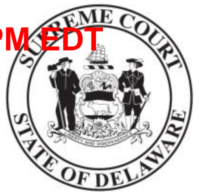
EFiled: Apr 16 2018 04:12PM EDT
Filing ID 61922818
Case Number Multi-Case



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

REPLY BRIEF OF PLAINTIFFS BELOW / APPELLANTS TIAA-CREF INDIVIDUAL & INSTITUTIONAL SERVICES, LLC; TIAA-CREF INVESTMENT MANAGEMENT, LLC; TEACHERS ADVISORS, INC.; TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA; AND COLLEGE RETIREMENT EQUITIES FUND ON PREJUDGMENT INTEREST

Of Counsel:

Robin L. Cohen
Adam S. Ziffer
Michelle R. Migdon
MCKOOL SMITH P.C.
One Bryant Park, 47th Floor
New York, NY 10036

POTTER ANDERSON & CORROON LLP
Jennifer C. Wasson (No. 4933)
Andrew Sauder (No. 5560)
Hercules Plaza, Sixth Floor
1313 North Market Street
Wilmington, Delaware 19801
Telephone: (302) 984-6000
jwasson@potteranderson.com
asauder@potteranderson.com

Attorneys for 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

Dated: March 30, 2018
PUBLIC VERSION
Dated: April 16, 2018

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

ARGUMENT 7

I. EXCESS INSURERS CANNOT JUSTIFY THE SUPERIOR COURT'S ERRONEOUS DENIAL OF PREJUDGMENT INTEREST 7

A. The Policies' Attachment and Shavings Provisions Do Not Reflect the Parties' Unmistakable Intent to Waive Prejudgment Interest or Otherwise Entitle Excess Carriers to the Time-Value of TIAA-CREF's Money 9

1. Prejudgment Interest May Only Be Waived by Clear and Explicit Policy Provisions, Absent Here 9

2. Excess Insurers' Efforts to Avoid the On-Point Holding in *J.P. Morgan* Are Without Merit 11

3. New York Courts Routinely Impose Prejudgment Interest on Parties Who Were Contractually Entitled to "Hold the Money" Prior to Final Judgment 17

B. Excess Insurers Must Pay Prejudgment Interest Because of Illinois National's Breach 23

C. Alternatively, Excess Insurers Must Pay Prejudgment Interest Because of Their Anticipatory Breach 26

D. The Denial of Prejudgment Interest under § 5001 Constituted Reversible Error Even under an Abuse of Discretion Standard 30

E. Excess Insurers Cannot Avoid an Award of § 5002 Interest 33

II. IF ACE AND ARCH ARE EXCUSED FROM THEIR OBLIGATIONS FOR PREJUDGMENT INTEREST, THOSE AMOUNTS ARE PROPERLY CHARGED AGAINST ILLINOIS NATIONAL AS CONSEQUENTIAL DAMAGES 36

CONCLUSION 39

TABLE OF AUTHORITIES

Page(s)

Cases

Aetna Cas. & Sur. Co. v. Lumbermens Mut. Cas. Co.,
543 N.Y.S.2d 806 (N.Y. App. Div. 1989) 17

Ali v. Fed. Ins. Co.,
719 F.3d 83 (2d Cir. 2013) 17

Am. Commer. Lines LLC v. Water Quality Ins. Syndicate,
679 Fed. App'x 11 (2d Cir. 2012) 28

Amoco Transp. Co. v. Dietze, Inc.,
582 F. Supp. 804 (S.D.N.Y. 1984) 19, 20

AMTRAK v. Steadfast Ins. Co.,
2009 U.S. Dist. LEXIS 21311 (S.D.N.Y. Mar. 5, 2009) 28

Bank of N.Y. Trust Co., N.A. v. Franklin Advisers, Inc.,
726 F.3d 269 (2d Cir. 2013) 24

Bear Wagner Specialists, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.,
2009 WL 2045601 (N.Y. Sup. Ct. July 7, 2009) 28

Beazley Ins. Co., Inc. v. Ace Am. Ins. Co.,
150 F. Supp. 3d 345 (S.D.N.Y. 2015) 17

Bi-Economy Market, Inc. v. Harleysville Ins. Co. of New York,
886 N.E.2d 127 (N.Y. 2003) 37, 38

Calgon Carbon Corp. v. WDF, Inc.,
700 F. Supp. 2d 408 (S.D.N.Y. 2010) 23, 24

CheckRite Ltd., Inc. v. Illinois Nat'l Ins. Co.,
95 F. Supp. 2d 180 (S.D.N.Y. 2000) 16

Continental Cas. Co v. Emps. Ins. Co. of Wausau,
865 N.Y.S.2d 855 (N.Y. Sup. Ct. 2008), *rev'd on other grounds*,
923 N.Y.S.2d 538 (N.Y. App. Div. 2011) 21

Dormitory Auth. v. Cont'l Cas. Co.,
756 F.3d 166 (2d Cir. 2014) 22

Doubet, LLC v. Trustees of Columbia Univ. in the City of New York,
941 N.Y.S.2d 537 (N.Y. Sup. Ct. 2011) 24

Doubet, LLC v. Trustees of Columbia Univ. in the City of New York,
952 N.Y.S.2d 16 (N.Y. App. Div. 2012) 25

Forest Labs., Inc. v. Arch Ins. Co.,
953 N.Y.S.2d 460 (N.Y. Sup. Ct. 2012) 17

Great Lakes Dredge & Dock Co. v. City of Chicago,
260 F.3d 789 (7th Cir. 2001) 25

Harriprashad v. Metropolitan Prop. & Cas. Ins. Co.,
2011 WL 6337699 (E.D.N.Y. Nov. 17, 2011) 28

In re Hoffman,
712 N.Y.S.2d 165 (N.Y. App. Div. 2000) 24

Insituform Techs., Inc. v. American Home Assurance Co,
2008 WL 886026 (D. Mass. 2008) 25

J.P. Morgan Secs. Inc. v. Vigilant Ins. Co.,
2017 WL 3448370 (N.Y. Sup. Ct. Aug. 7, 2017) .... *passim*

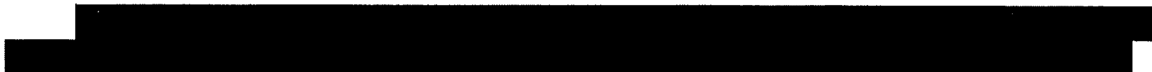
J.P. Morgan Secs. Inc. v. Vigilant Ins. Co.,
936 N.Y.S.2d 102 (N.Y. App. Div. 2011) 38

Jackson v. Hunt, Hill & Betts,
247 N.Y.S.2d 720 (N.Y. App. Div. 1964) 31

Katzman v. Helen of Troy Texas Corp.,
2013 WL 1496952 (S.D.N.Y. Apr. 11, 2013) 9, 10

Kane v. Fid. Ins. Co. of Am.,
980 N.Y.S.2d 72 (N.Y. App. Div. 2014) 29, 30

KV Pharm. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.,
2006 WL 1153825 (E.D. Mo. May 1, 2006) 26



Liberty Surplus Ins. Co. v. Segal Co.,
2004 WL 2102090 (S.D.N.Y. Sept. 21, 2004) .... *passim*

Love v. State,
78 N.Y.2d 540 (N.Y. 1991) 13, 32, 34, 35

Manufacturer's & Traders Trust Co. v. Reliance Ins. Co.,
8 N.Y.3d 583 (N.Y. 2007) 24

