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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

PUBLIC VERSION

DEFENDANT BELOW, APPELLEE ARCH INSURANCE COMPANY'S ANSWERING BRIEF RESPONDING TO PLAINTIFFS BELOW, APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS v

NATURE OF THE PROCEEDINGS 1

SUMMARY OF ARGUMENTS 4

COUNTERSTATEMENT OF FACTS 6

ARGUMENT 13

I. TIAA IS NOT ENTITLED TO AN AWARD OF PREJUDGMENT INTEREST AGAINST ARCH 13

A. Questions Presented 13

B. Scope of Review 14

C. Merits of Argument 16

1. Arch Cannot Have Any Obligation to Pay Until Both Illinois National and ACE Pay Their Underlying Insurance or Settle Their Insurance Disputes 16

2. Another Party's Breach Cannot Trigger Prejudgment Interest for Arch 20

3. Arch's Bauer Letter Did Not Constitute an Anticipatory Breach 24

4. The Case Law Cited by TIAA Is Easily Distinguishable or Otherwise Should Not Be Followed. 32

5. The Jury Verdict Did Not Address Anticipatory Breach or Otherwise Find Liability on the Part of Arch 38

6. Arch Also Could Not Incur Prejudgment Interest Between the Jury Verdict and the Final Judgment Because the Jury Did Not Find Any Liability or Present Obligation for Arch 41

II. EVEN IF THIS COURT DISAGREES WITH THE REASONS FOR THE SUPERIOR COURT'S DECISION, OTHER ARGUMENTS MADE BUT NOT ADDRESSED BELOW STILL PRECLUDE PREJUDGMENT INTEREST OR AT LEAST WARRANT A SMALLER AMOUNT OF INTEREST 44

A. Questions Presented 44

B. Scope of Review 44

C. Merits of Argument 45

1. Even if Arch Had Breached, Prejudgment Interest Was Already Resolved by TIAA's Settlement with St. Paul 45

2. Due to the Reduction of Arch's Limit, the Original Limit Should Never Be Used as the Principal Sum to Calculate Prejudgment Interest 46

CONCLUSION 48

TABLE OF CITATIONS

Cases

155 Henry Owners Corp. v. Lovlyn Realty Co.,
647 N.Y.S.2d 30 (App. Div. 1996).....15

2027, LLC v. Aspen Am. Ins. Co.,
2015 U.S. Dist. LEXIS 181604 (E.D.N.Y. Sept. 28, 2015).....29

Albert J. Schiff Assocs., Inc. v. Flack,
417 N.E.2d 84 (N.Y. 1980).....34

Am. Commer. Lines LLC v. Water Quality Ins. Syndicate,
679 Fed. App'x 11 (2d Cir. 2017).....28, 29, 33, 34

Am. Ins. Ass'n v. Chu,
476 N.E.2d 637 (N.Y. 1985).....19, 33

AMTRAK v. Steadfast Ins. Co.,
2009 U.S. Dist. LEXIS 21311 (S.D.N.Y. Mar. 5, 2009).....27, 33

Bank of N.Y. Trust Co. v. Franklin Advisers, Inc.,
726 F.3d 269 (2d Cir. 2013).....22

Bear Wagner Specialists, LLC v. Nat'l Union Fire Ins. of Pittsburgh, PA,
2009 N.Y. Misc. LEXIS 1806 (Sup. Ct. July 7, 2009).....27, 29, 30

Brauner v. Provident Life & Cas. Ins. Co.,
1998 U.S. Dist. LEXIS 23042 (E.D.N.Y. Mar. 24, 1998).....31

Briarwood Farms, Inc. v. Toll Bros., Inc.,
452 Fed. App'x 59 (2d Cir. 2011).....30, 41

Broadmeadow Inv., LLC v. Del. Health Res. Bd. & Healthsouth Middletown Rehab Hosp.,
56 A.3d 1057 (Del. 2012).....14

Calgon Carbon Corp. v. WDF, Inc.,
700 F. Supp. 2d 408 (S.D.N.Y. 2010).....22

CDX Holdings, Inc. v. Fox,
141 A.3d 1037 (Del. 2016).....15, 30

[redacted]

CheckRite Ltd. v. Ill. Nat'l Ins. Co.,
95 F. Supp. 2d 180 (S.D.N.Y. 2000) 34, 35

City of Utica v. Genesee Mgmt.,
934 F. Supp. 510 (N.D.N.Y. 1996).....27, 28

Cont'l Cas. Co. v. Emplrs Ins. Co. of Wassau,
865 N.Y.S.2d 855 (Sup. Ct. 2008).....23

Dershowitz v. United States,
2015 U.S. Dist. LEXIS 46269 (S.D.N.Y. Apr. 8, 2015) 19, 33

DiFolco v. MSNBC Cable L.L.C.,
831 F. Supp. 2d 634 (S.D.N.Y. 2011) 25, 40

Dormitory Auth. v. Cont'l Cas. Co.,
756 F.3d 166 (2d Cir. 2014) 20

Doubet, LLC v. Trustees of Columbia Univ. in the City of N.Y.,
941 N.Y.S.2d 537 (Sup. Ct. 2011).....21

Ely-Cruikshank Co. v. Bank of Montreal,
615 N.E.2d 985 (N.Y. 1993).....40

Forest Labs, Inc. v. Arch Ins. Co.,
116 A.D.3d 628 (N.Y. App. Div. 2014) 17

Granite Ridge Energy, LLC v. Allianz Global Risk U.S. Ins. Co.,
979 F. Supp. 2d 385 (S.D.N.Y. 2013) 36

Harriprashad v. Metro. Prop. & Cas. Ins. Co.,
2011 U.S. Dist. LEXIS 145573 (E.D.N.Y. Nov. 17, 2011) 25, 31

In re Hoffman,
712 N.Y.S.2d 165 (App. Div. 2000).....23

Insituform Techs., Inc. v. Am. Home Assurance Co.,
2008 U.S. Dist. LEXIS 25418 (D. Mass. Mar. 31, 2008) 24

J. D'Addario & Co., Inc. v. Embassy Indus., Inc.,
980 N.E.2d 940 (N.Y. 2012).....21

[redacted]

J.P. Morgan Securities Inc. v. Vigilant Ins. Co.,
2017 N.Y. Misc. LEXIS 3051 (Sup. Ct. Aug. 7, 2017) 32, 33, 34

Jacobson v. Metro. Prop. & Cas. Ins. Co.,
672 F.3d 171 (2d Cir. 2012) 28

Juarez-Cardoso v. La Flor De Santa Ines, Inc.,
2017 U.S. Dist. LEXIS 161139 (E.D.N.Y. Sept. 29, 2017) 15

Liberty Surplus Ins. Corp. v. Segal Co.,
2004 WL 2102090 (S.D.N.Y. Sept. 19, 2004) 24, 25, 30, 34

Long Island R.R. Co. v. Northville Indus. Corp.,
362 N.E.2d 558 (N.Y. 1977).....29, 31

Love v. State,
583 N.E.2d 1296 (N.Y. 1991).....42

Manufacturer's & Traders Trust Co. v. Reliance Ins. Co.,
870 N.E.2d 124 (N.Y. 2007).....21, 22

Maryland Cas. Co. v. W.R. Grace & Co.,
1996 WL 306372 (S.D.N.Y. June 6, 1996) 24, 27, 30, 34

Matter of Kane v. Fiduciary Ins. Co. of Am.,
980 N.Y.S.2d 72 (App. Div. 2014).....28

MBIA Ins. Corp. v. Patriarch Partners VIII, LLC,
842 F. Supp. 2d 682 (S.D.N.Y. Apr. 4, 2012) 31

Mehdi Ali v. Fed. Ins. Co.,
719 F.3d 83 (2d Cir. 2012) 17

N. River Ins. Co. v. ACE Am. Reins. Co.,
361 F.3d 134 (2d Cir. 2004) 46

Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Conn. Indem. Co.,
860 N.Y.S.2d 35 (App. Div. 2008).....23

Nat'l Union Fire Ins. Co. v. Antony,
1988 U.S. Dis. LEXIS 3905 (S.D.N.Y. May 9, 1988) 31

[redacted]

Nixon v. Blackwell,
626 A.2d 1366 (Del. 1993) 15

Olin Corp. v. OneBeacon Am. Ins. Co.,
2017 U.S. App. LEXIS 12939 (2d Cir. Jan. 12, 2017).....37, 38

PB Americas, Inc. v. Cont'l Cas. Co.,
690 F. Supp. 2d 242 (S.D.N.Y. 2010) 29, 33

Pedersen v. Farmington Cas. Co.,
2015 U.S. Dist. LEXIS 183337 (N.D.N.Y. Oct. 19, 2015).....29, 30

Princes Point LLC v. Muss Dev. L.L.C.,
87 N.E.3d 121 (N.Y. 2017).....25

Quellos Grp., LLC v. Fed. Ins. Co.,
312 P.3d 734 (Wash. App. 2013) 35

Rapid-Am. Corp. v. Travelers Cas. & Sur. Co. (In re Rapid-Am. Corp.),
2016 Bankr. LEXIS 2224 (S.D.N.Y. Bankr. June 7, 2016) 16, 17

