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

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| 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 |

# CORRECTED ANSWERING BRIEF OF APPELLEE EXECUTIVE RISK SPECIALTY INSURANCE CO.

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## NATURE OF THE PROCEEDINGS

This is an insurance coverage dispute wherein CorVel is appealing a grant of summary judgment to Executive Risk and Homeland (together, the "Insurers"). In granting summary judgment, the Superior Court for New Castle County issued a final declaratory order on June 13, 2013 holding that claims brought against CorVel in Louisiana, and the company's settlement of those claims, did not constitute a covered loss under either Insurer's policy with CorVel.

CorVel operates a "Preferred Provider Organization" network and contracts with both medical service providers and business owners responsible for worker's compensation claims to establish discounted fees for medical services. CorVel was sued by Louisiana medical providers for multiple alleged violations of La. R.S. 40:2203.1, a section of Louisiana's "Any Willing Provider" statute requiring notice to the provider when a PPO discount will be taken. The remedy for violations is "double the fair market value of the medical services provided, but in no event less than the greater of fifty dollars per day of noncompliance or two thousand dollars, together with attorneys' fees[.]" The Superior Court properly concluded that this remedy constituted an uninsurable penalty under the Insurers' policies. CorVel did not appeal the Superior Court's final order denying all coverage until September 26, 2013 – over 3 months after it was entered.

## SUMMARY OF ARGUMENT

The Supreme Court should affirm Superior Court's grant of summary judgment and declaration of no coverage under Executive Risk's Policy.

First, as invited by the Supreme Court, Executive Risk renews its argument that this appeal is untimely. CorVel appeals only the June 13, 2013 declaratory judgment of the Superior Court. The June 13 opinion and order constituted a final judgment in that it answered the dispositive question in the coverage litigation and resolved all claims as to all parties. As the procedural history shows, CorVel elected to sit on its appellate rights here in a tactical effort to advance the later-filed action in Louisiana. That failed tactic made its appeal untimely. In addition:

1. Denied. The Superior Court correctly held that the remedy provided by La. R.S. 40:2203.1(G) constitutes an uninsurable penalty. California law, which controls the contractual questions of whether CorVel's settlement is insurable, is clear: La. R.S. 40:2203.1(G) is a penalty because it automatically awards an amount in excess of a plaintiff's economic harm without consideration of the amount of that harm. Further, the result would be the same under Delaware, or indeed Louisiana, law also.

2. Denied. The Superior Court correctly applied the rules for construing insurance contracts in finding no coverage under the plain and unambiguous terms of the Executive Risk Policy. The Superior Court read the insuring clauses

broadly, then read the penalty provision (an element of Loss and condition precedent to the Insuring Grant) as an exclusion to be construed narrowly against Executive Risk. Finally, the Superior Court tested Executive Risk's arguments for non-coverage thoroughly and answered the question just as CorVel posed it: "is a claim under [La. R.S. 40:2203.1] covered, or excluded?" Following the rules for policy construction, the Superior Court correctly concluded that, under the clear and unambiguous Executive Risk Policy, coverage was not available.

3. Denied. The Superior Court rightly held that the payment of attorneys' fees to counsel for the Louisiana plaintiff class in the underlying settlement also constituted a penalty that was not insured under the Executive Risk Policy. The Superior Court concluded that, under Louisiana law, attorney fee awards are penalties. Further, as Executive Risk argued below, under California law, the proper characterization of an attorney fee award is dependent on the substantive remedy, which in this case is a penalty. Accordingly, under California law, the attorney fee award would also be considered an uncovered penalty. CorVel fails to address this precept and likewise fails to establish why the outlier and distinguishable *Hiscox* ruling (properly considered and rejected by the Superior Court) should apply to this case.

For all of these reasons, the judgment of the Superior Court should be affirmed.

## COUNTER-STATEMENT OF FACTS

## I. CORVEL AND THE UNDERLYING LOUISIANA ACTIONS BROUGHT AGAINST IT FOR LACK OF PPO NOTICE

### A. CorVel's Agreements In Louisiana And The Louisiana "Any Willing Provider" Act

CorVel owns and operates a Preferred Provider Organization (PPO) network. B066. It also contracts with worker's compensation payors, typically employers, who then can access CorVel's discounted PPO rates when paying for worker's compensation medical services. *Id*.

As part of its network, CorVel made PPO agreements with medical service providers in Louisiana through which the providers agreed to accept contractually discounted rates for services. *Id*. CorVel entered into such a PPO agreement with Lake Charles Memorial Hospital ("LCMH") in 1996. Op. at 3. Thus, for example, where a CorVel-affiliated payor sent an individual for worker's compensation services to a provider like LCMH, the provider would be paid for services rendered at the agreed PPO discount. A0117-18.

Pursuant to La. R.S. 40:2203.1, part of Louisiana's Any Willing Provider Act, PPOs like CorVel are required to give notice to medical service providers when a PPO discount will be applied. Specifically, the statute provides that:

> A preferred provider organization's alternative rates of payment shall not be enforceable or binding upon any provider unless such organization is clearly identified on the benefit card issued by the group purchaser or other

> entity accessing a group purchaser's contractual agreement or agreements and presented to the participating provider when medical care is provided.

La. R.S 40:2203.1(B). The provision goes on to state:

> When no benefit card is issued or utilized by a group purchaser or other entity, written notification shall be required of any entity accessing an existing group purchaser's contractual agreement or agreements at least thirty days prior to accessing services through a participating provider under such agreement or agreements.

La. R.S. 40:2203.1(B)(5).

Any failure to furnish notice represents a violation, and the remedy is set forth in the statute:

> [Violation] shall subject a group purchaser to damages payable to the provider of double the fair market value of the medical services provided, but in no event less than the greater of fifty dollars per day of noncompliance or two thousand dollars, together with attorneys' fees to be determined by the court.

La. R.S. 40:2203.1(G). The statutory remedy is independent of the amount of PPO discount taken and requires no proof of loss or financial harm.

