EFiled: Mar 14 2014 04:00PM EDT
Filing ID 55149481
Case Number 513,2013

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 SUPPLEMENTAL BRIEF

Kevin G. Abrams (#2375)
John M. Seaman (#3868)
Steven C. Hough (#5834)
ABRAMS & BAYLISS LLP
20 Montchanin Road, Suite 200
Wilmington, Delaware 19807
(302) 778-1000

Attorneys for CorVel Corporation
Defendant Below–Appellant

Dated: March 14, 2014

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

CASES **PAGES(S)**

Statutes

Other Authorities

PRELIMINARY STATEMENT

On February 26, 2014, the Louisiana Third Circuit Court of Appeal, in *George Raymond Williams, M.D. v. SIF Consultants of Louisiana, Inc.* ("*Williams II*") (Exhibit A hereto),[1] affirmed the ruling by Judge Alonzo Harris in the Louisiana trial court ("*Williams I*") (OB, Ex. D) (Exhibit B hereto) that claims for damages under LA. REV. STAT. 40:2203.1(G) are not penalties and are covered under the exact same insurance policy in this case. This is the first and only Louisiana appellate court decision directly addressing coverage for damages under Section 2203.1(G). *Williams II* considered the same Louisiana statute, same Louisiana settlement, same insurance policy, same insurance companies, and the same insured as this action, and affirmed the decision by the trial court judge who presided over both the underlying action *and* the coverage dispute. *Williams II* reached the right conclusion and repudiates the decision of the Superior Court.

On February 28, 2014, this Court granted CorVel Corporation's ("CorVel") request to submit a supplemental brief regarding the effect of *Williams II*. Dkt. 46. Adhering to the maxim that state courts should "stay in their lane,"[2] this Court should follow the holding in *Williams II* that statutory damages under Section 2203.1(G) are not penalties, and should reverse the Court below.

---

[1] No. 13-972, 2014 WL 718060, __ So.3d __ (La. Ct. App. Feb. 26, 2014) ("*Williams II*").

[2] *Martinez v. E.I. DuPont de Nemours and Co., Inc.*, No. 669,2012, 2014 WL 685685, at *8, __ A.3d __ (Del. Feb. 20, 2014).

ARGUMENT

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

The Court below effectively ignored the prior ruling of Judge Robert Wyatt of the Louisiana 14th Judicial District Court who held in *Gunderson v. F.A. Richard Associates, Inc.*, No. 2004-2417,[3] that claims under Section 2203.1(G) were not penalties and were covered under the defendant's errors and omissions insurance policy. Op. at 41. Just two weeks after the Court below rendered its Opinion (and more than two months before a final order was entered), Judge Harris issued his decision in *Williams I*, which was fully consistent with *Gunderson*, and distinguished the Opinion below. CorVel provided that decision to the Superior Court through its Rule 59/60 motion (A1220-32; A1243-48), but the Superior Court effectively ignored the holding of *Williams I* that claims under Section 2203.1(G)—the same claims at issue in this case—were not penalties, and therefore were covered under the same errors and omissions policy at issue in this case.[4] Now, in *Williams II*, three judges of the Louisiana Third Circuit Court of

[3] 14th Jud. Dist. Ct., Parish of Calcasieu, La. (July 20, 2007) (Tr.). A0987.

[4] The Superior Court mistakenly referred to *Williams I* as a "contrary decision of a Louisiana court in a *similar* case." OB Ex. C at 2 (emphasis added). *Williams I* is the *same* underlying case – Homeland and Executive Risk are defendants. *See* A0543-553 (*Williams I*, First Am. and Re-stated Pet. for Damages and Class Cert.) (alleging Homeland and Executive Risk are directly liable to the class under the Louisiana Direct Action Statute) (Exhibit C hereto).

Appeals have unanimously affirmed *Williams I* that the *Williams* Settlement (the same settlement here) is covered under the Executive Risk policy (the same policy here). Thus, five Louisiana state court judges have all reached the same conclusion: damages and attorneys' fees under Section 2203.1(G) are *not* penalties.

