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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 AND ARCH INSURANCE COMPANY REGARDING THE REASONABLENESS OF TIAA-CREF'S DEFENSE COSTS

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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 a tower of claims-made professional liability policies issued by Appellants Illinois National Insurance

Company ("Illinois National"), Arch Insurance Company ("Arch"), and certain other Defendants. The primary policy issued by Illinois National ("the Illinois National Policy"), to which Arch's and other Defendants' excess policies follow form, applies only to "Loss" of an Insured, which is defined to include "Defense Costs." The Illinois National Policy defines "Defense Costs" in pertinent part as the "reasonable and necessary fees, costs and expenses consented to by the Insurer . . . resulting solely from the investigation, adjustment, defense and appeal of any Claim against an Insured, but excluding salaries of an Insured."[1] At trial, TIAA-CREF had the burden to prove, by a preponderance of evidence, that the defense costs it sought to recover were both reasonable and necessary.[2] TIAA-CREF never satisfied this burden as to all of the defense costs incurred for the *Bauer-Ramazani* Action.

After the Superior Court's ruling on the parties' summary judgment motions, the case proceeded to trial, December 5-12, 2016, on remaining coverage issues relating to two of the Underlying Actions, the *Rink* and *Bauer-Ramazani* Actions,

[1] JA2541.08 at § II.3. 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 Illinois National and Arch cite documents contained in these appendices by the bates-stamped pages.

[2] *Curtis v. Nutmeg Ins. Co.*, 681 N.Y.S.2d 620, 620-621 (N.Y. App. Div. 1998).

including whether the costs incurred by TIAA-CREF in connection with the defense of those two actions were "reasonable and necessary." TIAA-CREF did not present competent evidence sufficient to satisfy its burden to prove, by a preponderance of the evidence, that all of the defense costs incurred in connection with the *Bauer-Ramazani* Action were reasonable and necessary, so as to satisfy the definition of "Defense Costs" and constitute "Loss" under the Illinois National Policy.

Accordingly, on December 8, 2016, at the close of TIAA-CREF's case in chief, Defendants Illinois National and Zurich American Insurance Company ("Zurich") moved for Judgment as a Matter of Law on the grounds that TIAA-CREF had not satisfied its burden to establish that the costs it sought to recover in connection with the defense of the *Bauer-Ramazani* Action were reasonable and necessary.[3] On the same day, Arch filed its own Motion for Judgment as a Matter of Law.[4] The court took the motions under advisement.[5] The jury returned its verdict on December 12, 2016.[6] The jury verdict found that all the defense costs incurred, in the amount of $1,790,796.77 for the *Rink* Action and in the amount of

[3] DA0113-42.
[4] DA0143-57.
[5] Ex. A, Part I at pgs. 202-215; Ex. A, Part II at pgs. 1-32.
[6] Ex. B.

$7,519,822.91 for the *Bauer-Ramazani* Action, were reasonable and necessary.[7] The jury found in favor of Zurich on its waiver and consent defenses.

On December 22, 2016, Illinois National filed a Renewed Motion for Judgment as a Matter of Law, and Notwithstanding the Verdict, on the grounds that TIAA-CREF did not present evidence that would satisfy its burden to establish that all the defense costs for the *Bauer-Ramazani* Action were reasonable and necessary. On February 17, 2017, Arch filed its own Renewed Motion for Judgment as a Matter of Law, or in the Alternative, Motion for a New Trial, which expressly joined in and adopted the arguments of Illinois National's Renewed Motion.[8] Illinois National sought a reduction of the defense costs incurred for the *Bauer-Ramazani* Action to comport with the evidence presented.[9]

As set forth in a June 29, 2017 Opinion, the Superior Court denied the Renewed Motions for Judgment as a Matter of Law.[10] 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 the *Rink* and *Bauer-Ramazani* Actions were resolved.[11] After entry of judgment on the

[7] Ex. B.
[8] DA0179-03.
[9] DA0158-78
[10] Ex. C.
[11] Ex. D.

docket on October 23, 2017, Illinois National and Arch each filed a timely Notice of Appeal on November 20, 2017. Illinois National and Arch appeal from the Superior Court's denial of their original and renewed Motion for Judgment as a Matter of Law with respect to defense costs incurred by TIAA-CREF for the *Bauer-Ramazani* Action. Illinois National and Arch are not challenging in this appeal the jury verdict on the reasonableness and necessity of defense costs incurred by TIAA-CREF for the *Rink* Action.

