2022 WL 2348845 (C.A.7) (Appellate Brief)
United States Court of Appeals, Seventh Circuit.

JOY GLOBAL INC. (n/k/a Komatsu Mining Corp.), Plaintiff-Appellant,

v.

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

No. 21-2695.
June 22, 2022.

On Appeal from the United States District Court for the Eastern District of Wisconsin Civil Division
No. 18-CV-02034-LA
Honorable Lynn Adelman

Brief for Plaintiff-Appellant and Required Short Appendix

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***1 JURISDICTIONAL STATEMENT**

District Court Jurisdiction: The district court had jurisdiction under 28 U.S.C. § 1332(a). The citizenship of the parties is diverse and the amount in controversy exceeds $75,000, exclusive of interest and costs. Plaintiff-Appellant Joy Global, Inc. ("Joy Global" or "Joy") is a corporation organized under Delaware law with its principal place of business in Wisconsin. Defendant-Appellee Columbia Casualty Company ("CNA") is a corporation organized under Illinois law with its principal place of business in Illinois. Defendant Arch Insurance Company ("Arch"), which is not a party to this appeal, is a corporation organized under Missouri law with its principal place of business in New Jersey. Defendant-Appellee Travelers Casualty and Surety Company of America ("Travelers," and together with CNA and Arch, "Insurers") is a corporation organized under Connecticut law with its principal place of business in Connecticut.

Appellate Jurisdiction: This Court has jurisdiction under 28 U.S.C. § 1291. This appeal is from a final judgment of the district court granting summary judgment on all claims in favor of CNA and Travelers (together, "Appellee-Insurers"), after the dismissal of Arch ***2** pursuant to a settlement agreement between Joy and Arch. The district court issued its summary judgment decision (SA1) and entered its final judgment (SA13) on August 18, 2021. Joy timely filed its Notice of Appeal on September 15, 2021. JA1419.

On September 20, 2021, this Court ordered the parties to show cause why this case should not be remanded for entry of a revised judgment specifically declaring the parties' rights. Dkt. 3. On October 4, 2021, the parties filed a Joint Jurisdictional Memorandum explaining why the Court has jurisdiction. Dkt. 9. As stated therein, Joy is the only party that sought any declaration of rights, monetary damages, or other relief below. Accordingly, when the district court denied Joy's summary judgment motion; granted Appellee-Insurers' cross-motions; and entered its judgment, it fully and finally disposed of the only claims in the case. *See id.*; Fed. R. Civ. P. 58(b)(1)(C) ("[T]he clerk must, without awaiting the court's direction, promptly ... enter the judgment when ... the court denies all relief.").

Even if there were a defect in the *form* of judgment, this Court still would have jurisdiction because it is clear that "the district court is done with the case, which permits an appeal." ***3** *Greenhill v. Vartanian*, 917 F.3d 984, 987 (7th Cir. 2019). There have been no further proceedings in the district court since the judgment, and none are pending or planned.

On March 18, 2022, this Court discharged the show-cause order and directed the parties to proceed to briefing. Dkt. 13.

PRELIMINARY STATEMENT

This case is an insurance coverage dispute. Joy seeks indemnity coverage under directors and officers ("D&O") liability insurance policies for "Loss" that Joy incurred to settle eight shareholder class action lawsuits (the "Securities Actions") filed in 2016, in connection with Joy's decision to sell itself to Komatsu America Corp. ("Komatsu"). The Securities Actions asserted securities-law and fiduciary-duty claims against Joy and various of its directors and officers for issuing allegedly misleading proxy statements to secure shareholder approval for the sale.

Like most public companies, Joy annually purchased D&O insurance coverage, which protects companies and their directors and officers against claims of wrongdoing including, as relevant here, claims under the federal securities laws. As CNA's lead underwriter for the Joy ***4** insurance program at issue acknowledged, "the biggest exposure" of public companies in the D&O context "is a securities class action," and "one of the reasons" companies like Joy buy D&O insurance is to protect against shareholder class actions arising after announcement of a merger or acquisition. JA1014.

At the time Joy announced its planned sale to Komatsu, 85% of public M&A transactions nationwide valued at over $100 million yielded shareholder class action lawsuits; data from the 2010s put that figure at 96% for transactions valued at over $500 million. JA816-17, 974. Joy's sale to Komatsu was valued at $3.7 billion. JA1023.

Joy disclosed its planned sale to CNA before renewing its D&O program and buying the insurance policies at issue. JA1025. CNA's lead underwriter responded by immediately searching the internet, finding law firms that already were soliciting shareholder claims, and telling Joy that CNA expected shareholder suits to be filed. JA1027.

Joy's coverage claim is based on precisely the sort of risk its insurance policies were designed to address and that CNA anticipated. Nonetheless, when the Securities Actions were filed (just weeks after Joy renewed its policies) and Joy called upon the coverage it had ***5** purchased, Insurers denied Joy's indemnity claim by invoking an industry-standard exclusion known as the "bump-up exclusion." JA1023, 1032, 1044. Joy ultimately settled the Securities Actions for a total of $20,800,000.

Joy then filed this action, seeking damages and a declaration that all three Insurers breached their contractual coverage obligations and that CNA, Joy's primary insurer, breached its duty of good faith and fair dealing in handling Joy's claim. Joy settled with Arch, and the district court later sided with Appellee-Insurers, granting them summary judgment on Joy's claims.

This Court should reverse the district court's judgment for three reasons:

First, the bump-up exclusion does not apply. That exclusion withdraws from covered "Loss" "any amount of any judgment or settlement of" "[t]hat part of any Claim alleging that the price or consideration paid or proposed to be paid for the acquisition ... of an entity is inadequate." JA579, 581. As its text, history, and prevailing industry understanding demonstrate, the exclusion is limited to "that part of" a lawsuit, if any, asserting a *price-based* "Claim" (such as a ***6** common-law appraisal or freeze-out claim) against the *buyer* in a corporate transaction. The exclusion's narrow focus is on allegations where payment of an inadequate purchase price is the act that gives rise to liability, and where the insured seeks payment of "Loss" attributable to such allegations. The exclusion does *not* apply to a claim against the seller for alleged securities fraud under federal securities laws.

The exclusion targets price-based payments and claims because rational buyers in M&A transactions otherwise would have an incentive to underpay for a target company and then look to their insurers to cover the difference (i.e., the "bump-up") when the target's shareholders challenge the adequacy of the purchase price, thereby reaping a windfall by having insurers shoulder "part of" the economic cost of the transaction. The Delaware Superior Court agrees. It recently adopted Joy's interpretation with respect to a substantially similar bump-up exclusion. *See Northrop Grumman Innov. Sys., Inc. v. Zurich Am. Ins. Co.*, No. N18C-09-210, 2021 WL 347015 (Del. Super. Ct. Feb. 2, 2021).

Here, the exclusion does not apply because Joy was the seller in the transaction, not the buyer, and the Securities Actions sought to ***7** impose liability for alleged misrepresentations in Joy's proxy statements, not the inadequacy of Komatsu's purchase price. In ruling otherwise, the district court bypassed key contextual clues regarding the exclusion's meaning and distinguished *Northrop* on unpersuasive grounds. At a minimum, the exclusion is susceptible of different reasonable readings, and controlling law requires such ambiguities in insurance policy exclusions to be resolved in favor of coverage.

Second, even if Joy were not entitled to indemnity for all of its $20.8 million "Loss," Appellee-Insurers still would be liable for some of Joy's "Loss." The exclusion applies to "any amount of" a judgment or settlement of "*that part of* any Claim alleging that the price or consideration paid ... is inadequate." Every *other* "amount" of "Loss," or "part of" a "Claim," remains covered.

Here, the Securities Actions principally alleged that Joy's proxy statements were misleading under the securities laws, and Joy's settlements necessarily resolved "that part of" the Securities Actions asserting these core allegations. Similarly, the Securities Actions sought more than compensatory damages for inadequate consideration; they also sought rescissory damages, attorneys' fees, injunctive relief, ***8** and other remedies. The portions of the settlements that resolved these "parts of" the claims likewise were not for "[t]hat part of any Claim alleging that the price or consideration paid or proposed to be paid for the acquisition ... is inadequate."

Because Joy settled the Securities Actions in their entirety, a portion of its settlements necessarily consisted of "amounts" for "part[s] of ... Claim[s]" beyond the scope of the exclusion. Joy is entitled to indemnity for such amounts, but Appellee-Insurers have not paid Joy a penny of its $20.8 million "Loss." In validating Appellee-Insurers' blanket denial of coverage, the district court inverted the exclusion's terms, holding that "[o]nce *a part of a claim* alleging inadequate consideration is settled, *the entire settlement is excluded* from the definition of loss and is not covered by the policies." SA7 (emphasis added).

Third, genuine issues of material fact preclude summary judgment on Joy's claim against CNA for bad-faith denial of coverage. Under controlling law, an insurer's bad faith ordinarily is a fact question that may be resolved on summary judgment only if coverage is "fairly debatable." ***9** *Brethorst v. Allstate Prop. & Cas. Ins. Co.*, 334 Wis. 2d 23, 36 (Wis. 2011). Here, it is not "fairly debatable" that Joy is entitled to coverage for at least "part of" its settlement payments, yet CNA denied Joy's indemnity claim in full. This fact, together with record evidence reflecting CNA's failure to undertake "honest ... consideration of [Joy's] claim" (*id.* at 41), is sufficient to present a jury question on CNA's state of mind. The district court, however, never considered Joy's evidence of CNA's bad faith; instead, it rejected Joy's claim based on its erroneous view that CNA could not have acted in bad faith because Joy was "not entitled to coverage" for *any part* of its "Loss." SA9.

This Court should reverse the district court's judgment and remand with instructions for the district court to (1) enter judgment in Joy's favor on the entirety of Joy's $20.8 million indemnity coverage claim, or alternatively, whatever "part of" that amount the Appellee-Insurers fail to establish falls unambiguously within the bump-up exclusion (plus interest); and (2) hold a trial on Joy's claim that CNA acted in bad faith.

