ATLANTIC CONCRETE CUTTING, INC. and EVANSTON INSURANCE COMPANY *Plaintiffs/Appellants* v. ZURICH AMERICAN INSURANCE COMPANY, AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY, ALLIANT INSURANCE SERVICES, INC., and TRAVELERS INDEMNITY COMPANY OF AMERICA *Defendants/Respondents*	: SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION : : DOCKET NO.: A-003358-22T2 : : ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BURLINGTON COUNTY : : Sat Below: : : Hon. James J. Ferrelli, J.S.C. : Docket No.: BUR-L-00742-19 :

BRIEF OF PLAINTIFFS/APPELLANTS, ATLANTIC CONCRETE CUTTING, INC. AND EVANSTON INSURANCE COMPANY

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PRELIMINARY STATEMENT

This appeal asks whether there are two sets of rules governing insurance policies in New Jersey, one of which governs contractor controlled insurance programs, and the other which governs everything else. Under a contractor controlled insurance program (commonly known as a "CCIP"), an entire construction project, or series of projects, is insured under a single insurance policy. Defendants, Zurich American Insurance Company ("Zurich") and American Guarantee and Liability Insurance Company ("AGLIC"), argued, and the trial court remarkably agreed, that an entirely different set of rules – ***ad hoc and undefined*** – governs CCIPs in New Jersey. In their view, there is no enforceable cancellation requirement for CCIPs. As a result, contractors enrolled in such programs may be insured one minute, and uninsured the next, without being provided notice of cancellation in accordance with the documents governing the CCIP (*i.e.*, the policy, the manual, and certificate of insurance) or New Jersey law. That is not and cannot be the law in New Jersey. To sanction a new set of cancellation requirements for CCIPs or, more to the point, conclude that there are no cancellation requirements at all for CCIPs, would invite ambiguity and uncertainty about the state of a contractor's insurance at any given time, and undoubtedly result in contractors being unwittingly stripped of insurance to compensate injured parties. Plaintiffs,

Atlantic Concrete Cutting, Inc. ("ACC") and Evanston Insurance Company ("Evanston"), and Defendant, Travelers Indemnity Company of America ("Travelers"), ask this Court to apply existing New Jersey insurance law to CCIPs, including cancellation requirements. If the usual rules apply, Plaintiffs and Travelers win, and Zurich and AGLIC lose.

In the alternative, if somehow ACC was not enrolled in the CCIP at the time of the Hood accident, then Defendant, Alliant Insurance Services, Inc. ("Alliant"), would still be liable to ACC for its negligence, as ACC's broker, in representing to ACC that it was CCIP insured.

ORDERS APPEALED

This is an appeal of three orders dated May 26, 2023: (1) the denial of ACC and Evanston's Motion for Summary Judgment, Pa2677; (2) the grant of Zurich and AGLIC's Motion for Summary Judgment, Pa2681; and (3) the grant of Alliant's Motion for Summary Judgment, Pa2683.

STATEMENT OF PROCEDURAL HISTORY

Plaintiffs initiated this action via Complaint filed on April 8, 2019. Pa1. The parties submitted Motions for Summary Judgment on February 10, 2023. Pa802, Pa843, Pa914. Following responses, replies, and oral argument, the trial court denied Plaintiffs' and Travelers' Motions for Summary Judgment and granted Zurich, AGLIC, and Alliant's Motions for Summary Judgment on

May 26, 2023. Pa2677, Pa2681, Pa2683. The trial court submitted a Supplemental Statement of Reasons in Support of these orders ("Trial Court Opinion") on July 25, 2023. Pa2716. This appeal of Evanston and ACC followed, and Travelers has filed a separate appeal at A-003393-22T4, which has been coordinated with this one by Order dated October 30, 2023.

STATEMENT OF FACTS

I. THE PROJECT AND PARTIES

This insurance coverage case arises out of a construction site accident that occurred on December 11, 2015, on the W/Element Hotel construction site at 1441 Chestnut Street, Philadelphia, Pennsylvania (the "Project" or the "Project Site"). Pa3. The Project's general contractor was Tutor Perini Building Corporation ("Tutor Perini"). Pa3. Tutor Perini retained C. Abbonizio Contractors, Inc. ("Abbonizio") as a subcontractor to perform certain work on the Project. Pa3. Abbonizio retained ACC, a New Jersey corporation, as a subcontractor to perform concrete saw cutting work. Pa3.

At that time, Travelers was ACC's primary CGL insurer, with a coverage limit of $1 million. Pa224. The Travelers Policy contained an endorsement providing an exclusion for injuries arising out of "all projects subject to a wrap-up insurance program with limited exceptions for certain ongoing operations," including "any contractor-controlled, owner-controlled or

similar insurance program." Pa285.

Evanston was ACC's excess CGL insurer, providing $9 million of coverage over Travelers' coverage. Pa34. The Evanston Policy also contained a "Contractors Limitation" endorsement providing that "the insurance provided by this policy shall not apply" for any loss "[a]rising out of any joint venture or any project insured under a 'wrap up' plan." Pa72.

Tutor Perini also contracted with Zurich to provide a CCIP, under which enrolled contractors were entitled to, among other coverages, general liability coverage from Zurich against claims by persons injured while working on the Project. Pa77.

II. THE CCIP POLICY AND MANUAL

Under the CCIP, Zurich was the primary insurer for Commercial General Liability Policy GLO 5819877-00, for Named Insured Tutor Perini for policy period August 3, 2015 to December 23, 2018, for the first $2 million in coverage. Pa104. AGLIC was the excess liability carrier for Excess Liability Policy SXS 5819649-00, for Named Insured Tutor Perini for policy period August 3, 2015 to December 23, 2018, with a coverage limit of $25 million excess over Zurich's CCIP primary insurance of $2 million. Pa223 (Zurich's and AGLIC's Policies are collectively, the "CCIP Policy").

The CCIP Policy, in its Named Insured – Contractor Controlled

Insurance Program Endorsement, defines its "named insureds" as contractors "enrolled in the Contractor Controlled Insurance Program" and performing at a "designated project." Pa148. Notably, there was no explicit exclusion in the CCIP Policy for "demolition work." Pa77-Pa221.

The CCIP Policy provides the following cancellation provision:

> **A.** Cancellation
>
> **1.** The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation.
>
> **2.** We may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least:
>
> **a.** 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or
>
> **b.** 30 days before the effective date of cancellation if we cancel for any other reason.

Pa84. The CCIP Policy's Earlier Notice of Cancellation or Non-Renewal Endorsement raises the number of days required for notice of cancellation to 90 days. Pa142.

Tutor Perini retained Alliant as its program administrator and agent to handle enrollment of contractors for coverage under the CCIP. Pa579-Pa616. Alliant is listed on the CCIP Policy as the "Producer" for that insurance. Pa77.

Kathleen Kelly of Zurich testified that Alliant was acting as insurance broker on behalf of ACC as a named insured under the CCIP Policy. Pa2116. Dennis McGowan of Alliant testified that Alliant was the broker of the policies, and that ACC was Alliant's client. Pa2469.

Tutor Perini published a CCIP Manual setting forth the rules for enrollment, which was distributed to all contractors before they began work at the Project Site. Pa579-Pa616. The CCIP Manual named Alliant as the "CCIP Broker," Benjamin Faust as the CCIP "Program Manager," and Dennis McGowan as the CCIP "Program Administrator." Pa584. The CCIP Manual defined "enrolled" contractors as "[e]ligible Subcontractors and Sub-Subcontractors that have submitted all necessary enrollment forms and documents, and have been accepted into the CCIP as evidenced by a Certificate of Insurance." Pa586. Enrollment could only be established by a Certificate of Insurance issued to a subcontractor by the Program Administrator, Dennis McGowan. Pa588. The CCIP Manual also stated that a subcontractor cannot work on the site unless enrolled in the CCIP, which made the CCIP a mandatory program for subcontractors. Pa588. The CCIP Manual defined "ineligible" contractors as "Subcontractors of any tier who are excluded from participation in the CCIP, including those involved in loading, transporting, and unloading materials, personnel, parts, or equipment, or any

other items to, from or within the Site." Pa587. The CCIP Manual excluded only "vendors, suppliers, truckers, material dealers, any contractors performing abatement or otherwise working with hazardous materials, and delivery services companies." Pa588. The CCIP Manual also provided a cancellation requirement:

> The Sponsor [Tutor Perini] reserves the right to terminate or modify the CCIP or any portion thereof. If the Sponsor exercises this right, subcontractors will be provided with at least 30 days notice of cancellation. At its option, Sponsor may procure alternate coverage or may require the Subcontractors to procure and maintain alternate insurance coverage. Sponsor shall identify the details and limits of such alternate insurance coverage to Contractor with its written notice of OCIP Termination. The form, limits of liability and cost of such insurance and the insurer issuing such insurance to Subcontractors will be subject to Sponsor's approval.
>
> Should coverage be cancelled by the insurer, 30 days written notice will be provided per the contract.

Pa589.

Tutor Perini's subcontract, referring to insurance requirements, provided that "Tutor Perini building Corp. may, for any reason, modify the CCIP Coverages, discontinue the CCIP, or request that any Subcontractor of any tier withdraw from the CCIP upon thirty (30) days written notice." Pa570.

III. ACC'S ENROLLMENT IN THE CCIP

On July 28, 2015, Alliant issued a Notice of Subcontract Award for ACC

with Abbonizio listed as awarding company, describing ACC's "scope of work" as "saw cutting." That notice noted that it was the responsibility of the awarding contractor to ensure that subcontractors enroll in any wrap up insurance programs, and that "[n]o hired tier sub may commence work until they are properly enrolled into the Wrap-up program, as evidenced by a Certificate of Insurance provided by the Wrap-up Administrator." Pa424.

On July 29, 2015, ACC completed a Contractor Enrollment Form describing its work as "concrete cutting." Pa425. ACC described ACC's work as concrete cutting and not demolition. Pa991, Pa999-Pa1000. It was left to higher contractors to designate whether ACC's saw cutting constituted demolition work or another category of work. Pa2316, Pa2351-Pa2352. On July 30, 2015, Anne Lorenz, Regional Risk Manager for Tutor Perini, advised several parties via email that ACC would not be able to enroll into the CCIP for structural demolition work on the Ritz Hotel retaining wall portion of the project. Pa2390.

Meanwhile, on July 30, 2015, ACC obtained a Certificate of Liability Insurance and enclosing letter from Alliant confirming ACC's enrollment in the CCIP, reading:

> Your enrollment into the Contractor Controlled Insurance Program 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 1441 Chestnut project site….

Pa618. The Certificate of Liability Insurance named Alliant as "producer," with Dennis McGowan as its contact, ACC as "insured," and Zurich and AGLIC as "insurer(s) affording coverage." Pa619-Pa620. The Certificate also provided an additional cancellation requirement: "Should any of the above described policies be cancelled before the expiration date thereof, notice will be delivered in accordance with the policy provisions." Pa619.

In an internal July 31, 2015 email, Kyle Yeager of Tutor Perini confirmed that ACC's CCIP enrollment was complete. Pa864. In an internal August 3, 2015 email, Anne Lorenz of Tutor Perini confirmed that ACC was enrolled in the CCIP, while noting that ACC "will not be enrolled in the CCIP for the Ritz Work so I want to make sure the work is kept separate." Pa866. In an internal August 5, 2015 email, Jeffrey Boggs of ACC noted that ACC's work at that time was excluded, and that "eventually I anticipate work on this project that will be covered by the CCIP. It is just this contract with C Abbonizio that has been excluded." Pa872. In internal August 5, 2015 emails, Michelle Morris, Jeffrey Boggs, and Nancy Dimacale of ACC referred to excluded August Ritz work, again limited to ACC's early work in August. Pa899. On August 10, 2015, Nancy Dimacale of ACC emailed Dennis

McGowan of Alliant, stating that "our work was excluded from the W Hotel Job, please make any adjustments accordingly," referred to payroll issues for July 2015. Pa903. In response, Dennis Mickeleit of Tutor Perini emailed Tutor Perini and Alliant employees that ACC was "structural demo and therefore not enrolled," also referring in the same email chain to that prior work. Pa903. On August 10, 2015, Dennis McGowan of Alliant sent an email to the Zurich wrap up team asking, "Please cancel effective 08/01/2015," apparently referring to ACC. The prior email in that chain referred to policy "WC 0181121-00," which was the CCIP workers' compensation policy, not its general liability policies. Pa893.

When shown a form letter that would advise contractors that they were excluded from a CCIP program, Mr. McGowan testified that he had never seen such a letter that was issued to ACC. Pa2460, Pa2485. He also testified that his intent in emailing Zurich's wrap up team to "cancel effective 8/1/2015" was to cancel the workers' compensation policy. Pa2485. Kathleen Kelly of Zurich testified that any endorsement canceling ACC's policy would go to Alliant, with the expectation that it would then go to Tutor Perini, who would then presumably inform ACC as its subcontractor. Pa2114. Ms. Kelly confirmed that Zurich never sent a cancellation notice to ACC. Pa2126. She also confirmed that cancellation of ACC's CCIP Workers' Compensation

Policy, which would result in a cancellation endorsement, would not affect its coverage under the CCIP Policy (*i.e.,* the general liability policies), and that the CCIP Policy had no language relating to the CCIP Workers' Compensation Policy. Pa2122-Pa2123.[1]

Michelle Morris of ACC testified that ACC never received any notice from either Alliant or Zurich that ACC was no longer enrolled in the CCIP. Pa2352-Pa2353. Benjamin Faust of Alliant testified that although he believed ACC was "erroneously" enrolled, there was no formal process at the time to inform erroneously enrolled contractors that they were not covered, and it was unclear to Alliant whether a notice of cancellation was sent to ACC. Pa2211-Pa2212. Anne Lorenz of Tutor Perini testified that, although Tutor Perini's subcontract provided that Tutor Perini may "request that any subcontractor with any tier withdraw from the CCIP upon 30 days written notice," she was not aware of any written notice issued to ACC informing them that they would be withdrawn from coverage. Pa965.

On September 25, 2015, Abbonizio noted ACC's CCIP enrollment in a correspondence that plainly stated that ACC was CCIP approved: "Atlantic Concrete Cutting, Inc., is CCIP Approved. For the above referenced

[1] While Zurich apparently sent notice of cancellation of the workers' compensation policy to the Pennsylvania Workers' Compensation ("PAWC") Bureau, ACC received no such notice. Pa1066-Pa1068.

[W/Element Hotel] Project." Pa427.

ACC continued work on the Project beyond this August 2015 work as evidenced by ACC's numerous proposals and Abbonizio's purchase orders for separate, distinct concrete cutting jobs at the Project Site in the months following that excluded work. Pa876-Pa891. At that point, ACC understood that it was enrolled in the CCIP, while its August 2015 saw cutting work at the Ritz project was designated as "structural demolition" work and was excluded from CCIP coverage, and that it would be enrolled going forward. Pa2311, Pa2313, Pa2316, Pa2322, Pa2323-Pa2324.

IV. THE HOOD ACCIDENT AND ACC'S TENDER TO THE CCIP CARRIERS

On December 11, 2015, Adam Hood suffered significant injuries as a result of an accident on the Project ("the accident"). Pa4. The contracted-for work done by ACC on the day of the accident was described as "core drilling" and "wire sawing." Pa422. The accident was the subject of a lawsuit brought by Mr. Hood against Tutor Perini, Abbonizio, and ACC, among others ("the Hood litigation"). Pa4.

After receiving service of the Hood complaint, ACC tendered its defense to and sought indemnification from Zurich and AGLIC as CCIP the insurers on June 29, 2017 and August 15, 2017 for the claims asserted in the Hood litigation. Pa669-Pa672. Zurich provided Tutor Perini and Abbonizio with a

defense and indemnification for the Hood litigation. However, Zurich and AGLIC denied coverage to ACC for the Hood litigation, taking the position that ACC was not enrolled in the CCIP at the time of the accident because it was performing "demolition work." Pa674-Pa675.

Meanwhile, on July 31, 2018, Kathleen Kelly of Zurich acknowledged in an email that, despite Alliant's belief that ACC was not enrolled in the CCIP, they had "enrollment documents for Atlantic effective 8/1/15. We issued a policy so, we would need to have received a request to cancel flat to unenroll them. We don't have a copy of any request." Pa913. Randi Vogt, Zurich's Customer Service Team Lead in the Zurich Wrap Up Department, testified that she was asked to provide evidence of a cancellation request and the related policy endorsement. Pa2444. She did not locate any documents that related to a cancellation of coverage under a general liability policy. Pa2444. When Ms. Vogt was asked to determine if ACC was enrolled under the CCIP, she "looked at a report and then [she] sent an e-mail to the underwriter telling her that we have them enrolled." Pa2443. As Ms. Vogt explained, in 2018 she reviewed the WrapUp list, which is a cumulative list of all of the subcontractors enrolled in the CCIP, and from reviewing the WrapUp list she concluded that ACC had been enrolled in the CCIP. Pa2445, Pa2448. Ms. Vogt did not locate any documents that related to a cancellation of coverage

under a general liability policy. Pa2444.

Due to Zurich and AGLIC's wrongful denial of coverage under the CCIP, ACC's own comprehensive general liability carriers, Travelers and Evanston, were forced to defend ACC in the Hood litigation, subject to their continuing reservations of rights, and eventually reached a confidential settlement. Pa1-Pa19, Pa669-Pa672, Pa674-Pa675.

In this litigation, ACC, Evanston, and Travelers seek reimbursement for the defense and indemnity of ACC in the Hood litigation, their attorneys' fees and costs in pursuing this liability coverage litigation pursuant to Rule 4:42-9, and prejudgment interest.

LEGAL STANDARDS

I. APPELLATE REVIEW OF SUMMARY JUDGMENT

The Appellate Division applies the same standard under Rule 4:46-2(c) that governs the motion court. Sashihara v. Nobel Learning Communities, Inc., 461 N.J. Super. 195, 205 (App. Div. 2019). That is, summary judgment should not be granted unless the record reveals "no genuine issue as to any material fact" and "the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). R. 4:46-2(c). Where a matter proceeds on cross-motions, the Appellate Division need not address whether there was a genuine dispute as to material facts, and need only decide whether the motion judge's

application of the law was correct. St. Peter's Univ. Hosp. v. New Jersey Bldg. Laborers Statewide Welfare Fund, 431 N.J. Super. 446, 453 (App. Div. 2013). The appellate court's review is *de novo*, and it need not defer to the trial court's conclusions. Qian v. Toll Bros. Inc., 223 N.J. 124, 135 (2015).

Purely legal questions, such as the interpretation of insurance contracts, are questions of law particularly suited for summary judgment. Badiali v. New Jersey Mfrs. Ins. Group, 220 N.J. 544, 555 (2015).

II. INTERPRETATION OF INSURANCE CONTRACTS

When interpreting a contract, the court's goal is to ascertain the "intention of the parties to the contract as revealed by the language used, taken as an entirety; and, in the quest for intention, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain." Driscoll Const. Co., Inc. v. State, Dept. of Transportation, 371 N.J. Super. 304, 313 (App. Div. 2004) (internal citations omitted). An insurance contract should be interpreted consistent with the usual rules of contract interpretation. Generally, when interpreting an insurance policy, courts should give the policy's words "their plain, ordinary meaning." President v. Jenkins, 180 N.J. 550, 562 (2004). "Our function when construing a policy of insurance, as with any other contract, is to search broadly for the probable intent of the parties in an effort to find a reasonable meaning in keeping with the express general

purposes of the policy." Sinopoli v. N. River Ins. Co., 244 N.J. Super. 245, 250 (App. Div. 1990). The language of liability insurance policies should be construed liberally in favor of the insured and strictly against the insurer, and in such manner as to provide full coverage of the indicated risk rather than to narrow protection. Id. If the controlling language of a policy supports two interpretations, one favorable to the insurer and the other favorable to the insured, a court is obligated to apply the interpretation supporting coverage. Kievit v. Loyal Protect. Life Ins. Co., 34 N.J. 475, 482 (1961). The courts will resolve any ambiguities in the policy in favor of the insured pursuant to the doctrine of *contra proferentem*. Martusus v. Tartamosa, 150 N.J. 148, 159 (1997); Oxford Realty Group Cedar v. Travelers Excess & Surplus Lines Co., 229 N.J. 196, 208 (2017). Insureds are entitled to the broad measure of protection necessary to fulfill its reasonable expectations, and its reasonable expectations should govern to the extent the policy's language allows. Id.

