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IN THE

Supreme Court of the State of Delaware

HOMELAND INSURANCE COMPANY OF NEW YORK,
Appellant/Defendant-Below,
v.
CORVEL CORPORATION,
Appellee/Plaintiff-Below.

NO. 60, 2018

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE

C.A. NOS. N11C-01-089 ALR AND N15C-05-069 ALR (CONSOLIDATED)
CORRECTED VERSION

APPELLANT HOMELAND INSURANCE COMPANY OF NEW YORK'S REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

SUMMARY OF ARGUMENT

CorVel's answering brief states—without equivocation—that CorVel "is not arguing that Homeland's coverage position was asserted in bad faith." Ans. Br. 32. But that is exactly what it argued below. App. A053, A054. And it is exactly what the Superior Court held. App. A026 ("Homeland committed bad faith in seeking a declaration that there was no coverage."). CorVel's abandonment of the basis for its claim, and the ruling below, should end this case.

But there is more. As a matter of law (whether Delaware or Louisiana), CorVel has not established that Homeland committed bad faith. CorVel concedes that its claim fails under Delaware law. And under Louisiana law, CorVel had to show that the allegation in Homeland's declaratory-judgment complaint on which CorVel bases its bad-faith claim "misrepresented" a "pertinent fact," and that the alleged misrepresentation caused it damages. CorVel failed on both fronts. On top of that, CorVel filed its bad-faith claim outside the statute of limitations.

Homeland was entitled to summary judgment on any one of these grounds, and this Court should reverse and enter judgment in Homeland's favor.

ARGUMENT

I. HOMELAND'S STATEMENT OF ITS COVERAGE POSITION IS NOT BAD FAITH AS A MATTER OF LAW.

A. Delaware's interest in this bad-faith claim requires application of Delaware law, under which CorVel concedes that its claim fails.

CorVel has never argued, below or before this Court, that it could state a bad-faith claim under Delaware law. Thus, if this Court concludes that Delaware law controls the bad-faith issue, CorVel has conceded its claim fails.

And Delaware law does control. CorVel, a *Delaware* corporation, chose to file its bad-faith claim in a *Delaware* court and based that claim solely on a declaratory-judgment complaint that Homeland had filed in the same *Delaware* court. Delaware has a strong interest in policing alleged misconduct committed in its courts, and against one of its own corporate citizens. Applying Delaware law also aligns with litigants' reasonable expectations that Delaware law will govern allegations related to Delaware pleadings. And it would also vindicate this State's established policy of favoring full and fair litigation of insurance coverage disputes. *See* Op. Br. 24–26.

CorVel does not dispute that these factors all favor application of Delaware law. Instead, it makes a two-fold attempt to avoid Delaware law. It is wrong on both counts. First, neither the location of the initial insurance claim nor the law under which the coverage dispute was ultimately resolved speaks to the comparative interests of Delaware and Louisiana in this bad-faith claim. Second,

while CorVel now points to various alleged communications made before and after Homeland's Delaware declaratory-judgment complaint, those are irrelevant to the choice-of-law analysis because they went unmentioned in CorVel's complaint and in the Superior Court's opinion—and did not occur in Louisiana.

1. The prior litigation's focus on the meaning of the Louisiana PPO Statute does not impact this choice-of-law analysis.

CorVel's bad-faith claim was predicated on a statement Homeland made in a Delaware court filing against a Delaware entity. Rather than offering a choice-of-law analysis specific to its claim, CorVel turns elsewhere, to this Court's 2015 decision to defer on comity grounds to a Louisiana court's decision that the remedies available under a Louisiana PPO statute were not "penalties." CorVel relies on that decision to argue that "[t]his Court has already held that 'the connection this litigation has with . . . Louisiana is much stronger' than its connection to Delaware." Ans. Br. 19; *see id.* at 5, 20. CorVel overreads this Court's prior opinion.

