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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

APPELLANT'S CONSOLIDATED REPLY BRIEF

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Appellant CorVel Corporation submits this consolidated reply brief in response to Homeland Insurance Company of New York's answering brief ("HAB") and Executive Risk Specialty Insurance Company's answering brief ("EAB"), and in further support of CorVel's opening brief ("OB").

PRELIMINARY STATEMENT

After shopping for a Delaware forum, Homeland and Executive Risk got a split decision on the question whether claims for relief under La. Rev. Stat. 40:2203.1(G) constitute a covered loss, or an excluded penalty. In *Williams*, the Louisiana court correctly concluded that a Louisiana settlement of claims brought under a Louisiana statute was not an excluded penalty.[1] The Court below, presented with the *exact* same question, incorrectly reached the opposite result.

This Court should (again) reject Appellees' tactical argument to dismiss this appeal as untimely and decide the matter on the merits and reverse the Court below. The *Williams* Court correctly applied Louisiana statutory and Supreme Court precedent, as well as accepted insurance policy construction principles, to *narrowly* construe the penalty exclusion. The Court below disregarded these same authorities and misapplied these same construction principles to *broadly* construe the penalty exclusion causing inconsistent results. Even if the statutory remedy is an excluded penalty, attorneys' fees paid in the *Williams* Settlement are covered.

[1] A decision on Executive Risk's appeal of the *Williams* decision is expected very soon.

ARGUMENT

I. CORVEL TIMELY APPEALED FROM THE FINAL JUDGMENT

This Court properly denied Appellees' motions to dismiss. *See* Dkt. 17. The Superior Court's August 28, 2013, Order Closing Case On Docket (the "Order"), not its June 13, 2013, opinion (the "Opinion"), was the final judgment below. CorVel timely appealed, so this Court should reject Appellees' renewed attempt to dismiss and should decide this appeal on the merits.[2]

"[W]hether 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.' If the language of the judgment evidences the judge's intention that the judgment be final, then the judgment is final."[3] The Opinion merely provided:

> For the reasons stated herein, 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. Accordingly, Executive Risk's motion for summary judgment [on the issue of penalties] is GRANTED and Homeland's motion for partial summary judgment is GRANTED. IT IS SO ORDERED.

Op. at 48. This is not a final judgment.

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[2] This Court should reject Executive Risk's attempt to circumvent this Court's rule on page limits by "incorporat[ing] the arguments from its motion to dismiss the instant appeal and reply filed in this Court as well as Homeland's motion and reply." EAB at 13. *See Ploof v. State*, 75 A.3d 811, 823 & n.50 (Del. 2013) ("[I]ncorporating arguments by reference… allows parties to ignore clearly established page limitations…. [A]doption by reference amounts to a self-help increase in the length of the appellate brief."); *see also* Del. Supr. Ct. R. 14(b).

[3] *Plummer v. R.T. Vanderbilt Co.*, 49 A.3d 1163, 1167 (Del. 2012) (quoting *J.I. Kislak Mortgage Corp. v. William Matthews, Builder, Inc.*, 303 A.2d 648, 650 (Del. 1973)).

In *J.I. Kislak Mortgage Corp.*, this Court held a similar opinion was not a final judgment, which "after stating that summary judgment 'will be entered' in favor of the appellee ended with the sentence 'IT IS SO ORDERED.'" 303 A.2d at 649. "That phrase, 'IT IS ORDERED,' often precedes utterances that are not judgments at all." *In re Brown*, 484 F.3d 1116, 1121 (9th Cir. 2007). Here, the Opinion *never* ordered dismissal. Further, "an order that merely provides that the motion of the Defendant for summary judgment is now decided as follows: [t]he said motion is hereby granted" is not sufficiently "clear and unequivocal" to be a final judgment. *Id.* at 1121–22 (internal quotation marks omitted).[4] Granting a motion is simply not the same as entering judgment. A final judgment typically includes language such as "judgment is entered" or "the complaint is dismissed."[5]

