

RETURN DATE: FEBRUARY 6, 2024 : SUPERIOR COURT
XL SPECIALTY INSURANCE COMPANY, : JUDICIAL DISTRICT OF
ARGONAUT INSURANCE COMPANY, : STAMFORD/NORWALK
ACE AMERICAN INSURANCE COMPANY,
STARR INDEMNITY & LIABILITY
COMPANY, AXIS INSURANCE COMPANY,
STRATFORD INSURANCE COMPANY,
IRONSHORE INDEMNITY, INC.

Plaintiffs,

v. : AT STAMFORD
PHL VARIABLE INSURANCE COMPANY : JANUARY 5, 2024

Defendant.

COMPLAINT FOR DECLARATORY RELIEF

Plaintiffs XL Specialty Insurance Company (“XL”), Argonaut Insurance Company (“Argonaut”), ACE American Insurance Company (“ACE”), Starr Indemnity & Liability Company (“Starr”), AXIS Insurance Company (“AXIS”), Stratford Insurance Company (“Stratford”), and Ironshore Indemnity, Inc. (“Ironshore”) (collectively, “Plaintiffs”), by and through their undersigned counsel and as and for their complaint for declaratory relief against defendant PHL Variable Insurance Company (“PHL”), allege as follows:

NATURE & BACKGROUND OF THE ACTION

1. This is an insurance coverage action. Plaintiffs bring this action pursuant to *Conn. Gen. Stat.* §52-29 to confirm that they have no obligations under certain management liability and errors and omissions primary and excess policies of insurance issued to PHL’s parent company, Nassau Financial Group LP (“Nassau”) to provide coverage for two lawsuits filed in 2022, styled *James Kenney v. PHL Variable Insurance Company* Case No. 3:22-cv-552 (D. Conn.) (the “Kenney Action”) and *Conestoga Trust et al. v. PHL Variable Insurance Company* Docket No. HHD-CV22-6157546-S (the “Conestoga II Action”) (collectively, the “Underlying Actions”).

2. PHL sells life insurance products to consumers for a fee. The Underlying Actions essentially duplicate the allegations, facts, and circumstances of past lawsuits and regulatory proceedings brought against PHL. Both the Underlying Actions and prior proceedings accuse PHL of a continuing scheme by which it unlawfully imposed so-called “Cost of Insurance” rate increases (“COI Increases”) on universal life (“UL”) insurance policies to increase profits and recoup past losses. As in the prior proceedings, the plaintiffs in the Underlying Actions seek to be made whole for PHL’s imposition of the unlawful and excessive COI Increases; that is, plaintiffs seek to get the life insurance benefits PHL promised to provide by contract, and to have PHL return the excessive COI Increases it has collected.

3. PHL has asserted a right to coverage for defense costs incurred in the Underlying Actions, and/or coverage for future settlement or judgment amounts, under one of two claims-made insurance programs for the Policy Period of June 13, 2020 to June 13, 2021: (i) an errors and omissions program led by primary “Insurance Company Professional Liability” Policy No. ELU168179-20 issued to Nassau by XL (the “E&O Policy”), and followed by excess policies issued by the “E&O Excess Insurers”, Argonaut, Starr and AXIS (the “E&O Excess Policies,” and together with the E&O Policy, the “E&O Policies”); and (ii) a directors and officers program led by primary “Private Company Insurance” Policy No. ELU168177-20 issued to Nassau by XL (the “D&O Policy”), and followed by excess policies issued by the “D&O Excess Insurers”, Argonaut, ACE, Starr, AXIS, Stratford, and Ironshore Indemnity (the “D&O Excess Policies,” and together with the D&O Policy, the “D&O Policies”).¹

4. As set forth below, there is no coverage afforded to PHL under the E&O Policies and D&O Policies (the “Policies”) for several independently sufficient reasons.

¹ The D&O Excess Insurers and E&O Excess Insurers are collectively referred to as the “Excess Insurers” and the D&O Excess Policies and E&O Excess Policies are collectively referred to as the “Excess Policies.”

5. First, the Underlying Actions do not constitute Claims first made during the Policy Period of the Policies.

6. Second, defense costs incurred in connection with and any judgment or settlement resulting from the Underlying Actions would not qualify as Loss under the Policies or would otherwise be uninsurable as a matter of law, and therefore would not be covered.

7. Third, coverage under the E&O Policies is barred by the Prior Claim and Notice Exclusion and Prior or Pending Litigation Exclusion in the E&O Policy.

8. Fourth, coverage under the D&O Policies is barred by the Professional Services Exclusion, Contract Exclusion, and Prior Notice Exclusion in the D&O Policy.

9. Fifth, if it is adjudged that the acts complained of in the Underlying Actions do not qualify as Professional Services (and thus the Underlying Actions do not arise out of Wrongful Acts), then there is no coverage under the E&O Policies.

10. Finally, to the extent there is coverage for the Underlying Actions under the E&O Policy or the D&O Policy, the obligations of the Excess Insurers, if any, have not been triggered because the Underlying Limits of each respective Excess Policy has not been exhausted.