CorVel I addressed the settlement of a class action brought by a Louisiana hospital alleging violation of a Louisiana statute, La. R.S. § 40.2203.1(G), "which by its own terms has no application outside that state's boundaries." *CorVel Corp. v. Homeland Ins. Co. of New York*, 112 A.3d 863, 869 (Del. 2015) ("*CorVel I*"). According to this Court, the question whether the statutory damages provided for under La. R.S. § 40.2203.1 were "penalties" was thus uniquely constrained by

Louisiana law, and so it deferred to a Louisiana court's interpretation of that law. That interpretation was rendered in coverage litigation that had proceeded in Louisiana parallel with the Delaware coverage litigation. *See CorVel I*, 112 A.3d at 873 (Strine, C.J., dissenting). Here, by contrast, CorVel has pressed its bad-faith claim only in Delaware, and no Louisiana court has reached it.[1]

CorVel's argument boils down to a contention that the location of the underlying claim should dictate the choice-of-law result in a bad-faith action. But as Homeland has explained, Op. Br. 26–27, if that were so, the law of the state where the underlying claim arose would *always* govern—even where all parties were citizens of, and interacted in, and the operative events giving rise to the claim occurred in, another state altogether. CorVel cites no precedent for its *per se* rule, and Delaware law is to the contrary. *See Certain Underwriters at Lloyds, London v. Chemtura Corp.*, 160 A.3d 457, 470 (Del. 2017) (applying New York law to a coverage dispute where insured maintained its principal place of business there when it entered into the contract, and giving less weight to the location of the underlying claim).

[1] CorVel suggests that Homeland has engaged in "forum shopping." Ans. Br. 19. But it was CorVel, not Homeland, who chose to file its bad-faith claim in Delaware.

Nor can CorVel's approach be squared with Delaware's use of "the Second Restatement's 'most significant relationship' analysis when considering" claims that, like a bad-faith claim, sound in contract under Delaware law. *Id.* at 464. That context-driven test leaves no room for rigid rules. *See Schwartz v. Liberty Mut. Ins. Co.*, 539 F.3d 135, 152 (2d Cir. 2008) (applying New York law to a bad-faith failure-to-settle claim where the alleged bad faith occurred in New York).[2]

CorVel also contends that because the underlying coverage claim was ultimately resolved under Louisiana law, Louisiana law should control the bad-faith issue. Ans. Br. 25–26. But neither this Court nor any other conducted a choice-of-law analysis as to which state's law governed the interpretation of the policy. As this Court noted in *CorVel I,* no such analysis was required because "the parties agree that there is no difference between Delaware and Louisiana regarding construing contracts." *CorVel I*, 112 A.3d at 869–70.[3] Indeed, CorVel agreed in *CorVel I* that Delaware law governed the interpretation of the contract. App. A582, A625. CorVel's attempt to retreat from that position, Ans. Br. 20 n. 17, does not change that the parties agreed in the coverage litigation that Delaware

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[2] CorVel's argument that the location of the risk controls, Ans. Br. 21, is wrong. The location-of-the-risk test does not apply here, where a contract insures against risks nationwide. *See Chemtura Corp.*, 160 A.3d at 460.

[3] The only prior choice-of-law determination was that Louisiana law governed whether La. R.S. § 40.2203.1(G) imposed a "penalty." *CorVel I*, 112 A.3d at 870.

law would govern interpretation of the policy, and no court has suggested otherwise.

In any event, there is no basis for CorVel's contention that a bad-faith claim is necessarily governed by the law applicable to a coverage claim. CorVel offers no precedent for this hard-and-fast rule, which makes little sense where, as here, the insured purports to base its bad-faith claim not on a challenge to the merits of the insurer's coverage position, but instead on statements the insurer made *about* its coverage position in a declaratory-judgment complaint.[4]

CorVel also makes a circular argument: Because it invoked Louisiana law in its Delaware bad-faith complaint, Louisiana has an interest in having its law apply. Ans. Br. 21–22 (citing La. R.S. § 22:1973). That is not how choice-of-law works. A plaintiff cannot simply cite the law of the state it *prefers* would apply. *See AT&T Wireless*, 2007 WL 1849056, at *2–*7 (applying Virginia law after a choice-of-law analysis even though plaintiff had pled a Washington statutory cause of action).

