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# IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| **ACE AMERICAN INSURANCE COMPANY,** | : | |
| Defendant-Below/ Appellant/Cross-Appellee, | : | **REDACTED PUBLIC VERSION** **Filed: December 7, 2022** |
| v. | : | No. 360, 2022 |
| **GUARANTEED RATE, INC.,** | : | APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE, |
| Plaintiff-Below/ Appellee/Cross-Appellant. | : | C.A. No. N20C-04-268 MMJ CCLD |

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## NATURE OF THE PROCEEDINGS

Plaintiff-Below/Appellee/Cross-Appellant Guaranteed Rate, Inc. ("GRI") seeks entity coverage under a directors and officers liability policy (the "D&O Policy") for an investigation by the Federal Government of GRI under the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.* (the "Investigation"). The D&O Policy, issued by Defendant-Below/Appellant/Cross-Appellee ACE American Insurance Company ("ACE"), includes a Professional Services Exclusion ("PSE"), which bars coverage for Claims "alleging, based upon, arising out of, or attributable to any Insured's rendering or failure to render professional services[.]"

In the Civil Investigative Demand ("CID") that started the Investigation, [redacted] Similarly, in the Settlement Agreement that ended the Investigation, GRI and the Government stipulated that [redacted] The Investigation arose out of GRI's professional services in [redacted] so ACE denied coverage pursuant to the PSE.

There is no dispute that underwriting and originating loans are among the professional services that GRI provides to its clients. Nor has there been any finding or argument that the language of the PSE is ambiguous. On the contrary, Delaware courts hold that the broad language used in the PSE is unambiguous.

Yet the trial court ruled, both on the pleadings and on summary judgment, that the PSE does not apply. On the Parties' cross-motions for judgment on the pleadings, in an Opinion dated August 18, 2021 (Ex. A, cited as "JOP Op."), the trial court determined that the Investigation was about [REDACTED] It also held that quality-control compliance "is not a Professional Service provided directly to borrower clients, such that coverage would be excluded by the" PSE. These determinations [REDACTED] No such restriction appears in the PSE. In fact, such a restriction was removed by a negotiated amendment to the Policy.

Notwithstanding the trial court's ruling on the pleadings, discovery subsequently revealed that GRI and the Government negotiated their [REDACTED] settlement by conducting a [REDACTED]



[REDACTED]

On summary judgment, however, in an Opinion dated August 14, 2022 (Ex. B, cited as "SJ Op."), the trial court held that its ruling on the pleadings was "law of the case" as to the PSE. As a result, it declined to consider evidence of the "actual facts" upon which the Settlement was based.

## SUMMARY OF THE ARGUMENT

I. ACE established on the pleadings that the Investigation was one [redacted] within the plain meaning of the PSE. GRI has conceded, as it must, that "loan underwriting and originating" are among the "professional services" it provides to clients. As a result, under Delaware law, the PSE unambiguously bars coverage as long as "there is some meaningful linkage" between the Investigation and GRI's loan underwriting and origination services. Clearly there is. The CID alleged that the Investigation concerned [redacted]

[redacted] The Government's FCA Claim would not exist "but for" GRI's underwriting and origination errors, so the PSE bars coverage.

II. The trial court's contrary ruling indicates that it misunderstood the scope of the Investigation, and attempted to rewrite the PSE. The trial court [redacted]

The trial court also held that "professional services" do not trigger the PSE unless they are "provided directly to borrower clients." But neither the PSE nor the case law construing "professional services" imposes any such restriction. In any event, GRI concedes that its underwriting and originating services are among the professional services provided "to the customer."

III. The trial court suggested, citing *Gallup, Inc. v. Greenwich Ins. Co.*, 2015 WL 1201518 (Del. Super. Ct. Feb. 25, 2015), that ACE's position as to the PSE could "vitiate" coverage under the Policy. But the distinct facts and policy language at issue in *Gallup* show otherwise. Further, the trial court disregarded

IV. The trial court determined that ACE's application of the PSE "directly contradicts" the position ACE took in *Iberiabank Corp. v. Illinois Union Insurance Co.*, 2019 WL 585288 (E.D. La. Feb. 13, 2019), *aff'd*, 953 F.3d 339 (5th Cir. 2020), regarding coverage for an FCA claim under a bankers professional liability policy. Yet *Iberiabank* has no conceivable relevance here. The trial court did not hold, and GRI did not argue, that ACE's position in that case gives rise to an estoppel, or has any evidentiary relevance, in this case. In any event, there is no contradiction in ACE's positions. The PSE is a different, and broader, exclusion than the language

in *Iberiabank,* because the PSE requires only "some meaningful linkage" to GRI's professional services, and is not restricted to claims asserted by, or services provided to, a customer or client.

V. ACE also demonstrated on summary judgment that the PSE bars coverage. Discovery revealed the undisputed facts showing that [REDACTED] Thus, even apart from the content of the CID and the Settlement Agreement, the "actual facts" upon which the Settlement was based demonstrate that the Investigation arose out of GRI's underwriting and origination errors, and falls within the PSE. The trial court declined to consider this evidence, on the theory that the judgment on the pleadings was the "law of the case," but that analysis has no application on appeal to this Court. To the extent this Court determines it cannot resolve the coverage issue on the pleadings, it may do so on the summary judgment record.