THE PARTIES

11. XL is an insurance company organized and existing under the laws of the State of Delaware with its principal place of business in Connecticut.

12. Argonaut is an insurance company organized and existing under the laws of the State of Illinois with its principal place of business in Illinois.

13. ACE is an insurance company organized and existing under the laws of the State of Pennsylvania with its principal place of business in Pennsylvania.

14. Starr is an insurance company organized and existing under the laws of the State of Texas with its principal place of business in New York.

15. AXIS is an insurance company organized and existing under the laws of the State of Illinois with its principal place of business in Georgia.

16. Stratford is an insurance company organized and existing under the laws of the State of New Hampshire with its principal place of business in New York.

17. Ironshore is an insurance company organized and existing under the laws of the State of Illinois with its principal place of business in Massachusetts.

18. PHL is an insurance company organized and existing under the laws of the State of Connecticut with its principal place of business in Connecticut.

JURISDICTION & VENUE

19. Plaintiffs have filed this action pursuant to, *inter alia*, *Conn. Gen. Stat. §52-29*, for the purpose of determining the parties' rights under the Policies.

20. The Court has jurisdiction over this action by virtue of, *inter alia*, *Conn. Gen. Stat. §52-29*.

21. The Court has jurisdiction over PHL as PHL is incorporated and has its principal place of business in Connecticut and, on information and belief, PHL has transacted and continues to transact business in Connecticut.

22. Under *Conn. Gen. Stat. § 51-345*, the Judicial District of Stamford/Norwalk is a proper venue for this action.

23. This lawsuit presents a ripe and justiciable controversy.

FACTS

The E&O Policies

24. The E&O Policy provides a \$5 million Limit of Liability subject to a \$1.25 million Retention. The E&O Policy, and each of the Excess E&O Policies, was issued to Nassau for the Policy Period of June 13, 2020 to June 13, 2021.

25. Argonaut issued excess E&O policy no. MLX4243598-1 to Nassau with a \$5 million limit of liability excess of \$5 million in underlying limits and, except as otherwise stated therein, follows form to the E&O Policy.

26. Starr issued excess E&O policy no. 10000621057201 to Nassau with a \$5 million limit of liability excess of \$10 million in underlying limits and, except as otherwise stated therein, follows form to the E&O Policy.

27. AXIS issued excess E&O policy no. P-001-00317020-01 with a \$5 million limit of liability excess of \$15 million in underlying limits and, except as otherwise stated therein, follows form to the E&O Policy.

28. Insuring Agreement I. of the E&O Policy states that “The Insurer will pay on behalf of the **Insured Loss** from **Claims** first made against the **Insured** during the **Policy Period** or, if applicable, the Extended Reporting Period, arising out of **Wrongful Acts**.”

29. Section II.(R)(1) of the E&O Policy defines Wrongful Acts, in relevant part, as “any actual or alleged act, error, omission, misstatement, misleading statement, or breach of fiduciary or other duty committed by an **Insured** in rendering, or in failing to render, **Professional Services**.”

30. Specifically, Section II.(M) of the E&O Policy defines Professional Services, in relevant part, as follows:

“Professional Services” means services performed by the **Insured** or by an **Outside Service Provider** on behalf of the **Insured** for a policyholder, customer or client of the **Insured**, including the selection and oversight of outside service providers that

provide services to the Insured's clients, which, alone or in combination with other services, are performed for monetary consideration pursuant to a policy of insurance or other **Express Contract or Agreement**.

31. Section II.(I) of the E&O Policy defines Loss, in relevant part, as follows:

"**Loss**" means damages, judgements, awards, settlements, and the **Defense Expenses** (including that portion of any settlement that represents plaintiffs' fees) which an **Insured** is legally obligated to pay as a result of a **Claim**. **Loss** includes punitive or exemplary damages when insurable under the law pursuant to which this Policy shall be construed and civil fines and penalties that an Insured Person is obligated to pay, provided that such civil fines and penalties are insurable by law and are imposed in connection with such Insured Person's service with respect to an entity included within the definition of Insurance Company that is financially insolvent.

Where the **Insurance Company** has determined in good faith that punitive or exemplary damages or civil fines and penalties are insurable under applicable law, the Insurer will not raise as a defense to coverage the insurability of such damages; provided, however, that in the event of a challenge to such a determination by any other person or entity, the Insurer shall be obligated to reimburse such damages only if a court of competent jurisdiction specifically determines that they are insurable. **Loss** shall not include (other than **Defense Expenses**):

- (1) fines, sanctions, taxes, penalties; provided that this paragraph shall not apply to civil fines or penalties that an Insured Person is obligated to pay, provided that such civil fines and penalties are insurable by law and are imposed in connection with such Insured Person's service with respect to an entity included within the definition of Insurance Company that is financially insolvent, or to any multiplied damage award which is in excess of the damages award so multiplied;
- (2) amounts which are uninsurable under the law pursuant to which this Policy shall be construed;
- (3) salaries, wages, fees, or other compensation, overhead, or benefit expenses of any **Insured**;
- (4) fees, commissions, compensation, or interest charged to or due from clients or customers of the **Insurance Company**;
- (5) the cost of complying with any settlement for, or award of, non-monetary relief;
or
- (6) any amount due under any contract or policy of insurance or reinsurance underwritten, issued, assumed, or subscribed to by the **Insurance Company**.

