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IN THE

Supreme Court of the State of Delaware

THE FIRST HEALTH SETTLEMENT CLASS, *Defendant Below, Appellant,* v. **CHARTIS SPECIALTY INSURANCE COMPANY,** *Nominal Defendant Below, Appellee.*	:	No. 498, 2013 On Appeal from C.A. No. 09C-09-027-ALR in the Superior Court of the State of Delaware in and for New Castle County

APPELLEE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

The First Health Settlement Class (the "Plaintiffs") failed to perfect an appeal challenging the proper grant of summary judgment in favor of Chartis Specialty Insurance Company ("CSIC"). The court below held there is no coverage under a Managed Care Organizations Errors and Omissions Policy issued by CSIC for the settlement negotiated by the insured, First Health Group Corp. ("First Health"), for its violation of a Louisiana statute. The CSIC policy specifically does not include "fines, penalties or multiplied damages" in the definition of "Loss." The court below found that First Health's liability was for an uncovered penalty because it was not connected to any actual losses suffered by the Plaintiffs. The trial court also held that the Plaintiffs' payment of their attorneys out of the settlement was not independently covered under the policy because First Health had no legal obligation to pay the fees.

Despite the reasoned order, Plaintiffs filed a motion to reconsider or amend the lower court's judgment. During the pendency of the motion to reconsider, the Plaintiffs filed this appeal. Because the rehearing motion was still pending, the Plaintiffs' appeal notice was premature. After the Court denied the motion to reconsider, the Plaintiffs merely amended their premature notice, and did not file a new notice of appeal. Therefore, the Plaintiffs did not file a timely notice of appeal.

SUMMARY OF ARGUMENT

I. The Plaintiffs did not perfect their appeal because the notice of appeal was not filed timely. The Plaintiffs admit that they prematurely filed a notice of appeal before their post-judgment motion was denied. Thereafter, the Plaintiffs simply filed an amendment to their defective notice of appeal. The Plaintiffs' appeal fails because the amended notice relates back to the original premature defective notice. Amending the defective notice does not render the notice proper or timely. Therefore, Plaintiffs failed to file a timely notice of appeal after the final order.

II. CSIC denies that the court below erred in granting it summary judgment:

1. The court below correctly determined that First Health's liability under the Louisiana statute was for "penalties," which the Policy specifically states is not a "Loss." The court correctly found, based on applicable authority, including authority Plaintiffs cite, that the description of a statutory remedy as "damages" is not dispositive. In fact, the Plaintiffs and the trial and appellate courts in the underlying litigation specifically referred to the payments as "penalties." Furthermore, the Plaintiffs' argument is off-base given that the real issue is whether there is "Loss" under the CSIC policy. The court relied on clear precedent finding that a "penalty" is an award not compensating a claimant for the

actual amount of the loss. In this case, where the award was $261 million and the actual damages were only $20 million, the court below correctly found that the statute at issue imposed "penalties."

2. The Plaintiffs have waived any argument that the term "penalties" is ambiguous, and have also failed to meet their burden on that argument. The Plaintiffs waived the argument because they failed to raise the matter in the underlying summary judgment motion. A new issue cannot be raised in an appellate brief. Contrary to the Plaintiffs' assertion, Plaintiffs have the burden to prove that the award is not a "penalty" to implicate coverage under the insuring agreement. Furthermore, Plaintiffs' main ambiguity argument, which rests on the fact that the term "penalty" is undefined, has no merit. They cite no case law. In actuality, there is substantial precedent that an undefined term is not *per se* ambiguous. Rather an undefined term is interpreted applying the reasonable person standard. Delaware law holds that a court should consult dictionary definitions to interpret an undefined term. The court below did exactly as the law required and correctly held that "penalties" plainly means sums awarded for violating a statute, without regard to actual losses. Plaintiffs' argument that the policy as a whole is ambiguous because it covers punitive damages is unpersuasive. Punitive damages and penalties are treated differently under both the law and the policy. Penalties are only covered when awarded in antitrust

claims, which are not at issue here. Plaintiffs omit language from the policy's "Loss" definition, and ignore the whole definition in an attempt to create an ambiguity that does not exist. One cannot omit language in order to create coverage.

3. The court below correctly held that the Plaintiffs' payment of their attorneys out of First Health's settlement for its penalty liability was not an independently covered "Loss." First Health was never legally obligated to pay any attorneys' fees. Instead, the Plaintiffs diverted a large percentage of the settlement to their attorneys under the "common fund" doctrine. In so doing, the Plaintiffs abandoned any direct claim for those fees against First Health, and negated any potential that the fees were a sum First Health was legally obligated to pay. Further, any award of fees under the statute, just like the $261 million judgment, would have been a "penalty."

COUNTERSTATEMENT OF FACTS

A. The Parties

The Plaintiffs are a group of Louisiana medical service providers who contracted with non-party First Health to accept discounted reimbursements for medical services rendered to workers compensation patients. (A0487) First Health is a provider of medical service plans, including PPO networks. (*Id.*) First Health settled its Louisiana statutory liability to the Plaintiffs, and assigned their rights to any insurance coverage for that settlement to the Plaintiffs. CSIC issued an excess policy to First Health. (A0439-51; A0488)

B. The Policy

The CSIC excess policy (the "Policy") follows form to First Health's primary Managed Care Organization Errors & Omissions Policy. The CSIC policy covers "Loss" that the insured is "legally obligated to pay." Specifically, the policy provides:

> The Underwriter will pay on behalf of any 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...(A0340)

The Policy specifically states that "penalties" are not included in the definition of "Loss":

> (J) "Loss" means Defense Expenses and any monetary amount which an Insured is legally obligated to pay as a result of a Claim. Loss shall include, up to the amount listed in ITEM 3(b) of the Declarations (which sum shall be part of and not in

addition to the Limit of Liability stated in ITEM 3(a) of the Declarations), and fines assessed, penalties imposed, or punitive, exemplary or multiplied damages awarded in Claims for Antitrust Activity, but only if such fines, penalties or punitive, exemplary or multiplied damages are insurable under applicable law. This paragraph shall be 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; (A0342; A0366).

