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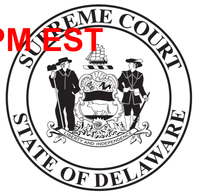

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ACE AMERICAN INSURANCE COMPANY, Defendant-Below/ Appellant/Cross-Appellee,	**REDACTED PUBLIC VERSION** **Filed: February 9, 2023**
v.	No. 360, 2022
GUARANTEED RATE, INC., Plaintiff-Below/ Appellee/Cross-Appellant.	APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE, C.A. No. N20C-04-268 MMJ CCLD

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

OF COUNSEL:

David Newmann
Victoria A. Joseph
HOGAN LOVELLS US LLP
1735 Market Street, 23rd Floor
Philadelphia, PA 19103
(267) 675-4600/(267) 675-4601 (Fax)
david.newmann@hoganlovells.com
victoria.joseph@hoganlovells.com

Robert J. Katzenstein (No. 378)
SMITH KATZENSTEIN & JENKINS LLP
1000 West Street, Suite 1501
Wilmington, DE 19899
302-652-8400/302-652-8405 (Fax)
rjk@skjlaw.com

John L. Reed (No. 3023)
DLA PIPER LLP (US)
1201 North Market Street, Suite 2100
Wilmington, DE 19801
(302) 468-5700
(302) 394-2341 (Fax)
john.reed@dlapiper.com

Attorneys for Defendant-Below/ Appellant/Cross-Appellee ACE American Insurance Company

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PRELIMINARY STATEMENT

GRI[1] tries to make this case about a different insurance policy than the one it purchased from ACE. Unsatisfied with the plain language of the Professional Services Exclusion (or PSE) in its *directors and officers liability policy*, GRI argues that coverage should be determined by the distinct language of *professional liability policies* issued to other policyholders.

No basis exists for looking beyond the plain language of GRI's D&O Policy. GRI does not claim, and the trial court did not find, that there is any ambiguity in that language. Under Delaware law, as GRI acknowledges, the PSE's broad phrase "arising out of" requires application of a "but for" test. The PSE applies if, but for GRI's alleged errors in "rendering or failing to render professional services," the Government would not have asserted a False Claims Act (or FCA) claim.

GRI tries to sidestep this analysis by contending that GRI's false certifications to the Government, rather than errors in loan underwriting and origination, were the "but for" cause of the FCA claim. But courts in Delaware and elsewhere do not permit this evasion of clear policy language. They hold that claims may arise from multiple "but for" causes. An "arising out of" exclusion applies if the excluded conduct is one of them. Here, the undisputed facts, and GRI's own cases, show that

[1] Defined and abbreviated terms have the same meaning as in GRI's Opening Brief.

the Government could not have asserted the FCA claim but for GRI's errors in underwriting and originating federally-insured loans. The PSE therefore applies.

The decisions cited by GRI under professional liability policies are inapposite because those policies contain narrower language—language that does not implicate the "but for" test. Further, almost all of those cases involve different types of FCA claims: claims for fraudulent billing by medical providers. In such cases, the Government's losses stem from overbilling, not from errors in medical treatment of patients. By contrast, in FCA claims against Direct Endorsement lenders like GRI, the Government has to connect its losses to the lender's underwriting and origination errors. Contrary to GRI's central theory, decisions that address different policy language and different FCA claims cannot dictate the outcome here.

GRI's cross-appeal as to its bad faith claim also is without merit. As the trial court recognized, ACE has raised *bona fide* issues as to coverage, foreclosing any bad faith claim.

ANSWER TO GRI'S SUMMARY OF ARGUMENT ON CROSS-APPEAL

I. DENIED. The trial court was correct in dismissing the bad faith claim because "[b]oth the record and the parties' briefing demonstrate legal issues regarding denial coverage and the particular grounds on which coverage denied" and "there are *bona fide* disputes as to the grounds on which the ACE denied liability and the facts or circumstances that existed at the time."

II. DENIED. GRI misstates the trial court's holding. The trial court considered the report, but determined not to use it to evaluate the bad faith claim because the report was based on impermissible legal conclusions and did not create a genuine issue of material fact.

STATEMENT OF FACTS ON CROSS-APPEAL

On July 8, 2019, GRI submitted its original notice but did not attach the Government's Civil Investigative Demand (or CID). (A01219.) The next day, ACE requested "the loss details or any attachment." (A01222.) The matter was assigned to Claims Director Sylvia Toyos, who had handled D&O claims for over ten years. (A01227-A01230 at 18:9-21:16; A01263-A01264 at 167:9-168:1.)

Despite ACE's July 9, 2019 request, GRI provided no additional information until two months later, on September 9, 2019, when GRI sent "a supplement" to the prior notice, stating: [REDACTED] (A01299.) One week later, on September 16, 2019, Toyos requested copies of the CID, [REDACTED] (A01303 at 3; A01337-A01339 at 262-264:23.) Despite this request, the only additional documentation about the investigation that GRI provided was the Government's CID. GRI did not provide that critical document until December 16, 2019, over four months after initially giving notice of the investigation. (A01399.)

In the interim, GRI and ACE had negotiated, at GRI's insistence, an NDA. GRI's original draft of the NDA, as well as the final executed version, recited that its "Purpose" was "to discuss *a potential claim* in connection with NDNY Investigation[.]" (A01353; A01393 (emphasis added).)

On January 13, 2020, Toyos issued a preliminary coverage position for the DOJ investigation. (A01415; A01420.) Her letter noted that "no regulatory proceeding has been commenced at this time and no request has been made of an insured individual," but accepted GRI's reports as a "Notice of Potential Claim under the Policy." (A01415 at 2, 3.)

"Notice of Potential Claim" referred to GRI's right under the Policy to provide notice "of facts or circumstances which may reasonably give rise to a future **Claim** covered under this **Policy.**" (A00836, § IX.B.) ACE determined that the investigation was not yet a "civil, administrative or regulatory proceeding" against GRI under subsection 5 of the Claim definition because no enforcement action or "adjudicative process" had been commenced. (A01321-A01322 at 72:24-73:3.) ACE noted that "no request has been made of an insured individual" because subsection 6 of the Claim definition, which applied to "*a civil, administrative or regulatory investigation* against the Insured," required "a written notice, including a target letter or Wells Notice, or subpoena from the investigating authority *identifying the Insured as an individual* against whom a civil, administrative or regulatory

investigation or proceeding may be commenced[.] (A00835, Endt. 7 § 5(6) (emphasis added).) The CID was directed to GRI, not to any "individual" Insured. (A01274-A01276 at 275:24-277:5.)

In preparing the January 13, 2020 letter, Toyos conducted a detailed review of Policy and the CID. (A01423; A01486; A01233-A01234 at 121:7-122:21.) Toyos' supervisor, Claims Team Leader John Varley, who had handled and supervised D&O claims for almost 20 years, reviewed and revised the letter. (A01309 at 26:13-19.) Underwriter Peter Pang, who negotiated the terms of the Policy with GRI's insurance broker, also reviewed and commented on the letter. (*Id.*; A00894-A00895 at 38:19-39:1.)

After receiving ACE's January 13, 2020 letter, GRI's insurance broker, Aon, emailed underwriter Peter Pang to say Aon agreed with ACE that the investigation at that point constituted a mere potential claim: [REDACTED] (A01506 (emphasis added).)