Illinois National, Arch and ACE Insurance Company are separately appealing the Superior Court's summary judgment rulings on "Loss" of an Insured. For reasons discussed in that appeal, this Court may rule, as a matter of law, that there is no coverage for "Defense Costs," which is a component of "Loss." Thus, the Court's ruling on "Loss" may moot or otherwise affect this appeal as to "Defense Costs."

There was no competent evidence to support the jury verdict awarding the full $7,519,822.91 being sought for defense of the *Bauer-Ramazani* Action. It is undisputed that at trial TIAA-CREF presented no witness who had reviewed all the *Bauer-Ramazani* bills for reasonableness or necessity. TIAA-CREF proffered an expert on this issue, but even he acknowledged that, in contrast with his prior practice, he had neither reviewed all the billing entries nor made any effort to

reduce one cent of the bills to adjust for unreasonable billing practices or rates. TIAA-CREF's expert ignored the usual and customary rates charged in the locality, and TIAA-CREF sought recovery for fees billed at much higher rates. These failures of proof should have precluded a full award for the *Bauer-Ramazani* defense costs, and yet the Superior Court upheld the jury's verdict and did not adjust the bills to comport with the evidence presented.

Given that TIAA-CREF never satisfied its burden to prove, by a preponderance of the evidence, that all of the defense costs incurred in connection with the *Bauer-Ramazani* Action were reasonable and necessary, the Superior Court should have granted judgment in favor of the moving Defendants as a matter of law. The judgment as to defense costs incurred for that action should be overturned as a matter of law. Alternatively, based upon the evidence presented, the matter either should be remanded for a new trial, or with instructions to reduce the judgment to reflect the rates customarily charged in the locality and adjustments for excessive billing practices and missing entries.

SUMMARY OF ARGUMENT

1. In order to satisfy the definition of "Defense Costs" under the Illinois National Policy, costs incurred by an Insured to defend a covered claim must be both "reasonable and necessary." TIAA-CREF did not present a legally sufficient evidentiary basis to satisfy its burden to prove, by a preponderance of the evidence, that all of the defense costs incurred for the *Bauer-Ramazani* Action were reasonable and necessary, so as to satisfy the definition of "Defense Costs." TIAA-CREF presented no witness at trial that was responsible for retaining counsel, negotiating the rates in question, or reviewing the defense bills for reasonableness and necessity, and even TIAA-CREF's expert – who made no adjustments whatsoever – agreed that had he made the effort to review all the bills, he would have found reductions for what he agreed were unreasonable billing practices. TIAA-CREF's expert never considered, and TIAA-CREF never proffered, the requisite evidence on the rates customarily charged in the locality for similar legal services, while Defendants Illinois National, Arch and Zurich established that TIAA-CREF sought to recover fees billed by defense counsel in the *Bauer-Ramazani* Action at significantly higher rates than those customarily charged in the locality. Accordingly, there was no

evidence legally sufficient to support the verdict allowing TIAA-CREF to recover all of the defense costs incurred for the *Bauer-Ramazani* Action at excessive rates, the Superior Court erred in failing to overturn and/or adjust the verdict for fees incurred in the *Bauer-Ramazani* Action to comport with the evidence presented.

STATEMENT OF FACTS

Illinois National issued to Teachers Insurance and Annuity Association of America Professional Liability Policy No. [redacted] (the "Illinois National Policy"), effective for the April 1, 2007 to April 1, 2008 policy period.[12] The Illinois National Policy is subject to a [redacted] and a [redacted] Aggregate Limit of Liability (both inclusive of defense costs).[13] 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, in pertinent part, to mean "judgments and settlements and any Defense Costs."[14] "Defense Costs" is defined as:

> "Defense Costs" shall mean reasonable and necessary fees, costs and expenses consented to by the Insurer (including premiums for any appeal bond, attachment bond or similar bond, but without any obligation to apply for or furnish any such bond) resulting solely from the investigation, adjustment, defense and appeal of any Claim against an Insured, but excluding salaries of an Insured.[15]

[12] JA2541.01-41.58.
[13] JA1887-88 at ¶ 37.
[14] JA2541.08 at § II.5.
[15] *Id.* at § II.3

[redacted]

Arch issued an excess policy bearing policy number [redacted] providing an aggregate limit of liability of [redacted] in excess of [redacted] in underlying insurance.[16] Except as otherwise provided therein, Arch's policy applies in conformance with the terms and conditions of the Illinois National Policy.[17]

