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Case No. N20C-04-268 MMJ CCLD

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

GUARANTEED RATE, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	C.A. No. N20C-04-268 MMJ CCLD
ACE AMERICAN INSURANCE COMPANY, XL SPECIALTY INSURANCE COMPANY, AXIS INSURANCE COMPANY, and ENDURANCE AMERICAN INSURANCE COMPANY,	)	
	)	
Defendants.	)	**FILED UNDER SEAL**

Submitted: June 21, 2022
Decided: August 24, 2022

On Defendant Ace American Insurance's Motion for Summary Judgment
GRANTED IN PART, DENIED IN PART

On Plaintiff Guaranteed Rate, Inc.'s Motion for Partial Summary Judgment
GRANTED IN PART, DENIED IN PART

On Plaintiff Guaranteed Rate, Inc.'s Motion for Judicial Notice
DENIED

On Plaintiff Guaranteed Rate, Inc.'s Motion to Strike
DENIED

OPINION

Lilit Asadourian, Esq. (Argued), Alice Kyureghian, Esq., Barnes & Thornburg LLP, Los Angeles, CA, Thomas E. Hanson, Jr. Esq., William J. Burton, Esq., Barnes & Thornburg LLP, Wilmington, DE, *Attorneys for Plaintiff Guaranteed Rate, Inc.*

Robert J. Katzenstein, Esq., Smith, Katzenstein, & Jenkins LLP, Wilmington, DE, David Newmann, Esq. (Argued), Victoria A. Joseph, Esq., Hogan Lovells US LLP, Philadelphia, PA, *Attorneys for Defendant ACE American Insurance Company*

JOHNSTON, J.

FACTUAL AND PROCEDURAL CONTEXT

This is an insurance coverage action for breach of contract and other relief resulting from alleged failure to cover an underlying settlement.

Plaintiff Guaranteed Rate, Inc. ("GRI") is a Delaware corporation with its principal place of business in Chicago, Illinois. GRI is in the business of underwriting and issuing federally-insured mortgage loans. Ace American Insurance Company ("ACE") is a Pennsylvania corporation that both issues insurance policies and transacts business in Delaware. ACE is a part of the Chubb Group of insurance companies and is a subsidiary of Chubb Limited.[1]

This matter commenced as an insurance coverage case where GRI sought approximately $18 million from insurer ACE in connection with the settlement ("Settlement") of a federal government investigation ("Government Investigation").

[1] The prior filings in this case have used "ACE" and "Chubb" interchangeably when referring to the Defendant.

The U.S. Department of Justice and the U.S. Attorney's Office for the Northern District of New York initiated an investigation for alleged violations of the False Claims Act ("The Act").[2] On June 27, 2019, GRI received a Civil Investigative Demand ("CID").

By Opinion dated August 18, 2021, the Court considered cross motions for Judgment on the Pleadings.[3] On August 25, 2021, Defendant filed a motion for re-argument, which the Court denied on October 11, 2021. Subsequently, ACE filed a motion for interlocutory appeal, which was also denied by the Court on November 16, 2021.

The parties subsequently filed cross motions for summary judgment. The remaining issues to be determined by the Court are GRI's claim for indemnification under ACE's Directors and Officers ("D&O") part of the Policy and/or the Employment Practices Liability ("EPL") part of the Policy, as well as GRI's bad faith claim against ACE.

On March 28, 2022, GRI filed a motion for judicial notice of two False Claims Act cases. GRI believes these have factual similarities relevant to their arguments against ACE.

[2] 31 U.S.C. §§ 3729-3733.
[3] *Guaranteed Rate, Inc. v. Ace American Ins. Co.*, 2021 WL 3662269 (Del. Super.).

On June 7, 2022, GRI filed a Motion to Strike evidence relied on in Defendant's Motion for Summary Judgement.

