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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)) Court Below–Superior Court of the) State of Delaware) C.A. No. N14C-05-178 JRJ (CCLD)) **PUBLIC VERSION**

OPENING BRIEF OF PLAINTIFFS BELOW / APPELLANTS 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

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NATURE OF THE PROCEEDINGS

Both the Superior Court and the jury in this insurance coverage action correctly determined that [redacted] million spent in defense and settlement of two underlying class actions (the "Underlying Actions") should have been paid years ago by Defendant Insurers[1] rather than from Plaintiff-Appellant TIAA-CREF's[2] own pocket. Yet despite the vindication of TIAA-CREF's claim for coverage, and the legal mandate that a victorious plaintiff be made whole, the Superior Court deprived TIAA-CREF of millions of dollars it should have received as a result of Defendants' refusal to provide the coverage for which TIAA-CREF paid its premiums. TIAA-CREF now asks that this Court reverse certain errors of law, and provide TIAA-CREF the full relief to which it is entitled.

First, the Superior Court incorrectly failed to award TIAA-CREF prejudgment interest on its losses covered under the Excess Insurers' policies.

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[1] "Defendants" or "Insurers" refers to primary insurer Illinois National Insurance Company ("Illinois National"), an AIG affiliate, and excess insurers Ace American Insurance Company ("ACE"), Arch Insurance Company ("Arch"), and Zurich American Insurance Company ("Zurich"). ACE and Arch are also referred to as the "Excess Insurers."

[2] 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 ("CREF") are referred to herein as "Plaintiffs" or "TIAA-CREF."

[redacted]

Although controlling New York law mandates such an award, the Superior Court erroneously held that ACE and Arch are entitled to retain the time value of TIAA-CREF's money because primary insurer Illinois National wrongly refused to pay covered losses. This ruling directly contradicts the only on-point New York authority, which holds an excess insurer liable for prejudgment interest from the date the policyholder incurs covered loss sufficient to reach that excess policy layer, even if the primary insurer has refused payment and its policy's limits thus remain unexhausted.

The Superior Court's ruling is also contrary to the plain language of New York's prejudgment interest statute, which mandates interest to verdict for damages on contract claims such as these, and after verdict to entry of judgment for *any* type of claim. The Superior Court misread that statute to require, as a prerequisite to an interest award, a finding that the Excess Insurers breached or anticipatorily breached their contracts. To the contrary, the plain language of the statute mandates interest on any sum awarded "because of a breach" – satisfied here as the Excess Insurers refused to pay because of Illinois National's breach. The Superior Court's error was compounded by its failure to appreciate that, when ACE and Arch definitively asserted that there was no coverage under their policies on substantive grounds, they anticipatorily breached their contracts.

Finally, the Superior Court ignored the purpose behind the prejudgment interest statute – that a party entitled to payment of money is not made whole by the mere receipt of that amount years after it should have been paid. Prejudgment interest is not designed to punish the non-paying party, and thus does not depend on any finding of bad faith or malicious intent. Rather, it is intended *and mandated* to ensure that the party that was entitled to, but denied, a sum of money is compensated for the loss of the time value of that money.

In the alternative, if ACE and Arch are excused from paying an award of interest because of Illinois National's breach, that interest should be paid by Illinois National, whose erroneous coverage denial led directly and foreseeably to ACE and Arch's refusal to pay. The Superior Court's ruling impermissibly denied TIAA-CREF its right to be made whole from the damage it incurred by being forced to pay from its own pocket [redacted] million that should have been paid by Defendants, and must be reversed.

Second, the Superior Court allowed one Defendant, Zurich, to proceed to trial on late notice and lack of consent defenses that, as a matter of controlling New York law, it had waived years ago. Zurich failed to identify these defenses for years while expressly preserving and pursuing others. The Court also erred by instructing the jury that TIAA-CREF was required to prove Zurich's waiver by

[redacted]

clear and convincing evidence, rather than the preponderance of the evidence standard adhered to by New York courts for more than a century. Under that erroneously higher standard, the jury found in Zurich's favor on the waiver issues, denying TIAA-CREF access to Zurich's [redacted] million policy.

TIAA-CREF now appeals from the judgment entered October 23, 2017 to the extent that it incorporates these errors of law. It asks that this Court: (1) reverse the Superior Court's denial of prejudgment interest to TIAA-CREF from ACE and Arch and remand to the Superior Court for a calculation of that interest or, alternatively, to award that interest as consequential damages against primary insurer Illinois National; and (2) reverse the Superior Court's denial of TIAA-CREF's motion *in limine* and motions for judgment as a matter of law against Zurich on the waiver issue or, alternatively, order a new trial on that issue and direct that the jury be instructed that TIAA-CREF is obligated to prove waiver only by a preponderance of the evidence.

[redacted]

SUMMARY OF ARGUMENTS

1. The Superior Court erred in denying TIAA-CREF prejudgment interest from the Excess Insurers, or alternatively, from Illinois National. (Exs. G-H; Raised below at TA0882-906, TA0924-46, TA0949-1009.)

   a. New York courts hold that an excess insurer who has denied coverage on substantive grounds may not avoid paying interest from the time its policy layer is triggered to decision or verdict on the ground that the underlying insurer has not exhausted its limits. This is consistent with the purpose of New York's interest statute, to compensate a party for the lost time value of money, and the language of the statute, which mandates prejudgment interest awards in actions brought "because of a breach" of contract. To the extent the Excess Insurers refused to pay because the primary insurer wrongly refused to pay its policy's limits, that refusal was "because of" the primary insurer's breach. Moreover, the Excess Insurers' substantive denials of coverage were repudiations of coverage sufficient to constitute an anticipatory breach, alternatively satisfying the statute's requirements.

   b. Prejudgment interest is also mandated from the date on which the Excess Insurers' coverage liability was established by decision or

[redacted]

verdict to the date of entry of judgment, regardless of the type of claim or basis of liability.

c. Alternatively, the prejudgment interest allocable to the Excess Insurers' policies should be awarded against Illinois National. Insurers are not exempt from paying consequential damages, nor is a showing of bad faith a prerequisite to such an award. Because it was foreseeable that follow-form Excess Insurers would adopt Illinois National's coverage denials, ensuring that TIAA-CREF would lose the use of the full [redacted] million spent on defense and settlement costs, Illinois National is properly chargeable with the interest necessary to make TIAA-CREF whole.

2. The Superior Court erred in allowing Zurich to proceed on its late notice and consent defenses and in its charge to the jury on the burden of proof applicable to Zurich's waiver of those defenses. (Exs. A-F; Raised below at TA0648-656, TA0734-39, TA0843-48, TA0875-81.)

a. Under controlling New York insurance law, an insurer who fails to promptly raise a late notice or consent defense, and who asserts other defenses to coverage, has waived its right to challenge notice or consent as a matter of law. Moreover, only defenses to coverage that

[redacted]

are clear, specific and unequivocal are preserved. In this case, Zurich waited until the eve of trial to raise its late notice and consent defenses, which were not promptly identified or reserved. Accordingly, Zurich waived those defenses as a matter of law.

b. Under New York law, waiver of coverage defenses must be proved only by a preponderance of the evidence. The Superior Court's instruction to the jury that they should find for Zurich unless TIAA-CREF proved waiver by clear and convincing evidence constituted reversible error.

[redacted]

STATEMENT OF FACTS

A. The Underlying Claims and Settlements

TIAA-CREF is a family of not-for-profit companies that offer retirement investment products to teachers, professors and others in the academic, research and medical communities, and/or offer services "at cost" to certain investment accounts. JA0744-842; JA0845-48; JA0858-61; JA0864-77; JA0881.

