Case No. 24-1678

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SINGH RX, PLLC d/b/a SRX SPECIALTY CARE PHARMACY and AMAN DEEP SINGH,

Plaintiffs-Appellants,

v.

SELECTIVE INSURANCE COMPANY OF SOUTH CAROLINA, AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA,

Defendants-Appellees,

and

JANSSEN SCIENCES IRELAND UNLIMITED COMPANY, JANSSEN PRODUCTS, LP, and JOHNSON & JOHNSON, an interested party,

Defendants.

On Appeal from the United States District Court
for the Eastern District of Michigan
Case No. 2:22-cv-12732-GAD-KGA

BRIEF OF APPELLANTS

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Date: November 27, 2024

CORPORATE DISCLOSURE

Pursuant to Fed. R. App. P. 26.1 and 6 Cr. R. 26.1, Appellants Singh RX, PLLC d/b/a SRX Specialty Care Pharmacy and Aman Deep Singh hereby make the following disclosures:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party: **No.**
2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest: **No.**

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III. STATEMENT IN SUPPORT OF ORAL ARGUMENT

In accordance with Fed. R. App. P. 34(a) and 6 Cir. R. 34(a), Plaintiffs respectfully submit that this appeal warrants oral argument. This appeal presents complex issues involving insurance contracts and their interpretation and Plaintiffs submit this Court would benefit from hearing oral argument.

IV. STATEMENT OF JURISDICTION

The District Court had jurisdiction pursuant to 28 U.S.C. § 1332(a) as the matter in controversy exceeded the sum or value of $75,000 and was between citizens of different states.

The District Court entered a final judgment on July 10, 2024, dismissing Plaintiffs' claims against Defendants in their entirety. Opinion and Order, R. 77, PageID ## 2264-2295. Plaintiffs timely filed a Notice of Appeal on August 7, 2024. Notice of Appeal, R. 79, PageID ##2298-2299. Accordingly, this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 because Plaintiffs are appealing a final judgment.

V. STATEMENT OF ISSUES

1. Whether the District Court erred in denying Plaintiffs' Motion for Judgment on the Pleadings or, Alternatively, Summary Judgment Against American Casualty, and granting American Casualty's Motion for Summary Judgment, when coverage is afforded to Plaintiffs under the American Casualty policy for the claims alleged in the underlying Janssen lawsuit and American Casualty breached its duty to defend Plaintiffs in the underlying Janssen lawsuit; and

2. Whether the District Court erred in denying Plaintiffs' Motion for Judgment on the Pleadings or, Alternatively, Summary Judgment Against Selective, and granting Selective's Motion for Summary Judgment, when coverage is afforded to Plaintiffs under the Selective policy for the claims alleged in the underlying Janssen lawsuit and Selective breached its duty to defend Plaintiffs in the underlying Janssen lawsuit.

VI. STATEMENT OF THE CASE

A. THE UNDERLYING JANSSEN LAWSUIT

On April 7, 2022, Johnson & Johnson and two subsidiaries, Janssen Sciences Ireland Unlimited Company and Janssen Products, LP, filed a complaint in the United States District Court for the Eastern District of New York against several defendants (complaint in Case No 1:22 cv-01983-BMC) (the "Janssen lawsuit"). On August 4, 2022, the three plaintiffs amended their complaint to include claims against additional defendants, including Plaintiffs SRX Specialty Care Pharmacy and Aman Deep Singh, referred to in the complaint as the "SRX defendants." Janssen Complaint, R. 1-5, PageID # 440.

The Janssen plaintiffs alleged that Singh RX, PLLC d/b/a SRX Specialty Care Pharmacy is a professional limited liability company that operates a pharmacy in Royal Oak, Michigan, and that Aman Deep Singh is an individual pharmacist and the principal of SRX. Janssen Complaint, R. 1-5, PageID # 451.

The Janssen plaintiffs further alleged SRX and other pharmacies purchased "counterfeit" bottles of HIV medication from wholesalers that is trademarked, processed and packaged by the underlying plaintiff. Janssen Complaint, R. 1-5, PageID ## 441, 442, 451. The underlying plaintiffs alleged the "counterfeit" bottles had "fake" labels and that the pills inside the bottles were different drugs. Janssen

Complaint, R. 1-5, PageID # 441. The plaintiffs allege that SRX Specialty Care Pharmacy and other pharmacies purchased "counterfeit" Janssen-branded medication from pharmacy wholesalers and dispensed them to patients. Janssen Complaint, R. 1-5, PageID # 444.

The plaintiffs in the underlying Janssen lawsuit alleged the following theories against SRX and Singh in their first amended complaint: (1) Count I, federal trademark infringement in violation of 15 U.S.C. sec. 1114(1)(a) (use of trademarks without consent in the sale of "counterfeit" products) [Janssen Complaint, R. 1-5, PageID # 475]; (2) Count II, federal trademark infringement in violation of 15 U.S.C. sec. 1114(1)(b) (use of trademarked labels on counterfeit bottles) [Janssen Complaint, R. 1-5, PageID # 476]; (3) Count III, "false description and designation of origin in commerce" in violation of 15 USC sec 1125(a)(1)(A) [Janssen Complaint, R. 1-5, PageID # 477]; (4) Count IV, federal false advertising in violation of 15 U.S.C. sec. 1125(a)(1)(B) [Janssen Complaint, R. 1-5, PageID # 478]; (5) Count V, federal dilution of mark in violation of 15 U.S.C. sec. 1125(c) [Janssen Complaint, R. 1-5, PageID # 480]; (6) New York dilution of mark and injury to business reputation in violation of New York General Business Law sec. 360-1 [Janssen Complaint, R. 1-5, PageID # 481]; (7) Count VII, New York Deceptive Business Practices in violation of New York General Business Law sec.

349 [Janssen Complaint, R. 1-5, PageID # 482]; (8) Count VIII, common law unfair competition [Janssen Complaint, R. 1-5, PageID # 482]; (9) Count IX, common law unjust enrichment [Janssen Complaint, R. 1-5, PageID # 483].

B. AMERICAN CASUALTY POLICY AND DENIAL

Plaintiffs are insured under American Casualty Professional Liability Policy No. 0656305643 ("American Policy") which includes, relevant to this action, a Professional Liability coverage agreement and a Personal Injury Liability coverage agreement. American Policy, R. 1-3, PageID ## 247, 255.

Professional Liability Coverage Agreement

The Professional Liability coverage agreement provides, in relevant part:

> [American Casualty] will pay all amounts...[the insureds] become legally obligated to pay as a result of a **professional liability claim** arising out of a **medical incident** by [the insureds] or by someone for whose **professional services** [the insureds] are legally responsible." [American Policy, R. 1-3, PageID # 255.]