LEGAL ARGUMENT

I. THE HOOD LAWSUIT SHOULD HAVE BEEN COVERED UNDER THE CCIP BECAUSE ACC WAS AN ENROLLED INSURED IN THE CCIP AND ITS COVERAGE WAS NEVER CANCELLED (PA2739-PA2752)

Put simply, ACC was enrolled in the CCIP at the time of the Hood accident and was never formally notified of any purported cancellation of its insurance. In ruling on the parties' cross motions for summary judgment, the

trial court ignored New Jersey's long-established policy enforcing cancellation requirements to protect insureds. If affirmed, such a new rule that fails to enforce insurance cancellation requirements will invite ambiguity and uncertainty about the state of a contractor's insurance at any given time, and undoubtedly result in contractors being unwittingly stripped of insurance to compensate injured parties. That is not, and cannot now, be the law in New Jersey.

A. ACC WAS ENROLLED IN THE CCIP AT THE TIME OF THE HOOD ACCIDENT

ACC was enrolled in the CCIP in July 2015 and remained enrolled at the time of the accident. In its Opinion, the trial court concluded that ACC had no insurance contract with Zurich and AGLIC at the time of the accident, as it was "undisputed" that ACC had been "erroneously enrolled" and was "immediately unenrolled." Pa2739-Pa2746. The trial court reasoned that ACC was immediately and unilaterally removed from the CCIP's coverage, despite its receipt of a Certificate of Liability Insurance and further acknowledgment of enrollment in the ensuing months. As discussed below, ACC was indisputably enrolled in the CCIP in July 2015, and while it understood that certain August 2015 work was excluded from CCIP coverage as it was deemed to be "demolition" work, ACC was still enrolled in the CCIP and entitled to its coverage going forward.

On July 29, 2015, ACC completed a Contractor Enrollment Form to perform work at the Project as a sub-subcontractor of Abbonizio. On July 30, 2015, ACC received a Certificate of Liability Insurance and enclosing letter from Alliant confirming ACC's enrollment in the CCIP, which plainly stated that ACC was enrolled in the CCIP and covered under the CCIP Policy: "Your enrollment into the Contractor Controlled Insurance Program 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 1441 Chestnut project site***…." Pa618. That certificate named Alliant as "Producer," with Dennis McGowan as its contact; ACC as "insured"; and Zurich and AGLIC as "insurer(s) affording coverage." Pa619-Pa620.[2]

Upon issuance of the Certificate of Insurance, ACC was enrolled in the CCIP and covered for policy period August 3, 2015 to December 23, 2018 under Zurich's and AGLIC's CCIP Policy, as well as Zurich's Workers Compensation Policy. Pa619. The CCIP Policy provided liability coverage for enrolled insureds under the CCIP for those sums Named Insureds/enrolled contractors, such as ACC, were legally required to pay because of "bodily

[2] In an internal July 31, 2015 email, Kyle Yeager of Tutor Perini confirmed that ACC's CCIP enrollment was complete. Pa864.

injury" caused by an "occurrence" during the policy period on a "designated project." Pa77-Pa221.

The dispute here was not whether the Hood accident and ensuing litigation was of the type for which a CCIP insurer would have a duty to defend an enrolled insured. Rather, it was ACC's status as an enrolled insured. Under the plain language of the documents cited above, as of its receipt of the Certificate of Liability Insurance, ACC was a "contractor of any tier" enrolled in the CCIP and performing operations at a "designated project," and was thus a "named insured" subject to the CCIP Policy's liability coverage.

Again, the language of liability policies should be construed liberally in favor of insureds and strictly against insurers, to provide full coverage of the indicated risk rather than to narrow protection. Sinopoli v. N. River Ins. Co., 244 N.J. Super. 245, 250 (App. Div. 1990). Inasmuch as the definition or identity of "named insureds" under the CCIP Policy is somehow ambiguous, courts look to the intent of the parties and interpret any ambiguities in favor of the insured and its reasonable expectations. See Martusus v. Tartamosa, 150 N.J. 148, 159-60 (1997) (looking to the reasonable expectations of the insureds and interpreting policy in their favor where they expected coverage for a child's use of the car at issue).

Along those lines, the CCIP Manual defined "enrolled" contractors as "[e]ligible Subcontractors and Sub-Subcontractors that have submitted all necessary enrollment forms and documents, and have been accepted into the CCIP as evidenced by a Certificate of [Liability] Insurance." Pa586. The CCIP Manual defined "ineligible" contractors as only "Subcontractors of any tier who are excluded from participation in the CCIP, including those involved in loading, transporting, and unloading materials, personnel, parts, or equipment, or any other items to, from or within the Site." Pa587. The CCIP Manual excluded only "vendors, suppliers, truckers, material dealers, any contractors performing abatement or otherwise working with hazardous materials, and delivery services companies." Pa588. ***ACC was none of those things.***

Enrollment in the CCIP could only be established by a Certificate of Liability Insurance. Pa588. Also pursuant to the CCIP Manual, ACC could not even have begun work on the site unless they were enrolled in the CCIP, making the CCIP a mandatory program for subcontractors and sub-subcontractors. Pa588. The CCIP Policy itself, in its Named Insured – Contractor Controlled Insurance Program Endorsement, defines its "named insureds" as contractors "enrolled in the Contractor Controlled Insurance Program" and performing at a "designated project." Pa148. This policy

language, along with supporting evidence such as the CCIP Manual, illustrates the intent of the parties to procure coverage for enrolled subcontractors as "named insureds," making this Certificate of Liability Insurance clear evidence that ACC was an enrolled contractor and entitled to coverage under the CCIP.

Moreover, when Zurich Customer Service Team Lead in the Zurich WrapUp Department, Randi Vogt, was asked to determine if ACC was enrolled under the CCIP at issue, she "looked at a report and then [she] sent an e-mail to the underwriter telling her that we have them enrolled." As Ms. Vogt explained during her deposition, in 2018 she reviewed the WrapUp list, which is a cumulative list of all the subcontractors enrolled in the CCIP, and from reviewing the WrapUp list she concluded that ACC had been enrolled in the CCIP. Pa2443-Pa2448.

Critically, ACC's CCIP enrollment was later noted by Abbonizio in a September 25, 2015 correspondence to ACC that stated that ACC was CCIP-approved: "Atlantic Concrete Cutting, Inc., is ***CCIP Approved.*** For the above referenced [W/Element Hotel] Project." Pa427 (emphasis added). There is no documentary evidence that ACC was notified of any unenrollment from the CCIP after that date and thus not subject to this insurance.

Therefore, pursuant to the documents and testimony cited above, ACC was enrolled in the CCIP and covered under the CCIP Policy at the time of the

accident in December 2015. Zurich should have defended, and Zurich and AGLIC should have indemnified, ACC in the Hood litigation, as explained in the June 29, 2017 and August 15, 2017 tender letters to Zurich and AGLIC. Pa669-Pa672. However, Zurich and AGLIC responded by improperly denying coverage. Pa274-Pa675.

B. EVEN ASSUMING AN EARLY JOB-SPECIFIC EXCLUSION FOR "DEMOLITION WORK," ACC CONTINUED TO BE ENROLLED IN THE CCIP

The trial court found that despite the Certificate of Liability Insurance, ACC was soon unenrolled from the CCIP, and aware of its supposedly impermissible enrollment and subsequent unenrollment, because it performed "demolition work," subject to Tutor Perini's authority and sole discretion to request cancellation or changes to the CCIP Policies. Pa2739-Pa2747. Once again, the trial court's reasoning was incorrect. The category of ACC's work was not grounds for a denial of coverage.

Tutor Perini having some "exclusive" right to unenroll parties from the CCIP amounts to nothing more than a red herring, and the trial court's emphasis on this fact led it to the incorrect conclusion that ACC had "no contract" with Zurich or AGLIC. Pa2739. No matter Tutor Perini's role, ACC was still insured under the CCIP and subject to its coverage and all the protections afforded to an insured at the time of enrollment, including notice of

cancellation. Tutor Perini was certainly not authorized to cancel a subcontractor's insurance on behalf of the insurer without notifying the subcontractor.

In any event, ACC's Contractor Enrollment Form described its work as "concrete cutting," not demolition. Pa425. Saw cutting was the described contracted work awarded by Abbonizio in its Notice of Subcontract Award. Pa424. That notice noted that it was the responsibility of the awarding contractor to ensure that subcontractors enroll in any wrap up insurance programs, and that "[n]o hired tier sub may commence work until they are properly enrolled into the Wrap-up program, as evidenced by a Certificate of [Liability] Insurance provided by the Wrap-up Administrator." Pa424. ACC employee Jeffrey Boggs testified that, while demolition work could be "incidental" to saw cutting, ACC specifically performed concrete cutting. Pa991. While ACC employee Art Swindell referred to "cutting with an electric wire saw to demo concrete north face – wall north face" in relation to the Hood litigation, it was not for Mr. Swindell to determine whether his saw cutting work fell into the incidental category of structural demolition for the purposes of ACC's liability coverage. Rather, it was for higher contractors to designate whether ACC's saw cutting constituted demolition work or another category of work for insurance purposes. Pa2316, Pa2351-Pa2352. The only

documentary evidence of ACC's contracted-for work on the day of the accident describes that work as "core drilling" and "wire sawing." Pa422.

Even so, there was no explicit exclusion in the CCIP Policy or Manual for "demolition work." The only source of the "demolition work" exclusion is a CCIP "bound program" binder submitted to Alliant that expired on February 28, 2014, well before the accident. Pa2228. This temporary insurance binder was ultimately replaced by the CCIP Policy, which did not include such an exclusion. Still, according to the trial court, "demolition work" was apparently intended to be excluded from coverage. While ACC acknowledges that certain early work done on the Ritz Hotel retaining wall in August 2015 may have been intended to be excluded from coverage under the CCIP because it was deemed to be "demolition work," ACC was still enrolled in the CCIP going forward, including at the time of the Hood accident.

The trial court, like Zurich and AGLIC, referred to certain emails regarding discrete work done on the Ritz Hotel retaining wall in August 2015, months before the accident, that was excluded from coverage as "demolition work." A July 30, 2015 email from Anne Lorenz of Tutor Perini advising several parties that ACC would not be permitted to enroll because it was performing structural demolition did not prevent ACC's enrollment later that day. Pa2391. At that time, ACC understood that despite this apparent early

job-specific exclusion, it was still enrolled in the CCIP moving forward.

Any acknowledgment of unenrollment was in the context of this understanding. In an internal August 3, 2015 email, Anne Lorenz of Tutor Perini ***confirmed*** ACC's enrollment in the CCIP, while noting that ACC "will not be enrolled in the CCIP for the Ritz Work so I want to make sure ***the work is kept separate***." Pa867. In an internal August 5, 2015 email, Jeffrey Boggs of ACC noted that ACC's work ***at that time*** was excluded, and that "eventually I anticipate work on this project that will be covered by the CCIP. It is just this contract with C Abbonizio that has been excluded." Pa872.[3] August 5, 2015 emails between Michelle Morris, Jeffrey Boggs, and Nancy Dimacale of ACC regarding the excluded August Ritz work were again limited to ACC's early work in August. Pa899-Pa901. The August 10, 2015 email from Nancy Dimacale of ACC to Dennis McGowan of Alliant stating that "our work ***was excluded*** from the W Hotel Job, please make any adjustments accordingly," referred to payroll issues for July 2015, not future work on the Project. Pa903-Pa904 (emphasis added). Dennis Mickeleit of Tutor Perini responded to Tutor Perini and Alliant employees that ACC was "structural demo and therefore not enrolled," also referring in the same email chain to that

[3] The fact that ACC's August 2015 work was a separate job is evidenced by ACC's numerous proposals and Abbonizio's purchase orders for separate, distinct concrete cutting work at the Project Site in the months following that excluded work. Pa876-Pa891.

prior work. Pa903-Pa904.

It is true that Dennis McGowan emailed the Zurich wrap up team on August 10, 2015 asking, "Please cancel effective 08/01/2015," apparently referring to ACC. Pa893. However, the prior email in that chain referred to policy "WC 0181121-00," which was the CCIP Workers' Compensation Policy, not the general liability policies at issue in this case. Pa893-Pa895. In any event, that email between Alliant and Zurich did not result in any notice to ACC, which of course continued its work on the project into December of 2015.

Critically, this July and August correspondence pre-dated Abbonizio's September 25, 2015 correspondence to ACC that it was "***CCIP Approved***" for the project. Pa427 (emphasis added). This communication further establishes that despite any prior excluded work, ACC remained "CCIP approved" going forward. The trial court's interest in ACC not "objecting" to its unenrollment is unwarranted, as ACC was entitled to rely on this guarantee and had no reason to expect cancellation of the insurance it was just guaranteed in writing.

In sum, the record reflects that ACC was enrolled in the CCIP Program as of July 30, 2015, and that only ACC's discrete August 2015 work on the Ritz Hotel retaining wall may have been intended to be excluded from coverage because it was deemed "demolition work." However, that purported

limited exclusion of "demolition work" was not proof of ACC's wholesale unenrollment from the CCIP.

C. ZURICH AND AGLIC DID NOT TAKE APPROPRIATE STEPS TO TERMINATE ACC'S ENROLLMENT IN THE CCIP AND CANCEL ITS LIABILITY INSURANCE UNDER THE CCIP POLICY

Critically, even if ACC was intended to be unenrolled from the CCIP, the trial court disregarded long-established New Jersey law in finding that ACC's CCIP insurers did not need to comply with ***any*** legal requirements of formal notice of cancellation of ACC's insurance under the CCIP Policy. Pa2749-Pa2752. This finding was erroneous. CCIP policies are, of course, ***insurance policies*** subject to the very same cancellation requirements as all other insurance policies in New Jersey. As a result, there is no "whoops a daisy" exception to these requirements, as impliedly suggested by the trial court.

Even if Zurich and AGLIC sought to completely cancel ACC's insurance under the CCIP Policy at some point before the accident via Tutor Perini's authority to effectuate that cancellation, ***no notice of cancellation of ACC's insurance was ever sent to ACC***. Zurich and AGLIC were legally obligated to provide such notice, no matter the parties' informal understandings of certain work that may or may not have been excluded. In the absence of any such notice, ACC was entitled to continued liability coverage as if it were enrolled

in the CCIP. The public policy behind New Jersey's requirement of formal notice of cancellation is rooted in decades of New Jersey caselaw, which makes no exception for contractor-controlled policies. The trial court did not even address this caselaw. Pa2749-Pa2752.

New Jersey courts favor the reasonable expectations of insureds and require appropriate notice and grounds for insurance policy changes in all contexts. See, e.g., Skeete v. Dorvius, 184 N.J. 5, 8-9 (2005) (affirming Appellate Division's finding that inadequate notice of policy change was insufficient where an "average policyholder" would not have identified the change "without extensive detective work, an unreasonable encumbrance on a policyholder that can only result in hidden pitfalls such as are presented here … policy changes must be conveyed fairly to the policyholder"); Bauman v. Royal Indem. Co., 36 N.J. 12, 25 (1961) ("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 … common fairness as well as legal duty dictated that [the insurer] call the lessened coverage to the attention of the insureds so that they might suitably protect themselves."). Critically, the purpose of these notice requirements "***is to give the insured the opportunity to guard against the peril of noncoverage, a peril which, as this case shows,***

can arise out of miscommunication among brokers, agents, insureds and carriers." Exchevarias v. Lopez, 240 N.J. Super. 104, 108 (App. Div. 1990) (emphasis added). Such a miscommunication, of which this caselaw warns, is precisely what led to this litigation.

This concept of fairness to and protection of insureds has been espoused by New Jersey courts. In Munoz v. N.J. Auto. Full Ins. Underwriting Ass'n, the Supreme Court noted "the Legislature's concern that insurance companies were canceling policies capriciously and not providing policyholders with sufficient time to find alternative coverage." 145 N.J. 377, 387 (1996). While ACC was fortunate enough to obtain coverage from Evanston and Travelers,[4] the ambiguity arising from the lack of formal cancellation notice here gives rise to a legitimate concern that there is no recourse for insured subcontractors if higher contractors or CCIP insurers could capriciously cancel their insurance before a certain portion of a project, leaving that subcontractor without sufficient time to find alternative coverage and without the ability to work on the project it contracted for.

New Jersey courts have long upheld a strong public policy favoring the

[4] The trial court erroneously found that ACC obtained its insurance from Travelers and Evanston "as a prerequisite" to starting its work on the Project following unenrollment, implying that ACC understood its insurance situation and that it was permanently unenrolled. Pa2743-Pa2746. However, those policies were issued well before this period on January 28, 2015. Pa34, Pa226.

protection of insurance customers to prevent such ambiguity and uncertainty, insisting that insurance companies strictly comply with all requirements regarding cancellation of insurance and continuing coverage in the absence of compliance. Bright v. T & W Suffolk, Inc., 268 N.J. Super. 220, 225 (App. Div. 1993); see, e.g., Romanny v. Stanley Baldino Constr. Co., 142 N.J. 576, 584 (1995) (in the context of workers' compensation insurance: "We acknowledge the strong public policy favoring uninterrupted workers' compensation coverage for all employers as well as the principle that insurance companies must comply strictly with all statutory and regulatory requirements relating to cancellation or non-renewal of such policies."); Millbrook Tax Fund, Inc. v. P.L. Henry & Associates, Inc., 344 N.J. Super. 49, 54 (App. Div. 2001) ("If, as a matter of law, [the insurer] could not vary a material provision of that policy upon renewal without specifically informing the policyholder of the change, both parties, upon renewal, continued to be bound by the provisions of the first policy."); Scott v. Jovil Constr., Inc., 2009 N.J. Super. Unpub. LEXIS 2947, *10 (App. Div. 2009) (recognizing, in the context of automobile insurance, "that in order to be effective, notices of non-renewal and notices of cancellation must be sent in strict compliance with applicable statutory and regulatory provisions"), Pa2726-Pa2731.

Courts resist "implied cancellation," as "insurance policies are complex

contracts of adhesion, prepared by the insurer and not subject to negotiation." Miller v. Reis, 189 N.J. Super. 437, 444 (App. Div. 1983). The "broad measure of protection" to which insureds are entitled pursuant to their reasonable expectations "includes an insistence that, with respect to statutes which enable insurance companies to shed risks voluntarily undertaken, those companies comply strictly with the statutory requirements." Id. at 444 (emphasis added). There is "no reason to dilute this stated policy, derived from legislative fiat, in matters of cancellation. If an insurance company intends to cancel a policy pursuant to the statute, ***it must say so expressly***." Id. (emphasis added).

There is no New Jersey caselaw specifically referencing cancellation of insurance under CCIP or OCIP policies, but there was no basis in New Jersey law that allowed the trial court to ignore the usual rules for insurance contracts and conclude that coverage under a CCIP policy could be cancelled without the insured's knowledge. However, other courts have reached the common-sense conclusion that the usual rules of insurance contracts apply to CCIPs and OCIPs. For example, in Workers' Comp. Fund v. Wadman Corp., the Utah Supreme Court articulated no distinction when it held that an employee of a contractor enrolled in an OCIP was still entitled to proceeds of the OCIP's workers' compensation insurance benefits where no notice was given to the

contractor of the policy's cancellation. See 210 P.3d 277, 287 (Utah 2009) ("Argonaut [OCIP insurer] is required by law to give notice to Wadman [enrolled contractor] of any policy cancellation … Since no notice was given to Wadman by Argonaut of the insurance policy being cancelled, the policy is still valid.").

