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IN THE SUPREME COURT OF THE STATE OF DELAWARE

CORVEL CORPORATION, Defendant Below, Appellant, v. HOMELAND INSURANCE COMPANY OF NEW YORK, and EXECUTIVE RISK SPECIALTY INSURANCE COMPANY, Plaintiffs Below, Appellees.	)	No. 513, 2013 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

APPELLEE HOMELAND INSURANCE COMPANY OF NEW YORK'S ANSWERING BRIEF

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NATURE OF THE PROCEEDINGS

CorVel Corporation ("CorVel" or "Appellant") appeals from an Opinion and Order issued by Judge Jerome O. Herlihy of the Delaware Superior Court on June 13, 2013 ("June Order")—an order which, by its plain terms, was a final judgment when entered. (A copy of the June Order may be found at Exhibit A to Appellant's Corrected Opening Brief, hereinafter "Opening Brief" or "Op. Br., __.") Before the Court below, Homeland Insurance Company of New York ("Homeland") and Executive Risk Specialty Ins. Co. ("Executive Risk") (together, "Appellees") sought a declaration from the Court that, as a matter of law, coverage was not available under their policies for an underlying claim asserted against CorVel in Louisiana (the "Louisiana Litigation").[1] (A0030-31; A0401-402.)

In the June Order, Judge Herlihy found that the amounts CorVel had paid to settle the Louisiana Litigation constituted "penalties," and held both that coverage was not available under the policies and that the remaining arguments made by Homeland and Executive Risk in support of their motions were rendered moot by the Court's holding. (Op. Br., Ex. A at 30, 33.) The June Order granted the entirety of the relief the insurers sought and resolved all claims as to all parties.

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[1] The Louisiana Litigation consists of two related proceedings: a class action styled *George Raymond Williams M.D. Orthopedic Surgery v. SIF Consultants of Louisiana* in the 27th Judicial District Court, Parish of St. Landry, Dkt. No. 09-C-5244-C ("*Williams* Action"), and a class arbitration captioned *SWLA Hospital Association d/b/a Lake Charles Memorial Hospital v. CorVel* ("LCMH Arbitration").

After entering the June Order, Judge Herlihy retired. For more than two months, CorVel sat on its rights to file a post-judgment motion or notice an appeal. Instead, CorVel filed a motion for partial summary judgment against Executive Risk in the *Williams* Action seeking a competing determination of coverage. (Op. Br., Ex. D.) On July 29, 2013, forty-six days after the June Order, Judge Alonzo Harris in Louisiana entered partial summary judgment against Executive Risk.[2] Judge Harris's opinion directly conflicts with the June Order. (*Id.*)

On August 27, 2013, Judge Andrea L. Rocanelli of the Superior Court issued an Order Closing Case on Docket (docketed on August 28, 2013) ("August Order"), stating: "Moreover, the Court notes that the Court's Order dated June 13, 2013 is a final Order and Judgment." (Op. Br., Ex. B.) Thereafter, CorVel sought extraordinary relief from the Superior Court, asking it to reverse, alter or amend the August Order, which confirmed the finality of the June Order, and further asking the Superior Court to hold that the August Order constituted the final judgment in this case. (A1238-1269.) The Superior Court rejected CorVel's request by an order dated September 20, 2013 and docketed on September 25, 2013 ("September Order"). (Op. Br., Ex. C.)

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[2] CorVel's Opening Brief says that the *Williams* Court reached its contrary result on the coverage issues "[j]ust sixteen days later" than the June Order. (Op. Br. at 15.) Actually, the motion for partial summary judgment was presented to the *Williams* Court on June 28 (fifteen days after the June Order), and the *Williams* Court entered judgment on that motion on July 29, 2013 (forty-six days after the June Order). (Op. Br., Ex. D.)

One day later, CorVel filed its notice of appeal. (Filing ID 54292489.) Homeland and Executive Risk each filed motions to dismiss arguing CorVel's appeal was untimely. (Filing ID's 54382409, 54383205.) On November 12, 2013, this Court denied the motions, stating Appellees could "renew their arguments as to the proper scope of this appeal in their answering briefs."

SUMMARY OF ARGUMENT

1. Denied.

2. Denied.

3. Denied.

4. The Supreme Court lacks jurisdiction over this untimely appeal from the June Order.

5. Assuming jurisdiction *arguendo*, the Superior Court correctly applied Delaware law in interpreting the clear and unambiguous language of the Homeland policy and concluding that there was no coverage because the amounts paid in settlement were "penalties."[3]

6. The attorneys' fees paid to class counsel are not a covered loss.

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[3] In its Opening Brief, Appellant did not address (1) whether the Superior Court erred in its Order and Memorandum Opinion of November 30, 2011 (denying Appellant's Motion to Dismiss or Stay the underlying Superior Court action), (2) whether the Superior Court erred in its August Order, or (3) whether the Superior Court abused its discretion in its September Order (denying Appellant's untimely Motion under Rule 59 (d) and (e), and denying Appellant's Motion under Rule 60 (b) because the Appellant failed to prove extraordinary circumstances needed to justify such an extraordinary remedy). As a result, all of CorVel's arguments with respect to such orders are waived and those orders are no longer subject to this appeal. Del. Supr. Ct. R. 14(b)(vi)(A)(3); *Stafford v. State*, 59 A.3d 1223 (Del. 2012), *cert. denied*, 1333 S. Ct. 2368 (2013); *Ploof v. State*, 75 A.3d 811 (Del. 2013).

STATEMENT OF FACTS

A. The Parties

Appellee Homeland, a plaintiff below, is a New York corporation with a principal place of business in Massachusetts. (A0451 ¶ 3.) Appellee Executive Risk, also a plaintiff below, is a Connecticut corporation with a principal place of business in New Jersey. (A0736 ¶ 7.) Appellant, CorVel, the defendant below, is a Delaware corporation with a principal place of business in California.[4] (A0716 ¶ 4.)