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[4] The cases CorVel cites do not support its rule. *See Abry Partners V, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032, 1048 (Del. Ch. 2006) (interpreting the scope of a contractual choice-of-law provision); *AT&T Wireless Servs., Inc. v. Fed. Ins. Co.*, 2007 WL 1849056, at *2–*7 (Del. Super. Ct. June 25, 2007) (considering the Restatement's factors without giving dispositive weight to the state's law governing the interpretation of the underlying contract).

This bad-faith claim, filed by a Delaware corporation, in a Delaware court, based on alleged misconduct in a Delaware declaratory-judgment complaint, is governed by Delaware law.

2. CorVel may not amend its bad-faith claim on appeal.

Having no answer to the multiple ways this Delaware bad-faith claim implicates Delaware interests, CorVel now claims that its bad-faith claim "is not predicated on statements made solely in Homeland's Delaware complaint." Ans. Br. 22. But that is not what CorVel said in its Complaint. The Complaint contends that "Homeland knowingly misrepresented pertinent facts" when it "alleged in the Declaratory Judgment Action" that CorVel had not submitted the arbitration Claim in accordance with the policy's reporting requirements. App. A053–054. The Superior Court's opinion likewise considered only the alleged misrepresentation in Homeland's declaratory-judgment complaint. App. A026.

CorVel's complaint, not any *post hoc* embellishments or supplements, controls the basis for its misrepresentation claim. *See Nutt v. A.C. & S., Inc.*, 466 A.2d 18, 23 (Del. Super. Ct. 1983) (finding that the details of "false representations" must be "stated with particularity" in the complaint) (citing Del. Super. Ct. Civ. R. 9(b)), *aff'd sub nom. Mergenthaler v. Asbestos Corp. of Am.*, 480 A.2d 647 (Del. 1984).

Moreover, the new alleged misrepresentations that CorVel attempts to add at this juncture do not move the choice-of-law needle. CorVel does not argue that the alleged misrepresentations were made in or directed at Louisiana, and a number of them were allegedly made in the Delaware coverage litigation. *See* Ans. Br. 24. As a result, they create no Louisiana interest in the bad-faith claim. *See* LSA-R.S. 22:1961 (noting statutory purpose to address "unfair methods of competition and unfair or deceptive acts and practices *in this state*") (emphasis added).

3. Delaware law forecloses CorVel's bad-faith claim.

CorVel does get one thing right: It nowhere disputes that if Delaware law applies, its bad-faith claim fails. Seeking a judicial determination of coverage—as Homeland did—is not bad faith under Delaware law. *See* Op. Br. 28–30. Moreover, Delaware requires that a bad-faith plaintiff show that an insurer had no reasonable basis for denying coverage. *See id.*; *see also Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 264 (Del. 1995). And because a Superior Court judge and two members of this Court have agreed with another of Homeland's coverage positions, that cannot be. *See* Op. Br. 29–30. Because Delaware law applies, CorVel's bad-faith claim fails as a matter of Delaware law.

B. Even if Louisiana law applies, CorVel's bad-faith claim still fails.

CorVel's claim also fails as a matter of Louisiana law, which instructs that a party cannot base a bad-faith claim on an assertion of its coverage position or on its

litigation of a reasonable coverage defense. *See Manchester v. Conrad*, 2012 WL 602185, at *7 (La. Ct. App. Feb. 10, 2012) ("[T]he insurer has the right to litigate these questionable claims without being subjected to damages and penalties."). And CorVel cannot salvage its claim by attempting on appeal to find new alleged misrepresentations.

1. CorVel's assertion of its coverage position is not a misrepresentation under La. R.S. § 22:1973(B)(1).

One of the four coverage defenses Homeland offered in its declaratory-judgment complaint was "that CorVel did not report the Arbitration Proceeding to Homeland in accordance with the … reporting requirements" in the policy. App. A227, A242. CorVel expressly bases its bad-faith claim on Homeland's assertion of that defense. App. A053–054 (alleging Homeland "misrepresented pertinent facts to its insured *when it alleged in the Declaratory Judgment Action* that CorVel did not timely report" the Claim) (emphasis added).