C. The Underlying Action Against First Health

1. Plaintiffs received a statutory award of $261 million.

Louisiana's Any Willing Provider Act (the "Act") provides that discounts on medical services are invalid unless notice is given prior to service. (A0489; *See* La. R.S. 40:2203.1(B)) A provider who does not receive notice under the statute is entitled to a $2,000 minimum award:

> ...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 attorney fees to be determined by the court...

(A0489; *See* La. R.S. 40:2203.1(G)) The Plaintiffs sued First Health and others[1] for violating the Act in Louisiana state court, in *Gunderson v. F.A. Richard &*

[1] The Plaintiffs note that other defendants in the Louisiana Action, AIG Claims Services, Inc. ("AIGCS") and F.A. Richard & Associates ("FARA"), settled early. AIGCS and FARA are not affiliated with First Health, are not insureds under the Policy, and were not parties to this coverage action. Thus, the settlements are irrelevant to the question of coverage under the CSIC Policy.

Assoc., No. 2004-2417 (14th Judicial District Court, Parish of Calcasieu, La.) (the "Louisiana Action") (A0537-55). In its complaint, the Plaintiffs alleged that the violation entitled them to recover "penalties" against First Health:[2]

- "Section G. of La. R.S. 40:2203.1 provides for mandatory penalties..." (A0544 ¶ IX);
- If First Health "has violated La. R.S. 40:2203.1, then the Plaintiff Plaintiffs would be entitled to injunctive relief and penalties..." (A0546 ¶ XIII.C);
- "The petitioners and Plaintiffs members seek to receive penalties under La. R.S. 40:2203.1(G) for the loss they have suffered..." (A0547 ¶ XIII.I);
- "As a result of their violations of La. R.S. 40:2203(B), the members of the Group Purchaser Defendant Plaintiffs are liable for penalties..." (A0549 ¶ XX);
- "...each member of the Group Purchaser Defendant Plaintiffs is individually, jointly, and severally liable for all penalties under La. R.S. 40:2203.1(G)." (A0550 ¶ XXIII).

The Plaintiffs moved for partial summary judgment in the Louisiana Action based on the undisputed fact that First Health had violated the Act. (A0630) In support, the Plaintiffs presented evidence that 130,931 of the Plaintiffs' bills had been discounted without notice. (A0491; A0665-74) After multiplying the number of bills, 130,931, by the $2,000 minimum per-violation award, the court entered judgment against First Health in the amount of $261,862,000. (A0231)

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[2] The Plaintiffs also filed 15,000 separate actions against First Health's payors for reimbursement of the discounts under Louisiana's workers compensation system. (A0571-72)

First Health appealed the judgment against it to the Louisiana Court of Appeal, which affirmed. *See Gunderson v. F.A. Richard & Assoc.*, 44 So. 3d 779 (La. Ct. App. 2010). In affirming the judgment, the Court of Appeal twice referred to the awards as a "penalty." *Id.* at 789-90.

2. First Health settles the $261 million judgment for $150.5 million plus an assignment of its rights under the Policy.

While its petition for leave to appeal to the Louisiana Supreme Court was pending, First Health settled with the Plaintiffs. (A0233-310) First Health agreed to pay the Plaintiffs $150.5 million and assign its insurance rights. (A0257; A0260-63) The court approved the settlement. (A0313-35) Later, in a separate order, the court approved the Plaintiffs' request to disburse 35% of the $150.5 million settlement fund -- $52.5 million -- to its attorneys. (A0312)

D. The Coverage Action

First Health's primary insurer filed this coverage action, seeking a declaration of no coverage under its Managed Care Organization Errors and Omissions Policy. (B1) First Health cross-claimed against CSIC, demanding coverage under the Policy. (A0967) The Plaintiffs joined as a party defendant and adopted First Health's pleadings. (A0071; B16) The Plaintiffs and CSIC then filed summary judgment motions regarding whether First Health's $150.5 million settlement comprised uncovered "fines, penalties, or multiplied damages."

(A0055; A0057; A0060; A0477) Both the Plaintiffs and CSIC acknowledged in their briefs that Delaware law applied. (A0075-77; A0496)

The court below found no conflict among applicable laws, and agreed that Delaware law applies. (Br. Ex. A at 15) The court held that the term "penalty" has a plain meaning as: 1) an automatic liability, 2) for a predetermined amount, 3) imposed without regard to a claimant's actual damages. (*Id.* at 20) First Health's liability under the Act, the court below held, met all three criteria. (*Id.* at 19-23) The court first held that because liability under the Act required an automatic minimum of $2,000 per violation award, the first two elements of the plain meaning for a "penalty" were satisfied. (*Id.* at 22) As to the third element, the court found this element was met based on record evidence showing that the Plaintiffs' actual losses were approximately $20 million, whereas the Act allowed for a total penalty of $261 million. (*Id.*)

The court below noted that other courts – including *Indian Harbor Ins. Co. v. Bestcomp*, No. 09-7327, 2010 WL 5471005 at *6 (E.D. La. Nov. 12, 2010) – had concluded that the sums awardable under the Act comprise a "penalty" under an insurance policy. (*Id.* at 23-25) The court below rejected as unpersuasive a bench ruling by the court in the Louisiana Action that the Act did not award "penalties." (*Id.* at 27-30) The court below noted that both the Plaintiffs and numerous Louisiana courts had referred to the sums awardable under the Act as a "penalty."

