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COURT OF APPEALS

STATE OF NEW YORK

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JIN MING CHEN,

Appellant,

-against-

NO. 77

INSURANCE COMPANY OF THE  
STATE OF PENNSYLVANIA,

Respondent.

-----

20 Eagle Street  
Albany, New York  
October 14, 2020

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

KENNETH J. GORMAN, ESQ.  
LAW OFFICES OF WADE T. MORRIS  
Attorney for Appellant  
225 Broadway, Suite 1510  
New York, NY 10007

ELIZABETH F. AHLSTRAND, ESQ.  
SEIGER GFELLER LAURIE LLP  
Attorney for Respondent  
977 Farmington Avenue  
Suite 200  
West Hartford, CT 06107

Karen Schiffmiller  
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The first appeal on this  
2 afternoon's calendar is appeal number 77, Chen v. Insurance  
3 Company of the State of Pennsylvania.

4 Counsel?

5 MR. GORMAN: Kenneth Gorman for the plaintiff-  
6 appellant. I'd like to reserve two minutes for rebuttal?

7 CHIEF JUDGE DIFIORE: You may, sir.

8 MR. GORMAN: Thank you.

9 CHIEF JUDGE DIFIORE: You're welcome.

10 MR. GORMAN: Do I begin?

11 CHIEF JUDGE DIFIORE: Please proceed, sir.

12 MR. GORMAN: Okay.

13 CHIEF JUDGE DIFIORE: Yes, please.

14 MR. GORMAN: The procedural problems of this case  
15 simply cannot be overlooked. I mean, with regard to the  
16 issue of waiver, there's no dispute that the plaintiff has  
17 always sought statutory interest, which included pre-  
18 judgment interest that was already factored into the  
19 judgment, no post-judgment interest. This was made clear  
20 in plaintiff's initial demand letter that was sent on  
21 October 31st, 2013. It was made clear in plaintiff's  
22 complaint. It was made clear in plaintiff's amended  
23 complaint, and it was made clear on a motion for summary  
24 judgment.

25 ICSOP waived this issue by failing to address it



1 when it opposed plaintiff's motion for summary judgment.  
2 This is the only reported decision in the State of New  
3 York, and I can't find any decisions outside of the State  
4 of New York, what's app - - - which applies the concept of  
5 a contractual waiver in a litigation context on opposing  
6 motions made on notice. And this decision has the  
7 potential of overturning, or at least significantly  
8 transforming, the decisional law regarding the legal  
9 doctrine of waiver.

10 With regard to reargument, granting ICSOP leave  
11 to reargue issues that were not previously raised prior to  
12 the entry of the final order, is contrary to the plain  
13 meaning of CPLR 2221(d), and the decisional law from every  
14 appellate court in the State of New York. This court held  
15 in Simpson v. Loehmann, and Reilly v. Steinhart, that a  
16 motion for reargument cannot be used as a vehicle to  
17 advance new legal theories that were not previously cited.

18 JUDGE FAHEY: No, but - - - aren't we really  
19 dealing with here with the court's perception that there  
20 was a mistake in law?

21 MR. GORMAN: I - - - I'm sorry. Could you repeat  
22 that, please?

23 JUDGE FAHEY: Sure. These masks make it hard  
24 sometimes, for all of us.

25 Aren't we really dealing here with the CPLR



1 question of whether there's a mistake in law on the - - -  
2 on the court's part? And a court always has the right to  
3 go back and address a mistake in its legal analysis.

4 MR. GORMAN: That's - - - that's right. But I  
5 mean, there - - - there was no mistake in law here. I  
6 mean, ICSOP didn't even mention the word "interest" in any  
7 of the papers that were submitted in opposition to our  
8 motion for summary judgment.

