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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

APPELLEES/CROSS-APPELLANTS' REPLY BRIEF ON CROSS-APPEAL

Dated: October 4, 2021

CROSS & SIMON, LLC

/s/ Michael L. Vild

Richard H. Cross, Jr. (No. 3576)
Christopher P. Simon (No. 3697)
Michael L. Vild (No. 3042)
1105 North Market Street, Suite 901
Wilmington, Delaware 19801
302-777-4200
302-777-4224 (fax)
rcross@crosslaw.com
csimon@crosslaw.com
mvild@crosslaw.com

Attorneys for Appellees/Cross-Appellants

[redacted]

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A. GEICO Again Tries To Reframe Plaintiffs' Case

In its Reply, GEICO once again attempts to mischaracterize Plaintiffs' case as a traditional "PIP case," where a plaintiff must demonstrate that its claim against the insurer was for reasonable and necessary medical services. Def. Reply at 26-27. GEICO argues the only "proper claim" an insured can ever bring against an insurer is one that asserts that the insurer failed to pay reasonable and necessary expenses. *Id.* That, contends GEICO, places a burden on Plaintiffs to prove the reasonableness and necessity of each of tens of thousands of claims that were submitted to GEICO by class members. Meanwhile, GEICO systematically denies tens of thousands of claims, without any consideration of the individualized facts of individualized cases. As it has since this case was filed, GEICO is attempting to reframe Plaintiffs' case in order to avoid judicial scrutiny of its conduct, while urging the Court to ignore Plaintiffs' actual theories of GEICO's contractual obligations and breach. As Plaintiffs noted in their opening brief (and repeatedly through the trial court proceedings), there is a fundamental difference between Plaintiffs' case and the kind of traditional "PIP case" that GEICO wishes were before the Court. Pl. Ans. Br. at 41-42.

[redacted]

Plaintiffs cited two cases in their answering brief that recognize this distinction. *Wilmington Pain & Rehab. Ctr., P.A. v. USAA Gen. Indem. Ins. Co.*, 2017 WL 8788707 (Del. Super. 2017) and *Jameson v. MetLife*, C.A. No. 10-310 (D. Del. July 15, 2011). These cases recognize the difference between a suit that challenges an insurer's decisions regarding medical treatment and causation (*i.e.*, a traditional "PIP case"), and a suit that challenges an insurer's rule-based claims handling practices.

In *Wilmington Pain & Rehab. Ctr.*, the Superior Court distinguished the line of cases that challenge the reasonableness of an insurer's payment from those cases that challenge the underlying system used by an insurer to process claims. The Superior Court refused to certify and proceed with a class action where the challenge was to the reasonableness of the amount paid (a traditional "PIP case"), but it distinguished (and left open) a challenge to the underlying process that plaintiffs alleged was flawed. *Wilmington Pain & Rehab. Ctr.,* 2017 WL 8788707 at *5. Here, Plaintiffs challenged GEICO's underlying use of arbitrary rules that violate its contractual, statutory and common law obligations to actually review claims in a meaningful fashion.

In *Jameson v. MetLife*, C.A. No. 10-310 (D. Del. July 15, 2011), the plaintiff filed two actions against MetLife, one in federal court and one in state court. MetLife sought to dismiss or stay the case pending against it in the federal court in

[redacted]

favor of a traditional "PIP case" pending in the Superior Court alleging that MetLife had failed to pay the reasonable and necessary bills. In the District Court, there was a class action challenging the underlying rules that MetLife employed. The District Court rejected Defendant's attempt to dismiss or stay the challenge to MetLife's claims handling rules:

> [T]he claims in each [case] are different. In the two-page complaint on appeal filed in the Superior Court, Jameson sought recovery of the medical expenses related to his individual automobile accident. In this case, Jameson filed an eighteen-page class action complaint alleging six different counts and seeking various forms of relief. Indeed, this action is "premised on the manner in which the claims are processed" by Metlife, whereas the Superior Court action is "premised on the final decision to reduce or deny payment." For these reasons, the court concludes that the Superior Court action and this action are not parallel.

Id. at fn. 3 (attached as Exhibit B to Plaintiffs' Answering Brief).