32. Section IV.A(4) of the E&O Policy provides:

All **Related Claims** will be treated as a single **Claim** made when the earliest of such **Related Claims** was first made or when the earliest of such **Related Claims** is treated as having been made in accordance with CONDITION (A)(2), whichever is earlier.

33. Section II.(P) of the E&O Policy defines Related Claims as all “Claims for Wrongful Acts based on, arising out of or resulting from the same or essentially the same series of facts, circumstances, situations, transactions, or events.”

34. Endorsement No. 1 of the E&O Policy, the Prior or Pending Litigation Exclusion, provides the following:

No coverage will be available under this Policy for Loss, including Defense Expenses, resulting from Claims based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any prior and/or pending litigation or proceeding or arbitration which incepted and/or was brought on or before:

June 13, 2018

or any fact, circumstance, situation, transaction or event underlying or alleged in any such litigation, order, judgment or decree.

35. Section III.(B) of the E&O Policy, the Prior Claim and Notice Exclusion, provides that Coverage under this Policy does not apply to that portion of Loss in any Claim:

(B) based on, arising out of or resulting from:

- (1) the same or essentially the same **Wrongful Act**, or matter, fact, circumstance, transaction, or event which has been the subject of, or which is logically or casually connected to, any **Claim** made or notice given and accepted under any policy of insurance prior to the Inception Date set forth in ITEM 2 (a) of the Declarations; or
- (2) any civil, criminal, administrative, or arbitration proceeding as to which any **Insured** has received written notice prior to the Inception Date set forth in ITEM 2 (a) of the Declarations or any matter, fact, circumstance, transaction, or event underlying or alleged in such proceeding [.]

36. The Inception Date set forth in Item 2(a) of the E&O Policy Declarations is June 13, 2020.

The D&O Policies

37. The D&O Policy provides a \$10 million Maximum Aggregate Limit of Liability subject to a \$750,000 Retention. The D&O Policy, and each of the Excess D&O Policies, was issued to Nassau for the Policy Period of June 13, 2020 to June 13, 2021.

38. Argonaut issued excess D&O policy no. MLX4243957-1 to Nassau with a \$5 million limit of liability excess of \$10 million in underlying limits and, except as otherwise stated therein, follows form to the D&O Policy.

39. ACE issued the excess D&O policy no. G46776537 002 to Nassau with a \$5 million limit of liability excess of \$15 million in underlying limits and, except as otherwise stated therein, follows form to the D&O Policy. ACE did not issue an excess E&O policy.

40. Starr issued excess D&O policy no. 1000621056201 to Nassau with a \$10 million limit of liability excess of \$20 million in underlying limits and, except as otherwise stated therein, follows form to the D&O Policy.

41. Lastly, Nassau purchased a \$20 million “quota share” excess of \$30 million in underlying limits consisting of three separate policies: (i) AXIS issued excess D&O policy no. P-001-00317018-01 with a \$10 million limit of liability as part of a \$20 million quota share limit; (ii) Ironshore issued excess D&O policy no. D06NAB0WKQ001 with a \$5 million limit of liability as part of a \$20 million quota share limit; and (iii) Stratford issued excess D&O policy no. FIP0000501 with a \$5 million limit of liability as part of a \$20 million quota share limit. These policies, except as otherwise stated therein, follow form to the D&O Policy. Ironshore and Stratford did not issue an excess E&O policy.

42. The Excess Policies each provide, *inter alia*, that liability for any covered Loss shall attach to the insurer only after the full amount of the underlying limit(s) and the full amount of the retention shall have been paid.

43. As amended by Endorsement No. 6, the first paragraph of the D&O Policy Declarations states, in pertinent part, as follows:

EXCEPT AS OTHERWISE PROVIDED HEREIN, THIS POLICY ONLY APPLIES TO CLAIMS FIRST MADE OR INCIDENTS REPORTED DURING THE POLICY PERIOD, THE AUTOMATIC EXTENSION PERIOD OR, IF APPLICABLE THE OPTIONAL EXTENSION PERIOD.

44. Insuring Agreement I(B) of the D&O Policy provides the following:

B. The Insurer shall pay on behalf of the Company Loss:

1. which the Company is required or is permitted to pay as indemnification to the Insured Persons resulting from a Claim first made against the Insured Persons; or
2. resulting from a Claim first made against the Company;

during the Policy Period, or, if applicable, the Optional Extension Period, for a Wrongful Act.

