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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.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

The plaintiff-appellant Jin Ming Chen ("plaintiff") submits this brief in reply to the brief submitted by defendant-respondent, Insurance Company of the State of Pennsylvania's ("ICSOP") in connection with the appeal plaintiff 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 ICSOP's disclaimer was invalid and ordering it to satisfy the underlying judgment, less a one-million-dollar credit, granted ICSOP reargument on its motion to resettle, reducing the award of pre-judgment and post-judgment interest on the underlying judgment by over 70%.

INTRODUCTION

Since 2016, under the Excellence Initiative, spearheaded by Chief Judge DiFiore, significant efforts were undertaken to improving disposition rates and reducing backlogs long plaguing the New York Court System. "A prevailing theme of the Excellence Initiative is that 'justice delayed is justice denied.' The public deserves to have its cases heard and resolved in a fair, timely, efficient, and cost-effective manner"[1]. The procedural deficiencies plaguing the instant litigation are an anathema to Excellence Initiative, embodying an adherence to inefficiency, delay and backlogs.

After entry of the May 2, 2016 final order, marking this case disposed, the matter should have concluded. Yet, it was merely the beginning an arduous process mired in procedural deficiencies which are still ongoing today. ICSOP first moved under CPLR § 2221(d) to reargue the issue of interest although it was never previously argued. After the trial court denied ICSOP's motion to reargue, ICSOP moved resettle plaintiff's proposed judgment, seeking to drastically reduce its obligation to pay pre-judgment interest and eliminate any obligation to pay post-judgment interest under CPLR § 5019(a). However, "CPLR 5019(a), made to correct judgments and orders, applies to the correction of only such things as clerical mistakes. It is not

[1] https://ww2.nycourts.gov/sites/default/files/document/files/2019-02/19_SOJ-Report.pdf

authority for making substantive changes" (3 West's McKinney's Forms Civil Practice Law and Rules § 8:80, citing, 184 Siegel's Prac. Rev. 3 [April 2007]).

The trial court, which should have denied ICSOP's motion to resettle, sua sponte granted it leave to reargue, permitting ICSOP to argue for the first time, whether it was responsible for paying interest, in violation of the plain meaning of CPLR § 2221(d) and the decisional law of this Court, which expressly states that "[a] motion for reargument is not an appropriate vehicle for raising new questions...which were not previously advanced..." (Simpson v. Loehmann, 21 NY2d 990 [1968]). Moreover, by raising this issue for the first time on reargument, ICSOP waived it (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 raising the claim [for the first time] on its motion to reargue]; Globe Surgical Supply v. GEICO Ins. Co., 59 AD3d 129, 137 [2d Dept. 2008] [same]).

Had the trial court followed the terms of CPLR § 2221(d) and § 5019(a), this case would have ended in 2016. By ignoring these statutes and the decisional law of this Court, the trial court and First Department have permitted this case to needlessly languish more than 3 years after the trial court marked this case disposed. The First Department, by permitting

ICSOP to squabble over these issues in violation of CPLR § 2221(d) and § 5019(a), approved a course of action that is contrary to everything the Excellence Initiative stands for.

Moreover, by endorsing the trial court's convoluted handing of this matter, the First Department set a new standard for waiving issues when a litigant fails to address an issue raised in connection with a motion made on notice. This new standard, mirroring a contractual waiver, is unprecedented and if permitted to stand, will provide parties with countless opportunities to raise issues that were previously waived. First Department's decision reflects a regression of the advancements made under the Excellence Initiative by rewarding incompetence and endorsing delay.

ICSOP's brief is littered with misstatements and inaccuracies designed to mislead this Court into believing that the procedural history of this matter did not violate the CPLR and the decisional law of this Court. Given that "[t]he function of an appellate brief is to assist, not mislead, the court" (Bank of New York Mellon Tr. Co., NA v. Obadia, 2019 WL 5408492, at *2 [2d Dept. October 23, 2019]), we now, once again, set the record straight with regard to the legally deficient procedural history of this case.

