STATE OF WISCONSIN
SUPREME COURT

West Bend Mutual Insurance Company,

Plaintiff-Respondent-Petitioner,

v.

Court of Appeals District II

Ixthus Medical Supply, Inc.,
Karl Kunstman,

Appeal No. 2017AP909

Racine County Circuit Court
Case No.: 2016CV1414 , The
Honorable David W.
Paulson, presiding

Defendants-Appellants,

Abbott Laboratories,
Abbott Diabetes Care Inc.,
Abbott Diabetes Care Sales Corp.,

Defendants-Co-Appellants.

PLAINTIFF-RESPONDENT-PETITIONER WEST BEND MUTUAL INSURANCE COMPANY'S BRIEF AND APPENDIX

Jeffrey Leavell
Kris Bartos
Danielle N. Rousset
JEFFREY LEAVELL, S.C.
723 S. Main Street
Racine, WI 53403

August 10, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. ISSUES PRESENTED FOR REVIEW, HOW THEY WERE RAISED AND DECIDED BY THE CIRCUIT COURT AND COURT OF APPEALS

1. Do the allegations of Ixthus' unlawful diversion to U.S. markets of Abbott's diabetic test strips manufactured for foreign markets, and fraudulent rebate scheme with resultant loss to Abbott, constitute injury caused by advertising so as to invoke the insuring agreement of the "advertising injury" liability coverage of the West Bend policy for the underlying lawsuit in federal court in New York, *Abbott Laboratories, et al. v. Adelphia Supply USA, et al.*, No. 15 Civ. 05826 (CBA)(MDG)(E.D. N.Y.) (the "Abbott Suit")?

Answered by the Circuit Court: Yes.

Answered by the Court of Appeals: Yes.

2. Do the allegations of Ixthus' unlawful diversion of test strips and fraudulent rebate scheme constitute a knowing violation of rights of another such that the exclusion in the West Bend policy for Knowing Violation applies?

Answered by the Circuit Court: Yes.

Answered by the Court of Appeals: No.

3. Do the allegations of Ixthus' unlawful diversion of test strips and fraudulent rebate scheme preclude coverage pursuant to the Criminal Acts exclusion in the West Bend policy?

Not answered by the Circuit Court or the Court of Appeals.

4. Do the allegations that Ixthus intentionally caused damage to Abbott by participating in the unlawful diversion of test strips and fraudulent rebate scheme preclude coverage on the basis of the Doctrine of Fortuity?

Not answered by the Circuit Court or the Court of Appeals.

5. Do the allegations of Ixthus' unlawful diversion of test strips and fraudulent rebate scheme preclude coverage on the basis of an insured's reasonable expectations?

Not answered by the Circuit Court or the Court of Appeals.

6. Do the allegations of Ixthus' unlawful diversion of test strips and fraudulent rebate scheme preclude coverage on the basis of public policy considerations?

Not answered by the Circuit Court or the Court of Appeals.

II. STATEMENT OF THE CASE, WITH NATURE OF THE CASE, FACTS, PROCEDURAL POSTURE, DISPOSITION AT THE CIRCUIT AND APPELLATE COURT

A. Nature of the Case.

This case involves an insurance coverage dispute. West Bend Mutual Insurance Company ("West Bend") sought a declaration that it does not owe a duty to defend or indemnify Ixthus Medical Supply, Inc. or Karl Kunstman (collectively, "Ixthus") in connection with an

underlying lawsuit: *Abbott Laboratories, et al. v. Adelphia Supply USA, et al.*, No. 15 Civ. 05826 (CBA)(MDG)(E.D. N.Y.) (the "Abbott Suit"). The Racine County Circuit Court granted West Bend's motion for summary judgment and declared it had no duty to defend or indemnify Ixthus. (R. 43; *See* A. 11-12; 13-30) Ixthus and Abbott appealed and the Court of Appeals reversed the Circuit Court. (A. 1-10)[1].

B. Undisputed Facts.

1. The Underlying Complaint (the Abbott Suit).

Abbott filed suit against Ixthus and more than 300 other defendants in the United States District Court Eastern District of New York. (R. 11; A. 49.) The Abbott Suit is an action for trademark and trade dress infringement, fraud, racketeering, unfair competition, conspiracy, unjust enrichment, RICO violations, and other alleged illegal acts by the defendants.[2] (*Id.*) Abbott's Second Amended Complaint (the "Complaint") alleges the defendants illegally conspired to import and sell diverted international blood glucose test strips manufactured by Abbott whose labeling had not been cleared by regulators for sale in the United States. (R. 11, ¶¶1-3; A. 54-55.)

[1] "A.__" designates herein the appendix page number, which is found at the bottom right of the appendix pages attached to this brief.

[2] The court in the Abbott Suit entered an order dismissing Abbott's causes of action for RICO violation, RICO conspiracy and unjust enrichment on January 4, 2017. *See Abbott Laboratories v. Adelphia Supply USA*, No. 15-cv-5826, 2017 WL 57802 (E.D.N.Y. Jan. 4, 2017).

Abbott alleges Ixthus sold the international test strips within the United States as part of a fraudulent scheme, benefitting from the lower price of the international test strips, as well as receiving unwarranted rebates that were only meant for domestic test strips - - all to the harm of Abbott. (R. 11, ¶¶ 8-9; A. 56.) Specifically, Abbott alleges Ixthus' conduct has caused unauthorized rebate payments, lost sales and market share, and other harm to Abbott. (*Id*. at ¶¶9, 567, 590; A. 56, A. 98, A. 95.) In sum, Ixthus bought Abbott's lesser expensive test strips that were made for overseas sales, sold them in the U.S. market as if they were made for that market, and got rebates paid by Abbott on them. It is alleged Ixthus wrongfully enjoyed the profit, and rebates it should not have received, all at Abbott's expense.

In addition, Ixthus purportedly ran this scheme before. Abbott alleges Ixthus knew it was defrauding Abbott because Ixthus, under the name "Milwaukee Notions, Inc." had previously been sued by Johnson & Johnson in 2006 for the unlawful importation and/or sale of LifeScan One Touch blood glucose test strips, a competitor product to Abbott's FreeStyle test strips. (R. 11, ¶¶ 543, 558-559; A. 92, 93.) Abbott alleges Milwaukee Notions was permanently enjoined in that suit from selling counterfeit LifeScan test strips. (R. 11, ¶ 561; A. 93.)

The Complaint alleges that:

> 7. The Distributor Defendants and Pharmacy Defendants have a long-standing relationship, through which they agreed to purchase diverted FreeStyle test strips from foreign countries at these lower prices and then dispense them to consumers at higher U.S. retail prices **for the purpose of receiving fraudulent reimbursement payments from the consumers' insurers**.
>
> ....
>
> 9. Defendants are accomplishing this **fraud by submitting falsified reimbursement claims** to insurance companies and knowingly causing falsified rebate claims to be submitted to Abbott.
>
> ....
>
> 568. **Defendants' acts have been committed deliberately and willfully, with knowledge of Abbott's exclusive rights** and goodwill in the FreeStyle Marks and FreeStyle Trade Dress, and with knowledge of the infringing nature of the marks when used in connection with the diverted international FreeStyle test strips. Defendants' acts have also been committed with bad faith and the intent to cause confusion, or to cause mistake and/or to deceive.
>
> ....
>
> 642. The Distributor Defendants [the Insured] sold diverted international FreeStyle test strips knowing and/or having reason to know that their customers would use such diverted international FreeStyle test strips in commerce in a manner that constitutes trademark infringement.

(R. 11; A. 55-56, 95, 106.)(bold added.)

Significantly, the Complaint consistently alleges Ixthus, and other defendants, acted deliberately and willfully in a fraudulent scheme and that they intended to cause damage to Abbott by obtaining unwarranted rebates. (R. 11, ¶¶8-9; A. 56.)

Abbott also alleges Ixthus sold domestically approximately forty-six diverted international boxes of FreeStyle test strips to defendant 110 Pharmacy & Surgical that were designed for sale in India and not in the United States. (R. 11: 104 ¶426.) Ixthus is also alleged to have sold sixteen diverted boxes of test strips that were designed for use in the United Kingdom and not in the United States to defendant 110 Pharmacy & Surgical. (*Id*.)

Further, Abbott alleges it subpoenaed Ixthus for documents regarding the identity of its customers and suppliers of diverted international FreeStyle test strips, but Ixthus refused to produce such documents, claiming it had a right against self-incrimination under the Fifth Amendment to the U.S. Constitution. (R. 11:143, ¶ 562; A. 94.)

2. The West Bend Policies.

West Bend issued four consecutive commercial general liability (CGL) policies and commercial umbrella policies to Ixthus, in effect from October 3, 2012 to October 3, 2016. (R. 2:1; R. 3:1; R. 4:1; R. 5:1; R. 7:1; R. 8:1; R. 9:1; A. 31.)[3] The CGL policies pertain to specifically defined "personal and advertising injury": "We will pay those sums that the insured becomes legally obligated to pay as damages because of

[3] For ease of reference, and because all the policies contain the same material language, West Bend will only provide record citations to West Bend's 2012-2013 CGL and umbrella policies.

"personal and advertising injury" to which this insurance applies." (R. 2:24; A. 38.) "Personal and advertising injury" is defined, in pertinent part, to mean specific offenses done by advertising:

> 14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:
>
> …
>
> f. The use of another advertising idea in your "advertisement"; or
> g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

(R. 2:32; A. 46.)

West Bend's policies contain the following exclusions that preclude coverage to Ixthus for the Abbott Suit:

> 3. Exclusions
>
> This insurance does not apply to:
>
> a. Knowing Violation Of Rights Of Another
>
> "Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury".
>
> ….
>
> c. Criminal Acts
>
> "Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.

(R. 2:24; A. 38.)

C. Procedural Posture

Ixthus tendered defense of the Complaint to West Bend. West Bend, disputing coverage, filed a declaratory action in Racine County Circuit Court, the county of Ixthus' business office. West Bend moved for summary judgment, seeking a declaration that it had no duty to defend or indemnify Ixthus and then dismissal of this lawsuit. (R. 31.) Abbott also filed a motion for declaratory judgment seeking a declaration that West Bend had a duty to defend and indemnify Ixthus. (R. 37.)

West Bend argued in its briefs, and orally, that there was no "personal and advertising injury" because there was no alleged causal connection between the alleged "advertisement" and Abbott's injury. (R. 32: 14-17; R. 55: 4-7.) West Bend argued in the alternative, that the allegations were excluded because the Knowing Violation exclusion precluded coverage to Ixthus for the Abbott Suit. (R. 32: 17-22; R. 55: 7-11.)

Abbott and Ixthus argued the Complaint alleged a covered "personal and advertising injury" and that the Knowing Violation exclusion did not preclude coverage. (R. 34; R. 37.)

The Circuit Court heard oral argument on the motions. At the hearing, Abbott's attorney urged the Circuit Court to ignore the

allegations, and instead imagine the Complaint had alleged only a bare minimum of what was necessary to establish liability for several of the Complaint's causes of action, including common law unfair competition and Lanham Act violation:

> So the question for this Court to ask is: Is Ixthus liable -- could it be held liable under the complaints in New York without a showing of intentional conduct? And the answer to that question undoubtedly is yes. Ixthus could absolutely be held liable under the complaint filed in New York without any showing of intentional conduct.

(R. 55:12-13.)

West Bend's attorney urged the Circuit Court to apply the plain language of the underlying Complaint's allegations:

> The defendants also contend that the exclusion shouldn't apply, because even if every allegation is filled with allegations of intentional injury, [Abbott] wasn't actually required to prove intent, and therefore we have or we should pretend as if those allegations don't exist in the underlying complaint. And we submit that that approach is inconsistent with what the Supreme Court said in the *Water Well* case where the court said we take the actual written words in the complaint at face value. We don't speculate about what could have been alleged and we don't imagine things about what plaintiff wanted to allege, instead we rely on the actual written allegations. And here all of those allegations are to the effect that there is nothing but intentional injury at issue.

(R. 55:10.)

1. The Circuit Court's Decision

The Circuit Court granted summary judgment to West Bend, and therefore denied Abbott's motion, and declared West Bend had no duty to defend or indemnify Ixthus. (R. 56; A. 13 *et seq*.) The Circuit Court

rejected West Bend's causal connection argument, but agreed with West Bend's argument that based on the policies' plain language and the Complaint's allegations, the Knowing Violation exclusion precluded coverage to Ixthus:

> The allegations of the complaint demonstrate that [Abbott's] damages arise out of an act or a series of acts that are intended to cause injury. I can't envision that a reasonable insured would expect liability coverage for the acts of intentionally diverting the test strips and the allegations of fraud and conspiracy that go along with the scheme that was employed here. I do find that the four corners of the underlying complaint clearly do allege an injury caused at the direction of the insured with the knowledge the act would violate the rights of another, and that the four corners do allege infliction of advertising injury.
>
> ....
>
> The allegations of the complaint allege a scheme to defraud that is knowing and deliberate. The allegations of the complaint and the relief requested allege liability by the insureds caused by intentional conduct with intent to injure Abbott.
>
> So it is my decision that the knowing violation exclusion applies, and based on that exclusion West Bend does not owe a duty to defend or indemnify the insured.

(R. 56: 15-16; A. 27-28.) Ixthus and Abbott appealed the Circuit Court's decision.

2. The Court of Appeals' Decision.

The Court of Appeals' Decision stated the "sole question" on appeal was "whether the policies' "knowing violation" exclusion applies and relieves West Bend of its duty to defend Ixthus. . . ." (A. 2; ¶1.) More accurately, the issue should have been framed as "whether West

Bend had a duty to defend and indemnify Ixthus and Kunstman against the allegations in Abbott's Second Amended Complaint." The Court of Appeals did not address the Criminal Acts exclusion, an argument that was fully briefed. West Bend also fully briefed arguments for affirmance of the Circuit Court based on the Doctrine of Fortuity, the reasonable expectations of the insured, and public policy considerations. The Court of Appeals did not address these arguments either.

The Court of Appeals concluded the Complaint alleged a causal connection between Abbott's injury and Ixthus' advertising activity. (A. 7, ¶14.) Despite stating it considered "whether **any** of the policy's exclusions preclude coverage," (A. 7, ¶15.) (bold added), the Court of Appeals then only addressed the Knowing Violation exclusion and held it did not preclude coverage:

> Regardless if a complaint alleges that the insured knew it was committing a wrongful act or not, however, an insurer has a duty to defend if the policyholder still could be liable without a showing of intentional conduct. *Air Eng'g*, 346 Wis. 2d 9, ¶24. We are not persuaded by West Bend's argument that all of the claims are pulled within the ambit of the "knowing violation" exclusion by virtue of the incorporation clause at the beginning of each claim for relief: "Abbott incorporates each paragraph of this Complaint as if fully set forth herein." Simply because the complaint alleges intent does not necessarily mean each underlying claim requires proof of intent.
>
> …

> As there are claims set forth in the complaint that survive the "knowing violation" exclusion, the inclusion of allegations of intentional conduct does not relieve the insurer of its duty to defend. *See Air Eng'g*, 346 Wis. 2d 9, ¶25. We therefore reverse the circuit court's grant of summary judgment and its order declaring that West Bend has no duty to defend or indemnify Ixthus.

(A. 8-9, ¶¶17, 20.)

D. Standard of Review.

Appellate courts review summary judgment decisions *de novo*, applying the standards set forth in Wis. Stat. §802.08(2) in the same manner as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816, 820 (1987). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Wis. Stat. §802.08(2).

Likewise, the meaning and interpretation of an insurance policy is a question of law reviewed *de novo* on appeal. *Nischke v. Aetna Health Plans*, 2008 WI App 190, ¶4, 314 Wis. 2d 774, 777, 763 N.W.2d 554, 555. In interpreting an insurance policy, the Court must first look to the plain language of the policy to determine its meaning. *Budget Rent-A-Car Sys. v. Shelby Ins. Group*, 197 Wis. 2d 663, 669, 541 N.W.2d 178, 180 (Ct. App. 1995). The words of the policy are to be given their plain and ordinary meaning. *Bank One N.A. v. Breakers Dev., Inc.*, 208 Wis. 2d 230, 233, 559 N.W.2d 911, 912 (Ct. App. 1997). Insurance

contracts should be construed to give effect to the parties' intentions and must not be construed to "cover risks that the insurer did not contemplate and for which the insurer has not received a premium." *Soc'y Ins. v. Bodart*, 2012 WI App 75, ¶20, 343 Wis. 2d 418, 428, 819 N.W.2d 298, 303.

The complaint allegations are determinative for the duty to defend. *See, e.g., Elliott v. Donahue*, 169 Wis. 2d 310, 320-21, 485 N.W.2d 403, 407 (1992) (the duty to defend "is predicated on allegations in a complaint which, if proved, would give rise to recovery under the terms and conditions of the insurance policy"). "Longstanding case law requires a court considering an insurer's duty to defend its insured to compare the four corners of the underlying complaint to the terms of the entire insurance policy." *Water Well Solutions Serv. Group Inc. v. Consol. Ins. Co.*, 2016 WI 54, ¶15, 369 Wis. 2d 607, 619, 881 N.W.2d 285, 291. Furthermore, "if there is no duty to defend there is also no duty to indemnify." *Great Lakes Bevs., LLC v. Wochinski*, 2017 WI App 13, ¶15, 373 Wis. 2d 649, 659, 892 N.W.2d 333, 338.

There is a three step process in determining whether advertising injury coverage has been triggered: 1) does the complaint state an offense covered under the advertising injury provisions of the insurance policies; 2) does the complaint allege the insured engaged in advertising

activity; and 3) does the complaint allege a causal connection between the injury alleged and the insured's advertising activity? *Fireman's Fund Ins. Co. v. Bradley Corp.*, 2003 WI 33, ¶26, 261 Wis. 2d 4, 22, 660 N.W.2d 666, 675.

In addition, affirmance of the Circuit Court on any ground is appropriate, regardless of the basis of the Circuit Court's decision. On appeal, review is *de novo* and the Court can affirm for entirely different reasons than those cited by the Circuit Court if it chooses. *Hansen v. Tex. Roadhouse, Inc.*, 2013 WI App 2, ¶32-33, 345 Wis. 2d 669, 693, 827 N.W.2d 99, 110 ("We affirm the trial court's grant of summary judgment, although on different grounds. We review *de novo* an order for summary judgment, using the same methodology as the trial court"). A respondent on appeal may raise ***any*** argument that would support the Circuit Court's holding, even arguments not raised in the Circuit Court. *State v. Holt,* 128 Wis. 2d 110, 124-25, 382 N.W.2d 679, 687 (Ct. App. 1985), *superseded on other grounds by statute*. ("An appellate court may sustain a lower court's holding on a theory or on reasoning not presented to the lower court."); *See also State v. Truax*, 151 Wis. 2d 354, 359, 444 N.W.2d 432, 435 (Ct. App. 1989). ("We may sustain the trial court's holding on a theory not presented to it, and it is

inconsequential whether we do so *sua sponte* or at the urging of a respondent.")

This Court has directed for over a century that appellate review should look to the record and affirm where "the ruling is correct and the record reveals" that fact, regardless of the reason offered by the Circuit Court. *See Mueller v. Mizia*, 33 Wis. 2d 311, 318, 147 N.W.2d 269, 273 (1967), *citing Bautz v. Adams*, 131 Wis. 152, 159, 111 N. W. 69, 71–72 (1907).

III. ARGUMENT

A. WEST BEND HAS NO DUTY TO DEFEND OR INDEMNIFY IXTHUS FOR THE ALLEGATIONS OF THE ABBOTT SUIT.

1. The allegations in the Complaint do not trigger the policies' "personal and advertising injury" coverage because the Complaint does not allege a causal connection between Abbott's injury and Ixthus' alleged advertising activity.

The policies do not provide an initial grant of coverage in the first instance because the Complaint does not allege a causal connection between an offense covered under the "advertising injury" provisions of the insurance policy and the insured's advertising activity. *See Fireman's Fund*, 2003 WI 33, ¶26, 261 Wis. 2d at 22, 660 N.W.2d at 675. To satisfy the causal connection requirement, this Court has held

that "the advertising must **contribute materially** to the injury." *Id.* at ¶52, 261 Wis. 2d at 35, 660 N.W.2d at 681, *citing R.C. Bigelow, Inc. v. Liberty Mut. Ins. Co.*, 287 F.3d 242 (2d. Cir. 2002). (bold added.)

The Decision completely ignored the "materially contribute" standard and instead wrongly found a causal connection existed merely because the Complaint referenced the word "advertisement" causing consumer confusion. (A. 7, ¶14.) However, the allegations in the Complaint fail to satisfy the "materially contribute" requirement because the crux of Abbott's allegations are that the importation and delivery of diverted international test strips by Ixthus and the consequential rebates injured Abbott, and not the advertising of test strips.

The mere presence of allegations that the defendants advertised is insufficient to satisfy the causal connection requirement. *See Heil Co. v. Hartford Acc. & Indem. Co.*, 937 F.Supp. 1355, 1361 (E.D. Wis. 1996). In *Heil,* the plaintiff alleged the insured infringed the plaintiff's patent by selling infringing products and replacement parts for such products. *Id.* at 1357. In support of its claim, the plaintiff attached an advertisement for the infringing product to its amended complaint. *Id.* at 1366. Although decided prior to *Fireman's Fund*, *Heil* applied reasoning similar to that employed by *Fireman's Fund*, holding that "in

order to interpret the language of the [general liability] insurance policy in context with the policy's intended function, any of the policy's enumerated advertising injuries must be caused by Heil's advertising." *Id.* at 1365. *Heil* held that even though the plaintiff attached an advertisement to the complaint itself and therefore alleged some advertising activity, the insured still "failed to establish any causal connection between the patent infringement alleged in the [underlying lawsuit] and any advertising activity, despite the fact that the infringing product was advertised and may have been sold in part, through advertising." *Id.* at 1366-1367. *Heil* reasoned that injury alleged in the complaint arose out of the alleged illegal manufacturing and selling of the infringing product, not out of the insured's advertising activities. *Id.*

Just as in *Heil*, the sparse references to advertising in the Complaint here have no connection to Abbott's alleged injuries. Abbott alleges the delivery of diverted international test strips and consequential rebates injured Abbott, not the advertising of test strips. Indeed, irrespective of any advertising, if Ixthus had only delivered domestic strips to pharmacies rather than the diverted international strips, there would have been no consumer confusion and no injury whatsoever to Abbott. Similarly, if Ixthus had only delivered legal test

strips, the pharmacies and, ultimately, the consumers would have received exactly what they were supposed to receive, and Abbott would not have been compelled to pay any undue rebates. Thus, the injury in question was not caused by an advertisement, but by Ixthus' purposeful decision to deliver test strips to domestic markets that were supposed to have been sold internationally, and then to profit from a fraudulent rebate from Abbott for them.

The lack of connection between any advertisement and the injury in question is further bolstered by the fact that Ixthus itself is not alleged to have sold the test strips directly to consumers. (R. 11:104, ¶426). Rather, the allegations directed specifically against Ixthus state only that Ixthus sold diverted international boxes of test strips to the pharmacies. (*Id.*) The pharmacies are then alleged in turn to have sold those boxes directly to consumers. (*Id.*; R. 11:7, ¶5; A. 55.) Thus, because Ixthus is not alleged to have had direct contact with the consumers, the causal connection between Ixthus' conduct and the alleged consumer confusion is even more tenuous. In the absence of any causal connection between Ixthus' alleged advertising and Abbott's alleged injury, there can be no coverage under the personal and advertising injury coverage, and West Bend cannot owe a duty to defend or indemnify Ixthus.

Fireman's Fund is instructive on the necessary causal connection. In *Fireman's Fund*, Lawler filed suit against Bradley, alleging patent infringement and unfair competition in violation of the Lanham Act and common law. *Id*. at ¶11, 261 Wis. 2d at 15, 660 N.W.2d at 672. *Fireman's Fund* held that Bradley engaged in injurious advertising activity because it created promotional materials and displayed the allegedly infringing products at trade shows directed at customers. *Id*. at ¶¶45-46, 261 Wis. 2d at 31, 660 N.W.2d at 679-680. No similar allegation is made here.

Further, while *Fireman's Fund* is instructive as to Wisconsin's legal requirements to trigger personal and advertising injury coverage, the facts of that case are not comparable to the facts at issue here, and the result reached in that case should not be replicated here. In *Fireman's Fund*, the complaint alleged an employee of the Lawler Corporation stole Lawler's technology and took it to Bradley Corporation. *Fireman's Fund*, 2003 WI 33, ¶12, 261 Wis. 2d at 16, 660 N.W.2d at 672. Bradley hired the employee and used the stolen information to create its own product. *Id*. Lawler filed suit against Bradley, alleging patent infringement and unfair competition in violation of the Lanham Act and common law. *Id*. at ¶11, 261 Wis. 2d at 15, 660 N.W.2d at 672. *Fireman's Fund* concluded the complaint

adequately alleged trade mark and trade dress infringement and therefore alleged a covered offense. *Id*. at ¶34, 261 Wis. 2d at 26, 660 N.W.2d at 677.

Fireman's Fund next held that that Bradley engaged in advertising because it created promotional materials and displayed the allegedly infringing products at trade shows directed at customers. *Id*. at ¶¶45-46, 261 Wis. 2d at 31, 660 N.W.2d at 679-680. Finally, *Fireman's Fund* held that the complaint sufficiently alleged a causal connection between the alleged injury and Bradley's advertising. *Id*. at ¶53, 261 Wis. 2d at 34, 660 N.W.2d at 681-682. In deciding that the complaint satisfied the causal connection requirement, the Court focused on Bradley's use of promotional materials and trade show displays to directly reach consumers and inferred that the use of such materials in its advertising activities caused at least some of the injury of consumer confusion to the detriment of Lawler. *Id*.

Unlike the complaint in *Fireman's Fund*, the Complaint here contains no allegations that Ixthus sent out promotional materials, participated in trade shows or engaged in any specific advertising activity toward consumers. Rather, only two paragraphs in the 645 paragraph Complaint even reference advertising and then only to generally allege that all defendants imported, advertised and

distributed test strips. (R. 11, ¶¶ 15, 385; A. 58-59, 81.) The alleged advertising here is not comparable to the specific allegations that the insured in *Fireman's Fund* created promotional material and advertised the allegedly infringing product at trade shows directly to consumers, and accordingly no inference can be made that Ixthus' advertising caused any consumer confusion or damage to Abbott.

