EFiled: Mar 26 2018 02:15PM EDT
Filing ID 61840983
Case Number Multi-Case

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 ï Superior Court of the State of Delaware C.A. No. N14C-05-178 JRJ [CCLD]

PUBLIC VERSION

ANSWERING BRIEF OF DEFENDANT BELOW / APPELLEE ZURICH AMERICAN INSURANCE CO.

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER
Ronald P. Schiller
Daniel J. Layden
One Logan Square, 27th Floor
Philadelphia, PA 19103
(215) 568-6200
(215) 568-0300

OF COUNSEL

BODELL BOVÉ, LLC
Bruce W. McCullough (Del. ID 3112)
1225 N. King Street, Suite 1000
P.O. Box 397
Wilmington, DE 19899-0397
(302) 655-6749
bmccullough@bodellbove.com

Attorneys for Defendant Below / Appellee Zurich American Insurance Co

Dated: March 19, 2018.
Public Version Dated March 26, 2018.

[redacted].

TABLE OF CONTENTS

[redacted].

[redacted].

TABLE OF AUTHORITIES

Page(s)

Cases

[redacted].

[redacted].

[redacted].

[redacted].

[redacted].

[redacted].

Statutes and Rules

Other Authorities

[redacted].

NATURE OF THE PROCEEDINGS

The following facts are undisputed:

- Appellants (collectively, ñTIAA-CREFò) failed to provide Appellee Zurich American Insurance Company (ñZurichò) notice of the underlying *Bauer-Ramazani* action for which it demands [redacted] in coverage until nearly five years after it was filed and almost four months after TIAA-CREF had already settled that litigation.

- The excess insurance policy (the ñZurich Policyò) issued by Zurich contains conditions precedent to coverage requiring timely notice of any claim and Zurichôs consent prior to any settlement.

- A jury of 12, when presented with these facts, correctly found TIAA-CREF failed to provide the required notice under the Zurich Policy and that Zurich did not waive its rights to receive prior notice or to consent to TIAA-CREFôs settlement.

TIAA-CREF does not challenge the juryôs findings that it failed to provide notice or seek Zurichôs consent. TIAA-CREF does not even contest the juryôs finding that each of these failures independently bars coverage. Instead, despite its inexcusable refusal to comply with the Zurich Policyôs clear terms, TIAA-CREF argues on appeal that the Superior Court should have taken from the jury (both before trial through a motion *in limine* and after the verdict via post-trial motion) the factual question of whether Zurich waived ï that is, knowingly and intentionally relinquished ï its right to rely on these policy conditions. Notably, TIAA-CREF did not assert estoppel; it has never contended that it was in any way prejudiced by anything Zurich said or did. Nor could it: TIAA-CREFôs failure to comply with the Policyôs notice and consent requirements was complete ï and

[redacted].

incurable ï long before TIAA-CREF first notified Zurich of the *Bauer-Ramazani* action.

TIAA-CREFôs waiver theory does not survive scrutiny. First, the Superior Court did not abuse its discretion ï the governing standard for reviewing motions *in limine* ï in allowing the fact-specific issue of waiver to go to the jury. Second, the record evidence cited by TIAA-CREF does not meet the high standard for overturning the juryôs reasoned judgment. Indeed, it is undisputed that TIAA-CREF only provided notice of the *Bauer-Ramazani* action to Zurich through the filing of its coverage complaint. It is indisputable that Zurich expressly denied in its answer that TIAA-CREF had provided timely notice, expressly pled that TIAA-CREF had failed to satisfy conditions precedent to coverage in the Zurich Policy ï ñall of which are reserved and none of which are waivedò ï and that Zurich reiterated throughout discovery and the pre-trial proceedings that TIAA-CREF had failed to satisfy conditions precedent to coverage.

Under Delaware law ï which governs the procedural question of pleading and waiver since TIAA-CREF chose to provide ñnoticeò of an already-settled lawsuit with a lawsuit of its own ï and even New York law which TIAA-CREF

[redacted].

contends applies,[1] these irrefutable facts preclude waiver, as the jury found. Still, TIAA-CREF asks this Court to take the extraordinary step of throwing out the juryôs verdict and rule that no reasonable juror could possibly have reached the conclusion on which all 12 members of the jury below agreed. On the record before the Court, any argument that Zurich intentionally relinquished the Policyôs notice and consent-to-settlement requirements ï let alone did so as a matter of law ï is spurious.

TIAA-CREFôs alternative argument for a new trial based on the Superior Courtôs jury instructions is equally without merit. The Superior Court properly instructed the jury that under New York law ï as under Delaware law ï a party must prove any claim that another party knowingly and intentionally relinquished a contractual right by clear and convincing evidence. New York case law directly supports the correctness of this instruction. If anything, the burden is higher than the ñclear and convincingò standard instructed here. The cases on which TIAA-CREF relies for its ñmere preponderanceò standard ï principally, two decisions from the Nineteenth Century ï are as inapposite as they are antiquated.

[1] Zurich and TIAA-CREF agree that New York law governs the substantive contract-law issues in this coverage dispute but disagree about whether TIAA-CREFôs ñwaiverò arguments present a question of substantive contract law or of Delaware procedural law. *See infra* Argument Section I.C.1.

[redacted].

Accordingly, Zurich respectfully requests that this Court affirm the juryôs unanimous verdict in Zurichôs.

[redacted].

SUMMARY OF ARGUMENTS

1. The arguments in this Paragraph do not pertain to Zurich.

2. Denied. The Superior Court properly allowed Zurich to raise its late-notice and consent-to-settlement defenses at trial and correctly instructed the jury on the burden of proof applicable to TIAA-CREFôs assertion that Zurich had waived those defenses.

   a. Denied. Zurich did not waive its late-notice or its consent-to-settlement defenses. Delaware procedural law, rather than New York contract law, controls the waiver issue. Under either body of law, however, TIAA-CREF is not entitled judgment.

   b. Denied. To the extent the burden of proof governing waiver under New York law is relevant to this appeal, the Superior Court correctly instructed the jury that TIAA-CREF must prove that Zurich waived its defenses by clear and convincing evidence.

[redacted].

STATEMENT OF FACTS

I. THE ZURICH POLICY

Zurich issued the Zurich Policy to TIAA-CREF for the policy period of April 1, 2007, to April 1, 2008. (TA0702.) The Zurich Policy provides excess insurance and attaches only after TIAA-CREF has sustained [redacted] in covered Loss (including a [redacted] deductible). (TA0703.) The Zurich Policy follows form to the terms and provisions of the underlying primary policy issued by Illinois National Insurance Company for the same policy period (the ñIllinois National Policyò), except where the Zurich Policy provides otherwise. (JA0529.) Like the Illinois National Policy, the Zurich Policy is not a general liability policy and does not provide a duty to defend; it provides professional liability insurance on a claims-made basis. (JA0352, JA0529.)

A. The Notice Requirement

Both the Illinois National Policy and the Zurich Policy prescribe requirements regarding notifying the insurer of a claim or potential claim against the policyholder. The former provides that ñ[t]he Insured shall, as a condition precedent to the obligations of the Insurer under this policy, give written notice to the Insurer of a Claim made against an Insured as soon as practicable after the Insured determines that a Claim presents a loss and/or expense exposure for a single Claim or related Claims of any amount equal to or exceeding [redacted] é .ò

[redacted].

(JA0361.) The Zurich Policy requires that ñ[t]he óInsurerô shall be given notice as soon as is practicable of any claim or any situation that could give rise to a claim under any óUnderlying Insuranceô when the óInsuredô reasonably believes that such claim or situation is likely to result in loss or damages that exceed twenty-five percent (25%) of the sum of the óUnderlying Limitsô and any retention specified in the óPrimary Policyô.ò (JA0531.)

B. The Consent-to-Settlement Requirement

The Zurich Policy contains a separate provision specifying that TIAA-CREF ñshall not é agree to any settlement which is reasonably likely to involve the Limit of Liability of this Policy without the óInsurerôsô consent.ò (JA0530.) The Zurich Policy further provides that ñ[n]o action shall be taken against the óInsurerô unless, as a condition precedent, there shall have been full compliance [by TIAA-CREF] with all the provisions of th[e] Policy.ò (JA0531.)