### B. Actions Brought Against CorVel By Medical Service Providers Under the "Any Willing Provider" Act For Lack of Notice

On December 22, 2006, LCMH filed a putative class action arbitration against CorVel with the American Arbitration Association captioned *SWLA Hospital Assoc. d/b/a Lake Charles Memorial Hospital v. CorVel*, No. 11 193

02760 06 ("LCMH Arbitration"). *See* A0122. LCMH, on behalf of a class of medical service providers, sued CorVel for violation of the notice requirement in La. R.S. 40:2203.1(B). A0116-28. LCMH alleged that CorVel or companies affiliated with CorVel's network had taken contractual PPO discounts for medical services provided to worker's compensation claimants, but had failed to provide proper notice as required under the Any Willing Provider Act. *Id*. LCMH sought relief as set forth in La. R.S. 40:2203.1(G). *Id.*[1]

On September 30, 2009, a physician practice brought suit, on behalf of a putative class of medical service providers, in the Louisiana state court in St. Landry Parish, styled *George Raymond Williams, M.D. v. SIF Consultants of Louisiana, Inc.*, No. 09-5244 (the "Williams Litigation"). Op. at 5. In this suit, as in the LCMH Arbitration, plaintiffs sought relief for alleged violations of La. R.S. 40:2203.1 for the application of PPO discounts for medical services without proper notification. A0221-30. Though not an original party, CorVel was pleaded in as a

[1] In its Opening Brief, CorVel discusses administrative matters filed in the Louisiana Dept. of Labor in 2004 and 2005, as well as a 2005 letter from the Louisiana Office of Risk Management. As is reflected in the summary judgment briefing below and the June 13, 2013 Opinion, the nature of these administrative matters is disputed. A0426-32, A1085-91, A1190-92; Op. at 26, 29-30. Notwithstanding these disputes, Executive Risk agrees with CorVel that the earlier administrative matters were brought pursuant to La. R.S. 23:1201 *et seq*., a portion of the worker's compensation act concerning benefits, and that the two actions at issue in the CorVel Settlement were brought pursuant to the PPO notice provisions of the Any Willing Provider Act, La. R.S. 40:2203.1. Accordingly, the **Claim** here commenced no earlier than the December 2006 arbitration demand. As the Superior Court found below, the year of claim remains a disputed issue of fact, but does not influence the ruling that the 40:2203.1 remedy sought under and at issue in the Williams Litigation and settlement is an uninsured penalty.

defendant on March 24, 2011. *Id*. Thus, the LCMH Arbitration and Williams Litigation sought the same relief from CorVel for the same violations of La. R.S. 40:2203.1 on behalf of substantially the same group of providers.

### C. The Insurers Are Joined In Louisiana Just Before CorVel Settles The Actions Against It

Executive Risk and Homeland were also joined to the Williams Litigation on March 24, 2011. *Id*. Through this amendment and pursuant to Louisiana's Direct Action Statute, La. R.S. 22:1269, the plaintiff class sought any applicable insurance for CorVel's liability in the matter. A0224-25, A0229.

One week later, on March 31, 2011, CorVel entered into a Memorandum of Understanding with the Louisiana plaintiff class under which CorVel agreed to settle the claims in the LCMH Arbitration for $9 million and any insurance proceeds. CorVel Br., Ex. E at 5.[2] Then on June 23, 2011, CorVel and the medical provider plaintiffs including LCMH jointly filed a comprehensive motion in the court in the St. Landry Parish seeking approval of a settlement agreement and plan that would resolve the Williams Litigation, the LCMH Arbitration, and other matters. A0237-389. In the Settlement Agreement, CorVel similarly agreed to pay $9 million and to assign its rights to any insurance coverage applicable to these actions. A0264-66. With respect to the insurance: (1) CorVel agreed to continue

[2] CorVel purported to tender notice of an insurance claim for the Louisiana actions to Homeland on March 31, 2011 and to Executive Risk on April 1, 2011. A0400, A0398. CorVel never sought approval of its Louisiana settlement from either insurer as required by the policies.

litigating this Delaware action and to consult with the plaintiff class about it; and (2) the plaintiff class agreed to fund CorVel's litigation here in Delaware. A0266.

CorVel's global settlement was approved by the Louisiana state court, and the claims against CorVel were dismissed. A0560-714. A court-appointed Special Master is distributing the funds under an approved allocation model. A0391-96.

## II. EXECUTIVE RISK'S CLAIMS-MADE AND REPORTED POLICY WITH CORVEL

Executive Risk issued a claims-made and reported errors and omissions liability policy to CorVel for the period of October 31, 2004 to October 31, 2005 providing indemnity limits of $10 million. A0077-114 ("Executive Risk Policy"). Thereafter, Homeland provided such coverage to CorVel. A0452.

The Insuring Agreement (Section I) of the Executive Risk Policy provides:

> The Underwriter will pay on behalf of the Insured any Loss which the Insured is legally obligated to pay as a result of any Claim that is first made against the Insured during the Policy Period and reported to the Underwriter during the Policy Period or within ninety (90) days after the end of the Policy Period. . . .

Executive Risk Policy at § I (as amended by Endorsement 8).[3] Loss is defined as:

> Defense Expenses and any monetary amount which an Insured is legally obligated to pay as a result of a Claim. Loss shall include . . . any fines assessed, penalties imposed, or punitive, exemplary or multiplied damages awarded in Claims for Antitrust Activity, but only if . . . insurable under applicable law. This paragraph shall be

[3] Defined terms in the Executive Risk Policy appear in bold as they do in the policy.

> construed under the applicable law most favorable to the insurability of such fines, penalties and punitive, exemplary or multiplied damages. Loss shall not include:
>
> (1*) except as expressly set forth above, fines, penalties, taxes or multiplied damages*;
>
> (2) fees, amounts, benefits or coverage owed under any contract, health care plan or trust, insurance or workers' compensation policy or plan or program of self-insurance;
>
> (3) non-monetary relief or redress in any form, including without limitation the cost of complying with any injunctive, declaratory or administrative relief; or
>
> (4) matters which are uninsurable under applicable law.

*Id*. at § II (J) (as amended by Endorsement 5) (emphasis added). Endorsement 5 changed the Executive Risk Policy to include as Loss "punitive or exemplary damages where insurable under applicable law." *Id.*

## III. HISTORY OF THE COVERAGE LITIGATIONS

Beginning January 10, 2011 – two months before being sued in Louisiana – Homeland and Executive Risk each brought declaratory judgment complaints in the Delaware Superior Court "seeking a declaration that its policy did not cover the LCMH Arbitration or the *Williams* Action." CorVel Br. at 14. The Insurers each sought a coverage declaration that would encompass the Louisiana settlement as well. As the Insurers were being pleaded into the Williams Litigation in March 2011, CorVel sought to dismiss or stay the Delaware action in favor of the

Williams Litigation. *See* CorVel Br., Ex. E at 4-5. The Superior Court denied CorVel's motion, stating, *inter alia*, that it was "concerned about the potential prejudice to [the Insurers] arising out of the Louisiana direct-file action filed after this declaratory judgment action." *Id*. at 13-15.