But Louisiana precedent unequivocally holds that an insurer's assertion of its coverage position, based on accurately-quoted policy language, is not a misrepresentation under La. R.S. § 22:1973(B)(1). *See Calogero v. Safeway Ins. Co. of Louisiana*, 753 So. 2d 170, 175 (La. 2000). CorVel does not contend otherwise or dispute that Homeland's complaint accurately quoted the policy. Instead, CorVel attempts to distinguish *Calogero* on the theory that the insurer

there "merely invoked an inapplicable policy exclusion." Ans. Br. 33. But far from distinguishing *Calogero*, that argument simply confirms it applies here.

In *Calogero*, the insurer asserted that coverage for an automobile accident was barred by an exclusion for damage "caused by the excluded driver(s)." 753 So. 2d at 173. The court held that the insurer's denial "was arbitrary and capricious" because the insurer "ha[d] no evidence that [the excluded driver] caused the accident." *Id.* But the court nonetheless held the insurer did *not* make a "misrepresentation" under La. R.S. § 22:1973(B)(1), since it had merely asserted "its *position* that the 'Exclusion of Named Driver' endorsement operated to preclude coverage . . . ." *Id.* at 175 (emphasis added). Under *Calogero,* an insurer's assertion of its position as to coverage is simply not a misrepresentation under § 22:1973(B)(1). *See Crescent City Baptist Church v. Church Mut. Ins. Co.*, 2006 WL 2631862, at *2 (E.D. La. Sept. 13, 2006).

CorVel tries to draw a distinction between the "legal prerequisite for coverage" of "when a claim is first *made*" and what it calls the "fact-based objective reporting predicate to coverage" of "when the claim was *reported.*" Ans. Br. 32 (emphases added). CorVel cites no precedent for this notion. That is because the precedent is to the contrary. As discussed in Homeland's opening brief, the case law and the plain language of the policy show that whether a claim is timely and properly reported turns not just on "when the claim was reported" but

on when the claim was "first made" under the policy's "Related Claims" provisions. *See* Op. Br. 34–35; *Southridge Capital Mgmt., LLC v. Twin City Fire Ins. Co.*, 2006 WL 2730312, at *10 (Conn. Super. Ct. Sept. 8, 2006) (claim untimely under the notice provision of a claims-made policy where it related back to an earlier claim); *Federal Ins. Co. v. Surujon*, 2008 WL 2949438, at *2, *5 (S.D. Fla. July 29, 2008) (claim was "untimely made" under one policy where the claim was "first made" before its inception). These established principles—which CorVel makes no attempt to address—leave no question that Homeland asserted a coverage position, no more and no less. Indeed, sufficiency of notice under a policy is a question of law, not fact. *See In re Matter of Compl. of Settoon Towing, L.L.C.*, 720 F.3d 268, 277 (5th Cir. 2013) (applying Louisiana law); *Resolution Tr. Corp. v. Ayo*, 31 F.3d 285, 289 (5th Cir. 1994) (applying Louisiana law). CorVel's attempt to convert Homeland's legal coverage position into a factual assertion should therefore be rejected.

2. CorVel's attempt to raise other alleged misrepresentations is both too late and meritless.

CorVel's bad-faith complaint alleged that Homeland "misrepresented pertinent facts to its insured when it alleged in the Declaratory Judgment Action that CorVel did not timely report" the arbitration action. App. A053. The Superior Court similarly held that "Homeland committed bad faith by knowingly misrepresenting the fact that CorVel provided notice of the Louisiana Arbitration

Action in compliance with the reporting requirements of the Homeland Policy." App. A026. And yet CorVel now contends it "*is not arguing that Homeland's coverage position was asserted in bad faith.*" Ans. Br. 32 (emphasis added). That concession disposes of the case: "where the insurer has legitimate doubts about coverage, [it] has the right to litigate these questionable claims without being subjected to damages and penalties." *Calogero*, 753 So. 2d at 173.[5]

Instead, CorVel pivots, offering a battery of *other* purported misrepresentations in support of its bad-faith claim. Those statements are mentioned nowhere in CorVel's bad-faith complaint or in the Superior Court's opinion. And they cannot salvage CorVel's bad-faith claim in any event.

