EFiled: Mar 14 2014 03:44PM EDT
Filing ID 55150739
Case Number 513,2013

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

| | |
|---|---|
| CORVEL CORPORATION,<br><br>Defendant Below, Appellant<br><br>v.<br><br>HOMELAND INSURANCE CO. and EXECUTIVE RISK SPECIALTY INSURANCE CO.,<br><br>Plaintiffs Below, Appellees. | No. 513, 2013<br><br>On Appeal from C.A. No. N11C-01-089-ALR in the Superior Court of the State of Delaware in and for New Castle County |

# SUPPLEMENTAL MEMORANDUM OF APPELLEE EXECUTIVE RISK SPECIALTY INSURANCE CO.

Dated: March 14, 2014

ROSENTHAL, MONHAIT & GODDESS, P.A.
Carmella P. Keener (No. 2810)
919 North Market Street, Suite 1401
P.O. Box 1070
Wilmington, DE 19899-1070
(302) 656-4433
E-mail: ckeener@rmgglaw.com

OF COUNSEL:

Ronald P. Schiller
Daniel J. Layden
HANGLEY ARONCHICK
SEGAL PUDLIN & SCHILLER
One Logan Square, 27th Floor
Philadelphia, PA 19103
(215) 568-6200

*Attorneys for Appellee*
*Executive Risk Specialty Insurance Company*

# TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Cases** **Page(s)**



**STATUTES**



**OTHER AUTHORITIES**

On February 26, 2014, the Louisiana Third Circuit Court of Appeal issued an opinion – thin on analysis and with no deference to the first-in-time proceedings finally adjudged in the Delaware Courts – in the matter of *George Raymond Williams, M.D. v. SIF Consultants of La., Inc.*, No. 13-972 (La. App. Feb. 26, 2014) (Attached as Exhibit A.) The panel held that the penalty sought by the plaintiff class in that case is insured **Loss** because the enabling statute did not use the magic word "penalty" when describing the relief. The La. Interim Decision contradicts several other Louisiana appellate panels, every federal court in Louisiana, and nearly all other courts in the nation – all of which recognize that the kind of relief sought from CorVel constitutes a penalty in name and substance. The La. Interim Decision, which is subject to reconsideration and then to further review by that state's Supreme Court, demonstrates in stark terms why the Delaware Supreme Court should: (1) affirm Judge Herlihy's June 13 Opinion on the fully dispositive penalty issue; and (2) hold that the June 13, 2013 Opinion constituted a final judgment, as the Superior Court stated in its August 27, 2013 Order.

## BACKGROUND PERTINENT TO THIS MEMORANDUM

CorVel is a Delaware corporation that maintains its principal place of business in California and operates throughout the United States. B065-66. Executive Risk and Homeland insure risks throughout the United States and are neither incorporated, nor principally located, in Louisiana. B004-05, B092.

In 2004, medical providers began seeking relief in Louisiana courts under La. R.S. 40:2203.1 for lack of PPO notice for workers' comp services. *See Gunderson v. F.A. Richards & Assocs., Inc.*, 977 So.2d 1128 (La. App. 2008). Insurers, like Executive Risk, to Delaware-entity defendants in such suits filed declaratory actions in Delaware because of the state's extensive experience in corporate and insurance disputes. In January 2011, Homeland filed this action over coverage for CorVel's violations of 40:2203.1 – *before* the Louisiana plaintiff class pleaded CorVel or the Insurers into the St. Landry Parish action and purportedly received CorVel's insurance rights. *See* A0001, 0223, 0237. As Homeland's allegations here implicated Executive Risk's policies, Executive Risk intervened, effective as of January 2011. A0008. Then the Superior Court denied CorVel's motion to dismiss in favor of the St. Landry Parish suit, deciding instead to expedite the Delaware proceedings to avoid prejudice to the Insurers. CorVel Br., Ex. E.

The Insurers moved for summary judgment in the Superior Court in August 2012 (A0019-20), and, on June 13, 2013, received a final declaratory judgment that the underlying actions brought under La. R.S. 40:2203.1 were not covered by the Executive Risk or Homeland policies because the relief sought constituted non-insured penalties. CorVel Br., Ex. A. Despite this, the court in St. Landry Parish ruled in the plaintiff class' favor on the penalty issue on July 29, 2013.[1]

[1] In its Answering Brief, at page 10, Executive Risk incorrectly stated that the Louisiana plaintiff class moved against Homeland as well, which it did not.

