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COURT OF APPEALS

STATE OF NEW YORK

HERZL RAGINS, M.D.,

Appellant,

-against-

HOSPITALS INSURANCE COMPANY, INC., ET AL.,

No. 234

Respondents.

20 Eagle Street
Albany, New York 12207
November 14, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Ragins v. Hospital
2 Insurance Company.

3 (Pause)

4 CHIEF JUDGE LIPPMAN: Counselor?

5 MR. PARERES: May it please the court. My
6 name is Joseph T. Pareres. I represent Dr. Herzl
7 Ragins in this case.

8 CHIEF JUDGE LIPPMAN: Do you want rebuttal
9 time, counselor?

10 MR. PARERES: Seven and three, Your Honor.

11 CHIEF JUDGE LIPPMAN: Seven - - - yes, go
12 ahead; three, you have it.

13 MR. PARERES: Okay. Thank you. We are
14 seeking relief before this honorable court based on a
15 ruling that the Appellate Division Second Department
16 issued declaring judgment with regard to a excess
17 insurance policy that Dr. Ragins had in effect with -
18 - -

19 CHIEF JUDGE LIPPMAN: Counselor, the excess
20 policy has a provision that there's no drop-down
21 coverage, right?

22 MR. PARERES: That's correct, Your Honor.

23 CHIEF JUDGE LIPPMAN: So why should they
24 have to pay more than they paid, than their - - -
25 than the 100,000 and the proportionate share of

1 everything else?

2 MR. PARERES: Because they are
3 contractually obligated to pay.

4 CHIEF JUDGE LIPPMAN: Why, if there's no
5 drop-down coverage, are they contractually - - -

6 MR. PARERES: This is not a case, Your
7 Honor, respectfully, where it's drop-down coverage -
8 - -

9 CHIEF JUDGE LIPPMAN: Wouldn't it be - - -

10 MR. PARERES: - - - we're seeking.

11 CHIEF JUDGE LIPPMAN: - - - the equivalent
12 of drop-down since there's - - -

13 MR. PARERES: Absolutely not. This is - -
14 -

15 CHIEF JUDGE LIPPMAN: Why not?

16 MR. PARERES: Because this is a case of
17 contractual rights that are set forth in an excess
18 policy between Dr. Ragins and HIC.

19 JUDGE SMITH: Are you asking the excess
20 carrier to pay any more than it would have paid if
21 the primary had remained solvent?

22 MR. PARERES: Can you repeat that question?

23 JUDGE SMITH: Yes. Assume - - - are you
24 ask - - - do I have this right? You represent the
25 primary, right? You represent - - -

1 MR. PARERES: I don't represent the
2 primary.

3 JUDGE SMITH: - - - the insured.

4 MR. PARERES: I represent the insured.

5 JUDGE SMITH: Okay. And are you asking - -
6 - and you're - - - you want the excess to pay. Are
7 you asking the excess to pay any more than you would
8 have asked them to pay if your primary carrier were
9 solvent?

10 MR. PARERES: The solvency of the primary
11 carrier has nothing to do with the amount - - -

12 JUDGE SMITH: Can you answer that one yes
13 or no?

14 MR. PARERES: They would be paying more
15 only because of an additional provision in the
16 primary policy which the excess policy did not
17 address at all. There was no meeting of the minds
18 between - - -

19 JUDGE SMITH: So that's a yes; you are
20 asking them to pay more?

21 MR. PARERES: Based on the limited and the
22 narrowness of that question, yes.

23 JUDGE GRAFFEO: Does the language of the
24 primary policy not have relevance here?

25 MR. PARERES: The language of the primary

1 policy is not an issue because there is a contract
2 between Dr. Ragins and HIC which provided, on four
3 separate occasions, for HIC to provide excess
4 coverage to Dr. Ragins - - -

5 JUDGE GRAFFEO: I'm not talking about the
6 excess costs.

7 MR. PARERES: - - - if the primary limits
8 were met.

9 JUDGE GRAFFEO: The primary policy says,
10 "all interest on the entire amount of any judgment",
11 not up to - - -

12 MR. PARERES: You're referring to the
13 supplemental provisions - - - provision in the Group
14 Council policy, correct?

15 JUDGE GRAFFEO: I'm looking at the Group
16 Council policy.

17 MR. PARERES: Okay.

18 JUDGE GRAFFEO: Right? So they - - -
19 they're to pay all interest on the entire amount, you
20 know, which does not exceed the limit of the
21 company's liability, which was - - -

22 MR. PARERES: That's correct.

23 JUDGE GRAFFEO: - - - one million - - -
24 which was one million, right?

25 MR. PARERES: The limits of the policy were

1 one million, that's correct.

