To be Argued by:
ELIZABETH F. AHLSTRAND
(Time Requested: 30 Minutes)

APL-2019-00118
New York County Clerk's Index No. 650142/14

Court of Appeals

of the

State of New York

JIN MING CHEN,

Plaintiff-Appellant,

– against –

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

Defendant-Respondent.

BRIEF AND APPENDIX FOR DEFENDANT-RESPONDENT

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Date Completed: September 26, 2019

COURT OF APPEALS
STATE OF NEW YORK

JIN MING CHEN	:	
	:	APL-2019-00118
Plaintiff-Appellant,	:	
	:	Index No. 650142/2014
- against -	:	
	:	**CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)**
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	:	
	:	
Defendant-Respondent.	:	

Pursuant to Section 500.1(f) of the Rules of Practice of the New York Court of Appeals, counsel for Defendant-Respondent Insurance Company of the State of Pennsylvania ("ICSOP") certifies that ICSOP is a direct, wholly-owned (100%) subsidiary of AIG Property Casualty U.S., Inc., which is a wholly-owned (100%) subsidiary of AIG Property Casualty Inc., which is a wholly-owned (100%) subsidiary of American International Group, Inc., which is a publicly-held corporation. No parent entity or publicly held entity owns 10% or more of the stock of American International Group, Inc.

Dated: West Hartford, Connecticut
September 27, 2019

SEIGER GFELLER LAURIE LLP

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INTRODUCTION

This insurance coverage dispute stems from a $2,330,000 award of damages against Kam Cheung Construction, Inc. ("Kam Cheung") in a New York Labor Law action commenced by Plaintiff related to injuries sustained by him on a Kam Cheung construction site. At the time of Plaintiff's injury, Kam Cheung was insured under a primary commercial general liability policy with an each occurrence limit of $1,000,000 and which provided coverage for pre- and post-judgment interest, as well as an excess liability insurance policy issued by the Insurance Company of the State of Pennsylvania's ("ICSOP") which sat on top of the coverage afforded by the primary policy. The instant appeal is Plaintiff's most recent attempt in a long line of misguided efforts to force the ICSOP excess policy to drop down and to fill the gaps in coverage created after the primary policy was voided due to misrepresentations made by Kam Cheung during the application process.

Throughout the course of this litigation, Plaintiff has argued, in direct contravention to the clear language of the policies and well-established purpose of excess insurance, that once the primary policy was rendered void, ICSOP was obligated to defend Kam Cheung, and pay the entire award of damages, with interest, under the excess policy. The trial court properly rejected Plaintiff's position and issued an order and judgment

adjudging ICSOP liable only for that portion of the damages award in excess of the $1,000,000 primary limits ($1,330,000), pre-judgment interest previously accrued on that amount, plus interest and costs from the date of its order. ICSOP promptly paid the judgment.

On appeal to the First Department, Appellate Division ("First Department"), Plaintiff abandoned his futile efforts to recoup the entire $2,330,000 award of damages under the excess policy and admitted (as he must) that the excess policy does *not* provide drop down coverage. Nevertheless, before the First Department and in the present appeal, Plaintiff irreconcilably pursues his argument that ICSOP is liable under the excess policy for all pre- and post-judgment interest accrued on the entire $2,330,000 award of damages, including pre-judgment interest accrued on the first $1,000,000 (which Plaintiff acknowledges ICSOP is not obligated to pay under the excess policy), and all post judgment interest. Critically, all of the additional interest sought by Plaintiff would have been covered under the voided primary policy.

The First Department properly and unanimously rejected Plaintiff's argument and affirmed the trial court's order and judgment. As detailed below, Plaintiff's overreaching position that he is entitled to recover from ICSOP all interest accrued on

the entire underlying award of damages is unsupportable.[1] To permit Plaintiff to recover additional interest would run afoul of the clear and unambiguous language of the primary and excess policies, the trial court's uncontested holding that the excess policy does not provide drop down coverage, the purpose of excess insurance, ICSOP's reasonable expectations, and the relevant case law. In short, no valid basis exists to reverse the First Department's affirmation of the trial court's determination that Plaintiff was not entitled to recover same.

Plaintiff's attempt to side-step the reality that his position finds no support in policy language, relevant case law or underlying facts, by arguing that ICSOP waived its interest-based arguments, is of no avail. The record is clear that ICSOP timely raised, and the trial court properly addressed by way of reargument, the specific issue on appeal – i.e. ICSOP's liability for pre- and post-judgment interest covered by the primary policy – as soon as it arose upon the filing of Plaintiff's proposed judgment which would have permitted it to recover all pre- and post-judgment interest accrued on the entire award of damages,

[1] To be clear, ICSOP does not challenge its liability for: i) pre-judgment interest accrued on the $1,330,000 between December 8, 2011 and October 29, 2013 (the period between summary judgment and entry of judgment in the Underlying Action); pre-judgment interest accrued following the court's order granting summary judgment in part to Plaintiff in this action, on May 2, 2016 and the clerk's entry of judgment on June 30, 2017; or, interest accrued during the brief period between the clerk's entry of judgment on June 30, 2017, and ICSOP's satisfaction of the judgment. Those sums have all been paid to and accepted by Plaintiff.

despite the trial court's order and decision finding no drop down in coverage.

Thus, ICSOP respectfully requests that this Court affirm the judgment of the First Department, which upheld the trial court's order and judgment.

COUNTERSTATEMENT OF FACTS AND NATURE OF THE PROCEEDINGS

ICSOP's insured, Kam Cheung, was hired to renovate a building located at 61 Chrystie Street, New York, New York. On October 3, 2007, Plaintiff allegedly struck a brick while working with a masonry hammer, causing a piece of brick to injure his eye (the "Incident"). [Plaintiff's Appendix 23].

The Underlying Action

In February 2008, Plaintiff filed suit against Kam Cheung for common-law negligence and violations of Labor Law Sections 200 and 241(6) (the "Underlying Action"). On December 8, 2011, the trial court granted summary judgment in favor of Plaintiff on the Section 241(6) claim. [Plaintiff's Appendix 112-123, 142-145].

On September 24, 2013, the trial court awarded Plaintiff damages in the amount of $2,330,000.00 (the "Underlying Award of Damages"). The court further awarded Plaintiff interest on said amount running from December 8, 2011, the date summary judgment was granted. [Plaintiff's Appendix 155-165]. On October 29, 2013, the county clerk entered Judgment in favor of Plaintiff in the amount of $2,330,000 plus $396,993.70 in interest, for a total of

$2,726,993.70 (the "Underlying Judgment"). [Plaintiff's Appendix 164-165].

The Applicable Insurance Policies

At the time of the Incident, Kam Cheung was insured under a primary commercial general liability policy issued by Arch Specialty Insurance Company ("Arch") bearing policy no. DPC0022451-00, for the policy period July 9, 2007 to July 9, 2008 and with limits of $1,000,000 each occurrence (the "Arch Policy"). *See* Arch Policy [Plaintiff's Appendix 395-459].

As is relevant here, the Arch Policy provides:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" . . . to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages.

Arch Policy, p. 1 [Plaintiff's Appendix 398].

The Arch Policy further provides:

> SUPPLEMENTARY PAYMENTS
>
> 1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:
>
> . . .
>
> f. *Prejudgment interest awarded against the insured on that part of the judgment we pay.* If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.
>
> g. *All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid,* offered to pay, or deposited in the court the part

> of the judgment that is within the applicable limit of insurance.
>
> These payments ***will not*** reduce the limits of insurance.

Id. at p. 14 (emphasis added)[Plaintiff's Appendix 411].

Thus, the Arch Policy expressly affords coverage for pre- and post-judgment interest which is in addition to and does not reduce its $1,000,000 each occurrence limit. *Id.*

Arch initially provided Kam Cheung with a defense to the Underlying Action, subject to a full reservation of its rights to disclaim coverage. Arch then filed a separate declaratory judgment action to rescind its policy due to material misrepresentations by Kam Cheung in its insurance application. *See Arch Specialty Ins. Co. v. Kam Cheung Const. Inc.*, No. 2009-601961 (N.Y. Sup.). On July 23, 2012, judgment was entered in favor of Arch, and that judgment was upheld on appeal. *See Arch Specialty Ins. Co. v. Kam Cheung Const. Inc.*, 961 N.Y.S. 2d 443 (1st Dept. 2013). Thereafter, Arch withdrew its defense of Kam Cheung in the Underlying Action. [Plaintiff's Appendix 149].

At the time of the Incident, Kam Cheung was also insured under an excess liability insurance policy issued by ICSOP, bearing policy no. 5686710, for the policy period July 8, 2007 to July 8, 2008 and with a $4,000,000 each occurrence limit (the "ICSOP Excess Policy"). *See* ICSOP Excess Policy [Plaintiff's Appendix 80-110].

The ICSOP Excess Policy provides:

I. Coverage

A. We will pay on your behalf Ultimate Net Loss *in excess of the Underlying Insurance* as shown in Item 4 of the Declarations, but only up to an amount not exceeding our Limits of Insurance as shown in Item 3 of the Declarations. Except for the terms, definitions, conditions and exclusions of this policy, the coverage provided by this policy shall follow the terms, definitions, conditions and exclusions of the First Underlying Insurance Policy as shown in Item 4 of the Declarations.

. . .

C. Maintenance of Underlying Insurance.

The limits of insurance of the Underlying Insurance shown in Item 4 of the Declarations shall be maintained in full effect during the period of this policy except for any reduction or exhaustion of aggregate limits contained therein solely by the payment of the damages for accidents or occurrences, whichever is applicable, that take place during each annual period of this policy and that are insured by this policy.

If you fail to comply with this requirement, we will only be liable to the same extent that we would have had you fully complied with this requirement.

See ICSOP Excess Policy, at Form 60225 (10/04), p. 2 (emphasis added) [Plaintiff's Appendix 82]. Item 4 of the Declarations identifies the Arch Policy as the applicable Underlying Insurance.

"Ultimate Net Loss" is defined by the ICSOP Excess Policy as "the amount payable in settlement of the liability of the insured after making deductions for all recoveries and for other valid and collectible insurance, excepting however the Underlying Insurance shown in Item 4 of the Declarations." [Plaintiff's Appendix 82].

Additionally, the ICSOP Excess Policy states:

> Your bankruptcy, insolvency or inability to pay or the bankruptcy, insolvency or inability to pay of any of your underlying insurers will not relieve us from the payment of any claim covered by this policy.
>
> *But under no circumstances will such bankruptcy, insolvency or inability to pay require us to drop down and replace the Underlying Insurance or assume any obligation within the Underlying Insurance area.*

See ICSOP Excess Policy, at Form 60225 (10/04), p. 3 (emphasis added) [Plaintiff's Appendix 84].

The Present Action

After Kam Cheung failed to satisfy the Underlying Judgment, Plaintiff commenced this direct action against ICSOP under Insurance Law Section 3420 seeking to collect from ICSOP the entire Underlying Award of Damages. [Plaintiff's Appendix 67-236].

On May 21, 2015, Plaintiff filed a Motion for Summary Judgment, wherein he sought an order from the court directing ICSOP to "satisfy the judgment awarding $2,330,000.00, plus interest." [Plaintiff's Appendix 20-309]. In its Opposition to Plaintiff's Motion for Summary Judgment, ICSOP argued, among other things, that Plaintiff was not entitled to the "full amount of the judgment" from ICSOP because the ICSOP Excess Policy does not "drop down or otherwise satisfy the limit of the Arch Policy," and that ICSOP is "liable only to the extent that it would have been had Kam Cheung maintained the underlying insurance." [Plaintiff's Appendix 322, 331, 332].

