EFiled: Jan 10 2023 12:12PM EST
Filing ID 68844005
Case Number 360,2022

NO. 360,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ACE AMERICAN INSURANCE COMPANY, a Pennsylvania corporation

Defendant-Below/Appellant/Cross-Appellee,

v.

GUARANTEED RATE, INC., a Delaware corporation

Plaintiff-Below/Appellee/Cross-Appellant

Appeal from the Superior Court of the
State of Delaware
Case No. N20C-04-268 MMJ CCLD

Guaranteed Rate's Corrected Answering Brief on Appeal and Opening Brief on Cross-Appeal

---

THOMAS E. HANSON, JR. (NO. 4102)
WILLIAM J. BURTON (NO. 6243)
BARNES & THORNBURG LLP
222 Delaware Ave, Ste 1200
Wilmington, DE 19801
Telephone: (302) 300-3447
thanson@btlaw.com
william.burton@btlaw.com

OF COUNSEL:

LILIT ASADOURIAN
ALICE KYUREGHIAN
BARNES & THORNBURG LLP
2029 Century Park E., Ste 300
Los Angeles, CA 90067-2904
Telephone: (310) 284-3786
Facsimile: (310) 284-3894
LAsadourian@btlaw.com
AKyureghian@btlaw.com

OF COUNSEL:

AARON D. LINDSTROM
BARNES & THORNBURG LLP
171 Monroe Ave NW, Ste 1000
Grand Rapids, MI 49503
Telephone: (616) 742-3931
Facsimile: (616) 742-3999
Aaron.Lindstrom@btlaw.com

Attorneys for Plaintiff/Appellee/Cross-Appellant, Guaranteed Rate, Inc.

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

NATURE OF PROCEEDINGS

This is an insurance coverage dispute resulting from Chubb's bad-faith refusal to honor its contractual obligations. The policyholder, Guaranteed Rate, Inc. ("GRI"), filed suit against defendant ACE American Insurance Company ("Chubb") for breach of contract (Count I), bad faith (Count II) and declaratory judgment (Count III). GRI alleged, among other things, that Chubb wrongfully denied coverage for GRI's settlement of a government investigation into alleged violations of the False Claims Act ("FCA"). Chubb denied coverage on the theory that the investigation allegedly arose out of GRI's "professional services," despite previously taking the position that "False Claims Act claims are not based on the rendering of professional services."

Shortly after initiating suit, the parties presented cross-motions for judgment on the pleadings regarding the application of the professional-services exclusion. The Superior Court issued its opinion on August 18, 2021, finding, on the merits, that the professional-services exclusion did *not* preclude coverage. As the Court explained, a claim based on the False Claims Act arises from a violation of a duty owed to the federal government, not from a violation of any duty to provide professional services to a customer.

Dissatisfied with the Court's decision, Chubb moved for rehearing on the professional-services exclusion issue. When its motion was denied, Chubb sought

certification for interlocutory review. Chubb's request for certification for interlocutory appeal was also denied.

Following the close of discovery, the parties subsequently filed cross-motions for summary judgment. GRI moved for summary judgment with respect to breach of contract (Count I) and declaratory relief (Count III). Chubb moved for summary judgment with respect to all counts arguing (again) that the professional-services exclusion barred coverage. Chubb further argued that GRI's claim for bad faith (Count II) should be dismissed as there was a bona fide dispute regarding coverage that barred GRI's bad-faith claim.

The Superior Court issued its opinion on the motion for summary judgment on August 24, 2022, granting (1) GRI's partial summary judgment on its breach-of-contract and declaratory-judgment claims (Counts I and III of the Amended Complaint), (2) granting Chubb's summary judgment as to bad faith (Count II), and (3) otherwise denying the cross motions for summary judgment. The Court's summary-judgment opinion resolved all issues pending before the Superior Court.

This is GRI's Answering Brief on Appeal, and Cross-Appellant's Opening Brief on Cross Appeal.

SUMMARY OF ARGUMENT

A. GRI's Answer to Chubb's Summary of Arguments on Appeal

I. Denied. The quality of GRI's professional services was not the genesis of the False Claims Act investigation. Rather, the Government's investigation arose out of [redacted] Indeed, Chubb reverses the causation when it says that the False Claims Act claims would not exist "but for" underwriting and origination errors. If GRI had simply made errors in underwriting or origination, there would *not* be a False Claims Act investigation; rather, *but for* [redacted] As a result, the claims at issue arise out of alleged violations of the False Claims Act, not out of underwriting or origination services.

II. Denied. The Superior Court correctly recognized that a number of the issues that the Government investigated did not relate to the origination or underwriting of any loan. For example, [redacted]

[redacted]

III. Denied. The Superior Court was also correct in recognizing that Chubb's interpretation of the professional-services exclusion would make any coverage illusory. Because GRI is in the business of underwriting and originating loans, Chubb's view that any claim relating to GRI's work must "arise out of" the professional services GRI provides would mean that *all* claims would be excluded. The Superior Court correctly rejected this view that would render all coverage illusory.

IV. Denied. As the Superior Court also correctly recognized, Chubb affirmatively argued in *Iberiabank* that claims arising from alleged violations of the False Claims Act are not professional services. Chubb's about-face on that precise issue in this case, apparently because its prior position supports the existence of coverage here, highlights the flaws in Chubb's current interpretation of its policy.

V. Denied. [redacted] not because it was otherwise concerned about underwriting errors. The Government's investigation [redacted]

[redacted]

[redacted]

[redacted]

B. GRI's Summary of Arguments on Cross-Appeal

I. As to GRI's cross-appeal on its bad-faith claim, the above arguments also show that Chubb lacked a reasonable justification for denying coverage. The plain language of the Policy covered civil investigations of GRI and its officers and directors. And the fact that Chubb has taken the diametrically opposite position on the definition of professional services in a contemporaneous case (the *Iberiabank* case) shows that even Chubb did not believe the justifications on which it relied (and still advances). At the very least, there is a genuine issue of fact: a reasonable jury could think that Chubb's interpretation was unreasonable under these circumstances and was motivated by financial gain, rather than by good-faith efforts to interpret the policy.

II. Additionally, as to GRI's cross-appeal, the Superior Court abused its discretion by refusing to consider the report of GRI's expert on industry standards on claim handling. Delaware courts have consistently recognized that expert testimony about industry standards is relevant to evaluating bad faith and to what conduct is reasonable under the circumstances.

STATEMENT OF FACTS

A. The False Claims Act and the Direct Endorsement Lender Program

The False Claims Act imposes civil liability on any party who "knowingly presents, or causes to be presented, *a false or fraudulent claim* for payment or approval," or "knowingly makes, uses or causes to be made or used, *a false record or statement* material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(A)–(B) (emphasis added). Enacted in 1863, the Act "was originally aimed principally at stopping the massive frauds perpetrated by large contractors during the Civil War." *Universal Health Services Inc. v. U.S.*, 579 U.S. 176, 181 (2016). Since then, "its focus remains on those who present or directly induce the submission of false or fraudulent claims." *Id.* at 182. A "claim" under the False Claims Act includes direct requests to the Government for payment as well as reimbursement requests made to the recipients of federal funds under federal benefits programs. *See* 31 U.S.C. § 3729(b)(2)(A).

One such program is the Direct Endorsement Lender program. The United States Government instituted this mortgage insurance program to promote homeownership. Under this program, if a homeowner defaults on a Government-insured loan, and the mortgage holder forecloses on the property, the Government will pay the mortgage holder the balance of the loan and assume ownership and possession of the property. Thus, by protecting mortgage holders against defaults,

the program encouraged approved lenders to make loans to millions of Americans who might not otherwise qualify under conventional underwriting criteria.

GRI is an approved lender under the Direct Endorsement program. As an approved lender, GRI is authorized to underwrite mortgage loans and certify loans for insurance without prior review or approval by the Government. 24 C.F.R. § 203.5. The Government then relies on the approved lender's certification that the mortgage meets all applicable requirements to bind coverage and pays claims out to the mortgage holder in the event the homeowner defaults. [redacted] (A00208–09.)

Given the nature of the relationship, Direct Endorsement Lenders are obligated to "act with the utmost good faith, honesty, fairness, undivided loyalty, and fidelity in their dealings with [the Government]." *United States v. Carrington Mortgage Services, LLC*, 2018 WL 372348, *2 (S.D. Ind. Jan. 10, 2018). This means all Direct Endorsement Lenders are required "to make full and fair

disclosures to [the Government] of all material facts and to take on the affirmative duty of employing reasonable care to avoid misleading [the Government]." *Id.* If a Direct Endorsement Lender makes a false statement of material fact that induces the Government to insure a loan and pay a claim it would not otherwise have paid, the Direct Endorsement Lender can be subject to liability under the False Claims Act. *See, e.g., United States v. Wells Fargo Bank, N.A.*, 972 F. Supp. 2d 593, 623-23 (2013); *United States v. Quicken Loans Inc.*, 239 F. Supp. 3d 1014, 1041 (E.D. Mich. 2017).

