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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

ANSWERING BRIEF OF APPELLEE ILLINOIS NATIONAL INSURANCE COMPANY TO APPELLANTS TIAA-CREF INDIVIDUAL & INSTITUTIONAL SERVICES, LLC; TIAA-CREF INVESTMENT MANAGEMENT, LLC; TEACHERS ADVISORS, INC.; TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA; AND COLLEGE RETIREMENT EQUITIES FUND'S OPENING BRIEF

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Dated: March 26, 2018

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NATURE OF PROCEEDINGS

In this insurance coverage action, Plaintiffs below, Appellants TIAA-CREF Individual & Institutional Services, LLC, TIAA-CREF Investment Management, LLC, Teachers Advisors, Inc., Teachers Insurance and Annuity Association of America, and College Retirement Equities Fund (collectively, "TIAA-CREF"), seek to recover settlement and defense costs incurred in connection with three class actions filed against them. Each of the underlying class actions sought disgorgement of investment gains, gains that TIAA-CREF had retained instead of paying to redeeming investors. TIAA-CREF settled two of the underlying class actions by disgorging a portion of the undistributed gains and [redacted].

With respect to the three underlying class actions, TIAA-CREF sought insurance proceeds under claims-made professional liability policies issued by primary insurer Illinois National Insurance Company ("Illinois National") and excess insurers St. Paul Mercury Insurance Company ("St. Paul"), ACE American Insurance Company ("ACE"), Arch Insurance Company ("Arch"), and Zurich American Insurance Company ("Zurich"). The insurers raised various defenses to coverage, which were litigated below, including the position taken by Illinois National (and other insurers) that TIAA-CREF's taking of investment gains from its

[redacted]

customers, the rightful owners of the accounts, and then subsequently agreeing to return those investment gains to the customers, was not an insurable risk covered as "Loss" under the policies at issue. The Superior Court rejected the insurers' argument and ruled in favor of TIAA-CREF on competing motions for summary judgment on "Loss." After the Superior Court's rulings on the parties' various summary judgment motions, St. Paul and TIAA-CREF settled their dispute as to coverage for a partial payment of St. Paul's policy limits.

The parties stipulated as to certain other defenses, and a trial was held to resolve certain remaining issues on just the two settled actions. After post-trial motions, the Superior Court issued a Rule 54(b) Order dismissing TIAA-CREF's claims against Zurich, which had prevailed on certain defenses at trial, and declared that Illinois National and remaining excess insurers ACE and Arch were liable to indemnify TIAA-CREF for the two settled actions in accordance with their applicable attachment points and policy limits.

The Superior Court's October 20, 2016 Opinion and Rule 54(b) Order are now the subject of various appeals by TIAA-CREF, Illinois National, ACE and Arch. This appeal involves the Superior Court's ruling that TIAA-CREF is not entitled to prejudgment interest for amounts owed by ACE and Arch. Illinois National agreed that TIAA-CREF would be entitled to recover prejudgment interest

from Illinois National based on the sum awarded to TIAA-CREF against Illinois National under the Illinois National Policy (i.e., up to the limit of liability of the Illinois National Policy). However, insurers ACE and Arch each opposed an award of prejudgment interest against them, on the grounds that the terms of their respective policies delay attachment of each policy until either actual payment of the amount of underlying limit(s) by the underlying insurer(s) or by the underlying insurer(s) and insured pursuant to a settlement agreement. In light of these ACE and Arch policy provisions, the Superior Court ruled that prejudgment interest could not accrue against ACE and Arch. The Superior Court also declined to hold Illinois National responsible to pay as purported consequential damages an assessment of prejudgment interest on the sums awarded against ACE and Arch for amounts due under those insurers' policies.

SUMMARY OF ARGUMENT

1. Denied as to Illinois National. This point is directed in part to other parties and not toward Illinois National. Illinois National neither admits nor denies this point to the extent it is directed to another party, and not toward Illinois National. The Superior Court properly denied TIAA-CREF's request that Illinois National be held liable for prejudgment interest on sums owed by ACE and Arch. Under New York law, TIAA-CREF cannot recover from Illinois National prejudgment interest assessed on sums awarded against other Defendants.

   a. This point is directed to another party. Since this point is not directed to it, Illinois National neither admits nor denies this point.

   b. This point is directed to another party. Since this point is not directed to it, Illinois National neither admits nor denies this point.

   c. Denied. The Superior Court properly denied TIAA-CREF's request that Illinois National be held liable for prejudgment interest on sums owed by ACE and Arch. TIAA-CREF cannot recover from Illinois National prejudgment interest on sums awarded against other defendant-insurers, for amounts determined to be owed by those insurers under the policies those insurers issued. TIAA-CREF and Illinois National agree that New York

substantive law governs this dispute, and as TIAA-CREF already has admitted, there is no New York law that would allow TIAA-CREF to recover prejudgment interest from Illinois National on sums awarded against ACE and Arch. TIAA-CREF seeks to recover this prejudgment interest on a consequential damages theory, but, under New York law, interest awards are governed by statute. New York's prejudgment interest statute does not allow recovery of prejudgment interest allocable to sums that have been awarded against other Defendants. Prejudgment interest on sums awarded against ACE and Arch for amounts owed by those insurers under their policies can not be assessed against Illinois National because interest represents the cost of having the use of another's money. There is no New York law that would allow TIAA-CREF to recover from Illinois National – as purported consequential damages on a breach of contract claim – prejudgment interest on amounts owed by other Defendants or any damages for that matter in excess of policy limits without a showing of bad faith. Special or consequential damages are available only where the parties to the contract reasonably contemplated those damages at the time of contracting and that the insurer acted in bad faith. TIAA-CREF's theories lack the requisite proof on bad faith, foreseeability and causation and should be rejected. The Superior

Court properly refused to assess prejudgment interest against Illinois National other than based on, pursuant to New York's statutory interest provisions, the sum awarded against Illinois National.

