

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Fall 2025 Term

FILED

November 13, 2025

ASHLEY N. DEEM, CHIEF DEPUTY CLERK
INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

No. 24-ICA-481

DAN RYAN BUILDERS, INC., DAN RYAN BUILDERS REALTY, INC.,
DRB ENTERPRISES, INC., MONOCACY HOME MORTGAGE, LLC,
CHRISTOPHER RUSCH and CRYSTAL RANKIN,
Defendants Below, Petitioners,

v.

EVANSTON INSURANCE COMPANY,
Defendant Below, Respondent.

Appeal from the Circuit Court of Harrison County, West Virginia
Honorable Christopher J. McCarthy
Civil Action No. CC-17-2009-C-57

AFFIRMED, in part, and VACATED, in part

Submitted: October 7, 2025

Filed: November 13, 2025

Avrum Levicoff, Esq.
Joseph E. Starkey, Jr., Esq.
The Levicoff Law Firm, P.C.
Pittsburgh, Pennsylvania
Counsel for Petitioners

Shaina L. Richardson, Esq.
Hannah E. Vogt, Esq.
Steptoe & Johnson, PLLC
Morgantown, West Virginia
Counsel for Respondent

JUDGE GREEAR delivered the Opinion of the Court.

GREEAR, JUDGE:

Petitioners Dan Ryan Builders, Inc., Dan Ryan Builders Realty, Inc., DRB Enterprises, Inc., Monocacy Home Mortgage, LLC, Christopher Rusch, and Crystal Rankin (collectively “DRB”) appeal the December 23, 2024, amended order of the Circuit Court of Harrison County, granting, in part, and denying, in part, Respondent Evanston Insurance Company’s (“Evanston”) motion for summary judgment on insurance coverage issues and denying DRB’s competing motion for summary judgment.¹ On appeal, DRB argues that the circuit court erred in finding that Evanston’s duty to defend and indemnify DRB, related to the claims raised against DRB by the plaintiffs in the underlying case, has not been triggered. Further, DRB is critical of the circuit court’s failure to find that Evanston was estopped from asserting additional grounds for denying coverage, including the application of a number of policy exclusions. In a cross-assignment of error, Evanston argues that the circuit court erred in applying the laws of West Virginia to the parties’ coverage dispute, as the Evanston policies were issued in Maryland.

¹On September 30, 2024, the circuit court entered its order granting, in part, and denying, in part, Evanston’s motion for summary judgment as to DRB’s crossclaim against it, seeking declaratory relief. On October 9, 2024, DRB moved the circuit court to clarify/correct certain aspects of the court’s September 30, 2024, order. Specifically, DRB requested clarification related to the court’s ruling that Evanston’s motion for summary judgment was denied, in part, or alternatively, “clarifying those portions which were denied.” Thereafter, on November 8, 2024, the parties entered into an agreed order dismissing DRB’s remaining extracontractual claims against Evanston for common law breach of insurance contract and violations of the West Virginia Unfair Trade Practices Act (“UTPA”), West Virginia Code §§ 33-11-1 to 10 (2005). The circuit court’s December 23, 2024, amended order followed.

Based upon our review of the record, applicable law, and the oral and written arguments of counsel, we find that the circuit court did not err in awarding summary judgment to Evanston and in denying DRB's motion for summary judgment. Here, DRB has not satisfied the threshold requirement of the self-insured retention ("SIR") endorsements to trigger application of the Evanston policies, as DRB has not made actual payment of the full SIR amount. Additionally, we recognize, as the circuit court did, and as DRB has previously conceded, a Travelers' policy of insurance² is primary to the Evanston policies. Thus, we find no error in the circuit court's determination that "any duty of Evanston to defend or indemnify DRB has not been implicated."

With regard to the circuit court's determination of the application of a number of specific exclusions under the Evanston policies, we find that as coverage under the Evanston policies has not been triggered, the circuit court's rulings as to the application of specific exclusions under the Evanston policies were not ripe for adjudication, thus depriving the circuit court of the subject matter jurisdiction necessary to make such rulings. Moreover, we find the circuit court's rulings related to this specific issue were tantamount

