EFiled: Nov 18 2025 01:33PM EST
Filing ID 77807789
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. GENWORTH FINANCIAL, INC., GENWORTH LIFE INSURANCE COMPANY, and GENWORTH LIFE INSURANCE COMPANY OF NEW YORK, Plaintiffs-Below/Appellees.	Case No. 325, 2025 Court Below - Superior Court of the State of Delaware C.A. No. N22C-05-057 EMD (CCLD) **PUBLIC VERSION**

ANSWERING BRIEF OF APPELLEES'

OF COUNSEL
(admitted *pro hac vice*):

Kenneth H. Frenchman
Michelle R. Migdon
Samantha E. Smith
COHEN ZIFFER FRENCHMAN & MCKENNA LLP
1325 Avenue of the Americas
New York, New York 10019
Tel: (212) 584-1890
kfrenchman@cohenziffer.com
mmigdon@cohenziffer.com
ssmith@cohenziffer.com

POTTER ANDERSON & CORROON LLP

Jennifer C. Wasson (No. 4933)
Carla M. Jones (No. 6046)
Hercules Plaza, Sixth Floor
1313 North Market Street
Wilmington, Delaware 19801
Tel: (302) 984-6000
jwasson@potteranderson.com
cjones@potteranderson.com

Attorneys for Plaintiffs-Below, Appellees

Dated: November 3, 2025

[redacted]

TABLE OF CONTENTS

[redacted]

[redacted].

TABLE OF AUTHORITIES

Page(s)

Cases

[redacted]

[redacted]

[redacted]

Statutes

[redacted]

NATURE OF THE PROCEEDINGS

Plaintiffs-Below/Appellees ("Genworth") sell long-term care ("LTC") insurance. To protect against lawsuits relating to its business, Genworth purchased professional liability insurance from Defendants-Below/Appellants ("Insurers") for substantial premiums. Yet when Genworth was sued by LTC policyholders in three class actions (the "Actions") for alleged misrepresentations regarding future LTC premium rate increases – the exact type of claims for which it purchased insurance – Insurers tried to evade coverage based on two inapplicable exclusions (the Claims-Reserves Exclusion and the Premiums Exclusion). As the Superior Court properly found in granting summary judgment to Genworth, these exclusions do not apply. The Superior Court's decisions and final judgment should be affirmed.[1]

The Claims-Reserves Exclusion. The Claims-Reserves Exclusion bars coverage for loss attributable to claims "arising out of" the inadequacy of Genworth's claims reserves. A0283. That Exclusion is inapplicable here because Genworth's liability in the Actions was not predicated on inadequate reserves. Indeed, the underlying court made clear that Genworth's "actuarial decisions," *i.e.* its setting of reserves, were "***beyond the scope of this case***." A1502 (emphasis

[1] "Ex." refers to Appellants' brief ("Br.") exhibits. "A___" and "B___" are Insurer/Appellants' and Genworth/Appellees' appendices respectively.

[redacted]

added). The class plaintiffs ("Plaintiffs") similarly conceded that they "do[] not challenge" the "***need for premium increases given changes in certain of Genworth's actuarial assumptions.***" A0368; A0428-29; A0492-93 (emphasis added). That makes sense, because Plaintiffs' misrepresentation claims turned on the adequacy of Genworth's disclosures about future planned premium increases, not the purported *motive* behind such increases. Under applicable Virginia law, because any background allegations about the inadequacy of Genworth's reserves were merely incidental, and not necessary to establish its liability, the Claims-Reserves Exclusion "does not bar Genworth's claims." Ex. C at 22-23.

The Premiums Exclusion. By its plain terms, the Premiums Exclusion only excludes coverage for "Loss" that actually "constitutes" premiums or return premiums. A0282. Genworth paid [redacted] in cash damages payments of either $1000, $2500, or $1250 to policyholders in each Action that previously elected to stop paying premiums and enter "Non-Forfeiture Status" ("NFS") ("NFS Damages"). All parties to the settlements, including class counsel, confirmed that these amounts, which exhaust Insurers' remaining coverage, were "***not based*** upon an amount of premiums the Class Members either paid, or would not have paid, if given an adequate disclosure." B2710 (emphasis added). Thus, the NFS Damages "did not return premiums to class members." Ex. B at 17. Further,

[redacted]

Genworth's payment of [redacted] in fees to Plaintiffs' lawyers cannot, by definition, constitute a return of premiums to policyholders.

[redacted]

SUMMARY OF ARGUMENT

1. Denied. The Superior Court correctly held that Insurers "failed to overcome the[ir] burden" of proving the Claims-Reserves Exclusion applied. Ex. C at 24.

a. Insurers incorrectly claim that the Claims-Reserves Exclusion is triggered by a "reasonable causal connection" between excluded facts or conduct and the complaints' allegations. Br. at 6. But applicable Virginia cases involving similar professional liability exclusions (excluding losses for liability or third-party claims rather than *injury* "arising out of" specified conduct) hold that such language only applies when the excluded conduct is essential to the "***elements necessary for [the insured's underlying] liability***." *Doctors Co. v. Women's Healthcare Assocs., Inc.*, 740 S.E.2d 523, 527-28 (Va. 2013) (emphasis added). Here, references to reserves in the Action's complaints were quintessential background information – explaining Genworth's alleged motivation for increasing premiums – that could have been excised from the complaints or disproven at trial without impacting Genworth's liability for Plaintiffs' core misrepresentation claims, which alleged a failure to disclose expected future premium rate increases.

b. The Superior Court did not render any contractual language superfluous Br. at 7. It construed both prongs of the Claims-Reserves Exclusion in context and

[redacted]

consistent with their intended purpose – to avoid transforming Genworth's Insurers into reinsurers for Genworth's policyholders' LTC-claims.

2. Denied. The Superior Court properly held that the Premiums Exclusion "does not bar" coverage for Genworth's NFS Damages. Ex. B at 18.

a. The NFS Damages do not "constitute" premiums or return premiums. Genworth paid [redacted] in nominal NFS Damages payments, which underlying class counsel ("Class Counsel") explained was "***not based*** upon an amount of premiums the Class Members either paid, or would not have paid, if given an adequate disclosure." B2710 (emphasis added); *see also* B2584-85. This unrefuted evidence is dispositive.

b. The Superior Court did not ignore the settlements' substance or rely only on "labels." Br. at 8. Rather, it rejected Insurers' reliance on purported *allegations* – what class Plaintiffs supposedly *sought* in the underlying Actions – and properly analyzed what the payments actually "constitute[d]." Ex. B at 17. Regardless, even if such evidence was relevant, Insurers ignore the full record, including briefing from Plaintiffs declaring that "**the relief they request does *not* seek the return of a portion of an approved rate**." A0626.

[redacted]

COUNTERSTATEMENT OF FACTS

A. Genworth's Insurance Program

Genworth purchased $100 million of professional liability insurance, excess of a $25 million retention (the "Policies"). A0240-43. AIG Specialty Insurance Company ("AIG") issued the "Primary Policy" (A0254-365) and the three other Insurers remaining on this appeal issued excess policies following the Primary Policy's terms (A0833-87):[2]

Insurer	Limits of Liability
AIG	$10M
AXIS Insurance Co. ("AXIS")	$10M xs $10M
U.S. Specialty Insurance Co.	$15M xs $20M
Settled Insurer	
ACE American Insurance Co. ("ACE")	$10M xs $45M

B1038.

Genworth's losses fall squarely within the relevant Insuring Agreement, which covers "Loss" that Genworth must pay for "Claim[s]" by a "policyholder" against Genworth for "Wrongful Acts" in its rendering of professional services. A0274. "Loss" includes settlement and defense costs, while a "Claim" includes a "civil proceeding." A0275-76.

[2] Genworth settled with four insurers ($35 million in total coverage). B1007-12; B1038-39; B3042-43. Two others had arbitration provisions. B1038-39.

[redacted]

Insurers denied coverage based on two inapplicable exclusions:

- **The Claims-Reserves Exclusion** excludes that portion of Loss on account of any Claim "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, A0283 § III.A.(23).