## STATEMENT OF FACTS

### A. The Policy

ACE issued Advantage Private Company Management Liability Policy number DON G25566956 004, to GRI for the June 30, 2018 to June 30, 2019 Policy Period, subsequently extended by endorsement to July 31, 2019 (the "Policy"). (A00837; A00891.) The Policy's aggregate limit of liability is $5,000,000. (A00837.) GRI was represented in the negotiation of the Policy forms by Timothy Gotta, a professional insurance broker at RSC Insurance Brokerage, Inc. (A00913.)

The Policy's "Management Liability" ("D&O") Insuring Agreement provides coverage for the Company, defined to mean GRI and any Subsidiary, and for Insured Persons. (A00839 at § I.A.1-4.) D&O Insuring Agreement I.A.3, entitled "Company Liability," applies to "a Claim first made against it and reported to the Insurer during the Policy Period . . . for any Wrongful Acts taking place prior to the end of the Policy Period." (A00839 at § I.A.3.) Coverage under Insuring Agreement I.A.3. is subject to a $2,500,000 self-insured retention. (A00837.)

Exclusion III.N.2, PSE, as amended by Endorsement 7, excludes coverage for any Claim under the D&O Part (other than Insuring Agreement I.A.1.) "alleging, based upon, arising out of, or attributable to any Insured's rendering or failure to render professional services." (A00869 at § 17.) The PSE replaced an exclusion that appeared in the main Policy form, entitled "Customer or Client." (A00869 at §

17.) The "Customer or Client" exclusion required that the Claim be "brought or maintained by or on behalf of or in the right of a customer or client of the Company" in connection with services "to or for the benefit of such customer or client." (A00847 at § III.N.2.) When the PSE replaced the Customer or Client Exclusion, it eliminated both of those "customer or client" requirements. (A00869 at § 17.)

The PSE was added to the Policy as part of a series of changes to the base policy form that GRI and ACE negotiated in 2016, when ACE became GRI's primary D&O insurer. (A00894-A00895 at 38:19-39:1, A00896 at 41:15-20; A00913.) During those negotiations, GRI's broker, Risk Strategies, recognized that the PSE [redacted] (A00914.) [redacted] " (A00914 (emphasis added).) ACE noted in doing so that GRI was [redacted] (A00914.)

GRI's E&O policy, Miscellaneous Professional Liability Policy No. G28137710003 (the "MPL Policy"), also issued by ACE, applied to "a Claim first made against the Insured and reported to the Company during the Policy Period by reason of a Wrongful Act[.]" (A01296.) The MPL Policy defined Wrongful Act to mean various acts or omissions "committed by the Insured … in the performance or

failure to perform Professional Services[,]" and defined Professional Services to mean "*mortgage banking and mortgage underwriting services and loan servicing for others for a fee*." (A01296 (emphasis added).) The MPL Policy excluded coverage for any Claim "alleging, based upon, arising out of, or attributable to, or directly or indirectly resulting from the False Claims Act (31 U.S.C. §§ 3729-3733), or any similar provision of any federal, state, local or foreign law, or any amendments thereto." (A01296.)

## B. The Government Investigation And Settlement

### 1. The Civil Investigative Demand

In June 2019, the U.S. Department of Justice ("DOJ") issued the CID to GRI. (A00917; A00932 at 21:10-14.) The CID stated that [redacted] (A00917.) It contained interrogatories and document requests [redacted] (A00922-A00923, Interr. Nos. 4-12; A00924-A00926, Doc. Demands 1-22.)

2. **GRI's Settlement Negotiations With The Government**

Due to the DOJ's interest in resolving the matter quickly, [redacted]

(A00935-A00940 at 43:9-48:10.) [redacted] (A00988; A00935 at 43:1-4, A00938-A00939 at 46:14-47:4, A00940 at 48:3-24, A00941 at 57:16-25.) For settlement purposes, [redacted] (A00956 at 103:2-14; A00942-A00943 at 59:7-60:9; A00989.)

In a December 9, 2019 presentation to the DOJ, GRI identified [redacted] (A00944-A00945 at 62:13-63:24, A00946-A00947 at 65:17-66:27; A01009-A01010.) This [redacted] (A00945 at 63:11-15.) [redacted] (A00947-A00948 at 66:24¬67:10.)

VA loans,

### 3. The Settlement Agreement

Effective April 20, 2020, GRI and the Government executed a settlement agreement that documented the terms of the settlement in principle that GRI and DOJ had reached on February 5, 2020 (the "Settlement Agreement"). (A01203.) The Settlement Agreement provided

## C. Communications Relating To Coverage Under The Policy

On July 8, 2019, [redacted]

[redacted] (A01219.) The notice did not attach the CID, but stated that [redacted]

[redacted]

[redacted] (A01219.)

By letter dated December 31 2019, [redacted]

[redacted]

[redacted]

[redacted] (A01296.)

On March 3, 2020, [redacted]

[redacted] (A01525.)

## D. Procedural Background

GRI filed the Complaint in this action on April 30, 2020, and filed an Amended Complaint on December 18, 2020, asserting claims against ACE for breach of contract, declaratory judgment and bad faith. On April 19, 2021, GRI filed its Motion for Judgment on the Pleadings (the "MJOP"), seeking determinations that, among other things, ACE was obligated to advance Defense Costs incurred in the Investigation, and that the PSE did not bar coverage for the Investigation. On May 14, 2021, ACE filed its Cross-Motion for Judgment on the Pleadings ("Cross-



[redacted]

MJOP"), seeking, among other things, a determination that the PSE barred coverage for the Investigation.

