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IN THE SUPREME COURT OF THE STATE OF DELAWARE

GEICO GENERAL INSURANCE COMPANY, *Defendant Below, Appellant/Cross-Appellee,* v. YVONE 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 CCLD [redacted]
YVONE 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 CCLD

APPELLEES' ANSWERING BRIEF ON APPEAL AND CROSS-APPELLANTS' OPENING BRIEF ON CROSS-APPEAL

[redacted]

Dated: August 23, 2021

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NATURE OF PROCEEDINGS

The Superior Court correctly ruled that GEICO violates Delaware law by using undisclosed and arbitrary rules systematically to deny PIP claims. It is fundamental that an insurance company has a duty to process an insured's claim in good faith, and must have a good-faith reason to deny a claim. An insurer must then communicate its claims decision truthfully to the claimant, so that the insured knows the true reason that claim was denied. Plaintiffs submitted volumes of undisputed documentary and testimonial evidence, and the Superior Court correctly ruled that GEICO violates those tenets by using secret rules that routinely deny claims that GEICO knows are valid, and by denying the claimants a truthful explanation for the denials.

The crux of GEICO's defense is that it has no obligation whatsoever, until a claimant can prove in Court that it is entitled to reimbursement for "reasonable" and "necessary" medical expenses. Until then, outside of judicial oversight, GEICO contends it is free to deny claims and litigate any dispute regarding the claims on grounds that it never actually considered during claims processing. That argument ignores two fundamental premises. First, in this case, Plaintiffs seek a determination of the legality of GEICO's conduct, its use of secret rules, not the merits of medical treatment or treatment pricing. Second, if GEICO denies a claim for a reason that

violates Delaware law and regulations, or in bad faith, or without any basis in fact or law, Delaware law provides that GEICO has waived those defenses to the claim. There is no dispute that an insurer has the right to investigate a claim. But an insurer cannot arbitrarily and systematically deny a claim without actually considering its merits, and preserve the right to investigate and litigate a defense to the claim on a later date.

If GEICO's interpretation of its conduct, its policies and Delaware law is correct, it can deny every claim it receives, for any unsupported reason whatsoever, and force insureds into protracted litigation before GEICO is ever forced to pay a single claim. That result is directly contrary to fundamental insurance law, the Delaware PIP statute, and the intent of the Delaware General Assembly.

Plaintiffs adopt the nature of proceedings set forth in GEICO'S opening brief supplemented as follows:

Plaintiffs cross-appealed from that portion of the Superior Court's summary judgment opinion that denied Plaintiffs' motion for partial summary judgment on Counts I and II and granted Defendant's motion for summary judgment on Counts I and II.

Additionally, after the Superior Court issued its summary judgment decision, the Plaintiffs filed a Motion for Relief Related to Declaratory Judgment. That

motion requested that the Superior Court conduct additional proceedings in order to implement its grant of declaratory judgment to Plaintiffs on Count III. The Superior Court's denial of that motion is an additional basis for Plaintiffs' cross-appeal. (Attached as Exhibit A, hereto).

[redacted]

SUMMARY OF ARGUMENT

Answers To Defendant/Appellant's Summary Of Argument

1. DENIED. The trial court correctly rejected GEICO's interpretation of *Clark v. State Farm Mut. Auto. Ins. Co.*, 131 A.3d 806 (Del. 2016) in denying GEICO's motion to dismiss.

2. DENIED. GEICO's second argument actually includes four separate sub-arguments concerning Count III of the Complaint, each of which Plaintiffs deny. As it repeatedly attempted to do in the Superior Court, GEICO misstates Plaintiffs' theory of liability in this case. Plaintiffs contend that GEICO's rules for denying claims violates Delaware law. The trial court understood Plaintiffs' theory of the case, and correctly ruled that GEICO's use of arbitrary rules is not permitted under Delaware law. In the second sub-argument, GEICO argues that the Court granted relief beyond that sought in Count III of the First Amended Complaint ("FAC"). In fact, the Court granted relief to Plaintiffs in accordance with the FAC. In the third sub-argument, GEICO argues that the Superior Court read 21 *Del. C.* § 2118B(c) too broadly. Plaintiffs contend the trial court was actually too restrictive in its interpretation of the obligations inherent in § 2118B(c). In the fourth sub-argument, GEICO argues that there were genuine issues of material fact precluding summary judgment in Plaintiffs' favor. GEICO identified only two facts – (1) whether there

[redacted]

was human involvement in processing claims, and (2) whether the Geographic Reduction Rule and Passive Modality Rule were justified. In both cases, Plaintiffs demonstrated, and the Court correctly ruled that there are no material facts at issue that preclude summary judgment.

3. DENIED. Plaintiffs provided the Court with volumes of undisputed evidence and admissions showing how GEICO uses its arbitrary and secret rules, and the Court, in turn, conducted a "rigorous analysis" of those facts before certifying the classes. GEICO's position conflates the standards for summary judgment and class certification.

Plaintiffs/Cross-Appellants' Summary Of Argument

4. The Superior Court erred by granting summary judgment to GEICO and denying summary judgment to Plaintiffs for breach of contract. The trial court identified numerous undisputed facts that demonstrate how GEICO breached its contractual obligations to Plaintiffs, including that GEICO's arbitrary rules (1) were undisclosed to any policyholder, (2) capped payments, (3) processed claims without human review or discretion, (4) violated Delaware Insurance Regulation 603, (5) denied payments without reasonable justification, (6) acted as an undisclosed sublimit, (7) failed to meet the standards required by 18 *Del. C.* § 2118(a)(2) and § 2118B(c), (8) resulted in GEICO's waiver of defenses to payment, (9) failed to take

into consideration GEICO's obligations under various statutes, and (10) caused harm to class members. (SJ Op. at 9-11, 18, 24-27, 32-41, 46-48).[1] These undisputed facts support reversal of the trial court's ruling and entry of judgment in favor of Plaintiffs on Count I.

5. The Superior Court erred by granting summary judgment to GEICO and denying summary judgment to Plaintiffs for bad faith breach of contract. In its summary judgment opinion (SJ Op. at 33-39), the Superior Court described why "[t]here does not appear to be any reasonable justification for how these rules correlate sufficiently with reasonableness of specific medical expenses." (*Id.* at 34). The trial court noted numerous facts, undisputed and admitted by GEICO, that show that GEICO's arbitrary and secret rules are unjustified, that GEICO knew they were unjustified when it initially imposed them, and that GEICO's use of the rules resulted in harm to Plaintiffs. This Court should reverse the Superior Court's ruling and enter judgment for Plaintiffs on Count II.

6. The Superior Court erred by denying Plaintiffs' Motion for Relief Related to Declaratory Judgment. Plaintiffs always sought damages for GEICO's misconduct, whether for breach of contract or for a violation of Delaware law

[1] The Superior Court's Memorandum Opinion on Summary Judgment was attached as Exhibit D to GEICO's opening brief and is cited herein as "SJ Op. at __."

regarding PIP claims. The Plaintiffs' motion was for "partial summary judgment," because Plaintiffs intended to obtain an award of damages following a liability determination. However, once the trial court determined liability, it then denied Plaintiffs a remedy. Damages were clearly contemplated in the FAC and, if there were any doubt, the motion for further relief sought to proceed with a damages phase. It was error for the Superior Court to rule that GEICO violated Delaware law and then leave Plaintiffs without any remedy.

[redacted]

STATEMENT OF FACTS

I. Background On PIP Law In Delaware

GEICO sells Delaware automobile insurance policies that provide no-fault "personal injury protection" or "PIP." 21 *Del. C.* § 2118. (B12-15).[2] PIP coverage is mandatory in Delaware. The purpose of PIP coverage is "to ensure reasonably prompt processing and payment of sums owed by insurers . . . and to prevent the financial hardship and damage to personal credit ratings that can result from the unjustifiable delays of such payments." 21 *Del. C.* § 2118B(a).

To ensure that PIP claims are paid promptly, Delaware regulations mandate that PIP claims "shall be payable within 30 days of the demand thereof by the claimants provided that reasonable proof of loss for which the benefits as demanded has been submitted to the PIP carrier." Dept. of Ins. Reg. 603 at § 6.2.

Delaware Insurance Regulations and Delaware Statutes further provide:

> - "Any insurer, in accordance with filings made with the Insurance Department, may provide for certain deductibles, waiting periods, ***sublimits***, ***percentage reductions***, excess provisions ***or similar reductions*** . . . . The owner's election of any reduced benefits described in this section must be made in writing and signed by that owner." (B959) (emphasis added).

[2] Citations to the Appendix that GEICO filed appear herein as "A__." Citations to the Plaintiffs' Appendix appear herein as "B__."

[redacted]

- "No person shall commit or perform with such frequency as to indicate a general business practice any of the following: . .

c. Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

d. Refusing to pay claims without conducting a reasonable investigation based upon all available information. . . ."