45. Section II.J. of the D&O Policy's General Terms and Conditions (the "GTC")

defines Loss, in pertinent part, as follows:

"Loss" means damages, judgments, settlements or other amounts (including pre- & post-judgment interest, punitive or exemplary damages, or the multiplied portion of any damage award, where insurable by law), that portion of any settlement which represents the plaintiff's attorneys' fees and Compliance Costs, if applicable, in excess of the Retention that the Insured is obligated to pay, including Defense Expenses, whether incurred by the Insurer or the Insured. Loss (other than Defense Expenses) will exclude:

1. amounts which are uninsurable under the law pursuant to which this Policy is construed; and

46. Section III.D. of the GTC provides:

All Claims and all Compliance Requests arising from Interrelated Wrongful Acts shall be deemed to constitute a single Claim or Compliance Request and shall be deemed to have been made at the earliest time at which the earliest Claim or Compliance Request is made or deemed to have been made pursuant to GENERAL CONDITIONS C. 1. a. or, if applicable, GENERAL CONDITIONS C. 1. b.

47. Section II.I. of the D&O Policy's GTC defines Interrelated Wrongful Acts as "Wrongful Acts which are based on, arising out of or attributable to any of the same or essentially the same series of related facts, circumstances, situations, transactions or events."

48. Section III.H. of the D&O Policy, the Professional Services Exclusion, provides that "[t]he Insurer shall not be liable to make any payment for that portion of Loss, and shall have no duty to defend or pay Defense Expenses, in connection with any Claim made against an Insured":

for any rendering or failure to render Professional Services, as defined in Insurance Company Professional Liability Policy No. ELU156008-18 issued to Nassau Holdings, LP by XL Specialty Insurance Policy or any renewal policy thereof; provided however, this Exclusion H. is not intended, nor shall it be construed to apply to a Claim brought by a security holder of the Company and brought and maintained independently of and without the solicitation, assistance, participation or intervention of, an Insured[.]

49. Section III.B. of the D&O Policy, the Prior Notice Exclusion, provides that "[t]he Insurer shall not be liable to make any payment for that portion of Loss, and shall have no duty to defend or pay Defense Expenses, in connection with any Claim made against an Insured":

based upon, arising out of or resulting from the same or essentially the same fact, circumstance, situation, transaction, event or Wrongful Act which, before the Inception Date of this Policy, was the subject of any notice given and accepted under any other management liability insurance policy, directors and officers liability insurance policy or any similar insurance policy[.]

50. Section III.G. of the D&O Policy, the Contract Exclusion, provides that "[t]he Insurer shall not be liable to make any payment for that portion of Loss, and shall have no duty to defend or pay Defense Expenses, in connection with any Claim made against an Insured":

based on or arising out of breach of any express contract or agreement, provided, however, this EXCLUSION G shall not apply to (i) any Claims brought by a security holder; or (ii) to the extent that liability would attach for non-contractual claims. With respect to this EXCLUSION G., an "express contract or agreement" is defined as an actual agreement of the parties, the terms of which are openly set forth or declared at the time of making in clear or distinct language. This EXCLUSION G. will apply only to the coverage available to the Company under INSURING AGREEMENT B. 2.

The 2017 COI Actions

51. On or about April 19, 2018, plaintiffs Advance Trust & Life Escrow Services, LTA (“Advance Trust”) and James Kenney filed a class action complaint against PHL (the “Advance Trust Action”) in the U.S. District Court for the Southern District of New York. On or about November 20, 2018, Advance Trust and Kenney filed the operative amended class action against PHL in the Advance Trust Action.

52. The Advance Trust Action details PHL’s past COI Increases and the prior proceedings arising from those increases that accused PHL of an ongoing scheme by which PHL would recoup losses sustained in prior years by levying COI Increases in later years.

53. More particularly, the Advance Trust Action alleged that PHL’s implementation of a COI Increase in 2017 (the “2017 COI Increase”) violated the terms of certain life insurance policies because the increase *inter alia*: (i) discriminated unfairly within a class of insureds since PHL applied progressive increases to costs of insurance rates beginning when an insured reaches age 71 through age 85; (ii) discriminated within a class of insureds based on whether they were part of a prior settlement class relating to the COI Increases applied by PHL in 2010 and 2011 (the “2010-11 COI Increase”) and the terms of various side-agreements with PHL; (iii) was not based on the contractual, enumerated factors, including mortality; and (iv) was designed to increase profits, recoup past losses, and earn a return on PHL private equity backer, Nassau Reinsurance Group, L.P.’s (“Nassau Re”) investment.

54. Similarly, on or about February 13, 2018, plaintiffs Derek Fan and Robert Putz filed a class action complaint against PHL and Nassau Re in the U.S. District Court for the Southern District of New York and alleged that the 2017 COI Increase was unlawful and in breach of certain life insurance policies (the “Fan Action”).

55. Next, on or about August 2, 2021, plaintiffs Conestoga Trust and its trustee, Conestoga Trust Services, LLC (“Conestoga Trust Services” and, collectively, the “Conestoga Plaintiffs”) filed a complaint against PHL in the Connecticut Superior Court, Hartford Judicial District (the “Conestoga I Action” and together with the Advance Trust Action and Fan Action, the “2017 COI Actions”). The Conestoga I Action alleges that the 2017 COI Increase was unlawful and in breach of life insurance policies purchased by Conestoga (the “Conestoga Policies”).