B. The Homeland Insurance Policy

Homeland first issued a Managed Care Errors and Omissions Liability Policy to CorVel for the policy period October 31, 2005 to October 31, 2006, and thereafter issued renewal policies. (A0452 ¶ 5; A0717 ¶ 5; A0468-502.) The policy at issue here is Policy No. MCP-1371-06, which, as amended, has a policy period of October 31, 2006 to December 1, 2007 (the "Homeland Policy"). (A0468-502.)

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[4] In the Settlement Agreement (A0570-599), CorVel agreed to pay $9 million for a global resolution of all the underlying actions. (A0587 ¶ 10.1.) CorVel also purported to assign its rights to any insurance coverage applicable to these actions to the Settlement Class. (A0588 ¶ 11.1.) The Settlement Class broadly includes "[a]ll medical providers . . . that have provided services to workers' compensation patients pursuant to the Louisiana's Workers' Compensation Act . . . and whose bills [were] discounted, adjusted, paid on a reduced basis, or otherwise paid at less than the billed amount pursuant to a Preferred Provider Agreement contracted with CorVel . . . ." (A0572 ¶ 1.6.) The Settlement specifically releases the class plaintiffs' statutory penalty claims under La. R.S. 40:2203.1(G). (A0573 ¶ 1.14; A0580 ¶ 5.1; A0570-571 Recitals.)

Subject to its other terms, the Homeland Policy provides that: "The Underwriters will pay on behalf of the **Insured** any **Loss** which the **Insured** is legally obligated to pay. . . ." (A0484 § I(A), emphasis in original.) The Homeland Policy's definition of "Loss," contained in Section II(L)(i), expressly provides, in pertinent part: "**Loss** shall not include: (i) fines, *penalties* or taxes;...." (A0486 § II(L)(i), italics added.)

C. Background, Pre-Policy Proceedings and Litigation

1. The PPO Agreement

In early 1996, CorVel and Lake Charles Memorial Hospital ("LCMH") entered into a contract through which LCMH, its medical staff and other affiliated physicians became preferred providers in the CorVel network by agreeing to discounted service rates. (A0453 ¶ 9; A0718 ¶ 9.) The CorVel-LCMH contract provided that disputes under the agreement must be submitted to arbitration. (*Id.*)

2. LCMH's Arbitration Demand and Associated Proceedings

On or about December 22, 2006, LCMH filed a demand for class arbitration ("the LCMH Arbitration") seeking statutory penalties for violation of La. Rev. Stat. Ann. § 40:2203.1. (A0454-55 ¶ 14; A0720 ¶ 14; A0537-38.) That statute imposes the following penalties for noncompliance: "[D]amages 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 attorney fees to be determined by the court." La. Rev. Stat. Ann. § 40:2203.1(G) ("Section 2203.1(G)"). CorVel was named as the respondent in this demand. (A0454-55 ¶ 14; A0720 ¶ 14; A0537-38.)

On September 30, 2009, a putative class of medical service providers filed the *Williams* Action, which asserted similar claims for violation of the notice provisions of La. Rev. Stat. Ann. § 40:2203:1. (Op. Br., Ex. A at 5-6.) Although not initially named as a party, CorVel was later made a defendant in the *Williams* Action. (*Id.*) The LCMH Arbitration and the *Williams* Action sought the same statutory relief from CorVel, for the same violations, on behalf of the same group of medical providers. (*Id.*) Both actions sought remedies pursuant to the statute. (*Id.*)

3. The Coverage Dispute Between Homeland and CorVel

On September 24, 2010, approximately four years after the class arbitration was filed, Homeland received a letter from CorVel claiming coverage for the class arbitration. (A0455-56 ¶ 18; A0721 ¶ 18; A0540.) On October 4, 2010, Homeland responded, reserving all rights pending a full investigation. (A0456 ¶ 19; A0721 ¶ 19.) On January 10, 2011, Homeland filed an action in the Delaware Superior Court, seeking an adjudication of its rights and responsibilities under the Policy regarding the LCMH Arbitration. (A0456 ¶ 20; A0722 ¶ 20.)

4. CorVel's Settlement and Other Events Subsequent To Filing of Original Delaware Declaratory Complaint

After January 2011, CorVel entered into a settlement with the class that had instituted the LCMH Arbitration. (A0570-599.) On March 24, 2011, CorVel, Homeland and Executive Risk were made parties to the *Williams* Action pursuant to Louisiana's Direct Action Statute. (A0542-553.)

Shortly after the class in the *Williams* Action named CorVel as a defendant, the class and CorVel filed a joint motion asking the court to approve the settlement they had reached. (A0560-714.) The settlement agreement provided for certification of a settlement class and partial assignment to the class of CorVel's rights under the Homeland Policy, and further provided that the class would assume control and responsibility for funding of the defense of this coverage litigation filed by Homeland in Delaware. (A0457 ¶ 24; A0723 ¶ 24; A0560-714.)

On November 4, 2011, the *Williams* Court approved the settlement proposed by the class and CorVel, entered a final judgment and dismissed CorVel from the case, with prejudice. (A0457 ¶ 25; A0723 ¶ 25.) Homeland and Executive Risk remained parties to the *Williams* Action.

5. The Competing Delaware and Louisiana Judgments

In this Delaware litigation, Homeland and Executive Risk sought a declaration that, as a matter of law, coverage was not available under their policies for the Louisiana Litigation. (B001-61; B090-107.) CorVel did not assert a

counterclaim. (A0715-733; B062-89; B108-126.) In the June Order, the Superior Court found that the amount CorVel had paid to settle the Louisiana Litigation constituted "penalties," and, therefore, that there was no coverage under the policies. (Op. Br., Ex. A at 30, 33.) Thereafter, on a motion filed by the class, solely against Executive Risk, the *Williams* Court issued a contrary ruling on coverage against Executive Risk. (Op. Br., Ex. D.) Executive Risk has appealed that decision. (B136.)

ARGUMENT

I. THE SUPREME COURT LACKS JURISDICTION OVER THIS APPEAL BECAUSE APPELLANT FAILED TO ARGUE ANY ERROR OR IMPROPRIETY IN ANY ORDER OTHER THAN THE JUNE ORDER AND FAILED TO TIMELY APPEAL FROM THAT ORDER.

