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IN THE SUPREME COURT FOR THE STATE OF DELAWARE

EMPLOYERS INSURANCE COMPANY OF WAUSAU; HELMSMAN MANAGEMENT SERVICES, LLC; LIBERTY INSURANCE CORPORATION; LIBERTY MUTUAL FIRE INSURANCE COMPANY; LM INSURANCE CORPORATION; THE FIRST LIBERTY INSURANCE CORPORATION; AND WAUSAU UNDERWRITERS INSURANCE COMPANY, Defendants Below, Appellants / Cross Appellees, v. FIRST STATE ORTHOPAEDICS, P.A., on behalf of itself and all others similarly situated, Plaintiff Below, Appellee / Cross-Appellant.	)	No. 27,2023 Court Below: Superior Court of the State of Delaware C.A. No. S19C-01-051 CAK

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

Section 2322F(e) of Delaware Workers' Compensation Act ("WCA") states that an insurance carrier denying any portion of a health care invoice must provide a "written explanation of reason for denial."[1] In January 2019, First State Orthopaedics, P.A. ("FSO") brought a declaratory judgment action against multiple Liberty Mutual insurers,[2] asking the Superior Court to declare that a denial message used sporadically between 2000 and 2018—but that was discontinued six months *before* FSO filed its lawsuit—failed to satisfy § 2322F(e)'s "written explanation" requirement.

The denial message that FSO challenges is associated with discontinued Code x553, which (when it was still in use) stated: "THIS SERVICE NOT AUTHORIZED BY CASE MANAGER. PLEASE CONTACT CASE MANAGER FOR FURTHER INFORMATION."[3] In its amended complaint, FSO alleges that

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[1] 19 *Del. C.* § 2322F(e).

[2] Defendants/Appellants are Employers Insurance Company of Wausau, Helmsman Management Services, LLC, Liberty Insurance Corporation, Liberty Mutual Fire Insurance Company, LM Insurance Corporation, The First Liberty Insurance Corporation, and Wausau Underwriters Insurance Company (collectively, "Liberty Mutual").

[3] A370 ¶ 12.

Code x553 violates 19 *Del C.* § 2322F(e) because it "do[es] not set forth any reason for the carrier or TPA's denial of coverage."[4]

Liberty Mutual sought summary judgment on multiple grounds. First, Liberty Mutual argued that FSO lacked standing to bring a declaratory judgment claim because Liberty Mutual discontinued Code x553 months *before* FSO filed this lawsuit as part of a system-wide migration to a new bill-review platform. Declaratory relief is prospective only, which means FSO must show that there is a real and immediate threat that Code x553 will cause *future* injury. That risk does not exist in this case.

Second, Liberty Mutual argued that FSO's claim is time-barred because FSO began receiving x553 denials more than twenty years ago and, by its own admission, believed the explanation violated the WCA ten years before it filed suit.

Third, Liberty Mutual argued that Code x553 is a "written explanation of reason for denial" under 19 *Del. C.* § 2322F(e). Indeed, during discovery, FSO's 30(b)(6) designee admitted that Code x553 is a "written explanation" of reason for denial. FSO's designee also admitted that FSO understood x553's reference to "not authorized" as meaning that there was no "prior authorization"—a common and well-known denial message used by insurers. FSO's designee clarified, under oath,

[4] A371 ¶ 13.

that its real grievance has nothing to do with whether x553 is a "written explanation" but, instead, is based on FSO's contention the Code x553 was wrongly applied because FSO is not subject to prior-authorization requirements. But there is a problem: that theory is not asserted in FSO's complaint. As for the claim in the complaint—whether Code x553 satisfies 19 *Del. C.* § 2322F(e)—the undisputed evidence shows that it does.

On December 29, 2022, the Superior Court issued a Memorandum Opinion and Order denying Liberty Mutual's motion for summary judgment.[5] And in a surprise twist, even though FSO did not independently move for summary judgment, the Superior Court *sua sponte* entered summary judgment in FSO's favor.

Liberty Mutual timely filed this appeal.[6]

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[5] Pursuant to Supreme Court Rule 14(b)(vii), Liberty Mutual attaches the December 29, 2022 Opinion and Order Denying Liberty Mutual's Motion for Summary Judgment *Sua Sponte* (hereinafter "Opinion & Order") to this Opening Brief.

[6] FSO's brought this case as a proposed class action. The Superior Court's Opinion and Order denied FSO's motion for class certification. FSO has cross appealed the Superior Court's order insofar as it denied class certification, but those issues are not raised in this brief.

SUMMARY OF ARGUMENT

1. **FSO lacks standing to challenge a practice that was discontinued *before* FSO filed its lawsuit.** "[A] plaintiff doesn't have standing to seek declaratory or injunctive relief on conduct that *ended before the lawsuit* without showing both that he was subjected to that conduct in the past *and that there is a 'real or immediate' threat that he will be subjected to the conduct again*."[7] FSO bears the burden to show that it faces a "real or immediate" threat of *future* injury.[8] FSO did not carry that burden as a matter of law. There is no dispute that Code x553 was discontinued six months *before* FSO filed this lawsuit. And there is no evidence that Code x553—which was discontinued as part of a system-wide migration to a new bill review platform—is likely to be used again, let alone that the risk of future use is "immediate" or "certainly impending."[9] Indeed, the Superior Court conducted no analysis whatsoever concerning the likelihood of future injury, but instead found standing because Liberty Mutual was "unwilling to admit that [it] violated 19 *Del.*

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[7] *Heredia v. Tate,* 2021 U.S. Dist. LEXIS 224659, at *17–18 (W.D. Wis. Nov. 22, 2021) (emphasis added).

[8] *Id.*; *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) ("[I]n a lawsuit brought to force compliance [with a statute], it is the plaintiff's burden to establish standing by demonstrating that, if unchecked by the litigation, the defendant's alleged wrongful behavior will likely occur or continue, and that the threatened injury [is] certainly impending.").

[9] *Id.*

C. § 2322F(e)" and therefore *could* theoretically reinstate Code x553.[10] But the fact that a practice is "capable of repetition" is relevant only to the *mootness* doctrine—not standing.[11] The law is clear that when a practice is discontinued *before* the suit, standing is not established absent a showing that the harm is *likely* to occur again.[12] Without evidence (or a factual finding) that there was a "real or immediate" threat that FSO would receive denials with Code x553 in the future, the Court's finding that FSO had standing to seek declaratory relief was erroneous.

2. **FSO's claim for declaratory judgment is time barred.** The undisputed evidence shows that FSO began receiving the challenged denial code before 2000, and that FSO believed Liberty Mutual's use of Code x553 violated the WCA as early as 2009—more than a decade before FSO filed this lawsuit. The Superior Court avoided the statute of limitations by concluding that a new three-year

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[10] Opinion & Order at 15.

[11] *See, e.g.*, *Renne v. Geary*, 501 U.S. 312, 320 (1991) ("[T]he *mootness* exception for disputes capable of repetition yet evading review . . . will not revive a dispute which became moot *before* the action commenced.") (emphasis added).

