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IN THE SUPREME COURT OF DELAWARE

GEICO GENERAL INSURANCE COMPANY, *Defendant Below,* *Appellant/Cross-Appellee,* v. YVONNE GREEN and REHABILITATION ASSOCIATES, P.A., on behalf of themselves and all others similarly situated, *Plaintiffs Below,* *Appellees/Cross-Appellants*	:	No. 107, 2021 On Appeal from the Superior Court of the State of Delaware in and for New Castle County. C.A. No. N17C-03-242 EMD **PUBLIC VERSION** **FILED OCTOBER 4, 2021**
YVONNE GREEN and REHABILITATION ASSOCIATES, P.A., on behalf of themselves and all others similarly situated, *Plaintiffs Below,* *Appellants/Cross-Appellees,* v. GEICO GENERAL INSURANCE COMPANY, *Defendant Below,* *Appellee/Cross-Appellant*	:	No. 166, 2021 On Appeal from the Superior Court of the State of Delaware in and for New Castle County. C.A. No. N17C-03-242 EMD **PUBLIC VERSION** **FILED OCTOBER 4, 2021**

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APPELLANT'S REPLY BRIEF AND CROSS-APPELLEE'S ANSWERING BRIEF ON CROSS-APPEAL

[redacted]

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NATURE OF PROCEEDINGS ON CROSS-APPEAL

GEICO General Insurance Company's ("GEICO") stands on the Nature of Proceedings set forth in its Opening Brief. GEICO objects to the portion of Plaintiffs' Nature of Proceedings that advances argument in violation of Supreme Court Rule 14(b)(3)(iii). *See* Pls.' Br. at 1-2. Those arguments are addressed below.

SUMMARY OF ARGUMENT ON CROSS-APPEAL[1]

4. DENIED. The Superior Court correctly entered judgment as a matter of law in GEICO's favor on Count I (breach of contract). It was impossible for Plaintiffs to meet their evidentiary burden given their chosen theory of liability, which disavowed proof that GEICO failed to pay a reasonable and necessary medical expense. Plaintiffs seek to inject into GEICO's policies a duty to investigate via Delaware common, statutory and regulatory law. Delaware law, however, does not allow Plaintiffs to rewrite GEICO's policies, and Plaintiffs cannot base their claim on a purported violation of a nonexistent contractual obligation.

5. DENIED. The Superior Court correctly entered judgment as a matter of law in GEICO's favor on Count II (bad faith breach of contract). To recover, Plaintiffs were required to establish that GEICO breached its policies by denying benefits. Plaintiffs' theory of liability, however, abandoned the very evidence needed to demonstrate that GEICO denied PIP benefits. In addition, Plaintiffs were required to show that GEICO's denial of benefits was clearly without any reasonable

[1] Plaintiffs numbered these arguments 4 through 6 in their brief. For consistency, GEICO adopts this scheme.

justification. The Superior Court correctly determined that Plaintiffs failed to present evidence to satisfy this element.

6. DENIED. The Superior Court correctly denied Plaintiffs' Motion for Relief Related to Declaratory Judgment. In their First Amended Complaint ("FAC"), Plaintiffs did not seek relief, including damages, under 21 Del. C. § 2118B with respect to Count III (declaratory judgment). Plaintiffs secured class certification, in part, by affirmatively disclaiming damages in connection with Count III. Consequently, they are judicially estopped from reversing positions. Moreover, the Superior Court did not abuse its discretion when it correctly denied Plaintiffs' request, under 10 Del. C. § 6508, for supplemental relief in the form of unpaid benefits and statutory penalties.

STATEMENT OF FACTS ON CROSS-APPEAL

Plaintiffs' Statement of Facts is riddled with misstatements and inaccuracies designed to obfuscate the issues presented on appeal. GEICO stands by its Statement of Facts in its Opening Brief, which addresses some, but not all of Plaintiffs' misstatements. To address four particularly egregious falsehoods, GEICO supplements its Statement of Facts as follows:

The Rules Are Not Secret. Plaintiffs state that GEICO's Rules are "secret" and "totally hidden from claimants and providers, and even its regulators." Pls.' Br. at 20, 31; *see also id.* at 20 ("GEICO does not disclose the GRR or the PMR to the Delaware Department of Insurance[.]"). This is false, and Plaintiffs know it.

[redacted]. GEICO's Br. at 8.

[redacted]

GEICO has explained the mechanics of the Rules to providers on several occasions. [redacted].[2] A913-921. [redacted].[3] A1101-1108.

Likewise, the Delaware Department of Insurance ("DOI") has known for years that GEICO uses the Rules in adjusting PIP claims:

- [redacted] A883-885.

[2] [redacted]. A1937-1939.

[3] Plaintiffs' falsely claim that GEICO relies on only 2 pieces of literature to support the PMR. Pls.' Br. at 37.

[redacted]

- [redacted] A971-973. [redacted].

  Id.; *see also* A979-983 ([redacted]).

- [redacted]. A1101-1108.

See also A903-04, 910-911, 947-948.

The GRR Does Not Cause "Wild" Or "Arbitrary" Payments. Plaintiffs state that use of the GRR "results in wild and arbitrary fluctuations." Pls.' Br. at 12. This is false.

[redacted]. A1238-1274. Their chart includes values for only 5 of 2,200 randomly selected CPT codes.

[redacted]

Regardless, Plaintiffs' claim that the GRR "results in wild and arbitrary fluctuations" is unfounded. [redacted]. *See* GEICO's Br. at 9-10. If the recommend payment amounts appear "wild" and "arbitrary," "wild" and "arbitrary" provider charges are to blame. Contrary to Plaintiffs' assertion, the disparities do not demonstrate a flawed system.

The GRR Does Not Ignore Relevant Factors. Plaintiffs state that "[redacted]" but "never considers these relevant factors" under the GRR. Pls.' Br. at 15. Untrue. [redacted]. A858-859. [redacted]. *Id.* [redacted]. *Id.*; *see also*, A1526, 1528-1533.

[redacted]

[redacted] Pls.' Br. at 15. [redacted]. [redacted]. A1296. [redacted]. [redacted]. [redacted]. [redacted]. [redacted]. GEICO's Br. at 8-14.

[redacted]

REPLY IN SUPPORT OF ARGUMENT ON APPEAL

I. PLAINTIFFS FAIL TO DISTINGUISH *CLARK*, WHICH IS DISPOSITIVE OF COUNT III

Clark v. State Farm Mut. Auto. Ins. Co., 131 A.3d 806 (Del. 2016) is dispositive of Count III. *Clark* stands for the proposition that the Judiciary cannot superimpose on insurers a regulatory scheme not promulgated by the General Assembly. Yet, in denying GEICO's motion to dismiss Count III, that is precisely what the Superior Court did.

In *Clark,* plaintiffs sought a declaration that 21 Del. C. § 2118B required State Farm to process PIP claims within 30 days, but this Court recognized that "as plainly written, § 2118B(c) does not impose an invariable standard that every PIP claim must be processed within thirty days." *Id.* at 809. Here, Plaintiffs requested a determination that GEICO's use of the Rules violated 21 Del. C. § 2118. A126. But, as in *Clark*, nothing in that statute regulates how an insurer must, or must not, process PIP claims.

