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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 CORRECTED OPENING BRIEF

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NATURE OF PROCEEDINGS

This is an appeal from a final order and judgment following a June 13, 2013 opinion issued by the Superior Court (the "Opinion") (Ex. A) on partial summary judgment motions by Defendants Below, Appellees Executive Risk Specialty Insurance Company ("Executive Risk") and Homeland Insurance Company of New York ("Homeland") that held in error that the remedies under LA. REV. STAT. § 40:2203.1(G) ("Section 2203.1(G)") are not damages as expressly stated therein, but instead are penalties. From that conclusion, the Court below erroneously found that CorVel Corporation's ("CorVel") $9 million payment to settle claims (the "Settlement") in the underlying class action captioned *George Raymond Williams M.D. Orthopedic Surgery v. SIF Consultants of Louisiana* in the 27th Judicial District Court, Parish of St. Landry, Dkt. No. 09-C-5244-C (the "*Williams* Action"), and the underlying class arbitration captioned *SWLA Hospital Association d/b/a Lake Charles Memorial Hospital v. CorVel* (the "LCMH Arbitration"), was excluded from coverage under CorVel's managed care errors and omissions ("E&O") insurance policies. The Court below also erroneously held that the attorneys' fees that CorVel was required to pay in connection with the Settlement were not a covered loss under the policies and were excluded from coverage. The Superior Court found that the class claims for statutory damages and attorneys' fees under Section 2203.1(G) that were settled were excluded from

coverage, even though the policies covered "any monetary amount" in the definitions of loss and even though neither statutory damages nor attorneys' fees were expressly excluded from coverage.

The Court below was asked to construe an unfamiliar Louisiana statute that provides specific remedies for failure to comply with certain notice provisions of the Louisiana Preferred Provider Act (the "Louisiana PPO Act"). In doing so, the Court below misapplied accepted statutory construction techniques under applicable Louisiana law and misapplied accepted insurance policy construction principles by broadly construing policy exclusions and narrowly construing coverage. The Superior Court thus broke a cardinal rule of insurance policy construction by narrowly construing the broad "any monetary amount" insuring provisions and broadly construing the undefined "penalties" exclusions to exclude coverage for statutory damage claims and attorneys' fees.[1]

After the Superior Court issued its Opinion, Judge Herlihy retired from the bench without entering an implementing order as he had done a month earlier in the related summary judgment ruling in *Executive Risk Specialty Insurance Co. v.*

[1] In other words, the Superior Court got it backwards. As discussed herein, the Court below should have broadly construed an already very broad insuring agreement (which covers claims for a loss – defined as a claim for "any monetary amount") and narrowly construed the undefined "penalties" exclusion. Instead, the Court below struggled to force statutory damage claims and attorneys' fees into the policies' "penalty" exclusion even though the policies exclude neither statutory damages nor attorneys' fees from the broad definitions of loss.

First Health Group Corp.[2] Responsibility for this matter was then assigned to Judge Rocanelli. Because the Opinion decided partial summary judgment motions and did not clearly declare it was a final judgment, on July 26, 2013, the Court issued a letter asking the parties for submissions identifying the claims they intended to present at trial and the number of trial days needed. Dkt. 95. On August 15, 2013, Homeland and Executive Risk responded that they believed no further issues remained for trial or other adjudication. Dkt. 97, 98. On August 22, 2013, CorVel responded that a recent ruling in the underlying *Williams* Action, issued July 29, 2013 (the "*Williams* Decision") (Ex. D), construed the exact same statute, settlement, and insurance policy, but held that the remedy under Section 2203.1(G) provided for damages, not a penalty, and was covered under the policy. Dkt. 99, 100. CorVel thus asked the Court to stay further proceedings pending a final unappealable ruling from the Louisiana courts or, alternatively, to determine that CorVel's affirmative defenses still remained to be tried because the Opinion ruled only on partial summary judgment motions. *Id.*

On August 28, 2013, after further correspondence, the Superior Court issued an "Order Closing Case on Docket" finding "that there are no issues which remain to be litigated in this action." Dkt. 104 (the "August 28 Order") (Ex. B). That

[2] *See* C.A. No. 09C-09-027-JOH (Del. Super. Ct. May 16, 2013) (order entering partial summary judgment) (Trans. Id. 52329481). *First Health* is currently on appeal in this Court. *See The First Health Settlement Class v. Chartis Specialty Ins. Co.*, No. 498, 2013.

Order then confusingly declared that the Opinion issued six weeks earlier was "a final Order and Judgment." *Id.* Thus, the August 28 Order suggested that two separate orders were the "final Order and Judgment" in this action: the Opinion and the August 28 Order.

Notwithstanding this mistaken reference to the Opinion as a final order and judgment, the August 28 Order was the final order and judgment in this action. Accordingly, on September 3, 2013, CorVel filed two timely motions: (a) a motion to alter or amend the judgment on the issue of penalty pursuant to Rule 59(d) or, alternatively, for relief from judgment pursuant to Rule 60(b), based on a change in the law as a result of the *Williams* Decision, Dkt. 106 (the "Rule 59(d)/60 Motion");[3] and (b) a timely motion to alter or amend and enter a final order and judgment pursuant to Rules 59(d) and 59(e), or alternatively, for relief from judgment pursuant to Rule 60(b), to clarify that the August 28 Order, not the Opinion, was the final order and judgment (the "Rule 59(e)/60 Motion").

During an untranscribed teleconference on the Rule 59(d)&(e)/60 Motions on September 12, 2013, the Court below confirmed "it was not the Court's intent by its comments in the August 2[8] Order, to find that the time for CorVel to

[3] CorVel could not have filed its Rule 59(d)/60 Motion any earlier, as there was no judgment from which to file a Rule 59(d) motion and the basis for the motion was the intervening ruling in the *Williams* Action holding that the remedy under Section 2203.1(G) was damages, not a penalty.

appeal the June [13] Order had expired."[4] Accordingly, on September 25, 2013, the Court below docketed an order denying CorVel's Rule 59(d)/60 Motion, and clarifying (twice) that the August 28, 2013, Order was the final order and judgment in this action.[5]

On September 26, 2013, CorVel timely filed its notice of appeal. Dkt. 1. On October 15, 2013, Homeland and Executive Risk filed separate motions to dismiss contending CorVel's appeal was untimely (Dkt. 6, 7); and CorVel opposed those motions (Dkt. 8). On November 12, 2013, this Court denied the motions to dismiss without prejudice, holding "[i]t is undisputed that CorVel's notice of appeal is timely as to the August 27, 2013 and September 20, 2013 orders." Dkt. 9. Nevertheless, the Court allowed appellees to "renew their arguments as to the proper scope of this appeal in their answering briefs." *Id.* at 2–3. The Opinion was not a final order and judgment because it did not clearly declare it was intended to be final. Appellant reserves the right to seek additional time and pages for its reply brief if appellees renew their argument for dismissal on timeliness grounds.[6]

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[4] Dkt. 113 at 2 (Sept. 17, 2013 ltr. from Homeland to Judge Rocanelli).

[5] Dkt. 114 (referring to "the decision entered on August 2[8], 2013, which declared final judgment and closed the docket on the case" and stating that "the Court… issued a final order on August [8], 2013") (Ex. C).

[6] *See Plummer v. R.T. Vanderbilt Co.*, 49 A.3d 1163, 1167 (Del. 2012) (requiring a final judgment to be "clear on its face that it is a final order," because "whether an opinion embodies a final decision depends on 'whether the judge has or has not clearly declared his intention in this respect in his opinion.'").

SUMMARY OF ARGUMENT

The Court below erred as a matter of law in three respects:

1. First, the Court below erred by concluding the statutory remedy under Section 2203.1(G) was a penalty, when the plain language of the statute identified the remedy as damages. Under Louisiana's Civil Code, legislation is the superior source of law. When the Louisiana legislature carefully crafted a remedy described as "damages," instead of "penalties," that choice must be given effect. Instead, the Court below improperly relied upon dictionary definitions, authorities from other jurisdictions, irrelevant authorities construing other insurance policies, and legislative history in misconstruing the statute. The Court below also disregarded established Louisiana Supreme Court precedent holding penalties are not allowable unless expressly authorized by statute. By misconstruing the statute, the Court below erred in concluding the underlying Settlement payment was excluded from coverage under the policies.

2. Second, the Court below erred by failing to apply accepted insurance policy construction principles. Insurance policies should be construed broadly when extending coverage and narrowly when excluding coverage. The Court below did the opposite by broadly construing the penalty exclusion. The question presented by the statute and the policy exclusion was not: "what constitutes a penalty?" This is what the Court below analyzed and, in the process, broadly and

erroneously construed the term. Instead, the proper question was simply: "is a claim under Section 2203.1(G) covered, or excluded?" Applying a narrow construction to the exclusion, the Court below should have concluded the remedy provides for statutory damages and attorneys' fees – not penalties. Moreover, to the extent the penalty exclusion is ambiguous, it must be strictly construed against the insurer and in favor of coverage.

3. Third, the Court below misconstrued the policies by concluding the attorneys' fee award in the Settlement was not a covered loss. Coverage grants are to be construed broadly. Again, the Court below did the opposite, and construed loss narrowly to conclude the attorneys' fee award was not covered. The attorneys' fees in the Settlement were an amount that the insured was legally obligated to pay and should have been a covered loss. The Court below further erred when it concluded the attorneys' fee award was "punitive in nature," and excluded. Attorneys' fees are not excluded; to the extent they are punitive or penal in nature, punitive and exemplary damages are expressly covered.

STATEMENT OF FACTS

A. The Underlying LCMH Arbitration and *Williams* Action

CorVel, a Delaware corporation, owns and operates a Preferred Provider Organization ("PPO") network throughout the United States, which includes medical service providers in Louisiana. Op. at 3. In 1996, CorVel entered into a PPO agreement with Lake Charles Memorial Hospital ("LCMH") under which LCMH and its medical staff became a PPO in the CorVel network of payors thereby allowing LCMH to discount rates for certain medical services.

In 2004 and early 2005, LCMH filed several claims against CorVel with the Louisiana Department of Labor, Department of Workers Compensation. The claims alleged mistakenly that CorVel "underpaid and/or late paid" certain workers' compensation medical bills.[7] CorVel was neither the employer, nor the insurer, however. Claims for underpaid and/or late paid medical bills against a workers' compensation insurer or employer are filed pursuant to LA. REV. STAT. § 23:1201(F), which allows a healthcare provider to file a disputed compensation claim in the same manner as the injured worker. In Louisiana, this is accomplished by filing a form 1008 claim with the Office of Worker's Compensation ("OWC"). Although CorVel could not properly be named a defendant in any OWC 1008

[7] In every instance where CorVel was improperly named, CorVel was either dismissed (as an improperly named party), or the form 1008 claim was amended to name the actual insurer with CorVel being removed. A1099–1115.

claim, LCMH erroneously named CorVel as the "insurer" in a handful of cases, which included challenges to the amount or timing of certain workers' compensation medical bills paid by CorVel's employer and insurer clients. *Id.* As a result of these claims, on May 17, 2005, the Louisiana Office of Risk Management put CorVel on notice that it was making a claim for indemnification against CorVel.[8]

On July 19, 2005, CorVel filed a lawsuit against LCMH in the United States District Court for the Western District of Louisiana captioned *CorVel Corp. v. Southwest Louisiana Hospital Association d/b/a Lake Charles Memorial Hospital*, C.A. No. 05-1330, seeking a declaration directing LCMH to bring all of its underpayment claims in arbitration pursuant to the 1996 PPO agreement. Op. at 5; A0504–17. On November 6, 2006, the court entered an order compelling arbitration. Op. at 5; A0350–51.

On December 22, 2006, LCMH instituted a class arbitration against CorVel (the "LCMH Arbitration"). Op. at 8; A0537–38. LCMH and a class of medical providers filed suit against CorVel asserting violations of the PPO Act, and specifically for violation of the notice provisions contained in Section 2203.1(B).

[8] *See Williams* (Ex. D) at 7 (holding "this was clearly sufficient written notice per policy"); A1167–68.

On September 30, 2009, a class of medical service providers filed the class claims in the *Williams* Action asserting similar claims for violations of the notice provisions in Section 2203.1(B). Op. at 5–6. CorVel was not initially a party to the *Williams* Action, but was later made a defendant. *Id*. at 6. The LCMH Arbitration and the *Williams* Action seek the same statutory relief from CorVel for the same violations of the PPO Act on behalf of the same group of medical providers. *Id*. Both the LCMH Arbitration and the *Williams* Action sought damages pursuant to Section 2203.1(G).

On March 24, 2011, the plaintiff class made CorVel, Homeland, and Executive Risk parties to the *Williams* Action. *Id.* Homeland and Executive Risk were named because they had issued E&O policies to CorVel and could be sued by the class directly pursuant to LA. REV. STAT. § 22:1269.

B. <u>The Settlement</u>

On July 23, 2011, CorVel agreed to the Settlement to resolve the *Williams* Action, the LCMH Arbitration, and other actions before the Louisiana OWC. *Id*.; A0569–707. The Settlement required a payment by CorVel of $9 million for the release of the Section 2203.1(G) claims (A0587 at §10.1) and included an assignment of any insurance coverage rights to the settlement class (A0588 at §11). On November 4, 2011, the *Williams* court approved the Settlement and entered a final judgment and order dismissing the claims against CorVel. A1119–27.

C. The Executive Risk and Homeland E&O Policies

Executive Risk issued an E&O policy (the "Executive Risk Policy") to CorVel for the period October 31, 2004, to October 31, 2005. The Executive Risk Policy has limits of $10 million and a broad insuring clause that provides:

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

The Executive Risk Policy defines Loss as:

> Defense Expenses and any monetary amount which an Insured is legally obligated to pay as a result of a Claim. Loss shall include… any fines assessed, penalties imposed, or punitive, exemplary or multiplied damages awarded in Claims for Antitrust Activity, but only if… insurable under applicable law. This paragraph shall be 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….[9]

Endorsement No. 5 amended the definition of Loss to *include* "any punitive or exemplary damages where insurable under applicable law."[10]

[9] A0082 at ¶ 1 (emphasis added).

[10] A0103. Endorsement No. 5 states in pertinent part:

Similarly, Homeland issued an E&O policy to CorVel for the period beginning October 31, 2005, and issued subsequent renewal policies. The policy relevant here has a policy period of October 31, 2006, until December 1, 2007 (the "Homeland Policy"), and has limits of $10 million. The Homeland Policy includes a broad insuring clause that provides:

> The Underwriters will pay on behalf of the Insured *any Loss which the Insured is legally obligated to pay as a result of any Claim* that is first made against the Insured… and reported to the Underwriter either during the Policy Period or in any event within ninety (90) days after the end of the Policy Period, in accordance with CONDITION (B) of this Policy.[11]

Under the Homeland Policy, a "Claim" is defined as "any written notice received by any Insured that a person or entity intends to hold an Insured responsible for a Wrongful Act…."[12] Such notice "may be in the form of an arbitration, mediation, judicial, declaratory or injunctive proceeding," and a Claim will be deemed to have been made when such written notice is first received by any Insured. *Id*. Further, the Homeland Policy provides:

> All Related Claims, whenever made, shall be deemed to be a single Claim and shall be deemed to have been first made on the earliest of the following dates:

> (1) The term "Loss," as defined in Section II Definitions (J) of the Policy, is amended to include… any punitive or exemplary damages where insurable under applicable law.

[11] A0484 at ¶ I(A) (emphasis added).

[12] A0485 at ¶ I(D).

> (1) the date on which the earliest Claim within such Related Claims was received by an Insured.[13]

The Homeland Policy defines "Related Claims" as:

> [A]ll Claims for Wrongful Acts based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving the same or related facts, circumstances, situations, transactions, or events, or the same or related series of facts, circumstances, situations, transactions or events, whether related logically, causally or in any other way.[14]

Furthermore, the Homeland Policy defines Loss as follows:

> "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:
>
> (1) *a claimant's attorney's fees and court costs*, but only in an amount equal to the percentage that the amount of monetary damages covered under this Policy for any settlement or judgment bears to the total amount of such settlement or judgment…
>
> (3) *punitive, exemplary or multiplied damages* where insurable by law….
>
> Loss shall not include:
>
> (1) fines, penalties or taxes; provided that (A) punitive damages shall be deemed to constitute fines, penalties or taxes for any purpose herein…[15]

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[13] A0495 at ¶ IV(C).

[14] A0488 at ¶ I(V).

[15] A0486–87 at ¶ I(L) (emphasis added).

D. Homeland and Executive Risk Bring this Declaratory Judgment Action

On January 10, 2011, Homeland filed a five-count complaint in the Superior Court seeking a declaration that the LCMH Arbitration was not an insurable Loss under the Homeland Policy. Dkt. 1. After Executive Risk and Homeland were made parties in *Williams*, on November 9, 2011, Executive Risk intervened in the Court below to file its own five-count complaint seeking a declaration that its policy did not cover the LCMH Arbitration or the *Williams* Action. Dkt. 32. Homeland then amended its complaint to seek a declaration that the *Williams* Action was not covered. Dkt. 56. After the Court below denied CorVel's motion to dismiss or stay (Dkt. 42), CorVel answered both complaints and asserted affirmative defenses, including waiver and estoppel, on the grounds that the denial of coverage was barred by the insurers' action or inaction. Dkt. 49, 54, 57, 99.

On August 29, 2012, Homeland filed a motion for partial summary judgment with respect to Counts I, II, and IV (Dkt. 81), and Executive Risk moved for summary judgment limited to the issues of penalty, restitution, and contract (Dkt. 80). Homeland and Executive Risk did not seek summary judgment as to all counts of their complaints, or as to any of CorVel's affirmative defenses.

E. The Opinion and the *Williams* Decision

In the Opinion, the Court below applied Delaware law to construe the policies and purported to apply Louisiana law to construe the "penalty issue." Op.

at 21–22. The Court below first attempted to ascertain whether the *Williams* Action and LCMH Arbitration fell under the Executive Risk Policy or the Homeland Policy. Op. at 24–30. The Superior Court concluded, however, there were genuine issues of material fact regarding (a) whether the settlement amounts fall within the coverage period for the Executive Risk Policy (Op. at 26), and (b) "whether the workers compensation cases filed [in 2004 and early 2005] are related claims under [the later Homeland Policy]" (Op. at 29). Despite those conclusions, the Court below held that disputes regarding the applicable policy period were "immaterial because the amounts are not covered as a Loss under either policy" based on the erroneous conclusion that the remedy under Section 2203.1(G) was an excluded penalty.

Just sixteen days later, the *Williams* court, presented with the same Settlement, the same insurance policies, and the same statute, reached dramatically different conclusions and held that a valid claim was made under the Executive Risk Policy, that the Opinion was erroneous and not binding, and that the remedy under Section 2203.1(G) was damages, not penalties. *See* Ex. D at 6–8.

ARGUMENT

I. THE COURT BELOW MISCONSTRUED, MISCHARACTERIZED, AND MISLABELED THE LOUISIANA STATUTE

A. Question Presented

Whether the Court below erred in concluding that the remedy under Section 2203.1(G) is a penalty, when the statute expressly describes that remedy as damages. A1069; A1073–74; A1077–81; A1207-10.

B. Scope of Review

On an appeal from a summary judgment decision, this Court's scope and standard of review is *de novo*.[16] A trial judge's interpretation of a statute is also subject to *de novo* review.[17]

C. Merits of Argument

The Opinion effectively concluded that the Louisiana legislature, when drafting Section 2203.1(G), mislabeled or mischaracterized the cause of action it created as a claim for damages, instead of a claim for "penalties." It did not.

1. Section 2203.1(G) Does Not Define, Refer to, or Characterize the Remedy as a Penalty

It is well-settled under Louisiana law, as well as Louisiana's Civil Code, that "[t]he starting point for interpretation of any statute is the language of the statute

[16] *Kelty v. State Farm Mut. Auto. Ins. Co.*, 73 A.3d 926, 929 (Del. 2013) (citing *E. Sav. Bank, FSB v. CACH, LLC*, 55 A.3d 344, 347 (Del. 2012); *Williams v. Geier*, 671 A.2d 1368, 1375–76 (Del. 1996)).

[17] *Id.* (citing *Sussex Cnty. Dep't of Elections v. Sussex Cnty. Republican Comm.*, 58 A.3d 418, 421 (Del. 2013); *Freeman v. X–Ray Assocs., P.A.*, 3 A.3d 224, 227 (Del. 2010)).

itself."[18] When the letter of a statute does not lead to absurd results the statute must be interpreted as written.[19] Statutes must be accepted as written and not added to by construction.[20] Under Louisiana law, it is improper to interpret Section 2203.1(G) in any manner other than as written.