It is important to remember that [redacted] There is nothing unique or special about GEICO's rules-based claims denials as they relate to individual claims. GEICO never considers individualized facts in its application of the Rules. GEICO's claims processing is systematic and universally applied to all claimants, regardless of the facts giving rise to claims. GEICO's rule-based claims processing is not premised on analyzing individualized facts. In fact,

[redacted]

GEICO's claims handling Rules were established [redacted]. Yet, GEICO insists that Plaintiffs are required to prove facts that have nothing to do with the conduct that Plaintiffs challenge. That conduct – GEICO's rules-based denials and the legal consequence of those denials – are *the* central issues in Plaintiffs' case. GEICO does not have the privilege nor the right to reframe the Plaintiffs' case in order to avoid judicial scrutiny of its systematic misconduct.

To be clear, GEICO is taking this approach in this litigation because, as the Superior Court correctly found, GEICO cannot defend its arbitrary, rules-based claims denials. So, rather than defend its Rules, GEICO argues that, once it denies claims through application of the Rules, the burden shifts to the insureds to make individual showings of reasonableness and necessity, and that GEICO should then have the opportunity to litigate the merits of individual claims. Plaintiffs' actual theory is that GEICO's breaches are universal and applied systematically solely through application of the Rules that GEICO's own experts acknowledge result in the denial of valid claims.

By way of analogy, suppose an insurer adopted an undisclosed rule that denied every third claim that was submitted to it. By pure chance, some of those claims

[redacted]

may be facially invalid in the first instance.[1] But many others would be valid claims that the insurer denied purely through application of its rule. By GEICO's reasoning, the hypothetical insureds only avenue of relief would be proving the reasonableness and necessity of the denied claims. Under GEICO's theory, the aggrieved insureds in this hypothetical could not challenge the insurer's use of the arbitrary rule to deny claims. Fortunately, the Courts in Delaware have recognized that GEICO's position is untenable – the hypothetical insured can pursue both a claim for payment of its wrongfully denied claim **and** a claim that the insurer has breached its contract and Delaware law by adopting an indefensible processing rule. The case now pending before this Court is the latter.

B. GEICO Incorrectly Argues That Plaintiffs Are Creating A New Policy Obligation.

GEICO next argues that Plaintiffs are attempting to insert a new, unprecedented obligation on GEICO to investigate claims in good faith. Def. Ans. Br. at 28. GEICO argues that it satisfies its duty to "investigate" claims by applying its Rules. GEICO is simply wrong.

First, the Superior Court correctly found that GEICO violates its statutory duty to investigate claims before denying them. But, GEICO's duties derive, not

[1] Of course, under the PIP statute if the insurer fails to raise a valid defense within 30 days, it waives all defenses to the claim.

only from Delaware insurance law, but also from its contract with its policyholders. GEICO knows that it has a contractual and statutory duty to investigate claims in a meaningful way. In fact, just pages earlier in its reply brief, GEICO acknowledges this duty:

> In sum, GEICO cannot (and does not) simply "deny every claim it receives, for any unsupported reason whatsoever." Pls.' Br. at 2. And if an insurer acted that way, Delaware law provides swift consequences.

Def. Reply. Br. at 22.

Despite acknowledging its obligation to undertake a meaningful investigation of submitted claims, GEICO essentially argues that it can deny claims based on any criteria it chooses – whether or not it is consistent with the law – and escape judicial scrutiny for contractual breach. Then, under GEICO's view of Delaware law, the aggrieved claimant's only remedy is to sue GEICO, hire an expert and spend the time and money required to prove the reasonableness and necessity of medical treatment that likely resulted in a relatively small medical bill. Meanwhile, GEICO is reaping the benefits that flow from denying valid claims knowing that few will spend the time and money to challenge the denial. The class action mechanism exists precisely to address this sort of conduct, and to prevent a party like GEICO from engaging in such behavior. *Bulmash v. Travelers Indem. Co.*, 257 F.R.D. 84, 91–92 (D. Md. 2009) ("one of the legitimate purposes of class actions is to provide a

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mechanism for litigation of small claims that no individual plaintiff would have the incentive to bring. If a defendant has committed a substantial violation of the law, it should not be able to retain the benefits of its wrongdoing simply because it took a little bit from a lot of people") (*citing In re Microsoft Corp. Antitrust Litig.,* 214 F.R.D. 371, 378 n. 10 (D. Md.2003).