Resmac 2 LLC v. Madison Realty Capital, L.P.,
927 N.Y.S.2d 328 (App. Div. 2011).....28

Royal Indem. Co. v. Providence Wash. Ins. Co.,
966 F. Supp. 149 (N.D.N.Y. 1997).....23

Ryan v. Corbett,
815 N.Y.S.2d 855 (App. Div. 2006).....25

Saratoga Trap Rock Co. v. Standard Acci. Ins. Co.,
143 A.D. 852 (N.Y. App. Div. 1911) 35

Seward Park Hous. Corp. v. Greater N.Y. Mut. Ins. Co.,
836 N.Y.S.2d 99 (App. Div. 2007).....28, 29, 33, 36

Shook & Fletcher Asbestos Settlement Trust v. Safety Nat'l Cas. Corp.,
909 A.2d 125 (Del. 2006) 33

Squilllante v. Cigna Corp.,
2012 U.S. Dist. LEXIS 169763 (S.D.N.Y. Nov. 28, 2012).....30

[redacted]

Standard Distrib. Co. v. Nally,
630 A.2d 640 (Del. 1993) 44

Stanford Square L.L.C. v. Nomura Asset Capital Corp.,
228 F. Supp. 2d 293 (S.D.N.Y. 2002) 39, 40

Tenavision, Inc. v. Neuman,
379 N.E.2d 1166 (N.Y. 1978).....25

TLC Beatrice Int'l Holdings, Inc. v. CIGNA Ins. Co.,
2000 U.S. Dist. LEXIS 2917 (S.D.N.Y. Mar. 16, 2000).....27

Travelers Indem. Co. of Am. v. S. Gastronom Corp.,
2010 U.S. Dist. LEXIS 32333 (E.D.N.Y. Mar. 3, 2010).....28

Turner Constr. Co. v. Kemper Ins. Co.,
341 Fed. App'x 684 (2d Cir. 2009) 15

Turner Constr. Co. v. Am. Manufacturers Mut. Ins. Co.,
485 F. Supp. 2d 480 (S.D.N.Y. 2007) 38

U.S. Fire Ins. Co. v. Fed. Ins. Co.,
858 F.2d 882 (2d Cir. 1988) 22, 23, 46

Unitrin, Inc. v. Am. Gen. Corp.,
651 A.2d 1361 (Del. 1995) 44

V.S. Int'l S.A. v. Boyden World Corp.,
862 F. Supp. 1188 (S.D.N.Y. 1994) 32

Van Nostrand v. Froehlich,
844 N.Y.S.2d 293 (App. Div. 2007).....42

Varda, Inc. v. Ins. Co. of N. Am.,
45 F.3d 634 (2d Cir. 1995) 36, 37

Wilmington Bd. of Public Educ. v. Digiacomo,
1987 Del. LEXIS 1025 (Del. Feb. 9, 1987).....14

Wunderman-Cooper v. Certain Underwriters at Lloyd's,
2015 U.S. Dist. LEXIS 133377 (C.D. Cal. Sept. 30, 2015) 17

[redacted]

Statutes/Rules

N.Y.C.P.L.R. § 5001 15

N.Y.C.P.L.R. § 5002 ..... 41, 42

[redacted]

NATURE OF THE PROCEEDINGS

Arch Insurance Company (**"Arch"**) submits this answering brief in opposition to the opening brief of Plaintiffs (collectively, **"TIAA"**). With respect to Arch, TIAA is appealing the Superior Court's denial of its claims for prejudgment interest. Stuck with unambiguous contractual terms that do not at all support its position, TIAA resorts to cherry-picking the facts out of context, mischaracterizing the jury's findings, and attempts to appeal to misguided notions of fairness. In reality, TIAA is a sophisticated purchaser of insurance that is now suffering from buyer's remorse and is effectively asking this Court to rewrite the material terms of the insurance contract.

TIAA purchased an excess insurance policy from Arch (the **"Arch Policy"**), and the material coverage terms require proper exhaustion to trigger Arch's liability. For proper exhaustion, the plain language requires that all "Underlying Insurance" actually be paid either (1) by the underlying insurers or (2) by both the underlying insurers and TIAA pursuant to a settlement agreement between TIAA and the underlying insurer(s). The very purpose of this contractual requirement (along with the "shavings" clause) is to make certain that all coverage disputes between TIAA and the underlying insurers are resolved before triggering any liability for Arch, so that Arch can wait out the dispute and benefit from any settlement by receiving a proportional reduction of its own limit. TIAA does not

[redacted]

(and cannot) deny this is the obvious intent. Nevertheless, TIAA asks this Court to ignore all this and instead focus on what would have happened if the underlying insurers did actually pay. However, that is not what happened, and the Arch Policy expressly permits Arch to wait out these underlying coverage disputes without risk of having to perform any obligation.

TIAA makes much of the general purpose of New York's prejudgment interest statute, but here it is empty rhetoric. Yes, the purpose is to compensate prevailing parties for loss of use of their funds during the dispute. However, while TIAA paid out of its own pocket, there was no loss to TIAA at the hands of Arch. At no point was Arch ever obligated to make any payment, and this is because there was never any payment by the underlying insurers to actually trigger the Arch Policy. Nor could the amount of Arch's liability even be determined until TIAA resolves its disputes with the underlying insurers. Given that TIAA was not yet entitled to coverage under the Arch Policy, Arch did not deprive TIAA of any funds to warrant prejudgment interest. Despite TIAA's best efforts to argue the contrary, the prejudgment interest statute simply does not apply when there is no obligation or liability from which to accrue interest ($0 x 0.09 = $0).

Following a trial in the Superior Court where the jury was given special interrogatories and returned a special verdict in favor of TIAA on certain of Arch's defenses but without finding any breach, TIAA filed a Rule 54(b) motion for entry

[redacted]

of a final judgment, seeking to hold Arch liable for a reduced limit of [redacted], plus prejudgment interest. With respect to what is at issue in TIAA's own appeal, the Superior Court found no repudiation by Arch and declined to award TIAA any damages or prejudgment interest from Arch. TIAA now appeals this ruling.

[redacted]

SUMMARY OF ARGUMENTS

1. **DENIED**. TIAA was not entitled to any damages award from Arch, let alone prejudgment interest. The Arch Policy's attachment provisions specifically permit Arch to wait out TIAA's coverage disputes with underlying insurers without the risk of breaching its coverage obligations. Arch's obligations were never triggered because there was never actual payment by all underlying insurers as required by the Arch Policy. Without any obligations triggered, there was no breach of contract or anticipatory breach by Arch and therefore no present liability on which to base an award for damages or interest.

a. **DENIED**. Prejudgment interest cannot be awarded against Arch in the absence of any breach, anticipatory breach, or present obligation on the part of Arch. Under New York law, a third party's breach of a separate insurance policy cannot trigger statutory prejudgment interest from Arch, and such interest cannot accrue until there is a breach (or at least an obligation) on the part of the party from which interest is pursued. Further, Arch's June 7, 2013 letter regarding *Bauer* under a different policy did not constitute a denial of coverage or repudiation.

b. **DENIED**. There is no basis to award prejudgment interest between the date of the jury verdict and the Superior Court's final judgment because the jury was not asked and did not find any liability on the part of Arch.

[redacted]

The jury verdict only found TIAA was excused from seeking Arch's consent to settle.

c. **DENIED**. This specific argument is directed to another Defendant-Appellee, and therefore Arch does not respond. To the extent a response is required, the argument is denied, and Arch adopts and incorporates the response made by such other Defendant-Appellee to the extent it is consistent with all of Arch's other arguments in TIAA's appeal and Arch's own appeal.

2. **DENIED**. This specific argument is directed to another Defendant-Appellee, and therefore Arch does not respond. To the extent a response is required, the argument is denied, and Arch adopts and incorporates the response made by such other Defendant-Appellee to the extent it is consistent with all of Arch's other arguments in TIAA's appeal and Arch's own appeal.

[redacted]

COUNTERSTATEMENT OF FACTS

On appeal, this action concerns insurance coverage for TIAA's costs in defending and settling two underlying class actions (the earlier class action is referred to as **"*Rink*"** and the subsequent action as **"*Bauer*"**).[1] TIAA seeks coverage under a group of professional-liability policies for the 2007-08 policy year, which includes the Arch Policy.[2] The Arch Policy provides excess coverage above three layers of underlying insurance provided by Illinois National Insurance Company (**"Illinois National"**), Ace American Insurance Company (**"ACE"**), and St. Paul Mercury Insurance Company (**"St. Paul"**), respectively.[3] Arch's excess coverage cannot be triggered until all of this underlying insurance is properly exhausted as required by the Arch Policy's terms.[4]

Section I.B of the Arch Policy prescribes how the underlying insurance is to be exhausted, and this provision was amended and fully replaced by Endorsement No. 4, which states:

1. Section I.B is amended to read in its entirety as follows:

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[1] TIAA Opening Br. 8.

[2] *Id*. at 13-14.

[3] JA0508. In this brief, Arch cites to three previously filed appendices: the Joint Appendix, Arch's own Appendix, and TIAA's own Appendix. The appendices are respectively bates-stamped with the prefix "JA," "AA," and "TA."

[4] JA0518.

