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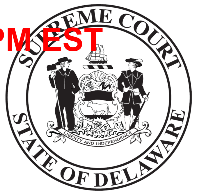

NO. 360,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ACE AMERICAN INSURANCE COMPANY, a Pennsylvania corporation

Defendant-Below/Appellant/Cross-Appellee,

v.

GUARANTEED RATE, INC., a Delaware corporation

Plaintiff-Below/Appellee/Cross-Appellant

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

Guaranteed Rate's Corrected Reply Brief on Cross-Appeal

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PRELIMINARY STATEMENT

GRI has demonstrated that Chubb handled GRI's claim unreasonably and in bad faith. Chubb denied coverage on the theory that a civil investigative demand against GRI was not a "civil . . . investigation against the Insured." Chubb later justified its decision by advancing a theory that an investigation is only a "Claim" if it is brought against an "individual." The Policy, however, defines "Claim" as "a civil . . . investigation against the Insured," and GRI is the Insured. Chubb's tortured interpretation of the plain words of the Policy it drafted is unreasonable and cannot be used to escape liability for its bad-faith conduct.

Further, despite having never accepted the civil investigative demand as a "Claim," Chubb proceeded to deny the "Claim" under the theory that the Government's investigation into potential False Claims Act violations were based on professional services. Chubb's position directly contradicted its contemporaneous position in *Iberiabank*, where Chubb argued that False Claims Act violations were *not* based on professional services. A reasonable jury might find bad faith in this flip-flop, given that Chubb's change of position benefited it in both scenarios – it allowed Chubb to escape coverage on two identical claims by taking a diametrically opposite position. Given that the facts create a genuine issue on the material fact of whether Chubb acted reasonably, it was error to award summary judgment against GRI's bad-faith claim.

Notably, in response to GRI's cross-appeal on the bad-faith claim, Chubb's first response is to argue that Chubb correctly interpreted the Policy and so was justified in denying coverage: "GRI's bad faith claim failed in the first place for all the reasons discussed above regarding the exclusion of coverage . . . ."). (Chubb Reply 30; *see also id.* 37 (citing arguments "addressed . . . above"). Accordingly, this Reply responds to Chubb's incorporated arguments relating to the bad-faith claim. *GEICO Gen. Ins. Co. v. Green*, 276 A.3d 462 (Del. 2022) ("an insurer's actions only give rise to a bad faith breach of contract claim if the insurer's actions first breach the contract"); *see also* GRI Br. 47 (arguing bad faith because Chubb's denial "contradicted the plain language of the Policy").

REPLY ARGUMENT ON CROSS-APPEAL

I. Chubb lacked a reasonable justification for denying GRI's claim and therefore acted in bad faith.

Bad faith exists "when the insurer refuses to honor its obligations under the policy and clearly *lacks reasonable justification* for doing so.'" *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 910 (Del. 2021). Importantly, Delaware courts require that the Insurer provide a *reasonable* justification – not just *any* justification for its breach. When judging reasonableness in this context, the facts and circumstances known to the insurer at the time it denied coverage must be considered. *Id.*

Chubb's refusal to honor its contractual obligation despite (1) the plain language of the Policy defining a "Claim" to include a "civil . . . investigation against an Insured" and (2) its contemporaneous position in an identical case that False Claims Act claims are *not* based on professional services, is unjustifiable. At the very least, the facts and circumstances known to Chubb at the time it made these decisions create a genuine issue of material fact as to the reasonableness of Chubb's conduct, and that issue must be decided by a jury. *In re Columbia Pipeline Grp., Inc. Merger Litig.*, 2022 WL 2902769, at *1 (Del. Ch. July 14, 2022) ("Whether a party's actions amount to bad faith and unfair dealing is to be determine by the trier of fact."); *Ferrari v. Helsman Mgmt. Servs., LLC*, 2020 WL 3429988, at *1 (Del. Super. Ct. June 23, 2020) (same); *Dunlap v. State Farm Fire*

& Cas. Co., 955 A.2d 132, 148 (Del. Super. Ct. 2007) ("the jury will make the ultimate 'reasonableness' determination").

