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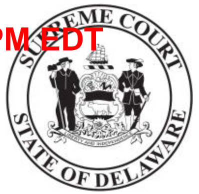

IN THE SUPREME COURT OF THE STATE OF DELAWARE

HOMELAND INSURANCE COMPANY OF NEW YORK,	)	No. 60, 2018
Defendant-Below, Appellant,	)	
v.	)	Case Below:
CORVEL CORPORATION,	)	Superior Court of the State of Delaware
Plaintiff-Below, Appellee.	)	C.A. Nos. N11C-01-089-ALR and N15C-05-069 (Consol.)

APPELLEE'S ANSWERING BRIEF

John M. Seaman (#3868)
April M. Kirby (#6152)
ABRAMS & BAYLISS LLP
20 Montchanin Road, Suite 200
Wilmington, Delaware 19807
(302) 778-1000

Attorneys for CorVel Corporation
Plaintiff Below–Appellee

Dated: April 23, 2018

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iv

NATURE OF PROCEEDINGS 1

SUMMARY OF ARGUMENT 5

STATEMENT OF FACTS 9

A. The Parties And The Underlying Policy 9

B. The Requirement To Report A Claim Under The Policy 9

C. The Underlying Louisiana Claim 10

D. The *Williams* Settlement 13

E. The Parallel Louisiana Action And The Superior Court Action 13

F. The Louisiana Court Holds That The Policy Provides Coverage And The Delaware Action Is Stayed Pending Resolution Of The Louisiana Appeal 15

G. The Coverage Claims In The Delaware Action Are Dismissed 16

H. The Superior Court Holds That Homeland Violated La. R.S. § 22:1973(B)(1) 17

I. Homeland Appeals The Judgment Awarding Damages And Penalties Under La. R.S. 22:1973 17

ARGUMENT 18

I. THE COURT BELOW CORRECTLY APPLIED LOUISIANA LAW 18

A. Question Presented 18

B. Scope of Review 18

C. Merits of Argument 18

1. The Superior Court Properly Concluded That Louisiana's Substantive Law Applies.......................................19

2. Louisiana Has The Most Significant Relationship To CorVel's Claim Under La. R.S. 22:1973 19

3. Delaware's Interest In Resolving Claims Arising Under La. R.S. 22:1973 Is Negligible 21

4. The Underlying Claim And Coverage Claim Were Resolved Under Louisiana Law, And The Same Law Should Apply to CorVel's Claim 25

5. Homeland Violated La. R.S. 22:1973.......................................26

a. Homeland Knowingly Misrepresented A Pertinent Fact..27

b. Making Misrepresentations In Delaware Pleadings Does Not Insulate Homeland From Liability..28

c. Homeland's Misstatements Were Misrepresentations of Pertinent Fact, Not Legal Arguments 30

d. Homeland's Misrepresentation Was Not A "Coverage Position" 32

II. THE COURT BELOW CORRECTLY HELD THAT CORVEL INCURRED $9 MILLION IN DAMAGES AS A RESULT OF HOMELAND'S VIOLATION OF LA. R.S. 22:1973 34

A. Question Presented...34

B. Scope of Review..34

C. Merits of Argument...34

1. Homeland's Mere Assertion Of Other Coverage Defenses Does Not Establish That Homeland's Factual Misrepresentations Were Not The Cause Of CorVel's Damages..34

2. La. R.S. 22:1973 Has No Reliance Element 36

3. Discovery Closed Without Homeland Ever Challenging Causation, Reliance, Or Damages 37

III. THE COURT BELOW CORRECTLY HELD THAT CORVEL'S CLAIM UNDER LA. R.S. 22:1973 WAS TIMELY 40

A. Question Presented 40

B. Scope of Review 40

C. Merits of Argument 40

1. A Bad Faith Claim Does Not Accrue Until The Claimant Can Plead Damages 40

2. Homeland Is Estopped From Asserting A Statute of Limitations Defense 43

CONCLUSION 45

TABLE OF AUTHORITIES

Cases **Page(s)**

Abry Partners V, L.P. v. F & W Acquisition LLC,
891 A.2d 1032 (Del. Ch. 2006) 26

Allstate Ins. Co. v. Daniel,
177 So.3d 169 (La. Ct. App. 2015)...15

AT&T Wireless Servs., Inc. v. Fed. Ins. Co.,
2007 WL 1849056 (Del. Super. June 25, 2007)..26, 41

Brown v. State,
900 A.2d 628 (Del. 2006) 44

Calogero v. Safeway Insurance Company of Louisiana,
753 So.2d 170 (La. 2000) 33

Connelly v. State Farm Mut. Auto. Ins. Co.,
135 A.3d 1271 (Del. 2016) 40

CorVel Corp. v. Homeland Ins. Co. of N.Y.,
112 A.3d 863 (Del. 2015) ....*passim*

Crescent City Baptist Church v. Church Mut. Ins. Co.,
2006 WL 2631862 (E.D. La. Sept. 13, 2006)..33

Durio v. Horace Mann Ins. Co.,
74 So.3d 1159 (La. 2011) 43

Harris v. Fontenot,
606 So.2d 72 (La. Ct. App. 1992)..29

Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.,
1993 WL 603360 (Del. Super. Nov. 16, 1993) 29

Homeland Ins. Co. v. CorVel Corp.,
2013 WL 3937022 (Del. Super. June 13, 2013)...13

Kelly v. State Farm Fire & Cas. Co.,
169 So.3d 328 (La. 2015) 27, 30, 42

Kelty v. State Farm Mut. Auto. Ins. Co.,
73 A.3d 926 (Del. 2013) 18

Kilroy Indus. v. United Pac. Ins. Co.,
608 F. Supp. 847 (C.D. Cal. 1985) 25

Lankford v. Richter,
570 A.2d 1148 (Del. 1990) 44

LeVan v. Indep. Mall, Inc.,
940 A.2d 929 (Del. 2007) 40

Magidson v. Lansing,
2012 WL 6677912 (La. Ct. App. Dec. 21, 2012) 41

Montgomery v. William Moore Agency,
2015 WL 1056326 (Del. Super. Feb. 27, 2015) 44

Perkins v. Entergy Corp.,
782 So.2d 606 (La. 2001) 35

Riley v. Southwest Business Corp.,
2008 WL 4286631 (E.D. La. 2008) 41, 43

Schwartz v. Liberty Mut. Ins. Co.,
539 F.3d 135 (2d Cir. 2008) 21

Sher v. Lafayette Ins. Co.,
988 So.2d 186 (La. 2008) 29

Thomas v. Grand Trunk Ry. Co. of Canada,
42 A. 987 (Del. Super. 1899) 25

Thomas v. Hartford Mut. Ins. Co.,
2003 WL 220511 (Del. Super. Jan. 31, 2003) 37

Utica Mut. Ins. Co. v. Klein & Son, Inc.,
460 N.W.2d 763 (Wis. Ct. App. 1990) 44

Williams v. SIF Consultants of La.,
218 So.3d 629 (La. 2017) 16

Williams v. SIF Consultants of La., Inc.,
209 So.3d 903 (La. Ct. Ap. 2016),
writ den., 218 So.3d 629 (La. 2017) .... *passim*

Williams v. SIF Consultants of La., Inc., et al.,
No. 09-C-05244-C (Dist. Ct., St. Landry Parish, La.) 12

Williams v. SIF Consultants of La., Inc.,
2013 WL 7330225 (La. Dist. Ct. Jul. 29, 2013) 14

Rules and Statutes

Del. Super. Civ. R. 56(e) 38

18 *Del. C.* § 906 44

18 *Del. C.* § 2304(16) 37

18 *Del. C.* § 3914 44

La. R.S. 22:1973 .... *passim*

La. R.S. 40:2203.1 .... 2, 28

La. R.S. 22:1269 12

Other Authorities

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 193 (1971) 19, 21

RESTATEMENT (SECOND) OF TORTS § 432(2) (1965) 35

NATURE OF PROCEEDINGS

On January 5, 2018, the Superior Court issued a thorough and well-reasoned Memorandum Opinion granting in part CorVel Corporation's ("CorVel") Motion for Summary Judgment and denying in part Homeland Insurance Company of New York's ("Homeland") Motion for Summary Judgment (the "Opinion"). The Superior Court correctly held that Homeland misrepresented that CorVel failed to report an arbitration action initiated against CorVel as required under an insurance policy issued by Homeland to CorVel, which violated a Louisiana statute prohibiting bad faith claims handling practices. The Superior Court further held that CorVel suffered $9 million in damages as a result of Homeland's violation of the Louisiana statute.

