ATLANTIC CONCRETE CUTTING, INC. and EVANSTON INSURANCE COMPANY, Plaintiffs,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003393-22T4
vs.	:	
ZURICH AMERICAN INSURANCE COMPANY, AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY, Defendants/Respondents,	:	On Appeal From: Superior Court of New Jersey Law Division Burlington County Docket No.: BUR-L-742-19
ALLIANT INSURANCE SERVICES, INC., Defendant,	:	Sat Below: Hon. James J. Ferrelli, J.S.C.
and TRAVELERS INDEMNITY COMPANY OF AMERICA, Defendant/Appellant.	:	

BRIEF OF DEFENDANT/APPELLANT THE TRAVELERS INDEMNITY COMPANY OF AMERICA

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[1,2] The references to these documents confirms that the cited arguments, which are germane to this appeal, were raised below even though the Law Division failed to address them. *R.*2:6-1(a)(2).

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[3-5] Pursuant to *R.*2:6-1(a)(2), these briefs are submitted to establish that the arguments set forth in the point headings were "raised in the trial court" in light of the fact that the rulings below did not address those arguments, and are part of appellant's substantive argument. (*See,* Brief at 29, 43, 48.)

Statement of Items Submitted on Summary Judgment Motions
Pursuant to *R.*2:6-1(a)(1)

Travelers' Summary Judgment Motion

PRELIMINARY STATEMENT

This appeal involves the improper cancellation of insurance coverage that defendant/respondent Zurich American Insurance Company issued to the plaintiff, Atlantic Concrete Cutting, Inc. ("ACC") without giving ACC notice of that coverage termination. Zurich admits that it both covered ACC as a "named insured" under a commercial general liability ("CGL") policy that it wrote; it also admits that it never provided notice to ACC that it cancelled that coverage. As a result, ACC was left uncovered under the Zurich CGL policy, as well as an excess policy issued by a Zurich affiliate, defendant/respondent American Guarantee Liability Insurance Company ("AGLIC"), for an underlying lawsuit asserted by a worker who suffered a significant injury on a construction site on which ACC performed work.

The only reason that ACC had any coverage for its alleged liability for that suit is the fortuity that defendant/appellant The Travelers Indemnity Company of America, ACC's insurer for liabilities occurring off the construction site, did not seek to enforce an exclusion in its policy that was triggered by ACC's initial enrollment in the Contractor Controlled Insurance Program (CCIP) that the Zurich and AGLIC policies covered. Travelers, which defended the suit and paid its full policy limit to settle the underlying suit on ACC's behalf in Zurich's stead, is subrogated to ACC's rights against Zurich.

On appeal, Travelers seeks to vindicate over sixty years of authority in New Jersey, which holds that an insurance company that purports to terminate or limit coverage without giving the insured notice of the change in its coverage status remains bound to the policy. This obligation and its remedy for non-compliance are imposed pursuant to common law, public policy, and regulation. In granting summary judgment in favor of Zurich, the court below ignored these venerable legal precepts.

The Law Division erred by endorsing Zurich's delegation of the independent, non-delegable notice obligations it owed to ACC to Tutor-Perini Building Corp., the construction company that purchased the Zurich policies. The court compounded this error by adopting Zurich's one-sided and cumulative recitation of facts that purportedly supported ACC's supposed comprehension of its termination from coverage. However, even if Zurich could legally delegate its notice obligations, the convoluted series of emails and conversations used to support the holding that ACC was aware of cancellation from the CCIP hardly met the settled "specific and clear" standard for conveying notice of coverage termination to an insured.

The communications relied upon by the Law Division were also conclusively rebutted by subsequently generated documentation issued to ACC advising it of its continued status as an insured under the Zurich CCIP policies,

and by the unrefuted testimony of ACC's Chief Operating Officer that the documentation led it to believe that it remained insured under the Zurich policy when the underlying accident occurred.

This is hardly the stuff of which summary judgments are made – especially ones that result in the denial of insurance coverage for a catastrophic liability. The fortuity that ACC had other coverage available to it from Travelers and plaintiff, Evanston Insurance Company, is not a mitigating factor. ACC just as easily might not have had other coverage, potentially leading to financially devastating consequences – not only for it, but for the injured party.

Ultimately, the error below is one of perspective. The court improperly focused on the non-party sponsoring contractor's purported ability to decide which subcontractors could participate in the CCIP. Such a contractual analysis might have been appropriate **before** ACC became a "named insured" on the Zurich policy. However, once ACC assumed insured status, the analytical focus shifted to Zurich's obligations as ACC's insurer, such as giving it notice of cancellation as required by law and the policy. Zurich's admissions that it covered ACC and that it did not give ACC notice that it was cancelling its coverage established Travelers' right to summary judgment, requiring reversal of the orders under review.

PROCEDURAL HISTORY

The co-plaintiffs, ACC and its excess liability insurer, Evanston Insurance Company, jointly filed a complaint against Zurich, AGLIC, Travelers and Alliant Insurance Services, Inc. on April 8, 2019.[1] The complaint sought a declaratory judgment regarding ACC's right to insurance coverage from Zurich for the underlying lawsuit, filed by an injured worker on a construction project. Plaintiffs also alleged claims of breach of contract and promissory estoppel against Zurich, and asserted professional liability, promissory estoppel and negligent misrepresentation claims against Alliant. (Dta1, *et seq.* at ¶¶3,4,30,36,37,42,43.) The complaint characterized Travelers as a "nominal Defendant" and alleged that it had "a similar interest in obtaining declaratory relief against Zurich." (Defendant Travelers' appendix ("Dta") 13,18, ¶¶85,114.)

On June 21, 2019, Travelers filed its responsive pleading, which included a counterclaim, along with a crossclaim with allegations reflecting its alignment of interests with plaintiffs. (Dta685.) Travelers' counterclaim sought a declaration that if, as alleged, ACC was enrolled, or allowed to enroll, in a CCIP for its work at the site, then an exclusion in the Travelers policy for

[1] Zurich and AGLIC are corporate affiliates and are generally collectively referred to as "Zurich" unless context otherwise requires. Travelers' correct name is "The Travelers Indemnity Company of America."

injury arising out of a project subject to such an insurance program precluded coverage for ACC in the then-still-pending underlying action. (Dta19.) The crossclaim alleged that Zurich wrongfully disclaimed coverage to ACC for the underlying action. Travelers sought a declaration that Zurich should defend and indemnify ACC, as well as for reimbursement of its fees, costs and interest. (Dta22.) (Travelers subsequently voluntarily dismissed a separate crossclaim it asserted against Alliant. (Dta1143.))

On June 17, 2019, Zurich and AGLIC filed a common answer, admitting that they issued the policies alleged in the complaint, adopting their "terms, conditions, provisions, exclusions and endorsements." (Dta711, ¶¶3,4,27,109.) They also asserted a counterclaim against ACC, seeking the alternative relief of policy rescission based on asserted material misrepresentation. (Dta729.) (On January 12, 2022, on leave granted, Zurich filed an amended answer. (Dta733.))

ACC responded to Zurich's and Travelers' counterclaims on July 22, 2019. (Dta756,760.) Evanston responded to Travelers' counterclaim on July 26, 2019. (Dta764.) Zurich answered Travelers' crossclaim on August 7, 2019. (Dta768.) Alliant filed its responsive pleading on October 4, 2019. (Dta776.)

Following extensive discovery, pursuant to case management order (Dta794), all parties simultaneously submitted motions for summary judgment on February 10, 2023, and oppositions to summary judgment motions on March 10, 2023 (except for Alliant, which filed its opposition to plaintiffs' motion on March 9, 2023). (*See*, Dta796,823,1205,1216.) The parties filed their respective reply briefs on March 24, 2023, following an unsuccessful mediation conducted before the Honorable John E. Keefe, Jr., P.J.A.D. (ret.). (*See*, Dta1259.)

On May 26, 2023, after hearing argument from the parties, the motion judge adopted the conclusions and opinions set forth in his preliminary oral ruling (1T), and entered orders of even date granting Zurich summary judgment and denying Travelers' and plaintiffs' motions. (Dta1370.) (On June 1, 2023, the court granted Alliant summary judgment, rendering the matter final for appellate disposition.)

Plaintiffs filed a joint notice of appeal on July 7, 2023, which was assigned docket number A-3358-22T2. (Dta1370.) Travelers filed its appeal on July 11, 2023. (Dta1376.) The motion judge filed a Supplemental Statement of Reasons ("SSR") on July 25, 2023. (Dta1331.) Following a pre-argument conference conducted pursuant to the Civil Appeals Settlement Program, Travelers' motion to consolidate this appeal with plaintiffs' appeal

was denied by order dated October 30, 2023, but the appeals were ordered to be calendared back-to-back and assigned to the same merits panel.

STATEMENT OF FACTS

A. Background

The gist of this deceptively simple insurance coverage litigation is clouded by Zurich's herculean efforts at obfuscation, which resulted in a loss of sight of the proverbial forest for the trees. To avoid a similar entanglement in the density of the facts, virtually all of which are immaterial to the proper disposition of the matter, the following is a concise summary of the case.

Non-party Tutor-Perini served as the general contractor for the construction of the W/Element Hotel in Philadelphia. Tutor sponsored the CCIP, which Zurich and AGLIC insured through CGL, excess liability and workers compensation policies. Tutor contractually required subcontractors of every tier to enroll in the CCIP. Once those subcontractors were enrolled in the CCIP, they became "Named Insured[s]" under the CGL and excess policies and were issued separate workers compensation policies by Zurich. (Dta430,814, 500,590,981.)

Tutor retained C. Abbonizio Construction Company to perform site work on the project, which, in turn, subcontracted with ACC to perform concrete cutting work. ACC's initial work encompassed the removal of a wall on the

property's boundary with the Ritz-Carlton Hotel in August of 2015 ("the Ritz wall work"), but Abbonizio recalled ACC to perform other work throughout the course of the project. (Dta1285-1296.)

After Abbonizio enrolled ACC in the CCIP, ACC was issued a Certificate of Insurance confirming its Named Insured status under the Zurich CGL and excess policies as well as a separate Zurich workers compensation policy, effective August 3, 2015. (Dta951.) Shortly after its enrollment, a Tutor employee determined that ACC's initial Ritz wall work should be excluded from the CCIP because it involved demolition work, even though the Zurich policies and the manual promulgated to govern the CCIP did not exclude demolition. (Dta498,590.) This led to a series of emails, the last of which is dated September 23, 2015, purporting to establish that ACC's work, at least insofar as the incipient Ritz wall work was concerned, was excluded from the CCIP. (Dta1331.)

Zurich admitted that it did not send any notice to ACC of any termination of its coverage, or otherwise communicate with it. Zurich's representatives confirmed that they could not locate any notice of cancellation of the CGL or excess policies, or similar documents. Zurich did, however, prepare a notice of cancellation of ACC's separate workers compensation

policy, which it sent to the Pennsylvania Workers Compensation Bureau, but not to ACC. (Dta 850,1043,1212,1407.)

On September 25, 2015, ACC received notice from Abbonizio, the upper-tier subcontractor charged with ensuring ACC's enrollment in the CCIP, advising ACC that it was "CCIP-Approved." (Dta1285.) Three months later, on December 15, 2015, the underlying accident occurred while ACC was performing additional work for Abbonizio. ACC's representative testified that ACC presumed it was covered under the CCIP policies for the underlying action filed against it by the injured worker based on Abbonizio's letter advising it that it was enrolled in the CCIP following the initial Ritz wall work. (Dta1290.)

Upon discovering the fact that Zurich covered ACC under the CCIP, ACC, through its Travelers-retained defense counsel, tendered the matter to Zurich, which belatedly denied the coverage request, leading to this lawsuit. (Dta860.) The Law Division did not consider the import of the post-September 23 communications and ACC's concomitant understanding of coverage in rendering its determination.

B. The Accident

The claimant in the underlying action, Adam Hood, an employee of Moretrench American Corp., a subcontractor on the project - the construction

of the W/Element Hotel - sustained injuries on December 11, 2015 when an employee of Abbonizio, who was operating a track hoe while installing a beam, inadvertently activated a lever as he moved to shake the hand of ACC's CEO, who was visiting the site, dropping the beam on Hood. (SSR 3-4.)

Tutor, the general contractor on the project, entered into subcontracts with various trades for the performance of work, retaining Abbonizio to perform site work. (SSR 3,Dta1333.) Abbonizio, in turn, subcontracted with ACC to perform various tasks that required concrete cutting work at different times throughout the course of the project. (Dta430.) Abbonizio initially assigned ACC to work on the project pursuant to agreement dated July 23, 2015. Abbonizio also occasionally assigned other work on the project to ACC via purchase orders, which included the work ACC was performing when the incident occurred. (Dta814-816.)

Hood's suit against Tutor, Abbonizio and ACC settled for a confidential sum. Zurich and AGLIC contributed to the settlement on behalf of Tutor and Abbonizio pursuant to the CCIP policies. After Zurich disclaimed coverage to ACC for the suit, Travelers, which insured ACC's off-project risks and other liabilities, and Evanston, which provided ACC's excess coverage above the Travelers policy, paid ACC's portion of the settlement. (SSR 4.)

C. The CCIP[2]

1. The Zurich And AGLIC Policies

The Zurich general liability policy covering the CCIP was effective from December 13, 2013 to December 13, 2018. The declaration listed Tutor as a "named insured." An endorsement entitled "Named Insured Contractor Controlled Insurance Program" expanded the class of "Named Insured[s]" under the policy to include "a contractor of any tier" that "performs operations at a 'designated project'." The policy also identified the limited class of contractors that were "not an Insured under this policy" to include "Vendors, suppliers, material dealers, abatement contractors, blasting contractors, delivery persons, haulers, hazardous waste removal contractors," as well as product or component manufacturers "that do[ ] not also install the product or component at the 'designated project,'" and similar parties lacking "dedicated payroll for employees on-site." (Dta146.)(*N.b.,* the provision does not purport to exclude demolition subcontractors.)

The Zurich policy's "Commercial General Liability Form," number CG00011207, was copyrighted by "ISO Properties, Inc." and is a standard

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[2] CCIP and Owner Controlled Insurance Programs ("OCIPS") are a form of insurance coverage colloquially known as "wrap-up" policies in which general contractors and project owners purchase insurance that covers the "owners, administrators, contractors and all tiers of subcontractors" for specific construction projects. *Cf. N.J.S.A.* 18A:7G-44(c); SSR at 6, Dta1336.)

form commonly used in commercial general liability policies.[3] The policy form contained a "Separation of Insureds" clause that provided that the insurance applies "[a]s if each Named insured were the only Named Insured." (Dta116.)

As to cancellation, the policy contains variable language under multiple endorsements, which appear to be modified by endorsement U-GL-1298, which required notice of cancellation of "not less than ninety (90) days advance written notice stating the reason(s) for cancellation, as well as the date when the cancellation is to take effect" (except for non-payment, in which case "not less than" ten days notice would be given). (Dta140.)

The Zurich policy also contained an endorsement, denominated "Sole Agent For The Insured," which states:

> THE INSUREDS HAVE ASSIGNED TO THE FIRST NAMED INSURED:
> ***

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[3] *See, Hartford Fire Ins. Co. v. California*, 509 *U.S.* 764, 772, 113 *S.Ct.* 2891, 125 *L.Ed.*2d 612 (1993) (noting "most CGL insurance written in the United States" "is written on" forms prepared by the Insurance Services Office (ISO); *Stanwick, Craig* ("A High Level View of the CGL Policy," https://www.irmi.com/articles/expert-commentary/a-high-level-view-of-the-cgl-policy (accessed October 19, 2023).

> 2. THE RIGHT TO REQUEST CANCELLATION OF THE POLICY; AND
> 3. AUTHORIZATION TO ACT ON THEIR BEHALF AS RESPECTS CHANGES TO ANY PROVISIONS OF THIS INSURANCE POLICY.
> [Dta173.]

(The AGLIC policy incorporated the "terms and conditions of the" Zurich policy. (Dta181.))

2. The CCIP Manual

Tutor promulgated an "Insurance Procedures Manual" for the CCIP, which was "to be used for informational purposes only." (Dta583.) It identified Tutor as the "Sponsor" and Alliant as the "Administrator." (Dta587,588.) The manual provided that subcontractors "shall not be permitted to work on the project until enrolled in the CCIP" and that enrollment was "established upon issuance...of a CCIP Certificate of Insurance to Participating Subcontractors." (Dta589, ¶4.1).)

The CCIP manual, by its terms, was subordinate to the Zurich policy, advising that the "actual terms and conditions provided by the CCIP are contained in the insurance policies procured by the Sponsor," Tutor. Zurich's designated deponent confirmed that "the policy language . . . controls." (Dta854,T99-18 to -21.)

Tutor, which reserved the right to "terminate or modify the CCIP *or any portion thereof*," also promised in the manual that "subcontractors will be

provided at least 30 days notice of cancellation" of enrollment in the CCIP, which is at odds with the 90 days offered by the Zurich policy's cancellation provision. (Dta590, ¶4.4.)

The manual defines the term "Enrolled" to mean contractors that "have been accepted into the CCIP as evidenced by a Certificate of Insurance." A "Certificate of Insurance" is, by definition, "evidence of coverage for a particular insurance policy or policies." (Dta587, ¶3.0.) "Insured" is defined to include "The Sponsor [Tutor], Participating Subcontractors, and any other party so named in the insurance policy or policies." The manual provides that "participating subcontractors will be issued a Workers' Compensation policy," and that they "will also provide a Certificate of Insurance evidencing General Liability, and Excess Liability Insurance to each Participating Subcontractor, **each of whom will be a named insured on the policy.**" (Dta590, ¶4.3.) Section 4.5 provides that participating subcontractors "will be issued a ***separate*** Workers' Compensation policy for their employees," and that general liability and excess "[m]aster policies will be endorsed to include "**the Subcontractors enrolled in the CCIP as a Named Insured.**" (Dta590 (emphasis supplied).)

3. The Underlying Construction Contracts

The "Scope of Work" in Abbonizio's contract with Tutor, executed on June 4, 2015, called for Abbonizio to "[c]omplete all Earthwork/SOE [Support of Excavation]/Underpinning Work," which is "more specifically described" to include, among other things, "Selective Demolition." (Dta442.)

"Attachment 3" of that agreement describes the CCIP. Paragraph 3 defined those "Excluded Parties" which were "not eligible to enroll in the CCIP, and who are excluded from the CCIP." (Dta498.) Nothing therein suggests that demolition subcontractors are ineligible for coverage under the CCIP. Paragraph 6, "Subcontractor's CCIP Obligations," required Abbonizio to "ensure that all of its lower tier Subcontractors who are Eligible Parties enroll in the CCIP prior to their commencement of construction . . . and maintain enrollment during the course of the Project." (Dta500, §6(a),(b).) **Significantly, paragraph 6(d) states that Tutor and Alliant "are not agents . . . of any CCIP insurer.**" (Dta500).

Parties enrolled in the CCIP were contractually required to maintain separate workers compensation and general liability coverage for their "off-site activities." (Dta501, ¶7.) Paragraph 10, "Modification or Discontinuance of the CCIP," afforded Tutor the ability to "modify or discontinue the CCIP, **or request that any Subcontractor of any tier withdraw from the CCIP Program on thirty 30 days written notice**," with the "cost of replacement

coverage" to be at Tutor's "expense . . . to the extent of the Cost of CCIP Coverage." (Dta500.) Paragraph 12, "Order of Precedence" confirmed that the Zurich policies' terms take "precedence" over both the CCIP Manual and all contract provisions. (Dta505.)

4. ACC Enrolled In The CCIP

Abbonizio complied with the Tutor contract requirements when it retained ACC. Alliant provided ACC with the mandated CCIP enrollment forms, dated July 28, 2015, which ACC completed and submitted. (Dta814,946.) This resulted in notification to ACC on July 30, 2015 that its "enrollment in the [CCIP] had been completed." (Dta949.) (ACC's compliance with the enrollment procedure and the issuance of a certificate of insurance to it are in contradistinction to a separate form letter advising subcontractors of CCIP ineligibility that Alliant would send to those subcontractors that were ineligible to enroll in the CCIP. No such letter was ever sent to ACC. (Dta875, McGowan dep. T35-10 to 36-15.))

5. The Certificate Of Insurance Confirming ACC's Zurich Coverage

Upon ACC's enrollment, Alliant issued a Certificate of Insurance to ACC at its address of "396 Pemberton Road, Mt. Holly, NJ," confirming ACC's status as a "Named Insured" under the Zurich policies. (Dta951.) The effective date of ACC's coverage on the Zurich policies set forth on ACC's

certificate is August 3, 2015. (Dta951.) The certificate also confirms ACC's separate workers compensation policy with Zurich. (Dta951.) (Zurich's designated corporate representative testified: "[If] you're enrolled in the Work Comp, you're enrolled in the GL [general liability] policy" scheme, and that once enrolled, a subcontractor "becomes an insured of Zurich." (Dta837,839,842, Kelly dep. T29-21 to 30-2; T36-10 to 37-8; T52-5 to -8).)

The certificate affirmatively states:

> *THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE [ACC] FOR THE POLICY PERIOD INDICATED*, **NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN**. THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. (Dta951(emphasis supplied).)

The certificate also provides that, if any of the policies are cancelled, "notice will be delivered in accordance with the policy provisions." Zurich's representative further confirmed that the issuance of an insurance certificate as "evidence of coverage" is "standard procedure throughout the industry for wrap-ups." (Dta839, 37-12 to -23.) In the proceedings below, Zurich admitted that ACC was initially "enrolled in the CCIP." (*See*, Dta1211,1212,1403.)