B. The Policy

Chubb issued a Management Practices Liability Policy (the "Policy") to GRI that promised to pay for "any **Loss** which GRI becomes legally obligated to pay by reason of a **Claim** first made against GRI and reported to Chubb during the Policy Period for any **Wrongful Acts**." (A00325, A00327.) As relevant here, the Policy defines "claim" to include "a *civil,* administrative or regulatory *investigation* against the **Insured**" (A00353, End. 7 ¶ 5.D.6 (italics added)); defines "loss" to include "*settlements* and **Defense Costs**" and any "multiplied portion of any multiple damage award" (A00354–55, End. 7 ¶ 9.P (italics added)); and defines "wrongful act" to include "any error, *misstatement, misleading statement,* act, omission, neglect, *or breach of duty* actually or allegedly committed by" any insured Person or the Company (A00331, § II.BB (italics added)).

The Policy includes an exclusion that is the key issue in this appeal: an exclusion for any Claim "alleging, based upon, arising out of, or attributable to any **Insured's** rendering or failure to render professionals services." (*Id.*, § III.N.2.) The policy does not define the term "professional services."

C. The Government's crackdown on mortgage fraud

In the wake of the 2008 financial crisis, the Government began investigating Direct Endorsement Lenders for failure to comply with Government regulations. E.g., http://www.fha.com/fha_article?id=70. Of the several lenders subject to False Claims Act investigations by the Government, Chubb insured at least two: GRI and Iberiabank.

The Government's False Claims Act investigations against GRI and Iberiabank were nearly identical. [redacted] (*Compare* A02504–06, *with* A01982–96.) [redacted]

[redacted] *Compare* A02506, A02509, *with* A01994 ¶ 5, A01995 ¶ 10.

- [redacted] *Compare* A02509, *with* A01993–94 ¶ 3, A01994 ¶ 7.
- [redacted] *Compare* A02510, *with* A01994 ¶ 6.
- [redacted] *Compare* A02510, *with* A01995 ¶ 10.

D. Chubb's coverage position in *Iberiabank*

The Iberiabank investigation claim reached Chubb first and is relevant because it reveals how Chubb interpreted the plain meaning of the term "professional services." In 2017, Iberiabank tendered its False Claims Act claim to Chubb under its bankers' professional-liability insurance policy. Unlike GRI's policy that excluded coverage for professional services, Iberiabank's policy provided coverage for professional services. It insured "any Loss which

[Iberiabank] became legally obligated to pay by reason of any Claim made by a third party client . . . for any Wrongful Acts in rendering or failure to rending *Professional Services*." *Iberiabank Corp. v. Ill. Union Ins. Co.*, 2019 WL 585288, *4 (E.D. La. Feb. 13, 2019) (emphasis added). The term "professional services" was defined as "services performed by or on behalf of [Iberiabank] for a policyholder or third party client of the Company." *Id.*

When faced with a policy that *covered* an insured's "professional services," Chubb denied coverage and argued that coverage was unavailable because submission of false claims to the government under the Direct Endorsement Lender program could not be considered "professional services." *See* A02648 ("[T]he very nature of a False Claims Act claim falls outside of professional-liability insurance coverage because *the act of submitting false claims to the Government cannot be considered to be performance of professional services*.") (emphasis added).

The Eastern District of Louisiana agreed, granting Chubb's motion to dismiss Iberiabank's complaint for breach of contract. Persuaded by Chubb's arguments, the court found that "[t]he crux of the FCA claim . . . is that the bank promised to provide a certain level of underwriting in connection with its participation in the [Direct Endorsement] program [and] certified to the government that it provided the agreed level of underwriting when it had not,"

resulting in the payment of insurance on ineligible loans." 2019 WL 585288 at *7. The court further reasoned that "while Iberiabank urges coverage by focusing only on its underwriting as the 'professional services' triggering coverage under the Chubb policy, *the bank ignores its conduct that lay at the heart of the FCA claim and that falls outside the ambit of insurance coverage – namely, Iberiabank's false certifications* to the Government that it had provided the agreed level of underwriting in connection with obtaining the FHA insurance." *Id.*

Iberiabank appealed to the Fifth Circuit Court of Appeals. On June 19, 2019, Chubb filed a response brief in opposition to Iberiabank's appeal, again repeating its position on the record that "the submission of false claims to the government to receive a benefit cannot be considered covered professional services." (A02517.)

E. Chubb's handling of GRI's claim

One week later, [redacted] (A00548–59.) On July 8, 2019, GRI, by and through its broker, tendered the claim to Chubb, and on September 9, 2019, GRI supplemented its notice by stating [redacted] (A01782, A01802.)

1. Early determination to deny coverage

On September 15, 2019, Chubb's claim handler, Sylvia Toyos, began to investigate the claim for possible declination. [redacted] (A02658 ¶ 81.) That same day, [redacted] (A02658 ¶ 82.) Ms. Toyos included this language as part of an effort to assert the professional-services exclusion on which Chubb later relied to preclude coverage. Thus, as of September 15, 2019, Chubb had identified the coverage exclusion which it relies on to this day. (A02658 ¶ 83.)

[redacted] (A02658 ¶ 81; A02597–2600.)

2. Hiding the ball

In response to Ms. Toyos's draft letter, her supervisor, John Varley instructed Ms. Toyos [redacted] (A02658 ¶ 84.) Following that direction, Ms. Toyos replaced her draft with a September 16, 2019 letter that said [redacted] (A01808–10.)

3. Delays in executing the non-disclosure agreement

[redacted] (A02659, ¶ 85.) [redacted] (A02660, ¶ 90.)

4. Chubb's deliberate silence in response to GRI's repeated requests for authority to settle

In December 2019, after not hearing from Ms. Toyos for nearly three months, GRI's broker, Kathryn Metz, wrote to Ms. Toyos [redacted] (A01814.) Ms. Metz further noted [redacted] (*Id.*) Ms.

[redacted] (*Id.*)

On December 31, 2019, Chubb denied coverage under its professional-liability policy,[1] stating in part: [redacted] (A01296.) Chubb ultimately denied coverage under its professional-liability policy [redacted] (A02784).

After not receiving a response regarding coverage under its management-liability policy, GRI wrote to Chubb again [redacted] (A01829.) Chubb again understood that GRI [redacted] (A01837–40 at 276:21–279:1.)

[1] Chubb issued both management-liability and professional-liability coverage to GRI. While Chubb's coverage decision under its professional-liability policy is not at issue in this case, it is nonetheless relevant to demonstrate the inconsistent positions Chubb has taken not only in its prior dealings with other insureds but also within the same claim.

Forwarding GRI's inquiry to Mr. Varley, Ms. Toyos stated, [redacted] (ACE003379) That same day, Ms. Toyos forwarded a [redacted] (A02610–12.)

[redacted] (A01866.)

Chubb's declination left GRI in the worst position possible. (A01873–75 at 190:2–192:21.) [redacted] *See infra*.

Notwithstanding Chubb's denial, GRI continued to keep Chubb apprised of its negotiations with the Government. [redacted] (A01886.) Based on this communication from GRI, Chubb has admitted that [redacted] (A01841–42 at 290:21–291:3.) [redacted] (A01900.) [redacted] (A01905; A01876 at 211:13-24; A01877–78 at 213:22-214:2; A01914–15 at 313:4–314:13; A01835–36 at 226:24–227:12.) [redacted] (A01845 at 298:14–22.)

Notwithstanding GRI's need for clarity, Chubb decided to affirmatively not take a position with respect to coverage or the settlement:

[redacted]

(A01855 at 339:9–20.)

5. Having been abandoned by its insurer, GRI settled.

[redacted] (A01965.) [redacted] (A01969.)

6. Chubb officially denies coverage four weeks later based on the professional-services exclusion.

On March 3, 2020—four weeks after GRI settled in principle—Chubb officially denied coverage based on the professional-services exclusion. Chubb stated: [redacted] (A01977.)

7. The Fifth Circuit affirms Chubb's position in *Iberiabank* that False Claims Act claims are not professional services.

On March 18, 2020, the Fifth Circuit affirmed the district court's ruling in *Iberiabank* in favor of Chubb. (*Iberiabank*, 953 F. 3d 339, 348, n.8 (5th Cir. 2020). Chubb confirmed in testimony that the decision [redacted] (A02476; A02595–2596.)

8. GRI finalizes its settlement agreement.

[redacted] (A01982–96.) The substance of GRI's settlement mirrored *Iberiabank*'s settlement, nearly verbatim. (A02471–75 (chart comparing the two settlements).)