Williams II correctly observes there is no mention of penalties under Section 2203.1(G) and therefore the penalty exclusion in the policy is not applicable. 2014 WL 718060, at *6. Conversely, *Williams II* held that because the remedy under Section 2203.1(G) (statutory damages and attorneys' fees) is not expressly excluded under the policy, coverage exists for these claims as both statutory damages and attorneys' fees constitute "any monetary amount" as set forth in the Executive Risk policy insuring agreement. *Id.*

The Louisiana appellate court correctly analyzed the cause of action under the policy. It broadly construed the insuring language while narrowly construing exclusionary language. This is a proper departure from the incorrect analysis conducted by the Superior Court, which impermissibly did the opposite by attempting to broadly construe an exclusion for penalties (stretching "penalties" to also cover statutory damages and attorneys' fees), while narrowly construing the insuring language (which is already so broad as to cover statutory damages and attorneys' fees as "any monetary amount"). *Id.* The rules of insurance policy construction do not allow courts to "stretch" a policy exclusion to void coverage.

II. *WILLIAMS II* HAS DECIDED COVERAGE IN THE UNDERLYING CASE AND DESERVES GREAT DEFERENCE UNDER PRINCIPLES OF COMITY

The Superior Court did not have the benefit of *Williams I* or *Williams II* when it rendered its Opinion. If it had, the Court below certainly would have given great deference to the rulings of the Louisiana trial and appellate courts on the exact same issues as presented to the Superior Court. Now that this Court has the benefit of *Williams I* and *Williams II*, there is no reason why Delaware should not follow the guidance of the very Louisiana courts which are actually handling the underlying case on matters of a Louisiana statute, which only applies within the State of Louisiana. Moreover, Executive Risk and Homeland are parties to the *Williams I* and *II* underlying case by virtue of Louisiana's direct action statute.[5] *See* LA. REV. STAT. 22:1269. In other words, Executive Risk is now asking this Court to make a coverage ruling exactly opposite of the coverage ruling made by the Louisiana courts in the underlying case in which it is a defendant.[6]

[5] Unlike virtually every other state, Louisiana's Direct Action Statute allows insurance companies to be named as defendants and sued directly by injured parties.

[6] In fact, Executive Risk did not intervene to seek declaratory relief in Delaware until December 8, 2011, more than eight months *after* it had been sued in the underlying Louisiana case under Louisiana's Direct Action Statute. *See George Raymond Williams, M.D. v. SIF Consultants of La. Inc., et al.*, No. 09-C-5244-C (27th Jud. Dist. Ct. La., Mar. 24, 2011) (First Am. and Re-stated Petition for Damages and Class Cert.) A0543-553. But now of course, judgment has been rendered against Executive Risk on coverage, and upheld unanimously by the Louisiana appellate court, and Executive Risk *still* is trying to seek declaratory relief in Delaware even after losing on coverage in Louisiana.

Although *Williams II* may be entitled to *res judicata* under Louisiana law,[7] considerations of comity weigh most strongly in favor of following *Williams II*. The former Chancellor held that "a Delaware judge applying the law of a respected sister state… should be chary about innovating."[8] This is especially true here, where this appeal implicates no matters of Delaware law, but instead directly affects unique matters of Louisiana statutory law. Indeed, the practical effect of the *Williams II* decision, and any affirmance by this Court, will not be felt outside of Louisiana. No other PPO statute in the country we have identified has a notice requirement and remedy similar to Section 2203.1. In fact, the statute is so narrow it only applies to "medical services rendered in this state [*i.e.*, Louisiana]." LA. REV. STAT. 40:2203.1(A).

