EFiled: Dec 22 2025 03:08PM EST
Filing ID 78056435
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,	:	C.A. No. 325,2025
Defendants-Below/Appellants	:	Appeal from the Superior Court of the State of Delaware N22C-05-057 EMD (CCLD) (Davis, J.)
v.	:	
GENWORTH FINANCIAL INC., GENWORTH LIFE INSURANCE COMPANY, and GENWORTH LIFE INSURANCE COMPANY OF NEW YORK,	:	**Original Version Filed: December 5, 2025** **Public Version Filed: December 22, 2025**
Plaintiffs-Below/Appellees.	:	

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Dated: December 5, 2025

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INTRODUCTION

Genworth defends the judgment below primarily with arguments, cases, and purported facts on which the Superior Court did not rely.[1] But Genworth misconstrues the policy language, mischaracterizes the evidence, and ignores large swaths of the record. Genworth's inability to defend the Superior Court's reasoning and its disregard for the contractual text and undisputed facts confirm that this Court must reverse, for two independent reasons.

First, under the Claim-Reserves Exclusion, the Underlying Actions were "based upon, arising out of or attributable to … the inadequacy of [Genworth's] claim reserves." A0283. Under Virginia law, that language requires only a "reasonable causal connection" between the Underlying Actions and Genworth's inadequate claim reserves, which Genworth does not dispute exists here. Instead, Genworth argues that the Claim-Reserves Exclusion does not apply unless inadequate claim reserves prevented Genworth from paying claims ***and*** were essential to the underlying suit's success. But neither of those requirements appears in the relevant contractual text—they are based on a separate prong of the Claim-Reserves Exclusion that the Insurers did not invoke and an outdated Virginia case that the Superior Court did not cite. Regardless, even under Genworth's

[1] Capitalized terms not defined herein have the same meaning as in the Joint Opening Brief of Appellants ("OB").

interpretation, inadequate claim reserves were essential to the Underlying Actions, as they proved the gap between what Genworth said and what it knew to be true.

Second, under the Premiums Exclusion, Genworth's settlement payments "constitute[] … premiums." A0282. As to the NFS payments, Genworth allegedly defrauded class members into electing NFS ***later*** than they would have with full information, and, in resolving those allegations, the settlements returned a portion of the premiums those class members paid in the interim. The Superior Court rejected that argument ***solely*** because it deemed evidence outside the settlements irrelevant. Genworth does not defend that reasoning, instead claiming that the court simply rejected evidence of what NFS class members "sought." What the plaintiffs "sought," however, is highly relevant to what they "got." Moreover, Genworth ignores direct evidence of what the plaintiffs "got"—including Genworth's own statement that the settlements "***put that premium money back in [policyholders'] pockets***." A0796 (emphasis added). Alternatively, attacking the judgment below, Genworth argues that the class counsel fees categorically do not constitute premiums. But Genworth did not cross-appeal, and regardless, under the American Rule, plaintiffs pay their own attorneys' fees. Here, the underlying plaintiffs did so out of constructive common funds, which were composed of premiums.

ARGUMENT

I. THE CLAIM-RESERVES EXCLUSION APPLIES

The Claim-Reserves Exclusion bars coverage for two reasons. First, there is a reasonable causal connection between the Underlying Actions and Genworth's inadequate claim reserves, which is all the policy language requires. Second, in any event, inadequate reserves were essential to the underlying plaintiffs' legal theories.

A. There is a Reasonable Causal Connection Between the Underlying Actions and Inadequate Claim Reserves

The Claim-Reserves Exclusion bars coverage for any Claim "based upon, arising out of or attributable to (i) the inadequacy of [Genworth's] claim reserves …; ***or*** (ii) the bankruptcy, insolvency, receivership, liquidation, or financial inability of [Genworth] to pay claims or perform **Professional Services**." A0283 (emphasis added). The Insurers denied coverage solely under prong (i), which, under Virginia law, bars coverage if there is a "reasonable causal connection" between the Underlying Actions and Genworth's inadequate claim reserves. *James River Ins. Co. v. Doswell Truck Stop, LLC*, 827 S.E.2d 374, 377 (Va. 2019). Genworth does not dispute that a reasonable causal connection exists here—nor could it. Genworth's inadequate claim reserves undisputedly provided a "motive or cause" for Genworth's alleged omissions. Ex. C, 23. Accordingly, had Genworth's reserves been adequate, it would not have withheld material information, leaving policyholders with no basis to sue. *Cf. Associated Cmty. Bancorp, Inc. v. The*

Travelers Cos., Inc., 2010 WL 1416842, *4 (D. Conn.) (finding "a causal connection between the insolvency and the claims" where, absent insolvency, "the investors would have had … no reason to file suit"), *aff'd*, 421 F. App'x 125 (2d Cir. 2011). Moreover, Genworth's inadequate claim reserves were central to the underlying plaintiffs' legal theories. *Infra*, § I.B.