The Louisiana Court of Appeal has now affirmed the trial court on the penalty issue with minimal analysis. Ex. A at 7-8. While the panel noted Executive Risk's Full Faith & Credit arguments that the trial ruling "directly contradicts the earlier-rendered Delaware Action Opinion" (La. Op. at 2), they undertook no analysis of, and issued no ruling on, the issue. Executive Risk has applied for rehearing of the La. Interim Decision, so it will not be the last word in Louisiana. In addition, the Louisiana Supreme Court is reviewing an issue regarding the state's Direct Action statute that may render the La. Interim Decision a nullity. *See Gorman v. City of Opelousas*, 129 So. 3d 522 (La. 2013) (granting cert). In short, the La. Interim Decision does nothing to affect this appeal before the Delaware Supreme Court.

## ARGUMENT

The La. Interim Decision perfectly illustrates why the Delaware Supreme Court should (1) affirm the Superior Court's judgment; and (2) hold that the Superior Court's comprehensive and careful June 13 Opinion was a final judgment of this matter and CorVel's appeal is untimely. First, the La. Interim Decision only provides cursory analysis of the coverage issue on penalties and can have no persuasive effect here because it: rests on no legal foundation at all; applies the wrong state's law to the coverage dispute; ignores directly opposite findings by other Louisiana appellate panels and federal courts; and contradicts the settled view

of California (and also Delaware and Louisiana) regarding penalties. Further, the La. Interim Decision ignores Full Faith & Credit preclusion issues presented to it and thus flouts the authority of Delaware courts to issue a binding ruling on a first-filed/first-decided insurance coverage dispute applicable to a Delaware entity.

Because the Superior Court's judgment (of Judge Herlihy, ret.) was first in time – in a Delaware contract dispute that predated the coverage action in Louisiana – the La. Interim Decision is not binding here and, indeed, should never have issued in the first place. Because the La. Interim Decision lacks analysis and ignores parallel rulings on the same issue, it also has no persuasive value here.

## I. THE ANALYSIS OF THE PENALTY ISSUE IN THE LA. INTERIM DECISION IS SUPERFICIAL AND WRONG

While the La. Interim Decision is replete with errors, the panel's address of the core penalty issue is cursory and incomplete. As importantly, its ruling that La. R.S. 40:2203.1(G) provides "damages" rests on no legal foundation at all.

As it has here, Executive Risk argued in Louisiana that the relief sought by the medical providers constituted an uninsured penalty. La. Op. at 2. But the Louisiana Third Circuit did not assess whether La. R.S. 40:2203.1 constituted a penalty under the Policy; it merely concluded, in a single paragraph, that the remedy provision "denotes that a violator is subject to pay 'damages' and includes no language regarding penalties." La. Op. at 7-8. This is a mere observation, not a proper legal analysis and holding.

The Court of Appeal conducted no analysis of (1) the meaning and scope of the penalty provision in the **Loss** definition in Executive Risk's Policy; or (2) what constitutes a penalty under the law of any jurisdiction, even Louisiana. Setting aside whether Louisiana law applies here, the court failed to cite, analyze, or apply *Int'l Harvester Credit Corp. v. Seale*, 518 So.2d 1039 (La. 1988), despite the fact that, as in Delaware, the parties briefed that opinion extensively with respect to the penalty issue. In *Seale*, the Louisiana Supreme Court determined an issue of statutory penalties. In doing so, it analyzed a remedy at La. R.S. 9:2782(A) that, like 40:2203.1(G), uses the word "damages" but constitutes a penalty under Louisiana law. *Id*. at 1042. Instead of addressing this key case and undertaking a genuine legal analysis, the Court of Appeal just floated the broad proposition that a "statute is first interpreted according to its plain language." La. Op. at 7.

The La. Interim Decision ignored the holdings of several of its sister panels, all of which recognized that 40:2203.1(G) was a penalty, in name and demeanor. *See* Exec. Risk Ans. Br. at 21(citing cases). It ignored the numerous Louisiana federal decisions that held the same. *Id*. at 22 (citing cases). It ignored the laws of countless jurisdictions holding that alleged "statutory damages" are penalties – as defined by law and the insurance policies – including California law (which governs interpretation of Executive Risk's Policy) and Delaware law. *Id*. at 16-19. And the La. Interim Decision ignored the proceedings before this Court.

The La. Interim Decision is deficient on multiple fronts, and Executive Risk has applied for rehearing in advance of an appeal. Also, one of the issues arising from the Direct Action statute is already under review in the *Gorman* appeal cited above. The La. Interim Decision is neither binding nor persuasive to the issues (correctly decided in the Superior Court) of whether, under the Executive Risk and Homeland policies, the relief sought constituted a contractually uninsured "penalty" beyond those policies' very definition of **Loss** – a condition precedent to coverage.

## II. THE LOUISIANA COURT OF APPEAL IGNORED THE PRECLUSION ARGUMENTS RAISED BY EXECUTIVE RISK

The La. Interim Decision acknowledges that Executive Risk argued that "the trial court failed to give full faith and credit" to Judge Herlihy's June 13, 2013 declaratory judgment "which has preclusive effect here, involving the very same issues, policies, and parties." La. Op. at 2. Yet, the Court of Appeal never analyzed this vital issue and made no ruling on it, thus flouting the authority of Delaware courts to determine contractual disputes involving Delaware entities.