On August 18, 2021, the trial court entered its Opinion on the MJOP and Cross-MJOP (the "JOP Opinion") holding among other things that ACE had a duty to advance Defense Costs incurred in the Investigation, and that the PSE did not bar coverage. The JOP Opinion granted GRI's MJOP in these respects and denied ACE's Cross-MJOP.

On March 28, 2022, following the completion of discovery, GRI and ACE filed Cross-Motions for Summary Judgment (the "MSJs"). GRI's MSJ sought, among other things, a determination that GRI was entitled to coverage for the Settlement. ACE's MSJ sought, among other things, a determination that, notwithstanding the JOP Opinion, facts adduced in discovery established that the PSE barred coverage for the Settlement. ACE also sought a determination that GRI's bad faith claim failed as a matter of law.

On August 24, 2022, the trial court entered its Opinion on the MSJs (the "SJ Opinion"), concluding, among other things that the D&O Policy affords coverage for the Settlement, and that GRI's bad faith claim failed as a matter of law.

This appeal followed.

## ARGUMENT

### I. THE TRIAL COURT ERRED IN ITS RULINGS AGAINST ACE ON THE PLEADINGS

#### A. Question Presented

Whether the pleadings established that the Investigation was a Claim "alleging, based upon, arising out of, or attributable to any Insured's rendering or failure to render professional services" within the meaning of the PSE? (Preserved at A01757.)

#### B. Standard And Scope Of Review

The Court reviews a trial court's grant or denial of a motion for judgment on the pleadings *de novo*. *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1204 (Del. 1993). "A party is entitled to judgment on the pleadings where there is no material fact in dispute and the moving party is entitled to judgment under the law." *Mackenson v. Anthony*, 2017 WL 2633492, at *2 (Del. Super. Ct. June 19, 2017) (citing *Catawba Assocs.-Christiana LLC v. Jayaraman*, 2016 WL 4502306, at *5 (Del. Super. Ct. Aug. 26, 2016)). In deciding a motion for judgment on the pleadings "the Court must accept all the complaint's well-pled facts as true and construe all reasonable inferences in favor of the non-moving party." *Silver Lake Off. Plaza, LLC v. Lanard & Axilbund, Inc.*, 2014 WL 595378, at *6 (Del. Super. Ct. Jan. 17, 2014). "The proper construction of any

contract, including an insurance contract, is purely a question of law" and is therefore suitable for resolution on a motion for judgment on the pleadings. *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992).

### C. Merits Of Argument

GRI's Amended Complaint and documents referenced therein established as a matter of law that the Investigation was a Claim "alleging, based upon, arising out of, or attributable to any Insured's rendering or failure to render professional services" within the plain language of the PSE. The CID which commenced the Investigation, [redacted] (A00917 (emphasis added).) Underwriting and originating federally-insured loans are "professional services" as Delaware courts construe that term. And under Delaware courts' broad construction of the phrase "arising out of," the PSE extends to an FCA claim [redacted]

The trial court's contrary holding misconstrued both the allegations of the CID and the plain language of the PSE.

### 1. Underwriting And Originating Federally-Insured Loans Are "Professional Services"

In construing an insurance contract, courts read the policy "as a whole[,]" apply its clear and unambiguous terms according to their "plain and ordinary meaning[,]" and enforce the policy as written. *In re Verizon Ins. Coverage Appeals,* 222 A.3d 566, 573 (Del. 2019). Where the policy language is unambiguous, "a Delaware court will not destroy or twist the words under the guise of construing them[,]" nor "creat[e] an ambiguity where none exists[.]" *Hallowell v. State Farm Mut. Auto. Ins. Co.,* 443 A.2d 925, 926 (Del. 1982). "An insurance contract is not ambiguous simply because the parties do not agree on its proper construction." *Axis Reinsurance Co. v. HLTH Corp.,* 993 A.2d 1057, 1062 (Del. 2010).

Underwriting and originating federally-insured loans qualify as "professional services" under the plain language of the PSE. When not otherwise defined in an insurance policy, "[t]he phrase professional services has been broadly defined as services involving specialized skill of a predominantly mental nature." *Del. Ins. Guar. Ass'n v. Birch,* 2004 WL 1731139, at *4 (Del. Super. Ct. July 30, 2004) (quoting Allen D. Windt, 2 Insurance Claims and Disputes, § 11:16 (4th ed.2003)); *Harad v. Aetna Cas. & Sur. Co.,* 839 F.2d 979, 984 (3d Cir. 1988) ("A "professional" act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is

predominantly mental or intellectual, rather than physical or manual.") (collecting cases).

GRI admits

Thus, there is no dispute in this case that "professional services" unambiguously includes underwriting and originating federally-insured loans.

**2. The CID Shows That The Investigation Arose Out Of Underwriting And Originating Federally Insured Loans**

The pleadings also clearly show that the Investigation was one "arising out of" GRI's alleged rendering or failing to render its loan origination and underwriting services. When used in an insurance policy exclusion, "[t]he phrase "arising out of" is unambiguous language "that lends itself to uncomplicated, common understanding."" *Liggett Grp. Inc. v. Affiliated FM Ins. Co.*, 2001 WL 1456808, at

[1] Courts likewise hold that loan origination "clearly constitutes a professional service." *Franklin Loan Corp. v. Certain Underwriters at Lloyd's, London,* 2011 WL 13224854, *4 (C.D. Cal. Apr. 5, 2011) (applying a similar meaning to hold that a mortgage banker's "origination of the loan clearly constitutes a professional service under California law") (citations omitted).