On a broader level, outside of CCIP and OCIP policies, other jurisdictions have emphasized the need for strict compliance with cancellation requirements in various insurance scenarios, even where the insured secured other coverage, in order protect the public and avoid confusion as to coverage and compliance. See, e.g., Midstate Hauling Co. v. Reliable Ins. Co., 437 F.2d 616, 618 (5th Cir. 1971) (rejecting insurer's contention the public purposes of the notice statute were satisfied as other insurance was in effect on the date of the accident, and the 30-day notice provision should not apply: "The State has asserted a public interest in the insurance policies of common carriers, and has determined by statute and legislatively authorized Commission rules how that interest shall be protected. To give effect to the cancellation here would erode the public policy contained in the statute."); Vrabel v. Scholler, 94 A.2d 748, 750 (Pa. 1953) (rejecting a lower court ruling which relieved the original insurer from liability on grounds the public interest was protected by replacement insurance obtained on the date of cancellation: "To treat the

[replacement] policy as an escape for Colonial from its liability under its extant policy would be to gratuitously inject collateral issues, and, hence, confusion, into a question of compliance with the statute's clear and unequivocal intendment.").

These jurisdictions refer to those states' statutory and regulatory provisions requiring certain notice of changes or cancellation of insurance. Likewise, in New Jersey, the Commissioner of the Department of Banking and Insurance is authorized to direct by rule or regulation that insurance companies include provisions in insurance policies "whereby 30 days' written notice shall be given … to the insured, of the cancellation of any such policy…." N.J.S.A. 17:29C-1. Pursuant to that statutory authority, the Commissioner issued regulations, one of which directs that "[n]o policy shall be nonrenewed upon its expiration date unless a valid written notice or nonrenewal has been mailed or delivered to the insured." N.J.A.C. 11:1-20.2(a). Regarding commercial policies, pursuant to N.J.A.C. 11:1-20.2(d):

> 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 except . . . .

Further, "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." N.J.A.C 11:1-20.2(g). The statute further directs that "if an insurer fails to send a notice of nonrenewal as required … the insured shall be entitled to continue the expiring policy at the same terms and premium until such time as the insurer shall send appropriate notice of termination or renewal." N.J.A.C. 11:1-20.2(j).

These regulations reflect "New Jersey's strong policy in favor of protecting insurance consumers" and the Commissioner's "clear intention to combat unfair cancellations and the prevalence of nonrenewals in the commercial and homeowner' insurance markets." Piermount Iron Works, Inc. v. Evanston Ins. Co., 197 N.J. 432, 440 (2009). In Piermount, the New Jersey Supreme Court stressed, "Our strong public policy requiring notice of nonrenewal, and the concomitant obligation to continue coverage when an insurer fails to satisfy that notice requirement, has been made ***broadly applicable*** by the Commissioner." Id. at 441 (emphasis added). This public policy predates these regulations and exists independent of them. See Harvester Chemical Corp. v. Aetna Cas. & Sur. Co., 277 N.J. Super. 421, 431 (App. Div. 1994) ("Although New Jersey now has in effect regulations that govern mid-term cancellations of general liability insurance policies, see, e.g.,

N.J.A.C. 11:20-1 et seq., the lack of those regulations between November 1984 and September 17, 1985, did not authorize Aetna to unilaterally terminate Harvester's policy mid-term without adequate and objective reasonable grounds.").

The trial court found that the Administrative Code did not apply. Pa2750-Pa2752. The court reasoned that while ACC was "unenrolled," the larger CCIP Policies as they applied to all other subcontractors were never "cancelled." Pa2750. This strained exercise in semantics (*i.e.,* "unenrollment" versus "cancellation") completely misses the point. Here, any unenrollment of ACC would have the same effect of ***cancelling ACC's insurance*** under the CCIP. The trial court also reasoned that the Code does not apply to "workers' compensation insurance," the cancellation of which is not at issue here, and that it does not apply to "multi-state risks." While it is true that the CCIP program applies to contractors and projects in other states, only ACC's coverage was cancelled, not the CCIP Policy itself. The CCIP Policy applied to ACC as a single-location New Jersey company, not a multi-state risk. Therefore, ACC did not constitute a multi-state location risk and its insurance is not of the type meant to be excepted from the Code's policy of protecting insureds.

Even if the Administrative Code does not apply, public policy protecting

insureds' reasonable expectations still mandates reasonable notice of any changes to their insurance. See McClellan v. Feit, 376 N.J. Super. 305, 315 (App. Div. 2005) ("Regardless of N.J.A.C. 11:1-20.2's inapplicability, notification of changes in renewal policies under some circumstances is still required … when the insured is not specifically and clearly informed of the change, the renewal will be ineffective"); Nova Dev. Group, Inc. v. J.J. Farber-Lottman Co., Inc., 2010 N.J. Super. Unpub. LEXIS 413, at *14 (App. Div. 2010) ("If the regulation is not applicable, the issue remains, as the motion judge found, whether Nova was otherwise given reasonable notice of the exclusion endorsement."), Pa2761-Pa2765.

Moreover, the CCIP Manual provides that if Tutor Perini terminates any portion of the CCIP, "subcontractors will be provided with at least 30 days notice of cancellation," and, "[s]hould coverage be cancelled by the insurer, 30 days written notice will be provided per the contract." Pa589. The Certificate of Liability Insurance issued by Alliant to ACC also provided an additional cancellation requirement: "Should any of the above described policies be cancelled before the expiration date thereof, notice will be delivered in accordance with the policy provisions." Pa619.

The CCIP Policy itself provides that the "first Named Insured" may cancel the policy by sending advance written notice of cancellation and that

the insurer may cancel the policy by "mailing or delivering to the first Named Insured written notice of cancellation" 10 days before the effective date for nonpayment of premium or 30 days before the effective date for any other reason. Pa84. The Earlier Notice of Cancellation or Non-Renewal Endorsement raises the number of days required for notice of cancellation to 90 days. Pa142. Although the policy refers to the "first named insured," Tutor Perini, insurance in this case was issued to ACC. N.J.A.C. 11:1-20.2(d) requires that notice be sent to "***the insured, and*** to any person entitled to notice under the policy" (emphasis added). As the insured here, ACC was entitled to notice.[5]

Even where a third party is empowered under the terms of the policy to cancel an insured's insurance, it simply cannot cancel absent proper notice, in which case the policy will remain in effect. See Kende Leasing Corp. v. A.I. Credit Corp., 217 N.J. Super. 101, 111-13 (App. Div. 1987) (even where a premium finance company was empowered under the policy to cancel the insured's insurance, it could not cancel absent proper notice, so the policy remained in effect despite the insured's nonpayment of premiums).

Notice obligations are ***not delegable***, and rest on "***the insurer***, not the

[5] Pursuant to the policy, enrolled contractors "qualify as a Named Insured," so ACC would qualify as a "named insured," not an "additional insured." Pa148.

broker or agent." Barbara Corp. v. Bob Maneely Ins. Agency, 197 N.J. Super. 339, 346 (App. Div. 1984) (emphasis added) (in the context of notice of nonrenewal of fire and casualty insurance: "The obligation has been placed on the carrier by the regulation to give the required notice. Failure to do so requires automatic renewal regardless of the conduct of brokers or agents."); see also Insinga v. Hegedus, 231 N.J. Super. 562, 567 (App. Div. 1989) ("our reference to nondelegability in Barbara was intended to make clear that 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"). Even so, Tutor Perini's subcontract provides that "Tutor Perini Building Corp. may, for any reason, modify the CCIP Coverages, discontinue the CCIP, or request that any Subcontractor of any tier withdraw from the CCIP upon thirty (30) days written notice." Pa570. In any event, ACC was still the insured party to whom liability coverage, and notice of any changes, were due.

Contrary to the strict notice requirements of New Jersey law, the CCIP documents, and the CCIP Policy, ***absolutely nothing has been produced by any party evidencing formal notice of cancellation sent to ACC***. Depositions of representatives of each party confirmed this lack of notice:

- Kathleen Kelly of Zurich testified that Zurich ***never sent a cancellation notice to ACC***. Pa2114.

- Randi Vogt, Zurich's Customer Service Team Lead in the Zurich Wrap Up Department, ***could not locate any documents that related to a cancellation of coverage*** under a general liability policy. Pa2444.

- Michelle Morris of ACC testified that ACC ***never received any notice*** from either Alliant or Zurich that ACC was no longer enrolled in the CCIP. Pa2352-Pa2353.

- When shown a form letter that would advise contractors that they were excluded from a CCIP program, Dennis McGowan of Alliant, listed as the contact person on ACC's Certificate of Liability Insurance, testified that he had ***never seen such a letter that was issued to ACC***. He also testified that his intent in emailing Zurich's wrap up team to "cancel effective 8/1/2015" was to cancel the workers' compensation policy. Pa2460, Pa2485.

- Benjamin Faust of Alliant testified that although he believed ACC was "erroneously" enrolled, there was ***no formal process at the time to inform erroneously enrolled contractors*** that they were not covered, and it was ***unclear to Alliant whether a notice of cancellation was sent to ACC***. Pa2211-Pa2212.

- Anne Lorenz of Tutor Perini testified that, although Tutor Perini's subcontract provided that Tutor Perini may "request that any subcontractor with any tier withdraw from the CCIP upon 30 days written notice," ***she was not aware of any written notice issued to ACC*** informing them that they would be withdrawn from coverage. Pa965.

The informal email discussion in July and August 2015 referenced in Section II.B. above regarding ACC's enrollment in the CCIP at that time did not satisfy this requirement that ACC be ***formally notified of cancellation*** of its insurance. See Miller, 189 N.J. Super. at 444 (finding notices warning of lapsed coverage inadequate: "the statute directs they must do more: they must advise that the subsisting policy will be *cancelled* on a certain date no sooner

than ten days thereafter" (emphasis in original)). The record certainly supports ACC's reasonable expectation that its insurance was not cancelled, given Abbonizio's unequivocal confirmation of ACC's CCIP approval later, in September 2015. Pa427. Further, ACC received this confirmation from Abbonizio within the CCIP Policy's 90-day notice period, although the trial court apparently determined that ACC's insurance was cancelled ***immediately*** after its enrollment. The potential confusion arising from such a situation is what these requirements are meant to avoid.[6]

Importantly, regardless of the intent of the insurer or the conduct of the insurer's brokers or agents, an insurer's ***proof of compliance*** with the requirements of the statute is necessary in the face of an insured's denial of receipt of the notice of cancellation. Pawlick v. New Jersey Auto. Full Ins. Underwriting Ass'n, 284 N.J. Super. 629, 634 (App. Div. 1995). The burden is on the insurer to provide specific notice, and in the absence of notice, the insured is entitled to the benefits of the policy. Celino v. General Acc. Ins., 211 N.J. Super. 538, 542-44 (App. Div. 1986). The Appellate Division in Celino noted "a substantial burden on the carrier in attempting to prove, in the

[6] The trial court, like Zurich and AGLIC, briefly refers to notice of cancellation sent to the PAWC, which referred to the CCIP ***Workers' Compensation Policy***, not the liability coverage, and which did not result in notice to ACC. Pa1066-Pa1068. It also referred to Alliant's Enrollment Status Reports, which had no actual effect on ACC's insurance, and which provide no evidence showing they resulted in any notice to ACC. Pa2729-Pa2730.

face of an insured's denial of receipt, that a specific notice was sent." See id. (finding "the notice of cancellation was, as a matter of law, ineffective. Hence, plaintiff is entitled to the benefits afforded by the policy in question.").

Here, in a July 31, 2018 email, Kathleen Kelly of Zurich acknowledged that they had "enrollment documents for ACC effective 8/1/15. We issued a policy so, we would need to have received a request to cancel flat to unenroll them. ***We don't have a copy of any request***." Pa913 (emphasis added). Zurich and AGLIC, were never relieved of their duty to provide notice to its insureds of any cancellation, and they still had a duty to maintain a record of authorization of any cancellation request. Further, any attempt to distinguish this case with hyper-technical distinctions from the regulations and caselaw cited above as dealing with different areas of insurance is also meritless, as they still provide the groundwork for assessing proof of effective policy cancellation. See Valley Nat. Bancorporation v. American Motorists Ins. Co., 316 N.J. Super. 152, 157-58 (App. Div. 1998) ("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 insurer's claims are evidence of effective notice of policy cancellation.").

Thus, at least ***five different sources*** required Zurich and AGLIC to provide notice to ACC of the purported cancellation of its CCIP coverage, but Zurich and AGLIC admittedly complied with ***none of them*** as summarized in the following chart:

SOURCE OF CANCELLATION REQUIREMENT	CANCELLATION REQUIREMENT	NOTICE GIVEN TO ACC?
CCIP Policy	90 days' notice	No
CCIP Manual	30 days' notice	No
Certificate of Liability Insurance	Notice in accordance with the policy provisions (90 days)	No
New Jersey Common Law	Notice in accordance with Administrative Code, policy provisions, and/or reasonable expectations of insureds	No
New Jersey Administrative Code	30 days' notice	No

As explained above, cancellation is not a *pro forma* requirement. Rather, there is a compelling public policy supporting this requirement, and there is no reason to treat CCIP insureds differently than other insureds. Rather, the ambiguity arising from lack of proper notice drives the need for clear notice to insureds to avoid the very confusion that came to pass in this case. Zurich and AGLIC did not take the necessary steps required by the CCIP Policy, the CCIP Manual, the Certificate of Service, or New Jersey law to cancel ACC's insurance. As a result, ACC was insured in the CCIP at the time of the Hood accident and entitled to coverage under the CCIP Policy.

II. EVEN IF ACC WAS NOT ENROLLED IN THE CCIP AT THE TIME OF THE HOOD ACCIDENT, ALLIANT WOULD STILL BE LIABLE TO PROVIDE COVERAGE DUE TO ITS NEGLIGENCE AS ACC'S INSURANCE BROKER (PA2752-PA2754)

The trial court also erroneously held that, in the event of Zurich and AGLIC's non-coverage, Alliant did not act negligently as ACC's insurance broker. The court found that there was "no theory under which Alliant can be held responsible for the money Travelers and Evanston spent to defend and settle the Hood Lawsuit." Pa2753. This was also erroneous. Even if Zurich and AGLIC did not owe coverage, Alliant, as ACC's insurance broker and fiduciary at the time it was enrolled, would be liable for these costs as it negligently caused ACC to rely on its representations that ACC was enrolled in the CCIP and that its work would be covered by the CCIP Policy.

New Jersey Administrative Code 11:17A-4.10 provides: "An insurance producer acts in a fiduciary capacity in the conduct of his or her insurance business." The Restatement of Agency provides that "[a]n agent is subject to liability for loss caused to the principal by any breach of duty." Restatement 2d of Agency, § 401. Insurance brokers, like agents, are obliged to inform insureds of available coverage. Weinisch v. Sawyer, 123 N.J. 333, 340 (1991) (internal quotations omitted). The fiduciary relationship gives rise to a duty owed by the broker to the client to exercise good faith and reasonable skill in advising insureds. Aden v. Fortsh, 169 N.J. 64, 79 (2001).

If a broker neglects to procure the insurance or if the policy is void or materially deficient or does not provide the coverage it undertook to supply, because of its failure to exercise the requisite skill or diligence, he becomes liable to his principal for the loss sustained thereby. Rider v. Lynch, 42 N.J. 465, 476 (1964); Marano v. Sabbio, 26 N.J. Super. 201, 205 (App. Div. 1953). Accordingly, an insurance broker is liable for professional negligence when, as here, the broker (1) neglects to procure the insurance; (2) if the policy is void; (3) if the policy is materially deficient; or (4) if the policy does not provide the coverage he undertook to supply. President v. Jenkins, 180 N.J. 550, 569 (2004). A court may grant judgment to a plaintiff as a matter of law "where the evidence permits no conclusion other than that the broker was ignorant of available coverage, failed to obtain requested coverage, or failed to advise the customer of the unavailability of requested coverage." Avery v. Arthur E. Armitage Agency, 242 N.J. Super. 293, 303 (App. Div. 1990). The failure of the broker to produce the coverage or else warn the client at once that coverage could not be obtained constitutes a failure to exercise the requisite skill or diligence required of a broker to the same extent as would have obtained had there been a failure to issue a policy which the broker promised to procure. Dimarino v. Wishkin, 195 N.J. Super. 390, 393 (App. Div. 1984). In DiMarino, an insurance broker was liable for its client's damages where the

broker expressly agreed to procure insurance at the request of the client but failed to do so and did not inform the client of such failure. Id.

Alliant is listed on the CCIP Policy as the "Producer" for that insurance. Pa77. The CCIP Manual named Alliant as the "CCIP Broker," Benjamin Faust as the CCIP "Program Manager," and Dennis McGowan as the CCIP "Program Administrator." Pa584. In that role, Alliant was responsible for ensuring that subcontractors were properly enrolled in the CCIP in order to work at the Project. This role made Alliant an insurance broker and fiduciary of each subcontractor that relied on Alliant's administration of the CCIP, including ACC upon receipt of its Certificate of Liability Insurance. Kathleen Kelly of Zurich confirmed Alliant's role as broker when she testified that Alliant was acting as insurance broker on behalf of ACC as a named insured. Pa2116. Dennis McGowan of Alliant acknowledged that Alliant was the broker of the policies and ACC was Alliant's client. Pa2469. Therefore, Alliant had a duty to ACC as its fiduciary to exercise good faith and reasonable skill in advising and administering its insurance.

Enrollment in the CCIP was mandatory for subcontractors to begin work on the Project. Pa588. ACC continued to perform work at the Project ***for months***, reasonably understanding that it could not have performed this work without CCIP enrollment. Pa588, Pa876-Pa891. Absent formal notice of

cancellation, ACC was entitled to reasonably rely on the documentation it received from Alliant confirming its enrollment and the coverage seemingly agreed upon. See Rider, 42 N.J. at 482 (insureds "were entitled to rely upon and believe that the broker had fulfilled his undertaking to provide the coverage impliedly agreed upon, and that the policy sent to them represented accomplishment of that undertaking").

ACC is not in the insurance business and was entitled to rely on Alliant's role as program administrator to continue to perform its work. See Aden v. Fortsh, 169 N.J. 64, 87 (2001) ("Insurance consumers who instruct their brokers to provide coverage are entitled to have those instructions followed without regard to the insured's failure to detect the broker's negligent conduct."). Nor was Alliant relieved of its duty because it did not have a direct role in excluding ACC from the CCIP. Pa2753. It was still Alliant's duty to administer the insurance ACC was guaranteed in its Certificate of Liability Insurance, and it would have been Alliant's ***negligence***, not necessarily its ***active role***, that caused ACC's improper unenrollment from the program Alliant administered.

Therefore, if the Court finds that Zurich and AGLIC did not owe coverage to ACC, Alliant would have neglected to administer the CCIP properly and to provide the general liability coverage under the CCIP for those

performing work at the Project. Alliant would be liable for ACC's defense and indemnification costs due to its breach of duty.

III. ACC AND EVANSTON (AND TRAVELERS) ARE ALSO ENTITLED TO REIMBURSEMENT OF ATTORNEYS' FEES AND COSTS FOR PURSUING THIS COVERAGE LITIGATION

Although this issue was not reached by the trial court, ACC and Evanston (and Travelers) are entitled to reimbursement of their attorneys' fees and costs in the event this Court reverses the trial court. New Jersey courts may award attorneys' fees and costs incurred in successfully pursuing defense and indemnity coverage from an insurance carrier which has refused to cover a claim. R. 4:42-9(a)(6) ("(a) Actions in Which Fee Is Allowable. . . .(6) In an action upon a liability or indemnity policy of insurance, in favor of a successful claimant.").

