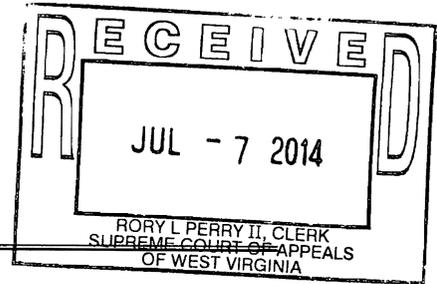


BRIEF FILED
WITH MOTION

No. 14-0343



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

THE TRAVELERS INDEMNITY COMPANY, ON BEHALF OF
THE TRAVELERS INSURANCE COMPANY

Petitioner,

v.

U.S. SILICA COMPANY, F/K/A PENNSYLVANIA GLASS
SAND COMPANY

Respondent.

From the Circuit Court of Morgan County, West Virginia
Civil Action No. 06-C-2

PETITIONER'S BRIEF

Flaherty Sensabaugh Bonasso PLLC
Jeffrey M. Wakefield (WV Bar No. 3984)
Erica M. Baumgras (WV Bar No. 6862)
200 Capitol Street
Charleston, WV 25301
(P) 304-345-0200
(F) 304-345-0260

Steptoe & Johnson LLP
Frank Winston, Jr. (*pro hac vice*)
John R. Casciano (*pro hac vice*)
Christopher M. Dougherty (*pro hac vice*)
1330 Connecticut Ave., N.W.
Washington, DC 20036
(P) 202-429-3000
(F) 202-429-3902

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ASSIGNMENTS OF ERROR

1. The Circuit Court erred in failing to rule as a matter of law that the clear and unambiguous terms of the Assistance and Cooperation clause -- a condition precedent contained in the insurance contracts at issue -- precluded U.S. Silica from seeking payments from Travelers in connection with Silica Claims for amounts that U.S. Silica paid before it had ever tendered such claims to Travelers.

2. The Circuit Court erred in failing to rule as a matter of law that the clear and unambiguous terms of a condition precedent requiring “immediate” notice of any claim or suit precluded U.S. Silica from obtaining coverage from Travelers where (a) U.S. Silica failed to provide notice of such claims or suits until years after U.S. Silica was not only served, but also years *after* it defended and settled those claims, (b) U.S. Silica failed to provide a reasonable excuse for its delay, and (c) Travelers was prejudiced by U.S. Silica’s late notice.

3. The Circuit Court erred in (a) instructing the jury, contrary to West Virginia law, that it *must* find that Travelers waived its late notice defense if Travelers asserted other coverage defenses, and (b) further giving the jury conflicting instructions on the same defense.

4. The Circuit Court erred in ruling that a “joint and several” method of allocation, as opposed to a *pro rata* method of allocation, applied to the Silica Claims, and in allowing U.S. Silica to obtain a windfall recovery under that approach without meeting its burden of establishing that the claims arose from accidents during the relevant policy periods, and without taking into account other payments U.S. Silica obtained with respect to the same claims.

5. The Circuit Court erred in awarding over \$5 million in prejudgment interest to U.S. Silica where (a) U.S. Silica failed to seek prejudgment interest pursuant to W. Va. Code § 56-6-27, which is applicable to actions, such as this, founded on contract claims, but instead

sought prejudgment interest from the Circuit Court pursuant to W. Va. Code § 56-6-31, which is not applicable in such actions, and (b) a portion of the interest was impermissibly applied to an award of attorneys' fees.

6. The Circuit Court erred in awarding U.S. Silica over \$4.6 million in attorneys' fees and costs, including fees incurred in connection with other, out-of-state litigation in which such fees and costs are not recoverable and in which Travelers was not even a party.

7. The Circuit Court erred in failing to correct the jury's excessive verdict against Travelers through *remittitur*, where the damage award included sums paid by U.S. Silica to claimants with no known dates of first exposure, and without taking into account over \$6 million that U.S. Silica received from other parties for the same Silica Claims.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This is an appeal from a final judgment in a contract action between U.S. Silica Company ("U.S. Silica") and The Travelers Indemnity Company, on behalf of The Travelers Insurance Company ("Travelers") in which U.S. Silica sought reimbursement of millions of dollars in defense and indemnity payments it claims to have paid in connection with underlying suits alleging injury from exposure to silica filed by thousands of claimants against it over the past 30 years ("the Silica Claims"). (JA 1.) However, U.S. Silica never provided any of the hundreds of complaints for those Silica Claims to Travelers until September 24, 2008 -- years and sometimes decades *after* U.S. Silica was served with those suits, and years *after* U.S. Silica had already paid millions of dollars in defense and settlement costs for those same suits. Indeed, by the time of U.S. Silica's "tender" of those complaints, more than 33,000 -- close to 90 percent -- of the Silica Claims had long since been closed and fully resolved by U.S. Silica without the

participation or knowledge of Travelers. (JA 1143.) When it finally did “tender” the Silica Claims, U.S. Silica simply dropped them in Travelers lap in 2008 *en masse*, in four compact discs containing copies of complaints filed against U.S. Silica over the preceding 30 years. Although it failed to disclose this with its “tender,” U.S. Silica had been indemnified for the same Silica Claims for which it seeks coverage from Travelers by a former parent company. U.S. Silica also received millions of dollars from other insurance companies in settlements of its coverage claims against them for these same Silica Claims, as described further below.

U.S. Silica’s conduct violated several specific terms in the policies issued by Travelers (“Travelers Policies”). Indeed, before trial, Travelers moved for summary judgment requesting that the Circuit Court enforce the plain and unambiguous policy terms and conditions, and rule that the “Immediate Notice” provision and the “Assistance and Cooperation” provision -- both of which are contractual conditions precedent to coverage -- each independently bar U.S. Silica’s claims. The Circuit Court denied Travelers summary judgment motion in an August 29, 2013 order, and allowed U.S. Silica’s contract claims to be decided by the jury. (JA 200.)

The three Travelers Policies at issue were issued to U.S. Silica’s predecessor, Pennsylvania Glass Sand Corporation (“PGS”), and were in effect between April 1, 1949 and April 1, 1958. (JA 1029; JA 1044; JA 1059.) They provide that Travelers will pay for sums the insured shall become “legally obligated to pay as damages because of bodily injury, sickness or disease ... sustained by any person and caused by [an] accident.” (JA 1031; JA 1046; JA 1061.) The Travelers Policies also provide that Travelers shall “defend any suit against the insured alleging such injury, sickness [or] disease ... and seeking damages on account thereof” (*Id.*) Importantly, however, the Travelers Policies provide that these defense and indemnity obligations apply “only to accidents which occur during the policy period,” i.e., accidents

occurring in the periods 4/1/49-4/1/52, 4/1/52-4/1/55, or 4/1/55-4/1/58. (*Id.*) As the insured, U.S. Silica bore the burden of establishing coverage, including that the claims involve damages for accidents occurring in the relevant policy period.

In addition, the Travelers Policies contain two conditions precedent that are particularly relevant here: one that requires that U.S. Silica provide “immediate” notice of a claim or suit to Travelers:

4. Notice of Claim or Suit. If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

(JA 1032; JA 1047; JA 1062.)

The second provision provides:

5. Assistance and Cooperation of the Insured ... The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

(JA 1032; JA 1047; JA 1062.) These conditions mandate that Travelers is provided with an absolute right to have a meaningful opportunity to assess, defend and, where appropriate, resolve such claims.

In March 1968, after the Travelers Policies issued to PGS had expired, PGS was acquired by International Telephone and Telegraph Corporation (“ITT”). (JA 385-86.) On or about September 12, 1985, ITT sold PGS’s stock to Pacific Coast Resources Co. (“Pacific Coast”), now known as U.S. Borax Inc. (“Borax”). (JA 1222.) PGS changed its name to U.S. Silica on or about December 31, 1986. (JA 1214.) As part of its sale of PGS to Pacific Coast, ITT agreed to indemnify Pacific Coast and later U.S. Silica against the Silica Claims (“the ITT Indemnity”). (JA 1268-69.) The ITT Indemnity provided that ITT would reimburse U.S. Silica 100 percent

for all defense and settlement costs incurred for Silica Claims that alleged exposure to silica products entirely before September 12, 1985. (JA 1268.) For Silica Claims that alleged exposure to silica products both prior to and after September 12, 1985, the ITT Indemnity provided that ITT would reimburse U.S. Silica for the portion of defense and indemnity costs that were attributable to the pre-September 12, 1985 period. (JA 1268-69.) U.S. Silica was responsible for the portions of defense and settlement costs for Silica Claims that alleged post-September 12, 1985 exposures. (*Id.*) The ITT Indemnity was in effect from September 12, 1985 until it expired on September 12, 2005. (JA 1272; JA 1316; JA 1321-22.)

