IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PNC BANK, N.A.,	)	
	)	
Plaintiff,	)	2:21-cv-01299
	)	
v.	)	
	)	
AXIS INSURANCE COMPANY, et al.,	)	
	)	
Defendants.	)	
	)	
	)	
	)	

OPINION

Mark R. Hornak, Chief United States District Judge

This case arises from a dispute over a failure of several insurance carriers to pay out insurance proceeds for a claimed loss under insurance Policies issued to Plaintiff, PNC Bank, N.A. ("PNC"), by the Defendants, a group of several insurance providers ("Defendants").[1]

PNC has sued to recover the amounts that it believes that it is entitled to receive under those Policies. Defendants filed joint Motions for Judgment on the Pleadings focused on the "Changes in Exposure Provision" and the "Interrelated Actions Provision" of the involved Policies. (ECF Nos. 67, 69).[2] PNC countered with its own Motion for Judgment on the Pleadings. (ECF No. 71). Those Motions are all fully briefed and are ripe for disposition. For the reasons set

[1] The insurance providers are Axis Insurance Company, Ace American Insurance Company, Arch Insurance Company, Certain Underwriters at Lloyd's London subscribing to Policy No. B0509QA096708 (referred to in the Complaint as "Lloyd's Underwrite Syndicates"), and Aspen Insurance UK Limited. (ECF No. 1 ¶¶ 21–28). They will be referred to collectively as the "Carriers" or "Defendants", and the insurance policies at issue collectively as the "Policies". To the extent reference to a particular Carrier or Policy is germane, such will be so denominated.

[2] These Motions raise distinct arguments and will be considered separately in the body of this Opinion.

forth below, PNC's Motion for Judgment on the Pleadings is DENIED, and Defendants' Motions for Judgment on the Pleadings are GRANTED.

I. Background

a. NPS Fraud and Litigation

The dispute over the Policies at issue has its genesis in extensive litigation in Missouri which spans several decades. National Prearranged Services ("NPS"), established in 1979, sold pre-need funeral contracts to consumers ahead of the deaths of any potential beneficiaries. (ECF No. 68 at 6). Under Missouri law, a portion of the proceeds generated from such contracts was required to be held in a trust administered by a financial institution. (*Id.* at 7). Allegiant Bank, a distant but direct predecessor in interest of PNC, administered such trusts over proceeds generated from NPS's business from August 24, 1998, to May 14, 2004. (*Id.*).

Allegiant merged into National City Bank of the Midwest as of July 31, 2004. (JA at 5).[3] In July 2006, National City Bank of the Midwest merged into National City Bank, N.A., and subsequently, PNC acquired National City Bank, N.A., effective as of 11:00 AM on December 31, 2008. (*Id.* at 78).

It came to light that Allegiant inadequately administered the NPS trusts, which enabled the owners of NPS to engage in a nationwide fraud scheme. *Jo Ann Howard & Assocs., P.C. v. Nat'l City Bank*, 11 F.4th 876, 880 (8th Cir. 2021). Consequently, aggrieved persons filed lawsuits in an effort to recover relief for the fraud that NPS perpetrated during Allegiant's watch as trustee. Those lawsuits are *James & Gahr Mortuary, Inc. v. National Heritage Enterprises, Inc.*, No. 2:08-cv-04148 (W.D. Mo.); *Kings-Tears Mortuary, Inc. et al. v. National Heritage Enterprises, Inc.*, No.

[3] The Joint Appendix is filed at ECF No. 73. The citations in this Opinion to the Joint Appendix are based on the JA pagination, not the ECF pagination.

1:08-cv-00813 (W.D. Tex.); and *Jo Ann Howard & Assocs., P.C. v. Cassity,* No. 4:09-cv-01252 (E.D. Mo.), *aff'd* No. 19-2554 (8th Cir). (ECF No. 70 at 1). While all three of these litigation matters are relevant to the current dispute, it is the *Jo Ann Howard* litigation that is front and center.

The plaintiffs in the *Jo Ann Howard* case first filed suit against National City and PNC on August 6, 2009, alleging that Allegiant had breached its fiduciary duties in administering the NPS trusts and that National City and PNC, as the successors in interest of Allegiant, were liable for Allegiant's actions as trustee. (ECF No. 1 ¶ 2). After an initial judgment in favor of the plaintiffs in that case—one that was later reversed by the Eighth Circuit—in 2019, the trial court on remand entered a judgment against PNC and National City in the amount of $106,641,791.97. (*Id.* ¶ 10). On appeal, the Eighth Circuit affirmed that judgment. *Jo Ann Howard*, 11 F.4th at 880. PNC alleges that its total loss in connection with the *Jo Ann Howard* litigation for which it is entitled to insurance coverage is $138,405,347.53. (ECF No. 1 ¶ 55). It is this sum for which PNC seeks coverage under the Policies and recovery here.

b. The Insurance Policies

PNC had a foundational Policy with Houston Casualty Company ("HCC"), which was effective from December 31, 2008 through December 31, 2009. (*Id.* ¶ 56). PNC also had several "excess" Policies with each of the Defendants that "follow form" to the HCC policy, meaning that the relevant provisions of the excess Policies mirror those of the HCC policy absent an agreement to the contrary. (*Id.* ¶ 67). Though coverage under each of the excess Policies is not triggered unless the coverage provided for in the HCC Policy and then the preceding excess layer(s) to any excess subsequent layers are exhausted, the coverage provided for in the HCC Policy was

exhausted due to an unrelated claim, and consequently, PNC seeks coverage pursuant to the various layers established by the excess Policies. (*Id.* ¶ 57). The coverage period for both the HCC and excess Policies began at 12:01 AM on December 31, 2008. (JA at 25). Thus, these Policies went into effect about eleven hours before PNC acquired National City.