56. The Fan Action and the Conestoga I Action set forth substantially similar allegations and seek similar relief as the Advance Trust Action and the Underlying Actions.

The Underlying Actions

57. The Underlying Actions arise from PHL’s 2021 determination and implementation of yet another COI increase (the “2021 COI Increase”) across product lines of UL insurance policies. Upon information and belief, the life insurance policies subject to the 2021 COI Increase at issue in the Underlying Actions are the same type of life insurance policies subject to the 2017 COI Increase at issue in the 2017 COI Actions.

1. The Kenney Action

58. On or about April 15, 2022, James Kenney, one of the named plaintiffs in the Advance Trust Action, filed a class action complaint in the Kenney Action on behalf of the “Phoenix 2021 COI Increase Class”.

59. The Kenney Action alleges that the 2021 COI Increase is the latest in a series of unlawful COI increases, including the 2010-11 and 2017 COI Increases, intended to recoup past losses and increase profits.

60. The Kenney Action alleges that the 2021 COI Increase, like the increases before it, was designed with the discriminatory intent of inducing lapses on life insurance policies sold to elderly policyholders. PHL allegedly manufactured a “perverse scheme” to collect premiums and fees from younger insureds, while inducing lapses in life insurance policies sold to elderly insureds by unlawful COI increases in order to avoid making payments under those policies. The Kenney Action alleges that PHL will do anything – including a fourth unlawful COI Increase in a decade – to accomplish the foregoing goal.

61. The Kenney Action alleges that the 2021 COI Increase violates the terms of the impacted life insurance policies because the increase *inter alia*: (i) was not imposed on a uniform basis because PHL reached side deals with several policyholders exempting them from any future COI increase, (ii) targets the elderly by imposing varying COI increases on insureds aged 70 and above; (ii) unlawfully seeks to recoup past losses motivated by profit objectives, including to meet the profit-driven strategy of Nassau Re; (iii) is improperly based on a reduction of the corporate tax rate; and (iv) is not supported by changes in expectations in enumerated factors, such as mortality, that would justify a COI Increase.

62. The Kenney Action alleges causes of action for breach of contract and declaratory relief and seeks compensatory damages, consequential damages, punitive damages, restitution, disgorgement, reinstatement of any lapsed or surrendered policies, injunctive and declaratory relief, specific performance, pre- and post-judgment interest, and costs.

2. The Conestoga II Action

63. The Conestoga II Action was commenced on or about June 29, 2022 in the Connecticut Superior Court, Hartford Judicial District by the Conestoga Plaintiffs in connection with the Conestoga Policies, which were subject to the 2021 COI Increase.

64. The Conestoga II Action refers to the 2017 COI Increase as the “First 2021 COI Increase” because, while announced in 2017, it was imposed on the Conestoga Policies in 2021. The 2021 COI Increase is referred to as the “Second 2021 COI Increase” and plaintiffs allege: “The Second 2021 COI Increase is a result of PHL, which no longer sells universal life insurance policies, deciding to increase profits the only way it knows how – by shifting further financial burdens onto policyholders, attempting to recoup past losses with yet another new unlawful cost of insurance increase.”

65. The Conestoga II Action alleges the 2021 COI Increase is unlawful and in breach of the Conestoga Policies. In this regard, the Conestoga II Action sets forth substantially similar allegations as the Kenney Action and the 2017 COI Actions.

66. The Conestoga II Action asserts causes of action for violation of the Connecticut Unfair Trade Practices Act, breach of contract, and declaratory relief and seeks monetary damages, restitution, disgorgement, punitive damages, pre- and post-judgment interest, injunctive and declaratory relief, specific performance, and costs.

67. By order dated July 15, 2022, the Connecticut Superior Court consolidated the Conestoga I and Conestoga II Actions based upon, among other things, the assertion of the Conestoga Plaintiffs that “[e]ach of the consolidated actions [Conestoga I and Conestoga II] arise from the same set of facts and circumstances, involves the same parties and the same questions of fact and law.” PHL did not oppose the Conestoga Plaintiffs’ motion for consolidation.

CONTROVERSY AND RIPENESS

68. In 2021, but prior to June 13, 2021 and prior to the Underlying Actions being filed, PHL provided a “Notice of Circumstances” to XL under the E&O Policy and D&O Policy. After the Underlying Actions were subsequently filed in 2022, PHL has sought coverage under the E&O Policy and D&O Policy based on the Notice of Circumstances.

69. XL has advised PHL that the E&O and D&O Policies do not afford coverage for the Underlying Actions and it reserved all rights under the E&O and D&O Policies and at law.

70. The Excess Insurers deny that coverage is available under the Excess Policies for the Underlying Actions and otherwise reserve all rights.

71. PHL disputes Plaintiffs' positions and seeks defense and indemnity coverage for the Underlying Actions under the Policies. Accordingly, a controversy exists that is ripe for adjudication.

COUNT I

CLAIM BY XL AND THE E&O EXCESS INSURERS FOR DECLARATORY RELIEF

(Declaratory Judgment that the Underlying Actions Do Not Constitute a Claim First Made During the Policy Period of the E&O Policies)

72. XL and the E&O Excess Insurers incorporate by reference each of the allegations of Paragraphs 1 through 71 of this Complaint as if fully set forth at length herein.

