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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE TIAA-CREF INSURANCE APPEALS	) No. 478,2017) No. 479,2017) No. 480,2017) No. 481,2017	PUBLIC VERSION
	) Court Below-Superior Court of the State of Delaware) C.A. No. N14C-05-178 JRJ (CCLD)	

OPENING BRIEF OF APPELLANTS ILLINOIS NATIONAL INSURANCE COMPANY, ACE AMERICAN INSURANCE COMPANY AND ARCH INSURANCE COMPANY REGARDING WHETHER TIAA-CREF SUFFERED COVERED "LOSS"

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NATURE OF PROCEEDINGS

Plaintiffs below, Appellees TIAA-CREF Individual & Institutional Services, LLC, TIAA-CREF Investment Management, LLC, Teachers Advisors, Inc., Teachers Insurance and Annuity Association of America, and College Retirement Equities Fund (collectively, "TIAA-CREF"), seek insurance coverage for settlement and defense costs incurred in connection with three class actions filed against them:

- *Rink v. College Retirement Equities Fund*, No. 07-CI-10761 (Ky. Cir. Ct. filed Oct. 29, 2007) (the "*Rink* Action");
- *Bauer-Ramazani v. Teachers Insurance & Annuity Association of America - College Retirement & Equities Fund, et al.*, No. 1:09-cv-00190 (D. Vt. filed Aug. 17, 2009) (the "*Bauer-Ramazani* Action"); and
- *Cummings v. Teachers Insurance & Annuity Association of America — College Retirement & Equities Fund, et al.*, No. 1:12-cv-93 (D. Vt. filed May 10, 2012) (the "*Cummings* Action") (collectively, the "Underlying Actions").

TIAA-CREF seeks insurance proceeds under claims-made professional liability policies issued by Appellants Illinois National Insurance Company [redacted]

("Illinois National"), ACE American Insurance Company ("ACE"), and Arch Insurance Company ("Arch").

The primary policy issued by Illinois National ("the Illinois National Policy"), to which ACE and Arch's excess policies follow form, only covers "Loss" of an Insured, which, as defined, does not include matters that are uninsurable under the applicable law. Under Delaware's conflict of law principles, the applicable law is that of New York, the location of policy negotiation, policy issuance, and the Named Insureds' headquarters.

On May 20, 2016, Illinois National filed a Motion for Summary Judgment seeking judgment as a matter of law that the Underlying Actions did not involve "Loss" of an Insured and so no coverage is owed for the amounts that TIAA-CREF seeks to recover.[1] ACE joined in Illinois National's motion,[2] and the arguments from Illinois National's motion were expressly incorporated by reference into

[1] JA1819-66. In accordance with Delaware Supreme Court Rule 14(j), the parties to the consolidated appeals filed a Joint Appendix of documents bates-stamped with the prefix "JA." Additionally, Defendants Below / Appellants Illinois National Insurance Company, ACE Insurance Company and Arch Insurance Company filed a Defense Appendix of documents bates-stamped with the prefix "DA." In this brief, Appellants cite documents contained in these appendices by the bates-stamped pages.

[2] JA3178-87.

Arch's own Motion for Summary Judgment.[3] In their motions, Illinois National, ACE, and Arch demonstrated that the Underlying Actions only sought, and that the settlements were solely for, disgorgement of investment gains of TIAA-CREF's customers – gains that TIAA-CREF previously had transferred from its customers' accounts to the accounts of TIAA-CREF itself. Illinois National, ACE, and Arch demonstrated that, under New York law, TIAA-CREF's taking of investment gains from its customers, the rightful owners of the accounts, and then subsequently returning those investment gains to the customers, was not a "Loss" suffered by TIAA-CREF. TIAA-CREF cross-moved for summary judgment arguing that settlements paid in the *Rink* and *Bauer-Ramazani* Actions represented a "Loss" of TIAA-CREF for which coverage was owed under the Illinois National Policy and the excess policies issued by ACE and Arch (collectively, "the Policies") and that coverage was not relieved by any applicable public policy because TIAA-CREF denied liability when it settled those actions.[4]

In its October 20, 2016 opinion, the Superior Court entered summary judgment in favor of TIAA-CREF on the issue of "Loss," as to all three Underlying Actions, even though TIAA-CREF had sought summary judgment

[3] JA2890 ("Arch adopts and incorporates by reference the arguments asserted by Illinois National in Sections III.D and III.E of its Opening Brief in Support of its Motion for Summary Judgment, which also apply to the Arch Policies.").
[4] JA0244-85.

with respect to only the two actions that had settled: *Rink* and *Bauer-Ramazani*.[5] The Superior Court declined to apply New York's public policy against insuring disgorgement on the grounds that TIAA-CREF had settled, prior to a final adjudication and with a disclaimer of liability.

Illinois National's request for interlocutory appeal was denied and the case proceeded to trial in December 5-12, 2016 on all remaining issues relating to the two settled actions, *Rink* and *Bauer-Ramazani*. The jury returned its verdict on December 12, 2016.[6]

On October 23, 2017, the Superior Court issued a final order, pursuant to Rule 54(b), that all claims and defenses relating to TIAA-CREF's request for coverage with respect to *Rink* and *Bauer-Ramazani* were resolved.[7] After entry of judgment on the docket on October 23, 2017, Illinois National, ACE, and Arch each filed a timely Notice of Appeal. With respect to issues in this particular opening brief, Illinois National, ACE and Arch appeal from the Superior Court's rulings that: (1) granted TIAA-CREF's Motion for Summary Judgment, finding that the settlements of the Underlying Actions constituted covered Loss under the Policies and that coverage was not relieved by any applicable public policy; and

[5] The October 20, 2016, opinion is attached as Exhibit A.
[6] Exhibit B.
[7] Exhibit C.

(2) denied Illinois National's, ACE's and Arch's Motions for Summary Judgment on the same grounds.[8]

[8] Exhibit A.

SUMMARY OF ARGUMENT

1. The Policies only apply to "Loss" of an Insured. It was TIAA-CREF's burden to establish "Loss" as that term is defined. The existence of "Loss" is a prerequisite to coverage that appears in the Insuring Agreement of the Illinois National Policy. The term "Loss," by definition, does not include "matters which may be deemed uninsurable under the law pursuant to which" the policy shall be construed.
2. The risk of having to disgorge funds is uninsurable under the applicable law of New York. Because disgorgement is uninsurable as a matter of law, New York law does not permit an insured to circumvent the public policy, and create coverage, by disgorging funds in settlement. The Superior Court erred in ruling that TIAA-CREF, by settling and denying liability in settlement agreements, avoided New York's public policy against insuring disgorgement, and established "Loss" of an Insured.
3. The evidence established, as a matter of law, that the Underlying Actions implicated the public policy against insuring disgorgement. The Underlying Actions only asserted claims for disgorgement of the millions in investment gains that TIAA-CREF wrongfully withheld from the investors whose accounts generated those gains. The courts in the Underlying Actions

denied TIAA-CREF's efforts to avoid liability, certified classes of investors whose gains TIAA-CREF had withheld, and awarded class counsel fees based upon the wrongful withholding of gains. To resolve the Underlying Actions, TIAA-CREF agreed to disgorge a portion of those gains that it admittedly withheld, [redacted] In light of the evidence presented, summary judgment should have been granted in favor of Illinois National, ACE and Arch that there was no "Loss" of an Insured.