Rather, the alleged consumer confusion and damage to Abbott is alleged to be attributable to the marketing and selling of diverted international test strips masquerading as domestic strips, which were sold by pharmacies, not Ixthus. The Complaint specifically alleges Ixthus sold diverted international test strips to a pharmacy, not consumers. (R. 11, ¶ 426.) Further, the Complaint alleges *only* the pharmacies marketed and sold the diverted international test strips to consumers:

> 3. At the center of this conspiracy are wholesalers …who import, market, and distribute large volumes of diverted international FreeStyle test strips for distribution to pharmacies … throughout the United States. **The Pharmacy Defendants are marketing and selling the diverted FreeStyle test strips to U.S. consumers** and submitting fraudulent reimbursement claims …
>
> 7. …**The Pharmacy Defendants complete the scheme, selling diverted international FreeStyle test strips to U.S. Consumers**...

(R. 11; A. 55-56.) (bold added.)

Abbott and Ixthus may argue that the fact that the Complaint seeks damages resulting from Ixthus' alleged violation of the Lanham Act, not just damages resulting from the wrongful rebates, suggests a causal connection between Ixthus' alleged advertising and at least some of Abbott's injuries resulting from such violations. However, any such argument must be rejected because Abbott's factual allegations underlying its Lanham Act theory demonstrate that Ixthus' importation and delivery of the diverted test strips, not its advertising activity, caused Abbott injury.

Wisconsin law requires that the advertising *materially contribute* to the alleged injury to trigger an insurance policy's personal and advertising injury coverage. *Acuity v. Bagadia*, 2008 WI 62, ¶50, 310 Wis. 2d 197, 223, 750 N.W.2d 817, 830. Here, only the importation and distribution of the diverted test strips materially contributed to Abbott's alleged injury. Accordingly, the causal connection standard is not satisfied and there is no personal and advertising injury coverage for the Abbott Suit, and West Bend does not owe a duty to defend or indemnify Ixthus.

2. Alternatively, the Knowing Violation exclusion bars coverage for the Complaint's allegations.

The facts alleged in the Complaint describe a knowing and deliberate scheme to defraud Abbott, invoking this exclusion. The exclusion states:

> This insurance does not apply to:
>
> a. Knowing Violation Of Rights Of Another
>
> "Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury".

(R. 2:24; A. 38.) Abbott alleges Ixthus knew it was defrauding Abbott through the diversion of international diabetic test strips, and the rebate scheme on them that injured Abbott. (R. 11, ¶¶7, 9, 388, 340, 568, 642; A. 55-56, A. 70, A. 88, A. 95, A. 106.) The entire purpose of the scheme was to profiteer off Abbott, buying internationally low, selling domestically high, and receiving rebates that were not intended by Abbott. *And*, Ixthus' principals knew exactly what they were doing, having done it before. The Complaint even alleges Ixthus had been sued for a similar scheme under its prior name, Milwaukee Notions, Inc., for the unlawful importation and/or sale of Johnson & Johnson's diabetic test strips. (R. 11, ¶¶543, 558-559; A. 92-93.) Abbott alleges

Milwaukee Notions was permanently enjoined from selling counterfeit LifeScan test strips. (R. 11, ¶561; A. 93.)

Further, Abbott alleges Ixthus knew its scheme exposed it to criminal prosecution. The Complaint alleges Abbott subpoenaed Ixthus for documents regarding the identity of its customers and suppliers of diverted international test strips, but Ixthus refused to produce such documents, claiming it had a right against self-incrimination under the Fifth Amendment to the U.S. Constitution. (R. 11, ¶562; A. 94.) A party's invocation of that right in a civil case is admissible to show an "influence of guilt." *See Grognet v. Fox Valley Trucking Serv.*, 45 Wis. 2d 235, 239-240, 172 N.W.2d 812, 815 (1969).

The Complaint alleges Ixthus committed its acts "deliberately and willfully, with knowledge of Abbott's exclusive rights and goodwill in the FreeStyle Marks and FreeStyle Trade Dress, and with knowledge of the infringing nature of the marks when used in connection with the diverted international FreeStyle test strips." (R. 11, ¶ 568; A. 95)

The allegations fall squarely within the Knowing Violation exclusion. Further, each of the causes of action in the Complaint expressly incorporated all of the preceding allegations, so all of the known violation conduct was reiterated constantly throughout the

Complaint in every cause of action, and is rightly considered on the duty to defend analysis. Courts have determined that such a pleading style imports allegations of intent to injure into each cause of action. *James Cape & Sons Co. v. Streu Constr. Co.*, 2009 WI App 154, ¶¶ 12, 17, 321 Wis. 2d 604, 612-13, 615, 775 N.W.2d 117, 121, 123. (Intentional injury exclusion barred coverage for causes of action for negligence where each cause of action incorporated factual allegations of intentional criminal conduct.) *See also Callas Enterprises, Inc. v. The Travelers Indem. Co. of Am.*, 193 F.3d 952, 955 (8th Cir. 1999) (Knowledge of falsity exclusion barred coverage because each claim for relief adopted by reference a preceding allegation of the insured's knowledge.)

a. The Court of Appeals and the decisions upon which it improperly relied focused on theories of liability and not the specific facts alleged in the Complaint.

The Court of Appeals Decision departed from long-standing Wisconsin law by focusing on the barest elements of Abbott's theories of liability, and not the facts alleged in the Complaint, when it evaluated the Knowing Violation exclusion. Specifically, the Court of Appeals focused on the required elements of proof for Abbott's claims for violation of the Lanham Act, 15 U.S.C. §1125(c)(1), and trademark

dilution and deceptive business practices under New York law. (A. 8, ¶18; A. 9, ¶19.) The Court of Appeals held those theories of liability did not require a showing of intent and so the Knowing Violation exclusion did not apply. This analysis ignored the fact that the Complaint only described Ixthus' conduct as intentional, deliberate and willful.

Contrary to the Court of Appeals Decision's approach, the facts alleged are dispositive for duty to defend. *Water Well,* 2016 WI 54, ¶20, 369 Wis. 2d at 623-624, 881 N.W.2d at 293. The theories of liability, or the titles given to causes of action, are immaterial. *James Cape,* 2009 WI App 154, ¶16, 321 Wis. 2d at 614, 775 N.W.2d at 122 ("The duty to defend arises from the allegations within the four corners of the complaint. Our focus is on the facts alleged, the incidents giving rise to the claims, not [plaintiff's] theory of liability."); *Bankert v. Threshermen's Mut. Ins. Co.,* 110 Wis. 2d 469, 480, 329 N.W.2d 150, 155 (1983) (policy in question insured against occurrences, not theory of liability).

Wisconsin Courts follow this maxim so consistently that even a complaint's use of the word "negligence" or assertion of a negligence cause of action is not enough to outweigh factual allegations of intentional criminal conduct that preclude a duty to defend. *See James Cape*, 2009 WI App 154, ¶18, 321 Wis. 2d at 615, 775 N.W.2d 117 at

123 ("The factually unsupported use of the term "negligence" in [the] complaint, when measured against the extensive factual allegations of intentional criminal conduct, is insufficient to trigger [the] duty to defend"); *See also C.L. v. School Dist. of Menomonee Falls*, 221 Wis. 2d 692, 704-705, 585 N.W.2d 826, 830 (Ct. App. 1998) (Facts trumped the legal theories asserted and precluded coverage).

The Decision said it was relying on *Air Eng'g,* 2013 WI App 18, ¶24, 346 Wis. 2d 9, 828 N.W.2d 565, for the proposition that it could effectively ignore the four-corners of the Complaint and instead evaluate the elements of Abbott's theory of liability and what proof it would minimally require. (A. 9, ¶¶ 19-20.) This contravenes the Supreme Court's clear direction in *Water Well,* and many other decisions, that the allegations govern. The duty to defend is dependent solely on the allegations of the complaint. *Water Well,* 2016 WI 54, ¶20, 369 Wis. 2d at 624, 881 N.W.2d at 293. It is also contrary to *James Cape*, 2009 WI App 154, ¶ 18, 321 Wis. 2d at 615, 775 N.W.2d 117 at 123 and *Bankert,* 110 Wis. 2d at 480, 329 N.W.2d at 155, which hold policies cover facts alleged, not claims. The Court of Appeals Decision is therefore a radical departure from existing law.

The Decision is also completely impractical because if this approach were adopted, then every duty to defend analysis would

require the Court, and insurers when they receive tender, to contemplate the law, the required elements, and assume only those facts had been alleged and not one fact more. Each duty to defend decision would become a weighty intellectual exercise on the law, and what a cause of action minimally requires, removed from the actual facts alleged. This is an unworkable standard, and directly contrary to the Supreme Court's recent command in *Water Well*.

The Decision in essence addressed whether West Bend had a duty to defend allegations that were not made. The Decision disregarded the abundant allegations of knowing and intentional illegal conduct and resulting injury, which plainly invoked the Knowing Violation exclusion. The illegal scheme alleged could only involve a knowing violation, because Ixthus had to understand it would hurt Abbott by buying its lesser priced international market strips, and then marketing them in the domestic marketplace in competition, and also grabbing product rebates at Abbott's expense as if the strips had been made for the domestic U.S. market. That was the only way Ixthus could profit. There could be no accidental switching of strips and rebate profiteering.

The Court of Appeals' Decision makes the facts alleged in the Complaint immaterial to deciding duty to defend. If the Decision were

an accurate statement of the law, then many Wisconsin insurance coverage decisions would have been decided differently. For example, if the Decision's application of the law were correct, then the Supreme Court in *Schinner v. Gundrum* would have found coverage because even though intentional acts were alleged, the plaintiff also alleged a claim against Gundrum for negligence. *See Schinner v. Gundrum*, 2012 WI App 31, ¶4, 340 Wis. 2d 195, 198, 811 N.W.2d 431, 433, *rev'd* 2013 WI 71, 349 Wis. 2d 529, 833 N.W.2d 685. Proof of that negligence claim would not have required proof of purposeful acts or intentional conduct. However, the Supreme Court held in *Schinner v. Gundrum* that there was no coverage and no duty to defend because the facts alleged were not an accidental "occurrence" within the meaning of the policy. *Id.* at ¶81, 349 Wis. 2d at 564, 833 N.W.2d at 703.

Likewise, in *Sustache*, the plaintiff pleaded a negligence claim, yet the Supreme Court held there was no duty to defend, because the alleged facts of the battery did not describe an accident or occurrence. *Estate of Sustache v. Am. Family Mut. Ins. Co.,* 2008 WI 87, ¶¶6, 54-56, 311 Wis. 2d 548, 554, 574-75, 751 N.W.2d 845, 848, 857-58. If duty to defend were determined by assessing only those facts necessary to support the claim, and ignoring all others, then *Sustache* would have

held there was potentially coverage for the negligence claim and therefore a duty to defend.

Similarly in *C.L. v. Sch. Dist. of Menomonee Falls*, 221 Wis. 2d 692, 585 N.W.2d 826 (Ct. App. 1998), the plaintiff alleged a negligence cause of action, but the cause of action incorporated the facts alleged in the intentional claims. 221 Wis. 2d at 701, 585 N.W.2d at 829-30. The Court held the negligence theory and claim did not resurrect coverage because the alleged acts were all intentional. *Id.* at 702-04, 585 N.W.2d at 830-31.

In sum, if the Court of Appeals' Decision here is correct, then *Schinner*, *Sustache*, and *C.L.* were all wrongly decided. The Decision is contrary to established Wisconsin law.

b. The Complaint alleges Ixthus knowingly violated Abbott's rights and knew it would cause injury to Abbott.

The Knowing Violation exclusion bars coverage here because the Complaint consistently alleges Ixthus deliberately violated Abbott's rights and knew the alleged injuries would occur:

> 7. … **Defendants further know that Abbott pays rebates to insurers for those undeserved reimbursement payments**. The Distributor **Defendants** and Pharmacy Defendants **have a long-standing relationship**, through which they agreed to purchase diverted FreeStyle test strips from foreign countries at these lower prices and then dispense them to consumers at higher U.S. retail prices **for the**

> **purpose of receiving fraudulent reimbursement payments** from the consumers' insurers.
>
> ….
>
> 9. **Defendants are accomplishing this fraud by** submitting falsified reimbursement claims to insurance companies **and knowingly causing falsified rebate claims to be submitted to Abbott. This boosts their profits at Abbott's loss**. . . .
>
> ….
>
> 388. . . . [**a**]***s*** **Defendants know, as it is fundamental to their scheme, it is then that Abbott pays the rebate to the insurer** based on the same fraudulent NDC number caused to be transmitted by Defendants.
>
> ….
>
> 390. Abbott has suffered and continues to suffer significant losses at the hand of Defendants' fraudulent scheme. For each sale of diverted international FreeStyle test strips for which Abbott pays a rebate, Abbott first receives the foreign list price, which is significantly lower than the U.S. list price. Then, Abbott pays a rebate that it is not supposed to pay. Thus, each of these transactions results in a net loss for Abbott.

(R. 11; A. 55-56, A. 88-89.) Indeed, the Complaint as a whole describes a deliberate and intentional scheme by the defendants to defraud and injure Abbott, and it was graphically depicted in the complaint with the title "Illegal Distribution Scheme." (A. 89)

The allegations cumulate in each newly asserted cause of action, because Abbott begins each cause of action by expressly incorporating "each paragraph of this Complaint as if fully set forth herein." (*Id*. at ¶¶ 563, 572, 579, 582, 587, 592, 597, 604, 616, 623, 626, 634, 641; A. 94-105.) Abbott's incorporation by reference of all other allegations is meaningful to the duty to defend analysis, because it imports

allegations of intent to injure into each cause of action. *See James Cape & Sons,* 2009 WI App 154, ¶¶ 12, 17, 321 Wis. 2d 604, 612-13, 615, 775 N.W.2d 119, 121, 123. (Intentional injury exclusion barred coverage for causes of action for negligence where each cause of action incorporated factual allegations of intentional criminal conduct.) *See also Callas Enterprises, Inc. v. The Travelers Indem. Co. of Am*., 193 F.3d 952, 955 (8th Cir. 1999) (Knowledge of falsity exclusion barred coverage because each claim for relief adopted by reference a preceding allegation of the insured's knowledge.)

Further, a number of Abbott's claims for relief contain additional allegations of knowing and intentional conduct and injury. (R. 11, ¶¶ 568, 575, 624, 627, 628, 630-31, 637, 642; A. 95-96, A. 103-106.) For instance, in Abbott's federal trademark infringement claim, the Complaint states:

> 568. Defendants' acts have been committed deliberately and willfully, with knowledge of Abbott's exclusive rights and goodwill in the FreeStyle Marks and FreeStyle Trade Dress, and with knowledge of the infringing nature of the marks when used in connection with the diverted international FreeStyle test strips.

(R. 11; A. 95.)

As further example, the Complaint's claim for federal unfair competition states:

> 575. Defendants' acts have been committed with knowledge of Abbott's exclusive common law rights and goodwill in the FreeStyle Marks and FreeStyle Trade Dress, as well as with bad faith and the intent to cause confusion or mistake, and/or to deceive.

(R. 11; A. 96.)

The fraudulent scheme alleged in the Complaint could only involve a knowing violation, because Ixthus had to know it would hurt Abbott buying its lesser expensive international strips, selling them as domestic strips, and then profiting from the rebate paid by Abbott only for domestic strips -- that was the only way Ixthus could profit. Thus, there can be no question Ixthus could not have perpetrated its scheme without knowingly violating Abbott's rights in order to fraudulently obtain rebates.

c. Alternatively, and if the Court of Appeals' *Ross Glove* and *Air Eng'g* accurately state the law in Wisconsin, the Court of Appeals' reliance on them is misplaced because of important factual distinctions, and *Ross Glove* and *Air Eng'g* should be limited to their facts.

The Court of Appeals' Decision that the Knowing Violation exclusion does not apply points to *Acuity v. Ross Glove Co.*, 2012 WI App 70, ¶19, 344 Wis. 2d 29, 47-48, 817 N.W.2d 455, 464-65 and *Air Eng'g, Inc. v. Industrial Air Power, LLC*, 2013 WI App 18, ¶¶23-24, 346 Wis. 2d 9, 26-27, 828 N.W.2d 565, 573-74 as authority. (A. 8, ¶¶ 17, 18)

However, *Ross Glove* and *Air Eng'g* addressed very different circumstances.

To begin with, the complaints in *Ross Glove* and *Air Eng'g* did not contain multiple, repeated allegations of intentional criminal conduct and expected injury like those in the Complaint here. This Complaint goes so far as to allege Ixthus' behavior was criminal and constituted mail, wire and insurance fraud and violated several federal statutes. (R. 11, ¶¶ 1, 9, 13, 383.) There were no allegations of criminal conduct in *Ross Glove* or in *Air Eng'g*. Instead, in *Ross Glove*, the plaintiffs alleged the defendants copied its cold weather face gear, offending its trade dress rights and constituting unfair competition. Similarly, in *Air Eng'g* the plaintiffs alleged the defendant copied its website content and internet advertising system to unfairly compete for customers. By contrast, here there was an alleged criminally fraudulent scheme to procure rebates.

Next, unlike *Ross Glove* and *Air Eng'g*, the allegations of knowing and intentional conduct and injury in the Complaint here are not merely recited in each claim for relief as a means to support Abbott's claims for punitive or other special statutory damages. Indeed, in *Ross Glove* intentional and knowing injury was not even alleged in every cause of action, as the Court there noted the underlying complaint

sought "to hold Ross Glove liable for trade dress infringement **without any allegation . . . of a knowing violation**." *Ross Glove Co.*, 2012 WI App 70, ¶ 19, 344 Wis. 2d 9, 48, 817 N.W.2d 455, 465. (bold added.) Here, Abbott alleges knowing and intentional conduct and injury throughout the Complaint's introduction and factual background sections, (R. 11, ¶¶ 7, 9, 388, 392; A. 55-56, 88-90), and then expressly incorporates and reiterates them in every succeeding claim for relief. (*Id*. at ¶¶ 563, 572, 579, 582, 587, 592, 597, 604, 616, 623, 626, 634, 641; A. 94, 96, 97, 98, 99, 100, 102, 103, 104, 105.) A number of Abbott's claims for relief contain additional allegations of knowing and intentional conduct and injury. (*Id.* at ¶¶ 568, 575, 624, 627, 628, 630-31, 637, 642; A. 95, 96, 103, 104, 105, 106.)

Further, the complaint in *Air Eng'g* alleged misappropriation and use of Air Engineering's website source code, site conduct and an advertising system and therefore implicated the general liability policy's "personal and advertising injury" coverage for the "use of another's advertising idea in [Industrial's] advertisement", which is not implicated here. *Id.* at ¶¶ 17, 22, 346 Wis. 2d at 23, 25-26, 828 N.W.2d at 572-573. There is no advertising idea at issue here.

In contrast to the complaints at issue in *Ross Glove* and *Air Eng'g,* here the allegations in the Complaint are clear about Knowing

Violation - - Abbott plainly alleges that Ixthus knew of Abbott's rights in the trademark and trade dress of the test strips, knew that its conduct infringed on Abbott's rights and intentionally and in "bad faith" misrepresented to health insurers that the Defendants including Ixthus dispensed authorized test strips, which misrepresentation Ixthus knew would be passed along by the insurers and cause Abbott to overpay rebates, thereby injuring Abbott. (R. 11, ¶¶ 568, 575, 628; A. 95, 96.) Moreover, the Complaint alleges Ixthus, under its prior name, was sued for the unlawful importation and/or sale of test strips and was permanently enjoined from selling counterfeit test strips. (*Id.* at ¶¶ 558, 559; A. 93). This allegation demonstrates again that Ixthus knew it was acting wrongfully and with an intent to injure.

The Complaint also notably alleges Abbott subpoenaed Ixthus for documents regarding the identity of its customers and suppliers of diverted international Free Style test strips, but that Ixthus refused to produce such documents and invoked its Fifth Amendment right against self-incrimination. (*Id.* at ¶ 562; A. 94). This right would have been invoked only if Ixthus knew it had likely engaged in criminal conduct, so civil law presumes. Wisconsin courts regularly recognize that a court in a civil case may, as a matter of law, draw an inference of guilt or against the interest of the entity invoking the Fifth

Amendment. *See Grognet v. Fox Valley Trucking Serv.*, 45 Wis. 2d 235, 239-240, 172 N.W.2d 812, 815 (1969) ("in a civil case as distinguished from a criminal case, an inference of guilt or against the interest of the witness may be drawn from his invoking the fifth amendment. **Since only one inference can be drawn logically in such a case**, the court may as a matter of law draw such inference.") (bold added). The plain meaning of the allegation that Ixthus invoked the Fifth Amendment, taken together with the Complaint allegations asserting a history of the exact same conduct at issue in this case, means Ixthus knew the illegal nature of its conduct and knew its conduct would cause injury to Abbott.

Further, Wisconsin federal courts have consistently held that a Knowing Violation exclusion like the one at issue here precludes coverage when the complaint alleges willful injury. *See T.C. Dev. & Design, Inc. v. Disc. Ramps.com, LLC*, 2011 U.S. Dist. LEXIS 36031, *17-18 (E.D. Wis. Mar. 31, 2011.)(Knowing Violation exclusion barred coverage for patent infringement, trademark infringement, false designation of origin and related claims where the complaint alleged that the insured had knowledge of the improper and illegal use of the trademark and knowingly and willfully manufactured, used, sold and offered for sale products that directly copied and infringed the

plaintiff's patents) (R. 33.); *See also Quad/Graphics, Inc. v. One2One Communs., L.L.C.*, 2011 U.S. Dist. LEXIS 52290, *9-11 (E.D. Wis. May 16, 2011.)(Knowing Violation exclusion barred coverage because complaint alleged statements were made "willfully" with "intent to defame", and "were calculated to injure [claimants'] reputation", which implicitly asserted that the insured had knowledge that the claimant's rights would be violated.) (R. 30.)

Other jurisdictions have held that knowing conduct and injury exclusions still apply where knowing and intentional conduct is alleged, even if the elements of a particular cause of action do not require proving intent. *See, e.g., Sletten & Brettin Orthodonics, LLC v. Continental Cas. Co.*, 782 F.3d 931, 936, 938 (8th Cir. 2015.)(Although defamation did not require intent to injure, intentional injury exclusion still barred coverage because each cause of action specifically alleged intent to injure.); *Atlantic Mut. Ins. Co. v. Terk Technologies Corp.*, 763 N.Y.S.2d 56, 309 A.D.2d 22, 32 (N.Y. App. Div. 2003.)("Notwithstanding the fact that a violation of the Lanham Act can be unintentional, and that the complaint in the federal action asserts that the [insured] acted with 'reckless disregard', we can discern no justification from the factual allegations set forth in the complaint to impose a duty to defend.")

These decisions are in line with the principles of insurance contract interpretation recently reiterated by the Wisconsin Supreme Court in *Water Well,* 2016 WI 54, ¶ 26, 369 Wis. 2d at 627, 881 N.W.2d at 295. *Water Well* made clear that a court should not read ambiguity into the complaint where there is none and should consider only the allegations in the complaint as compared to the terms of the policy. *Id.* at ¶ 37, 369 Wis. 2d at 638-39, 881 N.W.2d at 300. (An insurer is not required to "speculate beyond the written words of the complaint and imagine what kinds of claims for damages the plaintiffs are actually making . . .")

Finally, if *Ross Glove* and *Air Eng'g* stand for the proposition that duty to defend could arise "regardless" of the complaint's allegations, as is seemingly suggested by the Court of Appeals Decision here (*See* ¶17; A. 8), then those Court of Appeals decisions should be limited to their facts or the holdings withdrawn by this Court because that proposition would conflict with longstanding Supreme Court decisions and Wisconsin law. Wisconsin Supreme Court decisions have long held that duty to defend is governed by the allegations, not by ignoring them. *Water Well, supra.*

Rather, the proper analysis is to look at the plain language contained in the four corners of the Complaint, which here clearly

alleges Ixthus acted knowingly and intentionally to injure Abbott. Ixthus' scheme, as alleged, essentially required Abbott to sustain injury, an injury of which Ixthus would have been well aware in order for Ixthus to be enriched. Accordingly, the Knowing Violation exclusion applies, and West Bend does not owe a duty to defend or indemnify Ixthus against the Abbott Suit. The Court of Appeals' Decision should be reversed.

3. Alternatively, and despite full briefing of this issue, the Court of Appeals did not consider alternative reasons to affirm the Circuit Court, contrary to the suggestion of multiple decisions from this Court and the Court of Appeals.

West Bend's Court of Appeals' brief set forth several alternative arguments for the Court of Appeals to affirm the Circuit Court. The Court of Appeals' Decision did not address any of West Bend's alternative arguments, contrary to the suggestion of multiple decisions from this Court and the Court of Appeals.

This Court has directed for over a century that appellate review should look to the record and affirm where "the ruling is correct and the record reveals" that fact, regardless of the reason offered by the Circuit Court. *See Mueller v. Mizia*, 33 Wis. 2d 311, 318, 147 N.W.2d 269, 273 (1967). Although the arguments below were not argued in the Circuit Court, they are an alternative basis for affirmance of the

Circuit Court and therefore properly considered here. A respondent on appeal may raise any argument that would support the Circuit Court's holding, even arguments not raised in the Circuit Court. *State v. Holt,* 128 Wis. 2d 110, 124-25, 382 N.W.2d 679, 687 (Ct. App. 1985)("An appellate court may sustain a lower court's holding on a theory or on reasoning not presented to the lower court").

a. The Criminal Acts exclusion precludes coverage to Ixthus for the Abbott Suit.

The West Bend policies contain a Criminal Acts exclusion that precludes coverage for criminal acts like those alleged here:

> c. Criminal Acts
>
> "Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.

(R. 2:24; A. 38.)

The Complaint specifically alleges Ixthus' acts constitute crimes, such as illegal mail, wire and insurance fraud, and therefore coverage is precluded by the Criminal Acts exclusion. (R. 11; A. 54-55, A. 58, A. 87.) West Bend argued the Criminal Acts exclusion as a reason to affirm the Circuit Court but the Court of Appeals ignored this argument.

The application of a personal and advertising coverage's Criminal Acts exclusion appears to be a matter of first impression before this

Court. However, the phrase "arising out of" in policies has been found by the Wisconsin Supreme Court to be a "very broad, general and comprehensive" term and requires "only that there be some causal relationship between the injury and the risk." *Thompson v. State Farm Mut. Auto. Ins. Co.*, 161 Wis. 2d 450, 456-57, 468 N.W.2d 432, 434, *quoting Lawver v. Boling*, 71 Wis. 2d 408, 415, 238 N.W.2d 514, 518 (1996).

West Bend's policies do not define the term "criminal act," but a reasonable interpretation of that term adopted by other jurisdictions is "an act that violates the criminal code." *See, e.g., Allstate Ins. Co. v. Brown*, 16 F.3d 222, 225 (7th Cir. 1994); *Allstate Ins. Co. v. Burrough,* 914 F. Supp. 308, 312 (W.D. Ark. 1996).

