Court of Appeal
Third Circuit
State of Louisiana

CA 16-343

George Raymond Williams, M.D.,
Orthopaedic Surgery, A Professional Medical L.L.C.,

versus

SIF Consultants of Louisiana, Inc., Risk Management Services, LLC,
Med-Comp USA, Inc., et al.

On appeal
from the 27th Judicial District Court, Parish of St. Landry
No. 09-C-5244-C, Division C
Hon. Alonzo Harris, Judge

Original Brief of Homeland Insurance Company of New York, Defendant and Appellant

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Key to Record References

Because there have been two prior appeals in this case (CA 12-419 and CA 13-972), the record for this appeal includes, as exhibits, the records from the two prior appeals. References to the records in the prior appeals are by case number, volume, the abbreviation "R," and page number. Thus, "CA 12-419, 6 R. 1257" refers to the record in CA 12-419, volume 6, page 1257. References to the record in this most recent appeal follow the same format, using "CA 16-343" as the case number.

The record in the current appeal (CA 16-343) has been supplemented four times. References to the supplements are by case number CA 16-343, supplement number (i.e. 1st, 2d, 3d, 4th), the abbreviation "Supp. R.," and page number.

Jurisdictional Statement

This Court has jurisdiction over this appeal under La. Const. art. V § 10(A)(1) and La. Code Civ. P. arts. 2088 and 2123. The judgment appealed from is a final judgment in favor of the plaintiff class and against defendant and appellant, Homeland Insurance Company of New York, for $10 million plus legal interest.[1] Notice of this judgment was mailed by the clerk of court on February 12, 2016.[2] Under La. Code Civ. P. art. 1974, the deadline to apply for new trial was February 23, 2016, and the deadline to take a suspensive appeal was March 24, 2016. Homeland took its suspensive appeal on March 21, 2016, three days ahead of the deadline.[3]

Statement of the Case

This is an appeal from a summary judgment for $10 million against defendant and appellant, Homeland Insurance Company of New York. Homeland and a prior defendant, Executive Risk Specialty Insurance Company, issued successive claims-made liability policies to the same insured, CorVel Corporation. CorVel and its two insurers were sued in a class action. Because the Executive Risk and Homeland policies are claims-made policies, all parties agree that either Executive Risk or Homeland—not both—owed coverage to CorVel.

In earlier proceedings in this case, these plaintiffs moved for and won a motion for partial summary judgment against Executive Risk on the coverage

[1] CA 16-343, 3 R. 538.

[2] CA 16-343, 3 R. 539–55.

[3] CA 16-343, 3 R. 580–88.

issue, convincing the trial court that the Claim[4] against CorVel in this case was first made during Executive Risk's policy period. The trial court designated its judgment as final for immediate appeal under La. Code Civ. P. art. 1915(B). In Executive Risk's ensuing appeal, this Court affirmed, holding that the Claim against CorVel in this case was indeed first made during Executive Risk's policy period. *Williams v. SIF Consultants of La., Inc.*, 2013-972, pp. 8–9 (La. App. 3 Cir. 2/26/14), 133 So. 3d 707, 714–15. Executive Risk applied to the Louisiana Supreme Court for a writ of review, but withdrew its application upon reaching a settlement with the plaintiffs. Accordingly, this Court's judgment is final and definitive, and the issue of Executive Risk's coverage of CorVel is a thing adjudged or res judicata.

After accepting a monetary settlement from Executive Risk, the plaintiffs did an about-face in the trial court. Repudiating their earlier position, they moved for summary judgment against Homeland, arguing that the Claim against CorVel in this case was first made during Homeland's policy period, not Executive Risk's. Homeland responded with a motion to strike plaintiffs' summary-judgment exhibits and a combined motion to dismiss plaintiffs' summary-judgment motion and opposition to summary judgment. Homeland argued that plaintiffs, after successfully convincing the trial court and this Court that their Claim against CorVel was first made during Executive Risk's policy period, were judicially estopped from changing their position on that issue. In the alternative, Homeland argued that a number of unresolved factual issues precluded summary judgment.

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[4] In the brief, the terms "Claim," "Related Claims," and "Wrongful Act" are capitalized when used as terms defined in the Homeland or Executive Risk policy.

On September 24, 2015, the trial court denied Homeland's motion to dismiss plaintiffs' summary-judgment motion, and scheduled the hearing of the summary-judgment motion for a later date. Homeland applied to this Court for a supervisory writ. In an unpublished order, this Court denied Homeland's application. *Williams v. SIF Consultants of La., Inc.*, 15-1035 (La. App. 3 Cir. 12/1/15) (unpublished writ decision).

On December 21, 2015, the trial court heard plaintiffs' motion for summary judgment against Homeland. One month later, the trial court issued written reasons for judgment granting plaintiffs' motion, awarding them the full $10 million limit of Homeland's policy. The trial court signed a final judgment in plaintiffs' favor against Homeland on February 5, 2016. Following the February 12, 2016 notice of this judgment, Homeland took a timely suspensive appeal.

Assignment of Errors

1. The trial court's judgment is contrary to the principle of issue preclusion embodied in Louisiana's res judicata statute, La. R.S. 13:4231(3).

2. The trial court abused its discretion in failing to apply judicial estoppel, thus allowing plaintiffs to take contrary positions in obtaining two contradictory summary judgments.

3. The trial court committed legal error in granting plaintiffs' motion for summary judgment against Homeland despite a number of genuinely disputed issues of material fact.

Issues Presented for Review

1. Res Judicata. In this case, the trial court and this Court have issued final, definitive judgments holding that the Claim against CorVel in this case was first

made during Executive Risk's policy period. Now that those judgments have the authority of res judicata, did the trial court have authority to render a contrary judgment holding that the Claim was first made during Homeland's policy period?

