IN THE SUPREME COURT OF THE STATE OF DELAWARE

THE TRAVELERS INDEMNITY COMPANY, **Defendant Below,** **Appellant,** **v.** **CNH INDUSTRIAL AMERICA, LLC,** **Plaintiff Below,** **Appellee.**	No. 420, 2017 Court Below—Superior Court Of The State of Delaware C.A. No. N1C-07-108 EMD CCLD **PUBLIC VERSION** **FILED FEBRUARY 7, 2018**

APPELLANT THE TRAVELERS INDEMNITY COMPANY'S REPLY BRIEF ON APPEAL

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INTRODUCTION

CNH premises its choice-of-law argument on the propositions that it sought coverage "primarily" under the J.I. Case Policy and that that policy was not part of the Tenneco Insurance Program.[1] Both propositions are demonstrably false. CNH sought coverage under multiple policies issued as part of the Tenneco Insurance Program and argued that Wisconsin law governed all of them equally. And the Superior Court held that Wisconsin law governs all the Travelers Policies, without in any way treating the J.I. Case Policy differently than the other policies issued to Tenneco. In so holding, the Superior Court acknowledged that all the policies, including the J.I. Case Policy, were negotiated, paid for, and managed by Tenneco in Texas but erroneously held that the location of J.I. Case's headquarters controlled the choice-of-law decision.

Why would CNH attempt to change the narrative on appeal from what it argued below? Why would CNH premise its argument on serious mischaracterizations of both the record and the Superior Court's decision? The answer is this Court's subsequent decision in *Certain Underwriters at Lloyds, London v. Chemtura Corp.*, 160 A.3d 457 (Del. 2017). Under *Chemtura*, the law of a single state governs the entire Tenneco Insurance Program and that state is

[1] Travelers adopts in this reply brief the defined terms utilized in its opening brief.

Texas, which enforces anti-assignment provisions. CNH therefore vainly attempts for the first time on appeal to divorce the J.I. Case Policy from the rest of the Tenneco Insurance Program.

The Superior Court also erred in its application of Wisconsin law. First, CNH offers no explanation for how the fact-intensive "waiver" issue was appropriately decided on summary judgment.

Second, CNH's brief affirmatively asserts in support of its "waiver" argument that each occurrence results in a separate claim for coverage. That is precisely why CNH was required to tender each claim and is not entitled to recover pre-tender defense costs. No showing of prejudice is required.

Finally, CNH attempts to defend the Superior Court's refusal to produce its settlement agreement with CNA by addressing an issue not before the Court: whether Travelers is entitled to equitable contribution from CNA. Travelers, however, did not assert any such claim, and instead seeks to prevent CNH from obtaining the windfall of a double recovery by collecting the same defense costs from both CNA and Travelers. Nothing in Wisconsin, Texas, or Delaware law allows an insured to be unjustly enriched by recovering the same defense costs twice from different insurers.

ARGUMENT

1. *Chemtura* confirms that, under Delaware choice-of-law principles, Texas law governs interpretation of the Tenneco Insurance Program, including the J.I. Case Policy.

The Superior Court held that Wisconsin law applies to all the Travelers Policies because the Tenneco subsidiary whose products were at issue is headquartered in Wisconsin. Recognizing that *Chemtura* mandates reversal of that decision, CNH attempts for the first time on appeal to suggest that the J.I. Case Policy was not part of the Tenneco Insurance Program. CNH's effort fails.

a. The J.I. Case Policy is part of the Tenneco Insurance Program.

The Superior Court decision applied Wisconsin law to the Tenneco Insurance Program based solely on the location of Tenneco's wholly-owned subsidiary, J.I. Case. Indeed, in explaining its decision, the Superior Court expressly recognized that the policies -- including the J.I. Case Policy -- were negotiated, paid for, and managed in Texas. (A2170; A2167-68). It did not distinguish between the J.I. Case Policy and the other Travelers Policies in this regard. (A2176-78). And there was no basis for any such distinction, because the record establishes that all the policies (including the J.I. Case Policy) were negotiated, delivered, paid for, and managed in Texas. (Travelers Br. 9-13; A2167-70).

CNH repeatedly attempts to transform this dispute into one involving only the J.I. Case Policy. It contends, for example, that the Superior Court's choice-of-law decision "hinged" on the J.I. Case Policy (CNH Br. at 2) and that "[t]here is no record evidence that the J.I. Case Policy was part of the Tenneco Insurance Program" (*id.* at 9). These assertions are flat-out wrong.