A. Question Presented

Whether the Supreme Court lacks jurisdiction to hear this appeal where Appellant did not argue any error or impropriety in any order other than the June Order, and failed to file a timely appeal from the June Order?

B. Scope of Review

This issue does not concern a review of the propriety of an underlying decision, but rather addresses the jurisdiction of this Court. "It is fundamental that the appellate jurisdiction of this court rests wholly upon the perfecting of an appeal within the period of limitations fixed by law." *Fisher v. Biggs*, 284 A.2d 117, 118 (Del. 1971) (citing *Trowell v. Diamond Supply Co.*, 91 A.2d 797, 801 (Del. 1952) and *Casey v. S. Corp*, 29 A.2d 174, 176-77 (Del. 1942)).

C. Merits of Argument

In its June Order, the Superior Court found that the amounts CorVel paid to settle the Louisiana Litigation constituted "penalties," and held both that coverage was not available under the Homeland and Executive Risk policies and that the remaining arguments made by Homeland and Executive Risk in support of their

motions were rendered moot by the Court's holding. (Op. Br., Ex. A at 30, 33.) The June Order granted the entirety of the relief the insurers had sought in the action, and resolved all claims as to all parties. The June Order also expressed the Superior Court's decision to resolve all of the claims presented by clearly and unambiguously granting Homeland's motion for summary judgment, resolving that there was no coverage and concluding, "**IT IS SO ORDERED.**" (*Id.* at 48.)

Because the June Order left nothing more for the parties to litigate, it was, by its own terms, a final judgment. Indeed, it has long been the law in Delaware that the test of a final judgment is "whether such judgment or decree determines the substantial merits of the controversy and the material issues litigated or necessarily involved in the litigation." *Showell Poultry, Inc. v. Delmarva Poultry Corp.*, 146 A.2d 794, 796 (Del. 1958). In *Plummer v. R.T. Vanderbilt Co., Inc.*, 49 A.3d 1163 (Del. 2012), for example, this Court held that an order dismissing the complaint was final, for purposes of a 30-day appeal period, on the date that the trial court entered an unambiguous order providing that the "'above-captioned cases'" were dismissed, not on the later date when a special master granted an omnibus motion to dismiss.

Appellant failed to file a timely appeal from the June Order—the only final judgment issued below – and knowingly forfeited any opportunity to appeal the June Order. Appellant's deadline to file a Notice of Appeal from the June Order

was July 15, 2013. Del. Supr. Ct. R. 6(a)(i). The Appellant filed its Notice of Appeal from the June Order on September 26, 2013, more than 70 days late. The Supreme Court lacks jurisdiction to hear an appeal where a notice of appeal is not filed within the required time. *See Stanton v. Stanton*, 922 A.2d 416 (Del. 2007) (TABLE) (noting that, with respect to appeals, "[t]ime is a jurisdictional requirement").

That Appellant's Notice of Appeal included the Superior Court's Order of November 11, 2011, the August Order and the September Order, cannot cure CorVel's failure to file a timely appeal. In its Opening Brief, Appellant did not address whether the Superior Court had erred in any of these three orders. As a result, Appellant has waived any arguments with respect to the correctness of those orders, and those orders are no longer within the scope of this appeal. Del. Supr. Ct. R. 14(b)(vi)(A)(3); *Stafford v. State*, 59 A.3d 1223 (Del. 2012), *cert. denied*, 133 S. Ct. 2368 (2013); *Ploof v. State*, 75 A.3d 811 (Del. 2013). In any event, CorVel could not, as it attempted to do below, attack the underlying judgment for an error about which it could have complained on appeal by filing a Rule 59 or Rule 60 motion after the time for appeal had expired. *Epstein v. Matsushita Elec. Indus. Co.*, 785 A.2d 625 (Del. 2001); *Wilson v. Montague*, 19 A.3d 302 (Del. 2011) (TABLE). Because the scope of this appeal is limited to the June Order, this appeal should be resolved against Appellant on this jurisdictional basis alone.

II. THE SUPERIOR COURT CORRECTLY HELD THAT CORVEL'S SETTLEMENT PAYMENT IS NOT A COVERED LOSS.

A. Question Presented

Whether CorVel's settlement payment based on the relevant statutory remedies was made for "penalties" within the meaning of the Homeland Policy?

B. Scope of Review

The Supreme Court reviews a decision to grant summary judgment, and questions of law, *de novo*. *Bermel v. Liberty Mut. Fire Ins. Co.*, 56 A.3d 1062 (Del. 2012); *LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 932 (Del. 2007).

C. Merits of Argument

1. The Language of the Homeland Policy Does Not Cover "Penalties."

The Policy's definition of "**Loss**" expressly provides that certain items do not constitute **Loss** and are not payable under the Policy. (A0486 § II(L)(i), "**Loss** shall not include: (i) fines, *penalties* or taxes; ..." (italics added).)

2. The Superior Court Performed a Proper Choice of Law Analysis and Correctly Ruled that Delaware Law Would Apply.

CorVel neither contests the Superior Court's choice of law determination nor offers its own analysis. Accordingly, for purposes of this appeal, CorVel has waived any contrary argument. *Ploof*, 75 A.3d 811.

The Superior Court properly applied Delaware choice of law rules and determined that Delaware contract law governed interpretation of the Homeland Policy. (Op. Br., Ex. A at 20-22.) The Superior Court found that there was no "true conflict" between the law of Delaware (the forum state) and the law of California (where CorVel was headquartered and maintained its principal place of business). (*Id.*) In other words, the Superior Court concluded it would reach the same result whether it applied Delaware law or California law. (*Id.*)

3. The Superior Court Correctly Found that the Word "Penalties" Was Clear and Unambiguous, and Correctly Found that "Penalties" Should Be Given Its Common Dictionary Meaning.