2. Judicial Estoppel. The final judgments of the trial court and this Court were rendered at the urging of plaintiffs, who themselves asserted that the Claim against CorVel in this case was first made during Executive Risk's policy period. Having won a summary judgment based on that prior position, should plaintiffs now be allowed to take a contrary position?

3. Unresolved material factual issues. In the alternative—assuming that the first-claim issue were not already decided by final, definitive judgments—would there be a genuine issue of material fact concerning when the Claim asserted here was first made against CorVel?

Statement of Facts

1. The Claim against CorVel was first made during Executive Risk's policy period.

CorVel administered a Preferred Provider Organization ("PPO"), which offers discounts in medical fees to bill-review companies, third-party administrators, self-insured employers, and insurers providing workers' compensation coverage to various Louisiana employees. Plaintiffs allege that, in applying the PPO discounted rates to certain workers' compensation claims, CorVel fail to comply with the notice provisions of La. R.S. 40:2203.1, making it liable for damages.

The plaintiff class includes all medical providers who have provided services to workers' compensation patients and whose bills were discounted under

PPO agreements by CorVel between January 1, 2001 and December 31, 2006.[5] There is no dispute that all claims asserted here against CorVel are related.[6] Indeed, in affirming class certification here, this Court has held that "this lawsuit alleges a single cause of action for violation of La. R.S. 40:2203.1 …." *Williams v. SIF Consultants of La., Inc.*, 2012-419, p. 9 (La. App. 3 Cir. 11/7/12), 103 So. 3d 1172, 1179.[7]

Executive Risk and Homeland issued consecutive errors-and-omissions policies insuring CorVel. Both policies are claims-made policies, meaning that they apply to Claims first made against the insured during the policy period. The expiration date of the Executive Risk policy is the same as the inception date of the Homeland policy: October 31, 2005.

Because Executive Risk's and Homeland's respective policy periods do not overlap, only one of these insurers—not both—can be potentially liable for the claim asserted in this class action. Plaintiffs themselves have acknowledged this fact in both the trial court and this Court, asserting:

> Because both the Executive Risk and the Homeland policies are 'claims made' policies (providing coverage during the policy period when the first 'claim'—of all 'related claims'—was filed) only one of these two insurers (not both) can provide coverage for the claims asserted in this lawsuit.[8]

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[5] CA 12-419, 6 R. 1257 (judgment certifying class).

[6] *See, e.g.*, CA 16-343, 3d Supp. R. 81, where plaintiffs asserted, "There can be little doubt that the 2005 workers' compensation claims, the State of Louisiana's demand upon Corvel [sic] and Corvel's own declaratory judgment action were all related to the claims asserted herein." Homeland agrees with this assertion.

[7] CA 13-972, 1 R. 90.

[8] CA 16-343, 4th Supp. R. 24, 2013 WL 5758130, *1 (plaintiffs' brief in this Court); *see also* CA 13-972, 1 R. 140 (trial-court memorandum), CA 16-343, 3d Supp. R. 80 (same).

Plaintiffs' assertion quoted above is correct. The reason is that all claims asserted here against CorVel are related, and both policies treat all Related Claims as a single claim, deemed to have been made on the date of the earliest Related Claim:

> All Related Claims, whenever made, shall be deemed to be a single Claim and shall be deemed to have been first made on the earliest of the following dates:
>
> (1) the date on which the earliest Claim within such Related Claims was received by an Insured; or
>
> (2) the date on which such written notice was first given to the Underwriter of a Wrongful Act which subsequently gave rise to any of the Related Claims ….[9]

Both policies defined "Related Claims" identically to mean

> all Claims for Wrongful Acts based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving the same or related facts, circumstances, situations, transactions or events or the same or related series of facts, circumstances, situations, transactions or events, whether related logically, causally, or in any other way.[10]

Both policies define "Claim" as "any written notice received by an Insured that a person or entity intends to hold an Insured responsible for a Wrongful Act."[11] "Wrongful Act," in turn, is defined as "any actual or alleged act, error or omission in the performance of, or any failure to perform, a Managed Care Activity … by any Insured Entity or by any Insured Person acting within the scope of his or her duties or capacities as such …."[12]

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[9] CA 16-343, 1 R. 205 (Homeland policy); CA 13-972, 1 R. 171–72 (Executive Risk policy).

[10] CA 16-343, 1 R. 197 (Homeland policy); CA 13-972, 1 R. 165 (Executive Risk policy).

[11] CA 16-343, 1 R. 194 (Homeland policy); CA 13-972, 1 R. 163 (Executive Risk policy).

[12] CA 16-343, 1 R. 188 (Homeland policy); CA 13-972, 1 R. 191 (Executive Risk policy).

Only one of the Related Claims can be the first one made. Because the first Related Claim can be made only once, it can be made during only one insurer's Policy Period. If the first Related Claim was made before October 31, 2015, then the Claim in this case was first made during Executive Risk's policy period. If the first Related Claim was made after October 31, 2005, then the Claim in this case was first made during Homeland's policy period.

2. Prior final judgments established that the Claim was first made during Executive Risk's policy period.

The record shows numerous claims made against CorVel during Executive Risk's policy period. Plaintiffs themselves cited these claims when arguing for summary judgment against Executive Risk.[13] In February 2005, members of the plaintiff class began filing numerous workers' compensation claims against CorVel, alleging improper PPO discounting of medical bills.[14] Then, on May 17, 2005, the State of Louisiana Office of Risk Management—a CorVel client—made a written demand on CorVel for defense and indemnity against 81similar claims.[15] Plaintiffs would later convince both the trial court and this Court that this May 17, 2005 demand was the first Claim to which all claims in this case are related, thus bringing all of them within Executive Risk's policy period.[16]

On July 22, 2005, (during the Executive Risk policy period) CorVel filed a complaint in federal court against class member Lake Charles Memorial Hospital,

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[13] CA 16-343, 3d Supp. R. 81.