A **professional liability claim** is defined as "a **claim** arising out of a **medical incident**." American Policy, R. 1-3, PageID # 258. A **medical incident** is defined as "any act, error or omission in your providing **professional services** which results in **injury** or **damage**." American Policy, R. 1-3, PageID # 258. However, and importantly, a **medical incident** "does not include . . . **personal injury**." American Policy, R. 1-3, PageID # 258.

Personal Injury Liability Coverage Agreement

The **Personal Injury** Liability coverage agreement provides, in relevant part:

> [American Casualty] will pay all amounts...that [the insureds] become legally obligated to pay as a result of a **personal injury claim** arising out of **personal injury**. [American Policy, R. 1-3, PageID # 255.]

A **personal injury claim** is defined as "a **claim** arising out of **personal injury**." American Policy, R. 1-3, PageID # 258. **Personal injury** is defined, in relevant part, as:

> **injury** arising out of one or more of the following offenses committed in the conduct of **your professional services**:
>
> . . .
>
> 4. libel, slander or other disparaging materials;
>
> . . .
>
> 7. misappropriation of advertising ideas, trade secrets, or style of doing business; or
> 8. infringement of patent, copyright, trademark, trade name, trade dress, service mark, service name, logo, title or slogan. [American Policy, R. 1-3, PageID # 253.]

The American Policy defines a "**claim**" as:

> a demand for money or services alleging **injury** or **damage**. **Claim** also means the filing of a suit or the starting of an arbitration proceedings naming **you** and alleging **injury** or **damage**. [American Policy, R. 1-3, PageID # 252.][1]

[1] The American Policy defines an "**injury**" as "the meaning set forth in each individual coverage part." American Policy, R. 1-3, PageID # 258.

A policy endorsement, which mentions only the Professional Liability Coverage Part, provides the definition of a "**claim**" is "deleted in its entirety and replaced" as follows:

> "**Claim**" means a demand for money or services alleging **injury** or **damage**. **Claim** also means the filing of a suit or the starting of arbitration proceedings naming **you** and alleging **injury** or **damage**. However, no demand for money or services alleging **injury** or **damage** or filing of suit or starting of arbitration proceedings naming **you** and alleging injury or damage is a **claim** unless such demand is made, such suit is filed or such arbitration proceeding is started:
>
> A. As respects the Professional Liability Coverage Part:
>
> 1. by a natural person to whom **you** or someone for whom **you** are legally liable, provided **professional services**, but solely for such natural person's **injury** or **damage**; or
>
> 2. by such natural person's family member, legal guardian or estate, but solely for **injury** or **damage**; . . . [American Policy, R. 1-3, PageID # 275.]

American Casualty Denial of Defense and Indemnification

American Casualty denied it owed a duty to defend or indemnify Plaintiffs with respect to the Janssen lawsuit. American Denial Letter, R. 61, Page.ID ## 2058-2065. According to American Casualty, coverage was denied, in pertinent part, because (1) **personal injury claims** must be brought by a natural person; (2) the claimant must be the recipient of the **professional services**; and (3) the claimant

must allege an "**injury**" or "**damage**," as defined in the policy. American Denial Letter, R. 61, PageID ## 2063-2065.

C. SELECTIVE POLICY AND DENIAL

Selective issued policy number S 231679604, for policy period October 19, 2021 to October 19, 2022, to named insured Singh RX PLLC dba SRX Specialty Care Pharmacy ("Selective Policy"). Selective Policy, R. 1-2, PageID # 21. Aman Deep Singh is considered an insured under the policy under Section II.C.1.c. because he is a member and manager of a limited liability company. Selective Policy, R. 1-2, PageID # 107. The Selective Policy has two coverage parts: commercial business owners coverage and commercial umbrella coverage. Selective Policy, R. 1-2, PageID # 39.

Commercial Business Owner Coverage

The commercial business owner coverage part provides for liability coverage. Selective Policy, R. 1-2, PageID # 97. Section II.A.1.a states Selective has an obligation to pay as damages, and defend the insured against a suit seeking damages, because of "personal and advertising injury" to which the insurance applies:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury," "property damage" or "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the

> insured against any "suit" seeking damages for "bodily injury," "property damage" or "personal and advertising injury" to which this insurance does not apply. [Selective Policy, R. 1-2, PageID # 97.]

Section II.A.1.b.(2) further states "[t]his insurance applies" to "personal and advertising injury" caused by an offense arising out of your business, but only if the offense was committed in the "coverage territory" during the policy period. Selective Policy, R. 1-2, PageID # 97.

A "suit" is defined in the policy as "a civil proceeding in which damages because of "bodily injury," "property damage," or "personal and advertising injury" to which this insurance applies are alleged. Selective Policy, R. 1-2, PageID # 112. "Personal and advertising injury" is defined, in pertinent part, to mean "injury, including consequential "bodily injury," arising out of one or more of the following offenses:

> d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
>
> …
>
> f. The use of another's advertising idea in your "advertisement"; or
>
> g. Infringing upon another's copyright, trade dress or slogan in your "advertisement." [Selective Policy, R. 1-2, PageID ## 111-112.]

The Selective business liability coverage part contains the following exclusions:

> B. Exclusions

1. Applicable to Business Liability Coverage

This insurance does not apply to:

a. **Expected Or Intended Injury**

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

. . .

j. **Professional Services**

"Bodily injury" or "property damage" or "personal and advertising industry" caused by the rendering or failure to render any professional service. This includes but is not limited to:

. . .

(9) Services in the practice of pharmacy.

. . .

p. **Personal And Advertising Injury**

"Personal and advertising injury":

. . .

(12) Arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. Under this exclusion, such other intellectual property rights do not include the use of another's advertising idea in your "advertisement".

However, this exclusion does not apply to infringement, in your "advertisement", of copyright, trade dress or slogan[.]

[Selective Policy, R. 1-2, PageID ## 99, 102-104.]

Commercial Umbrella Liability Coverage

The commercial umbrella liability coverage provides that Selective "will pay on behalf of the insured" the "ultimate net loss" in excess of the "retained limit" that the insured becomes legally obligated to pay as damages because of "bodily injury," "property damage" or "personal and advertising injury" to which this insurance applies, and that Selective has the "right and duty to defend the insured against any 'suit' seeking those damages when the "underlying insurance" does not provide coverage or the limits of "underlying insurance" have been exhausted. Selective Policy, Section I.A.1, R. 1-2, PageID # 207. Section I.A.6. further provides that "[t]his insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period." Selective Policy, Section I.A.6, R. 1-2, PageID # 208.

"Personal and advertising injury" means injury, including consequential "bodily injury" arising out of one [sic or] more of the following offenses:

e. Oral or written publication in any manner of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or service.

f. The use of another's advertising idea in your "advertisement"; or

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement" [Selective Policy, Section V.13., R. 1-2, PageID # 221.]

