IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

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,	)	
Plaintiffs,	)	
v.	)	C.A. No. N14C-05-178 JRJ CCLD
ILLINOIS NATIONAL INSURANCE COMPANY; ST. PAUL MERCURY INSURANCE COMPANY; ACE AMERICAN INSURANCE COMPANY; ARCH INSURANCE COMPANY; ZURICH AMERICAN INSURANCE COMPANY; TWIN CITY FIRE INSURANCE COMPANY; AXIS REINSURANCE COMPANY; ST. PAUL FIRE & MARINE INSURANCE COMPANY; and U.S. SPECIALTY INSURANCE COMPANY,	)	
Defendants.	)	

Date Submitted: October 31, 2016
Date Decided: November 16, 2016

ORDER REFUSING TO CERTIFY AN INTERLOCUTORY APPEAL

Upon consideration of Defendants' application under Rule 42 of the Supreme Court for an order certifying an interlocutory appeal of this Court's Opinion, dated October 31, 2016,[1] it appears to the Court that:

1. This case involves an insurance coverage dispute. Plaintiff TIAA-CREF[2] seeks coverage under its 2007–2008 professional liability insurance policies with Defendants, Illinois National Insurance Company ("Illinois National"), St. Paul Fire & Marine Insurance Company, St. Paul Mercury Insurance Company, Ace American Insurance Company ("Ace"), Arch Insurance Company ("Arch"), and Zurich American Insurance Company ("Zurich")[3] for the costs of defending and settling three class action lawsuits.[4] Defendants have denied coverage on various grounds.

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[1] Defendants' Application for Certification to the Supreme Court of Delaware Pursuant to Delaware Supreme Court Rule 42(b) and Superior Court Civil Rule 74 ("Def. Appl. for Cert. of Interlocutory Appeal") (Trans. ID. 59768333).

[2] Plaintiffs 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 are a family of entities. For ease of reference, they will be collectively referred to in this order as "Plaintiff" or "TIAA-CREF."

[3] TIAA-CREF stayed or dismissed its claims against three insurers: Twin City Fire Insurance Company, Axis Reinsurance Company, and U.S. Specialty Insurance Company. The parties agreed that TIAA-CREF's losses were unlikely to trigger those Insurers' policies. *See* Stipulation and Order of Stay as to Axis Reinsurance Company and Twin City Fire Reinsurance Company (Trans. ID. 58465950); Stipulation and Order for Voluntary Dismissal without Prejudice as to U.S. Specialty Insurance Company (Trans. ID. 57178765).

[4] The three underlying class action lawsuits ("Underlying Actions") were: *Rink v. College Retirement Equities Fund*, No. 07- CI-10761 (Ky. Cir. Ct.) (Oct. 29, 2007); *Walker v. Teachers Ins. & Annuity Assoc. of Am. – College Retirement & Equities Fund, et al.*, No. 1:09- cv-00190 (D. Vt.); and *Cummings v. Teachers Ins. & Annuity Assoc. of Am. – College Retirement & Equities Fund, et al.*, No. 1:12-cv-93 (D. Vt.).

2. TIAA-CREF filed this lawsuit on May 20, 2014.[5] On May 24, 2016, the parties filed multiple motions for summary judgment. TIAA-CREF filed a Motion for Summary Judgment asking the Court to declare that: (1) "Plaintiffs' Settlements of the Underlying Class Actions Constitute Loss Covered Under Plaintiffs' Insurance Policies," and (2) "Defendants' Agreement to Insure that Loss is Not Relieved by Any Applicable Public Policy."[6] In opposition, Defendants filed a Motion for Summary Judgment asking the Court to declare that "TIAA-CREF Cannot Prove Loss Under the Illinois National Policies."[7] Due to the applicability of New York law in the event of a true conflict of law, and the lack of Delaware case law as to whether disgorgement constitutes uninsurable loss, the parties relied on New York law for their arguments regarding "loss." On September 16, 2016, the Court heard oral argument on these motions.