The relevant Policies contained several provisions relating to limitations on coverage that are central to the dispute here.

The Changes in Exposure Provision reads as follows:

> If, during the Policy Period: (i) an organization or entity becomes a Subsidiary, or (ii) the Company acquires any organization or entity by merger into or consolidation with the Company, then coverage shall apply to such organization or entity and the Insureds of such organization or entity**, but only with respect to Wrongful Act(s) committed, attempted, or allegedly committed or attempted, at the time of or after such event**, unless the Underwriter agrees, after presentation of all appropriate information, to provide coverage by endorsement for Wrongful Act(s) by such Insureds prior to such event.

(*Id.* at 27–28 (emphasis added)).

The Policies also contain a separate provision that impacts coverage when there are "Interrelated Wrongful Acts":

> All Claims arising out of the same Wrongful Act or Interrelated Wrongful Acts of one or more of the Insureds shall be considered a single Claim. Such Claims shall be deemed to be first made on the date the first such Claim is made or deemed to be made pursuant to Section 14 of the General Terms and Conditions, regardless of whether such date is before or during the Policy Period.

(*Id.* at 45).

The term "Claim" is defined as:

> (1) [A] written demand for monetary, non-monetary or injunctive relief;
> (2) a civil, criminal, administrative, regulatory or arbitration proceeding which is commenced by:

> (a) service of a complaint or similar pleading;
> (b) return of an indictment, information or similar document in the case of a criminal proceeding; or
> (c) receipt or filing of a notice of charges;
>
> (3) a civil, criminal, administrative or regulatory investigation:
>
> (a) once an Insured is identified in writing by an investigating authority that a proceeding described in Section (2) above may be commenced; or
> (b) in the case of an investigation by any state, federal or foreign governmental authority, after the service of a subpoena, target letter, Wells Notice or similar document; and
>
> (4) a written notice of commencement of a fact-finding investigation by the U. S. Department of Labor or the U.S. Pension Benefit Guaranty Corporation;
>
> for a Wrongful Act, including any appeal from the foregoing; provided, however, that a regulatory proceeding or investigation shall be a Claim only to the extent such regulatory proceeding or investigation: (I) relates to a Sponsored Plan or its beneficiaries; or (II) is on behalf of, for the benefit of, or at the behest of any Customer or potential Customer of the Insured.

(*Id.* at 40).

In turn, the term "Wrongful Act" is defined as an "actual or alleged act, error or omission committed by any Insured in the rendering of or failure to render Professional Services; (2) any matter claimed against a natural person Insured due solely to such natural person Insured's service as a fiduciary of any Sponsored Plan; and (3) any breach of the responsibilities, obligations or duties imposed upon the fiduciaries of the Company." (*Id.* at 43–44). An "Interrelated Wrongful Act" is defined as "all causally connected Wrongful Acts." (*Id.* at 42).

After the Eighth Circuit affirmed the nine-figure judgment in the *Jo Ann Howard* case against PNC as a successor in interest to Allegiant and National City, PNC sought insurance payouts from Defendants pursuant to the Financial Institution Professional Liability Section of the Policies. (*See* ECF No. 1 ¶ 104). Defendants, relying on the provisions set forth above, refused to provide coverage for the claimed Loss stemming from the *Jo Ann Howard* litigation. (*Id.* ¶ 107). PNC then filed this action, and Defendants now seek Judgment on the Pleadings based on both the

Changes in Exposure Provision and the Interrelated Actions Provision of the Policies. (ECF Nos. 67, 69).

PNC, for its part, also seeks Judgment on the Pleadings, alleging that PNC's costs stemming from the *Jo Ann Howard* litigation are covered by the Policies because (1) PNC and its predecessors in interest are each an "Insured"; (2) the *Jo Ann Howard* plaintiffs' claims were first brought during the coverage period; (3) the "Wrongful Acts" that gave rise to the NPS litigation occurred prior to the beginning of the Policy period[4]; and (4) the "Loss" suffered by PNC by virtue of the *Jo Ann Howard* judgment is of the kind contemplated by the Policies. (*See generally* ECF No. 72).

The Court will consider the parties' arguments in turn.

II. Discussion

a. Standard of Review and Overarching Contract Principles

A motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) is considered using the same standard as a Rule 12(b)(6) motion to dismiss for failure to state a claim. *Wilson v. USI Ins. Serv. LLC*, 57 F.4th 131, 140 (3d Cir. 2023) (citing *Wolfington v. Reconstructive Orthopaedic Assocs. II PC*, 935 F.3d 187, 195 (3d Cir. 2019)).

To state a plausible claim for relief—and to avoid a judgment on the pleadings—the non-moving party's factual allegations must "raise a right to relief above the speculative level," *Bell*

[4] The Policies provide coverage for Wrongful Acts that occur prior to or during the Policy period. Under the general terms of the Professional Liability Coverage Section, it is only *Claims* that must occur within the Policy period for coverage to apply; Wrongful Acts need not occur during the Policy period. Thus, Defendants are facially obligated to pay PNC "all Loss for which the Insured becomes legally obligated to pay on account of any Claim first made against the Insured during the Policy Period or, if applicable, the Discovery Period, for a Wrongful Act which takes place during or prior to the Policy Period, . . . " unless another Policy provision provides otherwise. (JA at 39).

Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007), and must do more than "plead[] facts that are 'merely consistent with' a defendant's liability." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 557). A mere "formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. In ascertaining whether the party moving for a judgment on the pleadings has met its burden, the Court must give the non-moving party "the benefit of every favorable inference." *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011) (quoting *Kulwicki v. Dawson*, 969 F.2d 1454, 1462 (3d Cir. 1992)). The Court is to "disregard threadbare recitals of the elements of a cause of action, legal conclusions, and conclusory statements." *City of Cambridge Ret. Sys. v. Altisource Asset Mgmt. Corp.*, 908 F.3d 872, 878–79 (3d Cir. 2018) (quoting *James v. City of Wilkes-Barre*, 700 F.3d 675, 681 (3d Cir. 2012)); *see also Wilson*, 57 F.4th at 140.

Under Pennsylvania law,[5] the interpretation of an insurance agreement is performed by the Court, not by a jury. *Am. Home Assurance Co. v. Superior Well Servs., Inc.*, 75 F.4th 184, 188 n.4 (3d Cir. 2023) (citing *401 Fourth St., Inc. v. Inv'rs Ins. Grp.*, 879 A.2d 166, 171 (Pa. 2005)) (internal quotation marks omitted). The "primary goal in interpreting a policy . . . is to ascertain the parties' intentions as manifested by the policy's terms." *Liberty Mut. Ins. Co. v. Sweeney*, 689 F.3d 288, 293 (3d Cir. 2012) (quoting *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Com. Union Ins. Co.*, 908 A.2d 888, 897 (Pa. 2006)). Given these principles, a motion for judgment on the pleadings or a motion to dismiss is an apt vehicle for resolving disputes such as the present one. *E.g.*, *PNC Fin. Servs., Grp., Inc. v. Houston Cas. Co.*, No. 13-cv-331, 2014 WL 2862611 (W.D. Pa. June 24, 2014), *aff'd in part, rev'd in part and remanded*, 647 F. App'x 112 (3d Cir. 2016).

[5] The parties agree that Pennsylvania law governs the resolution of this dispute. (ECF No. 68 at 10 n.5; ECF No. 72 at 8 n.15).

"Where 'the language of the contract is clear and unambiguous, a court is required to give effect to that language.'" *Hous. Cas. Co.*, 647 F. App'x at 117 (citations omitted). Although ambiguous contract provisions are to be interpreted against the insurer, *id.*, as a more general matter, this principle is not controlling where the insured is a large corporation who was advised by counsel and likely had equal bargaining power during the negotiation process. *E. Associated Coal Corp. v. Aetna Cas. & Sur. Co.*, 632 F.2d 1068, 1075 (3d Cir. 1980) (applying Pennsylvania Law).

The burden to establish coverage is on the insured, *Hous. Cas. Co.*, 647 F. App'x at 117, but the insurer bears the burden of proving the application of any applicable exclusions or similar limitations on coverage. *Koppers Co., Inc. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1446 (3d Cir. 1996). Such exclusions are strictly construed against the insurer and in favor of the insured. *Hous. Cas. Co.*, 647 F. App'x at 118. However, exclusions are not to be read in isolation—all of the terms of an insurance policy "must be read together and construed according to the plain meaning of the words involved. . . ." *Id.* (citing *Estate of Sanchez v. Colonial Penn Ins.*, 32 A.2d 857, 860 (Pa. Super. Ct. 1987)).

Here, PNC has met its burden to show that the claimed damages and costs visited upon it from the *Jo Ann Howard* litigation fall within the definitional coverage scope of the governing Policies. Defendants do not appear to dispute that the general terms of the Policies would, in a vacuum, provide coverage. Instead, Defendants rely upon various defenses and exclusions to the general terms of the Policies. (*See* ECF No. 68 at 5, 9, 10, 14 (acknowledging that PNC, the "Insured" under the policies, is seeking coverage for Wrongful Acts predating the Policies that PNC itself did not commit as a "Claim" made during the coverage period of the Policies)).

The Policies state that there is coverage for "all Loss for which the Insured becomes legally obligated to pay on account of any Claim first made against the Insured during the Policy Period or, if applicable, the Discovery Period, for a Wrongful Act which takes place during or prior to the Policy Period. . . ." (JA at 39). "Loss" is defined as "Claims Expenses and Damages," and as set forth above, a "Claim" includes a civil proceeding which is commenced by service of a complaint. (*Id.* at 40). The "Insured" is defined so as to include both PNC and its predecessors in business. (*Id.* at 41). The term "Wrongful Acts" includes actions by both PNC and its predecessors in business by virtue of referencing the "Insured" and is broad enough to cover allegations of actions or omissions committed by PNC or its predecessors. (*Id.* at 43–44). And there is no dispute here that the alleged "Wrongful Acts" were committed by Allegiant, a predecessor once removed from PNC, years before the beginning of the Policy period. Finally, the "Claim" against PNC (the institution of the *Jo Ann Howard* suit) was made in August 2009, during the Policy period. (ECF No. 1 ¶ 2). Therefore, under the Financial Institution Professional Liability Section of the Policies, the claims made against PNC in the *Jo Ann Howard* suit, and the damages stemming from it, are definitionally covered. The question remains, however, whether Defendants have met their burden in showing that one or both of the aforementioned exclusions necessarily apply as a matter of law.

