UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2494

September Term, 2014

CRISTAL USA INC.,

v.

XL SPECIALTY INSURANCE COMPANY

Leahy,
Friedman,
*Hotten, Michelle D.

JJ.

Opinion by Leahy, J.

Filed: February 24, 2017

*Michelle D. Hotten, J., participated in the hearing of this case while still an active member of this Court but did not participate in either the preparation or adoption of this opinion.

On May 15, 2007, Millennium Inorganic Chemicals ("Millennium"), a producer of titanium dioxide, was acquired by the National Titanium Dioxide Co. Ltd ("Cristal Arabia"), a Saudi Arabian company. Before completing the acquisition, Cristal Arabia formed Cristal Inorganic Chemicals, Ltd. ("CIC Ltd.") and Cristal Inorganic Chemical, US Inc. ("CIC US"). Millennium was renamed Cristal USA, Inc. ("Appellant") on September 27, 2012 and made a subsidiary of CIC US, which itself was a subsidiary of CIC Ltd.

Five years later, on May 16, 2007, Zurich American Insurance Company ("Zurich") issued a Private Company Directors, Officers and Employees Liability Policy ("Primary Policy"), to CIC US that was later renewed to cover the period from May 16, 2009, through May 16, 2010. CIC US, Appellant's direct parent company, was the Named Insured on the claims-made Primary Policy. The policy covered losses up to $10,000,000.00 resulting from claims first made against the Insured during the policy period for Wrongful Acts that took place before or during the policy period.

CIC Ltd. also purchased an excess policy ("XL Policy") from XL Specialty Insurance Company ("XL") in 2008 and renewed the same policy for coverage from May 16, 2009 to May 16, 2010. The XL Policy provided $5,000,000.00 of additional coverage to CIC Ltd., including its subsidiaries (such as CIC US and Appellant), for claims made during the policy period, after the underlying Primary Policy was exhausted. The XL Policy was a follow-form policy, which "appl[ied] in conformance with the terms, conditions, endorsements and warranties of the Primary Policy. . . ."

In 2010, direct purchasers of titanium dioxide filed a class action suit against the Appellant and other manufacturers in *Haley Paint Co. v. E.I. Dupont De Nemours and Co., et al.* (the "*Haley* Action"). Indirect purchasers of titanium dioxide filed a similar class action, *Los Gatos Mercantile, Inc., et al. v. E.I. Dupont De Nemours et al.* (the "*Los Gatos* Action"), in March 2013. Both actions (collectively, the "Class Actions") alleged that Appellant conspired with other manufacturers, beginning as early as March 2002, to artificially raise the price of titanium dioxide, in violation of antitrust law.

Appellant sought coverage for both actions under its policies with Zurich and XL. After initially denying coverage, Zurich changed its position and provided the full $10,000,000.00 of coverage in the *Haley* Action. After exhausting its coverage under the Zurich Policy, Appellant sought additional coverage under the XL excess policy. However, XL denied Appellant coverage, citing a Prior Acts Exclusion Clause contained in the Zurich Policy, which, it argued, barred coverage for Wrongful Acts or Interrelated Wrongful Acts of Appellant that occurred prior to May 15, 2007.

Appellant filed a complaint in the Circuit Court for Baltimore County, claiming that XL breached its contract with Appellant by not providing coverage for Appellant's defense of the Class Actions and asserting that the Prior Acts Exclusion did not bar coverage for the claims asserted in the Class Actions. The circuit court granted summary judgment for XL, finding that the Prior Acts Exclusion applied to the actions alleged in the Class Actions, and, therefore, excused XL from providing coverage to Appellant under the excess policy. Appellant filed a timely appeal.

Appellant presents ten questions, which we have consolidated, reworded, and reordered for clarity:

I. Whether the lower court erred in applying Maryland rules of insurance contract construction in its interpretation of the Prior Acts Exclusion by failing to give plain meaning to words in the exclusion, by adopting an interpretation of the Prior Acts Exclusion that is inconsistent with extrinsic evidence that coverage was intended in this case, and by not considering the reasonable expectations of the Insured that a follow-form insurer will follow the primary insurer's interpretation of the policy?

II. Whether the lower court erred in failing to correctly apply Maryland's "potentiality" rule regarding an insurer's defense obligation by ignoring the specific allegations in the underlying complaints that are potentially within the scope of coverage and improperly relying on the "gravamen" of the *Haley* and *Los Gatos* complaints?

III. Whether the lower court failed to properly construe the Allocation Clause and erred in concluding that the Allocation Clause was inapplicable and not in conflict with the Prior Acts Exclusion?

IV. Whether the lower court erred in failing to address whether XL is estopped by its conduct from taking the position that the Prior Acts Exclusion bars coverage?[1]

[1] Appellant's questions, as originally presented, were as follows:

1. "Whether the lower court erred in applying Maryland rules of insurance contract construction in its interpretation of the Prior Acts exclusion by failing to give meaning to the term 'Any Insured'?"

2. "Whether the lower court erred in applying Maryland rules of insurance contract construction in its interpretation of the Prior Acts exclusion by disregarding the plain meaning of the word 'for'?"

3. "Whether the lower court erred in applying Maryland rules of insurance contract construction in its interpretation of the Prior Acts exclusion by disregarding the plain meaning of the word 'and'?"

4. "Whether the lower court erred in applying Maryland rules of insurance contract construction in its interpretation of the Prior Acts exclusion by failing to give effect to the definition of 'Subsidiary'?"

We agree with the circuit court's determination that the insurance contract's Prior Acts Exclusion can only be interpreted reasonably to exclude acts before May 15, 2007 by CIC US and Appellant. We also hold that the circuit court correctly concluded that a follow form insurer is not bound by the coverage determination of the primary policy insurance. Furthermore, we hold that the Interrelated Wrongful Acts language in the insurance

5. "Whether the lower court erred in applying Maryland rules of insurance contract construction by interpreting the Prior Acts exclusion so as to violate the reasonable expectations of the Insured that a follow-form insurer will follow the primary insurer's interpretation of the policy?"

6. "Whether the lower court erred in applying Maryland rules of insurance contract construction in interpreting the Prior Acts exclusion by adopting an interpretation that is inconsistent with other evidence that coverage was intended in this case, including the drafter's interpretation of the exclusion, and the fact the primary insurer paid its $10 million in limits to defend Cristal?"

7. "Whether the lower court erred in failing to correctly apply Maryland's 'potentiality' rule regarding an insurer's defense obligation by ignoring the specific allegations in the underlying complaints that are potentially within the scope of coverage?"

8. "Whether the lower court erred in applying the rejected 'gravamen' test to determine XL's duty to defend the underlying complaints?"

9. "Whether the lower court failed to properly construe the Allocation clause, and erred in concluding that the Allocation Clause was inapplicable and not in conflict with the Prior Acts exclusion?"

10. "Whether the lower court erred in failing to address whether XL is estopped by its conduct from taking the position that the Prior Acts exclusion bars coverage, where XL waited nearly three years after notice to deny coverage based on the Prior Acts exclusion when it knew Zurich was defending despite the exclusion, and it led Cristal to believe to Cristal's detriment that XL would take the same position as Zurich?"

contract precludes coverage for an entire action where all of the actions are related to the same conspiracy claim. Finally, Appellant's equitable estoppel argument fails as a matter of law. We affirm the judgments of the circuit court.

BACKGROUND

Corporate Structure and History

Millennium, a producer of titanium dioxide,[2] was originally founded as ABC Chemicals Inc., in 1985. In 2004, Lyondell Chemical Company ("Lyondell") acquired

[2] The complaint filed in the *Haley Paint Company, et al. v. E.I. Dupont De Nemours and Company, et al*, Case No. 10-cv-00318-RDB, action describes titanium dioxide as

> a dry chemical powder that is primarily used as a white pigment. It is by far the world's most widely used pigment for providing whiteness, brightness, and opacity (it hides or masks other colors) to many products, particularly paints and other coatings. Consumed in more than 170 countries, it is one of the most important inorganic chemicals used in the production of goods. Given its ubiquity in global industries, Titanium Dioxide has been called a "quality of life" or "life-style" product, in that consumption rates tend to correlate with standards of living.
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> * * *
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> The vast majority (over 90%) of Titanium Dioxide is consumed by customers in the coatings, plastics, and paper industries. Titanium Dioxide is also used in synthetic fiber production and to make inks, pharmaceuticals (*e.g.*, tablet coatings), toothpaste, sunscreen, cosmetics (*e.g.*, rouge, eyeshadow), food (*e.g.*, candies, icings, salad dressings, cheese, confections, pet food), rubber, ceramic, and other products. It is also nonflammable and nontoxic and has replaced lead compounds in residential paints.
>
> * * *
>
> Given Titanium Dioxide's value and the lack of competitive substitutes for it, demand for Titanium Dioxide tends to be inelastic, in that loss in volume arising from a price increase tends to be small relative to the magnitude of

Millennium. In February 2007, Lyondell announced it would sell Millennium to Cristal Arabia. On April 24, 2007, before completing the acquisition, Cristal Arabia formed three subsidiary companies: CIC Ltd., which owns Cristal Inorganic Chemicals UK, Ltd., which in turn owns CIC US.

On May 15, 2007, Cristal Arabia acquired Millennium. Millennium was renamed Cristal USA, Inc., on September 27, 2012. Therefore, Appellant, Cristal USA, Inc., is a subsidiary of parent company CIC US, which is owned by Cristal Inorganic Chemicals UK Limited, a subsidiary of CIC Ltd., which is owned by Cristal Arabia.

Liability Insurance Policies—Primary and Excess

Zurich issued a Private Company Directors, Officers and Employees Liability Policy ("Primary Policy"), No. DOC 9040738 02, to CIC US, covering the period from May 16, 2009, until May 16, 2010. The claims-made[3] Primary Policy covered losses up to $10,000,000.00 resulting from claims first made against the Insured during the policy period for Wrongful Acts that took place before or during the policy period. The Primary

> the increase in price. This demand inelasticity also exists because the cost of Titanium Dioxide typically represents only a small share of the total cost of manufacturing the products which use it as an input.