A. Chubb's denial of coverage on the ground that the civil investigative demand was not a Claim was unreasonable.

The Policy defines "Claim" to include "a civil . . . investigation against the Insured, commenced by . . . receipt by the Insured of 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 . . . investigation or proceeding may be commenced . . ." (A00353, ¶ 5.D.6.) On June 27, 2019, the United States Attorney's Office for the Northern District of New York ("DOJ") commenced an investigation against GRI for alleged violations of the False Claims Act by serving GRI with a civil investigative demand. (A00548-59.) GRI's receipt of this written notice falls squarely within the definition of "Claim."

1. The Policy defines "Claim" as a civil investigation against the Insured – not against an "individual" Insured.

Despite the plain words of the Policy, Chubb justifies its decision to deny the civil investigative demand was a "Claim" because, according to Chubb, an investigation is only a "Claim" if it is brought against an "individual" Insured. (Chubb Reply 33 ("The CID was directed to GRI, not to an 'individual' Insured. On that basis, ACE concluded that subsection 6 did not apply.").)

Chubb's argument is nonsensical. The Policy defines a "Claim" to include a "civil . . . investigation *against the Insured*, commenced by . . . a written notice . . . ." (A00836, Endt. 7 § 5) (emphasis added). GRI is the Insured. (A00329, §II.L.2 (defining "Insured" as "the Company")). The DOJ's service of the civil investigative demand was the "civil . . . investigation . . ., commenced by . . . a written notice . . . ."

If Chubb intended to limit a "Claim" to investigations solely against individual insureds, it could have done so. The Policy includes a definition for an "Insured Person." (A00329, §II.M.1-2 (defining "Insured Person" as "a duly elected or appointed director, trustee . . . , officer or similar executive of the Company" or "a full time or part time employee of the Company")). However, the Policy does not limit a "Claim" to a "civil . . . investigation against an *Insured Person*"—it plainly and *unequivocally* defined a "Claim" as a "civil . . . investigation against *the Insured*."

2. The civil investigative demand was a written notice.

In an effort to further spin what is otherwise plain and unambiguous language, Chubb argues that the civil investigative demand did not constitute a "written notice" because the term "'written notice' must be construed to refer to matters similar to those specifically listed" in the definition. (Chubb Reply 33 (referring to the italicized portion of the definition: "a civil . . . investigation

against the Insured, 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 . . . investigating or proceeding may be commenced").) But Chubb never explains how the civil investigative demand is not similar to a target letter, a Wells notice, or a subpoena. A target letter, for example, informs the recipient that he is under investigation for possibly committing a federal crime. *See, e.g., United States v. Krohn*, No. 3:18-CR-391, 2020 WL 3405722, at *1 (M.D. Pa. June 19, 2020) (quoting a federal target letter: "This is to inform you that you are a target of a federal criminal investigation which is currently being conducted in the Middle District of Pennsylvania. This investigation is considering possible violations of Title 18, United States Code, 133 assault."); *see also* https://www.justice.gov/archives/jm/criminal-resource-manual-160-sample-target-letter (informing the target of "an investigation of possible violations of federal criminal laws involving, but not necessarily limited to *"). That target letter language is similar to the civil investigative demand at issue here, which stated it was "issued pursuant to the False Claims Act, 31 U.S.C. §§ 3729–3733, in the course of an investigation to determine whether there is or has been a violation of 31 U.S.C. § 3729." (AA00548.) And given that the definition of "Claim" specifically covers "*civil*" investigations, the words "written notice" within that definition cannot be interpreted to require the notice to be about a

criminal investigation, or else no notice would ever qualify as a "written notice" that is similar to a target letter or Wells notice.

Accordingly, Chubb's argument that the civil investigative demand did not qualify as a written notice is not possibly a reasonable interpretation of the Policy.

3. Even under Chubb's interpretation, the civil investigative demand was a "Claim."

Even under Chubb's interpretation, a "Claim" was made. The civil investigative demand *itself* provides notice [REDACTED] (A00553–54.) [REDACTED] (Chubb Reply 34–35 [REDACTED] A02561 at 14:2–12 [REDACTED] A02114 [REDACTED] In addition, GRI specifically informed Chubb on September 9, 2019, [REDACTED] (A00643.)

On these facts, where the civil investigative demand [REDACTED]

a jury could conclude that Chubb acted unreasonably and in bad faith by denying the existence of a "Claim"– notwithstanding Chubb's "justification" that the investigation had to target individuals to be a "Claim."