(*Id.* at 25-27) The court below also appropriately rejected the Plaintiffs' unsupported argument that the Act's description of the awards as "damages" was controlling. (*Id.* at 25-26) Examining the legislative history, the court found no clear intent for the Act to award "damages." (*Id.* at 27)

For these multiple reasons, the court below concluded that First Health was liable under the Act for an uncovered "penalty." (*Id.* at 30-31) Likewise, the court below soundly rejected the Plaintiffs' argument that the attorneys' fees paid out of First Health's $150.5 million settlement comprised an independently covered "Loss." (*Id.* at 34-38) Because no portion of the settlement was allocated to fees, the court found that First Health never became liable to pay those fees as "Loss." (*Id.* at 38) In addition, the court concluded that any fees awardable under the Act would have comprised an uncovered "penalty," just like the $261 million award. (*Id.*)

E. The Plaintiffs Failed to File a Timely Notice of Appeal .

The court below entered final judgment on August 23, 2013. (Br. Ex. C) On September 3, 2013, the Plaintiffs filed a motion to reconsider or amend under Superior Court Civil Rules 59(d) and 60(b)(6). (A1185) The Plaintiffs filed their Notice of Appeal on September 20, 2013. (B17) The court below denied the Plaintiffs' Rule 59 and 60 motion on September 25, 2013. (A1206) On October 3, 2013, the Plaintiffs filed an Amended Notice of Appeal. (B68)

ARGUMENT

I. THE APPEAL IS NOT PROPERLY BEFORE THE COURT AND SHOULD BE DISMISSED.

A. Question Presented

Whether the appeal is properly before the Court when the Plaintiffs only amended a premature notice and did not file a timely notice of appeal.

B. Scope of Review

As the Court must determine its own jurisdiction, there is no scope of review. 10 DEL. C. § 148; DEL. SUPR. CT. RULE 6(a)(i).

C. Merits of Argument

The Plaintiffs' appeal fails because it was not properly noticed. The Plaintiffs admit that their initial notice of appeal on September 23, 2013 was premature because their post-judgment motion was still pending. (B18, n.1; *see also Tomasetti v. Wilmington Sav. Fund Soc'y*, 672 A.2d 61, 63 (Del. 1996) (notice of appeal filed before resolution of Rule 59 motion is premature)) After the court below resolved that motion in a September 25, 2013 final order, the Plaintiffs did not file a new notice of appeal. Instead, the Plaintiffs merely amended their initial defective notice. This amended notice of appeal simply related back to and amended the initial improper notice. Therefore, Plaintiffs did not file a proper timely notice after final judgment sufficient to preserve an appeal. *See, e.g., McElroy v. Shell Petroleum, Inc.*, No. 311, 1992 WL 279112 (Del. Sept. 2, 1992).

McElroy is directly on point. There, the trial court issued a final order on June 18, 1992, and the defendant filed a timely Rule 59 motion. On July 15, 1992, while the Rule 59 motion was pending, the defendant filed a notice of appeal. On July 23, 1992, the Court directed appellants to amend their notice of appeal to comply with Supreme Court Rule 7. Between June 25 and July 29, 1992, the trial court denied the Rule 59 motion. The defendant filed an amended notice on July 29, 1992, under the same appeal number. Finding that the amended notice related back to the initial premature notice, this Court dismissed the appeal involving the July 15 and the July 29, 1992 notices. The *McElroy* appellants avoided dismissal only by filing a separate, timely notice of appeal on August 19, 1992. *Id.* at *2.

Unlike the *McElroy* appellants, the Plaintiffs did not file a new notice of appeal after the trial court's final order. Thus, this Court should reach the same result it reached in *McElroy* and find that the Plaintiffs' amended notice on October 3, 2013 was insufficient. The appeal should be dismissed.

II. THE COURT BELOW CORRECTLY FOUND THAT FIRST HEALTH'S LIABILITY UNDER THE LOUISIANA STATUTE WAS A "PENALTY" AND THERFORE NOT A COVERED "LOSS."

A. Question Presented

Whether the court below correctly held that First Health's liability under the Any Willing Provider Act (the "Act") was for "fines, penalties, or multiplied damages" that do not qualify as "Loss" under the Policy.

B. Scope of Review

CSIC agrees that review of a summary judgment decision is *de novo*. *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 191 (Del. 2009).

C. Merits of Argument

1. The Plaintiffs' own authority establishes that the use of the word "damages" in a statute does not control. (Br. 13-15)

Significantly, the Plaintiffs waived any argument that Louisiana law applies by conceding below that Delaware law applies. Issues not raised in the trial court shall not be heard on appeal. *Wilmington Trust Co. v. Conner*, 415 A.2d 773, 781 (Del. 1980). Here, the parties agreed in their summary judgment papers below that Delaware law governed the issue of coverage under the Policy. (Br. Ex. A, Op. at 15) The Plaintiffs' assertion now that the trial court should have applied Louisiana law to determine whether the Act fits the plain meaning of "penalties" is waived.

Nonetheless, examining the Plaintiffs' citation of Louisiana law supports the decision by the trial court below that there are no damages. The Plaintiffs' own

authority contradicts its erroneous argument that the use of the word "damages" in the Act is controlling. In *International Harvester Credit Corp. v. Seale*, 518 So. 2d 1039, 1041 (La. 1988), the Louisiana Supreme Court held that the legislature can evidence its intent to impose a penalty under a statute not only by "modifying the term 'damages' with such language as 'punitive' or 'exemplary,'" but also by "specifically awarding an amount in excess of the claimant's losses." *Id.* at 1042. The Plaintiffs quote only the first half of this holding, and fail to address the "amount in excess of losses" discussion in the *Seale* opinion. *Seale* undermines rather than supports the Plaintiffs' position that the use of the word "damages" is controlling. The *Seale* court specifically left open the possibility that statutory damages could be awarded as a penalty if the award exceeds the claimant's losses. Significantly, the Court did not rotely find that all statutory awards are "damages" based on the statute's use of that word, as Plaintiffs now advocate.