The parties' fundamental disagreement is whether, under Delaware law, GEICO's contract with its policyholders imposes an obligation on GEICO to conduct a meaningful investigation prior to denying a claim. GEICO argues that it has no contractual obligation to investigate claims, and that it is free to deny claims based upon Rules that it knows are flawed and unreliable. The decisions of this Court and of the trial courts of Delaware say otherwise.

In *Tackett v. State Farm Fire and Cas. Ins. Co.*, 653 A.2d 254 (Del. 1994), this Court held that the failure to conduct a meaningful investigation in the processing of a claim is a breach of contract.

> 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.

Id. at 264 (emphasis added) (*citing Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 101 (Del. 1992). Remarkably, GEICO reads this plain language from *Tackett* to mean the exact opposite of what the words actually say. GEICO reads the quoted

[redacted]

sentence to mean: "a failure to investigate, by itself, is not actionable as breach of contract." Rep. Br. at 29. Simply put, *Tackett*, notwithstanding GEICO's attempts to stretch its language beyond reasonable comprehension, stands for the fairly unremarkable proposition that an insurance contract imposes upon the insurer the obligation to investigate a claim prior to the denial of that claim. *See also Dunlap v. State Farm Fire and Cas. Co.*, 878 A.2d 434, 443 (Del. 2005) (An insurer's contractual obligations include the "obligation to fairly and promptly process and pay its insured's claims.").

Precedent from Delaware's trial courts is, unsurprisingly, consistent with this Court's reasoning in *Tackett* and *Dunlap*. In *Spine Care Delaware, LLC v. State Farm Mut. Auto. Ins. Co.*, 2007 WL 495899 (Del. Super. 2007), the Superior Court held, **in a breach of contract action**, that the insurer has the initial burden adequately to review claims. *Id.* at *2-3. Importantly, the Court also held that inaccurate and unreliable defenses are precluded. In this case, Plaintiffs contend that since the GRR and PMR are inaccurate and unreliable defenses, GEICO is precluded from relying on those defenses. It is no different than had GEICO denied every third claim – GEICO has no defense to paying the claims. GEICO whistles past the *Spine Care* decision (as it has tried to do throughout the litigation) hoping that this Court will too. If *Spine Care* has any meaning, then GEICO has waived its defenses to payment and the only remaining step is for GEICO to pay the claims. Rather than

address *Spine Care* directly, GEICO deflects by pointing to another portion of the *Spine Care* opinion that says an insurer cannot shift its defense later (*see* Def. Reply Br. at p. 29). But, *Spine Care* states:

> The Court holds that State Farm is **precluded** from asserting a coverage defense to claims for facility fees to which it did not respond within the statutory 30-day period set forth in § 2118B(c).
>
> **This principle also applies to inaccurate and unreliable responses.**

Spine Care, 2007 WL 495899, at *2–3 (emphasis added).

Judge Smalls reached a similar conclusion in *Ponzo v. Nationwide Mut. Ins. Co.*, 2013 WL 3965396 (Del. Com. Pl. Jul. 30, 2013). In *Ponzo*, a traditional "PIP case," the insurer conducted a facially deficient investigation and denied the claim. The claimant submitted an additional medical report that demonstrated the flaws in the insurer's investigation, but the insurer continued to deny the claim. The Court, citing *Tackett*, held that the insurer breached its contract in bad faith by failing to conduct a reasonable investigation.

> The Court finds that Nationwide acted in bad faith when it failed to investigate Ponzo's claim after it received [claimant's additional medical report]. . . . [I]n light of the facts and circumstances surrounding the conflicting reports, Nationwide's failure to investigate the validity of Ponzo's claim was clearly without justification.

Id. at *3.

In sum, Delaware law imposes on insurers a contractual obligation to investigate claims in good faith prior to denial. The Superior Court erred when it concluded that GEICO did not have a common law duty to investigate.