On February 1, 2018, the Superior Court entered a Final Judgment in favor of CorVel and against Homeland for $15,911,321.92, consisting of $9 million in damages, $4.5 million in penalties, and $2,411,321.92 in pre-judgment interest. Homeland appeals the summary judgment ruling insofar as it held that: (i) Louisiana law applies to CorVel's claim for violating the Louisiana statute, (ii) Homeland violated the Louisiana statute, (iii) Homeland's statutory violation caused CorVel to incur $9 million in damages, and (iv) CorVel's claim was timely. Homeland does not appeal the court's penalty or prejudgment interest rulings.

This action has its genesis in December 2006, when the Lake Charles Memorial Hospital of Lake Charles, Louisiana ("LCMH") initiated a class action arbitration (the "Arbitration Action" or "Claim") against CorVel alleging that CorVel violated certain notice provisions of Louisiana's Preferred Provider Act, La. R.S. 40:2203.1 ("Title 40"). Shortly thereafter, on March 28, 2007, CorVel's director of legal services called the claims administrator at CorVel's errors and omissions insurance carrier, Homeland, to notify Homeland of the claim asserted against CorVel in the Arbitration Action. CorVel then emailed to Homeland documents from the Arbitration Action including the letter from LCMH notifying CorVel of the initiation of the Arbitration Action.

Despite receiving the emails on March 28, 2007—and later acknowledging that the letter constituted a "Claim" under the insurance policy issued to CorVel (the "Policy") and was delivered to the appropriate person—Homeland has misrepresented to CorVel for years that CorVel did not timely report the Arbitration Action. This representation was false and involved a pertinent fact relating to coverage. Homeland has falsely asserted in correspondence with CorVel and in pleadings in this case that CorVel did not timely report the Claim under the Policy. Moreover, Homeland *knew* that CorVel's coverage counsel was uncertain whether CorVel had timely reported the Claim, and Homeland sought to take advantage of that uncertainty. Thus, Homeland knowingly misrepresented

pertinent facts to CorVel by falsely claiming CorVel had not timely reported the Claim as a basis for denying coverage. As a direct result of Homeland's misrepresentations about coverage, CorVel was forced to defend itself against the underlying claims seeking $140 million in damages, and was forced to settle the Arbitration Action at its own expense by making a $9 million payment to the plaintiff class (the "Class"), plus an assignment to the Class of CorVel's right to seek reimbursement from Homeland for the settlement payment.

In April 2017, the Class finally obtained some relief under the Policy when a Louisiana court, in a parallel action, conclusively determined that the Arbitration Action was a covered claim and, among other things, that CorVel had in fact timely reported the Arbitration Action.[1] The Louisiana court ordered Homeland to pay the Class $10 million, plus interest—the full amount of the Policy (the "Louisiana Judgment"). Thereafter, the Superior Court dismissed as moot Homeland's claim against CorVel seeking a declaration of non-coverage. While the Class has obtained relief, CorVel has not, as it still remains out of pocket $9 million. Had Homeland not falsely asserted that CorVel had failed to timely report the Claim, CorVel would not have been forced to pay $9 million out of pocket and would not have been required to assign its claim under the Policy to the Class.

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[1] *Williams v. SIF Consultants of La., Inc.*, 209 So.3d 903 (La. Ct. Ap. 2016), *writ den.*, 218 So.3d 629 (La. 2017); *see also* B577.

Instead, Homeland persisted in advancing a counter-factual assertion that it knew was false—that CorVel did not timely report the Arbitration Action. This was a misrepresentation of a pertinent fact.

Fortunately, Louisiana has a statute designed to deter insurance companies from misrepresenting pertinent facts when handling claims to ensure that insureds are not denied the benefits of their insurance policies. *See* La. R.S. 22:1973(B)(1) ("Section 1973"); B1. To give Section 1973 teeth, in addition to a mandatory damages award, the statute authorizes imposition of a penalty in an amount of up to two times an insured's damages.

On February 5, 2018, the Superior Court correctly held, among other things, that: (i) Louisiana law applied to CorVel's claim for Homeland's violating Section 1973, (ii) Homeland violated Section 1973 by misrepresenting to CorVel that it did not timely report the Arbitration Action, when it had, (iii) CorVel suffered $9 million in damages as a result of Homeland's violation of Section 1973, and (iv) CorVel timely asserted its claim under Section 1973. The Superior Court awarded CorVel $9 million in damages and $4.5 million in discretionary penalties (although it could have awarded up to $18 million in penalties). For all the reasons in the Opinion and below, the Superior Court's Opinion should be affirmed.

SUMMARY OF ARGUMENT

1. Denied. First, the Superior Court correctly held that Louisiana law applies to CorVel's claim for violating La. R.S. 22:1973. Although Homeland curiously attempts to argue for the application of other states' bad faith law, a simple review of CorVel's complaint shows that CorVel has not asserted a claim under any other state's laws, only under La. R.S. 22:1973.

This Court has already held that Delaware law has "very little connection" to this litigation, and that "[t]he connection this litigation has with the State of Louisiana is much stronger."[2] Recognizing that Louisiana has the most significant relationship with the claims in this case, this Court applied Louisiana law to its statutory construction analysis of the damages remedy under Title 40, and the Superior Court stayed the coverage claims in the Delaware Action pending resolution of the same coverage dispute in Louisiana, under Louisiana law. Coverage was ultimately decided by a *Louisiana* court, under *Louisiana* law, in an action initiated by a class of *Louisiana* healthcare providers alleging a violation of a *Louisiana* statute. Thus, Louisiana's substantive law applies to the underlying action.

Similarly, here, CorVel asserts a violation of La. R.S. 22:1973—and only La. R.S. 22:1973—arising from Homeland's handling of the class claim against

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[2] *See CorVel Corp. v. Homeland Ins. Co. of N.Y.*, 112 A.3d 863, 869 (Del. 2015) ("*CorVel I*").

CorVel. In short, CorVel's only bad faith claim was and is its claim that Homeland violated La. R.S. 22:1973(b) when it falsely asserted on numerous occasions (including in pleadings in this case) that CorVel had not timely reported the Claim. Homeland wrongly characterizes CorVel's claim as a general bad faith claim that could arise under any state's law when no such general bad faith claim has been asserted. The mere fact that some, but not all, of Homeland's misrepresentations were eventually asserted in a Delaware complaint does not render La. R.S. 22:1973 inapplicable, or immunize Homeland from liability.

The Superior Court also correctly held that Homeland violated La. R.S. 22:1973. By its own terms, Section 1973 imposes on insurers a duty of good faith and fair dealing and prohibits, among other things, "[m]isrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue." B1. This prohibition is not limited to the manner, time, or place of such misrepresentation.

The undisputed facts make clear that CorVel did, in fact, timely report the Arbitration Action, a prerequisite for coverage. But, Homeland knowingly and falsely denied—in pre-litigation correspondence and in its pleadings and discovery in the Delaware Action—the simple ***fact*** that CorVel had timely reported the Arbitration Action. The mere fact that certain of Homeland's misrepresentations were also asserted in Homeland's Delaware complaint is irrelevant to any choice of law analysis. Section 1973 does not exempt misrepresentations of ***fact*** made in

the course of litigation, nor does the statute exempt misrepresentations of fact anytime, anywhere, or in any setting.

2. Denied. Second, the Superior Court correctly held that Homeland sustained $9 million in damages as a result of Homeland's violation of La. R.S. 22:1973. Section 1973 provides that any insurer who violates subsection (B) "***shall be liable for any damages***" sustained as a result of the violation. After Homeland misrepresented that CorVel did not timely report the Claim (when it did), CorVel was faced with a $140 million claim, which it was forced to settle for $9 million of its own funds and an assignment of CorVel's right to indemnification under the Policy for the settlement amount. Neither the settlement payment nor the assignment is disputed. Accordingly, Homeland's violation of La. R.S. 22:1973 caused CorVel to incur $9 million in out-of-pocket monetary damages.