*10 STATEMENT OF THE ISSUES

1. Does the bump-up exclusion unambiguously remove indemnity coverage for Joy's settlement payments?

2. If the exclusion applies, is Joy nevertheless entitled to indemnity for "part of" its settlements?

3. Do genuine issues of material fact preclude summary judgment on Joy's bad-faith claim against CNA?

STATEMENT OF THE CASE

I. Factual Background

Joy is an industry-leading manufacturer and servicer of mining equipment headquartered in Milwaukee, where it has operated for more than 130 years. Joy was publicly traded until April 2017, when it was acquired by, and became a stand-alone subsidiary of, Komatsu. JA1044-45. Joy continues to exist today, operating under the name "Komatsu Mining Corp." *Id.*

A. Joy's 2016-17 D&O Insurance Program

Like other publicly-traded companies, Joy and its directors and officers faced potentially devastating exposure to securities class-action lawsuits filed by shareholders. JA1012, 1014. To protect against these and other risks, Joy annually purchased D&O liability insurance ***11** coverage. JA1012. Joy's claims in this case implicate three policies for the 2016-17 policy year (i.e., 7/31/16 through 7/31/17):

• Joy's primary policy, issued by CNA, which provides $10 million of coverage in excess of a $1.5 million self-insured retention (the "CNA Policy" or "Policy") (JA574);

• Joy's first-layer excess policy, issued by Arch, which provides $10 million of coverage in excess of the CNA Policy's limits (ECF 1-2); [1] and

• Joy's second-layer excess policy, issued by Travelers, which provides a further $10 million of coverage in excess of the Arch policy's limits (together with the CNA and Arch policies, the "Policies") (JA605).

The primary CNA Policy prescribes the terms of the program, while the excess policies "follow form," providing coverage on the same terms and conditions as CNA with immaterial differences. JA1017.

The Policies afford broad "Insured Entity Securities Liability" coverage, by which Insurers promised to "pay on behalf of" Joy any "Loss resulting from any Securities Claim first made against [Joy] ***12** during the Policy Period ... for a Wrongful Act," subject to specified definitions, conditions, and exclusions. [2] JA576 § I(3).

"Loss" [3] means: "those amounts that" Joy is "legally liable to pay as awards, settlements or judgments ... and Defense Costs." JA580.

"Securities Claim" means: "a Claim made against" Joy "[1] alleging, arising out of, based upon or attributable to the purchase or sale or offer or solicitation of an offer to purchase or sell any securities of an Insured Entity; or [2] brought by or on behalf of one or more [Joy] security holders." JA582-83.

"Claim" means: "any written demand for monetary damages or non-monetary relief ... [or] any civil ... proceeding ... alleging a Wrongful Act." JA577.

"Wrongful Act" means: "any actual or alleged error, misstatement, misleading statement, act, omission, neglect or breach of duty committed or attempted by" Joy "in regard to a Securities Claim." JA584.

***13** The Policies also contain an "Allocation of Loss" provision, which states that "[i]f a Claim made against [Joy] includes both covered and uncovered matters ...[,] there must be an allocation between insured and uninsured loss," and "[t]he Insureds and the Insurer shall exert their best efforts to agree upon a fair and proper allocation between insured and uninsured loss." JA589 § V(3). Absent agreement, governing law requires the insurer to prove the basis for and amount of any uncovered loss. *See* Argument, Part II.D,

B. The "Bump-Up" Exclusion

The exclusion Appellee-Insurers rely upon is the so-called "bump-up exclusion," a common feature in D&O policies. JA1022-23, 1057-58. In Joy's Policies, the exclusion operates through the interplay of two defined terms: "Loss" and "Inadequate Consideration Claim."

The definition of "Loss" states that "Loss ... shall not include: ... any amount of any judgment or settlement of any Inadequate Consideration Claim other than Defense Costs." JA581. "Inadequate Consideration Claim" means "that part of any Claim alleging that the price or consideration paid or proposed to be paid for the acquisition or ***14** completion of the acquisition of all or substantially all the ownership interest in or assets of an entity is inadequate." JA579.

Reading these definitions together, and focusing on the parts relevant here, the Policies withdraw coverage for "any amount of any ... settlement of" "that part of any Claim alleging that the price ... paid ... for the acquisition ... of an entity is inadequate."

The bump-up exclusion was developed in 1995 by National Union, a market-leading D&O insurer, in response to *Safeway Stores, Inc. v. Nat'l Union Fire Ins. Co.*, 64 F.3d 1282 (9th Cir. 1995). JA1057. In *Safeway*, the Ninth Circuit held that the seller in a leveraged-buyout transaction (Safeway) suffered no "loss" under its D&O policy when it agreed to settle shareholder claims by shifting the timing of a dividend payment so it would be received by selling shareholders rather than buying shareholders. 64 F.3d at 1286. The court reasoned that "the settlement did not ... result in [a] loss because Safeway was obliged to pay out the dividend in due course," so "the early payout of the dividend [to the selling shareholders] essentially amounted to [the buyer's] upping its purchase price for Safeway by [the dividend amount]." *Id.*

***15** *Safeway* underscored insurers' exposure to a moral hazard: although Safeway, the seller, was denied coverage because its dividend was an ordinary business cost, not an insured "loss," the court observed that "the dividend, if a 'loss' to anyone, was [the buyer's]." *Id. Safeway* thus raised the prospect that a policyholder who is the *buyer* in a corporate takeover could pay inadequate consideration for an acquisition and then try to offload the rest of the purchase price to *its* insurers (e.g., by settling an appraisal or freeze-out action by the selling entity's shareholders and then seeking coverage for the settlement amount), thereby securing a windfall.

National Union developed the bump-up exclusion to make clear that its policies would not cover such "bump-up" payments. JA871-74. As explained by Ann Longmore, a 30-year veteran of the D&O industry, "[t]he commonly understood purpose and intent of the 'bump-up' exclusion is to prevent part of the ordinary business cost of a corporate transaction from being passed along to insurers." JA869-880.

***16** In the decades that followed, other D&O insurers (like CNA) followed suit, and "[t]hese exclusions were all drafted and issued specifically to avoid paying for *Safeway*-type settlements and judgments ... and to avoid tapping insurance policies to pay part of the normal business cost of an M&A transaction." JA874.

C. CNA's Underwriting of Joy's 2016-17 Program with the Expectation that Securities Claims Would be Filed

On July 21, 2016, Joy agreed to be acquired by Komatsu for $28.30 per share. JA1023. The deal valued Joy at $3.7 billion. *Id.* On the same day, Joy publicly announced the proposed sale and told shareholders it soon would file a proxy statement. *Id.*

Joy's announcement occurred just ten days before the annual renewal of its D&O insurance program. JA1024-25. Accordingly, on the same day that Joy executed and announced its sale agreement, Joy asked CNA through its insurance broker, Marsh LLC ("Marsh"), whether the proposed sale "changes anything with the renewal." JA1025. While CNA already had "bound" (i.e., committed to issue) renewal coverage, it had "reserve[d] the right to rescind ... or to modify" the coverage terms due to "a material change in [Joy's] condition" before the July 31 renewal date. *Id.*

***17** Almost immediately after hearing from Marsh, CNA's underwriter for Joy's renewal, David Lim, searched online and observed that law firms already were "trolling" for claimants to challenge the transaction, just one day after its announcement.

JA1027. Mr. Lim concluded that the sale reflected a "material change in risk" that increased CNA's "exposure." JA1025. He appreciated that "a very high percentage of companies that were being acquired were being hit with merger objection lawsuits." JA1026. "[B]ased on what [CNA had] been seeing in the market," he believed that a lawsuit against Joy regarding the Komatsu sale "was a matter of not if it would happen" but "when." *Id.*

Mr. Lim did not state, however, that CNA would rescind its binder or refuse to sell renewal coverage. Instead, he stated that CNA's main concern was that it did not want to have "two limits exposed" to claims against Joy. JA1028. That is, CNA did not want to have exposure to shareholder claims under its expiring 2015-16 D&O policy *and* the 2016-17 renewal policy. *Id.*

***18** CNA thus gave Joy three options for renewal:

• *First*, Joy could "extend" the 2015-16 policy until the Komatsu sale closed. JA1029. Joy would "not be renewing the policy" but instead, would "keep the same policy" then in effect, and would pay the same 2015-16 premium on a pro-rated basis. *Id.*

• *Second*, Joy could purchase a renewal policy for 2016-17 as originally planned, if Joy also agreed to purchase an extra "Run-Off" endorsement that would extend coverage for claims arising from the sale for a six-year period. *Id.* Joy would pay the originally-negotiated premium of $236,250 for the renewal year of coverage (2016-17), plus an "additional premium" of that same amount for the run-off period, thereby effectively doubling the premium. *Id.*

• *Third*, Joy could elect the second option but receive a 10% discount if it paid the premiums upfront for the 2016-17 renewal and run-off endorsement. *Id.*

As an express condition of the second and third options (i.e., any renewal for 2016-17), CNA told Joy it must forgo giving notice under, or making any claim that might trigger, Joy's expiring 2015-16 coverage. JA1030.

Joy selected the second option: it agreed not to assert claims that would trigger the expiring policies, and it purchased renewal coverage for 2016-17, together with the post-closing run-off endorsement CNA required, for twice the premium that CNA had originally quoted. JA1033. Joy also accepted CNA's commitment to work with Joy after ***19** the renewal commenced "in good faith to provide favorable runoff coverage wording." *Id.*

As an in-house CNA presentation later revealed, CNA's data for shareholder M&A lawsuits showed that "most cases are dismissed with total costs between $500K and $1 million." JA822. That is, CNA's data suggested most shareholder cases could be resolved for less than Joy's $1.5 million self-insured retention. As Mr. Lim told his supervisor in justifying his underwriting decision four days before Joy's July 31 renewal: "Hard to say if this [risk] is just nuisance value," but "[w]e have a $1.5M retention [for all relevant coverages], which will help." JA852.

D. The Securities Actions

Joy filed a preliminary proxy statement with the Securities and Exchange Commission ("SEC") on August 15, 2016, and a definitive proxy statement on September 2, 2016. JA1024. Both disclosed extensive analysis and information considered by Joy's board of directors in approving the proposed sale. *Id.*

Over the ensuing weeks, just as CNA predicted, Joy shareholders filed class-action lawsuits - the Securities Actions - against Joy and its ***20** directors and officers challenging their representations and conduct concerning the proposed sale. JA1036 (listing the eight Securities Actions).[4] Seven of the eight suits were filed in federal court and principally alleged violations of Sections 14(a) and 20(a) of the Securities Exchange Act of 1934 and SEC Rule 14a-9 (collectively, the "Proxy Fraud Rules"). JA1036-38. The eighth suit was filed in state court and alleged, among other things, fiduciary-duty breaches in connection with the disclosures in Joy's proxy statements. JA1038.

