EFiled: Jul 25 2023 02:20PM EDT
Filing ID 70479362
Case Number 27,2023D

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. 27,2023D Court Below: Superior Court of the State of Delaware C.A. No. S19C-01-051 CAK

APPELLANTS' AMENDED, CORRECTED REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL

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Dated: July 25, 2023

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PRELIMINARY STATEMENT

FSO's opposition is a masterclass in misdirection and red herrings. FSO grasps at straws when it tries to explain how it had standing to assert a declaratory judgment action concerning a denial code that was discontinued before it filed this lawsuit. It similarly struggles to explain how its claim is not barred by the statute of limitations even though, by its own sworn admissions, it knew every fact necessary to bring its declaratory judgment claim ten years earlier. And when forced to reckon with the merits, FSO resorts to adding words to a statute that it admits is unambiguous and ignoring its own sworn testimony proving that it understood the denial code's written explanation from the start.

Without a good response to the defects raised in Liberty Mutual's appeal, FSO tries to distract this Court by filing a cross-appeal concerning a class-certification issue that it hardly paid lip service to below—even when the Superior Court raised the issue at oral argument. But as described in detail below, the cross-appeal fails, too. The Superior Court properly exercised its discretion to deny Rule 23(b)(2) class certification because classwide declaratory relief was not "appropriate" where it would not afford any relief beyond the relief afforded in an individual action. There was nothing unusual or "unprecedented" about the Superior Court's approach; it has been followed by the vast majority of federal courts for more than fifty years.

REPLY IN SUPPORT OF ARGUMENT ON APPEAL

I. THE SUPERIOR COURT ERRED WHEN IT HELD THAT FSO HAD STANDING TO SEEK DECLARATORY RELIEF CONCERNING A PRACTICE THAT WAS DISCONTINUED BEFORE FSO FILED THIS LAWSUIT.

FSO brings a single claim seeking a declaratory judgment that denial Code x553 violates the WCA's requirement that insurers provide a "written explanation of reason for denial." But by the time FSO filed its complaint in January 2019, Liberty Mutual had already discontinued the Code, so there was no longer a live controversy that could be redressed through a judicial declaration.

In its opening brief, Liberty Mutual explained in detail why the discontinuation of Code x553 six months *before* FSO filed this lawsuit means that FSO lacked standing to assert its claim for declaratory judgment when the case was filed. Liberty Mutual cited decisions from courts across the country—including the U.S. Supreme Court, federal appellate courts, and trial courts—that all hold that plaintiffs lack standing to seek declaratory relief for a policy or practice that ended before the lawsuit was filed.[1] The law is settled. And yet, FSO does not even acknowledge the law (a recurring theme in FSO's brief), let alone explain why it doesn't apply to the facts of this case.

Instead, FSO presses a series of irrelevant and misleading arguments. First,

[1] LM Br. 4–5 & n.7; *id.* at 21–22 & n.64 (collecting cases).

FSO criticizes Liberty Mutual for relying on U.S. Supreme Court precedent instead of this Court's decision in *Dover Historical Society v. City of Dover Planning Commission*.[2] But Liberty Mutual has explained that standing principles are the same under both federal law and Delaware law.[3] *Dover* sets out traditional federal standing requirements, including that a plaintiff must show (1) that it suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent; (2) that the injury is fairly traceable to the challenged conduct; and (3) that the injury will likely be redressed by a favorable decision.[4] That is the same test that courts across the country apply when holding (as the Superior Court should have held here) that a plaintiff lacks standing to seek a declaratory judgment concerning a practice that was discontinued before the lawsuit.[5]

An analysis of standing also requires an understanding of the claim asserted. FSO, however, ignores how declaratory judgment actions work. A declaratory

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[2] 838 A.2d 1103 (Del. 2003).

[3] LM Br. 20 n.57 (citing *Dover*, 838 A.2d at 1111 (the "requirements for establishing standing under Article III to bring an action in federal court are generally the same as the standards for determining standing to bring a case or controversy within the courts of Delaware")).

[4] 838 A.2d at 1110.

[5] *See*, *e.g.*, *Davis v. Conn. Dep't of Corr.*, 169 F. Supp. 3d 311, 316–17 (D. Conn. 2016); *Freedom from Religion Found., Inc. v. City of Green Bay*, 581 F. Supp. 2d 1019, 1031 (E.D. Wis. 2008).

judgment claim "is inappropriate solely to adjudicate past conduct."[6] Instead, the Declaratory Judgment Act was designed to afford "preventative justice"—that is, to issue rulings on ripe disputes to prevent anticipated future injuries.[7] Given the forward-looking nature of declaratory relief, courts hold that "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.*"[8] FSO, however, never identifies any real or immediate likelihood of future injury.

Instead, FSO focuses exclusively on *past* conduct—the second error in FSO's analysis. FSO argues only that some providers that received Code x553 denials from 2016 to 2018 have not received "corrected explanations."[9] That litigation-manufactured "injury" is not real or immediate. Nor does FSO explain how the declaration it seeks (and received below) would redress any "continuing effect"

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[6] *Corliss v. O'Brien*, 200 F. App'x 80, 84 (3d Cir. 2006); *see also Del. State Univ. Student Hous. Found. v. Ambling Mgmt. Co.*, 556 F. Supp. 2d 367, 374 (D. Del. 2008).

[7] *Hampson v. State ex rel. Buckson*, 233 A.2d 155, 156 (Del. 1967).

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

[9] FSO Br. 46–49. Liberty Mutual would respond to FSO's creative analogy about Vladimir Putin's "nod[ding] in agreement" to remarks about Ukraine's sovereignty (*id.* at 48), but it doesn't understand FSO's point.

arising from the fact that a healthcare provider somewhere in the State still holds a piece of paper from 2016 with Code x553 on it. There is no "continuing effect" from that seven-year-old piece of paper. And even if there was, a declaration alone (which is all FSO can obtain in this case) would do nothing to remedy it.[10]

It appears that what FSO really wants is some sort of injunction, but it is well settled that the Delaware Superior Court lacks jurisdiction to issue injunctions.[11] Thus, the Superior Court here lacked the power to compel Liberty Mutual to reissue denials from 2016 (which would not accomplish anything anyway). Indeed, when that prospect came up during the hearing, the Superior Court made clear: "I don't have any power to issue injunctions."[12] The Court reiterated later that Delaware still recognizes a "separation of equity and law" and that "there are extremely limited circumstances where [a superior court judge] can issue an injunction, and they are

[10] *See, e.g.*, *Clarry v. United States*, 85 F.3d 1041, 1049 (2d Cir. 1996) ("[T]he policy challenged by the plaintiffs was repealed . . . before the plaintiffs filed the amended complaint. Therefore, neither a declaratory judgment that the repealed policy is unconstitutional nor an injunction prohibiting the [defendant] from enforcing the policy would benefit the plaintiffs in any way.").

[11] *See Cunningham v. Horvath*, 860 A.2d 809, 809 (Del. 2004) ("To the extent Cunningham sought other injunctive relief, the Superior Court lacked jurisdiction to issue such relief."); *Kerns v. Dukes*, 707 A.2d 363, 368 (Del. 1998) ("The Court of Chancery has exclusive jurisdiction where injunctive relief is sought."), *overruled in part on other grounds by Scion v. Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 685 & n.94 (Del. 2013).