4. The Superior Court erred in finding that TIAA-CREF met its burden to prove that it experienced "Loss." The Superior Court misconstrued New York law, added a final adjudication requirement not found in the law or the language of the Policies, and relied entirely on TIAA-CREF's self-serving denial of liability in the underlying settlements. The Superior Court also ignored the underlying pleadings, court rulings, admissions by TIAA-CREF and the very nature of the settlements, which all established that the underlying settlements were for disgorgement of wrongfully withheld gains.
5. The Superior Court erred in finding that TIAA-CREF met its burden to prove that it experienced a "Loss," given that, due to TIAA-CREF's business model, no Insured was out-of-pocket so as to have suffered a

[redacted]

"Loss." [redacted].

[redacted]

STATEMENT OF FACTS

A. The TIAA-CREF Investment Funds

TIAA-CREF provides retirement accounts, annuities, life and other insurance, and pension plan counseling to employees of colleges, universities, and other institutions.[9] College Retirement Equities Fund ("CREF") offered customers the ability to invest in eight (8) investment funds (the "CREF Funds") and TIAA-CREF Insurance and Annuity Association of America ("TIAA") offered two (2) investment funds (the "TIAA Funds").[10] TIAA or its subsidiaries (through TIAA employees) provided the investment management and account administration services, and billed the Funds, which do not have employees, for these services.[11]

[redacted]

[9] JA1876 at ¶ 3.
[10] JA1876-77 at ¶ 4; JA1995-96; JA3896 at 15:12-15.
[11] JA2090; JA2092; *see also* JA2047-48 at 60:5-61:7; JA3898 at 17:18-25; JA3899 at 18:8-21.
[12] JA1996; JA3385 at 33:16-24; JA3389 at 37:8-25.
[13] JA1996; JA3372 at 20:10-20; JA3375-76 at 23:1-24:8; JA3381-82 at 29:14-30:5.

[redacted]

[redacted]

TIAA-CREF Individual & Institutional Services, LLC ("Services"), a for-profit entity, and in later years TIAA, acted as broker-dealer for account holders and billed the Funds for these services.[17] Where account holders sought to withdraw or sell their shares in the Funds, the TIAA-CREF broker-dealer was responsible for sending the order to the Funds on the day it received the request in good order ("the Good Order Date") and paying the investor the market value of the account.[18] The TIAA-CREF broker-dealer, however, did not always process

[14] JA1958-59 at ¶¶ 24-27; JA3385-86 at 33:16-34:7; JA3390-91 at 38:17-39:3; JA3581-82 at 18:23-19:5; JA2123 at 78:1-23; JA3911-12 at 30:5-31:9.
[15] JA2117 at 19:21-25; JA3737 at 19:9-19.
[16] JA2087 at 33:21-25.
[17] In 2009, after an inquiry by the SEC Division of Trading and Markets, and as part of an agreement to avoid enforcement efforts, TIAA replaced Services as the broker-dealer responsible for providing administration services for the CREF Funds. DA0071-74 at 115:14-118:19; JA1955-56 at ¶¶ 13-16.
[18] JA2118-19 at 33:22-34:2; DA0069-70 at 53:6-54:12; JA3779-80 at 61:22-62:9; JA3602 at 39:2-11; JA3613 at 50:10-16; JA3425-26 at 73:7-74:21.

[redacted]

transactions on the Good Order Date.[19] Until the TIAA-CREF broker-dealer processed the transaction ("the Processing Date"), there was no withdrawal of the investment, the shares remained in the investor's account and the money remained invested in the market.[20] As a result, the investor's shares could increase (or decrease) in value between the Good Order Date and the Processing Date.[21] [redacted] TIAA withheld the accrued gains from investors [redacted]

B. The Underlying Actions

Three class actions ("the Underlying Actions") were filed in response to TIAA-CREF's routine retention of investor's gains. Each alleged that class members requested withdrawals in one or more of the Funds; the TIAA-CREF

[19] JA3408 at 56:3-21; JA2264-65 at *1.
[20] JA2037-38 at 53:13-54:20; JA2041-42 at 160:22-161:7; JA3796 at 78:2-17; JA3397-98 at 45:11-46:16; JA3420-21 at 68:20-69:8; JA2145-46 (Response to Interrogatory No. 2).
[21] JA3609-10 at 46:24-47:4; JA3658-59 at 95:5-96:7; JA2145-46 (Response to Interrogatory No. 2).
[22] JA1174-75 (Supplemental Response to Interrogatory No. 2); JA3421-22 at 69:20-70:6; JA2144-45 (Response to Interrogatory No. 1); JA3656-58 at 93:22-95:9.
[23] JA2264-65 at *1; JA1174-77 (Supplemental Response to Interrogatory No. 2, Supplemental Response to Interrogatory No. 3, Supplemental Response to Interrogatory No. 8); JA2121-22 at 74:13-75:11; JA3411-12 at 59:12-60:23.

broker-dealer failed to process the request on the Good Order Date; and TIAA-CREF withheld from investors the gains that accrued in their accounts after the Good Order Date.[24] Each action sought, and recovered in settlement, the exact same relief – the appreciation in customer accounts that TIAA-CREF withheld from redeeming investors.[25]

In 2007, the *Rink* Action was filed on behalf of investors in the CREF Funds.[26] The court certified the class to include persons, who, during a class period commencing October 28, 2001, had a contract governed by New York law, and "were denied the appreciated value upon distribution of their accounts after an unreasonable delay," defined as more than seven days after the request for distribution (the Good Order Date).[27] On May 10, 2012, the parties entered into a settlement requiring TIAA-CREF to pay settlement class members whose requests for withdrawal were delayed during a shorter class period of October 1, 2005 to March 31, 2008, and who submitted a timely and proper claim, [redacted] plus [redacted] interest running from

[24] JA2230 at ¶ 4; JA2231-32 at ¶¶ 17-19; JA2232 at ¶ 21(c); JA1556 at ¶ 21-24; JA1557 at ¶27; JA1558 at ¶ 30; JA2513 at ¶ 1; JA2518 at ¶ 21; JA3520 at 168:13-19; JA2215; JA2219; JA2223.
[25] JA2231 at ¶¶ 16-17; JA2239 at Prayer for Relief ¶ (B); JA1562 at ¶ 49; JA1563 at ¶ 54; JA2513 at ¶ 1; JA3520 at 168:13-19.
[26] JA2232 at ¶ 21(c).
[27] JA2130.