STANDARDS OF REVIEW

Motion for Summary Judgment

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[4] All facts are viewed in a light most favorable to the non-moving party.[5] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.[6] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[7] If the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.[8]

Superior Court Rule 56(h) provides:

> Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the

[4] Super. Ct. Civ. R. 56(c).
[5] *Burkhart v. Davies*, 602 A.2d 56, 58–59 (Del. 1991).
[6] Super. Ct. Civ. R. 56(c).
[7] *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).
[8] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

equivalent of a stipulation for decision on the merits based on the record submitted with the motions.[9]

The Court will evaluate any contested facts pursuant to Rule 56(c). All facts are viewed in a light most favorable to the non-moving party.[10] The Court will evaluate the facts relating to each precise issue. The Court will take all reasonable inferences into consideration.

Motion to Strike

Superior Court Civil Rule 12(f) permits the Court to strike "any insufficient defense" or "redundant, immaterial, impertinent or scandalous matter."[11] The movant must show "clearly and without doubt that the matter sought to be stricken has no bearing on the ... litigation."[12] Because motions to strike are disfavored in Delaware, they are "granted sparingly" and only where "clearly warranted, with [any] doubt ... resolved in favor of the pleadings."[13]

[9] Super. Ct. Civ. R. 56.
[10] *Burkhart v. Davies*, 602 A.2d 56, 58–59 (Del.).
[11] Super. Ct. Civ. R. 12(f).
[12] *In re Estate of Cornelius*, 2002 WL 1732374, at *4 (Del. Ch.).
[13] *O'Neill v. AFS Hldgs., LLC*, 2014 WL 626031, at *5 (Del. Super.).

ANALYSIS

August 18, 2021 Opinion on Cross Motions for Judgment on the Pleadings

The Court issued an Opinion dated August 18, 2021.[14] The Court granted GRI's Motion for Partial Judgment on the Pleadings. The Court denied Insurers' Cross Motion for Judgment on the Pleadings. The Court made the following rulings:

The CID falls within the definition of "Claim" under the Policy, and the Claim was first made during the Policy period. Therefore, Plaintiff's Motion for Partial Judgment on the Pleadings is granted on this issue.

The CID and related investigation constitute a Claim that triggered the duty to advance defense costs under the Policy. Coverage was requested by the July 9, 2019 notice of the CID. Advancement is subject to repayment, should subsequent proceedings determine that the Policy does not provide coverage. Any relevant Policy retention also will apply. Therefore, GRI is entitled to advancement of defense costs under the Policy, and Plaintiff's Motion for Partial Judgment on the Pleadings is granted on this issue.

The Professional Services Exclusion does not apply to prevent coverage under the Policy. Plaintiff's Motion for Partial Judgment on the Pleadings is granted on

[14] *Guaranteed Rate, Inc. v. ACE Am. Ins. Co.*, 2021 WL 3662269 (Del. Super.), *reargument denied*, 2021 WL 4726608 (Del. Super.), *cert. denied sub nom. Guaranteed Rate, Inc. v. ACE Am. Ins. Co.*, 2021 WL 5370794 (Del. Super.), *appeal refused*, 266 A.3d 212 (Del. 2021).

this issue. Insurers' Cross Motion for Judgment on the Pleadings is denied on this issue.

Plaintiff has stated a claim for coverage under the EPL. However, this issue presents several questions of fact at this stage of the proceedings. Therefore, the Insurers' Cross Motion for Judgment on the Pleadings is denied on this issue.

It is premature to decide the validity of a bad faith claim at this time. Insurers' Cross Motion for Judgment on the Pleadings is denied on this issue.

Professional Services Exclusion

In this case, Plaintiff is seeking indemnification for approximately $15,060,000 in settlement costs with the United States Department of Justice, arising from GRI's defects in underwriting individual loans. GRI asserts that the Settlement represented: (1) damages the Government allegedly incurred for insurance payments it made to third parties, plus a multiplier under the False Claims Act; (2) and compensation to the Relator for her alleged retaliation claims.

