EFiled: Oct 06 2025 02:05PM EDT
Filing ID 77244293
Case Number 325,2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AIG SPECIALTY INSURANCE COMPANY, AXIS INSURANCE COMPANY, U.S. SPECIALTY INSURANCE COMPANY, and ACE AMERICAN INSURANCE COMPANY,	:	
Defendants-Below/Appellants	:	
v.	:	C.A. No. 325,2025
GENWORTH FINANCIAL INC., GENWORTH LIFE INSURANCE COMPANY, and GENWORTH LIFE INSURANCE COMPANY OF NEW YORK,	:	Appeal from the Superior Court of the State of Delaware N22C-05-057 EMD (CCLD) (Davis, J.)
Plaintiffs-Below/Appellees.	:	Original Filed: September 19, 2025 Public Version Filed: October 6, 2025

JOINT OPENING BRIEF OF APPELLANTS

OF COUNSEL:

ARNOLD & PORTER KAYE SCHOLER LLP
Scott B. Schreiber
William C. Perdue
Samuel I. Ferenc
Bou Lee
601 Massachusetts Avenue, NW
Washington, DC 20001
(202) 942-5000

HEYMAN ENERIO GATTUSO & HIRZEL LLP
Kurt M. Heyman (# 3054)
Aaron M. Nelson (# 5941)
Brendan P. McDonnell (# 7086)
222 Delaware Avenue, Suite 900
Wilmington, DE 19801
(302) 472-7300
Attorneys for Defendant-Below/Appellant AIG Specialty Insurance Company

OF COUNSEL:

WERNER AHARI MANGEL LLP
Douglas M. Mangel
Michelle Beecy
2112 Pennsylvania Ave. NW
Suite 200
Washington, DC 20037

PHILLIPS McLAUGHLIN & HALL, P.A.
John C. Phillips, Jr. (# 110)
David A. Bilson (# 4986)
1200 N. Broom Street
Wilmington, DE 19806
(302) 655-4200
Attorneys for Defendant-Below/Appellant
U.S. Specialty Insurance Company

OF COUNSEL:

CARLTON FIELDS, P.A.
Steven J. Brodie
2 Miami Central
700 NW 1st Avenue, Suite 1200
Miami, FL 33136-4118
- and -
Charles W. Stotter
Chrysler Building
405 Lexington Avenue – 36th Floor
New York, NY 10174-3699

DLA PIPER LLP (US)
John L. Reed (# 3023)
1201 North Market Street
Suite 2100
Wilmington, DE 19801
(302) 468-5635
Attorneys for Defendant-Below/Appellant
ACE American Insurance Company

OF COUNSEL:

WILEY REIN LLP
Jason Cronic
Matthew Beato
Jessica N. Gallinaro
2050 M Street, NW
Washington, DC 20036

SMITH KATZENSTEIN
& JENKINS LLP
Robert J. Katzenstein (# 378)
Julie M. O'Dell (# 6191)
1000 N. West Street, Suite 1501
Wilmington, DE 19801
(302) 652-8400
Attorneys for Defendant-Below/Appellant
AXIS Insurance Company

Dated: September 19, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules & Regulations

Other Authorities

NATURE OF PROCEEDINGS

This appeal concerns whether insurance coverage for three underlying class actions is barred by two exclusions. The first exclusion bars coverage for underlying lawsuits that are "based upon, arising out of or attributable to (i) the inadequacy of any claim reserves of [the insured]," which is precisely what the underlying complaints pled. The second exclusion bars coverage for any portion of a judgment or settlement that "constitutes … premiums," which is precisely what the insured agreed to pay class members in the underlying settlements. The Superior Court's rulings misapply the policy language and misconstrue the underlying lawsuits.

The insured here itself is an insurance company. Appellees Genworth Financial, Inc., Genworth Life Insurance Company, and Genworth Life Insurance Company of New York (collectively, "Genworth") sell long-term care ("LTC") insurance, which defrays the costs of custodial care for individuals unable to perform the basic activities of daily living. Genworth's LTC policies are renewable annually, but upon renewal, premiums may increase. If Genworth increases premiums substantially, policyholders can choose to maintain their full benefits in exchange for the increased premiums or to take reduced benefits in exchange for lower premiums. Alternatively, policyholders can elect to cap their benefits and pay no further premiums at all—an option known as "non-forfeiture status" ("NFS"). To

pay benefits under its LTC policies, Genworth establishes "claim reserves"—funds set aside to pay future claims.

In the underlying lawsuits (the "Underlying Actions"), Genworth policyholders alleged that Genworth withheld critical information about its claim reserves, thereby deceiving policyholders into renewing their policies with higher premiums than they would have chosen with full information. The policyholders alleged that, to fill a growing hole in its reserves, Genworth planned to significantly increase future premiums. But Genworth did not adequately inform its policyholders about the planned increases. Most importantly, Genworth did not tell its policyholders that the substantial increases were being planned because they were ***necessary*** to shore up Genworth's inadequate claim reserves. Consequently, when Genworth began increasing premiums, the underlying plaintiffs renewed their policies with full benefits (or with reduced benefits rather than NFS), unaware that premiums would continue rising in future years, quickly making the benefits they elected unaffordable to maintain. The plaintiffs thus allegedly paid Genworth more in premiums than they would have paid had Genworth told the truth about its inadequate claim reserves.

Genworth ultimately settled the Underlying Actions, [redacted] Genworth now seeks coverage for those expenditures under a primary professional liability

insurance policy (the "Primary Policy") issued by Appellant AIG Specialty Insurance Company ("AIG Specialty"), as well as follow-form excess policies issued by the other Appellants (together with AIG Specialty, the "Insurers").

The Insurers denied coverage under two exclusions. First, the Claim-Reserves Exclusion provides that the Primary Policy does not cover any "**Claim**,"[1] including a civil lawsuit, that is "based upon, arising out of or attributable to (i) the inadequacy of any claim reserves of [Genworth]." A0283. Here, the underlying complaints alleged that Genworth failed to disclose information about its plan for future premium increases and its inadequate claim reserves, which was misleading because Genworth knew that the planned increases were necessary to shore up those reserves.

Second, the Premiums Exclusion provides that the Primary Policy does not cover any portion of "**Loss**," including a settlement, that "constitutes … premiums." A0282. Here, Genworth's settlement payments were compensation for the only harm the underlying plaintiffs allegedly suffered: paying Genworth premiums they would not have paid with full information.

Nevertheless, in two decisions, the Superior Court granted summary judgment to Genworth on both exclusions. First, before discovery, the court found the Claim-

[1] Terms in **bold** appear as such in the original and are defined in the Primary Policy.

Reserves Exclusion inapplicable. Effectively rewriting the policy language, the court reasoned that the Claim-Reserves Exclusion bars coverage only for Loss that is "directly attributable to Genworth's inability to pay claims to its insureds because Genworth … failed to maintain sufficient claim reserves." Ex. C, 22. But the relevant portion of the Claim-Reserves Exclusion does not mention "inability to pay." Inadequate claim reserves were central to Genworth's omissions and the underlying plaintiffs' legal theories; nothing more is required.

Second, after discovery, the court held that, although the Premiums Exclusion bars coverage for settlement payments Genworth made to ***other*** class members, it does not bar coverage for payments to class members who, before the settlements, had elected the NFS option. The court reasoned that, under the settlements, the payments to NFS class members were flat amounts and were not ***calculated*** based on premiums NFS class members had previously paid. Under the policy language, however, the Premiums Exclusion turns on the substance of what the payments "constitute[]," not how they were calculated or labeled in an underlying settlement. The full record from the Underlying Actions is unequivocal: All of Genworth's settlement payments, including the NFS payments, compensated class members for the same basic harm—paying additional premiums due to Genworth's omissions.

The Superior Court's decisions reflect two basic errors: misinterpreting the policy language and misconstruing (or disregarding) the legal theories and the relief sought and obtained in the Underlying Actions. This Court should reverse.

SUMMARY OF ARGUMENT

1. The Superior Court erred in holding that coverage for the Underlying Actions is not barred by the Claim-Reserves Exclusion.

a. The Claim-Reserves Exclusion bars coverage for Loss resulting from a Claim "based upon, arising out of or attributable to (i) the inadequacy of any claim reserves of [Genworth]." A0283. The Primary Policy contains a Virginia choice-of-law clause, A0349, and the Virginia Supreme Court has held that, "[i]n the context of an insurance policy, the phrase 'arising out of …' is broad in its scope" and "only requires … a reasonable causal connection." *James River Ins. Co. v. Doswell Truck Stop, LLC*, 827 S.E.2d 374, 377 (Va. 2019).

