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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE VERIZON INSURANCE COVERAGE APPEALS	No. 558,2018 No. 561,2018 No. 560,2018 Court Belowð Superior Court of the State of Delaware C.A. No. N14C-06-048 WCC (CCLD) **PUBLIC VERSION**

APPELLANT ZURICH AMERICAN INSURANCE CO.'S OPENING BRIEF

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER

Ronald P. Schiller
Daniel J. Layden
Jason A. Levine
One Logan Square, 27th Floor
Philadelphia, PA 19103
(215) 568-6200

OF COUNSEL

BODELL BOVÉ, LLC

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

Attorneys for Defendant-Appellant / Cross-Appellee Zurich American Insurance Co.

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Nature of Proceedings

Defendant-Appellant Zurich American Insurance Co. joins the appeal of Defendants-Appellants Illinois National Insurance Co. and U.S. Specialty Insurance Co. regarding the threshold issue of whether the underlying action ï the *U.S. Bank* Action ï constitutes a Securities Claim under Plaintiff-Appellee Verizonôs[1] insurance policies, and incorporates that part of their appellate brief as Zurichôs own. Zurich separately appeals decisions, which uniquely affect Zurich, that the Superior Court made after it ruled on the Securities Claim issue.

At the outset of the case, Zurich repeatedly challenged whether Verizon met several conditions to coverage, including whether Verizonôs $49 million in defense expenditures were (1) reasonable and (2) ñjointly incurredò with John Diercksen, an Insured under the Runoff Policies, so as to constitute covered Loss. Verizon likewise acknowledged that these conditions must be litigated. Notably, and as will be further detailed below, these issues alone could potentially reduce the amount of covered Loss to below the $32.5 million attachment point of Zurichôs excess layer of coverage, even irrespective of the Securities Claim issue. But early in the litigation, the Superior Court bifurcated the case and instructed the parties to

[1] ñVerizonò refers collectively to Plaintiffs-Appellees Verizon Communications, Inc., Verizon Financial Services LLC and GTE Corporation. The insurance policies at issue in this appeal are referred collectively to the ñRunoff Policiesò and consist of the Primary Policy issued by Illinois National, the Zurich Policy, and the other excess insurersô policies. Two of the other excess insurers, XL Specialty Insurance Co. and Twin City Fire Insurance Co., settled with Verizon.

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first address the Securities Claim issue and only later litigate any other issues, including the conditions that Zurich previously asserted. The Courtôs order prevented the parties from pursuing discovery or litigating any ñPhase Twoò issues (*i.e.*, issues unrelated to the definition of Securities Claim), and Verizon consequently rebuffed the insurersô efforts to obtain discovery on these issues prior to the resolution of the ñPhase Oneò Securities Claim issue.

After the Superior Court issued its decision on the Securities Claim issue, however, it reversed course and held that the entire case was over and refused to allow Zurich to litigate the critical Phase Two coverage issues. The Superior Court recognized that Zurich did not waive any of its Phase Two defenses in its memorandum opinion but faulted Zurich for allowing Illinois National, as the primary insurer, to take the lead on litigating the Securities Claim issue, and for not re-asserting the coverage conditions Zurich raised prior to the Courtôs bifurcation order. The Superior Court also appears to have decided that this case ï a complex coverage dispute involving multiple underlying actions and several insurers with tens of millions of dollars at stake ï had been on its docket for too long, and it denied Zurich the ability to litigate coverage issues that Zurich had timely and repeatedly raised prior to the Courtôs bifurcation. The Superior Court compounded this error by holding that Zurich owed Verizon prejudgment interest, despite the

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fact that Zurichôs coverage obligations have not yet been triggered under its insurance policy.

These fundamental errors ignore the plain terms of the Runoff Policies and deny Zurichôs due process right to fully litigate coverage. The errors are particularly egregious because it was the Superior Court itself that instructed Zurich to wait to litigate these important issues. Zurich asks this Court to reverse the Superior Courtôs errors of law and remand the case so that Zurich can fully litigate all the issues this matter presents.

In addition to the Securities Claim issue, there are three specific holdings that Zurich appeals from the Superior Courtôs May 16, 2018 Memorandum Opinion and October 4, 2018 Order and Final Judgment:

***First*,** Zurich appeals the Superior Courtôs holding that Zurich cannot challenge whether Verizonôs $49 million in defense expenditures were both reasonable and ñjointly incurredò with Mr. Diercksen so as to constitute covered Loss under the Runoff Policies. Zurich reserved its rights on coverage conditions prior to the coverage action and repeatedly asserted those rights at the outset of the case. Further, Verizon came nowhere close to establishing that Zurich waived these conditions. Indeed, the Superior Court found that Zurich had not waived them, and yet still denied Zurich the opportunity to litigate whether Verizon satisfied the conditions.

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Second, Zurich appeals the Superior Courtôs use of the law of the case doctrine in finding that Delaware law applies. The Superior Court never engaged in a choice-of-law analysis or made a decision on which stateôs laws apply, which are prerequisites to the law of the case doctrine. Had the Superior Court engaged in that analysis, it would have unquestionably found that New York law applies.

Third, Zurich appeals the Superior Courtôs finding that Zurich owes Verizon prejudgment interest. Zurichôs coverage obligations are not triggered until all of the underlying insurers have exhausted their limits of liability through ñthe actual payment of loss(es).ò As made clear in several coverage cases that apply New York law, including most recently this Courtôs decision in *In re TIAA-CREF Insurance Appeals*, Zurich has no obligation to pay Verizon, and therefore prejudgment interest cannot begin to accrue, unless and until the underlying insurers exhaust their liability limits by actual payment of loss.

Summary of the Arguments

1. The Superior Court erred in holding that the *U.S. Bank* Action is a covered Securities Claim.[2] Ex. B (Raised below at JA4100-4150).[3]

2. The Superior Court erred by denying Zurich the opportunity to challenge whether Verizon satisfied requirements of coverage ï including whether Verizonôs defense expenditures were reasonable and ñjointly incurredò so as to constitute covered Loss. Ex. C & D (Raised below at JA5824-5832).

   a. An insured carries the burden of both establishing coverage and proving any waiver of coverage defenses. Prior to and throughout this coverage action, Zurich repeatedly made clear that all terms and conditions of the Runoff Policies must be met, including that Verizonôs defense expenditures be both reasonable and ñjointly incurredò with Mr. Diercksen so as to constitute covered Loss. Verizon likewise acknowledged, repeatedly, that it must prove these conditions to establish coverage.

   b. Despite its prior acknowledgements, after the Superior Court granted Verizonôs motion for partial summary judgment, Verizon reversed

[2] Zurich joins in and incorporates the arguments raised in the Opening Brief of Illinois National Insurance Company and U.S. Specialty Insurance Company as if set forth in full.

[3] ñJAò is to the Joint Appendix filed by all parties in this matter.

course and moved to bar Zurich from ever litigating these coverage issues. The Superior Court granted Verizonôs motion for final judgment, prohibiting Zurich from ever challenging whether Verizonôs claimed Loss met the terms of its insurance policy, on the grounds that Zurich did not advance Defense Costs to Verizon. But as an excess insurer that asserted several defenses to coverage, and given that the underlying insurers did not advance a single dollar or otherwise exhaust their policy limits, Zurich appropriately did not advance costs. Moreover, even if Zurichôs failure to advance Defense Costs constituted a breach of its insurance policy (it did not), such failure still would not bar Zurich from challenging whether Verizon had established coverage for its nearly $49 million in defense expenditures.