POINT I:

ICSOP WAIVED THE ISSUE OF INTEREST AS IT NEVER ADDRESSED THIS ISSUE IN ITS CROSS MOTION OR IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(A)

Although central to this matter, ICSOP's brief deliberately obfuscates the procedural history of this case. ICSOP's assertion that it addressed the issue of interest prior to entry of the final order is disingenuous. Even the First Department acknowledged that ICSOP did not address this issue until after the final order was entered. Yet, ICSOP contends that we "attempt[] to rewrite the procedural history of this action" (brief at 35). Although we accurately set forth the procedural history of this matter in our main brief, we briefly summarize it here to avoid any confusion caused by ICSOP's attempt to muddle this issue.

Interest was demanded in the demand letter and pleadings

The issue of interest was always at the center of this dispute. Plaintiff demanded that ICSOP satisfy the judgment, including pre and post-judgment interest in his initial demand letter dated October 31, 2013 (176). Plaintiff's amended complaint demanded that ICSOP satisfy the judgment, which had prejudgment interest built into it "($2,726,993.70), together with 9% interest from October 29, 2013" (73, 77).

Plaintiff moved for summary judgment motion

When plaintiff moved for summary judgment, he sought to have "ICSOP to satisfy the judgment awarding the plaintiff $2,330,000, plus interest..." (20-21, 22, 50-51).

ICSOP did not address the issue of interest in opposition

In opposition, ICSOP acknowledged that the judgment included $396,993.70 in pre-judgment interest ($2,330,000 + $396,993.70 = $2,726,993.70) (389) and argued that to the extent it was liable "it [was] liable only for the amount of the judgment less the $1,000,000 limit of the Arch Policy" (333).

Hearing on plaintiff's summary judgment motion

At the start of the hearing on plaintiff's motion for summary judgment, the court acknowledged that plaintiff was seeking an order directing ICSOP to satisfy the judgment which included interest (844). In its order dated May 2, 2016, after granting ICSOP's request for the $1 million credit, the trial court stated, "with regard to the balance of the judgment, ICSOP must satisfy that judgment" (872).

ICSOP first addressed interest after entry of final order

The first time ICSOP claimed that it did not have to pay interest was when it moved to reargue the issue of interest pursuant to CPLR § 2221(d) or resettle plaintiff's proposed judgment pursuant to CPLR § 5019(a) on June 1, 2016 (825-840). The Supreme Court, by order dated October 26, 2016, denied

ICSOP's motion, stating "Leave to reargue is denied" and once again marked the matter disposed (932).

ICSOP sought to eliminate interest under CPLR 5019[a]

ICSOP then moved, by notice of motion dated November 29, 2016, for leave to resettle plaintiff's proposed judgment (933-944) "to reflect that [it] is not responsible for the interest accrued/accruing on the entire underlying judgment" (940-944).

Supreme Court sua sponte grants ICSOP leave to reargue issue of interest

Although ICSOP moved to resettle plaintiff's proposed judgment, by order dated February 1, 2017, the Supreme Court, sua sponte granted ICSOP leave to reargue the issues of pre-judgment and post-judgment interest (1010). On June 20, 2017, the Supreme Court granted ICSOP (who moved for resettlement) reargument, absolving it of paying any pre-judgment interest on the first $1 million of the underlying judgment and absolving it of paying any post-judgment interest on the underlying judgment (14-15).

(B)

Thus, on this record, ICSOP cannot credibility argue that it addressed the issue of interest prior to entry of the May 2, 2016 final order. Yet, ICSOP contends that "Plaintiff's waiver argument ignores the fact that at all times [it] has consistently, repeatedly and emphatically taken the position

that Plaintiff was not entitled to the relief he sought – i.e. recovery of the entire $2,330,000 Underlying Award of Damages, plus interest...” (brief at 36).