²The Travelers' policy referenced herein was issued to other parties in the litigation below (the Lang defendants), who are not parties to this appeal. This opinion should not be read to establish the existence of any coverage under the Travelers policy issued to the Lang defendants or any limitation to such coverage (including the application of any endorsements or exclusions under the Travelers' policy). Any issues related to insurance coverage for the Lang defendants under the Travelers' policy are not before this Court for review. We simply acknowledge, as the circuit court did, that the Lang defendants were insured under a policy of insurance issued by Travelers during the time period at issue in the underlying case and that DRB has acknowledged that the Travelers' policy is primary to the Evanston policies.

to advisory opinions, which are prohibited. Accordingly, we vacate the circuit court's rulings as to the application of any exclusions under the Evanston policies, including any determination of an "occurrence" under said policies or lack thereof. Because we find that the circuit court correctly granted Evanston's motion for summary judgment, we find it unnecessary to address Evanston's cross-assignment of error arguing that the circuit court erred in applying West Virginia law.

I. FACTUAL AND PROCEDURAL BACKGROUND

The case below relates to a civil action brought by thirty-seven homeowners in the Crystal Ridge Development ("Crystal Ridge"), located in Bridgeport, West Virginia, alleging that DRB, a builder who constructed homes in Crystal Ridge, was negligent in the planning, designing, and construction of the development. The plaintiffs below contend that DRB should have known that the Crystal Ridge site was not suitable for residential development and assert a number of associated claims against DRB.³

³In their second amended complaint, plaintiffs generally allege that DRB acted, caused, or substantially contributed to a portion of the "subside, fall away[,] or slip" at Crystal Ridge by "improper planning, engineering, testing, development, excavation, and construction" of Crystal Ridge and the homes therein. Additionally, plaintiffs allege DRB's strict liability, negligence, trespass, breach of warranty, fraudulent misrepresentation, infliction of emotional distress, and vicarious liability. Plaintiffs further contend that DRB's actions or inactions created both public and private nuisances in Crystal Ridge and that DRB's actions were outrageous.

From October 24, 2005, through October 24, 2010 (which includes the time frame during which plaintiffs allege DRB was at fault), DRB was insured under five successive one-year commercial general liability insurance policies issued by Evanston. The parties agree that the Evanston policies included identical policy terms and provisions.⁴ The Evanston policies each contained an endorsement entitled “**SELF-INSURED RETENTION ENDORSEMENT**[.]” The endorsement specifically noted:

It is understood and agreed that such insurance as provided by this policy, specifically the Insuring Agreement and Supplementary Payments Provisions are modified and subject to the following provisions:

1. The total limit of liability of the Company^[5] as stated in the policy declarations shall apply excess of the retained limit (herein called the [SIR]) as stated in the endorsement, and the Named Insured agrees to assume this retained limit:

Self Insured Retention: \$100,000 per occurrence

. . .

2. The Company’s obligation under this policy applies only to the amount excess of the [SIR]. Your bankruptcy, insolvency, or inability to pay

⁴The relevant Evanston policies have been identified as: (1) Policy No. 05GLP1007615, with the effective date of October 24, 2005, through October 24, 2006; (2) Policy No. 06GLP1007615, with the effective date of October 24, 2006, through October 24, 2007; (3) Policy No. 07GLP1007615, with the effective date of October 24, 2007, through October 24, 2008; (4) Policy No. 08GLP1007615, with the effective date of October 24, 2008, through October 24, 2009; and (5) Policy No. 09GLP1007615, with the effective date of October 24, 2009, through October 24, 2010.

⁵Within this endorsement, “Company” refers to Evanston and “Named Insured” or “Insured” refers to DRB.

the [SIR] shall not increase our obligation under the policy.

The Insured shall have the obligation to provide, at his own expense, proper defense and investigation of any claim and to accept any reasonable offer of settlement within the [SIR]. The Insured's obligation to provide for his own defense is terminated upon the exhaustion of the [SIR] referenced above. In the event that there is any other insurance, whether or not collectible, applicable to an occurrence, claim or suit within the [SIR], the Insured must make actual payment for the full [SIR] amount before the limits of insurance under this policy apply. **Compliance with this clause is a condition precedent for coverage under this policy. In the event of the failure of the Insured to comply with this clause, no loss, cost or expense shall be payable by the Company.**

Further, in the **COMMERCIAL GENERAL LIABILITY COVERAGE FORM** contained within the Evanston policies, at **SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS**, the policies specified that:

4. Other Insurance.

If other valid and collectible insurance is available to the insured for a loss we cover . . . our obligations are limited as follows:

. . . .

b. Excess Insurance

This insurance is excess over

- (1) Any valid and collectible insurance available to you covering liability for

damages arising out of your . . . operations
. . . and/or completed operations.

