THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Paul M. Burch, Circuit Court Judge

Appellate Case No. 2015-000806

Ard Trucking Company ..... Respondent,

v.

Travelers Property Casualty Company
of America d/b/a The Travelers Indemnity
Company of Illinois, Appellant. ..... Appellant.

FINAL REPLY BRIEF OF APPELLANT

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The Legislature, by the South Carolina Department of Insurance ("SCDOI"), has adopted the entire LSRP plan (R. pp. 547-587) and the WCIP which has the "force of law" in South Carolina. Ard Trucking's attempt to "gut" the entire Loss Sensitive Rating Plan ("LSRP") plan by focusing on a small part of the entire process (where the SCDOI requires a five-step Endorsement/LSRP Brochure process (R. p. 587)) to the exclusion of the other parts of the notification process (the Application Notice, the Coverage Binder Notice, the Mandatory Endorsement, and the LSRP Brochure) attempts to create an ambiguity where no ambiguity exists.

At first blush, Ard Trucking's (hereinafter "Ard") arguments appear plausible if, and only if, this Court ignores the law and the facts in the Record. After reviewing the SCDOI approved plan and the evidence in the Record, however, it is clear that Ard quintessentially places "the cart before the horse" and ignores both the law and the uncontroverted facts in the Record in order to support its arguments. Although the Notice Endorsement is a part of the Workers' Compensation Insurance Plan (WCIP) and statutory scheme adopted by the SCDOI to provide an assigned risk insured of notice of the LSRP, it is only a minor part of providing such notice. It does not, however, affirmatively exclude the LSRP from the assigned risk policy as Ard asserts.[1] Rather, the Application Notice (R. pp. 197-200), the Coverage Binder Notice (R. pp. 272-273), the Notice Endorsement (R. p. 215), the Mandatory Endorsement (R. pp. 236-238) and the LSRP Letter and LSRP Brochure (R. p. 254-262) (hereinafter collectively referred to as the "SCDOI LSRP Notice Documents") provide specific notice to an assigned risk insured that the LSRP applies to assigned risk policies in South Carolina where, in addition to the specific notice provided by these documents, the Mandatory Endorsement unequivocally sets forth: "this Endorsement applies where LSRP has been approved." (R. p. 236). As the LSRP had previously been approved in South Carolina before the assigned risk policy was issued to Ard, the SCDOI LSRP Notice Documents provide sufficient notice to Ard that the LSRP applied to its assigned risk policy. Such

[1] By its own express terms, the Notice Endorsement is self-limiting and the Endorsement itself does not apply to the assigned risk policy. In contrast, by its express terms, the Mandatory Endorsement applies to Ard's policy. Per the SCDOI approved plan, the Mandatory Endorsement provides specific notice of the LSRP once the assigned risk premium exceeds the LSRP premium threshold.

notification scheme is specifically set forth in the SCDOI approved plan document [SCDOI 00029]. (R. p. 587).

Specifically, on or about March 1, 2004, Ard also received the Mandatory Endorsement (R. pp. 236-238), Travelers' explanatory LSRP letter (R. p. 254), and the LSRP Brochure (R. pp. 255-262) explaining the LSRP to Ard in laymen's terms. See Travelers March 1, 2004 letter to Ard stating:

> Dear Insured:
>
> The above referenced policy has been issued as part of the mandatory Loss Sensitive Rating Plan (LSRP). The purpose of the LSRP is to provide a retrospective rating plan for employers with assigned risk workers' compensation premium over a certain threshold. Retrospective rating programs determine the final premium for a policy after the policy period has ended and is based on actual losses incurred during the policy period.
>
> Enclosed please find the explanatory booklet *The Loss Sensitive Rating Plan (LSRP): An employer's guide to the mandatory assigned risk retrospective rating program.* Please review the booklet carefully and discuss it with your producer.
> (R. p. 254).

Ard cannot cherry-pick one part of the entire scheme and ignore the entire WCIP/SCDOI approved plan as a whole. Ard cannot point to the Notice Endorsement, in isolation, and ignore the entire remaining statutory scheme in place, including this letter, the LSRP Brochure, and the Mandatory Endorsement. The Notice Endorsement plays but a small part, a minor step, in the approved plan by the SCDOI as set forth in SCDOI 0001 to 0040. (R. pp. 547-587). The Notice Endorsement is just one step in the process, not the entire process itself, and it is not the entire solution to the issues presented in this case.

Ard agreed to be bound by the WCIP. The SCDOI adopted the LSRP statutory scheme as part of the WCIP and SCDOI determined that sufficient notice is provided to an assigned risk insured if the insured is provided with the SCDOI LSRP Notice Documents that Ard received. Here, based on the WCIP, the assigned risk insured Ard, a large dollar employer, and its producer (Ard's agent pursuant to the WCIP) received the SCDOI LSRP Notice Documents which, as a matter of law, provide notice to Ard of the LSRP. Moreover, the uncontroverted evidence in the Record proves that the SCDOI's LSRP Notice Documents "worked" – it is uncontroverted that Ard's producer knew of the LSRP program and told its insured that the LSRP applied to its

assigned risk policy before Ard provided its LSRP deposit[2] to Travelers. (R. pp. 316-329).

I. ARD'S ARGUMENTS ARE CONTRARY TO THE LAW.

Ard's attempt to focus exclusively on the Notice Endorsement, to the exclusion of the rest of SCDOI approved plan and the SCDOI LSRP Notice Documents, should fall on deaf ears.[3] Here, based on the uncontroverted evidence in the Record, the LSRP notice provisions were satisfied where it is uncontroverted that Travelers sent and Ard received the SCDOI LSRP Notice Documents; further, and importantly, in this specific case, the SCDOI plan "worked" because these documents provided actual notice and knowledge to Ard and its producer, where Ard was fully aware and knew that the LSRP plan applied to its assigned risk policy before it issued an irrevocable letter of credit (ILOC) according to the SCDOI approved plan.[4] (R. pp. 316-329).

Ard's arguments appear deceptively simple – because the Notice Endorsement does not affirmatively list South Carolina, it must necessarily follow that it specifically excludes the LSRP in South Carolina; therefore, Ard "wins." Ard asserts every other document/notice is either irrelevant or insufficient to put it on notice that the LSRP applies to its assigned risk policy. With no evidence in the Record, Ard further asserts that the servicing carrier could have somehow altered the Notice Endorsement (i.e., by adding South Carolina in the Notice Endorsement listing), but failed to do so. However, there is no evidence in the Record that the servicing carrier had or has the authority to alter the Notice Endorsement required by the SCDOI/NCCI (R. pp. 152-153; 264; 269). Finally, Ard also asserts that the Mandatory Endorsement is meaningless as it only explained how the LSRP would be calculated if it applied to the assigned risk policy and the LSRP

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[2] Indeed, the only mechanism for a servicing carrier to require an additional deposit from an assigned risk insured is the LSRP plan. If there was no LSRP plan that was adopted by the SCDOI, Travelers would be unable to request an ILOC in accordance with the LSRP plan documents SCDOI 4, 6, 16, 23, 27 (R. pp. 550, 552, 562, 569 & 573).

[3] Ard's argument that the policy terms specifically stated that the LSRP did not apply to the assigned risk policy ignores the terms of the policy and the applicable law. Ard makes its arguments by simply cherry-picking a minute part of the SCDOI plan and ignoring the rest of the plan designed to give sufficient notice of the LSRP. Ard purposely attempts to misconstrue the first Endorsement, to the exclusion of the Mandatory Endorsement and LSRP Brochure which, combined together, provide sufficient notice to Ard as is required by the SCDOI. Ard's argument is especially ironic where, here, the SCDOI approved plan actually "worked" to provide notice to Ard before it issued an ILOC.

[4] As such, this appeal does not involve an "innocent" employer who, out of nowhere, was charged an "extraordinary" premium where the employer had relied on the Notice Endorsement. Indeed, Ard admitted in its representative depositions that it did not review or rely on the Notice Endorsement (R. pp. 275-286; 310-314; 377-385). To the contrary, this appeal involves a large dollar, sophisticated employer who received the required Notices and Endorsements pursuant to the SCDOI requirements, and who agreed to be bound by the WCIP terms (including the LSRP). Furthermore, this large dollar employer (and his producer/agent) had actual knowledge that the LSRP applied to his assigned risk policy before said employer issued an ILOC.(R. pp. 316-329).