Between 1975 and September 12, 2005, U.S. Silica incurred over \$13 million in defense and settlement costs that were not reimbursed by the ITT Indemnity. (JA 840-52.) However, U.S. Silica made no effort whatsoever to locate any insurance policies issued to its predecessor PGS that might provide coverage for Silica Claims, and that might cover the \$13 million that was not reimbursed pursuant to the ITT Indemnity. (JA 477-78.) Indeed, U.S. Silica admitted that it only first looked for insurance contracts that could potentially provide coverage for Silica Claims in 2005, when the ITT Indemnity, by its terms, was coming to an end. (JA 478-79.) U.S. Silica's corporate representative, John Ulizio, testified that the expiration of the ITT Indemnity "was a big part of why" U.S. Silica finally decided to search for insurance policies, and that he would have looked for the policies earlier had the ITT Indemnity expired earlier. (JA 478-80.) He never explained, however, why the \$13 million in unreimbursed costs during that time period was somehow unimportant or trivial such that no search was conducted prior to that time.

During its 2005 policy search, U.S. Silica located the Travelers Policies at its own corporate headquarters. (JA 481.) Karrie Loucks, a paralegal in U.S. Silica's corporate legal department since 2003 and the person who searched for and located the Travelers Policies in

2005, testified that U.S. Silica maintains a computerized Access database of U.S. Silica's insurance policies that lists all of U.S. Silica's insurers' names, policy numbers, policy types and effective dates. (JA 907.) Although she does not have a specific recollection of conducting the 2005 policy search that located the Travelers Policies, Ms. Loucks has performed several insurance policy searches during her tenure at U.S. Silica, and has never conducted a search for insurance policies without using U.S. Silica's policy database. (JA 911.) Rather, she has always searched for the policies in U.S. Silica's insurance policy database and then, using the results of that computerized search, retrieved the policies identified in the insurance policy database from U.S. Silica's hard copy insurance policy archives. (JA 906-07.) Ms. Loucks testified that it would take her "[l]ess than an hour" to conduct a search to determine if the Travelers Policies are in U.S. Silica's insurance policy database. (JA 913.)

It was not until November 22, 2005 that U.S. Silica's counsel contacted Travelers to advise that U.S. Silica might seek reimbursement from Travelers under the Travelers Policies for the payments that U.S. Silica had allegedly made for defense and settlement of Silica Claims prior to September 12, 2005. (JA 1093.) Even then, U.S. Silica did not identify or send to Travelers any of the suits for which U.S. Silica purported to seek reimbursement. (JA 487; JA 1093.) Nor did U.S. Silica's coverage counsel request that Travelers defend or indemnify U.S. Silica for any specific Silica Claims at that time. (JA 1093.)

On January 6, 2006, U.S. Silica filed this suit against Travelers and certain other primary and excess insurance carriers seeking a declaration that U.S. Silica was entitled to "defense and indemnification" for several thousand Silica Claims. (JA 1; JA 13.) Even after it filed this suit, U.S. Silica still did not tender any of those Silica Claims to Travelers for defense under the Travelers Policies. (JA 660-61.)

On January 12, 2006, ACE Fire Underwriters Insurance Company filed *ACE Fire Underwriters Insurance Co. v. ITT Industries, Inc.*, Cause No. 600133-06, against U.S. Silica, ITT and a number of their alleged insurers in New York state court seeking a declaration concerning insurance coverage for Silica Claims against ITT and U.S. Silica under certain insurance policies issued to ITT (“New York suit”). (JA 3284.) Travelers has never been a party to the New York suit, the Travelers Policies have never been at issue in the New York suit, and U.S. Silica has never asserted any claims against Travelers in the New York suit.¹ (JA 3333.)

Then, in August, 2006, U.S. Silica was added to an action that had been previously filed by ITT entitled *Cannon Electric, Inc. v. Affiliated FM Insurance Co.*, Case No. BC 290354, in California state court (“California suit”), against more than 30 insurance companies regarding claims against ITT and its subsidiaries. U.S. Silica thereafter named Travelers as a third-party defendant on January 4, 2007. (JA 3358.) U.S. Silica’s claims against Travelers in the California suit, which are essentially identical to the claims that U.S. Silica asserted against Travelers in this case, remain pending.

On July 25, 2007, U.S. Silica provided Travelers with a list of “now closed silica claims asserted against U.S. Silica that were filed prior to September 12, 2005” (JA 1145.) The list was over 429 pages long, and listed approximately 32,000 Silica Claims.² It did not include any complaints. (JA 1143.)

¹ The complaint in the New York suit identifies “Travelers Casualty and Surety Company as successor to Aetna Casualty and Surety Company” as a defendant, but “Travelers Casualty and Surety Company” is not the same entity as the Petitioner here.

² An excerpt from this list, which is part of Plaintiff’s Exhibit 36, can be found in the appendix at JA 1194-1202. The full version of this spreadsheet is in the record but was not included in the appendix to reduce volume.

U.S. Silica did not provide to Travelers the complaint for a single Silica Claim for which it sought reimbursement in this action until September 24, 2008, when it sent Travelers a set of four compact disks containing copies of the complaints that had been filed against U.S. Silica over the preceding thirty years. (JA 1324.) The disks contained complaints for “[h]undreds of lawsuits with thousands of plaintiffs.” (JA 683.) Neither U.S. Silica’s letter nor the discs provided any information that identified the amounts of pre-September 12, 2005 costs that U.S. Silica sought to recover. (JA 684-85.) Nor did U.S. Silica make any effort to identify which of the hundreds of claims purportedly involved damages for accidents during the policy periods of the Travelers Policies.

On August 3, 2010, Travelers issued a reservation of rights to U.S. Silica’s tender of the Silica Claims that included the following:

5. Travelers has no obligation to reimburse [U.S. Silica] or pay for any voluntary payment, assumed obligation or incurred expense other than for first aid to others at the time of an accident.
6. Coverage will not apply should it be determined that there was a failure to comply with applicable notice provisions. Please note that the Alleged Policies require that if claim or suit is brought against the insured, that the insured shall immediately forward to the company every demand, notice, summons or other process received. Travelers will not pay any pre-tender costs incurred for any of the Lawsuits.

(JA 1359-60.)

In December 2012, prior to trial, U.S. Silica entered into settlements with certain of its other insurers and obtained over \$6 million for defense and indemnity costs associated with the underlying Silica Claims.³ It was ultimately determined during the trial that U.S. Silica incurred

³ U.S. Silica entered into an agreement with Pacific Employers Insurance Company and Century Indemnity Company (together “ACE”), two co-defendants in this action. (JA 1707.) The ACE primary policies issued to U.S. Silica were in effect from January 29, 1967 to December 31, 1974, and from December 31, 1977 to January 1, 1986. (JA 1725.) ACE made a \$4,400,000 payment in exchange for

the entire \$8,037,745 that U.S. Silica sought from Travelers before September 12, 2005. (JA 1754.)

II. PROCEDURAL HISTORY

On January 6, 2006, U.S. Silica initiated this suit against Travelers and 35 other insurers for reimbursement of defense and indemnity payments that U.S. Silica incurred in connection with the Silica Claims. (JA 1.) On October 3, 2007, the Circuit Court granted certain defendants' motion to stay this case in favor of the California suit. (JA 3978.) The Circuit Court lifted the stay in this case on April 25, 2012. (JA 3981.)

On July 15, 2013, Travelers moved for summary judgment on the grounds that the Immediate Notice provision and the Assistance and Cooperation provision in the Travelers Policies, separately and independently, barred coverage for U.S. Silica's reimbursement claims against Travelers. The Circuit Court denied Travelers summary judgment motion in an August 29, 2013 order. (JA 200.)

