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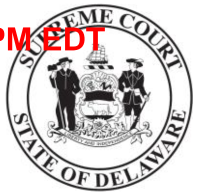

IN THE SUPREME COURT OF THE STATE OF DELAWARE

	)	**PUBLIC VERSION**
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)
	)	

ANSWERING BRIEF OF ACE AMERICAN INSURANCE COMPANY REGARDING PREJUDMENT INTEREST

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NATURE OF PROCEEDINGS

As relevant to this brief,[1] Plaintiffs TIAA-CREF[2] appeals from a portion of the Superior Court's October 23, 2017 decision holding that ACE does not owe TIAA-CREF any prejudgment interest.

The Superior Court enforced the unambiguous provisions of the ACE Excess Policy requiring exhaustion of underlying policies, and it also "shaved" the policy limit to a reduced amount based on the settlement of underlying insurers. Despite this, Plaintiffs on appeal insist that ACE must pay prejudgment interest on an amount that is not yet due under the Policy. As the Superior Court recognized, Plaintiffs' arguments along these lines are misplaced because ACE should not—and, in line with New York case law, cannot—be forced to pay interest on a contractual obligation that has not been breached or anticipatorily breached.

Furthermore, the unambiguous language of both the exhaustion and shavings provisions of the ACE Excess Policy undermine the faulty logic in Plaintiffs' argument. Specifically, the Superior Court correctly acknowledged that ACE cannot be ordered to pay interest on its alleged contractual obligations when the

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[1] ACE American Insurance Company's ("ACE's") Answering Brief to Plaintiffs'/Appellants' Opening Brief is limited to the sole issue of prejudgment interest.

[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 collectively referred to in this brief as "Plaintiffs" or "TIAA-CREF."

exhaustion provision does not require payment unless and until all underlying have already paid. Nor can ACE be made to pay interest when the shavings provision results in ACE not even knowing what its policy limit is (and thus the amount it would have to pay) until after all underlying insurers have paid or settled under their respective policies. Accordingly, the Court should affirm the Superior Court's decision holding that ACE does not owe any prejudgment interest to the Plaintiffs.[3]

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[3] ACE, along with two other insurers—Illinois National Insurance Company ("Illinois National") and Arch Insurance Company ("Arch") 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 TIAA-CREF for the Underlying Actions. The Court's ruling on "Loss" may therefore moot this appeal as to prejudgment interest.

SUMMARY OF ARGUMENT

1. **Plaintiffs' Summary:** 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.)

Response: The Superior Court did not err in denying TIAA-CREF prejudgment interest from the Excess Insurers. ACE therefore denies. The issue of whether the Superior Court erred in denying prejudgment interest from Illinois National (the primary carrier) as consequential damages is not directed toward ACE. ACE accordingly takes no position on this issue, but would urge affirmance on this point if a response were required of ACE.

Counterstatement: The Superior Court correctly determined that ACE does not owe TIAA-CREF any prejudgment interest because ACE's performance obligations under the policy have not yet been triggered. There is therefore no breach or anticipatory breach of contract by ACE that requires an award of prejudgment interest.

a. **Plaintiffs' Summary:** 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 wrongfully refused to pay its policy's limit, 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.

Response: ACE denies the entirety of sub-paragraph a. More specifically, ACE denies that New York law referenced by Plaintiffs is relevant to the issues in this case because ACE's exhaustion and shavings provisions govern when ACE owes the Plaintiffs any obligation under the Policy, and thus when any prejudgment interest would be due. ACE admits that one of the purposes of New York's interest statute is to compensate a party for the lost time value of money in a typical breach of contract case, but denies that the purpose of the statute is relevant to this case, which involves an excess insurer, and is therefore not a typical breach of contract case. ACE denies that it "refused to pay because the primary insurer wrongfully refused to pay its policy limit," and therefore denies that that there was

any refusal "because of" the primary insurer's alleged breach. ACE further denies that its denial of coverage was a repudiation constituting an anticipatory breach.

Counterstatement: ACE has no current obligation under the ACE Excess Policy to pay TIAA-CREF, and it is therefore premature to award prejudgment interest. New York law is well-settled that a contract cannot be breached until the time set for performance has expired. Where an excess insurer's policy is not triggered—here, because of the exhaustion and shavings provisions—there can be no breach of contract or anticipatory breach of contract. Without any breach of contract, there can be no prejudgment interest awarded under New York law.

b. **Plaintiffs' Summary:** Prejudgment interest is also mandated from the date on which the Excess Insurers' coverage liability was established by decision or verdict to the date of entry of judgment, regardless of the type of claim or basis of liability.

Response: ACE denies the entirety of sub-paragraph b.

Counterstatement: The terms of the ACE Excess Policy exhaustion and shavings provisions—not the date on which the Superior Court made a determination of some aspect of coverage—governs if and when prejudgment interest is awarded.

c. **Plaintiffs' Summary:** 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] spent on defense and settlement costs, Illinois National is properly chargeable with the interest necessary to make TIAA-CREF whole.

Response: ACE denies that any prejudgment interest is allocable to it as an excess insurer whose obligations under its policy have not yet been triggered. The remaining statements in sub-paragraph c. are not directed at ACE. ACE accordingly makes no response, and denies to the extent that a response is required.[4]

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[4] Paragraph 2 (and sub-paragraphs a. and b. of Paragraph 2) in Plaintiffs' Summary of Argument are addressed to Zurich American Insurance Company ("Zurich"), not ACE. Since the statements in these Paragraphs are not addressed to ACE, ACE makes no response, and denies to the extent that a response is required.