Instead, Genworth argues that the Claim-Reserves Exclusion requires more than a reasonable causal connection. In Genworth's view, the Claim-Reserves Exclusion does not bar coverage unless inadequate claim reserves (1) prevented Genworth from paying claims and (2) were essential for the underlying plaintiffs to prevail. Neither asserted requirement withstands scrutiny.

First, the Claim-Reserves Exclusion is not limited to Claims that inadequate reserves prevented Genworth from paying claims. Genworth downplays the significance of inability to pay in the Superior Court's ruling, contending that only "one sentence in the court's decision" referenced an "inability to pay claims," Appellees' Answering Brief ("AB") 32-33 & n.16. But that "one sentence" was where the court construed the Claim-Reserve Exclusion's requirements. *See* Ex. C, 22. If that construction is incorrect, the decision below cannot stand.

On the merits, Genworth accepts that, while prong (ii) of the Claim-Reserves Exclusion references Genworth's "inability … to pay claims," prong (i) does not. AB 33-34. Critically, Genworth does not seriously dispute that inserting an "inability

to pay" requirement into prong (i) would render it superfluous in light of prong (ii). *See* OB 28. Instead, Genworth suggests that such superfluity is permissible because various policy provisions contain lists of partially overlapping terms "to cover all bases." AB 33. But partial overlap within a list is a far cry from rendering an entire policy term complete surplusage. Under Genworth's illogical interpretation, prong (i) would ***never*** bar coverage except in a subset of cases where prong (ii) ***already*** barred coverage. OB 28. That violates the principle that "[n]o word or clause in a contract will be treated as meaningless." *Heron v. Transp. Cas. Ins. Co.*, 650 S.E.2d 699, 702 (Va. 2007).

Genworth next invokes *noscitur a sociis*, AB 33, which neither Genworth nor the Superior Court mentioned below. "Correctly viewed," however, "*noscitur a sociis* means only that when general and specific words are grouped, the general words are *limited by* the specific and will be construed to embrace only objects *similar in nature* to those things identified by the specific words." *Tomlin v. Commonwealth*, 888 S.E.2d 748, 754-55 (Va. 2023) (quotation marks omitted). Here, the two prongs of the Claim-Reserves Exclusion are separated by a semicolon and the disjunctive word "or," which "may not be omitted or replaced with the conjunctive without doing violence to the plain language of the policy." *TravCo Ins. Co. v. Ward*, 736 S.E.2d 321, 326 (Va. 2012). Moreover, Genworth's argument does not construe any "general" words in prong (i) in light of "specific" words in

prong (ii); it simply asks the Court to rewrite prong (i). That is improper. Prong (i) is unambiguous, and Virginia law "does not apply canons of construction to create an ambiguity where there is none." *Id.*

Furthermore, Genworth's reading unavoidably transforms the Claim-Reserves Exclusion from an "arising out of" exclusion to a "for" exclusion. *See* OB 29. Genworth answers with an example, offering that the Claim-Reserves Exclusion would exclude "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." AB 34. But breach-of-contract actions are barred by a separate exclusion, *see* A0282, and Genworth's hypothetical breach-of-fiduciary-duty action is still a Claim "for" inadequate claim reserves.

Genworth's speculation regarding the Claim-Reserves Exclusion's "purpose," AB 33-34, also fails. Genworth opines that the "obvious" purpose is to prevent the Insurers from "becom[ing] Genworth's reinsurers by assuming the risk of covering LTC insurance claims that Genworth is unable to pay." *Id.* But Virginia courts "interpret insurance policies … in accordance with the intention of the parties ***gleaned from the words they have used in the document***." *Erie Ins. Exch. v. EPC MD 15, LLC*, 822 S.E.2d 351, 354 (Va. 2019) (emphasis added) (citation omitted); *cf. Appalachian Power Co. v. State Corp. Comm'n*, 876 S.E.2d 349, 358 (Va. 2022) (holding that "vague invocations of … purpose" cannot override "clearly worded …

text" (cleaned up)). Here, the Claim-Reserves Exclusion's purpose is stated in its text, which bars coverage not only for Claims based on Genworth's inability to pay, but also for other Claims against Genworth that could have been avoided by maintaining adequate reserves.