Importantly, this rule applies to ***all*** successful claimants, including an excess or secondary carrier which successfully prosecutes a coverage action against the primary carrier when the latter has wrongfully refused to defend its insured. Tooker v. Hartford Accident & Indem. Co., 136 N.J. Super. 572, 577 (App. Div. 1975). ACC, Evanston, and Travelers have expended substantial sums in relation to Zurich's wrongful refusal to defend, and Zurich and AGLIC's wrongful refusal to indemnify, ACC in the Hood litigation, and were forced to prosecute this litigation to obtain defense and indemnity for ACC.

As a result, they are owed attorneys' fees and costs pursuant to this Rule.

The policy underlying Rule 4:42-9(a)(6) is "to discourage groundless disclaimers and to provide more equitably to an insured the benefits of the insurance contract without the necessity of obtaining a judicial determination that the insured, in fact, is entitled to such protection." Sears Mortgage Corp. v. Rose, 134 N.J. 326, 356 (1993) (internal citations omitted). The award of counsel fees and costs in such a case is equitable and just and accords with the purpose of the Rule to discourage groundless disclaimers by carriers by assessing against them the expenses incurred in enforcing coverage for their assureds. Tooker, 136 N.J. Super. at 576. As discussed above, Zurich and AGLIC's disclaimer was indeed groundless and falls within this category of practices that should be discouraged. ACC and Evanston (and Travelers) are entitled to attorney's fees and costs as successful claimants in pursing this litigation. See, e.g., id. at 577 (upholding award of attorneys' fees under Rule 4:42-9(a)(6) where insurer wrongfully refused to defend its insured: "It seems only fair and proper that the costs incurred by Allstate to compel Hartford to do that which it was legally obligated to do in the first place should fall upon Hartford.").

IV. ACC AND EVANSTON (AND TRAVELERS) ARE ENTITLED TO PRE-JUDGMENT INTEREST ON THEIR DAMAGES

Although this issue was also not reached by the trial court, ACC and

Evanston, as well as Travelers, are also entitled to prejudgment interest on their damages as well. The award of prejudgment interest on contract and equitable claims is based on equitable principles. County of Essex v. First Union Nat. Bank, 186 N.J. 46, 61 (2006). The basic consideration is that the defendant, and not the plaintiff, has had the use of the amount in question, and the interest factor simply covers the value of the sum awarded for the prejudgment period during which the defendant had the benefit of monies to which the plaintiff is found to have been earlier entitled. Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 506 (1974). The award of prejudgment interest is a matter of discretion for the trial court. In re Estate of Lash, 169 N.J. 20, 34 (2001). Similarly, the rate at which prejudgment interest is calculated is within the discretion of the court, which can be guided by the rates set by Rule 4:42-11. Litton Industries, Inc. v. IMO Industries, Inc., 200 N.J. 372, 390 (2009).

Since ACC, Evanston, and Travelers have been deprived the use of the money unnecessarily expended in their defense and indemnity costs, they are entitled to prejudgment interest on all damages, including defense costs incurred by ACC and Travelers, and indemnity costs incurred by Travelers and Evanston, running from the time those costs became due.

CONCLUSION

Plaintiffs respectfully requests that the Court reverse the Orders below, enter summary judgment in favor of Plaintiffs (and Travelers), and declare that:

(1) Zurich owed defense and indemnity to ACC for all expenses and liabilities incurred in connection with the Hood litigation;

(2) AGLIC owed indemnity to ACC for such expenses and liabilities exceeding Zurich's primary limit;

(3) Plaintiffs (and Travelers) are to be reimbursed for their expenses and liabilities incurred in connection with their defense of ACC in the Hood litigation;

(4) Plaintiffs (and Travelers) are to be reimbursed for their attorneys' fees and costs incurred in connection with this litigation under New Jersey Court Rule 4:42-9;

(5) Plaintiffs (and Travelers) are entitled to pre-judgment interest on all of the foregoing.

Respectfully submitted,

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Dated: December 13, 2023

PROOF OF SERVICE

I hereby certify that, on this day, copies of the foregoing Brief of Plaintiffs/Appellants and Appendix Vols. 1-8 were served upon all counsel of record via the Court's electronic filing system.

/s/ Edward M. Koch

Edward M. Koch

Dated: December 13, 2023

ATLANTIC CONCRETE CUTTING, INC. and EVANSTON INSURANCE COMPANY, Plaintiffs, vs. ZURICH AMERICAN INSURANCE COMPANY, AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY, ALLIANT SERVICES, INC. and TRAVELERS INDEMNITY COMPANY OF AMERICA, Defendants/Respondents.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-003358-22T2 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 AND APPENDIX OF DEFENDANT/RESPONDENT THE TRAVELERS INDEMNITY COMPANY OF AMERICA

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Procedural History

Defendant/respondent The Travelers Indemnity Company of America concurs in the procedural history set forth in the brief of the plaintiffs/appellants Atlantic Concrete Cutting, Inc. and Evanston Insurance Company. Travelers further notes that it is the appellant in a separate appeal, docketed under number A-3393-22, which involves the same order for summary judgment entered in favor of defendants/respondents Zurich American Insurance Company and American Guarantee and Liability Insurance Company ("AGLIC") at issue in the captioned appeal, and which has been fully briefed by Travelers. The Court previously

ordered the Clerk's office to "calendar the two appeals back-to-back on the same date before the same panel." (Dta1.)

Statement of Facts

Travelers generally concurs in the Statement of Facts set forth in plaintiffs'/appellants' brief.

Legal Argument

THE LAW DIVISION ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS ZURICH AND AGLIC AND DENYING THE MOTIONS FOR SUMMARY JUDGMENT FILED BY PLAINTIFFS (AND TRAVELERS).

In the captioned appeal, Travelers agrees with the legal arguments presented by plaintiffs/appellants as to their appeal from the orders granting Zurich and AGLIC summary judgment, and denying plaintiffs' motion for summary judgment against those parties.[1]

Conclusion

Travelers respectfully submits that the orders entering summary judgment in favor of Zurich and AGLIC, and denying plaintiffs' (as well as Travelers') motions for summary judgment, should be reversed.

[1] This brief is submitted pursuant to a communication from the Court that rejected a letter Travelers filed joining plaintiffs'/appellants' brief and directed Travelers to submit its "own letter brief indicating which arguments raised by the appellants respondent agrees with."

Respectfully submitted,

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

Dated: February 27, 2024

ATLANTIC CONCRETE CUTTING, INC. and EVANSTON INSURANCE COMPANY,	:	SUPERIOR COURT OF NEW JERSEY
	:	APPELLATE DIVISION
Plaintiffs/Appellants,	:	DOCKET NO.: A-003358-22T2
vs.	:	
ZURICH AMERICAN INSURANCE COMPANY, AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY, ALLIANT INSURANCE SERVICES, INC., and TRAVELERS INDEMNITY COMPANY OF AMERICA,	:	On Appeal From: Superior Court of New Jersey Law Division Burlington County Docket No.: BUR-L-742-19
	:	Sat Below:
Defendants/Respondents.	:	Hon. James J. Ferrelli, J.S.C.

BRIEF OF DEFENDANT/RESPONDENT ALLIANT INSURANCE SERVICES, INC.

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PRELIMINARY STATEMENT

At its core, this litigation is a fight between insurers as to which are responsible to pay the money spent to defend and settle a lawsuit ("Hood lawsuit") on behalf of Atlantic Concrete Cutting, Inc. ("ACC"). At the time the instant litigation was filed, the Hood lawsuit was still pending in Philadelphia, PA. In the Hood lawsuit, ACC was defended by its primary general liability insurer, Travelers Indemnity Company of America ("Travelers"), which paid all defense costs and legal fees for ACC. Several months after the instant litigation was filed, a settlement was reached in the Hood lawsuit, whereby Travelers paid its $1 million policy limit on behalf of ACC. ACC's umbrella insurer, Evanston Insurance Company ("Evanston"), paid an additional $350,000 to settle all claims against ACC. In the end, ACC was fully protected by its insurers – Travelers and Evanston – in the Hood lawsuit, and has no damages of its own in the instant litigation.

Now, through contract and declaratory judgment claims, Travelers and Evanston essentially seek to recover the money they spent from Zurich American Insurance Company ("Zurich") and American Guarantee and Liability Insurance Company ("AGLIC"). The trial court, in a very well-reasoned and supported opinion, correctly ruled in favor of Zurich and AGLIC in the coverage dispute. But regardless of which insurers prevail in that coverage dispute, there is no theory under which Alliant Insurance Services, Inc. ("Alliant") can be responsible for the money

Travelers[1] and Evanston spent to defend and settle the Hood lawsuit. The trial court correctly granted Alliant's motion for summary judgment.

PROCEDURAL HISTORY

Alliant generally agrees with the procedural history as set forth in the Appellants' Brief.

COUNTER-STATEMENT OF FACTS

This case arises out of a construction site accident involving Adam Hood that occurred on December 11, 2015 on the W/Element Hotel construction site ("Project Site") at 1441 Chestnut Street in Philadelphia, PA. Pa3. On the date and time of the accident, ACC was working on the Project Site. Pa3. Tutor Perini Building Corp. ("Tutor Perini") was the General Contractor for the construction project, and hired C. Abbonizio Contractors, Inc. ("Abbonizio") as a Sub-Contractor. Pa3. Abbonizio hired ACC as another Sub-Contractor. Pa3. ACC and others were sued by Adam Hood and his wife for the injuries he sustained on December 11, 2015 ("Hood lawsuit"). Pa4.

Zurich was the primary insurer for a Contractor Controlled Insurance Program ("CCIP") issued to Tutor Perini, for the first $2 million in coverage. Pa2. AGLIC

[1] 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, included with Plaintiffs' Appendix (Pa) at Pa2676.

was a CCIP excess liability carrier with a coverage limit of $25 million excess over Zurich's CCIP primary insurance of $2 million. Pa2. Evanston was a commercial umbrella liability carrier for ACC, with a coverage limit of $9 million excess over the primary liability coverage limit of $1 million afforded to ACC by Travelers. Pa2. ACC and Evanston claim that ACC should have been defended and indemnified in the Hood lawsuit by Zurich, as the CCIP Insurer for Tutor Perini. Pa5. Zurich and Alliant assert that ACC was *not* enrolled in the CCIP, and *knew* it was not enrolled. The trial court agreed with Zurich and Alliant, citing substantial evidence to prove that ACC knew it was not enrolled in the CCIP, and instead obtained its own insurance with Travelers and Evanston. Pa2746. As such, Zurich did not afford coverage under the Tutor Perini CCIP to ACC in the Hood lawsuit. Pa5. Instead, Travelers – as the primary liability insurer for ACC – defended ACC in the Hood lawsuit, and ultimately paid its $1 million limit in settlement of the Hood lawsuit on behalf of ACC. Pa821. Evanston – as the excess liability insurer for ACC – paid an additional $350,000 in settlement of the Hood lawsuit on behalf of ACC. Pa821. ACC, itself, has sustained no damages, as it was fully protected in the Hood lawsuit by both Travelers and Evanston. Pa822.

The Plaintiffs/Appellants' claims in this lawsuit against Zurich and AGLIC essentially seek a ruling, as a matter of law, that Zurich (*inter alia*) is obligated to reimburse Evanston for the $350,000 Evanston paid to settle the Hood lawsuit.

Pa822-Pa824. They contend that ACC was not properly notified that it had been unenrolled from the CCIP, and therefore the CCIP general liability coverage afforded by Zurich should have covered ACC. Pa822-Pa824. The trial court correctly ruled in favor of Zurich and AGLIC on the coverage issue.

ACC and Evanston sued Alliant for (*inter alia*) professional negligence. Pa11. Generally speaking, ACC and Evanston allege that Alliant owed a duty to ACC to notify ACC that it had not been enrolled in the CCIP. Pa11. ACC and Evanston produced the expert report of Akos Swierkiewicz to support their claims against Alliant. Pa811-Pa829. Alliant produced the expert report of Louis Iacovelli to support their defenses to Plaintiffs' claims. Pa831-Pa842. The trial court correctly found that "there is no theory under which Alliant can be held responsible for the money Travelers and Evanston spent to defend and settle the Hood Lawsuit." Pa2753.

LEGAL STANDARD

The Appellate Division reviews a trial court's grant of summary judgment *de novo*. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016) (citing Mem'l Props., LLC v. Zurich Am. Ins. Co., 210 N.J. 512, 524 (2012)). New Jersey Court Rule 4:46-2 provides that a motion for summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to

any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." The moving party has the initial burden of showing no dispute exists. Judson v. Peoples Bank & Tr. Co. of Westfield, 17 N.J. 67, 74 (1954). When determining whether a genuine issue exists as to a material fact, the court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). A motion for summary judgment should be granted when the evidence presented "is so one-sided that one party must prevail as a matter law." Id.

LEGAL ARGUMENT

I. ACC HAS NO DAMAGES

There is no dispute that Travelers paid ACC's costs of defending the Hood lawsuit, and that Travelers and Evanston settled the Hood lawsuit on ACC's behalf. There is no evidence in the record, and no argument in the Appellants' Brief, that ACC suffered any damages that can be recoverable against Alliant. Pa2754.

II. EVANSTON HAS NO VIABLE CLAIM FOR DAMAGES AGAINST ALLIANT

This case has always been a coverage dispute between Travelers and Evanston on one hand, and Zurich and AGLIC on the other. Travelers and Evanston contend that, as a matter of law, Zurich and AGLIC are obligated to reimburse Travelers and

Evanston for the amounts spent in defending and settling the Hood lawsuit on behalf ACC. The trial court ruled in favor of Zurich and AGLIC, and now this Court must determine if the trial court was correct. But no matter how this Court rules, Alliant has nothing to do with the coverage fight between the insurers. This was true when the case was in the trial court, and it remains true now. The trial court found that Travelers and Evanston owed coverage to ACC related to the Hood lawsuit, and that Zurich and AGLIC did not. Evanston's coverage obligations have nothing to do with Alliant. The only way Evanston can prevail in its coverage fight is if this Court reverses the trial court and finds that Zurich owed coverage to ACC under the CCIP instead. Alliant had no control over whether ACC was enrolled in the CCIP or not. The discretion of whether ACC was enrolled in the CCIP rested with Tutor Perini, not Alliant. Pa2753.

ACC has no damages, and Alliant cannot be responsible for Evanston's coverage obligations. This is why the trial court correctly granted Alliant's motion for summary judgment.

III. THE EXPERT OPINIONS OF AKOS SWIERKIEWICZ ARE IRRELEVANT

In their Brief, Evanston and ACC argue that Alliant was ACC's insurance broker, and breached duties owed to ACC. Alliant disputes all of that, but regardless of whether it is true, it is irrelevant because ACC has no damages.

While the litigation was pending in the trial court, Evanston and ACC produced the expert report of Akos Swierkiewicz to support their arguments that Alliant breached duties owed to ACC, but the opinions offered by Mr. Swierkiewicz only underscore the irrelevance of the arguments advanced by the Appellants. Indeed, it is telling that Evanston and ACC make no mention of Mr. Swierkiewicz's opinions in their Brief. However, Alliant will quickly address them for the sake of good order.

A. Mr. Swierkiewicz's opinions that Alliant did not perform its duty to inform ACC that ACC was unenrolled from the CCIP, or to ensure that Zurich notify ACC that the Zurich general liability (GL) policy had been canceled, are irrelevant.

In his report, Mr. Swierkiewicz set forth six different opinions against Alliant. Pa822-Pa824. The first two are recitals of New Jersey law, which he contends support his belief that Alliant was ACC's insurance broker, and owed duties to ACC. Pa822. Alliant disputes those first two opinions, but they do not need to be addressed for purposes of this appeal. The remaining four opinions outline the manner in which he believes the duties were breached. Three of those remaining four opinions are, essentially, different ways of stating that Alliant did not ensure that ACC knew it had been unenrolled from the CCIP.

First, the record is replete with evidence that ACC did in fact know it had been unenrolled from the CCIP, and took action to protect itself by securing its own

insurance instead. Pa2745-Pa2746. Mr. Swierkiewicz ignores this evidence in his report, as do Evanston and ACC in their Brief.

Second, and more importantly, even if this Court believes that ACC did not know it had been unenrolled by the CCIP, ACC suffered absolutely no harm from it. This is not a situation where ACC detrimentally relied upon representations by Alliant that it was enrolled, and was left otherwise uninsured with respect to the Project Site and the Hood lawsuit because Alliant did not inform ACC it had been unenrolled from the CCIP. If that were the situation here, then ACC would have an argument it was damaged by Alliant's actions. But that isn't what happened here. ACC was not covered by the CCIP for the Hood lawsuit, but it was covered by its own insurers, Travelers and Evanston. Of course, ACC was required to show proof of this insurance in order to work at the Project Site, so they never would have been uninsured.

Mr. Swierkiewicz basically states that if Alliant had taken steps to somehow ensure that ACC received a notice of cancellation, then ACC would have clearly known that it was not included in the CCIP. Had that occurred, what would ACC have done? It would have ensured it had its own coverage with Travelers and Evanston – and it did. Mr. Swierkiewicz's opinions are entirely irrelevant and do not support any causation of damages to either ACC or Evanston.

B. Mr. Swierkiewicz's opinion that the Zurich GL policy remained in effect because Alliant did not perform its duty to ensure compliance with the cancellation provision of the certificate of insurance (COI) is irrelevant.

A central focus of Evanston's coverage argument against Zurich is that Zurich or Alliant never issued a notice of cancellation of the Zurich general liability policy. In the absence of that notice, Evanston essentially claims the Zurich policy remained in effect, as a matter of law. Mr. Swierkiewicz additionally offers his "opinion" in support of this legal argument, claiming that because the Zurich general liability policy was not properly canceled (allegedly due in part to Alliant), it remained in effect and should have afforded coverage to ACC for the Hood lawsuit. This "opinion" is nothing more than Mr. Swierkiewicz's characterization of the coverage arguments advanced by Evanston (and Travelers) against Zurich and AGLIC. It does not support any independent claim for damages against Alliant.

The overwhelming thrust of Mr. Swierkiewicz's opinions against Alliant address Alliant's alleged failure to inform ACC it had been excluded from the CCIP coverage. Pa823-Pa824. But ACC suffered no harm from that, because ACC had its own insurance with Travelers and Evanston. The complete absence of any relevant opinions in the Swierkiewicz report underscores the fact that this litigation is a coverage dispute between insurers, and Alliant never should have been involved.

CONCLUSION

As the trial court aptly noted in its opinion in support of its decisions on the motions for summary judgment:

> (T)he undisputed facts demonstrate that (ACC) was not enrolled in the CCIP at the time of the Accident, that it understood and acknowledged the unenrollment, and that it obtained the necessary insurance at its own expense from its own carriers, Travelers and Evanston, as a prerequisite to its work on the Project. Pa2746.

Any argument by ACC or Evanston to the contrary is completely belied by the record. ACC was fully protected and indemnified, and can have no claim against Alliant. The trial court correctly ruled that "Zurich and AGLIC are entitled to a declaratory judgment that the CCIP Policies have no obligation to provide coverage to (ACC) for the Hood Lawsuit," and that "there is no theory under which Alliant can be held responsible for the money Travelers and Evanston spent to defend and settle the Hood Lawsuit." Pa2746; Pa2753. Alliant respectfully requests this Court to affirm the trial court.