The Securities Actions each alleged that, by failing to disclose material information in its proxy statements and making materially misleading statements therein, Joy misled its shareholders and deprived them of their right to make informed decisions about whether to approve the sale. JA1037-38; *see, e.g.* ECF 103-2. The Securities Actions also alleged that management engaged in improper self-dealing. JA1037-38; *see, e.g.*, ECF 103-3 at 16-17.

In addition, the suits included a range of claims for relief. For example, each suit demanded attorneys' fees and a judgment enjoining ***21** the proposed transaction from occurring, and the suits sought other remedies, such as a declaration that "the Proxy is materially misleading," an accounting of "all damages ... profits and any special benefits," or an order "rescinding [the transaction] or awarding rescissory damages to Plaintiff and the Class" in the event it was consummated before judgment. *See, e.g.*, ECF 103-3 at 23; *see also, e.g.*, ECF 103-2 at 26; ECF 103-6 at 40.

Joy settled seven of the eight lawsuits before the transaction closed. In a pair of settlement agreements (one for six of the federal suits and another for the sole state-court suit), Joy agreed (1) to make certain, additional proxy statement disclosures and (2) to pay plaintiffs' attorneys' fees (with no payment to plaintiffs themselves) in the total, combined sum of $800,000. *See* JA394, 407.

The plaintiffs in the eighth suit, *Duncan*, maintained their suit through the transaction's closing in April 2017, which Joy's shareholders approved by a 99% vote. JA1024. The *Duncan* plaintiffs then amended their complaint to plead claims solely predicated on the Proxy Fraud Rules and to add claims for "compensatory and/or ***22** rescissory damages," in recognition of the closing of the sale. JA412, 447; *see also* JA1045-46.

E. CNA's Initial Denial of Coverage, Subsequent Acknowledgment of Potential Coverage, and Reassertion of Its Denial of Coverage

Joy notified Insurers of the Securities Actions as they were filed in August and September 2016, and requested coverage for (1) Joy's "Defense Costs" and (2) any adverse settlements or judgments. JA1042-43; *see also* JA243.

Two months then passed while CNA's underwriters worked to finalize the 2016-17 CNA Policy, which CNA still had not issued. JA1043-44. CNA completed and forwarded the CNA Policy to Marsh on November 8, 2016. *See* ECF 106-49. Eight hours later, CNA responded to Joy's claim. ECF 106-50.

CNA denied all indemnity coverage for the Securities Actions and acknowledged coverage only for certain of Joy's "Defense Costs." JA620. In denying indemnity coverage, CNA relied entirely on the bump-up exclusion as applied to the complaints in the Securities Actions. JA623-24.

***23** After the *Duncan* Amended Complaint was filed in April 2017, CNA sent another letter to Joy reaffirming its denial of indemnity coverage. JA628. [5]

Less than a month later, however, without any intervening change in the pleadings or posture of *Duncan*, CNA reversed course, withdrawing its denial of coverage, "reserving" its rights, and conceding that the *Duncan* Amended Complaint, *as pleaded*, asserts a potentially covered "Claim." JA465. CNA acknowledged that the *Duncan* plaintiffs sought "an award of 'compensatory and/or rescissory damages against the defendants,"' and "it is theoretically possible that rescissory damages might not be equivalent to the quantum of inadequate consideration asserted." JA468.

On February 28, 2018, Joy requested that Insurers consent to a proposed $20 million settlement of the *Duncan* suit. JA471, 474. CNA responded a week later, reversing its position once again and disclaiming *all* coverage for the settlement, contending (again) that there could be no indemnity coverage because the *Duncan* Amended Complaint solely pleaded an "Inadequate Consideration Claim." JA477. ***24** Arch and Travelers adopted CNA's coverage denial the following day. JA484; ECF 103-27.

F. The *Duncan* Settlement

To protect its interests, Joy agreed to the proposed $20 million *Duncan* settlement without any assurance that Insurers would honor their coverage obligations. JA388-89, 487.

In the *Duncan* settlement agreement, Joy denied all liability for plaintiffs' claims. JA492-93. Joy agreed to pay the $20 million sum solely to eliminate the ongoing litigation exposure: none of that amount was for, or based upon, a calculation of the allegedly "fair" or "adequate" share price paid by Komatsu (a non-party) for Joy's shares. *See* JA389.

The *Duncan* settlement payment covered, among other things, the "fees, costs, and expenses incurred by or on behalf of Lead Plaintiffs and the Class associated with the Settlement ..., any award of attorneys' fees and expenses of Plaintiffs' Counsel, and any award to Lead Plaintiffs made by the Court pursuant to the [Private Securities Litigation Reform Act] for reasonable costs and expenses." JA502.

The *Duncan* court ultimately awarded fees in the amount of $5,000,000 to plaintiffs' attorneys and awarded lead plaintiffs $25,400 ***25** for costs and expenses. JA544, 548. Approximately $600,000 was paid for claims-administration costs. *See* JA391. The remainder of the $20 million (just under $14.4 million) was distributed to the plaintiff class members. *See* JA509; *see also* JA1074-75.

II. Procedural History

A. Joy's Insurance Coverage Action

Joy filed this action on December 28, 2018, seeking (1) a declaration of its rights to coverage for the Securities Actions, (2) damages for Insurers' refusal to indemnify Joy for its $20.8 million in settlement payments, and (3) damages for CNA's bad faith conduct in handling Joy's claim. JA20. [6] Insurers filed answers denying Joy's claims.

On the eve of summary judgment briefing, in December 2020, Joy settled its indemnity claim against Arch, resulting in Arch's dismissal from the case. JA18. Joy, however, was not able to resolve its claims against Appellee-Insurers, and the parties filed cross motions for summary judgment on Joy's indemnity claims against CNA and ***26** Travelers in the principal amounts of $7,784,690.78 and $3,015,309.22, respectively, plus prejudgment interest. *See* JA1078. CNA also moved for summary judgment on Joy's bad-faith claim against CNA.

B. The District Court's Decision

On August 18, 2021, the district court denied Joy's motion for summary judgment on its indemnity coverage claims and granted Appellee-Insurers' cross-motions. SA1, 13.

In ruling for Appellee-Insurers, the court read the bump-up exclusion to bar "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 transaction involved the acquisition of all or substantially all of the ownership interest in or assets of an entity." SA5. The court further concluded that each of the Securities Actions "meet[s] the definition of an Inadequate Consideration Claim" in its entirety under this interpretation. SA6.

First, the court concluded that each Securities Action "alleged that Joy Global issued a false or misleading proxy report for the purpose of inducing shareholders to vote in support of a merger agreement which ***27** secured inadequate consideration for Joy Global's shares." *Id. Second*, the court held that each settlement "resolved the entire suit or suits at issue and each cause of action within the suits relied on the allegations of inadequate consideration." *Id. Third*, the court determined that the Securities Actions "involved the acquisition of all the ownership interest of an entity, namely Joy Global." *Id.* Thus, in the court's view, the exclusion applied to *all amounts* of the settlements.

The court rejected Joy's argument that the bump-up exclusion does not apply or, at most, operates as a partial exclusion, such that there is coverage for amounts (1) relating to allegations other than inadequate consideration (e.g., misleading proxy statements) or (2) that were not paid for inadequate consideration. Instead, the court held: "Once *a part of a claim* alleging inadequate consideration is settled, *the entire settlement is excluded* from the definition of loss and is not covered by the policies." SA7 (emphasis added).

The court also rejected Joy's claim that CNA acted in bad faith, holding that because "Joy Global is not entitled to coverage," CNA "had a reasonable basis for denying benefits." SA9-10. The court thus entered judgment denying Joy's claims in full. SA13.

***28 SUMMARY OF ARGUMENT**

The district court's decision rests on three errors regarding the policy language, the nature of the allegations asserted in the Securities Actions, and governing Wisconsin law.

I. For Appellee-Insurers to prevail, the bump-up exclusion must unambiguously bar coverage for Joy's settlements. *See Day v. Allstate Indem. Co.*, 332 Wis. 2d 571, 585 (Wis. 2011). It does not; indeed, the exclusion is reasonably read to incorporate two limitations, both of which render it inapplicable.

A. To start, the exclusion reasonably applies only to settlements of claims alleging economic (i.e., price-based) underpayment as the "Wrongful Act" giving rise to liability. The exclusion implements this concept through the words "any Claim alleging" that the price "paid" for the acquisition "is inadequate." These words, narrowly construed as required by Wisconsin law, *see Day*, 332 Wis. 2d at 585, focus on claims that seek to impose liability *for the act* of paying inadequate consideration, and not for any other alleged wrongdoing (such as misrepresentations in securities filings).

***29** The Securities Actions did not allege that Joy engaged in wrongdoing *because* the price Komatsu paid to acquire Joy was inadequate. Rather, plaintiffs alleged that Joy harmed its own shareholders by issuing misleading proxy statements, thus depriving shareholders of their right to a fully informed vote on the sale and inducing them to accept the price offered by Komatsu. It was Joy's alleged acts of misrepresentation, not any "unfair" share price, that rendered plaintiffs' claims actionable under the Proxy Fraud Rules.

Northrop reinforces this understanding. There, the court held that claims under Section 14(a) of the Exchange Act (the same claims made in seven of the eight Securities Actions here) are not barred from coverage under a substantially similar bump-up exclusion. As the *Northrop* court explained, "'inadequate consideration' alone would not sustain a [Section] 14(a) suit," and Section 14(a) claims are not "[p]aradigmatic dissenting stockholder cases in which the consideration for a control sale is challenged as unfair." 2021 WL 347015, at *20. A "federal securities class action about fabricated proxy forms is not the narrowly tailored fit this Exclusion imagined." *Id.*

***30** B. Additionally, the bump-up exclusion is reasonably read as applying only when the policyholder is the buyer in a corporate transaction (and thus not here, where Joy was the seller). The Policies express this concept through the action words "paid or proposed to be paid for the acquisition ... of an entity" - that is, from the perspective of a reasonable policyholder, by the insured for *its* acquisition "of an entity." A comparison between other sections of the Policies (which refer expressly to both the purchase and sale sides of a transaction) and the bump-up exclusion (which does not mention the sale side) bolsters this conclusion. Contrary to Wisconsin law and the well-known purpose of the exclusion, the district court resolved this language against coverage.

