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Kenneth J. Gorman
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APL-2019-00118

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Court of Appeals

STATE OF NEW YORK

JIN MING CHEN,

Plaintiff-Appellant,

against

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

Defendant-Respondent.

BRIEF FOR PLAINTIFF-APPELLANT

LAW OFFICES OF WADE T. MORRIS
Attorneys for Plaintiff-Appellant
225 Broadway, Suite 1510
New York, New York 10007
212-406-4993
kennethjgorman@gmail.com

Of Counsel:
Kenneth J. Gorman

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COURT OF APPEALS
STATE OF NEW YORK

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JIN MING CHEN,

Plaintiff-Appellant

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-against-

APPELLATE BRIEF

INSURANCE COMPANY OF
THE STATE OF PENNSYLVANIA

Defendant-Respondent

----------X

PRELIMINARY STATEMENT

The plaintiff-appellant Jin Ming Chen ("plaintiff") submits this brief in connection with the appeal he took, upon an order of the Court of Appeals dated June 11, 2019 which granted plaintiff's motion for leave to appeal to this Court from the Appellate Division, First Departments' decision and order dated October 30, 2018 which affirmed a judgment of the Supreme Court, New York County (Rakower, J.) which, after entry of the final order granting plaintiff summary judgment finding that defendant-respondent, Insurance Company of the State of Pennsylvania's ("ICSOP") disclaimer was invalid and ordering it to satisfy the underlying judgment, less a one-million-dollar credit, granted ICSOP reargument, reducing the award of pre-judgment and post-judgment interest on the underlying judgment by over 70%[1].

[1] The underlying judgment with statutory interest and costs was ~$3,654,246.27 on June 20, 2017, the date of the judgment in this action. Given the years defendant ICSOP chose to litigate this matter the total interest including pre and post-judgment interest was ~$1,324,246.27 as of that date. The amount

INTRODUCTION

It is uncontested that excess insurer ICSOP's disclaimer of coverage was invalid. The plaintiff commenced 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) "less the $1,000,000 limit of the [underlying primary] 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

of interest and costs ICSOP included with its judgment was $356,576.23 or a reduction of ~73.07%.

> 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). Plaintiff also asserted that ICSOP could not reargue an issue it never raised prior to entry of the final order (894, 906-907). Plaintiff further maintained 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", once again marking the matter disposed (932). ICSOP then moved for leave to resettle plaintiff's proposed judgment, raising the same arguments it raised on its prior motion (932-943). Plaintiff opposed ICSOP's motion and cross-moved for leave to enter judgment in accordance with the May 2, 2016 final order (945-973).

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. After the matter was submitted, the court signed ICSOP's proposed judgment, absolving it of paying any post-judgment interest and only having to pay pre-judgment interest on the first $1 million.

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 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 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 incorrectly set a new standard for waiving issues when opposing motions made on notice (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 a motion made on notice. This is the only reported decision which applies the concept of contractual waiver in a litigation context and has the potential of overturning or significantly transforming the decisional law regarding the legal doctrine of waiver.

The First Department's decision was also fundamentally incorrect due to its improper application of CPLR §2221 and §5019. The Court 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".

However, 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] [same]).

While it may be 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]).

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 diametrically opposed 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.

Regarding the merits, ICSOP was responsible for paying all pre-judgment and post-judgment interest that accrued on the underlying judgment, up to its policy limits. ICSOP's excess policy, which followed form to the underlying Arch policy[2], stated that it was responsible for the "ultimate net loss" in excess of the underlying Arch policy limits, which was $1 million. The "ultimate net loss" did not exclude pre-judgment and post-judgment interest.

As ICSOP's use of the term "ultimate net loss", did not exclude pre-judgment and post-judgment interest, it was required to pay statutory interest on the underlying judgment within its policy limits (see, In re Viking Pump, Inc., 148 A.3d 633, 665 [Del. 2016, applying New York Law]).

ICSOP's excess policy further stated:

> "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

[2] The Arch policy was rescinded.

> 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"

The attached "Schedule of Underlying Insurance" stated that the limits of the Arch policy was $1 million for each occurrence (88). It made no reference to the Arch policy's Supplementary Payments section.