In 2007 and 2009, respectively, certain TIAA-CREF entities were sued in the two Underlying Actions: the *Rink* Action[3] and the *Bauer-Ramazani* Action.[4] Those actions alleged that class plaintiffs had been harmed by delays in TIAA-CREF's processing of their transfer or withdrawal requests and sought damages in the amount of the alleged appreciation in the value of their investment accounts. JA1285-96; JA1513-23.

In May 2012, CREF entered into a "claims-made" class action settlement agreement with the *Rink* plaintiffs. JA0601-633. The settlement amount was finalized after court approval in September 2012 and payment made in October

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[3] *Rink v. CREF*, No. 07-CI-10761 (Ky. Cir. Ct.). JA1285-96.

[4] Originally *Walker v. TIAA-CREF, et al.*, later re-named *Bauer-Ramazani v. TIAA-CREF, et al.*, No. 1:09-cv-00190 (D. Vt.). JA1513-23. Coverage issues relating to a third class action, *Cummings v. TIAA-CREF, et al.*, No. 1:12-cv-93 (D. Vt.) (the "*Cummings* Action"), were excluded from trial by stipulation of the parties, and are not at issue on this appeal. TA0690.

2012. JA0668-69; TA0708-09. In total, CREF paid almost [redacted] million in the *Rink* Action, including [redacted] million in settlement, [redacted] million in defense costs, and [redacted] million in class counsel and other costs. TA0742-57.

On January 31, 2014, Plaintiffs entered into a class action settlement agreement in the *Bauer-Ramazani* Action, pursuant to which Plaintiffs paid [redacted] million in settlement and [redacted] million for class counsel fees in March 2014. JA0673-701 at ¶¶ 4, 30; TA709. Along with [redacted] million in defense and administrative costs, Plaintiffs paid [redacted] million in the *Bauer-Ramazani* Action. TA0742-57.

B. The Insurance Policies at Issue

To protect against precisely the risks presented by the Underlying Actions, TIAA-CREF purchased what was intended to be a seamless tower of claims-made professional liability insurance each year. For the relevant 2007-08 policy year,[5] the tower included a primary policy sold by Illinois National (the "Primary Policy"), subject to a [redacted] deductible, and a series of excess policies sold by various insurers, including Defendants (the "Excess Policies"), as follows:

[5] The Court ultimately held that the *Rink* and *Bauer-Ramazani* Actions constituted a single related claim under the 2007-08 policy period. JA5230-32. The parties have not appealed from that determination.

[redacted]

2007-08 Policies	**Insurer**	**Limit of Liability**
Primary	Illinois National	[redacted]
First Excess	St. Paul Mercury[6]	[redacted]
Second Excess	ACE	[redacted]
Third Excess	Arch	[redacted]
Fourth Excess	Zurich	[redacted]

JA0350-546.

To ensure seamless coverage, the Excess Policies were written as "follow form" policies, adopting the same terms and conditions as the Primary Policy, except for limited express terms contained therein. JA0496; JA0511; JA0529. Accordingly, all Policies promise to "pay the Loss of the Insured . . . for any actual or alleged Wrongful Act [*i.e.* any breach of duty, neglect, error, misstatement, misleading statement, omission or other act] of any Insured" in the rendering of or failure to render Professional Services. JA0352-55 at § I, II.9. They also incorporate the definition of "Loss" as including "judgments and settlements" and "any Defense Costs." JA0353 at § II.5.

In addition to following form to this basic coverage grant, the ACE and Arch Policies contain attachment provisions providing that their respective coverage obligations are triggered even where an insured settles with an underlying insurer

[6] St. Paul Mercury Insurance Company ("St. Paul Mercury") settled with TIAA-CREF prior to trial and is not a party to the judgment or this appeal. *See* TA0668 n.1; TA0732-33; TA0947-48.

[redacted]

for payment of less than full limits. The ACE Policy provides that its obligations attach when a covered loss is paid by the underlying insurer or "the Insureds pursuant to an agreement with the insurer(s) of the Underlying Policies." JA0501 § A.2. The Arch Policy similarly provides that it must pay when a covered loss is paid by the underlying insurer or the Insureds "pursuant to a Limit Reduction Agreement (as defined below)[7] with the insurer(s) of the Underlying Insurance." JA0518 § 1.B.1.

The ACE and Arch Policies also contain so-called "shaving provisions," which grant those insurers the benefit of any settlement with an underlying carrier. Those provisions state that, if an underlying insurer settles for a reduced payment under its policy, ACE and Arch's limits applicable to the same claim are reduced by the largest percentage discount afforded to any settling insurer. JA0501-02 § C.; JA0518 § 3.

C. Insurers Refuse to Pay TIAA-CREF's Losses

Plaintiffs gave notice of the *Rink* Action to Defendants on November 29, 2007, during the 2007-08 policy period. JA1279-96. After the May 2012

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[7] A "Limit Reduction Agreement" is an agreement between the "Insureds and one or more insurer(s) of the Underlying Insurance pursuant to which such insurer(s) agrees to pay a portion of its unexhausted Limit of Liability in exchange for a release. . . ." JA0518 § 4.

settlement in *Rink*, TIAA-CREF demanded that Illinois National reimburse it for the defense and settlement costs incurred in that action (the ACE and Arch layers were not reached by the *Rink* loss). JA1473-79. In January 2013, Illinois National issued a letter denying coverage for the *Rink* Action, based primarily on its claim that the settlement payments constituted uninsurable disgorgement. JA1492-97.

Plaintiffs gave notice of the *Bauer-Ramazani* Action to Illinois National, ACE and Arch under their 2009-10 Policies on January 3, 2010. JA1509-23. In an April 23, 2013 letter, Illinois National denied coverage for the *Bauer-Ramazani* Action, raising the same disgorgement defense asserted in *Rink*. TA0763-67. Illinois National further asserted that "many of the issues in this letter are also applicable to the Rink lawsuit," and reserved the right to contend that both Underlying Actions "constitute one Claim" under its 2007-08 Primary Policy. TA0764 n.1.

Shortly thereafter, Arch and ACE each expressly adopted Illinois National's substantive denial of coverage, including its claim that the same defenses applied to both the *Rink* and *Bauer-Ramazani* Actions. TA0768-71; TA0778-80. Not more than a week after receiving a request from TIAA-CREF seeking "settlement authority" for an upcoming mediation, on June 7, 2013, Arch expressly denied coverage, "adopt[ing] the coverage issued on behalf of [Illinois National] . . .

[redacted]

within the April 23, 2013 letter," including that the bases for denial of the *Bauer-Ramazani* Action were "applicable to the Rink lawsuit." TA0779; TA0764 n.1; TA0772-77; JA6011-43 at 138:10-147:9, 158:20-170:1.

On June 11, 2013, ACE denied coverage for the *Bauer-Ramazani* Action, noting that it too was "adopt[ing] the positions" in Illinois National's April 23 letter, including its disgorgement defense. TA0770. Six months later, ACE confirmed that denial, informing TIAA-CREF that "[g]iven that coverage has been denied for this matter," TIAA-CREF need not seek or obtain ACE's consent to settle the *Bauer-Ramazani* Action. JA1704.

Thus, since the *Bauer-Ramazani* settlement in 2014, although it is undisputed that Plaintiffs' total Losses exceed the limits of ACE and Arch's excess layers (TA0708-09; TA0742-57), neither ACE, Arch nor Illinois National has paid TIAA-CREF a penny, forcing TIAA-CREF to pay out-of-pocket for those fully-covered claims.