Here, there is much more than a "reasonable causal connection" between the Underlying Actions and Genworth's inadequate claim reserves. Each underlying complaint mentions Genworth's reserves dozens of times—and for good reason. Inadequate claim reserves provided a motive for Genworth to increase future premiums. Furthermore, to meet their burden of showing intent to mislead, the plaintiffs alleged that Genworth failed to disclose its plans to increase premiums, even though it knew that future increases were necessary to shore up its inadequate claim reserves. The plaintiffs conceded that Genworth's omissions "would not have been misleading" had Genworth's claim reserves been adequate. A0630; A0670.

b. The decision below is mistaken. The Superior Court held that the Claim-Reserves Exclusion applies only if Loss is "directly attributable to Genworth's inability to pay claims to its insureds because Genworth … failed to maintain sufficient claim reserves." Ex. C, 22. But the Insurers denied coverage under prong (i) of the Claim-Reserves Exclusion, which says nothing about "inability to pay." Prong (ii) references Genworth's "inability … to pay," A0283, underscoring that prong (i) does not do so. Indeed, the court's interpretation would render prong (i) superfluous, excluding inability-based Claims that are already excluded under prong (ii). The court's interpretation is irreconcilable with the contractual language the parties chose.

The remainder of the Superior Court's reasoning is similarly flawed. The court distinguished the case articulating Virginia's "reasonable causal connection" standard on the ground that it involved an auto exclusion. But Virginia courts have applied the same standard to various types of exclusions. The Superior Court also stated that Genworth's inadequate claim reserves were mere "background," providing a "motive or cause" for Genworth to increase premiums. Ex. C, 23. But a motive or cause still provides a "reasonable causal connection," and regardless, the underlying complaints depended on Genworth's claim reserves being inadequate. Finally, the court suggested that the Claim-Reserves Exclusion is ambiguous, but

Virginia's standard for ambiguity is high, and Genworth's efforts to avoid the plain meaning of the policy language fall well short of that standard.

2. The Superior Court erred in holding that coverage for the settlement payments to NFS class members is not barred by the Premiums Exclusion.

a. The Premiums Exclusion bars coverage for Loss "if such **Loss** constitutes … premiums, return premiums or commissions." A0282. As the Superior Court correctly held, that language bars coverage for a payment by Genworth that "consists of premium payments being returned to [Genworth's] policyholders" or is "designed to compensate LTC policyholders for artificially inflated premiums due to Genworth's non-disclosures." Ex. C, 31; Ex. B, 15.

Here, Genworth's settlement payments to all class members, including NFS class members, constitute premiums Genworth allegedly defrauded class members into paying. The record of the Underlying Actions establishes as much.

b. The decision below is mistaken. Expressly disregarding the factual record before it, the Superior Court reasoned that whether a settlement payment "constitutes … premiums" depends exclusively on the "plain text" of the settlement agreement. Ex. B, 9, 17. That blinkered approach is inconsistent with the black-letter principle that coverage for a settlement turns on substance, not labels. Holding otherwise "would encourage litigants to manipulate settlement language to secure insurance coverage where it would otherwise not exist." *In re CVS Opioid*

Ins. Litig., 2025 WL 2383644, at *13 (Del.) (cleaned up). Tellingly, the Superior Court did not follow its own label-based approach, looking beyond the four corners of the underlying settlements in multiple ways.

STATEMENT OF FACTS

A. Genworth and LTC Insurance

Genworth is a financial services and insurance company that sells LTC insurance to individual policyholders. A0160; A0807. Genworth began selling LTC policies in 1974 and today is one of the largest LTC insurers in the country. A0371; A0436; A0500.

Genworth's LTC policies are renewable annually, but upon renewal, Genworth may increase premiums across a policy class with state regulatory approval. A0370; A0430; A0494; A0807-08. If Genworth increases premiums substantially, policyholders have "three choices for renewal: (1) pay the increased premiums to maintain the same level of benefits; (2) pay a lower premium for decreased benefits; or (3) elect [a] limited 'non-forfeiture' option and pay no further premiums." A0416-17; A0809. Under the "non-forfeiture" or "NFS" option, policyholders "walk away from the policy and retain a 'paid-up' contingent nonforfeiture benefit," meaning that, if policyholders ever "meet the criteria to claim on the policies in the future, then they could [receive benefits] up to the amount of premiums that [they] had already paid to Genworth." A0407; A0809. "In other words, the 'paid-up benefit' represent[s] an interest[-]free loan to Genworth, to be repaid *only if* the conditions precedent for claiming LTC benefits c[o]me to pass in the future …." A0407.

B. The Primary Policy and Follow-Form Excess Policies

Genworth Financial, Inc. obtained the Primary Policy from AIG Specialty for the policy period March 31, 2018, to March 31, 2019. A0255. The Primary Policy has a limit of liability of $10 million, excess of a $25 million self-insured retention. A0256. Genworth also purchased "follow-form" excess policies from the other Insurers, which incorporate the Primary Policy's terms and conditions unless otherwise provided. A0833-87.

Genworth seeks coverage under the Primary Policy's Insurance Company Professional Liability Coverage Part. In that part, Insuring Clause I(i) provides that the Insurers "shall pay on behalf of the **Insureds Loss** which the **Insureds** become legally obligated to pay by reason of any **Claim** first made by … a policyholder … against the **Insureds** during the **Policy Period** … for any **Wrongful Acts** by the **Insureds**." A0274. "**Insureds**" includes Genworth, "**Loss**" includes defense expenses and settlements, "**Claim**" includes civil lawsuits, and "**Wrongful Acts**" include actual or alleged acts or omissions. A0255; A0260; A0275-77.

The professional liability coverage part also contains certain "Exclusions," two of which are relevant here. First, the Claim-Reserves Exclusion provides that AIG Specialty "shall not be liable for that portion of **Loss** on account of any **Claim** made against [Genworth] … based upon, arising out of or attributable to (i) the inadequacy of any claim reserves of [Genworth] … or (ii) the bankruptcy,

insolvency, receivership, liquidation or financial inability of [Genworth] to pay claims or perform **Professional Services**." A0277, 283.

Second, the Premiums Exclusion provides that AIG Specialty "shall not be liable for that portion of **Loss** on account of any **Claim** made against [Genworth] … if such **Loss** constitutes … premiums, return premiums or commissions; but this exclusion shall not apply to **Defense Costs**." A0277, 282.

C. The Underlying Actions

In 2019, 2021, and 2022, Genworth policyholders filed the Underlying Actions—three similar class actions brought against Genworth in the U.S. District Court for the Eastern District of Virginia, captioned *Skochin v. Genworth Life Insurance Co.* ("*Skochin*"), *Halcom v. Genworth Life Insurance Co.* ("*Halcom*"), and *Haney v. Genworth Life Insurance Co.* ("*Haney*"). A0888-947; A0426-89; A0490-552.

In each Underlying Action, the plaintiffs alleged that they had purchased and renewed Genworth LTC policies and brought suit to "remedy the harm … from Genworth's partial disclosures of material information when communicating … premium increases." A0368; A0428; A0493. The plaintiffs allegedly "made policy option renewal elections they never would have made had [Genworth] adequately disclosed the staggering scope and magnitude of its internal rate increase action plans." A0368; A0429; A0493.

Genworth's rate increase plans arose from a "substantial shortfall in its LTC reserves." A0372; A0431; A0495. The plaintiffs alleged that, in 2012, "[a]s part of [a] 'deep dive' into its LTC claim reserves," Genworth "acknowledged internally that it had a substantial shortfall in its LTC reserves, much larger than it ever anticipated." A0372; A0431; A0495. Indeed, the "hole in [Genworth's] claims reserves was growing exponentially." A0372; A0431; A0495. "To right the ship and plug the growing hole in its reserves, Genworth created an internal action plan … to seek significant premium rate increases systematically across its older policy classes." A0373; *see* A0432; A0496. Genworth discussed this plan for shoring up its reserves in public earnings calls and in Form 10-Ks filed with the SEC. A0388-96; A0448-56; A0515-22.