Ixthus need not have been charged, or convicted, of criminal acts in order for the criminal acts exclusion to apply. The proper inquiry is whether the conduct was criminal, as the Court in *Suwannee Am. Cement LLC v. Zurich Ins. Co.*, 885 F. Supp. 2d 611, 616 (S.D.N.Y. 2012), explained:

> It makes no difference that the acts for which the manufacturers may be liable have both civil and criminal consequences, and were in Florida pursued only in civil actions. The acts are felonious: "Every person who shall make any contract or engage in any combination or conspiracy . . . shall be deemed guilty of a felony."

Id., *quoting* 15 U.S.C. § 1. *Sawannee* held "the acts for which the manufacturers seek a defense are statutorily deemed felonies regardless of whether the underlying actions are civil or criminal, and the policy excludes coverage for advertising injury arising out of a criminal violation." *Id*. at 616.

A number of jurisdictions have held the Criminal Acts exclusion at issue here is unambiguous and excludes coverage for injuries resulting from criminal acts by an insured, regardless of whether the insured intended to commit the act or to cause the harm. *See, e.g., Hooper v. Allstate Ins. Co.*, 571 So. 2d 1001, 1003 (Ala. 1990) (criminal act exclusion unambiguously excluded coverage where intoxicated insured "negligently" handed gun to friend which discharged and shot friend); *Allstate Ins. Co. v. Travers*, 703 F. Supp. 911, 915 (N.D. Fla. 1988) (criminal act exclusion precludes coverage for alleged sexual misconduct despite insured's claim of no intent to cause injury); *See also* Steven Plitt, et al., *7A Couch on Insurance* § 103:40 (3d ed. 2015) (intent requirement does not extend to criminal-act exclusion).

In addition, when interpreting similar Criminal Acts exclusions, courts from other jurisdictions have held the exclusion applies regardless of whether the act is negligent or intentional. *See e.g., Allstate Ins. Co. v. Sowers*, 97 Ore. App. 658, 660-661, 776 P.2d 1322,

1323 (Or. App. 1989) (Criminal Acts exclusion applies to both negligent and intentional acts); *Liebenstein v. Allstate Ins. Co.*, 517 N.W.2d 73, 75 (Minn. Ct. App. 1994)(same).

In sum, and based on the Criminal Acts exclusion's plain language, the exclusion applies to negligent and intentional acts that could violate any criminal code, regardless of the insured's intent, and regardless whether the insured has been charged or convicted of the crime.

Here, the Complaint specifically alleges Ixthus' actions constituted criminal behavior. For example, the Complaint states the conduct was "illegal":

> 1. This is an action for trademark and trade dress infringement, fraud, racketeering, unfair competition and other **illegal** and wrongful acts brought against Defendants who have imported, distributed and sold in the United States diverted international blood glucose test strips that are **illegal** to sell in the United States.
>
> 3. **In disregard of the law, Defendants are conspiring** to import diverted international FreeStyle test strips whose labeling has not been cleared by regulators for sale in the United States and is likely to confuse U.S. consumers.
>
> 13. ...The sale of misbranded medical devices in the United States is a **criminal offense** under the Federal Food, Drug and Cosmetics Act. 21 U.S.C. §§331, 333, 352. Where, as here, the sale is done with an intent to defraud or mislead, **the offense is punishable by up to three years' imprisonment.** 21 U.S.C. §§331, 333.

> Also, as discussed below, the Defendants' actions constitute mail and wire fraud. 18 U.S.C. §§1343, 1341.
>
> 383. To receive these reimbursements, Defendants are engaging in fraudulent and **criminal conduct**. …

(R. 11; A. 54-55, A. 58, A. 87.) (bold added.) The complaint contained a graphic depiction of Ixthus fraudulent reimbursement scheme, entitled "Illegal Distribution Scheme." (A. 89.)

The Complaint unambiguously alleges Ixthus' behavior of selling misbranded medical devices is a criminal offense under the Federal Food, Drug and Cosmetics Act punishable up to three years prison, 21 U.S.C. §§331, 333, 352, and also constitutes mail and wire fraud which is a criminal offense under 18 U.S.C. §§ 1343, 1341. (R. 11, ¶13; A. 58.) Undisputedly, the Complaint alleges criminal acts committed by Ixthus such that the Criminal Acts exclusion applies to preclude coverage. Each of the separately titled claims for relief incorporates all preceding allegations of criminal conduct. (*Id*. at ¶¶ 563, 572, 579, 582, 587, 592, 597, 604, 616, 623, 626, 634, 641.) Consequently, every single claim for relief asserts criminal conduct. *James Cape*, 2009 WI App 154, ¶¶ 12, 17, 321 Wis. 2d at 612-13, 615, 775 N.W.2d at 121, 123. (Finding that an intentional injury exclusion barred coverage for causes of action for negligence where each cause of action incorporated factual allegations of intentional criminal conduct.)

Furthermore, the Complaint alleges Abbott subpoenaed Ixthus for documents regarding the identity of its customers and suppliers of diverted international FreeStyle test strips, but Ixthus refused to produce such documents and invoked its Fifth Amendment right against self-incrimination. (R. 11, ¶ 562; A. 94.) Wisconsin Civil Courts may draw an inference of guilt against the entity invoking the Fifth Amendment. *Grognet*, 45 Wis.2d at 239, 240, 172 N.W.2d at 815. Therefore, it is appropriate to read this allegation to state Ixthus knew its behavior was criminal.

The Criminal Acts exclusion precludes coverage for Ixthus, therefore West Bend has no duty to defend or indemnify Ixthus against the Abbott Suit. This conclusion, standing alone, is sufficient basis for reversing the Court of Appeals.

b. The Doctrine of Fortuity bars coverage for Ixthus.

The Wisconsin Supreme Court adopted the Doctrine of Fortuity in *Hedtcke v. Sentry Ins. Co.,* 109 Wis. 2d 461, 326 N.W.2d 727 (1982):

> [Under] the "principle of fortuitousness," [ ] insurance covers fortuitous losses and [ ] losses are not fortuitous if the damage is intentionally caused by the insured. Even where the insurance policy contains no language expressly stating the principle of fortuitousness, courts read this principle into the insurance policy to further specific public policy objectives including (1) avoiding profit from wrongdoing; (2) deterring crime; (3) avoiding fraud against insurers; and (4) maintaining coverage of a scope consistent with the reasonable expectations of the contracting parties on matters as to which no intention or expectation was expressed.

Id. at 483-84, 326 N.W.2d 727.

Here, the Complaint alleges Ixthus intentionally caused damage to Abbott by participating in the illegal scheme to defraud Abbott. (R. 11, ¶¶ 9, 568; A. 56, A. 95.) Because the Complaint alleges Ixthus intentionally caused damage to Abbott, the Doctrine of Fortuity applies to bar coverage to Ixthus.

Of note, Ixthus' intent to injure Abbott need not be explicitly alleged, and instead can be inferred. In holding the Doctrine of Fortuity barred coverage for the insured's intentional acts, the Court in *Haessly v. Germantown Mut. Ins. Co.*, 213 Wis. 2d 108, 118, 569 N.W.2d 804, 808 (Ct. App. 1997), said "it is also well established that a person is presumed to intend 'the natural and probable consequences of his acts voluntarily and knowingly performed'." *Id.* Here, for the reasons stated above, the natural and probable consequence of Ixthus' intentional acts was injury to Abbott and the damage resulting from Ixthus' acts cannot be deemed fortuitous. The Doctrine of Fortuity bars coverage for Ixthus and so the Court of Appeals' Decision should be reversed.

c. No reasonable insured would expect coverage for repeatedly and intentionally participating in a scheme to defraud.

As was noted by the Court in *K.A.G. v. Stanford*, 148 Wis. 2d 158, 165-166, 434 N.W.2d 790, 793 (Ct. App. 1988), the dismissal of an insurance coverage claim on the basis that no reasonable person would expect coverage is "based upon sound legal principles and may present a viable alternative analysis."

Here, no reasonable insured would believe it would have liability insurance coverage for repeated and intentional participation in an illegal scheme to defraud. Furthermore, Ixthus asserted a right against self-incrimination under the Fifth Amendment regarding its intentional and fraudulent actions as described in the Complaint. No reasonable insured would expect liability insurance coverage for actions that constitute crimes. On this basis alone, the Court of Appeals' Decision should be reversed.

d. Public policy considerations require reversing the Court of Appeals' Decision.

Public policy considerations require this Court reverse the Court of Appeals' Decision and hold West Bend has no duty to defend or indemnify Ixthus. In *Hagen v. Gulrud,* 151 Wis. 2d 1, 6-7, 442 N.W.2d 570, 573 (Ct. App. 1989), the Court held that as a matter of sound public policy there is certain conduct for which there should be no coverage, like coverage for criminal sexual assault:

> The average person purchasing homeowner's insurance would cringe at the very suggestion that [he or she] was paying for such coverage. And certainly [he or she] would not want to share that type of risk with other homeowner's policyholders.

Id. This Court reiterated this premise when it agreed that there are "compelling policy considerations … precluding insurance recovery" in certain cases. *N.N. v. Moraine Mut. Ins. Co.,* 153 Wis. 2d 84, 94, 450 N.W.2d 445, 449 (1990). One of the policy considerations is allowing wrongdoers to escape having to personally compensate their victims for the harm they have inflicted. *Haessly*, 213 Wis. 2d at 119-120, 569 N.W.2d at 809.

Here, public policy requires a holding of no coverage for Ixthus. Finding insurance coverage here would wrongly allow Ixthus to escape the monetary consequences of having to compensate Abbott for its injuries. Doing so would also have the effect of allowing Ixthus to profit from its illegal conduct. The public policy against finding insurance here for Ixthus' intentional criminal acts is supported by the reasoning that such acts would be encouraged, or at least not dissuaded, if insurance were available to shift the financial burden of the loss from the wrongdoer to the insurer.

IV. CONCLUSION AND RELIEF REQUESTED

West Bend respectfully requests this Court reverse the Court of Appeals and hold that West Bend has no duty to defend or indemnify Ixthus.

Dated this 10th day of August, 2018.

JEFFREY LEAVELL, S.C.

By: */s/ Kris Bartos*
_____

Jeffrey Leavell
State Bar No.: 1004734
Kris Bartos
State Bar No.: 1065390
Danielle N. Rousset
State Bar No.: 1071328
Attorneys for West Bend Mutual Insurance Company

P.O. Address
723 S. Main Street
Racine, WI 53403-1211
Telephone: (262) 633-7322
Facsimile: (262) 633-7323

CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief counting sections corresponding to Wis. Stat. § 809.19 (1)(d), (e) and (f) is 10,612 words.

/s/ Kris Bartos
_____
Kris Bartos

CERTIFICATION REGARDING ELECTRONIC BRIEF AND APPENDIX PURSUANT TO WIS. STAT. §809.19(12)-(13), STATS.

I hereby certify that I have submitted an electronic copy of this brief, and appendix, which complies with the requirements of Wis. Stat. §809.19(12)-(13).

I further certify that this electronic brief and appendix is identical to the text of the paper copy of the brief and appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this brief and appendix filed with the Court and served on all opposing parties.

/s/ Kris Bartos
_____
Kris Bartos

CERTIFICATION OF CONTENT COMPLIANCE

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 10th day of August, 2018.

/s/ Kris Bartos

_____

Kris Bartos

CERTIFICATION OF MAILING

Pursuant to Wis. Stat. §809.80(3)(b), I hereby certify that on this 10th day of August, 2018, twenty-two (22) copies of this brief and appendix were deposited in the United States mail for delivery to the Clerk of the Wisconsin Supreme Court by first class mail, postage pre-paid.

I further certify that three (3) copies of this brief were served this same date by first-class United States mail, postage pre-paid, on each party.

/s/ Kris Bartos

Kris Bartos

STATE OF WISCONSIN
SUPREME COURT

West Bend Mutual Insurance Company,
Plaintiff-Respondent, Petitioner

District: 2
Appeal No. 2017AP000909
v. Circuit Court Case No. 2016 CV001414

Ixthus Medical Supply, Inc. and Karl Kunstman,
Defendants, Appellants,

Abbott Laboratories, Abbott Diabetes Care Inc. and Abbott Diabetes Care Sales Corp.,
Defendants-Co-Appellants.

Appeal from a Judgment of the Circuit Court of Racine County, Wisconsin
Honorable David W. Paulson, Circuit Judge, Presiding
Circuit Court Number 2016CV001414

IXTHUS MEDICAL SUPPLY INC. AND KARL KUNSTMAN'S RESPONSE TO THE BRIEF OF PLAINTIFF-RESPONDENT, PETITONER WEST BEND MUTUAL INSURANCE COMPANY

Jason Pilmaier
Albert Solochek
Howard, Solochek & Weber, S.C.
1800 E. Howard Ave.
Milwaukee, WI 53207
(414) 272-0760
jpilmaier@hswmke.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITY

Cases **Page**

State Statutes

Federal Statutes

Introduction

In its brief, West Bend continues to claim that following the Wisconsin Court of Appeals decisions of *Air Engineering* and *Ross Glove* would be a radical departure from existing law when, in fact *Air Engineering* and *Ross Glove* are existing Wisconsin Law, which both provide that a knowing acts exclusion does not preclude coverage when a complaint alleges causes of action that do not require proof of intent, even though the complaint may contain allegations that the insured acted with intent.

The Abbott Suit

The Second Amended Complaint was filed by Abbott Laboratories and its affiliates ("Abbott") on March 28, 2016 against 116 defendants, including pharmacies, wholesalers and their respective owners, officers and/or employees. (The "SAC"). Although the SAC initially contained RICO and unjust enrichment claims, those claims were dismissed by order of the Court on January 4, 2017. *West Bend Brief*, p.3, footnote 2. The remaining Lanham Act and related claims involve at least five claims which do not require a showing of intent for

Abbott to recover. Rather, each count allows a plaintiff to allege intent in order to obtain enhanced damages such as treble damages and attorneys' fees. Abbott has indeed alleged that the defendants acted with intent for those counts and has requested the additional recovery (treble damages, attorneys' fees, etc…) available to it.

The SAC alleges (i) offenses covered under the advertising injury provisions of the insurance policy at issue in this case (the "Policy"), (ii) that the Ixthus Defendants engaged in advertising activity and, (iii) a causal connection between the injury alleged and the Ixthus Defendants' advertising activity.

The SAC contains numerous "general allegations" which purport to apply to all of the defendants and are primarily applied to all defendants via incorporation paragraphs. However, the specific allegations as to Ixthus are sparse. Besides the ownership and location of the company, the SAC alleges that Ixthus purchased and sold international Abbott diabetic test strips. R-11, ¶¶421, 422, 426, 429, 430, 444. The SAC alleges that Ixthus has been sued in the past with regard to Lifescan blood glucose test strips. R-11 ¶543, 559. Finally, the SAC

alleges that Ixthus invoked its right against self-incrimination in responding to discovery. R-11, ¶562. This is the sum of the specific allegations against Ixthus in the SAC.

The allegations in the SAC, relevant to the advertising injury alleged by Abbott and which do not require a showing of intent are as follows:

- Count 1: Federal Trademark Infringement, 15 U.S.C. §1114(1) Lanham Act Section 32, R-11, p. 143
- Count 2: Federal Unfair Competition, 15 U.S.C. §1125(a)(i)(A) Lanham Act Section 43(a), R-11, p. 145.
- Count 3: Common Law Unfair competition, R-11, p. 146.
- Count 4: Federal Trademark Dilution 15 U.S.C. §1125(c) Lanham Act Section 43(c), R-11, p. 146
- Count 5: State Law Trademark Dilution, N.Y. Gen. Bus. Law §360-1, R-11, p. 147

West Bend does not argue and has previously admitted that the claims "reference an offense listed in the definition of "personal and advertising injury" because they allege that the Insured infringed upon Abbott's trade dress . . . and that the SAC "also arguably alleges, albeit sparingly, that the Insured advertised the

test strips and therefore satisfies the second factor." R-32, p. 13. Finally, the SAC alleges a causal connection between Ixthus' advertising activity and Abbott's alleged injury.

Standard of Review

With regard to evaluating whether or not an insurer has a duty to defend at the summary judgment stage, Wisconsin courts "assume all reasonable inferences in the allegations of a complaint and resolve any doubt regarding the duty to defend in favor of the insured." *Acuity v. Ross Glove Co.*, 2012 WI App 70, ¶6, 344 Wis.2d 29, 817 N.W.2d 455, 458 (2012). The Supreme Court will "review the interpretation of an insurance policy independently, but benefiting from the discussions of the court of appeals and the circuit court." *Acuity v. Bagadia*, 2008 WI 62 at ¶12, 310 Wis.2d 197, 207-208 750 N.W.2d 817 referencing *Nu-Pak, Inc. v. Wine Specialties Int'l, Ltd.*, 2002 WI App 92, ¶6, 253 Wis.2d 825, 643 N.W.2d 848.

"The duty to defend is based solely on the allegations 'contained within the four corners of the

complaint.'" *Fireman's Fund Ins. Co. v. Bradley Corp*, 2003 WI 33, ¶19, 261 Wis.2d 4, 600 N.W.2d 666, 673. "When comparing the allegations of a complaint to the terms of an insurance policy, the allegations in the complaint are construed liberally." *Id*. At 673-674. The "duty to defend is triggered by arguable, as opposed to actual, coverage." *Id*. An "insurer may have a clear duty to defend a claim that is utterly specious because, if it were meritorious, it would be covered." *Id*. The duty to defend is determined by "the nature of the claim alleged against the insured... even though the suit may be groundless, false or fraudulent." *Grieb v. Citizens Cas. Co. of New York*, 33 Wis.2d 552 at 558 (1967). If "an insurance policy provides coverage for even one claim made in a lawsuit, the insurer is obligated to defend the entire suit." *Fireman's Fund Ins. Co. v. Bradley Corp*, 2003 WI 33, ¶21. See also *Acuity v. Ross Glove Co.*, 2012 WI App 70.

To establish that West Bend owes a duty to defend the Ixthus Defendants with regard to the SAC, the Court need only find that (i) the SAC alleges an offense covered under the advertising injury provisions of the insurance

policy, (ii) the SAC alleges that the Ixthus Defendants engaged in advertising activity and, (iii) the SAC alleges a causal connection between the injury alleged and the Ixthus Defendants' advertising activity. See *Fireman's Fund Ins. Co. of Wis v. Bradley Corp*, 2003 WI 33.

ARGUMENT

I. West Bend has a duty to defend and Indemnify Ixthus for the Allegations of the Abbott Suit.

a. The SAC alleges an offense covered under the advertising injury provisions of the insurance policy and that the Ixthus Defendants engaged in advertising activity

As noted above, West Bend does not argue and has previously admitted that the claims "reference an offense listed in the definition of "personal and advertising injury" because they allege that the Insured infringed upon Abbott's trade dress and that the SAC "arguably alleges, albeit sparingly, that the Insured advertised the test strips and therefore satisfies the second factor." R-32, p. 13. Furthermore, both the Circuit Court and Court of Appeals found that the claims reference an offense listed in the definition of personal and advertising injury. R-55,

p. 8; *West Bend Appendix,* A7, ¶12. Furthermore, both the Circuit Court and Court of Appeals found that the claims reference Ixthus' advertising activity. R-55, p. 8; *West Bend Appendix,* A7, ¶13.

The Policy at issue defines "Personal and advertising injury as including "14 f. The use of another advertising idea in your "advertisement"; or g. "Infringing upon another's copyright, trade dress or slogan in your "advertisement." *West Bend Brief*, p. 7. For the purposes of the policy, the definition of "advertisement" is wide-ranging and includes notices "broadcast or published to the general public or specific market segments . . .for the purpose of attracting customers or supporters." *West Bend Appendix,* A44. The definition also specifically includes Internet and web-site advertisements. *West Bend Appendix,* A44. As the Court of Appeals noted, notices include packaging. *See Acuity v. Ross Glove Co.*, 2012 WI App 70, ¶13, 344 Wis.2d 29, 817 N.W.2d 455. Publish means to "bring to the public attention; announce" and "to place before the public (as through a mass medium) disseminate." *Id*., ¶14.

Abbott's claims allege consumer confusion and other damages based upon Ixthus' alleged violation of the Lanham Act, unfair competition and trademark dilution. R-11, pp. 143-147. The SAC clearly alleges that the Ixthus Defendants engaged in advertising activity. For example, paragraph 11 of the SAC alleges, while admitting the actual test strips are "functionally the same," that the test strips at issue are not labeled to comply with FDA requirements.[1] Paragraph 12 of the SAC alleges that there are numerous material differences between packaging intended for International versus U.S. sale. R-11, ¶12. Paragraph 13 of the SAC alleges that the products sold in the incorrect box are therefore misbranded, causing confusion. R-11, ¶13.

Additionally, Abbott further alleges the specific differences in the U.S./international packaging in paragraphs 353-367 of the SAC. R-11, ¶353-367. Abbott then moves to the specific advertising and injury allegations. In paragraph 385 Abbott alleges that "Using

[1] This distinction is key because if the primary difference between the products is simply the packaging, the primary issue is the advertising of and not the sale of an incorrect product. Also, see *Ross Glove* wherein the Court found that the packaging itself is an advertisement. *Acuity v. Ross Glove*, 2012 WI App 70.

Abbott's trademarks and trade dress, Defendants advertise to consumers and the marketplace their ability and willingness to sell FreeStyle test strips. These advertisements are made through, inter alia, websites, emails, facsimiles, point-of-sale displays, and other media." R-11, ¶385.

The SAC alleges significant, material, injury based upon advertising. Paragraph 15 of the SAC specifically alleges that:

> Defendants' unauthorized importation, *advertisement*, and subsequent distribution *causes, or is likely to cause, consumer confusion*, mistake, and deception to the detriment of Abbott, as well as to the detriment of consumers, insurance companies, third-party payors, and Medicaid and Medicare. As a result of Abbott's extensive branding, marketing, sales, and quality control efforts in the United States and around the world, patients in the United States expect a certain quality, packaging, and overall image from Abbott for FreeStyle test strips. When such patients encounter the diverted international FreeStyle test strips, which bear certain of Abbott's trademarks but which are materially different from what U.S. patients expect, they are likely to be confused and, indeed, disappointed. . . *and the advertisement and sales of diverted international FreeStyle test strips cause great damage to Abbott and the goodwill of Abbott's valuable trademarks*. (*Emphasis Added*). R-11, ¶15.

Abbot then alleges that "By dispensing [diverted international FreeStyle test strips] Defendants are exposing each consumer to the threat of confusion and misuse posed by the material differences between U.S. and international FreeStyle test strips. R-11, ¶386.

Finally, Abbott alleges in paragraphs 566-567 that the advertisement has caused Abbott's damages:

> 566. Defendants' acts have injured or are likely to injure Abbott's image and reputation with consumers in this judicial district and elsewhere in the United States by creating confusion about, and/or dissatisfaction with, Abbott's FreeStyle products., R-11, ¶566.
>
> 567. Defendants' acts have injured or are likely to injure Abbott's reputation in this judicial district and elsewhere in the United States by causing customer dissatisfaction, a diminution of the value of the goodwill associated with the FreeStyle Marks and FreeStyle Trade Dress, and a loss of sales and/or market share to Abbott's competition. R-11, ¶567.

It is clear that the SAC repeatedly alleges that the Ixthus Defendants engaged in advertising activity and that it alleges that Ixthus' advertising injury caused damage to Abbott.

b. The SAC Alleges a Causal Connection Between the Injury Alleged and the Ixthus Defendants' Advertising Activity

The sole issue West Bend contests in its duty to defend argument (other than policy exceptions) is whether or not the SAC alleges a causal connection between Abbott's injury and the Ixthus Defendants' advertising activity. The Circuit Court and the Court of Appeals held that the complaint alleges a causal connection between Abbott's claimed injury and Ixthus's

advertising activity. R-55. P. 10; *West Bend Appendix*, A-7, ¶14.

The inquiry with regard to causation "is "whether, based on the allegations in the complaint, [the insured's] advertising of products contributed to the alleged injury of consumer confusion suffered by [the complainant]." *Acuity v. Ross Glove* 2012 WI App 70, ¶17. "The advertisement does not need to be the only cause of the injury to trigger the duty to defend." *Id.* The Wisconsin Supreme Court has stated that the relevant causation issue is "not whether 'the injury could have taken place without the advertising,' but 'whether the advertising did in fact contribute materially to the injury.'" *Fireman's Fund Ins. Co. of Wis. v. Bradley Corp.,* 2003 WI 33, ¶35; 660 N.W.2d 666, 681 (2003). Further, the Court in *Fireman's Fund* agreed with the Court in *Bigelow* that "the causal nexus requirement of an insurance policy (is satisfied) when one of the alleged injuries was consumer confusion and advertisements of the alleged product were attached." *Id*. at ¶34 citing *R.C. Bigelow, Inc. v. Liberty Mutual Insurance Company*, 287 F.3d 242 (2d Cir.2002). Advertising "must merely "contribute materially" to the

harm." *Acuity v. Bagadia*, 2008 WI 62, ¶50. "Advertising activity can contribute materially to the trademark infringement if the advertising activity likely creates consumer confusion." *Id*. citing *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 209, 120 S.Ct. 1339, 146 L.Ed.2d 182 (2000).

Like the complaints in *Ross Glove* and *Fireman's Fund*, the SAC alleges a causal connection between the injury alleged and the Defendant's advertising activity. As stated above, the SAC includes multiple allegations of the Ixthus Defendants' advertising, including packaging, websites, point of sale displays, etc… The SAC connects the allegations of advertising as the cause of (or at least one of the causes of) Abbott's alleged injuries, including consumer confusion, damage to its image and reputation, dissatisfaction with Abbott's products, loss of goodwill, and loss of sales and/or market share. For example, the SAC alleges the following:

- "The Defendants . . .advertisement . . .causes or is likely to cause consumer confusion…" R-11, ¶15.
- "These material differences render [the test strips] "misbranded and confusing." R-11, ¶13.

- "Defendants' acts have injured or are likely to injure Abbott's image and reputation with consumers in this judicial district and elsewhere in the United States by creating confusion about, and/or dissatisfaction with, Abbott's FreeStyle products." R-11, ¶566.
- "Defendants' acts have injured or are likely to injure Abbott's reputation in this judicial district and elsewhere in the United States by causing customer dissatisfaction, a diminution of the value of the goodwill associated with the FreeStyle Marks and FreeStyle Trade Dress, and a loss of sales and/or market share to Abbott's competition." R-11, ¶567.

It is clear that the SAC alleges that the Ixthus Defendants advertised Abbott's product (the allegations include advertising related to packaging, websites, point of sale displays, etc…) and the SAC alleges that the advertising caused confusion and injury to Abbott. In the words of the Circuit Court, Abbott's allegations are "right on point . . .to invoke a causal connection" between "the alleged injury and the insured's advertising activity. R-55, p. 10.