Next, GEICO argues that Plaintiffs wrongly try to incorporate the obligations of 18 *Del. C.* § 2304(16) into their contract. Again, GEICO simply ignores the cases that Plaintiffs cited in support of this argument. *See* Pl. Ans. Br. at 48-49 (citing *Davidson v. Travelers Home & Marine Ins. Co.*, 2011 WL 7063521, at *2 (Del. Super. 2011) and *Crowhorn v. Nationwide Mut. Ins. Co.*, 2001 WL 695542, at *7 (Del. Super. 2001) (acknowledging that 18 *Del. C.* § 2304(16) does not create a private cause of action but allowing Plaintiff to reference it for illustrative purposes). The point of Plaintiffs' argument is that GEICO cannot interpret its contractual obligation to investigate and process claims in a way that is contrary to Delaware law. Pl. Ans. Br. at 48-49.

C. GEICO Wrongly Argues That Its Rules Are Not Undisclosed Exclusions

GEICO argues that Plaintiffs asserted "without authority" that the Rules amount to undisclosed exclusions. However, GEICO does not address any of the three cases that Plaintiffs cited in support of this argument. Pl. Ans. Br. at 52 (citing *Scottsdale Ins. Co. v. Lankford*, 2007 WL 4150212 at * 4 (Del. Super. 2007), *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co.*, 1994 WL 721786 (Del. Super.

1994) and *Dairyland Ins. Co. v. Ward*, 517 P.2d 966, 969 (Wash. 1974)). Plaintiffs stand by their position that GEICO is denying claims based on predetermined criteria that never look at individual circumstances. Pl. Ans. Br. at 51-52. The Superior Court agreed with Plaintiffs on this point:

> The Rules constitute, in essence and in application, a "limitation to coverage" in the GEICO Policies – the Rules basically make determinations before a claim is even submitted – known only to GEICO. The Rules exclude benefits without any investigation of the actual claim and ignore relevant factors of a valid claim. Well-settled law in Delaware places the burden on an insurer who asserts an exclusion to coverage and exclusions are interpreted narrowly.

SJ Op. at 38 (citing *Scottsdale*, *Hoechst*, and *Dairyland* at 38 fn. 147, 148).

Because GEICO's contract cannot, by law, conflict with the Delaware insurance law, and because the GRR and PMR are undisclosed exclusions, use of the Rules is breach of GEICO's contract with the Plaintiffs.

[redacted]

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

GEICO first argues that there can be no bad faith breach of contract without a finding of a breach. While that statement is true, as discussed above and in the Plaintiffs' opening brief, the Superior Court erred in concluding that GEICO's use of the Rules did not constitute a breach of contract. Because GEICO breached its contract by denying valid claims through the use of the Rules, this Court should address Plaintiffs' assertions of bad faith.

GEICO next argues that Plaintiffs' bad faith claim fails because, GEICO contends, there is evidence that there was some reasonable justification for the Rules. GEICO is simply wrong. Plaintiffs presented overwhelming evidence to the Superior Court, and the Court found overwhelming evidence of bad faith, and a lack of any justification for the Rules.

Once again, GEICO seeks to reframe Plaintiffs' case as a fight over medical treatment – *i.e.*, a traditional "PIP case" – contending that Plaintiffs can only prove a breach by proving the medical claims of every class member are reasonable and necessary. However, as discussed above, GEICO's breach occurs when it fails to investigate and review claims in any meaningful way and instead denies claims based on the Rules, which do not actually determine "reasonableness" or

"necessity." Again, if those Rules are inaccurate and unreliable then the defenses asserted by GEICO are precluded and GEICO has breached by not paying otherwise undisputed claims within 30 days.

GEICO's makes only two substantive arguments relating to Plaintiffs' bad faith claims. First, GEICO contends that the *Lundberg* case is distinguishable.[2] Def. Reply Br. at 41. Second, GEICO contends that it consulted with various physicians and physical therapists throughout the time the PMR has been in use to justify its use. Def. Reply Br. at 41. Both of these arguments are made in the context of GEICO's attempt to justify its use of the PMR. Neither argument relates to the GRR. And neither argument is persuasive.

