude that the Securities Actions are Inadequate Consideration Claims, and so the settlements are not covered. They also contend that extrinsic evidence cannot be used to change the meaning of the controlling policy language. The District Court (Adelman, J.) agreed.

Joy Global, in contrast, starts by lumping the Inadequate Consideration Claim provision together with a variety of policy provisions in different policies ***3** issued by different insurers to different policyholders at different times over many years, all of which it refers to generically as "bump-up" exclusions. It then proceeds to an incomplete and self-serving summary of the origin, history and purported intent of "bump-up" exclusions generally, focusing on a provision in a policy issued by a company not a party to this case more than 25 years ago. Finally, it uses that purported history and so-called "contextual clues" to back into a reading of the Inadequate Consideration Claim provision that cannot be squared with its plain meaning. JGI Brief at 7.

The result of Joy Global's exercise in "interpreting" the Inadequate Consideration Claim provision is striking. It reads "any Claim" to mean "only certain types of Claims." It reads "alleging that the price or consideration" paid or proposed to be paid to mean "alleging in the breach of duty or liability element of a cause of action but not in the damages element of the same cause of action that the price or consideration" paid or proposed to be paid is inadequate. And it reads "an entity" to mean "an entity other than Joy Global." As Judge Adelman held, Wisconsin law does not permit a court to rewrite a policy in this manner. *See Talley v. Mustafa*, 381 Wis. 2d 393, 416, 911 N.W.2d 55, 66 (Wis. 2018).

ISSUES PRESENTED FOR REVIEW

1. There is no coverage for "any amount" of "any settlement" of an "**Inadequate Consideration Claim**," defined as "that part of any **Claim** alleging that the price or consideration paid" to acquire "an entity is inadequate." Every cause of action settled alleged that Joy Global made misleading proxy statements to induce approval of its acquisition at an unfairly low price. The

only damages sought ***4** were based on the amount of the inadequate consideration. Did the District Court correctly hold that the settlements are not covered?

2. Under Wisconsin law, an insurer is not liable for "bad faith" if its coverage position is "fairly debatable," even if it turns out to be incorrect. Based on the unambiguous language of the policy, the District Court held that Columbia's coverage position is correct. Columbia responded on a timely basis to all communications regarding coverage. Joy Global does not cite any case decided before Columbia's denial that it contends interprets similar policy language differently than did Columbia. Did the District Court correctly grant summary judgment dismissing the "bad faith" claim?

STATEMENT OF THE CASE

I. The Policies

A. The Policies afford only limited coverage for "Inadequate Consideration Claims."

The Insurers issued directors and officers ("D&O") liability insurance policies to Joy Global for the policy period July 31, 2016 to July 31, 2017. JA-574, 600. Columbia issued a primary policy with a $10 million limit of liability (the "Primary Policy"). JA-574. Travelers issued an excess policy (the "Excess Policy" and together with the Primary Policy, the "Policies") with a $10 million limit of liability excess of $20 million of underlying insurance, including the $10 million ***5** primary limit and a first-level excess policy with a $10 million limit issued by Arch Insurance Company. JA-610. [2]

The Excess Policy generally "follows form" to the Primary Policy, meaning that it incorporates the terms of the Primary Policy except as specified otherwise. Here, the relevant terms of the Primary Policy control the coverage issues as to both Policies.

The relevant Insuring Agreements of the Primary Policy provide:

1. ***Management Liability (Individual)***

The Insurer shall pay on behalf of the **Insured Persons** that **Loss** resulting from any **Claim** first made against them during the **Policy Period** ... for a **Wrongful Act**, except and to the extent that the **Insured Entity** has indemnified them for such **Loss**.

2. ***Management Liability (Reimbursement*****)**

The Insurer shall pay on behalf of the **Insured Entity** that **Loss** for which the **Insured Entity** has indemnified the **Insured Persons** and which results from any **Claim** first made against the **Insured Persons** during the **Policy Period**... for a **Wrongful Act**.

3. ***Insured Entity Securities Liability***

The Insurer shall pay on behalf of the **Insured Entity** that **Loss** resulting from any **Securities Claim** first made against the **Insured Entity** during the **Policy Period** ... for a **Wrongful Act**.

JA-576.

***6** The Primary Policy defines "**Loss**" to include amounts Insureds are legally obligated to pay as awards, settlements or judgments and Defense Costs, but states that Loss shall not include:

any amount of any judgment or settlement of any **Inadequate Consideration Claim** other than **Defense Costs** and other than [settlements incurred by directors and officers that are not indemnified by Joy Global] ....

JA-581.

The Primary Policy in turn defines "**Inadequate Consideration Claim**" as:

[T]hat part of any **Claim** alleging that the price or consideration paid or proposed to be paid for the acquisition or completion of the acquisition of all or substantially all of the ownership interest in or assets of an entity is inadequate.

JA-579.

A **Claim** is defined in pertinent part as:

any civil, criminal, administrative or regulatory proceeding .... , which **Claim** shall be deemed first made upon the date of service upon or other receipt by an **Insured** of a complaint or similar pleading in any such proceeding[.]

JA-577.

II. Joy Global was represented by an insurance broker and renowned counsel in negotiating and procuring the Policies.

Joy Global, a manufacturer and servicer of heavy equipment used in mining coal and minerals, purchased primary D&O policies from Columbia every year beginning in 2006. JA-551. It was represented in negotiations leading to the ***7** purchases of the policies by its insurance broker, Marsh, and its attorney, Dan Bailey. JA-557.

Marsh characterizes itself as "the world's leading insurance broker and risk advisor"[3] with "deep expertise in D&O risk and coverage options."[4] It "served as a representative and advocate for [Joy Global] throughout th[e] whole underwriting process." JA-158.

Bailey is a prominent attorney who describes himself in a declaration submitted by Joy Global as "co-author of *Liability of Corporate Officers and Directors* ... which is generally regarded as a leading treatise on the subject of D&O liability and insurance," and states that he has "drafted all or parts of a large portion of the D&O insurance policy forms that are in use in the United States insurance market today ... [and] published dozens of articles on D&O insurance topics[.]" JA-550. Bailey reviewed Joy Global's coverage each year, suggested potential enhancements, and met in person each year with Columbia and Marsh to discuss potential changes. JA-557. For the 2011-2012 policy year, Bailey proposed revisions that resulted in the policy being rewritten, including changes to the Inadequate Consideration Claim provision. JA-552-57.

In 2015, Joy Global requested an amendment to the Inadequate Consideration Claim provision to allow coverage for "plaintiffs' fees and ***8** expenses that which are directly payable by the Insured separate from the settlement or judgment amount payable to the plaintiffs or plaintiff class." JA-199-200. Columbia's underwriter responded:

[Columbia] never agreed, nor will we do any carve back which specifically includes P[laintiff']s att[orne]y fees in Loss. We have no problem with some wording allowing it, solely in the circumstance of a pre-close bump up settlement, but never would agree to the language you suggest as it would suggest coverage for P[laintiff]s att[orne]y fees in post close which is, well, crazy (in our eyes).

JA-196.[5]

Later in 2015, Joy Global requested limited coverage for "any plaintiff fee award in an Inadequate Consideration Claim if such Claim is resolved without any monetary payment to the settlement class or if such fee award is directly payable by the Insureds separate from any settlement or judgment amount payable by the Insureds to the plaintiff class." JA-195. Language to that effect was included in the policy issued for the 2015-16 policy year but is not included in the Primary Policy applicable here. JA-1238.

Early in 2016, Joy Global started the process of renewing its insurance program, which was expiring on July 31, 2016. JA-204. Following in-person meetings among Joy Global, Marsh, Bailey, and Columbia underwriters, Columbia, on July 8, 2016, issued a binder of insurance agreeing to provide a renewal policy effective July 31, 2016. JA-207-8.

***9** On July 21, 2016, however, Joy Global announced that it had entered into an agreement to be acquired by Komatsu America Corp. ("Komatsu"). JA-488. Upon learning of the acquisition (the "Merger"), Columbia informed Joy Global that the transaction was a material change in circumstances negating the binder. JA-172. At the same time, Columbia proposed three options for continuing or renewing Joy Global's policy notwithstanding the planned transaction. JA-173-174.

Specifically, Joy Global could (1) extend its expiring policy; (2) purchase a renewal policy for the 2016-17 period and later have the option to purchase an extended reporting period for six years following closing of the Merger, provided it did not give notice of any potential Claims arising from the Merger during the expiring policy period; or (3) choose the second option and get a 10% discount in exchange for paying the premium for both the renewal policy and the extension upfront. JA-1087. As Bailey explained, Columbia proposed those options to ensure that only one limit of liability would be exposed for any Claims resulting from the Merger. JA-173. Joy Global elected the second option, and the Insurers issued the Policies. JA-574, 605.