[redacted] (A02597–98 at 255:22–256:19.)

F. Procedural Background

On August 18, 2021, the Superior Court issued its opinion on the parties' cross-motions for judgment on the pleadings, holding, among other things, that the professional-services exclusion did not bar coverage. The Court explained that "exclusionary provisions should be read narrowly" and "[t]erms are given their plain and ordinary meaning." (ACE's Opening Br., Ex. A at 4.) Recognizing that in *Iberiabank* "Chubb successfully asserted that "False Claims Act allegations

were not Professional Services," the Court held that "the Professional Services Exclusion does not apply to prevent coverage under the Policy." (*Id.* at 9, 11.)

The parties proceeded with discovery on Chubb's remaining affirmative defenses and on March 28, 2022, filed cross-motions for summary judgment. Rather than present a motion on its remaining defenses, Chubb reargued the professional-services exclusion and also sought dismissal of GRI's bad faith claim.

On August 24, 2022, the Superior Court held, just at it had on GRI's motion for judgment on the pleadings, that the professional-services exclusion did not apply because Chubb's additional arguments – that GRI's settlement was based on "underwriting errors" as opposed to [redacted] – were "unpersuasive." (ACE's Opening Br., Ex. B at 9.) The Court reiterated that her decision turned on the fact that the Wrongful Act at issue was [redacted] (*Id.*) The Court explained that because "the duty to meet certain standards was owed to the federal government, not to the mortgage borrowers," the professional-services exclusion did not apply. (*Id.*)

APPELLEE'S ANSWERING ARGUMENT

I. The Superior Court did not err in its ruling against Chubb on the pleadings.

A. Question presented

Whether the pleadings established that the Government's investigation for False Claims Act violations was a claim within the meaning of the professional-services exclusion. (Preserved at A00721–36, A02446–59.)

B. Scope of review

This Court "review[s] de novo a trial court's judgment granting a motion for judgment on the pleadings," and it also reviews questions of contractual interpretation de novo. *Baldwin v. New Wood Res. LLC*, 283 A.3d 1099, 1115 (Del. 2022). This includes "view[ing] the facts pleaded and the inferences to be drawn from such facts in a light most favorable to the non-moving party." *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993).

C. Merits of argument

1. The Government's False Claims Act investigation did not "arise out of" GRI's professional services.

The key premise of Chubb's argument – that the Government's False Claims Act investigation was predicated on "underwriting errors" – is wrong. The Government did not investigate GRI for "underwriting errors"; the Government

investigated GRI for [redacted] (A00548.) A False Claims Act claim cannot stand without false statements or claims to the Government. Under the False Claims Act, a party is liable to the government if it "knowingly presents, or causes to be presented, *a false or fraudulent claim* for payment or approval," or if it "knowingly makes, uses or causes to be made or used, *a false record or statement* material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(A)–(B) (emphasis added). Importantly, "errors" or "mistakes" in originating and underwriting loans – even if such "errors" constitute gross negligence – *cannot* give rise to a False Claims Act claim. *See United States v. Bourseau*, 531 F.3d 1159, 1167 (9th Cir. 2008) (an innocent mistake or negligence will not support a False Claims Act claim); *United States ex rel. Rakow v. Pro Builders Corp.*, 37 F. App'x 930, 931 (9th Cir. 2002) (gross negligence will not support a False Claims Act claim); *United States ex rel. Hagerty v. Cyberonics, Inc.*, 95 F. Supp. 3d 240, 264 (D. Mass. 2015) ("Because FCA liability attaches *only to false claims*, merely alleging facts related to a defendant's alleged misconduct is not enough.") (emphasis in original).

Thus, as a matter of law, the conduct giving rise to GRI's liability is *not* an "error" or "mistake" in the underwriting of a loan, but instead is GRI's allegedly false statements or certifications regarding the quality of those loans. *See, e.g., United States v. Wells Fargo Bank, N.A.*, 972 F. Supp. 2d 593, 623-23 (2013) ("implicit in the submission of a claim for payment on a defaulted loan is a certification that the loan complies with the core eligibility requirements of HUD insurance"); *United States v. Quicken Loans Inc.*, 239 F. Supp. 3d 1014, 1041 (E.D. Mich. 2017) ("a lender's certification to FHA requirements is a prerequisite to the endorsement of FHA insurance," and "*absent a truthful loan level certification*, a Direct Endorsement Lender is not entitled to endorse a particular loan for FHA insurance.") (emphasis added). In other words, "but for" [redacted]

The settlement agreement, incorporated by reference in GRI's complaint, establishes this same point:

> "As a result of GRI's conduct and omissions, *GRI certified* and [redacted] (A00210 ¶ 10 (emphasis added).)

a. Courts across the nation have consistently held that False Claims Act claims are not predicated on the rendering of professional services.

Chubb is keenly aware that certifications – and not professional services – form the basis of False Claims Act claims. In *Iberiabank*, Chubb argued in the district court that "a plain reading of the policy demonstrates that Iberiabank's claim was not covered" because the policyholder was not performing professional services for the government. 2019 WL 585288, at *4. The district court agreed with Chubb's point, and not solely because the policy in *Iberiabank* addressed services provided to a client of the policyholder. The district court also acknowledged that the certifications to the government were the key issue: "[t]he crux of the FCA claims" was "that the bank promised to provide a certain level of underwriting in connection with its participation in the [Direct Endorsement] program," and then "the bank *certified to the government that it provided the agreed level of underwriting when it had not*, resulting in the issuance of FHA

insurance on ineligible loans, the payment of insurance claims on ineligible loans, and the payment of mortgage commissions in violation of HUD regulations." 2019 WL 585288 at *7 (emphasis added). The *Iberiabank* court explained: "*[W]hile Iberiabank urges coverage by focusing only on its underwriting as the 'professional services' . . ., the bank ignores its conduct that lay at the heart of the FCA claim* and that falls outside the ambit of insurance coverage – *namely, Iberiabank's false certifications to the government that it had provided the agreed level of underwriting in connections with obtaining the FHA insurance*." *Id.* And after winning on this point in the district court, Chubb repeated this argument to the Fifth Circuit: Chubb argued that the "*conduct that lay at the heart*" of the Government's FCA claim are the "*false certifications* to the government" – *not* the origination or underwriting of the loan. (A02531 at 30 (emphasis added).)

Chubb's analysis in *Iberiabank* was correct. Indeed, as Chubb itself stated to the Fifth Circuit, every federal circuit court of appeal that has addressed the question has "uniformly held" that False Claims Act claims are not based on the rendering of professional services.(A02517 (emphasis added; citing cases).) For example, the Tenth Circuit has explained, in a False Claims Act case, that "[t]he government's injury [i]s not caused by [the insured's] failure to provide professional services, but instead result[s] from [the insured's] submission of false and fraudulent claims for reimbursement." *Zurich Am. Ins. Co. v. O'Hara Reg'l*

Ctr. for Rehab., 529 F.3d 916, 921 (10th Cir. 2008). "[T]he problem," the Tenth Circuit continued, "[i]s not the actual level of services provided . . . but rather that [the insured] billed for services it did not provide . . . ." *Id.* at 921–22. The Seventh Circuit has recognized the same point: "Liability under the FCA is based solely upon the creation or presentation of false claims to the government, not upon the underlying conduct used to establish the falsity of such a claim." *Health Care Indus. Liab. Ins. Program v. Momence Meadows Nursing Ctr., Inc.*, 566 F.3d 689, 695 (7th Cir. 2009) (citation omitted). And so has the Ninth Circuit: "The False Claims Act injury does not 'result from' [the insured's] failure to provide professional services, but from its submission of allegedly fraudulent bills and its alleged misrepresentation of care standards." *Horizon W., Inc. v. St. Paul Fire & Marine Ins. Co.*, 45 F. App'x 752, 753–54 (9th Cir. 2002). Similarly, the Eighth Circuit, recognizing the liability under the False Claims Act comes from "knowingly submitt[ing] false claims," has held that damages from a *qui tam* action "would not have resulted from the 'providing or withholding of professional services.'" *Jenkins v. St. Paul Fire & Marine Ins. Co.*, 8 F. App'x 573, 574 (8th Cir. 2001); *see also Cardiovascular Consultants Heart Ctr. v. Norcal Mut. Ins.*, 2022 Cal. App. Unpub. LEXIS 1642, *11 (Cal. Ct. App. Ma. 17, 2022) ("The False Claims Act attaches liability, not to the underlying fraudulent activity ('excessive,

medically unnecessary, and/or inadequately documented cardiovascular procedures'), but to the claim for payment").