Under the Policy, the Professional Services Exclusion provides that the Insurer shall not be liable for Loss on account any Claim:

> alleging, based upon, arising out of, or attributable to any Insured's rendering or failure to render professional services. Provided, however, that this exclusion shall not apply to Section 1, Insuring Agreement A, Management Liability, paragraph 1, Management Liability.

The language of the Settlement Agreement controls whether the Professional Services Exclusion applies. The Settlement must be a "Loss," not taxes, fines, penalties, or disgorgement.

ACE argues that the determination of whether ACE has a duty to indemnify GRI for the Settlement turns on the actual acts revealed in the course of the DOJ investigation—not the acts alleged in the CID. ACE asserts that the investigative facts show that the Settlement was derived directly from defects in GRI's underwriting of the individual loans issued to borrowers, and thus arises out of GRI's professional services within the scope of the Exclusion.

ACE further contends that the Settlement is a Loss that arose out of professional services classified as "underwriting errors." ACE reasons that the "actual facts" show that damages were calculated on the basis of underwriting errors in individual loan files, rather than on the basis of quality control deficiencies. Defendant claims this distinction was uncovered through depositions.

The Court finds that "underwriting errors" versus "quality control deficiencies" is a distinction without a difference. The Court finds further that the law of the case doctrine applies. Law of the case is a judicially-created doctrine that prevents parties from relitigating issue that previously have been decided. "Once a matter has been addressed in a procedurally proper way by a court, it is generally held to be the law of that case and will not be disturbed by that court unless a

compelling reason to do so appears."[15] In order for law of the case to apply, the action must be "one continuous action within the same court system."[16]

The Court already has decided that the Professional Service Exclusion does apply to exclude coverage under the Policy. The Court also has denied reargument on this issue. The Court finds Defendant's additional arguments unpersuasive. The distinction presented between the terms "quality control" and "underwriting" is not a distinction sufficient to alter the coverage ruling. The Court already acknowledged that "[t]he Wrongful Acts alleged in the underlying investigation involve originating and underwriting federally-insured loans that failed to meet applicable quality-control standards."[17] The Court's prior opinion turned on the fact that the duty to meet certain standards was owed to the federal government, not to the mortgage borrowers. The Court confirms that the Professional Services Exclusion does not bar coverage.

Employment Practices Liability ("EPL")

"The insured bears the burden of proving that a claim is covered by an insurance policy."[18] Once coverage is found, the burden shifts to the insurer to prove an exclusion precludes coverage.[19]

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[15] *Zirn v. VLI Corp.*, 1994 WL 548938, at *2 (Del. Ch.).
[16] *Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co.*, 2015 WL 5278913, at *8 (Del. Ch.).
[17] *Guaranteed Rate*, 2021 WL 3662269, at *4.
[18] *Zurich Am. Ins. Co. v. Syngenta Crop Prot., LLC*, 2020 WL 5237318, at *4 (Del. Super.).
[19] *Id.; see Northrop Grumman Innovation Sys., Inc. v. Zurich Am. Ins. Co.*, 2021 WL 347015, at *9 (Del. Super.).

The EPL provision provides:

> The **Insurer** shall pay the **Loss** of the **Insureds** which the **Insureds** have become legally obligated to pay by reason of a **Claim** first made against them and reported to the **Insurer** during the **Policy Period** or, if elected, the **Extended Reporting Period**, for any **Wrongful Acts** taking place prior to the end of the **Policy Period**, if such **Claim** is brought and maintained by or on behalf of:
>
> 1. any past, present or prospective full-time, part-time, temporary or leased employee(s) of the **Company**; or
> 2. any natural person who is a customer or client, or any group of such customers or clients, other than an employee or applicant for employment with the Company or any Outside Entity.