b. The Changes in Exposure Provision

Defendants contend that the Changes in Exposure Provision—which purports to limit coverage for Wrongful Acts by acquired companies committed before the acquisition—compels a judgment on the pleadings in their favor. (ECF No. 67). In response, PNC returns to the general terms of the Policies, arguing that PNC (and National City as a predecessor in business) is an "Insured" that is covered under the Policies. (ECF No. 76 at 8). Because the Changes in Exposure provision is best construed as an exclusion despite not being explicitly labeled as such, to prevail

at this stage of the proceedings, Defendants bear the burden of demonstrating the application of this provision as a matter of law. *See Borough of Moosic v. Darwin Nat. Assurance Co.,* 556 F. App'x 92, 97 (3d Cir. 2014) (holding that the district court erred in treating a limiting provision of an insurance policy as a condition precedent rather than treating said provision as an exclusion); *Neth. Ins. Co. v. Butler Area Sch. Dist.*, 256 F. Supp. 3d 600, 611 (W.D. Pa. 2017) ("[P]olicy exclusions are to be construed narrowly in favor of coverage.") (quoting *Mut. Benefit Ins. Co. v. Politsopoulos*, 115 A.3d 844, 852 n.6 (Pa. 2015)). *But cf. Hous. Cas. Co.* 647 F. App'x at 122–123 (reversing the district court's partial denial of judgment on the pleadings and holding that an exception in an insurance agreement between PNC and excess insurer Axis Insurance Company did exclude coverage for $30 million of claimed "Loss")

Defendants have met that burden. Here's why.

The Changes in Exposure Provision states that coverage for the acts of an acquired company exists "only with respect to Wrongful Act(s) committed, attempted, or allegedly committed or attempted, at the time of or after such event, unless the Underwriter agrees, after presentation of all appropriate information, to provide coverage by endorsement for Wrongful Act(s) by such Insureds prior to such event." (JA at 27–28). The language "such event" in the provision refers to a merger, consolidation, or acquisition of another company. (*See id.*). The plain language of this provision demonstrates that coverage does not exist for the "Wrongful Acts" of an acquired company committed before an acquisition or merger, and there is no dispute here that the "Wrongful Acts" in question were committed years before PNC acquired National City. The language of this provision is unambiguous, and where the terms of a contract are unambiguous, "the express language . . . controls its meaning." *Norfolk S. Ry. Co. v. Reading Blue Mountain & N. R. Co.*, 346 F. Supp. 2d 720, 725 (M.D. Pa. 2004) (citing *Sanford Inv. Co., Inc., v. Ahlstrom*

Mach. Holdings, Inc., 198 F.3d 415, 421 (3d Cir. 1999)). Therefore, the Changes in Exposure Provision bars coverage for acts committed by Allegiant and National City prior to the beginning of the coverage period.

PNC's counterarguments do not undermine this conclusion. PNC contends that Defendants' reading of the Changes in Exposure Provision "redraft[s]" the insurance agreements (ECF No. 76 at 13, 15), but in reality, it is PNC's arguments that have the effect of attempting to "redraft" the agreement. PNC first contends that the Changes in Exposure Provision restricts coverage only in circumstances in which there is a surprise or "snap" acquisition, and that the National City acquisition simply was not a surprise. (*Id.* at 12). But the provision in question makes no reference to a "surprise acquisition." Contrary to PNC's position, there is no "gotcha" (*id.* at 15) in the situation present here, one in which the plain language of an insurance agreement, negotiated between sophisticated entities, clearly and unambiguously limits (or, in actuality, precludes) coverage for actions that occurred before a certain event. As PNC accurately states in one of its briefs, "[s]traightforward language in an insurance policy should be given its natural meaning." *Lawson ex rel. Lawson v. Fortis Ins. Co.*, 301 F.3d 159, 162 (3d Cir. 2002); *see also Guardian Life Ins. Co. v. Zerance*, 479 A.2d 949, 953 (Pa. 1984) ("Language in a policy that is clear cannot be interpreted to mean other than what it plainly says.").

Further, even though Defendants knew of the National City acquisition before it occurred and, in some cases, issued endorsements waiving certain provisions of the Policies (ECF No. 1-1 at 55), Defendants did not waive the exclusionary language of the Changes in Exposure Provision; only the reporting requirement of such provision was waived.[6] (*Id.*; JA at 78). To embrace PNC's

[6] The endorsement reads, in relevant part: "[I]t is agreed that the Underwriter hereby waives the reporting requirements set fort[h] [sic] in: (1) subsection (ii) of Section 5(A) (Acquisition or Creation of Organizations) of the

arguments regarding the necessity for, and here a lack of, a "surprise" acquisition would require reading into the endorsement that PNC relies upon an implied waiver of the substantive terms of the Changes in Exposure Provision. Our Court of Appeals recently made plain that endorsements and the original insurance policy in question should be read in harmony so as to give meaning to all of the terms in both the endorsements and the original policy. *Am. Home Assurance Co.*, 75 F.4th at 190–91. Because the endorsement advanced by PNC here only references the reporting requirements of the Changes in Exposure Provision, it (the endorsement) cannot be read to also eliminate or modify the substantive coverage limitations of the Changes in Exposure Provision or the Policies. This is particularly so when, as here, the endorsement itself provides that all other terms remain in full force.

PNC next contends that, because the Professional Liability Coverage Section of the Policies is more specific than the Policy section in which the Changes in Exposure Provision lies, the terms of the more specific section should take precedence. (ECF No. 76 at 11–12). PNC's argument on this point is literal. The Changes in Exposure Provision, as applicable here, resides in a Section of the Policies titled "General Terms and Conditions." (JA at 27). PNC relies upon the definition of "Insured," as it appears in the Professional Liability Coverage Section, for the proposition that, because "Insured" includes predecessors in business, the Policies *must* provide coverage for PNC's "Loss" that can be attributed to National City (and Allegiant), no matter the Changes in Exposure Provision.

General Terms and Conditions . . . with respect to the acquisition of National City Corporation effective at 11:00 A.M. E.S.T. on December 31, 2008. *All other terms, conditions, and limitations of the Policy will remain unchanged*." (JA at 78 (emphasis added)).