Margo Props., Inc. v. Nelson,
473 N.Y.S. 2d 822 (N.Y. App. Div. 1984) 31

Maryland Cas. Co. v. W.R. Grace & Co.,
1996 WL 306372 (S.D.N.Y. Jun. 7, 1996) .... *passim*

Olin Corp. v. OneBeacon America Ins. Co.,
864 F.3d 130 (2d Cir. 2017) 32, 33

Princes Point LLC v. Muss Dev. LLC,
87 N.E.3d 121 (N.Y. 2017) 27

Rajchandra Corp. v. Title Guar. Co.,
558 N.Y.S.2d 1001 (N.Y. App. Div. 1990) 29

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

Roman Catholic Diocese of Rockville Ctr. v. Gen. Reinsur. Corp.,
2016 WL 5793996 (S.D.N.Y. Sept. 23, 2016) 37

Saratoga Trap Rock Co. v. Standard Acc. Ins. Co.,
128 N.Y.S. 822 (N.Y. App. Div. 1911) 16

Stanford Square, L.L.C. v. Nomura Asset Cap. Corp.,
232 F. Supp. 2d 289 (S.D.N.Y. 2002) 13

State Farm Ins. Co. v. Domotor,
697 N.Y.S.2d 348 (N.Y. App. Div. 1999) 29

Varda, Inc. v. Ins. Co. of N. Am.,
45 F.3d 634 (2d Cir. 1995) 10, 20, 21, 22

Wells Fargo Bank, N.A. v. Bank of America, N.A.,
2014 WL 476299 (S.D.N.Y. Feb. 6, 2014) 10

Other Authorities

CPLR § 5001 .... *passim*

CPLR § 5002 .... *passim*

PRELIMINARY STATEMENT

here: if the seamless insurance program purchased by TIAA-CREF had been properly applied as the Superior Court and jury ultimately found it should have been, TIAA-CREF, rather than its insurers, would long since have had the use of the funds paid to defend and settle the Underlying Actions. The Superior Court's granting to TIAA-CREF of only a declaration of its right to coverage under the ACE and Arch excess policies once Illinois National finally pays, without any compensation for the time value of money, will not put TIAA-CREF back in the position it would have been had there been no breach. As a matter of well-established New York law – including the *only* New York decision on point with respect to the payment obligations of ACE and Arch (the "Excess Insurers") – an award of prejudgment interest is necessary to place TIAA-CREF in the position it

---

[1] All short-form names and capitalized terms have the same meaning as set forth in the Opening Brief of Plaintiffs Below/Appellants TIAA-CREF Individual & Institutional Services, LLC; TIAA-CREF Investment Management, LLC; Teachers Advisors, Inc.; Teachers Insurance and Annuity Association of America; and College Retirement Equities Fund, dated January 26, 2018 ("Opening Brief" or "Opening Br.").

should have been in had TIAA-CREF's insurance claim been properly and timely paid. In their attempt to avoid that result, each of the Insurers blames the others.

Thus, while the Excess Insurers pay lip service to the fact that prejudgment interest is not a punishment, they simultaneously argue that they do not deserve to be punished, because primary insurer Illinois National has not yet exhausted its limits. This argument attempts to transform their exhaustion and shavings provisions, neither of which mentions or has anything to do with prejudgment interest, into shields barring any award of such interest against them – including the interest that New York law mandates be paid from the time of verdict or decision to the entry of judgment. But under New York law, courts have routinely awarded prejudgment interest to plaintiffs denied the time value of their money, even against insurers who claim an entitlement to retain that money until underlying insurers were forced to pay their limits through litigation. This was the holding in *J.P. Morgan,*[2] the only New York case to evaluate the interest obligations of an as-yet-unattached excess insurer that has denied coverage for a claim that was sufficient to reach the excess policy's attachment point.

---

[2] *J.P. Morgan Secs. Inc. v. Vigilant Ins. Co.,* 2017 WL 3448370 (N.Y. Sup. Ct. Aug. 7, 2017).

Unable to offer a single New York authority denying interest in such a case, Excess Insurers instead argue that *J.P. Morgan* is erroneous or, at least, distinguishable. To that end, Excess Insurers argue that they supposedly have not denied coverage for the *Bauer-Ramazani* Action, but are simply awaiting the day when Illinois National lives up to its coverage obligations, at which point they might pay. That assertion is belied not only by Excess Insurers' every action and statement prior to this coverage action, but by the five years of litigation that followed, through and including their current position on appeal.

Nor can Excess Insurers avoid *J.P. Morgan* by arguing that, because of their shavings provisions, their liability is subject to the "future contingency" that TIAA-CREF might enter into a settlement with an underlying insurer. As an initial matter, such a settlement would affect only the amount owed with respect to a given claim, not whether the claim fell within the substantive coverage terms of the Excess Policies. More importantly, the possibility *always* exists that TIAA-CREF may settle with an underlying insurer prior to the entry of judgment; the fix, if even necessary, is a simple recalculation of damages. However, there is no logical basis for precluding prejudgment interest based upon a shavings provision. That would contravene well-established New York law requiring that the parties use contractual language that "unmistakably manifests" an intent to forego

prejudgment interest where they intend to impose such a bar. The Excess Insurers did not do so here.

Excess Insurers' claim that they did not anticipatorily breach their coverage obligations for the *Bauer-Ramazani* Action is even less supportable than their efforts to avoid the holding in *J.P. Morgan.* According to Excess Insurers, unlike any other party to any other contract, an insurer can only be held to have anticipatorily breached its coverage obligations with respect to a *given* dispute if it repudiates the contract as a whole. But this "repudiation" requirement concerns only future claims and has no application to Excess Insurers' denial of coverage for the very claims at issue. Excess Insurers, like Illinois National, denied coverage on the substantive basis that the Underlying Actions sought disgorgement; Arch further refused coverage on the wholly separate ground that TIAA-CREF had failed to obtain its prior consent to the *Bauer-Ramazani* settlement, and forced TIAA-CREF to defeat that assertion at trial. Their rejection of coverage for the Underlying Actions on grounds other than lack of exhaustion of underlying policies constitutes an anticipatory breach. That breach supports an award of prejudgment interest under New York law to ensure that TIAA-CREF does not suffer the out-of-pocket costs it has borne for more than five years in connection with its claim.

In addition to claiming that they did not anticipatorily breach their contracts, Excess Insurers unbelievably argue that they cannot be held liable for post-decision, post-verdict interest under CPLR § 5002 *because they have not been held liable to TIAA-CREF. See* Arch Br.[3] at 42 ("the jury verdict did not find Arch liable for any claims"). That assertion is directly contradicted by Excess Insurers' agreement after trial that entry of final judgment on the *Rink* and *Bauer-Ramazani* claims was appropriate and necessary – as well as ACE's decision in the wake of the Superior Court's summary judgment ruling that there was nothing left for it to dispute at trial with respect to its liability for the Underlying Actions.

Finally, if Illinois National's breach relieves ACE and Arch from paying an award of prejudgment interest, Illinois National has to bear the consequences of its wrongful conduct – even if not taken in bad faith. New York case law does not require bad faith to hold an insurance company liable for the foreseeable consequences of its wrongful denial of coverage. Illinois National, the primary carrier on a seamless tower of follow-form coverage, should have foreseen that Excess Insurers would refuse to pay unless and until Illinois National did first.

---

[3] "Arch Br." refers to Defendant Below/Appellee Arch Insurance Company's Amended Answering Brief Responding to Plaintiffs Below/Appellants' Opening Brief, dated March 12, 2018.