9 JUDGE RIVERA: But - - - but it argued it did  
10 drop down - - - sorry. It argued it, right?

11 MR. GORMAN: ICSOP - - -

12 JUDGE RIVERA: It did drop down.

13 MR. GORMAN: - - - argued that it dropped down  
14 with regard to the million-dollar limit. I mean, I'd just  
15 like to refer the court to ICSOP's - - - ICSOP's - - - when  
16 it - - - when ICSOP opposed our motion for summary  
17 judgment, it acknowledged at page 389 of the record that  
18 the judgment was 2.3 million dollars, and that it had  
19 nearly 400,000 dollars of pre-judgment interest factored  
20 into it. And at page 333 of the record - - -

21 JUDGE STEIN: But - - - but weren't they - - -  
22 isn't that what the focus of the arguments was - - - was  
23 the drop-down issue and - - - and it - - - it seems to me  
24 like they never really - - - you - - - nobody ever really  
25 got to talking about interest in particular. The - - - the



1 - - - the focus was on, did they have to pay the whole  
2 amount or didn't they? And then once the court said no,  
3 they didn't, then the - - - the allocation of who is  
4 responsible for what interest really came to light.

5 Isn't - - - isn't that what happened? It - - - I  
6 - - - I mean, I - - - I know that your - - - your - - -  
7 your references to the record are accurate and all of that,  
8 but it - - - it doesn't - - - it - - - it doesn't  
9 demonstrate really what the - - - the nature of the  
10 discussion was, and I think the context of it has to be  
11 taken into account, doesn't it?

12 MR. GORMAN: No. And when ICSOP - - -

13 JUDGE STEIN: No?

14 MR. GORMAN: - - - opposed our motion for summary  
15 judgment, it said, and I'm going to quote it - - - what it  
16 said. "If ICSOP is liable at all, it is liable only for  
17 the amount of the judgment," which it acknowledged included  
18 pre-judgment interest, "less the million-dollar limit."  
19 Not less the million-dollar limit and the supplementary  
20 payments, just the million-dollar limit. This - - - the  
21 issue of interest is governed by the contractual language,  
22 and - - -

23 JUDGE FAHEY: So - - -

24 MR. GORMAN: - - - there was no reason - - -

25 JUDGE FAHEY: - - - let - - - let me ask - - -



1 let - - - let me ask a question on that, on the interest  
2 question, your response to Judge Stein. Is - - - is your  
3 argument that the follow-the-form requirement means that  
4 post-judgment interest goes back to the un - - - goes back  
5 to the primary policy. The excess policy, of course, would  
6 cover that. So the post-judgment interest would be on the  
7 full 2.3?

8 MR. GORMAN: That's correct.

9 JUDGE FAHEY: All right. And that's based on a  
10 follow-the-form argument; is that right?

11 MR. GORMAN: That's correct.

12 JUDGE FAHEY: All right. Just so I have it  
13 clear, thank you.

14 MR. GORMAN: Okay.

15 If ICSOP felt that it had no obligation to pay  
16 interest on the judgment, it had to raise the issue when  
17 the plaintiff moved for summary judgment, which clearly - -  
18 -

19 JUDGE STEIN: Well, I don't understand that to  
20 have been their position. I understand their position to  
21 be that they were required to pay only pre-judgment  
22 interest on the portion of the judgment that - - - or - - -  
23 or am I getting it backwards? Post-judgment interest. No,  
24 only pre-judgment interest on the portion of the judgment  
25 for which they were liable.



1 MR. GORMAN: That's - - - are you referring to  
2 the supplementary payments provision in the Arch policy?

3 JUDGE STEIN: Yes. I'm - - - I'm refer - - -  
4 yes, I am referring to that.

5 MR. GORMAN: Okay.

6 JUDGE STEIN: Now, based on that policy - - - on  
7 that provision, that the excess insurer was saying that's  
8 all the interest we're responsible for, right?

9 MR. GORMAN: ICSOP raised that argument after the  
10 final order was entered. Before the final order was  
11 entered - - -

12 JUDGE STEIN: I understand that.

13 MR. GORMAN: Right.

14 JUDGE STEIN: That goes to your waiver argument.  
15 I - - -

16 MR. GORMAN: Right, that goes to the waiver  
17 argument.

18 JUDGE STEIN: I - - - I was sort of following up  
19 on Judge Fahey's - - -

20 MR. GORMAN: Oh, just with regards to the  
21 language of the - - - of - - - of - - - of the  
22 supplementary payments provision regarding pre-judge - - -  
23 that's what it says.

