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IN THE SUPREME COURT OF THE STATE OF DELAWARE

AIG SPECIALTY INSURANCE COMPANY f/k/a CHARTIS SPECIALTY INSURANCE COMPANY, ACE AMERICAN INSURANCE COMPANY, and LEXINGTON INSURANCE COMPANY,	)	No. 35, 2024
Defendants-Below, Appellants,	)	Court Below: Superior Court of the State of Delaware
v.	)	C.A. No. N18C-12-074 MMJ CCLD
CONDUENT STATE HEALTHCARE, LLC, f/k/a XEROX STATE HEALTHCARE, LLC, f/k/a ACS STATE HEALTHCARE, LLC,	)	**PUBLIC VERSION EFILED MAY 17, 2024**
Plaintiffs-Below, Appellees.	)	

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

This appeal concerns Conduent's attempt to force Insurers to pay up to their policy limits for Conduent's $236 million settlement of a civil "law enforcement action" brought by the State of Texas alleging that Conduent committed years of Medicaid fraud while administering Texas's Medicaid program (the "State Action"). Over five years of litigation and until the eve of settlement, Texas's case against Conduent had always sounded solely in terms of Medicaid fraud. Because Conduent's liability policy with Insurers did not indemnify Conduent for losses involving fraud or dishonesty, Insurers properly disclaimed coverage. On the eve of settlement, however, Conduent pressured Texas's Office of the Attorney General ("OAG") to amend its Medicaid fraud complaint to add causes of action for breach of contract and negligence, then purported to attribute the entire $236 million settlement payment solely to those tacked-on claims.

Conduent sued its insurers for denying coverage, and the parties went to trial on Insurers' affirmative defenses to coverage—including that Conduent engaged in insurance fraud and bad faith because it misrepresented the impetus behind the final amended complaint so as to manufacture coverage "that would not otherwise be available," and that Conduent's eve-of-settlement deal with Texas violated Conduent's duty to cooperate with Insurers and obtain their consent before settling.

After a six-day trial involving eight witnesses and nearly 100 exhibits, a unanimous jury found that Conduent defrauded Insurers by lying about the settlement process (as proved by clear and convincing evidence), acted in bad faith in settling to manufacture insurance coverage, and failed to cooperate with and seek consent from Insurers before settling.

Notwithstanding the jury's unanimous verdict, the court granted Conduent's motion for a new trial on the fraud and bad faith findings, principally on grounds that Conduent never raised and Insurers lacked requisite opportunity to address. Ex. A, Opinion on Plaintiff's Renewed Motion for Judgment as a Matter of Law, dated February 14, 2023 ("Trial Op.") 32-35. The court also effectively disregarded the jury's undisturbed findings that Conduent failed to cooperate and seek consent before settling.

Nearly a year later, the court compounded its error by ruling that an express policy exclusion for fraud is legally inapplicable here. Ex. B, Opinion on Plaintiff's Motion for Summary Judgment on Exclusion 3(a) and Defendants' Motion for Summary Judgment on Exclusion 3(a) ("MSJ Op.") 11.

Reversing any of these errors requires judgment for Insurers.

Exclusion 3(a). Conduent's insurance policy excludes coverage for a settlement of a suit sounding in fraud, dishonesty, or unlawful acts. Under

controlling New York law, that exclusion applies when the "gravamen" of the suit sounds in excluded conduct. Although the court purported to apply the "gravamen" test, it failed to recognize that the gravamen of the State Action always sounded in fraud, dishonesty, and unlawful acts, such that the exclusion applied. MSJ Op. 6, 10-11. Nor did that gravamen of Texas's suit ever change. The six purported "breach of contract" allegations that the court relied upon to find that the gravamen expanded to include breach of contract, each appeared, word-for-word, in a prior iteration of Texas's petition, which included no cause of action for breach of contract.

Cooperation and Consent. The court effectively disregarded the jury's six unanimous findings that Conduent breached its duty to cooperate and seek consent before settling.

VERDICT FORM

Duty to Cooperate

1. Conduent had a duty to cooperate with and help the Insurers in connection with the State Action Settlement. Did Conduent prove by a preponderance of the evidence that cooperation would have been futile?

   YES: _____ NO: X

2. Have any of the Insurers proved by a preponderance of the evidence that Conduent breached the duty to cooperate with and help any of the Insurers in connection with the State Action Settlement?

   YES: X NO: _____

3. If you answered "YES" to Question 2, check each Insurer who proved by a preponderance of the evidence that Conduent breached the duty to cooperate with and help it in connection with the State Action Settlement.

✓ AIG Specialty Insurance Company

✓ ACE American Insurance Company

✓ Lexington Insurance Company

Duty to Seek Consent

4. Conduent had a duty to seek the Insurers' prior written consent in connection with the State Action Settlement. Did Conduent prove by a preponderance of the evidence that seeking the Insurers' prior written consent would have been futile?

YES: _____ NO: X

5. Did Conduent prove by a preponderance of the evidence that Conduent took reasonable steps to seek to obtain the Insurers' written consent in connection with the State Action Settlement?

YES: _____ NO: X

6. Did Conduent prove by a preponderance of the evidence that any of the Insurers' failure to provide written consent was unjustifiable or in bad faith?

YES: _____ NO: X

A1667-68.

The court ruled post-trial that Insurers' denial of coverage relieved Conduent of those obligations as a matter of law. Trial Op. 32. But the jury's findings on Questions 1 and 4—that cooperation and seeking consent would not have been futile—established conclusively that Insurers did *not* waive Conduent's cooperation and consent obligations. Under controlling New York law, an insured is *not* released

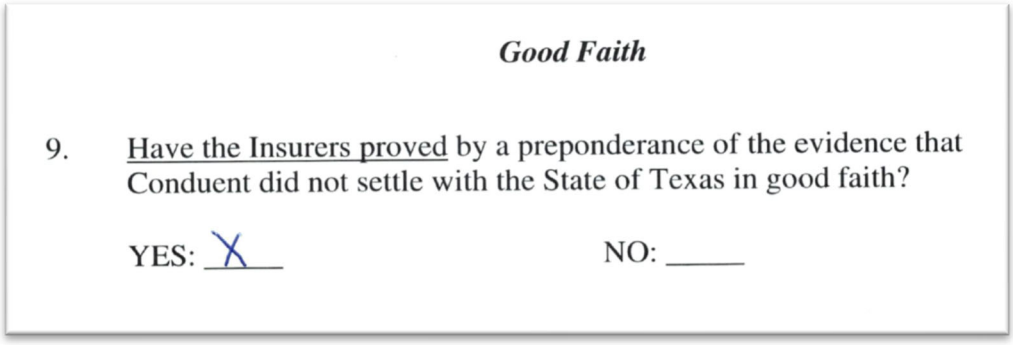
from its cooperation and consent obligations where an insurer *disclaims* coverage while remaining open to revisiting coverage based on changing circumstances. An insurer's coverage denial relieves an insured of its cooperation and consent obligations only when the insurer has *repudiated* liability—*i.e.*, declared no coverage existed under any circumstance. The jury's findings here leave no doubt that Insurers, at most, disclaimed coverage (without ever being presented with the operative Third Amended Petition so they could determine coverage before Conduent settled).

Bad Faith & Fraud. The court erroneously reversed the jury's separate factual findings that Conduent committed fraud by clear and convincing evidence and did not act in good faith in settling:

Fraud

7. Have the Insurers proved by clear and convincing evidence that Conduent engaged in fraud in connection with the State Action Settlement?

