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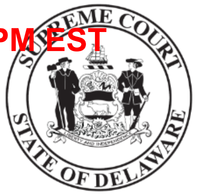

IN THE SUPREME COURT OF DELAWARE

GEICO GENERAL INSURANCE COMPANY,	:	
Defendant Below, Appellant/Cross-Appellee,	:	No. 107, 2021
v.	:	On Appeal from the Superior Court of the State of Delaware in and for New Castle County.
YVONNE GREEN and REHABILITATION ASSOCIATES, P.A., on behalf of themselves and all others similarly situated,	:	C.A. No. N17C-03-242 EMD
	:	**CORRECTED PUBLIC VERSION FILED NOVEMBER 9, 2021**
Plaintiffs Below, Appellees/Cross-Appellants	:	

YVONNE GREEN and REHABILITATION ASSOCIATES, P.A., on behalf of themselves and all others similarly situated,	:	
Plaintiffs Below, Appellants/Cross-Appellees,	:	No. 166, 2021
v.	:	On Appeal from the Superior Court of the State of Delaware in and for New Castle County.
GEICO GENERAL INSURANCE COMPANY,	:	C.A. No. N17C-03-242 EMD
Defendant Below, Appellee/Cross-Appellant	:	

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IN THE SUPREME COURT OF DELAWARE

GEICO GENERAL INSURANCE COMPANY, *Defendant Below, Appellant/Cross-Appellee,* v. YVONNE GREEN and REHABILITATION ASSOCIATES, P.A., on behalf of themselves and all others similarly situated, *Plaintiffs Below, Appellees/Cross-Appellants*	:	No. 107, 2021 On Appeal from the Superior Court of the State of Delaware in and for New Castle County. C.A. No. N17C-03-242 EMD
YVONNE GREEN and REHABILITATION ASSOCIATES, P.A., on behalf of themselves and all others similarly situated, *Plaintiffs Below, Appellants/Cross-Appellees,* v. GEICO GENERAL INSURANCE COMPANY, *Defendant Below, Appellee/Cross-Appellant*	:	No. 166, 2021 On Appeal from the Superior Court of the State of Delaware in and for New Castle County. C.A. No. N17C-03-242 EMD

APPELLANT GEICO GENERAL INSURANCE COMPANY'S OPENING BRIEF

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NATURE OF PROCEEDINGS

In this class action lawsuit, Plaintiffs Yvonne Green ("Green") and Rehabilitation Associates, P.A. ("RA") challenged GEICO General Insurance Company's ("GEICO") use of two computer rules – the Geographic Reduction Rule ("GRR") and Passive Modality Rule ("PMR") (collectively, the "Rules") – as a methodology for adjusting Delaware Personal Injury Protection ("PIP") claims. Plaintiffs' First Amended Complaint ("FAC")[1] set forth counts for breach of contract (Count I), bad faith breach of contract (Count II), and declaratory judgment (Count III).[2] In Count III, Plaintiffs sought a declaration that, as a matter of law, "(i) GEICO has violated 21 Del. C. § 2118; and (ii) GEICO may not lawfully use the [Rules]." A126.

GEICO moved to dismiss the FAC on August 1, 2017. As to Count III, GEICO argued that, under *Clark v. State Farm Mut. Auto. Ins. Co.*, 131 A.3d 806 (Del. 2016), the Superior Court lacked authority to rule on whether GEICO's use of

---

[1] The FAC, filed July 12, 2017, was the operative complaint.

[2] The FAC also included a fourth a final count under Delaware's Deceptive Trade Practices Act. A126-129. The Superior Court dismissed this count on April 24, 2018. Ex. A at 21-22. Plaintiffs do not appeal from this decision.

the Rules violated 21 Del. C. § 2118. The Superior Court held a hearing on the motion on December 1, 2017, and reserved its decision pending submission of a finalized decision of the Delaware Insurance Commissioner's market conduct examination ("MCE") of GEICO's claims handling procedures. [REDACTED]

[REDACTED] A296-315, [REDACTED]

[REDACTED]

[REDACTED] A316-317. [REDACTED]

[REDACTED]

[REDACTED] A317. On April 24, 2018, the Superior Court denied GEICO's motion to dismiss Counts I, II and III. Exhibit A.

On August 17, 2018, Plaintiffs moved for class certification. After a May 10, 2019 hearing, the Superior Court issued its opinion on August 27, 2019 granting Plaintiffs' motion. Exhibit B. On November 5, 2019, over GEICO's objections, the Superior Court entered an implementing order, proposed by Plaintiffs, certifying all classes under Delaware Superior Court Rule 23(b)(1), (b)(2) and (b)(3). Exhibit C.

On January 3, 2019, while Plaintiffs' class certification motion was pending, GEICO moved for summary judgment as to all counts. As to Count III, GEICO

[REDACTED]

argued that, as a matter of law, Plaintiffs could not establish a violation of 21 Del. C. § 2118 under their theory of the case, which foreclosed proof that GEICO failed to pay reasonable and necessary PIP claims. Following the class certification decision, on December 5, 2019, Plaintiffs filed a cross-motion for partial summary judgment. The Superior Court held hearings on March 2 and October 2, 2020, and issued its ruling on March 24, 2021. The Superior Court entered summary judgment for GEICO on Counts I and II, and for Plaintiffs on Count III. Exhibit D.

GEICO appeals from the Superior Court's opinions and orders dated April 24, 2018 (denying GEICO's motion to dismiss), August 27 and November 4, 2019 (granting Plaintiffs' motion for class certification) and March 24, 2021 (denying GEICO's motion for summary judgment as to Count III and entering judgment for Plaintiffs).