- (2) Any other valid and collectible insurance available to you covering liability for damages arising out of the premises, operations, products and/or completed operations for which you have been added as an additional insured by an endorsement, or by definition via a contract or agreement, or by combination thereof.

. . . .

When this insurance is excess, we will have no duty . . . to defend any claim or “suit” that any other insurer has a duty to defend.

The Evanston policies also contained other potential exclusions⁶ to prohibit coverage in the event of an occurrence under the policies.⁷ Upon receipt of plaintiffs’ underlying complaint, DRB notified Evanston of such claims. By letter dated July 22, 2009, Evanston denied coverage as to plaintiffs’ claims against DRB and referenced DRB’s failure to satisfy the policies’ SIR endorsements and otherwise that plaintiffs’ claims were

⁶The policy exclusions include exclusions related to subsidence/earth movement; expected or intended injury; breach of contract; your work; owned property; mold/mildew; punitive damages; and an exclusion for “property damage” to “impaired property” or property that has not been physically injured if that damage arises from “[a] defect, deficiency, inadequacy or dangerous condition in ‘your product’ or ‘your work’” or “[a] delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.”

⁷“Occurrence” is defined within the Evanston policies as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

excluded under the policies' subsidence/earth-movement exclusion. By letter dated August 26, 2009, counsel for DRB wrote to Evanston to dispute the denial of coverage. In that letter, DRB's counsel advised

We . . . tendered the complaint to the CGL carrier (Travelers) for Lang Brothers, the subcontractor responsible for the challenged work, in DRB's capacity as an additional insured. Travelers has accepted the tender, and agreed to defend. This does not mean that Evanston's duty to defend is not triggered as well, but we intend to look first to Travelers for the recovery of defense costs. In short, we believe that Travelers is primary to Evanston, and will seek to enforce that position, but Evanston's obligations have been triggered nonetheless.

On November 9, 2009, Evanston, by letter of its counsel to DRB's counsel, reiterated its position that coverage does not exist under the Evanston policies for the allegations contained in the complaint against DRB, given lack of an "occurrence" and the subsidence/earth movement exclusion and further referenced that Evanston was the excess insurer for DRB, not the primary insurer. Again, on August 25, 2016, Evanston wrote to DRB's counsel to advise that Evanston was not obligated to provide a defense to DRB for the plaintiffs' underlying claims because "there is no potentiality of coverage" given the application of policy exclusions (earth movement, your work, contractual liability, impaired property, owned property, punitive damages, professional liability, prior incidents and prior construction defects) as well as DRB's failure to comply with the SIR condition precedent of exhaustion of SIR by "actual payment for defense costs[.]" Additional denial letters with similar language were sent to DRB's counsel by Evanston on October 28, 2020, and October 4, 2022. In the November 9, 2009, August 25, 2016,

October 28, 2020, and October 4, 2022, letters, Evanston's representatives noted that Evanston's coverage position was based upon the facts and information available to Evanston at that time and was subject to change upon the availability and review of additional information.

In October of 2015, plaintiffs below filed a third amended complaint, which included a declaratory judgment claim against Evanston, to determine the existence of coverage under the Evanston policies for plaintiffs' claims. In August of 2016, DRB moved for leave to file a crossclaim against Evanston for declaratory relief regarding the coverage dispute and to raise extracontractual claims (including claims for breach of contract and violations of the UTPA), which was granted. In March of 2018, the circuit court bifurcated DRB's extracontractual claims against Evanston and stayed all discovery pertaining to those claims. Following discovery of the contractual coverage claims, DRB and Evanston filed their respective motions for summary judgment in October of 2022.

By order entered September 30, 2024, the circuit court granted, in part, and denied, in part, Evanston's motion for summary judgment and denied DRB's motion for summary judgment, finding that Evanston's duty to defend and indemnify DRB under the Evanston policies had not been triggered and, further, that plaintiffs' claims against DRB were otherwise excluded under the Evanston policies. Specifically, the court found that DRB failed to satisfy the SIR endorsements within the policies, which is a condition precedent to Evanston's duty to defend and indemnify DRB. Further, the court found that

Travelers was the primary insurer of DRB, making the Evanston policies excess coverage. The circuit court also found that even assuming the threshold requirements (SIR endorsements satisfaction and extinguishment of primary coverage of Travelers) were met, DRB failed to establish that there had been an “occurrence” of “property damage” or “bodily injury” under the Evanston policies. Further, the court reasoned that even if all the above occurred, that multiple exclusions would apply to preclude coverage.