TIAA-CREF sought to recover $7,519,822.91 as defense costs in connection with the *Bauer-Ramazani* Action, for work performed by different law firms, including [redacted], a Vermont firm,[18] and [redacted] Washington, D.C. office ("[redacted]"). Out-of-state counsel billed at much higher hourly rates than local counsel, including rates of [redacted] for inexperienced attorneys with three years or less experience and partner rates of [redacted] and up to and, in some cases, exceeding [redacted] an hour.[19]

TIAA-CREF did not bring to trial as a testifying witness any individual at TIAA-CREF who was responsible for the review of bills or who was involved with

[16] JA0505-24.
[17] *Id.* at § I.C: JA0511.
[18] Two other firms were involved: a firm from Vermont who replaced [redacted] as local counsel and another out-of-state firm. JA5395 at 90:6-9; JA5850 at 123:17-126:10.
[19] JA5841-42 at 90:8-91:6; JA5860-61 at 164:22-167:17; JA6183-84 at 44:6-45:9; JA6188 at 49:3-18.

[redacted]

the retention of counsel. Bills incurred in connection with the Underlying Actions were submitted to TIAA's in-house legal department[20] and Carranza Pryor, in-house counsel for TIAA-CREF, was responsible for retaining outside defense counsel and supervising the defense of the Underlying Actions.[21] TIAA-CREF did not bring as a testifying witness Mr. Pryor, or any member of TIAA's in-house legal department. The TIAA-CREF personnel who did testify at trial, TIAA-CREF's Corporate Controller and its former Director of Corporate Risk Insurance, admitted that they were not involved in the retention of counsel or the review of bills for the Underlying Actions.[22]

With respect to the *Bauer-Ramazani* Action, TIAA-CREF did not produce as a testifying witness any of the individuals from any of the defense firms who were responsible for reviewing and approving the bills for reasonableness before submitting such bills to TIAA-CREF for payment, or any of the individual lawyers who were hired by TIAA-CREF to defend *Bauer-Ramazani* and who set or negotiated the hourly rates.[23] While TIAA-CREF did produce as a testifying witness [redacted], a former [redacted] lawyer who had worked on

[20] JA5653-54 at 123:20-124:2; JA5803 at 163:7-11.
[21] JA5650 at 120:9-21; JA5803 at 162:10-164:3.
[22] JA5633-34 at 103:6-104:6; JA5653-54 at 123:6-124:6; JA5765 at 12:1-23; JA5803 at 162:17-164:1.
[23] JA5389-91 at 84:22-85:15, 86:1-20.

[redacted]

the *Bauer-Ramazani* Action,[24] [redacted] had no involvement in the case until more than three years after it was filed.[25] [redacted], accordingly, had no first-hand knowledge regarding the retention.[26]

Even after [redacted] became involved in November 2012, [redacted] never acted as the billing attorney, never reviewed the [redacted] bills before they were submitted for payment to TIAA, and never had any responsibility for reviewing bills to ensure they complied with reasonable billing standards.[27] [redacted] also testified that she had never reviewed the bills of TIAA-CREF's Vermont local counsel or the other large firm hired to represent TIAA-CREF in the *Bauer-Ramazani* Action, whose fees TIAA-CREF also sought to recover.[28] [redacted] was not proffered as an expert or to provide any opinion on whether any defense bills were reasonable and necessary.[29]

Both TIAA-CREF and Zurich retained experts to opine on the reasonableness and necessity of defense costs. Defendants Illinois National and

[24] TIAA-CREF did not bring to testify any other [redacted] lawyer or any lawyer from the other firms retained as counsel for TIAA-CREF in the *Bauer-Ramazani* Action.
[25] JA5331 at 26:6-12; JA5386 at 81:19-82:15; JA5416 at 111:9-22.
[26] JA5407 at 102:5-12; JA5408-09 at 103:19-104:11.
[27] JA5386-87 at 81:19-82:11; JA5391-92 at 86:21-87:7; JA5402-03 at 97:22-98:3; JA5407 at 102:13-22.
[28] JA5394-95 at 89:10-90:11; JA5401-02 at 96:13-97:1; JA5402 at 97:7-8.
[29] JA5394 at 89:6-9; JA5404 at 99:6-18; JA5427 at 122:3-14.