On January 16, 2020, GRI informed ACE of DOJ's opening [REDACTED] demand. (A01510.) In response, on the same day, ACE requested "a detailed report summarizing the allegations presented by the DOJ" and including "the findings by the DOJ and any other pertinent information addressed at the meeting [with the Government]," as well as "the basis for the [REDACTED] (A01513; A01420.)

Belying any sense of urgency, GRI did not respond to this request until more than a week later, on January 24, 2020, when it scheduled a call to discuss the matter another week after that, on January 30, 2020. (A01516.) Toyos and Varley participated in that call, during which GRI's defense counsel provided additional information regarding the investigation and settlement discussions. (A01340-A01343 at 296:22-299:10.)

On February 4 and 5, 2020, just days after the January 30, 2020 call, GRI reported on additional negotiations that culminated in a settlement in principle on February 5, 2020 for [redacted] (A01519.) GRI did not claim it needed further action by ACE to reach the settlement with the Government. (A01072; A01073 at 222:17-223:1-3.) Instead, GRI "advised the carriers that [GRI was] entering into settlement negotiations and that [GRI] would be settling." (*Id.*)

Shortly thereafter, in mid-February 2020, Varley and Toyos advised GRI's broker, Aon, of the coverage issues they were investigating, and expressed the view that GRI had not provided an adequate explanation of the basis for the DOJ's alleged damages. (A01281-A01282 at 334:7-335:3.)

On March 3, 2020, ACE issued its letter denying coverage for the DOJ Investigation pursuant to the PSE. (A01524.) ACE concluded that the PSE applied because, according to the CID and the additional information provided by GRI during the January 30, 2020 conference call, the Investigation arose from alleged

errors in originating and underwriting loans, a professional service provided by GRI. (A01332-A01333 at 201:7-202:1; A01334-A01335 at 226:15-227:12.) Toyos drafted and signed the letter, after Pang had reviewed it and Varley approved it. (A01529; A01331 at 199:9-19; A01336 at 230:6-11; A00910 at 157:8-24.) Prior to issuing it, ACE sent the letter to Aon for review. (A02876 at 302:2-11.) Aon did not raise any objection to ACE's position that the PSE barred coverage. (A01532; A01536-A01538 at 84:11-86:9.)

<u>**ARGUMENT ON APPEAL**</u>

I. <u>THE TRIAL COURT ERRED IN ITS RULING ON THE PLEADINGS</u>

GRI does not argue that the PSE is ambiguous. There is no dispute that "professional services" extends to GRI's "loan underwriting and originating" services (Ans. Br. at 1, 40), nor that the phrase "arising out of" requires only "some meaningful linkage" to that excluded activity. (*Id.* at 27.) GRI agrees that Delaware's "but for" test determines whether that linkage exists. (*Id.* at 3, 23.)

Rather, to manufacture a way past the PSE, GRI attempts to turn the "but-for" test on its head and relies on caselaw that addresses strikingly different policy language. GRI's half-hearted attempts to defend other aspects of the trial court's reasoning likewise fall flat.

A. <u>GRI's Authorities Highlight Why The PSE Applies</u>

GRI argues that GRI's false "certifications, not underwriting errors, are the 'but for' cause of" the FCA Claim. (Ans. Br. at 23.) But the premise of GRI's theory—that the Claim can only have one "but for" cause—is wrong. Courts recognize that a loss may have multiple "but for" causes. They hold that an "arising out of" exclusion applies as long as the excluded conduct is <u>*one of them*</u>. GRI's own authorities leave no doubt that its underwriting errors were a "but for" cause of the FCA claim, confirming the PSE applies.

GRI remains silent on two Delaware cases cited by ACE which apply the "but for" test in these circumstances: *Eon Labs Mfg., Inc. v. Reliance Ins. Co.,* 756 A.2d 889 (Del. 2000), and *Goggin v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 2018 WL 6266195 (Del. Super. Nov. 30, 2018). Yet these case are instructive. Both used the test to hold that an "arising out of" exclusion barred coverage, where—as here—the claims involved a "combination" or "co-existence" of excluded and non-excluded conduct. *Eon Labs,* 756 A.2d at 893; *Goggin*, 2018 WL 6266195, at *4-5.

Consistent with *Eon Labs* and *Goggin*, courts reject GRI's theory that there can only one "but for" cause of a given loss. As one court explained, citing the U.S. Supreme Court: "To put it plainly, 'the but for cause' is an oxymoron. *By definition, but for cause implies multiple causes*." *Owners Ins. Co. v. Sidener,* 2022 WL 17716905, at *7 (M.D. Ga. Dec. 15, 2022) (emphasis added) (citing *Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1739 (2020)); *Nautilus Ins. Co. v. Bike & Build, Inc.*, 340 F. Supp. 3d 399, 413–14 (E.D. Pa. 2018) ("there may be multiple but-for causes of a single loss") (quoting *Loughman v. Consol-Pa. Coal Co.*, 6 F.3d 88, 106 (3d Cir. 1993)).[2]

[2] The U.S. Supreme Court explained in *Bostock* that the "but for" test "*can be a sweeping standard*": "*Often, events have multiple but-for causes*. So, for example, if a car accident occurred *both* because the defendant ran a red light *and* because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision." 140 S. Ct. at 1739 (emphasis added); *see also Loughman*, 6 F.3d

Accordingly, to give effect to an "arising out of" exclusion, courts hold that the exclusion applies if the excluded activity "was <u>*a but for cause*</u> of … injury," even though other "but for" causes contributed to that injury. *Sidener*, 2022 WL 17716905, at *7; *Bike & Build, Inc.*, 340 F. Supp. 3d at 413 (excluded motor vehicle use "was a but for cause of the injuries," even though plaintiff also alleged other causes). The U.S. Court of Appeals for the Second Circuit endorsed this view in *Beazley Ins. Co., Inc. v. ACE Am. Ins. Co.*, 880 F.3d 64 (2d Cir. 2018), an analogous case involving an "arising out of" professional services exclusion in a D&O policy issued by ACE. The insured, NASDAQ, sought coverage for federal securities claims. NASDAQ's errors and omissions carrier, Beazley, argued that the PSE in the ACE policy did not apply, because the claims alleged "misstatements and omissions" about NASDAQ's capability to support the Facebook IPO, and such statements were "advertisements" rather than "professional services." *Id.* at 71-72.

Applying the "but for" test under New York law, the Second Circuit rejected that argument. It explained: "The flaw in [Beazley's] argument is that the [securities] plaintiffs could not win at trial merely by showing that NASDAQ made false and misleading statements as to its capabilities." *Id.* at 72. Rather, the plaintiffs also would have to show that these misrepresentations "concealed risks of …

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at 106 ("As both tort law and common sense tell us, there may be multiple but-for causes of a single loss[.]").