Starting from these fundamental principles of statutory construction, the damages set forth in Section 2203.1(G) do not constitute a penalty for a very simple reason – the legislature did not designate them as such. The Louisiana Supreme Court has made it very clear that statutory damages are *not* punitive or penal in nature (and thus, are not penalties) unless the statute specifically designates them as a penalty. In *International Harvester Credit Corp. v. Seale*,[21] the Louisiana Supreme Court specifically held:

> The term "damages" unmodified by penal terminology such as "punitive" or "exemplary," has been historically interpreted as authorizing only compensation for loss, not punishment. Under Louisiana law, punitive or other "penalty" damages are not allowable unless expressly authorized by statute.[22]

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[18] *Dugas v. Durr*, 707 So.2d 1368, 1370 (La. Ct. App. 1998).

[19] *See Pepper v. Triplet*, 864 So.2d 181, 193 (La. 2004).

[20] *See Joffrion-Woods, Inc. v. Brock*, 154 So. 660, 662 (La. Ct. App. 1934), *aff'd*, 157 So. 589 (La. 1934); *see also* La. Civ. Code art. 9 ("When 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.").

[21] 518 So.2d 1039 (La. 1988).

[22] *Id.* at 1041 (emphasis added) (citations omitted).

The court further explained "when the legislature chooses to impose a penalty it does so in a clear and unequivocal manner." *Id.* at 1043. Therefore, statutory damages are not considered or construed as "penalties" unless the legislature specifically designated them as such. Had the Louisiana legislature intended damages under Section 2203.1(G) to be a "penalty," it would have said so. Absent any language denoting a penalty, the remedy set forth in Section 2203.1(G) is exactly what the statute says it is – damages. Although the Court below said it would apply Louisiana law "regarding the penalty issue" (Op. at 22), it did not. Instead, it disregarded these fundamental statutory construction principles and entirely ignored the Louisiana Supreme Court's guidance (Op. at 36) in favor of an Illinois decision interpreting a municipal landlord-tenant code[23] and a federal court decision involving a very different policy with a far narrower definition of loss.[24]

Although many Louisiana statutes impose penalties, when they do, the legislature designates them as such. For example, insurers are subject to a 50% penalty for arbitrary and capricious failure to pay an insured within thirty days of

[23] *Landis v. Marc Realty L.L.C.*, 919 N.E.2d 300, 307 (Ill. 2009); Op at 31–32.

[24] *Indian Harbor Ins. Co. v. Bestcomp, Inc.*, C.A. No. 09-7327, 2010 WL 5471005 (E.D. La. Nov. 12, 2010), *aff'd*, 452 F. App'x 560 (5th Cir. 2011) ("*Bestcomp*").

sufficient proof of loss.[25] Thus, the legislature knows how to specify whether a remedy constitutes damages or a penalty. And here, the legislature specified that the remedies available under Section 2203.1(G) are damages – and nothing else. Further, "statutory damages" are recognized under Louisiana law. As noted in *Williams*, there are no fewer than 207 reported Westlaw decisions in Louisiana that reference "statutory damages." Ex. D at 2. It was a fundamental error for the Court below to disregard binding Louisiana Supreme Court precedent and conclude that Louisiana's legislature meant something other than what it said.

2. Two Louisiana Courts Already Decided this Issue Against the Insurance Companies

In *Gunderson v. F.A. Richard & Associates, Inc.* (the "*Gunderson* Action"),[26] Judge Robert Wyatt confronted the same coverage issue presented here. He took head-on the question whether Section 2203.1(G) provided for penalties, granted summary judgment against F.A. Richard's E&O carrier, and held:

> This Court notes from a very basic standpoint that it [Section 2203.1(G)] makes no mentions of fines or penalties. So in my mind, again, just going back to square one here, that I believe from a very basic standpoint that damages are covered by the Columbia policy. No one is arguing that point.

[25] *See* LA. REV. STAT. § 22:1892 ("Failure to make such payment… shall subject the insurer to a penalty…."); *see also* LA. REV. STAT. § 18:1505.5 ("any person who knowingly and willfully violates any provision of… this Chapter [on prohibited election campaign practices] shall be assessed a civil penalty for each violation").

[26] No. 2004-2417 (14th Jud. Dist. Ct., Parish of Calcasieu, La.).

> Now, as to whether or not the quote, "damages" being sought by the plaintiffs are in fact civil fines and penalties this Court is of the position that they are not.
>
> Civil fines and penalties in my feeling connote and/or imply payment to someone other than the plaintiff in a compensatory or damage suit other than what we have before us at this time.[27]

By simply following the statute and the law, Judge Wyatt concluded that the claims asserted were for damages as designated in the statute.

In the Opinion, the Court below improperly rejected Judge Wyatt's analysis, again, in favor of *Bestcomp*, which had drastically different coverage language. Op. at 40–41. Judge Wyatt, however, properly construed the statute and understood full-well that the remedy and judgment under Section 2203.1(G) was *not* a penalty, as he had issued a summary judgment ruling against defendant awarding $262,048,000 in *damages*.[28] The Court below should not have substituted its judgment for the *Gunderson* court's judgment.[29]

After the Court below issued the Opinion, the *Williams* court issued a decision reaching the *very same* conclusion as *Gunderson* that the remedy under

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[27] A0987.

[28] *See Gunderson v. F.A. Richard & Assocs.*, 44 So.3d 779, 785–86 (La. Ct. App. 2010) (affirming trial court's summary judgment award and referring to the remedy as "damages" at least seventeen times, and never referring to the remedy as a "penalty").

[29] *See* 2 Sutherland Statutory Construction § 37:3 (7th ed.) ("Where a foreign statute has been interpreted by courts of the state of its origin, such interpretation is followed in other states where the statute is applied. This is a rule of comity….").

Section 2203.1(G) provides for damages, not a penalty.[30] The *Williams* court also directly criticized the Opinion. Ex. D at 7–8. The *Williams* Settlement, like in *Gunderson*, involved a compromise of claims under Section 2203.1(G). Importantly, the policy in *Williams* is the same Executive Risk Policy at issue here. Together, *Williams* and *Gunderson* reflect a correct construction of the policies and Section 2203.1(G) that Delaware should follow.[31]

3. The Court Below Misapplied Louisiana Legislative History in Construing Section 2203.1(G)

The Court below also incorrectly relied on the legislative history of Section 2203.1(G) in concluding the remedy thereunder was a penalty. Legislative history is not to be considered where the language of the statute is clear.[32] And, under Louisiana law, it is improper to interpret Section 2203.1(G) in any manner other than *as written*, especially where, as here, the Court never determined that the statute was ambiguous. Despite this clear prohibition, the Court below relied on

[30] The *Williams* decision is currently on appeal in Louisiana, with oral argument expected in January 2014 and a decision expected in February 2014.

[31] *See* 2 Sutherland Statutory Construction § 37:5 (7th ed.) ("[T]he rules of the state in which the statute was enacted should be followed if they have been pleaded and proved.").

[32] *See* LA. REV. STAT. § 1:4 ("When the wording of a [statute] is clear and free of ambiguity, the letter of it shall not be disregarded under the pretext of pursuing its spirit."); *see also* LA. CIV. CODE art. 9 ("When 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.").

meeting minutes from a legislative drafting session.[33] The Superior Court observed that the legislature borrowed certain language from Title 22 of the Louisiana Civil Code when drafting Section 2203.1(G). Op. at 37. Specifically, LA. REV. STAT. § 22:1821(A) used the term "penalty" when fashioning a remedy, instead of "damages." Based on this perceived inconsistency, the Court below concluded that "the intent of the Legislature is ambiguous." *Id.* Of course, a court may not look to extrinsic evidence to create an ambiguity.[34]

Even if the Court below properly considered legislative history, that history *supports* the conclusion that the legislature intended a damages remedy, not a "penalty." That the legislature studied remedies under Title 22 and chose *not* to include the term "penalty" is significant and that omission cannot be ignored, *particularly* where, as the Court below observed, the Louisiana legislature was aware of and intentionally chose *not* to use the term. Op. at 37–38.

4. "Penalties," When Inserted Between the Words "Fines" and "Taxes," Refers to Amounts Owed to Governmental Entities, Not Private Litigants

The United States Court of Appeals for the Fifth Circuit addressed whether statutory damages available to a class of private plaintiffs were excluded from

[33] Op. at 37; A1270–74. Here, Executive Risk advanced the legislative history argument, not CorVel. *See* A1180 at n.4; Op. at 36 (characterizing argument as "CorVel's").

[34] *See Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997); *Cadwallader v. Allstate Ins. Co.*, 848 So.2d 577, 580 (La. 2003).

coverage as "penalties" under a similar E&O policy in *Flagship Credit Corp. v. Indian Harbor Ins. Co.*[35] In *Flagship*, an auto finance company settled a consumer class action alleging violations of a Texas statute that imposed statutory minimum damages for certain violations not defined as "penalties." That policy, like here, excluded coverage for "fines, penalties or taxes."[36] The court construed the exclusion applying the principle of *noscitur a sociis*, which gives meaning to one word in a group consistent with the meaning of its companion words.[37] Because fines and taxes are only paid to governmental entities, not private litigants, the court held "the term 'penalties' within the phrase, 'fines, penalties or taxes' is limited to payments made to the government." *Id.* Thus, the remedy under the Texas statute was not a penalty and was covered. Indeed, this is the same analysis applied in *Gunderson*.[38] Here, the facts are even stronger, because Section 2203.1(G) specifically labels the remedy "damages," while in *Flagship* the statute had no label. *Flagship* is persuasive and results in an appropriately narrow construction of the penalty exclusion consistent with the *Gunderson* and *Williams* coverage rulings regarding the same statute and penalty exclusion.

[35] 481 F. App'x 907 (5th Cir. 2012).

[36] *Id.* at 909.

[37] *Id.* at 911; *see also Delaware Bd. of Nursing v. Gillespie*, 41 A.3d 423, 427 (Del. 2012) (applying *noscitur a sociis* to construe statute).

[38] A0987 ("penalties… connote… payment to someone other than the plaintiff").

II. THE COURT BELOW MISAPPLIED FUNDAMENTAL POLICY CONSTRUCTION PRINCIPLES TO THE PENALTY EXCLUSION

A. Question Presented

Whether the Court below erred by broadly construing the penalty exclusion (and narrowly construing the broad insuring language) under the policies, when exclusions should be narrowly construed (and the insuring language broadly construed). A1072–73; A1083–86; A1095; A1209.

B. Scope of Review

"The Superior Court's interpretation of an insurance policy is a determination of law subject to a *de novo* standard of review."[39]

C. Merits of Argument

Insurance policies should be construed to effect, rather than deny, coverage.[40] While coverage provisions (*i.e.*, the definition of "Loss") are broadly construed in favor of coverage, exclusionary clauses (*i.e.*, the definition of "penalties") must be strictly construed against the insurer in favor of the insured.[41] The insurance company bears the burden of proving an exclusion.[42]

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[39] *Universal Underwriters Ins. Co. v. Travelers Ins. Co.*, 669 A.2d 45, 47 (Del. 1995).

[40] *See Engerbretsen v. Engerbretsen*, 675 A.2d 13, 17 (Del. Super. Ct. 1995); *see also Yount v. Maisano*, 627 So.2d 148, 151 (La. 1993). Because there is no conflict between Delaware and Louisiana principles of contract construction, this Court may apply general principles consistent with either jurisdiction. *See Eon Labs Mfg., Inc. v. Reliance Ins. Co.*, 756 A.2d 889, 892 (Del. 2000) (applying general insurance contract principles where the principles are consistent with the law of both possible jurisdictions).

[41] *See Borden, Inc. v. Howard Trucking Co.*, 454 So.2d 1081, 1086 (La. 1984); *see also Sun-Times Media Grp., Inc. v. Royal & Sunalliance Ins. Co. of Canada*, C.A. No. 06C-11-108

An exclusion from coverage must be clear and unmistakable.[43] If the terms of a policy are unclear, coverage must be resolved in favor of the insured.[44] If an exclusion is subject to more than one reasonable interpretation, the interpretation favoring coverage must be applied.[45] Finally, if an ambiguity exists, it must be construed strongly against the insurer, and in favor of the insured, because the insurer drafted the policy.[46] The Court below misapplied these fundamental principles and broke a cardinal rule of insurance contract construction.

1. The Court Below Broadly Construed the Exclusion

In its Opinion, the Court below tried to determine if the characteristics of the statutory remedy under Section 2203.1(G) were *like* a penalty. As explained above in Section I, this was error because it improperly added terms to the statute. The Court below also erred when it improperly broadened the scope of the excluded term "penalties," which must be narrowly construed. It is error to expand the

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RRC, 2007 WL 1811265, at *11 (Del. Super. Ct. June 20, 2007) ("[A]n exclusion clause in an insurance contract is construed strictly to give the interpretation most beneficial to the insured.").

[42] *La. Maint. Servs., Inc. v. Certain Underwriters at Lloyd's of London*, 616 So.2d 1250, 1252 (La. 1993); *Deakyne v. Selective Ins. Co. of Am.*, 728 A.2d 569, 574 (Del. Super. Ct. 1997).

[43] *Roger v. Estate of Moulton*, 513 So.2d 1126, 1130 (La. 1987).

[44] *See Penn Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146, 1151 (Del. 1997).

[45] *See Garcia v. St. Bernard Parish Sch. Bd.*, 576 So.2d 975, 976 (La. 1991); *see also Sammons v. Nationwide Mut. Ins. Co.*, 267 A.2d 608, 609 (Del. Super. Ct. 1970).

[46] *See Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 745 (Del. 1997).

scope of excluded penalties to include what the legislature specifically denominated statutory damages.

Once the Court below began to analyze whether the remedy under Section 2203.1(G) was *like* other forms of penalties through dictionary definitions and other inapplicable case law, the Court broadened the term beyond the narrow exclusion actually used in the policies – "penalties." For example, the Court below broadly construed the penalty exclusion by comparing Section 2203.1(G) to a municipal landlord tenant ordinance in Chicago,[47] and by applying decisions analyzing whether a remedy was "punitive" or "penal in nature."[48] No Louisiana court would look to a landlord-tenant ordinance in another state to determine if Section 2203.1(G) was a penalty.[49] Neither Executive Risk nor Homeland relied on *Landis* in their briefing (Op. at 32); it was error for the Court below to do so.

The Superior Court's reliance on *Bestcomp* was also erroneous because the policy in that case narrowly covered only "compensatory sums,"[50] not "any monetary amount," or punitive damages, as here. Given that narrow contractual framework, the *Bestcomp* court concluded that Section 2203.1(G) damages were

[47] Op. at 20–22.

[48] *Id.* at 24, 36.

[49] *See Williams*, Ex. D at 7 (distinguishing "the erroneous Delaware ruling" because it "cit[ed] cases" from "other jurisdictions such as Illinois").

[50] 2010 WL 5471005, at *1.

not strictly "compensatory," but were "punitive *in nature*," and therefore not covered.[51] But, here, the policies broadly cover amounts which an insured is "legally obligated to pay." A0486; A0082. Moreover, under both policies, punitive and exemplary damages are expressly covered. A0486; A0103. Under the Homeland Policy, "multiplied damages" are also covered. A0486.[52] It is fundamentally inconsistent with policy construction principles to extend the narrow definition of "penalty" more broadly to remedies that are also "penal" or "punitive in nature." In any event, *Bestcomp* is not controlling here.[53]

The Superior Court simply asked the wrong question. An inquiry into whether the remedies under Section 2203.1(G) are, or are not, "penal in nature" (Op. at 35) leads one no closer to answering the coverage question since the policies both cover *and* exclude remedies that are "penal in nature." For example, the Executive Risk Policy specifically covers punitive and exemplary damages (which are penal) (A0103), but excludes fines and penalties (which are also penal)

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[51] *Id.* at *6 (emphasis added).

[52] Notably, Executive Risk agrees that the Settlement constituted "multiplied damages." A0039; A0048; A0051. If Executive Risk is correct, multiplied damages are expressly covered by the Homeland Policy, and summary judgment was improper.

[53] "When a federal court undertakes to decide a state law question in the absence of authoritative state precedent, the state courts are not bound to follow the federal court's decision." *AT&T Corp. v. Clarendon Am. Ins. Co.*, 931 A.2d 409, 420 n.29 (Del. 2007) (giving no precedential effect to unpublished federal decision on issues of state law); *see In re Tufts Oil & Gas-III*, 871 So.2d 476, 481–82 (La. Ct. App. 2004) ("[U]npublished decision[s] of the United States District Court for the Eastern District of Louisiana… should not be cited or used as precedent in materials presented to any court, except in continuing or related litigation.").

(A0082). The Homeland Policy is even worse: it covers "punitive, exemplary or multiplied damages," but at the same time excludes "fines, penalties or taxes," while also providing that "punitive damages shall be deemed to constitute fines, penalties or taxes for any purpose herein." A0486. Once one ventures down such an inappropriate "penal in nature" inquiry path, one could just as easily (in fact more easily) conclude that damages under Section 2203.1(G) are exemplary (which are covered) as opposed to a penalty (which are excluded). At any rate, the Court below erred by looking into the "nature" of statutory damage and attorneys' fee claims. Op. at 15, 35, 46, 47.

2. In the Alternative, the Definition of Penalty Under the Policy is Ambiguous

While CorVel maintains the Settlement payment was *not* a penalty, even if the Court finds otherwise, the policies expressly and broadly *covered* a wide variety of penalties. For example, each contained a broad definition of Loss, a broad definition of Antitrust Activity that included coverage for penalties, coverage for penalties under HIPPA,[54] a presumption in favor of coverage for penalties,[55] no definition of penalties, and exclusions that simultaneously cover

[54] A0487 (Homeland Policy at ¶ II (L)).

[55] The Executive Risk Policy provides it "*shall be* construed under the applicable law *most favorable to the insurability of penalties*." A0082 at § II(J) (emphasis added). This is not merely a modifier of "Antitrust Activity," but applies to "[t]his paragraph," *i.e.*, the whole paragraph, including the definition of Loss.

punitive and exemplary damages, but not "penalties," while remaining silent as to statutory damages.

This is extremely confusing where none of these terms (punitive, exemplary, penalties) are defined. Adding to the confusion, settled Delaware law explains "[t]he purpose of awarding punitive or exemplary damages is to impose a penalty or deterrent to prevent conduct which is deemed to be bad or harmful."[56] If punitive and exemplary damages are penalties under Delaware law, then the exclusion is contradictory and ambiguous, because some penalties are covered (if punitive or exemplary), but certain other penalties (which remain undefined) are not. A harmonious construction of the policies as a whole, and one that avoids ambiguity, is that statutory damages are *not* penalties unless the legislature labels them as such.[57] If any ambiguity exists, it should be resolved in favor of the insured and against the insurance company.[58]

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[56] *Beals v. Washington Int'l, Inc.*, 386 A.2d 1156, 1160 (Del. Ch. 1978).

[57] *Alstrin v. St. Paul Mercury Ins. Co.*, 179 F. Supp. 2d 376, 389 (D. Del. 2002) ("[A] court should read policy provisions so as to avoid ambiguities, if the plain language of the contract permits."); *LeJeune v. Allstate Ins. Co.*, 365 So.2d 471, 483 (La. 1978) (adopting construction that "favors coverage and avoids exclusion where the terms are ambiguous or uncertain and may be given two or more reasonable interpretations").

[58] *Alstrin*, 179 F. Supp. 2d at 389.

III. THE COURT BELOW ERRED BY CONCLUDING THAT THE ATTORNEYS' FEE AWARD IN THE SETTLEMENT WAS NOT A LOSS, AND WAS AN EXCLUDED PENALTY

A. Question Presented

Whether the Court below erred by (1) narrowly construing the definition of Loss under the Policy to exclude attorneys' fees, and (2) broadly construing attorneys' fees as "punitive in nature" or "penal in nature"? A1096–97.

B. Scope of Review

The scope of review on this question is the same as in Section II.B above.

C. Merits of Argument

Even if this Court concludes that damages under Section 2203.1(G) are a penalty rather than statutory damages, CorVel's separate claim for attorneys' fees is nonetheless a covered Loss, and is not excluded under either policy as a penalty. The Court below erred in concluding that the attorneys' fee claim was not a covered Loss, and was excluded as a penalty.