West Bend fundamentally misinterprets the transaction at issue when it argues that "if Ixthus had only

delivered domestic strips to pharmacies . . .there would have been no consumer confusion" and that Ixthus' sales to its customers rather than consumers somehow severed the causation of Abbott's injury. *West Bend Brief*, p. 17-18. The SAC alleges that the foreign test strips and the domestic test strips are the same; the sole difference is the packaging and advertising of the product. R-11, ¶11. Abbott's injury, as it alleges, is caused by the associated advertising of the test strips of Ixthus, including but not limited to the advertising on its website and the packaging itself (i.e. Abbott alleges significant differences in the packaging, the lack of American units of measurement, lack of toll free helpline, instructional inserts, etc.., all causing injury to Abbott). Furthermore, Abbott addressed these issues in its reply brief to the Court of Appeals:

> West Bend's argument regarding delivery of the test strips and subsequent rebates "ignores the allegations of injury separate from 'rebates' – including 'a loss of sales and/or market share," injury to Abbott's reputation," and "a diminution of the value of the goodwill" associated with

Abbott's trademarks. *Abbott Reply Brief*, p. 8 citing R.11, ¶¶15, 567.

Another factor in determining whether advertising caused injury is the entry of an injunction. See *Acuity v. Bagadia*, 2008 WI 62, ¶55-58. As in *Bagadia*, the District Court for the Eastern District of New York entered a temporary restraining order and preliminary injunction enjoining Ixthus (and other defendants) from purchasing, selling, or otherwise using in commerce diverted international FreeStyle test strips. R-11, ¶17-20. Because of the likelihood, therefore, that Abbott has suffered irreparable injury due to Ixthus' advertising activities as alleged in the SAC, this factor weighs in favor of a finding that Ixthus' alleged advertising activities caused Abbott's alleged injuries for the purposes of the duty to defend analysis.

Finally, both the Circuit Court and the Court of Appeals found a causal connection between Abbott's alleged injury and Ixthus' advertising activity. The Circuit Court, in its oral decision, found that "the allegations of the complaint are what they are. Paragraph 15 clearly alleges, first, an unauthorized advertisement

causing or likely to cause confusion, mistake, and deception. In addition, Paragraph 15 alleges advertisement causes great damage to Abbott and the goodwill of Abbott's available trademarks." R-55, pg. 10. The Court then found that "there is a causal connection between the alleged injury and the insured's advertising activity." *Id*. at pg. 10-11. The Court of Appeals agreed with the Circuit Court in finding that Abbott suffered an advertising injury caused by an offense arising out of Ixthus' business, that Ixthus engaged in advertising activity and that the SAC alleges a causal connection between Abbott's claimed injury and Ixthus' advertising injury. West Bend Appendix, A-7, ¶¶12-14. The law is clear that this prong of the inquiry is satisfied. Indeed, if there is any doubt that this prong is satisfied, that doubt must be resolved in favor of the insured.

II. The Knowing Violation Exclusion does not bar coverage for the Second Amended Complaint's allegations

Contrary to West Bend's statement that Ixthus' argument "calls for a radical departure from existing law," Ixthus' argument that existing law, if applied to the

facts of this case, requires West Bend to defend Ixthus against the allegations of the Second Amended Complaint is squarely in line with existing law.

a. The Second Amended Complaint contains allegations that Ixthus could be liable to Abbott without a showing of intentional conduct; therefore, the knowing violation exclusion does not excuse West Bend from its duty to defend

Policy exclusions are "narrowly or strictly construed against the insurer if their effect is uncertain." *American Family Mut. Ins. Co. v. American Girl, Inc.*, 2004 WI 2, ¶24, 673 N.W.2d 65, 268 Wis.2d 16, 32 (2004). Ixthus agrees with West Bend that "[T]he duty to defend is based solely on the allegations 'contained within the four corners of the complaint.'" *Fireman's Fund Ins. Co. v. Bradley Corp*, 2003 WI 33, ¶19, 261 Wis.2d 4, 660 N.W.2d 666, 673 (2003). However, with regard to a knowing acts exclusion, Wisconsin case law is clear that the inquiry is not whether the complaint alleges intentional acts, but whether the complaint alleges any nonintentional cause of action for which the insured could be liable. In evaluating a knowing acts exclusion a court should look to whether "the complaint

also sought damages for nonintentional infringement." *Air Engineering, Inc. v. Industrial Air Power, LLC,* 2013 WI App. 18, ¶¶23, 24, 346 Wis.2d 9, 828 N.W.2d 565, 574 citing *Ross Glove*.

In *Air Engineering*, "each claim in the complaint include[d] an allegation of conduct that is 'willful and malicious.'" *Id*. at ¶23. Yet, despite allegations of willful and malicious conduct, the Court found that the proper standard in evaluating a knowing acts exclusion is whether "the complaint also sought damages for nonintentional infringement." *Id.* at ¶24 citing *Ross Glove*. Indeed, "intent is not a required element of trade dress infringement, but rather is required only to justify a request for enhanced damages or attorney fees. *Id.* citing *Ross Glove*. The Court went on to note that the "majority of jurisdictions hold that even if the underlying complaint alleges that the policyholder knew that it was committing a wrongful act, the insurance company still has a duty to defend if the policyholder could still be liable without a showing of intentional conduct." *Id*. The Court in *Air Engineering* went on to review the causes of action in the complaint, finding

that even though each claim in the complaint included an allegation of conduct that is willful and malicious, the claims (breach of fiduciary duty, unjust enrichment and trade secret misappropriation), could be proven without requiring actual knowledge or intent and therefore the insurer had a duty to defend. *Id*. As the Court held, "there are claims set forth in the complaint that survive the 'knowing violation' exclusion." *Id*. at ¶25. "The inclusion in the complaint of an allegation of willful and malicious conduct does not relieve Acuity of its duty to defend." *Id*.

Furthermore, the allegations in the complaint in *Ross Glove* were that "Ross Glove's trade dress infringements were willful and done with the intent to cause harm." *Ross Glove*, ¶19. Again, despite the allegations of willful and intentional conduct, the Court in *Ross Glove* held that there was coverage, noting that "intent is not a required element of trade dress infringement, but rather is required only to justify a request for enhanced damages or attorney fees." *Id*. referencing *Hard Rock Café Licensing Corp. v. Concession Servs., Inc.*, 955 F.2d 1143, 1152 n. 6 (7th Cir.1992). *Ross Glove* and to a greater extent, *Air*

Engineering are directly applicable to the facts in this case. Like the insured in *Air Engineering*, Ixthus is faced with a complaint which alleges multiple instances of intentional conduct but also alleges causes of action which can be proven without a showing of intent.

The inquiry, then, is not whether the SAC alleges intentional acts, or how many times it does so, but whether or not any cause of action in the SAC "could be proven without showing knowledge or intent." *Air Engineering, Inc. at* ¶25. The SAC provides five such causes of action and therefore the knowing violation exclusion does not relieve West Bend from its duty to defend.[2]

The first cause of action in the SAC is an allegation of Federal Trademark Infringement pursuant to 15 U.S.C. §1114(1) (Lanham Act Section 32). R-11, 143. In order to prevail under the statute, a plaintiff need not prove intent. The statute provides that any person

[2] The Ixthus Defendants submit that reciting all five causes of action and showing the lack of intent required is unnecessary and duplicative. One cause of action is sufficient under *Air Engineering* and *Ross Glove*. The Ixthus Defendants highlight two. The Ixthus Defendants reserve their right to argue that the other three causes of action referenced herein do not require a showing of intent and therefore are similar to causes one and two.

who, without consent, uses a registered mark or reproduces a registered mark and the use is likely to cause confusion and the use is in connection with the sale, distribution or advertising shall be liable. See 15 U.S.C. §1114(1). As in both *Ross Glove* and *Air Engineering*, the statute does not require a showing of intent. Intent is relevant in determining damages, as provided, for example, in 15 U.S.C.§1117(b) which requires a showing of intent for treble damages. Abbott's SAC alleges both a violation of 15 U.S.C. §1114(1), which can be proven without showing intent, and entitlement to attorneys' fees, treble damages and other remedies pursuant to the remedies section of the status which requires a showing of intent.

The second cause of action which does not require a showing of intent is Abbott's second cause of action, Federal Unfair Competition under the Lanham Act, 15 U.S.C. §1125(a)(i)(A). R-11, p. 145. 15 U.S.C. §1125(a), a plaintiff must only show a use in commerce of a false designation of origin, false or misleading description of fact, or false or misleading representation of fact which is likely to cause confusion." 15 U.S.C.

§1125(a)(1)-(A). Similar to 15 U.S.C. §1114, there is no requirement to show intent unless a plaintiff is seeking enhanced damages. The claim itself can be proven without showing an intentional act.

West Bend's position appears to be that even if a plaintiff can prove unintentional covered acts (an unintentional infringer, for example), the insurer is excused from its duty to defend as long as a Plaintiff also made allegations of intentional acts in an attempt to obtain treble damages, attorney's fees or other enhanced damages. West Bend's position, if applied going forward, could exclude coverage for virtually all Lanham Act claims, for example, from policy provisions that otherwise intended coverage with regard to such claims. This position squarely contradicts established Wisconsin law and was rejected by the Court of Appeals.

Whether or not a Plaintiff pleads intentional acts for the purpose of obtaining enhanced damages is not the inquiry with regard to knowing acts exclusion. In fact, each claim in the complaint in *Air Engineering* "include[d] an allegation of conduct that is 'willful and

malicious.'" *Air Engineering, Inc. v. Industrial Air Power, LLC,* 2013 WI App. 18, ¶*23.* The inquiry, under well-settled law is whether or not a complaint contains *any* causes of action which can be proven *without* proving intent. The answer, as to at least five of the claims in the Second Amended Complaint, is yes, Abbott can prevail on these causes of action without showing intent. Like the complaint in *Air Engineering*, the Second Amended Complaint, despite alleging intentional conduct, includes causes of action which can be proven without a showing of intent on the part of Ixthus. As in both *Ross Glove* and *Air Engineering*, this Court should hold that West Bend has a duty to defend Ixthus with regard to the Second Amended Complaint.

b. Ixthus' initial invocation of its fifth amendment right during initial discovery should not lead to any inference because Ixthus revoked its invocation and provided all requested information in discovery.

West Bend argues that the SAC's inclusion of an allegation that Ixthus invoked its fifth amendment right against self-incrimination during initial discovery

should lead to an inference that Ixthus acted with intent. However, Ixthus withdrew its invocation of the fifth amendment right and provided the documents requested in discovery. The withdrawal was not a "late withdrawal," but was done in the first months of a case that has lasted over three years and is just now at the summary judgment stage. As noted in *S.C. Johnson & Son, Inc. v. Morris*, a case involving the withdrawal of the Fifth Amendment right during civil litigation the "exercise of Fifth Amendment rights should not be made unnecessarily costly. . .because the privilege is constitutionally based, the detriment to the party asserting it should be no more than is necessary to prevent unfair and unnecessary prejudice to the other side." *S.C. Johnson & Son, Inc. v. Morris*, 2010 WI App 6, ¶12, 322 Wis.2d 766, 779 N.W.2d 19 citing *United States v. Certain Real Prop. and Premises Known as: 4003-4005 5th Ave., Brooklyn, N.Y.*, 55 F.3d 78, 84 (2d Cir.1995) and *S.E.C. v. Graystone Nash, Inc.*, 25 F.3d 187, 192 (3d Cir.1994). Courts should permit "as much testimony as possible to be presented in [the] civil litigation, despite the assertion of privilege." *Id*.

Indeed, Ixthus promptly withdrew its assertion of the privilege and provided all of the information requested by Abbott in discovery. By withdrawing the privilege, providing all requested information and causing no prejudice to Abbott, the unwarranted presumption West Bend seeks to attach to the assertion of a constitutionally protected right is now irrelevant.

c. The cases cited by West Bend with regard to its Knowing Violation Argument are readily distinguishable and/or irrelevant to the analysis of the facts and law regarding knowing violation exclusions.

Several of the cases cited by West Bend, and the analysis of them, specifically, T.*C. Dev. & Design, Inc. v. Disc. Ramps.com, LLC, Quad/Graphics, Inc. v. One2One Communs., L.L.C., Bankert, James Cape, Schinner*, *Sustache*, and *C.L.*, are either unpublished decisions which do not relate to the issue herein or are taken out of context and therefore do not support the analysis and argument of West Bend's position.

Quad/Graphics, Inc. v. One2One Communications, LLC is an unreported case which involves an insured

who conceded that "no count in the third-party complaint aside from the first (slander) would give rise to coverage." *Quad/Graphics, Inc. v. One2One Communications, LLC*, 2011 WL 1871108 at *4, (E.D. Wis. May, 16, 2011). The slander count alleged statements made with material knowledge of their falsity and the court found that because defamation is by definition a false statement, the allegations could only be willful. *Id*. *T.C. Dev. & Design, Inc. v. Disc. Ramps.com, LLC* is another unreported case involving a policy with a specific exclusion for copyright, patent, trademark, trade secret, or other intellectual property rights claims. *T.C. Dev. & Design, Inc. v. Disc. Ramps.com, LLC*, 2011 WL 1297521 (E.D. Wis. Mar. 31, 2011). Like the decision in *One2One*, the personal and advertising injury alleged in *T.C. Dev.* involved slander, or the "oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity." *Id*. at *7.

C.L. is a case involving sexual assaults in which the insured, a middle school librarian, was alleged to have sexually assaulted a thirteen-year-old boy on multiple

occasions and who also faced criminal charges as a result. *C.L. by Guerin v. School Dist. of Menomonee Falls*, 221 Wis.2d 692, 585 N.W.2d 826, 130 Ed. Law Rep. 290 (1998). West Bend's citation to *C.L.* for the proposition that an additional negligence count (made in the alternative) in *C.L.* did not allow an insured coverage is patently misleading. *C.L.* "like *K.A.G.*, involves conduct so substantially certain to cause injury that it justifies inferring intent to injure as a matter of law." *Id*. at 704. The mere sale of a product, as opposed to a sexual assault, is not so substantially certain to cause injury that it justifies inferring intent to injure as a matter of law and West Bend has presented no cases suggesting the same. The alternatively pled negligence count in *C.L.* has no bearing on a Lanham Act claim which can be proven without a showing of intent along with allegations of intent for which the Lanham Act provides treble damages and attorneys' fees as an additional remedy.

Likewise, West Bend's citation to *Schinner* with regard to the same negligence argument is not persuasive. *Schinner* involved the interpretation of

whether an act constituted an accident or occurrence under the policy, not whether an act was intentional with regard to a knowing acts exclusion. *Schinner v. Gundrum*, 2013 WI 71, 349 Wis.2d 529, 833 N.W.2d 685. Additionally, *Schinner* involve an underage, intoxicated teen who punched Schinner twice in the face and then kicked him in the head. Id. at ¶24. The aggressor pled no contest to substantial battery with intent to cause bodily harm. *Id*. at footnote 10. An additional charge of second-degree recklessly endangering safety was dismissed but read in. *Id*. Additionally, the conduct of the party host, setting up an isolated shed for a drinking party, procuring alcohol and expecting others to bring alcohol, inviting many underage guests to drink – especially an underage guest known to become belligerent when intoxicated – were intentional actions that violated the law. Id. at ¶92. This, the court held, means that the bodily injury which resulted was not an occurrence. *Id*. *Schinner* is distinguishable based not simply on the egregious conduct and criminal charges but because the court was determining whether the acts constituted an accident or

occurrence under the policy, not whether the acts qualified as an exclusion to the policy under a knowing acts exclusion. Therefore, *Schinner* does not support West Bend's argument regarding negligence being pled with regard to the knowing acts exclusion.

Unable to locate any case on point, West Bend cites to another case which is readily distinguishable because the court was (again) determining whether or not an act was an occurrence under the policy. *Estate of Sustache v. American Family Mut. Ins. Co.*, 2008 WI 87, 311 Wis.2d 548. *Sustache* also involved a person punching the victim in the face who's head then hit the curb and who later died from his injuries. *Id*. at ¶5. In *Sustache*, "there is no dispute that Jeffrey intended to strike Sustache." *Id*. Unlike Ixthus, who is an innocent infringer involved in a complaint which also alleges intentional conduct against it and 115 other parties, *Sustache* involves admitted intentional, volitional conduct which caused bodily harm. *Id*. *Sustache* also does not involve a knowing acts exclusion. *Id*. Ixthus intensely disputes that its conduct was intentional. It is entirely possible, especially given the paucity of specific

allegations against Ixthus, that the New York case ends with Ixthus being found to be an innocent infringer. It is impossible that the same could be said for the participants in *C.L.*, *Gundrum* and *Sustache*. Each case relied upon by West Bend fails to support its argument regarding the knowing acts exclusion.

The SAC seeks damages under the Lanham Act while also seeking the additional remedy based upon allegations that Ixthus acted with intent. Violations of the Lanham Act can be proven without showing knowledge or intent and because the SAC seeks damages for nonintentional infringement as well as additional damages for intentional acts, West Bend has a duty to defend and the Court of Appeals' decision should be affirmed.

III. The Criminal Acts exclusion does not preclude coverage and, in addition, West Bend forfeited this argument by failing to raise, brief or argue the issue to the Circuit Court.

"A fundamental appellate precept is that we 'will not . . . blindside courts with reversals based on theories which did not originate in their forum." *Schonscheck v. Paccar, Inc.*, 2003 WI App 79, ¶11, 261 Wis.2d 769, 661

N.W.2d 476. "[A]rguments raised for the first time on appeal are generally deemed forfeited." *State Farm Mut. Auto. Ins. Co. v. Hunt*, 2014 WI App 115, ¶32, 358 Wis.2d 379, 856 N.W.2d 633. West Bend failed to raise, brief or argue the criminal acts exclusion to the Circuit Court and has therefore forfeited this argument on appeal. Although the Court reviews motions for summary judgment de novo, this defense, as well as the defense of the "reasonable insured" and public policy arguments, were not raised to the Circuit Court and therefore were not part of the record before the Circuit Court to review on summary judgment. These defenses were first raised on appeal and therefore should not be part of the Court's de novo review of the motion for summary judgment.

With regard to the criminal acts exclusion argument, however, if the Court considers it, the exclusion does not apply. Ixthus has not been charged with or convicted of any crime. The civil causes of action alleging violation of the Federal RICO statutes and the related conspiracy count have been dismissed by the New York Trial Court. Even though at one time Ixthus raised its fifth amendment right to not respond to a question on a subpoena, Ixthus

subsequently responded to the subpoena and provided the information requested to Abbott. Even if an inference of guilt were relevant under a four corners analysis, which it is not, there should be no inference of guilt where, as argued herein, Ixthus withdrew its invocation of its fifth amendment right and turned over the information it had previously sought to withhold based on its fifth amendment rights.

The references to alleged criminal activity are not based on criminal charges or convictions. They are not even supported by civil causes of action based on criminal statutes (again, the RICO causes of action were dismissed). For instance, in the case heavily relied upon by West Bend, *James Cape & Sons*, the individual defendants were criminally charged and entered guilty pleas. *James Cape & Sons Co. ex rel. Polsky v. Streu Const. Co.*, 2009 WI App 154, 321 Wis.2d 604, 775 N.W.2d 117. Additionally, "[A]ll of the amended complaint's one hundred thirty-one allegations supporting Cape's claims describe undisputedly intentional criminal behavior. *Id*. at ¶17. The alleged criminal language in the Second Amended Complaint

does not rise to the level referenced in *James Cape* as there are no criminal charges, no pleas, no convictions. Out of a 156-page complaint, West Bend has cited five mentions of potential criminal allegations made against, generally, "all defendants." This language, in the context of the entire complaint, is utterly insufficient to relieve West Bend of its duty to defend based upon a criminal acts exclusion.

Additionally, as raised in Abbott's reply brief on appeal, most cases applying the criminal acts exclusion do so on the basis of a criminal conviction. See *Allstate Ins. Co. v. Brown*, 16 F.3d 222 (7th Cir.1994) (criminal recklessness) *Liebenstein v. Allstate Ins. Co.*, 517 N.W.2d 73 (Minn. Ct. App. 1994) (fifth degree assault); *Hooper v. Allstate Ins. Co. v. Schmitt*, 570 A.2d 488 (N.Y. App. Div. 1990) (aggravated assault); *Allstate Ins. Co. v. Sowers*, 776 P.2d 1322 (Or. App. 1989) (resisting arrest).

Finally, the policy at issue fails to define whether or not the criminal acts exclusion applies regardless of whether or not the insured is charged or convicted with a crime. When "policy language relates to coverage and is

ambiguous, we interpret the policy in favor of the insured to afford coverage." *Acuity v Bagadia*, 2008 WI 62, ¶13. Had the West Bend policy clarified the circumstances in which the criminal acts exclusion applies, there would be no ambiguity. However, because it is impossible to determine whether an insured must be charged, convicted, or simply accused of a crime without basis, the provision is ambiguous. Where ambiguous, the policy must be interpreted in favor of Ixthus to afford coverage.

For all of these reasons, the criminal acts exclusion does not preclude coverage. Nevertheless, West Bend waived this defense by failing to raise it with the Circuit Court.

IV. The Doctrine of Fortuity does not bar coverage for Ixthus

West Bend's argument with regard to the doctrine of fortuity fails as a matter of law. Abbott's SAC involves allegations of trademark infringement, et. al. The cases cited by West Bend to support the doctrine or fortuity involve insureds who pled guilty to criminal acts (*Hedtcke*, *Haessly*). In *Hedtcke*, for example, the wrongdoer pled guilty to being a party to arson.

Hedtcke v. Sentry Ins. Co., 109 Wis.2d 461, 466 (1982), 326 N.W.2d 727. Likewise, in *Haessly*, the wrongdoer was tried and convicted of intentional battery. *Haessly v. Germantown Mut. Ins. Co.*, 213 Wis.2d 108, 110 (1997), 569 N.W.2d 804. For the doctrine of fortuity to apply, "the intentional act must be of a nature that the intent to harm can be inferred as a matter of law without regard to the actual subjective beliefs in the mind of the insured at the time he committed the acts." *Prosser v. Leuck*, 196 Wis.2d 780, 785 (1995), 539 N.W.2d 466 citing *K.A.G. v. Stanford*, 148 Wis.2d 158, 434 N.W.2d 790 (1988) in which the doctrine of fortuity applied where the insured committed sexual assaults. The Court in *Prosser* determined that the doctrine of fortuity did not apply where the insured was playing with fire and gasoline and started a fire in which the building was extensively damaged. *Id*. "[P]laying with fire is far removed from the intentional criminal acts of sexual assault and murder." *Id*. at 786.

If playing with fire and gasoline is far removed from intentional criminal acts such as sexual assault and murder, the purchase and sale of diabetic test strips is in

another universe altogether. Ixthus bought and sold a product, whose manufacturer has alleged that these sales violated the Lanham Act. The purchase and sale of a product is not an offense which shows an intent to cause harm as a matter of law. Intent to harm Abbott cannot be inferred as a matter of law and is wholly dependent upon Ixthus' subjective beliefs. In these circumstances, the doctrine of fortuity does not apply to preclude coverage.

V. A reasonable insured would expect coverage for the personal and advertising injury it bargained for with West Bend; in addition, West Bend forfeited this argument by failing to raise, brief or argue the issue to the circuit court.

Ixthus bargained for the personal and advertising injury coverage included in the West Bend policy. A reasonable insured would expect that after paying premiums to its insurer, the insurer would provide a defense when the insured is in need of a defense against allegations that can be proven without any showing of intent. Ixthus is faced with allegations in the Second Amended Complaint which can be proven without any showing of intent. Therefore, as in *Ross Glove* and *Air*

Engineering, West Bend must abide by its duty to defend. Furthermore, West Bend failed to raise, brief or argue this issue to the Circuit Court and for the reasons stated in section III herein, their argument should be forfeit.

VI. Public Policy requires West Bend to provide coverage for Ixthus; in addition, West Bend forfeited this argument by failing to raise, brief or argue the issue to the circuit court.

West Bend argues that public policy considerations require a finding that West Bend has no duty to defend. However, West Bend fails to cite to a single case supporting its position that public policy considerations preclude coverage for advertising injury arising from an insured's business transactions. Instead, West Bend cites to *Hagen v. Gulrud*, 151 Wis.2d 1 (1989), 442 N.W.2d 570 (a case involving a sexual assault in which the perpetrator was found guilty), *N.N. v. Moraine Mut. Ins. Co.*, 153 Wis.2d 84 (1990), 450 N.W.2d 445 (a case involving the sexual assault of a nine-year-old in which the perpetrator pled guilty), *Haessly v. Germantown Mut. Ins. Co.*, 213 Wis.2d 108, 110 (1997), 569 N.W.2d 804 (a case in which the wrongdoer was tried and convicted of intentional battery). It should go without saying that

the case at bar is distinguishable from *Hagen, N.N.*, and *Haessly*. Sexual assault of children and intentional battery are acts which have public policy ramifications. West Bend has failed to cite to any case where public policy was implicated by alleged advertising injury arising from an insured's business transaction.

Finally, as raised by Abbott to the Court of Appeals, "courts rarely resolve cases on the basis of public policy" at the summary judgment stage. *Jessica M.F. v. Liberty Mut. Fire Ins. Co.*, 209 Wis.2d 42, 61, 561 N.W.2d 787 (Ct. App. 1997) (Schudson, J. concurring).

West Bend is asking to be relieved of its duty to defend unproven allegations in a

trademark lawsuit even though many of the causes of action therein can be proven without a showing of intent. This appeal involves arguable rather than actual coverage. No allegations have yet been proven. "[T]he duty to defend is necessarily broader than the duty to indemnify because the duty to defend is triggered by arguable, as opposed to actual coverage." *Air Engineering*, ¶18. Public Policy requires a finding that

West Bend must abide by its contract and defend Ixthus with regard to the Second Amended Complaint.

CONCLUSION

Ixthus respectfully requests that this Court affirm the decision Court of Appeals.

Dated this 29th day of August, 2018

HOWARD, SOLOCHEK, & WEBER, S.C.
Attorneys for Appellant

/s/Jason Pilmaier
Jason Pilmaier
State Bar No. 1070638
Albert Solochek
State Bar No. 1011075

CERTIFICATION OF COMPLIANCE WITH WIS. STAT 809.19(8)(b) and (c)

I hereby certify that this brief conforms to the rules contained in Wisconsin Statute Sections 809.19(8)(b) and (c) for a brief and appendix produced with proportional font. The length of this brief is 7,176 words.

HOWARD, SOLOCHEK, & WEBER, S.C.
Attorneys for Appellant
/s/Jason Pilmaier
Jason Pilmaier
State Bar No. 1070638
Albert Solochek
State Bar No. 1011075

CERTIFICATION OF COMPLIANCE WITH WIS. STAT 809.19(12)-(13)

I hereby certify that I have submitted an electronic copy this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. 809.19(12)-(13). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served

with the paper copies of this brief filed with the court and served on all opposing parties.