NASDAQ's technology and trading platform technical limitations and resulting failures," and thus caused plaintiffs' losses when NASDAQ "failed to … properly execute Class Members' buy and sell" orders during the IPO. *Id.* As these failures "go to the heart of NASDAQ's provision of professional services," the Second Circuit affirmed the District Court's determination that the PSE applied. *Id.*

Here, similarly, just as the securities plaintiffs in *Beazley* could not prove a securities fraud claim without establishing that NASDAQ botched the execution of customer buy and sell orders, the Government could not prove the FCA Claim without showing that GRI botched the underwriting and origination of federally insured loans. The express language of the CID and Settlement Agreement—with extensive references to GRI's underwriting and origination practice and comparably scant references to certifications—bear this out.[3]

So do the very authority, 24 C.F.R. § 203.5, that GRI cites to describe its responsibilities as a "Direct Endorsement" lender. (Ans. Br. 11.) That section does not address loan certifications but instead speaks to how such loans are "originated,"

"Underwriter due diligence" and the "underwriting decision." 24 C.F.R. §§ 203.5(b), (c), (d). GRI does not bother to cite the related regulation, which _does_ reference certifications, presumably because that regulation makes clear the certifications are all about one thing: "underwriting." 24 C.F.R. § 203.255(b)(5) (requiring "[a]n _underwriter certification_ … _that the proposed mortgage complies with HUD underwriting requirements_") (emphasis added).

GRI's assertion that "the conduct giving rise to GRI's liability is not an 'error' or 'mistake' in the underwriting of a loan" (Ans. Br. at 23), also is belied by the FCA cases it cites. They show that proof of errors in underwriting individual loans is required not only to prove a false statement, but also to show that the false statement caused the Government damages. In *United States v. Wells Fargo Bank, N.A.*, 972 F. Supp. 2d 593, 624–25 (S.D.N.Y. 2013), the Government adequately pleaded false statements by alleging specific "failures" in loan "underwriting and origination" (including failure "to verify and document the borrower's investment in the property" and "to verify and document the borrower's income") that "rendered the loans ineligible for HUD mortgage insurance[.]" These allegations also established a sufficient basis for proving causation of damages: "The [HUD] regulations the Government argues Wells Fargo violated are those meant to ensure that borrowers are able to afford their homes; failure to uphold these regulations 'could very well

be the major factor for subsequent defaults,' and thus satisfy the requirement that 'the defaults were related to the false statements in the application.'" *Id.* at 626.

Similarly, in *United States v. Quicken Loans Inc.*, 239 F. Supp. 3d 1014, 1025-26, 1029-30, 1031-32 (E.D. Mich. 2017), the Government adequately pleaded false statements based on allegations that the lender's loan underwriters requested higher appraisals, sought and received "exception[s] to underwriting requirements that could not be met" and "miscalculated a borrower's income." As to causation, the Government's "factual allegations must support an inference that it was reasonably foreseeable that the false claim would result in a default of the mortgage loan." *Id.* at 1042. The lender's underwriting errors sufficed because they "*bear directly on the borrower's ability to repay the loan*, such that the borrower's default was a reasonably foreseeable outcome." *Id.* at 1042-43 (emphasis added).

Confirming such allegations are requested, in *United States v. Carrington Mortg. Servs., LLC*, 2018 WL 372348 (S.D. Ind. Jan. 10, 2018), the court granted a motion to dismiss due to their absence. Notwithstanding general allegations that the lender engaged in "reckless underwriting" and "falsely certified" loans, the complaint failed to plead the falsity and materiality elements of an FCA claim because the complaint "*never connects a single loan to a specific fraudulent underwriting practice performed by a specific individual*." *Id.* at *4-5 (emphasis added). The court "recognize[d] that *the very nature of the underwriting process*

may make [this] difficult," but nonetheless ruled that, to state a claim, plaintiff "*must at least try to make a connection between the allegedly fraudulent underwriting decisions and HUD's subsequent payment of funds*[.]" *Id.* at *7 (emphasis added).

GRI cites other case law for the proposition that "an innocent mistake or negligence" will not support an FCA claim. (Ans. Br. at 22.) But these cases simply recognize that the complainant must connect underlying misconduct to a false statement. *U.S. ex rel. Hagerty v. Cyberonics, Inc.*, 95 F. Supp. 3d 240, 265 (D. Mass. 2015), *aff'd*, 844 F.3d 26 (1st Cir. 2016), and that, unless the defendant acts "knowingly," even a false statement is insufficient to establish liability. *United States v. Bourseau*, 531 F.3d 1159, 1167 (9th Cir. 2008); *U.S. ex rel. Rakow v. Pro Builders Corp.*, 37 F. App'x 930, 931 (9th Cir. 2002). In this case, and the other FCA cases involving direct endorsement lenders, the Government satisfies these elements by connecting underwriting errors in individual loan files to the lender's certifications, and by contending that the lender had knowledge of the errors.

GRI's own authority thus confirms that, in an FCA claim against a Direct Endorsement lender like GRI, the Government's claim turns on whether it can allege not just false certifications, but also specific failures in underwriting or originating in individual loans. But for such allegations about defective underwriting and origination—*i.e.,* professional services—the FCA claim could not succeed. Thus, pursuant to Delaware's "but for" test, the PSE bars coverage.

B. <u>Errors And Omissions Coverage Rulings Are Inapposite</u>

Unable to contest application of the PSE under its plain language and the "but for" test, GRI turns to its main argument: that the PSE in GRI's D&O policy should be no broader than the insuring clause in a different insurance policy issued to a different, unaffiliated, insured, Iberiabank. (Ans. Br. at 24.) GRI does not dispute that the actual language of the PSE in its D&O Policy is broader than the insuring clause of Iberiabank's professional liability policy in two key ways: (1) the Iberiabank policy only covers Claims "for" professional services, whereas the PSE extends to Claims "arising out of" professional services (A00872 at § 27); and (2) the Iberiabank policy covers only services "performed .. for a … third party client," whereas the GRI Policy was amended to eliminate that requirement. (A00847 at § III.N.2); *Iberiabank Corp. v. Ill. Union Ins. Co.,* 2019 WL 585288, *4 (E.D. La. Feb. 13, 2019), *aff'd*, 953 F.3d 339 (5th Cir. 2020).

GRI asks this Court to disregard these material and substantive differences on the theory that, under "basic tenants of insurance law," the PSE in GRI's D&O Policy cannot be broader than the insuring clause of a professional liability policy, even if the policies are issued to two different policyholders and contain different language. (Ans. Br. at 28-29.) Yet neither the tenets nor the cases GRI cites provide any support for this theory. The tenets and cases all concern interpretation of

individual policies according to their *own* language, not according to the language of a different types of policy issued to a different policyholder.

Plus, GRI ignores the overriding principle that insurance policies "are construed as a whole, to give effect to the intentions of the parties." *In re Solera Ins. Coverage Appeals*, 240 A.3d 1121, 1131 (Del. 2020). Here, the *parties'* intentions are clear: in negotiations over policy wording, they agreed that the PSE operated as an "*Absolute* Professional Liability Exclusion"—precisely because GRI purchased a separate policy of professional liability insurance from an ACE affiliate. (A00914 (emphasis added), A01296.) Tellingly, GRI makes no argument that the scope of the PSE should be restricted to coverage afforded by GRI's *own* professional liability policy. GRI has no basis for using the narrower language of someone else's professional liability policy to restrict the plain meaning of the "absolute" PSE exclusion in GRI's D&O Policy.