*8–9 (Del. Super. Ct. Sept. 12, 2001), *aff'd sub nom. Liggett Grp., Inc. v. Ace Prop. & Cas. Ins. Co.*, 798 A.2d 1024 (Del. 2002) (quoting *Eon Labs Mfg., Inc. v. Reliance Ins. Co.*, 756 A.2d 889, 893 (Del. 2000)). "Delaware law has ... adopted the construction that "arising out of" is broader than 'caused by, and is understood to mean "originating from," "having its origin in," "growing out of," or "flowing from."'" *Goggin v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 2018 WL 6266195, at *4 (Del. Super. Ct. Nov. 30, 2018) (quoting *Pac. Ins. Co. v. Liberty Mut. Ins. Co.*, 956 A.2d 1246, 1256-57 (Del. 2008)). Thus, "if there is some meaningful linkage between the [excluded matter] and the third party claim, the "arising out of" language unambiguously applies." *Eon Labs*, 756 A.2d at 894; *Pac. Ins. Co.*, 956 A.2d at 1256-57 ("under Delaware law, the term 'arising out of' is broadly construed to require some meaningful linkage between the two conditions imposed in the contract.").

The CID, incorporated by reference in GRI's Complaint, [redacted]

Further, the stipulated facts in GRI's Settlement Agreement with the Government explained *how* the Government's FCA Claim [redacted] The Government and GRI stipulated that, as a FHA and VA lender, GRI was "[redacted] (A01214-A01215 ¶ 3 (emphasis added)) that [redacted] (A01215 ¶ 5 (emphasis added)) and that the Government [redacted] (A01216 ¶ 10.) Clearly "there is some meaningful linkage between the" Investigation and GRI's alleged errors in underwriting and originating federally-insured loans, so the PSE's ""arising out of" language unambiguously applies." *Eon Labs*, 756 A.2d at 894.

GRI argued below that the PSE does not apply because the Investigation also [redacted] But under Delaware law, an exclusion's "arising out

of" language applies even where the third-party claim alleges a combination of excluded acts and other conduct. In these circumstances, "Delaware has applied the "but-for" test to determine if a claim "arises out of"" the excluded acts. *Goggin*, 2018 WL 6266195, at *5 (citing *Eon Labs*, 756 A.2d at 893). "[T]he question is whether the underlying claim would have failed "but for" the purportedly excluded conduct." *Id.* (citing *Langdale Co. v. Nat'l Union Fire Ins. Co.*, 609 F. App'x 578, 588-96 (11th Cir. 2015)); *Liggett Grp. Inc.*, 2001 WL 1456808, at *8 (""arising out of" ... is akin to "but for" causation").

In *Eon Labs*, this Court used the "but-for" test to analyze an exclusion for "all bodily injury ... arising out of your product." *Eon Labs*, 756 A.2d at 891-892. The insured, which manufactured the drug phentermine, sought coverage under the policy for "fen-phen" claims, in which plaintiffs alleged "injury as a result of ingesting either phentermine ... alone or in combination with the diet drugs fenfluramine or dexfenfluramine[,]" produced by other manufactures. *Id.* at 890. The Court held that the exclusion applied, even though the claims were predicated in part on use of other manufacturers' drugs. The Court explained: "Product liability suits predicated on the combination of phentermine and/or fenfluramine or dexfenfluramine ... arise out of Eon's product phentermine. This must follow because, but for Eon's product, there would be no combination that would lead to the fen-phen claims." *Id.* at 893.

Similarly, in *Goggin*, the court used the "but-for" test to analyze an exclusion for claims "alleging, *arising out of,* based upon or attributable to any actual or alleged *act or omission* of an Individual Insured serving in *any capacity, other than* as an" Insured. 2018 WL 6266195, at *4 (emphasis in original). The underlying claim alleged that two directors of the Insured entity, U.S. Coal, "schemed to form and use" two separate entities, called "the ECM Entities," "to control U.S. Coal and defraud its creditors[.]" *Id.* at *5. The court held that the exclusion applied, because the claim "would not have been established "but-for" Goggin and Goodwin's alleged ECM-related misconduct[,]" even though it "certainly related too to their co-existence as U.S. Coal's directors." *Id.*

Here, the "but-for" test confirms that the Investigation is one "arising out of" GRI's alleged errors in underwriting and originating federally insured loans. The stipulated facts in the Settlement Agreement show that [redacted]

[redacted]

[redacted] (A01214-A01215 ¶ 3, A01215 ¶ 5, A01216 ¶ 10.) Indeed, GRI's underwriting and origination errors are precisely what rendered false its certifications to the Government [redacted]

[redacted] (A01215 ¶ 5.)



[redacted]

Thus, the pleadings established that the CID alleged errors by GRI in underwriting and originating federally-insured loans, and also established that the Government claimed it suffered losses as a result of those errors. There is "some meaningful linkage" between GRI's alleged underwriting errors the Government's FCA Claim. "But for" those errors, the claim would not exist. As a result, the Investigation was one "arising out of" GRI's rendering or failing to render its professional loan underwriting and origination services, and the PSE applies.