Second, the Claim-Reserves Exclusion is not limited to Claims where Genworth's inadequate claim reserves were "necessary" or "essential" for underlying plaintiffs to prevail. AB 24. No such requirement appears in the policy language, which requires a connection between Genworth's inadequate claim reserves and a "**Claim**." As relevant here, a Claim is "a written demand for monetary or non-monetary damages or injunctive relief" or "a civil proceeding commenced by the service of a complaint or similar pleading." A0275. Under that language, each Underlying Action is a "**Claim**." In addition, "all **Claims** arising out of the same **Wrongful Act** and all **Interrelated Wrongful Acts** of [Genworth] shall be deemed one **Claim**." A0262. That language undisputedly applies here. B0002-05.

Accordingly, the "**Claim**" here is not a particular cause of action or liability; it is all three Underlying Actions together. The question, therefore, is whether the requisite connection exists between Genworth's inadequate claim reserves and those three lawsuits collectively. The answer to that question does not depend on those three lawsuits' merits or the essential elements necessary for them to succeed.

Genworth's position does not reflect a coherent reading of the policy language. Indeed, Genworth concedes that, when "arising out of" connects an event or fact to an "injury," it only requires a reasonable causal connection. AB 26-27. But when the phrase connects an event or fact to a "claim[] or liability," Genworth contends that it has a narrower meaning. AB 27. The Primary Policy, however, uses "arising out of" in relation to both Claims ***and*** injuries. *Compare* A0277-83 ("**Claim** … arising out of") *with* A0354 ("bodily injury, sickness, disease or death … arising out of"). Genworth thus argues that the same phrase carries different meanings in different parts of the Primary Policy, contravening the principle that terms have "the same meanings and the same connotations … throughout the entire contract." *Cone v. Cone*, 64 Va. Cir. 311, 312 (2004).

Genworth relies heavily on *Doctors Co. v. Women's Healthcare Associates, Inc.*, 740 S.E.2d 523 (Va. 2013), which the Superior Court never cited. But after *Doctors*, the Virginia Supreme Court clarified in *James River* that "arising out of," when used in a policy exclusion, "only requires that a reasonable causal connection exist." 827 S.E.2d at 377; *see* OB 31 (citing additional cases).

Regardless, *Doctors* does not help Genworth. *Doctors* concerned an exclusion for "damages arising from … Liability arising out of any … violation of any statute." 740 S.E.2d at 526. The parties disputed whether that exclusion barred coverage for a breach-of-contract suit where the breaching conduct (failure to participate in a state

program) was closely related to conduct violating a statute (failure to provide notice about participation). *Id.* at 524. Construing the phrase "arising out of," the court explained that "a plain meaning application is appropriate." *Id.* at 527. The court thus held that, "while there need not be a direct causal nexus between the statutory violation and the liability, there must be a sufficient nexus between them." *Id.*[2]

The *Doctors* court then explained that the word "Liability" required "consider[ing] from where the *liability* itself arises." *Id.* The court therefore "direct[ed] its attention to the elements necessary for liability." *Id.* The court concluded that "[t]he alleged liability arises specifically out of [the insured]'s failure to *participate* …—not its failure to accurately *notify of participation,* which is the act alleged to be in violation of the statute." *Id.* "Thus, using even the broad and common meaning of the term, the alleged liability is 'arising out of' the elements of the breach of the contract, not a violation of the statute." *Id.*

Here, nothing in the Claim-Reserves Exclusion suggests that it turns on "from where [Genworth's] *liability* itself arises." *Id.* Genworth asserts that "*Doctors'* holding is not limited to exclusions with the specific language at issue" and that "the

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[2] Notably, the parties in *Doctors* ***agreed*** on the meaning of "arising out of." *See* Br. of Appellant, *Doctors*, 2012 WL 8899092, *11 (Va.) ("In the insurance context[,] 'arising out of is broader than 'caused by,' and ordinarily means 'originating from,' 'having its origin in,' 'growing out of,' 'flowing from,' or 'incident to or having connection with.'" (citation omitted)); Br. of Appellees, *Doctors*, 2013 WL 4516719, *18-19 (Va.) (same).