[redacted]

the date of the withdrawal request.[28] TIAA-CREF paid [redacted] to participating class members and the court granted class counsel a fee award equal to one-third of the potential settlement fund.[29]

In 2009, the *Bauer-Ramazani* Action was filed with respect to accounts invested in any of the Funds and governed by the Employee Retirement Income Security Act ("ERISA").[30] TIAA-CREF argued,[31] and the court agreed, that the *Bauer-Ramazani* class was not entitled to a jury trial, because the class only sought the equitable remedy of disgorgement.[32] The court certified the class to include all persons, who during the August 17, 2003 to May 9, 2013 class period, requested a transfer or distribution from an account invested in the CREF or TIAA Funds and covered by ERISA "whose funds were not transferred or distributed within seven days of the date the account was valued and were denied the investment gains."[33]

In the January 31, 2014 *Bauer-Ramazani* settlement, TIAA-CREF agreed to pay into a fund [redacted], which represented [redacted] of the [redacted] in accrued investment gains that TIAA-CREF had retained instead of

[28] JA2274 at ¶ 3.
[29] JA2265-66 at *2.
[30] JA2284; JA1552-53 at ¶¶ 4-5, 8-9.
[31] JA2312-13; JA2316-17.
[32] JA2339-44.
[33] JA2325.

[redacted]

paying to class members.[34] Each class member would receive a pro rata share of the fund "based on the investment gains associated with" his or her investment.[35] TIAA-CREF agreed to pay [redacted] to class counsel.[36]

The *Cummings* Action, filed in 2012, involves TIAA-CREF's failure to pay gains that accrued in investment accounts governed by ERISA during delays greater than time limits established by the Securities & Exchange Commission and industry practice, but less than seven days.[37] The proposed class involves persons "whose funds generated investment gains during the period of delay" excluding *Rink* and *Bauer-Ramazani* class members.[38] [redacted]

C. The Policies

TIAA-CREF seeks reimbursement of defense and settlement costs under a tower of claims-made and reported professional liability insurance effective for the April 1, 2007 to April 1, 2008 policy period. TIAA-CREF and Illinois National agreed, and the Superior Court ruled, that, pursuant to policy provisions, *Bauer-*

[34] JA3994 at 113:17-23; JA2345-37; JA2445; JA2490-91 at § E.
[35] JA2477 at ¶ 61; JA2453.
[36] JA2455.
[37] JA2494; JA2521 at ¶ 36.
[38] JA2521 at ¶ 36.
[39] JA2530-41.

[redacted]

Ramazani and *Cummings* relate back to *Rink* so as to all be properly reviewed for coverage under the policies in the 2007-2008 tower.[40]

Illinois National issued the primary policy, [redacted] (the "Illinois National Policy"), in the tower.[41] The Illinois National Policy is subject to a [redacted] and a [redacted] Aggregate Limit of Liability (both inclusive of defense costs).[42] Subject to other policy terms, including limits, conditions and exclusions, the Illinois National Policy provides, as is pertinent here, that Illinois National "shall pay the Loss of the Insured . . . for any actual or alleged Wrongful Act of an Insured in the rendering of, or failure to render, Professional Services." "Loss" is defined to mean "judgments and settlements and any Defense Costs," but does not include, among certain enumerated matters, "(4) any amount for which an insured is not financially liable or which is without legal recourse to an Insured; or (5) matters which may be deemed uninsurable under the law pursuant to which this policy shall be construed."[43]

ACE and Arch issued the excess policies in the 2007-2008 tower which are pertinent here. ACE issued an excess policy bearing policy number [redacted]

[40] Ex. A at 30.
[41] JA2541.23-41.58.
[42] JA1887-88 at ¶ 37.
[43] JA2541.08 at § II.5.

[redacted]

[redacted] and providing an aggregate limit of liability of [redacted] in excess of [redacted] in underlying insurance (the Illinois National Policy with limits of [redacted], and an excess policy issued by St. Paul Mercury Insurance Company with limits of [redacted].[44] Except as otherwise provided therein, ACE's policy applies in conformance with the terms and conditions of the Illinois National Policy.[45]

Arch issued an excess policy bearing policy number [redacted] providing an aggregate limit of liability of [redacted] in excess of [redacted] in underlying insurance.[46] Except as otherwise provided therein, Arch's policy applies in conformance with the terms and conditions of the Illinois National Policy.[47]

Illinois National, ACE and Arch appeal from the Superior Court's rulings that: (1) granted TIAA-CREF's Motion for Summary Judgment, finding that the settlements of the Underlying Actions constituted covered Loss under the Policies and that coverage was not relieved by any applicable public policy; and (2) denied Illinois National's, ACE's and Arch's Motions for Summary Judgment on the same grounds.

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[44] JA0492-504. St. Paul Mercury has separately settled with TIAA-CREF.
[45] *Id.*
[46] JA0507-08.
[47] JA0511.

[redacted]

ARGUMENT

I. THE SUPERIOR COURT ERRED IN FINDING TIAA-CREF ESTABLISHED "LOSS" OF AN INSURED AS THE SETTLEMENTS WERE FOR UNINSURABLE DISGORGEMENT.

A. QUESTION PRESENTED

Did TIAA-CREF establish "Loss" of an Insured – which, by definition, does not include matters uninsurable under the law governing policy construction – when disgorgement is uninsurable as a matter of governing law and the Underlying Actions only sought and recovered the disgorgement of gains that TIAA-CREF withheld from investors?

This issue was raised in the parties' Motions for Summary Judgment, and in the oral argument related thereto.[48]

B. STANDARD AND SCOPE OF REVIEW

This Court reviews, *de novo*, the Superior Court's respective grant and denial of summary judgment, and in doing so, exercises plenary review.[49]

[48] *See, e.g.*, JA1849-59 at Section III.D; JA3297-18 at Section IIB; JA4874-92 at Sections IB-F; JA5049-50 at 25-42; JA5055-56 at 44-55; JA5082-83 at 65-75; The Superior Court issued a Joint Stipulated Order as to Issues Involving "Loss," Transaction ID 59776359, ruling that all issues concerning "Loss" and "Loss of an Insured" under the Illinois National Policy and excess policies in the tower are "preserved for purposes of any appeal, remand or retrial." JA5245-50. Arch raised the issue in its motion for summary judgment. JA2890.

[49] *Rizzitiello v. McDonald's Corp.*, 868 A.2d 825, 829 (Del. 2005); *Lank v. Moyed*, 909 A.2d 106, 108 (Del. 2006).