[4] *Accord Diaz-Reyes v. Fuentes-Ortiz*, 471 F.3d 299, 301 (1st Cir. 2006) ("order did not purport to end the case, as it merely listed the claims that were dismissed"); *Rappaport v. U.S.*, 557 F.2d 605, 605–06 (7th Cir. 1977) ("memorandum decision concluding with 'Defendant's motion for summary judgment is granted'… is simply a ruling on a motion for summary judgment… to treat it as a judgment would just be stretching too far"); *Monarch Brewing Co. v. George J. Meyer Mfg. Co.*, 130 F.2d 582, 583 (9th Cir. 1942) ("[T]he order… was not intended as the rendition of a judgment in favor of the defendant. Instead the trial judge announced that he granted the defendant's [summary judgment] motion."). These federal authorities are persuasive because the requirement of a clear declaration of finality is the same under both Delaware Superior Court Civil Rule 58 and Federal Rule of Civil Procedure 58; the older federal authority is particularly helpful because it predates the federal rules' addition of the separate document requirement in 1963. *See U.S. v. Indrelunas*, 411 U.S. 216, 219–22 (1973).

[5] *See In re Brown*, 484 F.3d at 1121 ("Tellingly, the… entry did not order that 'judgment be entered'… or that Brown's case be 'dismissed with prejudice.' These are conspicuous omissions."); *see also Homemakers N. Shore, Inc. v. Bowen*, 823 F.2d 174 (7th Cir. 1987) ("This entry was preceded by the phrase 'judgment is entered as follows:'…."); *In re Forstner Chain Corp.*, 177 F.2d 572, 576 (1st Cir. 1949) ("Not infrequently,… there is tacked on at the end of an

The Order, unlike the Opinion, contains clear language of finality needed for a final judgment:

> The Court HEREBY FINDS that there are no issues which remain to be litigated in this action. Plaintiffs Homeland and Executive Risk do not have claims to pursue and no independent claims upon which relief can be granted have been asserted by Defendant CorVel.... NOW, THEREFORE, because there are no further claims or issues for trial or other adjudication, the Prothonotary is expressly directed to CLOSE THE DOCKET IN THIS CASE.[6]

Although Executive Risk concedes finality is determined by whether the judge clearly declared his intention that a judgment be final (EAB at 14), Appellees argue a judgment is final if it resolves all claims as to all parties. In support, Homeland cites *Showell Poultry, Inc. v. Delmarva Poultry Corp.*, 146 A.2d 794, 796 (Del. 1958), and Executive Risk cites Superior Court Civil Rule 54, but these authorities concern interlocutory appeals and partial judgments—not finality.[7] *Plummer* holds that the test for finality is "whether the judge has or has not clearly declared his intention in this respect." 49 A.3d at 1167. The Opinion merely granted Homeland's motion for *partial* summary judgment and Executive

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opinion a sentence in mandatory language such as: 'The complaint is dismissed.'… [T]his concluding sentence may be the final judgment,… [b]ut not necessarily so.").

[6] OB at Ex. B. *See Plummer*, 49 A.3d at 1167 (order stating "IT IS HEREBY ORDERED… the above captioned cases are hereby DISMISSED" was "clear on its face that it [was] a final order").

[7] *See Showell Poultry, Inc.*, 146 A.2d at 795–96 (explaining in interlocutory appeal "[i]f there is no finality of the decision… the right to review any step in the proceeding must be held in abeyance until the case has reached a stage when it may be reviewed in a single appeal involving the whole issue."); *compare* Del. Super. Ct. Civ. R. 54 (governing partial final judgments), *with* Del. Super. Ct. Civ. R. 58 (governing the entry of judgment).

Risk's motion for summary judgment *as to penalties*, but did not rule on CorVel's affirmative defenses—or anything else. The Order, not the Opinion, determined that all issues had been decided.[8] While dismissal language may make a judgment final, the mere phrase "IT IS SO ORDERED" cannot.[9]

Executive Risk argues the Opinion is the final judgment because declaratory judgments are self-executing. But that has nothing to do with whether the Court below clearly declared its final ruling when it construed certain policy terms.