And, consistent with these federal courts, the only Delaware court to address the issue previously has also held that the professional-services exclusion does not bar coverage for False Claims Act allegations, a decision that the Superior Court appropriately cited in rendering its judgement on the pleadings. *Gallup, Inc. v. Greenwich Insurance Company*, 2015 WL 120518, at *11 (Del. Super. Ct. Feb. 25, 2015).

b. "Arising Out Of" and "For" is a distinction without a difference.

Seeking to deflect from this uniform authority, Chubb argues that "the insuring clause in the Iberiabank professional-liability policy was decidedly narrower than the [professional-services exclusion] in GRI's Policy." (ACE's Opening Br. 34.) Chubb argues: "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.'" (*Id.*at 34–35.) By contrast, the [professional-services exclusion] 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.'" (*Id.* at 35.) Chubb then concludes that because the phrase "arising out of" is construed broadly and requires only "some meaningful linkage" to rendering professional services, the

exclusion in GRI's management-liability policy must be interpreted more broadly than the insuring agreement in Iberiabank's professional-liability policy. Chubb's argument is without merit.

First, Chubb's argument ignores basic tenants of insurance law. Under Delaware law, principles of insurance policy construction favor the policyholder. As such, Delaware courts are required to read insuring agreements broadly and exclusionary provisions narrowly. *Sun-Times Media Group, Inc. v. Royal & Sunalliance Ins. Co. of Canada*, 2007 WL 1811265, at *11 (Del Super. Ct. Apr. 9, 2007). In addition, where, as here, an insurer relies on an exclusion to avoid coverage, "[t]he burden of proving the applicability of any exclusions or limitations on insurance coverage lies with the insurer." *Alstrin v. St. Paul. Mercury Ins. Co.*, 179 F. Supp. 2d 376, 388 (D. Del. 2002); *see also Cirka v. Nat. Union Fire Ins. Co. of Pittsburgh, PA*, 2004 WL 1813283, at *5 (Del. Ch. Aug. 6, 2004). Courts will not enforce an exclusion unless it is "specific, clear, plain, conspicuous and not contrary to public policy," even where the exclusionary provision is unambiguous. *Northrop Grumman Innovation Sys., Inc. v. Zurich Am. Ins. Co.*, 2021 WL 347015, *9 (Del. Super. Ct. Feb. 2, 2021). If there is any doubt, then that doubt must be resolved in favor of coverage. *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.,* 702 A.2d 1228, 1232 (Del. 1997).

Chubb's arguments that the exclusionary provision for "professional services" must be interpreted more broadly than the insuring agreement for "professional services" flies in the face of these rules. If False Claims Act claims are not predicated on the rendering of professional services when evaluating coverage under an insuring agreement, then surely such claims are not predicated on the rendering of professional services when evaluating coverage under an exclusion.

Second, when evaluating whether False Claims Act claims are predicated on the rendering of professional services, courts have not distinguished between policies containing the "arising out of" language and policies containing the "for" language. These courts have not made that distinction because no matter how broadly the term "professional services" is interpreted, liability under the False Claims Act is not based on the rendering of professional services. As shown above, neither negligence nor gross negligence in rendering professional services gives rise to liability under the False Claims Act. Rather, the relevant conduct is the submission of a *false claim* to the government regarding the level of services provided.

For example, in *Zurich American*, the insured (O'Hara) argued that the policy's insuring agreement should be interpreted broadly because it included the phrase "arising out of" and the Colorado Supreme Court interprets that phrase as

creating a "but for" test. 529 F.3d at 923–24. O'Hara argued that because the alleged injury by the government would not have occurred "but for" the nursing facility's substandard care, coverage for the False Claims Act claim was triggered under its professional-liability policy. *Id.* at 924.

The Tenth Circuit disagreed, holding that "O'Hara's false representations to the government constituted an independent act that interrupted the causal claim between O'Hara's failure to furnish adequate nursing services and the government's injury – the overpayment of claims." *Id.* at 924. "Because the alleged failure to furnish adequate nursing services is not 'directly related' or inextricably linked' to the injury claimed by the government, O'Hara failed to demonstrate that the insurers had a duty to defend" under the insuring agreement of the professional-liability policy. *Id.* "As we read the government's cause of action, the problem was not the actual level of services provided to O'Hara's patients, but rather that O'Hara billed for services it did not provide . . . ." *Id.* at 921–22.

Similarly, in *Health Care Industry Liability*, the insured (Momence) sought coverage for a False Claims Act *qui tam* suit under its professional-liability policy that covered claims "caused by a 'medical incident' *arising out of* the providing or withholding of various professional services, including medical or nursing treatment." 566 F.3d at 694 (emphasis added). Like O'Hara, Momence argued that

"*but for* the inadequate care and resulting bodily injury, there would have been no lost services and no false claims." *Id.*

The Seventh Circuit disagreed, holding that the "line of argument effectively bypasses" coverage. *Id.* The court explained that "[t]he injuries to the residents as alleged by the plaintiffs relate back to Momence's cost reports to the government where it certified that it provided quality services and care" despite knowing that was false. *Id.* Thus, like *O'Hara* and all other courts to address the issue, the Seventh Circuit found that coverage did not exist under the insuring agreement of the professional-liability policy, despite the "arising out of" language. *See also MSO Washington, Inc. v. RSUI Group, Inc.*, 2013 WL 1914482, *8–9 (W.D. Wash. May 8, 2013) (no coverage for False Claims Act claim where the insuring agreement provided coverage for damages "arising out of" a negligent act, error or omission in the rendering of or failure to render professional services); *Ismie Mut. Ins. Co. v. Michaelis Jackson & Assoc., LLC*, 397 Ill. App. 3d 964, 968 (2009) (no potential for coverage because False Claims Act claims do not "arise out of" the rendering or failure to render professional services); *U.S. ex. rel. Cal. V. Am. Intern. Specialty Lines Ins. Co.*, 2007 WL 4208352, *4 (N.D. Cal. Nov. 27, 2007) (same).

Thus, while Chubb urges this Court to cast a wide net over the professional-services exclusion to avoid coverage, the reality is that Chubb's argument

contravenes (1) overwhelming authority from other courts that have held False Claims Act claims do not arise out of professional services, (2) basic tenants of insurance law that require courts to interpret exclusionary clauses narrowly and insuring clauses broadly, and (3) Chubb's own position on the exact same issue before a different court. For these reasons, Chubb's appeal must be denied.

2. The Superior Court appropriately construed the professional-services exclusion.

The Superior Court correctly held that the professional-services exclusion did not bar coverage for the Government's investigation in this case. Relying on Delaware law of policy construction, the Court held that the professional-services exclusion "was drafted broadly by the Insurer" and had to be "interpreted narrowly in favor of coverage." (ACE's Opening Br., Exh. A at 11.) GRI is "in the business of underwriting and issuing loans to [mortgage] borrowers." (*Id.*)The Court reasoned that because "the duty to meet certain standards was owed most directly to the federal government, not to the mortgage borrowers," "[c]ompliance with applicable quality-control standards is not a professional service." (*Id.*) This holding is consistent with (1) Delaware law, (2) law from other jurisdictions, and (3) Chubb's own position in a separate case.

Chubb now argues that the Superior Court's analysis was flawed because (1) "it draws an artificial distinction" between "originating and underwriting federally-insured mortgage loans" and "quality-control standards," (2) rewrites the

professional-services exclusion to restrict its scope to professional services "provided directly to borrower clients," and (3) improperly considers Chubb's conflicting position in *Iberiabank* as that position "has no legal effect" on Chubb's position here and constitutes improper extrinsic evidence. (ACE Opening Br. 26, 33.) Chubb is wrong on all accounts.

First, the "artificial distinction" Chubb mentions stems from its own misunderstanding of the False Claims Act and of GRI's obligations to the Government under the Direct Endorsement Lender program. The Superior Court did not draw an artificial distinction. Instead, the Superior Court recognized – as numerous other courts have uniformly recognized – that the wrongful conduct at issue in a False Claims Act claim is not the underlying professional service but the representations to the Government that the professional services complied with a certain level of care. *See e.g.*, *O'Hara*, 529 F.3d at 921–23 ("[T]he problem [i]s not the actual level of services provided . . . but rather that [the insured] billed for services it did not provide"); *Horizon W.,* 45 F. App'x at 753–54 ("The FCA injury does not 'result from' [the insured's] failure to provide professional services, but from its submission of allegedly fraudulent bills and its alleged misrepresentation of care standards.").

Second, the Superior Court did not rewrite the exclusion to restrict its scope to professional services "provided directly to borrower clients." Instead, the

Superior Court applied a narrow interpretation of the undefined term, as it was required to do under Delaware law. *See Sun-Times Media Group, Inc. v. Royal & Sunalliance Ins. Co. of Canada*, 2007 WL 1811265, at *11 (Del Super. Ct. Apr. 9, 2007) (courts must read insuring agreements broadly and construe exclusionary provisions narrowly). In construing the exclusion, the Superior Court considered both Chubb's *own* interpretation of the same term in a nearly identical case and the interpretation of the majority of other court decisions in the same context.

