Motion No. 2019-337P
MOTION SUBMITTED **April 15, 2019**

New York County Clerk's Index No. 650142/14

Court of Appeals

STATE OF NEW YORK

JIN MING CHEN,

Plaintiff-Appellant,

against

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

Defendant-Respondent.

MOTION FOR LEAVE TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS

LAW OFFICES OF WADE T. MORRIS
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Date Completed: April 1, 2019

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

Index No.: 650142/14

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JIN MING CHEN,

Plaintiff-Appellant

-against-

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA

Defendant-Respondent

----------X

NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

PLEASE TAKE NOTICE, that upon the annexed affirmation of Kenneth J. Gorman, Esq., the notice of appeal and judgment appealed from the undersigned will move this Court at a Motion Part to be held at the Courthouse located at 20 Eagle Street, Albany, New York, on the 15th day of April, 2019 at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order providing the following relief:

[a] pursuant to CPLR §5601 et. seq. granting plaintiff leave to appeal to this Court from the Appellate Division's decision and order dated October 30, 2018, which affirmed the judgment of the Supreme Court, and;

[b] Any other, further or different relief that this Court may deem just, proper and equitable.

PLEASE TAKE FURTHER NOTICE that any answering affidavits are required to be served not later than seven (7) days prior to the return date of this motion pursuant to CPLR.

Dated: New York, New York
April 1, 2019

Yours, etc.,
Wade T. Morris, Esq.

By 
Kenneth J. Gorman, Esq.
225 Broadway, Suite 307
New York, NY 10007
(212) 267-0033

To: Clerk of the Court

Elizabeth F. Ahlstrand
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

Index No.: 650142/14

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JIN MING CHEN,

Affirmation in Support

Plaintiff-Appellant

-against-

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA

Defendant-Respondent

----------X

Kenneth J. Gorman, an attorney duly licensed to practice law in the State of New York, hereby affirms under the penalties of perjury the truth of the following statements pursuant to I 2106:

I am appellate counsel to Wade T. Morris, Esq., the attorney for the plaintiff-appellant Jin Ming Chen (hereinafter the "plaintiff"). I am fully familiar with the facts and circumstances of this case based upon a review of the file maintained by my office and in the prosecution of this action and appeal. I submit this affirmation in support of the plaintiff's motion for leave to appeal to the Court of Appeals from the decision and order of the Appellate Division, First Department dated October 30, 2018

INTRODUCTION

The First Department's decision is unique insofar as it presents numerous leave worthy issues. It is uncontested that the

defendant-respondent, Insurance Company of the State of Pennsylvania's ("ICSOP") disclaimer of coverage was invalid. The plaintiff commenced this this declaratory action against ICSOP to satisfy the underlying judgment of $2,330,000, with pre-judgment interest accruing from December 8, 2011 together with post-judgment interest. It is uncontested that when the plaintiff moved for summary judgment, he sought pre-judgment and post-judgment interest.

It is further undisputed that ICSOP failed to oppose that branch of plaintiff's motion that sought pre-judgment and post-judgment interest. ICSOP merely argued that to the extent it was liable "it is liable only for the amount of the judgment", which at that time was $2,726,993.70 ($2,330,000 + $396,993.70 in pre-judgment interest) (389)[1] "less the $1,000,000 limit of the [underlying] Arch Policy" (333).

On May 2, 2016, the trial court held oral argument on plaintiff's motion for summary judgment. At the start of the hearing, the court acknowledged that plaintiff was seeking an order directing ICSOP to satisfy the underlying judgment, which included interest:

> THE COURT: I have plaintiff's motion for summary judgment seeking a declaration that the defendant, Insurance Company of the State of Pennsylvania, ICSOP, that their disclaimer of insurance coverage is invalid as a matter of law and seeking to have me direct ICSOP to satisfy a judgment awarding

[1] Numbers in parenthesis refer to the appendix on appeal.

> plaintiff $2,330,000 *plus interest*, which was entered on October 29th, 2013.

(844).

The trial court agreed that ICSOP's excess policy did not require it to drop down cover the first $1 million (865-866, 872). However, the court stated, "with regard to the balance of the judgment, ICSOP must satisfy that judgment" (872).

The court issued a final order on May 2, 2016, granting plaintiff's motion for summary judgment to the extent indicated on the record, and marked the case disposed (16). Plaintiff, in accordance with the final order, submitted a proposed judgment to the Clerk on May 10, 2016, directing ICSOP to satisfy the underlying judgment minus the $1 million credit it received (875).

ICSOP then moved to reargue the issue of interest or to resettle the judgment to reflect that it owed no post-judgment interest and only owed pre-judgment interest on the first $1 million (825-840). In opposition, plaintiff argued that ICSOP waived this argument as it failed to address this issue when it opposed his motion for summary judgment (893, 898-901). In addition, plaintiff argued that ICSOP could not reargue an issue it never raised prior to entry of the final order (894, 906-907). Plaintiff further argued that the trial court lacked jurisdiction to make substantive changes to the final order pursuant to CPLR § 5019(a) (893-894, 902-905).

By order dated October 26, 2016, the Supreme Court (Rakower, J.) denied ICSOP's motion, stating "Leave to reargue is denied" and once again marked the matter disposed (932). ISCOP then moved for leave to resettle plaintiff's proposed judgment, raising the same arguments it raised in its first motion to reargue and/or resettle. The trial court denied ICSOP's motion to reargue but did not address its request for resettlement (933-944).

By order dated February 1, 2017, the Supreme Court (Rakower, J.) sua sponte granted ICSOP leave to reargue the issue of pre-judgment and post-judgment interest and directed the parties to submit supplemental briefs on these issues. After the submission of supplemental briefs, the trial court signed ICSOP's proposed judgment, absolving it of paying any post-judgment interest from October 29, 2013, the time judgment in the underlying action was entered to May 2, 2016, when the trial court granted plaintiff's motion for summary judgment, disposing of this matter.

On appeal, the First Department rejected plaintiff's argument that ICSOP waived the issues of pre-judgment and post-judgment interest when it opposed plaintiff's motion for summary judgment, stating that:

> ICSOP's failure to articulate its position on interest issues earlier does not support a finding of waiver, which requires an indication of an intentional relinquishment of a known right that, except for the waiver, the waiving party would have enjoyed (see e.g. DLJ Mtge. Capital Corp., Inc. v. Fairmont Funding, Ltd., 81 A.D.3d 563, 920 N.Y.S.2d 1 [1st Dept. 2011]). Nor will waiver be implied "unless the opposite

> party is misled to his or her prejudice into the belief that a waiver was intended" (57 N.Y. Jur 2d, Estoppel, Ratification and Waiver § 89), and plaintiff did not suffer prejudice from ICSOP's delay, as Supreme Court made no decision about interest until it provided both parties an opportunity to brief their respective positions.

(Jin Ming Chen v. Ins. Co. of the State of Pennsylvania, 165 AD3d 588, 589 [1st Dept. 2018]).

The First Department's decision presents a leave worthy issue as it sets a new standard for waiving issues when opposing motions made on notice, departing from the well settled rule that a failure to respond to a movant's arguments constitutes a waiver of opposing arguments (see, RSB Bedford Associates, LLC v. Ricky's Williamsburg, Inc., 91 AD3d 16, 23 [1st Dept. 2011] ["...defendants waived the argument by failing to raise it in opposition to the summary judgment motion"]; Shinn v. Catanzaro, 1 AD3d 195, 198 [1st Dept. 2003][Such failure to raise this issue before the motion court constitutes a waiver of any objection"]).

The First Department's citation to 57 N.Y. Jur 2d, Estoppel, Ratification and Waiver § 89 in support of its finding that waiver will not be implied "unless the opposite party is misled to his or her prejudice into the belief that a waiver was intended" has no bearing on waiving an issue due to a litigant's failure to address an issue raised in connection with motion made on notice.

The First Department's decision also presents leave worthy issues with regard to its improper application of CPLR § 2221 and

The First Department's decision, which impermissibly expands the scope of CPLR § 2221[d] to advance new legal theories after entry of a final order is a leave worthy issue given how diametrically opposed it is to the terms of the statute and the decisional law of every New York appellate court.

The First Department's decision also found that "plaintiff's arguments about the scope of the court's authority under [CPLR § 5019(a)]" were not relevant because the trial court granted ICSOP relief under CPLR § 2221[d].

However, CPLR § 5019[a] is relevant as the First Department impermissibly allowed CPLR § 2221[d] to be used as a vehicle to circumvent CPLR § 5019[a]'s strict prohibition on making substantive changes to a final order. Given the implications this decision has on using CPLR § 2221[d] to bypass CPLR § 5019[a]'s prohibition of making substantive changes to a final order, we respectfully submit that this presents a leave worthy issue.

Regarding the merits, it was uncontested that ICSOP followed form to the underlying Arch policy (which was void ab initio)[2]. ICSOP's policy stated that it is responsible for the "ultimate net loss" in excess of the underlying Arch policy limits, which was $1

[2] We expect ICSOP to place undue emphasis on the fact that the reason why the Arch policy was rescinded was because it was determined that the injured plaintiff's employer, Kam Cheung, the insured who defaulted, committed fraud when it purchased that policy. This issue is not relevant to this appeal and any attempt by ICSOP to raise it merely constitutes an attempt to distract this Court from the issues before it.

million. The "ultimate net loss" did not exclude pre-judgment and post-judgment interest.

The exception to ICSOP's "follow-the-form obligation" was where "terms and conditions [of its excess policy] are inconsistent with the underlying policy's...supplemental [payment provision]" But here there are no such inconsistencies" (Utica Mut. Ins. Co. v. Clearwater Ins. Co., 906 F.3d 12, 19 [2d Cir. 2018]).

Yet, the First Department held that because the Arch policy's supplemental payment provision stated that the payment of pre-judgment and post-judgment interest did not reduce the limits of 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 payments set forth in the Supplementary Payments provision.

This also presents a leave worthy issue as is well established that "a supplementary payments provision does not increase the policy's liability limits; the policy's liability limits are always those stated in the declarations" (Douglas R. Richmond, The Subtly Important Supplementary Payments Provision in Liability Insurance Policies, 66 DePaul L. Rev. 763, 766 [2017][citing, inter alia, Levit v. Allstate Ins. Co., 308 AD2d 475 [2d Dept. 2003][explaining that a policy's "limit of insurance" and

"applicable policy limits" do not include costs and interest payable under a supplementary payments provision).

ICSOP's declaration stated that its excess coverage would be triggered upon exhausting the limits of the Arch policy, which was $1 million per occurrence. The First Department's decision departed from the plain meaning of the insurance policies by finding that the supplementary payments provision increased the underlying policy liability limits, which in turn needed to be exhausted before the excess coverage was triggered (see, Graf v. Hosp. Mut. Ins. Co., 956 F. Supp.2d 337, 343 [D. Mass. 2013], aff'd, 754 F.3d 74 [1st Cir. 2014]["the Supplementary Payments provision, Section[s]...are supplemental to the [$1 million] limit. It does not change the 'applicable limits of insurance'"])[3].

As there was no inconsistency between the excess and primary policies, ICSOP's excess policy "followed form' with regard to Supplementary Payments" (In American Guarantee & Liability Insurance Co., v. Environmental Materials LLC, 2019 WL 1358839 at *9 [D. Colo. Mar. 26, 2019]). Moreover, as ICSOP's use of the term "ultimate net loss", did not exclude pre-judgment and post-

[3] See also, White v Auto Club Inter-Insurance Exch., 984 SW2d 156, 158 [Mo Ct App 1998]["The supplementary payment provision provided for compensation to a covered person 'in addition to [the] limit of liability.' It was a separate obligation beyond the company's limit of liability of $ 50,000"]; Vazquez-Filippetti v Cooperativa de Seguros Múltiples de Puerto Rico, 723 F3d 24, 30 [1st Cir 2013]["postjudgment interest is...definition...a supplementary payment [i]n addition to [the] liability limits" [internal quotations omitted]; State Farm Gen. Ins. Co. v Mintarsih, 175 Cal App 4th 274, 289 [2009]["The limits of liability apply to the personal liability coverage under the policies, but do not apply to the supplemental payments obligation"]

judgment interest, it was required to pay statutory interest on the underlying judgment (less the $1 million primary limit) within its policy limits (see, In re Viking Pump, Inc., 148 A.3d 633, 665 [Del. 2016, applying New York Law]).

As "[t]here is remarkably little law" on supplementary payments provisions (Michael Sean Quinn & Olga Seelig, Liability Insurance and Supplementary Payments, 25 INS. LITIG. REP. 133, 133 [2003]) and because "courts and lawyers have little authority to guide them when analyzing associated issues" (Douglas R. Richmond, The Subtly Important Supplementary Payments Provision in Liability Insurance Policies, 66 DePaul L. Rev. 763, 767 [2017]), we respectfully submit that leave to appeal is warranted.

Leave is also warranted as the First Department's decision conflicts with this Court's decision in Ragins v. Hosps. Ins. Co., 22 NY3d 1019 [2013]).

Statement of Procedural History Pursuant to 22 NYCRR § 500.22(B)(2)

Plaintiff commenced this action filing an amended summons and verified complaint dated January 16, 2014, seeking a declaration that ICSOP was obligated to satisfy the underlying personal injury judgment entered October 29, 2013 (67-78). Issue was joined with service of ICSOP's answer dated August 11, 2014 (237-244).

Judgment in this matter was entered on June 30, 2017 (14-15). In a decision and order dated October 30, 2014, the Appellate

Division, First Department affirmed the judgment. ICSOP served the First Department's decision and order with notice of entry on October 31, 2018. The plaintiff timely moved for leave to appeal to the Court of Appeals on November 30, 2018. By order dated February 28, 2018, the Appellate Division, First Department denied plaintiff's motion for leave to appeal to the Court of Appeals. This motion is being made within 30 days of service of the First Department's February 28, 2018, and is thus timely.

Questions Presented

1) Does the First Department's decision present a leave worthy issue by setting a new standard for waiving issues when opposing motions made on notice, where plaintiff moved for summary judgment on the issue of interest, which ICSOP failed to oppose? As it is black letter law that a failure to respond to a movant's arguments constitutes a waiver of opposing arguments, the First Department's decision, which now holds that waiver "requires an indication of an intentional relinquishment of a known right that, except for the waiver, the waiving party would have enjoyed" and that the moving party must suffer prejudice, presents a leave worthy issue.

2) Does the First Department's decision present a leave worthy issue by permitting litigants to advance new theories of law on a motion to reargue a final order? As the First Department's decision is contrary to the plain meaning of CPLR § 2221[d], the

decisional law of this Court and all Appellate Division departments, this presents a leave worthy issue.

3) Does the First Department's decision, which permitted CPLR § §2221[d] to be used as a vehicle to make substantive changes to a final order in violation of CPLR § §5019[a] present a leave worthy issue? Given that substances changes cannot be made a final order, the First Department's decision, which is contrary to this court's decisions in Kiker v. Nassau County, 85 NY2d 879 and Herpe v. Herpe, 225 NY 323, and the decisional law of all four Appellate Division Departments, presents a leave worthy issue

4) Does the First Department's decision which absolved the excess insurer, which followed form to the underlying policy, of paying any post-judgment interest and pre-judgment interest on the first $1 million of the underlying judgment present a leave worthy issue? As the ICSOP excess policy followed form to the underlying Arch policy and did not contradict the terms of the Arch policy, the impact this decision has on the law regarding excess policies that follow form presents a leave worthy issue.

5) Does the First Department's decision, finding that ICSOP's excess policy was "triggered" upon the primary carrier's payment of "supplemental payments" in addition to the full primary policy

limit of $1 million present a leave worthy issue? The First Department's decision presents a leave worthy issue as it created conditions that went far beyond the terms of the policies, carved out a new rule that excess coverage is now triggered after the judgment exceeds the predetermined amount set forth in the policies' declarations and an undetermined amount under the supplementary payments section.

6) Does the First Department's decision, which conflicts with this court's decision in Ragins v. Hosps. Ins. Co., 22 NY3d 1019 [2013] and Welsh v. Peerless cas. co., 8 AD2d 373 [1st dept. 1959], aff'd, 8 NY2d 745 [1960] present a leave worthy issue? Given the implications the First Department's decision has on this Court's decisions we submit that this issue is leave worthy.

FACTUAL AND PROCEDURAL HISTORY

On December 8, 2011, the plaintiff, a construction worker, was granted summary judgment on the issue of liability against Kam Cheung Construction, Inc. ("Kam Cheung") the general contractor under Labor Law § 241(6). Kam Cheung's primary insurance carrier was Arch Specialty Insurance Company ("Arch") and its excess carrier was Insurance Company of Pennsylvania ("ICSOP") (395-459).

Kam Cheung placed ICSOP on notice of the plaintiff's accident on June 1, 2009 (195). On June 26, 2009, ICSOP disclaimed coverage on the ground that Kam Cheung gave it late notice of the

plaintiff's accident (195). It is uncontested that the disclaimer was invalid, as ICSOP possessed plaintiff's complaint and failed to send plaintiff or LBW a copy of its disclaimer (194-196).

After plaintiff was granted summary judgment and prior to trial, Arch was granted summary judgment rescinding the primary insurance policy and withdrew counsel. Thereafter, ICSOP permitted Kam Cheung to default (32).

On September 24, 2013, over 5 years after ICSOP issued an invalid disclaimer, an inquest was held; the plaintiff was awarded $2,330,000, with prejudgment interest accruing from December 8, 2011, the date plaintiff was granted summary judgment on the issue of liability (181-187).

Plaintiff's initial demand letter

Judgment was entered on October 29, 2013. The total amount as of that date, including costs and $396,993.70 in prejudgment interest was $2,726,993.79 (164-165). On October 31, 2013, plaintiff served ICSOP with the judgment, demanding that it be satisfied (176). Specifically, plaintiff stated:

> Please find enclosed a copy of the judgment filed in the County Clerk of New York...dated October 29, 2013…awarding the Plaintiff...$2,726,993,70.
>
> Please be advised that we demand that you tender the full amount with post judgment interest within 30 days hereto. Failure to promptly tender will result in the accumulation of further interest at the statutory rate of 9% (approximately $20,452.45/month) and additional litigation.

(176).

Action for declaratory judgment

After ICSOP failed to satisfy the judgment, plaintiff commenced this action filing an amended summons and verified complaint dated January 16, 2014, seeking a declaration that ICSOP was obligated to satisfy the judgment entered October 29, 2013 (67-78).

The amended complaint asserted that "plaintiff demand[ed] judgment against [ICSOP] in the sum of TWO MILLION SEVEN HUNDRED TWENTY-SIX THOUSAND NINE HUNDRED NINETY-THREE AND SEVENTY CENTS ($2,726,993.70), together with 9% interest from October 29, 2013" (73, 77).

Plaintiff's motion for summary judgment

By notice dated May 21, 2015, plaintiff moved for summary judgment, seeking an order that ICSOP's disclaimer was invalid "and to direct ICSOP to satisfy the judgment awarding the plaintiff $2,330,000, plus interest..." (20). In his affirmation, plaintiff asserted that he was seeking an order directing "ICSOP to satisfy the judgment awarding the plaintiff $2,330,000, *plus interest...*" (20-21, 22, emphasis added). Plaintiff stated that after "[a]n inquest was held" he "was granted a default judgment, awarding him...$2,330,000 *plus costs and statutory interest*" (25) and that "[j]udgment was entered on October 29, 2013; the total judgment as of that date, including costs and *interest totaled* $2,726,993.70" (33).

Plaintiff further argued that as a consequence of ICSOP's improper disclaimer, its insured, "Kam Cheung is liable for the full amount of the judgment of $2,330,000 plus costs and statutory interest" and that "ICSOP...is legally responsible for paying the entire amount" (50-51).

ICSOP's cross motion and opposition

By notice dated July 21, 2015, ICSOP cross-moved for discovery and opposed plaintiff's motion for summary judgment (311-312). ICSOP, conceded that its disclaimer was invalid (323) and acknowledged that it followed form to the Arch policy (327, 339). ISCOP acknowledged that in the underlying action, the "court held an inquest on damages, awarding the plaintiff $2,330,000 and ...entered judgment against Kam Cheung for $2,726,993.70" (389).

ICSOP maintained that its "Excess Policy [did] not 'drop down' or otherwise satisfy the limit of the Arch Policy" (332). It then stated that to the extent it was liable:

> ...it is liable only for the amount of the judgment[4] less the $1,000,000 limit of the Arch Policy.

(333).

It is uncontested that ICSOP never argued that did not have to pay any postjudgment interest on the judgment and did not have to pay prejudgment interest on $1.3 million. In fact, ICSOP failed

[4] ICSOP acknowledged that the judgment included $396,993.70 in prejudgment statutory interest at paragraph 29 of its attorney's affirmation in opposition to plaintiff's motion for summary judgment ($2,330,000 + $396,993.70 = $2,726,993.70) (389).

to even mention the word interest in the two attorney affirmations and memorandum of law it submitted in opposition to plaintiff's motion for summary judgment (316-342, 383-394).

Plaintiff's reply

In reply (559-590), plaintiff once again argued that he was seeking an order directing ICSOP "to satisfy the judgment entered in favor of the plaintiff in the amount of $2,726,993.70, plus interest, which was entered on October 29, 2013" (559). Point III of plaintiff's reply affirmation stated "ICSOP is obligated to pay the entire judgment, with statutory interest" (585).

Hearing on plaintiff's motion and ICSOP's cross motion

On May 2, 2016, the trial court held oral argument on plaintiff's motion for summary judgment and ICSOP's cross motion to compel discovery (843-874). At the start of the hearing, the court acknowledged that plaintiff was seeking an order directing ICSOP to satisfy the judgment, which included statutory interest:

> THE COURT: I have plaintiff's motion for summary judgment seeking a declaration that the defendant, Insurance Company of the State of Pennsylvania, ICSOP, that their disclaimer of insurance coverage is invalid as a matter of law and seeking to have me direct ICSOP to satisfy a judgment awarding plaintiff $2,330,000 *plus interest*, which was entered on October 29th, 2013.

(844, emphasis added).

The Court rejected ICSOP's demand for further discovery but agreed that it did not have to cover the first million because the policy did not contain a drop-down provision (865-866, 872).

However, the Court stated, "with regard to the balance of the judgment, ICSOP must satisfy that judgment" (872).

Final order; proposed judgment

The trial court issued a final order on May 2, 2016, granting plaintiff's motion for summary judgment to the extent indicated on the record, and marked the case disposed (16).

Plaintiff, in accordance with the final order, submitted a proposed judgment to the Clerk on May 10, 2016, directing ICSOP to satisfy the underlying judgment minus the $1 million credit (875).

ICSOP's first motion to resettle and/or reargue

By notice dated June 1, 2016, ICSOP moved to resettle plaintiff's proposed judgment pursuant to CPLR § 5019(a), by drastically reducing the amount of interest plaintiff could recover, or for leave to reargue the amount of interest plaintiff was entitled to (825-840).

In opposition (891-915), plaintiff asserted that ICSOP waived this argument as it did not address plaintiff's demand for statutory interest when it opposed plaintiff's motion for summary judgment (893, 898-901). In addition, plaintiff argued that ICSOP could not reargue an issue it never raised prior to entry of the final order (894, 906-907). Plaintiff further argued that the trial court lacked jurisdiction to make substantive changes to the final order pursuant to CPLR § 5019(a) (893-894, 902-905). Finally, plaintiff asserted that ICSOP's substantive argument

lacked merit, as it contradicted the terms of the policy and relied on cases from Georgia and Louisiana that conflicted with New York law (909-915).

October 26, 2016 order

By order dated October 26, 2016, the Supreme Court, New York County (Rakower, J.) denied ICSOP's motion, stating "Leave to reargue is denied" and once again marked the matter disposed (932).

ISCOP's second motion to resettle

By notice dated November 29, 2016, ISCOP moved for leave to resettle plaintiff's proposed judgment (933-944). Now, it argued that "plaintiff's proposed judgment should be resettled to reflect that ISCOP is not responsible for the interest accrued/accruing on the entire underlying judgment" (940-944).

Plaintiff's cross motion and opposition

By notice dated December 8, 2016, plaintiff cross-moved for the court to sign his proposed judgment or for an order directing the clerk to enter judgment as per the clerk's directive (946-974).

ICSOP's opposition and proposed judgment

In opposition (991-1006) ICSOP submitted a proposed judgment which only accounted for prejudgment interest on $1.33 million from December 8, 2011, the date plaintiff was granted summary judgment in the underlying action to October 29, 2013, the date the underlying judgment was entered (1007-1009). ISCOP's proposed

judgment eliminated all post-judgment interest accruing from October 29, 2013 to May 2, 2016 with post-judgment interest only starting to accrue after May 2, 2016, when plaintiff was granted summary judgment in the declaratory action (1007-1009). Thus, their judgment now contained over 70% less interest than plaintiff was originally awarded.

Interim order granting reargument

By order dated February 1, 2017, the Supreme Court, New York County (Rakower, J.) granted ISCOP leave to reargue the issues of prejudgment and postjudgment interest and directed the parties to submit supplemental briefs on these issues (1010).

Judgment appealed from

On June 20, 2017, the court signed ICSOP's proposed judgment, absolving ICSOP from paying any pre and post judgment interest on the first $1 million of the underlying judgment and eliminated all postjudgment interest that accrued from October 29, 2013 to May 2, 2016 (14-15).

The Appellate Division's decision and order

In a decision and order dated October 26, 2018, the Appellate Division, First Department affirmed the judgment. Although plaintiff's pleadings framed the issue of prejudgment and postjudgment interest and plaintiff's motion for summary judgment sought an order directing "ISCOP to satisfy the judgment awarding the plaintiff $2,330,000, plus interest"., the First Department

determined that ICSOP's arguments pertaining to prejudgment and postjudgment interest were not waived and properly raised after entry of the final order:

> The specific interest-related questions at issue here did not become clear until after the May 2, 2016 order; only then did Supreme Court clarify that excess insurer defendant (ICSOP) was not liable to plaintiff for the first $1 million of the judgment. ICSOP's failure to articulate its position on interest issues earlier does not support a finding of waiver, which requires an indication of an intentional relinquishment of a known right that, except for the waiver, the waiving party would have enjoyed (see e.g. DLJ Mtge. Capital Corp., Inc. v Fairmont Funding, Ltd., 81 AD3d 563 [1st Dept 2011]). Nor will waiver be implied "unless the opposite party is misled to his or her prejudice into the belief that a waiver was intended" (57 NY Jur 2d, Estoppel, Ratification and Waiver § 89), and plaintiff did not suffer prejudice from ICSOP's delay, as Supreme Court made no decision about interest until it provided both parties an opportunity to brief their respective positions.

The First Department further stated that "ICSOP's interest-related arguments were not impermissible under CPLR 2221(d), since Supreme Court granted leave to reargue for the very purpose of enabling the parties to address the interest issue. As the record does not show that the court granted relief under CPLR 5019(a), plaintiff's arguments about the scope of the court's authority under that statute are not relevant here".

Regarding the merits, the First Department held:

> Plaintiff's interpretation of the "follow form" provision in the ICSOP policy is not persuasive. He acknowledges that a following form policy is read in accord with the terms and conditions of the underlying policy (see e.g. Jefferson Ins. Co. of N.Y. v Travelers Indem. Co., 92 NY2d 363 [1998]). However, he does not adequately take into account that the "terms and conditions" of the underlying

Arch policy include, in its Supplementary Payments provision, Arch's agreement to cover prejudgment interest "on that part of the judgment we pay," i.e., the first $1 million, and "all" postjudgment interest on the "full amount of any judgment." The actual ICSOP "follow form" provision, moreover, states: "Except for the . . . conditions . . . 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." Among the "conditions" of the ICSOP policy is the "Maintenance of Underlying Insurance" provision, pursuant to which, and 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 payments set forth in the Supplementary Payments provision.

We disagree that either Ragins v Hospitals Ins. Co., Inc. (22 NY3d 1019 [2013]) or Welsh v Peerless Cas. Co. (8 AD2d 373 [1st Dept 1959], affd 8 NY2d 745 [1960]) supports plaintiff's position, given key distinctions in the policy language at issue in those cases. Finally, we disagree that the ICSOP policy provisions regarding "Maintenance of Underlying Insurance" and "Ultimate Net Loss" encompassed underlying coverage only to the extent of the $1 million per occurrence the primary policy provided. The language of the policies does not support this interpretation, and instead supports 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.