CorVel first cites Homeland's statement in its June 4, 2007 declination letter that "[t]o date, the only Claims involving the OWC case and/or PPO litigation in Louisiana that have been reported to OBPP are the ORM and Kroger demand letters." Ans. Br. 23. CorVel never alleged below that this statement was a "misrepresentation" and thus waived any such argument. *See Stayton v. Clariant Corp.*, 2014 WL 28726, at *3 (Del. Jan. 2, 2014). Nor could the June 4, 2007 letter

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[5] The cases cited by CorVel on this issue, *Harris v. Fontenot*, 606 So.2d 72, 74 (La. Ct. App. 1992), and *Sher v. Lafayette Ins. Co.*, 988 So.2d 186, 198 (La. 2008), are inapposite because neither addressed an insurer's conduct in litigating admittedly reasonable coverage defenses. Instead, both merely addressed payment delays that continued after the onset of coverage litigation (and *Sher* concerned a different statute altogether).

provide any basis for a misrepresentation claim in any event. The letter accurately set forth Homeland's coverage position that any lawsuit "served to CorVel during or prior to 2005 . . . would not trigger coverage under the policy *because it was not reported within [90] days of the end of the Policy Period*"; that "*any Claim* against CorVel involving the Louisiana OWC and/or PPO litigation that may have been made subsequent to the Inception Date of the policy would be excluded" by the Prior/Pending exclusion, since those claims arose prior to the policy's inception date; and that coverage would therefore be denied "for *any other Claim deemed to be a Related Claim.*" App. A198–202 (emphases added).

CorVel also offers no factual support for its heated assertion that Homeland "intended to mislead" CorVel in stating that "[t]o date, the only Claims involving the OWC case and/or PPO litigation in Louisiana that have been reported to OBPP are the ORM and Kroger demand letters." Ans. Br. 11–12. CorVel submitted the letter referencing an intent to commence a class arbitration within a mass of other e-mailed materials in response to Homeland's request for other "OWC litigation or PPO cases naming CorVel as a party." App. A143, A144, A152, A158, A159. Where an insured submits documentation relating to a *pending* claim, the insurer is not required to analyze the documentation to determine whether something in it should be treated as a *separately* reported claim. *See Medical Inter Ins. Exchange of N.J. v. Health Care Ins. Exchange*, 651 A.2d 1029, 1032 (N.J. Super. Ct. 1995)

(claims personnel in receipt of a fourth amended complaint adding a new party "had no obligation to review pleadings transmitted to them for such limited informational purposes in order to determine whether they included new claims that might trigger additional coverage obligations"). More than three years later, when CorVel finally identified the arbitration as a separate matter for which it was seeking coverage, Homeland recognized and analyzed it as such. *See* App. B182.[6]

Nor do the other communications cited by CorVel provide any basis for a misrepresentation claim. In particular, Homeland's October 4, 2010 letter accurately recited Homeland's understanding that "[o]n September 24, 2010, the above-referenced Arbitration Demand was reported under the Policy." App. B052. And CorVel offers no evidence that this statement was intended to conceal Homeland's prior receipt of the December 4, 2006 letter. Moreover, as CorVel and the Superior Court recognized, Homeland acknowledged its receipt of the March 28, 2007 submissions and its awareness of the arbitration on multiple occasions *before* CorVel settled the arbitration. *See, e.g.*, App. A194, A196 (¶¶ 8, 13), A198, A215. CorVel's discussion of an October 20, 2010 telephone call references a statement by a *CorVel* representative about an earlier purported

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[6] CorVel also does not explain how Homeland's June 4, 2007 communication could have caused it to enter into a settlement more than four years later. *See infra* at 21–23.

"constructive notice of the claim." Ans. Br. 23. CorVel also references communications between its counsel and Homeland's counsel on November 17, 2010, and January 5, 2011, but identifies no alleged misrepresentation in either. *Id.*

CorVel also references purported misrepresentations made during the declaratory-judgment action. Ans. Br. 24. Setting aside that neither Delaware nor Louisiana permits CorVel to base a bad-faith claim on an insurer's litigation of reasonable coverage positions, *see supra* at 9–11, these statements all came *after* CorVel had settled the Louisiana class action. They could not have prompted the settlement.