CNH sought coverage from two historic primary insurers: (1) CNA, which issued the ***J.I. Case Insurance Program*** while J.I. Case was an independent corporation based in Wisconsin; and (2) Travelers, which issued the ***Tenneco Insurance Program*** after J.I. Case became a wholly-owned subsidiary of Tenneco in 1970. (A2408; A2418-2424).

The Tenneco Insurance Program began on January 1, 1971, when Travelers issued a policy to Tenneco and its corporate family for the policy period of January 1, 1971 to January 1, 1974 (the "1971-1974 Policy"). (A435; A454-525). To integrate J.I. Case into the Tenneco Insurance Program, Tenneco first arranged for Travelers to issue a standalone policy, the J.I. Case Policy, to J.I. Case for the one-year period of January 1, 1972 to January 1, 1973. (A435; A526-653). At the expiration of that policy, Tenneco arranged for J.I. Case to be added to the already-existing 1971-1974 Policy. (A502-505).

Tenneco negotiated, paid for, and managed the J.I. Case Policy as a part of the Tenneco Insurance Program. (Travelers Br. at 10-13). The record conclusively

refutes any suggestion that the J.I. Case Policy was issued before inception of the Tenneco Insurance Program with Travelers or that it was negotiated, paid for or managed from a different location than the rest of the Tenneco Insurance Program.

CNH's complaint sought coverage for the asbestos claims against CNH under the three unexhausted policies issued as part of the Tenneco Insurance Program. Two of those policies were issued to Tenneco, with J.I. Case as an insured, and the third was the J.I. Case Policy. The complaint sought coverage under all three unexhausted policies on exactly the same basis. (A2424).

Likewise, Travelers' summary judgment motion regarding choice-of-law sought a global determination that all of the policies at issue are governed by Texas law. (A331-69). CNH responded to Travelers' motion by arguing that Wisconsin law applied to all three policies based on the headquarters of J.I. Case. (A1480-1511). The Superior Court decided the choice-of-law motion in that context of a motion addressing all three policies on the same basis.

In its choice-of-law decision, the Superior Court did not distinguish between the J.I. Case Policy and the other policies. (A2176-78). It simply held that the location of J.I. Case's headquarters trumped the extensive Texas connection to the Tenneco Insurance Program. (A2169-70). Given this Court's decision in *Chemtura,* decided after the Superior Court had rendered its choice-of-law decision, the Superior Court's ruling cannot stand.

Implicitly recognizing that the Superior Court's decision cannot be reconciled with *Chemtura,* and that its only hope on appeal was somehow to divorce the J.I. Case Policy from the rest of the Tenneco Insurance Program, CNH asked the Superior Court to enter judgment against Travelers only under the J.I. Case Policy. (A3218-3221). The Superior Court rejected this request, which was flatly inconsistent with the positions taken by the parties and the decision issued by the Court in prior proceedings. (A3223-25; A3247-50).

b. Texas has the "most significant relationship" with the Tenneco Insurance Program.

CNH's assertion that Travelers' evidence of the Texas connection to the J.I. Case Policy is limited to a "lone witness" (Gary Bennett) is wrong. (CNH Br. at 10). [redacted]

[2] The Superior Court erroneously disregarded several underwriting documents on the basis that Bennett was not employed by Travelers until 1977. As discussed in Travelers' opening brief, these documents qualify as "ancient documents" under Delaware evidentiary rules and were properly authenticated. In addition, Travelers filed an affidavit of underwriter Julio C. Velez (AR265-67), which demonstrates that the underwriting documents are authentic. *See, e.g.*, *BAE Sys. Info. & Elec. Sys. Integration Inc. v. Aeroflex Inc.*, 2011 WL 3474344 (D. Del. Aug. 2, 2011).

[redacted]

Travelers need not rely on the (erroneously) stricken portions of Bennett's affidavit because there is ample other evidence (including deposition testimony from Bennett and documents) that was not stricken. Bennett is a credible witness with personal knowledge as the lead underwriter for the Tenneco Insurance Program, and offered testimony showing that the Tenneco Insurance Program was negotiated, paid for, and managed by Tenneco in Texas. [redacted]

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3 [redacted]

A1947-48. Against this backdrop, it is apparent that the J.I. Case Policy was but one small component of the much larger Tenneco Insurance Program that Tenneco (not J.I. Case) coordinated, managed, and maintained in Texas.