Oral argument on Plaintiff's Motion for Summary Judgment was held before the trial court *(Rakower, J.)* on May 2, 2016. ICSOP reiterated its position that the ICSOP Excess Policy does not drop down to fill the gap in coverage created by the rescinding of the Arch Policy, and therefore, the most ICSOP could be held liable for under the ICSOP Excess Policy was $1,330,000 together with any pre-judgment interest accrued on that amount. [Plaintiff's Appendix 851-852]. Plaintiff did not respond to ICSOP's position, but rather maintained that he was entitled to collect the entire Underlying Award of Damages from ICSOP with interest.

The trial court agreed with ICSOP, ruling from the bench: "I do agree that there is no drop down of coverage and that the first million dollars that the excess carrier contracted for a certain premium with the idea that there was a first layer of coverage which included the representation and the first million... you are entitled to the benefit of that. However, with respect to the balance of the judgment, ICSOP must satisfy that judgment." [Plaintiff's Appendix 17-19, 872-873, 865-866].

On May 10, 2016, Plaintiff filed a proposed judgment with the county clerk which would have permitted Plaintiff to recover from ICSOP all interest accrued and accruing on the entire $2,330,000 Underlying Award of Damages, including interest on the $1,000,000 the trial court expressly held Plaintiff was not entitled to collect from ICSOP. [Plaintiff's Appendix 875-889]. More

specifically, Plaintiff's proposed judgment stated that pursuant to the decision rendered by Judge Rakower on May 2, 2016, ICSOP:

> [M]ust satisfy the judgment filed with the Court on the 29th day of October . . . for the amount of TWO MILLION SEVEN HUNDRED TWENTY-SIX THOUSAND NINE HUNDRED NINETY-THREE DOLLARS AND SEVENTY CENTS ($2,726,993.70) plus interest from the time of the prior judgment and costs of this action, except for a ONE MILLION DOLLAR ($1,000,000.00) credit from the total amount owed at the time of satisfaction of the remainder of the judgment as determined by the Court.

Id.

ICSOP filed a motion to resettle Plaintiff's proposed judgment or in the alternative for leave to reargue the issue of whether and to what extent ICSOP was liable for pre- and/or post-judgment interest that would have been covered under the Arch Policy – i.e. interest accrued on the first $1,000,000 of the Underlying Award of Damages and all post-judgment interest. [Plaintiff's Appendix 825-889]. ICSOP argued that resettlement or reargument was necessary because Plaintiff's proposed judgment was inconsistent with the court's holding that the ICSOP Excess Policy does not drop down to cover sums that would have been covered under the Arch Policy.

By way of an order and decision dated February 1, 2017,[2] the trial court granted ICSOP leave to reargue "for the very purpose

[2] The trial court initially denied ICSOP leave to reargue. 10/26/16 Order Denying Reargument [Respondent's Appendix RA-1]. The court did not, however, address ICSOP's request for resettlement or otherwise clarify whether and/or to what extent ICSOP was liable for pre- and/or post-judgment interest. Consequently, ICSOP filed a second motion requesting that the court issue an order clarifying

of enabling the parties to address the interest issue." [Plaintiff's Appendix 1010-1011].

Following the submission of supplemental briefs, the trial court heard oral argument on June 20, 2017. Notably, in response to Plaintiff's argument that ICSOP waived any argument with respect to interest, the trial court stated unequivocally, "[j]ust so we are clear, I granted re-argument because I didn't think I addressed the interest issue sufficiently in my prior decision." 6/20/17 Transcript re: Reargument [Respondent's Appendix RA-16]. Thereafter, the trial court *(Rakower, J.)* clarified, by executing ICSOP's proposed judgment, that Plaintiff was not entitled to collect from ICSOP any interest that would have been covered under the Arch Policy. *See* Judge Rakower's 6/20/17 Order and Decision [Respondent's Appendix RA-2]; 6/20/17 Transcript re: Reargument [Respondent's Appendix RA-6].[3]

whether and to what extent Plaintiff was entitled to collect pre- and/or post-judgment interest from ICSOP and granting any other and further relief that the court deemed appropriate. [Plaintiff's Appendix 932-943]. ICSOP also filed its own proposed judgment, limiting Plaintiff's recovery to $1,330,000.00 together with pre-judgment interest accrued on that amount between December 8, 2011 and October 29, 2013 (the period between summary judgment and entry of judgment in the Underlying Action), or $1,526,938.00, with costs and interest from the date of the order granting summary judgment in part to Plaintiff in this action, on May 2, 2016. [Plaintiff's Appendix 1006-1008].

[3] Judge Rakower's 6/20/17 Decision and Order, and the 6/20/17 Transcript re: Reargument, were included in Plaintiff-Appellant's Appendices to the Appellate Division, First Department, but were omitted from Plaintiff-Appellant's Appendices to the Court of Appeals. Consequently, Respondent has included these documents in its Respondent's Appendix.

On June 30, 2017, the county clerk's office filed the judgment, which calculated interest in the amount of $159,638.23, rendering the total amount of the judgment $1,686,576.23 (the "Judgment").[4] [Plaintiff's Appendix 14-15]. ICSOP served Notice of Entry of Judgment upon Plaintiff and promptly satisfied the Judgment. [Plaintiff's Appendix 13-15].

The Appellate Division's Decision and Order

Plaintiff's appeal to the First Department followed, wherein Plaintiff argued that pursuant to Judge Rakower's May 2, 2016 order, he was entitled to interest on the entire Underlying Award of Damages. In particular, Plaintiff argued that ICSOP waived any argument with regard to pre-judgment and post-judgment interest, and, as such, Judge Rakower erred in granting ICSOP reargument and changing her May 2, 2016 "final order" in violation of the parameters of reargument permitted by CPLR 2221(d) and the scope of a court's authority under CPLR 5019(a). Plaintiff's Appellant Brief. Plaintiff also argued that pursuant to the express language of the Arch and ICSOP Policies, as well as purported "controlling" New York case law (specifically, *Ragins v. Hospitals Ins. Co.,*

[4] More specifically, Plaintiff was awarded $1,330,000 (the $2,330,000 Underlying Award of Damages less the $1,000,000 Arch Policy each occurrence limit), together with the pre-judgment interest accrued on that amount between December 8, 2011 and October 29, 2013 (the period between summary judgment and entry of judgment in the Underlying Action) which totaled $1,526,938, as well as costs and interest from the date of the order granting summary judgment in part to Plaintiff in this action, on May 2, 2016, in the amount of $159,638.23 for a total amount of $1,686,576.23.

Inc., 22 N.Y.3d 1019 (2013) and *Welsh v. Peerless Cas. Co.*, 187 N.Y.S. 2d 842 (1st Dept. 1959)), ICSOP was responsible for all post-judgment interest. *See generally,* Plaintiff's Appellant Brief. Significantly, Plaintiff did not contest Judge Rakower's ruling that the ICSOP Excess Policy does not drop down to cover the first $1,000,000 of the Underlying Award of Damages.

In response, ICSOP argued that the trial court record was clear that it was properly granted reargument on the interest issue and that the Judgment must be affirmed as Judge Rakower never awarded Plaintiff interest on the entire Underlying Award of Damages. ICSOP also countered that it had consistently argued that it was not liable for any sums covered by the Arch Policy, and, that recovery of the interest claimed by Plaintiff is prohibited by the clear language of the ICSOP and Arch policies, as well as the established purpose of excess insurance and interest.

The parties appeared for oral argument before the First Department on October 10, 2018 during which Plaintiff argued that the trial court improperly granted reargument, that ICSOP waived the issue of interest, and that, even if ICSOP had not waived the issue, this Court's decision in *Ragins* required the trial court to award Plaintiff interest on the entire Underlying Award of Damages, including the first $1,000,000, which Plaintiff conceded was not covered under the ICSOP Excess Policy. In response, ICSOP argued that Judge Rakower properly granted reargument because, although

she ordered that the ICSOP Excess Policy does not drop down to cover the $1,000,000 each occurrence limit of the Arch Policy, she did not specifically address whether ICSOP must drop down to cover interest that would have been recoverable under the Arch Policy. ICSOP also argued that Plaintiff's interpretation of the Arch and ICSOP Policies failed to take into account that, while the ICSOP Excess Policy follows-form, its terms and conditions control.

The First Department aptly noted that Judge Rakower granted reargument and permitted supplemental briefing because her prior order did not specifically address whether the ICSOP Excess Policy drops downs to cover interest that was covered by the Arch Policy. The First Department also noted that *Ragins* is distinguishable because, unlike the Arch Policy, the primary policy therein specifically provided that it does not cover interest in excess of the policy limits. The First Department further commented that Plaintiff's arguments ignore the terms of the ICSOP Excess Policy which provide that ICSOP will not drop down to cover sum the primary policy was to cover. Notably, although Plaintiff reserved time for rebuttal, Plaintiff declined to use same to address or contest these statements by the First Department, conceding, "I have nothing else."[5]

[5] *See* Oral Argument Archive, First Jud. Dept. Supreme Ct of the State of New York (Oct. 10, 2018, at 15:36:37), *http://wowza.nycourts.gov/vod/vod.php?source=ad1&video=AD1_Archive_Oct10_13-58-49.mp4*.

On October 30, 2018, the First Department unanimously affirmed the trial court's Judgment. *See* Decision and Order of the Supreme Court, Appellate Division, First Department (hereinafter "10/30/18 Decision") [Plaintiff's Appendix 1124-1127]. In particular, the First Department held that the specific interest-related questions at issue did not become clear until after the trial court's May 2, 2016 ruling, and that, as such, ICSOP did not and could not have waived its right to contest Plaintiff's interest calculation. The First Department also found that ICSOP's interest-related arguments were permissible under CPLR 2221(d) since the trial court specifically granted leave to reargue for the "very purpose of enabling the parties to address the interest issue," which its May 2, 2016 ruling did not address. 10/30/18 Decision, p. 28.

With respect to Plaintiff's substantive argument, that the additional interest sought is covered and collectible under the ICSOP Excess Policy, the First Department rejected Plaintiff's proposed interpretation of the "follow form" provision in the ICSOP Excess Policy[6] and held that neither *Ragins* nor *Welsh* supported

[6] Plaintiff argued before the First Department, as he does before this Court, that the Arch Policy provided coverage for pre- and post-judgment interest, and that such interest is therefore necessarily also covered and recoverable under the ICSOP Excess Policy because it "follows-form" to the Arch Policy. In rejecting this argument, the First Department aptly noted: that pursuant to the ICSOP Excess Policy's "Maintenance of Underlying Insurance" provision, "regardless of whether the insured actually maintained such underlying insurance, ICSOP's excess coverage would be triggered only upon exhaustion of the 'limits of insurance of the Underlying Insurance shown in Item 4 of the Declaration,' which 'limits,' in turn, were not reduced by, and thus included,

Plaintiff's position due to "key distinctions in the policy language at issue in those cases." 10/30/18 Decision, p. 29.

On November 30, 2018, Plaintiff filed a motion for reargument on and/or for leave to appeal the First Department's 10/30/18 Decision. Plaintiff argued that reargument was warranted because: (i) the trial court and the First Department incorrectly applied the doctrine of waiver and/or "carved out a new rule for waiver because this issue involved statutory interest;" and (ii) the First Department's holding that the ICSOP Excess Policy's coverage was triggered upon the primary carrier's payment of "supplemental payments" in addition to the primary limit of $1,000,000, was contrary to the plain meaning of the ICSOP Excess Policy and in conflict with *Ragins. See* Plaintiff's Motion to Reargue and/or Leave to Appeal to the Court of Appeals, pp. 18, 26, and 27 (dated November 30, 2018).