D. The Travelers Policy

Before its enrollment in the CCIP, ACC separately procured its own CGL policy from Travelers, effective on January 28, 2015. (Dta224.) That policy covered ACC for various liability risks unrelated to the project, as well as for ACC's off-site risks related to the project, as provided for in the contract documents and CCIP manual.

The Travelers policy included an endorsement, entitled "Exclusion – All Projects Subject To A Wrap-Up Insurance Program With Limited Exceptions For Certain Ongoing Operations." It provided that: "This insurance does not apply to . . . '[b]odily injury' . . . arising out of any project that is or was subject to a 'wrap-up insurance program'." The policy defined a "wrap-up insurance program" to mean a "contractor-controlled . . . insurance program . . . under which . . . **You [ACC] are or were enrolled or allowed to enroll."** (Dta283(emphasis supplied).) (The Evanston policy contained a similar exclusion.)

E. Zurich Improperly Denies ACC's Request For Coverage For The Underlying Action Based Upon Its Wrongful Termination Of Coverage

1. ACC's Tender To Zurich

Counsel retained by Travelers to defend ACC against the underlying action tendered the matter to Zurich on behalf of ACC on June 29, 2017 after discovering ACC's coverage under the Zurich and AGLIC policies. That tender included a copy of ACC's certificate of insurance and enrollment

confirmation. (Dta916.) Counsel reiterated its tender on August 17, 2017 after Zurich failed to respond. (Dta918.) Zurich belatedly rejected the tender a year later, on August 7, 2018. (Dta921.)

2. Zurich's Internal Review Of The Tender Fails To Reveal Any Documents Establishing That It Cancelled ACC's Liability Coverage

In investigating ACC's tender, Zurich personnel internally recognized that ACC was insured on the CCIP policy as Zurich maintained "enrollment documents for ACC effective 8/1/15," which established that Zurich "issued a policy" to ACC. (Dta1320.) Therefore, Zurich recognized that, in order for it to deny coverage to ACC for the underlying action, it "would need to have received a request to cancel flat to unenroll [cancel] them [ACC]."[4] (Dta851.) Zurich also contemporaneously internally conceded: "We don't have a copy of any request." (Dta1320.)

From Zurich's perspective, the terms "cancellation" and "unenrollment," mean the same thing. Zurich's designated deponent, its "national head of wrap-up" policies, testified that Zurich equates "unenrollment" with "cancellation": "You're either enrolled in the wrap or you're not enrolled. **In this case you were enrolled and then we had to unenroll you. We can say**

[4] The "flat" cancellation is pretext to cover for the fact that there is no notice of cancellation that complies with the notice required by the policy.

issue the policy and cancel the policy." (Dta842, T19-25 to 10-3; T52-17 to -25.)

Following ACC's tender, Zurich employee Randi Vogt, an employee in Zurich's "Wrap Up Department" was tasked by Zurich's underwriting department – "because of the complexity" of the program – with looking into ACC's coverage status in the CCIP. (Dta1310, T8-16 to 9-20; T15-13 to -19.) Vogt located a cancellation endorsement only for ACC's separate workers compensation policy, but not for ACC's coverage under the liability policies:

> **Q. Did you see any documents that related to a cancellation of coverage under the GL policy?**
>
> **A. No, I did not.** [Dta1309, T11-13 to 11-14.]

3. Zurich Admits That It Did Not Communicate Any Notice Of Termination Of ACC's Coverage to ACC

Subsequent admissions confirm Zurich's inability to uncover documentation evidencing cancellation of ACC's CGL and excess coverage. Zurich did not mail or otherwise send any notice of cancellation of the liability policies in conformance with its own policy language. Zurich's corporate designee also conceded at depositions that there would be no "circumstance where Zurich would have direct contact with a subcontractor like Atlantic Concrete regarding coverage under the CCIP." (Dta985, T68-14.) The representative also testified that Zurich does not "correspond with" insureds

such as ACC under the CCIP even though it could do so. (Dta850, T82-14 to 83-27.) In Zurich's opposition to Travelers' motion below, it admitted, in response to a statement of material facts that "Zurich did not 'mail or otherwise send any notice of cancellation' directly to Atlantic." (Dta1212-13.)

4. Zurich Saw Fit to Issue A Notice Of Cancellation Of ACC's Separate Workers Compensation Policy And Send It To A Governmental Agency, But Not To ACC.

Separate from the liability coverage, Zurich "prepared a Cancellation Endorsement on August 24, 2015, cancelling coverage for [ACC] under the CCIP's Worker's Compensation" policy. (Dta1407, ¶97.) Despite the conflation below of the cancellation of the workers compensation policy with the CGL coverage, the testimony confirms that they were different policies, and that Zurich did not send ACC notice of the compensation policy termination, either. The facts establish that Zurich saw fit to formally cancel *the workers' compensation policy only,* and only provided notice of that cancellation to the Pennsylvania Worker's Compensation Bureau.

Alliant sent an email to the Zurich wrap up team requesting it to "cancel effective 08/01/2015," referring to ACC's CCIP workers' compensation policy number "WC 0181121-00" only, and not the CGL and excess policies. (Dta1043.) (The stated cancellation date was prior to the effective date listed on the Certificate of Insurance.)

The Zurich representative testified that Zurich never sent a cancellation notice to ACC:

> Q. Okay. And the cancellation endorsement itself has a mailing address in the center, correct, where I'm reading it says, "396 North Pemberton Road."
> A. Yes.
> Q. And it's my understanding that Zurich did not mail anything to that address. Is that fair?
> A. I don't – I don't believe so. [Dta860, Kelly dep. T115-23 to 116-7.]

Zurich's testimony confirmed that cancellation of ACC's CCIP workers' compensation policy would not affect its coverage under the general liability policies, and that the liability policy had no language linking its coverage to the workers' compensation policy. (Dta854,855, T99-18 to 101-12.)

5. ACC Confirmed That It Did Not Receive Any Cancellation Or Termination Notice From Zurich Or Anyone Else Regarding Either the Liability Or Compensation Policies.

Zurich's concessions that it did not notify ACC of any cancellation of its CCIP coverage is consistent with ACC's documentation.

On September 10, 2018, after Zurich finally disclaimed coverage, ACC's insurance broker sent the following email to Michelle Morris at ACC regarding the Zurich workers compensation policy:

> **Although the Pennsylvania Bureau advised that the wrap-up policy was cancelled for coverage on the wrap-up, this contradicts the enrollment papers you provided us.** [Dta1323.]

Ms. Morris responded:

> **[A]re you clear that there was a small portion of work in the beginning that was not covered and then they issued the insurance policy and CCIP policy for the remaining work WHICH was for the period that the accident happened?** [Dta1322 (emphasis supplied).]

On October 18, 2018, ACC's insurance broker advised Ms. Morris for the first time that Zurich cancelled ACC's workers compensation policy:

> I called PA WC Bureau. The woman I spoke to confirmed that:
>
> 1.) A Workers Compensation policy (#WC0181121-00-through Zurich) per attached Certificate of Insurance issued to you [ACC] by Alliant for the W Hotel CCIP, was, in fact, issued and reported to them on 8/1/2015, **showing ACC as Named Insured**. (she could not provide copy of that policy to me).
> 2.) A copy of that actual policy #WC0181121-00 was received by the bureau on 8/10/2015
> 3.) Electronic notice was sent to the Bureau by Zurich that policy #WC0181121-00 **was cancelled flat (8/1/15)** – reason: Coverage placed elsewhere. The bureau was notified of this cancellation on 8/17/15.
>
> **Is there any record of Notice of Cancellation to you Directly from Zurich: You are the First Named Insured on this policy, therefore, you should have received formal notice from the carrier or Alliant.**
> [Dta1325 (emphasis supplied).]

On the same date, an employee of ACC responded that it "never come across a letter or email that formally notified us of cancellation." (Dta1324)

This is also confirmed by Alliant and Tutor. Alliant's representative testified that there was no formal process at the time to inform erroneously enrolled subcontractors that they were not covered, and it was unclear to Alliant whether a notice of cancellation was sent to ACC. (Dta1072-1076, T132-4 to 136-16.) Tutor's representative testified that, although its subcontract language provided that Tutor may "request that any subcontractor of any tier withdraw from the CCIP upon 30 days written notice," she was unaware of any written notice issued to ACC informing it of withdrawal from the CCIP. (Dta1077-80, Lorencz dep. T62-22 to 63-23.)

F. ACC's Purported "Unenrollment" From The CCIP

Zurich's conceded failure to give notice of coverage termination to ACC, and its inability to internally confirm cancellation, relegated it to crafting from whole cloth a factual mosaic based on the underlying contract documents to bootstrap its cancellation argument, which the Law Division improperly credited.

1. The Documents and Testimony Establishing ACC's Continued CCIP Enrollment

The opinion below, which adopted Zurich's argument, begins and ends with a series of communications that took place with respect to the initial phase of the work in August of 2015, with the last communication occurring on September 23, 2015. (SSR 11-17, Dta1341-47.) Those communications, at

best, arguably supported an awareness by ACC that it was uncovered only for that limited initial phase of the Ritz wall work.

ACC's understanding that it remained covered by the CCIP for subsequent work is confirmed by a letter dated September 25, 2015 that Abbonizio sent to the attention of Michelle Morris, ACC's Chief Operating Officer who handled ACC's insurance, three months before the underlying accident:

> Please find enclosed all Contract Exhibits for the above referenced Project.
>
> **Atlantic Concrete Cutting, Inc. is CCIP Approved**. [sic] For the above-referenced Project. [The "W/Element Hotel" is identified in the letter's reference.] [Dta1285 (emphasis supplied).]

At depositions, Morris confirmed ACC's understanding that the Ritz wall work that ACC performed "in August" was the only excluded work:

> Q. **[W]hat's -- what's the Ritz Hotel work that you're talking about?**
>
> A. ***The Ritz Hotel work was the work that we did do in August,*** *and that was the work that was to be excluded from the CCIP because that was structural demo, and* ***it was just for that work.***
>
> Q. And how do you know that?
>
> A. Based on the information that I was given through these e-mails, speaking with Jeff Boggs at the time. **Because we had already enrolled in CCIP, then they came back and said this work was separate. We typically**

> **never had a situation like that, so it was unusual.[5] Once we're enrolled in a CCIP, everything – or OCIP, everything is included. So this was an unusual circumstance that we were being asked, so my understanding was that the W Hotel was covered by the CCIP and that this work was just additional.** [Dta1289, T34-1 to -24 (emphasis supplied).]

Morris also testified that Abbonizio's letter confirmed ACC's belief in its continued enrollment:

> THE WITNESS: [**ACC**] **received [correspondence] that we were accepted into the CCIP program. We received that confirmation e-mail. So based on my conversations in the previous e-mails that just this work in August was to be excluded, that made sense to me because going forward**, we were working at the W Hotel site where they were building the W Hotel.
>
> So, to me, we were included. **Why would I receive a welcome letter and that we were enrolled in it after all of this?** And now we were bidding other work. So coincide that with the proposals and that acceptance letter – and our insurance certs were going out as though we were enrolled in the CCIP. The language was on it. ***And no one ever told us any different after that point.***[6] [Dta1290-1291, T78-3 to 79-7 (emphasis supplied).]

Ms. Morris gave identical testimony in the underlying action:

> **We were enrolled and what I understood was that it was only that portion of the work that was to be excluded. And the rest was going to fall under the CCIP. We were never notified that we weren't in the CCIP, but we were**

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[5] Zurich and Alliant representatives confirmed that a contractor's unenrollment from CCIP is an unusual event. (Dta 843,875.)

[6] Alliant's representative testified that, on some projects, subcontractors were excluded from some work and enrolled for other work on the same project. (Dta875, McGowan dep. T35-10 to 36-15.)

> **notified that we were accepted.** [Dta1298-1299, 4/8/19 dep. of Morris, T19-11 to 20-19.]

Following Abbonizio's September 25, 2015 letter advising ACC that it was "CCIP approved," ACC never received anything from Zurich or Alliant, or anyone else, advising it that its coverage in the CCIP had been cancelled. (Dta1293-1295, T201-15 to 203-6; Dta1080.) Tutor claimed it was "unaware" that ACC performed "other work." (Dta875, Lorencz dep. 55-25 to 56-4.)

Even though, the court below erroneously stopped the clock on September 23, 2015, the ignored facts confirm that neither Zurich nor ACC thought that ACC was effectively "unenrolled," and the record is anything but "clear."

POINT I

SETTLED LAW REQUIRED ZURICH TO NOTIFY ACC OF ITS TERMINATION FROM THE CCIP LIABILITY POLICIES, AND THE LAW DIVISION ERRED IN ITS FAILURE TO APPLY THAT LAW (Dta 1362-64,1151,1183,1259.)

The requirement that insurers provide their insureds with proper notice of coverage changes, especially those that limit or terminate coverage, has been a touchstone of New Jersey law for over sixty years. Its roots are in common law concepts of contractual good faith. *Bauman v. Royal Indem. Co.*, 36 *N.J.* 12, 25 (1961)("common fairness" dictated continuation of broader coverage where the insured was not notified of "lessened coverage" in a policy

renewal). Proper notice as a prerequisite to effective coverage cancellation and the "concomitant obligation to continue coverage when an insurer fails to satisfy that notice requirement" has since evolved into "strong public policy," *Piermount Iron Works v. Evanston Ins. Co.*, 197 *N.J.* 432, 441 (2009), and are said to reflect parties' "reasonable expectations." *Harvester Chem. Corp. v. Aetna Cas. & Sur. Co.*, 277 *N.J.Super.* 421, 431 (App.Div1994).

These precepts led to the promulgation of various statutes and regulations imposing upon insurers stringent formal timing, mailing, and record retention requirements to satisfy their burden of proving policy cancellation and non-renewal, as well prohibiting mid-term cancellations except in certain narrowly prescribed circumstances. *Id., In re N.J.A.C.,* 208 *N.J.Super.* 182 (App.Div.1986) (summarizing regulatory history). Regulatory inapplicability does not vitiate the insurer's obligation to provide notice of coverage changes, which still must be "clearly" and "specifically" conveyed even in the absence of the formal mailing and record retention provisions of the regulation. *Skeete v. Dorvius*, 187 *N.J.* 5, 8 (2005).

These common law, public policy and regulatory principles are jurisprudentially construed as complementary and synergistic, with the common law and public policy components informing the construction and application of their statutory and regulatory corollaries, and *vice versa*. *See,*

Harvester Chem., 277 *N.J. Super.* at 430; *Valley Nat'l. v. American Motorists Ins. Co.*, 316 *N.J.Super.*152, 158 (App.Div.1998); *McClellan v. Feit*, 376 *N.J.Super.* 305 (App.Div.2005) (each transferring related notice concepts from analogous, but technically inapplicable, sources). The insurer's obligation is non-delegable. *Barbara Corp. v. Bob Maneely Ins. Agency*, 197 *N.J. Super.* 339, 346 (App. Div. 1984)("the notice obligation [rests] on the insurer, not the broker or agent").

The Law Division ignored these vibrant and venerable interconnected legal precepts in favor of an improperly applied hyper-literal construction of certain regulations cited by the plaintiffs. The opinion below does not even advert to the common law and public policy underpinnings of those regulations despite extensive briefing addressing them. (Dta1144,1183,1259.) Instead, the Law Division's analysis focused almost exclusively on Tutor's contractual right to "exclude ACC from the CCIP program."

However, once ACC became "an insured under the CCIP Policies," even for a "short a window of time" (SSR 25), Tutor's contractual right to control the CCIP became immaterial to Zurich's obligations to its insureds. The court below erred in relying upon the various contract documents, instead of Zurich's obligations to ACC as its insurer. It is hornbook law that "[a]n insurer's duties are defined by what *it* contracted to do, not by what *the insured*

contracted to do." *Jeffrey M. Brown Associates, Inc. v. Interstate Fire & Casualty Co.*, 414 *N.J. Super.* 160, 172 (App. Div.), *quoting*, 2 Allan D. Windt, *Insurance Claims Disputes: Interpretation of Important Policy Provisions* § 11.30 at 11-469 (5th ed. 2007), *certif. denied,* 204 *N.J* 41 (2010). Thus, the Law Division erroneously viewed the case from Tutor's contractual point of view as opposed to Zurich's insurance coverage perspective. The contract documents, in fact, confirm the policies' "precedence" in these circumstances.

The regulations apply, and, even assuming they don't, Zurich remained bound by the principles cited above, as well as its policy, to advise ACC, in "specific and clear" terms that its coverage under the CCIP policies was cancelled --- much like the notice Zurich admittedly provided to the Pennsylvania Workers Compensation Bureau regarding ACC's workers compensation policy.

A. The Law Division Erred In Its Refusal To Apply New Jersey's Regulatory Cancellation Scheme[7] (Dta1362-64.)

As noted, New Jersey maintains a "strong public policy requiring notice of" insurance policy cancellation, "and the concomitant obligation to continue

[7] The court reviews "a grant of summary judgment *de novo*." *Norman Int'l v. Admiral Ins. Co.*, 251 *N.J.* 538, 549 (2022). The parties concur in the application of New Jersey law, which is similar to the law of other potentially interested states.

coverage when an insurer fails to satisfy that notice requirement." *Piermount Iron,* 197 *N.J.* at 441. This policy is imbued in the applicable regulations governing the cancellation, non-renewal, and renewal of insurance policies.

N.J.A.C. 11:1-20.2(d) provides:

> No cancellation, other than a cancellation based upon nonpayment of premium or for moral hazard as defined in (f) below, shall be valid unless notice is mailed or delivered **by the insurer to the insured**, and to any person entitled to notice under the policy, not more than 120 days nor less than 30 days prior to the effective date of such cancellation. [*Id.*]

The regulations also provide that "no nonrenewal or cancellation shall be valid unless the notice contains the standard or reason upon which the termination is premised and specifies in detail the factual basis upon which the insurer relies," and that "no . . . cancellation shall be valid unless notice thereof is sent; 1. By certified mail or 2. By first class mail," and the insurer retains the requisite proof of mailing. *N.J.A.C.* 11:1-20.2(g), (i).

The cancellation statutes and regulations "reflect a public policy" governing coverage termination. *Valley National, supra,* 316 *N.J.Super.* at 157. For example, in *Harvester Chem, supra,* 277 *N.J.Super.* 421, the court rejected an argument that the technical inapplicability of the cancellation regulations allowed an insurer to effectuate a mid-term policy cancellation "for any reason." *Id.* at 424. The insurer argued that it could enforce such a mid-

term cancellation because it purportedly cancelled the policy in 1984, before 1985's promulgation of *N.J.A.C.* 11:1-20, *et seq.*, prohibited the cancellation.

This court held "that public policy in 1984, foreshadowed in part by *N.J.S.A.* 17:29AA-11, prohibited arbitrary mid-term cancellation clauses in insurance policies." *Id.* at 430. In reaching that holding, the court cited *Weathers v. Hartford Ins. Group,* 77 *N.J.* 228 (1998), which "restated extant public policy which applied not only to automobile insurance policies but also to other forms of liability policies [that] the ability to arbitrarily terminate an insurance policy mid-term violates the tenets of good faith that *Weathers* noted was required of insurers." *Id.*

Similarly, in *Valley National,* 317 *N.J.Super.* 152, the court reversed a summary judgment upholding the cancellation of a fire policy utilizing cancellation standards applicable to other types of policies. The panel rejected an argument that was similar to the Law Division's opinion in this case:

> Defendant distinguishes statutory law, Insurance Department regulations, and certain case law from this appeal because they deal with automobile or commercial liability policy cancellations. ... True as those distinctions may be, [they] offer reasonable guidelines for assessing proofs that an insurers claims are evidence of effective notice of policy cancellation. We consequently consider them.... [*Id.* at 157-158.]

In this case, in contravention of this ingrained public policy as expressed by the cited cases over the past forty years, the court below declined to apply the regulation (SSR 34-36, Dta1364), despite its facial applicability and the

public policy requiring its application. Zurich and AGLIC are licensed in New Jersey, and the commercial policies at issue are not of the type excepted from the regulation. (*N.J.A.C.*11:1-20.1; SSR 36, Dta1366.).

The Law Division nevertheless concluded that the cancellation regulation "does not apply because the CCIP contained a worker's compensation component." Under the reckoning set forth in the opinion below, every package of commercial liability policies in which an insured purchases liability and compensation policies from the same insurer is exempt from cancellation rules – a result inconsistent with the purpose of the regulations, given the statutory requirement that businesses maintain workers compensation coverage. *N.J.S.A.* 34:15-1, *et.seq*. In fact, Zurich separately issued a cancellation notice for ACC's workers compensation policy.

The Law Division's alternative conclusion that the regulation is inapplicable because the "CCIP covered [Tutor] projects located throughout the country," rendering it a "multi-state location risk," *N.J.S.A.*11:1-20-2(d) (SSR 36, Dta1366), is similarly overbroad. Only ACC's coverage was purportedly cancelled, not the policy itself. The "risk" in question - ACC - had one "location," in New Jersey. The court's opinion would leave any insured that performs any operation in another state, or has remote workers elsewhere, to cancellation without regard for the regulations. The narrow interpretation

accorded by the court is inconsistent with the remedial nature of the regulation. *See, In re N.J.A.C. 11:1-20, supra,* 208 *N.J.Super.* at 188-189.

Zurich's conceded failure to notify ACC of its cancellation from coverage plainly violated the regulations, requiring "continuation of coverage" for ACC under those policies. *Piermount Iron, supra.*

B. Common Law Principles Required Zurich To Provide ACC With Notice Of The Cancellation Of Its Coverage (Dta1151-55,1274.)