The Superior Court acknowledged that Homeland and CorVel do not agree on the proper interpretation of the insuring clause of the Homeland Policy, but correctly found that their disagreement did not make the Policy language ambiguous. (Op. Br., Ex. A at 23.) In the Superior Court's view, the pertinent language of the Homeland Policy—"**Loss** shall not include (1) fines, penalties or taxes. . . ."—was not reasonably susceptible to more than one interpretation. (*Id.*)

The word "penalties" is not defined in the Homeland Policy. Therefore, in ascertaining the meaning of that critical word, the Superior Court looked to the guidance provided in *Lorillard Tobacco Co. v. American Legacy Foundation,* 903 A.2d 728, 738 (Del. 2006) and *Northwestern National Insurance Company v. Esmark, Inc.,* 672 A.2d 41, 44 (Del. 1996), where this Court explained that

"'dictionaries are the customary reference source that a reasonable person in the position of a party to a contract would use to [discern] the ordinary meaning of words not defined in the contract.'" (Op. Br., Ex. A at 30-31, quoting *Lorillard*, 903 A.2d at 738.) Accordingly, the Superior Court consulted an authoritative source, *Black's Law Dictionary*. (*Id.*)

Black's Law Dictionary defines "penalty" as: "Punishment imposed on a wrongdoer, usu. in the form of imprisonment or fine; esp., a sum of money exacted as punishment for either a wrong to the state or a civil wrong (as distinguished from compensation for the injured party's loss)." *Black's Law Dictionary* 1247 (9th ed. 2009) (as quoted in Op. Br., Ex. A at 31). *Black's Law Dictionary* defines "statutory penalty" in the same section as: "a penalty imposed for a statutory violation; esp., a penalty imposing automatic liability on a wrongdoer for violation of a statute's terms without reference to any actual damages suffered." (*Id.*) Thus, a statutory penalty must: "(1) impose automatic liability for a violation of its terms; (2) set forth a predetermined amount of damages; and (3) impose damages without regard to the actual damages suffered by the plaintiff." (Op. Br., Ex. A. at 31, citing *Landis v. Marc Realty,* 919 N.E.2d 300, 307 (Ill. 2009).)

4. The Superior Court Correctly Found that the Amounts Recoverable Under the Louisiana Statute Were "Penalties" Under Delaware Law, California Law and Louisiana Law.

The Superior Court correctly found that, under Delaware law, the Louisiana statute imposed "penalties" because it imposed automatic liability, set forth a pre-determined sum—$2,000 per violation and imposed liability for this sum without regard to any actual damages suffered. (Op. Br., Ex. A at 33.)

Although no Delaware case can be found that defines "penalty," "penalties," or "civil penalties,"[5] the term "penalties" is used throughout the Delaware Code by the legislature, and in Delaware jurisprudence by generations of Delaware judges applying its common ordinary meaning.[6] This is itself testimony to its common ordinary meaning and the correctness of the Superior Court's finding that it is not ambiguous.

The Superior Court's conclusion is also consistent with California law. The California courts, applying the same principles the Superior Court found in

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[5] Delaware courts, in the commercial contract context, indicate that "a liquidated damages award is valid unless its enforcement would serve as a penalty, rather than a reasonable assessment of anticipated damages." *Tropical Nursing, Inc. v. Ingleside Homes, Inc.*, 2006 WL 3579075, at *2 (Del. Super. Dec. 11, 2006) (citing *S.H. Deliveries, Inc. v. Tristate Courier & Carriage, Inc.*, 1997 WL 817883, at *2 (Del. Super. May 21, 1997)). Making this distinction, Delaware Courts define a penalty as a "sum inserted into a contract in order to serve as a punishment for default, rather than a measure of compensation for breach." *Id.* (citing *Del. Bay Surgical Serv., P.A. v. Swier,* 900 A.2d 646, 650 (Del. 2005)). The court-below's approach is consistent with this principle.

[6] Although there are numerous examples of civil and criminal penalties in the Delaware Code, the legislature has not sought to define the term "penalty." *See, e.g.,* 3 *Del. C.* § 1225; 5 *Del. C.* § 165; 24 *Del. C.* § 1228; 11 *Del. C.* §§ 221(c), 222, 4101-06.

Delaware law, have ascribed a similar meaning to the word "penalty." *See, e.g., In re Cellphone Termination Fee Cases*, 193 Cal. App. 4th 298, 322 (Cal. Ct. App. 2011) (holding that a "liquidated damages provision that 'bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a breach' is an unlawful penalty") (citation omitted); *Clark v. Superior Court*, 50 Cal. 4th 605, 614 (Cal. 2010) (holding that "a penalty is a recovery without reference to the actual damage sustained") (citations and quotations omitted); *see also Ridgley v. Topa Thrift & Loan Ass'n*, 17 Cal. 4th 970, 977 (Cal. 1988) (the "characteristic feature of a penalty is its lack of proportional relation to the damages which may actually flow from failure to perform under a contract").

The Superior Court also found support for its conclusion in Louisiana law, citing a Louisiana federal court's analysis of Section 2203.1(G) in *Indian Harbor Ins. Co. v. Bestcomp, Inc.*, 2010 WL 5471005, (E.D. La. Nov. 12, 2010), *aff'd,* 452 Fed. Appx. 560 (5th Cir. 2011). (Op. Br., Ex. A at 33-35.) *Bestcomp* involved a question of coverage for Section 2203.1(G) remedies under a policy that, like the Homeland Policy, "did not cover 'fines and penalties' and 'the multiplied portion of any multiplied awards.'" *Bestcomp,* 2010 WL 5471005, at *1.

The policy issued by Indian Harbor provided coverage for damages that Bestcomp became legally obligated to pay. *Id.* "Damages" were defined as "any

compensatory sum and include[d] a judgment, award or settlement." *Id.* The policy, however, specifically excluded from its definition of "damages," "(2) [f]ines, penalties, forfeitures, or sanctions . . ." *Id.* Indian Harbor argued that the Section 2203.1(G) damages sought against Bestcomp did not qualify for coverage under its policy because they were not compensatory, but rather penal, in nature and were specifically excluded by the definition of covered damages. *Id.* at *2. The *Bestcomp* Court concluded that the remedies were purely penal in nature because the remedy did more than just compensate an injured party for losses incurred and was unrelated to any actual harm. *Id.* at *5.