II. THE UNDERLYING ACTIONS

The trial below concerned TIAA-CREFôs demands for coverage for two class-action lawsuits filed against it: *Rink v. College Retirement Equities Fund* (the ñ*Rink* Actionò), filed on October 29, 2007; and *Walker v. Teachers Insurance & Annuity Assoc. of America – College Retirement & Equities Fund* (the ñ*Bauer-Ramazani* Actionò), filed on August 17, 2009. (TA0694-TA0696.) On May 10, 2012, TIAA-CREF entered into a class-action settlement agreement with the *Rink*

[redacted].

Action plaintiffs. (TA0696.) On January 31, 2014, the parties to the *Bauer-Ramazani* Action also entered into a class-action settlement agreement. (TA0697.)

TIAA-CREFôs alleged loss in the *Rink* Action, by itself, does not reach Zurichôs layer of excess coverage. Indeed, it is undisputed that if the Zurich Policy does not provide coverage for the *Bauer-Ramazani* settlement ï as the jury below unanimously found ï the remaining alleged losses that TIAA-CREF sought to recover at trial are insufficient to reach the Zurich Policyôs [redacted] attachment point.

III. TIAA-CREF BREACHED THE ZURICH POLICY'S NOTICE AND CONSENT-TO-SETTLEMENT PROVISIONS

Although the *Bauer-Ramazani* Action began in August 2009, and TIAA-CREF settled the action with the underlying plaintiffs in January 2014, Zurich was not provided notice of the Action at any time before TIAA-CREF filed its coverage lawsuit in May 2014 ï nearly five years after *Bauer-Ramazani* was filed and over four months after it was already settled. (TA0707.) The jury found that TIAA-CREF breached the Zurich Policyôs condition precedent requiring timely notice (JA6516), and TIAA-CREF does not challenge that finding on appeal. TIAA-CREF has never disputed ï whether below or in this appeal ï that it failed to satisfy the Zurich Policyôs consent-to-settlement provision.

[redacted].

IV. ZURICH INFORMED TIAA-CREF THAT IT DID NOT PROVIDE TIMELY NOTICE AND THAT IT FAILED TO SATISFY CONDITIONS PRECEDENT TO COVERAGE

Because TIAA-CREF first notified Zurich of the *Bauer-Ramazani* Action in TIAA-CREFôs coverage complaint, Zurichôs first opportunity to disclaim coverage was in its answer to the complaint. In both its original and First Amended Complaint, TIAA-CREF alleged that it had provided timely and proper notice of the *Bauer-Ramazani* Action to all of the defendant insurers, including Zurich. (TA0263 ¶ 69, TA0266 ¶ 80, JA1903 ¶ 87, JA1907 ¶ 98.) Far from waiving the notice defense, Zurich responded by expressly denying these allegations. (TA0315, TA0317, TA0411, TA0413.) Furthermore, in its answers to the original and First Amended Complaint, Zurich specifically pled as an affirmative defense that ñ[TIAA-CREFôs] claims are 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.ò (TA0325, TA0433 (emphasis added).) Zurich continued to raise the untimeliness of TIAA-CREFôs notice during discovery and the pre-trial proceedings. For example, Zurich objected to TIAA-CREFôs interrogatories ñbecause, prior to filing this lawsuit, [TIAA-CREF] did not make a claim for coverage of the *Bauer-Ramazani* Action under the Zurich Policy.ò (TA0645-

[redacted].

TA0646; *accord* TA0390-TA0393.) And in its supplemental response to TIAA-CREFôs interrogatories, Zurich stated:

> Zurich has no record or evidence that é the *Bauer-Ramazani* Action é was reported to Zurich in compliance with the provisions of the Primary Policy, including Section V.C(1), the Zurich Excess Policy, or governing law. [TIAA-CREFôs] apparent failure to provide proper and timely notice thus could impact the availability of coverage for these actions é.

(JA1275 (emphasis added).) Moreover, in its summary judgment briefing, Zurich expressly emphasized that TIAA-CREF had failed to provide it with an opportunity to consent to the *Bauer-Ramazani* settlement. (JA4784 n.1.) In sum, Zurich expressly denied that TIAA-CREF provided timely notice and repeatedly stated that it was reserving, and was not waiving, its right to deny coverage based on TIAA-CREFôs failure to comply with the Zurich Policyôs notice and consent-to-settlement requirements.

V. THE SUPERIOR COURT DENIED TIAA-CREF'S MOTION IN LIMINE BUT ALLOWED TIAA-CREF TO PRESENT ITS WAIVER THEORY TO THE JURY

Knowing that Zurich intended to rely on the notice and consent-to-settlement requirements at trial, TIAA-CREF moved *in limine* to preclude Zurich from raising those defenses on the purported ground that it had waived them. Notably, unlike its appellate brief, which relies exclusively on New York substantive law, TIAA-CREFôs motion *in limine* relied principally on Delaware

[redacted].

procedural law, asserting that Zurich had waived the notice and consent-to-settlement requirements by failing to raise them with sufficient specificity in the affirmative defenses in its answer and in response to TIAA-CREFôs interrogatories. (*See* TA0654).

In its response, Zurich pointed out that TIAA-CREFôs motion misapprehended the applicable rules of pleading and procedure. Even assuming *arguendo* that TIAA-CREFôs failure to satisfy the Zurich Policyôs notice and consent-to-settlement requirements are properly characterized as affirmative defenses (as discussed below, they are not), the law is settled that where a defendant has denied specific factual allegations relevant to an affirmative defense ï as Zurich had done in its answers to TIAA-CREFôs pleadings ï the defense is not waived. (ZA0007.) Zurich further noted that, in any event, it had expressly pled as an affirmative defense that ñ[TIAA-CREFôs] claims are barred 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.ò (ZA0007-ZA0008.) In addition, Zurich had raised notice and consent-to-settlement during discovery and pre-trial motion practice. (ZA0008.) As Zurich explained, the Superior Court Civil Rules do not deem a party to have waived an issue simply because it failed to raise it at a particular time or in a

[redacted].

particular form ï rather, so long as the party raised the issue ñat a pragmatically sufficient time and the plaintiff is not prejudiced in her ability to respond, there is no waiver.ò (ZA0009-ZA0010 & n.3.) That test was clearly met in this case: TIAA-CREF was not ï and had never even claimed to be ï prejudiced in its ability to respond to Zurichôs notice or consent-to-settlement defenses.[2]

In addition, insofar as TIAA-CREF had cited certain cases for the proposition that, in order to avoid waiver, an insurer must raise a defense in its initial disclaimer letter, the cases were inapposite. Unlike in those cases, TIAA-CREFôs initial notice of the *Bauer-Ramazani* Action was its filing of this coverage lawsuit. Zurich did not have an opportunity to raise disclaimers or defenses until it was sued and ï as the jury found ï Zurich did raise these issues in its answer (as soon as practicable given the circumstances) and elsewhere.

The Superior Court denied TIAA-CREFôs motion *in limine* to preclude Zurich from raising notice and consent-to-settlement at trial. (TIAA-CREF Br., Ex. A.) The Court noted, however, that its order did not preclude TIAA-CREF from arguing for waiver before the jury. (TIAA-CREF Br., Ex. B, at 5:1-8.)

TIAA-CREF took full advantage of this opportunity at trial, introducing evidence ï including the same pleadings and discovery responses on which it relies

[2] Indeed, all of the facts relevant to those defenses were known to TIAA-CREF long before it first notified Zurich of the *Bauer-Ramazani* Action in its coverage complaint.

[redacted].

in this appeal (TA0306-TA0328, TA0386-TA0399, TA0400-TA0437, TA0644-TA0647) ï and argument purporting to show Zurich had, in fact, waived both its notice and consent-to-settlement defenses. (JA5573-JA5574, JA6382-JA6388.) Indeed, TIAA-CREF does not contend that it was in any way impaired from presenting its strongest possible case to the jury.

Before the case was given to the jury, Zurich moved for judgment as a matter of law, pursuant to Superior Court Rule 50(a), on, among other things, TIAA-CREFôs argument that Zurich had waived its notice defense. Zurich argued, even assuming *arguendo* that TIAA-CREFôs argument presented a matter of fact rather than a procedural issue of pleading and discovery to be decided by the court, no reasonable factfinder could find waiver ï that is, the intentional relinquishment of a known right ï on this trial record. (ZA0139-ZA0143.)