II. Even if the Securities Actions included allegations that fall within the category of claims targeted by the bump-up exclusion, the district court improperly held that the bump-up exclusion excludes coverage for *all* $20.8 million of Joy's settlement costs. At a minimum, the Policies cover amounts paid to settle "parts of" the Securities Actions alleging that Joy made misleading proxy statements (a separate "Wrongful Act" from paying inadequate consideration), or that sought remedies other than compensation for any alleged underpricing.

***31** In upholding Appellee-Insurers' blanket coverage denial, the district court held that "[o]nce *a part of* a claim alleging inadequate consideration is settled, *the entire settlement is excluded* from the definition of loss and is not covered by the policies." SA7 (emphasis added). But this reading inverts the language of the exclusion and converts a partial exclusion into a total one. The exclusion looks first to whether there is an Inadequate Consideration Claim, and then, only if there is, to what "amount" of "Loss," if any, represents "that part of" the "Claim" alleging price "is inadequate."

Joy's settlements encompassed all parts of the Securities Actions, not just any parts seeking a price adjustment. SA6. Every action alleged that Joy issued misleading proxy statements, and the actions further alleged that its management engaged in improper self-dealing. And every action sought (and Joy paid $5.8 million for) plaintiffs' attorneys' fees, which may be awarded under federal securities law even absent damages. Other remedies sought by the Securities Actions were likewise separate and disconnected from any allegations regarding an inadequate sale price. Joy's settlement payments for all of these "part[s] of" the claims remain covered, even if the bump-up exclusion applies to ***32** some parts of the Securities Actions. Further, Appellee-Insurers have not carried their burden of proving an apportionment between covered and uncovered "Loss."

III. Lastly, Joy should be granted a trial on its bad-faith claim against CNA. An insurer's bad faith is ordinarily a fact question under Wisconsin law. The district court's dismissal of this claim rested solely on the court's erroneous determination that because "Joy Global is not entitled to coverage," CNA "had a reasonable basis for denying benefits." SA9-10. Because Joy is entitled to coverage for at least "part of" its "Loss," and because the record contains evidence of bad faith on CNA's part, the question of CNA's bad faith in denying *all* coverage is a triable issue of fact.

STANDARDS OF REVIEW

I. Summary Judgment

The Court reviews *de novo* a district court's entry of summary judgment. *I/N Kote v. Hartford Steam Boiler Inspec. & Ins. Co.*, 115 F.3d 1312, 1316 (7th Cir. 1997).

II. Insurance Policy Interpretation

It is undisputed that Wisconsin law governs. Under Wisconsin law, the interpretation of an insurance policy is a question of law. ***33** *Day*, 332 Wis. 2d at 584. "The objective in interpreting and construing [an insurance policy] is to ascertain and carry out the true intention of the parties," based on "what a reasonable person in the position of the insured would have understood the words to mean." *Kremers-Urban Co. v. Am. Emp'rs. Ins. Co.*, 119 Wis. 2d 722, 735 (Wis. 1984).

The policyholder "bears the burden of showing an initial grant of coverage," but once that is shown, the burden "shifts to the insurer to show that an exclusion nevertheless precludes coverage." *Day*, 332 Wis. 2d at 584. When an insurer relies on an exclusion, the exclusion will be construed narrowly; further, the policy will be construed in favor of coverage "if the effect of [the] exclusion is ambiguous or uncertain." *Id.* at 585. Similarly, insurers bear the burden of proving a proper allocation between any potentially covered and uncovered amounts. *See Valley Bancorporation v. Auto Owners Ins. Co.*, 212 Wis. 2d 609, 618-623

(Wis. Ct. App. 1997) (requiring insurer to indemnify full loss where it "failed to demonstrate" that covered conduct "played no role" in jury's damages award against insured).

A policyholder, therefore, is entitled to judgment if the terms of the insurance policy, applied to the facts, either (1) support a finding of ***34** coverage as a matter of plain meaning or (2) are ambiguous. *Day*, 332 Wis. 2d at 585 ("If words or phrases are susceptible to more than one reasonable construction, they are ambiguous" and will be "construed in favor of an insured seeking coverage."); *see also* *Langone v. Am. Family Mut. Ins. Co.*, 300 Wis. 2d 742, 756 (Wis. Ct. App. 2007). [7]

Prevailing understandings, customs, and practices in the D&O insurance industry and in M&A litigation are also appropriate to consider. *See* *Emp'rs Health Ins. v. Gen. Cas. Co. of Wis.*, 161 Wis. 2d 937, 946 (Wis. 1991) ("[T]he 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."). Indeed, this Court has long understood that "[a]n ***35** insurance policy is not to be interpreted in a vacuum; it is issued under given factual circumstances." *Sonoco Bldgs., Inc. v. Am. Home Assur. Co.*, 877 F.2d 1350, 1353 (7th Cir. 1989) (quoting Illinois law). "What at first blush might appear unambiguous in the insurance contract might not be such in the particular factual setting in which the contract was issued." *Id.*

These principles reflect that "the transfer of risk is the only reason that insureds pay premiums to insurers." *Pitts v. Revocable Trust of Knueppel*, 282 Wis. 2d 550, 575 (Wis. 2005). Thus, when a reasonable person in the position of the insured believes the policy provides coverage, there is coverage. *See* *Gen. Cas. Co. of Wis. v. Hills*, 209 Wis. 2d 167, 183-85 (Wis. 1997) (interpreting policy "in accord with the expectations of a reasonable person in the position of the insured" and "the purpose of liability policies").

ARGUMENT

There is no dispute that, absent exclusion, the full amount of Joy's settlement payments are covered as "Loss resulting from [a] Securities Claim" under the Policies' insuring agreement. JA576 § I(3). Thus, Joy's $20.8 million settlement payments are presumptively covered.

***36** Appellee-Insurers argue, and the district court held, that the bump-up exclusion removes coverage for Joy's settlements. To defeat coverage on this basis, the insurers must prove: (1) the exclusion unambiguously applies to Joy's "Loss," and (2) the precise portion of Joy's "Loss" that is excluded. *See* *Day*, 332 Wis. 2d at 585; *Valley Bancorporation*, 212 Wis. 2d at 618-23. Appellee-Insurers cannot sustain their burden on either front.

I. The Bump-Up Exclusion Does Not Apply.

Appellee-Insurers must demonstrate not only that the bump-up exclusion can be interpreted to exclude Joy's "Loss," but also that this is the only reasonable reading of the Policies. It is not. Instead, as the exclusion's text, history, and prevailing industry understanding demonstrate, the exclusion is reasonably read in another (indeed, better) way: as barring coverage for *price-based claims* (like common-law appraisal and freeze-out claims) against the *buyer* in a corporate transaction.

***37** Because the Securities Actions sought to hold Joy liable for misleading proxy statements under the federal securities laws (a risk traditionally covered by D&O insurance), and because Joy was the seller in the Komatsu transaction, the exclusion does not apply.

A. The Bump-Up Exclusion Is Reasonably Read to Apply to Price-Based Claims, Not Claims under the Federal Securities Laws.

1. *The Exclusion Focuses Narrowly on Price-Based Claims.*

The bump-up exclusion removes from coverage "any Claim alleging" that the "price or consideration paid" for the acquisition of an entity "is inadequate." These words, read narrowly as Wisconsin law requires, *see Day*, 332 Wis. 2d at 585, reasonably convey that coverage is excluded for claims that seek to impose legal liability *because* the "consideration paid" "is inadequate" - that is, claims seeking to impose liability *for the "Wrongful Act"* of paying inadequate consideration, not some other "Wrongful Act" like alleged misrepresentations in proxy statements actionable under the federal Proxy Fraud Rules.

The exclusion's reliance on the defined term "Claim" reinforces this reading. Under the Policies, a "Claim" is "any written demand for monetary damages or non-monetary relief ... [or] any civil ... proceeding ***38** ... alleging a Wrongful Act." JA577. Incorporating that definition, the exclusion withdraws coverage for any settlement "amount" representing "that part of" "any written demand for monetary damages or non-monetary relief ... [or] any civil ... proceeding ... alleging a Wrongful Act" "that the price or consideration paid or proposed to be paid ... is inadequate." JA577, 579, 581.

Thus, to trigger the exclusion, there must be (1) an alleged "Wrongful Act" (i.e., an "actual or alleged error, misstatement, misleading statement, act, omission, neglect or breach of duty committed or attempted") *and* (2) that "Wrongful Act" must be "that the price or consideration paid or proposed to be paid ... is inadequate." JA579, 584.

This reading of the exclusion is supported by decades of Delaware corporate law (where Joy and many large public companies are incorporated) and federal securities law, which together draw a clear distinction between purely economic, price-based claims and claims alleging other wrongdoing. JA961-71. Reading a D&O insurance policy "as an intelligent layperson would," *I/N Kote*, 115 F.3d at 1317-18, a reasonable corporate policyholder would appreciate this distinction.

***39** Delaware law has long recognized price-based claims, in which the defendant's alleged underpayment ("inadequate consideration") is the act that creates liability, in contrast to the federal securities laws, under which a misrepresentation or omission (not "unfair" consideration) is the act that gives rise to liability. For example, Delaware law gives shareholders the right to sue for an appraisal if a company incorporated in Delaware (like Joy) undertakes certain mergers or consolidations. *See* 8 Del. Code § 262(b). "An action seeking appraisal is intended to provide shareholders who dissent from a merger, on the basis of the *inadequacy of the offering price*, with a judicial determination of the *fair value* of their shares." *Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137, 1142 (Del. 1989) (emphasis added). "The scope of the appraisal action is limited, with the *only litigable issue* being the determination of the value of petitioner's shares on the date of the merger." *Id.* (emphasis added).