As argued in Executive Risk's appellate brief in Louisiana, under the doctrine of *res judicata*, Judge Herlihy's ruling on the penalty issue in the June 13 Opinion should have applied against the Louisiana plaintiff class, CorVel's putative assignee. Under the Full Faith and Credit Clause of the United States Constitution, a judgment rendered in another state *must* be given the same preclusive effect in Louisiana as it would have in the state in which it was rendered, here Delaware.

*See Durfee v. Duke*, 375 U.S. 106, 109 (1962); *In re Succession of Aguilera*, 956 So. 2d 718, 720-21 (La. App. 2007) (quoting *Durfee*).

In Delaware, a judgment has preclusive effect where: (1) the court making the prior ruling had jurisdiction; (2) the parties to both actions are either the same or in privity; (3) the earlier-decided issues were the same as those raised at the case at bar; (4) the earlier decision was adverse to the plaintiff in the pending case; and (5) the prior decree was a final judgment on the merits. *Bailey v. City of Wilmington*, 766 A.2d 477, 481 (Del. 2001).[2] First, there is no dispute that the Superior Court had jurisdiction over a contract dispute involving CorVel, a Delaware corporation. Second, the Insurers were parties in both actions, and, pursuant to their settlement, CorVel and the Louisiana plaintiff class were in privity with respect to CorVel's insurance and the parallel coverage actions. *See* A0264-66 (assigning CorVel's rights and agreeing that the plaintiff class would fund CorVel's Delaware defense); *Levinhar v. MDG Medical, Inc.*, No. 4301-VCS, 2009 WL 4263211, at *8, 10 (Del. Ch. Aug. 31, 2009). *See also* Restatement (Second) of Judgments § 44 (1982); Del. Super. R. Civ. P. 25(c). Third, the coverage issues, in particular the penalty issue, are the same. Fourth, the Superior Court ruled against CorVel (and thus against the plaintiff class) on coverage. Fifth, as is plain from the June 13 Opinion and was expressly affirmed by the August 27 Order, the June 13 Opinion constituted a final

[2] Issue preclusion also would have applied to whether the Title 40 remedy is a penalty. *See Defillipo v. Quarles*, No. 08C-02-009, 2010 WL 702310, at *3 (Del. Super. Feb. 26, 2010).

judgment. CorVel concedes key elements in its letter to this Court (attached as Exhibit B), stating that the Louisiana dispute "addresses the same issues, same claims and same parties as in this appeal[.]"

This preclusion analysis demonstrates why (1) the plaintiff class, through CorVel, has sought to obscure the finality of the June 13 Opinion; and (2) the La. Interim Decision (which Executive Risk is challenging) is deeply flawed and can have no effect whatsoever here. Again, this Court should conclude – as the Superior Court did in its August 27, 2013 Order – that the June 13 Opinion was a final judgment and that CorVel's appeal of the June 13 Opinion was thus untimely.

## CONCLUSION

Executive Risk respectfully requests that this Court (1) affirm the Superior Court's June 13, 2013 judgment; and (2) hold that the June 13 Opinion was a final judgment of this matter and CorVel's appeal is untimely.

Dated: March 14, 2014

ROSENTHAL, MONHAIT & GODDESS, P.A.

By: */s/ Carmella P. Keener*
Carmella P. Keener (No. 2810)
919 North Market Street, Suite 1401
Wilmington, DE 19899-1070
(302) 656-4433
E-mail: ckeener@rmgglaw.com

*Attorney for Plaintiff-Appellee*
*Executive Risk Specialty Insurance Company*

Of Counsel:
Ronald P. Schiller
Daniel J. Layden
HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER
One Logan Square, 27th Floor
Philadelphia, PA 19103
(215) 568-6200

## CERTIFICATE OF SERVICE

I, Carmella P. Keener, hereby certify that on this 14th day of March, 2014, I caused the **Supplemental Memorandum of Appellee Executive Risk Specialty Insurance Co.** and **this Certificate of Service** to be served via File & Serve*Xpress* upon the following counsel of record:

Kevin G. Abrams, Esquire
John M. Seaman, Esquire
Steven C. Hough, Esquire
Abrams & Bayliss LLP
20 Montchanin Road, Suite 200
Wilmington, DE 19807

James W. Semple, Esquire
Corinne E. Amato, Esquire
Morris James LLP
500 Delaware Avenue, Suite 1500
Wilmington, DE 19801

*/s/ Carmella P. Keener*
Carmella P. Keener (Del. Bar No. 2810)