In June 2019, the DOJ issued the CID to GRI. The parties agreed to the Settlement on February 5, 2020. On February 21, 2020, GRI received a redacted copy of the *qui tam* complaint which included the retaliation claim. Effective April 20, 2020, GRI, the DOJ, and the *qui tam* plaintiff executed a settlement agreement that memorialized the February 5 agreement.

ACE argues that GRI lacked knowledge of the retaliation claim until after the Settlement Agreement. ACE asserts that prior to February 5, 2020, when GRI reached a settlement in principle to pay that amount to the Government, the Carranza Complaint had not been disclosed to GRI, and the DOJ made no mention of the Retaliation Claim. ACE further asserts that the retaliation claim was provided to GRI for the first time on February 21, 2020, and its disclosure had no impact of the Settlement Amount.

GRI contends that it believed the *qui tam* complaint contained a Retaliation Claim so it requested a "a global release, including any retaliation claim that may be in the *qui tam*" at the time of settlement.[20] Plaintiff contends that it suspected the claim despite the complaint remaining under seal.

GRI further argues that the Settlement amount was increased to reflect the Retaliation Claim. GRI asserts that the U.S. Attorney increased the share of recovery to accommodate GRI's request for a release. GRI relies on deposition testimony that the U.S. attorney relayed to GRI that "to obtain the release on the retaliation claim from the [R]elator's counsel, he had to increase the share of recovery that was paid to her."[21]

ACE contends that GRI concedes that the Settlement comprised "compensatory damages allegedly incurred by the Government for insurance payments it made to third parties, plus a multiplier under the False Claims Act – and nothing more."[22] ACE argues that statements made by the U.S. Attorney illustrate that any increase in share of Settlement was paid by Carranza and not GRI.

ACE further contends that GRI, at most, speculated about or suspected a retaliation claim. However, the actual claim remained sealed at the time of the Settlement. ACE asserts that unless and until the Retaliation Claim was actually

[20] Pl. Op. Br. Ex. R. at 153:21-23; 154:8-11.
[21] *Id.* at 182:5-12.
[22] Pl. Op. Br. at 23.

asserted against GRI, it was not among "facts known" and could not trigger coverage under the Policy.

This Court has held:

> When a policyholder settles and seeks indemnification, it only needs to show the existence of "a potential liability on the facts known to [it] ..., culminating in a settlement in an amount reasonable in view of the size of possible recovery and degree of probability of claimant's success against the insured." Stated differently, the insured only needs to establish the potential for a covered liability on the facts known at the time of settlement. The potential for a covered liability may be demonstrated by the pleadings, pre-trial discovery, evidence, and testimony existing before settlement.[23]

The Settlement Agreement contains no reference to the Retaliation Claim. No portion of the Settlement, under the Settlement agreement, was attributed to the Retaliation Claim. After the Settlement was reached, but before the agreement was executed, it was known to both GRI and ACE that the *qui tam* complaint existed. However, the complaint remained sealed.

The Court finds that there is no evidence presented in the record that the potential Relation Claim resulted in any increase in the Settlement amount. The existence of the Retaliation Claim was speculative as of the time of Settlement. Therefore, the EPL is not available to cover any part of the Settlement. Thus, the allocation issue is moot. The Court finds that the entire Settlement is covered, and no exclusions or affirmative defenses apply. The Court need not address allocation.

[23] *Premcor Ref. Grp., Inc. v. Matrix Serv. Indus. Contractors, Inc.*, 2013 WL 6113606, at *3. (Del. Super.) (internal citations omitted).