In support of this assertion, ICSOP cites to the Appendix at pages 322, 331-334, and argues that “[t]his exact argument was raised in ICSOP’s Opposition to Plaintiff’s Motion for Summary Judgment and understood and accepted by the trial court during the oral argument” (brief at 37). The page references ICSOP cites to the Appendix in support of its contention that it addressed the issue of interest prior to entry of the final order confirms that its arguments regarding this issue are false.

When it opposed plaintiff’s summary judgment motion, ICSOP argued that it was not required to drop down to satisfy the limits of the Arch policy, which was $1 million. ICSOP never argued that it was not responsible for pre-judgment and post-judgment interest in addition to the $1 million Arch policy limit. This is confirmed by the pages of the Appendix ICSOP cites to. At page 322 of the Appendix, ICSOP argued that

> Under the ICSOP Excess Policy’s “maintenance” provision, Kam Cheung must maintain the limits of underlying insurance—the $1,000,000 limit of the Arch Policy—in full force during the ICSOP policy period. If Kam Cheung fails to do so, then ICSOP is liable only to the extent that it would have been had Kam Cheung maintained the underlying insurance.

At page 323 of the Appendix, ICSOP argued:

> As such, under the ICSOP Excess Policy's "maintenance" provision, the most for which ICSOP could ever be liable—subject to its EL Exclusion—is the underlying judgment less $1,000,000.

At pages 331-332 of the appendix, ICSOP citing to section I(C) of its excess policy and then argued that:

> This provision clearly requires Kam Cheung to maintain the $1,000,000 limit of the Arch Policy in full force during the ICSOP policy period. If Kam Cheung fails to maintain that limit, then ICSOP is liable only to the extent that it would have been if Kam Cheung had fully complied. In other words, the ICSOP Excess Policy does not "drop down" or otherwise satisfy the limit of the Arch Policy.

Reading the record in the light most favorable to ICSOP, we fail to see how it can honestly argue that it "has consistently, repeatedly and emphatically" argued that it was not responsible for pre-judgment and post-judgment interest prior to entry of the final order.

The arguments ICSOP raised in opposition to plaintiff's motion for summary judgment merely stated that the most it could be held liable for was the underlying judgment less the limits of the primary policy, ICSOP stated very clearly, "is the underlying judgment less $1,000,000" (323).

The trial court gave ICSOP exactly what it requested when it opposed plaintiff's summary judgment motion, a $1 million credit. ICSOP never argued that it was not responsible for pre-

judgment and post-judgment interest, which exceeded the primary policy's $1 million limit.

(C)

ICSOP argues that "[t]o the extent that Plaintiff did not grasp the scope of ICSOP's position prior to oral argument, it is undeniable that ICSOP's position on interest was made clear during oral argument" and that we "had every opportunity to respond to ICSOP's position during oral argument..." (brief at 36-37). ICSOP's contention is without merit. As noted in our main brief, at oral argument, after the trial court rejected ICSOP's demand for further discovery and agreed that it did not have to cover the first million because the policy did not contain a drop-down provision (865-866, 872), the court stated, "with regard to the balance of the judgment, ICSOP must satisfy that judgment" (872).

Yet, ICSOP argues that the issues it raised after entry of the final order were preserved because when the court stated that ICSOP was responsible for interest "at 9 percent" which "adds up", it stated "I haven't done the calculation as to what all the calculation is but, yes, with the interest on the $1.3 million" (852).[2]

[2] The Court should note that this is the only statement ICSOP cites to in support of its assertion that it timely raised these issues prior to entry of the May 2, 2016 final order.