Brochure (which explains the LSRP in detail) is not an Endorsement and, therefore, cannot alter the policy. As such, according to Ard, the original Notice Endorsement [which did not specifically list South Carolina] governs the day and it should not be required to pay the LSRP premium. As indicated previously, Ard's arguments appear plausible only IF this Court ignores the law (the WCIP and the entire LSRP plan set up by the SCDOI) and the uncontroverted facts in the Record in this case. Ard's "sleight of hand," red herring arguments are quickly exposed when the Court reviews SCDOI 0001-0040 (R. pp. 547-587), which is the approved plan by the SCDOI concerning the LSRP.

A. THE SCDOI APPROVED PLAN

In reviewing the SCDOI adopted plan, the SCDOI provides for sufficient notice to an assigned risk insured where a servicing carrier provides the SCDOI LSRP Notice Documents [the Application, the Coverage Binder, the Notice Endorsement, the Mandatory Endorsement and the LSRP Brochure], which Travelers provided and which Ard received in this case. According to the SCDOI approved plan, SCDOI 00029 (R. p. 587) sets forth the notice to be provided to an assigned risk insured:

> **D. Notice to Assigned Risk Policyholders**
>
> All assigned risk policies shall be endorsed with policy Endorsement WC00 04 17 – Assigned Risk Loss Sensitive Rating Plan (LSRP) Notification in order to ensure that all possible qualifying risks are notified of the intent and details of the Plan. All assigned carriers shall be required to attach this Endorsement to all assigned risk policies. **[First requirement: Notice Endorsement]**
>
> Assigned risk policies meeting the eligibility threshold to qualify for LSRP, shall be endorsed with policy Endorsement WC 00 04 18. **[Second requirement: Mandatory Endorsement]**
>
> Assigned risk carriers shall be required to indicate on all renewal quotations to risks with premium of $150,000 or more that payment of the renewal deposit constitutes knowledge and acceptance of the possible applicability of the LSRP to the policy. The assigned risk carrier shall provide the employer with the full details of the LSRP. **[Third requirement: LSRP Brochure]**
>
> The ACORD application for the assigned risk market will include the following language immediately above the signature of the employer:
>
> > **By signing below I acknowledge that the Loss Sensitive Rating Plan has been explained to me or that an explanatory notice or brochure has been provided to me and I agree that I shall be bound by the terms of such plan if my estimated annual premium or preliminary physical**

audit premium meets or exceeds the premium eligibility requirement. [Fourth requirement: Application]

When the policy is bound, a notice shall be included which reads:

Coverage is being bound subject to your signed statement acknowledging and agreeing to the terms of the Loss Sensitive Rating Plan in the event that your estimated annual premium or preliminary physical audit premium meets or exceeds the premium eligibility requirement. [Fifth requirement: Binder]

Once Travelers issued the SCDOI LSRP Notice Documents set forth above, pursuant to the law (the WCIP and the SCDOI approved plan), Travelers is entitled to charge the LSRP premium as the SCDOI has determined that Ard was provided with sufficient notice with such documents.[5]

B. ARD'S BRIEF ARGUMENTS

Ard's Brief arguments are set forth in three distinct sections. Ard's first argument is that the policy terms "cannot be unilaterally changed, amended or re-written." Ard fails to point out to the Court, however, that, by its very nature, the assigned risk policy explicitly sets forth that the premium will be governed by the WCIP manual of rules, rates, rating plans, which include the LSRP, and all of which are applicable to the policy from its inception. In relevant part, Ard's assigned risk policy sets forth:

PART FIVE – PREMIUM

A. Our Manuals
All premium for this policy will be determined by our manuals of rules, rates, rating plans and classifications. We may change our manuals and apply the changes to this policy if authorized by law or a governmental agency regulating this insurance.

Accordingly, Ard's argument that Travelers' policy terms "cannot be unilaterally changed, amended or rewritten" ignores the very language of the assigned risk policy itself which requires Travelers to charge premiums in accordance with the WCIP. Indeed, the LSRP is applicable to Ard's policy because the LSRP was adopted and became effective prior to the date the assigned risk insured policy was issued to it. It is not a matter "unilaterally changing, amending or rewriting" the policy terms as Ard would have the Court believe; rather, it is a matter of applying the policy terms in accordance with what the policy terms actually are; i.e., that the servicing carrier will charge premiums in accordance with the plan manual. Pursuant to Ard's

[5] Here, the SCDOI LSRP Notice Documents were uncontrovertibly sent to and received by Ard and its producer.

application and policy terms themselves, Ard agreed to be bound by the WCIP and it agreed to pay for the premium charges which include the LSRP in South Carolina.

Ard's related, but more specific, argument is that the policy may not be "changed or waived except by Endorsement issued by Appellant as part of this policy." Ard then focuses on a small part of a five-step process of providing an assigned risk insured notice and asserts that the Notice Endorsement itself must affirmatively exclude the LSRP so that the servicing carrier can no longer charge premium for LSRP unless the servicing carrier specifically lists South Carolina as an LSRP state in another Endorsement itself. Unfortunately for Ard, such is not the law in South Carolina or in this case. Again, Ard misrepresents the policy terms and the law to attempt to come to a forced conclusion.[6] The WCIP and the SCDOI approved plan set forth the applicable law in this instance. Ard's argument that the Notice Endorsement itself must list South Carolina or a servicing carrier can never be allowed to charge LSRP premium is directly refuted and rejected by the SCDOI approved LSRP plan itself.[7]

In Section I.B. of its Brief, Ard asserts its second argument – that no remedy was available to change Travelers' "admitted exclusion" of LSRP. As set forth previously, such argument is directly refuted and contrary to the SCDOI approved plan which has the effect of law. Nowhere does the Notice Endorsement exclude the LSRP applicability to the assigned risk policy. In conjunction with its second erroneous argument, Ard argues that the LSRP Mandatory Endorsement and the LSRP Brochure do not amend, change or rewrite the LSRP Notification Endorsement; however, again, Ard misses the point of the Mandatory Endorsement and the LSRP Brochure. Contrary to Ard's argument, the Mandatory Endorsement and the LSRP Brochure [along with the other SCDOI LSRP Notice documents] provide specific notice of the LSRP's application in South Carolina to any reasonable person. Even more importantly, however, the

[6] The assigned risk policy is governed by laws that are different than a voluntary insurance policy. The Supreme Court has been very clear that the WCIP governs assigned risk policies and takes precedence over more general insurance common law. Ard ignores the entire SCDOI statutory scheme that sets up the LSRP and the SCDOI's decision that the SCDOI LSRP Notice Documents provide sufficient notice to an assigned risk insured that the LSRP applies to the assigned risk policy.

[7] The Notice Endorsement itself merely sets forth that it does not apply to the policy; it in no way limits the Mandatory Endorsement which clearly applies to the assigned risk policy pursuant to its own express terms.

SCDOI, pursuant to the SCDOI approved plan and the WCIP, have deemed the LSRP Mandatory Endorsement and the LSRP Brochure (and the other SCDOI LSRP Notice Documents) as the appropriate mechanisms for a servicing carrier to provide sufficient notice to an assigned risk insured. Pursuant to the SCDOI approved plan, a servicing carrier is not only allowed, but is required, to charge premium for LSRP once those documents are sent to the insured. Here, it is uncontroverted that Ard received the SCDOI LSRP Notice Documents including the Notice Endorsement, the Mandatory Endorsement, and the LSRP Brochure. Ard's producer received such documentation and understood that the LSRP applied to Ard's assigned risk policy. Pursuant to the SCDOI approved plan and the LSRP, the servicing carrier was not required to take any further action in order to properly charge premium for LSRP in accordance with the SCDOI approved plan.[8]

In Section II of its Brief (Ard's third argument), Ard asserts that "the courts must enforce insurance contracts according to their plain ordinary and popular meaning of their terms and cannot rewrite insurance contracts to suit one of the parties." Travelers certainly agrees with such proposition; however, Ard purposely misapplies it. Travelers would assert that the Court must enforce insurance contracts according to the law (which certainly includes the plain, ordinary and popular meaning of their terms as is required by law) and courts cannot rewrite insurance contracts to suit one of the parties. Unfortunately, the judge's Order below violates this principle as it rewrites the assigned risk contract to suit Ard's needs, not the needs of the assigned risk market, a market that Ard