Straying even further from the facts of this case, GRI tries to resuscitate its *Iberiabank* argument with a slew of decisions that address coverage for FCA-based *fraudulent billing* claims under errors and omissions policies issued to *medical providers*. (Ans. Br. at 24-27.) GRI's lead case, *Zurich Am. Ins. Co. v. O'Hara Reg'l Ctr. for Rehab.*, 529 F.3d 916 (10th Cir. 2008), highlights the two reasons why these cases are inapposite.

The first, again, is policy language. GRI cites *O'Hara Reg'l Ctr.* to argue that there is no difference between "arising out of" and narrower causation language (Ans. Br. at 29), but the decision shows the opposite. The court, construing three different policies, recognized that the phrase "arising out of" in one of them necessitated a separate analysis. 529 F.3d at 923. Conducting that separate analysis, the court determined that, under Colorado law, "*the phrase 'arising out of' requires more than a mere 'but for' relation between the injury and the covered activity*." 529 F.3d at 923-924 (emphasis added; citation omitted). The court thus declined to apply the "but for" test which both parties agree controls here under Delaware law.

O'Hara Reg'l Ctr. and the other fraudulent billing cases GRI cites also are distinguishable because in those cases, unlike the FCA claims against lenders as discussed above, the government does not have to prove it suffered injury as a result of professional services errors. In *O'Hara Reg'l Ctr*, the court rejected the insured's argument that the Government had to prove a "failure to provide *adequate* professional nursing services." 529 F.3d at 921 (emphasis added). The court explained: "*The government's injury was not caused by O'Hara's failure to provide professional services*, but instead resulted from O'Hara's submission of false and fraudulent claims for reimbursement." *Id.* (emphasis added). In other words*, "the problem was not the actual level of services provided to O'Hara's patients, but*

rather that O'Hara billed for services it did not provide—namely, enhanced services." *Id.* at 921-22 (emphasis added).

Another false billing case GRI cites, *Health Care Indus. Liab. Ins. Program v. Momence Meadows Nursing Ctr., Inc.*, 566 F.3d 689 (7th Cir. 2009), also rests on the lack of injury to the Government from professional services errors. The policy there covered suits "seeking damages 'because of' an 'injury' that is 'caused by a 'medical incident' arising out of the providing or withholding … medical or nursing treatment." *Id.* at 692 n.1. The insured argued that the "injury" triggering coverage was alleged "physical harm to the residents" that "resulted from the provision of shoddy medical and nursing treatment." *Id.* The court rejected this theory, concluding that, under the FCA, "*the plaintiffs do not have to show that any damages resulted from the shoddy care*." *Id.* at 694–95. Indeed, the court noted, "*[n]either of the plaintiffs in the underlying suit seeks damages for personal injury caused by substandard medical care*. Nor could they[.]" *Id.* at 696 (emphasis added).[4]

[4] The other false billing cases GRI cites also point to the distinction between the Government's injury resulting from false billing and patients' injuries resulting from substandard medical care. *See Horizon W., Inc. v. St. Paul Fire & Marine Ins. Co.,* 45 F. App'x 752, 753–54 (9th Cir. 2002)*; Jenkins v. St. Paul Fire & Marine Ins. Co.*, 8 F. App'x 573, 574 (8th Cir. 2001).

Thus, the false billing claims against medical providers in the cases cited by GRI stand in stark contrast to the FCA claims made against lenders like GRI. As discussed above, the latter cases require the Government to plead that the lender committed errors in underwriting individual loans, both to demonstrate that lender made false certifications and to prove that the false certifications caused damages in the form of loan defaults—the exact injury that underwriting guidelines are intended to guard against. *Wells Fargo Bank,* 972 F. Supp. 2d at 624–25; Q*uicken Loans Inc.*, 239 F. Supp. 3d at 1042; *Carrington Mortg. Servs.*, 2018 WL 372348, *5, 7.

This case does not involve a professional liability policy, and it does not involve false billing claims against medical providers. Under the plain language of the PSE, the FCA Claim asserted by the Government in this case was one "arising out of" GRI's rendering or failing to render its professional service: underwriting and originating federally-insured mortgage loans.

C. <u>GRI Offers No Viable Defense Of The Trial Court's Analysis</u>

While purporting to defend the trial court's JOP Opinion, GRI all but abandons it. That ruling rested on the trial court's erroneous view that the investigation concerned "[c]ompliance with applicable quality control standards," rather than loan underwriting and origination. (JOP Op. at 11.) GRI does not dispute that, as the trial court itself later recognized, there is no meaningful distinction between GRI's loan underwriting (which it admits is a professional service) and its

quality control compliance. Rather, GRI insists that "[t]he Superior Court did not draw an artificial distinction" between the two. (Ans. Br. at 33.) GRI characterizes the JOP Opinion as instead concluding "that the wrongful conduct at issue in a False Claims Act claim is not the underlying professional service but the representations to the Government that the professional services complied with a certain level of care." (Ans. Br. at 33.) GRI offers no citation to the JOP Opinion to support that characterization—because no such citation exists. The JOP Opinion did not mention GRI's "representations to the Government," much less conclude they were the "conduct at issue" in the Investigation.

GRI's attempt to defend the trial court's reference to ACE's affiliate's briefing in *Iberiabank* is even more tenuous. GRI contends the briefing was relevant to GRI's "reasonable expectations" (Ans. Br. at 35-36), but "the reasonable expectations of the insured" must be assessed "*at the time when he entered into the contract*." *Bermel v. Liberty Mut. Fire Ins. Co.*, 56 A.3d 1062, 1071 (Del. 2012) (emphasis added; citations omitted). ACE issued the applicable Policy in 2018, and its terms were negotiated in 2016, long before the *Iberiabank* briefing cited by the trial court. (A00894-A00895 at 38:19-39:1.)

Furthermore, GRI offered no evidence as to its reasonable expectations at this or any other time, much less attempt to show they were influenced by *Iberiabank* briefing.[5] Indeed, GRI *concedes* that the briefing does not qualify as "extrinsic evidence" relevant to "interpretation of an ambiguous term," because it was not among the parties' "prior communications and course of dealing." (Ans. Br. at 36 (citation omitted).)

GRI also acknowledges that "the Superior Court did not invoke the judicial-estoppel doctrine" to justify its reference to the *Iberiabank* briefing, but GRI now contends for the first time that "it would have been proper to do so." (Ans. Br. at 35-36.) GRI never argued estoppel based on *Iberiabank* below, so that argument has been waived. *Dep't of Fin. v. AT&T Inc.*, 253 A.3d 537, 554 (Del. 2021). Moreover, GRI does not explain how it could side-step the impediments to judicial estoppel noted in ACE's Opening Brief. The one case GRI cites, *Chrysler Corp. v. New Castle Cnty.*, 464 A.2d 75 (Del. Super. 1983), is not about judicial estoppel at all, but about nonmutual offensive collateral estoppel. The collateral estoppel effect of the *Iberiabank* judgment is determined by Louisiana law, not Delaware law, *Columbia Cas. Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1219 (Del. 1991), and

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[5] Notably, GRI's coverage counsel during the Investigation, Reed Smith, represented Iberiabank in that case, which contested ACE's affiliate's position. *Iberiabank Corp.,* 2019 WL 585288, *1.