- **The Premiums Exclusion** excludes ***that portion of Loss*** on account of any Claim "if such ***Loss constitutes*** … iii. premiums, return premiums or commissions; but this exclusion shall not apply to Defense Costs." A0277, A0282 § III.A.(20)(iii) (emphasis added).

Notably, the Premiums Exclusion is narrower than a similar exclusion included in a prior AIG form policy (which AIG incorrectly issued then replaced), which barred coverage for "any payment for Loss ***in connection with a Claim made*** against the Insured … ***for*** premiums, return premiums …, or that portion of any settlement or award ***in an amount equal to*** such fees, commissions or other compensation.…" B1069-71 (j) (emphasis added); *see also* B1063; B1110-11.

B. The Underlying Lawsuits

If regulators approved a premium increase on a class of LTC policies, Genworth historically offered policyholders, at renewal, a choice to: (1) pay the increased rate and maintain full coverage; (2) pay reduced premiums for reduced coverage; or (3) stop paying premiums, fix benefits at a reduced amount and enter NFS status. B2901-02.

In three class Actions (the *Skochin*, *Halcom* and *Haney* Actions) filed in the Eastern District of Virginia, and pending before the same presiding judge, LTC policyholders alleged that Genworth made misleading disclosures or omissions about future known and planned premium increases. A0366-552. The class Plaintiffs alleged that, when Genworth implemented class-wide regulatorily-approved rate increases, it made partial or inadequate disclosures of material information regarding its intent to seek additional premium rate increases *in future years*.[3] Because customers purchase LTC insurance years before they need it, plaintiffs alleged they were unable to "make informed decisions" and "ultimately 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; A0428-29; A0492-93.

Specifically, the *Skochin* Action alleged that, in 2012, Genworth planned ongoing future rate increases of 44-60% over current premiums without informing its policyholders. A0374; A0403. It further alleged that, when regulators approved only a partial premium increase, Genworth disclosed that year's increase and noted only that future increases were "possible" or "likely," but withheld that it already

[3] *See, e.g.*, *Skochin* (A0368; A0374-76; A0403-22); *Halcom* (A0428-29; A0464-84; B0283 (omitted page)); *Haney* (A0492-93; A0529-47).

[redacted]

planned to seek additional increases in subsequent years. A0374; A0404-06; A0417; A0422. Further, when Genworth announced in 2018 rate increase letters that it would request 150% in premium increases, Genworth still did not disclose that it projected a 300% rate increase. A0376; A0404-05. The *Halcom* and *Haney* Actions made similar allegations. *Supra* n.3.

The purported reason for these planned increases (Br. at 13) – such as whether Genworth sought to fill an alleged hole in its reserves, or simply wanted (hypothetically) to increase future revenues or change its corporate policies – was irrelevant to the classes' ultimate claimed harm, *i.e.*, that Genworth failed to inform them of known future rate increases when it had ***definitive plans*** to seek additional amounts in subsequent years.

In fact, Plaintiffs explicitly stated at the outset of their complaints that they ***did not contest*** Genworth's decision to increase premiums or its alleged motivation for making such increases, *i.e.*, the alleged inadequacy of its reserves:

> This case does not challenge Genworth's right to increase these premiums, ***or the need for premium increases given changes in certain of Genworth's actuarial assumptions***.

A0368; A0428-29; A0492-93 (emphasis added). This was confirmed by the underlying court, which held that "concerns related to Genworth's actuarial

[redacted]

decisions and its long-term prospects for business success … ***[were] beyond the scope of this case***." A1502 (emphasis added).

Plaintiffs also did not contest or seek a refund of the rate increases themselves:

> Nor does this case ask the Court to reconstitute any of the premium rates or otherwise substitute its judgment for that of any insurance regulator in approving the increased rates. Rather this case seeks to remedy the harm … from Genworth's partial disclosures of material information when communicating the premium increases ….

A0368; A0428-29; A0492-93 (emphasis added). Plaintiffs' briefs later made clear that "***[T]he relief they request does not seek the return of a portion of an approved rate***." A0626; A0665 (emphasis added). Indeed, the court in the Actions confirmed that a claim challenging Genworth's rate increases would be "barred by the filed-rate doctrine," which precludes lawsuits challenging the payment of regulatorily-approved rates. B1386; A1501 ("[P]laintiffs do not – and claim that they cannot – substantively challenge Genworth's premium increases.").

Plaintiffs asserted causes of action for fraudulent inducement in all Actions. A0416-21; A0481-85; A0544-48. Insurers cite (Br. at 15) a single paragraph in each complaint stating that plaintiffs sought a return of premiums for any years ***if*** a policy was rescinded (A0420; A0484; A0547), but they omit that ***no Policies were ever rescinded***. B2535-37; B2639; B2709-10; B3447; B3521-22 (Class Counsel noting Plaintiffs "do not want" rescission because they still want their coverage). The

[redacted]

complaints' actual "prayer[s] for relief" sought only "compensatory, consequential, and general damages," and made no mention of premiums or rescission. A0423; A0486; A0549.

C. The Underlying Settlements

Genworth settled the Actions without admitting any liability/wrongdoing (the "Settlement[s]"). A1131; A1237; A1333. Each Settlement confirmed that plaintiffs had sought "compensatory, consequential, and general damages." A1117-18; A1219-20; A1314.

In the Settlements, Genworth agreed to send a "Special Election Letter" to class members ("Class Members"): 1) making disclosures about future premium rate increases; 2) offering a selection of several "Special Election Options," which would impact future policy benefits and premiums, and 3) for some options, paying an additional "damages payment[]," calculated differently based on the benefit selected ("Cash Damages"). A1125-26, A1156, B1274-78 (as revised) (*Skochin*); A1229-31, A1269-1288 (*Halcom*); A1325-27, A1358-1375 (*Haney*).[4]

[4] Appendix C to each Settlement Agreement details the Special Election Options. B1274-78 (*Skochin*, as revised); A1271-76 (*Halcom*); A1360-63 (*Haney*). For ease of reference, B1013-33 collects these appendices (with the Cash Damages highlighted in yellow and NFS Damages boxed in red), and will be cited hereafter. Genworth only sought coverage for its Cash Damages payments and not for any costs associated with other benefits in the Special Election Options.

[redacted]

1. Settlement Benefits for Non-NFS Policyholders

For non-NFS policyholders (who were still paying premiums), the Settlements sought to cure the alleged disclosure violations by allowing policyholders to effectively redo their prior election decisions armed with new information. B1515. For these non-NFS class members, the Settlements offered the option to maintain current benefits subject to future rate increases or to: (1) cease paying premiums (*i.e.* become NFS) in exchange for reduced paid-up coverage (the "Paid-Up Benefit" or "PBO" Options) (B1015-19 §§ I.A, III; B1021-27 §§ I.A, II.1; B1029-33 §§ I.A, II.1); or (2) pay reduced premiums, with a future reduction in benefits (the "Reduced Benefit" or "RBO" Options) (B1015-19 §§ I.B, III; B1021-27 §§ I.B-C, II.2; B1029-33 §§ I.B, II.2). They also offered "Cash Damages" payments. In the *Skochin* and *Halcom* Actions, policyholders electing the PBO/RBO Options could receive "damages payment[s]" calculated, as a measure of damages, as a multiple or aggregate of certain specified years of past premiums (PBO) (B1015-19 §§ I.A.1, III.A.1 (*Skochin*); B1021-27 § II.1(*Halcom*)), or as a multiple of the cost differential between current and future reduced premium options

[redacted]

(RBO). B1015-19 §§ I.B, III.B.1-B.2 (*Skochin*); B1021-27 §§ I.B-C, II.2 (*Halcom*).[5]

2. The NFS Damages Payments

By contrast, the NFS Damages in all three Actions were flat damages payments unconnected to any premiums or premium calculations.