We respectfully submit that leave should be granted given the impact this decision has on the doctrines of waiver, reargument (CPLR § 2221[d]), resettlement (CPLR § 5019[a]) and this Court's decisions in Ragins v Hospitals Ins. Co., Inc., 22 NY3d 1019 [2013] and Welsh v Peerless Cas. Co., 8 AD2d 373 [1st Dept 1959], aff'd 8 NY2d 745 [1960].

ARGUMENT

POINT I:

THE FIRST DEPARTMENT'S DECISION PRESENTS A LEAVE WORTHY ISSUE AS IT SETS A NEW STANDARD FOR WAVING ISSUES WHEN OPPOSING MOTIONS MADE ON NOTICE

It is black letter law that a "failure to respond to movant's arguments constitute[] a waiver of opposing arguments" (1 Civil Practice in the Southern District of New York § 11:4, fn 8, citing, Avillan v. Donahoe, 2015 WL 728169, *7 [S.D.N.Y. 2015] (Engelmayer, J.); see, RSB Bedford Associates, LLC v. Ricky's Williamsburg, Inc., 91 AD3d 16, 23 [1st Dept. 2011]["...defendants waived the argument by failing to raise it in opposition to the summary judgment motion"]; Shinn v. Catanzaro, 1 AD3d 195, 198 [1st Dept. 2003][Such failure to raise this issue before the motion court constitutes a waiver of any objection"]).

Although plaintiff sought statutory interest when he moved for summary judgment, the First Department stated that the "specific interest-related questions at issue here did not become clear until after the May 2, 2016 order; only then did Supreme Court clarify that excess insurer defendant (ICSOP) was not liable to plaintiff for the first $1 million of the judgment" (Jin Ming Chen v. Ins. Co. of the State of Pennsylvania, 165 AD3d 588 [1st Dept. 2018]).

However, ICSOP never argued that its liability for interest was dependent on whether it was liable for the first $1 million

of the judgment. Moreover, it was always plaintiff's position that ICSOP was responsible for interest on the entire judgment irrespective of whether it was liable for the first $1 million of the judgment.

Thus, the reason why the "specific interest-related questions at issue...did not become clear until after the May 2, 2016 order" was because ICSOP failed to raise this substantive issue when it opposed plaintiff's motion for summary judgment. Yet, the First Department, citing to DLJ Mtge. Capital Corp., Inc. v. Fairmont Funding, Ltd., 81 AD3d 563 [1st Dept. 2011], found that "ICSOP's failure to articulate its position on interest issues earlier does not support a finding of waiver, which requires an indication of an intentional relinquishment of a known right that, except for the waiver, the waiving party would have enjoyed".

However, DLJ Mtge. Capital Corp. did not involve a situation where a party failed to address an issue or claim for certain relief made in connection with opposing a motion made on notice. The issue of waiver pertained to pre-litigation contractual issues, namely whether "plaintiff waived its right to require repurchase of the EPDs [Early Payment Default Mortgages]...on four occasions between 2003 and 2005".

Moreover, the First Department's citation to 57 N.Y. Jur 2d, Estoppel, Ratification and Waiver § 89 in support of its finding that waiver will not be implied "unless the opposite party is

misled to his or her prejudice into the belief that a waiver was intended" has no bearing on waiving an issue due to a litigant's failure to address an issue raised in connection with motions made on notice.

It is uncontested that the issue of interest was always at the forefront of this case, when plaintiff initially served his demand that ICSOP pay the judgment, up until the time plaintiff moved for summary judgment. As noted above, the trial court acknowledged that plaintiff sought interest, stating, inter alia "I have plaintiff's motion for summary judgment...seeking to have me direct ICSOP to satisfy a judgment awarding plaintiff $2,330,000 *plus interest*, which was entered on October 29th, 2013" (844, emphasis added). After granting ICSOP's request for a $1 million credit, the trial court decided the issue of interest when it directed it to "satisfy" the "balance of the judgment" (872).

Thus, the First Department's finding that the trial court "made no decision about interest until it provided both parties an opportunity to brief their respective positions" was clearly incorrect. More importantly, the Appellate Division's finding that the issue was not waived because "plaintiff did not suffer prejudice from ICSOP's delay" sets a new standard for waiving issues due to a litigant's failure to oppose and/or address issues asserted in connection with motions made on notice.

The reason that the trial court did not address ICSOP's arguments when deciding plaintiff's motion was because ICSOP failed to oppose that branch of plaintiff's motion for summary judgment which sought statutory interest (see, 97 N.Y. Jur. 2d Summary Judgment, Etc. § 85 ["Under particular factual circumstances, an order which is entered on a grant of summary judgment to the plaintiff that is silent as to whether damages are awarded may be intended to award the amount sought in the complaint"]).

Yet, it appears that the First Department carved out a new rule for waiver because this issue involved statutory interest. However, prior to the First Department's decision, courts uniformly held that when a party seeks interest in connection with a motion made on notice, the opposing party must address the issue or waives it (see, MacMaster v. City of Rochester, 2008 WL 11363388, at *3 [W.D.N.Y. Sept. 10, 2008]["There being no opposition to plaintiff's motion for prejudgment interest, plaintiff's application is granted"]; Philips Lighting Co. v. Schneider, 2014 WL 4919047, at *2 [E.D.N.Y. Sept. 30, 2014], aff'd, 636 F. App'x 54 [2d Cir. 2016]["because [d]efendant has not opposed the award of prejudgment interest, the judgment should be adjusted such that statutorily mandated 9% per annum prejudgment runs from October 3, 2003"]; Publishers Press, Inc. v. Tech. Funding, Inc., No. 2008 WL 4937603, at *2 [W.D. Ky. Nov. 17, 2008]

["TFI has failed to respond to PPI's motion for prejudgment interest, and the Court treats this failure as a waiver of its opposition to the motion"]; Cox v. D.C., 754 F. Supp. 2d 66, 78 [D.D.C. 2010]["Prejudgment interest is awarded, since Defendant did not contest Plaintiffs' request in its Opposition"]; Kennedy Marr Offshore Singapore Pte Ltd. v. Techcrane Int'l Inc., 2013 WL 3283343, at *13 [E.D. La. June 27, 2013][Techcrane has not opposed an award of prejudgment interest and the Court finds that the calculation of interest suggested by Kennedy Marr is supported by the law]; cf., Kattan by Thomas v. D.C., 995 F.2d 274, 279 [D.C. Cir. 1993]["Because the District of Columbia did not contest Mr. Kattan's entitlement to attorney's fees in its original opposition to the Kattans' application for fees, we find that the District waived the issue"]).

Here, it is uncontested that plaintiff always sought statutory interest, which included prejudgment interest that was already factored into the judgment and all post-judgment interest. Plaintiff made this clear in his initial demand, served on October 31, 2013 and in his amended complaint (see, Capgemini U.S., LLC v. EC Manage, Inc., 2012 WL 5931837, at *6 [S.D.N.Y. Nov. 7, 2012][where ad damnum clause requested $1,000,000 "plus interest," "the Complaint put the defendants on notice that they could be liable for an amount in excess of $1,000,000 once interest was

computed"], report and recommendation adopted, 2012 WL 5938590 [S.D.N.Y. Nov. 27, 2012]).

Additionally, plaintiff sought statutory interest in his motion for summary judgment. At no time prior to entry of the trial court's May 2, 2016 final order did ICSOP argue that it was not liable for all the prejudgment interest that was built into the judgment or all the post-judgment interest that accrued on the underlying judgment from December 8, 2011 to October 29, 2013.

In fact, as noted above, when ICSOP opposed plaintiff's motion for summary judgment and addressed the issue of its potential liability, it acknowledged that the underlying judgment was $2,726,993.70 (which included post judgment interest) and that it was liable for "...the amount of the judgment less the $1,000,000 limit of the Arch Policy" (333, 389). ICSOP waived any argument pertaining to a further reduction as to what it believed it owed after entry of the final order.

"Adherence to the [waiver] rule" "is fully applicable to questions of prejudgment interest" (Terkildsen v. Waters, 481 F.2d 201, 205 [2d Cir. 1973] and under the First Department's decisional law, it was not even necessary for plaintiff to assert a request for statutory interest in his notice of motion and supporting affirmation. In Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting & Fin. Servs. Co., 117 AD3d 609 [1st Dept. 2014], an action seeking recognition and enforcement of a foreign money

judgment, the First Department rejected the "[d]efendant's argument that plaintiff waived its right to postjudgment interest because it was not requested in the notice of motion and was raised for the first time in a reply affidavit" since "[d]efendant was given a full and fair opportunity to oppose the request before the court issued its ruling..." (Id., at 613).

"While [p]laintiff has asserted [his] request for [interest] in [his] [m]otion for [s]ummary [j]udgment, [ICSOP] declined to respond to the request for...pre-judgment [and post-judgment] interest...As a result, [ICSOP] waived its opportunity to substantively oppose [p]laintiff's request for...pre-judgment [and post-judgment] interest, despite having a full and fair opportunity to do so" (Pavicich v. Aetna Life Ins. Co., 2010 WL 3854733, at *11 [D. Colo. 2010]).

As "[ICSOP] was given a full and fair opportunity to oppose the request [for interest] before the court issued its [final order]" (Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting & Fin. Servs. Co., 117 AD3d at 613, supra), we respectfully submit that it "waived [this argument] by failing to raise it at Supreme Court in opposition to [plaintiff's] motion" (Chakanovsky v. C.A.E. Link Corp., 201 AD2d 785, 786 [3d Dept. 1994][cits.]; see, Zaharatos v. Zaharatos, 134 AD3d 926, 928 [2d Dept. 2015]["The defendant also waived these contentions by failing to raise them in 2011 in support of his initial cross

motion or in opposition to the enforcement motion"][cits.] RSB Bedford Associates, LLC v. Ricky's Williamsburg, Inc., 91 AD3d 16, 23 [1st Dept. 2011]["...defendants waived the argument by failing to raise it in opposition to the summary judgment motion"]; Shinn v. Catanzaro, 1 AD3d 195, 198 [1st Dept. 2003][Such failure to raise this issue before the motion court constitutes a waiver of any objection"][cits.]).

In addition, a party waives an issue when raising it for the first time in a motion to reargue (see, Bayo v. 626 Sutter Ave. Assocs., LLC, 106 AD3d 648, 650 [1st Dept. 2013]["plaintiffs waived any challenge to the impropriety of such act by [first] raising the claim on its motion to reargue"]; Globe Surgical Supply v. GEICO Ins. Co., 59 AD3d 129, 137 [2d Dept. 2008]["GEICO did not challenge numerosity in its opposition to Globe's original motion, but instead first raised the issue in its opposition to Globe's motion for leave to reargue. *As such, GEICO has waived any challenge to numerosity*]; see also, 445 E. 85th St., L.L.C. v. Phillips, 2003 WL 22170112, at *10 [N.Y. Civ. Ct. 2003]["Landlord could have requested nunc pro tunc relief when tenant first raised jurisdictional objections and thus has waived its right to do so on reargument"]).

Given the far-reaching implications the First Department's decision has on the legal doctrine of waiver, we submit that this is a leave worthy issue.

POINT II:

THE FIRST DEPARTMENT'S DECISION PRESENTS A LEAVE WORTH ISSUE AS IT NOW PERMITS LITIGANTS TO ADVANCE NEW THEORIES OF LAW ON A MOTION TO REARGUE A FINAL ORDER, CONTRARY TO THE PLAIN MEANING OF CPLR § 2221[D], THE DECISIONAL LAW OF THIS COURT AND ALL APPELLATE DIVISION DEPARTMENTS

The First Department's decision acknowledged that ICSOP failed "to articulate its position on interest issues earlier" yet held that "ICSOP's interest-related arguments were not impermissible under CPLR 2221(d), since [the] Supreme Court granted leave to reargue for the very purpose of enabling the parties to address the interest issue". We respectfully submit that granting ICSOP leave to reargue issues that were not previously raised prior to entry of the final order is contrary to the plain meaning of CPLR § 2221[d] and the decisional law from every Appellate Court in the State of New York.

A motion for leave to reargue "shall be based upon matters of law or fact allegedly overlooked or misapprehended by the court in determining the prior motion" (CPLR 2221[d][2]). "A party's contention that was not presented in the party's original opposition to a motion for summary judgment is not properly made on reargument" (97 N.Y. Jur. 2d Summary Judgment, Etc. § 88; see, Lebovits, Drafting New York Civil-Litigation Documents: Part Xxxvi-Motions to Reargue and Renew, N.Y. St. B.J., October 2014, at 64 ["You may not raise new arguments or advance new theories you never raised on the original motion"]).

Professor David Siegel succinctly instructed that a motion to reargue "is based on no new proof; it seeks to convince the court that it overlooked or misapprehended something on the first go around and ought to change its mind" (Siegel, N.Y. Prac § 254, at 449 [6th ed], July 2018 update). It "...is not designed to afford an unsuccessful party...[an opportunity] *to present arguments different from those originally asserted*" (2 Carmody-Wait 2d § 8:96, Generally; determinants in granting or denying reargument[cits.][emphasis added]).

This Court has unequivocally held that a motion for reargument cannot be used as a vehicle to advance new legal theories not previously asserted (see, Simpson v. Loehmann, 21 NY2d 990 [1968]["A motion for reargument is not an appropriate vehicle for raising new questions, such as those now urged upon us, which were not previously advanced..."]; Reilly v. Steinhart, 218 NY 660 [1916]["The defendant cannot have a reargument to submit questions of law which he failed to submit when the opportunity was offered to him"]). "Thus, the moving party should be able to point out where in the papers submitted on the original motion the overlooked or misapprehended fact was asserted or the overlooked or misapprehended argument was made" (4 N.Y.Prac., Com. Litig. in New York State Courts § 31:67 (4th ed.)

In People v. D'Alessandro, 13 NY3d 216 [2009], this Court reaffirmed this well settled rule of law. There, a criminal

defendant petitioned the Appellate Division for a writ of error coram nobis on the ground that his appellate counsel had been ineffective for failing to raise a speedy trial argument on the appeal. The Appellate division deemed this application a motion to reargue under CPLR 2221(d). In reversing the Appellate Division's decision, this Court held that the application was not a motion for reargument because under CPLR 2221(d)(2), reargument requires that there must have been points either "overlooked" or "misapprehended" on the prior determination, and this motion was based on an entirely new theory.

This well settled rule has been followed by the First Department (see, Onglingswan v. Chase Home Fin., LLC, 104 AD3d 543, 544 [1st Dept. 2013][finding that a motion for reargument "should have been denied because plaintiff sought to improperly advance new theories that had not been set forth on the initial motion"]; the Second Department (see, Frisenda v. X Large Enterprises Inc., 280 AD2d 514, 515 [2d Dept. 2001][reargument "is not designed to offer a party an opportunity to argue a new theory of law not previously advanced by it"]), the Third Department (see, Wasson v. Bond, 134 AD3d 1224, 1225 [3d Dept. 2015]["[A] motion to reargue is not available to advance a new theory of liability, or to present arguments different from those originally asserted"]) and the Fourth Department (see, Blair v. Allstate Indem. Co., 124 AD3d 1224, 1224-1225 [4th Dept. 2015]["It is well

settled that a motion to reargue is not available...to present arguments different from those originally asserted"]; see also, 171 Siegel's Prac. Rev. 4, No Reargument Allowed When Sole Basis Is Legal Theory Not Raised on Original Motion).

"Here, [ICSOP] merely advanced arguments that had not been presented in its previous motion, and made no effort to demonstrate to the court in what manner it had either overlooked or misapprehended the relevant facts or law" (V. Veeraswamy Realty v. Yenom Corp., 71 AD3d 874 [2d Dept. 2010]). "Once the court found that [ICSOP] had failed to set forth any grounds upon which to grant...reargument, it should have concluded its analysis and denied the motion" (Andrea v. E.I. Du Pont De Nemours & Co., 289 AD2d 1039, 1041 [4th Dept. 2001], quoting, Pahl Equip. Corp. v. Kassis, 182 AD2d 22, 28 [1st Dept. 1992], lv. denied and dismissed 80 NY2d 1005, rearg. denied 81 NY2d 782). "Accordingly, it was an improvident exercise of discretion to grant leave to reargue" (V. Veeraswamy Realty v. Yenom Corp., supra).

While it is true that "every court retains continuing jurisdiction to reconsider its [own] prior interlocutory orders during the pendency of the action" (Liss v. Trans Auto Sys., 68 NY2d 15, 20 [1986]), "[a]n order granting summary judgment is in no sense interlocutory, a[s] it finally disposes of the action and determines the issues between the parties" (97 N.Y. Jur. 2d Summary Judgment, Etc. § 85). Thus, a motion to reargue is not a proper

procedural vehicle to address a final order (see, Gorman v. Hess, 301 AD2d 683 [3d Dept. 2003], citing, Matter of Urbach, 252 AD2d 318, 320 [3d Dept. 1999]).

Indeed, "a final judgment...is not subject to a motion to reargue; under no circumstances may a final judgment...be subject to a motion to reargue" (matrimonial motion practice, Law & The Family NY Forms § 65:2, commentary (2d), citing, Able v. Able, 209 AD2d 972 [4th Dept. 1994]; see also, Reed v. County of Westchester, 243 AD2d 714 [2d Dep't 1997][holding that, where there was a final judgment, petitioner had to move pursuant to CPLR § 5015 not by way of a motion to renew under CPLR § 2221, cited in, 2PT1 West's McKinney's Forms Civil Practice Law and Rules § 5:49).

We respectfully submit that the First Department's decision, which impermissibly expands the scope of CPLR § 2221[d] to advance new legal theories after entry of a final order is a leave worthy issue given how diametrically opposed it is to the terms of the statute and the decisional law of every New York appellate court (see, Rodriguez v. Gutierrez, 138 AD3d 964, 968 [2d Dept. 2016][reversing order granting reargument as "the Supreme Court did not overlook or misapprehend the facts, or misapply any controlling law"]; see, 8 N.Y.Prac., Civil Appellate Practice § 5:5 [2d ed.])

POINT III:

THE FIRST DEPARTMENT'S DECISION, WHICH PERMITTED CPLR §2221[D] TO BE USED AS A VEHICLE TO MAKE SUBSTANTIVE CHANGES TO A FINAL ORDER IN VIOLATION OF CPLR §5019[A] AND THIS COURT'S DECISIONS IN KIKER V. NASSAU COUNTY, 85 NY2d 879 AND HERPE V. HERPE, 225 NY 323, IS A LEAVE WORTHY ISSUE

The First Department's decision also found that "plaintiff's arguments about the scope of the court's authority under [CPLR § 5019(a)]" were not relevant because the trial court granted ICSOP relief under CPLR § 2221[d]. However, CPLR § 5019[a] is relevant as the First Department impermissibly allowed CPLR § 2221[d] to be used as a vehicle to circumvent CPLR § 5019[a]'s strict prohibition on making substantive changes to a final order. Given the implications this decision has on using CPLR § 2221[d] to bypass CPLR § 5019[a]'s prohibition of making substantive changes to a final order, we respectfully submit that this presents a leave worthy issue.

"With respect to errors in a judgment or order, this subdivision is designed to accomplish the same result as rule 60(a), Federal Rules of Civil Procedure, 28 U.S.C.A., which provides for correction of clerical mistakes and errors arising from oversight and omission" (Legislative Studies and Reports, cited in McKinney's Cons Laws of NY, Book 7B, CPLR 5019).

In Kiker v. Nassau Cty., 85 NY2d 879 [1995], this Court noted that under CPLR § 5019(a), "trial and appellate courts have the discretion to cure mistakes, defects and irregularities that do

not affect substantial rights of parties" (Kiker, at 881). The practice commentaries note that "[t]he Court of Appeals laid down the law on this in Herpe v. Herpe, 225 NY 323, 327 [1919), declaring that:

> [t]he rule has long been settled and inflexibly applied that the trial court has no revisory or appellate jurisdiction to correct by amendment error in substance affecting the judgment. It cannot, by amendment, change the judgment ... to meet some supposed equity subsequently called to its attention.... It cannot correct judicial errors either of commission or omission.... Clerical errors or a mistake in the entry of the judgment or the omission of a right or relief to which a party is entitled as a matter of course may alone be corrected ... through an amendment"

(David D. Siegel, 2007, Supplementary Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 5019).

It is uncontested that the May 2, 2016 order was a final order that disposed of this matter (16). That this was a final order as opposed to a judgment makes no difference. For good measure, this Court explained that while there was once a distinction between "final orders" and "final judgments," "modern practice" has abandoned this distinction (see, Slater v. Am. Mineral Spirits Co., 33 NY2d 443, 446 [1974]).

"It is elementary that a final judgment or order represents a valid and conclusive adjudication of the parties' substantive rights..." (Da Silva v. Musso, 76 NY2d 436, 440 [1990]) and is "final as to all questions at issue between the parties", "conclude[ing] all matters of defense which were or might have been litigated..." (Long Is. Sav. Bank v. Mihalios, 269 AD2d 502,

503, [2d Dept. 2000]). "[A] 'final' order or judgment is one that disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action apart from mere ministerial matters" (Burke v. Crosson, 85 NY2d 10, 15 [1995], citing, Cohen and Karger, Powers of the New York Court of Appeals §§ 10, 11).

As the trial court "was without jurisdiction to change the final order...as to substance" (Coulbourn v. Burns, 286 AD 856 [2d Dept. 1955], aff'd, 309 NY 915 [1955], citing, Herpe v. Herpe, 225 NY 323 [1919]), we respectfully submit that the scope of the court's authority under CPLR § 5019(a) is relevant and presents a leave worthy issue.

POINT IV:

THE FIRST DEPARTMENT'S DECISION WHICH ABSOLVED THE EXCESS INSURER, WHICH FOLLOWED FORM TO THE UNDERLYING POLICY, OF PAYING ANY POST-JUDGMENT INTEREST AND PRE-JUDGMENT INTEREST ON THE FIRST $1 MILLION PRESENTS A LEAVE WORTHY ISSUE.

It is uncontested that ICSOP's excess policy followed form to the Arch policy. "An excess policy may be written in two forms: as a stand-alone policy or as a policy that follows form...[A] follows form excess policy incorporates by reference the terms of the underlying policy and is designed to match the coverage provided by the underlying policy" (23-145 Appleman on Insurance § 145.1). "In other words, under such a provision, the excess insurer provides coverage subject to exactly the same terms and

conditions as those of the underlying insurance" (1-16 New Appleman New York Insurance Law § 16.04); see, Travelers Cas. & Sur. Co. v. Gerling Global Reins. Corp. of Am., 419 F.3d 181 [2d Cir. 2005][holding that where a certificate contains a "follow the form" clause, concurrency is presumed between the terms of the certificate and the underlying policy])[5].

"Following form language requires adherence to the actual language of the underlying policy where the excess policy is silent but does not require adherence to a judicial interpretation of the underlying policy or the underlying carrier's conduct" (James M. Fischer, Insurance Coverage for Mass Exposure Tort Claims: The Debate over the Appropriate Trigger Rule, 45 Drake L. Rev. 625, 691 (1997), citing, Matter of Midland Ins. Co., 164 Misc. 2d 363 [Sup. Ct. 1994], aff'd as modified sub nom. In re Liquidation of Midland Ins. Co., 269 AD2d 50 [1st Dept. 2000]).

"[W]henever an insurer wishes to exclude certain coverage from its policy obligations, it must do so 'in clear and unmistakable' language" (Simplexdiam, Inc. v. Brockbank, 283 AD2d 34, 38 [1st Dept. 2001], quoting, Seaboard Surety Co. v. Gillette Co., 64 NY2d 304, 311 [1984], quoting, Kratzenstein v. Western

[5] See also Douglas R. Richmond, Rights and Responsibilities of Excess Insurers, 78 Denv. U. L. Rev. 29, 30 [2000][An excess policy may be written as "stand alone" (with its own terms and conditions as stated in the excess policy) or as "follow form," which incorporates the terms and conditions of the primary policy]).

Assur. Co., 116 NY 54, 59 [1889]). Thus, "[a]n insurance company that uses a follow form policy must be cautious because it may inadvertently bind itself to unintended obligations...[T]oo often the insurance companies come to the courts asking that the courts supply the lacunae in their contract. Certainly, when the dispute concerns legal rights and obligations as between insurance companies, it is not too much to ask that they make specific provisions, either in their contracts or by treaties of understanding between themselves" (4Pt2 Bruner & O'Connor Construction Law § 11:542, Excess "follow-form" coverage, quoting, Johnson Controls, Inc. v. London Market, 325 Wis.2d 176 [2010]).

Following form excess insurance policies, such as this one, have been interpreted by looking to whether the provision in the primary policy which is to be incorporated is facially inconsistent with another term found in the excess policy (see, Home Ins. Co. v. Am. Home Prods. Corp., 902 F.2d 1111, 1113-14 [2d Cir. 1990][holding the terms of a primary policy which provided for supplementary payments conflicted with the excess policy that followed form, which contained single coverage provision that excluded supplementary payments]; Federated Rural Elec. Ins. Corp. v. Certain Underwriters at Lloyds, 293 Fed.Appx. 539, 541 [9th Cir. 2008][finding there was no conflict between the excess and primary policies where the excess policy was "simply less specific," because it failed to define the term "earth movement"]).

It follows that when parties intend the coverage provided by a following form policy to depart from the coverage in the followed policy, they must express that intention explicitly. For example, in Home Insurance Co. v. American Home Products Corp., 902 F.2d 1111, 1113-14 (2d Cir. 1990), the Second Circuit held that where an excess policy, which followed form to the primary policy, "explicitly exclude[d]" certain costs covered in the underlying policy, the "express exclusions" trumped the following form provision and barred coverage.

Here, although the Arch policy stated that "We will have the right and duty to defend the insured against any 'suit seeking those[6] damages" (398), ICSOP's excess policy specifically excluded any duty to defend. Specifically, ICSOP stated, "We will not be obligated to assume charge of the investigation, settlement or defense of any claim made, suit brought or proceeding instituted against the insured" (83). However, the ICSOP excess policy did not exclude any obligations set forth under the supplementary payments provision of the Arch policy, including pre-judgment and post-judgment interest.

The First Department's decision failed to articulate any inconsistent language between the Arch policy and ICSOP excess

[6] The word "those" refers to covered damages in the preceding sentence, which states "We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury, 'property damage', or 'personal and advertising injury' to which this insurance applies"

policy which warranted absolving ICSOP of paying any post-judgment interest. ICSOP's policy stated that it is responsible for the "ultimate net loss" in excess of the Arch policy limits, which was $1 million. The "ultimate net loss" did not exclude pre-judgment and post-judgment interest. If ICSOP wanted to limit its exposure for paying pre-judgment and post-judgment interest, it was required to exclude interest from the "ultimate net loss".

For instance, in Home Ins. Co. v. American Home Prods. Corp., 902 F.2d 1111, the excess insurer, who's policy followed form to the primary policy was not responsible for paying postjudgment interest on the award because the excess policy explicitly excluded "interest accruing after entry of judgment" and "legal expenses" from [the] "ultimate net loss" [Id., at 1113]; see also, TIG Ins. Co. v. N. Am. Van Lines, Inc., 170 S.W.3d 264, 269 [Tex. App. 2005]["In fact, both TIG and NAVL agree the definition of "ultimate net loss" in the Royal policy includes coverage for prejudgment and post judgment interest"]).

In Fox v. Will County, 2012 U.S. Dist. LEXIS 115255, at *16 [N.D. Ill. 2012] the excess insurance policy specifically stated that the:

> "Ultimate Net Loss shall exclude all interest accruing after entry of judgment, costs and expenses, except with the consent of the Company"

If ICSOP did not want to pay interest, then it had to have stated this clearly. There is no authority which supports the

First Department's strained interpretation of the policies. "If the plain language of the policy is determinative, [the Court] cannot rewrite the agreement by disregarding that language" (Fieldston Property Owners Ass'n v. Hermitage Ins. Co., 945 NE2d 1013, 1017 [2011], citing, Raymond Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 5 NY3d 157, 162 [2005]). "A court may not make or vary the insurance contract to accomplish its notions of abstract justice or moral obligation" (N.Y. Pattern Jury Instr.–Civil Division 4 B 3 Intro. 1, citing, Keyspan Gas East Corporation v Munich Reinsurance America, Inc., 31 NY3d 51 [2018]; Breed v Insurance Co. of North America, 46 NY2d 351 [1978]; P.J.P. Mechanical Corp. v Commerce and Industry Insurance Co., P.J.P. Mech. Corp. v. Commerce & Indus. Ins. Co., 65 AD3d 195 [1st Dept. 2009]).