The ruling by the trial court in this case is consistent with *Seale*. The court below evaluated whether the Act imposes "penalties" by considering that First Health's liability under the Act exceeds the Plaintiffs' actual losses. (Br. Ex. A, Op. at 20-22, citing BLACK'S LAW DICTIONARY 1247 (9th ed.), *Landis v. Marc Realty, L.L.C.*, 919 N.E.2d 300 (Ill. 2009)). The court below correctly recognized that a medical provider who does not receive proper notice of a discount is guaranteed a recovery under the Act far greater than the amount of that discount.

Specifically, the provider gets the greater of: $50 per day; $2,000 per violation; or twice the fair market value of the services provided, not just twice the discount. La. R.S. § 40:2203.1(G). Here, the Plaintiffs' actual losses due to First Health's violation of the Act were comprised of the total value of the improper discounts, which was approximately $20 million. The Act allowed an award of $261 million. Under the *Seale* rationale, as the court below held, First Health's liability under the Act was a "penalty" because the $261 million judgment was an amount over ten times Plaintiffs' $20 million actual losses, for which Plaintiffs separately sought reimbursement through the worker compensation procedures.

Numerous authorities support the conclusion of both the *Seale* court and the court below that awards labeled "damages" can constitute "penalties." For example, Black's Law Dictionary recognizes that the nature of the award, rather than its nomenclature, is controlling:

> Finally, it is to be noted that the mere use of the words "liquidated damages" is not decisive, for it is the task of the Court and not of the parties to decide the true nature of the sum payable.

DAMAGES, BLACK'S LAW DICTIONARY (9th ed. 2009); *see also Olsen v. Siddiqi*, No. ED 97455, 2012 WL 1699322, at *3 (Mo. Ct. App. May 9, 2012) ("[w]here the sum given by the statute is called damages by it, the fact will not prevent it being a penalty..., if such is its real nature").

Likewise, the *Bestcomp* court concluded that the Act at issue here imposed a "penalty" because the awards allowable under the Act "more than compensate [a medical provider] for loss incurred due to lack of notice" and "bear[] no correlation to the amount of the discount" taken. *Bestcomp*, 2010 WL 5471005 at *5. Similarly, in *Landis*, a statute mandated that tenants be awarded two times their security deposit plus interest if the deposit was not timely returned, but described the remedy as "damages." The Illinois Supreme Court ignored the word "damages," and evaluated the nature of the award. The court concluded that the statute imposed a "penalty" because liability was automatic and awarded under a formula not connected to actual damages. *Landis*, 919 N.E.2d at 307. Other than misquoting *Seale*, the Plaintiffs provide no authority establishing that the use of the word "damages" in the Act is dispositive, or that the rationale of *Landis*, *Bestcomp* or the court below is incorrect.

The Plaintiffs' vague suggestion that language in insurance policies issued by other insurers, not at issue here, might somehow address "statutory damages" differently is both waived and irrelevant. The Plaintiffs did not raise below the issue of other insurer policy language, thus waiving it on appeal.[3] *Conner*, 415

[3] The two cases cited by the Plaintiffs – *Capitol Indem., Inc. v. Brown*, 581 S.E.2d 339, 341 (Ga. Ct. App. 2003) and *Capitol Indem. Corp. v. Elston Self Service Wholesale Groceries, Inc.*, 551 F. Supp. 2d 711, 729-30 (N.D. Ill. 2008) – do not specifically address or interpret "statutory damages" exclusions and thus do not support the Plaintiffs' argument.

A.2d at 781 (holding issues not raised below are waived on appeal). Regardless, the fact that other insurance policies not issued by CSIC might exclude "statutory damages" is irrelevant. *Cf. O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 289 (Del. 2001) (holding that extrinsic evidence is not to be used where policy language is plain and clear on its face). All that matters is whether the sums awardable under the Act fall within the plain meaning of "penalties" under the CSIC Policy, which they do.

2. *Gunderson* is not controlling because CSIC was not a party to that case, and is not persuasive. (Br. 15-18)

The two trial court opinions cited by the Plaintiffs – *Gunderson* and *Williams* – are neither controlling nor persuasive. First, the Plaintiffs fail to establish that *Gunderson* and *Williams* would be *res judicata*, collateral estoppel, or law of the case, as CSIC was indisputably not a party to those actions. (Br. 16-17) The core notion of all three doctrines is that the same issue has already been litigated by the same parties. *Cf. LaPoint*, 970 A.2d at 192 (holding *res judicata* bars re-litigation of issues raised and decided in a prior suit). Because CSIC was not a party, both *Gunderson* nor *Williams* have no preclusive effect in this case.

Moreover, both *Gunderson* and *Williams* apply inapplicable Louisiana law and are inconsistent with Louisiana appellate decisions on the same issue. Both trial court decisions are contradicted by the Louisiana Supreme Court's holding in *Seale* that a description of statutory amounts as "damages" does not control

whether they are "penalties." The *Gunderson* and *Williams* trial court decisions are also inconsistent with numerous Louisiana appellate court decisions that refer to the sums awardable under the Act as "penalties." In the course of affirming the summary judgment for the Plaintiffs, the Louisiana Court of Appeal characterized the sums awardable under the Act as a "penalty." *Gunderson*, 44 So. 3d at 789 (rejecting First Health's argument that comparative fault applied and noting that no authority holds that "comparative fault principals [sic] can be applied to a penalty for a statutory violation"). In other appeals of the Louisiana Action, the appellate court referred to the Act's remedy as a "penalty" more than a dozen additional times. *See Gunderson v. F.A. Richard & Assoc.*, 977 So. 2d 1128, 1132, 1137-38 (La. Ct. App. 2008); *Gunderson v. F.A. Richard & Assoc.*, 40 So. 3d 418, 419 (La. Ct. App. 2010) ("In addition to the penalties provided by La. R.S. 40:2203.1(G)…").