The fact that Homeland asserted alternative theories for denying coverage (all of which have now been rejected by Louisiana courts), in addition to its misrepresentation about reporting the Claim, does not mean that Homeland's violation of La. R.S. 22:1973 did not cause CorVel's damages. For starters, nowhere in Section 1973 does the statute require that the violation solely cause the damage. Homeland's contention that CorVel's damages were really the result of Homeland's erroneous and meritless legal arguments on coverage—and not based on its misrepresentations of fact—borders on the absurd. The Superior Court

correctly held, "there is a direct causal link between Homeland's bad faith and CorVel's damages." Op. 26.

3. Denied. Third, the Superior Court correctly held that CorVel's claim was timely. The parties agree that the statute of limitations question turns on Delaware law. Under Delaware (or Louisiana) law, a claim for bad faith insurance handling practices does not accrue until the insured can plead damages. Moreover, CorVel's bad faith claim is predicated entirely on a finding of coverage. This is precisely why the Superior Court stayed discovery on CorVel's Section 1973 claim pending resolution of the coverage dispute in Louisiana. If the Louisiana courts had not found coverage, CorVel could not plead damages resulting from Homeland's misrepresentations. Thus, CorVel's claim did not (and could not) ripen and the statute of limitations did not (and could not) begin to run, until January 21, 2016, when the Louisiana trial court held that the *Williams* Settlement (defined below) was covered under the Policy. CorVel filed its bad faith claim on June 9, 2015, well-before the statute of limitations even began to run.

STATEMENT OF FACTS

A. The Parties And The Underlying Policy

CorVel is a Delaware corporation[3] with its principal place of business in California which owns and operates a Preferred Provider Organization ("PPO") network. B432. CorVel entered into a number of PPO agreements with medical providers in Louisiana, including an agreement with the LCMH in 1996. *Id.*; A044; A045. Homeland issued an Errors and Omissions Policy to CorVel with a policy period covering October 31, 2006 to December 1, 2007. B432; A056-A090 (the "Policy"). The Policy provides $10 million maximum coverage per claim. *Id.*

B. The Requirement To Report A Claim Under The Policy

Section I(A) of the Policy requires that a claim first made during the Policy Period must be "reported to the Underwriter either during the Policy Period" or within 90 days thereafter. A072. Section IV(B) of the Policy provides that "the Insured must, as a condition precedent to any right to coverage under this Policy, give the Underwriter written notice of such Claim." A083. The Policy does not require that an insured provide any specific information or documentation to report a claim, nor does it require that an insured formally request defense or indemnity

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[3] This is the *only* connection that any of the parties or the dispute has to Delaware. *CorVel I*, 112 A.3d at 869.

when reporting a claim.[4] An insured need only provide "the written notice that was received by the insured."[5] *See also* A073 (definition of "Claim").

C. **The Underlying Louisiana Claim**

In December 2006, LCMH initiated the Arbitration Action in which LCMH and the Class alleged that CorVel violated Title 40. A132-38. Under Title 40, a PPO is required to give prior notice to a medical provider when a PPO discount is to be applied. B3-4. The Arbitration Action alleged that CorVel failed to provide the notice required by Title 40.[6] A133.

CorVel first received notice of LCMH's intent to assert a Title 40 violation on December 4, 2006 when it received a letter from counsel for LCMH that it and a class of healthcare providers intended to initiate a class arbitration for statutory damages under Title 40 (the "December 4, 2006 Letter"). A131. Three weeks later, the Class filed the arbitration with AAA. A132-34.

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[4] *See* B192 at 196:5-196:8; B194 at 202:5-10.

[5] B181 at 149:9-149:12.

[6] Homeland spends a significant portion of its brief trying to re-litigate the coverage arguments that it has fully and finally lost, namely when the Claim was first made. *See, e.g.*, Op. Br. 7-10. This Court need not (and should not) revisit Homeland's "relation-back" and "first made" arguments that the Louisiana courts have already rejected in a final, unappealable ruling. *See Williams*, 209 So.3d at 911, 912 ("the 2006 class arbitration claim was made and reported during the period of Homeland's policy" and "[t]he plaintiff class' claims are not related to workers' compensation claims or contractual indemnity claims").

On March 28, 2007, CorVel's director of legal services, Sharon O'Connor, called Homeland's claims administrator, Virginia Troy, to notify Homeland of the claim asserted in the Arbitration Action. A143-44; A146-151. CorVel then reported the Arbitration Action by delivering a copy of the December 4, 2006 Letter. A152-58.[7] Despite receiving clear written notice of the Arbitration Action on March 28, 2007 (well within the Policy's reporting period), Homeland has continued to deny that CorVel reported the Arbitration Action. On June 4, 2007, Homeland wrote to CorVel asserting that "[t]o date, the only Claims involving the OWC cases and/or PPO litigation in Louisiana that have been reported to [Homeland] are the ORM and Kroger demand letters." B49. This statement was patently false (and intended to mislead CorVel into believing that the Claim had not been reported) because in March 2007 CorVel had reported the Arbitration Action.

In October 2010, after the arbitration panel concluded that the Arbitration Action could proceed as a class arbitration, CorVel's attorney, Seth Lamden told Homeland he believed his client had previously provided at least "constructive

[7] CorVel also sent Homeland, among other things: (i) CorVel's engagement letter with counsel "in connection with [an action to compel arbitration] and ***related arbitration proceeding***;" (ii) a letter from CorVel's counsel to the AAA case manager, requesting a stay of the Arbitration Action; and (iii) an email with the subject line "PPO Arbitration in Louisiana" attaching a decision compelling arbitration of the Title 40 claims and referencing an "overnight package with … the latest filing by [class counsel] of his claim with the AAA." A152-92.

notice" of the Arbitration Action during the Policy period. A212. But, Homeland had never issued a coverage letter regarding the Arbitration Action confirming (or denying) that the Arbitration Action had been properly reported. As a result, Lamden was not aware that O'Connor had sent emails on March 28, 2007 with "actual notice." A215 (Lamden asking Homeland's counsel, Rosen: "Would you mind sending me the letter and any other correspondence to or from CorVel in your files?"). Homeland latched onto Lamden's "constructive notice" comment. A212. Instead of correcting Lamden and telling him that CorVel had already reported the Claim in March 2007, Homeland sought to capitalize on Lamden's uncertainty. A215-16. When Lamden requested from Rosen copies of correspondence confirming that CorVel timely reported the Claim, Rosen refused to send the requested information (or a coverage letter). A215; A023.

On March 24, 2011, while the Arbitration Action was pending, CorVel was added as a party to an existing Louisiana class action captioned *Williams v. SIF Consultants of La., Inc., et al.*, No. 09-C-05244-C (Dist. Ct., St. Landry Parish, La.) (the "*Williams* Action"). A478 ¶11. Both the Arbitration Action and the *Williams* Action (together, the "Louisiana Actions") asserted the same allegations and sought damages under Title 40. *Id.* ¶7. Homeland was also made a defendant

in the *Williams* Action under Louisiana's direct-action statute which permits injured parties to assert claims directly against insurance companies.[8]

D. The *Williams* Settlement

CorVel requested Homeland's consent to settle the Louisiana Actions and for indemnification under the Policy. *See* A046 at ¶¶13-14; A214-17. Homeland refused to consent to the settlement or provide a defense. *See* § E, *infra*; B435 at ¶14; A046 ¶13. On July 23, 2011, with no coverage available and no other options, CorVel agreed to settle the Louisiana Actions for $9 million and an assignment of CorVel's insurance claim against Homeland. A046 at ¶15; A279-342. The Louisiana court approved the settlement in which the Class reserved its right to pursue claims against CorVel's non-settling insurers, including Homeland (the "*Williams* Settlement"). B59-68. The *Williams* Settlement is the subject of the coverage claims asserted in this action. A479 ¶17.

