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SUPREME COURT OF NEW JERSEY
DOCKET NO.: 089689

MIST PHARMACEUTICALS, LLC, Plaintiff-Petitioner, -vs- BERKLEY INSURANCE COMPANY, Defendant-Respondent.	ON PETITION FOR CERTIFICATION FROM FINAL DECISION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO.: A-1286-22 Sat Below: Hon. Morris Smith, J.A.D. Hon. Lisa Rose, J.A.D. Hon. Lisa Perez Friscia, J.A.D.

REPLY BRIEF OF PLAINTIFF-PETITIONER MIST PHARMACEUTICALS, LLC

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I. INTRODUCTION

If the Appellate Division Opinion stands, three opinions of this Court will be upended, and a "matter of first impression" wrongly decided by the panel will escape review. Nothing in Berkley's response alters the unintended far-reaching consequences of the panel's decision that requires correction by this Court.

First, the Opinion eviscerates the principles animating Griggs v. Bertram, 88 N.J. 347 (1982). Under Griggs, an insurer cannot wait five years, as Berkley did here – until ***after*** underlying cases settle and ***after*** raising a host of other failed coverage defenses – to advise its insured that it will not provide coverage. Berkley contends that the complaint allegations in the Underlying Actions alone were sufficient to trigger the capacity exclusion and deny its duty to indemnify. But, if that were true, both the trial court and Appellate Division would not have held that Berkley had a duty to defend Mist and the parties would not have been embroiled in seven years of unnecessary litigation.

Second, under Flomerfelt v. Cardiello, 202 N.J. 432 (2010), the panel erred in holding that Berkley had no duty to indemnify based solely on "heavily disputed" allegations and without any evidence or factual findings that Krivulka engaged in wrongful conduct in multiple capacities. In its twenty-page response, Berkley does not point to a shred of evidence or a single factfinding of wrongdoing by Krivulka. Therefore, for summary judgment purposes, Berkley

failed to fulfill its burden of proving that the capacity exclusion applied based on undisputed, definitive evidence, as required by this Court.

Third, under Fireman's Fund Insurance Co. v. Security Insurance Co., 72 N.J. 63, 73 (1976), because Berkley breached the Policy by unreasonably withholding consent to the underlying settlement, Mist was free to settle and recover from Berkley the amount of its Policy limits. So long as the settlement reached was reasonable and in good faith, id. at 71, Fireman's precludes Berkley's after-the-settlement objection based on the capacity exclusion.

Fourth, had the Appellate Division dutifully followed the dictates of Griggs and Fireman's, it never would have reached the "matter of first impression" first raised by Berkley five years too late and after Mist settled – the new-found interpretation of the capacity exclusion. Addressing this novel issue, the panel erred in expansively interpretating the capacity exclusion when it was required to narrowly construe exclusions and interpret any ambiguity in favor of the policyholder, in accordance with New Jersey law.

These issues warrant certification.

II. TO DENY THE DUTY TO INDEMNIFY ON SUMMARY JUDGMENT, THE OPINION AND BERKLEY WRONGLY RELIED ON DISPUTED ALLEGATIONS – NOT UNDISPUTED EVIDENCE.

To deny its duty to indemnify, this Court's precedent imposes on Berkley the heavy burden to present undisputed "definitive" evidence that Krivulka

engaged in wrongful acts that triggered the capacity exclusion. See R. 4:46-2(c); Flomerfelt, 202 N.J. at 457. But Berkley confirms it has no evidence of wrongdoing by Krivulka or any such factual findings from any court. Rather, no less than eight times in its response, Berkley references only what the Underlying Actions "claim" or "allege." (Db4.)[1]

Complaint allegations are not magically transformed into undisputed evidence or factual findings by sheer repetition. First, those allegations are "heavily disputed," according to the underlying Delaware court (Pa4), and, as confirmed by the panel: "there were disputed issues of material fact concerning . . . the capacity exclusion." (Pa21.) Thus, the Appellate Division erred in granting summary judgment in favor of Berkley despite the absence of any proof that Berkley's failure to indemnify rested on undisputed evidence or factual findings.

Second, unable to point to definitive evidence, Berkley desperately argues that allegations alone suffice to avoid a duty to indemnify in this case. Berkley states that "where the underlying complaint allegations create no potential that the insured will be held liable for a judgment . . . , there can be no duty to indemnify." (Db 18) (citing Voorhees v. Preferred Mut. Ins. Co., 128 N.J. 165 (1992)). But that is only true when those allegations negate the duty to defend because there is no potential for a duty to indemnify. See Voorhees, 128 N.J. at

[1] "Db" refers to Berkley's October 9, 2024 brief.

180 (stating that the "duty to defend applies only to those injuries for which there would be a duty to indemnify if a claim were valid.").