Other Louisiana appellate court cases have also referred to the remedy for violating the Act as a "penalty." *See, e.g., Central La. Ambulatory Surgical Ctr. v. Rapides Parish School Bd.*, 68 So. 3d 1041, 1045 (La. Ct. App. 2010); *Touro Infirmary v. Am. Maritime Officer*, 24 So. 3d 948, 956 (La. Ct. App. 2009). Louisiana federal courts are also unanimous in characterizing the awards available under the Act as "penalties." *See, e.g., Gray Ins. Co. v. Concentra Integrated Servs., Inc.*, No. 09-399, 2010 WL 5298763, at *1, n.4 (M.D. La. Aug. 24, 2010)

("[a] violation of [the Act] carries a statutory penalty"); *Liberty Mut. Ins. Co. v. Gunderson*, No. 04-2405, 2009 WL 259589, at *1 (W.D. La. Feb. 3, 2009) (referring to "the potential for statutory penalties under . . . Title 40:2203.1(G)").

Tellingly, before the Plaintiffs obtained rights to proceed against First Health's insurers, the Plaintiffs themselves characterized the damages they sought as a penalty in their complaint against First Health. (A0543 ¶ IX; A0546 ¶ XIII.C.; A0547 ¶ XIII.I.; A0549 ¶ XX; A0550 ¶ XXIII) The Plaintiffs' record admissions that they were seeking "penalties" under the Act demonstrate that the sums awardable under the Act fit the plain meaning of the term "penalties."

The Plaintiffs' argument that the *Gunderson* and *Williams* trial court decisions must be given full faith and credit is inapposite. (Br. 17, n. 22, n. 23) The Plaintiffs' own authority establishes that full faith and credit concerns arise only when a court is asked to apply a foreign statute in the forum state. *See* 2 SUTHERLAND STAT. CONST. § 37:3 (7th ed.) (foreign interpretations apply only "where the statute is applied" in the forum state); *see also Tyson v. Scartine*, 118 A.2d 795, 796 (Del. Super. Ct. 1955) (rights created by foreign state statutes should be enforced unless they contravene the statutes or public policy of the forum state). Here, CSIC was not sued under the Act, and neither the court below nor this Court is being asked to apply the Act as a substantive matter.

Accordingly, the *Gunderson* and *Williams* courts' interpretations of the Act are entitled to no deference.

3. The court below did not misapply legislative history. (Br. 18-19)

The Plaintiffs overstate the lower court's use of legislative history. (Br. 18) The court below did not rely on legislative history to interpret the Act under Louisiana law. Instead, the court below used legislative history merely to confirm that the sums awardable under the Act fit the plain meaning of "penalties" under the Policy. (Br. Ex. A, Op. at 26-27) Specifically, the court below reviewed legislative history showing that the Act's remedy provisions were borrowed from a Louisiana statute that authorizes a "penalty" against an insurer that does not pay claims timely. (B126-130) (noting that the Act was intended to "track the requirements the legislature has adopted in [La. R.S 22:1821(A)] for [a health insurer to] pay[] [its] claims timely"). The court below correctly held the legislative history is only more evidence that an award under the Act functions as and was intended to be a "penalty."

4. "Penalties" does not mean only amounts owed to the government. (Br. 19-20)

The Plaintiffs' mistaken position that "penalties" are limited to amounts owed to the government must be rejected because the Plaintiffs rely solely on the distinguishable case *Flagship Credit Corp. v. Indian Harbor Ins. Co.*, 481 F. App'x 907 (5th Cir. 2012), which is contrary to U.S. Supreme Court precedent.

(Br. 19-20) Contrary to the Plaintiffs' assertion, the court below did not ignore *Flagship*. The court below requested additional briefing on *Flagship*, then determined it did not alter its earlier ruling on the parties' summary judgment motions. (B122-125) Like the court below, this Court can easily conclude that *Flagship* is inapplicable.

First, *Flagship* applied Texas law, under which canons of construction may be used to determine if ambiguity exists. *Id.* at 911 ("Texas courts apply canons of construction prior to deciding whether a term is ambiguous."). The Plaintiffs' own authority recognizes that Delaware law is contrary, applying canons only after ambiguity is established. *See Delaware Bd. of Nursing v. Gillespie*, 41 A.3d 423, 427 (Del. 2012) (applying *noscitur a sociis* only after ambiguity had been found). *Flagship* is distinguishable on this basis alone.

In addition, the Fifth Circuit's assertion in *Flagship* that a "fine" is always payable to the government is contrary to controlling authority. U.S. Supreme Court precedent clearly establishes that a fine does not always contemplate a payment to the government. *See, e.g., Hicks v. Feiock*, 485 U.S. 624, 632 (1988) (addressing fine for contempt payable to private complainant); *U.S. v. United Mine Workers of Am.*, 330 U.S. 258, 304 (1947) (same). Thus, U.S. Supreme Court precedent requires rejection of the Fifth Circuit's premise that a "penalty," like a "fine," is only payable to the government.

Further, the Fifth Circuit misapplied the *noscitur a sociis* canon. The "Loss" definition at issue in *Flagship* had two subparts: 1) one that excepted "fines, penalties or taxes imposed by law," and 2) one that excepted "the multiplied portion of any damage award." The Fifth Circuit only applied *noscitur a sociis* to the first subpart, ignoring the well-established principle that all parts of a policy must be construed together. *See Forbau v. Aetna Life Ins. Co.,* 876 S.W.2d 132, 133-34 (Tex. 1994) (no single provision should be interpreted in isolation from the rest of the policy). The Fifth Circuit should have applied the canon to both parts of the "Loss" definition, and would have found that penalties are not always payable to the government because multiplied damages, like fines, are not always payable to the government.