D. Assertion of Claims and Defenses in the Coverage Litigation

1. Upon Notice of the *Bauer-Ramazani* Claim and Settlement, Zurich Fails to Assert Late Notice and Consent Defenses

On May 20, 2014, TIAA-CREF filed its initial Complaint in this action, pleading causes of action for breach of contract against Illinois National and ACE (under the 2009-10 ACE Policy) and declaratory relief and anticipatory breach of

[redacted]

contract against Illinois National, ACE, Arch, St. Paul Mercury and Zurich. TA0268-275. It is undisputed that Zurich received notice of the *Bauer-Ramazani* claim and settlement no later than the filing of this initial Complaint. TA0259-262.

In their Answers, every Insurer affirmed its refusal to provide any coverage for the *Rink* and *Bauer-Ramazani* Actions on substantive grounds, including an affirmative defense that the settlement amounts constituted non-coverable disgorgement. *See* TA0295-303; TA0325-26; TA0338-40; TA0371-72.[8] St. Paul Mercury specifically asserted affirmative defenses claiming that coverage was barred on grounds of late notice and lack of consent. *See* TA0298-300 (20th and 29th Defenses).

Zurich filed its Answer and Affirmative Defenses on July 17, 2014. Like the other Defendants, Zurich asserted defenses alleging that specific provisions in its policy barred coverage for the Underlying Actions, including that the settlement amounts were non-covered "disgorgement and/or restitution" and coverage was barred by the so-called mechanical exclusion. TA0325-326. Although it denied a factual allegation that notice of the *Bauer-Ramazani* Action had been provided to all insurers on a specified date (TA0317), unlike St. Paul Mercury, Zurich did not

[8] Arch did not answer the original Complaint as it instead moved to dismiss. That motion was later withdrawn. [Trans. ID. 55753943 and 57513371.]

assert a late notice or lack of consent Affirmative Defense. TA0325-26. Instead, Zurich's Answer merely included a catch-all, unspecified assertion that the claims were barred "in whole or in part, by the terms, exclusions, conditions and limitations contained or incorporated in the Zurich Policy and all relevant Underlying Policies, all of which are reserved and none of which are waived." TA0325 (2d Defense).

On March 10, 2015, Plaintiffs amended their Complaint in this action to add a third underlying suit, the *Cummings* Action, and again asserted breach of contract claims against Illinois National and ACE (for the 2009-10 ACE Policy), and declaratory judgment and anticipatory breach claims against Illinois National, ACE, Arch, St. Paul and Zurich. JA1912-39. In their Answers to the Amended Complaint, ACE and Arch reiterated that the Underlying Actions were not covered under their policies for substantive reasons not limited to lack of exhaustion of the underlying coverage. TA0497-504; TA0546-47. Arch also joined St. Paul Mercury in asserting Affirmative Defenses that coverage was barred under the notice and consent provisions of its policy. TA0500 (Arch, 20th and 21st Defenses); TA0590-92 (St. Paul, 20th and 29th Defenses). Once again, Zurich did not add such notice or consent defenses to its Answer. TA0433-34.

2. Zurich's Silence Continues Through Discovery

Throughout discovery, when Plaintiffs sought further information regarding each Insurers' defenses to coverage, Zurich still did not raise a late notice or consent defense. On July 22, 2014, Plaintiffs served contention interrogatories on all Defendants, including one requiring that they set forth the factual support for any defenses on which they would rely at trial. TA0384 (Interrogatory No. 11). Zurich responded on September 19, 2014, detailing certain substantive defenses to coverage, but not raising late notice or lack of consent and not generally reserving its rights to raise other known defenses. TA0392-94; TA0397.

Zurich supplemented its responses on June 18, 2015, but again made no mention of nor provided any factual basis for any late notice or lack of consent defense. TA0644-0647. At Plaintiffs' request, Zurich again supplemented its interrogatory responses on April 11, 2016. JA1271-77. Again, Zurich did not respond to Interrogatory No. 11 by asserting or providing any factual support for a notice or consent defense, but merely referred Plaintiffs generally to all documents and testimony in this action.[9] JA1276. Zurich's silence was in striking contrast to

[9] Zurich did briefly reference notice issues, but only in response to a *different* interrogatory response that concerned the relatedness of the three Underlying Actions. JA1275 (Response to Rog. No. 10.)

[redacted]

the responses of Arch and St. Paul Mercury, each of whom provided detailed recitations of the facts they expected to support their consent defense. JA1217-21; JA1244-46.

3. The Court Rejects Insurers' Substantive Coverage Defenses

The parties moved for summary judgment on several issues, including the validity of key defenses on which Defendants had based their substantive denials of coverage. In an opinion issued October 20, 2016 (the "SJ Decision"), the Superior Court rejected Defendants' disgorgement defense, ruling that Plaintiffs' civil settlements constituted insurable Loss as a matter of law. JA5225-30. The court also ruled that the *Bauer-Ramazani* Action was related to the *Rink* Action and both fell under the 2007-08 tower. JA5230-32.

Following the Court's ruling, Defendants withdrew by stipulation their reliance on the mechanical exclusion, their only remaining substantive coverage defense. JA5251-57. As a result, Illinois National and ACE – neither of which pursued a late notice or lack of consent defense – had no remaining defenses to coverage. Accordingly, ACE did not participate in the trial that followed, while Illinois National participated only for purposes of challenging the reasonableness of TIAA-CREF's defense costs. TA0668 n.1.

[redacted]

TIAA-CREF also moved for summary judgment to resolve the lack of consent defenses that had been raised by Arch and St. Paul. JA0287-319. Because Zurich had raised no such defenses, the motion was not directed against Zurich, and Zurich did not join in or file any opposition thereto. However, in a *footnote* in its brief on a different motion concerning the reasonableness of TIAA-CREF's defense costs, Zurich for the first time "reserved" the right to assert a lack of consent defense (notably not preserving a late notice defense). JA4784 at n.1.

At oral argument, the Court criticized Zurich for its reliance on its catch-all Second Affirmative Defense in lieu of specifically preserving a notice or consent defense:

> And to the extent that would constitute a dispositive issue, it should have been raised consistent with the dispositive motion deadlines, which have passed. . . . that's not something you just wait and drop in an opposition to a motion for summary judgment on attorney's fees. . . . [H]ow are they supposed to prepare for trial, with an eye toward trial when you have a broad affirmative defense, anything in the policy is fair game?

JA5181-83. Despite TIAA-CREF's request at oral argument for a ruling striking Zurich's lack of consent defense (JA5179-83), the Court's SJ Decision failed to address the issue. JA5200-44.

E. Pre-Trial and Trial Proceedings on Limited Issues

In advance of trial, TIAA-CREF moved *in limine* to bar Zurich from raising its late notice and consent defenses, both on the substantive ground that Zurich had waived the right to raise any such defense and on the procedural ground that Zurich failed to provide discovery on those defenses in response to interrogatories. TA0648-56. On November 18, 2016, the Superior Court denied that motion (the "MIL Ruling," attached as Exhibits A-B).

Also on November 18, 2016, the Court entered the parties' Pre-Trial Stipulation and Order, which expressly reserved the matter of prejudgment interest as a legal issue to be decided by the Court, including the component issues of whether TIAA-CREF was entitled to interest, what date it would begin to accrue, what interest rate should be applied and whether the Excess Policies' attachment provisions could preclude an interest award. TA0674.

Trial commenced on December 5, 2016 and continued for six days, concerning: (1) whether Arch or Zurich could avoid covering the settlements based on lack of consent, including whether either had waived that defense; (2) whether Zurich could prevail on, or had waived its defense of, late notice; and (3) whether the defense costs in the Underlying Actions were reasonable. JA6515-20; TA0849-52. At the close of Plaintiffs' case, TIAA-CREF moved for a directed

verdict holding that as a matter of law Zurich had waived its notice and consent defenses, and Zurich cross-moved. The court reserved decisions on both motions. TA0843-48; TA0853; JA5864-5865.