[8] Travelers does not acquiesce in Ard's strained argument that the Mandatory Endorsement or the LSRP Brochure do not provide notice that the LSRP applies in South Carolina. Any reasonable person who would read the Mandatory Endorsement, as well as the LSRP Brochure, would certainly understand, or at least be on notice, that the LSRP applies to the assigned risk policy in South Carolina. As set forth in the Georgetown Steel Co. decision cited in Travelers' Appellant's Brief, it is the assigned risk insured's responsibility to obtain a copy of and review the SCDOI approved plan if it is confused about what the LSRP is when it receives the SCDOI LSRP Notice Documents. Further, Ard's argument that the Mandatory Endorsement and the LSRP Brochure did not provide sufficient notice to Ard is largely irrelevant where (1) Ard agreed to be bound by the WCIP and (2) the SCDOI approved plan requires that an assigned risk insured be charged LSRP if the servicing carrier issues the SCDOI LSRP Notice documents to the assigned risk insured. As it is uncontroverted that Travelers, the servicing carrier, provided the SCDOI LSRP Notice Documents to Ard (and its producer admits that he received them and understood that the LSRP applied to Ard), the sufficiency of the notice provided by these documents *in the abstract* is simply irrelevant. Ard agreed to be bound by the WCIP and the WCIP requires LSRP to be charged if the assigned risk insured received the SCDOI LSRP Notice Documents. As Ard received such documents, LSRP is appropriate in this case.

voluntarily agreed to join and voluntarily agreed to be bound by.[9] Ard artfully attempts to create an issue premised on the argument that the Notice Endorsement, in isolation, and to the exclusion of the Application Notice, Binder Coverage Notice, the Mandatory Endorsement, the LSRP Letter and Brochure and in violation of the law (the WCIP and SCDOI approved plan) somehow creates an ambiguity that binds the servicing carrier and forever limits it from charging LSRP, where the policy language and law say otherwise. Importantly, the "plain, ordinary and popular meaning" of the policy terms in this case specifically incorporate the WCIP, which Ard agreed to be bound by. The policy terms themselves set forth premium will be charged in accordance with the manuals (the WCIP):

> **PART FIVE – PREMIUM**
>
> **A. Our Manuals**
> **All premium for this policy will be determined by our manuals of rules, rates, rating plans and classifications. We may change our manuals and apply the changes to this policy if authorized by law or a governmental agency regulating this insurance.**

Based on **Part 5** of the policy itself, Ard's third argument necessarily fails.[10]

C. ARD'S ADDITIONAL FACT[11] AND ARGUMENT ERRORS

1. Ard's false "extraordinary" premium charge argument

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[9] Respectfully, courts are required to enforce the law, including the contract between the servicing carrier and the assigned risk insured which incorporates the WCIP. Ard agreed to be bound by the WCIP. The WCIP requires the premium for LSRP in South Carolina. The only requirement for it to charge the LSRP premium is for the servicing carrier to provide the SCDOI LSRP Notice Documents as required by SCDOI approved plan. Uncontrovertedly, Travelers provided these documents to Ard; accordingly, Ard had actual and imputed knowledge that the LSRP applied. No further inquiry is required by the Court in order to enforce the WCIP and to allow the servicing carrier to charge the mandatory LSRP premium in this case.

[10] In Section III of its Brief, Ard also graciously concurs with Travelers' objection to the lower court's pre-judgment interest calculation. Travelers further asserts, however, that the error in pre-judgment interest is merely one of a series of errors of law in the trial judge's Order below. Indeed, the eight times the trial judge's Order refers to the LSRP premium as "extraordinary" shows a bias against the SCDOI approved plan. In other words, the Order below is not based on the law the way it exists, but rather how the underlying judge felt the law should be.

[11] Ard's purported "Statement of the Facts" fails to advise the Court of key evidence in the Record and misconstrues several important facts and the law. However, it is instructive for the Court based on the manner in which Ard attempts to present "facts" and, even more importantly, for the facts that Ard purposely omits. In a nutshell, Ard attempts to focus the Court on what it calls "the interpretation of contractual terms contained in two assigned workers' compensation insurance policies" as the basis of this appeal; however, Ard fails to mention that the assigned risk policies are governed by the WCIP and the approved SCDOI plan for LSRP. Ard further fails to indicate that it agreed to be bound by the WCIP even before the assigned risk policy was issued to Ard. Ard argues that Travelers asked the lower court to "rewrite" the insurance policies by "disregarding time-honored insurance contract rules"; however, it is Ard that is asking the Court to ignore the law (WCIP) and to misinterpret the assigned risk insurance contracts by narrowly interpreting one Endorsement, in isolation and to the exclusion of the entire plan (as well as policy terms themselves). The law is the time-honored tradition that needs to be enforced and Ard's purposely misconstruing of one part of the policy (the Notice Endorsement) in isolation does not negate the law or the policy terms themselves. Ard further argues that Travelers' "effort to rewrite the two policies was rejected in lower court"; however, Travelers' current appeal is an attempt to have the Court enforce the law and properly apply the assigned risk policy terms in accordance with their express terms and the law, not to rewrite the assigned risk policy as the lower court did.

Ard consistently refers to the LSRP premium as "an extraordinary premium surcharge requirement"; however, such characterization is refuted directly by the SCDOT approved plan.[12] As the SCDOI Plan states, the LSRP is a program which seeks to have large dollar employers pay their fair share of premiums in order to allow the entire assigned risk market to be viable. (R. pp. 547-587). Ad hoc judicial decisions which prevent servicing carriers from charging premium based on the exposure of these large dollar employers will only serve to weaken the entire assigned risk market and dramatically increase premium costs for all employers in the assigned risk policy market and the voluntary market as well.[13] The LSRP is not an "extraordinary premium surcharge" as Ard asserts; rather, it is a necessary component of the assigned risk market required by the SCDOI to ensure the assigned risk market's survival as an alternate workers' compensation system for high risk employers such as Ard. High risk, large dollar employers, such as Ard, should bear the cost of their extraordinary exposure and should pay their fair share. Further, assigned risk insureds, such as Ard, agree to be bound by the WCIP on the "front end," before an assigned risk policy is issued to it. Ard was free to obtain a cheaper policy in the voluntary market if it desired to do so/was able to do so; however, having voluntarily applied for an assigned risk policy, Ard cannot seriously complain that it is bound by the WCIP/SCDOI plan, where it expressly agreed to be bound by such plan before obtaining the benefits of its assigned risk policy.[14]

2. Ard's false "conditional" authority and servicing carrier discretion arguments

In its "Facts," Ard states that SCDOI "*conditionally* authorized appellant, and other similar insurers to add an LSRP premium surcharge to assigned risk insurance policies issued in South Carolina." (Emphasis added). Further, Ard asserts that the servicing carrier was to "*specifically include*" within their policies an LSRP Notice Endorsement that would "ensure" that all South Carolina insureds would have notice LSRP could

[12] Ard also either forgets or ignores the fact that an assigned risk policy, by design, is more expensive than a workers' compensation policy in the voluntary market.

[13] Slanted judicial decisions in favor of big local employers risk the entire workers' compensation market in South Carolina which will inevitably lead to premiums skyrocketing, businesses closing, and the state economy suffering. If South Carolina courts allow state court judges to let local, multi-million dollar employers skirt their responsibility to pay LSRP premium, South Carolina will likely face such a fate.

[14] This is especially the case with Ard where Travelers paid hundreds of thousands of dollars in benefits to injured employees during the exact same policy period.

be applied. By these two sentences, Ard misrepresents the LSRP plan as set forth in SCDOI numbers 0001 - 0040. (R. pp. 547-587). First, there is absolutely no evidence in the Record that the SCDOI *conditionally* authorized the servicing carrier to add LSRP; rather, the evidence in the Record is uncontroverted that the SCDOI requires LSRP to be applicable to assigned risk policies after November 1, 2003. (R. p. 547). This is a significant fact. Similarly, there is no evidence that a servicing carrier can vary the LSRP Endorsements that the SCDOI required in this case as Ard suggests. It is uncontroverted that Travelers provided the SCDOI required Endorsements to Ard. (R. pp. 152-153; 264; 269).

Of particular importance to exposing Ard's false argument, the SCDOI approved plan's statement that the servicing carrier should "ensure" that South Carolina insureds be provided with notice of the LSRP is not a broad statement of law that is left up to the discretion of each individual servicing carrier; in stark contrast to Ard's claim, the LSRP and SCDOI approved plan documents specifically set forth that notice to the insured is "ensured" by the servicing carrier sending the required SCDOI LSRP Notice Documents, including the exact WC000417 Notice Endorsement the servicing carrier uncontrovertedly sent in this case. The SCDOI approved plan is very specific in stating that the LSRP Notice Documents ensure notice of the LSRP to an assigned risk insured.[15] (R. p. 587). The SCDOI plan specifically sets forth what Travelers was required to do, and Travelers did exactly what the SCDOI requires in this case.