At the September 11, 2013 pretrial conference, the Circuit Court issued an order holding that "[j]oint and several allocation shall apply with respect to the Travelers Policies at issue in this case." (JA 291.) U.S. Silica did not request a jury instruction regarding prejudgment interest at the pretrial conference. (JA 253-81.) After the close of trial and during the final jury charge conference on September 25, 2013, U.S. Silica's counsel neither requested a jury instruction regarding prejudgment interest nor objected to the Circuit Court's failure to instruct

U.S. Silica dropping any claims for coverage for "Released Costs," which are defined in the ACE settlement agreement as "the PGS Silica Claim defense, settlement and judgment costs incurred by U.S. Silica prior to September 12, 2005 that fell outside the scope of the ITT Indemnity and for which U.S. Silica has not previously been reimbursed as of the date this Agreement is executed." (JA 1711.) U.S. Silica also entered into a settlement agreement with another co-defendant, Arrowood Indemnity Company ("Arrowood"), under which Arrowood agreed to pay \$1,624,000 in exchange for U.S. Silica releasing Arrowood from all claims in this action. (JA 1735.) Arrowood issued a primary policy to Borax or the period from January 1, 1984 to January 1, 1986. (JA 1738.)

the jury regarding prejudgment interest. (JA 917-56; JA 975.) As to Travelers late notice defense, the Circuit Court instructed the jury that “[i]f you find, by a preponderance of the evidence, that Travelers would have denied U.S. Silica’s claims regardless of when it received notice of the silica claims, then you must find that Travelers waived its late notice tender defense.” (JA 970-71.) The Circuit Court also instructed the jury that “if you find that Travelers raised a defense of untimely notice initially in this case, then you may find that it has not waived that defense and that it is not estopped from raising it now.” (JA 973.)

The jury returned a verdict that “Travelers breached its insurance policies when it refused to pay U.S. Silica’s claims for insurance coverage for the silica lawsuits” and awarded U.S. Silica \$8,037,745 in breach of contract damages. (JA 1754.) After the Circuit Court dismissed the jury, U.S. Silica orally moved for an award of prejudgment interest, and requested leave to brief the issue. (JA 1024-25.)

On October 15, 2013, the Circuit Court entered its Order of Judgment. (JA 1754.) On October 29, 2013, Travelers filed a Rule 50(b) Motion for Judgment as a Matter of Law and, in the Alternative, Motion for a New Trial seeking judgment as a matter of law based on U.S. Silica’s violation of the Immediate Notice and Assistance and Cooperation provisions in the Travelers Policies; a new trial based on the Court’s jury instruction regarding waiver of Travelers late notice defense; and/or a *remittitur* or new trial based on U.S. Silica’s failure to meet its burden of demonstrating entitlement to that portion of the jury’s verdict covering settlement payments to silica claimants with no known dates of exposure, and on settlement payments U.S. Silica received from two co-defendant insurers. (JA 1757.) U.S. Silica moved for an award of (1) over \$4.6 million in attorneys’ fees incurred not only in the suit in West Virginia, but also in the New York suit and the California suit; (2) prejudgment interest at a rate of 10 percent per

annum on the jury verdict under West Virginia Code § 56-6-31; and (3) prejudgment interest on its attorneys' fees. (JA 1867.)

The Circuit Court heard oral argument on the parties' Post-Trial Motions on January 13, 2014. (JA 3841.) On March 5, 2014, the Circuit Court denied Travelers Post-Trial Motion in its entirety and granted U.S. Silica's Post Trial Motion in part. (JA 3919.) The Circuit Court awarded U.S. Silica the full amount of its requested attorneys' fees and costs incurred in the West Virginia, New York and California suits. (*Id.*) The Circuit Court also awarded prejudgment interest to U.S. Silica at a 7 percent per annum rate and directed U.S. Silica to provide a calculation of prejudgment interest on its attorneys' fees at a 7 percent per annum rate. (*Id.*)

On May 6, 2014, the Circuit Court issued an order applying prejudgment interest to its award of attorneys' fees and expenses. (JA 3963-65.) The Circuit Court also awarded U.S. Silica another \$893,414.86 in prejudgment interest on its attorneys' fees and costs. (JA 3965.) Travelers timely appealed.

SUMMARY OF ARGUMENT

The Circuit Court committed a host of reversible errors, resulting in a windfall award to U.S. Silica of over \$17 million in damages, prejudgment interest, and attorneys' fees and costs. These errors, individually and collectively, require that the judgment be vacated and the case remanded with instructions to enter judgment in favor of Travelers as a matter of law.

First, the Circuit Court erred in failing to enforce the Assistance and Cooperation provision of each of the Travelers Policies, which in plain and unambiguous terms precluded U.S. Silica's claims for reimbursement of defense costs and indemnity payments that U.S. Silica unilaterally made before tendering the Silica Claims to Travelers. Courts across the country

have ruled in identical circumstances and virtually unanimously that a policyholder cannot collect so-called “pre-tender” costs.

Second, the Circuit Court similarly erred in denying judgment as a matter of law to Travelers based on U.S. Silica’s violation of the Immediate Notice provision of the Travelers Policies. The undisputed record established that U.S. Silica did not provide notice of the Silica Claims immediately, or even in a reasonably prompt fashion, but instead delayed tendering the Silica Claims to Travelers for between 3 and 30 years *after* U.S. Silica had been served with the ones for which it sought coverage from Travelers, and *after* U.S. Silica had already defended and resolved those claims. Travelers was not required to establish prejudice from U.S. Silica’s delay unless and until U.S. Silica established the reasonableness of its extensive delay. The undisputed record reflects that U.S. Silica failed to show that its delay in providing notice was reasonable, and even if U.S. Silica had met that burden (which it did not), Travelers was prejudiced by U.S. Silica’s late notice as a matter of law. Travelers was deprived of any opportunity to assess, defend and/or settle any of the Silica Claims as was its right, and U.S. Silica’s delay resulted in a loss of information about the underlying claims – information that was necessary to determine whether the claims were potentially covered under the Travelers Policies. Under controlling West Virginia law, these indisputable facts establish that Travelers was entitled to judgment as a matter of law, both at the summary judgment stage and at the conclusion of trial. *See, e.g.*, Syl. Pt. 2, *Colonial Ins. Co. v. Barrett*, 208 W. Va. 706, 542 S.E.2d 869 (2000); Syl. Pt. 2, *Dairyland Ins. Co. v. Voshel*, 189 W. Va. 121, 428 S.E.2d 542 (1993).

Third, even assuming the late notice issue should have been left to the jury to decide (it should not have been), the Circuit Court’s jury instructions on the late notice defense were erroneous as a matter of law. The Circuit Court’s instruction that the jury “must” find that

Travelers waived its late notice defense if the jury somehow concluded that Travelers would have denied coverage based on other coverage defenses was inconsistent with West Virginia law. Waiver requires an intentional relinquishment of a known right, and cannot be asserted so as to extend coverage beyond the terms of the insurance contract. *See* Syl. Pts. 1, 3, 5, 6, *Potesta v. U.S. Fid. & Guar. Co.*, 202 W. Va. 308, 504 S.E.2d 135 (1998). The Circuit Court compounded its error by giving the jury a second confusing and inconsistent instruction that the jury “may” find that Travelers did not waive its late notice defense if Travelers had asserted it from the outset (which never was an issue). This instruction bound to confuse the jury given the prior instruction that it “must” find a waiver of late notice based on Travelers assertion of other coverage defenses.

Fourth, the Circuit Court erred by issuing an order ruling that “joint and several” allocation applied to the Silica Claims. Damages attributable to underlying Silica Claims are properly allocated among U.S. Silica’s insurers on a *pro rata*, time-on-the risk basis. Although this Court has yet to address this important issue, the *pro rata* approach accords with the Travelers Policies at issue and the vast majority of jurisdictions that have addressed this issue. In addition, the Circuit Court’s ruling permitted U.S. Silica to obtain coverage for untold numbers of claims without meeting its burden of demonstrating that the claims involved bodily injury caused by “accidents which occur *during the policy period*,” i.e., between April 1, 1949 and April 1, 1958, and further allowed U.S. Silica to obtain a windfall recovery without accounting for the fact that U.S. Silica had been fully reimbursed for any portion of a Silica Claim that potentially triggered the Travelers Policies.

Fifth, the Circuit Court clearly erred in awarding over \$4.3 million in prejudgment interest to U.S. Silica on the damages award. West Virginia law is clear that prejudgment

interest in a contract action may be awarded by a jury under W. Va. Code § 56-6-27, but it may not be awarded by the court under W. Va. Code § 56-6-31. *See* Syl. Pt. 3, *Ringer v. John*, 230 W. Va. 687, 742 S.E.2d 103 (2013) (per curiam). Yet, U.S. Silica failed to seek interest under W. Va. Code § 56-6-27, and the Circuit Court erroneously awarded interest under § 56-6-31, precisely what this Court has held is impermissible in a contract dispute such as this. Similarly, the Circuit Court erred by awarding U.S. Silica prejudgment interest on U.S. Silica's award of attorneys' fees and costs in clear contravention of West Virginia law, which does not recognize awards of interest on attorneys' fees. *See State ex rel. Chafin v. Mingo Cnty. Comm'n*, 189 W. Va. 680, 684, 434 S.E.2d 40, 44 (1993); *Miller v. Fluharty*, 201 W. Va. 685, 700, 500 S.E.2d 310, 325 (1997).