3. On October 20, 2016, the Court published its Opinion on the motions for summary judgment ("Opinion").[8] The Court ruled that TIAA-CREF's settlements of the underlying class actions did not constitute uninsurable "loss" under TIAA-CREF's insurance policies with Defendants.[9] The Court further ruled that to the extent there is a public policy in New York against the insurability of disgorgement

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[5] Complaint (Trans. ID. 55477629).
[6] Plaintiffs' Motion for Partial Summary Judgment (Trans. ID. 59042327).
[7] Defendant Illinois National Insurance Company's Motion for Summary Judgment (Trans. ID. 59039625). This Motion was joined by all of the other Defendants.
[8] *TIAA-CREF Individual & Institutional Servs. v. Illinois Nat'l Ins. Co.*, 2016 WL 6534271 (Del. Super. Ct. Oct. 20, 2016).
[9] *Id.* at *12.

payments, that public policy is inapplicable given the facts in this case.[10] The Court accordingly denied Defendants' Motion for Summary Judgment with regard to "loss."[11]

4. Before certifying an interlocutory appeal, the Court must: (1) determine that the order to be certified for appeal "decides a substantial issue of material importance that merits appellate review before a final judgment;"[12] (2) decide whether certification is warranted based on the eight factors listed in Rule 42(b)(iii);[13] (3) determine whether the appeal is "exceptional," rather than

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[10] *Id.*
[11] *Id.*
[12] Del. Supr. Ct. R. 42(b)(i)
[13] Delaware Supreme Court Rule 42(b)(iii) provides that the trial court should consider whether:

> (A) The interlocutory order involves a question of law resolved for the first time in this State;
> (B) The decisions of the trial courts are conflicting upon the question of law;
> (C) The question of law relates to the constitutionality, construction, or application of a statute of this State, which has not been, but should be, settled by this Court in advance of an appeal from a final order;
> (D) The interlocutory order has sustained the controverted jurisdiction of the trial court;
> (E) The interlocutory order has reversed or set aside a prior decision of the trial court, a jury, or an administrative agency from which an appeal was taken to the trial court which had decided a significant issue and a review of the interlocutory order may terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice;
> (F) The interlocutory order has vacated or opened a judgment of the trial court;
> (G) Review of the interlocutory order may terminate the litigation; or
> (H) Review of the interlocutory order may serve considerations of justice.

routine;[14] (4) consider the Court's own assessment of the most efficient and just schedule to resolve the case;[15] and (5) identify whether and why the likely benefits of interlocutory review outweigh the probable costs, such that interlocutory review is in the interest of justice.[16]

5. Defendants Illinois National, Ace, Arch, and Zurich contend that the Court's Opinion misapprehends New York law as to disgorgement.[17] Defendants maintain that their motion for certification of interlocutory appeal meets the criteria of Rule 42(b) because the Court's ruling on "loss" in the Opinion comprises a substantial issue of material importance, and review of the ruling in favor of the Defendants may (1) terminate the litigation and (2) serve considerations of justice.[18]

6. TIAA-CREF opposes certification, arguing that the Court did not misapprehend New York law in the Opinion.[19]

7. Where an opinion "decide[s] a question of law which relates to the merits of the case, and not to collateral matters," the "substantial issue" requirement is

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[14] Del. Supr. Ct. R. 42(b)(ii).
[15] Del. Supr. Ct. R. 42(b)(iii)
[16] *Id.*
[17] Def. Appl. for Cert. of Interlocutory Appeal at 6.
[18] *Id.* § C; *see also* Del. Supr. Ct. R. 42(b)(i); Del. Supr. Ct. R. 42(b)(iii)(G)–(H).
[19] Plaintiffs' Opposition to 1) Defendants' Application for Certification of an Interlocutory Appeal and 2) Defendant Zurich's and Arch's Related Motion to Stay" ("Pl. Opp'n to Def. Appl. for Cert. of Interlocutory Appeal") (Trans. ID. 59822981).

met.[20] "Loss" is central to the merits of this case, and consequently, the Court's decision as to "loss" enabled TIAA-CREF to continue this litigation. Therefore, the Opinion decided a substantial issue of material importance.[21]

8. However, after considering the eight factors listed in Rule 42(b)(iii)(A)–(H), and the remainder of the Rule 42 analysis, certification for interlocutory review is not appropriate in this case for the following reasons.