SUMMARY OF ARGUMENT

1. GEICO was entitled to dismissal of Count III under *Clark v. State Farm Mut. Auto. Ins. Co.*, 131 A.3d 806 (Del. 2016). The question raised by Plaintiffs' request for declaratory judgment was whether GEICO's use of the Rules violated a provision of 21 Del. C. § 2118. As this Court held in *Clark* when construing a similar statute, the resolution of this question is exclusively within the province of the Insurance Commissioner, not the Judiciary. In failing to dismiss this claim, the Superior Court ultimately crossed the line from interpreting the law to making it, and thus acted beyond its authority.[3]

2. GEICO was entitled to judgment as a matter of law on Count III. Plaintiffs' theory of the case disavowed proof of reasonableness and necessity. Without such proof, Plaintiffs could not and did not present evidence that GEICO violated its duty under 21 Del. C. § 2118 to pay reasonable charges for necessary treatment. In granting summary judgment for Plaintiffs, the Superior Court erred by

[3] The Insurance Commissioner derives his authority from the legislative framework of the Delaware Insurance Code, and to the extent he is empowered to do so by the Legislature under the Code, to promulgate lawful regulations pursuant to and in accordance with the Delaware Administrative Procedures Act.

sua sponte ruling that GEICO violated a statute not at issue in Plaintiffs' claim for declaratory judgment, 21 Del. C. § 2118B, and thereby granted relief beyond what Plaintiffs did or could have requested. Further, without any analysis, the Court erroneously injected an investigation requirement into § 2118B(c) that does not exist. Finally, genuine disputes of material facts precluded entry of judgment for Plaintiffs.

3. The Superior Court abused its discretion in granting Plaintiffs' motion for class certification because it failed to conduct the rigorous analysis of genuine legal and factual disputes relevant to determining whether Plaintiffs satisfied Rule 23(a) and (b). Further, to sidestep predominance, the Court foreclosed a determination of money damages, rendering certification under Rule 23(b)(3) improper.

STATEMENT OF FACTS

I. DELAWARE'S PERSONAL INJURY PROTECTION STATUTE

Delaware law requires automobile insurers to offer PIP coverage to their insureds. The PIP statute, 21 Del. C. § 2118, requires an insurer to pay "[c]ompensation to injured persons for ***reasonable and necessary*** expenses incurred within 2 years for the date of the accident" up to the limits of an insured's policy. 21 Del. C. § 2118(a)(2)a. (emphasis added). GEICO's Delaware PIP policy incorporates this obligation. A466-477.

Auto Bulletin No. 10, published by the Department of Insurance, recognizes that a medical provider may charge an unreasonable fee. A201. In such instances, insurers are directed to pay the undisputed portion of the fee, and make good faith efforts with providers to resolve the balance. *Id.* GEICO complies with this requirement. *See* A387-388, A390-391, A396-400, A402-404, A406-408, A410-412, A414-417, A913-921, A1102-1108.

II. PLAINTIFFS' THEORY OF LIABILITY

Counts I through III challenged whether GEICO violated its contractual and statutory duty to pay reasonable and necessary PIP claims. A103-132. Plaintiffs' theory of liability, however, disavowed these key elements. Instead of claiming that

GEICO failed to pay reasonable and necessary expenses, Plaintiffs' challenged the lawfulness of the ***manner*** GEICO adjusted PIP claims.

The Superior Court summarized Plaintiffs' liability theory as follows:

> What [Plaintiffs are] saying is that under the contract and under Delaware law you have a – that GEICO has a way that it must address PIP claims. The way that GEICO is addressing PIP claims violates that contractual duty and violates Delaware law. ***And it wouldn't matter whether the reasonable, actual and necessary is a fundamental breach of the agreement between the parties and under Delaware law***.

A1599; *see also* A1616-1617 ("[I]f I determine at the [class certification] hearing that there isn't a violation of the law, this class goes away."). Plaintiffs agreed. A1600. Moreover, in objecting to GEICO's request for discovery on the reasonableness of providers' fees or the necessity of treatment, Plaintiffs stated:

> But the reasonable and necessary discovery we agreed. We don't think it's relevant or likely to lead to discovery of admissible evidence because we do think that this is a case that's really a question of what's the law. ….
>
> But the discovery itself isn't necessary or relevant or likely to lead to discovery of admissible evidence for either the plaintiff or defendant ***under plaintiff's theory.***

A1610 (emphasis added). The Superior Court stated that Plaintiffs would be held to their theory. A1600.

III. GEICO'S METHODOLOGY

A1725.

A460-464.

Id.

A460-464, A849-856, A861-877, A913-921, A1102-1108.

At issue here is GEICO's use of the GRR and PMR.[4]

---

[4] GEICO's Rules were previously challenged, unsuccessfully, in *Johnson v. GEICO Casualty Co.*, a case decided by the Delaware District Court (applying Delaware law) and affirmed by the Third Circuit. *See Johnson v. GEICO*, 2014 WL 1266832 (D. Del. Mar. 26, 2014); *Johnson v. GEICO*, 2014 WL 2708300 (D. Del. June 16,

A. The Geographic Reduction Rule

The GRR addresses the reasonableness of a provider's medical charge and provides a recommended reimbursement amount for PIP-related expenses. *Johnson,* 672 F. App'x at 152. [REDACTED] A686-694, A1102-1108. [REDACTED] A687, A1706.

[REDACTED]

2014); *Johnson v. GEICO*, 2014 WL 4540251 (D. Del. Sept. 12, 2014); *Johnson v. GEICO,* 310 F.R.D. 246 (D. Del. 2015); *Johnson v. GEICO Cas. Co.*, 672 F. App'x 150 (3d Cir. 2016).

[5] A CPT code is "a universal code assigned to each treatment procedure." Exhibit D at 10.

[REDACTED]

See A705-831 for additional examples.

A698-703, A705-831, A686-694, A1102-1108.

A686-687, A1102-1108.

A685-694, A1102-08.

---

[6] *See* Exhibit D at 42 ("Plaintiffs' get the math wrong in saying 20% of claims are denied under this system[.]").

A697-698.

A1793-1812, A1872-1876.

A925; *see also* A1469-1473.

A685-686, A1701, A1102-1108.

A695-832,

A1793-

1819, A1475-1516.

A1294, A1525-1535.

A460-464.

A463.