court interpreted the generic phrase 'arising out of.'" AB 26 n.14. But the Claim-Reserves Exclusion does not use the phrase "arising out of" alone; it bars coverage for Claims "based upon, arising out of or attributable to" inadequate claim reserves. A0283; *see* OB 25. Moreover, to the extent *Doctors* "interpreted the generic phrase 'arising out of,'" it held that, under that phrase's "plain meaning," "there need not be a direct causal nexus," and a "sufficient nexus" is enough. 740 S.E.2d at 527. Genworth does not explain how a "sufficient nexus," *id.*, meaningfully differs from a "reasonable causal connection," *James River*. 827 S.E.2d at 377.[3]

Finally, this Court can disregard Genworth's offhand suggestion that the Claim-Reserves Exclusion is "ambiguous." AB 35. Under Virginia law, policy language is not ambiguous unless its plain meaning is "undiscoverable" and multiple interpretations are "equally possible." *EPC MD 15,* 822 S.E.2d at 355-56; *see* OB 32-33. Here, Genworth's interpretation is contrary to the plain text, bedrock interpretive principles, and controlling caselaw.

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[3] Genworth's two other cases, *see* AB 25-26, are not to the contrary. *Minnesota Lawyers Mutual, Insurance Co. v. Protostorm, LLC*, 197 F. Supp. 3d 876 (E.D. Va. 2016), predates *James River*. Moreover, while the provision in *Minnesota Lawyers* used the word "CLAIM" rather than "liability," the court's interpretation of "CLAIM" aligned the policy language with *Doctors*. *See id.* at 883. In *Continental Casualty Co. v. AWP USA Inc.*, 2021 WL 1225968 (E.D. Va.), the court simply followed *Minnesota Lawyers* uncritically. *See id.* at *18.

B. Inadequate Claim Reserves Were Essential to the Underlying Actions

Even if the policy language somehow required inadequate claim reserves to be "essential" or "necessary" to an underlying suit's success, AB 24-25, the Claim-Reserves Exclusion still bars coverage. Genworth's contrary argument ignores unequivocal evidence and takes cherrypicked facts out of context.

To prevail, the underlying plaintiffs had to prove that Genworth omitted material information with intent to mislead. *See Winn v. Aleda Constr. Co.*, 315 S.E.2d 193, 195 (Va. 1984). The plaintiffs identified two basic facts Genworth allegedly withheld: (1) that it planned to increase premiums, and (2) that increases were necessary to shore up inadequate claim reserves. The plaintiffs thus alleged that Genworth ***knew*** that substantial increases were ***essential*** to "plug the growing hole in its reserves." A0373; A0432; A0496. Yet Genworth failed to tell policyholders about its "reliance on this rate action plan … to build adequate reserves." A0419-20; A0484; A0547.

Genworth asserts that the complaints' references to reserves were "quintessential background information" and that "the crux of the lawsuits was the failure to disclose specific percentage increases." AB 4, 32. But each complaint referenced claim reserves more than 60 times, *see* OB 25—and for good reason. As the *Skochin* plaintiffs explained in opposition to Genworth's motion to dismiss, "*[i]f* Genworth had known only that based on its reserves and updated actuarial

assumptions some future increase would likely be required, then the disclosure ***would not have been misleading***." A0669-70 (bolded emphasis added). "What is unique about Plaintiffs' case is that … when Genworth sent each rate increase announcement, it *knew* that successive rate increases *would* be filed in the next two to three years … and that it was ***already relying on the planned future rate increases to rebuild its reserves***." A0674 (bolded emphasis added). Consequently, even a disclosure "that Genworth 'plans to request at least 150% in additional premium increases over the next 6-8 years'" was "still incomplete." A0673 (emphasis omitted, cleaned up). The plaintiffs' central argument was that it was "impossible for [them] to … make an informed decision about their coverage options without some indication of when the next increase might come, how many increases might come, the magnitude of the increase, or ***the insurer's reliance on that increase to stabilize its reserves***." A0641 (emphasis added).