[redacted]

Arch designated Zurich's expert, Brand Cooper, in the Pretrial Stipulation and Order and relied upon his testimony and opinions at trial. [30]

TIAA-CREF's expert, Leif Clark, was proffered as an expert based upon his experience in reviewing fee applications as a former bankruptcy judge; however, he admitted that, in contrast to his prior practice as a bankruptcy judge, he had not reviewed every entry for reasonableness and necessity.[31] TIAA-CREF's expert also admitted that, had he followed his normal process, he would have taken deductions for entries that lacked detail or that billed attorney time for clerical work.[32] As to the *Bauer-Ramazani* Action, TIAA-CREF's expert also admitted that he had not considered the capabilities of, or the fees customarily charged by, firms in the locality where the action was pending, in federal district court in Vermont.[33] Despite those admissions, TIAA-CREF's expert opined that all the services and rates charged by defense counsel in both actions were reasonable and that he saw no reason to reduce any of the bills.[34]

[30] DA0096.
[31] JA5853 at 135:1-136:18; JA5853 at 137:4-13.
[32] JA5860-61 at 165:18-167:17; JA5862 at 171:10-172:22; JA5862 at 174:11-20.
[33] JA5861-62 at 167:4-171:9.
[34] JA5843 at 97:6-18; JA5851 at 127:12-19.

As to the *Bauer-Ramazani* Action, Defendants' expert, Brand Cooper, testified that in the locality,[35] the usual and customary hourly rate for complex litigation work ranged from $250-$350 for partners with 20 years or more of experience and $160-$180 for associates.[36] Nevertheless, in making his adjustments for hourly rates, Defendants' expert accepted as reasonable, and applied, the hourly rates of [redacted] for partners and [redacted] for associates charged to TIAA-CREF by its local Vermont counsel, [redacted].[37] Mr. Cooper opined that, after making those reductions to the rates charged by the two other defense firms and taking deductions for unreasonable billing practices, the total reasonable defense costs for the *Bauer-Ramazani* Action were $2,582,000.[38]

As to the *Rink* Action, there was testimony by Defendants' expert that the hourly rates charged TIAA-CREF by defense counsel, [redacted] for partners and [redacted] for associates, were reasonable for the locality.[39] In addition, TIAA-CREF did proffer at trial its defense counsel in that action, [redacted], who had been responsible for reviewing bills and communicating with TIAA-CREF's in-

[35] JA6178 at 39:10-16.
[36] JA6178-81 at 39:20-42:11; JA6185-86 at 46:16-47:13; DA0058 at ¶ 8.
[37] JA6189 at 50:2-18.
[38] JA6202 at 63:3- 63:13.
[39] JA6161 at 22:7-23:6.

[redacted]

house counsel regarding those bills.[40] Accordingly, Illinois National and Arch are not challenging in this appeal the sufficiency of the evidence presented on the reasonableness and necessity of fees incurred with respect to the *Rink* Action.[41]

Illinois National and Arch appeal from the Superior Court's denial of their original and renewed Motions for Judgment as a Matter of Law with respect to defense costs incurred by TIAA-CREF for the *Bauer-Ramazani* Action.

[40] JA5659 at 129:7-13; JA5690-91 at 160:17-161:3; JA5735-36 at 205:5-206:9; JA5756 at 226:2-12.
[41] JA5756 at 226:2-12.

ARGUMENT

I. THE SUPERIOR COURT ERRED IN ALLOWING TIAA-CREF TO RECOVER ALL ITS DEFENSE COSTS FOR THE *BAUER-RAMAZANI* ACTION AND AT RATES FAR EXCEEDING THOSE CUSTOMARILY CHARGED IN THE LOCALITY.

A. QUESTION PRESENTED

Did the Superior Court err in refusing to overturn or reduce the award of $7,519,822.91 in defense fees for the *Bauer-Ramazani* Action as excessive and not based upon legally sufficient evidence, to the extent that those fees did not comport with the evidence presented on (1) the hourly rates customarily charged in the locality for similar legal services and (2) testimony regarding unreasonable billing practices? These issues were raised below through motions at trial.[42]

B. STANDARD AND SCOPE OF REVIEW

Claims that a trial court failed to grant judgment as a matter of law because of legally insufficient evidence are reviewed *de novo* for legal error because they involve the formulation and application of legal concepts.[43] The Supreme Court will review a jury's factual findings for "any competent evidence upon which the

[42] *See* DA0113-14; DA0115-42; DA0158-78; DA0179-03.
[43] *Town of Cheswold v. Vann*, 9 A.3d 467, 471 (Del. 2010).

verdict could reasonably be based" and it will set aside jury verdicts only if "a reasonable jury could not have reached the result."[44]

C. MERITS OF ARGUMENT

The insured has the burden of proving that the claimed loss falls within the scope of the policy.[45] The parties agree that, in the event of a conflict, the policies at issue in this action should be construed pursuant to New York law.[46] The Illinois National Policy applies only to "Loss" of an Insured, which is defined to include "Defense Costs." The Illinois National Policy defines "Defense Costs" as the "reasonable and necessary fees, costs and expenses consented to by the Insurer . . . resulting solely from the investigation, adjustment, defense and appeal of any Claim against an Insured, but excluding salaries of an Insured."[47] As the Superior Court ruled, TIAA-CREF had the burden to prove, by a preponderance of

[44] *Id.* at 473–74.