Here, however, Berkley initially accepted its duty to defend (Da417) and the trial court and the Appellate Division correctly held that, based on the allegations in the complaint, Berkley had a duty to defend. (Pa22.) Berkley knew there was always the "potential that the [Mist Insureds] will be held liable for a judgment that is covered by the [Berkley] policy." Berkley cannot rely on mere allegations to abdicate its duty to indemnify.

Instead, because Berkley has a duty to defend, the standard in Flomerfelt – requiring the duty to indemnify "be analyzed separately" – controls. See 202 N.J. at 444. In Flomerfelt, this Court found a duty to defend but required "definitive answers" to determine if a duty to indemnify exists. Id. at 457.

III. IF MERE ALLEGATIONS SUFFICE TO INVOKE THE CAPACITY EXCLUSION, GRIGGS REQUIRED BERKLEY TO "PROMPTLY" INFORM MIST IT WAS DENYING COVERAGE IN 2016, NOT FIVE YEARS LATER.

Before addressing the capacity exclusion, the panel was required to consider whether Berkley "had a reasonable opportunity to investigate, or ha[d] learned of grounds for questioning coverage" and whether it "promptly . . . inform[ed] [Mist] of its intention to disclaim coverage or of the possibility that coverage w[ould] be denied or questioned." Griggs, 88 N.J. at 357. The panel conducted no such analysis, even though it recognized "Berkley did not raise

the capacity exclusion argument" until summary judgment briefing – after Mist settled. (Pa22.) Thus, during that briefing, the trial "court [could] only wonder why if this exclusion had any applicability, Berkley would not have raised it during the hard-fought briefing on the duty to defend. It was not mentioned." (Da130.)

To try to square with Griggs, Berkley revises history contending that – based on March 2016 and July and August 2017 letters – it "appropriately and repeatedly alert[ed] its insured to its reservation of rights." (Db12.) But if the capacity exclusion barred coverage based on allegations alone, then Berkley's "reasonable opportunity to investigate" was satisfied when it reviewed the allegations by March 2016. Surely, it would have known then that there was no coverage, and it needed to inform Mist "promptly" – not wait five years.

If complaint allegations alone truly triggered the capacity exclusion to completely bar coverage: (i) Why did Berkley not deny coverage in March 2016? (ii) Why, during "hard-fought" briefing on the duty to defend, did Berkley not raise the capacity exclusion? (iii) Why, when Mist sought settlement authority from October 2019 – June 2020, did Berkley not raise the capacity exclusion? (iv) And why, when it could have denied coverage in March 2016, did Berkley take its insureds on a five-year detour addressing issues having nothing to do with capacity? Berkley has not answered those questions.

The answer to those questions is that, for five years, Berkley never viewed the capacity exclusion as a complete bar to coverage – otherwise it would have just denied coverage in March 2016 based on the complaint allegations. Because Berkley did not take a "no coverage" position from 2016-2020, it certainly could not have communicated that viewpoint to Mist "promptly," "appropriately[,] and repeatedly." Instead, in its March 2016 letter, when Berkley quoted "Exclusion G" (the capacity exclusion), it informed Mist of its Coverage-Permitting Interpretation, i.e., "***coverage*** for Krivulka ***is limited to*** [conduct] in his [Mist] capacity." (Da413.) Berkley's position rests on two more letters; but its July 2017 letter echoes the Coverage-Permitting Interpretation and its August 2017 letter never mentions "capacity." (Da426; Da434-438.)

Consistent with the Coverage-Permitting Interpretation, when Mist sought settlement authority from Berkley from October 2019 – June 2020, Berkley never raised the capacity exclusion. Rather, because Mist was covered, Berkley stated it wanted to "meaningfully participate in settlement discussions" but it needed information regarding the "exposure of Mist" to do so. Again, if the complaint allegations and capacity exclusion truly barred coverage, as Berkley now disingenuously asserts, Berkley would never have requested more information about Mist's exposure or stated that it wanted to "meaningfully participate" in the settlement of the Underlying Actions.

Berkley's failure to notify Mist for five years that the capacity exclusion could totally bar coverage obligated the panel to follow Griggs, as the trial court did, and to "estop [Berkley] from later repudiating responsibility under the insurance policy." See 88 N.J. at 357.

Griggs also does not require a showing of prejudice because, particularly after a settlement, it is presumed: "That course cannot be rerun." Id. at 362. To be sure, prejudice exists: (i) Mist settled the Underlying Actions understanding that Berkley's Coverage-Permitting Interpretation entitled Mist to at least "***limited***" coverage and had been detrimentally blindsided by Berkley's after-the-settlement No Coverage Interpretation; and (ii) had Berkley invoked the capacity exclusion in March 2016, Mist would not have incurred substantial fees for years litigating a host of other unrelated issues (Da91; Da179.) See Knorr v Smeal, 178 N.J. 169, 178 (2003).