Louisiana law does not recognize nonmutual collateral estoppel. *Alonzo v. State ex rel. Dep't of Nat. Res.*, 884 So. 2d 634, 639 (La. App. 4 Cir. Sept. 8, 2004). Even under Delaware law, collateral estoppel has no conceivable application here because, among other things, this case and *Iberiabank* plainly do not involve "the identical issue." *In re Asbestos Litig.*, 1993 WL 81288, at *1-2 (Del. Super. Ct. Feb. 18, 1993).

GRI fares no better in its attempt to explain the trial court's decision to graft on to the PSE the requirement that GRI's professional services be "provided directly to borrower clients." (JOP Op. at 11.) GRI calls the trial court's imposition of this requirement a "narrow interpretation" of the term "professional services." (Ans. Br. at 33-34.) But it is undisputed that the parties agreed to remove that requirement when the PSE was added by endorsement (A00847 at § III.N.2; A00869 at § 17), and the requirement is not part of the well-understood meaning of "professional services" as courts have applied it time and time again.

GRI contends that, in the professional services cases ACE cites, the insured "provid[ed] some type of service directly to its clients" (Ans. Br. at 34-35), but that is true in this case, too. GRI concedes that its loan underwriting and originating are among the "'professional' services" that it "*provides ... to prospective borrowers*." (A02796 (emphasis added).) The cases which ACE cited recognize that such activity does not lose its character as a professional service merely because some

aspects of it involve internal processes or interactions with regulators. GRI offers no case law or other authority to the contrary.

GRI finally attempts to bolster the trial court's reliance on *Gallup, Inc. v. Greenwich Ins. Co.*, 2015 WL 1201518 (Del. Super. Feb. 25, 2015). (Ans. Br. at 37-38.) GRI does not dispute that *Gallup's* "illusory coverage" analysis rested on language in the exclusion in that case—"*or any act, error, or omission relating thereto*"—which does not appear in the PSE at issue here. But GRI contends that this language means the same thing as "arising out of." Not so. As already discussed, this Court and other Delaware courts construe "arising out of" to require a "meaningful linkage" consistent with the "but for" test. *Eon Labs,* 756 A.2d at 894; *Pac. Ins. Co. v. Liberty Mut. Ins. Co.,* 956 A.2d 1246, 1256-57 (Del. 2008). GRI cannot plausibly contend that the very standards adopted by this Court for interpreting exclusionary language render coverage illusory.

Moreover, while GRI cites case law holding that professional services exclusions should be narrowly construed (Ans. Br. at 37-38), it offers no alternative construction of the PSE. In particular, GRI has offered no competing interpretation of "arising out of," "professional services" or any other terms in the PSE. Indeed, GRI has never claimed that the language of the PSE is ambiguous, nor did the trial court find it to be.

In sum, none of the elements of the JOP Opinion—its narrowing of the scope of the Investigation to "[c]ompliance with applicable quality control standards," its reference to the *Iberiabank* briefing, its revision of the PSE to require services "provided directly to borrower clients" and its reliance on *Gallup*—withstands scrutiny. The pleadings established as a matter of law that the unambiguous language of the PSE bars coverage.

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

As the pleadings establish that the PSE barred coverage, the Court need not consider the trial court's summary judgment ruling. Yet the summary judgment record—including investigative findings and settlement negotiations that led to the settlement—confirms that the FCA claim arose out of GRI's rendering or failing to render its loan underwriting and origination services.

GRI does not dispute that its communications and negotiations with the DOJ are fair game in determining whether the PSE applies to the settlement. Nor does GRI take issue with most of ACE's recitation of the undisputed facts about the settlement negotiations. In particular, it is undisputed that [redacted] (A00947-A00948 at 66:24-67:10; A00956 at 103:2-14; A00961 at 109:6-22, A00969-A00970 at 145:22-146:16, A00958 at 106:6-108:10.) GRI *concedes* that the "material defect rate" calculation and the "negotiated multiplier" combined to generate the damages estimates on which the settlement amount was based. (Ans. Br. at 42-43.)

GRI also raises no objection to the conclusion which necessarily follows from this settlement methodology: if GRI and the Government had found no "defects" in individual loan files, the "material defect rate" would have been zero, and the Government could not have claimed either actual damages or multiplied damages. Thus, "but for" the "material defects" in underwriting individual loan files, parties' agreed settlement methodology would have produced zero damages.

While not appearing to debate this logic, GRI argues that it does not support application of the PSE for two reasons. First, GRI contends that the "material defect rate" was not about underwriting and origination errors, but about loans that "falsely certified compliance with Government underwriting standards." (Ans. Br. at 42.) The undisputed facts bely that hair-splitting contention. Even apart from its own general counsel's testimony about the "material underwriting defect rate," GRI specifically told the Government in its December 9, 2019 "Self-Disclosure" that the defects in question were "*underwriting mistakes, miscalculations or errors*." (A01009-1010 (emphasis added).) And GRI's January 24, 2020 letter responding to the Government's identification of twenty-seven other "materially defective" loans speaks only to "material deficiencies" in underwriting; there is no discussion of false certifications. (A01037-1067.) GRI quotes *Wells Fargo*, but the very quote GRI picks, like rest of the case, recognizes that "material" in this context refers to "material *underwriting* violations." *Wells Fargo Bank*, 972 F. Supp. 2d at 616

(emphasis added); *see also id*. at 598-599 (describing the action as one "alleging that the Bank engaged in misconduct in originating and underwriting government-insured home mortgage loans"). Indeed, GRI concedes: "*the Government reviewed GRI's underwriting of those loans* to prove that it differed from what GRI certified." (Ans. Br. at 41 (emphasis added).)

There is simply no disputed issue of fact on this point: the "material defect rate" that GRI and the Government used to negotiate the settlement represents loans in which GRI made material "underwriting mistakes, calculations or errors"—*i.e.,* errors in rendering or failing to render its professional services.

GRI's second argument as to summary judgment is that they "negotiated multiple" encompassed "non-underwriting issues," so application of the PSE to the Settlement "would vitiate *all* coverage and render the Policy illusory." (Ans. Br. at 44 (emphasis added).) GRI does not say exactly these "non-underwriting issues" are, or how they differ from "underwriting issues." The settlement agreement's recitation of the underlying facts draws no such distinction. It says all of the "applicable FHA and VA program rules" are "designed to ensure that *only mortgages that meet the credit and underwriting requirements* set by FHA and VA are endorsed or guaranteed by the Government." (A01214 (emphasis added).) It goes on to describe how GRI fell short of those rules, in paragraphs brimming with references to "underwriting" and "underwriters." (A01214-1216.)

Yet regardless of how GRI attempts to separate "underwriting" and "non-underwriting issues," application of the PSE does not vitiate coverage. As discussed in ACE's Opening Brief and above, courts in Delaware and elsewhere use the "but for" test to apply "arising out of" exclusions even where—indeed, *because*—a claim or loss arises from a combination of conduct that triggers the exclusion and conduct that does not. *Eon Labs,* 756 A.2d at 893; *Goggin*, 2018 WL 6266195, at *4; *Beazley Ins. Co.,* , 880 F.3d at 72; *Owners Ins. Co.*, 2022 WL 17716905, at *7; *Bike & Build, Inc.*, 340 F. Supp. 3d at 413-14. The mere fact that an exclusion applies in such cases does not render coverage illusory.