B. The Passive Modality Rule

The PMR addresses the medical necessity of passive modality therapy after an injury has progressed beyond the acute phase. *Johnson*, 672 F. App'x at 152-153. To be medically necessary, treatment must be indispensable and not just for comfort or convenience. *D'Orazio v. Hartford Ins. Co.*, 2011 WL 1756004, at *3 n.4 (E.D. PA. May 6, 2011); *Barker v. Nationwide Ins. Co.*, 1987 WL 16709, at *5 (Del. Super. Ct. Aug. 11, 1987).

A861-862.

A520-522, A861-862.

A384-85.

A861-877, A913-921, A1102-1108.

A460-464, A520-522, A861-862.

A926-945, A971-987, A861-862, A877.

IV. GEICO'S CLAIMS HANDLING PROCESS

A1443-1444, A1446-1455, A1717-1720.

A1443-1444.

A1717-1718.

A927-945, A1320-1321, A1341-1345.

[7] Delaware requires adjusters to be licensed by the State. 18 Del. C. § 1703.

A895-904, A927-945, A947-948, A950-966.

A1725-1731, A833, A837-839, A842, A994.

A1727-1731.

A1723.

V. THE CLASS REPRESENTATIVES.

A. Yvonne Green

Yvonne Green is the class representative for the insured class. Exhibit C at 4.

A119, A460-461.

A461.

A462, A477.

A461.

A462-463.

See e.g., A504-528.

In October 2012, one of Green's providers, Dynamic Physical Therapy ("DPT"), disputed some of GEICO's payment decisions.

A913-921.

Id. A1935-1944.

In the instant action, Green did not seek monetary damages. A1913-1914. l.[8] A1944. A358.

[8] The Superior Court incorrectly stated, "GEICO knows that Ms. Green was balance billed by Christiana Care and continues to receive calls from them." Exhibit D at 47. None of the documents cited by the Superior Court supports this proposition. *Id.* The Superior Court's citation to is misplaced. Exhibit D at 47, n. 162. A1347-1352. In short, there is no evidence Green was balance billed by any provider as a result of the Rules.

B. Rehabilitation Associates

RA is the class representative for the Claimant Class. [redacted]

[redacted] A1902-1903, A1927-1928. [redacted]

[redacted]

A1921-1922. [redacted]

[redacted] A1926.

[redacted]

ARGUMENT

I. COUNT III SHOULD HAVE BEEN DISMISSED BECAUSE THE SUPERIOR COURT LACKED AUTHORITY TO ISSUE PLAINTIFFS' REQUESTED DECLARATORY RELIEF

A. Question Presented

Whether *Clark v. State Farm Mut. Auto. Ins. Co.*, 131 A.3d 806 (Del. 2016) required the Superior Court to dismiss Count III. A188-192.

B. Scope of Review

The Court reviews rulings on a motion to dismiss pursuant to Rule 12(b)(6) *de novo*. *Ramirez v. Murdick*, 948 A.2d 395, 399 (Del. 2008).

C. Merits of Argument

At the heart of Plaintiffs' request for declaratory relief is the question of whether GEICO's use of the Rules is prohibited by 21 Del. C. § 2118. A126. As this Court recognized in *Clark* when construing a similar request for declaratory relief involving § 2118B, resolution of this question is exclusively within the province of the Insurance Commissioner, not the Judiciary. As such, Count III should have been dismissed.

At issue in *Clark* was whether the Superior Court properly denied the plaintiffs' request for leave to amend their class action complaint. The plaintiffs

filed a class action complaint claiming, *inter alia*, that State Farm failed to pay the full interest required by § 2118B when an insurer fails to process a PIP claim within 30 days. 131 A.3d at 809. Facing summary judgment, the plaintiffs sought leave to amend their complaint to seek a declaratory judgment that State Farm's failure to pay claims within 30 days violated § 2118B(c). *Id.* at 810. Concluding that the amendment would be futile, the Superior Court denied leave and entered summary judgment for State Farm. *Id.* at 808. This Court affirmed,[9] holding that § 2118B cannot be interpreted to allow the Judiciary to play regulator by defining the circumstances under which compliance with the 30-day requirement is required or excused:

> [T]o interpret [§ 2118B] as leaving a huge gap to be filled by intrusive and legislatively unguided judicial regulation of the insurance industry as the plaintiffs assert would strain its words beyond reason and require our Judiciary to play an amorphous role that there is no indication the General Assembly intended for it. Under the Insurance Code, the Insurance Commissioner is empowered to investigate and enforce any violations of the Code. ***That role cannot be subsumed by the Judiciary in the guise of giving effect to § 2118B(c).***

Id. at 809 (emphasis added).

[9] The decision was reviewed under the same *de novo* standard applicable to this Court's review of the Superior Court's denial of GEICO's motion to dismiss. *Id.* at 811-12.

Count III sought the same category of relief *Clark* held was beyond the Judiciary's authority to grant: a judicial determination that GEICO's PIP claims handling operations violated a provision of the Insurance Code. Moreover, the alternative avenues of relief that rendered the declaratory judgment claim in *Clark* improper are equally available to Plaintiffs here. They can petition the General Assembly to regulate the use of algorithms likes the Rules in processing PIP claims. Alternatively, Plaintiffs can raise the issue with the Insurance Commissioner, who possesses authority to issue rules, regulations and orders, 18 Del. C. §§ 311, 312, enforce lawful orders or actions via the Attorney General, § 313, conduct investigations into alleged violations of the Insurance Code and impose penalties, §§ 317, 318, 319, 329, as well as issue cease and desist orders for unfair or deceptive trade practices and suspend violators, §§ 2308, 2311.[10]

Moreover, in denying GEICO's motion to dismiss and ultimately entering summary judgment for Plaintiffs on Count III, the Superior Court engaged in the very "intrusive and legislatively unguided judicial regulation of the insurance

[10] [redacted] A316-317.