While it is true that the underlying HCC Policy, from which the Defendants' Policies flow, does state that "[i]f a General Term or Condition conflicts with any term or condition of a Coverage Section, then the term or condition of such Coverage Section shall prevail with respect to coverage under such Coverage Section," (*id.* at 27), the other reality is that there is no true "conflict" here.

A contract must be "read to give effect to all its provisions and to render them consistent with each other." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995). The term "Insured's" inclusion of National City as a predecessor in business does not automatically mean that PNC receives coverage for all of National City's or Allegiant's preexisting Wrongful Acts, no matter what else the Policies provide. The Changes in Exposure Provision and the inclusion of predecessors in business in the definition of Insured, when considered together as they must be, say that PNC is entitled to coverage for acts committed by its predecessors in business, *but only* for Wrongful Acts committed subsequent to an acquisition or merger—but still prior to the end of the Policy period— for instance as that acquired company either winds up its business or continues operating as a subsidiary of PNC. PNC's contrary reading reads the Changes in Exposure Provision out of the Policies and renders it wholly meaningless, and under Pennsylvania Law, courts are not to read potentially adverse provisions in a manner that would render one of them "meaningless, superfluous, unreasonable, [or] contradictory." *Neuhard v. Range Res.-Appalachia, LLC*, 29 F. Supp. 3d 461, 474 (M.D. Pa. 2014) (citing *Lesko v. Frankford Hosp.-Bucks Cnty.*, 15 A.3d 337, 342–43 (Pa. 2011)). Thus, while the Changes in Exposure Provision does eliminate coverage in the present circumstances, it does not necessarily contradict or conflict with a term or condition set forth in the Professional Liability Coverage Section (specifically the definition of "Insured" in the Professional Liability Coverage section) such that the terms in the

Professional Liability Coverage Section should be allowed to render the Changes in Exposure Provision wholly superfluous. Consequently, this argument fails for PNC, as well.

Put more neatly, the unambiguous language of the Changes in Exposure Provision is too much for PNC to overcome. Interpreting the plain language of one provision in a contract (here, the Changes in Exposure provision) that alters the practical effects of a provision elsewhere in the contract (the general coverage provisions) does not constitute a "redrafting" of that agreement. Interpreting these provisions in light of one another instead, in these circumstances, gives full effect to *all* of the provisions of the Policies, as the Court is obligated to do. Therefore, Defendants are correct that the Changes in Exposure Provision is both applicable to the situation here and defeats the claim for coverage advanced by PNC as a matter of law.

c. The Interrelated Actions Provision

At the outset, the Court notes that Defendants' arguments regarding the Changes in Exposure Provision and the Interrelated Actions Provision are separate. That is, these arguments are raised in two separate Motions for Judgment on the Pleadings (ECF Nos. 67 and 69, respectively), and even though the Court has concluded that Defendants prevail on the arguments advanced with respect to the Changes in Exposure Provision, for the sake of completeness, the Court will consider the Defendants' arguments with respect to the Interrelated Actions Provision.

The synopsis of Defendants' argument on this point is that (1) "Claims" arising out of the same "Wrongful Act or Interrelated Wrongful Acts" are not covered under the Policies where a "Claim" was first made based on an "Interrelated Wrongful Act" outside of the coverage period of the insurance policy; (2) the term "Interrelated Wrongful Acts," as used in this context, refers to "all causally connected wrongful acts"; (3) the *Jo Ann Howard* litigation, the *Kings-Tears*

litigation, and the *James & Gahr* litigation are all causally connected because each action is based on the fraud conducted by NPS during Allegiant's watch; and (4) the "Claims" (the court complaints, as defined in the Policies) in the *Kings-Tears* and the *James & Gahr* litigation were filed prior to the beginning of the coverage period of the Policies.[7] (*See generally* ECF Nos. 69, 70). Therefore, due to the factual overlap between the three actions, and the complaints in the *Kings-Tears* and *James & Gahr* actions being filed prior to the coverage period of the Policies, according to Defendants, coverage for the *Jo Ann Howard* litigation is unavailable.[8]

In response, PNC contends that the *Kings-Tears* and *James & Gahr* actions were not "Claims" as defined under the Policies and that the *Kings-Tears*, *James & Gahr*, and *Jo Ann Howard* actions do not involve the same "Wrongful Act or Interrelated Wrongful Acts." (ECF No. 78 at 10, 15). As with the Changes in Exposure Provision and as a matter of law, Defendants bear the burden in showing that this exclusion applies in order to prevail on their Motion. *Borough of Moosic*, 556 F. App'x at 97. Here, Defendants have met that burden.

First, the complaints filed in the *Kings-Tears* and *James & Gahr* actions are "Claims" because a "Claim" includes a civil proceeding "commenced by service of a complaint. . . for a Wrongful Act." (JA at 40).

[7] To further clarify the distinction between the Changes in Exposure Provision and the Interrelated Actions Provision, the two provisions have separate mechanisms. The Changes in Exposure Provision states that coverage for Wrongful Acts committed by the acquired company that predate PNC's acquisition of said company does not exist unless the Underwriter agrees to provide coverage by endorsement. (ECF No. 1-1 at 4–5). Conversely, the Interrelated Actions Provision essentially defines the date on which a Claim was first made. The Interrelated Actions Provision forcibly relates back a Claim made within the Policy period to the date a preexisting Claim was first made when those Claims arise out of the same Wrongful or Interrelated Wrongful Acts. (*Id.* at 22).