[14] *See* CA 13-972, 1 R. 213–49 (Ex. D attached to motion for summary judgment against Executive Risk).

[15] CA 13-972, 1 R. 197; CA 16-343, 2 R. 394; CA-16-343.

[16] *Williams v. SIF Consultants of La., Inc.*, 13-972, pp. 8–9 (La. App. 3 Cir. 2/26/14), 133 So. 3d 707, 715; CA 13-972, 4 R. 901 (trial court); CA-16-343, 3d Supp. R. 100 (trial court).

seeking to compel arbitration of the many worker's compensation cases filed against it.[17] Fourteen of these claims were described in the complaint itself, with 75 claims listed in an attachment to the complaint.[18]

In prior proceedings, plaintiffs settled with CorVel and the other non-insurer defendants, leaving Executive Risk and Homeland as the only defendants. A few months after this Court affirmed class certification,[19] the plaintiff class moved for partial summary judgment against Executive Risk on the issue of coverage.[20] In their motion, they explained to the trial court the nature of the claims-made policies issued by Executive Risk and Homeland respectively. They acknowledged the relatedness of the Claims asserted in this class action, the policies' treatment of Related Claims as a single Claim, and the undeniable fact that the first Related Claim could be made only once. They argued that the first Related Claim was made during Executive Risk's policy period, referring specifically to the May 17, 2005 demand from the Office of Risk Management. Therefore, they argued, partial summary judgment should be rendered against Executive Risk on the coverage issue.

The trial court granted plaintiffs' motion.[21] It agreed that the May 17, 2005 demand was a "Claim" as defined by the Executive Risk policy and that this Claim was first made during Executive Risk's policy period.[22]

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[17] CA 16-343, 3d Supp. R. 81.

[18] CA 13-972, 1 R. 199–211.

[19] *See Williams v. SIF Consultants of La., Inc.*, 12-419 (La. App. 3 Cir. 11/7/12), 103 So. 3d 1172.

[20] CA 13-972, 1 R. 135.

[21] CA 13-972, 4 R. 904.

[22] CA 13-972, 4 R. 901.

The trial court designated the judgment against Executive Risk as final for immediate appeal under La. Code Civ. P. art. 1915, and Executive Risk appealed.[23] This Court affirmed. *Williams v. SIF Consultants of La., Inc.*, 13-972 (La. App. 3 Cir. 2/26/14), 133 So. 3d 707.[24] Like the trial court, this Court accepted plaintiffs' argument that the May 17, 2005 demand from the Office of Risk Management was a Claim made during Executive Risk's policy period, and that Executive Risk's policy provided coverage. *Id.* pp. 8–9, 133 So. 3d at 714–15.[25]

Executive Risk applied to the Louisiana Supreme Court for a writ to review this Court's judgment. But before the Supreme Court acted on the application, Executive Risk settled with the plaintiffs and withdrew its writ application.[26] At that point, this Court's judgment on Executive Risk's appeal became final and definitive under La. Code Civ. P. art. 2166.

3. After winning a final judgment against Executive Risk and accepting a monetary settlement, plaintiffs changed their position on when the Claim was first made.

After consummating their settlement with Executive Risk, plaintiffs made a 180-degree change of position, filing a motion for summary judgment against Homeland.[27] Contradicting their earlier position in the trial court and this Court, they argued that the first Related Claim was not made until December 22, 2006,

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[23] *See* CA 13-972, 4 R. 904 (Judgment); *id.*, at 905 (motion for suspensive appeal).

[24] CA 16-343, 3d Supp. R. 110.

[25] CA 16-343, 3d Supp. R. 120–21.

[26] CA 16-343, 1 R. 78 (joint motion to approve settlement); *Id.* at 102 (joint motion and order of dismissal); CA 16-343, 3d Supp. R. 125 (La. Supreme Court order granting motion to dismiss writ application).

[27] CA 16-343, 1 R. 165.

when a demand for class arbitration was made against CorVel. Thus, they argued, Homeland's policy covered all of the class members' claims against CorVel.

In opposition, Homeland moved to strike several of plaintiffs' exhibits. Homeland also moved to dismiss plaintiffs' summary-judgment motion on grounds of judicial estoppel.[28] Without stating reasons for judgment, the trial court denied the motion to dismiss, thus allowing plaintiffs' summary-judgment motion to be heard.[29] A panel of this Court denied Homeland's ensuing writ application.[30] In a later hearing, the trial court denied Homeland's motion to strike and took plaintiffs' summary-judgment motion under advisement.[31] Ultimately, the trial court granted plaintiffs' motion, rendering summary judgment against Homeland for its full $10 million policy limits.[32] Homeland now appeals.

Summary of the Argument

Res judicata. The primary issue before this Court is not whether the Claim asserted here was first made during Executive Risk's or Homeland's policy period. Rather, the primary issue is whether that question has already been decided by a final judgment. It has. In earlier proceedings, the trial court rendered summary judgment against Executive Risk based on its determination that the first Related Claim was made during Executive Risk's policy period. That judgment is final for

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[28] CA 16-343, 1st Supp. R. 1 (motion to strike); *id.*, 3d Supp. R. 1 (opposition memorandum and alternative motion to dismiss); *id.* 4th Supp. R. 1 (same).

[29] CA 16-343, 2 Ex. 289 (transcript of Sept. 24, 2015 hearing). This interlocutory judgment was never reduced to writing.

[30] *Williams v. SIF Consultants of La., Inc.*, 15-1035 (La. App. 3 Cir. 12/1/15) (unpublished writ decision).

[31] CA 16-343, 3 R. 600–09 (overruling Homeland's objections to plaintiffs' exhibits); *id.* at 664 (taking motion for summary judgment under advisement).

[32] CA 16-343, 3 R. 522 (reasons for judgment); *id.* at 538 (judgment).

purposes of res judicata because the trial court designated it as final under La. Code Civ. P. art. 1915.