[12] *See, e.g.*, *Freedom from Religion Found., Inc. v. City of Green Bay*, 581 F. Supp. 2d 1019, 1025–26 (E.D. Wis. 2008) (holding that voluntary cessation "only applies where the defendant ceases the offending conduct ***after*** suit is filed.") (emphasis added); *N. Arapaho Tribe v. Ashe*, 925 F. Supp. 2d 1206, 1212 (D. Wyo. 2012) (explaining the legal distinction between standing and mootness and holding that the plaintiff lacked standing because the challenged action "had ceased by the time Plaintiffs filed their amended complaint").

period started every time Liberty Mutual issued a denial with Code x553.[13] And because 19-such denials were issued in the three years before FSO filed suit, the Court held that the declaratory judgment claim was not time barred.[14] But none of those 19 invoices are referenced in FSO's complaint, nor does FSO assert individual claims based on those invoices. FSO brought a single claim for declaratory judgment, asking the Court to issue a declaration about the general sufficiency of the language. FSO, by its own admission, knew all facts relevant to that single declaratory judgment claim more than a decade before it filed this lawsuit.[15]

3. **The undisputed evidence establishes that Code x553 satisfies 19 *Del. C.* § 2322F(e)'s "written explanation" requirement.** The only question in this case is whether Code x553 satisfies Section 2322F(e)'s requirement that carriers provide a "written explanation of reason for denial." In discovery, FSO's corporate designee unequivocally testified that FSO believed Code x553 *is* a written explanation of reason for denial. Indeed, FSO admitted that it understood Code x553 to mean that the patient or provider had failed to secure prior authorization for the treatment—a well-known reason for denying claims. FSO's late-in-discovery

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[13] Opinion & Order at 11–13.

[14] *Id.* at 13.

[15] *Contra Kerns v. Dukes*, 2004 Del. Ch. LEXIS 36, at *18–20 (Del. Ch. Apr. 2, 2004) ("[W]here suit can be brought immediately and complete and adequate relief is available, a cause of action cannot be tolled as a continuing violation.").

assertion that it is a "certified" healthcare provider that is not subject to prior authorization requirements has nothing to do with the claim in this case. Under Section 2322F(e), the question in *not* whether Liberty Mutual issued the *correct* denial, but only whether it provided a "written explanation of reason for denial." The record is clear that Code x553 meets that requirement.

The Superior Court nonetheless concluded that Code x553 did not provide a sufficiently "meaningful" explanation. That ruling errs as a threshold matter because the plain text of the statute does not impose a "meaningfulness" standard. But even if we accept that extratextual addition, the only way to assess whether the denial is "meaningful" is to consider the evidence of what the recipient (here, FSO) understood. The Court stated that FSO had "identified more than sufficient facts to create a genuine dispute of material fact as to whether Plaintiff understood these denials," but it cited *nothing* to support that finding. More perplexing, after stating that there was a "genuine dispute of material fact" as to what FSO understood, the Court then *sua sponte* issued summary judgment in FSO's favor.

The Superior Court's decision is illogical, internally inconsistent, and unsupported by the record. The decision below should be reversed.

STATEMENT OF FACTS

I. SECTION 2322F WAS ADOPTED IN 2007; FSO WAITED MORE THAN TEN YEARS TO FILE THIS LAWSUIT.

In January 2007, Delaware then-governor Ruth Minner signed into law reforms to Delaware's WCA.[16] Those reforms included the adoption of 19 *Del. C.* § 2322F, which requires, among other things, that a health insurer "pay a health care invoice within 30 days of receipt of the invoice . . . unless the invoice is contested in good faith."[17] If the insurer denies payment—in whole or in part—the denial "shall be accompanied with written explanation of reason for denial."[18]

FSO filed this lawsuit in January 2019—eleven years after § 2322F became law—asserting a single count for declaratory judgment.[19] Specifically, FSO sought a declaration that one of Liberty Mutual's explanations when denying payment for a medical bill fails to comply with Section 2322F(e)'s written explanation requirement.[20] The explanation in question is Code x553, which provides:

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[16] *See* 76 Del. Laws, c. 1, § 15.

[17] 19 *Del. C.* § 2322F(h).

[18] *Id.* § 2322F(e).

[19] *See* A376–78 ¶¶ 25–31.

[20] A371 ¶ 13.

> THIS SERVICE NOT AUTHORIZED BY CASE MANAGER. PLEASE CONTACT THE CASE MANAGER FOR FURTHER INFORMATION.[21]

FSO claimed that Code x553 "do[es] not set forth any reason for the carrier or TPA's denial of coverage."[22]

II. DEFENDANTS DISCONTINUED CODE X553 BEFORE FSO FILED THIS LAWSUIT.

Code x553 was one denial message that existed in the bill-review software (Coventry's "BR 4.0") that Liberty Mutual used before August 2018.[23] In August 2018—six months *before* FSO filed this lawsuit—Liberty Mutual transitioned to a new bill review software called "Stratacare®," offered by a new vendor, Conduent.[24] The Stratacare software has its own assortment of denial messages and does *not* include Code x553 (or any other denial code containing the language that FSO has argued is insufficient under Section 2322F(e)).[25] Liberty Mutual has not issued a denial with Code x553 denial since July 19, 2018—months before FSO filed this lawsuit.[26]

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[21] A370 ¶ 12.

[22] A371 ¶ 13.

[23] A765 ¶¶ 3-4; A774–76 (Resp. to ROGs 5 & 6).

[24] A765 ¶¶ 4, 5; A775–76 (Resp. to ROG 6).

[25] *Id.*

[26] A765 ¶¶ 4, 5; A774–75 (Resp. to ROG 5); A765 ¶¶ 4, 5.

III. THE SUPERIOR COURT DENIED LIBERTY MUTUAL'S MOTION TO DISMISS, FINDING THAT FSO HAD STANDING TO SEEK DECLARATORY JUDGMENT AND THAT SECTION 2322F(E) INCLUDES AN UNWRITTEN "MEANINGFULNESS" COMPONENT.

Liberty moved to dismiss FSO's declaratory judgment action, arguing in pertinent part that FSO lacked standing to challenge a Code that was discontinued *before* FSO filed its complaint. Liberty Mutual also argued that Code x553 satisfied Section 2322F(e)'s "written explanation" requirement as a matter of law.

The Superior Court denied Liberty Mutual's motion to dismiss. On the question of standing, the Court observed that "[t]he fact that Defendants no longer use the complained-of practice creates a theoretical tone to the proceeding, a 'tilting at windmills' flavor."[27] Nonetheless, the Court found that FSO had standing to assert its claim. The Court noted the "distinction between ending the practice prior to suit being filed, and ending it while suit is pending," but said that it was not "a serious impediment to Plaintiff's case" because Liberty Mutual had refused to admit Code x553 violated the WCA and thus, in the Court's opinion, left open "the specter of [Code x553's] use in the future."[28]

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[27] A262.

[28] A262–63.