[3] The Court of Appeals defined a claims-made insurance policy as "'policies [that] cover liability inducing events if and when a claim is made during the policy term, irrespective of when the events occurred.'" *Mut. Fire, Marine & Inland Ins. Co. v. Vollmer*, 306 Md. 243, 252 (1986) (quoting John K. Parker, *Untimely Demise of the "Claims Made" Insurance Form? A Critique of Stine v. Continental Casualty Company*, 1983 Det.C.L.Rev. 25, 27-28).

Policy at issue in this case is a renewal of the previous policy that began on May 16, 2007—the day after Crystal Arabia acquired Appellant.

CIC Ltd. purchased an excess policy ("XL Policy") No. ELU111271-09 from XL in 2008 and renewed the same policy, No. ELU104714-08, for coverage from May 16, 2009 to May 16, 2010. The XL Policy provided $5,000,000.00 of coverage to the Insured for claims made during the policy period, after the underlying Primary Policy was exhausted. The XL Policy was a follow-form policy,[4] which "appl[ied] in conformance with the terms, conditions, endorsements and warranties of the Primary Policy. . . ."

Before either company bought the policies, their insurance broker, Lockton, distributed "Coverage Specifications" to the marketplace, describing the coverage the companies sought. The specifications stated "Prior Acts Exclusion Date – May 15, 2007 for all entities insured, except the Parent Company which is to be April 24, 2007 (Parent Company's date of incorporation)." Zurich issued a binder confirming the Primary Policy with CIC US, which would include the following prior acts exclusion: "4/2/07 – Cristal Inorganic Chemicals, Ltd. And 5/15/07 for Named Insured."

[4] "'An excess policy may be written in two forms: as a stand-alone policy or as a policy that "follows form.". . . A stand-alone excess policy is an independent insuring agreement. In contrast, a "follows form" excess policy incorporates by reference the terms of the underlying policy and is designed to match the coverage provided by the underlying policy.'" *Johnson Controls, Inc. v. London Market*, 784 N.W.2d 579, 587 n.7 (Wis. 2010) (quoting 23 Eric Mills Holmes, *Holmes' Appleman on Insurance 2d* § 145.1 (interim vol. 2003)).

The Primary Policy included two Endorsements containing Prior Acts Exclusions.[5] Endorsement No. 2, (or "Prior Acts Exclusion") at issue in this appeal, states:

> The Underwriter shall not be liable for **Loss** on account of any **Claim** made against any **Insured** based upon, arising out of or attributable to **Wrongful Acts**, including **Interrelated Wrongful Acts**, committed, attempted or allegedly committed or attempted in whole or in part prior to May 15, 2007 for [CIC US,] and Its Subsidiaries.

This exclusion dates back only to May 15, 2007, when CIC US acquired Millennium. The Primary Policy defines "Insured" to encompass the named insured company and its subsidiaries, and officers and managers of the named company.

Significantly, Endorsement No. 5 changed the definition of "Company" in the policy to include CIC Ltd. and its subsidiaries, MIC RB Partners, L.P., CIC Ltd. Executive Committee, CIC Ltd. Steering Committee, and Appellant. There is no dispute that Appellant was a subsidiary of CIC Ltd. and CIC US and, therefore, an Insured when the Primary Policy and the XL Policy were issued.

[5] The first, Endorsement No. 1, applied to CIC Ltd., and is tied to its April 24, 2007 creation. Endorsement No. 1 stated:

> The Underwriter shall not be liable for **Loss** on account of any **Claim** made against any **Insured** based upon, arising out of or attributable to **Wrongful Acts**, including **Interrelated Wrongful Acts**, committed, attempted or allegedly committed or attempted in whole or in part prior to April 24, 2007 for Cristal Inorganic Chemicals, Ltd.

(Bold words are defined terms in the Primary Policy).

Class Actions Filed Against the Appellant

The *Haley* Action was filed against Appellant on April 12, 2010,[6] by direct purchasers of titanium dioxide and other manufacturers, followed by the *Los Gatos* Action, which was filed three years later by indirect purchasers of titanium dioxide. These Class Actions alleged that Appellant conspired with other manufacturers, beginning as early as March 2002, to artificially raise the price of titanium dioxide in violation of antitrust law.

The sole claim in the *Haley* Action rested on a violation of the Sherman Act, 15 U.S.C. § 1. The complaint, filed in the United States District Court for the District of Maryland, Northern Division, alleged:

> Beginning at least as early as March 1, 2002, the exact date being unknown to Plaintiffs and exclusively within the knowledge of Defendants, Defendants and their co-conspirators entered into a continuing combination or conspiracy to unreasonably restrain trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. § 1) by artificially reducing or eliminating competition in the United States. In particular, Defendants and their co-conspirators have combined and conspired to raise, fix, maintain or stabilize the prices of Titanium Dioxide sold in the United States.

The complaint alleged that the "collusive activities" took place during meetings and trade association functions. In particular, the complaint highlighted a meeting that took place in Finland on or about January 24, 2002, between members of the Titanium Dioxide Manufacturers Association. According to the plaintiffs, immediately following this meeting, Appellant and other named defendants announced that, effective March 1, 2002, prices for titanium dioxide would increase worldwide, "in spite of flat demand, decreasing

[6] *Haley Paint Co., et al.* was consolidated with *Isaac Industries, Inc., et al.*, which was filed on February 12, 2010, and alleged the same claims.

raw material costs, and excess capacity in the industry." The complaint identified multiple subsequent instances of alleged price coordination, including a number of price increases that occurred prior to 2007.

According to the plaintiffs, the defendants sought worldwide price increases in 2007, "despite weak demand" for Titanium Dioxide, stating, by way of example, that "In the US, defendants and their co-conspirators announced a $0.05 per pound increase effective July 1, 2007, and a $0.06 per pound increase effective October 15, 2007 . . . ." In 2008, the complaint asserts, the defendants again increased prices worldwide, and "implemented 'energy surcharges' for the first time."

The complaint alleged that on January 7, 2008, an article was published in an "industry publication" that quoted a Titanium Dioxide industry analyst and consultant

> [s]tating that Titanium Dioxide prices and margins were expected to increase in 2008. Tronox's CEO was also quoted in the same article as stating: "Although supply and demand fundamentals support increased prices, since 2004 the [Titanium Dioxide] industry has been largely unsuccessful in its efforts to offset rising costs of various inputs, from energy to process chemicals, through increased prices." This statement was false and misleading, because industry "supply and demand fundamentals" did not always explain and support increased prices during the 2004-2007 time period, and because Defendants were at times able to offset increased costs during this period and improve their margins. There was also overcapacity in the industry and flat or weak demand at times during this period, yet prices still increased. This statement by Tronex's CEO was also false and misleading to the extent that it justified increased prices based solely on "supply and demand fundamentals," in light of Defendants' unlawfully coordinated and sustained campaign to increase industry prices worldwide, as alleged herein.

The complaint alleged further price increases or surcharges were announced on May 23, 2008, June 4, 2008, and June 12, 2008.

The complaint further stated:

> The conspiracy among Defendants was successful in increasing prices during the Class Period, even when industry overcapacity and weak demand existed. For example, in November 2007, defendant Millennium announced that it was closing a Titanium Dioxide plant in France in part due to industry overcapacity. As discussed above, Defendants announced worldwide price increases in 2007 and in 2008. Unlike in the 1990s, when industry overcapacity contributed to lower prices and poor industry margins, Defendants' conspiracy managed to prevent overcapacity from severely impacting prices during the Class Period.

The *Los Gatos* complaint contained allegations substantially similar to those in the *Haley* Action. The plaintiffs in the *Los Gatos* Action additionally claimed, *inter alia*: (1) violations of several state antitrust statutes;[7] (2) violations of several state consumer protection statutes;[8] and (4) unjust enrichment. The complaint also sought injunctive and equitable relief. The complaint contained a table listing the price increases in the titanium dioxide industry, beginning in March 2002 through November 2011.

Appellant settled the *Haley* Action in September 2013, without any admission of liability or wrongdoing. The *Los Gatos* Action was still ongoing at the time of this appeal, although Los Gatos itself was terminated as a plaintiff on September 29, 2015.

[7] Specifically, the *Los Gatos* complaint alleges violations of antitrust statutes in Arizona, California, the District of Columbia, Hawaii, Illinois, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, South Dakota, Tennessee, Utah, Vermont, and West Virginia.

[8] The *Los Gatos* complaint alleges violations of consumer protection statutes in Arkansas, California, the District of Columbia, Florida, Massachusetts, Missouri, Montana, New Mexico, New York, North Carolina, South Carolina, and Vermont.

Zurich's Coverage for Losses Resulting from the Class Actions

Appellant timely notified both Zurich and XL of the *Haley* Action. On June 9, 2010, Zurich denied coverage to the Appellant for any losses incurred through defending the *Haley* Action. Although Zurich acknowledged that Appellant was an insured under the Primary Policy as a subsidiary of the named insured (CIC US), Zurich concluded that the *Haley* Action concerned Wrongful Acts or Interrelated Wrongful Acts that occurred prior to May 15, 2007, and, therefore, were excluded from coverage under Endorsement 2, Prior Acts Exclusion, of the Primary Policy.

On June 17, 2010, Lockton Financial Services—the insurance broker for the Appellant—emailed Zurich arguing that Zurich had a duty to defend Appellant in the *Haley* Action under the case law of *Berenyl, Inc. v. Landmark American Ins. Co.*, No. 2:09–CV–01556–PMD, 2010 WL 233861 (D.S.C. Jan 14, 2010). Lockton stated:

> In [*Berenyl, Inc.*], the insured civil engineering firm was sued by a client for professional negligence. Some of the negligent acts took place before the retroactive date in the firm's E&O policy; others may have taken place afterwards. The insurer argued that no part of the claim was covered because it was based in part on acts before the retroactive date. The District Court held that the insurer had a duty to defend the suit because some of the negligent acts may have taken place after the retroactive date.