Although Executive Risk may still attempt to seek further review by the Louisiana Supreme Court (by seldom-granted discretionary writ), this Court should not await a possible subsequent Louisiana ruling as there is no way of telling whether any writ would be accepted and, if so, how long any such appeal would

[7] *See Segal v. Smith, Jones & Fawer, L.L.P.*, 838 So.2d 62, 66 (La. Ct. App. 2003) (holding that judgment was entitled to res judicata treatment even when on appeal); *cf. Playtex Family Products, Inc. v. St. Paul Surplus Lines Ins. Co.*, 564 A.2d 681, 684, n.2 (Del. Super. Ct. 1989) ("the Courts of this state have indicated that the better view is that judgments on appeal are final for *res judicata* purposes.") (citing *Maldonado v. Flynn*, 417 A.2d 378 (Del. Ch. 1980)).

[8] *RBC Capital Markets, LLC v. Education Loan Trust IV*, C.A. No. 6297-CS, 2011 WL 6152282, at *6 n.43 (Del. Ch. Dec. 6, 2011).

take.[9] The opportunity to stay this action in favor of the Louisiana proceedings has long passed. The Court below denied CorVel's application for such a stay over Homeland's objection (Op. Ex. E), and set Delaware courts on an inevitable collision course with Louisiana courts. Executive Risk should not now be heard to argue that this Court should stay its ruling pending further developments in Louisiana. Of course, if this Court reverses the Court below, the Louisiana Supreme Court will still have the opportunity to make the final determination regarding matters of Louisiana law.

As the former Chancellor held in *RBC Markets*,

> If litigants want innovative common law, they should address their claims to the courts of the state whose law applies. My duty here is to show comity and respect by carefully and cautiously applying New York law. *Our courts should never serve or be seen to serve as a way to bypass the precedent of the courts of the sovereign whose law governs the case.*[10]

Here, the court of the state whose law applies has spoken. In fact, the very trial and appellate courts handling the underlying claim have spoken. This Court should not serve as a way for insurance companies to bypass the respected precedent of a sister state through a parallel declaratory judgment action especially

[9] *See* Restatement (Second) of Judgments § 16 cmt. b (advising against a stay pending an appellate ruling from another court if disposition by the other court may be delayed); *see also id.* at § 13 cmt. f (the "better view is that a judgment otherwise final remains so despite the taking of an appeal").

[10] *RBC Capital Markets, LLC*, 2011 WL 6152282, at *6 n.43 (emphasis added).

when, as here, an adverse coverage ruling has already been made in the underlying action where the insurer is a defendant.

Comity, respect and a cautious application of Louisiana law counsel strongly in favor of deference to the holding in *Williams II*, and for reversal of the decision of the Court below.

CONCLUSION

Delaware has no vested interest in construing LA. REV. STAT. 40:2203.1(G), and this Court should defer to the Louisiana courts that have correctly done so.

> When a state court with little legitimate interest in a matter purports to speak on a subject of importance to a sister state, the reliability of state law is undermined and a counterproductive incentive is created for all state courts to afford less than ideal respect to each other.[11]

CorVel respectfully requests that this Court follow the unanimous lead of the Louisiana courts handling the underlying claim, reverse the judgment of the Superior Court and enter judgment in its favor on the issues of coverage for the statutory damages and attorneys' fees claimed under LA. REV. STAT. 40:2203.1(G).

[11] *Third Ave. Trust v. MBIA Ins. Corp.*, C.A. No. 4486-VCS, 2009 WL 3465985, at *1 (Del. Ch. Oct. 28, 2009); *see also id.* at *5 ("Because of the importance of this question to New York public policy, and the absence of any legitimate interest Delaware has in the question, … an appropriate regard for comity requires this court to abstain and allow the courts of New York to speak on the collateral effect to be given to the determinations of the … New York Insurance Department.").

/s/ John M. Seaman

Kevin G. Abrams (#2375)
John M. Seaman (#3868)
Steven C. Hough (#5834)
ABRAMS & BAYLISS LLP
20 Montchanin Road, Suite 200
Wilmington, Delaware 19807
(302) 778-1000

Dated: March 14, 2014

Attorneys for CorVel Corporation
Defendant Below–Appellant