YES: X NO: _____



Good Faith

9. Have the Insurers proved by a preponderance of the evidence that Conduent did not settle with the State of Texas in good faith?

YES: X NO: _____

A1669.

While acknowledging how extraordinary it was to overturn the jury's verdict (Trial Op. 2), the court invoked, largely *sua sponte*, "four principal reasons," which effectively upended settled premises of the trial. Trial Op. 34. Specifically, the court pointed to (i) supposed prejudice resulting from written testimony by the OAG that had been admitted pursuant to the parties' agreed stipulation; (ii) a perception that Insurers drew "improper inferences from information set forth in privilege logs"; (iii) references by Insurers' counsel to a press release by the OAG that was allowed by pretrial evidentiary rulings; and (iv) an allegation that Insurers "argued that [they] never had any coverage obligation … in violation of the Court's pretrial holding that AIG breached its contractual duty to pay defense costs." Trial Op. 34-35. The court thereby relied in key part upon its own *sua sponte* rationales, without affording Insurers requisite "notice and an opportunity to be heard on the matter" under Superior Court Civil Rule 59(c).

None of the stated substantive grounds withstands scrutiny.

OAG Testimony. Before trial, the OAG was deposed by written questions as permitted by Superior Court Civil Rule 31. A3737. Conduent made the tactical decision to ward off live testimony at trial from the OAG by agreeing to a stipulation that this written testimony (the "OAG Testimony") would be "admissible by any party for any purpose at trial." A0652. The OAG Testimony was properly admitted at trial according to that stipulation; indeed, Conduent used the testimony affirmatively. A0905; A1553. Nonetheless, post-trial, the court effectively reversed the pretrial stipulation and order, *sua sponte*, and found the agreed OAG Testimony to be prejudicial. Trial Op. 34.

Privilege Log. Insurers strictly adhered to the court's order governing use of the privilege log at trial by showing the jury a pre-approved demonstrative of logged communications (without referencing privilege) and elicited testimony confined to the date, time, participants, and topics of meetings. These non-privileged facts showed that Conduent's settlement team had been meeting continuously with its insurance coverage counsel while negotiating the settlement with Texas. This use was not only permissible under Rule of Evidence 512(a), as the court had ruled, but directly responsive to Conduent's contention that it asked Texas to add claims against it purely for business and reputational reasons, not to influence insurance

coverage. Given that Insurers' trial presentation precisely complied with prior rulings and Rule 512(a), there was no discernible reason for the court later to fault the presentation as drawing "improper inferences from information set forth in privilege logs" (Trial Op. 35), let alone to undo the jury's verdict on this basis.

Press Release. Again ruling *sua sponte*, the court inflated and mischaracterized isolated references to a press release from the Texas Attorney General announcing a "Medicaid fraud" settlement with Conduent. Trial Op. 17-29. Without using the press release for the truth of the matter, Insurers twice referenced the press release for the non-hearsay purpose of showing its effect on Conduent: Conduent, despite purporting to harbor acute *reputational* concerns about being seen as settling a pure fraud claim (concerns that Conduent distinguished from insurance coverage considerations), did not offer the slightest objection or correction after the Texas Attorney General publicly announced he was settling a Medicaid fraud action with Conduent (without naming the newly-added breach of contract and negligence claims). Such use was properly allowed by on-point pretrial evidentiary rulings. Even setting that aside, however, the two passing references to the press release cited by the court could not have posed any meaningful prejudice.

Defense Costs Coverage. The court also faulted Insurers for implying they never had any coverage obligations when the court had previously ruled, at summary

judgment, that Insurers owed defense costs. Trial Op. 35. But Insurers needed to prove that Conduent attempted to create coverage that "otherwise would not have existed" in order to establish collusion and bad faith. A1656-57. Because the trial focused on indemnification and the parties were expressly admonished against referencing defense-cost coverage, it only made sense for Insurers to advance their position that they did not believe they owed the coverage that Conduent was seeking. That is all Insurers did, and it is no plausible basis for ordering a new trial.

SUMMARY OF ARGUMENT

1. Coverage is precluded by Exclusion 3(a), which unambiguously excludes losses incurred in connection with any suit alleging dishonest or fraudulent acts or omissions or knowing violations of law. Under controlling New York law, exclusions like Exclusion 3(a) apply when the "gravamen" of the suit sounds in excluded conduct. Here, the gravamen of the State Action always sounded in fraud, dishonesty, and knowing violations of law. That gravamen did not change when causes of action for breach of contract and negligence were tacked on at the time of settlement.

2. By ruling that Insurers' denial of coverage relieved Conduent of its duty to cooperate and seek consent from Insurers before settling, the court ignored controlling New York law and failed to credit the jury's relevant findings. An insurer's coverage denial does not relieve the insured of its duty to cooperate and seek consent unless the insurer repudiates liability under the policy; it does not suffice if an insurer merely disclaims coverage subject to reconsideration. The jury's undisturbed findings that cooperating and seeking consent would not have been futile leave no doubt that Insurers never repudiated liability but merely disclaimed coverage.

3. The court's "four principal reasons" for setting aside the jury's findings on fraud and bad faith and compelling retrial were unaccompanied by requisite notice and cannot justify that extraordinary remedy:

(i) The OAG Testimony was properly admitted at trial in accordance with the parties' stipulation that it "shall be admissible by any party for any purpose" and the court's pretrial rulings embracing that stipulation.

(ii) Insurers properly elicited testimony regarding the non-privileged facts appearing on Conduent's privilege log, and the only inference drawn—consistent with the court's pretrial order and Rule of Evidence 512(a)—was that Conduent was communicating about insurance coverage while negotiating its settlement with Texas.

(iii) Insurers properly referenced the press release, in conformity with the court's pretrial ruling, for the non-hearsay purpose of showing that Conduent, despite its purported non-insurance-coverage-related desire to not be seen publicly as settling a pure fraud claim, did not protest when Texas called out only the Medicaid fraud claim in a press release describing the settlement. Nor could any prejudice result from the passing references in question.

(iv) In proving that Conduent attempted to create coverage that "otherwise would not have existed," Insurers cannot fairly be faulted for not distinguishing

between indemnity and defense costs, especially given that the court's pretrial rulings precluded the parties from mentioning defense costs. Much less could this have inflicted any prejudice.

STATEMENT OF FACTS

A. Conduent Violated The Texas Medicaid Fraud Prevention Act

Texas chose Conduent to administer its Medicaid program. A0508. Conduent then staffed its pediatric orthodontic claim review division with so-called "dental specialists" (A3454-55, 3461) who were actually untrained and unsupervised high school graduates (A3461, 3481-82). Those clerks rubber-stamped hundreds of millions of dollars' worth of ineligible claims over dozens of years. A3489-90.