CorVel is not "forum shopping." EAB at 13. Appellees, not CorVel, made a tactical filing in Delaware rather than litigating the underlying action to conclusion in Louisiana. And it is Appellees who seek to strip CorVel of its appellate rights by manufacturing a technical jurisdiction defect.[10] Nor does CorVel seek to make the Opinion the "first final judgment on these issues." EAB at 12. Rather, CorVel seeks an unappealable final judgment on coverage, here and in Louisiana.

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[8] *See* Order; Dkt. 114 ("Upon receipt [and] review of those responses [to the July 26, 2013, letter], the Court decided that there were no remaining issues to be tried....").

[9] *Compare Plummer*, 49 A.3d at 1167 (order that "the above captioned cases are hereby DISMISSED" is "clear on its face that it is a final order"), *with J.I. Kislak Mortgage Corp.*, 303 A.2d at 649 (opinion "stating that summary judgment 'will be entered' in favor of the appellee," but ending "IT IS SO ORDERED," is not a final judgment); *see In re Brown*, 484 F.3d at 1121 ("That phrase, 'IT IS ORDERED,' often precedes utterances that are not judgments at all…. [T]here must be *some* dispositive language sufficient to put the losing party on notice that his *entire* action—and not just a particular motion or proceeding within the action—is over and that his next step is to appeal.").

[10] Homeland incorrectly argues the *Williams* class moved for summary judgment in Louisiana after the Superior Court entered the Opinion. HAB at 23; *see also id.* at 2 n.2. The class moved for summary judgment on May 24, 2013—well before the June 13, 2013 Opinion. *See* OB, Ex. D at 1; *see also* B135 (*Williams* summary judgment motion filed May 24, 2013).

"The actions of all concerned"—the judge, the Prothonotary, and both sets of counsel—"clearly show that none of them understood the opinion to be the judge's final act or to constitute his final judgment in the case." *U.S. v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 235–36 (1958).[11] Indeed, the confusion that has arisen here is exactly why this Court requires a final judgment be "clear on its face that it is a final order." *Plummer*, 49 A.3d at 1167. "Lest litigants be misled about when their time to appeal begins to run, there must be some clear and unequivocal manifestation by the trial court of its belief that the decision made, so far as it is concerned, is the end of the case. Wherever the rules establish a time requirement that limits a litigant's ability to obtain relief from a final judgment, it is imperative that the district court provide a clear signal that the time period within which that relief can be sought has begun to run." *In re Brown*, 484 F.3d at 1122 (citation omitted) (internal quotation marks omitted).

[11] *See* Dkt. 96 (letter to counsel six weeks after the "memorandum opinion"—not judgment—asking if "claims [are] still pending in this litigation," whether to assign a trial date, and instructing the parties to "submit a *brief* statement identifying the claims it intends to present at trial"); Dkt. 104 (Aug. 29, 2013, order describing the Order as "closing the case on the docket," without mention of the Opinion); Dkt. 113 (Homeland acknowledging that, during a Sept. 12, 2013, teleconference, the Superior Court "stated that it was not the Court's intent, by its comments in the August 2[8] Order, to find that the time for CorVel to appeal the June Order had expired"); Dkt. 114 (Sept. 20, 2013, Order reiterating that court "issued a final order on August 2[8], 2013"). These orders reflect confusion whether the Opinion was final and are not a clear declaration of finality.

II. THE SUPERIOR COURT MISCONSTRUED, MISCHARACTERIZED AND MISLABELED THE LOUISIANA STATUTE

A. Statutory Language Controls

Homeland and Executive Risk focus incorrectly, as did the Court below, on the definition of "penalties" under the insurance policies. Of course, the insurance companies had ample opportunity to define "penalties" in their policies, but failed to do so. Now, they ask this Court to craft for them a broad definition of penalty from various sources, including dictionaries, Illinois law, California law, analogies to liquidated damages provisions, and inapposite authorities. The appropriate question now is not "what is a penalty?" (which apparently has many definitions and characteristics), but "whether the remedy available under Section 2203.1(G) is damages or a penalty?"