CNH cites a handful of underwriting documents that it erroneously claims suggest that Wisconsin had a significant relationship with the Tenneco Insurance Program.[4] (CNH Br. at 12-14).

[redacted]

[4] [redacted]

[redacted] Thus, if J.I. Case elected to handle a claim itself, Travelers had no duty at all to investigate, settle or defend the claim. In other words, those claims were not to be handled by Travelers from Wisconsin; to the contrary, Travelers would not be handling the claims at all.

Finally, CNH's repeated reliance on Judge Vaughn's choice-of-law decision regarding the CNA Policies is misplaced. Judge Vaughn expressly held: "This

opinion addresses only the issue of the CNA Defendants' duty to defend in connection with three policies. It does not address and is without prejudice to the rights or liabilities of any other party or any other policies." (A190).

The distinction between the two insurance programs is obvious and dispositive. CNA issued its policies to J.I. Case as part of J.I. Case's own insurance program before it became a wholly-owned subsidiary of Tenneco. CNA's relationship with J.I. Case focused on Wisconsin. Travelers insured J.I. Case as part of the Tenneco Insurance Program after it became a wholly-owned subsidiary of Tenneco. Travelers' relationship with the entire Tenneco Insurance Program focused on Texas; the J.I. Case Policy was one component of that Program.

c. CNH cannot escape *Chemtura* and other Delaware choice-of-law precedent mandating reversal of the Superior Court decision.

Delaware employs the "most significant relationship" framework outlined within the Restatement in determining choice-of-law. It then evaluates the relevant contacts in light of the principles enumerated in Section 6 of the Restatement, including "the protection of justified expectations," as well as "certainty, predictability, and uniformity of result" and "ease in the determination and application of the law to be applied." *Chemtura*, 160 A.3d at 465 n.52, 470; Restatement (Second) of Conflict of Laws § 6.

CNH attempts to argue that the choice-of-law considerations should be assessed on an "issue by issue" basis. (CNH Br. at 29-31). Not so. For more than two decades, Delaware courts in complex, multi-party insurance coverage cases have rejected the impractical splintered approach advocated by CNH, and instead have favored global choice of law determinations at an early stage of the litigation. *Chemtura*, 160 A.3d at 460*; Liggett Grp., Inc. v. Affiliated FM Ins. Co.*, 788 A.2d 134, 137 *(*Del. Super. Ct. 2001); *Sequa Corp. v. Aetna Cas. & Sur. Co.*, 1995 WL 465192, at *5 (Del. Super. Ct. July 13, 1995); *Monsanto Co. v. Aetna Cas. & Sur. Co.*, 1991 WL 236936, at *1 (Del. Super. Ct. Oct. 29, 1991). The Superior Court's choice-of-law decision itself recognized that the law of one state should apply to the entire Tenneco Insurance Program, although it mistakenly determined that Wisconsin rather than Texas law controls. (A2176-78).

CNH attempts to distinguish *Chemtura* because that case "involved environmental insurance coverage and the question, not presented here, of whether the court should apply the different laws of each state where environmental sites are located." (CNH Br. at 37). This purported distinction ignores the core principles on which *Chemtura* relies: preventing a comprehensive set of insurance policies from "being read in fundamentally different ways in different cases" and adopting an approach to choice-of-law that provides the insurance policies' terms "with a meaning that does not vary based on the happenstance of the locations of a

particular claim." *Chemtura*, 160 A.3d at 460, 467. The nature of the claim at issue (environmental or otherwise) is a distinction without a difference.

CNH's suggestion that *Chemtura* supports application of Wisconsin law because J.I. Case was headquartered in Wisconsin turns *Chemtura* on its head. (CNH Br. at 38). *Chemtura* held that the choice-of-law determination for a nationwide insurance program like the Tenneco Insurance Program must focus on "the contacts among the parties at the outset of the insurance program . . . based, in part, on the sensible understanding that a company's headquarters staff is usually heavily involved in managing insurance programs that cover the entire company." *Id.* at 470. Against that backdrop, the appropriate focus is on Tenneco's headquarters in Houston, where Tenneco personnel bargained for, negotiated, managed, and handled claims for the entire Tenneco corporate enterprise, including J.I. Case. CNH's persistent attempt to focus the choice-of-law analysis on the headquarters of J.I. Case, as opposed to Tenneco, inverts the choice-of-law analysis and sends the parties on the very "choice of law road trip" *Chemtura* cautions against.