To make TIAA-CREF whole, it must be compensated, be it from Excess Insurers or Illinois National, for the loss of use of its funds during the period in which all Insurers maintained (and continue to maintain) that TIAA-CREF's (adjudicated as covered) loss is uninsurable. New York's prejudgment interest statute requires it.

ARGUMENT

I. EXCESS INSURERS CANNOT JUSTIFY THE SUPERIOR COURT'S ERRONEOUS DENIAL OF PREJUDGMENT INTEREST

Excess Insurers maintain that they are entitled to retain the time value of the insurance proceeds applicable to the fully-covered Underlying Actions – proceeds that to this day they continue to deny to TIAA-CREF – because Illinois National's ongoing breach of contract insulates them from any award for prejudgment interest. *See, e.g.*, ACE Br.[4] at 23. That argument fails on several grounds.

First, under § 5001, prejudgment interest is mandatory absent unmistakable intent by the parties to waive such a right. The attachment and shavings provisions in Excess Insurers' Policies, which do not even mention prejudgment interest at all, fail to reflect this unmistakable intent. In fact, New York courts have awarded prejudgment against parties who had a contractual or statutory basis for "holding onto" the money they ultimately were required to turn over to the plaintiff. Indeed, in *J.P. Morgan,* the *only* New York authority dealing with excess insurers' assertions that they are immune from any award of interest prior to exhaustion of the underlying limits, the court squarely rejected those assertions as contrary to New York law. Despite Excess Insurers' positions here, that decision was both a

---

[4] "ACE Br." refers to the Answering Brief of ACE American Insurance Company Regarding Prejudgment Interest, dated March 9, 2018.

correct application of New York law, and directly applicable to the coverage claims against Excess Insurers.

Second, [redacted] Illinois National breached its contract, and that Excess Insurers have refused to pay funds rightfully owed to TIAA-CREF "because of" that breach. The statute's plain language permits an interest award from Excess Insurers in these circumstances.

Third, contrary to Excess Insurers' arguments and reliance on distinguishable and inapplicable case law, their denial of coverage for the Underlying Actions on substantive grounds other than a mere failure of exhaustion constitutes an anticipatory breach of their coverage obligations. Accordingly, even if prejudgment interest could only be awarded if they had breached, that condition would be satisfied here by Excess Insurers' persisting (wrongful) denial of coverage.

Fourth, even if Arch were correct in its suggestion that prejudgment interest is not mandatory, the Superior Court still had the discretion to grant an interest award. Here, the court abused its discretion by not upholding the undisputed intent of the New York statute and granting such an award to TIAA-CREF.

Finally, Excess Insurers cannot avoid an award of post-decision or post-verdict interest under CPLR § 5002 on the ground that five years of litigation,

rulings on summary judgment so conclusive that ACE saw no need to participate in the trial, and a full trial and jury verdict in TIAA-CREF's favor against Arch supposedly did not establish Excess Insurers' liability for the claims at issue. Nor can they avoid § 5002 interest on the ground that the shavings clause might subsequently result in a change in the amount owed to TIAA-CREF under their policies, as again, such a holding would ignore New York's prohibition of such contractual bars on interest through implication.

A. The Policies' Attachment and Shavings Provisions Do Not Reflect the Parties' Unmistakable Intent to Waive Prejudgment Interest or Otherwise Entitle Excess Carriers to the Time-Value of TIAA-CREF's Money

The attachment and shavings provisions in Excess Insurers' Policies do not reflect a clear and unmistakable intent by TIAA-CREF to waive its right to prejudgment interest. Rather, courts that have evaluated circumstances similar or identical to those here have confirmed that the intent of the New York statute requires the imposition of interest on as-yet-unattached excess insurers.

1. Prejudgment Interest May Only Be Waived by Clear and Explicit Policy Provisions, Absent Here

Excess Insurers do not deny that, under New York law, prejudgment interest is so fundamental to the full relief of a prevailing plaintiff that its award cannot be waived by the parties absent clear and explicit language consistent with no other result. *See Katzman v. Helen of Troy Texas Corp.*, 2013 WL 1496952, at *6

(S.D.N.Y. Apr. 11, 2013) (in order to avoid such award, contract must "unmistakably manifest an intent to forego prejudgment interest");[5] *Wells Fargo Bank, N.A. v. Bank of America, N.A.*, 2014 WL 476299, at *3 (S.D.N.Y. Feb. 6, 2014) (vacated on other grounds) ("Wells Fargo's agreement to accept a court-ordered cash payment as its sole remedy is not a clear waiver of its right to prejudgment interest."). Neither can they contest the holding in *Varda, Inc. v. Insurance Co. of North America*, 45 F.3d 634 (2d Cir. 1995), which found that prerequisites to payment of claims otherwise covered under an insurance policy – in that case, a 30-day waiting period after entry of final judgment during which payment by the insurance company was not required – do not constitute such a waiver. Finally, Excess Insurers do not contest that their Policies do not contain any such express waiver of TIAA-CREF's right to an award of prejudgment interest, only that their exhaustion and shavings provisions by their nature imply it. On this basis alone, the Superior Court's decision must be reversed.

---

[5] Although *Katzman* was cited for this proposition in the Opening Brief (Opening Br. at 31-32), neither ACE nor Arch address, much less distinguish, the case in their Answering Briefs.

2. **Excess Insurers' Efforts to Avoid the On-Point Holding in *J.P. Morgan* Are Without Merit**

Not surprisingly, Excess Insurers spend pages of their brief urging the Court to ignore the New York Supreme Court's rejection in *J.P. Morgan* of the precise arguments they make here. Notably, they are forced to mount that attack because they can provide no New York authority to the contrary: neither ACE nor Arch cite to a single New York authority immunizing an excess insurer from prejudgment interest where it failed to pay a covered claim that reached its policy layer on the ground that the underlying limits had not yet been paid. In fact, Excess Insurers' strained attempts to distinguish or negate the holding in *J.P. Morgan* do not withstand even the slightest scrutiny.

First, both ACE and Arch quote out of context the court's statement that the excess insurers' liability in that case did not depend on "some future contingency." The court was referring to the single claim at issue there, which was large enough to fully exhaust lower layers of coverage and thus reach the excess policies:[6]

---

[6] ACE states that, "[u]nlike the single loss in *J.P. Morgan* that simultaneously triggered all of the insurers' policies at once, this matter involves several losses that triggered different policies' limits at different times." ACE Br. at 24, n.48. That ignores the fact that TIAA-CREF seeks prejudgment interest against Excess Insurers at this time *only* with respect to the *Bauer-Ramazani* Claim, as the *Rink* Claim alone was insufficient to trigger their layers of coverage. As with the single

> As discussed, *supra,* **Bear Stearns suffered a single large loss which exceeded each of the Insurers' limits, on the very date that it was incurred**. There is no question that Vigilant's primary policy would not have covered the first loss, which thereby would trigger coverage under seven of the excess policies simultaneously. **Thus, this is not a situation where the excess insurers' liability depends on some future contingency, <u>such as a potential subsequent loss that might reach the excess layers</u> . . . Here it is undisputed that the excess Insurers' coverage was reached on the date of the first loss.**

J.P. Morgan, 2017 WL 3448370, at *2 (emphasis added). The future contingency the court was concerned with involved multiple future claims that would implicate upper layers at a later time – and does not support Excess Insurers' argument that the shavings clause poses a "future contingency" because TIAA-CREF might settle with an underlying carrier and change the amount owed under their policies. Arch Br. at 33; ACE Br. at 24.