Reasonableness of the Settlement

Generally, "when an insurer wrongfully refuses to defend a claim, 'the insured may enter into a reasonable settlement with the claimant, absent fraud, collusion, or bad faith, and sue the insurer for indemnity…for the amount paid in settlement.'"[24] The insured is free to engage in the best possible settlement under the circumstances so long as it is reasonable.[25] The insured only needs to establish potential coverage liability based on facts known at the time of settlement.[26]

> The burden of proving reasonableness falls on the insured both out of fairness, since the insured was the one who agreed to the settlement, and out of practicality, since the insured will have better access to the facts bearing upon the reasonableness of the settlement. The insurer, however, retains the right to rebut any preliminary showing of reasonableness with its own affirmative evidence bearing on the reasonableness of the settlement agreement.[27]

GRI, as the insured, has the initial burden to establish reasonableness. "Reasonableness often depends on the 'nature of the pleadings' and 'the quality and quantity of proof which [the insured] would expect to be offered against it in an underlying action.'"[28] In determining reasonableness "the test is what a reasonably prudent person in the position of the insured would have settled for on the merits of plaintiff's claim."[29]

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[24] *Philadelphia Indem. Ins. Co. v. Bogel*, 269 A.3d 992, 1013 (Del. Super. 2021) (internal citations omitted).
[25] *Id*.
[26] *Premcor Ref. Grp., Inc. v. Matrix Serv. Indus. Contractors, Inc*., 2013 WL 6113606, at *3 (Del. Super.).
[27] *Fed. Ins. Co. v. Binney & Smith, Inc*., 913 N.E.2d 43, 49 (Ill. App. 2009).
[28] *Cincinnati Ins. Co. v. H.D. Smith Wholesale Drug Co.*, 410 F. Supp. 3d 920, 933 (C.D. Ill. 2019).
[29] *Id.* at 936.

If the insured had a duty to seek consent to settle—and failed to do so—the reasonableness requirement becomes moot. However, if coverage had been denied at the time of settlement, there was no duty to seek consent to settle.

GRI alleges the following timeline:

- On December 10, 2019, GRI's broker informed Chubb that GRI would be meeting with the Government on January 21, 2020, and "will need to be prepared to come to the meeting with authority to settle."

- On January 13, 2020, Chubb issued a coverage letter denying that the CID was a Claim.

- On February 5, 2020, GRI settled the Government Investigation and *qui tam* action for $15.06 million.

- On March 3, 2020, ACE issued its letter denying coverage for the Investigation pursuant to the PSE.

- On April 29, 2020, GRI finalized its Settlement with the Government which resolved both the CID and Carranza Action together as a single matter.

ACE argues that ACE's January 13, 2020, coverage letter only determined that the Investigation had not yet become a Claim. ACE concedes that on March 3, 2020, it issued a letter denying coverage.

ACE contends the GRI had a duty to seek consent and failed to do so. ACE relies on *Allstate Insurance Company v. Fie*,[30] arguing that, under Delaware law, allegations of breach of consent-to-settlement provision create a rebuttable

[30] 2006 WL 1520088 (Del. Super.).

presumption of prejudice.[31] The insured must prove lack of prejudice to the insurer.[32] ACE argues that it denied coverage only after GRI settled without consent.

GRI contends that its duty to seek consent ended when Chubb denied coverage. Specifically, GRI alleges that ACE's refusal to accept the Claim on January 13, 2020 eliminated any duty GRI had to continue to seek consent to settle, because ACE already had breached its contract at that point. Plaintiff argues that it sought authority to settle on eight separate occasions.

- On December 10, 2019, GRI's broker, Metz, informed Chubb that GRI would be meeting with the Government on January 21, 2020, and "will need to be prepared to come to the meeting with authority to settle."

- On December 11, 2019, Chubb's claim handler, Toyos, forwarded the broker's email to her supervisor, Varley, and noted that GRI "is requesting authority to settle."

- On January 6, 2020, GRI's in-house counsel, Shatat, sent a follow up email to Chubb asking about the status of Chubb's coverage position and reminding Chubb that its meeting with the Government "is fast approaching."

- Varley testified that he and Chubb understood from Shatat's correspondence that GRI was seeking authority to settle.

- On January 13, 2020, one week before GRI's meeting with the Government, Chubb issued a coverage letter denying the CID was a Claim.