3. The Superior Court erred by applying the law of the case doctrine and holding that Delaware law controls whether Verizon is entitled to prejudgment interest, and consequently finding that Zurich owes Verizon prejudgment interest. Ex. C & D (Raised below at JA5833-5843).

   a. The law of the case doctrine only applies when an issue is squarely presented to and decided by a court. In the choice-of-law context, courts have repeatedly rejected application of the law of the case

doctrine when the court did not previously make a decision on which stateôs laws apply. Here, the Superior Court never engaged in a choice-of-law analysis, because no party had previously identified a conflict between New York and Delaware law.

b. Had the Superior Court applied Delawareôs choice-of-law principles, it would indisputably have applied New York law to issues relating to prejudgment interest, because New York has the most significant relationship to this dispute.

c. Zurichôs coverage is not triggered until all of the underlying insurers have exhausted their limits of liability through ñthe actual payment of loss(es).ò Under New York law, Zurichôs coverage obligations have not yet been triggered because the underlying insurers have not yet paid their policy limits, and thus Zurich does not owe Verizon prejudgment interest.

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Statement of Facts

Zurich incorporates by reference the Statement of Facts in the Joint Opening Brief of Illinois National and U.S. Specialty Insurance Company, which summarizes the underlying lawsuits at issue in this coverage dispute. The following Statement of Facts provides the factual background and procedural history relating to the issues that only Zurich has appealed.

A. Verizon's Defense of the Underlying Actions

Of the several lawsuits filed against Verizon and its officers arising out of Verizonôs spin-off of Idearc, only two of those actions ï the *U.S. Bank* and *Coticchio* Actions ï asserted claims against a Verizon officer or director and thus implicated coverage under the Runoff Policies.[4] JA5380 at n.4; Ex. C at 5. Verizon incurred almost all of its costs in the *U.S. Bank* Action, in which the plaintiff sought various forms of relief under eleven separate causes of action against Verizon and John Diercksen, a former Idearc director. Of the eleven causes of action, only three were brought jointly against Verizon and Mr. Diercksen; the other eight claims were brought solely against Verizon. Verizon and Mr. Diercksen litigated that case for several years, collectively incurring

[4] The Runoff Policies were directors and officers insurance policies and therefore did not cover claims against only Verizon or Idearc.

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almost $49 million in fees and costs from more than two dozen law firms, experts and vendors. JA5812-5813.

Initially, Verizon and Mr. Diercksen jointly incurred attorneysô fees by retaining the same outside counsel. JA1816-1817 at ¶¶ 10-11. In April 2012, however, Mr. Diercksen retained separate counsel to represent him in the case, and Verizonôs counsel withdrew from their representation of Mr. Diercksen. JA5861; JA5812-5813. The total fees and costs Verizon and Mr. Diercksen purportedly incurred litigating the *U.S. Bank* Action were: (a) $11.6 million in attorneysô fees jointly incurred by both parties; (b) $1.2 million in fees incurred by only Mr. Diercksen; (c) $19.5 million in fees incurred by only Verizon after Mr. Diercksen retained his own counsel; and (d) $16.7 million in costs incurred by Verizon and/or Mr. Diercksen. JA5813. Verizonôs fees include substantial amounts that the company paid to retain or reimburse counsel and vendors on behalf of third parties involved with the spin-off pursuant to indemnification agreements. JA6230 at n.10; JA6401.

B. The Primary Runoff Policy and the Zurich Policy

Verizon purchased primary and excess insurance policies in connection with the Idearc spin-off (collectively, the ñRunoff Policiesò). Illinois National issued the Primary Policy, above a $7.5 million retention. JA1270. The Zurich Policy provided excess insurance and attached only after Verizon sustained $32.5 million

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in covered Loss. JA5866-5875. The Zurich Policy follows form to the Primary Policy, subject to its own terms and conditions. JA5868 at § 1. Like the Primary Policy, the Zurich Policy is not a general liability policy and does not provide a duty to defend; it provides professional liability insurance on a claims-made basis.

There are three policy provisions that are relevant to the coverage conditions that Zurich was denied an opportunity to litigate:

First, the Primary Policy provides that ñfor any Loss incurred while a Securities Claim . . . is jointly made and maintained against both the Organization and one or more Insured Person(s), this policy shall pay 100% of such Loss up to the Limit of Liabilityò that is sustained ñ***as Defense Costs jointly incurred***.ò JA1318 (End. 7, Cl. 8(e) (emphasis added)). In other words, if a claim asserted against Verizon and an Insured Person is a Securities Claim, the insurer must cover 100% of only Defense Costs that were ñjointly incurredò by both Verizon and the Insured Person (here, Mr. Diercksen). Defense Costs incurred by only Verizon, even in the defense of a Securities Claim maintained against Verizon and an Insured Person, are not covered under the Policy.

Second, section 2(f) of the Primary Policy defines ñDefense Costsò as ñ***reasonable and necessary*** fees, costs and expenses consented to by the Insurer . . . resulting solely from the investigation, adjustment, defense and/or appeal of a Claim . . . .ò JA1274 (emphasis added). Defense expenditures that are not

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reasonable and necessary do not constitute Defense Costs and therefore are not covered by the Policy.

Third, section I of the Zurich Policy states: ñCoverage under this policy shall attach only after all of the Limit(s) of Liability of Underlying Insurance has been exhausted by ***the actual payment of loss(es)***.ò JA5868 (emphasis added). Section III.B of the Zurich Policy reiterates this condition: ñIn the event and only in the event of the reduction or exhaustion of the Limit(s) of Liability of the Underlying Insurance solely as the result of ***actual payment of loss covered thereunder*** . . . .ò *Id.* (emphasis added).

C. Verizon's Communications With Zurich During Its Defense of the Underlying Actions

In October 2010, Verizon notified Zurich about the *U.S. Bank* Action. Zurich acknowledged receipt of the claim, stated that coverage attaches ñonly after the Limits of Liability of the Underlying Insurance have been exhausted solely by the actual payment of loss covered thereunder,ò and that Zurich ñfully reserve[d] all of its rights and defenses under the Zurich Excess Policy, the Underlying Insurance, and available at law or in equity with respect to this matter.ò JA5896-5899. After this initial correspondence, Verizon primarily communicated with and sought consent from only Illinois National about defense expenditures; Verizon

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never informed Zurich about any fees or costs until *after* they were incurred. JA5817-5818.

In June 2011, Illinois National issued its coverage position to Verizon, stating that there was coverage for Mr. Diercksen but not Verizon, because the *U.S. Bank* Action does not constitute a Securities Claim. JA5878-5894. Despite Zurich having requested the coverage positions of all the underlying insurers within weeks of receiving notice of Verizonôs claim, JA5896-5899, Verizon did not send Illinois Nationalôs coverage position to Zurich for almost a year after its issuance, JA5902.

In July 2012, the plaintiff in the *U.S. Bank* Action sent a demand letter to all of Verizonôs D&O insurers. In October 2012, Zurich responded, expressly stating that its policy attached only after the underlying insurance has ñbeen exhausted by the actual payment of loss(es),ò and that the coverage would ñapply in conformance with and subject to the warranties, limitations, conditions, provisions and other terms of the Primary Policy.ò JA5942-5943. Zurich reserved all rights under the Primary Policy, to which the Zurich Policy followed form, including ñthe right to raise additional defenses to coverage under the Policies should the facts and circumstances developed in this matter so warrant.ò *Id.*

Prior to and after receiving the July 2012 demand letter, Zurich tracked the *U.S. Bank* Action, because Mr. Diercksen had substantial exposure, and Zurichôs policy would likely have been implicated had the plaintiffs obtained a judgment

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against Mr. Diercksen. JA6033-6077. But Verizon never provided details about or sought Zurichôs consent for its fees and costs.

