**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

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| 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

[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.

[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:
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> **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:
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> (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]
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> 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

[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

[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

[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

[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

[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

[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

[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

[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

[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

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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).

Title 22 when enacting Section 40:2203.1(G). In that Title 22 statute, an insured was 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

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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).

timely,"[100] as set forth in Title 22, in the event of a violation, Section 40:2203.1(G) refers 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.
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> 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.

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

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

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 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

[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.

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]

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

[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.

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.

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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 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.

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 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,

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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).

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 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

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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).

failure to provide notice that contractually established PPO service rates will apply to a particular service delivery.[119]

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).

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

[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).

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 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

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

[123] 2010 WL 5471005, at *7.

"[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 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

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

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

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

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.

***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.**

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J.