Sixth, the Circuit Court erred in granting U.S. Silica's request for over \$4.6 million in attorneys' fees and costs in its entirety. U.S. Silica's request included (1) fees and costs incurred during the still-pending California suit, even though California law does not allow prevailing litigants to recover attorneys' fees; (2) fees and costs incurred in the New York suit to which Travelers was not a party; (3) fees and costs incurred pursuing claims against other insurers in this action; and (4) fees and costs incurred under block-billed and/or vague time descriptions.

Seventh, even assuming that the minority "joint and several" approach applied here (which it should not), the Circuit Court erred in denying Travelers post-trial motion for a *remittitur*. Under no theory was U.S. Silica entitled to coverage under the Travelers Policies for settlement payments made by U.S. Silica to silica claimants with no known dates of first exposure, or without taking into account payments totaling over \$6 million that U.S. Silica received from other defendants in this litigation for the same underlying Silica Claims.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary pursuant to the criteria in West Virginia Rule of Appellate Procedure 18(a). Travelers respectfully requests that the case be set for Rule 20 oral argument, since this appeal involves matters of first impression before the Supreme Court of Appeals.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FAILING TO ENFORCE THE ASSISTANCE AND COOPERATION PROVISION OF THE TRAVELERS POLICIES

Insurance policies are “controlled by the rules of construction that are applicable to contracts generally.” *Payne v. Weston*, 195 W. Va. 502, 506-07, 466 S.E.2d 161, 165-66 (1995). West Virginia courts therefore “will not rewrite the terms of the policy; instead, we enforce it as written.” *Id.*, 195 W. Va. at 507, 466 S.E.2d at 166. Thus, “where the provisions of an insurance policy contract are clear and unambiguous, they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended.” Syl. Pt. 1, *Russell v. State Auto. Mut. Ins. Co.*, 188 W. Va. 81, 422 S.E.2d 803 (1992) (citation omitted).

Here, the Travelers Policies plainly provide that U.S. Silica “shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.” (JA 1032; JA 1047; JA 1062.) This condition precedent, which is plain and unambiguous, expressly bars coverage for any payments made by U.S. Silica prior to seeking coverage for such payments from Travelers.

The Circuit Court erred by failing to give “full effect” to the “plain meaning intended” by this straightforward language. *Russell*, 188 W. Va. at 81, 422 S.E.2d at 83. It is an undisputed fact that U.S. Silica incurred every cent of the \$8,037,745 awarded at trial as damages prior to

September 12, 2005. However, U.S. Silica did not provide Travelers with a single underlying silica complaint until September 24, 2008. U.S. Silica's claims against Travelers thus are barred by the Assistance and Cooperation provision of the Travelers Policies as a matter of law. The Circuit Court's failure to so rule is reversible error.⁴

Courts nationwide have considered the same or similar language at issue here, and have consistently held that such language unambiguously precludes a policyholder from seeking reimbursement for costs incurred prior to tendering its claim for coverage to its insurer. For example, in *Augat v. Liberty Mutual Insurance Co.*, 571 N.E.2d 357 (Mass. 1991), the Massachusetts Supreme Judicial Court affirmed a trial court's ruling that an almost identical voluntary payments provision precluded coverage for environmental clean-up costs and related expenses incurred two years before the policyholder requested reimbursement of such costs from its insurer. *Id.* at 360. In so ruling, the court decreed, in words directly applicable here, that:

[T]he purpose of the policy provision in question is to give the insurer an opportunity to protect its interests. In this case, however, the record clearly establishes that Augat's breach of the voluntary payments provision undermined that purpose. After Augat agreed to a settlement, entered into a consent judgment, assumed the obligation to pay the entire cost of the cleanup, and in fact paid a portion of that cost, it was too late for the insurer to act to protect its interests. There was nothing left for the insurer to do but issue a check.

Id. at 361.

In *Dreaded, Inc. v. St. Paul Guardian Ins. Co.*, 904 N.E.2d 1267 (Ind. 2009), the policyholder, much like U.S. Silica here, waited several years before notifying its insurer that it was seeking reimbursement of defense costs and expenses incurred in responding to an

⁴ The denial of a post-trial motion for judgment as a matter of law is reviewed *de novo*. *Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 482, 457 S.E.2d 152, 159 (1995). A circuit court's denial of a motion for judgment as a matter of law must be reversed "if, after scrutinizing the proof and inferences derivable therefrom in the light most hospitable to the plaintiff, we determine that a reasonable fact finder could have reached but one conclusion: [appellant] was entitled to judgment." *Barefoot*, 193 W. Va. at 482, 457 S.E.2d at 159.

environmental contamination claim. The Indiana Supreme Court held that a voluntary payments clause similar to the one at issue here barred coverage for all defense costs paid by the policyholder prior to tendering its claim for coverage to its insurer. *Id.* at 1273. In so ruling, the Indiana Supreme Court noted that pre-tender costs are excluded from coverage because “an insurer cannot defend a claim of which it has no knowledge.” *Id.*

Numerous other decisions are in accord. *See, e.g., Towne Realty, Inc. v. Zurich Ins. Co.*, 548 N.W.2d 64, 68 (Wisc. 1996) (voluntary payments provision barred coverage for all defense costs incurred prior to tender of complaint against policyholder to its insured); *Tenneco Inc. v. Amerisure Mut. Ins. Co.*, 761 N.W.2d 846, 869 (Mich. Ct. App. 2008) (clause precluding coverage for all payments made prior to tender of claim to insurer was “clear and unambiguous,” and barred a policyholder’s request for reimbursement of defense and indemnity costs incurred in responding and entering into environmental decrees and settlements); *Aerojet-General Corp. v. Commercial Union Ins. Co.*, 65 Cal. Rptr. 3d 803, 155 Cal. App. 4th 132 (2007) (voluntary payments clause precluded policyholder’s demand for reimbursement of settlement payments made prior to providing notice of the claim to its insurer); *Etchell v. Royal Ins. Co.*, 165 F.R.D. 523, 547-56 (N.D. Cal. 1996) (policyholders not entitled to reimbursement of funds and costs they incurred before tendering matter to insurer); *Faust v. Travelers*, 55 F.3d 471, 472-73 (9th Cir. 1995) (applying California law) (Assistance and Cooperation provision barred the policyholder’s request for reimbursement of the policyholder’s pre-tender defense costs, as “an insurer will not be held liable for expenses voluntarily incurred by an insured before tendering defense of a suit to the insurer”); *West Bend Mut. Ins. Co. v. Arbor Homes LLC*, 703 F.3d 1092, 1095 (7th Cir. 2013) (citation omitted) (applying Indiana law) (Assistance and Cooperation provision barred policyholder’s recovery of defense costs and settlement payment made prior to

seeking coverage for such payments from its insurer, as any policyholder that settles a claim without its insurer's knowledge or consent "does so at the insured's own expense under the express language of this provision"); *Ingalls Shipbuilding v. Fed. Ins. Co.*, 410 F.3d 214, 233-34 (5th Cir. 2005) (under Texas law, insurer's duty to defend first arose on the date it became aware of insured's desire for a defense under the insurance policy).

Indeed, numerous courts recognize that costs incurred by a policyholder prior to tendering its claims to its insurer are not covered even in the absence of a voluntary payments provision. Thus, in *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 739 (Minn. 1997), the Minnesota Supreme Court affirmed that a policyholder could not recover pre-tender defense costs even though it also held that the policies provided coverage for post-tender defense of the environmental claims at issue. In so ruling, the Minnesota Supreme Court rejected the policyholder's argument that its pre-tender payments should be covered because it took several months to search and find its applicable insurance. *Id.* Instead, the Minnesota Supreme Court held that "an insurer cannot be held responsible for defense costs incurred prior to the tender of the defense request giving rise to the insurer's duty to defend, the diligence of the insured notwithstanding." *Id.* See also *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 311 (Minn. 1995), *overruled on other grounds by Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910 (2009) ("formal tender of a defense request is a condition precedent to the recovery of attorney fees that a party incurs defending claims that a third party is contractually obligated to pay") (citation omitted); *Great Am. Ins. Co. v. Aetna Cas. & Sur. Co.*, 876 P.2d 1314, 1320 (Haw. 1994) (policyholder waived claim for pre-notice defense costs by not notifying insurer for nearly five years after service of underlying complaint); *O'Brien Family Trust v. Glen Falls Ins. Co.*, 461 S.E.2d 311, 313 (Ga. Ct. App. 1995) (construing an insurance policy to require insurer to pay

pre-tender legal expenses “would render contractual terms necessary to trigger [the insurer’s] performance under the policy meaningless”).