Class Members who had *already* elected NFS prior to the Settlements and after January 2014 could elect a nominal flat damages payment, without any impact on future benefits or premiums (which they had already locked in and ceased paying, respectively), as follows:

Skochin	***Halcom***	***Haney***
$1,000 (B1017 §II.2)	**$2,500** (B1026 §III.1)	**$1,250** (B1033 §III.1)

Lead counsel for class Plaintiffs – Genworth's adversary below – confirmed in written deposition testimony that "[t]he calculation of [NFS Damages amounts] ***were not based upon*** an amount of premiums the Class Members either paid, or would not have paid, if given an adequate disclosure." B2710 (emphasis added). Even Insurers admitted, on this appeal and in briefs below, that the NFS Damages

[5] To simplify the *Haney* settlement, the parties included flat PBO/RBO damages amounts based on their experience in *Skochin* and *Halcom*. B1029-33; B3040-41; Ex. B at 19-20.

[redacted]

were "flat payments of set amounts" (Br. at 16) that "do not appear to have been calculated based on premiums previously paid." A0769-70.

As Genworth's corporate representative confirmed, the NFS Damages were simply a negotiated settlement amount. B2584-85 ("It was about as basic a dollars negotiation as you can get."). "[P]remiums previously paid" by NFS Class Members "were not considered in such negotiations." B3379-81 (NFS Damages were "compromise" attempt to negotiate "lowest amount" for claims release). Proving this point, the *Haney* NFS Damages increased from $1000 to $1150, and then from $1150 to $1250, based on settlement negotiations with different objectors. B1611; B1648-52; B1705-06; B3096-97; B3485; B3495-510.

Indeed, the presiding court never considered the NFS Damages (or any damages payment) to be a return of premiums. Rather, when the *Skochin* court *once in a single order* inadvertently referred to the damages for the PBO Options as a return of premiums, it immediately issued a corrected opinion eliminating that reference. A1743-44 (amending A1434, reissuing as B1420).[6] This was not a matter of semantics, or an effort to evade Genworth's Insurers (Br. at 47); rather, the parties'

[6] In all other decisions and briefs, the court and parties repeatedly referred to the settlement amounts as "damages." *See* A1467-71; B1235; B1313; B1381-83; B1406; B1452; B1487-88, B1506-08; B1541-42.

[redacted]

joint communication with the court made clear that the Settlement could not provide a refund, as that would have had detrimental tax implications for LTC policyholders.[7] A1746-47; B2619-21. Consistent with this, none of the Cash Damages (including the NFS Damages) were accounted for in Genworth's financials nor included in Genworth's taxes as a return of premiums. B3383-94; B3373-74.

3. Class Counsel Fees

Genworth also agreed to pay class counsel's attorneys' fees and expenses ("Class Counsel Fees"), ***in addition to*** Class Members' damages payments, not deducted therefrom nor as part of any "common fund." A1132-34; A1238; 1334-35.[8] These amounts were paid directly by Genworth to Class Counsel and did not in any way reduce the benefits available to the class (for which there was no limit or aggregate cap). *Id*.

---

[7] Premium payments for "qualified" LTC polices are tax deductible as "medical care" up to specified limits. 26 U.S.C. § 213(a), (d)(1), (d)(10). Further, benefits or claim payments by an insurer under a "qualified" LTC policy generally are non-taxable. 26 U.S.C. § 7702B(a)(2). To be "qualified," a LTC insurance contract must satisfy certain criteria, including that "all refunds of premiums … are to be applied as a reduction in future premiums or to increase future benefits." 26 U.S.C. § 7702B(b)(1)(E). This requirement is also incorporated into the LTC policies themselves, in a section titled "Limitations on the Refund of Premiums" or "Refund of Premiums." B2747; B2876; B2958.

[8] Genworth paid Class Counsel Fees pursuant to a set formula in each Action (an initial set dollar amount, plus an amount equal to a percentage of the "[d]amages payments" ultimately paid to the class, subject to a cap). *Id*.

[redacted]

Indeed, the Settlement Agreements explicitly stated that "Genworth shall pay [Class Counsel Fees] without reducing the benefits to any Settlement Class members." *Id*. The class Settlement Notice similarly announced: "Class members will not be required to separately pay Class Counsel … Genworth has agreed to pay all fees and expenses separately." A1173; A1295; A1383.

Consistent with this, the *Skochin* court stated that fees would be paid "independent of the benefits being provided to the class" and "from a separate fund that will not diminish class members' recovery." B1421; B1434. The *Halcom* court stated that fees would "not subtract from the amount that Genworth will disburse to plaintiffs" but will be paid "over and above the damage payments to class members." A1476-77; *see also* A1522 (*Haney*).

Likewise, class counsel confirmed that these payments "were negotiated *after* the terms of the settlement" (A1483) and were "in addition to (not taken from) the cash damages paid to the Class." B1722 (emphasis added). Genworth's corporate representative agreed. B2621-22. Even the mediator negotiating the Settlements made clear that "it was only upon reaching an agreement on the substantive terms of a settlement" that "further and reasonable consideration was given to" negotiating Class Counsel Fees. B1305.

[redacted]

Critically, the parties in the Actions explicitly stated in a joint filing that "the Settlement itself ***is not a capped, common-fund settlement***." B1614 (emphasis added). Appellant AXIS' corporate representative agreed. B2705.

D. Genworth's Loss

Genworth has incurred [redacted] in total Loss, including [redacted] in NFS Damages (out of [redacted] in total Cash Damages), [redacted] in Defense Costs, and [redacted] in Class Counsel Fees. A0713; B1047-53; B1723-2466.

The NFS Damages alone [redacted]

E. The Superior Court's Summary Judgment Decisions

1. Genworth Prevails on the Claims-Reserves Exclusion

Prior to discovery, on September 21, 2023, Judge Davis ruled for Genworth that the Claims-Reserves Exclusion did not bar coverage, but granted Insurers' Rule 56(f) motion requesting discovery on the Premiums Exclusion. Ex. C at 24, 27, 32.

[redacted]

The Superior Court held that even under a "broad reading," the plain language of the Claims-Reserves Exclusion "[did] not bar Genworth's claims." *Id*. at 22. Reading both prongs of the Exclusion together, the court held that Insurers may avoid Genworth's losses only if they "arise from" "either the inadequacy of Genworth's claim reserves, or the general financial insolvency of Genworth," both of which involved Genworth's "inability to pay claims to its insureds." *Id*. at 22-23. After a "careful reading," the court rejected Insurers' reliance on *James River Insurance Co. v. Doswell Truck Stop, LLC*, 827 S.E.2d 374 (Va. 2019) – which Insurers claimed permitted exclusion based on a broad "reasonable causal connection" standard – as limited to its facts. *Id*. Accordingly, the court held that, even if Plaintiffs offered theories that inadequate claims reserves were a "motive or cause" for increasing premiums, that did not bar coverage, as, critically, inadequate reserves were "not asserted as a claim against Genworth in [their] case-in-chief." *Id*. at 23. As the court explained, Plaintiffs explicitly "did not challenge" Genworth's right to increase premiums or the need for such increases, and the presiding court noted that Genworth's "actuarial decisions" were beyond the scope of that case. *Id*. Thus, the Superior Court correctly held: "Mere allegations or background facts

[redacted]

tangentially relating to Genworth's claims reserves are insufficient to trigger the exclusion." *Id*.[9]

2. Genworth Prevails on the Premiums Exclusion

On February 21, 2025, post-discovery, the Superior Court ruled for Genworth that the Premiums Exclusion did not apply to the [redacted] Genworth paid in NFS Damages, sufficient to exhaust all Insurers' limits. Ex. B.[10]

The Superior Court rejected Insurers' argument that the underlying complaints' allegations "determine[] what the Settlement represents." *Id*. at 16. The court held that Insurers' cases analyzing such allegations did so only in the context of exclusions that "reference what the underlying suit ***alleged***." Ex. B at 17 (emphasis added). Here, by contrast, the Premiums Exclusion "does not discuss what the underlying suit 'alleged' or what class members 'sought,'" but only bars coverage for payments that "constitute" premiums. *Id*. As the court held, "[t]he use of the word 'constituted' suggests that what matters is the Settlements themselves,

[9] At best for Insurers, the court held that the Claims-Reserves Exclusion "can be found to be ambiguous," but exclusionary and ambiguous language are both interpreted strongly in favor of coverage. *Id.* at 23-24.