On August 29, 2012, Executive Risk and Homeland moved for summary judgment in the Superior Court, arguing that, as a matter of law, each was entitled to a declaration that the LCMH Arbitration, Williams Litigation, and subsequent settlement were not covered under its policy. After the Delaware Superior Court granted summary judgment to different insurers in the substantially similar *First Health* case on May 7, 2013, the Williams Litigation plaintiff class moved for summary judgment against Executive Risk and Homeland on coverage in St. Landry Parish on May 24, 2013. *See* Exhibit A; B135.[4]

On June 13, 2013, Judge Herlihy of the Delaware Superior Court granted summary judgment to Executive Risk and Homeland, concluding that "the settlement arising from the *Williams* Litigation and the LCMH Arbitration is not a covered loss under Executive Risk's or Homeland's E&O Policies." Op. at 48. This ruling answered in full the question put before the Superior Court by each

[4] CorVel discussed *First Health Group Corp. v. RLI Ins. Co. et al.*, C.A. No. 09C-09-027 JOH, in its opening brief at pages 2-3, and discussed the Williams Litigation at length, attaching the summary judgment opinion as Ex. D to its brief. The summary judgment opinion in *First Health* is attached as Exhibit A to this brief and the *Williams* trial docket is included in the appellees' appendix. Under Del. R.E. 201, this Court can take judicial notice of both.

insurer – whether (as CorVel itself states) "its policy did not cover the LCMH Arbitration or the *William* Action." CorVel Br. at 14. The Superior Court did not address, and declared moot, the Insurers' several other coverage defenses since its ruling entirely resolved all questions of coverage based on the "penalty" carve-out from Loss. Executive Risk's unaddressed defenses included, *inter alia*: (a) the bar to coverage for restitution or disgorgement; (2) the preclusion from Loss of the repayment of benefits, contract damages or worker compensation fees; and (c) the year the claim first arose.[5] After this final judgment in Delaware, the court in St. Landry Parish held oral argument and then on July 29, 2013, ruled against the Insurers on the same penalty issue.

On August 27, 2013, following the retirement of Judge Herlihy, the Honorable Andrea L. Rocanelli of the Delaware Superior Court issued an order closing the docket on the Delaware coverage suits and expressly stating that "the Court's Order dated June 13, 2013 is a final Order and Judgment." In a September 20, 2013 order, Judge Rocanelli declined to amend or alter either the June 13, 2013 final judgment or the order of August 27, 2013.

[5] Thus, even if CorVel were to somehow prevail on its instant appeal – which it should not – the case must be remanded for the Superior Court to address these briefed but unanswered coverage defenses.

## ARGUMENT

### I. CORVEL'S APPEAL IS UNTIMELY BECAUSE THE JUNE 13, 2013 OPINION & ORDER CONSTITUTED A FINAL DECLARATORY JUDGMENT AND DISPOSED OF ALL CLAIMS

**Question Presented**

Is CorVel's appeal of the Superior Court's June 13, 2013 final declaratory judgment untimely pursuant to Delaware Supreme Court Rule 6(a)? Executive Risk preserved this issue of subject matter jurisdiction though its October 15, 2013 Motion to Dismiss Appeal filed in this Court.

**Scope of Review**

The timeliness of an appeal is a legal question that goes to this Court's jurisdiction to hear the matter at all. *Scott v. Draper*, 371 A.2d 1073, 1073 (Del. 1977); 10 Del. C. § 148.

**Merits of Argument**

It is clear from the June 13, 2013 Opinion & Order that the Superior Court disposed of all claims in the Insurers' complaints and issued a final declaratory judgment in this litigation. It is equally apparent from a review of the procedural history of the Delaware coverage litigation and the parallel Louisiana coverage litigation that CorVel, acting for the Louisiana plaintiff class that was assigned rights to its insurance, is merely trying to "displace" the June 13, 2013 judgment as the first final judgment on these issues.

As the Supreme Court invited the Insurers to renew their jurisdictional arguments in this briefing, Executive Risk incorporates the arguments from its motion to dismiss the instant appeal and reply filed in this Court as well as Homeland's motion and reply. Executive Risk adds only the following.

CorVel's notice of appeal purported to challenge every ruling issued by the Superior Court in this matter, including the August 27 and September 20, 2013 Orders, but CorVel's opening brief makes plain that it is only appealing the June 13, 2013 judgment. CorVel did not address the August 27 and September 20 Orders (which this Court indicated were the timely appealed rulings in this case) at all – not even attempting to "bootstrap" its untimely appeal of the June 13 final judgment to these later orders. And, as raised by CorVel in its opening brief, the history of the parallel coverage litigation in Louisiana makes plain that CorVel, and the Louisiana plaintiff class it represents, are maneuvering between two forums to maximize their chances of a recovery. When Judge Herlihy issued a May 5, 2013 ruling in favor of the insurers in a substantially similar coverage action, CorVel and the plaintiff class rushed a summary judgment motion before the court in St. Landry Parish. B135. CorVel then sat on its Delaware appeal rights, and its obligations under Supreme Court Rule 6(a), in hopes of the plaintiff class obtaining a more positive ruling in Louisiana through its game of forum shopping. When that erroneous ruling came down, CorVel took the opportunity of

Judge Herlihy's retirement to sow confusion and to question the finality of the Superior Court's June 13, 2013 final judgment.

CorVel now argues that in the *First Health* matter, Judge Herlihy issued something CorVel calls an "implementing order" on a separate date and that such an order was required in this case to make it final. CorVel Br. at 2-3. However, there is no requirement in Delaware for an "implementing order" (whatever that may be) to create a final judgment, and CorVel has pointed to no rule or case saying otherwise. In Delaware, a judgment is final where it resolves all claims as to all parties. Del. Super. Civ. R. 54; *Plummer v. R.T. Vanderbilt Co.*, 49 A.3d 1163, 1167 (Del. 2012) ("The question of whether an opinion embodies a final decision depends on 'whether the judge has or has not clearly declared his intention in this respect in his opinion'."). Indeed, Delaware courts do not require particular "magic words" for court decisions to have legal effect. *Cf. Dobler v. Montgomery Cellular Hold'g Co.*, C.A. 18105 NC, 2001 WL 1334182 at n.28 (Del. Ch. Oct. 19, 2001); *Associates Disc. Corp. v. Smith*, 975 CIV.A. 1970, 1971 WL 125485, at *1 (Del. Super. Sept. 13, 1971).

