

Delaware Supreme Court Affirms \$40 Million+ Coverage Win for TIAA – It Rules Settlement of Civil Disgorgement Claims Insurable Under New York Law

On July 30, 2018, the Delaware Supreme Court, in a written by Justice Vaughn, issued a decisive coverage victory for the Teachers Insurance and Annuity Association of America (“TIAA”) and other related entities (collectively, “TIAA”), conclusively securing over \$40 million in coverage from three insurance companies, primary insurer Illinois National Insurance Company (an AIG affiliate), and excess insurers Arch Insurance Company and ACE Insurance Company (including interest from the primary insurer).

First, Delaware’s highest court affirmed the October 20, 2016, summary judgment decision of Judge Jan Jurden of the Superior Court of Delaware in favor of TIAA, which found that a settlement of a civil lawsuit involving claims for disgorgement was an insurable loss under New York law. Like the court below, the Supreme Court distinguished the New York cases cited by the Insurers because those cases involved SEC or regulatory orders conclusively linking a government-mandated disgorgement payment with improperly acquired profits of the insured. By contrast, the Supreme Court found that TIAA settled civil suits in which it repeatedly denied any wrongdoing or liability in the underlying actions, that no

court had found that TIAA had obtained any ill-gotten gains, and that TIAA's consistent policies for the timing of valuing participants' retirement accounts did not result in any such ill-gotten gains. Accordingly, the Supreme Court held that any policy prohibiting coverage for disgorgement did not apply under the facts of this case.

The Delaware Supreme court also upheld a jury verdict that the team secured for TIAA on December 12, 2016, dismissing the carriers' reasonableness and consent-to-settle defenses, ruling that TIAA was entitled to full defense costs incurred in the two underlying class action lawsuits at issue.

TIAA is represented by Robin L. Cohen, Adam S. Ziffer and Jennifer C. Wasson of Potter Anderson & Corroon.

The Supreme Court case is *In re TIAA-CREF Insurance Appeals*, Nos. 478, 2017; 479, 2017; 480, 2017; 481, 2017. The lower court case is *TIAA-CREF Individual & Institutional Services, LLC, et al., v. Illinois National Insurance Company, et al.*, C.A. No. N14C-05-178 JRJ CCLD, in the Superior Court of Delaware.

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Robin Cohen

Meredith Elkins

Michelle R. Migdon

Adam Ziffer