III. The Securities Actions alleged that Komatsu paid inadequate consideration to acquire Joy Global.

A. The Non-Duncan Claims

Following announcement of the Merger, eight Joy Global shareholders filed the Securities Actions.[6] JA-53-54. The first seven lawsuits are referred to as the ***10** "Non-Duncan Claims" and are treated together because they all settled before the Merger closed, whereas the "Duncan Claim" did not settle until post-closing.

Each of the Non-Duncan Claims was premised on the allegation that Joy Global's shareholders would receive an inadequate price for their shares under the proposed terms of the Merger. For example:

• The *Oduntan* complaint alleged that the $28.30 share price was "fundamentally unfair" and should have been closer to $40.00 per share or higher. Dkt. No. 103-2, *Oduntan* Compl. ¶ 3;

• The *Gordon* and *Soffer* complaints alleged that "the consideration shareholders are to receive is inadequate. Joy shareholders are being cashed out at the unfairly low price of $28.30 per share." Dkt. No. 103-3, *Soffer* Compl. ¶ 41; Dkt. No. 103-4, *Gordon* Compl. ¶ 3;

• The *Garfield* complaint alleged that the $28.30 share price "fails to comply with the Joy Global Board's fiduciary duty to maximize value for shareholders." Dkt. No. 103-12, *Garfield* Compl. ¶ 2;

***11** • The *Rote* complaint alleged that the $28.30 per share consideration "is inadequate and undervalues the Company." Dkt. No. 103-5, *Rote* Compl. ¶ 2;

• The *Tansey* complaint alleged that "[t]he Proposed Transaction is the result of an unfair process and provides the Company's shareholders with inadequate consideration." Dkt. No. 103-6, *Tansey* Compl. ¶ 3; and

• The *McGregor* complaint alleged that "[t]he consideration to be paid to plaintiff and the Class in the Proposed Transaction is unfair and inadequate." Dkt. No. 103-7, *McGregor* Compl. ¶ 45.

Joy Global settled the Non-Duncan Claims by agreeing to provide further disclosures regarding the proposed Merger and to pay $800,000 to plaintiffs' counsel for attorneys' fees. JA-393-410.

After the Non-Duncan Claims were dismissed, leaving only the Duncan Claim pending, Joy Global's shareholders approved Komatsu's acquisition of Joy Global; the Merger closed in April 2017. JA-26-27.

B. The Duncan Claim

Like the Non-Duncan Claims, the Duncan Claim was premised on the allegation that the Merger provided inadequate consideration to Joy Global shareholders. *See*, *e.g.*, JA-413 (alleging that $28.30 per share was an "inadequate price" for the merger); *id.* (referencing analyst opinion that merger share price "does not extract as much value as there should be for Joy's shareholders," and should ***12** have been close to $40 per share); JA-439 ("The Acquisition significantly undervalued Joy Global").

As their legal theory, the shareholders alleged that Joy Global and its directors and officers violated Section 14(a) of the Securities Exchange Act by filing a false and misleading proxy statement. They also asserted a claim for control person liability under Section 20(a) of that Act. JA-445-547. According to the shareholders, Joy Global and its directors and officers made these false and misleading statements "to secure shareholder support for the undervalued acquisition." JA-414.

The premise of the Duncan Claim was simple and clear-cut: Joy Global and the other defendants made misrepresentations, including lowering Joy Global's projected revenue streams as a stand-alone company thereby understating its value. They made these misrepresentations to induce Joy Global's shareholders to vote in favor of the proposed Merger on terms that provided inadequate consideration for the shareholders' shares. For damages, the shareholders sought the difference between the fair value of their shares and the inadequate amount they received under the Merger. The Duncan Claim complaint articulates this theory repeatedly and specifically:

• "On July 21, 2016, defendants announced that they had entered into an Agreement and Plan of Merger (the 'Merger Agreement'), pursuant to which Komatsu would purchase all of Joy Global's outstanding shares *for the inadequate price of $28.30 per share,* or approximately $3.7 billion total."

JA-413 (emphasis added);

***13** • "'[T]he value of the transaction, which boils down to $28.30 (per share), effectively *does not extract as much value as there should be for Joy's shareholders. In our view, something closer to $40, frankly above $40, would accomplish that ....'* Similarly, Bloomberg reported that Komatsu was buying Joy Global '*[o]n the cheap*' by acquiring 'Joy at almost a 50 percent discount to its five-year average.'"

Id. (emphasis in original Duncan Claim amended complaint);

• "The Proxy, which recommended that Joy Global's shareholders vote in favor of the Acquisition, omitted and misrepresented material information in contravention of §§14(a) and 20(a) of the 1934 Act *regarding the unfair consideration offered in the Acquisition and the actual intrinsic value of the Company.*"

JA-414 (emphasis added);

• "*Based on the misleading Proxy with respect to the Company's intrinsic value,* defendants were able to obtain shareholder approval of the sale to Komatsu and deprive Joy Global shareholders of the full value of their interests in the Company."

JA-415 (emphasis added);

• "Because the Board reached a deal based on the unreasonably low Five-year Downside Scenario, however, *Joy Global's stock was capped at $28.30 per share during this time and Joy Global stockholders were shut out from any additional upside.*"

JA-437 (emphasis added);

• "*The Acquisition significantly undervalued Joy Global.*"

JA-439 (emphasis added);

• "*The consideration offered in the Acquisition did not adequately reflect the Company's prospects going forward or its synergistic value to Komatsu as a merger partner.* By entering into the Acquisition, Komatsu was able to capture the value of Joy Global's business, at far less than its actual synergistic value to Komatsu. *Joy Global's shareholders, on the other hand, did not share in these profits going forward,* as this is a cash-out ***14** transaction that did not include any stock component for shareholders." JA-440 (emphasis added);

• "As a result of the Acquisition, *Joy Global's shareholders were cashed out at a price that did not reflect their equity stake in the Company,* all while Komatsu reaped the benefits of Joy Global's position as a global leader in its field."

JA-440-41 (emphasis added);

• "*The Proxy falsely states that 'The Joy Global board considered that the merger consideration was more favorable to Joy Global's stockholders* than the potential value that would reasonably be expected to result from other alternatives reasonably available to Joy Global[.]"'

JA-442 (emphasis added);

• Identifying questions of law and fact common to the Class:

"(d) *whether the consideration payable in connection with the Acquisition to plaintiffs and the Class was unfair and inadequate;* and

(e) *whether Joy Global's standalone value existed above the Acquisition price of $28.30 per share,* which each Joy Global stockholder received upon consummation of the Acquisition."

JA-444 (emphasis added);

• "The Proxy *... misrepresents and/or omits material facts, including material information about the unfair sales process for the Company, the unfair consideration offered in the Acquisition, and the actual intrinsic value of the Company's assets.*"

JA-445 (emphasis added); and

• "As a *direct result* of the defendants' negligent preparation, review and dissemination of the false and/or misleading Proxy, plaintiffs and the class were precluded both from exercising their right to seek appraisal and *were induced to vote their shares and accept inadequate consideration of $28.30 per share* in connection with the Acquisition. The ***15** false and/or misleading Proxy used to obtain shareholder approval of the Acquisition *deprived plaintiffs and the Class of their right to a fully informed shareholder vote in connection therewith and the full and fair value for their Joy Global shares*.... [D]efendants were aware of and/or had access to the true facts concerning the process involved in selling Joy Global and *Joy Global's true value (as reflected in, at a minimum, the Five-Year Growth Plan), which was far greater than the $28.30 per share that shareholders received.* Thus, as a direct and proximate result of the dissemination of the false and/or misleading Proxy defendants used to obtain shareholder approval of and thereby consummate the Acquisition, plaintiffs and the class have suffered damage and actual economic losses *(i.e., the difference between the price Joy Global shareholders received and Joy Global's true value at the time of the Acquisition)* in an amount to be determined at trial."

JA-445-46 (emphasis added).

In May 2018, the parties entered into a Stipulation of Settlement requiring Joy Global to pay $20 million into a settlement fund. JA-487. In seeking approval for the Duncan Settlement, the shareholders' counsel confirmed that the settlement payment was compensation to the shareholders for the difference between the fair value of their shares and the inadequate price received in the Merger:

Lead Plaintiffs would have argued that damages on a §14(a) proxy claim following a merger are typically assessed based on the fair value of company common stock at the time of the acquisition, less the value received in the merger. Here, that would mean the fair value of Joy Global's stock (as eventually determined by Lead Plaintiffs' damages expert), less the $28.30 per share received by stockholders in the Acquisition. Lead Plaintiffs and Lead Counsel retained and were advised in this Litigation by paid financial consultants and valuation professionals, who concluded that Joy Global's fair value may have exceeded the $28.30 per share price.

JA-75.

***16** Joy Global's liability was capped at $20 million, with all attorneys' fees and costs to come out of the settlement fund and the remaining balance to be distributed to shareholders *pro rata* based on shares held as of the Merger. JA-77-78.; JA-499-500. The court approved the settlement and awarded attorneys' fees at 25% of the settlement fund, *i.e.*, $5 million. JA-544-45.