B. The insurance coverage afforded by this Policy shall apply only after:

1. the insurer(s) of the Underlying Insurance, and/or

2. the Insureds, either (i) pursuant to a Limit Reduction Agreement (as defined below) with the insurer(s) of the Underlying Insurance, or (ii) by reason of the financial insolvency of the insurer(s) of the Underlying Insurance,

shall have paid in legal currency loss covered under the Underlying Insurance equal to the full amount of the Underlying Limit.

2. For purposes of this Policy, the Underlying Limit shall be deemed to be depleted or exhausted solely as a result of the insurer(s) of the Underlying Insurance and/or the Insureds paying loss covered under the Underlying Insurance as provided in Section I.B above.

3. …[I]f with respect to any covered Claim the Underlying Limit is reduced or exhausted by payments by the Insureds as provided in Section 1(B) above,…the unexhausted Limit of Liability under this Policy applicable to such Claim shall be reduced by at least the largest percentage savings of the Underlying Insurance's Limit(s) of Liability as provided in the Limit Reduction Agreements applicable to such Claim.

4. …[A] Limit Reduction Agreement is an agreement between the Insureds and one or more insurer(s) of the Underlying Insurance pursuant to which such insurer(s) agrees to pay a portion of its unexhausted Limit of Liability in exchange for a release from the Insureds, provided the sole basis for such agreement and release is the compromise of good faith coverage issues under the Underlying Insurance….[5]

[5] *Id.*

[redacted]

Rink was filed during the 2007-08 policy year, and TIAA reported *Rink* under its 2007-08 policies, including the Arch Policy.[6] *Bauer* was commenced during the 2009-10 policy year, and TIAA reported *Bauer* under its 2009-10 policies, including certain other policies Arch issued for the 2009-10 year.[7] TIAA is not seeking coverage under the 2009-10 policies.[8]

TIAA settled *Bauer* and executed a settlement agreement on January 31, 2014.[9] TIAA did not seek or obtain Arch's consent before settling, and TIAA did not dispute this fact and later expressly stipulated to it.[10] Contrary to its own stipulation, TIAA now mischaracterizes a May 31, 2013 e-mail from TIAA's broker to the insurers as "seeking 'settlement authority'" from Arch.[11] Although TIAA dresses up the email as a request for settlement authority at odds with its own stipulation of facts, the e-mail in any event simply provided the insurers with notice of a court-ordered mediation scheduled in June 2013. The e-mail characterizes itself as "a further update," and the reference to the "need to decide on settlement authority" was not directed at the insurers but instead appears to be

[6] JA1281-JA1296.

[7] First Am. Compl., JA1898 at ¶ 65; JA1507-JA1548.

[8] TIAA Opening Br. 9, n.5; JA5230-JA5232.

[9] JA0667-JA0733.

[10] Ex. A to Pre-Trial Stip., AA000216 at ¶ 86.

[11] TA0772-TA0773; TIAA Opening Br. 12-13.

[redacted]

part of a third-party discussion that TIAA's broker said he was "forwarding" to the insurers as part of the update.[12]

TIAA also mischaracterizes Arch's June 7, 2013 letter (the **"*Bauer* Letter"**) by cherry-picking two partial sentences to incorrectly depict the letter as both a firm denial of coverage and as applying to the 2007-08 Arch Policy.[13] Throughout this action and now on appeal, TIAA conveniently omits significant portions of the *Bauer* Letter that unambiguously contradict any suggestion that Arch firmly denied coverage or refused to participate in the settlement.

The *Bauer* Letter provided TIAA with Arch's coverage position solely with respect to *Bauer* and only under Arch's policies in the 2009-10 policy year.[14] Specifically with respect to those 2009-10 policies, the *Bauer* Letter adopted Illinois National's denial of coverage for *Bauer*.[15] However, Arch's coverage position was expressly preliminary and conditional, stating its position was "premised upon…presently known facts" and was "subject to change" based upon any additional facts that develop.[16] The *Bauer* Letter also invited TIAA to provide "any additional information [it] believe[d] should be factored into [Arch's]

[12] TA0772-TA0773.

[13] TIAA Opening Br. 12-13.

[14] JA4716-JA4719.

[15] *Id*.

[16] *Id*.

[redacted]

coverage analysis" so that Arch could "review it for its impact on coverage."[17] The *Bauer* Letter also asked TIAA "to keep [Arch] advised of the status of [*Bauer*], so that Arch may at its discretion exercise its right to associate in the defense and/or settlement of any matter that may be covered by the Arch Policies, even if the Underlying Policies have not been exhausted."[18] Then the *Bauer* Letter "expressly reserve[d] all rights."[19] The *Bauer* Letter made no reference to the 2007-08 Arch Policy at issue, nor did it address coverage for *Rink*.

The procedural history relevant to TIAA's appeal consists of the trial and post-trial Rule 54(b) motion. Before proceeding to trial, the parties expressly preserved issues regarding exhaustion and prejudgment interest for post-trial determination by the Court.[20] At trial, the jury was given special interrogatories and found that Arch waived its consent defense and that, at the time of the settlements, it reasonably appeared futile for TIAA to request Arch's consent.[21]

However, the special interrogatories did not ask the jury to determine what specific conduct of Arch made consent futile, and the jury verdict did not explain

[17] *Id*.

[18] *Id*.

[19] *Id.*

[20] TIAA Opening Br. 19; TA0674.

[21] JA6518.

what led to the conclusion.[22] In addition to the *Bauer* Letter, TIAA presented the jury with evidence of a variety of reasons that TIAA argued made it futile to seek consent, including Arch's previous closure letter, Arch's internal file closure, Arch not re-opening the file, Arch not responding to TIAA's communications, Arch not objecting to the settlement, and testimony from other insurers that consent was not required.[23] In addition, the jury instructions expressly permitted the jury to find consent to be futile based on an ordinary disclaimer.[24]

Prior to trial, TIAA and St. Paul settled their insurance dispute for [redacted], which resolved TIAA's claims for St. Paul's [redacted] policy limit and approximately [redacted] in claimed prejudgment interest.[25] Following trial, TIAA filed a Rule 54(b) motion for entry of a final judgment, seeking to hold Arch liable for a reduced limit of [redacted], plus prejudgment interest.[26] On October 23, 2017, the Superior Court granted TIAA's motion in part and denied it in part.[27] With respect to what is at issue in TIAA's own appeal, the

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[22] *Id.*

[23] Trial Tr. 220:14-233:8 (Closing Arguments) (Dec. 9, 2016), JA6359-JA6372; Trial Tr. 38:1-10, 39:3-11, 45:18-48:4 (Test. of Ira Cohen) (Dec. 6, 2016), JA5772, JA5773-JA5774.

[24] JA6531.

[25] TIAA Opening Br. 10, 21 n.10; TA0668 n.1; TA0732-33; TA0947-48.

[26] TA0882-TA0906.

[27] TIAA Opening Br., Ex. G.

[redacted]

Superior Court found no repudiation by Arch and declined to award TIAA any damages or prejudgment interest from Arch.[28] TIAA now appeals this ruling.

[28] *Id.* at 18-25.

[redacted]

ARGUMENT

TIAA contends Arch is liable for prejudgment interest even without any determination that Arch currently owes any payment. TIAA's argument is based on a fundamental misunderstanding of (1) New York's prejudgment interest statute, (2) the substance of the jury verdict, and (3) the very concept of "anticipatory breach." The circumstances surrounding the denial of prejudgment interest are entirely in line with what was contemplated by the Arch Policy's terms. Consequently, any accrual of interest before both Illinois National and ACE fully pay their own limits (or settle with TIAA) would rewrite the Arch Policy's unambiguous terms and deprive Arch of a material benefit of the bargain—namely, Arch's right to wait until all underlying coverage disputes are resolved before making any payment to TIAA.

I. TIAA IS NOT ENTITLED TO AN AWARD OF PREJUDGMENT INTEREST AGAINST ARCH

A. Questions Presented

1. Is Arch obligated to pay before all underlying insurers actually pay the full limits of their underlying insurance and resolve their coverage disputes with TIAA?

2. Can TIAA rely on a third party's breach of a different contract as a basis to obtain statutory prejudgment interest from Arch?

[redacted]

3. Did the *Bauer* Letter constitute anticipatory repudiation of the 2007-08 Arch Policy?

4. Did the jury's special verdict find the *Bauer* Letter was an anticipatory breach of the Arch Policy or that Arch was otherwise presently liable?

5. Could Arch incur prejudgment interest between the date of the jury's verdict and the final judgment where there was no finding that Arch breached or was otherwise liable?

B. Scope of Review

Questions of law are reviewed *de novo*. *Broadmeadow Inv., LLC v. Del. Health Res. Bd. & Healthsouth Middletown Rehab Hosp.*, 56 A.3d 1057, 1059 (Del. 2012). Such questions of law would include the construction of the meaning of the Arch Policy's terms.

While a denial of prejudgment interest under Delaware law might be reviewed *de novo* as a general matter, the Superior Court's decision was made pursuant to a different statute. If the decision whether to award prejudgment interest under a particular statute involves the exercise of judicial discretion, then the decision must be affirmed absent an abuse of discretion. *Wilmington Bd. of Public Educ. v. Digiacomo*, 1987 Del. LEXIS 1025, at *2-4 (Del. Feb. 9, 1987) (requiring abuse of discretion to overturn denial of prejudgment interest pursuant to particular statute).