STATEMENT OF FACTS

To prevent the Court from having to re-read facts already laid out in the consolidated appeals at issue, ACE incorporates by reference the sections titled "The TIAA-CREF Investment Funds" and "The Underlying Actions" from Statement of Facts in the Opening Brief of Appellants Illinois National Insurance Company, ACE American Insurance Company and Arch Insurance Company Regarding Whether TIAA-CREF Suffered Covered "Loss," Filing ID 61614599. ACE's Statement of Facts below is limited to facts relevant to the issue of prejudgment interest, as well as to explaining and refuting Plaintiffs' Statement of Facts.[5]

A. The 2007-2008 Insurance Tower

TIAA-CREF seeks reimbursement of defense and settlement costs under a tower of claims-made and reported professional liability insurance effective for the April 1, 2007 to April 1, 2008 policy period. Illinois National issued the primary policy in the tower: Professional Liability [redacted] (the "Illinois National Policy").[6] The Illinois National Policy is subject to a [redacted]

[5] ACE's Statement of Facts does not address the facts in Plaintiffs' Statement of Facts relevant to Plaintiffs' appeal of the Superior Court's ruling in favor of Zurich.

[6] JA2541.23-41.58.

deductible and a [REDACTED] Aggregate Limit of Liability (both inclusive of defense costs).[7]

As relevant to the issues in this brief, ACE issued an excess policy bearing policy number [REDACTED] and providing an aggregate limit of liability of [REDACTED] in excess of [REDACTED] in underlying insurance (the Illinois National Policy with limits of [REDACTED], and an excess policy issued by St. Paul Mercury Insurance Company ("St. Paul") with limits of [REDACTED]).[8] Except as explained below in Section C, ACE's policy applies in conformance with the terms and conditions of the Illinois National Policy.[9]

B. <u>ACE Denies But Does Not Repudiate Coverage for *Rink* and *Bauer-Ramazani*</u>

Plaintiffs first noticed the *Rink* Action to Illinois National on November 29, 2007, and sought reimbursement for the defense and settlement costs of that action from Illinois National only—ACE's layer was not implicated by the *Rink* loss—after the underlying *Rink* settlement in May 2012.[10] Illinois National issued its letter denying coverage for the *Rink* Action in January 2013, citing several policy

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[7] JA1887-88 at ¶ 37.
[8] JA0492-504.
[9] *Id.*
[10] JA1279-96, JA1473-79.

[REDACTED]

provisions, including that the *Rink* settlement payments were uninsurable disgorgement.[11]

Plaintiffs similarly noticed the *Bauer-Ramazani* Action to Illinois National, ACE, and other excess insurers on January 3, 2010.[12] Illinois National denied coverage in an April 23, 2013 letter, raising similar coverage issues as asserted with respect to *Rink*.[13] ACE subsequently issued a June 11, 2013 coverage letter, which referenced the Illinois National's April 23 coverage letter and the terms of the underlying Illinois National policy to which the ACE Excess Policy followed form, and also "adopt[ed] the positions" raised therein.[14]

C. **The Exhaustion Provision and the Shavings Provision in the ACE Excess Policy That Govern When ACE's Obligations Under the Policy Come Due**

One of the provisions that is unique to the ACE Excess Policy is its exhaustion provision, which provides if and when ACE's obligations come due under the Policy. Specifically, the exhaustion provision provides that:

> It is expressly agreed that liability for any covered Loss shall attach to the Insurer *only after*
>
> 1. *the insurer(s) of the Underlying Policies*; or
> 2. the Insureds pursuant to an agreement with the insurer(s) of the Underlying Policies

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[11] JA1492-97.
[12] JA1509-23.
[13] TA0763-67.
[14] TA0768-71.

> *shall have paid, in the applicable legal currency, the full amount of the Underlying Limit and the Insureds shall have paid the full amount of the uninsured retention*, if any, applicable to the primary Underlying Policy. Nothing in this subsection shall preclude the Insurer of this Policy from considering any of the other terms, conditions, limitations and exclusions of this Policy, the Followed Policy, or any Underlying Policy, in determining whether any Loss is covered under this Policy. . . . *The Insurer shall then be liable to pay only covered Loss in excess of such Underlying Limit* . . . .[15]

The "insurer(s) of the Underlying Policies" for the 2007-2008 tower of insurance at issue in this case are Illinois National and St. Paul.[16]

The exhaustion provision is not, however, the only provision in the ACE Excess Policy relevant to the issue of whether ACE owes TIAA-CREF prejudgment interest. The ACE Excess Policy also contains a shavings provision, which states:

> Notwithstanding anything in this Policy to the contrary, in the event any insurer of an Underlying Policy reaches an agreement with the Insureds for such insurer to pay covered Loss in an amount less than such insurer's limit of liability, the Insurer of this Policy shall not be liable for any greater percentage of Loss under this Policy than such insurer of such Underlying Policy is liable, subject to the Aggregate Limit of Liability set forth in the Declarations and the remaining terms and conditions of this Policy.[17]

[15] JA0501 (emphasis added).
[16] JA0495.
[17] JA0502.