Notably, CNH does not offer any rebuttal to the fundamental policy considerations of "certainty, predictability, and uniformity of result" that are at the heart of *Chemtura*. This Court in *Chemtura* underscored that all insurance policies issued as part of a comprehensive, nationwide insurance program be interpreted on

a uniform and predictable basis, to ensure certainty of result and to uphold the parties' justified expectations at the time the insurance program was negotiated, brokered, and put into effect. *Id.* at 460. *Chemtura* perfectly captured the rationale for this sensible approach:

> Precisely because this is an insurance scheme covering diverse nationwide risks, the relationship of the parties cannot center in a rotating and ever-changing way on where the insurer happens to be sued currently, resulting in the policy being read in fundamentally different ways in different cases, based on the happenstance of where, across a broad variety of possible locations and jurisdictions, potential liability results in litigation. ***Such rotating uncertainty would not be limited to litigation over environmental claims, rather, given the broad scope of this insurance program, it could draw insurers into great uncertainty in all manner of tort disputes.***

Id. (emphasis added). The Superior Court's decision would permit the policies contained in the Tenneco Insurance Program to be subjected to the law of dozens of states based on the expanse and scope of Tenneco's corporate family. (Travelers Br. at 9; 40-41). That result is contrary to the dictate of *Chemtura* and results in uncertainty with respect to the interpretation and application of the identical terms of the insurance contracts.

Nor does CNH mention the Superior Court's repeated (and erroneous) reliance on the lack of a choice-of-law provision in the Travelers Policies for the proposition that Wisconsin law should govern. (A2169 ("Whatever the reason, however, ill behooved sophisticated parties like insurers, who fail to enter a choice

of law provision in a contract, to argue that they are suffering from uncertainty or that the choice of a particular jurisdiction's law does not comport with their expectations upon contract"); A2815 (reaffirming decision in part because "the Travelers Policies did not contain a choice of law provision")). *Chemtura* squarely rejects the proposition that an insurer should have included a choice-of-law provision in an insurance contract issued decades ago before the "most significant relationship" framework was adopted and when the *lex loci contractus* approach was employed. *Id.* at 470.

CNH is also unable meaningfully to distinguish the other relevant Delaware precedent. CNH describes *Viking Pump* as only involving a "narrow question" of what state's law should apply when a company moved its headquarters during the course of an insurance program. *Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76 (Del. Ch. 2009); CNH Br. at 41. However, the insurance program at issue in *Viking Pump*, like the Tenneco Insurance Program, provided coverage for a "variety of distinct businesses either as unincorporated divisions or through wholly owned subsidiaries." *Id.* at 83. The court appropriately emphasized the headquarters of the corporate parent, where the insurance program was managed and procured, for purposes of applying the principles of the Restatement. *Id*. *Viking Pump* held that the headquarters of the corporate parent was the "only common link" among the nationwide corporate enterprise insured as part of a

single program, and therefore held that the law of the state in which the corporate headquarters were located controlled as to the entire program. *Viking Pump* recognized that any other rule would subject the same set of policies to various different state laws, and would result in an "interpreting identical policies in a different way," frustrating the goals of the Restatement. *Id.* at 88.

Likewise, *Monsanto* demonstrates that the corporate headquarters of the entity controlling and managing the insurance program is the proper focal point of the choice-of-law analysis. *Monsanto Co.*, 1991 WL 236936 at *3. CNH's attempt to distinguish *Monsanto* because that case "did not involve … an insured subsidiary" (CNH Br. at 40) fails, because the focus of the *Monsanto* court was properly on the entity that managed and maintained the insurance program at issue. J.I. Case was not Tenneco's only subsidiary; to the contrary, Tenneco had multiple subsidiaries located throughout the country. Under CNH's approach, if two subsidiaries from different states were involved in the same claim and seeking coverage under the same policy issued as part of the Tenneco Insurance Program, the law to be applied to each subsidiary's insurance claim would differ merely because each was in a different state. That result cannot be reconciled with *Chemtura*.

So too in *Sequa Corp.*, where the court rejected the same argument CNH makes here – that the location of a corporate subsidiary should govern the choice-

of-law analysis. 1995 WL 465192. In *Sequa*, the court applied the law of the state where the corporate parent was headquartered, because that was the state where the insurance program was managed and maintained and through which communications regarding all aspects of the program flowed. *Id.* at *3. CNH attempts to undermine the impact of *Sequa* by asserting that the corporate parent was a party to that action (and Tenneco is not a party here). (CNH Br. at 39). The Delaware court's analysis, however, focused squarely on the predominant corporate entity involved in managing the insurance program at issue. In this case, that entity was Tenneco.

d. CNH distorts Delaware precedent in arguing that Delaware public policy precludes application of Texas law.