"Moreover, '[t]he interpretation of insurance contracts involves legal questions and thus the standard of review is *de novo.*'"[50]

1. Summary Judgment Standard

A moving party is entitled to summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.[51] When considering a summary judgment motion, the Court views the facts, and any inferences drawn from those facts, in a light most favorable to the nonmoving party.[52]

2. Choice of Law

The Policies should be construed pursuant to New York law. The threshold issue in a choice-of-law analysis is whether there is a true conflict of law, and a "'true conflict' exists if the laws of the competing jurisdictions produce different results when applied to the facts of the case."[53] There is a true conflict on the issue of "Loss" because New York public policy prohibits insurance coverage for

[50] *Lank*, 909 A.2d at 108 (quoting *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 744-45 (Del. 1997)).
[51] Super. Ct. Civ. R. 56(c); *Windom v. Ungerer*, 903 A.2d 276, 280 (Del. 2006).
[52] *Windom*, 903 A.2d at 280.
[53] *Valley Forge Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 2012 Del. Super. LEXIS 130, at *26 (Del. Super. Ct. Mar. 15, 2012) (citations omitted).

disgorgement claims,[54] while Delaware (as the parties agree) has recognized no such public policy.[55] The parties agree that, under Delaware's conflict of laws principles, the applicable law in the event of a conflict is that of New York, the location of policy negotiation, policy issuance and the Named Insureds' headquarters.[56]

C. MERITS OF ARGUMENT

The risk of having to disgorge funds is uninsurable under the applicable law of New York. At issue in this appeal is whether an insured that disgorges wrongful gains may circumvent enforcement of New York's firmly established public policy simply by settling underlying actions with a boilerplate denial of wrongdoing. As demonstrated below, the Superior Court misconstrued the law on burden, policy

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[54] *See, e.g., J.P. Morgan Securities Inc. v. Vigilant Ins. Co.*, 2 N.Y.S.3d 415 (N.Y. App. Div. 2015) ("*J.P. Morgan II*"); *Reliance Gr.p Holdings, Inc. v. Natl. Union Fire Ins. Co. of Pittsburgh, Pa.*, 594 N.Y.S.2d 20, 24 (N.Y. App. Div. 1993), *appeal denied*, 619 N.E.2d 656 (N.Y. 1993).

[55] JA0273; Ex. A at 22 ("Both parties agree that Delaware law is silent on this issue, but disagree as to the outcome under New York law. The Court can find no case, and the parties have not identified one, in which a Delaware court has articulated Delaware public policy regarding the insurability of disgorgement.").

[56] *See, e.g., Tyson Foods, Inc. v. Allstate Ins. Co.*, 2011 LEXIS Del.Super. LEXIS 379, at *18-19 (Del. Super. Ct. Aug. 31, 2011) (holding that Arkansas law applied to policies procured, negotiated, and delivered to insureds at their respective Arkansas headquarters, and noting that other than the fact that insureds were incorporated in Delaware, Delaware had "no real interest" in applying its own laws to policies); JA5024-25 at 13:13-14:13; JA5044-46 at 33:7-35:3; JA5056 at 45:11-13; Ex. A at 22.

interpretation and the public policy against insuring disgorgement. Further, in reaching its decision, the Superior Court never reviewed the pertinent evidence, which established, as a matter of law, that there was no "Loss" of an Insured.

1. It Was TIAA-CREF's Burden to Establish "Loss" As Defined In The Policy And Under New York Law.

The insured bears the initial burden of proving that the claimed loss falls within the insuring agreement of a policy before any exclusion is considered.[57] Under New York law, "courts bear the responsibility of determining the rights or obligations of parties under insurance contracts based on the specific language of the policies."[58] "Where the provisions of the policy are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement."[59] "A court may not write into a contract conditions the parties did not include by adding or excising terms under the guise of construction, nor may it construe the language in such a way as would distort the contract's apparent meaning."[60]

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[57] *See Consol. Edison Co. of N.Y. v. Allstate Ins. Co.*, 774 N.E.2d 687, 690 (N.Y. 2002).

[58] *Sanabria v. Am. Home Assur. Co.*, 501 N.E.2d 24, 24 (N.Y. 1986) (internal quotation marks and citation omitted).

[59] *U.S. Fid. & Guar. Co. v. Annunziata*, 492 N.E.2d 1206, 1207 (N.Y. 1986) (internal quotation marks and citation omitted).

[60] *Tikotzky v. City of New York*, 729 N.Y.S.2d 525, 527 (N.Y. App. Div. 2001) (citations omitted).

[redacted]

The Policies only apply to "Loss" of an Insured. The existence of "Loss" is a prerequisite to coverage that appears in the Insuring Agreement of the Illinois National Policy. "Loss" is defined as "judgments and settlements and any Defense Costs, provided, however, that Loss shall not include: ... (5) matters which may be deemed uninsurable under the law pursuant to which this policy shall be construed." Consequently, all the items for which an Insured seeks reimbursement must satisfy the "Loss" definition.

Thus, it was TIAA-CREF's burden to establish that the settlements and defense costs incurred in the Underlying Actions satisfied the "Loss" definition. Since "Loss" is a precondition to coverage, TIAA-CREF's burden to prove that those amounts constitute "Loss" includes the question of whether the settlements in *Rink* and *Bauer-Ramazani* are "matters which may be deemed uninsurable under the law pursuant to which this policy shall be construed." As discussed in greater detail below, TIAA-CREF never satisfied its burden to establish "Loss," nor could it, because the Underlying Actions only sought – and were only settled for – the disgorgement of gains wrongfully withheld from investors by TIAA-CREF and disgorgement is an uninsurable matter.

[redacted]

2. Under New York Law, Disgorgement Is Uninsurable and Not "Loss," Even If the Disgorgement Is Achieved Through Settlement Accompanied by a Denial of Wrongdoing.

New York courts have enunciated a clear public policy rationale prohibiting insurance coverage for disgorgement claims.[61] As New York's highest court stated, the public policy rationale "precluding coverage for disgorgement" is based on a desire to prevent the "unjust enrichment of the insured by allowing it to, in effect, retain the ill-gotten gains by transferring the loss to its carrier."[62] As a result, under New York law, there can be no "Loss" of an Insured where the insured settles disgorgement claims. Because the Illinois National Policy defines judgments, settlements, and defense costs as components of "Loss," and "Loss," by definition, shall not include matters uninsurable under governing law, no amount

[61] *See, e.g.*, *J.P. Morgan II*, 2 N.Y.S.3d at 415 (Noting that, among other defenses, the insurers had cited and relied upon "the doctrine that disgorgement payments are not insurable as a matter of settled New York law and public policy."); *Reliance*, 594 N.Y.S.2d at 24 ("It is well established that one may not insure against the risk of being ordered to return money or property that has been wrongfully acquired."); *Vigilant Ins. Co. v. Credit Suisse First Bos. Corp.*, 782 N.Y.S.2d 19, 20 (N.Y. App. Div. 2004) ("*Credit Suisse II*") ("The risk of being directed to return improperly acquired funds is not insurable.").

[62] *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 992 N.E.2d 1076, 1083 (N.Y. 2013) ("*J.P. Morgan I*").

incurred in settlement or litigation costs in connection with a disgorgement claim qualifies "Loss," and, thus, cannot be recovered from the insurer.[63]

There was no legal basis for the Superior Court to conclude that the underlying settlements for disgorgement were insurable or covered as "Loss." Even the Superior Court recognized that the public policy against insuring disgorgement applies whether accomplished by settlement demand or order, when it stated:

> Disgorgement is defined as "the act of giving up something (such as profits illegally obtained) on demand or by legal compulsion." New York courts elaborate that the purpose of disgorgement is "to deprive a party of ill-gotten gains and to deter improper conduct."[64]

Yet, the Superior Court still reasoned that TIAA-CREF's settlements somehow distinguished this case from some of the cited New York cases because:

> After lengthy litigation TIAA-CREF settled, expressly denying any liability. Moreover, neither the SEC nor any

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[63] *See Credit Suisse II* at 20; *Millennium P'rs, L.P. v. Select Ins. Co.*, 882 N.Y.S.2d 849, 853-54 (Sup. Ct. 2009), aff'd 889 N.Y.S.2d 575 (N.Y. App. Div. 2009) ("The reasoning of [*Credit Suisse II*]--that disgorgement of improperly acquired funds is not a covered loss, and that defense costs in connection with a claim for disgorgement are therefore also not a covered loss--is equally applicable here."); *Bear Wagner Specialists, LLC v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 2009 N.Y. Misc. LEXIS 1806, at *16-17 (N.Y. Sup. Ct., N.Y. Cnty. Mar. 9, 2009) (TABLE) (holding that disgorged amounts were not covered as "loss" and, thus, that costs incurred in litigating the action also were not insurable or covered under New York law).