It is undisputed that the shavings provision had already reduced ACE's policy limit from [redacted] to [redacted] as a result of Plaintiffs' settlement with St. Paul prior to trial on December 16, 2016.[18]

D. Summary Judgment and Trial in the Superior Court

After the parties filed cross-summary judgment motions on several issues, the Superior Court issued an opinion on October 20, 2016 holding that Plaintiffs' settlements of the *Rink* and *Bauer-Ramazani* Actions constituted insurable "Loss," and that *Bauer-Ramazani* was related to *Rink* such that both actions fell under the 2007-2008 insurance tower.[19] ACE had no remaining defenses to coverage after the Superior Court's summary judgment ruling, so it did not participate in the trial that followed regarding other insurers' remaining defenses. The Court's summary judgment ruling did not address whether ACE had breached or anticipatorily breached any of its obligations under the ACE Excess Policy, nor did it address whether ACE owed TIAA-CREF any prejudgment interest.[20]

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[18] *See* TA0668 n.1; TA0732-33; TA0947-48; Exhibit G to Plaintiffs' Opening Brief at 28. St. Paul is accordingly not a party to the Superior Court's judgment, or to this appeal. Also, St. Paul's settlement agreement with TIAA-CREF has only been provided to ACE subject to the utmost confidentiality, and therefore is not part of any appendices submitted to the Court. But TIAA-CREF does not dispute that the settlement with St. Paul was finalized on December 16, 2016.

[19] JA5225-32.

[20] JA5200-44

E. **The Superior Court Rules that the Exhaustion and Shavings Provisions In the ACE Excess Policy Require the Underlying Insurers to Pay Full Policy Limits Before ACE Can or Should Owe TIAA-CREF any Prejudgment Interest**

After trial, TIAA-CREF moved for entry of final judgment, including an award of prejudgment interest against Illinois National, ACE, and Arch.[21] On October 23, 2017, the Superior Court issued an opinion granting in part and denying in part Plaintiffs' Motion for Entry of a Final Order and Judgment Pursuant to Rule 54(b).[22] As relevant to the issues in this brief, the Court held that TIAA-CREF was entitled to an entry of judgment on its declaratory relief claim against Illinois National, ACE, and Arch with respect to the *Rink* and *Bauer-Ramazani* Actions.[23]

However, the Superior also held that because of the application of the exhaustion and shavings provisions in the respective excess policies, it had no basis to enter a damages judgment against either ACE or Arch for breach of contract, which necessarily precluded any award of prejudgment interest against ACE or Arch.[24] Indeed, the Superior Court held that the ACE exhaustion provision permits it, as an excess insurer, to "wait out good faith coverage disputes [between the insured and the underlying insurer(s)] without breaching their own

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[21] TA0882-906.
[22] Exhibit G to Plaintiffs' Opening Brief.
[23] *Id.* at 16.
[24] *Id.* at 23.

performance obligations . . . regardless of whether the underlying insurer(s) have wrongfully denied coverage."[25]

Finally, the Superior Court rejected TIAA-CREF's claim that ACE anticipatorily breached its obligations under the ACE Excess Policy by adopting Illinois National's denial of coverage, holding instead that while a "denial of coverage may amount to an anticipatory breach in some cases, in this case, the attachment provision[] and the shavings provision[] of the [ACE Excess Policy] serve[s] to insulate ACE . . . from liability until TIAA-CREF has resolved its coverage dispute with the underlying insurer(s).[26] The Superior Court also noted that ACE did not anticipatorily breach any obligations because in its coverage letter, ACE never indicated that it would "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."[27] The Superior Court's Order and Certified Final Judgment Pursuant to Rule 54(B) therefore found Illinois National, ACE, and Arch liable to indemnify Plaintiffs for their settlement payments and defense costs incurred in connection

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[25] *Id.* at 22-23.
[26] *Id.* at 24.
[27] *Id.* at 25.

with *Rink* and *Bauer-Ramazani*, but only "in accordance with their applicable policies' attachment points and limits, and applicable exhaustion provisions."[28]

[28] Exhibit H to Plaintiffs' Opening Brief at 1-2.

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY HELD THAT ACE HAS NOT BREACHED ANY OBLIGATION TO TIAA-CREF UNDER THE ACE EXCESS POLICY, AND THEREFORE DOES NOT AND CANNOT OWE TIAA-CREF PREJUDGMENT INTEREST

A. Question Presented

Did the Superior Court correctly hold that ACE did not breach or anticipatorily breach any obligations it owed to TIAA-CREF under the ACE Excess Policy because the exhaustion and shavings provisions allow an excess insurer like ACE to wait out good faith coverage disputes between the insured and the underlying insurer(s) without breaching its own performance obligations, regardless of whether the underlying insurer(s) have wrongfully denied coverage?

B. Standard and Scope of Review

The trial court's determination of matters of law are reviewed *de novo*.[29] "Moreover, '[t]he interpretation of insurance contracts involves legal questions and thus the standard of review is *de novo*.'"[30]

C. Applicable Law

ACE agrees with TIAA-CREF that New York law governs the substantive issues in this case, including whether prejudgment interest should be awarded.[31]

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[29] *City of Wilmington v. Nationwide Ins. Co.*, 154 A.3d 1124, 1127 (Del. 2017); *Chrysler Corp. v. Chaplake Holdings, Ltd.*, 822 A.2d 1024 (Del. 2003).

[30] *Lank v Moyed*, 909 A.2d 106, 108 (Del. 2006) (quoting *Emmons v. Hartford Underwriters Ins. Co.,* 697 A.2d 742, 744-45 (Del. 1997)).

D. **Merits of Argument**

Plaintiffs' claim for prejudgment interest is predicated upon treating this matter as a typical breach of contract case where one party has its contractual obligation come due, refuses to satisfy that obligation, and then owes interest on its breach of contract. But this is not the typical breach of contract case because ACE, as an excess insurer with a policy containing both exhaustion and shavings provisions, has not committed any breach. In fact, ACE has no obligation to Plaintiffs, and will not have any obligations, if and until the underlying carriers make their payments to Plaintiffs and exhaust their respective policies. Accordingly, since ACE has not breached or anticipatorily breached the ACE Excess Policy, it is not required to pay any prejudgment interest.