24 JUDGE STEIN: Right.

25 JUDGE RIVERA: But - - - but doesn't the colloquy



1 at oral argument suggests the same, that that was their  
2 understanding - - - or, that was their position; let me put  
3 it a different way. The - - -

4 MR. GORMAN: I'm sorry. At oral argument?

5 JUDGE RIVERA: Yes, the colloquy at oral  
6 argument.

7 MR. GORMAN: Yes.

8 JUDGE RIVERA: Doesn't that help us to understand  
9 what they are saying is their position with this drop-down  
10 argument?

11 MR. GORMAN: That was raised for the first time  
12 in oral argument. It wasn't raised in the papers at any  
13 time before that. And the case law's clear that you can't  
14 raise issues for the first time at oral argument.

15 JUDGE RIVERA: I understand. That was not what I  
16 said. My point was, didn't - - - didn't the oral argument  
17 help to clarify what their position was? Their position  
18 one being that it is not waiving their argument, because it  
19 would have encompassed this position that they are not  
20 liable - - - or they're not responsible, let me put that  
21 way, for - - -

22 MR. GORMAN: It was - - - it was a one - - -

23 JUDGE RIVERA: - - - for the interest that Arch  
24 would have been responsible for. Arch - - -

25 MR. GORMAN: When the court discussed interest,





1 ICSOP made a one-sentence comment, "on the 1.3." "On the  
2 1.3" does not reflect the substantive issues that ICSOP  
3 briefed after the final order was entered. It just said,  
4 "on the 1.3" - - -

5 JUDGE RIVERA: Does that mean I'm not liable for  
6 the interest on the one?

7 MR. GORMAN: That's correct. Raised for the  
8 first time at oral argument.

9 JUDGE RIVERA: Okay. And isn't that close to the  
10 argument on it doesn't drop down?

11 MR. GORMAN: Drop down, with regard to one  
12 million. I don't think it - - - I - - - I don't think  
13 interest has anything to do with the drop-down provisions.  
14 The drop-down provision only has to do with Arch's  
15 liability limit, which was clearly set forth in the  
16 declarations of its policy and in the declaration of  
17 ICSOP's excess policy.

18 JUDGE FEINMAN: Chief, if I may?

19 CHIEF JUDGE DIFIIORE: Yes.

20 JUDGE FEINMAN: Yeah. So I just want to be clear  
21 about one thing. Are your post-judgment arguments and your  
22 pre-judgment arguments regarding to interest, do they rise  
23 and fall together, or are you making - - - can - - - can we  
24 look at them separately and - - - and do you have separate  
25 arguments as to them?



1 MR. GORMAN: The pre-judgment - - - I mean, with  
2 regard to the pre-judgment - - - I'm sorry. You're talking  
3 about after the order was entered, or you're talking about  
4 just with regard to the issue of post judgment interest and  
5 pre-judgment interest?

6 JUDGE FEINMAN: I'm talking about pre and post.  
7 Do you - - - is it all one analysis? You get them all, or  
8 you get none, or part? Or is there a separate analysis for  
9 the pre and the post?

10 MR. GORMAN: Right. It - - - it - - - it can be  
11 a separate analysis. I mean, I can't - - - because the  
12 ultimate net loss provision in ICSOP's policy cannot be  
13 reconciled with the - - - with the supplementary payments  
14 provision regarding pre-judgment interest, ICSOP is  
15 responsible for all pre-judgment interest. That's our  
16 position. And that's - - - I - - - I don't know if it's -  
17 - - I don't think it rises and falls together. I think - -  
18 - I think post-judgment interest and pre-judgment interest  
19 are separate in this case.

20 I think that if ICSOP raised the issue at - - -  
21 at the appropriate juncture, maybe the argument would be  
22 different, but it didn't. And at page 333 of the record,  
23 it conceded that it had to pay the judgment, less one  
24 million dollars, not less on one million dollars and the  
25 supplementary payments provisions, which include pre-



1 judgment interest. It didn't - - - it didn't argue that,  
2 so it waived it.

3 But if it argued it at the appropriate point, I  
4 guess it could make that argument, but I would say that it  
5 still wouldn't - - - it still wouldn't pass muster because  
6 it can't be reconciled with the ultimate net loss provision  
7 in its policy, which doesn't make any provision for pre-  
8 judgment or post-judgment interest.