"[ICSOP]...agreed to follow form to the [Arch] policy as written, not as secretly imagined by [ICSOP]" (Carlson Mktg. Grp., Inc. v. Royal Indem. Co., 517 F. Supp. 2d 1089, 1118 [D. Minn. 2007]). "Due to the nature of the follow form provision, [ICSOP] cannot rely on the absence of a provision as otherwise providing that there would be [obligation to pay pre-judgment and post-judgment interest]" (4Pt2 Bruner & O'Connor Construction Law § 11:542, citing, Johnson Controls, Inc. v. London Market, 325 Wis. 2d 176 2010][citation omitted]). Thus, if ICSOP wanted to limit its liability for paying postjudgment interest and prejudgment

interest, it was required to exclude interest from the "ultimate net loss" when it drafted its insurance policy, and certainly not follow form to the Arch policy.

There was no reason to assume that ICSOP did not follow form to the Supplementary Payments provision in the Arch policy. This issue was decided by the United States District Court, District of Colorado on March 36, 2019, less than a week ago. In American Guarantee & Liability Insurance Co., v. Environmental Materials LLC, 2019 WL 1358839 [D. Colo. Mar. 26, 2019], the district court granted the plaintiff's motion for summary judgment "in so far as the Court declares that the Umbrella Policy 'followed form' with regard to Supplementary Payments" (Id., at *9).

Thus, there was no reason for the First Department to assume that the supplementary payments provision solely applied to the underlying insurer and absolved it of any responsibility for pre-judgment and post-judgment interest. The First Department's decision was contrary to the insured's reasonable expectations.

In 1963, the insurance industry established "Guiding Principles for Overlapping Insurance Coverages" (the "Guiding Principles") to "eliminate" disputes arising in "the adjustment and apportionment of losses and claims because of overlapping coverages" (Glassalum Int'l Corp. v. Albany Ins. Co., 2005 WL 1214333, at *4 [S.D.N.Y. 2005]). These Guiding Principles are relevant to the issue of the parties' reasonable expectations

because they reflect industry practice and understanding (Id., citing, Monarch Cortland v. Columbia Casualty Co., 165 Misc.2d 98, [Sup.Ct. 1995]["[T]he court employs the [Guiding Principles for Insurers of Primary & Excess Coverage] as an indication of a practice or a goal of the insurance industry."), aff'd as modified, 224 AD2d 135 [3d Dept. 1996]).

At best, when it came to paying pre-judgement and post-judgment interest, the Arch policy overlapped with ICSOP's excess policy. If the Arch policy was voided or inapplicable, there is no reason to assume that ICSOP would not be responsible for the interest up to the limits of its excess policy. The First Department's decision constituted a judicial alteration of that contractual balance, without any policy language justifying such an outcome, was contrary to the "reasonable expectations of the average insured," (Cragg v. Allstate Indem. Corp., 17 NY3d 118, 122 [2011]) and to the related principle that "[i]f the terms of a policy are ambiguous ... any ambiguity must be construed in favor of the insured and against the insurer" (White v. Cont'l Cas. Co., 9 NY3d 264, 267 [2007]).

Moreover, there was no reason to assume that the ultimate net loss did not encompass pre-judgment and post-judgment interest. Four months after this Court answered the certified questions from the Delaware Supreme Court in In re Viking Pump, Inc., 27 NY3d 244

[2016][7] and remanded the matter, the Delaware Supreme Court, applying New York Law addressed the issue of when the term "ultimate net loss" was undefined in an excess insurance policy. The Delaware Supreme Court held in pertinent part:

> "As used in the Group One policies, the undefined term "ultimate net loss" does not create an independent duty to pay defense expenses outside the policy limits. Rather, the Group One policies employ "ultimate net loss" to establish a limit that the insurer is obligated to pay, and such limit is inclusive of expenses. The Group One policies fail to exclude defense costs from the limit of covered ultimate net loss. The Superior Court's conclusion that the Group One policies pay defense costs within policy limits is affirmed.

(In re Viking Pump, Inc., at 665).

In this case, ICSOP's use of the term "ultimate net loss", which failed to exclude pre-judgment and post-judgment interest, required it to pay the underlying judgment (less the $1 million limit) within its policy limits. Thus, while the underlying insurer was obligated to pay interest past its policy limits, in the event the underlying insurance was inapplicable, ICSOP was required to pay interest up to its policy limits.

At best, the term "ultimate net loss" is ambiguous (see, Continental Casualty Co. v. Armstrong World Industries, Inc., 776

[7] The Delaware Supreme Court certified two questions to this Court regarding how to allocate losses among insurers for injuries potentially triggering coverage across multiple policy periods. This Court held existence of non-cumulation and prior insurance provisions in excess insurance policies mandated use of the all sums allocation method, and 2 insureds were required to vertically exhaust all triggered primary and umbrella excess layers before tapping into any of the additional excess policies (In re Viking Pump, Inc., 27 NY3d 244 [2016], opinion after certified question answered, 148 A.3d 633 [Del. 2016])

F. Supp. 1296, 1301 [N.D. Ill. 1991]; Mission Nat'l Ins. Co. v. Duke Transp. Co., 792 F.2d 550, 554 [5th Cir. 1986][holding the "Ultimate Net Loss" definition is unambiguous and applied to expenses covered by insurance in addition to the directly underlying insurance]; Bernard Lumber Co. v. Louisiana Ins. Guar. Ass'n, 563 So. 2d 261, 265 [La. App. 1990][same]). The First Departments' finding to the contrary presents a leave worthy issue.

POINT V:

THE FIRST DEPARTMENT'S DECISION, FINDING THAT ICSOP'S EXCESS POLICY WAS "TRIGGERED" UPON THE PRIMARY CARRIER'S PAYMENT OF "SUPPLEMENTAL PAYMENTS" IN ADDITION TO THE FULL PRIMARY POLICY LIMIT OF $1 MILLION PRESENTS A LEAVE WORTHY ISSUE

The First Department accepted ICSOP's argument that requiring it to pay prejudgment and post-judgment interest impermissibly seeks to have it drop down to cover a gap in coverage. Specifically, ICSOP argued, and the First Department agreed that "it's 'maintenance' provision clearly expresses the parties' understanding" that "the gap in coverage created by the voiding of the Arch Policy... also encompasses the interest covered under the Arch Policy" (ICSOP's brief at 25). In accepting this argument and rejecting plaintiff's argument, the First Department stated that plaintiff:

> ...does not adequately take into account that the "terms and conditions" of the underlying Arch policy include, in its Supplementary Payments provision, Arch's agreement to cover prejudgment interest "on that part of the judgment we pay," i.e., the first $1 million, and "all" postjudgment interest on the "full amount of any judgment." The actual ICSOP "follow

> form" provision, moreover, states: "Except for the ... conditions ... 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."
>
> Among the "conditions" of the ICSOP policy is the "Maintenance of Underlying Insurance" provision, pursuant to which, and 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 payments set forth in the Supplementary Payments provision.

(Jin Ming Chen v. Ins. Co. of the State of Pennsylvania, 165 AD3d at 589, supra).

The Appellate Division's decision, which created conditions that went far beyond the terms of the policies, carved out a new rule that excess coverage is now triggered after the judgment exceeds the predetermined amount set forth in the policies' declarations and an undetermined amount under the supplementary payments section.

The concept of excess coverage means that it "attaches only after a predetermined amount of 'primary' coverage has been exhausted" (Am. Home Assur. Co. v. Republic Ins. Co., 984 F.2d 76, 77 [2d Cir. 1993], citing, Hartford Accident & Indem. Co. v. Michigan Mutual Ins. Co., 93 AD2d 337, 338-39 [1st Dept. 1983], aff'd 61 NY2d 569 [1984]; Union Indem. Ins. Co. v. Certain Underwriters at Lloyd's, 614 F.Supp. 1015, 1017 [S.D.Tex. 1985]; B. Ostrager & T. Newman, Handbook on Insurance Coverage Disputes

§ 6.03[a] [5th ed.]). "This is accomplished by stating dollar limits on the declarations page of the policy..." (Insurance Coverage of Construction Disputes § 4:4 (2d ed.), November 2018 update). "Issues involving policy limits often arise out of determination of 'occurrence," (1 Excess Liability Rights & Duties of Commercial Risk Insureds & Insurers § 5:2).

ICSOP's "maintenance" provision states that:

> "The limits of insurance of the Underlying Insurance shown in Item 4 of the Declarations [the Arch Policy] 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 damages . . . 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 had you fully complied with this requirement".

(84).

Item 4 of ICSOP's declarations page, entitled "Schedule of Underlying Insurance" stated that the underlying insurance policy's applicable limits was set forth in the attached schedule (80). The attached "Schedule of Underlying Insurance" stated that the limits of the Arch policy was $1 million for each occurrence (88).[8] It made no reference to the Arch policy's Supplementary Payments section.

[8] Arch failed to submit the second page of its declarations page, setting for the exact limits of its policy when it opposed plaintiff's motion for summary judgment. It also failed to submit second page of its declarations page when it moved for reargument and when it moved for resettlement. However, ICSOP's excess policy's declaration page sets forth the limits of the Arch policy.

Based on a plain reading of these terms, the insured was merely required to maintain a primary policy with limit of $1 million in coverage. There is nothing on the face of ICSOP's excess policy that required the insured to maintain the primary policy limits plus the additional coverage afforded in the "supplementary payments" section of the Arch policy. The First Department's decision, which found that the Supplementary Payments section increased the limits of the Arch policy, which in turn had to be reached to trigger ICSOP's excess policy was contrary to the terms of the excess policy.

It is well established that a supplementary payments provision does not increase the policy's liability limits; the policy's liability limits are always those stated in the declarations" (Douglas R. Richmond, The Subtly Important Supplementary Payments Provision in Liability Insurance Policies, 66 DePaul L. Rev. 763, 766 [2017][citing, inter alia, Levit v. Allstate Ins. Co., 308 AD2d 475 [2d Dept. 2003][explaining that a policy's "limit of insurance" and "applicable policy limits" do not include costs and interest payable under a supplementary payments provision).

There is not one reported decision which holds that the supplementary payments section increases the limits of an insurance policy for purposes of triggering excess insurance. The language in the supplementary payments provision "simply means

that payments made pursuant to the Supplementary Payments provision, Section[s] [1(F) and 1(G)]...are supplemental to the [$1 million] limit. It does not change the 'applicable limits of insurance'" (Graf v. Hosp. Mut. Ins. Co., 956 F. Supp.2d 337, 343 [D. Mass. 2013], aff'd, 754 F.3d 74 [1st Cir. 2014]).

In addition, the First Department's decision conflicts with the Second Department's decision in Levit v. Allstate Ins. Co., 308 AD2d 475, supra, which expressly states that a policy's "limit of insurance" and "applicable policy limits" do not include costs and interest payable under a supplementary payments provision. The majority of courts are in accord (see, Levin v. State Farm Mut. Auto. Ins. Co., 510 SW2d at 458-59, supra, cited by Levit v. Allstate Ins. Co. [a supplementary payment provision stating that the insurer will pay pre- or post-judgment interest or first aid expenses does not increase the policy limits for purposes of determining in a bad faith case whether the plaintiff offered to settle within the limits]; Hargob Realty Assocs., Inc. v. Fireman's Fund Ins. Co., 73 AD3d 856, 858 [2010]["Liability coverage under the policy is afforded by Section I, not the supplementary payments provision"]; White v Auto Club Inter-Insurance Exch., 984 SW2d 156, 158 [Mo Ct App 1998]["The supplementary payment provision provided for compensation to a covered person 'in addition to [the] limit of liability.' It was a separate obligation beyond the company's limit of liability of $ 50,000"]; Vazquez-Filippetti v

Cooperativa de Seguros Múltiples de Puerto Rico, 723 F3d 24, 30 [1st Cir 2013]["postjudgment interest is...definition...a supplementary payment [i]n addition to [the] liability limits" [internal quotations omitted]; State Farm Gen. Ins. Co. v Mintarsih, 175 Cal App 4th 274, 289 [2009]["The limits of liability apply to the personal liability coverage under the policies, but do not apply to the supplemental payments obligation"]; Graf v. Hosp. Mut. Ins. Co., 754 F.3d 74, supra).

The only way the First Department could have logically affirmed the judgment was if ICSOP's excess policy stated, at the very least, that it was not responsible for paying pre-judgment and post-judgment interest. Not even a strained interpretation of ICSOP's excess policy lends support to the First Department's decision finding that that the Supplementary Payments section in the Arch policy increased the limits of the underlying insurance referenced in ICSOP's maintenance provision and declarations.

"The 1986 and later standard ISO CGL policies under Supplementary Payments—Coverages A and B expressly provide that prejudgment interest payments 'will not reduce the limits of insurance'" (Insurance Coverage of Construction Disputes § 6:4 (2d ed.) and that "[postjudgment interest] payments will not reduce the limits of insurance" (Id. at §6:5). As the First Department's decision impacts almost every excess insurance policy that follows

form to an underlying commercial general liability policy, we submit this presents an issue worthy of this Court's review.

POINT VI:

THE FIRST DEPARTMENT'S DECISION, WHICH CONFLICTS WITH THIS COURT'S DECISIONS IN RAGINS V. HOSPS. INS. CO., 22 NY3D 1019 [2013] AND WELSH V. PEERLESS CAS. CO., 8 AD2D 373 [1ST DEPT. 1959], AFF'D, 8 NY2D 745 [1960]

The First Department's decision, which is in direct conflict with this Court's decision in Ragins v. Hosps. Ins. Co., 22 NY3d 1019 [2013] and Welsh v. Peerless Cas. Co., 8 AD2d 373 [1st Dept. 1959], aff'd, 8 NY2d 745 [1960], permitted ICSOP to avoid its contractual obligation to the plaintiff and its insured with excess insurance coverage in direct contravention of the plain language of the applicable insurance policies. The decision, which violates the settled case law regarding the interpretation and application of unambiguous contracts and insurance policies presents a leave worthy issue.

The First Department stated that it disagreed:

> ...that either Ragins v. Hospitals Ins. Co., Inc., 22 NY3d 1019 [2013] or Welsh v. Peerless Cas. Co., 8 AD2d 373 [1st Dept. 1959], affd 8 NY2d 745 [1960] supports plaintiff's position, given key distinctions in the policy language at issue in those cases.

(Jin Ming Chen v. Ins. Co. of the State of Pennsylvania, 165 at 590, supra).

The First Department apparently distinguished this case from Ragins because the supplementary payments clause, which was not

listed in the declarations page, stated that it did not reduce the limits of the underlying insurance. However, as noted above, the maintenance provision stated that ICSOP's excess coverage would be triggered upon exhaustion of the "limits of insurance of the Underlying Insurance shown in Item 4 of the Declarations," (Jin Ming Chen v. Ins. Co. of the State of Pennsylvania, 165 AD3d at 589, supra), which only referred Arch policy's $1 million limit. As the declarations page did not reference the underlying policy's Supplementary Payments provision, excess coverage was triggered upon exhaustion of the underlying policy's $1 million limit (see, 5 Legal Malpractice § 38:17 [2019 ed.]["supplementary payments" are "in addition to the specific policy limits"]).

According to the record on appeal in Ragins, HIC's excess policy made it "a condition...that the Named Insured maintain...the underlying insurance and underlying limits specified in the Declarations" (Record at 57). Moreover, HIC's excess policy stated that it would "not provide coverage for sums which do not exceed the limits of liability of the Underlying Policy *except when the aggregate limits of the Underlying Policy have been exhausted by payment of claims...*" (Id).

Conversely, the ICSOP policy did not make it a condition to maintain the underlying insurance and did not make payment of the underlying policy a condition of triggering excess coverage. "Under this type of provision, the insured's failure to obtain or

maintain underlying insurance will not preclude coverage under the excess or umbrella policy. The insured's recovery from the excess insurer will, however, be limited to that amount which is in excess of the underlying coverage" (1 New Appleman New York Insurance Law § 16.08).

Although HIC's excess policy in Ragins conditioned coverage upon payment of the underlying insurance, in cases like this, New York adheres to the Second Circuit's decision in Zeig v. Mass. Bonding & Insurance Co., 23 F.2d 665 [2d Cir. 1928], which provides that "the fact that the insured may not have actually received the full amount of the primary coverage from the primary insurer should be of no consequence to the excess or umbrella insurer" (1 New Appleman New York Insurance Law § 16.08).

Thus, while the excess policy in Ragins was triggered when the liquidator of the insolvent primary insurer paid the $1 million per occurrence liability limit, excess coverage in this case was triggered when the loss exceeded the $1 million attachment point. With the exception of these distinctions, we submit that the First Department's decision is in direct conflict with Ragins.

In Ragins, this Court stated that "under the excess policy, HIC must cover any professional liabilities, including interest, above the primary policy's $1,000,000 limit. In that regard, the excess policy states that HIC will pay 'all sums' which are in excess of that limit and which plaintiff 'shall become legally

obligated to pay as damages.' And, although the excess policy does not specifically mention interest as a covered "sum" of "damages," that is of no moment because the excess policy does not limit the definition of "sums" to any particular category of damages or liability, or otherwise exclude interest from its reach" (Ragins, at 1021-22).

In this case, ICSOP, in addition to being responsible for the insured's "Ultimate Net Loss" in excess of the limits of the underlying insurance in the declarations, followed form to the Arch policy, which stated that it "will pay those sums that the insured becomes legally obligated to pay as damages...to which this insurance applies" (398).

In Ragins, "although the excess policy does not specifically mention interest as a covered 'sum' of 'damages,' that [was] of no moment because the excess policy [did] not limit the definition of 'sums' to any particular category of damages or liability, or otherwise exclude interest from its reach" (Ragins, at 1022, supra). "In fact, given that the excess policy does not define 'sums' at all, that contractual term logically acquires its widely used meaning of "indefinite or specified amount[s] of money" (Id). This Court went on to state:

> Similarly, the parties evidently intended that "damages" would retain its most common meaning, namely "[t]he sum of money which the law awards or imposes as pecuniary compensation, recompense, or satisfaction for an injury done or a wrong sustained as a consequence either of a breach of

> a contractual obligation or a tortious act" (Ballentine's Law Dictionary [3d ed. 2010], damages). By those definitions, interest included in any judgment against plaintiff constitutes a "sum" of money that is traceable to the judgment against him for "damages" in satisfaction of the wrong he caused to an injured party. Therefore, if that prejudgment interest is "in excess" of the primary policy's $1,000,000 liability limit, HIC must pay it. Indeed, even if there were any ambiguity as to whether the covered sums under the excess policy include interest, that ambiguity must be construed against HIC and in favor of plaintiff, thus providing coverage for that amount under the excess policy.
>
> * * *
>
> Thus, the additional interest on the judgment, as amended, constituted a "sum[ ] in excess of the limits of liability of the Underlying Policy," which is covered by the excess policy. Accordingly, HIC had to pay the additional interest.

(Ragins, at 1022-1023 supra).

The Court further stated that plaintiff did 'not impermissibly seek to have HIC 'drop down' to fulfill any duty which otherwise would fall to the primary insurer if that insurer were still a going concern. Rather, if the primary insurer had remained solvent and paid the primary policy's $1,000,000 liability limit, HIC would still bear the responsibility for the remaining interest; that is simply its obligation under the plain language of the excess policy" (Ragins, at 1023, supra).

We submit that the First Department incorrectly accepted ICSOP's argument that requiring that it pay prejudgment and post-judgment interest impermissibly seeks to have it drop down to cover a gap in coverage. The language contained in the Arch policy, which ICSOP followed form stated that ICSOP "will pay those sums

that the insured becomes legally obligated to pay as damages...to which this insurance applies" (398) was almost identical to HIC's excess policy in Ragins[9].

Given the implications the First Department's decision has on this Court's decision in Ragins, we submit that this issue is leave worthy.

WHEREFORE, for the foregoing reasons, it is respectfully submitted that this Court should grant plaintiff's motion for leave to appeal to the Court of Appeals and grant any other relief it deems just, equitable and proper.

Dated: New York, New York
April 1, 2019

Kenneth J. Gorman

[9] The First Department's decision also conflicts with Welsh v. Peerless Cas. Co., 8 AD2d 373 [1st Dept. 1959], aff'd, 8 NY2d 745 [1960], which held that where an excess liability policy covered the insured's liability in excess of $10,000, and a judgment was entered against the insured in a death action for $12,500 damages, to which interest from the date of death to the date of verdict of $6,656 was added and included in the judgment, the insurer was liable for all of the interest, and not only for a proportionate share of the interest on the $2,500 which exceeded the deductible amount for which the defendant was uninsured (Id.).

EXHIBIT A

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on February 28, 2019.

Present - Hon. Rolando T. Acosta, Presiding Justice,
David Friedman
Barbara R. Kapnick
Troy K. Webber
Peter H. Moulton, Justices.

----------X

Jin Ming Chen,
Plaintiff-Appellant,

M-6433
Index No. 650142/14

-against-

Insurance Company of the State of Pennsylvania,
Defendant-Respondent.

----------X

Plaintiff-appellant having moved for reargument of, or in the alternative, for leave to appeal to the Court of Appeals, from the decision and order of this Court, entered on October 30, 2018 (Appeal No. 7512),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion denied.

ENTERED:

CLERK

EXHIBIT B

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 **NOTICE OF ENTRY OF DECISION AND ORDER OF THE APPELLATE DIVISION, FIRST DEPARTMENT**

SIRS:

PLEASE TAKE NOTICE that the within is a true copy of the decision and order of the Supreme Court, Appellate Division, First Department, duly entered on October 30, 2018, and unanimously affirming the Judgment of the Supreme Court, New York County (Eileen A. Rakower, J.), entered June 30, 2017, without costs.

Dated: West Hartford, Connecticut
October 31, 2018

Yours, etc.,

SEIGER GFELLER LAURIE LLP

By: _____

Elizabeth F. Ahlstrand, Esq.
Attorneys for the Defendant
977 Farmington Ave / Suite 200
West Hartford, CT 06107
Tel. 860-760-8400 / Fax. 860-760-8401

To: Wade T. Morris, Esq.
Kenneth J. Gorman, Esq.
Law Offices of Wade T. Morris
Counsel for the Plaintiff
225 Broadway, Suite 307
New York, NY 10007

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 **AFFIDAVIT OF SERVICE**

I, **Heather McCoy**, Esq., being duly sworn, and under the penalties of perjury, deposes and says:

1. I am not a party to this action, am over the age of eighteen (18), and reside in Torrington, CT.

2. I am an associate with **Seiger Gfeller Laurie LLP**, attorneys for Defendant **Insurance Company of the State of Pennsylvania.**

3. On this 31st day of October, 2018, I served the foregoing **Notice of Entry** by e-filing the same through the Court's electronic filing system and by first class mail at the address indicated below:

Wade T. Morris, Esq.
Kenneth J. Gorman, Esq.
Law Offices of Wade T. Morris
Counsel for Plaintiff
225 Broadway, Suite 307
New York, New York 10007

Heather J. McCoy
Heather McCoy, Esq.

Sworn to before me this 31st day of October, 2018
Ellen Rohner
Notary Public
Ellen Rohner
My Commission Exp: 4/30/23

Acosta, P.J., Friedman, Kapnick, Webber, Moulton, JJ.

7512 Jin Ming Chen, Index 650142/14
Plaintiff-Appellant,

-against-

Insurance Company of the State of Pennsylvania,
Defendant-Respondent.

Kenneth J. Gorman, P.C., New York (Kenneth J. Gorman of counsel), for appellant.

Seiger Gfeller Laurie LLP, New York (Elizabeth F. Ahlstrand of counsel), for respondent.

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered June 30, 2017, adjudging defendant liable to plaintiff for $1,526,938 with costs and interest from May 2, 2016, the date of the order granting partial summary judgment to plaintiff, for $159,638.23, for a total award of $1,686,576.23, unanimously affirmed, without costs.

The specific interest-related questions at issue here did not become clear until after the May 2, 2016 order; only then did Supreme Court clarify that excess insurer defendant (ICSOP) was not liable to plaintiff for the first $1 million of the judgment. ICSOP's failure to articulate its position on interest issues earlier does not support a finding of waiver, which requires an indication of an intentional relinquishment of a known right

that, except for the waiver, the waiving party would have enjoyed (*see e.g. DLJ Mtge. Capital Corp., Inc. v Fairmont Funding, Ltd.*, 81 AD3d 563 [1st Dept 2011]). Nor will waiver be implied "unless the opposite party is misled to his or her prejudice into the belief that a waiver was intended" (57 NY Jur 2d, Estoppel, Ratification and Waiver § 89), and plaintiff did not suffer prejudice from ICSOP's delay, as Supreme Court made no decision about interest until it provided both parties an opportunity to brief their respective positions.

ICSOP's interest-related arguments were not impermissible under CPLR 2221(d), since Supreme Court granted leave to reargue for the very purpose of enabling the parties to address the interest issue. As the record does not show that the court granted relief under CPLR 5019(a), plaintiff's arguments about the scope of the court's authority under that statute are not relevant here.

Plaintiff's interpretation of the "follow form" provision in the ICSOP policy is not persuasive. He acknowledges that a following form policy is read in accord with the terms and conditions of the underlying policy (*see e.g. Jefferson Ins. Co. of N.Y. v Travelers Indem. Co.*, 92 NY2d 363 [1998]). However, he does not adequately take into account that the "terms and conditions" of the underlying Arch policy include, in its

Supplementary Payments provision, Arch's agreement to cover prejudgment interest "on that part of the judgment we pay," i.e., the first $1 million, and "all" postjudgment interest on the "full amount of any judgment." The actual ICSOP "follow form" provision, moreover, states: "Except for the . . . conditions . . . 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." Among the "conditions" of the ICSOP policy is the "Maintenance of Underlying Insurance" provision, pursuant to which, and 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 payments set forth in the Supplementary Payments provision.

We disagree that either *Ragins v Hospitals Ins. Co., Inc.* (22 NY3d 1019 [2013]) or *Welsh v Peerless Cas. Co.* (8 AD2d 373 [1st Dept 1959], *affd* 8 NY2d 745 [1960]) supports plaintiff's position, given key distinctions in the policy language at issue in those cases. Finally, we disagree that the ICSOP policy provisions regarding "Maintenance of Underlying Insurance" and

"Ultimate Net Loss" encompassed underlying coverage only to the extent of the $1 million per occurrence the primary policy provided. The language of the policies do not support this interpretation, and instead supports 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.

We have considered the parties' remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 30, 2018

CLERK

EXHIBIT C

INDEX NO. 650142/2014
NYSCEF DOC. NO. 135 RECEIVED NYSCEF: 05/03/2016

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 650142/2014
CHEN, JIN MING
VS
INSURANCE COMPANY OF THE
Sequence Number : 001
SUMMARY JUDGMENT

PART 15

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

After oral argument and for the reasons stated on the record the motion for summary judgment is granted to the extent indicated.

The X motion is denied.

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

Dated: 5/2/16

MAY 02 2016

_____, 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

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

----------X

JIN MING CHEN,

Plaintiff(s),

-against-

INDEX NO.
650142/14

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

Defendant(s).

----------X

EXCERPTED DECISION

71 Thomas Street
New York, New York 10013
May 2, 2016

B E F O R E:

THE HONORABLE EILEEN A. RAKOWER,
J U S T I C E

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

WADE T. MORRIS, ESQ.
Attorney for Plaintiff
225 Broadway
New York, New York 10007

KENNETH J. GORMAN, ESQ.
Of Counsel Attorney to Wade T. Morris
225 Broadway
New York, New York 10007

SEIGER GFELLER LAURIE, LLP
Attorneys for Defendant
877 Farmington Avenue
West Hartford, Connecticut 06107
BY: ELIZABETH F. AHLSTRAND, ESQ.

Eric Allen
Official Court Reporter

PROCEEDINGS

(The following constitutes the Court's decision only. The complete oral argument was stenographically recorded by the official court reporter.)

THE COURT: To the extent that the plaintiff seeks a declaration that ICSOP's disclaimer of insurance coverage is invalid, clearly we have a situation where their disclaimer for late notice is invalid as against this plaintiff.

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, that that's -- that you are entitle to the benefit of that.

However, with regard to the balance of the judgment, ICSOP must satisfy that judgment.