The opinion below as to cancellation was limited to the conclusion that the cancellation statutes and regulations "do not apply to the circumstances at issue or to a CCIP." (SSR 34, Dta1364.) The implication of that holding is that Zurich was not subject to any notice standards whatsoever – a conclusion belied by New Jersey's long common-law tradition requiring insurers to provide proper notice of policy cancellation, termination and reductions in coverage to their insureds, and the concomitant obligation to continue coverage when they fail to do so.

An insurer's obligation to convey proper notice to insureds of policy changes predates the regulations and has been reiterated in various contexts for decades. In *Bauman v. Royal Indem. Co., supra,* 36 *N.J.* 12, 21-26, an insurer sought to enforce a coverage exclusion that it placed in a renewal policy, without providing notice of that limitation to the insured. The Supreme Court reversed summary judgment entered in favor of the insurer. It cited a veritable

legion of cases from other jurisdictions which hold that, where an insurance company purports to change coverage "without fairly calling the insured's attention to a reduction in the policy coverage, it remains bound" to provide the prior coverage to the insured. This is based upon "elemental principle[s] of business morality and decency." *Id.* at 25. The Court continued: **"Absent notification that there have been changes in the restrictions, conditions or limitations of the policy, the insured is justly entitled to assume that they remain the same and that his coverage has not in anywise been lessened."** *Id.* at 26 (emphasis supplied).

This court more recently reiterated this concept in *McClellan v. Feit*, *supra.*, 376 *N.J.Super.* 305, in which it held that an amended definition of "occurrence" in a renewal policy was ineffective after the insurer failed to provide proper notice of the amended language. The insureds relied upon sections of "*N.J.A.C.* 11:1-20.2(a) – (i)," which also figured in the Law Division's holding in this case (*See*, SSR 35,36, Dta1365,6, *citing, N.J.A.C.* 11:1-20.2(d)), to argue that the insurer "altered the coverage of [the prior] policy, without proper notice and in violation of" that regulation. The court, although finding that the regulation was "not applicable" in the circumstances before it, held that "[r]egardless of *N.J.A.C.* 11:1-20.2's inapplicability," "in order to fulfill the insured's expectations . . . courts will void a reduction in

coverage that was not called to the insured's attention," *citing*, *Bauman.* The court continued: "When the insured is not **specifically and clearly informed**" of the change in coverage, it "will be ineffective." *Id.*

Millbrook Tax Fund, Inc. v. P.L. Henry Assocs., 344 *N.J.Super.* 49 (App.Div.2001), is also instructive. In that case, the court reversed judgment entered in favor of an insurer based upon an amended notice provision in a liability policy that reduced the period permitted for reporting claims. The trial judge, like the judge here, declined to credit the insured's testimony denying notice of the policy changes. *Id.* at 52. This court reversed, holding that the insurer's conceded failure to provide notice of the policy change rendered the insured's understanding immaterial: **"[W]hether or not [the insured] received the renewal policy, whether or not he read it, and even whether or not he had read the first policy and was aware of the duration of its limited reporting period, are all beside the legal point presented.**" *Id* at 52-53. Instead, the court relied upon *Bauman* to hold that the insured remained entitled to coverage for the claim against it. "Clearly, [the insurer] did not provide the required notification here, despite several opportunities to do so." Accordingly, the insurer could not change the policy "without specifically informing the policyholder of the change." Therefore, the insured "was entitled to coverage and a defense." *Id.* at 53.

The Supreme Court recommitted to these principles in *Skeete v. Dorvius*, *supra*. 184 *N.J.* 5, in which it declined to enforce a "step-down" provision in the uninsured/underinsured provisions of an automobile policy because the insurer provided inadequate notice in policy renewal documents it sent to the insured. The change was communicated to the insured in an "undifferentiated passel of two hundred documents." *Id.* The Court adopted the appellate panel's holding that the average policyholder could not have identified the clause "'without extensive detective work, an unreasonable encumbrance on a policyholder ***that can only result in hidden pitfalls such as are presented here."*** *Id.* at 9 (emphasis supplied). It held that "policy changes must be conveyed fairly" to the insured and that the insurer's presentation was "insufficient" to effectuate this requirement. *Id.*

These common law notice requirements, which are not as formal as their regulatory analogs, impose upon insurers the non-delegable obligation to provide "specific" and "clear" notice of material coverage changes to their insureds, which "can be readily done . . . in simple fashion," *Bauman*, 36 *N.J.* at 26, and "in no particular form," provided that it is "clear and specific." *Skeete,* 184 *N.J.* at 9. *See, Morrison v. American Intern. Ins. Co.*, 381 *N.J. Super*. 532, 542 (App.Div.2005) (proper "placement" of notice also necessary).

In this case, as a matter of law, Zurich's affirmative decision to provide no notice whatsoever ran afoul of this venerable principle that requires insurers to provide notice of coverage changes. ACC's remedy for Zurich's non-compliance with this requirement was the continuation of its coverage under the CCIP. *Millbrook, supra.* The Law Division erred in failing to comply with this principle.

Considering Zurich's lack of notice to ACC, the series of email communications cited by the court below, which did not involve Zurich, fall far short of the "clear," "specific," and properly "place[d]" notice of coverage termination required by the above cases -- even if they were material to the disposition of the matter. Those communications are even less clear than the "undifferentiated passel of documents," found lacking in *Skeete*, which – as Ms. Morris's unrefuted testimony establishes – required impermissible "detective work" to try to unravel.

For example, although the policy required Zurich to give 90 days notice of cancellation to its insureds, the effect of the ruling below is that cancellation was effected virtually immediately upon issuing coverage to ACC. Yet, within that very 90 day policy cancellation window, on September 25, 2015, Abbonizio confirmed to ACC that it continued to be covered under the CCIP for further work for Abbonizio at the project – such as the work that ACC was

performing when the underlying plaintiff was injured. This is the very type of confusion that the law requiring continuation of insurance where coverage is not properly cancelled is designed to prevent.

Plainly, ACC should not have had to engage in the type of analysis conducted by the Law Division in its forty-page opinion to try to ascertain if its coverage was cancelled. And, courts and parties should not have to engage in years of litigation and wade through hundreds of thousands of pages of documents and days of testimony to determine the propriety of coverage cancellation.

Harvester Chem., Bauman, Skeete, McClellan, et al., all addressed the inadequacy and lack of specificity of notices sent directly by the insurer. Here, the Law Division improperly countenanced an "inferential approach" to support its cancellation conclusion based on Tutor's and Alliant's communications with ACC. This was improper. *Millbrook Tax Fund*; *Whiteside v. New Castle Mut. Ins.*, 595 *F.Supp.* 1096, 1099 (D.Del.1984).

C. The Law Division Improperly Indulged Zurich's Delegation Of Its Non-Delegable Notice Obligations (Dta1158,59.)

New Jersey law is clear that "the notice obligation [rests] on the insurer, not the broker or agent." *Barbara Corp. v. Bob Maneely Ins. Agency, supra*, 197 *N.J. Super*. 339, 346. Thus, "the insurer cannot avoid responsibility for the insured's failure to receive notice ... by claiming that it is the broker who is

primarily responsible for sending such notices to the insured." *Insigna v. Hegedus*, 231 *N.J. Super.* 562, 567 (App.Div.1989). This is specifically to avoid "miscommunication among brokers, agents, insureds and carriers." *Echevarias v. Lopez,* 240 *N.J.Super.* 104, 108 (App.Div.1990).

Zurich conceded that it never sent anything whatsoever to ACC, or otherwise communicated with it, to advise ACC of its cancellation from the CCIP, or, as Zurich euphemistically calls it, "unenrollment." Despite the conceded rarity of cancellations from CCIP policies, and the fact that there was no procedure in place for notifying subcontractors of their termination of coverage, Zurich improperly left it to Tutor, Alliant, or perhaps Abbonizio to notify ACC of its putative cancellation of coverage.

Even though the court below acknowledged that Zurich did not send notice of any purported cancellation of coverage to ACC, it concluded that Zurich discharged its obligation through the confusing and perplexing series of emails between and among Tutor, Alliant, Abbonizio and ACC, under the "Sole Agent For The Insured" endorsement in the Zurich policy. (SSR 25, Dta1355.) As a matter of law, such "notice" is ineffective, and the "Sole Agent" endorsement does not even cover this situation.

First, even if Zurich could delegate its obligation to provide ACC notice of coverage termination, that notice, as set forth above, as a matter of law, was

neither "clear" nor "specific." Abbonizio's letter and Ms. Morris's testimony confirm this. Moreover, to the extent the prior emails could be argued to serve as the functional equivalent of Zurich's "cancellation notice," Abbonizio's subsequent letter confirming ACC's insured status is the equivalent of a "reinstatement notice."

Nor does the "Sole Agent for The Insured" endorsement of the Zurich policy have the effect stated by the Court – in fact, it is inapplicable. That endorsement, consistent with the contract documents, only purported to authorize Tutor to cancel the Zurich policy as a whole and to request changes to ACC's and other insureds' coverage. It plainly does not purport to excuse Zurich from its non-delegable obligation to give its insureds notice of the changes that Tutor requested, especially changes as drastic as termination of ACC's coverage – nor could it. *Insigna, Barbara Corp., supra.* In fact, Zurich irrefutably and admittedly took no action to effectuate any changes to any provision of the liability insurance policy that may have been requested by Tutor.

As "clear and unambiguous on its face" as that endorsement might be (SSR 27, Dta1357), it simply is irrelevant to the issues in this case, which relate to Zurich conveying proper notice of coverage changes, not to Tutor's

right to request that Zurich make such changes to exclude subcontractors from coverage, which is what the endorsement purports to permit.

Furthermore, the converse of Tutor being "the sole agent for the insured" is not true. Tutor expressly excluded the ability to act as Zurich's agent as it related to coverage in the contract documents. Zurich's "Sole Agent Of The Insured" endorsement argument, adopted by the court below, is a legal and factual *non-sequitur.*

Zurich's conceded failure to send coverage termination notice to ACC should have been dispositive of the issue. Instead, the opinion below cited only to Zurich's skewed and incomplete series of emails regarding the initial Ritz Wall work, which abruptly end on September 23, 2015, to conclude that ACC "was notified it had been unenrolled from the CCIP, acknowledged it was unenrolled, and did not object." (SSR 28, Dta1358.) Inexplicably, Abbonizio's September 25, 2015 confirmation of coverage to ACC is not even mentioned. Nor are Ms. Morris's several depositions confirming ACC's belief that the pre-September 25, 2015 emails only related to ACC's initial Ritz wall work, and not to its subsequent work on the site, as confirmed by Abbonizio's letter.

D. The Inferential Extrinsic Evidence Cited By The Court Does Not Support Its Conclusion (Dta1144-50,1259-74.)

The Law Division's suggestion that ACC had extraneous notice that it was cancelled from the CCIP policy is factually irrelevant and incorrect, and

legally improper. *McClellan v. Feit, Millbrook Tax Fund, supra.* Even assuming the email exchanges in the Summer of 2015 could be said to have offered substituted notice to ACC that its coverage under the CCIP policies was terminated, those communications, as a matter of law, could not – and did not – support that conclusion, and the evidence unaddressed below establishes the opposite.[8]

First, the concept of ACC's purported sentience regarding notice of cancellation as of September 23, 2015 is irrefutably rebutted by contemporaneously generated documentation – Abbonizio's September 25, 2015 letter confirming that ACC is "CCIP approved" for further work on the project. It is also reflected by ACC's representative's unrefuted testimony, over several depositions, that ACC believed that it was covered for its subsequent work. Indeed, every single party's representative testified that unenrollments from CCIPs are a rarity. Tutor's representative also conceded that Tutor did not have a formal unenrollment process. And, ACC and Zurich's representatives both testified that contractors were occasionally enrolled for some work, but not for other work on the same project. Even Zurich's

[8] Legendary jazz musician Miles Davis is credited with saying "It's not the notes you play, it's the notes you don't play." Biopic Of The Cool: Don Cheadle Channels A Jazz Legend In 'Miles Ahead'" by Amy Nicholson, www.mtv.com. March 30, 2016. This may be sound advice for musical composition, but is of questionable utility in contexts such as this.

professional underwriters had difficulty establishing ACC's status because they could not – and have not to this day – uncovered a notice or endorsement that was generated to cancel the liability policies. Rather than "demonstrate[ing] that [ACC] was not enrolled in the CCIP at the time of the Accident" (SSR 31), the uncited facts confirm the opposite.

Furthermore, the Law Division adopted the argument that cancellation of the separate workers compensation policy meant an automatic cancellation of the liability policies. (SSR 14, Dta1334.) ACC's lack of notice of cancellation of that policy eviscerates the viability of that position. Also, there is no language in the liability policy that links the availability of coverage to a contractor's concomitant insured status under the workers compensation policy.

To compound this, although Zurich sent notice of cancellation of ACC's workers compensation policy to the Pennsylvania Workers Compensation Bureau, it did not send a copy of that endorsement to ACC, even though ACC's address was on the notice. Because it lacked a cancellation notice of ACC's liability coverage, Zurich initially concluded that it could not decline ACC's tender of coverage under the liability policies for the underlying action. In fact, it took Zurich over a year to disclaim coverage to ACC – an unreasonable length of time in the circumstances. *Griggs v. Bertram,* 88 *N.J.* 347 (1982).

Rather than support the conclusion that coverage had been terminated, Zurich's machinations in trying to link the cancellation endorsement of the compensation policy to ACC's coverage under the separate liability policies, especially given the conceded lack of notice to ACC, establishes the opposite: The workers compensation cancellation offers an example of clear and specific notice – to the Pennsylvania Workers Compensation Bureau – that Zurich cancelled ACC workers compensation policy. This is in stark contrast to the disjointed mosaic of conflicting communications relied upon to support ACC's termination from the liability policies. *Skeete; Millbrook Tax Fund; McClellan v. Feit, supra.*

The opinion below also misconstrues ACC's Travelers and Evanston policies. Both of those policies were issued to ACC *before* ACC's enrollment in the CCIP. Yet, the opinion portrays ACC as having "immediately obtained its own general liability policy from Travelers and Evanston as a prerequisite to commencing work on the Project," following "unenrollment." (SSR 25, 29, Dta1355,1359.) This fact was spun despite the earlier statement that Travelers and Evanston "issued" their policies "effective January 28, 2015," *six months before Abbonizio hired ACC.* (SSR 5, Dta1375.)

The fortuitous fact that Travelers did not potentially expose ACC to ruinous liability by seeking to enforce its wrap-up exclusion, despite ACC's

undisputed enrollment in the CCIP, is reason to apply notice requirements to Zurich, not a basis for excusing it from them. The "complexity" of the CCIP establishes that it should be treated like every other policy when it comes to notice of changes to insureds – not differently.

The determination below that the "CCIP-related documents explicitly bar" ACC's enrollment (SSR 31) is likewise immaterial to the disposition and is unrelated to Zurich's obligations to ACC. It is also wrong. The Named Insured endorsement of the Zurich policy, which anchors ACC's and other subcontractors' CCIP coverage under the policy, has certain enumerated exclusions – none of which even mentions the word "demolition." Similarly, the ISO-drafted CGL coverage form, which sets forth the general coverage exclusions of the policy, does not exclude demolition operations.

Despite the "catch-all" language that purported to afford Tutor the unfettered discretion to determine if subcontractors could enroll in the CCIP, Zurich became subject to its own notice requirements once coverage was issued. (It also, from an insurance perspective, contravenes the public policy prohibiting arbitrary mid-term cancellation as set forth at length in *Harvester Chem., supra.* – another impediment to coverage termination that was ignored by the court below.)

The expired "CCIP-binder" (SSR 32, Dta1362) is inconsistent with the actual language of the policy, which governs Zurich's obligations to its insureds and supersedes the binder. By definition, binders are temporary and only "effective until the issuance of a formal policy." *Midland Ent. v. St. Paul Fire Mar. Ins. Co.*, 745 *N.E.*2d 445 (OhioApp.2000); *N.J.S.A.* 17:36-5.16 (noting temporal limits on insurance binders). The Zurich policy ultimately did not include the binder's exclusion for demolition, irrefutably establishing that there was no such exclusion from coverage, and vitiating the binder as support for the ruling that ACC "was ineligible for coverage under the CCIP." (SSR 32, Dta1362.)

Finally, the court cited to a post-dated contractual scope of work applicable to the initial Ritz-Wall work issued to the "Subcontractor," Abbonizio, in which Abbonizio – not ACC – purported to "acknowledge" that ACC was purportedly excluded under the CCIP. (*Id.* 32.) That statement is not only misleading, it is belied by Abbonizio's subsequent ratification of ACC's enrollment when it advised ACC that it was "CCIP approved" for subsequent work, which is not referenced in the opinion below.

The material utilized to support the ruling below is legally immaterial in light of Zurich's failure to directly provide notification of termination to ACC. *Millbrook, supra.* The confusion that these conflicting communications

regarding ACC's status engendered -- rather than serving as the conclusive evidence of cancellation ascribed to it below -- establishes the opposite. That confusion also confirms the necessity that Zurich provide specific and clear notice of coverage termination, *Skeete, supra,* which it failed to do.

Accordingly, the Law Division erred in denying Travelers' motion for summary judgment and granting Zurich's motion, and should be reversed.

POINT II

THE COURT BELOW SHOULD HAVE GRANTED TRAVELERS' REQUEST FOR REIMBURSEMENT OF THE SETTLEMENT AMOUNT, DEFENSE AND DECLARATORY JUDGMENT FEES, COSTS AND INTEREST (Dta1257-58,1279,1282.)

Due to Zurich's repudiation of ACC's coverage under the CCIP, Travelers defended the underlying action on ACC's behalf, subrogating Travelers to ACC's rights to rectify Zurich's wrongful disclaimer and entitling Travelers to reimbursement of the amount it paid to settle the underlying claim on behalf of ACC, as well as the costs of defending that claim. *Rooney v. Township of West Orange,* 200 *N.J.Super.* 201 (App.Div.1985). Additionally, *R.*4:42-9(a)(6) provides for an award of counsel fees "[i]n an action upon a liability or indemnity policy of insurance, in favor of a successful claimant." Such fees are awardable in disputes between insurers. *Moper Transp., Inc. v. Norbet Trucking Corp.*, 399 *N.J. Super.* 146, 157–58 (App. Div. 2008), *certif. denied*, 196 *N.J.* 463 (2008). Finally, Travelers is entitled to prejudgment

interest on the underlying settlement as well as interest on the counsel fees expended in this case and in the underlying action. *R.*4:42-11; *Federal Home Loan Mortgage Corp. v. Scottsdale,* 316 *F.*3d 431, 450 (3d Cir.2003) (affirming award of prejudgment interest under New Jersey law where an insurer wrongfully disclaimed coverage).

The Law Division's erroneous entry of summary judgment in Zurich's favor obviated consideration of these arguments below. However, upon reversal of that ruling, these elements of damages should be awarded to Travelers without the necessity of remand to consider the availability of those damages. *Cf. Pressler & Verniero, Current New Jersey Court Rules, R.*4:42-9(a)(6) Comment 2.6 (Gann 2023) ("[A] successful insured is presumptively entitled to attorney's fees and need not show bad faith or arbitrary action on the part of the insurer. *Citing, Liberty Village Assocs, Inc. v. West American Ins. Co.*, 309 *N.J. Super.* 393, 406 (App. Div. 1998)).

CONCLUSION

Based on the foregoing, it is submitted that this Court should reverse the orders under review and enter summary judgment in favor of Travelers, declaring that the Zurich and AGLIC policies covered ACC for the underlying action and awarding Travelers reimbursement of the settlement it paid on

behalf of ACC, the costs incurred in defending ACC, declaratory judgment fees, costs and interest.

Respectfully Submitted,

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Dated: December 21, 2023

ATLANTIC CONCRETE CUTTING, INC. and EVANSTON INSURANCE COMPANY, Plaintiffs, vs. ZURICH AMERICAN INSURANCE COMPANY, AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY, Defendants/Respondents, ALLIANT INSURANCE SERVICES, INC. Defendant, and TRAVELERS INDEMNITY COMPANY OF AMERICA, Defendant/Appellant.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003393-22T4 On Appeal From: Superior Court of New Jersey Law Division Burlington County Docket No.: BUR-L-742-19 Sat Below: Hon. James J. Ferrelli, J.S.C.

BRIEF OF DEFENDANT ALLIANT INSURANCE SERVICES, INC.

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PROCEDURAL HISTORY[1]

Alliant Insurance Services, Inc. ("Alliant") defers largely to the procedural history summarized by Travelers Indemnity Company of America ("Travelers") in its brief. However, Alliant notes that while the various parties' respective motions for summary judgment were pending in the lower court, Travelers agreed to dismiss its cross-claim against Alliant. *See* stipulation of dismissal, filed with the lower court on March 29, 2023, attached as 1a. As such, the Travelers appeal does not apply to Alliant, and there is nothing this Court needs to consider or decide between Travelers and Alliant.

Respectfully submitted:

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Dated: February 22, 2024

[1] For the reasons stated, the Travelers appeal does not apply to Alliant, and therefore there is actually no need for Alliant to even file this Brief. Alliant is doing so to ensure the panel takes note of this relevant procedural history, but there is nothing beyond that procedural history that needs to be addressed in this Brief.

Superior Court of New Jersey

Appellate Division

Docket No. A-003393-22T2

ATLANTIC CONCRETE CUTTING, INC. and EVANSTON INSURANCE COMPANY, *Plaintiffs,* vs. ZURICH AMERICAN INSURANCE COMPANY, AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY, *Defendants-Respondents,* and ALLIANT SERVICES, INC., *Defendant,* and TRAVELERS INDEMNITY COMPANY OF AMERICA, *Defendant-Appellant.*	:	CIVIL ACTION ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BURLINGTON COUNTY Docket No.: BUR-L-742-19 Sat Below: HON. JAMES J. FERRELLI, J.S.C.