With respect to whether TIAA-CREF was required to prove waiver by a preponderance of the evidence, or to meet the higher standard of clear and convincing evidence, the Court noted that it was not convinced that the higher standard was proper, but nonetheless would apply it (the "Burden Ruling," attached as Exhibits C-E). The Court thus instructed the jury that it requires proof that "something is highly probable, reasonably certain and free from serious doubt." JA6526; JA6528-33 (Instruction Nos. 4, 6, 7A, and 7B).

On December 12, 2016, the jury returned its verdict, finding for TIAA-CREF on all issues relating to Arch, including that it would have been futile to seek Arch's consent to the Underlying Action settlements, and that the defense costs incurred in connection with both Actions were reasonable. JA6518-20. However, the jury also held that TIAA-CREF had failed to prove "by clear and convincing evidence" that Zurich had waived its defenses. JA6516-17.

F. Post-Trial Proceedings

1. Plaintiff's Renewed Motion for JMOL Against Zurich

On December 22, 2016, Plaintiffs renewed their motion for judgment as a matter of law, and notwithstanding the verdict, on the Zurich waiver issue. TA0875-81. On June 29, 2017, the Superior Court denied that motion (the "JMOL Ruling," attached as Exhibit F), on the basis that (a) New York law barring an insurer who fails to timely raise a late notice or consent defense from asserting that defense does not apply to the assertion of defenses in a pleading; and (b) the jury's verdict could be justified by Zurich's boilerplate Second Affirmative Defense.

2. The Court's Prejudgment Interest Ruling

After trial, as all claims and defenses relating to coverage for the *Rink* and *Bauer-Ramazani* Actions were fully and finally resolved, TIAA-CREF moved for entry of final judgment pursuant to Rule 54(b). TA0882-96. Its proposed judgment included an award of prejudgment interest against Illinois National, ACE and Arch from the dates TIAA-CREF had first paid amounts sufficient to trigger their Policies' respective attachment points.[10] TA0893;TA0905. TIAA-CREF also

[10] Just prior to trial, St. Paul Mercury agreed to pay [redacted] of its policy limits in settlement of Plaintiffs' claims. Ex. G at 28. As such, Plaintiffs' motion adjusted the amount sought from ACE and Arch consistent with their Policies' shavings provisions. TA0905.

[redacted]

argued in the alternative that, if the Court excused ACE and Arch from paying interest prior to exhaustion of Illinois National's limits, it should award those amounts against Illinois National as the reasonable and foreseeable consequence of its coverage denial. TA0898-900.

On October 23, 2017, the Court denied TIAA-CREF's demand for prejudgment interest against ACE and Arch, and for consequential damages against Illinois National (the "Interest Ruling," attached as Exhibits G-H). The Court held that the Policies' attachment language permitted them to "wait out good faith coverage disputes between the insured and underlying insurer(s) without risk of breaching [their] performance obligations." Ex. G at 20. The Court also found that ACE and Arch's unequivocal assertion of substantive bars to coverage did not constitute an anticipatory breach of contract because in their denial letters neither "indicates that it will continue to deny coverage in the event that TIAA-CREF prevails in its coverage claim against Illinois National or in the event that Illinois National concedes the possibility of coverage through settlement." *Id*. at 25. Finally, even though Illinois National conceded that it had breached its contract and thus was obligated to pay prejudgment interest on its own policy limits (TA0916), the Court held that the interest owed on ACE's and Arch's limits could not be awarded as consequential damages against Illinois National, because New

York law only permitted such an award against an insurer on a bad faith claim. Ex. G at 25-26.

The Court then entered judgment which, in relevant part: (1) declared that ACE and Arch were obligated to indemnify TIAA-CREF for its Losses "in accordance with their applicable policies' attachment points and limits, and applicable exhaustion provisions;" (2) awarded damages against Illinois National in the amount of its [redacted] million policy limit, plus prejudgment interest on that limit; and (3) dismissed all claims against Zurich. Ex. H.

[redacted]

ARGUMENT

I. THE SUPERIOR COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO AWARD TIAA-CREF PREJUDGMENT INTEREST AGAINST THE EXCESS INSURERS

A. Question Presented

1. Did the Superior Court err in denying TIAA-CREF's request under N.Y. C.P.L.R. § 5001 ("§ 5001") for mandatory prejudgment interest during the period prior to verdict against Excess Insurers who denied coverage on substantive grounds, and holding instead that they were entitled to "wait out" payment by the underlying insurer(s) before incurring any interest obligation? Ex. G (Raised below at TA0882-906; TA0924-46; TA0949-1009).

2. Did the Superior Court err in denying TIAA-CREF's request under N.Y. C.P.L.R. § 5002 ("§ 5002") for mandatory prejudgment interest against the Excess Insurers from the date of verdict to the date of judgment? Ex. G (Raised below at TA0882-906; TA0924-46; TA0949-1009).

3. Alternatively, did the Superior Court err in holding that Illinois National is not responsible for the prejudgment interest

otherwise chargeable to the Excess Insurers as foreseeable consequential damages resulting directly from Illinois National's breach of its coverage obligations? Ex. G at 25-26 (Raised below at TA0898-900).

B. Standard and Scope of Review

The trial court's determinations of matters of law, including its interpretation of statutory provisions and denial of a demand for prejudgment interest, are reviewed *de novo*. *City of Wilmington v. Nationwide Ins. Co.*, 154 A.3d 1124, 1127 (Del. 2017); *Chrysler Corp. v. Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1037 (Del. 2003).

C. Applicable Law

The parties agree that, in the event of a conflict of law, New York law governs the substantive issues in this case. JA0270; JA1843; JA2889; JA3184. As the Superior Court correctly held, given the divergent interest rates in New York and Delaware,[11] "there is no dispute that New York law governs recovery of prejudgment interest in this case." Ex. G at 17, citing *Cooper v. Ross & Roberts, Inc.*, 505 A.2d 1305, 1307 (Del. Super. Ct. 1986) ("The recovery of prejudgment

[11] Delaware law sets interest at 5% over the Federal Reserve Discount Rate, 6 *Del. C.* § 2301, and N.Y. C.P.L.R. § 5004 sets the rate of prejudgment interest at 9%.

interest in Delaware is a matter of substantive law[,]" which is governed by "the state whose laws govern the substantive legal questions").

D. Merits of the Argument

This dispute is an object lesson in the purpose for which statutory prejudgment interest was intended by New York's lawmakers. TIAA-CREF paid from its own pocket [redacted] million dollars rightfully owed by its professional liability insurance carriers, which it could have used to fund its operations, distribute to its account holders or for any other business purpose. During that same time, ACE and Arch retained the use of [redacted] owing to TIAA-CREF – after taking [redacted] in premiums on the promise that they would protect TIAA-CREF from having to incur *precisely* those costs.

Prejudgment interest in these circumstances is neither a reward for TIAA-CREF, nor a punishment for ACE and Arch. It is instead a mandatory response to the inescapable reality that there is a time value to money, and the party who was entitled to the money is entitled to be reimbursed for the loss of that time value. *See Aurecchione v. N.Y. State Div. of Human Rights*, 771 N.E.2d 231, 233 (N.Y. 2002); *Love v. State*, 583 N.E.2d 1296, 1298 (N.Y. 1991); *Stanford Square, L.L.C. v. Nomura Asset Cap. Corp.*, 232 F. Supp. 2d 289, 293 (S.D.N.Y. 2002). The

[redacted]

Superior Court's denial of prejudgment interest violates these fundamental principles underlying the New York statute, and must be reversed.