2. This point is directed to another party. Since this point is not directed to it, Illinois National neither admits nor denies this point.

STATEMENT OF FACTS

A. The Underlying Actions

TIAA-CREF is a family of companies that provided the investment and retirement accounts that are at issue in the three underlying class actions.[1] College Retirement Equities Fund ("CREF") offered eight (8) investment funds (the "CREF Funds") and TIAA-CREF Insurance and Annuity Association of America ("TIAA") offered two (2) investment funds (the "TIAA Funds").[2] TIAA, directly or through one of its for-profit subsidiaries, TIAA-CREF Individual & Institutional Services, LLC, TIAA-CREF Investment Management, Inc., and Teachers Advisors, Inc.,[3] provided the investment management and account administration services, and billed the Funds, which do not have employees, for these services.[4]

[1] JA1876 at ¶ 3. In accordance with Delaware Supreme Court Rule 14(j), the parties to the consolidated appeals filed a Joint Appendix of documents bates-stamped with the prefix "JA." Additionally, Defendants Below / Appellees Illinois National, ACE and Arch filed a Defense Appendix of documents bates-stamped with the prefix "DA." Plaintiffs Below / Appellants TIAA-CREF filed a Plaintiff Appendix of documents bates-stamped with the prefix "TA." In this brief, Appellee cites documents contained in these appendices by the bates-stamped pages.

[2] JA1876-77 at ¶ 4; JA1995-96; JA3896 at 15:12-15.

[3] JA3732-35 at 14:12-17:12.

[4] JA2090; JA2092; DA0022; JA1082; JA0937; JA2047-48 at 60:5-61:7; JA3898 at 17:18-25; JA3899 at 18:8-21.

[redacted]

TIAA-CREF's regular withholding of certain investors' gains resulted in the three class action lawsuits that are the subject of this insurance coverage action:[5] *Rink v. College Retirement Equities Fund*, No. 07-CI-10761 (Ky. Cir. Ct. filed Oct. 29, 2007) (the "*Rink* Action"); *Bauer-Ramazani v. Teachers Insurance & Annuity Association of America - College Retirement & Equities Fund, et al.*, No. 1:09-cv-00190 (D. Vt. filed Aug. 17, 2009) (the "*Bauer-Ramazani* Action"); and *Cummings v. Teachers Insurance & Annuity Association of America — College Retirement & Equities Fund, et al.*, No. 1:12-cv-93 (D. Vt. filed May 10, 2012) (the "*Cummings* Action") (collectively, the "Underlying Actions"). Each action sought, and recovered in settlement, the exact same relief – the appreciation in customer accounts that TIAA-CREF had withheld from redeeming investors.[6]

B. The 2007-2008 Policies

In the 2007-08 policy period, TIAA-CREF's primary and excess policies were distributed subject to a $5 million self-insured deductible, as follows:[7]

Policy	Insurer	Limit of Liability
Primary	Illinois National	[redacted]
First Excess	St. Paul Mercury	[redacted]
Second Excess	ACE	[redacted]
Third Excess	Arch	[redacted]

[5] JA2119 at 34:16-23; DA0069-70 at 53:6-54:12; DA0071-74 at 115:14-118:19.
[6] JA0610-11 at § III; JA2130; JA2466 at § I.7.
[7] JA6655; JA5209.

[redacted]

Fourth Excess	Zurich		[redacted]

Illinois National issued the primary policy, Professional Liability Policy No. [redacted] (the "Illinois National Policy"), in the 2007-2008 tower.[8] Except as otherwise provided in those policies, the excess policies apply in conformance with the terms and conditions of the Illinois National Policy. The policies issued by the excess insurers also incorporate their own additional terms and provisions, including those provisions addressing the attachment of the policies issued by ACE and Arch that are the subject of TIAA-CREF's appeal.

C. This Insurance Coverage Litigation

On May 20, 2014, TIAA-CREF filed this insurance coverage action against several insurers that issued policies in effect at the time the Underlying Actions were filed.[9] TIAA-CREF pursued causes of action for declaratory judgment, breach of contract and anticipatory breach of contract, with respect to the costs incurred in defending and settling the Underlying Class Actions.[10] TIAA-CREF seeks reimbursement of defense and settlement costs only under the claims-made and reported professional liability insurance effective for the April 1, 2007 to April 1, 2008 policy period. The policies in question are subject to a Notice/Claim

[8] JA2541.01-41.58.
[9] TA0244-76.
[10] TA0244-76.