Respectfully submitted:

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Dated: February 28, 2024

Superior Court of New Jersey

Appellate Division

Docket No. A-003358-22T2

ATLANTIC CONCRETE CUTTING, INC. and EVANSTON INSURANCE COMPANY, *Plaintiffs-Appellants,* vs. ZURICH AMERICAN INSURANCE COMPANY, AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY, ALLIANT INSURANCE SERVICES, INC., and TRAVELERS INDEMNITY COMPANY OF AMERICA, *Defendants-Respondents.*	:	CIVIL ACTION ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BURLINGTON COUNTY Sat Below: HON. JAMES J. FERRELLI, J.S.C. DOCKET NO.: BUR-L-00742-19

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

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PRELIMINARY STATEMENT

This appeal examines whether a subcontractor should be entitled to an extraordinary relief - forced coverage under a contractors controlled insurance program ("CCIP") - pursuant to a facially inapplicable regulatory code where the subcontractor: (1) was erroneously enrolled in the CCIP based on its misrepresentations; (2) was notified of its ineligibility for the CCIP just hours after the erroneous enrollment; (3) acknowledged its unenrollment *nine* times; (4) never paid premiums toward the CCIP and instead increased its proposal based on removal from the CCIP; and (5) maintained its own insurance coverage outside the CCIP given its ineligibility due to excluded demolition work. As the trial court decisively found, such relief is not available here because sanctioning an alternative approach "doesn't pass the straight face test," subverts the plain language of a code inapplicable to multi-state risks and would "turn the whole CCIP program on its head." (May 26, 2023 Arg. Tr. 23:5-7, 28:1-3, 67:8-10.)

Despite overwhelming evidence to the contrary, Plaintiffs-Appellants, subcontractor Atlantic Concrete Cutting, Inc. ("ACC") and its excess carrier Evanston Insurance Company ("Evanston") (collectively, "Plaintiffs"), argue that ACC was enrolled in the CCIP maintained by Tutor Perini Corporation and Tutor Perini Building Corporation (collectively, "Tutor") at the time of the accident ("Accident") that was the subject of an underlying personal injury

action ("Hood Lawsuit"). Thus, Plaintiffs contend that the CCIP, a program comprised of three policies issued by Zurich American Insurance Company ("Zurich") and American Guarantee and Liability Insurance ("AGLIC") (collectively "Zurich" where appropriate), covers ACC's liability in the Hood Lawsuit instead of the policies that ACC actually paid for, and which paid for ACC's defense and settlement.

In doing so, Plaintiffs incorrectly argue ACC was a Named Insured under the CCIP while ignoring a key requirement for a Named Insured: that a subcontractor be "enrolled in the Contractor Controlled Insurance Program for which this policy is provided." As the trial court found and the evidence shows, including Zurich's endorsement unenrolling ACC and the CCIP Enrollment Status Reports, ACC was not enrolled in the CCP at the time of the Accident. Also, was not a Named Insured because it did not maintain required payroll.

Additionally, ACC was notified numerous times that it had been unenrolled from the CCIP because it was performing excluded demolition work and, importantly, revised its proposal for demolition work at the Ritz wall (the same work it was performing on the date of the Accident), by adding back the cost of insurance to account for its unenrollment. Moreover, ACC's employees acknowledged *nine times* in emails that ACC's work was excluded from participation in the CCIP.

Finally, as the trial court noted, the CCIP gave Tutor sole discretion to deem subcontractors ineligible, remove subcontractors from the CCIP or make modifications to the CCIP policies. Thus, even if ACC did not know it was unenrolled, as is implausibly claimed, it simply does not matter.

Given ACC's ineligibility under the CCIP, The Travelers Indemnity Company of America ("Travelers") (primary insurer that defended ACC and paid its policy limits to indemnify ACC in settling the Hood Lawsuit) declined to join Plaintiffs in filing this DJ Action: a decision that speaks volumes.

This Court should affirm the trial court's well-reasoned findings that: Tutor had the sole discretion to preclude a subcontractor from the CCIP; ACC's demolition work was ineligible under the CCIP; ACC was erroneously enrolled in the CCIP for a few hours before being notified of its ineligibility; ACC acknowledged its unenrollment from the CCIP *nine* times; ACC increased its proposal upon unenrollment; ACC procured insurance coverage outside the CCIP given its ineligibility; and, finally, N.J.A.C. § 11:1-20 does not apply.

PROCEDURAL HISTORY

Zurich adopts the Procedural History section in Plaintiffs' 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, Pennsylvania (the "Project"). (Pa3.) Tutor retained Abbonizio to perform "earthwork, SOE [support of excavation] and underpinning" at the Project. (Pa430; Pa956, Lorenz Tr., 27:16-28:8.) 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 at Pa952, 15:24-16:17 at Pa953, 27:8-15 at Pa956, and 32:7-11 at Pa957; and July 9, 2015 E-Mail at Pa973 with Attachment at Pa977.) Abbonizio subcontracted portions of this work to ACC. (Boggs Tr., 11:2-25 at Pa986; Lorenz Tr., 76:5-10 and 77:5-19 at Pa968; *see also* July 9, 2015 E-Mail at Pa973 with Attachment at Pa977.)

B. ACC's Direct Liability Policies

ACC was insured directly by two[1] liability policies. Travelers issued a commercial general liability ("CGL") policy to ACC effective January 28, 2015 to January 28, 2016, with policy limits of $1M Each Occurrence (the "Travelers Policy"), which contained 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] (Pa226 and Pa285.) In excess to that, Evanston issued

[1] ACC also maintained a Worker's Compensation Policy with Travelers. (Pa2095.)
[2] "Wrap-up insurance program" is defined as any agreement …, including any contractor controlled … or similar insurance program … (Pa285.)

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",[3] stating: "the insurance provided by this policy shall not apply to the 'Ultimate Net Loss' for any loss, cost, and/or expense arising out of, resulting from, or in any way contributed to … 4. [] any project insured under a 'wrap up' plan." (Pa34 and Pa72.)

C. The Contractor Controlled Insurance Program

Plaintiffs' contention that the CCIP enrollment coverage was mandatory for all subcontractors (Pb6) is incorrect, Tutor maintained a CCIP for "some (but not all)" of the subcontractors at the Project. (9/8/14 CCIP Manual, Pa582; 4/16/15 CCIP Manual, Pa510.) Alliant Insurance Services, Inc. ("Alliant") was the broker that procured the CCIP insurance policies on behalf of Tutor, as well as the CCIP's administrator. (Pa3, ¶ 13; 4/16/15 CCIP Manual, Pa 512.) The CCIP was jointly comprised of: (1) a CGL Policy issued by Zurich; (2) an Excess Policy issued by AGLIC; and (3) a Workers Compensation Policy (collectively, the "CCIP Policies"). (4/16/15 CCIP Manual, Pa512 and Pa517.)

Zurich issued a CGL Policy to Tutor effective December 23, 2013 to December 23, 2018, with policy limits of $2M Each Occurrence (the "Zurich

[3] Despite quotation marks, "wrap up" is not defined in the Evanston Policy.

Policy"). (Za034.) The Zurich Policy contained a Named Insured – Contractor Controlled Insurance Program endorsement, which adds certain qualifiers to "Section II - Who Is An Insured", which ACC does not satisfy. (Pa125; and Za078.) Notably, the Zurich Policy contains a Sole Agent for Insureds endorsement, by which all insureds assigned Tutor the right to act with regard to policy cancellation or changes. (Pa125; and Za055.)

AGLIC issued Excess Liability Policy to Tutor effective December 23, 2013 to December 23, 2018, with policy limits of $25M per occurrence. (Pa222.)

Zurich also provided a "Zurich in North America Contractor Controlled Insurance Program Confirmation of bound program" (the "Binder") regarding the CCIP Policies. (Pa2228-2255.) The section of the Binder 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.

(Italics added.) (Pa2231.) 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.) (Pa2233.)

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, Proposal 106439 ("Proposal One"), which totaled $22,900, and included the added cost of insurance because ACC would be excluded from the CCIP, as expected at the time. (Pa1002.) Proposal One describes several types of work as: (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 union laborers at $3,500 per day). (*Id*.)

However, on July 9, 2015, Tutor sent an email to Abbonizio and ACC asking Abbonizio to enroll ACC in the CCIP and further requested a revised proposal not to exceed the "previous proposal" (which was higher based on anticipated exclusion from the CCIP). (Pa972.) Abbonizio then emailed ACC

on July 21, 2015, asking for an update on the revised proposal (Pa2291) and providing ACC with CCIP paperwork based on the anticipation – at the time – that ACC would enroll. (Pa2129.) The CCIP paperwork included "Schedule 'A' to the C. Abbonizio Contractors Subcontract" which described the CCIP and Insurance Requirements for the Project (also identified as Attachment 3, Amendment to the Tutor Building Corp. Subcontract with Abbonizio, referred herein as the "CCIP Contract"), CCIP Insurance Procedures Manual ("CCIP Manual") and other forms for enrollment in the CCIP. (Pa2129-2176.)

The CCIP Contract defines "Excluded Parties" to include: "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.) (Pa2131.) Further, Section 4.0 INSURANCE COVERAGE of the CCIP Manual provides for "4.2 Parties Not Covered" as follows:

> 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 ver. at Pa516; and 9/8/14 ver. at Pa588.)

Consequently, ACC submitted a second proposal, Proposal 106846 ("Proposal Two"), on July 21, 2015, with a total estimate of $22,200, a lower amount than Proposal One based on ACC's anticipation - at the time - that it would be enrolled in the CCIP. (Proposal Two, Pa876-877; and Za203.) Proposal Two describes the identical work to Proposal One above, but with lower charges: (1) for the "hand sawing, chipping and breaking" pockets, it charges one person at $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[4] sent a Notice of Subcontractor Award (Form F) to ACC and Alliant to initiate the CCIP enrollment for ACC. The following day, on July 29, 2015, Abbonizio issued a purchase order (the "Purchase Order") for ACC's work, which corresponds to the work and amount in Proposal Two.[5] (Pa878-879.) The Purchase Order provides the following for ACC's work:

Description: SAW CUTTING

[4] Plaintiffs claim the Notice of Subcontractor Award (Form F) was "issued" by Alliant. (Pb7-8.) To clarify, while an Alliant form, it was completed by Abbonizio and then sent to Alliant. (ACC Tr. 78:24-79:8 at Pa1036; Faust Tr. 54:17-55:4 at Pa2192.) Although the form states "[n]o hired tier sub may commence work until they are properly enrolled," the subcontractors must still be eligible to enroll in the CCIP before enrolling. (Pa424.)

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

> **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.

(Pa878-879.) The Purchase Order describes three types of work for ACC: (A) "Hand sawing, chipping & breaking pockets x concrete slab to expose steel reinforcement" (*sic*); (B) 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." (Pa878-879.)

Also on July 29, 2015, Nancy Dimacale of ACC submitted to Alliant a Contractor Enrollment Form (Form A), which described ACC's work as "concrete cutting," but fails to reference demolition. [6] (Pa622.) That day, Dimacale further prepared an Insurance Cost Worksheet (Form B) which: described the work with Workers' Compensation Code 0854, a code for "Concrete Construction," omitting demolition; and detailed the gross contract value as $24,590 (includes higher cost for ACC's own insurance), with a net contract value $22,200 (excludes cost for ACC's own insurance). (Pa2299.)

On July 30, 2015, at 7:17 a.m., Alliant sent an auto-generated letter (the "Welcome Letter") to ACC stating "[ACC's] enrollment in the Contractor Controlled Insurance Program for your work performed under Contract Number

[6] It also provides "Tutor [] reserves the right to determine who participates in the Wrap-Up Insurance Program."

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]." (Pa2389.) With that, Alliant also provided a Certificate of Insurance (a "COI") listing the CCIP Policies. (Pa2387.)

B. Tutor's Confirmation That ACC Was Excluded

Importantly, on July 30, 2015, at 12:38 p.m., five hours after ACC's erroneous enrollment and receipt of the Welcome Letter, Anne Lorenz of Tutor emailed several people, including ACC's Jeffrey Boggs and Alliant's Ben Faust, clarifying that ACC was not permitted to enroll, 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." (Pa2390.) Plaintiffs concede that subcontractors performing demolition cannot be enrolled in the CCIP. (Pb8.) 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." (Pa2392.) On August 3, 2015, Mickeleit also sent Abbonizio additional documents related to work at the property line with the neighboring Ritz (the

"Project Requirements"), including additional requirements, such as an Exhibit A – Scope of Work, which addresses work on the "Ritz Retaining Wall/One Story Structure/Dog Walk (trespass) Work", and describes the work to be completed 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)[.]" (Pa2396-2403.) 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." (Pa2396 and Pa2398.)

On August 3, 2015, after receiving the Project Requirements from Mickeleit of Tutor, Peter Abbonizio forwarded them to Boggs of ACC 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." (Pa2405.)

Critically, based on Abbonizio's request to revise the prior proposal, ACC provided Abbonizio with a third proposal, Proposal 107127 ("Proposal Three"), dated August 5, 2015, which replaced Proposal Two and reverted back to the

details of Proposal One (*i.e.*, adding back insurance costs because of ACC's exclusion from the CCIP). (Pa881-872; Za206.) Proposal Three described the identical work set forth in Proposals One and Two, but added back the $100 per day for each type of work, an upward adjustment based on ACC's unenrollment. (*Id*.) With Proposal Three, which increased to $22,900 to account for ACC's insurance costs, ACC also sent an e-mail to Abbonizio stating, "attached is the *updated proposal to reflect the change in CCIP status*." (Pa1011.) (Empasis added.).

Later on August 5, 2015, Michelle Morris, Controller for ACC, who was copied on the e-mail sending Proposal Three to Abbonizio, responded stating "I am confused. Are we switching to a CCIP or they are (*sic*) removing us from it?" (Pa2416.) Moments later, after grasping the situation, she followed up with another e-mail stating "Now I see that *there is no CCIP*" and instructed Dimacale (also cc'd) "if we filled out the CCIP forms, disregard and issue them a certificate and let [T.C.] Irons[7] know that it has switched please." (Pa2419.) Boggs of ACC 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.) (Pa2422.) Boggs then sent another e-mail seconds later to Morris and Dimacale confirming "*this contract with C.*

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

Abbonizio that has been excluded." (Italics added.) (Pa2427.) Accordingly, as of August 5, 2015, all parties involved in the CCIP, including ACC, knew that ACC was not enrolled in the CCIP.

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.) (Pa2431.) Plaintiffs' current contention that this referred to July 2015 payroll issues at the Project (*see* Pb10) is illogical as ACC did not start work until some point in August 2015, at the earliest. (ACC Tr., 45:23-46:10 at Pa1027-1028 and 133:14-134:9 at Pa1049-1050.) In any event, minutes after the August 10, 2015 Dimacale email, McGowan emailed Tutor asking it to confirm that ACC has been "excluded" from the CCIP for the Project, and, shortly thereafter, in an e-mail exchange between Tutor and Alliant, it was confirmed by Mickeleit of Tutor that ACC was now excluded from the CCIP because "they are structural demo and therefore not enrolled." (Pa2434.)

Also, on August 10, 2015, McGowan of Alliant sent an e-mail to Zurich with the subject[8] "RE: Tutor Perini Corporation/1441 Chestnut/Atlantic Concrete Cutting, Inc./08.01.2015" and states "Please cancel effective 08/01/2015." (Pa2438.)

Based on Alliant's request, Zurich prepared a Cancellation Endorsement unenrolling ACC effective August 1, 2015. (Pa893; Pa2500; Vogt Tr., 23:8-24:3 at Pa2447; McGowan Tr., 120:7-11 at Pa2481 and 139:21-140:10 at Pa2486.) A copy of the Cancellation Endorsement was received by the Pennsylvania Compensation Ratings Bureau ("Ratings Bureau") on August 17, 2015. (Pa2567.) 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. (Pa893; Vogt Tr., 23:8-24:3 at Pa2447; McGowan Tr., 120:7-11 at Pa2481 and 139:21-140:10 at Pa2486.) ACC never tried to re-enroll in the CCIP as would have been required. (ACC Tr., 144:4-22 at Pa1052.)

ACC's unenrolled contractor status is confirmed in the Enrollment Status Reports maintained by Alliant and sent to Tutor, covering the period from July

[8] 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 from the July 29th email.

13 to December 15, 2015. (PA2257-2258; *see also* Faust Tr., 160:12-161:5 at Pa2218.) While ACC was listed as "enrolled" on an August 10th Enrollment Status Report (Pa2262), it is "excluded" on the next report dated August 11th and each Enrollment Status Report thereafter, including the one in effect on the Accident date (Pa2265-2285), confirming that ACC remained "excluded."[9]

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 emailed 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.) (Pa2490.) The next day, Dimacale e-mailed Abbonizio ACC's COI dated July 22, 2015 that listed the Travelers and Evanston Policies, proving ACC's understanding it had been unenrolled from the CCIP. (Pa2490 and Pa2502-2506.)

[9] While ACC remained "excluded" from the CCIP, it became "eligible to work onsite" on the Sept. 16, 2015 Enrollment Status Report (the next Report after ACC's COI was deemed compliant by Alliant on Sept. 4, 2015. (Pa2277-2278 and Pa2518.)

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." (Pa2508-2516.)

On September 4, 2015, Kelsey Johnson, Accounting Assistant at ACC, who likewise took over some of the OCIP/CCIP responsibilities for ACC, communicated with 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.) (Pa2508.) McGowan of Alliant responded later that day advising that ACC's "COI was 'compliant'" and that "*No payroll is required for 'excluded' contractors*." (Italics added.) (Pa2518 and Pa2529.)

Also, on September 4, 2015, Johnson separately emailed Tina Hughes, Payroll Administrator at Abbonizio, to let her know 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 for some reason." (Italics added.) (Pa2521.)

Johnson followed up with Abbonizio's 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.) (Pa2525.) Later on September 8, 2015, Kelsey Johnson responded to Hughes' insistence that "it is a CCIP job" by advising Hughes there was no CCIP reporting required because on the Alliant portal the Abbonizio-ACC "*contract comes up as 'excluded'*" and because, according to communications from McGowan of Alliant, "*no payroll is required for excluded contracts.*" (Italics added.) (Pa2529.)

After receiving an email from Abbonizio, Johnson emailed Michelle Morris, ACC's Controller, on September 23, 2015, requesting assistance with certain reports required for the Project and, in that email, Johnson advised "*I had found out that this isn't an OCIP (sic) reporting job either*[.]" (Italics added.) (Pa2532.)

Therefore, months before the Accident, ACC was aware that it was not enrolled in the CCIP. ACC confirmed this knowledge on numerous occasions, raised no objection to the fact, and maintained its own direct general liability insurance through Travelers and Evanston to cover its work at the Project.

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 and injured him (the "Accident"). (Pa4.) Just prior to the Accident, Nancy Walker, the owner of ACC, approached the track hoe operator, an employee of Abbonizio, and when the operator extended his hand to greet Walker he accidentally struck the controls causing the steel beam to fall on Hood. (Pa2009.)

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

ACC's December 30, 2015 invoice, 5487rev, identifies work on the date of the Accident and includes a note for one union laborer to complete "wire sawing." (Pa422.)[10] While Invoice 5487rev references Proposal 106846 (*i.e.*, Proposal Two), Proposal Two was later replaced by Proposal Three, which included 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. (Pa1035, ACC Tr., 75:20-76:1.)

[10] Referencing the invoice (Pa422), Plaintiffs incorrectly also assert "core drilling" was being done on the December 11, 2015 Accident date (Pb12 and Pb24). However, there is no discussion of core drilling (only wire sawing) on December 11, 2015. (Pa422.)