2 JUDGE ABDUS-SALAAM: So even if - - -

3 JUDGE GRAFFEO: So - - -

4 JUDGE ABDUS-SALAAM: - - - there was some
5 interest that would bring it over a million, the
6 primary policy was limited to a million, and that's
7 why your client got excess coverage, right?

8 MR. PARERES: With - - - yes and no. I
9 mean, the reality is that the supplemental payment
10 provision, while it is in the Group Council policy,
11 was not part of the contractual arrangement and
12 agreement between Dr. Ragins and HIC.

13 CHIEF JUDGE LIPPMAN: Are you reading into
14 HIC's policy with the doctor?

15 MR. PARERES: No, in fact, I'm not reading
16 into HIC's policy. And what the respondent is doing
17 in this case is trying to incorporate an additional
18 condition, the supplemental payment condition - - -

19 CHIEF JUDGE LIPPMAN: You're asking HIC - -
20 -

21 MR. PARERES: - - - in the Group Council
22 policy - - -

23 CHIEF JUDGE LIPPMAN: - - - to pick up - -
24 -

25 MR. PARERES: - - - into this policy.

1 CHIEF JUDGE LIPPMAN: Aren't you asking HIC
2 to pick up the gap that really exists - - -

3 MR. PARERES: There's no gap.

4 CHIEF JUDGE LIPPMAN: - - - as a result of
5 the insolvency?

6 MR. PARERES: Absolutely not. There is
7 absolutely no gap.

8 JUDGE GRAFFEO: So what's the cover - - -

9 MR. PARERES: Gapping coverage is when
10 there is no limit of coverage. Here, make no mistake
11 about it, the HIC policy is clear. It was written by
12 an insurer.

13 JUDGE GRAFFEO: Yeah, but what's the - - -

14 MR. PARERES: And I don't have to re - - -

15 JUDGE GRAFFEO: - - - what's the - - -

16 MR. PARERES: - - - I don't have to re - - -

17 -

18 JUDGE GRAFFEO: What's the clause? I mean,
19 I'm looking at the HIC policy.

20 MR. PARERES: What clause?

21 JUDGE GRAFFEO: Where does it say they're
22 going to pick up the interest - - -

23 MR. PARERES: It says - - -

24 JUDGE GRAFFEO: - - - for the underlying
25 primary?

1 MR. PARERES: It says - - - respectfully,
2 it says that they're going to pick up all sums. In
3 paragraph - - - let me just get the policy.

4 JUDGE GRAFFEO: "All sums in excess of the
5 limits of liability of the underlying policy".

6 MR. PARERES: That's exactly right, of the
7 limits.

8 JUDGE GRAFFEO: Doesn't that mean they're
9 going to - - -

10 MR. PARERES: Of - - -

11 JUDGE GRAFFEO: - - - pick it up over - - -
12 anything over the million?

13 MR. PARERES: Of the limits. It doesn't
14 say of the limits and any additional benefit that may
15 be provided for in the Group Council policy. There
16 are defense benefits that would - - - that were
17 available and provided to the insured. They could
18 have been carved out. There are policies that
19 provide for a defense, separate and apart - - -

20 JUDGE SMITH: In your theory, then, two
21 companies were liable for the interest? Both - - -
22 if the primary is solvent, both the primary and the
23 excess are liable for it?

24 MR. PARERES: Pursuant to the Group Council
25 policy, Dr. Ragins would have had a contractual

1 obligation - - - or right, I should say, to seek
2 payment of the interest from that entity.

3 JUDGE SMITH: Let me - - - let me ask if
4 you're not giving away too much by saying - - - where
5 exactly does the Group Council policy say that he - -
6 - that on these facts Ragins gets more than a
7 million?

8 MR. PARERES: That would be in the
9 supplemental payment provision of the policy.

10 JUDGE SMITH: Yeah, page 54 of the record,
11 under "Defense, Settlement, Supplementary Payments".
12 Where - - - I don't see it.

13 MR. PARERES: Your Honor, it would be on
14 page 54, Section II, "Defense, Settlement,
15 Supplementary Payments" - - -

16 JUDGE SMITH: Yeah.

17 MR. PARERES: - - - paragraph (A) (2) (b).

18 JUDGE SMITH: Yeah. Yeah. "All interest
19 on the entire amount of any judgment which accrues
20 after entry of the judgment and before the company
21 has paid or tendered or deposited in court" the
22 million bucks. But Group Council did pay the million
23 bucks. Why didn't that cut them off? Why didn't
24 they have no - - - why weren't they - - - why were
25 they exposed for interest?