- Notwithstanding, Shatat again wrote an email to Toyos stating that GRI expected the Government "to make a monetary demand by Thursday, January 16th" and that GRI needs to be "in a position to negotiate very

[31] *Id.* at *4.
[32] *Id.*

soon [there]after." Varley testified that he understood that, through this email, Shatat was once again seeking authority to settle.

- On January 30, 2020, GRI held a meeting with Chubb to discuss the government's allegations. Varley confirmed that, on that call, GRI wanted to talk about settlement numbers.

- On February 4, 2020, GRI informed Varley and Toyos that negotiations had been expedited at the Government's insistence and that GRI could settle the claims for $15 million.

Record evidence includes notes of ACE representatives acknowledging that GRI was seeking consent to settle. GRI argues that ACE declined to take a position on the Settlement and remained silent throughout the Settlement process.

ACE disputes these facts. ACE concedes it received notice of intent to settle, but argues that the detailed information it requested with regard to the Settlement was not provided until the January 30, 2020 call. ACE argues that GRI's assertion—that ACE lost its right to consent by failing to make a coverage determination in the 5-day window between the January 30, 2020 conference call and GRI's February 5, 2020 Settlement—is without merit. ACE contends that whether it had enough time to consent to Settlement raises a question of fact. However, ACE did not ask for additional time to evaluate the information.

The Court has considered the record evidence. The Court finds that GRI sought consent to settle. Therefore a presumption of reasonableness applies. Even if consent to settle were not properly sought, there is no evidentiary suggestion of any reason for GRI to collude or settle for an unreasonable amount. ACE has not

presented any genuine issues of material fact that the Settlement amount and methodology were unreasonable. Therefore, GRI has met its burden to demonstrate that the Settlement is reasonable.

Contract Exclusion

"The insured bears the burden of proving that a claim is covered by an insurance policy."[33] Once coverage is found, the burden shifts to the insurer to prove an exclusion precludes coverage.[34] Exclusions are to be "construed narrowly in favor of coverage."[35]

"Delaware courts consistently have held that contracts shall be 'interpreted in a way that does not render any provisions illusory or meaningless.'"[36] In *Gallup, Incorporated. v. Greenwich Insurance Company*, this Court reiterated that "interpreting exclusionary provisions so broadly as to vitiate all coverage undermines the purpose of having an insurance policy."[37]

[33] *Zurich*, 2020 WL 5237318, at *5.
[34] *Id.; see Northrop Grumman Innovation Sys., Inc. v. Zurich Am. Ins. Co*., 2021 WL 347015, at *9 (Del. Super.).
[35] *Ferrellgas Partners L.P. v. Zurich Am. Ins. Co.*, 2020 WL 363677, at *13 (Del. Super.); *see Gillen v. State Farm Mut. Auto. Ins. Co.*, 830 N.E.2d 575, 582 (Ill. 2005)("a policy provision that purports to exclude or limit coverage will be read narrowly and will be applied only where its terms are clear, definite, and specific.").
[36] *First Bank of Delaware, Inc. v. Fid. & Deposit Co. of Maryland*, 2013 WL 5858794, at *8 (Del. Super.)(quoting *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 287 (Del. 2001)(internal quotations omitted)).
[37] 2015 WL 1201518, at *12 (Del. Super.).

> Delaware recognizes the "mend-the-hold doctrine," which, bars a party who rejects a contract on certain specified grounds from changing position after litigation is filed when those grounds for rejection do not pan out. Thus, the mend-the-hold doctrine is an equitable doctrine intended to prevent a party from asserting grounds for repudiating contractual obligations and then, in bad faith, asserting different grounds for repudiation once litigation has commenced and it becomes apparent the original grounds for repudiation will not work.[38]

The Contract Exclusion excludes coverage for any Claim alleging, based upon, arising out of, or attributable to the actual or alleged breach of any oral, written, express or implied contract or agreement.