9 CHIEF JUDGE DIFIORE: Thank you, Counsel.

10 MR. GORMAN: Thank you.

11 CHIEF JUDGE DIFIORE: Counsel?

12 MS. AHLSTRAND: Thank you, Your Honor. Elizabeth  
13 Ahlstrand for the respondents.

14 Just to respond briefly about the reference at  
15 page 333. I - - - I think it's clear when you read our  
16 opposition to the motion for summary judgment in total,  
17 there is many statements that made our position very clear.  
18 At page 331 for example, we say "To the extent plaintiff  
19 seeks reimbursement of the entire judgment, his motion  
20 should be denied for the additional reason that the  
21 maintenance provision precludes ICSOP from dop - - -  
22 "dropping down and satisfying that portion of the judgment  
23 that would have been covered by the Arch policy had it not  
24 been rescinded."

25 It was our position throughout summary judgment



1 and even before in our answer. The maintenance provision  
2 does not permit a drop down in these circumstances.

3 JUDGE GARCIA: Counsel?

4 MS. AHLSTRAND: Our - - - yes?

5 JUDGE GARCIA: Counsel, I'd like to just move on  
6 a little bit to the substance of - - - of this - - -

7 MS. AHLSTRAND: Sure.

8 JUDGE GARCIA: - - - and particularly with  
9 respect to post-judgment interest. And as I read that  
10 provision in the Arch policy, it says, "All interest on the  
11 full amount of any judgment that accrues after entry of the  
12 judgment and before we have paid, offered to pay, et  
13 cetera, the part of the judgment that is within the  
14 applicable limits of insurance."

15 So as I read that provision, it seems to say to  
16 me, Arch will pay, and they'll pay all post-judgment  
17 interest, let's say on 2.3 million here, up to the point  
18 where Arch says, here's the million dollars we owe, right.  
19 And then they're done with interest payments. And that  
20 seems - - - post-judgment - - - that seems reasonable to  
21 me, because why would they be on the hook for a secondary  
22 carrier's award after they offered their payment?

23 But Arch is gone here, so there's no way to stop  
24 - - - there's no one paying. So the secondary carrier can  
25 not pay on the judgment for years; that's being put on the



1 Arch tab, but no one's going to pay that. So the way I  
2 read that provision - - - and this isn't a drop-down issue,  
3 but the way I think that provision could be read is, Arch  
4 owes nothing here, right. Arch is out. So at the time of  
5 the judgment, Arch has paid everything they're liable for  
6 in the insurance. Zero.

7 And the clock starts to run on the secondary  
8 carrier for post-judgment interest. And wouldn't as a  
9 policy matter that make more sense? Because the way the  
10 thing is designed is if Arch was there, Arch could end that  
11 obligation, pay four days of interest and offer the million  
12 dollars, let's say. But now Arch can't do that, because  
13 they're not a party anymore.

14 So it's seems like the effect of that provision  
15 should still hold, because, you know, you're not dropping  
16 down, but - - - and - - - and why wouldn't you read that  
17 provision that way?

18 MS. AHLSTRAND: Your Honor, if you read it in  
19 isolation, that's a plausible reading. However, when you  
20 read it in the context of the ICSOP policy, specifically  
21 the maintenance provision which requires the maintenance of  
22 the one-million-dollar limit, but also says that if you  
23 fail to comply this - - - with this requirement, we will  
24 only be liable to the same extent that we would have been,  
25 had you fully complied. So it's - - -



1 JUDGE GARCIA: And I'm saying you would be,  
2 because you're only liable for interest after the time Arch  
3 pays whatever it owes on any judgment. They owe nothing.  
4 So it's on - - - it's on your tab now.

5 MS. AHLSTRAND: Well - - -

6 JUDGE GARCIA: And that's how this provision  
7 works.

8 MS. AHLSTRAND: But the - - -

9 JUDGE GARCIA: Even if Arch was there - - - let's  
10 say Arch went in the day the judgment came out and said,  
11 we're offering you - - - here's our million-dollar judgment  
12 that we owe you.

13 MS. AHLSTRAND: I - - - I agree with - - -

14 JUDGE GARCIA: And you say, no, I'm not paying  
15 it; I want to do whatever.

16 MS. AHLSTRAND: Your Honor, I agree with you if  
17 Arch had stepped in and paid. It would be a different  
18 situation if the policy was still in effect. But the  
19 maintenance provision says, our obligations are only going  
20 to be the same as if they were in effect. And if they were  
21 in effect, Arch would have paid the million dollars.