[8] As part of their Motion for Judgment on the Pleadings as to Interrelated Actions, Defendants also argue that releases from the *Kings-Tears* litigation and the *James & Gahr* litigation also preclude liability. (ECF No. 70 at 22). Because the Court decides this Motion for Judgment on the Pleadings on the terms of the Interrelated Actions Provision, the Court need not address this argument.

Second, the *Kings-Tears*, *James & Gahr*, and *Jo Ann Howard* actions all share an underlying factual basis. "When determining whether claims relate back to or arise from the same facts, courts review the complaint filed in the prior action to determine whether the acts at issue in it—not the legal theories or claims that it propounds—are the same as, or related to, the acts alleged in the present dispute." *Ettinger & Assocs., LLC v. Hartford/Twin City Fire Ins. Co.*, 22 F. Supp. 3d 447, 456–57 (E.D. Pa. 2014). When viewed through this lens, the three actions are causally connected because they all concern the NPS fraud scheme and Allegiant's responsibility relative to that scheme due to its failures in supervising the NPS trusts:

- The Third Amended Complaint in the *Jo Ann Howard* action lists National City and PNC as defendants due to their roles as successors in interest of Allegiant. (JA at 872, 883). The Third Amended Complaint alleges that National City and PNC "served as trustees of the various NPS pre-need trusts and failed to properly supervise the NPS pre-need trusts' assets." (*Id.* at 883).
- The First Amended Class Action Complaint in the *James & Gahr* action lists Allegiant and National City as defendants. (*Id.* at 1214). This action also concerns the NPS fraud scheme, and the First Amended Complaint alleges that the "the Trust Defendants improperly supervised, handled and/or misappropriated the pre-need contract funds. . . ." (*Id.* at 1219).
- The Class Action Complaint in the *Kings-Tears* action lists Allegiant and National City as defendants. (*Id.* at 1316). This action, like the other two, concerns the NPS fraud scheme, and its allegations directed at the trustee defendants are nearly identical to the allegations listed in the *James & Gahr* and

Jo Ann Howard complaints. (*Compare id.* at 1321 *with id.* at 1219 *and id.* at 883).

The substantial overlap in the subject matter of the three actions qualifies these actions as "Interrelated," as the words "causally connected" in this context have been interpreted by courts to include actions that have a "common nexus of facts and arose out of the same occurrence of wrongful acts." *ACE Am. Ins. Co. v. Ascend One Corp.*, 570 F. Supp. 2d 789, 798 (D. Md. 2008); *see also Ettinger*, 22 F. Supp. 3d at 457 ("I conclude as a matter of law that the 'bad advice' aspect of the Malpractice Action relates back to the Dragonetti Action because they share a common nexus of facts and arose out of the same occurrence of wrongful acts."); *Mfrs. Cas. Ins. Co. v. Goodville Mut. Cas. Co.*, 170 A.2d 571, 607 (Pa. 1961) (synonymizing causal connection with "[b]ut-for causation"). Thus, the actions are "Interrelated."

Third, the acts complained of in the three actions were "Wrongful" in that these actions concern an "alleged act, error, or omission committed by any Insured." (JA at 43). And as set forth above, "Insured" includes both PNC and its "predecessors in business," (*id.* at 41) and PNC's predecessors in business are named as defendants in each of the three actions at issue.

Fourth, the *Kings-Tears* and *James & Gahr* actions were filed prior to the beginning of the coverage period. Thus, based on the terms of the Interrelated Actions limiting provision, there is no liability for Defendants for PNC's "Loss" associated with *Jo Ann Howard* litigation because all three actions concern the same causally connected "Wrongful Acts," and under the terms of the Interrelated Actions Provision, such "Claims" are deemed to be made outside of the Policy period, and definitionally, no coverage exists for "Claims" made outside the Policy period.

PNC's counterarguments do not carry the day. PNC first contends that the filing of the *Kings-Tears* and *James & Gahr* actions are not "Claims" because (1) the conduct at issue in those actions was not directly undertaken by PNC and (2) Allegiant and National City, the defendants in those actions, were not "Insureds" at the time of service of the complaints. Put more directly, PNC says that, because National City and Allegiant were not owned by PNC at the time of the commencement of the *Kings-Tears* and *James & Gahr* actions, and because the term "Wrongful Acts" references the conduct of an "Insured," there can be no "Claim." It cites *Sycamore Partners Mgmt., L.P. v. Endurance Am. Ins. Co.*, No. N18C-09-211, 2021 WL 4130631 (Del. Super. Ct. Sept. 10, 2021) and *Twp. of Ctr., Butler Cnty. v. First Mercury Syndicate, Inc.*, 117 F.3d 115 (3d Cir. 1997) in support of its position.

In *Sycamore*, the court determined that there was no "Claim" unless such "Claim" was directed against the holder of the insurance policy. *Sycamore*, 2021 WL 4130631, at *19. But unlike in the instant matter, under the insurance policy at issue in that case, "Insured" was limited to Sycamore itself and did not reference predecessors in business. *Id.* at *2 ("To be insurable, the Claim must be made against an Insured or Insured Entity and be based on a Wrongful Act. An Insured or Insured Entity is defined as Sycamore.") (internal marks and citations omitted). Perhaps sensing that *Sycamore* is not applicable given this distinction in the definition of "Insured," PNC turns to *First Mercury* for the proposition that "Insured" is defined with reference to the time at which the "Claim" is made. *First Mercury*, 117 F.3d at 118. But the court's conclusion in *First Mercury* was specific to the "insured v. insured" context,[9] and the court there went to great lengths to detail the history of the "insured v. insured" exclusion. *Id.* at 119. Further, *First Mercury* concerned whether dismissed local government employees were "insureds" as defined in the

[9] Conversely, here, an Insured is suing its Insurers.

relevant insurance policy, not whether a predecessor in business was an "Insured" for actions it undertook prior to being acquired by the policyholder. Given these distinctions and that the term "Claim," as defined in the relevant insurance Policies here, does not contain language requiring that complaints must be filed directly against PNC, PNC's arguments on this point do not alter the Court's reading of the Interrelated Actions Provisions.