4. Chubb's argument raises disputed facts that further support GRI's position that summary judgment was improper.

In a final effort to justify its position, Chubb argues that its decision to deny the civil investigative demand was a "Claim" was reasonable because

(Chubb Reply 35.) In doing so, Chubb concedes there is a factual dispute that precludes summary judgment.

Furthermore, GRI's responses to these disputed facts support a finding that Chubb's conduct was, in fact, unreasonable, including but not limited to (1)

(A02583-84),

(A02583-84), (3)

(A02590),

(A02590). Rather than trying to convince this Court that GRI's evidence of Chubb's unreasonableness is stronger than Chubb's evidence of its reasonableness, GRI requests that this Court give it the opportunity to present these facts to the jury. Indeed, the foregoing shows that, at the very least, a factual dispute exists. Based on this ground alone, the Court should reverse the Superior Court's grant of summary judgment against GRI on its bad-faith claim.

B. Chubb's denial of coverage based on the professional-services exclusion also lacked a reasonable justification.

After having denied coverage on the theory that the civil investigative demand was not a Claim, Chubb also denied coverage (on March 3, 2020) on the theory that the professional-services exclusion applied. In its response brief, Chubb presents a new theory: that the Government's investigation arose out of GRI's professional services because there are "multiple 'but-for' causes" for the investigation, including both false statements and underwriting errors. (Chubb Reply 9.) This too fails.

1. FCA claims do not "arise out of" underwriting errors.

Chubb's argument that the False Claims Act claim arose out of multiple but-for causes is incorrect and irrelevant because the underwriting errors were not a but-for cause for the False Claims Act investigation. A but-for cause is "[t]he cause

without which the event could not have occurred." CAUSE, Black's Law Dictionary (11th ed. 2019). But the Government could have commenced a False Claims Act investigation even in the absence of any underwriting errors, given that a False Claims Act investigation is about false statements.

The cases that Chubb cites support this point. For example, in *Goggin v. National Union Fire Insurance Co. of Pittsburgh*, 2018 WL 6266195 (Del. Super. Ct. Nov. 30, 2018), the Superior Court explained that "[w]hen the traditionally tort-liability oriented 'but-for' test is applied to insurance policy exclusion language, the question is whether the underlying claim would have failed 'but for' the purportedly excluded conduct." *Id.* at *5. As the court further explained, "[a] claim does not 'arise out of' a circumstance or conduct if, independent of that circumstance or conduct, the claim is still valid." Similarly, in *Beazley Insurance Co., Inc. v. ACE American Insurance Co.*, 880 F.3d 64 (2d Cir. 2018), the court held that "such a determination [is made] by examining whether the asserted claim could succeed but for the excluded conduct." *Id.* at 71 (applying New York law). If the specific conduct is an element of the claim, then the conduct is a but-for cause. *Id.* at 72–73 (finding the professional-services exclusion applied because NASDAQ's professional service of "execut[ing] orders and deliver[ing] timely order confirmations" was an element of the federal securities claim).

Here, in contrast, an underwriting error is not an element of a False Claims Act violation. *United States ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481, 487 (3d Cir. 2017) ("A False Claims Act violation includes four elements: falsity, causation, knowledge, and materiality."). And, contrary to Chubb's contention that "FCA claims made against lenders like GRI" "require the Government *to plead* that the lender committed errors in underwriting individual loans" (Chubb Reply 20), the causation requirement in a False Claims Act claim is the *presentation* of the false claim to the Government for payment. *United States ex rel. Bookwalter v. UPMC*, 946 F.3d 162, 175 (3d Cir. 2019) (causation is satisfied if "the defendant presented or caused to be presented to an agent of the United States a claim for payment."). *See also* 31 U.S.C. § 3729(a)(1)(A)–(B) (the False Claims Act imposes civil liability on any party who "knowingly *presents*, or *causes to be presented*, <u>*a false or fraudulent claim*</u> for payment or approval," or "knowingly makes, uses or causes to be made or used, <u>*a false record or statement*</u> material to a false or fraudulent claim.") (emphasis added).

Indeed, the Government could bring a False Claims Act investigation in the absence of any underwriting error. For example, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (GRI Br. 42–43.)