ICSOP is incorrect. First, this off the cuff comment did not preserve the complex substantive issues ISCOP after this matter was disposed. Second, substantive issues cannot be raised for the first time at oral argument (see, People v. Repanti, 24 NY3d 706, 712 [2015] ["Defendant's alternative argument, raised for the first time at oral argument...is wholly unpreserved for our consideration"] [cits.]; E-Z Eating 41 Corp. v. H.E. Newport LLC, 84 AD3d 401, 407 [1st Dept. 2011] [same]; Gonzalez v. Sun Moon Enterprises Corp., 53 AD3d 526, 526–27 [2d Dept. 2008][same]; CJS Appeal and Error § 791 ["...the court will generally not consider issues raised by a party for the first time at oral argument and not contained in the party's appellate brief"]).

Third, ICSOP's remark at oral argument that it did not have pay "interest on the $1.3 million" was unrelated to the arguments it raised in its reargument and resettlement motions, namely, that it did not have to pay any post-judgment interest on any portion of the underlying judgment. In addition, this one sentence comment, which apparently pertained to the issue of pre-judgment interest, did not reflect the complex substantive issues ICSOP raised regarding this issue after entry of the final order.

Even if ICSOP "raised this argument for the first time at oral argument...the argument is waived" (Psilakis v. Arpaia, 2013 WL 1232742, at *8 [Sup. Ct. 2013], citing, Schirmer v.

Athena-Liberty Lofts. LP, 48 AD3d 223 [1st Dept. 2008] [argument improperly raised for first time in reply papers]; see, Design Strategy, Inc. v. Davis, 469 F.3d 284, 300 [2d Cir. 2006] ["Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal"], quoting, Norton v. Sam's Club, 145 F.3d 114, 117 [2d Cir. 1998]; In re Monster Worldwide, Inc. Sec. Litig., 251 F.R.D. 132, 137 [SDNY 2008] ["this argument was raised for the first time at oral argument and so was waived in terms of this motion"]; see also, Knowles v. Iowa, 525 U.S. 113, 116 [1998] ["Iowa waived this argument by failing to raise it in its brief in opposition to the petition for certiorari"], citing, Oklahoma City v. Tuttle, 471 US 808 [1985]; 7 Annotated Patent Digest § 43:62 ["Issues first raised at oral argument are waived"]).

ICSOP "also waived these contentions by failing to raise them in [2015] in support of [its] initial cross motion or in opposition to [plaintiff's summary judgment]...motion" (Zaharatos v. Zaharatos, 134 AD3d 926, 928 [2d Dept. 2015], citing, inter alia, Foitl v. G.A.F. Corp., 64 NY2d 911 [1985]).

(D)

The First Department's decision, which impermissibly expands the scope of CPLR § 2221[d] by allowing ICSOP 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. More importantly, the Appellate Division's finding that the issue was not waived "unless the opposite party is misled to his or her prejudice into the belief that a waiver was intended" (Jin Ming Chen v. Ins. Co. of the State of Pennsylvania, 165 AD3d 588, 589 [1st Dept. 2018], leave to appeal granted, 33 NY3d 907 [2019], citing, 57 NY Jur 2d, Estoppel, Ratification and Waiver § 89) improperly conflates the concept of waiving an issue in a contractual context with waiving an issue in a litigation setting.

By allowing the First Department's issue to stand, CPLR § 2221(d) and § 5019(a) and the plethora of appellate decisional discussed above and in our main brief, will be open to challenge.

POINT II:

THE ISSUE OF INTEREST DID NOT "RIPEN" AFTER ENTRY OF THE FINAL ORDER; IT WAS ALWAYS AT THE FOREFRONT OF THIS CASE

ICSOP fails to address the well settled rule that "[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 either in this court or in the courts below" (Simpson v. Loehmann, 21 NY2d 990 [1968]; see, Reilly v. Steinhart, 218 NY 660 [1916]; Frisenda v. X Large Enterprises Inc., 280 AD2d 514, 515 [1st Dept. 2001]; Levi v. Utica First Ins. Co., 12 AD3d 256, 258 [1st Dept. 2004]).