IV. The Insurers denied coverage for the settlements of the Securities Actions because "any amount" of "any settlement" of an Inadequate Consideration Claim is not covered "Loss."

Joy Global provided notice of the Securities Actions under the Policies. JA-36. In a November 8, 2016 letter, Columbia explained that because the Securities Actions alleged the Merger price was inadequate, those Claims collectively constituted an Inadequate Consideration Claim and so there would be no coverage for a settlement or judgment. JA-620, 623-34. Columbia agreed, however, to provide coverage for Defense Costs, ultimately paying a total of $2,215,309.92. [7] JA-624-25.

Nearly a year later, in an October 26, 2017 letter, Joy Global asked Columbia to "revisit" within 10 days its conclusion concerning coverage for a judgment or settlement. JA-455-63. The same day, Columbia's claims professional replied to ask whether there was "some reason" for the 10-day deadline. JA-1271. Joy Global responded that the requested deadline arose only from its "desire for clarity in ***17** respect to its coverage claim," and thanked Columbia's representative for the "considerable attention" she was showing to the matter. *Id*. Joy Global also requested that Columbia "change its position to an acceptance of coverage or, at the very least, to a reservation of rights" in view of the points raised in its October 2017 Letter. JA-1272.

Columbia responded in a November 14, 2017 letter, stating:

For the reasons set forth below, Columbia Casualty withdraws its disclaimer of coverage and instead reserves its rights with respect to the extent to which the *Duncan* action constitutes an **Inadequate Consideration Claim**. Based on the allegations of the *Duncan* Amended Complaint, however, our view remains that the essence of the plaintiffs' claim in the *Duncan* action is that they received inadequate consideration for their shares of Joy Global in the merger with Komatsu.

JA-465 (emphasis in original).

Columbia invited Joy Global to provide further information that "plaintiffs are seeking damages beyond 'the difference between the price Joy Global shareholders received and Joy Global's true value at the time of the Acquisition.'" JA-468 (quoting the *Duncan* Amended Complaint). Pending receipt of such information, Columbia continued to reserve its rights. JA-469. Columbia's representative testified that she "wanted to make sure that Joy Global had the opportunity to provide additional information about what the plaintiffs were seeking" and was "inviting Joy Global to provide that information." JA-1282.

On December 22, 2017, Joy Global provided additional legal argument but no new facts. JA-266.

***18** On February 28, 2018, Joy Global notified Columbia of a proposed $20 million settlement of the Duncan Claim and demanded that Columbia agree to fund it. JA-1274. Again, Joy Global set forth legal argument but did not provide any new facts. *Id*.

Columbia responded on March 7, 2018, observing "Joy Global 'has not provided any information to support [its] contention'" that the Duncan Claim "'seeks damages measured by anything other than the amount by which plaintiffs contend the price paid for the acquisition of their Joy Global shares was inadequate.'" JA-1274. Accordingly, Columbia declined to fund the settlement.

V. The District Court's decision

Following completion of discovery, the parties filed cross-motions for summary judgment. The District Court granted the Insurers' motion and denied Joy Global's, holding that the Policies do not afford coverage for the settlements of the Securities Actions. The District Court also dismissed Joy Global's bad faith count.

After reviewing Wisconsin's rules of insurance contract construction, Judge Adelman first concluded that the applicable policy language is "clear and unambiguous, and its effect is not uncertain." SA-5. Based on that clear language, a reasonable insured in Joy Global's position would understand that there is no coverage "for any amount of any settlement if: (1) the part of the Claim which was settled (2) alleges that the price or consideration paid or proposed to be paid for an acquisition transaction was inadequate, and (3) the proposed or completed ***19** transaction involved the acquisition of all or substantially all of the ownership interest in or assets of an entity." *Id.*

The District Court explained that each Securities Action alleged that the consideration paid for the acquisition transaction was inadequate, that all of the causes of action in all of the lawsuits relied on those allegations of inadequate consideration, and so in each instance the part of the claim settled was based on the inadequate consideration allegations. Judge Adelman then noted that the proposed transaction was the acquisition of an entity, namely Joy Global. He therefore concluded that the settlement payments do not fall within the Policy's definition of covered Loss. SA-5-7.

The District Court rejected each of Joy Global's arguments in favor of coverage. SA-7. Judge Adelman first held that Joy Global's arguments regarding the history and purpose of similar exclusions are irrelevant because the controlling policy language is clear and unambiguous. *Id*.

He then explained that the "that part of" language in the definition of Inadequate Consideration Claim refers to the part of the Claim being settled. Once it is determined that what is being settled is an Inadequate Consideration Claim, then there is no

coverage for "any amount of any settlement." *Id*. Because Joy Global settled what are all Inadequate Consideration Claims, the settlements are not covered. SA-6-7.

Next, the District Court held that the unpublished state trial court decision in ***20** *Northrop Grumman Innovation Systems, Inc. v. Zurich American Insurance Co.,* C.A. No. N18C-09-210, 2021 WL 347015 (Del. Super. Ct. Feb. 2, 2021) ("*Northrop*"), on which Joy Global relied, "is not binding and its reasoning is unpersuasive." SA-8. As an initial matter, the District Court observed that the provision at issue in *Northrop* was narrower than that here. Beyond that, Judge Adelman concluded that the *Northrop* court effectively rewrote unambiguous policy language to make the provision narrower than its unambiguous natural meaning, which Wisconsin law does not permit. SA-8.

Finally, Judge Adelman rejected Joy Global's contention that Columbia's conduct during the negotiation of the Policies led Joy Global reasonably to expect coverage for the settlements. After noting that the parties did not discuss application of the Inadequate Consideration Claim provision during those negotiations, Judge Adelman concluded:

Joy Global cannot claim that it reasonably expected coverage on any and all shareholder suits which resulted from the merger given that it was aware of the carve outs and exclusions within the policy. I will also note that Joy Global did receive coverage for the defense costs stemming from shareholder suits which totaled more than $2 million. SA-9.

Having determined that the Insurers correctly denied coverage for the settlements, the District Court also granted summary judgment dismissing Joy Global's "bad faith" claim count. SA-9-10.

SUMMARY OF ARGUMENT

1. There is no coverage for "any settlement" of an Inadequate Consideration Claim, defined as "that part of any **Claim** alleging that the price or consideration paid or proposed to be paid for the acquisition or proposed acquisition of all or ***21** substantially all of the ownership interest in or assets of an entity is inadequate." The Securities Actions fall squarely within this definition because they allege that the price Komatsu paid to acquire an entity (Joy Global) was less than fair value and sought as compensation the difference between fair value and the lower acquisition price.

2. Joy Global nonetheless contends that the Securities Actions are not Inadequate Consideration Claims because they are based on allegedly inadequate disclosures in a proxy statement and are not "price-based claims," such as statutory appraisal proceedings and so-called "freeze-out litigation." It contends that an Inadequate Consideration Claim must be a Claim for the "Wrongful Act" of paying inadequate consideration and nothing else.

But Loss and Wrongful Act are separate elements of coverage. There must be a Claim for a Wrongful Act. *In addition*, regardless of the Wrongful Act alleged, the amount sought must be Loss. Because "any amount" of "any settlement" of an Inadequate Consideration Claim does not qualify as Loss, there is no coverage for such a settlement. There is not a hint in the controlling policy language that the allegation of inadequate consideration must be in the breach of duty (Wrongful Act) element of the Claim, rather than the equally essential damages element of the Claim.

3. Joy Global's assertion that Section 14(a) securities claims do not *require* allegations of inadequate consideration is true but irrelevant. The dispositive point is that the specific claims for which Joy Global seeks coverage were in fact premised ***22** on allegations of inadequate consideration. Indeed, plaintiffs' *only* theory of damages was that the price paid for Komatsu's acquisition of Joy Global was inadequate.

4. Joy Global also contends that "consideration paid for the acquisition of an entity" means "consideration paid *by Joy Global* for the acquisition of an*other* entity." Here again, Joy Global's reading contradicts the plain meaning of the controlling policy language. "An entity" means "an entity," not "some entities" or "an entity other than Joy Global."

5. The cases Joy Global cites to support its contention that bump-up exclusions apply where the insured is the buyer, not the seller, do not help it. Notably, *Genzyme Corp. v Federal Insurance Co.*, 622 F.3d 62 (1st Cir. 2010), involved a policy provision that was specifically limited to transactions involving "the actual or proposed payment by any Insured Organization of allegedly inadequate or excessive consideration in connection with its purchase of securities issued by [the Insured Organization] . . .." *Id.* at 67. This provision shows there is no such thing as a generic industry-standard "bump-up" exclusion, as Joy Global's argument supposes; where a policy intends to limit the scope of a provision (whether as to the acquiring entity or the acquired entity or both), it says so.

