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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, Plaintiff 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

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT[1]

On February 26, 2014, the Louisiana Third Circuit Court of Appeal, in *George Raymond Williams, M.D. v. SIF Consultants of Louisiana, Inc.*,[2] affirmed the ruling of the court below ("*Williams I*") (A1192-99) that claims for damages under La. Rev. Stat. 40:2203.1(G) are not penalties and are covered under the very same insurance policy language as in this case. This is the first and only Louisiana appellate court decision directly addressing coverage for damages under Section 2203.1(G). *Williams II* implicitly overruled the decision of the Court below. This Court should do so expressly.

Although Chartis and other insurance companies have asked Delaware courts to construe their insurance policies, here, they really seek guidance on Louisiana statutory law. This Court recently held (in another context) that "our courts must acknowledge that important and novel issues of other sovereigns are best determined by their courts where practicable."[3] It is manifestly "practicable"

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[1] This is the First Health Settlement Class' (the "Class") reply brief to Chartis Specialty Insurance Company's ("Chartis") answering brief ("AB"), and in further support of the Class' opening brief ("OB").

[2] No. 13-972, 2014 WL 718060, __ So.3d __ (La. Ct. App. Feb. 26, 2014) ("*Williams II*") (attached hereto as Exhibit A).

[3] *Martinez v. E.I. du Pont de Nemours and Co., Inc.*, No. 669,2012, 2014 WL 685685, at *4, __ A.3d __ (Del. Feb. 20, 2014) (footnotes omitted); *see also Third Ave. Trust v. MBIA Ins. Corp.*, C.A. No. 4486-VCS, 2009 WL 3465985, at *5 (Del. Ch. Oct. 28, 2009) ("Because of the importance of this question to New York public policy, and the absence of any legitimate interest Delaware has in the question, … an appropriate regard for comity requires this court to abstain and allow the courts of New York to speak on the collateral effect to be given to the determinations of the … New York Insurance Department.").

in this case to allow Louisiana courts to construe a Louisiana statute. Indeed, *Williams II* has correctly and very simply held as follows:

> The language of La. R.S. 40:2203.1(G) denotes that a violator is subject to pay "damages" and includes no language regarding penalties. Further, the language of Executive Risk's policy is that it will pay "any monetary amount which an Insured is legally obligated to pay as a result of a Claim." While there are exclusions listed thereafter, those exclusions do not include a monetary amount that is a statutory damage or a damage punitive in nature. Accordingly, we find no merit to Executive Risk's first contention and find that its policy covers the damages and attorney's fees sought by the plaintiff class.[4]

Following the maxim that state courts ought to "stay in their lane,"[5] this Court should follow the holding in *Williams II* – and the underlying coverage rulings in *Gunderson* (A0191) and *Williams I* (A1189) – that the statutory damages available under Section 2203.1(G) are not penalties, and reverse the Court below. The Court below incorrectly applied the Louisiana statute, legal precedent, and accepted insurance policy construction principles by *broadly* construing the penalty exclusion to conclude that damages and attorneys' fees are excluded from coverage. This Court should reverse.

Further, this Court should (again) reject Chartis' tactical argument to dismiss this appeal as untimely and decide the appeal on the merits.

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[4] 2014 WL 718060, at *6.

[5] *Martinez*, 2014 WL 685685, at * 8.

ARGUMENT

I. THE LOUISIANA APPELLATE COURT HAS SPOKEN AND UNANIMOUSLY FOUND THE LOUISIANA TRIAL COURT WAS CORRECT IN FINDING COVERAGE

The Court below effectively ignored the ruling of Judge Robert Wyatt of the 14th Judicial District Court, State of Louisiana (the judge in the underlying *Gunderson* action), who had previously held that there was errors and omissions coverage for the claims brought under the Louisiana PPO Act. A0190-92. Although no appeal was taken from that ruling (Op. at 30), an appeal *was taken* from a similar ruling made by Judge Alonzo Harris in the 27th Judicial District Court, State of Louisiana – *Williams I.* A1192-99. The insuring and exclusionary language in the Executive Risk insurance policy (which dictates coverage) in *this case* is *identical* to the insuring and exclusionary language in the Executive Risk policy in *Williams I.* A0340-66. Likewise, the claims asserted in this case (claims for statutory damages and attorneys' fees under Section 2203.1(G)) are identical to the claims asserted in *Williams I*.

A unanimous Louisiana Appellate Court in *Williams II* has now affirmed the coverage ruling in *Williams I,* and in doing so has implicitly overruled the Superior Court's summary judgment ruling below as well as the ruling in the related appeal in *CorVel Corp. v. Homeland Ins. Co. of N.Y.*, No. 513,2013, currently set for

argument immediately following argument in this case on April 9, 2014.[6] This newly minted Appellate Court decision clearly demonstrates that the Superior Court was simply wrong in its attempt to interpret a Louisiana statute. The *Williams II* decision correctly points out that there is absolutely no mention of any penalties available under Section 2203.1(G) and therefore the penalty exclusion in the policy is not applicable.[7] Conversely, the *Williams II* Court held that because the remedy available under Section 2203.1(G) (statutory damages and attorneys' fees) is not expressly excluded under the policy, coverage exists for these claims as both statutory damages and attorneys' fees clearly constitute "any monetary amount" as set forth in the Executive Risk policy insuring agreement.