[redacted]

Reporting Provision, which provides, in pertinent part, that, if a "claim" is made and reported during the 2007-2008 policy period, then, claims which are subsequently made and reported "alleging any Wrongful Act which is the same as or related to any Wrongful Act alleged in the Claim of which such notice has been given, shall be considered related to the first Claim and made at the time such notice was given."[11] The *Rink* Action, which was the first-filed of the three Underlying Class Actions, was first made against an Insured and reported to Illinois National during the April 1, 2007 to April 1, 2008 policy period of the Illinois National Policy.[12]

In May 2016, the parties filed various motions for summary judgment. TIAA-CREF, Illinois National, and ACE agreed that the *Bauer-Ramazani* and *Cummings* Actions relate back to the *Rink* Action, so as to constitute a single claim made during the 2007-2008 policy period;[13] St. Paul did not agree. St. Paul argued that the *Bauer-Ramazani* and *Cummings* Actions do not relate back to the *Rink* Action and the 2007-2008 policy period, and, thus, that St. Paul could owe no obligation for those actions under its 2007-2008 policy.[14]

In its October 20, 2016 Opinion, deciding the parties' competing motions for summary judgment, the Superior Court agreed with TIAA-CREF, Illinois National

[11] JA0362 at § V.C.2.
[12] JA1279-96.
[13] JA5221; JA5230-32 at § C.
[14] JA5221; JA5230.

and ACE that *Bauer-Ramazani* and *Cummings* relate back to *Rink* so as to all be properly reviewed for potential coverage in the 2007-2008 policy period.[15] The Superior Court determined that all the actions arise out of the same conduct on the part of TIAA-CREF – "TIAA-CREF's business practice that resulted in failure to pay customers their gains during delays in processing."[16] This ruling is not being challenged on appeal. As a result, the only remaining causes of action are: (1) breach of contract against Illinois National (duty to pay defense costs); (2) breach of contract against Illinois National (duty to indemnify); (3) declaratory relief against Illinois National, St. Paul, ACE, Arch and Zurich; and (4) anticipatory breach of contract against Illinois National, St. Paul, ACE, Arch, and Zurich.[17]

The parties filed other motions for summary judgment that are pertinent here. Illinois National (and the other insurers) sought judgment as a matter of law that the Underlying Actions did not satisfy the Illinois National Policy's definition of "Loss," and did not involve "Loss" of an Insured, and that, as a result, no coverage is owed for the amounts that TIAA-CREF seeks to recover.[18] TIAA-CREF cross-moved for summary judgment arguing that settlements paid in the *Rink* and *Bauer-Ramazani* Actions represented a "Loss" of TIAA-CREF for which coverage

[15] JA5232.
[16] JA5232.
[17] JA6658.
[18] JA1819-66; JA3178-87; JA2890.

was owed and that coverage was not relieved by any applicable public policy because TIAA-CREF denied liability when it settled those actions.[19] The Superior Court entered summary judgment in favor of TIAA-CREF on the issue of "Loss," as to all three Underlying Actions, even though TIAA-CREF only had sought summary judgment with respect to *Rink* and *Bauer-Ramazani*.[20]

Arch and St. Paul filed motions arguing that TIAA-CREF was required to obtain their consent to settle the Underlying Actions in order to trigger Arch and St. Paul's coverage obligations, but failed to do so, and TIAA-CREF filed a competing motion.[21] The Superior Court denied all the consent motions and ruled that there were issues for the finder of fact to resolve.[22] The Superior Court denied TIAA-CREF's motion on the reasonableness of defense costs, ruling that the finder of fact must consider a multi-factor analysis in determining the reasonableness of defense costs, and that it could not do so on the record before it.[23]

Following the issuance of the October 20, 2016 Opinion, but prior to trial, Illinois National's request for interlocutory appeal was denied;[24] TIAA-CREF reached a settlement with first-layer excess insurer St. Paul for less than policy

[19] JA0244-85.
[20] JA5200-44.
[21] JA5222; JA5236.
[22] JA5237-38; JA5242.
[23] JA5240-41.
[24] DA0075-84.

limits;[25] and Illinois National, ACE, Arch and Zurich agreed to withdraw their reliance on another policy exclusion (referred to as "the Mechanical or Electronic Failure Exclusion") as a potential defense to coverage.[26]

On December 5-12, 2016, trial proceeded on three main issues: (1) the consent defenses raised by Arch and Zurich; (2) the late notice defense raised by Zurich; and (3) whether the defense costs in the Underlying Actions were reasonable and necessary.[27] Neither Illinois National nor ACE pursued defenses based upon late notice or lack of consent. ACE did not participate in the trial, and "Illinois National participated only for the purposes of challenging the reasonableness of TIAA-CREF's defense costs."[28] The jury returned its verdict on December 12, 2016,[29] finding: in favor of Zurich on its notice and consent defenses;[30] that Arch waived the consent condition with respect to the *Rink* and *Bauer-Ramazani* settlements;[31] and that the defense costs sought in connection with the *Rink* Action and the *Bauer-Ramazani* Action were reasonable.[32]

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[25] TA0732-33; TA0947-48.
[26] JA5251-54.
[27] JA6515-20; TA0849-52.
[28] TIAA-CREF's Opening Brief at 17; TA0668 at n.1.
[29] JA6515-20.
[30] JA6516-17.
[31] JA6518.
[32] JA6519-20.