Sidestepping these authorities, Chubb relies on cases in other contexts to argue that courts have held "professional services" encompass a variety of actions that do not "directly" impact a customer or client. Ironically, the cases Chubb relies on find that a "professional service" existed only where the wrongful conduct at issue was providing some type of service directly to its clients. *See, e.g.*, *Mirman v. Exec. Risk Indem., Inc.*, 474 F. Supp. 3d 609, 615 (S.D.N.Y. 2019) (finding "professional services" where "the nature of the conduct under scrutiny" involved brokering a transaction "for the account of others"); *MDL Cap. Mgmt., Inc. v. Fed. Ins. Co.*, 274 F. App'x 169, 174 (3d Cir. 2008) (finding "professional services" where the conduct at issue involved the insured's "alleged derelictions as investment adviser and investment manager to [a third party client]"); *Goldberg v. Nat'l Union Fire Ins. Co., of Pittsburg, PA.*, 143 F. Supp. 3d 1283, 1300 (S.D. Fla. 2015), *aff'd sub nom. Stettin v. Nat'l Union Fire Ins. Co. of Pittsburg, PA*, 861

F.3d 1335 (11th Cir. 2017) (finding "professional services" where the conduct at issue involved "banking services" performed by the insured "for the benefit of [a third party client]").

Indeed, the only False Claims Act claim that Chubb cites – *HotChalk, Inc. v. Scottsdale Ins. Co.*, 736 F. App'x 646 (9th Cir. 2018)—is an outlier and recognizes that the holding is unique to the facts of that case. *See id.* at 648 n.2 ("Unlike in *Food Pro International, Inc. v. Farmers Insurance Exchange*, 169 Cal. App. 4th 976, 986-92 (2008) and the other cases cited by HotChalk and its amicus, United Policyholders, the relationship between HotChalk's professional services and its alleged liability was not merely 'incidental.' Rather, the relationship between HotChalk's professional services and its alleged liability was direct and well within the plain language of the professional services exclusion at issue in this case"). Further, no other court has drawn this connection. Contrary to *HotChalk* — and as both the *Iberiabank* court and Chubb itself acknowledged — the professional services at issue here are merely "incidental" to the Government's False Claims Act claim. The Government's claim focused on GRI's false statements regarding the quality of the loans at issue and their non-compliance with the Direct Endorsement Lender program, not on GRI's origination and underwriting services.

Third, contrary to Chubb's position, the Superior Court did not invoke the judicial-estoppel doctrine or use the *Iberiabank* briefing as extrinsic evidence.

Instead, the Court used the *Iberiabank* briefing to show that Chubb had *agreed* that a False Claims Act claim did not result from professional services, which further confirmed the reasonableness of GRI's interpretation here. *See Steigler v. Ins. Co. of North America,* 384 A.2d 398, 400 (Del. 1978) (the policy must be construed "in accordance with the reasonable expectations" of the insured). The Court is allowed to consider relevant briefing and case law to assess whether the insured's interpretation of a term is reasonable. However, even if the Court had relied on judicial estoppel, it would have been proper to do so. Delaware courts have long relied on the estoppel doctrine to promote judicial economy and to bar parties from re-litigating the same issues. *See Chryler Corp. v. New Castle Cnty.*, 464 A.2d 75, 80 (Del. Sup. Ct. 1983) ("plaintiff was barred from re-litigating the same issues even though the new suit was against a stranger to the first suit").

Moreover, the *Iberiabank* briefing does not constitute "extrinsic evidence." "Extrinsic evidence" consists of prior communications and course of dealing evidence specific to the interpretation of an ambiguous term. *GMG Capital Invs., LLC v. Athenian Venture Partners I, LP*, 36 A.3d 776, 784 (Del. 2012). The *Iberiabank* briefing does not consist of prior communications or course of dealings between Chubb and GRI related to the professional-services exclusion at issue in this case, and the Superior Court did not treat it that way. Instead, GRI and the Superior Court relied on the *Iberiabank* briefing to show that Chubb had

previously agreed with GRI's interpretation of the professional-services exclusion. If anyone should be estopped, it should be Chubb that is estopped from arguing that GRI's interpretation, which matches Chubb's own prior interpretation, is somehow unreasonable.

3. Chubb's interpretation of the professional-services exclusion renders coverage illusory.

The Superior Court appropriately found that Chubb's unreasonably broad interpretation of the professional-services exclusion would render coverage illusory. Coverage is illusory where an exclusion would have the effect of vitiating virtually all of the coverage provided by the policy. Accordingly, courts have consistently construed professional-services exclusions particularly narrowly to prevent such exclusions from "swallowing" the coverage otherwise provided. *Great Am. Ins. Co. v. GeoStar Corp.*, 2010 WL 845953, at *12 (E.D. Mich. Mar. 5, 2010) ("professional [errors-and-omissions] exclusions in [directors-and-officers] policies must be interpreted more narrowly to avoid negating the entire coverage scheme through the operation of an overly broad exclusions"); *Fed. Ins. Co. v. Hawaiian Elec. Indus., Inc.*, 1997 U.S. Dist. LEXIS 24129, *33–34 (D. Hawaii 1997) (a broad interpretation of the professional-services exclusion in a [directors-and-officers] policy would "have the effect of vitiating virtually all of the coverage provided by a [directors-and-officers] policy, the purpose of which is to cover any

wrongful act committed by an officer or director in their capacity as an officer or director").

In *Gallup*, 2015 WL 1201518, a Delaware court reviewed a professional-services exclusion with similar language in the context of a False Claims Act case. There, the exclusion 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. Like here, the term "professional services" was not defined. 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. Applying the same reasoning here, the Superior Court found that the professional-services exclusion in this case was also drafted broadly and if Chubb's interpretation was adopted, it would vitiate all meaningful coverage.

Chubb disputes the Court's holding and argues that the professional-services exclusion at issue here is not as broad as the one in *Gallup* because it does not extend to "any act, error or omission relating thereto." Chubb's attempt to distinguish *Gallup* falls flat. On one hand, Chubb argues that the exclusion must be interpreted so broadly as to include "non-underwriting issues" because the phrase "arising out of" requires only "*some meaningful linkage* between the [excluded

matter] and the third party claim." On the other, Chubb argues that the exclusion is not so broad as to include "any act, error or omission ***relating*** thereto." But no discernible difference exists between the terms "some meaningful linkage" and "relating thereto." Indeed, Oxford Languages defines the terms interchangeably.[2] ("Relating" means to "make or show a connection between," to "link (with)" and/or to "find/establish a link between"). Chubb cannot have it both ways. Its advocacy for such a broad interpretation of the professional-services exclusion here would render coverage illusory.

---

[2] Oxford English Languages (Google Search of "relate") https://www.google.com/search?q=relate&rlz=1C1CHBF_enUS995US995&oq=relate+&aqs=chrome..69i57j0i433i512l3j0i512l2j46i175i199i512j0i512j46i175i199i512j0i10i512.1690j1j15&sourceid=chrome&ie=UTF-8, accessed December 14, 2022 (defining "relate" to mean "make or show a connection between," to "link (with)" and/or to "find/establish a link between").

II. The Superior Court did not err in its summary-judgment ruling.

A. Question presented

Whether the undisputed facts established as a matter of law that the professional-services exclusion did not bar coverage. (Preserved at A02446–59.)

B. Scope of review

This Court also reviews a "grant of summary judgment de novo," to determine "whether an issue of material fact exists such that summary judgment was improper." *State Farm Mut. Auto. Ins. Co. v. Davis*, 80 A.3d 628, 632 (Del. 2013).

C. Merits of argument

1. The settlement was not based on GRI's loan underwriting and origination "errors."

Chubb's argument that Superior Court erred in its summary judgment ruling is wrong for all the same reasons discussed above. Furthermore, Chubb's effort to reframe the Government's allegations – and facts developed in discovery – must be rejected. Despite Chubb's best efforts, it cannot remove the False Claims Act from this case. [redacted]

[redacted]

Courts have long recognized the "distinction between the proof required for the False Claims Act claim and the conduct underlying the false claims." *Health Care Indus.*, 566 F.3d at 695. While liability under the False Claims Act is premised on the presentation of false claims and representations, the Government may use certain deficiencies in the defendant's services to establish the falsity of the defendants' claims and representations. *See United States ex rel. Cal. V. Am. Intern. Specialty Lines Ins. Co.*, 2007 WL 4208352, *4 (N.D. Cal. Nov. 27, 2007) ("liability under the FCA was premised on the presentation of falsity of Lenox's claims and representations, not the underlying deficiencies in patient care that [were] used to establish the falsity of Lenox's claims and representations").