Further, though it was not necessary to create a final judgment, the June 13, 2013 Opinion concludes with the following sentence, written in bold, all-caps typeface after the concluding paragraph: "IT IS SO ORDERED." Such a sentence does not appear in the *First Health* opinion. *See* Ex. A. Accordingly, it is clear

that Judge Herlihy included an "implementing order" (if such a thing was even required) in the opinion itself in this matter. Regardless, under Delaware law "declaratory judgments are self executing[.]" *Korn v. Wagner*, C.A. 6149-VCN, 2011 WL 4357244, at *1 (Del. Ch. Sept. 7, 2011) (citing 10 Del. C. § 6501).[6]

As a final note, it appears that the Louisiana plaintiff class plans to use this Court's denial, without prejudice, of the Insurers' motions to dismiss this appeal to argue that the July 29, 2013 opinion in St. Landry Parish was the first final judgment on the penalty issue. That stance is plainly incorrect and again part of the Louisiana plaintiffs' forum shopping agenda.

This Court should not permit Appellants' sharp tactics and procedural maneuvers. CorVel is a sophisticated company represented by able counsel. CorVel could have appealed the June 13, 2013 final judgment or taken steps to otherwise protect its appeal rights, but it did not. For the reasons set forth here and in the previous motions to dismiss this appeal, the Supreme Court should affirm Judge Herlihy's June 13, 2013 Order and Opinion as a final judgment and dismiss this appeal.

[6] At all events, the so-called "implementing order" in the *First Health* matter served a very clear purpose in that case that was unnecessary here: it amended the grant of summary judgment. *See* Order, *First Health Group Corp. v. RLI Insurance et al.*, C.A. No. 09C-09-027 JOH (Del. Super. May 16, 2013) (Trans. No. 52329481). In the instant case, no such amendment was requested by any party, so no follow-on order was necessary.

## II. THE SUPERIOR COURT CORRECTLY HELD THAT THE REMEDY SOUGHT IN LOUISIANA CONSTITUTES AN UNINSURED PENALTY

**Question Presented**

Should this Court affirm the Superior Court's holding that the remedy available under La. R.S. 40:2203.1 is a "penalty" that does not constitute insurable Loss under the Executive Risk Policy with CorVel? Executive Risk raised this issue in its summary judgment briefing in the Superior Court. A0051-62.

**Scope of Review**

Interpretation of an insurance policy is subject to *de novo* review. *Universal Underwriters Ins. Co. v. Travelers Ins. Co.*, 669 A.2d 45, 47 (Del. 1995).

**Merits of Argument**

The Superior Court correctly concluded that the remedy provided under La. R.S. 40:2203.1(G) is a penalty because it "imposes a monetary amount that has no correlation to the actual amount of damages suffered." Op. at 33. Under the express provisions of the Executive Risk Policy, penalties are not covered Loss. *Id*. at 41; Executive Risk Policy § II (J) (as amended by Endorsement 5). CorVel's arguments are contrary to law and unavailing.

### A. Under California Law, Section 40:2203.1(G) Is A Penalty

In ruling that the settlement in the Louisiana actions was uninsurable, the Superior Court applied both Delaware law of contract interpretation and Louisiana

law regarding penalties. Op. at 21-22. While the Superior Court reached the correct result and Executive Risk agrees that there are no actual conflicts between the laws of California and Delaware with respect to the questions here, Executive Risk respectfully concludes that California law should apply to both the interpretation of the insurance policy and the penalty issue. CorVel maintains its principal place of business in California, contracted with Executive Risk in California, and purchased the Executive Risk Policy to cover risks in multiple jurisdictions. *See* A0049-50. Pursuant to Delaware law, which looks to the Restatement (Second) of Conflicts of Law, this Court should interpret the Executive Risk Policy and the penalty issue using California law.[7] *See Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76, 87 (Del. Ch. 2009); *Liggett Grp. Inc. v. Affiliated FM Ins. Co.*, 788 A.2d 134, 137-38 (Del. Super. 2001).

Under well-settled California jurisprudence, a statute that "compel[s] a defendant to pay a plaintiff other than what is necessary to compensate him for a legal damage done him by the former" is a "penalty." *See G.H.I.I. v. MTS, Inc.*, 195 Cal. Rptr. 211, 225 (Cal. App. 1983). Indeed, "[t]he settled rule in California is that statutes which provide for damages that are in addition [] to actual losses incurred or not based upon actual injury are generally considered penal in nature."

[7] California law is, at least, highly persuasive as (1) there is no conflict with Delaware law on the issues here; and (2) there are cases from California that directly address such issues.

*Hypertouch, Inc. v. ValueClick, Inc.*, 123 Cal. Rptr. 3d 8, 37 (Cal. App. 2011). This definition aligns with the Superior Court's analysis of the penalty issue as well as the dictionary definitions and the useful Illinois case also considered by the Superior Court. *See* Op. at 30-34.

The statutory remedy sought against CorVel in the Louisiana actions, La. R.S. 40:2203.1(G), falls wholly within this uncontroversial, common sense definition of penalty. Its plain terms provide a fixed monetary award without regard to the actual financial harm of a defendant's conduct on the plaintiff. Even in the event that a provider's fees were discounted by only a tiny percentage, a violation of the statutory notice requirement automatically subjects the defendant to liability in an amount equal to "double the fair market value of the medical services provided" – not simply the actual amount of the discount – "but in no event less than the greater of fifty dollars per day of noncompliance or two thousand dollars." For example, if a provider's fee for services worth $100 is discounted by only $1 without proper notice, the defendant is automatically subject to liability of $2,000. The harm and the remedy are simply not connected. There is simply no clearer example of a statutory penalty.