1. The Exhaustion Provision Protects ACE from Breaching or Anticipatorily Breaching the ACE Excess Policy When There is a Good Faith Coverage Dispute Between the Insured and the Underlying Insurer(s)

ACE does not generally disagree with Plaintiffs' cited case law on the purpose of prejudgment interest, but an award of prejudgment interest under New York law must be "because of a breach of performance of a contract."[32] Here, that means that any claim for prejudgment interest must be based upon ACE' breach of an obligation to pay a valid and due contract claim. That claim does not yet exist.

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[31] *See* Plaintiffs' Opening Brief at 25-26.
[32] N.Y. C.P.L.R. § 5001.

The Superior Court's summary judgment opinion on "Loss" was only a determination of ACE's (and the other insurers) coverage obligations under their respective policies, not a determination as to whether ACE's coverage obligations under its Policy had come due. That determination necessarily comes from the terms of the ACE Excess Policy itself, specifically from the exhaustion provision. As the Superior Court recognized, the exhaustion provision (which the Superior Court refers to as the "attachment provision") provides that the ACE's coverage obligation to TIAA-CREF is not triggered unless and until either: (1) the underlying insurer(s) make actual payment of the limits of liability of the underlying insurance; or (2) pursuant to an agreement with the insureds, the underlying insurer(s) make actual payment of a percentage of the limits of liability in exchange for a release of the insureds' claim.[33] Importantly, this means that ACE has no obligation to pay under the Policy until the underlying limits are exhausted upon *actual payment* by the underlying carriers, not merely by the Superior Court's judgment that the underlying carriers have coverage obligations under their respective policies.

[33] JA0501; Exhibit G to Plaintiffs' Opening Brief at 20.

It is well-settled under New York law "that a contract is not breached until the time set for performance has expired."[34] In *Maryland Casualty*, the insured argued that the excess insurers' filing of a declaratory judgment action made it clear that they would refuse to pay even if underlying limits were exhausted, thus repudiating coverage, and, consequently, anticipatorily breaching their insurance contracts.[35] The court rejected the insured's argument, holding that "a claim of anticipatory repudiation is proper only when the repudiating party 'has indicated an unequivocal intent to forego performance' in the form of a 'definite and final communication.'"[36] The court additionally held that the insurers' assertion of affirmative defenses was not a "definite and final communication" because the insurers had not indicated that they would refuse payment "should they be found liable to indemnify [the insured] in this action . . . once underlying insurance is exhausted."[37]

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[34] *Maryland Cas. Co. v. W.R. Grace & Co.*, 1996 WL 306372, at *1 (S.D.N.Y. 1996) (citing *Rachmani Corp. v. 9 East 96th St. Apt.*, 629 N.Y.S.2d 382, 384 (1st Dept. 1995)); *Liberty Surplus Ins. Corp. v. Segal Co.*, 2004 WL 2102090, at *3 (S.D.N.Y. 2004) (same).
[35] 1996 WL 305372, at *1.
[36] *Id.* (citing *Rachmani*, 629 N.Y.S.2d at 385).
[37] *Id.*; *see also*, *Liberty Surplus*, 2004 WL 2102090, at *3 (rejecting insured's argument that excess insurer's filing of declaratory judgment action was an anticipatory breach of the policy, because it was not a refusal to pay once underlying insurance was exhausted).

Additionally, the *Maryland Casualty* court held that there were no damages to be assessed against the excess insurers because "the policies underlying those insurers are not exhausted."[38] In other words, the time set for an excess insurer's obligation to pay under its policy "occurs upon the exhaustion of the Underlying Policies," and that when the insured "has presented no evidence showing that this event has occurred, its claim for anticipatory breach is premature."[39]

Here, TIAA-CREF has never pled a breach of contract claim against ACE; rather, it sought a declaration as to ACE's obligations upon the triggering and attachment of its policy, and claimed anticipatory breach.[40] However, even if TIAA-CREF had pled a breach of contract claim against ACE, there can be no dispute that TIAA-CREF has not reached a final resolution of its coverage dispute with Illinois National, as Illinois National has not made actual payment of the limits of its liability, nor have the Plaintiffs and Illinois National entered into any settlement agreement. Accordingly, the clear and unambiguous terms of the exhaustion provision have not been met.

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[38] *Id.*

[39] *Liberty Surplus*, 2004 WL 2102090, at *3.

[40] JA1935; Exhibit G to Plaintiffs' Opening Brief at 23-24.

Similarly, Plaintiffs' request for prejudgment interest under a theory of anticipatory breach of contract by repudiation is also premature.[41] Plaintiffs' operative complaint alleges that ACE issued a coverage letter stating that it "adopt[s] the position of Illinois National, which has repudiated its obligations to cover Loss arising from the Underlying Class Actions under its policies," or alternatively, has "failed to provide Plaintiffs with a position as to coverage under their Policies."[42] If the filing of a declaratory judgment action in *Liberty Surplus* and the assertion of affirmative defenses in *Maryland Casualty* were not "definite and final" communications of the excess insurers' refusal to pay, then neither is ACE's adoption of Illinois National's position in a coverage letter, nor is ACE's alleged failure to provide Plaintiffs with a coverage position.[43]

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[41] Plaintiffs claim that the Superior Court's holding that ACE and Arch did not anticipatorily breach the respective excess policies contradicts both the record and the jury verdict. (Plaintiffs' Opening Brief at 33). However, ACE did not participate in the trial—only Arch did—so Plaintiffs argument that the Superior Court's decision is contrary to the jury verdict is necessarily limited to Arch only.