[redacted]

This appeal concerns New York's statutory prejudgment interest. While New York mandates interest for breach of contract, the statute provides courts with wide discretion in determining the date from which prejudgment interest may accrue. *Juarez-Cardoso v. La Flor De Santa Ines, Inc.*, 2017 U.S. Dist. LEXIS 161139, at *49 (E.D.N.Y. Sept. 29, 2017); *155 Henry Owners Corp. v. Lovlyn Realty Co.*, 647 N.Y.S.2d 30, 31-32 (App. Div. 1996). Here, the Superior Court determined Arch would not accrue prejudgment interest until it refuses to provide coverage after the underlying insurers pay or resolve their own coverage disputes. Therefore, the determination that no prejudgment interest has yet to accrue should be reviewed for abuse of discretion. *Id.*; *see also Turner Constr. Co. v. Kemper Ins. Co.*, 341 Fed. App'x 684, 687 (2d Cir. 2009) (stating with respect to N.Y.C.P.L.R. 5001(a) that "[t]he decision whether to award prejudgment interest and its amount are matters confided to the district court's broad discretion, and will not be overturned on appeal absent an abuse of that discretion").

The Superior Court's determination that there was no anticipatory breach or repudiation was a factual finding from the bench, which is reviewed to determine if it is sufficiently supported by the record and the product of an orderly and logical deductive process. If so, the finding is given deference on appeal. *CDX Holdings, Inc. v. Fox*, 141 A.3d 1037, 1042 (Del. 2016); *Nixon v. Blackwell*, 626 A.2d 1366, 1375 (Del. 1993).

[redacted]

C. Merits of Argument

1. Arch Cannot Have Any Obligation to Pay Until Both Illinois National and ACE Pay Their Underlying Insurance or Settle Their Insurance Disputes.

In the Superior Court, TIAA did not prove (and could not prove) that Arch breached the Arch Policy or is otherwise liable to TIAA. Arch's coverage cannot be triggered until the underlying insurance is exhausted by *actual payment from those underlying insurers*, and the Arch Policy specifically prescribes how the underlying insurance is to be exhausted for this purpose.

The exhaustion provision, which is located in Section I.B and was amended and fully replaced by Endorsement No. 4, provides "[t]he insurance coverage afforded by this Policy shall apply only after…*the insurer(s) of the Underlying Insurance…shall have paid* in legal currency loss covered under the Underlying Insurance equal to the full amount of the Underlying Limit."[29] The endorsement further provides that "the Underlying Limit shall be deemed to be depleted or exhausted solely as a result of *the insurer(s) of the Underlying Insurance…paying* loss covered under the Underlying Insurance."[30] New York courts have repeatedly held that similar excess policies can only be triggered by exhaustion of the underlying insurance through actual payment by those underlying insurers. *Rapid-*

[29] Arch Policy, Endorsement No. 4, JA0518 (emphasis added).

[30] *Id.* (emphasis added).

[redacted]

Am. Corp. v. Travelers Cas. & Sur. Co. (In re Rapid-Am. Corp.), 2016 Bankr. LEXIS 2224, at *31-32 (S.D.N.Y. Bankr. June 7, 2016); *Forest Labs, Inc. v. Arch Ins. Co.*, 116 A.D.3d 628, 628 (N.Y. App. Div. 2014); *Mehdi Ali v. Fed. Ins. Co.*, 719 F.3d 83, 91 (2d Cir. 2012); *Wunderman-Cooper v. Certain Underwriters at Lloyd's*, 2015 U.S. Dist. LEXIS 133377, at *17 (C.D. Cal. Sept. 30, 2015) (applying New York law).

The same endorsement also permits some of the payment to come directly from TIAA under very limited circumstances, including when payment is made by "the Insureds…pursuant to a Limit Reduction Agreement…with the insurer(s) of the Underlying Insurance."[31] It is undisputed, however, that neither Illinois National nor ACE ever entered into a "Limit Reduction Agreement" with TIAA. Nor did they pay any amount of their respective insurance limits, let alone the full amount. Therefore, unless and until both Illinois National and ACE either pay their full limits or resolve their coverage disputes with TIAA, Arch cannot have any obligation.[32]

Indeed, as conceded by TIAA, the amount of Arch's potential liability cannot possibly be determined (or even be estimated) until after both Illinois

[31] JA0518. The other limited circumstance is an insurer's financial insolvency (which is not applicable). *Id.*

[32] JA0508, JA0511.

[redacted]

National and ACE either pay their limits or settle with TIAA. This is because the same endorsement also includes a "shavings" provision entitling Arch to a reduction of its own limit in the event of an underlying insurer's Limit Reduction Agreement. Specifically, the endorsement goes on to provide:

> [I]f with respect to any covered Claim the Underlying Limit is reduced or exhausted by payments by the Insureds as provided in Section 1(B) above, … the unexhausted Limit of Liability under this Policy applicable to such Claim shall be reduced by at least the largest percentage savings of the Underlying Insurance's Limit(s) of Liability as provided in the Limit Reduction Agreements applicable to such Claim.[33]

In other words, if an underlying insurer settles an insurance dispute with TIAA, Arch is entitled to a proportional discount off of the Arch Policy's limit. TIAA concedes that Arch's limit has already been reduced by TIAA's settlement with St. Paul.[34] Until Illinois National and ACE pay their full limits thereby eliminating the possibility of another Limit Reduction Agreement, the possibility remains that Arch's limit will be further reduced. In fact, because the amount is contingent on future events, Arch's potential liability could range anywhere from $0 to [redacted].[35] Until the underlying insurance is fully exhausted and it becomes how much was exhausted by Limit Reduction Agreements, Arch's

[33] JA0518.

[34] TIAA Opening Br. 21 n.10; TA0905.

[35] TIAA conceded that its settlement with St. Paul already reduced Arch's limit from [redacted] to at most [redacted]. TIAA Opening Br. 21 n.10; TA0905.

[redacted]

potential liability and the amount thereof will remain unknown, unknowable, and unquantifiable.[36]

The very purpose of the exhaustion provision (together with its payment requirement and "shavings" clause) is to make certain all underlying coverage disputes are resolved before triggering Arch's liability, so that Arch can wait out the dispute and benefit from any settlement by receiving a proportional reduction of its own limit. TIAA does not (and cannot) deny that this is the obvious intent. Moreover, this material benefit was expressly given to Arch as part of the consideration for the premium charged for the Arch Policy.[37]

As the lack of exhaustion precluded any present obligation to pay, the Superior Court correctly determined it could not require Arch to pay damages or

[36] TIAA attempts to avoid this "future contingency" issue by confusing it with cases permitting prejudgment interest where monetary damages are not readily ascertainable or liquidated (such as in the case of lost profits). This, however, is not a situation where damages merely cannot be measured with certainty. Here, the potential damages are fully contingent on future events not within the parties' control. The amount cannot be measured or even estimated in the absence of clairvoyance. *Am. Ins. Ass'n v. Chu*, 476 N.E.2d 637, 639 (N.Y. 1985) (action is premature if issue involves "future event beyond control of the parties which may never occur"); *Dershowitz v. United States*, 2015 U.S. Dist. LEXIS 46269, at *87 (S.D.N.Y. Apr. 8, 2015) (court may reduce damages, or not award them at all, when based on "contingencies" which are "uncertain, dependent on future changeable events and, thus, inherently speculative").

[37] JA0518 ("In consideration of the premium charged…").

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prejudgment interest.[38] *Dormitory Auth. v. Cont'l Cas. Co.*, 756 F.3d 166, 170 (2d Cir. 2014) (prejudgment interest does not start accruing until there is an obligation to pay).

TIAA attempts to circumvent this shortcoming in two ways: (1) an absurd argument that prejudgment interest could be triggered by a third party's breach of a different contract; and (2) a factually and legally meritless argument that Arch's *Bauer* Letter anticipatorily repudiated the Arch Policy. Each is discussed in turn.

2. Another Party's Breach Cannot Trigger Prejudgment Interest for Arch.

TIAA expects Arch to somehow accrue interest even without first having an obligation to pay the principal. The true absurdity of this is shown when TIAA argues that Arch could accrue interest simply because another party (Illinois National) breached a different insurance policy.[39] Such a result would defy logic and hold a blameless party responsible for another party's breach without any justification (legal or otherwise).

First, in New York, it is abundantly clear that statutory prejudgment interest cannot accrue until there is a breach by (or at least an obligation from) the party from which interest is being pursued. According to New York's highest court, the

[38] TIAA Opening Br., Ex. G at 18-25, Ex. H.

[39] Nothing in this answering brief is intended to suggest that Illinois National actually did breach its own policy, and this issue is also being appealed.

[redacted]

statute "authorizes interest 'upon a sum awarded'—implying that the interest must be paid by the party *against whom* the sum was awarded." *Manufacturer's & Traders Trust Co. v. Reliance Ins. Co.*, 870 N.E.2d 124, 127 (N.Y. 2007) (emphasis in original). The Court went on to explain that, without a "sum awarded" against the parties, there was no predicate for an interest award against them. *Id.* The Court also identified a fundamental objection to statutory prejudgment interest where the party was not found to have breached any contract or to have interfered unlawfully with property. *Id.* at 127-28.