"These future rate increases, however, would not be recognized in Genworth's asset adequacy testing until that increased revenue began flowing into its reserves over the next decade." A0373; A0432; A0496. So in its reserve calculations, Genworth ***assumed*** that it would significantly increase future premiums. A0373; A0432; A0496. "In other words, *Genworth relied almost entirely upon billions of dollars in anticipated future (but not yet filed) rate increases to plug this massive hole in its reserves*." A0373; A0432; A0496.

"This material information about its plan for massive future rate increases, however, was never shared with Genworth's policyholders[.]" A0373; *see* A0432;

A0496. "While Genworth informed policyholders that future increases were 'possible' or 'likely,'" Genworth withheld that it "knew with certainty … that its claims experience ***already warranted*** additional increases and that Genworth ***would be*** seeking (or had ***already sought***) additional future rate increases." A0417; A0482; *see* A0545. The plaintiffs thus "were unaware of the scope and magnitude of Genworth's entire rate increase action plan" and "of Genworth's reliance on this rate action plan … to build adequate reserves." A0419; A0484; A0546-47.

As a result, the plaintiffs allegedly renewed their policies with higher premiums than they would have chosen with full information. In *Skochin*, for example, lead plaintiffs Jerome and Susan Skochin received a series of premium increases starting in 2013, and in 2018 they "elected to take the [NFS] option and pay no further premiums." A0410; *see* A0407-09. But "had they been given a … 'transparent' disclosure of Genworth's rate increase plans in the first instance," the Skochins would have elected NFS "***in 2013, and not have paid any of the premium increases***" in the interim. A0410 (emphasis added). In other words, over a five-year period, without full information, the Skochins paid Genworth tens of thousands of dollars in premiums, but with full information, they would have paid Genworth no premiums at all.

The plaintiffs in each Underlying Action sought class-wide relief for a single cause of action for fraudulent inducement by omission. A0416-23; A0481-85;

A0544-48.[2] The plaintiffs sought "rescission of their policy renewals" and a "return of premiums paid for each year a renewal of the policy was rescinded." A0420; A0484; A0547. In all three Underlying Actions, the parties engaged in discovery, during which the plaintiffs continued to describe their requested relief as "a refund of premiums." *See, e.g.*, A0957; A0970-72; A0987-98.

In *Skochin*, Genworth moved to dismiss under the "filed-rate doctrine," which "forbids a regulated entity from charging rates other than those filed with the regulatory agency." *Brown v. United Water Del. Inc.*, 3 A.3d 253, 255 (Del. 2010). Under that doctrine, Genworth argued that the *Skochin* complaint sought an impermissible "refund" of state-regulator-approved premiums. A1022-23. The court "disagree[d]," explaining that merely "asking for a refund" does not "necessarily mean[] that the filed-rate doctrine applies." A1100.

The Underlying Actions settled. Under each settlement, Genworth sent class members a "Special Election Letter" that made disclosures about future premium increases and Genworth's financial condition and offered "Special Election Options" that class members could select in light of the new disclosures. A1156-67; A1186-93; A1271-88; A1360-75. The "Special Election Options" included various

[2] The *Skochin* complaint also asserted a cause of action under Pennsylvania's unfair trade practices statute, but it did so only on behalf of a Pennsylvania sub-class, which was never certified. A0993-99; A0814.

combinations of full or reduced benefits, in addition to (for some options) a "damages payment." A1156-60; A1186-87; A1271-76; A1360-63. Some of the "damages payments" were calculated based on premiums class members had previously paid, but others—including all payments to class members who had elected NFS before the settlements—were flat payments of set amounts (*e.g.*, $1000). *See* A1156-60; A1186-87; A1271-76; A1360-63. The settlements also required Genworth to pay the plaintiffs' attorneys' fees and costs within an agreed range. A1133-34; A1238; A1334-35.

In the three Underlying Actions combined, Genworth paid almost [redacted] in defense expenses and over [redacted] in settlement payments. Inasmuch as the defense expenses [redacted], they are not at issue. The settlement payments included roughly [redacted] in payments to NFS class members, roughly [redacted] in payments to non-NFS class members, and roughly [redacted] in class counsel fees and expenses. Ex. B, 10.

D. Procedural History

In May 2022, Genworth filed this action, seeking coverage for its defense expenses and settlement payments in the Underlying Actions. A0094-150. Genworth filed an Amended Complaint in September 2022. A0151-99.

In October 2022, before discovery, Genworth moved for partial summary judgment, arguing that the Claim-Reserves and Premiums Exclusions are

inapplicable. A0224-34. The Insurers cross-moved for summary judgment on the Claim-Reserves Exclusion only. A0577-90.

In September 2023, the Superior Court granted in part and denied in part Genworth's motion and denied the Insurers' cross-motion. Ex. C. The court granted summary judgment to Genworth on the Claim-Reserves Exclusion. *Id.* at 20-27. The court reasoned that the Claim-Reserves Exclusion excludes only "'Losses' incurred by Genworth [that are] directly attributable to Genworth's inability to pay claims to its insureds because Genworth either failed to maintain sufficient claim reserves, or because of Genworth's financial insolvency." *Id.* at 22. The court acknowledged that the underlying plaintiffs pointed "to Genworth's inadequate reserves as a motive or cause for increasing the LTC policy premium rates." *Id.* at 23. But "[a]t best," the court concluded, the Claim-Reserves Exclusion is "ambiguous on whether supporting allegations or claims contained within the Underlying Actions' complaints are sufficient to trigger the clause," and "ambiguous language in an insurance policy will be given an interpretation which grants coverage." *Id.* at 23-24.

As to the Premiums Exclusion, the court found "genuine issues of material fact as to [its] applicability." *Id.* at 19. Reasoning that the Premiums Exclusion bars coverage "if the loss consists of premium payments being returned to the policyholders," the court identified factual disputes regarding "the make-up of the

cash damages offered to the class member plaintiffs in the Underlying Actions." *Id.* at 31. At one point, the court suggested that "the language of the final settlement agreements … dictates whether the 'Loss' consisted of a return of premium payments to the class plaintiffs." *Id.* But notwithstanding that the final settlement agreements were already before the court, it sent the case to discovery. *Id.* at 31-32.

In August 2024, after discovery, the parties filed renewed cross-motions for summary judgment on the Premiums Exclusion. A0689-732; A0733-80. In February 2025, the Superior Court granted in part and denied in part both sides' motions, in three steps. Ex. B.

First, the court held that the [redacted] in payments to ***NFS*** class members did not constitute premiums. *Id.* at 15-18. The court explained that the Premiums Exclusion bars coverage for payments that are "designed to compensate LTC policyholders for artificially inflated premiums due to Genworth's non-disclosures." *Id.* at 15. Whether that requirement is met, the court held, turns on "the language of the final settlement agreements." *Id.* at 16-17. The court concluded that the NFS payments were not excluded because, under the settlements, those payments were "flat awards, without reference to premiums paid." *Id.* at 17. The court acknowledged that the settlement language was finalized "after [Genworth] had received [the Insurers'] coverage denial based on the Premiums Exclusion." *Id.* at 21. The court further acknowledged evidence "indicating that all class members

suffered the same harm—having paid higher premiums," *id.* at 16 n.113, but it disregarded that evidence as "extra-textual," *id.* at 18.

Second, the court held that the [redacted] in payments to ***non-NFS*** class members constituted premiums. *Id.* at 19-23. For *Skochin* and *Halcom*, the court rested that conclusion on the settlements' plain text, which calculated non-NFS payment amounts based on premiums class members had paid during the class period. *Id.* at 20. For *Haney*, however, the court looked beyond the settlement's text, under which the NFS and non-NFS payments alike were "flat amounts." *Id.* Citing a hearing transcript, the court found that the flat non-NFS payments in *Haney* still constituted premiums because "the parties set the payments using data on the average annual premiums payments to simplify the *Haney* settlement." *Id.* at 20 & n.134 (cleaned up).

Third, the court held that there was a factual issue regarding the [redacted] in class counsel fees and expenses Genworth paid. The court found that an allocation was necessary to determine what portion of those fees and expenses were "attributable to the NFS payments" and thus outside the Premiums Exclusion. *Id.* at 24. The court invited additional briefing on allocation, *see id.*, which also affected the calculation of pre-judgment interest, but a stipulation mooted those issues, *see* A1769-77.

The court entered final judgment on June 23, 2025. Ex. A. The Insurers timely appealed. A1778-84.