ACC's Job Ticket No. 43788 on the Accident date describes the work completed by Arthur Swindell of ACC as "wire sawing" and specifies performing "saw cut in north side wall" and further identifies the contact for Abbonizio as Gil [Owens]. (Pa423.) Swindell admitted in the Hood Lawsuit that on the date of the Accident he (*i.e.*, ACC) 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 Pa1123-1124 and 36:8-21 at Pa1145.) Swindell further prepared 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." (Pa99, Swindell Tr., 36:8-21, and Statement, Pa1298.) A foreman for Abbonizio and several Tutor employees confirmed that ACC was performing demolition on the date of the Accident. (Owens Tr., 174:5-8 at Pa1475; Mott Tr., 107:1-4 at Pa1712, 115:2-23 at Pa1720, and 124:7-15 at Pa1729; and Lorenz Tr., 25:9-19 at Pa955 and 70:5-11 at Pa967.)

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, in part, based on ACC's negligence. (Pa2004 and Pa2024.) It also notes 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." (Pa2008, at ¶ 20.) The Hood Lawsuit settled in November 2019. On behalf of ACC, Travelers paid its primary limits and Evanston also made a payment under the Evanston Policy. (Pa2062, 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

After the Hood Lawsuit was filed, ACC's attorneys, Cohen Seglias, forwarded the Complaint to ACC on March 21, 2017. (Pa2536.) In turn, that day, ACC sent the Complaint to its insurance broker, C&H Agency, Inc. ("C&H")[11]. (Pa2536.) 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. (Pa2538-2539.)

On March 24, 2017, given the potential that the Hood Lawsuit might exceed the $1M limit of the Travelers Policy, Travelers requested that ACC's excess carrier be placed on notice. (Pa2542.) Accordingly, notice was provided that day on behalf of ACC to Evanston (ACC's excess carrier). (Pa2544-2549.)

Travelers and Evanston each acknowledged receipt of Hood's claim by communications to ACC dated March 29, 2017. (Pa2554 and Pa2557.)

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

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. (Pa2551-2552.) Evanston, at no point, reserved its rights to disclaim coverage on any specific basis. Neither reserved their rights to disclaim coverage for the Hood Lawsuit based on their respective Policies' Wrap-Up Exclusions. (Pa2559-2561.)

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 Policies asserting a lack of a formal notice of cancellation sent to ACC. (Pa2564.) However, this scheme was based on C&H's mistaken assumption that ACC was the "First Named Insured" under the Zurich Policy. (Pa2567.) Plaintiffs proceeded with this scheme despite: (1) the broker's acknowledgment that ACC was "excluded from the CCIP since they were doing demo"; and (2) the Ratings Bureau advising that 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). (Pa2567; Pa2569; Pa2572.)

Zurich reaffirmed its coverage denial to ACC under the CCIP 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. (Pa2575-2579.) However, by March 12, 2019, it became clear that Travelers was not interested in pursuing a declaratory judgment action. This resulted in Evanston revising its draft declaratory judgment 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. (Pa2577.)

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. (Pa1.) As to Zurich, the Complaint alleges two counts by ACC: breach of contract and promissory estoppel.[12] (Pa5, at ¶¶ 29-47; and Pa8, at ¶¶ 48-60.) The Complaint also demands, on behalf of both Plaintiffs, judgement 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. (Pa13, 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. (Pa681.) Zurich's Affirmative Defenses include: ACC was not enrolled in the CCIP at the time of

[12] Plaintiffs' have not challenged the trial court's finding against ACC's promissory estoppel claim and, thus, have waived it. Therefore, it is not address it in this appeal.

the Accident; and the CCIP is void *ab initio* as to ACC because of misrepresentations made by ACC in the CCIP application process. (Pa696.) On June 21, 2019, Travelers filed an Answer, with Crossclaims, including the projected "realignment" Crossclaims against Zurich. (Pa703.)

Zurich amended its Answer in 2022, to add several affirmative defenses, including: ACC's, Evanston's and Travelers' awareness that ACC was not enrolled in the CCIP at the time of the Accident; Evanston's and Travelers' determination that coverage for the Accident was not excluded based on their policies' Wrap-Up Exclusions; and the Zurich Policy's Sole Agent for Insured Endorsement. (Pa772.)

LEGAL ARGUMENT

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

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

Plaintiffs disingenuously argue that ACC was enrolled in the CCIP in July 2015, when it received the automated Welcome Letter and COI and, therefore, conclude ACC is entitled to coverage as a "Named Insured" going forward.[13]

[13] Plaintiffs' reliance on a "form letter" shown to Alliant's McGowan during deposition (at Pb10) is equally unpersuasive as such letters are used for cancellation of an entire CCIP Program at the request of the First Named Insured, not unenrollment of a specific subcontractor. (*See* Pa2673, the form letter, which was not provided by Plaintiffs in support of their Motion below.)

This argument ignores the plain language of the COI which states it is issued for "INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER" and "DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER." (Pa619.) 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, Plaintiffs concede ACC was notified it was being unenrolled from the CCIP mere hours after ACC received the auto-generated "Welcome Letter" on July 30, 2015, due to ACC's erroneous enrollment, when Tutor e-mailed Boggs of 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." (Pb8; Pa2390.) A few days later, on August 3, 2015, Boggs was sent the Project Requirements by Abbonizio along with an e-mail stating, "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." (Pa2405.) With the Project Requirements sent to Boggs 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." (Pa2398.) Critically, on this basis, ACC created Proposal Three, *adding back insurance costs for ACC's work* because of its unenrollment. (Pa881-872; Za206.)

Second, Plaintiffs acknowledge that the CCIP Policies were issued to Tutor, not ACC, but claim ACC was a "Named Insured" under the Named Insured – Contractor Controlled Insurance Program endorsement, 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.) (Pa125; and Za078.) Documents produced during discovery prove that ACC was not enrolled in the CCIP at the time of the December 2015 Accident, and it had not been enrolled since being 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[14] effective August 1, 2015. (Pa893; Pa2500; Vogt Tr., 23:8-24:3 at Pa2447; McGowan Tr, 120:7-11 at Pa2481 and 139:21-140:10 at Pa2486.) A copy of the Cancellation Endorsement was received by the Ratings Bureau on August 17, 2015. (Pa2567.) Further, the CCIP Enrollment Status Reports show ACC as "excluded" and, thus, unenrolled as of the report dated August 17, 2015, and ACC remained listed as "excluded" on each subsequent report. (Pa2265-2285.)

Finally, the Zurich Policy is specific 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. Moreover, it is undisputed that ACC did not have dedicated payroll for its employees at the Project. (In response to ACC's September 4, 2015 email stating it was "working on submitting payroll/OCIP for our contract with C. Abbonizio"

[14] Plaintiffs' contention that cancellation of workers' compensation coverage would not affect general liability coverage is wrong. (Pb26.) The CCIP is comprised of three policies: General Liability; Excess; and Workers' Compensation. The CCIP requires enrollment in the Workers Compensation portion to be enrolled in the CCIP's CGL portion. (*See* 4/16/15 CCIP Manual, Pa582.) The CCIP Binder provides: "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…" (Binder, Pa2231-2232.) 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 Pa2122; *see also* Zurich Tr. 30:2-5 at Pa2105 and 37:5-8 at 2107.)

and the "contract is excluded from our enrolled contracts so I am unable to submit," Alliant advised ACC "No payroll is required for 'excluded' contractors" (Pa2518 and Pa2529); ACC then advised Abbonizio on September 8, 2015 that "I am in touch with someone from OCIP [Alliant] – our contract is excluded from being able to upload payroll for some reason" (Pa2521); ACC advised Abbonizio there was no CCIP reporting needed because on the Alliant portal the Abbonizio-ACC "contract comes up as 'excluded'" and because, according to communications from Alliant, "no payroll is required for excluded contracts" (Pa2529); *see also* ACC internal email on September 23, 2015 confirming "I had found out that this isn't an OCIP reporting job either" (Pa2532).)

In fact, when asked about dedicated payroll for the Project, ACC's Controller, Michelle Morris, admitted that Payroll reports were not submitted to Alliant, the CCIP's Program Administrator. Specifically, she testified:

> 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 Pa2320-2321.) The trial court undoubtedly found this evidence compelling in ruling that ACC was not a Named Insured as a matter of law. (SSR p. 28 at Pa2743.) Thus, Plaintiffs' suggestion to look to the intent of the parties or reasonable expectations when determining "named insureds" under the CCIP can only lead to one conclusion: all parties, including ACC, reasonably expected, understood, and intended that ACC was not enrolled.

While Plaintiffs assert that Randi Vogt of Zurich "was asked to determine if ACC was enrolled under the CCIP" and, after reviewing the Wrap Up List, "concluded that ACC *had* been enrolled in the CCIP," this argument sorely misses the point because Ms. Vogt was explaining that the Wrap Up List was a cumulative list of every subcontractor ever enrolled, meaning, as Ms. Vogt testified, the list included subcontractors "who were enrolled and are no longer enrolled," such as those no longer working on designated projects or those that were erroneously enrolled (*i.e.*, ACC). (Vogt. Tr., at 14:15-23 at Pa2445.) 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 at Pa2445, and 32:17-33:1 at

Pa2449.) 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, Pa2444.)

Additionally, Plaintiffs grossly mischaracterize a September 25, 2015 letter from Abbonizio to ACC suggesting it proves ACC was enrolled in the CCIP. (Pb21.) Rather, this unsigned letter from an unknown author was purportedly sent by Abbonizio, which has no authority to enroll or unenroll contractors, states only that ACC is "CCIP Approved." (Pa427; McGowan Tr., 130:3-13 at Pa2484.) In other words, just as the Enrollment Status Reports state, beginning on September 16, 2015, after ACC's COI was deemed compliant by Alliant on September 4, 2015, ACC was "eligible" to work at the Project, but it does not say or mean ACC was "CCIP Enrolled" as Plaintiffs feebly imply. (Pa2277-2278 and Pa2518.)

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

Plaintiffs argue that enrollment in the CCIP was mandatory for work by all subcontractors at the Project, and therefore ACC must have been enrolled in the CCIP. (Pb6, 20 and 45.) This is simply not true. Rather, the CCIP does not permit certain contractors, including those performing demolition, like ACC, from enrolling in it. In fact, the CCIP Binder identifies several types of work at the

Project that are not eligible for enrollment stating, in relevant part, that "…NO COVERAGE WILL BE PROVIDED TO … DEMOLITION… AT THE PROJECT SITE(S)." (Pa2233.) 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, it is undisputed that ACC had no other contracts or proposals during this short erroneous enrollment period, and never attempted to re-enroll, ever. (ACC Tr. 144:4-22 at Pa1051; Boggs Tr. 13:1-19 at Pa986.)

Plaintiffs' argument that enrollment in the CCIP is mandatory is also belied by the CCIP Manual which explicitly states the CCIP provides coverage for "some (but not all)" contractors. (9/8/14 CCIP Manual, Pa582; 4/16/15 CCIP Manual, Pa510). Further, it specifically addresses subcontractors performing work at the Project but who are "Parties Not Covered", including certain vendors, suppliers, truckers, contractors, delivery services companies and "any subcontractor of any tier" which Tutor, "at their sole discretion," opts to exclude. (4/16/15 CCIP Manual, Pa516; 9/8/14 CCIP Manual, Pa588.) The CCIP Manual also provides certain requirements for these "nonparticipating subcontractors" before working at the Project, including, as ACC did, providing "the Program Administrator [] the insurance certificate(s) and endorsement(s) as required in the Contract." (4/16/15 version at Pa516; and 9/8/14 version at Pa588.)

Plaintiffs admit that "certain early work done on the Ritz Hotel retaining wall in August 2015" was excluded demolition work, however, Plaintiffs argue 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 Hotel retaining wall work. (Pb23.) To the contrary, after the Accident, two ACC employees admitted that its work on the date of the Accident was demolition work. Boggs conceded during his deposition that the saw cutting ACC was performing on the Ritz Wall on the date of the Accident "would be considered incidental demolition work." (Boggs Tr., 65:13-66:2 at Pa999-1000; *see also* Boggs' Aug. 5, 2015 email admitting excluded "demolition work" at Pa2422.) Further, Swindell (ACC's laborer) testified in the Hood Lawsuit that ACC's services were only utilized as needed as excavation uncovered existing structures and that on the date of the Accident that 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 Pa1123-1124 and 36:8-21 at Pa1145; *see also* Pa2671, photograph of Project 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." (Pa99, Swindell Tr., 36:8-21, and Statement, Pa1298.)

Additionally, Plaintiffs admit that "it was left to higher contractors to designate whether ACC's saw cutting constituted demolition work[.]" (Pb 8.) But that's exactly what the higher contractors did. 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 Pa1381 and 174:5-8 at Pa1475.) 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 ACC 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 Pa1712, 115:2-23 at Pa1720, and 124:7-15 at Pa1729.) Likewise, Anne Lorenz testified that ACC 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 Pa955 and 70:5-11 at Pa967.)

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 Pa516; and 9/8/14 version at Pa2148), the CCIP Contract has a definition of "Excluded Parties" which includes: "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." (Pa2131.) Thus, ACC was either not permitted to enroll in the first place, or such enrollment was subject to Tutor's discretion.

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.
>
> * * *

(Pa125; and Za055.) This endorsement gave Tutor the right to request ACC's unenrollment, which Tutor did and Zurich and Alliant effectuated. *See 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.[15] (*See* 4/16/15 CCIP Manual, Pa589, stating "Sponsor reserves the right to terminate or modify the CCIP or any portion thereof.")

Within five hours of ACC being sent the July 30, 2015 Welcome Letter, ACC was advised that it "will not be able to enroll into the CCIP" because the CCIP "cannot enroll subcontractors into the CCIP who are performing structural demolition." (Pa2390.) A few days later, on August 3, 2015, when Abbonizio requested a revised proposal from ACC, Abbonizio also included Project Requirements that contained 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." (Pa2398.) In an August 5, 2015, Boggs told Michelle Morris "the owners are excluding all structural foundation demolition work from

[15] 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).

their CCIP[.]" (Pa2422.) Boggs even clarified for Morris and Dimacale that it was ACC's "contract with C. Abbonizio that has been excluded." (Pa2427.) 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." (Pa2490.) And on September 4, 2015, McGowan of Alliant notified ACC that "No payroll is required for 'excluded' contractors." (Pa2518 and Pa2529.) If not enough, on September 23, 2015, Kelsey Johnson confirmed to Morris that the Project, "isn't an OCIP reporting job either." (Pa2532.) Thus, ACC was aware of its unenrollment from the CCIP in early August 2015 based on its demolition work, well in advance of the Accident or any time periods Plaintiffs contend may apply. No provisions of the Zurich Policy, CCIP Manual, COI or any regulatory code support Plaintiffs' contention that ACC was enrolled for the work performed on the date of the Accident.

Perhaps most damning to Plaintiffs' 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. (Pa881-872; Za206.) 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, pp. 30-31, Pa2745-2746.) 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).

C. "FORMAL NOTICE" OF CANCELLATION WAS NOT REQUIRED BY STATUTE, CODE OR COMMON LAW

Plaintiffs assert that the trial court erred when it found the Administrative Code (the "Code") did not apply. However, N.J.A.C. § 11:1-20.2 applies to "nonrenewal or cancellation," neither of which is an issue in this case because the CCIP Policies were not cancelled or nonrenewed. *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"). As discussed above, and as the trial court noted, the CCIP was never actually cancelled and, instead, remained in effect for the Project for all other entities permitted to enroll in the CCIP. (SSR, p. 35, Pa2750.) Thus, this Code is inapplicable.

The relevance of cancellation requirements under N.J.A.C. § 11:1-20.2(d) is further reduced by the plain language of N.J.A.C. § 11:1-20.1, which details

the scope of Subchapter 20 and why it does not apply to the facts here. Specifically, 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.) Not only does this Code Section not apply because the CCIP includes an integral worker's compensation component, it also does not apply because the CCIP covered Tutor projects located throughout the country at the time of the Accident in Pennsylvania, including several projects in California and Louisiana. (Za101, 135 and 138.) Moreover, the Project here involved not just the site in Pennsylvania, but, as Evanston's counsel flushed out during deposition testimony of Anne Lorenz of Tutor, an insured site in New Jersey. (Lorenz Tr., 58:7-59:2 at Pa964.) Plaintiffs try to shift the focus of the risk analysis by asserting that the coverage purportedly provided to ACC is not multi-state, but that simply is inaccurate given the plain language of the Code, which is inapplicable to multi-state risks, like the CCIP Policies. Plaintiffs also attempt to argue ACC is a single risk in New Jersey. (Pb35.) But even ACC's proposals advertise its work in multiple states (*i.e.*, "MD, NJ, NY, PA, SC"), a fact that Plaintiffs omitted by including in their appendix Proposals that, for some reason, do not contain these references. (Compare Pa 876 and 881, with

Za203 and 206.) Thus, N.J.A.C. § 11:1-20.2 is clear that it does not apply to an insurance program covering multi-state location risks like the CCIP here.

In fact, Plaintiffs admit they cannot cite a single case applying N.J.A.C. § 11:1-20 to a CCIP, OCIP or Wrap-Up Program policy. (Pb31.) No such case law exists because the code was never intended to apply to such programs. The cases cited by Plaintiffs largely include non-renewal or cancellations under different statutes covering different types of insurance policies, including automobile, workers compensation, property, and truck cargo liability insurance policies. *Pawlick v. New Jersey Auto. Full Ins. Underwriting Ass'n*, 284 N.J. Super. 629 (App. Div. 1995) (cancellation of an automobile policy under N.J.S.A. 17:29C-10); *Celino v. General Acc. Ins.*, 211 N.J. Super. 538 (App. Div. 1986) (same); *Bright v. T & W Suffolk, Inc.*, 268 N.J. Super. 220 (App. Div. 1993) (cancellation of workers compensation policy under N.J.S.A. 34:15-81); *Miller v. Reis*, 189 N.J. Super. 437 (App. Div. 1983) (cancellation of automobile policy); *Munoz v. N.J. Auto. Full Ins. Underwriting Ass'n*, 145 N.J. 377 (1996) (cancellation of automobile policy); *Romanny v. Stanley Baldino Constr. Co.*, 142 N.J. 576 (1995) (analyzing renewal and pricing of workers compensation policy); *Barbara Corp. v. Bob Maneely Ins. Agency*, 197 N.J. Super. 339 (App. Div. 1984) (non-renewal of fire insurance policy issued to car wash under N.J.A.C. § 11:1-5.5); *Kende Leasing Corp. v. A.I. Credit Corp.*, 217 N.J. Super. 101 (App.

Div. 1987) (cancellation under the Insurance Premium Financing Act, N.J.S.A. 17:16D-1, *et seq*., governing the cancellation of an insurance contract when an insured defaults in his obligations under a premium financing agreement); *Scott v. Jovil Constr., Inc*., 2009 N.J. Super. Unpub. LEXIS 2947 (App. Div. Dec. 4, 2009) (addressing cancellation of liability insurance and holding whether an insurers' notice effectively complied with N.J.A.C. § 11:1-20.2 presents an issue of fact). Obviously, the cases relied upon by Plaintiffs do not address a situation common with many Wrap-Up Programs: programs where contractors are constantly being added and/or removed during the course of a multi-year project with no direct communications with the insurer issuing the policies that comprise the Wrap-Up and, critically, the contractors maintain insurance through their own insurance carriers. Plaintiffs' argument exalts form over substance, especially when ACC had actual knowledge it was unenrolled based on undisputed facts in the record. *See Fitzpatrick v. Qasim*, 2023 N.J. Super. Unpub. LEXIS *10 (App. Div. Sept. 13, 2023).