Indeed, the shavings provision does not present a "future contingency" with respect to Excess Insurers' *liability*, as the only possible effect it can have is on the *amount,* rather than the *existence* of their coverage obligations (further distancing the concern raised in *J.P. Morgan*). By its plain terms, the clause provides Excess Insurers with, at most, a discount equal to the highest percentage discount granted by settlement to any underlying carrier. As a matter of black-letter New York law,

---

claim at issue in *J.P. Morgan,* the *Bauer-Ramazani* Claim is sufficient on its own to exhaust the ACE limits and reach into the Arch layer.

however, that limited impact is insufficient to preclude an award of prejudgment interest, as there is "no requirement that a monetary damages award must be readily ascertainable or liquidated in order to award prejudgment interest." *Stanford Square, L.L.C. v. Nomura Asset Cap. Corp.*, 232 F. Supp. 2d 289, 293-94 (S.D.N.Y. 2002) ("[C]ertainty as to the amount of money due is not a necessary factor in awarding prejudgment interest.");[7] *see also Love v. State*, 78 N.Y.2d 540, 544 (N.Y. 1991) ("The need to compute damages has never been regarded as an obstacle to measuring the accrual of interest from a date well in advance of the rendition of the final damages verdict.").

Unable to effectively distinguish *J.P. Morgan,* both ACE and Arch next urge the Court to reject its holding, arguing that the New York court erred "when it used the excess insurers' disclaimers to excuse non-exhaustion." Arch Br. at 42. In fact, the *J.P. Morgan* court did not "excuse" non-exhaustion; to the contrary, it specifically noted that its entry of judgment was warranted by the fact that the claim at issue was sufficient to exhaust all seven layers of coverage "simultaneously," and that Excess Insurers' refusal to consent to the settlement or

---

[7] Arch does not dispute this aspect of *Stanford Square's* holding, and, in fact, relies on the decision for other aspects of its argument. Arch. Br. at 39-40. ACE notes only that the case does not involve an insurance policy, without any explanation as to why the court's holding would not equally apply in the insurance context. ACE Br. at 33-34.

to make payment when demanded on grounds other than exhaustion constituted a breach of their existing obligations. *Id.* at *2.

Nor did the court misunderstand the supposed difference between disclaimer of a claim and repudiation of a policy simply because it did not cite *Maryland Casualty Co. v. W.R. Grace & Co.,* 1996 WL 306372 (S.D.N.Y. Jun. 7, 1996) or *Liberty Surplus Insurance Co. v. Segal Co.,* 2004 WL 2102090 (S.D.N.Y. Sept. 21, 2004) ("*Segal*"). Arch Br. at 33-34, 36 (also citing *Granite Ridge Energy, LLC v. Allianz Global Risk U.S. Ins. Co.*, 979 F. Supp. 2d 385, 393-94 (S.D.N.Y. 2013)); ACE Br. at 25-26. In fact, neither of those cases would have warranted a different result in *J.P Morgan* – nor do they here.

First, neither case deals with the scope of § 5001 prejudgment interest or prejudgment interest at all, but merely whether a claim for anticipatory breach would lie against the excess insurers there on the facts presented. As set forth herein and in the Opening Brief, an award of prejudgment interest under § 5001 is proper even in the absence of such a claim. Accordingly, *J.P. Morgan's* "failure" to address either *Segal* or *W.R. Grace* provides no basis for rejecting its holding.

Moreover, *Segal* and *W.R. Grace* – which form the linchpin of Excess Insurers' assertion that they cannot anticipatorily breach their coverage obligations

for the Underlying Actions prior to exhaustion[8] – will not support even that proposition. In *W.R. Grace,* the claims asserted against the policyholder "ha[d] not yet reached ... the levels of [the excess] policies." *W.R. Grace*, 1996 WL 306372 at *2. The court's discussion of a lack of "exhaustion" in the following paragraphs of the decision clearly refers not to the fact that an underlying insurer had refused payment, but that even if every underlying insurer paid all existing claims, the policyholder's losses still would not be sufficient to reach the excess insurers' layers of coverage. *See id.* ("while it is true that a party can sue for anticipatory breach of contract when the other party has repudiated its duties prior to the time designated for performance . . . there are as yet no damages to be assessed against the defendant-insurers"). Although *Segal* involved a single claim, there is no indication that that claim had been settled or adjudicated in an amount that would be sufficient to reach the excess insurers' $10 million attachment point. *See Segal,* 979 F. Supp. 2d at *3-4 (describing the claim in terms of the nature of the complaint, with no discussion of a subsequent resolution).

Thus, the existence of the excess insurers' liability in both *Segal* and *W.R. Grace* depended upon the precise type of "future contingency" that the *J.P. Morgan* insurers' – and Excess Insurers' – liability did not: the possibility of

---

[8] *See* Arch Br. at 38-42; ACE Br. at 18-20.

judgment on the pending claim or the filing of enough additional claims to implicate their layers of coverage, *which had not yet been implicated.* In contrast, as *J.P. Morgan* correctly held, where, as here, the policyholder has suffered a loss sufficient to trigger the excess layers, an excess insurer who denies coverage may not hide behind a supposed lack of exhaustion based solely on the primary carrier's failure to pay to insulate it from a later award of prejudgment interest.

Finally, in arguing that *J.P. Morgan* impermissibly treated the carriers' disclaimer as a waiver and broadened coverage, Arch relies on the falsity that the "exhaustion provision is not a mere condition" to coverage. Arch Br. at 34-35. Notably, it cites no New York authority for that proposition, relying instead on a decision of the Washington State Court of Appeals never cited for that or any other proposition by any state or federal court in the country. Arch Br. at 35, citing *Quellos Grp. LLC v. Fed. Ins. Co.,* 312 P.3d 734 (Wash. App. 2013).[9] Arch's failure to cite any New York authority for that proposition is no mere oversight. Even the New York cases cited by Excess Insurers show that the requirement of

---

[9] The two New York cases cited in that paragraph of Arch's brief (Arch Br. at 34-35) have nothing to do either with exhaustion or prejudgment interest on a coverage claim. *See CheckRite Ltd., Inc. v. Illinois Nat'l Ins. Co.,* 95 F. Supp. 2d 180 (S.D.N.Y. 2000) (holding that date of notice under claims made policy is triggering event, not mere condition precedent to coverage); *Saratoga Trap Rock Co. v. Standard Acc. Ins. Co.,* 128 N.Y.S. 822 (N.Y. App. Div. 1911) (insurer not obligated to pay interest accruing on *underlying* claim in excess of policy limits).

exhaustion is, in fact, a coverage condition.[10] That coverage condition in no way evidences an intent to waive the right to prejudgment interest, let alone an unmistakable intent to do so.

3. New York Courts Routinely Impose Prejudgment Interest on Parties Who Were Contractually Entitled to "Hold the Money" Prior to Final Judgment

That the Policies' exhaustion conditions do not relieve Excess Insurers of their prejudgment interest obligations is reinforced by the willingness of New York courts to award such interest even against parties that had no contractual or statutory obligation to make an actual payment sooner than they did.