Because the declaratory relief sought in *Clark* was plainly beyond the scope of § 2118B, this Court held that the statute "does not leave room for a claim asking the Judiciary to affirmatively govern the operations of an insurer by dictating" the timeline under which PIP claims must be processed. 131 A.3d at 809. Here, too,

nothing in § 2118 (or § 2118B) purports to govern how insurers must process PIP claims, let alone the degree of automation insurers may or may not use. Thus, neither statute can serve as a predicate for the Judiciary to fashion a regulatory scheme about the use of automation in processing PIP claims. *Clark* is on all fours, and required dismissal of Count III.

Plaintiffs ignore this argument. Instead, they block quote a paragraph from the Superior Court's opinion noting perceived differences between this case and *Clark*. Pls.' Br. at 25. Yet, neither the Superior Court nor Plaintiffs explain why these differences matter. Ironically, the first "difference" is that Plaintiffs allegedly suffered damages. GEICO's Br. Ex. A at 20. Yet Plaintiffs never sought damages under Count III. Section VI, *infra*. Another "difference" is that GEICO "has not remedied its purported breach of contract. " GEICO's Br. Ex. A at 20. GEICO's *Clark* argument addressed Plaintiffs' declaratory judgment claim only – it had nothing to do with Plaintiffs' breach of contract claim. A188-192. In short, Plaintiffs and the Superior Court do not meaningfully distinguish *Clark*.

In its Opening Brief, GEICO offered three examples demonstrating how, in denying GEICO's motion to dismiss Count III, the Superior Court ultimately engaged in the type of improper judicial overreach that forewarned against by *Clark*.

GEICO's Br. at 19-21. Plaintiffs seek to cast these examples aside as "unrelated," Pls.' Br. at 25, but they aptly demonstrate how the Superior Court was baited into improperly crafting a regulatory framework out of thin air, and thus why dismissal under *Clark* was required in the first instance.

First, the Superior Court determined that "the Rules are antiquated and need updating to be able to apply the Rules in a manner that accounts for all the relevant *Anticaglia*[4] and *Watson*[5] factors." GEICO's Br. Ex. D at 39. Plaintiffs disagree that this ruling was untethered from any statute, regulation or case law, but in support merely offer a citation to eight pages from the Superior Court's summary judgment opinion. Pls.' Br. at 26. Essentially, they invite this Court to figure it out. Regardless, the Superior Court's ruling was legally incorrect. GEICO is not required to incorporate the *Anticaglia*/*Watson* factors into its methodology for adjusting PIP claims. *State Farm Mut. Auto. Ins. Co. v. Spine Care Delaware, LLC*, 238 A.3d 850, 862 (Del. 2020).

[4] *Anticaglia v. Lynch*, 1992 WL 138983 (Del. Super. Ct. Mar. 16, 1992).

[5] *Watson v. Metropolitan Prop. & Cas. Ins. Co.*, 2003 WL 22290906 (Del. Super. Ct. Oct. 2, 2003).

Second, the Superior Court improperly weighed competing policy goals when it opined that "the goal of efficiently processing claims should not outweigh the goal of protecting all individuals' right to reasonable medical coverage under the policy." GEICO's Br. Ex. D at 41. Plaintiffs incorrectly assert that this opinion aligns with policy goals stated in § 2118B(a). Pls.' Br. at 26. That provision states the twin purposes of § 2118B (***a statute not implicated by Count III***): "ensur[ing] reasonably prompt processing and payment" of PIP claims, and "prevent[ing] the financial hardship and damage to personal credit ratings that can result from unjustifiable delays." 21 Del. C. § 2118B(a). It never mentions a "right to reasonable medical coverage" or anything close.

Plaintiffs further assert that the Court's interpretation of "process" in § 2118B(c) is supported by the statute's goals.[6] Pls.' Br. at 26-27. But GEICO's argument is that the Superior Court made certain policy rulings that exceeded its authority. This point is not rebutted by pointing to a different conclusion which, in Plaintiffs' view, is consistent with § 2118B.[7]

[6] GEICO addresses the merits of this argument in Section II.C., *infra*.

[7] Plaintiffs tangentially note that the Superior Court "found that [GEICO's] system was unjustifiable." Pls.' Br. at 26. The opposite is true. The Superior Court stated it "***cannot find that GEICO's use of the Rules was without any reasonable justification***." GEICO's Br. Ex. D at 30 (emphasis added).

Finally, under the "Relevant Facts" section of its summary judgment opinion, the Superior Court took "guidance" and found "persuasive" scholarly articles denouncing automation in processes requiring the exercise of human judgment. GEICO's Br. Ex. D at 4-6. Plaintiffs argue that "GEICO does not show how this *dicta* is inconsistent with the policy behind the PIP statute." Pls.' Br. at 27. But nothing in § 2118 (or § 2118B) resembles the positions expressed in these articles. If a connection between these articles and Delaware law existed, the Superior Court would have made it. Not only did the Superior Court fail to do so, it acknowledged that "there is no *per se* rule on whether automated rules can be employed in handling insurance claims." GEICO's Br. Ex. D at 6. Nevertheless, emboldened by these articles and without any legal basis, several of the Superior Court's conclusions ran far afield:

- "[H]uman judgment should not be eliminated from the process." *Id.* at 39.
- "The operation of the Rules does not precisely correlate with what is considered to be reasonable." *Id.* at 38.
- "[T]he logic of the system is clearly flawed and does not align with what is a reasonable claim." *Id*. at 41.

[redacted]

- The Rules are "antiquated and need updating to … account[] for all the relevant *Anticaglia* and *Watson* factors." *Id*. at 39.

In short, the Superior Court erred in denying GEICO's motion to dismiss Count III in the first instance under *Clark*. In later ruling for Plaintiffs, the Superior Court's error was compounded further – as *Clark* predicted would be the case – when it improperly fashioned an unprecedented regulatory scheme governing automobile insurers in Delaware.

II. THE SUPERIOR COURT ERRED IN DENYING GEICO'S MOTION FOR SUMMARY JUDGMENT ON COUNT III AND ENTERING JUDGMENT FOR PLAINTIFFS

A. Plaintiffs' Liability Theory Disavowed The Very Proof Necessary To Enter Their Requested Declaratory Relief.

The Superior Court erred in failing to grant GEICO's motion for summary judgment as to Count III.[8] GEICO presented a simple legal argument: because the operative terms of 21 Del. C. § 2118 require an insurer to pay "reasonable and necessary" accident related expenses, and because Plaintiffs' theory of the case disavowed proof of reasonableness and necessity, Plaintiffs were foreclosed as a matter of law from establishing that GEICO's use of the Rules violates § 2118.