In arriving at this correct conclusion, the Louisiana Appellate Court analyzed the cause of action under the insurance policy as it should. It broadly construed the insuring language while narrowly construing exclusionary language. This, of course, is a vast and proper departure from the incorrect analysis

[6] Both opinions on appeal in this action and in No. 513,2013 were thoroughly briefed and argued to the Louisiana Third Circuit Court of Appeal by both sides.

[7] There should be no dispute (AB at 23-24) that "penalties" are an exclusion on which Chartis bears the burden of proof. The Executive Risk policy provides coverage for Loss, but "Loss shall not include … penalties…." A0342. To the extent penalties are "not include[d]" they are, by definition, excluded and Chartis offers no legal, logical or grammatical reason why this is not so. *See* Op. at 17 & n.33, 19; *see id.* at 11 ("The Primary Policy initially *excluded* from the definition of 'Loss'….") (emphasis added); *see also Indian Harbor Ins. Co. v. Bestcomp, Inc.*, C.A. No. 09-7327, 2010 WL 5471005, at *1, *6 (E.D. La. Nov. 12, 2010), *aff'd*, 452 F. App'x 560 (5th Cir. 2011) (the "policy excludes the following from damages.…"; "the policy expressly excludes…."); *Flagship Credit Corp. v. Indian Harbor Ins. Co.*, 481 F. App'x 907, 910 (5th Cir. 2012) (penalty provision is an "exclusion from coverage").

conducted by the Superior Court in this case. In fact, the Superior Court impermissibly did just the opposite by attempting to broadly construe an exclusion for penalties[8] (stretching "penalties" to also cover statutory damages and attorneys' fees) while narrowly construing the insuring language (which is already so broad as to clearly cover statutory damages and attorneys' fees under its "any monetary amount" language). The rules of insurance policy construction simply do not allow courts to "stretch" a policy exclusion in an attempt to void coverage.

[8] Chartis cites *Olsen v. Siddiqi*, No. ED 97455, 2012 WL 1699322 (Mo. Ct. App. May 9, 2012) for the proposition that that courts will not adhere to a "damages" label if the "real nature" of the remedy is a penalty. AB at 15. Chartis omits that *Olsen* was directly overruled in *Columbia Cas. Co. v. HIAR Holding, L.L.C.*, which expressly held that "TCPA statutory damages of $500 per occurrence are not damages in the nature of fines or penalties. To the extent that *Olsen*, declared otherwise, *it no longer should be followed on this issue*." 411 S.W.3d 258, 268 (Mo. 2013) (emphasis added). Thus, *Columbia Casualty* held, like many other cases, that statutory damages for sending junk faxes were *not* penalties, but were covered under defendant's policy.

II. THE CLASS PROPERLY APPEALED THE FINAL JUDGMENT

This Court correctly denied Chartis' motion to dismiss and should do so again. *See* Dkt. 22. On September 20, 2013, the Class filed its original Notice of Appeal "out of an abundance of caution," while its motion to alter or amend the judgment was still pending before the Superior Court and expressly "reserve[d] the right to amend its Notice of Appeal to include any orders entered by the Superior Court that ar[o]se out of this outstanding motion." Dkt. 1 at 2 n.1. The reason for filing a "premature" notice of appeal was in case the Superior Court concluded the Rule 59/60 motions were untimely. In fact, on September 25, 2013, the Superior Court held that the "Motion to Alter or Amend Judgment is time-barred, as it was filed with the Court more than three months from [the Court's] decision." Dkt. 16, Ex. D.[9] Therefore, the original Notice of Appeal was not "premature." But even if it was, on October 3, 2013, the Class timely and prudently filed its Amended Notice of Appeal (really a "supplemental" notice). *See* Dkt. 4. Despite two timely Notices of Appeal – and no identifiable prejudice – Chartis argues that the Class should have filed an entirely new notice of appeal and that an amended notice is somehow defective.

[9] The conclusion that the Rule 59 motion was untimely, was wrong. The Class's motion was filed pursuant to Rule 59(d) (within 10 days after *judgment*), *not* Rule 59(e) (within five days after the Court's *decision*). *See* A1186; *compare* Dkt. 16, Ex. D. Indeed, the basis for the motion was, in part, that the subsequent *Williams* Opinion represented "an intervening change in controlling law." A1186. That error, however, is not the subject of this appeal.

For nearly half a century, this Court has subscribed to "the 'modern view' that, where possible and where there is no prejudice, appeals should not be dismissed on technicalities."[10] Thus, "appeals… should, where possible and where the other side has not been prejudiced, be decided on merits and not upon nice technicalities of practice."[11] Despite this long-established precedent, Chartis cites no prejudice and offers only the hyper-technical and conclusory argument that the appeal "was not properly noticed" because the Amended Notice of Appeal "simply related back to and amended the initial improper notice." AB at 11.