This Court affirmed, agreeing with the trial court that the plaintiffs' Claim was first made during Executive Risk's policy period. This Court's judgment became final and definitive when Executive Risk withdrew its writ application to the Louisiana Supreme Court.

The resolution of when the plaintiffs' Claim was first made was essential to the final judgments of both the trial court and this Court. It is therefore preclusive here. Homeland's peremptory exception of res judicata should be sustained, and plaintiffs' action against Homeland should be dismissed.

2. Judicial estoppel. The judgments described above did not happen by accident. They happened at plaintiffs' urging. Plaintiffs convinced both the trial court and this Court that their Claim against CorVel was first made during Executive Risk's policy period, with the Office of Risk Management's May 17, 2005 demand. The result was the relief plaintiffs sought: summary judgment against Executive Risk, affirmed by this Court. Now, after obtaining final judgments in their favor based on their prior position, plaintiffs are taking a contradictory position to get another summary judgment from the only remaining defendant. They are asking the court system to undermine its own integrity by accepting contradictory positions by the same party on the same issue in the same case. Judicial estoppel exists to prevent this misuse of the court system.

3. Genuine issues of material fact. Alternatively, genuine issues of material fact make summary judgment against Homeland inappropriate. These issues include whether any of the following demands—all made during Executive Risk's policy period—constitutes a Claim under the Homeland policy:

a) The May 17, 2005 demand letter from the Office of Risk Management (already found by this Court to be a Claim under Executive Risk's policy).

b) Numerous claims filed in the Office of Worker's Compensation during Executive Risk's policy period seeking to hold CorVel liable for improperly applying PPO discounts to worker's compensation claims.

c) Eighty-one claims identified in CorVel's federal lawsuit, filed on July 22, 2005, all alleging improper application of PPO discounts to worker's compensation claims.

All these claims were unquestionably made during Executive Risk's policy period. But despite these claims, the trial court rendered summary judgment against Homeland. In doing so, the trial court committed two errors.

First, the trial court erroneously held that a demand must be "covered" under the policy to be a Claim. In fact, neither the Executive Risk policy nor the Homeland policy defines "Claim" as requiring coverage. Whether a demand constitutes a Claim under either policy is a separate question from whether the Claim is covered.

Second, the trial court erroneously found that these claims were subject to certain exclusions in the Executive Risk and Homeland policies. In fact, the application of these exclusions depends on genuinely disputed factual issues.

Argument

1. The issue of when the Claim was first made has already been decided by final judgment, and is therefore res judicata.

As is its right, Homeland has filed, for the first time in this Court, a peremptory exception of res judicata. *See* La. Code Civ. P. art. 2163. Because

Homeland is raising this exception for the first time in this Court, this Court will necessarily decide the issue de novo.

This Court may consider Homeland's peremptory exception "if proof of the ground of the exception appears in the record." La. Code Civ. P. art. 2163. Consideration of Homeland's exception is appropriate, not only because the record provides grounds for the exception, but also because this defense is closely related to judicial estoppel, which Homeland urged in the trial court and urges in this appeal.

Homeland specifically invokes the issue-preclusion aspect of res judicata, recognized in La. R.S. 13:4231(3). Under issue preclusion, a final judgment is conclusive with respect to any issue actually litigated between the parties and decided by a final judgment. *See* La. R.S. 13:4231(3). The elements of issue preclusion are the following:

> (1) a valid and final judgment;
>
> (2) identity of the parties; and
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> (3) an issue that has been actually litigated and determined if its determination was essential to the prior judgment.

Horrell v. Horrell, 1999-1093 (La. App. 1 Cir. 8/15/01), 808 So. 2d 363, 373 (on rehearing). All three elements are met here.

A. The judgments of the trial court and this Court against Executive Risk are final judgments.

The prior summary judgment against Executive Risk is valid and final judgment. A final judgment is one that determines the merits in whole or in part. *See* La. Code Civ. P. art. 1841. The judgment against Executive Risk was

designated as a final judgment under La. Code Civ. P. art. 1915.[33] A judgment designated as final under art. 1915 is final for purposes of res judicata. *Segal v. Smith, Jones & Fawer, LLP*, 2002-1448, p. 7 (La. App. 4 Cir. 1/29/03), 838 So. 2d 62, 66.

The summary judgment against Executive Risk was affirmed on appeal by this Court. *Williams v. SIF Consultants of La., Inc.*, 13-972 (La. App. 3 Cir. 2/26/14), 133 So. 3d 707.[34] This Court's judgment became final and definitive when Executive Risk withdrew its writ application to the Louisiana Supreme Court.[35] *See* La. Code Civ. P. art. 2166(A) and (E). Once this Court's judgment became final, it too acquired the authority of the thing adjudged. *See Tolis v. Bd. of Supervisors of LSU*, 95-1529, p. 2 (La. 10/16/95), 660 So. 2d 1206, 1206.

Now that these judgments have the authority of the thing adjudged (res judicata), no court has jurisdiction, in the sense of authority, to modify, revise, or reverse them, regardless of the magnitude of any alleged error in them. *Tolis*, pp. 2–3; *Bourque v. Kansas City So. Ry. Co.*, 99-533, pp. 3–4 (La. App. 3 Cir. 5/27/99), 738 So. 2d 51, 53–54 (quoting *Tolis*); *Regan v. Helena Chem. Co.*, 99-568, pp. 3–4 (La. App. 3 Cir. 6/3/99), 742 So. 2d 586, 588 (quoting *Tolis*).

B. Plaintiffs and Homeland were parties to the proceedings resulting in the final judgments against Executive Risk.

The plaintiffs and Homeland were both parties to this case when the judgment against Executive Risk was rendered. The hearing transcript and the trial court's reasons for judgment against Executive Risk both note the presence of

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[33] CA 13-972, 4 R. 904.

[34] CA 16-343, 3d Supp. R. 110–23.