A federal audit into Conduent's approvals uncovered massive amounts of wasted Medicaid funds. A0520. The Texas Attorney General investigated and sued Conduent under the Texas Medicaid Fraud Prevention Act ("TMFPA"). A0509. Texas also sued several dental providers, some of whom in turn sued Conduent for pre-approving the now-challenged orthodontic work (the "Provider Actions"). *Id.*

Conduent submitted the State Action and the Provider Actions for coverage to its tower of professional services liability insurers. A2441-42. Insurers provided defense coverage for the Provider Actions but declined to provide coverage for the State Action because the latter was, expressly, "a law enforcement action" for the collection of "fines or penalties" for fraudulent and illegal conduct. A2442, A2444, A2451-52. Insurers reserved all rights and continued to request more information and monitor the cases. A2453. In the Texas courts, Conduent sought to have the State Action designated as seeking damages for breach of contract and negligence

rather than fines and penalties for statutory fraud. *See, e.g.*, A1016; A2483-85; A2856-57; A3070-3072. Conduent had obvious incentives to paint the State Action that way, particularly because its insurance policy covered breach of contract and negligence damages but not fines and penalties or actions alleging fraud. A2352 § 3(j)(6); *see* A1026 (Conduent's general counsel acknowledging it "might put you in a better position to seek coverage"). But the OAG steadfastly refused to add non-fraud claims. A2726-27; *see* A2882; A3418; A3435 (Texas courts upholding the OAG's fraud theory as basis for recovery).

B. Conduent Conditioned Settlement On Addition Of Claims

In a December 2018 settlement meeting, Conduent told OAG that it would settle for $236 million only if Texas agreed to amend its petition to *add* breach of contract and negligence claims that Conduent could then present to its insurers. A1059 ("Q. And it is then that the message was delivered … either you play ball if you want the money or you're not getting paid the $236 million. A. Yes"). [redacted] A3782-83.

Thereafter, Conduent's attorneys spent a day word-smithing an email to Insurers to plant the misimpression that Texas had told Conduent it intended to amend the action for trial by including causes of action for breach of contract and

negligence. A3529-30; A1006, 1035-36. In reality, Conduent had been conditioning settlement on Texas adding non-fraud causes of action, even as Texas repeatedly refused. In at least three settlement drafts, Texas rejected Conduent's language stating Texas intended to add contract and negligence claims. A3517, 3522; A3536, 3542; A3557, 3563-64; A3580, 3590; A3606, 3611-12; A3628. In sworn deposition responses, [redacted] A3747, 3750-51.

Ultimately, "in late January 2019, the State agreed to amend its pleadings in order to complete the settlement." A3755. Consequently, Texas amended to add causes of action for breach of contract and negligence, whereupon the parties settled *within one business day*—without Conduent having sought Insurers' consent. A3706, 3727-28; A3673; A1668.

The settlement agreement purported to allocate the entire settlement payment to breach of contract damages, rather than fines and penalties from fraud. A3706, 3714-15. When Conduent submitted the settlement for coverage, Insurers called foul. *See, e.g.*, A1248.

C. Procedural History

In December 2018, Conduent filed this action seeking coverage of the State Action, then amended in March 2019, to seek coverage, up to policy limits, of its $236 million settlement. A0114; A0142, 0162, 0174.

Conduent strenuously opposed discovery from the OAG (A0184-93), which nonetheless provided sworn written responses to direct, cross, redirect, and recross deposition questions pursuant to Superior Court Civil Rule 31(a). A194-96; A3737-4107. The OAG Testimony was signed by the Chief of the Texas Attorney General's Civil Medicaid Fraud Division, Assistant Attorney General Raymond Winter, testifying as the OAG's representative. A3737, 3760-61, 3781. That written deposition testimony became a key piece of evidence as the only account, outside of Conduent's self-serving testimony, of what actually transpired between Conduent and the OAG in settling the State Action. *See* A1038-40, 1088-98, 1181-83, 1585.

At summary judgment, the court held that Insurers should have covered defense costs for the State Action. A0525. Whether Insurers owed *indemnity* coverage for the settlement was left for trial. A0525-26.

In the lead-up to trial, Conduent convinced Insurers not to seek a live OAG witness in exchange for a stipulation that the OAG Testimony "shall be admissible by any party for any purpose at trial." A0652.

At trial that ran from February 14 to 22, 2022, numerous evidentiary objections were heard and resolved outside the jury's presence. At the conclusion of trial, Conduent made no arguments that the jury was misled, confused, prejudiced, or biased. Nor did it request any curative instructions. *See generally* A1627.

Conduent moved under Rule 50(a) for judgment as a matter of law on collusion, cooperation, and consent. A1627. The court allowed all three issues to proceed to the jury. A1667-69. After deliberating for two-and-half hours (A1703-07), the jury returned a unanimous verdict finding Insurers had proved the affirmative defenses of bad faith, fraud (by clear and convincing evidence), failure to cooperate, and failure to seek consent. *See* A1667-69. The jury found against Insurers on only two points: Insurers had not met their burden to prove that the OAG colluded with Conduent or that the settlement was unreasonable. A1669-70.

Conduent moved for judgment notwithstanding the verdict or a new trial on the bases that (i) the fraud and bad faith findings were against the weight of evidence and, therefore, unjust; (ii) the fraud and bad faith findings were tainted by inferences from Conduent's privilege log; and (ii) consent and cooperation should be decided as a matter of law in Conduent's favor or otherwise retried. A1748.

Nearly a year later, the court ordered a new trial on fraud and bad faith and ruled in Conduent's favor as a matter of law on cooperation and consent. Trial Op.

34-36. Insurers sought reargument plus judgment on the basis that Exclusion 3(a) precluded coverage. A1949-57; A1989-2027. Conduent cross-moved for summary judgment that Exclusion 3(a) did not apply. A2028-56.

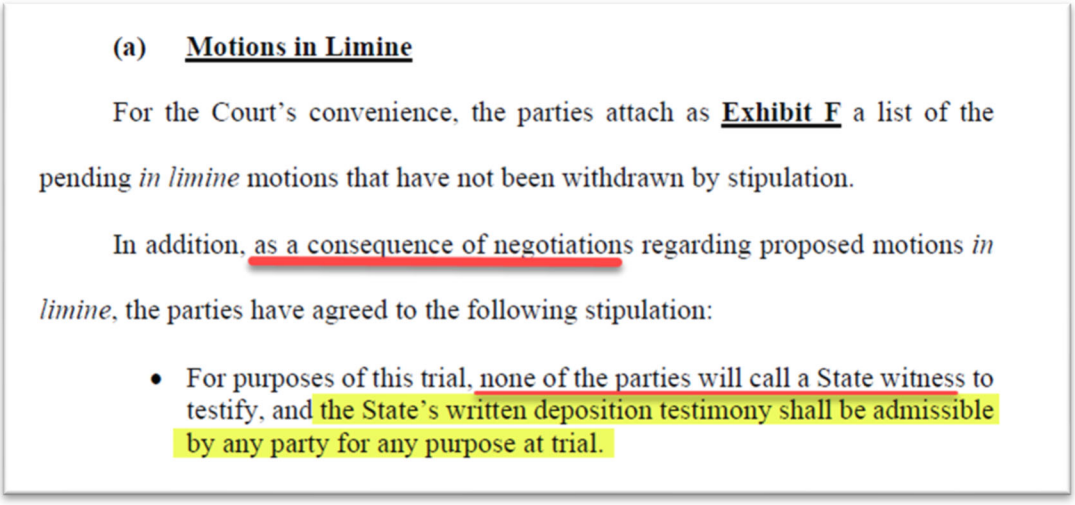
Nearly another year later, the court denied reargument and ruled Exclusion 3(a) inapplicable. A2239; MSJ Op. 1. Insurers then timely applied for interlocutory appeal under Rule 42, which Conduent opposed. *See* A2255-67; A2323-33. After the time limit passed for the Superior Court to rule on the application, this Court accepted the appeal on April 2, 2024. A4548-54.

D. The Four Principal Evidentiary Rulings

1. OAG Testimony

[redacted] (A3755). As such, the OAG Testimony [redacted]. *See* A3500; A1429-30.