The Superior Court also rejected Liberty Mutual's argument that Code x553 satisfied Section 2322F(e)'s "written explanation" requirement. The Court held that, although not stated in the text, it was reasonable to conclude the statute required more than a "written explanation of reason for denial" but also that the denial be sufficiently "meaningful."[29] But the Court was "unwilling . . . at [the motion-to-dismiss] stage of the litigation" to conclude that "the proffered explanation satisfied the notice provision as a matter of law."[30] Liberty Mutual reasonably understood that to mean that the question of whether Code x553 was "meaningful" should be resolved after discovery.

IV. FSO ADMITTED THAT CODE X553 COMPLIES WITH SECTION 2322F(E).

FSO's amended complaint asserts a single claim that Code x553 fails to satisfy Section 2322F(e)'s requirement that insurers provide a "written explanation of reason for denial." FSO alleges that Code x553's language falls short of that requirement "because, though the EOBs purport on their face to deny coverage for the health care invoice(s) in question, they do not set forth any reason for the carrier or TPA's denial of coverage."[31] FSO alleged that health care providers receiving

[29] A260–61.

[30] A261.

[31] A371 ¶ 13; A377 ¶ 28.

Code x553 did not "know the reason(s) why coverage for a particular health care invoice ha[d] been denied."[32] FSO expanded on that position in early briefing, arguing that "[n]o reasonable reader confronted with [Code x553] can possibly divine the actual reason why payment has been denied."[33]

Discovery, however, showed that FSO divined the reason all along. In a 30(b)(6) deposition, FSO's corporate designee—offering testimony binding on the company—repudiated the positions stated in FSO's complaint. FSO's designee *admitted* not only that FSO understood Code x553 but also testified to its belief that Code x553 constitutes a "written explanation of reason for denial" as required by 19 *Del. C.* § 2322F(e). FSO's designee testified that FSO understood Code x553 "to be saying [that] the service is something that requires prior authorization, and the prior authorization was not supplied."[34] FSO admitted that the concept of "prior authorization" is well known in the industry and that the federal government's healthcare.gov website provides a definition of "prior authorization" (sometimes called "preauthorization").[35] FSO's designee testified that FSO's understanding of

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[32] A371 ¶ 14.

[33] A163.

[34] A662:4–9.

[35] *See* "Preauthorization," Glossary, HealthCare.gov, https://www.healthcare.gov/glossary/preauthorization ("A decision by your health insurer or plan that a health care service, treatment plan, prescription drug or durable medical equipment is medically necessary. Sometimes called prior authorization, prior approval or

Code x553 was consistent with the definitions provided by the federal government, explaining that services requiring prior authorization are those that "requir[e] the beneficiary to get approval from the plan or insurer . . . before the service is performed by the physician."[36] FSO conceded that "[c]ertain health insurance carriers do require preauthorization for certain procedures" and that "in those instances where preauthorization is required . . . , it would be appropriate for the health insurer to deny an invoice and say that there was not prior authorization for the treatment."[37]

Contrary to the allegations in the complaint, when asked whether the "statement [associated with Code x553] is a written explanation of the reason for denial," FSO's corporate designee responded that "[i]t *is* a written explanation of the reason for denial."[38] Further, when asked directly whether FSO believed that the explanation associated with Code x553 complied with Section 2322F(e)'s requirement that the insurer provide a written explanation of reason for denial,

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precertification. Your health insurance or plan may require preauthorization for certain services before you receive them, except in an emergency."); "Prior Authorization," Glossary, HealthCare.gov, https://www.healthcare.gov/glossary/prior-authorization ("Approval from a health plan that may be required before you get a service or fill a prescription in order for the service or prescription to be covered by your plan.").

[36] A704:11–A705:1.

[37] A706:12–A707:2.

[38] A662:10–14 (emphasis added).

FSO's designee testified: "I can definitely define that [Defendants] provided a written explanation of reason for denial."[39]

During the 30(b)(6) deposition, it became clear that FSO's actual concern has nothing to do with Section 2322F(e) or the concerns expressed in its complaint. Instead, FSO testified that it believes the 2008 WCA reforms exempted it from traditional prior-authorization requirements. As FSO's designee explained, the issue is not that FSO did not understand Code x553, but that it believed "Liberty Mutual was wrong in applying it" to FSO.[40]

But that is a different issue than the one raised in FSO's complaint. FSO's complaint does not allege that Liberty Mutual improperly imposed a prior-authorization requirement on a provider that is not subject to prior authorization. Instead, the sole claim in FSO's complaint is that Code x553 does not constitute a "written explanation of reason for denial" under 19 *Del. C.* § 2322F(e). On that latter issue, FSO has conceded that Code x553 satisfies the statute's requirement.

V. FSO FIRST RECEIVED CODE X553 MORE THAN 20 YEARS AGO AND BELIEVED THAT IT VIOLATED THE WCA MORE THAN TEN YEARS BEFORE FILING SUIT.

[39] A662:24–A663:6.

[40] A658:13–A659:2; *see also* A708:11–23.

It is unclear when Code x553 first came into existence. Because the Coventry BR platform (BR stands for "bill review") dates back more than a quarter of a century, and because that software was decommissioned before FSO filed this lawsuit, Liberty Mutual cannot confirm when Code x553 first came to be. But evidence shows that FSO began receiving explanation of benefit forms ("EOBs") with Code x553 at least as early as 2000—roughly 20 years before FSO filed this lawsuit.[41]

After the 2008 WCA reforms, FSO continued to receive EOBs with Code x553. FSO received a denial with Code x553 in January 2009, for example.[42] FSO's corporate designee testified that when FSO received that EOB in January 2009—more than a decade before FSO filed this lawsuit—FSO "would have been in the position that [Code x553] did not comply" with the WCA.[43] FSO continued receiving EOBs with Code x553 from 2009 through 2018 (when the Code was discontinued).[44] And throughout that period, FSO always believed that those denials

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[41] A786; A677:14–A678:9. FSO received EOBs with that same message throughout the period from 2000 to 2008. *See* A788; A790; A792; A794–95; A681:10–A684:5.

[42] *See, e.g.*, A797 (x553 denial sent Jan. 22, 2009).

[43] A685:20–A686:14 ("Q. When FSO received this EOB in January of 2009 after the Delaware Workers' Compensation Reform had passed, did it believe that the Explanation x553 did not comply with the statute? . . . . A. . . . My answer is, First State Orthopaedics would have been in the position that it did not comply.").

[44] *See, e.g.*, A800 (x553 denial sent Apr. 6, 2011).

violated the WCA.[45] Indeed, in at least one instance, in July 2013, FSO sent a letter to Liberty Mutual complaining that the x553 denial was improper (again, because FSO believed it was not subject to prior authorization requirements, not because FSO did not believe the explanation was clear).[46]

VI. FSO CONCEDES THAT NOTHING PREVENTED IT FROM FILING THIS LAWSUIT AS EARLY AS 2009 OR AT ANY POINT BEFORE 2019.

When asked why FSO did not file this lawsuit in 2009, FSO's designee responded that "[t]he best answer [FSO could] give is what we were dealing with right after the reform."[47] FSO testified that it hoped things would smooth out with time.[48] But while that might have been true in 2009; it doesn't explain why FSO waited ten years—until 2019—to file this lawsuit. FSO's designee admitted that FSO "received . . . denials using x553 [over] a ten-year period without choosing to file a lawsuit."[49] FSO also admitted that there was nothing that prevented it from

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[45] *See, e.g.*, A690:18–23 ("Q. At the time FSO received this EOB in April of 2011, it would have been FSO's position that the Defendant carrier acted inappropriately by denying the invoice using a not-authorized code, correct? A. Yes.").