It is a very high bar for a Delaware court to refuse to apply a sister state's law on grounds that the law is "repugnant" to Delaware public policy. *See Yoder v. Delmarva Power & Light Co.*, 2003 WL 26066796, *4 (Del. Super. Ct. Dec. 31, 2003) (in the absence of an express statutory provision to the contrary, law of foreign state was not contrary to Delaware public policy and therefore applied); *J.S. Alberici Constr. Co. v. Mid-West Conveyor Co., Inc.*, 750 A.2d 518, 520 (Del. 2000) ("Although the law of a foreign jurisdiction cannot be used to interpret a contract provision in a manner repugnant to the public policy of Delaware . . . there is a corollary policy in favor of recognizing and enforcing rights and duties validly created by foreign law.").

Neither of the decisions CNH cites to support its public policy argument refused to enforce another state's laws based on public policy. In *Deuley v. DynCorp. International, Inc.*, 8 A.3d 1156, 1161 (Del. 2010), the Court determined that the "result would be the same under both Delaware and Dubai law," and therefore "avoid[ed] the choice of law analysis altogether." The same goes for *Sinnott v. Thompson*, 32 A.3d 351, 358 (Del. 2011), where the Court ultimately determined that Delaware had the most significant relationship to the claim at issue, and therefore never reached the issue of whether some purported "public policy" dictated a different result.

CNH's assertion that the court in *Viking Pump*, "refused to apply an anti-assignment clause … because doing so would have violated New York public policy" is also wrong (CNH Br. at 43). *Viking Pump* did not rely upon its own judgment as to "public policy" to negate an anti-assignment clause. Instead, the court in *Viking Pump* ruled that there was "well-established New York law on th[e] subject" and, accordingly, that the court would not "make innovative extensions of New York law[,]" which was better left "for the New York Courts and legislature." 2 A.3d at 105. In other words, the Delaware court appropriately applied the express law of New York in its decision. It did not purport to make new law that an anti-assignment clause violates New York public policy, let alone that such a

clause is so repugnant to Delaware public policy that a Delaware court would refuse to enforce the law of another state.

The "well-established" Texas law regarding non-assignment provisions is unequivocal:

> the non-assignment clause bars ***any*** assignment of the coverage without [the insurer's] approval, rendering invalid ***any*** transfer that might have taken place.

Keller Founds., Inc. v. Wausau Underwriters Ins. Co., 626 F.3d 871, 874 (5th Cir. 2010) (emphasis added).[5] *Viking Pump* does not suggest in any way that Delaware courts should refuse to enforce otherwise controlling Texas law on this point.

Any argument the Texas anti-assignment rule is somehow irrational or so offensive that Delaware should refuse to enforce it as a matter of public policy falls far short. States vary in whether they enforce anti-assignment policy provisions. Treating such provisions as valid and enforceable is a reasonable rule that Texas and other states adopt. As the Indiana Supreme Court explained:

> Insurance providers have a legitimate business interest in restraining assignment – these provisions protect them from a material increase in

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[5] *See Island Recreational Dev. Corp. v. Republic of Tex. Savs. Ass'n.*, 710 S.W.2d 551, 556 (Tex. 1986) (enforcing anti-assignment provision in loan commitment letter of consent); *Texas Farmers Ins. Co. v. Gerdes*, 880 S.W.2d 215, 218 (Tex. Ct. App. 1994) (anti-assignment provision in automobile insurance policy is unambiguous and prohibits assignment of policy without insurer consent); *Dallas Cnty. Hosp. Dist. v. Pioneer Cas. Co.*, 402 S.W.2d 287, 288 (Tex. Civ. App. 1966) (same); *Tex. Pac. Indem. Co. v. Atl. Richfield Co.*, 846 S.W.2d 580, 582 (Tex. App. 1993) (enforcing anti-assignment provision in fidelity bond).

> risk for which they did not bargain, specifically because of a change in the nature of the insured.