18 *Del. C.* § 2304(16).

II. GEICO's Insurance Policies

GEICO's policies are governed by Delaware law and state that "[a]ny terms of this policy in conflict with the statutes of Delaware are amended to conform to those statutes." (B28). The policies state that if there is a policy exclusion that is deemed invalid, GEICO will provide at least the minimum coverage required by law. (B27).

Under the terms of GEICO's policies, when a claimant is injured and incurs a loss, the claimant submits a "written proof of claim" to GEICO. (B15). The insured further agrees to provide any information that GEICO requests and to submit to a medical examination if requested. (B15, B27).

III. GEICO's Arbitrary Rules

GEICO has automated, secret rules governing PIP claims. In lieu of any legitimate process, these rules deny claims without discretion and without regard to

facts GEICO knows are material and relevant to a claim. GEICO delegates claim decisions to its secret rules, which are the sole determinant of whether a claim is denied or allowed. (B32-33, B38-39, B44-46, B51-52, B58, B63).

When GEICO receives a claim, it confirms [redacted]. (B69-70, B72, B73, B76). GEICO also confirms [redacted]. (B69-70, B72-73, B76). At that point, whether and how much to pay an otherwise valid claim is determined solely by GEICO's rules.

Yet, GEICO's computers allow or deny claims based on incomplete points of data. (A1212-13). As a GEICO witness testified: "Q: [redacted]? A: [redacted]" (*Id.*). The system is designed by GEICO not to investigate the factual basis for claims, but rather solely (i) to [redacted] and (ii) [redacted]. (A1217, A1219, A1221, A1223). The two rules at issue in this case are referred to as the Geographic Reduction Rule ("GRR") and the Passive Modality Rule ("PMR").

[redacted]

A. Geographic Reduction Rule

The GRR arbitrarily reduces claims based on an "80th percentile" cap — a percentage reduction of the claim. The GRR caps payment at the 80th percentile of other bills located only in GEICO's database. (A1225-26, A1231). This rule constitutes an undisclosed sublimit described nowhere in GEICO's policies; the policyholder never explicitly agrees to this term. GEICO's own expert described the GRR as a fee schedule. (A1526 p. 20 lines 3-5).

As brief background, a medical provider bills for a procedure using a CPT code identifier – a universal code assigned to each treatment procedure. [redacted]. (B79). [redacted]. (B83-84, B93). [redacted]

[redacted]

[redacted]. (A1225-26, A1231). All bills above the arbitrary 80th percentile are reduced as unreasonable.[3]

Because the price cap depends on [redacted], the GRR results in wild and arbitrary fluctuations of the amount GEICO will pay a claimant. The chart below shows five such examples drawn from the data that GEICO produced. In the first row, the cap fluctuated in each period from $[redacted] to $[redacted] to $[redacted] and back to $[redacted]. In the fifth row, the 80th percentile for a certain procedure performed by a doctor increases from $[redacted] to $[redacted] in one six-month period. The other examples show similar wild swings:

CPT Code	Provider Type	Geo-Zip Region	01/2007	06/2007	12/2007	05/2008
97113	**PT**	**197**	[redacted]	[redacted]	[redacted]	[redacted]
72100	CH	197	[redacted]	[redacted]	[redacted]	[redacted]
72148	MD	197	[redacted]	[redacted]	[redacted]	[redacted]
64476	**MD**	**198**	[redacted]	[redacted]	[redacted]	[redacted]
72040	CH	197	[redacted]	[redacted]	[redacted]	[redacted]

(A1238-74).

GEICO's use of the GRR not only causes wild swings in reimbursements within short windows of time, it also has created absurd outcomes where doctors [redacted]

[redacted]

[3] *See* A1347-49, A1351-52, B367-68, B370, B372-73 for examples of the explanation of benefits forms with reductions based on the GRR.

[redacted]

[redacted]. (A1298) ("[redacted]").

Notwithstanding Regulation 603 that requires GEICO to disclose any cap, sublimit, or similar limitation to the Delaware Insurance Commissioner and to obtain written consent from the insured, GEICO never discloses the GRR either in its policies or its explanations for why it did not pay a bill in full. The GRR remains a closely guarded secret known only to GEICO.[4] (A1276-77).

1. Selection Of The 80th Percentile Was Unjustified

[redacted]. (A1282-84, B97). [redacted] GEICO's Rule 30(b)(6) witness testified:

Q: [redacted]

A: [redacted]

[4] Indeed, GEICO has painstakingly worked to keep all aspects of the GRR and PMR marked confidential and out of the public eye in this litigation.

[redacted]

* * *

Q: [redacted]

A: [redacted]

* * *

Q: [redacted]

A: [redacted]

* * *

Q: [redacted]

A: [redacted]

(A1282-84).

A second GEICO Rule 30(b)(6) witness confirmed [redacted]:

Q: [redacted]

A: [redacted]

Q: [redacted]

A: [redacted]

Q: [redacted]

[redacted]

A: [redacted]

(A1226).

2. GEICO Ignores Obvious Factors That Impact Reasonableness

[redacted]. (A1294). Nevertheless, GEICO adopted the GRR, an arbitrary cap that never considers these relevant factors. (A1290). In one email, [redacted]. (B102). GEICO further admitted:

[redacted] (A1292).

[redacted] (A1296). [redacted]:

A: [redacted]

Q: [redacted]

A: [redacted]

* * *

[redacted]

Q: [redacted]

A: [redacted]

(B32-33; *see also* B38-39).

[redacted]. (B105, B107, B111-12).

B. Passive Modality Rule

Passive Modalities are generally defined as "'treatment/care modalities' by the care-giver to a patient, who 'passively' receives the care" (*e.g.*, hot/cold pack, electrical stimulation, massage). (B174). GEICO employs the Passive Modality Rule ("PMR") arbitrarily to deny all claims submitted for passive treatment [redacted]. (A1300-01, B144). [redacted]. (*Id*. and B146-47). [redacted]

[redacted]

[redacted]. (*Id.*).

1. Unjustified When Implemented

GEICO's corporate designee [redacted]:

> Q. [redacted]
>
> A. [redacted]
>
> Q. [redacted]
>
> A. [redacted]

(B155-56) (emphasis added). [redacted]. [redacted]. (A1300-01). [redacted] (*Id.*).

A Rule 30(b)(6) witness [redacted]:

> A. [redacted]
>
> Q. [redacted]

[redacted]

A. [redacted]

(B162).

2. Claims Representatives Rely Solely On The Rules

GEICO's claims representatives [redacted]:

Q. [redacted]

A. [redacted]

* * *

Q. [redacted]

A. [redacted]

(B146-47). [redacted]. (B58, B63).

3. GEICO Ignores Relevant Information And Misleads

[redacted]

[redacted]

[redacted]. (A1303-05, B167-70). However, those sources actually contradict the PMR and put GEICO on notice that it cannot rely on a rule to arbitrarily deny a claim for medical treatment.

[redacted] (B175[redacted] (B173) (emphasis in original).

[redacted]. (B178). [redacted] (*Id*.).

[redacted]. (B180). Yet, this

[redacted]

easily verifiable situation is never considered when GEICO denies a claim – bills are blanket denied under the PMR.

In discovery, [redacted]. (B182-84, B187-88, B195-97). [redacted]. (B208). [redacted]. (B199-200, B202-03, B205-06).

[redacted]. (B212). [redacted]. (B215-18). Yet, GEICO does none of these things.

C. GEICO's Bad Faith Conduct

GEICO's rules, and the details on their use are guarded secrets, and totally hidden from claimants and providers, and even its regulators. GEICO does not disclose the GRR or the PMR to the Delaware Department of Insurance, the rules

[redacted]

are not mentioned in GEICO's issued policies, GEICO does not ask policyholders to consent to the rules, and the explanations of benefits that GEICO sends to claimants do not disclose the real reasons why GEICO denied the claims. (A316-17, B7-28, B182-84, B187-88, B195-97, A1347-49, A1351-52, B367-68, B370, B372-73, A1276-77, B162, B954-57).

GEICO also employs tactics to avoid inquiries about denied claims, by giving conflicting information to providers and insureds about its denials. [redacted]

[redacted]:

[redacted]

(B277) (emphasis in original). [redacted]

[redacted]. (B230-31).

[redacted]

[redacted]

[redacted]

[redacted]:

[redacted]

(A1312).

When GEICO denies a claim, medical providers can and do balance bill the patient for unpaid claims [redacted]:

[redacted].

(B227).

Plaintiffs introduced dozens of examples where GEICO was made aware that insureds are balance-billed by providers and sent to collection agencies. (B234-339). [redacted]. (B341). [redacted] (B343-44), [redacted]. (*Id*.). Ironically, while GEICO hides its rules and exclusions, it prominently warms claimants on every explanation

[redacted]

of benefits that "[a]ny person who knowingly, and with intent to injure, defraud or deceive any insurer, files a statement of claim containing **any false, incomplete or misleading information** is **guilty of a felony**." (B183).