Along with being too late, these representations are too little: None suggest that Homeland secretly believed CorVel had timely reported the arbitration action under the policy, while simultaneously claiming the contrary to CorVel. At their core, all of CorVel's claims of "misrepresentation" refer back to the letter referencing an intent to file the arbitration demand e-mailed to Homeland on March 28, 2007, along with materials pertaining to other previously-reported matters. *See* Ans. Br. 31. Again, *no one disputes* that Homeland received information about a "Class Action arbitration" in March 2007, or that "these documents contained the December 4, 2006 letter." App. A023, A024. Homeland repeatedly acknowledged as much before CorVel ever settled the class action. *See*

supra at 13. But whether such correspondence satisfied the policy's requirement that CorVel give Homeland notice of a Claim "first made" during the policy period was and remains a question of law. *See* App. A201 (noting that coverage would be denied for "*any other Claim* deemed to be a Related Claim" to the "Louisiana OWC and/or PPO litigation") (emphasis added).

II. CORVEL WAS REQUIRED TO, AND DID NOT, ESTABLISH THAT IT SUFFERED DAMAGES "AS A RESULT" OF HOMELAND'S ALLEGED BAD FAITH.

By its terms, the Louisiana bad-faith statute requires a plaintiff to prove causation to obtain damages from an insurer. A plaintiff must show that it "*sustained*" its claimed damages "*as a result of* the breach" of a statutory duty of good faith and fair dealing. La. R.S. § 22:1973(A) (emphases added); *see also id.* § 22:1973(C) (making an insurer liable for "penalties . . . in an amount not to exceed two times the damages sustained or five thousand dollars, whichever is greater"). CorVel brought its claim under Section 22:1973(B)(1), which prohibits "[m]isrepresenting pertinent facts." Like any other misrepresentation claim, the recovery of damages requires proof of reliance and causation. *See* Op. Br. 39–40.

CorVel offered no evidence of reliance or causation below, and it offers none here (nor could it; it is too late for that). So it is left to repeat the analysis in the decision below. Ans. Br. 34–35. The problem with that is that there *was* no analysis in the decision below. The Superior Court merely assumed that the notice defense (as opposed to Homeland's other three coverage defenses) must have caused CorVel's damages because CorVel settled after Homeland filed its declaratory-judgment complaint. But as Homeland has explained, correlation does not amount to causation. Op. Br. 42.

The Superior Court also declined to assess whether CorVel's damages were actually caused by Homeland's notice defense—the sole subject of the bad-faith claim—or arose from one or more of Homeland's other three defenses to coverage, which CorVel never assailed as having been made in "bad faith." *See* App. A028; Op. Br. 42. CorVel now tries to paper over the holes in the decision below by claiming that Homeland's other defenses were "weak and meritless." Ans. Br. 36. Not so: Three Delaware judges agreed with one of those defenses. Two Louisiana courts and CorVel's privy agreed with another. *See* Op. Br. 15–17 (describing the *Williams* plaintiffs' claims for coverage under the prior, Executive Risk, and those plaintiffs' express acknowledgment that the claims were made prior to Homeland's policy). And CorVel points to nothing in the record to suggest that, at the time it settled, it actually *did* think Homeland's other three coverage defenses were "weak and meritless."[7]

This renders irrelevant CorVel's late-breaking argument, not made below, that Section 22:1973 requires only that Homeland's notice coverage defense have been a "substantial," not a but-for, cause of CorVel's damages. Ans. Br. 35–36. For one thing, CorVel waived this argument by failing to raise it in the briefing below and not attempting to explain why the "interests of justice" warrant its

[7] CorVel's two record citations, Ans. Br. 36, do not speak to CorVel's reasons for settling.

consideration now. Del. Supr. Ct. R. 8; *see also DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 363 (Del. 2017) ("[I]t is not only unwise, but unfair and inefficient, . . . to allow parties to pop up new arguments on appeal they did not fully present below."). But the argument does not help CorVel in any event, because it has not shown any causal link, let alone a "substantial" one, between this coverage defense and its decision to settle, other than timing alone, which is insufficient.