73. Coverage under the E&O Policies is only available for Claims that were first made during the June 13, 2020 to June 13, 2021 Policy Period.

74. The 2017 COI Actions constitute Claims first made prior to the Policy Period.

75. The Underlying Actions and 2017 COI Actions constitute Related Claims under the E&O Policies because they are "Claims for Wrongful Acts based on, arising out of or resulting from the same or essentially the same series of facts, circumstances, situations, transactions, or events."

76. Pursuant to Section IV.A(4) of the E&O Policy, the Underlying Actions and 2017 COI Actions are deemed a single Claim first made prior to the Policy Period of the E&O Policies. Accordingly, there is no coverage available for the Underlying Actions under the E&O Policies.

77. XL and the E&O Excess Insurers therefore ask the Court for a judicial declaration that the Underlying Actions are not subject to coverage under the E&O Policies because the Underlying Actions do not constitute a Claim first made during the Policy Period of the E&O Policies.

COUNT II

CLAIM BY XL AND THE D&O EXCESS INSURERS FOR DECLARATORY RELIEF (Declaratory Judgment that the Underlying Actions Do Not Constitute a Claim First Made During the Policy Period of the D&O Policies)

78. XL and the D&O Excess Insurers incorporate by reference each of the allegations of Paragraphs 1 through 77 of this Complaint as if fully set forth at length herein.

79. Coverage under the D&O Policies is only available for Claims first made during the June 13, 2020 to June 13, 2021 Policy Period.

80. The 2017 COI Actions constitute Claims that were first made prior to the Policy Period.

81. The Underlying Actions and 2017 COI Actions alleged Interrelated Wrongful Acts as they allege “Wrongful Acts which are based on, arising out of or attributable to any of the same or essentially the same series of related facts, circumstances, situations, transactions or events.”

82. Pursuant to Section III.D. of the D&O Policy’s GTC, the Underlying Actions and 2017 COI Actions constitute a single Claim first made prior to the Policy Period of the D&O Policies.

83. Accordingly, there is no coverage available for the Underlying Actions under the D&O Policies.

84. XL and the D&O Excess Insurers therefore ask the Court for a judicial declaration that the Underlying Actions are not subject to coverage under the D&O Policies because the Underlying Actions do not constitute a Claim first made during the Policy Period of the D&O Policies.

COUNT III

CLAIM BY XL AND THE E&O EXCESS INSURERS FOR DECLARATORY RELIEF

(Declaratory Judgment that the Underlying Actions are Barred From Coverage By the E&O Policy's Prior Claim and Notice Exclusion)

85. XL and the E&O Excess Insurers incorporate by reference each of the allegations of Paragraphs 1 through 84 of this Complaint as if fully set forth at length herein.

86. The 2017 COI Actions constitute a Claim first made prior to the June 13, 2020 Inception Date of the E&O Policy.

87. Upon information and belief, PHL provided notice of the 2017 COI Actions under other policies of insurance prior to the Inception Date of the E&O Policy, which was accepted.

88. Upon information and belief, PHL received written notice of the 2017 COI Actions prior to the Inception Date of the E&O Policy.

89. The Underlying Actions are based on, arise out of or result from the same Wrongful Act, matter, fact, circumstance, transaction, or event and/or are logically or casually connected to the 2017 COI Actions.

90. Accordingly, the Prior Claim and Notice Exclusion (Section III.(B)) of the E&O Policy operates to bar coverage for the Underlying Actions.

91. XL and the E&O Excess Insurers therefore ask the Court for a judicial declaration that the Underlying Actions are barred from coverage under the E&O Policies pursuant to the Prior Claim and Notice Exclusion.

92.

COUNT IV

CLAIM BY XL AND THE E&O EXCESS INSURERS FOR DECLARATORY RELIEF

(Declaratory Judgment that the Underlying Actions are Barred From Coverage by the E&O Policy's Prior or Pending Litigation Exclusion)

93. XL and the E&O Excess Insurers incorporate by reference each of the allegations of Paragraphs 1 through 91 of this Complaint as if fully set forth at length herein.

94. The 2017 COI Actions were brought on or before June 13, 2018.

95. The Underlying Actions are based on, arise out of, directly or indirectly result from, are in consequence of, or in any way involve the 2017 COI Actions.

96. Moreover, the Underlying Actions are based on, arise out of, directly or indirectly result from, are in consequence of, or in any way involve any fact, circumstance, situation, transaction or event underlying or alleged in the 2017 COI Actions.

97. Accordingly, the Prior or Pending Litigation Exclusion operates to bar coverage for the Underlying Actions.

98. XL and the E&O Excess Insurers therefore ask the Court for a judicial declaration that the Underlying Actions are barred from coverage under the E&O Policies pursuant to the Prior or Pending Litigation Exclusion.