[redacted]. (B346-48; *see also* B227, B341). [redacted]. (*Id.*).

D. GEICO Profits From Its Wrongful Conduct

[redacted].[5] (B354).

[5] This includes claim denials outside Delaware. *See* B356-59 for data on denials in Delaware for specific years.

[redacted]

ARGUMENT

Response To Defendant/Appellant's Arguments (Parts I-III)

I. THE COURT PROPERLY DENIED GEICO'S MOTION TO DISMISS COUNT III

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. (A260-62).

b. Scope of Review

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

c. Merits of Argument

The trial court rejected Defendant's argument that *Clark v. State Farm Mut. Auto. Ins. Co.*, 131 A.3d 806 (Del. 2016) bars judicial enforcement of insurance law, in response to Defendant's motion to dismiss:

> GEICO cites *Clark* for the sweeping proposition that Delaware courts cannot govern the operations of an insurer. GEICO overstates the holding in *Clark.* The *Clark* court addressed the very narrow issue of whether declaratory judgment concerning the appropriate remedy for violations of Section 2118B(c) when the legislature had clearly enumerated the available remedies for violation of Section 2118B(c). The *Clark* court then found that because the legislature had already established a remedy for when an insurer failed to pay within thirty days (payment plus

> interest), it would be improper for the judiciary to substitute its judgment and compel payment within thirty days.

(SJ Op. at 19).

In *Clark*, the Plaintiff sought to have the trial court ignore a statutory mechanism in the event an insurer simply failed to pay benefits within the required 30-day timeframe. The Plaintiff in *Clark* wanted, in effect, a mandatory injunction compelling an insurer to make a timely payment, even though the statute provided a remedy for late payment. That is not the case here. As the trial court stated in this case:

> This case is also different from *Clark* because Plaintiffs allegedly suffered damages and were not made whole under the code or otherwise. Moreover, Geico has not remedied its purported breach of the contract or statute. Therefore, declaratory judgment would not undermine the General Assembly or the Insurance Commissioner's powers. In fact, the Insurance Commissioner stated in the Commissioner's Letter that the insurance code does not provide for any private enforcement action by his department.

(*Id.* at 20).

Although the question that GEICO presented in this section of its brief related only to the Motion to Dismiss, in its opening brief, GEICO raises three additional, unrelated issues. (Op. Br. at 20-21).

First, GEICO argues that the Superior Court erred by ruling on summary judgment that the Rules are antiquated and must be updated to account for relevant

considerations. GEICO contends that the ruling was untethered to any statute, regulation or case law. This is simply untrue. The trial court explained why GEICO's rules were inappropriate, and what relevant information GEICO should have considered. (*See* SJ Op. at 32-39).

Second, Defendant incongruously argues that the Superior Court improperly injected its own policy considerations in interpreting the PIP statute, when, in fact, GEICO has substituted its corporate policy considerations for that of the General Assembly in adopting its rules. The trial court made the statement that "the goal of efficiently processing claims should not outweigh the goal of protecting all individuals' rights to reasonable medical coverage under the policy." (SJ Op. at 41). That sentence is entirely consistent with the General Assembly's policy statement that PIP is designed "to prevent the financial hardship and damage to personal credit ratings that can result from the unjustifiable delays of such payments." In other words, the PIP statute mandates timely processing to protect the insured, not the insurer. Here, GEICO has set up secret rules to deny claims resulting in financial harm and delay to claimants.

Based on the extensive undisputed factual record before it, the Superior Court correctly found that Defendant's system was unjustifiable, and had the effect of causing balance billing and financial strain on the claimants. (SJ Op. at 11, 33-35,

46-48). Furthermore, the Superior Court's reference was entirely proper when considering what was intended by the language of "processing" within the statute. *CML V, LLC v. Bax*, 28 A.3d 1037, 1041 (Del. 2011) ("We also ascribe a purpose to the General Assembly's use of particular statutory language and construe it against surplusage if reasonably possible."). *See also Barone v. Progressive N. Ins. Co.*, 2014 WL 686953, at *4 (Del. Super. Jan. 29, 2014) ("[i]n our constitutional system, this Court's role is to interpret the statutory language that the General Assembly actually adopts ... without rewriting the statute to fit a particular policy position.") *aff'd,* 103 A.3d 514 (Del. 2014). The Superior Court interpreted the statutory language consistent with policy goals expressed in the statute and in a manner that was harmonious with existing laws.

Third, GEICO complains that the Superior Court referenced legal discussions relating to automation in the insurance context (Op. Br. at 20-21); however, GEICO does not show how this *dicta* is inconsistent with the policy behind the PIP statute. The Superior Court specifically stated, "Delaware law, not law review articles, will govern the resolution of Plaintiffs' claims against GEICO." (SJ Op. at 6). Moreover, Plaintiffs do not object to automation; rather, Plaintiffs take issue with GEICO's use of arbitrary rules that systematically deny valid claims, while GEICO issues misleading statements about the real reason for the claim denial.

[redacted]

II. THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON COUNT III AND ENTERING JUDGMENT FOR PLAINTIFFS

a. Question Presented

Whether the trial court erred in denying Defendant's Motion for Summary Judgment on Count III and granting Plaintiffs' Motion for Partial Summary Judgment on Count III. (A1150-51, A1199-1204, A1562-65).

b. Scope of Review

The Court reviews *de novo* both the granting and denial of summary judgment. *Bagwell v. Prince*, 1996 WL 470723, at *2 (Del. Aug. 9, 1996) ("The standard and scope of review by this Court of a decision granting motion to dismiss or denying a motion for summary judgment is *de novo.*"). *Asbestos Workers Local Union No. 42 Welfare Fund v. Brewster*, 940 A.2d 935, 940 (Del. 2007) ("We review a grant of summary judgment *de novo.*")

c. Merits of Argument

GEICO makes five separate sub-arguments concerning Count III, all of which Plaintiffs deny.

1. Defendant Seeks To Reframe Plaintiffs' Case

In the first sub-argument, GEICO seeks, as it tried below, to reframe Plaintiffs' theory of the case into a dispute over the merits of treatment and pricing

for medical bills. From the outset, as the Superior Court correctly recognized, Plaintiffs challenged GEICO's use of rules to deny claims – while ignoring the merits of the claims. The undisputed facts in the record proved that GEICO's rules are entirely arbitrary, undisclosed, and fail to consider the merits of a claim.[6] The Superior Court correctly understood that GEICO's rules amount to an illegitimate, unreasonable sham.

GEICO acknowledged before the Superior Court that it cannot arbitrarily deny a claim and meet its obligations under the law:

> The Court: So, if you've determined its reasonable and necessary to deny 50% of every claim, you've complied with 2118, no matter what the claim has in it?
>
> Counsel for GEICO: No. I mean, you have to look at the claim.
>
> The Court: Right. . . .
>
> * * *
>
> The Court: Why would we ever have a trial on whether it was reasonable and necessary if all you had to do is have the insurance company determine any way that it wants to?
>
> * * *
>
> The Court: . . . . But, let's understand something. An insurance company can't just automatically deny coverage causing the

[6] GEICO claims it preserved this issue by identifying two entire briefs (Op. Br. at 23 citing A423-458 and A1353-1391). Those briefs raise numerous unrelated issues. It is not clear at all what GEICO is citing.

> other person to sue. That is not want 2118 is about. 2118 is to avoid that exact situation.

(B689-90).

GEICO further admitted that if it denies a claim without justification, it waives any defense to the claim, and must pay the claim and statutory damages without further inquiry into whether the claim is reasonable and necessary:

> The Court: . . . . Under the statute, I submit it. If it's a supported claim, you have 30 days to investigate it, correct?
>
> Counsel for GEICO: Yes.
>
> The Court: If you do not do it in 30 days, what happens?
>
> Counsel for GEICO: Well, then we'd have to pay statutory interest.
>
> The Court: No, you have to pay the amount – you lose the defense to –
>
> Counsel for GEICO: Right. We lose the defense, and then you have to pay –
>
> * * *
>
> The Court: … The statute – for instance, if I'm a claimant, and I send in a supporting claim, and let's say only 1% of it's reasonable and necessary, and you don't respond to it at all, guess what. You owe the whole amount.
>
> Counsel for GEICO: Correct.
>
> The Court: Right? At that point, it ends, right? In 30 days you're supposed to have done some type of analysis.
>
> Counsel for GEICO: You're supposed to pay what you owe or the interest on top of that –

(B684-85, B761-62).