Thereafter, DRB filed a motion for clarification of the September 30, 2024, order, seeking identification of the manner in which the court had denied “in part” Evanston’s motion for summary judgment. On November 8, 2024, the circuit court entered an agreed order dismissing DRB’s extracontractual claims against Evanston. More than a month later, on December 23, 2024, the court entered its Amended Order Granting In Part and Denying In Part Evanston Insurance Company’s Motion For Summary Judgment And Denying [DRB]’s Motion for Summary Judgment. In this amended order, the court reiterated its findings set forth in the September 30, 2024, order.⁸ It is from the December 23, 2024, amended order that DRB now appeals.

⁸In the December 23, 2024, order the circuit court noted its reason for the amendment of the September 30, 2024, order - to address DRB’s extracontractual claims against Evanston, which were previously bifurcated and stayed and were ultimately dismissed by the November 8, 2024, agreed order.

II. STANDARD OF REVIEW

“A circuit court's entry of summary judgment is reviewed *de novo*.” Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). Summary judgment is appropriate when “there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” W. Va. R. Civ. P. 56(a), in part; *see also* Syl. Pt. 4, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994) (“Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.”).

As to declaratory judgment actions, the SCAWV reviews a circuit court's entry of a declaratory judgment *de novo*, because the principal purpose of a declaratory judgment action is to resolve legal questions. Syl. Pt. 3, *Cox v. Amick*, 195 W. Va. 608, 466 S.E.2d 459 (1995). In Syl. Pt. 2, *Riffe v. Home Finders Associates, Inc.*, 205 W. Va. 216, 517 S.E.2d 313 (1999), the SCAWV held that “[t]he interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination that, like a lower court's grant of summary [judgment], shall be reviewed *de novo* on appeal.” With these standards in mind, we now address the parties' arguments on appeal.

III. DISCUSSION

In their petition for appeal, DRB raises four assignments of error, three of which directly challenge the factual basis and reasoning of the circuit court in awarding summary judgment to Evanston.⁹ Following our de novo review, we find no error in the circuit court's award of summary judgment to Evanston. In examining whether coverage for plaintiffs' claims against DRB existed under the Evanston policies, the circuit court began by examining the policies themselves and the specific language of the provisions therein. The circuit court made particular note of the SIR endorsements within the policies and found that said endorsements clearly and unambiguously require DRB's full satisfaction of the SIR as a condition precedent to coverage under the policies and that DRB "failed to satisfy" the mandatory requirements of the SIR. We agree.

The SIR endorsements denote that the insured "shall have the obligation to provide, at his own expense, proper defense and investigation of any claim" and succinctly state that an insured's "obligation to provide for his own defense is terminated upon the exhaustion of the SIR" – here, the sum of \$100,000 per occurrence. While DRB suggests that it has satisfied the SIR endorsements by "authorizing a contribution toward settlement

⁹In their first assignment of error, DRB contends that the circuit court erred in finding no coverage for DRB under the Evanston policies. DRB argues, in its second assignment of error, that the circuit court erred in making findings of fact that were unsupported in the record. As to their third assignment of error, DRB suggests that the circuit court's award of summary judgment was made despite the existence of genuine issues of material facts. Given that these assignments of error are interrelated, we will address them together.

that never materialized[,]" the circuit court determined, and we now concur, that such actions are not a satisfaction of the explicit requirement of the SIR endorsements. The SIR endorsements plainly require that the insured "must make actual payment for the full SIR amount before the limits of insurance" under the Evanston policies apply.

The SCAWV has held parties to a contract dispute involving an insurance policy to the plain language in the policy and noted that: "'We will not rewrite the terms of the policy; instead, we enforce it as written.'" *Auto Club Prop. Cas. Ins. Co. v. Moser*, 246 W. Va. 493, 500, 874 S.E.2d 295, 302 (2022) (quoting *Payne v. Weston*, 195 W. Va. 502, 507, 466 S.E.2d 161, 166 (1995)). Thus, as DRB has not made the required "actual payment" for satisfaction of the SIR endorsements, we find no error in the circuit court's determination that the duties of Evanston to defend and indemnify DRB for the underlying claims has not yet been triggered.