### 3. The Superior Court Erred In Construing The PSE And CID

The trial court's contrary conclusion resulted from an erroneous interpretation of both the content of the CID and the plain language of the PSE. The trial court observed that [redacted] (JOP Op. at 11.) The trial court then determined, on the pleadings, and without reference to any legal authority or pleaded facts: [redacted] (*Id.* (emphasis added).) On this shaky premise, the Superior Court held: [redacted] PSE. (*Id.* (emphasis added).)

The trial court's analysis was flawed for two basic reasons. First, it draws an artificial distinction between the professional services expressly referenced in the CID—[redacted]

[redacted]. Second, the Court's analysis rewrote the PSE to restrict its scope to professional services "*provided directly to borrower clients*[.]" (*Id.* (emphasis added).) No such restriction appears in the PSE or in caselaw interpreting "professional services." Indeed, the parties negotiated the terms of the Policy to eliminate any such restriction.

**a. The Superior Court Misread The CID**

By limiting the scope of the Investigation to "[c]ompliance with applicable quality-control standards," the Superior Court misread the CID. As both parties recognized, the reference on the CID's coverage page to [redacted]

[redacted] subsumed various standards and requirements against which the Government assessed GRI's underwriting and origination of federally insured loans. Indeed, the trial court itself later recognized in its SJ Opinion: [redacted]

[redacted]

(SJ Op. at 8-9 (emphasis added).)

The pleaded facts confirmed as much. As the Settlement Agreement states:

[redacted]

[redacted]



[redacted]

(A01215 ¶ 5 (emphasis added).) The Settlement Agreement explains that those requirements included (A01214 ¶ 3 (emphasis added).) Similarly, the information requests in the CID are replete with references to (A00922-A00923, Interr. Nos. 3-8, 11; A00924-A00926, Doc. Demand Nos. 1, 3-5, 7, 8, 11, 12, 14, 16, 18, 20, 22.) Some of the requests also refer to GRI's (A00924, Doc. Demand No. 3; A00926, Doc Demand No. 20; A00918 (emphasis added).)

In sum, the facts pled by GRI unequivocally establish that the Investigation arose from There is no question, and GRI concedes, that (A02796 (emphasis added).) GRI further concedes that (A00770 at 66:2-21 (emphasis added).) Thus, even under the trial court's holding that

"professional services" must be [redacted] GRI's loan underwriting and origination services clearly were.

**b. The Superior Court Misread The PSE**

The trial court's analysis also misconstrued the PSE. By holding that professional services must be "provided directly to borrower clients," the trial court effectively rewrote the PSE to impose a new requirement that appears nowhere in its plain language.

The plain meaning of "professional services," as the term has been construed in Delaware and elsewhere, contains no such requirement. Under that meaning—"services involving specialized skill of a predominantly mental nature"—"[i]t is the nature of the services being performed, that controls[.]" *Del. Ins. Guar. Ass'n,* 2004 WL 1731139, at *4 (citations omitted). Accordingly, "in determining whether or not a particular act or failure to act constitutes a professional service, one should look not to the title of the party performing the act, but to the act itself." *Id.*; *Harad*, 839 F.2d at 984 (same). In *Harad*, the U.S. Court of Appeals for the Third Circuit applied these principles to a malicious prosecution claim against an attorney, brought by his client's adversary. The district court held that the professional exclusion could not be triggered by "an attorney's activities with anyone other than his own client," but the Third Circuit reversed, disagreeing that "such a limitation on the term "professional service" should be read into the policy[.]" *Id.*

Consistent with *Harad*, numerous courts have held that "professional services" encompass a variety of actions that do not "directly" impact a customer or client, including the insured's internal management activities and acts directed to governmental entities or other third parties. *See, e.g.*, *HotChalk, Inc. v. Scottsdale Ins. Co.*, 736 F. App'x 646, 648 (9th Cir. 2018) (False Claims Act lawsuit arose from "professional services," where the insured's online marketing and recruiting services "caused ineligible students and ineligible universities to submit claims for federal financial aid to the" U.S. Department of Education); *Mirman v. Exec. Risk Indem., Inc.*, 474 F. Supp. 3d 609, 616–17 (S.D.N.Y. 2019) (U.S. Securities Exchange Commission action arose from "professional services," including defendant's negotiation of a loan from a third party to the insured entity); *MDL Cap. Mgmt., Inc. v. Fed. Ins. Co.*, 274 F. App'x 169, 174 (3d Cir. 2008) (U.S. Securities Exchange Commission investigation arose from insured's "professional services" as an investment adviser, including allegations that the insured "made unauthorized transactions in the course of its business and attempted to conceal losses from these transactions," and "may have failed to keep accurate records and books relating to its business"); *Goldberg v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 143 F. Supp. 3d 1283, 1300 (S.D. Fla. 2015), *aff'd sub nom. Stettin v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 861 F.3d 1335 (11th Cir. 2017) (bank's facilitation of customer's Ponzi scheme by its "failure … to comply with internal management procedures or

to perform certain regulatory functions" triggered professional services exclusion); *Colony Ins. Co. v. Suncoast Med. Clinic, LLC*, 726 F. Supp. 2d 1369, 1377 (M.D. Fla. 2010) ("Administrative functions that are an intricate part of the provision of medical services implicate insurance policy provisions precluding coverage for bodily injury arising out of the rendering or failure to render medical services or treatment.").