1. Attorneys' Fees are an Amount that the Insured Was Legally Obligated to Pay, and Therefore a Loss

CorVel's Loss under the policies was the $9 million payment in the *Williams* Settlement, which included an amount for attorneys' fees. A1118. The fees paid to class counsel were an amount CorVel "was legally obligated to pay," and therefore a Loss under both policies. Even though Section 2203.1(G) was the basis for the damages claim, the attorneys' fees ultimately awarded to class counsel were

not paid pursuant to the statute, but were awarded pursuant to the common fund doctrine. *See* A0587 at ¶ 10.6. Either way, CorVel was legally obligated to pay those attorneys' fees.

Attorneys' fees are expressly covered under the Homeland Policy.[59] The policy could not be clearer that attorneys' fees are covered Loss. Despite this express coverage, the Court below improperly construed the penalty exclusion and concluded that attorneys' fees are "a type of penalty imposed not to make the injured party whole, but rather to discourage a particular activity." Op. at 46. It was improper for the Court below to hold that because attorneys' fees are sometimes "punitive in nature" (Op. at 46–47), that such fees are excluded from coverage under the Homeland Policy as penalty-like.

For all the reasons in Section I above, the remedy under Section 2203.1(G), including attorneys' fees, is not a penalty. Nothing in the Homeland Policy expressly defines attorneys' fees as anything other than covered Loss, much less punitive damages. Even if it did, punitive damages are expressly covered—not excluded—and the Court erred in concluding that attorneys' fees are penalty-like. Absent an explicit and unambiguous exclusion, or a definition of penalty that included attorneys' fees, this Court should not insert an exclusion that does not

[59] A0486 ("Loss shall include: (1) a claimant's attorney's fees and court costs….").

exist, and should reverse a contract construction that adds terms to the contract that the parties never included.

The Court below also cited, but failed to address, two decisions holding that attorneys' fees paid in connection with settlements are covered losses. In *UnitedHealth Group, Inc. v. Hiscox Dedicated Corporate Member Ltd.*,[60] the court held that statutory remedies under an ERISA statute were penalties and not covered damages, but held that the class' attorneys' fees constituted damages and were covered by United Health's E&O policy, where damages were broadly defined under the policy there as "any monetary amount" that the insured was obligated to pay as a result of a claim.[61]

In *XL Specialty Ins. Co. v. Loral Space & Commc'ns, Inc.*,[62] the court held that attorneys' fees paid in connection with a Delaware derivative suit and awarded pursuant to the common fund doctrine were a covered loss under that policy. Because "[t]he policy's definition of 'Loss' is broad," the court held "[i]t covers 'other amounts' the insured becomes 'legally obligated' to pay."[63] Here, too, the

[60] C.A. No. 09-CV-0210 (PJS/SRN), 2010 WL 550991 (D. Minn. Feb. 9, 2010).

[61] The ERISA statute in question referred to some of its sections as civil penalties. No such characterization exists under Section 2203.1(G). *Id.* at *10.

[62] 82 A.D.3d 108 (N.Y. App. Div. 2011).

[63] *Id.* at 11; *see Safeway Stores, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 64 F.3d 1282, 1287 (9th Cir. 1995) (Payment of the attorneys' fees in settlement of stockholder claims for breach of fiduciary duty constituted "Loss" because "[t]he lawyers got the money, not

attorneys' fee award was an amount CorVel was "legally obligated to pay as a result of a Claim" under the policies. The Opinion fails to address why either *UnitedHealth Group* or *XL Specialty Insurance* is inapplicable.

2. Attorneys' Fees are Not "Penalties," and Not Excluded

For all the reasons in Section I above, the remedy under Section 2203.1(G), including attorneys' fees, is not a penalty. Nothing in the policies defines attorneys' fees as anything other than Loss. Nevertheless, the Court below again mistakenly relied upon *Bestcomp*,[64] which held there was no coverage for attorneys' fees under Section 2203.1(G). As already explained, the *Bestcomp* policy was very different because it narrowly covered only "compensatory sums," not all amounts an insured was "legally obligated to pay." The *Bestcomp* court concluded attorneys' fees were not covered because attorneys' fees were not simply "compensatory," but were "punitive" or "penal in nature."[65] *Bestcomp* is inapplicable and it is inappropriate to apply such a narrow reading to Loss.

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the shareholders," so the payment was "an actual out-of-pocket loss to Safeway incurred in defense of its directors and officers.").

[64] Op. at 47.

[65] 2010 WL 5471005, at *6–7.

The Court below also relied upon four decisions and characterized the attorneys' fees in those cases as "punitive in nature." Op. at 47.[66] None of those decisions are applicable. None involved insurance policies that expressly covered attorneys' fees (like the Homeland Policy) or punitive and exemplary damages, as here. None involved an insurance policy with a penalty exclusion that must be narrowly construed, as here.[67] And none involved attorneys' fees awarded from a common fund, as here.

To exclude coverage for attorneys' fees, all that would have been required is an exclusion from the definition of Loss. Absent such an exclusion, or a definition of penalty that included attorneys' fees, this Court should not insert an exclusion that does not exist, and certainly should not allow a narrow exclusion for penalties to trump an express grant of coverage for attorneys' fees under the Homeland Policy on the theory that attorneys' fees are "punitive in nature."

[66] *Bestcomp*, 2010 WL 5471005, at *7; *Langley v. Petro Star Corp. of Louisiana*, 792 So.2d 721, 723 (La. 2011); *Texas Indus., Inc. v. Roach*, 426 So.2d 315, 317 (La. Ct. App. 1983); *Peyton Place Condominium Assoc., Inc. v. Guastella*, 18 So.3d 132, 136 (La. Ct. App. 2009).

[67] *See* Section II, *supra*.

CONCLUSION

For the reasons stated herein, 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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CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2014, my firm served a true and correct copy of the foregoing *Appellant's Corrected Opening Brief*, via File & Serve*Xpress* upon the following counsel of record:

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EXHIBIT A

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Case No. N11C-01-089 JOH

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

HOMELAND INSURANCE CO., and EXECUTIVE RISK SPECIALTY INS. CO., Plaintiffs,	)	
v.	)	C.A. No. 11C-01-089 JOH
CORVEL CORPORATION, Defendant.	)	

Submitted: April 15, 2013
Decided: June 13, 2013

Upon Consideration of Executive Risk's Motion for Summary Judgment - ***GRANTED***

Upon Consideration of Homeland Insurance Co.'s Motion for Partial Summary Judgment - ***GRANTED***

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Herlihy, Judge

Introduction

Plaintiff Executive Risk Specialty Insurance Company ("Executive Risk") has moved for summary judgment and plaintiff Homeland Insurance Company of New York ("Homeland") has moved for partial summary judgment on the issue of insurance coverage regarding two Errors and Omissions Insurance Policies issued to defendant CorVel Corporation ("CorVel") covering different time periods. As will be discussed more fully below, the coverage issue stems from two settlement agreements that occurred in Louisiana resulting from violations of, and financial consequences imposed under, a Louisiana Statute known as the Any Willing Provider Act, La. R.S. 40:2203.1. The main issue to be decided by the Court is the meaning of the term "penalty" as set forth in each policy and whether the settlements in Louisiana are covered as "Loss."

The Court finds that as to both Executive Risk's motion and Homeland's motion, a violation of La. R.S. 40:2203.1 constitutes a penalty which is not covered as a "Loss" as set forth under either policy. Accordingly, Executive Risk's motion for summary judgment and Homeland's motion for partial summary judgment are hereby GRANTED.

Factual and Procedural Background

A. Louisiana's Preferred Provider Organizations Act

The coverage dispute in this matter revolves around a Louisiana statute and the insurance contracts, which are closely intertwined. The Court will first address the statute.

A PPO is statutorily defined as a group of medical providers which agree to provide medical services to subscribers of an insurance carrier at reduced rates.[1] PPOs were developed and are used to allow employers and insurance companies to offer health care services at reduced rates through a network of preferred providers. Following the advent of PPO networks, some managed care organizations began taking unfair advantage of health care providers. On occasion, providers learned that they were being reimbursed at reduced rates even though they had never agreed to participate in a PPO network.

The legislature in Louisiana set out to remedy this problem by enacting statutes that allow intermediaries to take advantage of the benefits of PPO networks, while eliminating the unfair practices to healthcare providers.[2] Its response is found in title 40, Chapter 12 of the Louisiana Revised Statutes which regulates the operation of PPO networks in what is known as the "PPO Act" or also the "Any Willing Provider Act." It was enacted in 1984 in an attempt to help reduce health care costs, but also to protect health care providers. It includes notice provisions that only allow reimbursement at the lower negotiated rates *if notice* is given in either one of two ways. One where a patient presents a benefit card at the time of service that identifies the discount to be taken:

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

[1] La. R.S. 40:2202(5)(a).

[2] La. R.S. 40:2203.1.

> and presented to the participating provider when medical care is provided....[3]

Alternatively, in the event that a benefit card is not issued or utilized by a group purchaser, injured employee or other entity, "written notification [to the provider] shall be required of any entity accessing an existing group purchaser's contractual agreement or agreements at least thirty days prior to accessing services through a participating provider under such agreement or agreements."[4]

The statute also provides for financial consequences in the event a PPO fails to comply with these mandatory notice provisions:

> Failure to comply with the [notice provisions] of this Section shall subject a group purchaser to damages payable to the provider of double the fair market value of the medical services provided, but in no event less than the greater of fifty dollars per day of noncompliance or two thousand dollars, together with attorney fees to be determined by the court.[5]

B. The Parties

CorVel, a Delaware Corporation with its principle place of business in California, owns and operates a Preferred Provider Organization ("PPO") network throughout the United States. As part of the national network, CorVel had PPO agreements with medical service providers in Louisiana, including Lake Charles Memorial Hospital ("LCMH"). In 1996, CorVel entered into a PPO agreement with LCMH. The PPO agreement provided that LCMH and its medical staff became a PPO in the CorVel

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[3] La. R.S. 40:2203.1(B).

[4] La. R.S. 40:2203.1(B)(5).

[5] La. R.S. 40:2203.1(G).

network of Payors. Under that agreement, LCMH agreed to discount rates regarding certain medical services performed. The agreement additionally contained a clause providing that disputes under the agreement must be submitted to arbitration. Additionally, CorVel contracted with workers' compensation payors, such as employers, who utilized CorVel's discounted PPO rates when paying for workers' compensation medical services.

Plaintiff Homeland is a New York corporation with its principal place of business in Massachusetts. Plaintiff Executive Risk is a Connecticut corporation with its principal place of business in New Jersey. Both companies issued Managed Care Organization Errors & Omissions ("E&O") Policies to CorVel. Homeland moved for declaratory judgment in this Court asserting that it was not liable regarding a settlement agreement entered into by CorVel in Louisiana. Executive Risk moved to intervene, also seeking a declaration that the settlement in Louisiana was not a covered Loss under its insurance policy.

C. Louisiana Actions against CorVel

In 2004 and early 2005, LCMH filed several claims against CorVel with the Louisiana Department of Labor – Department of Workers' Compensation. These Claims were brought because CorVel had allegedly been taking an improper discount – paying only the discounted PPO agreement rate – for services provided to workers' compensation patients. The Claims alleged that the resulting payments were below the rates set forth in the Louisiana Fee Schedule for workers' compensation-related services in violation of Louisiana law. LCMH sought to recover the amount of the discount and

statutory fees and penalties since the services provided to workers' compensation patients were not included in the PPO agreement.

On July 19, 2005, CorVel filed a lawsuit against LCMH in Louisiana federal district court entitled *CorVel Corporation v. Southwest Louisiana Hospital Association d/b/a Lake Charles Memorial Hospital*, No. CV05-1330 (Trimble, J.), requesting a declaration directing LCMH to bring all of its underpayment claims in an arbitration proceeding pursuant to the 1996 PPO agreement. On November 6, 2006, the Louisiana District Court entered an order compelling arbitration and staying further proceedings pending the arbitration.

Then, on December 22, 2006, LCMH instituted a putative class arbitration against CorVel with the American Arbitration Association entitled *SWLA Hospital Assoc. d/b/a Lake Charles Memorial Hospital v. CorVel* ("LCMH Arbitration"). LCMH, on behalf of a class of medical providers, sued CorVel based on a violation of La. R.S. 40:2203.1(B). LCMH claimed CorVel had unlawfully discounted medical bills for workers' compensation patients and the discounts pursuant to the PPO agreement were invalid because of lack of notice. LCMH sought statutory penalties from Homeland.

A few years later, on September 30, 2009, on behalf of a putative class of medical service providers, a physician practice brought suit in the 27th Judicial District Court for the Parish of St. Landry. In that case, entitled *George Raymond Williams, M.D. v. SIF Consultants of Louisiana, Inc.*, No. 09-C05244-C (St. Landry Parish, La.) (the "*Williams* Litigation"), the plaintiffs sought relief regarding alleged violations of La. R.S. 40:2203.1(B) for the application of PPO discounts for workers' compensation services

without the proper notification. CorVel was not an original party to this suit, but was pled in as a defendant on March 21, 2011. Essentially, the LCMH Arbitration and *Williams* Litigation sought the same statutory relief from CorVel for the same type of violations of La. R.S. 40:2203.1(B) on behalf of the same group of medical providers.

On September 24, 2010, Homeland's claims manager received a letter from CorVel's counsel stating that an arbitration panel determined that LCMH's December 22, 2006 arbitration demand could proceed as a class action arbitration and the claim was covered under CorVel's insurance policy with Homeland. The claims manager for Homeland responded to CorVel's letter indicating it reserved all rights pending a full investigation. CorVel's counsel subsequently adhered to the position stated in his September 24, 2010 letter that Homeland owed defense and indemnity obligations under the policy for the arbitration proceeding.

On March 24, 2011, CorVel, Homeland, and Executive Risk were made parties to the *Williams* Litigation. The *Williams* Litigation alleged the same claims against CorVel as the arbitration proceeding. Homeland and Executive Risk were named, as they had issued insurance policies to CorVel and therefore, could be sued directly by the plaintiff class under La. R.S. 22:1269.

On July 23, 2011, CorVel entered into a settlement with the plaintiffs in the *Williams* Litigation that would resolve it, the LCMH Arbitration, and other actions before Louisiana's Office of Workers' Compensation. Specifically, the settlement agreement required CorVel to pay $9 million for a resolution of all the actions and CorVel purported

to assign its rights to any insurance coverage applicable to these actions.[6] The settlement released the statutory penalty claims under La. R.S. 40:2203.1(G), in addition to individual claims for underpayment of benefits.

On November 4, 2011, the *Williams* Court approved the settlement proposal and entered a final judgment order dismissing CorVel from the case. The agreement required a court-appointed Special Master to distribute settlement funds based on a designated allocation model. According to that model, funds would be distributed in the following four parts: (1) each claimant would receive a "base amount" of $100; (2) claimants would receive a sum based on the number of bills that each provider submitted to CorVel; (3) claimants would receive a sum based the amount of discounts taken after the bills were submitted to CorVel; and (4) claimants would receive a sum based on the total number of workers' compensation claims each provider filed claiming an improper discount.[7]

Homeland and Executive Risk remain parties to the *Williams* Litigation and the putative class of medical service providers continue to pursue direct action claims against the carriers in Louisiana. The court deferred considering the carriers' arguments for dismissing, or staying the claims against Homeland and Executive risk until after a class certification hearing. The hearing occurred and the court certified the class. Executive Risk and Homeland filed an appeal of the order certifying the class which was heard on September 25, 2012. The Court has not been made aware of the results of the appeal.

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[6] CorVel Resp. to Mot. Summ. J., Ex. 3.

[7] Executive Risk Mot. Summ. J.., Ex. F.

D. Complaint for Declaratory Judgment filed in this Court

CorVel has demanded that Executive Risk provide coverage for the *Williams* Litigation and LCMH Arbitration under Executive Risk's E&O Policy effective October 31, 2004 – October 31, 2005. Additionally, CorVel has demanded that Homeland provide coverage for the *Williams* Litigation and LCMH Arbitration under Homeland's E&O Policy first effective October 31, 2005 – October 31, 2006 with subsequent renewals thereafter.

As a result of CorVel's demands, on January 10, 2011, Homeland filed this declaratory judgment action against CorVel seeking a declaratory judgment that the LCMH Arbitration was not an insurable Loss under its policy. Then, as stated above, on March 24, 2011, Executive Risk and Homeland were pleaded into the *Williams* Litigation in Louisiana. Subsequently Executive Risk moved to intervene in this Court on November 9, 2011, also seeking a declaration that the Executive Risk Policy did not cover the *Williams* Litigation or the LCMH Arbitration settlement. This Court granted the motion to intervene on December 6, 2011. CorVel filed a motion to dismiss claiming that Homeland's declaratory judgment complaint was not ripe for adjudication, which this Court denied on December 14, 2011.

E. Executive Risk's & CorVel's E&O Policies

Executive Risk issued an E&O Liability Policy to CorVel beginning on October 31, 1999, and renewing annually until the final policy period from October 31, 2004 to October 31, 2005. The Policy relevant to the issue before the Court is the 2004 to 2005

Policy, which has indemnity limits of $10 million. The provisions necessary for the determination of this issue are as follows:

> The insuring Agreement of the Executive Risk Policy provides:
>
> The Underwriter will pay on behalf of the **Insured** any **Loss** which the **Insured** is legally obligated to pay as a result of any **Claim** that is first made against the **Insured** during the **Policy Period** and reported to the Underwriter during the Policy Period or within ninety (90) days after the end of the **Policy Period** . . . .[8]
>
> The policy defines Loss as:
>
> **Defense Expenses** and any monetary amount which an **Insured** is legally obligated to pay as a result of a **Claim**. **Loss** shall include . . . any fines assessed, penalties imposed, or punitive, exemplary or multiplied damages awarded in **Claims** for **Antitrust Activity**, but only if . . . insurable under applicable law. This paragraph shall be construed under the applicable law most favorable to the insurability of such fines, penalties and punitive, exemplary or multiplied damages. **Loss** shall not include:
>
> (1) except as expressly set forth above, fines, penalties, taxes or multiplied damages;
>
> (2) fees, amounts, benefits or coverage owed under any contract, health care plan or trust, insurance or workers' compensation policy or plan or program of self-insurance;
>
> (3) non-monetary relief or redress in any form, including without limitation the cost of complying with any injunctive, declaratory or administrative relief; or
>
> (4) matters which are uninsurable under applicable law.[9]
>
> Endorsement 5 changed the Policy to include "punitive or exemplary damages under applicable law" as **Loss**.[10]

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[8] Executive Risk Mot. Summ. J., Ex. A, ¶ I.

[9] *Id.* at p. 3.

Additionally, certain claims are excluded from coverage under the Executive Risk Policy. Section III, Exclusion (A) of the Policy provides as follows:

> Except for **Defense Expenses**, the Underwriter shall not pay **Loss** from any **Claim** brought about or contributed to in fact by: (1) any willful misconduct or dishonest, fraudulent, criminal or malicious act, error or omission by any **Insured**; (2) any willful violation by any **Insured** of any law, statute, ordinance, rule or regulation; or (3) any **Insured** gaining any profit, remuneration or advantage to which such **Insured** was not legally entitled.[11]

Homeland issued an E&O Liability Policy to CorVel for the policy period of October 31, 2005 - October 31, 2006 and subsequently issued renewal policies to CorVel. The Policy relevant for purposes of this dispute is No. MCP-1371-06,which has a policy period of October 31, 2006 until December 1, 2007.

The Homeland Policy provides CorVel, the named insured, a $10 million limit of liability per claim, with a $10 million maximum aggregate limit of liability for all claims made during the policy period. Section I(A) of the policy provides: "The Underwriters will pay on behalf of the **Insured** any **Loss** which the **Insured** is legally obligated to pay as a result of any **Claim** that is first made against the **Insured** . . . and reported to the

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[10] Endorsement No. 5 states in pertinent part:

> (1) The term "Loss," as defined in Section II Definitions (J) of the Policy, is amended to include, up to the amount listed in ITEM 3(c) 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), any punitive or exemplary damages where insurable under applicable law.

Executive Risk Mot. Summ. J., Ex. A, Endorsement No. 5.

[11] *Id.* at Ex. A, ¶III(A)(1)-(3).