[12] A1173:14–15.

nothing to do with these kinds of cases."[13] As a result, any (nonexistent) "ongoing harm" to providers who received the Code between 2016 and 2018 cannot "be redressed" by the declaration FSO seeks.[14] FSO never addresses the redressability requirement.

Finally, FSO once again argues—as it has at every level of these proceedings—that it has standing because Liberty Mutual won't concede that Code x553 violated the WCA.[15] According to FSO, a plaintiff always has standing if a defendant refuses to admit that it violated the law. That is absurd. The fact that Liberty Mutual has disagreed with FSO's legal theory (in briefs filed *during* this lawsuit) could never establish that FSO had standing *when the suit was filed*. Indeed, Liberty Mutual did not even know about FSO's legal theory until it filed this case.

FSO's argument goes to a justiciability doctrine that considers what to do with disputes that are mooted after the case is filed but are "capable of repetition yet evading review." But that is a mootness principle. By raising the argument in this case, FSO conflates standing with mootness—two distinct legal doctrines.[16]

For standing, the plaintiff bears the burden to show it had standing at the time

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[13] A1266:13–17.

[14] 838 A.2d at 1110.

[15] FSO Br. 49–52.

[16] LM Br. 19–21.

the case was filed. If a plaintiff meets its burden to establish standing when the case was filed (which FSO did not) and then the defendant later discontinues the challenged practice during the lawsuit, the relevant issue is *mootness*. Unlike with standing, the defendant bears the burden to show that a case has become moot and that no exception applies, such as when a dispute is capable of repetition yet evading review. But this is critical: The U.S. Supreme Court has made clear that "the *mootness exception* for disputes capable of repetition yet evading review . . . will not revive a dispute which became moot before the action commenced."[17] Concerns about voluntary cessation "only appl[y] where the defendant ceases the offending conduct *after* suit is filed."[18] In short, timing matters. Mootness is irrelevant here because Liberty Mutual stopped using the Code *before* the lawsuit began, and FSO never carried its burden to establish it was likely to suffer an injury in the future.

The cases FSO cites prove the error and underscore why this case is distinguishable (and in line with the authority Liberty Mutual has cited).[19] *Knox* concerned a legal challenge to a labor union's charging fees to nonunion employees.[20] After the lawsuit was filed—in fact, after all lower court proceedings

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[17] *Renne v. Geary*, 501 U.S. 312, 320 (1991).

[18] *Freedom from Religion Found.*, 581 F. Supp. 2d at 1025–26.

[19] FSO Br. 50 (citing *Knox v. SEIU, Loc. 1000*, 567 U.S. 298 (2012) and *Cooper v. Charter Commc'ns Entm't I, LLC*, 760 F.3d 103 (1st Cir. 2014)).

[20] 567 U.S. at 305–06.

had concluded and the Supreme Court granted certiorari—the defendant union refunded the fees and then argued that the Supreme Court appeal should be dismissed as moot.[21] The Court rejected the argument, noting that "[s]uch post-certiorari maneuvers designed to insulate a decision from review by [the Supreme Court] must be viewed with a critical eye" and create a risk that the practice will be resumed after dismissal.[22] The procedural posture in *Cooper* was similar. The plaintiffs there sued a utility company for failing to provide a credit for periods of interrupted service.[23] After the case was filed, the utility company issued a credit for the one storm identified in the complaint but took the position that it was not required to issue credits for future power outages.[24] The Court found that the case was not moot because a question remained as to the utility company's behavior going forward.[25]

Neither of those *mootness* cases applies to the *standing* question raised in this appeal.[26] Nor are the facts comparable. Here, Liberty Mutual discontinued Code

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[21] *Id.* at 307.

[22] *Id.*

[23] 760 F.3d at 105.

[24] *Id.*

[25] *Id.* at 107.

[26] *See, e.g.*, *N. Arapaho Tribe v. Ashe*, 925 F. Supp. 2d 1206, 1212 (D. Wyo. 2013) (explaining the legal distinction between standing and mootness and the impact of the timing of the discontinuation on which doctrine applies, and then holding that plaintiffs lacked standing because the challenged practice "had ceased by the time Plaintiffs filed their amended complaint").

x553 months before FSO filed this lawsuit as part of a system-wide migration to a new bill review software—not to avoid litigation or preclude judicial review.[27] And Liberty Mutual's legal contention that it did not violate the law before 2018 is not intended to preserve any ability to use the Code in the future. Defending actions taken in the past does not mean a defendant is likely to do the same thing in the future. This case is proof. Liberty Mutual has submitted a sworn declaration that it "will not use code x553 or the language of that challenged explanation . . . now or at any time in the future,"[28] and even offered to stipulate to the entry of a consent judgment legally precluding them from ever using the Code again.[29]

The standing analysis is simple. FSO asserts a single claim for declaratory judgment. That claim is focused exclusively on the legal sufficiency of a denial message that was permanently discontinued six months before FSO filed suit. The law is settled: Under those circumstances, FSO lacked standing to assert a claim for declaratory judgment concerning Code x553 at the time it filed its complaint.

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[27] A765 ¶¶ 3–7.

[28] A766.

[29] *See, e.g.*, A551–52; A1183:13–21 (offering to "stipulate to a binding judgment from the Court saying [Liberty Mutual is] not allowed to use [Code x553]" and stating that "we [Liberty Mutual], of course, would be legally required to follow Your Honor's order").

II. FSO'S SINGLE-COUNT CLAIM FOR DECLARATORY JUDGMENT CONCERNING LIBERTY MUTUAL'S (DISCONTINUED) BUSINESS PRACTICE IS BARRED BY THE STATUTE OF LIMITATIONS.

This case is barred by the statute of limitations because FSO filed it at least seven years too late. As FSO admits, it "commenced this proposed class action to challenge the defendants' *practice* of responding" to invoices with the Code[30] and to ensure "a fair and lawful claims-handling *process*."[31] That "practice" and "process" started more than twenty years ago, and FSO admits that it has known all the facts necessary to "challenge [that] practice" or litigate questions related to that "process" as early as 2009.[32] FSO filed this case in 2019, long after the three-year limitations period elapsed.

Hoping to avoid the statute of limitations, FSO ignores its previous characterization of its claims as challenging a "practice" or "process" and, instead, argues that it is challenging Code x553 as used in "*specific* transactions" between 2016 and 2018.[33] In other words, FSO argues that the statute of limitations started anew with each identical piece of paper that Liberty Mutual issued—even though the *practice* never changed. That argument fails for three reasons. First, FSO is not

[30] FSO Br. 1.

[31] *Id.* at 2.

[32] LM Br. 14–16; A686:19–690:23; A712:2–15.