COUNT V

CLAIM BY XL AND THE D&O EXCESS INSURERS FOR DECLARATORY RELIEF

(Declaratory Judgment that the Underlying Actions are Barred from Coverage by the D&O Policy's Prior Notice Exclusion)

99. XL and the D&O Excess Insurers incorporate by reference each of the allegations of Paragraphs 1 through 97 of this Complaint as if fully set forth at length herein.

100. As set forth herein, the Underlying Actions are based upon, arise out of or result from the same or essentially the same fact, circumstance, situation, transaction, event or Wrongful Act alleged in the 2017 COI Actions.

101. Upon information and belief, before the Inception Date of the D&O Policy, PHL provided notice of the 2017 COI Actions and notice was accepted under other management liability insurance policies, directors and officers liability insurance policies or any similar insurance policy.

102. Accordingly, the Underlying Actions are barred from coverage pursuant to the Prior Notice Exclusion of the D&O Policy.

103. XL and the D&O Excess Insurers therefore ask the Court for a judicial declaration that the Underlying Actions are barred from coverage under the D&O Policies pursuant to the Prior Notice Exclusion.

COUNT VI

CLAIM BY XL AND THE D&O EXCESS INSURERS FOR DECLARATORY RELIEF

(Declaratory Judgment that the Underlying Actions are Barred from Coverage by the D&O Policy's Professional Services Exclusion)

104. XL and the D&O Excess Insurers incorporate by reference each of the allegations of Paragraphs 1 through 102 of this Complaint as if fully set forth at length herein.

105. PHL's determination and implementation of the 2021 COI Increase qualifies as Professional Services as defined by Section II.(M) of the E&O Policy.

106. Accordingly, the Underlying Actions constitute a Claim for any rendering or failure to render Professional Services and are therefore barred from coverage by the Professional Services Exclusion (Section III.H) of the D&O Policy.

107. XL and the D&O Excess Insurers therefore ask the Court for a judicial declaration that the Underlying Actions are barred from coverage under the D&O Policies pursuant to the Professional Services Exclusion.

COUNT VII

CLAIM BY XL AND THE D&O EXCESS INSURERS FOR DECLARATORY RELIEF (Declaratory Judgment that the Underlying Actions are Barred from Coverage by the D&O Policy's Contract Exclusion)

108. XL and the D&O Excess Insurers incorporate by reference each of the allegations of Paragraphs 1 through 106 of this Complaint as if fully set forth at length herein.

109. The Underlying Actions allege that PHL materially breached the subject life insurance policies.

110. The Underlying Actions assert causes of action for breach of contract. Plaintiffs in the Underlying Actions allege that, as a direct and proximate cause of PHL's material breaches of the subject policies, the plaintiffs have suffered and continue to suffer damages.

111. The Underlying Actions constitute a Claim that is "based on or arising out of breach of any express contract or agreement" and are therefore barred from coverage pursuant to the D&O Policy's Contract Exclusion (Section III.G.).

112. XL and the D&O Excess Insurers therefore ask the Court for a judicial declaration that the Underlying Actions are barred from coverage under the D&O Policies pursuant to the Contract Exclusion.

COUNT VIII

CLAIM BY XL AND THE E&O EXCESS INSURERS FOR DECLARATORY RELIEF

(Declaratory Judgment in the Alternative to Count VI That There is No Coverage Under the E&O Policies for the Underlying Actions Because the Underlying Actions Do Not Arise Out of Wrongful Acts)

113. XL and the E&O Excess Insurers incorporate by reference each of the allegations in Paragraphs 1 through 111 of this Complaint as if fully set forth at length herein.

114. In the alternative to Count VI, if it is determined that PHL's determination and implementation of the 2021 COI Increase do not qualify as Professional Services as defined by Section II.(M) of the E&O Policy, then there is no coverage under the E&O Policies for the Underlying Actions because the Underlying Actions do not arise out of Wrongful Acts.

115. Accordingly, if it is determined that PHL's determination and implementation of the 2021 COI Increase do not qualify as Professional Services as defined by Section II.(M) of the E&O Policy, XL and the E&O Excess Insurers ask the Court for a judicial declaration there is no coverage under the E&O Policies for the Underlying Actions because the Underlying Actions do not arise out of Wrongful Acts.

COUNT IX

CLAIM BY PLAINTIFFS FOR DECLARATORY RELIEF

(Declaratory Judgment that the Underlying Actions are Barred from Coverage as the Recovery Sought in the Underlying Actions is not Loss and/or is not Insurable as it is Restitutionary in Nature)

116. Plaintiffs incorporate by reference each of the allegations of Paragraphs 1 through 114 of this Complaint as if fully set forth at length herein.

117. Coverage under Insuring Agreement B of the D&O Policy is only available for "Loss."

118. Pursuant to Section II.J. of the GTC of the D&O Policy, the term “Loss” (other than Defense Expenses) does not include amounts which are uninsurable under the law pursuant to which the D&O Policy is construed.

119. Coverage under the Insuring Agreement of the E&O Policy is only available for “Loss.”

120. Pursuant to Section II.(I) of the E&O Policy, the term “Loss” (other than Defense Expenses) does not include amounts which are uninsurable under the law pursuant to which the E&O Policy shall be construed.