1 MR. PARERES: Because it wasn't tendered in
2 - - - the one million dollars was after a judgment
3 was entered.

4 JUDGE SMITH: The judgment I read credited
5 the million dollars.

6 MR. PARERES: There was a verdict, a 1.1
7 million-dollar judgment. There was both pre-judgment
8 int - - - pre-judgment interest and post-judgment
9 interest - - -

10 JUDGE SMITH: Are you sure - - -

11 MR. PARERES: - - - that accrued.

12 JUDGE SMITH: - - - you're not confusing
13 the verdict and the judgment?

14 MR. PARERES: No, I'm not.

15 JUDGE SMITH: I mean, there are only - - -
16 how many judgments are there? There's only one
17 judgment in the record, right?

18 MR. PARERES: There - - - believe it or
19 not, there are two. One was a judgment - - -

20 JUDGE GRAFFEO: There's an amended
21 judgment.

22 MR. PARERES: - - - and then there was an
23 amended judgment.

24 JUDGE SMITH: Oh, I see.

25 MR. PARERES: So - - -

1 JUDGE SMITH: And so you're saying - - - so
2 we're talking about the interest that ran on the
3 first judgment?

4 MR. PARERES: Correct, Your Honor. There
5 was a miscalculation, and there had to be an amended
6 judgment that was refiled.

7 JUDGE SMITH: Okay. So where is that other
8 judgment?

9 MR. PARERES: The other judgment was
10 replaced by the amended judgment - - -

11 JUDGE SMITH: The first judgment - - -

12 MR. PARERES: - - - in the Supreme Court -
13 - -

14 JUDGE SMITH: - - - is not in the record,
15 you're telling me?

16 MR. PARERES: No, I don't believe it is,
17 Your Honor.

18 JUDGE ABDUS-SALAAM: But before that
19 amended judgment was entered - - -

20 MR. PARERES: Yes.

21 JUDGE ABDUS-SALAAM: - - - the
22 Superintendent of Insurance paid the million dollars
23 on behalf of the now insolvent under - - - primary
24 carrier, right?

25 MR. PARERES: No, it was only after the

1 amended judgment - - -

2 JUDGE ABDUS-SALAAM: It was after?

3 MR. PARERES: That's correct.

4 JUDGE SMITH: No, the amended judgment has
5 right in - - - I've read the amended judgment. It
6 says we deduct the million that's already been paid.

7 MR. PARERES: That would - - - you're
8 talking about - - - let me retrack. That was - - -
9 the amended judgment did take - - - make mention.
10 But we were directed by court order to make payment.
11 Group Council - - - liquidator, on behalf of Group
12 Council, was directed to make payment in the amount
13 of a million dollars, and HIC was directed to pay
14 100,000 dollars. The balance, which is in dispute
15 here as to who is to provide coverage, is the accrued
16 interest. And because - - -

17 JUDGE SMITH: Accrued - - -

18 MR. PARERES: - - - the contract - - -

19 JUDGE SMITH: Accrued after what date?

20 MR. PARERES: Accrued after - - - it's both
21 post-judgment - - - pre-judgment and post-judgment
22 interest.

23 JUDGE SMITH: Wait a minute. Wait a
24 minute. Where did Group Council have any liability
25 for pre-judgment interest beyond the million?

1 MR. PARERES: It was on the wrongful - - -
2 it was a wrongful death case, so there was judgment
3 that accrued on - - -

4 JUDGE SMITH: I understand.

5 MR. PARERES: - - - the various proponents
6 of the verdict.

7 JUDGE SMITH: I understand why the
8 defendant had the liability. How does the primary
9 carrier have liability for pre-judgment interest
10 beyond its policy limits? I don't see that. And I
11 thought you were - - - and I thought you were
12 representing that side.

13 MR. PARERES: I am representing Dr. Ragins.

14 JUDGE SMITH: Yeah.

15 MR. PARERES: I am seeking - - -

16 JUDGE SMITH: But you - - -

17 MR. PARERES: - - - coverage - - -

18 JUDGE SMITH: But you're trying to hit the
19 excess. I mean, why are you resisting the idea that
20 the primary didn't - - - that the primary was done
21 when he paid his million?