Instead, ICSOP argues that "the issue of interest did not even truly ripen until the trial court issued its May 2, 2016 order and Plaintiff filed his proposed judgment" (brief at 45). We fail to see the logic in this argument. Plaintiff commenced this declaratory judgment action seeking an order directing ICSOP to satisfy the underlying judgment, which already had pre-judgment interest factored into it and made it abundantly clear he was seeking post-judgment interest[3].

"The court's power to render a declaratory judgment is limited to deciding the rights of persons that are actually at issue in the particular case" (43 N.Y. Jur. 2d Declaratory Judgments § 214). According to plaintiff's initial demand letter, pleadings and motion for summary judgment, the issue of ICSOP's liability for interest was always at the forefront of this case.

The issue of interest was not premature. Plaintiff moved for summary judgment on this issue and ICSOP's liability for pre-judgment interest, which was factored into the underlying judgment and post-judgment interest were determined based on the terms of the insurance policy.

We fail to see how the issue of interest in this case was premature as opposed to Ragins v. Hosps. Ins. Co., 22 NY3d 1019 [2013], which also involved a declaratory action to determine an

[3] There is no authority justifying this ripeness argument in a declaratory action as the interest being fought over is part of the underlying judgment.

excess carrier's liability for interest on the entire judgment. The issue in Ragins and in this case both dealt with the excess carrier's obligation to pay interest based on the terms of the excess policy. This was a substantive issue which ICSOP failed to address in opposition to plaintiff's motion for summary judgment and prior to entry of the final order.

"Whether or not a liability insurer is liable for interest and costs on that part of a judgment recovered against the insured by a third party which is in excess of the amount limited by the policy, depends primarily upon the language employed by the parties in their contract" (70A N.Y. Jur. 2d Insurance § 2220). If ICSOP felt that it had no obligation to pay interest on the judgment, it had to raise this issue when plaintiff moved for summary judgment, not after entry of the final order, when the proceeding was marked disposed.

ICSOP's contention that "the trial court felt it had overlooked the issue of whether and/or to what extent Plaintiff is entitled to collect pre- and/or post-judgment interest from ICSOP" (brief at 41) lacks logic. The trial court did not rule on this issue because ICSOP never addressed it when it opposed plaintiff's motion for summary judgment.

ICSOP fails to explain why it did not have to respond to that branch of plaintiff's motion which sought interest. "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]). ICSOP also fails to adequately address the cases cited at pages 25-28 of our main brief, holding 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 [WDNY 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 [EDNY 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"]).

In addition to stating that ICSOP was responsible for satisfying the underlying judgment, which included pre-judgment and post-judgment interest in our initial demand letter, pleadings and amended pleadings, when moving for summary judgment, plaintiff sought an order directing ICSOP "to satisfy the judgment awarding the plaintiff $2,330,000, plus interest..." (20). If ICSOP felt it was not responsible for paying interest based on the terms of the policy, it could have and should have raised these issues in response to plaintiff's

motion for summary judgment. ICSOP waived this issue and its assertion to the contrary is disingenuous.

The Second Department's decision in Anthony J. Carter, DDS, PC v. Carter, 81 AD3d 819 [2d Dept. 2011], is a prime example of just how indefensible ICSOP's position is. In Carter, the Supreme Court granted the respondent's motion for leave to reargue a prior motion for a refund of post-judgment interest which accrued on a judgment in its favor and against the respondent, relieving the respondent of any obligation to pay post-judgment interest that accrued between April 6, 2001, and March 10, 2003. In reversing the judgment and reinstating the order, the Second Department stated:

> ...the respondent...made no effort to demonstrate to the Supreme Court in what manner it had either overlooked or misapprehended the relevant facts or law, and included on his reargument motion facts not offered on the prior motion. Accordingly, it was an improvident exercise of discretion to grant leave to reargue.

(Id., at 820).

The facts in this case are even more compelling given that ICSOP moved for resettlement under CPLR § 5019(a).