In the alternative, PNC argues that the three actions at issue are not "Interrelated." In support of this proposition, PNC cites case law pertaining to insurance disputes stemming from automobile accidents and argues that, under Pennsylvania law, the term "Interrelated" requires more than but-for causation. *See, e.g.*, *Eichelberger v. Warner*, 434 A.2d 747, 278 (Pa. Super. Ct. 1981). In support of this proposition, PNC focuses on interpretations of the phrase "arising out of," rather than the definition of "Interrelated"—"causally connected wrongful acts"—which is the key term at issue under this Policy. (ECF No. 78 at 16 n. 15; JA at 42). Put more plainly, PNC hopes to rely on the "arising out of" language rather than the "causally connected wrongful acts" language because the three prior actions here are plainly causally connected—they all concern the same underlying factual circumstances. By asserting that "arising out of" is instead the language the Court should focus on, PNC seemingly hopes to implement a heightened (or at least very different) standard for the Court to rely upon in assessing whether the three prior actions are truly "Interrelated."

But when confronted with similar situations, courts have relied upon the more specific definitional provision:

> The policy states as one of its general conditions that "[a]ll Claims *arising out of* the same Wrongful Act or *Interrelated Wrongful Acts* shall be deemed one claim." . . . . The policy, in turn, defines "Interrelated Wrongful Acts" as "Wrongful Acts that are temporally, *logically or causally connected by any common nexus of any*

> *fact*, circumstance, situation or event . . . regardless of whether the Claim or Claims alleging such acts involve the same or different . . . legal causes of action." . . . First American's original, amended, and second amended complaints are plainly interrelated. *They all arise out of the same nexus of facts and circumstances*—Mountain Lakes misappropriating funds in a way that caused harm to First American.

Mountain Lakes Abstract Co. Inc. v. Certain Underwriters at Lloyd's, London, 605 F. Supp. 3d 645, 651–52 (M.D. Pa. 2022) (emphasis added). Indeed, PNC has chosen to avail itself of this assessment of the "causally connected" language in other cases:

> Additionally, the class actions, including Trombley and Henry, are *causally related* to the first Claim (Casayuran/MDL), which means they all fall within the Policies' coverage, irrespective of when they were served or noticed. *See* JA-45 at § B(4)(I) (Interrelated Wrongful Acts means "*all causally connected Wrongful Acts*"); *see also* JA-48 at § B(6)(C) (providing that "[a]ll Claims *arising out of* the same Wrongful Act or Interrelated Wrongful Acts of one or more of the Insureds shall be considered a single Claim" and "shall be deemed to be first made" on the date of the first such Claim).

Plaintiffs' Motion for Judgment on the Pleadings ¶ 51, *PNC Fin. Servs. v. Hous. Cas. Co.*, 13-cv-331, 2014 WL 12602876 (W.D. Pa. July 28, 2014) (motion filed on Nov. 1, 2013 and available at 2013 WL 8171152) (emphasis added).

This is not the first such instance in which PNC, or one of its subsidiaries, has emphasized the similarity of the three prior actions. One of the "Insureds," National City, tried to consolidate the *Jo Ann Howard* and *James & Gahr* actions because those two lawsuits "stem from the very same alleged practices of NPS." (JA at 1265). According to National City, the "essential allegations of the [*Jo Ann Howard*] complaint are identical to the essential allegations made by Plaintiffs [in the *James & Gahr* action]." (*Id.* at 1266). Indeed, the two actions "present[ed] more than merely a 'significant overlap.'" (*Id.*). By the point at which National City tried to consolidate the two actions, it had already been acquired by PNC. The Court is consequently reluctant to give

weight to PNC's arguments in the present action that are contrary to the positions of an entity that was by that point an arm of PNC on the very same points.

Given the reasoned decisions of other courts to give precedence to the more specific "causally connected" language appearing in the definitions section of similar insurance policies, the Court concludes that the "causally connected" language governs the inquiry as to the meaning of "Interrelated."

But even if the Court were to set aside the approaches of other courts when confronted with similar contractual provisions, PNC's cited automobile dispute cases also did not involve the other contractual language at issue here. One such case relied upon by PNC in support of its argument on this point actually cites to a case stating that "interrelated" *does not include* "causally connected" acts, notwithstanding the presence of the latter phrase in the Policies at issue here. (ECF No. 78 at 16 n.15 (citing *Neth. Ins. Co.*, 256 F. Supp. 3d at 615)). PNC's own cited cases demonstrate that an insurance policy's meaning "must be . . . construed according to its plain language." *E.g.*, *Neth. Ins. Co.*, 256 F. Supp. 3d at 611 (citing *Meyer v. CUNA Mut. Ins. Soc.*, 648 F.3d 154, 163 (3d Cir. 2011)). The phrase defining the key term, "Interrelated," is broad and focuses on the similarity of the underlying facts of the three prior actions. PNC's attempt to undermine such language by relying on proximate cause analyses from cases involving automobile accidents (and thus emphasizing that it was not it that negligently administered the NPS trusts) falls short. Because the *Jo Ann Howard*, *Kings-Tears*, and *James & Gahr* cases all share the requisite nexus, the matters are plainly "Interrelated."