In the alternative, Plaintiff argued leave to appeal was warranted because: (i) the First Department improperly held that the trial's court order granting ICSOP's motion to reargue was permissible under CPLR 2221(d) because a "final judgment" cannot be subject to a motion to reargue; and (ii) the First Department's 10/30/18 Decision is contrary to the terms of the ICSOP Excess Policy and is in conflict with *Ragins* and *Welsh*.

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the interest payments set forth in the [Arch Policy's] Supplemental Payments provision." 10/30/18 Decision, p. 29.

On February 28, 2019, the First Department denied Plaintiff's motion in its entirety. Thereafter, Plaintiff sought leave to appeal directly from this Court, which this Court granted on June 11, 2019. [Plaintiff's Appendix 1128].

ARGUMENT

I. THE FIRST DEPARTMENT PROPERLY CONSIDERED AND REJECTED PLAINTIFF'S PROFFERED INTERPRETATION OF THE ARCH AND ICSOP POLICIES

Despite his misguided assertions to the contrary, Plaintiff is simply not entitled to collect from ICSOP any interest which would have been covered by the Arch Policy had it not been rescinded - specifically, pre-judgment interest on the first $1,000,000 of the Underlying Award of Damages and all post-judgment interest.[7] Not only is Plaintiff's strained interpretation of the Arch and ICSOP Policies irreconcilable with the unambiguous language of those policies, awarding Plaintiff the additional interest claimed would run contrary to the trial court's accurate and accepted ruling that the ICSOP Excess Policy does not drop down, the purpose of excess insurance and interest, ICSOP's reasonable expectations, and the relevant case law. Consequently,

[7] To be clear, ICSOP does not challenge its liability for: i) pre-judgment interest accrued on the $1,330,000 between December 8, 2011 and October 29, 2013 (the period between summary judgment and entry of judgment in the Underlying Action); pre-judgment interest accrued following the trial court's order granting summary judgment in part to Plaintiff in this action, on May 2, 2016 and the clerk's entry of the Judgment on June 30, 2017; or, interest accrued during the brief period between the clerk's entry of the Judgment on June 30, 2017, and ICSOP's satisfaction of the Judgment. Those sums have all been paid to and accepted by Plaintiff.

the First Department properly affirmed the Judgment and the trial court's rejection of Plaintiff's attempt to recover additional interest from ICSOP.

A. The Arch Policy Covers the Additional Interest Claimed by Plaintiff

Plaintiff's interpretation of the Arch and ICSOP policies is fatally flawed in multiple respects. First, as the First Department aptly recognized, Plaintiff fails to appreciate that pursuant to the Arch Policy's Supplementary Payments provision, Arch expressly agreed to provide coverage for pre- and post-judgment interest in addition to its $1,000,000 each occurrence limit. In rejecting Plaintiff's policy interpretation, the First Department held: "[t]he language of the policies do not support [Plaintiff's] interpretation, and instead support ICSOP's position that its coverage obligations were meant to be excess to all aspects of coverage afforded by the primary policy – that is, not only the $1 million in coverage per occurrence, but also the Supplementary Payments, which by their terms, did not reduce the Arch policy's insurance limits." 10/30/18 Decision, p. 30.

As detailed above, the Arch Policy's Supplementary Payments provision provides that Arch shall pay:

> f. Prejudgment interest awarded against the insured on that part of the judgment we pay . . . .
>
> g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in the court

> the part of the judgment that is within the applicable limit of insurance.

Arch Policy, p. 14 [Plaintiff's Appendix 411]. This coverage is in addition to and does not reduce the $1,000,000 each occurrence limit of the Arch Policy. *Id.* ("These payments will not reduce the limits of insurance.").

It is well recognized that a "standard interest" clause such as this one is clear and unambiguous and obligates a primary insurer to pay all post-judgment interest, even though that obligation may bring its liability over the stated policy limits. *See*, *Southeast Atlantic Cargo Operators, Inc. ("SEACO") v. First State Ins. Co.,* 216 Ga. App. 791, 793-94, 456 S.E.2d 101 (Ga. Ct. App. 1995), *citing* 8A Appleman, Insurance Law and Practice, § 4894.25.

In short, the Arch Policy covers the first $1,000,000 of the Underlying Award of Damages, pre-judgment interest on the first $1,000,000 of the Underlying Award of Damages and all post-judgment interest accrued on the entire Underlying Award of Damages prior to the tender of the $1,000,000 each occurrence limit. *See* Arch Policy, p. 14 [Plaintiff's Appendix 411]. As neither Arch nor any other party in its stead tendered payment of the $1,000,000 primary limit as is required to cut off Arch's coverage for post-judgment interest, all post-judgment interest remains within the domain of what would have been covered by the Arch Policy.

B. The ICSOP Policy Does Not Drop Down to Cover Interest that Falls Within the Province of the Arch Policy

Notwithstanding that Plaintiff now finally acknowledges that the ICSOP Excess Policy does not drop down and provide coverage for the first $1,000,000 of the Underlying Award of Damages, in this appeal Plaintiff persists in his argument that the ICSOP Excess Policy nonetheless drops down and provides coverage for all pre- and post-judgment interest accrued on the entire Underlying Award of Damages. The express language of the Arch and ICSOP policies does not support Plaintiff's position. The "Maintenance of Underlying Insurance" and "Ultimate Net Loss" provisions of the ICSOP Excess Policy do not reflect, as Plaintiff contends, that ICSOP only contemplated underlying coverage in the amount of $1,000,000 – i.e. the Arch Policy's each occurrence limit. To the contrary, the language of the Arch and ICSOP policies confirm that ICSOP's coverage obligations were meant to be excess to all aspects of coverage afforded by the Arch Policy – that is, ICSOP agreed to pay Ultimate Net Loss in excess of the Arch Policy, which expressly provides coverage for interest in addition to the $1,000,000 each occurrence limit, and that any failure by Kam Cheung to maintain such coverage would not enlarge ICSOP's obligations under the ICSOP Excess Policy.

"[P]rimary insurance refers to the first layer of insurance coverage that attaches immediately upon the occurrence of a policy-

defined liability or loss." *Ali v. Fed. Ins. Co.*, 719 F.3d 83, 90–91 (2d Cir. 2013); *quoting Horace Mann Ins. Co. v. Gen. Star Nat'l Ins. Co.*, 514 F.3d 327, 329 (4th Cir. 2008). By contrast, excess liability policies "provide an additional layer of coverage" for losses that exceed the coverage afforded by the primary liability policy. *Id*. Coverage under an excess policy is thus triggered when the underlying primary insurance policy is exhausted. *Id.; see also Olin Corp. v. Am. Home Assurance Co.*, 704 F.3d 89, 93 (2d Cir. 2012) (describing how excess liability policies operate). Accordingly, "the very nature of excess insurance coverage is such that a predetermined amount of underlying primary coverage must be paid before the excess coverage is activated." *Id.* at 91, *quoting Gabarick v. Laurin Mar. (Am.), Inc.*, 649 F.3d 417, 422 (5th Cir. 2011) (alteration and quotation marks omitted). Because coverage is only triggered after the primary insurance policy has been exhausted, "excess insurance is generally available at a lesser cost than the primary policy since the risk of loss is less than for the primary insurer." *Id.* at 91 (internal quotation marks omitted).

Consistent with the purpose of excess insurance, the ICSOP Excess Policy was issued for a comparatively minimal premium in reliance upon the existence of the Arch Policy and all of the coverage provided thereunder (i.e. indemnity coverage for Kam Cheung up to the $1,000,000 each occurrence limit, defense costs

and pre- and post-judgment interest). *See* ICSOP Excess Policy [Plaintiff's Appendix 80-110]; *see Ali*, 719 F.3d at 91; *American Re-Insurance Co. v. SGB Universal Builders Supply, Inc.*, 532 N.Y.S.2d 712 (N.Y. Sup. Ct. 1988) (excess liability insurance is a low-cost method of providing extended protection where primary insurance leaves off). Indeed, the premium for the ICSOP Excess Policy was only $64,000 (in exchange for $4,000,000 in indemnity coverage per occurrence), while the premium for the Arch Policy was more than double that amount at $137,000 (in exchange for only $1,000,000 in indemnity coverage per occurrence). *See* ICSOP Excess Policy, Excess Liability Declarations [Plaintiff's Appendix 80]; Arch Policy, Premium Computation Endorsement [Plaintiff's Appendix 452].

Beyond its relatively low premium, the ICSOP Excess Policy's terms clearly reflect ICSOP's reliance upon the existence of the primary layer of coverage as set forth in the Arch Policy. As set forth above, the insuring agreement of the ICSOP Excess Policy provides "[w]e will pay on your behalf Ultimate Net Loss in excess of the Underlying Insurance as shown in Item 4 of the Declarations" and requires that "[t]he limits of insurance of the Underlying Insurance shown in Item 4 of the Declarations shall be maintained in full effect during the period . . . ." *See* ICSOP Excess Policy, at Form 60225 (10/04), p. 1 [Plaintiff's Appendix 82]. The insuring agreement goes on to state "If you fail to comply with this

requirement, we will only be liable to the same extent that we would have had you fully complied with this requirement." *See* ICSOP Excess Policy, at Form 60225 (10/04), p. 1 [Plaintiff's Appendix 82].

Courts interpreting policy language similar to the ICSOP Excess Policy language quoted above (i.e., language specifically providing that an excess insurer would only make payments on behalf of an insured in an amount in excess of underlying insurance), have held that such language clearly dictates that the excess policy does not drop down to cover losses which would or should have been covered by the primary policy. *See e.g., Ambassador Assocs. v. Corcoran*, 168 A.D.2d 281 (1st Dept. 1990), *aff'd*, 581 N.Y.S.2d 276 (1992) (finding this type of coverage grant presents no ambiguities and specifically provides that the insurer will make payments on behalf of the insured in an amount in excess of the underlying insurance and that no other interpretation is reasonable); *Federal Ins. Co. v. Estate of Irving Gould*, No. 10-CV-1160, 2011 WL 4552381, *1 (S.D.N.Y. Sept. 28, 2011) (maintenance of insurance provision expressly demonstrates that the coverage provided by the excess insurer will not be enlarged to compensate for gaps in underlying coverage); *see also, Steyr-Daimler-Puch AG v. Allstate Ins. Co.*, 151 A.D.2d 942, 943-44 (3d Dept. 1998); *Pergament Distributors, Inc. v. Old Republic Ins. Co.*, 128 A.D.2d 760 (2d Dept. 1987); *American Re-Insurance Co.*, 532 N.Y.S.2d 712.

In addressing the specific question of whether an excess policy must drop down where the underlying primary policy was held void *ab initio*, the United States District Court for the Eastern District of Louisiana explained that an excess policy – such as the one issued by ICSOP here – does not drop down to fill coverage gaps when the insured cannot collect from the primary insurer *unless* the excess policy expressly states that the coverage it provides is in excess of the amount "recoverable" or "collectible" under the primary policy. *Ins. Co. of North America v. West of England Shipowners Mut. Ins. Ass'n*, 890 F. Supp. 1292, 1294-95 (E.D. La. 1995). The District Court also pertinently noted that "it certainly would be contrary to an excess insurer's reasonable expectations to hold it liable as a primary carrier when the primary insurance on which it relied as providing coverage of a certain amount on certain types of risks is claimed after the fact to be non-existent," and held that the excess policy's maintenance provision[8] evidenced the excess insurer's clear intent not to extend coverage for loss the primary policy was intended to cover.