For example, in *Aetna Casualty & Surety Co. v. Lumbermens Mutual Casualty Co.,* 543 N.Y.S.2d 806 (N.Y. App. Div. 1989), Aetna and Lumbermans had both insured the same policyholder. When that policyholder was sued, the insurers agreed that Aetna would bear the full amount of the policyholder's loss without Lumberman's participation, and seek contribution in a later action. Thus,

---

[10] *See, e.g., Rapid-Am. Corp. v. Travelers Cas. & Sur. Co,* 2016 Bankr. LEXIS 2224 at *31-32 (S.D.N.Y. Bankr. June 7, 2016) (Arch Br. at 25); *Ali v. Fed. Ins. Co.,* 719 F.3d 83, 91 (2d Cir. 2013) (Arch Br. at 25) (excess policy provision requiring exhaustion by payment "establishes a clear condition precedent to the attachment of the Excess Policies"); *Beazley Ins. Co., Inc. v. Ace Am. Ins. Co.,* 150 F. Supp. 3d 345, 353 (S.D.N.Y. 2015); *Forest Labs., Inc. v. Arch Ins. Co.,* 953 N.Y.S.2d 460, 464 (N.Y. Sup. Ct. 2012) (noting parties may impose "a condition precedent to the excess carrier's liability that the underlying policies be exhausted only by payment").

under the agreement, Lumbermans was contractually entitled to withhold payment until and unless Aetna obtained a judgment establishing Lumbermans' share of liability. In the subsequent contribution action, the trial court held that Lumbermans was liable for half of the costs paid by Aetna, but denied Aetna's additional demand for prejudgment interest.

The New York Appellate Division reversed, and held that Lumbermans was obligated for prejudgment interest from the date that Aetna paid the policyholder's claim. It agreed with the trial court that "there was no express agreement that Lumbermans pay interest on any principal amount it was responsible to pay." *Id.* at 1004. It also did not question in any way the fact that the parties had agreed that Lumbermans would be entitled to wait out not only the underlying action but the subsequent contribution action without making any payment prior to judgment. However, it held that "the commercial context of the transaction"[11] required the imposition of prejudgment interest in order to compensate Aetna for the time value of the money it had expended in the meantime:

---

[11] Notably, Excess Insurers' briefs do not mention, much less distinguish, the legislative history cited in the Opening Brief establishing that the distinction in §5001 is between commercial claims, for which interest is mandated, and non-commercial claims in which it is not, not between breach of contract claims and other types of contract-based claims arising from contractual relationships. Opening Br. at 29.

> During the period between the time of the settlement and the time of the determination that Lumbermans was equally liable for the loss, Aetna was deprived of the use of the moneys it paid on Lumbermans' behalf. The only method to compensate Aetna for this deprivation is to include interest on the amount of moneys paid by Aetna on Lumbermans' behalf.

Id.

Similarly, in *Amoco Transport Co. v. Dietze, Inc.,* 582 F. Supp. 804 (S.D.N.Y. 1984), a New York federal court assessed § 5001[12] prejudgment interest in an equitable interpleader action against a party that the court held had fully complied with its financial obligations at issue in the action. The federal interpleader statute allowed the interpleading party, Amoco, to choose to either deposit the disputed funds with the court or post a bond for that amount. Amoco chose to post a bond, and thus to retain the use of the disputed funds while the interpleader action proceeded. Even though the court expressly acknowledged that Amoco was fully entitled to proceed in that manner and retain use of the funds, the court nonetheless held that Amoco was required to pay interest to RBC, the party ultimately held to be entitled to the money:

> In this case, **no one is suggesting that Amoco has done anything wrong by retaining the fund for its use. At the same time, however, no one can deny that Amoco benefitted enormously by**

---

[12] *See id.* at 807, n.3 (noting that New York state law in general, and § 5001 in particular, governed the award of interest in the case).

> **adopting the course it did.** This litigation cost Amoco far less than the amount it has either earned or saved by retaining the fund during this time of high interest rates. Furthermore . . . it is most probable that if the fund had been deposited, RBC would have received any interest that accrued on it. The fact that RBC made no demand for such a deposit is no reason to bestow a windfall on Amoco...

Id. at 807 (emphasis added).

Contrary to Excess Insurers' arguments, that result is also fully supported by *Varda*. Arch attempts to distinguish the award of prejudgment interest in *Varda* on the ground that the insurer in that case had been found to have breached an existing coverage obligation, while Excess Insurers supposedly have not. *See* Arch Br. at 36. That misses the point. The insurance policy in *Varda* expressly provided that the insurer had thirty days in which to pay the claim after certain specified events, including the final judgment in the coverage action. *Varda,* 45 F.3d at 640. Just as ACE and Arch claim they have no payment obligation prior to Illinois National's exhaustion, so, too, the *Varda* insurer had no contractual obligation to make a payment sooner than the expiration of that 30-day period. Despite that provision, the *Varda* court held that the insurer was liable for prejudgment interest from the date of judgment, including the thirty days in which it was entitled under the terms of the policy to withhold payment, because the calculation of prejudgment interest could not be affected by the timing of when actual payment was due. *Id.*

Nor is *Varda* distinguishable, as Arch claims, on the ground that the shavings clause "does address how the amount is to be calculated." Arch Br. at 38. To the contrary, as set forth in TIAA-CREF's Opening Brief, uncertainty as to the amount owed to a successful party does not warrant denial of an award of prejudgment interest. *See Continental Cas. Co v. Emp'rs Ins. Co. of Wausau,* 865 N.Y.S.2d 855 (N.Y. Sup. Ct. 2008), *rev'd on other grounds*, 923 N.Y.S.2d 538 (N.Y. App. Div. 2011). In *Continental*, the court expressly held that it could not determine on the record before it the amount that the defendant owed to the plaintiff on the contribution claims at issue. Rather, it held that if the parties did not subsequently settle on an amount, "plaintiffs will have to seek specific amounts of reimbursement in another action." *Id.* at 862. Nonetheless, in the very next paragraph of its opinion, the court agreed that the plaintiff was entitled to a declaration that the defendant, OneBeacon, was liable for prejudgment interest under § 5001 on whatever amount it was later determined to owe to the plaintiff, because "OneBeacon had the benefit of holding on to its funds while plaintiffs expended theirs." *Id.* [13]

---

[13] Excess Insurers attempt to dismiss the import of *Continental Casualty* and the other contribution cases cited in the Opening Brief on the supposed ground that, even though those actions did not assert claims for breach of contract, prejudgment interest could still be awarded because the liability of the defendants stemmed

Thus, even assuming that, like Lumbermans, Amoco and the *Varda* insurers, Excess Insurers were entitled to withhold and use the insurance proceeds applicable to the covered *Bauer-Ramazani* Claim, also like those defendants, Excess Insurers are nonetheless subject to an award of prejudgment interest to account for the time value of those funds that Excess Insurers obtained and TIAA-CREF was denied.[14]

In short, Excess Insurers' suggestion that they may not be held liable for prejudgment interest during any pre-exhaustion period is contrary to the letter, spirit and purpose of prejudgment interest under New York law, and should be rejected in all respects.

---

from their contractual coverage obligations to the underlying non-party policyholders. Arch Br. at 22-23; ACE Br. at 29. That is, in fact, precisely why those cases are directly applicable to the interest dispute here: while the actions at issue were not for breach of contract, their contractual underpinnings mandated the award of § 5001 interest to make the prevailing plaintiff whole.

[14] *Dormitory Authority v. Continental Casualty Co.,* 756 F.3d 166 (2d Cir. 2014) (cited in Arch Br. at 20), is not to the contrary. In that case, the policyholder *never* made a payment toward the claim brought against it by the Dormitory Authority. Instead, Continental Casualty settled directly with the Authority, paying $3.1 million immediately and agreeing that if the Authority obtained a certain ruling, Continental Casualty would pay the Authority an additional $3 million. Thus, the procedural posture in *Dormitory Authority* is analogous to TIAA-CREF's position prior to the time it paid the *Bauer-Ramazani* Settlement, not after it made that payment and Excess Insurers refused to cover it.