In error, and with no evidence in the Record, the trial judge *sua sponte* found as a fact that Travelers could have altered the Notice Endorsement somehow; however, there is absolutely no evidence in the Record that supports any such finding. To the contrary, the uncontroverted evidence in the Record is that the Notice Endorsement, along with the Mandatory Endorsement and LSRP Brochure, which Travelers sent to Ard and its producer, were required by the SCDOI and "ensured" notice to Ard in accordance with the SCDOI's plan. (R. pp. 152-153; 264; 269). As

[15] The plan specifically requires the Notice Endorsement Travelers sent and Ard received in this case. As a matter of law, the SCDOI approved plan/Basic Manual that Ard refers to is a part of the overall SCDOI plan itself which specifically sets forth that notice is provided to an assigned risk insured by a servicing carrier providing the specific SCDOI LSRP Notice Documents Travelers provided to Ard in this case. There is absolutely no evidence in the Record that Travelers was required to provide any other notice (or, on the flip side, was allowed to provide any other notice) to Ard concerning the LSRP plan; Ard's suggestion otherwise is contrary to the approved plan.

a matter of law, the SCDOI LSRP Notice Documents provide the insured with sufficient notice and knowledge of the LSRP applying to its assigned risk policy.[16]

Finally, as Ard asserts, the Basic Manual states "D. Notice to Assigned Risk Policy Holders... all assigned risk policies shall be endorsed with Policy Endorsement WC000417 - Assigned Risk Loss Sensitive Rating Plan (LSRP) notification in order to ensure that 'all possible qualifying risks are notified of the intent and details of the plan'"; however, again, Ard fails to advise the court that the WC000417 Assigned Risk Loss Sensitive Rating Plan (LSRP) Notification Endorsement [SCDOI 00029 & 00036 (R. pp. 575; 582)] is very specific and is the exact same Notification Endorsement that Ard now complains did not provide it sufficient notice. By providing the SCDOI/NCCI required Notice Endorsement, along with the other SCDOI LSRP Notice Documents, Travelers provided the required "notice to assigned risk policy holders" which, as a matter of law, "ensured" Ard was notified of the intent and details of the LSRP.[17]

3. Ard's false "affirmative exclusion" argument

Based on Ard's purposeful misconstruing of the LSRP plan, Ard further asserts that Travelers' assigned risk policy

> "failed to include Respondent South Carolina insurance policy as being subject to LSRP application. Conversely stated, the clear and unequivocal language in the policy Appellant issued to Respondent affirmatively excluded LSRP from being applicable to the South Carolina insurance policy...."

Again, this bold assertion is a clear error of law in light of the law and the facts in this case. The Notice Endorsement does not "affirmatively exclude" the LSRP as Ard asserts. Travelers was required to provide the exact Notice Endorsement that it provided as set forth in the SCDOI document 00036 (R. p. 582), which is only one step in a multi-step process of providing Ard notice of the LSRP application with the SCDOI LSRP Notice Documents. Whereas the Notice

[16] Even more than an academic exercise, however, the uncontroverted evidence in this case is that Ard knew that the LSRP applied to its policy before it issued the ILOC; however, after having this knowledge and issuing an ILOC in accordance with the LSRP plan, Ard then flips and now attempts to argue Travelers is estopped by the singular Notice Endorsement in isolation – by itself – without reference to the entire WCIP and SCDOI approved plan. The SCDOI's approved plan which Ard references, in and of itself, provides specific notice to Ard that the LSRP applies in South Carolina. "Ignorance of the law is no excuse," and, just as the appellant in Georgetown Steel Co., supra, Ard had knowledge of the Basic Manual, the WCIP, and the SCDOI approved plan requiring LSRP in South Carolina.

[17] As set forth in the SCDOI approved plan, after a preliminary audit's premium threshold indicated that Ard was a large dollar employer which was subject to the LSRP, Travelers issued a Mandatory Endorsement and LSRP Brochure explaining the LSRP to Ard pursuant to the SCDOI approved plan.

Endorsement required by the SCDOI approved plan/NCCI does not list South Carolina, the SCDOI has determined that the Application Notice, Coverage Binder Notice, the Mandatory Endorsement, and the LSRP Brochure do provide notice of the LSRP. The SCDOI has determined that together these SCDOI LSRP Notice Documents provide sufficient notice to Ard, and any objective reading of these documents support SCDOI's decision to provide notice in such a manner.[18] Therefore, focusing on the Notice Endorsement in isolation is an error of law, especially where Ard's logic is premised upon/assumes that the Notice Endorsement *affirmatively excludes* LSRP in South Carolina, where the Notice Endorsement verbiage itself and the SCDOI plan sets forth otherwise.[19]

4. The false "change document" argument

In Footnote 1 on page 10 of its Brief, Ard purposefully misconstrues the "change document" issued by Travelers on July 27, 2004. (R. p. 647). The actual date on the document (July 27, 2004) is key to understanding the document's accurate meaning. The "change document" is a receipt of the ILOC of $52,116. It simply notes that such amount will be returned as "return premium" assuming that there are no additional claims during the policy period which trigger the LSRP valuations. Such return premium, however, is premised upon no additional LSRP premium being due during the LSRP valuation periods which occur after the policy is concluded.[20] This document is in accordance with and pursuant to the SCDOI approved plan.[21]

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[18] Indeed, SCDOI's plan is validated where Ard's producer admits he understood the LSRP applied to Ard's assigned risk policy after he received the SCDOI LSRP Notice Documents. (R. pp. 316-329).

[19] In other words, by focusing only on the Notice Endorsement itself and ignoring the entire plan, Ard would have this Court ignore the law and the plan in its entirety and hold that the Notice Endorsement, in and of itself, excludes the possibility of a servicing carrier charging LSRP premium. Such absurd result, however, would be contrary to the law, the express policy terms, and the public policy of having large dollar employers pay their fair share to support the assigned risk market that they benefit from.

[20] Thus, the change document reflects the ILOC premium deposit to be returned to Ard subject to the LSRP valuations. Here, given Ard's multiple claims filed during the policy period, once LSRP valuations were calculated based on Ard's actual claim history during the policy period, Ard was not owed any refund; rather, Ard owed Travelers the $52,116 (collateralized by the ILOC), as well as an additional $122,948.

[21] Despite Ard's argument to the contrary, there is no requirement or need for the servicing carrier to "mention in this document" the application of LSRP as Ard has already been provided sufficient notice pursuant to the SCDOI plan required notices. Travelers' July 2004 (Letter of Credit for $52,116) documentation is not evidence Ard was owed a "return premium," but it is merely a confirmation/receipt that the ILOC was received by Travelers on or about July 27, 2004. Indeed, the Travelers documentation was issued months before the first valuation of LSRP was triggered, well before the expiration of the policy, and merely reflects what premium would be returned if the LSRP valuation were zero in the future. As the LSRP valuations are not determined until after the policy periods end, the judge's finding that the July 27th Travelers document promises a return of the ILOC as a "return premium," before any LSRP

5. Ard's false policy language arguments

On page 9, Argument I of its Brief, Ard asserts "the die was cast (by Appellant) and this Court cannot rewrite (Appellant's) policy" as support for the trial judge's Order finding that the LSRP Notification Endorsement required the judge to find that Travelers cannot charge LSRP premium pursuant to the SCDOI plan. However, the exact opposite is true as "the die was cast" by Ard when it agreed to be bound by the WCIP and the court cannot rewrite the assigned risk policy to ignore the law or the terms of the policy that expressly incorporate the law. Ard asserts Travelers argues that it is somehow "immune from the consequences of its own policy language … which specifically notified and informed Respondent that LSRP did not apply to Respondent." Ard further asserts "Travelers arrogantly[22] continues to argue that the LSRP Endorsement was, 'as a matter of law,' 'amended,' 'supplanted,'or 'revised' by other documents not included in the two policies issued to" Ard.[23] Again, here, Ard intentionally misconstrues the policy terms, the SCDOI LSRP Notice Documents and, most importantly, the WCIP/SCDOI approved plan. Ard's argument rests on a supposition that the law does not apply to it but, in contrast, the Notice Endorsement, in isolation, binds the servicing carrier not to charge LSRP premium, despite the policy terms themselves, the Notice Endorsement's express verbiage, and the entire SCDOI approved plan which state otherwise.