ICSOP's contention that "it was clear that the trial court's ruling nevertheless instructed that Plaintiff was not entitled to collect from ICSOP any interest which would have been covered under the Arch Policy" (brief at 42) is not true. The judgment plaintiff served on ICSOP had pre-judgment interest

factored into it (the judgment was for $2,330,000; with prejudgment interest it was $2,726,993.70) plaintiff argued at every phase of this litigation that he was entitled to all statutory interest. Thus, when the trial court granted plaintiff's motion for summary judgment, gave ICSOP the $1 million credit and marked the case disposed, it stated:

> 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.***

(872, emphasis added).

ICSOP's attempt to have this Court ignore these critical points of law and dispositive facts strains credulity. 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 609, 613 [1st Dept. 2014]) 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]).

POINT III:

ICSOP FAILS TO ADEQUATELY ADDRESS THAT PORTION OF THE FIRST DEPARTMENT'S DECISION WHICH CONFLICTS WITH CPLR 5019[A] AND THIS COURT'S DECISIONS IN KIKER V. NASSAU COUNTY, AND HERPE V. HERPE

ICSOP argues that the First Department's decision does not conflict with this Court's decisions in Kiker v. Nassau Cty., 85 NY2d 879 [1995] and Herpe v. Herpe, 225 NY 323, 327 [1919], because "both cases simply restate established law codified by CPLR 5019(a), which the First Department properly held was not relevant because the trial court did not grant relief under that statute" (brief at 43). We have not found one case where a trial court, faced with a motion to resettle pursuant to CPLR § 5019(a), after entry of a final order, sua sponte, grants reargument with regard to an issue raised for the first time, after the matter was marked disposed twice and reargument had already been denied. As ICSOP moved for resettlement under CPLR § 5019(a) after the matter was marked disposed, this statue is relevant.

"CPLR 5019(a), made to correct judgments and orders, applies to the correction of only such things as clerical mistakes. It is not authority for making substantive changes" (3 West's McKinney's Forms Civil Practice Law and Rules § 8:80, Correction of judgment or order, Marino, J., citing, 184 Siegel's Prac. Rev. 3 [April 2007]). As such, "the court's power is limited to corrections that do not involve matters of substance, and a court is not permitted to meet some legal or

equitable exigency to which the court's attention is called at a subsequent stage of the action or to limit the legal effect of a judgment. Thus, a motion to amend a judgment should be denied if the relief sought would affect substantial rights of the parties as established by the judgment" (8B Carmody-Wait 2d § 63:216, Errors on matters of substance, citing, inter alia, CPLR § 5019(a), Herpe v. Herpe, 225 NY 323 [1919]; Haggerty v. Market Basket Enterprises, Inc., 8 AD3d 618 [2d Dept. 2004]; Owens v. Stuart, 292 AD2d 677 [3d Dept. 2002]; Bolger v. Davis, 127 AD2d 979 [4th Dept. 1987]).

The right to pre-judgment and post-judgment interest is a substantial right (see, Kiker v. Nassau County, 85 NY2d at 88; Larsen v. Sittmar Cruises, 159 Misc. 2d 159, 164 [Civ. Ct. 1993] ["A party's right to pre-judgment interest is a substantial one..."]; 8B Carmody-Wait 2d § 63:67 ["the availability of pre-judgment interest is a substantive issue"]; Turner v. CSX Transportation, Inc., 23 Misc. 3d 527 [Sup Ct. 2009] [noting post-judgment interest was a substantive part of the measure of damages]; Pjetri v. New York City Health & Hosps. Corp., 169 AD2d 100, 104 [1st Dept. 1991] ["The right to recover interest upon a judgment...is undoubtedly a substantial right"]).