The irony of GEICO's contention in the Superior Court and on appeal is that it never considers the merits of a claim before denying it. Rather, GEICO relies solely on secret rules to make its claims decisions. However, when Plaintiffs challenged the rules and GEICO's actual conduct, GEICO claims that it has the right to contest facts that it never considered, and were not the basis for its claims decision. This position is tantamount to appealing an issue that was never raised below.

2. GEICO Incorrectly Argues That The Declaratory Relief Went Beyond What Plaintiffs Requested.

In the second sub-argument, GEICO incorrectly argues that the Court granted relief beyond the relief sought in Count III of the Complaint. The issue presented on appeal is different than the contention GEICO made to the Superior Court.

Plaintiffs sought the following relief in paragraph 79 of the FAC:

> Plaintiffs, on behalf of themselves and all others similarly situated 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 Geographic Reduction Rule or Passive Modality Rule.

(A126).

On summary judgment, Plaintiffs asked the Superior Court to issue the following declaratory judgment:

> that GEICO's use of the GRR and PMR violate their contracts and Delaware law, (ii) that GEICO is precluded from asserting defenses that were based on the GRR and PMR and (iii) that GEICO is precluded from asserting any defense not asserted within the first 30 days of when claims were first submitted.

(A1204). Plaintiffs contended that this relief was consistent with the relief previously requested and otherwise allowed. (A1562-65). The Superior Court rejected Plaintiffs' argument. (SJ Op. at 30-32).

On appeal, GEICO pivots now to a new argument and conflates the two requests for declaratory relief contained in the FAC, contending that any reference beyond § 2118 is improper. This contention is incorrect for three reasons.

First, GEICO is well aware that there were two distinct requests for relief in Plaintiffs' declaratory judgment count:

> Counsel for GEICO: So, Your Honor, basically, they've argued that GEICO's in violation of 2118.
>
> The Court: Right.
>
> Counsel for GEICO: That's the PIP statute. . . . **The other declaration is that GEICO may not lawfully use the rules**. . .

(B682) (emphasis added). GEICO cannot argue now that the Court gave a reasoning beyond § 2118 for its finding that GEICO's use of the rules violates Delaware law.

Second, Defendant is well aware that Plaintiffs contended that § 2118B (i) created statutory obligations on GEICO when it processed claims, and (ii) created statutory penalties when GEICO violated its statutory obligations. The obligations

mandated by § 2118B are articulated in the FAC, the motion for class certification, and throughout the litigation including briefing at summary judgment. (A105, A129, A333, A362, A1165, B687, B705).

3. GEICO Wrongly Contends It Has No Limitation To Deny Claims

In the third sub-argument, GEICO wrongly argues that the Superior Court misinterpreted 21 *Del. C*. § 2118B(c). GEICO is simply incorrect that it is untethered to laws, regulations, caselaw, the terms of its contract, and good faith. *See* Argument Section IV, *infra.* To find otherwise would allow GEICO to set its own rules for PIP, without any regard for the standards set by the General Assembly, the Courts, or the Department of Insurance.

The Superior Court was well founded in ruling that GEICO has statutory duties, had violated § 2118B, and that GEICO's use of secret, undisclosed, arbitrary rules violated Delaware law.

4. GEICO Incorrectly Argues It Was Given The Burden Of Proof In The Case

In the fourth sub-argument, GEICO argues that the trial court shifted the burden of proof to the Defendant. But, GEICO conflates the Plaintiffs' burden of proof in this case (which Plaintiffs satisfied) with GEICO's underlying statutory obligation to meaningfully review and process claims in accordance with Delaware

law. Plaintiffs carried their burden of proof, demonstrating with an extensive factual record that Defendant arbitrarily denies claims in violation of Delaware law (and its contract).

As the trial court correctly stated in deciding this case:

> . . . the Court must examine the particular facts before it without inappropriately shifting the burden of proof.

(SJ Op. at 6).

> Plaintiffs' case is very straightforward. Plaintiffs' case does not seek to shift any burdens of proof on the reasonableness of the claims for PIP benefits. Instead, Plaintiffs seek a judicial determination that the Rules deny claims for PIP benefits in a way that breaches the GEICO Policies and/or violates applicable Delaware law.

(*Id.* at 15-16).

As discussed above, GEICO admitted that it has a duty to investigate and process claims in good faith, and not arbitrarily without regard to facts giving rise to the merits of a claim. The undisputed facts showed that GEICO does not engage in a legitimate claims review process at all; on appeal, GEICO ignores its admissions and claims improperly that it has the right to reject all claims without any investigation, a position that is contrary to the very purpose of PIP.

[redacted]

5. There Were No Genuine Issues Of Material Fact Precluding Summary Judgment

In the fifth sub-argument, GEICO incorrectly argues that there are genuine issues of material fact precluding summary judgment in Plaintiffs' favor. GEICO identified only two facts – (1) whether there was human involvement in processing claims, and (2) whether the Geographic Reduction Rule and Passive Modality Rule are justified. In both cases, there were no material facts in dispute that precluded summary judgment.

a. There Was No Material Human Involvement

Based on the factual admissions that GEICO made in discovery, it is undisputed that there is no human involvement or discretion when the GRR and PMR deny claims. (SJ Op. at 9-11, 40). (Plaintiffs note, whether there is human review vs. computer review is not Plaintiffs' basis for challenging GEICO – it is the arbitrary and secret nature of rules that deny claims without a proper basis that is the crux of the claim.) On appeal, the *only* contrary fact that GEICO cites is a handful of instances where, on a **re-evaluation** of a previously denied claim, an adjuster approved an additional payment. GEICO states: "GEICO submitted evidence of adjusters **re-evaluating claims** and issuing additional payments." (Op. Br. at 36). Plaintiffs' case is not about re-evaluations, but whether the arbitrary and secret rules GEICO uses to deny claims violates Delaware law in the first instance. Plaintiffs

sought a determination whether GEICO is bound by its actual claims decisions (which are based on the rules), and whether it can deny claims using the rules in the first instance, forcing claimants to seek judicial or administrative review of GEICO's denials. As Plaintiffs stated in their summary judgment briefing, a statement that went uncontested:

> GEICO has never provided any evidence of a single instance where in the initial 30-day processing period an adjuster actually overrode the GRR or the PMR. None. Thus, GEICO's speculative contention of discretion is meaningless, because all of the actual evidence shows the rules are the claims decision. Geier v. Meade, 2004 WL 243033, at *8 (Del.Ch. 2004) (speculation is insufficient to defeat summary judgment). See also, Op.Br. at 11-12,14.

(A1566-67).

There is no material fact in dispute regarding human involvement in claim processing at issue in this case that precludes summary judgment.

b. The Rules Were Not Justified

GEICO next argues that it presented justification for the GRR and PMR that prevent summary judgment. GEICO is wrong.

As to the GRR, the following facts are undisputed – GEICO relied on an unwritten, undocumented, untested recommendation of a software vendor to deny claims above the 80th percentile. The appendix cites that GEICO presents on appeal prove those points, and Plaintiffs cited those same facts in support of summary

judgment. (*See* A1795-1802, 1872-76). GEICO admits on appeal that [redacted] (A1294). On appeal, GEICO also cites its own expert who stated [redacted] (A1526 at 17, 20). These facts are not disputed. The Superior Court did not make any findings of fact contrary to these points. The Superior Court ruled that what GEICO does – including ignoring the warnings of a software vendor, and using a bright-line 80th percentile cutoff (a "fee schedule" as GEICO's expert called it) that never considers important data like expertise, experience, skill level, and costs, did not conform to Delaware law.

As to the PMR, GEICO argues that professional literature supports its use of the passive modality cutoff. But, the only two pieces of literature upon which GEICO relies for this supposition are directly contrary to GEICO's contention and were cited by Plaintiffs in support of summary judgment. (B172-78).

Further, GEICO ignores caselaw that says an insurer may not rely on journal articles to deny claims. *Lundberg v. State Farm Mut. Ins. Co.*, 1994 WL 1547774

[redacted]

at *2 (Del. Com. Pl. 1994).[7] Importantly, GEICO admitted repeatedly in discovery that [redacted]. (B180). [redacted]. (B215-18, 222).

Nothing GEICO argues raises a disputed material fact precluding summary judgment.

[7] GEICO prefers to ignore *Lundberg*. The case was entirely omitted from GEICO's Opening Brief and was treated dismissively before the Superior Court:

> THE COURT: And we know that the Delaware cases say that you can' t just use medical literature.
>
> GEICO Counsel: Well, that was only the *Lundberg* case, Your Honor.
>
> THE COURT: Only?

(B695).