22 Then you look to the next piece, which is - - -  
23 you're saying that, well, Arch and our insured - - - our  
24 insured who is the one who resulted in the policy being  
25 voided for their material misrepresentations, that that - -



1 - that that responsibility should shift to ICSOP. But the  
2 insolvency provision makes very clear, that your inability  
3 to pay, your primary's inability to pay, is not going to  
4 require us to drop down and pay anything in interest.

5 Their - - -

6 JUDGE GARCIA: But it's not a drop-down issue. I  
7 - - - I mean - - -

8 JUDGE FAHEY: I agree with the Judge. I - - - I  
9 - - - I think that his reading of it is - - - is closer to  
10 - - - to what I seem to see here, is, I'm wondering - - -  
11 it's not a drop down, it's - - - I - - - I wouldn't  
12 characterize it that way. It's - - - it's a  
13 straightforward interest provision that has strong public  
14 policy purpose to it.

15 The public policy purpose is is that the primary  
16 pays up, so the excess can know what they have to pay and  
17 what it owes. But if the primary can't, then the excess is  
18 in - - - is, in essence, stuck, not with what the primary  
19 owed on the principal, but it's still stuck with those  
20 interest provisions, because of the follow-the-form section  
21 of the policy.

22 It - - - it - - - it doesn't escape them because  
23 of that, otherwise it would have an infinity to pay. So -  
24 - -

25 MS. AHLSTRAND: Well, Your Honor - - -



1 JUDGE FAHEY: - - - so as a public policy matter,  
2 that makes sense, particularly with the language - - - the  
3 language, it seems to have been designed that way.

4 MS. AHLSTRAND: Well, two points in that - - - in  
5 that regard. For one, our - - - our coverage grant says  
6 that we sit on top of the Arch policy. And there are two  
7 coverages the Arch policy provides. It provides a million-  
8 dollar limit for bodily interest, and outside of those  
9 limits, it provides interest. So we sit on top of both of  
10 those. We can't be forced to drop down into either.

11 The other point is that the public policy is  
12 really tied to the fact that the primary is going to be the  
13 entity that controls the defense, and they are going to be  
14 in control of the situation. And that control shifted back  
15 to our insurer when that policy got - - - was voided. We  
16 didn't even get notice of the fact that Arch had withdrawn  
17 its defense until after judgment had entered. That control  
18 never shifted over to ICSOP. So the - - -

19 JUDGE FAHEY: Well, what they were - - -

20 MS. AHLSTRAND: - - - the public policy piece  
21 really does not translate.

22 JUDGE FAHEY: Let me just stop you. I - - - I'm  
23 not sure I understand, because I thought that there was a -  
24 - - they - - - I thought the - - - the de - - - the primary  
25 carrier was out because of material misrepresentation by





1 the underlying insurer.

2 MS. AHLSTRAND: Yes. And they brought a DJ that  
3 was affirmed on appeal, and then - - -

4 JUDGE FAHEY: Right. And you - - - and you - - -

5 MS. AHLSTRAND: - - - they went through their  
6 counsel - - -

7 JUDGE FAHEY: So you were familiar with all this.  
8 You knew all this was going on. There was no surprise to  
9 anybody.

10 MS. AHLSTRAND: ICSOP was aware from a separate  
11 litigation that Arch had filed a DJ. Neither Arch nor our  
12 insured ever told ICSOP that they had succeeded in that DJ,  
13 or that they were withdrawing the defense. They - - -

14 JUDGE RIVERA: Can - - -

15 MS. AHLSTRAND: - - - they were never put on  
16 notice of that.

17 JUDGE FAHEY: I see.

18 JUDGE RIVERA: Can I just - - - I'm over here.  
19 Can I just clarify, because I think may be - - - may not  
20 understand what you claim you're liable for. I thought you  
21 were arguing that the point in time when there is a  
22 judgment, right, that that's when your interest clock  
23 starts ticking for everything that's above the underlying  
24 insurer, the primary insurance policy. Am I  
25 misunderstanding you?