B. Excess Insurers Must Pay Prejudgment Interest Because of Illinois National's Breach

Excess Insurers assert that the exhaustion provisions insulate them from liability for prejudgment interest because such interest cannot be granted "without a breach or unlawful conduct committed by the party *from whom interest is sought.*" Arch Br. at 21. That is not a correct statement of New York law, nor does it track the actual language of the prejudgment interest statute; to the contrary, under New York law, an award of prejudgment interest may be entered even against a party who was contractually entitled to retain the funds at issue pending litigation. In addition, the cases Excess Insurers cite do not require a finding of "breach or unlawful conduct" as a prerequisite for an interest award.

For example, Arch cites *Calgon Carbon Corp. v. WDF, Inc.,* 700 F. Supp. 2d 408, 418 (S.D.N.Y. 2010) as rejecting an award of interest against "Party A" where "Party B" withheld the funds in question. Arch Br. at 22. That is not the relief sought here; rather, TIAA-CREF seeks an award of interest against Excess Insurers to account for the time value of money *they* withheld. Even if Excess Insurers had withheld those funds solely on the basis of Illinois National's failure to exhaust its limits – which they did not – nothing in *Calgon* negates TIAA-

CREF's right to interest on funds withheld "because of" a breach by Illinois National.[15]

Similarly, Arch's reliance on the trial court decision in *Doubet, LLC v. Trustees of Columbia University in the City of New York,* 941 N.Y.S.2d 537 (N.Y. Sup. Ct. 2011) (Arch Br. at 21) ignores the fact that interest was denied in that case because the party from whom the money was allegedly withheld had no property interest in the funds – and because it sought prejudgment interest solely as a punitive measure against the defendant. That fact is made even clearer in the Appellate Division's affirmance of the trial court decision, which Arch neither cites nor mentions:

> Petitioner is not entitled to prejudgment interest as a matter of right under CPLR 5001(a), **since the restraining notices did not confer**

---

[15] *Manufacturer's & Traders Trust Co. v. Reliance Insurance Co.,* 8 N.Y.3d 583, 589-90 (N.Y. 2007) and *Bank of N.Y. Trust Co., N.A. v. Franklin Advisers, Inc.,* 726 F.3d 269, 282 (2d Cir. 2013) (cited in Arch Br. at 30) are distinguishable on similar grounds. Both cases were interpleader actions brought to determine rights to funds deposited with the court, and held that interest could not be assessed against the opposing party, which had not retained the use or benefit of the deposited funds, and also *could not be ordered to pay any sum,* because the funds in dispute were held by the court. Here, in contrast, the declaratory judgment against Excess Insurers is, in effect, the award of the sum of the insurance proceeds applicable to the Underlying Actions, which sum ACE and Arch continue to hold and whose benefits they retain to this day. *See In re Hoffman,* 712 N.Y.S.2d 165, 166 (N.Y. App. Div. 2000) (§ 5001 prejudgment interest warranted in surrogate's proceeding "[s]ince the petitioner's claim against the respondents is *essentially in the nature of a breach of contract. . . .*") (emphasis added).

> **upon it a lien or interest in the property**. . . . Nor is it entitled to prejudgment interest on the ground that respondent's violation of the restraining notice was willful. We agree with the motion court that petitioner improperly seeks a punitive award rather than "compensation for the advantage received from the use of that money over a period of time."

Doubet, LLC v. Trs. of Columbia Univ. in the City of New York, 952 N.Y.S.2d 16, 18 (N.Y. App. Div. 2012) (emphasis added).

In contrast, TIAA-CREF, through five years of litigation, hundreds of pages of summary judgment and post-verdict briefing, and a six-day jury trial has established its right to the insurance proceeds applicable to the Underlying Actions. It seeks interest on those funds not to punish Excess Insurers, but to restore the parties to the status quo they would have occupied if the seamless insurance program for which TIAA-CREF paid its premiums had been applied as the Superior Court and the jury concluded it should have been.[16]

---

[16] The non-New York cases cited by Excess Insurers also will not support their effort to evade an award of prejudgment interest here. For example, in *Great Lakes Dredge & Dock Co. v. City of Chicago*, 260 F.3d 789, 796 (7th Cir. 2001) (cited in ACE Br. at 31, n.63), as in *W.R. Grace* and *Segal,* the policyholder's total liabilities fell some $30 million short of the attachment point of the excess policy in question, meaning that coverage under the excess policies, no matter what the prerequisites to actual payment, was not implicated by the existing claim. *Insituform Technologies, Inc. v. American Home Assurance Co,* 2008 WL 886026 (D. Mass. 2008) (cited in ACE Br. at 30, n.63) is even more inapt, and not merely because the decision was later vacated by the First Circuit when it found that the excess insurer was not liable for the loss. Rather, in purporting to apply Missouri

C. Alternatively, Excess Insurers Must Pay Prejudgment Interest Because of Their Anticipatory Breach

As set forth above, TIAA-CREF is entitled to prejudgment interest on its claims against Excess Insurers regardless of whether their conduct gave rise to a claim for anticipatory breach. Their anticipatory breach merely provides an alternative basis to support prejudgment interest, notwithstanding their multitude of arguments as to why a denial of coverage on substantive grounds that they maintain to this day does not support such a finding.

Both Arch and ACE suggest that they cannot be found to have anticipatorily breached their coverage obligations with respect to the *Bauer-Ramazani* claim because they never made an "overt communication of an intention not to perform." Arch Br. at 33. In fact, ACE states that it "has not even had the opportunity to make an unequivocal refusal [to pay its policy limits]." ACE Br. at 21. ACE ignores that it responded to TIAA-CREF's request for permission to settle the

---

law, the Massachusetts court in *Institutform* failed to note that two years earlier, in *KV Pharmacuetical Co. v. National Union Fire Insurance Co. of Pittsburgh, Pa.*, 2006 WL 1153825, at *2-3 (E.D. Mo. May 1, 2006) the Missouri federal court held that Missouri law will not allow an excess insurer to evade prejudgment interest on the ground that the primary policy was not yet exhausted: "[T]he [excess insurer] cannot take advantage of the primary insurer's denial of coverage to delay its own prejudgment interest liability."

Bauer-Ramazani Action, by stating that TIAA-CREF need not seek such permission *because the claim had been denied.* JA1704.

Contrary to ACE's attempt to recast the statements in its letter (ACE Br. at 21, n.44), it admits that the reason TIAA-CREF was relieved of the obligation to seek such consent was because the claim had been denied. Since Arch and ACE both argue that compliance with policy conditions – including obtaining prior consent to settlements – is *only* excused when there has been a breach or an anticipatory breach of the contract, ACE's pre-litigation admission that its denial of the *Bauer-Ramazani* Claim excused the policy condition of consent is equally an admission that, if wrongful, that denial was an anticipatory breach (or a breach).[17]

---

[17] In contrast, ACE's description of the requirements for anticipatory breach actually describe, and thus would incredibly require, both an actual breach of contract and a violation of the orders of the Court, before an anticipatory breach could be found, *i.e.*: (1) the Superior Court must reject all of ACE's coverage defenses; (2) this Court must resolve all appeals from those rulings in TIAA-CREF's favor; (3) the underlying insurers must pay out their full limits; and then and only then (4) ACE must then nonetheless refuse to pay the Claim. ACE Br. at 21; *see also* Arch Br. at 32 (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*"). That is far from the concept of an anticipatory breach, which requires only a statement by the obligor that "the obligor *will commit* a breach that would of itself give the obligee a claim for damages." *Princes Point LLC v. Muss Dev. LLC,* 87 N.E.3d 121, 133 (N.Y. 2017).