Delaware common law also has long regulated so-called "freeze-out" transactions, in which a controlling shareholder seeks to take a company private. *See Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107 (Del. 1952). Much like an appraisal action, the essence of a freeze-out ***40** claim is that a controlling shareholder has breached its fiduciary duties to minority shareholders through "domination," by wielding its controlling stake to force them to accept an "unfair" or "inadequate" share price. *See, e.g.*, *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1115-17 (Del. 1994) (affirming "entire fairness" review in controlling-shareholder mergers); *In re Cellular Tel. P'ship Litig.*, 2022 WL 698112, at *2 (Del. Ch. March 9, 2022) (awarding freeze-out damages "equal to the difference between the consideration [the minority] received and a pro rata share of the fair value [of their shares] as determined by the court").

By contrast, federal courts have long disavowed such price-based theories of liability under the securities laws. "[S]ecurities fraud does not include the oppression of minority shareholders." *Stark Trading v. Falconbridge Ltd.*, 552 F.3d 568, 572 (7th Cir. 2009). "[T]he antifraud provisions of federal securities law are not a general charter of shareholder protection." *Beck v. Dobrowksi*, 559 F.3d 680, 683 (7th Cir. 2009).

Here, it was Joy's alleged act of making material misrepresentations in its proxy statements - not any "inadequate ***41** consideration" - that motivated and enabled plaintiffs to file the Securities Actions under the federal Proxy Fraud Rules. To state a claim under Section 14(a) of the Exchange Act and Rule 14a-9 thereunder, "a shareholder must, at the very least, identify a materially misleading misrepresentation or omission in the proxy materials." *St. Clair-Hibbard v. Am. Fin. Tr., Inc.*, 812 F. App'x 36, 38 (2d Cir. 2020) (citing *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 383-85 (1970)). [8]

Indeed, "[t]he purpose of § 14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation." *J.I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964). Section 14(a) liability is *not* predicated on inadequate price: the law has long been clear that Section 14(a) does not permit "liability to be foreclosed on the basis of a finding that the merger was fair," and *rejects* the notion that "[a] judicial appraisal of ***42** the merger's merits could be substituted for the actual and informed vote of the stockholders." *Mills*, 396 U.S. at 381. [9]

2. *The Securities Actions Did Not Assert Price-Based Claims.*

The Securities Actions did not allege that Joy engaged in wrongdoing because the price paid by Komatsu for the acquisition of Joy was inadequate. They alleged that Joy harmed shareholders by making material misrepresentations in proxy statements, thereby depriving shareholders of their right to a fully informed vote. Because such allegations are not price-based claims addressed by the bump-up exclusion, the exclusion is inapplicable.

This mismatch between the Securities Actions and the bump-up exclusion has been clear from the outset. *See* JA1036-37 (summarizing the pleadings). The *Duncan* Amended Complaint tied plaintiffs' claims ***43** to alleged misrepresentations in Joy's proxy disclosures from its very first paragraph, which defined the overall nature of the action:

• "[T]his matter *arises out of* the defendants' dissemination of a false and misleading proxy statement." JA413 (emphasis added).

• "Defendants were forced to issue multiple supplemental Proxy disclosures on September 29 and October 3, 2016 in an attempt to rectify the problems, but the final Proxy still woefully failed to provide full and fair disclosures to Joy Global stockholders." JA414.

• "When submitting the Acquisition to a stockholder vote here, however, the Joy Global Board deprived the Company's stockholders of management's most reasonable, reliable, and best estimates of Joy Global's future prospects." *Id.*

• "*As a result of the misleading Proxy*, uninformed Joy Global stockholders voted in favor of the Acquisition on October 19, 2016." JA415 (emphasis added).

The *Duncan* Amended Complaint also alleged wrongful acts in the form of conflicts of interest and self-dealing (i.e., alleged misconduct, not alleged underpricing):

• "The Board allowed its most conflicted member, Doheny, to conduct unsupervised pricing negotiations with Komatsu throughout the sale process." JA434.

• "Management did not create these new, downward projections until after Komatsu submitted an offer set to trigger millions in personal golden parachute compensation for Doheny and his senior management team ...." JA415.

***44** • "The Outside Directors failed to supervise or become directly involved in Doheny's discussions with Komatsu." JA438.

The complaint went on to allege that the transaction should never have happened and is subject to *rescissory* damages (i.e., the antithesis of a price adjustment for a consummated sale). *See* JA442 ("Without full and fair disclosure of the material information, set forth above, shareholders should not have been asked to vote on the Acquisition.”); JA442-43 (“Had the Five-Year Growth Plan been disclosed and accurately been presented as being reliable, Joy stockholders would not have voted in favor of the Acquisition.”).

The other seven Securities Actions (all of which Joy settled *before* consummation of the transaction) all sought to prevent the sale from happening at all because, they alleged, Joy had made incomplete or misleading disclosures. As the very first Securities Action (ECF 103-2 at 23-24) alleged:

> The misrepresentations and omissions in the Proxy are material to Plaintiff and the Class, who will be deprived of their right to cast an informed vote if such misrepresentations and omissions are not corrected prior to the vote on the proposed merger .... Only through the exercise of this ***45** Court's equitable powers can Plaintiff and the Class be fully protected.

To be sure, the Securities Actions also referred repeatedly to an “unfair” or “inadequate” share price. *See, e.g.*, JA412. But the Securities Actions did not allege pricing as the actionable wrong; instead, plaintiffs raised “inadequate” share price as a consequence of Joy's alleged wrongdoing, and in *Duncan* (the only suit that persisted after closing), as one measure for valuing damages. References to “unfair” or “inadequate” share price are hardly the only - or even principal - allegations in the Securities Actions. If they were, the Securities Actions would have been subject to dismissal for failure to state a claim. *See* 15 U.S.C. § 78u-4(b)(1); *Golub v. Gigamon Inc.,* 847 F. App'x 368, 371 (9th Cir. 2021) (affirming dismissal of Section 14(a) suit where plaintiffs “fail[ed] to allege plausible misstatement[s] of ... fact” in defendant's “proxy statement” (first brackets added)).

“Indeed, ‘inadequate consideration’ alone would not sustain a [Section] 14(a) suit.” *Northrop*, 2021 WL 347015, at *20. Appellee-Insurers' assertion that inadequate consideration was “the sole economic injury” asserted by the *Duncan* plaintiffs (*see* ECF 127 at 2), ***46** in addition to being inaccurate, [10] is thus beside the point: that alleged injury, standing alone, could not have supported the Securities Actions.

The Delaware Superior Court recently recognized this decisive distinction between price-based claims and claims under the Proxy Fraud Rules in *Northrop*, holding that the latter are not deprived of coverage by a bump-up exclusion. *See* 2021 WL 347015, at *5, 20. *Northrop* is a persuasive analysis, from a jurisdiction that historically has seen the most M&A litigation in the country, about what the bump-up exclusion conveys to a reasonable policyholder.

In *Northrop*, the underlying lawsuit at issue (*Knurr*) was filed by the same law firm that filed the *Duncan* suit against Joy, and the two were similar. *See* ECF 126-3. The *Knurr* plaintiffs claimed that the insured company made misrepresentations in its proxy statements in connection with a stock-for-stock merger, thereby “depriv[ing] [plaintiff shareholders] ‘of their right to a fully informed vote and induc[ing] them to vote their shares *and accept inadequate consideration*.”’ ***47** 2021 WL 347015, at *5 (emphasis added). Shareholders sued under the federal securities laws seeking “compensatory damages,” and the policyholder settled with the class of shareholders claiming under Section 14(a) for $45.6 million. *Id.*

Applying interpretative rules similar to Wisconsin's, the *Northrop* court rejected insurers' reliance on the bump-up exclusion, explaining that price-based claims are materially different from Section 14(a) claims. [11] As the court explained, the bump-up exclusion narrowly targets “a lawsuit (‘Claim’) that ‘alleges' only the ‘consideration’ exchanged - nothing else - as part of only one specific control transaction (an ‘acquisition’ of ‘all or substantially all ownership interest[’] or ‘assets' of an ‘entity’) was ‘inadequate.”’ *Id.* at *20 (original brackets omitted).

The court noted that the *Knurr* plaintiffs' Section 14(a) claim did not focus on “the [complaining] stockholders' ‘inadequate’ ‘consideration’ ***48** (i.e., unwisely-exchanged stock),” but instead, “primarily was about ... ‘dissemination of a materially false and misleading Joint Proxy Statement used to obtain approval of the merger."' *Id.* (original ellipses and brackets omitted). In reasoning that mirrors Joy's reading here, the court observed that Section 14(a) "does not grant stockholders a revised appraisal of the equity they sold," and thus, such claims are not "[p]aradigmatic dissenting stockholder cases in which the consideration for a control sale is challenged as unfair." *Id.* As the court explained, "*a federal securities class action about fabricated proxy forms is not the narrowly tailored fit this Exclusion imagined*." *Id.* (emphasis added).

The district court declined to follow *Northrop* for two unpersuasive reasons:

First, it perceived the *Northrop* decision as improperly inserting the word "only" into the exclusion. SA8. But the *Northrop* court did not write that word into the text; it simply interpreted the exclusion narrowly, as principles of insurance law require, and in light of the exclusion's text, history, and commonly understood scope. Those factors reveal that the exclusion focuses on price-based claims in which "the only litigable issue" is "the determination of the value of petitioner's ***49** shares on the date of the merger." *Cavalier Oil Corp.*, 564 A.2d at 1142. Because *Knurr* (like *Duncan*) asserted no such claim, the bump-up exclusion did not apply.

The district court's contrary reading improperly interprets the bump-up exclusion broadly, extending it beyond the "part of" a "Claim" alleging that consideration "is inadequate" to encompass, in full, any lawsuit that mentions "inadequate consideration." Under the district court's reading, "each cause of action within the [Securities Actions] *relied on* the allegations of inadequate consideration." SA6 (emphasis added). But as shown above, that premise is not true. The exclusion turns on the coverage-broadening phrase "that part of any Claim," and does not say that coverage is excluded for claims that "rel[y] on" inadequate-price allegations; instead, it refers to "that part of" "any Claim alleging" that the price paid "is inadequate." The district court should have interpreted the exclusion narrowly like *Northrop*; instead, contrary to Wisconsin law, it applied an expansive gloss.