So, I am giving you part of what you asked for, plaintiff, in seeking that.

I do not find that at this late time that ICSOP is free to now explore whether there would have been other grounds to disclaim even for the exclusion for employee. First of all, there has been no finding that the plaintiff was a Cheung employee. Secondly, it's not until 2014 that there's even this red flag raised. And, indeed, in 2010, ICSOP is saying, no, no, we're

PROCEEDINGS

going to rest on our late notice disclaimer and that position did not change until years later. So, I think that you are way out of the ballpark to try to seek to claim that now and, of course, you are not even prepared to claim that now. You are first seeking information which you may very well already possess since you are the workers comp coverage. So, there is certainly no excuse for such a late search for this information and so the cross-motion is denied.

There it is.

MR. MORRIS: Thank you, your Honor.

MR. GORMAN: Thank you, your Honor.

MS. AHLSTRAND: Thank you, your Honor.

****

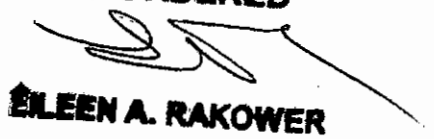
CERTIFIED THAT THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT OF THE ORIGINAL STENOGRAPHIC MINUTES IN THIS CASE.

ERIC ALLEN
SENIOR COURT REPORTER

MAY 10 2016

MAY 10 2016

SO ORDERED



EILEEN A. RAKOWER
J.S.C.

Eric Allen
Official Court Reporter

EXHIBIT D

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

Index No.: 650142/14

----------X

JIN MING CHEN,

Plaintiff-Appellant

-against-

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA

Defendant-Respondent

----------X

NOTICE OF MOTION FOR REARGUMENT AND/OR FOR LEAVE TO APEAL TO THE COURT OF APPEALS

PLEASE TAKE NOTICE, that upon the annexed affirmation of Kenneth J. Gorman, Esq., the notice of appeal and order appealed from the undersigned will move this Court at a Motion Part at the Courthouse located at 25th Street and Madison Avenue, New York, New York, on the 24TH day of December, 2018 at forenoon of that day or as soon thereafter as for an order providing the following relief:

[a] Pursuant to CPLR §2221[d] and 22 N reargument of this Court's deci October 30, 2018 which affirmed from and upon reargument, vacat remitting this matter for entry plaintiff all statutory interes personal injury judgment; or

[b] An order pursuant to CPLR Article leave to appeal to the Court of Ap October 30, 2018 decision and order; and

[c] Any other, further or different relief that this Court may deem just, proper and equitable.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

Index No.: 650142/14

----------X

JIN MING CHEN,

Plaintiff-Appellant

-against-

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA

Defendant-Respondent

----------X

NOTICE OF MOTION FOR REARGUMENT AND/OR FOR LEAVE TO APEAL TO THE COURT OF APPEALS

PLEASE TAKE NOTICE, that upon the annexed affirmation of Kenneth J. Gorman, Esq., the notice of appeal and order appealed from the undersigned will move this Court at a Motion Part at the Courthouse located at 25th Street and Madison Avenue, New York, New York, on the 24TH day of December, 2018 at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order providing the following relief:

[a] Pursuant to CPLR §2221[d] and 22 NYCRR §1250.16 granting reargument of this Court's decision and order dated October 30, 2018 which affirmed the judgment appealed from and upon reargument, vacating the judgment and remitting this matter for entry of judgment granting plaintiff all statutory interest on the underlying personal injury judgment; or

[b] An order pursuant to CPLR Article 56 granting plaintiff leave to appeal to the Court of Appeals from this Court's October 30, 2018 decision and order; and

[c] Any other, further or different relief that this Court may deem just, proper and equitable.

PLEASE TAKE FURTHER NOTICE that any answering affidavits are required to be served not later than seven (7) days prior to the return date of this motion pursuant to CPLR.

Dated: **New York, New York**
November 30, 2018

Yours, etc.,
Wade T. Morris, Esq.

By _____

Kenneth J. Gorman, Esq.
225 Broadway, 3rd Floor
New York, NY 10007
(212) 267-0033

To: Clerk of the Court

Elizabeth F. Ahlstrand
Seiger Gfeller Laurie LLP
Counsel for the Defendant
977 Farmington Ave., Suite 200
West Hartford, CT 06107
860-760-8400

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

Index No.: 650142/14

----------X

JIN MING CHEN,

Affirmation in Support

Plaintiff-Appellant

-against-

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA

Defendant-Respondent

----------X

Kenneth J. Gorman, an attorney duly licensed to practice law in the State of New York, hereby affirms under the penalties of perjury the truth of the following statements pursuant to I 2106:

I am appellate counsel to Wade T. Morris, Esq., the attorney for the plaintiff-appellant Jin Ming Chen (hereinafter the "plaintiff"). I am fully familiar with the facts and circumstances of this case based upon a review of the file maintained by my office and in the prosecution of this action. I submit this affirmation in support of the plaintiff's motion to reargue this Court's decision and order dated October 30, 30, 2018, or in the alternative, for leave to appeal to the Court of Appeals. This Court's decision and order is attached hereto at Exhibit "A" and the notice of appeal and judgment appealed from is attached hereto at Exhibit "B".

Judgment was entered on October 29, 2013. The total amount as of that date, including costs and $396,993.70 in prejudgment interest was $2,726,993.79 (164-165). On October 31, 2013, plaintiff served ICSOP with the judgment and demanded that it be satisfied, which included statutory interest (176). Specifically, plaintiff stated:

> Please find enclosed a copy of the judgment filed in the County Clerk of New York...dated October 29, 2013...awarding the Plaintiff...$2,726,993,70.
>
> Please be advised that we demand that you tender the full amount with post judgment interest within 30 days hereto. Failure to promptly tender will result in the accumulation of further interest at the statutory rate of 9% (approximately $20,452.45/month) and additional litigation.

(176).

Action for declaratory judgment

After ICSOP failed to satisfy the judgment, plaintiff commenced this action filing an amended summons and verified complaint dated January 16, 2014, seeking a declaration that ICSOP was obligated to satisfy the judgment entered October 29, 2013 (67-78).

The amended complaint asserted that "plaintiff demand[ed] judgment against [ICSOP] in the sum of TWO MILLION SEVEN HUNDRED TWENTY-SIX THOUSAND NINE HUNDRED NINETY-THREE AND SEVENTY CENTS ($2,726,993.70), together with 9% interest from October 29, 2013" (73, 77).

Plaintiff's motion for summary judgment

By notice of motion dated May 21, 2015, plaintiff moved for summary judgment, seeking an order that ICSOP's disclaimer was invalid "and to direct ICSOP to satisfy the judgment awarding the plaintiff $2,330,000, plus interest..." (20).

In his affirmation, plaintiff asserted that he was seeking an order directing "ICSOP to satisfy the judgment awarding the plaintiff $2,330,000, *plus interest...*" (20-21, 22, emphasis added). Plaintiff stated that "[a]n inquest was held" and that he "was granted a default judgment, awarding him…$2,330,000 *plus costs and statutory interest*" (25) and that "[j]udgment was entered on October 29, 2013; the total judgment as of that date, including costs and *interest totaled* $2,726,993.70" (33).

Plaintiff further argued that as a consequence of ICSOP's improper disclaimer, its insured, "Kam Cheung is liable for the full amount of the judgment of 2,330,000 plus costs and statutory interest" and that "ICSOP...is legally responsible for paying the entire amount" (50-51).

ICSOP's cross motion and opposition

By notice dated July 21, 2015, ICSOP cross-moved for discovery and opposed plaintiff's motion for summary judgment (311-312). ICSOP, conceded that its disclaimer was invalid (323) and acknowledged that it followed form to the Arch policy (327, 339). ISCOP acknowledged that in the underlying action, the "court held

an inquest on damages, awarding the plaintiff $2,330,000 and ...entered judgment against Kam Cheung for $2,726,993.70" (389).

ICSOP maintained that its "Excess Policy [did] not 'drop down' or otherwise satisfy the limit of the Arch Policy" (332). It then stated that to the extent it was liable:

> ...it is liable only for the amount of the judgment[1] less the $1,000,000 limit of the Arch Policy.

(333).

ICSOP never argued that it only had to pay prejudgment and postjudgment interest on $1.3 million, or any type of reduction in the amount of interest that it owed. In fact, ICSOP failed to even mention the word interest in the two attorney affirmations and memorandum of law it submitted in opposition to plaintiff's motion for summary judgment (316-342, 383-394).

Plaintiff's reply

In reply (559-590), plaintiff once again argued that he was seeking an order directing ICSOP "to satisfy the judgment entered in favor of the plaintiff in the amount of $2,726,993.70, plus interest, which was entered on October 29, 2013" (559). Point III of plaintiff's reply affirmation stated "ICSOP is obligated to pay the entire judgment, with statutory interest" (585).

ICSOP's sur-reply

[1] ICSOP acknowledged that the judgment included $396,993.70 in prejudgment statutory interest at paragraph 29 of its attorney's affirmation in opposition to plaintiff's motion for summary judgment ($2,330,000 + $396,993.70 = $2,726,993.70) (389).

After the motions were fully submitted ICSOP discharged its attorneys. After retaining new counsel, ICSOP filed a sur-reply. While ICSOP's new counsel theoretically could have raised this issue in its sur-reply, it failed to do so. In fact, ICSOP did not even mention the words "statutory interest", "prejudgment interest" or "postjudgment interest" in its sur-reply (724-736).

Hearing on plaintiff's motion and ICSOP's cross motion

On May 2, 2016, the trial court held oral argument on plaintiff's motion for summary judgment and ICSOP's cross motion to compel discovery (843-874). At the start of the hearing, the court acknowledged that plaintiff was seeking an order directing ICSOP to satisfy the judgment, which included interest:

> THE COURT: I have plaintiff's motion for summary judgment seeking a declaration that the defendant, Insurance Company of the State of Pennsylvania, ICSOP, that their disclaimer of insurance coverage is invalid as a matter of law and seeking to have me direct ICSOP to satisfy a judgment awarding plaintiff $2,330,000 *plus interest*, which was entered on October 29th, 2013.

(844, emphasis added).

The Court rejected ICSOP's demand for further discovery but agreed that it did not have to cover the first million because the policy did not contain a drop-down provision (865-866, 872). However, the Court stated, "with regard to the balance of the judgment, ICSOP must satisfy that judgment" (872).

Final order; proposed judgment

The trial court issued a final order on May 2, 2016, granting plaintiff's motion for summary judgment to the extent indicated on the record, and marked the case disposed (16).

Plaintiff, in accordance with the final order, submitted a proposed judgment to the Clerk on May 10, 2016, directing ICSOP to satisfy the underlying judgment minus the million-dollar credit it received (875).

ICSOP's first motion to resettle and/or reargue

By notice dated June 1, 2016, ICSOP moved to resettle plaintiff's proposed judgment pursuant to CPLR § 5019(a), by drastically reducing the amount of interest plaintiff could recover, or for leave to reargue the amount of interest plaintiff was entitled to (825-840).

In opposition (891-915), plaintiff asserted that ICSOP waived this argument as it did not address plaintiff's demand for statutory interest when it opposed plaintiff's motion for summary judgment (893, 898-901). In addition, plaintiff argued that ICSOP could not reargue an issue it never raised prior to entry of the final order (894, 906-907). Plaintiff further argued that the trial court lacked jurisdiction to make substantive changes to the final order pursuant to CPLR § 5019(a) (893-894, 902-905). Finally, plaintiff asserted that ICSOP's substantive argument lacked merit, as it contradicted the terms of the policy and relied

on cases from Georgia and Louisiana that conflicted with New York law (909-915).

October 26, 2016 order

By order dated October 26, 2016, the Supreme Court (Rakower, J.) denied ICSOP's motion, stating "Leave to reargue is denied" and once again marked the matter disposed (932).

ISCOP's second motion to resettle

By notice dated November 29, 2016, ISCOP moved for leave to resettle plaintiff's proposed judgment, asserting that while the Court denied its motion to reargue, it did not address its request for resettlement (933-944). As noted above, when it opposed plaintiff's motion for summary judgment, ISCOP acknowledged that the underlying judgment was $2,726,993.70 and that it was liable "for the amount of the judgment less the $1,000,000 limit of the Arch Policy" (333, 389). Now, it argued that "plaintiff's proposed judgment should be resettled to reflect that ISCOP is not responsible for the interest accrued/accruing on the entire underlying judgment" (940-944).

Plaintiff's cross motion and opposition

By notice dated December 8, 2016, plaintiff cross-moved for the court to sign his proposed judgment or for an order directing the clerk to enter judgment as per the clerk's directive (946-974). In opposition, plaintiff reiterated the same arguments above (956-973).

ICSOP's opposition and proposed judgment

In opposition (991-1006) ICSOP submitted a proposed judgment which only accounted for prejudgment interest on $1.33 million from December 8, 2011, the date plaintiff was granted summary judgment in the underlying action to October 29, 2013, the date the underlying judgment was entered (1007-1009). ISCOP's proposed judgment eliminated all post-judgment interest accruing from October 29, 2013 to May 2, 2016 with post-judgment interest only starting to accrue after May 2, 2016, when plaintiff was granted summary judgment in the declaratory action (1007-1009). Thus, their judgment now contained over 70% less interest than plaintiff was originally awarded.

Interim order granting reargument

By order dated February 1, 2017, the Supreme Court, New York County (Rakower, J.) granted ISCOP leave to reargue the issues of prejudgment and postjudgment interest and directed the parties to submit supplemental briefs on these issues (1010).

ISCOP's supplemental brief

In its supplemental brief (1012-1029), ICSOP now argued that because the Arch policy was rescinded, "Kam Cheung is now self-insured with respect to the coverage which would have otherwise been afforded by the Arch policy, including payment of the $1,000,000 primary limits, prejudgment interest on that amount and

postjudgment interest on the full amount of the judgment until the $1,000,000 primary limits are exhausted" (1013).

ISCOP maintained that because Kam Cheung did not tender the $1 million primary limits it was only responsible for prejudgment interest on $1.33 million (it's proportional share) and that it was not responsible for paying any postjudgment interest (1013-1014). In the alternative, ISCOP argued that plaintiff could not recover any prejudgment or postjudgment interest which accrued on the $1 million of the underlying judgment (1014).

Plaintiff's supplemental brief

After pointing out for the third time that ICSOP could not have these issues reviewed under CPLR § 2221(d) and § 5519(a) (1041-1043), plaintiff explained that because ICSOP conceded that it followed form to the Arch policy, it was liable for all postjudgment interest, as its excess policy matched the coverage of Arch's policy (1043-1044, 1050-1055). Plaintiff further noted that the primary policy in this case contained the same supplementary payments clause governing prejudgment and postjudgment interest as the policy in Ragins v. Hospitals Ins. Co., 22 NY3d 1019 [2013], and that ICSOP's arguments were identical to the arguments that the Ragins Court rejected (1055-1069). Moreover, under the plain terms of ICSOP's excess policy, especially its "ultimate net loss" provision, it was responsible for all accrued interest (1069-1071).

Judgment appealed from

On June 20, 2017, the court signed ICSOP's proposed judgment, absolving ICSOP from paying any pre and post judgment interest on the first $1 million of the underlying judgment, and inexplicably eliminated any postjudgment interest that accrued from October 29, 2013 to May 2, 2016 (14-15).

The Appellate Division's decision and order

In a decision and order dated October 26, 2018, the Appellate Division, First Department affirmed the judgment. Although plaintiff's pleadings framed the issue of prejudgment and postjudgment interest and plaintiff's motion for summary judgment sought an order directing "ISCOP to satisfy the judgment awarding the plaintiff $2,330,000, plus interest"., the First Department determined that ICSOP's arguments pertaining to prejudgment and postjudgment interest were not waived and properly raised after entry of the final order:

> The specific interest-related questions at issue here did not become clear until after the May 2, 2016 order; only then did Supreme Court clarify that excess insurer defendant (ICSOP) was not liable to plaintiff for the first $1 million of the judgment. ICSOP's failure to articulate its position on interest issues earlier does not support a finding of waiver, which requires an indication of an intentional relinquishment of a known right that, except for the waiver, the waiving party would have enjoyed (see e.g. DLJ Mtge. Capital Corp., Inc. v Fairmont Funding, Ltd., 81 AD3d 563 [1st Dept 2011]). Nor will waiver be implied "unless the opposite party is misled to his or her prejudice into the belief that a waiver was intended" (57 NY Jur 2d, Estoppel, Ratification and Waiver § 89), and plaintiff did not suffer prejudice from ICSOP's delay, as Supreme Court made no

decision about interest until it provided both parties an opportunity to brief their respective positions.

The First Department further stated that "ICSOP's interest-related arguments were not impermissible under CPLR 2221(d), since Supreme Court granted leave to reargue for the very purpose of enabling the parties to address the interest issue. As the record does not show that the court granted relief under CPLR 5019(a), plaintiff's arguments about the scope of the court's authority under that statute are not relevant here".

Regarding the merits, the First Department held:

> Plaintiff's interpretation of the "follow form" provision in the ICSOP policy is not persuasive. He acknowledges that a following form policy is read in accord with the terms and conditions of the underlying policy (see e.g. Jefferson Ins. Co. of N.Y. v Travelers Indem. Co., 92 NY2d 363 [1998]). However, he does not adequately take into account that the "terms and conditions" of the underlying Arch policy include, in its Supplementary Payments provision, Arch's agreement to cover prejudgment interest "on that part of the judgment we pay," i.e., the first $1 million, and "all" postjudgment interest on the "full amount of any judgment." The actual ICSOP "follow form" provision, moreover, states: "Except for the . . . conditions . . . 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." Among the "conditions" of the ICSOP policy is the "Maintenance of Underlying Insurance" provision, pursuant to which, and 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 payments set forth in the Supplementary Payments provision.
>
> We disagree that either Ragins v Hospitals Ins. Co., Inc. (22 NY3d 1019 [2013]) or Welsh v Peerless Cas. Co. (8

AD2d 373 [1st Dept 1959], affd 8 NY2d 745 [1960]) supports plaintiff's position, given key distinctions in the policy language at issue in those cases. Finally, we disagree that the ICSOP policy provisions regarding "Maintenance of Underlying Insurance" and "Ultimate Net Loss" encompassed underlying coverage only to the extent of the $1 million per occurrence the primary policy provided. The language of the policies does not support this interpretation, and instead supports 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.

We respectfully submit that leave should be granted given the impact this decision has on the doctrine of waiver, reargument (CPLR § 2221[d]), resettlement (CPLR § 5019[a]) and this Court's decision in Ragins v Hospitals Ins. Co., Inc., 22 NY3d 1019 [2013].

Argument

Point I:

Reargument is warranted as the Court's decision incorrectly applied the doctrine of waiver; in the event reargument is denied, the decision presents a leave worthy issue as it sets a new standard for waving issues when opposing motions made on notice

It is black letter law that a "failure to respond to movant's arguments constitute[] a waiver of opposing arguments" (1 Civil Practice in the Southern District of New York § 11:4, fn 8, citing,

Avillan v. Donahoe, 2015 WL 728169, *7 [S.D. N.Y. 2015] (Engelmayer, J.); see, RSB Bedford Associates, LLC v. Ricky's Williamsburg, Inc., 91 AD3d 16, 23 [1st Dept. 2011]["...defendants waived the argument by failing to raise it in opposition to the summary judgment motion"]; Shinn v. Catanzaro, 1 AD3d 195, 198 [1st Dept. 2003][Such failure to raise this issue before the motion court constitutes a waiver of any objection"]).

Although plaintiff sought statutory interest when he moved for summary judgment, this Court stated that the "specific interest-related questions at issue here did not become clear until after the May 2, 2016 order; only then did Supreme Court clarify that excess insurer defendant (ICSOP) was not liable to plaintiff for the first $1 million of the judgment" (Jin Ming Chen v. Ins. Co. of the State of Pennsylvania, 165 AD3d 588 [1st Dept. 2018]).

However, ICSOP never argued that its liability for interest was dependent on whether it was liable for the for the first $1 million of the judgment. Moreover, it was always plaintiff's position that ICSOP was responsible for interest on the entire judgment irrespective of whether it was liable for the first $1 million of the judgment.

The reason why the "specific interest-related questions at issue...did not become clear until after the May 2, 2016 order" was because ICSOP failed to raise this substantive issue when it

opposed plaintiff's motion for summary judgment or, at the very least, prior to entry of the final order.

Yet, this Court, citing to DLJ Mtge. Capital Corp., Inc. v. Fairmont Funding, Ltd., 81 AD3d 563 [1st Dept. 2011], found that "ICSOP's failure to articulate its position on interest issues earlier does not support a finding of waiver, which requires an indication of an intentional relinquishment of a known right that, except for the waiver, the waiving party would have enjoyed". However, DLJ Mtge. Capital Corp. did not involve a situation where a party failed to address an issue or claim for certain relief made in connection with a motion on notice. The issue of waiver pertained to whether "plaintiff waived its right to require repurchase of the EPDs [Early Payment Default Mortgages]...on four occasions between 2003 and 2005".

Moreover, this Court's citation to 57 N.Y. Jur 2d, Estoppel, Ratification and Waiver § 89 in support of its finding that waiver will not be implied "unless the opposite party is misled to his or her prejudice into the belief that a waiver was intended" has nothing to do with a litigant's waiver by failing to oppose or address an issue in connection with a motion made on notice.

In addition, finding that "plaintiff did not suffer prejudice from ICSOP's delay" because the trial court "made no decision about interest until it provided both parties an opportunity to brief their respective positions" sets a new standard for waving issues

due to a litigant's failure to oppose/address issues asserted in connection with motions made on notice. The reason why the trial court made no decision about interest was because ICSOP failed to oppose plaintiff's motion for summary judgment which sought statutory interest (see, 97 N.Y. Jur. 2d Summary Judgment, Etc. § 85 ["Under particular factual circumstances, an order which is entered on a grant of summary judgment to the plaintiff that is silent as to whether damages are awarded may be intended to award the amount sought in the complaint"]).

It appears that the trial court and this Court carved out a new rule for waiver because this issue involved statutory interest. However, when a party seeks interest in connection with a motion made on notice, the opposing party must address the issue or waives it (see, MacMaster v. City of Rochester, 2008 WL 11363388, at *3 [W.D.N.Y. Sept. 10, 2008]["There being no opposition to plaintiff's motion for prejudgment interest, plaintiff's application is granted"]; Philips Lighting Co. v. Schneider, 2014 WL 4919047, at *2 [E.D.N.Y. Sept. 30, 2014], aff'd, 636 F. App'x 54 [2d Cir. 2016]["because Defendant has not opposed the award of prejudgment interest, the judgment should be adjusted such that statutorily mandated 9% per annum prejudgment runs from October 3, 2003"]; Publishers Press, Inc. v. Tech. Funding, Inc., No. 2008 WL 4937603, at *2 [W.D. Ky. Nov. 17, 2008] ["TFI has failed to respond to PPI's motion for prejudgment interest, and the Court treats

this failure as a waiver of its opposition to the motion"]; Cox v. D.C., 754 F. Supp. 2d 66, 78 [D.D.C. 2010]["Prejudgment interest is awarded, since Defendant did not contest Plaintiffs' request in its Opposition"]; Kennedy Marr Offshore Singapore Pte Ltd. v. Techcrane Int'l Inc., 2013 WL 3283343, at *13 [E.D. La. June 27, 2013][Techcrane has not opposed an award of prejudgment interest and the Court finds that the calculation of interest suggested by Kennedy Marr is supported by the law]; cf., Kattan by Thomas v. D.C., 995 F.2d 274, 279 [D.C. Cir. 1993]["Because the District of Columbia did not contest Mr. Kattan's entitlement to attorney's fees in its original opposition to the Kattans' application for fees, we find that the District waived the issue"]).

Here, it is uncontested that plaintiff always sought statutory interest, which included prejudgment interest that was already factored into the judgment and all post-judgment interest. Plaintiff made this clear in his initial demand, served on October 31, 2013 and in his amended complaint (see, Capgemini U.S., LLC v. EC Manage, Inc., 2012 WL 5931837, at *6 [S.D.N.Y. Nov. 7, 2012][where ad damnum clause requested $1,000,000 "plus interest," "the Complaint put the defendants on notice that they could be liable for an amount in excess of $1,000,000 once interest was computed"], report and recommendation adopted, 2012 WL 5938590 [S.D.N.Y. Nov. 27, 2012]).

Moreover, plaintiff sought statutory interest in his motion for summary judgment and reiterated this point in his reply affirmation. At no time prior to entry of the trial court's May 2, 2016 final order, which granted plaintiff's motion for summary judgment, disposing this matter, did ICSOP argue that it was not liable for all the prejudgment interest that was built into the judgment or all the post-judgment interest that accrued on the underlying judgment. It never raised this issue in its answer, it never raised this issue in its opposition to plaintiff's motion for summary judgment, it never raised this issue in its cross-motion for discovery and it never raised this issue in its sur-reply.

In fact, as noted above, when it opposed plaintiff's motion for summary judgment and addressed the issue of its potential liability ISCOP acknowledged that the underlying judgment was $2,726,993.70 (which statutorily includes post judgment interest) and that it was liable for "...the amount of the judgment less the $1,000,000 limit of the Arch Policy" (333, 389). ICSOP asked for and received a $1,000,000 credit. It got exactly what it requested and waived any argument pertaining to a further reduction as to what it believed it owed after entry of the final order.

"Adherence to the [waiver] rule" "is fully applicable to questions of prejudgment interest" (Terkildsen v. Waters, 481 F.2d 201, 205 [2d Cir. 1973] and under this Court's decisional law, it

Contracting & Fin. Servs. Co., 117 AD3d at 613, supra), we respectfully submit that it "waived [this argument] by failing to raise it at Supreme Court in opposition to [plaintiff's motion for summary judgment] (Chakanovsky v. C.A.E. Link Corp., 201 AD2d 785, 786 [3d Dept. 1994][cits.]; see, Zaharatos v. Zaharatos, 134 AD3d 926, 928 [2d Dept. 2015]["The defendant also waived these contentions by failing to raise them in 2011 in support of his initial cross motion or in opposition to the enforcement motion"][cits.] RSB Bedford Associates, LLC v. Ricky's Williamsburg, Inc., 91 AD3d 16, 23 [1st Dept. 2011]["...defendants waived the argument by failing to raise it in opposition to the summary judgment motion"]; Shinn v. Catanzaro, 1 AD3d 195, 198 [1st Dept. 2003][Such failure to raise this issue before the motion court constitutes a waiver of any objection"][cits.]).

In the event this Court declines to grant reargument, given the implications the court's decision has on the legal doctrine of waiver, we submit that this is a leave worthy issue.

Point II:

The Court's decision, which permits litigants to advance new theories of law on a motion for reargument is contrary to the terms of CPLR § 2221[d], this decisional law of the Court of Appeals and Appellate Division

The Court's decision acknowledged that ICSOP failed "to articulate its position on interest issues earlier" yet held that

"ICSOP's interest-related arguments were not impermissible under CPLR 2221(d), since [the] Supreme Court granted leave to reargue for the very purpose of enabling the parties to address the interest issue". We respectfully submit that granting ICSOP leave to reargue issues that were not previously raised is contrary to the plain meaning of CPLR § 2221[d] and the decisional law from every Appellate Court in the State of New York.

A motion for leave to reargue "shall be based upon matters of law or fact allegedly overlooked or misapprehended by the court in determining the prior motion" (CPLR 2221[d][2]). It "...is not designed to afford an unsuccessful party...[an opportunity] *to present arguments different from those originally asserted*" (2 Carmody-Wait 2d § 8:96, Generally; determinants in granting or denying reargument[cits.][emphasis added]).

The Court of Appeals has unequivocally held that a motion for reargument cannot be used as a vehicle to advance new legal theories not previously asserted (see, Simpson v. Loehmann, 21 NY2d 990 [1968]["A motion for reargument is not an appropriate vehicle for raising new questions, such as those now urged upon us, which were not previously advanced..."]; Reilly v. Steinhart, 218 NY 660 [1916]["The defendant cannot have a reargument to submit questions of law which he failed to submit when the opportunity was offered to him"]). "Thus, the moving party should be able to point out where in the papers submitted on the original motion the

overlooked or misapprehended fact was asserted or the overlooked or misapprehended argument was made" (4 N.Y.Prac., Com. Litig. in New York State Courts § 31:67 (4th ed.)