[33] FSO Br. 54.

asking the court to redress harm for *each* identical Code that Liberty Mutual issued. Things might be different if FSO asked for monetary damages triggered by each additional denial, but that's not the relief it is seeking. FSO seeks only a declaratory judgment that Liberty Mutual's longstanding *practice* is unlawful—a practice it has known about for decades. Second, FSO tries to advance those transaction-specific claims as an assignee of its patients without producing or providing the Court with a copy of the assignment. FSO cannot rely on purportedly assigned claims without proving it has the right to assert them.[34] Third, the Superior Court cannot in the first instance hear claims challenging payment activity on single invoices. Instead, providers (like FSO) and patients who challenge discrete invoices must do so in proceedings before Delaware's Industrial Accident Board ("IAB").[35]

FSO's attempt to distinguish the cases cited by Liberty Mutual is unavailing. In *Kerns*, the plaintiffs argued that each new bill with a sewer assessment restarted

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[34] *See PVP Aston, LLC v. Fin. Structures Ltd.*, 2022 Del. Super. LEXIS 232, at *26 (Del. Super. Ct. May 31, 2022) (standing requires a valid assignment); *see also Progressive Spine & Orthopaedics, LLC v. Empire Blue Cross Blue Shield*, 2017 U.S. Dist. LEXIS 26671, at *12 (D.N.J. Feb. 27, 2017) (dismissing claims predicated on assignment where "Plaintiff did not set forth the actual language from the assignments in its complaint nor did it include a copy of the alleged assignments."); *Cohen v. Horizon Blue Cross Blue Shield of N.J.*, 2015 U.S. Dist. LEXIS 140344, at *7 (D.N.J. Oct. 15, 2015) (same).

[35] 19 *Del. C.* § 2301A(i) (IAB has "jurisdiction over cases arising under Part II of [the WCA]"); 19 Del. C. § 2350 (Superior Court has "jurisdiction to hear and determine all *appeals* [from the IAB]").

the limitations clock[36]—just like FSO argues here that each additional denial code restarted the clock. But the *Kerns* court disagreed, holding that the limitations period began running as soon as the plaintiff could file a lawsuit to achieve "complete and adequate relief."[37] Similarly, in *Ocimum*, the court rejected the plaintiff's attempt to extend the limitations period after noting that the plaintiff could have brought the same case, and achieved full relief, "after a single incident."[38] So too here. FSO could have filed this lawsuit "challenging the defendants' practice" of using Code x553 in 2009. All the facts relevant to the declaratory judgment it seeks in this case were known and available then. As a result, its claims are time barred.

[36] *Kerns v. Dukes*, 2004 Del. Ch. LEXIS 36, at *16 (Del. Ch. Ct. Apr. 2, 2004).

[37] *Id.* at *19–20.

[38] *Ocimum Biosolutions (India) Ltd. v. AstraZeneca UK Ltd.*, 2019 Del. Super. LEXIS 640, at *35 (Del. Super. Ct. Dec. 4, 2019).

III. THE SUPERIOR COURT ERRED IN HOLDING THAT CODE X553 VIOLATES 19 *DEL. C.* § 2322F(E)'S WRITTEN EXPLANATION REQUIREMENT.

In its opening brief, Liberty Mutual explained that the Superior Court committed legal error when it added the world "meaningful" into an unambiguous statute that did not contain that term. FSO twists that argument, claiming that Liberty Mutual is fighting for the ability to issue meaningless denials.[39] That's not true, as demonstrated by the very testimony that FSO quotes in its brief. Liberty Mutual's corporate designee explained that its denials—including Code x553—are written to be "understood by the health care provider, or anyone in the industry just looking at that description of the denial."[40] Here, the record confirms that FSO correctly understood that Liberty Mutual's use of the word "authoriz[ation]" in Code x553 meant that it was denying invoices for a lack of *prior authorization*—not for some arbitrary, undisclosed reason. FSO may have disagreed with that reason, but that doesn't mean there was no reason, let alone that the offered reason was "meaningless."

But while the evidence shows that the denials were meaningful, the Superior Court nonetheless committed legal error when it injected a "meaningfulness"

[39] FSO Br. 14.

[40] FSO Br. 64 (quoting A928–29).

standard into the statute. FSO's brief exposes the error. FSO admits that 19 *Del. C.* § 2322F(e)'s "language is clear,"[41] which under this Court's statutory interpretation canon means that "the language itself controls."[42] But §2322F(e) does not include the word "meaningful." FSO's argument is inconsistent. It makes no sense to argue that the statute's words are plain and yet frame the entirely statutory analysis around a term not found in the statute's plain text.

Reading a subjective "meaningful" test into an admittedly unambiguous statute that does not contain that term is problematic for another reason: it creates confusion, not clarity. That is especially true considering how the Superior Court construed the term. Although "meaningful" is defined as "having a purpose" or "significant,"[43] the Superior Court effectively construed "meaningful" to mean "correct." Likewise, on appeal, FSO argues that the explanation is not "meaningful" because it is incorrect as to those providers who are not subject to prior authorization requirements.[44] But that cannot be how the statute was intended. Indeed, FSO separately argues that the "written explanation" requirement is intended to ensure that healthcare providers have enough information to decide whether to challenge

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[41] FSO Br. 59.

[42] FSO Br. 58 (quoting *Spielberg v. State*, 558 A.2d 291, 293 (Del. 1989)).

[43] *See* "Meaningful", MERRIAM WEBSTER DICTIONARY (Online ed. 2023), https://www.merriam-webster.com/dictionary/meaningful.

[44] FSO Br. 62.

the denial (before the IAB).[45] But that argument recognizes that some denials will be incorrect. To illustrate, consider the following example. Suppose an insurer denies an invoice because treatment for shoulder pain was "not related to the workplace accident," which the insurer understood was an injury to the elbow. As it turns out, the insurer was mistaken; the workplace accident caused harm to both the shoulder and the elbow, so the procedure should have been covered. Thus, while the insurer issued a good-faith denial with a "meaningful" explanation, the denial was nevertheless incorrect. While the insurer may still be obligated to cover the accident, its denial message did not violate § 2322F(e)'s "written explanation" requirement.

Accordingly, the insurer's obligation to provide a "written explanation" should be no more expansive than an obligation to give the provider enough information to assess whether it agrees or disagrees with the decision. What matters, then, is what providers understood when they received Code x553. FSO and the Superior Court believe that the evidence in the record is irrelevant to that assessment.[46] But courts do not inherently know what denials are "meaningful" to a healthcare provider. They need discovery to tell them. Here, all the evidence shows that providers generally—*and FSO specifically*—understood that the Code was a denial for lack of prior authorization.

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[45] *Id.* 59.

[46] *Id.* 60.

As far back as 2013, FSO wrote a letter to Liberty Mutual challenging a denial with Code x553, stating: "We have a denial on this assistant bill stating that this service is not authorized by case manager. This is a Delaware claim and **prior authorization** is not warranted on open and compensable WC claims."[47] FSO thus understood in 2013 that the Code was about prior authorization. It knew then all it needed to challenge denials on that ground. It could have gone straight to the IAB with its dispute.

FSO's 30(b)(6) designee likewise admitted *repeatedly* that FSO always understood Code x553 to be about prior authorization (even while disagreeing that lack of prior authorization was a proper basis for denying the claim).[48] FSO tries to muddy the record by block quoting one of those passages where its designee testified that FSO believed the Code violated the WCA.[49] But that testimony, even read from FSO's own brief, makes clear that FSO believed the Code violated the WCA because it was wrong (because FSO was not subject to prior authorization requirements)—not because FSO believed the denial was "meaningless" or not a "written explanation of reason for denial."[50]

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[47] A804 (emphasis added).

[48] A658:13–A659:2; A661:23–A663:9; A704:11–A708:23.