[8] Similar to the ICSOP Excess Policy's language, the maintenance provision at issue in *Insurance Company of North America* provided: "It is a condition of this policy that the policy or policies referred to in the attached 'Schedule of Underlying Insurances' shall be maintained in full effect during the policy period without reduction of coverage or limits except for any reduction in the aggregate limit or limits contained therein solely by payment of claims in respect of accidents and/or occurrences occurring during the period of this policy. Failure of the Named Assured to comply with the foregoing shall not invalidate this policy, but in the event of such failure, the underwriters shall only be liable to the same extent as they would have been had the Named Assured complied with said condition." 890 F. Supp. at 1295.

Id. at 1295-96 (noting material misrepresentations by the insured which invalidated the primary policy are a failure by the insured to maintain coverage and that plaintiff's argument to the contrary is strained and unpersuasive).

The same rationale applies here. The coverage afforded by the ICSOP Excess Policy is not premised on whether the coverage provided by the Arch Policy is recoverable or collectible, and its maintenance provision clearly expresses the parties' understanding that ICSOP would not provide coverage that the Arch Policy was intended to provide.

Critically, the gap in coverage created by the voiding of the Arch Policy is not limited to its $1,000,000 each occurrence limit, but rather, also encompasses the interest covered under the Arch Policy. Item 4 of the Declarations and the Schedule of Underlying Insurance clearly identifies the "Underlying Insurance" as the Arch Policy, and sets forth not only the Arch Policy's limits, but also its policy number and term. The ICSOP Excess Policy language clearly reflects that the parties intended that any loss payable under the ICSOP Excess Policy must be for Ultimate Net Loss in excess of the coverage afforded by the Arch Policy, including coverage for interest. The coverage grant of the ICSOP Excess Policy simply does not state, as Plaintiff would like this Court to believe, that ICSOP will pay Ultimate Net Loss in excess of $1,000,000 or any other amount potentially recoverable or

collectible. Rather, it states that ICSOP will pay the Ultimate Net Loss "in excess of the Underlying Insurance." This is a key and insurmountable distinction.[9] The ICSOP Policy must be read as a whole; and when read in that manner, there can be no reasonable dispute that coverage is not afforded for any sum covered under the Arch Policy, including the interest at issue here.

As such, the First Department correctly held, pursuant to the ICSOP Policy's "Maintenance of Underlying Insurance Provision," that "regardless of whether the insured actually maintained such underlying insurance, ICSOP's excess coverage would be triggered only upon exhaustion of the 'limits of insurance of the Underlying Insurance shown in Item 4 of the Declarations,' which 'limits,' in turn, were not reduced by, and thus included, the interest payment set forth in the Supplementary Payments provision." 10/30/18 Decision, p. 29.

Similarly, in a well-reasoned decision specifically addressing an excess insurer's liability for interest, the Georgia

[9] Contrary to the position taken by Plaintiff, the absence of a reference to interest in the definition of "Ultimate Net Loss" does not render the ICSOP Excess Policy ambiguous with respect to the subject loss. Plaintiff's Brief, p. 45. For one, ICSOP is not taking the position that the ICSOP Excess Policy does not provide coverage for "interest," but rather, coverage is simply not available for interest covered under the Arch Policy. Reading the coverage grant and definition of Ultimate Net Loss together, it is clear that Ultimate Net Loss does not include amounts payable under the Arch Policy, including the interest at issue here. The language clearly and unambiguously reflects the parties' intent that the coverage afforded by the ICSOP Excess Policy sits on top of – i.e. in excess of – all of the coverage afforded under the Arch Policy. *See Ambassador Assoc. v. Corcoran*, 541 N.Y.S.2d 715 (Sup. Ct. NY County, 1989) (holding policy's definition of "ultimate net loss" was not ambiguous).

Court of Appeals agreed that the critical factor is whether the interest in question was covered under the primary policy. *SEACO*, 456 S.E.2d 101. In that case, the court determined that the excess carrier was not liable because (just as here) the primary policy clearly indicated that it covered post-judgment interest, even if said interest brought its obligation over its policy limits. The court explained that this result made "common sense" and that it was both "proper and fair to place upon the primary insurer the burden of all interest accruing" until it satisfied the judgment. *Id.* (rejecting insured's argument that excess insurer was liable for post-judgment interest which would have been covered under the insured's primary policy if the primary insurer had not become insolvent); *see also*, *McGowan v. Sewerage & Water Bd. of New Orleans*, 555 So. 2d 472 (La. Ct. App. 1989) (rejecting insured's argument that excess insurer was liable for pre- or post-judgment interest on insured's self-insurance limits).

In sum, the Arch Policy covers the additional interest claimed by Plaintiff and accordingly, the First Department properly affirmed the Judgment, which does not permit Plaintiff to collect the same from ICSOP.

C. *Ragins* and *Welsh* Are Inapposite and Plaintiff Does Not Identify Any Policy Language or Other Basis for Permitting the Recovery of Additional Interest From ICSOP

Nevertheless, Plaintiff argues that reversal is warranted because the First Department's decision is in "direct conflict" with *Ragins* and *Welsh* and improperly permits ICSOP to avoid its contractual obligation to provide Plaintiff excess insurance coverage. Plaintiff's Brief, p. 52. Contrary to Plaintiff's bluster, there is no conflict among the decisions; rather, this Court's decision in *Ragins* and the First Department's decision in *Welsh* are simply inapposite, and Plaintiff fails to identify any policy language or other basis which would justify an award of additional interest.

(i) Plaintiff's Reliance on Ragins *and* Welsh *is Inapt*

As the First Department properly recognized, Plaintiff fails to appreciate that *Ragins* is not controlling due to "key distinctions in the policy language at issue . . . ." 10/30/18 Decision, p. 29. In *Ragins*, this Court held that under the plain language of the primary and excess policies, the payment of the primary policy's $1,000,000 liability limit triggered the excess policy's duty to pay all remaining amounts in connection with the judgment, including interest.

However, two factors were critical to this Court's decision in *Ragins*, neither of which is present here. First, the liquidator of the insolvent primary policy paid the primary limits, thereby

cutting off the primary coverage for post-judgment interest. *Ragins*, 22 N.Y.3d at 1022. Second, the primary policy in *Ragins* "[did] not expressly cover interest above the [primary] policy's limit[s]." *Id.* at 1024. In particular, the "supplementary payments" section of the primary policy in *Ragins* expressly "obligates the primary insurer to pay postjudgment interest only 'before' it has 'paid . . . that part of the judgment which does not exceed the limit of the company's liability thereon,' and the primary insurer has no responsibility for interest after paying the $1,000,000 liability limit." *Id*. at 1021.

Here, unlike the liquidator in *Ragins*, neither Kam Cheung nor any other entity has stepped in to fulfill Arch's obligation under the primary Arch Policy by paying $1,000,000 to Plaintiff. Moreover, unlike the policy in *Ragins*, the Arch Policy expressly provides coverage for interest in addition to the $1,000,000 each occurrence limit. *See* Arch Policy, p. 14 [Plaintiff's Appendix 411]. Consequently, this Court's decision in *Ragins* does not control or even support in any fashion Plaintiff's claim for an award of the additional interest.

Similarly, the nearly sixty-year old, sparsely cited decision by the First Department in *Welsh,* has no bearing on ICSOP's obligations under the ICSOP Excess Policy for the additional

interest claimed by Plaintiff.[10] In *Welsh*, the insured by way of a self-insured retention assumed the primary layer of liability up to a maximum of $10,000 and the excess insurer agreed to pay ultimate net loss in excess of $10,000, up to $40,000. *Welsh*, 187 N.Y.S. 2d 842. This relationship is in direct contrast to the relationship between Arch and ICSOP. Unlike the insured in *Welsh,* Arch expressly agreed to provide coverage for interest in addition to its $1,000,000 each occurrence limit. Further, unlike the excess insurer in *Welsh*, ICSOP did not agree to pay Ultimate Net Loss in excess of $1,000,000, but rather in excess of the Arch Policy, which expressly provides coverage for interest. The difference in the policy language renders the court's holding in *Welsh* irrelevant.[11]

[10] The same holds true with respect to *Fox v. Will County*, No. 04C7309, 2012 WL 3469141 (N.D. Ill. Aug. 15, 2012). Plaintiff's Brief, p. 41. In *Fox*, the issue before the court was whether attorneys' fees awarded in conjunction with an underlying judgment against the insured county were recoverable under a second level excess policy. The court did not address whether post-judgment interest was covered under that excess policy because the county did not dispute that post-judgment interest was not covered. *Id*. at *10. Critically, the attorneys' fees at issue in *Fox* exceeded the coverage afforded for attorneys' fees under the preceding layers of coverage. Here, there is no dispute as to whether the ICSOP Excess Policy covers interest beyond that afforded by the Arch Policy; ICSOP has already paid Plaintiff for that interest. Rather, the critical question is whether the ICSOP Excess Policy provides coverage for the additional interest claimed by Plaintiff, which is covered by the Arch Policy, but, just like the $1,000,000 each occurrence limit, is uncollectible only because the Arch Policy was voided by Kam Cheung's misconduct.

[11] Indeed, given that the Arch Policy clearly distinguishes coverage for damages from coverage for interest, the trial court could not reasonably consider interest as damages. The language at issue in *Welsh* was not nearly as precise.

(ii) Plaintiff Fails to Identify Any Other Policy Language or Other Basis that Supports an Award of Additional Interest

In an effort to sidestep the obvious issues with his reliance on *Ragins* and *Welsh*, Plaintiff argues ICSOP is liable for the additional interest claimed because the Arch Policy covers pre- and post-judgment interest, the ICSOP Excess Policy "follows form" to the Arch Policy, and therefore the ICSOP Policy necessarily covers the additional interest claimed. Similar to Plaintiff's tortured reading of *Ragins* and *Welsh*, Plaintiff's argument as to the import of ICSOP Excess Policy's follow-form provision ignores the actual language of that provision and attempts to apply it in a vacuum without consideration of the Policy's language as a whole and/or the facts of this case.

In arguing that ICSOP is obligated to cover all pre- and post-judgment interest based upon the ICSOP Excess Policy's follow-form provision, Plaintiff fails to grasp (or conveniently ignores) that said provision expressly provides that the terms of the Arch Policy are only incorporated into the ICSOP Excess Policy to the extent that they are not in conflict with its own "terms, definitions, conditions and exclusions," all of which control. *See* ICSOP Excess Policy, at Form 60225 (10/04), p. 1 (emphasis added) [Plaintiff's Appendix 82]; *see also*, *Metropolitan Transportation Authority v. Zurich American Ins. Co.*, 68 A.D.3d 610 (1st Dept. 2009) (recognizing that a follow-form policy generally incorporates the

terms and conditions of the underlying policy to the extent not contradicted by the excess policy's express terms). Thus, the mere fact that the ICSOP Excess Policy "follows form" to the Arch Policy in some respects in no way obviates the parameters of the ICSOP Excess Policy's coverage grant and "Maintenance of Underlying Insurance" provision; rather, both provisions remain in full force and effect. *See Home Ins. Co. v. Am. Home Products Corp.*, 902 F.2d 111 (1990) (holding excess insurer was not liable under policy for post-judgment interest or defense costs, and recognizing that both the underlying and excess policy "must be looked to in determining the scope of [the excess insurer's] liability, but the [excess policy] controls [the excess insurer's] obligations if there is any conflict between the two insuring agreements"); *see also, SEACO*, 456 S.E.2d 101.[12]

Just as in *SEACO*, *supra*, the Arch Policy is clear that where, such as here, there is a judgment in excess of its limits, Arch shall be responsible for pre-judgment interest on its limits and post-judgment interest on the entire judgment until such time as its limits are paid. *See* Arch Policy, p. 14 [Plaintiff's Appendix

[12] Plaintiff's reliance on *In re Viking Pump, Inc.*, 143 A.3d 633 (Del. 2016) and *American Guarantee & Liability Ins. Co. v. Environmental Materials, LLC*, 2019 WL 1358839, (D. Col. March 26, 2019) to support his position that ICSOP is required to pay all interest, even interest covered by the Arch Policy, is baseless. In particular, in both cases, neither the policy language of the underlying and excess policies, nor the issues presented regarding payment of defense costs, bear any similarity whatsoever to the language of the Arch and ICSOP Excess Policies, or the interest issue before this Court. Plaintiff's Brief, p. 43-45.