Ard further asserts that Travelers' argument is that the LSRP Mandatory Endorsement and the LSRP Brochure "somehow individually or combined to rewrite the unambiguous language in the LSRP Notice Endorsement"; however, again, Ard purposely misstates Travelers' position. Pursuant to the WCIP/SCDOI approved plan and the unambiguous language of the policy terms, Travelers is required to charge LSRP premium. As stated previously, the

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valuation was completed, is erroneous, violates the SCDOI approved plan, and is not supported by any evidence in the Record.

[22] Travelers' argument is not "arrogant"; to the contrary, Ard's argument is "arrogant" in light of the fact that it requests this Court to ignore the law based on a strained interpretation of the Notice Endorsement which is just one part of a multi-faceted plan which provides sufficient notice to Ard.

[23] On page 10 of its Brief, Ard appears to suggest that the Mandatory Endorsement was "not included in the policies"; however, on page 17 and 21 of its Brief, Ard admits that the Mandatory Endorsement was provided in its assigned risk policy and, further, that it received the LSRP Brochure.

Notice Endorsement does not exclude the LSRP. **Part** 5 requires and incorporates LSRP charges in accordance with the plan. Further, the approved plan itself requires the Mandatory Endorsement and LSRP Brochure to be issued via a rewritten LSRP policy once a premium threshold is met. Travelers is not arguing to amend ambiguous language as Ard asserts; rather, Travelers is asking the Court to enforce the unambiguous language of the policy and the express provisions of the SCDOI approved plan.

On page 12, Argument I.A. of its Brief, Ard asserts that the terms of the assigned risk policy may not be changed or waived except by Endorsement and Ard further states that WC000000(A) sets forth that "the only contractual terms or agreements between the contracting parties are those terms set forth, included and contained within the four corners of this contract." Also, in the general section of the policy, Ard states that "the only agreements relating to this insurance are stated in this policy. The terms of the policy may not be changed or waived except by Endorsement issued by us to be part of this policy." Ard focuses on these provisions, again in isolation, to attempt to assert that the Notice Endorsement provision cannot be altered or the policy cannot require LSRP premium unless it somehow includes another Notice Endorsement that specifically lists South Carolina; unfortunately for Ard, it is wrong on both counts as, once again, Ard ignores the WCIP and the express policy terms set forth in **Part 5** of the policy.[24] As such, in citing the General Section A as supporting its contrived argument, Ard ignores that the very policy terms themselves allow the servicing carrier to charge premium in accordance with the WCIP "manuals of rules" which incorporates the LSRP. As such, the policy terms themselves incorporate the LSRP program set forth by the SCDOI approved plan; thus, Ard's red herring

[24] It is also important to note that this argument was not made to the lower court or ruled upon by the lower court, but has been made for the first time by Ard on appeal. Importantly, Ard fails to inform the Court that **Part 5** of the policy specifically and in unambiguous terms requires Ard to be responsible for premium based on the manuals/plan, which in South Carolina include the LSRP. In addition to the express terms of the contract, Ard is also bound by the law which is the WCIP and the SCDOI approved plan. Accordingly, the SCDOI's implementation of the LSRP program for assigned risk policies in South Carolina requires, as a matter of law, that LSRP applies to Ard's policy and Ard's reference to the General Section A, which ignores the "premium" **Part 5** section and the SCDOI approved plan, does not alter this result.

argument is easily dispelled.[25]

Ard continues to ignore that (1) South Carolina law is incorporated into the policy as a matter of law, and (2) the policy terms themselves require the servicing carrier to charge for premiums in accordance with the manual and plans, which include the LSRP. Thus, Ard's argument that the policy terms themselves exclude the LSRP is refuted in light of **Part 5** of the policy which specifically requires the servicing carrier to charge premium in accordance with the WCIP Plan which includes the LSRP. As **Part 5** incorporates the LSRP into the policy, Travelers is not requesting any "change" to the terms of the policy as the LSRP was incorporated into the assigned risk policy from the inception of Ard's assigned risk policy.[26]

6. Ard's false "novel lynchpin proposition" argument

Ard argues that Travelers' "lynchpin proposition" is that the LSRP Notification Endorsement "exclusion of LSRP application" was somehow "by operation of law" "changed," "amended/supplanted," and/or "revised and amended" by the Mandatory Endorsement. Ard's mischaracterization is silly. As stated previously, the Notice Endorsement does not "exclude" the LSRP application. Further, the LSRP is applicable to the assigned risk policy as a matter of law pursuant to the SCDOI approved plan set forth in pages SCDOI 0001-00040. (R. pp. 547-587). The SCDOI plan provides for SCDOI LSRP Notice Documents in order to provide sufficient notice to an assigned risk insured.[27] (R. p. 587). In other words, it is not, as Ard would assert, that the LSRP magically comes into existence after the Mandatory Endorsement and LSRP Brochure are sent; rather, the LSRP is applicable to Ard as a matter of law from the inception of the policy and, according to the SCDOI approved plan, Travelers is only required to

[25] Throughout its Brief, Ard artfully dances around and ignores the obvious ... the SCDOI approved plan binds Ard and Travelers is entitled to the premium it seeks. In South Carolina, an assigned risk policy of insurance, like all policies of insurance, incorporates South Carolina law. The assigned risk policy incorporates the WCIP. The specific provisions of the WCIP/the assigned risk plan and the SCDOI approved plan govern the assigned risk policy. Accordingly, Ard attempts to avoid the law by purposely misconstruing parts of the insurance policy terms, to the exclusion of others, is unavailing.

[26] In addition, although the law itself is sufficient notice to Ard that the LSRP applies, the SCDOI approved plan sets forth that sufficient notice is provided to the insured as a matter of law if the servicing carrier sends the SCDOI LSRP Notice Documents in accordance with the SCDOI plan. (R. p. 587). Because Travelers sent those documents, which is uncontroverted, Ard had sufficient notice as a matter of law and there is no defense to Travelers seeking the premium that it now seeks pursuant to the LSRP in this case.

[27] It is uncontroverted that Travelers provided these documents to Ard and its producer. Once these documents were provided to the producer and Ard, the SCDOI Plan itself requires Travelers to charge LSRP premium.

send the SCDOI LSRP Notice Documents in order to be able to charge the LSRP premium mandated by the WCIP. It is the SCDOI approved plan itself reflected in SCDOI 0001-00040 (R. pp. 547-587) which sets forth the statutory scheme which the SCDOI determined provides sufficient notice to make the LSRP applicable to Ard's policy, despite the lack of listing South Carolina in the initial Notice Endorsement. The SCDOI plan itself states the Mandatory Endorsement and LSRP Brochure, along with the other SCDOI LSRP Notice Documents, provide sufficient notice of the LSRP to Ard.[28] Contrary to Ard's argument, it is Ard's "novel lynch pin proposition" that it is not bound by the law, especially when it agreed to be bound by the law, which is (1) contrary to common sense; (2) violates hardened South Carolina rules regarding insurance contracts which hold contracting parties to their contractual terms;[29] and (3) is specifically prohibited by Ard's agreement to be bound by the law/WCIP.

In Section I. B. of its Brief, Ard argues that Travelers "is forced to admit, because it cannot deny" that the LSRP notification does not specifically list South Carolina. Travelers has always admitted and continues to admit that the Notice Endorsement provision required by the SCDOI does not specifically list South Carolina. However, Ard goes a step further and argues that, because South Carolina is not listed in the Notice Endorsement itself, this means that the LSRP is affirmatively excluded and is "not applicable" to the assigned risk policy. Such argument is a non-sequitur and contrary to the law. The Notice Endorsement express verbiage supports no such assertion. Simply put, Ard's argument ignores the WCIP and the SCDOI approved plan. It is Ard's extraordinarily convoluted reasoning where Ard maintains it is somehow immune from the law and the clear and unambiguous terms of the policy (which says that premiums will be charged in accordance with the manuals) which underpins (and undermines) Ard's fallacious arguments. It is Ard that is requesting the Court to rewrite the terms of the LSRP program in South Carolina and

[28] It is certainly within the SCDOI's authority to develop such an approved plan in South Carolina.