Genworth also cites a statement from the *Halcom* approval order "that Genworth's 'actuarial decisions,' *i.e.* its setting of reserves, were 'beyond the scope of this case.'" AB 1-2, 9-10 (quoting A1502). That is misleading. That statement rejected a class member's objection that Genworth was "in a long-term actuarial spiral" and that "the settlement d[id] not fix structural problems with … Genworth's deficit of income in relation to its spiraling costs." A1497. The court responded that "concerns related to Genworth's actuarial decisions … [were] beyond the scope of

this case." A1502. In other words, whether Genworth's plan for rebuilding its reserves would ***succeed*** was not at issue. But Genworth's undisclosed reliance on rate increases to ***try*** to shore up its reserves was central to the case. In the same opinion, the court noted the plaintiffs' allegation that Genworth failed to "inform them that … rate increases were necessary for Genworth to remain solvent and viable"—*i.e.*, they were essential to rebuild Genworth's inadequate reserves. A1463.

Similarly unavailing is Genworth's argument that the underlying plaintiffs "conceded that they 'do[] not challenge' the 'need for premium increases.'" AB 1-2 (quoting A0368; A0428-29; A0492-93); *see* AB 9-10, 18, 30. That is true but irrelevant. It was undisputed that Genworth's claim reserves were inadequate and that premium increases therefore were necessary—Genworth had said as much to the SEC and investors. A0388-96; A0448-56; A0515-22. No one has presented any evidence suggesting otherwise. *Contra* AB 24, 34. The problem was that Genworth knew, but failed to tell its policyholders, that its reserves were inadequate and massive rate increases were necessary to rebuild them. Because Genworth's inadequate claim reserves proved the gap between what Genworth disclosed and what it knew, they were essential to the Underlying Actions.

II. THE PREMIUMS EXCLUSION APPLIES

Even if the Claim-Reserves Exclusion did not bar coverage, the Premiums Exclusion does. Genworth does not dispute that the payments to non-NFS class

members constitute premiums. AB 21 n.12. The full record establishes that the payments to NFS class members likewise constitute premiums. Alternatively, Genworth argues that none of the class counsel fees constitute premiums, but that argument also fails.

A. The NFS Payments Constitute Premiums

The Premiums Exclusion bars coverage for Loss that "constitutes … premiums." A0282. "[C]onstitute[]" undisputedly means "make up" or "form," AB 36 (citation omitted), and voluminous evidence establishes that all Genworth's settlement payments were made up or formed of premiums because they compensated class members for paying more in premiums than they would have paid with full information. For NFS class members, Genworth allegedly defrauded those class members into choosing NFS ***later*** than they would have otherwise, and the settlements returned some of the premiums those class members paid in the interim. *See* OB 36-43.

But the Superior Court did not consider the Insurers' evidence. Instead, the Superior Court held—twice—that "the language of the final settlement agreements of the Underlying Actions dictates whether the 'Loss' consisted of a return of premium payments to the class plaintiffs." Ex. B, 16; Ex. C, 31. In the court's view, "what matters is the settlements themselves." Ex. B, 17; *see* Ex. B, 18 n.126

(similar). The court thus "look[ed] to the Settlements' language to determine if the Premiums Exclusion applies." Ex. B, 17.

Rather than defend that reasoning, Genworth pretends it does not exist. Genworth asserts that the Superior Court did not "treat[] labels as dispositive" and "[f]ocus[ed] on the 'substance' of the Settlements." AB 43 (citation omitted). In fact, the Superior Court disregarded the Insurers' evidence ***solely*** because it was "extra-textual" and could "not alter the Court's analysis of the Settlements' plain text." Ex. B, 18 & n.126.

Defending an opinion the Superior Court did not write, Genworth contends that the Insurers' evidence was not "relevant" because it concerned what NFS class members "sought" rather than what they "actually got." AB 39 (emphases omitted). But what the plaintiffs "sought" is highly relevant to what they "got." In *Towers Watson & Co. v. National Union Fire Insurance Co. of Pittsburgh, PA*, 138 F.4th 786 (4th Cir. 2025), for example, the Fourth Circuit held that plaintiffs "***sought*** what was effectively an increase (or 'bump-up') in the consideration paid for their shares," and "[t]he settlements they eventually ***received*** constituted … precisely such a bump-up." *Id.* at 794 (emphases added).

Indeed, in any reasonable settlement, what the plaintiffs "got" necessarily is a ***subset*** of what they "sought." Here, the "only alleged harm" NFS class members suffered, *Towers Watson & Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2024

WL 993871, *8 n.18, (E.D. Va.), *aff'd*, 138 F.4th 786 (4th Cir. 2025), was paying additional premiums. The settlements therefore "necessarily represent[]" compensation for additional premiums. *Id.* Importantly, the underlying plaintiffs did not assert "multiple legal claims with distinct theories of harm" that were all "settled at once." *Id.* The Underlying Actions were "solely predicated on the theory" that class members paid Genworth more in premiums than they would have with full information. *Id.* at *8.