A. Lundberg Is On Point And GEICO's Conduct Is Worse

The decision in *Lundberg* holds that the denial of claims cannot be based on the citation to medical journal articles without more. *Lundberg v. State Farm Mut. Ins. Co.*, 1994 WL 1547774 at *2 (Del. Com. Pl. 1994). First, GEICO's passive modality rule was not implemented because scientific journal articles justified it. The PMR was implemented [redacted]. There was no medical justification, and GEICO did not do

[2] GEICO attempts to take the Plaintiffs to task for criticizing GEICO's attempts to ignore *Lundberg*. *See* GEICO Ans. Br. at 40 n.16. While it is true that GEICO buried a reference to *Lundberg* in a footnote in its Opening Brief, reference to the case is strangely omitted from GEICO's Table of Cases in the brief.

[redacted]

anything at the time it implemented the rule to determine if it was justified. Pl. Ans. Br. at 57. Only after the fact, did GEICO begin citing to journal articles in an effort to make insureds and providers think there was actually a good faith reason for the claim denials; however, GEICO has never submitted a journal article in the record that supports the rule. The only two authorities that were cited and introduced into evidence in this case support **Plaintiffs' arguments not GEICO's**. In Plaintiffs' Answering Brief, Plaintiffs demonstrate this point thoroughly. Pl. Ans. Br. at 18-19. A bald allegation by GEICO that there are supportive articles or authorities is not evidence. After years of litigation, GEICO has not submitted one article that actually supports its use of the rule.

GEICO's arguments concerning *Lundberg* should be rejected.

B. GEICO's Physicians And Physical Therapists All Support Plaintiffs

GEICO contends that the opinions of numerous physicians and physical therapists support its Rules; however, the only two medical experts that GEICO identified in this case – Rhea Cohn, PT DPT and Stephen M. Levine, PT, DPT, MHSA – actually gave testimony that supported Plaintiffs' case, not GEICO's. Dr. Cohn testified [redacted]

[redacted]

[redacted] Pl. Ans. Br. at 20, 38. [redacted]

[redacted]. Pl. Ans. Br. at 11, 37. GEICO cannot make a bald assertion that there is medical justification in the record to avoid summary judgment. Indeed, beyond the experts just cited (that support Plaintiffs), Plaintiffs identified significant additional evidence that GEICO knew its Rules were denying valid claims. *See* Pl. Ans. Br. at 12-13 (citing A1298), 15-16 (citing A1290, A1292, A1294, A1296, B32-33, B38-39, B102), 38 (citing B180). Once GEICO knows that its Rules result in the denial of valid claims, GEICO does not escape liability by finding one hired gun (though it did not even do that in this case) to then justify a mountain of evidence to the contrary.

GEICO's argument that there is justification for the Rules simply does not exist. GEICO's argument should be rejected.

[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. Plaintiffs Sought Damages Pursuant To 21 Del. C. § 2118B(c)

GEICO wrongly contends that Plaintiffs never sought damages on their declaratory judgment count and then conflates that argument with the claim that Plaintiffs never sought damages pursuant to 21 *Del. C.* § 2118B(c). Both arguments are incorrect. Plaintiffs clearly sought damages pursuant to 21 *Del. C.* § 2118B(c) in the prayer for relief.

Certainly, Plaintiffs did not envision a scenario in which the Superior Court would declare that GEICO's Rules violated Delaware law and then determine that there was nonetheless no breach of contract. Even less foreseeable was a scenario in which the Superior Court ruled that GEICO's use of the Rules violates Delaware law, but yet the Plaintiffs are not entitled to a remedy for that violation. Damages from § 2118B(c) should necessarily flow from the statutory violation that is inherent in the Court's declaratory judgment.

As Plaintiffs set forth in the answering brief, a violation of § 2118B(c) mandates payment to the wronged party. Thus, when the Court determined that GEICO had violated the statute but did not breach the contract, Plaintiffs timely moved pursuant to 10 *Del. C.* § 6508 for further relief. Given that a finding of a

[redacted]

violation of the statute makes an award mandatory, 10 *Del. C.* § 6508 is the proper mechanism to ensure that GEICO does not now get to retain the spoils of years of unlawful claims denials.

GEICO argues that an award under these circumstances raises numerous issues. GEICO again ignores the natural consequences that should flow from its illegal conduct as spelled out in *Spine Care Delaware, LLC v. State Farm Mut. Auto. Ins. Co.*, 2007 WL 495899 at *2-3 (Del. Super. 2007), *i.e.,* all defenses are precluded. Under the statute, GEICO cannot raise new defenses after the 30-day window has closed. GEICO needs merely to identify the amounts that were denied from each claim from GEICO's use of the GRR and PMR and pay those amounts, a task that a sophisticated insurance company can easily accomplish. The prophetic warnings of issues related to calculating the amount owed by GEICO are a last-ditch effort to avoid liability for its wrongful conduct. Regardless, if there are difficulties in getting the claims paid, the last party that should benefit from those difficulties and be entitled to keep this money is the wrongdoer: GEICO.