The Louisiana legislature answered that question when it defined the remedy under Section 2203.1(G) simply as "damages" and it was error for the Court below to violate Louisiana's statutory regime by substituting its common law-based judgment and statutory construction principles for that of a civil code-based legislature where labels matter very much. Tellingly, neither Homeland, nor Executive Risk, nor the Court below, addressed Louisiana's fundamental statutory construction principle that "[w]hen the wording of a Section [of the Code] is clear and free of ambiguity, the letter of it shall not be disregarded under the pretext of pursuing its spirit," La. Rev. Stat. 1:4, or that "[w]hen a law is clear and

unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature," La. Civ. Code art. 9. Indeed, to the extent there is any conflict between an insurance policy (excluding coverage for penalties) and a statute (that defines a remedy as damages, not a penalty), "policy language must yield to conflicting statutory law." *Roberts v. State Farm Mut. Auto. Ins. Co.*, 662 So.2d 821, 824 (La. Ct. App. 1995).

In *International Harvester Credit Corp. v. Seale*, 518 So.2d 1039 (La. 1998), which Appellees struggle to distinguish, the Louisiana Supreme Court held that clear legislative labels are of utmost importance when defining a statutory remedy as damages or a penalty. At issue in *Seale* was whether a statute required manufacturers to repurchase stock from dealers at full reimbursement value, or full reimbursement value *plus* a 100% penalty. The court held that penalty damages were not allowed unless expressly authorized by the statute, *id.* at 1041, and further held that "[h]istorically, when the legislature chooses to impose a penalty it does so in a clear and unequivocal manner. That is not the case here," *id.* at 1043. Instead of focusing on the holding in *Seale*, the insurance companies quote dicta in which the court stated it was "unable to find any… statute in which the legislature has not clearly shown its intent by either denoting the award as 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. In *Seale*, no language in the statute demonstrated a clear intent to provide a remedy more than the dealer's loss. Here, there is an express intent to award a remedy compensating health care providers for more than mere loss, so the last clause of the quoted section is inapposite, but that does not make the remedy *only* a penalty, it also makes it exemplary and punitive. *See* § II.B, *infra*.[12] The *Gunderson* and *Williams* courts found *Seale* controlling and both ruled in favor of coverage (OB at 19–21); this Court should do the same.

B. If the Remedy Under Section 2203.1(G) is an Excluded Penalty, it is Nevertheless Covered as Exemplary Damages

Homeland and Executive Risk made hash out of their insurance policies when they attempted to exclude penalties, but expressly covered exemplary and punitive damages. Their definitions of "penalty" (*i.e.*, imposing automatic liability in a predetermined amount exceeding actual loss without regard to actual damages suffered) (HAB at 15, 21–22; EAB at 18, 20) all apply equally to "exemplary"

[12] *See also Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network, Inc.*, 401 F.3d 876 (8th Cir. 2005) (affirming judgment imposing duty to defend against claims that damages of $500 per violation of the Telephone Consumer Protection Act (TCPA) were civil penalties not covered under E&O policy, but also holding damages had a punitive or deterrent effect and punitive damages were expressly covered); *Alea London Ltd. v. Am. Home Services, Inc*., 638 F.3d 768 (11th Cir. 2011) (holding trial court erred in concluding policy excluded coverage for TCPA treble damages); *Carey v. Emp'rs Mut. Cas. Co.*, 189 F.3d 414 (3d Cir. 1999) (statutory surcharges assessed against township supervisors were not penalties and were covered under E&O policy); *Terra Nova Ins. Co. v. Fray-Witzer*, 869 N.E.2d 565 (Mass. 2007) (damages under TCPA covered under E&O policy); *Exec. Risk Indem., Inc. v. CIGNA Corp.*, 976 A.2d 1170, 1174 (Pa. Super. 2009) (multiplied damages under RICO held covered by E&O policy).

damages, which also exceed a claimant's losses, but here are expressly covered. A0486; A0103. As one treatise commented:

> Most Louisiana statutes use the term "exemplary" rather than "punitive" damages. The two terms are used interchangeably in Louisiana jurisprudence although they have slightly different connotations. "Punitive" emphasizes the goal of punishment. "Exemplary" emphasizes the goal of making an example of the wrongdoer for purposes of education and deterrence.[13]