[45] *Consol. Edison Co. of N.Y., Inc. v. Allstate Ins. Co.*, 774 N.E.2d 687, 690 (N.Y. 2002); *E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997).

[46] The parties agree that, under Delaware's conflict of law's 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. JA5024-25 at 13:13-14:13; JA5044-46 at 33:7-35:3; JA5056 at 45:11-13; Ex. A at 22; *see, e.g.*, *Tyson Foods, Inc. v. Allstate Ins. Co.*, 2011 WL 3926195, at *5 (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).

[47] Illinois National Policy, JA2541.08 at ¶ II.3.

[redacted]

evidence, that all of the defense costs it sought to recover were both reasonable and necessary.[48] TIAA-CREF did not present a legally sufficient evidentiary basis for a reasonable jury to find that the $7,519,822.91 in defense costs incurred for the *Bauer-Ramazani* Action was reasonable and necessary. The Superior Court should have granted Defendants' motion for judgment as a matter of law and notwithstanding the verdict.

First, the Superior Court allowed TIAA-CREF to recover for all billing entries even though there was no proof presented by any witness that all such entries could be construed as reasonable and necessary. As discussed in greater detail below, because TIAA-CREF did not present any fact or expert witness who reviewed all of the bills and testified that all of the billing entries were both reasonable and necessary,[49] there was no support for the jury's verdict awarding the full amount of fees incurred for the *Bauer-Ramazani* Action.

TIAA-CREF witnesses Phillip Goff and Ira Cohen testified that the bills incurred in connection with the Underlying Actions were submitted to TIAA's in-house legal department.[50] Carranza Pryor, in-house counsel for TIAA-CREF, had responsibility for retaining outside defense counsel and for supervising the defense

[48] *Curtis*, 681 N.Y.S.2d at 621; JA5238-41; JA6075-76 at 6:21-7:8.
[49] *See, e.g.*, JA5653-54 at 123:6-124:6; JA5803 at 162:17-164:1; JA5389-90 at 84:22-85:15; JA5391 at 86:1-20.
[50] JA5653-54 at 123:20-124:2; JA5803 at 163:7-11.

of the Underlying Actions.[51] Yet, TIAA-CREF did not bring as a testifying witness Mr. Pryor, any member of TIAA's in-house legal department, or any witness purportedly responsible for the retention of counsel or review of bills in connection with the Underlying Actions. Thus, TIAA-CREF did not offer a single witness involved with the review or approval of the *Bauer-Ramazani* litigation bills, whether on behalf of TIAA-CREF or the defense firms, to provide testimony.

TIAA-CREF relied on expert Leif Clark, but he in no way provided grounds that would support the jury's verdict awarding the full amount of fees incurred for the *Bauer-Ramazani* Action. TIAA-CREF proffered Mr. Clark based upon his experience in reviewing fee applications as a bankruptcy judge, but he admitted at trial that, in contrast to his prior practice as a bankruptcy judge, he had not reviewed every billing entry for reasonableness and necessity.[52] Further, TIAA-CREF's expert agreed that, had he followed his normal process, he would have taken deductions for certain entries, including those that lacked detail or billed for clerical work.[53] By way of example, TIAA-CREF's expert agreed that, as a general proposition, reasonable and necessary restrictions on billing mean that

[51] JA5650 at 120:9-21; JA5803 at 162:10-164:3.
[52] JA5852-53 at 134:18-137:16.
[53] JA5860-61 at 165:18-167:17; JA5862 at 171:10-172:22; JA5862 at 174:11-20.