Moreover, courts across the country have consistently held that prejudice need not be shown in order to enforce a voluntary payments provision even if prejudice must be shown before enforcement of a notice provision. For example, in *Tenneco*, the Michigan Court of Appeals rejected the policyholder’s assertion that the voluntary payments provision should not apply because the insurer had not demonstrated prejudice, stating that “no such judicial requirement has been grafted onto the ‘voluntary payment’ and ‘no action’ clauses at issue here.” 761 N.W.2d at 870. The Indiana Court of Appeals reached the same conclusion in *Travelers Ins. Cos., Inc. v. Maplehurst Farms, Inc.*, 953 N.E.2d 1153 (Ind. Ct. App. 2011), ruling that where an insured makes payments to settle a claim “without the insurer’s consent in violation of a voluntary payments provision, that obligation cannot be recovered from the insurer, and prejudice is irrelevant.” *Id.* at 1160.

In *Faust v. The Travelers*, 55 F.3d 471, 472-473 (9th Cir. 1995), the United States Court of Appeals for the Ninth Circuit, after noting that California courts have required a showing of prejudice before an insurer can disclaim coverage on the basis of the insured’s breach of a notice or cooperation clause, explained why the same is not required as to a voluntary payments provision:

[In the case of notice and cooperation provisions], enforcement of the provision in question would have worked a forfeiture of the insured’s rights under the policy. The voluntary payment provision, by contrast, provides only that an insurer will not be held liable for expenses voluntarily incurred by an insured before tendering defense of a suit to the insurer.

Id. at 472-473.

Other decisions are in accord. *See, e.g., American Mut. Liability Ins. Co. v. Beatrice Companies, Inc.*, 924 F. Supp. 861, 873 (N.D. Ill. 1996) (finding that there is no prejudice requirement for pre-tender defense costs); *Fireman's Fund Ins. Cos. v. Ex-Cell-O-Corp.*, 790 F. Supp. 1318, 1330 (E.D. Mich. 1992) (under Michigan law, the “no pre-tender defense costs” applies notwithstanding the “notice-prejudice” rule).

Here, it is undisputed that U.S. Silica paid millions of dollars to defend and resolve Silica Claims before ever advising Travelers that it wanted reimbursement of such payments under the Travelers Policies, and before ever sending a Silica Claim to Travelers. This Court therefore should reverse the Circuit Court and hold instead that the Assistance and Cooperation provision in the Travelers Policies bars coverage of all payments that U.S. Silica made for defense and settlement of Silica Claims prior to ever tendering such claims to Travelers.

II. THE CIRCUIT COURT ERRED IN DENYING TRAVELERS MOTION FOR JUDGMENT AS A MATTER OF LAW BASED ON U.S. SILICA'S BREACH OF THE IMMEDIATE NOTICE PROVISION

The Travelers Policies also require, separate and independent from the Assistance and Cooperation provision, that “[i]f claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.” (JA 1032; JA 1047; JA 1062.) The Circuit Court failed to give this Immediate Notice Provision its plain, straightforward application to the undisputed facts at issue, which should have resulted in judgment as a matter of law in Travelers favor under controlling West Virginia precedent. The Circuit Court thus erred in letting the question of whether U.S. Silica's late notice was “reasonable” go to the jury. This Court therefore should reverse and grant judgment in Travelers favor as a matter of law.

A. U.S. Silica's Notice To Travelers Was Late, And Its Excuse For Its Delay In Providing Notice Was Not Reasonable As A Matter Of Law

Under West Virginia law, “[t]he satisfaction of the notice provision in an insurance policy is a condition precedent to coverage for the policyholder.” *Colonial Ins. Co. v. Barrett*, 208 W. Va. 706, 711, 542 S.E.2d 869, 874 (2000) (citations omitted). A court determining whether notice was untimely considers “the length of the delay in notifying the insurer ... along with the reasonableness of the delay.” Syl. Pt. 2, *Dairyland*, 189 W. Va. 121, 428 S.E.2d 542. Only if the delay appears reasonable in light of the policyholder’s explanation does the burden shift to the insurer to show that it was prejudiced by the late notice. *Id.* If a policyholder fails to provide a reasonable explanation for its delay, then the policyholder is precluded from arguing that the insurer was not prejudiced by the delay. *See Dairyland*, 189 W. Va. at 125, 428 S.E.2d at 546 (late notice provision barred coverage as a matter of law where policyholder gave no reasonable explanation for two-year delay in providing notice); *Ragland v. Nationwide Mut. Ins. Co.*, 146 W. Va. 403, 420, 120 S.E.2d 482, 490-91 (1961) (where no excuse for late notice was given, five-month delay in providing notice of fatal auto accident “is not, under normal circumstances, a reasonable time”).⁵

Application of these standards to the facts of this case demonstrates that the Circuit Court erred in failing to rule that U.S. Silica breached the Immediate Notice Provision as a matter of

⁵ *See also Med. Assur. of W. Va. Inc. v. U.S.*, 233 F. App’x 235, 237 (4th Cir. 2007) (applying West Virginia law) (insured’s “unexplained, four-year delay in notice is unreasonable as a matter of law”); *United Nat’l Ins. Co. v. Lee*, 51 F. App’x 407, 411 n.4 (4th Cir. 2002) (“Lee’s failure to state a reasonable explanation for the six-month delay precludes his argument that United National was not prejudiced.”); *Buckeye Union Cas. Co. v. Perry*, 406 F.2d 1270, 1272 (4th Cir. 1969) (“Where the insured has suggested no justification for a delay of well over two months, notice was clearly not given ‘as soon as practicable’ ...”); *Arch Specialty Ins. Co. v. Go-Mart, Inc.*, No. Civ. A. 2:08-0285, 2009 WL 5214916, at *9 (S.D. W. Va. Dec. 28, 2009) (granting summary judgment to insurer on basis of policyholder’s three-year delay in providing notice; “[i]t was inexcusable and entirely unreasonable as a matter of law that [insured’s third-party claims administrator], as the agent of [insured], failed to notify [insurer] immediately of the [underlying] claim”).

law. All of the defense costs and settlement payments for which U.S. Silica sought reimbursement were made prior to September 12, 2005. (JA 496.) Yet U.S. Silica did not submit any complaints for those Silica Claims to Travelers until September 24, 2008. (JA 1093; JA 1324; JA 680-82.)

Given the indisputable lateness of U.S. Silica's notice, the burden was on U.S. Silica to demonstrate that its delay was "reasonable" in light of its explanation. *Dairyland*, 189 W. Va. at 125, 428 S.E.2d at 546. U.S. Silica did not meet this burden. U.S. Silica's explanation for its delay in notifying Travelers of its request for reimbursement of previously paid sums is that it simply "lost" or forgot that it had the Travelers Policies, and that it was only motivated to search for insurance policies in 2005 due to the pending expiration of the ITT Indemnity. (JA 478-79; JA 1807.) This explanation is meritless on several grounds and fails to establish that U.S. Silica's delay was reasonable as a matter of law. First and foremost, U.S. Silica, like any other policyholder, is responsible for keeping track of what insurance it had purchased, and a "lack of knowledge of an insurance policy does not excuse delay in notification of an occurrence." *Olin Corp. v. Ins. Co. of N. Am.*, 966 F.2d 718, 724 (2d Cir. 1992); *see also Domtar*, 563 N.W.2d at 739 (pre-tender defense costs not covered despite policyholder's alleged "diligent search" for previously missing policies); *Travelers v. Maplehurst Farms*, 953 N.E.2d at 1161 (delay in giving notice due to difficulty in locating insurance policies does not "legally excuse" policyholder from providing late notice); *City of Chicago v. U.S. Fire Ins. Co.*, 260 N.E.2d 276 (Ill. Ct. App. 1970) (late notice not excused by fact that insurance policy had been misfiled by policyholder).