Travelers Cas. & Sur. Co. v. U.S. Filter Corp., 895 N.E.2d 1172, 1179 (Ind. 2008). In short, anti-assignment clauses are an appropriate way to protect the insurer against unfair imposition of additional risks that the insurer has no control over, did not bargain to accept, and did not collect any additional premium for.[6]

Lastly, CNH cites to several cases in asserting that Travelers argument "would bring about the very type of insurance coverage forfeiture and insurance company windfall that Delaware courts have long disfavored." (CNH Br. at 44). In fact, however, only one of those cases involves a choice-of-law question, and the Court in that case did not rule that the law of another state was "repugnant" to that of Delaware. *See Annestella v. GEICO*, 2014 WL 4229999 (Del. Super. Ct. Aug. 18, 2014). The other case applying Delaware law to a policy issued in Delaware in the context of a Delaware claim did not involve the law of another state in any form whatsoever. *See Pac. Ins. Co. v. Higgins*, 1993 WL 133181 (Del. Ch. Apr. 15, 1993). The third case CNH cites was decided under New York law and does not once mention "public policy." *See Deutsche Bank Tr. Co. Ams. v. Royal Surplus Lines Ins. Co.*, 2012 WL 2898478 (Del. Super. Ct. July 12, 2012).

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[6] In addition to Texas and Indiana, a number of other states routinely enforce anti-assignment provisions contained in insurance contracts. *See, e.g., Del Monte Fresh Produce (Hawaii), Inc. v. Fireman s Fund Ins. Co.*, 183 P.3d 734, 747 (Haw. 2007); *Holloway v. Republic Indem. Co. of Am.*, 147 P.3d 329 (Or. 2006); *In re Katrina Canal Breaches Litig.*, 63 So. 3d 955, 959 (La. 2011).

CNH does not, and cannot, cite any case where a Delaware court refused to apply an anti-assignment clause where that clause would be enforced under the law of the state whose law applied to the case.

2. The Superior Court's "waiver" decision should be reversed because the Superior Court decided genuine issues of disputed fact on summary judgment.

The Superior Court erred in holding on summary judgment that Travelers "waived" its right to enforce the notice and cooperation provisions in the Travelers Policies because there were multiple disputed issues of material fact. Most notably, Travelers presented substantial evidence that it was unable to investigate properly CNH's coverage claim because CNH misrepresented its corporate relationship with J.I. Case.

a. Travelers was entitled to obtain necessary documentation and investigate coverage before making a coverage determination.

CNH's contention that Wisconsin law required Travelers to make one of "three choices" upon receipt of CNH's initial tender – *i.e*., intervene in the underlying suit, defend CNH, or deny coverage – is wrong. Wisconsin law gave Travelers the right to investigate CNH's request for coverage before making a determination as to coverage. *See Towne Realty, Inc. v. Zurich Insurance Co.*, 548 N.W.2d 64, 67 n.2 (Wis. 1996); *Am. Design & Build, Inc. v. Houston Cas. Co.*, 2012 WL 719061, at *7, *11 (E.D. Wis. Mar. 5, 2012); *Lakeside Foods, Inc. v. Liberty Mut. Fire. Ins. Co.*, 789 N.W.2d 754 (Wis. Ct. App. 2010).

CNH premises its "three choices" argument on the false proposition that Travelers "denied" coverage for the asbestos claims. (CNH Br. at 46). Travelers repeatedly sought from CNH essential corporate documentation necessary to its

investigation of coverage, but CNH never provided it. (Travelers Br. at 47-48).

The cases CNH cites to support its "three choices" argument are off point because in each of them the insurer denied coverage. *See Newhouse by Skow v. Citizens Sec. Mut. Ins. Co.*, 501 N.W.2d 1 (Wis. 1993); *Precision Cable Assemblies LLC v. Central Resistor Corp.*, 635 N.W.2d 905 (Wis. Ct. App. 2001).

Moreover, CNH's assertion that Travelers had nothing to investigate when CNH first tendered some of the asbestos lawsuits in May 2008 is wrong.

[redacted]

[redacted]

Moreover, the Broker Documents that CNH was sanctioned for withholding in discovery underscore the error in the Superior Court's "waiver" decision. [redacted]

Significantly, the Broker Documents evidence that CNH itself was still investigating whether it was entitled to coverage under the Travelers Policies for years beyond May 2008. [redacted]

[7] [redacted]

[redacted]

[redacted]

b. Travelers was prejudiced by CNH's failure to comply with its notice and cooperation obligations.

CNH does not attempt to dispute the extensive factual evidence cited in Travelers' opening brief demonstrating that CNH repeatedly failed to comply with its notice and cooperation obligations under the Travelers Policies. Instead, CNH argues that Travelers cannot demonstrate any prejudice from CNH's noncompliance.