ARGUMENT

I. COVERAGE FOR THE UNDERLYING ACTIONS IS BARRED BY THE CLAIM-RESERVES EXCLUSION

A. Question Presented

Whether the Underlying Actions were "based upon, arising out of or attributable to … the inadequacy of any claim reserves of [Genworth]." Yes. (Preserved at A0577.)

B. Scope of Review

This Court reviews the grant of summary judgment and the interpretation of an insurance policy *de novo*. *See In re FairPoint Ins. Coverage Appeals*, 311 A.3d 760, 767 (Del. 2023).

The Primary Policy provides that "any dispute concerning the interpretation of this Policy shall be governed by the laws of the State of Virginia." A0349. Under Virginia law, "the construction and application of the terms of an insurance contract … are issues of law," and "[t]he canons of construction that generally govern contracts also apply to insurance policies specifically." *Erie Ins. Exch. v. EPC MD 15, LLC*, 822 S.E.2d 351, 354 (Va. 2019) (citation omitted). Virginia courts thus "interpret insurance policies … in accordance with the intention of the parties gleaned from the words they have used in the document." *Id.* (citation omitted). If the words "are clear and unambiguous," they "are to be taken in their plain, ordinary

and popular sense." *Id.* at 355 (citation omitted). "If the plain meaning is undiscoverable, Virginia courts apply the contra proferentem canon, which construes ambiguities against the drafter …." *Id.* But where "[an] exclusion is not ambiguous, there is no reason for applying the rules of contra proferentem or liberal construction for the insured." *PBM Nutritionals, LLC v. Lexington Ins. Co.*, 724 S.E.2d 707, 713 (Va. 2012) (citation omitted).

C. Merits of Argument

The Claim-Reserves Exclusion precludes coverage for the Underlying Actions as a matter of law. The Superior Court's reasoning inserts requirements not found in the plain language of the policy, misconstrues the allegations and legal theories in the underlying complaints, and misapplies Virginia law.

1. The Underlying Actions Were Based upon, Arising out of or Attributable to Genworth's Inadequate Claim Reserves

Under the Claim-Reserves Exclusion, the Insurers "shall not be liable for that portion of **Loss** on account of any **Claim** made against [Genworth] … based upon, arising out of or attributable to (i) the inadequacy of any claim reserves of [Genworth] … or (ii) the bankruptcy, insolvency, receivership, liquidation or financial inability of [Genworth] to pay claims or perform Professional Services." A0277, 83. Here, the Exclusion's introductory language and the requirements of prong (i) are satisfied. As to the introductory language, Genworth's defense costs

and settlement payments were incurred in, and thus were "on account of," the Underlying Actions. As to prong (i)—the focus of Genworth's demand for coverage and the decision below—the allegations in the underlying complaints and other undisputed facts establish that the Underlying Actions were "based on, arising out of or attributable to … the inadequacy of [Genworth's] claim reserves."

At the outset, the plain meaning of prong (i) is expansive. The verb "base" means "[t]o make, form, or serve as a foundation for," or "to place on a foundation; to ground." *Base*, Black's Law Dictionary (12th ed. 2024); *see AGCS Marine Ins. Co. v. Arlington Cnty.*, 800 S.E.2d 159, 172 n.17 (Va. 2017) (relying on Black's Law Dictionary to interpret insurance policy). Similarly, the verb "arise" means "[t]o originate; to stem (from)." *Arise*, Black's Law Dictionary (12th ed. 2024). Finally, the adjective "attributable" means "capable of being attributed," and, as relevant here, the verb "attribute" means "to explain as caused or brought about by: regard as occurring in consequence of or on account of." Webster's Third New Int'l Dictionary 141-42 (2002); *see Erie Ins. Exch. v. Jones by Hardison*, 870 S.E.2d 716, 718 (Va. 2022) (relying on Webster's Third New International Dictionary to interpret insurance policy).

Virginia courts have recognized that, "[i]n the context of an insurance policy, the phrase 'arising out of …' is broad in its scope." *James River*, 827 S.E.2d at 377. The Virginia Supreme Court accordingly has held, for example, that an exclusion

"for bodily injury or property damage 'arising out of the use of an[] auto'" "operate[d] to broadly bar coverage." *Nationwide Mut. Fire Ins. Co. v. Erie Ins. Exch.*, 798 S.E.2d 170, 174 (Va. 2017) (citation omitted). Similarly, in *James River Insurance Co. v. Doswell Truck Stop*, the Virginia Supreme Court held that an exclusion for injury "arising out of the ownership, maintenance or use" of a vehicle "only requires that a ***reasonable causal connection*** exist between the ownership, maintenance or use of the automobile and the injury." 827 S.E.2d at 377 (emphasis added) (citation omitted); *see Lucas v. Lucas*, 186 S.E.2d 63, 64 (Va. 1972) (similar). "The Supreme Court of Virginia has quoted this definition of 'arising out of' many times with approval." *Liberty Univ., Inc. v. Citizens Ins. Co. of Am.*, 792 F.3d 520, 533 (4th Cir. 2015) (quotation marks omitted).

While the phrase "arising out of" alone is broad, the phrase "based upon, arising out of or attributable to" is necessarily broader. This language "is plain in meaning and is phrased in the disjunctive, using 'or' to separate" the different lead-in terms. *TravCo Ins. Co. v. Ward*, 736 S.E.2d 321, 326 (Va. 2012). Under Virginia law, "[n]o word or clause in the contract will be treated as meaningless if a reasonable meaning can be given to it, and there is a presumption that the parties have not used words needlessly." *Id.* at 325 (citation omitted). The terms "based upon" and "attributable to" would be impermissibly superfluous if they did not make the Claim-Reserves Exclusion broader than it would be if it contained only the term

"arising out of" alone. *See Valeant Pharms. Int'l, Inc. v. AIG Ins. Co. of Canada*, 625 F. Supp. 3d 309, 329-37 (D.N.J. 2022).

Here, there is—at the very least—a "reasonable causal connection" between the Underlying Actions and Genworth's inadequate claim reserves. Indeed, references to Genworth's inadequate reserves pervade the underlying complaints, which reference Genworth's reserves in section headings, graphs, and critical allegations throughout. *E.g.*, A0381, 384-86, 390-91, 394-97. In total, each complaint mentions claim reserves ***more than 60 times***. *See* A0366-552.

The large number of references to claim reserves is unsurprising. To start, as the Superior Court acknowledged, "Genworth's inadequate reserves" provided "a motive or cause for increasing the LTC policy premium rates." Ex. C, 23. As the word "cause" suggests, that fact alone establishes a reasonable causal connection. The underlying plaintiffs alleged that Genworth failed to adequately disclose its plans to increase premiums, which Genworth planned to do ***because*** its claim reserves were inadequate.

Furthermore, the underlying complaints alleged that Genworth wrongfully failed to disclose the inadequacy of its claim reserves and the consequent necessity of significant future premium increases. To prove their causes of action, the plaintiffs had to prove that Genworth failed to disclose material information with intent to mislead. *See Winn v. Aleda Constr. Co.*, 315 S.E.2d 193, 195 (Va. 1984).

To meet that burden, the plaintiffs alleged that Genworth failed to disclose at least two material facts: (1) Genworth's plan to increase premiums and (2) Genworth's determination that substantial future increases were ***necessary*** to shore up its inadequate claim reserves. In the plaintiffs' words, Genworth "fail[ed] to adequately disclose material information about Genworth's rate increase action plans, current reliance on its planned future increases actually being approved, and the risks to Genworth's solvency if such increases were not approved." A0419; A0483; A0546. Consequently, the plaintiffs were "unaware of Genworth's reliance on this rate action plan … to build adequate reserves." A0419-20; A0484; A0547.

Thus, the plaintiffs alleged that Genworth's disclosures were misleading ***because*** Genworth's claim reserves were inadequate. Inadequate claim reserves meant that Genworth ***had*** to increase future premiums, which is what made it ***deceptive*** to tell policyholders that future increases were merely "possible" or "likely." A0417; A0482; A0545. As the *Skochin* plaintiffs explained, Genworth's disclosures "would not have been misleading" but for the fact "that when Genworth sent each rate increase announcement, it *knew* … that it was already relying on the planned future rate increases to rebuild its reserves." A0630, 35; A0670, 74. That establishes a "reasonable causal connection," *James River*, 827 S.E.2d at 377, between Genworth's inadequate reserves and the Underlying Actions. Nothing more is required.