HOWARD, SOLOCHEK, & WEBER, S.C.

Attorneys for Appellant

/s/Jason Pilmaier
Jason Pilmaier
State Bar No. 1070638
Albert Solochek
State Bar No. 1011075

CERTIFICATION OF CONTENT COMPLIANCE

I hereby certify that, with regard to the supplemental appendix filed with this brief pursuant to s. 809.19(3)(b), that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

/s/Jason Pilmaier

Jason Pilmaier

CERTIFICATION OF MAILING

Pursuant to Wis. Stat. 809.80(3)(b), I hereby certify that on this 30th day of August, 2018, twenty two copies of this brief and appendix were deposited for delivery to the

Clerk of the Wisconsin Supreme Court by first-class United States mail, postage pre-paid.

I further certify that three (3) copies of this brief were served this same date by first-class United States mail, postage pre-paid, on each party.

/s/Jason Pilmaier

Jason Pilmaier

In the Supreme Court of Wisconsin

No. 17AP909

WEST BEND MUTUAL INSURANCE COMPANY,
Plaintiff-Respondent-Petitioner,

v.

IXTHUS MEDICAL SUPPLY, INC., and
KARL KUNSTMAN,
Defendants-Appellants,

ABBOTT LABORATORIES,
ABBOTT DIABETES CARE INC., and
ABBOTT DIABETES CARE SALES CORP.,
Defendants-Co-Appellants.

Review of Decision of Court of Appeals District II
Circuit Court Case No. 2016-CV-001414

RESPONSE BRIEF OF DEFENDANTS/APPELLANTS ABBOTT LABORATORIES, ABBOTT DIABETES CARE INC., AND ABBOTT DIABETES CARE SALES CORP.

WINSTON & STRAWN LLP
Michael P. Mayer, Wis. Bar No. 1036105
Linda T. Coberly, *Pro Hac Vice*
35 W. Wacker Drive
Chicago, Illinois 60601
Phone: 312-558-5600
lcoberly@winston.com

Attorneys for Defendants/Appellants Abbott Laboratories, Abbott Diabetes Care Inc., and Abbott Diabetes Care Sales Corp.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

The Court of Appeals in this case faithfully followed existing precedent, and West Bend's brief does not provide any basis for setting that precedent aside. In a straightforward, unpublished opinion, the Court of Appeals resolved two issues, holding that (i) a complaint filed against the insured in New York alleges an "advertising injury" covered by the policies, and (ii) the insurer could not invoke a "knowing violation" exclusion to avoid coverage or a duty to defend because the lawsuit includes claims that do not require proof that the insured knew of the violation. The first holding is a case-specific factual determination and is plainly correct on this record. The second holding involves a pure issue of law—the appropriate rule for applying a "knowing violation" exclusion—and followed two prior authorities from the Court of Appeals that took the very same approach. It is also entirely consistent with this Court's precedents, including its instruction to interpret policies and policy exclusions in favor of the insured. The decision should be affirmed.

Accepting West Bend's position on the "knowing violation" issue would require a dramatic change in coverage law, overruling not only the decision below but also the line of precedent on which it rests. Yet West Bend's brief does not give this Court any reasoned basis for such a ruling.

None of the cases West Bend relies upon suggests that an insurer can use the "knowing violation" exclusion to avoid coverage for a lawsuit that includes claims that do not require proof of a knowing violation. Although West Bend argues that the decision below departed from "existing law," its discussion of the legal standard ignores the critical Court of Appeals cases. And when West Bend does attempt to distinguish those cases, the distinctions are illusory. Those cases hold unequivocally that a "knowing violation" exclusion does not interrupt coverage for any claim for which "intent is not a required element[.]" *Acuity v. Ross Glove Co.*, 2012 WI App 70, ¶ 19, 344 Wis. 2d 29, 817 N.W.2d 455, *pet. for review den'd* (2012); *accord Air Eng'g, Inc. v. Indus. Air Power, LLC*, 2013 WI App 18, ¶ 24, 346 Wis. 2d 9, 828 N.W.2d 565, *pet. for review den'd* (2013). This rule is fair, workable, and consistent with insurance coverage decisions by this Court dating back more than a century. There is no reason to cast it aside.

As a fallback, Petitioner raises several alternate grounds for affirming the award of summary judgment, none of which appeared in its motion for summary judgment in the Circuit Court. This Court can and should decline to reach those arguments, just as the Court of Appeals did. And if it does choose to reach them, this Court should find that they do not warrant a declaration of "no coverage" in any event.

COUNTERSTATEMENT OF THE ISSUES

This case presents only two issues:

1. Does the complaint against the insured in New York allege an "advertising injury" for purposes of determining coverage under the insurance policy?

Answer by the Circuit Court: *Yes*

Answer by the Court of Appeals: *Yes*

2. Can a liability insurer invoke a "knowing violation" exclusion to avoid coverage for a lawsuit merely because the underlying complaint includes factual allegations of willful misconduct, when one or more of the claims—in terms of their nature and required elements—do not require any proof of a knowing violation?

Answer by the Circuit Court: *Yes*

Answer by the Court of Appeals: *No*

COUNTERSTATEMENT OF THE CASE

I. Factual Background

A. The Insurance Policies

This case arises out of insurance policies that Petitioner West Bend Mutual Insurance Company ("West Bend") issued to Defendants Ixthus Medical Supply, Inc. and its principal Karl Kunstman (collectively,

"Ixthus"). Ixthus is engaged in the business of buying and selling medical products.

At all relevant times, West Bend insured Ixthus under both a commercial general liability policy and a commercial umbrella policy. Both sets of policies require West Bend to defend and indemnify Ixthus for "Personal and Advertising Injury Liability," as follows:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply.

See, e.g., A33.[1]

Each policy defines "personal and advertising injury" as "injury, including consequential 'bodily injury', arising out of one or more of the following offenses:"

a. False arrest, detention or imprisonment;

b. Malicious prosecution;

c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;

[1] "A__" refers to materials in the appendix submitted with West Bend's opening brief. "R__" refers to materials that are not in the appendix but that do appear in the record.

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

e. Oral or written publication, in any manner, of material that violates a person's right of privacy;

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

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement."

A46. The policies further define "advertisement" as "a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters." A44.

The policies contain a variety of exclusions, though West Bend invoked only one of these in its motion for summary judgment—the exclusion for the "Knowing Violation of Rights of Another." This provision excludes coverage for personal and advertising injury "caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury.'" A38.

B. The Underlying Lawsuit

In October 2015, Appellants Abbott Laboratories, Abbott Diabetes Care Inc., and Abbott Diabetes Care Sales Corp. (collectively, "Abbott") filed a lawsuit in New York against Ixthus and other medical products distributors, as well as a number of wholesale pharmacies. R1, Exs. H–I, Compl. in *Abbott Laboratories, et al. v. Adelphia Supply USA, et al.*, 1:15-CV-05826 (the "New York Action") (produced in full at R10–11 and excerpts from the operative complaint reprinted in A49–A107). The New York Action concerns the wrongful importation and domestic advertising, marketing, distribution, and sale of FreeStyle® blood glucose test strips that Abbott manufactured and packaged for sale internationally. According to the operative complaint, the defendant distributors advertised their ability and willingness to sell test strips domestically, when in fact they were selling international test strips within the United States, benefitting from the international/domestic price differential. A87, ¶¶ 383–86.

The New York Action alleges that Ixthus bought test strips that various other suppliers had diverted from international markets, and then

sold those strips to U.S.-based pharmacies. R1, Ex. I, ¶ 426.[2] According to the operative complaint, Ixthus and the other distributor defendants "advertise to consumers and the marketplace their ability and willingness to sell" the international test strips as if they were packaged and designed for sale domestically. A87, ¶ 385. They make these advertisements "through, inter alia, websites, emails, facsimiles, point-of-sale displays, and other media"—all "[u]sing Abbott's trademarks and trade dress." *Id.* This conduct "causes, or is likely to cause, consumer confusion, mistake, and deception to the detriment of Abbott[.]" A58–A59, ¶ 15. The complaint alleges: "[T]he advertisement and sales of diverted international FreeStyle test strips cause great damage to Abbott and the goodwill of Abbott's valuable trademarks." *Id.*

The damages include injury to "Abbott's reputation," as well as "customer dissatisfaction, a diminution of the value of the goodwill" associated with the trademarks and trade dress, and "a loss of sales and/or market share to Abbott's competition." A95, ¶ 567. In addition, the defendants' conduct caused Abbott to pay rebates that it should not have paid. A56, ¶¶ 8–9. The complaint also alleges that a predecessor of

[2] Curiously, this critical paragraph is not part of the complaint excerpts included in West Bend's appendix. It does, however, appear at page A6 of the appendix submitted by Defendant Ixthus.

Ixthus filed for bankruptcy after being sued by a different manufacturer for the wrongful distribution of a similar product—and that the predecessor's liability insurance carrier (not West Bend) covered and ultimately resolved the claim. A93–A94, ¶¶ 558–61.

Based on these and other allegations, the New York Action asserts causes of action under both state law and the Lanham Act, including:

(i) trademark infringement under 15 U.S.C. § 1114(1);

(ii) unfair competition under 15 U.S.C. § 1125(a)(1)(A);

(iii) common law unfair competition;

(iv) trademark dilution under 15 U.S.C. § 1125(c);

(v) state law trademark dilution;

(vi) deceptive business practices in violation of New York consumer protection statute;

(vii) unjust enrichment;

(viii) racketeering, in violation of 18 U.S.C. § 1962(c);

(ix) conspiracy to violate the federal racketeering statute;

(x) importation of goods with infringing marks (15 U.S.C. § 1124);

(xi) fraud and fraudulent inducement;

(xii) aiding and abetting fraud; and

(xiii) contributory trademark infringement.

A94–A106, ¶¶ 563–645.[3] Although some of these claims require proof of intentional conduct, others can be the basis of liability without any proof of knowledge or intent. For these claims, while the complaint does assert that the conduct was committed "deliberately and willfully" (*e.g.*, A95, ¶ 568), that allegation is not necessary for liability. Instead, it supports the complaint's request for exemplary damages and attorney's fees. E*.g.*, A95 ¶ 571; A106–A107.

II. Procedural History

Ixthus tendered the defense of the New York Action to its liability carrier, West Bend. West Bend denied coverage and later filed this declaratory judgment action, naming both Ixthus and Abbott as defendants. *See* R1 (West Bend complaint).

A. The Circuit Court's Declaration of "No Coverage"

West Bend moved for summary judgment on its claims, seeking a "no coverage" declaration on two grounds. First, it argued that the New York complaint did not allege a causal connection between Ixthus's advertising activity and Abbott's injury and, therefore, that it failed to trigger the policies' coverage for "advertising injury." R32 at 2, 12–17. Second, West Bend argued that the policies' "knowing violation" exclusion

[3] The court has since dismissed the two racketeering claims, as well as the claim for unjust enrichment.

barred any coverage. *Id.* at 2, 17–22. West Bend did not assert any other basis for a declaration of "no coverage." Abbott and Ixthus both opposed the motion, and Abbott affirmatively cross-moved for summary judgment, seeking a declaration that West Bend had a duty to indemnify the entire suit and cover any liability on claims that are not based on a finding of knowledge. R34, R37.

After briefing and oral argument, the Circuit Court granted West Bend's motion and denied Abbott's. On the causation point, the Circuit Court analyzed the paragraphs of the New York complaint that refer to the harm caused by Ixthus's advertisement of the diverted test strips, finding that these allegations were "right on point . . . to invoke a causal connection" between "the alleged injury and the insured's advertising activity." A21–A23 (transcript of hearing).

With respect to the "knowing violation" exclusion, however, the Circuit Court erred, holding that coverage was unavailable because the New York complaint included factual allegations of willfulness. A28 (concluding that the factual "summary" in the New York complaint describes "a scheme to defraud that is knowing and deliberate"). Rather than analyzing the claims and their elements individually—as Wisconsin law requires—the court followed West Bend's invitation to consider the

factual narrative as a whole. The court observed, for example, that "the complaint itself[,] looking at the four corners[,] contains allegations of numerous intentional conduct." A24. Because this holding contravened Wisconsin precedent applying "knowing violation" exclusions, Abbott and Ixthus both appealed.

B. The Court of Appeals' Reversal

The Court of Appeals reversed and remanded with directions that declaratory relief be entered against West Bend. A1–A9.

With respect to the causation issue—which West Bend raised as an alternative ground for affirmance—the Court of Appeals agreed with the Circuit Court's decision. The Court of Appeals rejected West Bend's argument that there was no allegation of causation; it pointed to the complaint's allegations of "'consumer confusion, mistake, and deception'" resulting from Ixthus's "unauthorized importation, advertisement, and distribution of diverted test strips[.]" A7, ¶ 14 (quoting New York complaint). As the Court of Appeals recognized, "[p]ackaging itself is an advertisement[,]" and the complaint alleges that Abbott suffered a loss of goodwill—not to mention lost sales and/or market share—from Ixthus's distribution of packages that "bear certain of Abbott's trademarks but are materially different from what United States patients expect, causing 'great

damage to Abbott and the goodwill of Abbott's valuable trademarks.'" A7, ¶¶ 13–14 (quoting complaint).

On the "knowing violation" issue, the Court of Appeals reversed the Circuit Court, following settled precedent and holding that the exclusion did not apply. A9, ¶ 20. The court recognized that the mere presence of an allegation of knowledge is not dispositive, as the insurer "has a duty to defend if the policyholder still could be liable ***without*** a showing of intentional conduct." A8, ¶ 17 (citing *Air Eng'g, Inc.*, 2013 WI App 18, ¶ 24) (emphasis added). The court then walked through several of Abbott's claims—including its federal and state trademark dilution claims, and its state deceptive business practices claim—and found, correctly, that they do not require a showing of intent. The court concluded, "As there are claims set forth in the complaint that survive the 'knowing violation' exclusion, the inclusion of allegations of intentional conduct does not relieve the insurer of its duty to defend." A9, ¶ 20 (citing *Air Eng'g*, 2013 WI App 18, ¶ 25).

On this basis, the Court of Appeals reversed and remanded with directions to enter declaratory judgment "such that West Bend must defend the suit and indemnify Ixthus against any damages awarded to

Abbott as compensation for its advertising injury on claims that do not require proof of a knowing violation." A9, ¶ 20.

In its response brief on appeal, West Bend raised a number of additional arguments against finding coverage, including the "criminal acts" exclusion, the doctrine of fortuity, the expectations of the insured, and public policy. None of these arguments, however, appeared in West Bend's extensive summary judgment motion in the Circuit Court. Indeed, other than the "Criminal Acts" exclusion, these theories were never pleaded. Given the absence of these arguments from the summary judgment record, the Court of Appeals exercised its discretion and declined to reach these arguments in the first instance on appeal.

ARGUMENT

In evaluating a duty to defend, Wisconsin courts compare "the four corners of the underlying complaint to the terms of the insurance policy." *Water Well Sols. Serv. Grp. Inc. v. Consol. Ins. Co.*, 2016 WI 54, ¶ 3, 369 Wis. 2d 607, 881 N.W.2d 285. This approach "generally favors Wisconsin insureds" and "supports the policy that an insurer's duty to defend is broader than its duty to indemnify." *Id.* ¶ 25; *see also Fireman's Fund Ins. Co. of Wis. v. Bradley Corp.*, 2003 WI 33, ¶ 20, 261 Wis. 2d 4, 660 N.W.2d 666 ("the duty to defend is triggered by arguable, as opposed to actual,

coverage"). The court must construe the complaint liberally, make reasonable inferences, and resolve any ambiguity in favor of the insured. *Water Well*, 2016 WI 54, ¶ 15. Policy exclusions in particular are "narrowly or strictly construed against the insurer if their effect is uncertain." *American Family Mut. Ins. Co. v. American Girl, Inc.*, 2004 WI 2, ¶ 24, 673 N.W.2d 65, 268 Wis. 2d 16.

This analysis necessarily requires examining each claim separately, rather than reviewing the factual narrative as a whole. As this Court has explained, if the policy arguably covers even one claim in the underlying suit, "the insurer has a duty to defend its insured on all the claims alleged in the entire suit." *Water Well*, 2016 WI 54, ¶ 16.

The Court of Appeals' decision in this case faithfully followed this authority. It evaluated each claim based on factual allegations within the "four corners" of the complaint, and it found that at least some of the claims were based on allegations of "advertising injury" and did not fall within the exclusion for "knowing violation[s]." Accordingly, the policies cover ***at least some*** of the claims, and West Bend has a duty to defend the entire suit. A9, ¶ 20. This analysis is entirely consistent with this Court's cases; there is no reason to set it aside.

I. The complaint in the New York Action alleges that advertising caused injury and thus triggers coverage for "advertising injury."

In this Court, West Bend first argues—incorrectly—that the New York complaint does not allege a causal connection between Ixthus's advertising and Abbott's injuries, and thus it does not trigger an initial grant of coverage for "advertising injury." Both the Circuit Court and the Court of Appeals rejected this argument, and this Court should as well.

West Bend's policies explicitly cover "Personal and Advertising Injury Liability," which includes liability for injury "arising out of" the infringement of copyright, trade dress, or slogan "in your 'advertisement.'" A38; A46. Under Wisconsin law, this type of provision provides coverage as long as it is "reasonable to infer" from the allegations that the advertising "contributed materially to the injury." *Fireman's Fund*, 2003 WI 33, ¶¶ 52–54. Importantly, the advertising "need not be the sole cause of the harm, but only contribute materially to it." *Acuity v. Bagadia*, 2007 WI App 133, ¶ 10, 302 Wis. 2d 228, 734 N.W.2d 464.

The allegations here easily meet this requirement. The New York complaint alleges that Ixthus and others "advertise to consumers and the marketplace their ability and willingness to sell" international test strips as if they were designed for sale domestically. A87, ¶ 385. Ixthus makes these advertisements "through, inter alia, websites, emails, facsimiles,

point-of-sale displays, and other media"—all "[u]sing Abbott's trademarks and trade dress." *Id.* In addition, the complaint alleges that the misleading packaging causes consumer confusion and other harm to Abbott. *See* A57–A58, ¶¶ 12–13 ("These material differences [in packaging] render diverted intentional FreeStyle test strips misbranded and confusing"). Specifically, the complaint explains that this "advertisement and sales of diverted international FreeStyle test strips" causes, or is likely to cause, "consumer confusion, mistake, and deception to the detriment of Abbott," as well as "great damage to Abbott and the goodwill of Abbott's valuable trademarks." A58–A59, ¶ 15. Wisconsin law requires that the Court construe these allegations "liberally," "in favor of the insured." *Fireman's Fund*, 2003 WI 33, ¶ 20. As the Court of Appeals properly recognized, these passages allege a causal connection between Ixthus's advertising and an injury to Abbott. A7, ¶ 14.

West Bend's argument on appeal depends on a selective reading of the complaint—a reading that the Court of Appeals properly rejected. According to West Bend, the New York complaint alleges that it was "the ***delivery*** of diverted international test strips ***and consequential rebates*** [that] injured Abbott, not the advertising of test strips." Opening Br. 17 (emphasis added). But this ignores the allegations of injury separate from

"rebates"—including "a loss of sales and/or market share," injury to "Abbott's reputation," "consumer confusion," and "a diminution of the value of the goodwill" associated with Abbott's trademarks. *E.g.*, A58–A59, ¶ 15; A95, ¶ 567. This alleged injury has nothing to do with fraudulent rebates and everything to do with misleading advertising.

For the same reason, West Bend cannot avoid coverage by focusing on the requirement that the causation must be "material." *See* Opening Br. 16, 22. Even if "advertising" did not materially contribute to the inappropriate rebates (and it did), the complaint certainly alleges that advertising contributed materially to the other alleged injuries, including injury to Abbott's reputation, goodwill, sales, and market share. *E.g.*, A58–A59, ¶ 15; A95, ¶ 567. West Bend's only response on this point is to pose a hypothetical: it argues that if Ixthus had not delivered international test strips after advertising domestic ones, "there would have been no consumer confusion and no injury whatsoever to Abbott." Opening Br. 17. This is circular. Under this hypothetical, the advertised goods would have been the ***same*** as the delivered goods, so the advertising would not have been misleading in the first place. Here, the complaint alleges that the advertised goods were ***different*** than the delivered goods—and it was that very difference that rendered the advertising misleading. The complaint

alleges that this misleading advertising caused injury to Abbott's reputation, goodwill, sales, and market share, as well as customer confusion. It is these allegations that must drive the analysis—not a hypothetical set of facts that extends outside the "four corners of the underlying complaint." *Water Well*, 2016 WI 54, ¶ 3.

In this respect, the principal authority West Bend cites actually defeats its argument. West Bend's brief relies on this Court's decision in *Fireman's Fund* to emphasize the proposition that the advertising must "***contribute materially*** to the injury." Opening Br. 16 (quoting *Fireman's Fund*, 2003 WI 33, ¶ 52). But West Bend fails to quote the previous clause, which puts this quotation in context. In *Fireman's Fund*, this Court explained that "the relevant causation issue . . . is not whether 'the injury ***could have*** taken place without the advertising,' but 'whether the advertising did in fact ***contribute materially*** to the injury.'" *Fireman's Fund*, 2003 WI 33, ¶ 52 (citation omitted). West Bend's argument does exactly what *Fireman's Fund* disapproves: it focuses on whether the injury "***could have***" taken place even if there had been no false advertising. Under *Fireman's Fund*, the correct analysis is "whether, based on the allegations in the complaint"—as opposed to a hypothetical—it is "reasonable to infer" that the advertising "contributed to the alleged

injury." *Id.* ¶ 53. Here, that injury includes both the rebates and things like lost sales, reduced goodwill, and customer confusion. In the words of *Fireman's Fund*, "[i]t is a reasonable inference, in the present case, that the promotional materials [and packaging] . . . caused at least some of that injury." *Id.* ¶ 51.

West Bend's point about "the mere presence of allegations that the defendants advertised" (Opening Br. 16) is a straw man. No one contends that the "mere presence" of advertising allegations would be enough to trigger coverage. But the presence of these allegations ***does*** help to distinguish this case from *Heil v. Hartford Accident & Indemnity Co.*, 937 F. Supp. 1355 (E.D. Wis. 1996), on which West Bend relies. *See* Opening Br. 16–17. Although the complaint in *Heil* attached an advertisement, it did not assert advertising-related claims at all. As the court explained, the claims were based solely on ***patent*** infringement, which was "entirely absent from the policy language." 937 F. Supp. at 1365–67. Indeed, the court in *Heil* recognized that injuries from advertising-related infringement—specifically, "infringement of copyright or of title or slogan"—are "the types of injury an insured . . . can reasonably expect to be covered by a policy insuring against advertising injury." *Id.* at 1367.

Nor can West Bend avoid coverage by pointing out that Ixthus "sold diverted international test strips to a pharmacy, not consumers." Opening Br. 18–19, 20-21. The policies define "advertisement" as "a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters." A44. Given its particular market segment, Ixthus's own customers were the pharmacies to which it sold the products, and the complaint alleges that it advertised to those customers—as well as to consumers—through packaging and other means. *See supra* at 7–8, 11, 13. The policies do not require Ixthus to have had direct contact with the ultimate user of the product, or to be the only advertiser in the chain of distribution. *See Ross Glove*, 2012 WI App 70, ¶ 16 (rejecting a similar argument and observing that the policy did not require the insured to "be the first, last or only entity to publish"). West Bend's characterization of the allegations about "consumer confusion" as "tenuous" (Opening Br. 18) is not enough to avoid coverage; the duty to defend turns on "the ***nature*** of the claim alleged," not on whether it will ultimately succeed. *Grieb v. Citizens Cas. Co.*, 33 Wis. 2d 552, 558, 148 N.W.2d 103 (1967). And the

complaint alleges injury beyond "consumer confusion" in any event. *See* A58–A59, ¶ 15.

Again, under this Court's cases, a coverage analysis requires construing the complaint liberally, assuming all reasonable inferences, and resolving any ambiguity in favor of the insured. *Water Well*, 2016 WI 54, ¶ 15. This approach properly led the Circuit Court and Court of Appeals to find coverage in this case. This Court should reach the same conclusion.

II. The "knowing violation" exclusion does not bar coverage.

West Bend next argues that the Court of Appeals "departed from long-standing Wisconsin law" in holding that the "knowing violation" exclusion did not apply. Opening Br. 25. This has it exactly backward. It is West Bend—not the Court of Appeals—that departs from long-standing Wisconsin law. Accepting West Bend's position would require upsetting a line of Wisconsin Court of Appeals precedent that the opening brief scarcely acknowledges. These cases squarely hold that the exclusion does not interrupt coverage for any claim for which "intent is not a required element[.]" *Ross Glove*, 2012 WI App 70, ¶ 19.

This principle of law is fair, workable, and entirely consistent with this Court's cases, which resolve any lack of clarity in a coverage exclusion in favor of the insured. *American Girl*, 2004 WI 2, ¶24. In fact, this

principle is the law in a "majority of jurisdictions." *Air Eng'g*, 2013 WI App 18, ¶ 24 (citation omitted). There is no reason to cast it aside.

The New York Action asserts a number of claims that do not require any proof of knowledge. The jury could well find Ixthus liable for trade dress infringement, for example, even if it found insufficient proof that Ixthus acted willfully or with knowledge that its acts would violate Abbott's legal rights. In that event, West Bend would be required to indemnify that liability, at least for that claim. As a matter of law, then, West Bend has a duty to defend the entire suit.

A. In describing "existing law," West Bend ignores a line of Court of Appeals precedent holding that a "knowing violation" exclusion does not bar coverage for a claim if the defendant may be held liable without proof of knowledge.

Far from a "radical departure from existing law" (Opening Br. 27), the Court of Appeals' decision faithfully follows Wisconsin law, which holds that a "knowing violation" exclusion does not interrupt coverage for a claim if "intent is not a required element[.]" *Ross Glove*, 2012 WI App 70, ¶ 19; *accord Air Eng'g*, 2013 WI App 18, ¶ 24. These may be decisions of the Court of Appeals rather than this Court, but they ***are*** "existing Wisconsin law." Opening Br. 25. They are published, unanimous decisions (with respect to which this Court considered and denied Petitions for Review). They involve a "knowing violation" exclusion, and they address similar

underlying claims. West Bend has not cited a single Wisconsin precedent that reaches the opposite conclusion.

