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

APPELLEE HOMELAND INSURANCE COMPANY OF NEW YORK'S SUPPLEMENTAL MEMORANDUM

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BACKGROUND

This is the Supplemental Memorandum of Appellee Homeland Insurance Company of New York ("Homeland") filed in accordance with a letter from the Clerk of this Court dated February 28, 2014. It addresses supplemental authority - an opinion and judgment of the Louisiana Court of Appeal, Third Circuit, in a case titled *George Raymond Williams, M.D., et al. v. SIF Consultants*, No. 13-972, 2014 WL 718060, ___ So.3d ___ (La. Ct. App. Feb. 26, 2014) (hereinafter, "*Williams*" or "Op. at __.") - filed by CorVel Corporation ("CorVel") on February 27, 2014. *Williams* affirmed a Louisiana trial court's grant of summary judgment in favor of the plaintiff Class and against Co-Appellee, Executive Risk Specialty Insurance Company, Inc. ("Executive Risk"), in a case previously cited by CorVel in its briefs on this appeal. In its letter to the Court dated February 27, 2014, CorVel took the position that *Williams* "addresses the same issues, same claims and same parties as this appeal," and suggested that the Court invite "supplemental briefing regarding its effect on this appeal." (Trans. I.D. 55068617 at 1.)

The only issue addressed in *Williams* that bears any relevance to this appeal was framed by the *Williams* court by quoting Executive Risk's Third Assignment of Error:

> The trial court improperly determined that the relief sought by the plaintiff class under Title 40 is not a penalty, and instead constitutes covered statutory damages covered under the Policy. The trial court's holding is out of step with Louisiana appellate courts, including the

> Third Circuit, and federal courts which repeatedly and consistently have characterized the relief under Title 40 as an uninsured penalty. It also directly contradicts the earlier-rendered Delaware Action Opinion, which has preclusive effect here, involving the very same issues, policies, and parties.

(Op. at 3.)

How did the *Williams* court proceed to consider this issue? The *Williams* court first reviewed basic rules of construction not dissimilar from those employed in Delaware and quoted the Louisiana statute providing the remedy at issue. (Op. at 4-6.) It proceeded by repeating Executive Risk's argument that the statutory remedy is not covered because it is a penalty. Then, the court found "no merit" in Executive Risk's argument after engaging in a superficial discussion of the meaning of the statute, noting that it was guided by the principle that a "*statute* is first interpreted according to its plain language." (Op. at 7, emphasis added.) In short, the *Williams* court construed the *statutory* meaning of the word "damages," not the *contractual* meaning of the word "penalties" as it was used in the insurance policy.

The court's analysis was nominalist, not plenary, as it reasoned that, because the word "penalty" was not found in the statute, but the word "damages" was, the remedy was not a "penalty." The *Williams* court did not perform a choice of law analysis. It applied Louisiana law bearing on statutory construction alone. The court also failed to consider the dictionary meaning of the word "penalty," or

whether the statutory remedy was susbstantively consistent with the meaning of that word in the dictionary. By contrast, the Delaware Supreme Court has held that the dictionary is "the customary reference source that a reasonable person in the position of a party to a contract would use to discern the ordinary meaning of words not defined in the contract." *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006).

The *Williams* court failed to display any comity toward the Delaware Superior Court's Opinion and Order of June 13, 2013 ("June Order"). (Op. Br. Ex. A.) It did not review the June Order, discuss it, conduct an examination or consideration of the court's obligations under the Full Faith and Credit clause in light of the June Order, consider the Order's possible preclusive effect, or defer ruling until this appeal was resolved. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 373 (1996) (Full Faith and Credit Act "directs all courts to treat a state court judgment with the same respect that it would receive in the courts of the rendering state"). Rather than address these issues, the *Williams* court noted that the Delaware court had issued an opinion on coverage in favor of Executive Risk and cited that fact as proof that the coverage issue was ripe for its own, contrary decision. (Op. at 10.)

ARGUMENT

Williams improperly failed to consider giving preclusive effect to the June Order on constitutional, *res judicata* and collateral estoppel grounds, and failed to defer ruling pending the resolution of this appeal. *Williams* should have no effect on this appeal for three reasons: (1) *Williams* cannot be used offensively in this appeal; (2) the June Order is entitled to Full Faith and Credit in Louisiana and elsewhere and, insofar as Homeland is concerned, binds CorVel under the doctrines of *res judicata* and collateral estoppel; and (3) *Williams* did not properly analyze or discuss the coverage issues before this Court.

I. *Williams* Cannot be Used Against Homeland in This Appeal.

Homeland was not a party to the motion practice that resulted in *Williams*. No judgment has been entered against Homeland in Louisiana. In the event that CorVel attempts to use *Williams* offensively as a final judgment, *Williams* is not entitled to any preclusive effect against Homeland in this appeal.[1]

II. *Williams* Failed to Consider the June Order, Failed to Defer Its Ruling Pending This Appeal and is Not Due Any Deference by This Court.