[64] Ex. A at 23 (citations omitted).

> other governmental entity was involved in the Underlying Actions. … *Credit Suisse*, *Millennium*, and *J.P. Morgan* all involve conclusive links between the insured's misconduct and the payment of monies. Not so here. TIAA-CREF settled and expressly denied any liability. The Court finds no conclusive link between the settlements and the Underlying Actions that would render the settlements uninsurable disgorgement.[65]

Despite recognizing that the purpose of the remedy is served whether the disgorgement is accomplished "on demand or by legal compulsion," the Superior Court created a presumption of coverage for disgorgement if accomplished through settlement. In so holding, the Superior Court added a final adjudication requirement not found in the law or policy language, mistakenly assuming that there was "no New York case at odds with the proposition that there must be a conclusive link between disgorgement and a finding of wrongdoing in order to render disgorgement payments uninsurable."[66]

This is not the law of New York. Under New York law, "even in cases of negotiated settlements, there can be no duty to indemnify unless there is first a covered loss."[67] In allowing an insured to control the question of coverage for disgorgement by arranging a settlement with a self-serving denial of liability, the

[65] Ex. A at 27 (citations omitted).
[66] DA0083 at ¶ 14.
[67] *Servidone Constr. Corp. v. Sec. Ins. Co. of Hartford*, 477 N.E.2d 441, 444 (N.Y. 1985); *see also In re Kenai Corp. v. Nat'I Union Fire Ins. Co.*, 136 B.R. 59, 64 (S.D.N.Y. 1992).

Superior Court failed to follow New York law, which treats *all* disgorgement claims as uninsurable. Because disgorgement claims are uninsurable to begin with, no amount incurred in connection with a disgorgement claim, even if settled with a denial of wrongdoing, is insurable or qualifies as "Loss." Moreover, by placing the question of coverage in the hands of the insured, the Superior Court negated a public policy designed to prevent the "unjust enrichment of the insured by allowing it to, in effect, retain the ill-gotten gains by transferring the loss to its carrier."[68] It defies reason to allow an insured to avoid this public policy and create coverage simply by settling the disgorgement claim with a rote denial of wrongdoing.[69]

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[68] *J.P. Morgan I*, 992 N.E.2d at 1083; *see also Level 3 Commc'ns, Inc. v. Fed. Ins. Co.*, 272 F.3d 908, 911 (7th Cir. 2001) (recognizing it "can't be right" that the insured, "seeing the handwriting on the wall," can pay claimants "all they were asking for" in order to retain insurance).

[69] *See, e.g.*, *Level 3 Commc'ns, Inc.*, 272 F.3d at 911 ("An insured incurs no loss within the meaning of the insurance contract by being compelled to return property that it had stolen, even if a more polite word than 'stolen' is used to characterize the claim for the property's return."); *Nortex Oil & Gas Corp. v. Harbor Ins. Co.*, 456 S.W.2d 489, 493-94 (Tex. Civ. App. 1970) (An insured "does not sustain a covered loss by restoring to its rightful owners that which the insured, having no right thereto, has inadvertently acquired. (The insured's innocence and good faith are immaterial.)"); *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1268-69 (1992) ("When the law requires a wrongdoer to disgorge money . . . , to permit the wrongdoer to transfer the cost of disgorgement to an insurer would eliminate the incentive for obeying the law. Otherwise, the wrongdoer would retain the proceeds of his illegal acts, merely shifting his loss to an insurer.").

In enforcing the long-standing public policy against insuring disgorgement, New York courts make no exception for cases that involve a settlement with a disclaimer of liability. Rather, the courts have held that a claim for disgorgement does not trigger coverage because disgorgement is, as a fundamental matter, uninsurable.[70] For example, in *Reliance,* the New York Supreme Court, Appellate Division, held that a settlement was uninsurable because it was based on a theory of unjust enrichment.[71] *Reliance* involved the settlement of consolidated shareholder class action and derivative suits. The insured, Reliance Group Holdings, agreed to return a portion of the profits that it earned when the Disney Corporation bought back its stock from Reliance at an inflated price after a failed hostile takeover attempt. The Appellate Division did not allow the insured to obtain coverage for disgorgement based upon the fact that the parties settled the matter.[72] Instead, the Appellate Division ruled that the settlement "was essentially equivalent to a determination, reached through agreement of the parties, that Reliance had been unjustly enriched in the amount of" the settlement.[73]

Not one of the cases relied upon by the Superior Court held that a final adjudication on liability was a prerequisite to applying New York's public policy

[70] *Shapiro v. OneBeacon Ins. Co.,* 824 N.Y.S.2d 46, 47 (N.Y. App. Div. 2006).
[71] *Reliance,* 594 N.Y.S.2d at 26.
[72] *Id.* at 24-25.
[73] *Id.*

against insuring disgorgement. Indeed, the courts in both *Credit Suisse* and *Millennium* applied the public policy and held that where, as here, the policy denotes judgments, settlements and defense costs as components of "Loss," and "Loss," by definition, shall not include matters uninsurable under governing law, no amount incurred in a disgorgement claim, even if settled with a denial of wrongdoing, qualifies as "Loss."[74]

Credit Suisse involved a settlement of allegations by the SEC that customers of Credit Suisse First Boston Corporation ("CSFB") paid CSFB excessive brokerage commissions on securities trades to satisfy CSFB's demands for a share of customer profits associated with unrelated trades on initial public offerings.[75] The consent judgment indicated that, while CSFB was "not admitting to any wrongdoing," CSFB would pay $70 million "representing disgorgement of monies obtained by CSFB as a result of conduct alleged in the complaint."[76] The trial court found the consent judgment "links the disgorgement payment to the improper activity that the SEC complaint alleged."[77] The Appellate Division agreed that

[74] *Vigilant Ins. Co. v. Credit Suisse First Bos. Corp.*, 2003 N.Y. Misc. LEXIS 1984, *9-10 (N.Y. Sup. Ct. 2003, N.Y. Cnty. Jul. 8, 2003) (TABLE) ("*Credit Suisse I*"); *Credit Suisse II*, 782 N.Y.S.2d at 20; *Millennium*, 882 N.Y.S.2d at 852-3.
[75] *Credit Suisse I*, 2003 N.Y. Misc. LEXIS 1984, at *9-10.
[76] *Id.* at *6, *11.
[77] *Id.* at *12.

