SUPREME COURT OF THE STATE OF DELAWARE

In re TIAA-CREF Insurance Appeals

192 A.3d 554 (Del. 2018) · No. Nos. 478, 2017; 479, 2017; 480, 2017; 481, 2017 · Decided July 30, 2018

SUMMARY

The Delaware Supreme Court affirmed the Superior Court’s judgment in consolidated insurance coverage appeals involving TIAA-CREF’s settlements and defense costs arising from investor class actions. The Court held that the settlements were not uninsurable disgorgement under New York public policy, upheld the award of defense costs, rejected challenges concerning Arch’s consent-to-settle defense and limits-reduction provision, and declined to award prejudgment interest against excess insurers whose obligations had not yet attached. The Court also upheld the verdict for Zurich on notice and consent-to-settle defenses.

CASE DETAILS

COURT	Supreme Court of the State of Delaware
WRITING FOR THE COURT	James T. Vaughn, Jr.; Leo E. Strine, Jr., Chief Justice; Karen L. Valihura, Justice; James T. Vaughn, Jr., Justice; Gary F. Traynor, Justice; Collins J. Seitz, Jr., Justice
JURISDICTION	Delaware
DECIDED	July 30, 2018
DOCKET	Nos. 478, 2017; 479, 2017; 480, 2017; 481, 2017
DISPOSITION	affirmed
PROCEDURAL POSTURE	Four consolidated appeals from a Superior Court judgment following a jury trial in an insurance coverage action involving coverage for class-action settlements and defense costs.
STANDARD OF REVIEW	Questions of insurance-policy interpretation were reviewed as matters of law. The Court reviewed the denial of renewed motions for judgment as a matter of law for whether the evidence and reasonable inferences, viewed in TIAA's favor, could support the verdict. Any alleged jury-instruction error was reviewed for harmlessness.
PRECEDENTIAL VALUE	Published Delaware Supreme Court decision; precedential
PARTIES	Illinois National Insurance Company, Ace American Insurance Company, Arch Insurance Company, TIAA-CREF Individual & Institutional Services, LLC, TIAA-CREF Investment Management,

LLC, Teachers Advisors, Inc., Teachers Insurance and Annuity Association of America, College Retirement Equities Fund v. TIAA-CREF Individual & Institutional Services, LLC, TIAA-CREF Investment Management, LLC, Teachers Advisors, Inc., Teachers Insurance and Annuity Association of America, College Retirement Equities Fund, Illinois National Insurance Company, Ace American Insurance Company, Arch Insurance Company, Zurich American Insurance Company

TOPICS

insurance coverage · contract interpretation · appellate procedure · commercial litigation · contracts

PRACTICE AREAS

insurance coverage · insurance · contracts · appellate procedure · commercial litigation

QUESTIONS PRESENTED

1. Whether the settlements of the investor class actions constituted uninsurable disgorgement under the policies and New York public policy.
2. Whether TIAA proved that its Bauer-Ramazani defense costs were reasonable and necessary.
3. Whether Arch waived its consent-to-settle defense or was excused from obtaining consent because requesting it would have been futile.
4. Whether Arch's limits reduction under its shavings provision should be calculated using the underlying policy limit or the total claim including prejudgment interest.
5. Whether Ace and Arch owed prejudgment interest before the underlying insurance layers had paid out and their performance obligations had been triggered.
6. Whether Zurich waived its notice and consent-to-settle defenses and whether the jury received a proper instruction concerning waiver.

HOLDINGS

1. The settlements were not uninsurable disgorgement under New York public policy because they were not conclusively linked to ill-gotten gains obtained by TIAA.
2. TIAA met its burden to prove that the Bauer-Ramazani defense costs were reasonable and necessary, and the Superior Court properly denied the insurers' renewed motions for judgment as a matter of law.
3. Sufficient evidence supported the jury's finding that Arch waived its consent-to-settle condition, and any error concerning the futility issue was harmless.
4. The percentage savings was properly calculated using the underlying insurer's policy limit and settlement amount, resulting in a 14 percent reduction, rather than using the total claim including prejudgment interest.