In People v. D'Alessandro, 13 NY3d 216 [2009], the Court reaffirmed this well settled rule of law. There, a criminal defendant petitioned the Appellate Division for a writ of error coram nobis on the ground that his appellate counsel had been ineffective for failing to raise a speedy trial argument on the appeal. The Appellate division deemed this application a motion to reargue under CPLR 2221(d). In reversing the Appellate Division's decision, the Court of Appeals held that the application was not a motion for reargument because under CPLR 2221(d)(2), reargument requires that there must have been points either "overlooked" or "misapprehended" on the prior determination, and this motion was based on an entirely new theory.

This well settled rule of has been followed by this Court (see, Onglingswan v. Chase Home Fin., LLC, 104 AD3d 543, 544 [1st Dept. 2013][finding that motion for reargument "should have been denied because plaintiff sought to improperly advance new theories that had not been set forth on the initial motion"]; the Second Department (see, Frisenda v. X Large Enterprises Inc., 280 AD2d 514, 515 [2d Dept. 2001][reargument "is not designed to offer a party an opportunity to argue a new theory of law not previously advanced by it"]), the Third Department (see, Wasson v. Bond, 134

AD3d 1224, 1225 [3d Dept. 2015]["[A] motion to reargue is not available to advance a new theory of liability, or to present arguments different from those originally asserted"]) and the Fourth Department (see, Blair v. Allstate Indem. Co., 124 AD3d 1224, 1224-1225 [4th Dept. 2015]["It is well settled that a motion to reargue is not available...to present arguments different from those originally asserted"]; see also, 171 Siegel's Prac. Rev. 4, No Reargument Allowed When Sole Basis Is Legal Theory Not Raised on Original Motion).

Professor David Siegel succinctly instructed that a motion to reargue "is based on no new proof; it seeks to convince the court that it overlooked or misapprehended something on the first go around and ought to change its mind" (Siegel, N.Y. Prac § 254, at 449 [6th ed], July 2018 update). "Once the court found that [ICSOP] had failed to set forth any grounds upon which to grant...reargument, it should have concluded its analysis and denied the motion" (Andrea v. E.I. Du Pont De Nemours & Co., 289 AD2d 1039, 1041 [4th Dept. 2001], quoting, Pahl Equip. Corp. v. Kassis, 182 AD2d 22, 28 [1st Dept. 1992], lv. denied and dismissed 80 NY2d 1005, rearg. denied 81 NY2d 782).

"A party's contention that was not presented in the party's original opposition to a motion for summary judgment is not properly made on reargument" (97 N.Y. Jur. 2d Summary Judgment, Etc. § 88; see, Lebovits, Drafting New York Civil-Litigation

Documents: Part Xxxvi-Motions to Reargue and Renew, N.Y. St. B.J., October 2014, at 64, 58 ["You may not raise new arguments or advance new theories you never raised on the original motion"]).

While it is true that "every court retains continuing jurisdiction to reconsider its [own] prior interlocutory orders during the pendency of the action" (Liss v. Trans Auto Sys., 68 NY2d 15, 20 [1986]), "[a]n order granting summary judgment is in no sense interlocutory, and it finally disposes of the action and determines the issues between the parties" (97 N.Y. Jur. 2d Summary Judgment, Etc. § 85).

We respectfully submit that in the event the Court declines to grant reargument, this Court's decision, which impermissibly expanded the scope of CPLR § 2221[d] to advance new legal theories not previously raised after entry of a final order is a leave worthy issue given how diametrically opposed it is to the plain terms of the statute and New York's appellate decisional law (see, Rodriguez v. Gutierrez, 138 AD3d 964, 968 [2d Dept. 2016][reversing order granting reargument as "the Supreme Court did not overlook or misapprehend the facts, or misapply any controlling law"]; see, 8 N.Y.Prac., Civil Appellate Practice § 5:5 [2d ed.])

Point III:

As this Court's decision permitted CPLR § 2221[d] to be used as a vehicle to make substantive changes to a final order in violation of CPLR § 5019(a), plaintiff's arguments are relevant and present a leave worthy issue

The Court's decision also found that "plaintiff's arguments about the scope of the court's authority under [CPLR § 5019(a)]" were not relevant because the trial court granted ICSOP relief under CPLR § 2221[d]. However, CPLR § 5019(a) is relevant as the Court's decision permitted CPLR § 2221[d] to be used as a vehicle to circumvent CPLR § 5019[a]'s strict prohibition on making substantive changes to a final order. Given the implications this Court's decision will have on CPLR § 5019(a), we respectfully submit that reargument is warranted and in the event this Court disagrees, this presents a leave worthy issue.

It is uncontested that the May 2, 2016 order disposing of this matter was a final order. That this was a final order as opposed to a judgment makes no difference. For good measure, the Court of Appeals explained that while there was once a distinction between "final orders" and "final judgments," "modern practice" has abandoned this distinction (see, Slater v. Am. Mineral Spirits Co., 33 NY2d 443, 446 [1974]).

"It is elementary that a final judgment or order represents a valid and conclusive adjudication of the parties' substantive rights..." (Da Silva v. Musso, 76 NY2d 436, 440 [1990]) and is

"final as to all questions at issue between the parties", "conclude[ing] all matters of defense which were or might have been litigated..." (Long Is. Sav. Bank v. Mihalios, 269 AD2d 502, 503, [2d Dept. 2000]).

Plaintiff's arguments pertaining the scope of the trial court's authority under that statute are relevant because "a final judgment...is not subject to a motion to reargue; under no circumstances may a final judgment...be subject to a motion to reargue (matrimonial motion practice, Law & The Family NY Forms § 65:2, commentary (2d), citing, Able v. Able, 209 AD2d 972 [4th Dept. 1994]; see also, Reed v. County of Westchester, 243 AD2d 714 [2d Dep't 1997][holding that, where there was a final judgment, petitioner had to move pursuant to CPLR § 5015 not by way of a motion to renew under CPLR § 2221, cited in, 2PT1 West's McKinney's Forms Civil Practice Law and Rules § 5:49).

"Once the court found that [ICSOP] had failed to set forth any grounds upon which to grant...reargument, it should have concluded its analysis and denied the motion" (Andrea v. E.I. Du Pont De Nemours & Co., 289 AD2d 1039, 1041 [4th Dept. 2001], quoting, (Pahl Equip. Corp. v. Kassis, 182 AD2d 22, 28 [1st Dept. 1992], lv. denied and dismissed 80 NY2d 1005, rearg. denied 81 NY2d 782).

As the trial court "was without jurisdiction to change the final order...as to substance" (Coulbourn v. Burns, 286 AD 856 [2d

Dept. 1955], aff'd, 309 NY 915 [1955], citing, Herpe v. Herpe, 225 NY 323 [1919]), we respectfully submit that the scope of the court's authority under CPLR § 5019(a) is relevant and presents a leave worthy issue.

Point IV:

This Court's decision, finding that ICSOP's excess policy was "triggered" upon the primary carrier's payment of "supplemental payments" in addition to the full primary policy limit of $1 million was contrary to the plain meaning of the excess policy and in conflict with Ragins v. Hospitals Ins. Co.,

It is undisputed that the Arch policy contained a "Supplemental Payment Provision" that provided for the payment of interest and costs. However, ICSOP's excess policy was silent as to the "Supplemental Payment Provision" and there was no reference to the excess policy being contingent on the payment of any interest or costs. Rather, the ICSOP's excess policy was solely conditioned on Kam Cheung maintaining the $1 million limit of the primary policy.

There is no provision in the ICSOP's excess policy which states that it shall provide coverage only when the judgment exceeds the limits of the liability of the underlying policy and "Supplemental Payments". Thus, ICSOP was required to interest on the entire judgment, and its obligation to pay interest up to its policy limits was triggered when Arch rescinded the primary policy.

This Courts finding is contrary to the applicable case law relating to the interpretation of insurance contracts.

In Hartol Products Corp. v. Prudential Ins. Co. of America, 290 NY 44 [1943], the Court of Appeals ruled that:

> insurance contracts, above all others, should be clear and explicit in their terms. They should not be couched in language as to the construction of which lawyers and courts may honestly differ. In a word, they should be so plain and unambiguous that men of average intelligence who invest in these contracts may know and understand their meaning and import (Id. at 50).

Accordingly, "[w]here the provisions of an insurance contract are clear and unambiguous, the courts should not strain to superimpose an unnatural or unreasonable construction (see, Maurice Goldman & Sons, Inc. v. Hanover Ins. Co., 80 NY2d 986 [1992]). However, that is exactly what this Court's decision did, which is why reargument is warranted.

The Court of Appeals has made it clear that "whenever an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language" (Federal Ins. Co. v. International Business Machines Corp., 18 NY3d 642, 649 [2012][internal quotes and citations omitted]). As such, any exclusions or exceptions from policy coverage "are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction" (Id. at 649).

In this case, the provisions of ICSOP's excess policy are clear and unambiguous and required it to satisfy the underlying

judgment, inclusive of statutory interest up to the limit of its excess policy minus the million-dollar credit. This Court's decision relied on language not contained within the four comers of the excess policy and imposed an obligation on the insured to satisfy a condition precedent to coverage that was not stated in the insurance contract.

This Court's decision stating that it disagreed with our position that "the ICSOP policy provisions regarding 'Maintenance of Underlying Insurance' and 'Ultimate Net Loss' encompassed underlying coverage only to the extent of the $1 million per occurrence the primary policy provided" is contrary to the terms of the excess policy.

"Many general liability excess policies employ the term 'ultimate net loss.' It is a term of limitation in that it provides the extent to which the excess insurer will respond to a loss. The term has no single universal definition" (4Pt2 Bruner & O'Connor Construction Law § 11:558).

Section I(A) of ICSOP's insurance policy, entitled "Coverage", provides in relevant part:

> "We will pay on your behalf the ultimate net loss in excess of the underlying insurance as shown in item 4 of the declarations (the Arch policy), but only up to an amount not exceeding our limits of insurance as shown in item 3 of the declarations" ($4 million).

Section I(C) of ICSOP's insurance policy, entitled "Maintenance of Underlying Insurance", provides:

> "The limits of insurance of the Underlying Insurance shown in Item 4 of the Declarations [the Arch Policy] 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 damages . . . that are insured by this policy.

There is no basis to assume the "ultimate net loss" does not include post-judgment interest. If ICSOP wanted to limit its exposure for paying prejudgment and postjudgment interest, it had to have excluded interest from the "ultimate net loss".

For instance, in Home Ins. Co. v. American Home Prods. Corp., 902 F.2d 1111 [2d Cir. 1990] the excess insurer was not responsible for paying postjudgment interest on the award because the policy explicitly excluded "interest accruing after entry of judgment" and "legal expenses" from [the] "ultimate net loss" (Id., at 1113)(see also, Fox v. Will County, 2012 U.S. Dist. LEXIS 115255, at *16 [N.D. Ill. 2012] the excess insurance policy specifically stated that the "Ultimate Net Loss shall exclude all interest accruing after entry of judgment, costs and expenses, except with the consent of the Company"]).

At best, the term "ultimate net loss" is ambiguous (see, Continental Casualty Co. v. Armstrong World Industries, Inc., 776 F. Supp. 1296, 1301 [N.D. Ill. 1991]; Mission Nat'l Ins. Co. v. Duke Transp. Co., 792 F.2d 550, 554 [5th Cir. 1986][holding the "Ultimate Net Loss" definition is unambiguous and applied to expenses covered by insurance in addition to the directly

underlying insurance]; Bernard Lumber Co. v. Louisiana Ins. Guar. Ass'n, 563 So. 2d 261, 265 [La. App. 1990][same]).

Moreover, as ICSOP follows form to the Arch policy, ICSOP "provides coverage subject to exactly the same terms and conditions as those of the underlying insurance" (1-16 New Appleman New York Insurance Law § 16.04); see, Travelers Cas. & Sur. Co. v. Gerling Global Reins. Corp. of Am., 419 F.3d 181 [2d Cir. 2005][holding that where a certificate contains a "follow the form" clause, concurrency is presumed between the terms of the certificate and the underlying policy]).

In Coleman Co., Inc. v. California Union Insurance Co., 960 F.2d 1529 [10th Cir. 1992], decided under New York law, an insured and its excess insurer disputed whether defense costs were properly included in the retained limit calculation. The excess policy there followed form to an underlying policy that included defense costs in its limit of liability. The court ruled,

> Because the manner by which to calculate the "retained limit" is left otherwise undefined, the endorsement providing that coverage "shall follow and be subject to the same terms and conditions of the underlying policy" manifests the parties' intent to look to the underlying policy to determine whether its limit of liability has been reached and, accordingly, whether the "retained limit" of the umbrella policy has been exceeded.

(Id. at 1537).

"Courts enforce the plain and ordinary meaning or terms in insurance policies and having drafted the policy language without

a 'govern and direct' requirement, the Insurers must live with the policy language they wrote" (S.E.C. v. Credit Bancorp, Ltd., 147 F. Supp. 2d 238, 261 [S.D.N.Y. 2001], citing, American Home Products Corp. v. Liberty Mutual Ins. Co., 565 F.Supp. 1485, 1492 [S.D.N.Y. 1983], aff'd 748 F.2d 760 [2d Cir.1984]).

"The Court of Appeals has used dictionary definitions to determine the meaning of words used in a contract. When a term is not defined in a contract, courts consult dictionaries and relevant treatises to ascertain the accepted meaning of the term" (28 N.Y. Prac., Contract Law § 9:3, citing, Ragins, 22 NY3d 1019).

Thus, aside from the fact that ICSOP follows form to the Arch policy, under a plain reading of ICSOP's policy, prejudgment and postjudgment interest are factored into the "ultimate net loss". To the extent there is any ambiguity to the contrary, it should be construed in plaintiff's favor.

"The rule requiring that ambiguities be resolved in favor of a policyholder and against an insurance company is enforced even more strictly when the language at issue purports to limit the company's liability" (N.Y. Pattern Jury Instr.--Civil Division 4 B 3 Intro. 1, Insurance Contracts).

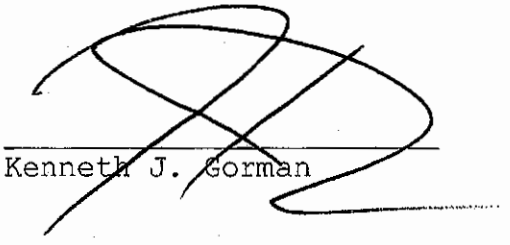
New York courts commonly employ the contra proferentem rule and resolve ambiguities against the issue (see, e.g., Tonkin v. Cal. Ins. Co. of San Francisco, 294 NY 326, -[1945][noting the "well settled principle 'that if a policy of insurance is written

in such language as to be doubtful or uncertain in its meaning, all ambiguity must be resolved in favor of the policy holder and against the company", citation omitted, quoting, Hartol Prods. Corp. v. Prudential Ins. Co. of Am., 290 NY 44 [1943]).

Therefore, we respectfully submit that in the event this Court declines to grant reargument, these are leave worthy issues warranting review by the Court of Appeals.

WHEREFORE, for the foregoing reasons, it is respectfully submitted that this Court should grant plaintiff's motion for reargument or for leave to appeal to the Court of Appeals and grant any other relief it deems just, equitable and proper.

Dated: New York, New York
November 30, 2018



Kenneth J. Gorman

EXHIBIT "A"

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 **NOTICE OF ENTRY OF DECISION AND ORDER OF THE APPELLATE DIVISION, FIRST DEPARTMENT**

SIRS:

PLEASE TAKE NOTICE that the within is a true copy of the decision and order of the Supreme Court, Appellate Division, First Department, duly entered on October 30, 2018, and unanimously affirming the Judgment of the Supreme Court, New York County (Eileen A. Rakower, J.), entered June 30, 2017, without costs.

Dated: West Hartford, Connecticut
October 31, 2018

Yours, etc.,

SEIGER GFELLER LAURIE LLP

By: _____

Elizabeth F. Ahlstrand, Esq.
Attorneys for the Defendant
977 Farmington Ave / Suite 200
West Hartford, CT 06107
Tel. 860-760-8400 / Fax. 860-760-8401

To: Wade T. Morris, Esq.
Kenneth J. Gorman, Esq.
Law Offices of Wade T. Morris
Counsel for the Plaintiff
225 Broadway, Suite 307
New York, NY 10007

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 **AFFIDAVIT OF SERVICE**

I, **Heather McCoy**, Esq., being duly sworn, and under the penalties of perjury, deposes and says:

1. I am not a party to this action, am over the age of eighteen (18), and reside in Torrington, CT.

2. I am an associate with **Seiger Gfeller Laurie LLP**, attorneys for Defendant **Insurance Company of the State of Pennsylvania.**

3. On this 31st day of October, 2018, I served the foregoing **Notice of Entry** by e-filing the same through the Court's electronic filing system and by first class mail at the address indicated below:

Wade T. Morris, Esq.
Kenneth J. Gorman, Esq.
Law Offices of Wade T. Morris
Counsel for Plaintiff
225 Broadway, Suite 307
New York, New York 10007

Heather J. McCoy
Heather McCoy, Esq.

Sworn to before me this 31st day of October, 2018
Ellen Rohner
Notary Public
Ellen Rohner
My Commission Exp. 4/30/23

Acosta, P.J., Friedman, Kapnick, Webber, Moulton, JJ.

7512 Jin Ming Chen, Index 650142/14
Plaintiff-Appellant,

-against-

Insurance Company of the State
of Pennsylvania,
Defendant-Respondent.

Kenneth J. Gorman, P.C., New York (Kenneth J. Gorman of counsel), for appellant.

Seiger Gfeller Laurie LLP, New York (Elizabeth F. Ahlstrand of counsel), for respondent.

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered June 30, 2017, adjudging defendant liable to plaintiff for $1,526,938 with costs and interest from May 2, 2016, the date of the order granting partial summary judgment to plaintiff, for $159,638.23, for a total award of $1,686,576.23, unanimously affirmed, without costs.

The specific interest-related questions at issue here did not become clear until after the May 2, 2016 order; only then did Supreme Court clarify that excess insurer defendant (ICSOP) was not liable to plaintiff for the first $1 million of the judgment. ICSOP's failure to articulate its position on interest issues earlier does not support a finding of waiver, which requires an indication of an intentional relinquishment of a known right

that, except for the waiver, the waiving party would have enjoyed (*see e.g. DLJ Mtge. Capital Corp., Inc. v Fairmont Funding, Ltd.*, 81 AD3d 563 [1st Dept 2011]). Nor will waiver be implied "unless the opposite party is misled to his or her prejudice into the belief that a waiver was intended" (57 NY Jur 2d, Estoppel, Ratification and Waiver § 89), and plaintiff did not suffer prejudice from ICSOP's delay, as Supreme Court made no decision about interest until it provided both parties an opportunity to brief their respective positions.

ICSOP's interest-related arguments were not impermissible under CPLR 2221(d), since Supreme Court granted leave to reargue for the very purpose of enabling the parties to address the interest issue. As the record does not show that the court granted relief under CPLR 5019(a), plaintiff's arguments about the scope of the court's authority under that statute are not relevant here.

Plaintiff's interpretation of the "follow form" provision in the ICSOP policy is not persuasive. He acknowledges that a following form policy is read in accord with the terms and conditions of the underlying policy (*see e.g. Jefferson Ins. Co. of N.Y. v Travelers Indem. Co.*, 92 NY2d 363 [1998]). However, he does not adequately take into account that the "terms and conditions" of the underlying Arch policy include, in its

Supplementary Payments provision, Arch's agreement to cover prejudgment interest "on that part of the judgment we pay," i.e., the first $1 million, and "all" postjudgment interest on the "full amount of any judgment." The actual ICSOP "follow form" provision, moreover, states: "Except for the . . . conditions . . . 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." Among the "conditions" of the ICSOP policy is the "Maintenance of Underlying Insurance" provision, pursuant to which, and 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 payments set forth in the Supplementary Payments provision.

We disagree that either *Ragins v Hospitals Ins. Co., Inc.* (22 NY3d 1019 [2013]) or *Welsh v Peerless Cas. Co.* (8 AD2d 373 [1st Dept 1959], *affd* 8 NY2d 745 [1960]) supports plaintiff's position, given key distinctions in the policy language at issue in those cases. Finally, we disagree that the ICSOP policy provisions regarding "Maintenance of Underlying Insurance" and

"Ultimate Net Loss" encompassed underlying coverage only to the extent of the $1 million per occurrence the primary policy provided. The language of the policies do not support this interpretation, and instead supports 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.

We have considered the parties' remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: OCTOBER 30, 2018

CLERK

EXHIBIT "B"

NOTICE OF APPEAL FROM JUDGMENT BY PLAINTIFF, DATED JULY 20, 2017

(2-3)

FILED: NEW YORK COUNTY CLERK 07/20/2017 04:00 PM INDEX NO. 650142/2014
NYSCEF DOC. NO. 207 RECEIVED NYSCEF: 07/20/2017

SUPREME COURT OF THE STATE OF NEW YORK Index No.: 650142/14
COUNTY OF NEW YORK

----------X

JIN MING CHEN,

Plaintiff,

-against-

NOTICE OF APPEAL

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA

Defendant

----------X

PLEASE TAKE NOTICE, that the plaintiff Jin Ming Chen ("plaintiff") hereby appeals to the Appellate Division, First Department from a judgment of the Supreme Court, New York County (Rakower, J.) dated June 20, 2017, and entered June 30, 2017, in the office of the Clerk of this Court.

The plaintiff appeals from each and every part of said judgment which is adverse to him.

Dated: New York, New York
July 20, 2017

Yours, etc.,

Wade T. Morris
Law Offices of Wade T. Morris
Attorney for Plaintiff
225 Broadway, Suite 1510
New York, New York 10007
(212) 406-4993

TO:
Clerk of the Court

FILED: NEW YORK COUNTY CLERK 07/20/2017 04:00 PM INDEX NO. 650142/2014
NYSCEF DOC. NO. 207 RECEIVED NYSCEF: 07/20/2017

Selger Gfeller Laurie LLP
Attorneys for defendant
Insurance Company of The State Of Pennsylvania
West Hartford Center
977 Farmington Ave., Suite 200
West Hartford, CT 06107
Tel: 860-760-8400

CIVIL APPEAL PRE-ARGUMENT STATEMENT BY PLAINTIFF
(4-7)

FILED: NEW YORK COUNTY CLERK 07/20/2017 04:00 PM INDEX NO. 650142/2014
NYSCEF DOC. NO. 208 RECEIVED NYSCEF: 07/20/2017

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK ----------X JIN MING CHEN, Plaintiff, -against- INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA Defendant. ----------X	Index No.: 650142/14 CIVIL PREARGUMENT STATEMENT
Title of action:	**JIN MING CHEN v. INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA**
There has been no change in The title except as follows:	The following parties were previously named as defendants, AIG Domestic Claims, Inc., AIU Holdings, Inc., American International Group, Inc., And Chartis Claims, Inc.
Individual name, law firm name, address, and telephone number of counsel for each Appellant	Elizabeth Ahlstrand Seiger Gfeller Laurie LLP 977 Farmington Ave., Suite 200 West Hartford, CT 06107 Tel: 860-760-8400
Individual name, law firm name, address, and telephone number of counsel for each Respondent	Wade T. Morris Law Offices of Wade T. Morris 225 Broadway, Suite 1510 New York, N.Y. 10007 (212) 406-4993 Kenneth J. Gorman Of counsel to Wade T. Morris 225 Broadway, Suite 1510 New York, N.Y. 10007 (212) 267-0033

FILED: NEW YORK COUNTY CLERK 07/20/2017 04:00 PM INDEX NO. 650142/2014
NYSCEF DOC. NO. 208 RECEIVED NYSCEF: 07/20/2017

Court and County from which appeal is taken:	Supreme Court, New York County
Judge:	Eileen Rakower
The appeal is from a judgment entered:	June 30, 2017
There is no related action or proceeding now pending in any court of this or any other jurisdiction:	Not applicable
The nature and object of the cause(s) of action:	Declaratory Judgment, seeking an order declaring that the defendant insurer's disclaimer was invalid and that it had to satisfy the underlying judgment plus interest.
Result reached below:	**The court granted plaintiff's motion for summary judgment on the ground that the defendant insurer's disclaimer was invalid. As defendant was found to be an excess carrier, defendant received a $1 million credit on the ground that the excess policy did not drop down. It was ordered to pay the balance of the judgment, which included pre-judgment interest and post-judgment interest.** **While the plaintiff also sought all pre and post judgment interest in his motion for summary judgment, defendant did not address this issue when it opposed plaintiff's motion. Defendant only first raised this issue in its motion to resettle and reargue, which was initially denied. Thereafter Defendant moved again to resettle (but not**

FILED: NEW YORK COUNTY CLERK 07/20/2017 04:00 PM INDEX NO. 650142/2014
NYSCEF DOC. NO. 208 RECEIVED NYSCEF: 07/20/2017

	reargue) and the trial court, sua sponte, then granted reargument, despite having already denied it. Upon reargument the Court then declined to award the plaintiff any post-judgment interest on the underlying award and cut the award of pre-judgment interest in half.
Issues to be raised on appeal:	Whether the trial court erred in granting defendant's motion for reargument as the issue of interest was never raised prior to entry of the final order disposing of this matter. Whether the trial court erred in amending the final order in violation of CPLR § 5019. Whether defendant waived this issue by failing to raise it in opposition to plaintiff's motion for summary judgment. Whether the trial court erred in declining to award any post-judgment interest and reduced the award of prejudgment interest in half on the underlying award. Any other issues raised on the record.

Dated: New York, New York
July 20, 2017

Yours, etc.,

Wade T. Morris
Law Offices of Wade T. Morris
Attorney for Plaintiff
225 Broadway, Suite 1510

FILED: NEW YORK COUNTY CLERK 07/20/2017 04:00 PM INDEX NO. 650142/2014
NYSCEF DOC. NO. 208 RECEIVED NYSCEF: 07/20/2017

New York, New York 10007
(212) 406-4993

TO:
Clerk of the Court

Seiger Gfeller Laurie LLP
Attorneys for defendant
Insurance Company of The State Of Pennsylvania
West Hartford Center
977 Farmington Ave., Suite 200
West Hartford, CT 06107
Tel: 860-760-8400

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, Steiger Oteller Lamle 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 of 215 Street, Bayside, New York, has judgment over and against Defendant Insurance Company of the State of Pennsylvania, in the amount of $1,626,948.00, with costs and interest from the date of the Order.

granting summary judgment in part to the Plaintiff, on May 2, 2016, in the amount of $ 159,638.23, making the total amount of $ 1,696,576.23 and that the Plaintiff has execution therefore.

Judgment signed this 29 day of June, 2017, in the County of New York, City and State of New York.

Honorable Eileen A. Rakower

Clerk

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 650142/2014
CHEN, JIN MING
vs.
INSURANCE COMPANY OF THE
Sequence Number : 001
SUMMARY JUDGMENT

PART 15

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

Accordingly, it is for the reasons stated on the record the motion for summary judgment is granted to the extent indicated. The X motion is denied.

Dated: 5/2/16

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

MAY 02 2016

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

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

JIN MING CHEN,

Plaintiff(s),

-against-

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

Defendant(s).

INDEX NO. 650142/14

EXCERPTED DEPOSITION

71 Thomas Street
New York, New York 10013
May 2, 2016

B E F O R E:

THE HONORABLE EILEEN A. RAKOWER,

J u s t i c e

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

WADE T. MORRIS, ESQ.
Attorney for Plaintiff
225 Broadway
New York, New York 10007

KENNETH D. GORMAN, ESQ.
Of Counsel Attorney to Wade T. Morris
225 Broadway
New York, New York 10007

SEIGER GFELLER LAURIE, LLP
Attorneys for Defendant
677 Farmington Avenue
West Hartford, Connecticut 06107
BY: ELIZABETH B. AHLSTRAND, ESQ.

Eric Allen
Official Court Reporter

PROCEEDINGS

(The following constitutes the Court's decision only. The complete oral argument was stenographically recorded by the official court reporter.)

THE COURT: To the extent that the plaintiff seeks a declaration that ICSOP's disclaimer of insurance coverage is invalid, clearly we have a situation where their disclaimer for late notice is invalid as against this plaintiff.

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, that that's -- that you are entitle to the benefit of that.

However, with regard to the balance of the judgment, ICSOP must satisfy that judgment.

So, I am giving you part of what you asked for, plaintiff, in seeking that.