The June Order was, for the reasons set forth in Homeland's Answering Brief, a final judgment on June 13, 2013, and became unappealable on July 13, 2013. The June Order was entered earlier than the August 2, 2013 judgment entered against Executive Risk in the *Williams* case. (B136.) Thus, the *Williams*

[1] Executive Risk has applied for rehearing of *Williams*.

court was required, at least initially, under the United States Constitution and federal law, to afford the Delaware judgment Full Faith and Credit. 28 U.S.C § 1378; *see also Durfee v. Duke*, 375 U.S. 106, 109 (1962) (holding that federal law requires that a judgment rendered in another state be given the same preclusive effect as it would have in the state in which it was rendered); *In re Succession of Aguilera*, 956 So. 2d 718, 720-21 (La. App. 2007) (quoting *Durfee*). In addition, the *Williams* court was required to give the Delaware judgment preclusive *res judicata* effect. *Bailey v. City of Wilmington*, 766 A.2d 477, 481 (Del. 2001).

Even if this Court were to find that CorVel's Delaware appeal was timely, a disposition in the *Williams* case should have been deferred. *Maldonado v. Flynn*, 417 A.2d 378, 384 (Del. Ch. 1980) (citing *Epstein v. Chatham Park, Inc.*, 153 A.2d 180, 185 (Del. Super. Ct. 1959) ("The better view is that a judgment being appealed will support the application of the doctrine of res judicata but, in an appropriate case, the dismissal of the second action should be held in abeyance until the appeal of the first action is completed.").

Assuming *arguendo* that the Superior Court's Order docketed on August 28, 2013 ("August Order") (Op. Br. Ex. B), and not the June Order, was the final judgment in this case, that judgment would still be the first in time between Homeland, on the one hand, and CorVel and the Class, on the other. For the reasons set forth in Homeland's Answering Brief, the Superior Court's judgment

was correct. Therefore, even if the August Order were held to constitute the Superior Court's final judgment in this case, it would still bind CorVel and its assignee, the Class, because, as CorVel acknowledges, it involves the same parties and the same issues regarding coverage under the Homeland Policy, and *Williams* did not decide any issues against Homeland or enter any judgment against it.

In any event, however, the failure by the *Williams* court to consider the issue of the effect of the June Order, its failure to consider the principles of comity, its rejection of Executive Risk's argument on those points without analysis, and its failure to defer decision pending this appeal raise serious questions about its jurisprudence and methodology, deprive *Williams* of persuasive value and argue against any deference to it by this Court.

III. *Williams* Did Not Correctly Analyze or Discuss the Coverage Issues before this Court.

The correct formulation of the question presented in both this case and the *Williams* litigation, as identified by the Superior Court, was whether the remedy provided in La. R.S. § 40:2203.1(G) was a "penalty" within the meaning of the Executive Risk and Homeland Policies, and therefore fell outside their coverages. As shown in the Answering Briefs filed by Executive Risk and Homeland, the law governing interpretation of the Executive Risk and Homeland Policies is either that of Delaware (where CorVel is incorporated) or California (where CorVel was headquartered). In its conflict-of-laws analysis, the Superior Court found no actual

conflict between the law of California and the law of Delaware, and therefore applied Delaware law to interpret the word "penalties" as used in both contracts. It then followed the instruction of this Court provided in *Lorillard Tobacco Co. v. American Legacy Foundation,* 903 A.2d 728, 738 (Del. 2006) and *Northwestern National Insurance Company v. Esmark, Inc.,* 672 A.2d 41, 44 (Del. 1996), where this Court explained that "'dictionaries are the customary reference source that a reasonable person in the position of a party to a contract would use to [discern] the ordinary meaning of words not defined in the contract.'" (Op. Br., Ex. A at 30-31, quoting *Lorillard*, 903 A.2d at 738.) In contrast, however, the *Williams* court did not perform any conflict-of-laws analysis, choosing instead to apply Louisiana law without discussing the basis for its choice. Moreover, the *Williams* court did not apply Louisiana *contract* law to interpret the language of the Executive Risk Policy, but rather applied, without rationale, that state's more general law to find that the Louisiana statute at issue "denotes that a violator is subject to pay 'damages' and includes no language regarding penalties." (Op. at 7.) In short, the *Williams* court did not apply Louisiana law to interpret the meaning of the word "penalties" in the Executive Risk policy, or attempt to determine what the parties intended to place beyond coverage by use of that word. At best, the Louisiana court applied Louisiana law to interpret the pertinent Louisiana statute. It also failed to analyze relevant authorities in Louisiana and other jurisdictions that the

Superior Court considered and that Homeland discussed in its Answering brief at pages 14-25. For the foregoing reasons, *Williams* should carry no weight or authority.

CONCLUSION

Williams should have no effect on this appeal for three reasons: (1) *Williams* cannot be used offensively in this appeal; (2) the June Order is entitled to Full Faith and Credit in Louisiana and elsewhere and, insofar as Homeland is concerned, binds CorVel under the doctrines of *res judicata* and collateral estoppel; and (3) *Williams* did not properly analyze or discuss the coverage issues before this Court.

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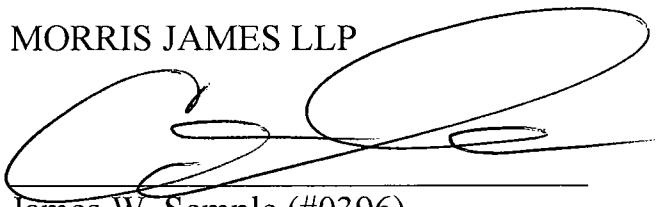

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