1. Under § 5001, TIAA-CREF Is Entitled to Prejudgment Interest From ACE and Arch for the Period Prior to the Decisions Confirming Their Coverage Obligations

The most recent on-point New York authority, *J.P. Morgan Securities, Inc. v. Vigilant Insurance Co.*, 2017 WL 3448370 (N.Y. Sup. Ct. Aug. 7, 2017), recognizes that TIAA-CREF is entitled to prejudgment interest from ACE and Arch. In *J.P. Morgan*, as here, the policyholder settled an underlying claim for an amount exceeding the limits of its primary and excess policies and, after the court rejected the carriers' substantive coverage defenses, sought an award of prejudgment interest against all carriers from the date it paid the underlying settlement. *Id.* at *1. As here, the excess insurers also argued that they could not be held liable for interest because they had no obligation to pay until the primary insurer had paid its full limits. *Id.* at *1-2.

The *J.P. Morgan* court disagreed, holding that it would violate both the letter and purpose of New York's prejudgment interest statute:

> The excess Insurers' proposition that no insured can ever recover damages from an excess insurer despite incurring a covered loss that reaches, and even exceeds that excess insurers' limits until the insured establishes that the primary insurer has paid up to its limits, is without a sound basis. . . .

[redacted]

> Moreover, it would be inequitable to permit the excess Insurers to benefit from [the primary carrier's] erroneous repudiation of liability, that is the very event which delayed exhaustion of the underlying primary policy in the first place.

Id. at *2. The court thus held that the excess insurers owed interest as long as the insured paid losses reaching their excess layers and they refused coverage. *Id.*; *see also Olin Corp. v. OneBeacon Am. Ins. Co.*, 864 F.3d 130, 152 (2d Cir. 2017) (rejecting argument that, because it had not been obligated to pay prior to court's ruling, insurer did not owe interest: "It is not the intention of [New York's interest statute] that an insurer could deny coverage for years in the face of reasonable demands and then, once it is adjudicated liable, avoid paying any prejudgment interest."); *KV Pharm. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 2006 WL 1153825, at *2 (E.D. Mo. May 1, 2006) ("Just as an insurer cannot dispute coverage to avoid paying prejudgment interest, the [excess insurer] here cannot take advantage of the primary insurer's denial of coverage to delay its own prejudgment interest liability.")[12]

[12] *Turner Constr. Co. v. Am. Mfrs. Mut. Ins. Co*., 485 F. Supp. 2d 480, 491 (S.D.N.Y. 2007) (ordering prejudgment interest to be paid by both primary and excess insurer where primary breached by nonpayment, and thus, excess limits had not previously attached), *aff'd sub nom. Turner Const. Co. v. Kemper Ins. Co.*, 341 F. App'x 684 (2d Cir. 2009).

[redacted]

These decisions are consistent with not only the spirit, but also the language of New York's interest statute:

> (a) . . . Interest shall be recovered upon a sum awarded **because of a breach of performance of a contract**, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion,
>
> (b) . . . Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred . . . .

N.Y. C.P.L.R. § 5001(emphasis added).

The statute does not provide that prejudgment interest is mandated only on breach of contract claims, or only against a breaching party, but for any sum awarded "***because of***" a breach of contract. As the official commentary to § 5001 reflects, the statute is not meant to distinguish between breach and other types of contractual claims, but rather between contractual obligation and personal injury claims.[13] Even by ACE and Arch's own justification, their failure to pay the Underlying Action settlements was "because of" a breach of contract – Illinois

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[13] *See* Advisory Committee Notes to § 5001(a) (noting it "establishes a single rule for the awarding of interest in all contract and property damage cases" but that the Committee had decided "not to recommend legislation allowing interest in personal injury cases" due to policy concerns).

National's breach of its coverage obligations – which is sufficient to implicate the interest provisions of § 5001(a).

This "because of" language has justified awards of prejudgment interest in declaratory judgment or contribution actions brought by insurers against other insurers, who owe no contractual obligations to each other. The paying insurer does not – indeed, cannot – bring an action for breach of contract against that other insurer, but courts assess interest on the contribution claim "because of" the breach of the non-paying insurer's contract with its policyholder.[14] *See U.S. Fire Ins. Co. v. Fed. Ins. Co.*, 858 F.2d 882, 888-89 (2d Cir. 1988) (co-insurer entitled to interest on contribution award "because of" other insurer's breach); *Royal Indem. Co. v. Providence Wash. Ins. Co.*, 966 F. Supp. 149, 151 (N.D.N.Y. 1997) (insurer's contribution action "was essentially a contract action . . . whereby the Plaintiff is entitled to prejudgment interest"); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Conn. Indem. Co.*, 860 N.Y.S.2d 35 (N.Y. App. Div. 2008); *Cont'l Cas. Co. v.*

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[14] Similarly, the Advisory Committee Notes state that a prior statutory provision authorizing prejudgment interest on claims for the return of monies paid had been deleted as unnecessary, because such claims trigger the basic provision mandating prejudgment interest in contract-related claims. *See* Advisory Committee Notes to Article 50, *citing Mfrs. Trust Co. v. Gray*, 16 N.E.2d 373, 376 (1938) (when one pays money that should have been paid by another, there is an implied promise of repayment that triggers interest award).

Emp'rs Ins. Co. of Wassau, 865 N.Y.S.2d 855, 862 (N.Y. Sup. Ct. 2008), *rev'd on other grounds*, 923 N.Y.S.2d 538 (N.Y. App. Div. 2011).[15]

These decisions are consistent with New York law that insurance policy provisions regarding the timing of payment – like the exhaustion and shavings provisions Excess Insurers and the Court rely upon here – will not implicitly supersede New York's statutory law requirement for prejudgment interest. In *Varda, Inc. v. Insurance Company of North America*, 45 F.3d 634 (2d Cir. 1995), the policy required the insurer to pay a burglary loss claim within 30 days after the occurrence of certain specified events. Like here, the insurer argued that interest did not begin to accrue until after that contractual period expired. *Id*. at 640. The Second Circuit rejected that contention, finding that the provision in question did not "trump[] New York law" on prejudgment interest, but "merely established the time when [the insurer] must pay [the insured's] claim. It does not address the question of how the amount of the claim is to be calculated." *Id*. As the provision "does not even mention pre-judgment interest," it could not preclude an interest award. *Id*.; *see also Katzman v. Helen of Troy Texas Corp.*, 2013 WL 1496952, at

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[15] *See also In re Hoffman*, 712 N.Y.S.2d 165, 166 (N.Y. App. Div. 2000) (granting prejudgment interest in surrogate's proceeding to discover property of deceased's estate as petitioner's claim is "essentially in the nature of a breach of contract").

*6 (S.D.N.Y. Apr. 11, 2013) (contractual provision waiving right to prejudgment interest must be "clear and express" and "unmistakably manifest an intent to forego prejudgment interest"). Similarly here, in the absence of an *explicit* agreement by TIAA-CREF to waive its right to prejudgment interest, the Court's release of ACE and Arch from their statutory interest obligations was reversible error.[16]

Additionally, although not required for an award of interest under the statute, ACE and Arch's definitive statements of non-coverage – their explicit denials of coverage for the *Bauer-Ramazani* losses on grounds other than the non-exhaustion of Illinois National's coverage (TA0770; TA0779) – constituted an anticipatory breach of their coverage obligations for which interest is owed. *See J.P. Morgan*, 2017 WL 3448370, at *1-2 ("law regards the insurers as being in breach" where they wrongfully disclaimed coverage and refused to pay covered losses reaching excess layer, forcing insured to make payment on its own); *Granite Ridge Energy*,

[16] Nor do the shavings provisions relieve the Excess Insurers from paying interest on grounds that the amount they owe is not yet fixed. Ex. G at 21-22. Rather, New York courts have consistently held that "there is no requirement that a monetary damages claim be readily ascertainable or liquidated in order to award prejudgment interest." *Stanford Square*, 232 F. Supp. 2d at 293 ("certainty as to the amount of money due is not a necessary factor in awarding prejudgment interest"); *see also Aurecchione*, 771 N.E.2d at 233.