Plaintiffs claim GEICO has "refram[ed]" their theory of the case, and, in their own words, state their theory: "Plaintiffs challenged GEICO's use of the rules to deny claims – while ignoring the merits of the claims." Pls.' Br. at 28-29. There is no disagreement or reframing. All agree Plaintiffs sought a declaration that GEICO's use of the Rules violated § 2118. Proving a violation of § 2118 requires

[8] Plaintiffs make a halfhearted waiver argument, questioning whether GEICO preserved for appeal the Superior Court's denial of its motion for summary judgment as to Count III. *See* Pls.' Br. at 29 n.6. [redacted]. GEICO's Br. at 23 (citing A423-458 [redacted] and A1353-1391 [redacted].

[redacted]

evidence of a failure to pay a reasonable charge for necessary treatment – evidence that Plaintiffs disavowed. Plaintiffs' theory, therefore, is incompatible with their requested declaratory relief.

Plaintiffs never explain how they could prove, in a vacuum, that GEICO's use of the Rules violate § 2118. Instead, they block quote from the summary judgment hearing transcript where GEICO's counsel agreed that § 2118B requires GEICO to look at a PIP claim and, if a claim is not processed within 30 days, pay the full amount plus statutory interest. Pls.' Br. at 29-31. None of this is controversial – it is clearly laid out in § 2118B(c). Further, Plaintiffs did not present evidence that GEICO fell short of either obligation. But most importantly, none of this is relevant to Count III, which only sought a declaration that GEICO's Rules violate § 2118, not § 2118B.

The disconnect between Plaintiffs' theory of liability and burden of proof is irreconcilable. Rather than addressing this fatal defect in Count III, Plaintiffs lob unsupported hyperbole designed to distract the Court and discredit GEICO. Plaintiffs claim that GEICO's Rules are "guarded secrets, and totally hidden from claimants and providers, and even its regulators." Pls.' Br. at 20. As discussed, this is utterly false and Plaintiffs know it. *See* Statement of Facts, *supra*. Regardless,

these falsehoods have nothing to do with whether GEICO's use of the Rules violates § 2118.

In sum, Plaintiffs' theory of liability disavowed the very proof required to enter a declaration that GEICO's use of the Rules violated § 2118. Accordingly, the Superior Court erred in denying GEICO's motion for summary judgment as to Count III.

B. Plaintiffs Never Sought A Declaration That GEICO Violated § 2118B, And The Superior Court Erred When It Granted Such Relief *Sua Sponte*.

Plaintiffs do not dispute that a court may not enter declaratory judgment beyond that requested in their pleadings. Rather, Plaintiffs suggest that they requested a declaration that GEICO's use of the Rules violated § 2118B, and thus the Superior Court's declaration was appropriate. Pls.' Br. at 32-33.

This Court need look no further than Paragraph 79 of the FAC, which set forth Plaintiffs' requested declaratory relief. Plaintiffs requested "that this Court enter judgment, as a matter of law, that (i) GEICO has violated 21 Del. C. § 2118; and (ii)

GEICO may not lawfully use the [GRR] or [PMR]." A126. Section 2118B was not cited in the body of Count III, including Paragraph 79.[9]

Nevertheless, Plaintiffs appear to claim that § 2118B is subsumed in part (ii) of Paragraph 79. Pls.' Br. at 32. This argument ignores that Plaintiffs joined parts (i) and (ii) with a conjunctive. Either GEICO's use of the Rules violated § 2118 ***and*** could not be lawfully used (i.e. Plaintiffs' requested relief) or GEICO's use of the Rules did not violate § 2118 ***and*** could be lawfully used. Plaintiffs cannot now recast part (ii) as a separate – and impossibly broad – request for a declaration that GEICO's use of the Rules violated any facet of Delaware law.

Plaintiffs next argue that, throughout the litigation, they discussed § 2118B including penalties triggered by GEICO's purported violations of the statute. Pls.' Br. at 32-33. In support, Plaintiffs cite to the record where they quoted or cited to § 2118B to provide background on PIP law in Delaware, A105, A333, A1165, or discussed a case involving the statute. A362. They cite to the summary judgment hearing transcript where GEICO's counsel and the Superior Court discussed the statute, B687, and Plaintiffs' counsel discussed the statute's role in their breach of

[9] Nor did Plaintiffs, at summary judgment, request a declaration that GEICO violated § 2118B. GEICO's Br. at 26 n.16. Such a request would have been improper as beyond the scope of the pleadings.

contract claim. B705. Finally, they cite to subparagraph e of the ad damnum clause of the FAC where Plaintiffs made a generic request for an award of "penalties consistent with 21 Del C. § 2118B(c)." A129. Plaintiffs, however, later made clear that this request was not connected to Count III. A352 [redacted]. In short, Plaintiffs do not and cannot cite a single instance where they requested a declaratory judgment that GEICO's use of the Rules violated § 2118B.

C. The Superior Court Cannot Rewrite § 2118B(c) To Fit Its Particular Policy Position.

In response to GEICO's argument that the Superior Court erroneously injected 18 Del. C. § 2304(16)d's investigation requirement into § 2118B(c), Plaintiffs advance two arguments. Neither is availing.

Plaintiffs first argue that the Superior Court interpreted "process" "consistent with policy goals expressed in [§ 2118B] and in a manner that was harmonious with existing laws." Pls.' Br. at 27. This argument fails for at least two reasons.

First, the word "process" is unambiguous, and the Superior Court did not find otherwise. Thus, the Superior Court erred as a matter of law when it looked beyond the plain meaning of the term. *See* GEICO's Br. at 30-31. Case law cited by Plaintiffs supports this conclusion. Pls.' Br. at 27 (citing *Barone v. Progressive N.* [redacted]

Ins. Co., 2014 WL 686953, at *4 (Del. Super. Ct. Jan. 29, 2014), *aff'd*, 103 A.3d 514 (Del. 2014) ("[I]t is equally well-established that, in our constitutional system, this Court's role is to interpret the statutory language that the General Assembly actually adopts ... ***without rewriting the statute to fit a particular policy position***." (cleaned up; emphasis added))); *see also Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1259 (Del. 2011) ("[W]e do not sit as an überlegislature to eviscerate proper legislative enactments. It is beyond the province of courts to question the policy or wisdom of an otherwise valid law. Rather, we must take and apply the law as we find it, leaving any desirable changes to the General Assembly.").

Second, Plaintiffs offer no evidence whatsoever that the General Assembly intended the investigation requirement of § 2304(16)d to be baked into the word "process" in § 2118B. Presumably, if the General Assembly so intended, it could have included a simple cross-reference, yet none exists. Contrary to Plaintiffs' argument, injecting § 2304(16)d's investigation requirement into § 2118B(c) would undermine the General Assembly's intent; it would create a backdoor private cause of action under the Unfair Trade Practices Act ("UTPA") that the General Assembly did not see fit to establish. *Moses v. State Farm Fire & Cas. Ins. Co.*, 1991 WL 269886, at *4 (Del. Super. Nov. 20, 1991).

Plaintiffs next warn that if "process" does not include § 2304(16)d's investigation requirement, insurers will adjust Delaware PIP claims without oversight or consequence. Preliminarily, this ends-driven argument violates well-established cannons of statutory construction. *Sternberg v. Nanticoke Mem'l Hosp., Inc.*, 62 A.3d 1212, 1217 (Del. 2013) ("[P]ublic policy considerations only empower courts to construct gap fillers when the statute is ambiguous, and unambiguous statutory text trumps the statute's purpose or broad public policy preamble." (cleaned up)). Further, Plaintiffs' dire prophecy is unfounded.