Stipulation of admissibility. To resolve Conduent's *in limine* objection to the prospect that Insurers might call a live OAG witness at trial, the parties stipulated that the OAG Testimony would be admissible "by any party for any purpose at trial."



(a) **Motions in Limine**

For the Court's convenience, the parties attach as **Exhibit F** a list of the pending *in limine* motions that have not been withdrawn by stipulation.

In addition, as a consequence of negotiations regarding proposed motions *in limine*, the parties have agreed to the following stipulation:

- For purposes of this trial, none of the parties will call a State witness to testify, and the State's written deposition testimony shall be admissible by any party for any purpose at trial.

A0652.

Credibility of declarant may be challenged. Insurers moved *in limine* to bar argument that OAG's declarant, Winter, lacked sufficient personal knowledge. A0558. The court denied the motion and ruled that "[t]he jury must be able to assess the weight to be given to Winter's testimony." A0712-13.

Exhibit is admissible. After Conduent sought to have portions of the OAG Testimony redacted as hearsay, the court upheld the pretrial stipulation and ruled "[t]hese written questions are coming in as-is." A0848-49. Conduent proceeded to make affirmative use of the OAG Testimony and to impugn the credibility of the OAG's witness. *See, e.g.*, A0905; A1268; A1533-36; A1553, 1585.

Superior Court's reversal. Post-trial, in a surprising about-face, the court ruled *sua sponte* that the OAG Testimony never should have been admitted because "there was no way the jury could adequately evaluate the validity of the Winter Submission in the absence of the declarant or Winter's out-of-court testimony, subject to cross examination." Trial Op. 8-10.

2. Privilege Log

Insurers may refer to non-privileged information. Pretrial, the court ruled that "the information contained in the privilege log may be put in a demonstrative exhibit and shown to the jury [and] Defendants may refer to the information." A0809. Therefore, it was fair game for Insurers to show simply that coverage attorneys advised Conduent about the settlement, so long as Insurers did not draw inferences about what the attorneys "must have advised." *Id.* During trial, the court approved Insurers' demonstrative that depicted the non-privileged contents of Conduent's log. *See* A1001-02.

Superior Court's reversal. Post-trial, the court ruled it was improper for Insurers' counsel to have argued to the jury based on the timing and content of Conduent's meetings with counsel (as juxtaposed with the absence of any comparable meetings with businesspeople). Trial Op. 11-17.

3. Press Release

Conduent's witnesses testified that Conduent allocated its settlement payment to a breach of contract claim out of concern for its business reputation and ability to obtain government contracts. A1069; A1253-54. That contention was undercut by Conduent's failure to object or request a correction after the OAG's press release announced a "Medicaid Fraud Settlement" without even mentioning the breach of contract claim. A3730; A0490; A3753-54.

Content of press release not admissible but fact of press release may be elicited on cross. Pretrial, the court ruled the press release would not be admitted but that Insurers could solicit, on cross-examination, testimony "that the Texas OAG made the reference to Medicaid fraud in a press release after the Third Amended Petition was filed," and that "circumstances may arise in which the Press Release may be used for impeachment." A0808.

Conduent opened the door. Early in the trial, "the Court found that Conduent had opened the door to presenting the Press Release to the jury" (Trial Op. 21 n.14; A1075) when its witness testified that the Third Amended Petition simply gratified Conduent's desire to avoid "be[ing] seen as having settled … a pure fraud claim." A1069. Nonetheless, the court sustained objections when Insurers,

following the court's guidance, asked limited prefatory questions about the press release's mere existence. A1069; A1072-73; A1124-25.

Superior Court's reversal. After trial, *sua sponte*, the court ruled that "AIG repeatedly referred to and [*sic*] the Press Release in the presence of the jury" and thereby violated "the Court's unambiguous ruling" (Trial Op. 21), even though the court had previously ruled that Conduent opened the door and Insurers' questions had followed the court's on-point instructions.

4. Defense Costs Coverage

Insurers owe coverage for defense costs. The court ruled on summary judgment that Insurers owed defense costs to Conduent for the State Action. A0525.

Defense costs coverage should not be mentioned at trial. On motions *in limine*, the court excluded evidence or argument on defense costs because "the duty to defend and the payment of defense costs are no longer issues in this litigation." A0713.

Insurers must prove that Conduent sought to obtain indemnity coverage that would not otherwise have been available. To establish collusion and bad faith, Insurers needed to prove that Conduent manufactured coverage "that would not otherwise be available." A1656-57. That is, Insurers had to prove that Conduent was not eligible for indemnity coverage for the State Action (because, *e.g.*, it

sounded in fraud and sought statutory fines and penalties) and that Conduent procured the amendment to the petition to add covered causes of action for breach of contract and negligence.

Superior Court's reversal. Post-trial, the court ruled that Insurers violated a pretrial order not to "gild[] the lily" by "repeatedly inferring that AIG never had ***any*** coverage obligation." Trial Op. 17. In so stating, the court did not pinpoint any aspect of its orders or any alleged transgression by Insurers. *Id.*

ARGUMENT

A. Exclusion 3(a) Precludes Coverage.

1. Question Presented

Did the Superior Court err in ruling that Exclusion 3(a) does not preclude coverage, according to its unambiguous terms and controlling New York law? This issue was raised (A0225, 0265, 0324; A0638, 0649-50; A1724-27; A1959-63; A1989-2136; A2145-89) and decided below (A0658, A0698; MSJ Op.).

2. Scope Of Review

This Court reviews *de novo* the Superior Court's legal determination that Exclusion 3(a) does not apply. *See* MSJ Op. 3 ("Application of Exclusion 3(a) is a purely legal issue."); *Terex Corp. v. S. Track & Pump*, 117 A.3d 537, 541 (Del. 2015) (pure questions of law reviewed *de novo*).

3. Merits Of Argument

Conduent's settlement payment falls within Exclusion 3(a), an unambiguous policy exclusion that excludes losses incurred in connection with any suit alleging dishonest or fraudulent acts or omissions, or knowing violations of law. Exclusion 3(a) provides that:

> This policy shall not cover Loss in connection with a Claim made against an Insured (a) alleging, arising out of, based upon or attributable to a dishonest, fraudulent, criminal or malicious act, error or omission, or any intentional or knowing violation of the law ….

A2350. Under New York law, which governs (A0514), an exclusion must be "read[] … in its entirety and ascrib[ed] … its plain and ordinary meaning." *Lend Lease (US) Constr. LMB v. Zurich Am. Ins.*, 136 A.D.3d 52, 59 (N.Y. App. Div. 2015), *aff'd*, 28 N.Y.3d 675 (2017). Here, the court correctly determined that, "[b]y paying the settlement amount, Plaintiff experienced a Loss in connection with a Suit, which constituted a Claim made against the Plaintiff Insured." MSJ Op. 5. The policy's definition of "Loss" expressly includes "settlements." A2350. "Claim," in turn, is defined to include "a Suit," *i.e.*, "a civil proceeding … commenced by service of a complaint or similar pleading" (A2349-50), such as the State Action. The settlement payment was indisputably made "in connection with" the State Action. *See* A3714 ("The CONDUENT DEFENDANTS shall make payment to the STATE … in full settlement of the claims asserted in … the State Action ….").