I do not find that at this late time that ICSOP is free to now explore whether there would have been other grounds to disclaim even for the exclusion for employee. First of all, there has been no finding that the plaintiff was a Cheung employee. Secondly, it's not until 2011 that there's even this red flag raised. And, indeed, in 2010, ICSOP is saying, no, no, we've

PROCEEDINGS

going to rest on the late notice disclaimer and that position did not change until years later. So, I think that you are way out of the ballpark to try to seek to disclaim that now and, of course, you are not even prepared to disclaim that now. You are first seeking information which you may very well already possess since you are the workers comp coverage. So, there is certainly no excuse for such a late search for this information and so the cross-motion is denied.

There it is.

MR. MORRIS: Thank you, your Honor.

MR. GORMAN: Thank you, your Honor.

MS. ANDERSAND: Thank you, your Honor.

****

CERTIFIED THAT THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT OF THE ORIGINAL STENOGRAPHIC MINUTES IN THIS CASE.

Brie Allen
SENIOR COURT REPORTER

Brie Allen
Official Court Reporter

AFFIRMATION OF SERVICE

STATE OF NEW YORK)
SS.:)
COUNTY OF NEW YORK)

Kenneth J. Gorman, an attorney duly admitted to practice law in the State of New York, affirms pursuant CPLR 2106 that service was made on the 30th day of November 2018 of the attached

NOTICE OF MOTION FOR REARGUMENT AND/OR LEAVE TO APPEAL TO THE COURT OF APPEALS

by regular mail in compliance with CPLR 2103(a) and 2103(b), on the addressee listed below:

Elizabeth F. Ahlstrand
Seiger Gfeller Laurie LLP
Counsel for the Defendant
977 Farmington Ave., Suite 200
West Hartford, CT 06107

Kenneth J. Gorman, Esq.

Dated: **New York, New York**
November 30, 2018

Index No.: 650142 *Year: 2014*

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

JIN MING CHEN,

Plaintiff-Appellant

-against-

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

Defendant-Respondent

NOTICE OF MOTION

WADE T. MORRIS, ESQ.
Attorney at Law
225 Broadway, 15th Floor
New York, New York 10007-3024

212-406-4993 Tel
212-406-4996 Fax

To:

Attorney(s) for

Service of a copy of the within *is hereby admitted.*

Dated:

.....
Attorney(s) for

EXHIBIT E

EXHIBIT 2

THE INSURER (INSURERS)* NAMED HEREIN IS (ARE) NOT LICENSED BY THE STATE OF NEW YORK, NOT SUBJECT TO ITS SUPERVISION, AND IN THE EVENT OF THE INSOLVENCY OF THE INSURER (INSURERS), NOT PROTECTED BY THE NEW YORK STATE SECURITY FUNDS. THE POLICY MAY NOT BE SUBJECT TO ALL OF THE REGULATIONS OF THE INSURANCE DEPARTMENT PERTAINING TO POLICY FORMS.

Arch
Insurance Group®
ARCH SPECIALTY INSURANCE COMPANY
(A Nebraska Corporation)

Home Office Address:
10306 Regency Parkway Drive
Omaha, NE 68114

Administrative Address:
One Liberty Plaza, 53rd Floor
New York, NY 10006
Tel: (800) 617-3252

NEW YORK – COMMERCIAL GENERAL LIABILITY POLICY

DECLARATIONS

Policy No.: DPC 0022451 00 Renewal of: NEW

Effective Date: 07/08/07
Expiration Date: 07/08/08
At 12:01 am standard time at the mailing address of the Named Insured shown below.

Item 1. Named Insured and Producer

Named Insured: KAM CHEUNG CONSTRUCTION INC
Mailing Address: 135-137 CHRYSTIE STREET
NEW YORK, NY 10002

Producer: PROGRAM BROKERAGE CORPORATION
Mailing Address: 100 SUNNYSIDE BLVD.
WOODBURY, NY 11797

Surplus Line Producer: PROGRAM BROKERAGE CORPORATION
Mailing Address: 1055 AVENUE OF AMERICAS
NEW YORK, NY 10018

Surplus Lines License Number: EX-799492-R

Item 2. Named Insured Classified as

☐ Individual ☐ Partnership ☒ Corporation ☐ Trust
☐ Joint Venture ☐ LLC ☐ LLP ☐ Other

Item 3. Limits of Insurance

Each Occurrence Limit	$ 1,000,000		
Personal and Advertising Injury Limit	$ 1,000,000	Any one person or organization	
Damage to Premises Rented to You Limit	$ N/A	Any one premises	
General Aggregate Limit (Other Than Products -- Completed Operations)	$ 2,000,000		
Products -- Completed Operations Aggregate Limit	$ 2,000,000		

Item 5. Policy Premium: $ 137,500

Deposit Premium: $ 137,500 ☐ A flat charge per each policy period ☒ Adjustable, per the Premium Computation Endorsement

Minimum Retained Audit Premium: $ 137,500
Minimum Retained Premium: $ 34,375 Not subject to adjustment in the event of cancellation by you.

Item 6. Forms & Endorsements attached: See Schedule of Forms and Endorsements Form 00 ML0012 00 01 03

IN CONSIDERATION OF THE PAYMENT OF PREMIUM AND IN RELIANCE UPON STATEMENTS MADE IN THE APPLICATION, THIS POLICY INCLUDING ALL ENDORSEMENTS ISSUED HEREIN SHALL CONSTITUTE THE CONTRACT BETWEEN THE COMPANY AND THE NAMED INSURED.

Arch Specialty Insurance Company is licensed in the state of Nebraska only.
Arch Specialty Insurance Company is not licensed in the state of New York and is not subject to its supervision.

SCHEDULE OF FORMS AND ENDORSEMENTS

NAMED INSURED: KAM CHEUNG CONSTRUCTION INC. TERM: 7/8/2007 to 7/8/2008
POLICY NUMBER: DPC 0022451 00

ENDT. NO.	FORM NO.	TITLE
	05 CGL0047 33 03 07	NEW YORK – COMMERCIAL GENERAL LIABILITY POLICY DECLARATIONS
		EXCLUSION ENDORSEMENT
3	00 CGL0041 00 09 06	WRAP-UP EXCLUSION ENDORSEMENT
4	00 CGL0039 00 09 06	ENGINEERS, ARCHITECTS OR SURVEYORS PROFESSIONAL LIABILITY EXCLUSION ENDORSEMENT
5	00 CGL0011 00 09 06	EARTH MOVEMENT OR SUBSIDENCE EXCLUSION ENDORSEMENT
6	00 CGL0092 00 09 06	CHROMATED COPPER ARSENATE ("CCA") EXCLUSION ENDORSEMENT
		AGGREGATE LIMIT AND POLICY AGGREGATE LIMIT ENDORSEMENT
12	00 CGL0221 00 01 06	EXCLUSION OF TERRORISM OTHER THAN A CERTIFIED ACT OF TERRORISM
13	00 CGL0240 00 01 07	CONDITIONAL TOTAL TERRORISM EXCLUSION (RELATING TO DISPOSITION OF FEDERAL TERRORISM RISK
		POLICY – VERSION I
		TERRORISM COVERAGE CONDITIONAL TOTAL TERRORISM EXCLUSION (RELATING TO DISPOSITION OF FEDERAL TERRORISM RISK INSURANCE ACT)
	00 ML0065 00 05 07	U.S. TREASURY DEPARTMENT'S OFFICE OF FOREIGN ASSETS CONTROL ("OFAC") ADVISORY NOTICE TO POLICYHOLDERS

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under SECTION II – WHO IS AN INSURED.

Other words and phrases that appear in quotation marks have special meaning. Refer to SECTION V– DEFINITIONS.

SECTION I – COVERAGES

BODILY INJURY, PROPERTY DAMAGE, PERSONAL AND ADVERTISING INJURY

1. Insuring Agreement

   a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury", "property damage", or "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for any injury or damage to which this insurance does not apply. We may, at our sole discretion, investigate any "occurrence" or offense and settle any claim or "suit" that may result. But:

      (1) The amount we will pay for damages is limited as described in SECTION III – LIMITS OF INSURANCE; and

      (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements to which this insurance applies.

   No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under the SUPPLEMENTARY PAYMENTS part of this policy.

   b. This insurance applies to:

      (1) "Bodily injury" and "property damage" only if:

         (a) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

         (b) The "bodily injury" or "property damage" occurs during the "policy period"; and

         (c) The "bodily injury" or "property damage" commences after the Effective Date of this policy. "Bodily injury" or "property damage" which is a continuation of or arises out of, relates to or results from, in whole or in part, injury or damage that commences before the Effective Date of this policy does not commence after the Effective Date of this policy.

      (2) "Personal and advertising injury" only if:

(a) The "personal and advertising injury" is caused by an offense arising out of your business and committed in the "coverage territory";

(b) The offense is committed during the "policy period"; and

(c) The "personal and advertising injury" commences after the Effective Date of this policy. "Personal and advertising injury" which is a continuation of or arises out of, relates to or results from, in whole or in part, injury that commences before the Effective Date of this policy does not commence after the Effective Date of this policy.

c. If any "occurrence" or offense covered under this policy is also covered in whole or in part under any other commercial general liability policy issued to you by us (or by any of our related or affiliated companies) including but not limited to prior policies issued to you by us, (or by any of our related or affiliated companies), the most that will be paid under all such policies covering the "occurrence" or offense is the single highest applicable limit of liability of one of the policies which cover the "occurrence" or offense. This provision does not apply to policies written by us (or by any of our related or affiliated companies) as insurance that applies in excess of this insurance.

2. Exclusions

The exclusions contained herein and any exclusions contained in endorsements to this policy apply regardless of whether any cause, event, material or product contributed concurrently or in any sequence to the injury or damage.

This insurance does not apply to any claim, "suit", demand or loss that alleges:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" that in any way, in whole or in part, arises out of, relates to or results from injury or damage expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a third party are deemed to be damages because of "bodily injury" or "property damage", provided:

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract";

(b) Such party is not an insured (other than an additional insured added by endorsement to this policy); and

(c) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

c. **Liquor Liability**

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

(1) Causing or contributing to the intoxication of any person;

(2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or

(3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

d. **Workers' Compensation And Similar Laws**

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law(s)

e. **Employer's Liability**

"Bodily injury" that in any way, in whole or in part, arises out of, relates to or results from injury to:

(1) An "employee" or "temporary worker" of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph (1) above.

This exclusion applies:

(1) Whether the insured may be liable as an employer or in any other capacity; and

(2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

f. **Pollution**

(1) Any "bodily injury", "property damage" or "personal and advertising injury" that in any way, in whole or in part, arises out of, relates to or results from the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:

(i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use by the building's occupants or their guests;

(ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire";

(b) At or from any premises, site or location which is or was at any time used by or for any person or entity for the handling, storage, disposal, processing or treatment of waste;

(c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for any Insured or any person or organization for whom you may be legally responsible;

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any Insured's behalf are performing operations if the "pollutants" are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:

(i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;

(ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire";

(e) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or

(f) To the extent that any such "bodily injury" or "property damage" is included in the "products-completed operations hazard".

(2) Any loss, cost or expense that in any way, in whole or in part, arises out of, relates to or results from any:

(a) Request, demand, order, or statutory or regulatory requirement, or any other action authorized or required by law, that any insured or others investigate, test for, monitor, clean up, remove, dispose of, contain, treat, abate, remediate, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or

(b) Claim or "suit" by or on behalf of a governmental authority for damages because of investigating, testing for, monitoring, cleaning up, removing, disposing of, containing, treating, abating, remediating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

g. Aircraft, Auto Or Watercraft

"Bodily injury" or "property damage" that in any way, in whole or in part, arises out of, relates to or results from the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" or offense which caused the injury or damage involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

This exclusion does not apply to:

(1) A watercraft while ashore on premises you own or rent;

(2) A watercraft you do not own that is:

(a) Less than 26 feet long, and

(b) Not being used to carry persons or property for a charge;

(3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured;

(4) "Bodily injury" or "property damage" arising out of the operation of any of the equipment listed in Paragraph f.(2) or f.(3) of the definition of "mobile equipment".

h. Mobile Equipment

"Bodily injury" or "property damage" that in any way, in whole or in part, arises out of, relates to or results from

(1) The transportation of "mobile equipment" by an "auto" owned or operated by or rented or loaned to any insured; or

(2) The use of "mobile equipment" in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition, or stunting activity.

I. War

"Bodily injury", "property damage" or "personal and advertising injury" that in any way, in whole or in part, arises out of, relates to or results from:

(1) War, including undeclared or civil war; or

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents, or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these

J. Damage To Property

"Property damage" to:

(1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;

(2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;

(3) Property loaned to you;

(4) Personal property in the care, custody or control of the insured;

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraphs (1), (3) and (4) of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in SECTION III – LIMITS OF INSURANCE.

Paragraph (2) of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

k. Damage To Your Product

"Property damage" to "your product" arising out of "your product" or any part of "your product".

l. Damage To Your Work

"Property damage" to "your work" arising out of "your work" or any part of "your work" and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

Exclusions j. through m. do not apply to damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in SECTION III – LIMITS OF INSURANCE.

n. Recall Of Products, Work Or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

(1) "Your product";

(2) "Your work"; or

(3) "Impaired property";

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

o. Asbestos

"Bodily injury", "property damage" or "personal and advertising injury" that in any way, in whole or in part, arises out of, relates to or results from the "asbestos hazard".

This exclusion includes but is not limited to compliance with any request, demand, order, or statutory or regulatory requirement, or any other action authorized or required by law, or any loss, cost or expense arising out of or relating to the investigation of, abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating

or disposing of, or in any way responding to, or assessing the effects of asbestos, as well as any costs, fees, expenses, penalties, judgments, fines or sanctions arising from or relating thereto.

As used in this exclusion, "asbestos hazard" means:

(1) the actual, alleged or threatened exposure to, consumption of, ingestion of, inhalation of, absorption of, existence of, or presence of, asbestos in any manner or form whatsoever, either directly or indirectly;

(2) the actual or alleged failure to warn, advise or instruct related to asbestos in any manner or form whatsoever;

(3) the actual or alleged failure to prevent exposure to asbestos in any manner or form whatsoever;

(4) the actual or alleged presence of asbestos in any manner or form whatsoever, in any place whatsoever, whether or not within a building or structure, including its contents.

As used in this exclusion, "asbestos" means any substance, regardless of its form or state, containing asbestos.

p. Nuclear Liability

Any injury or damage

(1) with respect to which an insured under the policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters, Nuclear Insurance Association of Canada or any of their successors, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability; or

(2) resulting from the "hazardous properties" of "nuclear material" and with respect to which (a) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or (b) the insured is, or had this policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization; or

(3) under any Medical Payments coverage, to expenses incurred with respect to "bodily injury" resulting from the "hazardous properties" of "nuclear material" and arising out of the operation of a "nuclear facility" by any person or organization; or

(4) under any Liability Coverage, to any injury or damage resulting from "hazardous properties" of "nuclear material", if:

(a) The "nuclear material" (a) is at any "nuclear facility" owned by, or operated by or on behalf of, an insured or (b) has been discharged or dispersed therefrom;

(b) The "nuclear material" is contained in "spent fuel" or "waste" at any time possessed, handled, used, processed, stored, transported or disposed of, by or on behalf of an insured; or

(c) The injury or damage arises out of the furnishing by an insured of services, materials, parts or equipment in connection with the planning, construction,

maintenance, operation or use of any "nuclear facility", but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion (c) applies only to "property damage" to such "nuclear facility" and any property thereat.

As used in this exclusion:

(1) "Hazardous properties" includes radioactive, toxic or explosive properties.

(2) Nuclear material" means "source material", "Special nuclear material" or "by-product material".

(3) "Source material", "special nuclear material", and "by-product material" have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof.

(4) "Spent fuel" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a "nuclear reactor".

(5) "Waste" means any waste material (a) containing "by-product material" other than the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its "source material" content, and (b) resulting from the operation by any person or organization of any "nuclear facility" included under the first two paragraphs of the definition of "nuclear facility".

(6) "Nuclear facility" means:

(a) Any "nuclear reactor";

(b) Any equipment or device designed or used for (i) separating the isotopes of uranium or plutonium, (ii) processing or utilizing "spent fuel", or (iii) handling, processing or packaging "waste";

(c) Any equipment or device used for the processing, fabricating or alloying of "special nuclear material" if at any time the total amount of such material in the custody of the insured at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235;

(d) Any structure, basin, excavation, premises or place prepared or used for the storage or disposal of "waste";

and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations.

(7) "Nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material

(8) "Property damage" includes all forms of radioactive contamination of property.

q. **Employment Related Practices**

Any injury or damage to:

(1) A person arising out of any:

(a) Refusal to employ,

(b) Termination of that person's employment; or

(c) Employment-related practices, policies, acts or omissions such as hiring, promotion, coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation or discrimination directed at that person,

(d) Action under Title VII of the 1964 Civil Rights Act and/or any amendments thereto; or

(2) The spouse, child, parent, brother or sister of that person as a consequence of any injury or damage to that person at whom any of the employment-related practices described in Paragraphs (a), (b), (c) or (d) above is directed.

This exclusion applies.

(1) Whether the insured may be held liable as an employer, prospective employer, or in any other capacity; and

(2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

r. Prior Loss

Any "bodily injury", "property damage" or "personal and advertising injury", if such injury or damage is a continuation of, or arises out of injury or damage that commenced prior to the Effective Date of the policy.

s. Fungi or Bacteria

"Bodily injury", "property damage" or "personal and advertising injury" that in any way, in whole or in part, arises out of, relates to or results from the "fungi or bacteria hazard".

This exclusion includes but is not limited to compliance with any request, demand, order, or statutory or regulatory requirement, or any other action authorized or required by law, or any loss, cost or expense arising out of or relating to the investigation of, abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of "fungi or bacteria", as well as any costs, fees, expenses, penalties, judgments, fines, or sanctions arising from or relating thereto.

This exclusion does not apply to any "fungi or bacteria" that are, are on, or are contained in food or beverages.

This exclusion applies regardless of whether any cause, event, material or product contributed concurrently or in any sequence to any such injury or damage.

As used in this exclusion, "fungi or bacteria hazard" means:

(1) actual, alleged or threatened exposure to, consumption of, ingestion of, inhalation of, absorption of, existence of, or presence of, "fungi or bacteria" in any manner or form whatsoever, either directly or indirectly;

(2) the actual or alleged failure to warn , advise or instruct related to "fungi or bacteria" in any manner or form whatsoever,

(3) the actual or alleged failure to prevent exposure to "fungi or bacteria" in any manner or form whatsoever; or

(4) the actual or alleged presence of "fungi or bacteria" in any manner or form whatsoever, in any place whatsoever, whether or not within a building or structure, including its contents.

As used in this exclusion, "fungi or bacteria" include, without limitation, mold, mildew, yeast, spores, mycotoxins, endotoxins, or other pathogens, as well as any particulates or byproducts of any of the foregoing, either directly or indirectly.

t. Lead

"Bodily injury", "property damage", or "personal and advertising injury" that in any way, in whole or in part, arises out of, relates to, or results from the "lead hazard".

This exclusion includes but is not limited to compliance with any request, demand, order, or statutory or regulatory requirement, or any other action authorized or required by law, or any loss, cost or expense arising out of or relating to the investigation of, abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, lead, as well as any costs, fees, expenses, penalties, judgments, fines, or sanctions arising from or relating thereto.

As used in this exclusion, "lead hazard" means:

(1) the actual, alleged or threatened exposure to, consumption of, ingestion of, inhalation of, absorption of, existence of, or presence of, lead in any manner or form whatsoever, either directly or indirectly;

(2) the actual or alleged failure to warn, advise or instruct related to lead in any manner or form whatsoever;

(3) the actual or alleged failure to prevent exposure to lead in any manner or form whatsoever; or

(4) the actual or alleged presence of lead in any manner or form whatsoever, in any place whatsoever, whether or not within a building or structure, including its contents.

u. Intellectual Property

"Bodily injury", "property damage", or "personal and advertising injury" that in any way, in whole or in part, arises out of, relates to or results from the actual or alleged publication or utterance or oral or written statements which are claimed as an infringement, violation or defense of any of the following rights or laws:

(1) copyright, other than infringement in your "advertisement" of copyright or slogan;

(2) patent;

(3) trade secrets;

(4) trade dress; or

(5) trademark, service mark, certification mark, collective mark or trade name, other than trademarked or service marked titles or slogans.

v. Various Personal and Advertising Injury Offenses

"Personal and advertising injury".

(1) Caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury";

(2) That in any way, in whole or in part, arises out of, relates to or results from oral or written publication of material or any television, radio or other electronic publication or broadcast of any kind whatsoever (including but not limited to publication by means of internet, extranet, e-mail or website), if done by or at the direction of the insured with knowledge of its falsity;

(3) That in any way, in whole or in part, arises out of, relates to or results from oral or written publication of material or any television, radio or other electronic publication or broadcast of any kind whatsoever (including but not limited to publication by means of internet, extranet, e-mail or website) whose first publication or broadcast took place before the beginning of the "policy period";

(4) That in any way, in whole or in part, arises out of, relates to or results from a criminal act committed by or at the direction of the insured;

(5) For which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement;

(6) That in any way, in whole or in part, arises out of, relates to or results from a breach of contract;

(7) That in any way, in whole or in part, arises out of, relates to or results from the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement";

(8) That in any way, in whole or in part, arises out of, relates to or results from the wrong description of the price of goods, products or services stated in your "advertisement";

(9) Committed, in whole or in part, by an insured whose business is:

(a) Advertising, broadcasting, publishing or telecasting;

(b) Designing or determining content of web-sites for others; or

(c) An internet search, access, content or service provider.

However, this exclusion does not apply to Paragraphs 15. a., b. and c. of "personal and advertising injury" under SECTION V – DEFINITIONS.

For the purposes of this exclusion, the placing of frames, borders or links, or advertising, for you or others anywhere on the internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.

(10) Arising out of an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.

(11) Arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

w. Silica

"Bodily injury", "property damage", or "personal and advertising injury" that in any way, in whole or in part, arises out of, relates to or results from:

(1) the actual, alleged or threatened exposure to, consumption of, ingestion of, inhalation of or absorption of, "silica", either directly or indirectly;

(2) the actual, alleged or threatened exposure to, consumption of, ingestion of, inhalation of, absorption of, existence of or presence of, "silica dust" either directly or indirectly;

(3) the actual or alleged failure to warn, advise or instruct related to "silica" in any manner or form whatsoever;

(4) the actual or alleged failure to prevent exposure to "silica".

This exclusion includes but is not limited to compliance with any request, demand, order, or statutory or regulatory requirement, or any other action authorized or required by law, or any other claim, "suit", demand, loss, cost or expense arising out of, relating to or resulting from the investigation of, abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of "silica", as well as any costs, fees, expenses, penalties, judgments, fines, or sanctions arising or resulting therefrom or relating thereto

As used in this exclusion:

(1) "Silica" means any substance containing silicon dioxide (SiO_2), including, but not limited to, crystalline or non-crystalline silica, silica particles, silica compounds, "silica dust" or synthetic silica, including but not limited to precipitated silica, silica gel, fumed silica or silica flour.

(2) "Silica dust" means dust containing "silica" alone or mixed with any other dust or fiber(s).

x. Electronic Data

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate "electronic data".

y. Violation of Communication or Information Laws

"Bodily injury", "property damage" or "personal and advertising injury" that in any way, in whole or in part, arises out of, relates to or results from the violation or alleged violation of:

(1) The Telephone Consumer Protection Act (TCPA), the Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM), or the Drivers Privacy Protection Act, including any amendments or additions to the foregoing; or

(2) Any other federal, state or local statute, regulation or ordinance that limits or prohibits the sending, transmitting, communicating or distribution of material or information.

SUPPLEMENTARY PAYMENTS

1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

   a. All expenses we incur.

   b. Up to $250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. We do not have to furnish these bonds.

   c. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.

   d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to $250 a day because of time off from work.

   e. All court costs taxed against the insured in the "suit". However, these payments do not include attorney's fees or attorney's expenses taxed against the insured.

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

   These payments will not reduce the limits of insurance.

2. If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met:

   a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";

   b. This insurance applies to such liability assumed by the insured;

   c. The obligation to defend, or the cost of the defense of, that indemnitee has also been assumed by the insured in the same "insured contract";

   d. The allegations in the "suit" and the information we know about the "occurrence" are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;

   e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such "suit" and agree that we can assign the same counsel to defend the insured and the indemnitee; and

   f. The indemnitee:

      (1) Agrees in writing to:

         (a) Cooperate with us in the investigation, settlement or defense of the "suit";

         (b) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "suit";

(c) Notify any other insurer whose coverage is available to the indemnitee; and

(d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and

(2) Provides us with written authorization to

(a) Obtain records and other information related to the "suit"; and

(b) Conduct and control the defense of the indemnitee in such "suit".

So long as the above conditions are met, attorneys' fees incurred by us in the defense of the indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as SUPPLEMENTARY PAYMENTS. Notwithstanding the provisions of Paragraph 2. b. (2) of SECTION I – COVERAGES, such payments will not be deemed to be damages for "bodily injury" and "property damage" and will not reduce the limits of insurance.

Our obligation to defend the insured's indemnitee and to pay for attorney fees and necessary litigation expenses as Supplementary Payments ends when:

a. We have used up the applicable limit of insurance in the payment of judgments or settlements; or

b. The conditions set forth above, or the terms of the agreement described in paragraph f. above are no longer met.

SECTION II – WHO IS AN INSURED

1. If you are designated in the Declarations as:

a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.

b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.

c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers in the conduct of your business.

d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors in the conduct of your business. Your stockholders are also insureds, but only with respect to their liability as stockholders.

e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees in the conduct of your business.

2. Each of the following is also an insured:

a. Your "volunteer workers" only while performing duties directly related to the conduct of your business, or your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their

employment by you or while performing duties directly related to the conduct of your business. However, none of these "employees" or "volunteer workers" are insureds for:

(1) "Bodily injury" or "personal and advertising injury":

(a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), to a co-"employee" while in the course of his or her employment or performing duties directly related to the conduct of your business, or to your other "volunteer workers" while performing duties directly related to the conduct of your business;

(b) To the spouse, child, parent, brother or sister of that co-"employee" or "volunteer worker" as a consequence of Paragraph (1)(a) above;

(c) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraphs (1)(a) or (b) above; or

(d) Arising out of his or her providing or failing to provide professional health care services.

(2) "Property damage" to property:

(a) Owned, occupied or used by, or

(b) Rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by

you, any of your "employees", "volunteer workers", any partner or member (if you are a partnership or joint venture), or any member (if you are a limited liability company).

b. Any person (other than your "employee" or "volunteer worker"), or any organization while acting as your real estate manager.

c. Any person or organization having proper temporary custody of your property if you die, but only:

(1) With respect to liability arising out of the maintenance or use of that property; and

(2) Until your legal representative has been appointed

d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this policy.

3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other insurance available to that organization. However, coverage under this provision:

a. Is afforded only until the 90th day after you acquire or form the organization or the end of the "policy period", whichever is earlier;

b. Does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization, and

c. Does not apply to "personal and advertising injury" arising out of an offense committed before you acquired or formed the organization.

Further:

(1) Any newly acquired or formed organization that is not reported to us within the time period described in subparagraph 3. a. above is not an insured under this policy; and

(2) Following the end of the 90th day described in subparagraph 3. a. above with respect to such newly acquired or formed organization, we reserve the right to exclude coverage, or to charge additional premium, or to amend the terms and conditions of coverage.

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

SECTION III – LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:

   a. Insureds;

   b. Claims made or "suits" brought; or

   c. Persons or organizations making claims or bringing "suits".

2. The General Aggregate Limit is the most we will pay for the sum of:

   a. Damages for "bodily injury" or "property damage", except such damages included in the "products-completed operations hazard"; and

   b. Damages for "personal and advertising injury".

3. The Products-Completed Operations Aggregate Limit is the most we will pay for damages because of "bodily injury" and "property damage" included in the "products-completed operations hazard".

4. Subject to Paragraph 2. above, the Personal and Advertising Injury Limit is the most we will pay for the sum of all damages because of all "personal and advertising injury" sustained by any one person or organization.

5. Subject to Paragraphs 2. or 3. above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of all damages because of all "bodily injury" and "property damage" arising out of any one "occurrence".