Despite never providing such details or requesting Zurichôs consent, in June 2013, Verizon informed Zurich that it had incurred $50 million in defense expenditures. JA5905-5908. Verizon did not demand payment from Zurich, did not inform Zurich whether it agreed with Illinois Nationalôs coverage position that only Mr. Diercksen was covered, and did not state whether any of the underlying insurers had exhausted their limits of liability. *Id.*

In January 2014, Verizon requested mediation to resolve its dispute with Illinois National regarding whether the *U.S. Bank* Action constitutes a Securities Claim. JA2134-2135 at ¶ 7. Until Verizon submitted its mediation request, Zurich did not know that Verizon was contesting Illinois Nationalôs coverage position, as Zurich did not receive any of Verizonôs correspondence regarding coverage on the Securities Claim issue.

Two months later, in March 2014, Verizon, only then and for the first time, demanded payment from Zurich (in connection with the above-referenced mediation). Also in March, and also for the first time, Verizon produced to Zurich invoices of the fees and costs it purportedly incurred. JA1930-1931 at ¶ 4.

To summarize, Verizon had extensive discussions and other correspondence with the primary carrier Illinois National for several years regarding both the fees

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and costs Verizon incurred and whether the *U.S. Bank* Action constituted a Securities Claim. But Verizon did not include Zurich or any of the other excess insurers on these communications. In fact, until early 2014, when Verizon requested mediation, Zurich did not even know that Verizon disputed Illinois Nationalôs position on the Securities Claim issue or that Illinois National had not reimbursed Verizon for any of its defense expenditures.

D. Zurich's Repeated Assertions of Coverage Conditions, and Verizon's Acknowledgement of Same

On June 4, 2014, Verizon filed this coverage action. JA0199. On August 27, 2014, Zurich answered Verizonôs Complaint and asserted several coverage conditions and defenses relating to the above-referenced policy provisions, including (a) Verizonôs claims are barred to the extent it did not exhaust the underlying insurersô limits of liability, (b) Verizon ñfail[ed] to allocate covered from uncovered loss,ò including Defense Costs that were not ñjointly incurred,ò and (c) Verizonôs claims are barred by the Runoff Policiesô terms, exclusions and conditions. JA0256-0257.

On September 24, 2014, prior to the commencement of discovery in the litigation, Verizon filed a motion for partial summary judgment on defense costs, focusing solely on the Securities Claim issue. JA0352-0400.

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On October 30, 2014, Illinois National filed a brief in opposition to Verizonôs motion, and Zurich filed a joinder brief. Zurichôs brief argued that summary judgment was premature because Zurich had not had an opportunity to test the coverage defenses it asserted in its Answer. JA1858-1869. Specifically, Zurich reiterated the following coverage conditions and defenses:

- ñBecause Zurichôs attachment point has never been reached, Zurich cannot be deemed to have breached its obligation to pay, and certainly should not be deemed to have waived any right to investigate and review Verizonôs disputed Defense Costs, through discovery in this litigation, for their reasonableness . . . .ò JA1864.

- ñMoreover, Zurich disputes the amount of alleged Defense Costs and Verizon has provided no documentary evidence to sustain the amount or validity of such costs at summary judgment, as is their burden.ò *Id.* at 3.

- ñZurich and the other insurers are entitled to take discovery from Mr. Hartmann, Verizon and relevant third-parties to explore the amount of alleged costs now presented by Verizon as fact without any verification, and also the reason that those costs were incurred ï which is directly relevant to whether the costs were ñin connection withò a Securities Claim or ñjointly incurredò between the non-insured entity (Verizon) and an insured director (Diercksen).ò *Id.* at 4.

On November 17, 2014, in response to the insurersô various oppositions to Verizonôs summary judgment motion, Verizon contended that the insurersô ñdemand for discovery on the reasonableness of the Defense Costs ignores the defined meaning of that term,ò which includes only costs that are reasonable and necessary. JA1925-1926. ñThus, contrary to Defendantsô contention,ò Verizon

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argued, ñresolution of Insuredsô motion for a declaration of their right to recover Defense Costs under the Policies ***does not require the Court to determine at this time whether any portion of the fees incurred were unreasonable or unnecessary – because if they were, then those costs are not 'Defense Costs.***ôò JA1926 (emphasis added).

On December 4, 2014, Verizonôs counsel reiterated at the hearing on Verizonôs motion that the amount of covered Defense Costs is ñnot before this Court now.ò JA2251.

On March 20, 2015, the Superior Court denied Verizonôs motion for partial summary judgment, but heeded Verizonôs suggestion that the Court resolve the Securities Claim issue first by instructing the parties to focus on that issue first during discovery. *See* Ex. A at 10. Following the Courtôs instruction, the parties submitted a proposed Case Management Order, signed by the Court on May 5, 2015, that bifurcated the case into two phases: Phase I would address whether the *U.S. Bank* Action constitutes a Securities Claim; and Phase II would ñaddress all remaining issues in the case after the completion of Phase I.ò JA2267-2268 at ¶¶ 2-3.

After the Court bifurcated the case, the parties focused exclusively on the Securities Claim issue. Illinois National, as the primary insurer, took the lead on

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behalf of the insurers with respect to this issue, because it affected all insurers equally.

Pursuant to the Courtôs instruction that discovery be focused on the meaning and scope of ñSecurities Claimò in the Runoff Policies, Verizon refused to answer several discovery requests relating to the reasonableness of defense expenditures and whether they were jointly incurred on the grounds that the requests sought information beyond the scope of the Courtôs March 20, 2015 Opinion. JA5910-5932. For example, in response to an interrogatory that asked Verizon to identify communications ñconcerning who should be counsel for John Diercksen,ò Verizon objected to the request as premature, ñbecause it seeks information beyond the scope of discovery contemplated in the Courtôs March 20 opinion.ò JA5927-5928. Verizon also objected to identifying communications ñconcerning allocation of attorney fees, costs and expensesò on the same basis. JA5925-5926.

At the September 8, 2016 hearing on the partiesô cross-motions for summary judgment on the Securities Claim issue, the Court asked counsel to advise whether the case could be taken off the trial docket, in light of the fact that both sides agreed the Securities Claim issue was an issue of law. JA5372 at 99:13-18. The parties agreed to respond to the Courtôs question in writing. Three weeks later, Verizon sent Illinois Nationalôs counsel a draft letter to the Superior Court, which acknowledged that the Securities Claim issue was not dispositive of the entire case.

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The draft letter states: ñ***[I]f the Court rules in Verizon's favor on the 'Securities Claim' issue, the only remaining issue will be the 'reasonableness' of the defense costs that Verizon incurred, which likely can be resolved on motion with minimal additional discovery.***ò JA5857-5858 (emphasis added).