[redacted]

On February 10, 2017, TIAA-CREF moved for Entry of a Final Order and Judgment Pursuant to Rule 54(b) seeking prejudgment interest from ACE and Arch, or in the alternative from Illinois National as consequential damages.[33] ACE and Arch maintained that they did not breach or anticipatorily breach their contractual obligations under the terms of their respective policies.[34] Illinois National opposed TIAA-CREF's alternate request to recover from it prejudgment interest assessed on any amounts owed by ACE and Arch.[35] As set forth in an October 23, 2017 opinion, the Superior Court denied TIAA-CREF's demand for prejudgment interest against ACE and Arch or, in the alternative, against Illinois National.[36] The Superior Court issued a final appealable order, pursuant to Rule 54(b), that all claims and defenses relating to TIAA-CREF's request for coverage with respect to *Rink* and *Bauer-Ramazani* were resolved.[37] The judgment indicated that Illinois National, ACE and Arch are liable to indemnify TIAA-CREF for their settlement payments and defense costs incurred in connection with the *Rink* Action and the *Bauer-Ramazani* Action in accordance with their applicable policies' attachment

[33] TA0882-06.
[34] JA6651-79.
[35] JA6651-79.
[36] JA6651-79.
[37] JA6680-82.

points and limits, and applicable exhaustion provisions.[38] The judgment further indicated that TIAA-CREF is entitled to recover from Illinois National its [redacted] policy limits plus prejudgment interest on that amount.[39] Judgment was entered in favor of Zurich.[40]

With respect to issues in this particular answering brief, TIAA-CREF appeals from the Superior Court's rulings that: (1) denied TIAA-CREF's demand for prejudgment interest against ACE and Arch, finding that ACE and Arch did not breach their contracts under the terms of their policies; and (2) denied TIAA-CREF's demand to award this claimed prejudgment interest as consequential damages against Illinois National, finding there is no basis to make such an award.[41]

In separate appeals, Illinois National is challenging two topics that were the subject of the Superior Court's rulings, which led to the Rule 54(b) Order. Illinois National, ACE and Arch are 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 no coverage is owed by Illinois National, ACE and Arch in connection with the Underlying Actions, or may remand the matter. Illinois National and Arch also are appealing the Superior Court's denial of their

[38] JA6680-81.
[39] JA6681.
[40] JA6681.
[41] JA5200-44.

[redacted]

original and renewed Motions for Judgment as a Matter of Law with respect to defense costs incurred by TIAA-CREF for the *Bauer-Ramazani* Action. For reasons discussed in that appeal, this Court may rule, as a matter of law, that the award for "Defense Costs," which is a component of "Loss," should be reduced to comport with the evidence presented at trial. Thus, this Court's ruling on "Loss" and "Defense Costs" may moot or otherwise affect this appeal as to the amount of prejudgment interest, if any, to which TIAA-CREF is entitled.

ARGUMENT

I. THE SUPERIOR COURT PROPERLY HELD THAT ILLINOIS NATIONAL ONLY OWES PREJUDGMENT INTEREST BASED UPON THE SUM AWARDED AGAINST IT

A. QUESTION PRESENTED

1. Did the Superior Court correctly refuse TIAA-CREF's request to hold Illinois National responsible for paying prejudgment interest on sums awarded against other Defendants, when, under applicable New York law, interest is assessed only on the sum awarded against the party from whom interest is sought?

This issue was raised below in the briefs and at oral argument.

B. STANDARD AND SCOPE OF REVIEW

This Court reviews, *de novo*, the Superior Court's denial of prejudgment interest and its interpretations of insurance contracts.[42]

C. MERITS OF ARGUMENT

In this insurance coverage action, TIAA-CREF seeks to recover prejudgment at New York's generous statutory interest rate, pursuant to New York's statutory interest provisions. Should Illinois National not prevail on its corresponding appeal on "Loss," it agrees that TIAA-CREF would be entitled to recover prejudgment interest from Illinois National on the sum awarded to TIAA-CREF against Illinois National for amounts determined to be due under the Illinois National Policy.

[42] *Chrysler Corp. v. Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1037 (Del. 2003); *O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 286 (Del. 2001).

TIAA-CREF, however, also seeks relief from Illinois National far beyond, and contrary to, what New York law allows. ACE and Arch each dispute with TIAA-CREF whether, and, if so, to what extent, each excess insurer is liable, under New York's statutory interest provisions, for prejudgment interest on the amounts due from each of them under their policies. TIAA-CREF argues that, should this Court determine that ACE and Arch are not liable for prejudgment interest on amounts owed by them under their policies, Illinois National should be required to pay those amounts as consequential damages. TIAA-CREF admits there is no case law supporting its consequential damages theory,[43] but the law is clearer than that. New York law forecloses recovery of prejudgment interest other than under the statutory interest provisions on the sum awarded against that party.

Because New York law limits an insured's recovery of interest to what is allowed by the statutory interest provisions, there is no basis for TIAA-CREF to recover prejudgment interest as consequential damages. Further, TIAA-CREF cannot satisfy, under New York law, the prerequisites to consequential damages, which, in the insurance coverage context, must be premised on showing that the insurer acted in bad faith and the specific damages sought were foreseeable at the time of contracting. TIAA-CREF never pursued or prevailed on a claim that

[43] JA6557 at 10:2-20.

[redacted]

Illinois National acted in bad faith, or that Illinois National should be held responsible for the insurance contracts issued by ACE and Arch where Illinois National was not a party to those insurance contracts. TIAA-CREF also never made a showing that Illinois National reasonably contemplated, at the time it issued the Illinois National Policy, that it could be held liable for prejudgment interest on any amounts owed by ACE and Arch. Accordingly, Illinois National asks that this Court affirm the Superior Court's ruling and hold that Illinois National is obligated to pay interest (1) only under New York's statutory interest provisions and (2) only on the sum awarded against Illinois National, if any.