GEICO's argument that individuals can file separate lawsuits for these small amounts goes against the very purpose of class actions. *See Bulmash v. Travelers Indem. Co.*, 257 F.R.D. 84, 91–92 (D. Md. 2009).

[redacted]

B. Plaintiffs Are Not Judicially Estopped From Seeking Damages For GEICO's Breach

GEICO argues that Plaintiffs are estopped from seeking damages because, at class certification, Plaintiffs supposedly conceded that no damages were sought under Count III. (Ans. Br. at 45). That is incorrect. Following the reasoning in *A&M Gerber Chiropractic LLC v. GEICO Gen. Ins. Co.,* 321 F.R.D. 688, 700 (S.D. Fla. 2017), the Superior Court certified the declaratory judgment claim under Rule 23(b)(2).

> Plaintiffs in this case seek a declaratory judgment that the Rules are unlawful. The requisite cohesiveness exists here because a determination on Geico's use of the Rules does not require an individualized analysis of each underlying claim and declaratory relief would cover any subsequent policies with substantially similar language.

(Class Cert. Op. at 21-22). The Court did not rely on a supposed waiver of monetary damages in making a finding under Rule 23(b)(2), and nowhere in the Superior Court opinion is there a finding of waiver. The Superior Court acknowledged that Plaintiffs sought monetary damages in its opinion on class certification: "Plaintiffs contend they are owed the amount that Geico has withheld under the GRR and PMR as damages because Geico violated Section 2118B and the terms of the policies." (Class Cert. Op. 22).

Further, Plaintiffs argued that certification under Rule 23(b)(2) is appropriate "even when money damages are also sought." (Pl. Class Cert. Op. Br. at 27).

[redacted]

Plaintiffs cited, among other cases, *Markocki v. Old Republic Nat'l Title Ins. Co.*, 254 F.R.D. 242 (E.D. Pa. 2008), where the plaintiff sought not only monetary damages, but also injunctive relief. The Court in *Markocki* found certification appropriate under 23(b)(2), stating:

> Plaintiff does not exclusively seek monetary damages, and further claims that injunctive relief is at least equally as important as monetary relief. Plaintiff alleges that Defendant engaged in a scheme to cheat and deceive borrowers that resulted in higher title insurance premiums, and seeks an injunction against such action in the future. Any remedy provided to the class could certainly include both money damages and enjoining the conduct in question. As a result, class certification under Rule 23(b)(2) is also appropriate.

Id. (Pl. Class Cert. Op. Br. at 28).

Additionally, Plaintiffs sought and received class certification for two classes, the Insured Class and the Claimant Class. In their reply brief on class certification, Plaintiffs stated that the fact that the Claimant Class sought money damages did not mean the case could not also be certified under Rule 23(b)(2). (Pl. Class Cert. Reply Br. at 36).

Importantly, to this day, with the exception of a handful of documents showing [redacted] GEICO has refused to disclose to Plaintiffs how much money it has withheld from the Classes by denying claims. The reason Plaintiffs did not present evidence of class-wide damages at certification is because, as the Court noted, GEICO refused to provide that information in discovery

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at that stage of the proceedings. (Class Cert. Op. at 23). The Plaintiffs always contemplated damages discovery after a finding of liability.

GEICO's reliance on *Wal-Mart Stores, Inc. v. Dukes* is misplaced. The Supreme Court in *Dukes* did not reach the issue of whether Rule 23(b)(2) of the Federal Rules permitted an award of monetary relief in a case where the plaintiffs were attempting to certify a nationwide class action alleging disparate, subjective and discretionary treatment by local managers of local Wal-Mart Stores. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011). The Supreme Court stated that, "[t]he key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted – the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" *Id*. Again, the Superior Court could determine that the GRR and the PMR were unlawful as to all class members. Once the Superior Court made that determination, nothing prevented the Court from undertaking a determination whether Rule 23(b)(3) permitted an award of monetary damages under § 2118B.