That is exactly what the Government did here. [redacted]

Chubb mislabels "material defects" as "errors" in origination and underwriting. Contrary to Chubb's statements, the record reflects [redacted] (A00946–47 at 65:20-66:2, A00988–90.) HUD defines "Material

Risk" loans as those that contain "'material violations of FHA or mortgagee requirements and represent an unacceptable level of risk.'" *Wells Fargo Bank*, 972 F. Supp. 2d at *31 (quoting HUD Handbook 4060.1 REV-2, ¶ 7-4(D)). Indeed, the absence of material violations must be *certified* by a Direct Endorsement Lender as an explicit condition of payment. *See id.* Therefore, Chubb's mischaracterization of the term "material defects" as a way of describing an "underwriting defect rate" is a fiction. [redacted]

2. Chubb's arguments regarding the contribution of "other factors" to the settlement underscore the illusory coverage.

Chubb's argument that the professional-services exclusion also excludes coverage for "non-underwriting related issues" underscores the precise problem discussed above – namely, that Chubb's interpretation is so broad it vitiates all coverage and renders the Policy illusory. Chubb's argument is also unsupported by case law and highlights its fundamental misunderstanding of the False Claims Act and the Direct Endorsement Lender program.

[redacted] (A02562–64 at 131:1–133:18; A02565–57 at 136:24–138:10; A02568–70 at 184:7–186:17; A02571–73 at 188:23–190:16; A01367–70.) [redacted]

[redacted] (A02559–61 at 12:1–14:24, A01993–95, A00999–1000.) [redacted] (A02562–64 at 131:1–133:18, A01930–31 at 107:3–108:10; A01932 at 109:6–22; A019333 at 114:13.).

Chubb now argues that even though the annual certification is unrelated to the quality of the underwritten loans, the professional-services exclusion nevertheless precludes coverage because "[t]he FCA multiplier . . . was applied only *after* the Government's damages had been calculated by multiplying the 'material underwriting defect rate' against the Government's loan losses." (ACE's Opening Br. 43.) Thus, "if there had been no material underwriting defect, the Government would have had zero damages, and there would have been nothing against which to apply an FCA multiplier." (*Id.*) Chubb's arguments are nonsensical.

First, Chubb's entire argument is based on the false premise that "errors" in GRI's origination and/or underwriting of the subject loans were the basis for the

False Claims Act claim. As discussed above, underwriting errors do not give rise to a False Claims Act claim.

Second, Chubb attempts to shoehorn certifications regarding *non-underwriting issues* into the professional-services exclusion by virtue of the settlement mechanics, but this effort has no basis in law or fact.

The evidentiary record is clear that these issues do not relate to GRI's professional service of originating and underwriting loans. [redacted] Further, Chubb provides no analysis or explanation for how these certifications "arise out of" underwriting errors. And any attempt by Chubb to morph these certifications into professional services underscores the fact that Chubb's broad interpretation of the exclusion would vitiate *all* coverage and render the Policy illusory. *Gallup*, 2015 WL 1201518 at *12 (the professional-services exclusion should not be drafted so broadly so as to vitiate coverage for nearly all claims that may be "related" to any aspect of Plaintiff's business practices generally).

CROSS-APPELLANT'S OPENING ARGUMENT

I. The Superior Court erred in granting Chubb's motion for summary judgment with respect to GRI's bad-faith claim.

A. Question presented

Whether there were genuine issues of material fact with respect to the reasonableness of Chubb's conduct. (Preserved at A02463–84.)

B. Scope of review

An appeal from a Superior Court's summary-judgment decision is reviewed *de novo*. *Enrique v. State Farm Mut. Auto. Ins. Co.*, 142 A.3d 506, 511 (Del. 2016). A grant of summary judgment will be sustained only if there are no genuine issues of material fact . *Lank v. Moyed*, 909 A.2d 106, 108 (Del. 2006). "The facts of record, including any reasonable hypotheses or inferences to be drawn therefrom, must be viewed in the light most favorable to the non-moving party." *Williams v. Geier*, 671 A2d 1368, 1375 (Del. 1996). A genuine issue of material fact exists where the facts are disputed or where reasonable minds could draw different inferences from the undisputed facts. *GreenPoint Mortgage Funding, Inc. v. Hirt*, 97 N.E. 3d 66, 71 (Ill. App. 2018).

C. Merits of argument

This Court has recognized that an insured pursuing a bad-faith claim against an insurer need not come forward with a "smoking gun" to survive summary judgment. *Enrique*, 142 A.3d at 516. Rather, "inferences from facts can lead to a

triable bad faith claim." *Id.*; *Moyer v. American Zurich Ins. Co.*, 2021 WL 1663578 at *4 (Sup. Ct. Apr. 28, 2021). Because the ultimate issue in an insured's bad-faith claim involves an assessment of reasonableness and the insurers' state of mind, Delaware courts have consistently held that it is improper to dismiss such claims on summary judgment. *See In re Columbia Pipeline Grp., Inc. Merger Litig.*, 2022 WL 2902769, at *1 (Del. Ch. July 14, 2022) ("Whether a party's actions amount to bad faith and unfair dealing is to be determine by the trier of fact."); *Ferrari v. Helsman Mgmt. Servs., LLC*, 2020 WL 3429988, at *1 (Del. Super. Ct. June 23, 2020) (same); *Moyer*, 2021 WL 1663578 at *4 ("Where a litigant's state of mind is an element of a claim, summary judgment is frequently inappropriate because of its fact-intensive nature."); *Dunlap v. State Farm Fire & Cas. Co.*, 955 A.2d 132, 148 (Del. Super. Ct. 2007) ("the jury will make the ultimate 'reasonableness' determination").

1. There were genuine issues of material fact relating to the "reasonableness" of Chubb's conduct.

"An insured has a cause of action for bad faith against an insurer 'when the insurer refuses to honor its obligations under the policy and clearly *lacks reasonable justification* for doing so.'" *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 910 (Del. 2021) (quoting *Bennett v. USAA Cas. Ins. Co.*, 158 A.3d 877 (Del. 2017) (emphasis added)). "When judging reasonableness in this context, '[t]he ultimate question is whether at the time the insurer denied liability, there existed a

set of facts or circumstances known to the insurer which created a *bona fide* dispute and therefore a meritorious defense to the insurer's liability.'" *Murdock*, 248 A.3d at 910 (quoting *Casson v. Nationwide Ins. Co.*, 455 A.2d 361, 369 (Del. Super. 1982)).

Here, Chubb denied liability on two separate occasions: (1) on January 13, 2020, when it took the position that the civil investigative demand was not a Claim under the Policy and (2) on March 3, 2020, when it denied coverage under the professional-services exclusion. Both decisions lacked reasonable justification.

a. Chubb's decision to deny that the civil investigative demand was a "Claim" was unreasonable and motivated by financial gain.

Chubb's decision to deny the civil investigative demand constituted a "Claim" one week before GRI was scheduled to meet with the Government to discuss settlement was indefensible. The decision contradicted the plain language of the Policy and was motivated by financial gain. In addition, a jury can reasonably infer that Mr. Varley's decision to [redacted] A jury can also reasonably infer that the timing of Chubb's decision to deny the civil investigative

demand constituted a "Claim" was unreasonable, [redacted] *See Dunlap*, 878 A.2d at 444 ("[T]he implied covenant of good faith is the obligation to preserve the spirit of the bargain rather than the letter . . . . It requires more than just literal compliance with the policy provisions and statutes.") (internal citations omitted). At a minimum, these undisputed facts give rise to a material dispute with respect to the reasonableness of Chubb's conduct.

i. Chubb ignored the plain language of the Policy in favor of a tortured and artificial interpretation.

One of the most basic tenets of insurance law is that, absent ambiguity, words are to be given their plain and ordinary meaning. S. Plitt, D. Maldonado, J. Rogers & J. Plitt, *Couch on Insurance* § 22:10 (3d ed. 2020). The construction of a word or provision must therefore "not be strained, arbitrary, irrational, unnatural or forced, or strictly technical; rather, it must be fair, natural, reasonable, logical, and practical." *Id.* Chubb's decision to deny the civil investigative demand was a "Claim" violated this basic tenet.

Chubb issued a letter denying that the civil investigative demand was a "Claim" under subsection 5 of the definition of "Claim." As mentioned above, Mr. Varley [redacted]

which defines "Claim" as "a *civil*, administrative or regulatory *investigation against the* ***Insured***, commenced by *written notice, including* a target letter or Wells Notice, or subpoena from the investigating authority identifying the Insured as an individual against whom a civil, administrative or regulatory investigation or proceeding may be commenced." A00353 (italics added). A civil *investigative* demand falls squarely within the plain language of subsection 6: (1) the civil investigative demand was, as stated on its face, an "investigation," and (2) it was an investigation of an **Insured.**

Rather than adopt the plain meaning of this definition, Chubb decided to ignore it and that decision was deliberate: [redacted] (Compare A02658 ¶ 82 with A01865–67.) Chubb's explanations after the fact did not fare well either.