22 MR. PARERES: Because the policy does
23 provide for a supplemental payment provision. I
24 think there may be ambiguity, frankly, and I see
25 where Your Honor's going with this. But I do believe

1 there's ambiguity in that Group Council policy. And
2 I can tell you their custom and practice, having
3 dealt with Group Council for years and years, they
4 did provide that type of coverage, on occasion, that
5 was over and above their limits, solely to the extent
6 that there was interest that was being taxed.

7 CHIEF JUDGE LIPPMAN: Okay, counselor.
8 You'll have your rebuttal time.

9 MR. PARERES: Thank you.

10 MR. SIMONE: Just to - - - Christopher
11 Simone for HIC. Just to clarify something, I think
12 the reason the confusion might be - - - that it might
13 not be clear in this record is there was a long
14 period of time before the first judgment was entered
15 because the case was originally - - -

16 JUDGE SMITH: Before the first judgment was
17 entered?

18 MR. SIMONE: Yes, because there was - - -
19 there was an appeal.

20 JUDGE SMITH: Why is that - - - why should
21 the primary have any responsibility for any - - -
22 beyond a million dollars before a judgment is
23 entered?

24 MR. SIMONE: Well, because - - - because
25 there was an appeal. Plaintiff had won the case, and

1 - - -

2 JUDGE SMITH: No, no, no, no. My question
3 is why - - - why does the primary have to go beyond
4 its policy limits before a judgment is entered?
5 What, in the primary policy, says that?

6 MR. SIMONE: Well, two things. Number one,
7 it's - - - the Dingle case holds that a carrier is
8 responsible for their proportionate share of what
9 they pay. They paid a million dollars; they're
10 responsible for a million dollars of pre-judgment
11 interest. Post-judgment interest, which has accrued
12 all this time, which is not in the judgment,
13 obviously, because it's post-judgment - - -

14 JUDGE SMITH: You're saying that - - - you
15 read Dingle to say that if there's a verdict for a
16 million dollars, and before judgment that has
17 accumulated to a million-two, and I have a
18 million-dollar policy, I have to pay a million-two?

19 MR. SIMONE: I don't interpret Dingle as
20 that; that's what Dingle says. And a carrier is
21 responsible for their pre - - - there's no provision
22 in the - - - in the Group Council policy or the HIC
23 policy for pre-judgment interest.

24 JUDGE GRAFFEO: So what's the - - -

25 MR. SIMONE: They follow New York policy.

1 JUDGE GRAFFEO: What's the dispute here,
2 about pre or post or both - - -

3 MR. SIMONE: Well, it's both - - -

4 JUDGE GRAFFEO: - - - judgment interest?

5 MR. SIMONE: It's both, because, number
6 one, HIC paid its proportionate share of interest on
7 its 100,000 dollars that it paid up to its limit - -
8 -

9 JUDGE ABDUS-SALAAM: But counsel - - -

10 MR. SIMONE: - - - on that case.

11 JUDGE ABDUS-SALAAM: - - - if the
12 underlying policy provision says that the underlying
13 carrier is liable up to its limit, and the limit is a
14 million dollars, you're saying that even if there is
15 some pre- or post-judgment interest that exceeds that
16 limit, that the underlying carrier is still
17 responsible for that?

18 MR. SIMONE: The supplementary payments
19 provision obligates Group Council to pay all interest
20 on the entire amount of the judgment regardless of
21 whether it's a million dollars. It's any amount. It
22 doesn't matter - - -

23 JUDGE ABDUS-SALAAM: But if the language of
24 the primary policy says up to its limit, and the
25 limit is a million, and then the interest carries it

1 over a million, you're saying that they're still
2 liable for whatever it is over the million.

3 MR. SIMONE: Right. That's why it's
4 supplementary payments; it's in supplement to the
5 limit.

6 JUDGE SMITH: I've got - - -

7 MR. SIMONE: That's standard contract
8 language.

9 JUDGE SMITH: I've got Dingle in front of
10 me. It seems to me to say the opposite of what you
11 just said it said. The insurer is liable for the
12 portion of the judgment that it must pay "up to the
13 policy limits".

14 MR. SIMONE: Well, that means that it's not
15 going to pay more than its policy limit, but the - -
16 - if you read - - - if you continue to read Dingle,
17 they talk about the share that it is paying liable
18 for in that case.