6. Subject to Paragraph 5. above, the Damage To Premises Rented To You Limit is the most we will pay for damages because of "property damage" to any one premises, while rented to you, or in the case of damage by fire, while rented to you or temporarily occupied by you with permission of the owner.

The Limits of Insurance apply to the "policy period" set forth in the Declarations or any endorsements thereto.

SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS

1. Bankruptcy

Bankruptcy or insolvency of the Insured or of the Insured's estate will not relieve us of our obligations under this policy.

2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:

(1) How, when and where the "occurrence" or offense took place;

(2) The names and addresses of any injured persons and witnesses; and

(3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

Notice of an "occurrence" or an offense is not notice of a claim.

b. If a claim is made or "suit" is brought against any Insured, you must:

(1) Immediately record the specifics of the claim or "suit" and the date received; and

(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved Insured must:

(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";

(2) Authorize us to obtain records and other information;

(3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and

(4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the Insured because of injury or damage to which this insurance may also apply.

d. No Insured will, except at that Insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

3. Legal Action Against Us

No person or organization has a right under this policy:

a. To join us as a party or otherwise bring us into a "suit" asking for damages from an Insured; or

b. To sue us on this policy unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an Insured; but we will not be liable for damages that are not payable under the terms of this policy or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the Insured and the claimant or the claimant's legal representative.

4. Other Insurance

This insurance is excess over any other valid and collectible insurance that applies to any claim or "suit" to which this insurance applies, whether such other insurance is written on a primary, excess, contingent or on any other basis (except if that other insurance is specifically written to apply excess of this insurance), and this insurance will not contribute with any other such insurance. However, this condition does not apply to Commercial General Liability insurance policies issued to you by us as described in subparagraph c. of the Insuring Agreement (Part 1 of SECTION I - COVERAGES).

5. Premium Audit

a. We will compute all premiums for this policy in accordance with our rules and rates.

b. The premium shown in this policy as the Deposit Premium is an advance premium only. At the close of each audit period we will compute the earned premium for that period and send notice to the first Named Insured. The due date for audit and retrospective premiums is the date shown as the due date on the bill. If the sum of the Deposit and any audit premiums paid for the "policy period" is greater than the earned premium, we will return the excess to the first Named Insured. However, such return is subject to the Minimum Retained Audit Premium shown in Item 4. of the Declarations.

c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

6. Representations

By accepting this policy, you agree:

a. The statements in the Declarations are accurate and complete;

b. Those statements are based upon representations you made to us; and

c. We have issued this policy in reliance upon your representations.

7. Separation Of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this policy to the first Named Insured, this insurance applies:

a. As if each Named Insured were the only Named Insured; and

b. Separately to each insured against whom claim is made or "suit" is brought.

8. Transfer Of Rights Of Recovery Against Others To Us

If the Insured has rights to recover all or part of any payment we have made under this policy, those rights are transferred to us. The Insured must do nothing after loss to impair our rights. At our request, the Insured will bring "suit" or transfer those rights to us and help us enforce them.

9. Cancellation

a. The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation.

b. We may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least:

(1) 10 days before the effective date of cancellation if we cancel for non-payment of premium; or

(2) 30 days before the effective date of cancellation if we cancel for any other reason

c. We will mail or deliver our notice to the first Named Insured's last mailing address known to us.

d. Notice of cancellation will state the effective date of cancellation. The "policy period" will end on that date.

e. If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, the refund may be less than pro rata, and any refund will be subject to the Minimum Retained Premium shown in the Declarations. The cancellation will be effective even if we have not made or offered a refund.

f. If this policy is cancelled and the Policy Premium is adjustable, the Minimum Retained Audit Premium shown in Item 4 of the Declarations will be pro-rated commensurate with the resulting coverage period, and that pro-rated amount will be the new Minimum Retained Audit Premium. Notwithstanding the premium calculation determined by a premium audit, or by premium additions or returns during the "policy period", the amount of the Deposit Premium that we retain shall be no less than the pro-rated Minimum Retained Audit Premium. In the event that the first Named Insured cancels the policy, the amount that we retain shall be no less than the pro-rated Minimum Retained Audit Premium, or the Minimum Retained Premium shown in Item 4 of the Declarations, whichever is greater.

g. If the policy is subject to audit, a premium audit will be conducted to determine the amount of return premium due (subject to the minimum premiums described above). If the policy is cancelled by the first Named Insured, and the Insured does not allow us to conduct the premium audit or fails to cooperate with us in its completion, then no premium will be returned.

h. If notice is mailed, proof of mailing will be sufficient proof of notice.

10. Changes

This policy contains all agreements between you and us concerning the insurance afforded. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

11. Inspection

We shall be permitted, but not obligated, to inspect, sample and monitor on a continuing basis the Insured's property or operations at any time. Neither our right to make inspections, sample and monitor nor the actual undertaking thereof nor any report thereon shall constitute an undertaking, on behalf of the Insured or others, to determine or warrant that property or operations are safe or healthful or conform to acceptable engineering practice or are in compliance with any law, rule or regulation.

12. Named Insureds

a. The first Named Insured shown in the Declarations is authorized to act on behalf of all persons or organizations insured under this policy with respect to all matters pertaining to the insurance afforded by the policy.

b. Each Named Insured is jointly and severally liable for:

(1) All premiums due under this policy;

(2) All obligations that arise due to any deductibles applicable under this policy, and

(3) Any other financial obligations of the Named Insured to us arising out of any agreements contained in this policy.

13. Transfer of Your Rights and Duties under this policy

Your rights and duties under this policy may not be transferred without our written consent, except in the case of death to an individual Named Insured. If you die, your rights and duties will be transferred to your legal representative but only within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property.

SECTION V – DEFINITIONS

1. "Advertisement" means a notice that is broadcast, published or distributed to market segments or to the general public, about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:

a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and

b. Regarding web-sites, only that part of a web-site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an "advertisement".

2. "Auto" means:

a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment;

b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged

However, "auto" does not include "mobile equipment".

3. "Bodily Injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

4. "Coverage territory" means:

a. The United States of America (including its territories and possessions), Puerto Rico and Canada;

b. International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in Paragraph a. above; or

c. All other parts of the world if the injury or damage arises out of:

(1) Goods or products made or sold by you in the territory described in Paragraph a. above;

(2) The activities of a person whose home is in the territory described in Paragraph a. above, but is away for a short time on your business; or

(3) "Personal and advertising injury" offenses that take place through the Internet or similar electronic means of communication

provided the insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in Paragraph a. above or in a settlement we agree to.

5. "Electronic data" means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

6. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".

7. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.

8. "Hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be.

9. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:

a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by:

a. The repair, replacement, adjustment or removal of "your product" or "your work"; or

b. Your fulfilling the terms of the contract or agreement.

10. "Insured contract" means:

a. A written contract for a lease of premises. However, that portion of the written contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";

b. A written sidetrack agreement;

c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;

d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;

e. A written elevator maintenance agreement;

f. That part of any other written contract or written agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any written contract or written agreement.

Paragraph f. does not include that part of any written contract or written agreement:

(1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;

(2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:

(a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or

(b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or

(3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in Paragraph (2) above or supervisory, inspection, architectural or engineering activities.

11. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".

12. "Loading or unloading" means the handling of property:

a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto";

b. While it is in or on an aircraft, watercraft or "auto"; or

c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;

but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto".

13. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;

b. Vehicles maintained for use solely on or next to premises you own or rent;

c. Vehicles that travel on crawler treads;

d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

(1) Power cranes, shovels, loaders, diggers or drills; or

(2) Road construction or resurfacing equipment such as graders, scrapers or rollers;

e. Vehicles not described in Paragraphs a., b., c. or d. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

(1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

(2) Cherry pickers and similar devices used to raise or lower workers;

f. Vehicles not described in Paragraphs a., b., c. or d. above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

(1) Equipment designed primarily for:

(a) Snow removal;

(b) Road maintenance, but not construction or resurfacing; or

(c) Street cleaning;

(2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

(3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment

However, "mobile equipment" does not include land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

14. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

15. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following enumerated offenses (referred to throughout this policy as offense):

a. False arrest, detention or imprisonment;

b. Malicious prosecution;

c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;

d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

e. Oral or written publication of material, in any manner, that violates a person's right of privacy;

f. The use of another's advertising idea in your "advertisement"; or

g. Infringing upon another's copyright or slogan in your "advertisement".

All "personal and advertising injury" arising out of the same or similar material, regardless of the mode in which such material is communicated, including but not limited to publication by means of Internet, extra-net, email or website, will be considered as arising solely out of one offense.

16. "Policy period" means the period of time from the Effective Date shown in the Declarations to the earlier of the Expiration Date shown in the Declarations or if cancelled, the effective date of cancellation.

17. "Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes, without limitation, materials to be recycled, reconditioned or reclaimed.

18. "Products-completed operations hazard".

a. Means all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

(a) When all of the work called for in your contract has been completed

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

(c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed

b. Does not include "bodily injury" or "property damage" arising out of:

(1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;

(2) The existence of tools, uninstalled equipment or abandoned or unused materials; or

(3) Products or operations for which the classification, listed in the Declarations or in a policy schedule, states that products-completed operations are subject to the General Aggregate Limit.

19. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

For the purposes of this insurance, "electronic data" is not tangible property.

20. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:

a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or

b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

21. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

22. "Volunteer worker" means a person who is not your "employee", and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.

23. "Your product":

a. Means:

(1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

(a) You;

(b) Others trading under your name; or

(c) A person or organization whose business or assets you have acquired; and

(2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

b. Includes

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and

(2) The providing of or failure to provide warnings or instructions.

c. Does not include vending machines or other property rented to or located for the use of others but not sold.

24. "Your work":

a. Means:

(1) Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and

(2) The providing of or failure to provide warnings or instructions.

Arch
Insurance Group®

Signature Page

IN WITNESS WHEREOF, Arch Specialty Insurance Company has caused this policy to be executed and attested.

Mark D. Lyons
President

Martin J. Nilsen
Secretary

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

SERVICE OF SUIT

It is agreed that in the event of the failure of this Company to pay any amount claimed to be due hereunder, this Company, at the request of the Insured, will submit to the jurisdiction of any Court of Competent Jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

It is further agreed that service of process in such suit may be made upon the highest one in authority bearing the title "Commissioner", "Director" or "Superintendent" of Insurance of the state or commonwealth wherein the property covered by this policy is located, and that in any suit instituted against it upon this contract this Company will abide by the final decision of such Court or any Appellate Court in the event of an appeal. The one in authority bearing the title "Commissioner", "Director" or "Superintendent" of Insurance of the state or commonwealth wherein the property covered by this policy is located is hereby authorized and directed to accept service of process on behalf of this Company in any such suit and/or upon the Insured's request to give a written undertaking to the Insured that they will enter a general appearance upon this Company's behalf in the event such a suit shall be instituted.

All other terms and conditions of this policy remain unchanged.

This endorsement is effective on the inception date of this policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Policy Number: DPC 0022451 00

Named Insured:

Endorsement Effective Date:

02 ML0003 00 08 02

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CROSS SUITS EXCLUSION ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM
COMMERCIAL GENERAL LIABILITY SELF-INSURED RETENTION COVERAGE FORM

Under SECTION I – COVERAGES, 2. Exclusions is amended to included the following additional exclusion:

This insurance does not apply to any claim, "suit" or demand made or asserted by or on behalf of one Named Insured against another Named Insured.

All other terms and conditions of this Policy remain unchanged.

Endorsement Number: 1

This endorsement is effective on the inception date of this policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Policy Number: DPC 0022451 00

Named Insured:

Endorsement Effective Date:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXTERIOR INSULATION AND FINISH SYSTEM ABSOLUTE EXCLUSION ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM
COMMERCIAL GENERAL LIABILITY SELF-INSURED RETENTION COVERAGE FORM

Under SECTION I – COVERAGES, 2. Exclusions is amended to include the following additional exclusion:

This insurance does not apply to any claim, "suit", demand or loss that alleges "bodily injury", "property damage", or "personal and advertising injury" that in any way, in whole or in part, arises out of, relates to or results from:

1. The design, manufacture, construction, fabrication, preparation, installation, application, maintenance or repair, including remodeling, service, correction, or replacement, of an "exterior insulation and finish system" or any part thereof, or any substantially similar system or any part thereof, including the application or use of conditioners, primers, accessories, flashings, coatings, caulking or sealants in connection with such a system; or
2. Any moisture-related or dry-rot related decay, infection or infestation of a house or other building caused, in whole or in part, by the "exterior insulation and finish system".

For the purposes of this endorsement, an "exterior insulation and finish system" means an exterior cladding or finish system applied to a house or other building, and consisting of:

a) A rigid or semi-rigid sheathing or insulation board, including gypsum-based, wood-based, or insulation-based materials; and

b) The adhesive or mechanical fasteners used to attach the insulation board to the substrate; and

c) A reinforcing mesh that is embedded in a coating applied to the sheathing or insulation board; and

d) A finish coat.

All other terms and conditions of this Policy remain unchanged.

Endorsement Number: 2

This endorsement is effective on the inception date of this policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Policy Number: DPC 0022451 00

Named Insured:

Endorsement Effective Date:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

WRAP-UP EXCLUSION ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM
COMMERCIAL GENERALLIABILITY SELF-INSURED RETENTION COVERAGE FORM

Under SECTION I – COVERAGES, 2. Exclusions is amended to include the following additional exclusion:

This insurance does not apply to any claim, "suit", demand or loss that alleges "bodily injury", "property damage", or "personal and advertising injury" that in any way, in whole or in part, arises out of, relates to or results from any wrap-up, owner controlled insurance program, contractor controlled insurance program, or similar rating or consolidated program.

All other terms and conditions of this Policy remain unchanged.

Endorsement Number:3

This endorsement is effective on the inception date of this policy unless otherwise stated herein

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Policy Number: DPC 0022451 00

Named Insured:

Endorsement Effective Date:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ENGINEERS, ARCHITECTS OR SURVEYORS PROFESSIONAL LIABILITY EXCLUSION ENDORSEMENT

This endorsement modifies insurance provided under the following.

COMMERCIAL GENERAL LIABILITY COVERAGE FORM
COMMERCIAL GENERAL LIABILITY SELF-INSURED RETENTION COVERAGE FORM

Under SECTION I COVERAGES, 2. Exclusions is amended to include the following additional exclusion:

This insurance does not apply to any claim, "suit", demand or loss that alleges "bodily injury", "property damage" or "personal and advertising injury" that in any way, in whole or in part, arises out of, relates to or results from the rendering of or failure to render any professional services by you or any engineer, architect or surveyor who is either employed by you or performing work on your behalf in such capacity.

Professional services include:

1. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications, and
2. Supervisory, inspection, architectural or engineering activities

All other terms and conditions of this Policy remain unchanged

Endorsement Number: 4

This endorsement is effective on the inception date of this policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Policy Number: DPC 0022451 00

Named Insured:

Endorsement Effective Date:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EARTH MOVEMENT OR SUBSIDENCE EXCLUSION ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM
COMMERCIAL GENERAL LIABILITY SELF-INSURED RETENTION COVERAGE FORM

Under SECTION I –COVERAGES, 2. Exclusions is amended to include the following additional exclusion:

This insurance does not apply to any claim, "suit", demand or loss that alleges "bodily injury", "property damage", or "personal and advertising injury" that in any way, in whole or in part, arises out of, relates to or results from the subsidence, settling, sinking, slipping, falling away, caving in, shifting, eroding, consolidating, compacting, flowing, rising, tilting or any other similar movement of earth or mud, regardless of whether such movement is a naturally occurring phenomena or is man-made.

All other terms and conditions of this policy remain unchanged

Endorsement Number: 5
This endorsement is effective on the inception date of this policy unless otherwise stated herein.
(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)
Policy Number: DPC 0022451 00
Named Insured:
Endorsement Effective Date:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CHROMATED COPPER ARSENATE ("CCA") EXCLUSION ENDORSEMENT

This endorsement modifies insurance provided under the following.

COMMERCIAL GENERAL LIABILITY COVERAGE FORM
COMMERCIAL GENERAL LIABILITY SELF-INSURED RETENTION COVERAGE FORM

Under SECTION I – COVERAGES, 2. Exclusions is amended to include the following additional exclusion:

This insurance does not apply to any claim, "suit", demand or loss that alleges "bodily injury", "property damage", or "personal and advertising injury" that in any way, in whole or in part, arises out of, relates to or results from any product treated with, preserved with, or containing chromated copper arsenate ("CCA").

All other terms and conditions of this Policy remain unchanged.

Endorsement Number:6
This endorsement is effective on the inception date of this policy unless otherwise stated herein.
(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)
Policy Number: DPC 0022451 00
Named Insured:
Endorsement Effective Date:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EMPLOYEE BENEFITS LIABILITY COVERAGE ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Schedule

Coverage	Limit Of Insurance		Deductible		Premium
Employee Benefits Programs	$1,000,000	Each Employee	$10,000	Each Employee	$INCLUDED
	$1,000,000	Aggregate			
Retroactive Date:	7/8/2007				

If no entry appears above with respect to the Aggregate, then the Aggregate limit will be $1,000,000.

If no entry appears above with respect to the Retroactive Date, then the Retroactive Date will be the "policy period" inception date.

A. The following is added to SECTION I - COVERAGES:

COVERAGE - EMPLOYEE BENEFITS LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of any negligent act, error or omission by the insured, or of any person for whom the insured is legally liable, in the "administration" of the insureds "employee benefit program", to which this insurance applies.

But:

(1) The amount we will pay for damages is limited as described in Paragraph C. of this endorsement; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS.

b. This insurance applies to damages only if:

(1) The negligent act, error or omission did not take place before the Retroactive date, if any, shown in the Schedule, nor after the end of the policy period; and

(2) A "claim" for damages, because of an act, error or omission, is first made against any insured, in accordance with Paragraph c. below, during the policy period or an Extended Reporting Period we provide under Paragraph F. of this endorsement.

c. A "claim" seeking damages will be deemed to have been made when notice of such "claim" is received and recorded by any insured or by us, whichever comes first.

A "claim" received and recorded by the insured within sixty (60) days after the end of the policy period will be considered to have been received within the policy period, if no subsequent policy is available to cover the claim.

d. All "claims" for damages made by an "employee" because of any act, error or omission, or a series of related acts, errors or omissions, including damages claimed by such "employee's" dependents and beneficiaries, will be deemed to have been made at the time the first of those "claims" is made against any insured.

2. Exclusions

This insurance does not apply to:

a Dishonest, Fraudulent, Criminal Or Malicious Act

Damages arising out of any intentional, dishonest, fraudulent, criminal or malicious act, error or omission, committed by any insured, including the willful or reckless violation of any statute.

b. Bodily Injury, Property Damage, Or Personal And Advertising Injury

"Bodily injury", "property damage" or "personal and advertising injury".

c. Failure To Perform A Contract

Damages arising out of failure of performance of contract by any insurer.

d. Insufficiency Of Funds

Damages arising out of an insufficiency of funds to meet any obligations under any plan included in the "employee benefit program"

e. Inadequacy Of Performance Of Investment/Advice Given With Respect To Participation

Any "claim" based upon:

(1) Failure of any investment to perform;

(2) Errors in providing information on past performance of investment vehicles; or

(3) Advice given to any person with respect to that person's decision to participate or not to participate in any plan included in the "employee benefit program"

f. Workers' Compensation And Similar Laws

Any "claim" arising out of your failure to comply with any workers' compensation, unemployment compensation insurance, social security or disability benefits laws or any similar laws.

g. ERISA

Damages for which any insured is liable because of liability imposed on a fiduciary by the Employee Retirement Income Security Act of 1974, as now or hereafter amended, or by any similar federal, state or local laws.

h. Available Benefits

Any "claim" for benefits to the extent that such benefits are available, with reasonable effort and cooperation of the insured, from the applicable funds accrued or other collectible insurance.

i Taxes, Fines Or Penalties

Taxes, fines or penalties, including those imposed under the Internal Revenue Code or any similar state or local law.

j. Employment-Related Practices

Damages arising out of employment-related practices to:

(1) A person arising out of any:

(a) Refusal to employ;

(b) Termination of a persons employment; or

(c) Employment-related practices, policies, acts or omissions, including but not limited to coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation or discrimination directed at that person; or

(d) Action under Title VII of the 1964 Civil Rights Act and/or any amendments thereto; or

(2) any other person as a consequence of any injury or damage to that person at whom any of the employment-related practices described in paragraphs (a), (b), (c), or (d) above is directed.

This exclusion applies:

(1) Whether or not the insured may be held liable as an employer or in any other capacity; and

(2) To any obligation to share damages with or repay someone else who must pay damages because of any such injury.

B. For the purposes of the coverage provided by this endorsement, Paragraphs 2. and 3. of SECTION II - WHO IS AN INSURED are deleted in their entirety and replaced by the following:

2. Each of the following is also an insured:

a. Each of your "employees" who is or was authorized to administer your "employee benefit program".

b. Any persons, organizations or "employees" having proper temporary authorization to administer your "employee benefit program" if you die, but only until your legal representative is appointed.

c. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Endorsement.

3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if no other similar insurance applies to that organization. However:

a. Coverage under this provision is afforded only until ninety (90) days after you acquire or form the organization or the end of the policy period, whichever is earlier.

b. Coverage under this provision does not apply to any act, error or omission that was committed before you acquired or formed the organization.

C. For the purposes of the coverage provided by this endorsement, SECTION III - LIMITS OF INSURANCE is deleted in its entirety and replaced by the following:

1. Limits Of Insurance

a. The Limits of Insurance shown in the Schedule and the rules below fix the most we will pay regardless of the number of:

(1) Insureds;

(2) "Claims" made or "suits" brought;

(3) Persons or organizations making "claims" or bringing "suits";

(4) Acts, errors or omissions; or

(5) Benefits included in your "employee benefit program".

b. The Aggregate Limit is the most we will pay for all damages to which this insurance applies.

c. Subject to the Aggregate Limit, the Each Employee Limit is the most we will pay for all damages sustained by any one "employee", including damages sustained by such "employee's" dependents and beneficiaries, as a result of:

(1) A negligent act, error or omission; or

(2) A series of related acts, errors or omissions negligently committed in the "administration" of your "employee benefit program".

However, the amount paid under this endorsement shall not exceed, and will be subject to, the limits and restrictions that apply to the payment of benefits in any plan included in the "employee benefit program".

The limits of the coverage provided by this endorsement apply to the policy period set forth in the Declarations or any endorsements thereto.

2. Deductible

a. Our obligation to pay damages on behalf of the Insured applies only to the amount of damages in excess of the deductible amount stated in the Schedule as applicable to Each Employee. The limits of insurance shall not be reduced by the amount of this deductible.

b. The deductible amount stated in the Schedule applies to all damages sustained by any one "employee", including such "employee's" dependents and beneficiaries, because of all acts, errors or omissions to which this insurance applies.

c. The terms of this insurance, including those with respect to:

(1) Our right and duty to defend any "suits" seeking those damages; and

(2) Your duties, and the duties of any other involved insured, in the event of an act, error or omission, or "claim";

apply irrespective of the application of the deductible amount

d. We may pay any part or all of the deductible amount to effect settlement of any "claim" or "suit" and, upon notification of the action taken, you shall promptly reimburse us for such part of the deductible amount as we have paid.

D. For the purposes of the coverage provided by this endorsement, Conditions 2. and 4. of SECTION IV- COMMERCIAL GENERAL LIABILITY CONDITIONS are deleted in their entirety and replaced by the following:

2. Duties In The Event Of An Act, Error Or Omission, Or "Claim" Or "Suit"

a. You must see to it that we are notified as soon as practicable of an act, error or omission which may result in a "claim". To the extent possible, notice should include:

(1) What the act, error or omission was and when it occurred; and

(2) The names and addresses of anyone who may suffer damages as a result of the act, error or omission.

b. If a "claim" is made or "suit" is brought against any insured, you must:

(1) Immediately record the specifics of the "claim" or "suit" and the date received; and

(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the "claim" or "suit" as soon as practicable.

c. You and any other involved insured must:

(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "claim" or "suit";

(2) Authorize us to obtain records and other information;

(3) Cooperate with us in the investigation or settlement of the "claim" or defense against the "suit"; and

(4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of an act, error or omission to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation or incur any expense without our consent.

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under this endorsement, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

b. Excess Insurance

(1) This insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis, that is effective prior to the beginning of the policy period and that applies to an act, error or omission on other than a claims-made basis, if the other insurance has a policy period which continues after the Retroactive Date shown in the Schedule of this insurance.

(2) When this insurance is excess, we will have no duty to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

(3) When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of the total amount that all such other insurance would pay for the loss in absence of this insurance; and the total of all deductible and self-insured amounts under all that other insurance.

(4) We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Schedule of this endorsement.

c. Method Of Sharing

Except with respect to the insurance described in Item b.(1) above, if all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limits of insurance of all insurers.

E. For the purposes of the coverage provided by this endorsement, the following Extended Reporting Period provisions are added, or, if this endorsement is attached to a Claims-Made Coverage Form, replaces any similar Section in that Coverage Form:

EXTENDED REPORTING PERIOD

1. You will have the right to purchase an Extended Reporting Period, as described below, if:
   a. This endorsement is canceled or not renewed; or
   b. We renew or replace this endorsement with insurance that:
      (1) Has a Retroactive Date later than the date shown in the Schedule of this endorsement; or
      (2) Does not apply to an act, error or omission on a claims-made basis.
2. The Extended Reporting Period does not extend the policy period or change the scope of coverage provided. It applies only to "claims" for acts, errors or omissions that were first committed before the end of the policy period but not before the Retroactive Date, if any, shown in the Schedule. Once in effect, the Extended Reporting Period may not be canceled.
3. An Extended Reporting Period of five (5) years is available, but only by an endorsement and for an extra charge.

You must give us a written request for the endorsement within sixty (60) days after the end of the policy period. The Extended Reporting Period will not go into effect unless you pay the additional premium promptly when due.

We will determine the additional premium in accordance with our rules and rates. In doing so, we may take into account the following:

a. The "employee benefit programs" insured;

b. Previous types and amounts of insurance;

c. Limits of insurance available under this endorsement for future payment of damages; and

d. Other related factors

The additional premium will not exceed 100% of the annual premium for this endorsement.

The Extended Reporting Period endorsement applicable to this coverage shall set forth the terms, not inconsistent with this Section, applicable to the Extended Reporting Period, including a provision to the effect that the insurance afforded for "claims" first received during such period is excess over any other valid and collectible insurance available under policies in force after the Extended Reporting Period starts.

4. If the Extended Reporting Period is in effect, we will provide an extended reporting period aggregate limit of insurance described below, but only for claims first received and recorded during the Extended Reporting Period. The extended reporting period aggregate limit of insurance will be equal to the dollar amount shown in the Schedule of this endorsement under Limits of Insurance.

Paragraph D.1.b. of this endorsement will be amended accordingly. The Each Employee Limit shown in the Schedule will then continue to apply as set forth in Paragraph D.1.c.

F. For the purposes of the coverage provided by this endorsement only, the following definitions are added to the SECTION V - DEFINITIONS:

1. "Administration" means:

a. Providing information to "employees", including their dependents and beneficiaries, with respect to eligibility for or scope of "employee benefit programs";

b. Handling records in connection with the "employee benefit program"; or

c. Effecting, continuing or terminating any "employee's" participation in any benefit included in the "employee benefit program".

However, "administration" does not include handling payroll deductions.

2. "Cafeteria plans" means plans authorized by applicable law to allow employees to elect to pay for certain benefits with pre-tax dollars.

3. "Claim(s)" means any demand, or "suit", made by an "employee" or an "employee's" dependents and beneficiaries, for damages as the result of an act, error or omission.

4. "Employee benefit program" means a program providing some or all of the following benefits to "employees", whether provided through a "cafeteria plan" or otherwise:

a. Group life insurance; group accident or health insurance; dental, vision and hearing plans; and flexible spending accounts; provided that no one other than an "employee" may

subscribe to such benefits and such benefits are made generally available to those "employees" who satisfy the plan's eligibility requirements;

b. Profit sharing plans, employee savings plans, employee stock ownership plans, pension plans and stock subscription plans, provided that no one other than an "employee" may subscribe to such benefits and such benefits are made generally available to all "employees" who are eligible under the plan for such benefits;

c. Unemployment insurance, social security benefits, workers' compensation and disability benefits;

d. Vacation plans, including buy and sell programs; leave of absence programs, including military, maternity, family, and civil leave; tuition assistance plans; transportation and health club subsidies; and

e. Any other similar benefits designated in the Schedule or added thereto by endorsement.