E. The Parallel Louisiana Action And The Superior Court Action

To avoid unfavorable coverage rulings in Louisiana, on January 10, 2011, Homeland filed its Delaware complaint seeking, among other things, a declaration of no coverage under the Policy on multiple grounds, including that the Title 40 claim against CorVel was an uninsurable penalty and that CorVel failed to timely report the Claim. A242. On June 13, 2013, Judge Herlihy granted summary

[8] *See* La. Rev. Stat. 22:1269; A478 ¶11.

judgment to Homeland on its defense that the underlying claim was an uninsurable penalty.[9] Meanwhile, the Class in the Louisiana Action had moved for partial summary judgment seeking a declaration that amounts owed under Title 40 were not penalties, but insurable damages. On July 29, 2013, the Louisiana trial court reached the opposite conclusion from Judge Herlihy, holding that amounts owed under Title 40 were not penalties, but were insurable damages.[10] This Court subsequently reversed Judge Herlihy's summary judgment ruling and remanded the case back to the Superior Court for further proceedings.[11]

On May 8, 2015, CorVel commenced its own action in the Superior Court alleging breach of the Policy for Homeland's refusal to indemnify and defend CorVel in the Louisiana Actions. A472-83. On June 9, 2015, CorVel amended its complaint, to add a specific claim for violating La. R.S. 22:1973. B105-17. On July 7, 2015, the Court consolidated the Delaware actions, but stayed discovery on CorVel's Section 1973 claim until a pending motion to dismiss was resolved. B118-21.

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[9] *See Homeland Ins. Co. v. CorVel Corp.*, 2013 WL 3937022 (Del. Super. June 13, 2013).

[10] *Williams v. SIF Consultants of La., Inc.*, 2013 WL 7330225 (La. Dist. Ct. Jul. 29, 2013); B70-77.

[11] *CorVel I*, 112 A.3d 863.

F. The Louisiana Court Holds That The Policy Provides Coverage And The Delaware Action Is Stayed Pending Resolution Of The Louisiana Appeal

On January 21, 2016, the Louisiana trial court in the *Williams* Action granted summary judgment to the Class finding that the Policy covered the Class' claims against CorVel and awarded the full amount of Homeland's Policy limits to the Class (the "Louisiana Coverage Ruling"). A461-66. Judgment was entered on February 5, 2016. A467.

The Louisiana Coverage Ruling confirmed key facts regarding CorVel's reporting of the Arbitration Action and established that:

> In December of 2006, plaintiff class sent to CorVel a class arbitration demand for claims made against the same for its violation of Title 40 under the Louisiana PPO Act. From that day forward, Homeland continued to receive notice of the filing of the class arbitration by plaintiff class against Corvel. In the suit record are a number of exhibits referencing Homeland's knowledge of both the class arbitration demand and proceedings involving Louisiana PPO Litigation.… ***Therefore, this Court finds that the 2006 class arbitration was in fact made and reported during the reporting period of Homeland's Policy***.

A464-65 (emphasis added). These factual findings cannot be challenged in this Action as it would be an impermissible collateral attack on a final judgment.[12] On March 21, 2016, Homeland appealed the Louisiana Coverage Ruling.

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[12] *Allstate Ins. Co. v. Daniel*, 177 So.3d 169, 173 (La. Ct. App. 2015).

On April 6, 2016, the Superior Court stayed this action pending the outcome of the appeal, holding that:

> The Court agrees with CorVel's contention that a stay of Delaware proceedings is appropriate because a decision by this Court will be rendered moot if the Louisiana Court of Appeals affirms the Louisiana Trial Court's decision to grant summary judgment in favor of Plaintiff Class.

B391.

On December 29, 2016, the Louisiana appellate court affirmed the Louisiana Coverage Ruling. B394-402. Homeland then sought a discretionary writ from the Louisiana Supreme Court. On April 13, 2017, the Louisiana Supreme Court denied Homeland's writ application and the Louisiana Coverage Ruling became final and unappealable.[13]

On April 21, 2017, Homeland paid the Class $10 million and the undisputed amount of pre- and post-judgment interest. A468-71. However, Homeland has not paid CorVel a penny and, to this day, CorVel remains out the $9 million settlement amount that it should never have had to pay.

G. <u>The Coverage Claims In The Delaware Action Are Dismissed</u>

On July 6, 2017, the parties participated in an office conference with the Superior Court and agreed that all coverage claims could be dismissed with prejudice as moot based on the Louisiana judgment. The Court further instructed

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[13] *See Williams v. SIF Consultants of La.*, 218 So.3d 629 (La. 2017).

the parties that all discovery on the remaining bad faith claim must be completed, and all dispositive motions must be under advisement, by November 1, 2017. B414. Later that day, the Court issued an Order confirming that (i) "[t]he claim of bad faith is the only remaining claim to be resolved;" (ii) the stay of the Delaware Action has been lifted; and (iii) the parties' dispositive motions relating to coverage are "declared moot." A532-34.

H. The Superior Court Holds That Homeland Violated La. R.S. § 22:1973(B)(1)

On September 1 and 22, 2017, the parties filed cross-motions for summary judgment on CorVel's claim for violating Section 1973. On January 5, 2018, the Superior Court issued the Opinion. A001-39. On February 1, 2018, the Superior Court issued a Final Judgment. A040-42.

I. Homeland Appeals The Judgment Awarding Damages And Penalties Under La. R.S. 22:1973

On February 1, 2018, Homeland appealed the Final Judgment insofar as it held that: (i) Louisiana law applies to CorVel's claim for violating La. R.S. 22:1973 and Homeland violated Section 1973, (ii) Homeland's violation of Section 1973 caused CorVel to incur $9 million in damages, and (iii) CorVel's claim was timely.

ARGUMENT

I. THE COURT BELOW CORRECTLY APPLIED LOUISIANA LAW

A. Question Presented

Did the Superior Court correctly conclude that Louisiana law applied, and that Homeland violated subsection (B)(1) of La. R.S. 22:1973? A053-54; A667-78; B286-89; B399-402; B512-22; B544-48.

B. Scope of Review

On an appeal from a summary judgment decision, this Court's scope and standard of review is *de novo*.[14] A trial judge's interpretation of a statute is also subject to *de novo* review.[15]

C. Merits of Argument

The Superior Court correctly concluded that (i) Louisiana law applies to CorVel's claim for violating La. R.S. 22:1973, and (ii) Homeland's conduct was not an assertion of a coverage position, or a legal argument but, instead, was a knowing misrepresentation of a pertinent fact (*i.e.*, whether the Claim was timely reported) which constituted a violation of La. R.S. 22:1973. Op. 9-19.

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[14] *Kelty v. State Farm Mut. Auto. Ins. Co.*, 73 A.3d 926, 929 (Del. 2013) (citing *E. Sav. Bank, FSB v. CACH, LLC*, 55 A.3d 344, 347 (Del. 2012).

[15] *Id.* (citing *Sussex Cty. Dep't of Elections v. Sussex Cty. Republican Comm.*, 58 A.3d 418, 421 (Del. 2013).

1. The Superior Court Properly Concluded That Louisiana's Substantive Law Applies

The Superior Court conducted a proper choice of law analysis and determined, as this Court previously determined for the coverage claim in *CorVel I*, that Louisiana has the most significant relationship to CorVel's claim. Op. 9-12.

2. Louisiana Has The Most Significant Relationship To CorVel's Claim Under La. R.S. 22:1973

Homeland agrees that the choice of law analysis turns on an application of Section 6 of the RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS. Op. Br. 24. The Superior Court properly applied Section 6, focusing on subsection (2)(c) ("the relevant policies of the other interested states and the relative interests of those states in the determination of the particular issue"), to conclude that "Louisiana has the 'most significant relationship' to the bad faith claim." Op. 15-19. This Court has already held that "the connection this litigation has with the State of Louisiana is much stronger" than its connection to Delaware.[16] Indeed, this Court has emphasized that this case is only in Delaware because Homeland "saw the handwriting on the wall in Louisiana" after a series of unfavorable Louisiana coverage rulings. *Id.* Homeland should not be rewarded for forum shopping to avoid controlling Louisiana statutory law.

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[16] *CorVel I*, 112 A.3d at 869 ("The center of this litigation has been in Louisiana and the dispute underlying the Delaware declaratory action arises out of the Louisiana Litigation.").

In *CorVel I*, this Court recognized Louisiana's superior interest in policing coverage claims litigated in Louisiana and applied Louisiana substantive law to its statutory construction analysis interpreting the damages remedy under Title 40.[17] Consistent with this Court's analysis in *CorVel I*, and the primacy of Louisiana law with respect to the coverage dispute, the Superior Court stayed the Delaware Action pending resolution of the Louisiana coverage dispute.[18]

CorVel's complaint sought damages from Homeland's handling of a claim brought by a class of *Louisiana* healthcare providers, under a *Louisiana* statute that only applies to *Louisiana* healthcare providers who provided service in *Louisiana*, that ultimately resulted in a $9 million settlement, approved by a *Louisiana* court, paid by CorVel. Louisiana's interest in preventing Homeland's conduct is paramount.