CFSB was not entitled to coverage for "disgorgement of certain funds allegedly improperly obtained," and further, that no coverage was owed for defense costs under a policy that, like the Illinois National Policy, treated defense costs as a component of "Loss."[78]

In *Millennium*, the policyholder, Millennium Partners, L.P. ("Millennium"), did not even claim that it was entitled to coverage for the $148 million it paid for disgorgement as a result of investigations by the New York State Attorney General and the SEC.[79] Instead, in seeking coverage for only its defense, Millennium argued that because it consented to relief without admitting or denying agency findings, a triable issue of fact existed as to whether the amount it disgorged in settlement represented improperly acquired funds. Citing *Reliance*, the *Millennium* court found that, although the settlement did not state it was for disgorgement of "improperly obtained funds," disgorgement and profit generated by the allegedly improper activities were "conclusively linked," and that the settlement was "essentially equivalent to a determination, reached through agreement of the parties."[80] In addition, because "disgorgement of 'ill-gotten funds is not insurable under the law'" and "disgorgement of improperly acquired funds is not a covered

[78] *Credit Suisse II*, 782 N.Y.S.2d at 20-21.
[79] *Millennium*, 882 N.Y.S.2d at 852.
[80] *Id.* at 854 (quoting *Reliance*, 594 N.Y.S.2d at 20).

loss," the court held that defense costs incurred on a claim for disgorgement are also not covered loss.[81]

More recently, in the *J.P. Morgan* litigation, the Appellate Division cited the "stronger interest in enforcing public policy" in holding that a settlement for disgorgement would be uninsurable despite being accompanied by a denial of liability and lacking a final adjudication.[82] The court held that, even where the insured's liability has not been adjudicated, the insurer still may pursue coverage defenses based on public policy, including "the affirmative defense invoking the public policy against permitting insurance coverage for disgorgement."[83] Thus, the court reasoned an insurer may rely on a settlement agreement for the purpose of establishing whether a payment constituted disgorgement, even if the insured did not admit guilt.[84]

In sum, there is no support under New York law for TIAA-CREF to avoid the public policy against insuring disgorgement or to satisfy the "Loss" definition by voluntarily disgorging its customers' investment gains with a rote denial of any

[81] *Id*. at 853-54 (quoting *Credit Suisse II*, 782 N.Y.S.2d at 19).
[82] *J.P. Morgan II*, 2 N.Y.S.3d at 420-23. The SEC Order "expressly provided that Bear Stearns did not admit guilt, and reserved the right to profess its innocence" in other proceedings and the agreement "was expressly crafted to preserve [Bear Stearns'] ability to contest its liability" against a different person or entity. *Id.* at 420-421.
[83] *Id.* at 423.
[84] *Id.* (emphasis added).

[redacted]

liability. New York's public policy against insuring disgorgement does not include a final adjudication requirement, and it was error for the Superior Court to have interpreted New York law to include one. Indeed, a ruling that allows TIAA-CREF to create insurance coverage for disgorgement by voluntarily disgorging ignores the fundamental premise of New York's public policy to "deter the improper conduct" – the initial act of unjust enrichment – and should be rejected.

The undisputed evidence establishes that TIAA-CREF settled disgorgement claims – claims which challenged TIAA-CREF's withholding of the appreciated value of customer accounts from the rightful owners – by disgorging those gains. Because a settlement is viewed as "essentially equivalent to a determination, reached through agreement of the parties," whether a settlement "represents" the return of improperly acquired funds does not require a final adjudication of liability, but an examination of the nature of the claim being settled. This inquiry, which the Superior Court disregarded, is addressed immediately below.

3. TIAA-CREF Settled Claims for Disgorgement of Gains Wrongfully Withheld By TIAA-CREF.

The Superior Court erred in ruling there were "no conclusive links between the settlements in the Underlying Actions and wrongdoing by TIAA-CREF that would render the settlement agreements uninsurable disgorgement" simply because

TIAA-CREF settled while denying any liability.[85] Not only did the Superior Court misinterpret New York law (as addressed *supra* at Section I.C.2), the Superior Court ignored: (1) the evidence that established, without contradiction, that the only claims pursued in the Underlying Actions were for disgorgement of gains wrongfully withheld from investors by TIAA-CREF,[86] and (2) the TIAA-CREF admissions and court rulings that established conclusive links between TIAA-CREF's misconduct and the payment of monies.

There is no dispute that the gains in question accrued in investors' accounts during processing delays and that those gains were withheld from investors by TIAA-CREF.[87] As TIAA-CREF's corporate designee testified:

Q. [redacted]

A. [redacted]

Q. [redacted]

A. [redacted]

Q. [redacted]

[85] Ex. A at 27.

[86] The insured, not the insurer, has the initial burden of proving that the payments are for "actual or alleged Wrongful Acts."

[87] JA2416-18 at Section I.A; JA3509 at 157:7-19; JA3520 at 168:13-24; JA3524-25 at 172:4-173:10; JA3528-29 at 176:21-177:8; JA3530-31 at 178:22-179:3.

[redacted]

A. [redacted]

* * *

Q. [redacted]

A. [redacted]

Q. [redacted]

A. [redacted]

Q. [redacted]

A. [redacted]

[redacted]

[88] JA3509 at 157:7-19; JA3528-29 at 176:21-177:8.

[89] JA2416-18 at Section I.A; JA3411 at 59:6-16; JA3412 at 60:19-24; JA3921 at 40:10-23.

[90] JA1174-75 (Supplemental Response to Interrogatory No. 2); JA2145-46 (Response to Interrogatory No. 2, Response to Interrogatory No. 3); JA3609-10 at 46:24-47:11.

[redacted]

[redacted]

Further, the Underlying Actions proceeded on disgorgement theories alone. The *Rink* Action alleged that, in refusing to pay redeeming investors the full appreciated value of their accounts, TIAA-CREF "kept and diverted funds belonging to Plaintiff and the Class to its own purpose and used and retained for its own benefit monies which belong to the Plaintiff and the Class."[93] TIAA-CREF admitted that the *Rink* Action sought only "disgorgement of improper profits, a restitutionary remedy,"[94] and that all counts were "duplicative" and "recast versions" of a claim for "the unlawful withholding of the appreciated value" of investor accounts.[95]

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[91] JA3655-57 at 92:15-93:12, 93:22-94:17; JA4048 (Redemption of Shares: Rising Market).

[92] *See, e.g.*, JA2163-64; JA2157 (Response to Interrogatory No. 29); JA4523-24; JA4525-26. Gains associated with various types of withdrawals from CREF accounts were memorialized in documents, including those entitled: TFE Gains and Losses – Benefits and Transfers CREF Funds 2003 – May 9, 2013, JA4523-24, and the gains associated with withdrawals in TIAA real estate fund were memorialized in documents entitled: TFE Gains and Losses – Benefits and Transfers RESA Funds 2003 – May 9, 2013, JA4525-26. *See also* JA3928 at 47:9-24, JA3934-35 at 53:3-54:4, JA3948 at 67:4-15.