[redacted]

III. THE SUPERIOR COURT DID NOT ERR BY GRANTING CLASS CERTIFICATION

a. Question Presented

Did the trial court abuse its discretion by (1) failing to conduct a rigorous analysis of genuine legal and factual disputes in determining whether Plaintiffs satisfied Rule 23(a) and (b) and (2) certifying classes under Rule 23(b)(3). (A332-45, A348-66, A1060-75, A1087-90, A1093-95).

b. Scope of Review

The Court reviews determinations on Rule 23 class certification for abuse of discretion. *In re Celera Corp. S'holder Litig.*, 59 A.3d 418, 428 (Del. 2012). This Court does not set aside factual findings "unless they are clearly wrong and the doing of justice requires their overturn." *Id.*

c. Merits of Argument

1. The Court Did Not Fail To Conduct A Rigorous Analysis Of Genuine Legal And Factual Disputes In Determining Whether Plaintiffs Satisfied Rule 23(a) And (b).

GEICO argues that Plaintiffs effectively needed to meet the standard of summary judgment in order to have the case certified as a class action. That argument is unfounded. *See Diabate v. MV Transp., Inc.*, 2015 WL 4496616, at *8 (E.D. Pa. 2015) ("A plaintiff is not required to prove her case during the class certification stage, but only prove that she has met the requirements of Rule 23."

(*citing In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir. 2008)). Notwithstanding GEICO's contention, Plaintiffs submitted essentially the same extensive factual record at class certification as they did for summary judgment, mooting GEICO's argument.

GEICO argues that the trial court should have decided the legal issue of whether GEICO violated § 2118 as part of class certification. GEICO is incorrect. As even GEICO acknowledges, the Superior Court need only resolve legal issues that are "relevant to determining the requirements" of Rule 23. (Op. Br. at 39). It was not necessary for the trial court to determine as a matter of law that GEICO violated § 2118 in order to determine the requirements of Rule 23. Further, GEICO's argument is illogical as a matter of procedure. If true, no class action could be certified before a plaintiff was able to prove its case sufficient to obtain summary judgment.

Lastly, GEICO argues that the Court could not reference anything beyond § 2118 in analyzing the declaratory judgment count. That argument was discussed in detail in Section II.c.2 *supra.* Plaintiffs repeatedly raised and referenced § 2118B in the FAC, and both parties argued § 2118B throughout the case as the process that was invoked by § 2118. The Superior Court did not err.

[redacted]

PLAINTIFFS/CROSS-APPELLANTS' ARGUMENTS (PARTS IV-VI)

IV. THE COURT ERRED BY DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN GRANTING DEFENDANT'S MOTION ON BREACH OF CONTRACT

a. Question Presented

The trial court erred by denying Plaintiffs' motion for summary judgment and granting summary judgment to Defendant on the claim for breach of contract. (A1181-93, A1555-62, B702-20).

b. Scope of Review

The Court reviews *de novo* both the granting and denial of summary judgment. *Bagwell v. Prince*, 1996 WL 470723, at *2 (Del. Aug. 9, 1996) ("The standard and scope of review by this Court of a decision granting motion to dismiss or denying a motion for summary judgment is *de novo.*"). *Asbestos Workers Local Union No. 42 Welfare Fund v. Brewster*, 940 A.2d 935, 940 (Del. 2007).

c. Merits of Argument

GEICO has contractual obligations to Plaintiffs, and the Superior Court accepted the uncontested facts that GEICO's rules (1) were undisclosed, (2) capped payments, (3) processed claims without human review or discretion, (4) violated the scope of Delaware Insurance Regulation 603, (5) denied payments without reasonable justification, (6) acted as an undisclosed sublimit, (7) failed to meet the

[redacted]

standards required by 18 *Del. C.* §§ 2118(a)(2) and 2118B(c), (8) resulted in a waiver of defenses to payment asserted by GEICO, (9) failed to take into consideration GEICO's obligations under various statutes, and (10) caused harm to class members, and yet the Court ruled that GEICO had not breached its contractual obligation to pay PIP benefits. (SJ Op. at 9-11, 18, 24-27, 32-41, 46-48). Those undisputed facts and conclusions were sufficient on summary judgment to rule that GEICO breached its contractual obligations to Plaintiffs.

The Superior Court recognized, as other courts have, that the nature of this case is the illegal processes of the insurance company and not whether a particular claimant's bill was reasonable or necessary; nevertheless, the trial court appeared reluctant to act given this Court's decision in *State Farm Mut. Auto. Ins. Co. v. Spine Care Delaware*, 238 A.3d 850 (Del. 2020). *But see Wilmington Pain & Rehab. Ctr., P.A. v. USAA Gen. Indem. Ins. Co.*, 2017 WL 8788707 at *6 (Del. Super. 2017) (distinguishing PIP claims over "reasonableness" from claims regarding underlying process) and *Jameson v. MetLife*, C.A. No. 10-310 (D. Del. July 15, 2011) at fn.3 (attached as Ex. B) (in discussing two separate actions filed against MetLife, the court found "this [class] action is 'premised on the manner in which the claims are processed' by Metlife, whereas the [PIP] action is 'premised on the final decision to reduce or deny payment.'").

[redacted]

1. GEICO's Insurance Policy

GEICO is obligated to pay claims following submission of a written proof of claim. (B13, B15, B959). 21 *Del. C.* § 2118B(c) (within 30 days of a claim being submitted, the insurer shall "make payment of the amount of claimed benefits that are due to the claimant or, if said claim is wholly or partly denied, provide the claimant with a written explanation of the reasons for such denial.") The Superior Court and GEICO discussed the scope of GEICO's contractual obligations by reference to, among other things, the PIP statute:

> The Court: Your contract doesn't have that process in it. It doesn't say within 30 days, you have to do X, Y, Z, correct?
>
> Counsel for GEICO: No. The PIP –
>
> The Court: - So, it's got to be a little bit more than just what your contract says. In other words, your contract doesn't put a 30-day requirement in it; does it?
>
> Counsel for GEICO: No. There's no –
>
> The Court: - Under your contract, it could take eight years to determine whether it's reasonable and necessary. . . .
>
> Counsel for GEICO: Well, we're required under the PIP statute to pay within 30 days or deny. . . .
>
> The Court: So it's different from your contract. It's read into your contract.
>
> Counsel for GEICO: Right. . . .

(B683-84; *see also* B689-90). The issue, then, is whether GEICO has a contractual obligation (a term in its contract) that requires it to review, investigate and either allow or disallow claims in good faith.

Insurance contracts must be interpreted in a common-sense manner, giving effect to all provisions so that a reasonable policyholder can understand the scope and limitation of coverage. *Crossan v. Travelers Comm'l Ins. Co.*, 2015 WL 1378916 at *1 (Del. Super. 2015). Most importantly, "[i]f ambiguity exists in the contract, **it is construed strongly against the insurer, and in favor of the insured**, because the insurer drafted the language that is interpreted." *Id.* (emphasis added).

Courts presume "that the parties intended the contract to conform to the law in effect at the time it was formed." *Little v. MGIC Indem. Corp.*, 836 F.2d 789, 796 (3d Cir. 1987). GEICO's form contract includes a provision that expressly states "[a]ny terms of this policy in conflict with the statutes of Delaware are amended to conform to those statutes." (B28). The Delaware District Court has reviewed GEICO's form contract and found "the only possible interpretation of the cited language is that the contract is to be interpreted consistent with Delaware law. The clause is meant to avoid conflicts between the contract and Delaware law." *Johnson v. Gov't Employees Ins. Co.*, 2014 WL 1266832, at *3 (D. Del. 2014), *aff'd*, 672 Fed. Appx. 150 (3d Cir. 2016). This view is codified in the Delaware insurance code:

[redacted]

> Any condition, omission or provision not in compliance with the requirements of this title [Title 18] and contained in any policy, rider or endorsement hereafter issued and otherwise valid shall not thereby be rendered invalid but shall be construed and applied in accordance with such condition, omission or provision as would have applied had the same been in full compliance with this title.

18 *Del. C.* § 2718(b). Importantly, the policy states that if there is an exclusion in the policy that is deemed invalid, GEICO will provide at least the minimum coverage required by law. (B27).

2. GEICO Confirms A Claim Complies With The Claimant's Contractual Obligations

When a claim is submitted, [redacted]. (B69-70, B72-73, B76). At this point, GEICO admits that there is a causal connection between the accident and the injury. (*Id.*). In other words, when the claim is submitted to the automated system, GEICO has confirmed [redacted]. The only question that remains for GEICO is whether or not to pay, a decision that will be determined solely by GEICO's secret and arbitrary rules.