2. The Superior Court's Reasoning Is Mistaken

In granting summary judgment to Genworth, the Superior Court reasoned that the Claim-Reserves Exclusion applies ***only*** if Loss is "directly attributable to Genworth's inability to pay claims to its insureds because Genworth either failed to maintain sufficient claim reserves, or because of Genworth's financial insolvency," and here, the underlying complaints contained "[m]ere allegations or background facts tangentially related to Genworth's claim reserves." Ex. C, 22-23. That reasoning misconstrues both the policy language and the underlying complaints.

Starting with the policy language, the Claim-Reserves Exclusion contains two prongs. Prong (i) excludes Claims "based upon, arising out of or attributable to (i) the inadequacy of any claim reserves of [Genworth]." A0283. Prong (ii) separately excludes Claims "based upon, arising out of or attributable to … (ii) the bankruptcy, insolvency, receivership, liquidation or financial inability of [Genworth] to pay claims or perform **Professional Services**." *Id.* The Insurers denied coverage solely under prong (i), yet the Superior Court took prong (ii)'s "inability to pay" requirement and inserted it into prong (i). In collapsing these two separate prongs, the court violated three basic principles of contract interpretation.

First, nothing in the text of prong (i) remotely suggests that it is limited to Claims "attributable to Genworth's inability to pay claims to its insureds." Ex. C, 22. Under Virginia law, courts must "construe[] a contract as written, without

adding terms that were not included by the parties." *Ehrhardt v. SustainedMED, LLC*, 865 S.E.2d 807, 810 (Va. 2021) (citation omitted).

Second, the reference to "inability … to pay" in prong (ii), but not in prong (i), confirms that the parties "knew how" to impose such a requirement, *RRR, LLC v. N.H. Ins. Co.*, 2007 WL 5963770, at *6 (Va. Cir.), but chose ***not*** to do so in prong (i). The two prongs are distinct, separated by a semicolon and the disjunctive word "or." A0283. The fact that the parties referenced "inability … to pay" ***solely*** in prong (ii) reinforces that prong (i) does ***not*** have an "inability to pay" requirement.

Third, the Superior Court's interpretation would render prong (i) superfluous. Under Virginia law, "[n]o word or clause" in an insurance policy "will be treated as meaningless if a reasonable meaning can be given to it, and there is a presumption that the parties have not used words needlessly." *Heron v. Transp. Cas. Ins. Co.*, 650 S.E.2d 699, 702 (Va. 2007). Here, prong (ii) bars coverage for ***all*** Claims arising out of Genworth's "inability … to pay claims." A0283. So if prong (i) were to bar coverage for Claims arising out of "Genworth's inability to pay claims," but only if that inability stems from Genworth "fail[ing] to maintain sufficient claim reserves," Ex. C, 22, prong (i) would do nothing but exclude a narrow subset of Claims already excluded by prong (ii). That would make prong (i) "superfluous." *Hilfiger v. Transamerica Occidental Life Ins. Co.*, 505 S.E.2d 190, 192 (Va. 1998).

The way to avoid these problems is to apply the Claim-Reserves Exclusion as written: Prong (i) excludes Claims arising out of the inadequacy of Genworth's claim reserves (regardless of whether Genworth is able to pay claims), and prong (ii) excludes Claims arising out of Genworth's inability to pay claims (regardless of whether that inability results from inadequate claim reserves). That plain reading gives meaning to all of the policy language. The Superior Court's does not.

Effectively, the court rewrote the Claim-Reserves Exclusion to exclude coverage only where a Claim is made ***for*** inadequate claim reserves—that is, where the Wrongful Act Genworth actually or allegedly committed was maintaining inadequate reserves, rendering it unable to pay claims. But the Primary Policy distinguishes between exclusions that exclude Claims "for" something and exclusions that, like the Claim-Reserves Exclusion, exclude Claims "based on, arising out of or attributable to" something. *Compare, e.g.*, A0277 (§§ III.A.1-2), *with* A0277-78 (§§ III.A.3, 6). The caselaw draws this distinction as well. As one court explained, "[t]his dichotomy suggests that the Policy, and thereby the parties, contemplated when exclusions … should apply to broad or narrow sets of circumstances." *U.S. TelePacific Corp. v. U.S. Specialty Ins. Co.*, 2019 WL 2590171, at *10 (C.D. Cal.) (quotation marks omitted), *aff'd*, 815 F. App'x 155 (9th Cir. 2020). As another court explained, "the policy language could not have been broader. It excluded claims 'arising from' …, rather than excluding claims 'for' …."

GE HFS Holdings, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 2009 WL 10690504, at *3 (D. Mass.).

The decision below reflects additional interpretive errors as well. The Superior Court framed the question presented as whether "'***Losses***' incurred by Genworth [are] ***directly*** attributable to Genworth's inability to pay claims." Ex. C, 22 (emphases added). But the word "directly" does not appear in the Claim-Reserves Exclusion, and the Virginia Supreme Court has held that the phrase "arising out of" requires "only … a reasonable causal connection." *James River*, 827 S.E.2d at 377. Accordingly, inadequate claim reserves "need not be the direct, proximate cause of the [Underlying Actions] in the strict legal sense." *Id.* The Superior Court's focus on particular "Losses" is similarly mistaken. Under the policy language, the question is whether the "**Claim** made against [Genworth]" is "based upon, arising out of, or attributable to (i) the inadequacy of [Genworth's] claim reserves." A0283. If so, then all portions of Loss "on account of" that Claim are excluded. *Id.* Here, because there is a reasonable connection between the Underlying Actions and Genworth's inadequate claim reserves, ***all*** of Genworth's resulting defense expenses and settlement payments are excluded.

The Superior Court also misread Virginia caselaw. The court rejected the "reasonable causal connection" standard from *James River*, reasoning that *James River* "did not provide for its interpretation … to be applied wholesale in any and all

insurance dispute cases beyond specific situations involving bodily injuries arising from maintenance or use of automobiles, and liability coverage exclusion clauses." Ex. C, 22-23. But the Claim-Reserves Exclusion ***is*** a "liability coverage exclusion clause[]," and the Superior Court offered no basis to conclude that "arising out of" has a different meaning in auto exclusions than in other exclusions. Indeed, the Virginia Supreme Court has approved the interpretation in *James River* "many times," *Liberty Univ.*, 792 F.3d at 533 (citation omitted), and Virginia courts have applied it to various types of exclusions, *see id.* (criminal exclusion in commercial general liability policy); *Erie Ins. Exch. v. Young*, 69 Va. Cir. 34, 41 (2005) (business pursuits exclusion in homeowner's policy); *Certain Underwriters at Lloyd's, London Subscribing to Pol'y No. BO 823PP1308460 v. AdvanFort Co.*, 422 F. Supp. 3d 1078, 1089 (E.D. Va. 2019) (vessel exclusion in maritime policy).

Applying its erroneous interpretation of Virginia law, the Superior Court also stated that the underlying complaints contained "[m]ere allegations or background facts tangentially relating to Genworth's claim reserves," Ex. C, 23, and that, while the plaintiffs pointed to inadequate claim reserves "as a motive or cause for increasing the LTC premium policy rates, it was not asserted as a claim against Genworth in [their] case-in-chief." *Id*. That reasoning is mistaken on two levels. First, even if inadequate reserves were merely "a motive or cause" for increasing premiums, that alone establishes a "reasonable causal connection" between

Genworth's inadequate claim reserves and the Underlying Actions that followed. Second, regardless, inadequate claim reserves were much more than just "a motive or cause" for increasing premiums. As explained, the plaintiffs alleged that Genworth defrauded them ***by failing to disclose Genworth's own reliance on future premium increases to shore up its inadequate claim reserves***. Inadequate reserves thus were central to the underlying plaintiffs' legal theories. In the plaintiffs' words, Genworth's omissions "would not have been misleading" had Genworth's reserves been adequate. A0630, 35; A0670, 74.