All that remains is whether the State Action was, per the terms of Exclusion 3(a), a Suit "alleging, arising out of, based upon or attributable to a dishonest, fraudulent, criminal or malicious act, error or omission, or any intentional or knowing violation of the law." A2350. That question is easily answered in the affirmative. New York law is clear that, in applying exclusions like this, courts look to the Claim's overall "gravamen." *See, e.g.*, *Gibbs v. CNA Ins.*, 263 A.D.2d 836, 838 (N.Y. App. Div. 1999) (ruling that the "gravamen" of allegations brought under

negligence headings fell within an "intentional acts" exclusion, thereby obviating insurer's duty to indemnify); *Cent. Mut. Ins. v. Willig*, 29 F. Supp. 3d 112, 118-19 (N.D.N.Y. 2014) (applying exclusion for damage "intended by an 'insured'" where "the Underlying Complaint [was] replete with allegations of intentional conduct").

The gravamen of the Third Amended Petition sounded in fraud, dishonesty, and knowing violations of the law. As the court recognized, "[t]he bulk of the original Petition is based on dishonest or fraudulent acts, or on intentional or knowing violations of the law." MSJ Op. 10. That observation should have ended the inquiry because the Third Amended Petition did not remove any of the allegations of fraudulent and dishonest acts and knowing violations on which Texas's petition was founded from the beginning. *Compare* A2418-40 *with* A2455-81, A3385-413, A3673-705; *see* A1081-82 (Conduent's general counsel testifying that "the material factual allegations in th[e] third amended complaint" did not "change at all from the prior complaints").

Like all prior iterations of the petition, the Third Amended Petition is replete with allegations of "unlawful acts" (A3673-78, 3698), "including the making of false statements and misrepresentations of material fact to the Texas Medicaid Program" (A3676-77; *see* A3682-88, 3691-92, 3694, 3696-98). The Third Amended Petition merely tacked on additional counts for breach of contract and negligence while

retaining, word for word, the same underlying allegations of fraud, dishonesty, and knowing violations of the law that had consistently supported the count for Medicaid fraud. A0609 (Conduent arguing: "In this case, the factual allegations of the Second Amended Petition and Third Amended Petition are identical…. No new *facts* were alleged."). Lest there be any doubt, Conduent itself previously admitted that "[t]he same allegations [of fraud] supporting the State's TMFPA claim also supported breach of contract and negligence claims." A0430; *see* A0370; Trial Op. 29 (recognizing parties' concurrence that "the Third Amended Petition contained materially identical factual allegations").

Although the court purported to assess the "gravamen" of the State Action, it erred in inquiring whether the allegations of the Third Amended Petition were "solely or primarily based on" excluded conduct. MSJ Op. 6. To answer no, the court purported to identify six "breach of contract" allegations from the State Action that, by its account, did not sound in fraud or dishonesty. *Id.* at 7-9. But the *essence* of the Claim, not any one allegation (or six allegations out of hundreds), is what matters. *See* Black's Law Dictionary (11th ed. 2019) (defining "gravamen" as "[t]he substantial point or essence of a claim, grievance, or complaint"). The gravamen of the Third Amended Petition, including even its breach of contract cause of action standing alone, is Conduent's scheme of misconduct. *See* A3677, 3687-88, 3698-

700 (describing Conduent's failures to comply with contractual obligations as, *inter alia*, "misrepresentations," "omissions," "fail[ures] to disclose," and "[f]ail[ures] to comply with … laws").

Nor did the gravamen of the State Action ever meaningfully change. As the court correctly observed, "the facts underlying all allegations are related." MSJ Op. 10-11. Indeed, the six allegations that the court identified from the Third Amended Petition had in fact appeared, verbatim, in the First and Second Amended Petition, which included no causes of action for breach of contract or negligence. *Compare* MSJ Op. 7-9 *with* A3393-94, 3396, 3404-05 *and* A3278-79, 3281, 3290. And, though not always verbatim, the materially identical allegations appeared in the Original Petition. A2424-26, 2434; *see* MSJ Op. 10 ("The bulk of the original Petition is based on dishonest or fraudulent acts, or on intentional or knowing violations of the law."). The court erred by treating the six contract allegations, combined with the two tacked-on counts, as though they changed the "gravamen" of the petition so as to disable the otherwise-operative exclusion. MSJ Op. 10. This result makes a mockery of New York law and invites insureds to defeat exclusions through sheer sophistry.

Nor does it matter that the settlement purported to allocate the entire payment solely to "contract claims [that] are separate and distinct from the claims based on

fraud, dishonest acts, or knowing violations of the law." MSJ Opp. 11. The court stated that "[i]t would be unreasonable for a fraud exception to eliminate coverage for a loss relating to contract claims." MSJ Op. 6. But New York law focuses on the *gravamen* of the underlying allegations, not the label for any particular cause of action. In *Gibbs*, for example, even though the "sole allegations" at issue supported a cause of action styled as one for "negligence," the court held there was no duty to indemnify because "the gravamen of [the] action" came "within the meaning of the policy exclusion [for intentional acts]." 263 A.D.2d at 837-38. Courts elsewhere are in accord. *See, e.g.*, *Scottsdale Ins. v. RiverBank*, 815 F. Supp. 2d 1074, 1084-85 (D. Minn. 2011) (denying coverage under similar exclusion because "fraud and dishonesty [were] alleged in the underlying suit," and because "[t]he 'negligence' label of the underlying judgment is not determinative of the issue").

The court also invoked the maxim that "exclusions must be read strictly and narrowly against the insurer." MSJ Op. 5. But "[i]f the plain language of the policy is determinative, [a court] cannot rewrite the agreement by disregarding that language." *Fieldston Prop. Owners Ass'n v. Hermitage Ins.*, 16 N.Y.3d 257, 264 (N.Y. 2011). Although the court chided Insurers for an overly broad reading of "arising out of" (MSJ Op. 6), those words are not relevant here. For Exclusion 3(a)

to apply, it suffices that the Claim merely "alleg[e]" excluded conduct. A2350 ("alleging, arising out of, based upon ***or*** attributable to …" (emphasis added)).

Exclusion 3(a) requires judgment for Insurers.

B. The Jury's Findings on Cooperation and Consent Mandate Judgment For Insurers.

1. Question Presented

Whether the Superior Court properly entered judgment as a matter of law in favor of Conduent on the issues of cooperation and consent, *notwithstanding* the jury's *undisturbed* findings that Conduent breached its duties to cooperate and seek consent from its insurers before settling and that doing so would not have been futile. This issue was raised (A1847-62; A4416-36, A4499) and decided below (Trial Op. 29-34).

2. Scope Of Review

"A Superior Court decision granting a motion for judgment as a matter of law is a question of law, which this Court reviews *de novo*." *Peterson v. Del. Food Corp.*, 788 A.2d 132 (Table), 2001 WL 1586831, at *1 (Del. 2001).

3. Merits Of Argument

Conduent was obligated under the policy to cooperate with Insurers and to seek their consent before settling. A2344. Conduent's failure to discharge either of these duties "is a breach of a condition precedent under the policy, which bars recovery under it." *Empire Fire & Marine Ins. v. Estrella*, 2019 WL 6390193, at *5 (E.D.N.Y. Sept. 13, 2019), *adopted*, 2019 WL 4744208 (E.D.N.Y. Sept. 30, 2019). The jury found that Conduent did not cooperate and failed to seek consent before

settling (*see supra* pp. 3-5), and those findings remain undisturbed (Trial Op. 30 & n.16).