[redacted]

industry" that *Clark* recognized would be inevitable, but improper. For example:

- The Superior Court ruled that "[u]nder the circumstances of this case, the Rules are antiquated and need updating to be able to apply the Rules in a manner that accounts for all the relevant *Anticaglia*[11] and *Watson*[12] factors. Until such a system is in place, human judgment should not be eliminated from the process." Exhibit D at 39. This statement is merely the Superior Court's opinion of how insurers should operate in Delaware, untethered from any statute, regulation or case law.
- The Superior Court noted: "Under the circumstances of this case, the goal of efficiently processing claims should not outweigh the goal of protecting all individuals' right to reasonable medical coverage under the policy." *Id.* at 41. The General Assembly or Insurance Commissioner, not the Judiciary, is charged with weighing competing policy goals.
- Under the heading "Relevant Facts," the Superior Court cited and quoted extensively from scholarly articles expressing concern over the automation

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[11] *Anticaglia v. Lynch*, 1992 WL 138983 (Del. Super. Ct. Mar. 16, 1992).

[12] *Watson v. Metropolitan Prop. & Cas. Ins. Co.*, 2003 WL 22290906 (Del. Super. Ct. Oct. 2, 2003).

of processes requiring the exercise of human judgment. *Id.* at 4-6. The parties never argued, and the Superior Court never ruled that these policy considerations were relevant in construing the Insurance Code. This discussion, therefore, appears entirely out-of-place, but the Court nevertheless found the authorities "persuasive." *Id.* at 6

In short, the Superior Court crossed the line from interpreting the law to making it. This is precisely what *Clark* cautioned against. 131 A.3d at 816 ("Under our system of government … the Judiciary cannot substitute its own judgment for that of the legislative branch. Section 2118B does not give the Judiciary a mandate to act in the role of the Insurance Commissioner or to read into § 2118B(c) mandates that the General Assembly could have, but did not, adopt.").

In denying GEICO's motion to dismiss, the Superior Court narrowly ruled that *Clark*'s holding was confined to declaratory judgments involving claimed violations of § 2118B(c) because the statute provided an automatic remedy, rendering a judicial determination improper. Exhibit A at 19.[13] But *Clark* was not

[13] Ironically, the Superior Court ultimately ruled, *sua sponte*, that GEICO violated § 2118B(c). Exhibit D at 39. Even if *Clark* is limited to § 2118B(c) as the Superior Court concluded, its summary judgment ruling violated *Clark*.

so limited. Just as important to the Court's holding were two concerns raised by the nature of the requested relief. *First,* the Court explained that any remedy "would involve the Judiciary necessarily crafting what would look like an insurance regulatory scheme," which could not properly be achieved by a declaratory judgment. 131 A.3d at 814-15. *Second,* the Court observed that the legislative and executive branches provided alternative means of recourse. *Id.* at 815 ("Most important for present purposes … the Policyholders have other means of recourse. Among them, of course, is seeking to have the General Assembly strengthen § 2118B(c)" and "ask[ing] the Insurance Commissioner to use her wide authority to enforce the Insurance Code, which includes the insurance provisions in Title 21").

Plaintiffs' request that the Superior Court declare that GEICO's use of the Rules violated 21 Del. C. § 2118 – which nowhere mandates ***how*** insurers are to process PIP claims – presented these same concerns, and warranted the same result. And as *Clark* foresaw, by failing to dismiss Count III and later ruling in Plaintiffs' favor, the Superior Court acted well beyond its jurisdiction by fashioning a brand new regulatory scheme governing Delaware insurers' use of automation in adjusting PIP claims. The Superior Court's decision should be reversed.

II. THE SUPERIOR COURT ERRED IN DENYING GEICO'S MOTION FOR SUMMARY JUDGMENT AS TO COUNT III AND ENTERING JUDGMENT FOR PLAINTIFFS

A. Question Presented

Whether the Superior Court erred by denying GEICO's motion for summary judgment as to Count III and entering judgment in favor of Plaintiffs when (1) Plaintiffs' theory of liability foreclosed recovery under Count III as a matter of law (A423-458, A1353-1391); (2) the Superior Court *sua sponte* granted declaratory relief beyond that requested by Plaintiffs (A1438-1440); (3) the Superior Court, without any analysis, interpreted § 2118B(c) to include an investigation requirement found in a different statute (A1362-1367, A1385-1387, A1415-1419, A444-453); (4) the Superior Court improperly shifted the burden of proof to GEICO (A440, A1420-1421, A1368-1369, A1945-2012); and (5) genuine disputes of material fact existed that precluded entry of judgment in Plaintiffs' favor (A1392-1415).

B. Scope of Review

The Court reviews *de novo* the entry of summary judgment both as to the facts and the law. *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 2003). The Court must determine "whether the record shows that there is no genuine, material issue of fact and the moving party is entitled to judgment as a matter of law." *Id.* (cleaned up).

Facts must be viewed "from a perspective which favors the non-movant." *In re Asbestos Litigation*, 673 A.2d 159 (Del. 1996).

C. Merits of Argument

1. **Summary Judgment Should Have Been Entered In GEICO's Favor Because Plaintiffs Failed To Present Evidence That GEICO Violated 21 Del. C. § 2118.**

In the FAC, Plaintiffs spelled out the exact declaratory relief sought in Count III: "Plaintiffs … respectfully request that this Court enter judgment, as a matter of law, that: (i) GEICO has violated 21 Del. C. § 2118; and (ii) GEICO may not lawfully use the [Rules]." A126. Their theory of liability, however, foreclosed this relief as a matter of law.

Although Plaintiffs did not specify which particular provision of § 2118 GEICO allegedly violated, the only provision related to their claims is § 2118(a)(2)i.2, which generally requires PIP insurers to make "[p]ayments of expenses under paragraph (a)(2)a. … as soon as practical." 21 Del. C. § 2118(a)(2)i.2. Paragraph (a)(2)a., in turn, requires an owner of a motor vehicle registered in Delaware to secure minimum insurance coverage for "[c]ompensation for ***reasonable and necessary*** expenses" for medical treatment incurred within two years from the date of an accident. 21 Del. C. § 2118(a)(2)a. (emphasis added).