[46] A804.

[47] A686:19–A687:10.

[48] *Id.*

[49] A688:16–23 ("Q. And so FSO received the denials using x553 in due course for a ten-year period without choosing to file a lawsuit, correct? A. Yes, right. Liberty continued to deny claims using 553 despite the reform, and then, yes, years later they were still doing it, still doing it, and that's when we decided to give it to David.").

filing this exact same lawsuit in 2008, 2009, or any other year before 2019.[50]

VII. THE SUPERIOR COURT DENIED LIBERTY MUTUAL'S MOTION FOR SUMMARY JUDGMENT AND *SUA SPONTE* GRANTED SUMMARY JUDGMENT IN FSO'S FAVOR.

Liberty Mutual filed a motion for summary judgment on multiple grounds, including (i) that FSO lacked standing to assert a declaratory judgment action concerning denial code that was discontinued before the lawsuit; (ii) that FSO's claim is time barred; and (iii) that FSO's own admissions in discovery confirmed that Code x553 was a "written explanation of reason for denial" that was understood by FSO. The Superior Court denied Liberty Mutual's motion on all three grounds. And in a twist, even though FSO had not filed its own summary judgment motion, the Superior Court *sua sponte* granted judgment in FSO's favor.

[50] A712:02–A712:15 ("Q. And so is there any reason that FSO could not have filed the lawsuit that it eventually filed in January of 2019 as early as 2008? A. No, there wouldn't have been a reason . . . Q. And FSO could have filed this lawsuit in 2009 also if it wanted to, correct? A. Right, yes. . . . .").

ARGUMENT

I. THE SUPERIOR COURT ERRED IN HOLDING THAT FSO HAS STANDING TO BRING A DECLARATORY JUDGMENT CLAIM CONCERNING A DENIAL CODE THAT WAS DISCONTINUED SIX MONTHS BEFORE FSO FILED SUIT.

A. Question Presented

Whether FSO has standing to bring a declaratory judgment claim challenging a denial message that Liberty Mutual discontinued before FSO filed its complaint?[51]

B. Scope of Review

"The party invoking the jurisdiction of a court bears the burden of establishing the elements of standing."[52] The plaintiff's evidentiary standard to establish standing evolves as the litigation matures.[53] "At the pleading stage, general allegations of injury are sufficient to withstand a motion to dismiss because it is presumed that general allegations embrace those specific facts that are necessary to support the claim."[54] At summary judgment, however, "the plaintiff must set forth by affidavit or other evidence specific facts which must be taken as true for purposes of the

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[51] A191; A232:13–A233:19; A247–50; A266–71; A292; A398; A547–49; A957–60.

[52] *Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1109 (Del. 2003).

[53] *Id.* at 1109–10.

[54] *Id.* at 1010 (internal quotation marks omitted).

summary judgment motion."[55] This Court reviews orders addressing both motions to dismiss and motions for summary judgment *de novo*.[56]

C. Merits of Argument

The Superior Court erred in holding that FSO had standing to seek a judicial declaration concerning a denial message that Liberty Mutual discontinued before FSO filed its complaint. The Court order improperly conflates the standing and mootness doctrines, ignoring the legal significance of the fact that Liberty Mutual discontinued Code x553 *before* the lawsuit was filed. Courts uniformly hold that plaintiffs lack standing to assert a declaratory judgment claim challenging a practice that was discontinued *before* the lawsuit—at least absent concrete evidence that the plaintiff is likely to be subject to the same practice in the immediate future. FSO presented no evidence to carry its burden to affirmatively establish a "real and immediate" threat that Liberty Mutual would use Code x553 in the future.

1. In a declaratory judgment claim, pre-suit discontinuation of the challenged practice defeats standing.

Standing and mootness are two related, but distinct, jurisdictional doctrines. Standing looks at whether there is (or was) a justiciable controversy *at the time the*

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[55] *Id.* (quotation marks omitted)

[56] *Furman v. Del. DOT*, 30 A.3d 771, 773 (Del. 2011); *Stonewall Ins. Co. v. E.I. du Pont de Nemours & Co.*, 996 A.2d 1254, 1256 (Del. 2010).

suit was filed.[57] Mootness, on the other hand, looks at whether the litigant can maintain standing throughout the pendency of the litigation.[58]

The burden of proof differs depending on which doctrine is at issue, so it is critical that the doctrines are not conflated. When the question concerns a matter of standing, the burden rests squarely on the plaintiff to establish an injury in fact that is redressable by the court.[59] Mootness, in contrast, arises only after threshold standing is established, and the "burden shifts" to the defendant to show that the case and controversy is extinguished.[60]

The difference between the burden of proof under the standing and mootness doctrines is particularly stark in circumstances like this one where the only claim

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[57] *See Davis v. FEC*, 554 U.S. 724, 728 (2008) ("The standing inquiry focuses on whether the party invoking jurisdiction had the requisite stake in the outcome *when the suit was filed*.") (emphasis added); *see also Dover Historical Soc'y*, 838 A.2d at 1110–11 (stating that Delaware courts follow federal Article III standing decisions).

[58] *GMC v. New Castle Cty.*, 701 A.2d 819, 824 (Del. 1997) ("A party must have continued standing throughout the pendency of the action to avoid an invocation of the mootness doctrine.").

[59] *See, e.g.*, *Hartnett v. Pa. State Educ. Ass'n*, 963 F.3d 301, 305 (3d Cir. 2020) ("At the start of litigation, the burden rests on the plaintiff, 'as the party invoking . . . jurisdiction,' to show its standing to sue.") (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016)); *Dover Historical Soc'y*, 838 A.2d at 1110 ("The party invoking the jurisdiction of a court bears the burden of establishing the elements of standing.").

[60] *Hartnett*, 963 F.3d at 305–06.

seeks declaratory relief. Claims for declaratory judgment are "forward looking,"[61] and therefore allegations of past injury are irrelevant.[62] Instead, where a plaintiff brings a declaratory judgment claim "to force compliance [with a statute], it is the plaintiff's burden to establish standing by demonstrating that, if unchecked by the litigation, the defendant's alleged wrongful behavior *will likely occur or continue*, and that the threatened injury *[is] certainly impending*."[63]

Given the substantial differences in the analysis, the Court must determine whether Liberty Mutual's discontinuation of Code x553 before FSO filed this lawsuit raises a standing issue, or a mootness concern. The answer is clear: the pre-suit discontinuation of a policy or practice challenged in a declaratory judgment action implicates the *standing* doctrine. A legion of courts across the country have held that a plaintiff seeking declaratory relief lacks *standing* to challenge a practice

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[61] *See Hampson v. State ex rel. Buckson*, 233 A.2d 155, 156 (Del. 1967) ("The principal purpose of the statute is to provide preventative justice."); *Corliss v. O'Brien*, 200 F. App'x 80, 84 (3d Cir. 2006) ("Declaratory judgment is inappropriate solely to adjudicate past conduct."); *Del. State Univ. Student Hous. Found. v. Ambling Mgmt. Co.*, 556 F. Supp. 2d 367, 374 (D. Del. 2008) (same).