The following exclusions are contained within this section of the Selective Policy:

> B. **Exclusions**
>
> This insurance does not apply to:
>
> 7. **Expected Or Intended Injury**
>
> "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.
>
> . . .
>
> 16. **Professional Services**
>
> "Bodily injury", "property damage" or "personal and advertising industry" due to rendering or failure to render any professional service. This includes but is not limited to:
>
> . . .
>
> i. Professional health care services as a pharmacist[.]
>
> [Selective Policy, Section I.B., R. 1-2, PageID ## 208-209, 211.]

A policy endorsement, entitled "COMMERCIAL UMBRELLA LIABILITY 2015 CHANGES," states:

> D. Paragraph **16**. **Professional Services** of **SECTION I – COVERAGES**, **B. Exclusions** is replaced with the following:
>
> This insurance does not apply to "bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of or failure to render any professional service. This includes, but is not limited to:
>
> . . .
>
> i. Services in the practice of pharmacy[.] [Selective Policy, R. 1-2, PageID # 237.]

Selective's Denial of Defense and Indemnification

Selective denied coverage for several reasons. Selective Denial Letter, R. 57, PageID ## 1807-1818. First, because the damages pled by the Janssen plaintiffs in the underlying litigation "do not qualify as "bodily injury," "property damage," or "personal and advertising injury as required within the policy's insuring agreement." Selective Denial Letter, R. 57, PageID # 1810. Second, Selective asserted that, even if the damages pled in the underlying suit "qualify within one of the forms of covered damages," exclusions for "expected or intended injury" ((B)(1)(a)); injury caused by "the rendering or failing to render any professional service" ((B)(1)(j)(9)); and for "personal and advertising injury" arising out of infringement of copyright, patent, trademark, trade secret or other intellectual property rights" ((B)(1)(p)(12) apply. Selective Denial Letter, R. 57, PageID ## 1810-1812. Third, Selective claimed the Commercial Umbrella Liability Coverage Part of the policy does not provide coverage because the damages sought are not covered, or because of exclusions for "expected or intended injury" ((B)(7)), and injury due to rendering or failing to render professional services ((B)(16)). Selective Denial Letter, R. 57, PageID ## 1812-1817.

D. PROCEDURAL HISTORY

Plaintiffs filed the present action against American Casualty and Selective (collectively "Defendants") for Breach of Contract and Declaratory Relief, which arose out of Plaintiffs' demand for Defendants to defend and indemnify them the underlying Janssen lawsuit. See First Amended Complaint, R. 16, PageID ## 1048-1065.

Subsequently, Plaintiffs filed a Motion for Judgment on the Pleadings or, Alternatively, Summary Judgment Against Selective on January 15, 2024. See Plaintiffs' Motion for Summary Judgment Against Selective, R. 57, PageID ##1773-1818. Selective responded on February 13, 2024, and Plaintiffs replied on March 5, 2024. See Selective Response, R. 65, PageID ## 2073-2099; Reply Brief re Selective, R. 72, PageID ## 2248-2251. Plaintiffs also filed a Motion for Judgment on the Pleadings or, Alternatively, Summary Judgment Against American Casualty on January 16, 2024. Plaintiffs' Motion for Summary Judgment Against American, R. 61, PageID ## 2026-2065. American Casualty responded on February 13, 2024, and Plaintiffs replied on March 5, 2024. See American Response, R. 66, PageID ## 2131-2053; Reply Brief re American, R. 71, PageID ## 2242-2247.

Defendant American Casualty filed a Motion for Summary Judgment on January 16, 2024. See American Motion for Summary Judgment, R. 58, PageID ##

1819-1842. Plaintiffs responded on February 13, 2024, and American Casualty Company replied on March 5, 2024. See Plaintiff's Response, R. 68, PageID ## 2176-2200; American Reply, R. 70, PageID ## 2234-2241. Selective also filed a Motion for Summary Judgment on January 16, 2024. See Selective Motion for Summary Judgment, R. 60, PageID ## 1867-2025. Plaintiffs responded on February 13, 2024, and Selective replied on March 5, 2024. See Plaintiff's Response, R. 67, PageID ## 2154-2175; Selective Reply, R. 69, PageID ## 2201-2233.

The District Court held oral argument with respect to all parties' motions on June 25, 2024. Hearing Transcript, R. 87. PageID ## 2312-2344. On July 10, 2024, the District Court issued its Opinion and Order:

(1) Denying Plaintiffs' Motion for Judgment on the Pleadings or, Alternatively, Summary Judgment Against American Casualty;

(2) Denying Plaintiffs' Motion for Judgment on the Pleadings or, Alternatively, Summary Judgment Against Selective;

(3) Granting Selective's Motion for Summary Judgment; and

(4) Granting American Casualty's Motion for Summary Judgment. [Opinion and Order, R. 77, PageID ## 2264-2295.]

In its Opinion and Order, the District Court held American has no duty to defend or indemnify Plaintiffs in the Janssen lawsuit as the claims alleged in the Janssen lawsuit do not meet the definition of a "claim" as they were not brought by

a natural person. Opinion and Order, R. 77, PageID ## 2291-2292. The District Court further held the American Policy was not illusory because

> the policy provides coverage for lawsuits brought by natural persons or their representatives that allege a "personal injury[,]" such as "misappropriation of advertising ideas, trade secrets, or style of doing business; or infringement of patent, copyright, trademark, trade name, trade dress, service mark, service name, logo, title or slogan." ECF No. 1-3, PageID.253. In these circumstances, the Court does not find that the coverage is illusory. [Opinion and Order, R. 77, PageID ## 2293-2294.]

The District Court also held "Selective does not have a duty to defend or indemnify Plaintiffs" under the business owners coverage or umbrella coverage forms because the Selective Policy's exclusion for "professional services" applies. Opinion and Order, R. 77, PageID ## 2278-2284. Specifically, the Court held Plaintiffs engaged in the practice of pharmacy, by purchasing medications from wholesalers, filling prescription orders, and allegedly dispensing mislabeled HIV medications to patients, which satisfies the policy's definition of "professional services." Opinion and Order, R. 77, PageID ## 2279. Thus, because "[a]ll claims against Plaintiffs – alleged in the Janssen Lawsuit – arise from Plaintiffs' rendering of professional services," there "is no arguable basis for applying coverage." Opinion and Order, R. 77, PageID ## 2284.

VII. SUMMARY OF THE ARGUMENT

This appeal arises from an action involving, in relevant part, an insurance coverage dispute between Plaintiffs, the insureds (Singh RX, PLLC and Aman Deep Singh), and Defendants American Casualty Company of Reading PA ("American Casualty") and Selective Insurance Company of South Carolina ("Selective"). Plaintiffs seek a declaratory judgment stating that American Casualty and Selective breached their duty to defend Plaintiffs in the underlying the Janssen lawsuit filed against them and are therefore liable for all damages that naturally flow from the breach.