[10] As the Superior Court noted, Insurers do not dispute that the Premiums Exclusion does not apply to Genworth's [redacted] in Defense Costs, which reduce the Policies' retention by that amount. Ex. B at 14; Br. at 36 n.4.

[redacted]

not what class plaintiffs sought to recover." *Id*. Thus, it is not the "initial theory of liability" that counts, but the "negotiated result." *Id*. at 16.

Applying the Exclusion's plain language, the Superior Court held that the NFS Damages "did not return premiums to class members." *Id*. at 17.[11] Rather, they "were flat awards, without reference to premiums paid." Ex. B at 17. They also did not affect the LTC policyholders' coverage, as they were not credited against future premium payments nor did they increase benefits. *Id*. at 18. Notably, the court rejected Insurers' reliance on various "'types of evidence'" they claimed showed that NFS Class Members suffered the same harm as other Class Members – the court correctly found such litigation documents were irrelevant, "extra-textual," and not specific to the NFS payments. *Id*. at 16 & n. 113, 18 & n. 126. The court ruled that Insurers were thus "liable to Genworth up to their policy limits." *Id*. at 18.

Although not necessary, the Superior Court thereafter offered *dicta* on the parties' other arguments, for "the sake of completeness." *Id*. Specifically, the court distinguished the PBO/RBO damages payments in the *Skochin* and *Halcom* settlements from the NFS payments, claiming the former were explicitly calculated

[11] The Superior Court previously found that Genworth's Losses would only be barred if they "consist[]" of "premium payments being returned to policyholders." Ex. C at 31. The court relied upon the dictionary definition of "constitutes," which means to "make up, form, compose." *Id*. at 30 (citations omitted).

[redacted]

"based on premiums that policyholders paid." *Id.* at 19. The court also observed that the parties used data on the "'average annual premium payments'" to adopt a flat rate to "simplify" the *Haney* PBO/RBO payments. *Id*. at 19 n.128, 20. Thus, the court held that, unlike the NFS Damages, the PBO/RBO payments gave back to policyholders amounts they allegedly overpaid in premiums. *Id*.[12]

Finally, the court ruled that Genworth was entitled to coverage for Class Counsel Fees corresponding to at least the covered NFS Damages. Ex. B at 22-24. The court was highly skeptical of Insurers' argument that coverage for all Class Counsel Fees was precluded on grounds that fees were effectively part of a common fund with the settlement damages payments. *Id*. at 23 n.151. However, even if coverage for counsel fees "turn[ed] on the resolution of that issue" (it did not), at a minimum, the court concluded, only those fees corresponding to excluded settlement payments would be excluded. *Id*. at 22-23. Thus, the court invited further briefing on the allocation of counsel fees as between the covered NFS and excluded PBO/RBO payments. *Id*. at 23-24.

[12] As Genworth argued below, none of the Cash Damages payments constitute a return of premiums. The PBO/RBO Options merely used premiums as a means of calculating compensatory damages for allegedly improper disclosures. *See* A0726-31. However, as Genworth's NFS Damages alone exhaust Insurers' limits, this Court need not address this issue.

[redacted]

Instead, the parties negotiated a Stipulation which allocated $21.5 million of Class Counsel Fees to the NFS Damages. A1774-75. Genworth reserved all rights to argue on appeal that no allocation was necessary and all Class Counsel Fees were covered. A1775.

[redacted]

ARGUMENT

I. THE CLAIMS-RESERVES EXCLUSION DOES NOT APPLY

A. Question Presented

Did the Superior Court correctly determine that the Claims-Reserves Exclusion does not bar coverage here? Yes. Ex. C at 22-23; A0200-38; B0444-502.

B. Scope of Review

Because interpretation of an insurance policy is a question of law, the Court's review is *de novo*. *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 905 (Del. 2021).

Under applicable Virginia law (A0349), an exclusion must be construed "most strongly against the insurer," with the insurer bearing the heavy burden to prove it applies. *Am. Reliance Ins. Co. v. Mitchell*, 385 S.E.2d 583, 585 (Va. 1989); *see also Sentry Select Ins. Co. v. Acuna*, 2011 WL 5593159, at *6 (E.D. Va. Nov. 15, 2011) (exclusions "construed strictly and narrowly, in order to maximize coverage"). Moreover, if there is more than one reasonable interpretation, *i.e.* "if an ambiguity exists, it must be construed against the insurer." *Penn. Nat. Mut. Cas. Ins. Co. v. Block Roofing Corp.*, 754 F. Supp. 2d 819, 823, 825-26 (E.D. Va. 2010).

C. Merits of Argument

The Claims-Reserves Exclusion does not apply. As the Superior Court held, Genworth's potential liability derived from alleged misrepresentations about future known premium increases and was not dependent upon background allegations

[redacted]

regarding reserves. Ex. C at 22-23. Indeed, whether Genworth's reserves were deficient or abundant simply had no impact on whether Genworth could be liable for its alleged failure to disclose specific planned rate increases. *Supra* at 8-9. Thus, even the underlying court made clear that Genworth's "actuarial decisions," *i.e.* its setting of reserves, were "***beyond the scope of [that] case***." A1502 (emphasis added).

1. The Claims-Reserves Exclusion Bars Coverage Only Where Excluded Conduct Is Necessary to Establish Liability

Insurers erroneously contend that all that is required to satisfy the Claims-Reserves Exclusion is a "reasonable causal connection" between Genworth's claims reserves and the Action's allegations. Br. at 23-24, 30-31. But that framing disregards both the contractual language and the governing law. First, it ignores that the Claims-Reserves Exclusion does not apply to Claims merely *alleging* certain conduct or facts; it only applies to Loss on account of a Claim "arising out of" the actual inadequacy of Genworth's reserves.[13] It also contradicts applicable Virginia law holding that this type of exclusion in a professional liability insurance policy only applies when the excluded facts are essential to the "***elements necessary for***

[13] Further, Insurers' indemnity obligation "springs from the facts actually discovered or proven," not mere allegations. *Penn. Nat.*, 754 F. Supp. 2d at 827.

[redacted]

liability" in the underlying action. *Doctors*, 740 S.E.2d at 527-28 (emphasis added). That was not the case here.

In *Doctors*, the Virginia Supreme Court addressed a professional liability policy exclusion barring coverage for "[l]iability arising out of any … violation of any statute." *Id*. at 526. Although acknowledging that the words "arising out of" are broad, the court held that the exclusion only applied if the excluded conduct – there, a statutory violation – was "necessary to the elements of the cause of action" in the underlying suit. *Id.* at 527-28. Because the insured's purported statutory violation (not notifying patients of its lack of participation in a compensation fund) was merely "incidental to" and not one of the "elements necessary for liability" on the at-issue breach of contract claim (claiming only failure to *participate* in the fund, not failure to *notify*), the exclusion did not bar coverage. *Id.* at 524-25, 527-28.

Virginia courts have consistently applied this standard. In *Minnesota Lawyers Mutual Insurance Co. v. Protostorm, LLC*, 197 F. Supp. 3d 876, 881, 883-84 (E.D. Va. 2016), *aff'd*, 703 F. App'x 208 (4th Cir. 2017), the court reviewed a professional liability policy provision that provided increased coverage limits for any "CLAIM arising out of any act, error or omission" occurring after a specific date. Applying Virginia law, and following *Doctors*, the court held that the plain meaning of "arising out of" requires "a causal connection between a particular fact or source of law and

an ***essential element*** of the cause of action alleged." *Id.* (emphasis added). Because the referenced facts (acts occurring after the specified date) were "merely 'incidental' to the necessary elements of the plaintiff's cause of action," and not "necessary" or "required" to establish the policyholder's malpractice liability (the claim at issue), the provision increasing limits did not apply. *Id*. at 884-85.[14]

Similarly, in *Continental Casualty Co. v. AWP USA Inc.*, 2021 WL 1225968, at *18 (E.D. Va. Mar. 31, 2021), the insurer argued and the court agreed, in the context of assessing an exclusion in a professional liability policy, that there must be a causal connection between the excluded conduct and "an essential element" of the claim. 2021 WL 1225968, at *18; *see* Reply Mem. of Law (Section II.C.), *Continental Cas. Co. v. AWP USA Inc*., 2020 WL 4882677 (E.D. Va. 2020).