[35] CA 16-343, 3d Supp. R. 125.

Homeland's counsel at the hearing of the summary-judgment motion against Executive Risk.[36] This Court's judgment, affirming summary judgment against Executive Risk, lists Homeland as an appellee.[37] *See Williams*, 13-972, 133 So. 3d at 709–10 (listing Homeland as an appellee). If these judgments contained anything adverse to Homeland, plaintiffs certainly would press their res judicata effect on Homeland. The fact that the judgments happen to favor Homeland does not lessen their res judicata effect.

C. The issue of when the Claim was first made was litigated in and determined by the trial court and this Court.

In rendering partial summary judgment on coverage against Executive Risk, the trial court had to determine whether the plaintiffs' Claim against CorVel was first made during Executive Risk's policy period. The resolution of this issue was essential to the rendition of summary judgment against Executive Risk. To resolve this issue, the trial court examined the policy language, applying that language to the evidence presented, and concluded that the first claim was made on May 17, 2005 by the Office of Risk Management:

> The second matter to consider is whether a valid claim was made. A valid claim must be "a written notice received by the insured that a person or entity intends to hold an insured responsible for a Wrongful Act." When CorVel was named erroneously as a defendant in prior worker's compensation claims, they may have been put on notice, yet it was not enough to constitute a claim under the policy provisions. However, when CorVel was put on written notice on May 17, 2005 by the State of Louisiana Office of Risk Management that a claim for

[36] CA 13-972, 4 R. 922 (transcript); *id.*, 4 R. 895 (reasons for judgment).

[37] CA 16-343, 3d Supp. R. 111–12.

> indemnification against CorVel was being made, this was clearly sufficient written notice per policy.[38]

In Executive Risk's ensuing appeal, the issue of when the Claim was first made was again litigated by the parties. In its opinion, this Court noted Executive Risk's contention that "the trial court incorrectly found that a claim existed against CorVel during Executive Risk's policy period …." *Williams*, 13-972, pp. 1–2, 133 So. 3d at 710.[39] Among Executive Risk's assignments of error was lack of evidence that a claim against CorVel "ever truly existed during the policy period …." *Id.*, p. 2, 133 So. 3d at 711.[40]

This same issue was decided by this Court, which held that the Claim was first made during Executive Risk's policy period. This Court agreed with the trial court that the Office of Risk Management's letter of May 17, 2005 was a Claim under Executive Risk's policy:

> The plain language in Executive Risk's policy necessitates that the letter fits under the definition of a claim. It is written notice received by an insured, CorVel, that an entity, the State of Louisiana, through the ORM, intended to hold an insured, CorVel, responsible for a wrongful act.

Id., pp. 8–9, 133 So. 3d at 715.

The resolution of when plaintiffs' Claim was first made was essential to this Court's affirmance of summary judgment against Executive Risk. This Court's resolution of this issue—embodied in a final judgment—is conclusive and binding on all parties to this case.

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[38] CA 13-972, 4 R. 901.

[39] CA 16-343, 3d Supp. R. 113–14.

[40] CA 16-343, 3d Supp. R. 114.

2. Judicial estoppel applies here.

Homeland's second argument—judicial estoppel—is similar to its first because it is based on litigation that has already occurred and already culminated in a final judgment against Executive Risk. The difference is that the focus is less on the judgments of the trial court and this Court, and more on the position taken by plaintiffs to win those judgments. Plaintiffs won by convincing the trial court and this Court that their Claim against CorVel was first made during Executive Risk's policy period. Having won summary judgment against Executive Risk by taking that position, they are estopped from taking a contrary position as to Homeland.

A district court's determination of judicial estoppel is reviewed for abuse of discretion. *Thomas v. Economy Premier Assur. Co.*, 50,638, p. 6 (La. App. 2 Cir. 5/18/16), 2016 WL 2903442, *3; *In re Superior Crewboats, Inc.*, 374 F.3d 330, 334 (5th Cir. 2004). But this standard does not mean that a mistake of law is beyond appellate correction because a district court, by definition, abuses its discretion when it makes an error of law. *Superior Crewboats*, 374 F.3d at 334.

Judicial estoppel is an equitable doctrine designed to protect the integrity of the judicial process. It does so by prohibiting parties from deliberately changing positions according to the exigencies of the moment. *Miller v. ConAgra, Inc.*, 2008-0021, p. 9 (La. 9/8/08), 991 So. 2d 445, 452. Judicial estoppel is intended to prevent the perversion of the judicial process; it prevents parties from playing fast and loose with the courts. *Hancock Bank of La. v. C & O Enterprises, LLC*, 2014-0542, p. 7 (La. App. 1 Cir. 12/23/14), 168 So. 3d 595, 600; *Lowman v. Merrick*, 2006-0921, p. 12 (La. App. 1 Cir. 3/23/07), 960 So. 2d 84, 92.

The circumstances under which judicial estoppel may be invoked are "not reducible to any general formulation of principle …." *Miller*, p. 9, 991 So. 2d at

452. Nevertheless, Louisiana courts applying judicial estoppel have generally considered the following factors:

> (1) The party against whom judicial estoppel is sought has asserted a legal position which is plainly inconsistent with that party's prior position.
>
> (2) A court has accepted the party's prior position.
>
> (3) The party did not act inadvertently.

Hancock Bank, p. 7, 168 So. 3d at 600; *see also Miller*, p. 9, 991 So. 2d at 452. All three elements are met here.