Conduent argued below that, even if it failed to cooperate and seek consent, it was relieved from those duties when Insurers denied coverage of the State Action. *See* Trial Op. 29. Under controlling New York law, an insured need not cooperate and seek consent if doing so would be futile because the insurer has repudiated liability—*i.e.*, declared there would be no coverage under any circumstance. *Seward Park Hous. Corp. v. Greater New York Mut. Ins.*, 836 N.Y.S.2d 99, 105 (N.Y. App. Div. 2007); *Armstrong v. United Frontier Mut. Ins.*, 121 N.Y.S.3d 488, 492 (N.Y. App. Div. 2020). An insured is *not* released from obligations to cooperate and seek consent to settle where an insurer denies coverage but references the specific policy provisions underlying its decision while remaining attentive to changing circumstances. *Seward*, 836 N.Y.S.2d at 105. The latter constitutes a "disclaimer" under New York law; the former, a "repudiation." *Id.* at 104-05; *see Bear Wagner Specialists, LLC v. Nat'l Union Fire Ins.*, 2009 WL 2045601, at *7 (N.Y. Sup. Ct. July 7, 2009) (no repudiation where "the denial letters never stated that all future claims would be denied, and even provided [insured] with the opportunity to submit additional information for a re-evaluation").

Previously, New York courts sometimes used the terms "denial," "disclaimer," and "repudiation" interchangeably. *See Seward*, 836 N.Y.S.2d at 104-05. Yet the New York Appellate Division has cautioned against "erroneously equat[ing] 'disclaimer of coverage' with 'repudiation of liability.'" *Id.* ("To the extent that we have used the terms interchangeably, we now correct that imprecision."); *accord Fed. Ins. v. SafeNet, Inc.*, 817 F. Supp. 2d 290, 305 (S.D.N.Y. 2011).

Post-verdict, the court nonetheless ruled, as a matter of law, that Insurers' denial of defense coverage was "a disclaimer of coverage and repudiation of liability,[] both of which release the insured from its duties to cooperate and to seek consent." Trial Op. 31. That ruling is erroneous for two reasons: *First*, Insurers never repudiated liability. They merely disclaimed coverage for the State Action, while covering the related Provider Actions and asking to be apprised of any changing circumstances. *Second*, even if Insurers repudiated coverage for the State Action that was tendered to them, they never provided *any* coverage determination for the *Third Amended Petition* because Conduent never tendered *that* petition for coverage—Conduent instead settled the petition simultaneously with its filing and then tendered the *settlement* for coverage.

1. *Because Cooperation And Consent Were Not Futile, Insurers Could Not Have Repudiated.*

The jury found that cooperating with Insurers and seeking their consent would not have been futile. A1667-68. Throughout the State Action, while providing coverage for the related Provider Actions, Insurers stated that there was "at present no coverage available" for the State Action but "ask[ed] [to be kept] apprised ... so that we may review [] and, if needed, supplement our coverage evaluation." A2441; *see* A1421-22; A0950 (Conduent's general counsel: "[T]here was correspondence and conversations [with Insurers] between the time the State action was filed all the way up through I think January of 2019."); A1462. Because Insurers merely disclaimed coverage, their denial did not relieve Conduent of its duties.

The court nevertheless found as a matter of law that Insurers repudiated coverage based on their "unjustifiable refusal" to provide defense coverage. Trial Op. 32. This is insufficient to relieve Conduent of contractual duties. *See Seward*, 836 N.Y.S.2d at 105 (distinguishing "true contractual repudiations" from "run-of-the-mill breaches of contract … alleged by insureds upon receiving coverage disclaimers"). As the Tenth Circuit explained, "[i]f this were not the law, it would … amount to a virtual denial of the right to insist upon an honest, but erroneous, interpretation." *Kimel v. Mo. State Life Ins.*, 71 F.2d 921, 923 (10th Cir. 1934).

In sum, Insurers disclaimed coverage; they did not repudiate, particularly insofar as they were paying defenses costs for another related lawsuit under the same

policy. *See* A0950; *Seward*, 836 N.Y.S.2d at 105. The jury reasonably found the absence of futility (A1667-68), from which it follows that the door remained open for Conduent to return with any enhanced grounds for coverage.

2. *Conduent Was Obligated To Submit The Third Amended Petition For Coverage.*

Conduent undisputedly failed to tender the Third Amended Petition to Insurers before settling. Conduent argued, and the court agreed, that it did not need to do so because the new contract claim was based on "materially identical factual allegations." Trial Op. 29. But the court ultimately found *material differences* in ruling for Conduent: According to the court's summary judgment ruling, the Third Amended Petition was *transformative*, changing the "gravamen" of the State Action from an action sounding in fraud to one sounding in breach of contract. MSJ Op. 10-11.

Insurers do not believe the "gravamen" of the State Action changed (*see supra* pp. 27-29), but, assuming it did, it necessarily follows that Conduent was obligated to alert Insurers to that change and permit them to reassess coverage in light of it. Doing so would not have been futile, as the jury found. Trial Op. 30. That leaves no prospect of Conduent properly being entitled to coverage on this record.

C. The Superior Court Improperly Set Aside The Jury Findings Of Fraud And Bad Faith.

1. Question Presented

Whether the Superior Court erred in setting aside the jury's findings of fraud and bad faith and ordering a new trial, largely *sua sponte* and without notice or hearing, on the grounds that:

(i) The OAG Testimony should have been excluded at trial, notwithstanding the parties' stipulation that the OAG Testimony "shall be admissible by any party for any purpose at trial" and the court's pretrial rulings affirming that stipulation;

(ii) Insurers drew improper inferences from non-privileged information appearing on Conduent's privilege log, even though the only inference drawn—consistent with the court's pretrial order and Rule of Evidence 512(a)—was that Conduent was communicating internally about the general subject matter of insurance coverage while negotiating settlement;

(iii) Insurers improperly referenced the press release in front of the jury, even though Insurers did so only after Conduent opened the door to such evidence and as permitted by the court's pretrial rulings; and

(iv) In proving that Conduent attempted to create coverage that "would not have otherwise existed," Insurers improperly implied that they did not owe defense

costs by not precisely distinguishing between indemnity and defense costs, even though the court's pretrial ruling precluded Insurers from even mentioning defense costs.

These issues were raised at the first opportunity (A1826-27, 1842-47; A1952-55; A4462-99) and acknowledged below (A2242-43; Trial Op. 8-29).

2. Scope Of Review

This Court reviews "the grant or denial of a new trial for abuse of discretion," but "great deference is given to jury verdicts," and so "long as there is a sufficient evidentiary basis … the jury's verdict should not be disturbed by a grant of ... a new trial." *Chilson v. Allstate Ins.*, 979 A.2d 1078, 1083 (Del. 2009). The record is reviewed "from the perspective most favorable to the jury's verdict." *Id.* "[Q]uestions of law" are reviewed "*de novo*." *McGuiness v. State*, 2024 WL 566607, at *11 (Del. Feb. 13, 2024).

3. Merits Of Argument

The court rested its "exceptional," once-in-a-judicial-career decision on four grounds. If any is reversed, the four-legged basis for the court's new trial decision falls and the jury verdict should be reinstated. *See Reinco, Inc. v. Thompson*, 906 A.2d 103, 111-12 (Del. 2006) (reversing new trial order).

None of the four bases withstands scrutiny.

i. Sworn OAG Testimony

The court's treatment of the OAG Testimony defies the parties' agreement together with the court's own orders, and affirmatively inflicts an injustice. To avoid the prospect of any live witness from the OAG at trial (A0652), Conduent made the strategic decision to stipulate that "the State's written deposition testimony shall be admissible by any party for any purpose at trial." A0652. When Conduent later sought to have portions of the exhibit excluded as hearsay (A0840-41), the court upheld the stipulation. A0848-49.