1. New York Law Only Allows TIAA-CREF to Recover Interest Pursuant to New York's Statutory Interest Provisions.

The recovery of prejudgment interest is a matter of substantive law to be governed by the state law that governs the substantive legal questions.[44] Delaware law sets prejudgment interest at 5% over the Federal Reserve Discount Rate, 6 *Del. C.* § 2301. TIAA-CREF seeks to recover at New York's 9% statutory interest rate. The parties agree New York law governs the substantive legal questions and TIAA-CREF's right, if any, to prejudgment interest.

[44] *Kimball v. Penn Mut. Ins. Co.*, 2009 Del. Super. LEXIS 23, at *4 (Del. Super. Ct. Jan. 30, 2009); *see also MPEG LA, L.L.C. v. Dell Global B.V. & Dell Prods., L.P.*, 2013 Del. Ch. LEXIS 61, at *15 (Del. Ch. Mar. 6, 2013) ("Delaware courts and the Restatement Second [of Conflicts] have concluded that a party's entitlement to prejudgment interest is an issue of substantive law.").

[redacted]

TIAA-CREF argues that, if the statutory interest provisions do not allow it to recover interest against ACE and Arch for amounts those insurers owe TIAA-CREF under their policies, Illinois National should be held liable for those amounts as purported consequential damages. That is, while TIAA-CREF acknowledges that the New York statutory interest provisions do not afford it the relief that it seeks, TIAA-CREF still seeks to recover those amounts against Illinois National as consequential damages using the New York statutory interest rate.

Under New York law, the availability of prejudgment interest is governed by Sections 5001 and 5002 of New York Civil Practice Law and Rules ("CPLR").[45] Section 5001 addresses the right to pre-decision interest, while Section 5002 addresses the right to post-decision interest.[46] "Interest continues to accrue in contract cases until 'the date the verdict was rendered or the report or decision was made,' and then 'the total sum awarded, including interest to verdict, report or decision,' accrues additional interest from that date until 'the date of entry of final judgment.'"[47] The cases on which TIAA-CREF relies for seeking interest against

[45] *Royal Indem. Co. v. Providence Washington Ins. Co.*, 966 F. Supp. 149, 150 (N.D.N.Y. 1997), *aff'd*, 172 F.3d 38 (2d Cir. 1999).
[46] *Id.*
[47] *Granite Ridge Energy, LLC v. Allianz Global Risk US Ins. Co.*, 979 F. Supp.2d 385, 394 (S.D.N.Y. 2013)(quoting portions of N.Y. C.P.L.R § 5001(c), 5002).

ACE and Arch recognize that these provisions govern interest awards in insurance coverage actions.[48]

There is no basis to seek additional interest beyond the statutory provisions. TIAA-CREF admitted as much in seeking prejudgment interest against ACE and Arch, when it cited the Legislature's Advisory Committee Notes, for the proposition that section 5001 "establishes a single rule for the awarding of interest in all contract and property damage cases."[49] Indeed, if TIAA-CREF is correct that New York law applies, and Illinois National does not contest this point, TIAA-CREF is bound by New York's statutory framework. Interest awards under New York law are "purely a creature of statute."[50] Because the right to interest is purely statutory,

[48] *Olin Corp. v. OneBeacon Am. Ins. Co.*, 864 F.3d 130, 151–52 (2d Cir. 2017) ("In an insurance-coverage dispute, the application of § 5001(b) requires that prejudgment interest be calculated from the date the insurer becomes obligated to indemnify the insured."); *Turner Const. Co. v. Kemper Ins. Co.*, 341 Fed. Appx. 684, 687 (2d Cir. 2009) (unpublished) ("There was no abuse of discretion here, because Turner is entitled to interest on any award for any breach of contract by Kemper under N.Y. C.P.L.R. 5001(a), which provides that '[i]nterest shall be recovered upon a sum awarded because of a breach of performance of a contract.'"); *Granite Ridge Energy, LLC*, 979 F. Supp. 2d at 394 ("In other words, for purposes of § 5002, the 'decision' is 'made' when 'the sole remaining question to be answered was the amount of money that defendant owed plaintiff.'") (citation omitted).

[49] See TIAA-CREF's Opening Brief at 29 n. 13.

[50] *Mfrs. & Traders Trust Co. v. Reliance Ins. Co.*, 870 N.E.2d 124, 126 (N.Y. 2007) (citing *Matter of Bello v. Roswell Park Cancer Inst.*, 833 N.E.2d 252, 253 (N.Y. 2005)).

[redacted]

TIAA-CREF may not recover prejudgment interest by any means other than the statutory interest provisions.[51]

2. New York's Statutory Interest Provisions Do Not Allow TIAA-CREF to Recover From Illinois National Any Interest On Sums Owed By Other Parties.