As Chubb knows well, every federal court of appeals that has analyzed the issue has held that False Claims Act claims are not caused by the insured's professional services. For example, the Seventh Circuit has explained that under the False Claims Act, "plaintiffs do not have to show that any damages resulted from the shoddy care." *Health Care Indus. Liab. Ins. Program v. Momence Meadows Nursing Ctr., Inc.*, 566 F.3d 689, 695 (7th Cir. 2009). Indeed, the Seventh Circuit noted that "[l]iability under the FCA is based *solely* upon the creation or presentation of false claims to the government, *not upon the underlying conduct* used to establish the falsity of such a claim." *Id.* (emphasis added)). Similarly, the Ninth Circuit has held that "[t]he FCA injury does not '*result from*' [a provider's] failure to provide professional services, but from its submission of allegedly fraudulent bills and its alleged misrepresentation of care standards." *Horizon W., Inc. v. St. Paul Fire & Marine Ins. Co.*, 45 F. App'x 752, 753 (9th Cir.

2002) (emphasis added). And similarly again, the Tenth Circuit has held that "[t]he 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." *Zurich Am. Ins. Co. v. O'Hara Reg'l Ctr. for Rehab.*, 529 F.3d 916, 921 (10th Cir. 2008) (emphasis added).

Chubb attempts to distinguish these cases on the theory that there is some difference between false statements a healthcare provider makes to obtain reimbursement from the government and false statements a lender makes about a loan to obtain mortgage insurance on a loan from the government. (Chubb Reply 17–19.) But Chubb itself relied on these exact same cases in its *IberiaBank* briefing. (A02539–41 (citing *Health Care Industries*, *Zurich American*, and *Horizon West*, among other cases).) It argued that the "federal circuit courts of appeals" have addressed this issue "and have consistently held that False Claims Act claims are not based on the rendering of professional services." (A02539.) In fact, Chubb explained why IberiaBank's attempts to distinguish fraudulent-billing cases failed. In Chubb's own words: "IberiaBank seeks to minimize the significance of this mountain of consistent authority by arguing that most of the cases involved 'fraudulent billing.'" (A02543.) "But this is a distinction without a difference," Chubb continued, "as the relevant conduct in these cases is the same as it is here: submitting false certifications to the government in violation of the

False Claims Act to obtain a benefit from the government." (A02543.) Chubb went on to spell out the similarities: "In Medicare cases, the false certifications concerned care provided in order to obtain unearned payments for medical insurance claims;" "[s]imilarly, in this case, the false certifications concerned qualifications of loans and performance of underwriting to obtain mortgage insurance on ineligible loans, shifting the risk of default from IberiaBank to the government and ultimately to benefit from the government's payment of mortgage insurance claims." (A02543.) As Chubb correctly concluded, "[*t*]*he nature of the conduct and liability is the same, just in different industries*." (A02543 (emphasis added).)

In an attempt to dodge its prior judicial admissions, Chubb asks this Court to ignore its statements in *IberiaBank* by characterizing those statements as "extrinsic evidence." (Chubb Reply 22.) Even if Chubb's contemporaneous conduct were extrinsic evidence (which it is not), GRI is not limited to the policy language to demonstrate Chubb's bad faith – Chubb's bad-faith conduct must be judged against the backdrop of the facts and circumstances known to Chubb at the time it denied coverage. *Murdock*, 248 A.3d at 910. [redacted]

[redacted] (A02595–96

[redacted]

Chubb further argues that its change of position is not evidence of bad faith, because GRI's counsel (who never represented IberiaBank) previously worked at the same large law firm (with over 1500 attorneys) that represented IberiaBank. (Chubb Reply 37.) Other than trying to disparage GRI's counsel, none of this helps Chubb's position. By contrast, Chubb was the insurer in two cases involving the exact same fact pattern and took two diametrically opposite coverage positions simultaneously. The district court in *IberiaBank* agreed with Chubb's former position, and yet Chubb adopted what it knew to be the losing position in *IberiaBank* (and in cases in every federal circuit to have considered the issue) to deny coverage to GRI. Chubb has no explanation for why it abandoned its previous position. A reasonable jury, though, might recognize a pattern: Chubb consistently picked the position that would benefit it, arguing in *IberiaBank* that a False Claims Act claim is "not based on the rendering of professional services and thus does not trigger professional liability *coverage*" (A02539 (emphasis added)), while arguing here that an False Claims Act claim is based on the rendering of professional services and so falls with a professional-services *exclusion*. A reasonable jury might view this as opportunistic flip-flopping and as evidence that Chubb is acting in bad faith.