In support of its argument, CNH mischaracterizes the deposition of Travelers' corporate representative. Travelers' representative offered extensive testimony demonstrating exactly how Travelers was prejudiced by CNH's misconduct, [redacted] (B5989).

Travelers' representative similarly testified regarding the prejudice to Travelers from CNH's failure to cooperate. *See, e.g.*, B5846 [redacted]; B5876 [redacted]

[redacted]; AR467-68 [redacted]; B6045 [redacted]

CNH also relies on outdated and irrelevant case law regarding the doctrine of "futility" to attempt to rehabilitate the Superior Court's decision on "waiver." Some of those cases do not even arise in the insurance context, and they are otherwise distinguishable because they involve parties who repudiated their contractual obligations. Travelers never did that, and instead reserved its rights. *See, e.g.*, *Ricchio v. Oberst*, 251 N.W.2d 781, 782 (Wis. 1977); *Logan v. City of Two Rivers*, 278 N.W. 861 (Wis. 1938); *J.I. Case Threshing Machs. Co. v. Johnson*, 122 N.W. 1037, 1037 (Wis. 1909). The others likewise involve distinguishable circumstances where an insurer outright denied coverage for a claim. *See Capitol Indem. Corp. v. St. Paul Fire & Marine Ins.*, 357 F. Supp. 399, 408 (W.D. Wis. 1972); *Radcliffe v. Network Am. Life Ins. Co.*, 96 Wash. App. 1002, *6 (1999); *Flintkote Co. v. General Accident Assurance Co. of Canada*, 480 F. Supp. 2d 1167 (N.D. Cal. 2007).

3. CNH is not entitled to recover pre-tender defense costs.

Wisconsin law is clear that pre-tender costs are never recoverable, even where an insurer breaches the duty to defend. *See, e.g., Towne Realty*, 548 N.W.2d at 68; *Old Republic Ins. Co. v. Liberty Mut. Fire Ins. Co.*, 138 F. Supp. 3d 1013, 1025 (E.D. Wis. 2015). CNH does not dispute this Wisconsin precedent. Instead, CNH plays semantic games by attempting to argue that defense costs incurred in specific cases before they were tendered to Travelers somehow do not constitute "pre-tender costs." That argument is meritless.

CNH has a contractual obligation to "immediately forward to the company every demand, notice, summons or other process received" and "[i]n the event of any occurrence, written notice containing particulars sufficient to identify the insured . . . as soon as practicable." (A532; A787-88; A1104-05). After May 2008, [redacted]

Wisconsin law is clear-cut: costs incurred by CNH in defense of a lawsuit before it provided Travelers with notice of that lawsuit are not recoverable, regardless of whether Travelers breached its duty to defend. *Towne Realty*, 548 N.W.2d at 68 (stating that "the fact that [the insurer] did eventually breach its duty

. . . is a distinction without a difference in relation to the issue of pre-tender expenses."). The reason for this is obvious: an insurer cannot defend a suit that it does not know exists. Furthermore, under Wisconsin law, the insurer need not demonstrate prejudice to deny coverage for pre-tender costs. Indeed, *Towne Realty* recognizes that, "to hold otherwise would require [the insurer] to have breached a contractual duty . . . that did not even exist." *Id.*

CNH's effort to avoid Wisconsin law by re-branding its pre-tender defense costs as "post-denial costs" is entirely unpersuasive. (CNH Br. at 59). A horse is a horse even if one calls it a camel. There is no question that the defense costs in question were incurred in specific lawsuits before those lawsuits were tendered to Travelers for coverage. (AR345-73, AR648-97). Travelers did not deny coverage for lawsuits before receiving any notice of them.

CNH tries to conflate the Superior Court's "waiver" decision with the separate and distinct issue of whether it may recover pre-tender defense costs. The waiver issue goes to whether Travelers is entitled to enforce the late notice and cooperation provisions of the Travelers Policies. Travelers acknowledges that it must show prejudice to prevail on that issue, which it did as explained above.

Coverage for pre-tender defense costs presents the different issue of whether an insured may recover defense costs incurred in connection with a claim before it tendered the claim to the carrier. There, Wisconsin has a clear rule that

pre-tender defense costs are not covered, even if the carrier wrongly refused to defend the claim. No showing of prejudice is required.