In *Ross Glove*, for example, the underlying complaint included claims for patent and trademark infringement, along with a factual allegation that the infringement was "willful and done with an intent" to cause harm. 2012 WI App 70, ¶¶ 2, 8 (quoting the complaint). Applying a "knowing violation" exclusion, the Court of Appeals looked at these allegations from the perspective of the elements of the claims. The court noted that "intent is not a required element of trade dress infringement, but rather is required only to justify a request for enhanced damages or attorney fees." *Id.* ¶19. Because the Lanham Act is a "strict liability" statute, "there need not be an allegation of willfulness in order to succeed on the issue of liability." *Id.* (citing *Hard Rock Café Licensing Corp. v. Concession Services*, 955 F.2d 1143, 1152 n.6 (7th Cir. 1992)). As a result, the court concluded that the exclusion did not interrupt the duty to defend, as at least one claim in the case did not require knowledge. *Id.* (explaining that plaintiff sought "to hold Ross Glove liable for trade dress infringement without any allegation, ***much less any required showing***, of a knowing violation") (emphasis added), *quoted in* Opening Br. 35 (though without the critical emphasized language).

The Court of Appeals confirmed this approach the following year in *Air Engineering*. That case involved allegations of a conspiracy by the insured and its employees to misappropriate their former employer's proprietary information, including an advertising system. *See* 2013 WI App 18, ¶¶ 1–2, 7–8. The former employer asserted six causes of action against the insured, some of which required proof of knowledge and some of which did not. Again, the court held that the "knowing violation" exclusion did not preclude coverage because the plaintiff could prevail on some of its claims—including trade secret misappropriation under the Lanham Act—without any proof of knowledge or intent. *See id.* ¶¶ 23–26 (analyzing the elements of the causes of action).

The "knowing violation" issue in *Air Engineering* is indistinguishable from the issue here. There, as here, the underlying complaint alleged that the insured "knew" that it was engaged in misappropriation, carried out the misappropriation "in a willful and malicious manner, and did so to obtain business from [its victim's] past and prospective customers." *Id.* ¶ 23. Indeed, ***every single claim*** in the complaint "include[d] an allegation of conduct that [was] 'willful and malicious.'" *Id.*; *see also Ross Glove*, 2012 WI App 70, ¶¶ 2, 8 (same, by incorporation). But the reasoning in *Air Engineering* (and *Ross Glove*) does not turn on the number or quality of the

willfulness allegations; it turns on the court's conclusion that for at least some of the claims, knowledge is not required. It is no surprise, then, that the Court of Appeals here rejected West Bend's efforts to distinguish *Air Engineering* and *Ross Glove*—efforts that West Bend repeats in its brief in this Court. *See* Opening Br. 34–36.

West Bend's discussion of "existing Wisconsin law" largely ignores these cases. *See id.* at 25–33. In fact, these cases do not even appear in the brief's Table of Authorities. When the brief does address them, it first attempts (unsuccessfully) to distinguish them (*id.* at 34–37), and then it points instead to two unpublished federal decisions from the Eastern District of Wisconsin that ***predate*** *Ross Glove* and *Air Engineering*, along with two decisions that apply a different state's law. *Id.* at 37–39. It finally suggests—in two brief sentences—that *Ross Glove* and *Air Engineering* should be "limited to their facts" or "withdrawn." *Id.* at 39. This approach does nothing to support the central argument in West Bend's brief—that "[t]he Court of Appeals Decision departed from long-standing Wisconsin law." *Id.* at 25. In fact, the court did no such thing.

Not surprisingly, the Court of Appeals did not find that the exercise of analyzing the elements was "unworkable," "impractical," or a "weighty intellectual exercise on the law," as West Bend suggests it would be.

Opening Br. 27–28. Courts analyze factual allegations in terms of legal elements every day—for example, every time they decide a motion to dismiss. Such a task is neither unworkable, impractical, nor overly "intellectual." In fact, the rule followed by the Court of Appeals is the rule in a "majority of jurisdictions," which hold that "even if the underlying complaint alleges that the policyholder knew that it was committing a wrongful act, the insurance company still has a duty to defend if the policyholder could still be liable without a showing of intentional conduct." *Air Eng'g*, 2013 WI App 18, ¶ 24 (quoting 3 NEW APPLEMAN LAW OF LIABILITY INSURANCE § 18.02[5][b] (Matthew Bender rev. ed. 2011)).

B. West Bend also misconstrues this Court's decisions, which do not prohibit examining the elements but instead call for assessing coverage based on the "nature of the claim."

West Bend's characterization of "existing Wisconsin law" also misreads this Court's decisions. In essence, West Bend contends that this Court's cases require focusing on the complaint's factual narrative and prohibit any consideration of the legal claims asserted or the elements required for liability. Opening Br. 25–26 ("the facts alleged are dispositive for duty to defend. . . . The theories of liability . . . are immaterial.") (citations omitted). ***That is not the law.*** This Court has long held that a coverage analysis requires analyzing the nature of each claim, which

requires examining the allegations through the lens of the claim's legal elements.

In *Fireman's Fund*, for example, this Court held that "a duty to defend is based upon the nature of the claim," even if the claim is ultimately meritless. 2003 WI 33, ¶ 21. The Court required a claim-by-claim analysis, explaining that "when an insurance policy provides coverage for even one claim made in a lawsuit, the insurer is obligated to defend the entire suit." *Id.* Following that approach, the Court evaluated the complaint to determine whether any of the claims amounted to "the offense of 'infringement of trademark.'" *Id.* ¶ 28. Focusing on a claim for federal unfair competition, the Court first examined the statute to understand "[t]he key to finding a violation"—in other words, the elements of that particular claim. *Id.* ¶ 30 (quoting Lanham Act authority that recited the elements of a violation). The Court then focused on the specific facts alleged in the complaint to satisfy those elements. *Id.* ¶ 31. In this sense, the Court in *Fireman's Fund* did just what West Bend says the Court of Appeals should not have done in this case: "focus[] on the required elements of proof for [the] claims for violation of the Lanham Act." Opening Br. 25.

Similarly, the Court in *Water Well* confirmed that each claim must be analyzed independently, because "[i]f the policy, considered in its entirety, provides coverage for at least one of the claims in the underlying suit, the insurer has a duty to defend its insured on all of the claims alleged in the entire suit." 2016 WI 54, ¶ 16 (quoting *Fireman's Fund*, 2003 WI 33, ¶ 21). As for the "four corners" rule (cited in Opening Br. 26), it has nothing to do with whether the court in a coverage case should consider the elements of the cause of action. As *Water Well* explains, "The four-corners rule prohibits a court from considering extrinsic evidence when determining whether an insurer breached its duty to defend." 2016 WI 54, ¶ 15. Thus, when this Court in *Water Well* focused on "allegations contained in the four corners of the complaint" (2016 WI 54, ¶ 20), it was distinguishing between allegations that ***were*** in the complaint and allegations that were not. *See id.* ¶ 38 (cautioning against "imagin[ing] facts," and declining to read an unpled factual allegation into the complaint). *Water Well* does not suggest that the factual allegations are dispositive regardless of the nature of the legal claims.

We are not aware of any case holding that the "four corners" rule prohibits a court from examining the complaint's allegations through the lens of the cause of action that may give rise to liability. Nor would such a

rule make sense. As *Water Well* explains, the ultimate question in a duty-to-defend case is whether the insurer "***could be*** held bound to indemnify the insured.'" 2016 WI 54, ¶ 17 (emphasis in original). That kind of analysis ***requires*** examining the factual allegations in terms of the causes of action asserted. The mere presence of "knowledge" allegations is not enough to trigger a "knowing violation" exclusion. If the jury could reject the allegations of knowledge and still find liability, the "knowing violation" exclusion would not interrupt coverage, at least for that particular claim. This approach does not require considering facts outside the "four corners" of the complaint; it simply requires hypothesizing that not all of the allegations may ultimately be proven.

West Bend's reference to *Bankert v. Threshermen's Mutual Insurance Company,* 110 Wis. 2d 469, 329 N.W.2d 150 (1983), does not show otherwise. *Bankert* does not hold—and has never been interpreted to hold—that the legal claims on which liability may be based are "immaterial" to the duty to defend. Opening Br. 26 (citing *Bankert* for this proposition). *Bankert* considered a different issue—the location of the "occurrence" for purposes of applying a location-based exclusion. The plaintiffs asserted negligence claims against a farmer who had allowed his 15-year-old son to drive. 110 Wis. 2d at 472. But the policy specifically

excluded coverage for occurrences involving automobiles "'while away from the [farm] premises.'" *Id.* at 479. The Court held that while the farmer's negligent act may have taken place at the farm, the "occurrence" — the accident itself—did not. *Id*. at 480. The Court's comment that "[a]n occurrence . . . is what is insured against[,] not theories of liability" (*id.*, *cited in* Opening Br. 26–27), must be understood in that context. Nothing in *Bankert* suggests that the nature and elements of the legal claim are always "immaterial."

The Court of Appeals' decision in *James Cape* does not support West Bend's position either—and it predates that court's decisions in *Ross Glove* and *Air Engineering* in any event. Opening Br. 26 (citing *James Cape & Sons Co. v. Streu Constr. Co.*, 2009 WI App 154, 321 Wis. 2d 604, 775 N.W.2d 117, for the proposition that "[t]he theories of liability . . . are immaterial").[4] In *James Cape*, the Court of Appeals considered coverage for civil claims based on a criminal bid-rigging conspiracy—a conspiracy that had already produced a number of criminal convictions. The court held that because the claims all depended on the existence of the criminal conspiracy, they

[4] Similarly inapposite is the Court of Appeals' decision in *C.L.*, which also preceded *Ross Glove*. *See C.L. v. School Dist. of Menomonee Falls*, 221 Wis. 2d 692, 703, 585 N.W.2d 826 (Ct. App. 1998) (holding that an "intentional damages" exclusion barred coverage for all claims, regardless of theory, for damages flowing from the alleged molestation of a 13-year-old—an act for which an "intent to injure" is inferred as a matter of law), *cited in* Opening Br. 27, 30.

did not trigger coverage under an insurance policy that applied only to "accident[s]." 2009 WI App 154, ¶¶ 10–16. The court distinguished between the underlying event (a crime, not an "accident") and the theories of recovery (one of which asserted that the felons had been "negligent in retaining and in failing to supervise themselves"). Even the negligence claim, however, required proof of the underlying criminal conspiracy, which the negligence allegedly allowed to occur. *Id.* ¶ 13 (even for the negligence claims, "the damages sought are tied to losses resulting from the criminal conspiracy").

For the same reason, West Bend is wrong when it suggests that "many Wisconsin insurance coverage decisions would have been decided differently" under the Court of Appeals' approach. Opening Br. 28–30. In support of its argument, West Bend cites two Supreme Court cases—*Schinner* and *Estate of Sustache*—both of which examined whether a homeowner's policy provided an initial grant of coverage. This is a different context than a policy exclusion, which this Court has held must be "narrowly or strictly constructed against the insurer if [its] effect is uncertain." *American Girl*, 2004 WI 2, ¶ 24.

Moreover, the nature of the claims in these cases is quite distinct. Both *Schinner* and *Estate of Sustache* involved claims for damages arising

out of assaults at underage drinking parties. In *Schinner*, the insured was the party's host, and the Court concluded that his actions—hosting the party, inviting underage guests, and "actively promoting heavy drinking"—were necessarily intentional, illegal actions and thus did not constitute an "accident" triggering coverage. *Schinner v. Gundrum*, 2013 WI 71, ¶¶ 68, 81, 349 Wis. 2d 529, 833 N.W.2d 685. In *Estate of Sustache*, the insured was the assaulter, and the Court found no "accident" where everyone agreed that the insured "voluntarily traveled" to meet the victim at the party and then "intentionally punched [him] in the face." *Estate of Sustache v. Am. Family Mut. Ins. Co.*, 2008 WI 87, ¶¶ 52–54, 311 Wis. 2d 548, 751 N.W.2d 845. In both of these cases, even the claims framed as "negligence" necessarily rested on—and would have required proof of—the underlying intentional conduct. And there is no reason to think that these cases would come out differently under the Court of Appeals' approach to a "knowing violation" exclusion, which—unlike the "accident" question—necessarily requires looking at the specific "violation" at issue.

C. The Court of Appeals correctly held that the New York Action asserts several claims for which the "knowing violation" exclusion does not interrupt coverage.

Construing the complaint liberally—and resolving any ambiguity in favor of the insured—the Court of Appeals correctly held that at least some of the claims in the New York Action would not fall within the exclusion for "knowing violation[s]." Indeed, at least ***seven*** of the claims in the New York Action do not require any proof of knowledge or intent. As the Court of Appeals concluded, these include the claims for federal and state trademark dilution, and for deceptive business practices under New York common law, none of which require knowledge as an element of liability. A8–A9. There are also four others in addition to these, including the First and Second Claims for Relief (Federal Trademark Infringement and Unfair Competition), *see, e.g.*, *Ross Glove*, 2012 WI App 70, ¶ 19 (citing *Hard Rock Café*, 955 F.2d at 1152 n.6) ("the Lanham Act is a strict liability statute[,]" meaning that "there need not be an allegation of willfulness in order to succeed on the issue of liability"); the Third Claim for Relief (Common Law Unfair Competition), *see, e.g.*, *Pulse Creations, Inc. v. Vesture Grp., Inc.*, 154 F. Supp. 3d 48, 58 (S.D.N.Y. 2015) (in considering common law unfair competition claims, courts may infer bad faith through constructive knowledge, as opposed to actual knowledge); and the

Thirteenth Claim for Relief (Contributory Trademark Infringement), *see*, *e.g.*, *Medline Indus., Inc. v. Strategic Commercial Sols., Inc.*, 553 F. Supp. 2d 979, 991 (N.D. Ill. 2008) (contributory trademark infringement does not require actual knowledge of infringement).

Given their nature and elements, these claims do not depend on any allegations of knowledge by Ixthus that its conduct would violate Abbott's rights and cause advertising injury. *See* A38 ("Knowing Violation" exclusion applies only to injury "caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury'"). The complaint alleges that Ixthus bought test strips that various other suppliers had diverted from international markets, and that it then sold those strips to U.S.-based pharmacies. R11, ¶ 426 (alleging Ixthus's purchase and sale of 62 boxes of diverted test strips) (reprinted at Ixthus Appx. A6). Ixthus and the other distributors allegedly used "Abbott's trademarks and trade dress" to "advertise to consumers and the marketplace their ability and willingness to sell" the international test strips as if they were packaged and designed for sale domestically. A87, ¶ 385. This conduct "causes, or is likely to cause, consumer confusion, mistake, and deception to the detriment of Abbott[.]" A58–A59, ¶ 15. These allegations, if proven,

would create a liability that West Bend would be required to indemnify under the policies—even if the jury found no proof that Ixthus knew its conduct would violate Abbott's rights.

To be sure, the complaint alleges that Ixthus ***did*** know, but the claims for liability do not depend on those allegations. For example, the complaint alleges that Ixthus engaged in federal trademark infringement "deliberately and willfully, with knowledge of Abbott's exclusive rights and goodwill in the FreeStyle Marks and FreeStyle Trade Dress, and with knowledge of the infringing nature of the marks when used in connection with the diverted international FreeStyle test strips." A95, ¶ 568. The complaint also asserts that Ixthus had engaged in similar conduct before, through a different entity, and faced a lawsuit by a different manufacturer. A93–A94, ¶¶ 558–562. But while these allegations may be necessary for a finding of enhanced damages or attorney's fees, they are not necessary for liability. *See Ross Glove*, 2012 WI App 70, ¶ 19.

It is possible, therefore, that the jury could find Ixthus liable for infringement under the Lanham Act, for example, even if it finds a failure of proof with respect to willfulness. In this sense (among others), this case is markedly different from the cases cited by West Bend that involve negligence claims that depend on proof of intentional wrongdoing by the

insured. *See, e.g., C.L.*, 221 Wis. 2d at 703 ("intentional damages" exclusion interrupted coverage because, regardless of the legal theory, the "damages" sought in the lawsuit necessarily flowed from the insured's illegal molestation of a 13-year-old).[5]

In sum, based on their nature and elements, at least ***some*** of the New York claims could produce liability even if the jury does not find proof of willfulness. Those claims are covered by the policies notwithstanding the "knowing violation" exclusion. As a matter of law, West Bend must indemnify Ixthus for ordinary damages awarded on those claims, and it has a duty to defend the entire suit in the meantime.

III. West Bend's other arguments are meritless and were neither raised on summary judgment in Circuit Court nor resolved on appeal.

Highlighting the weakness of its first two arguments, West Bend's brief in this Court also advances a series of arguments that it did not raise as grounds for summary judgment in the Circuit Court and that the Court of Appeals appropriately did not consider. This Court can and should

[5] *See also James Cape*, 2009 WI App 154, ¶ 13 (no "accident" where all claims—even one framed as "negligent supervision"—ultimately sought damages caused by the "criminal conspiracy"); *Schinner*, 2013 WI 71, ¶ 68 (no "accident" when all claims—even those framed as negligence—depended on allegations that insured had illegally and intentionally served alcohol to minors); *Estate of Sustache*, 2008 WI 87, ¶¶ 52–54 (no "accident" when all claims—even those framed as negligence—depended on allegations that the insured had intentionally assaulted the victim).

decline to reach them. *See Umansky v. ABC Ins. Co.*, 2009 WI 82, ¶ 23 n.17, 319 Wis. 2d 622, 769 N.W.2d 1 (appellate courts have such discretion); *see also DaimlerChrysler v. Labor & Indus. Review Comm'n*, 2007 WI 15, ¶ 21, 299 Wis. 2d 1, 727 N.W.2d 311 (declining to address issue raised for the first time on appeal). West Bend makes no showing, for example, that these arguments are "issue[s] of statewide importance" meriting review on appeal in the first instance. *Contrast State v. Long*, 2009 WI 36, ¶ 44, 317 Wis. 2d 92, 765 N.W.2d 557 (reaching a new statutory interpretation argument that was of broad importance and that resulted in an inappropriate sentence of "life imprisonment without the possibility of parole"). Nor has West Bend explained how these issues would satisfy this Court's standard for discretionary review. Wis. Stat. § 809.62 (1r).

This Court need not reach any of these arguments. If it does choose to reach them, however, it should conclude that they do not provide any basis for reinstating the Circuit Court's judgment.

A. The "criminal acts" exclusion does not apply here.

West Bend concedes that the application of a "criminal acts" exclusion is an issue of first impression in this Court (Opening Br. 41), and it cites no authority that would apply such an exclusion under these circumstances. Ixthus has not been charged with—much less convicted

of—any crime. As West Bend's own authorities show (*id.* at 42–44), most cases applying a "criminal acts" exclusion do so on the basis of a prior criminal conviction. *See Allstate Ins. Co. v. Brown*, 16 F.3d 222 (7th Cir. 1994) (criminal recklessness); *Liebenstein v. Allstate Ins. Co.*, 517 N.W.2d 73 (Minn. Ct. App. 1994) (fifth-degree assault); *Hooper v. Allstate Ins. Co.*, 571 So.2d 1001 (Ala. 1990) (second-degree assault); *Allstate Ins. Co. v. Sowers*, 776 P.2d 1322 (Or. App. 1989) (resisting arrest).

Furthermore, while some insurance policies state that the "criminal acts" exclusion may apply regardless of whether the insured was charged with a crime (*see, e.g.*, *Allstate Ins. Co. v. Burrough*, 914 F. Supp. 308, 310–12 (W.D. Ark. 1996), *cited in* Opening Br. 42)), the policies here do not include such language. This ambiguity in the policy must be resolved in favor of Ixthus, as the insured. *American Girl*, 2004 WI 2, ¶ 24.

Setting that aside, West Bend has not demonstrated that any aspect of the New York complaint depends on the assumption that Ixthus committed a crime. West Bend's primary authority is *Suwannee*, a federal district court case applying New York and Florida law. *See* Opening Br. 42–43 (citing *Suwannee Am. Cement LLC v. Zurich Ins. Co.*, 885 F. Supp. 2d 611 (S.D.N.Y. 2012)). But that case applied a "criminal acts" exclusion to bar coverage only after finding that ***none*** of the claims could reasonably be

interpreted to exist independent of the felonious conduct. *See* 885 F. Supp. 2d at 616. Here, West Bend has not identified ***any*** claim that depends on proof of felonious conduct. At most, West Bend points to a footnote stating that the sale of misbranded medical devices "can constitute a felony"—and to the fact that Ixthus invoked the Fifth Amendment after being subpoenaed for documents. Opening Br. 44–46. This is a far cry from the felonious conduct alleged in *Suwannee* (unequivocally criminal price-fixing and conspiracy). Although West Bend also cites a reference to "criminal conduct" in ¶ 383 of the New York complaint (Opening Br. 45), that paragraph refers to conduct by the "Pharmacy Defendants," not Ixthus, which is not a pharmacy. *See* A87, ¶ 383. And West Bend's reference to an allegation that the defendants were "conspiring" (Opening Br. 44) ignores the fact that the racketeering claim has been dismissed.

Moreover, even if some of the claims here could be understood to be based on criminal conduct, others cannot. The infringement claims, for example, are based on the nature of Ixthus's advertising and trade dress; they do not depend on any "criminal acts" by Ixthus. As the Seventh Circuit has recognized, a "criminal acts" exclusion does not apply unless the claim can be "understood to be charging [the insured] with a crime." *Curtis-Universal, Inc. v. Sheboygan Emergency Med. Servs., Inc.*, 43 F.3d 1119,

1125 (7th Cir. 1994) (applying Wisconsin law) (finding it "dubious . . . that the advertising injury alleged . . . should be classified as arising out of [criminal conduct] rather than arising out of the tort of unfair competition"). Although West Bend focuses on the (now-dismissed) racketeering claim—the claim encompassing Abbott's mail and wire fraud allegation, against which Ixthus invoked a self-incrimination right—it has no basis for avoiding coverage for the other claims. And the mere fact that the various causes of action include boilerplate language "incorporat[ing] all preceding allegations" (Opening Br. 45) does not mean that every cause of action depends on charging Ixthus with a crime.

In short, the "criminal acts" exclusion cannot support affirmance of the Circuit Court's judgment, and it does not require reversal of the Court of Appeals decision here.

B. Other principles of insurance law also cannot support a judgment in West Bend's favor.

As a fallback, West Bend invokes three related principles of insurance law—the doctrine of fortuity, reasonable expectations of the insured, and public policy (Opening Br. 46–49)—none of which appear anywhere in the Circuit Court record. West Bend did not plead these principles in its complaint as a basis for its declaratory judgment action, and it did not include them in its extensive motion for summary judgment.

Under the circumstances, there is no reason for this Court to consider these arguments in the first instance.

Further, it is no surprise that West Bend did not raise these arguments earlier, as they do not provide any basis for avoiding coverage in this case. West Bend presents these three principles as independent grounds for affirmance, but Wisconsin courts generally consider them together. *See Haessly v. Germantown Mut. Ins. Co.*, 213 Wis. 2d 108, 117, 569 N.W.2d 804 (Ct. App. 1997) (courts read a fortuity principle into policies to further "specific public policy objectives," including "avoiding profit from wrongdoing" and conforming to "reasonable expectations"); *see also Schinner*, 2013 WI 71, ¶¶ 79–80 (same).

West Bend has not cited a single authority holding that these kinds of concerns would preclude coverage for advertising injury arising out of an insured's business conduct. Precedent from other jurisdictions squarely rejects any such argument. *See Liberty Mut. Ins. Co. v. OSI Indus., Inc.*, 831 N.E.2d 192, 204 (Ind. Ct. App. 2005) (insurer cannot avoid advertising liability coverage on public policy grounds by claiming "intentional misconduct," as "[w]e are perplexed at how advertising could be anything but intentional conduct"). Many of the cases West Bend cites involve sexual or physical assault, for which the public policy concerns are

obviously quite different. *See, e.g., Haessly*, 213 Wis. 2d at 118 (domestic violence); *Hagen v. Gulrud*, 151 Wis. 2d 1, 6–7, 442 N.W.2d 570 (Ct. App. 1989) (sexual assault); *K.A.G. v. Stanford*, 148 Wis. 2d 158, 165–66, 434 N.W.2d 790 (Ct. App. 1988) (sexual molestation of a minor).

Indeed, even in cases involving a crime, public policy and the principle of fortuity do not necessarily preclude coverage. *See Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 326 N.W.2d 727 (1982) (as a matter of public policy, holding that arson by one insured does not necessarily bar coverage for another); *see also Becker by Kasieta v. State Farm Mut. Auto. Ins. Co.*, 220 Wis. 2d 321, 327, 582 N.W.2d 499 (Ct. App. 1998) ("When the supreme court adopted the principle of fortuity, it did not conclude that public policy prohibits coverage at any time that the insured is involved in the commission of a criminal act"). Here, of course, the claims do not depend on proof of a crime, nor do they require proof of knowledge or willfulness. It is entirely reasonable for an insured to expect its insurer to defend it against claims based on business conduct, particularly when they do not require any proof of intent.

In any event, "courts rarely resolve cases on the basis of public policy" at the summary judgment stage. *Jessica M.F. v. Liberty Mut. Fire Ins. Co.*, 209 Wis. 2d 42, 61, 561 N.W.2d 787 (Ct. App. 1997) (Schudson, J.,

concurring). It would be inappropriate to decide this issue on the limited record before the Court, particularly in light of the burden of proof, which falls squarely on West Bend. *See* 7 COUCH ON INS. § 102:8 (insurers have the burden to prove implied fortuity). Accordingly, such arguments do not provide a basis for reinstating the Circuit Court judgment.

CONCLUSION

For all these reasons, Abbott respectfully requests that this Court affirm the Court of Appeals' order, which remands the case with instructions that declaratory relief be entered in Defendants' favor, such that West Bend must defend the suit and indemnify Ixthus against any damages awarded to Abbott as compensation for its advertising injury on claims that do not require proof of a knowing violation.

Dated: September 18, 2018

Respectfully submitted,

WINSTON & STRAWN LLP

By: /s/*Michael P. Mayer*

Michael P. Mayer, Wis. Bar No. 1036105
Linda T. Coberly, *Pro Hac Vice*
35 W. Wacker Drive
Chicago, Illinois 60601
Phone: 312-558-5600
lcoberly@winston.com

Attorneys for Defendants/Appellants Abbott Laboratories, Abbott Diabetes Care Inc., and Abbott Diabetes Care Sales Corp.

CERTIFICATION AS TO FORM / LENGTH
PURSUANT TO RULE 809.19(8)(d)

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,358 words.

Dated: September 18, 2018

By: /s/*Michael P. Mayer*
Michael P. Mayer
Wis. Bar No. 1036105
Winston & Strawn LLP

One of the Attorneys for Defendants/Appellants Abbott Laboratories, Abbott Diabetes Care Inc., and Abbott Diabetes Care Sales Corp.

CERTIFICATION AS TO ELECTRONIC BRIEF
PURSUANT TO RULE 809.19(12)(f)

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of the brief filed with the court and served on all opposing parties.

Dated: September 18, 2018

By: */s/Michael P. Mayer*
Michael P. Mayer
Wis. Bar No. 1036105
Winston & Strawn LLP

One of the Attorneys for Defendants/Appellants Abbott Laboratories, Abbott Diabetes Care Inc., and Abbott Diabetes Care Sales Corp.