Yet, the First Department held that the Supplementary Payments section increased the limits of the underlying insurance in the declarations. Thus, in order for the excess policy to be triggered, the limits of insurance in the declarations section and the supplementary payments has to be exceeded. The Court reasoned that this was because the Arch policy's supplementary payment provision stated that the payment of pre-judgment and post-judgment interest did not reduce the limits of insurance.

The First Department's reasoning was fundamentally incorrect as 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]).

The First Department's decision, which created conditions that went far beyond the terms of the policies, 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 exceeded before triggering excess coverage (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].

In addition, as noted above, ICSOP followed form to the Arch policy. 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]). As there was no inconsistency between the excess and primary policies,

[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] ["post-judgment 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"]

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]).

The First Department's decision should also be reversed as it conflicts with this Court's decision in Ragins v. Hosps. Ins. Co., 22 NY3d 1019 [2013]).

QUESTIONS PRESENTED

1) Does the First Department's decision, which held that waiving an issue in connection with a motion made on notice "requires an indication of an intentional relinquishment of a known right that, except for the waiver, the waiving party would have enjoyed" incorrectly set a new standard for waiving issues when opposing motions made on notice?

2) Does the First Department's decision incorrectly permit litigants to advance new legal theories on a motion to reargue, contrary to the plain meaning of CPLR § 2221[d], the decisional law of this Court and all four Appellate Division Departments?

3) Does the First Department's decision incorrectly permit CPLR § 2221[d] to be used as a vehicle for making substantive changes to a final order in violation of CPLR § 5019[a], the decisional law of this Court (see, Kiker v. Nassau County, 85 NY2d 879 and

Herpe v. Herpe, 225 NY 323), and the decisional law of all four Appellate Division Departments?

4) Does the First Department's decision incorrectly absolve ICSOP of paying any post-judgment interest and pre-judgment interest on the first $1 million of the underlying judgment where the ICSOP excess policy, which stated it was responsible for the ultimate net loss, followed form to the primary policy and did not contradict the terms of that policy?

5) Does the First Department's decision incorrectly impose conditions going beyond the terms of the insurance policies, creating a new rule that excess coverage is now triggered upon the primary carrier's payment of "supplemental payments" in addition to the limits of insurance set forth in the policy's declarations section?

6) Is the First Department's decision in conflict with 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]?

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 a copy of its disclaimer (194-196).

After plaintiff was granted summary judgment, Arch was granted summary judgment in a separate declaratory judgment action rescinding the primary insurance policy and withdrew counsel from defending Kam Cheung in the underlying personal injury action. ICSOP then 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 pre-judgment 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 pre-judgment 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). ICSOP 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[4]" (389).

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

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

(333).

ICSOP never argued that it did not have to pay any post-judgment interest on the judgment; it never argued it was entitled to a reduction in the amount of interest it would have to pay. 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).

[4] ICSOP acknowledged that the judgment included $396,993.70 in pre-judgment 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).

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).

ICSOP's second motion to resettle

By notice dated November 29, 2016, ICSOP 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 ICSOP 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 pre-judgment 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). ICSOP's proposed judgment reduced the interest that plaintiff was initially awarded by over 70%. It eliminated all post-judgment interest and did not require ICSOP to pay pre-judgment interest on the first $1 million (1007-1009).

Interim order granting reargument

Although ICSOP's motion was only to resettle and two final orders were issued disposing of this matter, by order dated

February 1, 2017, the Supreme Court, New York County (Rakower, J.) sua sponte granted ICSOP leave to reargue the issues of pre-judgment and post-judgment 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 it of paying any pre and post-judgment interest on the first $1 million of the underlying judgment, eliminated all post-judgment interest on the underlying judgment (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 pre-judgment and post-judgment interest and plaintiff's motion for summary judgment sought an order directing "ICSOP to satisfy the judgment awarding the plaintiff $2,330,000, plus interest"., the First Department determined that ICSOP's arguments pertaining to pre-judgment and post-judgment interest were not waived and properly raised after entry of the final order, reasoning 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. 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 pre-judgment interest "on that part of the judgment we pay," i.e., the first $1 million, and "all" post-judgment 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 the First Department's decision should be reversed given the impact this decision has on the doctrines of waiver, reargument (CPLR § 2221[d]), resettlement (CPLR § 5019[a]), the law of insurance contracts 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, IN DEROGATION OF THE DECISIONAL LAW OF THIS COURT AND ALL APPELLATE DIVISION DEPARTMENTS, INCORRECTLY 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.