[42] JA1935.

[43] Plaintiffs cite *Granite Ridge Energy, LLC v. Allianz Global Risk U.S. Ins. Co.*, 979 F. Supp. 2d 385, 393 (S.D.N.Y. 2013) for the idea prejudgment interest is to be paid from the date of an insurer's first denial of coverage. However, *Granite Ridge* did not involve an excess insurer, and the policy at issue specified that payment was due on an "ascertainable date" that was either within a certain time after the insured either submitted a proof of loss form, or when the insurer disclaimed liability. In contrast, the ACE Excess Policy's exhaustion provision provides that payment is not due on a specific date, but rather, when the underlying policy limits are exhausted. Until that has occurred, ACE cannot disclaim (and has not disclaimed) liability under the Policy.

Moreover, and perhaps more importantly, the unambiguous exhaustion provision in the ACE Excess Policy provides that ACE's performance under the Policy only occurs upon the underlying insurers paying "in the applicable legal currency, the full amount of the Underlying Limit." Again, Illinois National has not yet made any payments under its policy. Thus, in order for Plaintiffs to have a valid anticipatory breach claim to anchor their demand for prejudgment interest, the Court would first need to reject all of ACE's coverage defenses; then all appeals pertaining to those coverage defenses would have to be resolved in favor of Plaintiffs; then Illinois National and St. Paul (the underlying insurers) would have to make payment to Plaintiffs exhausting the full limits of their policies; and ***then*** ACE would have to refuse to pay its policy limits. Because the underlying policies have not exhausted, ACE has not even had the opportunity to make an unequivocal refusal, and Plaintiffs therefore have no anticipatory breach claim upon which to base their request for prejudgment interest.[44]

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[44] Plaintiffs also claim that ACE anticipatorily breached the Policy because it told TIAA-CREF, after denying coverage, that TIAA-CREF did not need ACE's permission to consent to settle the *Bauer-Ramazani* Action. Not requiring Plaintiffs to ask ACE for consent after ACE disclaimed coverage does not, as Plaintiffs believe, equate to a waiver of all policy conditions or a repudiation. *Bear Wagner Specialists, LLC v. National Union Fire Ins. Co of Pittsburgh, Pa.*, 2009 WL 2045601, at 7 (N.Y. Sup. Ct. 2009) ("If an insurer *repudiates* the policy, the insured is relieved of its policy obligations; conversely, if the insurer merely *disclaims* an individual claim, the insured continues to be obligated to comply with its contractual responsibilities") (emphasis added). Framed in a different context,

In arguing for an award of prejudgment interest, Plaintiffs' chiefly rely on *J.P. Morgan Securities, Inc. v. Vigilant Insurance Co.*, 2017 WL 3448370 (N.Y. Sup. Ct. Aug. 7, 2017) for the idea that an excess insurer cannot benefit from an underlying carrier's wrongful denial of coverage. But, according to the Superior Court, this is *exactly* the benefit that an excess insurer like ACE receives when the parties contract to include clear and unambiguous exhaustion and shavings provisions in an excess policy to counteract the comparatively lower premium that ACE receives (as compared to the premium received by primary or other underlying insurers). Specifically, the Superior Court held:

> TIAA-CREF's argument that ACE and Arch are illegitimately attempting to take advantage of Illinois National's breach of contract has considerable rhetorical force. However, ACE and Arch's ability to *wait out good faith coverage disputes without breaching their own performance obligations is a benefit conferred upon them by the terms of the attachment provisions, regardless of whether the underlying insurer(s) have wrongfully denied coverage*. ACE and Arch's performance obligations have not yet been triggered, and *the purposes served by prejudgment interest in other cases do not give the Court license to ignore the terms of the ACE and Arch Excess Policies or to ignore the fact the prejudgment interest statute requires the Court award a sum for breach of performance*. In light of the foregoing, the Court does not currently have a basis to enter a damages judgment against ACE and Arch for breach of contract. This fact necessarily

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if a mortgage company waives the late fee on an untimely mortgage payment, the homeowner would not be able to argue that the mortgage company anticipatorily breached the loan agreement or waived any security interest it has in the home.

> precludes any award of prejudgment interest against ACE and Arch for breach of contract under Section 5001(a).[45]

In so stating, the Superior Court also rejected TIAA-CREF's invitation to ignore the clear and unambiguous exhaustion and shavings provisions in the ACE Excess Policy.[46] Accordingly, ACE is not—as Plaintiffs claim—arguing that the Policy trumps New York's law on prejudgment interest; rather, ACE is arguing that the clear and unambiguous terms of its policy govern if and when ACE's obligations under the Policy come due, and that ACE is not required to pay prejudgment interest until such breach occurs.[47]

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[45] Exhibit G to Plaintiffs' Opening Brief at 22-23 (emphasis added); *see also id.* at 20 ("By encompassing situations where the underlying insurer(s) have wrongfully denied coverage, the effect of these attachment provisions is to permit the excess insurer to *wait out good faith coverage disputes between the insured and the underlying insurer(s) without risk of breaching* the excess insurer's performance obligations") (emphasis added).

[46] *Seaport Park Condo. v. Greater N.Y. Mut. Ins. Co.*, 828 N.Y.S.2d 381, 383 (N.Y. App. Div. 2007) (holding that where the terms of an insurance policy are clear and unambiguous, the policy must be enforced as written).