19 JUDGE SMITH: Where - - -

20 MR. SIMONE: In this case - - -

21 JUDGE SMITH: Where does it say that they
22 have to go beyond their policy limits in Dingle?

23 MR. SIMONE: Here. "The insurer" - - - in
24 the first paragraph - - - "The insurer is only liable
25 for interest on that portion of the judgment it must

1 pay up to the policy limits." The portion of the
2 judgment it paid up to its policy limits - - -

3 JUDGE SMITH: I see.

4 MR. SIMONE: - - - was 100,000.

5 JUDGE GRAFFEO: Do you mean just - - -

6 MR. SIMONE: So they paid interest on that.

7 JUDGE GRAFFEO: Does that mean just - - -

8 JUDGE SMITH: That's how you're reading it.

9 JUDGE GRAFFEO: - - - the pre-judgment
10 interest?

11 MR. SIMONE: This - - - Dingle dealt with
12 pre-judgment interest. Post-judgment interest, in
13 this case, is governed by the specific contractual
14 language in the Group Council policy. And - - - and
15 you hit the nail - - -

16 JUDGE GRAFFEO: Okay. And so - - -

17 MR. SIMONE: - - - right on the head before
18 - - -

19 JUDGE GRAFFEO: And how do you interpret
20 that?

21 MR. SIMONE: Exactly as it says. They pay
22 - - - they were obligated to pay all interest on the
23 entire amount of the judgment, not just their share.
24 It says the entire amount of the judgment, regardless
25 of what it is. That's a very common supplementary

1 payments provision language. And you hit the nail
2 right on the head before when you said - - -

3 JUDGE SMITH: So you're - - -

4 MR. SIMONE: - - - that but for that
5 benefit - - -

6 JUDGE SMITH: - - - you're saying that - -

7 -

8 MR. SIMONE: - - - we wouldn't be here.

9 JUDGE SMITH: You're saying that if the - -
10 - if the primary - - - let's say the primary has
11 completely discharged its obligation, put in
12 everything it has to pay, and then a judgment is
13 later rendered, which would be - - - yes, which would
14 be wholly the excess' responsibility, and interest
15 runs on that judgment; you say it can go back to the
16 primary and collect the interest?

17 MR. SIMONE: I'm not sure I understand the
18 sequence.

19 JUDGE SMITH: Okay.

20 MR. SIMONE: Because I think this case has
21 a kind of a weird sequence of what happened here.

22 JUDGE SMITH: Well, forget about this case
23 for a minute. Hypothetically - - -

24 MR. SIMONE: Okay.

25 JUDGE SMITH: - - - the primary puts in its

1 policy limits right away, it's gone, it's done.
2 Everyone agrees it's paid everything it has to pay.
3 It goes and takes a holiday. A judgment gets entered
4 for excess. The excess carrier is the only guy in
5 the picture. That judgment gets entered and interest
6 starts running. You're saying the primary is liable
7 for that interest because that all sum - - - because
8 that "all the interest" language?

9 MR. SIMONE: Under the Group Council
10 policy, the primary would be liable for everything up
11 to the point where it paid its money.

12 JUDGE SMITH: Oh, okay.

13 MR. SIMONE: Okay. Yeah.

14 JUDGE SMITH: But once it's paid its money,
15 it's done.

16 MR. SIMONE: That's correct.

17 JUDGE SMITH: Okay.

18 MR. SIMONE: The HIC policy has no
19 supplementary payments provision. They only provided
20 excess coverage on the million. And under Dingle and
21 New York policy, which Dingle was based on public
22 policy, it paid its proportionate share. And if the
23 - - -

24 CHIEF JUDGE LIPPMAN: But there's no basis
25 for you to fill that gap? You - - -

1 MR. SIMONE: Well, that's what the court
2 made it clear before; but for Group Council's
3 bankruptcy, we wouldn't be here right now. This
4 wouldn't be happening because everybody - - -

5 CHIEF JUDGE LIPPMAN: So nothing - - -

6 MR. SIMONE: - - - would have been - - -

7 CHIEF JUDGE LIPPMAN: Nothing changes?

8 MR. SIMONE: Nothing changes. We are not
9 responsible to fill that gap. It's unfortunate, but
10 the person who bore the risk - - -

11 CHIEF JUDGE LIPPMAN: The doctor - - -

12 MR. SIMONE: - - - of Group Council was the
13 doctor.

14 CHIEF JUDGE LIPPMAN: The doctor bears the
15 risk?

16 MR. SIMONE: That's correct.

17 JUDGE PIGOTT: Mr. Simone - - -

18 JUDGE READ: Can he insure against that in
19 any way?

20 MR. SIMONE: Pardon?

21 JUDGE READ: Can he insure against that
22 particular risk in any way?

23 MR. SIMONE: I think you can buy insurance
24 for anything. I mean, I think it's entirely - - -

25 JUDGE READ: Okay.

1 MR. SIMONE: - - - there's all different
2 types of insurance. It may be he didn't anticipate
3 it, but you know, that's the reality of it. It's
4 unfortunate, but - - -