> [T]he court finds that the damages under Section 40.2203.1(G) do not qualify as compensatory sums because the damages more than compensate an injured party for losses incurred due to lack of notice. . . . The damages available under section 40.2203.1(G) also are not compensatory because the amount of damages bears no correlation to the amount of the discount applied. . . . Williams' argument that the legislature made a predetermined amount of compensatory damages available is unavailing because a "predetermined damage amount" runs afoul of the nature of compensatory damages given that compensatory damages are not calculated based on predetermined amounts, but are calculated based on the harm incurred.

Id.

In addition, the Superior Court, like the Louisiana federal court in *Bestcomp*, found it significant that there were numerous Louisiana cases that specifically

referred to remedies provided for in Section 2203.1(G) as penalties.[7] *Bestcomp,* 2010 WL 5471005, at *6. (*See also* Op. Br., Ex. A at 41.)

Based on an extensive analysis of the penal nature of Section 2203.1(G) and the many cases construing it, the trial court in *Bestcomp* concluded that the remedies provided in Section 2203.1(G) were not covered. *Id.* at *8.

5. CorVel's Criticism of the Superior Court's Decision is Unfounded.

CorVel's principal attack on the Superior Court's analysis focuses almost exclusively on the label CorVel says the Louisiana legislature attached to the remedy provided in Section 2203.1(G). CorVel asks this Court to conclude that the remedies set forth in Section 2203.1(G) are not penalties because the Legislature didn't call them penalties. (*See, e.g.,* Op. Br. at 6, 16-17.) In other

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[7] These cases included *Touro Infirmary v. Maritime Officer*, 24 So. 3d 948, 951 (La. Ct. App. 2009) (holding that the penalty provisions of section 40:2203.1(G) applied to group purchasers only); *Cent. La. Ambulatory Surgical Ctr., Inc. v. Rapides Parish Sch. Bd.*, 68 So. 3d 1041, 1045 (La. Ct. App. 2010) (noting that "the panel reversed its position on the penalty and attorney fee award based on failure of the defendants to comply with the notice requirements of La. R. S. 40:2203.1"); *Gray Ins. Co. v. Concentra Integrated Servs., Inc.*, 2010 WL 5298763, at n.4 (M.D. La. Aug. 24, 2010) ("A violation of La. R.S. 40:2203.1 carries a statutory penalty"); *Gunderson v. F.A. Richard & Assocs.*, 44 So. 3d 779 (La. Ct. App. 2010) (referring to the remedy as a penalty throughout the opinion); *Gunderson v. F.A. Richard & Assocs.*, 40 So. 3d 418, 419 (La. Ct. App. 2010) ("In addition to the penalties provided by La.R.S. 40:2203.1(G), the healthcare providers sought an injunction ..."); *Gunderson v. F.A. Richard & Assocs.*, 977 So. 2d 1128, 1132 (La. Ct. App. 2008) (same); *Isle of Capri Casinos, Inc. v. COL Mgmt.*, 2009 WL 691167, at *1 (W.D. La. Mar. 16, 2009) (characterizing the remedy under Section 40:2203.1 as a penalties and noting that such penalties amounted to "twice the bill it charges or $50.00 per day, per claim, plus attorney' fees); *Sentry Ins. v. Sw. La. Hosp. Ass'n*, 2008 U.S. Dist. LEXIS 44183, at *5 (W.D. La. June 4, 2008) (same); *Compare Flagship Credit Corp. v. Indian Harbor Ins. Co.,* 2011 WL 1638638 (S.D. Tex. April 29, 2011), *rev'd in part, vacated in part on other grounds,* 481 Fed. Appx. 907 (5th Cir. 2012) (finding minimum statutory damages recoverable under § 9.625 of the Texas Business and Commerce Code are penalties.).

words, CorVel argues the Superior Court was wrong to consider the substance of the remedy at issue, and instead should have looked solely to its label.

Distilled to its essence, and giving CorVel the benefit of doubt, CorVel's argument appears to be that the word "damages" is irreconcilably inconsistent with the word "penalties." But, of course, it is not. Courts look not to the labels attached to statutory remedies, but rather to their nature and substance. Statutory damages are penalties if their function is penal, not compensatory.[8]

Moreover, the case relied upon by CorVel to show that statutory damages in Louisiana are not "penalties" unless "the statute specifically designates them as a penalt[ies]," (Op. Br. at 17), does not stand for that proposition. Instead, that case, *International Harvester Credit Corp. v. Seale,* 518 So. 2d 1039 (La. 1998), supports Homeland's view that the substance of the statutory remedy controls its character.

The issue presented in *International Harvester Credit Corp.* was whether another Louisiana statute had created a right to recover a specified amount as compensatory damages, or instead had created such a right together with an additional right to recover an equal amount as a penalty. The statute at issue

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[8] Delaware courts have long held that use of the words "penalty" or "liquidated damages" in a contract are not conclusive as to the character of the item. *Olsen v. T.A. Tyre Gen. Contractor, Inc.*, 2006 WL 2661140, at *2 (Del. Aug. 24, 2006) (citing *In re Ross & Son, Inc.*, 95 A. 311, 315 (Del. Ch. 1915)) ("It has been repeatedly held that the words 'penalty' or 'liquidated' damages, if actually used in the instrument, are not at all conclusive as to the character of the stipulation.").

required a manufacturer to repurchase equipment from a terminated dealer for 100% of the net cost of such equipment, but also went on to specify that, if the manufacturer failed or refused to make payment within 60 days, it "shall be liable to the retailer . . . for *damages*" of 100% of the net cost. *Int'l Harvester Credit Corp.,* 518 So. 2d at 1041. The Louisiana Supreme Court held that, because the legislature had not clearly indicated its intent to impose a penalty, it would interpret the statute to create a right to recover only the compensatory amount—the full net cost of the equipment. *Id.* at 1043. Further undermining CorVel's strained interpretation of the case, the Louisiana Supreme Court went on to observe that "we have been unable to find any such statute in which the legislature has not clearly shown its intent [to create a penalty] 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." Id.* at 1042 (emphasis added.)

It is undisputed that, Section 2203.1(G) mandates an award in excess of a claimant's losses. Thus, while it is true that *International Harvester Credit Corp.* does hold that "punitive or other penalty damages are not allowable unless expressly authorized by statute," *Id.* at 1041, that case does not stand for the proposition that statutory damages are not "penalties" unless the Legislature uses the word "penalties" in the text of the statute. Indeed, under the Louisiana

Supreme Court's reasoning in *International Harvester Credit Corp.*, the statutory damages in Section 2203.1(G) are "penalties" because that statute "specifically award[s] an amount in excess of the claimant's losses."