[47] Plaintiffs cite *Varda, Inc. v. Insurance Co. of North America*, 45 F.3d 634 (2d Cir. 1995) for the idea that a provision in an insurance policy cannot supersede New York's prejudgment interest statute. But *Varda* is distinguishable, as it did not involve excess insurance, the policy at issue was an occurrence policy rather than a claims-made policy, and the policy did not have an exhaustion clause. Rather, the policy had a provision providing for payment on a specific date within thirty days after either an agreement with the insured, the filing of an appraisal award, or entry of a final judgment. *Id.* at 640. Additionally, the *Varda* insured explicitly argued that this provision required that interest not accrue until thirty days after entry of the final judgment, trumping New York law on when prejudgment interest should accrue. The court rejected this argument, finding that

There are also a few key distinguishing factors between *J.P. Morgan* and this case. First, in holding that the excess insurers owed prejudgment interest, the *J.P. Morgan* court noted that the exhaustion provisions relied on by the excess insurers to argue against an award of prejudgment interest were not enough to overcome the fact that the insured suffered a single large loss that simultaneously exceeded each insurers' limit.[48] In so holding, the court noted that "this is not a situation where the excess insurers' liability depends on some future contingency, such as a potential subsequent loss that might reach the excess layers . . . ."[49] In this case, however, there is a future contingency: the shavings provision.

Per the shavings provision, ACE cannot know its own limit of liability (and therefore the extent of its obligations under the ACE Excess Policy), if and until all underlying insurers exhaust their policy through payment or settlement. If one of the underlying insurers settles for less than that insurer's limit of liability, that future contingency gives ACE the benefit of receiving a corresponding reduction in its own policy limits. In other words, ACE's payment obligation under the Excess Policy is subject to change based on the actions of the underlying insurers.

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the provision did not even mention prejudgment interest, much less how and when it should be calculated. *Id.* Again, ACE has made a similar argument here.

[48] Unlike the single loss in *J.P. Morgan* that simultaneously triggered all of the insurers' policies at once, this matter involves several losses that triggered different policies' limits at different times.

[49] *J.P. Morgan*, 2017 WL 3448370, at *2.

Extending the shavings provision to the logical conclusion, ACE's situation presents the exact kind of "future contingency" contemplated by the *J.P. Morgan* court. The necessary result of such a contingency is that ACE cannot breach its obligations to the insured (and thus not owe prejudgment interest) until all underlying insurers exhaust their policies through settlement or payment. If ACE is ordered to pay prejudgment interest before it knows whether the shavings clause is implicated, the Court will essentially be rewriting the policy to impermissibly read the shavings clause out existence.[50]

Second, part of the reasoning behind the *J.P. Morgan* court's rejection of the excess insurer's argument that there could be no breach until the primary insurer's policy exhausted, was that "where an insurer repudiates a claim and disclaims coverage, an insured's purported failure to comply with a condition contained in the policy is excused."[51] However, the *J.P. Morgan* court incorrectly equates "repudiation" with a "disclaimer" or "denial" of coverage.[52] Indeed, as the *Seward Park* court noted, parties (and courts) often interchange these two terms and use

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[50] *Fieldston Prop. Owners Ass'n, Inc. v. Hermitage Ins. Co.*, 945 N.E.2d 1013, 1017 (N.Y. 2011) ("If the plain language of the policy is determinative, [the court] cannot rewrite the agreement by disregarding that language").
[51] *J.P. Morgan*, 2017 WL 3448370, at *2.
[52] *See*, *Seward Park Hous. Corp. v. Greater New York Mut. Ins. Co.*, 43 A.D.3d 23, 30 (N.Y. App. Div. 2007) (finding that the lower court "erroneously equate[d] 'disclaimer of coverage' with 'repudiation of liability,' and noting that "New York courts have been reluctant to find repudiation of liability in insurance cases unless the circumstances conform narrowly to those elucidated" in two seminal cases).

them incorrectly.[53] However, a true repudiation only occurs when the insured "establishes that the insurer has committed an anticipatory breach by 'disclaim[ing] the intention or the duty to shape its conduct in accordance with the provisions of the contract."[54] The *Seward Park* court eventually determined that the insurer did not "repudiate" the policy because it did not "immediately or summarily reject[] the plaintiff's claim and proofs of loss" but rather, investigated the loss and sent a seven-page letter rejecting the proof of loss, explaining "the denial of coverage with reference to policy provisions and exclusions. In other words, it was an explanation with reference to the terms of the contract."[55]

Similarly here, ACE did not "immediately or summarily" anticipatorily breach the Excess Policy. ACE sent Plaintiffs a coverage letter that referenced the coverage letters from the underlying carrier, which in turn referenced the terms of underlying policy to which the ACE Excess Policy followed form. Again, this was a disclaimer of coverage, not a repudiation, and the insured is therefore not excused from complying with the provisions of the ACE Excess Policy, including the exhaustion provision.

TIAA-CREF cites to another inapposite case, *Olin Corp. v. OneBeacon Am. Ins. Co.*, 864 F.3d 130 (2d Cir. 2017), to support its contention that New York's

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[53] *Id.* at 31.
[54] *Id.* at 32 (internal citations omitted).
[55] *Id.*

prejudgment interest statute does not permit an insurer to deny coverage while avoiding paying prejudgment interest. Significantly, the policy in *Olin* had a very different exhaustion provision than the ACE Excess Policy. In *Olin*, liability under the excess carrier's policy "with respect to any occurrence shall not attach unless and until the Insured, or the Insured's Underlying Insurer, shall have paid the amount of the Underlying Limits on account of such occurrence."[56] In other words, the excess carrier's policy was triggered if either the insured *or* the underlying carrier paid an amount equal to the underlying limit. In *Olin*, it was stipulated and undisputed that damages at each pollution site far exceeded the excess carrier's attachment point when apportioned to a single policy year, and that the insured had already paid cleanup and remediation costs for each pollution site in excess of the primary policy's underlying limit.[57] Accordingly, the court found that prejudgment interest began to run as of the dates when the insured incurred its remediation costs at the various pollution sites.