Here, by limiting the PSE to services "provided directly to borrower clients," the trial court disregarded the plain meaning of "professional services" as interpreted in these and other cases.

The trial court also disregarded a negotiated amendment to the Policy which showed that ACE and GRI agreed no such limitation would apply to the PSE. The PSE was added by a negotiated endorsement, Endorsement 7, to replace another exclusion, called the "Customer or Client" exclusion. (A00847 at § III.N.2; A00869 at § 17.) That exclusion had applied to any Claim "brought or maintained by or on behalf of or in the right of a customer or client of the Company in connection with the actual or alleged rendering or failure to render any service *to or for the benefit of such customer or client*." (A00847 at § III.N.2 (emphases added).) But the PSE eliminated any reference to "customer or client." It removed the Customer or Client exclusion's requirement that a "customer or client" bring the claim, as well as the requirement that the service be provided "to or for the benefit of such customer or

client." (A00847 at § III.N.2.) Thus, the trial court's restriction of the PSE to services "provided directly to borrower clients" improperly restored a restriction that the parties agreed to remove.

In sum, the pleadings established that the Investigation arose from GRI's [redacted] regardless of whether these professional services also included quality-control compliance or other actions not "provided directly to borrower clients."

### 4. The PSE Does Not Render Coverage Illusory

The trial court based its interpretation of the PSE in part on *Gallup*, 2015 WL 1201518, but that case is distinguishable. There, an FCA lawsuit alleged that the insured "knowingly mischarg[ed] the Government by billing labor to a cost-based contract when the labor was actually performed to meet requirements on other fixed-price contracts, and obtaining contracts through improper influence." *Id.* at *3. The *Gallup* court determined the insured's ""professional service" is limited to polling and consulting services and does not include billing practices." *Id.* at *11. Yet under the particular policy language at issue in *Gallup*, "the inquiry [did] not end there." *Id.* The policy's PSE applied to "any actual or alleged act, error or omission in connection with the Insured's performance or failure to perform professional services for others for a fee, *or any act, error, or omission relating thereto*." *Id.* at *3 (emphasis added). The court held that "in drafting the language so broadly, ...

virtually any aspect of Plaintiff's business would be "related" to rendering "professional services" which conceivably would preclude coverage for all claims made under the Policy." *Id.* at *12.

Here, unlike in *Gallup*, there was no allegation of improper "billing practices." Instead, [REDACTED] which as discussed above is unquestionably a professional service. Further, unlike in *Gallup*, the PSE at issue here does not extend to "any act, error or omission relating thereto." Rather, the PSE applies only to Claims "alleging, based upon, arising out of, or attributable to any Insured's rendering or failure to render professional services." (A00869 at § 17.) As a result, there is no conceivable basis for contending that the PSE applies "so broadly as to vitiate all coverage[.]" *Gallup*, 2015 WL 1201518, at *12.[2]

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[2] In fact, the PSE itself excepts from its scope any Claim against Insured Persons for which they are not indemnified by GRI. (A00873 at § 29; A00839 at § I.A.3.) This express exception forecloses GRI's contention that the exclusion renders coverage illusory. *HotChalk*, 736 F. App'x at 648 n. 3 (express exception to exclusion defeats argument that it "eviscerates coverage"); *Tagged, Inc. v. Scottsdale Ins. Co.*, 2011 WL 2748682, at *5 (S.D.N.Y. May 27, 2011) (express exception to exclusion defeats argument that it renders "coverage . . . illusory").

#### 5. The Superior Court Erroneously Cited ACE's Position In A Different Case Involving Different Policy Language

The trial court's JOP Opinion cites and discusses ACE's position in a different case, *Iberiabank Corp. v. Illinois Union Insurance Co.*, 2019 WL 585288 (E.D. La. Feb. 13, 2019), *aff'd*, 953 F.3d 339 (5th Cir. 2020). (JOP Op. at 8-10.) That case did not involve a D&O Policy, and did not involve a professional services exclusion. Rather, *Iberiabank* addressed coverage for an FCA claim under a bankers professional liability policy with materially different language. Yet the trial court stated that, [redacted] That conclusion, which is also the centerpiece of GRI's coverage theory, is untenable.

To begin with, ACE's position in *Iberiabank* has no legal effect in this case. The trial court did not determine, and GRI never argued, that anything ACE did or said in *Iberiabank* estops ACE from invoking the PSE in this case. Nor could it. Judicial estoppel requires not only that the party took "inconsistent" positions—not the case here—but also that the party took those positions "*in the same or earlier related legal proceeding*." *La Grange Communities, LLC v. Cornell Glasgow, LLC*, 74 A.3d 653, *4 (Del. 2013) (emphasis added) (citing *Motorola Inc. v. Amkor Technology, Inc.*, 958 A.2d 852, 859 (Del. 2008)). *Iberiabank* is of course neither. And in any event, "it is a well-settled rule that when the clear and unambiguous

terms of an insurance policy preclude coverage, *a policyholder cannot create coverage by asserting estoppel*." *E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, 711 A.2d 45, 63 (Del. Super. Ct. 1995), *on reconsideration,* 1996 WL 769627 (Del. Super. Ct. Dec. 24, 1996) (emphasis added).