[redacted]

attorneys, billing at [redacted] an hour, should not be charging for clerical work, such as putting labels on notebooks.[54] TIAA-CREF's expert also testified:

> Q. There were other issues with the bills that our expert witness commented on, including not just redactions but people billing time with no description whatsoever; just the name of the attorney, a blank and then 4.5 hours and a dollar amount. Do you agree with me that a client shouldn't have to pay or its insurer shouldn't have to pay for $15,000 worth of time from one firm where there's no description whatsoever?
>
> A. I agree with you.
>
> ***
>
> Q. So if you did the kind of review that you would have done when you were a Bankruptcy Judge, you may have found deductions?
>
> A. I may have found some.
>
> Q. . . . If you found missing time entries completely, that would be a reduction, among others?
>
> A. That would be a reduction, yes.[55]

In light of this testimony, it cannot be said that there was competent evidence legally sufficient to support the jury's verdict awarding the full amount of fees incurred for the *Bauer-Ramazani* Action. In fact, the testimony of TIAA-CREF's expert actually supported a reduction in fees. Not only did TIAA-CREF's expert not review all of the bills for reasonableness and necessity as had

[54] JA5860-61 at 165:18-167:17.
[55] JA5862 at 172:7-17; JA5862 at 174:11-20.

[redacted]

been his prior practice or to adjust for what he agreed would have amounted to unreasonable billing practices, he admitted that certain billing practices – identified by Defendants' expert – would not reflect reasonable and necessary billing and, thus, would warrant a reduction. Because TIAA-CREF's only witness on the reasonableness of the *Bauer-Ramazani* fees admitted that reductions were warranted, there was insufficient evidence to support a jury verdict awarding the full amount of fees.

Second, and equally troubling, the Superior Court allowed TIAA-CREF to recover all of the fees presented at attorney billing rates of [redacted] per hour even though those rates far exceeded any permissible range of reasonableness. The award of fees should have been guided by the "fees customarily charged in the locality for similar legal services."[56] Instead, the Superior Court allowed recovery of rates that were more than double and triple the rates customarily charged in the locality, even though neither TIAA-CREF nor its expert provided any competent evidence to support a basis for doing so.

[56] *See, e.g.*, *Curtis*, 681 N.Y.S.2d at 621 (In determining reasonable counsel fees, the court reviews the testimony pertaining to the integral factors which include "the fee customarily charged in the locality."); *General Motors Corp. v. Cox*, 304 A.2d 55, 57 (Del. 1973) ("Factors to be considered as guides in determining the reasonableness of a fee include the following: . . . (3) The fees customarily charged in the locality for similar legal services.").

[redacted]

TIAA-CREF's expert acknowledged that the "locality" was a factor to review in examining whether fees were reasonable and necessary, but he admitted that, in rendering his opinion, he did not consider the rates customarily charged in the locality where the *Bauer-Ramazani* Action was pending.[57] For example, as to rates in the locality, for an action pending in district court in Vermont, TIAA-CREF's expert testified:

> Q. Now, I read you a minute ago a paragraph from an affidavit from a lawyer with 38 years experience in Vermont on what the average rates were; and for somebody of his experience level he said they averaged 250 to 350 and he was even higher than that after 38 years, he was at 400, as I recall. Did you see that? Did you ever undertake or look at an analysis of Vermont firm's rates?
>
> A. No, I didn't. I was aware that -- I believe that your expert had done that.
>
> Q. Correct.
>
> A. So there was no need to reinvent the wheel.
>
> Q. But you did not?
>
> A. No.[58]

While the Superior Court reasoned that TIAA-CREF's expert discussed the nature of the case and argued that TIAA-CREF was warranted in hiring [redacted], that testimony did not warrant a departure from the rates of the

[57] JA5861 at 167:18-168:10.
[58] JA5861 at 167:18-168:10.

[redacted]

locality. For one thing, the rates of the locality must be considered in the examination of reasonableness regardless of whether an insured choses counsel from outside the locality. For another, TIAA-CREF's expert based his opinion on speculation.

There was no evidence to support an opinion based upon the circumstances surrounding TIAA-CREF's retention of [redacted]. TIAA-CREF had not presented any evidence regarding why it hired that firm or brought any witness involved with the retention. As a result, TIAA-CREF's expert had to admit there was no evidence to support his assumption:

> Q. Have you heard any witness testify on behalf of TIAA that TIAA hired O'Melveny for its expertise in this courtroom? I'm not asking you what you think; I'm asking you whether you heard a witness so testify?
>
> A. No, I did not hear a witness testify to that in this courtroom.
>
> Q. And have you seen any documents that have been admitted into this courtroom in which TIAA, somebody on behalf of TIAA said we hired O'Melveny because of its expertise?
>
> A. I have not.[59]

TIAA-CREF's expert stated: "As I said, I have not heard any testimony or seen a document that says this is why [redacted] -- this is why [redacted] was hired by TIAA-CREF."[60]

[59] JA5857 at 151:3-14; *see also generally* JA5856-57 at 150:10-152:13.