Second, the district court distinguished the *Northrop* exclusion on the ground that, unlike the exclusion here, it ends with the phrase "representing the amount by which such price is effectively increased." ***50** SA8. But the Policies express that same concept at the *beginning* of their exclusionary text, carving the excluded "amount" out from otherwise covered "Loss." *See* Argument, Part II.A, *infra*.

Moreover, the *Northrop* court did not rely upon the words "representing the amount by which such price is effectively increased" to hold that Section 14(a) claims are *categorically* beyond the "narrowly tailored fit this Exclusion imagined." 2021 WL 347015, at *20. Instead, the court rested its decision on language nearly identical to the language here: "In the event of a Claim alleging that the price or consideration paid for the acquisition ... is inadequate ...." *Id.* at *19-20. The *Northrop* court observed, *later* in its decision, that the "effectively increased" language provided an *additional* reason not to exclude coverage under the facts at issue. *Id.* at 22.

At a minimum, *Northrop* illustrates that Joy's reading is a reasonable interpretation of the bump-up exclusion. Indeed, CNA's own flip-flop on coverage in Joy's case even more powerfully proves the point. *See* Statement of the Case, Part II.E, *supra*; Argument, Part II.D, *infra*. Under Wisconsin law, nothing more is required for Joy to prevail. *See Day*, 332 Wis. 2d at 585.

***51 B. The Phrase "Paid or Proposed to Be Paid for the Acquisition" Reasonably Limits the Exclusion to Claims Against the Buying Entity.**

The bump-up exclusion is also inapplicable because, reasonably construed, it focuses on action by the buyer in a corporate transaction. Here, Joy was the seller.

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 the price it pays and the "fair" price for an acquired company (irrespective of any wrongdoing). In that circumstance, the availability of D&O insurance creates a moral hazard, giving the buyer an incentive to underpay for a transaction and attempt to offload "part of" the price for the deal to its insurer, if the selling shareholders sue for a price adjustment. *See* JA979-80. The bump-up exclusion addresses this hazard by carving out from "Loss" the amount of a settlement or judgment by which the buyer shifts part of the economic consideration for the deal to its insurer (the "bump-up -payment"). *See* JA979-83, 1007-11.

***52** By contrast, a seller in a corporate transaction (like Joy) does not have the same incentive: it does not stand to gain by selling itself for *too little*, and management risks liability for self-dealing if it does. *See id.*; *see also* JA877. Thus, the availability of insurance does not create the same moral hazard in a seller, and the ameliorative effect of the bump-up exclusion is unnecessary.

The Policies' exclusion implements this concept through the phrase "paid or proposed to be paid for the acquisition ... of an entity." These words, narrowly construed, refer to the "Wrongful Act" giving rise to the excluded liability. They address the price "paid or proposed to be paid" (i.e., by the buyer) "*for the acquisition*" - that is, from the perspective of a reasonable policyholder, by the insured for *its acquisition* (not sale) "of an entity." Here, the Securities Actions did not allege that any "price or consideration paid or proposed to be paid" *by Joy* "for the acquisition of an entity" was "inadequate." As the selling entity, Joy did not offer or pay anything. The exclusion, therefore, does not apply.

***53** Two additional considerations reinforce this reading:

First, where the Policies refer to the sale side of a transaction, they do so expressly. The Policies provide coverage to Joy for, among other things, "any Securities Claim." JA576 § I(3). The definition of "Securities Claim" refers to both the purchase and sale sides of a transaction, encompassing "a Claim made against any Insured ... alleging, arising out of, based upon, or attributable to the *purchase or sale* or *offer or solicitation* of an offer to *purchase or sell* any securities of an Insured Entity." JA582-83 (emphasis added). By contrast, the bump-up exclusion conspicuously mentions only the purchase side: "*paid* or proposed to be *paid* for the *acquisition* ... of an entity." JA579 (emphasis added).

Second, the genesis of the bump-up exclusion in the *Safeway* case, and court decisions that have evaluated insurance coverage for "bump-up" payments, confirm the reasonableness of reading the bump-up exclusion as focusing on the *buyer's* potential insurance windfall. All reported appellate decisions that have evaluated insurance coverage for ***54** alleged "bump-up" payments involved a buyer's potential windfall. *See, e.g.*:

• *Genzyme Corp. v. Fed. Ins. Co.*, 622 F.3d 62, 72-73 (1st Cir. 2010) (bump-up exclusion applied to risk that "[insured] corporation might *underpay* the existing shareholders to benefit the remaining shareholders" (emphasis added));

• *Pan Pac. Retail Props. v. Gulf Ins. Co.*, 471 F.3d 961, 966-70, 973 (9th Cir. 2006) (restitution extracted from *buyer* in takeover litigation not covered under *buyer's* policy, but damages against *seller* would be covered if not indemnified by buyer);

• *Level 3 Commc'ns, Inc. v. Fed. Ins. Co.*, 272 F.3d 908 (7th Cir. 2001) (under Nebraska law, no indemnifiable "loss" where policyholder *acquired* shares of target company in circumstances entitling target's shareholders to restitution).

At a minimum, the exclusion is ambiguous in light of its history and the considerations noted above, and Joy is thus entitled to coverage. *See* *Day*, 332 Wis. 2d at 585.

C. The Purpose and Context of the Exclusion Confirm That a Reasonable Insured Would Expect Coverage for the Securities Actions.

Joy's interpretation reflects what insurance and M&A practitioners understand as the purpose of D&O insurance and the bump-up exclusion. *See* *Empr's Health.*, 161 Wis. 2d at 946 (courts "may consider the apparent object or purpose of the insurance" and "the ***55** situation of the parties and the circumstances surrounding the making of the contract").

The exclusion "was developed to make clear that coverage is excluded for price-based claims in the M&A context alleging that the acquirer's purchase price, or proposed purchase price, for the target company is inadequate and needs to be increased (or 'bumped-up')." JA871. "[I]t was not intended to broadly curtail or eliminate coverage for lawsuits in the M&A context, including shareholder class action lawsuits pleaded under the federal securities laws or otherwise alleging 'wrongful acts' by companies and their directors and officers." JA874.

Like D&O professionals, M&A practitioners distinguish between price-based suits, like appraisals and freeze-outs, and suits alleging fraud or other wrongdoing. JA961-71. "The prevailing understanding among securities law commentators and M&A practitioners is that the 'bump-up' exclusion does not apply to federal securities claims." JA984-88.

This understanding accords with the parties' course of dealing. CNA began issuing primary D&O coverage to Joy in 2006, a decade before the policy period at issue. JA1066. CNA's policies contained a ***56** bump-up exclusion with industry-standard language, copied nearly word-for-word from National Union's 2000 version of the exclusion. JA1066-67. Then, in 2010, CNA introduced an "*Enhancement* Endorsement" to its standard D&O policy form to compete with recently-expanded coverage introduced by National Union. JA1067. The idea was to enhance, not narrow, coverage.

CNA's "Enhancement Endorsement" was the source of the bump-up language that appears in Joy's 2016-17 CNA Policy, with one exception: the definition of "Inadequate Consideration Claim," as it appeared in CNA's 2010 Endorsement, omitted the words "*that part of any* Claim ...." JA1068-70; *see* ECF 105-3 at 3 (CNA's original 2010 "Enhancement Endorsement").

Through its broker, Marsh, Joy asked CNA "to clarify that the [bump-up] exclusion only applies to the bump-up payment, not to other portions of a settlement/judgment in a bump-up Claim." JA556. In response, CNA drafted and inserted the words "*that part of any* Claim" into the definition of "Inadequate Consideration Claim" for Joy's 2011 policy renewal. JA556-57; *see also* ECF 106-56 (internal CNA email proposing the revision). CNA's clarified definition of "Inadequate ***57** Consideration Claim" remained in Joy's CNA policy for every ensuing annual renewal. JA1031-32, 1069-70.

Thus, when Joy's 2016-17 CNA Policy issued, (1) both parties understood that the Policy contained a bump-up exclusion with a narrowly-drawn focus on "bump-up" payments for price-based claims, and (2) the exclusion's language was CNA's "standard ... language." The district court should have held Appellee-Insurers to their bargain.

II. The Bump-Up Exclusion Does Not Unambiguously Remove Coverage for *All* Amounts of Joy's "Loss."

Even if the Securities Actions included allegations that fall within the *category* of claims targeted by the bump-up exclusion, the district court nevertheless erred by holding that no *amount* of Joy's settlements remains covered. The Policies remove from coverage only settlement "amount[s]" corresponding to "that part of" the Securities Actions "alleging that the price ... paid ... [was] inadequate." Every other "part of" the Securities Actions, and every other "amount of" the settlement payments, remains covered.

Thus, the Policies provide coverage - at a minimum - for the parts of Joy's settlements that resolved the plaintiffs' (1) allegations of misrepresentations in proxy statements or management self-dealing ***58** and (2) claims for relief other than compensation for any allegedly "inadequate" share price (such as the $5.8 million Joy paid for plaintiffs' attorneys' fees).

A. The Bump-Up Exclusion Withdraws Coverage Only for a Discrete "Amount" of Otherwise-Covered "Loss."

The bump-up exclusion operates through the word "Loss," and serves as a carve-out from otherwise-covered "Loss." As the exclusion states: "Loss ... shall not include ... any amount of any judgment or settlement of any Inadequate Consideration Claim." JA581. The words "any amount of" are critical: they identify the portion of "Loss" that the exclusion removes from coverage. This phrase comes first and frames the entire exclusion. Everything that comes after describes the "amount" that is excluded.

The definition of "Inadequate Consideration Claim" then provides the criteria that must be satisfied before any particular "amount" of "Loss" is excluded. JA579. Specifically, the exclusion removes coverage for any amount - and because it is an exclusion, *only* that amount - of a settlement of (1) "that part of" (2) "any Claim alleging" that (3) the "price ... paid for the acquisition ... of an entity is inadequate." *Id.* Each of these criteria limits the exclusion's scope, and each must be ***59** established before any "amount" of a settlement is excluded from "Loss." [12]

Through the words "that part of," the exclusion addresses the "amount" of a settlement representing the part of a "Claim" alleging that the "price ... paid ... is inadequate." *Id.* Every part of a "Claim" alleging anything else thus falls outside the exclusion.