ACE's position in *Iberiabank* also has no conceivable *evidentiary* value here. Under Delaware law, "extrinsic evidence has no place in the interpretation of clear and unambiguous provisions." *W. Am. Ins. Co. v. Bogush*, 2006 WL 1064069, at *7 (Del. Super. Ct. Apr. 12, 2006) (citing *Rhone-Poulenc*, 616 A.2d at 1195-96). Accordingly, "[c]ourts consider extrinsic evidence to interpret the agreement only if there is an ambiguity in the contract." *Nw. Nat'l Ins. Co. v. Esmark, Inc.*, 672 A.2d 41, 43 (Del. 1996) (emphasis added); *In re Verizon Ins.* , 222 A.3d at 580 n. 87. The trial court never found, and GRI never argued, that the PSE is ambiguous, much less that ACE's position in *Iberiabank* would be relevant to resolving any such ambiguity.

Moreover, even if *Iberiabank* had any bearing on this case, the crucial differences in policy language foreclose any contention that ACE has taken inconsistent positions. First, the insuring clause in the Iberiabank professional liability policy was decidedly narrower than the PSE in GRI's Policy. The Iberiabank policy's insuring clause applied only to Claims by a customer or client "*for* any Wrongful Acts in rendering or failing to render Professional Services."

*Iberiabank*, 2019 WL 585288, *4 (emphasis added). By contrast, the PSE extends to any Claim (whether or not brought by a customer or client) "*alleging, based upon, arising out of, or attributable to* any Insured's rendering or failure to render professional services." (A00872 at § 27 (emphasis added).) The phrase "arising out of," as discussed above, requires only "some meaningful linkage" to rendering professional services. The "for" language in the Iberiabank policy's insuring clause is more restrictive, confining consideration to the theory of liability asserted. *Health Corp. v. Clarendon Nat'l Ins. Co.*, 2009 WL 2215126, at *17 & n.62 (Del. Super. Ct. July 15, 2009); *U.S. Telepacific Corp. v. U.S. Specialty Ins. Co.*, 2019 WL 2590171, *10 (C.D. Cal. June 18, 2019).

Second, the *Iberiabank* policy defined "Professional Services" to have a *narrower* meaning than the meaning courts have given to the undefined term "professional services" as used in the PSE. The policy in *Iberiabank* defined "Professional Services" to require that the services "*be performed ... for a ... third party client of*" the insured. 2019 WL 585288 at *4 (emphasis added). No such limitations appear in the PSE at issue here. On the contrary, as discussed above, a similar requirement was removed by Endorsement 7 to the GRI Policy.

These differences in policy language explain why there is no inconsistency in ACE's positions. The FCA Claim in *Iberiabank* did not satisfy that policy's insuring clause, because it was not brought by a customer or client of Iberiabank and because it was a claim "for" false statements to the Government. By contrast, the same type of FCA claim in this case triggers the PSE because the PSE is not limited to claims brought by a client, and the because the PSE requires only "some meaningful linkage" to GRI's professional underwriting and origination services.

## II. THE TRIAL COURT ERRED IN ITS SUMMARY JUDGMENT COVERAGE RULINGS

### A. Question Presented

Whether the undisputed facts regarding negotiation of the Settlement established as a matter of law that the Government's FCA Claim arose from [redacted]

[redacted]

[redacted] (Preserved at A01757.)

### B. Standard And Scope Of Review

This Court reviews a trial court's grant of summary judgment "*de novo* with respect to both the facts and the law." *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 75 (Del. 2011). Summary judgment shall be granted to the moving party if the submitted evidence shows that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Del. Super. Ct. R. Civ. P. 56(c).

### C. Merits Of Argument

The undisputed facts established in discovery, beyond those established on the pleadings, provide additional grounds for concluding that the PSE barred coverage for the Investigation and the resulting Settlement. Specifically, discovery revealed that GRI and the Government negotiated the Settlement based on a detailed analysis of [redacted] in individual loan files. They used this



[redacted]

analysis to calculate GRI's [redacted] and calculated damages by [redacted]

[redacted] The undisputed facts thus confirm that the Investigation and the Settlement arose from GRI's [redacted]

[redacted]

The trial court declined to consider these undisputed facts on summary judgment because it concluded that its MJOP Opinion operated as law of the case as to the PSE. That conclusion, while erroneous, has no impact on this Court's review, as both the MJOP Opinion and the MSJ Opinion have been appealed. *Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 40-41 (Del. 2005) (applying law of the case to "matters already decided and not appealed"). As a result, in the event this Court finds that it cannot resolve the coverage question on the pleadings, it may readily do so on summary judgment.