[redacted]

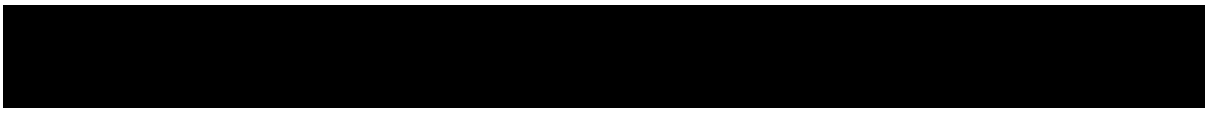
LLC v. Allianz Global Risk U.S. Ins. Co., 979 F. Supp. 2d 385, 393 (S.D.N.Y. 2013) (ordering interest to be paid from date of insurer's first coverage denial).[17]

The Superior Court's statement that ACE and Arch did not anticipatorily breach their policies (Ex. G at 25) is directly contrary to the record and, more importantly, the jury verdict. ACE denied coverage long before being asked to pay. TA0770. In fact, ACE expressly instructed TIAA-CREF that it need not seek ACE's consent to settle the *Bauer-Ramazani* Action, *i.e., that it no longer needed to comply with policy conditions*, because ACE had denied coverage for the claim. JA1704 ("Given that coverage has been denied for this matter, we do not believe that TIAA-CREF requires ACE's consent to settle."). Arch explicitly denied coverage as well. TA0779. The suggestion that Arch had not unequivocally denied coverage is irreconcilable with the jury's factual finding that Arch's actions – issuing a coverage denial letter, on the same substantive grounds as Illinois National, directly in response to a request from TIAA-CREF seeking "settlement

[17] The Superior Court wrongly concluded that the Excess Insurers could not anticipatorily breach their contracts because, under their policies' attachment and shavings provisions, their payment obligations were not yet due. Ex. G at 24. To the contrary, by definition, an anticipatory breach is conduct or a statement before the time for performance is due that a party will not perform its obligations, exactly what ACE and Arch did here. *See Howard v. Bioworks, Inc.*, 921 N.Y.S.2d 776 (N.Y. App. Div. 2011).

authority" for an upcoming mediation – rendered a request for consent so futile that TIAA-CREF was relieved of its obligation to seek consent. TA0758-67; TA0772-80; JA6011-6043 at 138:10-147:9, 158:20-170:1; JA6518.

Moreover, the Court's suggestion that TIAA-CREF must seek summary judgment or request that the jury enter a verdict on TIAA-CREF's anticipatory breach claims as a prerequisite to an interest award (Ex. G at 24) ignores the parties' Pre-Trial Stipulation and Order, which explicitly reserved all aspects of the prejudgment interest determination, including its calculation and whether there was a foundation therefore, as post-trial legal issues for the Court, not the jury. TA0674. Further, no party disputed that the jury's resolution of the conduct defenses and reasonableness issues would fully resolve the question of whether the Excess Insurers, rather than TIAA-CREF, should have paid the costs of defending and settling the Underlying Actions – indeed, Illinois National conceded it breached its contract without a summary judgment or jury ruling to that effect TA0916. Accordingly, the parties agreed to give the jury special interrogatories rather than a general verdict form asking which party had prevailed on TIAA-CREF's breach claims by denying coverage. JA6515-20.



In short, at the time of the settlements, whether or not the condition of prior exhaustion had been met, ACE and Arch had already denied coverage for the Underlying Actions. As a matter of New York law, they thus cannot avoid paying prejudgment interest under § 5001 necessary to make TIAA-CREF whole for the years in which it was denied [redacted] million in coverage to which it was entitled.

2. Under § 5002, TIAA-CREF Is Entitled to an Award of Prejudgment Interest for the Period from the Decisions Confirming ACE and Arch's Coverage Obligations Until Entry of Judgment

Section 5002 governs the award of interest "from the date the verdict was rendered or the report or decision was made to the date of final judgment." Like § 5001, an award of interest under § 5002 is mandatory. Unlike § 5001, however, ***there is no limitation on the nature of the action to which it applies***. *See Love*, 583 N.E.2d at 1296-97 (although plaintiff not entitled to § 5001 interest on personal injury claim, § 5002 interest was mandatory). Once a defendant's liability, for whatever legal reason, is determined by decision or verdict, the successful plaintiff is entitled to § 5002 prejudgment interest from that date until entry of judgment.

[redacted]

Moreover, § 5002 interest continues to run even if the verdict or decision does not set the amount owed to the plaintiff. In *Love*, New York's highest court held that where issues of liability and damages are determined in bifurcated trials, § 5002 interest still runs from the date of the liability determination, "regardless of which party is responsible for the delay, if any, in the assessment of the plaintiff's damages" because "at that point, the defendant's obligation to pay the plaintiff is established, and the only remaining question is the precise amount that is due." *Id.* at 1298. The court held that such a conclusion was not unfair to the defendant, because it simply accounted for the fact it had had the use of another's money: "the defendant is merely being directed to repay the plaintiff for the use of the plaintiff's money that the defendant enjoyed during that period." *Id.*

Regardless of the nature of the claim brought against ACE and Arch, or whether they anticipatorily breached their policies, TIAA-CREF is entitled to prejudgment interest under § 5002 from the date their liability to TIAA-CREF was established until the entry of judgment. For ACE, interest runs from the Court's summary judgment ruling, after which ACE admitted it had no further defenses to coverage. For Arch, who asserted an unsuccessful lack of consent defense at trial, it runs from the date of the jury's verdict. The Superior Court's failure to award this post-decision, prejudgment interest was reversible error.

[redacted]

3. Alternatively, All Prejudgment Interest Should Be Assessed Against Illinois National as Consequential Damages

Finally, to the extent the Superior Court did not err in denying an award of prejudgment interest against ACE and Arch, it erred in denying TIAA-CREF's alternate request that Illinois National pay those amounts as consequential damages. New York's highest court, in *Bi-Economy Market, Inc. v Harleysville Insurance Co. of New York*, 886 N.E.2d 127, 132 (N.Y. 2008), held that where reasonably foreseeable damages flow from "an insurer's excessive delay *or improper denial*, the insurance company should stand liable for these damages. This is not to punish the insurer, but to give the insured its bargained-for benefit." (emphasis added). Foreseeability – not bad faith – is the only prerequisite to a claim for consequential damages under New York law. *Id.*; *see also Orient Overseas Assoc. v. XL Ins. Am. Inc.*, 18 N.Y.S. 3d 381 (N.Y. App. Div. 2015) ("In [*Bi-Economy*], while the Court mentioned that the plaintiff asserted a claim for 'bad faith claims handling,' it did not discuss that claim at all and, instead, focused its discussion on plaintiff's breach of contract claim seeking consequential damages.").

Here, the very nature of Illinois National's role as the primary insurer in a seamless tower of coverage placed Illinois National on notice that its failure to perform could foreseeably lead to the collapse of the tower. *Cf. Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76, 89 (Del. Ch. 2009) ("The obvious reason why [the policyholder] purchased a continuous and tightly-related group of policies was to create seamless coverage."). As the Excess Policies follow form to the terms and conditions of Illinois National's primary policy, it was foreseeable that each Excess Insurer would follow Illinois National's interpretation of the policy terms and its denials of coverage, leaving TIAA-CREF without any insurance and forcing it to pay its defense and settlements costs from its own pocket. Illinois National is properly liable for the foreseeable damages to TIAA-CREF flowing from its breach, including an award of prejudgment interest on payments that would have been made under the Excess Policies but for Illinois National's own refusal to pay, to the extent ACE and Arch are not held liable to pay.