Underwriter either during the Policy Period or in any event within ninety (90) days after the end of the Policy Period, in accordance with CONDITION (B) of this Policy."[12]

Under the policy, a "**Claim**" is defined as, "any written notice received by any **Insured** that a person or entity intends to hold an **Insured** responsible for a **Wrongful Act**. . ."[13] Additionally, such notice "may be in the form of an arbitration, mediation, judicial, declaratory or injunctive proceeding," and a Claim will be deemed to have been made when such written notice is first received by any Insured. Further, the Policy's Conditions Clause IV(C) provides that:

> All Related Claims, whenever made, shall be deemed to be a single Claim and shall be deemed to have been first made on the earliest of the following dates:
> (1) the date on which the earliest Claim within such Related Claims was received by an Insured.[14]

The policy defines "Related Claims" as:

> [A]ll Claims for Wrongful Acts based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving the same or related facts, circumstances, situations, transactions, or events, or the same or related series of facts, circumstances, situations, transactions or events, whether related logically, causally or in any other way.[15]

Furthermore, the Policy states the following regarding "Loss:"

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[12] Homeland Mot. Summ. J., Ex. A-35, ¶I(A).

[13] *Id.* at Ex. A-36, ¶II(D).

[14] *Id.* at Ex. A-47, ¶IV(C)(1) (emphasis removed).

[15] *Id.* at Ex. A-39, ¶II(V) (emphasis removed).

"Loss" means Personal Information Protection Event Expenses, Defense Expenses and any monetary amount which an Insured is legally obligated to pay as a result of a Claim.[16]

Loss shall include:

(1) a claimant's attorney's fees and court costs, but only in an amount equal to the percentage that the amount of monetary damages covered under this Policy for any settlement or judgment bears to the total amount of such settlement or judgment;
(2) pre-and post-judgment interest awarded or imposed in any judgment, and premiums on appeal bonds required to be furnished with respect to any such judgment; and
(3) punitive, exemplary or multiplied damages where insurable by law; provided that the law of the jurisdiction most favorable to the insurability of punitive damages shall control the insurability of such punitive damages, so long as such jurisdiction:
    a. is where such punitive damages were awarded or imposed;
    b. is where the Insured Entity is incorporated or otherwise organized, or has a place of business;
    c. is where the Underwriter is incorporated or has its principal place of business; or
    d. is where the parent company of the Underwriter is incorporated.[17]

Loss shall not include:

(1) fines, penalties or taxes; provided that (A) punitive damages shall be deemed to constitute fines, penalties or taxes for any purpose herein, and (B) Loss shall include fines and penalties imposed under the Health Insurance Portability and Accountability Act or in Claims for Antitrust Activity, but only if such fines and penalties are insurable under applicable law most favorable to the insurability of such fines and penalties;
(2) fees, amounts, benefits, coverage or obligations owed under any contract with any party (including providers of Medical Services),

[16] *Id.* at Ex. A-37, ¶II(L) (emphasis removed).

[17] *Id.* at ¶II(L)(1)-(3) (emphasis removed).

> health care plan or trust, insurance or workers' compensation policy or plan or program of self-insurance . . .[18]

The policy further defines "Antitrust Activity" as:

> [A]ny actual or alleged: price fixing; restraint of trade; monopolization ;or violation of the Federal Trade Commission Act, the Sherman Act, the Clayton Act, or any other federal statute involving antitrust, monopoly, price fixing, price discrimination, predatory pricing or restraint of trade activities, or of any rules or regulations promulgated under or in connection with any of the foregoing statutes, or of any similar provision of any federal, state or local statute, rule or regulation or common law.[19]

Parties' Contentions

Executive Risk moves for summary judgment regarding CorVel's settlement of $9 million pertaining to the *Williams* Litigation and the LCMH Arbitration. It argues that CorVel has not suffered an insurable Loss under Executive Risk's policy issued for the October 31, 2004 to October 31, 2005 policy period, as the settlement amount constitutes a penalty. As a preliminary argument, Executive Risk contends that California law governs the construction of the insurance policy because CorVel was headquartered and maintained its principal place of business in California during the negotiation and issuance of its Policy.

It first asserts that payments of the settlement constitute penalties and/or multiple damages and are thus, expressly carved out of the definition of Loss. In support of its position, it contends the following arguments: (1) the statutory remedy in the LCMH Arbitration and *Williams* litigation is a penalty under California law; (2) the Court of

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[18] *Id.* at Ex. A-37-38, ¶II(L)(i)-(ii) (emphasis removed).

[19] *Id.* at Ex. A-35, ¶II(A).

Appeal of Louisiana and the federal district courts across Louisiana have characterized La. R.S. 40:2203.1(G)'s remedy as a penalty; (3) a Fifth Circuit Court's decision applying Texas law to a different policy is distinguishable from this case; (4) distribution of settlement funds under the allocation model reflects payment of a penalty; (5) any payment of CorVel settlement funds to attorneys' fees constitutes a penalty under California law; (6) the settlement of the underlying litigation does not constitute loss because penalties and punitive damages are readily distinguishable.

Secondly, Executive Risk argues that the settlement of the underlying litigation is not covered under its policy because it constitutes restitution and/or disgorgement. Specifically, under part three of the settlement which released approximately 100 workers' compensation administrative claims against CorVel, it contends that part three constitutes disgorgement and restitution of funds improperly retained by CorVel. Thirdly, Executive Risk argues the settlement of the underlying litigation is not covered because it constitutes payment of a contractual obligation or amounts owed pursuant to a workers' compensation policy. Lastly, Executive Risk contends that the settlement of the underlying litigation does not constitute loss as insurable "Antitrust Activity" as defined in the policy.

Homeland advances several arguments in support of its motion. First, it contends that the matters at issue are not encompassed by the terms of the policy because they are not claims first made during the policy period. Homeland alleges that its Policy inception date was on October 31, 2005 yet the CorVel complaint filed on July 19, 2005 in

Louisiana Federal District Court[20] was filed prior to the policy's inception date. Specifically the complaint filed on July 19, 2005, alleged LCMH had submitted dozens of workers' compensation complaints to Louisiana regulators claiming that CorVel had paid medical bills for workers' compensation patients at rates below the Louisiana fee schedule. Thus, it is Homeland's position that each of the complaints filed months before the policy inception date constitutes a claim for a wrongful act as defined in the policy. Further, Homeland submits that because these claims are related to the other claims, they too are excluded from coverage under the policy.

It next argues that the matters at issue are not eligible for coverage under the policy because the recovery of penalty damages is not a covered "Loss" under the policy. In support of this argument, it points to the definition of "Loss" and that penalty damages are specifically not included as a covered loss. Further, it cites to *Indian Harbor Ins. Co. v. Bestcomp, Inc.*, where the court concluded that Section 40:2203.1(G) was "punitive in nature because its purpose is to punish group purchasers for failure to provide notice of PPO discounts to healthcare providers."[21] Homeland distinguishes a bench trial decision from a District Court Judge in the Parish of Calcasieu in Louisiana indicating that the remedy in La. R.S. 40:2203.1(G) are covered as damages by claiming: (1) no authority supports the ruling; (2) the policy language at issue in that case differs from that presented here; and (3) Louisiana Courts addressing the penalty issue have reached the

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[20] *CorVel Corp. v. Southwest Louisiana Hospital Ass'n d/b/a Lake Charles Memorial Hospital*, No. CV05-1330 (Trimble, J).

[21] 2010 WL 5471005, at *6 (E.D. La.); *aff'd* 452 Fed. Appx. 560 (5th Cir. 2011).

opposite conclusion. Lastly, Homeland argues that the prior proceedings exclusion III(C)(8) bars coverage because the matters at issue arose from the pre-policy Workers' Compensation and Louisiana federal litigation filed by CorVel. In support of this contention, Homeland submits that because the policy at issue is a renewal, and because prior continuous coverage by Homeland commenced on October 31, 2005, the inception date for purposes or Exclusion III(C)(8) is October 31, 2005.

CorVel argues in opposition that neither Homeland nor Executive Risk has satisfied its burden to show that the settlement amount is excluded from coverage under the policies issued to CorVel. At a minimum, CorVel submits factual questions remain regarding the proper characterization of the underling settlement which would preclude summary judgment. CorVel first contends that under California, Louisiana, or Delaware Law, the Executive Risk and Homeland have not proven that Section 40:2203.1 damages are penalties. CorVel contends that Louisiana law applies to the determination of whether 40:2203.1 are penalties because Louisiana is the jurisdiction with the "most significant relationship" to the issue of insurance coverage. CorVel claims that Louisiana law must apply to whether Loss under 40:2203.1(G) constitutes "punitive, exemplary or multiplied damages" because it is more favorable to the insurability of punitive damages. Furthermore, under Louisiana and California law, Section 40:2203.1 damages are not excluded penalties. At a minimum CorVel argues that the exclusions in the definition of "Loss" in the Policies are ambiguous, requiring this Court to deny the motions.

CorVel next argues that Homeland and Executive Risk have not met their burden of proving that any other exclusion completely eliminates coverage. Specifically, the

Executive Risk and Homeland have not established that either the "Prior Acts Exclusion", the "Related Claims" provision, or the "Prior Pending Litigation" Exclusion in the policies clearly and unambiguously defeats coverage. CorVel also submits that the settlement funds do not constitute disgorgement or restitution under the policies. CorVel additionally contends that the settlement does not constitute payment of any amount owed pursuant to a contract or a workers' compensation policy.

In the alternative, CorVel asserts that even if La. R.S. 40:2203.1(G) imposes a penalty, the Claims in the *Williams* Litigation and LCMH Arbitration are covered as Antitrust Activity under the Executive Risk policy. Finally, CorVel argues that the attorneys' fees in connection with the *Williams* settlement are covered under the Homeland Policy's definition of Loss.

Standard of Review

The Court may grant summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving part is entitled to summary judgment as a matter of law."[22] The moving party bears the initial burden of showing that no material issues of fact are present.[23] Once such a showing is made, the burden shifts to the non-moving party to demonstrate that there are material issues of fact

[22] Super. Ct. Civ. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

[23] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

in dispute.[24] In considering a motion for summary judgment, the Court must view the record in a light most favorable to the non-moving party.[25] "Summary judgment will not be granted when a more thorough inquiry into the facts is desirable to clarify the application of the law to the circumstances."[26]

Discussion

I. Choice of Law

Executive Risk, Homeland and CorVel disagree whether California, Louisiana or Delaware law should apply in determining the issues before the Court. Executive Risk argues that California law governs this case, as CorVel was headquartered and maintained its principal place of business in California, both at the time of the negotiation of the policy, and now. Homeland contends that either Delaware or California law applies, as there does not appear to be a direct conflict between the laws of Delaware and California on the general rules of policy interpretation. CorVel submits that Louisiana law applies to this dispute. CorVel further argues that the penalty issue is to be governed by tort and not contract law and thus, Louisiana law, and not California law should apply.

Where an insurance policy does not contain a choice-of-law provision, the Court must determine the applicable contract law in accordance with the rules established in the

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[24] *Id.* at 681.

[25] *Burkhart*, 602 A.2d at 59.

[26] *Phillip-Postle v. BJ Prods., Inc.*, 2006 WL 1720073, at *1 (Del. Super. Apr. 26, 2006).

Restatement (Second) of Conflict of Laws.[27] Section 193 of the Restatement "calls for application of the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless, with respect to the particular issue, some other state has a more significant relationship to the contract and the parties."[28] Additionally, where "a company obtains insurance for risks and operations in a variety of jurisdictions," courts also apply the general choice of law considerations set forth in Section 188.[29] Section 188 considers the following factors in determining the applicable law: (1) the place of contracting; (2) the place of negotiation of the contract; (3) the place of performance; (4) the location of the subject matter of the contract; and (5) the domicile, residence, nationality, place of incorporation, and place of business of the parties.[30]

CorVel argues that the issue of whether the amount recoverable in La. R.S. 40:2203.1 is a "penalty" is a matter of tort law and not contract law. Specifically, it argues that the Court must follow Section 145 and Section 6 of the Restatement (Second) of Conflict of Laws which states that, "the laws of the state with the most significant relationship to the occurrence and the parties under the principles stated in § 6 [of the

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[27] *Oliver B. Cannon & Son, Inc. v. Dorr-Oliver, Inc.*, 394 A.2d 1160, 1166 (Del. 1978); *Viking Pump, Inc. v. Century Indem., Co.*, 2 A.3d 76, 87 (Del. Ch. 2009).

[28] Restatement (Second) of Conflict of Laws § 193.

[29] *Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76, 87 (Del. Ch. 2009); *Affiliated FM Ins. Co.*, 788 A.2d 134, 137-38 (Del. Super. 2001); *See* Restatement (Second) of Conflict of Laws § 188.

[30] Restatement (Second) of Conflict of Laws § 188.

Second Restatement] is the governing law . . . ."[31] The following relevant contacts should be considered when applying Section Six: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation and place of business of the parties, and; (4) the place where the relationship, if any, between the parties is centered.[32]

CorVel's contention that the issue regarding penalties is a matter of tort, and not contract law, is meritless. The cases cited in support of CorVel's argument pertain to an entirely different issue, specifically, underinsured motorist claims where the key issue was the amount of damages owed to the injured insured by the underlying third-party tortfeasor.[33] Additionally, in *Rapposelli v. State Farm*, the Delaware Supreme Court held that even though the determination of the amount of underinsured motorist damages was a matter of tort law, disputes regarding the contract was governed by contract law.[34] In this case, the dispute pertains the contract itself and will thus be covered by contract, and not tort law.

In determining whether to apply Delaware, California, or Louisiana law, this Court must first "compare the laws of the competing jurisdictions to determine whether the laws actually conflict."[35] If applying Delaware's, California's and Louisiana's laws

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[31] *State Farm Mut. Auto. Ins. Co. v. Patterson*, 7 A.3d 454, 457 (Del. 2010).

[32] *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 47 (Del. 1991).

[33] 988 A.2d 425 (Del. 2010); *See State Farm Mut. Auto v. Ins. Co. v. Patterson*, 7 A.3d 454 (Del. 2010).

[34] 988 A.2d at 429.

would produce different results, a "true conflict" is present, and the court must conduct a choice of law analysis.[36] If however, "the laws would produce the same decision . . . there is no real conflict and a choice of law analysis would be superfluous."[37] Where neither jurisdiction has decided the particular issue, " . . . the Court will not read a conflict where none exists, and will apply the law of the forum state, Delaware."[38]

Here, Delaware law applies to the interpretation of the contract, as there is no direct conflict between Delaware and California law. In California, as in Delaware, insurance policies are contracts and are subject to the rules of construction governing contracts.[39] Additionally, as will be discussed more fully below regarding Delaware law of contract interpretation, California also applies the "plain meaning rule." Specifically, in California "[u]nder statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. Such intent is to be inferred, if possible, solely from the written provisions of the contract."[40] Therefore,

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[35] *Mills Ltd. P'ship v. Liberty Mut. Ins. Co.*, 2010 WL 8250837, *4 (Del. Super. Nov. 5, 2010) (quoting *Penn. Employee, Benefit Trust Fund v. Zeneca, Inc.*, 710 F.Supp.2d 458, 466 (D. Del. 2010) (predicting Delaware courts, like other state and federal courts, would require an actual conflict exist before engaging in a complete conflict of laws analysis).

[36] *Id.*

[37] *Id.* (quoting *Great Am. Opportunities, Inc. v. Cherrydale Fundraising*, LLC, 2010 WL 338219, at *8 (Del. Ch. Jan. 29, 2010) (Parsons, V.C.)).

[38] *Tyson Foods, Inc. v. Allstate Ins. Co.*, 2011 WL 3926195, at *6 (Del. Super. Aug. 31, 2011) (citing *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 358 (3d Cir. 2007)).

[39] *Bank of the West v. Superior Court (Industrial Indem. Co.)*, 833 P.2d 545, 547 (Cal. 1992); *Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992).

because this Court finds that there is no conflict between California and Delaware law, Delaware law will apply.

Additionally, while this Court will apply Delaware law to interpret the insurance contracts, Louisiana law will be applied regarding the penalty issue, as this Court must examine a Louisiana Statute.

II. Contract Interpretation

The interpretation of a contractual provision is a question of law.[41] Delaware Courts apply traditional principles of contract interpretation. As such, courts are to give effect to the plain meaning of a contract's terms and provisions when the contract is clear and unambiguous.[42] On the other hand, when the meaning of the terms and provisions of a contract is not clear and there exists multiple and different reasonable interpretations, the court is required to find that the contract is ambiguous.[43]

The interpretation of insurance contracts is guided by similar principles.[44] Therefore, clear and unambiguous language in an insurance contract should be given its ordinary and usual meaning.[45] In construing insurance contracts, the Delaware Supreme

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[40] *AIU Ins. Co. v. Superior Court (FMC Corp.)*, 799 P.2d 1253, 1264 (Cal. 1990).

[41] *Pellaton v. Bank of New York*, 592 A.2d 473, 478 (Del. 1991).

[42] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159-60 (Del. 2010) (citing *Rhone-Poulenc Basic Chem. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1195 (Del. 1992)).

[43] *Id.* at 1160 (citing *Twin City Fire Ins. Co. v. Delaware Racing Ass'n*, 840 A.2d 624, 628 (Del. 2003)).

[44] *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 69 (Del. 2011).

[45] *Id.* (citing *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 288 (Del. 2001)).

Court has held that an "ambiguity does not exist where the court can determine the meaning of a contract without any other guide than a knowledge of the simple facts on which, from the nature of the language in general, its meaning depends."[46] An insurance contract is not ambiguous simply because the parties do not agree on its proper construction.[47] "Creating an ambiguity where none exists could, in effect, create a new contract with rights, liabilities and duties to which the parties had not assented."[48] An insurance contract is ambiguous when it is reasonably susceptible to different interpretations or has more than one possible meaning.[49]

CorVel argues that the contracts in this case are ambiguous. The Court finds that both the Executive Risk Policy and the Homeland Policy are clear and there are not multiple and different reasonable interpretations of their meaning. Thus, the insurance contracts at issue are not ambiguous merely because the parties cannot agree upon their proper construction.

III. Definition of Loss Under the Policies

Under Delaware's well-established principles of insurance contract interpretation, an insured has the initial burden to prove that a claim is covered under the terms of a

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[46] *Id.* (quoting *Rhone-Poulenc*, 616 A.2d at 1196).

[47] *Axis Reinsurance Co. v. HLTH Corp.*, 993 A.2d 1057, 1062 (Del. 2010).

[48] *ConAgra Foods*, 21 A.3d at 69 (quoting *O'Brien*, 785 A.2d at 288).

[49] *Id.*

policy.[50] Once the insured has met that initial burden, the insurer then has the burden to prove that the policy's exclusions apply removing the claim from coverage.[51]

Executive Risk E&O Policy

Executive Risk's E&O Policy contains a broad definition of covered losses as "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[.]"[52] To ascertain coverage under the policy, the Court must determine if the LCMH Arbitration and the *Williams* Litigation fall within the meaning of "Loss," which is defined in the policy in Section II, containing definitions.

The analysis begins with the definition of "Loss." It contains four sentences, each of which must be considered. The first broadly defines the coverage provided as "Defense Expenses and any monetary amount which an insured is legally obligated to pay as a result of a Claim."[53] The second sentence states that "Loss" includes any "fines assessed, penalties imposed, or punitive, exemplary or multiplied damages" related to "Claims for Antitrust Activity."[54] The third contains a general statement that claims for

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[50] *State Farm Fire and Cas. Co. v. Hackendorn*, 605 A.2d 3, 7 (Del. Super. 1991) (citing *New Castle County v. Hartford Accident and Indemnity Co.*, 933 F.2d 1162, 1181 (3d Cir. 1991)).

[51] *Deakyne v. Selective Ins. Co. of America*, 728 A.2d 569, 571 (Del. Super. 1997); *Hackendorn*, 605 A.2d at 7.

[52] Executive Risk Mot. Summ. J., Ex. A, ¶I. Capitalized terms not defined in this Opinion are given the meaning ascribed to them in the Policy.

[53] Executive Risk Mot. Summ. J., Ex. A, ¶II(J) (emphasis removed).

[54] *Id.*

Antitrust Activity should be construed under the applicable law most favorable to the insurability of such amounts. Finally, the last sentence of the definition contains a list of certain exclusions from the definition of "Loss."[55] One such exclusion relevant to this case states that "fines, penalties, taxes, and punitive, exemplary or multiplied damages" not related to Antitrust Activity are excluded from the definition of "Loss."[56] In sum, the definition contains a broad description of what is covered, specifically provides that Antitrust Activity is covered, and then attempts to rein in the broad grant of coverage through specific exclusions.