In Mount Sinai Hosp. v. Country Wide Ins. Co., 81 AD3d 700 [2d Dept. 2011], the insurer moved pursuant to CPLR 5019(a) to modify the amount of the judgment, belatedly asserting that the

judgment exceeded the coverage limit of the subject policy due to payments previously made under the policy to other health care providers. The Supreme Court granted the insurer's motion, and ordered a hearing to determine the amount remaining on the policy. In reversing the order, the Appellate Division held:

> ...in seeking to modify the amount of the judgment on the ground that the policy limits were nearly exhausted, the insurer was not seeking to correct a mere clerical error. Rather, it sought to change the judgment with respect to a substantive matter. As such, CPLR 5019(a) was not the proper procedural mechanism by which to seek such modification.

(Id., at 701).

This Court's decision in CRP/Extell Parcel I, L.P. v. Cuomo, 29 NY3d 1034 [2016] vividly makes the point. In CRP/Extell, the attorney general ordered the sponsor of a condominium offering to return down payments to purchasers. The sponsor commenced an Article 78 proceeding challenging the attorney general's determinations, but the Supreme Court denied the petition, directed the release and return of the down payments with accumulated escrow interest, and dismissed the proceeding.

After the sponsor returned the down payments and accumulated escrow interest, the purchasers made a motion and obtained an award of statutory interest under CPLR 5001 totaling $4.9 million. Because the purchasers did not seek this substantial relief until after the final judgment dismissing the Article 78 proceeding was entered, this Court affirmed the

appellate division's vacatur of the award. The Court held that once the Supreme Court dismissed the petition and judgment was entered, it no longer possessed jurisdiction to entertain the post-judgment motion for statutory interest.

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, supra), 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 cannot stand.

POINT IV:

THE FIRST DEPARTMENT'S DECISION CANNOT BE RECONCILED WITH RAGINS V. HOSPS. INS. CO., 22 NY3d 1019

ICSOP argues that the First Department's decision does not conflict with Ragins because "the liquidator of the insolvent primary policy paid the primary limits, thereby cutting off the primary coverage for post-judgment interest" (brief at 28-29). ICSOP further maintains that the First Department's decision does not conflict with Ragins because the supplementary payments section of the Arch policy explicitly stated that it would not reduce the limits of insurance while the primary policy's supplementary payments section in Ragins did not. ICSOP's arguments are unavailing.

(A)

First, as noted in our main brief, 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" and also made it a condition that the primary policy limits had to be "exhausted by payment of claims..." (Ragins record on appeal at 57). ICSOP argues that this case is unlike Ragins because "unlike the liquidator in Ragins, neither Kam Cheung nor any other entity has stepped in to fulfill Arch's obligation under the primary Arch Policy by paying $1,000,000 to Plaintiff" (brief at 29). ICSOP misses the mark.

Although some excess policies condition actual payment of the primary policy to trigger excess coverage, ICSOP's excess policy did not. This is because under excess policies containing language akin to the "maintenance" provision (84) in ICSOP's policy "the insured's failure to obtain or maintain underlying insurance will not preclude coverage under the excess or umbrella policy" (1-16 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, where the excess policy does not have this condition, New York adheres to the Second Circuit's decision in Zeig v. Mass. Bonding

& Insurance Co., 23 F.2d 665 [2d Cir.1928][4], 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, which occurred when the underlying judgment for $2.33 million was entered on October 29, 2013.

(B)

ICSOP's contention that this case is unlike Ragins because the supplementary payments section of the Arch policy stated that it would not reduce the limits of insurance while the primary policy's supplementary payments section in Ragins did not is without merit.

Although we discussed this issue extensively in our main brief, ICSOP fails to address the plethora of case law and secondary sources uniformly stating 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

[4] ICSOP's failure to address, let alone mention the Second Circuit's decision in Zeig, 23 F.2d 665 is a testament to the inherent weakness of its position.

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]).

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. "Most policies contain a ***Supplementary Payments provision, which lists monies the insurer will pay in addition to the policy limits, such as expenses incurred by the insurer***, costs of appeal and/or bail bonds, costs taxed against the insured, and prejudgment interest" (Judith F. Goodman, Liability Insurance 101: How to Read the Policy, Brief, Winter 2013, at 61, 64, emphasis added).