Accordingly, Louisiana courts define "exemplary" damages as "damages on an increased scale, awarded to the plaintiff over and above what will barely compensate him for his property loss… or else to punish the defendant for his evil behavior or to make an example of him…."[14] Exemplary damages can also be awarded pursuant to statute.[15]

> Numerous purposes for awarding exemplary damages have been given. Those most often mentioned are: (1) to punish the wrongdoer; and (2) to deter the kind of conduct involved by delivering a message to the wrongdoer, and generally to others in society, that severe financial consequences, beyond mere compensation of the victim for

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[13] John W. deGravelles & J. Neale deGravelles, *Louisiana Punitive Damages—A Conflict of Traditions*, 70 La. L. Rev. 579, 614 (2010) (citing James E. Bolin, Jr., *Enter Exemplary Damages*, 32 La. B.J. 216, 217 (1984)).

[14] *Sharp v. Daigre*, 545 So.2d 1063, 1064 (La. Ct. App. 1989) (quoting *Black's Law Dictionary* (5th ed.)), *aff'd*, 555 So.2d 1361 (1990); *see Indian Harbor Ins. Co. v. Bestcomp, Inc.*, C.A. No. 09-7327, 2010 WL 5471005, at *4 (E.D. La. Nov. 12, 2010), *aff'd*, 452 F. App'x 560 (5th Cir. 2011).

[15] *See Louviere v. Byers*, 526 So.2d 1253, 1257 (La. Ct. App. 1988) (exemplary damages under La. Civ. Code art. 2315.4 are insurable). *See also* EAB at 31; 6 *Del. C.* § 2003(b) (permitting Delaware courts to award exemplary damages for misappropriation of trade secrets); 6 *Del. C.* § 2533(c) (treble damages provision of deceptive trade practices act).

> actual losses sustained (i.e. "compensatory damages"), will flow from engaging in that conduct.[16]

The *Bestcomp* decision relied upon so heavily by the Court below and the insurance companies found that damages under Section 2203.1(G) were excluded as a penalty, but were also excluded because they were "exemplary," "punitive in nature," and "multipl[ied] awards." 2010 WL 5471005, at *4-6. The Court below and the insurance companies here all ignore that the fundamental difference between *Bestcomp* and this case is that CorVel paid for a policy *expressly covering* exemplary and punitive damages (Homeland and Executive Risk) and multiplied damages (Homeland). Therefore, if the remedy under Section 2203.1(G) is a penalty based on the factors identified by the insurance companies, then it must also be exemplary and/or punitive damages for those same reasons. This, of course, results in a remedy that is both covered and excluded. The only reading of the statute and the policies that results in a harmonious construction is that damages under Section 2203.1(G) are not penalties. *See* OB at 28-29.

C. Penalties are Typically Paid to the State, Not an Individual

The Court should reject the definitional analysis under *Landis v. Marc Realty*, 919 N.E.2d 300 (Ill. 2009), advanced by the Court below (Op. at 32) and

[16] *Sharp*, 545 So.2d at 1070 (quoting Bolin, 32 La. B.J. 216); *see Lou Fusz*, 401 F.3d at 881 (explaining that treble damages imposed for violation of TCPA were "at least in part, an incentive for private parties to enforce the Act…. Because the actual losses associated with individual violations of the Act are small, this added incentive is necessary").

Homeland (HAB at 15). *Landis* is not only inapposite in that it applies a Chicago landlord tenant code, it employs a definitional analysis *expressly rejected* by Delaware *and* Louisiana courts.

In *Staub v. Triangle Oil Co.*,[17] this Court held that a similar landlord tenant statute allowing an improperly evicted tenant to "recover treble damages sustained by him and costs of the suit," "is not a penal statute." "The test whether a law is penal… is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual."[18] Because the wrong at issue was to an individual (just as the wrong here is to individual healthcare providers), the statute imposing treble damages was held not to be a penalty.[19]

In *Whatley v. Love*,[20] the court similarly concluded a Louisiana rent-control act imposing treble damages was not a penalty under the same public/private analysis. "Penal laws… are those imposing punishment for an offense committed against the state…. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed

[17] 349 A.2d 209, 210 (Del. 1975).