The court also rejected attempts by both parties to preclude relevant credibility testing. The court denied Insurers' motion to preclude argument that the designated author of the OAG Testimony lacked personal knowledge, and such testimony was presented. *See supra* pp. 8. When Conduent moved (despite the stipulation) to exclude portions of the testimony as double hearsay or otherwise not credible (A0840-41), the court refused (A0849).

Conduent used the OAG Testimony affirmatively in its opening statement (A0905) and throughout trial (*e.g.*, A1553). "The trial was replete with testimony from other witnesses about Winter's credibility and alleged bias." Trial Op. 8. Conduent even repurposed a percipient witness who happened to know OAG designee Winter into a quasi-expert on Winter's credibility, modus operandi, and

standing within the OAG. A1533-36. Although the court noted in its post-trial order that "Winter's credibility became a centerpiece of the trial" (Trial Op. 9-11), that was a feature rather than a bug, as the court consistently took pains to enable credibility testing at trial and thereby enable the jury's informed assessment. *See, e.g.*, A0712-13; A0849.

As grounds for setting aside the verdict, the court opined that Winter lacked personal knowledge as to portions of his testimony and that certain testimony was "directly contradictory of the explicit terms of the Settlement Agreement" and "inconsistent" with the jury's finding that Conduent did *not* collude with the OAG. Trial Op. 9-10. "From all appearances," however, this was "simply a case where the Trial Judge drew a conclusion different from the jury on a disputed question of fact." *Storey v. Camper*, 401 A.2d 458, 467 (Del. 1979). That conclusion should not withstand review.

First, because Conduent never argued the OAG Testimony should not have been admitted,[1] the court violated Rule 59(c) in granting a new trial without first giving Insurers "notice and an opportunity to be heard on the matter." Super. Ct. Civ. R. 59(c).

[1] Conduent argued only that the OAG Testimony was "unreliable" and "insufficient to establish fraud" (A1755, 1768), not that the entire submission was inadmissible.

Second, under Rule 59(c), the court could order a new trial only "for any reason for which it might have granted a new trial on motion of a party." Because Conduent could not overturn the jury verdict by faulting the admission of stipulated testimony, neither could the court. *See Devaney v. Nationwide Mut. Ins.*, 679 A.2d 71, 75 (Del. 1996) ("[T]he trial court abused its discretion in failing to give effect to the parties' stipulation."); *Rush v. Weinstein*, 2023 WL 7381459, at *4 (9th Cir. Nov. 8, 2023) (affirming denial of new trial where challenging party "stipulated to the admission" at trial). Having entered into that stipulation to avoid a live witness from the OAG at trial, Conduent could not challenge the verdict based on implementation of the stipulation. *Cf. Green v. Alfred A.I. duPont Inst.,* 759 A.2d 1060, 1061 (Del. 2000) ("[I]t was an abuse of discretion to prevent the use of such evidence at trial when ... the pretrial stipulation and order acknowledged its potential use by either party.").[2] By faulting the written nature of the OAG testimony, the court effectively conferred a windfall on Conduent, which had stipulated to the OAG's *written* testimony to ensure against *live* testimony. Far from correcting any grave injustice, *post hoc* exclusion of the stipulated testimony actually perpetrated injustice.

[2] Contrary to the court's assertion that "Winter was not subject to cross-examination" (Trial Op. 8), Conduent had the opportunity to and did cross-examine Winter on written deposition (A3763-83).

Lest there be any doubt, the court's own pretrial ruling refuted its post-trial one: "[Y]ou all have agreed to put [the OAG Testimony] in, and I understand why. And I am not suggesting that that is wrong…. These written questions are coming in as-is. If there had been an exception to that broad agreement to [admissibility], it should have been put in the agreement." A0847, 0849.

Third, the court committed clear error in making its own credibility determination that the OAG Testimony was contradictory, on the premise that Winter denounced the Settlement Agreement as "false." [redacted] That timeline is not "directly contradictory of the explicit terms of the Settlement Agreement," which states that, at some time "[p]rior to entering into and reaching this Agreement, the STATE advised DEFENDANTS that it was prepared to amend the State Action to add causes of action for breach of contract … and negligence." Trial Op. 9-10.

In fact, [redacted] *See* A3706, 3727; *see also* A3628 (email from OAG to Conduent on January 29, 2019: "we would much prefer not to amend the pleadings themselves to allege contract claims…."); A1059-60.

Finally, the court surmised that the jury may have been "confused"—presumably by the OAG Testimony—into rendering "verdicts [that] can be viewed as contradictory" (Trial Op. 34) because the jury found no "collusion" or unreasonableness in Conduent's settlement with OAG, while finding fraud and bad faith by Conduent. But there is no inconsistency in jury findings if there is "one possible method of construing the jury's answers as consistent with one another." *Grand Ventures, Inc. v. Whaley*, 622 A.2d 655, 664 (Del. Super. Ct. 1992), *aff'd*, 632 A.2d 63 (Del. 1993).

Here, the questions of fraud and good faith focus on Conduent's misconduct in pursuing the settlement and coverage (*see* A1655, 1657), whereas reasonable settlement focuses on the end result of the settlement terms (*see* A1658) and collusion requires that the OAG have been complicit in Conduent's deceit (*see* A1656). The jury could readily find that Conduent committed misconduct toward its Insurers, but that the OAG was not complicit or unreasonable in settling on terms favoring its taxpayers. It is straightforward, therefore, to "construe[] the jury's answers as consistent with one another." *Whaley*, 622 A.2d at 664.

ii. References To Privilege Log

The court faulted Insurers post-trial for "attempted references to [attorney-client] privileged communications before and throughout trial." Trial Op. 13. For this, the court quoted closing arguments to which Conduent "did not object," before nonetheless finding that objections "were not waived." *Id.* As the court's order shows (Trial Op. 13-16), however, all Insurers actually did was extract non-privileged information as permitted by Rule of Evidence 512(a) and the court's own pretrial order, including its approval of the relevant demonstrative. *Compare* A0809 *with* Trial Op. 14, 16.

Pretrial, the court ruled that Insurers were entitled to elicit testimony "that meetings took place, the dates of those meetings, the general subject matter, and who

attended those meetings" with counsel, precisely as reflected in a court-approved demonstrative. *See supra* p. 20. Thus, it was beyond reproach for Insurers to note that Conduent was discussing insurance coverage with counsel at the same time it was negotiating the State Action settlement. Per the court's own orders, argument about "the general subject matter" was permitted (A0809), for example: "The lawyers on the ground are having discussions about what? The proposed Conduent settlements" constitutes permissible argument about "general subject matter," without crossing the line into impermissible exploration of any specific "positions" that counsel "advised [Conduent] to take." Trial Op. 16.

The court's decision to allow this evidence and argument followed Rule of Evidence 512(a), which prohibits commenting upon or drawing inferences from "[t]he claim of privilege." D.R.E. 512(a). The rule prohibits a party from drawing adverse inferences based on the other party's *withholding* of a privileged document. Parties may, in contrast, draw inferences from the non-privileged information appearing on a privilege log, provided they avoid inferences about the specific content of attorney-client advice. *See, e.g.*, *Ontario Provincial v. Walton*, 2023 WL 3093500, at *4 (Del. Ch. Apr. 26, 2023) (drawing "fair inference" from privilege log).