The Superior Court reserved decision on Zurichôs motion (as well as TIAA-CREFôs cross-motion for a directed verdict) and allowed the waiver issue to be submitted to the jury.

VI. THE JURY UNANIMOUSLY REJECTED TIAA-CREF'S WAIVER ARGUMENT AND THE SUPERIOR COURT DENIED TIAA-CREF'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

After considering all of the evidence, the jury rejected TIAA-CREFôs waiver arguments and returned a verdict in favor of Zurich. The twelve jurors unanimously found that TIAA-CREF had failed to prove that it had provided

[redacted].

timely notice of the *Bauer-Ramazani* Action to Zurich, and had also failed to prove Zurich waived either the Policyôs notice requirement or its consent-to-settlement requirement.[3] (JA6516-JA6517.)

TIAA-CREF then filed a Renewed Motion for Judgment as a Matter of Law. Conceding that ñthe standard for overturning a jury verdict is high,ò TIAA-CREF argued that the Superior Court ñshould set aside the verdict on Zurichôs notice and consent defensesò on the purported ground that ñno reasonable jury could have found that Zurich did not waive [both of] those defenses.ò (TA0876-TA0877.) As the Superior Court noted, TIAA-CREFôs motion essentially ñrehashe[d] its argument from its Reply Memorandum in Further Support of its Motion *in Limine* to Exclude Defendant Zurichôs Notice and Consent Defenses,ò which cited case law that had not been cited in its original Motion *in Limine*. (JA6644 & n.18.) Whereas the original motion had been primarily predicated on Delaware law regarding pleading and discovery, TIAA-CREF had since abandoned that argument. In its motion for judgment notwithstanding the verdict, TIAA-CREF argued that the case was controlled by New York case law finding waiver of defenses by insurers where (1) unlike here, the policyholder had provided notice of the underlying claim to the insurer before filing any coverage claim; and (2) unlike

[3] TIAA-CREF had conceded that it failed to comply with the Zurich Policyôs consent-to-settlement requirement, so the jury was not asked to decide that issue.

[redacted].

here, the insurer had not responded to the policyholderôs notice with an express reservation of rights, including the right to disclaim coverage based on the policyholderôs failure to satisfy conditions precedent to coverage. (TA0875-TA0881.)

The Superior Court disagreed with TIAA-CREF. Noting that, ñ[i]n this case, Zurichôs first opportunity to disclaim coverage was in its response to TIAA-CREFôs Complaint,ò and that Zurichôs Answer ñ(1) denied TIAA-CREFôs allegation that it timely and properly provided Zurich with notice of the *Bauer-Ramazani* Action; and (2) asserted that TIAA-CREFôs claims against Zurich are barred, in whole or in part, by the terms, exclusions, conditions, and limitations of the policies[,] óall of which are reserved and none of which are waived,ôò the Court found that none of the cases cited by TIAA-CREF was on point. (JA6644 & n.20.) None of those cases involved a situation in which, as here, the insurer ñfirst received notice of [the underlying claim] as a defendant in [coverage] litigation.ò (JA6644 n.20.) Furthermore, the Court had no trouble ñfind[ing] that the evidence at trial and all reasonable inferences that can be drawn therefrom could justify a jury verdict in favor of Zurich on [both] its notice and consent defenses.ò (JA6644.) The Superior Court denied TIAA-CREFôs motion for judgment as a

[redacted].

matter of law, concluding that there was no basis for setting aside the juryôs considered view of the evidence. (JA6644-JA6645.)

[redacted].

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY RULED THAT TIAA-CREF FAILED TO MEET THE HIGH STANDARD NECESSARY FOR JUDGMENT NOTWITHSTANDING THE VERDICT

A. Question Presented

Did the Superior Court correctly deny TIAA-CREFôs motions *in limine* and for judgment as a matter of law, which sought to set aside the juryôs verdict that Zurich had not waived either its notice or consent-to-settlement defenses?

B. Standard and Scope of Review

The Supreme Court reviews a trial courtôs decision to grant or deny a motion *in limine* for abuse of discretion. *See Strauss v. Biggs*, 525 A. 2d 992, 997 (Del. 1987); *Smith v. State*, 913 A.2d 1197, 1227-28 (Del. 2006); *Stickel v. State*, 975 A.2d 780, 782 (Del. 2009). An abuse of discretion occurs when the trial judge ñhas exceeded the bounds of reason in view of the circumstances or so ignored recognized rules of law or practice so as to produce injustice.ò *Id.*, quoting *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988).

The Supreme Court ñreviews *de novo* the Superior Courtôs decision to deny [TIAA-CREFôs] directed verdict motion and its post-trial motion for judgment as a

[redacted].

matter of law.ò[4] *CitiSteel USA, Inc. v. Connell Ltd. P'ship*, 758 A.2d 928, 930 (Del. 2000); *accord Whittaker v. Houston*, 888 A.2d 219, 224 (Del. 2005). This Court ñwill not disturb a Superior Court ruling denying a motion for judgment as a matter of law where under any reasonable view of the evidence the jury could have justifiably found for [the non-moving party].ò *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, 866 A.2d 1, 7 n.4 (Del. 2004). In conducting this analysis, the Court must view ñthe evidence and all reasonable inferences that can be drawn therefrom é in a light most favorable to the non-moving party.ò *Id.*

C. Merits of the Argument

TIAA-CREFôs appeal of the Superior Courtôs denial of its motions *in limine* and for judgment as a matter of law is meritless for at least three reasons. First, TIAA-CREF relies on inapplicable law. Delawareôs procedural rules properly govern TIAA-CREFôs waiver contentions, as those rules control pleadings, discovery, and the preservation of issues in litigation. TIAA-CREF bases its appellate arguments, however, on inapplicable New York cases in which, unlike here, the policyholder provided notice of the underlying claim before filing its coverage complaint. Second, even assuming *arguendo* that TIAA-CREFôs waiver

[4] Superior Court Rule of Civil Procedure 50(b) now designates motions for judgment notwithstanding the verdict as motions for judgment as a matter of law. *Gillernardo v. Connor Broad. Del. Co.*, 2002 WL 991110, at *1 n.2 (Del. Super. Ct. Apr. 30, 2002). ñThe standards are the same.ò *Id.*

[redacted].

argument is governed by New York substantive contract law, rather than Delaware procedural law, the undisputed facts here establish that it is Zurich, not TIAA-CREF, that was entitled to judgment as a matter of law. Third, at an absolute minimum, the trial record is more than sufficient to sustain the juryôs verdict in Zurichôs favor.

1. TIAA-CREF's Waiver Argument Is Governed by Delaware Procedural Law; Under the Applicable Legal Standards, Zurich Did Not Waive Either Its Notice or Consent-to-Settlement Defense

As a threshold matter, TIAA-CREFôs appellate arguments fail because they misapprehend the legal standard governing waiver in the circumstances presented here. TIAA-CREF first notified Zurich of the *Bauer-Ramazani* Action in its coverage complaint in this action, which was a pleading governed by the Superior Court Civil Rules. Zurichôs first opportunity to respond to TIAA-CREFôs coverage claim was in its answer, another pleading also governed by Delawareôs procedural rules. TIAA-CREF contends Zurich did not adequately preserve either its notice or consent-to-settlement defenses for trial because Zurich (1) purportedly did not specifically refer to ñlate noticeò or ñconsentò in its affirmative defenses (despite the fact that Zurich expressly denied TIAA-CREFôs allegation that it provided timely notice of the *Bauer-Ramazani* Action and pled as an affirmative defense that TIAA-CREFôs ñclaims are barred, in whole or in part, by the terms,

[redacted].

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 waivedò (TA0325)) and (2) purportedly did not adequately identify ñlate noticeò or ñconsentò in its initial discovery responses.