CorVel also relies on two Louisiana trial court cases holding that the remedies provided in Section 2203.1(G) are not penalties. (Op. Br. at 19-21.) The first, *Gunderson v. F.A. Richard & Associates, Inc.*, No. 2004-2417 (14th Jud. Dist. Ct., Parish of Calcasieu, La.), is discussed at length in the Superior Court's Opinion. (Op. Br., Ex. A. at 38-41; A0901-1025.) In essence, the *Gunderson* Court believed that the remedies provided for in Section 2203.1(G) were not penalties because, to that court, penalties were something paid to persons other than a plaintiff in a damage suit.[9] (Op. Br., Ex. A at 39.) The Superior Court respectfully, but emphatically, rejected that reasoning in favor of that offered by the Louisiana federal court in *Bestcomp*, which it found "persuasive." (Op. Br., Ex. A at 41.)

The other Louisiana trial court decision on which CorVel relies was in the *Williams* Action, a case to which, as the Superior Court noted, Homeland and Executive Risk were added as parties more than two months after Homeland had commenced this action. (Op. Br., Ex. A at 11.) The Superior Court denied

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[9] As the Superior Court noted, while the Louisiana trial court's grant of summary judgment to the plaintiff class in *Gunderson* was affirmed by the Louisiana Court of Appeals, the penalty issue was not appealed, and the Louisiana Court of Appeals did not address that issue in its opinion, referring to the amount awarded as "statutory damages." (Op. Br., Ex. A at 40.)

CorVel's motion to dismiss or stay the Delaware action and found that it, not the Louisiana actions, were first filed as to coverage. (Op. Br., attached as an undesignated exhibit.) By failing to address that order in its Opening Brief, CorVel has waived its right to argue that it was entered in error. (*See infra* n. 3.) After the Superior Court entered the June Order, the *Williams* class moved for partial summary judgment against Executive Risk, asking the *Williams* Court to find, contrary to the Superior Court's judgment, that the remedy provided in Section 2203.1(G) was not a "penalty" excluded by the Executive Risk policy. (Op. Br., Ex. D.) On July 29, 2013, the Louisiana court entered summary judgment in favor of the *Williams* class and against Executive Risk, finding that the statutory damages provided in Section 2203.1(G) were not "penalties."[10] (*Id.*) The Louisiana court did not consider the substance or nature of the relief sought, but rather decided the case on what CorVel has characterized as the "label" attached to the remedy.

> It is clear that the Louisiana Legislature intended LSA-RS 40:2203.1 to provide for statutory damages. In *International Harvester Credit Corporation v. Seal,* 518 So.2d 1039, 1041 (La. 1988) the court held, "The term damages unmodified by penal terminology such as "punitive" or "exemplary" has been historically

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[10] This is the backdrop against which this Court must determine if the Superior Court's June Order, which preceded the summary judgment order in *Williams* Action, was a final judgment, thereby both giving it *res judicata* effect upon entry and making this appeal untimely. CorVel argues that the final judgment of the Superior Court was not entered until August 27, 2013, *after* the summary judgment was entered in the *Williams* Action, thereby rendering it first in time.

> interpreted as authorizing only compensation for loss, not punishment. It is the Court's understanding that if the Legislature meant for the remedy under 40:2203.1 to be penalties, they would have simply called them penalties.

(Op. Br., Ex. D at 6.)

6. The Legislative History of Section 2203.1(G) Does Not Evidence a Clear Legislative Intent.

In evaluating the arguments made below by CorVel regarding the intent of the Louisiana legislature, the Superior Court reviewed certain minutes of the Louisiana Senate's Insurance Committee. In those minutes, the Superior Court found evidence that the Louisiana legislature had modeled the language of the remedy provided in Section 2203.1(G) on an existing statute, LSA R.S. 22:1821(A), which described the remedy it provided as a penalty. The Superior Court found the intent of the Legislature to be unclear because of the seeming inconsistency inherent in the adoption of a remedy the legislature had earlier described as a "penalty" directly into Section 2203.1(G), but referring to it in the latter statute as "damages." (Op. Br., Ex. A at 37-38.)

CorVel's response to the Superior Court's analysis of the legislative history of Section 2203.1(G) is to say that it was improper for the Superior Court to consider such materials because "the language of the statute is clear." (Op. Br. at 21.) CorVel appears to have entirely missed the point of the Superior Court's discussion. The Superior Court looked to the legislative history for assistance in

assessing the nature of the statutory remedies, but found none helpful. In other words, the Superior Court found it could not rely on the legislative history to determine the nature of the statutory remedies, and therefore was left to ascertain the nature of the statutory remedies by reference to the language of the statute. This is precisely what CorVel argues the Superior Court should have done (Op. Br. at 21-22), although it appears CorVel disagrees with the result.

7. The Interpretative Principle *Noscitur a Sociis* is Inapplicable Here.

CorVel's final effort to show the Superior Court erred on the penalty issue is to invoke the interpretive principle *noscitur a sociis*, but that principle has no application here. In Delaware, *noscitur a sociis* is reserved for the interpretation of ambiguous terms. *Smartmatic Int'l Corp. v. Dominion Voting Sys. Int'l Corp.*, 2013 WL 1821608 (Del. Ch. May 1, 2013); *C & T Assocs., Inc. v. Gov't of New Castle Cnty.*, 408 A.2d 27 (Del. Ch. 1979); *Butler v. Butler*, 222 A.2d 269 (Del. 1966). The term "penalties" is not ambiguous; indeed, it has a common and ordinary meaning as explained by the Superior Court.