In referencing the privilege log at trial, Insurers adhered to both the court's pretrial order and Rule of Evidence 512(a). Insurers did not comment on or draw any inferences from Conduent's assertion of privilege. Nor did they draw inferences about the specific content of attorney-client advice. The only inference—drawn entirely from the non-privileged information appearing on the privilege log—was that Conduent communicated internally about the general subject matter of insurance coverage for a settlement of the State Action while negotiating the settlement with Texas. *See supra* p. 7-8; A1063.

Insurers cannot fairly be faulted for drawing this inference at trial, especially considering they did so in direct response to Conduent's central defenses. Conduent argued that "contemporaneous documents showing what was happening at the time [Conduent and Texas] were settling" did not mention insurance, and that addition of the contract claim was driven "critically" by the concern of Conduent's business and contracting personnel about the optics of settling a "pure fraud claim." A1069; A1253-54; A1041. Insurers were entitled under Delaware law to use basic facts derived from the privilege log to rebut Conduent's account. *See, e.g.*, *Medicalgorithmics S.A. v. AMI Monitoring, Inc.*, 2016 WL 4401038, at *23 (Del. Ch. Aug. 18, 2016) (testimony was "belied by evidence from [the] privilege log").

Finally, Conduent waived any objection to Insurers' closing statements by failing to object contemporaneously. *See Gen. Motors Corp. v. Grenier*, 981 A.2d 531, 541 n.27 (Del. 2009); *Klosiewicz v. Stevenson*, 2020 WL 707639, at *6 n.46 (Del. Super. Ct. Feb. 12, 2020). The court discounted this failure to object by noting it "is typical in civil trials in Delaware" not to raise objections during closing argument. Trial Op. 13. But the court ignored that Conduent *did* object during closing argument for *other* reasons. A1574, 1578. Moreover, if an error is so consequential that it warrants the extraordinary relief of overturning a jury verdict, it follows *a fortiori* that it warrants at least some contemporaneous objection or admonition.

Had Conduent objected or had the court raised any "contemporaneous objection" or even a "post-summation objection," then a prompt, tailored remedy could have been administered via "a curative instruction." *Messick v. Star Enter.*, 1998 WL 110082, at *10 (Del. Super. Ct. Jan. 30, 1998), *aff'd*, 723 A.2d 840 (Del. 1998). There certainly is no reason to order a new trial based on conduct that adhered to on-point guidance and passed without concern at trial.

iii. References To Press Release

The court similarly veered astray by faulting Insurers post-trial for having "repeatedly referred to [a] Press Release in the presence of the jury." Trial Op. 21.

Because Conduent never sought post-trial relief on that basis, the court violated Rule 59(c) by failing to give Insurers an opportunity to be heard on the issue. *See supra* pp. 40.

As the court acknowledged, Insurers referenced the press release in conformance with the court's pretrial ruling (Trial Op. 20-21), and *only after* "Conduent had opened the door to presenting the Press Release to the jury" through the testimony of Conduent's first witness (*id.* 21 n.14).

Pretrial, the court ruled the press release was not admissible but that "on cross-examination a Conduent witness might be asked: 'Isn't it true that the OAG referred to the settlement as one for Medicaid fraud after the Third Amended Petition was filed?'" A0808. Thus, Insurers would be allowed to prove—whether through testimony or, if necessary, admission of the press release—that "the Texas OAG made the reference to Medicaid fraud in a press release, after the Third Amended Petition." *Id.*

Conduent's initial witnesses testified that the settlement of the Third Amended Petition "was all about the government contracts business" and that Conduent did not want to "be seen as having settled a … pure fraud claim." A1069; A1041. The court ruled (and Conduent agreed) that this opened the door to a question about how the OAG publicly characterized the settlement: "Isn't it true

that after the settlement agreement was finalized, the Office of the Attorney General of the State of Texas publicly referred to the settlement as one for Medicaid fraud?" A1076. In response, Conduent's witness testified: "I think they mentioned it, that they would issue a press release." *Id.* That express reference to the "press release" further opened the door for Insurers to "argue that this is what was said in a press release." *See* Trial Op. 27 (recounting trial ruling that, "since the witness said it, you can argue that this is what was said in a press release, because the witness put that in there").

All the jury heard was that a press release had issued mentioning "Medicaid fraud and other grounds." A1077. Of the six instances the court cited, only two occurred in the jury's presence; the remainder were in argument before the court and cannot possibly justify a mistrial. Trial Op. 21-29. As for the two instances that occurred in front of the jury, they were, as the court noted during trial, "not controversial" because they did not go beyond the mere fact that, "of course, a press release is going to be issued." A1277. These two "not controversial" references cannot justify a mistrial. *See Reinco*, 906 A.2d at 111-12 (new trial was not properly ordered on theory that "merely hearing [certain evidence] would have necessarily confused the jury," when the jury "never gave any indication that it was confused"). Nor would it suffice if, as the court erroneously claimed post-trial, the references

"had the *potential* to be unduly prejudicial." Trial Op. 21 (emphasis added). That still falls well short of identifying "significant prejudice [that] denied [Conduent] a fair trial." *O'Riley v. Rogers*, 69 A.3d 1007, 1010 (Del. 2013).

Further, the press release was *not* hearsay because it goes not to the truth of the matter asserted, but to the effect on Conduent as listener. *See Atkins v. State*, 523 A.2d 539, 548 (Del. 1987) (admitting tape recording offered "to prove the effect of those words upon [the listener] irrespective of their truthfulness"). Had Conduent actually been concerned (as it claimed) that its reputation would suffer from characterizing the settlement as one for Medicaid fraud, it would presumably have protested when Texas so characterized the settlement to the world. That Conduent said nothing (A3777; A1305) speaks volumes. A1273-74.

iv. References To Coverage Obligations

The court also faulted Insurers for implying they never had any coverage obligations. Trial Op. 17. Because the court did not identify any specific testimony or argument that it deemed objectionable, this "principal reason" supporting a new trial is facially deficient. *See, e.g.*, *Storey*, 401 A.2d at 466 (reversing new trial order where Superior Court failed to identify the basis for its opinion).

Nor can Insurers fairly be faulted for implying that they did not have any coverage obligation. For their fraud and bad faith defenses, Insurers needed to prove

that Conduent attempted to obtain coverage "that otherwise would not have existed." Trial Op. 5. In doing so, Insurers did not precisely distinguish indemnity from defense costs, which the court previously determined were covered. A0517. But it would be nitpicking at best to fault Insurers for failing to be more precise about a "nuance" (A1245) that was irrelevant to a trial that focused entirely on indemnity (*id.*). In no way did this lack of precision "constitute[] significant prejudice so as to have denied [Conduent] a fair trial." *O'Riley*, 69 A.3d at 1010. If anything, trying to draw any such distinction, as the court put it, "has the potential for really confusing the jury." A1245-46.

The court's rulings also placed Insurers in a Catch-22. The court's pretrial ruling *prohibited* the parties from even *mentioning* defense costs: "[T]he duty to defend and the payment of defense costs are no longer issues in this litigation. These issues are irrelevant. I find that the evidence will not be admitted unless the door is opened." A0713; *see also* A1245. Insurers complied. It is unfair to fault Insurers for not drawing a distinction between indemnity and defense costs when the court's own rulings effectively prevented Insurers from doing so.

CONCLUSION

This Court should reverse the grant of a new trial, reverse the judgment for Conduent as a matter of law, and remand for entry of judgment for Insurers.

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