Zurich responded via telephone on July 7, 2010, stating that it would consider the case, but it felt that the case concerned different policy language that was "much less broad than what is in the Zurich policy." Internal correspondence between Lockton senior vice presidents after receipt of Zurich's response stated:

> Should we elevate this on the underwriting side. I would really like to avoid an outright denial. Cristal has been with Zurich since 2007 (4 years) with no

> claims activity. They've paid over $300K [i]n premium. It would seem to me we may have a case to appeal on the business side of things. Thoughts?

The response of another senior vice president cautioned, "[i]n view of Zurich's policy language we may need a business resolution on this. . . . The fact that the exclusion includes interrelated wrongful acts makes this a very tough argument for us to win."

Appellant later responded via letter to Zurich on October 20, 2010, arguing that Zurich was obligated to pay defense costs that arose under the *Haley* Action because: (1) Appellant was not a subsidiary of CIC US prior to May 15, 2007 and, therefore, any action by Appellant prior to that date would not fall into the exclusion as worded in Endorsement 2; (2) the language of Endorsement 2 was ambiguous and it was not clear what was meant by the term "subsidiary;" (3) the complaint in the *Haley* Action admitted that the plaintiffs did not know the specific dates that the Wrongful Acts took place and, as a result, all acts *could* have occurred after May 15, 2007; and, (4) based on the wording in Endorsement 2, only Wrongful Acts committed prior to May 15, 2007, *for the benefit of* CIC US *and* its Subsidiaries were excluded and there was no allegation that the acts in the complaint were done for the benefit of CIC US and Appellant.

On February 4, 2011, Zurich withdrew its complete denial of coverage and "accept[ed] tender of this matter for coverage under the Policy subject to the following reservations of rights." Zurich stated that coverage for Appellant for the *Haley* Action "existed solely under Insuring Clause D of the Policy, as added by Endorsement 3 of the

Policy."[9] Without further explanation of their change in coverage, Zurich reserved rights under five sections of the Primary Policy that would bar indemnification for Appellant if, for example, a judgment established that the Appellant engaged in "deliberately fraudulent act[s] or omission[s] or any purposeful violation of any statutes or regulation . . . ."

In a business record dated January 24, 2011, Zurich's claim notes explain Zurich's change in coverage position as:

> After consideration of letter and discussions with director and Claims [sic] Legal, have determined to revise coverage position and accept tender under ROR. Primary reason for change of position is Insured's point that

[9] Endorsement 3 states, in relevant part:

3. Company Liability Coverage

The following Insuring Clause D is added to Section I:

D. COMPANY LIABILITY COVERAGE

The Underwriter shall pay on behalf of the **Company** all **Loss** for which the Company becomes legally obligated to pay on account of any **Claim** first made against the **Company** during the **Policy Period** or, if exercised, during the Extended Reporting Period, for a **Wrongful Act** taking place before or during the **Policy Period**.

Solely with respect to coverage under Insuring Clause D:

a. Any reference in the definition of "**Claim**" or "**Loss**" to **Insured Persons** shall also mean the **Company**.
b. The definition of **Wrongful Act** is amended by adding the following:
   ,or (iii) by the **Company**,
c. Any reference to "Insuring Clause C" in Items 4, 8 and 9 of the Declarations, Section IV, Exclusions, or in Subsection V.B. or C shall also include Insuring Clause D.
d. The following clause is deleted from the first sentence of Subsection V.D.: "(including the **Company** in a **Claim** other than an **Employment Practices Claim**)"

> [Appellant], the only Insured entity named in the litigation, was not a Subsidiary of [CIC US] prior to 5/15/07, the operative date of the exclusion. Note that policy is DTD [Duty to Defend] such that any possibility of coverage triggers DTD.

A similar statement was made by Zurich in "Case Summary Reports" dated July 5, 2011, June 28, 2011, and January 2, 2013. The statements in the reports explained "[CIC] US . . . acquired [Appellant] and that transaction closed on May 16, 2007. Since Endorsement 2 used the term "Subsidiary" as a defined term under the Policy, we concluded that Endorsement 2 did not apply and therefore accepted tender of this matter under a full reservation of rights."

Appellant received its full $10,000,000.00 coverage to defend the *Haley* Action under the Primary Policy from Zurich, which it exhausted on or around July 11, 2013. On September 11, 2013, Zurich denied coverage for the *Los Gatos* Action, because Zurich found that the *Los Gatos* Action and the *Haley* Action were one Claim for purposes of coverage, based on the allegations in the lawsuits, and, therefore, that the policy limits had been exhausted under the *Haley* Action.

Denial of Coverage by XL for Losses Resulting from the Class Actions

Appellant provided timely notice to XL of both the *Haley* and *Los Gatos* Actions. On July 7, 2010, after receiving notice of the *Haley* Action, XL issued a letter to CIC Ltd., reserving all rights under the XL Policy and requesting that CIC Ltd., "provide [XL] with copies of [Zurich's] coverage position as soon as it is issued." The letter explained that the XL Policy would not apply to provide coverage to Appellant until the Primary Policy was exhausted. On February 14, 2013, nearly three years after it received notice of the *Haley*

Action, XL issued a letter stating its position that the *Haley* Action "is precluded entirely from coverage by operation of the Prior Acts Exclusion." The letter states:

> Here, the plain language of the Prior Acts Exclusion appears to squarely apply. The Haley action constitutes a Claim against [Appellant], which is a "Company" and therefore an "Insured." (*See* Primary Policy, Section III.H. (defining "Insured" to include the "Company")). The Haley Action Claim, and any resulting Loss, also arises out of Wrongful Acts or Interrelated Wrongful Acts that were committed or allegedly committed "in whole or in part prior to May 15, 2007." Haley Action alleges that [Appellant] conspired for years to raise and maintain the price of [titanium dioxide] sold in the United States—starting the price increases in 2002, 2003, 2004, 2005, 2006 and onward to the present. These acts constitute Wrongful Acts and Interrelated Wrongful Acts and they undeniably occurred—"in whole or in part"—prior to May 15, 2007. [10]

On May 14, 2013, XL issued a letter taking the same position as to the *Los Gatos* Action.

The Underlying Action

Appellant filed a complaint in the Circuit Court for Baltimore County on July 15, 2013, seeking a declaratory judgment against XL for a breach of contract. The complaint alleged that XL was obligated to provide coverage under the XL Policy, which follows the Primary Policy provided by Zurich. Appellant stated that XL "refused to honor its obligations under the Policy" even though it knew that Zurich had provided coverage for the same claims and paid its full policy limits in defense of the *Haley* Action. Appellant sought damages and interest for XL's breach of contract, including, but not limited to, attorney's fees, expenses, and costs incurred.

[10] The letter also stated that the XL Policy "is *not* a duty to defend policy." (Emphasis supplied).

XL filed an answer and affirmative defenses on November 4, 2013,[11] denying that XL "'has wrongfully refused to pay for the defense or, if needed, indemnity for any of the Underlying Actions.'" XL referenced its letters to Appellant and reiterated its defense that the Prior Acts Exclusion, contained in Endorsement 2, removes all potential coverage for the Class Actions.

The parties undertook discovery until July 14, 2014. On June 17, 2014, the parties filed cross-motions for summary judgment on the duty to defend. Appellant's motion was for partial summary judgment on the issue of XL's duty to defend. Appellant argued that: (1) "the reasonable expectations of the insured would have been that XL would take the same coverage position as the primary insurer Zurich because XL chose to 'follow form' to the policy language Zurich drafted;" (2) the Class Action allegations allow that Appellant may only be held liable for acts occurring *after* May 15, 2007; (3) the language of Endorsement 2 requires that the acts have been committed *for* CIC US *and* its subsidiaries, which was not alleged in the class action because Appellant was not a subsidiary of CIC US prior to May 15, 2007; and (4) the acts alleged are not "Wrongful Acts" as defined by the Primary Policy because the definition requires the acts be committed *by* an Insured under the policy, which Appellant was not at the time of the acts. Appellant further argued that XL should be estopped from relying on the Prior Acts Exclusion because XL did not provide its coverage position until nearly two years after

[11] Appellant served XL on September 9, 2013, in Connecticut. Maryland Rule 2-321(b)(1) allows a defendant served outside of the State but within the United States 60 days to file an answer.

receiving notice of the Class Actions, and its behavior in the meantime reasonably led Appellant to believe XL would provide coverage under the XL Policy.

XL's motion for summary judgment argued that the Prior Acts Exclusion contained in Endorsement 2 precluded coverage entirely for the Class Actions. XL contended that the inclusion of the terms "Interrelated Wrongful Acts" and "in whole or in part" in the Prior Acts Exclusion operated to exclude all of the allegations made in the Class Actions from coverage, regardless of whether some of the acts took place after May 15, 2007. XL disposed of Appellant's "for the benefit of" interpretation of the language of Endorsement 2 by pointing out that the dates in Endorsement 1 (applying to CIC Ltd.) and Endorsement 2 correspond with the dates of creation or acquisition of the entity named in the endorsement, and that the word "'for' describe[d] the entity(ies) to whom the Prior Acts Exclusions apply." XL argued that it does not make sense to suggest that the Prior Acts Exclusion applies "to preclude coverage for Wrongful Acts or Interrelated Wrongful Acts allegedly committed in whole or in part prior to May 15, 2007, for the benefit of an entity that did not even exist."

Further, XL averred that Appellant understood the Prior Acts Exclusion to apply to *all* Wrongful Acts done in whole or part prior to May 15, 2007, relying on the "Coverage Specifications" presented by Appellant's insurance broker, Lockton, which stated, "Prior Acts Exclusion Date – May 15, 2007 for all entities insured, except the Parent Company [CIC, Ltd.] which is to be April 24, 2007 (Parent Company's date of incorporation)." XL disagreed that (1) Appellant's actions prior to May 15, 2007, are not covered by the Prior

Acts Exclusion, (2) the Class Actions alleged claims that could have been committed wholly after May 15, 2007, and (3) Zurich's interpretation of the Primary Policy is binding on XL.

The parties each filed motions in opposition to the cross-filed summary judgment memoranda. XL refuted Appellant's estoppel argument stating that Appellant did not properly plead estoppel under Maryland Rule 2-305 and, in any event, an estoppel claim would fail as a matter of law.