[62] *Adarand Constructors v. Pena*, 515 U.S. 200, 210–11 (1995) ("[T]he fact of past injury, 'while presumably affording [the plaintiff] standing to claim *damages* . . . , does nothing to establish a real and immediate threat that he would again' suffer similar injury in the future [for purposes of a claim for declaratory judgment].") (emphasis added).

[63] *Friends of the Earth*, 528 U.S. at 190 (emphasis added).

discontinued before the lawsuit was filed.[64]

There is nothing unusual about applying a bright-line rule or modifying the analysis based on when the challenged practice ceased. That's how the law works.

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[64] *See, e.g.*, *City of Los Angeles v. Lyons*, 461 U.S. 95, 190 (1982) (finding no standing where the constitutionally objectionable practice ceased altogether before the plaintiff filed his complaint); *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991) (explaining the legal distinction in standing principles in a case "in which the constitutionally objectionable practice ceased altogether before the plaintiff filed his complaint"); *Davis v. Conn. Dep't of Corr.*, 169 F. Supp. 3d 311, 317 (D. Conn. 2016) ("[W]hen 'the constitutionally objectionable practice ceased altogether before the plaintiff filed [her] complaint,' the plaintiff lacks standing."); *Freedom from Religion Found., Inc. v. City of Green Bay*, 581 F. Supp. 2d 1019, 1031 (E.D. Wis. 2008) (dismissing for lack of standing and explaining that "[t]his case presents an even stronger case for dismissal . . . since the allegedly unconstitutional action had ceased and the policy was changed *before the lawsuit was even filed*") (emphasis added); *Clarry v. United States*, 85 F.3d 1041, 1049 (2d Cir. 1996) (holding the plaintiffs lacked standing to seek injunctive relief because the challenged policy was repealed before they filed suit); *Wells v. McKoy*, 2018 U.S. Dist. LEXIS 217519, at *10 (W.D.N.Y. Dec. 27, 2018) ("The Court concludes that Plaintiff lacks standing for his RLUIPA claim in this case because he has not demonstrated a likelihood of future harm. While the official policy at issue undisputedly existed, it was rescinded by the time the lawsuit commenced."); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 2015 U.S. Dist. LEXIS 147561, at *367 (S.D.N.Y. Oct. 19, 2015) ("[I]f the 'objectionable practice ceased altogether before the plaintiff filed his complaint,' then the plaintiff may not seek an injunction."); *Robidoux v. Celani*, 987 F.2d 931, 938 (2d Cir. 1993) (holding that, in order to show the plaintiff has standing to seek declaratory or injunctive relief, the plaintiff must "alleg[e] that the defendant was engaging in the unlawful practice against the plaintiff *at the time of the complaint*") (emphasis added); *Williams v. City of Cleveland*, 907 F.3d 924, 933–34 (6th Cir. 2018) (finding no standing for declaratory or injunctive relief against a city's jail policy because the plaintiff was released from jail prior to filing her lawsuit and the city had discontinued the policy); *Preston v. Gutierrez*, 1993 U.S. Dist. LEXIS 10339, at *8 (W.D. Mo. July 23, 1993) (finding that the plaintiff had standing because "at the time the plaintiff filed his complaint, the objectionable practice had not ceased").

As the Third Circuit has recognized, "sometimes a suit filed on Monday will be able to proceed even if, because of a development on Tuesday, the suit would have been dismissed for lack of standing if it had been filed on Wednesday."[65] The analysis in this case might be different if FSO had filed suit before Code x553 was discontinued. But instead, by the time FSO filed this suit, the practice it was challenging was no longer in place.

2. FSO failed to carry its burden to establish a real and immediate risk that Liberty Mutual would use Code x553 in the future.

Because Liberty Mutual discontinued Code x553 *before* FSO filed suit, FSO must show that "there is a 'real or immediate' threat that [it] will be subjected to the conduct again."[66] A theoretical possibly that Liberty Mutual will reinstate Code x553 is not enough; instead, FSO was required to present evidence that the challenge Code "*will likely occur* or continue, and that the threatened injury [*is*] *certainly impending*."[67]

The Superior Court did not hold FSO to that burden. In its original motion to dismiss order, which the court later cited favorably in its summary judgment order, the Court found that FSO had standing because Liberty Mutual was "still defending

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[65] *Hartnett*, 963 F.3d at 306.

[66] *Heredia*, 2021 U.S. Dist. LEXIS 224659, at *17–18.

[67] *Friends of the Earth*, 528 U.S. at 190 (emphasis added).

the practice [of using Code x553] leaving the specter of its use in the future."[68] But the "specter" that Liberty Mutual could conceivably use Code x553 in the future does not establish that it is *likely* that FSO faced a real, immediate, or impending threat of future use—which is what is necessary to establish standing. Further, the law is clear that Liberty Mutual's refusal to admit past wrongdoing does not confer standing over a declaratory judgment claim concerning a practice that was discontinued before the lawsuit. The U.S. Supreme Court and lower federal courts have explained that concerns about "voluntary cessation" or something being capable of repetition yet evading review "only appl[y] where the defendant ceases the challenged conduct *after* suit is filed."[69]

At summary judgment, the Superior Court again found standing, ignoring the fact that FSO offered no evidence that Liberty Mutual (who has not used Code x553 since summer of 2018) was likely to use Code x553 in the future. The Court provided no analysis whatsoever concerning the likelihood (or *un*liklihood) that Code x553 would be used again. That lack of analysis is striking given that it is undisputed that Liberty Mutual discontinued Code x553 six months before FSO filed this lawsuit as

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[68] A262.

[69] *Freedom from Religion Found.*, 581 F. Supp. 2d at 1025–26; *see also Renne*, 501 U.S. at 320 ("The *mootness* exception for disputes capable of repetition yet evading review . . . will not revive a dispute which became moot *before* the action commenced.") (emphasis added).

part of a corporate-wide migration to a new bill-review platform that had nothing to do with pending or anticipated litigation.[70]

The Superior Court offered several observations in support of its decision. But each is irrelevant to the standing analysis and insufficient to justify the Court's decision to allow this suit to continue.

First, the Superior Court referenced its motion-to-dismiss decision that FSO had standing because Liberty Mutual was "unwilling to admit that [it] violated 19 *Del. C.* § 2322F(e)" and thus "may return to [its] old ways in the future."[71] The extent to which that earlier decision influenced the Court's summary-judgment decision is unclear.[72] But any reliance on voluntary cessation or mootness principles is error because it prematurely shifts the burden to Liberty Mutual before FSO has carried its burden to show a concrete threat of future injury *at the time the case was filed*.