5 JUDGE ABDUS-SALAAM: But isn't that what he
6 thought he did when he bought the excess policy?

7 MR. SIMONE: I don't know what the
8 operation of his mind was, but the excess policy
9 makes clear what its respon - - - I don't think
10 anybody expects the carrier to go bankrupt, but - - -

11 JUDGE PIGOTT: I lost the last part of your
12 - - - you said if there hadn't been a bankruptcy, we
13 wouldn't be here because - - -

14 MR. SIMONE: Because Group Council would
15 have paid what it's responsible for.

16 JUDGE PIGOTT: Which is?

17 MR. SIMONE: Which is the million dollars,
18 pre-judgment interest on the million dollars, and all
19 post-judgment interest. And we paid our 100,000 and
20 pre-judgment interest.

21 JUDGE PIGOTT: Why didn't that get paid by
22 the liquidator, then?

23 MR. SIMONE: Well, their position is - - -
24 and they don't represent the Liquidation Bureau. The
25 Liquidation Bureau's position is we're not allowed to

1 pay more than a million dollars. That issue is not
2 really relevant here because our position was it
3 really doesn't matter what the Liquidation Bureau
4 says they can do or not do; we've satisfied our
5 obligation.

6 CHIEF JUDGE LIPPMAN: You're not affected
7 by - - -

8 MR. SIMONE: That issue has not been
9 litigated - - -

10 CHIEF JUDGE LIPPMAN: You're not affected
11 by whether there's a liquidator or there's not a
12 liquidator?

13 MR. SIMONE: Right, it's not - - - it's not
14 our fight. That's their claim. And that's - - - and
15 they're making that argument, but it hasn't been
16 litigated here and nobody - - - the person who maybe
17 should be making that argument is Dr. Ragins himself
18 - - -

19 JUDGE PIGOTT: Through the liquidator.

20 MR. SIMONE: - - - through the liquidator.
21 But our position is it doesn't matter what the
22 Liquidation Bureau thinks; we've satisfied our
23 obligation.

24 JUDGE PIGOTT: Don't you guys - - -

25 JUDGE GRAFFEO: You don't have to pay any

1 interest on the amount of excess that you paid - - -

2 MR. SIMONE: We did.

3 JUDGE GRAFFEO: - - - the doctor?

4 MR. SIMONE: We did. We paid 35,000 and
5 change, representing our one-eleventh. The judgment
6 was a million-one, which - - -

7 JUDGE GRAFFEO: I thought - - -

8 MR. SIMONE: - - - and I - - -

9 JUDGE GRAFFEO: I thought you just said
10 that - - - that Group Council was responsible for all
11 the interest.

12 MR. SIMONE: Post-judgment. Under their
13 policy, they're responsible for post-judgment
14 interest.

15 CHIEF JUDGE LIPPMAN: Your one-eleventh is
16 pre-judgment?

17 MR. SIMONE: Is pre-judgment. Neither
18 policy has a pre-judgment provision, for the simple
19 reason that it's New York policy, under Dingle, to
20 pay your proportionate share. Sometimes that's in
21 the policies, and I'm sure you have seen them before,
22 and they mirror that language. So each party would
23 have paid its proportionate share of pre-judgment
24 interest like we paid.

25 JUDGE GRAFFEO: So do they take that

1 interest and subtract it from their million-dollar
2 limit - - -

3 MR. SIMONE: I don't believe that's true,
4 no - - -

5 JUDGE GRAFFEO: - - - as to what they pay
6 for the basic damage verdict?

7 MR. SIMONE: No, I don't believe that's
8 true, because - - - I mean, we didn't do that. We
9 paid the 100,000, and Group Council would have paid
10 the pre-judgment interest on its proportionate share.
11 That's just - - - that's just the policy. But - - -
12 you know - - - but again, the focus here is what - -
13 -

14 JUDGE GRAFFEO: Why would - - - I guess I'm
15 missing something. Why would the Group Council, in
16 figuring out its premium, want to pay your post-
17 judgment interest?