As noted above, 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 pre-judgment 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 pre-judgment interest, the judgment should be adjusted such that statutorily mandated 9% per annum pre-judgment 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 pre-judgment 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] ["Pre-judgment 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 pre-judgment 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 pre-judgment 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 pre-judgment interest that was built into the judgment, accruing from December 8, 2011 to October 29, 2013, or all the post-judgment interest that accrued on the underlying judgment after 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 pre-judgment 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 post-judgment 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"]).

Thus, the First Department's decision should be reversed on this ground. To hold otherwise creates a completely new category of motion waiver, permitting litigants to raise legal issues for the first time on reargument and even after entry of final judgments.

POINT II

THE FIRST DEPARTMENT'S DECISION INCORRECTLY 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, should be reversed, 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 SHOULD BE REVERSED AS IT IMPERMISSIBLY ALLOWED 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

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 far reaching implications it has on using CPLR § 2221[d] to bypass CPLR § 5019[a]'s prohibition of making substantive changes to a final order, the First Department's decision should be reversed.

"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 (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) was relevant and the First Department's finding to the contrary was reversible error.

POINT IV:

THE FIRST DEPARTMENT INCORRECTLY 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

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

[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]).

34, 38 [1st Dept. 2001], quoting, Seaboard Surety Co. v. Gillette Co., 64 NY2d 304, 311 [1984], quoting, Kratzenstein v. Western 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 [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 (Id., at 1113-1114).

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.

[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"

The First Department's decision failed to articulate any inconsistent language between the Arch policy and ICSOP's excess policy that justified absolving ICSOP of paying any post-judgment interest and not having to pay any pre-judgment interest on the first $1 million of the underlying judgment. 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 post-judgment 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]).

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., 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 [no 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 post-judgment interest and pre-judgment interest on $1.33 million 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 recently decided by the United States District Court, District of Colorado, which 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" (American Guarantee & Liability Insurance Co., v. Environmental Materials LLC, 2019 WL 1358839 at *9 [D. Colo. Mar. 26, 2019]).

Thus, there was no reason for the First Department to assume that the supplementary payments provision solely applied to the underlying insurer, absolving ICSOP of any responsibility for paying post-judgment interest. Moreover, as discussed infra, given that ICSOP's policy stated that it was responsible for paying the "ultimate net loss" there was no reason to assume that it was not responsible for paying prejudgment interest on the first $1 million.

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, and was thus 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], 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 F. Supp. 1296, 1301 [N.D. Ill. 1991]; Mission Nat'l Ins. Co. v.

[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])

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 underlying insurance]; Bernard Lumber Co. v. Louisiana Ins. Guar. Ass'n, 563 So. 2d 261, 265 [La. App. 1990][same]). The First Department's decision should be reversed on this ground as well.

POINT V:

THE FIRST DEPARTMENT INCORRECTLY DETERMINED 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

The First Department accepted ICSOP's argument that requiring it to pay pre-judgment and post-judgment interest impermissibly sought 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 appellate brief at 25). In accepting this 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 pre-judgment interest "on that part of the judgment we pay," i.e., the first $1 million, and "all" post-judgment 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 First Department'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 a 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 (see also, Hargob Realty Assocs., Inc. v. Fireman's Fund Ins. Co., 73 AD3d 856, 858 [2d Dept. 2010] ["Liability coverage under the policy is afforded by Section I, not the supplementary payments provision"]).

The majority of courts across the country 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]; 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] ["post-judgment 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 pre-judgment interest payments 'will not reduce the limits of insurance'" (Insurance Coverage of Construction Disputes § 6:4 (2d ed.) and that "[post-judgment interest] payments will not reduce the limits of insurance" (Id. at §6:5). As the First Department's decision, which impacts almost every excess insurance policy that

follows form to an underlying commercial general liability policy, was incorrectly decided and should be reversed.

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, should be reversed.

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, this Court held that "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 pre-judgment 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 it to pay pre-judgment interest on the first $1 million and post-judgment interest impermissibly sought 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.