Finally, the Superior Court suggested that the Claim-Reserves Exclusion should be construed against the Insurers because its language "can be found to be ambiguous on whether supporting allegations or claims contained within the Underlying Actions' complaints are sufficient to trigger the clause." Ex. C, 23-24. Under Virginia law, however, a provision is ambiguous only "[i]f the plain meaning is undiscoverable"; it is not enough that there is "disagree[ment] about the meaning of its language." *EPC MD 15*, 822 S.E.2d at 355-56 (citation omitted). The Virginia Supreme Court has admonished courts to "resist[]" the "temptation" to "give up quickly on the search for a plain meaning by resorting to the truism that a great many words—viewed in isolation—have alternative, and sometimes quite different, dictionary meanings." *Id.* at 355. Otherwise, the "contra proferentem thumb-on-the-scale would apply to nearly every interpretation of nearly every insurance

policy." *Id.* The proper rule is that "conflicting interpretations reveal an ambiguity only where they are reasonable," meaning that they "are equally possible given the text and context of the disputed provision." *Id.* at 355-56 (cleaned up).

Here, as explained, the Superior Court's interpretation is contrary to the Claim-Reserves Exclusion's plain text, settled canons of construction, and controlling caselaw. It therefore is not reasonable, let alone an "equally possible" interpretation. Because the Claim-Reserves Exclusion "is not ambiguous, there is no reason for applying the rules of contra proferentem or liberal construction for the insured." *PBM Nutritionals*, 724 S.E.2d at 713 (citation omitted). All amounts incurred in the Underlying Actions are therefore not covered.

II. COVERAGE FOR GENWORTH'S SETTLEMENT PAYMENTS IS BARRED BY THE PREMIUMS EXCLUSION

A. Question Presented

Whether Genworth's settlement payments "constitute[] … premiums." Yes. (Preserved at A0595-96; A0752.)

B. Scope of Review

The standard of review and relevant principles of insurance policy interpretation are set forth in § I.B, *supra*.

C. Merits of Argument

Genworth's settlement payments to all underlying plaintiffs, including class members who had elected NFS, are barred by the Premiums Exclusion because they "constitute[] … premiums." A0282. The Superior Court's reasoning misconstrues the policy language and erroneously disregards the underlying allegations and other relevant record evidence.

1. Genworth's Settlement Payments to NFS Class Members Constitute Premiums

The Premiums Exclusion provides that the Insurers "shall not be liable for that portion of **Loss** on account of any **Claim** made against any **Insured** … if such Loss constitutes … premiums, return premiums or commissions." A0277, 82. Relevant here, "**Loss**" includes "settlements," A0276, "constitute" means to "make up or form," *Constitute*, Black's Law Dictionary (12th ed. 2024), and "premium" means

a "payment required to keep an insurance policy in effect," *Premium*, Black's Law Dictionary (12th ed. 2024).[3]

Putting those definitions together, the Premiums Exclusion bars coverage for settlement payments made up of money that policyholders originally paid for insurance coverage. Of course, money is "fungible," *Bank of Hampton Roads v. Powell*, 785 S.E.2d 788, 791 (Va. 2016), so Genworth's payments "need not be the very same bills or checks" the policyholder gave to Genworth, *Robers v. United States*, 572 U.S. 639, 643 (2014). Rather, if policyholders pay Genworth premiums, and Genworth pays the policyholders back to compensate them for having paid more in premiums than they would have paid but for Genworth's Wrongful Acts, then that payment by Genworth is not covered. As the Superior Court correctly held, the Premiums Exclusions bars coverage for a payment by Genworth if it "consists of premium payments being returned to [Genworth's] policyholders" or is "designed to compensate LTC policyholders for artificially inflated premiums due to Genworth's alleged non-disclosures." Ex. C, 31; Ex. B, 15.

Here, Genworth's settlement payments to all class members, including NFS class members, consist of premiums Genworth allegedly defrauded them into

---

[3] "[R]eturn premium[s]" are "the amount due the insured if the actual cost of a policy is less than what the insured has previously paid." IRMI, *Return Premium*, https://bit.ly/47MCxd2; *see* Treas. Reg. § 1.809-4(a)(1)(ii); *Am. Nat'l Ins. Co. v. United States*, 690 F.2d 878, 885 (Ct. Cl. 1982).

paying. The only monetary relief the underlying plaintiffs sought, and thus the only monetary relief Genworth could have agreed to pay in a settlement, compensated class members for the alleged harm of paying more in premiums than they would have paid otherwise. At least ***five*** types of record evidence establish as much.[4]

Underlying Complaints. The complaints in each Underlying Action alleged fraudulent inducement by omission, claiming that, with full information, class members would have elected less costly options when renewing their policies. A0416-23; A0481-85; A0544-48. To remedy that fraud, the complaints demanded a "return of premiums paid." A0420; A0484; A0547. Elsewhere, the complaints also requested "compensatory … damages," A0423; A0486; A0549, but in context, and as underlying plaintiffs' counsel explained at an approval hearing, that is just another term for a "return of premiums paid." *See* A1402-04.

Importantly, the complaints drew no distinction between policyholders who had elected NFS and other policyholders. Indeed, many of the named plaintiffs had elected NFS, yet they claimed that their injuries were representative of class members who had not elected NFS. *See* A0410, 13-14; A1425-26; A0542.

---

[4] The Premiums Exclusion "shall not apply to **Defense Costs**." A0282. Because Genworth's [redacted] do not exceed the $25 million retention, *see* Ex. B, 10; A0255-56, 62-63, they are irrelevant if no settlement payments are covered.

The allegations of the lead plaintiffs in *Skochin*, NFS class members Jerome and Susan Skochin, are illustrative. Between 2013 and 2018, Genworth repeatedly raised premiums, which the Skochins paid for several years to keep their full benefits. A0407-09. By 2017, the Skochins decided that the increases were too much, so they elected to pay reduced premiums in exchange for reduced benefits. A0409. In 2018, before they filed suit, the Skochins elected NFS and stopped paying premiums altogether. A0409-10.

In total, during this period, the Skochins paid Genworth over $48,000 in premiums. *See* A0410. With full information, however, the Skochins allegedly would have chosen NFS in 2013 and paid no premiums at all, as the chart below depicts:

Year	**Premiums Paid (Jerome Skochin)**	**Premiums Paid (Susan Skochin)**	**Premiums the Skochins *would have paid with full information***
2013	$4,270.50 (*increased premiums*)	$4,365.00 (*increased premiums*)	$0 (NFS)
2014	$4,270.50	$4,365.00	$0 (NFS)
2015	$5,124.60 (*increased premiums*)	$5,238.00 (*increased premiums*)	$0 (NFS)

2016	$6,661.98 (*increased premiums*)	$6,809.00 (*increased premiums*)	$0 (NFS)
2017	$3,545.10 (*reduced benefits*)	$3,528.72 (*reduced benefits*)	$0 (NFS)
2018	$0 (NFS)	$0 (NFS)	$0 (NFS)
Total	**$48,178.40**		**$0**

A0408-10. In short, the Skochins alleged that Genworth defrauded them into paying premiums for five additional years after they would have stopped paying with full information.

Skochin* Motion to Dismiss.** In their motion-to-dismiss briefing in *Skochin*, Genworth and the plaintiffs ***agreed that all plaintiffs, including those who had chosen NFS, sought monetary relief to compensate them for paying more in premiums than they would have paid with full information.

In arguing for dismissal under the "filed-rate" doctrine, Genworth asserted that the plaintiffs, including the Skochins, "avoid[ed] characterizing the relief they request as reimbursement for the premiums they paid," but "that is undoubtedly what they s[ought]." A1017. While the plaintiffs "characteriz[ed]" their requested relief "as 'rescission of the policy renewal elections they made,'" that relief would "ma[k]e [them] whole" only by allowing them "to recover premiums they paid." A1018 (citations omitted).

In response, the plaintiffs confirmed that, if they obtained their requested relief, "Genworth will refund the premiums paid." A1058. In reply, Genworth pounced on that concession, reiterating that the plaintiffs were seeking "a full refund" and that the Skochins in particular "undoubtedly seek the return of their 2013-2018 premium payments." A1549-50. Genworth made this point repeatedly:

- "[Plaintiffs] outright concede that they seek a ***refund of the premiums they paid*** to [Genworth] as damages."
- "Plaintiffs expressly seek a '***refund [of] the premiums paid*** after the first increase was announced.'"
- "Plaintiffs seek the ***return of a filed premium paid*** for valid coverage they have already received in every cause of action they aver."

A1549, 56-57 (emphases added).

At oral argument, Genworth again argued that the plaintiffs' "damages claim is seeking a refund of the filed rate." A1575. Genworth made this point repeatedly:

- "Plaintiffs are seeking ***to recover the premiums they paid*** …."
- "[T]hey … essentially say, … we're going to have a do-over, and we're going to get either ***a partial refund of our premium back*** or we're going to get ***a full refund of our premium back***."
- "[W]hat they're asking for, even in the do-over, … that's still asking for ***a refund of the premiums*** …."
- "What they're seeking as their compensatory damage is a ***refund***."