On September 3, 2014, the circuit court denied Appellant's motion for partial summary judgment, stating:

> The Motion correctly states that the duty to indemnify and the duty to defend between insurer and insured is governed by the Court of Appeals decision in *Brohawn v. Transamerica Co.*, 276 Md. 396, 347 [A.2d] 846 (1975). However, there nowhere appears within the 4 corners of the motion filed any statement as to the content of the complaint filed and/or the policy of insurance involved as to the cause of action alleged against the insured. Without that information I am unable to rule on the motion filed.

Appellant filed a motion for reconsideration on September 8, 2014 and a request that the motion be heard at a hearing set at the same time as XL's cross motion for summary judgment. That motion was denied on September 12, 2014. A hearing took place on December 9, 2014. At that time, the circuit court stated on the record that it would hear "both XL Specialty's motion for summary judgment and [Appellant's] motion for summary judgment."

At the hearing, the parties made the same arguments contained in their memoranda. At the close of the hearing, the court requested that counsel submit via letter any case that

"deals with a conspiracy alleged where the conspiracy began before any date of coverage and continued beyond that date." After receiving letters from both parties, the court issued its written opinion on January 7, 2015, (entered January 20, 2015), denying Appellant's motion for partial summary judgment and simultaneously granting XL's motion for summary judgment.

In its memorandum opinion, the circuit court acknowledged that the parties stipulated that XL "issued an excess insurance policy that provides a duty to defend all claims covered by the policy, [Appellant] is an insured under the XL policy, the underlying Zurich policy is exhausted, and the underlying class-action suits allege 'claims' for 'wrongful acts' that fall within the coverage grant of the policy." The court clarified that the dispositive issue was "whether the Prior Acts Exclusion bars coverage for the underlying claims against [Appellant]." The court observed that the parties' conflicting interpretations of the exclusion "concern the very last clause 'for [CIC US] and Its Subsidiaries.'"

The court concluded that the Appellant's interpretation of the exclusion added words to the language of the exclusion in order to "arrive at its interpretation of the exclusion, i.e., that a Wrongful Act is 'for the benefit of' Cristal Inorganic Chemicals and Cristal USA [Appellant] and that it refers to a subsidiary 'at the time of' the Wrongful Acts." Acknowledging that it may not add words to the policy in order to derive its meaning, the circuit court pointed out that "the result of construing the exclusion according to [Appellant]'s interpretation is that coverage for prior acts would be excluded for an

entity that was a subsidiary of the insured prior to May 15, 2007 and coverage for prior acts would apply to an entity that was not a subsidiary of the insured prior to May 15, 2007 . . . .” because, under Appellant’s interpretation, the exclusion would not apply. Furthermore, the court noted, the definition of “subsidiary” contained in the Policy does not include any provision requiring that the entity be a subsidiary at the time of the Wrongful Acts or prior to May 15, 2007. The court concluded:

> . . . the Court believes that the words “prior to May 15, 2007 for [CIC US] and Its Subsidiaries,” refers to the date by which the Wrongful Acts were committed, not to whether a company was a subsidiary prior to May 15, 2007. Thus, “for” refers to the prior acts cut-off date “for” a particular insured entity, so that the prior acts cut-off date “for [CIC US] and its subsidiaries” (including [Appellant]) is May 15, 2007. Any Wrongful Acts committed before May 15, 2007 are excluded for [CIC US] and [Appellant]. This interpretation is consistent with the fact that [Appellant] was acquired by its parent on May 15, 2007. It is also consistent with the fact that Endorsement Number 1 is a different prior acts exclusion for CIC [US] and [Appellant’s] parent, [CIC] Ltd., a named Insured, which has a prior acts cut-off date of April 24, 2007, the date it was formed. The exclusion for Wrongful Acts or Interrelated Wrongful Acts committed in whole or in part prior to May 15, 2007 therefore applies “for” [Appellant].

The court also decided that the titanium dioxide price fixing conspiracy was the common nexus for the alleged acts before and after May 15, 2007, making the alleged acts “Interrelated Wrongful Acts” within the terms of the Prior Acts Exclusion. Lastly, the court determined that the Allocation clause, pertaining to allocation of defense costs for covered and uncovered claims, was “not applicable and does not conflict with the application of the Prior Acts Exclusion” because that exclusion precludes coverage in its entirety.” Appellant noted an appeal on January 22, 2015 from the order entered on January 20, 2015.

DISCUSSION

I.

Motion to Strike

Before discussing the merits of this case, we address XL's November 17, 2015 motion to strike portions of Appellant's reply brief. In the motion to strike, XL argues: (1) that Appellant improperly raised a new argument related to the "Changes in Exposure" clause in its reply brief that was not raised below or in its initial brief; and (2) that Appellant's argument that the Prior Acts Exclusion was "potentially applicable" to other named insureds was not properly supported by citation to the joint record extract because nothing in the record shows when those other entities came into existence. Ironically, XL attached two documents to its motion that are not part of the record in this case.

Appellant responded to the motion on November 25, 2015, arguing that its "new argument" related to the "Changes in Exposure" clause was within the bounds of the reply brief, because it responded to XL's argument that "'*[n]othing in the Primary Policy* suggests that the Exclusion applies only to the Wrongful Acts a Subsidiary committed while a Subsidiary.'" (Quoting XL's motion to strike) (alteration and emphasis in original). Furthermore, Appellant contends that its argument that "any Insured" referenced in the Exclusion included all named insureds in the Primary Policy was properly supported by its record cites to the list of named insureds and the definition of "Insured" in the Primary Policy. Appellant argues that XL improperly provided documents, along with its motion

to strike, that were not included in the record and that the Court should not consider those documents.

A.

New Argument in Reply Brief

XL cites to *Federal Land Bank of Baltimore, Inc. v. Esham*, 43 Md. App. 446 (1979), in support its argument that the Appellant cannot raise the Changes in Exposure clause for the first time in its reply brief. In *Federal Land*, the appellants raised a completely new issue in their reply brief, claiming for the first time that the lower court incorrectly credited $670,000.00 to appellee. 43 Md. App. at 454-56. This argument had never been raised prior to filing the reply brief. *Id*. at 456. Noting that the appellants in that case "not only omitted supporting argument on the issue of the $670,000 credit; but they failed even to raise the issue in their questions presented," this Court concluded that appellants' reply brief "was a reply brief in style only. Although it made a pretense of 'replying' to issues raised by the . . . appellees' brief, the reply was illusory." *Id*. at 458-59. This Court explained:

> The function of a reply brief is limited. The appellant has the opportunity and duty to use the opening salvo of his original brief to state and argue clearly each point of his appeal. We think that the reply brief must be limited to responding to the points and issues raised in the appellee's brief. . . . To allow new issues or claims to be injected into the appeal by a reply brief would work a fundamental injustice upon the appellee, who would then have no opportunity to respond in writing to the new questions raised by the appellant.
>
> * * *

> The reply brief must do what it purports to do: it must respond to the points raised in the appellee's brief which, in turn, are addressed to the issues originally raised by the appellant.

Id. at 459.

Here, the Appellant's argument concerning the "Changes in Exposure" clause is distinguishable from circumstances in *Federal Land*, where an entirely new claim was raised. The Appellant's argument in this case was responsive to XL's argument that the Prior Acts Exclusion was directed at Appellant's "Wrongful Acts" taking place before Appellant became a Subsidiary. Thus, Appellant used the "Changes in Exposure" clause to argue that such an interpretation of the Prior Acts Exclusion would render that clause surplusage. We determine, therefore, that Appellant's argument complies with the limitation that reply briefs must be responsive to the points and issues raised in the appellee's brief, and XL's motion to strike this argument is denied. *Id*. at 459. However, the Court will also consider the counter-arguments (but, as explained below, not the exhibits) provided by XL in its motion to strike on this argument.

B.

Failure to Cite to the Joint Record Extract

XL also moves to strike Appellant's argument—contained both in its initial brief and its reply brief—that the Prior Acts Exclusion applied to all entities covered under the Primary Policy, noting that the briefs lacks sufficient citations to the record to support such an argument. XL cites Maryland Rule 8-504 and *Rollins v. Capital Assocs., L.P.*, 181 Md. App. 188 (2008), to support its motion to strike.

Maryland Rule 8-504(a)(4) states:

> (a) Contents. A brief shall comply with the requirements of Rule 8–112 and include the following items in the order listed:
>
> * * *
>
> (4) A clear concise statement of the facts material to a determination of the questions presented, except that the appellee's brief shall contain a statement of only those additional facts necessary to correct or amplify the statement in the appellant's brief. Reference shall be made to the pages of the record extract supporting the assertions. If pursuant to these rules or by leave of court a record extract is not filed, reference shall be made to the pages of the record or to the transcript of testimony as contained in the record.

In *Rollins*, this Court, citing Maryland Rule 8-504(a)(4), dismissed the appeal because the appellant failed to cite to the record extract in its statement of facts, and "[l]arge portions of [appellant's] brief are simply left unsupported by any citation whatsoever." 181 Md. App. at 201. This Court added that "'[w]e cannot be expected to delve through the record to unearth factual support favorable to [the] appellant.'" *Id*. (alteration in original) (quoting *von Lusch v. State*, 31 Md. App. 271, 282, (1976)).

Rule 8-504 and *Rollins* do not apply here to bar Appellant's argument, where Appellant made an argument and cited to the list of covered entities and the definition of "any Insured" in the Primary Policy to assert that the Exclusion applied to all of those listed entities, not just CIC US and Appellant. Any failure by Appellant to cite to a portion of the record that lists when those entities came into existence is perhaps a flaw in their argument, but does not rise to the level of flagrant failure to cite to the record that occurred in *Rollins*. We decline to strike this argument from the Appellant's reply brief.

C.