Notwithstanding TIAA-CREFôs conclusory assertion to the contrary ï which is unsupported by any citation to authority (*see* TIAA-CREF Br. at 40) ï the adequacy of a partyôs pleadings and discovery responses, and whether a partyôs litigation conduct adequately preserved a given defense for trial, are quintessentially matters of procedure governed by the litigation rules of the forum. *See Martinez v. E.I. DuPont De Nemours & Co.*, 82 A.3d 1, 15 n.36 (Del. Super. Ct. 2012) (ñSince the governing rules of pleading are procedural, not substantive, Delaware Superior Court Civil Rules apply.ò), *aff'd*, 86 A.3d 1102 (Del. 2014); *see also Trotter ex rel. Windham v. Eli Lilly*, 2006 WL 2225475, at *1 (S.D. Miss. Aug. 2, 2006) (issues of discovery and the adequacy of pleadings are procedural matters governed in federal court by the Federal Rules of Civil Procedure); Restatement (Second) of Conflict of Laws § 122 (ñA court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.ò).

TIAA-CREF rightly recognized the applicability of Delaware procedural

[redacted].

law in its motion *in limine*, relying on cases applying Delaware procedural law regarding the adequacy of pleading and discovery responses. (TA0654 (citing *Baxter Int'l Inc. v. Rhone-Poulenc Rorer, Inc.*, 2004 WL 2158051, at *5 (Del. Ch. Sept. 17, 2004) and *VICI Racing, LLC v. T-Mobile USA, Inc.*, 763 F.3d 273, 301 (3d Cir. 2014)). But, as Zurich pointed out in its brief in opposition to that motion, under Delaware law, TIAA-CREFôs argument that Zurich should be prevented from raising its notice and consent defenses at trial plainly failed. Although TIAA-CREF complained that Zurich did not expressly raise lack of notice as a specific affirmative defense, Zurich was under no obligation to do so. It is undisputed that compliance with the Zurich Policyôs notice requirement is a condition precedent to coverage,[5] and ñ[t]he burden of allegation é of a condition precedent is on the plaintiff.ò *Ewell v. Those Certain Underwriters of Lloyd's, London*, 2010 WL

[5] The parties agree that New York law governs the interpretation of the Zurich Policy. Under New York law, it is well-settled that policy conditions requiring timely notice and consent-to-settlement are construed as conditions precedent to coverage. *See Argo Corp. v. Greater N.Y. Mut. Ins. Co.*, 827 N.E.2d 762, 764-65 (N.Y. 2005); *Am. Home Assur. Co. v. Int'l Ins. Co.*, 684 N.E.2d 14, 16-18 (N.Y. 1997); *Ralex Servs., Inc. v. Sw. Marine & Gen. Ins. Co.*, 65 N.Y.S.3d 49, 51-52 (N.Y. App. Div. 2017). A policyholderôs failure to strictly comply with these conditions ñvitiates the policy,ò regardless of whether the insurer can show that it was prejudiced by the non-compliance. *Am. Home Assur. Co.*, 684 N.E.2d at 16-17; *accord N.Y. Cent. Mut. Fire Ins. Co. v. Danaher*, 736 N.Y.S.2d 195, 196-98 (N.Y. App. Div. 2002).

[redacted].

3447570, at *3 (Del. Super. Ct. Aug. 27, 2010) (emphasis added); *see also In re Tri-Star Pictures, Inc., Litig.*, 1995 WL 106520, at *6 n.2 (Del. Ch. Mar. 9, 1995) (distinguishing facts that should be pleaded as an affirmative defense from ñfacts that negate an essential element of the plaintiffsô claimò). Under Delawareôs pleading rules, Zurich did everything necessary to preserve its notice argument when it expressly denied TIAA-CREFôs affirmative allegations that Plaintiffs had complied with the Policyôs notice requirement. (*See* TA0263 ¶ 69, TA0266 ¶ 80, JA1903 ¶ 87, JA1907 ¶ 98.)

Furthermore, even if, for the sake of argument, the notice and consent-to-settlement defenses should have been pled as affirmative defenses (as is not the case), non-compliance with that technical pleading requirement would not result in waiver where, as here, the defenses were clearly raised in other ways. *See, e.g.*, *Giddens v. UPS Supply Chain Sol.*, 70 F. Supp. 3d 705, 711 (D. Del. 2014), *aff'd*, 610 F. Appôx 135 (3d Cir. 2015). Indeed, under Delawareôs liberal rules for amendment of pleadings ï and given TIAA-CREFôs inability to show any unfair prejudice (TIAA-CREF does not even attempt to argue prejudice) ï Zurich could have raised its defenses any time up through trial. *See, e.g.*, *Parastino v. Lathrop*, 1997 WL 718631, at *1 (Del. Super. Ct. July 21, 1997) (ñIt is the general policy in this jurisdiction to be liberal in permitting amendments to pleadings unless the

[redacted].

opposing party would be seriously prejudiced thereby.ò); *Heiman, Aber & Goldlust v. Ingram*, 1997 WL 366887, at *1 (Del. Super. Ct. May 14, 1997); *Abdi v. NVR, Inc.*, 2007 WL 2363675, at *2 (Del. Super. Ct. Aug. 17, 2007), *aff'd*, 945 A.2d 1167 (Del. 2008); *Rowe v. Everett*, 2000 WL 1800250, at *2 (Del. Ch. Sept. 26, 2000); *In re NVF Co. Litig.*, 1990 WL 100801, at *3 (Del. Ch. July 18, 1990); *accord Aubrey Rogers Agency, Inc. v. AIG Life Ins. Co.*, 55 F. Supp. 2d 309, 314-15 (D. Del. 1999) (ñCourts é have allowed an affirmative defense to be raised for the first time in a post-answer motion for summary judgment in instances where no prejudice to the non-moving party results.ò).

As this Court has explained, when it comes to waiver of a defense, courts should focus on ñwhether the issue could have been, but was not, raised pretrial in some form and whether or not the failure to do so caused prejudice to a party without notice of the defense by making it difficult, if not impossible, to fairly face the issue for the first time during trial.ò *Alexander v. Cahill*, 829 A.2d 117, 128 - 129 (Del. 2003) (emphasis added); *see also Fletcher v. Ratcliffe*, 1996 WL 527207, at *2 (Del. Super. Ct. Aug. 6, 1996) (if ñthe defendant raises [an] issue at a pragmatically sufficient time and the plaintiff is not prejudiced in her ability to respond, there is no waiverò). As shown above, *see supra* Statement of Facts § IV, Zurich did raise the notice and consent-to-settlement defenses at a sufficient time,

[redacted].

and TIAA-CREF was not ï and does not even claim to be ï prejudiced. Nor could it: all of the information relevant to (1) the timing of its first notice of the *Bauer-Ramazani* Action to Zurich, and (2) the dispositive fact that TIAA-CREF did not provide that notice until months after it had already settled the Action, were fully known to TIAA-CREF and unchangeable at the time it filed its coverage complaint. Accordingly, the Superior Court properly denied TIAA-CREFôs motion *in limine*.

This may be why, in its later motion for judgment as a matter of law and its appellate brief before this Court, TIAA-CREF disavowed the Delaware procedural law it had cited in its motion *in limine* and argued that New York contract law governed its assertions of waiver. But as the Superior Court noted in denying TIAA-CREFôs motion for judgment as a matter of law, virtually all of the New York waiver cases cited by TIAA-CREF involved disclaimer letters issued by insurers before any coverage action was filed, and none of the cases presented a scenario, like the one here, in which the insurerôs first notice of the underlying claim against the policyholder came in the policyholderôs coverage complaint. (JA6644.)

TIAA-CREF cites three cases for the proposition that New York contract law, rather than Delaware procedural law, governs the waiver question here.

[redacted].

(TIAA-CREF Br. at 45-46.) But TIAA-CREFôs reliance is misplaced. *In re Balfour Maclaine International Ltd.*, 873 F. Supp. 862 (S.D.N.Y. 1995), was cited by TIAA-CREF below. As the Superior Court explained, ñ*Balfour* involved an insurerôs waiver of a defense for failure to include it in the insurerôs declaratory judgment complaint against the policyholder, filed in response to the policyholderôs [claim].ò (JA6644 n. 20 (citing *Balfour*, 873 F. Supp. at 865).) In other words, unlike here, the *Balfour* policyholder provided notice of the underlying claim to the insurer before any coverage litigation was filed.