While Selective denied a defense and indemnification under its business owners liability coverage, in part, on the ground that the conduct alleged in the underlying complaint constitutes "professional services" and, specifically, "services in the practice of pharmacy" that are excluded under the Selective policy, American Casualty denied a defense and indemnification, in part, on the ground that the conduct alleged by the underlying Janssen lawsuit did *not* constitute professional services.

Nevertheless, the American Casualty Policy clearly distinguishes between a professional liability claim and a personal injury claim, the key difference being that personal injury claims cannot arise from a "medical incident." Rather, a "personal

injury claim" means a "claim arising out of personal injury," which the policy defines to include a number of the claims alleged in the Janssen lawsuit. American Casualty seeks to avoid its obligation to defend and indemnify Plaintiffs in the Janssen lawsuit based on a policy endorsement that, according to American Casualty, redefined a "claim" under the Personal Injury coverage form to require bodily injury or damage, and required personal injury claims be brought by a natural person. However, the policy endorsement conflicts with the general policy provisions and the Personal Injury coverage form, and renders coverage for personal injury claims illusory. Namely, American Casualty's claim that personal injury claims must be brought by a "natural person" and allege bodily injury or property damage would require a *patient* to bring *business* tort claim against their pharmacist alleging bodily injury or property damage. Since no factual scenario could possibly give rise to such a claim, American Casualty's interpretation of the policy would render the personal injury coverage entirely illusory. The District Court erred in holding otherwise.

Additionally, the District Court erred in its conclusion that no coverage is available under Selective's Policy because the claims alleged in the Janssen lawsuit fall within the Policy's exclusion for "professional services." For example, some of the claims in the underlying Janssen lawsuit involve allegations that do not fall

within the definition of the "practice of pharmacy" and, therefore, would not be excluded from coverage. If some of the underlying claims fall within policy coverage, while others do not, Selective is required to defend.

VIII. ARGUMENT

A. Legal Standard

Summary judgment pursuant to Federal Rule of Civil Procedure 56 is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Summary judgment is appropriate if the evidence, taken in the light most favorable to the non-moving party, establishes that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Weiss v. St. Paul Fire and Marine Ins. Co.*, 283 F.3d 790 (6th Cir. 2002).

B. Insurance Policy Interpretation

Where, as here, subject matter jurisdiction is based on diversity of citizenship, the substantive law of the forum state must be applied. *State Auto Prop. & Cas. Ins. Co. v. Hargis*, 785 F.3d 189, 195 (6th Cir. 2015).

Interpretation of an insurance policy is a question of law for the court. *Petovello v. Murray*, 362 N.W.2d 857, 858 (Mich. Ct. App. 1984). The function of the court is to determine and give effect to the parties' intent as discerned from the

policy's language, looking at the policy as a whole. *Auto-Owners Ins. Co. v. Churchman*, 489 N.W.2d 431, 434 (Mich. 1992). It is improper for the court to ignore the plain meaning of the policy's language in favor of a technical or strained construction. *Arco Indus. Corp. v. Travelers Ins. Co*., 730 F. Supp. 59, 66 (W.D. Mich. 1989).

The court interprets insurance contracts in two steps: it first determines coverage under the general insurance agreement, then it decides whether an exclusion applies to negate coverage. *Auto-Owners Ins. Co. v. Harrington*, 455 Mich. 377, 565 N.W.2d 839, 841 (Mich. 1997). While the burden of proving coverage rests on the insured party, the insurer bears the burden of proving that an exclusion precludes coverage. *See Am. Tooling Ctr., Inc. v. Travelers Cas. & Sur. Co. of Am.*, 895 F.3d 455, 459 (6th Cir. 2018) (applying Michigan law). Exclusions are strictly construed in favor of the insured. *Auto-Owners Ins. Co. v. Churchman*, 440 Mich. 560, 489 N.W.2d 431, 434 (Mich. 1992).

C. The Duty to Defend is Broad and is Triggered if the Complaint Allegations Arguably Fall Within Coverage Under the Policy.

The duty to defend is determined by examining the allegations of the underlying complaint and the provisions of the insurance policy and inquiring whether the *potential* for indemnification exists. *Am. Bumper and Mfg. Co. v.*

Hartford Fire Ins. Co., 207 Mich. App. 60, 71, 523 N.W.2d 841, 846 (1994), aff'd, 452 Mich. 440, 550 N.W.2d 475 (1996). The inquiry asks whether the potential for indemnification existed at the time the underlying suit was brought; it is not answered with the benefit of hindsight. *Id.*

If the potential exists, then the duty to defend arises. *Michigan Millers Mut. Ins. Co. v. Bronson Plating Co*. 445 Mich. 558, 562, 519 N.W.2d 864, 866 (1994); *Aetna Cas. & Sur. Co. v. Dow Chemical Co*., 44 F.Supp.2d 847 (E.D. Mich. 1997). "In evaluating whether there is a duty to defend, the policyholder is not required to prove — and the insurance carrier is not permitted to challenge — the ultimate right to indemnification." *Aetna Cas. & Sur. Co. v. Dow Chemical Co.*, 44 F.Supp.2d 847 (E.D. Mich. 1997); *Upjohn Co. v. Aetna Cas. & Sur. Co*., 768 F.Supp. 1186 (W.D.Mich.1990).

Under Michigan law, an insurer's duty to defend is broader than the duty to indemnify. *Cincinnati Ins. Co. v. Zen Design Group*, 329 F.3d 546, 552 (6th Cir. 2003); *Am. Bumper & Mfg. Co. v. Hartford Fire Ins. Co.*, 452 Mich. 440, 550 N.W.2d 475, 481 (Mich. 1996). Michigan law governing the insurer's duty to defend is set forth as follows:

> In liability policies, the obligation of the insurer depends upon the allegations of the underlying complaint. The insurer only has a duty to defend the insured if the charges against the insured in the underlying

> action arguably fall within the language of the policy. However, the terminology that was used by the underlying plaintiff in the complaint is not dispositive. Instead, the analysis of the issue must include the actual cause of the injury. Any doubt as to the insurer's liability must be resolved in favor of the insured. Moreover, where only some of the claims against the insured party are covered, the insurer must defend the whole claim until it becomes apparent that no recovery is possible under the covered theory. [*Cincinnati Ins. Co.*, 329 F.3d at 552.]

Thus, Michigan law requires an insurer to defend not only when the underlying claim actually is covered by the policy, but also when the underlying claim is "arguably" covered by the policy. See *Allstate Ins. Co. v. Freeman*, 432 Mich. 656, 443 N.W.2d 734, 737 (Mich. 1989); *Am. Bumper*, 550 N.W.2d at 481. Even if a policy excludes some claims, the duty to defend applies "if there are any theories of recovery that fall within the policy." *Safety Specialty Ins. Co. v Genesee Cnty. Bd. of Comm'rs,* 53 F.4th 1014, 1024 (6th Cir. 2022), citing *Protective Nat'l Ins. Co. v. City of Woodhaven*, 438 Mich. 154, 476 N.W.2d 374, 376 (Mich. 1991).