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[17] Homeland misleadingly contends that "CorVel ***stipulated*** that Delaware law governs the interpretation of the underlying policy." Op. Br. 27 (emphasis added). Homeland mischaracterizes this Court's statement in *CorVel I* that "the parties agree that ***there is no difference between Delaware and Louisiana [law] regarding construing contracts***." 112 A.3d at 869, 870 (emphasis added). The Superior Court correctly rejected Homeland's mischaracterization of the choice of law analysis in *CorVel I* by recognizing that any agreement about the application of Delaware law to the contract construction dispute was merely "for the purposes of th[e] appeal" and "[a]ny concession CorVel made regarding choice of law was limited to the context and subject matter of the Supreme Court's narrow review, and does not control choice of law for the bad faith claim." Op. 10.

[18] B385-93.

Moreover, the presumption that the state law of the principal location of the insured risk applies to an insurance contract dispute also compels the application of Louisiana law. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 193 (1971). Because CorVel operated a PPO network subject to a Louisiana regulatory regime and was sued by a class of Louisiana healthcare providers under a statute that only applies to PPOs operating in Louisiana, the location of the subject matter of the insured risk is Louisiana. *See Schwartz v. Liberty Mut. Ins. Co.*, 539 F.3d 135, 152 (2d Cir. 2008) (holding that the "location of the subject matter" of plaintiff's bad faith claims was New York, and applying New York bad faith law when underlying litigation occurred in New York, was mediated in New York, and insured was forced to settle with his own funds in a New York settlement after insurance companies refused coverage, notwithstanding that corporate headquarters were in California).

3. Delaware's Interest In Resolving Claims Arising Under La. R.S. 22:1973 Is Negligible

By contrast, Delaware's institutional interest in CorVel's claim under La. R.S. 22:1973 is non-existent to tentative, at best. In *CorVel I*, this Court emphasized that "there is very little connection to the State of Delaware in this litigation," despite the fact that "the State of Delaware is CorVel's situs of

incorporation."[19] Nevertheless, Homeland argues that Delaware law should apply because Delaware purportedly has a strong interest in a claim predicated on a misrepresentation "made to a Delaware court in a Delaware pleading against a Delaware corporation." Op. Br. 25.

First, Homeland's argument fails for the simple reason that all insurance companies doing business in Louisiana (including Homeland) are subject to La. R.S. 22:1973 when handling Louisiana claims.[20]

Second, Delaware has no interest in applying its bad faith law to other states' coverage litigation. Insurance companies refusing to participate in settlements in various courts around the country should not be encouraged to file declaratory judgment actions in Delaware to flee the substantive bad faith law of the jurisdiction with the most significant relationship to the underlying claims.

Third, CorVel's claim for violating La. R.S. 22:1973 is not predicated on statements made solely in Homeland's Delaware complaint. Homeland also misrepresented facts regarding CorVel's reporting of the Claim in prelitigation correspondence before it made misrepresentations in its Delaware papers.

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[19] *CorVel I*, 112 A.3d at 869.

[20] *See* La. R.S. 22:12 ("No person shall be authorized to transact or shall transact a business of insurance in this state without complying with the provisions of this Code.").

- On June 4, 2007, less than three months after CorVel reported the Arbitration Action, Homeland wrote to CorVel and stated that "[t]o date, the only Claims involving OWC cases and/or PPO litigation in Louisiana that have been reported to [Homeland] are the ORM and Kroger demand letters." B49; Op. Br. 9. This was plainly false. *See* B52; A152 ("More information regarding the AAA proceeding"); A158 (December 4, 2006 demand letter); A159 (email subject "PPO Arbitration in Louisiana"); B24 ("another piece of information regarding the arbitration proceeding").

- On October 4, 2010, Homeland falsely represented that "[o]n September 24, 2010, the above-referenced Arbitration Demand ***was reported*** under the Policy." B52. This too was false. The claim was reported on March 28, 2007.

- On an October 20, 2010 telephone call, Lamden (CorVel) told Troy (Homeland) that he believed that Homeland "had constructive notice of the claim during the '06 policy period." A141. Troy never responded that the Claim had been reported in March 2007 as her own claims notes conclusively confirmed. A143; A148.

- By October 28, 2010, Rosen (representing Homeland) knew that CorVel reported the Claim on March 28, 2007, because he had Troy's claim notes for that day. B237.

- Despite having Troy's claim notes confirming CorVel reported the Claim, on November 17, 2010, Rosen asked Lamden "for copies of any … PPO actions naming CorVel as a party … several of these requests remain outstanding… I would like to review the cases naming CorVel as a party…." A216.

- On January 5, 2011, after Rosen began drafting the Delaware complaint (B239), Lamden requested copies of the March 2007 correspondence that would have confirmed CorVel timely reported the Claim. A215-16. Sensing Lamden's uncertainty whether CorVel had adequately reported the Arbitration Action – or merely provided "constructive notice" – Rosen refused to send CorVel's counsel the documentary proof of reporting he certainly had. A215.

On January 10, 2011, Rosen filed Homeland's declaratory judgment complaint in Delaware. A218-30. Despite having acknowledged just days before

that he had CorVel's March 2007 correspondence (A215), Homeland filed a complaint falsely representing that:

- "CorVel ***did not report the Arbitration Proceeding to Homeland*** in accordance with the requirements of the Policy…" A222 at ¶15 (emphasis added).

- "Following the filing of the Arbitration Proceeding on or about December 22, 2006, ***CorVel did not report the Arbitration Proceeding*** as a Claim under the Policy…" A223 at ¶17 (emphasis added).

- "***CorVel did not report the Arbitration Proceeding to Homeland*** in accordance with the forgoing reporting requirements." A227 at ¶34 (emphasis added).

- "***[T]he Arbitration Proceeding was not reported in the time and manner prescribed by the Policy***." *Id.* at ¶35 (emphasis added).

Homeland continued to misrepresent that CorVel did not timely report the Arbitration Action in its discovery responses in the Delaware Action.

- "Homeland denies that Homeland received, on or before March 28, 2007, the actual 'notice' of the Claim made in the Arbitration Action required by the terms of the Homeland Policy as a condition to any right of coverage." B128 at No. 13.

- Denying that "the Arbitration Action was reported to Homeland within ninety (90) days of the end of the 2006-2007 Policy Period." *Id.* at No. 14.

- "Homeland denies that it ever received notice, as required by the foregoing terms of the Homeland Policy, that plaintiffs' counsel in the Arbitration Action had demanded arbitration." B129 at No. 15.

- Stating falsely that "CorVel provided the actual 'notice' of the Arbitration Action required as a condition to any right to coverage under the Homeland Policy ***for the first time in [a] letter dated September 24, 2010***." (emphasis added). *Id.* at No. 17.

These false statements in Homeland's Complaint and discovery responses reiterate the misrepresentations Homeland made prior to filing the Delaware Action. Homeland cannot avoid liability for misrepresentations of fact under La. R.S. 22:1973 merely by reiterating those misrepresentations in a complaint or discovery in Delaware.

Fourth, CorVel pled a violation of a specific Louisiana statute, and did ***not*** plead a general (or other) bad faith claim. There is no requirement in La. R.S. 22:1973 that claims under the statute can only be asserted in Louisiana. Delaware courts have long recognized the application of foreign statutes when they are alleged in a complaint. *See Thomas v. Grand Trunk Ry. Co. of Can.*, 42 A. 987, 988 (Del. Super. 1899); *see also* 2 Sutherland Statutory Construction § 37:5 (7th ed.) ("[T]he rules of the state in which the statute was enacted should be followed if they have been pleaded…."); *see also Kilroy Indus. v. United Pac. Ins. Co.*, 608 F. Supp. 847, 861 (C.D. Cal. 1985) ("[t]here is no conflict of laws problem with respect to the statutory [bad faith] claim because there is only one state's law involved").