Thus, the undisputed facts relating to the negotiation of the settlement reinforce what is clear on the face of the CID and the settlement agreement: the PSE bars coverage as a matter of law.

ARGUMENT ON CROSS-APPEAL

I. THE TRIAL COURT DID NOT ERR IN ITS RULING ON BAD FAITH

A. Question Presented

Whether the trial court correctly determined that GRI's bad faith claim fails as a matter of law? (Preserved at A02463-84.)

B. Standard And Scope Of Review

This Court reviews the trial court's summary judgment decision *de novo*. *Enrique v. State Farm Mutual Automobile Insurance Co*., 142 A.3d 506, 511 (Del. 2016). A grant of summary judgment will be sustained if there are no genuine issues of material fact and the moving party was entitled to judgment as a matter of law. *Lank v. Moyed*, 909 A.2d 106, 108 (Del. 2006).

C. Merits Of Argument

GRI's bad faith claim failed in the first place for all the reasons discussed above regarding the exclusion of coverage for the investigation and settlement pursuant to the PSE. *GEICO General Insurance Company v. Green*, 2022 WL 1052195, at *8 (Del. 2022); *Bramble v. Old Republic Gen. Ins. Corp.,* 2017 WL 345144, at *9 (Del. Super. Jan. 20, 2017). But even under the trial court's view that GRI was entitled to coverage, the court properly granted ACE's summary judgment motion on the bad faith claim. As GRI acknowledges, it must show that ACE "clearly lack[ed] reasonable justification for" denying coverage. *RSUI Indem. Co.*

v. Murdock, 248 A.3d 887, 910 (Del. 2021) (quoting *Bennett v. USAA Cas. Ins. Co.*, 158 A.3d 877, (Del. 2017)). GRI cannot meet its burden if "at the time the insurer denied liability, there existed a set of facts or circumstances known to the insurer which created a *bona fide* dispute and therefore a meritorious defense to the insurer's liability." *Murdock*, 248 A.3d at 910 (emphasis added) (quoting *Casson v. Nationwide Ins. Co.*, 455 A.2d 361, 369 (Del. Super. 1982)) (internal quotations omitted).

Even where a court holds that the insurer incorrectly denied coverage, the courts apply these standards to reject bad faith claims on summary judgment. *Murdock*, 248 A.3d at 910-911; *Enrique v. State Farm Mut. Auto. Ins. Co.*, 142 A.3d 506, 514 (Del. 2016); *E.I. du Pont de Nemours & Co. v. Stonewall Ins. Co.,* 2009 WL 2502101, at *1–2 (Del. Super. Jan. 12, 2009). GRI asserts that Delaware courts hold "it is improper to dismiss such claims on summary judgment" (Ans. Br. at 45-46), but not a single case GRI cites for this proposition so holds. *See In re Columbia Pipeline Grp., Inc. Merger Litig.,* 2022 WL 2902769, at *1–2 (Del. Ch. July 14, 2022) (no mention of summary judgment; addressing *motions in limine* to exclude expert testimony at trial); *Ferrari v. Helsman Mgmt. Servs., LLC*, 2020 WL 3429988, at *1 (Del. Super. June 23, 2020) (same); *Dunlap v. State Farm Fire & Cas. Co.*, 955 A.2d 132, 145 (Del. Super. 2007) (rejecting insureds' attempt "to

resurrect their claim that State Farm acted in bad faith," including their related claim for "punitive damages").

Here, the trial court properly applied Delaware law to dismiss GRI's bad faith claim as a matter of law, concluding that based on "the record and the parties' briefing … "there are *bona fide* disputes as to the grounds on which ACE denied liability and the facts or circumstances that existed at the time." (SJ Op. at 22.)

1. ACE's Initial Coverage Determination Was Reasonable

GRI's arguments focus on ACE's January 13, 2020 determination that the Investigation was a "Potential Claim," rather than an actual "Claim." (Ans. Br. at 48-52.) GRI contends that ACE misinterpreted the Policy's "Claim" definition, "removed any reference to subsection 6" of the Claim definition, from the January 13, 2020 letter and acted to benefit ACE. Each of these arguments is without merit.

ACE's interpretation of the "Claim" definition was straightforward. Subsection 5 of the definition requires a "civil, administrative or regulatory *proceeding*," while subsection 6 requires a "civil, administrative or regulatory *investigation*." (A00835, Endt. 7 § 5 (emphasis added).) As of January 13, 2020, the DOJ Investigation remained an "investigation," rather than a "proceeding," so ACE determined that subsection 5 did not apply. (A01415.) On appeal, GRI raises no objection to that determination.

ACE also reasonably concluded that subsection 6 of the Claim definition was not implicated because it requires that the investigation be "commenced by … a written notice, including a target letter or Wells Notice, or subpoena from the investigating authority ***identifying the Insured as an individual*** against whom a civil, administrative or regulatory investigation or proceeding may be commenced[.]" (A00836, Endt. 7 § 5 (emphasis added).) The CID was directed to GRI, not to an "individual" Insured. On that basis, ACE concluded that subsection 6 did not apply. (A01274-A01276 at 275:24-277:5.)

GRI argues that the words in the subsection following "written notice, including" create a non-exclusive list that would literally include any type of written notice to anyone. (Ans. Br. at 49-50.) Yet, under the basic principles of construction, "written notice" must be construed to refer to matters similar to those specifically listed, notwithstanding the term "including." *In re Verizon Ins. Coverage Appeals,* 222 A.3d 566, 580 (Del. 2019); *Aspen Advisors LLC v. United Artists Theatre Co.,* 861 A.2d 1251, 1265 (Del. 2004); *Del. Bd. of Nursing v. Gillespie,* 41 A.3d 423, 427–28 (Del. 2012) ("words grouped in a list should be given related meaning"). The CID plainly was not comparable to a target letter or Wells Notice. [REDACTED]

[REDACTED] (A02859.) Thus, even under GRI's construction, the CID would only trigger subsection 6 if it "identif[ies] the insured *as an individual* against whom a

civil administrative or regulatory investigation or proceeding may be commenced." (A00836, Endt. 7 § 5 (emphasis added).) [redacted] (A02726 at 32:3-10.)

GRI acknowledges that "insured as an individual" refers to GRI's directors and officers, but relies on the fact that its September 9, 2019 supplemental notice stated that the "the investigation concerns . . . the Company's officer and directors." (Ans. Br. at 50.) Yet GRI is not the Government, so it cannot create the notice that triggers coverage under subsection 6, and GRI never disclosed to ACE any notice from the Government to a director or officer. Even after ACE by letter dated December 16, 2019 specifically asked GRI to provide "the referenced documents concerning the investigation of the Company's officers or employees" (A01303 at 3), the only document GRI ever sent was the CID. At best, the September 9, 2019 letter, which specifically said it was "still notice only," put ACE on notice of circumstances that could lead to a Claim against directors and officers. That is how ACE's January 13, 2020 treated it.

GRI's related argument—[redacted] (Ans. Br. at 50)—simply highlights GRI's failure to disclose that information to ACE at the time. GRI first revealed the information during discovery in this case, [redacted]

(A01014-A01020; A02885-A02888.) (A02293 14:1-12.). To this day, however, GRI has not produced a single Government notice targeting anyone else other than GRI.