1 MS. AHLSTRAND: Our argument is that our  
2 liability is exactly the same as it would have been had the  
3 Arch policy been intact, because that is consistent with  
4 the language of the maintenance provision. And that is, we  
5 would be liable for the 1.33 million, pre-judgment interest  
6 on that amount, which is one hundred percent consistent  
7 with the first clause of the supplementary provisions, and  
8 no pre-judgment interest because the - - - the million  
9 dollars was never paid. Arch obviously wasn't going to pay  
10 it because their policy was voided.

11 But what normally happens in this circumstance is  
12 the insured steps in and they pay the money. And Kam  
13 Cheung's inability to do that in this circumstance does not  
14 change the result. That's what the - - - the insolvency  
15 provision - - -

16 JUDGE WILSON: So let me - - - let me - - -

17 JUDGE RIVERA: But - - - but - - -

18 MS. AHLSTRAND: - - - clearly directs.

19 JUDGE RIVERA: But my - - - my - - - what I'm  
20 trying to figure out is the calculation of this interest.  
21 Does that not begin in terms of your liability at the point  
22 of the judgment?

23 MS. AHLSTRAND: In this case?

24 JUDGE RIVERA: Sure. This is the case in front  
25 of us; I'll go with that.



1 MS. AHLSTRAND: Right.

2 JUDGE RIVERA: This is the policy we're trying to  
3 figure.

4 MS. AHLSTRAND: So the way that - - - to move  
5 things forward - - - because this case basically stagnated  
6 after the May 2nd order on the summary judgment. Plaintiff  
7 submitted his proposed judgment, and our view of it was  
8 that it was an order that said we didn't have to drop down,  
9 and therefore not responsible for anything within the  
10 primary area. He filed his proposed judgment, which was  
11 totally inconsistent with our reading of the order. We  
12 filed a motion to resettle, we filed another motion; we're  
13 here today.

14 MS. AHLSTRAND: We, in connection with our  
15 section motion, also submitted a proposed judgment, and  
16 that judgment is what the court signed. And it provided  
17 that we would pay the 1.33 million, pre-judgment interest  
18 on that as calculated within the underlying case, and then  
19 post-judgment interest from the time that summary judgment  
20 entered in this case, and our liability for anything  
21 attached. Because there's a difference between what our  
22 insured is liable for, and what ICSOP covers, right.

23 This is - - - this is an action to collect on the  
24 policy, because our insured didn't satisfy the judgment.  
25 But in order to get col - - - a collection from ICSOP,



1 plaintiff has to establish that it's covered under the  
2 policy, not just that from a global sense they're entitled  
3 to that money from Kam Cheung, our insured.

4 JUDGE WILSON: Let me just follow up on - - -  
5 over here - - - over - - - on Judge Garcia's question in a  
6 little bit different way. He read you from the Arch  
7 policy, 1, subparagraph g. But the preface there, it - - -  
8 right in - - - in paragraph 1, setting out Arch - - -  
9 Arch's obligations, says that it will pay, and that would  
10 then pick up the post-judgment interest in any suit against  
11 an insured, which we defend. But they didn't actually  
12 defend this suit. So why do they have an obligation, and  
13 why doesn't that obligation entirely fall on you?

14 MS. AHLSTRAND: Well, Your Honor, that language  
15 has been inter - - - that wasn't really a focus in this  
16 case. Everybody assumed that Arch had this obligation, and  
17 it's never been disputed. And that's because in other  
18 cases that have looked at similar issues, or have looked at  
19 that issue, it's presumed that that means that they would -  
20 - - they would have an obligation to defend, that a defense  
21 would otherwise be required.

22 So that they - - - that the policy language  
23 doesn't change, for example, if the - - - the policy is  
24 voided, or if they're insolvent. It's just more globally,  
25 would a defense - - - a defense be required under that



1 policy. Because if not, then if - - - you know, if a  
2 primary carrier wanted to avoid its interest obligations by  
3 wrongly defending, I mean, you would have a situation  
4 where, oh, you didn't provide a defense, now perhaps you  
5 don't have to pay the interest.

6 And so the - - - that piece of the provision has  
7 not been interpreted to actually require the defense, but  
8 rather whether a defense would be owed under the policy  
9 language.

10 JUDGE WILSON: If I understood your earlier  
11 answer, if - - - if you had stepped in and assumed the  
12 defense, you would then not dispute that you would be  
13 liable for the post-judgment interest. If I misunderstood,  
14 let me know.