D. American Casualty Owes Plaintiffs a Duty to Defend and Indemnify as the Janssen lawsuit Alleges Personal and Advertising Injury Claims.

The American Policy Coverage Agreements, also referred to as "Insuring Agreements," are the portion of the policy which grant coverage to the insureds.[2] The first step to determine policy coverage is to read the Insuring Agreement.

[2] *International Risk Management Institute, Inc., Glossary,* https://www.irmi.com/term/insurance-definitions/insuring-agreement

Lumbermens Mut. Cas. Co. v. S-W Industries, Inc., 39 F.3d 1324, 1340 (6th Cir. 1994). Determining whether a particular loss falls within the scope of an insuring agreement begins with determining "[t]he nature of the damage and the risk involved." *Detroit Water Team Joint v. Agricultural Ins. Co.*, 371 F.3d 336 (6th Cir. 2004).

The American Policy Coverage Agreements distinguish between professional liability claims and personal liability claims by specifying the nature of the damages and the risks involved in each. American Policy, R. 1-3, PageID ## 247, 255. A professional liability claim arises out of a "medical incident," which is defined as "any act, error or omission in your providing professional services which results in injury or damage." American Policy, R. 1-3, PageID # 258. Conversely, a "personal injury claim" is defined to include the torts of libel, slander, violation of privacy, misappropriation of advertising ideas, trade secrets, or style of doing business, infringement of patent, copyright, trademark, trade name, trade dress, service mark, service name, logo, title or slogan. American Policy, R. 1-3, PageID # 253.

Plaintiffs were named among several defendants the Janssen lawsuit which includes several counts that fall directly within the American Policy's definition of "personal injury," including Trademark Infringement, False Description and Designation of Origin in Commerce, False Advertising, Dilution of Trademark,

Injury to Business Reputation, Deceptive Business Practices, and Unfair Competition. Janssen Complaint, R. 1-5, PageID ## 475-478, 480-483. These are all classic personal injury claims, *i.e.*, business torts brought by third parties (not patients), seeking an award for economic damages (not bodily injury or property damage). Plaintiffs submitted the Janssen lawsuit for coverage under the policy and American Casualty denied Plaintiffs' claim. American Denial Letter, R. 61, Page.ID ## 2058-2065.

Whereas a professional liability claim is brought by a natural person who receives an insured's professional services, personal injury claims are brought by third parties, not patients. Likewise, whereas professional liability claims seek compensation for bodily injury and property damage, personal injury claims seek an award of economic damages. Nevertheless, in denying coverage, American Casualty maintains that personal injury claims are not covered unless they are brought by a "natural person" and allege bodily injury or property damage. American Policy, R. 1-3, PageID ## 2063-2065. This interpretation of the policy is nonsensical as it would require *patients* to bring *business tort* claims against their pharmacist alleging *bodily injury or property damage*. Since no factual scenario could give rise to such a claim, American Casualty's interpretation of the policy would render the personal injury coverage entirely illusory.

1. The Policy Does Not Require a Natural Person to Bring a Personal Injury Claim.

The Coverage Agreements clearly distinguish between a professional liability claim and a personal injury claim, the key difference being that personal injury claims do not need to arise from a "**medical incident**." American Policy, R. 1-3, PageID # 258. Similarly, the American Policy's duty to defend distinguishes between professional liability claims and personal injury claims:

> DEFENSE AND SETTLEMENT
>
> We have the right and duty to defend any **claim** that is a **professional liability claim**, **Good Samaritan Claim**, **personal injury claim** or **malplacement claim**. [American Policy, R. 1-3, PageID ## 257-258 (underline added for emphasis).]

Additionally, the definition of "**medical incident**," which is a prerequisite for a **professional liability claim**, expressly *excludes* "**personal injury claims**":

> "**Medical Incident**" means any act, error or omission in **your** providing **professional services** which results in **injury** or **damage**. **Medical incident** does not include a **Good Samaritan incident**, a **placement services incident** or **personal injury**. [American Policy, R. 1-3, PageID # 258 (underline added for emphasis).]

With respect to conflicting provisions, the policy states:

> if any provision in the Common Policy Conditions is inconsistent or in conflict with the terms and conditions of any Coverage Part, the terms and conditions of such Coverage Part shall control for purposes of that Coverage Part. [American Policy, R. 1-3, PageID # 249.]

In sum, the policy, read as a whole,[3] establishes that specific provisions control in the event they conflict with general provisions, which is consistent with the canon of contract construction *generalia specialibus non derogan*.[4] This is relevant to coverage because the policy has conflicting definitions of the word "claim," one of which appears in the general "Common Policy Conditions" form, and the other appearing in the more specific "Personal Injury" coverage form. American Casualty argues that the general Common Policy Conditions definition of claim should control over the more specific Personal Injury coverage form. This interpretation runs contrary to the above-cited policy provision governing conflicting terms and conditions which applies *generalia specialibus non derogan* (specific over general).

Notably, the endorsement that American Casualty relies upon in making its argument that a "natural person" must bring a personal injury claim, does not include the term "Personal Injury" anywhere in the document:

---

[3] Michigan contract law requires the Court "to look at the policy as a whole, and to give meaning to all of its terms." *Advance Watch v. Kemper Nat'l. Ins. Co.*, 99 F.3d 795, 799 (6th Cir. 1996).

[4] If there is a conflict between a general provision and a specific provision, the specific provision prevails. *A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 252 (2012)*.

> It is understood and agreed that the Policy is amended as follows:
>
> Solely as respects the Professional Liability Coverage Part, the General Liability Coverage Part and the Workplace Liability Coverage Part, the COMMON CONDITIONS, the section entitled DEFINITIONS; the definition of "claim" is deleted in its entirety and replaced as follows:
>
> "Claim" means a demand for money or services alleging injury or damage...
>
> A. As respects the Professional Liability Coverage Part:
>
> > 1. by a natural person to whom you or someone for whom you are legally liable, provided professional services, but solely for such natural person's injury or damage; or
> >
> > 2. by such natural person's family member, legal guardian or estate, but solely for injury or damage . . . [American Policy, R. 1-3, PageID # 275.]

The more specific Personal Injury coverage form defines "Personal Injury Claim" to mean "a claim arising out of personal injury" which the policy defines to include a number of the claims alleged in the Janssen lawsuit.[5]

In sum, reading the policy as a whole and using the definition found within the more specific coverage form, there is no requirement that a natural person bring

[5] E.g., misappropriation of advertising ideas, trade secrets, style of doing business, infringement of patent, copyright, trademark, trade name, trade dress, service mark, service name, logo, title or slogan. Janssen Complaint, R. 1-5, PageID ## 475-478, 480-483.

a personal injury claim for there to be coverage. The District Court erred in concluding otherwise.