North American Philips Corp. v. Aetna Casualty and Surety Co., 1995 WL 628443 (Del. Super. Ct. Apr. 29, 1995), a non-binding trial court decision cited by TIAA-CREF, does not specify whether the insurer was given notice of the underlying claim before the coverage complaint was filed. In any event, *North American Philips* is plainly inapposite because it was applying a statutory requirement, N.Y. Insurance Law § 3420(d), which provides, among other things, that an insurer may not disclaim coverage unless it provides notice of the disclaimer ñas soon as reasonably possibleò after it learns of the grounds for disclaimer of liability. N.Y. Ins. Law § 3420(d)(2); *see N. Am. Philips*, 1995 WL 628443, at *2 (citing *Interboro Mut. Indem. Ins. Co. v. Rivas*, 613 N.Y.S.2d 191, 191 (N.Y. App. Div. 1994) (citing N.Y. Ins. Law § 3420(d))). As the New York

[redacted].

Court of Appeals has clearly held, that statuteôs ñheightened standard for disclaimerò applies only to ñinsurance cases involving death and bodily injury claims arising out of a New York accident and brought under a New York liability policy.ò *KeySpan Gas E. Corp. v. Munich Reinsurance Am., Inc.*, 15 N.E.3d 1194, 1197-98 (N.Y. 2014). It is undisputed that the present coverage dispute does not involve any death and bodily injury claims, but rather only claims for monetary loss. In such circumstances, the statutory waiver standard is not applicable. *Id.* at 1198. (And regardless, Zurichôs denial of TIAA-CREFôs allegation that it provided timely notice of the *Bauer-Ramazani* Action in its answer was reasonable and timely itself).

The third case on which TIAA-CREF relies is *Burt Rigid Box, Inc. v. Travelers Property Casualty Corp.*, 302 F.3d 83 (2d Cir. 2002), a decision that TIAA-CREF had not cited to the Superior Court. Although *Burt Rigid* found that the specific wording of an affirmative defense in the insurerôs answer did not encompass failure to satisfy a condition precedent such as the obligation to give timely notice, *see id.* at 95 (wording that, as discussed below, is readily distinguishable from the content of Zurichôs answer here), it is also inapposite because the policyholder provided notice of the underlying claims at issue ï and

[redacted].

the insurer denied coverage ï before the coverage action was filed, *see id.* at 88, 95.

In sum, TIAA-CREF has failed to identify any authority to contradict what should be an obvious proposition: TIAA-CREFôs argument that Zurichôs pleadings, discovery responses, and other litigation conduct failed to preserve defenses to coverage claims asserted for the first time in TIAA-CREFôs complaint, is governed by Delaware procedural law, not New York contract law. Because TIAA-CREF provides no argument as to why, under Delaware procedural law, the Superior Court erred in allowing Zurich to present its notice and consent-to-settlement defenses to the jury ï or why the juryôs verdict should be taken from it ï the Superior Courtôs denial of TIAA-CREFôs motion *in limine* and motion for judgment as a matter of law should be affirmed.

2. Affirmance Is Also Required Under New York Law

In any event, affirmance is also required under New York law. Pursuant to well-established New York precedent, waiver requires proof that a party intentionally relinquished a known right. Not only is the factual record here amply sufficient to support the juryôs verdict that Zurich did not intentionally relinquish either its late-notice or its consent-to-settlement defense, the record defeats TIAA-CREFôs waiver arguments as a matter of law. TIAA-CREFôs arguments to the contrary rest on a fundamental misunderstanding of New York law.

[redacted].

a) Waiver Requires Proof that a Party Intentionally Relinquished a Known Right

TIAA-CREFôs entire appellate argument is premised on the notion that, under New York law, Zurich was subject to special waiver rules that are unique to insurance contracts, rather than a common-law waiver standard that is generally applicable. TIAA-CREF is wrong. The New York Court of Appeals made this point unmistakably clear in *KeySpan*, 23 N.Y.3d 583. As the Court explained, where, as here, the underlying claims do not involve bodily injury or death and are therefore not subject to N.Y. Ins. Law § 3420(d)(2), any assertion that the insurer waived defenses to coverage ñshould be considered under common-law waiver é principles.ò 23 N.Y.3d at 590-91. As the cases cited by the *KeySpan* Court make clear, those common-law principles are not unique to insurance contracts but rather are generally applicable. *See id.* at 591 (citing, among other cases, *Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt., L.P.*, 850 N.E.2d 653 (N.Y. 2006)).

Under those general principles, ñ[w]aiver is the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it.ò *Trustees of the New York City Counsel of Carpenters Pension Fund v. Metro. Enters.*, 2016 WL 5334982, at *4 (S.D.N.Y. Sept. 22, 2016) (applying New York law); *accord Gilbert Frank Corp. v. Fed. Ins. Co.*, 520 N.E.2d 512, 514 (N.Y.

[redacted].

1988). Put differently, waiver ñmust be based on a clear manifestation of intent to relinquish a contractual protection.ò *Fundamental*, 850 N.E.2d at 658; *see also* 57 N.Y. Jur. 2d Estoppel, Etc. § 93 (ñThe existence of a waiver of rights requires proof of the voluntary and intentional relinquishment of a known and otherwise enforceable right.ò). ñGenerally, the existence of an intent to forgo such a right is a question of fact.ò *Fundamental, 850 N.E.2d at 658*; *see also* 57 N.Y. Jur. 2d Estoppel, Etc. § 93 (ñInasmuch as waiver is the intentional relinquishment of a known right, it is essentially an issue of intention for the jury.ò).

b) As a Matter of Law, Zurich Did Not Waive Its Notice or Consent-to-Settlement Defenses

Although waiver generally presents a fact question for the jury, courts applying New York law reject assertions of waiver as a matter of law where the insurer issued a general reservation of rights sufficiently broad to encompass the defense at issue, regardless of whether the reservation specifically identified that defense. This rule of non-waiver is apparent from the very line of New York cases on which TIAA-CREF (mistakenly) relies. TIAA-CREF cites *New York v. Amro Realty Corp.*, 936 F.2d 1420, 1432 (2d Cir. 1991), misleadingly suggesting that it stands for the proposition that any defense that is not specifically asserted in an insurerôs initial disclaimer of coverage is waived, regardless of whatever else the disclaimer may say. (TIAA-CREF Br. at 41-42.) But that is an incorrect

[redacted].

interpretation of the case. Indeed, TIAA-CREF admits elsewhere in its brief that the case law stands, at most, for the proposition that an insurer may waive the defense of failure to satisfy a condition precedent to coverage ñwhere é it denies a claim solely because it is not covered by the policy.ò (TIAA-CREF Br. at 41 (citing cases).) Importantly, the *Amro Realty* court expressly stated that ñwe do not address here the case where the insurerôs disclaimer of coverage based on specified grounds is accompanied by an express and unequivocal statement that other grounds for disclaimer are reserved and not waived.ò 936 F.2d at 1433.

Cases following *Amro Realty*, however, did address the question of ñwhether an óexpress and unequivocalô reservation of rights serves to preserve unasserted defensesò under New York law ï and squarely held that it did. *See MCI LLC v. Rutgers Cas. Ins. Co.*, 2007 WL 2325867, at *14 (S.D.N.Y. Aug. 13, 2007) (explaining that ñ*Amro Realty* does not stand for the broad proposition that óreservation of rightsô provisions are irrelevant so long as the facts giving rise to an affirmative defense were known to the insurer at the time it reserved its rightsò; to the contrary, ñcourts [applying New York law] have found that an express reservation of rights precludes consideration of waiverò as a matter of law (citing *Globecon Grp. v. Hartford Fire Ins. Co.*, 434 F.3d 165, 176 (2d Cir. 2006), and other cases). Indeed, in *Globecon*, the Second Circuit described the argument

[redacted].