411]. The ICSOP Excess Policy is equally clear that it is only triggered upon the exhaustion of the "limits of insurance of the Underlying Insurance shown in Item 4 of the Declarations," which "limits," were specifically not reduced by, and thus included, the interest payments set forth in the Arch Policy's Supplementary Payments provision. Critically, it is not the case that pre- and post-judgment interest may never be covered under the ICSOP Excess Policy. Rather, under the specific facts of this case, any interest beyond that which was already awarded by the trial court and paid by ICSOP is not covered because that interest (i.e. pre-judgment interest on first $1,000,000 of the Underlying Award of Damages and all post-judgment interest) is covered under the Arch Policy. Moreover, the ICSOP Policy, pursuant to its clear and unambiguous language, does not drop down to fill any gap in coverage, including coverage for interest created by the voiding of the Arch Policy.

Contrary to Plaintiff's assertion, the fact that the Arch Policy was rescinded and declared void *ab initio* does not render its coverage meaningless. *See* Plaintiff's Brief, p. 44. Indeed, Plaintiff's position makes little practical sense. As previously discussed, the coverage provided by the ICSOP Excess Policy follows-form to the Arch Policy. Thus, if Plaintiff were correct and the terms and coverages of the Arch Policy disappear upon it being rendered void, so would all coverage for bodily injury under

the ICSOP Excess Policy as that coverage is derived from the terms of the Arch Policy. Moreover, the voiding of an insurance policy *ab initio* – as if it never existed – is merely a legal fiction used to describe the impact of the policy being rendered void with respect to other claims and insureds.

It is undeniable that the Arch Policy exists; the coverages afforded thereunder are simply no longer available to Kam Cheung (and Plaintiff standing in its shoes) due to Kam Cheung's wrongful conduct in making material misrepresentations to Arch, which voided the Arch Policy. Thus, it is the obligation of Kam Cheung, not ICSOP, to fulfill the obligations of its primary insurer. That Kam Cheung cannot meet its obligations to Plaintiff is of no effect, as the ICSOP Excess Policy states unequivocally:

> Your bankruptcy, insolvency or inability to pay or the bankruptcy, insolvency or inability to pay of any of your underlying insurers will not relieve us from the payment of any claim covered by this policy.
>
> But under no circumstances will such bankruptcy, insolvency or inability to pay require us to drop down and replace the Underlying Insurance or assume any obligation within the Underlying Insurance area.

See ICSOP Excess Policy, at Form 60225 (10/04), p. 3 (emphasis added) [Plaintiff's Appendix 84].

Accordingly, because the Arch Policy would have provided coverage for pre-judgment interest accrued on the first $1,000,000, as well as all post-judgment interest, ICSOP is not liable for the same. Kam Cheung is now responsible for all monies

payable under the primary layer of coverage, which includes pre-judgment interest accrued on the first $1,000,000 of the Underlying Award of Damages and all post-judgment interest. That Plaintiff is or may be unable to collect those monies does not justify re-writing the ICSOP Excess Policy and forcing ICSOP to drop down and cover liabilities assumed initially by Arch, and now Kam Cheung.

II. ICSOP TIMELY RAISED THE ISSUE OF ITS LIABILITY FOR PRE- AND POST-JUDGMENT INTEREST COVERED BY THE ARCH POLICY

Plaintiff's arguments that the First Department's 10/30/18 Decision incorrectly sets forth a "new standard for waiving issues," impermissibly permits litigants to advance new arguments on a motion to reargue, and conflicts with controlling authority on the issue of waiver, are unavailing. In his brief, Plaintiff not only misrepresents the First Department's holding but also overlooks and attempts to rewrite the procedural history of this action. The First Department did not "set a new standard for waiving issues" or "permit litigants to advance new theories of law on a motion to reargue." Rather, the First Department properly held that the specific interest-related question at issue here (i.e. ICSOP's liability for pre- and post-judgment interest covered by the Arch Policy) did not become clear until after the trial court's May 2, 2016 order granting Plaintiff partial summary judgment, and that the trial court properly addressed that

question, which it did not address in its May 2, 2016 order, through reargument.

Notably, Plaintiff identifies no case law that actually conflicts with the decisions of the trial court or First Department and/or supports a different outcome in this case. Indeed, as detailed below, the cases upon which Plaintiff relies simply restate the established law on waiver from which the trial court and First Department did not deviate, are inapposite and/or support ICSOP's position and the First Department's holding.

A. ICSOP Timely Raised the Issue of Interest Before the Trial Court

Critically, Plaintiff's waiver argument ignores the fact that at all times ICSOP has consistently, repeatedly and emphatically taken the position that Plaintiff was not entitled to the relief he sought – i.e. recovery of the entire $2,330,000 Underlying Award of Damages, plus interest – because the policy language and legal authority clearly dictate that the ICSOP Excess Policy does not drop down to fill any gap in coverage created by the voiding of the Arch Policy.

As is evident from ICSOP's clearly stated response to Plaintiff's argument that ICSOP owed Kam Cheung a defense, ICSOP's opposition to Plaintiff's Motion for Summary Judgment was not limited to the Arch Policy's $1,000,000 each occurrence limit. *See e.g.,* 7/21/15 ICSOP's Memorandum in Opposition to Plaintiff's

Motion for Summary Judgment and in Support of ICOPS's Cross-Motion to Compel, p.1 [Plaintiff's Appendix 322]. Rather, the record is clear that ICSOP repeatedly argued that the ICSOP Excess Policy does not drop down to cover any liabilities covered under the Arch Policy, which necessarily includes interest. *Id.* at pp. 1, 10, 11 [Plaintiff's Appendix 322, 331, 332, 334].[13] This exact argument was raised in ICSOP's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and understood and accepted by the trial court during the oral argument. *See* 5/2/16 Transcript at pp. 9-10 [Plaintiff's Appendix 851-852]. In short, ICSOP's liability, if any, for interest was part and parcel of ICSOP's fundamental and repeatedly stated argument that its coverage does not drop down. ICSOP did not have to use magic words in its summary judgment papers to state this obvious conclusion.

To the extent that Plaintiff did not grasp the scope of ICSOP's position prior to oral argument, it is undeniable that ICSOP's position on interest was made clear during oral argument. *See* 5/2/16 Transcript at pp. 9-10 [Plaintiff's Appendix 851-852].

[13] In particular, ICSOP argued in its Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of ICSOP's Cross-Motion to Compel, the following: (i) "[t]o the extent plaintiff seeks reimbursement of the entire judgment, his motion should be denied for the additional reason that the maintenance provision precludes ICSOP from dropping down and satisfying that portion of the judgment that would have been covered by the Arch Policy had it not been rescinded;" (ii) "[i]f Kam Cheung fails to maintain [the limit], then ICSOP is liable only to the extent that it would have been if Kam Cheung had fully complied;" and (iii) "ICSOP had no duty . . . to disclaim coverage for that portion of the judgment that might fall within the limit the of the Arch Policy." [Plaintiff's Appendix 322, 331, 332, 334].

Plaintiff had every opportunity to respond to ICSOP's position during oral argument and to request an opportunity to submit supplemental briefing to the extent he felt the same was needed. Rather than do so, Plaintiff simply persisted with his position that he was entitled to recover the *entire* Underlying Award of Damages, with interest, from ICSOP.

Moreover, the issue of interest did not even truly ripen until the trial court issued its May 2, 2016 order and Plaintiff filed his proposed judgment. The trial court held that ICSOP is entitled to the benefit of its bargain with Kam Cheung and that the ICSOP Excess Policy does not drop down to fill the coverage gap. Prior to the filing of Plaintiff's proposed judgment, ICSOP simply had no reason to anticipate that Plaintiff would improperly seek to collect interest expressly covered under the Arch Policy and/or accrued on an amount of money that the trial court expressly held ICSOP is not obligated to pay (i.e. the first $1,000,000 of the Underlying Award of Damages), as such a proposed order would be inconsistent with the trial court's ruling. Upon receipt of Plaintiff's proposed judgment, ICSOP timely sought reargument on the limited issue of its liability for pre- and post-judgment interest in light of the trial court's ruling that there was no drop-down coverage. The trial court then appropriately, and as permitted by CPLR 2221(d), granted reargument to address this issue. The trial court addressed and rejected the exact waiver

argument raised by Plaintiff to this Court stating, "[j]ust so we are clear, I granted re-argument because I didn't think I addressed the interest issue sufficiently in my prior decision." 6/20/17 Transcript, p. 11 [Respondent's Brief 1124-1125].

In affirming the Judgment, the First Department likewise properly addressed and rejected Plaintiff's waiver argument. It did not "set a new standard for waiving issues." Rather, it found based on a clear record that ICSOP (1) timely stated its position on the issue of interest, (2) properly sought and was granted reargument following Plaintiff's filing of the proposed judgment, and (3) did not intentionally relinquish a known right. Critically, the First Department aptly held that ICSOP could not have intentionally relinquished its arguments as to the specific interest-related questions at issue on appeal because they did not become clear until after the trial court's May 2, 2016 order granting Plaintiff partial summary judgment. 10/30/18 Decision, pp. 27-28.

The cases cited by Plaintiff in support of its lengthy and convoluted waiver argument do not call into question the First Department's decision. They either simply restate established law on waiver from which the First Department did not deviate, are

inapposite and/or support ICSOP's position and the First Department's holding.[14] *See,* Plaintiff's Brief, pp. 24-30.

In short, the facts and circumstances of this case are unique and the manner and timing of ICSOP's arguments as to interest must be evaluated in the context of the same. When evaluated in context, it is clear that the First Department properly concluded that ICSOP timely raised the specific interest-related issue on appeal upon receipt of Plaintiff's proposed judgment, and that the trial court properly evaluated and ruled on same through reargument.

B. The Trial Court Properly Addressed ICSOP's Interest Arguments Through Reargument Under CPLR 2221(d)

The record reflects and the trial court expressly stated that its May 2, 2016 order did not address ICSOP's liability for pre- and post-judgment interest accruing on the Underlying Award of

[14] *See, e.g.*, *MacMaster v. City of Rochester*, No. 05-CV-6509, 2008 WL 11363388, at *3 (W.D.N.Y. Sept. 10, 2008)(granting plaintiff's post-judgment application for prejudgment interest after the City did not file opposition papers and the court confirmed with defense counsel at oral argument that it did not oppose plaintiff's application for or calculation of prejudgment interest); *Philips Lighting Co. v. Schneider*, No. 05-CV-4820, 2014 WL 4919047, at *2 (E.D.N.Y. Sept. 30, 2014) (on remand, amended the judgment to include prejudgment interest because defendant never opposed the award of prejudgment interest); *Terkildsen v. Waters*, 481 F.2d 201 (2d Cir. 1973) (Second Circuit refused to consider issue of whether prejudgment interest was properly awarded by the district court where defendant raised the issue for the first time on appeal, and never once raised the issue to the trial court, even after the trial court issued an opinion directing that prejudgment interest be included in plaintiff's recovery); *Publishers Press, Inc. v. Technology Funding, Inc.*, No. 07-48, 2008 WL 4937603, at *2 (W.D. Ky Nov. 17, 2008)(granting plaintiff's post-judgment motion for prejudgment interest upon finding defendant failed to oppose plaintiff's motion and because plaintiff was entitled to prejudgment interest on the merits); *Kattan v. District of Columbia*, 995 F.2d 274 (D.C. Cir. 1993) (affirming district court's holding that defendant waived argument that *pro se* plaintiffs were not entitled to attorneys fees where defendant did not oppose plaintiffs' post-judgment application for attorneys' fees).