2. A "Personal Injury Claim" Does Not Need to be Brought by Someone Who Received Professional Services From the Plaintiffs.

American Casualty, and the District Court, posits coverage for "personal injury" only extends to claims brought by a natural person who received the insured's professional services, i.e., the insureds' patients. American Denial Letter, R. 61, PageID ## 2063-2065; Opinion and Order, R. 77, PageID ## 2293-2294. However, and notably, American Casualty does not cite to anything in the policy in support of this argument; likely because such language does not exist. Rather, "**personal injury**" means "**injury** arising out of one or more of the following offenses committed in the conduct of **your professional services** . . .." American Policy, R. 1-3, PageID # 253 (underline added for emphasis). Thus, per the plain language of the policy, coverage for "**personal injury**" claims is not limited to individuals who receive the insureds' "**professional services**" - it broadly covers all offenses committed while performing "**professional services**." The policy defines "**professional services**," in pertinent part, as:

> services for which **you** are licensed, certified, accredited, trained or qualified to perform within the scope of practice recognized by the regulatory agency responsible for maintaining the standards of the

> profession(s) shown on the **certificate of insurance**. [American Policy, R. 1-3, PageID # 253 (underline added for emphasis).]

The profession shown on the policy certificate of insurance is "Pharmacist Firm" and the Licensing Division of the State of Michigan, in conjunction with state licensing boards, regulates the practice of pharmacy in Michigan in accordance with the Michigan Public Health Code. American Policy, R. 1-3, PageID # 247. The Michigan Public Health Code, MCL 333.17707(8), defines the scope of pharmacy practice:

> "Practice of pharmacy" means a health service, the clinical application of which includes the encouragement of safety and efficacy in the prescribing, dispensing, administering, and use of drugs and related articles for the prevention of illness, and the maintenance and management of health.
>
> Practice of pharmacy includes the direct or indirect provision of professional functions and services associated with the practice of pharmacy.
>
> Professional functions associated with the practice of pharmacy include the following:
>
> (a) The interpretation and evaluation of the prescription.
>
> (b) Drug product selection.
>
> (c) The compounding, dispensing, safe storage, and distribution of drugs and devices.
>
> (d) The maintenance of legally required records.

> (e) Advising the prescriber and the patient as required as to contents, therapeutic action, utilization, and possible adverse reactions or interactions of drugs. [Emphasis added.]

The Janssen Lawsuit alleges, *inter alia*, that the insureds purchased, and dispensed medication labeled with the companies' trademarked branding. Janssen Complaint, R. 1-5, PageID # 451.

Hence, the regulatory agency responsible for maintaining the standards of its profession (State of MI Licensing Division) shown on the certificate of insurance (Pharmacy Firm) includes services identified in the Janssen lawsuit (purchasing and dispensing medication) as giving rise to Personal Injury claims (Trademark Infringement, False Description and Designation of Origin in Commerce, False Advertising, Dilution of Trademark, Injury to Business Reputation, Deceptive Business Practices, and Unfair Competition.)

In sum, nothing in the policy requires these claims to be brought by the insureds' patients. Obviously, a patient of the insureds would *never* bring a claim for trademark infringement, misappropriation of advertising ideas, or copyright violations. American Casualty's interpretation of the policy is therefore nonsensical, renders the entire personal injury coverage part illusory. An "illusory contract" is an agreement in which one party gives as consideration a promise that is so insubstantial as to impose no obligation. *Ile v Foremost Ins Co*, 809 N.W.2d 617

(Mich. Ct. App. 2011), rev'd on other grounds, 823 N.W.2d 426 (Mich. 2012). Here, on one hand, the American Policy specifically identifies coverage for "personal injury" claims that include trademark infringement, patent infringement, trade name infringement, etc., but on the other hand, the policy ultimately furnishes no tangible coverage that would ever apply for these claims. In other words, coverage for these claims could never be triggered.

American Casualty's interpretation also violates the rule, as articulated by the 6th Circuit, that a court "'must give effect to every word, phrase, and clause in [the] contract and avoid an interpretation that would render any part of the contract surplusage or nugatory. *Klapp v. United Ins. Grp. Agency, Inc*., 663 N.W.2d 447, 453 (Mich. 2003).

3. Personal Injury is not Bodily Injury or Property Damage.

American Casualty completely misses the mark on its claim that "**personal injury**" requires "**bodily injury**" or "**damage**."[6] First, American Casualty cites the definition of "**damage**" which is irrelevant because it does not appear within the definition of "**personal injury**." American Policy, R. 1-3, PageID # 258; American

[6] "Damage" means (1) physical injury to tangible property, including all resulting loss of use of that property; or (2) loss of use of tangible property that is not physically injured. American Policy, R. 1-3, PageID # 252.

Denial Letter, R. 61, PageID ## 2063-2065. The policy states that "**injury**" has the meaning set forth in each individual coverage part, and the Personal Injury coverage part states that a "**personal injury claim**" means a claim arising out of "**personal injury**" which is further defined as "**injury** arising out of one or more of the following offenses committed in the conduct of **your professional services**..."[7] American Policy, R. 1-3, PageID ## 252, 253. There is no requirement that a personal injury claim include bodily injury or property damage. American Policy, R. 1-3, PageID # 253.

American Casualty's argument conflates professional liability with personal injury, the latter of which does not involve bodily injury or property damage. This is evident by the definition "**medical incident**," which is the underlying basis of a "**professional liability**" claim, which does not include "**personal injury**." American Policy, R. 1-3, PageID # 258. A "**medical incident**" results in "**injury**" or "**damage**," but does not include "**personal injury**," which is distinct and has an entirely different meaning that does not involve "bodily injury." American Policy, R. 1-3, PageID # 258. American Casualty confuses the meaning of personal injury

[7] misappropriation of advertising ideas, trade secrets, style of doing business, infringement of patent, copyright, trademark, trade name, trade dress, service mark, service name, logo, title or slogan. American Policy, R. 1-3, PageID # 253.

with "bodily injury" and ignores the express policy language distinguishing the terms in its definition of "**medical incident**."

E. Selective Owes Plaintiffs a Duty to Defend and Indemnify as the Janssen Lawsuit Alleges Personal and Advertising Injury Claims.

Section II.A.1 of Selective's commercial business owner coverage part provides for liability coverage and states that Selective has an obligation to defend Plaintiffs against a suit seeking damages because of "personal and advertising injury" to which the insurance applies, as follows:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury," "property damage" or "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury," "property damage" or "personal and advertising injury" to which this insurance does not apply. [Selective Policy, R. 1-2, PageID # 97.]