The First Department's decision is also in conflict with Welsh v. Peerless Cas. Co., 8 AD2d 373 [1st Dept. 1959], aff'd, 8 NY2d 745 [1960]. Welsh involved the construction of an excess insurance policy made by Peerless Casualty Company (the insurer) and Surface Transportation Corporation of New York (the insured) whereby it was agreed that for any single accident involving Surface, the latter would bear the initial liability of $10,000 and Peerless would pay any sum in excess of that amount up to $40,000. "Surface was a self-insurer to the extent of the first $10,000 and Peerless an excess insurer up to $40,000" (Id.).

The appellant, Lucy Welsh, obtained a judgment against Surface for $19,343.25 in a wrongful death action resulting from personal injuries. She was awarded $12,500 plus interest, the interest from the date of death amounted to $6,656.25. The appellant commenced a declaratory judgment action against the excess insurer to recover $9,343.25, the excess over $10,000.

Like ICSOP, Peerless argued that it was only obligated to pay its proportionate share of interest, i. e., on $2,500 since the damage award was $12,500 which is $2,500 in excess of Surface's liability of $10,000. In other words, Peerless maintained that it could not be charged with the sum of $6,656.25 representing interest on the award of $12,500 from the date of death to the

entry of judgment. The Special Term, accepting Peerless' view, held that its liability was limited to $2,500 with interest on that amount only, from the date of death, plus its proportionate share of court costs.

In reversing the order, the First Department cited the relevant provisions of the excess policy; the pertinent provision of the policy was Section III which after defining the term "ultimate net loss" provided:

> "Should the Assured retain the primary loss at the Assured's own cost and expense then other loss and legal expenses including taxed court costs and any interest on any settlement verdict or judgment incurred with the consent of the company shall be apportioned in proportion to the respective interests as finally determined."

That provision had to be read in connection with Items 7 and 8 of the 'Declarations, which were as follows:

> 'Item 7. The maximum liability of the Company shall be as follows: The Company's limit of liability shall be Forty Thousand ($40,000) Dollars for one person injured or killed and subject to that limit for each person the Company's total liability for more than one person injured or killed in any one accident or series of accidents arising out of one event or disaster shall be Ninety Thousand ($90,000) Dollars.
>
> 'Item 8. Limit of Primary Insurer's policy or Assured's retention: The Assured's Primary Insurer or the Assured shall bear the first amount of Ten Thousand ($10,000) Dollars for one person injured or killed but in no event shall the Assured's total liability for more than one person injured or killed in any one accident or series of accidents arising out of one event or disaster exceed Ten Thousand ($10,000) Dollars.'

The Court, based on a reading of the policy, noted that "Peerless agreed to pay the loss in excess of the sum of $10,000

up to $40,000. Part of that loss [was] the statutory amount added to the award from the date of death, and, inasmuch as the assured had reached its limit with respect to such loss, and [Peerless] had not reached the limit of its policy, it becomes the obligation of [Peerless] to bear that burden".

The Appellate Division held that this language was not ambiguous, but in the event it was, it had to be construed against Peerless:

> We see no ambiguity in Section III of the policy. If, however, there should be any, that section must be construed against the defendant, it having written the policy. Moreover, Item 8 of the declaration, although included for the purpose of indicating that the liability of the assured for more than one person injured or killed would not be more than $10,000, nevertheless indicates the limit of the liability of the assured to be $10,000 except, of course, its obligation to pay a proportionate share of interest on the judgment as entered. Everything beyond that sum of $10,000 and up to $40,000 assessed as damage—and as above indicated, it must include the statutory sum added by clerk—must be borne by the defendant.

(Welsh, at 376-77).

Likewise, in the instant matter, while ICSOP received a $1 million credit, everything beyond the sum of $1 million and up to $5 million ($1 million Arch primary plus ICSPO's additional limits of $4 million), which includes paying prejudgment and post-judgment interest on the entire award, has to be borne by ICSOP.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the First Department's decision should be reversed and that the matter be remitted for entry of judgment, finding ICSOP liable for all pre-judgment and post-judgment interest.

Respectfully submitted,
WADE T. MOPRIS, Esq.
Attorney for Plaintiff-Appellant

By: Kenneth J. Gorman

Kenneth J. Gorman, Esq.
225 Broadway, Suite 307
New York, N.Y. 10007
212-267-0033

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c) that the foregoing brief was prepared on a computer.

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Respectfully submitted,

Kenneth J. Gorman, Esq.
225 Broadway, Suite 307
New York, N.Y. 10007
212-267-0033