Arch's attempt to avoid the consequences of its own assertion of substantive bars to coverage is more involved, but no more valid. As an initial matter, Arch relies on cases which, like *Segal* and *W.R. Grace,* deal with whether and to what extent an insurer's denial of coverage with respect to one claim is sufficient to constitute a repudiation of the contract as a whole so as either to allow the policyholder to sue for damages it had not yet suffered[18] or to be relieved of the obligation to comply with policy conditions for future claims.[19] Whatever relevance those cases may have to whether a policyholder can extend the effect of a denial of a particular claim to coverage for, or the policyholder's obligations with respect to other claims, they have none here, where the claim of anticipatory breach and waiver of defenses relates to the very claim for which coverage was

---

[18] *Segal,* 2006 WL 2102090 at *3-4; *W.R. Grace* 1996 WL 306372 at *4-5; *Harriprashad v. Metropolitan Prop. & Cas. Ins. Co.,* 2011 WL 6337699, at *2 (E.D.N.Y. Nov. 17, 2011) (absent total repudiation of policy, policyholder entitled to seek damages only for installment payments currently owed, not payments that will accrue in future).

[19] *See, e.g., Bear Wagner Specialists, LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.,* 2009 WL 2045601, at *5-7 (N.Y. Sup. Ct. July 7, 2009) (denial of civil claims does not relieve policyholder of notice requirements for related, but separate criminal claims); *AMTRAK v. Steadfast Ins. Co.,* 2009 U.S. Dist. LEXIS 21311, at *39 (S.D.N.Y. Mar. 5, 2009) (denial of specific claim does not relieve policyholder of duty to give notice of other claims); *Am. Commer. Lines LLC v. Water Quality Ins. Syndicate,* 679 Fed. App'x 11, 16 (2d Cir. 2012) (repudiation issue raised with respect to notice requirement).

denied. As the New York Appellate Division held in *State Farm Ins. Co. v. Domotor,* 697 N.Y.S.2d 348, 349 (N.Y. App. Div. 1999):

> An insurance carrier may not insist upon adherence to the terms of its policy after it has **repudiated liability <u>on the claim</u> by sending a letter disclaiming coverage** . . . for "[o]nce an insurer repudiates liability . . . the [in]sured is excused from any of its obligations under the policy."

(emphasis added; citations omitted); *see also Rajchandra Corp. v. Title Guar. Co.,* 558 N.Y.S.2d 1001, 1005 (N.Y. App. Div. 1990) (insurer cannot enforce policy condition with respect to claim "after it has *repudiated liability on the claim* . . . by sending a letter denying liability . . . or denying liability in an answer to a complaint in an action on the policy.") (emphasis added; citations omitted). As in *J.P. Morgan,* Arch's denial of coverage for reasons other than a supposed lack of underlying exhaustion, on a claim that resulted in existing damages sufficient to reach its layer of coverage, relieved TIAA-CREF of compliance with conditions *for that claim* – and warrants an award of prejudgment interest.

That conclusion is supported by Arch's own authority. Arch cites *Kane v. Fiduciary Insurance Co. of America,* 980 N.Y.S.2d 72 (N.Y. App. Div. 2014) for the proposition that a disclaimer of a single claim will not constitute a repudiation of the policy. Arch Br. at 36. In *Kane,* however, the court held that the disclaimer of coverage was insufficient because it was "based solely on the primacy of

coverage" – *i.e.* not that the claim did not fall within the terms of the policy, but that some other applicable insurer must pay first. 980 N.Y.S.2d at 72.

Arch, in contrast, chose not to rest its non-payment solely on a lack of exhaustion but to adopt the substantive defenses asserted by Illinois National[20] and pursue its own consent defense. Moreover, in light of Arch's refusal to abandon those defenses and its efforts to advance them even now in its appeal to this Court, Arch's attempt to depict its denial as preliminary or equivocal is an insupportable fiction that does not preclude the award of § 5001 prejudgment interest.

D. The Denial of Prejudgment Interest under § 5001 Constituted Reversible Error Even under an Abuse of Discretion Standard

While ACE concedes that the Superior Court's denial of prejudgment interest is subject to *de novo* review by this Court (ACE Br. at 15), Arch suggests that the denial was merely the Superior Court's exercise of its broad discretion to set the date when such interest would accrue, by determining that the date had not yet arrived. Arch Br. at 23. As an initial matter, that depiction is at odds with the decision of the Superior Court, which clearly reflects that Judge Jurden believed

---

[20] Arch's assertion that its denial was equivocal because it was made with respect to the 09-10 policy rather than the 07-08 policy (Arch Br. at 34) is a meaningless red herring, as the terms of the two policy years are identical, and as Arch did not in any way alter its position after the Superior Court determined that the *Bauer-Ramazani* Claim fell under the early policy period.

that she was precluded from awarding such interest as a matter of law. Interest Ruling, Ex. G at 23-25 (JA6673-75) (holding that absence of judgment against ACE and Arch for breach or anticipatory breach "necessarily precludes any award for prejudgment interest").

More importantly, the Superior Court's denial of prejudgment interest constituted reversible error even if an abuse of discretion standard is applied. Addressing the interest issue in equitable actions, where the decision whether to grant or deny interest is not barred, but left to the court's discretion, New York appellate courts have routinely held that a trial court abuses that discretion when it denies an award of interest necessary to make the prevailing plaintiff whole. *See, e.g., Margo Props., Inc. v. Nelson,* 473 N.Y.S. 2d 822, 823 (N.Y. App. Div. 1984) (trial court abused its discretion in denying prejudgment interest in action for specific performance where such interest was necessary "to fully compensate the [plaintiff] for the loss"); *Jackson v. Hunt, Hill & Betts,* 247 N.Y.S.2d 720, 724 (N.Y. App. Div. 1964) (trial court abused its discretion by denying interest in partnership accounting despite fact that defenses to action were raised in good faith; "[t]he most significant factor. . . is that by virtue of unsuccessful litigation defendants have had the use of plaintiff's share of the fees collected after his withdrawal").

Of the parties remaining in this case, there is only one that has paid money in connection with the Underlying Actions, only one that has thus been denied the use of those funds since that payment, and only one that had paid premiums to ensure that it would not have to incur precisely such losses: TIAA-CREF. As New York's highest court held in *Love v. State*, the very purpose of prejudgment interest is to balance those scales in favor of the party that should have had the benefit of the money from the start: "[A] rule that would permit the defendant to retain the cost of using the money (i.e. interest) would provide the defendant with a windfall." 78 N.Y.2d at 545.

That is particularly important here given that Excess Insurers did not refuse payment solely on the ground that Illinois National had not yet paid its policy limits. Rather, they consistently and repeatedly asserted substantive objections to coverage, forcing TIAA-CREF to engage in protracted multi-party litigation in order to vindicate its right to payment. As the court held in *Olin Corp. v. OneBeacon America Insurance Co.*, 864 F.3d 130, 152 (2d Cir. 2017):

> [I]t has been OneBeacon's position all along that it has *no* obligation to indemnify Olin. It has denied coverage for over twenty years. Having been found liable for coverage to Olin, OneBeacon cannot now benefit from its tactical decision to deny its contractual obligation to indemnify Olin for covered losses by avoiding liability for interest. **It is not the intention of §5001(b) that an insurer could deny coverage for years in the face of reasonable demands and then,**

once it is adjudicated liable, avoid paying any prejudgment interest.