Documents Not in Record

Appellant argues that the documents attached to XL's motion to strike should not be considered by this Court because they are not part of the record on appeal.[12] Appellant cites *Cochran v. Griffith Energy Service, Inc.*, where this Court struck the appendix of a reply brief that contained documents that were not part of the record. 191 Md. App. 625, 661-63 (2010). *Cochran* relies on Maryland Rule 8-501(f) and concludes that parties may not supplement the record extract with documents not contained in the record on appeal. *Id.* at 662-63 ("Rule 8-501(f) specifies that an 'appellant may include as an appendix to a reply brief any additional *part of the record* . . . that the appellant believes is material in view of the appellee's brief or appendix'" (alteration and emphasis in *Cochran*)); *see also Rollins*, 181 Md. App. at 200 n.7 (noting that appellant erroneously relied on documents that were not before the circuit court and were thus "not part of the 'record'"). *Cochran* also notes that this restriction follows from Maryland Rule 8-131, which narrows the appellate court's scope of review to those issues that plainly appear from the record to have been raised in the trial court. 191 Md. App. at 663.

A review of the record below demonstrates that neither the Lockton Companies internal email nor the list of Cristal Global Directors and Officers that accompanies XL's

[12] XL attached an affidavit sworn by its counsel and two exhibits produced by Lockton.

motion to strike were part of the record below. Therefore, we agree with the Appellant and strike the exhibits attached to the XL's motion and do not consider them in this appeal.

II.

Interpretation of the Prior Acts Exclusion Under Maryland Rules of Insurance Contract Construction

Maryland courts undertake a two-step process when determining if an insurer has a duty to defend. *See St. Paul Fire & Marine Ins. Co. v. Pryseski*, 292 Md. 187, 193 (1981). The Court of Appeals has instructed:

> In determining whether a liability insurer has a duty to provide its insured with a defense in a tort suit, two types of questions ordinarily must be answered: (1) what is the coverage and what are the defenses under the terms and requirements of the insurance policy? (2) do the allegations in the tort action potentially bring the tort claim within the policy's coverage?

In the underlying case, the circuit court understood that it "must first determine the intended scope and limitations of coverage under the [XL Policy], and next, determine whether the allegations in the underlying action are potentially covered under the insurance policy." In undertaking this determination, the court focused on the last clause of the Prior Acts Exclusion, which states "for [CIC US] and Its Subsidiaries."

On appeal, we review the circuit court's ruling *de novo* and "examine the record independently to determine whether there exists any genuine issue of material fact and whether the moving party was entitled to judgment as a matter of law." *Blackstone Intern. Ltd. v. Maryland Cas. Co.*, 216 Md. App. 471, 480 (2014) (citing *Walk v. Hartford Cas. Ins. Co.*, 382 Md. 1, 14 (2004)), *rev'd on other grounds* 442 Md. 685 (2015). We "review the record in the light most favorable to the non-moving party and construe against the

moving party any reasonable inferences which may be drawn from the facts." *Blackstone*, 216 Md. App. at 480 (citation omitted).

When determining the meaning of an insurance policy, "we construe the instrument as a whole to determine the intention of the parties." *Clendenin Bros., Inc.*, 390 Md. 449, 458 (2006) (citing *Cheney v. Bell National Life Insurance Company*, 315 Md. 761,767 (1989); *Pacific Indemnity Company v. Interstate Fire & Casualty Company*, 302 Md. 383, 388 (1985)). Words contained in the policy or exclusion are given their usual, ordinary, and accepted meaning, unless the parties indicate an intention to employ a technical meaning of the words. *Blackstone Intern. Ltd. v. Maryland Cas. Co.*, 216 Md. App. 471, 480 (2014) (citing *Walk v. Harford Cas. Ins. Co.*, 382 Md. 1, 14-15 (2004)). We will only consider extrinsic evidence of the intention of the parties where the language is ambiguous, i.e. susceptible to more than one meaning, and will not construe the insurance policy in favor of the insured and against the drafter of the instrument unless the ambiguity remains after consideration of extrinsic evidence. *Clendenin Bros.*, 390 Md. at 459-60 (citations omitted).

Accordingly, we must first determine the scope of the Prior Acts Exclusion contained in the Zurich Policy, which applies equally to the XL Policy. The exclusion provides:

> The Underwriter shall not be liable for **Loss** on account of any **Claim** made against any **Insured** based upon, arising out of or attributable to **Wrongful Acts**, including **Interrelated Wrongful Acts**, committed, attempted or allegedly committed or attempted in whole or in part prior to May 15, 2007 for [CIC US] and Its Subsidiaries.

Appellant's arguments, broadly summarized, are that the lower court erroneously read the Prior Acts Exclusion to bar a duty to defend for the Class Actions for four reasons: (1) "the Prior Acts exclusion is not limited to [CIC US] and its Subsidiaries because it expressly applies to "any Insured," and the lower court erroneously read this phrase out of the exclusion to buttress its erroneous conclusion that the exclusion was designed just for [CIC US] and [Appellant]"; (2) "the exclusion does not apply because any acts before May 15, 2007, could not be '*for*' [CIC US] '*and*' its Subsidiaries"; (3) "[Appellant] was not a 'Subsidiary' prior to May 15, 2007, and, therefore, the exclusion is inapplicable"; and, (4) "the lower court's interpretation of the exclusion is contrary to the reasonable expectations of the insured, and the other evidence proffered by [Appellant], and should be reversed."

A.

Plain Meaning of the Prior Acts Exclusion

i. Contentions of the Parties

Again, Appellant's first contention is that the lower court rejected as surplusage the words "any Insured" improperly when it interpreted the Prior Acts Exclusion. The Appellant reasons that if the exclusion only applied to CIC US and Appellant, "there would have been no need for the phrase 'any Insured' in the first part of the exclusion." Appellant relies on *Empire Fire & Marine Ins. Co. v. Liberty Mutual Insurance Co.*, 117 Md. App. 72 (1997) and *JMP Associates, Inc. v. St. Paul Fire & Marine Insurance Co.*, 345 Md. 630 (1997), to support its argument that no words in the policy may be rejected as "mere surplusage."

Appellant admits that, "[a] typical prior acts exclusion simply precludes coverage for wrongful acts that take place prior to a certain date." However, Appellant notes that the exclusion at issue in this case includes the phrase "for [CIC US] and its Subsidiaries." Appellant argues that, unlike a typical prior act exclusion, this phrase excludes only acts committed prior to May 15, 2007 that were for the benefit of CIC US *and* its subsidiaries.

Appellant also contends that "for," as defined by a number of dictionaries, means "for the benefit of," and argues that the only reasonable interpretation of the Prior Acts Exclusion language is that, "to be excluded, Wrongful Acts must be committed for [CIC US] and Its Subsidiaries." Because the Class Actions did not allege that any acts were *for* the benefit of *both* CIC US *and* Appellant, Appellant asserts that the exclusion does not apply. Moreover, because Appellant was not a subsidiary of CIC US until after May 15, 2007, under the definition of "subsidiary" contained in the Policy, Appellant insists "any acts committed before that date cannot be acts 'for the benefit of' or with the purpose of benefiting "[CIC US] and its Subsidiaries." Related to this point, Appellant contends that the circuit court ignored the definition of "subsidiary" in finding that the exclusion applied to Appellant. "Subsidiary" is defined in Zurich's policy as, "any organization in which more than 50% of the outstanding voting securities or voting rights representing the present right to vote for election of directors or to select **Managers** is owned or controlled, directly or indirectly, in any combination, by one or more **Company.**" (Emphasis in original indicating defined terms). Appellant argues that this definition ties "Subsidiary" to the "date an insured company obtains control of the entity." Therefore, Appellant contends,

the Class Actions could not have alleged any claims that encompassed acts for CIC US and Appellant *as a subsidiary*, because Appellant did not become a subsidiary until May 15, 2007, after the prior acts exclusion date.

XL counters that the Appellant's interpretation of the exclusion impermissibly adds the terms "for the benefit of" and renders the exclusion meaningless. XL points out that Appellant's suggestion that the exclusion could have applied only to Wrongful Acts committed by CIC Ltd. and its subsidiaries for the benefit of CIC US and its subsidiaries prior to May 15, 2007, is "irreconcilable with [Appellant's] position that the Exclusion applies only to acts done for the benefit of Subsidiaries that were Subsidiaries at the time of the act," because CIC US had no subsidiaries between April 24 and May 15, 2007. Therefore, XL asserts that the circuit court properly adopted another dictionary definition of "for" as a "preposition 'used to indicate the thing that something is meant to be used with,'" when determining that the date in the exclusion was the prior acts exclusion date for CIC US and its subsidiaries. XL explains that the circuit court's interpretation of the exclusion makes the most sense reading the Primary Policy as a whole, given Cristal Arabia's May 15, 2007 acquisition of Appellant. XL contends that Endorsement 1 provides an April 27, 2007 prior acts date for CIC Ltd., and Endorsement 2 provides a May 15, 2007 prior acts date for CIC US and its subsidiaries, including Appellant, consistent with the Cristal Companies seeking coverage with a May 15 prior acts date for all entities except CIC Ltd.

XL further argues that the term "Insured" under the Primary Policy includes the directors, officers, and managers of the insured entities covered under the Primary Policy.[13] Therefore, it contends that the words "any Insured" were used in the Prior Acts Exclusion in order to encompass any such individual who is covered under the Primary Policy through their association with CIC US or Appellant.

XL points out that the Appellant's interpretation of "Subsidiary" would turn claims-made policies, like the Primary Policy, into occurrence-based policies. Citing *Mutual Fire, Marine & Inland Insurance Company v. Vollmer*, 306 Md. 243, 252 (1986), XL explains that occurrence policies cover events that occur during the policy period, "irrespective of when an actual claim is presented," but claims made policies cover claims made during the policy term, "irrespective of when the events occurred." XL argues:

> If [Appellant] were correct that an entity's status as a Subsidiary and Insured is determined at the time of the alleged wrongful act, an entity would be covered under a former parent's claims-made policy for wrongful acts allegedly committed while it was a Subsidiary of the former parent even though it was not a Subsidiary or Insured when the claim was made or when the policy incepted. That approach would turn claims-made coverage on its head. Claims-made policies, like the Policies here, premise coverage on the insured's status at the time a claim is made and, unless otherwise excluded, provide coverage for wrongful acts that occurred prior to or during the claims-made policy period, and not the other way around.