In this respect, La. R.S. 40:2203.1(G) is indistinguishable from Cal. Bus. & Prof. § 17529.5(b)(1)(B)(ii), the remedy examined in *Hypertouch*. That California provision authorized an award of "[l]iquidated damages of one thousand dollars

($1,000) for each unsolicited commercial e-mail advertisement transmitted in violation of this section, up to one million dollars ($1,000,000) per incident." *Hypertouch*, 123 Cal. Rptr. 3d at 35. The California Court of Appeals unequivocally held that the provision was a penalty, noting that "nothing in the text of the statute indicates that the amount of liquidated damages – $1,000 per e-mail or $1,000,000 per incident – is in any way based on the actual injury suffered by the entity seeking redress." *Id*. at 37.[8] Applying California law to interpretation of the Executive Risk Policy (or indeed Delaware or Illinois law), the same is true of the remedy provided by the Louisiana statute. The relief is a penalty and, under the Executive Risk Policy, a penalty is not a covered Loss.

### B. Even Under Louisiana Law, La. R.S. 40:2203.1(G) Is A Penalty

CorVel does not dispute any of the above because it cannot. Instead, it relies on (1) an unsupported notion that, in Louisiana, a remedy cannot be a penalty unless expressly labeled as one; and (2) two trial court rulings that run contrary to the clear consensus in Louisiana on this Any Willing Provider Act provision.

CorVel argues that the "Louisiana Supreme Court has made it very clear that statutory damages are *not* punitive or penal in nature (and thus are not penalties)

[8] The fact that the provision in *Hypertouch* used the term "liquidated damages" rather than "penalty" gave the court no pause. The remedy was a penalty because it had the characteristics of one. *Id.* at 37. Similarly, the description of the La. R.S. 40:2203.1(G) remedy as "damages" is of no consequence here.

unless the statute specifically designates them as a penalty." CorVel Br. at 17-19. CorVel is wrong on this point and misreads *International Harvester Credit Corp. v. Seale*, which states the following about penalties:

> [W]e have been unable to find any such statute in which the legislature has not clearly shown its intent by either denoting the award a "penalty," modifying the term "damages" with such language as "punitive" or "exemplary," or specifically awarding an amount in excess of the claimant's losses.

518 So.2d 1039, 1042 (La. 1988) (emphasis added). This definition of penalty as including any automatic award of "an amount in excess of the claimant's losses" aligns exactly with the California view and the Superior Court's ruling here. *See Hypertouch*, 123 Cal. Rptr. 3d at 37 ("statutes which provide for damages that are in addition [] to actual losses incurred or not based upon actual injury are generally considered penal in nature"); Op. at 30-41. Thus in Louisiana (as in California, Delaware, and Illinois), the label or lack thereof is not dispositive; what matters is whether an aggrieved plaintiff receives some amount beyond his economic losses that is automatically applied for a violation.

Further, the legal analysis in *International Harvester* supports this view and discredits CorVel's "penalty label required" argument. In analyzing various Louisiana statutes that do involve penalties, the Supreme Court of Louisiana discussed the La. R.S. 9:2782(A) penalty remedy for bounced checks:

> Other statutes similarly specify the punitive nature of the damages awarded and the method of calculating the award. When a check is dishonored for insufficient funds the drawer is liable for "damages of twice the amount so owing . . ." if he fails to satisfy the obligation within thirty days of demand. La. R.S. 9:2782(A).

*Id*. at 1042. Just like the La. R.S. 40:2203.1(G) remedy, the nonsufficient funds remedy at La. R.S. 9:2782(A)[9] is not expressly labeled a penalty in the statute, but is recognized by Louisiana courts as one. *See id*. (discussing the bounced check remedy as a penalty); *Redden v. Ripley*, 862 So.2d 469, 473 (La. App. 2003) (characterizing the nonsufficient funds remedy as a "statutory penalty" and stating of La. R.S. 9:2782(A) that "[b]ecause this statute provides for penalty damages and attorney fees, it is penal in nature and must be strictly construed").

Further, the Court of Appeals of Louisiana consistently and repeatedly has designated the remedy in the Any Willing Provider Act a "penalty." *See, e.g.*, *Gunderson v. F.A. Richard & Assocs.*, 44 So. 3d 779 (La. App. 2010) (referring to the remedy as a penalty throughout the opinion); *Gunderson v. F.A. Richard & Assocs.*, 40 So. 3d 418, 419 (La. App. 2010) ("In addition to the penalties provided by La. R.S. 40:2203.1(G), the healthcare providers sought an injunction"); *Touro Infirmary v. Am. Maritime Officer*, 24 So. 3d 948 (La. App. 2009); *Gunderson v. F.A. Richard & Assocs.*, 977 So. 2d 1128, 1132 (La. App. 2008). Federal district

[9] "Whenever [there is a violation of the statute], the drawer shall be liable to the payee or a person subrogated to the rights of the payee for damages of twice the amount so owing, but in no case less than one hundred dollars plus attorney fees and court costs."

courts across Louisiana have issued at least a dozen opinions on the notice provision in which the La. R.S. 40:2203.1(G) remedy is characterized as a penalty. *See Opelousas Gen. Trust Auth. v. Multiplan Inc.*, Civ. No. 12-1830, 2013 WL 1405432, at *1 (W.D. La. Apr. 4, 2013) ("plaintiffs have argued that LSA–R.S. 40:2203.1 *et seq.* does not contain a prescription period; instead, a ten year prescriptive period applies to their claims for penalties and attorney fees"). *See also, e.g., Indian Harbor Ins. Co. v. Bestcomp, Inc.*, Civ. No. 09-7327, 2010 WL 5471005, at *5-6 (E.D. La. Nov. 12, 2010); *Gray Ins. Co. v. Concentra Integrated Servs., Inc.*, Civ. No. 09-399, 2010 WL 5298763, at *1 n.4 (M.D. La. Aug. 24, 2010) ("A violation of La. R.S. 40:2203.1 carries a statutory penalty"); *Liberty Mut. Ins. Co. v. Gunderson*, Civ. No. 04-2405, 2009 WL 259589, at *1 (W.D. La. Feb. 3, 2009) ("the potential statutory penalty under Title 40:2203.1(G) of $50 per day from the date that any bill was submitted *ad infinitum*, plus attorneys fees").