Interest at the 9% statutory rate, pursuant to CPLR 5004, is assessed "upon" the "sum awarded" (pursuant to CPLR 5001(a) and 5002), with the running of interest "computed from the earliest ascertainable date the cause of action existed" pursuant to CPLR 5001(b) or "from the date the verdict was rendered or the report or decision was made" pursuant to CPLR 5002. The import of the language is clear. Because CPLR 5001 and 5002 authorize interest "upon a sum awarded," a party only pays interest on the award against it.[52] There is no "predicate for an award of interest" on any amount other than the "sum awarded" against the party from whom interest is sought.[53]

In this case, no sum has been awarded against Illinois National for the amounts owed by ACE and Arch under the ACE and Arch policies. The only sum awarded against Illinois National is for the payment of Illinois National's policy limits. Though Illinois National did not concede, as TIAA-CREF asserts, that it

[51] *Matter of Bello*, 833 N.E.2d at 254.
[52] *Mfr's & Traders Trust Co.*, 870 N.E.2d at 127.
[53] *Id.*

breached its contract, it did recognize, in light of the Superior Court's summary judgment rulings rejecting certain coverage defenses, the parties' subsequent pretrial stipulations as to others and the jury verdict, that TIAA-CREF had prevailed on a breach of contract claim for amounts owed under the terms of the Illinois National Policy. Under those circumstances, Illinois National agreed to entry of a final appealable judgment pursuant to Rule 54(b) obligating Illinois National to pay its policy limits with prejudgment interest assessed on the award against it (its own policy limits).

TIAA-CREF's request is at odds with the principles underlying New York law on interest. The New York Court of Appeals has declared that interest "is not a penalty."[54] Instead, interest represents "the cost of having the use of another person's money for a specified period."[55] Since Illinois National never had the use of the ACE and Arch policy proceeds, the purpose for awarding interest is not served by assessing interest against Illinois National on these sums. In addressing the fairness of ordering a party to pay prejudgment interest, the New York Court of Appeals has explained:

[54] *Love v. State*, 78 N.Y.2d 540, 544 (N.Y. 1991).

[55] *Aurecchione v. New York State Div. of Human Rights*, 771 N.E.2d 231, 234 (N.Y. 2002); *Love*, 78 N.Y.2d at 544; *see also Stanford Square, L.L.C. v. Nomura Asset Capital Corp*., 232 F. Supp. 2d 289, 293 (S.D.N.Y. 2002) ("[T]he party owing the money has had the use of the funds he was obligated to have paid, and should be required to pay compensation by way of interest.").

> In this regard, it is worthy of note that the defendant, who has actually had the use of the money, has presumably used the money to its benefit and, consequently, has realized some profit, tangible or otherwise, from having it in hand during the pendency of the litigation. There is thus nothing unfair about requiring the defendant to pay over this "profit" in the form of interest to the plaintiff, the party who was entitled to the funds from the date the defendant's liability was fixed.[56]

TIAA-CREF never asserted any cause of action that Illinois National should be held responsible to pay in accordance with the insurance contracts issued by ACE or Arch, or that Illinois National used, owed or held the proceeds of those policies.[57] Accordingly, New York's interest statute and the principles underlying New York law on interest preclude penalizing Illinois National by requiring that Illinois National pay interest on sums awarded against ACE and Arch and not against Illinois National.[58] Under the circumstances, Illinois National only can be assessed interest on a sum awarded against Illinois National for proceeds available under the Illinois National Policy.

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[56] *Love*, 78 N.Y.2d at 545.

[57] The ACE and Arch policies afforded those carriers the right and opportunity to associate with their insureds in the investigation, settlement, defense of a claim even if the underlying Illinois National policy limit had not exhausted. *See* JA0497 at Section V.E; JA0513 at Section V.E.

[58] *See, e.g.*, *Spodek v. Park Property Dev. Assoc.*, 96 N.Y.2d 577, 581 (N.Y. 2001) (reasoning that, allowing prejudgment interest on amounts owed by a debtor but that was unpaid, "does not penalize debtors for exercising their right to contest the debt through litigation.").

[redacted]

3. New York Law Does Not Permit TIAA-CREF To Recover Prejudgment Interest From Illinois National On a Consequential Damages Theory.

The Superior Court properly rejected TIAA-CREF's consequential damages argument as an attempt to assert bad faith on the part of Illinois National in order to obtain damages in excess of policy limits.[59] In the absence of a showing of bad faith, damages for breach of contract are limited to reimbursement of covered loss up to the policy limits.[60] The Superior Court recognized that TIAA-CREF never pursued a bad faith claim.[61] Having neither pursued nor prevailed upon allegations that Illinois National acted in bad faith, TIAA-CREF cannot pursue consequential damages against Illinois National in excess of policy limits. Illinois National only can be assessed with prejudgment interest on the amount determined to be due from Illinois National pursuant to the terms of the Illinois National Policy.[62]

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[59] JA6676.

[60] *See, e.g., Gordon v. Nationwide Mut. Ins. Co.*, 285 N.E.2d 849, 854 (N.Y. 1972) ("For a breach of contract based only on a failure to make reasonable settlement of a claim within the policy limits, damages are measured by the policy limits. For a breach of implied conditions of the contract to act in its performance in good faith in refusing to settle within policy limits, the damages may exceed the policy limits.").

[61] JA6676 ("The authorities TIAA-CREF cites in support of the award of consequential damages above policy limits concern bad faith claims. As previously stated, TIAA-CREF has never pursued a bad faith claim in this case.").

[62] *Mann v. Gulf Ins. Co.*, 751 N.Y.S.2d 557, 559-560 (N.Y. App. Div. 2002) ("In an action to recover the proceeds of an insurance policy, prejudgment interest must be awarded on amounts due pursuant to the terms of the insurance policy on the ground that the delay in payment constituted a breach of the terms of the insurance policy.").