As this case makes clear, TIAA cannot point to a different party's breach. Instead, it must be determined that *Arch* breached or unlawfully interfered, and neither is supported by the record. It does not matter whether TIAA suffered a hardship in not receiving insurance funds as early as it wished to have them because any hardship did not result from any misconduct by Arch. *Id.* at 128; *Doubet, LLC v. Trustees of Columbia Univ. in the City of N.Y.*, 941 N.Y.S.2d 537, 537 (Sup. Ct. 2011) ("Prejudgment interest does not lie because petitioner was not entitled to use of the money that was restrained…").

Other New York cases similarly hold that one party's interest cannot be triggered by another party's breach and also that interest cannot be obtained without a breach or unlawful conduct committed by the party *from whom interest is sought*. *E.g.*, *J. D'Addario & Co., Inc. v. Embassy Indus., Inc.*, 980 N.E.2d 940,

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942 (N.Y. 2012) (recognizing "fundamental objection" to statutory interest award because losing claimants were not found to have breached any contract regardless of whether they received benefit from disputed funds); *Calgon Carbon Corp. v. WDF, Inc.*, 700 F. Supp. 2d 408, 418 (S.D.N.Y. 2010) (explaining the party seeking interest "d[id] not cite a single case in which Party A was held responsible for damages measured as the interest on a sum of money that was wrongfully withheld by Party B"); *Bank of N.Y. Trust Co. v. Franklin Advisers, Inc.*, 726 F.3d 269, 282 (2d Cir. 2013).

TIAA's reliance on insurance contribution cases is misplaced. Those cases involve disputes between co-insurers where one insurer is seeking contribution from another insurer. Obviously, there is no privity of contract between the two insurers as they are not parties to the same insurance policy. However, this does not change the fact that, in those cases, interest was sought from insurers that, unlike Arch, *actually had an obligation* to provide insurance funds or had themselves breached an *implied* contract between the insurers. For example, in *U.S. Fire Insurance Co. v. Federal Insurance Co.*, the Court applied New York's prejudgment interest statute because the recovery of contribution required "nonpayment by the defendant to the insured of a sum called for by that contract." 858 F.2d 882, 888 (2d Cir. 1988). According to *U.S. Fire*, "[t]he defendant's nonpayment may easily be construed as a breach of performance of that contract,

[redacted]

'because of' which the coinsurer is entitled to contribution." *Id.* The Court also explained that the recovering insurer may be said to have recovered because of the defendant-insurer's breach of an implied contract between two co-insurers (Arch and Illinois National are not co-insurers). *Id.* at 889. In other words, the interest was still sought from an insurer that, unlike Arch, committed a breach or at least had an obligation to pay.

TIAA's other contribution cases are distinguishable for the same reasons. *Royal Indem. Co. v. Providence Wash. Ins. Co.*, 966 F. Supp. 149, 150 (N.D.N.Y. 1997) (addressing prejudgment interest only after Court already determined defendant "is obligated under the terms of its policy to reimburse Plaintiff for its pro-rata share of the cost to defend and settle the [underlying] action"); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Conn. Indem. Co.*, 860 N.Y.S.2d 35, 36-37 (App. Div. 2008) (prejudgment interest award against insurers was proper when those insurers were obligated to defend and indemnify and therefore owed reimbursement to insurer that paid underlying settlement); *Cont'l Cas. Co. v. Emplrs Ins. Co. of Wassau*, 865 N.Y.S.2d 855, 862 (Sup. Ct. 2008) (awarding prejudgment interest against insurer found to owe duty to defend but failed to defend); *In re Hoffman*, 712 N.Y.S.2d 165, 165-66 (App. Div. 2000) (reinstating interest claim against respondents that indisputably failed to make payments under agreement and owe principal sum to petitioner).

[redacted]

3. Arch's *Bauer* Letter Did Not Constitute an Anticipatory Breach.

TIAA also attempts to circumvent the Arch Policy's exhaustion language by asserting that Arch anticipatorily breached the contract with its *Bauer* Letter. However, under New York, an excess insurer does not commit an anticipatory breach of contract unless and until the excess insurer refuses to pay *after there is a declaration that the insurer owes coverage* under the excess policy and *after the underlying insurance has been exhausted*. *Liberty Surplus Ins. Corp. v. Segal Co.*, 2004 WL 2102090, at *9 (S.D.N.Y. Sept. 19, 2004); *Maryland Cas. Co. v. W.R. Grace & Co.*, 1996 WL 306372, at *4 (S.D.N.Y. June 6, 1996) (damages could not be assessed against excess insurers because their policies have not yet been triggered by exhaustion of underlying insurance).[40]

In *Segal*, the Court granted the insured's claim for declaratory relief, declaring that an excess insurance policy provided coverage. *Segal Co.*, 2004 WL 2102090, at *8. However, the Court dismissed the insured's claim for anticipatory breach, finding there was no evidence the underlying insurance had been exhausted, and therefore an assessment of damages against the excess insurer

[40] *See also Insituform Techs., Inc. v. Am. Home Assurance Co.*, 2008 U.S. Dist. LEXIS 25418, at *3-4 (D. Mass. Mar. 31, 2008) (excess insurer's interest did not accrue until underlying insurer paid its limit), *vacated on other grounds*, 566 F.3d 274 (1st Cir. 2009).

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would be inappropriate. *Id*. The Court further explained the insured's anticipatory breach claim would only be timely once the excess insurer's obligations were triggered *and* it nonetheless refused to provide coverage. *Id*. Similarly, TIAA cannot prove anticipatory breach because there has not been exhaustion of the underlying insurance. *See also Harriprashad v. Metro. Prop. & Cas. Ins. Co.*, 2011 U.S. Dist. LEXIS 145573, at *6 (E.D.N.Y. Nov. 17, 2011) (dismissing anticipatory breach claim because insured may recover from insurer only payments that already accrued).

Even if we put exhaustion aside, no act by Arch could be viewed as repudiation in any event. TIAA points to Arch's *Bauer* Letter as the source of Arch's anticipatory breach, which set forth Arch's coverage position with respect to *Bauer* under Arch's 2009-10 policies.[41] However, the alleged act of repudiation must be an "overt communication of intention not to perform," the announcement must be "positive and unequivocal," and the repudiating party's subjective intent is irrelevant. *Princes Point LLC v. Muss Dev. L.L.C.*, 87 N.E.3d 121, 125 (N.Y. 2017); *Ryan v. Corbett*, 815 N.Y.S.2d 855, 856 (App. Div. 2006) (quoting *Tenavision, Inc. v. Neuman*, 379 N.E.2d 1166 (N.Y. 1978)); *DiFolco v. MSNBC Cable L.L.C.*, 831 F. Supp. 2d 634, 642 (S.D.N.Y. 2011).

[41] JA4716-JA4719.

[redacted]

In contrast, the *Bauer* Letter was far from an unequivocal communication of non-performance. As a threshold matter, the letter expressly applied only to Arch's policies from the 2009-10 policy year.[42] TIAA is no longer seeking coverage under any 2009-10 policy,[43] and the letter makes zero mention of the 2007-08 Arch Policy at issue.[44] Therefore, it is unreasonable to view the *Bauer* Letter as having any impact on the 2007-08 Policy.[45]

Moreover, despite TIAA's argument to the contrary, the *Bauer* Letter was not a *definitive* denial of coverage under any policy. While the letter adopted Illinois National's disclaimer of *Bauer*, Arch qualified its position making it clear that it was not actually refusing potential liability for *Bauer*. Instead, Arch expressly made its position subject to change based on new information and specifically invited TIAA to provide any additional information it believed "should be factored into" Arch's analysis so that Arch could review it for its impact on

[42] JA4717; TIAA Opening Br. 9, n.5; JA5230-JA5232.

[43] JA5230.

[44] JA4716-JA4719.

[45] JA5230-JA5232; AA000204. TIAA also cannot rely on the *Bauer* Letter's reservation of Arch's right to relate *Bauer* back to *Rink* under the 2007-08 Arch Policy or a vague footnote in Illinois National's April 2013 letter. These references do not unequivocally refuse performance under the 2007-08 Arch Policy, and Arch only adopted Illinois National's coverage position with respect to the 2009-10 policies. JA4718-JA4719. Therefore, any position of Illinois National regarding *Rink* or the 2007-08 policy year was not adopted by Arch.

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coverage.[46] *Bear Wagner Specialists, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2009 N.Y. Misc. LEXIS 1806, at *19-*20 (Sup. Ct. July 7, 2009) (no repudiation where "the denial letters never stated that all future claims would be denied, and even provided [the insured] with the opportunity to submit additional information for a re-evaluation of the claim by the insurers"); *AMTRAK v. Steadfast Ins. Co.*, 2009 U.S. Dist. LEXIS 21311, at *43 (S.D.N.Y. Mar. 5, 2009) (no repudiation where denial letter invited additional information and/or raised possibility insurer might modify position); *cf. TLC Beatrice Int'l Holdings, Inc. v. CIGNA Ins. Co.*, 2000 U.S. Dist. LEXIS 2917, at *14-15 (S.D.N.Y. Mar. 16, 2000) (consent not excused where insurer's disclaimer was preliminary and invited additional information), *aff'd*, 2000 U.S. App. LEXIS 27848 (2d Cir. 2000).