Accordingly, to survive summary judgment on their claim that GEICO violated § 2118, Plaintiffs were required to present evidence that GEICO's use of the Rules resulted in a failure to pay "reasonable and necessary" expenses. *See* A125 [redacted] *id.* [redacted]

Plaintiffs' liability theory, however, disavowed proof of reasonableness or necessity. A1599-1600, A1610.[14] Consequently, they presented no evidence that GEICO failed to pay a reasonable charge for a medically necessary service. Absent proof that GEICO failed to pay reasonable and necessary expenses as required by § 2118, GEICO was entitled to judgment as a matter of law on Count III.

2. <u>The Superior Court Committed Reversible Error In Entering Declaratory Relief In Plaintiffs' Favor.</u>

a) The Superior Court erred by ruling, sua sponte, that GEICO violated 21 <u>Del. C</u>. § 2118B.

Despite acknowledging that "[t]he only declaration the Court may make is the original request in the Amended Complaint that GEICO's use of the Rules violates

[14] Presumably, Plaintiffs made this tactical decision because proving reasonableness and necessity would have defeated class certification due to the individualized issues those claims present, as was the case in *Johnson*.

[redacted]

Section 2118," the Superior Court *sua sponte* ruled that GEICO violated an entirely different statute: § 2118***B***. Exhibit D at 32, 39. This is reversible error.

As discussed above, the relief sought by Plaintiffs in Count III was limited to a judicial determination that GEICO violated § 2118; reference to § 2118B is entirely absent from Count III.[15] *See* A126. In their cross-motion for summary judgment, Plaintiffs improperly requested judicial determinations beyond that requested in the FAC. A1151, A1204.[16] The Superior Court properly rejected this effort:

> "The only declaration the Court may make is the original request in the Amended Complaint that GEICO's use of the Rules violates Section 2118. Plaintiffs do not assert any case law supporting otherwise. The only case that is cited is irrelevant in that it discusses a situation in which declaratory and coercive relief may be properly joined in the same action. The *Spine Care* case reaffirms that Plaintiffs are 'entitled to summary judgment ***on the relief sought in its complaint***.'"

Exhibit D at 32 (emphasis in original; footnotes and citations omitted).

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[15] Plaintiffs referenced 21 Del. C. § 2118B in the body of Count II only. A124.

[16] *Id.* Even under their expanded request for declaratory judgment, Plaintiffs did not seek a determination that GEICO violated § 2118B. A1151, A1204.

Despite (properly) recognizing that it could not grant declaratory relief beyond that sought in the FAC, the Superior Court committed this very error. It ruled, *sua sponte*, that GEICO's use of the Rules violated § 2118B(c). Exhibit D at 39. By entering a judicial declaration that Plaintiffs never requested, the Superior Court committed reversible error. *Bd. of Zoning Appeals of James City Cty. v. Univ. Square Assocs.*, 435 S.E.2d 385, 387 (Va. 1993) ("[I]n a declaratory judgment action, the trial court may resolve only issues that have been pleaded specifically in the petition for declaratory judgment."); *Segal v. Fleischer*, 113 N.E.2d 608, 610 (Oh. Ct. App. 1952) (entry of declaratory judgment was in error because the trial court "extended its jurisdiction beyond that invoked by the pleadings and assumed to decide issues upon which neither party … requested decision."); *see also Wheelbarger v. Landing Council of Co–Owners*, 471 S.W.3d 875, 896 (Tex. App. 2015) ("A trial court commits reversible error if it grants relief beyond that requested in the parties' pleadings."); *Land Dev. Servs., Inc. v. Gulf View Townhomes, LLC*, 75 So. 3d 865, 871 (Fla. Dist. Ct. App. 2011) ("[T]he final judgment providing relief that was not requested violated [the defendant's] due process rights, and its entry constituted reversible error on this basis alone.").

Further, even if Plaintiffs included in their FAC a request for a declaration that GEICO violated § 2118B(c), the request would have been dismissed because Plaintiffs could have sued directly under § 2118B(d). *See* Exhibit D at 31 ("Action in declaratory judgment is available ***only where no other remedy is available*** under circumstances where impending injury has not yet occurred." (emphasis added) (citing *Hampson v. State ex rel. Buckson*, 233 A.2d 155 (Del. 1967)); 21 Del. C. § 2118B(d) (providing a private cause of action for a violation of subsection (c)). Accordingly, it was error for the Superior Court to enter declaratory relief that Plaintiffs could not have requested themselves.

b) The Superior Court improperly injected an investigation requirement into 21 Del. C. § 2118B(c).

The Superior Court's declaratory judgment ruling was premised on an erroneous construction of § 2118B(c). Specifically, without any legal support or analysis, the Superior Court infused into the word "process" found in § 2118B(c) a requirement that an insurer conduct a "reasonable investigation based on all available information." Exhibit D at 33, 38. This language is lifted from the Unfair Trade Practices Act ("UTPA"). The Superior's Court's interpretation was incorrect as a matter of law.

Section 2118B(c) provides, in relevant part, that upon receipt of a written request for PIP benefits, "the insurer shall promptly ***process*** the claim and shall" either pay or, if the claim is denied in whole or part, provide a written explanation for the denial within 30 days. (Emphasis added). In its summary judgment decision, the Superior Court never found the word "process" ambiguous, nor did it engage in any statutory construction analysis. Rather, it reflexively ruled that "process" imposes a requirement on PIP insurers to conduct a "reasonable investigation based on all available information." Exhibit D at 38; *see also id.* at 33 (noting that "process" must have a meaning invoked by the statute, and concluding that "GEICO failed to 'process' the claims and investigate all available information"). This language comes from the UTPA, which prohibits insurers from engaging in certain general business practices, including "[r]efusing to pay claims without conducting ***a reasonable investigation based upon all available information***." 18 Del. C. § 2304(16)d. (emphasis added).