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]).

POINT V:

THERE WAS NO INCONSISTENTLY BETWEEN ICSOP'S EXCESS POLICY, WHICH FOLLOWED FORM TO THE ARCH POLICY WITH REGARD TO THE PAYMENT OF INTEREST

(A)

The First Department and ICSOP acknowledged that ICSOP's excess policy followed form to the Arch policy. "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).

Thus, the issue becomes astonishingly simple, boiling down to whether there are any inconsistencies between ICSOP's excess policy and the Arch policy with regard to the payment of interest. Neither ICSOP nor the First Department articulated any inconsistences between the primary and excess policies regarding this issue. Simply put, if ICSOP did not want to pay interest, it was required to say this in its excess policy.

We acknowledge that if the Arch policy had not been rescinded, then Arch would be responsible for paying the interest at issue here (with the exception of the first $1 million). Given that the Arch policy was rescinded, ICSOP steps into the

shoes of Arch with regard to paying interest. ICSOP fails to cite any authority which holds that a primary policy's supplementary payments section is ipso facto excluded when determining an excess carrier's obligation to the primary policy it follows form to. However, there is authority to the contrary.

In our main brief, we discussed the Colorado district court's recent decision in American Guarantee & Liability Insurance Co., v. Environmental Materials LLC, 376 F. Supp. 3d 1189 [D. Colo. 2019], which granted the plaintiff's motion for summary judgment "in so far as the Court declare[d] that the Umbrella Policy 'followed form' with regard to Supplementary Payments. ICSOP argues that our "reliance" on American Guarantee is "baseless" because the policy language and issues regarding the payment of defense costs do not "bear any similarity whatsoever to the language of the Arch and ICSOP Excess Policies, or the interest issue before this Court" (brief at 32, fn 12).

ICSOP once again misses the mark. Just as the umbrella policy in American Guarantee did "not express a clear intent to contradict the Defense Within Limits provision" in the primary policy it followed form to (American Guarantee, at 1197), ICSOP's excess policy expressed no intent to contradict the interest provisions in Arch's policy.

ICSOP also fails to explain how this case is any different from Home Ins. Co. v. Am. Home Prods. Corp., 902 F.2d 1111 [2d Cir. 1990]. As noted in our main brief, the Second Circuit held that 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]).

"[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]).

By assuming that the supplementary payments provision solely applied to the underlying insurer when ICSOP's excess policy did not even mention interest, 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]).

(B)

Finally, there was no reason to assume that the ultimate net loss did not encompass pre-judgment and post-judgment interest. In our main brief, we discussed the Delaware Supreme Court's decision in In re Viking Pump, Inc., 148 A.3d 633 [Del. 2016], which was issued four months after this Court answered the certified questions posed to it from the Delaware Supreme Court (see, In re Viking Pump, Inc., 27 NY3d 244 [2016]). 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).

ICSOP, who merely addresses this issue in a footnote, argues, that our reliance on the Delaware Supreme Court's decision in Viking Pump, Inc., is also "baseless" because the

policy language and issues regarding the payment of defense costs in that case do not "bear any similarity whatsoever to the language of the Arch and ICSOP Excess Policies, or the interest issue before this Court" (brief at 32, fn 12).

ICSOP once again, is incorrect. Just at the Group One Policies in Viking Pump, Inc. failed exclude defense costs from the "ultimate net loss", ICSOP failed to exclude interest from the "ultimate net loss" in its excess policy. 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. 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]).

Thus, even when addressing the substantive arguments ICSOP improperly raised below, the First Department's decision should be reversed.

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,

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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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Dated: November 5, 2019

Respectfully submitted,

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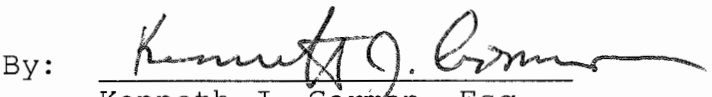
By: 

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