[redacted]

TIAA-CREF cannot rely upon *Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of New York*, 886 N.E.2d 127 (N.Y. 2008) to pursue consequential damages against Illinois National in excess of policy limits. As explained in *Panasia Estates, Inc. v. Hudson Ins. Co.*, 886 N.E.2d 135 (N.Y. 2008), the New York Court of Appeals held in *Bi-Economy Market* that "consequential damages resulting from a breach of the covenant of good faith and fair dealing may be asserted in an insurance contract context, so long as the damages were within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting."[63]

In *Bi-Economy Market*, the New York Court of Appeals recognized that special or consequential damages only may be awarded in "limited circumstances."[64] The court noted that "such unusual or extraordinary damages must have been brought within the contemplation of the parties as the probable result of a breach at the time of or prior to contracting."[65] To determine whether consequential damages are reasonably contemplated by the parties, a court must examine "the nature, purpose and particular circumstances of the contract known by the parties" and also "what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it

[63] *See Panasia Estates*, 886 N.E.2d at 137 (N.Y. 2008) (internal quotation marks omitted).
[64] *Bi-Economy Mkt., Inc.* 886 N.E.2d at 130.
[65] *Id.* (citations omitted).

assumed, when the contract was made."[66] In *Bi-Economy Market*, the court addressed the circumstances of the case before it, including the nature and purpose of the business interruption insurance purchased vis-à-vis the claim that the insurer's failures resulted in the collapse of a family-owned meat market.[67] Ultimately, the *Bi-Economy Market* court allowed the consequential damages claim for the collapse of the business to proceed past summary judgment "in light of the nature and purpose of the insurance contract at issue, as well as Bi-Economy's allegations that [the insurer] breached its duty to act in good faith."[68]

Courts have recognized, thus, that "*Bi–Economy* stands for the proposition that consequential damages are permitted when they derive from an insurer's bad faith refusal to pay an insured's claim and such damages were reasonably contemplated by both parties at the time of the contract's execution."[69] TIAA-CREF is, therefore, mistaken in asserting that only foreseeability, and not bad faith, is necessary to pursue consequential damages in the insurance coverage context. TIAA-CREF cited *Orient Overseas Associates v. XL Ins. Am., Inc.*, 18 N.Y.S.3d 381, 383 (N.Y. App. Div. 1st Dept. 2015), but the court there merely held

[66] *Id.* (internal quotation marks and citations omitted).
[67] *Id.* at 131-34, section III.
[68] *Id.* at 132; *see also Panasia Estates*, 886 N.E.2d at 137.
[69] *Goldmark, Inc. v. Catlin Syndicate Ltd.*, 2011 U.S. Dist LEXIS 18197, at *8 (E.D.N.Y. Feb. 22, 2011) (and cases cited therein).

that the insured's bad faith claims handling count was based on the same allegations as for a breach of contract, and, thus, being duplicative of that claim, should be dismissed.[70] *Orient Overseas* does not support TIAA-CREF's argument that foreseeability is the only prerequisite to consequential damages.[71]

Under New York law, an insured's entitlement under given circumstances to consequential damages, as discussed by the Court of Appeals in *Bi–Economy Market*, only applies where "the insurer breached its implied covenant of good faith and fair dealing by not investigating the claim before denying it, or . . . the insurer otherwise acted in bad faith toward the insured."[72] TIAA-CREF did not pursue, let alone prove, a claim that Illinois National breached its implied covenant of good faith and fair dealing by not investigating the claim before denying it, or that Illinois National otherwise acted in bad faith. Having made no such showing, TIAA-CREF may not pursue interest from Illinois National under a consequential damages theory.

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[70] *Orient Overseas Assocs. v. XL Ins. Am., Inc.*, 18 N.Y.S.3d 381, 383 (N.Y. App. Div. 1st Dept. 2015).

[71] *See also Goldmark*, 2011 U.S. Dist LEXIS 18197, at *8-9 ("Plaintiff's argument, therefore, that its only obligation in seeking consequential damages is to prove that such damages were reasonably contemplated at the time of execution is erroneous. Cases have virtually uniformly held that, after *Panasia Estates* and *Bi-Economy*, a plaintiff simply 'cannot sustain a claim for consequential damages without showing that defendants lacked good faith in processing [plaintiff's] claim.'").

[72] *Zelasko Constr., Inc. v. Merchants Mut. Ins. Co.*, 38 N.Y.S.3d 643, 644–45 (N.Y. App. Div. 4th Dept. 2016).

[redacted]

TIAA-CREF also never proved foreseeability, to wit, that the "specific damages sought" – the prejudgment interest on sums to be awarded against ACE and Arch – were reasonably contemplated by Illinois National at the time of contracting.[73] In fact, TIAA-CREF's theory is inherently flawed in that it is premised on a very different assertion, its assumption that the excess insurers simply would have adopted all of the same coverage positions as Illinois National.[74] The assumption itself ignores, of course, that Arch and ACE raised their own policy attachment provisions and that, in addition, the excess insurers raised and litigated their own separate coverage defenses based upon consent and late notice,[75] defenses that Illinois National did not pursue. Also importantly, the divergent positions on the relation back issue that had been espoused by St. Paul, which had issued the first-level excess policy in the 2007-2008 policy period to which the policies issued by ACE and Arch were excess, presented its own exhaustion issue.