E. The Superior Court's Decision on Verizon's Renewed Motion for Partial Summary Judgment, and Zurich's Request for Phase II Discovery Under the Operative Case Management Order

On March 2, 2017, the Superior Court granted Verizonôs motion for partial summary judgment, holding that the *U.S. Bank* Action constitutes a ñSecurities Claim.ò *See* Ex. B. Pursuant to the operative Case Management Order, Zurich then informed Verizon that it intended to raise the terms, conditions and defenses it had not yet had an opportunity to pursue because the case was bifurcated. JA5934-5940.

In response, on March 24, 2017, Verizon filed a motion for final judgment and prejudgment interest, arguing that the case was over and that Verizon was entitled to all of the $49 million it purportedly incurred in defending both the *U.S. Bank* and *Coticchio* Actions. JA5374. Verizon argued that Zurich waived its right to contest conditions precedent to coverage or to Phase II discovery. Verizonôs motion attached 150 pages of invoices (totaling more than $560,000) that the company never produced prior to filing its motion and demanded both payment and prejudgment interest for those invoices, without any examination of their

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reasonableness or necessity. JA5459 at ¶ 8; JA5463-5617. That is, as to Zurich, ***Verizon produced invoices for the first time in its demand for final judgment***. Zurich and the other excess insurers opposed Verizonôs motion.[5] JA5824-5832.

F. The Superior Court's Rejection of Zurich's Request for Phase II Discovery

On May 7, 2018, the Superior Court issued a Memorandum Opinion granting Verizonôs motion for final judgment and prejudgment interest.[6] Ex. C. The Court issued three substantive holdings that are relevant to Zurichôs appeal:

First, although the Superior Court held that Zurich did not waive its right to litigate conditions precedent to coverage ï which makes sense, given that the Court phased the case to address those issues *only after* it determined whether a ñSecurities Claimò was present ï it still barred Zurich from ever raising those conditions. Indeed, the Court acknowledged that Verizon had not proven waiver as a matter of law. The Court rejected Verizonôs argument that, because Zurich and the other excess insurers allowed primary insurer Illinois National to take the lead on the threshold issue of whether the *U.S. Bank* Action constitutes a Securities

[5] Illinois National opposed only Verizonôs proposed interest rate and accrual date for prejudgment interest. JA5945-5982. The coverage conditions that Zurich seeks to litigate are unlikely to affect Illinois Nationalôs exposure because it is the primary insurer, and therefore Illinois National did not join the excess insurersô opposition.

[6] On May 16, the Court issued a Corrected Memorandum Opinion that is substantively identical to its May 7 decision. Zurich cites to only the Corrected Opinion in this brief. Ex. C.

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Claim, they could not litigate other defenses or coverage conditions. Ex. C at 17. The Court emphasized that it never said the ñExcess Insurers could not continue to litigate valid defenses they raised and preserved in their respective pleadings.ò *Id*.

But, despite the absence of waiver and its own prior order preventing the parties from conducting discovery beyond Securities Claim issues, the Court denied Zurich its due process right to pursue the additional bars to coverage, stating that it ñnever guaranteed any of the parties a Phase II of discovery.ò *Id.* The Court acknowledged that ñ[w]hile there may be costs that are not reasonable or jointly incurred, the Primary Policy language is clear the Defendants must advance Defense Costs even if the costs cannot be agreed upon.ò *Id.* at 19. The Court relied on a provision of the Primary Policy, which states that the insurers shall advance ñcovered Defense Costs,ò and in the event of a disagreement of which costs are covered, ñthe Insurer shall advance Defense Costs . . . which the Insurer states to be fair and proper until a different amount shall be agreed upon or determined pursuant to the provisions of this policy and applicable law.ò *Id.* (quoting End. 7, Cl. 8). Based on this provision, the Court held that Zurichôs and the other excess insurersô ñright to challenge [conditions precedent to coverage] has not accrued until they comply with the Policies and advance the Defense Costs.ò Ex. C at 20-21. The Court did not hold that Zurich or any insurer unfairly or improperly determined that Defense Costs were unavailable under the Policies,

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and Verizon did not allege any bad faith in the insurersô determination of non-coverage.

Second, the Court held that Delaware law applies to the coverage action based on the law of the case doctrine. Ex. C at 12-13.

Third, applying Delaware law, the Court rejected Zurichôs position that its excess coverage does not attach, and thus prejudgment interest does not begin to accrue, until actual payment of loss by the underlying insurers. Instead, without reference to the Zurich Policy, the Court held that ñprejudgment interest should be a shared burden among the Defendants.ò Ex. C at 30-31.

The Court initially appeared to base its decision on Superior Court Rule 54(b), which provides for final judgment as to less than all claims or parties. Ex. C at 13-14. The Court stated that its entry of final judgment was ñdiscretionaryò and should be done ñsparingly,ò and it cited to cases that issued judgment under Rule 54(b). *Id.* at 14. The Court went on to state that ñthe requirements of Rule 54(b) have been established,ò because ñ[t]he litigation includes multiple parties, the rights and liabilities of at least one party, in this case Illinois National, has been finally decided and clearly there is no just reason to delay the appeal of the only real central issue in this case, whether the defended actions were securities claims.ò Ex. C at 21. However, immediately after that sentence, the Court inexplicably stated that Verizonôs motion was granted under Rule 58, which provides for final

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judgment as to the entire case. *Id.* Because of the contradictory language in the Courtôs opinion, the parties sought clarification from the Court. JA6443-6447; JA6448-6454.

Five months later, on October 4, 2018, the Superior Court issued a final judgment under Rule 58, making clear that the case was over, and that Zurich would *never* have an opportunity to litigate certain of its critical coverage defenses. Ex. D. In a cover letter, the Court stated that ñthis litigation has ended in this Court and no further hearings or findings are necessary to resolve this dispute.ò JA6476-6480.

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Arguments

I. The Superior Court Erred As a Matter of Law by Denying Zurich the Opportunity to Challenge Whether Verizon Satisfied Several Coverage Conditions.

A. Question Presented

Did the Superior Court err as a matter of law by denying Zurich the opportunity to challenge whether Verizon satisfied several coverage conditions, after the Court had initially instructed the parties to wait to litigate these conditions until after resolution of the threshold Securities Claim issue? Ex. C & D (Raised below at JA5824-5832).

Suggested Answer: Yes.

B. Standard and Scope of Review

The Supreme Court reviews *de novo* questions of law. *Delle Donne & Assoc. v. Millar Elevator Serv. Co.*, 840 A.2d 1244, 1251 (Del. 2004). This includes the Superior Courtôs ruling on Verizonôs motion for final judgment and its decision barring Zurich from challenging conditions precedent to coverage. *Id.* (reviewing *de novo* trial courtôs determination on waiver).

[redacted]

C. Merits of Argument

1. The Superior Court's Decision Barring Zurich From Litigating Coverage Conditions Constitutes Reversible Error.

The Superior Court erred by refusing to allow Zurich to litigate coverage conditions. Under both Delaware and New York law, an insured carries the burden of establishing coverage. *See, e.g.*, *In re: TIAA-CREF Ins. Appeals*, 192 A.3d 554 (Del. 2018) (repeatedly referring to insuredôs burden of establishing that its fees were reasonable and necessary); *Ewell v. Those Certain Underwriters of Lloyd's, London*, 2010 WL 3447570, at *3 (Del. Super. Ct. Aug. 27, 2010) (ñThe burden of allegation and proof of a condition precedent is on the plaintiff.ò); *Curtis v. Nutmeg Ins. Co.*, 681 N.Y.S.2d 620, 621 (N.Y. App. Div. 1998) (affirming holding that insureds have burden of proving reasonableness of fees).

Under both Delaware and New York law, an insured also has the burden of proving waiver of coverage requirements.[7] *See, e.g.*, *Bantum v. New Castle Cty. Vo-Tech Educ. Ass'n*, 21 A.3d 44, 50-51 (Del. 2011); *Echostar Satellite L.L.C. v. ESPN, Inc.*, 914 N.Y.S.2d 35, 39 (N.Y. App. Div. 2010). ñInasmuch as waiver is

[7] Because the standard for waiver is the same under the laws of both jurisdictions, there is not a conflict of laws, and this Court can default to Delaware law as the law of the forum state. *See Valley Forge Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2012 WL 1432524, at *9 (Del. Super. Ct. Mar. 16, 2012). In contrast, if there is a conflict of laws on other issues that requires the Court to engage in a choice of law analysis ï such as accrual of interest ï New York law would apply. *See infra* Arguments § II.C.1.

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the intentional relinquishment of a known right, it is essentially an issue of intention for the jury.ò 57 N.Y. Jur. 2d Estoppel, Etc. § 93; *see also TIAA-CREF*, 192 A.3d 554 (upholding jury instructions and jury verdict with respect to waiver); *Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgmt., L.P.*, 7 N.Y.3d 96, 104 (N.Y. 2006) (ñGenerally, the existence of an intent to forgo [a contractual protection] is a question of fact.ò).

Verizon did not meet its burden of establishing that its defense expenditures were reasonable or were jointly incurred with Mr. Diercksen, and as the Superior Court found, Verizon likewise did not show that Zurich intentionally relinquished its right to litigate these coverage defenses so as to constitute a waiver. Nonetheless, the Superior Court denied Zurich the ability to litigate its defenses, because (1) Zurich did not advance Defense Costs, and (2) it did not raise conditions precedent to coverage until after the Court decided the Securities Claim issue. Both of these conclusions are legally and factually flawed.

First, Zurich had no obligation to advance Defense Costs for several reasons. The Runoff Policies required each insurer to advance Defense Costs ñwhich the Insurer states to be fair and proper.ò Ex. C at 19. Zurich fairly and properly did not advance Defense Costs, because it had repeatedly raised conditions precedent to coverage prior to and since Verizon filed this coverage action, JA5942-5943; JA0256-0257; JA1864-1866, and those issues still have not

been litigated. *See, e.g.*, *QBE Americas, Inc. v. ACE American Ins. Co.*, 997 N.Y.S.2d 670, at *7 (N.Y. App. Div. 2014) (requiring insured to comply with policy conditions before it can seek advancement of defense costs and stating: ñAn application for the advancement of defense costs, where no duty to defend exists, must be denied where the insured does not establish, at a minimum, which claims in each *pending* lawsuit are subject to coverage and that the applicable retention for such claims has been exhausted.ò) (emphasis in original).

Moreover, Verizon never gave Zurich the opportunity to advance defense costs while such costs were being incurred, nor did Verizon seek Zurichôs consent before incurring them. Rather, Verizon waited until after the underlying litigation was over and after it purportedly exhausted Zurichôs policy limits before it even informed Zurich of such expenditures. JA5905-5908. And Verizon inexplicably did not provide Zurich with a single invoice or detail about its defense expenditures until after it demanded mediation against the insurers in early 2014. An insurerôs duty to advance cannot be triggered where it did not even get a chance to consent or review the costs it is being asked to pay during the pendency of the underlying litigation.

Relatedly, and as further detailed below, because the underlying insurance policies have not yet been exhausted ñas the result of actual payment of loss,ò Zurichôs coverage obligations have not even been triggered, even presuming

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Zurich was required to otherwise advance Defense Costs (which is denied). JA5868-5869 at § III.B.

The Superior Courtôs holding is therefore in error, as it would have required Zurich to advance Defense Costs simply to preserve its coverage defenses, despite the fact that (a) Zurich did not have a triggered coverage obligation, (b) the underlying litigation in the trial court was over, and (c) Verizon had demanded mediation with Zurich and the other insurers before even requesting such ñadvancement.ò

Second, even assuming that Zurich was required to ñadvanceò some of Verizonôs defense expenditures after the fact, Zurichôs failure to do so certainly did not mean that it waived its coverage defenses, entitling Verizon to all its defense expenditures regardless of whether they were reasonable or ñjointly incurredò. *See, e.g.*, *Julio & Sons Co. v. Travelers Cas. and Sur. Co. of Am.*, 684 F. Supp. 2d 330, 340 (S.D.N.Y. 2010) (ñThe general rule of contract law ï that a non-defaulting party must fulfill its contractual obligations if it elects to enforce the contract after the other party breaches ï still carries force in the insurance context. . . . And [] even an innocent insured must comply with conditions that are unrelated to a claim for which coverage was denied.ò). Verizon did not meet its burden of establishing waiver, let alone meet it as a matter of law. The Superior Courtôs statement that Zurichôs ñposition on coverage lived and died on the issue

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of óSecurities Claim,ôò Ex. C at 19, is plainly incorrect. Zurich repeatedly made clear that (1) it intended to contest whether Verizon had met the terms and conditions of coverage under the Runoff Policies, and (2) its coverage obligations were not triggered until the underlying insurers paid their respective limits of liability. JA5896-5899; JA5942-5943; JA0256-0257; JA1864-1866.[8]

Critically, Verizon also understood from the outset of the litigation that the amount of covered Defense Costs would still need to be addressed, regardless of the outcome of the Securities Claim issue. In Verizonôs reply in support of its initial summary judgment motion on the Securities Claim issue, it represented that the Court need not ñdetermine ***at this time*** whether any portion of the fees incurred were unreasonable or unnecessary ï because if they were, ***then those costs are not 'Defense Costs***.'ò JA1925-1926 (emphasis added). Verizon reiterated that representation in open court during oral argument on its motion. JA2251 at 7:8-14.

Even worse, after the Superior Court bifurcated the litigation so that the parties could first focus solely on the Phase I Securities Claim issue, Verizon refused to answer several discovery requests that are at the heart of whether

[8] In Zurichôs correspondence prior to this coverage action, Zurich fully and specifically reserved its rights under the Runoff Policies, including each of the warranties and conditions under the Policies. JA5894-5899; JA5941-5943. These reservations of rights ñserves to preserve unasserted defensesò as a matter of law. *MCI LLC v. Rutgers Cas. Ins. Co.*, 2007 WL 2325867, at *14 (S.D.N.Y. Aug. 13, 2007) (citation omitted). At a minimum, whether Zurich intentionally relinquished its ability to litigate coverage conditions was a fact issue for the jury.

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Verizonôs defense expenditures were reasonable and ñjointly incurredò on the grounds that the requests sought information beyond the scope of Phase I. JA5925-5928. Finally, on September 30, 2016, after the hearing on the partiesô motions for summary judgment, Verizon sent Illinois National a draft letter which again acknowledged that the Securities Claim issue was not dispositive of the entire litigation. JA5857-5858.

To summarize, Verizon always understood that Zurich intended to litigate the amount of covered Defense Costs. Based on the Courtôs order bifurcating the case, as well as Verizonôs representations about the need to separately litigate the Phase Two issues, Zurich reasonably understood that it would have an opportunity to litigate and seek additional discovery after resolution of the Securities Claim issue.[9] But after the Superior Court issued its decision on Verizonôs renewed motion for partial summary judgment, Verizon changed course and argued the entire case was over. JA5388-5390. Verizonôs reversal of its prior representations

[9] The Superior Court stated that Zurich could have challenged the reasonableness of Verizonôs defense expenditures after it received the invoices in March 2014. Ex. C at 20. When Zurich received the invoices, the parties were mediating whether the *U.S. Bank* Action constituted a Securities Claim, an issue that could have negated the need to consider other conditions precedent to coverage. While Zurich timely and repeatedly raised other conditions to coverage, *see supra*, there was no reason for any party to spend substantial time and money investigating such issues appending the resolution of the Securities Claim issue, especially given the Superior Courtôs own decision to bifurcate. The Superior Courtôs criticism of Zurichôs focus on the Securities Claim issue during Phase I of the litigation, at the same time Verizon was denying Zurich discovery relating to other conditions to coverage, ignores the fact that it was the Court who instructed the parties to focus on the Securities Claim issue before addressing other issues in the litigation. Ex. A at 10.

and admissions is unjustifiable. Likewise, the Superior Courtôs decision prematurely ending the case ï after expressly inviting the parties to bifurcate the case into two phases and issuing a bifurcation order which expressly contemplated that second phase ï is likewise unjustifiable. That decision should be reversed.

2. The Coverage Conditions Zurich Seeks To Litigate Could Substantially Affect Zurich's Coverage Obligations.

Because the Superior Court did not assess the reasonableness of Verizonôs defense expenditures or whether the expenditures were ñjointly incurred,ò this Court should remand for the Superior Court to consider these issues in the first instance. These conditions unquestionably have merit, and they could substantially affect Zurichôs coverage obligations.

As to the reasonableness of Verizonôs expenditures, the company purportedly incurred $48,961,630 litigating the *U.S. Bank* and *Coticchio* Actions. The company engaged more than two dozen law firms, experts and vendors to represent it in these actions. JA5812. Several of these firms and vendors were involved with the Idearc spin-off, and Verizon paid millions of dollars in retaining or reimbursing counsel for them pursuant to indemnification agreements. JA6230 at n.10; JA6401. Because the Runoff Policies limited indemnification coverage to an Organizationôs indemnification of Insured Persons, JA1316 (End. 7, Cl. 1), these fees did not constitute covered ñLossò and in any event were unreasonable.

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Zurich was not able to further assess the nature of Verizonôs expenses, because Verizon refused to engage in discovery about these issues.

During the Superior Court proceedings, Verizon defended the amount of its expenditures by asserting that ñthe complexities of the issues presentedò and the damages sought by the plaintiff justified $49 million in fees. JA6001. Verizon claimed that, because its in-house counsel purportedly reviewed all the invoices and wrote off some time, the expenditures were necessarily reasonable. *Id.* Verizonôs say-so about what was reasonable, after it rebutted Zurichôs efforts to obtain any information about these issues, is patently improper.

As to whether Verizonôs expenditures were ñjointly incurred,ò the Primary Policy provides coverage for only ñloss incurred as . . . Defense Costs jointly incurred by . . . an Organization and an Insured Person.ò JA1318 (End. 7, Cl. 8(e)). Verizon admittedly incurred $19.5 million in fees after Mr. Diercksen retained separate counsel. JA0414. Verizon also incurred $16.7 million in costs, but Zurich was unable to assess whether those fees were incurred by Verizon and/or Mr. Diercksen, because Verizon refused to produce discovery relating to these costs. JA5925-5928.

At the trial court, Zurich and Verizon disputed the meaning of ñjointly incurredò Defense Costs. Zurich argued that this phrase includes those costs for which Verizon and Mr. Diercksen were jointly liable for payment. JA6221-6245.

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Verizon, in contrast, argued that the phrase means all costs incurred in a lawsuit that is maintained against both Verizon and an Insured Person, JA6247-6257, despite the fact that the ñjointly made and maintainedò requirement is wholly separate from the ñjointly incurredò requirement in the Policy.[10] *See* JA1318.

The resolution of these two conditions may substantially affect Zurichôs coverage. Zurichôs policy covered $32.5 million to $47.5 million in ñLossò, and Verizon claimed to have incurred $48,961,630 in Defense Costs. JA5387. Thus, the defense costs at issue exceed the top end of Zurichôs coverage layer by only $1.46 million. Accordingly, if more than $1.46 million in defense expenditures were not reasonable or were not jointly incurred ï less than 3% of Verizonôs asserted Defense Costs ï Zurich will owe less than Verizon demands. (Notably, given the numbers outlined above, even the jointly-incurred issue alone could conceivably bring the amount of potentially covered Loss below Zurichôs $32.5 million attachment point.) Since Verizon is seeking substantial interest, this also has a practical impact beyond even the policy limits, assuming interest attaches at all.

[10] Notably, the Court never addressed either argument, instead making the improper findings at issue that effectively eliminated Zurichôs right to litigate these issues at all.

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II. The Superior Court Committed Reversible Error by Awarding Verizon Prejudgment Interest Against Excess Insurer Zurich.

A. Questions Presented

1. Did the Superior Court err in applying the law of the case doctrine and holding that Delaware law controls whether Verizon is entitled to prejudgment interest? Ex. C (Raised below at JA5833; JA5954-5957).

Suggested Answer: Yes.

2. Did the Superior Court err in granting Verizonôs request for prejudgment interest against Zurich? Ex. C (Raised below at JA5834-5843).

Suggested Answer: Yes.

B. Standard and Scope of Review

A trial courtôs application of the law of the case doctrine is subject to *de novo* review. *See Cede & Co. v. Technicolor, Inc.*, 884 A.2d 26, 36 (Del. 2005). A trial courtôs determination on a request for prejudgment interest is likewise reviewed *de novo*. *See Chrysler Corp. v. Chaplake Holdings, Ltd.*, 822 A.2d 1024, 1037 (Del. 2003).

C. Merits of Argument

1. The Superior Court Erred by Applying Delaware Law.

In Delaware, choice of law issues in contract disputes are governed by the *Restatement (Second) of Choice of Law*ôs ñmost significant relationshipò test. *See Certain Underwriters at Lloyds, London v. Chemtura Corp.*, 160 A.3d 457, 464

(Del. 2017). The Superior Court sidestepped this test through the law of the case doctrine, holding that Delaware law applies to issues relating to prejudgment interest, because the Court had previously relied on Delaware law in its decisions on the partiesô motions for summary judgment. Ex. C at 12-13. The Superior Courtôs application of the law of the case doctrine was improper, and under the *Second Restatement* test, New York law indisputably applies.

(a) *The Law of the Case Doctrine Does Not Apply.*

ñThe law of the case doctrine is a self-imposed restriction that prohibits courts from revisiting issues previously decided . . . .ò *State v. Wright*, 131 A.3d 310, 321 (Del. 2016). The doctrine ñonly applies to issues the court actually decided,ò and while the decision need not be explicit, there must be a decision for the doctrine to apply. *See id.* (citation omitted).

In the choice-of-law context, the law of the case doctrine only applies when the choice-of-law issue was squarely presented and decided by the court. *See, e.g.*, *Homeland Ins. Co. of N.Y. v. CorVel Corp.*, 2018 WL 317283, at *5 (Del. Super. Jan. 5, 2018) (rejecting application of Louisiana law based on law of the case doctrine, because the court had not made a choice-of-law decision, even though court had previously applied Louisiana law), *reversed on other grounds by* 2018 WL 6061261 (Del. Nov. 20, 2018); *Delville v. Firmenich Inc.*, 23 F. Supp. 3d 414, 425 (S.D.N.Y. 2014) (rejecting application of New Jersey law based on law of the

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case doctrine, even though it previously applied New Jersey law, because there was never a ñrulingò on choice of law); *Cobart Multifamily Inv'rs v. Shapiro*, 857 F. Supp. 2d 419, 430 (S.D.N.Y. 2012) (ñBecause the Court has not made a legal decision as to which law or laws apply to the Receiver's claims, the law of the case doctrine does not preclude the Receiver from arguing that the Court do so now.ò).

The Superior Courtôs application of the law of the case doctrine was directly contrary to these decisions. The Superior Court stated that because it ñapplied Delaware substantive law in both motions for summary judgment opinions in 2015 and in 2017,ò that law will continue to apply. Ex. C at 12-13. But the Court did not engage in a choice-of-law analysis before applying Delaware law. Because no party identified a conflict between New York and Delaware law on the threshold issue of whether the *U.S. Bank* Action constitutes a Securities Claim, the Court defaulted to Delaware law, as the law of the forum state.[11] *See, e.g.*, *Valley Forge Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2012 WL 1432524, at *9 (Del. Super. Ct. Mar. 16, 2012) (finding that laws of Massachusetts and Delaware would produce the same result and, accordingly, applying ñDelaware law as the law of the forum stateò). As in *CorVel* and *Delville*, although the Superior Court

[11] To be sure, Verizon and Illinois National raised the choice-of-law issue in their respective briefs on Verizonôs initial motion for partial summary judgment. JA0382-0383; JA1788; JA1894 at n.7. But the Court never addressed the choice-of-law issue, presumably because, as Verizon correctly noted, Illinois National had not ñshown any conflict of law requiring a choice-of-law analysis.ò JA1894 at n.7.

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applied Delaware law in prior decisions, the law of the case doctrine does not apply, because the Court never made a choice-of-law determination.

(b) *Delaware's Choice-of-Law Principles Mandate Application of New York Law.*

Had the Superior Court applied Delaware's choice-of-law principles, it would have unquestionably found that New York law applies.

The first step in any choice-of-law analysis is to "compare the laws of the competing jurisdictions to determine whether the laws actually conflict." *Mills Ltd. Partnership v. Liberty Mut. Ins. Co.*, 2010 WL 8250837, at *4 (Del. Super. Ct. Nov. 5, 2010). If the competing jurisdictions' laws yield different results, "a 'true conflict' exists, and the court then conducts a choice of law analysis." *Id*. "If the laws would produce the same decision," however, "there is no real conflict and a choice of law analysis would be superfluous." *Id.* at *4.

There are clear conflicts between Delaware and New York law with respect to prejudgment interest. As an initial matter, Delaware's prejudgment interest rate is five percent over the Federal Reserve Discount Rate, 6 *Del. C.* § 2301, while New York's rate is nine percent, N.Y. C.P.L.R. § 5004.

Moreover, when an excess insurer's policy requires exhaustion of the underlying policies by "actual payment of loss" (as the Zurich Policy required), New York and Delaware law may differ on when an excess insurer's coverage is

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triggered and, consequently, when prejudgment interest begins to accrue. This difference is squarely at issue in this litigation, as detailed further at *infra* Arguments § II.C.2.

Under New York law, an excess insurance policy that requires exhaustion of the underlying policies through actual payment of loss ñrequires [the excess insurer] to pay only after the insurance has been paid under the provisions of the underlying policies.ò *Forest Labs., Inc. v. Arch Ins*. Co., 953 N.Y.S.2d 460, 465 (N.Y. Sup. Ct. 2012), *aff'd* 984 N.Y.S.2d 361 (N.Y. App. Div. 2014). In contrast, the Superior Court found that Delaware courts have not required exhaustion of underlying policies before an excess insurerôs obligation for prejudgment interest begins to accrue. Ex. C at 30 (citing cases). As above, if there is a conflict between New York and Delaware law, the *Second Restatement*ôs § 188 applies. *See Chemtura*, 160 A.3d at 465 (Del. 2017).

Section 188 identifies five factors for trial courts to use in deciding which state has the most significant relationship to a contract dispute: (1) place of contracting; (2) place of negotiation of the contract; (3) place of performance; (4) location of the subject matter of the contract; and (5) domicile, residence, nationality, place of incorporation, and place of business of the parties..

In two recent decisions, this Court applied the *Second Restatement* test to coverage disputes. *First*, in 2017, this Court held that New York law applies to

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resolve a coverage dispute where ñNew York was the principal place of business for [insured] at the beginning of the coverage, and there were a number of contacts with New York over time after the beginning of the coverage.ò *Id.* at 459-60. The Court based its decision in part ñon the sensible understanding that a companyôs headquarters staff is usually heavily involved in managing insurance programs that cover the entire company.ò *Id.* at 470.

Second, less than a year ago, this Court applied *Chemtura* and held that Texas law applies to an insurance coverage dispute because the insured ñnegotiated and secured insurance coverage, and managed its insurance program, out of its Texas offices.ò *Travelers Indem. Co. v. CNH Indus. Am.*, 191 A.3d 288, at *1 (Del. July 16, 2018).

These two decisions mandate application of New York law to this coverage dispute. Both Verizon and the insurers are headquartered in New York, and the insurance policies were negotiated in and delivered to Verizonôs broker in New York. JA5391; JA5833. In contrast, Delawareôs relationship with this coverage dispute was minimal ï two of the three plaintiffs, although headquartered in New York and New Jersey, are Delaware corporations (the third plaintiff is a New York corporation). JA0402 at ¶¶ 3-5. For these reasons, New York law applies to issues relating to prejudgment interest.

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2. The Superior Court Erred in Awarding Verizon Prejudgment Interest From Zurich.

The Zurich Policy provides: ñCoverage under this policy shall attach only after all of the Limit(s) of Liability of Underlying Insurance has been exhausted by the actual payment of loss(es).ò JA5868 at § I. The Zurich Policy reiterates this condition two paragraphs later: ñIn the event and only in the event of the reduction or exhaustion of the Limit(s) of Liability of the Underlying Insurance solely as the result of actual payment of loss covered thereunder . . . .ò *Id.* at § III.B.

Under New York law, this policy language has consistently been interpreted to require the ñactual payment of loss(es)ò by the underlying insurers before an excess insurerôs coverage is triggered. In *Forest Labs., Inc. v. Arch Ins*. Co., 953 N.Y.S.2d 460 (N.Y. Sup. Ct. 2012), *aff'd* 984 N.Y.S.2d 361 (N.Y. App. Div. 2014), for example, a New York court found that similar policy language does not trigger the excess carrierôs coverage obligations until after the underlying insurer(s) have paid their policy limits. *See id.* at 465-66. The U.S. Court of Appeals for the Second Circuit likewise held: ñThe plain language of the relevant excess insurance policies requires the ópayment of lossesôï not merely the accrual

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of liability ï in order to reach the relevant attachment points and trigger the excess coverage.ò *Ali v. Federal Ins. Co.*, 719 F.3d 83, 94 (2d Cir. 2013).[12]

This Courtôs recent application of New York law in *TIAA-CREF* is directly on point. As background, two excess insurers argued that they did not owe prejudgment interest because the exhaustion provisions of their respective policies had not yet been satisfied by actual payment of loss. *See TIAA-CREF Individual & Institutional Servs., LLC v. Ill. Nat'l Ins. Co.*, 2017 WL 5197860, at *6-7 (Del. Super. Oct. 23, 2017). At the trial court, President Judge Jurden stated that an excess insurerôs attachment provision ñpermit[s] the excess insurer to wait out good faith coverage disputes between the insured and underlying insurer(s) without risk of breaching the excess insurerôs performance obligations.ò *Id.* at *7. Judge

[12] Other courts have interpreted similar exhaustion language the same way. *See, e.g.*, *Diamond Shamrock Chems. Co. v. Aetna Cas. & Surety Co.*, 609 A.2d 440, 482 (N.J. Super. Ct. App. Div. 1992) (ñWhile it is true that Diamond [the insured] lost the use of its money once it paid its share of the settlement,ò as Verizon did here when it paid costs relating to the underlying actions, ñthe obligation of the excess providers had not been triggered, because the primary policies had not been exhausted and there was no adjudication of the primary insurerôs responsibility to pay the policy limits.ò) (New York law); *Martin Res. Mgmt. Corp. v. AXIS Ins. Co.*, 803 F.3d 766, 771-72 (5th Cir. 2015) (holding that exhaustion clause, which is substantively identical to Zurichôs, requires exhaustion by actual payment of loss by underlying insurers); *Gabarick v. Laurin Maritime (America), Inc.*, 649 F.3d 417, 422 (5th Cir. 2011) (holding that excess insurers did not owe prejudgment interest because primary policy had not been ñexhausted by payment of judgments and settlementsò and highlighting that insured ñis not entitled to rewrite the policy to place a burden on the Excess Insurers that they did not bargain for in their contractò); *Insituform Tech., Inc. v. Am. Home Assurance*, 2008 WL 886026, at *2 (D. Mass. Mar. 31, 2008), *vacated on other grounds by* 566 F.3d 274 (1st Cir. 2009) (holding that excess insurer with exhaustion provision in policy ñwas not obligated to pay until the applicable limit of the underlying policy was exhausted,ò and thus prejudgment interest did not begin to accrue until primary insurer paid limits of its policy).

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Jurden recognized the ñrhetorical forceò of the insuredôs argument that the excess insurers allegedly were ñillegitimately attempting to take advantage of [the primary insurerôs] breach of contract,ò but held that the ability to wait out coverage disputes ñis a benefit conferred upon them by the terms of the attachment provisions, regardless of whether the underlying insurer(s) have wrongfully denied coverage.ò *Id.* at *8.

This Court affirmed Judge Jurdenôs decision, holding that the excess insurersô ñperformance obligations have not been triggered because the insurance tiers underlying their policies have not yet paid outò and are uncertain. *TIAA-CREF*, 192 A.3d 554, at *5. The same holds true here in the instant circumstance as to Zurich; under the plain language of its policy, its obligations are not triggered as no payment has been made by the underlying carrier. Interest should not accrue on an obligation which has not yet been triggered. Zurichôs performance obligations are also uncertain, because Verizon has failed to establish its defense expenditures were reasonable or were jointly incurred with Mr. Diercksen. These conditions may limit or possibly eliminate entirely Zurichôs performance obligations.

During the Superior Court proceedings, Verizon ignored the plain language of the Zurich Policy and attempted to distinguish *TIAA-CREF*, arguing that Zurichôs denial of coverage amounted to an anticipatory breach of its policy.

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JA6406-6409. This argument is based on the false premise that Zurich repudiated coverage. Under New York law, an insurer repudiates coverage only when it ñdisclaim[s] the intention or the duty to shape its conduct in accordance with the provisions of the contract.ò[13] *Seward Park Hous. Corp. v. Greater N.Y. Mut. Ins. Co.*, 836 N.Y.S.2d 99, 105 (N.Y. App. Div. 2007); *Princes Point LLC v. Muss Dev. L.L.C.*, 30 N.Y.3d 127, 134 (N.Y. 2017) (requiring communication of intention not to perform that is ñpositive and unequivocalò to constitute a repudiation of coverage). A repudiation of an insurance policy is wholly different from a run-of-the-mill disclaimer of coverage. *See Seward Park*, 836 N.Y.S.2d at 105 (holding that insurerôs denial of coverage, ñwith reference to policy provisions and exclusionsò is not an anticipatory breach).

Here, Zurich always recognized that Mr. Diercksenôs (but not Verizonôs) Defense Costs were covered, and Zurich repeatedly informed Verizon that coverage does not attach until the underlying policies have been exhausted by the actual payment of loss covered thereunder. JA5896-5899; JA5942-5943; JA0256-

[13] In an effort to explain why the Superior Courtôs decision in *TIAA-CREF* was inconsistent with New York law, Verizon relied on a New York trial judgeôs decision, *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 2017 WL 3448370 (N.Y. Sup. Ct. Aug. 7, 2017). JA6406 at n.1. As Zurich stated during the Superior Court proceedings, JA6208 at 49:9-50:10, this decision improperly conflated the repudiation of coverage with the mere denial of coverage, and it ignored the well-settled New York law cited above. In any event, in September 2018, the Appellate Division of the New York Supreme Court reversed the trial judgeôs decision on several threshold issues, and it is no longer good law. *See* 166 A.D.3d 1 (N.Y. Sup. Ct. App. Div. Sept. 20, 2018).

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0257; JA1864-1866. Zurichôs reservations and ultimate denials of coverage were always based on valid coverage defenses and did not amount to a policy repudiation. Accordingly, as the *TIAA-CREF* decision makes clear, Zurich cannot be held to have breached until its ñobligations have been triggered,ò which in this case cannot happen until the underlying policies have been exhausted by actual payment of loss and other requirements of coverage have been met. *See, e.g.*, *Liberty Surplus Ins. Corp. v. Segal Co.*, 2004 WL 2102090, at *4 (S.D.N.Y. Sept. 21, 2004) (holding that insuredôs breach of contract claim against excess insurer would only be ripe once the excess insurerôs ñobligations are triggeredò). To hold otherwise would be to allow Verizon to effectively rewrite the partiesô agreement.

As Verizon correctly acknowledged during the trial court proceedings, prejudgment interest is not a penalty; it merely ñserves to compensate [a] successful party for nonpayment of what is due.ò JA5394 (citation omitted). Here, Zurich, as an excess insurer that received a lower premium than the underlying insurers, does not yet owe anything to Verizon, and it will not owe anything unless and until the underlying insurers exhaust their limits of liability by actual payment of losses. Zurich accordingly does not owe prejudgment interest.

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Conclusion

For the foregoing reasons, Zurich respectfully requests that this Court reverse the Superior Courtôs (1) order finding that the underlying *U.S. Bank* Action constituted a Securities Claim; (2) order granting final judgment to Verizon and barring Zurich from litigating the coverage conditions that Zurich timely and repeatedly raised prior to the Courtôs order bifurcating the case; (3) application of Delaware law regarding prejudgment interest issues based on the law of the case doctrine, and instead direct the Superior Court to apply New York law based on Delawareôs choice-of-law principles; and (4) order requiring Zurich to pay prejudgment interest before the underlying insurers have exhausted their respective limits of liability through actual payment of loss.

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BODELL BOVÉ, LLC

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

Attorneys for Defendant-Appellant / Cross-Appellee Zurich American Insurance Co.

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

OF COUNSEL

[redacted]