Second, U.S. Silica's alleged motivation to search for insurance policies for the first time in 2005 because of the ITT Indemnity's pending expiration rings hollow. During the years that

the ITT Indemnity was in effect, U.S. Silica still racked up over \$13 million in *unreimbursed* payments for defending and settling Silica Claims. Yet U.S. Silica somehow remained unmotivated during this time frame, and never bothered to search for potentially applicable insurance despite its mounting expenditures. It therefore is not reasonable for U.S. Silica to assert that it searched for policies only because it was losing the benefit of the ITT Indemnity, when in fact it had been incurring millions of dollars in unreimbursed payments for years while the ITT Indemnity was in effect without ever doing any policy search.

U.S. Silica's excuse for its late notice to Travelers is further undercut by the fact that, when U.S. Silica did finally conduct its policy search in 2005, it easily and immediately located the Travelers Policies at U.S. Silica's own corporate headquarters. U.S. Silica simply reviewed the list of its insurance policies in its Access database policy list and then located the hard copies in its records at corporate headquarters, which entailed searching about 20 file drawers -- a search that would take "[l]ess than an hour." (JA 913.) And yet, even after locating the Travelers Policies, U.S. Silica still did not send one complaint to Travelers for which it incurred any of the \$8,037,745 it sought at trial until September 24, 2008. (JA 492-93; JA 1099; JA 1324.) U.S. Silica has never explained the three-year delay between locating the Travelers Policies and submitting an actual pre-paid claim for which it was seeking reimbursement.

Because U.S. Silica's stated excuse for its delay in providing notice is not reasonable as a matter of law, and because it has never offered *any* explanation for the three-year delay between advising Travelers of the existence of the Travelers Policies and submitting pre-September 2005 claims that it had already paid, the failure of the Circuit Court to enter judgment in Travelers favor as a matter of law was reversible error, and this Court may end its inquiry there. *E.g.*, *Dairyland*, 189 W. Va. at 125, 428 S.E.2d at 546.

Even if U.S. Silica's delay somehow could be construed as "reasonable" (and it was not), the Circuit Court still should be reversed on this issue because the undisputed facts establish that Travelers was prejudiced as a matter of law. The purpose of a notice requirement in an insurance contract "is to give the insurer an opportunity to make a timely and adequate investigation of all the circumstances surrounding the event which resulted in a claim being made against the insurer." *State Auto. Mut. Ins. Co. v. Youler*, 183 W. Va. 556, 561, 396 S.E.2d 737, 742 (1990) (citation omitted). In this case, Travelers was prejudiced as a matter of law because it was denied its rights to conduct any investigation of the Silica Claims; to engage counsel (for U.S. Silica or for itself); or to have any opportunity to assess, limit or contain its potential liability and exposure under its insurance contracts before it was a foregone conclusion. *Arch Specialty Ins. Co. v. Go-Mart, Inc.*, No. 2:08-0285, 2009 WL 5214916, at *8 (S.D. W. Va. Dec. 28, 2009).

In *Arch*, the United States District Court for the Southern District of West Virginia found the denial of these precise rights to be prejudicial to an insurer as a matter of law where, as here, the policyholder failed to provide its insurer with notice of the claim until after the underlying suit against the policyholder had proceeded to judgment. *Id.* at *10. In reaching its decision, the *Arch* court concluded that the insurer "was prejudiced by the 32 month delay in notification inasmuch as it was denied any right to compromise, defend or even assist in the claims against [the policyholder] prior to jury verdict and judgment in the [underlying] case." *Id.* The court further stated that the insurer's deprivations due to the late notice "go far beyond posing difficulty and mere inconvenience to Arch in the handling of the claim against Go-Mart. Rather, they rise to the level of rendering Arch impotent in the face of a more than \$1 million tab it may have been able to prevent or substantially reduce" *Id.*

Likewise, in *Dairyland*, this Court similarly held that an insurer was prejudiced as a matter of law by a two-year delay in providing notice of a claim because the delay adversely affected the insurer's ability to investigate claims and establish availability of coverage. 189 W. Va. at 125, 428 S.E.2d at 546.

Arch and *Dairyland* are directly applicable here, and both decisions establish that Travelers has been prejudiced by U.S. Silica's late notice of the Silica Claims. By allegedly paying millions of dollars to defend and settle thousands of Silica Claims before ever notifying Travelers of their existence, U.S. Silica indisputably deprived Travelers of its right to investigate, assess, defend, compromise and/or protect its own interests. *Arch*, 2009 WL 5214916 at *8. Like the insurer in *Arch*, Travelers was confronted with expended defense and settlement costs -- more than \$8 million -- *after* the fact. *Id.* at *10. (JA 1143; JA 1193-1202.) And like the insurer in *Dairyland*, Travelers lost any opportunity to investigate the thousands of U.S. Silica's previously resolved Silica Claims and establish whether and to what extent coverage was available. 189 W. Va. at 125, 428 S.E.2d at 546. Accordingly, Travelers has demonstrated prejudice as a matter of law. *Dairyland*, 189 W. Va. at 125, 428 S.E.2d at 546; *Arch*, 2009 WL 5214916, at *8. *See also* 1 Allan D. Windt, *Insurance Claims and Disputes* § 1:4 (6th ed. 2013) (“[p]rejudice should be presumed any time an insured enters into a settlement prior to affording notice”).⁶ This Court therefore should reverse the Circuit Court and grant Travelers judgment as a matter of law. *E.g., Dairyland Ins. Co.*, 189 W. Va. at 125, 428 S.E.2d at 546.

⁶ U.S. Silica's own damages expert, Ross Mishkin, illustrated the prejudice to Travelers when he testified that relevant claim information could not now be determined in many files because “[i]t's fairly typical to see gaps in information in these types of databases.” (JA 784-85.) Obviously, such information could have been obtained and preserved if U.S. Silica had tendered claims in timely fashion.

B. The Circuit Court's Conflicting Jury Instructions On Late Notice Were Contrary To West Virginia Law

The Circuit Court erred in letting the issue of late notice go to the jury. It compounded its error by giving erroneous and conflicting instructions to the jury for its consideration of Travelers late notice defense. The Circuit Court instructed the jury that “[i]f you find, by a preponderance of the evidence, that Travelers would have denied U.S. Silica’s claims regardless of when it received notice of the silica claims, then you *must* find that Travelers waived its late notice tender defense,” (JA 970-71 (emphasis added)) and, separately, that “if you find that Travelers raised a defense of untimely notice initially in this case, then *you may find that it has not waived that defense* and that it is not estopped from raising it now.” (JA 973 (emphasis added).)⁷ The Circuit Court erred in giving these instructions on two separate grounds. (JA 928-32; JA 956.)

First, the Circuit Court’s instruction that the jury *must* find that Travelers waived its late notice defense if Travelers asserted other coverage defenses is contrary to West Virginia law. Waiver requires an *intentional* relinquishment of a known right, and *cannot* be asserted to extend coverage beyond the terms of the Travelers Policies. *See* Syl. Pts. 1, 3, 5, 6, *Potesta v. U.S. Fid. & Guar. Co.*, 202 W. Va. 308, 504 S.E.2d 135 (1998). At no time did Travelers ever

⁷ This Court reviews a circuit court’s formulation and giving of jury instructions under an abuse of discretion standard. *See, e.g., AIG Domestic Claims, Inc. v. Hess Oil Co.*, 232 W. Va. 145, 751 S.E.2d 31, 37 (2013) (citing Syl. Pt. 6, in part, *Tennant v. Marion Health Care Found.*, 194 W. Va. 97, 459 S.E.2d 374 (1995)). However, “[i]t is error to give inconsistent instructions, even if one of them states the law correctly, inasmuch as the jury, in such circumstances, is confronted with the task of determining which principle of law to follow, and inasmuch as it is impossible for a court later to determine upon what legal principle the verdict is founded.” Syl. Pt. 1, *State Road Comm’n v. Darrah*, 151 W. Va. 509, 153 S.E.2d 408 (1967). “[T]he giving of ‘[a]n erroneous instruction is presumed to be prejudicial and warrants a new trial unless it appears that the complaining party was not prejudice[d] by such instruction.’ *AIG Domestic Claims*, 751 S.E.2d at 37 (quoting Syl. Pt. 2, *Hollen v. Linger*, 151 W. Va. 255, 151 S.E.2d 330 (1966)).

intentionally waive or fail to assert its right to disclaim coverage on late notice grounds. (JA 1359-60). The Circuit Court's instruction thus was wrong as a matter of law. Syl. Pts. 1, 3, 5, 6, *Potesta*, 202 W. Va. 308, 504 S.E.2d 135.