Section II.A.1.b(2) further states that "[t]his insurance applies" to "personal and advertising injury" caused by an offense arising out of your business, but only if the offense was committed in the "coverage territory" during the policy period." [Section II.A.1.b(2), B 00 03 07 13, p 35.] Selective Policy, R. 1-2, PageID # 97

The underlying Janssen lawsuit is a civil proceeding, seeking damages for "advertising injury" as defined in Section II.F.14 of the policy as follows:

"Personal and advertising injury" means injury, including consequential "bodily injury," arising out of one or more of the following offenses:

. . .

d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, produces or services;

. . .

f. The use of another's advertising idea in your "advertisement"; or

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement." [Selective Policy, R. 1-2, PageID ## 111-112.]

"Advertisement" is further defined in Section II.F(1) as follows:

1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:
   a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and
   b. Regarding web sites, only that part of a web site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement. [Section II.F(1), BP 00 03 07 13, p 47.] [Selective Policy, R. 1-2, PageID # 109.]

Here, the underlying Janssen lawsuit alleges that Plaintiffs infringed upon the Janssen plaintiffs' trademark or slogan by selling allegedly "counterfeit" medications using labels containing the trademark and slogan of the Janssen plaintiffs. Janssen Complaint, R. 1-5, PageID ## 475-478, 480-48. The Janssen lawsuit further alleges that Plaintiffs engaged in "false description and designation

of origin of commerce" of Janssen products in Count III of their complaint. Janssen Complaint, R. 1-5, PageID # 477. This satisfies Section II.F.14.d. above.

The Janssen lawsuit further alleges false advertising in Plaintiffs' sale to the public of "counterfeit" medications using Janssen's labels. Janssen Complaint, R. 1-5, PageID #476. This allegation of widespread selling of medications using Janssen's bottles and labels satisfies Section II.F.14.g. above, as it constitutes an infringement on another's trade dress or slogan in an "advertisement." Cf. *Citizens Ins. Co. v. Pro-Seal Serv. Group*, 477 Mich. 75, 730 N.W.2d 682, 687-688 (Mich. 2007) (in order to "advertise," the insured must publicly disseminate information about its goods and services; a single transaction involving a product sent to a specific customer in that case did not constitute "advertisement'). These allegations are, at a minimum, "arguably covered" under Selective's policy coverage for "personal and advertising injury."

1. Selective cannot establish that the exclusion for "expected and intended injury" applies.

In denying both a defense and indemnification, Selective asserted, *inter alia*, that a policy exclusion for "expected and intended injury" applies to preclude coverage. Selective Denial Letter, R. 57, PageID # 1810. However, as set forth above, the duty to defend exists when the allegations are "arguably" within coverage

and not excluded. *Cincinnati Ins. Co.*, 329 F.3d at 552. As to policy exclusions, the burden is on insurer to prove that the exclusion applies (or, for purposes of the duty to defend, that there are no theories of recovery that can "arguably" survive the exclusion). *Safety Specialty Ins. Co.*, 53 F.4th at 1024.

Selective denied a defense here, in part, based on the "expected or intended injury" exclusion, which states that the insurance does not apply to " "[b]odily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property." Selective Denial Letter, R. 57, PageID # 1810.

By its own terms, the "expected or intended injury" exclusion applies only to exclude claims for damages for "bodily injury" or "property damage." Here, Plaintiffs submit the underlying claims are claims for "personal and advertising injury." "Personal and advertising injury" is not a type of injury addressed in the "expected or intended injury" exclusion. Therefore, this exclusion does not apply.

2. Selective cannot establish that the exclusion for "professional services" applies.

Selective also denied a defense and indemnification by relying upon a policy exclusion for "professional services," which states that this insurance does not apply

to " "[b]odily injury," "property damage" or "personal and advertising injury" caused by the rendering or failure to render any professional service," which "includes but is not limited to…services in the practice of pharmacy." Selective Denial Letter, R. 57, PageID ## 1810-1812.

Selective invoked this exclusion, asserting that the "distribution or sale of pharmaceutical products" constitutes a "primary enterprise of a pharmacy business." Selective Denial Letter, R. 57, PageID ## 1810-1812. Plaintiffs submit that, if the allegations in the underlying suit do not involve professional services under the American Casualty policy, then the allegations cannot be subject to the "professional service" exclusion under this policy (and, at a minimum, are "arguably covered" under the Selective policy).

Under Michigan law, conduct to which a "professional service" policy exclusion has been held to apply typically requires "[s]omething more than an act flowing from mere employment or vocation"; "[t]he act or service must be such as exacts the use or application of special learning or attainments of some kind." *St Paul Fire & Marine Ins Co v Quintana*, 165 Mich. App. 719, 723; 419 N.W.2d 60 (1988), quoting *Marx v. Hartford Acci. & Indem. Co.*, 183 Neb. 12, 13; 157 N.W.2d 870 (1968). In *Quintana*, the Michigan Court of Appeals recognized that, in *Marx*, 183 Neb at 13, the Nebraska Supreme Court had observed that the term "professional

. . . services" connotes some degree of learning, proficiency, or intellectual skill, and does not encompass the "production or sale of commodities." See also *Nautilus Ins. Co. v. Strongwell Corp.*, 968 F.Supp.2d 807, 819 (W.D. Va. 2013) (noting that the *Marx* definition of "professional services" has been 'widely adopted").

The allegations in the underlying Janssen lawsuit involve the purchase and retail sale of medications from wholesalers using incorrect labels or trade dress, and arguably do not involve the "rendering" of a "professional service," i.e. the "practice of pharmacy." See *Kuznar v. Raksha Corp.*, 481 Mich. 169; 750 N.W.2d 121 (Mich. 2008) (holding that, under Michigan law, a pharmacy is not a health facility or agency and that dispensation of medication by a nonlicensed person is not professional negligence or malpractice). Here, while plaintiff alleges that Singh, a pharmacist, was involved in these activities, there is no allegation that Singh was the sole person who was involved. Moreover, if this Court holds that the acts of purchasing allegedly "counterfeit" medications with false labels from a wholesaler and selling them to the public do not fall within the definition of "practice of pharmacy" in MCL 333.17707(8) for purposes of the American Casualty policy, then this exclusion does not apply.

3. Selective cannot establish that the exclusion for personal and advertising injury arising out of copyright, patent, or trademark infringement applies.

Finally, Selective incorrectly relies upon an exclusion for "personal and advertising injury" arising out of infringement of trademark. The exclusion states that this insurance does not apply to "personal and advertising injury"

> (12) Arising out of the infringement of copyright, patient, trademark, trade secret or other intellectual property rights. Under this exclusion, such other intellectual property rights does not include the use of another's advertising idea in your "advertisement".
>
> However, this exclusion does not apply to infringement, in your "advertisement," of copyright, trade dress or slogan[.] Selective Policy, R. 1-2, PageID # 104.