In contrast, the ACE Excess Policy exhaustion provision states that ACE has no obligation to pay until the underlying limits are exhausted upon actual payment *by the underlying carriers* (or payment by the insured pursuant to a gap-filling agreement that does not exist in this case). Unlike in *Olin*, the ACE Excess Policy

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[56] *Olin*, 864 F.3d at 138 (emphasis added).
[57] *Id.* at 136.

is not triggered by *the insured* paying a judgment or incurring defense costs, and here, the triggering event (the underlying insurer(s) paying full policy limits) has not occurred.

Moreover, the crux of the Second Circuit's holding in *Olin* with respect to prejudgment interest was about whether the insured had made a "definite claim" as contemplated by the policy, such that interest could begin to run when the insured incurred its remediation costs. Accordingly, the Second Circuit's ruling with respect to prejudgment interest did not actually discuss whether the underlying carrier's policy had been exhausted, and indeed, did not need to. Rather, in an earlier part of the opinion, the Second Circuit concluded that the excess carrier's proposed exhaustion method (horizontal exhaustion across policy years rather than vertical exhaustion within a single policy year) was incorrect.[58] As a result, the excess carrier had an obligation to pay, as there had been both payment by the primary carrier and payment of remediation costs by the insured, either of which triggered the excess policy.

Ultimately, the excess insurer in *Olin* breached its obligation to its insurer, and prejudgment interest began to run from the time of breach, because the excess insurer's policy *had already been triggered* when the insured made its demand for coverage. In contrast, ACE did not have any obligations to the Plaintiffs at the

[58] *Id.* at 144-145.

time of the demand for coverage (and still has no obligation due, since Illinois National has yet to actually pay its underlying limits), so there has been no breach and no corresponding date from which prejudgment interest can run.[59]

Focusing on the "because of" language in New York's prejudgment interest statute, Plaintiffs next point to a series of cases where New York Courts have awarded prejudgment interest against an excess insurer.[60] However, these cases were not coverage actions by an insured against its insurer, but rather, contribution actions between insurers, which make them distinguishable on their face. TIAA-CREF's claim that the "because of" language is broad enough to encompass contribution claims where there is no contract (and therefore no "breach of contract") between two insurers may be true, but it is simply irrelevant. Not one of

[59] The only other New York case that Plaintiffs cite as an example on this point is *Turner Construction Company v. American Manufacturers Mutual Insurance Company*, 485 F. Supp. 2d 480 (S.D.N.Y 2007), where the total underlying settlement fully exhausted the primary policy and partially exhausted the excess policy. However, the policy at issue in that case provided that the excess insurer had a duty to defend the insured if the underlying limits were used up in payment of judgments and settlements. The ACE Excess Policy explicitly states that ACE does not have a duty to defend. JA0497. In other words, because the excess insurer in *Turner* had essentially dropped down into the role of primary insurer, the court summarily awarded prejudgment interest without any discussion at all, much less a discussion of the date of accrual for prejudgment interest paid by an excess carrier.

[60] *See U.S. Fire Ins. Co. v. Fed. Ins. Co.*, 858 F.2d 882 (2d Cir. 1988); *Royal Indem. Co. v. Providence Wash. Ins. Co.*, 966 F. Supp. 149 (N.D.N.Y 1997); *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. Emp'rs Ins. Co. of Wassau*, 865 N.Y.S.2d 855 (N.Y. Sup. Ct. 2008).

these cases involved an excess insurer with an exhaustion provision like in the ACE Excess Policy that permits an excess insurer to wait out good faith coverage disputes between the insured and the underlying insurer(s).[61]

In the face of Plaintiffs' inapplicable New York law, there is relevant persuasive authority in ACE's favor involving excess insurers with similar exhaustion provisions. For example, a New Jersey court held that an excess insurer with an exhaustion provision providing that it owed no duty to the insured until the primary insurers were either "paid" or "held liable to pay," did not have to pay prejudgment interest to the insured until underlying limits were exhausted.[62] The *Diamond Shamrock* court reached this decision even though the insured "*lost the use of its money once it paid its share of the settlement*," because "the obligation of the excess providers had not been triggered, because the primary policies had not been exhausted and there was no adjudication of the primary insurer's responsibility to pay the policy limits."[63] Accordingly, the relevant case

[61] *See id.* Notably, several of these opinions awarded prejudgment interest from one insurer to another with little to no analysis or discussion about why the court awarded prejudgment interest beyond a cursory citation to New York's prejudgment interest statute.

[62] *Diamond Shamrock Chemicals Co. v. Aetna Cas. & Sur. Co.*, 609 A.2d 440, 482 (N.J. Super. Ct. App. Div. 1992).

[63] *Id.* (emphasis added); *see also*, *Insituform Technologies, Inc. v. American Home Assurance Co.*, 2008 WL 886026 (D. Mass. 2008) (excess insurer with exhaustion provision "was not obligated to pay until the applicable limit of the underlying policy was exhausted," so prejudgment interest against the excess insurer only

law confirms that, pursuant to the unambiguous language of the exhaustion provision, ACE cannot be required to pay prejudgment interest until its obligations are triggered by the exhaustion of all underlying limits.