Turning first to CorVel's burden, the Court must determine if the amounts awarded in the LCMH Arbitration and the *Williams* Litigation are a monetary amount that Executive Risk was legally obligated to pay as a result of a "Claim." Where a capitalized term is used, the Court must give that term the meaning set forth in the Policy. "'Claim' means any written notice received by any Insured that a person or entity intends to hold an Insured responsible for a Wrongful Act."[57] Wrongful Act, in turn, means "any actual or alleged act, error or omission in the performance of, or any failure to perform, a Managed Care Activity by any Insured Entity or by any Insured Person acting within the

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[55] The Court notes that both Executive Risk's and Homeland's E&O Policies contain a separate section listing "Exclusions." Despite the existence of a section specifically listing exclusions, the Court finds that the definition of "Loss" also contains exclusions. The Court reaches this conclusion because the first sentence of the definition of "Loss" begins with a broad and inclusive description of what is covered under the policy and, in the fourth sentence, attempts to limit what is covered.

[56] Executive Risk Mot. Summ. J., Ex. A, ¶II(J)(1).

[57] Executive Risk Mot. Summ. J., Ex. A., ¶II(C) (emphasis removed).

scope of his or her duties of capacity as such[.]"[58] Managed Care Activity consists of the following services or activities:

> Provider Selection; Utilization Review; advertising, marketing, selling, or enrollment for health care or workers' compensation plans; Claim Services; establishing health care provider networks; reviewing the quality of Medical Services or providing quality assurance; design and/or implementation of financial incentive plans; wellness or health promotion education; development or implementation of clinical guidelines; practice parameters or protocols; triage for payment of Medical Services; and services or activities performed in the administration or management of health care or workers' compensation plans.[59]

Executive Risk argues that settlement of the *Williams* Litigation and the LCMH Arbitration post-date the Executive Risk Policy and do not fall within its coverage period of October 31, 2004 – October 31, 2005. There appear to be genuine issues of material fact in dispute whether the settlement amounts fall within the coverage period. However, based on the holding in this case that the settlement in the *Williams* Litigation and the LCMH Arbitration are not covered as Loss under the policy, such dispute is immaterial. As such, the Court will assume *arguendo* that, based on the broad coverage of Claims under the policy's definition of Loss, CorVel has met its initial burden to show that the settlement amount is covered under the policy.

Homeland E&O Policy

The Court must engage in the same analysis as above with the Homeland policy. Like Executive Risk's E&O Policy, Homeland's E&O Policy also contains a broad

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[58] *Id.* at ¶(II)(V)(1) (emphasis removed).

[59] *Id.* at ¶II(K) (emphasis removed).

definition of covered losses as "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[.]"[60] To determine coverage under the policy, the Court must decide if the LCMH Arbitration and the *Williams* Litigation fall within the meaning of "Loss," which is defined in the policy in Section II, containing definitions.

The analysis begins with the definition of "Loss." It contains one sentence and then includes three subsections of what is included within the meaning of Loss. The first broadly defines the coverage provided as "Personal Information Protection Event Expenses, Defense Expenses and any monetary amount which an Insured is legally obligated to pay as a result of a Claim."[61] The policy then contains three sentences of what is included in the definition of Loss. The first sentence states that Loss shall include "a claimant's attorney's fees and court costs, but only in an amount equal to the percentage that the amount of monetary damages covered under this Policy for any settlement or judgment bears to the total amount of such settlement or judgment."[62] The second sentence states that Loss shall include "pre- and post-judgment interest awarded or imposed in any judgment, and premiums on appeal bonds required to be furnished with respect to any such judgment."[63] Lastly, the Homeland Policy states that Loss shall include "punitive, exemplary or multiplied damages where Insurable by law; provided,

[60] Homeland Mot. Part. Summ. J., Ex. A-35.

[61] Homeland Mot. Summ. J., Ex. A-35, ¶II(L) (emphasis removed).

[62] *Id.* at Ex. A-35, ¶II(L)(1).

[63] *Id.* at Ex. A-35, ¶II(L)(2).

that the law of the jurisdiction most favorable to the insurability of punitive damages shall control the insurability of such punitive damages . . ."[64]

The Homeland Policy then states specific exclusions which are not included in the definition of Loss. The exclusion relevant to this case states that Loss shall not include "fines, penalties or taxes; provided, that (A) punitive damages shall not be deemed to constitute fines, penalties or taxes for any purpose herein, and (B) Loss shall include fines and penalties imposed under the Health Insurance Portability and Accountability Act or in Claims for Antitrust Activity, but only if such fines and penalties are insurable under applicable law most favorable to the insurability of such fines and penalties[.]"[65] In sum, like the Executive Risk Policy, the definition in Homeland's Policy contains a broad description of what is covered, specifically provides that Antitrust Activity is covered, and then attempts to rein in the broad grant of coverage through specific exclusions.

Turning first to CorVel's burden, the Court must determine if the amounts awarded in the LCMH Arbitration and the *Williams* Litigation are a monetary amount that Homeland was legally obligated to pay as a result of a "Claim." Where a capitalized term is used, the Court must give that term the meaning set forth in the Policy. "'Claim' means any written notice received by any Insured that a person or entity intends to hold an Insured responsible for a Wrongful Act which was committed or allegedly committed

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[64] *Id.* at Ex. A-35, ¶II(L)(3).

[65] *Id.* at Ex. A-35, ¶II(L)(i) (emphasis removed).

on or after the Retroactive Date listed in ITEM 7 of the Declarations."[66] Wrongful Act, in turn, means "any actual or alleged act, error or omission in the performance of, or any failure to perform, a Managed Care Activity by any Insured Entity or by any Insured Person acting within the scope of his or her duties of capacity as such[.]"[67] Managed Care Activity consists of the following services or activities:

> Provider Selection; Utilization Review; advertising, marketing, selling, or enrollment for health care, consumer directed health care, behavioral health, prescription drug, dental, vision, long or short term disability, automobile medical payment or workers' compensation plans; Claim Services; establishing health care provider networks including tiered networks; provision of information with respect to tiered networks and/or consumer directed health care plans, including cost and quality information regarding specific providers, services and/or charges; reviewing the quality of Medical Services or providing quality assurance; design and/or implementation of financial incentive plans; wellness or health promotion education; development or implementation of clinical guidelines; practice parameters or protocols; triage for payment of Medical Services; and services or activities performed in the administration or management of health care, consumer directed health care, behavioral health, prescription drug, dental, vision, long or short term disability, automobile medical payment or workers' compensation plans.[68]

Homeland argues that the matter at issue in this case is not encompassed by the terms of the policy, as the claims were filed before the policy's inception date and are thus, not claims first made during the policy period. However, as stated above, while there appears to be a genuine issue of material fact regarding whether the workers' compensation cases filed are related claims under Homeland's definition as set forth in

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[66] Homeland Mot. Summ. J., Ex. A-36, ¶II(D) (emphasis removed).

[67] *Id.* at Ex. A-40, ¶II(AA)(1) (emphasis removed).

[68] *Id.* at Ex. A-38, ¶II(M) (emphasis removed).

the policy, based on the ultimate holding in this case, such facts are immaterial because the amounts are not covered as a Loss under either policy regardless.

IV. The Amounts Awarded in the Williams Litigation and the LCMH Arbitration Are Not Covered Under the Plain Meaning of Either Policy

Executive Risk and Homeland argue that the settlement amount paid in the *Williams* Litigation and the LCMH Arbitration were a penalty, and are therefore, specifically excluded from the Policies definition of "Loss." CorVel contends that Executive Risk and Homeland cannot prove that the settlement amount constitutes damages and not penalties.

In considering whether the settlement amount paid by CorVel in the *Williams* Litigation and the LCMH Arbitration are covered as "Loss" under either policy, the Court must apply the plain meaning of the terms as set forth in both Policies. [69] In the Executive Risk Policy, Loss does not include, "fines, penalties, taxes, and punitive, exemplary or multiplied damages," whereas in Homeland's Policy, "fines penalties and taxes" are not included as a covered Loss.

It is well-settled in Delaware that, in ascertaining the meaning of words not defined in a contract, courts "look to dictionaries for assistance in determining the plain meaning of terms which are not defined in a contract."[70] "This is because dictionaries are the customary reference source that a reasonable person in the position of a party to a

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[69] *See O'Brien v. Progressive Northern Ins. Co.*, 785 A.2d 281, 288 (Del. 2001).

[70] *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006) (citing *Northwestern National Ins. Co. v. Esmark, Inc.*, 672 A.2d 41, 44 (Del. 1996)).

contract would use to [discern] the ordinary meaning of words not defined in the contract."[71]

The word "penalty" is defined as follows:

> Punishment imposed on a wrongdoer, usu. in the form of imprisonment or fine; esp., a sum of money exacted as a punishment for either a wrong to the state or a civil wrong (as distinguished from compensation for the injured party's loss). • Through usu. for crimes, penalties are also sometimes imposed for civil wrongs.[72]

Black's then defines a "civil penalty," as a "fine assessed for a violation of a statute or regulation and a "statutory penalty," which is a "penalty imposed for a statutory violation; esp., a penalty imposing automatic liability on a wrongdoer for violation of a statute's terms without reference to any actual damages suffered."[73] Thus, a statutory penalty must: "(1) impose automatic liability for a violation of its terms; (2) set forth a predetermined amount of damages; and (3) impose damages without regard to the actual damages suffered by the plaintiff."[74]

The Louisiana statute in this case, La. R.S. 40:2203.1(G), guarantees recovery to the provider, if a PPO fails to comply with mandatory notice requirements of La. R.S. 40:2203.1(B). In the event that a PPO fails to give the requisite notice as provided in the statute, the provider is entitled to "double the fair market value of the medical services

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[71] *Id.*

[72] BLACK'S LAW DICTIONARY 1247 (9TH ED. 2009).

[73] BLACK'S LAW DICTIONARY 1247 (9TH ED. 2009).

[74] *Landis v. Marc Realty*, 919 N.E.2d 300, 307 (Ill. 2009) (citing *McDonald's Corp v. Levine*, 439 N.E.2d 475, 480 (Ill. App. Ct. 1982)).

provided, but in no event less than the greater of fifty dollars per day of noncompliance or two thousand dollars . . . ."[75] The focus of the analysis is on the language after "but in no event less than . . . ."

Although not cited by either Executive Risk or Homeland, *Landis v. Marc Realty* stands for the proposition that the amounts awarded in Section 40:2203.1(G) fall within the plain meaning of penalty. In *Landis*, the Supreme Court of Illinois held that a statute set forth in the Chicago Residential Landlord and Tenant Ordinance for the benefit of tenants, constituted a statutory penalty.[76] The court reasoned that an automatic liability was imposed by a statutory provision stating that, "where a landlord fails to comply with the statutory provision, [regarding the timely return of security deposits] the tenant 'shall be awarded' damages in an amount equal to two times the security deposit plus interest."[77] Further, the court held that the term "shall" within the statute, suggests that the award to plaintiff is automatic, or mandatory.[78] Thus, the Court held that "because [the statutory provision] imposes automatic liability for a violation of its terms, sets forth a predetermined amount of damages, and imposes liability regardless of plaintiffs' actual damages, the provision is a 'penalty' within the meaning of [the] section []."[79]

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[75] La. R.S. 40:2203.1(G).

[76] 919 N.E.2d 300, 307 (Ill. 2009).

[77] *Id.* (citing Chicago Municipal Code § 5-12-080(f)).

[78] *Id.*

[79] *Id.* at 308.

Based on the language set forth in La. R.S. 40:2203.1(G), and the reasoning of the *Landis* court, the remedy available for noncompliance of La. R.S. 40:2203.1(B), satisfies the definition of a penalty, specifically a statutory penalty. Like in *Landis*, the term "shall" as set forth in La. R.S. 40:2203.1(G), suggests that the amount payable to the provider for failure to comply with the notice requirements is automatic, or mandatory. Further, the remedy at issue imposed in the *Williams* Litigation and the LCMH Arbitration is a statutory penalty because the provision imposes automatic liability on a PPO for violation of La. R.S. 40:2203.1(B), without reference to any damages actually suffered. Instead, the statute imposes a monetary amount that has no correlation to the amount of actual damages suffered. Thus, amount expended by CorVel in the *Williams* Litigation and LCMH Arbitration is considered a statutory penalty and is therefore not covered under either Executive Risk's Policy or Homeland's Policy.

In addition to the remedy available for noncompliance of La. R.S. 40:2203.1(B) being a statutory penalty, Executive Risk and Homeland cite to *Indian Harbor Ins. Co. v. Bestcomp, Inc.*,[80] in support of its argument that the settlement in the *Williams* Litigation and the LCMH Arbitration do not constitute a "Loss" under both Policies.

In that case, which is remarkably similar to the case before this Court, a United States District Court in Louisiana was presented with a coverage dispute regarding La. R.S. 40:2203.1(G), the same statutory provision at issue here. In July 2009, Indian Harbor issued a professional liability insurance policy to a subsidiary of Bestcomp. The

[80] 2010 WL 5471005 (E.D. La. Nov. 12, 2010) *aff'd*, 452 F. App'x 560 (5th Cir. 2011).

policy provided coverage for damages and claim expenses in excess of the deductible that Bestcomp was legally obligated to pay between the policy period. Damages were defined as a "duty to defend any claim against the Insured even if any of the allegations of the claim [were] groundless, false or fraudulent."[81] The policy did not cover "[f]ines [and] penalties" and "the multiplied portion of any multiplied awards."[82]

In *Bestcomp*, Louisiana medical providers, as a class, sued Bestcomp for failing to provide notice of discounts to workers' compensation medical bills for medical services as required by La. R.S. 40:2203.1(B), the same transgression as here.[83] In that suit entitled *George Raymond Williams, M.D. v. Bestcomp, Inc.*, plaintiffs alleged that Bestcomp was a group purchaser that failed to comply with the notice requirements of La. R.S. 40:2203.1. Indian Harbor filed a declaratory judgment asserting it had no duty to defend or indemnify Bestcomp or to pay damages incurred under La. R.S. 40:2203.1(G).[84] Indian Harbor first moved for summary judgment arguing that the claims filed against Bestcomp and the damages requested were not covered, as the damages did not qualify as "compensatory sums" under the policy.[85] Indian Harbor further contended that Section 40:2203.1(G) damages were specifically excluded from

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[81] *Id.* at *1.

[82] *Id.*

[83] 2010 WL 5471005, at *1.

[84] *Id.* at *2.

[85] *Id.*

the policy's definition of damages because they were penal in nature.[86] The class also moved for summary judgment arguing that the damages requested were covered under the policy because they qualified as "compensatory sums" and were not punitive in nature.[87]

The court in *Bestcomp* held that the damages under Section 40:2203.1(G) were excluded from the policy's definition of damages for several reasons. First, it held that the damages did not qualify as "compensatory sums" as the amount "more than compensate[d] an injured party for losses incurred due to lack of notice."[88] Second, the court noted that the damages available under the statute were not compensatory because there was no correlation between the amount of damages and the discount applied.[89] Lastly, the court reasoned that section 40.2203.1(G) is "punitive in nature because its purpose is to punish group purchasers for failure to provide notice of PPO discounts to health care providers."[90] Additionally, the court "[found] it significant that numerous courts [had] referred to the damages under 40.2203.1(G) as penalties."[91]

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[86] *Id.*

[87] *Id.*

[88] 2010 WL 5471005, at *5.

[89] *Id.*

[90] *Id.* at *6.

[91] *Id.* (citing *Liberty Mut. Ins.*, 2009 WL 259589, at *1 (W.D. La. Feb. 3, 2009); *Isle of Capri Casinos, Inc. v. COL Mgmt*, 2009 WL 691167, at *1 (W.D. La. Mar. 16, 2009); *Cent La. Ambulatory Surgical Ctr., Inc. v. Rapides Parish School Bd.*,2010 WL 4320487, at *3 (La.App. 3 Cir. 11/3/10); *Gunderson v. F.A. Richard & Assocs.*, 2010 WL 2594287, at *8 (La.App. 3 Cir.

CorVel argues that, based on the language set forth in La. R.S. 40:2203.1(G), the Louisiana legislature did not intend that the language regarding "damages" set forth in the statute to be transformed into "penalties." In support of this contention, it cites to *International Harvester Credit Corp. v. Seale*, where the Louisiana Supreme Court held that statutory damages are only construed as penalties where the language in the statute is specifically stated as such.[92] "The term 'damages,' unmodified by penal terminology such as 'punitive' or 'exemplary,' has been historically interpreted as authorizing only compensation for loss, not punishment."[93] Furthermore, "[u]nder Louisiana law, punitive or other 'penalty' damages are not allowable unless expressly authorized by statute."[94] If a statute, however, authorizes "the imposition of a penalty, it is to be strictly construed."[95]

This Court is not persuaded by CorVel's argument regarding legislative intent. On June 8, 1999, the Senate Insurance Committee met in Baton Rouge, Louisiana to discuss, among other topics, House Bill 1072 which prohibits certain practices by health care providers.[96] The meeting minutes reveal that the legislature borrowed the language from Title 22 when enacting Section 40:2203.1(G). In that Title 22 statute, an insured was

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4/30/10); *Touro Infirmary v. American Maritime Officer*, 34 So.3d 878, 881 (La.App. 4 Cir. 1/7/10); *Touro Infirmary v. Am. Mar. Officer*, 24 So.3d 948, 955 (La.App. 4 Cir. 11/9/09)).

[92] 518 So.2d 1039 (La. 1988).

[93] *Id.* at 1041 (citing *Vincent v. Morgan's La. T.R. & S. Co.*, 74 So. 541, 549 (La. 1917)).

[94] *Id.* (citing *Ricard v. State*, 390 So.2d 882 (La. 1980)).

[95] *Id.* (citing *State v. Peacock*, 461 So.2d 1040, 1044 (La. 1980)).

[96] The Senate Insurance Committee Meeting Minutes, p. 2 (Baton Rouge, La. June 8, 1999).

permitted to recover a "penalty" equal to double the value of any insurance benefits not paid, together with attorney's fees. In the event of a violation, the statute states the following:

> Failure to comply with the provisions of this Section shall subject the insurer to a *penalty* payable to the insured of double the amount of the health and accident benefits due under the terms of the policy or contract during the period of delay, together with attorney fees to be determined by the court.[97]

The Legislature specifically drafted Section 40:2203.1(G) based on Title 22 of the Louisiana Revised statutes.[98] That statutory provision explicitly uses the term penalty when referring to consequences for failing to comply with the provisions of La. R.S. 22:1821(A). "When the law is clear and unambiguous and its application does not lead to absurd consequences, the law should be applied as written and no further interpretation may be made in search of the intent of the legislature."[99]

Here, the intent of the Legislature is ambiguous because the meeting minutes regarding Senate Bill 1072 are not consistent to the language set forth the Any Willing Provider Act. While the minutes explicitly state that Section 40:2203.1(G) would "track the requirements the legislature had adopted under Title 22 for paying their claims timely,"[100] as set forth in Title 22, in the event of a violation, Section 40:2203.1(G) refers

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[97] La. R.S. 22:1821(A) (emphasis added).

[98] The Senate Insurance Committee Meeting Minutes, p.2 (Baton Rouge, La. June 8, 1999).

[99] *Pepper v. Triplet*, 864 So.2d 181, 193 (La. 2004).

[100] The Senate Insurance Committee Meeting Minutes, p. 2 (Baton Rouge, La. June 8, 1999).

to "damages" while Title 22 refers to a "penalty." Furthermore, the word "penalty" does not appear in Section 40:2203.1(G). Thus, based on the ambiguity present in discerning the Legislature's intent at the time of enacting Section 40:2203.1(G), this Court is not persuaded by CorVel's argument regarding the intent of the Louisiana legislature in enacting Section 40:2203.1(G).