9. First, the Court recognizes that Rule 42(b)(iii)(G) favors certifying this application for interlocutory appeal because a successful appeal of the issue of "loss" in the Opinion may terminate the litigation.[22] That said, it is true in most cases that litigation may be terminated if the trial court's ruling on an important issue is reversed. This factor *alone* does not militate in favor of certifying an interlocutory appeal that Rule 42(b) reserves for "exceptional" cases.[23]

10. Second, Defendants' assertion that review of the interlocutory order will serve considerations of justice "because this case involves millions of dollars of

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[20] *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2861717, at *1 (Del. Ch. July 22, 2008) (citing *Casteldo v. Pittsburgh-Des Moines Steel Co.*, 301 A.2d 87, 87 (Del. 1973)).

[21] *See* Del. Supr. Ct. R. 42(b)(i). In their motion, Defendants make four substantive arguments as to why this order to be certified for appeal decides a substantial issue for material importance. *See* Def. Appl. for Cert. of Interlocutory Appeal § B. Given the Court's finding that this is a substantial issue of material importance, the Court will instead address these substantive arguments later in its analysis.

[22] *See* Del. Supr. Ct. R. 42(b)(iii)(G).

[23] *See, e.g.*, *Almah v. Lexington Ins. Co.*, 2016 WL 3521880, at *3 (Del. Super. June 20, 2016); *see also* Del. Supr. Ct. R. 42(b)(ii)–(iii).

insurance coverage" is conclusory.[24] Defendants do not explain how the amount of money at stake implicates considerations of justice that could not equally be served by an appeal of right following trial.[25]

11. Third, Defendants' arguments regarding the Court's alleged misapprehension of the applicable legal principles are unavailing. Defendants argue that the Court overlooked *Reliance*,[26] a 1993 decision from a lower New York court.[27] The Court did not overlook *Reliance*. Rather, the Court grounded its analysis in more recent and germane cases than *Reliance*, including *J.P. Morgan*, a case from New York's highest court.[28]

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[24] *See* Def. Appl. for Cert. of Interlocutory Appeal ¶ 27; *see also* Del. Supr. Ct. R. 42(b)(iii)(H).

[25] *Cf. Rhone-Poulenc Basic Chemicals Co. v. Am. Motorists Ins. Co.*, 606 A.2d 73, 74 (Del. 1992) (finding that the party demonstrated that interlocutory review would serve considerations of justice where the Court's decision on an issue had the potential to impact approximately twenty other similar actions pending in Delaware courts).

[26] *Reliance Grp. Holdings, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 594 N.Y.S.2d 20 (N.Y. App. Div. 1993).

[27] Def. Appl. for Cert. of Interlocutory Appeal ¶ 22. Defendants also contend that the Court overlooked *Shapiro v. OneBeacon Ins. Co.*, 34 A.D.3d 259, 260 (2006) in the Opinion; however, *Shapiro* is inapplicable because it involved the application of a contract provision specific to that case, not an application of New York's public policy against the insurability of disgorgement.

[28] *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 992 N.E.2d 1076 (N.Y. 2013); *see also Millennium Partners v. Select Ins. Co.*, 882 N.Y.S.2d 849, 853 (N.Y. Sup. Ct. 2009), *aff'd*, 889 N.Y.S.2d 575 (N.Y. App. Div. 2009); *Vigilant Ins. Co. v. Credit Suisse First Boston Corp.*, 782 N.Y.S.2d 19 (N.Y. App. Div. 2004).

To the extent that *Credit Suisse* and *Millennium* cite *Reliance*, they do so for a different proposition than the Defendants argue. Defendants contend that a civil settlement, without government involvement or a final adjudication, automatically comprises uninsurable disgorgement. *Credit Suisse* cited *Reliance* for the case-specific proposition that after a governmental finding of wrongdoing by the Insured, the "restitution of ill-gotten funds does not constitute 'damages' or a 'loss' as those terms are used in [those] insurance policies." *Credit Suisse*, 782 N.Y.S.2d at 20. Similarly, *Millennium* cites *Reliance* for the proposition that "that one may not insure against the risk of being ordered to return money or property that has been

12. The Court considered the Rule 42(b)(iii) factors but finds that these factors do not shift the balance in favor of certifying this interlocutory appeal.