The principle should never be used to create an ambiguity where none exists. *In re Continental Airlines*, 125 B.R. 399, 406 (D. Del. 1991) exemplifies this point. At the time it filed for bankruptcy, Continental held its aircraft by lease under sale-leaseback transactions. Shortly after filing its Chapter 11 petition, Continental filed a motion seeking a ruling that the leases were not subject to Section 1110 of

the bankruptcy code. Section 1110 exempts persons with specified interests in an aircraft from the automatic stay. Parties within the protection of Section 1110 are permitted to repossess an aircraft if the debtor does not pay all obligations and cure all defaults within 60 days. The issue before the court was whether the terms "lessor" and "lease" in Section 1110 applied to lessors who purchased from the airline certain aircrafts that they then leased back to it. Continental asserted that the word "lease" in Section 1110, when read in the context of surrounding words in the section, and in light of the code's purposes, could only be read to include those "leases" that were designed to augment a carrier's fleet. Continental argued that this result was dictated by *noscitur a sociis* and asked the court to rule that "lease" meant acquisition lease because the other terms in the list: "conditional sales" and "purchase money equipment security agreements" involved acquisitions. The court disagreed. *Continental Airlines*, 125 B.R. at 403.

The court began by noting that canons of construction were aids in ascertaining the plain meaning of a statute, not tools to contradict plain meaning. *Id.* Just because words were grouped together did not mean that each word was intended to be treated like its neighbors in all respects. In fact, when the words were grouped by the disjunctive "or," they were to be given separate meaning. *Id.* The court then found that the words "lease" and "lessor," as used in Section 1110, were not ambiguous and, absent a clear indication to the contrary, the plain

meaning of those terms controlled. *Id.* at 404, 406; *see also Zimmerman v. Crothall* , 2012 WL 707238, at *7 (Del. Ch. Mar. 27, 2012) (holding that *noscitur a sociis* "provides no reasonable support for finding ambiguity. . ."). Here, the term "penalties" is not ambiguous and has a common and accepted meaning that cannot be rendered uncertain simply by reference to a canon meant to aid the interpretation of ambiguous words.

CorVel relies on *Flagship Credit Corp. v. Indian Harbor Ins. Co.,* 481 Fed. Appx. 907 (5th Cir. 2012), a case that applied *noscitur a sociis* to interpret policy language that mirrored some words found in the Homeland Policy, but also included a critical phrase absent from that Policy.

CorVel incorrectly describes the policy language at issue in *Flagship* by saying that it "excluded coverage for 'fines, penalties or taxes.'" (Op. Br. at 23.) Central to the appellate court's reasoning in *Flagship,* however, was the qualifying phrase that followed the words quoted by CorVel. The *Flagship* policy actually provided the following exemption from covered damages: "fines, penalties or taxes *imposed by law*. . ." 481 Fed. Appx. at 909 (emphasis added). Indeed, the appellate court in *Flagship* found the words "imposed by law" modified all three words in the series, and held that phrase to be determinative of its conclusion that the term "penalties," as used in the policy at issue in that case, referred only to payments made to a government. *Id.* at 910.

> The dispute in this case is whether the statutory minimum damages provided by *Section 9.625(c)(2)* are "penalties . . . imposed by law" under Flagship's policy. Neither party argues that in analyzing the exclusion from coverage of "fines, penalties or taxes imposed by law," we should limit the "imposed by law" phrase to modifying the immediately preceding word in the list, *i.e.*, "taxes." . . . All three categories in the exclusion are limited to payments imposed by law. Our issue is whether these particular impositions of law were penalties as meant by the contract.

Id.

The court went on to apply *noscitur a sociis* to assist it in its construction of the word "penalties" in the referenced context. As described by the appellate court in *Flagship*, "[t]hat canon gives the meaning to one word in a group that will be consistent with the meaning of its companion words." *Id.* at 911. "[W]hen a list of words contains some whose generally accepted meanings have a commonality, then those associate words should limit a *single* word that has more varied meanings." *Id.* at 912 (emphasis added). Because fines and taxes imposed by law are, in essentially all circumstances, paid to a government, applying the canon led the court to ascribe the same limitation to the word "penalties" in the Indian Harbor policy. *Id.* at 911-12.

The qualifying phrase "*imposed by law*" is absent from the Homeland Policy. Therefore, even under the reasoning of the *Flagship* Court, it would be improper to apply the canon in these circumstances. This is true because, although taxes are typically levied by and paid to governments, it is axiomatic that both

fines and penalties can be imposed by and paid to private parties, as anyone who has been a member of a condominium or homeowners' association, negotiated a construction contract, or lost a secured key to leased premises would readily attest. Therefore, there is no *single word* in this series of three words in the Homeland Policy that has a more varied meaning than the others.

Moreover, both the trial and appellate courts in *Flagship* determined the meaning of the word "penalties" in the Indian Harbor policy in the same manner as the Superior Court—that is, by reference to Section 1247 of *Black's Law Dictionary*. *Id.* at 911; *Flagship Credit Corp. v. Indian Harbor Ins.* Co., 2011 WL 1638638, at *4 (S.D. TX Apr. 29, 2011). Both courts concluded, as did the Superior Court, that the statutory minimum damages imposed were penalties because they were not based on actual damages. *Flagship*, 481 Fed. Appx. at 912; *Flagship*, 2011 WL 1638638, at *4-5. "A statutory penalty is exactly what these damages were." *Flagship,* 481 Fed. Appx. at 912.

III. THE ATTORNEYS' FEES AWARDED TO CLASS COUNSEL FROM THE COMMON FUND ARE NOT A COVERED LOSS.

A. Question Presented

Whether the attorneys' fees paid by the plaintiff class to its counsel are covered under the Homeland Policy?

B. Scope of Review

The Supreme Court reviews a trial court's decision to grant summary judgment *de novo*. *Bermel v. Liberty Mut. Fire Ins. Co.,* 56 A.3d 1062 (Del. 2012); *LeVan v. Independence Mall, Inc.*, 940 A.2d 929, 932 (Del. 2007).

C. Merits of Argument

The attorneys' fees paid by the class from the common settlement fund are not a covered loss for at least three reasons. While the Superior Court relied on only one of these, each of them supports its holding.