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[73] *Panasia Estates*, 886 N.E.2d at 136-37.

[74] TIAA-CREF cited a Delaware choice of law decision, supposedly to prove that any primary insurer that disclaims coverage automatically should be held liable for all the subsequent acts of excess insurers, however, there the Chancery Court merely held it appropriate to apply the same substantive law to the same policy language in order to avoid the "risk of a court inconsistently applying identical policy language within a single integrated insurance scheme." *Viking Pump, Inc. v. Century Indem. Co.*, 2 A.3d 76, 88–89 (Del. Ch. 2009).

[75] JA5236; DA0090-03; JA6516-18; JA6528-6533; TA0298-300 and TA0590-92 (St. Paul, 20th and 29th Affirmative Defenses); TA0500 (Arch, 20th and 21st Affirmative Defenses); DA0102-03 (nos. 1-11); DA100-01 (nos. 1-9). ACE did not raise the same issues as the other excess insurers. TA0769-71.

[redacted]

In addition to disputing coverage, St. Paul disagreed with TIAA-CREF and Illinois National that *Bauer-Ramazani* related back to *Rink* and the 2007-2008 policy period.[76] Even if St. Paul had not disputed coverage for *Rink*, St. Paul still disputed that *Bauer-Ramazani* implicated the 2007-2008 policy period, and the *Rink* Action alone would not have exhausted St. Paul's first layer excess policy for the 2007-2008 policy period. Thus, the excess insurers made their own decisions regarding coverage under their own insurance contracts and did not rely solely on Illinois National's coverage position.

In any event, foreseeability is still lacking, because, even if the excess insurers had adopted every single position taken by Illinois National, it would not prove that ACE and Arch's position on prejudgment interest was reasonably contemplated by Illinois National at the time the Illinois National Policy was issued. ACE and Arch's position that they owe no prejudgment interest is based on the attachment provisions to their own policies. TIAA-CREF cannot establish now, and did not establish at or prior to trial, that Illinois National should have reasonably contemplated, at the time of or prior to contracting, ACE and Arch's positions on

[76] JA5230 at n. 131. The Superior Court ruled that all the Underlying Actions should be handled under the 2007-2008 policy period and that decision is not the subject of appeal.

prejudgment interest.[77] Because those positions are not even based on the language of the contract between Illinois National and TIAA-CREF – the Illinois National Policy,[78] the Superior Court properly rejected TIAA-CREF's attempt to hold Illinois National responsible for policy terms that were "part of the bargain between TIAA-CREF and ACE and TIAA-CREF and Arch."[79]

In sum, there is no basis to award TIAA-CREF interest as consequential damages under New York law. TIAA-CREF did not establish that Illinois National acted in bad faith or that the purported damages were reasonably contemplated by Illinois National and TIAA-CREF at the time of policy execution. Moreover, having neither pursued nor prevailed on bad faith allegations, TIAA-CREF's recovery of damages against Illinois National, if any, is limited to the Illinois National policy limits.

Under New York's statutory interest provisions, and the principles underlying New York law on interest, Illinois National only can be assessed prejudgment interest on the sum awarded against it. Neither *Bi-Economy Market* nor *Orient*

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[77] JA6521-47; DA0085-12.

[78] *See Intl. Rehabilitative Scis. Inc. v. Govt. Employees Ins. Co.*, 2014 U.S. Dist. LEXIS 161436, at *7 (W.D.N.Y. Aug. 5, 2014) (There, the court noted that, unlike the insurance contract at issue in *Bi-Economy*, the plaintiff did not point to any provision in the automobile insurance policies which purported to cover the consequential damages sought for business interruption, loss of revenue or diminution of business value incurred by a third-party payee.).

[79] JA6676.

Overseas can be said to allow TIAA-CREF to pursue prejudgment interest from Illinois National outside the statutory framework, as consequential damages, or on breach of contract sums awarded against other parties for insurance contracts to which Illinois National was not a party. These cases did not convert prejudgment interest into a form of consequential damages or repudiate the fact that CPLR 5001 and 5002 alone govern recovery of prejudgment interest for TIAA-CREF's claims under New York law.

[redacted]

II. CONCLUSION

TIAA-CREF cannot recover from Illinois National interest on sums awarded, or to be awarded, against other insurance companies based on other insurance contracts to which Illinois National is not a party. Under New York law, interest represents the cost of the use of another's money, not a penalty, and the basis for an award of interest is the "sum awarded" against that party. Given the clarity of New York law on these points, TIAA-CREF's consequential damage theory must be rejected. The two New York cases that TIAA-CREF cited do not even address prejudgment interest, and cannot be said to allow an insured to deviate from the statutory framework or the principles underlying the awarding of interest. TIAA-CREF has found no case that would allow TIAA-CREF to recover additional prejudgment interest from Illinois National outside the statutory framework under a consequential damages theory. The reason is clear. Under New York law, interest awards are governed by statute.

Illinois National asks that this Court affirm the Superior Court's ruling that Illinois National is not liable for prejudgment interest other than on a sum awarded against it. Given that the parties' other appeals may eliminate or alter the award against Illinois National and the other insurers, Illinois National asks that this Court

rule that, under New York law, any recovery of interest from Illinois National is limited to interest assessed on any sum awarded against Illinois National.