[18] *Id.* (quoting *Huntington v. Attrill*, 146 U.S. 657 (1892)).

[19] *See Playtex Family Products, Inc. v. St. Paul Surplus Lines Ins. Co.*, 564 A.2d 681, 686 n.4 (Del. Super. Ct. 1989) (applying same public/private analysis and stating that a judgment is not penal, and therefore insurable, when it "assesses a penalty for the benefit of the person aggrieved, rather than the state at large" (quoting *Huntington*, 146 U.S. 657)).

[20] 13 So.2d 719 (La. Ct. App. 1943).

out that neither the liability imposed nor the remedy given is strictly penal." *Id.* at 722 (quoting *Huntington*, 146 U.S. 657).

Black's Law Dictionary similarly includes a definition of penalty as a remedy imposed by the state, *i.e.*, "imprisonment," or "a sum of money exacted as punishment for either a *wrong to the state* or a civil wrong." HAB at 15; EAB at 18; Op. at 30-31 (emphasis added).[21] Appellees offer no reason why the penalty definitions in *Staub* or *Whatley* should be rejected in favor of their definitions when the insurance companies failed to define the term. At a minimum, the case law and dictionary definitions indicate that more than one reasonable definition exists for "penalties" and highlight the problem with broadly construing these policy exclusions.

D. ***Flagship* is Highly Persuasive**

Homeland and Executive Risk try in vain to distinguish the holding in *Flagship Credit Corp. v. Indian Harbor Ins. Co.*, 481 F. App'x 907 (5th Cir. 2012), and its application of *noscitur a sociis* to construe "penalties" in context as amounts paid to governmental entities. *See* HAB at 25-29; EAB at 25-27.

[21] It is also improper to rely on a 2009 edition of a law dictionary (HAB at 15) to construe a policy term dated as of May 1999 (Executive Risk) (A0082) or June 2006 (Homeland) (A0486). The version of Black's Law Dictionary in existence when the Executive Risk policy was drafted was the sixth edition published in 1990, in which the first definition of "penalty" was "[a]n elastic term with many different shades of meaning; it involves idea of punishment, corporeal or pecuniary, or civil or criminal, although its meaning is generally confined to pecuniary punishment." *Black's Law Dictionary* (6th ed. 1990).

First, ambiguity is not required in order to apply *noscitur a sociis*. The insurance companies' own authorities confirm as such.[22] The doctrine is a useful tool when words have "doubtful" meaning. As shown above, the term "penalties" does not have one accepted meaning. Context, therefore, matters.

Second, the language "imposed by law" in the *Flagship* policy, which is not present here, is no help to Homeland. HAB at 27-28. There is no question that the remedy under Section 2203.1(G) is "imposed" by law. Just as fines and taxes are paid to government bodies, so are penalties. *See* § II.C. *supra.*

Third, the fact that the Executive Risk policy excludes "multiplied damages" (EAB at 27) does not change the analysis that "fines, penalties, [and] taxes" should be construed together as payments to the state. The policy in *Flagship* also excluded multiplied damages. Moreover, "multiplied damages" are expressly covered by the Homeland policy.

Finally, *Flagship* used *noscitur a sociis* as "a traditional means of *limiting* statutory or contract words from being given every conceivable meaning." 481 F. App'x at 912 (emphasis added). Here, the doctrine prevents Appellees from giving

[22] *See Butler v. Butler*, 222 A.2d 269, 271 (Del. 1966) ("The first pertinent rule… of Noscitur a sociis [is]… that the meaning of doubtful words or phrases may be determined by reference to their association with other associated words and phrases.") (HAB at 25); *Brooks v. Cty. of Santa Clara*, 236 Cal. Rptr. 509, 514 (Cal. App. Ct. 1987) (applying *noscitur a sociis* "when the clear meaning of the words used… is doubtful") (EAB at 26); *cf.* La. Civ. Code art. 12 ("When the words of a law are ambiguous, their meaning must be sought by examining the context in which they occur and the text of the law as a whole.").

the term "penalties" too broad a meaning. Of course, when construing an exclusionary clause in an insurance policy, terms are to be given a narrow reading, not the most expansive reading possible. *See* OB § II; *infra* § III. The courts in *Gunderson* (A0987) and *Williams* (OB Ex. D) both reached the same result for the same reason.