Here, the Superior Court rightly looked to *Bestcomp*, 2010 WL 5471005, as a "remarkably similar" case to this one. Op. at 33-35, 41. In a manner that aligns fully with the Louisiana Supreme Court decision in *Seale*, the court in *Bestcomp* concluded that the remedies under Section 40:2203.1(G) are <u>not</u> compensatory because they "more than compensate an injured party for losses incurred due to lack of notice." *Id.* at *5. The court's holding recognized that the statutory remedy bears no correlation to the amount of the discount that actually was applied

without notice and thus unquestionably constituted a penalty. *Id*. That is the same conclusion that the Superior Court reached below. Op. at 30-41.[10]

The two rulings cited by CorVel that run counter to the prevailing view in Louisiana appellate courts, California, and here, are flawed in their reasoning and non-binding on this Court. The 2007 bench ruling from the trial judge (Judge Wyatt) in *Gunderson v. F.A. Richard & Assocs.*, No. 2004-002417, concerned a dispute between an insurer not involved in this case (Columbia Casualty) over a materially different policy. During the hearing – which preceded the authority cited above holding that La. R.S. 40:2203.1(G) constituted a penalty – Judge Wyatt stated that the provision created "statutory damages" rather than a penalty because, in his view, a penalty must be paid to a third party. Judge Wyatt's oral ruling included no authority to support this conclusion, and several years later, the Louisiana appellate court, reviewing the judgment against First Health in the *Gunderson* case, found that the statutory notice provision in fact imposed a penalty. *See Gunderson*, 44 So. 3d at 789-91. The Superior Court examined Judge Wyatt's bench ruling in detail and found it unpersuasive. Op. at 38-40.

[10] CorVel argues that the policy in *Bestcomp* covered only "compensatory sums" – but this is a distinction without a difference here because (1) the Executive Risk Policy does not cover penalties; and (2) as the Superior Court and the court in *Bestcomp* both rightly concluded, La. R.S. 40:2203.1 is a penalty. It is misguided to contend that because the *Bestcomp* policy may have involved narrower coverage than the Executive Risk Policy, and the court in that case referred to the La. R.S. 40:2203.1 remedy as "penal in nature," that this compels a finding of coverage for CorVel. The fact is that CorVel has not shown how a remedy that looks like a penalty, acts like a penalty, and is "penal in nature" can nonetheless (somehow) not be a penalty.

Likewise, the July 29, 2013 ruling of the court in St. Landry Parish, currently on appeal, is simply incorrect for all the reasons discussed in the Superior Court's opinion on the same coverage issues. And because the Delaware Superior Court ruled first on these issues in an action filed before the Insurers were pleaded into the Williams Litigation, neither the Superior Court nor this Court is bound by that Louisiana trial court decision.[11] *Bailey v. City of Wilmington*, 766 A.2d 477, 480 (Del. 2001) (doctrine of *res judicata* bars a subsequent action on the same issue); *Epstein v. Chatham Park, Inc.*, 153 A.2d 180, 186-87 (Del. Super. 1959) (discussing "full faith and credit" clause in U.S. Const. art. IV, § 1).

Finally, CorVel makes much of the legislative history of La. R.S. 40:2203.1 and the Superior Court's examination of it. CorVel Br. 21-22. But the legislative history is of little moment here in light of the fact that: (1) the Superior Court correctly held that the Executive Risk Policy is not ambiguous on the non-insurability of penalties (Op. at 23); (2) the Superior Court found that the legislative history of La. R.S. 40:2203.1 was ambiguous and thereby did not base its holding on any analysis of it (Op. at 37-38); and (3) the Superior Court correctly held that La. R.S. 40:2203.1 constitutes a penalty not covered "under the plain meaning of the Policies" (Op. at 41).

[11] Indeed, the opposite is true: the court in St. Landry Parish should have applied the Superior Court's preclusive judgment on the penalty issue. That issue is also on appeal in Louisiana.

### C. The Fifth Circuit Ruling In *Flagship Credit* Is Inapposite

Despite CorVel's insistence to the contrary, the Fifth Circuit's unpublished *per curiam* opinion in *Flagship Credit Corp. v. Indian Harbor Ins. Co.*, 481 F. App'x 907 (5th Cir. 2012), does nothing to undermine the Superior Court's holding that the La. R.S. 40:2203.1(G) remedy constitutes an uninsured penalty under the Executive Risk Policy. Importantly, the policy provision at issue in *Flagship Credit* provided that "Loss" did not include "fines, penalties or taxes imposed by law" (and thus did not list "multiplied damages" as the Executive Risk Policy provision does). *Id*. at 909. The district court in *Flagship Credit* held that a particular remedy provision in a Texas statute constituted a penalty because it imposed automatic liability for violation of the statute without reference to the amount of actual damages suffered by the plaintiff. *See Flagship Credit Corp. v. Indian Harbor Ins. Co.*, No. H-10-3616, 2011 WL 1638638, at *4-5 (S.D. Tex. Apr. 29, 2011) *rev'd*, 481 F. App'x 907 (5th Cir. 2012). The Fifth Circuit actually agreed with the trial court's definition of the term "penalty," saying "[a] statutory penalty is exactly what these damages were." 481 F. App'x at 912. Even so, the Fifth Circuit felt that, for purposes of construing the meaning of the particular provision in the particular policy at issue, "penalty" had to be given a narrower construction: because that policy placed "penalty" only between "fines" and "taxes," and fines and taxes are both payments to the government, the exclusion of

any "penalty" should also be limited, under that particular policy, only to penalties paid to the government. *Id*.

This policy-specific analysis is materially distinguishable from the instant case for two fundamental reasons. First, while construction of the *Flagship Credit* policy was governed by Texas law (*id.* at 910), the Executive Risk Policy is governed by California law. Texas law applies the canon of *noscitur a sociis*,[12] central to the Fifth Circuit's ruling, prior to a determination of ambiguity. *Id*. at 911. Under California law, by contrast, *noscitur a sociis* "will not be applied where there is no ambiguity . . . . The maxim is only an extrinsic aid and should only be used when the clear meaning of the words used . . . is doubtful." *Brooks v. County of Santa Clara*, 236 Cal. Rptr. 509, 514 (Cal. App. 1987). And, as discussed above, California courts (like those in Delaware, Illinois, and Louisiana) hold that any statutory remedy that "compel[s] a defendant to pay a plaintiff other than what is necessary to compensate him for a legal damage" is unambiguously a penalty. *G.H.I.I.*, 195 Cal. Rptr. at 225 (quoting *Miller v. Municipal Court*, 142 P.2d 297, 308 (Cal. 1943)) (emphasis added). La. R.S. 40:2203.1(G) is just such a remedy – a conclusion confirmed by the numerous Louisiana cases discussed above. Accordingly, the canon of *noscitur a sociis* has no application to the construction of the Executive Risk Policy.

[12] Ascertaining the meaning of a word in a provision from accompanying words.