Furthermore, the *Bauer* Letter expressly asked to keep Arch advised of the status of *Bauer* so Arch could participate in settlement discussions.[47] Given this indication that Arch might contribute to a settlement of *Bauer*, the language clearly eliminates any inference that the letter was a blanket refusal of coverage, and no repudiation could result. *W.R. Grace*, 1996 U.S. Dist. LEXIS 7795, at *4-5 (repudiation requires insurer's "definite and final communication"); *cf. City of Utica v. Genesee Mgmt.*, 934 F. Supp. 510, 521 (N.D.N.Y. 1996) (insurer's letter

[46] JA4718.

[47] JA4719.

[redacted]

did not directly disclaim coverage as it invited insured to "explain why [it] believe[s] that this contract should respond to this situation").

Throughout this action, TIAA ignored this qualifying language, opting instead to depict the *Bauer* Letter as a firm and definitive denial of coverage. TIAA cannot be permitted to cherry-pick language from the letter while disregarding other parts that cannot be reconciled with TIAA's characterization. *Travelers Indem. Co. of Am. v. S. Gastronom Corp.*, 2010 U.S. Dist. LEXIS 32333, at *47-48 (E.D.N.Y. Mar. 3, 2010) ("simply incredulous" for insured to ignore conditions in coverage letter), *aff'd*, 2011 U.S. App. LEXIS 11711 (2d Cir. June 8, 2011).

Even assuming, *arguendo*, that the *Bauer* Letter somehow constituted an unconditional and unequivocal disclaimer, an ordinary disclaimer of coverage does not support a finding of anticipatory breach. There is overwhelming authority, including from New York appellate courts and the Second Circuit, that a disclaimer for a particular claim does not rise to the level of repudiation. *E.g.*, *Am. Commer. Lines LLC v. Water Quality Ins. Syndicate*, 679 Fed. App'x 11, 16 (2d Cir. 2017); *Jacobson v. Metro. Prop. & Cas. Ins. Co.*, 672 F.3d 171, 177 (2d Cir. 2012); *Matter of Kane v. Fiduciary Ins. Co. of Am.*, 980 N.Y.S.2d 72, 72 (App. Div. 2014); *Seward Park Hous. Corp. v. Greater N.Y. Mut. Ins. Co.*, 836 N.Y.S.2d

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99, 104-05 (App. Div. 2007); *Resmac 2 LLC v. Madison Realty Capital, L.P.*, 927 N.Y.S.2d 328, 329 (App. Div. 2011).

As explained, there is a distinction between a true contractual repudiation of an insurance policy—usually called an anticipatory breach—and the usual, run-of-the-mill disclaimer of coverage for a particular claim. *Bear Wagner Specialists, LLC*, 2009 N.Y. Misc. LEXIS 1806 at *18; *Seward Park Hous. Corp.*, 836 N.Y.S.2d at 105. When an insurer only disclaims an individual claim, the insured continues to be obligated to comply with its contractual responsibilities. *Id.*; *PB Ams., Inc.*, 690 F. Supp. 2d 242, 250 (S.D.N.Y. 2010). In the absence of repudiation, even a *firm* disclaimer cannot be an anticipatory breach. *See Long Island R.R. Co. v. Northville Indus. Corp.*, 362 N.E.2d 558, 563 (N.Y. 1977).

To constitute repudiation, rather than a disclaimer, one party must show that the other party distinctly, unequivocally, and absolutely refused to perform its obligations under the policy by denying its intention or duty to shape its conduct in accordance with the provisions of the contract. *Am. Commer. Lines LLC*, 679 Fed. App'x at 16; *Seward Park Hous. Corp.*, 836 N.Y.S.2d at 105. There is no repudiation if the insurer, in denying liability, relies upon the authority of the policy's provisions and endeavors to apply them. *Id.* In other words, when an insurer's denial is predicated on the policy terms, the insurer does not repudiate but instead merely denies an individual claim. *Pedersen v. Farmington Cas. Co.*, 2015

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U.S. Dist. LEXIS 183337, at *9-*10 (N.D.N.Y. Oct. 19, 2015); *2027, LLC v. Aspen Am. Ins. Co.*, 2015 U.S. Dist. LEXIS 181604, at *9 (E.D.N.Y. Sept. 28, 2015) (no repudiation when resting rejection of claim squarely on policy's terms); *Bear Wagner Specialists, LLC*, 2009 N.Y. Misc. LEXIS 1806, at *19; *Squilllante v. Cigna Corp.*, 2012 U.S. Dist. LEXIS 169763, at *12 (S.D.N.Y. Nov. 28, 2012) (not proper to consider un-accrued policy benefits when insurer denies specific claim).

In view of this disclaimer/repudiation distinction, and in line with the decisions in *Segal* and *W.R. Grace* (discussed above), the Superior Court emphasized that Arch never indicated it would deny coverage in the event TIAA prevails in its coverage claim against Illinois National or in the event that Illinois National concedes the possibility of coverage through settlement.[48] As the Superior Court explained, the Arch Policy's exhaustion provision permitted Arch to wait out underlying coverage disputes.[49] Consequently, the Superior Court correctly found no unambiguous evidence of repudiation.[50]

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[48] TIAA Opening Br., Ex. G at 18-25.

[49] *Id.*

[50] *Id.* Given that the purported repudiation was in writing, Arch was entitled to a decision as a matter of law that there was no anticipatory breach. *Briarwood Farms, Inc. v. Toll Bros., Inc.*, 452 Fed. App'x 59, 61 (2d Cir. 2011). However, it appears the Superior Court's determination of no repudiation was a finding of fact, which means TIAA must overcome a difficult, deferential standard of review for

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Even if we assume the *Bauer* Letter repudiated the Arch Policy (and it did not), the doctrine of anticipatory breach in New York does not apply to insurance claims under these circumstances. Anticipatory breach can only apply where the party asserting breach has an "obligation from which it needs to be relieved." *Long Island R. R. Co.*, 362 N.E.2d at 565. Here, TIAA already paid the Arch Policy's premium, so there was no concern TIAA would have to perform under the contract even though Arch might not ultimately pay. *Id.* at 563 ("[A] party who has fully performed cannot invoke the doctrine even though the other party has repudiated."); *MBIA Ins. Corp. v. Patriarch Partners VIII, LLC*, 842 F. Supp. 2d 682, 718 (S.D.N.Y. Apr. 4, 2012). In addition, an anticipatory breach claim against an insurer is barred where the claim seeks only future insurance payments. *Harriprashad*, 2011 U.S. Dist. LEXIS 145573, at *6-*7 (no anticipatory breach when contract is for payment of money only; insured may only recover already-accrued benefits and cannot recover future benefits).[51]

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factual findings made from the bench. *CDX Holdings*, 141 A.3d at 1042 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

[51] *See also Brauner v. Provident Life & Cas. Ins. Co.*, 1998 U.S. Dist. LEXIS 23042, at *4 (E.D.N.Y. Mar. 24, 1998) ("[A] plaintiff seeking to recover on an insurer's breach of an insurance policy generally cannot recover future payments[.]"); *Nat'l Union Fire Ins. Co. v. Antony*, 1988 U.S. Dis. LEXIS 3905, at *18-19 (S.D.N.Y. May 9, 1988) (anticipatory breach generally not applicable to contracts involving periodic payment).

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Moreover, following Arch's *Bauer* Letter and the underlying insurers' disclaimer letters, TIAA acted as if the policies were still in effect and contrary to any purported repudiation. For example, even after Illinois National and ACE denied coverage, TIAA still sought their consent to settle *Bauer*.[52] Thus, TIAA elected to continue with the contractual relationships despite purported breaches (anticipatory or otherwise), and TIAA cannot now rely on purported earlier breaches that it elected not to immediately pursue. *V.S. Int'l S.A. v. Boyden World Corp.*, 862 F. Supp. 1188, 1196 (S.D.N.Y. 1994) (once non-breaching party elects to continue contract, he may not at later time renounce his election and seek to terminate based on prior breach).

4. The Case Law Cited by TIAA Is Easily Distinguishable or Otherwise Should Not Be Followed.

TIAA primarily relies on *J.P. Morgan Securities Inc. v. Vigilant Insurance Co.*, 2017 N.Y. Misc. LEXIS 3051 (Sup. Ct. Aug. 7, 2017) (holding excess insurers liable for prejudgment interest even though primary insurer did not pay its limit). The facts here, however, are materially different and distinguishable.

First, in justifying prejudgment interest, the *J.P. Morgan* case found it crucial that the excess insurers' liability did not depend on "some future contingency." *Id.* at *3-4. Unlike the excess policies in *J.P. Morgan*, the Arch

[52] JA1703-JA1706; JA1568-JA1578; AA000667-AA000670.

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Policy contains a "shavings" provision, which reduces Arch's potential liability in the event an underlying insurer settles with TIAA. The shavings provision has kept the amount of Arch's potential liability in flux, and it will remain in flux until both Illinois National and ACE either fully pay their limits or settle their coverage disputes with TIAA. Since Arch's potential liability is contingent on future events, interest cannot begin to accrue until those future events occur. *Am. Ins. Ass'n*, 476 N.E.2d at 639; *Dershowitz*, 2015 U.S. Dist. LEXIS 46269, at *87.