We further concur with the circuit court's determination that the language of the Evanston policies clearly provides that said policies are excess, as there is "valid and collectible" insurance available to DRB to cover its liability for plaintiffs' alleged damages – the Travelers policy under which it was named an additional insured. As referenced in DRB's counsel's August 26, 2009, letter to Evanston, DRB has "tendered the [plaintiffs'] complaint" to Travelers, the insurance carrier for the "subcontractor responsible for the challenged work" and "Travelers has accepted the tender, and agreed to defend." Further, in this letter, DRB's counsel specifically acknowledged that DRB believed "that Travelers

is primary to Evanston.” Taking such evidence, the circuit court determined, in accord with *Horace Mann Ins. Co. v. Gen. Star Nat. Ins.*, 514 F.3d 327, 334-35 (4th Cir. 2008) (interpreting West Virginia law)¹⁰ that any duty of Evanston to defend or indemnify DRB under the Evanston policies “has not been implicated.” Accordingly, as there is no dispute that DRB has not satisfied the SIR endorsements under the Evanston policies and, further,

¹⁰In *Horace Mann*, the Fourth Circuit reasoned that

Primary liability insurance “provides the first layer of insurance coverage. Primary coverage attaches immediately upon the happening of an ‘occurrence,’ or as soon as a claim is made. The primary insurer is first responsible for defending and indemnifying the insured in the event of a covered or potentially covered occurrence or claim.” *Gauze v. Reed*, 219 W. Va. 381, 633 S.E.2d 326, 332 (2006) (internal quotation marks omitted) . . . Excess liability policies, by contrast, do not provide first-dollar coverage for insured losses, but instead provide an additional layer of coverage for losses that exceed the limits of a primary liability policy. Coverage under an excess policy thus is triggered when the liability limits of the underlying primary insurance policy have been exhausted . . . 15 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 220:32 (3d ed. 2005) (“The purpose of ... excess ... coverage is to protect the insured in the event of a catastrophic loss in which liability exceeds the available primary coverage. Accordingly, it is only after the underlying primary policy has been exhausted does the excess ... coverage kick in.” (footnote omitted)). “Excess insurance is priced on the assumption that primary coverage exists: indeed, an excess policy usually requires by its terms that the insured maintain in force scheduled limits of primary insurance.” [footnote omitted] *Gauze*, 633 S.E.2d at 332 (internal quotation marks omitted).

Id. at 329.

as there is no evidence to establish that DRB's primary insurer, Travelers, has exhausted its policy limits, we find no error in the circuit court's determination that any duty of Evanston to defend or indemnify DRB has not been triggered.

On appeal DRB further argues that the circuit court erred in not finding that Evanston was estopped from raising the application of additional policy exclusions to prevent the establishment of coverage for DRB under the Evanston policies. However, we find that the circuit court's rulings in this regard were improper, as such issues are not ripe for adjudication.

In *State ex rel. Universal Underwriters Ins. Co. v. Wilson*, 239 W. Va. 338, 345-46, 801 S.E.2d 216, 223-24 (2017) (footnotes omitted), the SCAWV reasoned that

[t]he ripeness doctrine “seeks to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.” *Paraquad v. St. Louis Housing Auth.*, 259 F.3d 956, 958 (8th Cir. 2001) (internal quotations and citation omitted). “Questions that may never arise or are purely advisory or hypothetical do not establish a justiciable controversy. Because an unripe claim is not justiciable, the circuit court has no subject matter jurisdiction over it.” *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 270 (Ky. Ct. App. 2005) (footnotes omitted); *see generally* 13 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3529 (3d ed. 2008) (recognizing central concepts of justiciability often are elaborated into specific categories including advisory opinions, standing, ripeness, mootness, and political questions).

It is well established that the issue of subject matter jurisdiction can be raised at any time, even *sua sponte* by this Court. “This

Court, on its own motion, will take notice of lack of jurisdiction at any time or at any stage of the litigation pending therein.” Syl. Pt. 2, *In re Boggs’ Estate*, 135 W. Va. 288, 63 S.E.2d 497 (1951). Furthermore, “[t]he urgency of addressing problems regarding subject-matter jurisdiction cannot be understated because any decree made by a court lacking jurisdiction is void.” *State ex rel. TermNet Merch. Servs., Inc. v. Jordan*, 217 W. Va. 696, 700, 619 S.E.2d 209, 213 (2005); *see also* Franklin D. Cleckley, Robin Jean Davis, and Louis J. Palmer, Jr., *Litigation Handbook on W. Va. Rules of Civ. Pro.*, § 12(b)(1), at 325-26 (4th ed. 2012) (“Any judgment or decree rendered without such jurisdiction is utterly void.”).