Berkley's reliance on stray and vague references to an ambiguous capacity exclusion in two letters, and a third letter that does not mention the capacity exclusion, did not put the Mist Insureds on notice of Berkley's No Coverage Interpretation. The crux of Berkley's position is that blanket and vague reservation of rights letters, which simply "copy and paste" ambiguous policy exclusions, allow an insurer to deny coverage years later after other coverage defenses have failed and after the insured has settled the case relying on Berkley's earlier

Coverage Permitting Interpretation. This Court has a long history of protecting policyholders from shell games played by insurers.

Griggs requires insurers to investigate claims, identify the grounds for questioning coverage (if any), and then promptly inform the insured, based on that investigation, that it is disclaiming coverage or that there is a possibility it could do so. See 88 N.J. at 357. A "copy and paste" reservation of rights does not excuse insurers from their Griggs disclosure and disclaimer obligations.

IV. HAVING NEVER INVOKED THE CAPACITY EXCLUSION FOR FIVE YEARS, BERKLEY'S BREACH OF THE POLICY BARS SUCH INVOCATION UNDER FIREMAN'S AND GRIGGS.

For five years, Berkley never asserted that the capacity exclusion constituted an absolute bar to coverage. When Mist requested that Berkley honor its duty to indemnify the Mist Settlement Portion, starting in October 2019 through June 2020, Berkley requested information "to evaluate and analyze the potential settlement value to and the exposure of Mist . . . so that Berkley can meaningfully participate in settlement discussions." (Dca402.) Taking Berkley at its word, the trial court correctly found that (i) Mist provided Berkley with the necessary information; (ii) Berkley unreasonably withheld consent to the Mist Settlement Portion; and (iii) ultimately, Berkley breached the Policy. (Da168-69.)

Berkley argues that the facts in Fireman's and this case are not in perfect alignment. (Db 14.) But Fireman's (and Griggs) set forth core principles of law

that are binding in all cases. When an insurer has breached the policy, the insured is free to settle and can "recover from [the breaching insurer] the amount of its policy limits." Fireman's, 72 N.J. at 73. Because this Court is clear that "[t]he ***only*** qualifications to this rule are that the amount paid in settlement be reasonable and . . . in good faith," Griggs, 88 N.J. at 364, Berkley cannot superimpose its own additional qualifications, such as the belated capacity exclusion.

V. IF THE CAPACITY EXCLUSION MUST BE INTERPRETED, BERKLEY'S FIVE-YEAR COVERAGE-PERMITTING INTERPRETATION MUST CONTROL.

Although the Appellate Division announced its decision as a "matter of first impression," Berkley, oddly, frames the decision as "regular" and not a question that "should be settled by the Supreme Court." R. 2:12-4. The Appellate Division did not have to reach out to make new law if it properly applied Griggs, Fireman's, and Flomerfelt. See, supra, Points III and IV. Now this Court's intervention is necessary to align the exclusion with New Jersey law.

Berkley is mistaken that the Opinion "evaluated the exclusion's plain language as guided by the State's 'well-settled jurisprudence' regarding the construction of insurance contacts." (Db16.) For instance, Berkley never explains how the capacity exclusion can be so broad as to bar coverage if an insured acts in a 1% uninsured capacity and a 99% insured capacity, when "exclusions must be narrowly construed" and "strictly construed against the insurer." Flomerfelt,

202 N.J. at 442. This Court's precedents also require ambiguous policy provisions to be "construed against the insurer and in favor of the insured." Id. at 441. Yet Berkley never explains why – when faced with its own reasonable Coverage Permitting Interpretation – the Appellate Division adopted a broader, later-developed, and insurer-favorable interpretation.

Instead, the panel and Berkley turn to inapt, out-of-state decisions to address "a matter of first impression" – the meaning of the capacity exclusion. One decision construed a capacity exclusion in the duty to defend context. See Langsdale Co. v. Nat'l Union Fire Ins. Co., 609 Fed. Appx. 578 (11th Cir. 2015). Unlike Langsdale, the panel held the capacity exclusion did not negate Berkley's defense obligation. (Pa22.) In another case relied on by the panel, Abrams v. Allied World Assurance Co., 657 F. Supp. 3d 1280 (N.D. Cal. 2023), the capacity exclusion did not bar coverage and "the Court decline[d] to follow the two out-of-state cases," including the case the Opinion rests on, i.e., Langsdale.

VI. CONCLUSION

Certification is warranted to address the panel's failure to follow Griggs, Fireman's, and Flomerfelt and to address an issue of "first impression."

Respectfully submitted,

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