Plaintiffs won summary judgment by taking the position—and convincing the trial court and this Court—that their claim against CorVel was first made during Executive Risk's policy period. In their summary-judgment motion against Executive Risk, they cited the May 17, 2005 letter from the Office of Risk Management to CorVel as a Related Claim made against CorVel during Executive Risk's policy period:

> It is undisputed that, during the above mentioned policy period, Executive Risk's insured, Corvel [sic], received written demand on May 17, 2005 from its client, State of Louisiana Office of Risk Management demanding that Corvel defend, indemnify and hold harmless the State of Louisiana in connection with 81 workers' compensation claims which arose as a result of alleged improper Corvel PPO discounts being applied.[41]

Plaintiffs kept up the drum beat in their supporting memorandum:

> By May of 2005, one of Corvel's clients, the State of Louisiana Office of Risk Management, made written demand upon Corvel demanding that Corvel defend, indemnify and hold harmless the State of Louisiana in connection with 81 claims involving Corvel PPO

[41] CA 13-972, 1 R. 135; CA 16-343, 3d Supp. R. 75.

> discounts which had been filed in the Louisiana Office of Workers' Compensation…. [42]

Plaintiffs asserted that this demand and others "arise out of Corvel's wrongful application of PPO discounts to Plaintiff Class members workers' compensation medical bills and all pre-dated October 31, 2005 and therefore fall within the Executive Risk (rather than Homeland) policy period."[43]

As shown above, plaintiffs convinced the trial court on this issue, and by doing so, won a summary judgment against Executive Risk. In Executive Risk's ensuing appeal, plaintiffs took the same position. In their original appellee brief, they insisted that the May 17, 2005 demand letter was a claim made during Executive Risk's policy period:

> There is no question that the May 17, 2005 demand letter to CorVel entitled "DEMAND LETTER – MEDICAL FEE SCHEDULE REVIEW CONTRACTS – PPO LITIGATION", … easily constituted a "claim " under Executive Risk's policy. After all, Executive Risk admits that a "claim" is broadly defined under its policy as "any written notice received by an insured that a person or entity intends to hold an insured responsible for a wrongful act…" ….
>
> The May 17, 2005 demand letter clearly constituted a writing which made a claim against CorVel for indemnity in connection with what has commonly been referred to as the "PPO litigation"—litigation of numerous claims in Workers' Compensation Court as well as State District Court arising from the failure of workers' compensation insurers to follow the dictates of LSA-R.S. 40:2203.1 et seq. (the Louisiana PPO Act) when applying PPO discounts to workers' compensation bills.[44]

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[42] CA 13-972, 1 R. 141; CA 16-343, 3d Supp. R. 81.

[43] CA 13-972, 1 R. 141; CA 16-343, 3d Supp. R. 81.

[44] CA 16-343, 4th Supp. R. 32 (Pl. Original Brief at 9).

Obviously, plaintiffs did not act inadvertently—they deliberately took this position to win a summary judgment against Executive Risk. And they succeeded in convincing both the trial court and this Court that the May 17, 2005 demand was a Claim under Executive Risk's policy.

But now, after the summary judgment against Executive Risk became res judicata, and plaintiffs have accepted a settlement payment from Executive Risk, plaintiffs have taken a position plainly inconsistent with the position they previously took in the trial court and this Court. In their summary-judgment motion against Homeland, plaintiffs took the position that the claim was first made "in December 2006 when undersigned counsel first demanded class arbitration against Corvel for Corvel's violation of LSA-R.S. 40:2203.1."[45] Contrary to their prior position, they label as "wrong" and "untenable" any argument that the May 17, 2005 demand letter was a claim made during Executive Risk' policy period.[46]

What plaintiffs are attacking here is not only their own prior position in the trial court and this Court, but also the courts' final judgments. The reasoning that they persuaded the trial court and this Court to adopt is the same reasoning that they now label as "wrong" and "untenable." If the integrity of the judicial proceedings in this case is to be maintained, then judicial estoppel must be applied here.

Plaintiffs may argue that this Court's prior denial of Homeland's application for a supervisory writ precludes application of judicial estoppel in this appeal. Such an argument would be mistaken. A writ denial is not law of the case in a subsequent appeal. As the Louisiana Supreme Court has explained, once a court of

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[45] CA 16-343, 1 R. 166 ¶ 4.

[46] CA 16-343, 1 R. 177.

appeal declines to exercise its supervisory jurisdiction by denying the writ, the court is without jurisdiction to affirm, reverse or modify the trial court's judgment. *Davis v. Jazz Casino Co.*, 2003-0276, p. 1 (La. 6/6/03), 849 So. 2d 497, 498. In this Court's words, writ denials "carry no precedential value." *Willis v. Gulf Coast Bldg. Supply*, 11-272 (La. App. 3 Cir. 10/5/11), 2011 WL 4578665, *3.

Thus, the writ denial is no obstacle to this Court's consideration of Homeland's argument for judicial estoppel. Since all elements of judicial estoppel are amply met here, the trial court's failure to apply judicial estoppel is a legal error that should be reversed.

3. In the alternative, genuine issues of material fact make summary judgment inappropriate.

A. Several claims against CorVel were made before Homeland's policy period.

Alternatively, a genuine issue of material fact exists regarding whether the first Related Claim against CorVel was made during Executive Risk's policy period rather than Homeland's.

In reviewing a summary judgment, this Court conducts a de novo review, applying the same criteria that govern the trial court's determination of whether summary judgment is appropriate. *Bridges v. Cepolk Corp.*, 2013-1051, p. 3 (La. App. 3 Cir. 2/12/14), 153 So. 3d 1137, 1141. In conducting its de novo review, this Court gives no deference to the trial court's legal findings and makes an independent review of the evidence to determine whether there is no genuine issue of material fact and whether the mover is entitled to judgment as a matter of law. *Id.*, p. 10, 153 So. 3d at 1145.

The record shows numerous written demands against CorVel made before October 31, 2005, all seeking to hold CorVel responsible for misapplying PPO discounts to worker's compensation claims. They include the following:

The May 17, 2005 demand by the Office of Risk Management.[47] On its face, this demand fits the definition of "Claim" in both the Executive Risk policy and the Homeland policy. It is a written demand by the State of Louisiana showing that the State intends to hold CorVel responsible for a Wrongful Act.[48] Indeed, both the trial court and this Court have reached this conclusion.[49]

Several worker's compensation claims against CorVel in early 2005. Attached to plaintiffs' own motion for summary judgment against Executive Risk were copies of 11 claims filed in the Office of Worker's Compensation, all seeking to hold CorVel responsible for misapplying PPO discounts to worker's compensation medical bills.[50] All of these Claims were made in February or March of 2005, long before the October 31, 2005 inception date of the Homeland policy.