6. Joy Global's proposed limitation of the Inadequate Consideration provision to transactions where Joy Global is the acquiring entity also does not make economic sense. In that regard, Joy Global says the purpose of the Inadequate Consideration Provision is to avoid the use of insurance to subsidize an acquisition. ***23** But that is exactly what Joy Global seeks here. Komatsu acquired Joy Global, which is now its subsidiary; coverage for the settlement payment in the Duncan Claim would subsidize the costs of Komatsu's acquisition and benefit the post-acquisition combined entity.

7. Joy Global relies on expert opinions to support its central argument that all "bump-up exclusions" have the same purpose and should be interpreted in the same way. Those experts recite the purported history and purpose of "bump-up exclusions" generally, focusing on a provision in a policy issued by a carrier not a party to this case 25 years ago and discussing different policies issued to different insureds at different times with different language. Likewise, Joy Global contends that it had a "reasonable expectation of coverage."

However, interpretation of a policy provision presents an issue of law as to which expert testimony is not needed or permitted. More generally, as Judge Adelman held, extrinsic evidence is not admissible where there is no reasonable interpretation of the actual language of the policy that would result in coverage. Similarly, an insured cannot have a reasonable expectation of coverage where the purported expectation is contrary to the plain meaning of the controlling policy language.

8. Joy Global's alternative contention that it is entitled to an allocation to determine "that part of" the settlements carved out from Loss fares no better. As Judge Adelman held, the "that part of" language relates to the part of a Claim being settled. Once it is determined that all of the causes of action being settled are ***24** Inadequate Consideration Claims, as here, then "any amount" of "any settlement" is not covered.

The attorneys' fees portions of the settlement also are not covered. The $800,000 paid for attorneys' fees in the Non-Duncan Claims and the $5 million of attorneys' fees paid in the Duncan Claim all are part of "any settlement" of an Inadequate Consideration Claim and so not covered.

The attorneys' fees payment in the Duncan Claim is excluded for two additional reasons. First, courts have consistently held that a fee award on a non-covered claim is also not covered. Second, Joy Global did not pay any attorneys' fees at all in the Duncan Claim. It paid $20 million into a common fund settlement all of which represented compensation to the plaintiffs, and the plaintiffs paid their own attorneys' fees out of the common fund.

9. Finally, "[t]o prove a bad faith claim in Wisconsin, 'a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.'" *Christopherson v. Am. Strategic Ins. Corp.*, No. 19-CV-202-JPS, 2019 WL 4141259, at *1 (E.D. Wis. Aug. 30, 2019) (quoting *Brethorst v. Allstate Prop. & Cas Ins. Co.*, 334 Wis. 2d 23, 36, 798 N.W.2d 467, 474 (Wis. 2011)). Here, a respected federal judge held that Columbia's position is not merely reasonable but correct. That position is supported by the language of the Policies, and Joy Global does not cite a single case decided before Columbia's denial of coverage that it contends applied similar language differently. Columbia responded on a timely and ***25** thoughtful basis to all of Joy Global's communications regarding the Securities Actions. Accordingly, the "bad faith" claim fails even if the Court were to reverse the District Court as to the coverage issues.

ARGUMENT

I. Under Wisconsin law, the plain language of the Policies controls.

Insurance policies are governed by the same rules of construction that apply to other contracts. *See Wis. Label Corp. v. Northbrook Prop. & Cas. Ins. Co.*, 233 Wis. 2d 314, 607 N.W.2d 276 (Wis. 2000). Words of the policy should be given the meaning that a reasonable person in the position of the insured would have given them. *See id.* at 328, 607 N.W. 2d at 283. If the policy language is plain and unambiguous, courts will afford them their plain, ordinary meaning and apply them as written. *See Garriguenc v. Love*, 67 Wis. 2d 130, 134-35, 226 N.W.2d 414, 417 (Wis. 1975). Courts will not search for ambiguity where there is none. *See Smith v. Atl. Mut. Ins. Co.*, 155 Wis. 2d 808, 811, 456 N.W.2d 597, 599 (Wis. 1990). Moreover, when the policy is unambiguous, a rule of "narrow construction," does *not* apply, even to those policy terms deemed exclusions. *Phillips v. Parmalee*, 351 Wis. 2d 758, 765, 840 N.W.2d 713, 716 (Wis. 2013).

II. The Securities Actions are Inadequate Consideration Claims.

A. The Inadequate Consideration Claim provision is not limited to "price-based" claims.

To show the necessary economic harm element of the causes of action asserted, the Securities Actions repeatedly alleged that Joy Global's shareholders received inadequate consideration for their shares. Specifically, in the Duncan ***26** Claim, the shareholders allege that "plaintiffs and the class have suffered damage and actual economic losses (*i.e.,* the difference between the price Joy Global shareholders received and Joy Global's true value at the time of the Acquisition) in an amount to be determined at trial." JA-446. The Non-Duncan Claims were premised on similar allegations. JA-1312-15.

Joy Global nevertheless contends that the Securities Actions are not Inadequate Consideration Claims because they are based on allegedly inadequate disclosures in a proxy statement and are not what it calls "price-based" claims, such as statutory appraisal proceedings and so-called "freeze-out" litigation. According to Joy Global, Inadequate Consideration Claims are limited to those "price-based" claims where claimants allege "economic ... underpayment as the 'Wrongful Act' giving rise to liability." JGI Br. at 28.

In the same vein, Joy Global argues that it was "Joy's alleged act of making material misrepresentations in its proxy statements - not any 'inadequate consideration' that motivated and enabled the plaintiffs to file the Securities Action under the federal Proxy Fraud Rules." JGI Br. at 40-41. It asserts that (1) the Policies cover Loss resulting from Claims for Wrongful Acts, so an Inadequate Consideration Claim *must* be a Claim for the "Wrongful Act" of paying inadequate consideration - and nothing else; and (2) Section 14(a) lawsuits are not "price-based" claims turning solely on an allegation that consideration in a transaction was inadequate. JGI Br. at 37-38, 40.

***27** On its face, however, the definition of an Inadequate Consideration Claim extends to *any* Claim alleging inadequate consideration paid or proposed to be paid for an acquisition of an entity. The definition turns on the allegations of the Claim, not the legal theories asserted.

Joy Global's argument also ignores the fundamental structure of the Primary Policy. Loss and Wrongful Act are separate elements of coverage. Of course, there must be a Claim for a Wrongful Act. *In addition*, to be covered, the Claim for a Wrongful Act must result in payment of an amount that falls within the definition of "Loss." For example, "fines or penalties imposed by law" cannot be covered because they are carved out from the definition of Loss. JA-581. There is not a hint in the controlling policy language that the allegation of inadequate consideration must pertain solely to the breach of duty (Wrongful Act) allegations of the Claim, rather than the equally essential damages element of the Claim. [8]

Put differently, while an Inadequate Consideration Claim must, like any Claim to which the Primary Policy applies, allege a Wrongful Act, nowhere does the contract language require the Wrongful Act to be the payment of inadequate consideration.

Rather, the extensively negotiated policy unambiguously provides that covered Loss does not include any settlement of that part of any Claim "*alleging* that the price or consideration paid or ***28** proposed to be paid for the acquisition or completion of the acquisition of all or substantially all of the ownership interest in or assets of an entity is inadequate." JA 579 (emphasis added). If the Claim being settled *alleges* the payment of inadequate consideration, then the settlement does not qualify as Loss and coverage is barred, regardless of the statutory basis for or legal theory underlying the claim.

As the District Court held, the Delaware state trial court decision in *Northrop*, on which Joy Global relies, is unpersuasive.[9] In that case, the court held that coverage for the proxy fraud portion of a multi-faceted lawsuit was not barred by a bump-up provision. The policy provision at issue applied to "a Claim alleging" that inadequate consideration was paid for an acquisition. Nonetheless, the court applied the provision as though it were limited to "Claims" alleging "***only***" that inadequate consideration was paid for an acquisition, holding that it did not apply because the proxy "Claim wasn't *exclusively* about the [insured's] stockholders' 'inadequate' 'consideration.'" *Id*. at *20 (emphasis added) (internal citation omitted).

As Judge Adelman held, Wisconsin law does not permit a court to rewrite unambiguous policy language in this manner. SA-8; *see Peterson v. Pa. Life Ins. Co*., 265 Wis. 2d 768, 776-77, 669 N.W.2d 151, 155 (Wis. Ct. App. 2003).

***29** In a better-reasoned decision, *Onyx Pharmaceuticals, Inc. v. Old Republic Insurance Co*., Case No. CIV 538248, 2020 WL 9889619 (Cal. Super. Ct., San Mateo Cnty. Oct. 1, 2020), the court recognized in a post-trial proposed statement of decision that an inadequate consideration provision similar to that here extended beyond so-called "price-based claims" and applied to a proposed acquisition of the named insured entity. There, shareholders of the named insured, Onyx Pharmaceuticals, filed a class action asserting a breach of fiduciary duty claim against Onyx's directors and officers in connection with Onyx's acquisition by Amgen, Inc. *Onyx*, 2020 WL 9889619, at *4-5. The shareholders alleged that the proposed merger price offered to Onyx shareholders under-valued the company and misleading statements in a proxy led the shareholders to approve the merger. *Id*.