**1. GRI And The Government Negotiated The Settlement Based <u>On GRI's Loan Underwriting And Origination Errors</u>**

The Parties' MJOPs addressed GRI's claim that ACE was obligated to advance Defense Costs, while their MSJs addressed GRI's claim that ACE was obligated to indemnify GRI for the [redacted] Settlement with the Government. Courts approach the duty to advance Defense Costs and the duty to indemnify differently. The duty to advance defense costs "is triggered at the beginning of the



[redacted]

case," so "the Court must look to the underlying complaint's allegations in order to determine whether the action states a claim covered by the policy." *Legion Partners Asset Mgmt., LLC v. Underwriters at Lloyds London*, 2020 WL 5757341, at *6-7 (Del. Super. Ct. Sept. 24, 2020) (citations omitted). In contrast, "the duty to indemnify … is triggered at the end of the case," and does not turn solely on the allegations of the underlying complaint. *Id.* (internal citation omitted); *Mine Safety Appliances Co. v. AIU Ins. Co.*, 2015 WL 5829461, at *5–6 (Del. Super. Ct. Aug. 10, 2015). Rather, "[i]n determining whether a duty to indemnify exists, the Court must consider "*actual facts developed through discovery or at trial.*"" *Premcor Ref. Grp., Inc. v. Matrix Serv. Indus. Contractors, Inc.*, 2013 WL 6113606, at *3 (Del. Super. Ct. Nov. 18, 2013) (citation omitted, emphasis added); *Mumford & Miller Concrete, Inc. v. Marinis Bros.*, 2015 WL 1914731, at *4–6 (Del. Super. Ct. Apr. 16, 2015). As a result, notwithstanding a duty to advance defense costs, the insurer may ultimately have no duty to indemnify. *Steadfast Ins. Co. v. DBi Servs., LLC*, 2019 WL 2613195, at *11–13 (Del. Super. Ct. June 24, 2019).

Here, the "actual facts" on which the Settlement was based make clear that the Investigation arose out of [redacted] As discussed above, it is undisputed that GRI and the Government agreed [redacted]



[redacted]

(A00988; A00935 at 43:1-4, A00938-A00939 at 46:14-47:4, A00940 at 48:3-24, A00941 at 57:16-25.) This review was used to generate a

(A00956 at 103:2-14 (emphasis added); A00942-A00943 at 59:7-60:9.)

(A00947-A00948 at 66:24-67:10; A00956 at 103:2-14; A00961 at 109:6-22, A00969-A00970 at 145:22-146:16 (emphasis added.)

GRI and the Government disagreed about was. GRI conceded for settlement purposes that (A00944-A00945 at 62:13-63:24, A00946-A00948 at 65:17-67:10; A01009-A01010.) In response, the Government claimed the (A00949-A00950 at 80:21-81:8, A00954 at 100:1-19; A01035.) The Government and GRI made their respective settlement demands and offers by

(A00958 at 106:6-108:10.) Continued negotiations over

the appropriate [REDACTED] and [REDACTED] ultimately led to the agreed [REDACTED] Settlement Amount. (*Supra* at § II.C.1.)

The undisputed facts regarding negotiation of the Settlement thus reinforce the conclusion that the Investigation was one [REDACTED] The Government did not merely allege that GRI committed such errors. It proposed, and GRI agreed, that as part of the settlement process GRI's [REDACTED] The resulting calculation of a [REDACTED] then drove the settlement negotiations and led a final Settlement Amount. The undisputed facts thus establish that "there is some meaningful linkage between the" Investigation and [REDACTED] satisfying the PSE's "arising out of" requirement. *Eon Labs*, 756 A.2d at 894.



[REDACTED]

### 2. <u>The Contribution Of Other Factors To The Settlement Amount Does Not Avoid The PSE</u>

GRI argued below that various factors which it described as [redacted] [redacted] influenced the Settlement Amount. (A02455.)[3] According to GRI, [redacted] [redacted] used to account for the potential for double-to-treble damages under the FCA. (A02456.) GRI's attempt to separate such conduct from its underwriting and origination services is dubious, but setting that aside, this theory has no impact on application of the PSE.

As discussed above, when a claim alleges a combination of excluded acts and other conduct, Delaware courts use the "but-for" test to determine whether an exclusion's "arising out of" language is satisfied. (*Supra* at § I.C.2.) If "the underlying claim would have failed "but for" the purportedly excluded conduct," the exclusion applies. *Goggin*, 2018 WL 6266195 at *5; *Eon Labs*, 756 A.2d at 893.

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[3] Specifically, GRI cited (1) [redacted] (A02455.)

Here, the undisputed facts regarding negotiation of the Settlement show that the Government's claim would not exist but for [redacted] The [redacted] (A00959-A00960 at 107:3-108:10.) For example, the [redacted] (A00957-A00959 at 105:14-107:2.) [redacted] (A00959-A00960 at 107:3-108:10.) Under this formula, if there had been no [redacted] the Government would have had zero damages, and there would have been nothing against which to apply an FCA multiplier.

Thus, simple math demonstrates that, [redacted] Indeed, GRI and the Government stipulated in the Settlement Agreement that, [redacted] (A01216 ¶¶ 9, 10.) In other words, "but for" [redacted]



[redacted]

the FCA Claim would not exist. The Investigation therefore arises from [redacted] and the PSE applies, regardless of whether other factors may have contributed to the Settlement Amount.

## CONCLUSION

For all the foregoing reasons, ACE requests that this Court reverse the trial court's rulings on the pleadings and on summary judgment, and direct that judgment be entered in ACE's favor and against GRI on ACE's defense that the PSE barred coverage, and award ACE such other and further relief this Court deems just.

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## CERTIFICATE OF SERVICE

I, John L. Reed, hereby certify that on this 7th day of December, 2022, I caused true and correct copies of the foregoing REDACTED PUBLIC VERSION of **OPENING BRIEF OF APPELLANT ACE AMERICAN INSURANCE COMPANY** to be served upon the foregoing counsel of record in the manner indicated:

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