BRIEF FOR DEFENDANTS-RESPONDENTS ZURICH AMERICAN INSURANCE COMPANY AND AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY

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PRELIMINARY STATEMENT

In seeking insurance coverage for Atlantic Concrete Cutting, Inc. ("ACC") for an underlying personal injury action ("Hood Lawsuit"), under a contractor controlled insurance program ("CCIP"), The Travelers Indemnity Company of America ("Travelers") asks the Court to ignore the relevant facts, which Travelers argues are virtually all "immaterial to the proper disposition of this matter[.]" (TRVb7.) But facts matter. Particularly here, where the facts show ACC: (1) was erroneously enrolled in a CCIP based on its misrepresentations; (2) was notified of its ineligibility for the CCIP hours after the erroneous enrollment; (3) increased its proposal based on removal from the CCIP; (4) acknowledged its unenrollment *nine* times; (5) never paid premiums toward the CCIP; and (6) maintained its insurance coverage outside the CCIP due to excluded demolition work.

The disposition of this appeal does not turn on "improper cancellation of insurance coverage without proper notice," as Travelers argues. (TRVb1.) Further, Zurich American Insurance Company ("Zurich") and American Guarantee and Liability Insurance Company ("AGLIC") (collectively, "Zurich" where appropriate) are not attempting to overturn "sixty years of authority in New Jersey." (TRVb2.) Rather, Zurich is applying New Jersey law to the facts regarding the unenrollment of a contractor from a CCIP. The facts show that the

plain language of the Zurich CCIP policies for construction projects run by Tutor Perini Corp. and Tutor Perini Building Corp. (collectively, "Tutor"), the general contractor and CCIP sponsor, did not include ACC as a Named Insured and, even *assuming arguendo* it did, Tutor had the sole discretion to deem subcontractors ineligible from participating in, remove subcontractors from, or make modifications to, the CCIP. Tutor did just that when it unenrolled ACC from the CCIP, after which, ACC acknowledged and had no objection.

Further, the facts show that N.J.A.C. § 11:1-20 does not apply to this claim for coverage under the CCIP because the plain language of that Code excludes policies that cover multi-state location risks, like Tutor's construction projects located throughout the country.

Finally, the facts show that Travelers initially declined to pursue coverage on behalf of ACC, essentially conceding a lack of coverage under the CCIP. Travelers' position changed only when ACC and Evanston Insurance Company ("Evanston," ACC's excess carrier) named Travelers a defendant in this coverage litigation, and Travelers was forced to litigate the coverage issues to completion. Its change of position speaks volumes.

Given these facts, discussed in detail below, this Court should affirm the trial court's determination that ACC was not an enrolled contractor in the CCIP and is not owed coverage under the CCIP for the underlying Hood Lawsuit.

PROCEDURAL HISTORY

Zurich adopts the Procedural History section in Travelers' opening brief.

COUNTERSTATEMENT OF FACTS

I. THE PROJECT, THE PARTIES AND THE INSURANCE POLICIES

A. The Project

Tutor was the general contractor for construction of the W Hotel at 1441 Chestnut St., Philadelphia ("Project"). (¶ 12, TRVa3.) Tutor retained Abbonizio to perform "earthwork, S[upport] O[f] E[xcavation] and underpinning" at the Project. (Subcontract, TRVa430; Lorenz Tr. 27:16-28:8, TRVa1428.) Separately, Abbonizio was retained to perform demolition work on a retaining wall at the property line where the Ritz Hotel was located and encroached onto the Project's property. (Lorenz Tr. 11:12-23, 15:24-16:17, 27:8-15, and 32:7-11, at TRVa1424-1425 and 1428-1429; and E-Mail, TRVa1447, with Attach. at TRVa1451.) Abbonizio subcontracted portions of the demolition work to ACC. (Boggs Tr., 11:2-25, TRVa1460; Lorenz Tr., 76:5-10 and 77:5-19 at TRVa1440; E-Mail, TRVa1447-1448, with Attach. at TRVa1449-1451.)

B. ACC's Direct Liability Policies

ACC was insured by two[1] liability policies. Travelers issued a Commercial General Liability ("CGL") Policy effective January 28, 2015 to

[1] ACC also had a Worker's Compensation Policy with Travelers. (TRVa2887.)

January 28, 2016, with policy limits of $1M Each Occurrence (the "Travelers Policy"), which contains a Wrap-Up Exclusion that excludes coverage to ACC for: "Bodily injury" [] arising out of any project that is or was subject to a "wrap-up insurance program".[2] (TRVa234 and TRVa283.) Evanston issued a Commercial Umbrella Liability Policy effective January 28, 2015 to January 28, 2016 (the "Evanston Policy"), which generally follows form to the Travelers Policy, but contains an endorsement titled Contractors Limitation that excludes coverage for losses insured under a "wrap up", such as a CCIP. (TRVa21 and TRVa70.) To this day, neither insurer has disclaimed coverage to ACC under their policies based on a "wrap up" exclusion.

C. The Contractor Controlled Insurance Program

Contrary to Travelers' contention (TRVb7), Tutor maintained a CCIP for "some (but not all)" of the subcontractors at the Project (4/16/15 CCIP Manual at TRVa510). Alliant Insurance Services, Inc. ("Alliant") was the broker that procured the CCIP policies for Tutor, as well as the CCIP's administrator. (TRVa4, ¶ 16; 4/16/15 CCIP Manual at TRVa512 and ZURa208.) The CCIP was jointly comprised of: (1) a CGL Policy issued by Zurich; (2) an Excess Policy

[2] "Wrap-up insurance program" is defined as any agreement …, including any contractor controlled … or similar insurance program..." (TRVa283.)

issued by AGLIC; and (3) a Workers Compensation Policy (collectively, the "CCIP Policies"). (4/16/15 CCIP Manual at TRVa510 and ZURa 206.)

Zurich issued a CGL Policy to Tutor effective December 23, 2013 to December 23, 2018, with limits of $2M Each Occurrence (the "Zurich Policy"). (TRVa75 and 102.) The Zurich Policy contained a Named Insured – Contractor Controlled Insurance Program endorsement, which adds certain qualifiers to "Section II - Who Is An Insured" in the Zurich Policy, which ACC does not satisfy. (TRVa146.) Notably, the Zurich Policy contains a Sole Agent for Insureds endorsement, by which all insureds assigned Tutor the right to act with regards to policy cancellation or changes. (TRVa123.)

AGLIC issued Tutor an Excess Liability Policy effective December 23, 2013 to December 23, 2018, with policy limits of $25M per occurrence (the "AGLIC Policy"). (TRVa176.)

Zurich also provided Tutor a "Zurich in North America Contractor Controlled Insurance Program Confirmation of bound program" ("Binder"), an initial contract generally laying out the terms of the CCIP Policies. (TRVa2612 and ZURa291; Faust Tr. 74:20-75:22, TRVa2581.) The Binder section entitled "COMMENTS / RESTRICTIONS / QUOTE SUBJECT TO:", provides in part:

> Enrollment in the Workers' Compensation program automatically enrolls the subcontractor in the General Liability portion of the program. If a subcontractor is not enrolled in the Workers' Compensation program there will be no coverage provided under

> the General Liability program until such time as that subcontractor is specifically approved and endorsed onto the General Liability policy by the Zurich underwriter.

(TRVa2615-16 and ZURa294.) The section of the Binder entitled "Schedule of Named Insureds:" provides, in relevant part, as follows:

> UNLESS OTHERWISE ENDORSED ON THIS POLICY, *NO COVERAGE WILL BE PROVIDED TO* VENDORS, SUPPLIERS, MATERIAL DEALERS, ABATEMENT CONTRACTORS, TEMPORARY LABOR SERVICES, *DEMOLITION, OR OTHER HAZARDOUS WASTE REMOVAL CONTRACTORS WHO VISIT, MAKE DELIVERIES TO OR WORK TEMPORARILY AT THE PROJECT SITE(S).*

(Italics added.) (TRVa2617 and ZURa296.)

II. ACC'S ROLE AT THE PROJECT AND CCIP COMMUNICATIONS

A. ACC's Initial Retention for the Project and CCIP Submissions

On June 29, 2015, ACC provided its first proposal to Abbonizio, No. 106439 ("Proposal One"), with a total of $22,900, which includes the added cost of ACC being excluded from the CCIP, as expected at the time. (TRVa1476.) Proposal One describes ACC's work including: (1) "hand sawing, chipping and breaking" pockets of "concrete slab to expose steel reinforcement" (one person at $1,900 per day); (2) six days for "wall sawing, hand sawing, chipping and breaking 150' concrete wall at property line" at the adjacent Ritz and also describes the scope as "'shaving' of vertical wall at 'high spots' to create a clean

edge at property line limits" and "flush cut wall sawing concrete slab overhang to match vertical wall limits" (two laborers at $3,500 per day). (TRVa1476.)

However, on July 9, 2015, Tutor sent an email to Abbonizio and ACC requesting: that Abbonizio enroll ACC in the CCIP; and a revised proposal from Abbonizio not to exceed the "previous proposal" (which was higher based on the originally anticipated exclusion from the CCIP). (TRVa1447.) Abbonizio then emailed ACC on July 21, 2015, inquiring about ACC's revised proposal (Email, TRVa2676) and providing ACC with CCIP paperwork based on the expectation - at the time - that ACC would enroll (Email, TRVa2559/ZURa243; CCIP Paperwork, TRVa498-573/ZURa244-289). The CCIP paperwork included "Schedule 'A' to the C. Abbonizio Contractors Subcontract" which describes the CCIP and Insurance Requirements for the Project (also identified as Attachment 3, Amendment to the Tutor Perini Building Corp. Subcontract with Abbonizio, referred herein as the "CCIP Contract"), CCIP Insurance Procedures Manual ("CCIP Manual") and other enrollment forms for the CCIP. (TRVa498-573 or ZURa244-289.)

Undermining Travelers' argument that CCIP enrollment was mandatory at the Project, the CCIP Contract defines "Excluded Parties", including: "e. *Any other party or entity not specifically identified herein, that is excluded by Tutor Perini [] in its sole discretion, even if such party or entity is otherwise eligible*."

(Italics added.) (TRVa498.) Further, Section 4.0 INSURANCE COVERAGE of the CCIP Manual discusses "4.2 Parties Not Covered" as:

> Subcontractors of any tier who will not be included in participation in the CCIP (Nonparticipating Subcontractors) shall include all vendors, suppliers, truckers, material dealers, any contractors performing abatement or otherwise working with hazardous materials, and delivery services companies, regardless of contract size. Nonparticipating Subcontractors shall not be permitted to work on the Project until they have provided to the Program Administrator (on behalf of Tutor Perini Building Corp.) the insurance certificate(s) and endorsement(s) as required in the Contract.
>
> **Tutor Perini Building Corp. has the right to include or exclude ANY SUBCONTRACTOR of ANY tier from participating in the CCIP at their sole discretion.**

(Bolded in the original.) (4/16/15 version at TRVa516; legible 4/16/15 version at ZURa212; 9/8/14 version at ZURa261.)

Consequently, ACC submitted a second proposal, No. 106846 ("Proposal Two"), on July 21, 2015, with a total estimate of $22,200, a lower amount than Proposal One due to ACC's anticipation - at the time - that it would be enrolled in the CCIP. (TRVa1485.) Proposal Two describes the identical work to Proposal One above, except: (1) for the "hand sawing, chipping and breaking" pockets, it charges $1,800 per day (instead of $1,900); and (2) for "wall sawing, hand sawing, chipping and breaking 150' concrete wall at property line" at the adjacent Ritz, it charges $3,400 per day (instead of $3,500). (*Id.*)

On July 28, 2015, Abbonizio sent a Notice of Subcontractor Award (Form F), to ACC and Alliant to initiate ACC's CCIP enrollment. The following day, on July 29, 2015, Abbonizio issued a purchase order ("Purchase Order") for ACC's work, corresponding to the work and amount described in Proposal Two.[3] (TRVa1496-1497.) The Purchase Order provides the following:

> **Description**: SAW CUTTING
>
> **Scope**: Daily rates for saw cutting to expose steel reinforcement and breaking 150' concrete wall at property line of Ritz will include all union labor, equipment and materials to complete.

(TRVa1496.) The Purchase Order describes three types of work: (A) "Hand sawing, chipping & breaking pockets x concrete slab to expose steel reinforcement" (*sic*); (B) unspecified down time; and (C) "Shaving of vertical wall 'high' spots to create clean edge at property line of Ritz, limits and flush cut wall sawing concrete slab overhang to match vertical wall limits." (*Id*.)

Also on July 29, 2015, ACC submitted to Alliant a Contractor Enrollment Form (Form A), which described ACC's work as "concrete cutting," but failed to reference demolition. (TRVa2685.) That day, ACC further prepared an Insurance Cost Worksheet (Form B) which: identified Workers' Compensation Code 0854, for "Concrete Construction," omitting "demolition"; and detailed

[3] Proposal Two was subsequently replaced by Proposal Three.

the gross contract value as $24,590 (includes cost of ACC's own insurance), with a net value $22,200 (excludes cost of ACC's own insurance). (TRVa2687.)

On July 30, 2015, at 7:17 a.m., Alliant sent an auto-generated letter (the "Welcome Letter") to ACC stating its "enrollment in the [CCIP] for your work performed under Contract Number 1441-103-04 has been completed. The attached insurance certificate is provided to evidence your coverage for Workers' Compensation, General Liability, and Excess/Umbrella while working at the [Project]." (TRVa2774-2777.) With that, Alliant also provided a Certificate of Insurance (a "COI") listing the CCIP Policies. (TRVa2775.)

B. Tutor's Confirmation That ACC Was Excluded

Critically, on July 30, 2015, at 12:38 p.m., five hours after ACC's erroneous enrollment, Anne Lorenz of Tutor emailed several people, including ACC's contact for the Project, Jeffrey Boggs, and Alliant's Ben Faust, clarifying that ACC was not permitted to enroll in the CCIP, writing: "if the [ACC's] work referred to below is the Ritz work then please note that since it involved structural demolition, [ACC] will not be able to enroll into the CCIP for that work. We cannot enroll subcontractors into the CCIP who are performing structural demolition." (TRVa2779.) Thus, within hours, ACC was notified that it could not participate in the CCIP.

On August 3, 2015, Dennis Mickeleit of Tutor emailed Abbonizio writing ACC "is performing structural demo on the job, they shouldn't be enrolled." (TRVa2781.) That day, Mickeleit sent Abbonizio additional documents for the work at the property line with the neighboring Ritz (the "Project Requirements"), including additional requirements, such as an Exhibit A-Scope of Work for the "Ritz Retaining Wall/One Story Structure/Dog Walk (trespass) Work" (Email, TRVa2783, and Attach. at ZURa321-328), and describes the work to be completed over several days as "110 l.f. [*i.e.*, linear feet] saw cutting as directed by Contractor's superintendent" and "provide 4-6 test locations (chip out concrete structure to locate steel rebar)[.]" (ZURa323.) Entry A.2. to Exhibit A-Scope of Work states "[Abbonizio] acknowledges that for the work of this Subcontract, it is an excluded party under the Contractor Controlled Insurance Program ("CCIP") for this Project[]" and Entry B.6. states "[Abbonizio] acknowledges that Atlantic Concrete Cutting is also an excluded party under the CCIP[,]" and must "comply with all insurance requirements set forth in the CCIP Insurance [] Manual and Schedule 'B' as an excluded party." (ZURa321.)

Travelers argues that the trial court's reference to the Scope of Work applicable to the initial Ritz-Wall work was improper because it was Abbonizio - not ACC - that acknowledged ACC was excluded. (TRVb47.) But, on August 3, 2015, after receiving the Project Requirements from Tutor, Abbonizio

forwarded them to Boggs of ACC, as well as Tutor representatives, confirming ACC's unenrollment and stating, "I just got this from TP, you need to revise your proposal and add for the insurance. Also[,] please make sure the insurance is in place before we start any work." (TRVa1491 and TRVa2783.)

Moreover, based on Abbonizio's request to revise the prior proposal, ACC provided Abbonizio with a third proposal, No. 107127 ("Proposal Three"), dated August 5, 2015, which replaced Proposal Two and reverts back to the details of Proposal One (*i.e.*, adding back insurance costs due to ACC's CCIP unenrollment). (TRVa1488.) Proposal Three describes the identical work as Proposals One and Two, but adds back the $100 per day for each type of work, an upward adjustment based on ACC's unenrollment. (TRVa1488.). ACC also sent an e-mail to Abbonizio with Proposal Three, which totaled $22,900, an increase to account for ACC's insurance costs, stating, "attached is the *updated proposal to reflect the change in CCIP status*." (TRVa1491.) (Empasis added.)

Later on August 5, 2015, Michelle Morris, Controller for ACC, copied on the e-mail sending Proposal Three, responded stating "I am confused. Are we switching to a CCIP or they are (*sic*) removing us from it?" (TRVa2797.) Moments later she sent another e-mail stating "Now I see that *there is no CCIP*" and instructs Nancy Dimacale of ACC (also cc'd) "if we filled out the CCIP

forms, disregard and issue them a certificate and let Irons[4] know that it has switched please. Very important." (TRVa2800.) Boggs responded one minute later stating "*the owners are excluding all structural foundation demolition work from their CCIP*, which applies to our work this time." (Italics added.) (TRVa2803.) Boggs immediately sent another e-mail to Morris and Dimacale confirming "*this contract with C. Abbonizio that has been excluded*." (Italics added.) (TRVa2808.) Thus, as the trial court observed, "as of August 5, 2015, all parties involved in the CCIP - including [ACC] -undoubtedly knew and understood that [ACC] was not enrolled in the CCIP." (SSR p.13 at TRVa1343.)

C. Communications Confirming ACC's Unenrollment from the CCIP

On August 10, 2015, Dimacale of ACC sent an e-mail to Dennis McGowan, Alliant's Program Administrator, confirming that "*Our work was excluded from the [Project], please make any adjustments accordingly*." (Italics added.) (TRVa2812.) Moments later, McGowan emailed Tutor asking it to confirm that ACC has been "excluded" from the CCIP for the Project, and, shortly thereafter it was confirmed by Mickeleit of Tutor that ACC was now excluded from the CCIP because "they are structural demo and therefore not enrolled." (TRVa2815.)

[4] T.C. Irons was ACC's insurance broker at the time.

Also, on August 10, 2015, McGowan of Alliant sent an e-mail to Zurich with the subject[5] "RE: Tutor Perini Corporation/1441 Chestnut/Atlantic Concrete Cutting, Inc./08.01.2015" stating "Please cancel effective 08/01/2015." (TRVa2819.)

Based on Alliant's request, Zurich prepared a Cancellation Endorsement unenrolling ACC effective August 1, 2015. (TRVa2882; Vogt Tr. 23:8-24:3, TRVa2830; McGowan Tr., 120:7-11, TRVa2864 and 139:21-140:10, TRVa2869.) As the trial court correctly observed, this resulted in ACC's unenrollment in the CCIP *ab initio*. (SSR p. 14, TRVa1344.) A copy of the Cancellation Endorsement was received by the Pennsylvania Compensation Ratings Bureau ("Ratings Bureau") on August 17, 2015. (TRVa2949.) Further, Zurich responded to McGowan referencing "3297809-Tutor Perini-1 CXL ENDT", with "3297809" being an internal Zurich tracking/confirmation number for the attached Cancellation Endorsement. (Email, TRVa2822; Vogt Tr. 23:8-24:3, TRVa2830; McGowan Tr., 120:7-11, TRVa2864 and 139:21-140:10, TRVa2869.) ACC never tried to re-enroll in the CCIP, which would have been required. (ACC Tr., 144:4-22 at TRVa1535; *see* CCIP Manual, at TRVa520

[5] McGowan's August 10, 2015 email is a reply to an email which had confirmed ACC's enrollment on July 29, 2015 in WC 0181121-00 effective 08/01/15, and, thus, the August 10th email maintains the same subject line.

(requiring subcontractors to "Notify the CCIP Administrator of all subcontracts awarded and to provide all necessary enrollment forms[.]").)

ACC's unenrolled contractor status is confirmed in the Enrollment Status Reports maintained by Alliant and sent to Tutor, covering the period from July 13 to December 15, 2015. (TRVa2641-2669; *see also* Faust Tr. 160:12-161:5 at TRVa2602.) While ACC was listed as "enrolled" on an August 10th Enrollment Report (TRVa2646), it is "excluded" on each Enrollment Report beginning August 11, 2015, including the one in effect on the Accident date (TRVa2649-2669), confirming that ACC remained "excluded."[6]

D. ACC's Subsequent Acknowledgments That Its Work Was Unenrolled from the CCIP

ACC knew in early August 2015 that it was unenrolled in the CCIP for the Project. Subsequent communications further confirm ACC was aware and acknowledged this status. For example, on August 11, 2015, Abbonizio's CFO sent an email to Dimacale of ACC advising that "Atlantic Concrete Cutting must correct their Certificates of Insurance for Tutor Perini and [Abbonizio]… *have your insurance carrier review the CCIP manual for the insurance requirements for contracts not covered under the CCIP*." (Italics added.) (TRVa2873.) The

[6] While ACC remained "excluded" from the CCIP, it became "eligible to work onsite" on the Sept. 16, 2015 Enrollment Report (the next Report after ACC's COI was deemed compliant by Alliant on Sept. 4, 2015). (TRVa2661.)

next day, on Dimacale e-mailed Abbonizio ACC's COI dated July 22, 2015, proving ACC's understanding it had been unenrolled. (TRVa2873 and TRVa2877.)

Kelli Hopkins, ACC's Human Resources and Payroll Coordinator, who took over some CCIP responsibilities from Dimacale, e-mailed ACC's broker, T.C. Irons, on August 27, 2015 with "another COI request," after being provided certain COI requirements from Abbonizio, including the document identified as "Schedule 'A' to C. Abbonizio Contractors Subcontract." (TRVa2890-2898.)