The term "Claim," in turn, is defined broadly to include "any written demand for monetary damages or non-monetary relief ... [or] any civil ... proceeding ... alleging a Wrongful Act." JA577. The Policies thus recognize that a plaintiff not only can allege multiple wrongs but also can seek distinct remedies from the insured (e.g., multiple "demand[s] for monetary damages or non-monetary relief"). Together with the exclusion's statement that "Claim[s]" contain multiple ***60** "part[s]," this language establishes that a single shareholder lawsuit may have many components, each of which "alleg[es]" different things. JA579.

A shareholder lawsuit may (and indeed, typically does) include multiple components - its factual allegations, legal conclusions, and prayers for relief - that constitute separate "part[s] of" a "Claim" that must be assessed separately for purposes of the bump-up exclusion. And across each of these separate components, the exclusion narrows the "amount" excluded to solely "that part of" the "Claim" that triggers the exclusion. JA579, 581. By contrast, any "amount" associated with any other "part[s] of" a "Claim" remains covered.

B. The District Court Erroneously Converted a Partial Exclusion into a Total One.

In applying the bump-up exclusion to Joy's settlements, the district court inverted the exclusion's logic and meaning. Rather than appreciating that the exclusion expressly operates upon a qualifying "amount" as a partial exclusion, the court concluded that "the provision excludes '*any* amount of *any* settlement,"' SA7 (emphasis in original), and from there reasoned that "[o]nce a *part of* a claim alleging inadequate consideration is settled, *the entire settlement is excluded* ***61** from the definition of loss and is not covered by the policies," *id.* (emphasis added).

This interpretation rests on two key errors:

First, it misconstrues the phrase "any amount of." The Policies do not exclude coverage for the entirety of a settlement if "any amount of" that settlement resolves an Inadequate Consideration Claim. Rather, the Policies remove from otherwise-covered "Loss" only "any amount of any ... settlement of any Inadequate Consideration Claim," where such claim constitutes "*[t]hat part of any* Claim alleging that the price ... paid ... is inadequate." JA579 (emphasis added).

The Policies thus contemplate that settlement payments are divisible into separate "amounts," each corresponding to a different "part of" a "Claim," and that a subset of those amounts is excluded from coverage. The district court inverted this framework, reading the exclusion as mandating that all amounts of a settlement are excluded if even a single amount resolves a part of a "Claim" alleging that the price paid is inadequate.

Second, the district court failed to appreciate that because the bump-up exclusion operates as an exclusion to coverage - rather than as ***62** a condition precedent to coverage - everything that falls outside of its terms remains covered as a matter of law. In other words, far from expanding the scope of the exclusion, the words "that part of" further limit it.

Thus, properly understood, the exclusion does not apply *at all* unless there is a triggering "Claim" alleging that the price paid for the acquisition of an entity "is inadequate." In that event, only the "amount of any judgment or settlement of" "that part of" the "Claim" is excluded from covered "Loss."

C. At Least Some "Amount" of Joy's "Loss" Falls Outside the Scope of the Exclusion.

Joy's settlements resolved each of the Securities Actions in full. The settlements encompassed every pleading and demand set forth in each of the eight actions, and paid compensation both to shareholders and to their attorneys. The district court erroneously allocated all of the settlement amounts to the Securities Actions' allegations about "unfair" and "inadequate" price, and held that coverage was foreclosed for everything. *See* SA6. In doing so, the court misconstrued the underlying pleadings and Joy's settlements.

***63** Most importantly, the district court overlooked that the Securities Actions contained numerous allegations other than "unfair" or "inadequate" price - indeed, all of these cases were principally about alleged misrepresentations in violation of the securities laws, and all demanded various monetary and non-monetary relief other than any price adjustment. *See* Argument, Part I.A.2, *supra*.

For example, the *Duncan* plaintiffs alleged that their case "[arose] out of the defendants' dissemination of a false and misleading proxy statement," that Joy's "final Proxy ... failed to provide full and fair disclosures to Joy Global stockholders," and that Joy's senior management improperly sought to obtain "millions in personal golden parachute compensation." JA413-14, 415, 438. The other lawsuits similarly alleged that Joy's "Proxy fails to provide the Company's shareholders with material information and provides them with materially misleading information thereby rendering shareholders unable to cast an informed vote about the Proposed Transaction." *See, e.g.*, ECF 103-3 at 2-3; *see also, e.g.*, ECF 103-2 at 23 (shareholders "will be deprived of their right to cast an informed vote if such ***64** misrepresentations and omissions are not corrected prior to the vote on the Proposed Merger").

Because Joy's settlements encompassed all of those "parts of" the "Claim[s]" in addition to allegations about "unfair" or "inadequate" price, the settlement amounts attributable to those other parts of the "Claim[s]" remain covered.

The district court further overlooked that violations of the Proxy Fraud Rules give rise to remedies other than compensatory damages for any supposedly "unfair" or "inadequate" price, and that Joy's settlements encompass the "parts of" the Securities Actions that sought these additional remedies. Specifically, a violation of the Proxy Fraud Rules supports equitable remedies, such as rescission, an accounting, or injunctive relief. *See Mills*, 396 U.S. at 388. Indeed, a defendant may be ordered to pay plaintiffs' attorneys fees incurred in establishing the violation even if no compensatory damages are warranted. *See Mills v. Elec. Auto-Lite Co.*, 552 F.2d 1239, 1245-48 (7th Cir. 1977) (affirming fee award for the mere "corporate therapeutics" of "providing an important means of enforcement of the proxy statute"). And as this Court has recognized in other securities-law contexts, rescissory ***65** damages are available as a substitute for rescission. *See Rowe v. Maremont Corp.*, 850 F.2d 1226, 1240-41 (7th Cir. 1988).

The Securities Actions sought all of these remedies. Each of the actions sought attorneys' fees. *See* JA448. [13] The *Duncan* Amended Complaint sought "compensatory and/or rescissory damages," and preserved equitable remedies as "such other relief as this Court may deem just and proper." JA448. The other seven actions sought to enjoin the transaction from occurring at all. [14] Each of these requests for relief constituted a separate "part of" the "Claim [s]" under the Policies, requiring each to be parsed separately for purposes of the bump-up exclusion. *See* Argument, Part II.A, *supra*. As with the allegations regarding conduct other than "unfair" or "inadequate" price, Joy's settlements encompassed these remedies, too. The settlement amounts attributable to these parts of the Securities Actions remain covered.

Finally, the district court ignored the economic reality of the settlements. Substantial amounts of Joy's settlements did not go into ***66** plaintiffs' pockets at all. Joy settled all seven non-*Duncan* lawsuits at a stage when plaintiffs principally sought to enjoin the transaction pending additional disclosures, not obtain compensation for any alleged underpricing. The entire $800,000 that Joy paid in those settlements went to compensate plaintiffs' attorneys; none went to shareholders. *Cf. Safeway*, 64 F.3d at 1287 (holding policyholder's settlement amount for plaintiffs' attorneys' fees covered, even though dividend payment was not covered "loss," because "[t]he lawyers got the money, not the shareholders"). Similarly, of the $20 million that Joy paid to settle the *Duncan* matter, $5 million went to plaintiffs' attorneys, and approximately $600,000 more was spent on claims administration costs. JA391, 544. These amounts, too, did not compensate shareholders for any "inadequate" price.

Because the Securities Actions did not just involve allegations that the merger price was "inadequate" or "unfair," or just seek damages for a "bump-up" in price, Joy's settlements of those other "parts of" the Securities Actions fall outside the bump-up exclusion.

***67 D. Insurers Did Not Carry Their Burden of Proving a Fair or Proper Allocation.**

Despite the "parts of" the Securities Actions and associated settlements that fell outside the scope of the bump-up exclusion, Appellee-Insurers nevertheless denied coverage for all of Joy's "Loss." This was improper both under the Policies' language and Wisconsin law.

By taking the blanket position that no amounts of Joy's settlements are covered, Appellee-Insurers declined to exert any efforts - much less "best efforts" - "to agree upon a fair and proper allocation between the insured and uninsured loss" as required by the Policies. JA589 § V(3). Absent an agreed allocation, Wisconsin law places the burden on Appellee-Insurers to prove the specific amount of any "Loss" that is not covered; if Appellee-Insurers cannot do so, or any allocation would be arbitrary, the full loss is covered. *See* *Valley Bancorporation*, 212 Wis. 2d at 618-623 (discussing insurer's burden to allocate where it invokes exclusion to deny coverage).

Joy submitted considerable evidence, first to Appellee-Insurers and then to the Court, to support allocating 100% of the settlements to covered parts of the "Loss." Appellee-Insurers submitted no evidence in ***68** rebuttal. As discussed above, Joy's settlements encompassed *all* "parts of" the Securities Actions, including (among other things) their contentions that Joy issued misleading proxy statements, that management engaged in self-dealing, and that the transaction should be enjoined or unwound. The settlements also covered shareholders' claims for rescissory damages, attorneys' fees, injunctive relief, and any other appropriate equitable relief.

Against this backdrop, Joy presented unrebutted evidence that no amount of the *Duncan* settlement - even the $14.4 million that was distributed to plaintiffs - was designed to (or did) compensate plaintiffs for an "inadequate" deal price. That is, none of it was a "bump-up" payment within the scope of the exclusion. As explained by Joy's in-house counsel who oversaw the settlement, the *Duncan* settlement amount was calculated on the basis that "it was the lowest sum that [Joy] could persuade the *Duncan* plaintiffs' counsel to accept to dismiss their suit." JA389. It "was not based upon, or derived from, any determination of the allegedly 'fair' or 'adequate' share price paid by Komatsu for Joy's shares." *Id.*

***69** Indeed, the full $20 million *Duncan* settlement amount represented merely 0.54% of the total value of the $3.7 billion transaction. JA389-90. After deducting the portions that did not go to shareholders, the *Duncan* settlement represents approximately 15¢ per share - not a sum indicative of compensation for underpricing. JA390, 989. A rational juror could conclude, based on this evidence, that all, or at least some, amounts of Joy's settlements are allocable to "parts of" the Securities Actions other than those alleging that the price paid by Komatsu was inadequate.