Second, the Superior Court cited *Sanborn v. Geico General Insurance Company*,[73] a case where another court found that a plaintiff had standing to seek declaratory relief concerning a discontinued practice.[74] But *Sanborn* supports

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[70] A765 ¶ 6.

[71] Opinion & Order at 15.

[72] *Id.* at 19.

[73] 2016 Del. Super. LEXIS 61 (Del. Super. Ct. Feb. 1, 2016).

[74] Opinion & Order at 16–17.

Liberty Mutual's position. The *Sanborn* court concluded that the plaintiff had standing only after repeatedly observing that the defendant changed its practices *after* the lawsuit was filed.[75] Because the practice was discontinued *after* the lawsuit was filed, post-suit discontinuation would not have impacted *standing*. The relevant inquiry, then, should concerned *mootness*, and the burden would have rested on the defendant to show the claim was moot. *Sanborn* does not apply to a declaratory judgment action like this one challenging a practice discontinued *before* the lawsuit.

Finally, the Superior Court concluded that FSO had established standing because past instances where Code x553 had resulted in "delayed processing of its claims for payment" and because Code x553 had been used for earlier claims without being withdrawn.[76] But both of those observations ignore that FSO's single declaratory judgment claim offers only prospective relief, which is why FSO must demonstrate a "real or immediate" risk of *future* injury[77] that "will likely occur" and is "certainly impending."[78] The fact that FSO suffered injury in the past would be

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[75] *Sanborn*, 2016 Del. Super. LEXIS 61, at *5 ("In January 2013, *subsequent to the instant action being filed*, GEICO implemented a new claims-handling policy.") (emphasis added); *id.* at *21 ("The Court finds that Ms. Sanborn has established an injury-in-fact. *At the time Ms. Sanborn filed this action*, GEICO's *then-current* policy did not routinely seek recovery of the deductibles of its insured until the applicable deductible was exhausted.").

[76] Opinion & Order at 18–19.

[77] *Heredia,* 2021 U.S. Dist. LEXIS 224659, at *17–18.

[78] *Friends of the Earth*, 528 U.S. at 189.

relevant only if FSO were seeking monetary damages—which are not at issue in this case. "[T]he fact of past injury . . . does nothing to establish a real and immediate threat that he would again' suffer similar injury in the future [for purposes of a claim for declaratory judgment]."[79]

There is no evidence that Liberty Mutual will reinstate Code x553—let alone evidence that it is "likely" or "certain" to do so. Liberty Mutual used its previous bill review software for more than twenty years.[80] After going through the costly process of a corporate-wide migration to a new bill review platform that does not include Code x553, there is simply no valid basis to assume Liberty Mutual will return to the now-discarded code. Moreover, Liberty Mutual's corporate representative, who provided the declaration describing the migration to the new software, stated in her declaration that she was "authorized to declare, on behalf of the above-named Defendant companies, that Defendants will not use code x553 or the language of that challenged explanation . . . now or at any time in the future."[81] The record in this case cannot support a finding that FSO has standing to pursue its claim for declaratory relief. The judgment below should be reversed.

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[79] *Adarand Constructors*, 515 U.S. at 210–11.

[80] *Compare* A786 (denial using Code x553 dated December 1, 2000), *with* A765 ¶ 4 (declaring that Liberty Mutual shifted billing platforms in 2018).

[81] A766 ¶ 8.

II. THE COURT ERRED IN FINDING THAT FSO'S DECLARATORY JUDGMENT CLAIM WAS NOT BARRED BY THE STATUTE OF LIMITATIONS.

A. Question Presented

Whether the governing statute of limitations bars FSO from bringing a declaratory judgment claim challenging a practice that FSO knew about and thought was illegal more than a decade before it filed suit?[82]

B. Scope of Review

The Court reviews whether a claim is barred by statute of limitations *de novo*.[83]

C. Merits of Argument

Because FSO's claim is statutory in nature, it is subject to a three-year statute of limitations.[84] FSO filed this lawsuit on January 19, 2019.[85] Thus, FSO's claim is barred if it accrued before January 31, 2016. The undisputed evidence confirms that the claim accrued much, much earlier than that.

FSO first received the challenged denial more than 20 years ago, and testified

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[82] A295; A401; A552–55; A964–67.

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

[84] *See* 10 *Del. C.* § 8106.

[85] A33.

that it believed that the language violated the WCA at least as early as 2009.[86] And FSO admitted that nothing prevented it from filing this lawsuit as early as 2009 or at any time between 2009 (when FSO first thought Code x553 violated the WCA) and when it finally filed suit in January 2019.[87]

On those facts, FSO waited too long to bring its statutory claim. The Superior Court acknowledged that FSO's "declaratory judgment claim is based on Defendants' general practice of sending EOBs with Code x553."[88] And it also acknowledged that FSO knew about its claim long before it filed suit and waited to file suit until "the offending practice had become widespread enough to threaten Plaintiff's bottom line."[89] Nonetheless, the Court held that FSO's claims were timely because FSO is "challenging both the general language of Code x553 and the 19 discrete invoices sent within the three-year period before the Complaint was filed."[90]

The Superior Court's order is inconsistent with FSO's complaint and its own

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[86] A685:20–A686:14 (testifying that FSO believed Code x553 did not comply with the WCA as early as 2009).

[87] *See* A712:02–A713:14 ("Q. And so is there any reason that FSO could not have filed the lawsuit that it eventually filed in January of 2019 as early as 2008? A. No, there wouldn't have been a *reason* . . . Q. And FSO could have filed this lawsuit in 2009 also if it wanted to, correct? A. Right, yes. . . . .").

[88] Opinion & Order at 13.

[89] *Id.*

[90] *Id.*

earlier motion-to-dismiss order. FSO does not assert claims in its complaint related to individual invoices, and indeed the Superior Court previously observed that this case does not concern individual patient-level claims.[91] On the contrary, FSO's complaint contains a single claim for declaratory judgment, which asks the Court to make a declaration about the textual sufficiency of Code x553. FSO knew all the facts relevant to that claim more than a decade before it brought it.

The facts of this case resemble *Kerns v. Dukes*.[92] In that case, the Sussex County Council adopted a resolution in 1990 to expand the sewer system. It was not until 1995, however, that residents began receiving bills with assessments to fund the expansion. The court in that case was faced with deciding whether the statute of limitations for claims challenging the expansion began running in1990 (when the resolution was passed) or whether each new bill with an assessment provided new start date. The court rejected the plaintiffs' attempt to "save their cause of action by arguing that the . . . [later] assessments for the [sewer] were continuing wrongs."[93] Instead, the court held:

> [W]here suit can be brought immediately and complete and adequate relief is available, a cause of action cannot

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[91] *See First State Orthopaedics, P.A. v. Emprs. Ins. Co.,* 2020 Del. Super. LEXIS 226, at *5 (Del. Super. Ct. May 20, 2020) (finding that this "case is about claims handling . . . and not individual benefits").