5. Ace and Arch were not liable for prejudgment interest because their performance obligations had not been triggered and remained uncertain under the attachment and shavings provisions.
6. The Superior Court properly treated waiver of Zurich's defenses as a matter of Delaware procedural law and did not err in allowing the issue to go to the jury; any alleged jury-instruction error was harmless.

KEY QUOTATIONS

> *"New York public policy prohibits enforcement of insurance agreements in cases involving disgorgement where the payment is conclusively linked, in some fashion, to improperly acquired funds in the hands of the insured."* (¶ 10)

> *"Waiver is the intentional relinquishment of a known right."* (¶ 22)

FACTUAL BACKGROUND

TIAA administered investment funds in which investors' shares were sometimes sold after the applicable good-order date, creating transactional fund expense gains or losses that were netted against fund expenses and allocated among remaining investors. Investors filed three class actions challenging that practice, and TIAA settled two actions and faced a third settlement in principle. TIAA sought insurance coverage under a primary policy and several excess policies, while the insurers asserted defenses including uninsurable disgorgement, lack of notice, failure to obtain consent to settle, and limits reductions under shavings provisions.

PROCEDURAL HISTORY

TIAA sued several insurers in the Delaware Superior Court seeking coverage for settlements and defense costs arising from the Rink, Bauer-Ramazani, and Cummings class actions. The Superior Court entered judgment for TIAA against Illinois National, Ace, and Arch, while Zurich prevailed on its notice and consent-to-settle defenses. The Supreme Court affirmed the judgment on all issues presented.

DISPOSITION

affirmed

CASES CITED

- Rink v. CREF, No. 07-CI-10761 (Ky. Cir. Ct.)
- Bauer-Ramazani v. TIAA-CREF, et al., No. 1:09-cv-00190 (D. Vt.)
- Cummings v. TIAA-CREF, et al., No. 1:12-cv-93 (D. Vt.)
- J.P. Morgan Securities, Inc. v. Vigilant Insurance Co., 126 A.D.3d 76 (N.Y. App. Div. 2015)
- Reliance Group Holdings, Inc. v. National Union Fire Insurance Co. of Pittsburgh, PA., 594 N.Y.S.2d 20, 24 (N.Y. App. Div. 1993)
- Vigilant Insurance Co. v. Credit Suisse First Boston Corp., 2003 WL 24009803 (N.Y. Sup. Ct. July 8, 2003), aff'd, 10 A.D.3d 528 (N.Y. App. Div. 2004)
- Millennium Partners, L.P. v. Select Insurance Co., 882 N.Y.S.2d 849 (N.Y. Sup. Ct. 2009), aff'd, 889 N.Y.S.2d 575 (N.Y. App. Div. 2009)

- Bear Wagner Specialists, LLC v. National Union Fire Insurance Co. of Pittsburgh, PA, 2009 WL 2045601 (N.Y. Sup. Ct. July 7, 2009)
- J.P. Morgan Securities, Inc. v. Vigilant Insurance Co., 91 A.D.3d 226 (N.Y. App. Div. 2001), rev'd, 992 N.E.2d 1076 (N.Y. 2013)
- TIAA-CREF Individual & Institutional Services, LLC v. Illinois National Insurance Co., 2016 WL 6534271, at *12 (Del. Super. Ct. Oct. 20, 2016), appeal refused, 151 A.3d 899 (Del. 2016)
- TIAA-CREF v. Illinois National Insurance Co., 2017 WL 3085324, at *5-*6 (Del. Super. Ct. June 29, 2017)
- TIAA-CREF Individual & Institutional Services, LLC v. Illinois National Insurance Co., 2017 WL 5197860, at *8 (Del. Super. Ct. Oct. 23, 2017)
- AeroGlobal Capital Management, LLC v. Cirrus Industries, Inc., 871 A.2d 428, 444 (Del. 2005)
- Martinez v. E.I. DuPont De Nemours & Co., Inc., 82 A.3d 1, 14 n.36 (Del. Super. Ct. 2013), aff'd, 86 A.3d 1102 (Del. 2014), as revised (Mar. 4, 2014)