The *Flagship* rationale does not apply here because the Policy enumerates "fines, penalties, taxes, *or multiplied damages*" in a single clause. Even under the Fifth Circuit's flawed approach, the term "penalties" cannot be limited to government payments because two other terms in the same phrase -- fines and multiplied damage -- are not. *Flagship* is inapplicable, poorly reasoned and the court below properly rejected it.

III. THE COURT BELOW CORRECTLY HELD THAT THE TERM "PENALTIES" IS NOT AMBIGUOUS AS USED in THE POLICY

A. Question Presented

Whether the court below correctly determined that the term "penalties," as used in the Policy's "Loss" definition is unambiguous.

B. Scope of Review

CSIC agrees that review of a trial court's interpretation of an insurance policy is *de novo*. *O'Brien*, 785 A.2d at 286.

C. Merits of Argument

1. The Plaintiffs bear the burden on coverage because the "penalty" provision of the Policy is not an exclusion. (Br. 21-25)

Plaintiffs have the burden to show that the statutory award was not a penalty to establish that the settlement was a "loss" falling within the Policy's insuring agreement. Clear and unambiguous policy language must be given its plain meaning under Delaware law. *See, e.g., Axis Reins. v. HLTH Corp.*, 993 A.2d 1057, 1064 (Del. 2010) (policy language "must be given its plain meaning"). As the assignee of the insured First Health, the Plaintiffs have the burden to prove a covered loss under the Policy. *See, e.g., E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997) (recognizing that the insured bears the burden of establishing coverage). Where certain types of losses are excepted from a policy's insuring clause, the burden remains with the Insured to prove that the exception does not apply. *See, e.g., ZRZ Realty Co. v. Beneficial Fire & Cas. Ins.*

Co., 241 P.3d 710, 717 (Or. 2010) (holding the insured bears the burden to prove that damages were "unexpected or unintended" when insuring agreements specifically limited coverage on those terms); *Travelers Cas. & Sur. Co. v. Ribi Immunochem Research, Inc.*, 326 Mont. 174, 181 (2005) (same).

Contrary to the Plaintiffs' mischaracterization, the "penalties" provision at issue here is an exception to the definition of "Loss," which is part of the Policy's insuring agreement. Because the insuring agreement of the Policy requires the Plaintiffs to demonstrate that the award at issue is a not a "penalty," to meet the definition of "Loss," it is not an exclusion that must be construed narrowly or in the Plaintiffs' favor. (Br. 22) Instead, the Plaintiffs bear the burden to show that First Health's liability was not for "penalties."

In an attempt to avoid its burden, the Plaintiffs mischaracterize the "Loss" definition as an "exclusion." The definition falls within the "Definitions" section of the Policy, not the "Exclusions" section. The two cases cited by the Plaintiffs do not support the Plaintiffs' mischaracterization, because both cases involved exclusions, not definitions. In *Sun-Times Media Group, Inc. v. Royal & Sunalliance Ins. Co. of Canada*, No. 06C-11-108, 2007 WL 1811265, at *11 (Del. Super. Ct. June 20, 2007), the "exclusion clause" at issue was specifically designated as an exclusion. Likewise, the policy provision at issue in *Louisiana Maint. Servs., Inc. v. Certain Underwriters at Lloyd's of London*, 616 So. 2d 1250,

1252 (La. 1993) was specifically referred to as "Exclusion K." Thus, the Plaintiffs' assertion that the "penalties" provision of the Policy is an "exclusion" is entirely unsupported.

Ignoring its burden, the Plaintiffs entirely fail to demonstrate that the trial court erred in its interpretation of the Policy. The trial court correctly interpreted the Policy's unambiguous language. "Clear and unambiguous language in an insurance contract should be given 'its ordinary and usual meaning.'" *O'Brien*, 785 A.2d at 288. Policy terms are only ambiguous when they are "reasonably or fairly susceptible of different interpretations." *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 69 (Del. 2011).[4]

The Plaintiffs wrongly suggest that the court below erred by consulting dictionary definitions and cases from other jurisdictions to interpret the term "penalties." "Delaware courts look to dictionaries for assistance in determining the plain meaning of terms which are not defined in a contract." *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006). Because the Policy does not define the term "penalties," the trial court properly looked to BLACK'S

[4] The Plaintiffs again wrongly suggest that Louisiana law may be applied. The Plaintiffs waived the application of Louisiana law by conceding below that Delaware law applies. *See supra*, Section II.C.1. The Plaintiffs also erroneously asserts that Louisiana law can be applied because it does not conflict with Delaware law. (Br. 21, n. 35) If no conflict exists, the forum state's law – here, Delaware law – is applied. *Cf. Tyson Foods, Inc. v. Allstate Ins. Co.*, No. 09C-07-087, 2011 WL 3926195, at *6 (Del. Super. Ct. Aug. 31, 2011).

LAW DICTIONARY 1247 (9th ed.) to confirm its plain meaning as "an automatic liability imposed for violation of statute's terms without reference to any actual damages suffered." (Br. Ex. A, Op. at 19)

Additionally, since no Delaware court has considered a similar issue, the trial court judiciously considered persuasive authority from other jurisdictions. *Cf. Flamer v. State*, 953 A.2d 130, 134 (Del. 2008) (legal arguments must be supported by "controlling precedent or persuasive decisional authority from other jurisdictions"). Thus, the court below properly considered *Landis* and *Bestcomp* in finding that the Policy term "penalties" refers to an award automatically entered against an insured in an amount unrelated to any actual damages suffered. (Br. Ex. A, Op. at 21-25) The mere fact that the statute at issue in *Landis* was a landlord-tenant ordinance is irrelevant. Plaintiffs miss the point that *Landis* broadly proclaimed that statutory remedies described as "damages" are "penalties" if they award sums in excess of the claimant's losses. The Plaintiffs do not even attempt to offer any contrary authority or show that *Landis* was wrongly decided.