[93] JA2234 at ¶ 32.

[94] JA2864.

[95] JA4192-93.

[redacted]

Though TIAA-CREF argued in various motions that it was legally entitled to keep the gains,[96] the *Rink* court denied those motions, and the matter proceeded on theories of unjust enrichment and disgorgement.[97] The *Rink* court certified the class as persons "who were denied the appreciated value upon distribution of their accounts after an unreasonable delay"[98] and framed the question as whether TIAA-CREF was "unjustly enriched" to the extent it "may have benefited by retaining the alleged increase in the accounts after the 'good order' date."[99] TIAA-CREF's counsel testified that, by April 2012, "it was time to seriously discuss settlement" given the unsuccessful motions, the approaching jury trial, and the fact that a notice was about to go to the class that was "detrimental to the client."[100]

After five years of unsuccessfully attempting to avoid liability in *Rink*, and just months before trial, [redacted] – to all class members in a shortened class period who submitted claim forms.[101] As the courts in *Rink* recognized, while only a portion of the eligible [redacted] settlement class

[96] JA2862-2867; JA4174-98.
[97] *See* JA2870-74; JA4200-02 (proposed order marked by court as "Considered and Denied" at JA4201).
[98] JA2130.
[99] JA2129.
[100] JA5665 at 135:20-22; JA5670-71 at 140:11-141:8.
[101] JA2274 at ¶¶ 3-4; JA5672-73 at 142:14-143:11.

[redacted]

members submitted claims, which amounted to over [redacted] in settlement payments, the total gains that had been withheld by TIAA-CREF, during the shortened settlement class period, with interest, was [redacted].[102]

The *Bauer-Ramazani* Action similarly sought disgorgement based on TIAA-CREF's "wrongful use of customer funds,"[103] alleging also that:

> . . . TIAA-CREF had a widespread practice of **investing or keeping funds** in customer accounts for periods up to four weeks or more after the good order date. **Investment earnings on such funds were not paid to the account holder but were used by TIAA-CREF for its own purposes**, including to satisfy its legal obligations to other customers. Amounts not used to satisfy such obligations were used to pay TIAA-CREF's administrative expenses, including salaries and investment advisory fees unrelated to the redeeming customer's account.[104]

As it had in *Rink*, TIAA-CREF admitted, on the record, that disgorgement of investment gains was the only form of relief being sought in *Bauer-Ramazani*.[105] The court agreed with TIAA-CREF that "disgorgement of any investment profits made through the use of" class funds was equitable and the only remedy being pursued, and, thus, TIAA-CREF prevailed on its argument that the class was not entitled to a jury trial.[106]

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[102] JA2265-66 at *2; JA2274 at ¶ 4.
[103] JA1551-52 at ¶ 1.
[104] JA1557 at ¶ 27 (emphasis added).
[105] JA2312-13; JA2318-19; JA1993-94; JA2016 at n. 14.
[106] JA2326; JA2342-44.

[redacted]

In May 2013, the court certified a class of more than [redacted] whose funds were not distributed within seven days and "were denied the investment gains."[107] TIAA-CREF'S defense counsel in *Bauer-Ramazani* asserted that, with that ruling, the *Bauer-Ramazani* Plaintiffs "had the case they wanted, which was a huge nationwide Class action."[108] In November 2013, after the *Bauer-Ramazani* court issued its rulings on TIAA-CREF's motion for summary judgment, the surviving claim was that TIAA-CREF breached its fiduciary duty of loyalty "by investing or keeping invested retirement funds of class members 'for purposes other than their benefit.'"[109] Again, as to the relief being sought on that claim, the court stated: "They seek disgorgement of any investment profits."[110] The parties agreed to settle, a month before the January 21, 2014 trial date, for payment equating to [redacted] of the [redacted] in gains that TIAA-CREF had withheld from class members.[111]

[107] JA2420 at Section I.C.1, JA2418-19.
[108] JA5357 at 52:12-19.
[109] JA2332 and JA2334 at Subsection 1.
[110] JA2332.
[111] JA2477 at ¶ 61; JA2445; JA2453; JA3994 at 113:17-23; JA2345-37; JA2490-91 at § E; JA5356-57 at 51:4-52:19; JA5359-60 at 54:6-55:23; JA5361-64 at 56:15-59:23.

[redacted]

Though the *Cummings* Action remains pending,[112] it similarly involved a demand for return of gains wrongfully withheld by TIAA-CREF and should not be found to involve "Loss." The *Cummings* complaint asserted, for example, that:

> This is a class action for equitable and legal relief, based on TIAA-CREF's **breach of the fiduciary duty of care and loyalty and its dealing with ERISA plan assets for its own account**. Defendants failed to process customer requests to pay out funds in a timely fashion, **then kept the investment gains the funds earned during the delay. Plaintiffs seek return of the investment gains**, together with prejudgment interest and attorney's fees.[113]

The proposed class includes persons whose requests were not transmitted or settled within time limits established by the SEC and industry practice and "whose funds generated investment gains during the period of delay."[114] [redacted]

As discussed, after unsuccessful efforts to avoid liability and class certification, TIAA-CREF settled each action by agreeing to disgorge gains that

[112] While there is no confirmation that this settlement will include the blanket denial of liability that the Superior Court believes is controlling, the Superior Court applied its summary judgment ruling in favor of TIAA-CREF to *Cummings*.
[113] JA2513 at ¶ 1 (emphasis added).
[114] JA2521 at ¶ 36.
[115] JA2530-41.

[redacted]

had actually been withheld by TIAA-CREF from redeeming investors.[116] In addition to the aforementioned rulings on motion practice and class certification, the courts in *Rink* ruled the retention was improper when they awarded attorneys' fees to class counsel, based upon a percentage of the potential settlement fund, "under the common fund doctrine, as codified in KRS 412.070."[117] That statutory provision applied only if the action were for "the recovery of money or property which has been illegally or improperly collected, withheld or converted," and, thus, the fee award necessarily *presumed* that TIAA-CREF illegally or improperly collected, withheld or converted the investment gains.[118]

In affirming the fee award, the Kentucky Court of Appeals recognized that the shares had appreciated and that TIAA-CREF had kept and diverted the gains to cover other customer losses that it had caused:

> Instead of accepting CREF's compensation, Rink filed a class action complaint against CREF, alleging that it breached its fiduciary duties and contractual obligations by retaining the amount his and other class members' accounts appreciated during distribution delays exceeding the seven day limit set forth in CREF's form contract. Discovery eventually revealed that CREF used gains from appreciated accounts to offset losses from

[116] JA3520 at 168:13-24; JA3524-25 at 172:4-173:10; JA3528-29 at 176:21-177:8; JA3530-31 at 178:22-179:3; JA2445; JA2450; JA2274; JA2264-65 at *1.
[117] JA2275 at ¶ 6; JA2264-65 at *1; JA2266 at *3.
[118] *See* Ky. Rev. Stat. Ann. § 412.070; *Reid v. Allinder*, 504 S.W.2d 706, 707 (Ky. 1974) (recognizing statute applies *only* if funds are improperly withheld).