The UTPA empowers the Insurance Commissioner to regulate the insurance practices described in the statute. *Moses v. State Farm Fire & Cas. Ins. Co.*, 1991 WL 269886, at *4 (Del. Super. Ct. Nov. 20, 1991). The Act does not provide a private right of action to an insured or claimant, nor does it vest a court with authority

to determine violations of the Act. *Yardley v. U.S. Healthcare Inc.*, 698 A.2d 979, 988 (Del. Super. Ct. 1996); *Moses*, 1991 WL 269886, at *4-*5; *Johnson v. GEICO Cas. Co.*, 516 F. Supp. 2d 351, 360-61 (D. Del. 2007). By stark contrast, § 2118B(d) establishes a private cause of action for a violation of § 2118B(c). Accordingly, by importing the investigation requirement from the UTPA into § 2118B(c), the Superior Court impermissibly created a backdoor private cause of action via § 2118B(d) for a violation of UTPA's investigation requirement. If the General Assembly wanted to incorporate the UTPA's investigation requirement into § 2118B(c), it could have easily done so.[17]

The Superior Court's interpretation is all the more flawed because it was unnecessary. "Words used in a statute that are undefined should be given their ordinary, common meaning." *Coastal Barge Corp. v. Coastal Zone Indus. Control*

[17] Based on its erroneous injection of § 2304(16)'s investigation requirement into Delaware's PIP scheme, the Superior Court found that "Delaware requires insurers to evaluate claims in a particular manner." Exhibit D at 36. On this basis, the Superior Court incorrectly concluded that Delaware's PIP statute tracks Oregon's. *Id.* at 37-38. Unlike Delaware, the Oregon statute includes a presumption that submitted medical expenses are reasonable and necessary. Or. Rev. Stat. § 742.524(1)(a). That Delaware and Oregon (and other states) provide the same "investigation based on all available information" requirement in their respective UTPAs concerning is not relevant to any comparison of PIP schemes involving entirely different presumptions and evidentiary burdens.

Bd., 492 A.2d 1242, 1245 (Del. 1985). "If the statute as a whole is unambiguous, there is no reasonable doubt as to the meaning of the words used and the Court's role is then limited to an application of the literal meaning of the words." *Id.* at 1246. Here, there is no ambiguity in the plain meaning of the word "process." As a verb, Merriam-Webster defines "process" to mean "to subject to or handle though an established usually routine set of procedures," "to integrate sensory information received so that an action or response is generated," and "to subject to examination or analysis." *Process,* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/process (last visited Jul. 16, 2021). These definitions comport with the PIP scheme set out in § 2118B(c): claimants must submit information to insurers from which insurers must make a payment decision. Clearly, to make a payment determination, § 2118B(c) requires insurers to examine the information submitted (which GEICO indisputably does). Thus, there was no need for the Superior Court to search out the meaning of "process" from an unrelated statute and create an examination standard the General Assembly could have but did not create. Moreover, by affording "process" its plain meaning, Delaware's UTPA and PIP schemes are separately preserved, rather than improperly comingled beyond

recognition. Accordingly, the Superior Court committed reversible error when it construed "process" to incorporate the UTPA's investigation requirement.

c) The Superior Court improperly shifted the burden of proof to GEICO.

This Court recently made clear that, in a PIP claim, "the burden lies on the ***Plaintiff, not on the insurer***, to show that the expenses were reasonable and necessary." *State Farm Mut. Auto. Ins. Co. v. Spine Care Delaware, LLC*, 238 A.3d 850, 859 (Del. 2020) (emphasis in original; cleaned up). In entering summary judgment for Plaintiffs, the Superior Court shifted the burden to GEICO in violation of *Spine Care*.

As in this case, the plaintiff in *Spine Care* sought a declaratory judgment that State Farm's practice of applying a Multiple Payment Reduction ("MPR") to covered charges for multi-injection spine procedures violated § 2118(a)(2). *Id.* at 851. When State Farm received bills for a multi-injection procedure, it applied a MPR to the charges for injections after the first injection. *Id.* The Superior Court held that "State Farm failed to show that the MPR reductions correlate to reasonable charges for the multiple-injection treatments, and thus violated section 2118(a)(2)." *Id.*

On appeal, State Farm argued that the Superior Court erroneously shifted the burden of proof to State Farm. This Court agreed. *Id.* at 852. In analyzing the burden of proof in the context of a PIP claim, this Court concluded that it was the plaintiff's burden to demonstrate the reasonableness of the reduced charges, not State Farm's burden to prove that its reductions were reasonable:

> The burden … is on [the plaintiff] to show that State Farm is not entitled to take the Medicare guidelines-based MPRs. And to answer that question, ***[the plaintiff] first has to demonstrate that its charges for the second and subsequent injections are reasonable.*** If it is determined that they are reasonable, then, under the statute, State Farm must pay them without reduction.

Id. at 857 (emphasis added).

Thus, under *Spine Care*, to demonstrate a violation of § 2118(a)(2) as sought in Count III, it was Plaintiffs' burden – ***and Plaintiffs' burden alone*** – to demonstrate that GEICO failed to pay a reasonable and necessary expense. Plaintiffs' liability theory, however, disavowed such proof, meaning Plaintiffs could not meet their burden as a matter of law.

In direct contravention of *Spine Care*, the Superior Court improperly shifted the burden of proof to GEICO. *Spine Care* teaches that, in a PIP case, the focus is exclusively on whether the plaintiff has met their burden of proving a given charge

was reasonable and necessary. "If it is determined that they are reasonable, then, under the statute, [the insurer] must pay them without reduction." *Id.* at 857. Here, the Superior Court did not focus on the reasonableness or necessity of any given charge (because this evidence was not presented). Instead, it focused solely on the methodology behind GEICO's system for processing PIP claims. In particular, the Superior Court faulted GEICO for not implementing "any type of analysis that tracks" the *Anticaglia* and *Watson* factors "beyond the automated application of the Rules to each PIP claim." Exhibit D at 35; *see also id.* at 41 ("[T]he logic of the system is clearly flawed and does not align with what is a reasonable claim"); *id.* at 44 ("GEICO has not demonstrated that the systems are able to accurately determine the reasonableness of medical fees."). This is the very type of burden shifting *Spine Care* rejected. 238 A.3d at 858 (quoting the Superior Court's statement that "State Farm has made no showing that its application of MPRs results in a fee that conforms to *Anticaglia* and *Watson* standards"). *Spine Care* requires reversal of the Superior Court's ruling.