2. The settlement amounts were based on defects material to false or fraudulent claims, not on underwriting errors.

In another effort to justify its interpretation of the professional-services exclusion, Chubb contends that [redacted] (Chubb Reply 26–28.) [redacted] (Chubb Br. 10 (emphasis added).) As the U.S. Supreme Court has explained, "[a] misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision in order to be actionable under the False Claims Act." *Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 181 (2016). [redacted] 31 U.S.C. § 3729(a)(1)(B) (providing that a person is liable if they make "a false record or statement *material to* a false or fraudulent claim") (emphasis added). [redacted]

See Health Care Indus., 566 F.3d at 695 (there is a "distinction between the proof required for the False Claims Act claim and the conduct underlying the false claims").

In the end, despite all Chubb's efforts to explain why claims arising out of false statements should be covered by the professional-services exclusion, Chubb has a simple way to write policies that actually would exclude claims under the False Claims Act: it could simply include an exclusion for "any Claim 'alleging, based upon, arising out of, or attributable to, or directly or indirectly resulting from the False Claims Act (31 U.S.C. §§ 3729–3733)," just as it did in the other policy it sold GRI. (Chubb Br. 9 (quoting another policy).) But the Policy here did not include that exclusion, and Chubb's efforts to reinterpret the professional-services exclusion to achieve the same outcome are not justified – and could be viewed by a jury as bad faith.

II. Genuine questions of material fact precluded granting summary judgment on the bad-faith claim.

The foregoing arguments show that Chubb lacked a reasonable justification for its decisions to deny coverage. A reasonable jury could infer from Chubb's lack of a reasonable justification, combined with it taking a polar-opposite position in this case when compared with its position in *IberiaBank*, that its denial of coverage is bad faith. *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 910 (Del. 2021) ("An insured has a cause of action for bad faith 'when the insurer refuses to honor its obligations under the policy and clearly lacks reasonable justification for doing so.'"). *In addition*, Chubb's response confirms that there is at least a factual dispute regarding the reasonableness of Chubb's conduct. And because the ultimate issue involves an assessment of reasonableness, Delaware courts have consistently held that these issues must be decided by a trier of fact. *In re Columbia Pipeline Grp., Inc. Merger Litig.*, 2022 WL 2902769, at *1; *Ferrari*, 2020 WL 3429988, at *1; *Moyer*, 2021 WL 1663578, at *4; *Dunlap*, 955 A.2d at 148.

Specifically, in addition to Chubb's unjustified coverage decisions stated above, a reasonable jury could rely on the following facts to support a finding that Chubb acted in bad faith:

- [redacted]

(A02658 ¶¶ 82–83 & n.41)

- (A01296.)

- (A02610–12.)

-

- (A01814; A01855.)

- (*Compare* A02610–12, *with* A01977.)

These facts, which are undisputed, all support an inference that Chubb acted in bad faith. *See Enrique v. State Farm Mut. Auto. Ins. Co.*, 142 A.3d 506, 516 (Del. 2016) ("inferences from facts can lead to a triable bad faith claim" and "an insured pursuing a bad faith claim against an insurer [need not] come forward with a 'smoking gun' to survive summary judgment"); *Williams v. Geier*, 671 A2d 1368, 1375 (Del. 1996) ("The facts of record, including any reasonable hypotheses or inferences to be drawn therefrom, must be viewed in the light most favorable to the non-moving party.").

III. GRI suffered a legally cognizable harm.

Chubb's argument that GRI's bad-faith claim fails because GRI did not incur a "legally cognizable harm" is legally and factually wrong. First, the case law that Chubb relies on – *E.I. Du Pont De Nemours & Co. v. Admiral Ins. Co.*, 1994 WL 465547 (Del. Super. Ct. Aug. 3, 1994) – for the proposition that "a bad faith claim cannot be based on a failure to investigate" is stale. In *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 265 (Del. Super. Ct. 1995), this Court affirmatively held that an insurer's failure to investigate can give rise to a bad faith cause of action. *Id.* at 264 ("Where an insurer fails to investigate or process a claim or delays payment in bad faith, it is in breach of the implied covenant of good faith and fair dealing.'"). Second, unlike the insured in *E.I. Du Pont De Nemours*, GRI has pled "a failure to pay" in connection with its bad-faith claim. *See E.I. Du Pont De Nemours*, 1994 WL 465547 (dismissing bad-faith claim because insured failed to allege "a failure to pay").