Moreover, as GRI omits from its brief, ACE was not alone in its view that the Investigation was a "Potential Claim" as of January 13, 2020. The NDA that ACE and GRI executed with respect to the Investigation described it as a "potential claim." (A01393 at 1.) And as soon as ACE issued its January 13, 2020 letter, GRI's professional insurance broker, Aon, expressed agreement with the position, telling ACE: "*it is a circumstance now*"—*i.e.,* a circumstance that could lead to Claim, not an actual Claim. (A01506 (emphasis added).) The broker also said that an anticipated "demand" by the DOJ would "move [the investigation] to a Claim" (*id.)*, reinforcing the conclusion that the investigation had not yet become a Claim.

GRI's contention that Varley "removed" a reference to subsection 6 of a "draft coverage letter" (Ans. Br. at 49), rests on sleight of hand. GRI compares not an actual draft but *its own putative expert's description* of a "September 15, 2019 … draft coverage letter" to ACE's January 13, 2020 letter. (*Id.* (citing A02658 ¶ 82 and A01865–67).) Even apart from the fact that its expert's characterization of a draft

letter counts for nothing, GRI neglects to mention that the September 15, 2019 draft was finalized and sent to GRI *the next* day, September 16, 2019. (A01303.) The September 16, 2019 letter did not address the Claim definition at all because, at that point, GRI still had not provided any documentation regarding the investigation, including the CID. (A01304-06.) The January 13, 2020 letter, issued after receipt of the CID, focused on subsection 5 but included a reference to subsection 6 ("no request has been made of an insured individual"), in view of the fact that the CID was directed only to GRI. (A01417.)

GRI's argument that ACE's initial determination was "motivated by financial gain" (Ans. Br. at 51-52), is also incorrect, as GRI's own evidence shows. GRI bases this view on the position that, as a result of ACE's position in its January 13, 2020 letter, ACE "would never have to reimburse GRI for the GRI had already incurred in legal fees." (*Id.* at 52.) But as GRI acknowledges, ACE never would have reimbursed that amount in any case because it was within the Policy's retention. (*Id.* at 51.) Plus, the settlement alone exceeded the limits of the ACE Policy, so GRI's defense costs could not impact how much ACE paid.

2. <u>ACE Had Reasonable Grounds For Applying The PSE</u>

GRI's alternative ground for asserting bad faith—ACE's denial of coverage based on the PSE—largely rehashes its *Iberiabank* arguments, which are addressed in ACE's Opening Brief and above. GRI disagrees with ACE's view that the policy language in *Iberiabank* is materially different than the language of the PSE, but as the trial court recognized these differences at a minimum create a *bona fide* dispute as to whether *Iberiabank* has any bearing here. Indeed, the premise of GRI's theory—that ACE "contemporaneously argu[ed] before the Fifth Circuit that the submission of false claims to the government could <u>*not*</u> be considered 'Professional Services'" (Ans. Br. at 53)—highlights this *bona fide* dispute. GRI's coverage counsel at the time, Reed Smith, took the opposite position in *Iberiabank*, and the Fifth Circuit declined to resolve the point, precisely because the specific policy language at issue in *Iberiabank* made it unnecessary to do so. 953 F.3d at 341, 348 & n.8.

GRI complains that ACE did not actual consider the obvious differences between *Iberiabank* and this case at the time, but the record is clear that ACE reasonably concluded *Iberiabank* was pertinent here. (A02871-A02872 at 237:9-238:5.) Moreover, GRI, presently represented by Iberiabank's own counsel at the time, makes no claim that it challenged ACE's coverage position on any ground, including *Iberiabank*.

For the first time on appeal, GRI also contends that ACE's application of the PSE was inconsistent with the coverage determination under GRI's own professional liability policy. Quite apart from GRI's waiver of this point, GRI neglects to mention multiple distinguishing facts: (1) GRI's professional liability policy also lacked the broad "arising out of" language of the PSE; (2) the professional liability examiner had no need to resolve the "professional services" issue, because it is undisputed that that policy independently excluded coverage for the FCA claim; and (3) ACE's position as to the PSE reflected not only the content of the CID but also GRI's presentation regarding the basis of the Government's claims during the January 30, 2020 conference call about the settlement. (A02873-A02875 at 297:22-299:10.)

3. <u>GRI Lacks Legally Cognizable Harm To Support Bad Faith</u>

To the extent GRI rests its bad faith claims on allegations that ACE failed to conduct an appropriate investigation, those allegations fail for the additional reason that GRI has no legally cognizable harm to support such a claim. To prove bad faith, GRI "must not only meet the *Casson* requirements in alleging a bad faith tort action, but must also enumerate a colorable allegation [that the insurer's] alleged misconduct caused some legally cognizable harm." *E. I. Du Pont De Nemours & Co. v. Admiral Ins. Co.*, 1994 WL 465547, at *3 (Del. Super. Aug. 3, 1994). Accordingly, a bad faith claim cannot be based on a failure to investigate, as distinct

from failing to pay, where insured "fail[s] to enumerate any legally cognizable damages resulting from [the] alleged bad faith failure to investigate." *Id.* *7.

Here, GRI conceded that, apart from its coverage litigation expenses (which are not recoverable under Delaware law, *E. I. Du Pont De Nemours*, 1994 WL 465547, at *3), GRI has no damages caused by alleged delays or deficiencies in ACE's investigation. (A02878-A02880 at 199:2-201:4.) GRI makes no attempt to identify any such damages on appeal. As a result, any such claim also fails as a matter of law.

4. GRI's Punitive Damages Claim Also Fails

GRI's inability to prove a bad faith claim precludes recovery of punitive damages, *Dunlap v. State Farm Fire & Cas. Co.*, 955 A.2d 132, 145 (Del. Super. Ct. 2007) ("punitive damages are not recoverable …. without bad faith"), but GRI's punitive damages claim fails for the additional reason that the undisputed facts show ACE did not act with "malice or reckless indifference." *Enrique*, 142 A.3d at 512. Under this standard, "the taking of an unreasonable or unjustified stance by an insurer, standing alone, will not justify the imposition of punitive damages." *Pierce v. Int'l Ins. Co. of Ill.*, 671 A.2d 1361, 1367–68 (Del. 1996) (citing *Tackett v. State Farm Fire & Cas. Ins.*, Co., 653 A.2d 254, 266 (Del. 1995)). Nor can punitive damages be based on a "'tough stance' policy," even on that is allegedly "part of [insurer's] dilatory handling" of a claim. *Tackett*, 653 A.2d at 255-266. Rather, a

claim for punitive damages requires "particularly egregious" conduct in which the insured is "singled out for malicious treatment." *Id.* at 266.

There is no such evidence here. Rather, GRI bases its claim for punitive damages on its assertions that ACE took unreasonable coverage positions and unreasonably delayed issuing them. (Ans. Br. at 58-59.) The undisputed facts contradict these assertions, but in any event they could not warrant punitive damages under well-established Delaware law.