Even under CorVel's preferred causation standard, reversal is required. That standard requires CorVel to prove by a preponderance of the evidence that Homeland's notice argument "was a substantial factor [in] bringing about the complained of harm." *Perkins v. Entergy Corp.*, 782 So.2d 606, 612 (La. 2001) (citation omitted).[8] This requires a nuanced and fact-specific analysis. The *Perkins* court, for example, extensively discussed the factual basis for causation. *See id.* at 612-619. Numerous other Louisiana cases likewise have engaged in lengthy factual determinations when applying the "substantial factor" test. *See, e.g.*, *Roberts v. Rudzis*, 146 So.3d 602, 609–611 (La. Ct. App. 2014); *Chaisson v.*

[8] The substantial factor test is applied to situations involving either multiple independent events or multiple independent actors, each of which is a necessary and sufficient cause of an injury. It does not apply where, as here, the alleged "cause" of CorVel's injury lie in a single claim in a declaratory-judgment complaint filed by a single entity, Homeland.

Avondale Indus., Inc., 947 So.2d 171, 188–189 (La. Ct. App. 2006). Thus, even if CorVel had alleged *any* evidence supporting causation—which it did not—that would have at best created fact issues for trial regarding causation and damages. *See Sullivan v. Standard Fire Ins. Co.*, 956 A.2d 643, 2008 WL 361141, *3 (Del. Feb. 11, 2008). But because CorVel did *not* raise any fact issues, Homeland was entitled to summary judgment.

CorVel resists the conclusion that Louisiana's bad-faith statute contains a reliance element by describing La. R.S. § 22:1973 as a strict-liability statute. This argument merges two separate elements of a bad-faith claim under Louisiana law. A breach of the duty of good faith and fair dealing outlined in the statute amounts to a violation of Section 22:1973. But the question of a violation is separate from the question of what *damages*, if any, a plaintiff is entitled to once it has established a violation. And the latter plainly requires a showing of reliance and causation. *See* La. R.S. § 22:1973(A), (C); *see also Edwards v. Nw. Mut. Life Ins. Co.*, 2016 WL 7077883, at *3 (W.D. La. Oct. 11, 2016).

CorVel also faults Homeland for not taking and introducing evidence *of its own* as to causation or reliance. Ans. Br. 37–38. CorVel has it backwards. As the plaintiff seeking summary judgment, *CorVel* bore the burden of proving and eliminating all issues of fact as to each element of its claim, including causation. *Enrique v. State Farm Mut. Auto. Ins. Co.*, 142 A.3d 506, 512 (Del. 2016)

(referring to "direct and consequential damages" for a bad-faith claim); *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149 (Del. 1987) (plaintiff bears the burden of proving causation for misrepresentation claims); *Bayview Loan Serv. LLC v. Edwards*, 2017 WL 1019729, at *2 (Del. Super. Ct. Mar. 13, 2017). And when Homeland cross-moved for summary judgment, it was *CorVel* who had to offer evidence of causation. And CorVel introduced *no* evidence as to the reasons for its decision to settle, only that it had settled. The Superior Court was left merely to assume that CorVel had relied on Homeland's notice coverage defense when deciding to settle, and that *that* defense—as opposed to any of Homeland's other three defenses—caused it to settle. Homeland was thus entitled to argue, as it did, that CorVel's claims failed as a matter of law. *See Shearin v. Allstate Ins. Co.*, 820 A.2d 373, 2003 WL 1747176, at *2 (Del. Mar. 31, 2003) (finding summary judgment proper where a plaintiff "fails to make a showing sufficient to establish the existence of an element essential to [its] case, and on which [it] will bear the burden of proof at trial"). It was CorVel's obligation to introduce evidence of causation and reliance, not Homeland's to introduce evidence negating those issues.