A1576; A1582, 84, 88 (emphases added). At no point did Genworth distinguish between NFS class members like the Skochins and other class members.

Discovery. Discovery in the Underlying Actions further demonstrates that all underlying plaintiffs sought to recover premiums previously paid. In their initial disclosures, the *Skochin* plaintiffs explained that they "s[ought] compensatory damages, which [would] be calculated as a refund of premiums paid." A0957. Genworth described that statement as an "outright conce[ssion] that [the plaintiffs] seek a refund of the premiums they paid to [Genworth] as damages." A1549.

Similarly, at an initial conference in *Skochin*, plaintiffs' counsel explained that the plaintiffs were demanding "disclosures, and money, refund of premium." A1592. Genworth's counsel did not dispute this description and agreed that "the amount of premiums" the plaintiffs paid was within the scope of discovery. A1594.

Finally, in verified interrogatory responses, the named plaintiffs, some of whom were NFS class members, all stated that the "damages" they sought would be "calculated as a refund of premiums paid" or that their preliminary estimates of their damages consisted of "premiums [they] paid to Genworth." A1600-01; A1612-13; A1623-24; A0970-72; A1640-41; A1656-58; A1672-74; A0987-98; A1688-90; A1704-06; A1720-22; A1736-37.

Approval Hearings. At hearings on approval of the settlements, Genworth and the underlying plaintiffs repeatedly stated that what all plaintiffs sought—and what the settlements provided—was a return of premiums previously paid.

In *Skochin*, plaintiffs' counsel explained that, if Genworth had provided class members with full information, "that would have meant that they would have paid less money in premiums," and "[t]hat's what the cash damages payment is meant to refund." A1399. Plaintiffs' counsel also noted that the complaint's "prayer for relief … asks for rescission of the prior elections and a refund of premiums." A1402. Asked to reconcile that statement with the complaint's prayer for "compensatory, consequential, and general damages in an amount to be determined at trial," counsel explained: "[W]hen you distill the allegations in the complaint and you filter them through the claims we alleged to end up at the damages," the plaintiffs allegedly would have made renewal decisions that "would have resulted in [them] paying less money in premiums …. That's the monetary harm alleged in the complaint. That's the monetary harm that is – the monetary benefits that are offered the class in the settlement." A1402, 04.

Genworth agreed. In Genworth's counsel's words, "the cash payments are designed to put that premium money back in [class members'] pockets." A0796. The settlement "put[s] those cash payments back in their pocket. That's what this settlement is about. It's about reducing premiums." A0800.

The approval hearings in *Halcom* and *Haney* were similar. In *Halcom*, plaintiffs' counsel explained that, "if policyholders had had the benefit of full disclosures sooner," they "would have reduced their benefits sooner in order to pay a lower premium." A1416. "So in that interim period, Genworth … collected … increased premiums that they wouldn't have been entitled to had they been forthright with the policyholder years ago." *Id*. "That delta, that difference in premiums, is the measure of financial harm for not having that information sooner …." A1416-17. In *Haney*, plaintiffs' counsel stated: "The only way, under plaintiffs' theory of the case, that [a class member] could have been financially harmed by not having the disclosure sooner is that … those disclosures … would have caused them to reduce his premium sooner." A1428. That harm is "exactly what the cash payments that go along with the special election options are intended to make … class members whole for." *Id*.

At no point in the hearings did underlying plaintiffs' counsel, Genworth's counsel, or the court ever suggest that the NFS settlement payments constituted anything other than a return of premiums paid.

***Skochin* Approval Order.** In its order approving the *Skochin* settlement, the court initially stated that the settlement gave policyholders "a partial refund of the premiums that the policyholder has already made." A1434.

The court later replaced that language with the term "Cash Damages," A1743, but that change does not indicate that the settlement payments represent something other than premiums previously paid. The genesis of the change was a request in which Genworth—fully aware that the Insurers had reserved rights on the Premiums Exclusion—sought "clarification that the Settlement relief includes … Cash Damages, not the 'refund of premiums.'" A1747; A1537-42. Without objection from the plaintiffs, Genworth requested this change purportedly "[t]o avoid any negative implications to the tax-qualified status of Class Policies." A1746-47; A1743. Nothing about that request suggests that any settlement payment compensated class members for harm other than paying more in premiums than they would have paid otherwise.[5]

In short, the record is unmistakable. The settlement payments compensated all class members, including NFS class members, for paying Genworth premiums they would not have paid with full information. Consequently, the settlement payments "constitute[] … premiums." A0282.

[5] To the extent the Court considers evidence post-dating the settlements, underlying plaintiffs' counsel confirmed in written deposition testimony that the financial harm to the plaintiffs was paying premiums they would not have paid with full information. *See* A0952.

2. The Superior Court's Reasoning Is Mistaken

The Superior Court held that the record evidence of the harm alleged and the relief sought and obtained in the Underlying Actions is irrelevant, reasoning that determining whether settlement payments "*constitute*[] … premiums" requires looking exclusively at the "text" and "language" of the settlement agreements. Ex. B, 16-17. In so doing, the court overlooked that the underlying settlements expressly incorporated the underlying complaints and procedural history. *See* A1117-19, 29-30; A1219-20, 34-36; A1313-15, 30-32. But more fundamentally, the court's exclusive reliance on the settlement text was mistaken. Virginia courts recognize that determining what something "constitute[s]" requires looking at substance, not labels. *See, e.g.*, *Tench v. Commonwealth*, 462 S.E.2d 922, 924 (Va. Ct. App. 1995) (in determining whether a sanction "constitute[s] punishment," "labels … are not controlling"). In the insurance context, Virginia courts evaluating coverage for a settlement consider not only the underlying settlement agreement, but also the underlying allegations and legal theories. *See, e.g.*, *Towers Watson & Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 138 F.4th 786, 793-94 (4th Cir. 2025); *West v. Harleysville Mut. Ins. Co.*, 1998 WL 972255, at *3 (Va. Cir.).

Virginia's approach reflects well-established principles. As this Court recently held, "settlement agreement language is not a reliable coverage indicator." *CVS*, 2025 WL 2383644, at *13 (cleaned up). Delaware courts thus consider "the

pleadings, pre-trial discovery, evidence, and testimony existing before settlement." *Premcor Ref. Grp., Inc. v. Matrix Serv. Indus. Contractors, Inc.*, 2013 WL 6113606, at *3 (Del. Super.); *see Goodge v. Nationwide Mut. Fire Ins. Co.*, 2015 WL 5138240, at *2 (Del. Super.) (similar). Courts nationwide reject the notion that "the label assigned to [a] payment by [the underlying parties] … is dispositive." *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 183 N.E.3d 443, 451 (N.Y. 2021). Indeed, "[h]ow the … settlement is worded is irrelevant." *Level 3 Commc'ns, Inc. v. Fed. Ins. Co.*, 272 F.3d 908, 911 (7th Cir. 2001). One court described an insured's argument based on the label in an underlying settlement agreement as "too lacking in merit to warrant discussion." *CNL Hotels & Resorts, Inc. v. Twin City Fire Ins. Co.*, 291 F. App'x 220, 224 (11th Cir. 2008) (cleaned up). "[T]he label isn't important." *Ryerson Inc. v. Fed. Ins. Co.*, 676 F.3d 610, 613 (7th Cir. 2012).

Under Virginia law, a settlement is excluded if the underlying "allegations of harm were solely predicated on [a] theory" falling within an "[e]xclusion," and courts consider all available evidence from the underlying proceedings when determining whether settlements are covered. *Towers Watson & Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 2024 WL 993871, at *7 n.16, *8 (E.D. Va.), *aff'd*, 138 F.4th 786 (4th Cir. 2025). Virginia courts certainly examine whether "the allegations in the [underlying] complaint fall within the Policy exclusions." *West*, 1998 WL 972255, at *3; *see RRR, L.L.C.*, 2007 WL 5963770 at *8-9 (similar).