[49] FSO Br. 63–64.

[50] *Id.*; A661:23–A663:9.

Liberty Mutual's testimony is the same. FSO quotes testimony from Liberty Mutual's 30(b)(6) designee but misleadingly cuts off her response.[51] When FSO sought an admission that Code x553 did not use the word *pre*authorization, Liberty Mutual's witness testified truthfully that "It does not." But she continued her response by explaining that the industry recognizes multiple ways to say the same thing. Here is the full response, with the emphasized text representing portions that FSO misleadingly omitted from its brief:

> It does not. *But I do believe that the concept of authorization, prior authorization, preauthorization, is a concept that is widely known in – in the industry from health care providers, whether it's workers' compensation or any other insurance line. It's just a concept that we believe is easily understood by someone in the industry, including a health care provider. It's a message that they see frequently, I'm sure.*[52]

We know that Liberty Mutual was correct to believe healthcare providers would understand the explanation because FSO has admitted that it knew the "not authorized" language in the Code was about prior authorization. The fact that FSO disagreed with the written explanation does not mean there wasn't one.

Although FSO has "disputed" those facts in briefs, it has never done so with citations to evidence. There is no evidence that supports FSO's assertions that Code x553 was "confusing." The Superior Court issued its ruling without contending with

[51] FSO Br. 64.

[52] A900:5–15.

the record. Although the Superior Court should never have reached the merits of this case (*see* Section I & II, above), once it did, it should have granted summary judgment in Liberty Mutual's favor. This Court should reverse.

SUMMARY OF ARGUMENT ON CROSS-APPEAL

The Superior Court properly held that Rule 23(b)(2) classwide relief wasn't "appropriate" because a class offered no benefit that FSO's individual action did not. The court gave FSO what it wanted: a declaration that Code x553 violates Delaware law and cannot be used. While Liberty Mutual has appealed that ruling, if it stands, the declaration will bind Liberty Mutual as to all Delaware providers. No purpose is served by converting FSO's individual action into a class action.

Although FSO labels the court's approach "unprecedented," courts have been doing the same thing for a half century. Federal courts applying the materially-identical Federal Rule 23 routinely decline to certify Rule 23(b)(2) classes where "class action designation is largely a formality."[53] At least eight federal circuit courts have upheld or allowed for the denial of a Rule 23(b)(2) class for exactly that reason—a result consistent with the text and spirit of Rule 23. As importantly, it's good policy. It allows judges to manage their dockets and fashion appropriate relief. And it stops enterprising attorneys from abusing the class-action device to circumvent the American Rule to collect attorneys' fees in cases where classwide relief serves no purpose.

FSO stretches its "Summary of Argument" into eight paragraphs but presents only one legal issue that Liberty Mutual denies for the reasons above. Still, we

[53] *Galvan v. Levine*, 490 F.2d 1255, 1261 (2d Cir. 1973).

provide this paragraph-by-paragraph response:

1. Denied. Courts may also consider whether classwide relief would provide any benefit that an individual action doesn't.

2. Denied. The court held that FSO failed to satisfy the requirements of Rule 23(b)(2) because classwide relief wasn't "appropriate."

3. Denied. The court held that FSO didn't satisfy Rule 23(b)(2). There was no three-part test.

4. Denied. The court may consider "need" when deciding whether to certify a class.

5. Denied. Liberty Mutual discontinued Code x553 before this lawsuit began. The court suggested only that injunctive relief could become necessary if Liberty Mutual later reinstates the Code in violation of its order.

6. Denied. Courts have applied the same analysis for fifty years, and Rule 23 remains alive and well.

7. Denied. Courts have applied the same analysis for fifty years, and it has not deterred class-action lawsuits.

8. Denied. The court didn't apply a need *requirement*. Many courts have considered "need" and still certified the class.

STATEMENT OF FACTS ON CROSS-APPEAL

Liberty Mutual relies on the Statement of Facts set forth in its Opening Brief[54] with the following additions that are specific to the issues on cross-appeal. On April 21, 2021, FSO filed a motion for class certification,[55] which it later supplemented on May 26, 2022, after the conclusion of class discovery.[56] Liberty Mutual opposed because FSO didn't meet the requirements of Rule 23(a) or (b).[57] During oral argument, the Superior Court asked the parties: "[W]hy do we even need a class here?"[58] The parties responded at the hearing and in post-hearing briefs.[59] On December 29, 2022, the Superior Court issued its order denying FSO's motion for class certification.[60] The court summarily concluded that FSO satisfied Rule 23(a).[61] But it then held that FSO did not satisfy Rule 23(b)(2) because a class action would not achieve anything that FSO's individual action could not.[62] FSO's cross-appeal followed.

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[54] LM Br. 7–17.

[55] A407.

[56] A807.

[57] A978–1050.

[58] A1107:5.

[59] A1300; A1307–10; A1320–22.

[60] Opinion & Order at 1.

[61] *Id.* at 9.

[62] *Id.* at 9–11.

ARGUMENT IN OPPOSITION TO CROSS-APPEAL

I. THE SUPERIOR COURT PROPERLY HELD THAT A RULE 23(b)(2) CLASS IS NOT APPROPRIATE WHEN CLASSWIDE RELIEF WOULD SERVE THE SAME PURPOSE AS INDIVIDUAL RELIEF.

A. Question Presented

Did the Superior Court properly conclude that it was not appropriate to certify a Rule 23(b)(2) class as a mere formality where it could accomplish the same objectives through an individual action?

B. Scope of Review

This Court reviews a lower court's decision to deny class certification for abuse of discretion. Inasmuch as this Court considers whether the lower court may consider the "need" for classwide relief under Rule 23(b)(2), however, the analysis is *de novo*.[63]

C. Merits of Argument

The Superior Court gave FSO the only thing it asked for: A declaration that Code x553 violates the WCA. While Liberty Mutual disagrees with (and has appealed) the court's ruling, there is no dispute that the ruling (if it stands) binds Liberty Mutual with respect to all Delaware providers. Liberty Mutual has already discontinued the Code and submitted a sworn declaration agreeing not to use it

[63] *In re Celera Corp. S'holder Litig.*, 59 A.3d 418, 428 (Del. 2012).

anymore.[64] Liberty Mutual even offered to enter a consent judgment legally precluding it from using the Code again.[65]

The Superior Court recognized that its summary judgment ruling and Liberty Mutual's "abandonment of the use of Code x553" benefits not only FSO but all Delaware providers, so it declined to certify a declaratory relief class that wouldn't add anything. Because classwide relief wouldn't provide any benefit over the relief it awarded FSO (and by extension, all Delaware providers), the court held that class treatment wasn't "appropriate" under Rule 23(b)(2) and denied FSO's motion for class certification.

Displeased with the court's common-sense approach, FSO filed this cross-appeal seeking to overturn the Superior Court's "unprecedented" ruling that, according to FSO, spells the end of Rule 23 as we know it.[66] But the decision below is not "unprecedented." Most jurisdictions across the country have endorsed the same common-sense approach, some for more than a half century. It even has a name—the "necessity doctrine"—and it is ***the majority rule*** adopted by at least the

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[64] A766.

[65] *See, e.g.*, A551–52; A1183:13–21 (offering to "stipulate to a binding judgment from the Court saying [Liberty Mutual is] not allowed to use [Code x553]" and stating that "we [Liberty Mutual], of course, would be legally required to follow Your Honor's order").