[13] The Primary Policy defines "Insureds" as, "any one or more Insured Persons and the Company." "Insured Persons" are defined as, "any person who has been, now is or shall become a duly elected director or a duly elected or appointed officer of Manager of the Company; and elected or appointed officer or Manager of the Company while serving in an Outside Position; and if Employee Liability Coverage is granted as set forth in Item 10 of the Declarations, any Employee of the Company." "Company" is defined as, "the Parent Company and its Subsidiaries." The Parent Company in the Primary Policy is CIC US, of which Appellant is a Subsidiary.

In its reply brief, Appellant points out that the "Changes in Exposure" clause contained in the Primary Policy would prevent the situation illustrated by XL by limiting coverage for subsidiaries to the time after the entity is acquired. The "Changes in Exposure" clause states:

> 1. Acquisition or Creation of Another Organization
>
> If before or during the **Policy Period** the **Company:**
>
> (a) acquires securities or voting rights in another organization or creates another organization, which as a result of such acquisition or creation becomes a **Subsidiary**, or
>
> (b) acquires any organization by merger into or consolidation with the Company,
>
> such organization and its **Insured Persons** shall be covered under this policy *but only with respect to Wrongful Acts taking place after such acquisition or creation* unless the Underwriter agrees after presentation of a complete application and all appropriate information, to provide coverage by endorsement for **Wrongful Acts** by such **Insured Persons** taking place prior to such acquisition or creation.

(Italic emphasis added). The Appellant further argues that "if the exclusion does what XL contends (eliminate coverage for [Appellant] prior to its acquisition as a subsidiary on May 15, 2007), it would be redundant and make the Changes in Exposure provision surplusage."

ii. Analysis

We begin by examining whether the language in the Prior Acts Exclusion is clear and unambiguous, and if it is, we can determine the meaning of the terms as a matter of law. *Clendenin Bros.*, *supra*, 390 Md. at 459. But if we determine that the language is ambiguous, we may consider extrinsic evidence and will construe the exclusion against the

insurer only where the ambiguity remains. *Id.* at 459-60. Ambiguity exists where a term is susceptible to more than one meaning by a reasonably prudent person. *Id.* at 459 (citing *Cole v. State Farm Mut. Ins. Co.*, 359 Md. 298 at 305-06 (2000)).

In interpreting insurance contracts, prior acts exclusions have been described as:

> Prior-acts exclusions operate to bar coverage for loss in connection with otherwise covered wrongful acts but which occurred prior to the date specified in the exclusions. Prior-acts exclusions frequently contain language extending the exclusions' reach to subsequent wrongful acts that are related to the excluded prior acts regardless of whether they occurred before or after the date specified in the exclusion.

Steven Plitt and Jordan Ross Plitt, 2 *Practical Tools for Handling Insurance Cases* § 14:21 (2011 Ed., 2016 update). Prior acts exclusions are also described as:

> Some policies exclude claims arising from acts occurring before a specific date, often the inception date of the first policy issued by the insurer to the insured. The exclusion may also bar coverage for acts occurring prior to the date of a significant business transaction. For example, when an insured acquires another entity, the insurer may wish to bar coverage for future claims arising from wrongful acts of the D&Os of the acquired entity prior to the acquisition. Prior acts exclusions can result in gaps in coverage in such situations and insureds should review their insurance needs in the context of mergers, acquisitions and corporate reorganizations. A recent decision of the Court of Appeals of the State of Minnesota enforced an exclusion which barred coverage for wrongful acts occurring prior to a specific date (a retroactive date exclusion) to bar coverage for a claim alleging related wrongful acts which occurred both before and after the policy's retroactive date.

David L. Leitner, *et al.*, 4 Law and Prac. of Ins. Coverage Litig. § 47:38 (2005) (citing *Foster v. Summit Medical Systems, Inc.*, 610 N.W.2d 350 (Minn. Court. App. 2000)). Thus, a prior acts exclusion focuses on excluding acts done prior to a certain date, not acts done "for the benefit of" specific covered entities.

In *Megonnell v. United Services Automobile Association*, the Court of Appeals discussed the construction of exclusions while examining whether an excess umbrella policy "followed form" to a primary policy such that the excess policy contained the same exclusion to coverage contained in the primary policy. 368 Md. 633, 636-37 (2002). The Court quoted *Holmes's Appleman on Insurance*, explaining:

> "Since the language of the insurance policy is to be construed strongly against the insurer *where an ambiguity is found*, the insurer must use clear and unambiguous language to distinctly communicate the nature of any limitation of coverage to the insured. Similarly, the exclusion must be conspicuously, plainly and clearly set forth in the policy. An exclusion by implication is legally insufficient. *But where the insurer properly and unambiguously uses language in its exclusion, the clear and specific terms must be enforced since the insurer cannot be held liable for risks it did not assume.* This is because the insurer may freely limit liability and impose reasonable conditions upon the obligations it assumes by contract, provided that the exclusion does not violate statutory mandates or public policy.
>
> "Where the exclusion or limitation is found to be ambiguous, the legal effect is to find that provision ineffective to remove coverage otherwise granted by the insuring agreements. . . .
>
> *** * ***
>
> "The terms of the exclusion cannot be extended by interpretation but rather must be given a strict and narrow construction. . . . It has even been held that since exclusions are designed to limit or avoid liability, they will be construed more strictly than coverage clauses and must be construed in favor of a finding of coverage."

Id. at 656 (emphasis added; alteration in original) (quoting Eric Mills Holmes & Mark S. Rhodes, *Holmes's Appleman on Insurance, 2d* 276-81 (Eric Mills Holmes ed., vol. 2 § 7.2, West 1996)).

There are no Maryland cases that directly address how *prior act* exclusions are to be interpreted. But in *Clendenin Bros.*, the Court of Appeals found a pollution exclusion contained in a liability insurance policy was ambiguous where "a reasonably prudent person could construe the pollution exclusion clause . . . as both including and not including manganese welding fumes"—the pollutant at issue. 390 Md. at 461; *see also Sullins v. Allstate Ins. Co.*, 340 Md. 503 (1995) (determining whether a pollution exclusion was ambiguous as to lead paint). In coming to this determination, the Court considered "the character and purpose of the insurance policy and the facts and circumstances surrounding its execution . . . ." *Clendenin Bros.*, 390 Md. at 461. The Court also consulted Webster's Dictionary definitions to determine whether terms in the exclusion encompassed manganese, as well as other Maryland and the federal cases that had addressed what a reasonable person considered to be a "pollutant." *Id.* at 461-64.

In *Philadelphia Indemnification Insurance Company v. Maryland Yacht Club, Inc.*, this Court further explained how Maryland courts construe the language of an insurance contract exclusion:

> The goal in construing a contract is to ascertain and effectuate the intention of the contracting parties, unless that intention is at odds with an established principle of law . . . The primary source for determining the intention of the parties is the language of the contract itself. . . . Therefore, in construing insurance contracts in Maryland we give the words of the contract their ordinary and accepted meaning, looking to the intention of the parties from the instrument as a whole. . . . Moreover, a contract must be construed as a whole, and effect given to every clause and phrase, so as not to omit an important part of the agreement.
>
> Ordinarily, the clear and unambiguous language of a written agreement controls, even if the expression is not congruent with the parties' intent at the time of the document's creation. . . . Whether

> a contract is ambiguous is a question of law. . . . Contractual language is considered ambiguous if, when read by a reasonably prudent person, it is susceptible of more than one meaning.

129 Md. App. 455, 467-68 (1999) (internal quotations and citations omitted).

In *Empire Fire & Marine Ins. Co.*, *supra*, this Court, writing about the interpretation of contract language, noted that "*whenever possible*, each clause, sentence, or provision shall be given force and effect." 117 Md. App. at 96 (emphasis added). In *JMP Associates, Inc.*, *supra*, the Court of Appeals explained:

> 'It is a fundamental rule of contract construction that the entire contract, and each and all of its parts and provisions, must be given meaning, and force and effect, if that can consistently and reasonably be done. An interpretation which gives reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable. So far as reasonably possible, effect will be given to all the language and to every word, expression, phrase, and clause of the agreement. No word or clause should be rejected as mere surplusage *if the court can discover any reasonable purpose thereof which can be gathered from the whole instrument.* A construction will not be given to one part of a contract which will annul another part, unless such a result is fairly inescapable. Comparatively unimportant parts or provisions which may be severed from the agreement without impairing its effect or changing its character will be suppressed or subordinated if in that way, and only in that way, the agreement can be sustained and enforced.'

345 Md. at 636 (emphasis added) (quoting *Orkin v. Jacobson*, 274 Md. 124, 129-30 (1975)).

Applying these principles to the case before us, we agree with the circuit court's interpretation of the Prior Acts Exclusion. As the court pointed out, the conflicting interpretations by the parties concern the very last clause of the Prior Acts Exclusion: "prior to May 15, 2007 for [CIC US] and its Subsidiaries." It is clear that "for" refers to the prior

acts cut-off date for CIC US and its subsidiaries, including Appellant; meaning, that any wrongful acts committed by CIC US or Appellant prior to May 15, 2007 are excluded from coverage. This interpretation is consistent with the fact that the Appellant was acquired by CIC US on May 15, 2007 and the underlying Primary Policy with Zurich was entered into on May 16, 2007. This interpretation does not render the words "any Insured" surplusage because the term "any Insured" in the policy includes directors and officers of both CIC US and Appellant. Any insured, including the other entities insured under the Primary Policy, may potentially be sued for the Wrongful Acts or Interrelated Wrongful Acts of CIC US or Appellant. This fact makes the Prior Acts Exclusion applicable to exclude such actions from coverage under both the Primary Policy and XL Policy.

Were we to interpret the exclusionary language as Appellant urges, we would render the exclusion meaningless. It does not follow from a plain reading of the contract language that the Prior Acts Exclusion applies only to acts committed prior to May 15, 2007 *for the benefit of* CIC US and its subsidiaries. First, we would have to add words to the policy to attain the meaning Appellant urges. And second, we would have to completely ignore the facts. CIC US had just been formed in 2007, and *none* of CIC US's subsidiaries were acquired prior to May 15, 2007.