Onyx applied a carve-out from the definition of Loss, which read:

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

Id. at *4.

Because the breach of fiduciary duty claim was premised on allegations that the proposed acquisition price was too low, the *Onyx* court held that the inadequate consideration carve-out unambiguously barred coverage for a settlement payment. *Id*. at *15.

Similarly, the shareholder plaintiffs in all of the Securities Actions alleged that Joy Global and its officers and directors made misrepresentations in the proxy ***30** statement, including by their failure to disclose Joy Global's revenue projections that justified a higher purchase price. In the one case not settled before the acquisition closed, the Duncan Claim, the shareholders alleged they were induced to vote to sell their shares for inadequate consideration "[a]s a direct result of" the proxy fraud. JA-445. Those allegations place the Securities Actions squarely within the definition of an Inadequate Consideration Claim.

B. Inadequate consideration was an essential part of the Securities Actions.

Joy Global's assertion that Section 14(a) claims do not *require* allegations of inadequate consideration is true but irrelevant. As a matter of first principles, the issue is whether the *specific* claims asserted against Joy Global allege inadequate consideration.

On that point, the Section 14(a) (and Section 20(a)) causes of action asserted in the Securities Actions were tied inextricably to the shareholders' allegations that the Merger consideration was inadequate. [10] All the Securities Actions repeatedly alleged that the price Komatsu proposed to be paid and ultimately paid for Joy Global was too low. The allegedly inadequate purchase price was the *only* economic loss or harm *ever* identified by the *Duncan* plaintiffs as a basis for recovery. It was also the *only* justification they ever provided for obtaining the $20 million settlement payment from Joy Global.

***31** Joy Global's contention that only so-called "price-based" claims, such as appraisal actions and freeze-out mergers, can qualify as Inadequate Consideration Claims not only is entirely removed from the policy language but also flies in the face of the principle that "[j]udges endeavor to read contracts to make economic sense." *Superl Sequoia Ltd. v. Carlson Co., Inc.*, 615 F.3d 831, 836 (7th Cir. 2010). The monetary relief in so-called "price-based" claims is based on the contention that the claimant received too little for the shares or property at issue. Likewise, the $20 million settlement of the Duncan Claim was based on the contention that the shareholders received too little for their shares. As discussed more fully below, providing insurance coverage for a settlement of an Inadequate Consideration Claim subsidizes the acquisition just as does providing coverage for a so-called price-based claim. *Infra* at 36-37.

In short, the District Court rightly characterized as a "non-starter" Joy Global's argument that the settlements for which it seeks coverage were not settlements of Inadequate Consideration Claims because they alleged liability based on misleading proxy statements. SA-7. As a matter of indisputable fact, "the claims do allege inadequate consideration." *Id.*

***32 C. The Inadequate Consideration Claim provision is not restricted to transactions where Joy Global is the buyer rather than the seller.**

1. The text of the Inadequate Consideration Claim provision does not permit Joy Global's attempt to limit the meaning of "an entity" to "entities other than Joy Global."

Joy Global asserts that the Inadequate Consideration Claim provision "focuses on action by the buyer in a corporate transaction" and only applies to Claims involving Joy Global's acquisition of *another* entity. JGI Br. at 51. Discussing different policy provisions issued by different insurers at different times, Joy Global asserts that "the exclusion originated as a tool to address a specific, narrow concern: that the buyer in a corporate transaction could obtain a windfall if insurance can be called upon to fund the economic difference between price it pays and the 'fair' price.[]" JGI Br. at 51.

Joy Global's contention that the supposed original intent (over 25 years ago) [11] of a generic type of policy provision controls here is wrong for at least three reasons.

First, the Inadequate Consideration Claim definition applies to any Claim alleging inadequate consideration for the acquisition of "an entity." The relevant dictionary definition of "entity" is "an organization (such as a business or governmental unit) that has an identity separate from those of its members." [12] ***33** Under basic English language principles, "an entity" cannot reasonably be read to mean "an entity *other than Joy Global*." In a parallel context, courts routinely hold that "an insured" as used in an exclusion includes all insureds. *E.g.*, *Argent v. Brady*, 386 N.J. Super, 343, 347-50, 901 A.2d 419, 422-23 (N.J. Super. Ct. App. Div. 2006) (noting that courts across the country that have interpreted the term "an insured" in an exclusion to mean "all insureds" or "any insured"); *Mallozzi v. Nationwide Mut. Ins. Co.,* 72 Conn. App. 620, 628, 806 A.2d 97, 102 (Conn. App. Ct. 2002) ("'any' means 'any'"); *Allstate Ins. Co. v. Freeman*, 432 Mich. 656, 694, 443 N.W.2d 734, 752 (Mich. 1989) (similar); [13] *see also Tempelis v. Aetna Cas. & Sur. Co.*, 169 Wis. 2d 1, 11, 485 N.W.2d 217, 221 (Wis. 1992) ("the word 'any means any.'") (citation omitted). Joy Global is unquestionably "an entity"; after all, it is the "Insured Entity" under the Policies.

Second, Joy Global's proposed reading would lead to internal inconsistencies within the Primary Policy itself, thereby rendering it unreasonable as a matter of law. *See Foskett v. Great Wolf Resorts, Inc.*, 518 F.3d 518, 522 (7th Cir. 2008); *Campion v. Montgomery Elevator Co.,* 172 Wis. 2d 405, 416, 493 N.W.2d 244, 249 (Wis. Ct. App. 1992). In particular, where the Primary

Policy refers to entities *other than* Joy Global, it does so expressly. For example, the Policy's definition of Not-For-Profit Outside Entity is: "any entity, *other than an* ***Insured Entity***, exempt ***34** from federal income taxation." JA-582 (emphasis added). Likewise, the Primary Policy's exclusion for "**Wrongful Acts** of Executives of Other Entities" refers to the acts of certain individuals in enumerated positions "in *any entity*, *other than an* ***Insured Entity*** ...." JA-586 (emphasis added). If, as Joy Global posits, the generic term "entity" does not include Joy Global, it would be nonsensical for the Primary Policy to refer to an entity "other than" an Insured Entity (*i.e.*, Joy Global) in those other Policy provisions.

Third, Joy Global asserts that the phrase "price or consideration *paid or proposed to be paid* for the acquisition of ... an entity" is inadequate" means that only Claims against the buyer in a transaction can be an Inadequate Consideration Claim. JGI Br. at 52 (emphasis added). But the Policy language says no such thing; it refers generically to the "price or consideration paid or proposed to be paid," without reference to who is paying or which "entity" is being acquired. Furthermore, by issuing a proxy statement, "which recommended that Joy Global's shareholders vote in favor of the [Merger]" at $28.30 per share, Joy Global did in fact propose that its shareholders be paid allegedly inadequate consideration for acquisition of an entity. JA-414.

2. The cases on which Joy Global relies do not support its position.

Joy Global asserts that reported cases evaluating insurance coverage for an "alleged 'bump-up' payment involved a buyer's potential windfall." JGI Br. at 53-4. In fact, however, those cases illustrate why Joy Global's position is fatally flawed.

***35** *Genzyme Corp. v. Federal Insurance Co.*, 622 F.3d 62 (1st Cir. 2010), involved materially different policy language than that here. The *Genzyme* policy barred coverage for:

> Loss, other than Defense Costs, which is based upon, arising from, or in consequence of the *actual or proposed payment by any Insured Organization* of allegedly inadequate or excessive consideration in connection with its purchase of securities issued by [the Insured Organization].

Id. at 72 (emphasis added).

Thus, *Genzyme* limited coverage to a settlement by an insured buyer because *that is what the specific policy language stated. Genzyme* shows that where the intent is to limit a "bump-up" provision to situations in which the insured is the buyer (or to limit its application to acquisition of certain entities) the policy language says so.

Genzyme is also relevant because it shows that there is no such thing as an "industry standard" bump-up provision, contrary to the essential premise of Joy Global's main argument. The policy language in *Genzyme* unambiguously limited the "bump-up" provision to acquisitions by the insured entity. Here, the Primary Policy's language unambiguously contains no such limitation.

The other cases cited by Joy Global - *Pan Pacific Retail Properties, Inc. v. Gulf Insurance Co.*, 471 F.3d 961 (9th Cir. 2006), *Level 3 Communications Inc. v. Federal Insurance Co.*, 272 F.3d 908 (7th Cir. 2001), and *Safeway Stores, Inc. v. National Union Fire Insurance Co. of Pittsburgh*, 64 F.3d 1282 (9th Cir. 1995) - are irrelevant. They do not involve policy language concerning "bump-up" payments or ***36** inadequate consideration at all. Instead, those cases hold *as a matter of law* that the buyer in a transaction does not incur an insurable loss where it is required to make restitution to the seller in a transaction.