4. The Underlying Claim And Coverage Claim Were Resolved Under Louisiana Law, And The Same Law Should Apply to CorVel's Claim

It would be nonsensical to apply Delaware law to a bad faith claim wholly derivative of the coverage claim decided under Louisiana law. Delaware courts

frown upon applying one state's law to contract claims and a different state's law to other claims arising out of the contract dispute. *See Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1048 (Del. Ch. 2006). Accordingly, Delaware courts apply the same law to bad faith claims arising out of an insurance contract as applied to the insurance contract itself. *AT&T Wireless Servs., Inc. v. Fed. Ins. Co.*, 2007 WL 1849056, at *3 (Del. Super. June 25, 2007) (refusing to apply different law to coverage and bad faith claims holding Virginia law should apply to both) (citing *Millett v. Truelink, Inc.*, 2006 WL 2583100, at *3 (D. Del. 2006)).

Here, a *Louisiana* court decided coverage under *Louisiana* law, in an action filed by *Louisiana* healthcare providers alleging a violation of a *Louisiana* statute. Applying a different state's law would be inconsistent with Delaware's policy of applying the same substantive law to contract and related claims.

5. Homeland Violated La. R.S. 22:1973

Section 1973 provides, in relevant part:

> (A) An insurer… owes to his insured a duty of good faith and fair dealing…. Any insurer who breaches these duties ***shall be liable*** for any damages sustained as a result of the breach.
>
> (B) Any one of the following acts, if knowingly committed or performed by an insurer, constitutes a breach of the insurer's duties imposed in Subsection A of this Section:

(1) ***Misrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue***.[21]

Homeland misrepresented a critical and pertinent fact that went right to the heart of coverage – that CorVel supposedly did not timely report the Arbitration Action. CorVel was well aware that the Policy was a claims made *and reported* policy and that there would be no coverage if the claim was not *reported* during the Policy's reporting period.[22] Unlike a common-law bad faith claim, the Court need not conduct a subjective, multi-prong test to determine if there has been a violation of La. R.S. 22:1973(B)(1). An insured need only prove that one of the delineated actions under subsection (B) has occurred.[23] CorVel did so here.

a. Homeland Knowingly Misrepresented A Pertinent Fact

The undisputed documentary and testimonial evidence confirms that CorVel timely reported the Claim. *See* B5-46 (March 2007 emails); *see also* A143 & A148 (Troy's claim notes); A152-192. Homeland has now been forced to admit:

- The December 4, 2006 letter was a Claim;[24]
- The December 4, 2006 Letter was sent to and received by Troy at Homeland on March 28, 2007;[25]

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[21] La. R.S. 22:1973 (emphasis added).

[22] *See* A216 (Lamden acknowledging that "CorVel did not place its prior insurer on notice of the Louisiana PPO … claims").

[23] *Kelly v. State Farm Fire & Cas. Co.*, 169 So.3d 328, 342 (La. 2015).

[24] B182 at 154:12-154:15.

- Troy was the appropriate person to receive notice of a claim under the Policy;[26] and
- March 28, 2007 was within the Policy reporting period.[27]

While these facts are now irrefutable, the record evidence further confirms that Homeland *knowingly* misrepresented to CorVel that CorVel did not timely report the Arbitration Action. *See* § I.C.3. Homeland does not dispute that it made its misrepresentations *knowingly*. Instead, Homeland argues its misrepresentations do not violate La. R.S. 22:1973 because they were made during litigation and represent a coverage position, not a fact. Homeland's arguments fail again.

b. Making Misrepresentations In Delaware Pleadings Does Not Insulate Homeland From Liability

Citing inapplicable Delaware law, Homeland argues that an insurer cannot be liable for misrepresentations made in a complaint because "Delaware policy disfavors actions that chill an insurer's ability to state and defend a coverage position in the State's courts." Op. Br. 25. Homeland misses the point. CorVel is not arguing that Homeland cannot defend its coverage position. CorVel simply argues that Homeland can never misrepresent ***facts*** to its insured in defending its

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[25] B176 at 130.

[26] B199 at 221:13-19.

[27] *See* B434 at ¶10 ("Admitted that CorVel informed Homeland of matters asserted under La. R.S. 40:2203.1 to which CorVel was a party within 90 days of the expiration of the policy at issue.").

coverage position, whether in claims handling, or in a pleading. Indeed, CorVel has never contended that the ***legal*** arguments Homeland asserted for denying coverage support any bad faith claim, even though they were all categorically rejected.[28] But Homeland can never knowingly misrepresent ***facts*** to an insured, during litigation or otherwise.[29]

Significantly, Section 1973 does not distinguish between misrepresentations of fact made during litigation or otherwise. *See* B1-2; *Harris v. Fontenot*, 606 So.2d 72, 74 (La. Ct. App. 1992) ("[N]owhere in [Section 1973] is there an express distinction limiting the application to the pre-litigation conduct of the insurer.… [I]t is clear that the statute was enacted to impose a requirement of good faith and fair dealing on the insurer, requirements that are no less important after litigation has begun as before."). The Louisiana Supreme Court has expressly held that "the duties of good faith and fair dealing imposed on insurers by [statute] are continuing duties that do not end during litigation." *Sher v. Lafayette Ins. Co.*, 988 So.2d 186, 198 (La. 2008). This Court should emphatically reject Homeland's absurd argument that it should be immune from liability for making false factual

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[28] The Superior Court agreed. *See* Op. 24 & n.83 (Homeland asserted four counts for denying coverage in its complaint, three counts based on exclusions, and a *separate* count for "failure to report the Arbitration Proceeding"); A224-229.

[29] Homeland's reliance on *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 1993 WL 603360 (Del. Super. Nov. 16, 1993) (Op. Br. 25) is inapposite because Louisiana law applies.

statements regarding coverage, as long as some, but not all, of those statements appear in Delaware pleadings.

c. Homeland's Misstatements Were Misrepresentations of Pertinent Fact, Not Legal Arguments

Homeland next argues that its misrepresentations that CorVel never reported the Claim were legal arguments, not factual misrepresentations. According to Homeland, when it represented that CorVel did not timely "report the Arbitration Proceeding" (A227), it was stating a legal conclusion, not a fact. The Louisiana Supreme Court has held that a "[m]isrepresentation," for purposes of Section 1973 means "[a]ny manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the ***facts***". *Kelly*, 169 So.3d at 342 (emphasis added) (citing Black's Law Dictionary (6th ed. 1990)). Homeland's statements regarding CorVel's reporting of the Claim fall squarely within this definition. Moreover, Homeland's argument is belied by numerous false statements about when the claim was reported.

First, as a matter of fact, not law, the Claim was *reported* during the 2006-2007 Policy Period. *See* § I.C.3, *supra*. Louisiana courts and the trial court agree. Op. 6 & n.18. Put simply, the timing of when an event occurred is ***always*** an issue of fact, not law.

Second, Homeland knows the difference between when a claim is ***made*** (legal conclusion) and when it is ***reported*** (a fact). But it intentionally conflates the two in an attempt to avoid the consequences of its blatant misrepresentations.

It is a fact, not a legal argument, that on March 28, 2007, CorVel reported that an arbitration proceeding involving PPO litigation had been asserted against CorVel. *See* A143 & A148; A152; A158; A159; B24.

It is also a fact, not a legal argument, that Homeland told CorVel that "[o]n September 24, 2010, the [Arbitration Demand] was ***reported*** under the Policy." B52 (emphasis added). Similarly, in its sworn discovery responses (B142), Homeland stated as a ***factual*** matter that "CorVel provided the actual 'notice' of the Arbitration Action required as a condition to any right to coverage under the Homeland Policy ***for the first time in [a] letter dated September 24, 2010***." B129 at No. 17 (emphasis added); *see also* A222-23 at ¶¶15 & 17 (alleging in the "Factual Allegations" section of Homeland's complaint "CorVel did not report the Arbitration Proceeding….").

Both versions of these facts cannot be true. Either CorVel reported the Claim on March 28, 2007, or it reported the Claim on September 24, 2010. The former is a verifiable and undisputed fact, the latter is a knowing misrepresentation of a fact.