[66] FSO Br. 8, 10 ("The Superior Court's 'needs' analysis effectively repeals Rule 23.").

First, Second, Third, Fourth, Sixth, Eighth, Ninth, and Tenth Circuits. Fifty years later, Rule 23 remains alive and well.[67]

FSO doesn't cite one case so much as suggesting that other jurisdictions have entertained the concept, never mind that most endorse it. Instead, it seeks to put Delaware on an island that refuses to allow judges to use their common sense—all in a misguided effort to leverage Rule 23 to collect attorneys' fees in a textbook individual action that would otherwise be governed by the American Rule.[68] There is no reason for Delaware to stray from the majority. Use of the necessity doctrine is supported by both the plain language of Rule 23 and sound policy. This Court should affirm the Superior Court's ruling that a class action is not appropriate in this

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[67] *Nottingham Partners v. Dana*, 564 A.2d 1089, 1094 (Del. 1989) (Federal Rule 23 is "almost identical" to Delaware Chancery Court Rule 23 and therefore "interpretation of [Federal Rule 23] by the federal courts" is "persuasive authority."); *Murphy v. United Servs. Auto Ass'n*, 2005 Del. Super. LEXIS 159, at *6 n.4 (Del. Super. Ct. May 10, 2005) (Chancery Court Rule 23 is "essentially the same as" Superior Court Rule 23).

[68] "Under the American Rule and Delaware law, litigants are normally responsible for paying their own litigation costs." *Sternberg v. Nanticoke Mem'l Hosp., Inc.*, 62 A.3d 1212, 1220 (Del. 2013). Below, FSO argued that attorneys' fees might be appropriate under the "the common benefit doctrine" if a class is certified. A890. But that doctrine applies in securities class actions, and there is no authority for applying it in a case like this one. *Dover*, 902 A.2d at 1091 (refusing to apply the common-benefit doctrine to case in the "building construction context"). Even in the rare case where the doctrine applies, the fee award must be commensurate with the benefit created for the class. *Id.* at 1089. A declaration concerning a code that was permanently discontinued before the lawsuit would confer no meaningful benefit that could justify a fee award.

case.

1. FSO mischaracterizes the Superior Court's ruling.

FSO's cross-appeal is based on the flawed premise that the Superior Court departed from the usual "two-step" class certification test and invented "a new and unprecedented three-part test."[69] FSO describes the usual two-part test as comprising a review of the Rule 23(a) factors followed by a determination of whether the requirements of Rule 23(b)(2) are met.[70] But according to FSO, after finding that the requirements of both Rule 23(a) and (b)(2) were met, the court then added a new "third inquiry into whether a class action is 'needed.'"[71] That is not what happened.

The Superior Court applied the usual two-step inquiry; there was no third step. At the first step, it held that Rule 23(a) was satisfied.[72] But at the second step, it concluded that Rule 23(b)(2) was *not* satisfied because FSO couldn't show that classwide relief "is appropriate"—a textual requirement of Rule 23(b)(2).[73] Citing

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[69] FSO Br. 8.

[70] *Id.*

[71] *Id.* at 8–9.

[72] The lower court's conclusory statement that Rule 23(a) was satisfied contains no analysis whatsoever. Opinion & Order at 9. As explained in Section C.5 below, a "rigorous analysis" of Rule 23(a)'s requirements shows that Rule 23(a) is not met here. Thus, while the Court should affirm based on FSO's failure to satisfy Rule 23(b)(2), it may also affirm because Rule 23(a)'s requirements are not met.

[73] Opinion & Order at 9 (quoting Rule 23(b)(2) that any classwide declaratory relief be "appropriate").

persuasive authority under similar facts, the court found that class treatment wasn't "appropriate" because FSO couldn't show that there was "a need for such class certification in this case."[74] In other words, the court denied class certification at step two because it found that a (b)(2) class wasn't "appropriate." It did not, as FSO contends, "conclude that [(b)(2)] was satisfied" and then invent a third step at which it "promptly discarded the rule."[75] FSO never survived the second step.

2. The Superior Court's "needs analysis" isn't "unprecedented"; it has been the majority rule for fifty years.

FSO claims that "the Superior Court's "needs analysis" is an "unprecedented" approach to class certification that "[e]ffectively [r]epeals Rule 23,"[76] but it fails to mention that the needs analysis (also known as the necessity doctrine) has been the majority rule for fifty years. This Court is on firm footing to uphold the Superior Court's approach.

a. Most federal jurisdictions have endorsed the same Rule 23(b)(2) needs analysis applied by the Superior Court.

More than half a century ago, the Eighth Circuit affirmed the denial of a Rule

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[74] *Id.* at 9–10 (citing *First State Orthopaedics, P.A. v. Liberty Mut. Ins. Co.*, 2020 WL 6875219, at *13–14 (Del. Super. Ct. Nov. 20, 2020)).

[75] FSO Br. 33.

[76] FSO Br. 10, 36–38.

23(b)(2) class on the ground that certification was unnecessary.[77] In *Ihrke*, two individuals sought to represent a class seeking a declaratory judgment that certain of the defendant power company's rules and regulations were unconstitutional because they allowed the power company to terminate its customers' service without notice and a hearing.[78] The Eighth Circuit agreed with the lower court's decision to deny class certification: "The determination of the constitutional question can be made by the Court and the rules and regulations determined to be constitutional or unconstitutional regardless of whether this action is treated as an individual action or as a class action."[79] "No useful purpose would be served by permitting this case to proceed as a class action."[80]

The Second Circuit, in an opinion penned by Judge Friendly, took a similar approach the following year when affirming a lower court's decision to deny certification of a Rule 23(b)(2) class challenging the constitutionality of a New York employment statute.[81] The court explained that "an action seeking declaratory or injunctive relief against state officials on the ground of unconstitutionality of a

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[77] *Ihrke v. N. States Power Co.*, 459 F.2d 566 (8th Cir. 1972), *vacated on other grounds*, 409 U.S. 815 (1972).

[78] *Id.* at 572.

[79] *Id.*

[80] *Id.*

[81] *Galvan*, 490 F.2d at 1261.

statute or administrative practice is the archetype of one where class action designation is largely a formality."[82] What mattered to the court was that "[t]he [defendant] . . . made clear that it understands the judgment to bind it with respect to all claimants."[83]

The Fourth Circuit followed suit in a case where two plaintiffs sued a realty company for maintaining a discriminatory housing policy.[84] The Fourth Circuit rejected the plaintiffs' attempt to convert their individual action into a class action: "[I]t was *not necessary* . . . to secure a class certification in order to secure such enlarged injunctive relief . . . because the settled rule is that '[whether] plaintiff proceeds as an individual or on a class suit basis, the requested [injunctive] relief generally will benefit not only the claimant but all other persons subject to the practice or the rule under attack.'"[85] In other words, because "the plaintiffs could receive the same injunctive relief in their individual action as they sought by the filing of their proposed class action . . . class certification was unnecessary."[86]

The Ninth Circuit followed the same approach in a case challenging an

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[82] *Id.*

[83] *Id.*

[84] *Sandford v. R. L. Coleman Realty Co.*, 573 F.2d 173, 178 (4th Cir. 1978).