3. Joy Global's proposed limitation of the Inadequate Consideration Claim provision does not make economic sense.

Joy Global's argument that insurance coverage for a Claim alleging inadequate consideration in an acquisition would subsidize the transaction only where Joy Global is the buyer is simply wrong.

Joy Global was acquired by and became a subsidiary of Komatsu. The settlement of the Duncan Claim resulted in the Joy Global shareholders receiving a payment of $20 million (from which their attorneys' fees and costs were deducted) to compensate them for the allegedly inadequate consideration Komatsu paid for their shares. Coverage for that settlement would subsidize Komatsu's acquisition of Joy Global (and benefit the combined entity post-acquisition) by providing additional compensation to the shareholders beyond the (allegedly inadequate) amount Komatsu paid. As the *Onyx* court noted, "[i]t is reasonable that the insurance carriers did not want to have insurance proceeds be a means of funding the purchase of assets by a corporation - which, as pragmatic matter, would be the result [i]f insurance funds were paid to [the policyholder], which is now wholly owned by its acquirer[.]" *Onyx*, 2020 WL 9889619, at *15.

In sum, Joy Global's proposed interpretation of the Inadequate Consideration Claim provision would result in Komatsu (of which Joy Global is now a subsidiary) receiving a windfall in terms of obtaining insurance coverage to address the ***37** allegedly inadequate consideration it paid for an acquisition. To the extent the parties intend to preclude coverage only where the insured is the acquiring entity, the policy language needs to say so, as did the *Genzyme* policy.

III. Joy Global may not rely on expert testimony to vary the plain meaning of the Policies; and if extrinsic evidence were admissible, it would support the Insurers' position.

A. Expert opinions and extrinsic evidence are not admissible where a policy provision is unambiguous.

As noted above, Joy Global argues, in substance, that "bump-up exclusions" all have the same purpose and should be interpreted the same way. JGI Br. at 15, 55. In doing so, Joy Global relies on statements from its purposed expert witnesses, a retired insurance broker and a securities law professor, to argue that there is a freestanding generic "purpose" of "the bump-up exclusion," without regard to the specific policy language here. *Id.* at 54. According to those witnesses, "the bump-up exclusion" was developed in 1995 by a company not a party to this case. JGI Br. at 14. The purported purpose was to "make clear" that "coverage is excluded for price-based claims in the M&A context alleging that the acquirer's purchase price ... is inadequate" but not "lawsuits pleaded under the federal securities laws." JGI Br. at 55.

To justify its resort to this supposed purpose of "bump-up" exclusions generally, Joy Global asserts that "the court may consider the apparent object or purpose of the insurance, the subject matter of the insurance, the situation of the parties and the circumstances surrounding the making of the contract." JGI Br. at 54-5 (quoting *Emps.* ***38** *Health Ins. v. Gen. Cas. Co. of Wis.*, 161 Wis. 2d 937, 946, 469 N.W.2d 172, 176 (Wis. 1991) (citation omitted)). As the District Court held, however, these considerations are relevant *only* "[w]here an insurance contract is uncertain and the intention of the parties is not clearly ascertainable from the policy itself[.]" *Swart v. Rural Mut. Ins. Co.*, 117 Wis. 2d 478, 482, 344 N.W.2d 719, 721 (internal citation omitted). "If the contract's language is unambiguous, the court may not consider extrinsic evidence.... Only when the contract is ambiguous, meaning it is susceptible to more than one reasonable interpretation, may the court look beyond the face of the contract and consider extrinsic evidence." *Charter Oak Fire Ins. Co. v. Wis. Elec. Power Co.*, 262 F. Supp. 3d 760, 768 (E.D. Wis. 2017) (internal citation omitted); *see also Progressive N. Ins. Co. v. Olson*, 331 Wis. 2d 83, 88, 793 N.W.2d 924, 926 (Wis. Ct. App. 2010) ("Policy language is ambiguous if it is susceptible to more than one reasonable interpretation.").

Moreover, where an insurance policy is unambiguous, the policy's interpretation presents a question of law for the Court. *See Fontana Builders, Inc. v. Assurance Co. of Am.*, 369 Wis. 2d 495, 520-22, 882 N.W.2d 398, 410-11 (Wis. 2016). Expert testimony is not appropriate to address questions of law. *State v. Pico*, 382 Wis. 2d 273, 302-3, 914 N.W.2d 95, 110 (Wis. 2018) (collecting cases and other authorities for proposition that experts cannot address questions of law).

Joy Global cannot meet the threshold for consideration of the extrinsic expert opinions it proffers because it presents no reasonable interpretation of the actual language of the Primary Policy's definition of Inadequate Consideration Claim that ***39**

would result in coverage. It therefore cannot show any ambiguity and cannot introduce extrinsic or purported expert evidence to support its interpretation. [14]

B. Were extrinsic evidence admissible, the testimony of Joy Global's representatives refutes its coverage position.

If it were permissible to look beyond the unambiguous language of the Primary Policy, the testimony of Joy Global's own counsel and that of its corporate representative refute its arguments. Bailey, the lawyer who represented Joy Global in negotiation of the Primary Policy and its predecessors, agrees that the Inadequate Consideration Claim provision *does not* depend on the particular legal cause of action pled. JA-180. Bailey also agrees with the Insurers that "an entity" in the Inadequate Consideration Claim definition "would include Joy Global itself":

A: In today's world, like the exclusion here, at issue here, it's not limited to acquisitions by the named insured, but it's a broader concept, and it applies to acquisitions by other folks as well.

Q: So the typical provision today would apply to acquisitions regardless of whether the company being acquired is the - whether the insured is being acquired or the insured is doing the acquiring; is that right?

A: Correct.

JA-152-53.

Likewise, Joy Global's designated corporate representative on the topic of negotiating the Policies conceded in binding testimony that the term "entity" as ***40** used in the Primary Policy *does* refer to Joy Global, unless the policy explicitly qualifies the term with "other than an Insured Entity." JA-114-15.

This testimony, unlike the speculation of Joy Global's proffered experts, is consistent with the Policies' plain and unambiguous language. But regardless, the District Court rightly concluded that "this history is not relevant" because the Inadequate Consideration Claim provision "is unambiguous and its language controls." SA-7.

IV. Joy Global cannot have a "reasonable expectation" of coverage not provided by the plain terms of the Policies.

Joy Global contends that it had "reasonable expectations" of coverage for settlements of all securities claims generally. JGI Br. at 73. That contention fails because "[t]he principle that a court will interpret an insurance contract according to the reasonable expectations of the insured has no bearing when the contract simply and clearly excludes coverage." *Boehm v. Scheels All Sports, Inc.*, 202 F. Supp. 3d 1030, 1036-37 (W.D. Wis. 2016).

Under Wisconsin law, "a reasonable insured is presumed to understand that an exclusion in an insurance policy limits, rather than confers, coverage." *Wadzinski v. Auto-Owners Ins. Co.*, 342 Wis. 2d 311, 323, 818 N.W.2d 819, 825 (Wis. 2012). The Primary Policy contains numerous limitations and exclusions that apply to any Claim - including claims brought under the federal securities laws. It excludes, for example, coverage for Loss resulting from Claims arising out of adjudicated fraudulent conduct or out of matters that Joy Global reported under a previous policy. JA-585-86. Joy Global cannot credibly contend that it would be ***41** reasonable to expect none of the Primary Policy's limitations and exclusions to apply to the Securities Actions merely because Joy Global generally desired coverage for securities litigation. As Judge Adelman held, such coverage can only reasonably be understood to be subject to all of the Policies' terms. SA-9.

In an imaginative argument for which it cites no authority, Joy Global also argues that its purported expectation of coverage is reasonable because the $20 million *Duncan* settlement "represented merely 0.54% of the total value of the $3.7 billion transaction," which it deems "not a sum indicative of compensation for underpricing." JGI Br. at 69. It contends that "none

of it was a 'bump-up' payment" because it was "the lowest sum that [Joy] could persuade the *Duncan* plaintiffs' counsel to accept to dismiss their suit." *Id.* at 68.

Of course, virtually every settlement of every type of claim is based on the lowest sum the defendant can persuade the plaintiff to accept, or conversely the highest sum the plaintiff can persuade the defendant to pay. That is the very nature of settlement negotiations. Thus, for example, a settlement of an antitrust claim is a settlement of an antitrust claim, regardless of the amount of the settlement, the reasons the defendant or the plaintiff chose to settle, or the merits of the claim.

Loss does not include "*any* amount of *any* judgment or settlement" of *any* Inadequate Consideration Claim. PSOF ¶ 24 (Dkt. No. 102) (emphasis added). That Joy Global paid only a small percentage of what the *Duncan* plaintiffs claimed goes only to the *amount* of the settlement; it does not change the *nature* of the ***42** payment, which was to settle an Inadequate Consideration Claim. As the Wisconsin Supreme Court has held, "the word 'any means any.'" *Tempelis*, 169 Wis. 2d at 11, 485 N.W.2d at 221 (citation omitted).