1. The Attorneys' Fees Paid to Class Counsel Are Not Covered Because the Relief Sought by the Class Is Not Covered.

In its Opening Brief, CorVel argues that, "[e]ven if this Court concludes that damages under Section 2203.1(G) are a penalty, rather than statutory damages, CorVel's separate claim for attorneys' fees is nonetheless a covered Loss, . . ." (Op. Br. at 30.) But CorVel's coverage claim for attorneys' fees is not independent of its claim for penalties. Indeed that notion is directly contradicted by the language of the Homeland Policy. Section II(L) of the Homeland Policy provides

that "Loss shall include: (1) a claimant's attorney's fees and court costs, but only in an amount equal to the percentage that the amount of monetary damages covered under this Policy for any settlement or judgment bears to the total amount of such settlement or judgment . . ." (A0486 § II(L).) In other words, the Homeland Policy provides coverage for a claimant's attorneys' fees only if, and only to the extent, that the underlying claim is covered. It necessarily follows that, because the statutory remedies sought in the claim asserted by the Class are not covered by the Homeland Policy, so too the attorneys' fees incurred by the Class are not covered.

2. There Is No Coverage for the Attorneys' Fees Awarded by the Court from the Common Settlement Fund because the Class, Not CorVel, Was Legally Obligated to Pay Those Fees.

CorVel did not pay the attorneys' fees incurred by the plaintiffs' class. Moreover, CorVel is not now and never was legally obligated to pay those fees. The Order entered by the Louisiana Court on November 4, 2011, to which CorVel makes reference, establishes these facts beyond reasonable dispute. (*See* Op. Br. at 30; A1118.) In that Order, the Louisiana court granted the Petition for Common Benefit Attorneys' Fees and Expenses and awarded fees to class counsel in the amount of thirty-five percent of the common settlement fund, plus expenses. As CorVel acknowledges, "[e]ven though Section 2203.1(G) was the basis for the damages claim, the attorneys' fees ultimately awarded to class counsel *were not*

paid pursuant to the statute, but were awarded pursuant to the common fund doctrine." (Op. Br. at 30-31, emphasis added.) Applying the common fund doctrine, the Louisiana court required the class, for whose benefit the settlement fund was maintained, to pay its own attorneys' fees out of the settlement fund before the fund was distributed to class members.

The Homeland Policy covers "Loss which the Insured is legally obligated to pay as a result of any Claim . . ." (Op. Br. 11; A0484 § I(A).) The Homeland Policy further provides:

> "Loss" means . . . Defense Expenses and any monetary amount which an Insured is legally obligated to pay as a result of a claim.

(A0486 § II(L).) (emphasis omitted.)

Thus, the Homeland Policy only covers a claimant's attorneys' fees if one of its Insureds is legally obligated to pay them. Because CorVel was never so obligated, there is no coverage under the Homeland Policy for the fees and expenses paid by the class to class counsel.

3. The Attorneys' Fees Paid to the Class Are Not Covered Because They Are Penal in Nature.

The Superior Court has held that CorVel was not covered for the attorneys' fees incurred by the class without referencing the language of the Homeland Policy (providing coverage for such fees only to the extent the underlying settlement was covered), and without discussing whether CorVel was "legally obligated to pay"

such fees. Instead, persuaded by opinions by the *Bestcomp* court, by the Supreme Court of Louisiana and by several intermediate Louisiana appellate courts, the Superior Court determined such fees were not covered because, "the attorneys' fees are punitive in nature, under Louisiana law, and exist merely to discourage group purchasers from failing to provide adequate notice of PPO discounts to health care providers." (Op. Br., Ex. A at 47.) Even if Louisiana law did not view attorneys' fees awards generally as penal, however, Section 2203.1(G) specifically 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 attorney's fees to be determined by the court[.]" Thus, fee awards under Section 2203.1(G) are an integral portion of the remedy provided in the statute, and are inextricably intertwined with its other elements.

The Superior Court's holding regarding coverage for the class's attorneys' fees is also consistent with how the California courts, applying the same legal principles as the Delaware courts, have decided analogous cases. The California cases make it clear that coverage for payment of attorneys' fees cannot exist independently of coverage for the underlying claims. For coverage purposes, attorneys' fee awards assume the same character as the primary relief. *Health Net, Inc. v. RLI Ins. Co.,* 141 Cal. Rptr. 3d 649, 668-69 (Cal. Ct. App. 2012) ("if the

entire action alleges no covered wrongful act under the policy, coverage cannot be bootstrapped based solely on a claim for attorney's fees"). The insured in *Healthnet*, like CorVel here, argued that it was entitled to coverage for a fee award against it regardless of whether the underlying claims were covered. *Id.* at 654-56. The California Court of Appeals, expressly rejecting the *Hiscox* case on which CorVel relies in its Opening Brief at page 32, held that a "claim for attorney's fees is covered only to the extent it arises out of the covered wrongful acts." *Id.* at 669. Because the monetary award was not insurable, the attorneys' fees awarded were also not insurable.

The Superior Court's holding regarding attorneys' fees is also consistent with how other courts view the issue. *See, e.g., City of Sandusky, Ohio v. Coregis Ins. Co.*, 192 Fed. Appx. 355, 360 (6th Cir. 2006) (characterizing an attorneys' fee award as "parasitic to the success of other claims for relief").

Under governing principles of law, even if the policy language did not provide otherwise and even if CorVel had been legally obligated to pay the attorneys' fees incurred by the class, the attorneys' fees awarded to class counsel in this case are not covered because they are penal in nature, both under general Louisiana law and because, under the applicable law, they assume the overall penal nature of the remedy provided in Section 2203.1(G).

CONCLUSION

The scope of CorVel's appeal is limited to the June Order and is untimely. For that reason, Homeland renews its request that the Court dismiss the appeal. Assuming *arguendo* that this Court does have jurisdiction over this appeal, Homeland requests that the Court affirm the June Order because it correctly found that "penalties" and the attorneys' fees of the class are not covered under the Homeland Policy.

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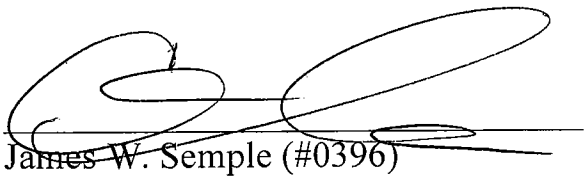

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