To sidestep *Spine Care* and place the burden on GEICO, the Superior Court noted that insurers bear the burden of proving when a policy exclusion is triggered and found the Rules constitute undisclosed coverage exclusions. Exhibit D at 38.

The Superior Court, however, provided no legal support or analysis for its determination that a claims processing tool used to identify the limits of coverage is an "exclusion." Here, the Rules simply assist GEICO in identifying the limits of its PIP obligation, namely, to pay reasonable and necessary expenses. If the Rules amount to coverage exclusions, the same would be true of every claims handling procedure used by any insurer. In effect, the Superior Court's ruling would require insurers to disclose all such procedures in their policies lest they be considered an "undisclosed exclusion." No authority exists for this proposition, and it should be rejected.

d) At a minimum, genuine disputes of material facts precluded the entry of summary judgment in favor of Plaintiffs.

Assuming *arguendo* that the Superior Court correctly determined that Delaware law requires GEICO to conduct a "reasonable investigation of all available information," and that the burden rested with GEICO to make this showing, genuine disputes of material fact precluded the entry of summary judgment on Count III.

This Court has recognized that "the issue of reasonableness is ordinarily a question of fact for the trier of fact." *Brzoska v. Olson*, 668 A.2d 1355, 1363 n.9 (Del. 1995). Reasonableness may only be decide as a matter of law if a single

"conclusion can be reached from the application of the legal standard to the undisputed facts." *Id*. Moreover, facts must be viewed "from a perspective which favors the non-movant." *In re Asbestos Litigation*, 673 A.2d 159, 161 (Del. 1996).

Here, several disputes of fact bearing on the reasonableness of GEICO's use of the Rules in investigating PIP claims precluded entry of summary judgment. *First*, a genuine dispute of material fact exists as to whether GEICO's claims processing methodology involves sufficient human review such that it conducts a "meaningful investigation." Exhibit D at 41.

A1443-1444, A1446-1455, A1717-1720. The Superior Court acknowledged that "some" human involvement exists, but concluded that "the evidence shows no instance in which a GEICO employee did not follow the generated recommendation." Exhibit D at 40. This is incorrect.

A927, A1320-1321, A1341-1435.

Second, a genuine dispute of material facts exists as to whether the Rules constitute a reasonable method for determining the reasonableness of charges and the necessity of treatment.

A1793-1802, A1872-1876.

A1294, A1525-1535.

A861-877, A913-921, A1102-1108.[18]

Accordingly, the Superior Court improperly resolved or ignored genuine disputes of material facts when it entered summary judgment for Plaintiffs on Count III.

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[18] Contrary to the Superior Court's conclusion, the body of scientific literature supporting the PMR is nothing like the adjuster's paltry investigation in *Lundberg v. State Farm Mut. Auto. Ins. Co.*, 1994 WL 1547774 (Del. Com. Pl. July 11, 1994). *See* Exhibit D at 46.

III. THE SUPERIOR COURT ABUSED ITS DISCRETION BY GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

A. Question Presented

Whether the Superior Court abused its discretion in granting Plaintiffs' motion for class certification where the Superior Court (1) failed to conduct a rigorous analysis of the genuine legal and factual disputes relevant to determining whether Plaintiffs satisfied Rule 23(a) and (b); and (2) certified classes incompatible with Rule 23(b)(3).[19] A589-658.

B. Scope of Review

The Court reviews the lower court's determinations on Rule 23 class certification for abuse of discretion. *In re Celera Corp. Shareholder Litig.,* 59 A.3d 418, 428 (Del. 2012). To the extent the lower court's decision rests on findings of fact, the Court will set aside its factual findings if they are "clearly wrong and the doing of justice requires their overturn." *Id.* (cleaned up).

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[19] The Court need not address this question in the event the Court reverses the Superior Court as to Count III and affirms the summary judgment decision on Counts I and II.

C. Merits of Argument

1. **The Superior Court Abused Its Discretion When It Granted Class Certification Without Considering Evidence Or Legal Issues Fatal To Plaintiffs' Claims.**

To grant Plaintiffs' motion to certify, the Superior Court was required to find that Plaintiffs satisfied each element of Rule 23(a), and that the action fell into at least one of the three class action categories set forth in Rule 23(b). A class certification decision commands a "rigorous analysis," *In re Celera Shareholder Litig.*, 59 A.3d at 432, that required the Superior Court to make findings of fact by a preponderance of the evidence. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir. 2008), *as amended* (Jan. 16, 2009). "If it were appropriate for a court simply to accept the allegations of a complaint at face value in making class action findings, every complaint asserting the requirements of Rule 23(a) and (b) would automatically lead to a certification order[.]" *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365 (4th Cir. 2004). The court may not "decline to resolve a genuine legal or factual dispute because of concern for an overlap with the merits." *In re Hydrogen Peroxide Antirust Litig.,* 552 F.3d at 324. Thus, a court "errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the requirements" of Rule 23. *Id.* at 320. The Superior Court so erred

here.

Even before granting class certification, the Superior Court recognized that, given their theory of liability, Plaintiffs' breach of contract claim presented a pure legal dispute. A1599-1600, A1610, A1616-1617. Accordingly, before certifying this cause of action, the Superior Court was required to resolve this dispute. Though the Superior Court ultimately (and properly) ruled in GEICO's favor on this legal issue at the summary judgment stage, Exhibit D at 28, it erred in failing to resolve it at the class certification stage.