On September 4, 2015, Kelsey Johnson of ACC, who likewise took over some of the OCIP/CCIP responsibilities, wrote to Alliant advising she was "working on submitting payroll/OCIP for our contract with C. Abbonizio" and noting "*The contract is excluded from our enrolled contracts* so I am unable to submit --- please let me know what is needed[.]" (Italics added.) (TRVa2900.) Alliant's McGowan responded that ACC's "COI was 'compliant'" and "*No payroll is required for 'excluded' contractors*." (Italics added.) (TRVa2900.)

Also, on September 4, 2015, Johnson emailed Tina Hughes, Payroll Administrator at Abbonizio, to advise ACC's work was excluded from the CCIP, writing "I am in touch with someone from OCIP (*sic*) [Alliant] – *our contract is excluded* from being able to upload payroll [.]" (Italics added.) (TRVa2903.)

Johnson followed up with Hughes on September 8, 2015 advising "I had gotten word about there being *no OCIP (sic) required for this job (as per the other email I had sent).*" (Italics added.) (TRVa2907.) Later that day, Johnson responded to Hughes' insistence that "it is a CCIP job" by advising there was no CCIP reporting required because on Alliant's online portal the ACC "*contract comes up as 'excluded'*" and because, according to communications from Alliant's McGowan, "*no payroll is required for excluded contracts.*" (Italics added.) (TRVa2911.) In a September 23, 2015 email to Morris, ACC's Controller, Ms. Johnson admitted "*I had found out that this isn't an OCIP (sic) reporting job either*[.]" (Italics added.) (TRVa2914.)

Thus, as the trial court observed, months before the Accident, ACC was aware, confirmed numerous times, and raised no objection to the fact that it was not enrolled in the CCIP, and maintained its own direct liability insurance through Travelers and Evanston to cover its work at the Project. (SSR p. 16-17, at TRVa1346-1347.) The cited communications are clear and specific and can lead to no interpretation other than ACC being an unenrolled contractor.

III. THE ACCIDENT, THE HOOD LAWSUIT AND ACC'S TENDER OF COVERAGE TO TRAVELERS AND EVANSTON

A. The Accident

On December 11, 2015, Adam Hood ("Hood"), a Moretrench employee, was working at the Project when a steel beam attached to a track hoe fell on him

(the "Accident"). (DJ Complaint, ¶¶ 9 and 25, TRVa3-4; Hood Complaint, ¶¶ 26 and 31, TRVa640-641.) Just prior to the Accident, Nancy Walker, ACC's owner, approached the track hoe operator, an employee of Abbonizio, and when the operator went to shake hands, he accidentally struck the controls causing the beam to fall on Hood. (Hood Complaint, ¶¶ 27-32, TRVa641.)

B. ACC's Work on the Date of the Accident

Travelers admits that ACC's initial work may have been excluded demolition, but claims that the work on the date of the Accident was somehow different, covered work. (TRVb25.) This assertion is patently false.

ACC's December 30, 2015 invoice, 5487rev, identifies work on the date of the Accident and includes a note for one laborer to complete "wire sawing." (TRVa1593.) While Invoice 5487rev references Proposal 106846 (*i.e.*, Proposal Two), Proposal Two was later replaced by Proposal Three, which added back the cost of insurance due to ACC's CCIP unenrollment. ACC confirmed that the work on the date of the Accident, despite noting Proposal Two, was actually done pursuant to a subsequent proposal. (ACC Tr. 75:20-76:1, TRVa1518.)

ACC's Job Ticket No. 43788 on the Accident date describes the work completed by ACC's Arthur Swindell as "wire sawing" and specifies performing "saw cut in north side wall" and further identifies the contact for Abbonizio as Gil [Owens]. (TRVa1595.) Swindell testified in the Hood Lawsuit that on the

date of the Accident he was working in the northeast corner wire sawing parts of the concrete wall for removal that were recently located during excavation. (Swindell Tr., 14:15-15:13 at TRVa1610-1611 and 36:8-21 at TRVa1632.) ACC's Swindell further signed a written statement after the Accident stating he "had been working the northeast corner of the job site" doing "cutting with an electric wire saw to demo concrete north face – wall north face." (Swindell Tr., 36:8-21,TRVa1632; Statement, TRVa1787-1788.) In addition to statements by Swindell, who was actually doing the work for ACC, an Abbonizio foreman and several Tutor employees confirmed that ACC was performing demolition on the date of the Accident. (Owens Tr., 174:5-8, TRVa1963; Mott Tr., 107:1-4 at TRVa2200, 115:2-23 at TRVa2208, and 124:7-15 at TRVa2217; and Lorenz Tr., 25:9-19 at TRVa1427 and 70:5-11 at TRVa1439.)

C. The Hood Lawsuit

On March 17, 2017, Hood and his wife filed a complaint in the Philadelphia Court of Common Pleas, Case No. 170301763 (the "Hood Lawsuit"), alleging that Hood was injured based in part on ACC's negligence. (Count III, TRVa636-667.) It alleges that ACC "was a contractor on the Project and in charge of and/or responsible for cutting concrete foundations for the demolition at the Project." (TRVa640, at ¶ 20.) The Hood Lawsuit was settled in November 2019. On behalf of ACC, Travelers paid its limits and Evanston

made a payment. (TRVa2514, Evanston Tr., 95:15-96:10.) Zurich also made substantial settlement payments on behalf of Tutor and Abbonizio under the CCIP Policies.

D. ACC's Tender to Its Direct Liability Insurance Carriers

On March 21, 2017, ACC's attorneys, Cohen Seglias, forwarded the Complaint to ACC (TRVa2918) and ACC sent the Complaint to its broker, C&H Agency, Inc. ("C&H")[7] (TRVa2918). ACC also tendered its defense to Travelers (its primary CGL carrier), which confirmed on March 23, 2017, that it was handling the claim against ACC. (TRVa2920.) On March 24, 2017, given the potential for a verdict in excess of the Travelers' Policy $1M limit, Travelers requested that ACC's excess carrier be placed on notice. (TRVa2924.) Accordingly, notice was provided that day on behalf of ACC to Evanston (ACC's excess carrier). (TRVa2926-2930.)

Travelers and Evanston both acknowledged receipt of Hood's claim by communications to ACC dated March 29, 2017. (TRVa2933-2937 and TRVa2939.) Thereafter, Travelers, the primary CGL carrier, provided ACC with a defense in the Hood Lawsuit without reservation, other than reserving on the uninsurability of punitive damages. (TRVa2933-2934.) Evanston, at no point, reserved its rights to disclaim coverage on any specific basis. Neither Travelers

[7] C&H took over from T.C. Irons the role as ACC's insurance broker.

nor Evanston reserved their rights to disclaim coverage for the Hood Lawsuit based on their policies' Wrap-Up Exclusions.

On June 29, 2017, two weeks after the defense and indemnity of Tutor and Abbonizio were tendered to ACC, Travelers and Evanston, ACC's defense counsel responded by tendering ACC's defense to Alliant, but, contrary to Travelers' assertion (TRVb19), not to Zurich (TRVa916.) After a formal tender to Zurich, and after a thorough investigation, Zurich disclaimed coverage to ACC under the CCIP. (TRVa921-922.)

IV. THE INSURANCE COVERAGE ACTION

In September 2018 (more than a year after the Hood Lawsuit was filed), ACC's broker, C&H, devised a scheme to "steer the claim" from ACC's direct liability carriers to the CCIP asserting a lack of a formal notice of cancellation sent to ACC. (TRVa2946.) However, this scheme was based on C&H's mistaken assumption that ACC was the "First Named Insured" under the Zurich Policy. (TRVa2948-2949.) Plaintiffs proceeded with this scheme despite C&H's acknowledgment that: (1) ACC was "excluded from the CCIP since they were doing demo"; and (2) the Ratings Bureau confirmation it had received notice from Zurich that the CCIP had been cancelled because ACC's coverage was placed elsewhere (*i.e.*, with its direct liability carriers). (TRVa2949-2952.)

Zurich reaffirmed its coverage denial to ACC on January 29, 2019. Thereafter, in February 2019, Evanston put forth significant effort to have both ACC and Travelers prosecute a declaratory judgment action seeking coverage under the CCIP. (TRVa2957-2961.) However, by March 12, 2019, it became clear that Travelers would not pursue a declaratory judgment action, so Evanston revised its draft complaint to name Travelers as a defendant, which would then force "Travelers to assert cross claims" against Zurich, which, in Evanston's words, would "then realign parties" and their respective interests. (TRVa2959.)

Notwithstanding Travelers' unwillingness to pursue coverage, on April 11, 2019, Plaintiffs filed this action (the "DJ Action") alleging Zurich failed to defend and indemnify ACC under the CCIP. (TRVa1.) As to Zurich, the Complaint alleges two counts by ACC: breach of contract and promissory estoppel. (TRVa5-8, at ¶¶ 29-47; and TRVa8-9, at ¶¶ 48-60.) The Complaint also demands, on behalf of both Plaintiffs, judgment that ACC is owed defense and indemnity from Zurich in the Hood Lawsuit, and that Plaintiffs be reimbursed for all fees and expenses incurred for the DJ Action and the Hood Lawsuit. (TRVa13-17, at ¶¶ 83-110.)

On June 17, 2019, Zurich filed an Answer with Affirmative Defenses, a Counterclaim against ACC for rescission, and a Crossclaim against all co-defendants for contribution based on their potential liability. (TRVa711-732.)

The Affirmative Defenses included: ACC was not enrolled in the CCIP at the time of the Accident; and the CCIP is void *ab initio* due to ACC's misrepresentations in the CCIP application process. (TRVa748-51.)

On June 21, 2019, Travelers filed an Answer, along with the projected "realignment" Crossclaims against Zurich. (TRVa685.)

Zurich amended its Answer in 2022, adding several affirmative defenses, including: detailing ACC's, Evanston's and Travelers' awareness that ACC was not enrolled in the CCIP; Evanston's and Travelers' determination that coverage for the Accident was not excluded under Wrap-Up Exclusions in their policies; and Zurich's Sole Agent for Insured Endorsement. (TRVa733-755.)

LEGAL ARGUMENT

I. ACC WAS NOT ENROLLED IN THE CCIP WHEN THE ACCIDENT OCCURRED AND, THEREFORE, IS NOT ENTITLED TO COVERAGE

A. ALL CCIP RECORDS CONFIRM THAT ACC WAS NOT ENROLLED IN THE CCIP AT THE TIME OF THE ACCIDENT

Travelers argues that ACC was enrolled in the CCIP in July 2015, when it received the automated Welcome Letter and COI and, therefore, suggests ACC is entitled to coverage as a "Named Insured" on the date of the Accident. (TRVb16.)[8] This argument, however, ignores the language of the COI which

[8] Travelers' reliance on a "form letter" shown to Alliant's McGowan during deposition (at TRVb16) is equally unpersuasive as such letters are used for cancellation of an entire CCIP Program at the request of the First Named

states it is issued for "INFORMATION ONLY AND CONFERS NO RIGHTS" and "DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER." (TRVa2775.) It further ignores the fact that ACC was not actually enrolled in the CCIP on the Accident date and, thus, cannot satisfy the Zurich Policy's definition of "Named Insured."

First, ACC was notified it was erroneously enrolled and was being unenrolled from the CCIP mere hours after ACC received the auto-generated "Welcome Letter" on July 30, 2015, when Tutor e-mailed ACC stating "Atlantic will not be able to enroll into the CCIP for that work" because the CCIP "cannot enroll subcontractors into the CCIP who are performing structural demolition." (TRVa2779.) Days later, on August 3, 2015, ACC was sent the Project Requirements by Abbonizio along with an e-mail stating, "you need to revise your proposal and add for the insurance." (TRVa1491 and TRVa2783.) With the Project Requirements was a notification that "Atlantic Concrete Cutting is also an excluded party under the CCIP[,]" which must "comply with all insurance requirements set forth in the CCIP Insurance [] Manual and Schedule 'B' as an excluded party." (ZURa323.) Critically, on this basis, ACC created Proposal

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Insured, not unenrollment of a specific subcontractor. (*See* TRVa2973, form letter, which was not provided in support of Travelers' own Motion below.)

Three, *adding back insurance costs for ACC's work* because of its unenrollment. (TRVa1488.) The trial court concluded that the above unequivocally demonstrated that ACC was engaged in demolition work and, thus, excluded from the CCIP. (SSR p. 17 at TRVa1347.)

Second, the CCIP Policies were issued to Tutor, not ACC, but Travelers claims ACC was a "Named Insured" under the Named Insured – Contractor Controlled Insurance Program endorsement (TRVb16), which adds the following to the "**Who Is An Insured**" section:

> **1**. Subject to Paragraph **2**, below, a contractor of any tier, including the person or organization designated in the Declarations of this policy will qualify as a Named Insured, if such contractor:
> **a**. *Is enrolled in the Contractor Controlled Insurance Program* for which this policy is provided; and
> **b**. Performs operations at a "designated project".
>
> * * *
>
> **2**. Unless added by separate endorsement, *the following are not an insured* under this policy:
>
> * * *
>
> **c**. *Any contractor* or other person or organization *that does not have dedicated payroll for employees* on-site at the "designated project".
>
> * * *

(Italics added.) (TRVa146.) Documents produced during discovery prove that ACC was not actually "enrolled" in the CCIP at the time of the December 2015 Accident, and could not have been enrolled since it was unenrolled in August 2015. For example, at Tutor and Alliant's request, Zurich prepared the Cancellation Endorsement for the workers compensation component of the

CCIP thereby automatically removing coverage for ACC under the CCIP[9] effective August 1, 2015. (TRVa2882; Vogt Tr. 23:8-24:3, TRVa2830; McGowan Tr., 120:7-11,TRVa2864 and 139:21-140:10, TRVa2869.) The Cancellation Endorsement was received by the Ratings Bureau on August 17, 2015. (TRVa2949.) Further, the Enrollment Reports show ACC as "excluded" and, thus, unenrolled as of the report dated August 17, 2015, and ACC remained listed as "excluded" on all subsequent reports. (TRVa2649-2669.)

Finally, the Named Insured – Contractor Controlled Insurance Program endorsement is clear that "Any contractor […] that does not have dedicated payroll for employees on-site" is not an insured "[u]nless added by separate endorsement." ACC was not added by separate endorsement. (TRVa146.) Moreover, ACC admitted it did not have dedicated payroll for its employees at the Project. (ACC's Sept. 4, 2015 email states it was "working on submitting

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[9] Travelers' contention that "cancellation of ACC's CCIP workers' compensation policy would not affect its coverage" under the CCIP is wrong. (TRVb22.) The CCIP is comprised of three policies: General Liability; Worker's Compensation; and Excess. The CCIP requires enrollment in the Workers Compensation portion to be enrolled in the general liability portion. (TRVa517, CCIP Manual.) The CCIP Binder provides: "Enrollment in the Workers' Compensation program automatically enrolls the subcontractor in the General Liability portion … If a subcontractor is not enrolled in the Workers' Compensation program there will be no coverage provided under the General Liability program…" (TRVa2615.) To reiterate this, Zurich's Corporate Designee testified "If you're enrolled under the Work Comp, you're enrolled under the GL … So if you cancel under the Work Comp, you cancel under the GL." (Zurich Tr. 98:9-99:3 at TRVa854).

payroll/OCIP for our contract with C. Abbonizio" but the "contract is excluded from our enrolled contracts so I am unable to submit" (TRVa2900); ACC then advised Abbonizio on Sept. 8, 2015 that "our contract is excluded from being able to upload payroll for some reason" (TRVa2903); ACC advised Abbonizio there was no CCIP reporting needed because on the Alliant portal the ACC "contract comes up as 'excluded'" and because, according to communications from Alliant, "no payroll is required for excluded contracts" (TRVa2911); *see also* ACC internal email on September 23, 2015 confirming "I had found out that this isn't an OCIP reporting job either" (TRVa2914).)

In fact, when asked about dedicated payroll for the Project, ACC's corporate designee admitted that payroll reports were not submitted to Alliant, the CCIP's Program Administrator. Specifically, she testified as follows:

> Q: This is Atlantic Concrete's Answers and Objections to Alliant's Interrogatories.
> A: Right.
> Q: Which, if we scan down to the bottom, again, you – you certified those, right?
> A: Yes.
> Q: Okay. So if we look at question number 9, "Set forth the date upon which you submitted any payroll records or reports to Alliant relating to the CCIP." And the answer is, "ACC does not believe that any payroll records or payroll – payroll reports were actually submitted to Alliant for the subject project," right?
> A: Yeah.
> Q: That's a true – that's a true answer that you certified, right?
> A: Yes.
>
> ***

Q: [] am I right – this answer is that ACC did not submit any payroll records or payroll reports to Alliant, right?
A: Yeah.
Q: Ever?
A. Yeah.

(Morris Tr., 73:14-75:12 at TRVa2707-2708.) The trial court undoubtedly found this evidence compelling in correctly ruling that ACC was not a Named Insured as a matter of law. (SSR p. 28 at TRVa1358.)

Travelers' argument that "Zurich personnel internally recognized that ACC was insured on the CCIP policy" or that Zurich "conceded" it didn't have a copy of a request to unenroll ACC relies on partial testimony. (TRVb19, citing TRVa1320.) Randi Vogt of Zurich clarified that the Wrap Up List she consulted was a cumulative list of every subcontractor ever enrolled, meaning, as she testified, the list included subcontractors "who were enrolled and are no longer enrolled," such as those no longer working on designated projects or that were erroneously enrolled (*i.e.*, ACC). (Vogt. Tr. at 14:15-23 at TRVa2828.) When asked if a contractor would "stay on that list even if they're unenrolled," she testified that was "correct." (Vogt. Tr., 14:15-23, TRVa2828 and 32:17-33:1, TRVa2832.) She also testified that she ultimately located Alliant's request to unenroll ACC, as well the Cancellation Endorsement for the workers' compensation component thereby removing coverage for ACC under the entire CCIP. (Vogt Tr. 10:13-11:7, TRVa2827.)

Additionally, Travelers mischaracterize a September 25, 2015 letter from Abbonizio suggesting it shows ACC was enrolled in the CCIP. (TRVb42.) Rather, this unsigned letter from an unknown author was purportedly sent to ACC by Abbonizio, which has no authority to enroll or unenroll contractors, and merely states ACC is "CCIP Approved." (TRVa1285.) In other words, just as the Enrollment Reports show, beginning on September 16, 2015, after ACC's COI was deemed compliant on September 4, 2015, ACC was reportedly "eligible" to work at the Project, just like other contractors not permitted to enroll. (TRVa2649-2669.) The letter clearly does not state (or mean) that ACC was "CCIP Enrolled", as Travelers disingenuously implies. (TRVb25.)

B. ACC WAS PERFORMING EXCLUDED DEMOLITION WORK ON THE DATE OF THE ACCIDENT

Travelers' argument that enrollment in the CCIP was mandatory for "subcontractors of every tier" at the Project, and therefore ACC must have been enrolled (TRVb7), is simply not true. Rather, the CCIP plainly does not permit certain contractors, including those performing demolition, like ACC, from enrolling. In fact, the CCIP Binder identifies several types of work at the Project that is not eligible for enrollment stating, in relevant part, that "…NO COVERAGE WILL BE PROVIDED TO … DEMOLITION…" (TRVa2617 and ZURa296.) While ACC may have been erroneously enrolled in the CCIP for a few hours before being unenrolled upon the realization that ACC's work was

demolition, ACC admits it had no other contracts or proposals during this fleeting erroneous enrollment period, and never attempted to re-enroll for subsequent contracts or proposals, ever. (ACC Tr. 144:4-22 at TRVa1535.). Further, on the date of the Accident, ACC was removing parts of the Ritz wall, demolition work contracted for in July 2015 that was admittedly barred from the CCIP. (Boggs Tr., at 19:20-20:4 at TRVa1462, 26:4-8 at TRV1464, 33:20-34:20 at TRVa1465-1466, 65:13-66:2 at TRVa1473-1474.)

Travelers' argument that enrollment is mandatory is also belied by the CCIP Manual, which specifically addresses subcontractors identified as "Parties Not Covered", including, critically, "ANY SUBCONTRACTOR of ANY tier" which Tutor, "at their sole discretion," opts to exclude. (4/16/15 version at TRVa516 and ZURa212; 9/8/14 version at ZURa261.) That includes ACC. The CCIP Manual also provides requirements for such "nonparticipating subcontractors" before starting work, including, as ACC did, providing "the Program Administrator [] the insurance certificate(s) and endorsement(s) as required[.]" (4/16/15 version at TRVa516; and 9/8/14 version at ZURa261.)

Travelers essentially admits that certain early work done on the Ritz retaining wall in August 2015 was "uncovered" demolition work; however, it argues that ACC was enrolled in the CCIP going forward, including for demolition work on the date of the Accident, even though that work was a

continuation of the August 2015 Ritz retaining wall work. (TRVb25.) To the contrary, after the Accident, two ACC employees admitted its work on the date of the Accident was demolition work. Boggs testified that the saw cutting on the Ritz wall "would be considered incidental demolition work." (Boggs Tr. 65:13-66:2 at TRVa1473-1474.) Further, Swindell (ACC's laborer) testified in the Hood Lawsuit that ACC's services were only utilized as excavation uncovered existing structures and that on the date of the Accident he (*i.e.*, ACC) was wire sawing parts of the concrete wall for removal that were recently located during excavation. (Swindell Tr., 14:15-15:13 at TRVa1610-1611 and 36:8-21 at TRVa1634; *see also* TRVa2971, photograph on date of Accident.) He further signed a statement confirming he "had been working the northeast corner of the job site" doing "cutting with an electric wire saw to demo concrete north face – wall north face." (Statement, TRVa1787-1788.)