2. Insurers' "Reasonable Causal Connection" Standard Is Inapplicable

Insurers fail to mention any of this controlling authority. Instead, Insurers cite inapplicable cases involving policies that bar coverage where an *injury* arises out of

[14] *Doctors'* holding is not limited to exclusions with the specific language at issue (barring coverage for "liability" arising out of a "violation"), as Insurers suggested below; instead, the court interpreted the generic phrase "arising out of." 740 S.E.2d at 527-28. Moreover, *Minnesota Laws* applied *Doctors* to a provision, like here, referencing a "CLAIM" without any mention of "violation" or "liability." 197 F. Supp. 3d at 883-84.

[redacted]

a specific circumstance. Br. at 23, 31. The Superior Court properly held that these cases addressed different contractual language. Ex. C at 22-23.

Insurers primarily rely on *James River*, 827 S.E.2d 374, for their "reasonable causal connection" standard. Br. at 23-26, 30-31. But *James River* assessed a fundamentally different exclusion. *Doctors* and *Minnesota Laws* involved professional liability policies that (like here) excluded claims or liability (*i.e.*, "Loss on account of a Claim") based on specific facts or circumstances. A0283. By contrast, *James River* involved a commercial general liability policy exclusion that barred coverage for "'*Bodily injury' or 'property damage'* arising out of the ownership, maintenance, use or entrustment to others of [certain vehicles]." 827 S.E.2d at 375 (emphasis added). Because the exclusion applied if the *injury – i.e.* the resulting harm, and not the liability imposing or claim seeking recovery for that harm – arose out of certain conduct, the court found that the exclusion applied "regardless of the nature of the claim" and as long as there was a reasonable causal relationship between the *injury* and the maintenance of the vehicle. *Id.* at 377.

Further, *James River* did not purport to interpret the words "arising out of" generally, as Insurers suggest (Br. at 23, 30-31), but specifically addressed the phrase "'arising out of the ownership, maintenance or use' of a vehicle." 827 S.E.2d at 377. *James River* relied on *State Farm Mutual Automobile Insurance Co. v. Powell*, 318

S.E.2d 393, 397 (Va. 1984), an earlier case also involving an automobile policy, which held that "[c]ertain basic concepts uniformly are applied to the 'ownership, maintenance, or use' provisions of automobile liability policies." Tellingly, *James River* made no mention of *Doctors*, let alone overruled it.

Insurers' other authority fares no better, as it also involves injury-focused provisions. Br. at 24, 31; *Nationwide Mut. Fire Ins. Co. v. Erie Ins. Exch.*, 798 S.E.2d 170, 173-74 (Va. 2017) (similar automobile injury exclusion); *Lucas v. Lucas*, 186 S.E.2d 63, 64 (1972) (statutory workers' compensation provision *covering* injury "arising out of" and in "course of" employment); *Liberty Univ., Inc. v. Citizens Ins. Co. of Am.*, 792 F.3d 520, 533-34 (4th Cir. 2015) (excluding injuries "arising out of" criminal acts); *Erie Ins. Exch. v. Young*, 2005 WL 4827396, at *6-7 (Va. Cir. Ct. May 24, 2005) (exclusion for "injury" arising out of "business pursuits" inapplicable to tractor injury when tractor on loan to neighbor).

Finally, Insurers incorrectly speculate that the Claims-Reserves Exclusion is "broader" because it uses the additional words "based upon" and "attributable to." Br. at 24. But Insurers' own definitions of these terms (Br. at 23) reflect their similarity, which is consistent with their common usage. Insurers cite no Virginia

[redacted]

court that has held these words expand the scope of an exclusion.[15] Insurers cite only one New Jersey case, which interpreted the distinct policy terms "*alleging*, arising out of, based upon or attributable to." *Valeant Pharmaceuticals Int'l, Inc. v. AIG Ins. Co. of Canada*, 625 F. Supp. 3d 309, 329 (D.N.J. 2022) (emphasis added). Besides containing the key word "alleging," which excludes mere allegations, the operative language appeared in a coverage grant, which is construed more broadly than an exclusion. Even so, *Valeant* still held that the provision did not encompass allegations that "are factually unnecessary or that add only background detail" (*id.* at 331), as is the case here.

3. The Inadequacy of Genworth's Reserves Was Not "Necessary" to Establish Its Liability

Applying the correct standard, the Claims-Reserves Exclusion plainly does not apply. As the Superior Court held, any background allegations regarding Genworth's reserves were merely contextual, not necessary to Genworth's potential or settled liability in the Actions. Ex. C at 22-23.

Insurers fail to address the underlying court's critical holding that "***concerns related to Genworth's actuarial decisions*** and its long-term prospects for business success … ***[were] beyond the scope of this case***." A1502 (emphasis added). This

[15] *TravCo Insurance Co. v. Ward* (Ins. Br. at 20) did not assess relevant language; it considered the word "or" in an unrelated list. 736 S.E.2d 321, 326 (Va. 2012).

[redacted]

ruling addressed an objectors' concern that "Genworth is in a long-term actuarial spiral" and that the Settlement does not fix "Genworth's deficit of income in relation to its spiraling costs." A1497-98; A1502. Further, Plaintiffs expressly stated that they did not challenge Genworth's motivation for premium increases, *i.e.* "***the need for premium increases given changes in certain of Genworth's actuarial assumptions.***" A0368; A0428-29; A0492-93 (emphasis added).

Indeed, Plaintiffs never alleged that Genworth failed to pay them due to allegedly inadequate reserves or sought damages due to an alleged failure to pay. *See* A0410 ¶ 163; A0366-552. Instead, Plaintiffs asserted causes of action for fraudulent inducement. A0416-21; A0481-85; A0544-48. A fraud claim requires a false representation or omission, of a material fact, made knowingly, with intent to mislead, reliance and damage. *Hitachi Credit America Corp. v. Signet Bank*, 166 F.3d 614, 628 (4th Cir. 1999). Here, the allegedly material disclosure violation that gave rise to Genworth's risk of liability – *i.e.*, what was allegedly actionable – was Genworth's alleged failure to inform policyholders of future rate increases *when it already had decided to seek those increases, knew the proposed amounts and/or already sought regulatory approval for them. Supra* at 8-9; *see also* A0618-21 & A0630-34 (class counsel summarizing claims).

[redacted]

The alleged motive behind that omission was not required to establish Genworth's liability. Whether the rate increases were motivated by inadequate reserves, an effort to maximize profit, or some other reason, did not affect whether the disclosures were knowingly misleading to policyholders. Genworth's reserves could have been overflowing, but if it intentionally failed to advise policyholders of future, planned rate increases, that omission would still be actionable. Alternatively, if Genworth's reserves were inadequate, but Genworth nonetheless fully disclosed its intent to raise rates, there would have been no potential liability in the Actions.

Faced with this reality, Insurers simply tout the number of times Plaintiffs used the word "reserves" in otherwise lengthy complaints. Insurers also exaggerate the underlying allegations to try to make Genworth's reserves the central basis of the Actions. Br. at 26, 31-32. Citing the *Skochin* complaint, Insurers suggest that Genworth's disclosures were misleading precisely "because" its claim reserves were inadequate, *i.e.*, because it failed to disclose that premium increases were necessary to shore up its reserves. Br. at 26. Not so. What was alleged as "deceptive" (*id*.) was to tell policyholders that future rate increases were only "possible" or "likely" when, at the time, Genworth allegedly had concrete plans to raise premiums; thus, they were *certain*, not just "possible" or "likely." *Supra* at 8-9.