13. As to Rule 42(b)(iii)(A): Although this would be an issue of first impression in this State if it were decided under Delaware law, the Court addressed the issue of "loss" by applying New York law because in the event of a true conflict, it is undisputed that New York law would apply.[29] Determining Delaware law would have only been for the purposes of conducting a conflict analysis, and therefore the Court resolved the issue by applying the law that would ultimately govern the dispute. The Court's determination ultimately did not resolve an issue of first impression. Consequently, this factor does not weigh in favor of certifying an interlocutory appeal.

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wrongfully acquired. *Millennium*, 882 N.Y.S.2d at 853. Neither *Credit Suisse* nor *Millennium* cites *Reliance* for the proposition that a civil settlement, free of any adjudication, finding, or admission of wrongdoing, automatically comprises uninsurable disgorgement.

In fact, the current trend in New York *and* additional jurisdictions "has been for courts to narrow the [disgorgement] defense considerably," and in some cases "reject[] insurers' restitution/disgorgement defense outright." Peter Gillon & Vernon Thompson, Jr., *Another Blow Dealt to Restitution, Disgorgement Defense*, Law360, Oct. 6, 2014 at 3, *available at* http://www.law360.com/articles/584183/another-blow-dealt-to-restitution-disgorgement-defense (last visited Nov. 1, 2016). *See, e.g.*, *U.S. Bank Nat. Ass'n v. Indian Harbor Ins. Co.*, 68 F. Supp.3d 1044, 1049–50 (D. Minn. 2014), *appeal dismissed* (Mar. 22, 2016) (interpreting Delaware law) (noting that "no Delaware authority forbids insurance coverage for restitution," and holding that the Ill-Gotten Gains exclusion in the insurance policy at issue did not bar coverage because there was no final adjudication determining that the payment resolved claims for ill-gotten gains).

[29] *See* Del. Supr. Ct. R. 42(b)(iii)(A).

14. As to Rule 42(b)(iii)(B): The Court can find no New York case at odds with the proposition that there must be a conclusive link between disgorgement and a finding of wrongdoing in order to render disgorgement payments uninsurable.[30]

15. As to Rule 42(b)(iii)(C)–(F): The question of law at issue does not relate to the constitutionality, construction, or application of a statute.[31] The Court's jurisdiction of this case is not controverted here.[32] The Court's interlocutory order did not reverse or set aside any prior decision,[33] nor has it vacated or opened any judgments.[34]

16. Finally, certification will not promote the "most efficient and just schedule to resolve th[is] case."[35] Nor will the likely benefits of interlocutory review outweigh the probable costs, such that interlocutory review is in the interest of justice.[36] "Interlocutory appeals should be exceptional, not routine, because they disrupt the normal procession of litigation, cause delay, and can threaten to exhaust scarce party and judicial resources."[37] This case is not exceptional. Trial is scheduled to begin in less than three weeks, and the parties have jointly whittled

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[30] *See* Del. Supr. Ct. R. 42(b)(iii)(B).
[31] *See* Del. Supr. Ct. R. 42(b)(iii)(C).
[32] *See* Del. Supr. Ct. R. 42(b)(iii)(D).
[33] *See* Del. Supr. Ct. R. 42(b)(iii)(E).
[34] *See* Del. Supr. Ct. R. 42(b)(iii)(F).
[35] *See* Del. Supr. Ct. R. 42(b)(iii).
[36] *See id.*
[37] Del. Supr. Ct. R. 42(b)(ii).

down the issues to be presented at trial to only two: (1) consent to settle and (2) the reasonableness of defense costs.[38] While a reversal from the Delaware Supreme Court on the issue of "loss" could foreclose the need to decide either of the two remaining issues, an affirmation of this Court's Opinion would only serve to disrupt the procession of this case and cause delay of a trial that the parties have already expended many valuable resources in preparing for. Full discovery has already occurred, the parties have submitted their pretrial stipulation, and the parties are prepared to go to trial. Thus, interlocutory review will provide few benefits compared to the probable costs and is not in the interest of justice.

17. The Court finds that Defendants have failed to meet the strict standards for certification under Rule 42.

NOW THEREFORE, for the foregoing reasons, Defendants' Application for Certification of Interlocutory Appeal is **DENIED.**

IT IS SO ORDERED.

Jan. R. Jurden, President Judge

[38] *See, e.g.*, Pl. Opp'n to Def. Appl. for Cert. of Interlocutory Appeal at 3; Pretrial Stipulation and Order (Trans. ID. 59832651).