A foreman for Abbonizio testified that ACC's role was "Basically demolition" and that it "was doing selective demolition." (Owens Tr., 80:7-15 at TRVa1869 and 174:5-8 at TRVa1963.) Moreover, Tutor confirmed that ACC's work at the Project on the date of the Accident was in fact demolition. For example, Timothy Mott, an Assistant Superintendent, testified in the Hood Lawsuit that ACC's work on the day of the Accident was demolition, in that Atlantic was performing "Excavating and removing existing foundations,

demolition" and further clarified that at the time of the Accident the crews doing the excavating and demolition work were Abbonizio and ACC and they were "Demolishing existing foundations right up against the neighboring Ritz [] Building." (Mott Tr., 107:1-4 at TRVa2200, 115:2-23 at TRVa2237, and 124:7-15 at TRVa2246.) Similarly, Anne Lorenz testified that Atlantic was demolishing parts of the concrete wall at the property line with the Ritz and that contractors performing demolition work were not allowed to enroll in the CCIP. (Lorenz Tr., 25:9-19 at TRVa1427 and 70:5-11 at TRVa1439.)

Additionally, the CCIP documents make it clear that Tutor has the authority to determine which contractors are permitted to be enrolled. In addition to the CCIP Manual, which unequivocally provides "Tutor Perini [] has the right to include or exclude ANY SUBCONTRACTOR of ANY tier from participating in the CCIP at their sole discretion" (4/16/15 version at TRVa516; legible 4/16/15 version at ZURa212; 9/8/14 version at ZURa261), the CCIP Contract has a definition of "Excluded Parties" including: "e. Any other party or entity [] that is excluded by Tutor Perini [] in its sole discretion, even if such party or entity is otherwise eligible." (TRVa498.)[10] Thus, ACC was either not permitted to enroll at all, or such enrollment was subject to Tutor's discretion.

[10] The Contractor Enrollment Form (Form A) also reflects this discretion noting "Tutor Perini reserves the right to determine who participates in the Wrap-Up Insurance Program." (TRVa2685.)

Moreover, the CCIP Policies provided Tutor with discretion to preclude ACC. Specifically, the Sole Agent for Insureds endorsement provides:

> IT IS AGREED THAT THIS POLICY IS ISSUED AT THE DIRECTION OF THE FIRST NAMED INSURED, WHICH SHALL BE SOLELY RESPONSIBLE FOR THE PAYMENT OF PREMIUMS AND LOSSES UNDER THE DEDUCTIBLE AMOUNT AS OUTLINED IN THE POLICY AND SHALL HAVE OTHER POLICY RIGHTS TO ACT ON BEHALF OF INSUREDS. THE INSUREDS HAVE ASSIGNED TO THE FIRST NAMED INSURED:
>
> * * *
>
> 2. THE RIGHT TO REQUEST CANCELLATION OF THE POLICY; AND
> 3. AUTHORIZATION TO ACT ON THEIR BEHALF AS RESPECTS CHANGES TO ANY PROVISIONS OF THIS INSURANCE POLICY.
>
> WE CONSENT TO SUCH ASSIGNMENT OF RIGHTS, TITLE AND INTEREST.

(TRVa123; and ZURa055.) The trial court properly found this endorsement gave Tutor the right to request ACC's unenrollment, which Tutor did and Zurich and Alliant effectuated. SSR p. 25 at TRVa1355; s*ee also Team Indus. Servs. v. Zurich Am. Ins. Co*., 2023 U.S. App. LEXIS 31491 (10th Cir. Nov. 29, 2023) (OCIP sponsor designates which contractors are eligible); *Maxim Crane Works, L.P. v. Zurich Am. Ins. Co*., 642 S.W.3d 551, 553 (Tex. 2022) (CCIP sponsor has discretion to exclude entities from coverage). This is how CCIPs work.[11]

[11] N.J. Schools Develop. Auth.'s OCIP III Ins. Proc. and Enrollment Manual, p. 8, https://www.njsda.gov/Content/Business/forms/OCIP_III_Manual.pdf (exclusion from enrollment in OCIP is at "sole discretion" of the NJSDA).

Within five hours of being sent the July 30, 2015 Welcome Letter, Tutor advised ACC that it "will not be able to enroll into the CCIP" because it "cannot enroll subcontractors into the CCIP who are performing structural demolition." (TRVa2779.) A few days later, on August 3, 2015, when Abbonizio requested a revised proposal from ACC, Abbonizio also provided Project Requirements confirming "Atlantic Concrete Cutting is also an excluded party under the CCIP[,]" which must "comply with all insurance requirements set forth in the CCIP Insurance [] Manual and Schedule 'B' as an excluded party." (ZURa323.) On August 5, 2015, Morris (ACC) was told by Boggs (ACC) "the owners are excluding all structural foundation demolition work from their CCIP[.]" (TRVa2803.) Boggs even clarified for Morris and Dimacale that it was ACC's "contract with C. Abbonizio that has been excluded." (TRVa2808.) Additionally, on August 11, 2015, Abbonizio's CFO advised Dimacale that "Atlantic [] must correct their Certificates of Insurance" and "review the CCIP manual for the insurance requirements for contracts not covered under the CCIP." (TRVa2873.) Additionally, on September 4, 2015, McGowan of Alliant notified ACC that "No payroll is required for 'excluded' contractors." (TRVa2900.) As further confirmation, on September 23, 2015, Kelsey Johnson confirmed to Morris that the Project, "isn't an OCIP reporting job either." (TRVa2914.) Thus, ACC was aware of its unenrollment from the CCIP in early

August 2015 based on demolition work, well ahead of the Accident, or any other time periods Travelers contends may apply. No provisions of the Zurich Policy, CCIP Manual, COI or any regulatory code support Travelers' contention that ACC was enrolled for the work performed on the date of the accident.

Perhaps most damning to Travelers' claim, in response to Abbonizio's request to revise the proposal, ACC provided Proposal Three, adding back insurance costs based on its unenrollment from the CCIP. (TRVa1488.) As the trial court observed in its Supplemental Statement of Reasons, ACC employees admitted *nine times*, without objection, that its work at the Project was not covered by the CCIP. (SSR p.30-31, TRVa1360-1361.) Moreover, ACC's understanding that it was not enrolled based on its demolition work is supported by the fact that, upon receipt of the Hood Lawsuit, it tendered its defense and indemnity to its direct liability carriers, and not to the CCIP. *Welcome v. Just Apts., LLC*, 2008 N.J. Super. Unpub. LEXIS 2466 (App. Div. July 11, 2018) (deriving intent based on which carrier a contractor forwarded a claim).

II. NEITHER REGULATION NOR COMMON LAW OBLIGATED ZURICH TO GIVE FORMAL NOTICE OF CANCELLATION

A. The Trial Court Was Correct When It Determined That New Jersey's Regulatory Scheme Does Not Apply To The CCIP

The trial court properly found that the New Jersey Administrative Code did not apply to the CCIP.

Travelers makes several baseless arguments as to why New Jersey regulations should apply to the CCIP. First, Travelers cites N.J.A.C. 11:1-20, arguing that it requires: (1) notice of "nonrenewal or cancellation" to be sent no less than 30 days prior to cancellation; and (2) that such notice shall provide the reason and be sent via certified or first class mail. (TRVb31.) However, as the trial court found, Travelers' argument sorely "misses the point" because the CCIP Policies were never cancelled and, instead, remained in effect for the Project for all other entities permitted to enroll in the CCIP. *See Matter of N.J.A.C., § 11:1-20*, 208 N.J. Super. 182 (App. Div. 1986) ("The rule was designed to curb what the commissioner conceived as abuses by insurance companies, including midterm policy cancellations, blanket nonrenewals, cancellations of entire lines of insurance and midterm premium increases without adequate reasons or notice to the insured"). In other words, the CCIP Policies were not cancelled, rather ACC was unenrolled, just hours after receiving the auto-generated Welcome Letter, at the request of Tutor, which had authority to request ACC's unenrollment. Travelers cites no testimony to support its statement that "every single party's representative testified that unenrollments from CCIPs are a rarity." (TRVb43.) In fact, Tutor's discretion to remove a contractor, albeit not commonly invoked, is akin to a policyholder

adding or removing vehicles from an automobile policy - the policy remains in effect, only the scheduled vehicles change. (Zurich Tr., 53:21-55:20, TRVa843.)

Travelers' argument also misses the point based on the plain language of N.J.A.C. 11:1-20. N.J.A.C. § 11:1-20.1, provides the Code's Scope as follows:

> **(a)** This subchapter shall apply to all commercial insurance policies […] except workers' compensation insurance, […] and any policy written by a surplus lines insurer. […] *this subchapter shall not be applicable to multi-state location risks* or policies subject to retrospective rating plans.

(Italics added.) The Code does not apply to the CCIP because it insures multi-state location risks. The CCIP covered Tutor projects throughout the country at the time of the Accident in Pennsylvania, including projects in California and Louisiana. (ZURa101, 135, 138, 154.) Travelers concocts a warped interpretation arguing that the trial court's ruling that the Code does not apply because the CCIP is a "multi-state location risk" is wrong because, according to Travelers, the "risk" in question is ACC, with just one location in New Jersey. Travelers incorrectly suggests the lower court's opinion would leave any insured that performs work in another state subject to cancellation. ACC, is not the risk insured by the CCIP, rather the risk – as identified by the CCIP Policies - is Tutor and its nationwide construction projects, further reinforcing why the Code does not apply here.[12] Moreover, the Project here involved not just the

[12] Travelers' also disregards the ACC Proposals highlighting its work in "MD, NJ, NY, PA, SC". (*See, e.*g., Proposal Three, TRVa1488-1489.)

Pennsylvania site, but a second insured site in New Jersey. (Lorenz Tr., 58:7-59:2 at TRVa1436.)

Travelers incorrectly contends that the trial court primarily based its finding that the Code did not apply because the CCIP contained a workers' compensation component. (TRVb33.) As noted above, the trial court's finding was primarily based on the fact that the CCIP Policies covered "multi-state location risks." However, the trial court observed, as an additional basis for finding the Code inapplicable, that the CCIP Policies had an inseparable workers' compensation element, one so intertwined that it was mandatory for all enrolled contractors, a fact that remains undisputed.

Travelers cites *Valley Nat'l. Bancorporation v. American Motorists Ins. Co.*, 316 N.J. Super. 152 (App. Div. 1998) for the position that statutes and regulations "reflect a public policy" to govern cancellation and that distinctions as to the type of policy are immaterial. While statutes and regulations may certainly inform public policy, it is clear that N.J.A.C. 11:1-20 purposely carved out certain types of insurance policies, like the CCIP. Further, *Valley* involved notice to a mortgagee of fire damaged property under a multi-peril property policy, far from similar to the CCIP Policies excluded by the plain language of the Code here. The *Valley* decision hinged on cancellation language in the policy and notice via mailing, but here, "cancellation" is not at issue and, in any event,

all insureds gave Tutor the sole discretion to act on their behalf. Finally, unlike the *Valley* plaintiff, ACC was aware and acknowledged its unenrollment numerous times and did not pay any premium, a key observation in the *Valley* decision. *Valley*, 316 N.J. Super. at 159 ("Moreover, here the policy expressly provides a mortgagee can receive loss payment if it '[p]ays any premium due under [the policy's] Coverage Part at [the insurer's] request if [the insured mortgagee] fail[s] to do so.'").

Travelers also cites *Harvester Chemical Corp.*, 277 N.J. Super. 421 (App. Div. 1994), a declaratory judgment action filed by an insured seeking coverage, under a policy cancelled mid-term, for an underlying lawsuit in which a claimant was seriously burned by the insured's dangerous product, arguing that *Harvester* rejected the notion that technical inapplicability of the cancellation regulations allow insurers to effectuate a mid-term policy cancellation "for any reason." As noted above, *Harvester* dealt with mid-term cancellation, which again is not at issue as the CCIP remained in effect. Notably, the *Harvester* Court actually found that N.J.A.C. 11:1-20 was not applicable because it went into effect subsequent to the policy at issue. *Harvester*, 277 N.J. Super. 421, 431. The *Harvester* Court ultimately remanded the case to determine whether the insurer had provided notice of mid-term cancellation to the insured and, if so, "whether there were objective and reasonable underwriting reasons at the time the notice

was sent that did not exist at the inception of the policy." *Id*., at 432. Moreover, the decision emphasized the purposes of cancellation rules, including: (1) "prohibit[ing] arbitrary mid-term cancellation," (2) ensuring an insurer "notify [the insured] of an intent to cancel" and (3) "protect[ing] injured third parties" by obviating "uncompensated injury." Here, none of the three stated purposes are relevant to the facts here. Zurich did not effectuate an *arbitrary* mid-term cancellation, but instead unenrolled ACC from the CCIP based on excluded demolition work and, further, the unenrollment happened upon Tutor's request. Second, ACC was notified that it was being unenrolled and acknowledged the same multiple times. Last, ACC was not left bare without coverage, but was defended by Travelers (TRVa2933-2934), and plaintiffs in the Hood Lawsuit were fully compensated based on a settlement partially funded by Travelers and Evanston, each of which provided coverage for ACC. Accordingly, N.J.A.C. 11:1-20, *et seq*., as well as other regulations and statutes, are not applicable here.

B. New Jersey's Common Law Does Not Require Formal Notice to ACC That It Was Unenrolled From The CCIP

Travelers' contention that New Jersey common law mandates compulsory coverage for ACC under the CCIP, despite ACC not paying premium towards it, is similarly unpersuasive. Notably, this argument was not raised in Travelers' original brief in support of summary judgment filed before the trial court. Rather, Travelers' common law argument was first raised in Travelers' reply

brief and goes beyond the issues raised in its summary judgment motion: that ACC's unenrollment from the CCIP was ineffective based solely on N.J.A.C. § 11:1-20. In any event, Travelers' argument fails for the reasons discussed herein.

Travelers cites *Bauman, v. Royal Indem. Co.*, 36 N.J. 12 (1961), for the suggestion that an insurer's obligations to provide notice of cancellation or changed policy language upon renewal are part of New Jersey common law and predate any regulations or statutes subsequently enacted. The *Bauman* Court concluded that, upon a homeowner's insurance policy renewal, "[a]bsent notification that there have been changes in the restrictions, conditions or limitations of the policy, the insured is justly entitled to assume that they remain the same and that his coverage has not in anywise been lessened." *Bauman*, 36 N.J. at 25. The Court added that "any reduction in coverage upon a renewal must be called to the insured's attention so that the insured can decide whether to continue the coverage or purchase new insurance." *Id*., at 26. What distinguishes the decision in *Bauman* (involving a homeowner's policy) from the situation here (involving a CCIP), is that the common law argument - which Travelers contends is based on business morality and decency - falls flat because ACC was actually notified and acknowledged that it was being unenrolled based on its demolition work (the only work it had been retained to perform at the time of its short-lived erroneous enrollment, and the very same work it was

performing on the date of the Accident). Further, ACC maintained its coverage elsewhere – through Travelers and Evanston – meaning ACC was not left bare, and claimants in the Hood Lawsuit were not left without a source of recovery. moreover, unlike the insured in *Bauman*, ACC never paid premiums (either directly or via a reduced proposal) for the CCIP Policies and is, therefore, not entitled to coverage under them. Finally, the *Bauman* considerations are inapplicable here where the request for unenrollment came from Tutor, the general contractor and CCIP sponsor to which all subcontractors gave authorization to act as the sole agent on their behalf with regard to changes to or cancellation of the CCIP pursuant to the Sole Agent for Insureds endorsement.

Travelers cites *McClellan v. Feit* , 376 N.J. Super. 305 (App. Div. 2005), for the proposition that an amended definition of "occurrence" in a renewal policy was ineffective after the insurer failed to provide proper notice. Relying on *Bauman*, the *McClellan* Court, reached a similar conclusion holding that an insurer which reduces coverage under a homeowner's policy upon renewal must provide the broader coverage offered in the prior policy where the reduction was not *adequately* called to the homeowner's attention. *McClellan*, 376 N.J. Super. at 315. As a result, the Appellate Division remanded the case for a determination as to whether proper notice of the renewal was in fact provided. *Id*., at 316. The *McClellan* decision called for an insured to be "specifically and clearly

informed," which is exactly what happened here when ACC was notified of its unenrollment, acknowledged that and increased its proposal. Notably, as Travelers concedes, relying on the plain language of N.J.A.C. 11:1-20.2, upon which the homeowners also relied, the *McClellan* Court held that it was not applicable because, at the time, the regulation only applied to notice of cancellation of a policy and not renewal. *Id*.

Likewise, *Millbrook Tax Fund, Inc. v. P.L Henry Assocs.*, 344 N.J. Super. 49 (App. Div. 2001), a case involving a change during renewal to a reporting period under a claims-made and reported professional liability policy, does not support Travelers' appeal. *Millbrook*'s holding was based on the rationale of *Bauman*, which as discussed above, does not apply. Additionally, while the *Millbroo*k Court held that the reporting period in the original policy must remain in effect, as outlined in Section I.A., this does not help Travelers' cause because ACC did not qualify as a "Named Insured" under the Named Insured – Contractor Controlled Insurance Program endorsement in the first instance.

Travelers points to *Skeete v. Dorvius*, 184 N.J. 5 (2005), observing that the Supreme Court there declined to enforce a "step-down" provision in the uninsured/underinsured provisions of a renewal automobile policy issued to an individual where the insurer provided insufficient notice. Of course, *Skeete* was based on notice requirements mandated by statute, N.J.A.C. 11:3-15.1 to -15.7.

Such is not the case here where Travelers relies on a different administrative code and the perception of a sophisticated business rather than an individual. Further, the Supreme Court in *Skeete* neatly summarized its holding, stating:

> In sum, we hold that policy changes must be conveyed fairly to the policyholder, although in no particular form, and that in this case the insurer fell short.

Id. at 11. Here, not only was ACC given notice, but it acknowledged its unenrollment from the CCIP, raised its proposal for work at the Project, including the work on the date of the Accident, and made an effort to ensure that its direct liability policies through Travelers and Evanston were in effect. Travelers' reliance on a September 25, 2015 letter from Abbonizio suggesting it shows ACC was covered under the CCIP is not only factually incorrect, but a red herring. (TRVb38.) This unsigned letter, purportedly sent by Abbonizio, having no authority to enroll or unenroll contractors, states that ACC is "CCIP Approved." (TRVa1285.) In other words, just as the Enrollment Reports state, beginning on September 16, 2015, after ACC's COI was deemed compliant by Alliant on September 4th, ACC was "eligible" to work at the Project, but it does not mean or say ACC was "CCIP Enrolled."

Travelers' assertion that the notification by ACC from others is immaterial because such notices could not be delegated lacks credibility. (TRVb39.) Travelers makes this argument even though Morris of ACC

acknowledged that it was protocol for Alliant to handle all communications with subcontractors related to eligibility, enrollment and unenrollment. (Morris Tr., 158:10-20 at TRVa2729.) Travelers further argues that the decision in *Barbara Corp. v. Bob Maneely Ins. Agency*, 197 N.J. Super. 339 (App. Div. 1984) compels notice obligations to remain with the insurer. (TRVb39.) While Travelers' argument may be true in certain circumstances, such as to avoid lapse or protect innocent third parties, as was the case in *Barbara*, it should not be expanded to cover CCIPs where communications flow through the CCIP administrator and sponsor. Additionally, subsequent to *Barbara*, this Court has found that automatic renewal was not appropriate where a broker, instead of the insurer, had provided notice to the insured and the insured acknowledged its uninsured status. *See Insinga v. Hegedus*, 231 N.J. Super. 562 (App. Div. 1989). ("We clearly did not intend to hold that if the broker did send an effective, proper and timely notice, the insurer would be deprived of the benefit thereof.")

Accordingly, Travelers must not be allowed to shift its risk to the CCIP (or "steer the claim" as ACC's broker suggested) simply because ACC misinterpreted a third-party's letter, particularly where ACC was aware that it was never permitted to enroll in the CCIP in the first instance.

III. REIMBURSEMENT OF ATTORNEYS' FEES AND COSTS PURSUING THIS ACTION ARE UNRECOVERABLE

As Travelers notes in its brief, the trial court did not address the recoverability of attorneys' fees and costs Travelers spent prosecuting this action. But that was for good reason: the trial court overwhelmingly ruled in Zurich's favor and, thus, Travelers was not a "successful claimant" under R. 4:42-9(a)(6). This Court should reach the same conclusion.

Even if Travelers succeeds on appeal, which is highly unlikely, it should not be allowed to recovery attorneys' fees and costs because New Jersey "has a strong policy disfavoring the shifting of attorneys' fees." *N. Bergen Rex Transp., Inc. v. Trailer Leasing Co.*, 158 N.J. 561, 569 (1999). Further, awarding counsel fees pursuant to R. 4-42-9(a)(6) is not mandatory for a successful claimant on a liability policy. *Enright v. Lubow*, 215 N.J. Super. 306, 313 (App. Div. 1987). Instead, the "trial judge has broad discretion as to when, where, and under what circumstances counsel fees may be proper and the amount to be awarded." *Iafelice ex rel. Wright v. Arpino*, 319 N.J. Super. 581, 590 (App. Div. 1999). The exercise of that discretion should respectfully result in a rejection of Travelers' request for recovery of its inflated attorneys' fees and costs.