G. For the purposes of the coverage provided by this endorsement, Definitions 6. and 20. in SECTION V – DEFINITIONS are deleted in their entirety and replaced by the following:

6. "Employee" means a person actively employed, formerly employed, on leave of absence or disabled, or retired. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".

20. "Suit" means a civil proceeding in which damages because of an act, error or omission to which this insurance applies are alleged. "Suit" includes:

a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or

b Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

. All other terms and conditions of this Policy remain unchanged.

Endorsement Number: 7

This endorsement is effective on the inception date of this policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Policy Number: OPC 0022451 00

Named Insured:

Endorsement Effective Date:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

WAIVER OF SUBROGATION ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM
COMMERCIAL GENERAL LIABILITY SELF-INSURED RETENTION COVERAGE FORM

SCHEDULE

Name of Person or Organization: Where required by written contract.

Under SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS, Condition 8. Transfer Of Rights Of Recovery Against Others To Us is amended by the addition of the following provision:

We waive any right of recovery we may have against the person or organization shown in the SCHEDULE above because of payments we make for injury or damage arising out of your operations or "your work" done under a written contract with that person or organization.

All other terms and conditions of this Policy remain unchanged.

Endorsement Number: 8

This endorsement is effective on the inception date of this policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Policy Number: DPC 0022451 00

Named Insured:

Endorsement Effective Date:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

SUBCONTRACTOR ENDORSEMENT
(DEDUCTIBLE POLICY)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS is amended to include the following additional conditions:

1. Certificates of Insurance for Commercial General Liability coverage, with limits at least equal to or greater than $1,000,000 each "occurrence" for "bodily injury" and "property damage" and $1,000,000 per offense for "personal and advertising injury", will be obtained by the Named Insured from all "subcontractors" prior to commencement of any work performed for any Insured.

2. The Named Insured will obtain agreements, in writing, from all "subcontractors" pursuant to which the "subcontractor(s)" will be required to defend, indemnify and hold harmless the Named Insured, and any other Insured under the policy for whom the "subcontractor" is working, for any claim or "suit" for "bodily injury", "property damage", and "personal and advertising injury" arising out of the work performed by the "subcontractor."

3. The Named Insured, and any other Insured under the policy for whom the "subcontractor" is working, will be named as additional insured on all of the "subcontractors" Commercial General Liability policy(s).

4. For items 1. through 3. above, documentation will be retained for a minimum of eight years from the expiration date of this policy.

If any of the above conditions are not satisfied, a deductible of $1,000,000 per "occurrence" or offense will apply to any claim or "suit" under this policy seeking damages for "bodily injury", "property damage" and "personal and advertising injury" arising out of the work performed by the "subcontractor" for the Insured. (If no deductible amount is shown above, then the deductible will be deemed to be $1,000,000 per "occurrence" or offense). Provisions for the application of deductibles under this policy are set forth in the DEDUCTIBLE LIABILITY ENDORSEMENT.

For the purposes of this endorsement only, "subcontractor" or "subcontractors" means any person or entity who is not an employee of an Insured and does work or performs services for or on behalf of an Insured.

All other terms and conditions of this Policy remain unchanged.

Endorsement Number: 9

This endorsement is effective on the inception date of this policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Policy Number: DPC 0022451 00

Named Insured:

Endorsement Effective Date:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

BLANKET ADDITIONAL INSURED ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM
COMMERCIAL GENERAL LIABILITY SELF-INSURED RETENTION COVERAGE FORM

SECTION II – WHO IS AN INSURED is amended to include as an additional insured those persons or organizations who are required under a written contract with you to be named as an additional insured, but only with respect to liability for "bodily injury", "property damage", or "personal and advertising injury" caused, in whole or in part, by your acts or omissions or the acts or omissions of your subcontractors:

A. In the performance of your ongoing operations or "your work", including "your work" that has been completed; or

B. In connection with your premises owned by or rented to you.

As used in this endorsement, the words "you" and "your" refer to the Named Insured.

All other terms and conditions of this Policy remain unchanged.

Endorsement Number: 10

This endorsement is effective on the inception date of this policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Policy Number: DPC 0022451 00

Named Insured:

Endorsement Effective Date:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

DESIGNATED CONSTRUCTION PROJECT(S) GENERAL AGGREGATE LIMIT AND POLICY AGGREGATE LIMIT ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM
COMMERCIAL GENERAL LIABILITY SELF-INSURED RETENTION COVERAGE FORM

Schedule

Designated Construction Project(s):
ANY CONSTRUCTION PROJECT AT WHICH YOU PERFORM OPERATIONS

A. Subject to paragraph F. below, for all sums which the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies and which can be attributed only to ongoing operations at a single designated construction project shown in the Schedule above:

1. A separate Designated Construction Project General Aggregate Limit applies to each designated construction project, and that limit is equal to the amount of the General Aggregate Limit shown in the Declarations.

2. The Designated Construction Project General Aggregate Limit is the most we will pay for the sum of all such damages except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard", regardless of the number of:

   a. Insureds;

   b. Claims made or "suits" brought; or

   c. Persons or organizations making claims or bringing "suits".

3. Any payments made for such damages shall reduce the Designated Construction Project General Aggregate Limit for that designated construction project. Such payments shall not reduce the General Aggregate Limit shown in the Declarations nor shall they reduce any other Designated Construction Project General Aggregate Limit for any other designated construction project shown in the Schedule above.

4. The limits shown in the Declarations for Each Occurrence and for Damage To Premises Rented To You continue to apply. However, instead of being subject to the General Aggregate Limit shown in the Declarations, such limits will be subject to the applicable Designated Construction Project General Aggregate Limit.

B. For all sums which the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies and which cannot be attributed only to ongoing operations at a single designated construction project shown in the Schedule above:

1. Any payments made for such damages shall reduce the amount available under the General Aggregate Limit or the Products-Completed Operations Aggregate Limit, whichever is applicable; and

2. Such payments shall not reduce any Designated Construction Project General Aggregate Limit.

C. When coverage for liability arising out of the "products-completed operations hazard" is provided, any payments for damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard" will reduce the Products-Completed Operations Aggregate Limit, and not reduce the General Aggregate Limit or the Designated Construction Project General Aggregate Limit.

D. If the applicable designated construction project has been abandoned, delayed, or abandoned and then restarted, or if the authorized contracting parties deviate from plans, blueprints, designs, specifications or timetables, the project will still be deemed to be the same construction project.

E. The provisions of SECTION III – LIMITS OF INSURANCE not otherwise modified by this endorsement shall continue to apply as stipulated.

F. Regardless of the number of projects and any other circumstance, the amount we will pay under this insurance policy shall be no more than the Policy Aggregate Limit shown below:

Policy Aggregate Limit $ 5,000,000

In the event that no dollar amount is shown next to the Policy Aggregate Limit above, the Policy Aggregate Limit is $10,000,000

All other terms and conditions of this Policy remain unchanged.

Endorsement Number: 11

This endorsement is effective on the inception date of this policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Policy Number: DPC 0022451 00

Named Insured:

Endorsement Effective Date:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION OF TERRORISM OTHER THAN A CERTIFIED ACT OF TERRORISM

This endorsement modifies insurance provided under this policy.

A. The following definitions are added and apply under this endorsement whenever the term terrorism, the phrase any injury or damage, or the phrase certified act of terrorism are enclosed in quotation marks:

1. "Terrorism" means activities against persons, organizations or property of any nature

   a. That involve the following or preparation for the following:

      (1) use or threat of force or violence; or

      (2) commission or threat of a dangerous act; or

      (3) commission or threat of an act that interferes with or disrupts an electronic, communication, information, or mechanical system; and

   b. When:

      (1) the effect is to intimidate or coerce a government or a civilian population or any segment thereof, or to disrupt any segment of the economy; and/or

      (2) it appears that the intent is to intimidate or coerce a government or a civilian population, or to further a philosophical, political, ideological, religious, social or economic objective or to express (or express opposition to) a philosophical, political, ideological, religious, social or economic objective

2. "Any injury or damage" means any injury or damage covered under this policy to which this endorsement is applicable, and includes but is not limited to "bodily injury", "property damage", "personal and advertising injury", "injury" or "environmental damage" as may be defined in this policy.

3. "Certified act of terrorism" means an act that is certified by the Secretary of the Treasury, in concurrence with the Secretary of State and the Attorney General of the United States, to be an "act of terrorism" pursuant to the federal Terrorism Risk Insurance Act of 2002 and any amendment(s) thereto.

B. The following exclusion is added:

EXCLUSION OF TERRORISM OTHER THAN A CERTIFIED ACT OF TERRORISM

This insurance does not apply to any claim, "suit", demand, or loss that alleges "any injury or damage" that, in any way, in whole or in part, arises out of, relates to or results from "terrorism", including action in hindering or defending against an actual or expected incident of "terrorism". "Any injury or damage" is excluded regardless of any other cause or event that contributes concurrently or in any sequence to such injury or damage.

This exclusion does not apply to a "certified act of terrorism".

But, this exclusion also applies when one or more of the following are attributed to an incident of "terrorism", including a "certified act of terrorism":

1. The "terrorism" is carried out by means of the dispersal or application of radioactive material, or through the use of a nuclear weapon or device that involves or produces a nuclear reaction, nuclear radiation or radioactive contamination; or
2. Radioactive material is released, and it appears that one purpose of the "terrorism" was to release such material, or
3. The "terrorism" involves the use, release, or escape of nuclear materials, or that directly or indirectly results in nuclear reaction, nuclear radiation or radioactive contamination, or
4. The "terrorism" is carried out by means of the dispersal or application of pathogenic or poisonous biological or chemical materials; or
5. Pathogenic or poisonous biological or chemical materials are released, and it appears that one purpose of the "terrorism" was to release such materials.

All other terms and conditions of this Policy remain unchanged.

Endorsement Number: 12

This endorsement is effective on the inception date of this policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Policy Number: DPC 0022451 00

Named Insured:

Endorsement Effective Date:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CONDITIONAL TOTAL TERRORISM EXCLUSION
(RELATING TO DISPOSITION OF FEDERAL TERRORISM RISK INSURANCE ACT)

This endorsement modifies insurance provided under this policy.

A. Applicability Of The Provisions Of This Endorsement

The provisions of this endorsement will become applicable commencing on the date when any one or more of the following first occurs:

1. The federal Terrorism Risk Insurance Program ("Program"), established by the Terrorism Risk Insurance Act of 2002 as amended and extended by the Terrorism Risk Insurance Act of 2005, has terminated with respect to the type of insurance provided under this Coverage Form, Coverage Part or Policy; or

2. A renewal, extension or replacement of the Program has become effective without a requirement to make terrorism coverage available to you and with revisions that:
   a. Increase our statutory percentage deductible under the Program for terrorism losses. (That deductible determines the amount of all certified terrorism losses we must pay in a calendar year, before the federal government shares in subsequent payment of certified terrorism losses.); or
   b. Decrease the federal government's statutory percentage share in potential terrorism losses above such deductible, or
   c. Redefine terrorism or make insurance coverage for terrorism subject to provisions or requirements that differ from those that apply to other types of events or occurrences under this policy.

   The Program is scheduled to terminate at the end of December 31, 2007 unless renewed, extended or otherwise replaced by the federal government.

3. If the provisions of this endorsement become applicable, such provisions:
   a. Supersede any terrorism endorsement already endorsed to this policy that addresses "terrorism" and/or "certified act of terrorism" and/or "other act of terrorism", but only with respect to loss, damage or injury from an incident(s) of terrorism (however defined) that occurs on or after the date when the provisions of this endorsement become applicable; and
   b. Remain applicable unless we notify you of changes in these provisions, in response to federal law.

4. If the provisions of this endorsement do NOT become applicable, any terrorism endorsement already endorsed to this policy that addresses "terrorism" and/or "certified act of terrorism" and/or "other act of terrorism" will continue in effect unless we notify you of changes to that endorsement in response to federal law.

B. The following definitions are added and apply under this endorsement whenever the term terrorism, or the phrase any injury or damage, are enclosed in quotation marks:

1. "Terrorism" means activities against persons, organizations or property of any nature:

   a. That involve the following or preparation for the following:

      (1) use or threat of force or violence, or

(2) commission or threat of a dangerous act, or

(3) commission or threat of an act that interferes with or disrupts an electronic, communication, information, or mechanical system; and

b. When:

(1) the effect is to intimidate or coerce a government or a civilian population or any segment thereof, or to disrupt any segment of the economy; and/or

(2) it appears that the intent is to intimidate or coerce a government or a civilian population, or to further a philosophical, political, ideological, religious, social or economic objective or to express (or express opposition to) a philosophical, political, ideological, religious, social or economic objective.

2. "Any injury or damage" means any injury or damage covered under this policy to which this endorsement is applicable, and includes but is not limited to "bodily injury", "property damage", "personal and advertising injury", "injury" or "environmental damage" as may be defined in this policy.

C. The following exclusion is added:

EXCLUSION OF TERRORISM

This insurance does not apply to any claim, "suit", demand, or loss that alleges "any injury or damage" that, in any way, in whole or in part, arises out of, relates to or results from "terrorism", including action in hindering or defending against an actual or expected incident of "terrorism". "Any injury or damage" is excluded regardless of any other cause or event that contributes concurrently or in any sequence to such injury or damage. This exclusion also applies when one or more of the following are attributed to an incident of "terrorism":

1. The "terrorism" is carried out by means of the dispersal or application of radioactive material, or through the use of a nuclear weapon or device that involves or produces a nuclear reaction, nuclear radiation or radioactive contamination; or

2. Radioactive material is released, and it appears that one purpose of the "terrorism" was to release such material; or

3. The "terrorism" involves the use, release, or escape of nuclear materials, or that directly or indirectly results in nuclear reaction, nuclear radiation or radioactive contamination; or

4. The "terrorism" is carried out by means of the dispersal or application of pathogenic or poisonous biological or chemical materials; or

5. Pathogenic or poisonous biological or chemical materials are released, and it appears that one purpose of the "terrorism" was to release such materials.

All other terms and conditions of this Policy remain unchanged.

Endorsement Number: 13

This endorsement is effective on the inception date of this policy unless otherwise stated herein

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Policy Number: DPC 0022451 00

Named Insured:

Endorsement Effective Date:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

PREMIUM COMPUTATION ENDORSEMENT-DEDUCTIBLE POLICY – VERSION I

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

1. The Deposit Premium set forth in Item 4.of the Declarations is adjustable, and is only an estimated premium for the Audit Period shown below.

   The final earned premium for the Audit Period shall be determined as specified in Condition 5 Premium Audit of SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS. The Audit Premium shall be computed by applying the Rate of $45.83 per each $1,000 of the Premium Base identified in 2. below. Such Rate is net of any taxes, licenses, or fees. However, the final premium calculation for the policy period shall be no less than the Minimum Retained Audit Premium as stated in Item 4 the Declarations.

   Unless otherwise specified in this Policy, the Audit Period will be the same as the policy period; or if this policy is cancelled, the Audit Period will be from the Effective Date of the policy to the effective date of cancellation.

2. The Premium Base shall be identified in (A) and (B) below.

   (A) Premium Base

   ☐ Gross sales excluding aircraft products,

   ☐ Intracompany sales (e.g. subsidiary-to-subsidiary, partner-to-partner, etc.) and

   ☐ foreign sales

   ☐ Payroll as determined immediately below.

   ☐ Gross Unmodified Payroll

   ☐ Workers Compensation Payroll

   ☐ Workers Compensation Payroll excluding:

   (1) Clerical Office Employees

   (2) Salesmen, Collectors, Messengers

   (3) Drivers and their helpers if principal duties are to work on or in connection with "autos"

   ☒ Other (Describe) ESTIMATED SUBCONTRACTOR COSTS

   Estimated Exposures $3,000,000

   (B) Specific Deletions From Premium Base, If Any:

   ☐ Designated Products: _____

☐ Designated Operations: _____

☐ Other: _____

All other terms and conditions of this Policy remain unchanged.

Endorsement Number 14

This endorsement is effective on the inception date of this policy unless otherwise stated herein.

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Policy Number: DPC 0022451 00

Named Insured:

Endorsement Effective Date:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

DEDUCTIBLE LIABILITY ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Schedule

1. Specific coverages to which a deductible(s) applies and amount of deductible(s):

	Coverage	Amount of Deductible
☒	All coverages	$10,000
☐	Products/Completed Operations	$
☐	All coverages other than Products/Completed Operations	$

2. The deductible applies to:

☒ Damages and Supplementary Payments
☐ Damages Only

3. A Deductible Aggregate applies as follows:

☐ The deductible(s) shown in Item 1 of this Schedule is subject to a Deductible Aggregate amount of $ ____. The Deductible Aggregate is subject to adjustment upwards based on a rate of $____ per ____. Such adjustment will be made on a pro-rata basis in the proportion that the final exposure base for the policy period bears to the estimated exposure base as of the Effective Date of this policy, which is $ ____. Subject to the foregoing, once the loss payments actually paid by us, and reimbursed by you to us, equals the Deductible Aggregate amount, your deductible(s) (shown in Item 1. above) will be reduced to $ ____.

(If no Deductible Aggregate is shown, then there is no aggregate on the cumulative amount of deductible payments for which the Insured is responsible.)

Application of the Deductible Liability Endorsement

The deductible(s) set forth in the Schedule apply to damages and Supplementary Payments, (or damages only if the appropriate box is checked in the Schedule), on a per-"occurrence" or per-offense basis. The Insured is responsible for payment of the deductible(s).

The Insured is responsible for all payments within the deductible amount. Subject to the Limits of Insurance and all other terms and conditions for this policy, our obligation to pay damages and expenses on your behalf applies only to the amount of damages and expenses in excess of the deductible amounts set forth in the Schedule. We may pay part or the entire deductible amount to effect settlement of any claim or "suit" and, upon notification of the action taken, you shall promptly reimburse us for such part of the deductible amount that has been paid by us.

The Limits of Insurance are not increased by the presence of a deductible. Further, our obligation under SECTION I – COVERAGES to pay damages on behalf of the Insured applies only to the amount of damages in excess of any deductible amount(s) shown in the Schedule that are applicable to such coverages, and the applicable Limits of Insurance shall be reduced by the amount of such deductible(s). The Limits of Insurance set forth in this policy as "aggregate" for such coverages shall not be reduced by the application of such deductible amount(s).

All other terms and conditions of this Policy remain unchanged

Endorsement Number: 15
This endorsement is effective on the inception date of this policy unless otherwise stated herein.
(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)
Policy Number: DPC 0022461 00
Named Insured:
Endorsement Effective Date:

TERRORISM COVERAGE DISCLOSURE NOTICE

TERRORISM COVERAGE PROVIDED UNDER THIS POLICY

The Terrorism Risk Insurance Act of 2002 and amendments thereto established a program within the Department of the Treasury, under which the federal government shares, with the insurance industry, the risk of loss from future terrorist attacks. The Act applies when the Secretary of the Treasury certifies that an event meets the definition of an act of terrorism. The Act provides that, to be certified, an act of terrorism must cause losses that exceed five million dollars. The act of terrorism must have been committed by an individual or individuals acting on behalf of any foreign person or foreign interest to coerce the government or population of the United States

In accordance with the Terrorism Risk Insurance Act of 2002 and amendments thereto, we are required to offer you coverage for losses resulting from an act of terrorism that is certified under the federal program as an act of terrorism committed by an individual(s) acting on behalf of a foreign person or foreign interest. The policy's other provisions will still apply to such an act. This offer does not include coverage for incidents of nuclear, biological, chemical, or radiological terrorism which will be excluded from your policy. Your decision is needed on this question: do you choose to pay the premium for terrorism coverage stated in this offer of coverage, or do you reject the offer of coverage and not pay the premium? You may accept or reject this offer.

If your policy provides commercial property coverage, in certain states, statutes or regulations may require coverage for fire following an act of terrorism. In those states, if "terrorism" results in fire, we will pay for the loss or damage caused by that fire, subject to all applicable policy provisions including the Limit of Insurance on the affected property. Such coverage for fire applies only to direct loss or damage by fire to Covered Property. Therefore, for example, the coverage does not apply to insurance provided under Business Income and/or Extra Expense coverage forms or endorsements that apply to those coverage forms, or to Legal Liability coverage forms or Leasehold Interest coverage forms

Your premium will include the additional premium for terrorism as stated in the section of this Notice titled DISCLOSURE OF PREMIUM.

DISCLOSURE OF FEDERAL PARTICIPATION IN PAYMENT OF TERRORISM LOSSES

The United States Government, Department of the Treasury, will pay a share of terrorism losses insured under the federal program. The federal share equals 90% in 2006 and 85% in 2007 of that portion of the amount of such insured losses that exceeds the applicable insurer retention.

DISCLOSURE OF PREMIUM

Your premium for terrorism coverage is: $0
(This charge/amount is applied to obtain the final premium.)

You may choose to reject the offer by signing the statement below and returning it to us. Your policy will be changed to exclude the described coverage. If you chose to accept this offer, this form does not have to be returned.

REJECTION STATEMENT

I hereby decline to purchase coverage for certified acts of terrorism. I understand that an exclusion of certain terrorism losses will be made part of this policy.

Policyholder/Legal Representative/Applicant's Signature	Kam Cheung Construction Inc. Named Insured
Print Name of Policyholder/Legal Representative /Applicant	Arch Specialty Insurance Company Insurance Company
Date:	Policy Number: DPC0022451-00

ADDENDUM TO TERRORISM DISCLOSURE NOTICE

Excluded lines of insurance

If your policy contains insurance for fidelity, burglary and theft, commercial auto, medical malpractice or professional liability, the TERRORISM COVERAGE DISCLOSURE NOTICE does not apply to such lines of insurance because they are excluded from the federal Terrorism Risk Insurance Act Program ("Program").

Potential Terrorism Risk Insurance Act Program Change

For lines of insurance subject to the Program, the Program will terminate at the end of December 31, 2007 unless renewed, extended, or replaced by the federal government. Your policy will become effective (or will be renewed) while the Program is still in effect, but prior to a decision by the federal government on extension of the Program. Since the timetable for any further United States Government action is unknown at this time, we continue to offer the terrorism coverage described in the second paragraph of the TERRORISM COVERAGE DISCLOSURE NOTICE for the period of time from your policy inception until 12/31/07.

If the Program is renewed, extended or replaced during the term of your policy with the requirement that we make terrorism available, the treatment of terrorism under your policy will continue to be applicable subject to all the terms, definitions, exclusions, and conditions of your policy unless we are required to make insurance coverage for terrorism subject to provisions or requirements that differ from those that apply under this policy.

If the Program terminates, or is renewed, extended or replaced during the term of your policy without a requirement that we make terrorism available, the treatment of terrorism under your policy may change and a conditional terrorism endorsement may be effective.

Terrorism Premium Impact

If you are charged Terrorism Premium for the period through 12/31/2007 and the Program is renewed, extended or replaced during the term of your policy and we are required to continue to offer terrorism coverage, we will calculate the premium for such period of time from January 1, 2008 until the Expiration date of your policy and provide you with notice and charge additional premium which will be due as specified in the notice.

If you are charged Terrorism Premium for the period up to the Expiration of your policy and the Program terminates, or is renewed, extended or replaced with certain changes, during the term of your policy, then your acceptance of the offer of the terrorism coverage described in the second paragraph of the TERRORISM COVERAGE DISCLOSURE NOTICE will only be effective up to December 31, 2007 and the treatment of terrorism thereafter under your policy may change. Unless similar Terrorism Coverage continues to be provided for such period of time from January 1, 2008 until the Expiration date of your policy, any unearned premium for terrorism coverage no longer applicable under your policy, if paid by you, will be returned.

If the Program is renewed, extended or replaced during the term of your policy and we are required to continue to offer terrorism coverage but the level or terms of the Program change to the extent that our premium may not be appropriate, we may recalculate the premium and provide you with notice and charge additional premium which will be due as specified in the notice.

NOTICE TO POLICYHOLDERS

POTENTIAL RESTRICTIONS OF TERRORISM COVERAGE

CONDITIONAL TOTAL TERRORISM EXCLUSION
(RELATING TO DISPOSITION OF FEDERAL TERRORISM RISK INSURANCE ACT)

This Notice has been prepared in conjunction with the POTENTIAL implementation of changes related to coverage of terrorism under your policy.

The federal Terrorism Risk Insurance Act of 2002 as amended and extended by the Terrorism Risk Insurance Act of 2005 established a Terrorism Risk Insurance Program ("Program") within the Department of the Treasury, under which the federal government shares, with the insurance industry, the risk of loss from future terrorist attacks. That Program will terminate at the end of December 31, 2007 unless renewed, extended or replaced by the federal government. Your policy will become effective (or will be renewed) while the federal Program is still in effect, but prior to a decision by the federal government on extension of the federal Program. If the federal Program terminates, or is renewed, extended or replaced with certain changes, during the term of your policy, then the treatment of terrorism under your policy will change. This Notice is being provided to you for the purpose of summarizing potential impact on your coverage. The summary is a brief synopsis of significant exclusionary provisions and limitations.

This Notice does not form a part of your insurance contract. The Notice is designed to alert you to coverage restrictions and to other provisions in certain terrorism endorsement(s) in this policy. If there is any conflict between this Notice and the policy (including its endorsements), the provisions of the policy (including its endorsements) apply.

Carefully read your policy, including the endorsements attached to your policy.

POTENTIAL CHANGE DURING THE TERM OF YOUR POLICY:

If the policy provides any coverage for loss, damage or injury arising out of a terrorism incident, including coverage pursuant to the federal Terrorism Risk Insurance Act of 2002 as amended and extended by the Terrorism Risk Insurance Act of 2005, such coverage will not be applicable and the terrorism exclusion(s) contained in the CONDITIONAL TOTAL TERRORISM ENDORSEMENT will become applicable commencing on the date when any one or more of the following first occurs:

1. The federal Terrorism Risk Insurance Program ("Program"), established by the Terrorism Risk Insurance Act of 2002 as amended and extended by the Terrorism Risk Insurance Act of 2005, has terminated with respect to the type of insurance provided under this Coverage Form, Coverage Part or Policy; or

2. A renewal, extension or replacement of the Program has become effective without a requirement to make terrorism coverage available to you and with revisions that:

   a. Increase our statutory percentage deductible under the Program for terrorism losses. (That deductible determines the amount of all certified terrorism losses we must pay in a calendar year, before the federal government shares in subsequent payment of certified terrorism losses.); or

   b. Decrease the federal government's statutory percentage share in potential terrorism losses above such deductible; or

   c. Redefine terrorism or make insurance coverage for terrorism subject to provisions or requirements that differ from those that apply to other types of events or occurrences under this policy.

Our deductible in 2006 is 17.5% of the total of our previous year's direct earned premiums. In 2007, that figure is 20%. The government's share is 90% in 2006 and 85% in 2007 of the terrorism losses paid by us above the deductible.

U.S. TREASURY DEPARTMENT'S OFFICE OF FOREIGN ASSETS CONTROL ("OFAC") ADVISORY NOTICE TO POLICYHOLDERS

No coverage is provided by this Policyholder Notice nor can it be construed to replace any provisions of your policy. You should read your policy and review your Declarations page for complete information on the coverages you are provided.

This Notice provides information concerning possible impact on your insurance coverage due to directives issued by OFAC. Please read this Notice carefully.

The Office of Foreign Assets Control (OFAC) administers and enforces sanctions policy, based on Presidential declarations of "national emergency". OFAC has identified and listed numerous:

- Foreign agents;
- Front organizations;
- Terrorists;
- Terrorist organizations; and
- Narcotics traffickers;

as "Specially Designated Nationals and Blocked Persons". This list can be located on the United States Treasury's web site – http://www.treas.gov/ofac.

In accordance with OFAC regulations, if it is determined that you or any other insured, or any person or entity claiming the benefits of this insurance has violated U.S. sanctions law or is a Specially Designated National and Blocked Person, as identified by OFAC, this insurance will be considered a blocked or frozen contract and all provisions of this insurance are immediately subject to OFAC. When an insurance policy is considered to be such a blocked or frozen contract, no payments nor premium refunds may be made without authorization from OFAC. Other limitations on the premiums and payments also apply.