This Court also should not follow *J.P. Morgan* as it misapplies the concept of repudiation.[53] As discussed above, an ordinary disclaimer of coverage for a particular claim is not repudiation. *E.g.*, *Am. Commer. Lines LLC*, 679 Fed. App'x at 16. Indeed, some cases have expressed concern that courts have sometimes erroneously used "disclaimer" and "repudiation" synonymously or interchangeably. *Seward Park Hous. Corp.*, 836 N.Y.S.2d at 104-05; *PB Ams.*, 690 F. Supp. 2d at 250; *AMTRAK*, 2009 U.S. Dist. LEXIS 21311, at *39-40.

While these courts warned of the impulse to conflate disclaimers with repudiation, it appears *J.P. Morgan* failed to account for this important distinction. In a conclusory fashion, the Court characterized the excess insurers' disclaimers as

[53] This Court need not follow a single trial-level decision and should predict how New York's highest court would rule. *Shook & Fletcher Asbestos Settlement Trust v. Safety Nat'l Cas. Corp.*, 909 A.2d 125, 128 (Del. 2006).

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repudiation and then erroneously used this finding to justify excusal of proper exhaustion. *J.P. Morgan Sec. Inc.*, 2017 N.Y. Misc. LEXIS 3051, at *3-4.

It also appears none of the excess insurers in *J.P. Morgan* mentioned or cited two crucial cases regarding repudiation in connection with excess policies: *Segal*, 2004 WL 2102090, at *9, and *W.R. Grace*, 1996 WL 306372, at *4. Those decisions refused to recognize an excess insurer's anticipatory breach until there was both proper exhaustion *and* the excess insurer refused to pay *after* a declaration that the insurer owed coverage. *Id.* The result in *Segal* and *W.R. Grace* makes sense in view of the distinction between disclaimers and repudiation. For there to be an anticipatory breach, an insurer's refusal to pay must be so unreasonable as to also deny the insurer's intention or duty to shape its conduct in accordance with the policy. *Am. Commer. Lines*, 679 Fed. App'x at 16. Since *J.P. Morgan* was not asked to consider *Segal* or *W.R. Grace*, its contrary result should not be followed. We also reiterate that Arch's *Bauer* Letter does not even constitute a disclaimer, let alone a repudiation.

J.P. Morgan further erred when it used the excess insurers' disclaimers to excuse non-exhaustion. Neither repudiation nor a disclaimer can create coverage where none exists. *Albert J. Schiff Assocs., Inc. v. Flack*, 417 N.E.2d 84, 87 (N.Y. 1980). Where the issue is the existence or nonexistence of coverage (*e.g.*, the insuring clause and exclusions), waiver is simply inapplicable. *CheckRite Ltd. v.*

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Ill. Nat'l Ins. Co., 95 F. Supp. 2d 180, 190 (S.D.N.Y. 2000). Unlike provisions for consent, proof of loss, and cooperation, the exhaustion provision is not a mere condition. The requirement that underlying insurers must first pay their limits does not designate the manner in which covered claims are to be handled. Rather, the Arch Policy unambiguously states how the underlying insurance is exhausted, which is essential to the risk. *Quellos Grp., LLC v. Fed. Ins. Co.*, 312 P.3d 734, 743 (Wash. App. 2013). Arch's exhaustion provision cannot be waived as it is part of the Insuring Agreement and key to the scope of risk Arch agreed to insure. *See CheckRite Ltd.*, 95 F. Supp. 2d at 190 (unlike a defense to *existing* coverage, a *trigger* of coverage cannot be waived). It bears repeating that the very purpose of Arch's exhaustion provision is to make certain that all underlying coverage disputes are resolved before triggering any liability for Arch, so that Arch can wait out the insurance disputes and receive the benefit of a proportionally discounted limit. This goes to the heart of Arch's agreement with TIAA and is not waivable. *Id.* Although *J.P. Morgan* thought this result was "inequitable," there is nothing inequitable about applying an unambiguous provision in the precise manner contemplated by that provision. *Saratoga Trap Rock Co. v. Standard Acci. Ins. Co.*, 143 A.D. 852, 857-58 (N.Y. App. Div. 1911) ("While it seems inequitable to compel the [insured] to pay the interest…, the answer to it is that the parties otherwise agreed"). It would be inequitable to allow a sophisticated party like

[redacted]

TIAA to effectively rewrite the parties' express agreement because it does not like a particular provision in retrospect.

For similar reasons, the outcome should not be determined by *Granite Ridge Energy, LLC v. Allianz Global Risk U.S. Ins. Co.*, 979 F. Supp. 2d 385, 393-94 (S.D.N.Y. 2013). This is just another example of a court conflating repudiation with an ordinary disclaimer, which other New York courts have cautioned against. *E.g.*, *Seward Park Hous. Corp.*, 836 N.Y.S.2d at 104-05. Moreover, *Granite* only led to an excusal of a proof of loss, which was a waivable condition in the insured's control and was not critical to the risk in the same way as Arch's exhaustion provision.

TIAA also relies on *Varda, Inc. v. Insurance Co. of N. America*, 45 F.3d 634 (2d Cir. 1995), which is easily distinguishable because the *Varda* jury returned a verdict awarding damages for the insurer's breach, and the Court explained it was this breach that warranted prejudgment interest. *Id*. at 637, 640-41. However, there has been no finding nor can there be any finding that Arch committed any breach. Further, *Varda* did not even involve exhaustion issues but a requirement that payment not be made until thirty days after final judgment.

TIAA places undue emphasis on *Varda*'s statement that this provision "merely establishes the time when [the insurer] must pay [the insured's] claim. It does not address the question of how the amount of the claim is to be calculated."

[redacted]

Unlike in *Varda*, the Arch Policy's exhaustion language ***actually does address how the amount is to be calculated***. The shavings provision reduces Arch's potential liability in the event any underlying coverage dispute is settled.[54] Arch's liability cannot be fixed or even ascertainable until all underlying insurance is properly exhausted. Consequently, the exhaustion provision cannot be dismissed as a mere "timing of payment" provision.

Varda is also an anomaly resulting from a procedural technicality. Although it appears there was no repudiation, the insurer failed to preserve this argument, and the interest issue was therefore addressed under the stricter "manifest injustice" standard.

TIAA also cites to *Olin Corp. v. OneBeacon America Insurance Co.*, 2017 U.S. App. LEXIS 12939 (2d Cir. Jan. 12, 2017), which is not analogous and does not warrant a different outcome. First, when prejudgment interest was awarded, there already had been findings that the excess insurer was liable. *Id.* at *3 n.1. Arch, however, has not been found liable, nor can it be found liable until after Illinois National and ACE first pay. This distinction makes sense because, unlike the Arch Policy, the excess policies in *Olin* had less stringent exhaustion

[54] JA0518.

[redacted]

requirements, which expressly permitted payment from the insured without limitation. *Id.* at *9-10.

TIAA also cites to *Turner Construction Co. v. American Manufacturers Mutual Insurance Co.*, 485 F. Supp. 2d 480, 491 (S.D.N.Y. 2007). However, *Turner* awarded prejudgment interest only after making a determination of liability against the insurers. *Id*. at 490. Moreover, it appears that the excess insurer never challenged its obligation to pay prejudgment interest. Indeed, the Court in *Turner* was not asked to consider and did not actually consider the issue of whether prejudgment interest could accrue for an excess insurer prior to exhaustion. *Id.* at 490-91. It is not even clear in *Turner* whether the excess policy might have permitted exhaustion through the insured's direct payments.

5. The Jury Verdict Did Not Address Anticipatory Breach or Otherwise Find Liability on the Part of Arch.

As discussed, Arch's *Bauer* Letter is not even an unequivocal disclaimer of coverage, let alone a repudiation. In its opening brief, TIAA tellingly does not even attempt to address this issue based on the evidence itself. Instead, TIAA argues that the absence of repudiation is "irreconcilable" with the jury's factual finding. As a threshold matter, the jury finding is subject to Arch's own appeal, so TIAA's reliance on the finding may become moot. Regardless, TIAA's argument distorts the jury's finding.

[redacted]

The jury generally determined that it appeared futile for TIAA to seek Arch's consent to settle.[55] However, without any basis, TIAA narrowly construes the jury's determination as specifically referring only to the *Bauer* Letter as the basis for what made consent futile. In reality, the jury was never asked to determine what *specific conduct* by Arch made consent futile, and the jury never explained what conduct led to the conclusion. In fact, TIAA presented the jury with evidence of a host of other reasons that it argued made consent futile, including (1) Arch's previous closure letter, (2) Arch's internal file closure, (3) Arch not re-opening the file, (4) Arch not responding to TIAA's communications, (5) Arch not objecting to the settlement, and (6) testimony from other insurers that consent was not required.[56] Consequently, it is incorrect to assume it was specifically the *Bauer* Letter that made consent futile.