[85] *Id.* (emphasis added) (citing 7 Wright & Miller, *Federal Practice and Procedure*, § 1771, pp. 663–64 (1972)).

[86] *Id.*

Arizona voting rights statute, holding that denying certification of a Rule 23(b)(2) class was appropriate because "the relief sought will, as a practical matter, produce the same result as formal class-wide relief."[87]

The Tenth Circuit reached the same conclusion in a proposed class action challenging a Medicaid reimbursement formula for Kansas nursing homes, holding that "class certification is unnecessary if all the class members will benefit from an injunction issued on behalf of the named plaintiffs. . . . . [W]e have no reason to doubt that defendants would apply any changes made to the reimbursement formula uniformly to nursing homes in Kansas."[88]

The First, Third, and Sixth Circuits likewise recognize the necessity doctrine.[89] While the First and Third Circuits don't consider necessity a "freestanding requirement," they recognize that necessity "may be considered to the extent it is relevant to the enumerated Rule 23 criteria, including 'that final injunctive relief or corresponding declaratory relief [be] *appropriate* respecting the

[87] *James v. Ball*, 613 F.2d 180, 186 (9th Cir. 1979), *rev'd on other grounds*, 451 U.S. 355 (1981).

[88] *Kan. Health Care Ass'n v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1548 (10th Cir. 1994) (emphasis added).

[89] *Dionne v. Bouley*, 757 F.2d 1344, 1356 (1st Cir. 1985); *Gayle v. Warden Monmouth Cnty. Corr. Inst.*, 838 F.3d 297, 310 (3d Cir. 2016); *Hill v. Snyder*, 821 F.3d 763, 771 (6th Cir. 2016).

class as a whole.'"[90] Following the First Circuit's approach, the Third Circuit created several factors that courts can apply when determining whether classwide relief is necessary, which include (1) the nature of the claims and parties, (2) the extent to which awarding relief to the individual plaintiff would benefit the putative class, (3) the strength of the evidence that a defendant would abide by the ruling; (4) how easy it would be for the putative class to enforce the ruling; and (5) whether other circumstances may nonetheless make classwide relief "appropriate."[91] The Sixth Circuit has likewise suggested that courts may consider "whether class certification may . . . be necessary and appropriate."[92]

Only the Seventh Circuit has said that courts cannot consider need.[93] But that outlier decision has not garnered support from other circuit courts. "[T]he clear majority rule is that 'need' is a proper consideration (even if not technically a 'requirement' for class certification), and that class certification may be properly denied where a class is unnecessary to obtain the full measure of relief sought."[94]

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[90] *Gayle*, 838 F.3d at 310 (emphasis added); *Dionne*, 757 F.2d at 1356.

[91] *Gayle*, 838 F.3d at 312.

[92] *Hill*, 821 F.3d at 771.

[93] *See Brown v. Scott*, 602 F.2d 791, 795 (7th Cir. 1979).

[94] *M.R. v. Bd. of Sch. Comm'rs*, 286 F.R.D. 510, 519 (S.D. Ala. 2012); *See also, e.g.*, *McArthur v. Firestone*, 690 F. Supp. 1018, 1019 (S.D. Fla. 1988) ("[A] district court should ask itself whether the need for the class exists to offset the concommitant expense and complexities associated with class action suits."); *Uzzell v. Friday*, 592 F. Supp. 1502, 1523 (M.D.N.C. 1984) ("There is, in any event, no compelling need

b. **This case presents the quintessential circumstances where the necessity doctrine supports denial of class certification.**

This case is on all fours with the decisions by the Second, Fourth, Eighth, Ninth, and Tenth Circuits cited above, and the mountain of district court decisions following them. In each of those cases, the courts affirmed denial of class certification because they realized that class treatment was a formality. Individual relief would automatically benefit the entire class whether or not a class was certified. That's true here. If the Superior Court's ruling that the Code violates the WCA stands (despite the defects that Liberty Mutual has identified on appeal), then Liberty Mutual cannot use the Code anymore "whether this action is treated as an individual action or as a class action."[95] "No useful purpose would be served by permitting this case to proceed as a class action."[96] That is especially true because here, Liberty Mutual "has made clear that it understands the judgment to bind it with

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for class certification in this case."); *Caspar v. Snyder*, 77 F. Supp. 3d 616, 642–43 (E.D. Mich. 2015); *McCormack v. Hiedeman*, 2012 U.S. Dist. LEXIS 10226, at *17–18 (D. Idaho Jan. 27, 2012); *Nnebe v. Daus*, 2022 U.S. Dist. LEXIS 36325, at *38 (S.D.N.Y. Mar. 1, 2022); *Thompson v. Merrill*, 2020 U.S. Dist. LEXIS 11877, at *15 (M.D. Ala. Jan. 24, 2020); *Eagle v. Koch*, 471 F. Supp. 175, 177 (S.D.N.Y. 1979); *Du Pont v. Woodlawn Trustees, Inc.*, 64 F.R.D. 16, 22 (D. Del. 1974); *Graham v. Bowen*, 648 F. Supp. 298, 303 (S.D. Tex. 1986).

[95] *Ihrke*, 459 F.2d at 572.

[96] *Id.*

respect to all claimants."[97]

The Superior Court's decision is also supported by the factors that the Third Circuit set out.[98] First, the nature of the claim is a declaratory judgment action against an insurer (Liberty Mutual) that a now-discontinued denial code violates a state statute. The claim turns on the language of the denial and the requirements of the statute. If the Court rules that the denial does not satisfy the statute, that will become the law. This case is exactly the kind that courts routinely hold are not suitable for class certification because relief can be afforded in an individual action. FSO doesn't seek the kind of "complex, affirmative relief" that may make class treatment more appropriate.[99] "The determination of the [statutory] question can be [and has been] made by the Court and [Code x553] determined to be [lawful] or [unlawful] regardless of whether this action is treated as an individual action or as a class action."[100]

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[97] *Galvan*, 490 F.2d at 1261; *see also Lisnitzer v. Zucker*, 983 F.3d 578, 588–89 (2d Cir. 2020) (approving lower court's denial of class certification on necessity grounds so long as the lower court "seek[s] a commitment from state officials that the state will abide by the . . . ruling in all pending cases."). Liberty Mutual has been unequivocal throughout that it will be bound by whatever final judgment is reached in this case. *See* A1265 (acknowledging at the class-certification hearing that Liberty Mutual "would be bound by [the] judgment regardless of what it is. We're going to be bound by the Court's judgment.").

[98] *Gayle*, 838 F.3d at 310.

[99] *Casale v. Kelly*, 257 F.R.D. 396, 406–07 (S.D.N.Y. 2009).

[100] *Ihrke*, 459 F.2d at 572.

The second factor—the relief available to FSO and the extent to which the relief would benefit the putative class—also favors denial of class certification. While we disagree that the Code violates Delaware law, the declaratory judgment issued below means that Liberty Mutual can no longer use the Code—in response to bills from FSO or any other Delaware provider. FSO and the putative class benefit equally from that result.