CERTIFICATION OF MAILING
PURSUANT TO RULE 809.80(3)(b) AND (4), RULE 809.19(8)(a)(1)

I hereby certify that on this 18th day of September 2018, I delivered twenty-two (22) copies of the foregoing Brief to FedEx for overnight priority service to:

Clerk of the Supreme Court
110 E. Main St., Suite 215
Madison, WI 53701-1688

I further certify that on this 18th day of September 2018, I delivered three (3) copies of the foregoing Brief to FedEx for overnight standard service to each of:

Daniel J. Cunningham
Tressler LLP
233 South Wacker Drive – 22nd Floor
Chicago, IL 60606-6399

Jeffrey Leavell
Jeffrey Leavell S.C.
723 S. Main Street
Racine, WI 53403

Attorneys for Plaintiff-Respondent-Petitioner
West Bend Mutual Insurance Company

Jason Pilmaier
Howard, Solochek & Weber, S.C.
1800 E. Howard Ave.
Milwaukee, WI 53207

Attorneys for Defendants-Appellants
Ixthus Medical Supply, Inc. and Karl Kunstman

I further certify that the foregoing was correctly addressed and the postage was pre-paid.

Dated: September 18, 2018

By: */s/Michael P. Mayer*
Michael P. Mayer
Wis. Bar No. 1036105
Winston & Strawn, LLP

One of the Attorneys for Defendants/Appellants Abbott Laboratories, Abbott Diabetes Care Inc., and Abbott Diabetes Care Sales Corp.

STATE OF WISCONSIN
SUPREME COURT

West Bend Mutual Insurance Company,

Plaintiff-Respondent-Petitioner,

v.

Court of Appeals District II

Ixthus Medical Supply, Inc.,
Karl Kunstman,

Appeal No. 2017AP909

Racine County Circuit Court
Case No.: 2016CV1414 , The
Honorable David W.
Paulson, presiding

Defendants-Appellants,

Abbott Laboratories,
Abbott Diabetes Care Inc.,
Abbott Diabetes Care Sales Corp.,

Defendants-Co-Appellants.

PLAINTIFF-RESPONDENT-PETITIONER WEST BEND MUTUAL INSURANCE COMPANY'S COMBINED REPLY BRIEF

Jeffrey Leavell
Danielle N. Rousset
JEFFREY LEAVELL, S.C.
723 S. Main Street
Racine, WI 53403

October 3, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Wisconsin Decisions

Other Decisions

Statutes

I. The Complaint allegations do not allege a causal connection between Abbott's injury and Ixthus' alleged advertising activity.

Ixthus notably fails to distinguish, or even reference, *Heil Co. v. Hartford Acc. & Indem. Co.*, 937 F.Supp. 1355, 1366-67 (E.D. Wis. 1996), in which the court held that even though the underlying plaintiff attached an advertisement to the complaint itself and therefore alleged some advertising activity, the insured still "failed to establish any causal connection between the patent infringement alleged in the [underlying lawsuit] and any advertising activity, despite the fact that the infringing product was advertised and may have been sold in part, through advertising." (*See* West Bend's Br. pgs. 14-15.)

Abbott wrongly argues *Heil* is distinguishable because there the complaint alleged patent infringement and patent infringement was not an enumerated offense constituting "personal and advertising injury." (Abbott Br. p. 29.) This distinction is immaterial because West Bend cited *Heil* for its discussion and treatment of "advertising activity." *Heil* is instructive because despite the allegations of advertising, that Court viewed the complaint as a whole and held the manufacturing and selling of the infringing product, not the insured's advertising activities, caused the plaintiff's injuries. *Heil*, 937 F.Supp. 1366-67. Similarly here, and viewing the Complaint as a whole, Ixthus'

importation and distribution of the tests strips, and not Ixthus' advertising activities, caused Abbott's injuries.

Ixthus points to *Ross Glove Co.*, 2012 WI App 70, 344 Wis. 2d 29, 817 N.W.2d 455 and *Fireman's Fund*, 2003 WI 33, 261 Wis. 2d 33, 660 N.W.2d 666, and cursorily claims that the Complaint is "[l]ike the complaints in *Ross Glove* and *Fireman's Fund*" because it alleges a causal connection between the injury alleged and the Defendants' advertising activity. (Ixthus Br. at p. 12.) As discussed in West Bend's initial brief, the advertising facts in *Fireman's Fund* are not comparable to the facts at issue in this case. (West Bend's Brief at pgs. 16-17.) The alleged advertising in *Fireman's Fund* specifically alleged that the insured infringed on the underlying claimant's trade mark and trade dress and caused injury via promotional material and advertising the allegedly infringing product at trade shows. *Fireman's Fund* at ¶¶45-46, 261 Wis. 2d at 31, 660 N.W.2d at 679-680. By contrast here, only two paragraphs in the 645 paragraph Complaint even reference advertising and then only to generally allege that all defendants imported, advertised and distributed test strips, with nothing more specific said. (R. 11, ¶¶ 15, 385; A. 58-59, 87.) Therefore, no inference can be made that Ixthus' advertising caused any consumer confusion or other damage to Abbott.

Further, in *Ross Glove*, the packaging of the products at issue was alleged to be the sole cause of the consumer confusion. 2012 WI App at ¶ 11, 344 Wis. 2d at 40-41, 817 N.W.2d at 461-62 Unlike the alleged damage in *Fireman's Fund* and *Ross Glove*, the consumer confusion and damage here only exists because Ixthus imported and distributed the diverted test strips to the Pharmacy Defendants, not because of any advertising by Ixthus.

Ixthus and Abbott cite the Complaint for allegations that purportedly show some connection between Ixthus' advertising and Abbott's alleged injury. (Ixthus Br. p. 12; Abbott Br. p. 16.) However, the allegations cited by them only demonstrate that Abbott's injury was, in actuality, caused by Ixthus' importation and delivery of the diverted test strips, not the advertising of the test strips. For example, both Ixthus and Abbott cite to in the Complaint, but tellingly fail to quote the entirety of this allegation, leaving out any reference to "importation" and "distribution" as the cause of Abbott's alleged injury. (Ixthus Br. p. 12; Abbott Br. p. 16; R. 11, ¶ 15, A58-59.) The Complaint's Paragraph 15 alleges that "[d]efendants' unauthorized importation, advertisement, and subsequent distribution causes, or is likely to cause, consumer confusion, mistake, and deception to the detriment of Abbott, as well as the detriment of consumers, insurance

companies, third-party payors, and Medicaid or Medicare." (R. 11, ¶ 15; A58-59.) The inclusion of "importation" and "distribution" in the allegation is significant because it demonstrates that any advertising by Ixthus did not materially contribute to Abbott's injury. Instead, the advertising would have been done by the Pharmacy Defendants -- the last in the distribution stream before the customer. Accordingly, any advertising by Ixthus is not a materially contributing factor to Abbott's injuries.

Moreover, Ixthus and Abbott's arguments fail to adequately consider the alleged role of Ixthus in the scheme to defraud Abbott. The Complaint divides the defendants into two categories – the wholesalers (the "Distributor Defendants") and the pharmacies (the "Pharmacy Defendants"). (R. 11, ¶ 5; A55.) The Complaint states that the Distributor Defendants "import, market, and distribute large volumes of diverted international FreeStyle test strips for distribution to pharmacies." (*Id.*) (bold added.) The Pharmacy Defendants, in turn, are alleged to market and sell "the diverted FreeStyle test strips to U.S. consumers and submit[] fraudulent reimbursement claims to insurance companies." (*Id.*) (bold added.) Reading the Complaint as a whole, as is required in a duty to defend analysis, establishes Ixthus injured Abbott by importation and distribution, not advertising.

Abbott points to paragraph 385 to argue the Complaint alleges Ixthus advertised, (Abbott Br. p. 7), but all that paragraph says is "Defendants advertise to consumers and the marketplace." (R. 11, ¶385, A87.) This is merely a general allegation clarified elsewhere in the Complaint that the Pharmacy Defendants do the advertising to the consumers and the Distributer Defendants, like Ixthus, distribute to the Pharmacy Defendants. (R. 11, ¶ 5, A55; R. 11, ¶ 7, A55-56.) Abbott also argues that "Ixthus's own customers were the pharmacies" (Abbott Br. p. 20), but the Pharmacy Defendants could not be "confused consumers" because they were a part of the fraudulent scheme.

Ixthus and Abbott argue West Bend's brief failed to address any of Abbott's injuries other than rebates and consumer confusion, *i.e.*, loss of sales and/or market share, injury to Abbott's reputation and a diminution of the value of the goodwill. (Ixthus Br. p. 14-15; Abbott Br. pgs. 16-17.) To the contrary, West Bend's initial brief directly addressed injuries other than consumer confusion. (See West Bend Br. pg. 18-19.)

Ixthus incorrectly asserts that *Fireman's Fund* "agreed with the Court in *Bigelow* that 'the causal nexus requirement of an insurance policy (is satisfied) when one of the alleged injuries was consumer confusion and advertisements of the alleged product were attached.'"

(Ixthus Br. p. 11.) *Fireman's Fund* did not apply such a sweeping rule, but rather only adopted the *Bigelow* court's causal connection standard, which, as discussed above, requires that the insured's advertising *materially* contributed to the alleged injury. *Fireman's Fund*, 2003 WI 33, ¶ 52, 261 Wis. 2d at 35, 660 N.W.2d at 681, *citing R.C. Bigelow, Inc. v. Liberty Mut. Ins. Co.*, 287 F.3d 242 (2d Cir. 2002). (Emphasis added.) Indeed, *Fireman's Fund* specifically declined to endorse a blanket rule. *Id.* at ¶ 53, fn. 54, 261 Wis.2d at 35, 660 N.W.2d at 682 ("We do not address in the present case whether a claim for trademark or trade dress infringement inherently involve advertising activity because in order to cause consumer confusion one must advertise the mark or dress.")

Wisconsin law requires that the advertising *materially* contribute to the alleged injury to trigger an insurance policy's personal and advertising injury coverage. Here, only the importation and distribution of the diverted test strips materially contributed to Abbott's alleged injury. If Ixthus had only imported and delivered the proper test strips, there would have been no injury. Accordingly, the causal connection standard is not satisfied and there is no coverage for the Abbott Suit under the West Bend policy.

II. Alternatively, the Knowing Violation exclusion bars coverage for the Complaint's allegations.

In Wisconsin, a four-corners duty to defend analysis prohibits a court from looking beyond the complaint's allegations. *Water Well Solutions Service Group, Inc. v. Consolidated Ins. Co.*, 2016 WI 54, ¶ 26, 369 Wis.2d 607, 627, 881 N.W.2d 285, 295 (2016). Ixthus and Abbott agree with this principle, but at the same time ask this Court to completely disregard the prevalent allegations of knowing and intentional conduct and resulting injury. (Ixthus Br. p. 17; Abbott Br. pgs. 13-14.) Those allegations plainly invoke the Knowing Violation exclusion. Ixthus and Abbott also fail to explain how looking beyond a complaint's allegations, as the Court of Appeals did here, complies with the four-corners rule. Indeed, they cannot, because the Court of Appeals did exactly what the four-corner's rule prohibits when it looked beyond the complaint allegations to the elements of Abbott's claims. Undisputedly, looking beyond the four-corners of the complaint in a duty to defend analysis conflicts with decades of Wisconsin insurance law, more recently reiterated in *Water Well*.

Ixthus and Abbott attempt to sidestep the extensive allegations of knowing and intentional conduct and injury by pointing to decisions that are factually distinguishable from the instant case. (Ixthus Br.

pgs. 17-20; Abbott Br. pgs. 22-25.) As set forth in West Bend's initial brief, *Ross Glove* and *Air Eng'g* are simply not applicable here, (*See* West Bend Initial Br. p. 28-30), because they did not contain multiple, repeated allegations of intentional criminal conduct and expected injury like those in the Complaint here.

If Ixthus and Abbott's interpretation of *Acuity v. Ross Glove Co.*, 2012 WI App 70, 344 Wis. 2d 29, 817 N.W.2d 455 and *Air Eng'g, Inc. v. Indus. Air Power, LLC*, 2013 WI App 18, 346 Wis. 2d 9, 828 N.W.2d 565, (Ixthus Br. pgs 18-20; Abbott Br. pgs. 21, 25), is correct, then those decisions conflict with Wisconsin's four-corners case law because they are detrimental to coherence and consistency in the law.

At times it is necessary for this Court to limit a line of decisions and it may be just the time for *Ross Glove* and *Air Eng'g*. For instance, in *Marks v. Houston Cas. Co.*, 2016 WI 53, ¶ 80, 369 Wis. 2d 547, 597, 881 N.W.2d 309, 335, this Court found it necessary to overrule portions of *Radke v. Fireman's Fund Insurance Co.*, 217 Wis. 2d 39, 577 N.W.2d 366 (Ct. App. 1998), *Kenefick v. Hitchcock*, 187 Wis. 2d 218, 522 N.W.2d 261 (Ct. App. 1994) and *Grube v. Daun*, 173 Wis. 2d 30, 496 N.W.2d 106 (Ct. App. 1992). In *Marks*, this Court held "*Grube*, *Kenefick*, and *Radke* constitute a stunted strand of law that conflicts with our four-corners jurisprudence" and were "unsound in principle,"

and "detrimental to coherence and consistency in the law." *Marks*, 2016 WI 53, ¶¶ 74-75, 369 Wis. 2d at 593-594, 881 N.W.2d at 333.

Moreover, the nature of Ixthus' alleged conduct means that it could have only been committed with knowledge that it would violate Abbott's rights. The Complaint alleges Ixthus knew of Abbott's exclusive rights and goodwill in the test strips and deliberately used and infringed on those rights and goodwill in furtherance of their fraudulent scheme. (R. 11, ¶¶ 9, 388 568, 575; A56, 88,95-96.) Further, the Complaint alleges Ixthus, under a different name, previously engaged in exactly the type of conduct alleged in the Abbott Suit and was permanently enjoyed from selling counterfeit test strips. (*Id.* at ¶¶ 558-61; A93-94.) There can be no question Ixthus could not have perpetrated its scheme without knowingly infringing on Abbott's rights.

Abbott attempts to distinguish *James Cape & Sons Co. v. Streu Constr. Co.*, 2009 WI App 154, 321 Wis. 2d 604, 775 N.W.2d 117 and *Bankert v. Threshermen's Mut. Ins. Co.*, 110 Wis. 2d 469, 329 N.W.2d 150 (1983), (Abbott Br. pgs. 29-31), but they were both properly relied upon by West Bend for the proposition that insurance policies cover facts alleged, not the theories of liability or labels given to them. (West Bend Initial Br. p. 26-27.)

West Bend's initial brief also cited decisions that held knowing conduct and injury exclusions still apply where knowing and intentional conduct is alleged, even if the elements of a particular cause of action do not require intent. (West Bend Initial Br. p. 32-33.) *See Sletten & Brettin Orthodonics, LLC v. Continental Cas. Co.*, 782 F.3d 931, 936, 938 (8th Cir. 2015) and *Atlantic Mut. Ins. Co. v. Terk Technologies Corp.*, 763 N.Y.S.2d 56, 309 A.D.2d 22, 32 (N.Y. App. Div. 2003) Notably, neither Ixthus nor Abbott's briefs address or distinguish these persuasive decisions.

Ixthus argues that under West Bend's position, an insurer will have no duty to defend if the plaintiff also made allegations of intentional acts in an attempt to obtain enhanced damages. (Ixthus Br. p. 22.) The reasoning behind a plaintiff alleging intentional acts is completely irrelevant to the duty to defend analysis which must be based on the four-corners. Moreover, the result is exactly what insurance contract interpretation requires - - liability policies do not cover damages that are intentionally caused. *James Cape*, 2009 WI App 154, ¶ 15, 321 Wis. 2d at 614, 775 N.W.2d at 122 ("It has long been established that insurance policies do not cover intentional acts.")

Ixthus further argues that its invocation of the Fifth Amendment in the underlying suit should not lead to an inference of guilt because

"Ixthus withdrew its invocation of the fifth amendment right and provided the documents requested in discovery. (Ixthus Br. p. 23-25.) Tellingly, Ixthus' fails to point to any record citation to support its assertion that it withdrew invoking the right, nor does Ixthus provide any authority for the proposition that an inference of guilt is inappropriate when the Fifth is later withdrawn. Based upon the four-corners analysis, inferring guilt is appropriate because the Complaint specifically alleges Ixthus invoked the Fifth Amendment. *See Grognet v. Fox Valley Trucking Serv.*, 45 Wis. 2d 235, 239, 240, 172 N.W.2d 812, 815 (1969). (Wisconsin Civil Courts may draw an inference of guilt against the entity invoking the Fifth Amendment.) The Complaint says nothing about withdrawing it at a later time.

Ixthus' attempts to distinguish the cases relied upon by West Bend are unavailing. (Ixthus Br. p. 25-30.) Despite the factual differences between *T.C. Dev. & Design, Inc. v. Disc. Ramps.com, LLC*, 2011 U.S. Dist. LEXIS 36031, *17-18 (E.D. Wis. Mar. 31, 2011.) (R. 33.), *Quad/Graphics, Inc. v. One2One Communs., L.L.C.*, 2011 U.S. Dist. LEXIS 52290, *9-11 (E.D. Wis. May 16, 2011.) (R. 30.) and this case, they are nonetheless instructive as to how Wisconsin federal courts apply the exclusion and they hold the exclusion precludes coverage when the complaint alleges willful injury.

Ixthus' efforts to distinguish *Schinner v. Gundrum*, 2013 WI 71, 349 Wis. 2d 529, 833 N.W.2d 685, *Estate of Sustache v. Am. Family Mut. Ins. Co.*, 2008 WI 87, 311 Wis. 2d 548, 751 N.W.2d 845 and *C.L. v. School Dist. of Menomonee Falls*, 221 Wis. 2d 692, 585 N.W.2d 826 (1998) also miss the mark. (Ixthus Br. p. 26-30.) West Bend relied on *Schinner*, *Sustache* and *C.L.*, to illustrate how at odds the Court of Appeals' Decision is with the four-corners analysis when it held determining West Bend's duty to defend required looking beyond the Complaint to the elements of each cause of action. Further, the fact that *C.L.* predated *Ross-Glove,* (Abbott Br. p. 30), only goes to show how *Ross Glove* and *Air Eng'g* -- if they mean what Ixthus and Abbott say -- departed from long-standing Wisconsin law as espoused in *C.L.*

The Circuit Court rightly determined that the allegations described a purposeful scheme to defraud Abbot, and correctly applyed the law stated in *Bankert, James Cape,* and *C. L.* that the facts alleged -- not causes of actions or label applied to claims or bare elements of claims -- are dispositive:

> The allegations of the complaint demonstrate that [Abbott's] damages arise out of an act or a series of acts that are intended to cause injury. I can't envision that a reasonable insured would expect liability coverage for the acts of intentionally diverting the test strips and the allegations of fraud and conspiracy that go along with the scheme that was employed here. I do find that the four corners of the underlying complaint clearly do allege an injury caused at the direction of

> the insured with the knowledge the act would violate the rights of another, and that the four corners do allege infliction of advertising injury.
>
> ....
>
> The allegations of the complaint allege a scheme to defraud that is knowing and deliberate. The allegations of the complaint and the relief requested allege liability by the insureds caused by intentional conduct with intent to injure Abbott.

(R. 56: 15-16; A. 27-28.)

Likewise, Abbott's attempts to distinguish *Schinner* and *Sustache* also fail. (Abbott Br. pgs. 31-32.) Abbott seems to be arguing that the elements of a claim can only be considered when determining the application of an exclusion and are not to be considered when determining whether there is an initial grant of coverage. (Abbott Br. p. 32.) Abbott fails to provide any explanation as to why consideration of a claim's elements should depend on whether a court is determining initial grant of coverage or application of an exclusion. If elements of a claim are to be scrutinized, rather than alleged facts to determine duty to defend, then it must be required in every duty to defend analysis, whether it be initial grant of coverage, exclusions or exceptions to exclusions. Regardless, Abbott's argument is a perfect example of how upholding the Court of Appeals' decision here would result in a departure from the four-corners rule, a departure that is "unsound in principle," and "detrimental to coherence and consistency in the law."

See Marks, 2016 WI 53, ¶¶ 74-75, 369 Wis. 2d at 593-594, 881 N.W.2d at 333.

Incredibly, Abbott's brief states "[t]o be sure, the complaint alleges that Ixthus *did* know [its conduct would violate Abbott's rights], but the claims for liability do not depend on those allegations." (Abbott Br. p. 35.) (emphasis in original.) In this sentence, Abbott boldly urges this Court to selectively ignore the Complaint's actual allegations in its duty to defend analysis. This should be rejected. Further, looking to whether Abbott might ultimately succeed on any claim, (Abbott Br. p. 35-36), goes directly against this Court's directive that "the duty to defend depends upon the nature, not the merits, of the claim against the insured." *Acuity, A Mut. Ins. Co. v. Chartis Specialty Ins. Co.*, 2015 WI 28, ¶ 27, 361 Wis. 2d 396, 409, 861 N.W.2d 533, 539. Here, the nature of the claim was a criminal scheme.

The facts of the Complaint, by Abbott's own admission, undisputedly allege Ixthus knew its conduct would violate Abbott's rights. These facts are determinative to the duty to defend and cannot be ignored. *Schinner*, 2013 WI 71, ¶ 56, fn.14, 349 Wis. 2d at 552, 833 N.W.2d at 697. (The facts alleged in a complaint determine a duty, not theory of liability.) *See also Doyle v. Engelke*, 219 Wis. 2d 277, 284-285, 580 N.W.2d 245, 248 (1998). (An insurer has a duty to defend

where the plaintiff's complaint alleges facts that would give rise to liability under a policy).

The Knowing Violation undisputedly applies and precludes coverage to Ixthus, and direct liability to Abbott.

III. Alternatively, the Criminal Acts exclusion precludes coverage.

Ixthus and Abbott argue West Bend cannot argue the Criminal Acts exclusion because it was not before the trial court, (Ixthus Br. pgs. 30-31; Abbott Br. pgs. 36-37), citing *Schonscheck v. Paccar, Inc.*, 2003 WI App 79, ¶ 11, 261 Wis. 2d 769, 661 N.W.2d 476. This argument is wrong because in *Schonscheck* it was the appellant that raised new arguments for the first time on appeal, not the respondent as West Bend is here. Wisconsin Courts may address arguments raised for the first time on appeal when they are raised by a respondent. *See State v. Truax*, 151 Wis. 2d 354, 359, 444 N.W.2d 432, 435 (Ct. App. 1989). ("We may sustain the trial court's holding on a theory not presented to it, and it is inconsequential whether we do so *sua sponte* or at the urging of a respondent.") Similarly, Ixthus' reliance on *State Farm Mut. Auto. Ins. Co. v. Hunt*, 2014 WI App 115, ¶ 32, 358 Wis. 2d 379, 856 N.W.2d 633 and Abbott's reliance on *DaimlerChrysler v. Labor & Indus. Review Comm'n*, 2007 WI 15, ¶ 21, 299 Wis. 2d 1, 727 N.W.2d 311 are unpersuasive because both *Hunt* and *DaimlerChrysler* do not state that

arguments raised for the first time on appeal are never to be considered, rather they are "generally" not considered. (bold added.) "An appellate court may sustain a lower court's holding on a theory or on reasoning not presented to the lower court." *State v. Holt,* 128 Wis. 2d 110, 124-25, 382 N.W.2d 679, 687 (Ct. App. 1985), *superseded on other grounds by statute*.

West Bend is not required to prove the Criminal Acts exclusion argument is one of "statewide importance," in order for this Court to address it. (Abbott Br. p. 37.) Instead, it is merely one reason this Court has decided to address new arguments. *See State v. Long*, 2009 WI 36, ¶ 44, 317 Wis. 2d 92, 112, 765 N.W.2d 557, 567 ("Waiver does not limit this court's authority to address unpreserved issues, particularly when doing so can clarify an issue of statewide importance.") Nonetheless, application of the Criminal Acts exclusion is a matter of first impression and analysis of the exclusion by this Court would have state-wide impact on the insurance industry and its insureds.

West Bend's Criminal Acts exclusion does not require Ixthus be charged or convicted with a criminal act for the exclusion to apply, contrary to Ixthus and Abbott's arguments otherwise. (Ixthus Br. pgs. 31-33; Abbott Br. pgs. 37-38.) Requiring a charge or conviction of a

crime for the Criminal Acts exclusion ignores the plain language of the exclusion. The words of the policy are to be given their plain and ordinary meaning. *Bank One N.A. v. Breakers Dev., Inc.*, 208 Wis. 2d 230, 233, 559 N.W.2d 911, 912 (Ct. App. 1997). The exclusion applies plainly to "acts," regardless of whether they result in conviction:

> c. Criminal Acts
>
> "Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.

(R. 2:24; A. 38.) The exclusion does not state "arising out of the charging or conviction of a criminal act committed by or at the direction of the insured." Ixthus and Abbott's argument reads words into the policy that are not there. Courts may not "read into the exclusion a limiting factor that simply does not exist under the policy's clear and unambiguous language." *Advanced Waste Servs. v. United Milwaukee Scrap, LLC*, 2015 WI App 35, ¶ 21, 361 Wis. 2d 723, 736, 863 N.W.2d 634, 640. *See also Burgraff v. Menard, Inc.*, 2016 WI 11, ¶ 54, 367 Wis. 2d 50, 73, 875 N.W.2d 596, 607. (Same.)

Based upon the four-corners rule, which governs this duty to defend determination, *Water Well*, 2016 WI 54, ¶15, 369 Wis. 2d at 619, 881 N.W.2d at 291, the Criminal Acts exclusion applies because the Complaint clearly alleges Ixthus committed criminal activity. For

example, the Complaint states "the sale of misbranded medical devices in the United States is a criminal offense….", and "defendants are engaging in fraudulent and criminal conduct" and other "illegal" acts. (R.11, ¶ 1; A. 54-55; R.11, ¶13, A. 58; R. 11, ¶ 383; A. 87.) (*See also* West Bend's initial brief, pgs. 37-38.)

Ixthus and Abbott further argue the Criminal Acts exclusion does not apply because the Complaint's racketeering claim has been dismissed, (Ixthus Br. p. 31; Abbott Br. p. 40), but they fail to develop their arguments further. Regardless, the Complaint unambiguously alleges Ixthus' behavior is a criminal act because selling "misbranded medical devices in the United States is a criminal offense under the Federal Food, Drug and Cosmetics Act 21 U.S.C. §§331, 333, 352, where, as here, the sale is done with an intent to defraud or mislead, the offense is punishable by up to three years imprisonment. 21 U.S.C. §§331, 333. (R. 11, ¶13; A. 58.) Further, conspiracy is not intricately intertwined with racketeering as Abbott argues, (Abbott Br. p. 39), because Ixthus can conspire without racketeering.