E. Louisiana Law Applies to the Interpretation of the Statute, and Delaware Law Applies to the Interpretation of the Policies

The Court below properly applied Louisiana law when interpreting the statute and Delaware law when construing the policies. Op. at 22.[23] The *Williams* Court also correctly applied Louisiana law. *See* OB Ex. D. Despite Executive Risk's curious suggestion that it should apply here, *see* EAB at 17, California law construing (California) statutes gives no guidance when construing coverage for a Louisiana settlement of claims arising under a Louisiana statute.

[23] The parties agree that there is no actual conflict between relevant California and Delaware law, *see* HAB at 13–14; EAB at 16–17, so "the Court should avoid the choice-of-law analysis altogether," *Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156, 1161 (Del. 2010). Accordingly, there is no reason to disturb the Superior Court's decision to apply Delaware law when construing the policies.

III. THE SUPERIOR COURT MISAPPLIED FUNDAMENTAL POLICY CONSTRUCTION PRINCIPLES TO THE PENALTY EXCLUSION

Appellees concede exclusions must be clear and narrowly applied. EAB at 29; HAB at 14. Unless the policies *unambiguously* exclude coverage, a court must construe the policies to afford coverage. *See* OB at 25. The Court below violated fundamental construction principles by broadly construing an exclusion and interpreting "penalties" to include essentially all non-compensatory damages. This is the very *opposite* of the narrow construction required for policy exclusions. Stated differently, when faced with multiple definitions of "penalties," *see* § II *supra*, the Court below should have adopted a narrow construction, not the broadest. Indeed, the Court below did not even consider how to harmonize its broad construction of the penalty exclusion with express coverage for punitive, exemplary, and multiplied damages.

If "penalties" encompass remedies "penal in nature" (Op. at 35-36), "automatic, or mandatory" (*id.* at 33), that "more than compensate[] an injured party for losses" (*id.* at 41)—as well as punitive, exemplary, multiple, or non-compensatory damages, then the contract terms lose meaning. In short, reading "penalties" to exclude from "Loss" anything that does not purely compensate for actual harm suffered would render other provisions in the policy superfluous. The Court should reject such a reading and reverse the summary judgment ruling.

IV. THE ATTORNEYS' FEE AWARD IN THE SETTLEMENT WAS A LOSS, AND WAS NOT AN EXCLUDED PENALTY

There is no policy exclusion for attorneys' fees. Nor do Appellees contend that if the Settlement is covered, that attorneys' fees are excluded. Of course, it would have been simple enough to exclude attorneys' fee awards had the insurance companies so intended. But even if the statutory remedy were a penalty, the attorneys' fees remain a monetary amount that the insured was legally obligated to pay and is a covered Loss.

The Superior Court properly applied Louisiana law, and not California law, to the question of coverage for attorneys' fees (Op. at 47) because class plaintiffs sought attorneys' fees under a Louisiana statute and payment of attorneys' fees was ordered by a Louisiana court under the common fund doctrine pursuant to a Louisiana settlement. *See* EAB at 33-34. Accordingly, *Health Net, Inc. v. RLI Ins. Co.*, 141 Cal. Rptr. 3d 649 (Cal. App. 2012), is inapplicable.