Indeed, the U.S. Court of Appeals for the Fourth Circuit, applying West Virginia law, confirmed this result in an analogous situation in *Buckeye Union Casualty Co. v. Perry*, 406 F.2d 1270 (4th Cir. 1969). In that case, the policyholder asserted that even if notice had been provided late, his insurer should be estopped from denying coverage on late notice grounds because the insurer also denied coverage on other grounds, as U.S. Silica asserted here. The Fourth Circuit rejected this argument, noting that the policyholder:

did not rely on the company's conduct when he delayed giving notice; *all of the facts underlying the estoppel argument occurred after he had already given his untimely notice to the company*. The insurer has taken no inconsistent positions and is not now estopped from raising the defense of late notice.

Id. at 1272 (emphasis added). Here, likewise, the same principles apply under a waiver standard. The Circuit Court's instruction that the jury *must* find that Travelers waived its late notice defense if it asserted other coverage defenses is a clear error of law. *Id.* Travelers therefore has not "waived" any defenses, and its simultaneous assertion of other defenses does not establish anything to the contrary. *Id.*

In addition, the Circuit Court's issuance of two conflicting instructions was erroneous. Under the Circuit Court's first instruction, the jury was told that it *had* to find that Travelers waived its late notice defense if it asserted other coverage defenses. (JA 970-71.) Yet the Circuit Court's second instruction told the jury that it *may* find that Travelers did not waive late notice if it timely raised that defense. (JA 973.) Thus, even if the jury concluded that Travelers timely asserted its late notice defense (which was never at issue), the jury was instructed that it

must find waiver nonetheless based on other coverage defenses. These instructions, taken together, were thus confusing and potentially inconsistent, and in any event both instructions improperly permitted the jury to find that Travelers waived its late notice defense in the absence of a finding that Travelers intentionally waived a known right. *See Darrah*, 151 W. Va. at 513, 153 S.E.2d at 411-12 (issuance of inconsistent instructions is error). The Circuit Court’s error in giving these instructions is presumptively prejudicial and requires a reversal of the judgment “unless it clearly appears from the record that such party could not have been prejudiced by the giving of the instruction.” *Id.*, 151 W. Va. at 515, 153 S.E.2d at 412.

Accordingly, even if the Court does not reverse the Circuit Court and grant judgment to Travelers as a matter of law pursuant to the Assistance and Cooperation and Late Notice provisions of the Travelers Policies, it still should reverse the judgment and award Travelers a new trial due to the Circuit Court’s erroneous and conflicting instructions on late notice. *See, e.g., AIG Domestic Claims*, 751 S.E.2d at 33 (“Due to the conceivable injection of jury confusion into the trial as the result of these conflicting instructions, the insurance companies are entitled to a new trial.”) (citation omitted).

III. THE CIRCUIT COURT ERRED IN RULING THAT “JOINT AND SEVERAL” ALLOCATION APPLIED TO THE UNDERLYING SILICA CLAIMS

The Circuit Court also erred by ruling that a “joint and several” method of allocation, as opposed to *pro rata* allocation, should be applied to the Silica Claims.⁸ The Circuit Court’s

⁸ Under “joint and several” allocation, an insured is entitled to collect the total amount of its liability under any triggered insurance policy it chooses, even though the injury may span time periods before and/or after the chosen policy period. In contrast, under *pro rata* allocation, an insurer is liable for its percentage of defense and indemnity costs in proportion to the number of triggered years. *See, e.g., Olin Corp. v. Ins. Co. of N. Am.*, 221 F.3d 307, 322 (2d Cir. 2000).

ruling is contrary to the Travelers Policies and the majority view of courts that have addressed the issue.⁹ The Circuit Court’s decision therefore should be reversed.

A. The Travelers Policies Require *Pro Rata* Allocation

When reviewing insurance policies, this Court adheres to the long-standing rule that, where terms of the policy are clear and unambiguous, the policy language controls, and “full effect” will be given to the plain meaning intended. *E.g., Russell*, 188 W. Va. at 81, 422 S.E.2d at 803. The plain language of the Travelers Policies -- the language which Travelers and PGS bargained for and relied upon -- explicitly provides insurance coverage for a defined, finite period. Specifically, the Travelers Policies provide that coverage only extends to “bodily injury” caused by “accidents which occur *during the policy period.*” (JA 1031; JA 1046; JA 1061 (emphasis added).) By their very terms, these contracts do *not* require Travelers to pay “all sums” without regard to the timing of the accident. Rather, the fundamental premise of the Travelers Policies’ language is that damages should be allocated on the basis of the time Travelers provided coverage, and should be limited to the injuries as a result of an accident sustained during that period. Thus, the Travelers Policies require *pro rata* allocation of the Silica Claims over all triggered insurance coverage and uninsured/self-insured periods. *See, e.g., Domtar*, 563 N.W.2d at 732 (insurers’ liability was properly limited to damages occurring during policy period because, under *pro rata* allocation, “[e]ach insurer is liable for that period of time it was on the risk compared to the entire period during which damages occurred”).

⁹ A circuit court’s grant of summary judgment also is reviewed *de novo*, under the same standards that the circuit court initially applied to determine whether summary judgment was appropriate. Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994); *Payne*, 195 W. Va. at 506, 466 S.E.2d at 165.

Accordingly, Travelers is *not* responsible for reimbursing costs incurred by U.S. Silica in connection with bodily injury caused by an accident during any time *not* within the Travelers policy period. *Id.*

B. This Court Should Follow The Majority View And Modern Trend And Adopt *Pro Rata* Allocation

Recognizing the plain limitation of coverage to the actual policy period, the majority of state supreme courts that have considered the issue have rejected the “joint and several” ruling imposed by the Circuit Court and instead adopted *pro rata* allocation. *See, e.g., Towns v. N. Sec. Ins. Co.*, 964 A.2d 1150, 1166 (Vt. 2008) (*pro rata* allocation based on time on the risk “is most consistent with . . . the standard occurrence-based policy provision limiting coverage to damages occurring *during* the policy term on which it is based”) (emphasis in original). *Id.* at 224.¹⁰ As

¹⁰ Fifteen state supreme courts have adopted *pro rata* allocation, and since 2003, nine of the ten state supreme courts to address the issue on first impression have adopted *pro rata* allocation and rejected the joint and several approach. *See Crossman Cmty. of N.C. v. Harleysville Mut. Ins. Co.* 717 S.E.2d 589, 599 (S.C. 2011); *Dutton-Lainson Co. v. Cont'l Ins. Co.*, 778 N.W.2d 433 (Neb. 2010); *Boston Gas Co. v. Century Indem. Co.*, 910 N.E.2d 290 (Mass. 2009); *Towns v. N. Sec. Ins. Co.*, 964 A.2d 1150 (Vt. 2008); *Southern Silica of La., Inc. v. Louisiana Ins. Guar. Ass'n*, 979 So. 2d 460 (La. 2008); *EnergyNorth Natural Gas Inc. v. Certain Underwriters at Lloyd's*, 934 A.2d 517 (N.H. 2007); *Aetna Cas. & Sur. Co. v. Commonwealth*, 179 S.W.3d 830 (Ky. 2005); *Atchison, Topeka & Santa Fe Ry. v. Stonewall Ins. Co.*, 71 P.3d 1097 (Kan. 2003); *Sec. Ins. Co. v. Lumbermens Mut. Cas. Co.*, 826 A.2d 107 (Conn. 2003); *Consol. Edison Co. of N.Y. v. Allstate Ins. Co.*, 74 N.E.2d 687 (N.Y. 2002); *Pub. Serv. Co. of Colo. v. Wallis & Cos.*, 986 P.2d 924 (Colo. 1999); *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724 (Minn. 1997) (en banc); *Sharon Steel Corp. v. Aetna Cas. & Sur. Co.*, 931 P.2d 127 (Utah 1997); *Sentinel Ins. Co. v. First Ins. Co. of Haw., Ltd.*, 875 P.2d 894 (Haw. 1994); *Owens-Illinois, Inc. v. United Ins. Co.*, 50 A.2d 974 (N.J. 1994), while only eight state high courts have endorsed all sums allocation. The majority of federal and state intermediate courts have also endorsed *pro rata* allocation. *See, e.g., Nationwide Ins. Co. v. Central Mo. Elect. Coop., Inc.*, 278 F.3d 742 (8th Cir. 2001); *E.R. Squibb & Sons, Inc. v. Lloyd's & Cos.*, 241 F.3d 154 (2d Cir. 2001); *Spartan Petroleum Co., Inc. v. Federated Mut. Ins. Co.*, 162 F.3d 805 (4th Cir. 1998); *Commercial Union Ins. Co. v. Sepco*, 918 F.2d 920 (11th Cir. 1990); *Porter v. Am. Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981); *Huntsman Advanced Materials, LLC v. OneBeacon Am. Ins. Co.*, No. 08-229, 2011 WL 3202936 (D. Idaho July 21, 2011); *The Morrow Corp. v. Harleysville Mut. Ins. Co.*, 101 F. Supp. 2d 422 (E.D. Va. 2000); *Liberty Mut. Ins. Co. v. Wheelwright Trucking Co.*, 851 So. 2d 466 (Ala. 2002) (applying Georgia law); *Mayor & City Council of Baltimore v. Utica Mut. Ins. Co.*, 802 A.2d 1070 (Md. Ct. Spec. App. 2002); *Arco Indus., Corp. v. Am. Motorists Ins. Co.*, 594 N.W.2d 61 (Mich. App. Ct. 1998), *aff'd*, 617 N.W.2d 330 (Mich. 2000); *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 670 N.E.2d 740 (Ill. App. Ct. 1996).