TIAA-CREF makes here ï that an insurer could be deemed to have intentionally relinquished a defense even when it expressly reserved all defenses ï as ñfrivolous.ò *Globecon*, 434 F.3d at 176 (holding that reservations of rights ñpreclude arguments both as to waiver and as to equitable estoppelò). Nor is *Globecon* an isolated holding. Numerous other decisions applying New York law have held that a general reservation of rights is sufficient, as a matter of law, to preserve unasserted defenses, including failure to satisfy a condition precedent to coverage such as notice or consent-to-settlement. *See, e.g.*, *Home Décor Furniture & Lighting, Inc. v. United Nat'l Grp.*, 2006 WL 3694554, at *6-7 (E.D.N.Y. Dec. 14, 2006); *Mount Vernon Fire Ins. Co. v. William Monier Constr. Co.*, 1996 WL 447747, at *5 (S.D.N.Y. Aug. 7, 1996), *aff'd*, 112 F.3d 504 (2d Cir. 1997); *Heiser v. Union Cent. Life Ins. Co.*, 1995 WL 355612, at *5 (N.D.N.Y. June 12, 1995); *Lugo v. AIG Life Ins. Co.*, 852 F. Supp. 187, 192 (S.D.N.Y. 1994); *MCC Non Ferrous Trading Inc. v. AGCS Marine Ins. Co.*, 2015 WL 3651537, at *4 n.5 (S.D.N.Y. June 8, 2015); *Tudor Ins. Co. v. First Advantage Litig. Consulting, LLC*, 2012 WL 3834721, at *11 (S.D.N.Y. Aug. 21, 2012), *aff'd sub nom. First Advantage Litig. Consulting, LLC v. Am. Int'l Specialty Lines Ins. Co.*, 525 F. Appôx 60 (2d Cir. 2013); *Nat'l Restaurants Mgmt., Inc. v. Exec. Risk Indem., Inc.*,

[redacted].

758 N.Y.S. 2d 624, 625 (N.Y. App. Div. 2003); *Gen. Ins. Co. of Am. v. Marvel Enters., Inc.*, 2004 WL 483212, at *4-5 (N.Y. Sup. Ct. Mar. 9, 2004).

This rule, of course, makes perfect sense. As noted, waiver requires proof that a party intentionally and voluntarily relinquished a known right. That conclusion plainly cannot reasonably be drawn where, as here, a party expressly states that it reserves all of its defenses and does not waive any of them. *See Globecon*, 434 F.3d at 176; *Heiser*, 1995 WL 355612, at *4-5; *Lugo*, 852 F. Supp. at 191-92.

As previously noted, Zurichôs answer to TIAA-CREFôs coverage complaint ï which was Zurichôs first opportunity to respond to the *Bauer-Ramazani* claim ï expressly denied that notice was timely and expressly pled as an affirmative defense that ñPlaintiffsô claims are barred é 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.ò (TA0325 (emphasis added).) This language is materially identical to the reservation-of-rights language that courts have repeatedly held sufficient to preserve defenses as a matter of law. *See, e.g.*, *Home Décor*, 2006 WL 3694554, at *6 (insurer did not waive its late-notice defense where its letter stated that it ñreserves all of its rights at law or otherwise and does not waive any of the terms or

[redacted].

conditions of the policyò); *Lugo*, 852 F. Supp. at 192 (insurer did not waive its late-notice defense where its disclaimer letter stated that ñissuance of [this] denial is not to be interpreted as a waiver of any and all other rights and defenses that [insurer] may have under the policy provisions, all of which are hereby expressly reservedò).[6] Furthermore, Zurich specifically denied that TIAA-CREF provided timely notice. Under New York law, these express statements in Zurichôs answer preclude a finding of waiver.

Notably, TIAA-CREF, which is well aware of the (numerous) cases cited above, does not (and cannot) dispute that they represent controlling New York law. TIAA-CREFôs only answer is an assertion that this case law does not apply here because Zurich did not expressly reiterate its general reservation of defenses in its September 2014 responses to TIAA-CREFôs Interrogatories No. 4, 5, and 6. (*See* TIAA-CREF Br. at 44 n.19.) But this argument is both factually and legally wrong: Zurichôs responses to these interrogatories did expressly ñreserve[] the

[6] This language is manifestly distinguishable from more limited reservations of rights analyzed in certain cases. *See Amro Realty*, 936 F.2d at 1433 & n.13 (insurer reserved its right to disclaim not on all possible defenses, but only on the basis of unasserted defenses that ñbecome apparent in the futureò; the defense at issue ñwas evident at the time [the insurer] issued its disclaimerò); *Burt Rigid*, 302 F.3d at 95 (insurer reserved right to disclaim only on the basis that the losses at issue were outside the scope of the policyôs coverage); *MCI*, 2007 WL 2325867, at *15-16 (reservation of rights applied only to future, as-yet-unasserted claims); *see also Marvel Enters., Inc.*, 2004 WL 483212, at *5 (distinguishing reservation language in *Amro*).

[redacted].

right to assert all defenses as to the é *Bauer-Ramazani* Action[].ò (TA0391-TA0394.) Furthermore, these interrogatories asked merely whether Zurich was making certain specific coverage arguments that did not include failure to provide timely notice or consent to settlement. Accordingly, TIAA-CREF has no basis to argue that Zurich should have addressed those defenses in its responses. In any event, TIAA-CREF fails to cite any authority for the proposition that an insurerôs failure to reiterate a general reservation of rights in discovery responses can operate as a waiver of defenses notwithstanding the insurerôs assertion of an express reservation of rights in its earlier correspondence or pleading. Indeed, tellingly, the only authority TIAA-CREF cites regarding the effect of discovery responses is the same case on Delaware procedural law that it cited in its motion *in limine*. (*See* TIAA-CREF Br. 45 & n.20 (citing *Baxter*, 2004 WL 2158051, at *4-5).) *Baxter* is easily distinguishable. There, the court precluded a defendant from providing evidence in support of an equitable estoppel defense that it failed to raise until after the close of discovery. *Id.* at *4-5. Crucial to the courtôs conclusion was that the defense was an ñintensely factual theoryò and it was ñnot reasonable or appropriate to expect [the plaintiff] to undertake an extensive additional discovery program to explore [the defense] at this stage of [the] case.ò *Id.* at *5. Here, by contrast, as shown above, TIAA-CREF was aware of all of the facts bearing on

[redacted].

Zurichôs notice and consent-to-settlement defenses at the time it filed its coverage complaint and thus cannot claim any prejudice in being made to answer for its failure to comply with the Policyôs conditions precedent at trial. Furthermore, Zurich expressly denied in its answer that TIAA-CREF had provided timely notice and reiterated the notice issue in supplemental interrogatory responses. (*See supra* Statement of Facts § IV.) In sum, *Baxter* provides no support for TIAA-CREFôs waiver theory.

Indeed, none of the cases cited by TIAA-CREF square with the facts presented to the jury. Most, involve disclaimers of coverage on a specific ground that were not contemporaneously accompanied by an express, general reservation of rights. *See Rock Transp. Props. Corp. v. Hartford Fire Ins. Co.*, 433 F.2d 152, 153 (2d Cir. 1970); *In re Balfour Maclaine Int'l Ltd.*, 873 F. Supp. 862, 871 (S.D.N.Y. 1995), *aff'd*, 85 F.3d 68 (2d Cir. 1996); *Benjamin Shapiro Realty Co. v. Agricultural Ins. Co.*, 731 N.Y.S.2d 453, 454 (N.Y. App. Div. 2001); *Haslauer v. N. Country Adironack Co-op Ins. Co.*, 654 N.Y.S.2d 447, 448 (N.Y. App. Div. 1997); *N. Am. Philips Cop. v. Aetna Cas. & Sur. Co.*, 1995 WL 628443, at *3 (Del. Super. Ct. Apr. 20, 1995); *Ehrlich ex rel. Williams v. Aetna Cas. & Sur. Co.*, 463 N.Y.S.2d 934, 938 (N.Y. App. Div. 1983); *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 (2d Cir. 1979).

[redacted].

Other cases cited by TIAA-CREF involved limited reservations rather than the general reservation at issue here. *See Burt Rigid*, 302 F.3d at 95-96; *Amro Realty*, 936 F.2d at 1432; *Olin Corp. v. Ins. Co. of N. Am.*, 2006 WL 509779, at *2-3 (S.D.N.Y. Mar. 2, 2006).