CorVel additionally relies on a bench ruling in *Gunderson v. Richard & Assoc., Inc. et. al.*[101] In that case, defendant F.A. Richard & Associates ("F.A. Richard") settled, thereby paying the *Gunderson* Class $10 million. In connection with the F.A. Richard settlement, its insurance company, Columbia Casualty argued that its insurance policy did not provide coverage from penalties and thus, claims brought under La. R.S. § 40:2203.1(G) were excluded from coverage. The trial court was faced with identical argument on summary judgment as this Court is now. After hearing the motions for summary judgment, the trial judge ruled from the bench as follows:

> As I indicated before I left for lunch[,] I was going to attempt to make a decision regarding the motions that were heard this morning in the matter of the Third Party Demand and the Motion for Summary Judgment by FARA as it addressed Columbia.
>
> This Court has considered the information, reviewed the evidence that was submitted, looked over the documents that have been submitted, rehashed the arguments that have been made and has come to a decision.
>
> After all is said and done[,] I believe that the basis of what we've got [sic] here[,] we must go back to where we all started these many years ago, and that's Revised Statute 40:2203.1 Section G, which reads in pertinent part[,] ["]Failure to comply with the provisions of this section shall subject a group purchaser to damages payable to the provider of double the fair

[101] No. 2004-2417 (14th Judicial D.C. Parish of Calcasieu, State of La. July 20, 2007) (TRANSCRIPT).

market value of the medical service provided but in no event less than the greater of $50 per day of noncompliance or $2000 together with attorney's fees to be determined by the Court.["]

Much ado has been made about what that constitutes, and what this Court determines it is. And what, if any, does it mean as it relates to fines, penalties, pecuniary damage.

This Court notes from *a very basic standpoint* that it makes no mentions of fines or penalties. So in my mind, again, just going back to square one here, that I believe from a very basic standpoint that damages are covered by the Columbia policy. No one is arguing that point.

Now, as to whether or not the quote, "damages" being sought by the plaintiffs are in fact civil fines and penalties this Court is of the position that they are not.

Civil fines and penalties[,] in my feeling[,] connote and/or imply payment to someone other than the plaintiff in a compensatory or damage suit other than what we have before us at this time.

For instance, if part or partial of the settlement or the agreement by FARA [F.A. Richard] was to pay not only the medical service provider something, plus pay someone else some fines and penalties, then I think we have fines and penalties.

Payment of the agreed amount [of the settlement] at this time is to plaintiffs to compensate them for the failure of FARA to abide by the notice requirements of Louisiana Revised Statute 40:2203.1.

Accordingly, pursuant to the evidence [] argument, documents submitted and reviewed by this Court, this Court finds that the policy of insurance provided by Columbia provides coverage for this claim and accordingly[,] the Motion for Summary Judgment is granted.[102]

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[102] *Gunderson v. Richard & Assoc., Inc. et. al*, No. 2004-2417, at pp. 86-88 (14th Judicial D.C. Parish of Calcasieu, State of La. July 20, 2007) (TRANSCRIPT).

Following the bench ruling, the court designated the judgment as final and immediately appealable under La. Code Civ. P. art. 1915(B).[103]

Defendant, First Health, appealed that decision granting the *Gunderson* Class' motion for summary judgment and denying defendant's motion for summary judgment.[104] In its appeal, among other contentions,[105] "First Health assert[ed] that the trial court erred in granting [p]laintiffs' motion for partial summary judgment on the issues of the applicability of La. R.S. 40:2203.1 to First Health and on the issue of partial, undisputed damages."[106] The specific issue of whether the payment for lack of notice was damages or a penalty was, however, not appealed. While the Louisiana Third Circuit Court of Appeals affirmed, referring to the amount awarded as "statutory damages," the specific issue present in this case was not addressed in its opinion.[107]

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[103] *Gunderson v. F.A. Richard & Assoc.*, 44 So.3d 779, 782 (La. Ct. App. Aug. 25, 2010).

[104] *Gunderson*, 44 So.3d at 781.

[105] First Health argued the following in its appeal: (1) its appeal of the trial court's denial of its motion to decertify the Gunderson Class divested the court of jurisdiction to hear the motions for summary judgment; (2) the trial court erred in denying its motion for summary judgment because most First Health provider agreements require application of California or Illinois law; (3) the trial court erred in proceeding with summary judgment where the U.S. District Court for the Western District of Louisiana had issued injunctions prohibiting the class representatives from pursuing their own claims against First health; (4) the Gunderson Class' cause of action has prescribed because the prescriptive period is one year rather than ten years applied by the trial court; (5) La. R.S. 40:2203.1 is unconstitutionally vague and its damage provision violates due process; (6) the trial court erred in granting the Gunderson Class' motion for partial summary judgment on the issues of the applicability of section 40.2203.1 to First Health and on the issue of partial, undisputed damages; and (7) the trial court erred in designating the damages portion of its judgment as final under La. Code Civ. P. art. 1915(B).

[106] *Id.* at 785.

[107] *Gunderson v. F.A. Richard & Assoc.*, 977 So.2d 1128 (La. App. 3d Cir. Feb. 27, 2008).

Respectfully to the trial court in Louisiana, this Court's review of both policies reveals that the damages under Section 40:2203.1(G) are excluded under the definition of Loss. Based on the arguments presented by both parties, the *Bestcomp* decision is persuasive to the situation currently before the Court. While the policy provision in *Bestcomp* differs slightly from the policy provision applicable in this case, the Court finds that the damages under Section 40:2203.1(G) are excluded from coverage under the policy as a statutory penalty. The amount under the statute more than compensates an injured party for losses sustained for a lack of notice. Additionally, "[S]ection 40:2203.1(G) is punitive in nature because its purpose is to punish group purchasers for failure to provide notice of PPO discounts to health care providers."[108] Further, like the *Bestcomp* court, this Court also finds it significant that other courts have referred to the specific statutory provision as imposing a "penalty."[109] Thus, under the plain meaning of the Policies, the amount is excluded and is not covered.

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[108] 2010 WL 5471005 at *6 (citing *Gunderson v. F.A. Richard & Assocs.*, 44 So.3d 779, 783 (La.App. 3 Cir. 6/30/10) (finding that "[t]he mandatory provisions of this statute evidence a strong public policy in favor of notice to health care providers that a PPO discount may be taken").

[109] *See Cent. La. Ambulatory Surgical Ctr., Inc., v. Rapides Parish Sch. Bd.*, 68 So.3d 1041, 1045 (La. App. 3d. Cir. Nov. 3, 2010) (noting that "the panel reversed its position on the penalty and attorney fee award based on failure of the defendants to comply with the notice requirements of La. R.S. 40:2203.1"); *Gray Ins. Co. v. Concentra Integrated Servs.*, 2010 WL 5298763, at n.4 (N.D. La. Aug. 24, 2010) (stating that "a violation of La. R.S. 40:2203.1 carries a statutory penalty); *Gunderson v. F.A. Richard & Assoc.*, 44 So.3d 779, 782, 789-91 (La. Ct. App. 2010) (declining to adopt a comparative fault argument as "applied to a penalty for statutory violation" and describing the remedy as recovering "penalties under the statute"); *Touro Infirmary v. Am. Maritime Officer*, 24 So.3d 948, 951 (La. Ct. App. 2009) (holding that the penalty provisions of section 40:2203.1(G) applied to group purchasers only); *Liberty Mutual Ins. Co. v. Gunderson*, 2009 WL 259589, at *1 (W.D. La. Feb. 3, 2009) (noting that section 40:2203.1(G) "provides for penalties of fifty dollars per day of noncompliance together with

V. The Claims Asserted in the *Williams* Litigation and the LCMH Arbitration Do Not Constitute Antitrust Activity

In the alternative, CorVel argues that discounting workers' compensation medical bills to health care providers in Louisiana without the notice required under La. R.S. 40:2203.1 is an "unfair trade practice" constituting Antitrust Activity under the Executive Risk Policy. In support of its contention, it argues that *Virginia Mason Medical Center v. Executive Risk Indemnity Ins.*,[110] is similar to the current situation here. In that case, an Executive Risk affiliate issued the policy which contained the identical definition of Antitrust Activity. Executive Risk conceded that the underlying "differential pricing claim [charging patients more at a downtown clinic] . . . triggered the Antitrust Endorsement . . . ."[111] Thus, under the broad grant of coverage under the policy, CorVel contends the settlement reached constitutes Antitrust Activity under the Policy.

Executive Risk argues that under the Policy, the conduct resulting in the settlement does not amount to Antitrust Activity because the definition is clear and specific, limiting coverage to conduct that falls within boundaries of antitrust law.

The definition of Loss in the Executive Risk Policy with CorVel includes "any fines assessed, penalties imposed, or punitive, exemplary or multiplied damages awarded

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attorneys fees determined by the court"); *Isle of Capri Casinos, Inc. v. COL Mgmt.*, 2009 WL 691167, at *1 (W.D. La. Mar. 16, 2009) (referring to the remedy under section 40:2203.1 as penalties and noting that such penalties amounted to "twice the bill it charges or $50.00 per day, per claim, plus attorney's fees").

[110] 2007 WL 3473683 (W.D. Wash. Nov. 14, 2007) *aff'd* 331 Fed. App'x 473 (Wash. Ct. App. 2009).

[111] *Id.* at *6.

in **Claims** for **Antitrust Activity**, but only if such fines, penalties or punitive, exemplary or multiplied damages are insurable under applicable law."[112] Similarly, in Homeland's Policy with CorVel, "Loss shall include **Claims** for **Antitrust Activity**, but only if such fines and penalties are insurable under applicable law most favorable to the insurability of such fines and penalties."[113] Both Executive Risk's and Homeland's Policies define "Antitrust Activity" as:

> [A]ny actual or alleged; price fixing; restraint of trade; monopolization; unfair trade practices; or violations of the Federal Trade Commission Act, the Sherman Act, the Clayton Act, or any other federal statute involving antitrust, monopoly, price fixing, price discrimination, predatory pricing or restraint of trade activities, or of any rules or regulations promulgated under or in connection with any of the foregoing statutes, or of any similar provision of any federal, state or local statute, rule or regulation or common law.[114]

The Supreme Court of Delaware has held that "the terms of an insurance contract are to be read was a whole and given their plain and ordinary meaning."[115] Furthermore, Delaware recognizes the principle of *ejusdem generis*, which stands for the proposition that "where general language follows an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in the widest extent, but are to be held as applying only to persons or things of the game general kind

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[112] Executive Risk Mot. Summ. J., Ex. A, ¶II(J).

[113] Homeland Mot. Part. Summ. J., Ex. A, ¶II(L)(ii).

[114] Executive Risk Mot. Summ. J., Ex. A ¶II(A); Homeland Mot. Part. Summ. J., Ex. A, ¶II(A).

[115] *O'Brien v. Progressive Northern Ins. Co.*, 785 A.2d 281, 291 (Del. 2001).

or class as those specifically mentioned."[116] In reading the definition of "Antitrust Activity" as a whole, it exists when an Insured is sued for anti-competitive conduct, or injury to the marketplace.[117] CorVel bears the burden of showing that the asserted claims fit within the definition of "Antitrust Activity" under the policies.[118]

The judgment arising from the *Williams* Litigation and the LCMH Arbitration are not covered under either Executive Risk's or Homeland's Policies as Antitrust Activity. The definition of Antitrust Activity in both policies connotates a clear and specific meaning, which limits coverage to conduct which falls within boundaries of identified antitrust law. The portion of the Louisiana statute at issue in this case punishes any failure to provide notice that contractually established PPO service rates will apply to a particular service delivery.[119]

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[116] *Aspen Advisors v. United Artists Theater Co.*, 861 A.2d 1251, 1265 (Del. 2004).

[117] *See e.g., Saint Consulting GP. v. Endurance Am. Spec. Ins. Co.*, 2012 WL 1098429, at *3 (D. Mass. Mar. 30, 2012) (noting that, while an "antitrust" exclusion is broad, it only pertains to "anticompetitive conduct"); *Integra Telecom v. Twin City Fire Ins. Co.*, 2010 WL 1753210, at *5-6 (D. Or. Apr. 29, 2010) (holding that the term "unfair trade practices" was "limited to antitrust and anti-competitive violations because the terms that come before and after it are reasonably limited to antitrust or anti-competitive conduct."); *Cont'l Cas. Co. v. Multiservice Corp.*, 2009 WL 1788422, at *3 (D. Kan. June 23, 2009) (holding that an identical exclusion applied only to "claims based upon charges or violations of antitrust laws"); *Clinch v. Heartland Health*, 187 S.W.3d 10, 19 (Mo. Ct. App. Jan. 17, 2006) (stating that, "[b]ecause the purpose of antitrust laws is to protect competition and not individual competitors, an antitrust plaintiff must prove that a defendant's anti-competitive behavior injured consumers or competition in the relevant market").

[118] *See, e.g., E.I. duPont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997).

[119] *See* La. R.S. 40:2203.1(B); Executive Risk Mot. Summ. J., Ex. D, §§ V-IX.

Additionally, the conduct is not considered an "unfair trade practice." That definition requires showing that the alleged conduct "offends established public policy and . . . is unethical, oppressive, unscrupulous, or substantially injurious."[120]

VI. CorVel's Attorneys' Fees Do Not Constitute"Loss" Under the Policies

CorVel argues that the amount paid in connection with the settlement is a "monetary amount which the insured is legally obligated to pay," and therefore, a covered Loss. CorVel only claims that under the plain terms of the Homeland Policy, such fees constitutes Loss, which includes "(1) a claimant's attorney's fees and court costs, but only in an amount equal to the percentage that the amount of monetary damages covered under this Policy for any settlement or judgment bears the total amount of such settlement or judgment."[121] Thus, CorVel contends the 35% attorneys' fees expended as a result of the $9 million settlement are covered as Loss.

In opposition, Homeland and Executive Risk argue that the 35% attorneys' fees that CorVel paid constitutes a penalty, as the underlying judgment resulted from a penalty in violation of Section 40:2203.1(G).

CorVel cites to *UnitedHealth Grp. Inc. v. Hiscox Dedicated Corp. Member Ltd.*[122] in support of its argument that attorneys' fees are covered regardless of the court's designation of Section 40:2203.1 being penalties or damages. In that case, plaintiff

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[120] *Risk Mgmt. Servs., L.L.C. v. Moss*, 40 So.3d 176, 184 (La. Ct. App. 2010).

[121] Homeland Mot. Partial Summ. J., Ex. A, ¶II(L)(1).

[122] 2010 WL 550991, at *10 (D. Minn. Feb. 9, 2010).

UnitedHealth Group, Inc., the insured, agreed to settle two lawsuits – a class action filed in federal court in New Jersey and a potential action by the New York Attorney General's Office. Plaintiff filed suit seeking to compel its managed-care liability insurers to indemnify it for the settlement amounts, in addition to the attorney's fees and costs incurred in defending the actions. The insureds filed five motions to dismiss the complaint, which were referred to the magistrate judge. The magistrate judge recommended denying the motions in their entirety. The insurers objected to the magistrate judge's recommendation and thus, the district court of Minnesota conducted a *de novo* review of the magistrate's findings. The Court in *UnitedHealth* held that, while the underlying claims were not covered under the insurance policy, plaintiff's attorneys' fees expended regarding the uncovered claims were covered under the policy.

However, in *Bestcomp*, the court held that the attorneys' fees recoverable under section 40.2203.1(G) were excluded from coverage under the insurance policy, as they were "penal in nature."[123] As a basis for this holding, the court cited to various opinions of Louisiana courts finding that an award of attorneys' fees is punitive in nature. For example, in *Langley v. Petro Star Corp of La.*, the Supreme Court of Louisiana held that "[a]n award of attorney fees is a type of penalty imposed not to make the injured party whole, but rather to discourage a particular activity on the part of the opposing party."[124] Similarly, in *Texas Indus., Inc. v. Roach*, the Second Circuit Court of Appeal in Louisiana

[123] 2010 WL 5471005, at *7.

[124] 792 So.2d 721, 723 (La. 6/29/11).

held that an attorneys' fees award was penal in nature and only favored in extenuating circumstances.[125] Likewise, in *Peyton Place, Condo. Assocs., Inc., v. Guastella*, the court held that an attorneys' fees award was not compensatory in nature, but instead, existed "to discourage a particular activity or activities on the part of the other party."[126]

Generally, this Court has applied Delaware law concerning interpretation of insurance contracts. But, the Court believes it is consonant with its holding on coverage and the statute underlying this matter to employ Louisiana law to determine whether the CorVel is entitled to attorneys' fees.

The Court holds that CorVel has not met its burden of proving the amount of attorneys' fees paid in connection with *Williams* Litigation and the LCMH Arbitration are a covered loss under both the Executive Risk and the Homeland insurance Policies. In accord with the rationale of *Bestcomp*, *Langley*, *Texas Industries, Inc.* and *Peyton Place*, the attorneys' fees are punitive in nature, under Louisiana law, and exist merely to discourage group purchasers from failing to provide adequate notice of PPO discounts to health care providers. CorVel's attorneys' fees expended are not covered as a Loss under either the Homeland or the Executive Risk E&O Policies. Accordingly, CorVel is not entitled to coverage for attorneys' fees paid in connection with this litigation.

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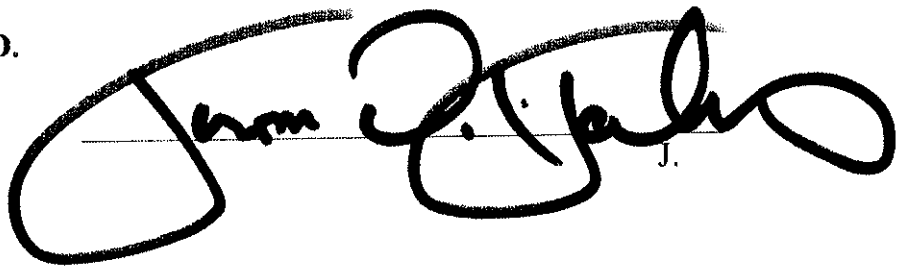
[125] 426 So.2d 315, 317 (La.App.2d Cir. 1983).

[126] 18 So.3d 132, 136 (La.App. 5 Cir. 5/29/09).

Conclusion

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 is GRANTED and Homeland's motion for partial summary judgment is GRANTED.

IT IS SO ORDERED.



J.

EXHIBIT B

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

HOMELAND INSURANCE CO., and EXECUTIVE RISK SPECIALTY INS. CO., Plaintiffs,	)	
v.	)	C.A. No. 11C-01-089 ALR
CORVEL CORPORATION, Defendant.	)	

ORDER CLOSING CASE ON DOCKET

1. Plaintiff Homeland Insurance Company of New York filed this declaratory judgment action.
2. Thereafter, Plaintiff Executive Risk Specialty Insurance Company was granted permission to intervene as a plaintiff.
3. The issues were joined when Defendant CorVel Corporation filed answers to the complaints. No counterclaims were filed. Affirmative defenses were asserted.
4. The Court issued a Memorandum Opinion and Order dated June 13, 2013:
   (a) Upon consideration of Executive Risk's Motion for Summary Judgment – GRANTED; and
   (b) Upon consideration of Homeland Insurance Company's Motion for Partial Summary Judgment – GRANTED.
5. By letter dated August 15, 2013, Executive Risk informed the Court that "[a]s a matter of Delaware law and procedure, the June 13, 2013 ruling constituted a final judgment for this case as a whole. There are no further claims or issues for trial or other adjudication."
6. By letter dated August 15, 2013, Homeland informed the Court that "[b]ecause of [the Court's June 13, 2013] decision and order, there remain no further claims for trial or other adjudication."
7. By letter dated August 22, 2013, CorVel stated that its "affirmative defenses [of waiver and estoppels] remain to be tried."

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.** Moreover, the Court notes that the Court's Order dated June 13, 2013 is a final Order and Judgment.

IT IS SO ORDERED this 27th day of August 2013.

The Honorable Andrea L. Rocanelli

EXHIBIT C

EFiled: Sep 25 2013 12:28PM EDT
Transaction ID 54283201
Case No. N11C-01-089 ALR

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

HOMELAND INSURANCE COMPANY OF NEW YORK and EXECUTIVE RISK SPECIALTY INS. CO.	)	
Plaintiffs	)	**C.A. No. 09C-09-027 ALR**
v.	)	
CORVEL CORPORATION	)	
Defendants	)	

ORDER

This 20th day of Sept, **2013**, upon the foregoing Motion to Alter or Amend the Judgment on the Issue of Penalty Pursuant to Superior Court Civil Rule 59(d), or, Alternatively, for Relief from Judgment Pursuant to Superior Court Civil Rule 60(b) and the Motion to Alter or Amend and Enter a Final Order and Judgment Pursuant to Superior Court Civil Rules 59 (d) and 59 (e), or, Alternatively, for Relief from Judgment Pursuant to Superior Court Civil Rule 60 (b), having been considered, it is the decision of the Court that the Motions are **DENIED.**

Although CorVel purports to seek review of the decision entered on August 27, 2013, which declared final judgment and closed the docket on the case, CorVel actually seeks reargument under Rule 59(e) of the Motion for Summary Judgment decided by Judge Herlihy on June 13, 2013. A Motion for Reargument must be filed "within five days of the filing of the Court's opinion."[1] Thus, the Motion to Alter or Amend Judgment on the Issue of Penalty is

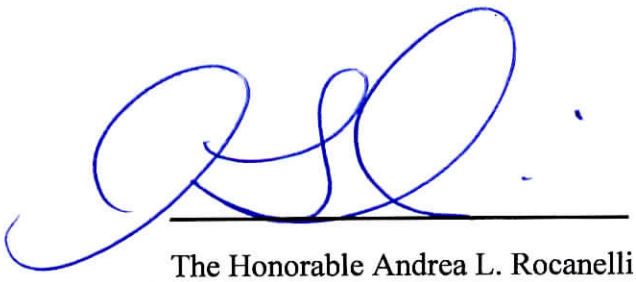
[1] Super Ct. Civ. R. 59 (e).

time-barred, as it was filed with the Court more than three months from Judge Herlihy's decision.