[29] Here, the assigned risk policy terms themselves incorporate the law in **Part 5** of the policy which states that premium will be charged in accordance with plan manuals.

to ignore the SCDOI approved plan altogether. It is Ard that is asking the Court to ignore the plain and unambiguous words of its assigned risk policy.[30]

Ard continues to assert that Travelers' "novel proposition" would require this Court to rewrite the insurance contract terms so that they have the exact opposite meaning from the existing plain, clear, and unambiguous words used in the policy; however, in actuality, Ard is peddling the novel proposition that it is not bound by the law or that applying the law somehow "rewrites" the insurance terms where the plain meaning of the terms themselves allow Travelers to charge the premium in accordance with plan manuals, which include the LSRP.[31]

7. Ard's false Mandatory Endorsement argument

In Section B.1 of its Brief, Ard argues that the Mandatory Endorsement did not amend, change or rewrite the LSRP Notification Endorsement. In making its argument, Ard again ignores the SCDOI approved plan pages 00017, 18, 23, 29, 33, 36 and 37 (R. pp. 563, 564, 569, 575, 579, 582 & 583), which set forth that the Notice Endorsement, Mandatory Endorsement and the LSRP Brochure provide sufficient notice to Ard. Specifically, SCDOI 00029 (R. p. 587) sets forth the required "notice to assigned risk policyholders," (i.e., the SCDOI LSRP Notice Documents) which is the exact notice Ard received.[32]

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[30] Ard also asserts that Travelers is partaking in a "ham-handed effort to rewrite Appellant's own clear and unambiguous language used to promulgate contract terms," and it is "a desperate attempt by Travelers to avoid the consequences of its own terms contained in its own insurance contract." To the contrary, it is Ard's arguments that are a "ham-handed" effort to attempt to have this Court ignore the clear and unambiguous language in the contract itself (such as **Part 5**), as well as the law itself (the WCIP/SCDOI approved plan). Pellucidly, Ard's argument is a "desperate attempt" for Ard "to avoid the consequences" of the insurance contract terms it agreed to and the law. Further, Travelers' efforts are not a "ham-handed" attempt to rewrite the policy, but rather it is Travelers' effort to require Ard to fulfill the obligations it agreed to when it agreed to be bound by the WCIP. Travelers respectfully asks this Court to enforce the law. If the courts look to the law (the WCIP and the SCDOI approved plan), then it is self-evident that Ard's arguments are based on cherry-picked, purposeful misinterpretations of the Notice Endorsement and general policy language, to the exclusion of the specifics of the entire SCDOI plan, as well as the specific policy terms. Courts are required to enforce the law and Ard is asking the Court to ignore the law.

[31] Travelers agrees that the courts cannot rewrite insurance policies to suit the pleasure of one of the contracting parties; indeed, in this case, the underlying trial Order rewrites the assigned risk policy to suit the pleasure of Ard by ignoring the law and the express terms of the policy.

[32] Also, Ard points to the lower court's Order that the Mandatory Endorsement "did not negate the clear and unequivocal language contained in the LSRP notification Endorsement." However, the lower court's finding is an error of law because it ignores the WCIP/SCDOI approved plan. Ard continues to argue that the LSRP Notice Endorsement "expressly negated" the application of LSRP to the policies; however, Ard's argument is contrary to the WCIP/SCDOI approved plan. Further, the Notice Endorsement is self-limiting and does not apply to the policy – it does not and cannot affirmatively exclude the LSRP. In short, just because the Notice Endorsement does not specifically list South Carolina, it does not automatically mean that the entire SCDOI plan is rendered irrelevant, especially where the Plan itself [SCDOI 0017, 18 & 29] (R. pp. 563, 564, & 575) sets forth that the Notice Endorsement, along with the Mandatory Endorsement and the LSRP Brochure, provide sufficient notice to Ard

Ard also argues that the Mandatory Endorsement only applies if the Notice Endorsement specifically lists South Carolina, and it does not indicate that the LSRP is applicable in South Carolina.[33] Again, such argument is contrived because the LSRP is applicable to the assigned risk policy in South Carolina as of November 1, 2003 as a matter of law pursuant to the WCIP and SCDOI approved plan.[34] (R. p. 547). The SCDOI approved plan only requires that Travelers provide the insured with the Mandatory Endorsement [and the other SCDOI LSRP Notice Documents] which Ard admits it received. (R. p. 587). Initially, Ard admits the Mandatory LSRP Endorsement states "this Endorsement applies where the LSRP has been approved," but Ard then asserts "nowhere in the Endorsement does it specifically state LSRP was ever approved in the State of South Carolina." Again, Ard places "the cart before the horse." What Ard fails to acknowledge is that the servicing carrier is not required to specifically list South Carolina in any Endorsement in order to advise Ard that the LSRP was approved in the state of South Carolina because **THAT IS THE LAW IN SOUTH CAROLINA**. As the LSRP applies in South Carolina, by its express terms, the Mandatory Endorsement applies to Ard's policy. Further, it is axiomatic that the WCIP is the law and ignorance of the law is no excuse. Similar to the appellant in Georgetown Steel, Ard could have requested clarification from its producer or obtained and reviewed the actual SCDOI approved plan which is set forth in the Record in SCDOI 0001 - 00040.[35] (R. pp. 547-587).

It is simply incredible that Ard attempts to argue that the Mandatory Endorsement, along

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pursuant to the Plan. Therefore, cherry-picking the Notice Endorsement in isolation and ignoring the rest of the SCDOI plan is not supportive of Ard's arguments.

[33] Indeed, Ard's argument makes little sense. If South Carolina was listed in the Notice Endorsement, then there would be no need for the Mandatory Endorsement or the LSRP Brochure to begin with. The SCDOI chose a statutory scheme which provides notice to an insured by the Mandatory Endorsement and LSRP Brochure supplementing the Notice Endorsement when a premium threshold is met. Reasonable people may differ about whether or not the SCDOI approved plan method of notice is the "best" method of providing notice, but it is axiomatic that the SCDOI has the discretion and the right to adopt the plan in accordance with what it believes is appropriate.

[34] By its own terms, the Notice Endorsement is self-limiting and does not apply to the policy. The Notice Endorsement does not and cannot affirmatively exclude anything. Per the plan, once Ard's estimated premium exceeded the LSRP threshold, the policy was re-written to be an LSRP policy issued with the Mandatory Endorsement which supplants the Notice Endorsement and, along with the LSRP Brochure and accompanying Letter, specifically advises an insured of the LSRP applicability where it specifically states "this Endorsement applies where the LSRP has been approved." As the LSRP had been approved in South Carolina prior to when the assigned risk policy was issued, the Mandatory Endorsement provides specific notice of the LSRP to Ard.

[35] Ard, like any reasonable person/entity, could have determined that the LSRP applies in South Carolina if it was confused by the Mandatory Endorsement provision or the LSRP Brochure.

with the March 2004 letter and the LSRP Brochure, are somehow confusing. No reasonable person would be confused by such Endorsement, LSRP Brochure, or letter. What is uncontroverted, however, is that Ard's producer was not confused by the Mandatory Endorsement and the LSRP Brochure as the producer himself, the agent of Ard, knew that the LSRP applied to the assigned risk policy before the ILOC was issued by Ard to Travelers. This notice is imputed to Ard as a matter of law.[36] Accordingly, the argument *in the abstract* that the Mandatory Endorsement does not provide notice that the LSRP applies in South Carolina is contrary to the facts in this case where Ard's producer testified under oath to the exact opposite.[37]

8. Ard's false subjective beliefs and LSRP Brochure arguments

In Section B. 2. of its Brief, Ard essentially asserts that the LSRP Brochure did not "amend, change or rewrite" the LSRP Notification Endorsement because "Respondent did not believe LSRP applied to the policies." However, Ard's statement that it did not *subjectively* believe the LSRP applied to its policies is (1) irrelevant, and (2) is directly refuted by its producer's admission that Ard and its producer had actual knowledge of the LSRP's applicability to the assigned risk policy before Ard issued the ILOC to Travelers. Ard further argues that the LSRP Brochure did not specifically advise it of the LSRP's applicability in South Carolina; again, Ard's argument is meritless as any objective reading of the LSRP Brochure would put any reasonable person on notice that LSRP applies in South Carolina; moreover, to the extent that the LSRP Brochure does not do so, Ard is presumed to know the law which is incorporated into the assigned risk policy.

Ard's safety director Brown's generic Affidavit (cited on page 23 of Respondent's Brief) setting forth his *subjective* belief that the LSRP did not apply to Ard's assigned risk policy is simply irrelevant. Mr. Brown's "belief" after "carefully" reviewing the policy during the course of

[36] Indeed, Ard does not even discuss this dispositive fact in its Brief/Arguments. Ard argues that Travelers did not sufficiently advise it of what, as a matter of law, it already knew! Ard's argument collapses under the weight of its own absurdity.