The remaining cases cited by TIAA-CREF, all of which are non-binding trial-court rulings, are also inapposite. *JP Morgan Chase & Co. v. Travelers Indem. Co.*, 2009 WL 889957 (N.Y. Sup. Mar. 3, 2015), did not involve merely a denial of coverage but rather the insurerôs attempt to rescind the policy. *Viking Pump, Inc. v. Liberty Mut. Ins. Co.*, 2007 WL 1207107 (Del. Ch. Apr. 2, 2007), does not rely on New York case law for its proposition that a reservation of rights must be articulated ñas soon as practicableò after an insurer has ascertained the facts supporting a given defense. *Id.* at *28. That rule of waiver does not apply under New York law, except where ï as is not the case here ï the coverage claim is subject to the requirements of N.Y. Ins. Law § 3420(d)(2), *see KeySpan*, 15 N.E.3d at 1197-99, or the insurer is not merely disclaiming coverage but also seeking to rescind the policy, *see JP Morgan Chase*, 2009 WL 889957 (citing *Continental Ins. Co. v. Helmsley Enters. Inc.*, 622 N.Y.S.2d 20, 20-21 (N.Y. App. Div. 1995). In cases such as the one at bar, ñthe insurer will not be barred from disclaiming coverage simply as a result of the passage of timeò but rather only where it has

[redacted].

ñclearly manifested an intent to abandon [the] defense [at issue].ò *KeySpan*, 15 N.E.3d at 1197-99. Furthermore, the sole New York case *Viking Pump* cited in support of the proposition that ñordinarily, when an insurer states grounds for potentially disclaiming liability, it waives all other possible grounds for disclaimerò is *Haslauer*, 654 N.Y.S.2d at 488. *See Viking Pump*, 2007 WL 1207107, at *29 n.127. As noted above, *Haslauer* did not involve a general reservation of rights or consider whether such a reservation would be sufficient to preclude waiver.

Finally, *JP Morgan Chase & Co. v. Travelers Indemnity Co.*, 2009 WL 137044 (N.Y. Sup. Jan. 12, 2009), involved an insurerôs rejection of the policyholderôs purported claim not because it was untimely (as was the case here), but rather because the notice was insufficiently detailed. *Id.* at *5. There, the court sensibly held that an insurer could not defend its denial of coverage on the grounds that the policyholder had failed to provide certain specific information where the insurer had failed to advise the policyholder of the deficiencies and behaved as if the notice had been sufficient, thus precluding the policyholder from curing the shortcomings. *Id.* Here, by contrast, TIAA-CREFôs untimely notice could not have been cured and there is no issue of prejudice to TIAA-CREF.

Because, under New York law and the undisputed facts here, Zurich did not

[redacted].

waive its late-notice or consent-to-settlement defenses as a matter of law, the denial of TIAA-CREFôs motion for judgment as a matter of law should be affirmed.

3. At an Absolute Minimum, There Was Ample Evidence Supporting the Unanimous Jury Verdict in Favor of Zurich

Notably, however, affirmance of the judgment in favor of Zurich does not require Zurich to show that it was entitled to judgment as a matter of law. Rather, the judgment must be affirmed if, ñunder any reasonable view of the evidence,ò construed in the light most favorable to Zurich, and drawing all reasonable inferences from that evidence in favor of Zurich, a jury could justifiably have found that Zurich did not intentionally and voluntarily waive its right to rely on its late-notice and consent-to-settlement defenses. *Saudi Basic*, 866 A.2d at 7 n.4 (emphasis added) (standard for review of denial of a Rule 50 motion for judgment as a matter of law); *see Metro. Enters.*, 2016 WL 5334982, at *4 (defining the concept of waiver under New York law); *see also* 57 N.Y. Jur. 2d Estoppel, Etc. § 93 (ñInasmuch as waiver is the intentional relinquishment of a known right, it is essentially an issue of intention for the jury.ò). As underscored by the discussion of New York law, that standard is easily met here, as the Superior Court ruled: In its answer, which was its first opportunity to respond to TIAA-CREFôs coverage claim, Zurich expressly denied that TIAA-CREF provided timely notice and

[redacted].

expressly invoked all available defenses, ñnone of which are waivedò; Zurich reiterated the late-notice issue in discovery responses; and it expressly raised the consent-to-settlement defense in its summary judgment briefing. TIAA-CREFôs argument that no reasonable juror could have found Zurich did not waive its notice and consent-to-settlement policy conditions is meritless.

[redacted].

II. THE SUPERIOR COURT CORRECTLY INSTRUCTED THE JURY ON TIAA-CREF'S BURDEN OF PROOF

A. Question Presented

Did the Superior Court correctly instruct the jury that TIAA-CREF had to prove that Zurich had waived its late-notice and consent-to-settlement defenses by clear and convincing evidence?

B. Standard and Scope of Review

This Court ñreview[s] *de novo* the Superior Courtôs decision to issue [] challenged jury instructions.ò *Corbitt v. Tatagari*, 804 A.2d 1057, 1062 (Del. 2002). The ñanalysis focuses ónot on whether any special words were used, but whether the instruction correctly stated the law and enabled the jury to perform its duty.ôò *Id.*

C. Merits of the Argument

As an alternative to its argument for judgment as a matter of law, TIAA-CREF advances a half-hearted, one-page argument for a new trial. According to TIAA-CREF, the Superior Court committed reversible error by instructing the jury that TIAA-CREF had to prove waiver by clear and convincing evidence rather than a mere preponderance of the evidence. TIAA-CREF is wrong.

[redacted].

1. The Burden of Proof Is Immaterial

As a threshold matter, TIAA-CREFôs argument is moot. As demonstrated above, TIAA-CREFôs ñwaiverò argument was a matter of Delaware procedural law to be decided by the Superior Court, which properly denied TIAA-CREFôs motion *in limine*. *See* Argument Section I.C.1. And even assuming *arguendo* that the issue was governed by New York contract law, the undisputed record shows that, irrespective of the precise burden of proof, Zurich did not intentionally relinquish its late-notice or consent-to-settlement defenses as a matter of law. *See* Argument Section I.C.2.b. Accordingly, TIAA-CREFôs burden-of-proof argument is irrelevant to the disposition of this appeal.

2. Waiver Must Be Proved by Clear and Convincing Evidence

The Superior Court correctly instructed the jury on the applicable burden of proof. TIAA-CREF concedes that, under Delaware law, waiver must be proved by clear and convincing evidence. (TA0735 n.1.) *See* Delaware Superior Court Civil Pattern Jury Instructions § 19.23 (ñclaims in waiver é must be shown by clear and convincing evidenceò); *Smith v. Goodville Mut. Ins. Cas. Ins. Co.*, 2010 WL 8250828, at *3 (Del. Super. Ct. Oct. 21, 2010) (same), *aff'd*, 29 A.3d 246 (Del. 2011); *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005) (ñWaiver is the voluntary and intentional relinquishment of a known

[redacted].

rightò and ñ[t]he facts relied upon to prove waiver must be unequivocal.ò (emphasis added)).

Contrary to TIAA-CREFôs assertion, New York law provides a materially identical standard and burden of proof for waiver. Under well-defined New York jurisprudence, ñwaiver is the intentional relinquishment of a known right.ò *Metro. Enters.*, 2016 WL 5334982, at *4; *accord AeroGlobal*, 871 A.2d at 444. The party seeking to show waiver must provide ñclear and convincing evidence,ò *301 E. 69th St. Corp. v. Vasser*, 461 N.Y.S.2d 932, 933 (N.Y. Civ. Ct. 1982) (collecting appellate decisions holding that waiver of contractual rights could be established ñonly upon clear and convincing evidenceò), that is, ña clear, unmistakable, and unambiguous intent to relinquish [] legal rights,ò *Metro Enters.*, 2016 WL 5334982, at *4; *accord Echostar Satellite, L.L.C. v. ESPN, Inc.*, 914 N.Y.S.2d 35, 39 (N.Y. App. Div. 2010) (intent to waive ñmust be unmistakably manifested, and is not to be inferred from a doubtful or equivocal actò); *Civil Serv. Employees Ass'n, Inc. v. Newman*, 450 N.Y.S.2d 901 (N.Y. App. Div. 1982) (waiver must be ñexplicit, unmistakable, [and] unambiguousò), *aff'd*, 463 N.E.2d 1231 (N.Y. 1984); *Fundamental*, 850 N.E.2d at 658 (ñ[W]aiver should not be lightly presumed and must be based on a clear manifestation of intent to relinquish a contractual protection.ò); *Conant v. Alto 53, LLC*, 2008 WL 5263810, at *9 (N.Y. Sup. Ct.