Moreover, Joy Global received coverage for the Securities Claims; Columbia paid Joy Global more than $2 million in Defense Costs. JA-1261. In addition, under Insuring Agreement A, Joy Global's directors and officers had insurance to protect them individually if Joy Global could not indemnify them.

Joy Global's contention that it reasonably expected coverage broader than that provided under the Primary Policy's unambiguous terms is particularly unreasonable because Joy Global had leading insurance coverage experts at its disposal during the underwriting process. Those experts, Bailey and Marsh, advised Joy Global, negotiated policy terms with Columbia, and generally advocated for Joy Global's interests.

Bailey also testified unequivocally that the Columbia representatives who negotiated the Primary Policy with Joy Global did not "do anything in the course of these discussions ... that [he] considered to be misleading or inappropriate." JA-179. In short, nothing that occurred in the negotiation of the Policies or otherwise could lead Joy Global reasonably to expect the Inadequate Consideration Claim provision to be applied so as to provide coverage for the settlements of the Duncan Claim and the non-Duncan Claims.

***43 V. No portion of the underlying settlements is covered because the entire amount represents settlement of an Inadequate Consideration Claim.**

A. No portion of the settlements is covered because the matters settled were all Inadequate Consideration Claims.

As the District Court held, the "that part" language in the Inadequate Consideration Claim provision refers to the part of a Claim being settled. If the settlement encompasses more than an Inadequate Consideration Claim, then the portion of the settlement payment not attributable to the Inadequate Consideration Claim may be covered. However, once it is determined (as here) that the entire Claim being settled is an Inadequate Consideration Claim, then "any amount of any settlement" is excluded from coverage. The District Court got the analysis exactly right. SA-7.

The Duncan Claim complaint stated that the losses sought by the shareholders were "damage and actual economic losses (*i.e.*, the difference between the price Joy Global shareholders received and Joy Global's true value at the time of the Acquisition) in an amount to be determined at trial." JA-446. The motion for approval of the settlement of the Duncan Claim confirms that the shareholders' alleged damages were the difference between the actual fair value of their Joy Global shares and what they were paid for their shares in the Merger. JA-75-76. Thus, there is no part of the settled Claim that does not involve allegations of inadequate consideration. There is no need for any allocation between covered and ***44** uncovered amounts because there are no covered amounts; the settlements in their entirety are not included in the Policy's definition of covered Loss. [15]

Joy Global contends that some unspecified part of the Securities Actions is not an Inadequate Consideration Claim because the Duncan Claim plaintiffs included a prayer for rescissory damages. However, plaintiffs never sought to rescind the transaction, and never suggested that the damages they sought were anything other than the difference between the stock price Joy Global shareholders received and Joy Global's alleged true value at the time of the acquisition. The Duncan Claim plaintiffs' motion for approval of the settlement also did not even mention rescissory damages. Therefore, no component of the Duncan Claim settlement can reasonably be characterized as "rescissory damages."

Moreover, the form of damages or remedy sought by the Duncan Claim plaintiffs is irrelevant. The Primary Policy's definition of Loss excludes "*any* amount of *any* settlement or judgment" of an Inadequate Consideration Claim. SA-7. Because the Duncan Claim alleged that the consideration for the Merger was inadequate - and does not allege any harm or injury independent from their receipt of inadequate consideration - no settlement of the Duncan Claim can be covered, ***45** whether the damages sought were characterized as compensatory, rescissory, or any other variation.

The District Court did not, as Joy Global contends, convert a "partial" exclusion into a "total" one. JGI Br. at 60. To the contrary, it recognized that "[t]he phrase 'that part' [in the Inadequate Consideration Claim definition] unambiguously refers to a part of the claim, not a part of the settlement." SA-7. The District Court properly read the policy to not include in covered Loss "any amount of *any* settlement" of an Inadequate Consideration Claim." *Id.* (emphasis in original). Therefore, although the Securities Actions of course contained allegations other than the payment of inadequate consideration, the District Court correctly focused on the fact that "each cause of action within the suits relied on the allegations of inadequate consideration." SA-6. Accordingly, the District Court properly held that "each part of the Claim which was settled alleged inadequate consideration" because facts here simply did not involve the settlement of anything other than Inadequate Consideration Claims.

B. The portions of the settlement paid to the plaintiffs' attorneys are not covered.

Joy Global offers the fall-back argument that, even if settlement amounts paid to class members in the Securities Actions are not covered, there is coverage for the attorneys' fees paid to plaintiffs' counsel. The plain policy language precludes this alternative position. So too does the history of negotiations between the parties, although again the inquiry should end with the unambiguous language of the Primary Policy.

***46 1. Joy Global paid settlements: no attorneys' fees were ever awarded against it.**

Joy Global's argument that the attorneys' fees portions of its settlements of the Securities Actions is covered fails because the definition of Loss excludes coverage for *any* amount of *any* settlement of any Inadequate Consideration Claim. As to the Non-Duncan Claims, Joy Global paid $800,000 as plaintiffs' attorneys' fees in settlements. That amount represents settlements of Inadequate Consideration Claims, and therefore is not covered.

Joy Global's argument that the $5 million attorneys fee award in the Duncan Claim fails for the same reason and for two additional reasons. First, the fee award was not independent from the settlement amount Joy Global paid, which itself is not covered because it was a settlement of an Inadequate Consideration Claim. Courts have consistently held that a fee award based on a non-covered claim is also excluded from coverage. *See* *Health Net, Inc. v. RLI Ins. Co.*, 141 Cal. Rptr. 3d 649, 669 (Cal. Ct. App. 2012), *as modified on denial of reh'g* (June 12, 2012); *Lamar Baptist Church of Arlington, Inc. v. St. Paul Fire & Marine Ins. Co.*, No. 4:08-CV-370-A, 2009 WL 329885, at *8 (N.D. Tex. Feb. 10, 2009). This reasoning applies equally to fee awards in class actions. *See* *BOC Grp., Inc. v. Fed. Ins. Co.*, No. A-4167-052, 2007 WL 2162437, at *12 (N.J. Super. Ct. App. Div. July 30, 2007). Joy Global cites no cases to the contrary.

Second, the Primary Policy provides coverage only for amounts that Joy Global is "legally liable to pay." JA-580. Joy Global was never legally liable to pay any attorneys' fee award in the Duncan Claim. Rather, Joy Global was ***47** obligated to pay

$20 million into a common settlement fund, and counsel for the Duncan Claim plaintiffs moved for a fee award to be paid from the fund.

Under the common fund doctrine, "the attorney's fees come from the fund, *which belongs to the class*. In this way, the [class], not the losing party, pays the attorney's fees." *In re Home Depot Inc.*, 931 F.3d 1065, 1079 (11th Cir. 2019) (emphasis added). Joy Global's only legal liability was to pay the $20 million settlement into the common fund for the benefit of the plaintiffs, who paid their own fees out of the fund. *See PNC Fin. Servs. Grp., Inc. v. Houston Cas. Co.*, 647 F. App'x 112, 122-123 (3d Cir. 2016) (no coverage for plaintiffs' attorneys' fees paid from a common fund settlement, because PNC was not "legally obligated to pay" such fees).

2. Joy Global expressly requested coverage for plaintiff attorneys' fees in Inadequate Consideration Claims in a prior year but did not obtain that coverage in the Policies.

Although there is no need to look beyond the unambiguous language of the Primary Policy, the history of dealing between the parties unequivocally shows that both parties understood there is no coverage for attorneys' fees awarded in an Inadequate Consideration Claim. In 2015, for the policy year immediately preceding the issuance of the Primary Policy, Joy Global specifically sought a policy amendment to allow coverage for plaintiffs' attorneys' fees awarded in settlements of Inadequate Consideration Claims. Columbia agreed to consider such an amendment *only* for claims resolved before closing of the acquisition that did *not* involve a monetary payment to the plaintiff class. JA-195. Indeed, ***48** Columbia's underwriter stated that it would be "crazy" in Columbia's view to permit coverage for a post-closing award of attorneys' fees and that Columbia would never agree to such a provision. JA-196.

This negotiation history shows that the parties understood that the Inadequate Consideration Claim policy language precluded coverage for any attorneys' fees in an Inadequate Consideration Claim. Columbia never agreed in any policy year to modify that language to provide coverage for a post-closing attorneys' fees award. Thus, the Primary Policy does not provide coverage for any attorneys' fees award regardless of whether (as in the Duncan Claim) that fee is paid out of a settlement payment to the plaintiff class. [16]

VI. Joy Global's "bad faith" claim fails because Columbia's position is, at minimum, "fairly debatable."

A. Columbia's coverage position was correct or, at a minimum, "fairly debatable," and therefore not a breach of any implied covenant.