In *Dukes*, the Supreme Court cited *Allison v. Citgo Petroleum Corp.,* 151 F.3d 402, 415 (5th Cir. 1998), a Court of Appeals case that held that a (b)(2) class would permit the certification of monetary relief for "incidental damages." Such "incidental damages should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new and substantial legal

[redacted]

or factual issues, nor entail complex individualized determinations." *Dukes*, 564 U.S. at 365–66. There is nothing complex, nor are there disparate merits of each individual case in a damage calculation under § 2118B. The Delaware PIP Statute is straightforward:

> When an insurer receives a written request for payment of a claim for benefits pursuant to § 2118(a)(2) of this title, the insurer shall promptly process the claim and shall, no later than 30 days following the insurer's receipt of said written request for first-party insurance benefits and documentation that the treatment or expense is compensable pursuant to § 2118(a) of this title, 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. **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 (emphasis added). GEICO's computers track all the claims that GEICO receives and denies, the dates of those submissions and denials, and the amounts of those denials. A calculation of damages under § 2118B does not entail "complex individualized determinations," but rather is easily calculated based on data readily available to GEICO.

[redacted]

The Superior Court found that "Plaintiffs contend they are owed the amount that Geico has withheld under the GRR and PMR as damages because Geico **violated Section 2118B and the terms of the policies**." (Class Cert. Op. 22) (emphasis added). Again, Plaintiffs did not waive a claim for damages, GEICO never produced the information in discovery and the Court proceeding with a determination of liability. *Id*. at 23. However, the Court recognized that damages under § 2118 were a component of Plaintiffs' claims. The Court certified Plaintiffs' class for the *limited purpose* of determining whether GEICO's use of the GRR and PMR was a breach of contract, bad faith breach of contract, and to rule on declaratory judgment. (Class Cert. Op. 24). In fact, the Superior Court indicated in the Order Granting Class Certification that it was certifying the classes for the purpose of determining liability and that the Court would revisit whether to treat the classes under Rule 23(b)(3) after it made its 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 and no notice to the class shall be required and no opt out by class members will be available. To the extent any 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.

[redacted]

See Class Certification Order ¶ 9. In other words, once the Court ruled on declaratory judgment, the case was not over. GEICO should have been compelled to provide data of class-wide damages. Plaintiffs had a right to obtain that information, and apply for an award of statutory damages, as set forth in their FAC.

CONCLUSION

For these reasons and for the reasons set forth in Plaintiffs' Answering Brief, the Court should (1) reverse the Superior Court's denial of Plaintiffs' motion for partial 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 partial 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: October 4, 2021

CROSS & SIMON, LLC

/s/ Michael L. Vild
Richard H. Cross, Jr. (No. 3576)
Christopher P. Simon (No. 3697)
Michael L. Vild (No. 3042)
1105 North Market Street, Suite 901
Wilmington, Delaware 19801
302-777-4200
302-777-4224 (fax)
rcross@crosslaw.com
csimon@crosslaw.com
mvild@crosslaw.com

Attorneys for Appellees/Cross-Appellants

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

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Dated: October 4, 2021

CROSS & SIMON, LLC

/s/ Michael L. Vild
Richard H. Cross, Jr. (No. 3576)
Christopher P. Simon (No. 3697)
Michael L. Vild (No. 3042)
1105 North Market Street, Suite 901
Wilmington, Delaware 19801
302-777-4200
302-777-4224 (fax)
rcross@crosslaw.com
csimon@crosslaw.com
mvild@crosslaw.com

Attorneys for Appellees/Cross-Appellants

CERTIFICATE OF SERVICE

I, Christopher P. Simon, hereby certify that on October 11, 2021, a true and correct copy of the foregoing *Redacted-Public Version of Appellees/Cross-Appellants' Reply Brief on Cross Appeal* was served upon the following individuals by File & ServeXpress:

Paul A. Bradley, Esq.
MARON MARVEL BRADLEY
ANDERSON & TARDY LLC
1201 North Market Street, Suite 900
Wilmington, DE 19899-0288

/s/ Christopher P. Simon
Christopher P. Simon (No. 3697)