Application of the Contract Exclusion was first raised on March 3, 2020. Previously, on January 13, 2020, Chubb denied that the CID constituted a "Claim" and declined to advance defense costs before GRI's meeting with the Government. ACE did not raise the Contract Exclusion at that time.

ACE argues that the evidence shows that GRI issued federally-insured loans pursuant to contracts or agreements with HUD and the VA, and that the underlying investigation arose from actual or alleged breaches of those agreements. ACE alleges that the evidence shows GRI's submission of certifications to HUD and its compliance (or noncompliance) with FHA underwriting requirements were part and parcel of the requirements imposed by GRI's contracts or agreements with the FHA. ACE specifically alleges that the FHA Mortgage Insurance Certificates that GRI

[38] *Health Corp. v. Clarendon Nat. Ins. Co.*, 2009 WL 2215126, at *14 (Del. Super.)(internal citations and quotations omitted).

obtained for its loans were contracts obligating GRI to comply with FHA underwriting requirements.

GRI contends that Chubb is estopped from relying on the Contract Exclusion (and all other defenses). GRI emphasizes that the Contract Exclusion bars coverage for claims "alleging, based upon, arising out of, or attributable to the *actual or alleged breach of any oral, written, express or implied contract or agreement*." GRI asserts that both the *qui tam* complaint and the Settlement Agreement demonstrate that the claims did not arise out of alleged or actual breaches. GRI argues that the Contract Exclusion was not intended to extend to regulatory violations—such as violation of HUD guidelines. GRI argues that under Chubb's interpretation, all coverage for regulatory investigations would be excluded by both the Professional Services Exclusion and the Contract Exclusion, leaving GRI and its Directors and Officers without coverage for the essence of its business.

ACE argues that that Professional Services Exclusion applies. ACE alleges that GRI's own testimony establishes that GRI's loan underwriting plainly constituted professional services. GRI asserts that this argument contradicts ACE's claim that the Contract Exclusion applies. ACE previously argued that the crux of the underlying government claim was professional services. Now—in support of application of the Contract Exclusion—ACE argues that false certification gave rise to the Settlement.

The Court finds that ACE's broad interpretation of the Contract Exclusion would void coverage. Even if GRI and HUD had a contractual relationship, the CID was not based on a breach of contract cause of action. The Claim leading to the Settlement Agreement arose out of the CID, not breach of any contract or agreement. There has been no government claim of breach of contract. Therefore, the Contract Exclusion does not bar coverage.

Bad Faith

"An insured has a cause of action for bad faith against an insurer 'when the insurer refuses to honor its obligations under the policy and clearly lacks reasonable justification for doing so.'"[39] "When judging reasonableness in this context, '[t]he ultimate question is whether at the time the insurer denied liability, there existed a set of facts or circumstances known to the insurer which created a *bona fide* dispute and therefore a meritorious defense to the insurer's liability.'"[40]

In *Tackett v. State Farm Fire & Casualty Insurance Company*, the Delaware Supreme Court held that a bad faith claim can arise from an insurer's failure to investigate, pay, process a claim; or from delay in payment.[41] However, *Tackett* also established that "[m]ere delay is not evidence of bad faith, provided that a reasonable

[39] *RSUI Indem. Co. v. Murdock*, 248 A.3d 887, 910 (Del.)(quoting *Bennett v. USAA Cas. Ins. Co.*, 158 A.3d 877, 2017 WL 961806, at *4 (Del. 2017)).
[40] *Id.* (quoting *Casson v. Nationwide Ins. Co.*, 455 A.2d 361, 369 (Del. Super.)).
[41] 653 A.2d 254, 265-66 (Del. 1995).

justification exists for refusing to make payment upon submission of proof of loss."[42] In *Price v. State Farm Mutual Automobile Insurance Company*,[43] this Court held that where the delays in handling a plaintiff's claim are reasonable, with each party sharing some responsibility, a *"Tackett* bad faith breach of contract claim based on delay cannot stand."[44]

GRI argues that summary judgment is improper because the jury could find that ACE acted in bad faith. GRI argues that there is a genuine issue of material fact that must be resolved by expert testimony at trial. GRI's expert will testify that Chubb's conduct fell short of claim handling practices in the insurance industry. GRI alleges that the expert report is evidence that Chubb's denial of coverage was unreasonable and biased among other things.