Plaintiffs essentially argue that, absent the Superior Court's interpretation of "process," no guardrails exist to keep PIP insurers from running off the track. Insurers, however, are statutorily and contractually obligated to pay reasonable and necessary PIP claims. 21 Del. C. § 2118(a)(2); A462, 477. PIP claims must be processed within 30 days, and if any charge is partially or wholly denied, a written explanation must be provided. 21 Del. C. § 2118B(c). Failure to comply results in the imposition of statutory penalties, and subjects the insurer to a civil action where attorneys' fees may be recovered. *Id.* § 2118B(c)-(d). A policyholder who is denied benefits may file a civil action for breach of contract. Where the denial was clearly without any reasonable justification, a claim lies for bad faith breach of contract.

[redacted]

Moreover, insurance companies are subject to the regulatory oversight of the Department of Insurance, which is authorized to investigate alleged violations of the Insurance Code and has the authority to impose penalties. *See* GEICO's Br. at 19.

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

D. Plaintiffs Fail To Refute GEICO's Argument That The Superior Court Improperly Shifted The Burden Of Proof.

GEICO contends that, in entering summary judgment for Plaintiffs on Count III, the Superior Court improperly shifted the burden of proof in violation of *State Farm Mut. Auto Ins. Co. v. Spine Care Delaware, LLC*, 238 A.3d 850 (Del. 2020). GEICO's Br. at 32-35. Noticeably absent from Plaintiffs' brief is any discussion of this case with respect to the parties' respective burdens of proof.[10] Instead, Plaintiffs assert that "GEICO conflates the Plaintiffs' burden of proof … with GEICO's underlying statutory obligation to meaningfully review and process claims." Pls.' Br. at 33. In essence, Plaintiffs simply fall back on their argument that the Superior Court correctly construed § 2118B(c) to incorporate the investigation requirement

[10] This is particularly glaring given the parallel issues between this case and *Spine Care* and that burden of proof is a critical issue on appeal.

of § 2304(16)d. As already discussed, the Superior Court's construction was legally incorrect.

Plaintiffs only other argument on this issue is that the Superior Court did not improperly shift the burden because it said so. Pls.' Br. at 34. Despite saying it would not shift the burden, however, the Superior Court did just that. *See* GEICO's Br. at 33-34. Plaintiffs do not address, let alone refute the specific examples identified by GEICO showing that the Superior Court improperly shifted the burden.

III. THE SUPERIOR COURT DID NOT ABIDE BY THE STANDARD OF REVIEW GOVERNING CLASS CERTIFICATION

Plaintiffs assert that GEICO is conflating the standard for summary judgment with the standard for class certification.[11] Pls.' Br. at 39. Not so.

Class certification is proper only "'if the trial court is satisfied, after a rigorous analysis, that the prerequisites' of Rule 23 are met." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 309 (3d Cir. 2008), *as amended* (Jan. 16, 2009) (quoting *Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 161 (1982)). A court's rigorous analysis may include "a preliminary inquiry into the merits" and consideration of "the substantive elements of the plaintiffs' case in order to envision the form that a trial on those issues would take." *Id.* at 317 (cleaned up).

On class certification, GEICO challenged Plaintiffs' ability to prove, by a preponderance of the evidence, the elements of Rule 23 under their theory of liability which disavowed proof of reasonableness and necessity. Rather than conduct the required evidentiary analysis, the Superior Court improperly accepted Plaintiffs' allegations at face value. GEICO's Br. at 39, 42.

[11] Plaintiffs present no argument with respect to GEICO's position that the Superior Court erred in certifying the case under Rules 23(b)(1), (2), and (3), and erred even further in its faulty Rule 23(b)(3) analysis. *See* GEICO's Br. at 43-44.

Further, during discovery, the Superior Court recognized that whether GEICO violated Delaware law or its policies was "very close to just a legal determination in this case," and Plaintiffs agreed. A1599, A1600. Critically, the Superior Court acknowledged that its class certification decision required resolution of this legal question: "***[I]f I determine at the [class certification] hearing that there isn't a violation of the law, this class goes away***." A1616-17 (emphasis added). Despite acknowledging this pivotal legal issue relevant to class certification, the Superior Court made no inquiry into the merits of Plaintiffs' legal theory.

In sum, in granting class certification without conducting the evidentiary and legal analysis required under Rule 23, the Superior Court committed reversible legal error. *In Re Hydrogen Peroxide Litig*., 552 F.3d at 320.

[redacted]

ARGUMENT IN OPPOSITION TO CROSS-APPEAL

IV. THE SUPERIOR COURT CORRECTLY ENTERED JUDGMENT FOR GEICO ON PLANITIFFS' BREACH OF CONTRACT CLAIM

A. Question Presented

Was the Superior Court legally correct in entering judgment in favor of GEICO on Plaintiffs' breach of contract claim when (1) Plaintiffs' theory of liability foreclosed presentation of evidence of a breach; and (2) there was no legal basis to reform GEICO's policies to inject an investigation obligation?

B. Scope of Review

The Court reviews *de novo* the entry of summary judgment both as to the facts and the law. *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996).

C. Merits of Argument

1. Having Abandoned Proof Of Reasonable And Necessary, Plaintiffs Cannot Prove Breach Of Contract.

First-year law students know that, to recover for breach of contract, the plaintiff must identify and then prove a breach of an obligation imposed by a contract. *Johnson v. GEICO Cas. Co.*, 672 F. App'x. 150, 155 (3d Cir. 2016); *Anderson v. Wachovia Mortg. Corp.*, 497 F. Supp. 2d 572, 581 (D. Del. 2007) (citing *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 901 A.2d 106, 116 (Del. 2006)). Plaintiffs

did not do either.[12] As such, the Court correctly entered judgment in GEICO's favor on Count I.

The only conceivable contract provision implicated by GEICO's use of the Rules is GEICO's obligation to pay reasonable medical expenses for necessary treatment. A477. Plaintiffs, however, pursued a legal theory that abandoned proof that GEICO denied a PIP claim for reasonable expenses pertaining to necessary medical treatment. Under this theory, it was legally impossible to prove a breach of contract: under Delaware law, a PIP claimant bears the burden of proving that medical charges are reasonable and treatment is necessary. *Spine Care*, 238 A.3d at 859. "Plaintiffs chose not to take that individualized claim approach in this case." GEICO's Br. Ex. D at 28.

Simply put, without proof of reasonableness and necessity, Plaintiffs cannot prove the central allegation in their breach of contract claim: that "GEICO breached the applicable policies … by reducing or denying payment of covered PIP benefits

[12] Plaintiffs list ten "uncontested facts" which they assert the Superior Court accepted, and which were sufficient to justify the entry of judgment in their favor on Count I. Pls.' Br. at 41-42. GEICO rejects Plaintiffs' characterization. However, these "uncontested facts" are not probative of whether GEICO breached a contractual obligation, and Plaintiffs offer no substantive argument to the contrary. Accordingly, Plaintiffs "uncontested facts" are immaterial to any issue on appeal.

through the use of the rules." A124. Consequently, the Superior Court correctly entered judgment in GEICO's favor as to Count I.

2. Plaintiffs Cannot Inject An Investigation Requirement Into GEICO's Policies.

As Plaintiffs see it, the issue presented in their breach of contract claim "is whether GEICO has a contractual obligation … that requires it to review [and] investigate" before making a claim decision. Pls.' Br. at 44. It is undisputed that GEICO reviews claims before making a payment decision. A105-106; Pls.' Br. at 45. Thus, the question boils down to whether GEICO is under some unstated contractual obligation to "investigate." Plaintiffs cannot point to any policy term reflecting such an obligation. Consequently, they look elsewhere – namely, Delaware common law, statutory law, and regulations – in an attempt to inject an investigation obligation into GEICO's policies. None operate to rewrite GEICO's policies.

a) Delaware common law

The Superior Court concluded that "Delaware law seems straightforward that GEICO did not have a common law duty to investigate." GEICO's Br. Ex. D at 24. Neither *Tackett v. State Farm Fire and Cas. Ins. Co.,* 653 A.2d 254 (Del. 1994), nor *Ponzo v. Nationwide Mut. Ins. C*o., 2013 WL 3965396 (Del. Com. Pl. Jul. 30, 2013),

stand for the proposition that a "failure to investigate or process claims is a breach." Pls.' Br. at 46. *Tackett* actually states:

> Where an insurer fails to investigate or process a claim or delays payment in bad faith, it is in breach of the implied obligations of good faith and fair dealing underlying all contractual obligations. A lack of good faith, or the presence of bad faith, is actionable where the insured can show that the insurer's ***denial of benefits*** was clearly without any reasonable justification.

Tackett, 653 A.2d at 264 (cleaned up; emphasis added). Thus, under *Tackett*, a failure to investigate, by itself, is not actionable as a breach of contract. Rather, a bad faith breach of contract action lies if and only if there is a breach of contract (i.e. a denial of benefits). Simply stating that a failure to investigate equates to a breach is incorrect. GEICO's Br. Ex. D at 22.

Plaintiffs' reliance on the 2007 *Spine Care Delaware, LLC v. State Farm Mut. Auto Ins. Co.*, 2007 WL 495899 (Del. Super. Feb. 5, 2007) decision is equally misplaced. Pls.' Br. at 46. *Spine Care* contains no discussion of an insurer's burden to investigate, and merely held that a PIP carrier is precluded from "shifting its position on defense of a denial after the 30 day[] [payment period] expires." 2007

WL 495899, at *3; *see also Kanick v. State Farm Mut. Auto. Ins. Co.*, 2007 WL 1378334, at *1 (Del. Super. May 7, 2007) (limiting the reach of *Spine Care*).[13]

Likewise, *Egan v. Mutual of Omaha Ins. Co.*, 620 P.2d 141 (Cal. 1979) is inapposite. In a good faith and fair dealing case brought under California law, the court concluded that the insurer must act in a way not to prevent the insured from receiving the benefit of the contract (i.e. the "fruits of the bargain"). *Id.* at 145.[14] The fruits of the bargain for a GEICO PIP policyholder is "***the prompt payment of reasonable and necessary medical expenses caused by a car accident.***" *Johnson v. GEICO Cas. Co.*, 672 F. App'x 150, 155 (3d Cir. 2016) (emphasis added). Of course, Plaintiffs abandoned presentation of evidence that any policyholder was denied this bargain.

[13] While not pertinent to their argument that Delaware common law imposes an investigation requirement, Plaintiffs miss the mark in relying on the "inaccurate and unreliable" *dicta* in *Spine Care* to argue that GEICO has waived all defenses by using the Rules. Pls.' Br. at 46. Nothing in *Spine Care* supports Plaintiffs' theory that GEICO's use of computer rules in determining its payment of PIP benefits is "inaccurate and unreliable."

[14] As the Superior Court correctly concluded, *Mt. Hawley Ins. Co. v. Jenny Craig, Inc.*, 1995 WL 716929 (Del. Super. Oct. 20, 1995), citing *Egan*, does not support Plaintiffs' position that Delaware common law imposes a duty to investigate on GEICO. GEICO's Br. Ex. D at 23-24.

Finally, *St. Anthony's Club v. Scottsdale Ins. Co.,* 1998 WL 732947 (Del. Super. July 15, 1998), a policy coverage dispute, is equally unsupportive. An underlying lawsuit was filed against St. Anthony's Club and its manager alleging various causes of action – including assault and battery – in connection with the plaintiff's forced ejection from the club by its manager. *Id.* at *1. Based on an "assault and battery" exclusion, Scottsdale declined to defend. *Id.* In *dicta*, the court stated that the policy "***may*** also impose some effort to learn some facts before the insurer heads for the door." *Id.* at *6 (emphasis added). Whether the failure to "learn some facts" would have supported a claim for breach of the policy was neither presented nor decided.

b) Delaware statutes

Plaintiffs next look to Delaware statutory law, specifically 18 Del. C. § 2304(16), for an investigation obligation to inject into GEICO's policies. The Superior Court is the third consecutive court to reject this argument. *See* GEICO's Br. Ex. D at 19-21. This Court should be the fourth.

The UTPA – where § 2304(16) is codified – was intended to vest power in the Insurance Commissioner to regulate the insurance practices described in the statute. *Moses v. State Farm Fire & Cas. Ins. Co.*, 1991 WL 269886, at *4 (Del.

Super. Nov. 20, 1991). The UTPA does not provide a private right of action to an insured or claimant. *Id.*; *see also Price v. State Farm Mutual Auto Ins. Co.*, 2013 WL 1213292, at *14 (Del. Super Ct. Mar. 15, 2013) (same). Thus, Plaintiffs' attempt to base their breach of contract claim upon § 2304(16) fails from the outset.

Plaintiffs, however, attempt to inject § 2304(16) into GEICO's contract by invoking policy language that states that "[a]ny terms of this policy ***in conflict*** with the statutes of Delaware are amended to conform to those statutes" (hereafter, the "conflict clause"). Pls.' Br. at 48 (emphasis added). The Superior Court correctly noted that Plaintiffs never "specif[ied] a particular provision that conflicts with Delaware law" and that "[t]he absence of a provision does not mean there is a conflict warranting reformation." GEICO's Br. Ex. D at 21. Accordingly, the conflict clause does not provide Plaintiffs with a backdoor UTPA private cause of action.

Finally, though never explicitly articulated, Plaintiffs appear to claim that § 2304(16) should be read into GEICO's policies via the implied covenant of good faith and fair dealing. *See* Pls.' Br. at 44 (framing that issue on Count I as "whether GEICO has a contractual obligation … that requires it to review, investigate and either allow or disallow claims ***in good faith***" (emphasis added)), 1 ("It is

fundamental that an insurance company has a duty to process an insured's claim in good faith[.]"), and 34 ("GEICO admitted that it has a duty to investigate and process claims in good faith[.]"). To the extent the Court considers this theory, it should be rejected.

First, as the Superior Court acknowledged, Plaintiffs did not plead a good faith and fair dealing claim. GEICO's Br. Ex. D at 20; B673 ("I don't know how I'd read an implied covenant. First of all, they haven't plead it.").

Second, even before the Superior Court's ruling, Plaintiffs' counsel's effort to read § 2304(16) into GEICO's policies via the implied covenant of good faith and fair dealing was twice rejected. In *Johnson v. Gov't Emps. Ins. Co.,* the district court rejected that theory, granted GEICO's motion for summary judgment, and reasoned:

> [T]he Plaintiff is attempting to reform the contract via the implied covenant of good faith and fair dealing, to include the requirements of 18 Del. C. § 2304. ***For the Court to read into the insurance contract the requirements of § 2304 would require the Court to find that the parties would have agreed to such a term had the parties thought to have negotiated with respect to the matter***. *See Dunlap* [*v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005)].

2014 WL 2708300, at *4 (D. Del. June 16, 2014) (emphasis added).

The Third Circuit affirmed, explaining that "[u]nder Delaware Law, an implied covenant of good and fair dealing attaches to every contract and requires a

party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits' of the bargain." 672 Fed. App'x 150, 155 (3d Cir. 2016) (cleaned up). The court held:

> ***The "fruit of the bargain" was the prompt payment of reasonable and necessary medical expenses caused by a car accident,*** and, insofar as [the plaintiff] has failed to offer sufficient evidence for a reasonable jury to find that her expenses were reasonable, necessary, or caused by her accident, no reasonable jury could find that she was prevented from receiving the "fruits of the bargain" to prevail on this claim.

Id. at 155-156 (emphasis added). The Third Circuit refused to rewrite GEICO's policy:

> [W]e cannot reform [the plaintiff's] contract to prohibit the use of GEICO's claims processing rules because [the plaintiff] ***has not offered any evidence of the parties' intent at the time of contracting for us to conclude that one of the fruits of the contract was review of her claim without those rules.***

Id. at 156 n.20 (emphasis added).

Just as the district court and Third Circuit concluded in *Johnson*, the Superior Court correctly ruled that it "cannot reform the GEICO Policies to prohibit GEICO's claims processing rules where there was no evidence of [the] parties' intent to have a contractual duty to review claims based on all available information." GEICO's

Br. Ex. D at 21. Consequently, § 2304(16) cannot be read into GEICO's policies by virtue of the implied covenant of good faith and fair dealing, even if such a cause of action had been pled.

c) Delaware regulations

Plaintiffs argue that GEICO's Rules violate 18 Del. Admin. Code § 603-6.3, and, citing nothing, declare that such violation amounts to a breach of contract. Pls.' Br. at 49-51. The Superior Court correctly found "fault with Plaintiffs' breach of contract theory under … Regulation 603." GEICO's Br. Ex. D at 26.

Regulation 603 governs, *inter alia*, an insured's selection of insurance coverage, limits and deductibles at the time a policy is purchased. 18 Del. Admin. Code § 603-6.3. The regulation is neither related to the use of a database in adjusting PIP medical bills, nor does it govern the manner in which PIP claims are adjusted.

Plaintiffs' argument that the GRR and PMR fall within the definition of "percentage reduction" or "sublimits" is erroneous. The non-Delaware cases cited by Plaintiffs concerning sublimits[15] involve the interpretation and definition of "sublimits" which were specifically incorporated into the insurance policies in those

[15] *Starstone Nat'l Ins. Co. v. Polynesian Inn, LLC*, 2019 WL 4016151 (M.D. Fl. Aug. 26, 2019) and *Doctors Hosp. 1997 LP v. Beazley Ins.*, 2009 WL 3719482 (S.D. Tex. Nov. 3, 2009).

[redacted]

cases. Quoting *Starstone*, Plaintiffs contend that a sublimit is a "'***limitation in an insurance policy on the amount of coverage*** available to cover a specific type of loss.'" Pls.' Br. at 50 (emphasis added). No such sublimit exists in any GEICO policy at issue here. [redacted]. A467. Plaintiffs' sublimit argument is unfounded.

Plaintiffs state that the GRR "appears to fall within the concept of a 'percentage reduction,'" but do not explain why. Pls.' Br. at 50. [redacted]. *See* GEICO's Br. at 9-10. The GRR is not a "percentage reduction."

Yet even assuming GEICO's Rules somehow violate Regulation 603 – they do not – Plaintiffs fail to cite any authority supporting their unprecedented theory that such a violation demonstrates a breach of contract, and none exist. On this basis alone, Plaintiffs' argument must be rejected.

3. <u>The Rules Are Not Undisclosed Exclusions.</u>

Plaintiffs further argue, without citation to any authority, that the Rules amount to improper undisclosed exclusions. Pls.' Br. at 51-52. As discussed in [redacted]

GEICO's Opening Brief, the Rules are not "exclusions." *See* GEICO's Br. at 34-35. Accordingly, Plaintiffs' argument is without merit.

V. THE SUPERIOR COURT CORRECTLY ENTERED JUDGMENT FOR GEICO ON PLAINTIFFS' BAD FAITH BREACH OF CONTRACT CLAIM

A. Question Presented

Whether the Superior Court correctly entered judgment in GEICO's favor on Plaintiffs' bad faith breach of contract claim when Plaintiffs (1) failed, as a matter of law, to demonstrate a breach of contract in the first instance; and (2) could not carry their burden of demonstrating that GEICO's use of the Rules was clearly without any reasonable justification?

B. Scope of Review

The Court reviews *de novo* the entry of summary judgment both as to the facts and the law. *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996).

C. Merits of Argument

1. No Breach Of Contract Means No Bad Faith Breach Of Contract.

To prove an insurer's liability for bad faith breach of contract, the plaintiff must first prove that the insurer breached the contract. *D'Orazio v. Hartford Ins. Co.*, 2011 WL 1756004, at *4 (E.D. Pa. May 6, 2011), *aff'd* 459 F. App'x 203 (3d Cir. 2012) (citing *Tackett*, 653 A.2d at 256). Specifically, the plaintiff must prove a "denial of benefits" by the insurer. *Tackett*, 653 A.2d at 264. To show a denial of

benefits in the PIP context, Plaintiffs must prove GEICO did not pay for "reasonable and necessary" medical expenses. 21 Del. C. § 2118(a)(2); *Spine Care*, 238 A.3d at 859.

As already discussed, the Superior Court correctly entered judgment in GEICO's favor on Count I. On this basis alone, the Superior Court's entry of judgment in GEICO's favor on Count II was legally correct. *Johnson*, 2014 WL 2708300, at *3 ("[A]s the Court has found there is no breach of contract, there can, ***as a matter of law, be no bad faith breach of contract***." (emphasis added)).

2. Plaintiffs Failed To Meet Their Burden Of Showing That GEICO's Use Of The Rules Was Clearly Without Any Reasonable Justification.