[37] As such, the Mandatory Endorsement, which specifically sets forth that "the Endorsement applies where the LSRP has been approved," is notice to Ard that the LSRP has been approved in South Carolina. Because the LSRP was approved in South Carolina on November 1, 2003 prior to the issuance of Ard's assigned risk policy, pursuant to the Mandatory Endorsement itself, the Mandatory Endorsement provides sufficient notice to Ard that the LSRP applies to its assigned risk policy by any objective and reasonable reading.

this litigation is irrelevant and does not refute Ard's sworn admissions that it did not rely on the Notice Endorsement or that its producer explained the LSRP to Ard prior to its issuing the ILOC to Travelers. (R. pp. 275-286; 310-314; 316-329; 377-385). Once again, Ard employs "sleight of hand" arguments, submitting an Affidavit which purports to create the impression that Ard relied on the Notice Endorsement, or was unaware of the LSRP applicability to the assigned risk policy based on the Notice Endorsement or LSRP Brochure, when such innuendo is directly refuted by Mr. Ard (Ard President), Mr. Brown (Ard Safety Director), and its own producer's sworn testimony.[38]

Finally, on page 24 of its Brief, Ard argues that the LSRP booklet stated that the LSRP was not yet implemented in South Carolina in the provision marked "Implementation" (where the brochure states "we have proposed that in your state, the LSRP be implemented six months from the effective of regulatory approval.") However, this section does not fail to provide notice of the LSRP to Ard because, once again, Ard could easily have determined the date of approval and implementation of the LSRP in South Carolina. As set forth in SCDOI 0001 (R. p. 547), the LSRP was again approved on May 1, 2003 and became effective on November 1, 2003, six months later. Approximately one week later, Ard's assigned risk policy was issued. As the date of regulatory approval and implementation were available to Ard, the "implementation" paragraph in the brochure does not excuse Ard's failure to comply with the law. As the date of LSRP regulatory approval was May 1, 2003, and Ard could have easily determined such information by reviewing the SCDOI approved plan, Ard is bound by the November 1, 2003 implementation date.[39]

9. Ard's request to ignore the law

In Section B. II. of its Brief, Ard appears to argue that the court should not apply the law

[38] Ard safety director Brown's Affidavit indicates that his current beliefs are based on having "carefully" reviewed the policies and appear to assert what Ard's legal position is in this case. His Affidavit, however, is in stark contrast to the Ard President's, his own and their producer's testimony where Ard readily admitted under oath that they had not reviewed or relied upon the Notice Endorsement (R. pp. 275-286; 310-314; 316-329; 377-385); thus, Ard's key factual assertion which underpins its entire argument is refuted by Ard's own sworn testimony.

[39] Ard further asserts that the LSRP Brochure is not an Endorsement and therefore cannot bind Ard; however, such argument is contrary to the SCDOI plan and the law applicable in this case.

when interpreting insurance contracts.[40] Ard, by sticking its head in the sand and ignoring the law and **Part 5** of the policy, continues to assert that Travelers is "boldly" attempting to avoid its own insurance policy provisions. In contrast, Travelers merely seeks to apply the law and the contract pursuant to its express terms. As set forth previously, the assigned risk policy provisions themselves require Travelers to charge premium in accordance with the LSRP (i.e., **Part 5** of the policy) and, moreover, the WCIP/SCDOI approved Plan requires the same. Regrettably, it is Ard who seeks to "defile, distort and ignore centuries of contract rules of law, which would create disorder, disruption and chaos."[41] This Court should deny Ard's request to invite chaos in South Carolina workers' compensation markets and, instead, require Ard to comply with (1) the established and controlling rules of insurance contract law, (2) the law (i.e., the WCIP and SCDOI approved plan), and (3) to keep its promise to be bound by the WCIP. Under South Carolina, both the insurer and the insured, as parties to the insurance contract are bound by the law and the clear terms of the insurance policies' unequivocal provisions. As set forth in the WCIP, the SCDOI approved plan and **Part 5** of the policy, Ard is obligated to pay premium in accordance with NCCI's manuals and the WCIP, which includes the LSRP premium in this case.[42]

10. Ard's false Georgetown Steel arguments

As set forth in Travelers' Brief, the Georgetown Steel decision further supports Travelers' position. Ard attempts to distinguish Georgetown Steel by citing that the Notice Endorsements' NCCI/SCDOI required language at the time was different. However, although the SCDOI/NCCI

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[40] Ard slants its argument by stating, "plainly put, Appellant's bold request to rewrite the policies issued to Respondent is the only hope Appellant has to overcome the consequences of its own insurance policy provisions. However, doing this would defile, distort and ignore centuries of contract rules of law, which would create disorder, disruption and chaos."

[41] In so doing, Ard advocates that the SCDOI plan be torn asunder and for premiums rightly owed by large dollar employers to go uncollected and that their large exposure risk should be borne by the entire voluntary and assigned risk workers' compensation market throughout South Carolina. If such is the case, premiums across the board in both assigned risk markets and voluntary markets in South Carolina will continue to spiral and sky-rocket, affecting every other employer throughout this State.

[42] Interestingly, in citing "legions of cases" applying "long standing rules of law" for insurance contracts on page 26 of its Brief, Ard correctly cites the law dispositive in this appeal: "an insurance contract is read as a whole document so that one may not, by pointing out a single sentence or clause, create an ambiguity." Ard violates this principle by pointing to a single part of the insurance contract and a single part of the WCIP to falsely attempt to create a forced ambiguity where no ambiguity exists (where the assigned risk policy **Part 5** and the SCDOI approved plan should be read and implemented in their entirety according to the SCDOI plan).

Notice Endorsement language itself is different, the holding of Georgetown Steel and the reasoning supporting its holding negates Ard's present arguments. Indeed, the Georgetown Steel court held that the LSRP applied to the assigned risk policy because the servicing carrier provided the NCCI required Endorsements to the assigned risk insured. It matters not that the verbiage of the Endorsements that was required by SCDOI in Georgetown Steel is different than the verbiage that SCDOI requires in this present case as the SCDOI has determined that the SCDOI LSRP Notice Documents that Travelers provided to Ard are, as a matter of law, sufficient to provide notice of the LSRP. Moreover, a review of the SCDOI LSRP documents, in addition to the March 1, 2004 letter from Travelers to Ard and the LSRP Brochure, clearly provide notice to Ard that the LSRP applies in South Carolina in laymen's terms. Ard's attempt to misconstrue Georgetown Steel given the specific Endorsement language required at that time is unavailing. As Georgetown Steel states ... "An insured could examine the South Carolina plan to determine the specific factors applicable to all policies written under the Assigned Risk plan."[43] Ard cannot escape Georgetown Steel's holding, which is equally applicable to Ard, if not more so, where Ard's producer admitted he knew that the Endorsements and LSRP Brochure (of which Ard now complains) notified him and, therefore, Ard of the LSRP's applicability in South Carolina. (R. pp. 316-329).

11. Ard's false "conclusion" arguments

In its conclusion, Ard asserts that an insurer operating in South Carolina is "bound to follow the mandates of SCDOI." Travelers agrees with such assertion and further asserts that Ard is also bound to follow such mandates. The SCDOI specifically requires Travelers to provide notification with the SCDOI LSRP Notice Documents to Ard. Travelers provided these exact documents to Ard and, therefore, Travelers is entitled to the LSRP premium it seeks. With no evidence in the Record, Ard asserts that Travelers was mandated to provide additional notice

[43] Similar to this case, Georgetown Steel also holds that "The standard LSRP Endorsements drafted and copyrighted by SCDOI/NCCI ... specifically and unambiguously notifies the policy holder that the LSRP has been adopted in South Carolina." Here, similarly, the SCDOI/NCCI required SCDOI LSRP Notice Documents unquestionably provided specific notice to Ard and put Ard on notice that the LSRP applies to its assigned risk policy in South Carolina.

somehow and that Travelers somehow failed to provide "specific notification" which is of "preeminent importance" to the SCDOI. Ard has not set forth any evidence as to what additional notification the SCDOI required. Ard also argues that the LSRP Notice Endorsement "clearly and unequivocally excluded" the LSRP, where Ard ignores the SCDOI approved plan which refutes such argument. Ard also focuses on the lower court's erroneous finding which stated "Travelers could easily have clearly and unequivocally applied LSRP provisions ... but failed to include, and therefore clearly excluded, LSRP application" to Ard's policy. Such finding is erroneous, however, because there is no evidence in the Record that Travelers could in any way alter the SCDOI/NCCI Endorsements and LSRP Brochure which Ard admits it received in this case.