[92] 2004 Del. Ch. LEXIS 36, at *20 (Del. Ch. Ct. Apr. 2, 2004).

[93] *Id.* at *18–19.

> be tolled as a continuing violation. The only element missing from Plaintiffs' cause of action at the time the Resolution passed was significant money damages giving Plaintiffs' an incentive to bring their action. Injunctive relief, however, was available to *prevent* or reduce any damages.[94]

Other courts have reached similar conclusions. In *Ocimum Biosolutions (India) Ltd. v. AstraZenca UK Ltd.*, [95] for example, the court considered the timeliness of a plaintiff's claim that the defendant breached a contract by using the plaintiff's trade secrets with third-party collaborators. The plaintiffs argued that the defendant's repeated use of their trade secrets created a continuing breach, thus tolling the limitations period. As in *Kerns*, the *Ocimum* court rejected plaintiff's position, holding that "[i]f a plaintiff could allege a prima facie case for breach of contract after a single incident, the [continuing breach] doctrine does not apply, even if the defendant engages in 'numerous repeated wrongs of similar, if not [the] same, character over an extended period.'"[96]

The same reasoning from *Kerns* and *Ocimum* applies here. In declining to apply the statute of limitations, the Superior Court accepted FSO's argument that a plaintiff can sit on its hands until a challenged practice "bec[o]me[s] widespread

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[94] *Id.* at *20.

[95] 2019 Del. Super. LEXIS 640 (Del. Super. Ct. Dec. 4, 2019).

[96] *Id.* at *35.

enough to threaten its bottom line."[97] That is wrong. A plaintiff cannot wait until the problem is widespread enough to create an "incentive" to sue.[98] The record is clear that FSO could have filed the exact same suit that it eventually brought in 2019 as early as 2009, and if it had that would have "*prevent*[*ed*] or reduce[d] any damages."[99] The Superior Court's order effectively creates an endless statute of limitations for declaratory judgment claims challenging a policy or practice. That position should be rejected.

[97] A1069; Opinion & Order at 13.

[98] 2004 Del. Ch. LEXIS 36, at *20.

[99] *Id.*

III. THE SUPERIOR COURT HOLDING THAT CODE X553 VIOLATES 19 *DEL. C.* § 2322F(E) IS UNSUPPORTED BY STATUTE OR THE RECORD.

A. Question Presented

Whether the Superior Court erred in holding as a matter of law, and notwithstanding all undisputed evidence to the contrary, that Code x553 fails to satisfy 19 *Del. C.* § 2322F(e), which the Superior Court interpreted to require "meaningful" explanations of denial?[100]

B. Scope of Review

This Court reviews the Superior Court's orders considering motions to dismiss and motions for summary judgment *de novo*.[101] When reviewing a trial court's disposition of a motion to dismiss, the Court must "determine whether the judge erred as a matter of law in formulating or applying legal precepts."[102] The Court should affirm the Superior Court's order granting summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[103]

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[100] A66–69; A195–97; A292; A295; A398; A400–01; A555–57; A951–55.

[101] *See, e.g.*, *Furman*, 30 A.3d at 773; *Brown v. United Water Del., Inc.*, 3 A.3d 272, 275 (Del. 2010).

[102] *Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156, 1160 (Del. 2010).

[103] Del. Super. Ct. Civ. R. 56(c).

C. Merits of Argument

FSO's asserts a single claim in this case: that the explanation associated with Code x553 is not a "written explanation of reason for denial" under 19 *Del. C.* § 2322F(e). In ruling on Liberty Mutual's motion to dismiss, the Superior Court concluded that Section 2322F(e) was not satisfied by any "written explanation" but instead held that the explanation must be "meaningful."[104] But the Court did not provide further clarity on how to assess whether a denial was "meaningful." And, at least at the motion to dismiss stage, the Court was "unwilling" to rule on whether the "profered [sic] explanation satisfies the notice provision as a matter of law."[105] The Superior Court then followed that same logic at summary judgment, holding that Code x553 was meaningless as a matter of law.

The Superior Court's first error was adding the word "meaningful" into a statute that does not include that word. Section 2322F(e) requires only a "written explanation of reason for denial."[106] The Court's interpretation of what that statute requires "must, in the first instance, be sought in the language in which the [provision] is framed, and if that is plain . . . the sole function of the courts is to

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[104] A261 ("But for me it does not rewrite subsection 2322F(e) by requiring any denial be meaningful.").

[105] *Id.*

[106] 19 *Del. C.* § 2322F(e).

enforce [the statute] according to its terms."[107] The Court must "not engraft upon a statute language which has clearly been excluded therefrom."[108] "[I]f the General Assembly had intended" to include a meaningfulness requirement in Section 2322F(e) "it would have done so."[109]

There is no dispute that an insurer violates the statute if it denies an invoice with no explanation at all. But by providing a written denial form stating that the invoice was "not authorized" (or there was not "prior authorization"), Liberty Mutual provided the "written explanation" that the statute requires. Although the Superior Court never offered a standard for assessing "meaningfulness," it appears that it equated a "meaningful" denial with a "correct" denial. But that is not the purpose of Section 2322F(e). If FSO or a healthcare provider believes the explanation is incorrect, it can take the written explanation and appeal it to the Industrial Accident Board—the administrative body created by the General Assembly to hear these kinds of disputes—and a provider is entitled to interest if it prevails.[110]

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[107] *Arnold v. State*, 49 A.3d 1180, 1183 (Del. 2012).

[108] *Leatherbury v. Greenspun*, 939 A.2d 1284, 1291 (Del. 2007).

[109] *Id.*

[110] The Delaware General Assembly vested the IAB with "jurisdiction over cases arising under Part II of [the WCA]" and instructed that the IAB "shall hear *disputes as to compensation* to be paid under Part II." 19 Del. C. § 2301A(i) (emphasis added). Section 2322F(e) is located under Part II of the WCA.

Even accepting the Superior Court's flawed interpretation, the evidence demonstrates that Code x553 complies with Section 2322F(e), even under a "meaningfulness" standard. Discovery confirmed that Code x553 was not a tautological response as FSO claimed in its complaint (FSO alleged that Code x553 says "we won't pay because we say so"), but instead demonstrated that healthcare providers, including FSO, understood Code x553's meaning. FSO's corporate designee testified that "when [it] saw Explanation 553, it understood that the claim was being denied based on [a] lack of prior authorization."[111] That is exactly the message Liberty Mutual intended to send.[112]

Indeed, the concept of prior authorization is well understood by those in the healthcare industry. The federal government's healthcare.gov website explains that "preauthorization" is:

> A decision by your health insurer or plan that a health care service, treatment plan, prescription drug or durable medical equipment is medically necessary. Sometimes called prior authorization, prior approval or precertification. Your health insurance or plan may require

[111] A708:11–15.

[112] A899:22–A900:1 (Liberty Mutual's designee testifying that "the information that [Code x553] provides the health care provider is that this service requires preauthorization").