Damages – the exact issue which was the subject of ICSOP's motion for reargument and this appeal. Nevertheless, Plaintiff persists in arguing that the First Department's decision, affirming the trial court's order granting ICSOP's motion to reargue, was impermissible under CPLR 2221(d) because it "impermissibly allowed CPLR 2221(d) to be used as a vehicle to make substantive changes to a final order" (i.e. the May 2, 2016 order) and because it conflicts with two Court of Appeals decisions, specifically *Kiker v. Nassau County, et al.*, 626 N.Y.S.2d 55 (1995) and *Herpe v. Herpe*, 225 N.Y. 323 (1919). Plaintiff's Brief, p. 34. These arguments do not withstand scrutiny.

It is well settled that a motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the trial court and is properly granted upon a showing that the court overlooked or misapprehended the facts and/or the law or mistakenly arrived at its earlier decision. *See Weiss v. Bretton Woods Condominium II*, 58 N.Y.S. 3d 61 (2d Dept. 2017). Applying that standard here, it is clear that the trial court felt it had overlooked the issue of whether and/or to what extent Plaintiff is entitled to collect pre- and/or post-judgment interest from ICSOP. 6/20/17 Transcript re: Reargument [Respondent's Appendix RA-6 – RA-29]. Indeed, as the First Department recognized, the trial court said just that at oral argument. 10/30/18 Decision, p. 28 [Plaintiff's Appendix 1125].

As detailed above, on May 2, 2016, the trial court ruled that the ICSOP Excess Policy does not drop down to fill the void left by the rescinded Arch Policy. *See* 5/2/16 Transcript and 5/2/16 Order [Plaintiff's Appendix 16-19]. Nevertheless, Plaintiff filed a proposed judgment which would have permitted him to recover from ICSOP all interest accrued and accruing on the entire $2,330,000 Underlying Award of Damages. *See* 5/10/16 Plaintiff's Proposed Judgment [Plaintiff's Appendix 875-889]. Specifically, Plaintiff's proposed judgment stated that the trial court held Plaintiff shall recover:

> TWO MILLION SEVEN HUNDRED TWENTY-SIX THOUSAND NINE HUNDRED NINTY-THREE DOLLARS AND SEVENTY CENTS ($2,726,993.70) plus interest from the time of the prior judgment and costs of this action, except for a ONE MILLION DOLLAR ($1,000,000.00) credit from the total amount owed at the time of satisfaction of the remainder of the judgment.

Id.

The trial court made no such ruling. Indeed, the trial court's order and decision did not expressly address the issue of interest at all. To ICSOP, it was clear that the trial court's ruling nevertheless instructed that Plaintiff was not entitled to collect from ICSOP any interest which would have been covered under the Arch Policy. Upon receipt of Plaintiff's proposed judgment, however, it was clear that Plaintiff did not grasp or simply chose to ignore the implications of the trial court's ruling on his claim for interest. Given the parties' divergent views on the issue,

ICSOP requested that the trial court resettle Plaintiff's proposed judgment in accordance with its May 2, 2016 ruling, clarify the scope of its May 2, 2016 ruling and/or permit reargument on the issue of interest. The court ultimately granted ICSOP leave to reargue and, following the submission of supplemental briefs and oral argument by the parties, executed ICSOP's proposed judgment which did not award Plaintiff any interest recoverable under the Arch Policy. In short, prior to the trial court's execution of ICSOP's proposed judgment, there was no final judgment addressing ICSOP's liability for interest.

In a misguided effort to support his appeal, Plaintiff argues that the First Department's decision conflicts with this Court's decisions in *Kiker* and *Herpe*, as well as a litany of cases that purportedly support Plaintiff's position that the trial court improperly utilized reargument to reconsider a "final order." Plaintiff's Brief, pp.35-37. Tellingly, none of the case law cited actually supports Plaintiff's position.

Even upon the most cursory review, it is clear that neither *Kiker* nor *Herpe* conflict with the trial court's conduct or the First Department's holding in this case. Indeed, both cases simply restate established law codified by CPLR 5019(a), which the First Department properly held was not relevant because the trial court did not grant relief under that statute. *See, Kiker v. Nassau Cty.*, 85 N.Y.2d 879 (1995) (holding that a clerk's ministerial error in

calculating interest on a final judgment, even when realized after the appeals process has been completed, may be corrected by the trial court pursuant to § 5019(a)); *Herpe v. Herpe*, 225 N.Y. 323 (1919) (recognizing that the trial court has no revisory or appellate jurisdiction to correct an error in substance, but noting that a trial court may amend clerical errors under § 5019(a)).

The remaining cases cited by Plaintiff also fail to support his position, as they either restate established principles of law, involve property disputes and subsequent notice pendency procedures under CPLR Article 65, and/or are so wholly unrelated to the issue presented here that Plaintiff's reliance on the same is preposterous.[15]

In sum, the trial court properly granted reargument, and after consideration of same, ordered that Plaintiff was not entitled to recover from ICSOP interest covered by the Arch Policy by executing ICSOP's proposed judgment. The First Department aptly agreed that

[15] *See, e.g., Slater v. Am. Mineral Spirits Co.*, 33 N.Y.2d 443, 446 (1974)(recognizing that although "technical and historical distinctions might be drawn between final orders and final judgments," there is no reason to continue to do so in modern practice; *Da Silva v. Musso, et al.*, 76 N.Y. 2d 436 (1990) (in an appeal involving plaintiff's failure to obtain a CPLR 5519 stay following a judgment overturning specific performance, and the subsequent order canceling a notice of pendency pursuant to CPLR 6514, the court recognized that it is "elementary that a final judgment or order represents a value and conclusive adjudication of the parties' substantive rights, unless and until it is overturned on appeal"); *Long Island Sav. Bank v. Mihalios*, 269 A.D.2d 502, 503 (2d Dept. 2000) (affirming judgment of foreclosure and holding that since a judgment of foreclosure is final "as to all questions at issue between the parties," defendants are barred from raising new defense of usury on appeal since they could have asserted such defense at an earlier time); *Burke v. Crosson*, 85 N.Y.2d 10 (1995); *Matter of Coulbourn v. Burns*, 143 N.Y.S. 2d 675 (2d Dept. 1955).

the trial court was within its discretion to grant leave to reargue for the very purpose of permitting the parties to address and brief the interest-related issues. Accordingly, Plaintiff's CPLR-based arguments do not demonstrate any legitimate legal basis for this Court to reverse the First Department's decision.

CONCLUSION

For all the reasons stated above, ICSOP respectfully requests that the Court affirm the judgment of the First Department, which upheld the trial court's order and Judgment limiting Plaintiff's recovery from ICSOP to $1,330,000 together with pre-judgment interest accrued on that amount between December 8, 2011 and October 29, 2013, or $1,526,938.00, with costs and interest from the date of the order granting summary judgment in part to Plaintiff, on May 2, 2016, in the amount of $159,638.23, for a total award of $1,686,576.23. *See* Judgment Entered 6/30/17 [Plaintiff's Appendix 14-15].

Respectfully Submitted,

Seiger Gfeller Laurie LLP
Attorneys for Defendant-Respondent
Insurance Company of the State of Pennsylvania

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief was prepared on a computer.

Type: A monospaced typefact was used as follows:

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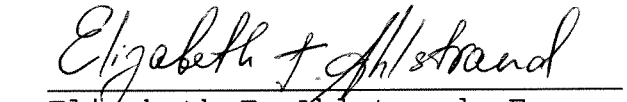
Dated: New York, New York
September 27, 2019



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APPENDIX

RESPONDENT'S APPENDIX

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* Judge Rakower's 10/26/16 Order Denying Reargument, Judge Rakower's 6/20/17 Decision and Order, and the 6/20/17 Transcript re: Reargument (*Rakower, J*), were included in Plaintiff's Appendices to the Appellate Division, First Department, but were omitted from Plaintiff's Appendices to the Court of Appeals. Consequently, Respondent has included these documents in its Respondent's Appendix.

RA-1

JUDGE RAKOWER'S OCTOBER 26, 2016 ORDER DENYING REARGUMENT

FILED: NEW YORK COUNTY CLERK 10/31/2016 12:25 PM INDEX NO. 650142/2014
NYSCEF DOC. NO. 173 RECEIVED NYSCEF: 10/31/2016

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER Justice PART 15

Index Number : 650142/2014
CHEN, JIN MING
vs.
INSURANCE COMPANY OF THE
SEQUENCE NUMBER : 002
RESETTLE ORDER

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Leave to reargue is denied.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 10/24/16
OCT 26 2016

HON. EILEEN A. RAKOWER, J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

RA-2

JUDGE RAKOWER'S JUNE 20, 2017 DECISION AND ORDER [RA- 2 - RA- 5]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER PART 15
Justice

Jin Ming Chen
v.
Insurance Company of the State of Pennsylvania

INDEX NO. 650142/14
MOTION DATE
MOTION SEQ. NO. 003

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). ____
Answering Affidavits — Exhibits ____ No(s). ____
Replying Affidavits ____ No(s). ____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/20/17

J.S.C.
HON. EILEEN A. RAKOWER

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

RA-3

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

----------X

Jin Ming Chen,

Plaintiff,

Index No.
650142/2014

- against -

DECISION and ORDER

Insurance Company of the State of Pennsylvania,

Defendant.

Mot. No. 003

----------X

HON. EILEEN A. RAKOWER

Defendant, Insurance Company of the State of Pennsylvania ("ICSOP"), moves for an Order clarifying whether and/or to what extent Plaintiff, Jin Ming Chen ("Plaintiff"), is entitled to collect pre-judgment and/or post-judgment interest from ICSOP. Plaintiff cross moves for an Order for the Court to sign the proposed judgment submitted by Plaintiff.

After oral argument on the record on June 20, 2017 and after considering the parties' arguments,

Wherefore, it is hereby

ORDERED that ICSOP's motion is granted and the issue of pre-judgment and post-judgment interest that Plaintiff is entitled to collect from ICSOP is resolved in accordance with the attached judgment; and it is further

ORDERED that Plaintiff's cross motion is denied.

This constitutes the decision and judgment of the Court. All other relief requested is denied.

Dated: JUNE 20 2017

J.S.C.

RA-4

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JIN MING CHEN Plaintiff, - against - INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA Defendant.	:	Index No. 650142/2014 JUDGMENT Hon. Eileen A. Rakower

The Plaintiff Jin Ming Chen having moved for summary judgment on May 21, 2015, by his counsel, Wade J. Morris, Esq.;

AND Defendant Insurance Company of the State of Pennsylvania having submitted opposition to Plaintiff's motion on July 21, 2015, by its prior counsel, Hodgson Russ, LLP;

AND the parties having appeared for oral argument regarding Plaintiff's motion for summary judgment in front of the Honorable Eileen A. Rakower, on May 2, 2016, through Plaintiff's counsel, Wade J. Morris, and Defendant's present counsel, Seiger Gfeller Laurie LLP;

AND the Honorable Eileen A. Rakower, having issued an Order dated May 2, 2016, and attached hereto as Exhibit "A", granting in-part and denying-in part Plaintiff's motion for summary judgment;

AND the Order of the Honorable Eileen A. Rakower, dated May 2, 2016, having been duly entered in the Office of the Clerk of this Court on May 5, 2016;

NOW, upon the Order of the Honorable Eileen A. Rakower, dated May 2, 2016, granting in-part and denying-in part Plaintiff's motion for summary judgment, it is

ADJUDGED that Plaintiff Jin Ming Chen, residing at 45-61 215 Street, Bayside, New York, has judgment over and against Defendant Insurance Company of the State of Pennsylvania, in the amount of $1,526,938.00, with costs and interest from the date of the Order

RA-5

granting summary judgment in-part to the Plaintiff, on May 2, 2016, in the amount of _____, making the total amount of _____ and that the Plaintiff has execution therefore.