15 MS. AHLSTRAND: Well, we - - - our - - - this is  
16 an indemnity policy, so we didn't have - - -

17 JUDGE WILSON: Yeah.

18 MS. AHLSTRAND: - - - a duty to defend. So had  
19 we - - -

20 JUDGE WILSON: I understand. But you were making  
21 a big point of the fact that you had no notice, and you  
22 didn't actually have - - - have the opportunity to control  
23 the litigation in response to Judge Fahey's question about  
24 public policy. And so I'm wondering what you thought the  
25 import of your answer was.



1 MS. AHLSTRAND: Well, that was just circling back  
 2 to the gen - - - the general, sort of, espoused public  
 3 policy that's been articulated about the supplementary  
 4 payments in general, because that provision has been  
 5 interpreted a lot, because it - - - it does put a big onus  
 6 on the primary insurer, so that it's been interpreted a lot  
 7 to confirm that yes, the primary carrier owes all the  
 8 interest on all - - - the whole judgment, not just its  
 9 proportionate share.

10 But in terms of whether we would owe it at that  
 11 point, I - - - I guess it would dep - - - it would depend  
 12 on the circumstances, because there's just a lot of  
 13 variables there in the sense that if the plaintiff was  
 14 defaulted and that's why the judgment entered in the way  
 15 that they did, because they didn't have counsel, they  
 16 didn't appear so if we had appeared, who - - - who knows  
 17 where the case would have even gone. So I'm not sure I can  
 18 - - -

19 JUDGE STEIN: So - - - so your position is is  
 20 that you are responsible for post-judgment interest after a  
 21 judgment was entered against you?

22 MS. AHLSTRAND: Yes. Or if Kam Cheung had  
 23 stepped in and paid the million dollars, then absolutely,  
 24 because the policy language clearly would have caught - - -  
 25 cut off the primary layer's obligations.



1           Our overarching mantra in this case has been, we  
2           are only liable to the same extent that we would have been  
3           had the primary policy stayed in place. And that's the  
4           purpose of the maintenance provision, and the insolvency  
5           provision.

6           I can see my time is up.

7           CHIEF JUDGE DIFIORE: Thank you, Counsel.

8           MS. AHLSTRAND: Thank you.

9           CHIEF JUDGE DIFIORE: Mr. Gorman?

10          MR. GORMAN: Just with regard to the maintenance  
11          provision, ICSOP's maintenance provision required the  
12          insured to maintain a primary policy with a limit of one  
13          million dollars in coverage. There is nothing on the face  
14          of ICSOP's excess policy that states that the insured was  
15          required to maintain the primary limits plus the coverage  
16          contain - - -

17          JUDGE STEIN: Well, but what about the ultimate -  
18          - - the definition of ultimate - - - ultimate net loss and  
19          the general coverage position - - - provision which  
20          incorporates ultimate net loss, which refers not to the  
21          limits of the underlying insurance, but to the underlying  
22          insurance, which, when I look at the - - - the schedule of  
23          that in the excess policy, there are two columns. One is,  
24          this is the underlying insurance, and this is the limits of  
25          the underlying insurance.



1                   So they use those terms not interchangeably, it  
2                   seems to me. They're two different things. So why - - -  
3                   why - - -

4                   MR. GORMAN: The ultimate net loss provision in  
5                   the excess policy - - - I'm sorry. ICSOP's policy stated  
6                   that it was responsible for the ultimate net loss in excess  
7                   of the Arch policy limits.

8                   JUDGE STEIN: No, that - - - that's not how I  
9                   read it. It says, ultimate net loss is "accepting however,  
10                  the ultimate" - - - I'm sorry - - - "the underlying  
11                  insurance." Whereas if you look at the maintenance  
12                  provision, it refers to the limits of insurance.

13                  MR. GORMAN: The limits - - -

14                  JUDGE STEIN: To me, those are two different  
15                  things. The limits is the one million. The underlying  
16                  insurance is the one million plus the supplemental, or  
17                  whatever else is in the policy that we're not talking about  
18                  right now.