The cases GRI cites are readily distinguishable. In *Moyer v. American Zurich Insurance Company*, 2021 WL 1663578, (Del. Super. Apr. 28, 2021), the only Delaware case GRI cites which allowed a punitive damages claim to proceed, the insurer "*concede[d] that genuine issues of material fact exist regarding whether it delayed investigating and paying [the insured's] claim in bad faith*," and there was no dispute that insured was entitled to coverage. *Id.* at *1, 5 (emphasis added). Further, the claims adjuster determined that the insured's claim was "[c]ompensable," but nonetheless recommended denial of the claim for impermissible reasons, including the fact that the insured had retained counsel). *Id.* at *6. The adjuster's behavior so egregious that she was removed from the claim. *Id.* GRI points to no comparable conduct here.

GRI's other cases on punitive damages also do not help it. One, decided under Virginia law, says not a word about punitive damages, and involved a claim that the insurer fraudulently concealed a cause of action from the insured. *Overstreet v. Kentucky Cent. Life Ins. Co.*, 950 F.2d 931, 934 (4th Cir. 1991). In the other, decided under Ohio law, the plaintiff on behalf of a putative class alleged that the life insurer had "systematically" found insureds not eligible for coverage after the 90-day deadline following receipt of the insureds' premiums for making eligibility determinations. *O'Donnell v. Fin. Am. Life Ins. Co.*, 171 F. Supp. 3d 711, 717 (S.D. Ohio 2016). The court found a genuine issue of fact as to the bad faith claim, and, in contrast to the requirements of Delaware law, made no separate determination as to whether punitive damages were warranted. *Id.* at 723.

II. THE TRIAL COURT CORRECTLY DISREGARDED GRI'S EXPERT

A. Question Presented

Whether the trial court properly disregarded GRI's putative expert report in ruling on summary judgment. (Preserved at A02710-A02712.)

B. Standard And Scope Of Review

An appellate court reviews a trial court's decision to admit or exclude expert testimony for abuse of discretion. *M.G. Bancorporation v. Le Beau*, 737 A.2d 513, 522 (Del. 1999).

C. Merits Of Argument

The trial court correctly held that it was "appropriate to disregard" the report of GRI's putative expert, Charles Ehrlich, because the report "present[ed] legal conclusions that do not create any genuine issue of material fact." (SMJ Op. at 22.) "[I]n the context of a motion for summary judgment, an expert must back up his opinion with specific facts" that "raise a genuine issue of fact." *Lynch v. Athey Prod. Corp.*, 505 A.2d 42, 45, 46 (Del. Super. 1985). The expert may not simply "restate the pleadings" in the case, opine on "ultimate facts and conclusions of law," or offer "argument of the party's cause." *Lynch,* 505 A.2d at 46; *Harris v. Penserga*, 1990 WL 9505, at *3–4 (Del. Super. Jan. 10, 1990). An assertion that the expert "read 'everything' relating to the case and … applied her extensive training and experience to consider these materials and reach" conclusions is not sufficient to create a

genuine issue for trial. *Jones v. Astrazeneca, LP*, 2010 WL 1267114, at *1 (Del. Super. Mar. 31, 2010).

Ehrlich's report contravenes these precepts, as revealed by the very points for which GRI cites it. GRI contends the trial court should have considered Ehrlich's opinion that ACE did "not meet industry standards of good faith claim handling" (Ans. Br. at 60-61), but that is an "ultimate issue" on which an expert opinion may not be used at summary judgment, nor at trial. GRI also contends that Ehrlich offered a series of Ehrlich's opinions as to "industry standards," but each of them is an impermissible assertion of a legal conclusion about what ACE "must do" or "should not" do. (*Id.* at 62.) Further, GRI neglects to mention that much of Ehrlich's analysis involves clearly inadmissible legal argument about the *Iberiabank* case and about the Policy's "Claim" definition. (A02648-A02652.) *See Enrique*, 142 A.3d 506, 515–16 (Del. 2016) (expert report that "essentially expressed opinions on the law, not the facts," and "reads like a legal brief" is "correctly accorded the report little weight on summary judgment").

GRI's cases are inapposite. Most do not address insurance bad faith claims, none concluded that an expert report created an issue of fact sufficient to defeat summary judgment an expert opinion on summary judgment to create an issue of fact. Instead, GRI cites cases addressing expert testimony at trial where genuine issues of material fact were already established. *Sears, Roebuck & Co. v. Midcap*,

893 A.2d 542, 552 (Del. 2006); *In re Columbia Pipeline Group*, 2022 WL 2902769, at *1; *Ferrari*, 2020 WL 3429988, at *1; *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa*, 1994 WL 721642, at *2 (Del. Super. Apr. 13, 1994); *Hercules Inc. v. OneBeacon Am. Ins. Co.*, 2004 WL 3250119, *1 (Del. Super. Sept. 7, 2004).

The two other cases GRI cites also do not advance its cause. In *Bennett v. USAA Casualty Ins. Co.*, 158 A.3d 877, *4 (Del. 2017), the Court affirmed a directed verdict not because the insureds failed to call an insurance expert, but because they "did not produce any evidence in their case-in-chief to support a bad faith claim." In *Phelps v. State Farm Mut. Auto. Ins. Co.,* 736 F.3d 697, 707 (6th Cir. 2012), the court found numerous disputed fact issues that foreclosed summary judgment, before also concluding that district court "had a duty to at least address" to expert reports which the insurer had "not move[d] to exclude." Here, by contrast, ACE sought to exclude the expert report from consideration on summary judgment, and the trial court expressly addressed the report, correctly deciding that it offered impermissible legal conclusions and raised no issues of fact.

CONCLUSION

The pleadings and undisputed facts establish that the Government's Investigation arose out of GRI's rendering or failing to render its professional services in underwriting and originating federally-insured mortgages. As a result, the trial court's rulings as to coverage in the JOP Opinion and the SJ Opinion were erroneous. The trial court correctly granted ACE's summary judgment motion as to GRI's bad faith claim. The undisputed facts show that, at a minimum, there was a *bona fide* dispute as to coverage for the Investigation.

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OF COUNSEL:

David Newmann
Victoria A. Joseph
HOGAN LOVELLS US LLP
1735 Market Street, 23rd Floor
Philadelphia, PA 19103
(267) 675-4600

DLA PIPER LLP (US)

/s/ John L. Reed
John L. Reed (I.D. No. 3023)
1201 North Market Street, Suite 2100
Wilmington, DE 19801
(302) 468-5700
john.reed@dlapiper.com

- and -

Robert J. Katzenstein (I.D. No. 378)
SMITH KATZENSTEIN & JENKINS LLP
The Brandywine Building
1000 West Street, Suite 1501
Wilmington, DE 19899
rjk@skjlaw.com

Attorneys for Defendant Below/ Appellant/Cross-Appellee ACE American Insurance Company

CERTIFICATE OF SERVICE

I, John L. Reed, hereby certify that on this 9th day of February, 2023, I caused true and correct copies of the foregoing REDACTED PUBLIC VERSION of **APPELLANT'S REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL** to be served upon the foregoing counsel of record in the manner indicated:

VIA FILE & SERVE*XPRESS*

Thomas E. Hanson Jr.
William J. Burton
BARNES & THORNBURG LLP
222 Delaware Avenue
Wilmington, DE 19801

Robert J. Katzenstein
Kathleen M. Miller
SMITH KATZENSTEIN & JENKINS LLP
1000 North West Street, Suite 1501
Wilmington, DE 19801

/s/ John L. Reed
John L. Reed (I.D. No. 3023)