In support, Chartis relies solely upon an unpublished decision, *McElroy v. Shell Petroleum, Inc.*, which, according to Westlaw, has never been cited by any court.[12] *McElroy* is inapposite. As Chartis concedes, the *McElroy* appellants filed *two* amended notices of appeal *and* a completely separate appeal under a new case number. *See id.* at *1. Thus, dismissal of the amended notice of appeal in *McElroy* had no impact because the separate appeal was permitted to proceed.

Critically, *McElroy* stands against this Court's precedent, which expressly permits an appellant to amend a notice of appeal until the time to appeal expires.[13]

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[10] *Di's, Inc. v. McKinney*, 673 A.2d 1199, 1202 (Del. 1996).

[11] *Episcopo v. Minch*, 203 A.2d 273, 275 (Del. 1964).

[12] C.A. No. 311,1992, 1992 WL 279112 (Del. Sept. 2, 1992).

[13] *See, e.g.*, *State Pers. Comm'n v. Howard*, 420 A.2d 135, 138 n.4 (Del. 1980); *Dzedzej v. Prusinski*, 259 A.2d 384, 386 (Del. Super. Ct. 1969) ("Because the applicable statute is jurisdictional, defendant may not amend after the time permitted to perfect the appeal."); *Cf.* Fed.

McElroy is also inconsistent with this Court's practice. For example, when a party files a notice of appeal while its application for interlocutory review is pending in the trial court, this Court often instructs the party to file a supplemental notice of appeal after the trial court has ruled – not an entirely new notice.[14] The Amended Notice of Appeal is consistent with this precedent and practice.

McElroy also was wrongly decided for independent reasons, and Chartis offers no defense of its reasoning. *McElroy* relied on an unpublished decision regarding the relation back of an amended complaint under Superior Court Rule 15(c) to conclude—without analysis—that the "amended Notice of Appeal relates back to the date of the original… [and] fails to rehabilitate the prematurity of the original notice."[15] But trial court rules do not apply to appeals. In addition, Superior Court Civil Rule 15(c) concerns whether an amendment to a pleading relates back, and a notice of appeal is not a pleading.[16] The relation back doctrine

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R. App. 4(a)(4) 1993 cmt. ("If the judgment is altered upon disposition of a posttrial motion, however, and if a party wishes to appeal from the disposition of the motion, the party must amend the notice to so indicate."); 16A Charles A. Wright et al., *Fed. Prac. & Proc.* § 3950.5 (4th ed. 2013) ("When there is uncertainty as to whether a previously-filed notice of appeal has ripened upon entry of the judgment, the safest course is to also file a new *or amended* notice after the entry of that judgment.") (emphasis added).

[14] *See* Del. Supr. Ct. Civ. R. 42(d)(iii); Dkt. 20, Ex. 1.

[15] 1992 WL 279112, at *1 & n.2 (citing *Sanchez v. Abdel-Misih*, No. 149,1987, 1987 WL 4622 (Del. Oct. 9, 1987)).

[16] *See* Del. Super. Ct. Civ. R. 7(a); *accord, e.g., Adkins v. Safeway, Inc.*, 985 F.2d 1101, 1102 (D.C. Cir. 1993) ("A notice of appeal is not a 'pleading.'").

makes no sense here, because the critical intervening event is the final judgment. Moreover, the "very purpose underlying the relation back doctrine is to permit amendments to pleadings when the limitations period has expired, so long as the opposing party is not unduly surprised or prejudiced."[17] *McElroy* improperly applied the relation back doctrine to defeat a duplicate appeal on a technicality rather than the merits.

"The proper purpose of a notice of appeal… is to provide notice of the appeal to all litigants who may be directly affected thereby, and to afford them an opportunity to take action to adequately protect their interests."[18] The Amended Notice of Appeal served these purposes. Timely amending or supplementing a notice of appeal results in no prejudice to an appellee, and avoids the costs, inefficiencies, and potential confusion to the parties, the public, and the Court that result filing an entirely new appeal under a new appeal number. Chartis' hyper-technical position, in contrast, would serve only to create a trap for the unwary and would hinder this Court's efforts to decide appeals on their merits.

[17] *Chaplake Holdings, Ltd. v. Chrysler Corp.*, 766 A.2d 1, 7 (Del. 2001) (quoting *Hill v. Shelander*, 924 F.2d 1370, 1377 (7th Cir. 1991)).

[18] *Silvious v. Conley*, 775 A.2d 1041, 1042 (Del. 2001).

CONCLUSION

Unlike Louisiana, Delaware has no vested interest in the construction of La. Rev. Stat. 40:2203.1(G), and this Court should defer to the Louisiana courts that have already correctly done so.

> When a state court with little legitimate interest in a matter purports to speak on a subject of importance to a sister state, the reliability of state law is undermined and a counterproductive incentive is created for all state courts to afford less than ideal respect to each other.[19]

For the reasons stated herein, and in the Class' opening brief, the Class requests that this Court reverse the judgment of the Superior Court and enter judgment in favor of the Class on the issues of coverage for the statutory damages and attorneys' fees claimed under La. Rev. Stat. 40:2203.1(G).

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[19] *Third Ave. Trust*, 2009 WL 3465985, at *1.