Contrary to the Plaintiffs' assertion, the distinction between the policy language in *Bestcomp* and CSIC policy language is insignificant. (Br. 24) The policy in *Bestcomp* covered the insured for "compensatory damages" but not "penalties." Here, the Policy does not restrict coverage to "compensatory damages" but, like the policy in *Bestcomp*, does not cover "penalties." The

difference is irrelevant, however, since "penalties" are by definition, not compensatory. Like the trial court here, the *Bestcomp* court recognized that the awards allowable under the Act "more than compensate an injured party for loss incurred due to lack of notice" and bear "no correlation to the amount of the discount" taken, and thus impose penalties that are not covered under the Policy. 2010 WL 5471005 at *5. Thus, the court below correctly relied only on the principle set forth in *Bestcomp* that "penalties" are sums in excess of actual losses.[5]

2. The Plaintiffs have both waived the argument, and fail to establish, that the Policy is ambiguous. (Br. 25-26)

The Plaintiffs have waived any argument that the word "penalties" in the Policy is ambiguous by failing to make that argument below. (Br. Ex. A, Op. at 19) *Conner*, 415 A.2d at 781 (issues not raised below are waived on appeal). Substantively, the Plaintiffs fail to show that "penalties" is ambiguous because the Plaintiffs do not offer multiple reasonable interpretations. Policy terms are only ambiguous when they are "reasonably or fairly susceptible of different interpretations." *ConAgra*, 21 A.3d at 69. The Plaintiffs admit this principle (Br. 22, n. 40) but do not even attempt to show another reasonable interpretation of the word "penalties."

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[5] The Plaintiffs wrongly suggest that the court below found no coverage solely because the judgment against First Health under the Act was "penal" or "punitive in nature." (Br. 25) The court below only noted that the Act was punitive in nature as an additional basis for its holding. (Br. Ex. A, Op. at 30)

The Plaintiffs implausibly assert that the Policy as a whole is ambiguous because it covers punitive damages but not penalties. (Br. 26) Plaintiffs' argument ignores the significant differences between penalties and punitive damages under both the law and the Policy. Unlike penalties, which are imposed without reference to any actual losses, punitive damages cannot be awarded unless actual, compensatory damages have been established. *See generally* 22 AM. JUR. 2D *Damages* § 552. Indeed, punitive damages are constitutionally constrained by the amount of compensatory damages. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-18 (2003). Punitive damages are also different from penalties in that they require proof of intent, whereas liability for penalties is "automatic." The policy supports this premise because the same endorsement that extends coverage for punitive damages specifies that "fines, penalties, or multiplied damages" remain outside coverage. There is no inconsistency or ambiguity in that provision, or the policy as a whole.

The Plaintiffs also incorrectly, and misleadingly, assert that the Policy "presumes" coverage for all penalties because it extends coverage for fines and penalties awarded in claims for Antitrust Activity. Plaintiffs' argument, however, conveniently ignores the plain language of the "Loss" definition. (Br. 26) The second sentence of the Policy's "Loss" definition provides that "Loss" includes fines, penalties, or multiplied damages when "awarded in Claims for Antitrust

Activity, but only if such fines, penalties or multiplied damages are insurable under applicable law." (A0342) (emphasis added). The next sentence provides that the definition should be construed "under the law most favorable to the insurability of such" fines or penalties. *Id.* (emphasis added). The word "such" in the "Loss" definition plainly limits coverage for fines and penalties to those awarded in Claims for Antitrust Activity.[6] *Cf. Riley v. State* 249 A.2d 863, 865 (Del. 1969) (noting that the word "such" in a second clause "can only refer back" to things enumerated in the first).

After the Policy states clearly that "penalties" are covered for claims for Antitrust Activity, the "Loss" definition unambiguously states that any other fines, penalties, or multiplied damages are not covered. When read in full and in context, the Policy's "Loss" definition plainly establishes that coverage for penalties applies only to claims for Antitrust Activity. Fines, penalties or multiplied damages awarded in any other types of claims (*i.e.* claims that do not involve Antitrust Activity) are not covered. It would make no sense, in fact, for the Policy to be read to agree to cover penalties under all circumstances and then immediately state that penalties are not covered.

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[6] The trial court rejected the Plaintiffs' assertions below that its claims against First Health implicated Antitrust Activity, and the Plaintiffs do not challenge that finding on appeal. (Br. Ex. A, Op. at 31-34)

Overall, the Plaintiffs provide no principled reason to find that the Policy's treatment of coverage for "penalties" is ambiguous. "Penalties" are treated separately from punitive damages under the Policy because they are a different liability under the law. Moreover, the Policy specifically provides that "penalties" are only covered when awarded for Antitrust Activity claims. The Plaintiffs, therefore, fail to establish both ambiguity and that the trial court misconstrued the Policy.

IV. THE COURT BELOW CORRECTLY HELD THAT THE PLAINTIFFS' PAYMENT OF ITS ATTORNEYS' FEES WAS NOT A "LOSS" TO FIRST HEALTH.

A. Question Presented

Whether the court correctly concluded that the payment of the Plaintiffs' attorneys' fees was not a "Loss" that could be separately covered under the Policy.

B. Scope of Review

CSIC agrees that review of this decision is *de novo*.

C. Merits of Argument

The Policy only covers "Loss" that the insured is legally obligated to pay. (A0340). The $50.5 million that the Plaintiffs paid to its attorneys is not covered because it was not a "Loss" that First Health ever became legally obligated to pay.