PNC next points to a deleted exclusion in Defendant ACE's Excess Policy titled "Prior or Pending Proceeding Exclusion" that barred coverage for costs associated with litigation that was

commenced on or before December 1, 2007. (JA at 135, 142). PNC's argument on this point is, if the Interrelated Actions Provision really barred coverage under the present circumstances, then why did ACE delete a provision that obviously barred coverage for costs stemming from prior litigation? But the provision at issue here is not ambiguous—"Interrelated" is defined in the Policies, and the applicable case law makes plain that the phrase "causally connected" includes events with an overlapping factual nexus. The Court cannot "bend the language of a contract to create an ambiguity when none exists." *In re Airadigm Commc'ns, Inc.*, 616 F.3d 642, 664 (7th Cir. 2010). Here, the language actually in the Policies is not ambiguous, but the impact of the removal of language as advocated by PNC *is* ambiguous, and PNC's argument based on this removal is more speculation than the application of logic. Thus, the removal of the Prior or Pending Proceeding Exclusion in the ACE Policy does not move the needle as PNC posits.

The Court also notes that Defendant Arch issued an endorsement in the form of a Prior Notice Exclusion that broadened the terms of the Interrelated Actions Provision by redefining "Interrelated Wrongful Acts" as "Wrongful Acts that have as a common nexus any fact, circumstance, situation, event, transaction, cause or series of causally connected facts, circumstances, situations, events, transactions or causes." (JA at 157). Under this more broadly worded endorsement, where a prior "Claim" was the subject of a given notice, "Loss" relating to that "Claim" is nonetheless excluded from coverage if the underlying circumstances of that former "Claim" share a "common nexus of fact" with the underlying circumstances of the present "Claim." Here, the *Kings-Tears*, and *James & Gahr* cases were the subject of a prior notice under Defendant Arch's Policy with National City. (*Id.* at 1376 (settling a "Claim" stemming from National City's 2007–2008 policy with Defendant Arch)). And because of the endorsement's more precise language, to the extent that there is any doubt whether the *Kings-Tears, James & Gahr*,

and *Jo Ann Howard* actions are "Interrelated," the "common nexus" definition of Arch's endorsement demonstrates that those actions are Interrelated, at least as to Defendant Arch.

PNC contends that Arch's endorsed exclusion should not apply because PNC had not submitted a prior notice to Arch concerning the *Kings-Tears*, and *James & Gahr* cases. Rather, it was National City that submitted those prior notices under a separate Policy. In support of this argument, PNC relies upon the decision in *Emmis Commc'ns Corp. v. Ill. Nat'l Ins. Co.*, 323 F. Supp. 3d 1012 (S.D. Ind. 2018). But that case concerned a concurrent notice of the same "Claim" to a separate insurer, and the crux of the argument in *Emmis* was whether the prior notice exclusion at issue there was temporally limited to notices associated with polices predating the policy at issue in that case. *Id.* at 1023 ("[T]he term is written in the past tense, and thus should be read as referring to events that had already occurred at the time of drafting."). Unlike in *Emmis*, there is no dispute related to timing based on the Policy language here.

Despite this, PNC relies upon a hypothetical from the *Emmis* court concerning the defendant insurer's very strained reading of involved policy language on this general topic in that case; the insurer's reading in that case would have resulted in the exclusion of all claims reported under the separate insurer's policy, even those made by unconnected parties or by mistake, and the court strongly rebuked the possibility of such a result: "[T]here is simply no rational basis for interpreting an insurance policy such that the scope of coverage potentially hinges on a report made by someone other than the insured or its agent." *Id.* The hypothetical that the *Emmis* court addressed is not at issue here. To the contrary, one of the "Insureds," National City, (because "Insured" is defined to include predecessors in business),[10] filed a notice with the relevant insurer,

[10] For this reason, PNC's secondary reliance on *HR Knowledge, Inc. v. Professional Ins. and Risk Brokerage*, LLC, No. 04-5220-BLS2, 2006 WL 4862058 (Mass. Super. Nov. 20, 2006) in support of its argument on this point is also

and due to the overlapping factual basis of the "Claim" against National City, set forth in its notice to Arch, and the "Claim" pressed against PNC in the *Jo Ann Howard* litigation, coverage for the latter is excluded under the plain terms of Defendant Arch's endorsement.

III. Conclusion

In summary, despite PNC demonstrating that the general terms of the insurance policies provide coverage for the "Loss" of the sort that PNC suffered, Defendants have met their burden to demonstrate, as a matter of law, that the Changes in Exposure Provision and the Interrelated Actions Provision of the policies each excluded coverage for such loss, from the bottom of the Policy pyramid to the very top. In addition, because PNC's Motion for Judgment on the Pleadings is effectively a mirror image of Defendants' Motions, the Court need not separately analyze PNC's Motion, and it will be DENIED.

The Court therefore GRANTS Defendants' Motions for Judgment on the Pleadings (ECF Nos. 67, 69) and DENIES PNC's Motion for Judgment on the Pleadings. (ECF No. 71).

An appropriate Order will issue.

s/ Mark R. Hornak
Mark R. Hornak
Chief United States District Judge

Dated: March 13, 2024

misplaced. The *HR Knowledge* court was considering the conduct of a party who was not an "Insured" under the policy at issue. *See id.* ("Advantius is not an insured under the Policy. The only insureds are HR itself and its officers and employees (when acting within the scope of their employment), not HR's independent contractors. Therefore, HR's coverage is limited to damages and claim expenses resulting from claims made against HR for acts, errors, or omissions committed by HR or its employees that HR should have rendered in providing Professional Services to its clients.").