Also unavailing is Plaintiffs' reliance on *Piermount Iron Works, Inc. v. Evanston Ins. Co.*, 197 N.J. 432 (2009), to suggest that that N.J.A.C. § 11:1-20 should apply because it was promulgated by the Commissioner of the Department of Banking and Insurance ("DOBI") to address non-renewal and cancellation notices. In *Piermount*, the New Jersey Supreme Court actually

highlighted the limitations of N.J.A.C. § 11:1-20 after an insured contractor argued for a regulatory penalty of automatic extension where the insurer failed to provide notice of non-renewal. The Supreme Court emphasized that the "purpose behind the requirement of continued coverage […] is to avoid lapse in coverage for the want of a simple notice to the insured. *Id*., at 440-441. It added that notice "allows the consumer to take protective action" and "gives the insured the opportunity to guard against the peril of noncoverage." *Id*., at 441 (internal quotations omitted). Unlike the situation in *Piermount*, ACC never sustained a lapse in coverage, nor was any "protective action" needed because it continued to maintain coverage through its direct liability carriers, Travelers and Evanston, which defended and indemnified ACC for the Hood Lawsuit. Furthermore, the *Piermount* decision, ultimately concluding N.J.A.C. § 11:1-20 did not apply to extend coverage, underscores the DOBI's policy that the Code only applies to lines of insurance made subject to its requirements. *Id*., at 447. This eviscerates Plaintiffs' argument that common law and public policy mandate applying such cancellation requirements.

Plaintiffs point to cases involving non-CCIP related policies, with fact patterns dissimilar to the one at issue here and, importantly, involving policyholders that – unlike ACC which maintained the liability policies it actually paid for - were left with no coverage when policies were allegedly

improperly cancelled. *Harvester Chemical Corp. v. Aetna Cas. & Surety Co*., 277 N.J. Super. 421 (App. Div. 1994) (CGL policy issued to a chemical company); *Valley Nat'l. Bancorporation v. American Motorists Ins. Co.*, 316 N.J. Super. 152 (App. Div. 1998) (multi-peril property policy issued to fire damaged property owner); *Barbara Corp. v. Bob Maneely Ins. Agency*, 197 N.J. Super. 339 (App. Div. 1984) (fire insurance policy issued to car wash); *Insignia v. Hegedus*, 231 N.J. Super. 562 (App. Div.) (casualty policy issued to owners of mobile home park); *Echevarias v. Lopez*, 240 N.J. Super. 104 (App. Div. 1990) (unspecified policy issued to landlord). Plaintiffs' reliance on *Nova Dev. Group, Inc. v. J.J. Farber-Lottman Co., Inc*., 2010 N.J. Super. Unpub. LEXIS 413 (App. Div. March 1, 2010), is equally unavailing as that decision turned on whether the insured, under N.J.A.C. § 11:1-20, received "reasonable notice," which ACC clearly did based on the communications discussed above, and further noted that the Code was enacted to curb "abuses by insurance companies, including midterm policy cancellations, blanket nonrenewals, cancellations of entire lines of insurance and midterm premium increases without adequate reasons," which is not the case here.

Plaintiffs' citation to *Workers' Comp. Fund v. Wadman Corp*., 210 P.3d 277 (Utah 2009), decided by a Utah court applying Utah law, reflects just how unsupported Plaintiffs' position is under New Jersey law. (Pb31.) In any event,

that decision turned solely on whether the injured employee, pursuant to Utah workers compensation code, was a statutory employee of a general contractor which, unlike ACC, was properly enrolled under the OCIP and paid premiums. *Id*., at 285-286. That is not the scenario here. Further, the portion of that decision denying coverage based on the injured employee's actual employer not being enrolled highlighted that the actual employer was not enrolled in the OCIP and emphasized the need to look at the OCIP manual and the policy language, the language of which weighs against coverage for ACC here. *Id*., at 283-284.

Surprisingly, Plaintiffs cite to *McClellan v. Feit*, 376 N.J. Super. 305 (App. Div. 2005), even though there the Appellate Division recognized that the N.J.A.C. § 11:1-20.2 was "not applicable" and held that changes in coverage "must be called to the insured's attention so that the insured can decide whether to continue the coverage or purchase new insurance," as was done here when ACC was notified of its unenrollment, and maintained its direct insurance coverage for the Project.

Plaintiffs also rely on *Harvester Chemical Corp.*, 277 N.J. Super. 421, for public policy 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 that ought rightfully be renumerated." However, here,

none of the three public policy purposes are at issue. Zurich did not effectuate an arbitrary mid-term cancellation, but instead unenrolled ACC from the CCIP based on the excluded demolition work and, further, the unenrollment happened upon Tutor's request. Also, ACC was notified that it was being unenrolled and acknowledged the same on multiple occasions. Last, ACC was not left bare without coverage, but was defended by Travelers (Pa2551), 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.

Plaintiffs contend 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 that 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.")

Finally, Plaintiffs point to an email from Kathleen Kelly of Zurich to argue that, even if Tutor was authorized to unenroll ACC, Zurich did not have properly documented proof that termination was made because Kelly allegedly confirmed "we don't have a copy of any request" to unenroll ACC. (Pb13 and 41.) But that citation brazenly ignores the fact that she testified: it was her understanding that "the policy was already cancelled" and that she was simply "trying to find out how it came to be cancelled" ten days later (Zurich Tr., 87:19-88:21 at Pa2119); and that the referenced email was transmitted in the course of Zurich's search and, importantly, that such documents, including Alliant's request to unenroll and Zurich's endorsement removing ACC from the CCIP, were ultimately discovered (Zurich Tr., 65:8-68:4 at Pa2114, 82:11-20 at Pa2118 and 115:9-116:3 at Pa2126). Thus, Plaintiffs' misleading argument falls flat.

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

As Plaintiffs note, the trial court did not address the recoverability of attorneys' fees and costs spent prosecuting this action. That is because the trial court overwhelmingly ruled in Zurich's favor and, thus, Plaintiffs were not found to be "successful claimant[s]" under R. 4:42-9(a)(6). That outcome should remain unchanged.

In the event Plaintiffs are successful on appeal, they should still not be allowed to recovery attorneys' fees and costs expended. 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). 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 Plaintiffs request for recovery of their inflated attorneys' fees and costs.

R. 4:42-9(a)(6) was promulgated to discourage groundless disclaimers and to provide more equitably to an insured the benefits of the insurance contract. *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 that govern a court's discretion include: "(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 Plaintiffs are successful in this appeal, the Court must still consider the factors under *Enright*. Here, "the bona fides" of Zurich's declination based on ACC's unenrollment from the CCIP and the pursuit of coverage for ACC by Plaintiffs despite ACC's knowledge and acknowledgment that it was unenrolled from the CCIP, weigh sharply against awarding attorneys' fees. Also, Zurich's justification in litigating the coverage issues is well-reasoned based on the overwhelming evidence that ACC was not enrolled in the CCIP at the time of the Accident and its admission of the same. The trial court's ruling denying Plaintiffs' summary judgment motion and granting summary judgment in favor of Zurich further supports Zurich's initial decision to deny coverage and thereafter to litigate the coverage issues. Additionally, the general conduct of the parties, including Zurich's substantial payment on behalf of other entities associated with the settlement of 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 determination that ACC was not an insured under the CCIP and the initial unwillingness of Travelers (ACC's primary insurer with the most financial incentive) to pursue coverage under the CCIP via this DJ Action. Further, the Court should consider that ACC was informed and was aware 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 it was performing at the Project included an increase to account for its unenrollment in the CCIP (as it did with the increased proposal), and even that Travelers increased ACC's policy premiums at the end of the 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) (Court declines 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 further support the argument that the issues involved here were novel and unsettled, thereby weighing heavily against an award of attorneys' fees and costs for Plaintiffs (May 26, 2023 Oral Arg. Tr., 90:19-24.) Therefore, the Court here – or the trial court on remand - should exercise its judicial discretion and deny Plaintiffs' claim for attorneys' fees in the DJ Action.[16]

[16] For the same reasons discussed in this section, if Plaintiffs were "successful claimants," 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.

III. EVEN IF COVERAGE WERE FOUND UNDER THE CCIP, EVANSTON'S PAYMENT IS NOT RECOVERABLE UNDER THE VOLUNTARY PAYMENTS DOCTRINE

As an alternative ground for affirming the trial court's judgment denying Evanston's 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, settlement payments made by Evanston on ACC's behalf are unrecoverable payments subject to the voluntary payment doctrine ("VPD"). To apply the VPD, this Court must only make four determinations, namely that Evanston: 1) made the settlement payments 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 decision that the VPD applied to extinguish the paying insurer's claim for reimbursement against another insurer where paying insurer made payment on behalf of the insured without mistake of fact, fraud, duress, or extortion).

Here, Evanston voluntarily paid its portion of the settlement attributed to ACC in the Hood Lawsuit. (Pb14.) Evanston does not allege fraud, duress or extortion. There is no mistake of fact because Evanston was aware the Accident

occurred and that Zurich had disclaimed an obligation to provide coverage 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 enrollment in the CCIP remained in dispute. (Pa1.) Evanston even admitted that it had concluded ACC was an insured under the CCIP, but was erroneously excluded, when it paid the settlement. (Evanston Tr., 95:15-96:10 at Pa2062.)

Evanston may attempt to distinguish *Palisades*, 469 N.J. Super. 30, arguing there was no mistake of fact (only mistake of law) in that case. But, like the paying insurer in *Palisades*, there was no mistake of fact by Evanston when it made a settlement payment because Evanston 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").

Evanston may also argue it reserved its rights, but Evanston paid to settle the Hood Lawsuit without asserting a reservation based on its Contractors Limitation Endorsement. (Pa2551.) Evanston may further claim that it initiated this DJ Action to obtain a ruling that the CCIP Policies covered ACC, but Evanston could have brought suit against ACC seeking a declaration of no coverage based on its Contractors Limitation Endorsement. The DJ Action does not belatedly create a reservation of rights where one never existed.

Evanston may also 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 it paid based on either: (1) conventional subrogation; or (2) 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 single New Jersey State Court since its ruling more than 25 years ago. The Complaint in the DJ Action did not assert any theories based on conventional subrogation, rather it sought a breach of contract claim by ACC (Count I), promissory estoppel by ACC (Count II) and a declaratory judgment by ACC and Evanston (Count V), and to date no subrogation agreement has been produced. Further, in subrogation cases, the insured's right to recovery against a third-party tortfeasor vest in the insurer, and the insurer steps into the shoes of the insured. *City of Asbury Park v. Star Ins. Co*., 242 N.J. 596 (2020). Here, Evanston does not seek recovery against a third-party tortfeasor.

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

IV. IF COVERAGE WERE FOUND UNDER THE CCIP, COVERAGE SHOULD BE RESCINDED BASED ON ACC'S MISREPRESENTATIONS

Understandably, after ruling ACC was not enrolled in the CCIP at the time of the Accident and that the Code did not 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 affirmance, 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) (quoting *Allstate Ins. Co. v. Meloni*, 98 N.J. Super. 154, 158-59 (App. Div. 1967)). 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 (quoting *Liebling v. Garden State Indem.*, 337 N.J. Super. 447, 453 (App. Div.), *certif. denied*, 169 N.J. 606 (2001)).

Prior to the erroneous enrollment, ACC completed, signed and submitted a Contractor Enrollment Form to Alliant, which described ACC's work as "concrete cutting." (Pa622.) Also submitted by ACC on July 29, 2015, was a completed Insurance Cost Worksheet which described the work with Workers' Compensation Classification Code 0854, a classification for "Concrete Construction." (Pa2299.) 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 in the CCIP, a fact that ACC was aware of. (Pa2390; and Lorenz Tr., at 25:3-19 at Pa955 and 70:5-11 at Pa967.) 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 Pa2102; 24:10-24 at Pa2103; 34:5-35:16 at Pa2106; 79:9-13 at Pa2117.) As the trial court determined, the evidence confirms that ACC was performing demolition on the day of the Accident. (SSR, p. 18, Pa2733.) Thus, to the extent this Court determines that ACC was enrolled in the CCIP, the CCIP Policies should be rescinded as to ACC because: ACC's enrollment forms contained false statements; the false statements 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 actually performing, it would never have been erroneously enrolled.

While Plaintiffs 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, an 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).

Plaintiffs may also implausibly counter that there was no detrimental reliance based on ACC's misrepresentation. However, this is contrary to the undisputed facts: ACC was erroneously enrolled in the CCIP for a brief window based on its misrepresentation; Plaintiffs filed claims seeking coverage for ACC; 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 not aware that ACC continued to work at the site for anything other than the excluded demolition work. (Lorenz Tr., 56:8-12 at Pa963; Enrollment Status Reports at PA2257-PA2285.) 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 that the Court affirm the: (1) denial of Plaintiffs-Appellants' Motion for Summary Judgment; and (2) granting of Defendants-Respondents' Motion for Summary Judgment.

Dated: March 22, 2024

Respectfully submitted,
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ATLANTIC CONCRETE CUTTING, INC. and EVANSTON INSURANCE COMPANY *Plaintiffs/Appellants* v. ZURICH AMERICAN INSURANCE COMPANY, AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY, ALLIANT INSURANCE SERVICES, INC., and TRAVELERS INDEMNITY COMPANY OF AMERICA *Defendants/Respondents*	: SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION : : DOCKET NO.: A-003358-22T2 : : ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BURLINGTON COUNTY : : Sat Below: : : Hon. James J. Ferrelli, J.S.C. : Docket No.: BUR-L-00742-19 :

REPLY BRIEF OF PLAINTIFFS/APPELLANTS, ATLANTIC CONCRETE CUTTING, INC. AND EVANSTON INSURANCE COMPANY

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PRELIMINARY STATEMENT

Between this appeal and Travelers' coordinated appeal (A-003358-22), Zurich and AGLIC have submitted a staggering 110 pages of briefing to this Court, but a single page would have sufficed: a notice of cancellation issued to ACC. Because they concede that single page was never sent to ACC, Zurich and AGLIC spend 110 pages to ask this Court to not only overlook their omission, but to create a new set of rules for CCIPs in New Jersey in which there are no enforceable cancellation requirements. CCIPs are, of course, insurance policies, and there is no reason to relieve CCIP insurers of their basic obligation to provide notice of cancellation to their insureds. Moreover, the CCIP Policy, CCIP Manual, and the Certificate of Liability Insurance all contained specific cancellation requirements, none of which were met here. Long-standing New Jersey law and public policy rigorously enforce insurance-cancellation requirements because insureds like ACC are entitled to know with certainty whether or not they are insured. Since the record is clear that ACC received no such cancellation notice from Zurich or AGLIC, its CCIP coverage remained in effect at the time of the Hood accident.

LEGAL ARGUMENT

I. ACC WAS ENROLLED IN THE CCIP WHEN THE HOOD ACCIDENT OCCURRED

A. ACC WAS ENROLLED IN THE CCIP AND WAS A NAMED INSURED UNDER THE CCIP POLICY AT THE TIME OF THE ACCIDENT

Zurich and AGLIC first claim that ACC was not enrolled in the CCIP at the time of the accident, Pb17-27, but their arguments are easily rebutted.

First, Zurich and AGLIC point to the language of the Certificate of Liability Insurance received by ACC, which states that it confers no rights upon the holder. Zurich Db25. To the contrary, according to the CCIP governing documents, the Certificate of Insurance meant that ACC ***was enrolled in the CCIP***. See, e.g., CCIP Manual (Pa586, an "enrolled contractor" was one that has "been accepted into the CCIP as evidenced by a Certificate of Insurance"; Pa588, "Enrollment will be established only upon issuance by the Program Administrator of a CCIP Certificate of Insurance to the Participating Subcontractor"); Cover Letter (Pa618, "The attached insurance certificate is provided to evidence your coverage for … General Liability, and Excess/Umbrella while working at the 1441 Chestnut project site…."); Notice of Subcontract Award (Pa424, "that "[n]o hired tier sub may commence work until they are properly enrolled into the Wrap-up program, as evidenced by a Certificate of Insurance provided by the Wrap-up Administrator."). Upon

issuance of the Certificate of Insurance, ACC was thus enrolled in the CCIP and covered for policy period August 3, 2015 to December 23, 2018 under Zurich's and AGLIC's CCIP Policy and Zurich's Workers Compensation Policy. Pa619.

Zurich and AGLIC claim next that ACC was notified it was unenrolled after receipt of this Certificate.[1] Zurich Db25. As Plaintiffs have extensively argued in their initial brief, the emails referring to ACC's purported "erroneous enrollment" only refer to certain excluded work at that time in August 2015, and ACC still continued to expect it was covered per its reasonable expectations arising from all the confirming documentation it received. ACC noted at that time that this excluded work referenced in these emails was one discrete job and anticipated that future work would be covered under the CCIP. Pa866; Pa871; Pa902; Pa2322.

Zurich and AGLIC further argue that since the CCIP Policies were issued to Tutor Perini as a "named insured" and not ACC, ACC was not an enrolled contractor. They also argue that the CCIP's workers compensation component was cancelled, resulting in a cancellation endorsement sent to the Ratings

[1] Zurich and AGLIC claim Plaintiffs "concede ACC was notified it was being unenrolled from the CCIP mere hours after ACC received the auto-generated 'Welcome Letter' on July 30, 2015." Zurich Db25. Plaintiffs have not conceded that ACC was unenrolled from the CCIP, and maintain that ACC continued to believe it was enrolled with the understanding that certain work at that time was excluded.

Bureau. Zurich Db26-Db27. They also argue that the CCIP enrollment status reports show ACC's exclusion, and that ACC did not have dedicated payroll for employees and was not added as an insured by separate endorsement. Zurich Db27-Db28. Zurich and AGLIC are again wrong.

First, the CCIP Policy itself, in its Named Insured – Contractor Controlled Insurance Program Endorsement – defines its "named insureds" as contractors "enrolled in the Contractor Controlled Insurance Program" and performing at a "designated project." Pa148. Enrollment in the CCIP could only be established by a Certificate of Liability Insurance. Pa588. Inasmuch as the definition or identity of "named insureds" under the CCIP Policy is somehow ambiguous (it is not), courts look to the intent of the parties and interpret any ambiguities in favor of the insured and its reasonable expectations. Martusus v. Tartamosa, 150 N.J. 148, 159-60 (1997). The language of the CCIP Policy and Manual thus illustrate the intent of the parties to procure coverage for enrolled subcontractors as "named insureds," making ACC's Certificate of Liability Insurance clear evidence that ACC was an enrolled contractor and entitled to coverage under the CCIP.

Second, notice to the Ratings Bureau would be ineffective to cancel ACC's insurance. In 2018, ACC apparently learned that electronic notice had been sent by Zurich to the Bureau that its CCIP Workers' Compensation Policy

had been canceled, but Michelle Morris of ACC did not know whether that notification to the Bureau would be forwarded to the insured, and reiterated that, in fact, ACC received no such notice. Pa1066-68. Further, it refers to the CCIP Workers' Compensation Policy, ***not*** the liability policy at issue here. Moreover, Alliant's Enrollment Status Reports, which had no actual effect on ACC's insurance, do not constitute evidence demonstrating that cancellation notice was sent to ACC. Pa2729-30.

Regarding Zurich and AGLIC's argument that ACC could not have been covered as it did not have dedicated payroll, Zurich and AGLIC have only pointed to certain emails communicating confusion regarding difficulties with uploading payroll in September of 2015, referring to work well before the December 2015 accident. Zurich Db27-28. Further, these communications show that ACC did have dedicated payroll for on-site employees. The Named Insured endorsement cited by Zurich and AGLIC says nothing of submission or reporting of payroll, but rather, in the context of the endorsement, is intended to refer to service providers who would not have payroll "dedicated" to on-site operations like ACC would, *e.g.,* "[v]endors, suppliers, material dealers, abatement contractors, blasting contractors, delivery persons, haulers, [and] hazardous waste removal contractors." Za00078. In any event, this is yet another attempt to categorize ACC as "not a named insured" despite ACC

clearly falling within the Policy's definition, referenced above. Only adding to ACC's understanding was Abbonizio's separate confirmation of ACC's CCIP enrollment in a September 25, 2015 correspondence to ACC stating that it was "***CCIP Approved.*** For the above referenced [W/Element Hotel] Project." Pa427 (emphasis added). Zurich and AGLIC claim that Plaintiffs have mischaracterized this correspondence, but its text is clear and supports ACC's reasonable expectations of CCIP coverage.