III. THE STATUTE OF LIMITATIONS BARS CORVEL'S CLAIM AND PROVIDES AN INDEPENDENT BASIS TO REVERSE.

All agree that the three-year statute of limitations on CorVel's bad-faith claim began to run when CorVel could plead damages. Ans. Br. 40. CorVel claims that Homeland's alleged misrepresentation—its notice coverage defense—caused it to settle and pay $9 million on June 23, 2011. App. A026. The statute of limitations thus began to run on that date and expired on June 23, 2014. CorVel filed its bad-faith claim too late, nearly a year later. App. A043.

To this, CorVel merely repeats the Superior Court's assertion that a bad-faith claim under Louisiana law requires that the insured prevail on its coverage position. Ans. Br. 41. It chooses not to respond to Homeland's explanation that the case on which the Superior Court relied for that proposition simply held that a third party who has no claim under an insurance contract is owed no duty of good faith. Op. Br. 45–46 (discussing *Riley v. Sw. Bus. Corp.*, 2008 WL 4286631, at *3 (E.D. La. 2008)). There is no response. Louisiana courts have repeatedly and clearly explained that a bad-faith claim under Louisiana law is an independent claim, separate from, and not dependent on, a breach-of-contract claim (which is covered by a separate statutory provision). *See Durio v. Horace Mann Ins. Co.*, 74 So. 3d 1159, 1170 (La. 2011); *see also id.* at 1171 (holding that bad-faith damages cannot be based on "contractual damages due or awarded under the insurance contract").

CorVel also claims that Homeland has conceded that Louisiana law requires a plaintiff to have a valid coverage claim before it can plead damages. Ans. Br. 40–41. But it cites Homeland's discussion of the standard for bad-faith under *Delaware* law in the briefing below. Louisiana has chosen a different rule. CorVel cannot claim that Delaware law does not govern its bad-faith claim at one turn (when arguing the merits) and then seek the protection of Delaware law at the next (when arguing about when it could plead damages). In any event, CorVel's position would require not only a valid claim for coverage but also a final *adjudication* of that claim before a bad-faith claim may be asserted. No such requirement exists under either state's law—as confirmed by CorVel's own filing of the bad-faith claim in this case prior to an adjudication of coverage.[9]

CorVel also contends that Homeland waived any statute-of-limitations defense because it did not comply with Section 3914 of Title 18 of the Delaware Code, which requires an insurer "during the pendency of any claim received pursuant to a casualty insurance policy to give . . . timely written notice to claimant . . . of the applicable state statute of limitations regarding action for his or her damages." Ans. Br. 43–44. It is (again) inconsistent for CorVel to invoke

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[9] Contrary to CorVel's assertion, Homeland's opening brief distinguished *Connelly v. State Farm Mut. Auto Ins. Co.*, 135 A.3d 1271 (Del. 2016). *See* Op. Br. 46.

Delaware law here, while arguing against applying Delaware's bad-faith standard. This provision does not help CorVel, in any event. CorVel offers no Delaware precedent to show that the statute applies to the contract between it and Homeland. Nor has CorVel offered any precedent (and Homeland has found none) applying this provision to a bad-faith claim against an insurer. The plain terms of the statute—"regarding action for his or her damages"—relate only to claims for contract damages. 18 DEL. C. § 3914. CorVel's bad-faith claim is not based on the insurance contract itself, so this provision does not apply.

Finally, CorVel is silent on the inconsistency between the Superior Court's statute-of-limitations and prejudgment-interest rulings. It uncoupled the accrual date of CorVel's cause of action from the date on which it awarded prejudgment interest. But if the claim did not accrue until coverage was determined in 2016, prejudgment interest *on that claim* cannot be deemed to have run from the date CorVel settled in 2011. *See* Op. Br. 47. CorVel has no answer to this.

CONCLUSION

For these reasons and authorities, and those in its Opening Brief, Homeland requests that this Court reverse the Superior Court's summary judgment, render summary judgment in Homeland's favor and against CorVel, and award Homeland such other and further relief this Court deems just.

Respectfully submitted,

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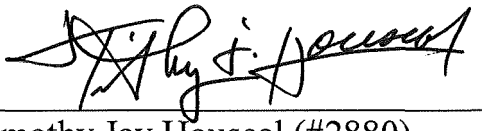

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