1. The Plaintiffs' attorneys' fees are not a "Loss" because First Health was never legally obligated to pay them. (Br. 28-31)

First Health had no legal obligation to pay the attorneys' fees because they were paid under the "common fund" doctrine. (Br. 28) Under this doctrine, where attorneys' fees are paid out of a common fund, the defendant itself "cannot be obliged to pay fees awarded to the Plaintiffs' lawyers." *Boeing Co. v. Van Gemmert*, 444 U.S. 472, 473, 482 (1980). Thus, as the Plaintiffs' lawyers were paid out of a common fund (*i.e.* First Health's settlement of its penalty liability under the Act), the Plaintiffs abandoned any claim they might have had against First Health for attorneys' fees. *Cf. BOC Gp., Inc. v. Fed. Ins. Co.*, No. L-4271-

03, 2007 WL 2162437, at *12 (N.J. Super. Ct. App. Div. Jul. 30, 2007), citing *McLendon v. Cont'l Gp.*, 872 F. Supp. 142, 152 (D.N.J. 1994) (rejecting coverage for common fund fees "[b]ecause the settlement...extinguished any liability defendants might have had" for the fees).

By admitting that they paid their lawyers under the "common fund" doctrine, the Plaintiffs concede that those fees were not a sum that First Health ever became legally obligated to pay. Because of its liability under the Act, First Health owed the $150.5 million settlement regardless of what portion was later allocated to fees. The attorneys' fees were simply a portion of the uninsured "penalty" relief that the Plaintiffs recovered against First Health. First Health was not directly liable to pay attorneys' fees prior to the settlement. Thus, the attorneys' fees were not a "Loss" that First Health was ever legally obligated to pay.

The Plaintiffs' attorneys' fees are also not covered because First Health's principal liability was not covered. A majority of courts adopt this principle. *See, e.g., City of Sandusky v. Coregis Ins. Co.*, 192 F. App'x 355, 360 (6th Cir. 2006) (fee award under statute was not independently covered because it was awarded in connection with an uncovered claim); *State Farm Gen. Ins. Co. v. Mintarish*, 175 Cal. App. 4th 274, 287 (2009) ("no basis" to hold insurer liable for fees when damages were not covered). The fact that a plaintiff uses a portion of an

uncovered settlement to pay its attorneys cannot alter the character of the insured's liability. *Cf. CNL Hotels & Resorts v. Houston Cas. Co.*, 505 F. Supp. 2d 1317, 1326 n.12 (M.D. Fla. 2007) (rejecting coverage for attorneys' fees paid out of uncovered settlement). Otherwise, an uncovered settlement "would nonetheless be insurable to the extent of the fee awarded," a result that "cannot be the law." *Health Net, Inc. v. RLI Ins. Co.*, Nos. B224884C, B240833, 2012 WL 1850929 at *13, n.32 (Cal. Ct. App. May 22, 2012). Plaintiffs' argument is in direct contradiction to the majority rule.

United Health Grp., Inc. v. Hiscox Dedicated Corporate Member Ltd., No. 09-CV-0210, 2010 WL 550991 (D. Minn. Feb. 9, 2010), is contrary to the majority rule and is distinguishable . Indeed, the court in *Hiscox* even admitted that its own rationale was "strange" and "counterintuitive." *Id.* at *9. Unlike this case, where the court below granted summary judgment on the issue of coverage for attorneys' fees, *Hiscox* involved a motion to dismiss requiring all inferences in favor of the insured. There was no ruling in *Hiscox* that fee awards are covered. Instead, *Hiscox* held only that the insured had sufficiently made allegations regarding liability and coverage of the attorneys' fees. Id. at *10-11, *12 (noting unresolved evidentiary issue as to "the amount (if any) that [the insured] paid to settle" a fee claim). Furthermore, our case is not contrary to the court's reasoning in *Hiscox*. *Hiscox* hinged on whether the insured would be legally liable to pay

attorneys' fees. Id. at *10. In our case, there was never a finding that First Health was legally liable for attorneys' fees. Rather, the court in the Louisiana Action only found that the amount of fees the Plaintiffs requested out of the settlement fund was reasonable. (A0312) Accordingly, *Hiscox* does not support Plaintiffs' arguments regarding attorneys' fees.

XL Specialty Insurance Co. v. Loral Space & Communications, Inc., 918 N.Y.S.2d 57, 61 (N.Y. App. Div. 2011) cited *Hiscox* without analysis and without recognizing that *Hiscox* is limited by its procedural posture. Moreover, *Loral* is distinguishable because it addresses fees paid under Delaware's "corporate benefit doctrine," rather than the "common fund" doctrine. Unlike a "common fund" fee, which is paid after a monetary recovery, a "corporate benefit" fee is paid when there is no monetary award. *Dover Historical Soc., Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1090 (Del. 2006) ("corporate benefit" fees are awardable when litigation has conferred some non-monetary benefit). *Loral* is thus the opposite of this case, where there was a monetary settlement by First Health that did not include any attorneys' fees and therefore distinguishable.

2. When awarded under the Act, attorneys' fees are an additional, uncovered "penalty." (Br. 31-33)

The Court need not address coverage for attorneys' fees under the Act, because none were awarded in this case. The court in the Louisiana Action only found that First Health was liable for $261 million in penalties under the Act and

later approved First Health's $150.5 million settlement of that judgment. Regardless, the Plaintiffs are wrong that an award of attorney fees is not a "penalty." An attorneys fee claim under a statute "is not its own independent claim; rather, it is parasitic to the success of other claims for relief." *City of Sandusky*, 192 F. App'x at 360. Thus, any award of fees under the Act is necessarily a "penalty" because the principal remedies of $2,000 per violation, $50 per day, or double the fair market value awards are "penalties." Therefore, had First Health been liable for fees under the Act (which it was not), the fee award would have been a "penalty" as well.

CONCLUSION

For the reasons stated above and upon the authorities cited, defendant-appellee, Chartis Specialty Insurance Company, respectfully requests that this Court affirm the judgment in all respects, and grant such further and additional relief as this Court deems just.

Respectfully submitted,

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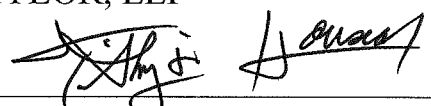

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