Claims subject to CorVel's federal complaint filed on July 22, 2005. On July 22, 2005, CorVel filed a complaint in the U.S. District Court against class member Lake Charles Memorial Hospital, seeking declaratory judgment and an order compelling arbitration. The body of the complaint lists 15 claims that had been made against CorVel for misapplying PPO discounts to worker's

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[47] CA 16-343, 2 R. 394.

[48] *See* CA 16-343, 1 R. 194 (definition of "claim" in Homeland policy); CA 13-972, 1 R. 163 (definition of "claim" in Executive Risk policy).

[49] *See* CA 13-972, 4 R. 901 (trial court's reasons for judgment against Executive Risk); *Williams v. SIF Consultant of La., Inc.*, 13-972, pp. 8–9 (La. App. 1 Cir. 2/26/14), 133 So. 3d 707, 714–15, CA 16-343, 3d Supp. R. 120–21 (this Court's opinion).

[50] CA 13-972, 1 R. 213 – 2 R. 290.

compensation claims.[51] Attached to the complaint is a list of 75 complaints against CorVel making the same allegation. (Ironically, the trial court accepted plaintiffs' argument that a demand for class arbitration made against CorVel by Lake Charles Memorial Hospital in December 2006 was the first claim made against CorVel.[52] Yet the record shows that this demand resulted from CorVel's July 22, 2005 complaint seeking to compel arbitration of claims that the hospital had already made against CorVel.)

B. Policy exclusions are irrelevant in determining whether a demand constitutes a "Claim" under Executive Risk's and Homeland's policies.

In disregarding these earlier claims, the trial court committed additional errors. It accepted plaintiff's argument that a demand against an insured is not a Claim unless it is covered by the policies. The trial court then held—contrary to this Court's decision in the last appeal—that the Office of Risk Management's May 17, 2005 demand was not a Claim after all because it was subject to a policy exclusion. The trial court misapplied another policy exclusion to rule out the numerous demands filed in the Office of Worker's Compensation as Claims under the policies. This entire line of reasoning is flawed.

The trial court's first error was assuming that a demand must be "covered" to constitute a Claim under the Homeland or Executive Risk policy. Nothing in either policy supports the trial court's interpretation. For a Claim to exist, all that is required is a written demand seeking to hold the insured liable for a Wrongful Act.

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[51] 13 R. 972, 1 R. 200–05, Complaint ¶¶ 5–19.

[52] CA 16-343, 3 R. 525–26.

The definitions of "Claim" and "Wrongful Act" contain no requirement that the Claim be exempt from all policy exclusions.

In fact, the exclusions do not come into play at all unless a Claim as defined in the policy has been made. The preamble to the exclusions states, "The Underwriter shall not pay Loss, including Defense Expenses, from any Claim" described in the exclusions.[53] Without a Claim as defined in the policy, no exclusion can apply. Thus, application of a policy exclusion is irrelevant in determining whether a Claim has been made against the insured.

In grafting a "coverage" requirement onto the policy definition of "Claim," the trial court misinterpreted an unreported decision applying Illinois law, *Benefit Systems & Services, Inc. v. Travelers Casualty & Surety Co.*, No. 07-C-3922, 2009 WL 1106948 (N.D. Ill. Apr. 22, 2009).[54] *Benefit Systems* is inapt because the issue decided there is different from the issue here. The issue in *Benefit Systems* was whether a demand made during the claims-made insurer's policy period fit the policy definition of "Claim," such that it could be related to a later demand made after the policy had expired. The court held that the earlier demand was not a Claim at all because it alleged only breach of contract. The court held that the policy's definition of "Claim" required the allegation of a "Wrongful Act," and that the policy defined "Wrongful Act" as negligence. *Id.* at *5. The court further held that, under Illinois law, "[t]here is a well-recognized line of demarcation between negligent acts and breaches of contract." *Id.* at *6. Because the earlier demand alleged only breach of contract, it did not allege a Wrongful Act; therefore, the earlier demand was not a Claim at all. *Id.* Having decided that the

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[53] CA 16-343, 1 R. 199 (Homeland policy); *see also* CA 13-972, 1 R. 168 (Executive Risk policy).

[54] *See* CA 16-343, 3 R. 526 (Reasons for Judgment).

earlier demand was not a Claim, the *Benefit Systems* court had no need to determine whether the demand was subject to any policy exclusions.

The analysis in *Benefit Systems* does not fit this case. Unlike the earlier demand in *Benefit Systems*, the May 17, 2005 demand by the Office of Risk Management was unquestionably a Claim alleging a Wrongful Act. *Williams*, 13-972, pp. 8–9, 133 So. 3d at 715 (holding that the May 17, 2005 demand was a Claim under Executive Risk's policy). This is so regardless of whether the Claim would be subject to any policy exclusions. Because it is a Claim, it is related to any later claims made during Homeland's policy period making the same allegation.

C. If policy exclusions mattered, genuine issues of material fact would exist as to whether any exclusions apply to the claims made during Executive Risk's policy period.

Another error by the trial court was its misapplication of two policy exclusions to turn the Claims made against CorVel before October 31, 2005 into non-claims. Even if the exclusions were relevant in determining when the first Related Claim was made against CorVel, genuine issues of material fact as to applicability of the exclusions would make summary judgment inappropriate.