[redacted]

Insurers misquote Plaintiffs' motion to dismiss opposition briefs, claiming they state that Genworth's disclosures would not have been misleading "but for the fact" that Genworth needed to rebuild its reserves. Br. at 6, 26. But that conclusion only comes from combining ***two separate quotes five pages apart***. *Id*. (citing A0630; A0635). Instead, the briefs explain that the crux of the lawsuits was the failure to disclose specific percentage increases. A0618-21; A0630-34; A0657-59; A0670-73. They include a chart identifying Genworth's alleged misrepresentations, which does not mention Genworth's reserves even *once*; rather, it compares each of Genworth's statements regarding the likelihood of future increases to what Genworth supposedly "knew" regarding the size of those increases. A0619-20; A0658-59. The briefs also explain the types of disclosure that would have been satisfactory, including examples from other insurers and Genworth's belated disclosure that it planned to request "150% in additional premium increases over the next 6-8 years." A0630-34; A0670-73. Thus, Plaintiffs conceded that Genworth's disclosures would have been adequate if Genworth had noted its intention to raise rates in the future, *even if it made no mention of reserves.*

4. Insurers' Policy Language Arguments Highlight the Inapplicability of the Claims-Reserves Exclusion

Insurers incorrectly accuse the Superior Court of conflating the two prongs of the Claims-Reserves Exclusion by stating that Losses for both must involve

[redacted]

Genworth's "inability to pay claims." Br. at 27-28. According to Insurers, financial inability is only explicitly referenced in the second prong and thus cannot have any impact on the first. *Id*. But rather than rendering words superfluous, the Superior Court properly read the two prongs together and in context, as required. The traditional canon of construction, *noscitur a sociis*, dictates that "a word is known by the company it keeps;" thus, words grouped together should be given related meaning. *Cuccinelli v. Rector*, 722 S.E.2d 626, 633 (Va. 2012). Insurance policies often provide lists or subsets of similar items to ensure that all alternatives are considered. *See, e.g.*, A0277 (Wrongful Act definition includes various types of erroneous conduct that may be co-extensive). By contrast, taking Insurers' argument to its logical conclusion would render various terms in prong two superfluous, as bankruptcy, insolvency, and liquidation all reflect situations where Genworth would be unable to pay claims, yet still they are listed as alternatives to cover all bases.[16]

Interpreting the two prongs together also makes sense. As Insurers recognize, Genworth is itself an insurance company. Thus, Insurers understandably did not want to become Genworth's reinsurers by assuming the risk of covering LTC

[16] Insurers' hyper-focus on one sentence in the court's decision ignores its full and well-reasoned decision thereafter. Indeed, in the next sentence, the court explained that "[e]ven under a broad reading," the Exclusion did not apply. Ex. C at 22.

[redacted]

insurance claims that Genworth is unable to pay. Thus, the purpose of the Exclusion is obvious: to bar coverage where a Genworth policyholder claims that Genworth failed to pay its LTC claim *either* because Genworth's reserves were inadequate, *or* where Genworth is otherwise financially unable to do so due to circumstances such as insolvency or bankruptcy. Indeed, it is no accident that one combined exclusion targets all claims arising from Genworth's inability to pay claims or perform its professional claims services as an *insurer*.

Insurers also wrongly accuse the Superior Court of rewriting the Claims-Reserves Exclusion to only exclude coverage where a Claim is made ***for*** inadequate claim reserves. Br. at 29. The court's interpretation is not so limited. Under its reading, the Exclusion still would bar coverage where, for example, a Genworth policyholder asserted a claim for breach of contract or breach of fiduciary duty based on Genworth's failure to pay an insurance claim due to inadequate reserves. Here, however, Plaintiffs did not allege that Genworth failed to pay any claims, let alone due to insufficient reserves.

Insurers' policy arguments simply mask their own improper attempt to rewrite the Exclusion to bar coverage for Claims merely *alleging* the inadequacy of Genworth's reserves. *See RRR, LLC v. New Hampshire Ins. Co.*, 74 Va. Cir. 265, *3, 6 (Va. Cir. Ct. 2007) (insurer may not add policy terms post-loss). Regardless, at a

minimum, Genworth's interpretation of the policy language is reasonable. Thus, the court did not err in finding that the Exclusion was at least ambiguous and should be interpreted in favor of Genworth. Br. at 32-33; Ex. C at 23-24; *Penn. Nat.*, 754 F. Supp. 2d at 823, 825-26.

[redacted]

II. THE PREMIUMS EXCLUSION DOES NOT APPLY

A. Question Presented

Did the Superior Court properly hold that the Premiums Exclusion does not bar coverage exhausting Insurers' limits here? Yes. Ex. B at 20-24; A0689-732; B3044-84; B3395-422.

B. Scope of Review

The Court's review is de novo. *Supra* Section II.B.

C. Merits of Argument

The Superior Court correctly held that the Premiums Exclusion does not bar coverage for Genworth's payment of the NFS Damages, which were not calculated based on any premiums and do not "constitute" premiums or return premiums, as required to trigger that Exclusion. In addition, Genworth's payment of Class Counsel Fees cannot "constitute" return of premiums either.

1. The NFS Damages Do Not Trigger the Premiums Exclusion

The Premiums Exclusion excludes only ***that portion of Loss*** "***if such Loss constitutes*** … premiums, return premiums or commissions." A0277, A0282 § III.A.(20)(iii) (emphasis added). Thus, as the Superior Court correctly held, Genworth's Loss – not any claims or allegations, but its *actual Loss* – must "consist of" or "make up, form, [or] compose" a refund of premiums to the recovering

[redacted]

Plaintiffs, rather than simply representing a form of compensatory relief. Ex. C at 30. The NFS Damages do not satisfy that requirement.

i. The NFS Damages Do Not "Constitute" Premiums or Return Premiums

The Superior Court correctly found that the [redacted] Genworth paid in NFS Damages do not "constitute" premiums or return premiums. The NFS Damages were simply flat, nominal payments of either $1000, $2500, or $1250 paid to NFS policyholders to compensate for alleged disclosure violations.

Unlike the RBO/PBO Cash Damages, which explicitly referenced premiums in calculating damages (B1013-33), all parties agreed that the NFS Damages had no correlation to any amounts Class Members had paid in premiums. Class Counsel unequivocally confirmed in written testimony in this action that the NFS Damages were "***not*** based upon an amount of premiums the Class Members either paid, or would not have paid, if given an adequate disclosure." B2710 (emphasis added). Genworth's representative reiterated that they were simply a negotiated settlement amount, without regard to any policyholder's premium history. B2584-85; *see also* B3379-81. Insurers even conceded below that the NFS Damages were not calculated based on previously paid premiums. A0769-70.

This makes sense. The NFS policyholders had already decided to stop paying premiums, notwithstanding any allegedly inaccurate disclosures; thus, they received

[redacted]

a different measure of relief than other policyholders. B3290-91; B1017 § II.2; B1026 § III.1; B1033 § III.1. Further, NFS policyholders' benefits were fixed and available to pay claims; thus, their policies were, by definition, ***not rescinded***. *Id*. Finally, the NFS Damages were not credited against future premium payments, nor did they result in an increase in benefits (*id*.), as necessary to constitute a return of premiums under the LTC policies' terms. B2747; B2876; B2958.

Insurers ignore all this dispositive record evidence, which conclusively establishes that the NFS Damages do not "constitute" a return of premiums.

ii. Insurers Impermissibly Try to Expand the Premiums Exclusion

To avoid this inexorable conclusion, Insurers try to rewrite the Policies' terms, accuse the Superior Court of improperly focusing on the Settlement's text and incorrectly emphasize the "monetary relief the underlying plaintiffs ***sought***" in the Actions. Br. at 36 (emphasis added). These arguments fail.

First, Insurers claim that the Exclusion bars coverage for settlements that consist of "money that policyholders originally paid" for insurance or amounts Genworth "pays the policyholders back to compensate them" for paying inflated premiums. Br. at 35-36. But such language appears nowhere in the Policies' text.

Next, Insurers complain that the Superior Court viewed the evidence too narrowly. But the Superior Court properly considered both the Settlements' text

[redacted]

(which is the best evidence of what the Settlement damages "constitute"), and, as even Insurers acknowledge, other *relevant* evidence relating to the Settlement *payments*. Br. at 47-48. The court requested discovery (Ex. C at 30-32) regarding the Settlements' terms, which led to Plaintiffs' counsel's unequivocal admission that the NFS amounts were not calculated based on premiums. Ex. B at 15; B2710. The court also distinguished the NFS Damages from the PBO/RBO payments in *Haney*, where testimony indicated that they were calculated using "average annual premium payments." Ex. B at 20 & n.134. As the unrefuted evidence established that the NFS Damages were ***not*** similarly calculated, there was no "contradiction" (Br. at 48) in the court's conclusion that the NFS Damages were covered.