Although Ard argues that it would be "contrary to establish rules of law" for the court to rewrite the policies in question, it is the underlying trial Order below which in fact rewrites the policies contrary to the WCIP, which is the law in South Carolina. If the courts invade this sacred providence and permit Ard to disregard the law and the plain language of the policy, the assigned risk market would be torn asunder and parties to insurance contracts would no longer be able to rely on the WCIP, the law, or the plain, specific, clear and unequivocal language as set forth in the SCDOI approved plan and the policy itself. Instead, contracting parties would be required to go beyond the law and beyond the four corners of the contract and require servicing carriers to do more than the WCIP requires in order to provide notice of the LSRP to Ard, even though the SCDOI statutory scheme for providing notice actually "worked" and provided notice to Ard in this case.[44]

Finally, Ard argues that Travelers "points to South Carolina law requiring an insured party to read and be bound by the terms of their insurance policies" and "clearly this principle of law is a sword with two edges. Insurers who promulgate the terms of their insurance policies likewise have a duty to read

[44] Such a result would not only be ludicrous and nonsensical, but destructive and chaotic to the assigned risk market and voluntary workers compensation market in South Carolina. When Ard applied for and received an assigned risk policy, it agreed to be bound by the terms of the WCIP. Ard should not be allowed to skirt its agreement after having benefitted from it.

their own policies and are also bound by their terms." Travelers agrees that it is bound by both the WCIP and the policy; however, it is Ard who attempts to "slice and dice" the law and the policy in a manner that is contrary to the law and the express terms of the policy itself in order to come to an absurd result. Protecting a local, large dollar employer seems to be a motivating factor in the underlying opinion. However, the trial Order below attempts to "gut" the WCIP in South Carolina as it seeks to protect this local, large dollar employer from paying the premium it should pay in accordance with the law and the assigned risk policy terms themselves. The underlying decision is a knife at the "heart and soul" of the LSRP program of the WCIP which is the law in South Carolina. The South Carolina courts have repeatedly held that the WCIP is the law in prior decisions (from the Supreme Court's 2006 Avant decision to the more recent Court of Appeals' Burris decision) and the underlying Order skirts these binding precedents in order to help a local, large dollar employer. The law should not bend or be broken for such parochial concerns. Travelers requests that this Court refuse to condone the errors in the trial court's Order and apply the WCIP, as well as the assigned risk policy terms themselves, in an even-handed and balanced manner as is required by the law.

II. ARD'S ARGUMENTS ARE CONTRARY TO THE FACTS IN THE RECORD.

This case does not represent the factual scenario which Ard is trying to present. Ard representatives admitted that they did not rely on the Notice Endorsement. Ard's producer admitted that he knew the LSRP plan applied to Ard's assigned risk policy and he told Ard representatives (the safety director) that the LSRP applied before Ard issued its ILOC to Travelers. (R. pp. 275-286; 310-314; 316-329; 377-385). Ard did not rely on the Notice Endorsement and was later shocked to find out that LSRP applied to its assigned risk policy. The facts in the Record, which are uncontroverted, set forth a much more calculating argument by Ard where it received the required SCDOI LSRP Notice Documents advising it of the LSRP, it voluntarily moved forward by issuing an ILOC after its producer explained to Ard representatives that the LSRP applied and, only after the LSRP bill was due (based on the actual losses of Ard

during the policy period), did Ard begin with its present argument that it should not pay what it had agreed to pay pursuant to the WCIP.

This appeal does not involve an esoteric philosophical debate about whether or not the SCDOI LSRP Notice Documents provide sufficient notice to Ard *in the abstract*; rather, here, the SCDOI approved plan to provide sufficient notice of the LSRP to Ard actually "worked." Here, Ard's producer/agent received these documents, understood the LSRP to apply to Ard's assigned risk policy before Ard issued an ILOC, and then explained to Ard representatives that the LSRP applied to its assigned risk policy before Ard issued an ILOC pursuant to the LSRP. Any failure of Ard to understand the specifics of the LSRP program, if such failure actually existed, would lie with Ard's own producer's negligence in failing to explain to Ard the full parameters of the LSRP, not with the servicing carrier. Ard's producer admits that he knew the LSRP applied and advised Ard that the LSRP applied before an ILOC was issued to Travelers by Ard. As such, Ard had actual and imputed knowledge that the LSRP applied to its assigned risk policy before it issued the ILOC. Accordingly, Ard's arguments rest on its hope that this Court will ignore the law, as well as these uncontroverted facts in the Record.[45]

III. ARD FAILS TO ADDRESS ITS FAILURE TO APPEAL TRAVELERS' PREMIUM DECISION TO NCCI AND THE SCDOI AS REQUIRED BY WCIP RULE 4.

Travelers incorporates its prior arguments set forth in its Appellant brief. Ard's failure to administratively appeal these issues prohibit it from asserting its current arguments to the Court. The trial court's refusal to rule on such dispositive issues of fact and law concerning the administrative appeal mechanism via Travelers Request for Reconsideration Nos. 21 & 22 are fatal to Ard's appeal. (R. pp. 588-590; Supplemental Record 1-9; R. pp. 113-135; 15). Ard cannot

[45] On page 20 of its Brief, Ard asserts that the trial judge was correct in finding that Travelers could have easily and unequivocally applied LSRP provisions to Ard's assigned risk policy if it would have listed South Carolina in the Notice Endorsement. However, there is absolutely no evidence in the Record that Travelers could alter the SCDOI/NCCI required forms that were a part of the assigned risk policies issued to Ard; moreover, per the Affidavits of Roshani B. Ghayal, Frederick B. Moylen, and Steven Evangelista (R. pp. 152-153; 264; 269), the uncontroverted evidence in the Record, these forms were required by the SCDOI/NCCI at the time this policy was issued and pending. Thus, the trial judge's incorporation of Ard's argument at the summary judgment hearing that the servicing carrier could have somehow altered the Notice Endorsement in any way is mere speculation, adopted by the trial judge, and not supported by any evidence in the Record.

sidestep the entire administrative mechanism in place which was the appropriate forum to address Ard's objections to the LSRP.

IV. ARD FAILS TO ADDRESS ITS PRODUCER'S ADMISSIONS NEGATING ITS PRESENT ARGUMENTS TO THE COURT.

Travelers incorporates its prior arguments set forth in its Appellant brief. The trial court's refusal to rule on such dispositive issues of fact and law concerning the producer's admissions via Travelers Request for Reconsideration Nos. 1-4 and 18 are fatal to Ard's appeal. (R. pp. 113-135; 15).

Respectfully Submitted,

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Dated: April 15, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Paul M. Burch, Circuit Court Judge

RECEIVED
APR 21 2016
SC Court of Appeals

Appellate Case No. 2015-000806

Ard Trucking Company ..... Respondent,

v.

Travelers Property Casualty Company
of America d/b/a The Travelers Indemnity
Company of Illinois ..... Appellant.

CERTIFICATE OF COMPLIANCE

I hereby certify that the Final Reply Brief of Appellant and the Final Brief of Appellant comply with Rule 211(b).

Barnwell Whaley Patterson & Helms, LLC

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Paul M. Burch, Circuit Court Judge

Appellate Case No. 2015-000806

Ard Trucking Company ..... Respondent,

v.

Travelers Property Casualty Company
of America d/b/a The Travelers Indemnity
Company of Illinois ..... Appellant.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 19 day of April, 2016, I filed with the Clerk's Office of the South Carolina Court of Appeals, via U.S. Mail, the required number of copies of the Final Brief of Appellant and the Final Reply Brief of Appellant, and I further certify that I served the required number of copies on counsel for the Respondent with sufficient postage, properly addressed as follows:

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APR 21 2016
SC Court of Appeals

April 18, 2016

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Ard Trucking Company, Respondent
v.
Travelers Property Casualty Company of America d/b/a The Travelers Indemnity Company of Illinois, Appellant
Appellate Court Case No. 2015-000806

Dear Ms. Kitchings:

Please find enclosed the original and 16 copies each of the Final Brief of Appellant and the Final Reply Brief of Appellant. Please file the original and 15 copies and return one clocked copy of each Brief to me in the envelope provided herein.

In addition, please find the original and one copy of the Certificate of Compliance and the Certificate of Filing and Service.

By copy of this letter and pursuant to the Certificate of Service, I am simultaneously serving counsel for the Respondent with copies of both documents.

Thank you for your assistance.

With kind regards,

Phillip S. Ferderigos

Enc.

Cc w/enc.: Martin S. Driggers, Sr., Esq.

PSF/bbm

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