The Superior Court distinguished these Virginia cases on the theory that "[w]hile Virginia courts sometimes consider the allegations in the underlying complaint to determine whether a settlement is covered, these courts do so in the context of exclusions that reference what the underlying suit alleged." Ex. B, 17 (cleaned up). That is inaccurate. Applying Virginia law, the Fourth Circuit recently considered what the underlying plaintiffs "claim[ed]" and how their "damages expert estimate[ed] damages" in determining that a settlement fell within a provision barring coverage for a "judgment or settlement representing the amount by which [the] price or consideration [in an acquisition] is effectively increased." *Towers Watson*, 138 F.4th at 793-94 (cleaned up). The exclusions in the other Virgina cases the Insurers cited likewise said nothing about "what the underlying suit alleged." *See West*, 1998 WL 972255, at *2-3; *RRR*, 2007 WL 5963770, at *2, 8. Moreover, even if these cases were factually distinguishable, the Superior Court did not account for the wealth of caselaw nationwide holding that coverage for a settlement does ***not*** turn on labels in the settlement agreement.

Limiting the analysis solely to the settlement text would create serious practical problems. Because settlements are negotiated between insureds and underlying plaintiffs, their language is subject to manipulation. As this Court recently recognized, treating labels as dispositive "would encourage litigants to manipulate settlement language to secure insurance coverage where it would

otherwise not exist." *CVS*, 2025 WL 2383644, at *13 (cleaned up). Here, that danger is not merely theoretical. In *Skochin*, the court initially described Genworth's settlement payments as "a partial refund of … premiums," A1434, but Genworth persuaded the court to remove that language, A1746-47—after the Insurers had reserved rights on the Premiums Exclusion, A1537-42. Genworth claimed that it requested this change for tax reasons, but the mere possibility that it also was motivated by insurance considerations underscores that "settlement agreement language is not a reliable coverage indicator." *CVS*, 2025 WL 2383644, at *13.

Notwithstanding its holding that only the settlement text matters, the Superior Court looked outside the four corners of the settlements in three ways. First, in resolving the parties' first round of summary-judgment motions, the court required the parties to conduct discovery on the Premiums Exclusion even though it already had the settlement agreements in hand. If the settlements' text were dispositive, there would have been no need for discovery; the court could have ruled as a matter of law on the existing record.

Second, the non-NFS payments in *Haney* were "flat awards, without reference to premiums paid," Ex. B, 17, just like the NFS payments in all three Underlying Actions. The Superior Court acknowledged that "the *Haney* settlement's calculation methodology does not explicitly reference premiums paid." Ex. B, 19 n.128. Nevertheless, the court held (correctly) that the non-NFS payments in *Haney*

constituted premiums based on a hearing transcript indicating that the parties calculated the flat *Haney* non-NFS payments using "data on [the] … average annual premium payments." Ex. B, 20 & n.134. The court failed to explain the contradiction between its reliance on that hearing transcript and its refusal to consider other record evidence from the Underlying Actions.

Third, the Superior Court delved into the substance, suggesting that, unlike the other payments, the NFS payments were not premiums because of "the different status of the class members' LTC policies when the [Underlying] Actions were filed." Ex. B, 20. In the court's view, NFS class members "were harmed by the non-disclosure alone, not increased premium rates." *Id*. But it is unclear how any Genworth policyholder could have been "harmed by the non-disclosure alone." The complaints alleged fraudulent inducement by omission, which requires proof of damages separate from the omission itself. *See Winn*, 315 S.E.2d at 195. Regardless, the plaintiffs alleged that NFS class members paid excess premiums; with full information, NFS class members allegedly would have elected NFS ***earlier***. The Skochins, for example, would have chosen NFS in 2013 rather than 2018, saving five years of premiums. A0410.

If the Court looks beyond the bare text of the underlying settlements, the record permits only one conclusion: The payments to ***all*** underlying plaintiffs, NFS and otherwise, compensated them for paying premiums they would not have paid

but for Genworth's omissions. The settlement payments accordingly "constitute … premiums."[6]

[6] Because the Superior Court held that the NFS payments were covered but the non-NFS payments were not, it held that an allocation was necessary to identify the fees and expenses that were "attributable to the NFS payments" and thus outside the Premiums Exclusion. Ex. B, 23-24. In fact, because no settlement payments are covered, no class counsel fees and expenses are covered either, and no allocation is necessary.

Regardless, the Superior Court correctly recognized that, to the extent class counsel fees and expenses are paid out of an uncovered "constructive common fund," they are not covered. *See* Ex. B, 22-23; *see also Towers Watson*, 138 F.4th at 796-97. Here, the underlying court held—correctly—that each underlying settlement created a constructive common fund. *See* A1445; A1478-79; A1522; A1756-57, 180-83; A0825-26; *In re Home Depot Inc.*, 931 F.3d 1065, 1080 (11th Cir. 2019). Accordingly, like Genworth's other settlement payments, the class counsel fees and expenses are not covered.

CONCLUSION

The judgment of the Superior Court should be reversed.

OF COUNSEL:

ARNOLD & PORTER KAYE SCHOLER LLP
Scott B. Schreiber
William C. Perdue
Samuel I. Ferenc
Bou Lee
601 Massachusetts Avenue, N.W.
Washington, D.C. 20001-3743
(202) 942-5000

HEYMAN ENERIO GATTUSO & HIRZEL LLP

/s/ Kurt M. Heyman
Kurt M. Heyman (# 3054)
Aaron M. Nelson (# 5941)
Brendan P. McDonnell (# 7086)
222 Delaware Avenue, Suite 900
Wilmington, DE 19801
(302) 472-7300
Attorneys for Defendant-Below/Appellant AIG Specialty Insurance Company

OF COUNSEL:

WERNER AHARI MANGEL LLP
Douglas M. Mangel
Michelle Beecy
2112 Pennsylvania Avenue NW
Suite 200
Washington, DC 20037
(202) 599-1030

PHILLIPS McLAUGHLIN & HALL, P.A.

/s/ David A. Bilson
John C. Phillips, Jr. (# 110)
David A. Bilson (# 4986)
1200 N. Broom Street
Wilmington, DE 19806
(302) 655-4200
Attorneys for Defendant-Below/Appellant U.S. Specialty Insurance Company

OF COUNSEL:

CARLTON FIELDS, P.A.
Steven J. Brodie
2 Miami Central
700 NW 1st Avenue, Suite 1200
Miami, FL 33136
(305) 530-0050
-and-
Charles W. Stotter
Chrysler Building
405 Lexington Avenue, 36th Floor
New York, NY 10174

DLA PIPER LLP (US)

/s/ John L. Reed
John L. Reed (# 3023)
1201 North Market Street, Suite 2100
Wilmington, DE 19801
(302) 468-5635
Attorneys for Defendant-Below/Appellant ACE American Insurance Company

OF COUNSEL:

WILEY REIN LLP
Jason Cronic
Matthew Beato
Jessica N. Gallinaro
2050 M Street, NW
Washington, DC 20036
(202) 719-7000

SMITH KATZENSTEIN & JENKINS LLP

/s/ Robert J. Katzenstein
Robert J. Katzenstein (# 378)
Julie M. O'Dell (# 6191)
1000 N. West Street, Suite 1501
Wilmington, DE 19801
(302) 652-8400
Attorneys for Defendant-Below/Appellant AXIS Insurance Company

Dated: September 19, 2025

CERTIFICATE OF SERVICE

Aaron M. Nelson, Esquire, hereby certifies that, on October 6, 2025, the foregoing *Public Version of the Joint Opening Brief of Appellants* was served on all counsel of record electronically.

Jennifer C. Wasson, Esquire
Carla M. Jones, Esquire
POTTER ANDERSON & CORROON LLP
Hercules Plaza – Sixth Floor
1313 North Market Street
Wilmington, DE 19801

John C. Phillips, Jr., Esquire
David A. Bilson, Esquire
PHILLIPS, MCLAUGHLIN & HALL, P.A.
1200 N. Broom Street
Wilmington, DE 19806

John L. Reed, Esquire
DLA PIPER LLP
1201 North Market Street, Suite 2100
Wilmington, DE 19801

Bruce E. Jameson, Esquire
John G. Day, Esquire
PRICKETT, JONES & ELLIOTT, P.A.
1310 King Street
Wilmington, DE 19801

Robert J. Katzenstein, Esquire
Julie M. O'Dell, Esquire
SMITH KATZENSTEIN & JENKINS LLP
1000 N. West Street, Suite 1501
Wilmington, DE 19801

/s/ Aaron M. Nelson
Aaron M. Nelson (# 5941)