Alternatively, CorVel seeks relief from judgment under Rule 60 (b)(6). Rule 60 (b)(6) relief is "an extraordinary remedy which requires a showing of extraordinary circumstances."[2] The decision to grant relief under Rule 60 (b)(6) is "within the sound discretion of the trial judge."[3] The finality of the judgment will not be interrupted absent a demonstration of "extraordinary circumstances."[4] CorVel has pointed to a contrary decision of a Louisiana court in a similar case, issued on July 29, 2013, however, it has not demonstrated that this decision gives rise to extraordinary circumstances sufficient to persuade the Court to reopen the case and grant of Rule 60 (b)(6) relief.

Moreover, the Court sent correspondence to counsel on July 26, 2013 requesting that the parties submit a statement of issues remaining to be tried. With the exception of CorVel indicating that their affirmative defenses remained to be tried, none of the parties raised the issues implicated by this Louisiana decision or otherwise, but rather stated that there were no remaining issues to be resolved. Upon receipt review of those responses, the Court decided that there were no remaining issues to be tried and issued a final order on August 27, 2013.

IT IS SO ORDERED.



The Honorable Andrea L. Rocanelli

[2] *Shipley v. New Castle Cnty.*, 975 A.2d 764, 767 (Del. 2009) (internal quotation marks omitted) (citations omitted).
[3] *Id.*
[4] *Daniels v. Bayhealth Med. Ctr., Inc.*, 2003 WL 22048214, at *1 (Del. Super Aug. 25, 2003).

EXHIBIT D

GEORGE RAYMOND WILLIAMS, M.D. ORTHOPEDIC SURGERY, A PROFESSIONAL MEDICAL, L.L.C.	**DOCKET NO. 09-C-5244-C**
VERSUS	**27TH JUDICIAL DISTRICT COURT**
SIF CONSULTANTS OF LOUISIANA, et al	**ST. LANDRY PARISH, STATE OF LOUISIANA**

REASONS FOR JUDGMENT

This matter came before the court on June 28, 2013 on and a Motion for Partial Summary Judgment brought by The Plaintiff Class through class representative George Raymond Williams against defendant Executive Risk Specialty Insurance Company. Present in court were Attorney Patrick Morrow, Arthur Murray, Tom Filo and John Bradford representing the plaintiff class, Attorney Ed Wicker and Daniel Laden representing Executive Risk Specialty Insurance Company and Michael Rosen representing Homeland Insurance Company.

FACTS OF THE CASE

This matter arises from a suit brought by the Plaintiff class for alleged Title 40 violations in which CorVel and its insurers Executive Risk and Homeland Insurance Company were named. Plaintiff Class and CorVel subsequently settled for 9 million dollars which released CorVel of any Title 40 claims and individual claims for underpayment of benefits. After insurer Executive Risk filed an answer and affirmative defenses, Plaintiff Class filed the instant motion for partial summary judgment on the issue of coverage.

PROCEDURAL HISTORY

9-30-2009 Petition for damages and class certification filed by the Plaintiff.

3-24-2011 Petition was amended to add claims against CorVel and its insurers.

5-6-2011 Defendant Executive Risk removed the matter to federal court.

6-20-2011 Matter was remanded back to district court.

11-4-2011 Final Order and Judgment Approving CorVel settlement issued.

5-17-2013 Executive Risk filed Answer and Affirmative Defenses.

5-24-2013 Motion for Partial Summary Judgment filed by Plaintiff Class

A hearing was held on June 28 in which the Court took the matter under advisement.

ARGUMENTS OF THE PARTIES

Plaintiff argues that the policy issued by Executive Risk covers statutory damages and Attorney fees due to the broad language of the policy and the liberal language of LSA-R.S. 40:2203.1. Plaintiff further argues that Executive Risk cannot claim this motion is premature due to Executive Risk already arguing its own motion for summary judgment in Delaware Superior Court. Moreover, Plaintiff's contend that the policy covers punitive and exemplary damages yet fines, penalties and taxes are not. Plaintiff points to the fact that statutory damages do exist in at least 207 cases on Westlaw and that Executive Risk could have easily excluded statutory damages and Attorney fees in its policy and did not. Defendant argues that the statutory damages under 40:2203.1 are penal in nature and should be excluded from coverage under its issued policy. Plaintiff argues that defendant cannot re-label the legislature's intent for statutory damages under LSA-R.S. 40:2203.1 and points to the clear language of *damages* in the statute. LSA-R.S. 40:2203.1 which reads in pertinent part:

> Failure to comply with the provisions of Subsection A, B, C, D or F of this Section shall subject a group purchaser to *damages* payable to the provider... Plaintiff cites *International Harvester Credit Corporation v. Seale*, 518 So.2d 1039, 1041 (La. 1988) in which the Louisiana Supreme Court held when construing a statute that:

"The term "damages" unmodified by penal terminology such as "punitive" or "exemplary" has been historically interpreted as authorizing only compensation for loss, not punishment. Plaintiff further argues that insurance agreements have to be broadly construed yet exclusions must be strictly construed. Plaintiff alleges that Attorney fees are compensatory in nature and not penal. Plaintiff also cites *Gunderson v. F.A Richard* in which the Third Circuit Court of Appeals was confronted with similar coverage issues and found that "damages" were not fines and penalties. Plaintiff asserts that the Delaware State Judge ignored Louisiana Supreme Court in *Gunderson v. F.A Richard,* and Civil Code Article 9 in his ruling and argues that this Court is not bound by any Delaware Court ruling. In relation to Executive Risk's affirmative defense that Section IV (B) (1) of its policy excludes coverage because CorVel did not timely notify Executive Risk of its receipt of a claim during the policy period, Plaintiff argues that under Direct Action

Statute this notice is irrelevant. Plaintiff asserts that it has no control over whether the CorVel gave Executive Risk notice. Moreover, under the Direct Action Statute the Plaintiff's class is suing Executive Risk directly. Lastly, Plaintiff argues that Executive Risk was put on notice three different ways 1) when CorVel was erroneously named as a direct defendant in the worker's compensation suit. 2) When written notice was given on May 17, 2005 by the State of Louisiana Office of Risk Management. 3) When CorVel instituted its own claim for declaratory relief in Federal Court. Plaintiff asserts that the written notice given in 2005 constitutes a claim and falls within the date Executive Risk insured CorVel.

Defendant Executive Risk argues that this matter is premature for several reasons: 1) Only filed answer 5 weeks ago 2) Need more time for discovery 3) No affidavit filed with exhibit B (letter from La. Office of Risk Management 4) Need time to depose author of exhibit B. 5) Never seen letter until attached to Plaintiff Motion for Partial Summary Judgment. Defendant further argues that the Delaware Superior Court recently considered the very same issues involving the same parties and held that there was no coverage for Title 40 claims involving CorVel. Moreover, the Delaware Court found that relief under Title 40 is an uninsured penalty. Defendant asserts that a claim doesn't even exist, because it must be written notice received by the any insured that a person intends to hold an insured responsible for a Wrongful Act. As relates to claims, defendant argues that being erroneously named in a Workers Compensation suit does not qualify as a written claim under the applicable policies. Moreover, although the letter from La. Office of Risk Management is written, defendant takes issue with the lack of affidavit provided by the Plaintiffs. Defendant also argues that CorVel's Title 40 Notice Constitutes a Penalty or multiplied damages. Defendant asserts that such penalties are carved out the definition of "loss" in their policy. Defendant further argues that plaintiff's cited case, *Gunderson v. F.A. Richard & Associates, 44 So. 3d 779 (La. App. 3d Cir. 2010)* the Court referred to the remedy under Title 40 as a "penalty". Moreover, the Delaware Court cited several Louisiana cases in rendering its opinion that the Title 40 remedy is a penalty. Defendant also cites *Indian Harbor Ins. Co v. BestComp, Inc.*, No. 09-7327, 2010 WL 5410005, at 5-6 (E.D. La. Nov 12, 2010) in which the court concluded that the remedies under Title

40 are not compensatory because they "more than compensate an injured party for losses incurred due to lack of notice." Defendants assert that its policy requires as a condition precedent to coverage that a claim be made within the Policy period and reported by written notice to Executive Risk within 90 days of end of the policy period. Thus defendants contend that its policy notification requirements were not met, and there can be no coverage. Lastly, defendants assert that CorVel's failure to Obtain Executive Risk's Consent to conduct a settlement is also a bar to coverage, per policy.

HOLDING OF THE COURT

The Louisiana Code of Civil Procedure sets forth the procedural rules governing motions for summary judgment. The judgment shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, show that there is no genuine issue as to material facts and that the mover is entitled to judgment as a matter of law.[1] After adequate discovery or after a case is set for trial, a motion which shows that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law shall be granted.[2] The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact.[3]

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein... The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or by further affidavits." Louisiana Code of Civil Procedure Article 967 B, reads, "When a

[1] Louisiana Code of Civil Procedure Article 966 B
[2] La. Code Civ. Pro. Art. 966 C (1)
[3] La. Code Civ. Pro. Art. 966 C (2)

motion for summary judgment is made and supported as provided above, an adverse party may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided above, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be rendered against him."

The applicable law in the instant matter is,

LSA-R.S 2203.1. Prohibition of certain practices by preferred provider organizations reads in pertinent part:

A. Except as otherwise provided in this Subsection, the requirements of this Section shall apply to all preferred provider organization agreements that are applicable to medical services rendered in this state and to group purchasers as defined in this Part. The provisions of this Section shall not apply to a group purchaser when providing health benefits through its own network or direct provider agreements or to such agreements of a group purchaser.

B. A preferred provider organizations alternative rates of payment shall not be enforceable or binding upon any provider unless such organization is clearly identified on the benefit card issued by the group purchaser or other entity accessing a group purchaser's contractual agreement or agreements and presented to the participating provider when medical care is provided. When more than one preferred provider organization is shown on the benefit card of a group purchaser or other entity, the applicable contractual agreement that shall be binding on a provider shall be determined as follows:

(1) The first preferred provider organization domiciled in this state, listed on the benefit card, beginning on the front of the card, reading from left to right, line by line, from top to bottom, that is applicable to a provider on the date medical care is rendered, shall establish the contractual agreement for payment that shall apply.

(2) If there is no preferred provider organization domiciled in this state listed on the benefit card, the first preferred provider organization domiciled outside this state listed on the benefit card, following the same process outlined in Paragraph (1) of this Subsection shall establish the contractual agreement for payment that shall apply.

(3) The side of the benefit card that prominently identifies the name of the insurer, or plan sponsor and beneficiary shall be deemed to be the front of the card.

(4) When no preferred provider organization is listed, the plan sponsor or insurer identified by the card shall be deemed to be the group purchaser for purposes of this Section.

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

G. Failure to comply with the provisions of Subsection A, B, C, D, or F of this Section shall subject a group purchaser to damages payable to the provider of double the

fair market value of the medical services provided, but in no event less than the greater of fifty dollars per day of noncompliance or two thousand dollars, together with attorney fees to be determined by the court. A provider may institute this action in any court of competent jurisdiction.

In the instant matter Executive Risk's policy defines the following as:

Claim- means any written notice received by any insured that a person or entity intends to hold an insured responsible for a Wrongful Act... Such notice may be in the form of an arbitration, mediation, judicial, declaratory or injunctive proceeding. A Claim will be deemed to be made when such written notice is first received by any Insured. (Executive Risk Policy pg. 2 definition (C).)

Loss- means Defense expenses and any monetary amount which an Insured is legally obligated to pay as a result of a Claim… 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:

- Except as expressly set forth above, fines, penalties, taxes, and punitive, exemplary or multiplied damages;
- Fees, amounts, benefits or coverage owed under any contract, health care plan or trust, insurance or workers' compensation policy or plan or program of self-insurance;
- Non-monetary relief or redress in any form, including without limitation the cost of complying with any injunctive, declaratory or administrative relief; or
    - Matters which are uninsurable under applicable law

(Executive Risk Policy pg. 3 definition (J)

Related Claims- means all claims for Wrongful Acts based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving the same or related facts, circumstances, situations, transactions or events, whether related logically, causally or in any other way.

(Executive Risk Policy pg.4 definition Q)

While insurance coverage provisions are broadly construed in favor of coverage, exclusionary clauses must be strictly construed in favor of finding coverage. *Borden, Inc. v. Howard Trucking Co., Inc. 454 So. 2d 1081 (La. 1984)* In the instant matter the Executive Risk Policy excludes several things such as fines, penalties and multiplied damages, yet there is no mention of statutory damages. LSA-R.S. 40:2203.1 specifically uses the language *damages* and not penalties. When the letter of a statute does not lead to absurd results the statute must be interpreted as written. *Pepper v. Triplet, 864 So.2d 181,*

193 (La. 2004) It is clear that the Louisiana Legislature intended LSA-RS 40:2203.1 to provide for statutory damages. In *International Harvester Credit Corporation v. Seal, 518 So.2d 1039, 1041 (La. 1988)* the court held, "The term damages unmodified by penal terminology such as "punitive" or "exemplary" has been historically interpreted as authorizing only compensation for loss, not punishment. It is the Court's understanding that if the Legislature meant for the remedy under 40:2203.1 to be penalties, they would have simply called them penalties. Considering the vague language of the Executive risk Policy, defining loss as "any monetary amount which an Insured is legally obligated to pay as a result of a Claim," the Plaintiffs Class claims for statutory damages and attorney fees easily apply under the policy.

The second matter to consider is whether a valid claim was made. A valid claim must be a"written notice received by the insured that a person or entity intends to hold an insured responsible for a Wrongful Act." When CorVel was named erroneously as a defendant in prior worker's compensation claims, they may have been put on notice, yet it was not enough to constitute a claim under the policy provisions. However, when CorVel was put on written notice on May 17, 2005 by the State of Louisiana Office of Risk Management that a claim for indemnification against CorVel was being made, this was clearly sufficient written notice per policy. Executive Risk plead an affirmative defense to coverage because CorVel did not timely notify Executive Risk of its receipt of a claim during the policy, however we find this argument to be without merit. This exclusion is only valid between the insured and the insurer; it has no application in regards to claims brought under Louisiana Direct Action Statute. Any policy exclusion which purports to exclude coverage due to an insured's failure to give timely notice of a claim to insurers is inapplicable and cannot defeat coverage where the claim is made directly against the insurer under the Louisiana Direct Action Statutes. Murray v. City of Bunkie, 686 So. 2d 45 (La.App. 3rd Cir. 1996) and Gorman v. Opelousas, 2013 WL 1831075 (La.app.3rd Cir. 2013). Moving on, Executive Risk claims it needs time to conduct discovery yet it has previously raised and argued its own motion for summary judgment in Delaware Superior Court. Moreover, Louisiana District Court is not bound by the erroneous Delaware ruling. The ruling in the Delaware Court comingled analysis

of Louisiana law by citing cases, not only from Louisiana, yet also other jurisdictions such as Illinois.

Ultimately, Executive Risk has already filed and argued its Motion for Summary Judgment in Delaware Superior Court, thus this motion is ripe for hearing. Moreover, it is clear that if the Louisiana Legislature intended the remedy proscribed for LSA-RS 40:2203.1 to be of a punitive nature, it would have called them **penalties** instead of **damages**. Furthermore, failure to give insurer notice cannot negate coverage under Louisiana law and written notice was clearly rendered in the instant matter from La. Office of Risk Management.

For the following reasons, this Court finds that the Executive Risk Errors and Omissions policy clearly provides coverage for the valid claims asserted in the instant matter. Accordingly, the Court GRANTS George Raymond Williams, (as certified class representative) Motion for Partial Summary Judgment.

All costs of this matter are assessed to Defendant.

Judgment is to be submitted by counsel for Plaintiffs.

Opelousas, Louisiana, this 29th of July, 2013.

ALONZO HARRIS, DISTRICT JUDGE

CC: Patrick Morrow, Esq.
John Bradford, Esq.
Ed Wicker, Esq.
Arthur Murray, Esq.
Tom Filo, Esq.
Daniel Laden,Esq.
Michael Rosen,Esq.

St. Landry Parish Clerk of Court's Office
Filed July 29 20 13
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IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

HOMELAND INSURANCE COMPANY OF NEW YORK	)	CIVIL ACTION NUMBER
	)	
	)	11C-01-089-JOH
Plaintiff	)	
v.	)	
	)	
CORVEL CORPORATION	)	
	)	
Defendant	)	

Submitted: August 2, 2011
Decided: November 30, 2011

MEMORANDUM OPINION

Upon Motion of the Defendant to Dismiss, or
In the Alternative to Stay Proceedings - ***DENIED***

Appearances:

James W. Semple, Esquire, and Corinne E. Amato, Esquire, of Morris James LLP, Wilmington, Delaware, and Michael J. Rosen, Esquire, and Jeffrey T. Shaw, Esquire, of Boundas, Skarzynski, Walsh & Black, LLC, Chicago, Illinois, Attorneys for Plaintiff Homeland Insurance Company of New York

Arthur G. Connolly, III, Esquire, and Josiah R. Wolcott, Esquire, and Bradley R. Aronstam, Esquire, of Connolly Bove Lodge & Hutz LLP, Wilmington, Delaware, and Seth D. Lamden, Esquire, and Jill B. Berkeley, Esquire, and Katherine D. Vega, Esquire, of Neal, Gerber & Eisenberg LLP, Chicago, Illinois, Attorneys for Defendant CorVel Corporation

HERLIHY, Judge

Plaintiff Homeland Insurance Company of New York ("Homeland") filed this declaratory judgment action against its insured Defendant CorVel Corporation ("CorVel"). Homeland seeks an order from this Court regarding its purported defense and indemnity obligations with respect to damages from a pending arbitration action. CorVel's has moved to dismiss, or in the alternative, stay proceedings. CorVel argues that because there has been no finalized settlement or judgment, Homeland's liability has not been triggered and Homeland's action is, therefore, not ripe. Because sufficient events have occurred, the Court finds Homeland's action ripe. CorVel has also moved to stay these proceedings pending the outcome of arbitration proceedings in Louisiana. The Court finds those proceedings will not resolve the fundamental issue of coverage. CorVel's motion to dismiss, or in the alternative, to stay is DENIED.

Factual Background[1]

CorVel is an insured on a Managed Care Organizations Errors and Omissions Liability Policy (the "Policy") issued by Homeland. The original policy period ran from October 31, 2005 to October 31, 2006. CorVel renewed the policy until at least December 1, 2007. Under the terms of the Policy, CorVel received up to $10 million in coverage, inclusive of defense expenses, in excess of a $1 million self-insured retention. The Policy and renewals were all "claims made and reported" policies and it, therefore, only applied to claims made against, and reported by, the insured during the policy period or within 90 days after the policy period expired.

[1] The factual background is basically taken from Homeland's Answering Brief.

In 1996, CorVel entered into a preferred provider organization ("PPO") agreement (the "PPO agreement") with Lake Charles Memorial Hospital ("LCMH"). The PPO agreement provided that LCMH and its medical staff became a PPO in the CorVel network of Payors. Under that agreement, LCMH agreed to discount rates for certain services performed. The agreement also contained a clause providing that disputes under the agreement must be submitted to arbitration.

In 2004 and early 2005, LCMH filed several claims against CorVel with the Louisiana Department of Labor – Department of Workers Compensation. These claims were brought because CorVel allegedly had been taking an improper discount -- paying only the discounted PPO agreement rate -- for services provided to worker's compensation patients. The claims were that the discounted payments were below rates prescribed by Louisiana law for workers' compensation services. Because the services provided to worker's compensation patients were not included in the PPO agreement, LCMH sought to recover the amount of the discount and statutory fees and penalties provided by Louisiana law. By July 19, 2005, LCMH had filed seventy-five such claims against CorVel.