By contrast, Insurers erroneously focus on "***five*** types of record evidence" they claim shows that the NFS policyholders, like other Class Members, *sought* compensation "for the alleged harm of" overpaying premiums. *Id*. at 36 (emphasis in original). But the Premiums Exclusion does not turn on what Plaintiffs *allege* was their claimed harm, but rather on what the NFS Damages actually "constitute" – *i.e.*, what Plaintiffs *actually got*. *See Penn. Nat.*, 754 F. Supp. 2d at 827 (indemnity obligation arises from facts not allegations).

That is because the Premiums Exclusion indisputably bars coverage for a particular type of ***Loss***, not a particular type of ***Claim***. The difference is apparent

[redacted]

when compared to Appellant AIG's erroneously-issued-then-retracted policy, which included a return of premium exclusion that applied more broadly to Loss "in connection with ***a Claim*** made against the Insured … ***for***" a return of premiums. B1069-71 (emphasis added); *see also* B1063, B1110-11. Likewise, the Primary Policy contains various exclusions that exclude Loss "arising out of" particular types of Claims, *see, e.g.*, A0277-81 §§ III.A.(6)-(7), (16), (19), or based upon "alleged" conduct, *id.* §§ III.A.(4), (12)-(13). Here, Insurers drafted a Premiums Exclusion focused solely on the composition of the Loss.

Courts analyzing similar exclusions based on the type of Loss examine evidence relating to the settlement agreement and payment, not the claims alleged or purported compensation sought. *See TIAA-CREF Individual & Institutional Servs., LLC. v. Ill. Nat'l. Ins. Co.*, 2016 WL 6534271, at *12 (Del. Super. Oct. 20, 2016) (although complaint asserted *only* claims for disgorgement, negotiated civil settlement payment did not constitute disgorgement, *i.e.*, the return of wrongfully acquired funds), *aff'd*, 2018 WL 3620873, at *2 (Del. 2018); *see also Conduent State Healthcare, LLC v. AIG Specialty Ins. Co.*, 2021 WL 2660679, at *4-*5 (Del. Super. June 23, 2021) (settlement of claim seeking penalties as sole form of relief not barred by exclusion for Claims "for" fines or penalties; "what matters is what the settlement *actually includes*") (emphasis in original).

Towers Watson & Co. v. National Union Fire Insurance Co. of Pittsburgh, Pa., 138 F.4th 786 (4th Cir. 2025), cited by Insurers, does not mandate a different result, nor does it establish a rule that coverage for settlements depends on the "sole" "theory" underlying the "allegations of harm." Br. at 44-46. That is because the "Bump-Up" exclusion at issue there was fundamentally different from the Premiums Exclusion here, in two critical ways. First, the "Bump-Up" exclusion required that there be a "Claim *alleging*" the receipt of inadequate consideration in an acquisition; no such Claim requirement exists here. 138 F.4th at 793 (emphasis added). Second, it required that the Loss "*effectively*" "*represent*" the amount by which the "price or consideration" for the acquisition was "effectively increased," thereby looking beyond the Loss to what it "represent[s]" and linking the Loss to the nature of the relief sought in the Claim or allegation. *Id.* at 793-94. The Premiums Exclusion contains no such link.

Insurers' other cases are similarly inapplicable. The business pursuits exclusion in *West v. Harleysville Mutual Insurance Co.*, did not exclude types of Loss, but rather injury or damage "arising out of" an insured's business; it thus required an analysis of the facts underlying the at-issue occurrence. 46 Va. Cir. 99, *1-2 (Va. Cir. Ct. 1998). The *West* court also simultaneously analyzed the insurers' duty to defend, which depends only on the complaints' allegations. *Id.* at *3.

[redacted]

Likewise, *RRR* involved exclusions for damages "caused by" or "arising out of" willful acts or legal violations of laws (and also addressed the duty to defend); thus, the parties did not even submit information regarding the basis for the settlement. 74 Va. Cir. at *2-4, 8-9.[17]

Insurers' "labels" argument also misses the point. Br. at 44-45. Genworth does not contend that the Settlement "labels" the NFS Damages as "not" premiums. Rather, as a matter of fact, they are simply nominal negotiated amounts not derived from premiums at all. Insurers' cases support Genworth. *J.P. Morgan Securities Inc. v. Vigilant Insurance Co*. held that an exclusion for penalties did not bar coverage simply because a settlement was labeled as disgorgement; what mattered was that the payment actually "constituted" a measure of the investors' losses and thus was compensatory (not a sanction). 37 N.Y.3d 552, 565-66 (N.Y. 2021). The

[17] Insurers' Delaware cases also involved fact-based exclusions, unlike the Loss-based Premiums Exclusion here. *See Premcor Refining Grp., Inc. v. Matrix Service Industrial Contractors, Inc*., 2013 WL 6113606, at *3 (Del. Super. Nov. 18, 2013) (assessing *coverage provision* for liability "arising out of" work operations); *Goodge v. Nationwide Mut. Fire Ins. Co*., 2015 WL 5138240, at *1 n.1 (Del. Super. May 14, 2015) (pollution exclusion barring injury "arising out of" contaminants).

court looked at the settlement, the settlement negotiations and the calculation of the payment to find coverage. *Id.*[18]

Focusing on the "substance" of the Settlements – as the Superior Court did – avoids any danger of "manipulation" that Insurers claim would arise from "treating labels as dispositive." Br. at 46-47. However, it is wrong to suggest that this Court can ignore the Settlements' language entirely in determining what the Settlement payment constitutes. Insurers' cases say no such thing. Indeed, *CVS Opioid Insurance Litigation* addressed the entirely different question of whether the parties settled a risk within the coverage agreement, not what its Loss "constitute[d]." 2025 WL 2383644, at *13 (Del. Aug. 18, 2025) (looking at claims rather than settlement language to assess whether policyholder suffered injury or damage "because of" bodily injury or property damage).

[18] Insurers remove key words from their *Level 3 Communications, Inc. v. Fed. Ins. Co.*, 272 F.3d 908, 911 (7th Cir. 2001), quotation. It says: "How ***the claim or judgment order*** or settlement is worded is irrelevant." *Id*. (emphasis added). In *Ryerson Inc. v. Federal Insurance Co.*, the court said the "label isn't important" after the plaintiff "restyled its ***claim***" as one for damages. 676 F.3d 610, 613 (7th Cir. 2012) (emphasis added). The court looked to what the payment was – an adjustment of the purchase price – not the claims, in determining it was disgorgement. *Id.* at 612. *Tench v. Commonwealth*, 462 S.E.2d 922, 924 (Va. Ct. App. 1995), asked whether a civil penalty "constitute[d]" punishment, but did not analyze that term.

Nor is Insurers' paranoia about settlement manipulation justified. Insurers rely on (Br. at 42-43, 47) the *Skochin* court's ***one*** isolated reference to a return of premiums (in relation to the PBO Option *only*), despite its repeated references to "damages" in the same order and elsewhere, and quick correction of its misstatement. A1743-44; A1434; B1420; *supra* n.6. Insurers' speculation that Genworth requested this change for insurance considerations (Br. at 47) is pure conjecture. Instead, the joint communication to the court confirms a return of premiums would have adverse tax consequences for LTC policyholders. A1746-47; B2619-21.

iii. Insurers Ignore the Full Evidentiary Record

Even if what Plaintiffs *sought* could trump what the NFS policyholders actually received (it cannot), Insurers wrongly claim that the *only* monetary relief the Plaintiffs could obtain in the Actions was a return of premiums. Br. at 36-45.