The third and fourth factors—the strength of the evidence that Liberty Mutual will follow the court's order as to putative class members and how easy it would be for putative class members to enforce the order—also weigh against certification. Liberty Mutual has readily admitted in public briefing and arguments that it will be bound by any judgment even as to non-litigants, and it has even offered to enter a consent judgment legally barring it from ever using Code x553 again.[101] That sort of "affirmative statement" that Liberty Mutual "will apply any relief across the board militates against the need for class certification."[102]And in any event, Liberty Mutual stopped using the Code before the lawsuit even began. In the unlikely event that an enforcement action becomes necessary—an extremely remote possibility whether or not a class is certified—no discovery would be needed because the consent judgment

[101] A551–52; A1183:13–21.

[102] *Casale*, 257 F.R.D. at 406.

would govern.[103]

Finally, the fifth factor—whether other circumstances render classwide relief "appropriate"—also weighs against certification. There are no other factors that demonstrate why this individual action should be turned into a class action.

c. **Amicus curiae is wrong: This Court has never rejected the necessity doctrine.**

Amicus argues that "[t]his Court's precedents confirm that Rule 23 contains no 'necessity' requirement" and then cites three Delaware Supreme Court decisions that don't even address the issue.[104]

In *Nottingham Partners*—the first case that amicus cites—this Court held, in relevant part, that the Court of Chancery didn't abuse its discretion to certify a Rule 23(b)(2) shareholder class rather than a (b)(3) class, even where the plaintiffs sought monetary damages in addition to declaratory and injunctive relief.[105] The Court didn't consider whether any needs analysis was proper because the issue wasn't presented. The same is true of the other two cases that amicus cites. Neither has anything to do with the kind of needs analysis at issue here.[106]

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[103] If the Code is used in the future, those disputes would go to the IAB, which is subject to judicial precedent and would assuredly follow this Court's order.

[104] Public Citizen Br. 7–9.

[105] *Nottingham Partners*, 564 A.2d at 1096–97.

[106] *Leon N. Weiner & Assocs. v. Krapf*, 584 A.2d 1220, 1224 (Del. 1991) (issue was whether the court properly denied class certification "predominantly on financial

3. Amicus curiae is wrong: The necessity doctrine is consistent with Rule 23.

Amicus argues that the necessity doctrine contravenes Rule 23—even though most jurisdictions across the country have blessed it. As an initial matter, the Court shouldn't even reach the issue because FSO waived it by not briefing it. FSO cannot use a non-party amicus brief to raise new arguments.[107] Regardless, amicus is wrong.

First, according to amicus, Rule 23(b)(2) requires only that classwide relief be "appropriate"—not "necessary." But courts can reasonably conclude that certification is not "appropriate" when class designation is just a formality. As the Third Circuit explained, "there may be circumstances where class certification is not *appropriate* because in view of the declaratory or injunctive relief ordered on an individual basis, there would be *no meaningful additional benefit* to prospective class members in ordering classwide relief."[108] That's exactly what the Superior Court said below: "[FSO] must . . . show that class certification is appropriate under Rule 23(b)(2) . . . . I am not persuaded that there is a need for such class certification

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considerations" rather than "due process concerns"); *In re Celera Corp. S'holder Litig.*, 59 A.3d at 432–33 (issue was whether the lower court abused its discretion to certify both a (b)(1) and (b)(2) shareholder class).

[107] *Turnbull v. Fink*, 644 A.2d 1322, 1324 (Del. 1994) ("[A]n *amicus curiae* brief is . . . limited to addressing the issues raised by counsel in the party's opening brief.").

[108] *Gayle*, 838 F.3d at 310 (emphasis added) (citing *Galvan*, 490 F.2d at 1261–62); *see also Dionne*, 757 F.2d at 1356.

in this case."[109]

Moreover, courts routinely consider concepts that don't perfectly mirror Rule 23's language but are nonetheless logically subsumed by its requirements. For example, courts analyzing Rule 23 apply a "cohesiveness" requirement even though "cohesive" is not a term that appears in the Rule.[110] The same is true of "ascertainability," which is "an essential prerequisite, or an *implied* requirement, of Rule 23."[111] "The ascertainability requirement . . . is consistent with the general understanding that the class-action device deviates from the normal course of litigation in large part to achieve judicial economy."[112] Here, no judicial economy is gained by demanding class certification in a case where an individual judgment would achieve the same result.

Second, Rule 23(b)(3)'s superiority requirement has nothing to do with the necessity doctrine at issue here. The lower court didn't apply a "superiority" analysis in deciding that a (b)(2) class wasn't appropriate, nor are we suggesting, as amicus

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[109] Opinion & Order at 9.

[110] *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998); *Wilmington Pain & Rehab. Ctr., P.A. v. USAA Gen. Indem. Ins. Co.*, 2017 Del. Super. LEXIS 528, at *15–16 (Del. Super. Ct. Oct. 17, 2017).

[111] *Byrd v. Aaron's, Inc.*, 784 F.3d 154, 162 n.5 (3d Cir. 2015); *id.* at 162 ("The source of, or basis for, the ascertainability requirement . . . is grounded in the nature of the class-action device itself.").

[112] *Id.*

claims, that courts *must* consider necessity.[113] The issue is whether a lower court can, as part of its inquiry into whether class treatment is "appropriate," consider whether a class action has any practical significance to the case. As explained above, it can.

Third, applying a needs analysis would not render (b)(2)'s reference to declaratory relief superfluous.[114] Liberty Mutual isn't advocating for a necessity *requirement*, nor is it suggesting that Rule 23(b)(2) classes are never needed. Indeed, courts have considered the need for a (b)(2) class and nonetheless certified a class.[115]

Fourth, Rule 23's Advisory Committee notes do not counsel against applying the necessity doctrine.[116] The examples listed in those notes—inapposite civil rights cases and hypothetical buyer-seller scenarios —say nothing about whether courts can consider the need for a class action.[117] Courts rendering each of the dozens of decisions cited above had the benefit of the Advisory Committee notes and

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[113] Public Citizen Br. 6–7.

[114] Public Citizen Br. 12.

[115] *See, e.g.*, *J.S.X. v. Foxhoven*, 330 F.R.D. 197, 214–15 (S.D. Iowa 2019) (Rule 23(b)(2) class needed because the Court had "only limited confidence that Defendants are capable of extrapolating broader required changes to its mental health care program based on a holding involving only three students, two of which are no longer at the School"); *Casale*, 257 F.R.D. at 414.

[116] Public Citizen Br. 14.

[117] *Casale*, 257 F.R.D. at 406–07 ("[W]here the relief sought is merely a declaration that a statute or policy is unconstitutional, denial of class certification is more appropriate than where plaintiffs seek complex, affirmative relief.").

nonetheless concluded that class certification was not appropriate where it was not necessary to achieve the desired result. Indeed, if anything, the Advisory Committee notes *support* use of the necessity doctrine. Amicus argues that declaratory relief classes must automatically be certified anytime a defendant takes action that applies generally to the class.[118] The Advisory Committee notes confirm that position is wrong: "[S]ubdivision [(b)(2)] is intended to reach situations where a party has taken action or refused to take action with respect to a class, ***and*** final relief of an injunctive nature or of a corresponding declaratory nature . . . ***is appropriate***."[119] In other words, certification isn't automatically "appropriate" any time a defendant takes action that generally applies to the class. Rather, the court must first consider whether a defendant has taken action that generally applies to the class *and then* determine whether that action makes class treatment "appropriate."[120]

Fifth, amicus's argument about the "effect" of an individual judgment in this case misses the mark. Courts routinely fashion relief to bind defendants even as to

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[118] Public Citizen Br. 5–6.