Moreover, the factual record clearly demonstrates that GRI has incurred damages. Delaware recognizes that an insured is entitled to both direct and consequential damages resulting from an insurer's breach of the implied covenant of good faith and fair dealing. *See Enrique v. State Farm Mut. Auto. Ins. Co.*, 142 A.3d 506, 512 (2016); *Moyer v. Am. Zurich Ins. Co.*, 2021 WL 1663578, *4 (Del. Sup. Ct. Feb. 5, 2021). *In addition*, punitive damages are available when the

insurer breaches its obligations with malice or reckless indifference to the plight of its insured. *Enrique*, 142 A.3d at 512; *Moyer*, 2021 WL 1663578, *4.

GRI has established, *at a minimum*, that it is entitled to compensatory damages in the amount of $5 million – the policy limits – resulting from Chubb's bad-faith failure to pay. In addition, [REDACTED] (Declaration of Anwar T. Shatat in Support of Plaintiff Guaranteed Rate, Inc.'s Opposition to Defendant ACE American Insurance Company's Motion to Supplement the Record on Defendant's Motion for Summary Judgment (Aug. 19, 2022).) In addition, GRI is entitled to punitive damages. This Court has consistently held that if an insured can demonstrate that the insurer breached its obligations with malice or reckless indifference (i.e., an "I don't care" attitude), then punitive damages are available. *Tackett*, 653 A.2d at 266. For all the reasons stated above, there is a genuine issue of material fact as to whether Chubb's handling of GRI's claim amounted to an "I don't care" attitude to GRI's plight.

IV. The Superior Court erred in refusing to consider GRI's bad-faith expert report.

In defending the Superior Court's decision to exclude GRI's expert's report on industry standards, Chubb argues that whether Chubb met industry standards of good-faith claims handling "is an 'ultimate issue' on which expert opinion may not be used at summary judgment or at trial." (Chubb Reply 43 (citing no authority for this proposition). If Chubb is right, that is a sweeping rule that would preclude *any* expert testimony on industry standards. That is not consistent with Delaware law. *See, e.g.*, *In re Columbia Pipeline Group, Inc. Merger Litigation*, 2022 WL 2902769, at *1 (It is "proper for an expert to testify as to the customs and standards of an industry and to opine as to how a party's conduct measured up against some such standards."); *Ferrari*, 2020 WL 3429988, at *1 (concluding that an expert "may opine on claims-handling industry standards, and whether or not Defendant's conduct was in compliance with those standards").

Chubb argues that these cases are not relevant because they involved cases "where genuine issues of material fact were already established." (Chubb Reply 43.) But here, as addressed in the preceding section, there are sufficient facts to create a genuine issue of material fact as to whether Chubb acted unreasonably and in bad faith. And an expert report on whether an insurance company followed industry standards is evidence that may be admitted to show bad faith. That is why this Court's decision in *Bennett v. USAA Casualty Insurance Co.*, 158 A.3d 877

(Del. 2017), is relevant here, contrary to Chubb's contentions. In *Bennett*, this Court affirmed a directed verdict dismissing a bad-faith claim on the ground that the policyholders "failed to present evidence that USAA lacked a reasonable justification to deny their claim." *Id.* at *1. This Court then provided examples of the type of evidence that the policyholders could have submitted to show bad faith, such as "call[ing] an insurance expert to opine on the arbitrariness of USAA's action." *Id.* at *4. Here, that is exactly what GRI attempted to submit, but the Superior Court precluded the evidence.

GRI's expert did not offer legal conclusions; he offered testimony about industry customs and standards. (A02643–44 [redacted] Accordingly, the Superior Court should have followed this Court's instruction that "[t]he custom or practice in a particular industry is probative of what conduct is reasonable under the circumstances." *Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 554 (Del. 2006). In refusing to consider this probative, non-legal testimony, the Superior Court abused its discretion. Further, because a reasonable jury could find the expert testimony supports a finding of bad faith, the bad-faith claim should be allowed to proceed.

CONCLUSION

For these reasons, this Court should reverse the Superior Court's decision with respect to Count II.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William J. Burton, hereby certify that on February 13, 2023, I caused a copy of the foregoing Redacted Public Version of *Guaranteed Rate's Corrected Reply Brief on Cross-Appeal* to be served on the following counsel of record via File & Serve*Xpress*:

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