Genworth cites no Virginia case declining to consider underlying allegations when evaluating coverage for a settlement. At most, Genworth unsuccessfully attempts to distinguish the Insurers' cases holding the opposite. Genworth argues, for example, that *West v. Harleysville Mutual Insurance Co.*, 1998 WL 972255 (Va. Cir.), and *RRR, LLC v. New Hampshire Insurance Co.*, 2007 WL 5963770 (Va. Cir.), concerned policy provisions excluding types of underlying lawsuits rather than "types of Loss." AB 41-42. But the underlying allegations that a settlement resolves plainly inform what "type[] of Loss" that settlement constitutes.[4]

Moreover, the "bump-up" provision at issue in *Towers Watson* barred coverage for a "type[] of Loss." Genworth tries to distinguish that case on the ground

[4] In attempting to distinguish *West* and *RRR*, Genworth cites alternate policy language not contained in the Primary Policy. AB 39-40. Because "the Premiums Exclusion is unambiguous," Ex. C, 31, that language is irrelevant. *See Robinson-Huntley v. George Washington Carver Mut. Homes Ass'n, Inc.*, 756 S.E.2d 415, 418 (Va. 2014).

that the "bump-up" provision barred coverage for Loss "representing" an "effective[] increase[]" in consideration, 2024 WL 993871, *4, whereas the Premiums Exclusion bars coverage for Loss that "constitutes … premiums," A0282. *See* AB 41. But "represent" and "constitute" are synonyms—"represent" means "constitute or amount to." *Towers Watson*, 138 F.4th at 793 (quoting *Represent*, Black's Law Dictionary (12th ed. 2024)).[5]

Moreover, the Insurers presented direct evidence of what the plaintiffs "got." As the Insurers explained, at all three settlement approval hearings, Genworth and class counsel described in detail what the settlement payments represent. *See* OB 41-42. Class counsel explained, for example, that if Genworth had provided full information, class members "would have paid ***less money in premiums***," and "***[t]hat's what the cash damages payment is meant to refund***." A1399 (emphases added). Genworth likewise explained that "***the cash payments are designed to put that premium money back in [policyholders'] pockets***." A0796 (emphasis added). "That's what th[e] settlement is about. ***It's about reducing premiums***." A0800 (emphasis added). Genworth has no response.

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[5] Genworth also cites two Superior Court cases. *See* AB 40. Applying New York law, both cases merely held that particular allegations did not trigger particular exclusions. *See TIAA-CREF Individual & Institutional Servs., LLC v. Ill. Nat'l Ins. Co.*, 2016 WL 6534271, *11-12 (Del. Super.), *aff'd*, 192 A.3d 554 (Del. 2018); *Conduent State Healthcare, LLC v. AIG Specialty Ins. Co.*, 2021 WL 2660679, *4-5 (Del. Super.). Neither held that allegations are categorically irrelevant.

Straying even farther from the decision below, Genworth invokes the "[f]ull [e]videntiary [r]ecord." AB 44. But in so doing, Genworth relies on cherrypicked facts taken out of context. For instance, Genworth notes that the plaintiffs' "prayers for relief" did not expressly mention premiums. AB 45 (quoting A0423; A0486; A0549). But as the Insurers noted, the underlying court directly asked about the prayer for relief at the *Skochin* approval hearing. *See* OB 41. Class counsel explained: "[W]hen you distill the allegations … and you filter them through the claims … to end up at the damages," the plaintiffs allegedly would have "***pa[id] less money in premium*s** to Genworth." A1404 (emphasis added). "That's the monetary harm alleged in the complaint" and "the monetary benefits that are offered … in the settlement." *Id.* Genworth again has no response.