19                  MR. GORMAN: Well, if - - - I mean, I'd like to  
20                  refer you to the Second Circuit's decision in Home  
21                  Insurance Company v. American Home Products Corporation,  
22                  which we cited in our brief. And in that case, the excess  
23                  insurer, who followed form to the primary policy, was not  
24                  responsible for paying post-judgment interest on the award  
25                  because the excess policy explicitly excluded interest





1 accruing after entry of the judgment from the ultimate net  
2 loss. If ICSOP did not want it - - -

3 JUDGE STEIN: Okay, but that doesn't mean that  
4 that's the only way to exclude it. Here, they excluded it  
5 by their definition of ultimate net loss, which was  
6 referring to the entire policy, which includes the  
7 supplementary coverage.

8 MR. GORMAN: The ult - - - I did not see the  
9 ultimate - - - I - - - I did not interpret the ultimate net  
10 loss to encompass - - -

11 JUDGE STEIN: Well, that's - - - that - - -  
12 that's clear from your briefing, that you - - - you - - -  
13 to see - - - I guess that's what I'm - - - I'm asking you.  
14 Aren't you conflating two different terms? One term is the  
15 limits of the underlying policy, and the other is the  
16 underlying policy more generally.

17 MR. GORMAN: Well, this is a follow-the-form  
18 policy.

19 JUDGE STEIN: I understand that.

20 MR. GORMAN: And, I mean, you know, I - - - I  
21 just - - - I mean, I just want to refer you to Ragins,  
22 which we did not discuss. But in Ragins, the excess policy  
23 stated that HIC will pay all sums which are in excess of  
24 the primary policy limit, that the insured shall become  
25 legally obligated to pay as damages, in this case.



1 JUDGE STEIN: Well, that's exactly the language  
2 that I'm suggesting may be missing here. It doesn't refer  
3 to the limits in this particular policy. It refers to the  
4 - - -

5 MR. GORMAN: Right. At page 3 - - - I'd - - -  
6 I'd like - - -

7 JUDGE STEIN: - - - underlying insurance.

8 MR. GORMAN: I want to refer to you page 398 of  
9 the record in this case. It has the same language. ICSOP  
10 followed form to the Arch policy, and that policy states -  
11 - - has the same language as the language in Ra - - -  
12 Ragins, that it will pay those sums that the insured  
13 becomes legally obligated to pay as damages; there's no  
14 distinction. And like the policy in Ragins, ICSOP's excess  
15 policy did not mention interest as a covered sum of  
16 damages, and ICSOP's policy did not limit the definition of  
17 sums to any particular category of damages or exclude  
18 interest.

19 JUDGE GARCIA: Counsel?

20 I'm sorry. Chief, may I?

21 CHIEF JUDGE DIFIIORE: Yes.

22 JUDGE GARCIA: Counsel, what post-judgment  
23 interest has the defendant agreed to pay, and what are they  
24 contesting, post-judgment interest?

25 MR. GORMAN: The post-judgment interest that they



1 paid was after - - - they paid post-judgment interest on a  
2 portion of the judgment.

3 JUDGE GARCIA: Which portion?

4 MR. GORMAN: The 1 - - - they paid a post-  
5 judgment interest on, I believe, 1.5 million. They're  
6 responsible - - - it was our position that they were  
7 responsible for paying post-judgment interest on the entire  
8 judgment.

9 JUDGE GARCIA: But I thought they only paid a - -  
10 - a certain - - - let's say, it's the 1.33, but let's say  
11 they only - - - I thought they only paid a portion of time,  
12 post-judgment interest, even on the, let's call it, the  
13 excess award?

14 MR. GORMAN: They did. They paid - - -

15 JUDGE GARCIA: And what was that period that they  
16 paid, and what didn't they pay?

17 MR. GORMAN: They paid from May 2016 to June  
18 2017, on I believe approximately 1.5 million, which brings  
19 it up to about a little - - - about 1.7 million all  
20 together.

21 JUDGE GARCIA: And what does that period  
22 represent?

23 MR. GORMAN: I'm not sure. I - - - I don't know.  
24 I don't have an answer to - - - I don't have an answer to  
25 that question. I was never able to figure it out. I don't



1 know why they paid it.

2 CHIEF JUDGE DIFIORE: Thank you, Counsel.

3 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Jin Ming Chen v. Insurance Company of the State of Pennsylvania, No. 77 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

Agency Name: eScribers

Address of Agency: 352 Seventh Avenue  
Suite 604  
New York, NY 10001

Date: October 19, 2020