By improperly conflating a legal prerequisite for coverage (when a claim is first ***made***), with the separate factual prerequisite for coverage (when the claim was ***reported***), Homeland attempts to eliminate a fact-based objective reporting predicate to coverage and turns it into a subjective predicate that Homeland can twist and bend whenever it wants to deny coverage. While Homeland is free to make questionable legal arguments to support a coverage denial, it can neither misrepresent facts relating to coverage, nor mischaracterize facts as legal argument. That is precisely what Homeland did here.

d. Homeland's Misrepresentation Was Not A "Coverage Position"

Finally, Homeland argues that "an insurer's assertion of its coverage position based on accurately-quoted policy language is not a misrepresentation." Op. Br. 30. Again, Homeland misses (or avoids) the point. The issue is not the quotation of the Policy, but again Homeland's statement about the factual predicate required under the Policy. CorVel is not arguing that Homeland's coverage position was asserted in bad faith. CorVel argues that in articulating its coverage position, Homeland misrepresented a pertinent fact that (if true) would preclude coverage.

Thus, the court below did not reach an "extraordinary conclusion that Homeland had committed bad faith 'in seeking a declaration that there was no

coverage.'" Op. Br. 30. The Superior Court merely found Homeland misrepresented a pertinent ***fact*** when communicating its coverage position.

Homeland relies on *Calogero v. Safeway Insurance Company of Louisiana*, to support its argument that an assertion of a coverage position cannot form the basis of a claim under Section 1973. 753 So.2d 170 (La. 2000); Op. Br. 31. In *Calogero*, an insured sought coverage for an automobile accident that occurred while her husband was operating the vehicle. The insurer denied coverage, citing an exclusion that applied when the driver was not a named insured. The Louisiana court held (i) that the exclusion only applied to accidents *caused* by the unnamed driver and (ii) the insured's husband did not *cause* the accident. The insured argued that the insurer violated the predecessor to Section 1973 by misrepresenting that the exclusion applied. The court found no violation of Section 1973 because the insurer's application of the exclusion was a coverage position, not a misrepresentation of fact. The court emphasized that the insurer never misquoted the policy language, but merely erroneously applied the exclusion.

The insurer in *Calogero* did not misrepresent any *facts* to its insured, it merely invoked an inapplicable policy exclusion.[30] *Calogero* is inapposite. Here, Homeland's misrepresentation was grounded in a *fact* existing outside the Policy.

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[30] *Crescent City Baptist Church v. Church Mut. Ins. Co.*, is equally inapposite. 2006 WL 2631862, at *3 (E.D. La. Sept. 13, 2006). In *Crescent*, the insured argued that its insurer violated Section 1973 by "misrepresent[ing] the

II. THE COURT BELOW CORRECTLY HELD THAT CORVEL INCURRED $9 MILLION IN DAMAGES AS A RESULT OF HOMELAND'S VIOLATION OF LA. R.S. 22:1973

A. Question Presented

Did the Superior Court correctly conclude that CorVel sustained $9 million in damages as a result of Homeland's violation of La. R.S. 22:1973? A656; A659; A678-82; B377-80; B522-23; B547-48.

B. Scope of Review

On an appeal from a summary judgment decision, this Court's scope and standard of review is *de novo*.[31]

C. Merits of Argument

1. Homeland's Mere Assertion Of Other Coverage Defenses Does Not Establish That Homeland's Factual Misrepresentations Were Not The Cause Of CorVel's Damages

The Superior Court correctly held that "CorVel did sustain $9 million in damages as a result of Homeland's bad faith conduct." Op. 25. The Superior Court further concluded that "to avoid incurring a significantly higher judgment, CorVel settled the Louisiana [Actions] for $9 million and an assignment of its insurance claim against Homeland. Thus, the Court [found] that there is a ***direct***

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terms of the policy." The court held that an accurate citation to a policy provision and a statement that the provision applied was not a misrepresentation of pertinent fact under Section 1973. *Id.* at *1, 3

[31] *See* fn. 14, *supra*.

causal link between Homeland's bad faith conduct and CorVel's payment of $9 million." Op. 26 (emphasis added).

Section 1973 provides that an insurer who violates the statute shall be liable for "***any*** damages sustained" as a result of the violation. La. R.S. 22:1973(A). Homeland twists that plain language to read "shall be liable for ***only*** those damages sustained ***solely or exclusively*** as a result of the violation." However, Section 1973 contains no requirement that the factual misrepresentation must be the ***sole or only*** cause of a claimant's damages. Homeland's misrepresentation that CorVel did not timely report the Claim—a ***prerequisite*** for coverage—was sufficient to put CorVel in the untenable position of defending and paying out of pocket a potential judgment far exceeding coverage limits.

The Louisiana Supreme Court has held that, in the event of concurrent causes of a tort, the appropriate inquiry is whether the conduct complained of was a "substantial factor" in bringing about the accident. *Perkins v. Entergy Corp.*, 782 So.2d 606, 611 (La. 2001); *see also* RESTATEMENT (SECOND) OF TORTS § 432(2) (1965) ("If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about."). Thus, even if Homeland's factual misrepresentations and its now-rejected coverage positions *both* caused CorVel to

settle the Arbitration Action for $9 million, the Superior Court could find causation under Louisiana law if the bad faith conduct was a "substantial factor." It was, but the Superior Court went further and found that Homeland's bad faith was a "***direct causal link***" of CorVel's damages.

If CorVel had failed to timely report the Claim, that fact would have been fatal to coverage. By contrast, Homeland's remaining bases for denying coverage were weak and meritless legal arguments that Louisiana courts and this Court ultimately rejected. Based on the record and the lack of any contrary evidence from Homeland, it is reasonable to conclude that Homeland's misrepresentation about not timely reporting the Claim was the coverage defense that CorVel feared, and ultimately motivated CorVel to settle the Louisiana Actions. After three years, and in the face of Homeland's misrepresentations, CorVel was uncertain whether it adequately reported the Claim. A141; A215. Rather than confirm that CorVel timely reported the Claim, Homeland took advantage of CorVel's uncertainty and misrepresented that it had an absolute coverage defense. Faced with $140 million in liability, and a (false) factual basis for denying coverage, CorVel was forced by Homeland's misrepresentations to settle the underlying claim for $9 million.

2. La. R.S. 22:1973 Has No Reliance Element

Homeland also argues that CorVel failed to establish reliance (Op. Br. 39-42) by citing multiple Delaware and Louisiana authorities addressing inapposite

fraud claims. CorVel has not asserted a fraud claim. CorVel asserts a *statutory* claim under La. R.S. 22:1973(B)(1). Subsection (B)(1) of La. R.S. 22:1973 simply has no reliance element. A violation of subsection (B)(1) *is* a strict liability action against insurers, because "[a]ny insurer who breaches these duties ***shall be liable*** for any damages sustained as a result of the breach." La. R.S. 22:1973(A) (emphasis added).[32]

3. Discovery Closed Without Homeland Ever Challenging Causation, Reliance, Or Damages

It is undisputed that CorVel introduced evidence of causation, including, but not limited to the fact that (a) Homeland misrepresented (and falsely denied) the fact that CorVel timely reported the Claim (§ I.C.3, *supra*), (b) CorVel faced a damages claim far exceeding policy limits (B56); (c) CorVel demanded coverage from Homeland up to policy limits (A214); (d) Homeland knew CorVel had timely reported the Claim, but refused to provide that confirmation to CorVel (A215); and (e) Homeland filed suit in Delaware alleging falsely that the Claim was not timely reported (A218 (Complaint) at ¶¶ 15, 17, 34, 35;); B111-12).

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[32] *See also Thomas v. Hartford Mut. Ins. Co.*, 2003 WL 220511, at *5 (Del. Super. Jan. 31, 2003) (construing Delaware's similar statute, 18 *Del. C.* § 2304(16) (which has no private right of action) but concluding it "does not mention any reasonable reliance element" and "[i]f the act were construed as implying a private cause of action, it would have to be interpreted as a strict liability action against insurers.").