Second, and independently, the phrase at issue in the Executive Risk Policy contains materially different language than the phrase construed in *Flagship Credit*. In the *Flagship Credit* policy, "penalties" appeared in the key provision with only two other terms ("fines" and "taxes") – both of which, the Fifth Circuit found, had a plain meaning limited to payments to the government. 481 F. App'x at 911-12. But in the Executive Risk Policy, the term "penalties" is accompanied by "fines," "taxes," and "multiplied damages." Even if fines and taxes are generally paid to governmental entities, multiplied damages are undeniably common fixtures of statutory remedies availing private plaintiffs. *See, e.g.*, 15 U.S.C. § 15(a) (antitrust statute); 18 U.S.C. § 1964(c) (RICO statute); *see also Drewry v. Welch*, 46 Cal. Rptr. 65, 75 n.5 (Cal. App. 1965) (observing that "the statutory device of double or treble damages is used in nearly every state"). The distinction between the key provisions in the two policies is fatal to any application of *noscitur a sociis* here. Without a commonality of meanings among all the other terms in the phrase, the essential premise of the *Flagship Credit* ruling is lacking. Accordingly, any attempt by CorVel to limit the term "penalties" in the Executive Risk Policy to payments to government must fail.

## III. THE SUPERIOR COURT CORRECTLY FOLLOWED THE RULES OF INSURANCE POLICY INTERPRETATION

### Question Presented

In ruling that the Executive Risk Policy did not cover the Louisiana actions against CorVel, did the Superior Court properly apply the rules of insurance policy interpretation by broadly construing coverage provisions and narrowly construing exclusions? Executive Risk raised this issue in the Superior Court. A1175-85.

### Scope of Review

Interpretation of an insurance policy is subject to *de novo* review. *Universal Underwriters*, 669 A.2d at 47 (Del. 1995).

### Merits of the Argument

The Superior Court thoroughly analyzed the Executive Risk Policy in granting summary judgment and declaring no coverage for CorVel, and in doing so, used the proper rules of insurance policy interpretation. CorVel's arguments that Judge Herlihy made fundamental mistakes are surprising and puzzling. Further, CorVel's insistence that the Executive Risk Policy is ambiguous was unavailing below and remains incorrect.

#### A. The Superior Court Analyzed Coverage Provisions Broadly And Exclusions Narrowly, Just As It Was Required To Do

In interpreting an insurance policy, courts read coverage provisions broadly to afford protection to the insured and read exclusions narrowly against the insurer.

*See Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 15 Cal. Rptr. 2d 815, 829 (Cal. App. 1993). Exclusions need to be clear to be applied, but mere disagreement between the parties as to an exclusion's meaning does not render it unclear. *Id*. at 828-29. *Accord Deakyne v. Selective Ins. Co. of America*, 728 A.2d 569, 571 (Del. Super. 1997); *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997).

The Superior Court concluded that the Executive Risk Policy was "clear and there are not multiple and different reasonable interpretations of [its] meaning." Op. at 23.[13] It went on to: (1) observe that "Executive Risk's E&O Policy contains a broad definition of covered losses" (*id*. at 24); and (2) assume for purposes of its summary judgment review that the settlement of the Louisiana actions was covered under the insuring provisions of the Executive Risk Policy (*id*. at 26). In short, the Superior Court applied the interpretation rules carefully and correctly, construing coverage broadly in CorVel's favor.

The Superior Court then stated that the carve-out of "fines, penalties, taxes … or multiplied damages" from the definition of Loss constituted exclusionary language that would be narrowly construed against Executive Risk. Op. at 25 & n.55. While Executive Risk disagrees that this provision in the Loss definition

[13] As is discussed below, CorVel argues that the Policy was ambiguous but does not provide a reasonable alternative reading, as is required for a finding of ambiguity. Further, an entity like CorVel that operates in a complex, highly-regulated industry can be expected to understand a clear contract like the Executive Risk Policy. *Shell Oil*, 15 Cal. Rptr. 2d at 829.

constitutes an exclusion,[14] the Superior Court's process in reviewing it as one was the most careful and deferential path it could take on summary judgment with respect to the insured. And, in following this path, Judge Herlihy subjected the "penalty" provision and its application to La. R.S. 40:2203.1 to considerable scrutiny. Op. at 30-41. The Superior Court ascertained "the plain meaning of the terms as set forth in" the Executive Risk Policy. *Id*. at 30. And then, it properly applied such plain meaning to La. R.S. 40:2203.1 to hold that the remedy is a penalty. *Id*. at 31-33. Even though such further analysis was unnecessary for interpreting the Executive Risk Policy, the Superior Court then confirmed that its holding aligned with how Louisiana views the notice provision remedy. *Id*. at 33-40. In doing all this careful work, the Superior Court concluded that under Louisiana law and "the plain meaning" of the Executive Risk Policy, the Louisiana actions against CorVel sought "excluded" penalties. *Id*. at 41.

CorVel is wrong when it asserts that Judge Herlihy "broadly construed" the penalty provision because he purportedly found that La. R.S. 40:2203.1 was "*like* a penalty" or "punitive *in nature*." CorVel Br. at 25-28. The face of the opinion makes clear that the Superior Court concluded that Section 40:2203.1 is a penalty.

[14] For coverage, the insured must have suffered a **Loss**, and thereby, if something is not **Loss**, there is no coverage. Executive Risk Policy §§ I, II(J). *See E.I. du Pont de Nemours & Co. v. Admiral Ins.*, C.A. No. 89C-AU-99, 1996 WL 111133, at *1-2 (Del. Super. 1996) (scope of "loss" as defined in a policy is a coverage issue even regarding limitations on the definition of "loss"); *Royal Globe Ins. Co. v. Whitaker*, 226 Cal. Rptr. 435, 437 (Cal. App. 1986) (a provision is not an exclusion where "the question concerns the scope of the basic coverage itself").

### B. The Superior Court Correctly Concluded That The Language Of The Executive Risk Policy Is Clear And Unambiguous

Putting aside its rear guard effort in Louisiana, in a last-ditch effort here, CorVel argues that the Executive Risk Policy as a whole is ambiguous insofar as it bars coverage for penalties while it extends coverage to Antitrust Activity as well as punitive damages. The position rests on the absurd premise that a sophisticated entity like CorVel that operates in a highly regulated industry and is advised by sophisticated insurance representatives cannot, without substantial confusion, differentiate between penalties and punitive damages and likewise cannot differentiate between claims that involve Antitrust Activity and those that do not.