Chubb argued subsection 6 did not apply because [redacted] A0137 at 94:5–18.) Under Chubb's interpretation, [redacted] Chubb's argument, however, ignores the plain meaning of the word "including," which means "containing as part of the whole being

considered."[3] As a leading treatise explains, "[t]he verb *to include* introduces examples, not an exhaustive list." A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* § 15 (Thompson/West 2012). Under the plain meaning, the referenced "target letter or Wells Notice or Subpoena . . . identifying the insured as an individual" unquestionably presents a subset—examples within—the broader term "a civil, administrative or regulatory investigation against the **Insured** . . . ."

Moreover, even under Chubb's interpretation requiring an individual to be the subject of the investigation, a Claim was made. [redacted] (A00643.) [redacted] A00426–27 ¶¶ 7–8. [redacted] (A02561 at 14:2–12; 28:1–22; 33:5–34:23; 94:25–95:5; 116:14–1179.) [redacted]

[3] Oxford English Languages (Google Search of "definition of 'including'") https://www.google.com/search?client=safari&rls=en&q=defintion+of+%22including%22&ie=UTF-8&oe=UTF-8#cobssid=s, accessed April 18, 2022 (emphasis added).

[redacted]

Thus, even under Chubb's interpretation, coverage was triggered.

ii. Chubb's decision to deny financially benefited Chubb.

The Policy has a self-insured retention of $2.5 million per claim and provides that only Defense Costs and Loss can be applied against this retention amount. (A00325.) Defense Costs, in turn, include only "costs, charges, fees and expenses incurred by any Insured in defending ***Claims***." (A00328–29, § II.F.) Loss is defined to include "settlements and Defense Costs which the Insured becomes legally obligated to pay on account of any ***Claim.***" (A00354, End. 7 ¶ 9.P.) [redacted] GRI's broker informed Chubb of this fact on December 10, 2019. (See A01814 [redacted] These costs, however, would not be reimbursed or even count towards GRI's $2.5 million retention unless they were "incurred by the Insured in defending [a] ***Claim***." (A00328, § II.F.) Thus,

[4] "Insured as an individual" is not defined in the Policy. The Policy defines Insured Person, in relevant part, as "any person who was, now is or shall become. . . a full time or part time employee of the Company." D.I. 175, Ex. A § II.M(2). Notably, subsection 6 of the definition of Claim does not reference the defined term "**Insured Person**."

Chubb's position that the civil investigative demand constituted only a notice of "potential" claim and not an actual "**Claim**," was motivated by financial gain: [redacted]

In sum, there are disputed issues of material fact as to the reasonableness of Chubb's decision to deny the civil investigative demand was a "Claim" and Chubb's state of mind regarding the same. A reasonable jury could infer that Chubb's decision lacked reasonable justification and was motivated by financial gain.

b. Chubb's decision to deny coverage under the professional-services exclusion lacked reasonable justification.

Chubb's outcome determinative approach to "professional services" was also unreasonable and a breach of the implied covenant of good faith and fair dealing. As shown above in Appellee's Answering Brief, and incorporated by reference herein, Chubb's "just-for-this-case" interpretation of professional services contradicts (1) Chubb's *contemporaneous* position in an identical claim against another insured, (2) overwhelming authority from across the nation – *which Chubb itself cited in a contemporaneous case*, and (3) Chubb's own position *in this case* under its professional-liability policy. The only consistency in Chubb's changing positions is its consistent denial of coverage.

As explained above, the professional-services exclusion does not bar coverage because False Claims Act claims do not arise out of the rendering or failure to render professional services. *See supra*.

If the inquiry ended there, Chubb might have an argument that there was a bona fide dispute because courts across the nation have addressed this issue. But the inquiry does not end there. The reasonableness of Chubb's conduct must be judged based on the set of facts or circumstances known to Chubb at the time it denied coverage.

At the time Chubb denied coverage to GRI, it was ***contemporaneously*** arguing before the Fifth Circuit that the submission of false claims to the government could ***not*** be considered "Professional Services." A02529 ("[t]he very nature of a False Claims Act claim falls outside of professional-liability insurance coverage because submission of a false claim to the government is not any form of 'Professional Services'") As the Superior Court correctly observed, the conduct at issue in *Iberiabank* was identical to that alleged against GRI and Chubb's position in *Iberiabank* "directly contradict[ed]" its position here. (ACE's Opening Br. Exh. A at 9–10.)

Moreover, as the Court recognized in its judgment-on-the-pleadings ruling, Chubb's after-the-fact "justification" for its contradictory position is without merit. While Chubb now contends that the language in the two policies differs because

"'arising out of' professional services" in GRI's Policy is broader than "'for' professional services" in Iberibank's policy, Chubb ignores the very case law it cited in *Iberiabank* that dispelled that distinction. *See* A02539 (citing *Health Care Indus.*, 566 F.3d at 695, and *Zurich American*, 529 F.3d at 921–23). Further, no evidence suggests that anyone at Chubb considered this purported "distinction." Indeed, Mr. Varley testified that, [redacted] (A02597–98 at 255:22–256:19.)

Mr. Varley and Ms. Toyos did not even make an effort to determine whether Chubb's coverage position with respect to its management-liability policy was consistent with its position with respect to its professional-liability policy. At the time Chubb denied coverage under both policies, the set of facts and circumstances known to Chubb were found in the civil investigative demand. On December 31, 2020, Chubb denied coverage under its professional-liability policy and stated [redacted] (A01296). Just a week later, on January 7, 2020, Chubb [redacted]

[redacted] (A02611.) Chubb reiterated this position on March 3, 2020, when it officially denied coverage. Chubb cannot have it both ways. Either the civil investigative demand alleged facts involving professional services or it did not. One Chubb adjuster determined the civil investigative demand did not contain enough information to make a coverage determination under one policy, while another Chubb adjuster concluded unwaveringly, based on the same civil investigative demand, that the professional-services exclusion would exclude coverage under another policy. Both results unilaterally favored Chubb.

Chubb's decision must be judged based on the facts and circumstances known to Chubb at the time it denied coverage. *See Murdock*, 248 A.3d at 910. At a minimum, there is a genuine dispute of material fact as to the reasonableness of Chubb's conflicting positions, and a reasonable jury could find that Chubb lacked reasonable justification for denying coverage to GRI under the professional-services exclusion while simultaneously denying coverage to Iberiabank under its professional-liability policy.

2. There were genuine issues of material fact relating to Chubb's state of mind.

There is also a genuine issue of material fact as to whether Chubb's handling of GRI's claim amounted to reckless indifference and therefore entitled GRI to punitive damages. Because of the special nature of insurance relationships, Delaware courts have allowed an insured to recover punitive damages, in addition

to direct or consequential damages, if the insured can demonstrate that the insurer breached its obligations with malice or reckless indifference to the plight of its insured. *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 266 (Del. 1995). In *Tackett*, this Court observed that punitive damages are appropriate where the defendant showed a willful or wanton disregard of the plaintiff's rights. To prove "willful or wanton" conduct, the insured must at a minimum produce evidence of the insurer's "conscious indifference" or "I don't care" attitude. Thus, the least level of culpability necessary to impose punitive damages against a bad-faith insurer requires an elevated state of mind over the one necessary to demonstrate bad faith – that is, at a minimum, the bad-faith insurer must have consciously disregarded the insured's rights with an "I don't care attitude." Importantly, "[w]here a litigants state of mind is an element of a claim, summary judgment is frequently inappropriate because of its fact-intensive nature." *Moyer v. American Zurich Ins. Co.*, 2021 WL 1663578 *4 (Sup. Ct. Apr. 28, 2021); see also *Overstreet v. Kentucky Cent. Life Ins. Co.*, 950 F.2d 931 (4th Cir. 1991) (reasoning "where states of mind are decisive as elements of a claim or defense, summary judgment ordinarily does not lie"); *O'Donnell v. Fin. Am. Life Ins. Co.*, 171 F. Supp. 3d 711 (S.D. Ohio 2016) (finding genuine issues of material fact existed regarding defendant's knowledge and motivations); 10B Charles Alan Wright et al., *Federal Practice and Procedure* § 2730.2 (4th ed. 2019) (citing decisions from

multiple jurisdictions denying summary judgment in the *bad-faith* insurance context including instances involving claims for punitive damages) (emphasis added).