2. The Logic of the Shavings Provision Also Dictates that ACE Has Not Breached or Anticipatorily Breached Its Obligations Under the Policy

The exhaustion provision is not the only provision in the ACE Excess Policy supporting ACE's argument that it does not, and cannot, owe prejudgment interest if and until underlying limits are exhausted. As noted by the Superior Court, the shavings provision works in tandem with the exhaustion provision, providing that if the underlying insurer(s) enter into an agreement to pay the insureds less than the full limits of liability, then ACE is entitled to a reduced limit of liability on its Excess Policy commensurate with the settlement of the underlying policy.[64]

It is undisputed that ACE's policy limits have been reduced by virtue of Plaintiffs' settlement with St. Paul Mercury, one of the underlying insurers. However, per the shavings provision, ACE cannot know its final limit of liability,

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began to accrue when the primary carrier paid its full limits) (vacated and remanded on other grounds after the court found in favor of excess insurer, *Instituform Technologies, Inc. v. American Home Assurance Co.*, 566 F.3d 274 (1st Cir. 2009)); *Great Lakes Dredge & Dock Co. v. City of Chicago*, 260 F.3d 789, 796 (7th Cir. 2001) ("Moreover, because the [excess insurer's] policy does not come into play until the underlying limits of $41 million have been exhausted, [excess insurer] is not obliged to fund any of this settlement and cannot be required to pay [prejudgment] interest for delay").

[64] Exhibit G to Plaintiffs' Opening Brief at 11.

and therefore the extent of its obligations under the Excess Policy, if and until *all* underlying insurers pay or settle. Thus, the shavings provision further supports ACE's position that no anticipatory breach has occurred (and that no prejudgment interest is owed) because ACE did not, and could not, even know what the limit of its potential obligations to Plaintiffs would be until St. Paul settled.

Moreover, ACE's obligations under the Excess Policy may change yet again. Although St. Paul has settled, if the other underlying insurer, Illinois National, settles for less than the reduced amount of the St. Paul settlement, ACE's policy limit and corresponding obligations under the policy will similarly be reduced. Extending the language of the shavings provision to the logical conclusion, if ACE cannot know the extent of its liability until *all* underlying carriers have settled or paid policy limits, then any obligation to pay Plaintiffs cannot arise until each and every underlying insurer has done so.

A simple thought experiment underlines the flaws in Plaintiffs' logic. If ACE is ordered to pay Plaintiffs prejudgment interest, but, as Plaintiffs concede, the unambiguous language of the shavings provision applies to reduce ACE's policy limits, the Court will have to determine when that interest began to accrue. Plaintiffs argue that under Section § 5002, interest runs "from the date the verdict was rendered or the report to decision was made to the date of final judgment." In this case, Plaintiffs contend that the date interest began to run for ACE is the date

of the Superior Court's summary judgment ruling.[65] However, if Plaintiffs are correct, then ACE would have to pay interest on its reduced [redacted] limit starting on October 20, 2016 (the date of the Superior Court's summary judgment order)[66] even though its reduced limit had not been determined at that time because the settlement with St. Paul was not finalized until *after* the summary judgment ruling. This would be illogical, and again proves that ACE should not and cannot pay TIAA-CREF any interest at all at this time. Stated differently, Plaintiffs improperly focus on the when interest should begin to accrue, when the actual issue is whether interest should begin to accrue *at all* because ACE has no duty to pay under the ACE Excess Policy if and until all terms of the exhaustion and shavings provision are fulfilled.

Plaintiffs only make a cursory attempt to address the shavings provision, citing to two cases in a footnote for the proposition that "certainty as to the amount of money due is not a necessary factor in awarding prejudgment interest."[67] However, neither *Stanford Square* nor *Aurecchione* involved an insurance policy, much less an excess insurance policy with exhaustion or shaving provisions. Furthermore, unlike the ACE Excess Policy that has ACE's obligations come due

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[65] Plaintiffs Opening Brief, at 36.
[66] JA5200-5244.
[67] *Stanford Square, L.L.C. v. Nomura Asset Corp.*, 232 F. Supp. 2d 289, 293 (S.D.N.Y. 2002); *Aurecchione v. New York State Div. of Human Rights*, 771 N.E.2d 231, 233 (N.Y. 2002).

after a *specific event* (*i.e.* payment of the full limits by the underlying insurers), the contract at issue in *Stanford Square* identified a *specific date* for payment under the contract ("within two business days following termination of the Rate Lock Period").[68] The *Stanford Square* court awarded prejudgment interest as of that specific, fixed date in the contract.[69] *Aurecchione* did not involve a contract at all, but rather involved "pre-determination" interest on a back pay award for a human rights discrimination claim.[70] Ultimately, the logic of the clear and unambiguous shavings provision demonstrates that no obligations have come due under the ACE Excess Policy, and that any claim for prejudgment interest is premature.

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[68] *Id.* at 292.
[69] *Id.* at 293.
[70] *Aurecchione*, 771 N.E.2d at 232.

CONCLUSION

As the Superior Court correctly held, the exhaustion and shavings provisions in the ACE Excess Policy allow ACE to wait out any good faith coverage disputes between TIAA-CREF and the underlying carriers without breaching or anticipatorily breaching any obligations owed to TIAA-CREF under the Policy. The Superior Court also properly concluded that it could not make ACE pay any award of prejudgment interest to TIAA-CREF without a breach or anticipatory breach to anchor that award. This Court should affirm the decision of the Superior Court with respect to prejudgment interest.

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