[redacted]

3. Delaware Law Requires Investigation Of Claims

Common law requires an insurer must perform a proper investigation of a claim before denying it. *Tackett v. State Farm Fire and Casualty Ins. Co.*, 653 A.2d 254, 264 (Del. 1995) (failure to investigate or process claims is a breach); *Ponzo v. Nationwide Mut. Ins. Co.*, 2013 WL 3965396, at *2-3 (Del. Com. Pl. 2013); *Spine Care Delaware, LLC v. State Farm Mut. Auto. Ins. Co.*, 2007 WL 495899 at *2-3 (Del. Super. 2007) (insurer has the initial burden to investigate and defenses asserted that are inaccurate and unreliable are precluded); *Egan v. Mutual of Omaha Ins. Co.*, 620 P.2d 141,144-146 (Cal. 1979) (failure to "properly investigate" is a breach, "an insurer cannot reasonably and in good faith deny payments to its insured without thoroughly investigating the foundation for its denial"); *Mt. Hawley Ins. Co. v. Jenny Craig, Inc.*, 1995 WL 716929, at *1 (Del. Super. 1995) (Delaware law "place[s] a duty on insurers to fully and/or properly investigate claims made to them").

As the Court in *St. Anthony's Club v. Scottsdale Ins. Co.*, 1998 WL 732947 (Del. Super. 1998) stated:

> What good is a duty to investigate if none is carried out and an early exit is sought without an investigation? Should not the insured reasonably expect a little more? The premium which was paid here carries with it not only which risks are to be covered but it may also impose some effort to learn some facts before the insurer heads for the door.

[redacted]

In *Mut. Auto. Ins. Co. v. Spine Care Delaware*, 238 A.3d 850 (Del. 2020), this Court remanded to the trial court for further proceedings and found – in the particular circumstances of that case – "[t]he factor most germane to this case is the ordinary and reasonable charges usually made by members of the same profession of similar standing." *Id.* at 862. This Court also stated that factors from *Anticaglia v. Lynch*, 1992 WL 138983, at *1 (Del. Super. Mar. 16, 1992) and *Watson v. Metro. Prop. & Cas. Ins. Co.*, 2003 WL 22290906 (Del. Super. Oct. 2, 2003) could be considered. 238 A.3d at 862. It is important to note that in the case at bar, the trial court found that GEICO – in applying the 80th percentile as a cap – does not look at even this first factor because there is no distinction between providers of "similar standing." (SJ Op. at 35, 43-44). As the Superior Court stated during oral argument, the court had a concern that the adjusters do not look at differences between "Dr. Kildare, who is Harvard-education, and he's the top surgeon at Christiana Care, and this is Dr. Hacksaw, who went to Granada University. . . ." (B656). GEICO repeatedly admitted that its rules make no distinction for experience or specialty of a provider. (B107, 111-112). The Superior Court found in deciding summary judgment that GEICO's system does not "track" **any** of the relevant factors, including basing reasonableness on providers of "similar standing." (SJ Op. at 35).

4. Delaware Law Is Incorporated Into GEICO's Contracts

[redacted]

Importantly, GEICO expressly agreed as a matter of contract that "[a]ny terms of this policy in conflict with the statutes of Delaware are amended to conform to those statutes." (B28). Delaware statutory law is therefore expressly incorporated into GEICO's contracts, and that, in turn, requires GEICO to perform an investigation based on ***all available information*** and to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies. 18 *Del. C.* § 2304(16) & 2303. Assuming that GEICO has agreed to "perform an investigation based on all available information," there would be no doubt that GEICO has breached the contract because the rules perform no investigation and ignore available information. GEICO's private agreement in the insurance policy to conform the contract with the statutes of Delaware imposes the same obligation – as a matter of contract – on GEICO.

5. GEICO's Violation Of Delaware Law Is A Breach Of Contract

Even without the foregoing provision, GEICO cannot interpret its contract in a way that allows it to completely eliminate any investigation, and then hide the truth about how it arrived at its claims decisions.[8] GEICO's wrongful interpretation of its

[8] Indeed, GEICO disagrees with following its statutory and common law obligations and has argued that it would not be in breach, even if it paid claims by "throwing darts at a Ouija board." (B361).

[redacted]

own legal obligations is a breach of contract. *See also Davidson v. Travelers Home & Marine Ins. Co.*, 2011 WL 7063521 at *2 (Del. Super. 2011) ("an insurer's violation of the Act may be used as evidence of bad faith"); *Crowhorn v. Nationwide Mut. Ins. Co.*, 2001 WL 695542, at *7 (Del. Super. 2001) (acknowledged that 18 *Del. C.* §2304(16) did not create a private cause of action but allowed Plaintiff to reference it for illustrative purposes). This concept is consistent with other areas of the law where a statutory obligation can always be used to prove an element of a separate claim. *New Haverford P'ship v. Stroot*, 772 A.2d 792, 797-98 (Del. 2001) (holding that statutory duty imposed by Landlord Tenant Code could be used to prove duty element of common law negligence claim); *DiSimplico v. Equitable Variable Life Ins. Co.*, 1988 WL 15394 at *2 (Del. Super 1988) (holding that although Unfair Trade Practices Act did not provide for a private cause of action for a particular claim, the plaintiff could maintain a separate common law action that was otherwise within the UTPA). *See also Farm Family Ins. Co. v. Verizon Comm.*, 2011 WL 531941 (Del. Super. 2011) (Delaware Regulations can be used to show required standard of conduct in civil lawsuit).

6. The GRR And PMR Impose An Illegal Sublimit, Cap, Percentage Reduction, Or Similar Reduction

Delaware Insurance Regulation 603 at 6.3 – which covers PIP policies – states that "[a]ny insurer, in accordance with filings made with the Insurance Department,

[redacted]

may provide for certain deductibles, waiting periods, sublimits, percentage reductions, excess provisions or similar reductions. . . . The owner's election of any reduced benefits described in this section must be made in writing and signed by that owner." (B959).

The GRR and the PMR automatically cap and deny payments. These rules result in reduced benefits and fall within this regulation. The GRR and PMR fall within the definition of a percentage reduction or sublimit, *i.e.*, "[a] limitation in an insurance policy on the amount of coverage available to cover a specific type of loss." *Starstone Nat'l Ins. Co. v. Polynesian Inn, LLC*, 2019 WL 4016151, at *4 (M.D. Fla. 2019) (where the Court went on to say "[a] sublimit is part of, rather than in addition to, the limit that would otherwise apply to the loss. In other words, it places a maximum on the amount available to pay that type of loss, rather than providing additional coverage for that type of loss"). *See also Doctors Hosp. 1997 LP v. Beazley Ins.*, 2009 WL 3719482, at fn.6 (S.D. Tex. 2009) (discussing generally accepted definitions and applications of sublimits as "limit[ing] the coverage for certain types of loss to amounts less than the limits of liability" and "smaller internal limits"). If not a sublimit, the GRR also appears to fall within the concept of a "percentage reduction" and both the GRR and PMR fall within the "similar reductions" cited in the regulation.

[redacted]

Regulation 603 is not a general concept for all insurance; it is a regulation expressly, specifically and solely directed to PIP benefits under auto insurance and known to GEICO.

The GRR and the PMR are neither described nor disclosed anywhere in GEICO's policies. Insureds and claimants are not aware of the rules when purchasing a policy or obtaining required treatment.[9] GEICO never discloses the GRR and PMR when it issues an explanation of benefits which should truthfully explain the real reason for the claim denial. Even when challenged by claimants and insureds after a denial, GEICO does not disclose the rules.

Under Delaware law, if the GRR and PMR are not in compliance with Regulation 603, GEICO cannot use them to deny benefits and therefore GEICO waived any defenses and has breached the policy by not paying allowed claims.

7. The GRR And PMR Are Undisclosed Exclusions In Violation Of Delaware Law

The PMR and GRR amount to secret and undisclosed policy exclusions – they exclude payment, and are pre-determined before a claim is even submitted.

[9] Insureds are obligated to submit to recommended treatment in order to comply with the obligations of PIP insurance. Delaware Insurance Regulation 603 at 13.0 requires that "[a]n injured party shall submit to reasonable treatment recommended by competent physicians. . . ." (B961).

[redacted]

They are known only to GEICO, and arbitrarily deny claims. Well settled law in Delaware places the burden on an insurer who asserts an exclusion to coverage and exclusions are interpreted narrowly. *See, e.g., Scottsdale Ins. Co. v. Lankford*, 2007 WL 4150212 at * 4 (Del. Super. 2007). This burden exists, even when the insurance company sandwiches the exclusion within the coverage provisions of the policy. *See Hoechst Celanese Corp. v. Nat'l Fire Union Ins. Co.*, 1994 WL 721786 (Del. Super. 1994) ("For public policy reasons, the insurer should not be relieved of their burden of proof as to an exclusion simply because they have the tactical advantage of being able to place the exclusion within a coverage provision"); *see also Dairyland Ins. Co. v. Ward*, 517 P.2d 966, 969 (Wash. 1974) (analyzing language as an exclusion even though "the subject clause is sandwiched into the general coverage provisions of the respondent's insurance contract").

In this case, the exclusion is worse than the cited cases where an exclusion might be "sandwiched into the general coverage provisions" – GEICO does not disclose the exclusions at all, and keeps them secret, even though they are the actual basis for the claim denial.