Judgment signed this 20 day of JUNE, 2017, in the County of New York, City and State of New York.

Honorable Eileen A. Rakower

Judgment Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CIVIL TERM - PART: 15

----------X

JIN MING CHEN,

Plaintiff,

-against-

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA

Defendant.

----------X

Index No. 650142-2014

71 Thomas Street
New York, New York
June 20, 2017

B E F O R E:

HONORABLE EILEEN RAKOWER, Justice

A P P E A R A N C E S:

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BY: ELIZABETH F. AHLSTRAND, ESQ.

Lisa A. Casey
Official Court Reporter

RA-7

Proceedings

THE COURT: Originally, Plaintiff sued the insured in another action, and there was a judgment in that action. Then plaintiff, a worker, sued, here, the Insurance Company of the State of Pennsylvania to seek to have them satisfy the judgment with pre- and post-judgment interest. Before me previously was the motion by the plaintiff to have defendant satisfy that judgment and to declare that their disclaimer for late notice was not good. There was a cross motion as well, I believe.

Previously, I found that the defendant should satisfy the judgment, although the first layer of insurance, the first million dollars, that was not the responsibility of the Insurance Company of the State of Pennsylvania. They were just the excess insurer. So the motion was decided and the parties moved to reargue on the issue of the pre- and post-judgment interest, as it relates to that first layer of insurance, the million dollars.

I'll hear from you now.

MS. AHLSTRAND: Good morning, your Honor. Yes, the question before the Court today is very narrow. It's simply to what extent plaintiff can collect pre- and post-judgment interest from ICSOP, the insurance company, and the critical --

Proceedings

THE COURT: The excess insurer.

MS. AHLSTRAND: The excess insurer, your Honor.

The critical component of this is the language, the specific language between the Arch, the underlying primary policy, and the excess policy. I think a lot of the disagreement between the parties has to do with the existing caselaw and how that applies to the specific language at issue here.

What the caselaw that we site on pages 9 and 10 of our brief makes very clear, and it's very consistent with what your Honor found, which is that when you have the language that we have in our excess policy, which does not specifically tie the coverage grant to the collectability or the recoverability of the underlying insurance, that policy does not drop down to fulfill the obligations of the primary level.

So to understand what coverage the excess policy does provide, you have to understand what coverage the Arch policy, the primary policy, provides and, you know, kind of paraphrasing the coverage grant, that policy pays all sums the insureds because legally obligated to pay his damages for bodily injury caused by an occurrence, subject to a $1 million per occurrence limit.

In addition to that, the policy also provides coverage for interest. Now, there's three critical pieces of the coverage that Arch provides with respect to interest. In the first component, it provides coverage for prejudgment interest, awarded against the insured, on that part of the judgment we pay. We make an offer to pay the applicable limit of insurance. We'll not pay any prejudgment interest based on the period of time after the offer.

Second, it provides we'll pay --

THE COURT: So in other words, Arch has the ability to stop that interest from accruing by making an offer.

MS. AHLSTRAND: Right, but in the first instance, it pays prejudgment interest on the $1 million limit, up until the point that it offers or tenders those $1 million. That has not occurred here, so they are obligated, or they would have been obligated, if that policy had not been voided, for all prejudgment interest accruing on the $1 million.

The next component is, we will pay all interest on the full amount of any judgment that accrues after the entry of judgment, and before we have paid, offered to pay, or deposited in the court that part of the judgment that is within the applicable limit of

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insurance, so we will pay all post-judgment interest, up until such time as we pay, again, our limits of insurance. Again, that has not occurred.

And then the third critical component is, these payments will not reduce the limits of insurance.

So it's very clear in that policy that there are three components, and that this coverage is on top of the $1 million limit. When you look at that coverage in connection with the excess policy coverage grant, that says we will pay ultimate net loss in excess of underlying insurance, which then directs you to the declarations which directs you to the schedule, which does not simply state $1 million. What it does is it directs you to the Arch policy, by name, by policy, by policy period and by the limits.

So in this way, the policies that we have are very different from the policies in the Raggins case, and the Welsh case that plaintiff relies upon, because we don't have a coverage grant that says we will pay in excess of $1 million. That's not what we have here. We have an excess policy that attaches on top of the coverages of the primary policy and that includes, yes, the $1 million, but also the interest.

If you think about what would happen today if the Arch policy hadn't been voided, you would have, as

of today's date, Arch paying $1 million, of the underlying damages award; prejudgment interest on that $1 million; and all post-judgment interest, up until the time that they tender the $1 million. As of today's date, that hasn't occurred.

That then leaves the obligation for the excess carrier. My client is to pay the $1.33 million, and the prejudgment interest on that portion of the damages award. This is consistent with the purpose of statutory interest, which is that it's a payment to indemnify the successful party for the losing party having use of that money. ICSOP can't reasonably and with common sense be held to have withheld the use of the $1 million, because your Honor has already found that we have no obligation to pay for it.

So that's, effectively, ICSOP'S position. It's only obligated to pay the $1.33 million, and the prejudgment interest on that portion. It's supported by the language of the policies, which is the critical factor here.

THE COURT: What about the post-judgment interest on the 1.33?

MS. AHLSTRAND: Well, as in our proposed judgment that we prepared in an effort to move things forward and bring a conclusion, we would acknowledge

that we owe post-judgment interest from the date your Honor -- post-judgment interest in this case where your Honor deemed that we are obligated to pay the 1.33 million, as opposed to post judgment interest running, you know, back from the underlying case.

Now, plaintiffs made a couple arguments to try to deviate from this, one of which is that, you know, that their client is an innocent party here. Well, ICSOP is an innocent party here as well. Neither of them were responsible for the voiding of the Arch policy. The party in whose shoes the plaintiff stands is Kam Cheung in this action.

THE COURT: That's the original insured.

MS. AHLSTRAND: The original insured. The original insured is not the innocent party. They misrepresented information on their application of insurance, which is what resulted in the policy being void. They now, Kam Cheung, steps in the shoes of Arch to fulfill that layer, and the fact that they have dissolved, that they are insolvent, doesn't change where the obligations lie. It would be inconsistent with the parties' reasonable expectations as set forth by the policy premiums, the policy language, the purpose of excess insurance versus primary insurance, to rewrite the policies simply because, in this case, the plaintiff

cannot or will not be able to collect all of that money.

The fact that we have a follow form excess policy here, again, doesn't change that result either. Our position isn't that the excess policy doesn't provide coverage for interest from a global perspective. It does. It just simply doesn't provide coverage for the interest that plaintiffs seek in this case, because the vast majority of that remains on the primary level, and that interest has not been cut off. Nobody has tendered the $1 million, thereby cutting off the primary obligations.

THE COURT: Thank you.

MR. MORRIS: Good afternoon, your Honor. If you recall from the first time, my name is Wade Morris. I'm the attorney that handled the underlying matter of Jin Ming Chen versus Kam Cheung, and obviously my office is still handling the case. Next to me is Ken Gorman, my appellate counsel, who did motions in the briefing. I'm going to just talk about some introductory stuff, and then as far as the substance of the arguments regarding the drop down and the follow form, and also some of the procedural arguments we are making, I'll leave to Mr. Gorman.

I just want to start out saying that first of all, it's not re-argument by the parties. It's the

defendants, ICSOP had moved for re-argument. We only cross moved, just to have you sign our original judgment, since the clerk would not enter that.

The first thing I want to say is interest is not a penalty. We are not looking to penalize ICSOP. We are not challenging or criticizing their behavior and saying this is why they should pay interest. They fought us for all these years, even though they knew their disclaimer was invalid. That's really irrelevant to the issue of interest. Interest is just the cost of the loss of use of money to the plaintiff. Plaintiff hasn't had that money that he's entitled to, that he has been awarded all these years ago. For these years he couldn't spend it or invest. He was deprived of the use, and the legislature says you are entitled to nine percent per annum when you recover that money. That's just the bottom line.

To the extent that they're complaining that there's a lot of interest here, it just is what it is. You can't say that they didn't know that interest was racking up as we were litigating this case. They could have turned off the faucet at any time. But when they say they're an innocent party, that I have a little bit of an issue with, simply because they chose to litigate what they knew and admitted in their original papers was

an invalid disclaimer.

The point I want to make is, I think neither of us are insurance guys, Ken or myself, but I think Ken has done a tremendous job of really going down in the rabbit holes an digging up these cases that are really on point to very specific issues that we have here, and at learning a tremendous amount about some of this esoterica, and of course bringing me up to speed as well, but the Raggins case that he pulled out, and he will discuss that, is so devastatingly on point to the issues here, I don't understand how, really, any other result could come, that they have to pay all pre- and post-judgment interest.

Again, Ken will explain why, but under Raggins, it's not forcing somebody to drop down to pick up the interest once that excess is triggered. That triggering event results in the fact that the excess policy then has to start paying. And, you know, if you look at the Raggins decision, it's kind of short, but when you look at the briefs you really get the flavor of how almost identical the issues are in this case, and to the extent that they are some minor differences, they are not helpful to them, but Raggins is essentially on all fours, and compels a result from the Court of Appeals that they have to pay all the interest.

The last point I just want to make before I turn it over to counsel is that you got this right the first time, Judge. You decided this correctly. We moved and asked for a determination that they had to satisfy that judgment with all of the interest. You gave them a $1 million credit, which is exactly what they asked for. They did not raise this interest, this issue of post-judgment interest in any way, shape or form. I believe because they acknowledged the invalid disclaimer, that they essentially understood that the law compelled them to pay it, and that's why they didn't raise the issue as a knowing waiver, but whether it was nothing or unknowing, the waiver is kind of the elephant in the room that we really shouldn't even be having this discussion, and that, I think, even though we went into the merits and we show that on the merits, no matter how you look at this, they really do have to pay all the pre- and post-judgment interest after the million dollar credit. The appropriate decision for this Court to make is to adhere to its original decision to deny re-argument, deny resettlement on legally valid procedural grounds.

THE COURT: Just so we are clear, I granted re-argument because I didn't think I addressed the interest issue sufficiently in my prior decision.

MR. MORRIS: Okay. There was that one quote that we pulled out of the oral argument in the sense that she was saying, you know, interest on the 1.3 and you said, Yeah, interest. It's been a few years. It racks up. So it was clear that it was on your mind at that time that they were going to be compelled to pay post-judgment interest, something she just seems to not acknowledge in her papers, saying that you never really addressed it and it wasn't brought up.

It was brought up. It was right on the surface of everything, and at the end of the day, even if you grant the re-argument, you can still adhere to your original decision, which I think is the appropriate thing to do, and to sign the judgment that we submitted.

I'm just going to turn it to Ken for the more in depth legal discussion, and you can ask him anything you like, of course.

Thank you, your Honor.

THE COURT: Go ahead.

MR. GORMAN: Good afternoon, your Honor.