Homeland contends attorneys' fees are covered under its policy, but only in an amount equal to the percentage that a covered settlement bears to the entire settlement. HAB at 31-32. Executive Risk's policy is different and contains no such restriction, but Executive Risk argues attorneys' fees cannot be a covered loss because the entitlement to fees is defined by the primary relief. EAB at 33-34. Nothing under the Executive Risk policy, however, provides that attorneys' fees

are only covered if the related claim is also covered.[24] Indeed, Executive Risk avoids the fact that "Loss" expressly includes "Defense Expenses," which are "reasonable legal fees and expenses incurred [i]n the… adjustment… of a Claim…." A0485 at § II(F).[25]

CorVel could not simply refuse to pay the attorneys' fee portion of the Settlement; it was legally obligated to pay those funds. In fact, the insurers and the Court below fail to explain how attorneys' fees payable under a statute, or from a common fund, are not an amount the insured is legally obligated to pay. Further, to the extent any portion of CorVel's Loss is not covered (*i.e.*, penalties), another portion of that Loss may nevertheless be covered (*i.e.*, attorneys' fees).[26] There is nothing unusual about covering part of a loss.

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[24] *See UnitedHealth Group, Inc. v. Hiscox Dedicated Corp. Member Ltd.*, C.A. No. 09-cv-00210 (PJS/SRN), 2010 WL 550991, at *10 (D. Minn. Feb. 9, 2010) ("*Hiscox*") ("If a court then orders United to pay the fees of the plaintiff's attorney, that award represents 'Damages'—that is, 'a [ ] monetary amount... which an Insured is legally obligated to pay as a result of a Claim.' The same is true if United's obligation to pay the fees arises out of a settlement rather than a court order.").

[25] *See XL Specialty Ins. Co. v. Loral Space & Commc'ns, Inc.*, 82 A.D.3d 108 (N.Y. App. Div. 2011) (holding that attorneys' fees insured had to pay to plaintiffs' counsel in derivative settlement were covered damages); *Sokolowski on Behalf of M.M. & P. Pension Plan v. Aetna Life & Cas. Co.*, 670 F. Supp. 1199, 1210 (S.D.N.Y. 1987) (holding that "all sums which the Insured shall become legally obligated to pay as damages" included attorneys' fees ultimately awarded to class plaintiffs). The same is true even under California law. *See Safeway Stores, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 64 F.3d 1282, 1289 (9th Cir. 1995) (attorneys' fees in a derivative suit constituted covered loss).

[26] *See Hiscox*, 2010 WL 550991, at *11 ("The fact that most of a settlement is attributable to uncovered claims does not mean that the insured cannot seek indemnification for a portion of the settlement that is attributable to covered claims."); *see also Rosen v. United Services Auto. Ass'n*, 104 So.3d 633 (La. Ct. App. 2012); *Playtex v. Columbia*, C.A. No. 88C-

Further, to the extent statutory attorneys' fee awards are penal or "punitive in nature" (HAB at 32-33; Op. at 47), they are *expressly covered*, not excluded. *See* OB at 31-32. Equating attorneys' fees with penalties *improperly expands* the exclusion in violation of fundamental policy construction principles, and results in a logical inconsistency such that attorneys' fees are covered if they are "Defense Expenses," but excluded if they are *like* penalties. *See* A0081.

In the end, the Superior Court's reasoning was not based on the policy language, which gives rise to the error. Instead, the Superior Court looked to *Bestcomp*, which concluded, under a *very different* insurance policy that expressly excluded punitive and exemplary damages, that "attorneys' fees are *punitive in nature*." Op. at 47 (emphasis added). Fees awarded from a common fund are simply not punitive. But, to the extent any portion of the *Williams* Settlement is punitive or exemplary, it should have been covered, not excluded.

Most significantly, this issue is easy to resolve because in the context of insurance coverage, there must be coverage unless the policy unambiguously excludes some portion of coverage. Here, the Homeland policy only limits coverage for fees to the extent there is coverage for damages, while the Executive Risk policy has no such exclusion.

MR-233, 1991 WL 138374, at *1 (Del. Super. Ct. July 9, 1991) ("[T]he Court will allocate covered and uncovered portions of the settlement by excluding any portion of the settlement determined to be for [uncovered] punitive damages.").

CONCLUSION

For the reasons herein, and in CorVel's opening brief, CorVel requests that this Court reverse the judgment of the Superior Court and enter judgment in favor of CorVel on the issues of "penalty" and coverage for attorneys' fees.

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