"To prove a bad faith claim, 'a plaintiff must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim.'" *Christopherson*, 2019 WL 4141259, at *1 (quoting *Brethorst*, 334 Wis. 2d at 36, 798 N.W.2d at 474). Where "the question of coverage was fairly debatable and a reasonable basis existed for denying the claim, [an] insurer could not have committed the tort of bad faith." ***49** *Brethorst*, 334 Wis. 2d at 38, 798 N.W.2d at 475. "Bad faith should be found ... only if there was no fairly debatable coverage question." *Mowry v. Badger State Mut. Cas. Co.*, 129 Wis. 2d 496, 517, 385 N.W.2d 171, 181 (Wis. 1986); *see also Farmers Auto. Ins. Ass'n v. Union Pac. Ry. Co.*, 313 Wis. 2d 93, 115, 756 N.W.2d 461, 472 (Wis. Ct. App. 2008). A "legitimate disagreement" about coverage is not enough to state a cause of action on a bad faith claim. *Id.* at 117.

Here, Columbia's interpretation of the policy language is based on its plain, ordinary meaning. Judge Adelman, a respected judge in Wisconsin, held that Columbia's reading of that language is correct. The principal case on which Joy Global relies, *Northrop*, was decided long after Columbia denied coverage and the District Court found its reasoning to be unpersuasive. *Onyx*, discussed above, strongly supports Columbia's position. Finally, the lawyer who represented Joy Global in negotiating the Primary Policy largely agreed with the Insurers' interpretation of the Inadequate Consideration Claim provision and flatly rejected some of the coverage arguments Joy Global advances in this litigation.

Under these circumstances, Columbia's coverage position, if not correct, surely presents a "fairly debatable" issue.

B. Columbia carefully considered Joy Global's request for coverage and did not knowingly or recklessly disregard any valid basis for coverage.

The record refutes any allegation that Columbia showed "reckless disregard of the lack of a reasonable basis for denying" Joy Global's request for coverage. *Christopherson*, 2019 WL 4141259, at *1. Instead, Columbia issued correspondence ***50** explaining the basis for its position that settlements of the Securities Actions would not be covered under the Primary Policy. When Joy Global requested in November of 2017 that Columbia change its position to a reservation of rights, Columbia did exactly as Joy Global requested and gave Joy Global an opportunity to provide any additional information it could to support its contention that the Duncan Claim was not in full an Inadequate Consideration Claim. JA-465-69.

At the time of that exchange of correspondence, in late 2017, only the Duncan Claim remained pending. JA-1249. Columbia's "view remain[ed] that the essence of the plaintiffs' claim in the Duncan action is that they received inadequate consideration for their shares of Joy Global in the merger with Komatsu," implicating the Inadequate Consideration Claim Provision. JA-465. Nevertheless, Columbia "wanted to make sure that Joy Global had the opportunity to provide additional information about what the plaintiffs were seeking" and was "inviting Joy Global to provide that information." JA-468. For that reason, Columbia "invite[d Joy Global] to submit additional information or evidence that ... the [*Duncan*] plaintiffs are seeking damages beyond 'the difference between the price Joy Global shareholders received and Joy Global's true value at the time of the Acquisition." JA-468. At the same time, Columbia expressly stated that "[p]ending receipt of such information, we reserve rights with respect to whether the damages sought by plaintiffs fall outside the exclusion from the definition of **Loss** for 'any amount of any judgment or settlement of any **Inadequate Consideration Claim** other than **Defense Costs**."' *Id.*

***51** Joy Global did not submit any facts supporting its contentions. Instead, Joy Global made purely legal arguments by its counsel, along the same lines as Joy Global's arguments in this case. Columbia analyzed those arguments and responded in detail. JA-465-69. Because Joy Global did not provide any information to change Columbia's conclusion that there was no coverage for any settlement of the Duncan Claim, Columbia affirmed its position, as it had expressly reserved the right to do.

There is no support in the record for any contention that Columbia knowingly or recklessly disregarded any lack of a reasonable basis for denying coverage for the underlying settlements.

CONCLUSION

Joy Global argues that "contextual clues" and speculative ruminations on the supposed history and purpose of a generic "bump-up exclusion" should displace the plain English language meaning of the Inadequate Consideration Claim provision's actual text. Wisconsin law precludes that approach. The District Court's judgment should be affirmed.

***52** Respectfully submitted,

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Footnotes

1 Bold terms are defined in the Primary Policy and reproduced in bold here when quoting that Policy.

2 Arch was a party to this case but was dismissed after settling with Joy Global. JA-18.

3 *About Marsh*, Marsh, *https://www.marsh.com/us/about/about-marsh.html* (last visited July 20, 2022)

4 *Directors and Officers Liability (D&O)*, Marsh, *https://www.marsh.com/us/services/financial-professional-liability/products/directors-andofficers-liability.html* (last visited July 20, 2022)

5 Claims or lawsuits alleging that shareholders are receiving or have received inadequate consideration for their shares in a merger are sometimes referred to as "bump-up" claims. The reference to "post close" is to the period after an acquisition has been completed. JA-147-48.

6 Those lawsuits were: *Oduntan v. Joy Global, Inc*., No. 16-cv-1136 (E.D. Wis.); *Soffer v. Doheny*, 16-cv-1148 (E.D. Wis.); *Garfield v. Joy Global Inc*., No. 16-cv-6588 (Wis. Cir. Ct., Milwaukee Cnty.); *Gordon v. Joy Global Inc*., 16-cv-1153 (E.D. Wis.); *Rote v. Joy Global Inc*., No. 16-cv-1186 (E.D. Wis.); *Tansey v. Joy Global Inc*., No. 16-cv-1201 (E.D. Wis.); *McGregor v. Joy Global Inc*., No. 16-cv-1213 (E.D. Wis.); and *Duncan v. Joy Global Inc.,* No. 16-cv-1229 (E.D. Wis.).

7 In addition to providing Defense Costs coverage, the Inadequate Consideration Claim provision also permits coverage for loss incurred by directors or officers in a settlement or judgment that is not indemnified by Joy Global. Here, Joy Global paid all of the settlements in question, so this exception to the provision does not apply.

8 As discussed above, the Duncan Claim in any event alleged the proxy was misleading because it did not disclose favorable revenue projections that increased Joy Global's value as a stand-alone entity. JA-429.

9 In citing *Northrop*, Joy Global asserts that Delaware is "a jurisdiction that historically has seen the most M&A litigation in the country." JGI Br. at 46. In fact, however, the Delaware Chancery Court and Supreme Court handle M&A litigation - not the Superior Court, which decided *Northrop* and is a court of general jurisdiction with no particular corporate law expertise.

10 Moreover, while Section 14(a) plaintiffs - in general - do not need to plead "inadequate consideration" as an element of the cause of action, they must allege *some* economic injury to recover damages. *Kuebler v. Vectren Corp.*, 13 F.4th 631, 645 (7th Cir. 2021) ("[A] Section 14(a) plaintiff must plead both economic loss and proximate causation.").

11 Joy Global notes that "bump-up" exclusions first appeared in a National Union policy in 1995. JGI Br. at 14.

12 *Entity*, Merriam Webster, *https://www.merriam-webster.com/dictionary/entity* (last visited July 20, 2022)

13 In a non-precedential decision issued last year, the Wisconsin Court of Appeals likewise held that "the use of 'an' as an indefinite article is applicable to more than one individual object." *Fire Ins. Exch. v. Gibson*, Appeal No. 2020AP810, 2021 WL 1975045 (Wis. May 18, 2021).

14 Moreover, even if expert witness testimony were appropriate, the District Court did not err in denying Joy Global's motion for summary judgment because its experts' opinions are disputed by persuasive expert testimony offered by the Insurers. JA-1213-21.

15 If allocation were appropriate, "the burden of proof should be on the *insured* to allocate the judgment between the covered and non-covered claims." *Cousins Submarines, Inc. v. Fed. Ins. Co.*, No. 12-CV-387-JPS, 2013 WL 12485224 at*2 (E.D. Wis. Mar. 19, 2013) (citing Allan Windt, 2 *Insurance Claims and Disputes* 5th § 6:31) (emphasis added); *see also UnitedHealth Grp., Inc. v. Columbia Cas. Co.*, 941 F. Supp. 2d 1029, 1039 (D. Minn. 2013). The case Joy Global cites for the contrary proposition, *Valley Bancorporation v. Auto Owners Insurance Co.*, 212 Wis. 2d 609, 569 N.W.2d 345 (Wis. Ct. App. 1997), does not address allocation at all but rather involves the "concurrent causation rule" under commercial general liability insurance.

16 Joy Global's own counsel who negotiated the Primary Policy, Bailey, agrees with Insurers that, where a plaintiffs' attorneys' fee award is payable out of a common fund, "[i]t would be reasonable to view the common fund in its entirety as a transaction cost and therefore, part of the [Inadequate Consideration] exclusion." JA-169.

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