18 MR. SIMONE: Because their policy says - -
19 - page 54 says they will. They say the entire amount
20 of the judgment - - -

21 JUDGE GRAFFEO: It says only up to the
22 limits of their liability.

23 MR. SIMONE: No, but if you leave the
24 supplementary payments - - - what that means is
25 they're not going to pay more than their - - - than

1 their million dollars in coverage. But they pay the
2 entire amount on the entire judgment, whatever it is.
3 And again - - -

4 JUDGE PIGOTT: Just to be sure I understand
5 - - -

6 MR. SIMONE: And again, the issue is what
7 we're obligated, not whether - - - we're not - - -
8 you know, and any question about what they would have
9 paid is a gap that we're not going to fill.

10 JUDGE GRAFFEO: Are we sure that's how they
11 interpreted their insurance contract? We don't know,
12 right?

13 MR. SIMONE: Well - - -

14 JUDGE GRAFFEO: Because they're in
15 insolvency.

16 MR. SIMONE: I can only tell you what HIC's
17 position is, and HIC's position is it satisfied its
18 obligation under its insuring agreement. That's the
19 issue here.

20 JUDGE PIGOTT: If there was no - - - if
21 there was no excess carrier, and just a million-
22 dollar policy, and you're trying to reso - - - you're
23 not - - - the plaintiff's trying to settle the case,
24 and they say look, I've got a million bucks, that's
25 it, you know, take it or leave it, and they say we'll

1 leave it, and then there's a judgment for a million-
2 one. And so does all the interest on the million-one
3 get paid by the million-dollar carrier because of the
4 supplemental coverage?

5 MR. SIMONE: Post-judgment?

6 JUDGE PIGOTT: Yeah.

7 MR. SIMONE: Yes, according to the policy.

8 JUDGE ABDUS-SALAAM: Even though your
9 policy mentions all sums - - - right? Don't you have
10 language - - -

11 MR. SIMONE: In the context - - -

12 JUDGE ABDUS-SALAAM: - - - in your policy
13 of all sums?

14 MR. SIMONE: In the context of the limits,
15 and the limits of liability here were one million for
16 the primary and - - -

17 JUDGE SMITH: But they can - - - on your
18 theory, they can stop the post-judgment; they can end
19 their responsibility for post-judgment interest by
20 putting in their full obligation.

21 MR. SIMONE: Group Council, you mean,
22 Judge?

23 JUDGE SMITH: Yes.

24 MR. SIMONE: I believe so. And I think - -

25 -

1 JUDGE SMITH: Yeah.

2 MR. SIMONE: - - - at that point you may -

3 - -

4 JUDGE SMITH: But I guess where I'm getting
5 hung up is your theory that their obligation, even
6 for pre-judgment interest, is more than a million. I
7 have a lot of trouble reading that into their policy.

8 MR. SIMONE: Well, I mean, regardless of
9 whether - - - whether their position - - -

10 JUDGE SMITH: They paid the million.

11 MR. SIMONE: Right, but regardless of
12 whether that's their position or not, under Dingle,
13 we've satisfied our obligation, and that's the issue
14 here, whether we - - -

15 JUDGE SMITH: So your argument really
16 depends on reading Dingle to say that the primary is
17 liable - - - even though the policy doesn't say so -
18 - - that they're liable beyond the policy limits when
19 the pre-judgment interest goes beyond the policy
20 limits?

21 MR. SIMONE: Beyond the million - - -

22 JUDGE SMITH: Yes.

23 MR. SIMONE: Yes.

24 CHIEF JUDGE LIPPMAN: Okay, counsel.

25 MR. SIMONE: Thank you.

1 CHIEF JUDGE LIPPMAN: Thank you.

2 Counselor, rebuttal?

3 MR. PARERES: Yes. Thank you. Number one,
4 I just want to point out Dingle is not controlling in
5 this particular area. It is a prime - - - it was a
6 decision that was based on a primary policy, not an
7 excess policy, and it dealt with the automobile
8 industry, which this court has already determined - -
9 -

10 JUDGE SMITH: As I read Dingle - - -

11 MR. SIMONE: - - - is to be viewed somewhat
12 skeptically.

13 JUDGE SMITH: I mean, isn't there a simpler
14 point? Dingle is a case where the insurance company
15 won, right? I mean, the court says that the - - -
16 that the carrier is not - - - is only liable for
17 interest it must pay up to the policy limits. And
18 maybe the words "up to the policy limits", I don't
19 know what they modify, but the carrier won the case
20 in Dingle.