ACE argues it is improper to consider the expert report. ACE alleges that the expert testimony is inadmissible because it offers conclusory assertions that are not supported by a factual foundation.

Where an expert report essentially expresses opinions on the law, but not the facts, the Court affords the report little weight on summary judgment.[45] The Court

[42] *Id.* at 266.
[43] 2013 WL 1213292, at *12 (Del. Super.), *aff'd*, 77 A.3d 272 (Del. 2013).
[44] *Id.*
[45] *Enrique v. State Farm Mut. Auto. Ins. Co*., 142 A.3d 506, 515-16 (Del. 2016).

also considers whether the expert is qualified to express an opinion on Delaware law; and whether the expert report reads like more than a legal brief.[46]

The Court finds that it is appropriate to disregard the expert report. The expert report presents legal conclusions that do not create any genuine issue of material fact. The genuine dispute in this action involves insurance coverage. Both the record and the parties' briefing demonstrate legal issues regarding denial coverage and the particular grounds on which coverage was denied. The Court finds that there are *bona fide* disputes as to the grounds on which the ACE denied liability and the facts or circumstances that existed at the time. Therefore, the claim for bad faith must be dismissed.

CONCLUSION

The Court finds that the Professional Service Exclusion does not apply to prevent coverage. The Court finds that "underwriting errors" versus "quality control deficiencies" is a distinction without a difference.

The Court finds that the Employment Practices Liability Provision is not available to cover any part of the Settlement. There is no record evidence that the potential relation claim increased the Settlement amount.

[46] *Id.*

The Court finds that based on record evidence, GRI sought consent to settle. Therefore, a presumption of reasonableness applies. The Court finds that GRI has met its burden to demonstrate that the Settlement is reasonable.

The Court finds that ACE's broad interpretation of the Contract Exclusion would void coverage. The claim leading to the Settlement Agreement arose out of the CID, not breach of any contract or agreement. There has been no government claim of breach of contract. Therefore, the Contract Exclusion does not bar coverage.

The Court finds that it is appropriate to disregard the expert report. The expert report presents legal conclusions that do not create any genuine issue of material fact. The genuine dispute in this action involves insurance coverage. The Court finds that there are *bona fide* disputes as to the grounds on which the ACE denied liability and the facts or circumstances that existed at the time. Therefore, the claim for bad faith must be dismissed.

THEREFORE, Plaintiff's Motion for Partial Summary Judgment on Count I (Breach of Contract) is hereby **GRANTED.** Plaintiff's Motion for Summary Judgment on Count III (Declaratory Relief) is hereby **GRANTED.** Plaintiff's Motion for Partial Summary Judgment requesting the Court find that Government Investigation is a D&O covered loss is hereby **GRANTED.** Plaintiff's Motion for

Partial Summary Judgment requesting that Court find that the retaliation claim is covered under the EPL is hereby **DENIED.**

THEREFORE, Defendant's Motion for Summary Judgment requesting the Court find that there is no coverage for the Settlement is hereby **DENIED.** Defendant's Motion for Summary Judgment requesting the Court dismiss the bad faith claim is hereby **GRANTED.**

The Court finds that it is not necessary to consider evidence offered by judicial notice. The Court also finds that it is not necessary to consider evidence subject to motion to strike. **THEREFORE**, Plaintiff's Motion for Judicial Notice and Motion to Strike Certain Evidence are hereby **DISMISSED AS MOOT.**

IT IS SO ORDERED.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston