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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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 REGARDING WAIVER OF ZURICH'S NOTICE AND CONSENT DEFENSES

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TIAA-CREF[1] hereby submits its Reply Brief in response to Zurich's Answering Brief[2] and in further support of its appeal from the Superior Court's denial of TIAA-CREF's motion *in limine* and for JMOL against Zurich on the waiver issue or, alternatively, for a new trial on that issue.

PRELIMINARY STATEMENT

On the first page of its Answering Brief, Zurich characterizes the alleged delay in TIAA-CREF's notice to Zurich of the *Bauer-Ramazani* Action and settlement as "inexcusable." Zurich Br. at 1. According to Zurich, because notice of that claim and settlement was first given to it in this action, Zurich's nebulous reservation of the right to rely on any policy term as an affirmative defense to coverage somehow suffices to avoid a waiver of its notice and consent defenses, even though it would have been insufficient to avoid waiver of those defenses prior to litigation. Unfortunately for Zurich, however, notice first given in a pleading is

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[1] All short-form names and capitalized terms have the same meaning as that 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 Br.").

[2] "Answering Brief" or "Zurich Br." refers to the Answering Brief of Defendant Below/Appellee Zurich American Insurance Co., dated March 9, 2018.

excused by an insurer's failure to assert specific notice and consent defenses in its answer or during a coverage litigation. The remaining insurer defendants who alleged that they were relieved from their coverage obligations by the timing of TIAA-CREF's notice and lack of consent understood this, and asserted them as affirmative defenses to coverage.

Zurich does not deny that it failed to assert either defense. Instead, it argues that, by merely denying the assertion in TIAA-CREF's complaint that notice was timely given (confirming that it knew of the facts supporting the defense), and asserting a boilerplate, catchall defense relating to all policy conditions, Zurich adequately preserved its notice and consent defenses.

That argument fails on several grounds. First, while Delaware law may control the procedural adequacy of a pleading in this case, New York law controls substantive contract issues, including whether and to what extent the insurer has preserved its right to raise notice and consent defenses. Second, New York courts have held that a boilerplate reservation of rights – which is the strongest characterization that can be given to the affirmative defense Zurich now relies on to preserve its claim to be excused from coverage – is insufficient to avoid waiving a specific coverage objection known but not asserted. Also, contrary to Zurich's characterization, denying the Complaint's allegation that notice was timely does

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not assert a late notice bar to coverage – but it *is* an admission that Zurich knew all it needed to know to make such an assertion, if it chose to do so. Third, Zurich's belated claim that its pleading actually contained an oblique assertion of a late notice defense is belied by its failure to articulate such a defense (along with any consent defense) in discovery and motion practice until the eve of trial. Finally, where an insurer fails to assert a bar to coverage in a timely manner, prejudice to the insured is presumed. Zurich's conclusory assertion that TIAA-CREF was not harmed by Zurich's failure to meet those standards is therefore legally insufficient. In short, notwithstanding Zurich's arguments, the Superior Court committed reversible error in submitting Zurich's notice and consent defenses to the jury.

The Superior Court also reversibly erred by instructing the jury that TIAA-CREF was required to prove Zurich's waiver by clear and convincing evidence, rather than a preponderance of the evidence standard. Zurich defends this ruling by equating cases holding that waiver must be unequivocal and deliberate with the standard by which that unequivocal and deliberate action must be proved. But (except for one inapposite lower-court decision) *none* of the New York cases on which Zurich relies even deals with the burden of proof to be applied to a waiver defense. In contrast, New York's highest court has issued binding precedent on this topic that should have been, but was not, followed by the Superior Court.

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Even if waiver were indeed a trial issue, the Superior Court's reversible error on the burden of proof requires a new trial so that waiver can be decided by a properly-instructed jury.

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RESPONSE TO ZURICH'S STATEMENT OF FACTS

In glaring contrast to the full timeline of the waiver issue set forth in TIAA-CREF's Opening Brief (Opening Br. at 43), Zurich condenses two years of coverage litigation into a truncated description designed to gloss over its failure to raise notice and consent defenses until the very end stages of this case – and long after it was aware of the facts supporting them. For example, Zurich does not deny that its Answer to the Amended Complaint specifically asserted that coverage was not available because the settlement constituted a claim for disgorgement, but not because notice was untimely or consent lacking. TA0325-326.

The record similarly belies Zurich's assertion that it "continued to raise" these defenses during discovery. In fact, Zurich's sole oblique mention of "notice" during discovery came nearly two years after the Complaint was filed, in response to an interrogatory asking for the bases of Zurich's contention regarding when the Underlying Actions were deemed "first made," not in response to its interrogatory seeking factual support for any additional affirmative defenses it intended to raise or rely upon in this action. JA1275-76.

Nor, contrary to the depiction in its Statement of Facts, did Zurich seek summary judgment on either its notice or consent defenses. Zurich Br. at 10. Rather, Zurich merely dropped a *footnote* in a summary judgment opposition brief (concerning an entirely different defense to coverage), and attempted to preserve

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only its consent-to-settlement defense and reserve the right to raise it at trial. JA4784 at n.1.

Further, Zurich's assertion that TIAA-CREF was not prejudiced by Zurich's failure to raise these defenses earlier is similarly at odds with the record. Zurich Br. at 12; *see* JA5181-83 (court noting "that's not something you just wait and drop in an opposition to a motion for summary judgment on attorney's fees... [H]ow are they supposed to prepare for trial, with an eye toward trial when you have a broad affirmative defense, anything in the policy is fair game?"). Similarly, although the Superior Court (erroneously) denied TIAA-CREF's motion *in limine* to exclude Zurich's belated defenses, the Superior Court again acknowledged that Zurich's actions prejudiced TIAA-CREF because TIAA-CREF "did not see this coming" and thus did not move for summary judgment on the notice or consent defenses. JA5263 at 22:14-20. As the Superior Court noted to Zurich's counsel, TIAA-CREF "would have had this resolved on summary judgment, or at least attempted to do that. And now you're saying they can't raise it on a motion in limine because it's not properly the substance of a motion in limine, aren't you?" JA5261 at 13:14-19.

In fact, TIAA-CREF took discovery regarding, and sought summary judgment with respect to, every defense raised by every other carrier in this action

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(notice, consent, and others). That discovery enabled TIAA-CREF to defeat Arch's consent defense at trial. Zurich's assertion that TIAA-CREF was not prejudiced by its inability to inquire into more fully or attempt to dismiss the Zurich defenses before trial is insupportable on this record.

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ARGUMENT

I. ZURICH CANNOT JUSTIFY THE SUPERIOR COURT'S ERRONEOUS REFUSAL TO DECIDE WAIVER AS A MATTER OF LAW

A. New York Law Controls the Waiver Issue

In a futile effort to justify its silence and evade a finding of waiver, Zurich argues that the law of Delaware, not New York, controls the waiver issue.[3] Zurich Br. at 10-11. Zurich relies solely on its Delaware pleading to argue that, under Delaware law, it did not substantively waive the right to raise a late notice defense. However, that substantive issue is controlled by New York insurance law. Indeed, the Superior Court itself recognized that the issue as presented was one of substantive New York law, as it addressed and distinguished only New York cases in denying TIAA-CREF's JMOL.[4] JA6644.

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[3] Contrary to Zurich's suggestion (Zurich Br. at 10-11), TIAA-CREF never conceded below that Delaware law controls. In its briefing to the Superior Court on the waiver issue, both in its initial motion *in limine* and its JMOL briefs, TIAA-CREF presented the Superior Court with New York law on the waiver issue, and explained at the motion *in limine* and JMOL hearings the distinction between substantive New York insurance law, which TIAA-CREF relied on, and Delaware procedural pleading law, which Zurich attempts to use here as a shield. JA5259-60; TA0648-56; TA0843-48; TA0875-81.

[4] There might be, in some cases, both substantive and procedural aspects to waiver. TIAA-CREF therefore cited both Delaware and New York law on the waiver issue to the Superior Court.

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Moreover, the Delaware cases on which Zurich relies actually support the application of New York law to the substantive sufficiency of Zurich's purported reservation of the notice defense. In *Martinez v. E.I. Dupont de Nemours & Co.*, 82 A.3d 1, 14 n.36 (Del. Super. Ct. 2012), *aff'd*, 86 A.3d 1102 (Del. 2014) (Zurich Br. at 20) for example, as Zurich notes, the court applied Delaware law to determine the *procedural* sufficiency of the complaint under the Delaware pleading rules. Nonetheless, it ultimately dismissed the case on *forum non conveniens* grounds in part because Argentinian law, which would apply to the substantive validity of the matters asserted in the complaint, would permit certain substantive forms of damage to be alleged that substantive Delaware law would not. *Id.* at 24-25. Similarly, in *VICI Racing, Ltd v. T-Mobile USA, Inc.*, 763 F.3d 273, 300 (3d Cir. 2014), the court in a federal diversity action applied Delaware state law to determine the substantive sufficiency of the affirmative defense of mitigation asserted in the answer; under the *Erie* doctrine, if that had been a matter of procedural rather than substantive law, federal law would have governed the issue.[5]

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[5] Zurich's reliance on *Baxter Int'l, Inc. v. Rhone-Poulenc Rorer, Inc.*, 2004 WL 2158051 (Del. Ch. Sept. 17, 2004) is even more misplaced, as that case does not suggest that any law other than Delaware would apply either to the procedural or substantive matters at issue in the case. *See id.* at *13-15 (noting that defendant

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The adequacy of Zurich's waiver or purported reservation of rights – whether contained in a pleading or elsewhere – is a matter of substantive insurance law, and is thus properly governed by the law of New York.[6]

B. Zurich Cannot Avoid Black-Letter New York Law Barring the Belated Assertion of Alleged Defenses to Coverage

Zurich's attempts to evade the New York authorities requiring that its belated notice and consent defenses be stricken as a matter of law fare no better than its broader attempt to avoid the application of New York law altogether. For example, Zurich attempts to distinguish *Burt Rigid Box, Inc. v. Travelers Property & Casualty Corp.*, 302 F.3d 83 (2d Cir. 2002) and *In re Balfour Maclaine International Ltd.*, 873 F. Supp. 862 (S.D.N.Y. 1995) on the ground that the policyholder in those cases provided notice to the insurer prior to the commencement of the coverage litigation. Zurich Br. at 25-27. That is a

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had sought to raise affirmative defenses based on substantive Delaware law). And, to the extent Delaware law applies, under *Baxter*, Zurich's provision of rote and uninformative responses to discovery requests calling for factual bases for affirmative defenses precludes its ability to rely on those defenses at trial. *Id.* at *14; *see also VICI*, 763 F.3d at 301 (3d Cir. 2014).

[6] For that same reason, Zurich's citation to Delaware cases governing the amendment of pleadings (Zurich Br. at 22-23) is inapt, as the proper question before the Court was whether the assertion of notice and consent defenses as bars to coverage was timely as a matter of substantive New York insurance law, not whether or when a substantively preserved notice and consent defense could have been asserted procedurally as a matter of Delaware pleading rules.

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distinction without a difference. In those cases, as here, the linchpin of waiver was not when the insurer became aware of facts on which it later relied to assert late notice as a bar to coverage, but what it did (or, more precisely, did not do) once it had that knowledge.[7] *See also Olin Corp. v. Ins. Co. of North Am.*, 2006 WL 509779, at *4 (S.D.N.Y. Mar. 2, 2006) (plaintiff's notice letter gave insurers enough information to put them on notice of a potential late notice defense, and failure to raise it in reservation of rights letter constituted waiver). Here, by Zurich's own admission in denying the paragraphs of the Complaint alleging that notice was timely, Zurich knew all it needed to know to assert late notice as a bar to coverage no later than the time it served that Answer. Yet for years, it not only failed to allege a specific notice defense, it failed even to list such a defense in response to interrogatories specifically designed to elicit the factual bases for its denial of coverage.

Neither can Zurich evade black-letter New York law holding that "an insurer is deemed, *as a matter of law*, to have intended to waive a defense to coverage where other defenses are asserted, and where the insurer possesses sufficient knowledge (actual or constructive) of the circumstances regarding the unasserted

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[7] Indeed, in *Burt Rigid Box,* although the insurer asserted its late notice defense in response to interrogatories, the court still held that it waived that defense by failing to raise it in answering the complaint. *Id.* at 96.

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defense," and that the failure to assert the defense at issue at that time is deemed "conclusive" evidence of that intent. *New York v. Amro Realty Corp.*, 936 F.2d 1420, 1431 (2d Cir. 1991); *N. Am Philips Corp. v. Aetna Cas. and Surety Co.*, 1995 WL 628443, at *3 (Del. Super. Ct. Apr. 10, 1995) (waiver by failure to specifically assert one notice defense in Answer, while asserting another); *see also Luria Bros. & Co. v. Alliance Assurance Co.,* 780 F.2d 1082, 1091 (2d Cir. 1986) (when insurer has actual or constructive knowledge of circumstances regarding potential defense, yet asserts only other defenses, insurer waives unasserted defense as matter of law); *Balfour*, 873 F. Supp. at 862 (holding insurer waived a defense by failing to include it in insurer's declaratory judgment complaint against policyholder).

In an effort to avoid those holdings, Zurich suggests that *Amro* did not reach the question of whether a general denial of coverage based on unspecified terms or conditions of the policy would suffice to preserve unasserted defenses, but that subsequent New York cases addressing that issue have found no waiver. Zurich Br. at 30-31. In fact, however, the cases cited by Zurich on that point do not support its arguments.

For example, the court in *MCI LLC v. Rutgers Casualty Insurance Co.*, 2007 WL 2325867 (S.D.N.Y. Aug. 13, 2007) affirmed the proposition that New York

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courts will find waiver *as a matter of law* when the insurer disclaims on other grounds without mentioning late notice until a later date. *Id.* at *9 (citing *Marino v. New York Tel. Co.*, 1992 WL 212184, at *7 (S.D.N.Y. Aug. 24, 1992); *AMRO Realty*, 936 F.2d at 1431-33). Contrary to Zurich's suggestion (Zurich Br. at 30), the court in *MCI* held the insurer's reservation of rights language was *not* limited to the subsequent discovery of relevant information. 2007 WL 2325867, at *15. Because all of the defenses asserted by the insurer were based upon the same facts the insurer knew when it first responded to the claim, the general reservation of rights language did not reserve the right to assert the defenses later. *Id.*

Similarly, the insurers in *Globecon Group, LLC v. Hartford Fire Insurance Co.*, 434 F.3d 165, 169 (2d Cir. 2006) and *Home Décor Furniture and Lighting, Inc. v. United National Group*, 2006 WL 3694554, at *6 (E.D.N.Y. Dec. 14, 2006) (cited in Zurich Br. at 31-32) did what Zurich here did not: raise the specific defense at issue upon learning the facts necessary to its assertion. Thus, the insurer in *Globecon* responded to a claim with a reservation of rights stating it needed time to investigate potential coverage of the claim. As a result of that investigation, the insurer promptly raised its disputed defense one month after the coverage complaint was filed, so the court found it did not waive that defense. *Id.* at 169, 176. Similarly, the insurer in *Home Décor* quickly supplemented its general

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disclaimer and clarified its intent to raise the notice defense. 2006 WL 369554 at *7.[8]

Neither can Zurich evade the holding of *Viking Pump, Inc. v. Liberty Mutual Insurance Co.*, 2007 WL 1207107, at *29 (Del. Ch. Apr. 2, 2007), under New York law, that "when an insurer states grounds for potentially disclaiming liability, it waives all other possible grounds for disclaimer" and that a general reservation of rights is not sufficient to preserve an insurers' right to raise defenses in the

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[8] The remaining cases Zurich cites are inapposite, either because the insurer asserted the defense in question long before trial (*see Lugo v. AIG Life Ins. Co.*, 852 F. Supp. 187 (S.D.N.Y. 1994) (dismissing time-barred action based on insurer's defense raised in response to complaint); *MCC Non Ferrous Trading Inc. v. AGCS Marine Ins. Co.*, 2015 WL 3651537, at *4 n.5 (S.D.N.Y. June 8, 2015) (insurer included facts relevant to its defense in its Answer after reserving all rights in letter); *Nat'l Restaurants Mgmt., Inc. v. Exec. Risk Indem., Inc.*, 758 N.Y.S.2d 624, 625 (N.Y. App. Div. 2003) (insurer invoked policy exclusion in its first response to amended complaint); *Gen. Ins. Co. of Am. v. Marvel Enters., Inc.*, 2004 WL 483212, at *4-5 (N.Y. Sup. Ct. Mar. 9, 2004) (insurer raised defense in declaratory judgment complaint)), or because waiver was precluded by other facts in the case. *See, e.g., Mount Vernon Fire Ins. Co. v. William Monier Constr. Co.*, 1996 WL 447747, at *5 (S.D.N.Y. Aug. 7, 1996) (noting waiver inapplicable where insured's claim is outside scope of coverage). Finally, in several of the cases on which Zurich relies, the court found that the insurance companies did not have knowledge of the facts supporting the defenses – a fact belied here by a review of the Complaint and Zurich's denial of TIAA-CREF's assertion that notice was timely without actually asserting late notice as a defense to coverage. *See Tudor Ins. Co. v. First Advantage Litig. Consulting, LLC*, 2012 WL 3834721, at *5 (S.D.N.Y. Aug. 21, 2012) (insurer raised defense after reviewing verdict sheet in underlying action); *Heiser v. Union Cent. Life Ins. Co.*, 1995 WL 355612, at *4 (N.D.N.Y. June 12, 1995) (insurer awaiting additional information relevant to defense at time of disclaimer letter).

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future. *Id.* at *28; *see also Gen. Accident Ins. Grp. v. Cirucci*, 387 N.E.2d 223, 225 (N.Y. 1979) (denial of coverage must "promptly apprise the claimant with a high degree of specificity"). Zurich suggests that *Viking Pump* either is distinguishable, or does not correctly apply New York law because it holds that a reservation of rights must be articulated "as soon as practicable," language that is present in an insurance code not relevant here. Zurich Br. at 36. However, TIAA-CREF did not cite *Viking Pump* for that proposition, but for the fact that a general reservation of rights will not preserve a specific defense to coverage where the insurer asserts other specific defenses – as Zurich did here.

C. Zurich's Grossly Belated Assertion of Its Notice and Consent Defenses Fails as a Matter of Law

Zurich does not deny that, unlike its fellow Defendants, it never asserted an express affirmative defense of late notice or lack of consent in its Answer, nor did it move for summary judgment on those defenses. Instead, it effectively acknowledges that it mentioned the consent defense for the first time in a footnote to a summary judgment opposition, and even then only ambiguously reserved the right to assert lack-of-consent in the future. It did not specifically mention late notice as a defense until preparing the pre-trial order. TA0672.

Conceding it did not plead notice or consent as affirmative defenses – a step taken by every other defendant who sought to raise such a defense to coverage –

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Zurich still claims that it "did everything necessary to preserve its notice argument" and that its defenses were "clearly raised in other ways." Zurich Br. at 22. In particular, Zurich argues either that it had no obligation to raise those defenses because timely notice is a condition to coverage, or that it met its burden by denying the allegation of timely notice in the Complaint. Zurich Br. at 21-22.

The first of those arguments fails by simple reference to the cases holding that an insurer waives the right to deny coverage based on a failure to raise notice, or consent, or failure to cooperate as an express bar to coverage. The policyholders in those cases, including *Viking Pump,* had the same burden of showing that they had complied with the policy's preconditions to coverage; yet the court held that the insurers had waived their right to rely on the failure of such a condition by not specifically asserting their intention to do so.[9]

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[9] *See, e.g. Viking Pump*, 2007 WL 1207107, at *28 ("the law places an outer time limit on the effectiveness of a general reservation of rights"). Zurich's citation to *KeySpan* as supposedly negating that portion of the *Viking Pump* holding is misplaced. *See KeySpan Gas East Corp. v. Munich Reinsur. America, Inc.*, 15 N.E.3d 1194 (N.Y. 2014). Although *KeySpan* held that waiver as a matter of law could not be established in non-personal injury cases "simply as a result of the passage of time," on remand, the New York Appellate Division still held that the facts established insurers were long aware of their waived defense yet "manifested an intent not to assert [it]." *Long Island Lighting Co. v. Am. Re-Insur. Co.*, 998 N.Y.S.2d 169, 172 (N.Y. App. Div. 2014).

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Nor can Zurich evade its obligation to affirmatively assert late notice as a bar to coverage by claiming that it denied in its Answer the factual assertion in TIAA-CREF's Complaint that notice was timely given. As an initial matter, Zurich cites no authority for that proposition, which, again, is belied by cases holding that absent an affirmative denial of coverage on that basis, the insurer waives its right to raise such a denial. Moreover, the *real* effect of that denial is to establish beyond dispute that Zurich was aware, when it filed its Answer, of every fact that it would have needed to know to deny coverage based on the timing of TIAA-CREF's notice. That fact alone precludes Zurich's belated assertion of a late notice defense, and required that the Superior Court reject that defense as a matter of law.

Finally, Zurich's suggestion that TIAA-CREF suffered no prejudice from Zurich's failure to assert its notice and consent defenses is as irrelevant as it is wrong. Waiver, unlike estoppel, does not require a showing that the non-waiving party has been prejudiced in any way. *Burt Rigid Box*, 302 F.3d at 95. In any event, as set forth in the Opening Brief, TIAA-CREF *was* prejudiced by the timing of Zurich's assertion of its defenses. Because Zurich did not assert such defenses until just before trial, TIAA-CREF did not conduct discovery of them like it did of

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Zurich's (and other defendants') disclosed defenses, nor did it move for summary judgment dismissing them at the pre-trial stage.

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II. ZURICH CANNOT ESTABLISH ITS ENTITLEMENT TO THE HEIGHTENED BURDEN OF PROOF[10]

Zurich criticizes TIAA-CREF's long-standing line of New York case law essentially on the ground that it is old – not that it has been superseded, overruled or is no longer good law in New York. Zurich's suggestion that, because those cases began an unbroken line of precedent on the burden of proof applicable here more than one hundred years ago, that is a reason to abandon that longstanding law now, is wholly meritless.

That is particularly true in light of the fact that Zurich does not cite a single New York case that holds that a party asserting waiver by an insurance company must prove its assertion by clear and convincing evidence. Zurich Br. at 41-44. Indeed, it only cites *one* case, from a trial-level New York court, that uses the language "clear and convincing" at all. *See 301 E. 69th St. Corp. v. Vasser*, 461 N.Y.S.2d 932, 933 (N.Y. Civ. Ct. 1982). In that case, a landlord-tenant dispute, the court discussed the requirements to show that a landlord had waived the right to act on a breach of a lease. That relationship, and that waiver, is not analogous to

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[10] TIAA-CREF appeals (1) the trial court's refusal to reject Zurich's notice and consent defenses as a matter of law, and (2) the burden of proof with respect to Zurich's waiver. *See* TIAA-CREF's Opening Brief, filed January 26, 2018. TIAA-CREF has not appealed on the grounds that the jury's verdict was unsupported by sufficient evidence when evaluating the incorrect clear and convincing burden of proof. Opening Br. at 38-39.

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the communications between a sophisticated insurer and its insured. *See MCI, LLC*, 2007 WL 2325867, at *10 ("[T]he insurer's responsibility to furnish notice of the specific ground on which the disclaimer is based is not unduly burdensome, the insurer being highly experienced and sophisticated in such matters.").

In citing to the remainder of the inapposite cases set forth in its brief, Zurich attempts to conflate the facts TIAA-CREF must show with the standard by which it must show them. Cases holding that waiver must be clear and unequivocal in no way alter centuries-old law in New York that the fact of that clear and unequivocal waiver must be shown by a preponderance of the evidence.[11]

Moreover, in many of the irrelevant non-insurance cases upon which Zurich relies to pad its arguments on this point, the burden of proof either was irrelevant because the court found that absolutely no evidence of any kind could support a claim of waiver[12] or was not addressed in the context of a civil dispute.[13]

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[11] In addition, Zurich's dismissive treatment of *Sillman v. Twentieth Century-Fox Film Corp.*, 144 N.E.2d 387, 393 (N.Y. 1957) on the ground that the reference to the standard of proof in that case appeared in the dissenting opinion is wholly inaccurate. The majority opinion in that case did not address the burden issue, and the dissent was not from the imposition of a higher standard; indeed, the dissenting judge actually concluded that the plaintiff there failed to prove waiver under any standard.

[12] *See, e.g.*, *Echostar Satellite, L.L.C. v. ESPN, Inc.*, 914 N.Y.S.2d 35, 39 (N.Y. App. Div. 2010) (no evidence of affirmative action reflecting waiver); *Civil Serv. Emps. Ass'n, Inc. v. Newman*, 450 N.Y.S.2d 901, 902 (N.Y. App. Div. 1982)

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Finally, Zurich's argument that the burden of proof was immaterial disregards both the hard-fought battle for each party's proposed burden, and the ultimate impact of the heightened burden: a jury verdict in Zurich's favor. Though the jury should never have been asked to decide the waiver issue,[14] the injury to TIAA-CREF was compounded by the Superior Court imposing an improperly high burden of proof to establish waiver.

(record contained no evidence of waiver); *Conant v. Alto 53, LLC*, 2008 WL 5263810, at *9 (N.Y. Sup. Ct. Dec. 10, 2008) (noting "burden of proving waiver is upon the party asserting such defense," without imposing higher burden of proof).

[13] *Solomon v. State of New York*, 541 N.Y.S.2d 384, 384-85 (N.Y. App. Div. 1989) (addressing clear and convincing standard in criminal context). Indeed, to the extent that the burden of proof applied in criminal cases is deemed to be relevant here, that would support TIAA-CREF, not Zurich, as New York courts have long held that the government need prove a waiver of rights by the defendant by only a preponderance of the evidence. *See, e.g. Holtzman v. Hellenbrand,* 460 N.Y.S.2d 591, 596-97 (N.Y. App. Div. 1983) (waiver of rights by misconduct need only be proved by a preponderance of the evidence).

[14] To the extent that Zurich relies on bases for reversal also raised by other Insurers, including the reasonableness of the defense costs incurred or the disgorgement issue, those arguments are addressed in TIAA-CREF's Answering Briefs on those issues.

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CONCLUSION

For the reasons set forth above, TIAA-CREF respectfully requests that this Court reverse the Superior Court's denial of TIAA-CREF's motion *in limine* and for JMOL against Zurich on the waiver issue or, alternatively, order a new trial and direct that the jury be instructed that TIAA-CREF must prove waiver only by a preponderance of the evidence.

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