First, punitive damages are distinct from penalties. Under either California or Delaware law, punitive damages (1) require an underlying award of actual damages for a tort; and are awarded (2) at the factfinder's discretion (3) upon a showing by clear and convincing evidence (4) that the defendant is guilty of oppression, fraud, or malice. *Uzyel v. Kadisha*, 116 Cal. Rptr. 3d 244, 290 (Cal. App. 2010); *accord Guthridge v. Pen-Mod, Inc*., 239 A.2d 709, 715 (Del. Super. 1967). As set forth above, penalties do not share any of these features. To the contrary, penalties (1) do not require an underlying actual damages award; and are (2) given automatically (3) upon a simple showing, by a preponderance of the evidence, (4) that the defendant is liable for a statutory violation. Furthermore, the amount of the penalty is predetermined by the legislature and will be awarded

"even though there are little or no actual damages sustained." *L.A. Ctny. Metro. Transp. Auth. v. Superior Court*, 20 Cal. Rptr. 3d 92, 103-04 (Cal. App. 2004) (distinguishing punitive damages from penalties). Thus, penalties and punitive damages are unmistakably distinct. As is apparent from the discussion above, La. R.S. 40:2203.1(G) exemplifies a penalty remedy and simply does not qualify as punitive damages.

Second, the Superior Court held (and CorVel does not challenge in this appeal) that the Louisiana actions did not involve Antitrust Activity. Op. at 42-45. CorVel was not sued under any antitrust law, as is required to trigger coverage for Antitrust Activity. Op. at 44. Further, CorVel does not contend that it was, in fact, confused about coverage for Antitrust Activity in this instance; it merely contends that the categorization in the Executive Risk Policy "is extremely confusing where none of these terms (punitive, exemplary, penalties) are defined." CorVel Br. at 29. Such *ipse dixit* potential confusion simply cannot be a basis for a finding of ambiguity or for reversal of the Superior Court's ruling. Policy terms are not ambiguous merely because the contract does not expressly define them. *Wallman v. Suddock*, 134 Cal. Rptr. 3d 566, 578 (Cal. App. 2011); *accord Sassano v. CIBC World Markets Corp.*, 948 A.2d 453, 468 n.86 (Del. Ch. 2008).

## IV. THE SUPERIOR COURT CORRECTLY CONCLUDED THAT THE ATTORNEYS' FEES PAID OUT OF THE SETTLEMENT DO NOT CONSTITUTE LOSS UNDER THE EXECUTIVE RISK POLICY

### Question Presented

Should this Court affirm the Superior Court's holding that the portion of the Louisiana settlement paid out as attorneys' fees is a penalty that does not constitute insurable Loss under the Executive Risk Policy? Executive Risk raised this issue in its summary judgment briefing in the Superior Court. A0061-62.

### Scope of Review

Interpretation of an insurance policy is subject to *de novo* review. *Universal Underwriters*, 669 A.2d at 47 (Del. 1995).

### Merits of Argument

The legal authorities overwhelmingly deem the fee award to the attorneys representing the Louisiana plaintiff class a penalty. Despite this (and selectively abandoning its stance that Louisiana law is controlling here), CorVel holds tight to a single outlier case from a federal court in Minnesota applying New York law. CorVel is wrong and the Superior Court should be affirmed on this issue.

The Superior Court held that the attorney fee award was not covered under the Executive Risk Policy because, in Louisiana, such fee awards are considered penalties. Op. at 45-47. The Superior Court examined, and declined to adopt, the unusual view of the *Hiscox* opinion that CorVel relies upon. *Id*. at 45-46.

Further, Section 40:2203.1 requires violators to pay "double the fair market value of the medical services provided, but in no event less than the greater of fifty dollars per day of noncompliance or two thousand dollars, together with attorneys' fees to be determined by the court." La. R.S. 40:2203.1(G). On the face of the statute, an award of attorneys' fees is central to the overall penalty remedy.

California law is also clear that attorneys' fees in cases like the Williams Litigation cannot constitute covered loss – because, quite sensibly, the fees are defined by the primary relief. *Health Net, Inc. v. RLI Ins. Co.*, 141 Cal. Rptr. 3d 649, 668-69 (Cal. App. 2012). Thus, CorVel's argument that the attorneys' fees in Louisiana were "not paid pursuant to the statute, but were awarded pursuant to the common fund doctrine" is unavailing. CorVel Br. at 31-32.

In *Health Net*, the insured sought coverage for monetary awards in litigation brought by health plan consumers, including attorneys' fees. *Id*. at 654-56. The insured argued that the fee award constituted damages irrespective of the nature of the substantive claims. *Id*. at 668-69. The California Court of Appeals rejected that view, concluding that any "claim for attorneys' fees is covered only to the extent it arises out of the covered wrongful acts"; because the main monetary award was non-insurable, attorneys' fees also were non-insurable. *Id*. In so ruling, the Court of Appeals aligned itself with the vast majority of courts that find that coverage for attorney's fee awards is defined by the primary remedy. *See, e.g.*,

*City of Sandusky v. Coregis Ins. Co*., 192 F. App'x 355, 360 (6th Cir. 2006). It also reviewed and expressly rejected *Hiscox*.[15] 141 Cal. Rptr. 3d at 668-69.

The Superior Court should be affirmed because the attorneys' fees are not a separate and independent Loss to CorVel. As there is no coverage for the La. R.S. 40:2203.1(G) remedy, there can be no coverage for the dependent attorneys' fees.

## CONCLUSION

Executive Risk respectfully requests that this Court dismiss this appeal as untimely or affirm the June 13, 2013 final order and judgment of the Superior Court holding that CorVel's settlement of the Louisiana suits against it is not insurable "Loss" under the Executive Risk Policy.

February 11, 2014

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[15] CorVel cites *XL Specialty Co*, but the circumstances there do not implicate penalties in any way, nor did the insurer argue that a specific exclusion or coverage provision barred payment of the fees at issue. 918 N.Y.S.2d 57 (N.Y.A.D. 2011). Indeed, the claims in *XL Specialty* were plainly covered under the policy. *Id*. at 63 ("this policy covers derivative lawsuits. . . [t]he award of attorneys fees is typical in a derivative suit where plaintiff has prevailed"). Accordingly, coverage of the attorneys' fees pursuant to that covered claim was entirely consistent with the rule set forth in *Health Net*.