The Superior Court's analysis with respect to Plaintiffs' bad faith breach of contract claim was equally flawed. To prove this claim, Plaintiffs were required to prove a breach of contract. *Tackett v. State Farm Fire and Cas. Ins. Co.,* 653 A.2d 254, 264 (Del. 1995); *Casson v. Nationwide Ins. Co.*, 455 A.2d 361, 369 (Del. Super. Ct. 1982). As discussed, this presented a pure legal issue that the Superior Court failed to resolve. Further, the Court failed to resolve factual disputes as to whether any alleged breach was clearly without any reasonable justification as required by Delaware law. *Tackett,* 653 A.2d at 264; *Casson*, 455 A.2d at 369. Instead, the Superior Court merely accepted Plaintiffs' allegations – rather than any record evidence – that the Rules were arbitrary and excluded human review. A1443-1444,

A1446-1455, A1717-1720, A927-945, A927-45, A1320-31, A1341-1345. The Superior Court ignored the substantial body of evidence submitted by GEICO explaining its methodology, support and use of the GRR and PMR, re-evaluation process, or claims handling procedures.

Finally, the Superior Court's certification of Plaintiffs' declaratory judgment claim rested on a faulty analysis. *First*, the Superior Court distorted the relief Plaintiffs were seeking. In order to find commonality, the Superior Court stated that "Plaintiffs' claim for declaratory relief alleges that Geico violated Section 2118***B*** by engaging in bad faith actions such as reducing or denying claims without a proper investigation using the Rules, allowing claims to be balanced-billed, and giving insureds and medical providers conflicting information." Exhibit B at 15 (emphasis added). Plaintiffs, however, only sought a declaration that GEICO violated § 2118. *Second*, as discussed above, Plaintiffs' theory foreclosed a determination that GEICO violated § 2118, which the Superior Court should have but failed to resolve

at the class certification stage.[20] *Finally*, the Superior Court, again, exclusively relied on allegations that GEICO engaged in the conduct that purportedly violated § 2118B, and made no factual findings notwithstanding GEICO's evidence to the contrary.[21] A1443-1455, A1717-1720, A927-945, A1320-1321, A1341-1345, A895-904, A927-966, A1925-31, A833, A837-39, A842, A994, A1723, A1727-31.

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[20] Because the Superior Court failed to resolve this legal dispute, it necessarily erred in granting class certification under Rule 23(b)(1) and (b)(2). Further, in analyzing certification under Rule 23(b)(2), the Superior Court's reliance on *A&M Gerber Chiropractic LLC v. GEICO General Ins. Co.*, 321 F.R.D. 688 (S.D. Fla. 2017), *vacated,* 925 F.3d 1205 (11th Cir. 2019), was misplaced. The Superior Court incorrectly stated that the *A&M Geber* plaintiffs "sought a declaratory judgment that ***GEICO's use of the GRR*** was a breach of the parties' contract." Exhibit B at 21 (emphasis added). The GRR, however, was never at issue in that case.

[21] Though not dispositive of class certification, it is notable that the Superior Court rejected GEICO's challenge to Green's standing based purely on the allegations in the FAC. Exhibit B at 12 ("The Court finds that the Plaintiffs have sufficiently ***alleged*** that Ms. Green has standing at this stage in the proceedings." (emphasis added)). [REDACTED] A358. As such, she is not a "claimant" and is not entitled to receive any payments from GEICO under her PIP coverage. *Sammons v. Hartford Underwriters Ins., Co.,* 2011 WL 6402189, at *2-3 (Del. Super. Ct. 2011), *aff'd,* 49 A.3d 1194 (Del. 2012). Moreover, "peace of mind" is insufficient to support a declaratory judgment action. *Johnson v. GEICO*, 2014 WL 4540251, at *2 (D. Del. Sept. 12, 2014), *aff'd*, 672 F. App'x 150 (3d Cir. 2016).

[REDACTED]

2. **Class Certification Under Rule 23(b)(3) Was Improper.**

Having failed to conduct the rigorous analysis required to grant Plaintiffs' motion for class certification, the Court necessarily erred in certifying the case under Rules 23(b)(1), (2) and (3). This Court erred even further in its faulty Rule 23(b)(3) analysis. Exhibit B at 22-24.

To allege a viable action under Rule 23(b)(3), a potential class plaintiff must show (1) questions of law or fact common to class members predominate over any questions affecting only individual members, and (2) a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Rule 23(b)(3). The predominance requirement is "far more demanding" than the commonality requirement. *In re Hydrogen Peroxide Antitrust Litig.,* 552 F.3d at 311 (cleaned up). Moreover, "because the nature of the evidence that will suffice to resolve a question determines whether the question is common or individual," the court must "formulate some prediction as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case." *Id.* (cleaned up).

In an effort to comply with the Rule 23(b)(3) predominance standard, the Superior Court stated that it would "not determine individual liability or damages.

In this way, common issues predominate any individual claims for damages." Exhibit D at 24. The Superior Court correctly recognized that the individualized liability and damages issues raised by Plaintiffs' claims precluded certification under Rule 23(b)(3).[22] Stripping money damages from the case, however, made Rule 23(b)(3) all the more improper.

"Rule 23(b)(3) class actions are money damages class actions." 2 NEWBERG ON CLASS ACTIONS § 4:47 (5th ed.); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011) ("[W]e think it clear that individualized monetary claims belong in Rule 23(b)(3)."); Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment (noting that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages"). No money damages, no Rule 23(b)(3) certification. As such, rather than saving Plaintiffs' claims under Rule 23(b)(3) by eliminating money damages, the Superior Court merely created another reason why certification was improper.[23]

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[22] Individualized issues relating to damages doomed class certification in *Johnson*. 310 F.R.D. 246, 254-55 (D. Del. 2015).

[23] Curiously, the Superior Court noted that Plaintiffs were not seeking monetary damages. Exhibit B at 12. This provides yet another reason why certification under Rule 23(b)(3) was improper.

CONCLUSION

For the reasons sets forth above, this Court should (1) reverse the Superior Court's denial of GEICO's motion to dismiss Count III under *Clark v. State Farm Mut. Auto. Ins. Co.*, 131 A.3d 806 (Del. 2016); (2) reverse the Superior Court's denial of GEICO's motion for summary judgment and entry of summary judgment in Plaintiffs' favor on Count III; and (3) reverse the Superior Court's grant of Plaintiffs' motion for class certification.

Date: July 23, 2021

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