First, all three underlying complaints explicitly stated that Plaintiffs did not seek "to reconstitute any of the premium rates" or "substitute [their] judgment" for any insurance regulator's approval of increased rates. A0368; A0428; A0492-93. Rather, they sought to "remedy the harm" caused by "Genworth's partial disclosures of material information when communicating the premium increases." *Id.*

[redacted]

Accordingly, the actual "prayer[s] for relief" in each complaint sought ***only*** "compensatory, consequential, and general damages," and made no mention of premiums. A0423; A0486; A0549. Only a single paragraph referenced a return of premiums as an alternative and only for years a policy was rescinded. A0420; A0484; A0547. Critically, ***none were rescinded here***. B2535-37; B2639; B2709-10; B3447; B3521-22. Instead, class members that paid premiums maintained their policy benefits (and NFS policyholders, like the Skochins, maintained their paid-up benefits), ***including the ability to submit claims for LTC coverage***. *Id*.

Plaintiffs later confirmed that they were not challenging Genworth's setting of premiums. Insurers' quotations from Genworth's motion to dismiss (Br. at 38-40) omit that, in opposition, class Plaintiffs declared that "**the relief they request does *not* seek the return of a portion of an approved rate**." A0626 (emphasis added, italics in original); *see also* B2709 (Plaintiffs' counsel confirming "[w]e did not challenge that the rates were 'over-charged' or inaccurate"). Likewise, in denying Genworth's motion to dismiss, the court repeated that the Plaintiffs "are not asking the Court to reconstitute any of the premium rates or to substitute its judgment" for any regulator. A1091.

Even the discovery Insurers cite (Br. at 40) confirms that Plaintiffs sought "compensatory damages," which could, at best, be "calculated" based on premiums.

[redacted]

That is because, as the *Skochin* court confirmed, a claim directly challenging Genworth's rate increases would be "barred by the filed-rate doctrine," which precludes suits challenging the payment of regulatorily-approved premium rates. B1386. Insurers also ignore that Genworth, in its publicly-filed financial statements, did not account for any of its damages as return premiums, nor did it treat them as premiums for tax purposes. B3373-74; B3383-94.

Faced with these facts, Insurers argue that the NFS Class Members suffered the same alleged harm as other Class Members, who purportedly only sought damages for paying excess premiums. But as the Superior Court recognized (Ex. B at 17-21), the NFS and non-NFS policyholders were not similarly situated. Indeed, Insurers themselves suggested below that the NFS Class Members had "weaker" claims. A0771. This makes sense, as those eligible for NFS Damages had *already* entered into NFS status prior to the Settlements. B1017 § II.2.; B1026 § III; B1033 § III. As Class Counsel explained, "their decision to cease paying premiums … was not hindered by having less information." B3290-91. These Class Members were nevertheless included in the class for completeness and to achieve the broadest possible release. B2594. Accordingly, as Insurers conceded below, regardless of the relief sought, these damages payments were "calculated differently." A0771.

Regardless, even if NFS policyholders suffered the same harm, courts interpreting even broader claims-based premium exclusions agree that they apply only to an actual refund of premiums, not to claims for misrepresentation damages. *See Fremont Indem. Co. v. Lawton-Byrne-Bruner Ins. Agency Co.*, 701 S.W.2d 737, 743-44 (Mo. Ct. App. 1985) (exclusion for "any claim for premiums, return premiums" applies to paradigmatic lawsuits "to recover back premiums paid where there was no effective contract or the contract was repudiated"); *Utica Mut. Ins. Co. v. Impallaria*, 892 F.2d 1107, 1114 (1st Cir. 1989); *Gulf Coast Bldg. Systems, Inc. v. United Am. Sur. Co.*, 614 So. 2d 1360, 1365 (La. Ct. App. 1993) (exclusion inapplicable to tort damages for broker negligence, even though damages based on premiums paid).[19] The NFS Damages do not trigger the Premiums Exclusion.

2. Class Counsel Fees Do Not Constitute Premiums

Finally, even if the NFS Damages are excluded, Genworth's Class Counsel Fees are covered in their entirety. Insurers' argument that Class Counsel Fees fall within the Premiums Exclusion contradicts not only its plain language, but also common sense. Br. at 49 n.6. Class Counsel Fees, paid directly by Genworth to compensate Plaintiffs' lawyers for their legal work, are not "made up" or

[19] *Cf. Evanston Insurance Co. v. Fred A. Tucker & Co.*, 872 F.2d 278, 279 (9th Cir. 1989) (premiums exclusion applied where insured sued broker for *failing to secure coverage*). Here, Class Members received the coverage for which they paid.

[redacted]

"composed" of premiums. Nor were such fees ever paid to or controlled by Class Members. They simply cannot, by definition, "constitute" a return of premiums.

To avoid this conclusion, Insurers claim that Class Counsel Fees were paid as part of a "constructive common-fund." *Id*. But Insurers mistakenly equate: 1) a *traditional* common fund, *i.e.* a single capped settlement fund with a percentage deducted to pay class attorneys' fees, with 2) a *constructive* common fund, which, as the *Skochin* court explained, is merely a legal construct courts use for purposes of calculating the reasonableness of fees. B1423-31. Insurers ignore all the direct evidence here conclusively establishing that the Settlements were *not* common-fund settlements, as there was no actual joint fund, class benefits were not capped or limited, and fees were negotiated and paid separately from and did not reduce any benefits to the Class. *Supra* at 15-17. As the underlying court explained, the Settlement was only "*constructively* treated as a common fund settlement because the attorney fees and damages payments are not actually paid out of a common fund." A1478-79 (emphasis added).[20]

[20] Insurers cite *Towers Watson* (Br. at 49 n.6) to argue that, where settlement payments are excluded, so too are counsel fees. But *Towers Watson* involved a *traditional common fund settlement* – settlement payments were deposited in one global fund from which fees were deducted, reducing class benefits. 138 F.4th at 796-97. The *opposite* is true here.

[redacted]

In any case, Class Counsel Fees should be covered *even if* they were paid out of a lump-sum settlement fund (they were not). Addressing a similar exclusion, the court in *AEGIS Electric & Gas International Services Ltd. v. ECI Management LLC*, 2022 WL 17079054, at *6 (N.D. Ga. Jan. 5, 2022), held that "Class Counsel Fees … simply do not constitute a 'return'" of funds to class members," and rejected "that application of the common fund doctrine can convert the Class Counsel Fees into a 'return of sums.'"[21]

No ordinary person would expect that money directed *away* from Class Members somehow "constitutes" a return of premiums to those Class Members. The Premiums Exclusion does not bar coverage for Class Counsel Fees, which erodes almost all of Insurers' limits, even if no other settlement payments are covered.

[21] *See also UnitedHealth Group Inc. v. Hiscox Dedicated Corp. Member Ltd.*, 2010 WL 550991, at *10–12 (D. Minn. Feb. 9, 2010) (plaintiffs' attorneys' fees were covered "damages," even when paid from uncovered lump-sum settlement fund); *Safeway Stores, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 64 F.3d 1282, 1287 (9th Cir. 1995) (attorneys' fees covered because "lawyers got the money" not shareholders); *Republic Franklin Ins. Co. v. Albemarle Cnty. School Bd.*, 670 F.3d 563, 567-69 (4th Cir. 2012).

[redacted]

CONCLUSION

The judgment for Genworth should be affirmed.

Respectfully submitted,

POTTER ANDERSON & CORROON LLP

By: */s/ Jennifer C. Wasson*
Jennifer C. Wasson (No. 4933)
Carla M. Jones (No. 6046)
Hercules Plaza, Sixth Floor
1313 North Market Street
Wilmington, Delaware 19801
Tel: (302) 984-6000
jwasson@potteranderson.com
cjones@potteranderson.com

Attorneys for Plaintiffs-Below, Appellees

OF COUNSEL
(admitted *pro hac vice*):

Kenneth H. Frenchman
Michelle R. Migdon
Samantha E. Smith
COHEN ZIFFER FRENCHMAN & MCKENNA LLP
1325 Avenue of the Americas
New York, New York 10019
Tel: (212) 584-1890
kfrenchman@cohenziffer.com
mmigdon@cohenziffer.com
ssmith@cohenziffer.com

Dated: November 3, 2025

Public Version Dated: November 18, 2025

[redacted]