With the claims filed by LCMH pending, CorVel filed a complaint in the United States District Court for the Western District of Louisiana on July 19, 2005 requesting a declaration directing LCMH to bring all of its underpayment claims in an arbitration proceeding pursuant to the 1996 PPO agreement. On November 6, 2006, the Louisiana District Court entered an order compelling arbitration and staying further proceedings pending that arbitration. Shortly thereafter, on December 22, 2006, LCMH instituted a

class arbitration action for its claims. LCMH claimed CorVel had unlawfully discounted medical bills for worker's compensation patients (the "Worker's Compensation Claims") and the discounts pursuant to the PPO agreement were invalid because of lack of notice (the "Notice Claims"). LCMH sought statutory penalties from Homeland.

The PPO agreement contains the following provision regarding reporting of a claim:

> (B) Reporting of Claims and Circumstances:
>
> 1. If, during the Policy Period or any applicable Extended Reporting Period, any Claim is first made against any Insured, the Insured must, as a condition precedent to any right to coverage under this Policy, give the Underwriter written notice of such Claim as soon as practicable thereafter and in no event later than:
>
> a) with respect to a Claim made during the Policy Period, ninety (90) days after the end of the Policy Period; or
>
> b) with respect to a Claim made during an Extended Reporting Period, ninety (90) days after such Claim is first made.[2]

Homeland alleges that CorVel failed to report the arbitration proceeding as a Claim in accordance with the requirements of the Policy. On February 21, 2007, the Louisiana District Court held that the Notice Claims were also subject to arbitration. Homeland alleges the claims were first reported to it on September 24, 2010. CorVel reported the claims to Homeland by letter and requested full defense and indemnity.[3] That letter briefly describes the procedural history of the arbitration proceeding, at that time, and

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[2] Homeland Insurance Company of New York Managed Care Errors and Omissions Liability Policy Section IV(B)(1) (App. to Homeland's Ans. Br. at A31).

[3] Letter from Seth D. Lamden, Attorney for CorVel, Howrey LLP, to Virginia A. Troy, Claims Counsel, OneBeacon Professional Partners (Homeland's Claims Manager) (Sept. 24, 2010) (App. to Homeland's Ans. Br. at A87).

requested a discussion with Homeland regarding defense of the claims. Homeland's claims manager, OneBeacon Professional Insurance, responded to CorVel notifying it that the claims would be investigated and Homeland reserved all rights pending the investigation.[4] Counsel for both CorVel and Homeland subsequently exchanged e-mail messages regarding whether Homeland would be providing coverage for CorVel's claims. In one of those e-mail messages, CorVel's counsel requested a meeting to discuss potential liability exposure and settlement strategy.[5]

At some point in the following weeks, it became apparent to Homeland that it would not be able to reach an agreement with CorVel. On January 10, 2011, Homeland filed this action for declaratory judgment seeking an order determining its rights and responsibilities under the Policy regarding the arbitration proceeding. Homeland claims it is not responsible for defense or indemnity of the arbitration claims because: (1) the arbitration claims involve events that occurred prior to the inception date of the Policy -- October 31, 2005; (2) the arbitration claims are not covered because the claims were received by CorVel prior to the inception date of the Policy; (3) CorVel failed to report the arbitration proceeding in accordance with the terms of the Policy; and (4) LCMH seeks statutory damages which are not covered under the terms of the Policy.

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[4] Homeland's Complaint ¶ 19.

[5] E-mail from Seth D. Lamden, Attorney for CorVel, Howrey LLP, to Michael J. Rosen, Attorney for Homeland, Boundas, Skarzynski, Walsh & Black, LLC (Nov. 15, 2010, 20:05 p.m.).

Despite the fact that Homeland filed this declaratory judgment action in January, 2011 to determine its obligations and responsibilities related to the Louisiana litigation, counsel for CorVel requested that a representative of Homeland be present at a mediation scheduled for March 22, 2011.[6]

On March 15, 2011, CorVel filed this motion to dismiss or, in the alternative, to stay the proceedings based on an argument that Homeland's cause of action is not yet ripe for adjudication. Then on March 31, 2011, CorVel entered into a Memorandum of Understanding with the class in the arbitration proceeding whereby CorVel agreed to settle the claims against it by paying $9 million and assigning its rights to insurance proceeds to the class.

This potential settlement has prompted the underlying plaintiffs to name CorVel and its insurers as additional defendants in an amended complaint filed in a Louisiana state court on September 27, 2011.[7] This direct file action seeks a judgment against CorVel's insurers (including Homeland), and CorVel is no longer even a party to that proceeding. Because the Louisiana Direct Action Statute allows this suit to be filed against Homeland, it must now prepare and launch a defense to the identical issue it first filed in this Court.

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[6] E-mail from Seth D. Lamden, Attorney for CorVel, Neal, Gerber & Eisenberg LLP, to Michael J. Rosen, Attorney for Homeland, Boundas, Skarzynski, Walsh & Black, LLC (Feb. 24, 2011, 16:25 p.m.).

[7] Letter from James W. Semple, Attorney for Homeland, to The Honorable Jerome O. Herlihy, Judge, Superior Court of Delaware (Oct. 5, 2011) (See Ex. 2, Plaintiff's Amended Motion for Class Certification in the Louisiana 27th Judicial District Court in Landry Parish).

Parties' Contentions

CorVel contends this Court should dismiss, without prejudice, Homeland's Complaint because Homeland's coverage obligations are not ripe for adjudication as the underlying arbitration proceeding has not concluded. Delaware Courts use a balancing test to evaluate ripeness, and CorVel believes the balancing test dictates that Homeland's Complaint must be dismissed.

Homeland argues this matter is ripe for adjudication and should be decided without delay. Although it acknowledges there is no immediate funding obligation, Homeland contends declaratory judgment is still appropriate. Additionally, because of the recent settlement agreement and the fact that it has been named as a defendant in the Louisiana state court action, Homeland asserts it will be prejudiced by a delay in determining its rights and obligations. The delay could cause prejudice because its choice of Delaware as a forum for resolving this dispute is in jeopardy if the Louisiana state action proceeds with Homeland as a defendant. For these reasons, Homeland asks this Court to deny CorVel's motion.

Applicable Standard

A motion to dismiss based on lack of ripeness is properly considered under Superior Court Civil Rule 12(b)(1) for lack of subject matter jurisdiction.[8] The burden of establishing the Court's subject matter jurisdiction rests with the party seeking the

[8] *Bebchuk v. CA, Inc.*, 902 A.2d 737, 740 ("Ripeness, the simple question of whether a suit has been brought at the correct time, goes to the very heart of whether a court has subject matter jurisdiction").

Court's intervention, here Homeland. Unlike a motion to dismiss pursuant to Superior Court Civil Rule 12(b)(6), the Court may consider documents other than the Complaint when reviewing a motion to dismiss pursuant to Rule 12(b)(1).[9]

This Court has the authority to entertain declaratory judgment actions pursuant to Delaware's Declaratory Judgment Act.[10] Because of the nature of the relief provided in a declaratory judgment action and to avoid issuing advisory opinions, an actual controversy must exist between the parties to a declaratory judgment action.[11] Courts will not consider a matter when there is no real likelihood that the issue "will be raised in the future by reason of actual contest between the parties."[12] The facts must present a situation involving an immediate, or about to become immediate, controversy between the parties.[13]

Delaware courts require four prerequisites for adjudication of a declaratory judgment action, that a controversy: (1) must involve the rights or other legal relations of the party seeking declaratory relief; (2) be one in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) be between parties where interests are real and adverse; and (4) be ripe for judicial declaration.[14]

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[9] *NAMA Holdings, LLC v. Related World Market Center, LLC*, 922 A.2d 417, 429 n.15 (Del. Ch. 2007).

[10] 10 *Del. C.* § 6501.

[11] *See Ackerman v. Stemerman*, 201 A.2d 173, 175 (Del. Ch. 1964).

[12] *Id.*

[13] *Id.*

CorVel only challenges the presence of the fourth element -- that of ripeness -- in the present case. When deciding whether an issue is ripe for adjudication, the Court must conduct a balancing test.[15] The balancing test necessitates that the Court weigh several competing interests in its determination of whether a declaratory judgment action is ripe for adjudication. On one hand, the party bringing the declaratory judgment action typically seeks an early resolution to the controversy. On the other, the party responding to the action typically opposes because further factual development could influence the ultimate determination. Additionally, the Court has an interest in only deciding matters where an actual controversy exists; but when such controversies exist, the Court's preference is to resolve the matter in the most efficient manner possible. For these reasons the Court considers the following factors in its determination of whether a declaratory judgment action is ripe for adjudication: (1) an evaluation of the legitimate interests of the plaintiff in a prompt resolution of the controversy; (2) hardship inflicted in the event of further delay in deciding the matter; (3) possibility of future factual development that might be relevant to the determination made; (4) the need to conserve scarce judicial resources; and (5) a due respect for identifiable policies of the law touching upon the subject matter of the dispute.[16]

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[14] *Playtex Family Products, Inc. v. St. Paul Surplus Lines Ins. Co.*, 564 A.2d 681, 687 (Del. Super. 1989) (citing *Marshall v. Hill*, 93 A.2d 524, 525 (Del. Super. 1952)).

[15] *Monsanto Co. v. Aetna Cas. and Sur. Co.*, 565 A.2d 268, 274 (Del. Super. 1989).

[16] *Id.*

Discussion

The Court agrees with the parties that this case satisfies the first three prerequisites required prior to adjudication of a declaratory judgment action. The Court further agrees that the sole issue requiring analysis in this case is that of ripeness -- the fourth and final prerequisite required. This case presents the specific issue of whether a declaratory judgment action is ripe where an insurer's obligation to indemnify or defend has not yet created a liability to the insurer. CorVel contends the facts before this Court create a scenario where the issue is not ripe and, therefore, the Court lacks subject matter jurisdiction. Homeland cites cases with factual circumstances similar to this case where an insurer had not incurred liability at the time of a declaratory judgment action and the Delaware courts declined to dismiss the insurer from the action on the basis of lack of ripeness. The Court must begin by balancing the interests of the parties involved through an analysis of the ripeness factors listed above.

(1) *Evaluation of the legitimate interests of the plaintiff in a prompt resolution of the question presented.* Homeland possesses an interest in a prompt resolution of the issue of its rights and obligations to indemnify and/or defend CorVel for costs associated with the pending class arbitration action in Louisiana. It desires a decision in this declaratory judgment action because it is currently in a state of uncertainty regarding its potential liability as a result of those actions. Although CorVel is technically correct that it has not incurred any liability at this time, Homeland has a legitimate interest in the results of the Louisiana proceedings. If Homeland is found to be liable to indemnify or defend CorVel in the Louisiana actions, it would probably desire to insert itself in those

actions as soon as is practical for either litigation or settlement discussions. For these reasons, Homeland possesses a legitimate interest in seeing the instant matter resolved without delay and this factor weighs in favor of finding the matter is ripe for adjudication.

(2) *The hardship that further delay may threaten.* Recent developments in the Louisiana arbitration action have caused this factor to become a major concern to the Court. CorVel has apparently entered into a Memorandum of Understanding whereby it agreed to settle the claims in the class arbitration action for an amount that would implicate the Homeland Policy, depending on the outcome of this action. CorVel takes the position that no liability exists, and this action is not ripe, until the settlement agreement is court approved and becomes non-appealable in the arbitration action. While this Court understands the risks associated with an agreement becoming final in a class action,[17] it believes this situation presents a serious threat of hardship if this action is delayed. The Court recognizes there is a risk that the settlement will not become final and non-appealable because of the contingencies that must be satisfied; however, it is likely that in the event the settlement is not approved, the amount of the settlement will increase, and not decrease. Certainly, the amount of the proposed settlement is above the $1 million self-insured retention above which Homeland's policy is triggered. The Court

[17] According to the Form 8-K filed by CorVel, the settlement is contingent upon several further steps. The first step is that the parties must execute a mutually acceptable definitive settlement agreement. Then the parties must apply to the Louisiana court for approval of the settlement. The Court will only approve the settlement following notice to the class and an opportunity to be heard about the fairness of the settlement or to be excluded from the settlement.

finds, therefore, that the proposed settlement has for all practical purposes triggered the monetary value requirements for the claim to be covered under the policy.

Homeland filed this declaratory judgment action in Delaware. Its choice of forum to resolve the issues presented in this case has already come under threat because it has been added as a defendant in a Louisiana state court action. This development requires Homeland to expend resources and time litigating issues presented in this case in another jurisdiction in a later-filed action. Where a Delaware action is first filed, Delaware Courts provide a great deal of respect and protection to the plaintiff's choice of forum, and that choice will rarely be disturbed.[18] Homeland's choice of Delaware as the forum to resolve the issues raised in this action has already been threatened by subsequent developments in the Louisiana litigation. Accordingly, this Court views this as an important factor in its analysis in favor of finding that this matter is ripe for adjudication.

(3) *The prospect of future factual development that might affect the determination made*. This factor does not provide a compelling reason for this Court to find that this matter is not ripe for adjudication. Although there is a possibility that future factual development could produce helpful material to the determination of the issues in this case, the Court views that possibility as remote and unlikely. Nor has CorVel argued there is a risk of future factual development. The issue presented is one that is typically able to be decided on the record presented by the parties without any factual disputes. The decision that must be made by the Court is one that will involve contract

[18] *Lisa, S.A. v. Mayorga*, 993 A.2d 1042, 1047 (Del. 2010).

interpretation and application of what will likely be undisputed facts. The Court finds this factor is neutral in its consideration of whether this matter is ripe for adjudication.

(4) *The need to conserve scarce resources*. This factor requires that the Court consider its scarce resources in deciding whether it is appropriate to give attention to a matter at the current stage of the dispute. In situations where it appears to the Court that a current expenditure of resources will create resource savings in the future, it is advantageous for the Court to act early. That is precisely the state of the present case. A decision on the issue of Homeland's rights and obligations regarding the Louisiana actions could potentially save courts and the parties' a considerable amount of time and resources by preventing the need for excess litigation as a result of uncertainties in ultimate liability for past actions. As evidenced by the potential settlement agreement in the arbitration action and the direct filed action against Homeland in the Louisiana state court action, the most significant dispute seems to be which party is ultimately liable and not whether any liability exists. The purpose of this factor is to determine whether it is an efficient use of the Court's resources to address the claims before the Court at the present time. The Court notes that the Louisiana arbitration action does not appear to be addressing the issue of which party is liable – the issue presented in this Court. While the Court favors resolution of claims by the parties in arbitration, it must also consider whether the arbitration will obviate the need for further litigation in the case. Where it appears further litigation is required, regardless of the outcome of an arbitration

proceeding, the issue presented to the Court may be addressed without delay.[19] Because this declaratory judgment action could play a major role in determining which party is ultimately liable, it would be an economical use of resources for this Court to consider the issues presented at the present time. This factor weighs in favor of finding that this case is ripe for adjudication.

(5) *The Court's due respect for identifiable policies of law touching upon the subject matter in dispute.* This factor requires the Court to consider the appropriateness of determining an issue at the time it is presented to the Court. Cases are only able to be decided by Delaware courts when the issue is fully and fairly presented as an actual controversy. In situations where a case is not an actual controversy, facts might not be fully developed and the parties might not dedicate the same amount of resources – thereby affecting the development of law. This case does not present that problem. Before the Court is an actual controversy with each party having a legitimate interest in the outcome. Homeland and CorVel are engaged in an actual dispute that can be resolved properly at this time. This factor weighs in favor of finding that this matter is ripe for adjudication.

The Court's analysis of the above-listed factors weighs in favor of finding that this declaratory judgment action is ripe for adjudication. Three prior Delaware cases

[19] *See K&K Screw Products, LLC v. Emerick Capital Investments, Inc.*, 2011 WL 3505354, at * 11 (Del. Ch. Aug. 8, 2011) (pending arbitration proceeding is unlikely to preclude need for further litigation and, therefore, stay is unwarranted).

involving similar facts are consistent with this determination.[20] The Court finds these three prior cases instructive in its analysis of the present facts. In *Mt. Hawley Ins. Co. v. Jenny Craig, Inc.*, an insurance company's motion to dismiss was denied because primary coverage had been exhausted and plaintiff's excess coverage was implicated by a *potential* settlement.[21] Similarly, in *Hoechst Celanese Corp. v. National Union Fire Ins. Co of Pittsburgh*[22] and *Monsanto Co. v. Aetna Cas. And Sur. Co.*[23] excess insurers' motions to dismiss were denied because the plaintiffs demonstrated a sufficient likelihood that the defendant insurers could be liable under the circumstances presented in the complaint. The Court appreciates the distinction between the facts of this case and the facts of those three prior cases – in which there was no question that the insured was liable to some extent. However, the Court still finds those cases helpful and instructive in its analysis.

The Court cannot determine, with certainty, that CorVel will incur liability as a result of the claims pending in Louisiana. This does not require that the Court dismiss the present action. The prior Delaware cases addressing this issue have required the plaintiff to show that a there exists a substantial likelihood that the insurer's policy will be implicated. In this case, CorVel has already contacted Homeland and demanded a "full

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[20] *See Mt. Hawley Ins. Co. v. Jenny Craig, Inc.*, 668 A.2d 763 (Del. Super. 1995); *See also Hoechst Celanese Corp. v. National Union Fire Ins. Co of Pittsburgh*, 623 A.2d 1133 (Del. Super. 1992); *See also Monsanto Co. v. Aetna Cas. And Sur. Co.*, 565 A.2d 268 (Del. Super. 1989).

[21] 668 A.2d 763 (Del. Super. 1995).

[22] 623 A.2d 1133 (Del. Super. 1992).

[23] 565 A.2d 268 (Del. Super. 1989).

defense and indemnity." CorVel has also requested that Homeland participate in a mediation of the claims. Additionally, CorVel has entered into an agreement (although not finalized) which, based on the Policy, would require payment based solely on the amount involved. CorVel's actions are inconsistent with its arguments presented in this motion. Homeland has satisfied its burden to show that a substantial likelihood exists that the Policy will be implicated.

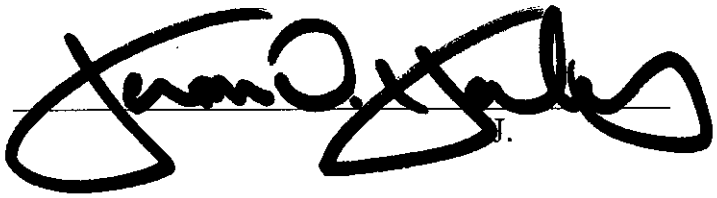
Analysis of the factors leads the Court to conclude that the matter is, in fact, ripe, and Homeland has shown a substantial likelihood that the Policy coverage would be implicated if it is applicable. The Court holds that this matter is ripe for adjudication.

The Court is also concerned about the potential prejudice to Homeland arising out of the Louisiana direct-file action filed after this declaratory judgment action. Because of the potential prejudice caused by any delay in adjudicating this matter, the Court will make available to the parties, upon request, an expedited handling of this case.[24]

Conclusion

For the reasons stated herein, CorVel's Motion to Dismiss or, in the alternative, to stay the proceedings is **DENIED**. CorVel shall file its answer to the complaint within 10 days of this order pursuant to Superior Court Civil Rule 12(a)(1).

IT IS SO ORDERED.



J.

[24] Superior Court Civil Rule 57 ("The Court may order a speedy hearing of an action for declaratory judgment and may advance it on the calendar.").

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IOMELAND INSURANCE COMPANY OF IEW YORK,	:	
Plaintiff,	:	Case No. N11C-01-089-JOH
v.	:	
ORVEL CORPORATION,	:	
Defendant,	:	

ORDER

AND NOW, this _____ day of November, 2011, IT IS HEREBY ORDERED that xecutive Risk Specialty Insurance Company's Motion to Intervene is GRANTED.

It is FURTHER ORDERED that Executive Risk shall cause to be filed in substantially he form attached to its Motion as Exhibit "1" its Complaint in Intervention, within three (3) usiness days after entry of this Order.

BY THE COURT:

_____
The Honorable Jerome O. Herlihy

This document constitutes a ruling of the court and should be treated as such.

Court Authorizer Comments:

SO ORDERED BY HERLIHY, J. ON 12-6-11