R. 4:42-9(a)(6) was promulgated to both discourage groundless disclaimers and to provide more equitably to an insured the benefits of the insurance policy. *Kistler v. N.J. Mfrs. Ins. Co.*, 172 N.J. Super. 324, 328-330

(App. Div. 1980). To award attorneys' fees under R. 4:42-9(a)(6), the Court must evaluate the factors outlined in *Enright v. Lubow*, 215 N.J. Super. 306, 313 (App. Div. 1987). The *Enright* factors governing a court's discretion are: "(1) the insurer's good faith in refusing to pay the demands; (2) excessiveness of plaintiff's demand; (3) bona fides of one or both of the parties; (4) the insurer's justification in litigating the issue; (5) the insured's conduct in contributing substantially to the necessity for the litigation on the polices; (6) the general conduct of the parties; and (7) the totality of the circumstances." *Id*. at 313.

Thus, even if Travelers were somehow successful here, the Court must still apply the factors under *Enright*. Here, "the bona fides" of Zurich's declination is based on ACC's actual unenrollment from the CCIP, as well ACC's acknowledgment that it was unenrolled, weigh sharply against awarding attorneys' fees. Also, Zurich's justification in litigating coverage is well-reasoned based on the overwhelming evidence that ACC was not enrolled at the time of the Accident and ACC's several admissions of the same. The trial court's denial of Travelers' summary judgment motion and granting of Zurich's motion of Zurich further bolsters Zurich's decision not to provide coverage and defend its coverage position. Additionally, the general conduct of the parties, including Zurich's large payment on behalf of other entities settling the Hood Lawsuit must also be taken into account. Finally, the "totality of the circumstances" must

be considered, including the compelling support for Zurich's conclusion that ACC was not an insured under the CCIP and Travelers' (ACC's primary insurer with the most financial incentive) unwillingness to pursue coverage under the CCIP via this DJ Action, which only changed when it was named as a defendant. Further, the Court should consider that ACC was informed and acknowledged that it had been unenrolled from the CCIP, did not object, and ultimately maintained coverage for the Accident through Travelers and Evanston. The Court should likewise consider that ACC's pricing for the work at the Project included an increase based on its unenrollment from the CCIP (as it did with the increased proposal), and even that Travelers increased ACC's premiums at the end of the Travelers Policy period. Finally, in situations involving "novel and unsettled insurance coverage issues," as is the case here, the *Enright* factors do not favor an award of fees. *Jignayasa Desai, D.O., LLC v. N.J. Mfrs. Ins. Co*., 473 N.J. Super. 582, 590 (App. Div. 2022) (declining to award attorney fees after analyzing *Enright* factors where the "issue presented was novel and unsettled."). The trial court's decision in Zurich's favor, as well as the trial judge's statement on the record expressing surprise that he was deciding issues of first impression, support the argument that the issues presented were novel and unsettled, thereby weighing heavily against an award of attorneys' fees and costs. (May 26, 2023 Oral Arg. Tr. 90:19-24.) Therefore, the Court here – or the

trial court on remand - should exercise its discretion and deny Travelers' claim for attorneys' fees in the DJ Action.[13]

IV. Even if Coverage Were Found Under the CCIP, Travelers' Settlement Payment Is Not Recoverable Under the Voluntary Payments Doctrine

As an alternative ground for affirming the trial court's judgment denying Travelers' claim for recovery of the amount it paid toward indemnity, even if it is determined that ACC was enrolled in the CCIP at the time of the Accident, the settlement payment made by Travelers is unrecoverable due to the voluntary payments doctrine ("VPD"). To apply the VPD, this Court must only make four determinations, namely that Travelers: 1) made the payment voluntarily, 2) was without a mistake of fact, 3) was not a victim of fraud, and 4) was not under duress or extortion. *Cont'l Trailways, Inc. v. Dir., Div. of Motor Vehicles*, 102 N.J. 526, 548 (1986). Courts in New Jersey have applied the VPD to inter-insurer reimbursement lawsuits, as is the case here. *Palisades Ins. Co. v. Horizon Blue Cross Blue Shield of New Jersey*, 469 N.J. Super. 30 (App. Div. 2021) (affirming that the VPD extinguished a paying insurer's claim for reimbursement against another insurer where the paying insurer made payment on behalf of the insured without mistake of fact, fraud, duress, or extortion).

[13] For the same reasons discussed in this section, if Travelers is a "successful claimant," the Court should respectfully exercise its discretion and deny an award of pre-judgment interest. *In re Estate of Lash*, 169 N.J. 20, 34 (2001).

Here, Travelers voluntarily paid its portion of the settlement attributed to ACC. (TRVb1.) Travelers does not allege fraud, duress or extortion. And there is no mistake of fact because Travelers was aware of the Accident and that Zurich had disclaimed a coverage obligation to ACC under the CCIP. Further, when the Hood Lawsuit settled in September 2019, the DJ Action was in suit and the issue of ACC's alleged CCIP enrollment remained in dispute. Travelers may attempt to distinguish *Palisades*, 469 N.J. Super. 30, arguing there was no mistake of fact (only a mistake of law) in that case. But, like the paying insurer in *Palisades*, Travelers had no mistake of fact when it made a settlement payment because it knew Zurich had disclaimed coverage to ACC under the CCIP based on ACC's unenrolled status. *See Palisades*, 469 N.J. Super. at 40 (no mistake of fact because paying insurer was provided "with notice that it was not obligated to pay the subject claims").

Further, Travelers also failed to reserve its rights when it paid to settle the Hood Lawsuit without asserting a reservation based on its Wrap-Up Exclusion. (TRVa2933-2934.) Travelers may further claim that it pursued coverage in the DJ Action to obtain a ruling that the CCIP should have covered the claim in the Hood Lawsuit, but Travelers did not initiate the DJ Action, neither did it file suit against ACC seeking a declaration of no coverage based on its Wrap-Up

Endorsement. Travelers' Crossclaim in the DJ Action does not belatedly create a reservation of rights where one never existed.

Travelers may point to *Jorge v. Travelers Indem. Co.*, 947 F.Supp. 150 (D.C.N.J. 1996), for the proposition that it may pursue reimbursement of the settlement amount paid based on either conventional or equitable subrogation. The *Jorge* court held that an insurer, which paid a judgment on behalf of its insured, was allowed to pursue recovery for the payment from another carrier *via* conventional subrogation based on policy language, as well as equitable subrogation based on principles of equity (with the VPD applicable only to the latter). *Jorge*, at *6-7. However, equitable subrogation does not apply given ACC's notice it was unenrolled and because it paid no premiums toward the CCIP. Importantly, *Jorge* is an outlier that has never been cited by a New Jersey State Court since its ruling more than 25 years ago. Travelers' Crossclaim did not assert any theories based on conventional subrogation, rather it asserted an unjust enrichment claim, and to date no subrogation agreement has been produced. (TRVa706.) Further, in subrogation cases, the insured's right to recovery against a third-party tortfeasor vests in the insurer, and the insurer steps into the shoes of the insured pursues the tortfeasor. *City of Asbury Park v. Star Ins. Co*., 242 N.J. 596 (2020). Here, Travelers does not seek recovery against a third-party tortfeasor.

Because Travelers does not allege fraud, duress or extortion, and there was no mistake of fact in the payment, Travelers' payment remains subject to the VPD.

V. If Coverage Were Found Under the CCIP, Coverage Should Be Rescinded Due to ACC's Misrepresentations

Because it ruled that ACC was not enrolled in the CCIP at the time of the Accident and that the Code did not apply to mandate coverage for ACC, the trial court did not address Zurich's further argument that rescission would be appropriate if coverage were found. However, as an alternative ground for affirming the trial court's judgment, even if it is determined that ACC was enrolled in the CCIP at the time of the Accident, rescission is appropriate as to ACC due to ACC's material representation in the enrollment process.

"'[A] representation by the insured, whether contained in the policy itself or in the application for insurance, will support the forfeiture of the insured's rights under the policy if it is untruthful, material to the particular risk assumed by the insurer, and actually and reasonably relied upon by the insurer in the issuance of the policy.'" *First Am. Title Ins. Co. v. Lawson*, 177 N.J. 125, 137 (2003). A misrepresentation is material if, when made, "a reasonable insurer would have considered the misrepresented fact relevant to its concerns and important in determining its course of action." *Longobardi v. Chubb Ins. Co. of N.J.*, 121 N.J. 530, 542 (1990). To be material, the false statement must have

"'naturally and reasonably influence[d] the judgment of the underwriter in making the contract at all, or in estimating the degree or character of the risk, or in fixing the rate of premium.'" *Mass. Mut. Life Ins. Co. v. Manzo*, 122 N.J. 104, 117 (1991). "The law is well settled that equitable fraud provides a basis for a party to rescind a contract." *First Am. Title, supra*, 177 N.J. at 136. Equitable fraud "'requires proof of (1) a material misrepresentation of a presently existing or past fact; (2) the maker's intent that the other party rely on it; and (3) detrimental reliance by the other party.'" *Id.* at 136-37.

Prior to the erroneous CCIP enrollment, ACC, completed, signed and submitted a Contractor Enrollment Form (Form A), which described ACC's work as "concrete cutting." (TRVa2685.) Also submitted by ACC on July 29, 2015, was a completed Insurance Cost Worksheet (Form B) which described the work with Workers' Compensation Classification Code 0854, a code for "Concrete Construction." (TRVa2687.) At no point did ACC advise that it had been retained to perform demolition work and contractors performing demolition work were not permitted to enroll, a fact that ACC was aware of. (SSR p.30-31, TRVa1360-1361; and Lorenz Tr., at 25:9-19 at TRVa1427 and 70:5-11 at TRVa1439.) Zurich's corporate designee, who was also the lead underwriter, testified that demolition contractors were not permitted to enroll. (Zurich Tr. 19:4-23 at TRVa834; 24:10-24 at TRVa835; 34:5-35:16 at

TRVa838; 79:9-13 at TRVa849.) As the trial court determined, the evidence confirms that ACC was performing demolition on the day of the Accident. (SSR p. 17-8, TRVa1347-1348.) Thus, if this Court finds that ACC was enrolled in the CCIP on the date of the Accident, the CCIP Policies should be rescinded as to ACC because: ACC's enrollment forms contained false statements, which were material; Zurich reasonably relied on ACC's representations in erroneously enrolling ACC into the CCIP; and had ACC been truthful with the type of work it was performing, it would never have been erroneously enrolled.

While Travelers may contend that ACC's submission describing "concrete cutting" was a subjective response that cannot be a material misrepresentation, that doesn't change the fact that ACC's representation was "untruthful, material to the particular risk assumed by the insurer, and actually and reasonably relied upon by the insurer in the issuance of the policy." *First Am. Title Ins. Co. v. Lawson*, 177 N.J. 125, 137 (2003). Moreover, intent to defraud is not required. *Mass. Mut. Life Ins. Co. v. Manzo*, 122 N.J. 104, 114-115 (1991). "Even an innocent misrepresentation can constitute equitable fraud justifying rescission." *Ledley v. William Penn Life Ins. Co*., 138 N.J. 627, 635 (1995).

Travelers may also implausibly counter that there was no detrimental reliance based on ACC's misrepresentation. However, this is contrary to the facts: ACC was erroneously enrolled in the CCIP for a brief window based on

its misrepresentation; ACC, Evanston and Travelers have asserted claims for ACC's coverage; Zurich has expended substantial resources defending such claims; and Zurich could potentially be liable for such claims based on ACC's misrepresentation. Additionally, Zurich, Tutor and Alliant were unaware that ACC had worked at the Project doing anything other than the excluded demolition work. (Lorenz Tr., 56:8-12 at TRVa1435; Enrollment Reports at TRVa2649-2669.) Thus, if ACC is found to have been enrolled at the time of the Accident, the CCIP Policies should be rescinded with regard to ACC.

CONCLUSION

Accordingly, Zurich respectfully request the Court affirm the trial court's well-reasoned: (1) denial of Travelers' Motion for Summary Judgment; and (2) granting of Zurich's Motion for Summary Judgment.

Dated: February 29, 2024

Respectfully submitted,
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ATLANTIC CONCRETE CUTTING, INC. and EVANSTON INSURANCE COMPANY, Plaintiffs,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003393-22T4
vs.	:	
ZURICH AMERICAN INSURANCE COMPANY, AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY, Defendants/Respondents,	:	On Appeal From: Superior Court of New Jersey Law Division Burlington County Docket No.: BUR-L-742-19
ALLIANT INSURANCE SERVICES, INC., Defendant,	:	Sat Below: Hon. James J. Ferrelli, J.S.C.
and TRAVELERS INDEMNITY COMPANY OF AMERICA, Defendant/Appellant.	:	

REPLY BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANT/APPELLANT THE TRAVELERS INDEMNITY COMPANY OF AMERICA

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* Defendant Travelers' supplemental appendix is abbreviated as "Dtsa." Dtsa15, *et seq.*, is a letter to the court below, which is submitted pursuant to *R.*2:6-1(a)(2) to confirm that a germane argument was properly presented below, refuting respondents' assertion that an argument "was first raised in Travelers' reply brief and goes beyond the issues raised in its summary judgment motion." (Zb40.) *See, post* at 20, n.14.

PROCEDURAL HISTORY

Defendant/appellant Travelers adopts the procedural history set forth in its opening brief.

STATEMENT OF FACTS

Travelers adopts the statement of facts set forth in its opening brief, with the following commentary regarding Zurich's counter-statement. Although Zurich states that "the facts matter" (Zb1), some do, and some don't. On motions for summary judgment, only "material" ones do – facts "that are irrelevant and unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.,* 477 *U.S.* 242, 250, 91 *L.Ed.* 21 202, 248 (1986).

Here, Zurich engages in a herculean effort to shift focus from its own legal notice obligations as a New Jersey-admitted insurer to its irrelevant *ad hoc* factual contrivance that it cut from whole cloth years after the underlying accident. However, the only truly material facts in relation to the applicable substantive law governing Zurich's role as ACC's insurer are that: ACC became a "Named Insured" under the Zurich CCIP liability policies, and a separately issued workers compensation policy (Dta 837-842,851,949,951); Zurich was aware of ACC's status as such (Dta1320); Zurich did not send ACC any notice that its CCIP coverage was terminated upon ACC's alleged "unenrollment," nor did it otherwise communicate at all with ACC regarding

its coverage (Dta850,985); and that Zurich formally notified the Pennsylvania Workers Compensation Bureau ("WCB") of its cancellation of ACC's separate workers compensation policy, without telling ACC.

In the context of the governing law – which imposes upon insurers such as Zurich the non-delegable duty to give insureds such as ACC notice of coverage termination – the focus is on Zurich's conduct. Its tautological rehash of the ambiguous third-party communications cited in the Law Division's opinion *twice* in its overlength opposition brief in its effort to deflect from its conceded failure to convey the required notice to ACC is legally irrelevant and factually immaterial.[1]

I. ZURICH'S OBLIGATION TO NOTIFY ACC

Zurich implausibly argues that it had no obligation whatsoever to provide notice to ACC of the cancellation of its CCIP coverage despite ACC's undisputed initial qualification as Zurich's "Named Insured." Zurich claims that it is exempt from the settled law that requires insurers to provide notice of substantive coverage changes under every other type of insurance because it issued its otherwise run-of-the-mill liability policies in the context of a CCIP,

[1] *Millbrook Tax Fund, Inc. v. P.L. Henry & Assoc., Inc.,* 344 *N.J.Super.* 49, 54 (App.Div.2001) (prohibiting policy change "without specifically informing" the insured of the change, "irrespective of the state or quality of [the insured's] actual knowledge concerning" the provision at issue).

which, it says, allowed it to delegate its responsibilities as a licensed New Jersey insurer to a construction company. However, the complexity of Zurich's argument proves the necessity that it retain singular responsibility for conveying notice of coverage changes to those affected by them.

A. The Regulation Applies To "Cancellation[s]" Not To "Polic[ies]."

Zurich's argument that *N.J.A.C.* 11:1-20 does not apply "because the CCIP **Policies** were never cancelled and, instead remained in effect for the Project for all **other** entities" (Zb36), is meritless. By its terms, *N.J.A.C.* 11:1-20.2(d) applies to "**cancellation[s]**," not to "**policies**": **"No *cancellation*** . . . shall be valid." This contrasts with *N.J.A.C.* 11:1-20.2(a), which addresses non-renewals: "No **policy** shall be non-renewed." Where a term is "carefully employed . . . in one place [in a regulation] and excluded [] in another, it should not be implied where excluded." *Twp. of W. Orange v. 769 Assocs., LLC*, 198 *N.J.* 529, 540–41 (2009); *Lopez v. N.J.A.F.I.U.A.,* 239 *N.J.Super.* 13, 19 (App.Div.) (noting differences between cancellation and non-renewal), *certif. denied*, 122 *N.J.* 131 (1990).

Longstanding case law, which treats the cancellation of divisible risks within a policy as severable, further undermines Zurich's erroneous regulatory interpretation. In *Studzinski v. Travelers Ins. Co.,* 180 *N.J.Super.* 416, 421 (Law Div.1980), the court invalidated the cancellation of that portion of an

automobile policy covering a principally insured vehicle after the insured failed to pay the premium on a subsequently added vehicle. The "add-on" vehicle's coverage was deemed "divisible" from the already-paid-for coverage on the originally insured vehicle, creating "an ambiguous situation" that had to be construed in favor of continuing coverage for the principal vehicle, although coverage for the add-on vehicle, instead of the entire policy, remained cancelled. *Cf., Pawlick v. N.J.A.F.I.U.A.*, 284 *N.J.Super*. 629, 632 (App.Div.1995) (upholding cancellation as to a named insured, but noting that an additional insured vehicle lessor, to which the insurer "neglected to send notice of cancellation," remained covered by the policy and was successfully defended by the insurer). Similarly, here, Zurich confirms that the CCIP policies "remained in effect" as to subcontractors other than ACC, thereby admitting the "divisibility" of its CCIP coverage. (Zb36.)

This coverage severability also vitiates Zurich's "multi-state risk" argument (Zb37), which again ignores the plain language of the regulation. The first sentence of *N.J.A.C.* 11:1-20.1(a) states that it applies to "**all** commercial **policies**" other than those it specifically exempts in that first sentence. The second sentence then separately addresses "multi-state location ***risks,"*** along with "***policies*** subject to retrospective rating plans." The divisibility of the CCIP policies according to each "Named Insured"

subcontractor establishes that each subcontractor constitutes its own separate "***risk***" under the Zurich liability policies. The particular "***risk***" at issue in this instance is ACC, which only has one "**location**" in a single state – New Jersey. "[W]e are convinced 'multi-state location risks' does not apply to a New Jersey corporation … with its sole office location in New Jersey, irrespective of whether the performance of its operations may extend beyond New Jersey borders." *Nova Dev. Grp., Inc. v. J.J. Farber-Lottman Co.,* No. A-5531-08T2, 2010 *WL* 4117113, at *2 (App. Div. 2010) (Dtsa1.)

Zurich's claim that the regulation is inapplicable because of an "inseparable workers' compensation element" (Zb38) again ignores the law. First, Zurich's "liability" policies are not "workers compensation insurance." Second, *N.J.S.A.* 11:1-20.1(a) is inapplicable to "workers compensation insurance" because such insurance is governed by its own cancellation statute, *N.J.S.A.* 34:15-81. *Calderon v. Jiminez,* 356 *N.J.Super.* 513, 515 (App.Div.) (coverage continuation deemed remedy for non-compliant notice), *certif. denied*, 177 *N.J.* 497 (2003).

B. The Applicable Law Is Consistently Construed Across Coverage Types

Zurich's effort to distinguish the cases that address continuation of coverage as a remedy for deficient – or in this case, non-existent – notice of termination (Zb38-40), is unavailing. These cases all confirm the bigger

picture, *i.e.*, that "continuation of coverage is favored in our law." *Bright v. T.W. Suffolk, Inc.,* 268 *N.J.Super.* 220, 225 (App.Div.1993). The technical factual distinctions Zurich attempts to draw only serve to prove the point that cancellation statutes, regulations and common law principles are complementary and establish a consistent body of law across different lines of coverage to facilitate this oft-stated policy.

Although Zurich also tries to circumvent the law altogether by leaning into its unenrollment argument, suggesting that "here, cancellation is not an issue" (Zb38), Zurich itself equates "cancellation" with "unenrollment." (Tb19-20.) Regardless, Tutor's purported "unenrollment" of ACC could not be consummated without Zurich's regulatorily-valid proper notice that "contain[ed] the standard or reason upon which the **termination** is premised" and "specif[ied] in detail the factual basis" of ACC's termination. *N.J.A.C.* 11:1-20.2(g). Here, even though Zurich was the only party empowered to change its own policy, and was also contractually charged with giving notice (Dta140), it never provided any notice to anyone of the cancellation of ACC's liability coverage – not even to Tutor. (Tb24, Dta1077-80.) This is in contrast to the notice that Zurich, not Tutor, gave to the WCB of termination of ACC's workers compensation policy – Zurich's disingenuous effort to conflate the

two (Zb28), notwithstanding.[2] The burden of proving notice rested on Zurich; its concession that it never sent any notice is also its concession of its failure to carry that burden.

C. Zurich Failed To Provide ACC With Specific And Clear Notice

The venerable common law requiring notice of policy changes, which is cumulative to the regulatory and statutory requirements, is especially applicable here.[3] Zurich's effort to avoid it is all premised on its false contention that "ACC did not qualify as a 'Named Insured' under the [Zurich policy's] Named Insured Contractor Controlled Insurance Program endorsement **in the first instance**." (Zb43.) It is beyond dispute that ACC initially enrolled in the CCIP, was issued the requisite certificate of insurance, and therefore became a "Named Insured" under the Zurich endorsement in that "first instance." (Tb16-17.)