[redacted]

II. THE SUPERIOR COURT ERRED AS A MATTER OF LAW BY (1) FAILING TO HOLD THAT ZURICH WAIVED ITS NOTICE AND CONSENT DEFENSES BEFORE TRIAL AND (2) INCORRECTLY INSTRUCTING THE JURY ON THE BURDEN OF PROOF AT TRIAL

A. Questions Presented

1. Did the Superior Court commit reversible error by denying TIAA-CREF's motion *in limine* and requests for judgment as a matter of law that Zurich had waived its late notice and consent defenses? Exs. A-B, F (Raised at TA0648-56; TA0843-48, TA0875-81).

2. Did the trial court commit reversible error by instructing the jury that TIAA-CREF was required to prove waiver by clear and convincing evidence rather than a preponderance of the evidence? Exs. C-E (Raised at TA0734-39).

B. Standard and Scope of Review

The Court reviews *de novo* a Superior Court decision to grant or deny judgment as a matter of law. *Kardos v. Harrison*, 980 A.2d 1014, 1016 (Del. 2009). Under Superior Court Civil Rule 50(a), judgment as a matter of law is appropriate if the issue has been fully presented and "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." *Morgan*

[redacted]

v. Scott, 2014 WL 4698487, at *3 (Del. Sept. 22, 2014). The Court also reviews *de novo* a trial court's refusal to give a requested jury instruction, *Chrysler*, 822 A.2d at 1035, as well as its decision regarding the appropriate burden of proof. *Lynch v. The City of Rehoboth Beach*, 894 A.2d 407 (Del. 2006).

C. Applicable Law

In the Superior Court, Zurich argued that preservation of its late notice defense must be decided under Delaware law, which governs the sufficiency of the pleadings in a Delaware action. [Trans. ID 59803677]. However, "pleading sufficiency" is not the issue here. Rather, the question is whether, under New York insurance law, Zurich waived its late notice and consent defenses, regardless of whether those statements are contained in a pleading, discovery response or letter.

Delaware courts hold that the burden of proof applicable to a given dispute is a substantive issue and thus controlling state law applies. *See Monsanto Co. v. Aetna Cas. & Sur. Co.*, 1994 WL 317557, at *4 (Del. Super. Apr. 15, 1994); *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 52–54 (Del. Ch. 2001). Accordingly, as New York imposes a preponderance of the evidence standard (and Delaware law applies a clear and convincing standard (TA0735)), there is a conflict of law on the burden issue and New York's standard will apply.

[redacted]

D. Merits of the Argument

1. Zurich's Conduct Established Waiver as a Matter of Law

Under well-established New York insurance law, Zurich's failure to assert its late notice and consent defenses after being made aware of the facts supporting those defenses, while it raised other defenses to coverage, acts as a waiver of those defenses. Under New York law, an insurer waives a late notice defense where, without mentioning that defense, it denies a claim solely because it is not covered by the policy. *See, e.g.*, *Rock Transp. Props. Corp. v. Hartford Fire Ins. Co.*, 433 F.2d 152, 153 (2d Cir. 1970) (defendant "waived the notice requirement" because defendant "specifically disclaimed liability under the policies" on other substantive grounds); *Haslauer v. N. Country Adironack Co-op. Ins. Co.*, 654 N.Y.S. 2d 447, 448 (N.Y. App. Div. 1997) (same); *Ehrlich ex rel. Williams v. Aetna Cas. & Sur. Co.*, 463 N.Y.S.2d 934, 938 (N.Y. App. Div. 1983) (same).[18]

With respect to any defense of which the insurer had knowledge, "the act by an insurer of disclaiming on certain grounds but not others is deemed *conclusive* evidence of the insurer's intent to waive the unasserted grounds" as a matter of

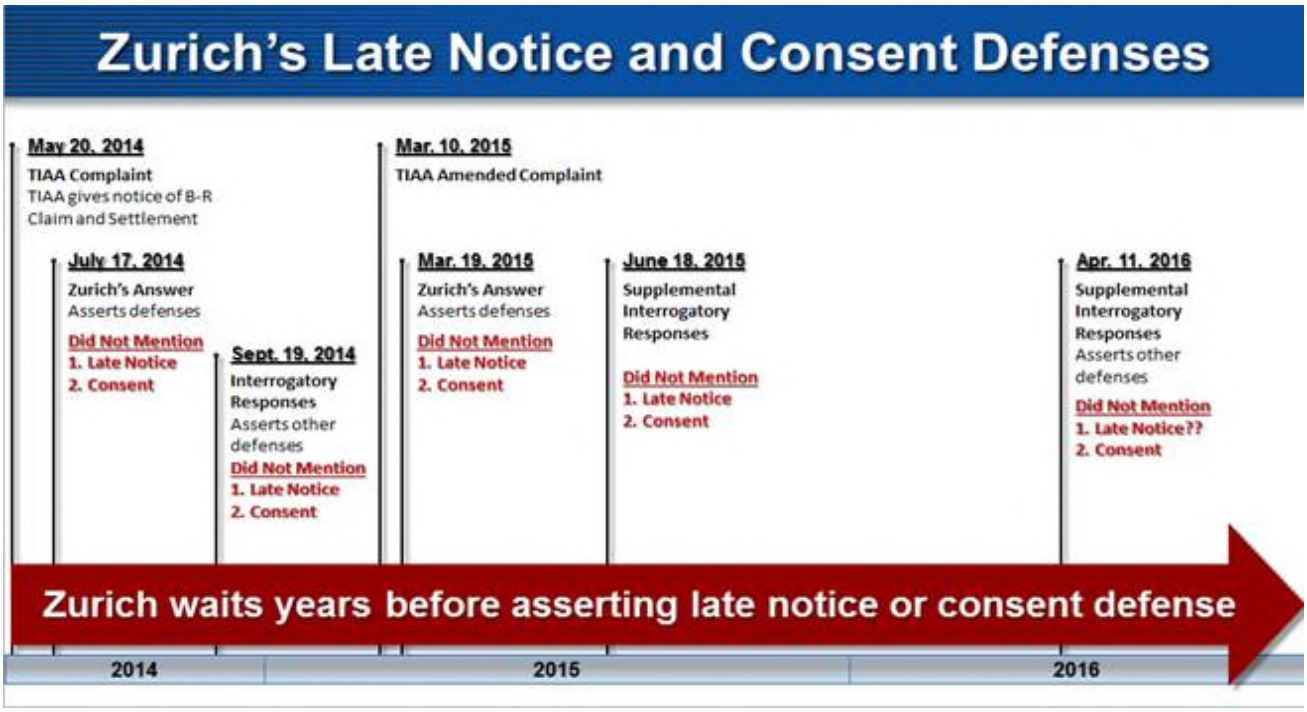
[18] *See also Gen. Accident Ins. Grp. v. Cirucci*, 403 N.Y.S.2d 773, 773 (N.Y. App. Div. 1978), *aff'd*, 46 N.Y.2d 862 (N.Y. 1979); *Rockland Exposition, Inc. v. Great Am. Assur. Co.*, 746 F. Supp. 2d 528, 543-45 (S.D.N.Y. 2010).