In *Moyer*, a Delaware court found that a material issue of disputed fact existed with respect to the insurer's recklessness, where the insurer's claim handler internally noted that the claim was "Compensable: Y" but then emailed the risk manager to recommend denial. 2021 WL 1663578, at *6. The insurer noted three reasons for its denial, two of which were "patently unsupportable." While the third reason was not as patently improper, the court held that "the jury could infer an 'I don't care' attitude." *Id.* The court noted that, when the facts are considered in their totality, an inference of reckless conduct can be made from the insurer's refusal to accept or deny coverage. *See id.* ("There are further facts that cumulatively support an inference of [the insured's] reckless conduct. For instance, approximately two weeks after [the claim handlers'] email recommending denial, [the insurer] wrote to [the insured] telling him differently. There, it gave him two reasons, not reasons to deny his claim, but rather reasons why it could not yet accept or deny it.") The court also held that a jury could infer a recklessness by the fact that the insurer had awareness that its conduct created a substantial risk of harm to the insured. *See id.* ("For instance, the record includes March 26, 2019 emails between [the insured's]

employer and [the insurer] that demonstrate how frustrated [the insured] was with [the insurer's] refusal to act.").

Similarly here, a jury could infer reckless indifference based on Chubb's (1) patently unsupportable position that the civil investigative demand was not a "Claim" under the Policy, (2) its outcome determinative approach to interpreting "professional services," (3) its delayed and biased investigation of GRI's claim, and (4) its disregard for GRI's plight when it [redacted] A reasonable jury could infer that Chubb acted with reckless indifference and an "I don't care" attitude when it [redacted] when it denied that the civil investigation demand against GRI was a "Claim," (2) took the position that the Government's False Claims Act investigation against GRI arose out of professional services at the same time it argued that the Government's False Claims Act investigation against Iberiabank did not, (3) decided to disregard the Iberiabank decision [redacted] (4) [redacted] and (5) [redacted]

[redacted]

[redacted]

II. The Superior Court erred in granting Summary Judgment on GRI's bad faith claim without considering GRI's bad-faith expert report.

A. Question presented

Whether the Superior Court erred in granting summary judgment and dismissing GRI's bad-faith claim without first considering Mr. Ehrlich's expert report. (Preserved at A02463–65, A02634–77.)

B. Scope of review

This Court reviews decisions about excluding expert reports for abuse of discretion. *See Richards v. Copes-Vulcan, Inc.*, 213 A.3d 1196, 1200 (Del. 2019).

C. Merits of argument

In denying GRI's bad faith claim, the Superior Court found that "it is appropriate to disregard the expert report" because the expert report "presents legal conclusions that do not create any genuine issue of material fact." (ACE's Opening Br., Exh. B at 22.) Citing *Enrique v. State Farm Mutual Automobile Insurance*, 142 A.3d 506, the Superior Court stated "[w]here an expert report essentially expresses opinions on the law, but not the facts, the Court affords the report little weight on summary judgment." (*Id.* at 21.)

Mr. Ehrlich's report did not express opinions on the law or present legal conclusions. Rather, the report provided expert testimony about insurance industry standards, customs, and practices in handling claims and how Chubb's conduct compared to those standards and practices. *Compare* A02671 [redacted]

[redacted] *with Enrique v. State Farm Mut. Automobile Ins. Co.*, 142 A.3d 506, 515 n.38 ("Cohen, who is an insurance broker in Carmel, New York, who never adjusted claims, and who is not a lawyer, believed that State Farm acted in bad faith under Delaware law. In Cohen's report and his deposition, he essentially expressed opinions on the law, not the facts."). Based on his 17 years of experience as a senior-level insurance industry executive, Mr. Ehrlich identified several key claims customs, standards, and practices that industry participants generally accept and adhere by, including:

- [redacted] (A02643.)
- [redacted] (A02643.)
- [redacted] (A02644.)
- [redacted] (A02644.)

- [redacted] (A02645.)
- [redacted] (A02645.)
- [redacted] (A02645.)

Mr. Ehrlich then identified multiple facts in the record that supported his conclusion that [redacted]

Delaware courts have consistently held that expert testimony regarding the customs and practices of the insurance industry are relevant and pertinent to the issue of bad faith. *See In re Columbia Pipeline Group, Inc. Merger Litigation*, 2022 WL 2902769, at *1 (Del. Ch. July 14, 2022) (It is "proper for an expert to testify as to the customs and standards of an industry and to opine as to how a party's conduct measured up against some such standards.") (internal citations omitted); *Ferrari v. Helsman Mgmt. Servs., LLC*, 2020 WL 3429988, at *1 (Del. Super. Ct. June 23, 2020) (defendant's expert may opine as to whether defendant's actions complied with or were consistent with insurance industry standards, customs, and practices); *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pennsylvania*, 1994 WL 721642, at *2 (Del. Super. Ct. Apr. 13, 1994)

(holding that "the testimony of insurance industry experts will provide the jury with a factual basis of knowledge from which the contracts at issue can be intelligently construed, with the experts' industry-related testimony in mind"). Indeed, this Court has previously dismissed an insured's bad-faith claim for failure to "call an insurance expert to opine on the arbitrariness of [the insurer's] action"). *Bennett v. USAA Casualty Ins. Co.*, 158 A.3d 877, *4 (Del. 2017). Some courts have even held that it is improper to grant summary judgment in favor of the insurer on bad faith without considering testimony from the insured's bad-faith exert witness. *Phelps v. State Farm Mut. Auto. Ins. Co.*, 736 F.3d 697, 705 (6th Cir. 2012).

This Court recognizes that the reasonableness of a party's conduct must be judged through the lens of what is customary in the industry. *See Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 554 (Del. 2006) ("The custom and practice in a particular industry is probative of what conduct is reasonable under the circumstances."). In *Hercules Inc. v. OneBeacon Am. Ins. Co.*, 2004 WL 3250119, *1 (Del. Sup. Ct. Sept. 7, 2004), the court permitted expert testimony from an insurance industry expert to "assist the jury in understanding that the positions taken by the Insurers [were] so extreme and at odds with the custom and practice in the industry that practitioners in the field would consider them to be totally without support." *Id.* The court was persuaded that the expert's testimony would "enable

the jury to determine that the Insurers are acting in bad faith to deny coverage based upon such frivolous positions." *Id.*

Similarly here, Mr. Ehrlich's report was offered to assist the Court in understanding that the positions taken by Chubb in this case were so at odds with the custom and practice in the industry that a jury could find Chubb acted in bad faith. The Superior Court's decision to disregard his opinion entirely was an error because the reasonableness of Chubb's conduct (and therefore its bad faith) must be judged by what is customary in the industry.

CONCLUSION

For these reasons, this Court should affirm the Superior Court's decision with respect to Counts I and III of GRI's Amended Complaint and reverse the Superior Court's decision with respect to Count II.

Respectfully submitted,

Dated: December 29, 2022

/s/ *William J. Burton*

Thomas E. Hanson, Jr. (No. 4102)
William J. Burton (No. 6243)
BARNES & THORNBURG LLP
222 Delaware Ave, Suite 1200
Wilmington, DE 19801
Telephone: (302) 300-3447
thanson@btlaw.com
william.burton@btlaw.com

-Of Counsel-

Lilit Asadourian (admitted *pro hac vice*)
Alice Kyureghian (admitted *pro hac vice*)
BARNES & THORNBURG LLP
2029 Century Park East, Suite 300
Los Angeles, CA 90067
Telephone: (310) 284-3786
LAsadourian@btlaw.com
AKyureghian@btlaw.com

AARON D. LINDSTROM (admitted *pro hac vice*)
BARNES & THORNBURG LLP
171 Monroe Avenue N.W., Suite 1000
Grand Rapids, MI 49503
Telephone: (616) 742-3931
Aaron.Lindstrom@btlaw.com

Attorneys for Plaintiff/Appellee/Cross-Appellant, Guaranteed Rate, Inc.

CERTIFICATE OF SERVICE

I, William J. Burton, hereby certify that on January 10, 2023, I caused a copy of the foregoing Redacted Public Version of *Guaranteed Rate's Corrected Answering Brief on Appeal and Opening Brief on Cross-Appeal* to be served on the following counsel of record via File & Serve*Xpress*:

John L. Reed
1201 North Market Street, Suite 2100
Wilmington, DE 19801
(302) 468-5700
john.reed@dlapiper.com

Robert J. Katzenstein
The Brandywine Building
1000 West Street, Suite 1501
Wilmington, DE 19899
302-652-8400
rjk@skjlaw.com

Dated: January 10, 2023

/s/ *William J. Burton*
Thomas E. Hanson, Jr. (No. 4102)
William J. Burton (No. 6243)
BARNES & THORNBURG LLP
1000 N. West Street, Suite 1500
Wilmington, DE 19801
Tel.: (302) 300-3447
thanson@btlaw.com
william.burton@btlaw.com

Attorneys for Plaintiff-Below/Appellee/Cross-Appellant