B. ACC WAS NOT PERFORMING INELIGIBLE DEMOLITION WORK ON THE DATE OF THE ACCIDENT

Zurich and AGLIC next argue that ACC was working on the project as an excluded demolition contractor. Zurich Db30. They also refer to the usual communications referencing the work as excluded, which, as explained above in Section I.A. and in Plaintiffs' initial brief, Pb22-Pb27, referenced certain early excluded work, along with the Hood litigation deposition testimony of ACC, Abbonizio, and Tutor Perini employees who described ACC's work as demolishing certain elements.

In this litigation, however, ACC employee Jeffrey Boggs clarified that, while demolition work could be "incidental" to saw cutting, ACC specifically performed concrete cutting. Pa991. In any event, it was for higher contractors to designate whether ACC's saw cutting constituted demolition work or another

category of work for insurance purposes. Pa2316, Pa2351-52. While some of ACC's work may be characterized by others as some sort of "demolition" of certain elements, ACC is exactly what its name indicates: ***a concrete cutting company***, as evidenced by the descriptions in its Contractor Enrollment Form and Notice of Subcontract Award. Pa424-25. The only documentary evidence of ACC's contracted-for work on the day of the accident describes that work as "core drilling" and "wire sawing." Pa422.

Zurich and AGLIC refer to Tutor Perini's purported discretion to request cancellation of the CCIP Policy, even citing to other jurisdictions and a wholly unrelated OCIP Manual for the State of New Jersey Schools Development Authority. Zurich Db35. As discussed at length in Plaintiffs' initial brief, Pb37-38, New Jersey law is clear that even where a third party is empowered to cancel an insured's insurance, it cannot do so absent proper notice, in which case the policy will remain in effect. See, e.g., Kende Leasing Corp. v. A.I. Credit Corp., 217 N.J. Super. 101, 111-13 (App. Div. 1987) (even where a third party was empowered under the terms of the policy to cancel the insurance, it could not cancel absent proper notice, so that policy remained in effect despite nonpayment of premiums). Moreover, notice obligations are not delegable – they rest on "the insurer, not the broker or agent." Barbara Corp. v. Bob Maneely Ins. Agency, 197 N.J. Super. 339, 346 (App. Div. 1984).

In any event, Tutor Perini was certainly not authorized to cancel a subcontractor's insurance on behalf of the CCIP insurer without ever notifying the subcontractor. As explained in more detail in Section I.C. below, the CCIP Policy, CCIP Manual, and Certificate of Liability Insurance all provided cancellation notice requirements that would still have been in effect no matter Tutor Perini's authority. Pa84; Pa142; Pa589; Pa619.

Zurich and AGLIC next point to ACC adding insurance costs back to its proposal for its excluded August 2015 work, but this proposal has no bearing on ACC's continued enrollment in the CCIP leading up to the time of the accident. Za206. Nor does, as Zurich and AGLIC contend, ACC tendering its defense and indemnity to its own liability insurance carriers rather than the CCIP carriers reflect some "implicit understanding" that it was not enrolled for demolition work. Zurich Db37. Indeed, after initiation of the Hood litigation, ACC tendered its defense to and sought indemnification from Zurich as the CCIP insurer on June 29, 2017 and August 15, 2017, when Zurich improperly denied coverage. Pa669-75. Thus, Travelers and Evanston were forced to defend ACC, subject to their reservations of rights, resulting in this litigation.

C. FORMAL NOTICE OF CANCELLATION WAS REQUIRED BY STATUTE, REGULATION, AND COMMON LAW, AND WAS NOT PROVIDED TO ACC

Most critically, Zurich and AGLIC, like the trial court, remarkably

disregard long-established New Jersey law in an attempt to support the dubious proposition that they need not comply with ***any*** legal requirements of formal notice of cancellation of one of their insureds' insurance under the CCIP Policy, necessarily conceding they did not provide this formal notice. Zurich Db37-Db45. ***But CCIP policies are insurance policies subject to the same cancellation requirements as all other insurance policies***. Zurich and AGLIC point to no authority for a new rule that relieves CCIP insurers of their basic obligation to provide notice of cancellation to their insureds.

Zurich and AGLIC first claim the statutory and Administrative Code provisions cited at Section I.C. of Plaintiffs' initial brief, Pb33-Pb34, does not apply because the CCIP Policy itself was not "cancelled." Zurich Db37. This semantic argument characterizing the cancellation of ACC's insurance as a mere "unenrollment," ignores the reality that unenrollment results in the cancellation of insurance. Zurich and AGLIC cannot escape their notice obligations by recharacterizing the cancellation of ACC's insurance, which was confirmed with its Certificate of Liability Insurance, as a mere "enrollment" issue. Zurich and AGLIC also claim the Code does not apply as the CCIP Policy contains a workers' compensation component and because the CCIP covered multi-state location risks, which supposedly places this situation outside of the subchapter's scope. Zurich Db38. But this case does not concern ACC's workers'

compensation insurance.[2] Rather, it concerns the alleged cancellation of ACC's general liability insurance. Further, while the CCIP program applies to projects in other states, only ACC's coverage was cancelled, not the entire CCIP Policy itself. The CCIP Policy applied to ACC as a single-location New Jersey company doing certain work on a single project, not a multi-state risk.

Zurich and AGLIC also fault Plaintiffs for not citing caselaw applying these rules specifically to CCIP policies. Zurich Db39. While New Jersey courts have not had the opportunity to rule on this exact set of facts, the issue of whether notice of cancellation of any insurance policy is required by law is hardly novel in New Jersey. Indeed, Zurich and AGLIC acknowledge that the cases cited by Plaintiffs in their initial brief include "different types of insurance policies, including automobile, workers compensation, property, and truck cargo liability," but give no compelling reasoning as to why CCIP policies should be suddenly treated differently. Zurich Db39-40. Instead, they just claim wrap-up programs are somehow "different" because contractors are "constantly being added and/or removed" while maintaining their own insurance. ***But the complexity and scale of CCIP programs is another compelling reason contractors should be provided notice of cancellation to avoid the very***

[2] Further, N.J.S.A. 11:1-20.1(a) does not apply to workers' compensation insurance because cancellation of such insurance is regulated by its own statutory requirements at N.J.S.A. 34:15-81.

confusion that resulted here. Of course, ACC was lucky that its general liability carriers conscientiously provided coverage subject to their reservation of rights, but this proposed disparate treatment of CCIP policies, if adopted by this Court, would invite confusion and potentially dangerous results for contractors who may not be so lucky.[3] New Jersey law is clear that notice of cancellation is required for ***all insurance policies*** – a doctrine that is reflected in cancellation notice provisions in the CCIP Policy and CCIP Manual themselves.

Zurich and AGLIC essentially contend that since New Jersey law requiring notice of policy changes and cancellation has not been applied to this exact scenario, it cannot be applied to CCIP policies. But this history of caselaw, both pre- and post-regulation, cited by Plaintiffs in their initial brief, Pb28-Pb36, does not limit this public policy protecting the reasonable expectations of insureds to each case's own narrow facts or even to policies that fall under the regulations. Plaintiffs will not repeat that analysis here, but as stressed by the Supreme Court in Piermount Iron Works, Inc. v. Evanston Ins. Co., 197 N.J. 432, 440 (2009), this "strong public policy requiring notice of nonrenewal, and

[3] Fitzpatrick v. Qasim, 2023 N.J. Super. Unpub. LEXIS 1529 (App. Div. 2023), cited by Zurich and AGLIC, does not avail them as it concerns the inapposite situation of a seller's cancellation of a real estate contract via actual notice of cancellation via telephone.

the concomitant obligation to continue coverage when an insurer fails to satisfy that notice requirement, has been made ***broadly applicable*** by the Commissioner." Id. at 441 (emphasis added).

Zurich and AGLIC also argue that an insurer's notice obligations disappear where CCIP communications "flow through the CCIP administrator and sponsor" – another novel rule that Zurich and AGLIC have invented for this case. Zurich Db44. In Insinga v. Hegedus, 231 N.J. Super. 562 (App. Div 1989), cited by Zurich and AGLIC, this Court actually endorsed the holding of Barbara Corp. v. Bob Maneely Ins. Agency, 197 N.J. Super. 339 (App. Div. 1984), that this obligation on the insurer is non-delegable, and only rejected the insured's argument because the broker actually sent "effective, proper and timely notice" and because the insured made a decision not to renew. 231 N.J. Super. 562, 567 (App. Div. 1989). In Insinga, this Court maintained that "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." Id.

Finally, although Zurich and AGLIC acknowledge that Kathleen Kelly could not find a copy of a request to unenroll ACC, they claim that Alliant's request to unenroll and Zurich's endorsement removing ACC from the CCIP were eventually discovered. Zurich Db45. However, in the same portions of

testimony cited by Zurich and AGLIC, Ms. Kelly also testified that such an endorsement would go to the broker, not ACC, that Zurich did not have direct communication with ACC, and that Zurich did not mail anything to the address on the endorsement. Pa2114; Pa2118; Pa116.

II. PLAINTIFFS ARE ENTITLED TO REIMBURSEMENT OF ATTORNEYS' FEES AND COSTS

As set forth in more detail in Plaintiffs' initial brief, Pb47-Pb48, Plaintiffs (and Travelers) are entitled to attorneys' fees and costs in the event of their successful claim for defense and indemnity coverage from Zurich and AGLIC, who have wrongfully refused coverage. See R. 4:42-9(a)(6) ("(a) Actions in Which Fee Is Allowable … (6) In an action upon a liability or indemnity policy of insurance, in favor of a successful claimant.").

In opposing this argument, Zurich and AGLIC cite a New Jersey policy disfavoring the shifting of attorneys' fees, but, as Zurich and AGLIC acknowledge in the same breath, the policy underlying Rule 4:42-9(a)(6) is "to discourage groundless disclaimers and to provide more equitably to an insured the benefits of the insurance contract without the necessity of obtaining a judicial determination that the insured, in fact, is entitled to such protection." Sears Mortgage Corp. v. Rose, 134 N.J. 326, 356 (1993) (internal citations omitted). Thus, this rule is meant to discourage the exact situation at bar. See, e.g., Tooker v. Hartford Accident & Indem. Co., 136 N.J. Super. 572, 577 (App.

Div. 1975) (upholding award of attorneys' fees under Rule 4:42-9(a)(6) where insurer wrongfully refused to defend its insured: "It seems only fair and proper that the costs incurred by Allstate to compel Hartford to do that which it was legally obligated to do in the first place should fall upon Hartford.").

Zurich and AGLIC cite Jignyasa Desai, D.O., LLC v. N.J. Mfrs. Ins. Co., 473 N.J. Super. 582, 590 (App. Div. 2022), for the contention that attorneys' fees are not warranted where the "issue presented was novel and unsettled." Zurich Db48. As explained in Section I.C. above, the requirement that insurers give insureds proper notice of cancellation for any policy, particularly where there is a requirement in the policy itself along with all the other requirements mandated by law, ***is hardly novel***. As discussed in the sections above, Zurich and AGLIC's disclaimer was indeed groundless and falls well within this category of practices that should be discouraged, so in the event Plaintiffs (and Travelers) are successful on appeal, they are entitled to attorneys' fees and costs.

III. PAYMENT TO EVANSTON IS NOT BARRED BY THE VOLUNTARY PAYMENTS DOCTRINE

Zurich and AGLIC next claim that Evanston's settlement of the Hood litigation was a voluntary payment, so Evanston cannot recover its indemnity payment from Zurich and AGLIC even if they were responsible to pay under the CCIP Policy. Zurich Db49. Evanston's claim is supported by principles of conventional subrogation, equitable subrogation, and public policy.

Evanston's and Travelers' Policies contained exclusion endorsements for wrap-up insurance programs. As a result, although Travelers and Evanston believed their wrap-up exclusion applied, Travelers and Evanston proceeded prudently in an abundance of caution to protect their insured, ACC, through a defense and indemnification of the Hood litigation, while preserving their rights at every turn to hold Zurich and AGLIC responsible for such defense and indemnification. The settlement agreement and release from the Hood litigation contained references to Travelers' and Evanston's preservation of their claims. Pa2621. In contrast, Zurich and AGLIC improperly denied coverage and thus required ACC to proceed on its own. New Jersey law is clear that, when one insurer pays an obligation that a second insurer should have paid, the first insurer has a legal right to recover those payments from the second insurer under principles of conventional and/or equitable subrogation. Jorge v. Travelers Indem. Co., 947 F. Supp. 150, 154-56 (D.N.J. 1996).

Zurich and AGLIC cite Palisades Ins. Co. v. Horizon Blue Cross Blue Shield of New Jersey, 469 N.J. Super. 30 (App. Div. 2021). But there, an automobile insurer mistakenly paid for personal injury given the insureds' designation as health insurance-primary in their auto policies and sought to recover the payments against the health insurer. Id. at 35. This Court concluded that the "No-Fault statutes do not provide an enforcement mechanism that PIP

carriers may use against health insurers." Id. at 40. This Court held that the auto insurer voluntarily paid the benefits and was precluded from recovering against the health insurer because "the insureds' designation of health-as-primary on their policies provided [the auto insurer] with notice that it was not obligated to pay the subject claims." Id. at 44. There was no mistake of fact, but rather, a mistake of law, which rendered the payments voluntary and unrecoverable. Id. Here, there is no statutory scheme that precludes reimbursement of the indemnity payments made by Travelers and Evanston. As a result, Travelers and Evanston have right of conventional and equitable subrogation, firmly rooted in the public policy favoring the prompt payment of claims, against Zurich and AGLIC for their indemnity payments.

Finally, New Jersey is a notice-pleading state, meaning only a short statement of the claim needs to be pleaded. Velop, Inc. v. Kaplan, 301 N.J. Super. 32, 56 (App. Div. 1997). Evanston's claim for reimbursement against Zurich and AGLIC is well-stated in Plaintiffs' Complaint. Pa1-19. As a result, Evanston has a cognizable legal claim for reimbursement against Zurich and AGLIC for its indemnity payment for the Hood litigation.

IV. COVERAGE SHOULD NOT BE RESCINDED BASED ON ANY MISREPRESENTATION AS ACC DID NOT MISREPRESENT ITS WORK

Zurich and AGLIC next claim that, if it is determined that ACC was enrolled in the CCIP at the time of the accident, ACC's coverage should be rescinded due to alleged "material misrepresentations" by ACC. Zurich Db52. This argument is also meritless.

To rescind an insurance contract on grounds of equitable fraud, a party has the high burden to demonstrate by clear and convincing evidence: (1) a material misrepresentation of a presently existing or past fact; (2) the maker's intent that the other party rely on the misrepresentation; and (3) detrimental reliance by the other party. First Am. Title Ins. Co. v. Lawson, 177 N.J. 125, 136-37 (2003). To state the obvious, Atlantic ***Concrete Cutting***, Inc. is a concrete cutting company. There is no evidence in this record that ACC misrepresented the work that it was performing, let alone clear and convincing evidence of a material misrepresentation. ACC's Contractor Enrollment Form and Notice of Subcontract Award described its work as "concrete cutting" and "saw cutting." Pa424-25. The contracted-for work done by ACC on the day of the accident was described as "core drilling" and "wire sawing." Pa422. Jeffery Boggs of ACC described ACC's work as concrete cutting. Pa991. Concrete cutting and structural demolition are not mutually exclusive, and at most, this

classification is a subjective question that cannot rise to the level of clear and convincing evidence of a material misrepresentation.

Further, even if there were an exclusion for demolition work, Zurich and AGLIC certainly cannot prove detrimental reliance on any such misrepresentation. After its initial exclusion for its discrete August 2015 work, ACC continued to perform a significant number of jobs on the project as evidenced by its numerous successive proposals and purchase orders from Abbonizio. Pa875. This continued work, after Zurich, Alliant, and the contractors were aware of ACC's August 2015 work, leads to the inevitable conclusion that no party was relying to its detriment on ACC's description of its work as "concrete cutting" instead of demolition.

V. IF ACC WAS NOT ENROLLED IN THE CCIP AT THE TIME OF THE HOOD ACCIDENT, ALLIANT WOULD BE LIABLE TO PROVIDE COVERAGE DUE TO ITS NEGLIGENCE

As set forth in Plaintiffs' initial brief, in the unlikely event the Court finds that ACC was properly unenrolled from the CCIP and Zurich and AGLIC did not owe coverage, Alliant, as ACC's insurance broker and fiduciary at the time it was enrolled, would be liable for that coverage as it negligently caused ACC to rely on Alliant's purported procurement of liability insurance. In Alliant's Respondent's Brief, Alliant claims that ACC has no damages, and that Evanston has no viable claim for damages. Alliant Db5-6. To the contrary, ACC has

expended a significant amount in litigating this ensuing coverage litigation, which arose from Alliant's negligence. Further, although Alliant contends that this coverage dispute is between the insurers, claiming it has "nothing to do" with that dispute and had "no control over whether ACC was enrolled in the CCIP," Alliant Db6, such blanket statements ignore Alliant's legal duty as an insurance broker. Despite disagreeing with the conclusions of Plaintiffs' expert, Alliant can still be found negligent as a matter of law.

In its role as Program Administrator, Alliant was responsible for ensuring that subcontractors were properly enrolled in the CCIP in order to work at the Project. This role made Alliant an insurance broker and fiduciary of each subcontractor that relied on Alliant's administration of the CCIP, which was mandatory for subcontractors to begin work. Absent formal notice of cancellation, ACC was entitled to reasonably rely on the documentation it received from Alliant confirming its enrollment and the coverage seemingly agreed upon. See Aden v. Fortsh, 169 N.J. 64, 87 (2001) ("Insurance consumers who instruct their brokers to provide coverage are entitled to have those instructions followed without regard to the insured's failure to detect the broker's negligent conduct."); Rider v. Lynch, 42 N.J. 465, 482 (1964) (insureds "were entitled to rely upon and believe that the broker had fulfilled his undertaking to provide the coverage impliedly agreed upon, and that the policy

sent to them represented accomplishment of that undertaking").

As explained in greater detail in Plaintiffs' initial brief, Pb43-47, expert testimony is not even necessary to prove Alliant's negligence as an insurance broker where it fell below the minimum standard of care for insurance brokers established by law. Rider, 42 N.J. at 476; see also Indus. Dev. Assoc. v. F.T.P., Inc., 248 N.J. Super. 468, 471 (App. Div. 1991) ("Where a broker fails to meet the established minimum standards, expert testimony is not necessary to establish the culpability of the broker."); Dimarino v. Wishkin, 195 N.J. Super. 390, 394 (App. Div. 1984) ("the standard of care to be exercised by a broker in the circumstances, as noted above, has as a matter of law certain established minimums … In the event of a failure to comply with these minimums, expert testimony is not necessary to establish the culpability of an insurance broker."). If ACC was indeed wrongfully unenrolled from the CCIP, Alliant, as ACC's insurance broker, would have failed to comply with the minimum standard of care established by law and would be liable for ACC's costs as a matter of law.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that this Court reverse the orders below and enter summary judgment in their favor.

Respectfully submitted,

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Dated: April 26, 2024

PROOF OF SERVICE

I hereby certify that, on this day, copies of the foregoing Reply Brief of Plaintiffs/Appellants, Atlantic Concrete Cutting, Inc. and Evanston Insurance Company, were served upon all counsel of record via the Court's electronic filing system.

/s/ Edward M. Koch

Edward M. Koch

Dated: April 26, 2024