121. As summarized above, the Underlying Actions allege, *inter alia*, that the 2021 COI Increase is a continuation and part of an unlawful profit-driven strategy undertaken by PHL to recoup past losses and was improperly motivated by profit objectives. Additionally, the Underlying Actions both seek restitution and disgorgement.

122. Under the law pursuant to which the D&O Policy and E&O Policy are to be construed, insurance coverage for restitution of ill-gotten gains and/or disgorgement is precluded.

123. Accordingly, there is no coverage available for the Underlying Actions under the Policies.

124. Plaintiffs therefore ask the Court for a judicial declaration that the Underlying Actions are barred from coverage under the Policies based on the lack of Loss and/or the uninsurability of the amounts sought in the Underlying Actions.

COUNT X

CLAIM BY THE EXCESS INSURERS FOR DECLARATORY RELIEF

(Declaratory Judgment That no Coverage is Presently Afforded Under the Excess Policies for the Underlying Actions Due to Lack of Underlying Exhaustion)

125. The Excess Insurers incorporate by reference each of the allegations of Paragraphs 1 through 123 of this Complaint as if fully set forth at length herein.

126. The Excess Policies each provide, *inter alia*, that liability for any covered Loss shall attach to the insurer only after the full amount of the underlying limit(s) and the full amount of the retention shall have been paid.

127. The full amount of the limit(s) of liability underlying each of the Excess Policies have, to date, not been paid.

128. The Excess Insurers therefore ask the Court for a judicial declaration that no coverage is presently afforded under the Excess Policies for the Underlying Actions based on the lack of exhaustion of underlying policy limits.

WHEREFORE, Plaintiffs request that this Court adjudicate and determine the respective rights and duties of the parties as to insurance coverage and declare:

(1) As to Count I, a judicial declaration that the Underlying Actions are not subject to coverage because the Underlying Actions do not constitute a Claim first made during the Policy Period of the E&O Policies;

(2) As to Count II, a judicial declaration that the Underlying Actions are not subject to coverage because the Underlying Actions do not constitute a Claim first made during the Policy Period of the D&O Policies;

(3) As to Count III, a judicial declaration that that there is no coverage for the Underlying Actions under the E&O Policies because the Prior Claim and Notice Exclusion in the E&O Policy bars coverage for the Underlying Actions;

(4) As to Count IV, a judicial declaration that there is no coverage for the Underlying Actions under the E&O Policies because the Prior or Pending Litigation Exclusion in the E&O Policy bars coverage for the Underlying Actions;

(5) As to Count V, a judicial declaration that there is no coverage for the Underlying Actions under the D&O Policies because the Prior Notice Exclusion in the D&O Policy bars coverage for the Underlying Actions;

(6) As to Count VI, a judicial declaration that there is no coverage for the Underlying Actions under the D&O Policies because the Professional Services Exclusion of the D&O Policy bars coverage for the Underlying Actions;

(7) As to Count VII, a judicial declaration that there is no coverage for the Underlying Actions under the D&O Policies because the Contract Exclusion of the D&O Policy bars coverage for the Underlying Actions;

(8) As to Count VIII, in the event that it is determined that PHL's determination and implementation of the 2021 COI Increase do not qualify as Professional Services as defined by Section II.(M) of the E&O Policy, a judicial declaration there is no coverage for the Underlying Actions under the E&O Policies because the Underlying Actions do not arise out of Wrongful Acts;

(9) As to Count IX, a judicial declaration that no coverage is afforded for the Underlying Actions under the Policies based on the lack of Loss and/or the uninsurability of the amounts sought in the Underlying Actions;

(10) As to Count X, a judicial declaration that no coverage is presently afforded under the Excess Policies for the Underlying Actions based on the lack of exhaustion of underlying policy limits; and

(11) Such other and further relief as the Court may deem just and proper.

Dated: January 5, 2024

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RETURN DATE: FEBRUARY 6, 2024 : SUPERIOR COURT
XL SPECIALTY INSURANCE COMPANY, : JUDICIAL DISTRICT OF
ARGONAUT INSURANCE COMPANY, : STAMFORD/NORWALK
ACE AMERICAN INSURANCE COMPANY,
STARR INDEMNITY & LIABILITY
COMPANY, AXIS INSURANCE COMPANY,
STRATFORD INSURANCE COMPANY,
IRONSHORE INDEMNITY, INC.

Plaintiffs,

v. : AT STAMFORD
PHL VARIABLE INSURANCE COMPANY : JANUARY 5, 2024

Defendant.

STATEMENT OF AMOUNT IN CONTROVERSY

Plaintiffs state that the sole relief sought by Plaintiffs is the equitable relief of a declaratory judgment.

Dated: January 5, 2023

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Defendant.

CERTIFICATION

Plaintiffs certify, pursuant to *Connecticut Practice Book* §17-56(b), that all persons interested in the subject matter of the attached Complaint have either been joined as parties or have been given reasonable notice hereof.

The nonparties given notice by certified mail and the nature of their interest are as follows:

None.

Dated: January 5, 2024

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