[redacted]

TIAA-CREF's expert also could not testify that there were no qualified complex litigation firms *in the locality*, to defend the action proceeding in federal district court *in Vermont*, because he admittedly had made no effort to determine whether a firm in Vermont or neighboring New Hampshire was qualified to defend the action.[61]

Expert testimony based on speculation or expressing mere possibilities has no probative value.[62] There was no competent evidence to support TIAA-CREF's expert opinion on the circumstances surrounding retention of [redacted]. Thus, the opinion did not establish a basis to ignore the local rates of Vermont in determining the reasonable hourly rates to apply to the fees incurred in the *Bauer-Ramazani* Action.

Even if TIAA-CREF's expert had identified competent grounds to deviate from the rates of the locality – which he did not, TIAA-CREF's expert testimony at trial was insufficient, as a matter of law, to establish a range of reasonableness. While TIAA-CREF's expert compared a subset of partner rates charged by [redacted] to the rates charged by *partners* at the *Miami, Florida* firm who

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[60] JA5857 at 152:5-13.
[61] JA5856-57 at 150:10-153:5; JA5861-62 at 168:11-171:9.
[62] *Patton v. Simone*, 1993 Del. Super. LEXIS 126, at *18 (Del. Super. Mar. 22, 1993).

[redacted]

were taking the lead as *plaintiffs'* counsel in the *Bauer-Ramazani* Action,[63] this limited comparison did not establish a range of reasonableness.[64]

As TIAA-CREF's expert admitted, that Miami, Florida firm was prosecuting the *Bauer-Ramazani* Action on a contingent basis. Thus, it bore the risk of non-payment if it did not win or achieve a settlement, whereas [redacted] defending the matter did not bear a risk of nonpayment.[65] The comparison also was rendered meaningless by the fact that the Miami, Florida plaintiffs' firm did not argue that its rates fell within the range of reasonableness for a fee recovery in the locality where the *Bauer-Ramazani* Action was pending, but rather asked to recover a fee award based upon Vermont rates, a point TIAA-CREF's expert overlooked.[66] In seeking approval of the negotiated class action fee award, counsel for plaintiffs in the *Bauer-Ramazani* Action submitted a verification that the usual and customary hourly rates charged in the locality for complex litigation work were [redacted] for partners with more than twenty

[63] JA5841-42 at 88:6-91:17; JA5856 at 147:6-149:6.
[64] *See, e.g., In re Natl. Lloyds Ins. Co.*, 2017 Tex. LEXIS 522, at *29 (Tex. June 9, 2017), *reh'g denied* (Dec. 8, 2017) (Noting that, with respect to the fee customarily charged in the locality for similar legal services, "opposing parties are not providing 'similar legal services' even in the same case, and the term 'customarily' connotes a composite of fee information for the area rather than a single data point.").
[65] JA5856 at 147:6-150:4; JA2459.
[66] JA5859-60 at 159:1-164:21.

[redacted]

years of experience, [redacted] for attorneys with more than ten years of experience, [redacted] for associates, and [redacted] for paralegals.[67] Counsel for plaintiffs in the *Bauer-Ramazani* Action gained court approval of their fee award, which had been negotiated with TIAA-CREF, based upon the local Vermont rates.[68] The local Vermont rates likewise should govern the determination of reasonable hourly rates in this action.

TIAA-CREF sought recovery of defense costs incurred for the *Bauer-Ramazani* Action at much higher hourly rates than those customarily charged in the locality of Vermont. By way of one example, [redacted] charged rates of [redacted] for inexperienced attorneys with up to three years experience, which significantly exceeded the usual and customary rates in Vermont of $160-$180 for associates.[69] TIAA-CREF's expert was not even aware that [redacted] had charged such high rates for such inexperienced attorneys.[70] As a result, TIAA-CREF's expert could not (and did not) opine at trial as to the reasonableness and necessity of such rates. Even Richard Sullivan, who as defense counsel in the *Rink* Action consulted with [redacted] attorneys working on

[67] DA0058 at ¶ 8; JA5859 at 160:3-162:14; JA6178-81 at 39:7-42:11; JA6185-86 at 46:16-47:13.
[68] JA5860 at 163:19-164:21; JA6187-88 at 48:1-49:2.
[69] JA6183-84 at 44:6-45:9; JA6188 at 49:3-18.
[70] JA5860-61 at 164:22-165:17.