Finally, in footnote 7 of its answering brief, CNH attempts to excuse its more than [redacted] delay in notifying Travelers of any asbestos lawsuits whatsoever, stating that "each of the Underlying Asbestos Claims constitutes a separate 'occurrence.'" (CNH Br. at 43 n.7). That is precisely the point here; each lawsuit is separate and so must be noticed separately.

Wisconsin law is clear and makes good sense. There is no reason why courts should be required to speculate after-the-fact about whether an insurer would have denied coverage for a lawsuit if it had been tendered, when it would be easy for the insured to tender the lawsuit and get an answer. CNH is not entitled to recover defense costs incurred in connection with any asbestos lawsuit before the date it tendered that particular lawsuit to Travelers.

4. The Superior Court erred in refusing to protect Travelers from CNH receiving the windfall of a double recovery, including by permitting CNH to conceal its settlement agreement with CNA.

The Superior Court's decision to refuse Travelers information regarding CNH's settlement with CNA is contrary to Wisconsin law precluding an insured from obtaining the windfall of a double recovery. CNH tacitly concedes as much by attempting to misdirect this Court's focus to a different legal issue not even presented by Travelers.

As an initial matter, this Court reviews a Superior Court's formulation and interpretation of an appropriate legal standard *de novo*, because a lower court "would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *see also Hopkins v. State*, 893 A.2d 922, 927 n.5 (Del. 2006). The dispositive issue here is whether the Superior Court misconstrued Wisconsin law regarding double recoveries. The appropriate standard of review of the legal standard adopted by the Superior Court in deciding whether CNH was obligated to produce the settlement agreement is, therefore, *de novo*.

Second, CNH's principal argument on this issue is that Travelers, having breached its duty to defend, is not entitled to equitable contribution from CNA.

Whether that contention is true is entirely irrelevant and not before the Court as Travelers is not attempting to assert any such claim.

Travelers seeks appropriate protection against CNH's effort to collect the same defense costs from two different carriers. The two cases cited by CNH, *Gronik* and *Plastics Engineering*, do not stand for the proposition that CNH is entitled to recover, over and over again, the same defense costs from multiple carriers. To the contrary, those cases address allocation and note that Wisconsin is a so-called "all sums" defense jurisdiction, *i.e.*, wherein each carrier individually may have an obligation to pay all defense costs incurred by an insured with respect to a given claim regardless of whether other carriers are also on the risk. The cases do not stand for the proposition, however, that an insured having collected from one "picked" carrier may nevertheless proceed along and receive those same defense costs from another carrier. Not surprisingly, no Wisconsin court has suggested that an insured may profit from claims made against it by being reimbursed twice for the same defense costs; such unjust enrichment is itself offensive to public policy. The Superior Court should have assured that CNH's bid for unjust enrichment was rebuffed.

CNH does not attempt to rehabilitate the Superior Court's erroneous reliance on *Burgraff v. Menard, Inc.*, 875 N.W.2d 596 (Wis. 2016), nor argue that it is not seeking the same defense costs from multiple carriers. Instead, CNH posits that

Travelers failed to make the "particularized showing" under Delaware and Wisconsin law warranting production of its settlement agreement with CNA. But the Wisconsin case relied upon by CNH in advancing that position states that discovery of the settlement agreement would be appropriate when "the issues of insurers liability have been resolved" and when "final judgment is rendered." *Wisconsin Elec. Power Co. v. N. Assurance Co. of Am.*, 2007 WL 4631363, at *1 (W.D. Wis. Oct. 31, 2007).

Travelers appropriately sought the settlement documents at the point in the proceedings when the amount of liability and damages was being decided, and the Superior Court denied the relief. Thus, the Superior Court erred in not preventing CNH from obtaining a double recovery, including by failing to require production of the settlement agreement with CNA so that Travelers can determine whether CNA has already paid some of the amounts included in the judgment against Travelers, which is almost certainly the case. If the Superior Court's judgment is affirmed, CNH stands to make a windfall profit by recovering more in defense costs than it spent.

CONCLUSION

This Court should reverse the judgment of the Superior Court regarding choice-of-law and either direct that judgment be entered for Travelers or remand the case with directions that the Superior Court consider the validity of the purported assignment from Tenneco and J.I. Case to CNH and all other issues under Texas law. Alternatively, the Court should reverse and remand with the following holdings: (1) the Superior Court erred in granting summary judgment for CNH that Travelers waived its coverage defenses; (2) CNH may not recover any pre-tender defense costs; and (3) Travelers is entitled to obtain all relevant discovery as to prior insurer settlements, including the settlement agreement between CNA and CNH.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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