[redacted]

law. *New York v. Amro Realty Corp.*, 936 F.2d 1420, 1432 (2d Cir. 1991) (emphasis in original); *see also Olin Corp. v. Ins. Co. of N. Am.*, 2006 WL 509779, at *2 (S.D.N.Y. Mar. 2, 2006) (same); *Viking Pump, Inc. v. Liberty Mut. Ins. Co.*, 2007 WL 1207107, at *29 (Del. Ch. Apr. 2, 2007) (under New York law, "when an insurer states grounds for potentially disclaiming liability, it waives all other possible grounds for disclaimer"). As soon as practicable after an insurer has gained actual or even constructive knowledge of the circumstances supporting a particular defense, it must raise the defense or it will be deemed waived. *See, e.g.*, *JPMorgan Chase & Co. v. Twin City Fire Ins. Co.*, 2009 WL 889957 (N.Y. Sup. Ct. Mar. 3, 2009).

As a matter of law, Zurich's conduct constituted a waiver on this ground. Following its initial notice of the *Bauer-Ramazani* Action claim and settlement no later than the filing of TIAA-CREF's Complaint, Zurich failed for years to raise any late notice and consent defenses, even though it did raise other substantive defenses:

[redacted]



TA0244-76; TA0325-26; TA0386-99; JA1868; TA0400-37; TA0644-47; JA1272.

Furthermore, to be effective, the assertion of a coverage defense must be specific, not merely contained within a generalized catch-all defense or a general reservation of rights, thus rendering Zurich's Second Affirmative Defense ineffective. The court in *JPMorgan Chase & Co. v. Travelers Indem. Co.*, 2009 WL 137044, at *5 (N.Y. Sup. Ct. Jan. 12, 2009), *aff'd*, 897 N.Y.S.2d 405 (N.Y. App. Div. 2010), held that a boilerplate reservation of rights in a coverage denial was insufficient to preserve the insurer's right to raise a notice defense (claiming a lack of specificity), particularly where the insurer "fail[ed] to indicate [the notice's] purported deficiencies and otherwise behaved as if it was sufficient." *See*

[redacted]

also Cirucci, 46 N.Y.2d at 864 (denial of coverage requires "high degree of specificity"); *Viking Pump*, 2007 WL 1207107, at *29 (general reservation of rights ineffective after insurer gains knowledge of facts on which it intends to disclaim); *Cf. Benjamin Shapiro Realty Co. v. Agricultural Ins. Co.*, 731 N.Y.S.2d 453, 454 (N.Y. App. Div. 2001); *N. Am Philips Corp. v. Aetna Cas. & Sur. Co.*, 1995 WL 628443, at *3 (Del. Super. Apr. 20, 1995) (under New York law, insurer's assertion of late notice of occurrence defense in Answer was not sufficiently specific to also assert late notice defense under different policy provision).[19]

Zurich's attempt to rely on its denial of a factual allegation concerning notice in TIAA-CREF's pleadings, or on its boilerplate omnibus defense based on unspecified terms and conditions in the Zurich Policy, fails to meet these requirements. *See Burt Rigid Box, Inc. v. Travelers Prop. Cas. Corp.*, 302 F.3d 83, 95-96 (2d Cir. 2002) (catch-all affirmative defense that policy's "terms, conditions,

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[19] Nor can Zurich rely on cases following *Amro* that suggest that a general reservation of rights may allow an insurer to resurrect late defenses. In Zurich's September 2014 responses to interrogatories, it detailed certain defenses to coverage (*see* Responses 4, 5 and 6) but did not reserve its right to raise others, like notice, of which it had at least constructive knowledge at the time. And even in its footnote in its summary judgment brief attempting to raise a late consent defense two years later, Zurich still did not specifically reserve a notice defense. JA4784.

[redacted]

exclusions and limitations" did not provide coverage did not preserve notice defense). Other defendants, including Arch and St. Paul Mercury, whose answers also contained similar catchall defenses, still understood that they had to assert specific affirmative defenses raising late notice and lack of consent. TA0500 (20th and 21st Defenses); TA0590-92 (20th and 29th Defenses). *See Amro*, 936 F.2d at 1430 (no "plausible explanation" why insurer did not identify late notice defense when other insurers did).

Moreover, any assertion that the denials and boilerplate defenses in Zurich's pleadings contemplated a late notice or lack of consent defense is belied by its discovery responses. For years, when repeatedly asked to set forth the factual basis for its defenses to coverage, *not once* did Zurich detail support for any late notice or lack of consent defense.[20]

The Superior Court's conclusion that Zurich is immune from waiver because it received notice of the claim and responded via pleadings is also contrary to New York law. *See Burt Rigid Box*, 302 F.3d at 95-96 (insurer waived unasserted notice defense when it listed other affirmative defenses in its Answer disclaiming on

[20] *See Baxter Int'l, Inc. v. Rhone-Poulenc Rorer, Inc.*, 2004 WL 2158051, at *4-5 (Del. Ch. Sept. 17, 2004) (where party provided rote and uninformative responses to discovery requests calling for factual basis for affirmative defenses, court rejected later attempt to rely on defense).

other policy exclusions); *N. Am Philips Corp.*, 1995 WL 628443, at *3 (waiver by failure to specifically assert one notice defense in Answer, while asserting another); *see also In re Balfour Maclaine Int'l Ltd.*, 873 F. Supp. 862, 871 (S.D.N.Y. 1995) ("[E]ven if [insurers'] late-notice defense has merit, we find that [it] waived this defense by failing to include it in its original declaratory judgment complaint."), *aff'd*, 85 F.3d 68 (2d Cir. 1996).

Thus, under controlling New York standards, Zurich waived its right to raise a late notice or consent defense long before trial as a matter of law. Accordingly, the Superior Court's denial of TIAA-CREF's motion *in limine* and motions for JMOL constituted reversible error.

2. The Superior Court Improperly Instructed the Jury on the Burden of Proof with Respect to Waiver

For more than a century, New York's highest court and other courts following it have held in the insurance context that an insured has the burden to establish waiver only "by a preponderance of evidence." *Gibson Elec. Co. v. Liverpool & London & Globe Ins. Co.*, 54 N.E. 23, 26 (N.Y. 1899); *Van Tassel v. Greenwich Ins. Co.*, 45 N.E. 365, 366 (N.Y. 1896) (holding preponderance of the evidence is necessary to establish waiver of insured's rights); *Watson v. Farmers Co-op. Fire Ins. Co.*, 151 N.Y.S.2d 321 (N.Y. App. Div. 1956) (waiver of breach

[redacted]

of insurance policy must be established by preponderance of the evidence), *aff'd*, 140 N.E.2d 876 (N.Y. 1957); *B-M-G Inv. Co. v. Cont'l/Moss-Gordin, Inc.*, 320 F. Supp. 968, 972 (N.D. Tex. 1969), *aff'd in part, remanded in part*, 437 F.2d 892 (5th Cir. 1971) (applying New York law and quoting *Gibson*). The *Gibson* rule has been reiterated by New York's highest court: "waiver must be established by the person claiming it by a preponderance of evidence." *Sillman v. Twentieth Century-Fox Film Corp.*, 144 N.E.2d 387, 393(N.Y. 1957) (quoting *Gibson*).

In direct contravention of this long-standing law, the Superior Court instructed the jury that TIAA-CREF was required to prove waiver by the far more stringent clear and convincing standard. JA6526-33. That instruction constitutes reversible error, and requires that, in the event this Court does not reverse the denial of TIAA-CREF's JMOL on the waiver issue, this issue be re-tried with a preponderance of the evidence jury instruction.

CONCLUSION

For the reasons set forth above, TIAA-CREF respectfully requests that this Court: (1) reverse the Superior Court's denial of prejudgment interest to TIAA-CREF from Arch and ACE and remand to the Superior Court for a calculation of that interest or, alternatively, award those amounts as consequential damages against Illinois National; and (2) reverse the Superior Court's denial of TIAA-CREF's motion *in limine* and for JMOL against Zurich on the waiver issue or, alternatively, order a new trial and direct that the jury be instructed that TIAA-CREF must prove waiver only by a preponderance of the evidence.

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