> other participants' accounts that depreciated during the delays, which during the three-year duration of CREF's computer glitch was substantial.[119]

The record evidence, thus, established, as a matter of law, that the matters settled by TIAA-CREF were for disgorgement of customer gains that it had no right to retain. Further, TIAA-CREF admitted the truth of the underlying allegations that the money had remained in the market, the investment accounts had increased in value, and TIAA-CREF had paid the gains to itself instead of paying the gains to the rightful owners of the investment accounts. There was, therefore, a conclusive link between TIAA-CREF's wrongdoing and the disgorgement of funds in settlement.

New York law is clear that this risk – of having to return or disgorge funds – ***cannot be insured***.[120] As a result, the Superior Court erred in finding that TIAA-CREF established "Loss" in connection with its defense and settlement of the Underlying Actions. The Superior Court's ruling on summary judgment should be reversed, and summary judgment should be granted in favor of Appellants.

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[119] JA2264-65 at *1; JA2266 at *3.

[120] *See Reliance*, 594 N.Y.S.2d at 24 ("It is well established that one may not insure against the risk of being ordered to return money or property that has been wrongfully acquired.") (citation omitted); *see also Credit Suisse II*, 782 N.Y.S.2d at 20 ("The risk of being directed to return improperly acquired funds is not insurable.").

4. At a Minimum, the Matter Should Be Reversed and Remanded to Address the Factual Record.

Because the Superior Court absolved TIAA-CREF from satisfying its initial burden to establish – as a preliminary matter – coverage under the policy's insuring agreement, the matter should, at the very least, be reversed and remanded to address the factual record. The Superior Court created a presumption of coverage for any insured that settles a disgorgement claim when there is no such presumption under the governing law or policy language. Instead of reviewing the body of evidence, the Superior Court granted TIAA-CREF's motion based entirely upon the fact that TIAA-CREF summarily denied liability in the settlement agreements.

As a result, the Superior Court never addressed why the underlying pleadings, court rulings, and TIAA-CREF's admissions – addressed in subsection 3 above – did not establish that the matters settled were uninsurable disgorgement claims. At a minimum, the evidence Appellants presented created a question of fact to counter TIAA-CREF's bare assertion that there was no uninsurable disgorgement simply because the underlying settlement agreements incorporated the type of rote denial of liability that is found in most settlement agreements. If the record indicates that there is a material fact in dispute, summary judgment

should not have been granted.[121] Thus, the Superior Court should have, at the very least, denied all summary judgment motions, allowed the case to proceed to trial and left it for the jury to decide whether the settlements were for uninsurable disgorgement. At a minimum, therefore, this issue should be reversed and remanded for a jury trial.

[121] *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).

II. THE SUPERIOR COURT ERRED IN FINDING THAT TIAA-CREF ESTABLISHED "LOSS" OF AN INSURED WHEN TIAA-CREF CHARGED SETTLEMENTS AND LITIGATION COSTS TO INVESTORS.

A. QUESTION PRESENTED

Can TIAA-CREF establish "Loss" of an Insured when it passed on the costs of settlement and litigation to customers?

This issue was raised in Appellants' briefs and at oral argument.[122]

B. STANDARD AND SCOPE OF REVIEW

The scope and standard of review is set forth in Section IB, *supra*.

C. MERITS OF ARGUMENT

Where account holders sought to sell their shares in the Funds, the TIAA-CREF broker-dealer was responsible for sending the order to the Funds on the day it received the request in good order ("the Good Order Date") and paying the investor the market value of the account.[123] TIAA-CREF Individual & Institutional Services, LLC ("Services"), a for-profit entity, and in later years

[122] *See, e.g.*, JA1840; JA2890; JA4887-89 at Section I.E; JA5049-50 at 38:6-39:17; JA5055-56 at 44:19-45:10; JA5082-83 at 71:6-72:19. The Superior Court issued a Joint Stipulated Order as to Issues Involving "Loss," Transaction ID 59776359, ruling that all issues concerning "Loss of an Insured" under the Policies are "preserved for purposes of any appeal, remand or retrial." JA5245-50.

[123] JA2118-19 at 33:22-34:2; DA0069-70 at 53:6-54:12; JA3779-80 at 61:22-62:9; JA3602 at 39:2-11; JA3613 at 50:10-16; JA3425-26 at 73:7-74:21.

TIAA, acted as broker-dealer for account holders and billed the Funds for these services.[124]

Even though the Underlying Actions established that the for-profit TIAA-CREF broker-dealer failed to process transactions on the Good Order Date, [redacted]

[124] DA0071-74 at 115:14-118:19; JA1955-56 at ¶¶ 13-16.
[125] DA0022.
[126] JA1164-65 (Response to Interrogatory No. 4); JA1168 at Exhibit A; JA3990-91 at 109:24-110:7, JA3992-93 at 111:10-112:4.
[127] JA1166-67 (Response to Interrogatory No. 5); JA1168 at Exhibit A; JA3990-91 at 109:24-110:7; JA3995-96 at 114:8-115:22.
[128] JA11667 (Response to Interrogatory No. 4, Response to Interrogatory No. 5) (noting that, in the ordinary course, expenses allocated to the Funds are borne by the account holders); JA1168 at Exhibit A; JA1176-77 (Amended Response to Interrogatory No. 8).

[redacted]

TIAA-CREF is not entitled to recover amounts where it already has been indemnified by others. TIAA-CREF chose to obtain indemnification from its customers inasmuch as customers' losses and operational expenses were reduced as a result of the improperly withheld investment gains. TIAA-CREF itself is, therefore, not out-of-pocket for these amounts and has sustained no "Loss." There can be no "Loss" of an Insured, as required under the Policies, where, as here, the [redacted] The Superior Court's ruling on summary judgment should be reversed, and summary judgment should be granted in favor of Appellants on the grounds that there was no "Loss" of an Insured, to the extent that TIAA-CREF was indemnified by others for the costs of settlement and litigation.

[129] *Pan P. Retail Properties, Inc. v. Gulf Ins. Co.*, 471 F.3d 961, 974 (9th Cir. 2006) (An insured does not have the right to recover insurance after having been compensated by other parties.); *St. Paul Fire & Marine Ins. Co. v. Petroplex Energy, Inc.*, 474 S.W.3d 454, 464 (Tex. App. 2015) (Feb. 12, 2016) (In examining whether the insured paid for expenses so as to be said to suffer an insured loss, the court noted that, while the insured did not initially pay for the expenses in question, the insured ultimately would be charged with those expenses when there was a true-up of accounts).

[redacted]

III. CONCLUSION

The Policies only pay "Loss" of an Insured and "Loss" does not include claims that are uninsurable as a matter of law. TIAA-CREF settled claims for the disgorgement of investment gains that TIAA-CREF had transferred to itself, instead of to the rightful owners – the investors whose accounts generated those gains. On public policy grounds of deterrence and unjust enrichment, such claims are uninsurable as a matter of law. [redacted] Therefore, as a matter of law, there is no "Loss" of an Insured under the Policies and no coverage is owed.

[redacted]