> preauthorization for certain services before you receive them, except in an emergency.[113]

FSO testified that its understanding of the prior authorization requirement was consistent with the federal definition.[114] FSO further agreed that a lack of prior authorization is, in some circumstances, a valid reason for denying a health care invoice.[115] Given that testimony, it is no surprise then that when pressed, FSO even conceded that Code x553 *is a written explanation of reason for denial*:

> Q. And you don't dispute that [the] statement [associated with Code x553] is a written explanation of the reason for denial, correct?
>
> A. It *is* a written explanation of the reason for denial.[116]

Asked again, FSO's designee testified that she "can definitely define that [Defendants] provided a written explanation of reason for denial."[117]

Perplexed by those answers, Liberty Mutual pressed FSO's corporate

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113 "Preauthorization," Glossary, HealthCare.gov, https://www.healthcare.gov/glossary/preauthorization.

114 A704:11–A706:11 (FSO's designee explaining that FSO understands what prior authorization is and that FSO's understanding is consistent with federal definitions found on healthcare.gov); *see also* A900:5–15 (Liberty Mutual's designee testifying that the concept of prior authorization is "widely known").

115 *See* A706:12–A707:2 ("Q. And so in those instances where preauthorization is required and permitted under the law, it would be appropriate for the health insurer to deny an invoice and say that there was not prior authorization for the treatment, correct? A. Yes.").

116 A662:10–14 (emphasis added).

117 A663:4–6.

designee about the nature of its claim in this case. In response, FSO explained that its disagreement with Code x553 has nothing to do with § 2322F(e), whether Code x553 is a "written explanation of reason for denial," or whether the code has meaning. Instead, FSO believes Code x553 was improperly issued to FSO because FSO falls into a category of "certified" healthcare providers that are not subject to a prior authorization requirement under the WCA.[118] FSO confirmed repeatedly that it understood the explanation but simply disagreed with its use as to FSO.[119]

That testimony reveals a gaping hole between what FSO believes is the problem with Code x553 and the legal theory asserted in the complaint. Whether FSO is subject to a prior authorization requirement *is not an issue in this case*—a point which FSO has conceded in its briefing.[120] The only question set forth in the

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[118] A658:13–A659:2 ("Q. And so it is your understanding that [Code x553] was improper because FSO was not obligated to secure prior authorization for those claims? A. That code was not proper because Delaware Workers' Comp Statutes say that no prior authorization is needed. Q. And so your understanding of the claim in this case . . . is it that . . . FSO did not understand the explanation or that the Defendants were wrong to apply it to their specific invoices? A. Liberty Mutual was wrong in applying it.").

[119] *See, e.g.*, A708:16–23 ("Q. And so, again, the disagreement here is FSO's view that this was not a service that required prior authorization, right? A. Yes. Q. But FSO [is] not saying we don't understand the explanation; it [is] just saying we disagree with the explanation? A. Yes.").

[120] A874 (FSO stating in its opposition to Liberty Mutual's Motion for Summary Judgment that whether FSO is exempt from prior authorization "is not the subject of this lawsuit.").

complaint is whether Code x553 constitutes a "written explanation of reason for denial" under 19 *Del. C.* § 2322F(e). And on that issue, all evidence in the record—including FSO's own binding corporate admissions—confirm that the answer is yes.

Without *any* contradictory evidence to point to, FSO nonetheless tried to salvage its position through unsupported assertions in its brief, baldly asserting that "FSO and [its designee] clearly struggle to understand what Liberty's 'explanation' means."[121] And at oral argument, FSO's counsel offered further *ipse dixit*, arguing that its corporate testimony should be discounted because FSO's designee "may not have a college degree" and "may not have gone to community college."[122] Those arguments are invalid. Rule 30(b)(6) testimony is binding on the party.[123] While a party may be permitted to contradict 30(b)(6) testimony in some instances, it must do that *with evidence*; it cannot rest on lawyer *ipse dixit*.[124] Nor can a party claim the witness was unprepared:

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[121] A878.

[122] A1195:23–A1196:3, A1279:15–16.

[123] *E. I. Dupont De Nemours & Co. v. Admiral Ins. Co.,* No. 89C-AU-99-1-CV, 1994 Del. Super. LEXIS 798, at *9 (Del. Super. Ct. July 7, 1994) ("There is, however, an important difference which make the Rule 30(b)(6) deposition significant. The defendants, as parties, are not bound by the testimony of witnesses but would be bound by the testimony of persons designated for a Rule 30(b)(6) deposition.").

[124] *TrustCo Bank v. Mathews,* No. 8374-VCP, 2015 Del. Ch. LEXIS 18, at *44 (Del. Ch. Jan. 22, 2015) ("Plaintiffs have offered no explanation as to why they should not be bound by their own admission and the consistent testimony of their Rule

> [Rule 30(b)(6)] implicitly requires such persons to review all matters known or reasonably available to it in preparation for the Rule 30(b)(6) deposition. This interpretation is necessary in order to make the deposition a meaningful one and *to prevent the "sandbagging" of an opponent by conducting a half-hearted inquiry before the deposition but a thorough and vigorous one before the trial.* This would totally defeat the purpose of the discovery process.[125]

Under Rule 56, a party opposing summary judgment must cite "specific facts showing that there is a genuine issue for trial."[126] FSO has never cited facts that contradict its admissions.

And the Superior Court did not cite evidence either. Instead, the Court merely concluded that the explanation was not "meaningful." But the Court reached that conclusion apparently by concluding that the explanation was not meaningful to the Court—ignoring the undisputed evidence that FSO understood the explanation all along. Indeed, the Superior Court's discussion spans seven pages,[127] but the first six are focused exclusively on establishing the Court's authority to direct summary

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30(b)(6) witnesses. Mere *ipse dixit* in their briefing . . . is insufficient to create a genuine dispute of material fact.").

[125] *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.,* No. 00C-07-161-JRJ, 2003 Del. Super. LEXIS 306, at *17 (Del. Super. Ct. Sept. 2, 2003) (emphasis in original).

[126] Del. Super. Ct. R. 56(e).

[127] Opinion & Order at 21–27.

judgment *sua sponte*. And its ultimate explanation for its ruling consists largely of a statement that it "disagree[d]" with Liberty Mutual's position.[128]

The most the Court offered was an unsupported conclusion that healthcare providers "must be able to make an informed decision whether or not to challenge particular denials," and Code x553 does not afford that opportunity.[129] But the record is clear that FSO had the information it needed to make an informed decision. Section 2322(e) does not require correct denials. It requires "written" denials. If FSO understood Code x553 was a denial based on a lack of prior authorization, and if it believed that denial was improper, FSO had everything it needed to appeal the denial through the administrative process created by the General Assembly.[130] If it had done so, the need for this case may have been eliminated a decade ago.

The Superior Court ignored the record and effectively held that Section 2322F(e) requires an explanation that is "meaningful" to the judge assigned to the case. That ruling was wrong and should be reversed.

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[128] *Id.* at 26.

[129] *Id.* at 27.

[130] *See supra* n.110 (describing the IAB's jurisdiction).

CONCLUSION

The judgment of the Superior Court should be reversed and judgment should be entered in Liberty Mutual's favor.

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