We do not agree with Appellant's argument that the 'Changes in Exposure" clause is redundant if the circuit court's interpretation of the Prior Acts Exclusion is accepted. The clause provides that acquired or created subsidiaries will only have coverage for Wrongful Acts that take place after their acquisition or creation. In contrast, the Prior Acts

Exclusion, as interpreted by the circuit court, is much broader, additionally precluding coverage for Interrelated Wrongful Acts and Wrongful Acts that took place "in whole or part" prior to the May 15, 2007 date.

We hold that the Prior Acts Exclusion can only reasonably be interpreted to exclude coverage for wrongful acts committed by CIC US and its subsidiaries, including Appellant, prior to May 15, 2007.[14]

B.

Reasonable Expectations

Appellant argues that the circuit court should have considered that Appellant held a "reasonable expectation" that Zurich's Primary Policy would provide extrinsic evidence of the intended meaning of XL's follow-form excess policy. Appellant cites a number of cases that state that follow form policies should be construed in a manner consistent with

[14] Given that we determine that the contract language is unambiguous, we need not consider extrinsic evidence. *See Clendenin Bros.*, 390 Md. at 459 (stating that only after the contractual language is determined to be ambiguous will the court consider extrinsic evidence of the parties' intent). Nonetheless, even if this Court concluded that the language of the Prior Acts Exclusions is susceptible to more than one interpretation by a reasonably prudent person, the extrinsic evidence does not convince us of Appellant's position.

Appellant argues that the circuit court should have considered Zurich's interpretation of the policy language as extrinsic evidence. We note that Zurich's interpretation of the policy language that Appellant urges we consider occurred *after* its initial denial of coverage. The evidence shows that Zurich initially denied coverage because it interpreted the exclusion in the same manner as the circuit court, and then, possibly for business reasons, decided to extend coverage later. Therefore, the evidence of Zurich's change in coverage decision is not very strong evidence of the intent of the parties at the time of contract formation. *See Tackney v. U.S. Naval Academy Alumni Association, Inc.*, 408 Md. 700, 717 (2009) ("[t]he construction placed upon the ambiguous language *before any controversy has arisen* holds significant importance.").

the primary policy and that the terms contained in the primary policy should be afforded the same meaning in the excess policy, including *Associates Indem. Corp. v. Dow Chem. Co.*, 814 F. Supp. 613, 618 n.5 (E.D. Mich. 1993); *W.R. Grace & Co. v. Hartford Accid. & Indem. Co.*, 555 N.E.2d 214, 221 (Mass. 1990); *Kropa v. Gateway Ford*, 974 A.2d 502, 506 (Pa. Super. Ct. 2009).

Maryland courts have not yet considered this exact issue. This Court has found persuasive two cases from New York and Massachusetts addressing whether a follow form insurer is bound by the primary insurer's decision to provide coverage or to settle a claim. In *In re Liquidation of Midland Ins. Co.*, the Supreme Court of New York County stated:

> [A]n excess policy following form adopts only the contract language of the underlying policy. When a court must interpret an excess policy following form and the underlying policy, that court would generally not render different interpretations of two policies with identical language. The court would first analyze and interpret the primary policy, and then apply that interpretation to the excess policy, citing the fact that the excess policy follows form. *See e.g. Dow Chemical Co. v. Associated Indem. Corp.*, 724 F. Supp. 474, 480 (E.D.Mich.1989) ("the Court must focus on the language of the relevant primary insurance policies"); *Associated Indem. Corp. v. Dow Chemical Co.*, 814 F. Supp. 613, 618 (E.D.Mich.1993); *Industrial Indem. Co. v. Apple Computer, Inc.*, 79 Cal.App.4th 817, 840, 95 Cal.Rptr.2d 528 (1st Dist.1999). Thus, the excess policy following form predictably would adopt the coverage determinations of the underlying policy.

861 N.Y.S.2d 992, 937 (SCt. N.Y. Cnty. 2008), *rev'd* 893 N.Y.S.2d 31 (2010), *aff'd* 16 N.Y.3d 536 (2011). We read this statement as standing for the principle that, where a *court* interprets the policy language of the primary policy, it may not give the same language a different meaning as to the excess policy. However, in the case *sub judice*, the circuit court interpreted the primary policy language and applied it in the same manner to Zurich and

XL, while expressing its disagreement with Zurich's interpretation of the language of the exclusion. Nothing in *In re Liquidation of Midland Ins. Co.* requires that, where a primary insurer has interpreted the policy language on its own, without judicial review, the excess insurer is bound by that same interpretation.

In *Allmerica Financial Corp v. Certain Underwriters at Lloyd's, London*, the Supreme Judicial Court of Massachusetts addressed whether an excess policy was bound by the primary policy's decision to settle the claim brought by a class action. 871 N.E.2d 418, 421 (Mass. 2007). The court stated, "primary and excess insurers act independently of each other with respect to decisions about their policies, including coverage determinations and settlements." *Id.* at 426. The court acknowledged that coverage determinations and settlements are different, stating, "[w]hile decisions to settle are often closely related to an insurer's conclusion that a particular loss is covered, an insurer may decide to settle a claim for other reasons." *Id.* at 426 n.14. Such reasons are (1) the cost of settlement would be less than the cost of litigation, or (2) the insurer "may value the good will of the insured and settle a claim in the interest of fostering a business relationship that involves many more policies than the one in question." *Id.* The court concluded that follow form policies do not "bind the various insurers to a form of joint liability should coverage at a prior layer fail." *Id*. at 426. The court noted that "[t]he layer of risk each insurer covers is defined and distinct." *Id.* (footnote omitted). In its analysis, the court refuted the argument that by adopting the primary policy language, the excess policy

provider also adopted the intent of the parties to the primary policy. *Id.* at 428. The court explained:

> An excess carrier's intent to incorporate the same words used in a separate agreement between the primary insurer and the insured does not imply an intent by the excess carrier to accept decisions made by the primary carrier about the extent of its obligations under its own agreement.
>
> * * *
>
> The meaning of words in an insurance contract, that is, the interpretation of the contract, is a question of law resting ultimately with the court, not the parties. What the parties intended the words to mean becomes relevant only when an ambiguity in the contractual language is apparent.
>
> * * *
>
> [A]bsent an explicit contractual commitment to do so, an insurer is not bound by the settlement another insurer makes for the same claim, even if the language of the nonsettling policy follows the form of the settling policy. The underwriters were entitled to make a determination concerning the merits of the [class action] settlement and coverage under its policy independent of that made by [the primary insurer].

Id. at 428-29 (internal citations and footnotes omitted).

We agree with the rationales expressed in both *In re Liquidation of Midland Ins. Co.* and *Allmerica* and conclude that a follow form insurer is not automatically bound by the coverage determinations of the primary policy insurer. Although, as noted *supra*, Appellant cites a number of out-of-state cases for the premise that follow form policies should be construed in a manner consistent with the primary policy, we note that none of these cases require that the follow form insurer be bound by the primary insurer's interpretation of the contract language. Instead, these cases stand for the principle that where a *court* interprets the policy language of the primary policy, it may not give the same

language a different meaning as to the excess policy. *See In re Liquidation of Midland Ins. Co.*, 861 N.Y.S.2d at 937. Therefore, we hold that XL was free to interpret the contract language contained in the Zurich Policy in a way that departed from Zurich's interpretation of the same language under the circumstances presented.

III.

Potentiality of Coverage and Reliance on the Gravamen of the Complaint

Having concluded that the Prior Acts Exclusion applies to the allegations in the Class Actions against Appellant, we must now determine whether XL still had a duty to defend under the requirement that liability insurers defend anytime there is a *potential* for coverage. This is the second prong of the two-part test delineated in *Clendenin Bros.*, *supra*, which requires the Court to consider whether the allegations in the Class Action complaints potentially brought the action within the policy's coverage. 390 Md. at 458.

i. Contentions of the Parties

Appellant argues that XL has a duty to defend in the Class Actions as long as the complaint against Appellant alleged any action that was *potentially* covered by the XL Policy.

Appellant points out the Class Actions concerned alleged acts that occurred both before and after May 15, 2007. Appellant states, "[w]hen faced with allegations of acts or occurrences that may fall both inside and outside the time period covered by a liability insurance policy, Maryland courts apply the *Brohawn* [*v. Transamerica Insurance Company*, 276 Md. 396 (1975)] potentiality standard to require the insurer to provide a full

defense to the insured." Appellant posits that the circuit court incorrectly relied on the "gravamen" of the *Haley* complaint when it determined that XL did not have a duty to defend.

According to Appellant, prior acts exclusions do not preclude a duty to defend where it is possible that the claims were based on acts within the coverage period. Appellant argues that the "Interrelated Wrongful Acts" provision does not preclude a duty to defend because the date of the conduct alleged is not clear in the allegations of the Class Action complaints. Furthermore, the Appellant notes that the complaint in the *Los Gatos* Action contains allegations of unjust enrichment and violations of state consumer protection laws that are not related to the conspiracy claims and, therefore, do not "necessarily" share a common nexus to those acts that took place prior to May 15, 2007. Appellant does not explain why it believes that actions underlying the consumer protection and unjust enrichment claims only took place after May 15, 2007.

XL calls Appellant's "potentiality" argument a "red herring," and argues that the circuit court properly applied the standard from *Brohawn*. XL does not dispute what the potentiality standard is, but instead argues that courts applying Maryland law have found that exclusions in a policy may remove *any* potentiality of coverage. XL argues that the Class Actions allege Wrongful Acts "as part of a *single* conspiracy that started no later than March 2002." (Emphasis added). XL maintains all of the allegations contained in the Class Actions concern the same conduct, product, motive, and parties, that the allegations are Interrelated Wrongful Acts that started before May 15, 2007, and, therefore, not

covered under the Primary Policy. XL also points out that Appellant has ignored the Prior Acts Exclusion's express terms, which apply to "Wrongful Acts 'committed . . . *or allegedly* committed . . . *in whole or in part* prior to May 15, 2007.'" XL highlights that an ultimate liability determination is not what determines a duty to defend under this exclusion, rather, where a wrongful act is *allegedly* committed prior to May 15, 2007, *in whole or in part*, or an act alleged is interrelated to such a Wrongful Act, XL does not have a duty to defend.

ii. Analysis

Appellant relies on *Brohawn*, in which the Court of Appeals stated, "[i]f the plaintiffs in the tort suits allege a claim covered by the policy, the insurer has a duty to defend . . . . Even if a tort plaintiff does not allege facts which clearly bring the claim within or without the policy coverage, the insurer still must defend if there is a potentiality that the claim could be covered by the policy." 276 Md. at 407-08 (internal citations omitted). *Brohawn* addressed a tort action that alleged both intentional and negligence tort claims against an insured. *Id*. at 400-01. However, the insurance policy in *Brohawn* covered only negligence tort claims, and excluded "any act committed by or at the direction of the Insured with intent to cause injury or damage to person or property." *Id*. As a result, the insurer denied coverage for all the claims in the case based on the policy's exclusion of damages for intentional torts. *Id*. at 401. Noting that the insurer had no way of establishing that all of the injuries in the case resulted from intentional torts and that the insurer had a duty to defend its insured in suits that allege an unintentional tort covered by the policy,

the Court held that the insurer was obligated to defend the insured because the complaint alleged a covered claim in addition to alleging a claim that was not covered under the policy. *Id.* at 408-09.