This law has been applied to various types of coverage and extends to settings well beyond cancellation and other policy changes. The application of this requirement to different coverage lines over the past sixty-odd years – notwithstanding the applicability of various regulatory notice mandates –

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[2] Despite Zurich's mischaracterization, Randi Vogt emphatically confirmed her testimony thusly: "Did you see any documents that related to a cancellation of coverage **under a GL policy**? A. **No. I did not**." (Dta2827.)

[3] *N.J.A.C.* 11:1-20.1(c) states: "[T]hese rules are not exclusive," and that the "rights provided by these rules **are in addition to and do not prejudice any other rights policyholders may have at common law**."

confirms the universality of continuation of coverage as a remedy for improper notice.[4]

Zurich's argument that common law notice requirements "should not be expanded to cover CCIPs" (Zb45) is baseless, all but guaranteeing repetition of the wasteful depletion of resources, general messiness and uncertainty this case has engendered. As this case demonstrates, CCIPs are bureaucratically-layered and laden with red tape. Yet, one of the primary selling points of wrap-ups is to facilitate retention of less costly subcontractors, which may not have the wherewithal to procure policies with the preferred "depth of coverage."

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[4] *Bauman v. Royal Indem. Co.* 36 *N.J.* 12 (1961) (homeowner policy; no corollary regulatory notice requirement); *McClellan v. Feit,* 376 *N.J.Super.* 305 (App.Div.2005) (same); *Millbrook Tax Fund, Inc. v. PL Henry Assoc.*, *supra,* 344 *N.J.Super.* 49 (App.Div.2001) (professional liability policy); *Skeete v. Dorvius,* 185 *N.J.* 5 (2005) (personal automobile policy; notice also governed by regulation); *See also, Mangiaricina v. American Cas. Co. of Reading, PA,* 2008 *WL* 1733611 (App.Div.2008) (commercial auto policy: "Nothing in either *Bauman* or *Skeete* suggests that the holdings are limited to personal auto policies," and confirming that the regulations "are not exclusive"), *certif. denied,* 199 *N.J.* 511 (2009) (Dtsa4); *A&C Investment Gp., LLC v. Zurich-American Ins. Co.*, 2006 *WL* 8457335 (D.N.J.2006) (concept applicable to commercial property coverage issued by Zurich; no reference to regulation) (Dtsa9). The obligation to provide proper notice even applies beyond policy changes. *Cf. Erie Ins. Exch. v. Lobenthal*, 114 *A*.3d 832, 839 (Pa.Super.2015) (reservation of rights invalid as to resident relative additional insured who was not separately advised of the reservation); *Knox-Tenn Rental Co. v. Home Ins. Co.*, 2 *F*.3d 678, 682 (6th Cir.1993) (denial ineffective where reservation of rights issued to company did not also provide notice thereof to an insured employee). Notice is required for all "substantive" policy changes, *e.g.,* "adding or removing vehicles." (Zb37.) (Zurich's, and the Law Division's, synonymization of inanimate objects with people who are potentially subject to devastating financial consequences when their coverage is cancelled without notice is troubling.)

Resnick, Richard, "Wrap-ups: Back to Basics," *IRMI Articles, Expert Commentary*.https://www.irmi.com/articles/expert-commentary/wrap-ups-back-to-basics.

Zurich improperly, but unfortunately effectively, rooted through reams of this red tape to concoct its disclaimer. The result of this blatant impropriety resulted in the exchange of approximately 1,000,000 pages of documents, nearly a dozen depositions, the filing of 22 briefs and the expenditure of approximately $1,000,000 of counsel fees by Travelers and plaintiffs in this lawsuit, so far. Zurich needed 77 exhibits, encompassing over 1,200 pages, and 131 paragraphs of allegedly "material" facts to support its motion. (Dta1384, *et. seq*.) The small subcontractors that entities such as Tutor seek to attract to save costs, while preserving their risk transfer preferences through CCIPs, simply cannot absorb these resources to vindicate their interests when coverage is denied – not to mention risking the potentially devastating costs of large judgments.

Nor does the fortuitous existence of ACC's Travelers and Evanston policies relieve Zurich of its obligation to have provided ACC with "specific and clear" notice of cancellation. Those policies, issued prior to ACC's CCIP coverage are intended to be mutually exclusive to the Zurich policies, and not to replace Zurich's coverage. Indeed, many policies without wrap-up

exclusions nevertheless exclude injuries to employees of other contractors. *American Wrecking Corp. v. Burlington Ins. Co.*, 400 *N.J.Super.* 276 (App.Div.2008) (upholding "cross-liability" exclusion). If anything, the complexity and asserted fluidity of CCIP policies exacerbates the potential that contractors will be "left bare," and that claimants will be "left without a source of recovery" (Zb42), if a CCIP insurer such as Zurich is relieved of its obligations.[5]

The fact that ACC was not charged a premium (Zb39,51) is likewise immaterial; all continuation cases implicate coverage extensions for which no premium has been paid. The insurer's remedy is to assert a claim for that premium: "The fact that no premium was paid is no impediment to this ruling; it can be billed." *Miney v. Baum,* 170 *N.J.Super.* 282, 291(Law.Div.1979); *Harr v. Allstate Ins. Co.*, 54 *N.J.* 287, 307 (1969). Zurich has not asserted an alternative claim for unpaid premium, and has waived such relief.

D. Zurich's Notice Obligation Is Non-Delegable

[5] Zurich borrows certain other policy considerations from *Harvester Chem. Corp. v. Aetna Cas. & Sur. Co.*, 277 *N.J.Super.* 421, 431 (App.Div.1994) (Zb40.) However, Zurich plainly has already run afoul of all of the considerations that it cites. For example, there could be nothing more "arbitrary" than ACC's "mid-term cancellation" from the CCIP – the policy provision on which Zurich relies, which allows one contractor to exclude another contractor from coverage "in its sole discretion," is the very definition of "arbitrary."

Zurich's argument that it could delegate its notice obligations to others (Zb44) is a non-starter. Despite its contractual obligation to do so, Zurich never prepared any notice of cancellation or termination of ACC's liability coverage whatsoever, as its own wrap-up specialist conceded. (Tb20, Dta1309.) Even Zurich's alleged delegatee, Tutor, denied awareness of any written notice Zurich issued to inform of ACC's alleged coverage termination. (Tb24, Dta1077-80.) Thus, there is nothing for Zurich to argue that it delegated.

Furthermore, although acknowledgment of receipt of formal notice of cancellation through a third-party such as a broker may not necessarily invalidate improperly communicated notice,[6] Zurich cites to no case that provides a derelict insurer the benefit of unclear, inferential third-party notice that it did not generate. In the absence of "specific" and "clear" notice of termination by Zurich, as a matter of law, ACC remained covered under the policy. *Millbrook Tax Fund,* 344 *N.J.Super.* at 54. And, as Zurich's thirty-four-and-a-half page redundant rehash of ACC's alleged "unenrollment" confirms, that second and third-hand "notice" was anything but the "specific," "clear" and "properly placed" notice the law requires. It is significantly more

[6] *See, Insigna v. Hegedus,* 231 *N.J.Super.* 562, 567 (App.Div.1987) (insurer's "non-delegable" obligation "is a non-delegability of responsibility for performance, not non-delegability of the performance itself"; *N.J.A.C.* 11:1-20.2(1) (delegation "shall not relieve the insurer of its responsibilities.").

convoluted than the "undifferentiated passel of two hundred documents" held to be improper by the Supreme Court in *Skeete,* 184 *N.J.* at 9 – especially when juxtaposed against the clear and specific single-page cancellation of the workers compensation policy that Zurich itself communicated to the WCB. The inadequacy of Zurich's claimed "notice" is confirmed by the material Zurich cites. It refers **only** to ACC's August, 2015 work, and says nothing about ACC's subsequent work, **which Tutor was unaware that ACC even performed**. (Tb27, Dta875.) Abbonizio's letter of September 25, 2015, which advised ACC that it was "CCIP-approved" led ACC to believe it continued to be covered under the CCIP policies, as ACC repeatedly testified. (Tb24-27.)[7] Indeed, ACC's receipt of the September 25 reconfirmation of its initial August enrollment was well within the 90-day notice of cancellation requirement in the Zurich policy, expressly rescinding any "notice" that the August communications may have arguably implied. (At a minimum, even if Zurich's

[7] Zurich's silence regarding ACC's testimony is deafening, and its minimization of the import of Abbonizio's letter is telling. (Zb44.) Whether that letter, which was authenticated in both litigations and its receipt by ACC confirmed, was "unsigned" is irrelevant, as is ACC's lack of authority to enroll ACC in the CCIP. (Zb44.) Contractual responsibility for ensuring ACC's enrollment rested upon Abbonizio. Also, Zurich asserts that **both** Abbonizio and ACC were unenrolled from the August Ritz wall work. (Zb11-12.) But, the December accident happened when an Abbonizio employee shook hands with an ACC employee, while they were performing the same work. Zurich covered Abbonizio for the accident, but not ACC, undercutting Zurich's effort to draw a parallel between the August and December work, even assuming the latter may have been on a subterranean portion of the "Ritz wall."

narrative were relevant, ACC's side of the story refutes that narrative, and should not have been discounted below.)

E. Zurich Misdirects The Proper Focus From Its Obligations As An Insurer

Nor does the extrinsic material Zurich cites relieve it from its legal notice obligation. Contrary to Zurich's argument, neither its policy nor the CCIP manual excluded demolition subcontractors. (Dta146, Tb11.) As a matter of law, the policy, which does not exclude "demolition," superseded the expired "binder."[8] Such an exclusion is also absent from the operative CCIP Manual. (Dta588,589.) The confusion regarding ACC's eligibility in July of 2015 regarding the Ritz wall work was purely the product of Tutor employee's Anne Lorencz's erroneous belief that the binder language regarding demolition carried over into the policy – an error Zurich continues to exploit to justify its improper disclaimer to ACC.

Zurich's strategically abridged reference to the Named Insured endorsement of its policy to support its "dedicated payroll" argument (Zb25) is also unavailing. Nothing in the exclusion says anything about "**reporting**" or "**submitting**" payroll – it speaks in terms of ***not having*** a "**dedicated**" payroll

[8] The binder states: "**Only the policy itself provides coverage**. This binder is not a part of and is not incorporated into the insurance policy. If there is any conflict between the coverage descriptions shown in this proposal and the actual insurance policy, the insurance policy prevails. **The insurance policy supersedes this binder.**" (Dta1362.)

for employees on site. However, Zurich admits that ACC did, as exemplified by its references to the efforts ACC made to report its dedicated payroll for on-site employees to Alliant. (Zb16.) As is apparent from the policy language that Zurich omits, which excludes material providers, delivery persons, and the like, the cited language confirms the policy's intent to exclude similar types of service providers who were incidentally on the site on a transitory basis, *i.e.*, those lacking a payroll **"*dedicated*"** to on-site operations. (Dta146.) To the extent Zurich argues otherwise, its strained interpretation must be construed against it.

Zurich argues that cancellation of ACC's separate workers compensation policy also "automatically" cancelled its CGL coverage. Such language is absent from the policy. (Zb26,n.9.) (Zurich concedes there is no "language in the GL policy which relates its coverage to any coverage existing under the Workers' Compensation policy." (Dta 854-55.)) Although the CCIP manual provides that a subcontractor issued a workers compensation policy is automatically a named insured on the liability policies, it does not also say that the converse is true.

The cases cited by Zurich to support its unenrollment argument are inapposite. *Team Indus. Services, Inc. v. Zurich American Ins. Co.* 87 *F.*4th 461 (10th Cir. 2023) (addressing coverage for an entity that "never enrolled,

nor was ever invited to enroll" in an OCIP), and *Marin Crane Works, L.P. v. Zurich American Ins. Co.*, 642 *S.W.*3d 551,553 (Tx.2022) (simply referencing discretion to exclude subcontractors from a CCIP). *Compare, Workers Compensation Fund v. Wadman Corp.*, 210 *P.*3d 277, 287 (Utah 2009) ("no notice was given to [the contractor] by [the CCIP insurer] of the insurance policy being cancelled, [accordingly] the policy is still valid.").

Zurich's arguments, which highlight the vagaries and complexities inherent in CCIP coverage, confirm the necessity of a single repository for the conveyance of notice of policy changes – Zurich.

II.THE VOLUNTARY PAYMENT DOCTRINE IS INAPPLICABLE

As an alternative argument to support affirmance, unaddressed by the court below, Zurich seeks refuge in the "voluntary payment doctrine" ("VPD"), an especially egregious canard. As a matter of law, fact, equity, policy and logic, the doctrine is inapplicable here. Further, the doctrine could only be operative because Zurich wrongfully disclaimed coverage to ACC, barring Zurich's reliance on it.

It is hornbook law that "public policy supports a narrow interpretation of the insurer's volunteer status." *Carolina Cas. Ins. Co. v. Burlington Ins. Co.*, 951 *F.*3d 1199, 1215 (10thCir.2020), *quoting*, 16 *Couch on Ins.* §223:26 (3d ed.); *Jefferson Ins. Co. v. Healthcare Ins. Exchange,* 247 *N.J.Super.* 241, 246

(App.Div.1991), quoting *Appleman Ins. Law of Practice,* §4921, and noting public policy considerations encouraging "swift payment of claims" and discouraging the necessity of "legal action." Nor does the VPD apply where, as here, a subrogation claim, which is "highly favored," is also supported by contractual, *i.e*., "conventional," subrogation. *See, City of Asbury Park v. Star Ins. Co.*, 242 *N.J.* 596, 604, 612 (2020).

Jorge v. Travelers Indem. Co., 947 *F.Supp.* 150 (D.N.J.1996), which applies New Jersey law in an analogous context, is especially salient.[9] The court held that the VPD did not preclude an insurer's recovery of costs expended in resolving a claim from two other insurers that wrongfully disclaimed coverage to the insured, even though the claim apparently was not covered by the insurer's policy. The court initially held that the VPD was inapplicable to the insurer's contractual subrogation right. *Id.* at 154. It also held that the VPD did not bar the insurer's equitable subrogation right because its interests in "control[ing] the defense of the litigation" and avoiding

[9] *Jorge* is in contrast to *Palisades Ins. Co. v. Horizon Blue Cross Blue Shield of New Jersey,* 469 *N.J.Super*. 30, 44 (App.Div.2021), cited by Zurich. That case involved an auto insurer's suit for reimbursement of personal injury protection ("PIP") benefits from a health insurer. However, based on the controlling statutory scheme, "no cause of action for subrogation exists to allow a PIP carrier to pursue reimbursement for claims" that it paid "out of turn," and the health insurer never formally denied coverage, resulting in voluntary payments. Here, the opposite is true. *Rooney v. West Orange Tp.* 200 *N.J.Super.* 201 (App.Div.1985) (confirming liability insurer's subrogation right where another insurer, like Zurich, denies coverage, and rejecting volunteer status).

"insurance coverage litigation" with its insured constituted "palpable economic interests" that precluded application of the VPD.[10]

In this case, the policy contractually transfers ACC's rights to Travelers "to recover all or part of any payment [Travelers] made under" the policy (Dta249), rendering the VPD inapplicable to Travelers' conventional subrogation right. More important, Travelers did not "volunteer" anything given Zurich's improper denial of coverage in light of the mutually exclusive intent of the policies. Travelers simply had no obligation to compound Zurich's impropriety and expose ACC to uncovered liability, risking a bad faith claim against itself in the process. In any event, Zurich, which wrongly disclaimed coverage to ACC, cannot avail itself of a voluntary payment defense. *Fireman's Fund Ins. Co. v. Security Ins. Co.*, 72 *N.J.* 63, 72 (1976) (wrongfully disclaiming insurer barred from arguing that insured's settlement of claim constituted a "voluntary payment[]").[11]

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[10] Zurich mischaracterizes *Jorge* as an "outlier." (Zb51.) To the contrary, the opinion is based on, and in accord with, New Jersey substantive law, *Jefferson Ins.*, as well as a legion of cases from other jurisdictions. *See*, cases collected in *Grinnell Mut. Reins. Co. v. Central Mut. Ins. Co.*, 658 *N.W.*2d 363, 379-80 (N.D.2003), including citation to *Jorge*. *And see, Weir v. Federal Ins. Co.,* 811 *F.*2d 1387, 1395, n.6 (10thCir.1987) (the "liability of an insurer need not be ironclad in order for it to settle a claim without a subsequent finding that the payment to the insured was voluntary").

[11] Nor is any alleged lack of a reservation of rights to ACC relevant. (Zb51.) *General Ins. Co. v. New York Marine & Gen Ins. Co.*, 320 *N.J.Super.* 546, 557

III. ZURICH'S RESCISSION CLAIM IS BASELESS

Zurich's alternative argument for rescission of the insurance it issued to ACC based on a purported misrepresentation by ACC is factually, legally and intellectually bankrupt. Zurich admits that it never asked ACC anything about anything regarding coverage, precluding a claim that ACC misrepresented facts upon which Zurich relied, especially since the policy does not exclude demolition. It is settled that "an applicant's failure to disclose facts about which no questions were asked will not avoid the policy." *Progressive Cas. Ins. Co. v. Hanna*, 316 *N.J. Super.* 63, 73 (App.Div.1998).[12] Any claim of reliance also is irrefutably rebutted by Tutor's role in qualifying subcontractors for the CCIP policy. As the general contractor, it was fully aware of the type of work ACC performed, yet arranged for ACC's undisputed initial enrollment. Tutor's employee's mistake as to the contents of the Zurich policy in reconsidering ACC's eligibility is not a basis for Zurich to avoid its obligations. Zurich's argument is inherently disingenuous and uncreditable.

IV. ZURICH MUST PAY TRAVELERS' FEES

(App.Div.1999) (precluding insurer, which "unilaterally" declined to participate in defense, from asserting an estoppel claim against the defending insurer).

[12] *See also, Catton v. N.J.A.F.I.U.A*, 242 *N.J.Super.* 5, 9 (App.Div.1990); *Merchants Indem. Corp. v. Eggleston,* 37 *N.J.* 114, 124 (1962)("It would be unjust to … absolve a carrier which could have asked, but did not, for the facts it regards as material.").

Zurich's cumbersome fact-laden defense to its failure to provide notice to ACC also proves Travelers' right to recover declaratory judgment fees.[13] As noted in Travelers' brief (Tb49), counsel fee awards under *R.*4:42-9(a)(6) are "presumptive," but with discretion to decline such an award where, *e.g.*, the insured "contributed substantially to the necessity for the litigation." *Passaic Valley Sewage Comms'rs v. St. Paul Fire & Marine Ins. Co.*, 206 *N.J.* 596, 619 (2011) (internal quotation omitted). Conversely, neither an insurer's "good faith" in declining coverage, nor "novelty" of an issue is an impediment to fee recovery. *Iafelice ex. rel. Wright v. Arpino*, 319 *N.J.Super.* 581, 590 (App.Div.1999) (affirming fee award where cancellation deemed ineffective); *Corcoran v. Hartford Ins Co.*, 132 *N.J.Super.* 234, 246 (App.Div.1975).

Zurich's conduct "contributed to the necessity for the litigation" – not Travelers' or the plaintiffs'. Zurich could simply have sent a single page notice to ACC that its coverage was terminated – like the law required it to do, and like it did with the WCB regarding ACC's workers compensation policy. Instead, Zurich took a year to craft its one-sided "unenrollment" story, and several years to expensively develop it in discovery, all the while ignoring the evidence of ACC's continued "CCIP-approved" status. Nor is Zurich's position "novel," as exemplified by all the other types of policies subject to

[13] The costs incurred by Travelers in defending ACC are a separate element of damages. *Rooney, supra,* 200 *N.J.Super.* at 109.

notice requirements (*ante* at 7, n.3). Travelers, by contrast, is blameless, protecting ACC through settlement. It had no obligation to preemptively sue Zurich. *Burd v. Sussex Mut. Ins. Co.* 56 *N.J.* 383, 391-92 (1970): "We leave it to the contenders to decide for themselves if and when to sue." Nor was it required to join force with plaintiffs' claim. However, when sued, Travelers became required to assert its germane crossclaim against Zurich. *R.*4:7-5(a); *R.*4:30A. The "*bona fides,*" *Enright v. Lubow,* 215 *N.J.Super.* 306, 313 (App.Div.1987), clearly favor Travelers and frown upon Zurich.[14] (Travelers also joins in all applicable arguments asserted in plaintiffs' reply brief in A-003358-22T2.)

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[14] Speaking of "bona fides," in attempting to compensate for the weaknesses of its own arguments, Zurich engages in multiple instances of dissembling in an improper effort to undermine the credibility of Travelers' arguments. The most egregious of these is Zurich's statement that Travelers' "common law argument was first raised in Travelers' reply brief and goes beyond the issues raised in its summary judgment motion." (Zb40.) This is a knowingly false statement. Travelers properly raised the "common law argument" in its opposition to Zurich's summary judgment motion, which is also under appeal. (Dta1155-58.) Travelers was compelled to supplement its briefing below to point out this mischaracterization when Zurich previously sought to preclude consideration of this argument. (Dtsa15-31, submitted pursuant to *R.*2:6-1(a)(2).) Zurich's continued prevarication here is not an error and should not be countenanced.

Similarly, in response to Zurich's gratuitous false characterization that Travelers' argument that "unenrollments from CCIPs are a rarity" is "unsupported by testimony" (Zb36), see the testimony cited in Travelers' brief at Tb26, n.5.

Zurich also sets up the straw man argument that Travelers is claiming that all subcontractors on the project were covered by the CCIP. (Zb4,7,29) That is not the case and an irrelevancy. Travelers' brief specifically notes that certain subcontractors had to enroll, others were excluded, and others were subject to Tutor's whim. (*See*, Tb15, explaining "Ineligible Parties.")

Respectfully Submitted,

s/ Frank E. Borowsky, Jr.
FRANK E. BOROWSKY, JR.