Ixthus also argues, again, that its invocation of the Fifth Amendment was later withdrawn and so no inference of guilt may be made. (Ixthus Br. p. 31-32.) Ixthus points to no record citations to support its assertion. Regardless, doing so would require looking

beyond the four corners of the Complaint, which is forbidden in a duty to defend analysis. *See Water Well*, 2016 WI 54, ¶15, 369 Wis. 2d at 619, 881 N.W.2d at 291. The Complaint clearly alleges Ixthus invoked its Fifth Amendment right in the underlying suit. Therefore, an inference of guilt is appropriate. *See Grognet*, 45 Wis. 2d at 239-240, 172 N.W.2d at 815.

Further, Ixthus wrongly states that West Bend relied heavily on *James Cape* in arguing the Criminal Acts exclusion applies, (Ixthus Br. p. 32), when in reality, West Bend's Criminal Acts exclusion argument only mentions *James Cape* once, and then only for the proposition that every one of the Complaint's causes of action asserts criminal conduct because each of the claims incorporate all preceding allegations of criminal conduct. *James Cape*, 2009 WI App 154, ¶¶ 12, 17, 321 Wis. 2d at 612-13, 615, 775 N.W.2d at 121, 123. (Finding that an intentional injury exclusion barred coverage for causes of action for negligence where each cause of action incorporated factual allegations of intentional criminal conduct.)(West Bend Initial Br. p. 38.) *James Cape* did not address the Criminal Acts exclusion.[1]

[1] Ixthus further argues "[o]ut of a 156-page complaint, West Bend has cited five mentions of potential criminal allegations made against, generally, "all defendants." This language, in the context of the entire complaint, is utterly insufficient to relieve West Bend of its duty to defend based upon a criminal acts exclusion." (Ixthus Br. p. 33.) Abbott also makes this argument. (Abbott Br. p. 39.) If their rationale were to

Moreover, Ixthus and Abbott's arguments that "most cases applying the criminal acts exclusion do so on the basis of a criminal conviction" is not an accurate statement. (Ixthus Br. p. 33; Abbott Br. p. 38.) For example, in *Carney v. Village of Darien*, 60 F.2d 1273 (7th Cir. 1995), the Court interpreted a similar Criminal Acts exclusion that excluded coverage for the "willful violation of a penal statute or ordinance." *Id.* at 1280. The Court held the Criminal Acts exclusion applied because the complaint alleged intentional acts of restraint and confinement that would violate Wisconsin's false imprisonment statute. *Id.* at 1280-81. Notably, the defendant was never charged or convicted with false imprisonment. As further example, in *Acceptance Ins. Co. v. Bates, Dunning & Assocs.*, 858 So. 2d 1068 (2003 Fla. App. Ct.), the court held the Criminal Acts exclusion precluded coverage when the complaint alleged violation of several penal statutes despite the fact that the defendant had never been charged or convicted under any of those statutes. *Id.* at 1069. Further, while all the insureds in *Allstate Ins. Co. v. Brown*, 16 F.3d 222 (7th Cir. 1994), *Allstate Ins. Co. v.*

---

be accepted, which West Bend strongly refutes, then it must also apply to their casual connection/advertising argument. As West Bend discussed *supra*, only two paragraphs in the 645 paragraph Complaint reference advertising and then only to generally allege that all defendants imported, advertised and distributed test strips. (R. 11, ¶¶ 15, 385; A. 58-59, 81.) Using the words of Ixthus "[t]his language, in the context of the entire complaint, is utterly insufficient" to establish Ixthus' advertising was casually connected to Abbott's injuries.

Schmitt, 570 A.2d 488 (N.Y App. Div. 1990), *Allstate Ins. Co. v. Sowers*, 776 P.2d 1322 (Or. App. 1989), *Liebenstein v. Allstate Ins. Co.*, 517 N.W.2d 73 (Minn. Ct. App. 1994) were convicted of crimes, none of the decisions held conviction of a crime was required for application of the exclusion.

Tellingly, Ixthus' brief does not address or rebut *Suwannee Am. Cement LLC v. Zurich Ins. Co.*, 885 F. Supp. 2d 611, 616 (S.D.N.Y. 2012). Abbott weakly argues *Suwannee* requires the criminal act be felonious, (Abbott Br. pgs. 38-39), but that is not what *Suwannee* held. In *Suwannee* the criminal act happened to be a felony but neither the policy language nor the Court required a felonious act -- but instead merely a "criminal" act. *Id.*

Curtis-Universal, Inc. v. Sheboygan Emergency Med. Servs., Inc., 43 F.3d 1119, 1125 (7th Cir. 1994) also does not support Abbott's position, (Abbott Br. p. 39-40), because the complaint in *Curtis-Universal* did not specifically allege criminal acts like the Complaint here.

Lastly, Ixthus and Abbott wrongly argue that West Bend's Criminal Acts exclusion is ambiguous. (Ixthus Br. p. 33-34; Abbott Br. p. 38.) To the contrary, West Bend's exclusion plainly states coverage is excluded for "personal and advertising injury arising out of a

criminal act committed by or at the direction of the insured." (R. 2:24; A. 38.) If West Bend had intended a criminal conviction be necessary for application of the exclusion, it would have simply stated so in the policy. The absence of any such language is telling. Furthermore, the exclusions in *Brown*, 16 F.3d at 225; *Schmitt*, 570 A.2d at 492, and *Sowers*, 776 P.2d at 661, had the added requirement of intent and were all found unambiguous. As West Bend's exclusion is even simpler, without the requirement of intent, it can only be considered unambiguous.

IV. The Doctrine of Fortuity, the reasonable expectations of the insured and public policy considerations all require a declaration that West Bend has no duty to defend or indemnify Ixthus.

As a respondent, West Bend properly raised these issues before the Court of Appeals and they are therefore appropriate for the Court's consideration, contrary to Ixthus and Abbott's argument otherwise. (Ixthus Br. p. 37; Abbott Br. pgs. 40-41.) *See Truax*, 151 Wis. 2d at 359, 444 N.W.2d at 435.

Ixthus' arguments against application of the Doctrine of Fortuity and public policy considerations are unavailing. (Ixthus Br. p. 34-36.) For instance, Ixthus cites to *Prosser v. Leuck*, 196 Wis. 2d 780, 539 N.W.2d 466 (1995) where the Court refused to apply the Doctrine of Fortuity to an insured playing with fire and gasoline that started a fire

causing extensive damage to a building. What Ixthus fails to mention is that because the insured was a 13-year-old boy, and because he had not intended to burn the building, the *Prosser* Court held public policy considerations did not justify applying of the Doctrine of Fortuity. *Id.* at 786, 539 N.W.2d at 468. Here, Ixthus clearly intended to cheat Abbott, according to facts alleged in the Complaint.

Further, despite the fact that *Haessly v. Germantown Mut. Ins. Co.*, 213 Wis. 2d 108, 569 N.W.2d 804 (1997) and *Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 326 N.W.2d 727 (1982) both involve insureds that pled guilty to criminal acts, (Ixthus Br. pgs. 34-36; Abbott Br. pgs. 41-42), the underlying public policy objectives furthered by the Doctrine of Fortuity and enumerated in both decisions are applicable to any type of case - - not just those where the insured was convicted of a crime. Indeed, application of the Doctrine here would further all four of the public policy objectives, *e.g.*, (1) avoiding profit from wrongdoing; (2) deterring crime; (3) avoiding fraud against insurers; and (4) maintaining coverage of a scope consistent with the reasonable expectations of the contracting parties on matters as to which no intention or expectation was expressed. *Id.* at 483-84, 326 N.W.2d at 738.

This is especially true here because Ixthus ran this scheme before. Abbott alleges Ixthus knew it was defrauding Abbott because Ixthus -- under the name "Milwaukee Notions, Inc." -- had previously been sued by Johnson & Johnson in 2006 for the unlawful importation and/or sale of LifeScan One Touch blood glucose test strips, a competitor product to Abbott's FreeStyle test strips. (R. 11, ¶¶ 543, 558-559; A. 92, 93.) Abbott alleges Milwaukee Notions was permanently enjoined in that suit from selling counterfeit test strips. (R. 11, ¶ 561; A. 93.)

Despite knowing its conduct would subject it to legal action, Ixthus merely changed its name and targeted a new victim - - now Abbott -- upon which to perpetrate its crime. Applying the Doctrine of Fortuity and precluding coverage to Ixthus would prevent Ixthus from profiting from its wrongdoing, deter further wrongdoing and criminal acts by Ixthus, prevent further insurance fraud and maintains a scope of coverage consistent with what a reasonable person would expect. These are four important public policy objectives that would be fulfilled by precluding coverage to Ixthus for its fraudulent and criminal conduct.

Ixthus and Abbott argue a reasonable insured would expect coverage here because the Complaint's allegations can be proven

without any showing of intent, willfulness, knowledge or proof of a crime, (Ixthus Br. p. 36; Abbott Br. p. 42), however, they fail to explain how allegations not requiring intent, *etc.* relates to the expectations of a reasonable insured. Indeed, no reasonable insured would believe it would have liability insurance coverage for repeated and intentional participation in an illegal scheme to defraud.

The insured's conduct need not rise to the level of sexual assault, as Abbott argues, (Abbott Br. pgs. 41-42), to preclude coverage based on public policy objectives. Whether to preclude coverage because of public policy considerations is determined on a case-by-case basis. Abbott argues public policy did not preclude coverage in *Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 326 N.W.2d 727 and *Becker by Kasieta v. State Farm Mut. Auto Ins. Co.*, 220 Wis. 2d 321, 582 N.W.2d 499 (1998) despite those cases involving crimes, (Abbott Br. p. 42), but that is irrelevant to public policy considerations based on the facts in this case. It is exactly Ixthus' repeated and intentional participation in the illegal scheme to defraud that distinguishes this matter from the cases relied upon by Ixthus and Abbott, (Ixthus Br. pgs. 34-36; Abbott Br. pgs. 41-42), and makes precluding coverage based on public policy considerations appropriate. Ixthus' conduct was so inherently harmful

to Abbott that it goes against common sense for West Bend to have to defend and indemnify for the consequences of Ixthus' fraudulent acts.

V. CONCLUSION

West Bend respectfully requests this Court reverse the Court of Appeals and hold that West Bend has no duty to defend or indemnify Ixthus or Karl Kunstman, and no direct liability to Abbott.

Dated this 3rd day of October, 2018.

JEFFREY LEAVELL, S.C.

By: *Electronically signed by Danielle N. Rousset*

Jeffrey Leavell
State Bar No.: 1004734
Danielle N. Rousset
State Bar No.: 1071328
Attorneys for West Bend Mutual Insurance Company

P.O. Address
723 S. Main Street
Racine, WI 53403-1211
Telephone: (262) 633-7322
Facsimile: (262) 633-7323

CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief counting sections corresponding to Wis. Stat. § 809.19 (1)(d), (e) and (f) is 5,729 words. The Supreme Court's order of September 19, 2018 permitted West Bend 6,000 words for this combined reply brief.

Electronically signed by Danielle N. Rousset
Danielle N. Rousset

CERTIFICATION OF MAILING

Pursuant to Wis. Stat. §809.80(3)(b), I hereby certify that on this 3rd day of October, 2018, twenty-two (22) copies of this brief were deposited in the United States mail for delivery to the Clerk of the Wisconsin Supreme Court by first class mail, postage pre-paid.

I further certify that three (3) copies of this brief were served this same date by first-class United States mail, postage pre-paid, on each party.

Electronically signed by Danielle N. Rousset
Danielle N. Rousset

CERTIFICATION REGARDING ELECTRONIC BRIEF AND PURSUANT TO WIS. STAT. §809.19(12)-(13), STATS.

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. §809.19(12)-(13).

I further certify that this electronic brief is identical to the text of the paper copy of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Electronically signed by Danielle N. Rousset
Danielle N. Rousset

RECEIVED
10-03-2018
CLERK OF SUPREME COURT
OF WISCONSIN

STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2017AP909

WEST BEND MUTUAL INSURANCE COMPANY,

PLAINTIFF-RESPONDENT-PETITIONER,

v.

IXTHUS MEDICAL SUPPLY, INC., and KARL KUNSTMAN,

DEFENDANTS-APPELLANTS,

ABBOTT LABORATORIES, ABBOTT DIABETES CARE INC., and ABBOTT DIABETES CARE SALES CORP.,

DEFENDANTS-CO-APPELLANTS.

APPEAL FROM A JUDGMENT OF THE
RACINE COUNTY CIRCUIT COURT,
THE HON. DAVID W. PAULSON, PRESIDING
CASE NO. 2016-CV-1414

NON-PARTY BRIEF OF THE WISCONSIN INSURANCE ALLIANCE

GODFREY & KAHN, S.C.
James A. Friedman, State Bar No. 1020756
Amber Coisman, State Bar No. 1102371
One East Main Street, Suite 500
P.O. Box 2719
Madison, WI 53701-2719
(Phone) (608) 257-3911
(Fax) (608) 257-0609

Attorneys for the Wisconsin Insurance Alliance

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

INTRODUCTION

This Court has made clear that to establish advertising injury coverage under a CGL policy there must be a direct causal relationship between the insured's advertising activity and the claimant's injury. *Fireman's Fund Ins. Co. of Wis. v. Bradley Corp.*, 2003 WI 33, 261 Wis. 2d 4, 660 N.W.2d 666. In the present matter, there are no such allegations contained in the complaint and, hence, there is no advertising injury coverage under the relevant West Bend Mutual Insurance Company ("West Bend") policies.

Furthermore, the Court consistently has applied a bright-line rule for determining whether an insurer has a duty to defend under a liability insurance policy. That duty is determined by comparing the express allegations within the "four corners" of the complaint to the policy's terms and conditions. The insureds in this action, Ixthus Medical Supply, Inc. and Karl Kunstman (collectively, "Ixthus"), have sought to muddy the four corners rule by claiming the Court

should consider unpled, potential allegations when evaluating the duty to defend.

The Court of Appeals mistakenly did just that by taking into consideration the unpled elements of certain claims. The Court of Appeals held, despite overriding allegations of fraudulent, knowing, and intentional conduct by Ixthus as part of every claim, that the knowing violation exclusion in the West Bend policies does not bar coverage because not all the claims require proof of knowing or intentional conduct.

A consistent line of cases from this Court, however, requires a different answer. Wisconsin law is clear that the duty to defend is "based solely on the allegations 'contained within the four corners of the complaint,'" and not unpled, potential allegations. *Id.* ¶ 19, quoting *Atl. Mut. Ins. Co. v. Badger Med. Supply Co.*, 191 Wis. 2d 229, 236, 528 N.W.2d 486 (Ct. App. 1995). Based on the appropriate application of the four corners rule, there should be a finding of no coverage in this matter.

The WIA asks the Court to reaffirm its well-established precedent governing the causal connection requirement for advertising injury coverage and the four corners rule with respect to the duty to defend analysis and to reverse the decision of the Court of Appeals.

ARGUMENT

I. THERE IS NO ADVERTISING INJURY COVERAGE WHEN THERE ARE NO ALLEGATIONS OF A CAUSAL CONNECTION BETWEEN THE ADVERTISING ACTIVITY AND THE INJURY.

The West Bend insurance policies at issue in this case (the "West Bend Policies") provide coverage for injury "arising out of … [t]he use of another advertising idea in your 'advertisement'; or [i]nfringing upon another's copyright, trade dress or slogan in your 'advertisement.'" (R. 2:32) To trigger advertising injury coverage, there must be a showing that the alleged injury to Abbott Laboratories, Abbott Diabetes Care Inc., or Abbott Diabetes Care Sales Corp. (collectively, "Abbott") was caused by an offense committed by Ixthus in the course of advertising. *See Bradley Corp.,*

261 Wis. 2d 4, ¶ 52. The Court has explained that the relevant inquiry is "'whether the advertising did in fact *contribute materially* to the injury.'" *Id.* (citation omitted.

In the present matter, the allegations set forth in Abbott's Second Amended Complaint (the "Complaint") do not meet the Court's causal connection requirement to trigger advertising injury coverage. Abbott does not allege that any advertising activity by Ixthus materially contributed to the alleged injury. Rather, Abbott claims it was injured by the importation and delivery of diverted international test strips by Ixthus and the consequential rebates, but not the advertising of the test strips.

Abbott alleges that Ixthus misappropriated Abbott's international test strips and diverted them to pharmacies. The pharmacies, in turn, sold the boxes of test strips directly to consumers. (R. 11, 7, ¶ 5) There is no allegation that Ixthus displayed, offered for sale, or actually sold the test strips to consumers. But for two general allegations that *all* defendants imported, advertised, and disturbed the test strips,

the Complaint does not even allege that Ixthus advertised the test strips in any manner whatsoever or that Ixthus' advertising of the test strips contributed to the alleged injury suffered by Abbott. (R. 1, ¶¶ 15, 285)

It is not enough to establish a causal connection simply to allege consumer confusion elsewhere in the Complaint. There are no allegations that Ixthus' alleged advertising in any way caused consumer confusion, which only makes sense given that Ixthus did not offer the product for sale to the general public. *Cf. Acuity v. Ross Glove Co.*, 2012 WI App 70, ¶ 17, 344 Wis. 2d 29, 817 N.W.2d 455 (finding advertising injury coverage triggered where it was alleged that the insured created packaging for products offered for sale that misled the public as to their source of origin and created consumer confusion).

Wisconsin law is clear that advertising injury coverage requires the insured's advertising to materially contribute to the alleged injury. *Acuity v. Bagadia*, 2008 WI 62, ¶ 50, 310 Wis. 2d 197, 750 N.W.2d 817. The allegations in the

Complaint do not satisfy the casual connection requirement. As such, advertising injury coverage is not triggered, and West Bend owes no duty to defend or indemnify Ixthus.

II. BASED ON THE FOUR CORNERS RULE, THE KNOWING VIOLATION EXCLUSION APPLIES TO PRECLUDE COVERAGE.

A. The Four Corners Rule.

It is a pillar of insurance coverage law in Wisconsin that

> [t]o determine whether a duty to defend exists, the complaint claiming damages must be compared to the insurance policy and a determination made as to whether, if the allegations are proved, the insurer would be required to pay the resulting judgment.

Sch. Dist. of Shorewood v. Wausau Ins. Cos., 170 Wis. 2d 347, 364-65, 488 N.W.2d 82 (1992). "The duty to defend is based solely on the allegations 'contained within the four corners of the complaint, without resort to extrinsic facts or evidence.'" *Bradley Corp.*, 261 Wis. 2d 4, ¶ 19.

The purpose of the four corners rule is to fulfill the insured's "'reasonable expectations of coverage while meeting the intent of both parties to the contract.'" *Everson v. Lorenz,* 2005 WI 51, ¶ 14, 280 Wis. 2d 1, 695 N.W.2d 298

(citation omitted). While the protection of the insured remains a paramount consideration, the court "must not rewrite the insurance policy to bind an insurer to a risk which the insurer did not contemplate and for which it has not been paid." *Id*.

B. The Four Corners Rule's Impact on Insurers.

The four corners rule is critical to every Wisconsin insurer's claims handling procedure. Insurers rely on the four corners rule when their insureds are sued because the rule allows insurers to make initial defense determinations without costly, time consuming, and contentious investigation or litigation. When a complaint alleges facts that, if proven, would constitute a covered claim, the insurer must appoint defense counsel for its insured without looking beyond the complaint's four corners. But when the express allegations in the complaint, if proven, would not be covered, the insurer need not defend. Eviscerating that rule by imposing caveats and exceptions would wreak havoc on the claims handling process.

If an insurer were required to provide a defense based on the unpled elements of a claim rather than the actual allegations contained in a complaint, insurers would be required to defend against claims where coverage was neither expected nor intended by any party.

Courts across the country have routinely rejected this approach to the duty to defend, holding that coverage cannot be established by bootstrapping an unsupportable negligence claim to an obviously intentional tort. *See e.g. United Nat'l. Ins. Co. v. Entm't Grp., Inc.*, 945 F.2d 210, 214 (7th Cir. 1991) (there simply is no coverage for intentional bodily injury, "even when the injured party alleges that the assault was the result of the insured's negligence"); *L.A. Checker Cab Coop., Inc. v. First Specialty Ins. Corp.*, 112 Cal. Rptr. 3d 335, 338 (Cal. Ct. App. 2010) (Taxi cab company's "alleged negligence in not adequately supervising" driver who shot passenger did "not qualify as an 'occurrence' under the policy."); *McAllister v. Agora Syndicate, Inc.*, 11 P.3d 859

(Wash. Ct. App. 2000) (no coverage for negligence claims against nightclub following fight between patrons).

Nevertheless, insureds have persisted in creative attempts to trigger insurance coverage by attempting to shoehorn baseless negligence claims into otherwise straightforward intentional torts. Courts have seen through these cynical attempts to "mischaracterize intentional acts as negligence claims in order to avoid the exclusions contained within the insurance policy." *Mt. Vernon Fire Ins. Co. v. Dobbs*, 873 F. Supp. 2d 762, 766 (N.D. W. Va. 2012) (Negligence claim against insured that was "solely based on allegations that employees of [the insured] punched, hit, and kicked" plaintiff was not covered under CGL policy.); *see United Nat'l. Ins. Co. v. Tunnel, Inc.*, 988 F.2d 351, 354 (2d Cir. 1993) (no coverage for negligence claims against nightclub for assault by bouncer that fractured a patron's skull; "[T]his is a case where the plaintiff is seeking to recover by 'dressing up the substance' of one claim, here a battery, in the 'garments' of another, here negligence.")

(quoting *Laird v. Nelms*, 406 U.S. 797, 802 (1972)). Of course, this Court recently came to the same conclusion in *Talley v. Mustafa*, 2018 WI 47, ¶ 1, 381 Wis. 2d 393, 911 N.W.2d 55 ("When the negligent supervision claim pled rests solely on an employee's intentional and unlawful act without any separate basis for a negligence claim against the employer, no coverage exists."). That holding is consistent not only with insurance coverage jurisprudence, but also Wisconsin's pleading requirements. The facts pled, not the names of the claims, determine coverage. *See Shelstad v. Cook*, 77 Wis. 2d 547, 553, 253 N.W.2d 517 (1977).

C. The Knowing Violation Exclusion.

Like most commercial general liability policies, the West Bend Policies exclude advertising injury coverage when the alleged injury is "caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury'" (the "knowing violation exclusion"). By applying the four corners rule to this matter, the knowing violation

exclusion clearly applies to preclude coverage. The allegations in the Complaint describe knowing and intentional conduct by Ixthus to defraud Abbott. (R. 11, ¶¶ 7, 9, 388, 340, 568, 642) It is these allegations, and not the unpled elements of any claim or theory of liability asserted by Abbott, that should control the Court's duty to defend analysis.

In *Quad/Graphics, Inc. v. One2One Communications, LLC*, 2011 WL 1871108 (E.D. Wis. May 16, 2011), for example, the district court, under Wisconsin law, applied the four corners rule and held the underlying claims were precluded from coverage based on a knowing injury exclusion identical to that in the West Bend Policies. The complaint contained a claim for slander against the insured. That claim did not require proof of intentional or knowing conduct. *See Mach v. Allison*, 2003 WI App 11, ¶ 12, 259 Wis. 2d 686, 656 N.W.2d 766. The complaint in *Quad/Graphics*, however, contained only allegations that the allegedly slanderous statements "were made with knowledge

of their falsity, and with knowledge that they would violate Heverly's rights." 2011 WL 1871108, *4. In applying these allegations to the policy, the district court held that the claimants were seeking to recover for advertising injury caused by the insured with the knowledge that the act would violate the rights of another and, thus, coverage was precluded by the knowing injury exclusion. *Id*. The district court did not consider the elements of a negligent slander claim in reaching its determination.

Ixthus relies on *Acuity v. Ross Glove Company*, 2012 WI App 70, 344 Wis. 2d 29, 817 N.W.2d 455, and *Air Engineering, Inc. v. Industrial Air Power, LLC*, 2013 WI App 18, 346 Wis. 2d 9, 828 N.W.2d 565, for the proposition that a court may consider the unpled elements of a claim to determine if it survives a knowing violation exclusion. *Ross Glove* does not support that position, however, and *Air Engineering* contravenes the four corners rule.

In *Ross Glove,* the court declined to apply a knowing violation exclusion because the plaintiff "does not allege any

knowing violations …." 344 Wis. 2d 29, ¶ 19. The court acknowledged that "intent is not a required element of trade dress infringement …." *Id.* Yet the court ultimately concluded that the knowing violation exclusion did not apply because the plaintiff sought to hold the insured liable "without any allegation, much less any required showing, of a knowing violation." *Id.* In this matter, unlike in *Ross Glove*, the Complaint is replete with allegations of knowing violations that apply to all claims against Ixthus.

In *Air Engineering,* the court misconstrued *Ross Glove* and departed from Wisconsin precedent by concluding that the knowing rights exclusion did not apply, and the insurer owed a duty to defend. 346 Wis. 2d 9, ¶¶ 24-25. The court found that the inclusion of allegations in the complaint of willful and malicious conduct by the insured did not relieve the insurer of its duty to defend. *Id.* In reaching its conclusion, the court offered no explanation, other than its misguided reliance on *Ross Glove*, for its deviation from the four corners rule.

In Wisconsin, the facts alleged in a complaint are dispositive of the duty to defend. *Water Well Solutions Serv. Group, Inc. v. Consol. Ins. Co.*, 2016 WI 54, ¶ 20, 369 Wis. 2d 607, 881 N.W.2d 285. The allegations in the Complaint here fall squarely within the knowing violation exclusion. Hence, there is no coverage under the West Bend Policies.

CONCLUSION

For the reasons stated above, the Wisconsin Insurance Alliance respectfully requests that this Court reverse the decision of the Court of Appeals and hold that advertising injury coverage is not available because the Complaint does not allege a causal connection between the advertising and the injury and because the four corners rule does not permit a court to consider potential allegations or unpled elements of a claim when reviewing the duty to defend.

Dated this 3rd day of October, 2018.

Respectfully submitted,

GODFREY & KAHN, S.C.

By:

s/ James A. Friedman

James A. Friedman, State Bar No. 1020756
Amber Coisman, State Bar No. 1102371
One East Main Street, Suite 500
P.O. Box 2719
Madison, WI 53701-2719
(Phone) (608) 257-3911
(Fax) (608) 257-0609

Attorneys for the Wisconsin Insurance Alliance

CERTIFICATION

I hereby certify that this brief conforms to the requirements of Wis. Stat. §§ 809.19(8)(b) and (c), for a brief produced with a proportional font. The length of this brief is 2,322 words.

Dated this 3rd day of October, 2018.

s/ James A. Friedman
James A. Friedman

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 3rd day of October, 2018.

s/ James A. Friedman
James A. Friedman