Furthermore, all three underlying complaints expressly sought a "return of premiums." A0420; A0484; A0547. Genworth asserts that no policies were rescinded and that the complaints "referenced a return of premiums … only for years a policy was rescinded." AB 45. But that is not what the complaints say. The complaints sought a "return of premiums paid for each year a ***renewal*** of the policy was rescinded." A0420; A0484; A0547 (emphasis added). Policies and renewals are different. As class counsel explained, the plaintiffs "didn't allege a claim that goes back to the formation of the contract" and thus were not "seeking re[s]ci[s]sion of the entire contract." B3522-23. But the plaintiffs sought—and obtained—rescission

of their renewals. "[T]o rescind an initial decision" is, "in essence, a 'do-over.'" *Brady v. DaVita, Inc.*, 2022 WL 2046212, *7 (S.D. Ohio), *adopted*, 2022 WL 4480126 (S.D. Ohio). Here, a "do-over" is precisely what the settlements provided. *See* OB 15-16; AB 11. Indeed, class counsel and Genworth both repeatedly described the settlement relief as a "do-over." *E.g.*, A1398-99; A1401.

Genworth also cites statements that the underlying plaintiffs did not challenge the regulator-approved premium rates Genworth charged. *See* AB 44-45. Again, that is true but irrelevant. While the plaintiffs did not allege that Genworth overcharged for the coverage it provided, they did allege that Genworth defrauded them into renewing coverage they would not otherwise have purchased. The settlements returned some of the premiums the plaintiffs paid for that fraudulently induced coverage. *See* OB 36-38.

It does not matter that the NFS payments were not "calculated" based on premiums. AB 36-39. The Premiums Exclusion bars coverage for Loss that "constitutes … premiums," not Loss that is "calculated based on premiums." Nor does it matter that NFS class members' causes of action were "weaker" than those of other class members. AB 46 (citation omitted). While it was harder for NFS class members to show reliance, *see id.*, their alleged ***harm*** was the same as other class members'. That is why NFS class members served as class representatives. *See* OB 36. The "weak[ness]" of the NFS class members' causes of action may have

reduced the ***amount*** of premiums they recovered in the settlements, but it does not change that what they recovered "constitutes … premiums."[6]

Finally, Genworth asserts that the Premiums Exclusion does not apply to "claims for misrepresentation damages," citing four non-Virginia cases. AB 47 & n.19. But the cases do not actually say that. *See id.* (citing cases). In addition, none of Genworth's cases considered the policy language here, and they all involved suits against brokers, not insurers. Furthermore, one of Genworth's cases, *Fremont Indemnity Co. v. Lawton-Byrne-Bruner Insurance Agency Co.*, 701 S.W.2d 737 (Mo. Ct. App. 1985), affirmatively supports the Insurers. There, the court stated that a premiums-related exclusion would bar coverage for "paradigmatic lawsuits to 'recover back premiums paid where there was no effective contract.'" AB 47 (quoting *Fremont*, 701 S.W.3d at 743). The Underlying Actions are just such "paradigmatic lawsuits." Alleging that their renewals were fraudulently induced and, thus, ineffective, the plaintiffs sued to recover the premiums they paid as a result. The payments they received to settle those suits "constitute … premiums."

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[6] Genworth notes that the LTC policies required "refunds of premiums" to be applied toward future premiums or benefits and that Genworth did not treat the settlement payments as premiums on its tax returns. AB 15 n.7, 38, 46. Those circumstances cannot change whether the settlement payments "constitute … premiums."

B. The Class Counsel Fees Constitute Premiums

The judgment below held that, because the payments to NFS class members are covered but the payments to other class members are not, [redacted] Ex. A; A1773-75. Accordingly, if the NFS payments are ***not*** covered, no NFS class counsel fees are covered either. *See* Ex. B, 22-23; OB 49 n.6. But Genworth now argues that the opposite is true—***all*** class counsel fees are covered, NFS- and non-NFS-related alike. AB 47-49. That argument is improper. Genworth chose not to cross-appeal, which "is necessary if the appellee seeks affirmative relief from a portion of the judgment, i.e., enlarging the appellee['s] own rights or lessening the rights of an adversary." *Haley v. Town of Dewey Beach*, 672 A.2d 55, 58 (Del. 1996); *accord Banaszak v. Progressive Direct Ins. Co.*, 3 A.3d 1089, 1093 n.5 (Del. 2010).