Thus, the application of any exclusions under the Evanston policies here, when those policies have not been triggered, calls for speculation as to future events that may not occur as anticipated, or at all. In *State Farm Mutual Automobile Insurance Co. v. Schatken*, 230 W. Va. 201, 737 S.E.2d 229 (2012), the SCAWV determined that

courts will not . . . adjudicate rights which are merely contingent or dependent upon contingent events, as distinguished from actual controversies. Likewise, courts [will not] resolve mere academic disputes or moot questions or render mere advisory opinions which are unrelated to actual controversies. Indeed, a matter must be ripe for consideration before the court may review it. Courts must be cautious not to issue advisory opinions.

Id. at 210, 737 S.E.2d at 238 (quoting *Zaleski v. West Virginia Mut. Ins. Co.*, 224 W. Va. 544, 552, 687 S.E.2d 123, 131 (2009) (quotation marks omitted)). Moreover, in *Wilson*, the SCAWV found that “subject matter jurisdiction does not exist over claims that are not ripe for adjudication.” *Wilson*, 239 W. Va. at 346, 801 S.E.2d at 224. In Syl. Pt. 2, *Harshbarger v. Gainer*, 184 W. Va. 656, 403 S.E.2d 399 (1991), the SCAWV further held

that “[c]ourts are not constituted for the purpose of making advisory decrees or resolving academic disputes. The pleadings and evidence must present a claim of legal right asserted by one party and denied by the other before jurisdiction of a suit may be taken.”¹¹

Here, given the circuit court’s determination that the duty to defend and indemnify DRB has not been triggered under the Evanston policies, we find that the circuit court’s rulings as to the application of specific exclusions under the Evanston policies were not ripe for adjudication, thus depriving the circuit court of the subject matter jurisdiction necessary to make such rulings. The proper time for consideration of the applicability of any exclusions under the Evanston policies is when said policies have been triggered, as it is not until that time that the facts necessary to analyze coverage determination are fully known. This is particularly important in complex cases, such as the underlying case, where the alleged damages continue to evolve. Accordingly, we vacate the circuit court’s rulings regarding the application of specific policy exclusions under the Evanston policies at issue, including the determination of establishment of an “occurrence” under the policies.

In its cross-assignment of error, Evanston argues that the circuit court erred in its application of West Virginia law to the parties’ coverage dispute, as the Evanston

¹¹The SCAWV has also held that “[i]n deciding whether a justiciable controversy exists sufficient to confer jurisdiction for purposes of” a declaratory judgment, one of the factors a court must consider is “whether the claim involves uncertain and contingent events that may not occur at all.” Syl. Pt. 4, in part, *Hustead on Behalf of Adkins v. Ashland Oil, Inc.*, 197 W. Va. 55, 475 S.E.2d 55 (1996).

policies were issued in Maryland. However, as we have affirmed the trial court’s finding that “any duty of Evanston to defend DRB has not been implicated” under West Virginia law, and as DRB has not alleged the application of West Virginia law as error, we decline to address this cross-assignment of error.¹²

IV. CONCLUSION

Wherefore, based on the foregoing, we affirm, in part, and vacate, in part, the circuit court’s December 23, 2024, amended summary judgment order. Specifically, we affirm the circuit court’s award of summary judgment to Evanston on the issue of the present unavailability of insurance coverage to DRB under the Evanston policies, as DRB has not met the threshold requirements under the policies’ SIR endorsements and, further, as the record is devoid of any evidence that Travelers has exhausted its coverage to DRB for plaintiffs’ claims, which is primary to the Evanston policies. As to the circuit court’s rulings on the application of specific exclusions within the Evanston policies (including a determination of no “occurrence” as that term is defined in the subject policies), we vacate the circuit court’s rulings, as a determination as to the applicability of exclusions under the Evanston policies was not a matter ripe for adjudication and, thus, constituted an advisory opinion, which is prohibited.

Affirmed, in part, and Vacated, in part.

¹²We note that Evanston did not request a remand on the choice of law issue. Instead, in footnote 13 of its brief Evanston requested that this Maryland law be applied if this Court determined “that the trial court’s order cannot be upheld under West Virginia law[.]”