In this case, the GRR and PMR are invalid, secret exclusions and any denials based on them must be paid.

[redacted]

For the reasons set forth above, Plaintiffs proved that GEICO has breached its contractual obligations to insureds, and this Court should reverse the Superior Court's denial of Plaintiffs' motion for summary judgment and reverse the grant of summary judgment to GEICO on breach of contract.

V. THE SUPERIOR COURT ERRED IN DENYING SUMMARY JUDGMENT TO PLAINTIFFS AND GRANTING SUMMARY JUDGMENT TO DEFENDANT ON THE CLAIM FOR BAD FAITH BREACH OF CONTRACT

a. Question Presented

Did the Superior Court err by denying summary judgment to Plaintiffs and granting summary judgment to Defendant on the claim for bad faith breach of contract? (A1193-99, A1565-66, B721-39).

b. Scope of Review

The Court reviews *de novo* both the granting and denial of summary judgment. *Bagwell v. Prince*, 1996 WL 470723, at *2 (Del. Aug. 9, 1996) ("The standard and scope of review by this Court of a decision granting motion to dismiss or denying a motion for summary judgment is *de novo.*"). *Asbestos Workers Local Union No. 42 Welfare Fund v. Brewster*, 940 A.2d 935, 940 (Del. 2007).

c. Merits of Argument

In Delaware, when an insurer denies reimbursement and payment of claims and breaches duties under its contract with insureds, that breach may trigger bad faith claims. *Tackett v. State Farm Fire & Casualty Ins. Co.*, 653 A.2d 254, 264 (Del. 1995). "Under Delaware law, a bad faith insurance claim 'sounds in contract and arises from the implied covenant of good faith and fair dealing.'" *Coleman Dupont Homsey v. Vigilant Ins. Co.*, 496 F.Supp.2d 433, 437 (D. Del. 2007).

> Where an insurer fails to investigate or process a claim or delays payment in bad faith, it is in breach of the implied obligations of good faith and fair dealing underlying all contractual obligations.... A lack of good faith, or the presence of bad faith, is actionable where the insured can show that the insurer's denial of benefits was "clearly without any, reasonable justification.

Dunlap v. State Farm Fire & Cas. Co., 878 A.2d 434, 440 (Del. 2005). An insurer engages in bad faith denial of claimed PIP benefits when an insured can prove "that the insurer's refusal to honor [the claim] was clearly without any reasonable justification." *Albanese v. Allstate Ins. Co.,* 1998 WL 437370, at *2 (Del. Super. 1998) (citing *Casson v. Nationwide Ins. Co.*, 455 A.2d 361, 369 (Del. Super. 1982)). That is the case here – with the PMR, GEICO knows it is excluding valid claims and with the GRR, it knows there are relevant factors that it is ignoring in setting a cap or fee schedule.

If there is a "general business practice of claims denial without a reasonable basis, [such conduct] may subject the insurer to a bad faith claim." *Fay v. Unum Life Ins. Co.*, 1999 WL 1611318, at *2 (Del. Super. 1999). Further, the defendant may, in addition, be held liable for punitive damages if the conduct is willful or malicious, with malice being demonstrated through "a reckless indifference to the plight of the insured." *Id.* (emphasis added).

Use of the PMR and GRR are GEICO's general business practice. GEICO's use of the rules is willful, and driven solely by a desire to reduce the amount of

[redacted]

money GEICO pays in claims. There was no good faith basis – under insurance law – for their adoption, and no good faith basis – under insurance law – for their continued implementation. (A1225-26, A1282-84, B155-56). GEICO imposed them for its own benefit, [redacted] (A1300-01, A1217). This decision, in turn, maximizes GEICO's profits.

There are numerous factors GEICO admits it would need to investigate before declaring a charge unreasonable, [redacted] (A1294). [redacted]. (B105, B107, B111-12). *See also Ponzo v. Nationwide Mut. Ins. Co.*, 2013 WL 3965396, at *3 (Del. Com. Pl. 2013) (where the Court found the insurer acted in bad faith when it refused to investigate a claim when it was on notice of potential issues).

In *Lundberg v. State Farm Mut. Ins. Co.*, 1994 WL 1547774 (Del. Com. Pl. 1994), the Court considered whether an insurance company could deny a claim as unnecessary merely by relying on medical journal articles. The Court concluded it could not:

> [S]urely, the legislature did not envision nor intend[] to create a statutory scheme where a trained medical doctor would prescribe

[redacted]

> a medical procedure and the insurer through its adjuster, with no medical training or background would be able to deny coverage payment merely by reading a series of articles in medical publications and reviewing the file. If such a procedure was envisioned or created, it would subject the medical decision of a physician to open questions without a reasonable standard.

Id. at *2. In the case at bar, the situation is worse than in *Lundberg*. [redacted]. (A1225-26, A1282-84, B97). In hindsight, GEICO cites treatises as purported justification for its use of the PMR (it has never provided justification for the GRR); however, even a cursory reading of those treatises does not support GEICO's use of the PMR at all – in fact, they warn that passive modalities may be necessary after eight weeks and that there can be no "cookbook" method for determining what treatment is appropriate. (B173-75). And GEICO knows from its own medical experts that [redacted]. (B212, 215-18).

GEICO does not disclose to its insureds the actual reason for the denial, and provides conflicting information to insureds and medical providers on their right to protest the denials.[10] *See Cooper v. Berkshire Life Ins. Co.*, 810 A.2d 1045, 1070-

[10] [redacted].

[redacted]

71 (Md. App. 2002) (The insureds' "cause of action against [the insurer] Berkshire [for negligent misrepresentation] rests not only on a general duty of care, but on the narrower duty to convey accurate information to a person with whom one enters a business transaction.").

In *Egan v. Mutual of Omaha Ins. Co.*, 620 P.2d 141 (Cal. 1979), the Court held that "an insurer cannot reasonably and in good faith deny payments to its insured without thoroughly investigating the foundation for its denial." *Id.* at 146. Making GEICO's bad faith conduct even worse is that it is willful and institutional. GEICO's bad faith is not a lone, rogue employee acting contrary to the law. On the contrary, GEICO's conduct is company policy, adopted by management, universally imposed, its secrecy guarded, implemented to eliminate human discretion, and designed solely to financially reward GEICO, at the expense of and to the detriment of claimants. *See Willow Inn, Inc. v. Public Service Mut. Ins. Co.*, 399 F.3d 224, 232 (3d Cir. 2005) ("[r]epeated conduct is more reprehensible than in individual instance of malfeasance" in affirming punitive damages award). Defendants' management stresses [redacted]. (B341). [redacted]

[redacted]

[redacted] These are not hypothetical discussions; they are actual, continuing practice. [redacted] (B230-31).

When challenged in Court, as here, GEICO seeks to impose a duty on the claimants to prove the merits of their claims, even though GEICO has already accepted the claims as valid, but for the imposition of the rules. This practice forces claimants into expensive, protracted litigation, where the claim amounts are relatively small. GEICO can afford to have this fight, as it has the incentive to keep its "cost containment" system in place. For claimants, on the other hand, the expense of prosecuting their individual claims typically far outweighs the amount they will ever recover.

This Court should reverse the Superior Court's denial of Plaintiffs' motion for summary judgment and reverse the grant of summary judgment to GEICO on bad faith breach of contract.

[redacted]

VI. THE SUPERIOR COURT ERRED IN DECLINING TO AWARD DAMAGES TO PLAINTIFFS AND THE CLASSES AND FURTHER ERRED IN DENYING PLAINTIFFS' MOTION FOR RELIEF RELATED TO DECLARATORY JUDGMENT

a. Question Presented

The Superior Court erred as a matter of law in not proceeding with a determination of damages, penalties, costs and fees and other relief following the granting of partial summary judgment that GEICO violated 21 *Del. C.* §§ 2118 & 2118B. Furthermore, the court erred by not allowing further relief pursuant to 10 *Del. C.* § 6508. (B775-80, B940-49, B951-53).

b. Scope of Review

Questions of law are reviewed *de novo*. *Gala v. Bullock*, 250 A.3d 52, 64 (Del. 2021); *State of Delaware Dep't of Nat. Res. & Envtl. Control v. McGinnis Auto & Mobile Home Salvage, LLC,* 225 A.3d 1251, 1254 (Del. 2020), *reh'g and reargument denied* (Del. 2020).