[redacted]

the *Bauer-Ramazani* Action, conceded that certain of his consultations with [redacted] attorneys were with "relatively low level people" involved with the discovery work, which "really wasn't brain surgery."[71] There simply was, therefore, no evidence to support a verdict finding that the rates were reasonable.

In sum, TIAA-CREF never presented competent testimony as to the reasonableness or necessity for all of the fees, both of which were required to satisfy the definitions of "Defense Costs" and "Loss" in the Illinois National Policy. TIAA-CREF's expert did not reduce the fees by one penny even though, based on his own admissions, he should have – a failure of proof which should have proved fatal to TIAA-CREF's position. TIAA-CREF's expert made no effort to follow what was his normal practice in reviewing fees for reasonableness and necessity, and even he admitted that certain billing practices could not be deemed reasonable. Further, though he acknowledged the locality was a factor to be considered, TIAA-CREF's expert did not identify or base his opinion on the rates customarily charged *in the locality* for *similar legal services*, nor did he present any basis, based upon competent evidence, to deviate from those rates. Even if he had identified competent grounds to deviate from the rates of the locality – which he did not, his testimony did not establish a customary range of

[71] JA5715 at 185:4-15.

[redacted]

reasonableness.[72] There being no competent evidence that the hourly rates billed in connection with the *Bauer-Ramazani* Action were reasonable or necessary, TIAA-CREF failed to meet its burden of proof as a matter of law.

In light of these shortcomings, there was, under the controlling law, "no legally sufficient evidentiary basis for a reasonable jury to find"[73] for TIAA-CREF on the issue of reasonableness and necessity in the full amount of the $7.5 million in fees at the excessive rates charged. As a result, the Superior Court should have determined the issue against TIAA-CREF and granted Illinois National's motion for judgment as a matter of law and notwithstanding the verdict,[74] either by overturning the verdict or molding it to reflect the evidence presented by Defendants.[75] At the very least, it was incumbent upon the Superior Court to reduce the fees to comport with the usual and customary rates in the locality.[76]

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[72] *See, e.g., In re Natl. Lloyds Ins. Co.*, 2017 Tex. LEXIS 522, at *29.
[73] Super. Ct. Civ. R. 50.
[74] *Id.*
[75] Defendants' expert, Brand Cooper, addressed the reasonableness of defense fees vis-à-vis fees customarily charged for similar legal work in the locality, and opined that reasonable defense costs for the *Bauer-Ramazani* Action were $2,582,000. JA6185 at 46:3-15; JA6189 at 50:2-18; JA6202 at 63:3-63:13.
[76] *See, e.g., Curtis*, 681 N.Y.S.2d at 621 (finding a reduction in billing rates necessary where plaintiffs failed to present evidence on fees commonly charged in the locality, the court declared: "With the burden upon plaintiffs, the paucity of evidence presented proved fatal."); *1010 Tenants Corp. v. Atlantic Mutual Ins. Co.*,

Accordingly, the award for defense fees as to the *Bauer-Ramazani* Action should be overturned and/or remanded for a new trial or with instructions to mold the verdict to include adjustments for unreasonable billing practices and to allow recovery only at the rates customarily charged in the locality.

536 N.Y.S.2d 439, 440 (App. Div. 1989) (Having found the award of attorney's fees excessive, the court modified the judgment, "on the law and the facts, to the extent of remanding the matter for a new trial on the issue of the fairness and reasonableness of those fees unless plaintiff . . . stipulates to a reduced verdict which includes the reduced sum of $225,000 for legal fees"); *Burns v. Delaware Coca-Cola Bottling Co.*, 224 A.2d 255, 260 (Del. Super. Ct. 1966) (new trial to be ordered on question of damages, unless plaintiff agreed to reduction of verdict).

II. CONCLUSION

In order to satisfy the definition of "Defense Costs" under the Illinois National Policy, costs incurred by an Insured to defend a covered claim must be both "reasonable and necessary." TIAA-CREF did not establish, by a preponderance of the evidence, that all of the defense costs incurred in connection with the *Bauer-Ramazani* Action were reasonable and necessary, so as to satisfy the definition of "Defense Costs" and constitute "Loss" under the Illinois National Policy. Because excessive fees at excessive rates are not recoverable, the Superior Court erred in refusing Illinois National's and Arch's requests that the award be overturned and adjusted to comport with the evidence so as to reflect rates customarily charged in the locality and reductions for missing entries and excessive billing practices. Any award for defense fees should be overturned and remanded for a new trial or with instructions to allow these adjustments.[77]

[77] Super. Ct. Civ. R. 50 (d).

[redacted]