This exclusion does not apply to eliminate the duty to defend. First, in addition to the claims of infringement of trademark, the underlying plaintiffs alleged other claims of unfair competition and common law unjust enrichment that do not fall within this exclusion. Janssen Complaint, R. 1-5, PageID ## 482, 483. If some of the underlying claims fall within policy coverage, while others do not, Selective is required to defend. *Safety Specialty Ins. Co.*, 53 F.4th at 1024. Second, the claims of infringement of trademark do not fall within the exclusion because the exclusion does not apply to infringement of trade dress or slogan in an advertisement (see Argument in Subsection E., pp 33-35 above).

4. Selective Also Has a Duty to Defend Plaintiffs Under the Commercial Umbrella Liability Coverage Part.

The commercial umbrella liability coverage part of the policy provides that Selective "will pay on behalf of the insured" the "ultimate net loss" in excess of the "retained limit" that the insured becomes legally obligated to pay as damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies, and that Selective has the "right and duty to defend the insured against any 'suit' seeking those damages when the "underlying insurance" does not provide coverage or the limits of "underlying insurance" have been exhausted Selective Policy, Section I.A.1, R. 1-2, PageID # 207. The umbrella coverage provides the same coverage for "personal and advertising injury" and applies for the same reasons as set forth above. Selective Policy, Section V.13., R. 1-2, PageID # 221

In denying both a duty to defend and a duty to indemnify under the commercial umbrella liability coverage part, Selective relied on two of the same exclusions asserted with respect to the commercial liability (the "expected and intended injury" exclusion, and the "professional services" exclusion). See Section I.B(7), CXL 4 04 03, p 3; Section I.B(16) (as altered by endorsement, see CXL 462 11 15, p 2). Selective Policy, R. 1-2, PageID ## 208-209, 211, 237. These exclusions

are identical to those in the commercial liability coverage part, and do not apply for the same reasons discussed above.

F. Defendants are Liable to Plaintiffs for All Foreseeable Damages That Flow From Their Breach of Contract.

1. Defendants are Liable for Plaintiffs' attorney fees and litigation costs incurred in the Janssen lawsuit.

Where a defendant owed plaintiff a contractual duty to defend in the but breached this obligation, the plaintiff is entitled to damages just as any other successful party would be in a breach-of-contract action. *Stockdale v Jamison*, 416 Mich 217, 224; 330 NW2d 389 (1982), overruled in part on other grounds *Frankenmuth Mut Ins Co v Keeley*, 433 Mich 525 (1989) (observing that when an insurer has a duty to defend and fails to fulfill that duty, "then, like any other party who fails to perform its contractual obligations, it becomes liable for all foreseeable damages flowing from the breach").

It is well settled that "the damages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made." *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 414; 295 NW2d 50 (1980); *see also Hadley v Baxendale*, 9 Exch 341; 156 Eng Rep 145 (1854). If an insurer breached its duty to defend, the damages due to the insured will generally include attorney fees and other litigation costs incurred

by the insured in the underlying litigation. *See Cooley v Mid-Century Ins Co*, 52 Mich App 612, 615-616; 218 NW2d 103 (1974); *see also Fireman's Fund Ins Cos v Ex-Cell-O Corp*, 790 F Supp 1318, 1325 (ED Mich. 1992). "[a]n insurer who wrongfully refuses to defend an action against the insured, on the ground that the action was not within the coverage of the policy, is liable for reasonable attorney fees incurred by the insured in the defense of the action . . . ." *Cooley*, 52 Mich App at 615-616. The breaching insurer is liable to pay other costs and litigation expenses necessarily incurred by the insured in defending the underlying action as well. *Id*. at 616.5... *Aladdin's Carpet Cleaning, Inc. v. Farm Bureau General Insurance Company*, No. 278605 (Mich. App. 2/12/2009), No. 278605. (Mich. App. Feb 12, 2009).

2. Defendants are Bound to any Reasonable Settlement Negotiated by Plaintiffs in Good Faith in the Janssen Lawsuit.

Under Michigan law, an insurance company waives its right to contest a settlement negotiated by the insured if it breaches its policy duty to defend:

> Clauses prohibiting the insured from voluntarily settling a claim without the insurer's consent give the insurer the opportunity to contest liability, to participate in settlement negotiations and to have input as to the value of the claim. When an insurer breaches its own policy of insurance by refusing to fulfil its duty to defend the insured, the insurer is bound by any reasonable settlement entered into in good faith between the insured and the third party. An insured is released from any

> agreement not to settle without the insurer's consent where the insurer has denied liability and wrongfully refused to defend. Upon notice, there is some burden on the insurer to act to protect its interests or those of its insured. The insurance carrier will not be permitted to benefit by sitting idly by, knowing of the litigation, and watching its insured become prejudiced. *Alyas v Gillard*, 180 Mich.App. 154, 160; 446 N.W.2d 610 (1989) (citations omitted).
> ***
> The insurer does not have to prove that the insured's actions prejudiced the insurer before it can assert a no-action clause as a defense to reimbursing the insured for the settlement. See Tenneco, 281 Mich.App. at 468-471. *Home-Owners Ins. Co. v. Amco Ins. Co*., 357273 (Mich. App. Jan 19, 2023

IX. CONCLUSION AND RELIEF REQUESTED

The Defendants insured Plaintiffs against personal and advertising injury claims which are defined to include claims for, *inter alia*, trademark infringement, slander, libel, and false claims in advertising, all of which are alleged in the Janssen lawsuit. Defendants could have defended Plaintiffs under a reservation of rights which would satisfy their duty to defend but preserve their defenses to indemnity under the policy. However, they instead denied coverage under the policies entirely and refused to provide Plaintiffs a defense to the Janssen lawsuit. By refusing to provide Plaintiffs a defense, Defendants breached their duty to defend. For the reasons set forth herein, the District Court erred in concluding otherwise.

Accordingly, Plaintiffs request this Honorable Court reverse the decisions of the District Court and grant summary judgment in Plaintiffs favor as to both American Casualty and Selective.

Respectfully Submitted,

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November 27, 2024

CERTIFICATE OF COMPLIANCE

I hereby certify this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 9,254 words, as determined by the word-count function of Microsoft Word, excluding parts of the brief exempted by Fed. R. App. P. 32(f).

/s/ Pratheep Sevanthinathan
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Dated: November 27, 2024

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of November, 2024, a copy of the foregoing document was filed electronically with the Clerk of the U.S. Court of Appeals for the Sixth Circuit by using the appellate CM/EFC system. I certify service will be accomplished by the appellate CM/ECF system to the following parties:

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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1-3	American Policy	247-302
1-5	First Amended Complaint (USDC ED NY, Case No. 1:22 cv-01983-BMC)	440-487
16	Plaintiffs' First Amended Complaint	1048-1065
57	Selective Denial Letter	1807-1818
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58	American Casualty Motion for Summary Judgment	1819-1842
60	Selective Motion for Summary Judgment	1867-2025
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65	Selective Response to Plaintiffs' Motion	2073-2099
66	American Casualty Response to Plaintiffs' Motion	2131-2053
67	Plaintiff's Response to Selective's Motion	2157-2175
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