While this Court did grant a re-argument in its interim order, I just want to make something clear. The plaintiff has always brought the issue of interest before this Court. He put it in the first notice to ICSOP. It was in the complaint. The issue of interest

was in our -- was in the motion for summary judgment. It was in our affirmation. ICSOP never addressed it. So when this Court talks about re-argument, I just want to make this point clear, I don't see how you can raise an issue on re-argument that was never raised beforehand, and when it moved for resettlement, you can't raise new issues on a motion for resettlement. That's mainly a ministerial mechanism, but in this case we are dealing with whether you are entitled to interest. You are not dealing with percentage points. We are not dealing with whether they should get nine percent.

THE COURT: But let's just be clear, because -- and in all fairness, it was a long time ago. It was over a year ago, but I don't recall the issue having been framed for me as it is in this briefing. I don't recall, in that briefing, it having been framed as, Arch was responsible for million-plus interest separately, as provided in the policy, such that the excess policy was entitled to rely on that.

MR. GORMAN: Is wasn't framed because they never raised it. That's why. But we argued, always, that Arch was responsible for paying interest on the entire judgment. The judgment that we served on Arch -- I mean, I'm sorry. Excuse me. ICSOP, encompassed all

prejudgment interest, and in our papers we argued that it was responsible for interest on the entire judgment. If it was going to make that argument, if it was going on make the argument that it raises now, it had to have raised it prior to entry of the final order. It raised it after the entry of the final order.

But with regard to the merits, and I'm sure this Court want to discuss the merits, I think Raggins is outcome determinative. It determines the issues very easily in this case and rejects -- the Court of Appeals rejected the same arguments that ICSOP is making now. In order to be crystal clear on this, we gave -- we submitted the briefs in Raggins as exhibits to our papers, and the arguments that were set forth in HIC's appellate brief, HIC was the excess carrier, were identical to the arguments that ICSOP raises now. HIC argued, as ICSOP does now, that it had no duty to drop down and pay post-judgment interest, and that group counsel, the primary carrier that was insolvent, was solely responsible for paying all the post-judgment interest.

The Court of Appeals rejected those arguments, and to the extent that ICSOP is going to argue the contrary, in this case ICSOP argues that because Arch didn't pay the first million, it never had -- it's duty

was never triggered, but in Raggins, group counsel was insolvent. In this case, Arch never existed. It was a voided policy. ICSOP is trying to place the burden of paying interest on a voided policy. I don't see how you can do that when ICSOP's policy follows the terms of Arch's policy, which means that it incorporates the terms and matches the coverage of Arch's policy.

I can't be more clear. If you follow the terms of the policy, it's not that you follow some terms and then not others. There's no inconsistencies here. ICSOP's policy doesn't address interest because it follows the terms of the Arch policy, and under these circumstances I don't see how you can say that Arch is responsible, and because Arch's policy is void, we are not responsible. Now, if it didn't follow the terms, I can I understand that argument being made. But it does follow the terms.

THE COURT: Thank you.

MR. GORMAN: Thank you.

MS. AHLSTRAND: Your Honor, quickly, it's very clear why our policy doesn't drop down and provide the coverage and why the Arch layer remains responsible. First, the language of the coverage grant, as I went through earlier, is different than the language in the coverage grant in Raggins. Also, when you do look at

the briefs that were provided, the policy language is different in the primary layer. It does not have those three components that I went through earlier with your Honor, and critical to the Court's decision in that case was that it found that the interest was payable under the primary policy within the limits. The liquidator paid those limits, thereby cutting off the obligations of the primary policy.

Totally different scenario than what we have here. We don't have interest within the limits, and we don't have anybody paying the $1 million. It's not that we are saying that Arch on its voided policy in fact is going to pay the $1 million. Kam Cheung is now self-insured for that amount. It had every opportunity and obligation to step in and fill those shoes and pay it up with a million dollars. The fact that it was insolvent and unable to do so does not change those facts, and in fact, the cases that both parties site in the brief have insured who do, in fact, step in and pay obligations that are owed to third-party plaintiffs.

You know, when they are missing, now missing, either insolvent or otherwise unavailable layers of coverage, and they go in and pay those losses, and then they trigger the next excess level, the Federal Insurance Company case that we cite is a situation that

involves that type of an issue, so in Raggins we have a very different scenario. It's very clear from the Court of Appeals holding that the interest was within the primary limits. That was the same with the Welsh case that plaintiffs rely on. That is not our situation here. It would be wholly inconsistent with the policy language to read out the sentence that says these payments are in addition to the limits, so Raggins really is not instructive here at all, because the differences are critical.

With respect to the follow form aspect, again, yes, the policy follows form, but it doesn't follow form with absolution, and in fact, when you look at the coverage grant, it says, Subject to the terms and conditions and exclusions of this policy, we follow form. So what does that mean? It means that subject to the coverage grant, which explains how it sits on top, subject to the maintenance, the bankruptcy and the insolvency provisions, all of which dictate how the excess coverage works.

When you look at the cases that we cite in page 9 and 10 of our brief, the insolvency and the maintenance language is actually -- it's great, because it's really helpful to understand how the policy should respond, but what those cases say is that when you have

coverage grants like ours, without that collectable or available language in the coverage grant, that's all you need to have to show that you are not a drop-down policy, and you don't drop down in the primary layer to provide any of those coverages.

Again, the federal case that we cite isn't about indemnity payments, it's about defense costs. That's a different type of coverage than interest, but the idea is the same; right? You don't drop down into the level to pick up what the primary level --

THE COURT: The shaking of head is really not helpful.

MR. MORRIS: I'm sorry. It's subconscious. I apologize, your Honor.

THE COURT: It's really not helpful.

MR. MORRIS: I'm sorry, your Honor.

THE COURT: Go ahead. I'm sorry.

MS. AHLSTRAND: No problem, your Honor.

And the Arch policy, this idea that the Arch policy, because it's voided, doesn't exist, makes no sense. That's a legal term of art to say that it's void, ab initio. The policy clearly existed. It provides coverage. If the Arch policy didn't exist at all, there would be no coverage under the excess policy. It's by virtue of the coverage grants, and the language

that I talked about earlier about bodily injury caused by an occurrence, that there is any coverage, we follow form in the sense that we provide that coverage, coverage for bodily injury caused by an occurrence, but it's not a blanket situation.

Now, with respect to the waiver issue, your Honor, ICSOP's position from the beginning, as set forth in its answer, is that Kam Cheung -- that plaintiff steps in the shoes of Kam Cheung, and it is only entitled to the coverage that Kam Cheung would have been entitled to. It's a very clear from our affirmative defenses that we have always claimed that the policy does not drop down, and that the policy is only triggered once the primary layer is exhausted, and those arguments are part and parcel of the insurance and the interest issue.

In our opposition papers, again, the sort of overlying mantra was, Our policy does not drop down, and that was what was discussed in oral argument. I agree. Was interest at the forefront of everybody's briefing? Absolutely not. But I think the reason it wasn't is because in the notice of motion, plaintiff sought relief directing recovery of $2.3 million with interest, and other relief the Court deemed just and equitable.

From that framing of the issue, it was not

clear as to how plaintiffs would ultimately, once your Honor disagreed with them that they were entitled to $2.3 million -- we were partially successful, they did not get the relief that they requested, and when your Honor and I had the discussion, or oral argument, as to what the impact of the interest would be, plaintiffs never said, Well, your Honor, in the alternative, if we assume that you are going to, you know, grant them the $1 million, that here is still what we would want. Their whole mantra was, we get the 2.3 and we get interest.

So that left everybody with the situation with, when they filed their proposed judgment, where they decided to just carve $1 million off the top. That's when the issue became primed; that's when the issue became ripe; and that's when we filed our request for clarification, to find out what the impact of your ruling was on the interest issue, so it's not that we waived the issue. It's that it became ripe when it became clear how plaintiffs felt that your ruling impacted the issue of interest.

THE COURT: Thank you.

Anything else?

MR. GORMAN: With regard to the issue of self insurance, I just want to refer the Court to page 9 of

our supplemental brief, paragraph 26, and I'll read it, in applying other insurance, and assigning, right from Appleman New York Insurance:

"In applying an other insurance clause in making a policy excess to other valid and collectable insurance, a policy holder's --" in this case, Kam Cheung, "-- self-insured retention does not qualify as other insurance. A self insurer is not an insurer of anything, other than its own ability to pay for damages, for which it is legally responsible."

I'm quoting it, so I don't see anywhere in the Arch policy that Kam Cheung was legally responsible for paying interest. It was legally responsible for getting a million dollars coverage under the excess. It didn't do that, because its policy was voided. ICSOP got that credit. What else does it want?

Thank you.

MS. AHLSTRAND: Your Honor --

MR. MORRIS: May I jump in?

MS. AHLSTRAND: Sure.

MR. MORRIS: Just a different point than he's making, just this concept of this trigger. First of all, if we were really to talk about what triggered the excess policy when the underlying policy was voided, ab initio, and then a judgment was entered in excess of

that million, their policy was absolutely triggered, but what's more substantive is their policy survives the destruction of the underlying policy, which is different than the Raggins case. In the Raggins case there was a payment, but if their, their policy continues to exist, even if that million-dollar coverage disappears, and Raggins wasn't even a follow-the-form case.

The fact of the matter is that even if we want to say the trigger is when you ordered them to pay the remainder of the judgment and gave them the credit, it doesn't change the amount of interest that they owe. It doesn't -- like, Raggins doesn't say, Okay, you only pay the post-judgment interest once the superintendent tendered his million. It's once that trigger occurred, you pay all of the remaining interest. Once that excess policy is invoked, you pay all the remaining interest.

That's what happened in this case. Their policy has been triggered. They admit that it has been triggered, and so they owe all the post-judgment interest.

MS. AHLSTRAND: Your Honor, if I may, just super quickly?

THE COURT: Yes.

MS. AHLSTRAND: Self insured retentions are completely irrelevant to this discussion. When we say

that Kam Cheung is self insured, we are not talking about a negotiated self-insured retention. We are talking about the fact that their primary level has now been voided, and therefore they are uninsured. They are without insurance. They have chosen not to step into the shoes of Arch, and therefore fulfill the obligations that were required under the policy, but that has nothing to do with the self-insured retention, or the other insurance clause. The valid and collectable language in the other insurance clause has to do with other collectable excess insurance. It's how this policy responds to other policies, other than the scheduled underlying insurance, which is very clear from the other insurance provision. Here, Kam Cheung has effectively become Arch. They are self insured for that amount.

With respect to the trigger, I think counsel misconstrues what I'm saying. In Raggins, because the interest was within the limit, the payment of $1 million cut off the primary obligations. That is not the situation that we have here. We are obligated to pay the 1.33 million, but our obligations to pay post-judgment interest have not yet been triggered, because the primary obligations have not been cut off.

THE COURT: Anything else?

Proceedings

MS. AHLSTRAND: Thank you, your Honor.

MR. MORRIS: Thank you, your Honor.

THE COURT: All right, thanks. I'm not going to put a decision on the record. Thank you.

MR. MORRIS: Thank you very much, your Honor.

MS. AHLSTRAND: Thank you, your Honor.

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Certified to be a true and accurate transcription of the above-entitled matter.

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Lisa A. Casey
Senior Court Reporter

CERTIFICATION PURSUANT TO CPLR § 2105

I, Heather L. McCoy, an attorney of the firm of Seiger Gfeller Laurie LLP, attorneys for the Defendant-Respondent, hereby certify pursuant to Section 2105 of the CPLR that the foregoing papers constituting the Respondent's Appendix have been personally compared by me with the original Record filed herein and have been found to be true and accurate copies of said originals, which are now on file in the office of the Clerk of the County of New York, and are being transferred by subpoena for the purposes of this case.

Dated: September 24, 2019

Heather L. McCoy

Attorney for Defendant-Respondent