In addition to proving breach of contract, a plaintiff seeking to recover under a theory of bad faith breach of contract must "show that the insurer's denial of benefits was clearly without any reasonable justification." *Tackett,* 653 A.2d at 264 (cleaned up). The Superior Court correctly concluded that it "cannot find that GEICO's use of the Rules was without any reasonable justification." GEICO's Br. Ex. D at 30. In their brief, Plaintiffs never address, let alone refute this critical holding. On this basis alone, the Court can affirm the Superior Court's ruling on Count II.

[redacted]

Moreover, Plaintiffs cannot demonstrate that GEICO's use of the Rules was "***clearly*** without ***any*** reasonable justification" – that is, with no justification whatsoever. GEICO submitted ample evidence justifying the genesis and continued use of the Rules. *See* GEICO's Br. at 11 ([redacted]) and 12 ([redacted]). Whether Plaintiffs agree that the Rules are justified is immaterial. The relevant inquiry is whether the Rules have any support, and they unquestionably do. *Id*. Accordingly, as a matter of law, Plaintiffs did not – and cannot – meet their burden.

Plaintiffs' reliance on *Lundberg v. State Farm Mut. Ins. Co.*, 1994 WL 1547774 (Del. Com. Pl. July 11, 1994) to demonstrate GEICO's bad faith in using the PMR is unavailing.[16] Pls.' Br. at 56-57. In *Lundberg*, the plaintiff/insured brought a breach of contract action against State Farm under its Delaware PIP policy where State Farm denied payment for a thermogram as not medically necessary. In determining whether State Farm had breached its contract, the court, relying on the PIP statutory scheme, explained the "***resolution of this matter … turns on whether the thermogram treatment provided was reasonable and necessary.***" *Id.* at *2

[16] Plaintiffs accuse GEICO of "ignor[ing] *Lundberg*. The case was entirely omitted from GEICO's Opening Brief." Pls.' Br. at 38 n.7. Plaintiffs are wrong. *See* GEICO's Br. at 37 n.18 (specifically addressing, and distinguishing, *Lundberg*).

[redacted]

(emphasis added). The court concluded that State Farm was required to base its denial of payment on evidence that met an objective standard and that an adjuster's review of a few articles and consultation with a supervisor with no medical training did not suffice. *Id.* at *2-3.

Lundberg is easily distinguishable. [redacted]. A861-877, A913-921, A971-987. [redacted]. A972. The *Lundberg* adjuster's paltry investigation is simply not comparable to the medical consensus supporting GEICO's implementation and use of the PMR.

In short, to defeat Plaintiffs' bad faith breach of contract claim at the summary judgment stage, all GEICO needed to show was that the Rules had ***some*** justification. GEICO easily cleared this low evidentiary bar by demonstrating that the Rules were substantially justified. Accordingly, the Superior Court properly entered judgment in GEICO's favor on Count II.

[redacted]

VI. THE SUPERIOR COURT CORRECTLY DENIED PLAINTIFFS' REQUEST FOR DAMAGES

A. Questions Presented

Whether the Superior Court erred as a matter of law in denying an award of unpaid benefits and statutory interest under 21 Del. C. § 2118B(c) where Plaintiffs never requested such relief in their FAC and affirmatively disclaimed damages under Count III, and whether the Superior Court abused its discretion in ruling that an award of damages under 10 Del. C. § 6508 was neither necessary nor proper?

B. Scope of Review

The Court reviews questions of law, including the application of judicial estoppel, *de novo*. *Wright v. Wright*, 49 A.3d 1147, 1150 (Del. 2012); *Motorola Inc. v. Amkor Tech., Inc.*, 958 A.2d 852, 859 (Del. 2008). This Court reviews discretionary rulings of the trial court under an abuse of discretion standard. *Zimmerman v. State*, 628 A.2d 62, 65 (Del. 1993).

C. Merits of Argument

1. The Superior Court Did Not Commit Legal Error In Refusing To Award Damages Plaintiffs Did Not Seek And, In Fact, Affirmatively Disclaimed.

As argued in GEICO's Opening Brief and above, the Superior Court committed reversible error when it *sua sponte* granted declaratory relief that

GEICO's use of the Rules violates 21 Del. C. § 2118B. *See* GEICO's Br. at 25-28; Section II.B., *supra*. The relief sought by Plaintiffs in Count III was limited to a judicial determination that GEICO's use of the Rules violates § 2118; reference to § 2118B is entirely absent from Count III. *Id*. Had the Superior Court awarded damages under § 2118B(c), its error would have been compounded further. Accordingly, the Superior Court did not commit legal error in refusing to award such damages.

2. Plaintiffs Are Judicially Estopped From Seeking Damages Under Count III.

There was no legal error in denying Plaintiffs' request for damages under Count III because Plaintiffs were judicially estopped from seeking such relief.[17] "Judicial estoppel acts to preclude a party from asserting a position inconsistent with a position previously taken in the same or earlier proceeding." *Motorola Inc.*, 958 A.2d at 859. The doctrine is designed to "protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *In re Silver Leaf, L.L.C.*, 2004 WL 1517127, at *2 (Del.

[17] GEICO raised this argument below, B789-792, but the Superior Court did not rule on it. "This Court may affirm on the basis of a different rationale than that which was articulated by the trial court, if the issue was fairly presented to the trial court." *RBC Cap. Markets, LLC v. Jervis*, 129 A.3d 816, 849 (Del. 2015).

Ch. June 29, 2004); *see also Motorola Inc*, 958 A.2d at 859 (same). "The two requirements of judicial estoppel are that a litigant advance an argument that contradicts a position previously taken by that same litigant, and that the Court was persuaded to accept as the basis for its ruling." *Windsor I, LLC v. CWCapital Asset Mgmt. LLC*, 2019 WL 4733430, at *9 (Del. Super. Ct. Sept. 27, 2019) (cleaned up).

The first requirement is easily satisfied. As noted, the FAC only sought a declaration that GEICO has violated 21 Del. C. § 2118; damages were not requested. A126. Plaintiffs later confirmed this omission was deliberate: [redacted]

[redacted]

A352 (emphasis added). The Superior Court correctly noted that Plaintiffs did not seek damages under Count III until ***after*** the summary judgment decision. Pls.' Br. Ex. A at 6 ("Plaintiffs only seek damages for this violation post-trial."). This is a quintessential example of a party "deliberately changing positions according to the exigencies of the moment." *In re Silver Leaf, L.L.C.*, 2004 WL 1517127, at *2.

The second requirement is also satisfied. "The party's prior position will be considered a basis for the court's ruling where (i) the prior position contributed to the court's decision; (ii) the court relied on the party's prior position; or (iii) the party's newly inconsistent position contradicts the court's ruling." *In re Rural/Metro*

[redacted]

Corp. S'holders Litig., 102 A.3d 205, 247 (Del. Ch. 2014) (cleaned up); *see also Motorola Inc.*, 958 A.2d at 859 (explaining that while "parties raise many issues throughout a lengthy litigation, … only those arguments that persuade the court can form the basis for judicial estoppel"). In ruling on class certification, the Superior Court relied on Plaintiffs' position that no damages were sought under Count III in at least two ways.