The Court reviews discretionary rulings for abuse of discretion. *Saunders v. State*, 716 A.2d 974 (Del. 1998). "An abuse of discretion occurs when the trial judge 'exceed[s] the bounds of reason in view of the circumstances and has so ignored recognized rules of law or practice so as to produce injustice.'" *State v. Wright*, 131 A.3d 310, 320 (Del. 2016).

c. Merits of Argument

1. Damages And Penalties Were Pleaded And Are Mandatory

In its decision on declaratory judgment, the trial court stated "that GEICO's practice (*i.e.*, the use of the Rules) violates Section 2118B(c) and 2118(a)(2)." (SJ Op. at 39). Relief in the form of the penalties under 21 *Del. C.* § 2118B(c) was clearly contemplated in the FAC. (A129). The prayer for relief in the FAC seeks a declaration that the Rules violate 21 *Del. C.* § 2118, an award of damages to the Plaintiffs and similarly situated persons who suffered damages as a result of GEICO's application of the Rules, an award of penalties consistent with 21 *Del. C.* § 2118B(c), and any other relief the Court finds appropriate. *Hughes Tool Co. v. Fawcett Pubs., Inc.*, 315 A.2d 577, 579 (Del. 1974) ("[While] prayers are not controlling, they are nevertheless a part of the complaint and may be considered in determining what a plaintiff really seeks.")

Furthermore, the Delaware General Assembly states that the very purpose of the PIP statute is as follows:

> The purpose of this section is to ensure reasonably prompt processing and payment of sums owed by insurers to their policyholders and other persons covered by their policies pursuant to § 2118 of this title, and to prevent the financial hardship and damage to personal credit ratings that can result from the unjustifiable delays of such payments.

21 *Del. C.* § 2118B(c). Denying the Plaintiffs and the class the award of benefits and the statutory penalties under the PIP statute after finding GEICO violated its obligations flies in the face of the intent of the statute.

In granting class certification and having the case proceed with a liability determination, the Superior Court expressly recognized that a decision on liability – if favorable to Plaintiffs – would lead to a damages assessment:

> A favorable ruling will provide a remedy to Ms. Green because the ruling will either (i) require Geico to assess Ms. Green's claim without using the Rules, which may lead to Ms. Green receiving a payment or (ii) require Geico to pay the entire amount of Ms. Green's initial claim.

(Op. Br. Ex. B at 12). The implementing order on class certification affirmed that a damages phase was contemplated following a favorable liability determination:

> The case shall be treated as a Rule 23(b)(2) class action for the purpose of determining liability and a declaratory judgment. . . . To the extent damages or punitive damages are ordered as a remedy under any determination made under Rule 23(b)(2) as to the certified claims, the Court will revisit whether the case should be subsequently treated as a Rule 23(b)(3) class action for the purposes of notice and opt out rights of individual class members.

(Op. Br. Ex. C at ¶9).

GEICO has admitted that it has an obligation to pay statutory damages after a finding that it had no valid defense to the claim:

> The Court: . . . . Under the statute, I submit it. If it's a supported claim, you have 30 days to investigate it, correct?
>
> Counsel for GEICO: Yes.
>
> The Court: If you do not do it in 30 days, what happens?
>
> Counsel for GEICO: Well, then we'd have to pay statutory interest.
>
> The Court: No, you have to pay the amount – you lose the defense to –
>
> Counsel for GEICO: Right. We lose the defense, and then you have to pay –
>
> . . . .
>
> The Court: … The statute – for instance, if I'm a claimant, and I send in a supporting claim, and let's say only 1% of it's reasonable and necessary, and you don't respond to it at all, guess what. You owe the whole amount.
>
> Counsel for GEICO: Correct.
>
> The Court: Right? At that point, it ends, right? In 30 days you're supposed to have done some type of analysis.
>
> Counsel for GEICO: You're supposed to pay what you owe or the interest on top of that –

(B684-85, B761).

2. If Not Mandatory, Damages Are Necessary In The Interest Of Justice

In any declaratory judgment action, further relief may be granted when necessary or proper. *See* 10 *Del. C.* § 6508 ("Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application

therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith."

In *Sullivan v. Local Union 1726 of AFSCME, AFL-CIO*, 464 A.2d 899, 903 (Del. 1983), this Court stated:

> While it is clear that the primary question before the Court was one for declaratory judgment, the Union's pleadings may reasonably be construed to assert a claim for damages as well. In a declaratory judgment proceeding, an appropriate remedy clearly includes an award of damages. 10 *Del. C.* § 6508. *Clemente v. Greyhound Corporation,* Del.Super., 155 A.2d 316 (1959). Thus, the Union having prevailed on the declaratory judgment issue, the case should now be remanded to Superior Court for a determination of the proper measure and amount of damages.

In *Catlin Specialty Ins. Co. v. CBL & Assocs. Props., Inc.*, 2018 WL 3805868, at *2 (Del. Super. 2018), the Plaintiff moved for monetary relief pursuant to 10 *Del. C.* § 6508 and the Court reasoned as follows:

> Catlin moves for this reimbursement via § 6508 of Delaware's Declaratory Judgments Act (the "DJA"), under which "[f]urther relief based on a declaratory judgment or decree may be granted whenever necessary or proper." Section 6508 – our DJA's supplemental relief provision – is "used to grant additional relief after a declaratory judgment or decree has been rendered." It was adopted here in 1981 from the Uniform Declaratory Judgment Act. Sister state courts interpreting identical provisions adopted under the same uniform Act have found that supplemental relief

[redacted]

> granted thereunder "should be designed to provide complete relief to the parties, which may include a monetary judgment or coercive relief or both"; and, "[i]n fashioning the remedy, the court is not bound by the relief requested in the complaint but may order any relief needed to effectuate the judgment."

In *Clemente v. Greyhound Corp.*, 155 A.2d 316, 323 (Del. Super. 1959), the Court found that this provision was included in the statute in order to allow for damages from past breach or other relief that is necessary to settle the entire controversy:

> There would be no reason for the Legislature to have included this section unless it had contemplated the possibility that damages for past breach or otherwise might be obtained when it was required for the purpose of settling the entire controversy between the parties. In 6 Moore's Federal Practice, Par. 57.10, pp. 3047, 3048, it is said: "Hence, a prayer for coercive relief may properly be combined with a prayer for a declaratory judgment; and the judgment on the merits may likewise combine both remedies, and couple, with a declaratory judgment, injunctive relief, an order for an accounting, a money judgment, or any other appropriate relief. Thus the alternative and cumulative nature of the remedy permits a complete adjudication of the controversy."

Here, the Superior Court has ruled that GEICO violated the provisions of 21 *Del. C.* § 2118 and 2118B. Under the provisions of 21 *Del. C.* § 2118B(c) – which the Court declared GEICO violated – the award of penalties for a violation is **mandatory**:

[redacted]

> If an insurer fails to comply with the provisions of this subsection, then the amount of unpaid benefits due from the insurer to the claimant **shall be increased** at the monthly rate of:
>
> (1) One and one-half percent from the thirty-first day through the sixtieth day; and
>
> (2) Two percent from the sixty-first day through the one hundred and twentieth day; and
>
> (3) Two and one-half percent after the one hundred and twenty-first day.

21 *Del. C.* § 2118B(c).

Allowing GEICO to keep the money it wrongfully denied in benefits would be manifestly unjust. To suggest, alternatively, that individual class members would sue for the amounts owed is unrealistic and would lead to millions of dollars wrongly being retained by GEICO.[11] This Court should remand the case in order to prevent that injustice and direct the Superior Court to make an award of damages.

[11] A class action allows for recovery where the individual claims are too small to provide adequate incentive to bring claims (while ensuring the defendant is not allowed to keep a windfall). *See In re Prudential Ins. Co.*, 148 F.3d 283, 316 (3d Cir. 1998); *Lake v. First Nationwide Bank*, 156 F.R.D. 615, 626 (E.D. Pa. 1994); *Bulmash v. The Travelers Indem. Co.*, 257 F.R.D. 84, 91 (D. Md. 2009)

CONCLUSION

For the reasons set forth above, this Court should (1) reverse the Superior Court's denial of Plaintiffs' motion for summary judgment and reverse the grant of summary judgment to GEICO on breach of contract, (2) reverse the Superior Court's denial of Plaintiffs' motion for summary judgment and reverse the grant of summary judgment to GEICO on bad faith breach of contract, and (3) remand to the Superior Court and order proceedings to determine damages, penalties, costs and fees, including attorney fees, and such other relief as the Superior Court deems just.

Dated: August 23, 2021

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IN THE SUPREME COURT OF THE STATE OF DELAWARE

GEICO GENERAL INSURANCE COMPANY, *Defendant Below, Appellant/Cross-Appellee,* v. YVONE 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 CCLD
YVONE 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 CCLD

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i)

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2. This brief complies with the type-volume limitations of Rule 14(d)(i) because it contains 13,940 words, which were counted by Microsoft Word 2013.

Dated: August 23, 2021

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CERTIFICATE OF SERVICE

I, Christopher P. Simon, hereby certify that on September 7, 2021, a true and correct copy of the foregoing *Redacted-Public Version of Appellees' Answering Brief on Appeal and Cross-Appellants' Opening Brief on Cross-Appeal* was served upon the following individuals by File & ServeXpress:

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