[redacted].

Dec. 10, 2008) (ñA waiver must be óclear, unequivocal and deliberateô óunmistakably manifestedô and ónot lightly presumed.ôò); 57 N.Y. Jur 2d Estoppel, Etc. § 87 (ñThere will be no waiver construed from language or conduct unless it is so inconsistent with the [partyôs] purpose to standard upon his or her rights as to leave no opportunity for reasonable inference to the contraryò (emphasis added)).

This New York authority, which either expressly refers to a ñclear and convincing evidenceò standard, or requires a ñclear, unmistakable, and unambiguousò or ñclear, unequivocal and deliberate, unmistakably manifestedò showing of waiver, confirms that waiver must be proven by clear and convincing evidence, and that a mere preponderance of the evidence will not suffice. *See Solomon v. State of N.Y.*, 541 N.Y.S.2d 384, 385 (N.Y. App. Div. 1989) (ñ[C]lear and convincing evidence means evidence that is neither equivocal nor open to opposing presumptions.ò); *In re Guttmacher, M.D.*, 45 Misc. 3d, 933, 936 (N.Y. Sup. Ct. 2014) (ñ[T]his higher than preponderance standard óforbids relief whenever the evidence is loose, equivocal or contradictory.ôò); *see also AeroGlobal*, 871 A.2d at 444 (articulating Delawareôs burden of proof for waiver, which TIAA-CREF concedes is clear and convincing evidence, by stating that ñ[t]he facts relied upon to prove waiver must be unequivocalò (emphasis added)); *Lofton v. Lofton*, 745 S.W.2d 635, 637 (Ark. Ct. App. 1988) (requirement that

[redacted].

waiver be proved with ñpositive,ò ñunequivocal,ò and ñunmistakableò evidence was tantamount to ñclear and convincingò standard); *Rutenberg v. Rutenberg*, 334 So. 2d 633, 634-35 (Fla. Dist. Ct. App. 1976) (same); *Yadkin Valley Bank & Tr. v. Oaktree Homes, Inc.*, 2014 WL 3747342, at *1 (S.C. Ct. App. July 30, 2014); *Kirchgestner v. Denver & R.G.W.R. Co.*, 233 P.2d 699, 700-01 (Utah 1951).

Indeed, if anything, New York law, which, as noted, requires waiver to be proven by ñunambiguous,ò ñunmistakable,ò and ñunequivocalò evidence, imposes a burden of proof higher than ñclear and convincingò evidence. *See Addington v. Texas*, 441 U.S. 418, 431-33 (1979); *Ward v. Holder*, 733 F.3d 601, 604-06 (6th Cir. 2013); *Tambourine Comercio Internacional SA v. Solowsky*, 312 F. Appôx 263, 276 (11th Cir. 2006); *Vanerson v. West*, 12 Vet. App. 254, 258-59 (1999) (ñ[t]he óclear and convincingô burden of proof é is a lower burden to satisfy then clear and unmistakable evidenceò).

3. The Cases on Which TIAA-CREF Relies Are Inapposite

Ignoring all of the authority discussed above, TIAA-CREF relies on several much older opinions containing statements that a party must prove waiver ñby a preponderance of evidence.ò (TIAA-CREF Br. at 46-47.) TIAA-CREF neglects to mention, however, that the opinion it cites in *Sillman v. Twentieth Century-Fox Film Corporation*, 144 N.E.2d 387 (N.Y. 1957), was a dissenting opinion. *See id.* at 393 (Fuld, J., dissenting). Even more significantly, none of the cited opinions

[redacted].

examined the distinction between a ñmere preponderance of the evidenceò and a ñclear and convincing evidenceò standard. And even if they had, it would have been dictum because each of the cited opinions found that waiver had not been proved. The burden of proof was immaterial to the conclusion because it would have been the same under either a ñmere preponderanceò or a ñclear and convincingò standard.

Furthermore, TIAA-CREFôs reliance on these cases appears to rest on linguistic confusion. TIAA-CREF asserts that these cases stand for the proposition that waiver must be established ñonly óby a preponderance of evidence.ôò (TIAA-CREF Br. at 46 (quoting *Gibson Elec. Co. v. Liverpool & London & Globe Ins. Co.*, 54 N.E. 23, 26 (N.Y. 1899) (emphasis added).) But the ñonlyò is TIAA-CREFôs addition; none of its cited cases say ñonlyò or ñmere.ò This is significant because, as confirmed by a case of similar vintage , ñ[i]t must be kept in mind that terms such as ómere preponderanceô and óclear and convincingô only describe degrees of preponderation.ò *Kirchgestner*, 233 P.2d at 701; *see also Koplewicz v. Colony Ticket Serv., Inc.*, 620 N.Y.S.2d 384, 384 (N.Y. App. Div. 1995) (ñ[a] verdict should only be set aside when the evidence é so preponderates in favor of the opposing party that the verdict could not possibily have been reached on any fair interpretation of the evidenceò). Thus, the opinions cited by TIAA-CREF

[redacted].

cannot properly be interpreted as specifying the particular degree of preponderance that is necessary. Particularly in light of the legion of more recent New York cases discussed above, which squarely hold that waivers of contractual rights must be proved by clear and convincing evidence, TIAA-CREFôs reliance on these opinions is unavailing.

In sum, the Superior Court correctly instructed the jury on the burden of proof applicable to TIAA-CREFôs assertions of waiver.

[redacted].

III. JUDGMENT IN ZURICH'S FAVOR SHOULD BE ENTERED ON THE ALTERNATIVE BASES THAT TIAA-CREF'S SETTLEMENTS WERE NOT A COVERED LOSS AND ITS ATTORNEYS FEES WERE NOT REASONABLE

A. Question Presented

Should the Court affirm judgment in Zurichôs favor on the alternative bases argued by Zurich below that TIAA-CREFôs claim represents uninsurable disgorgement and that TIAA-CREF failed to prove its damages at trial?

B. Standard and Scope of Review

This Court ñmay affirm on the basis of a different rationale than that which was articulated by the trial court, if the issue was fairly presented to the trial court.ò *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 849 (Del. 2015). *See, also, e.g.*, *Rossdeutscher v. Viacom, Inc.*, 768 A.2d 8, 24 (Del. 2001), as revised (Apr. 2, 2001) (affirming trial court judgment on alternative grounds).

C. Merits of the Argument

As Zurich argued at summary judgment and in the trial court below, TIAA-CREF is not entitled to insurance coverage because: (a) the risk of having to disgorge funds is uninsurable under applicable New York law and (b) TIAA-CREF failed to present sufficient evidence that its Defense Costs incurred in the *Bauer-Ramazani* Action were reasonable. Zurich joins in and incorporates the Opening Brief of Appellants Illinois National Insurance Company, Ace American Insurance

[redacted].

Company and Arch Insurance Company Regarding Whether TIAA-CREF Suffered Covered ñLossò as an alternative basis for affirming judgment in Zurichôs favor.[7] Additionally, Zurich joins in and incorporates the Opening Brief of Appellants Illinois National Insurance Company and Arch Insurance Company Regarding the Reasonableness of TIAA-CREFôs Defense Costs.[8] On these additional bases, the Court should affirm judgment in Zurichôs favor.

[7] Zurich raised this argument in the Superior Court. (*See* JA3188-JA3193; ZA0001-ZA0004.)

[8] Zurich raised this argument in the Superior Court. (*See* ZA0122-ZA0149; JA5869-58723.)

[redacted].

CONCLUSION

For the foregoing reasons, the Supreme Court should affirm the Superior Courtôs judgment in Zurichôs favor.

BODELL BOVÉ, LLC

/s/ Bruce W. McCullough
Bruce W. McCullough (Del. ID 3112)
1225 N. King Street, Suite 1000
P.O. Box 397
Wilmington, DE 19899-0397
(302) 655-6749
bmccullough@bodellbove.com

Attorneys for Defendant Below-Appellee Zurich American Insurance Co.

Ronald P. Schiller
Daniel J. Layden
HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER
One Logan Square, 27th Floor
Philadelphia, PA 19103
(215) 568-6200
(215) 568-0300

OF COUNSEL

Dated: March 19, 2018
Public Version Dated March 26, 2018

[redacted].