[119] Fed. R. Civ. P. 23(b)(2) Notes of Advisory Committee on Rules – 1966 Amendment (emphasis added).

[120] *See also Gayle*, 838 F.3d at 310 ("[I]n light of Rule 23(b)(2)'s express requirement that final injunctive relief or corresponding declaratory relief [be] *appropriate* respecting the class as a whole . . . certification under Rule 23(b)(2) may be denied where classwide relief is unnecessary because such relief is then a 'formality or otherwise inappropriate.'") (quoting *Dionne*, 757 F.2d at 1356).

non-parties.[121] U.S. district courts, for example, have the power to issue nationwide injunctions against defendants even as to non-litigants—and do so often without certifying class actions.[122] Here, the Superior Court made clear that its order would bind Liberty Mutual as to all providers. And more importantly, Liberty Mutual "has made clear that it understands the judgment to bind it with respect to all claimants" and stated that "it did not intend to reinstate [the Code]."[123]

4. Policy strongly favors the necessity doctrine.

Public policy favors allowing courts to apply the necessity doctrine. *First*, the doctrine is consistent with judges' inherent power to manage their docket and resolve disputes.[124] The lower court here impliedly recognized that certifying a class "would yield inefficiencies and complexities that would needlessly burden litigant and

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[121] *See Planned Parenthood S. Atl. & Julie Edwards v. Baker*, 2020 U.S. Dist. LEXIS 51771, at *11–12 (D.S.C. Mar. 23, 2020) ("[W]hen . . . the relief being sought can be fashioned in such a way that will have the same purpose and effect as a class action, the certification of a class action is unnecessary and inappropriate.").

[122] *See, e.g.*, *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42, 88 (2d Cir. 2020) ("[T]he law. . . permits district courts to enter nationwide injunctions, and agree that such injunctions may be an appropriate remedy in certain circumstances — for example, where only a single case challenges the action. . . ."); *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir. 2017) (upholding nationwide injunction on the President's travel ban), *vacated on other grounds*, 138 S.Ct. 353 (2017).

[123] *Galvan*, 490 F.2d at 1261.

[124] *Solow v. Aspect Res., LLC*, 46 A.3d 1074, 1075 (Del. 2012) ("Delaware trial courts have inherent power to control their dockets.").

judicial resources alike, all for the sake of obtaining a class injunction [or declaration] that would be identical in scope, breadth and effect to an individual injunction awarded in favor of the individual plaintiffs alone."[125] Yet FSO advocates for a rule that hamstrings courts and forces them to needlessly certify classes that serve no purpose.

Second, FSO is not shy that its real purpose for seeking certification is to obtain attorneys' fees. To be sure, FSO is wrong; it would not be entitled to fees even if a Rule 23(b)(2) class is certified.[126] But regardless, FSO's stratagem seeks to circumvent the American Rule by subjecting businesses and government entities to attorneys' fees and protracted litigation costs in cases that could be resolved on an individual basis. If FSO's position carries the day, it is difficult to imagine when a declaratory judgment case challenging government action or a business practice that impacts multiple people would *not* become a class action—and under FSO's view, plaintiffs' attorneys should now get paid to litigate all those cases. The necessity doctrine is an important check *against* abuse of Rule 23 and the prospect where courts and litigants assume extra costs and burdens only so that plaintiffs' counsel

[125] *Thompson*, 2020 U.S. Dist. LEXIS 11877, at *14–15; *see also M.R.*, 286 F.R.D. at 519 ("[I]t is not appropriate to bog down the litigation with the expense, delay, complexity and burden of class certification when there is no corresponding benefit to implementation of the resulting judgment.").

[126] *See* note 68, above.

can get paid. This Court should uphold the Superior Court's ruling denying class certification.

5. <u>This Court can affirm the denial of class certification for other reasons.</u>

FSO argues that the Superior Court "correctly found that all the criteria under Rule[] 23(a) . . . were met."[127] But while there may have been a "finding," there was no analysis—never mind a "rigorous analysis"—to justify it.[128] Indeed, the following represents the entirety of the Superior Court's "analysis" of Rule 23(a):

> As discussed above, there are four requisites under Rule 23(a) for a class action: numerosity, commonality, typicality, and adequacy. I find that Plaintiff has satisfied all four of these requirements.[129]

In briefing below, Liberty Mutual explained in detail why FSO had not satisfied Rule 23(a)'s requirements. For instance, FSO didn't meet the numerosity requirement because it never presented evidence concerning the number of providers in the class.[130] FSO was required to "affirmatively demonstrate [its] compliance with the Rule,"[131] but failed to carry that burden.

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[127] FSO Br. 32.

[128] *In re Celera Corp. S'holder Litig.*, 59 A.3d at 432 ("In analyzing Rule 23's counterpart under the Federal Rules of Civil Procedure, the United States Supreme Court has stated that a federal court must engage in a 'rigorous analysis' in certifying a class. A rigorous analysis is similarly required under the Delaware counterpart.").

[129] Opinion & Order at 9.

[130] A990–92.

[131] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011).

FSO also failed to show that its claim was typical of the proposed class because it was "markedly different from that of the members of the class."[132] FSO's corporate representative abdicated the legal theory in the complaint that Code x553 was not a "written explanation" of denial and, instead, argued that it was an improper explanation to use as to "certified" healthcare providers. But the class would also include non-certified healthcare providers, a group who FSO concedes may appropriately have their claims denied based on a lack of prior authorization.[133] FSO's claims are also atypical because FSO is subject to multiple unique defenses, including because of its admission that it knew all the relevant facts to seek a declaratory judgment more than a decade before it filed its lawsuit. Those sort of "factual complexities and individualized situations . . . make [FSO's] claims atypical of the entire class."[134]

That same "[s]tatute-of-limitations issue[] . . . [also] touch[es] the adequacy requirement" and "may be relevant to evaluating [the named plaintiff's] adequacy as a class representative in the same away any type of defense may be relevant to that inquiry, i.e., named plaintiffs may be inadequate representatives if their claims

[132] *Mentis v. Del. Am. Life Ins. Co.*, 2000 Del. Super. LEXIS 237, at *12 (Del. Super. Ct. May 30, 2000).

[133] A1019.

[134] *Mentis*, 2000 Del. Super. LEXIS 237, at *17.

are extremely weak as compared to the rest of the class."[135] Although we do not know what sort of statute of limitations issues plague other proposed class members, none could have a weaker argument than FSO in light of its blunt admissions that it could have, but failed to, file this lawsuit more than a decade ago.

In the end, any one of these defects supports the Superior Court's decision to deny class certification. At minimum, if this Court remands the Superior Court's Rule (b)(2) decision, it should direct the court to conduct a rigorous analysis of the Rule 23(a) requirements as this Court's precedent demands.

[135] *In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortg. Loan Litig.*, 622 F.3d 275, 294 (3d Cir. 2010).

CONCLUSION

For the reasons discussed, the Superior Court's order denying FSO's motion for class certification should be affirmed; its order granting summary judgment in FSO's favor should be reversed.

Dated: July 25, 2023

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