Regardless, Genworth's argument is meritless. "[U]nder the traditional American Rule, litigants are generally responsible for paying their own legal fees …." *In re Del. Pub. Sch. Litig.*, 312 A.3d 703, 710 (Del. 2024). Class actions are no different. Fees in class actions often are awarded under the "common fund doctrine," which "allows a court to award a reasonable attorney's fee to … a lawyer who recovers a common fund … from the fund as a whole." *Towers Watson*, 138 F.4th at 796 (cleaned up). But while "[c]ourts and commentators often characterize the

common fund fee award as an exception to the American Rule," "that is not an entirely accurate portrayal because … the beneficiaries of the fund pay fees out of the fund that they received." 5 William B. Rubenstein, Newberg & Rubenstein on Class Actions ("Rubenstein") § 15:53 (6th ed. 2022). Class-action jurisprudence thus "draw[s] a clear line between fee-shifting cases and common-fund cases." *In re Home Depot Inc.*, 931 F.3d 1065, 1085 (11th Cir. 2019). "[T]he key distinction … is whether the attorney's fees are paid by the client (as in common-fund cases) or by the other party (as in fee-shifting cases)." *Id.* at 1079.

One variant of a common fund is a ***constructive*** common fund, whereby "an agreement is reached on the amount of a settlement fund and a separate amount for attorney fees and expenses." David F. Herr, Ann. Manual Complex Lit. § 21.7 (4th ed.). In that circumstance, "the sum of the two amounts ordinarily should be treated as [one] settlement fund for the benefit of the class." *Id.* Constructive common funds are widely recognized. *See, e.g.*, *In re Dell Techs. Inc. Class V S'holders Litig.*, 300 A.3d 679, 697-99 (Del. Ch.), *aff'd*, 2024 WL 3811075 (Del.).

Courts have consistently held that, if amounts paid to class members from a common fund are not covered by insurance, attorneys' fees paid from the fund are not covered either. *E.g.*, *Towers Watson*, 138 F.4th at 796-97; *PNC Fin. Servs. Grp., Inc. v. Houston Cas. Co.*, 647 F. App'x 112, 123 (3d Cir. 2016). That class members

agree that part of their recovery should be transferred to their lawyers "simply has no bearing on the analysis." *Towers Watson*, 138 F.4th at 797.

Here, the underlying court held, and Genworth accepts, that the settlements created constructive common funds. *See* OB 49 n.6; AB 48. Genworth primarily argues that, even if attorneys' fees paid from "*traditional* common fund[s]" would not be covered, constructive common funds are different. AB 48. But constructive common funds are "a well-recognized variant of a common-fund arrangement." *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1072 (S.D. Tex. 2012). The American Rule still applies in constructive-common-fund cases, with plaintiffs "paying their own attorneys' fees." Rubenstein § 15:53. As the Superior Court correctly recognized, "[u]nder both the traditional and constructive common fund doctrines, payment[s] to class counsel are … excluded if the underlying award to class members fall[s] within a policy exclusion." Ex. B, 22-23.[7]

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[7] Genworth briefly suggests that fees paid from traditional common funds also would be covered, AB 49 & n.21, but its cases are inapposite. In *AEGIS Electric & Gas International Services Ltd. v. ECI Management LLC*, 2022 WL 17079054 (N.D. Ga.), the American Rule did not apply because the underlying plaintiffs sued under a fee-shifting statute. *See id.* at *1, *5-6 & n.5. Genworth's remaining cases do not mention "common funds" and concerned only whether attorneys' fees constituted "loss" or "damages." *See Safeway Stores, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 64 F.3d 1282, 1286-87 (9th Cir. 1995); *UnitedHealth Grp. Inc. v. Hiscox Dedicated Corp. Member Ltd.*, 2010 WL 550991, *10-12 (D. Minn.); *Republic Franklin Ins. Co. v. Albemarle Cnty. Sch. Bd.*, 670 F.3d 563, 569 (4th Cir. 2012).

Distinguishing between traditional and constructive common funds would elevate form over substance and invite manipulation. Because the two types of common funds are "mathematically equivalent," *Dell Techs.*, 300 A.3d at 729, parties can structure substantively identical settlements as one or the other. Genworth's position thus 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, *13 (Del.) (cleaned up). "[P]rivate arrangements to structure artificially separate fee and settlement arrangements should not enable parties to circumvent … what is in economic reality a common fund situation." *Heartland*, 851 F. Supp. 2d at 1072 (quotation marks omitted).

CONCLUSION

The judgment of the Superior Court should be reversed.

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Dated: December 5, 2025

CERTIFICATE OF SERVICE

Aaron M. Nelson, Esquire, hereby certifies that, on December 22, 2025, the foregoing *Public Version of the Joint Reply Brief of Appellants* was served on all counsel of record electronically.

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