[redacted]

A352. The Superior Court agreed. In granting class certification, the Superior Court observed in its analysis of the commonality requirement that "[t]he Plaintiffs assert that individual issues are not relevant to the counts." GEICO's Br. Ex. B at 14.

Second, the Superior Court necessarily relied on Plaintiffs' damages disclaimer when it certified Count III under Rule 23(b)(2). Claims for monetary relief are certifiable under Rule 23(b)(2), but only if such damages are "incidental." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011). Incidental damages means "'damages that flow directly from liability to the class ***as a whole*** on the claims forming the basis of the … declaratory relief.'" *Id.* at 366 (quoting *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998)). If a damages

[redacted]

determination requires additional hearings to resolve the merits of individual cases, or the introduction of substantial legal or factual issues, or involve complex individualized determinations, such damages cannot be considered "incidental." *Id.* Where non-incidental monetary relief is requested, certification must be considered under Rule 23(b)(3) which, unlike Rule 23(b)(2), provides due process safeguards to absent class members, namely, mandatory notice and the ability to opt out. *Id*. at 361-63.

Plaintiffs seek "the award of [unpaid] benefits ***and*** the statutory penalties" under § 2118B(c). Pls.' Br. at 62. These damages are not "incidental" – they do not "flow directly from liability to the class ***as a whole***," but instead require individualized analysis. To quantify "unpaid benefits," upon which statutory interest is based, a host of individualized issues must be determined including whether (1) a patient paid his/her balance and was reimbursed by GEICO; (2) GEICO and the provider compromised the balance; (3) the dispute was litigated or arbitrated to resolution; or (4) the balance was written off because the provider agreed with GEICO's payment decision. Plaintiffs implicitly acknowledged the individualized issues surrounding the determination of unpaid benefits owed to the class, as they

[redacted]

sought a hearing and further discovery to ascertain the amounts purportedly owed to all class members. B779-780.

If unpaid benefits plus statutory interest were sought in connection with Count III, certification under Rule 23(b)(2) would have been impossible under *Dukes*. The Superior Court highlighted this issue early in the case. GEICO's Br. Ex. A at 13 ("If [Plaintiffs] seek to get individual damages for each class member for the difference between the insured's claim and the amount paid by GEICO on that claim, then Plaintiffs' individual issues may override the common questions."). Accordingly, when it certified Count III under Rule 23(b)(2), the Court necessarily accepted and was persuaded by Plaintiffs' representation that no damages were sought.

Murray v. Silberstein, 882 F.2d. 61 (3d Cir. 1989) is instructive. Murray, a judicially appointed bail commissioner, sought a declaration that he could not be removed from office before his four-year term expired. He never sought damages in his complaint, and secured preliminary injunctive relief after arguing that monetary relief was unavailable. *Id*. at 63-64. Murray ultimately lost on the merits and appealed. In light of the expiration of his four-year term during the appeal, Murray sought to escape a mootness determination by claiming monetary damages. *Id*. at 65. The Third Circuit held that Murray was judicially estopped from doing so:

> The bottom line is this: inasmuch as Murray contended … that damages … were not available in this action … so that he was entitled to preliminary injunctive relief, he may not now, when injunctive relief is no longer possible, reverse his position and argue that damages are available.

Id. at 66–67.

As in *Murray*, Plaintiffs' disclaimer of monetary relief under Count III contributed to the Court's conclusion that Count III satisfied the commonality element of Rule 23(a), and was appropriate for certification under Rule 23(b)(2). Because Plaintiffs secured certification of Count III, in part, by disclaiming damages, Plaintiffs are judicially estopped from seeking damages under Count III. Accordingly, the Superior Court properly refused to award damages to Plaintiffs.

3. The Superior Court Did Not Abuse Its Discretion In Denying Plaintiffs' Motion for Supplemental Relief.

Following the entry of summary judgment, Plaintiffs sought supplemental relief in the form of unpaid benefits and statutory penalties under 10 Del. C. § 6508. B775-780. The statute provides that "[f]urther relief based on a declaratory judgment or decree ***may be granted*** whenever necessary or proper." 10 Del. C. § 6508 (emphasis added). Inasmuch as the decision was committed to the sound discretion of the Superior Court, it is reviewed under an abuse of discretion standard. *Zimmerman*, 628 A.2d at 65. In their brief, Plaintiffs never even attempt to

[redacted]

demonstrate how the Superior Court's denial of their motion constituted an abuse of discretion. Regardless, the ruling was sound.

In denying Plaintiffs' motion, the Superior Court ruled that damages "would … be improper relief in this class action." Pls.' Br. Ex. A at 6. The Superior Court explained that, to certify the class, it "specifically noted that it would not determine individual liability or damages so that 'common issues predominate any individual claim for damages.'" *Id*. This analysis was correct. Although the Superior Court certified the classes under Rule 23(b)(3), it only did so by foreclosing determinations of "individual liability or damages" to prevent individualized issues from predominating.[18] GEICO's Br. Ex. B. at 24; *see also* GEICO's Br. Ex. A at 13 (observing that, if Plaintiffs seek "pay-the-difference" damages for each class member, "individual issues may override the common questions"). Accordingly, the Court correctly determined that a determination of damages would be improper.

The Superior Court also concluded that awarding damages was unnecessary because individuals could file "separate suits seeking damages." Pls.' Br. Ex. A at 6. On appeal, Plaintiffs describe this as "unrealistic" but never explain why that

[18] Individualized issues relating to damages doomed class certification in *Johnson v. GEICO Cas. Co.*, 310 F.R.D. 246, 254-55 (D. Del. 2015).

[redacted]

makes an award of damages "necessary." Pls.' Br. at 66. Clearly, if damages were a necessary corollary to Count III, Plaintiffs could have requested them in the FAC and never would have stated in their class certification brief: [redacted] *See* A352 (emphasis added). Although Plaintiffs developed an economic motivation to seek damages under Count III after the Superior Court disposed of their other damage-seeking claims, that, alone, does not make such an award necessary.

Finally, in support of their appeal, Plaintiffs rely on three cases they claim support their request for damages. Pls.' Br. at 64-65. Each is inapposite. Plaintiffs block quote language from each case that merely discusses the operation and purpose of 10 Del. C. § 6508. Each decision found that further relief was or could be "necessary or proper," but did so based on the unique circumstances presented. *See* B795-796. This makes sense because whether further relief is "necessary or proper" will typically vary from case to case. Importantly, Plaintiffs make no effort to analogize those cases to this one. And for good reason – those cases are nothing like this case.

For these reasons, the Superior Court did not abuse its discretion in denying Plaintiffs' motion under 10 Del. C. § 6508.

[redacted]

CONCLUSION

For the reasons sets forth above, GEICO requests this Court (1) reverse the Superior Court's denial of GEICO's motion to dismiss Count III; (2) reverse the Superior Court's denial of GEICO's motion for summary judgment and entry of summary judgment in Plaintiffs' favor on Count III; (3) affirm the Superior Court's entry of summary judgment in GEICO's favor on Counts I and II; and (4) reverse the Superior Court's grant of Plaintiffs' motion for class certification.

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