By contrast, Appellee-Insurers presented no evidence to establish a different allocation. Instead, they denied indemnity coverage for all "parts of" the Securities Actions. The categorical nature of their denial is highlighted by CNA's flip-flop regarding coverage for the *Duncan* suit. As CNA's claims handler wrote when CNA withdrew its original denial of coverage in November 2017 (one month before the *Duncan* settlement discussions began), "[i]t is theoretically possible that rescissory damages might not be equivalent to the quantum of inadequate consideration asserted." JA468. Having acknowledged that the *Duncan* Amended Complaint, *as pleaded*, asserted potentially ***70** covered claims, CNA was obligated to prove what part of the claim was uncovered, or else to cover the claim in full when Joy settled the case *as pleaded*. Yet CNA reasserted its original denial of coverage three months later, despite no subsequent change in the *Duncan* pleadings, after Joy requested CNA's consent to the proposed settlement in February 2018. JA477.

Because at least some amounts of Joy's settlements fall outside the scope of the bump-up exclusion, Appellee-Insurers are required to prove what specific amounts of Joy's settlements are not covered. They have not even attempted to do so. As a result, all or at least a substantial portion of the settlements is covered.

III. The District Court Erred In Dismissing Joy's Bad-Faith Claim Against CNA.

The district court dismissed Joy's bad-faith claim against CNA solely on the ground that Joy "is not entitled to coverage" under the CNA Policy. SA9-10. Because Joy is entitled to at least some coverage, the district court's premise and resulting dismissal were erroneous.

***71 A. Bad Faith Ordinarily Is a Question of Fact.**

Wisconsin law has long recognized that an insurer owes "a special duty" to its insured imposed by law and flowing from the "duty of good faith and fair dealing" in every insurance contract. *Jones v. Secura Ins. Co.*, 249 Wis. 2d 623, 631 (Wis. 2002).

An insurer's breach of this special duty constitutes the "tort of bad faith." *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 686 (Wis. 1978). Wisconsin cases do not "purport to catalogue all possible bad faith claims"; rather, "bad faith" is an inherently fact-bound issue. *Roehl Transp., Inc. v. Liberty Mut. Ins. Co.*, 325 Wis. 2d 56, 75 (Wis. 2010). An insurer is liable for "bad faith" where (1) "there is no reasonable basis for the insurer to deny the insured's claim for benefits under the policy," and (2) "the insurer knew of or recklessly disregarded the lack of a reasonable basis to deny the claim." *Brethorst*, 334 Wis. 2d at 46. The first prong is objective in nature; the second is subjective; and both are fact-intensive. *Id.* at 38.

Given the fact-intensive nature of the "bad faith" inquiry, courts commonly commit the issue to the fact-finder, so long as coverage is not "fairly debatable" and there exists evidence of a triable state of mind: ***72** that the insurer knew of, or recklessly disregarded, the absence of a reasonable basis to deny coverage. *See, e.g.*, *Danner v. Auto-Owners Ins.*, 245 Wis. 2d 49, 77-82 (Wis. 2001). Here, it is not "fairly debatable" that CNA should have paid at least some amount of indemnity coverage for Joy's settlements. *See* Argument, Part II, *supra*.

B. The Record Contains Extensive Evidence Upon Which a Rational Juror Could Conclude that CNA Engaged in Bad Faith.

Fact issues abound regarding CNA's bad faith conduct. To begin, CNA has wrongly interposed the bump-up exclusion to reject 100% of Joy's $20.8 million claim, despite the exclusion's expressly partial scope.

Further, CNA's coverage denial came on the heels of lawsuits that CNA anticipated would be filed, told Joy to expect, and led Joy to believe would be covered consistent with CNA's clarification of the industry-standard scope of its exclusion in 2011. *See* JA1025-27; Argument, Part I.C, *supra*; *see also* JA1288-89. Indeed, after Joy informed CNA of its planned sale, CNA extracted significant concessions from Joy to complete the 2016-17 policy renewal. Joy's concessions included:

• agreeing not to give a "notice of circumstance" that would trigger coverage under the expiring 2015-16 policy (JA902);

***73** • agreeing to keep CNA as its primary insurer, rather than obtaining coverage elsewhere in the market (JA903); and

• agreeing to buy the "run-off" endorsement on which CNA conditioned the renewal, effectively doubling the premium that Joy paid (*id.*).

Throughout the proceedings below, CNA sought to brush aside Joy's reasonable expectations by suggesting that the parties merely expected Joy would have coverage for its own defense expenses incurred the Securities Actions - a point the district court accepted. SA9. But companies do not buy D&O coverage for defense costs alone, and a rational juror could conclude that the record contradicts CNA's self-serving, retroactive explanation.

Indeed, as CNA's claims data for shareholder M&A lawsuits showed in 2018, "most cases are dismissed with total costs between $500K and $1 million" - below Joy's $1.5 million self-insured retention. *See* JA822. CNA's underwriter invoked Joy's self-insured retention to justify the renewal with his supervisor. *See* JA852. It is thus reasonable to infer that, contrary to CNA's litigating position, CNA believed that the anticipated shareholder claims were likely to fall within coverage, but be resolved for less than $1.5 million. When that bet did not pay off, CNA left Joy holding the bag.

***74** CNA's bad-faith conduct persisted throughout the life of the claim. In the words of industry veteran Ann Longmore, CNA's flip-flop with respect to the prospect of coverage for the *Duncan* Amended Complaint - all without any change in that pleading - is "virtually unheard of" and something she has "never seen before in my decades of experience." JA1359. Nor did CNA seriously engage with Joy in seeking to allocate between covered and uncovered amounts of Joy's settlements, despite CNA's contractual duty to use its "best efforts" to do so. *See* Argument, Point II.D.

Further, at the same time that CNA was flip-flopping regarding coverage for the *Duncan* Amended Complaint, CNA's senior D&O personnel were growing increasingly alarmed about Joy's case and its implications for CNA's broader book of D&O business. JA1296; *see* JA1359-60. In internal emails from February 2018, a senior CNA underwriter questioned whether "we should be reconsidering the merger objection language we use as well as what language we will agree to follow" in light of "what we are experiencing with Joy Global." JA1297. He continued, "I sense this issue may become more ***75** problematic, especially since [the *Duncan* plaintiffs' law firm] is now pursuing these so aggressively." *Id.*

Seven days after (and unaware of) this email exchange, Joy asked CNA to consent to the *Duncan* settlement. JA471. The following week, CNA reinstated its coverage denial for every "part of" the *Duncan* claim. JA477.

A rational juror could conclude, based on the record as a whole, that CNA failed to undertake "honest ... action or consideration" of Joy's claim, and instead, improperly put its own self-interest ahead of its obligations to its insured. *See Brethorst*, 334 Wis. 2d at 41.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's judgment and remand with instructions for the district court to (1) enter judgment in Joy's favor on the entirety of Joy's $20.8 million indemnity coverage claim, or alternatively, whatever "part of" that amount the Appellee-Insurers fail to establish falls unambiguously within the bump-up exclusion (plus interest); and (2) hold a trial on Joy's claim that CNA acted in bad faith.

***76** Respectfully submitted,

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Appendix not available.

Footnotes

1 All references to the ECF system are to the district court record using native pagination.

2 Joy is also entitled to coverage for its indemnification of its directors and officers. JA576 § I(2).

3 Capitalized terms are defined in the Policies.

4 All eight complaints are in the record. *See* ECF 103-2 to 103-7, 103-12, and 103-18.

5 The letter is erroneously dated Nov. 8, 2016.

6 Joy also sought damages for CNA's refusal to pay certain “Defense Costs” for the Securities Actions. Joy and CNA subsequently resolved that issue.

7 Appellee-Insurers wrongly suggested below that the bump-up exclusion is “manuscripted” (i.e., negotiated) language proposed by Joy, such that Joy is not entitled to the Wisconsin principles of interpretation recited above. To the contrary, (1) CNA wrote every word of the “bump-up” language at issue as part of a coverage “*enhancement*” effort in 2010-2011, during which CNA assured Joy and undertook to “clarify” that the “bump-up” language being inserted into its policy at that time did not narrow the pre-existing scope of coverage, and (2) by the time of Joy's 2016-17 renewal, the “bump-up”

language at issue had become CNA's "standard [Management Liability Solutions] language." JA1031-32, 1067-70; *see* Argument, Part I.C, *infra*. ("Management Liability Solutions" is the name CNA applies to its D&O insurance products.)

8 The Securities Actions also pleaded claims under Section 20(a) of the Exchange Act, which extends corporate liability under Section 14(a) to culpable directors and officers. *See* JA1036-37.

9 Indeed, when Joy bought the Policies and settled the Securities Actions, the law of this Circuit did not require plaintiffs to prove loss causation as an element of a Section 14(a) claim. The Court adopted the loss-causation element for such claims only in September 2021, noting that the Supreme Court has yet to decide the question. *See Kuebler v. Vectran Corp.*, 13 F.4th 631, 637 & n.1, 645-47 (7th Cir. 2021).

10 As discussed above, the *Duncan* plaintiffs also sought to recover attorneys' fees for their claims under the Proxy Fraud Rules, "rescissory damages" for a transaction they claimed never should have happened, and equitable remedies.

11 The bump-up exclusion at issue in *Northrop* stated: "In the event of a Claim alleging that the price or consideration paid for the acquisition ... of all or substantially all the ownership interest or assets in 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 is effectively increased ...." 2021 WL 347015, at *3.

12 Appellee-Insurers refer to the exclusion as the "Inadequate Consideration Claim" exclusion. In so doing, they truncate the exclusion's text and downplay that it operates through the definition of "Loss" to exclude coverage for a specified "amount" of "Loss" (i.e., a bump-up payment). It is commonplace in the D&O insurance field to refer to the exclusion as the "bump-up" exclusion. *See, e.g.*, JA852 (internal CNA email asking "[h]ow tight is our bump up language?"); *Northrop*, 2021 WL 347015, at *5, 18-22 (noting that insurers "felt that the § 14(a) Claim was a forbidden 'Bump Up' Claim," and referring to the "Bump Up Provision" or "Bump Up Exclusion").

13 *See also* ECF 103-2 at 27; ECF 103-3 at 24; ECF 103-4 at 27; ECF 103-5 at 34-35; ECF 103-6 at 41-42; ECF 103-7 at 15; ECF 103-12 at 21-22.

14 *Id.*

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