In ruling that the numerous worker's compensation claims against CorVel were not covered, the trial court misinterpreted Exclusion C(2), applying it to any and all worker's compensation claims.[55] The trial court's interpretation is unsupported by the policy language. According to its own language, this exclusion does not apply categorically to all demands made in a worker's compensation proceeding. Rather, it applies only to personal-injury claims against CorVel by CorVel's own employees:

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[55] CA 16-343, 3 R. 526 ("worker's compensation claims could never be a covered claim under Homeland's policy").

> (C) The Underwriter shall not pay Loss, including Defense Expenses from any Claim:
>
> …
>
> (2) based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any actual or alleged bodily injury, sickness, disease or death of any employee of any Insured arising out of or in the court of employment by the Insured ….[56]

The various claimants whose medical bills were allegedly underpaid were not CorVel's own employees. Therefore, this exclusion does not apply here. In concluding otherwise, the trial court committed legal error.

The trial court likewise erred in applying another exclusion to the May 17, 2005 demand by the Office of Risk Management ("ORM"). The exclusion, applicable to claims for contractual indemnity, contains an exception to the exclusion for the insured's own tort liability:

> [(C) The Underwriter shall not pay Loss, including Defense Expenses, from any Claim]
>
> (6) for any actual or alleged express or assumed liability of any Insured under an indemnification agreement; provided that this EXCLUSION (C)(6) shall not apply to any tort liability, including but not limited to liability arising out of a fiduciary relationship, that would have attached to the Insured in the absence of such agreement and is otherwise insured under this Policy.[57]

ORM's indemnity Claim against CorVel was based, in part, on the terms of the contract between them, but it was also based on CorVel's own tort liability for

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[56] CA 16-343, 1 R. 199. *See also* Executive Risk's nearly identical exclusion at CA 13-972, 1 R. 168.

[57] CA 16-343, 1 R. 200. *See also* CA 16-343, 3 R. 526 ("those indemnity … claims could never be a covered claim under Homeland's policy," citing Exclusion C-6).

its alleged mishandling of its obligation to properly reimburse class members on behalf of the ORM. The Policy provides coverage for a Claim based on liability assumed by CorVel under an indemnification agreement where, as here, tort liability "would have attached [to CorVel] in the absence of such agreement." In its May 17, 2005 letter, the ORM stated that "certain claims have been filed against this agency, alleging damages as a direct result of actions and recommendations by CorVel to the ORM ...."[58] Under Louisiana law "[it] is well settled that the same acts or omissions may constitute breaches of both general duties and contractual duties and may give rise to both actions in tort and actions in contract. A plaintiff may assert both actions and is not required to plead the theory of his case. When a person negligently performs a contractual obligation, he has committed an active breach of contract which may also support an action in tort." *In re St. Louis Encephalitis Outbreak in Ouachita Parish*, 41,250, pp. 4–5 (La. App. 2 Cir. 9/1/06), 939 So. 2d 563, 566–67.

This principle of law has already been applied by this Court in a prior appeal in this case. *Williams v. SIF Consultants of La., Inc.*, 12-419 (La. App. 3 Cir. 11/7/12), 103 So. 3d 1172 (affirming class certification). In that prior appeal, CorVel's insurers argued (unsuccessfully) that plaintiffs had no right of action against them under the Direct Action Statute[59] because the plaintiffs' claims lie in contract, not in tort. *Id.*, p. 3, 103 So. 3d at 1176. This Court rejected the argument, explaining, "[T]he same acts or omissions may constitute a breach of both a general duty owed to all persons (ex delicto) and a breach of a special obligation

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[58] CA 16-343, 2 R. 394.

[59] La. R.S. 22:1269 (renumbered from La. R.S. 22:655 by Acts 2008, No. 415, § 1, eff. Jan. 1, 2009).

the obligor contractually assumed (ex contractu)." *Id.*, p. 5, 103 So. 3d at 1177 (brackets by the Court).

Because the May 17, 2005 letter claims a right of indemnity based on the "actions and recommendations" by CorVel, exclusion C(6) does not apply as a matter of law, and the trial court committed legal error in determining that it barred coverage for ORM's indemnity claim against CorVel. At a minimum, there is genuine issue of material fact concerning whether CorVel would have had delictual liability to the ORM because of its actions and recommendations in the discharge of its obligations to the ORM under the contract.

In fact, Homeland never cited this exclusion as a reason to deny coverage. Homeland's answer does not raise this exclusion as an affirmative defense.[60] Virginia Troy, Homeland's representative responsible for handling and adjusting claims against CorVel, testified by affidavit that the May 17, 2005 demand is not excluded from coverage by Exclusion (C)(6), and that Homeland has never taken the position that this exclusion applies to the May 17 demand.[61]

To sum up: application of policy exclusions is irrelevant in determining whether a demand against an insured is a "claim" under the policy. But even if the exclusions were relevant, genuine issues of material fact would exist regarding application of the exclusions cited by the trial court. These disputed factual issues make summary judgment against Homeland inappropriate.

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[60] CA 13-972, 1 R. 105–10.

[61] CA 16-343, 1st Supp. R. 12.

Conclusion

The trial court's judgment is contrary not only to its own prior final judgment, but also to a final judgment of this Court. In reaching those final judgments, the trial court and this Court determined that the first Related Claim against CorVel was made during Executive Risk's policy period, not Homeland's. In makings these determinations, both the trial court and this Court accepted plaintiffs' prior position that the first Related Claim against CorVel was made during Executive Risk's policy period. Therefore, this Court need not re-decide when the first Related Claim was made. Even if the first-claim issue were not precluded by prior final judgments in this case or plaintiffs' prior position in obtaining those judgments, then summary judgment against Homeland should still be reversed because a genuine issue of material fact would exist concerning when the first Related Claim was made against CorVel.

Homeland prays that this Court sustain its peremptory exception of res judicata and dismiss plaintiffs' action against Homeland with prejudice at plaintiffs' cost. In the alternative, Homeland prays that the Court reverse the summary judgment against it.

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