To raise a material disputed issue of fact relating to causation (Op. Br. 42), Homeland had to offer evidence of disputed issues of material fact to "create[] fact issues for trial as to both causation and damages." *Id.*; *see* Del. Super. Ct. Civ. R. 56(e) ("adverse party may not rest upon the mere allegations or denials of the adverse party's pleading"); *compare* A530 ("[T]here are facts material to CorVel's motion that are in substantial dispute.… At a minimum there is substantial dispute between the parties over facts material to causation."). Homeland never came forward with any competing facts regarding causation (or damages). Indeed, in more than seven years of litigation, Homeland inexplicably *never* noticed a single deposition of any CorVel witness. The Superior Court instructed the parties that all fact discovery had to be completed by November 1, 2017. B414; *See also* B428-30. Notwithstanding that instruction, Homeland was so convinced of its legal arguments that it never bothered to take any evidence regarding reliance, causation or damages. Only *after* summary judgment briefing was complete did Homeland attempt to serve requests to admit directed to causation. B551-66. But it was too late. The record was closed and the discovery cut-off had passed. Thus, Homeland introduced no competing facts from which the Superior Court could find a disputed issue of material fact suggesting that CorVel settled the *Williams* Action with its own funds *for any reason other than* Homeland's factual misrepresentations. Homeland cannot avoid summary judgment by arguing on

appeal “that evidence would have at best created fact issues for trial as to both causation and damages” (Op. Br. 42) when Homeland neither took nor introduced any contrary evidence.

III. THE COURT BELOW CORRECTLY HELD THAT CORVEL'S CLAIM UNDER LA. R.S. 22:1973 WAS TIMELY

A. Question Presented

Did the Superior Court correctly conclude that CorVel timely filed its claim under La. R.S. 22:1973 because such a claim does not accrue until there is a finding of coverage? A646-47; B279-81; B332-33; B525-28.

B. Scope of Review

"Whether a complaint is barred by a statute of limitations is a question of law that [the Court] review[s] *de novo*."[33]

C. Merits of Argument

The Superior Court correctly held that CorVel's claim under La. R.S. 22:1973 was timely because it did not accrue until January 21, 2016, when the Louisiana trial court held there was coverage under the Policy for the *Williams* Settlement. Op. 29-31.

1. A Bad Faith Claim Does Not Accrue Until The Claimant Can Plead Damages

The parties agree that Delaware's three-year statute of limitations applies to CorVel's bad faith claim. Homeland concedes that, "[i]n Delaware, a bad-faith claim accrues when a plaintiff can plead damages." Op. Br. 46 (citing *Connelly v. State Farm Mut. Auto. Ins. Co.*, 135 A.3d 1271, 1279-80 (Del. 2016)). Homeland fails to distinguish *Connelly*. Moreover, Homeland previously conceded CorVel's

[33] *LeVan v. Indep. Mall, Inc.*, 940 A.2d 929, 932 (Del. 2007).

claims are "not legally sufficient in the absence of coverage" (B382) and without a finding of coverage, "no bad faith claim is cognizable." B383. Homeland is estopped from arguing otherwise. Accordingly, the Superior Court correctly held that CorVel did not have a viable bad faith claim, and could not plead damages to support that claim, until there was first a finding of coverage and CorVel incurred damages. *See*, *AT&T Wireless Servs.*, 2007 WL 1849056, at *6 ("While the complaint asserts a bad faith claim, it is first a contract dispute and the breach of the contract must be determined before one can decide if [the insurer] acted in bad faith.").

Louisiana law, if it applied, is consistent with the Superior Court's determination. "To prevail under [Section 1973], a plaintiff 'must first have a valid, underlying, substantive claim upon which insurance coverage is based.'"[34] Accordingly, if the Louisiana trial court found no coverage under the Policy, not only would CorVel have no viable bad faith claim (as Homeland previously conceded), it would have suffered no damages as a result of Homeland's factual misrepresentations. Indeed, Homeland's factual misrepresentations caused CorVel's damages precisely because they went directly to the heart of coverage.

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[34] *Riley v. Sw. Bus. Corp.*, 2008 WL 4286631, at *3 (E.D. La. 2008) (citing cases); *see also Magidson v. Lansing*, 2012 WL 6677912, at *8 (La. Ct. App. Dec. 21, 2012) ("[i]t is illogical to contend that [the insurer] is liable to plaintiff for bad faith penalties and attorney fees when there [is] no coverage under it's UM policy.").

Any determination of no coverage based on a failure to timely report the Claim would have been dispositive of both CorVel's coverage *and* bad faith claims.

Homeland does not cite a single Louisiana case in which a court found a violation of La. R.S. 22:1973 absent a finding of coverage. Instead, Homeland points to language from the Louisiana Supreme Court stating that "[a]n insurer can be found liable under 22:1973(B)(1) for misrepresenting or failing to disclose facts that are not related to the insurance policy's coverage." Op. Br. 45 (quoting *Kelly*, 169 So.3d at 344). *Kelly* merely confirms that an insurer can be liable for misrepresenting facts outside the four corners of the policy. For example, in *Kelly*, the insurer failed to notify its insured that medical bills incurred by the other driver in an automobile accident substantially exceeded the policy limits. This misrepresentation had nothing to do with whether coverage was due under the policy, or the policy language. But, the misrepresentation in *Kelly* could not have supported a bad faith claim if there was no coverage under the policy for the accident in the first place. *Kelly*, therefore, hardly compels the conclusion that an insurer can be found liable for misrepresentations made in connection with uncovered claims.

Homeland also relies on language from the Louisiana Supreme Court stating that "[t]he duties of an insurer under [Section 1973] are separate and distinct from its duties under the insurance contract. Op. Br. 44-45 (citing *Durio v.*

Horace Mann Ins. Co., 74 So.3d 1159, 1170 (La. 2011)). Again, it is hardly surprising that the insurer's obligations under a statute are different than its obligations under its policy. And it is precisely because no Policy provision provides that Homeland will not misrepresent pertinent facts, that La. R.S. 22:1973 is necessary and applicable here.

More significantly, however, *Durio* does not compel the conclusion that an insurer can be found liable under Section 1973 for factual misrepresentations made in connection with claims that are ***not covered*** under the policy. It merely confirms that an insurer could breach its duty of good faith without breaching the insurance contract. In any event, where, as here, the factual misrepresentation and statutory violation solely relate to coverage, there can be no statutory violation without coverage. *See Riley*, 2008 WL 4286631, at *3.

Accordingly, CorVel's bad faith claim accrued on January 21, 2016, when the Louisiana trial court determined that there was coverage under the Policy. CorVel filed its bad faith claim on June 9, 2015, even before the statute of limitations began to run (A43-55) and its claim is timely.

2. Homeland Is Estopped From Asserting A Statute of Limitations Defense

Even if CorVel's claim was untimely—it was not—Homeland has waived any statute of limitations defense. Delaware law provides that "[a]n insurer shall be required during the pendency of any claim received pursuant to a casualty

insurance policy to give prompt and timely written notice to claimant informing claimant of the applicable state statute of limitations regarding action for his/her damages."[35] Failure to provide the requisite notice precludes the insurer from raising the statute of limitations as a defense to a subsequent action pursuant to the insurance policy.[36] Homeland failed to provide notice under 8 *Del. C.* § 3914; therefore, it is now estopped from asserting the statute of limitations as a defense to CorVel's bad faith claim.[37]

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[35] 18 *Del. C.* § 3914. The Homeland Policy is a "casualty insurance" policy, under 18 *Del. C.* § 906. *See Utica Mut. Ins. Co. v. Klein & Son, Inc.*, 460 N.W.2d 763, 766 (Wis. Ct. App. 1990) (describing "an errors and omissions policy [as] a form of casualty insurance.").

[36] *Lankford v. Richter*, 570 A.2d 1148, 1149 (Del. 1990) ("Section 3914 must be construed as intended to preclude an insurer from invoking the [applicable limitations period] where the insurer fails to comply with the timely notice mandate of section 3914.").

[37] *See Montgomery v. William Moore Agency*, 2015 WL 1056326, at *4 (Del. Super. Feb. 27, 2015) ("Absent notice to the claimant, the statute of limitations does not begin to run."). "It is reversible error to allow an insurer to raise the statute of limitations as a defense when it has not provided notice to a claimant." *Brown v. State*, 900 A.2d 628, 631 (Del. 2006).

CONCLUSION

For the reasons stated herein, CorVel requests that this Court affirm the judgment of the Superior Court in its entirety.

/s/ John M. Seaman
John M. Seaman (#3868)
April M. Kirby (#6152)
ABRAMS & BAYLISS LLP
20 Montchanin Road, Suite 200
Wilmington, Delaware 19807
(302) 778-1000

Attorneys for CorVel Corporation
Plaintiff Below–Appellee

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