(emphasis added).

Accordingly, whether or not Excess Insurers' assertion of bars to coverage other than exhaustion constituted an anticipatory breach of Excess Insurers obligations – which they did (*see supra,* Point I(C)) – it ensured that TIAA-CREF would be denied, and Excess Insurers would retain, the use of the funds that should have been used to pay for the fully-covered Losses incurred in connection with the Underlying Actions. On this record, the Superior Court's denial of prejudgment interest to TIAA-CREF thwarted the bedrock purpose for such interest and constituted an abuse of discretion.

E. Excess Insurers Cannot Avoid an Award of § 5002 Interest

To evade an award of post-decision/post-verdict interest, Arch insists that it has not been found liable. Arch Br. at 50 ("the jury verdict did not find Arch liable for any claim"). By logical extension, § 5002 interest could *never* be granted where issues are efficiently resolved prior to trial and juries are asked to issue special verdicts on the "last" pieces of the "puzzle." In this case, the jury's verdict resolved the last issues necessary to establish Arch's liability so as to allow the entry of judgment declaring that, contrary to Arch's arguments, it was liable for the Underlying Actions under the terms of its Policy. Indeed, Arch confirmed that fact

by agreeing with all other parties that in the wake of the jury's verdict, final judgment could properly be entered with respect to coverage for the Underlying Actions. Given that admission, Arch cannot now be heard to suggest that its liability for that Claim was not resolved when the jury rejected its last remaining defense.

ACE, on the other hand, engages in a "simple thought experiment" to argue that because the shavings clause could result in a reduction in the amount of its liability prior to the entry of judgment, § 5002 interest cannot be awarded on the time value lost to TIAA-CREF from the summary judgment ruling on ACE's defenses to coverage through to entry of judgment. ACE Br. at 32. That suggestion is directly contradicted by the ruling of New York's highest court in *Love* that, even in bifurcated proceedings, where the amount of the defendant's damage obligations are not determined until months or years after the determination of liability, mandatory § 5002 post-verdict/decision interest begins to run *from the conclusion of the liability phase* because "[a]t that point, the defendant's obligation to pay the plaintiff is established, and the only remaining question is the precise amount that is due." 78 N.Y.2d at 544.

If, during the period prior to entry of judgment, the *amount* of ACE and Arch's liability is changed by operation of the shavings clause, that change will

concomitantly alter the amount of the § 5002 prejudgment interest for which they are liable.[21] However, as the New York Court of Appeals held in *Love,* that uncertainty as to the ultimate amount of ACE and Arch's liability does not warrant a denial, in its entirety, of § 5002 interest commencing on the date of the verdict or summary judgment decision.

---

[21] The Superior Court never ruled on how the timing of TIAA-CREF's settlement with St. Paul would impact the calculation of prejudgment interest, and in that regard did not address the arguments set forth in Point II (C)(2) of the Arch Br. With respect to Arch's Point II (C)(1), as the Superior Court correctly held, the shavings clause entitles ACE and Arch to a deduction reflecting only the difference between the St. Paul limits and that of the St. Paul settlement. Moreover, to the extent that the St. Paul settlement includes the payment of prejudgment interest owed by St. Paul, that has no effect on the separate loss to TIAA-CREF occasioned by the loss of use of the proceeds of the ACE and Arch Policies applicable to the Underlying Actions.

II. IF ACE AND ARCH ARE EXCUSED FROM THEIR OBLIGATIONS FOR PREJUDGMENT INTEREST, THOSE AMOUNTS ARE PROPERLY CHARGED AGAINST ILLINOIS NATIONAL AS CONSEQUENTIAL DAMAGES

Illinois National spends much of its argument explaining why it cannot be held liable under the terms of § 5001 for prejudgment interest on insurance proceeds held by ACE and Arch. Illinois National Br.[22] at 17-24. That argument misses the point – to the extent that TIAA-CREF suffers a loss for which it is not compensated in the form of prejudgment interest from Excess Insurers, that loss is recoverable as *consequential damages* from Illinois National.

Illinois National also argues that it was not reasonably foreseeable that Excess Insurers would raise and litigate "their own" coverage defenses to evade liability for coverage of the *Bauer-Ramazani* claim. Illinois National Br. at 29. Again, that is not the point. In a seamless insurance program, designed with layered primary and excess policies to provide coverage for precisely the types of claims at issue here within their respective layers and trigger points, any primary carrier could foresee that if it failed or refused to pay a claim large enough to reach

---

[22] "Illinois National Br." refers to the 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, dated March 9, 2018.

the limits of follow-form excess policies, that failure would result in the policyholder being denied not only its primary but its excess coverage as well. Just as the "nature and purpose" of the business interruption insurance in *Bi-Economy Market, Inc. v. Harleysville Insurance Co. of New York*, 886 N.E.2d 127 (N.Y. 2003) informed the nature of the consequences the parties could reasonably foresee from a breach of the insurer's obligations, so, too, the layered, follow-form nature of the seamless program at issue here makes the rippling effect of Illinois National's denial not only foreseeable, but clear.

Moreover, contrary to Illinois National's assertion (Illinois National Br. at 28), TIAA-CREF does not contend that "foreseeability is the only prerequisite to consequential damages." Rather, it contends, as *Bi-Economy* and its progeny hold, that consequential damages are available for a breach of the obligation of good faith and fair dealing, even though the policyholder has not asserted (and, indeed, under New York law, cannot assert) a separate claim for bad faith.

For example, in *Roman Catholic Diocese of Rockville Center v. General Reinsurance Corp.*, 2016 WL 5793996, at *3 (S.D.N.Y. Sept. 23, 2016), the court upheld a claim for consequential damages based on allegations that the insurance company had continued to deny coverage in the face of "clear regulatory findings and precedent" contradicting its positions.

. That is precisely the type of claim and evidence which, under *Bi-Economy* and its progeny, will support a claim for consequential damages.

TIAA-CREF agrees that Excess Insurers should be held liable under § 5001for the prejudgment interest the New York Legislature intended and the New York courts have awarded to shift to TIAA-CREF the time value of the insurance proceeds they withheld. But to the extent that the Court holds that Excess Insurers have no obligation to pay that interest because Illinois National refused to pay its policy limits towards the Underlying Actions, the loss of that time value should be borne by Illinois National, not TIAA-CREF.

CONCLUSION

For the reasons set forth above, TIAA-CREF respectfully requests that this Court (1) reverse the denial of § 5001 and § 5002 interest, and enter an award for such interest against ACE and Arch; or, alternatively, reverse the denial of consequential damages against Illinois National; and (2) remand to the trial court for entry of judgment after calculation of the amounts owed under item (1).

POTTER ANDERSON & CORROON LLP

By: */s/ Jennifer C. Wasson*
Jennifer C. Wasson (No. 4933)
Andrew H. Sauder (No. 5560)
Hercules Plaza – Sixth Floor
1313 North Market Street
Wilmington, Delaware 19801
Telephone: (302) 984-6000
Facsimile: (302) 658-1192
jwasson@potteranderson.com
asauder@potteranderson.com

Attorneys for 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

Of Counsel:

Robin L. Cohen
Adam S. Ziffer
Michelle R. Migdon
MCKOOL SMITH P.C.
One Bryant Park, 47th Floor
New York, NY 10036
Telephone: (212) 402-9400
Facsimile: (212) 402-9444

Dated: March 30, 2018
PUBLIC VERSION
Dated: April 16, 2018