TIAA also incorrectly assumes that repudiation is subject to the same standard as what was presented to the jury on the futility question. As discussed in the opening brief of Arch's own appeal, a finding of repudiation can only be based on *direct communications* from Arch to TIAA *at the time* of the purported repudiation, and subjective intent is irrelevant. *Stanford Square L.L.C. v. Nomura*

[55] JA6518.

[56] Trial Tr. 220:14-233:8 (Closing Arguments) (Dec. 9, 2016), JA6359-JA6372; Trial Tr. 38:1-10, 39:3-11, 45:18-48:4 (Test. of Ira Cohen) (Dec. 6, 2016), JA5772, JA5773-JA5774.

[redacted]

Asset Capital Corp., 228 F. Supp. 2d 293, 299-300 (S.D.N.Y. 2002) (repudiation requires "overt communication" and cannot be "learned from third parties"); *DiFolco*, 831 F. Supp. 2d at 642. Yet, the Superior Court permitted TIAA to present the jury with evidence of information *unknown to TIAA at the time* of the purported repudiation, including Arch's then-unknown internal file closure and other insurers' testimony regarding when consent is required.[57] In addition, while an ordinary disclaimer of coverage does not constitute repudiation, the jury instructions expressly permitted the jury to find consent to be futile based on a disclaimer.[58]

Therefore, the jury's futility finding does not equate to a finding of repudiation *at all*, let alone that the *Bauer* Letter was the specific basis for repudiation. In any event, Arch was entitled to a determination as a matter of law that the *Bauer* Letter was neither an unequivocal disclaimer nor a repudiation,

[57] While Arch's closure letter (JA1328) was known to TIAA, TIAA wisely does not assert the closure letter was an anticipatory breach even though TIAA previously argued it was evidence of waiver and futility. AA000403-AA000405. The closure letter is not an anticipatory breach, but if it were, then TIAA's claim against Arch would be time-barred by New York's statute of limitations because Arch's letter was issued more than six years before TIAA filed this action. *Ely-Cruikshank Co. v. Bank of Montreal*, 615 N.E.2d 985, 987 (N.Y. 1993).

[58] JA6531 ("[I]f an insurer denied coverage before the settlement, then it would reasonably appear to be futile to request the insurer's consent for the settlement.").

[redacted]

irrespective of the jury's finding. As already discussed above, a review of the letter on its face requires this result. *Briarwood Farms*, 452 Fed. App'x at 61.

Arch also disputes TIAA's unsupported suggestion that there was an understanding between TIAA and Arch that the special interrogatories presented to the jury would fully resolve the issue of exhaustion or prejudgment interest. As TIAA readily admits in its opening brief, these issues were specifically preserved for post-trial determination by the Court, not the jury.[59] Accordingly, the jury's findings have no impact on prejudgment interest, exhaustion of the underlying limits, or anticipatory breach. TIAA then points to purported concessions by Illinois National regarding its own breach even though another party's concessions cannot be binding on Arch. In any event, exhaustion issues certainly could not affect Illinois National's liability as the primary insurer, so there is no reason to consider any concession by Illinois National as evidence of some understanding between TIAA and Arch.

6. Arch Also Could Not Incur Prejudgment Interest Between the Jury Verdict and the Final Judgment Because the Jury Did Not Find Any Liability or Present Obligation for Arch.

TIAA attempts to salvage part of its prejudgment interest claim by focusing on N.Y.C.P.L.R. § 5002, which pertains to interest incurred between the date of a

[59] TIAA Opening Br. 19; TA0674.

[redacted]

verdict and the date of final judgment. TIAA argues that Section 5002 allows it to avoid the absence of a breach. While it is true Section 5002 (unlike 5001) is not limited to "breach of performance of a contract," TIAA fails to recognize that interest under Section 5002 still requires that the verdict *actually find Arch liable* (whether it is liable for breach of contract or some other cause of action). *Love v. State*, 583 N.E.2d 1296 (N.Y. 1991) (repeatedly explaining Section 5002 interest begins to accrue from date that *liability* is "fixed," "established," "determined," or "held"); *Van Nostrand v. Froehlich*, 844 N.Y.S.2d 293, 296 (App. Div. 2007) (in Section 5002, "[t]he terms 'verdict,' 'report' or 'decision' generally refer to the date that *liability is established*…") (emphasis added).

As discussed, the jury verdict did not find Arch liable for any claim, nor did the jury find that Arch had a present obligation to pay. The jury's findings as to Arch were limited to excusal of the consent-to-settle requirement and the reasonableness of defense costs.[60] As explained above and confirmed by the Superior Court, Arch does not have any obligation until after both Illinois National and ACE either pay their respective insurance limits or settle their coverage

[60] JA6518 –JA6520.

disputes with TIAA.[61] This is fatal to TIAA's prejudgment interest claims under both Section 5001 and 5002.

[61] TIAA Opening Br., Ex. G at 18-25.

[redacted]

II. EVEN IF THIS COURT DISAGREES WITH THE REASONS FOR THE SUPERIOR COURT'S DECISION, OTHER ARGUMENTS MADE BUT NOT ADDRESSED BELOW STILL PRECLUDE PREJUDGMENT INTEREST OR AT LEAST WARRANT A SMALLER AMOUNT OF INTEREST.

A. Questions Presented

1. Even if this Court disagrees with the Superior Court's reasoning in declining to award prejudgment interest, should TIAA's settlement with St. Paul in any event preclude any award in excess of Arch's reduced limit?

2. Even if this Court determines that TIAA is entitled to prejudgment interest at this time, should the principal sum used to calculate the interest be Arch's original limit or the new amount of Arch's limit as reduced by TIAA's settlement with St. Paul pursuant to the Arch Policy's "shavings" provision?

B. Scope of Review

These questions were presented by Arch below but were not addressed by the Superior Court as they were alternative arguments rendered moot by the Court's decision in Arch's favor. However, this Court may affirm the Superior Court's judgment for reasons different than those articulated below and may rule on an issue fairly presented to the trial court but not addressed below. *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1390 (Del. 1995); *Standard Distrib. Co. v. Nally*, 630 A.2d 640, 647 (Del. 1993).

[redacted]

C. Merits of Argument

1. Even if Arch Had Breached, Prejudgment Interest Was Already Resolved by TIAA's Settlement with St. Paul.

As TIAA concedes, its settlement with St. Paul reduced the Arch Policy's limit pursuant to the "shavings" provision, which entitles Arch to a discount off its limit proportional to the discount received by St. Paul.[62] However, TIAA and St. Paul did not *only* settle the principal claim against St. Paul's policy limit. They also settled approximately [redacted] in claimed prejudgment interest against St. Paul.[63] Therefore, the St. Paul settlement already included *both* the policy limit and the claimed prejudgment interest.

Given that Arch is entitled to a proportional discount and given that prejudgment interest was already factored into the St. Paul settlement, it would be a windfall to permit TIAA to recover any amount in excess of the already reduced Arch Policy limit. Indeed, Arch's limit reduction already reflects prejudgment interest. Awarding any additional amount would effectively cause Arch to be charged twice, as said interest was already built into the discount Arch received from the St. Paul settlement.

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[62] JA0518.

[63] AA000636-AA000641; AA000448-AA000472. The [redacted] figure reflects the amount of interest St. Paul would have allegedly owed at the time it settled in principle with TIAA.

[redacted]

Consequently, in the event this Court disagrees with the reasoning of the Superior Court in declining to award prejudgment interest but affirms the amount of the limit reduction, this Court should either decline to award any amount in excess of Arch's reduced limit or remand the matter to the Superior Court.

2. Due to the Reduction of Arch's Limit, the Original Limit Should Never Be Used as the Principal Sum to Calculate Prejudgment Interest.

TIAA concedes that its settlement with St. Paul reduced the Arch Policy's limit pursuant to the "shavings" provision. Yet, TIAA argued in the Superior Court that some prejudgment interest should be calculated based on Arch's original and full [redacted] limit, rather than the reduced limit.[64] TIAA contended this would be consistent with New York's statutory prejudgment interest. However, New York law (as well as logic) dictates otherwise.

In *U.S. Fire Insurance Co. v. Federal Insurance Co.*, it was held that, "[t]o the extent [the prevailing party] seeks to recover from [the other party] interest on any sum greater than the sum awarded to it from [the other party], its claim is frivolous." 858 F.2d 882, 884 (2d Cir. 1988); *cf. N. River Ins. Co. v. ACE Am. Reins. Co.*, 361 F.3d 134, 145 (2d Cir. 2004) ("[T]he plain language of

[64] TIAA conceded that Arch's reduced limit is at most [redacted]. The appropriate amount of Arch's reduced limit is the subject of Arch's own appeal, and Arch contends that TIAA's settlement with St. Paul reduced the Arch Policy's limit to [redacted].

[redacted]

[N.Y.C.P.L.R.] § 5001 only gives the court authority to award prejudgment interest on the 'sum awarded[.]'").

Therefore, prejudgment interest should never be calculated by using more than Arch's reduced limit (which is at most [redacted]) as the principal amount. Thus, if this Court vacates the Superior Court's decision and determines that Arch owes prejudgment interest, this Court should either calculate the interest based on Arch's reduced limit or remand the matter to the Superior Court.

[redacted]

CONCLUSION

For the reasons above, the portion of the Superior Court's judgment that denied TIAA's request for an award of prejudgment interest against Arch should be affirmed.

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