21 MR. PARERES: Yes.

22 JUDGE SMITH: So how can that establish the
23 liability of the carrier for beyond the policy
24 limits?

25 MR. PARERES: And that's part of my

1 argument, respectfully.

2 JUDGE PIGOTT: Why didn't you sue the
3 liquidator?

4 MR. PARERES: The liquidator is not
5 amenable to lawsuit in any court, and that's by - - -
6 it's a statutory limitation on what you can do in
7 terms of commencing an action against New York State
8 Liquidation Bureau. You can't sue them in state
9 court.

10 JUDGE PIGOTT: Not even in a Court of
11 Claims?

12 MR. PARERES: No.

13 JUDGE PIGOTT: Okay.

14 MR. PARERES: I just want to also point out
15 - - - and I think it's a point that has not really
16 been focused on - - - we talk about the terms and
17 conditions of the Group Council policy. This case is
18 about the terms and conditions of the HIC policy. It
19 is unambiguous - - -

20 CHIEF JUDGE LIPPMAN: Where is it that they
21 haven't met their obligations?

22 MR. PARERES: Specifically in the language,
23 four separate times in that policy, the sole
24 condition to coverage, which is to serve as the
25 triggering event for coverage under the HIC policy,

1 is payment of the limit of the underlying policy.
2 That limit was paid. One million dollars was the
3 limit.

4 CHIEF JUDGE LIPPMAN: So then once it's
5 paid, they pay everything else, is your view?

6 MR. PARERES: That's exactly what - - -

7 CHIEF JUDGE LIPPMAN: Under which
8 provision? Under what provision?

9 MR. PARERES: Under - - - I believe it's
10 Section II, "Coverages", and under Section III,
11 "Limitations of Liability" - - - or "Limits of
12 Liability".

13 CHIEF JUDGE LIPPMAN: What does that
14 language say?

15 JUDGE GRAFFEO: Is this page 58 of the
16 record that you're looking at?

17 MR. PARERES: I'm actually looking - - -
18 yes.

19 JUDGE SMITH: I'm looking at the words "All
20 sums in excess of the limits of liability on the
21 underlying policy"?

22 MR. PARERES: Yes, that's where it is.

23 JUDGE SMITH: Yeah.

24 MR. PARERES: Where exactly are you on - -

25 -

1 JUDGE SMITH: On page 50 - - -

2 MR. PARERES: 58?

3 JUDGE SMITH: - - - 58 - - -

4 MR. PARERES: Okay.

5 JUDGE SMITH: - - - the first - - - or the
6 second full paragraph.

7 JUDGE GRAFFEO: Roman numeral I.

8 MR. PARERES: On number I, "The company
9 will pay on behalf of the named insured all sums in
10 excess of the limits of liability of the underlying
11 policy as set forth in the declaration." When you -
12 - -

13 JUDGE SMITH: So your theory is that even
14 if the underlying policy has a clause saying we're
15 going to pay some stuff outside our limits, so that
16 there's a no-limit limit there, you're saying that
17 what is described in the limits of the underlying
18 policy is what's binding.

19 MR. PARERES: Absolutely. And if you go -
20 - - because this particular section makes reference
21 to the declaration page of the HIC policy, which is
22 also in the - - - in the record on page 52. If you
23 look at item IV on page 52 of the record, it says,
24 "Limits of coverage hereunder. Policy coverage in
25 excess of the covered person's primary, which primary

1 policy must be no less than one million per claimant
2 and three million" - - -

3 JUDGE SMITH: "No less than" doesn't mean
4 it can't be more.

5 MR. PARERES: Well, but it says "no less
6 than".

7 JUDGE SMITH: Okay. But - - -

8 MR. PARERES: So by meeting it - - - by
9 paying the million - - -

10 JUDGE SMITH: But everybody - - -

11 MR. PARERES: - - - you've met that burden.

12 JUDGE SMITH: Everybody, except me, seems
13 to read the underlying policy as saying that you can
14 go beyond the million, for reasons I don't
15 understand; that you're liable beyond the million,
16 even apart from post-judgment interest, even pre-
17 judgment you can be liable beyond the million. If
18 that's true, why isn't that really the limit of
19 coverage of the underlying policy?

20 MR. PARERES: I don't know that it is true,
21 and I think that's - - - that's an ambiguity in that
22 policy.

23 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
24 you.

25 MR. PARERES: Thank you.

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CHIEF JUDGE LIPPMAN: Thank you both.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Herzl Ragins, M.D. v. Hospitals Insurance Company, Inc., et al., No. 234 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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