In *Chantel Associates v. Mount Vernon Fire Insurance Company*, the Court of Appeals reiterated *Brohawn*'s holding and concluded that an insurance company had a duty to defend where the allegations against the insured included covered bodily injuries that *potentially* began during the policy period. 338 Md. 131 (1995). In *Chantel*, the insured party faced tort claims based on alleged lead-based paint injuries suffered by an infant that resided in one of its properties. *Id*. at 135. However, the insurer claimed that the insurance policy included a lead paint poisoning exclusion and refused to defend the insured party. *Id*. at 137. The Court determined that because the complaint against the insured alleged facts that established the injured parties were potentially exposed to lead paint during the policy period, which resulted in the later bodily injury, the insurer had a duty to defend. 338 Md. at 145.

We distinguish *Chantel* from the case before us because the policy at issue in *Chantel* did not include any exclusion for wrongful acts or interrelated wrongful acts alleged to have occurred in whole or in part prior to the exclusion date. Here, XL reasonably determined that all of the allegations contained in the Class Actions—even the unjust enrichment and consumer protection violation allegations—concern the same parties, product, motive, and conduct that started before May 15, 2007, and, therefore, were not covered under the Primary Policy as Interrelated Wrongful Acts. A finding by this

Court that some of the actions alleged in the Class Actions against Appellant occurred after May 15, 2007, would not, under *Chantel*, require XL to defend Appellant.

Appellant cites *Fulton Bellows, LLC v. Federal Insurance Company*, 662 F. Supp. 2d 976 (E.D. Tenn. 2009), to support its argument that a prior acts exclusion does not preclude a duty to defend where the underlying complaints allege both covered and uncovered acts. In *Fulton Bellows*, the prior acts exclusion stated:

> "[I]n consideration of the premium charged, it is agreed that no coverage will be available under Insuring Clause(s) I.(A) of the Coverage Section identified above for any Claim based upon, arising from, or in consequence of any Wrongful Act committed, attempted, or allegedly committed or attempted in whole or in part prior to August 6, 2004."

662 F. Supp. 2d at 983-84. The court determined that the actions underlying the only actionable claim *could have* occurred after August 6, 2004, and, therefore, would have been covered under the policy. *Id.* at 988. The *Fulton* court specifically disagreed that the claim for discriminatory hiring *arose from* acts underlying an additional claim for an alleged conspiracy to discriminate prior to August 6, 2004. *Id.* The court concluded that there was a genuine issue of material fact as to the discriminatory hiring complaint, therefore, summary judgment was not appropriate. *Id.*

Again we distinguish the exclusion provision in *Fulton* from that contained in the XL policy at issue in this case. The most significant distinction is that the exclusion in *Fulton* did not include a provision for "Interrelated Wrongful Acts." *See id.* at 982-84 (defining "Wrongful Act" and "Related Claim," but not "Interrelated Wrongful Acts"). Here, "Interrelated Wrongful Acts" are defined by the Primary Policy as, "all Wrongful

Acts that have as a common nexus any fact, circumstance, situation, event, transaction, cause or series of casually connected facts, circumstances, situations, events, transactions or causes." The *Haley* Action only alleges one claim in its complaint for violation of 15 U.S.C. § 1, under which it incorporates by reference all of the allegations of acts that occurred both before and after May 15, 2007, contained in the complaint. Similarly, the *Los Gatos* Action, which brought claims for violations of state consumer protection statutes and unjust enrichment in addition to state antitrust violations, incorporated all of the allegations in the complaint under each claim, evidencing that all the claims shared a common nexus of fact, circumstance, situation, event, or transaction.

No Maryland case has directly analyzed "Interrelated Wrongful Acts" in the exclusion context. However, in *Foster v. Summit Medical Systems*, the Court of Appeals of Minnesota confronted a retroactive date exclusion that encompassed interrelated wrongful acts and determined that the alleged embezzlement claims were "comprised of interrelated acts that occurred both before and after the retroactive date. Thus, each element of the retroactive date exclusion clause is satisfied and coverage for the underlying actions is barred." 610 N.W.2d 350, 353 (Minn. 2000). Similarly, at least two cases have also found that where an exclusion contains the words, "in whole or in part," any of the actions alleged in the complaint that fall within the exclusion could remove coverage for the entire action. *See United National Insurance Co. v. Hydro Tank, Inc.*, 497 F.3d 445 (5th Cir. 2007) (determining that the insurer could deny coverage where the complaint alleged bodily injuries that resulted from exposure, at least in part, to pollutants and the policy

contained a pollution exclusion with "in whole or in part" language); *Silverman Neu, LLP v. Admiral Insurance Co.*, 933 F. Supp. 2d 463 (E.D.N.Y. 2013) (finding that coverage was precluded where the complaint stated at least some allegations based upon excluded conduct and the exclusion contained "in whole or in part" language).

Here, the Class Actions alleged Wrongful Acts that occurred as early as 2002—well before the May 15, 2007, Prior Acts Exclusion date. Even if the complaints also alleged acts that occurred after May 15, 2007, the "in whole or in part" and Interrelated Wrongful Acts language contained in the exclusion precludes coverage for the entire action where it is clear that all of the actions alleged are related to the same conspiracy claim. Therefore, we conclude that the circuit court properly found that the allegations in the Class Action complaints did not bring them within the XL policy's coverage.

IV.

Allocation Clause

The Appellant argues that the Allocation Clause contained in the Primary Policy requires that XL pay defense costs for any claim that includes both covered and uncovered matters. The Allocation Clause states:

> If the **Insureds** incur both **Loss** covered by this policy and loss not covered by this policy either because a **Claim** against the **Insureds** includes both covered and uncovered matters or because a claim is made against both **Insureds** and others (including the **Company** in a **Claim** other than an **Employment Practices Claim**), then 100% of such **Defense Costs** will be considered covered **Loss** and all other such loss shall be allocated by the **Insured Persons**, the **Company** and the Underwriter between covered **Loss** an uncovered loss based upon the relative legal exposure of the parties to covered and uncovered matters.

This clause clearly and unambiguously applies where the insured had a duty to defend because at least one claim alleged was covered under the policy. Here, we have determined that *none* of the alleged claims are covered under the Primary Policy because the Prior Acts Exclusion precludes coverage for all acts alleged in the Class Actions. Therefore, the Allocation Clause does not apply here.

V.

Estoppel

Appellant contends the circuit court erred by not addressing its estoppel argument, which was first raised in Appellant's motion for partial summary judgment. Appellant originally argued that estoppel was appropriate where "the conduct of the insurer [was] inequitable." Appellant argued that because XL waited nearly three years after receiving notice of the *Haley* Action to issue a coverage decision, Appellant reasonably believed that XL would provide coverage.

XL responds by stating that Appellant failed to properly plead an estoppel claim, therefore, this Court should not consider it. XL further contends that, even if this Court were to consider Appellant's estoppel argument, the argument fails as a matter of law. XL points out that Appellant failed to "even suggest in argument that it relied to its detriment on anything XL did," which is a required element of an estoppel claim.

An equitable estoppel claim consists of three elements: (1) representation, (2) reliance, and (3) detriment. *See Lipitz v. Hurwitz*, 435 Md. 273, 291 (2013) (quoting *Hill v. Cross Country Settlements, LLC*, 402 Md. 281, 309 (2007)). Maryland Rule 2-305

establishes that a pleading "shall contain a clear statement of the facts necessary to constitute a cause of action and a demand for judgment for the relief sought."

In this case, Appellant did not plead any of the elements of equitable estoppel against XL in its complaint. It is true that Appellant's motion for partial summary judgment stated that "XL did not provide even a 'preliminary' coverage position until . . . nearly two years after notice," and added that, "[d]uring that period, XL asked questions about the defenses of the Underlying Actions and reasonably led [Appellant] to believe it would perform under its follow form excess policy. Thus, XL should be estopped from denying coverage." Appellant's motion for summary judgment thus stated the representation and reliance elements of equitable estoppel, but it did not even address the element of detriment.[15] And, in regard to the representation element, there must be a "clear and definite promise[.]" *Pavel Enters., Inc. v. A.S. Johnson Co., Inc.*, 342 Md. 143, 166 (1996) (citing Restatement (Second) of Contracts § 90(1) (1979)). We note that, in 2010, XL reserved all rights under the policy in connection with the *Haley* policy and that Appellant acknowledged this reservation. Moreover, XL never represented to Appellant that it would pay for the costs of defending the Class Actions. The record does not evidence any representation by XL that could support an estoppel claim. Thus, even looking past the

[15] On appeal, the only argument that Appellant has advanced that can be construed as concerning the detriment element is a single sentence, in which that Appellant claims it "has been unexpectedly funding its own defense since Zurich paid its policy limits, as well as funding this action as a result." That detriment, however, springs from XL's denial of coverage and is not independently tied to any representation by XL or reliance by Appellant.

fact that Appellant alleged estoppel for the first time in a motion for summary judgment—instead of in its complaint—Appellant's equitable estopped argument fails as a matter of law, and the circuit court's denial of Appellant's motion for summary judgment is affirmed.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.