New York's highest court explained in *Consolidated Edison Co. of New York v. Allstate Insurance Co.*, "singular focus on 'all sums' would read this important qualification ['during the policy period'] out of the policies." 774 N.E.2d 687, 695 (N.Y. 2002). Thus:

Pro rata allocation . . . while not explicitly mandated by the policies, is consistent with the language of the policies. Most fundamentally, the policies provide indemnification for liability incurred as a result of an accident or occurrence during the policy period, not outside that period. * * *

Id.

This Court therefore should reverse the Circuit Court's ruling and hold that Travelers coverage obligation, if any, should be determined based on its *pro rata* portion of the relevant time periods covered by the allegations of bodily injury in the Silica Claims.¹¹

C. The Circuit Court's Adoption Of A Joint And Several Allocation Without Application Of The ITT Indemnity Resulted In U.S. Silica Being Awarded A Windfall Recovery For Its Uncovered Costs Incurred In Defending And Settling Silica Claims

The Circuit Court's decision to adopt a joint and several allocation without consideration of the ITT Indemnity produced an inequitable, unjust and windfall result in U.S. Silica's favor. Specifically, the Circuit Court's decision allowed U.S. Silica to obtain \$8.037 million in damages from Travelers for uncovered Silica Claims while negating the fact that U.S. Silica

¹¹ In reaching its "joint and several" allocation ruling, the Circuit Court relied upon *Wheeling Pittsburgh Corp. v. Am. Ins. Co.*, No. Civ. A 93-C-340, 2003 WL 23652106 (W. Va. Cir. Ct. Oct. 18, 2003), an unpublished and distinguishable circuit court decision. In *Wheeling Pittsburgh*, which involved environmental property damage claims, the circuit court concluded that the insurance policies at issue "do not contain any provisions that address the method of allocating losses among triggered policies, let alone a provision limiting defendants' duty to indemnify to a portion, share or fraction of otherwise covered damages" in deciding to apply the "joint and several" method. *Id.* at *19. Here, however, the Travelers Policies provide such limiting language, as the Policies apply "only to accidents which occur during the policy period." Therefore, the analysis in *Wheeling Pittsburgh* does not apply here. See *Consol. Edison Co. v. Allstate Ins. Co.*, 774 N.E.2d 687, 695 (N.Y. 2002) (holding that "joint and several allocation is not consistent with the language of the policies providing indemnification for 'all sums' of liability that resulted from an accident or occurrence 'during the policy period'") (citations omitted).

already had been reimbursed for all Silica Claims or portions of Silica Claims that even arguably triggered the Travelers Policies. This Court therefore should reverse the Circuit Court, and rule instead that Travelers has no coverage obligation to U.S. Silica.

1. ITT reimbursed U.S. Silica for all defense and settlement costs attributable to Silica Claims or portions of Silica Claims that, even under a continuous trigger of coverage, could trigger the Travelers Policies

The Travelers Policies were in effect from April 1, 1949 to April 1, 1958. As noted, those Policies only provide coverage for bodily injury caused by “accidents which occur during the policy period.” (JA 1031; JA 1046; JA 1061.) Thus, to trigger a Travelers Policy, any portion of any Silica Claim for which U.S. Silica seeks coverage would have to allege exposure to U.S. Silica’s products prior to April 1, 1958. (JA 76; JA 1031; JA 1046; JA 1061.)

The only damages that U.S. Silica was awarded at trial were for unreimbursed payments that U.S. Silica incurred prior to September 12, 2005 in defending and settling Silica Claims. (JA 767; JA 778-79.) However, between September 12, 1985 and September 12, 2005, ITT reimbursed U.S. Silica for 100 percent of all defense and settlement payments for Silica Claims that alleged exposure to silica products prior to September 12, 1985. (JA 1268-69.) Likewise, for Silica Claims that alleged exposure to silica products both prior to and after September 12, 1985, the ITT Indemnity provided that ITT would reimburse U.S. Silica for 100 percent of the pre-September 12, 1985 exposure defense and settlement costs of such claims. (*Id.*) U.S. Silica was not reimbursed for the defense and settlement costs attributable to the post-September 12, 1985 exposure portion of those Silica Claims. (*Id.*)

U.S. Silica admits that ITT fully complied with the ITT Indemnity. (JA 499.) U.S. Silica thus was fully reimbursed for all Silica Claim defense and indemnity costs involving exposure

prior to September 12, 1985 -- the only Silica Claims that could trigger the Travelers Policies, whose last policy period ended on April 1, 1958. As a result, all Silica Claim defense and indemnity costs that are directly allocable to a Travelers Policy period were paid by ITT under the ITT Indemnity, and U.S. Silica should not have been allowed to recover its unreimbursed post-September 12, 1985 exposure costs from Travelers when the Travelers Policies do not cover those claims.

2. Even if “all sums” were correct, the Circuit Court’s ruling was still erroneous because the facts demonstrated that the unreimbursed costs were all outside the Travelers Policy Periods

The Circuit Court compounded its joint and several error because it failed to take into account the fact that U.S. Silica had already been reimbursed for all Silica Claim payments that were potentially allocable to the Travelers Policies. Instead, the Circuit Court’s ruling enabled U.S. Silica to backload its unreimbursed defense and settlement costs for Silica Claims with post-September 12, 1985 exposures -- and for which no coverage was available under the Travelers Policies -- into an \$8.037 million damages award against Travelers. The Circuit Court’s joint and several ruling, combined with the failure to apply the ITT Indemnity, allowed U.S. Silica to assign to Travelers *all* unreimbursed defense costs for Silica Claims with exposures both before and after September 12, 1985 that touched the Travelers Policies as well as all unreimbursed defense and settlement costs for Silica Claims with no known dates of exposure, even though all costs for the portions of those Silica Claims that were potentially allocable to the Travelers Policies had already been reimbursed by ITT. Travelers thus was held liable for \$8.037 million in costs that were not allocable to its policy periods under either a “*pro rata*” or “*all sums*” approach.

U.S. Silica's own damages expert, Ross Mishkin, confirmed this erroneous approach and the windfall award that it produced for U.S. Silica. Mr. Mishkin admitted that he was completely unaware of the ITT Indemnity until presented with it at his deposition by Travelers counsel. (JA 780-84.) Even thereafter, he still did not consider it in any part of his damages analysis. (*Id.*) Instead, Mr. Mishkin, pursuant to U.S. Silica counsel's instructions, simply allocated to the Travelers Policies all unreimbursed portions of Silica Claims that alleged any part of exposure during a Travelers Policy period as well as all Silica Claims that had no alleged dates of exposure. (JA 779-80.) Mr. Mishkin did so even though all such remaining unreimbursed sums were defense and settlement costs for the post-September 12, 2005 exposure portion of the Silica Claims, which fell outside of, and should never have been allocated to, the Travelers Policies.

The Circuit Court thus erred in adopting its joint and several allocation ruling, which enabled U.S. Silica to recover \$8.037 million in costs actually associated with Silica Claims with post-September 12, 1985 exposures, which clearly fall outside the Travelers Policies' years of coverage. Because it is undisputed that all costs for all pre-September 12, 1985 exposures were paid under the ITT Indemnity, the \$8.037 million that U.S. Silica was awarded at trial are clearly not allocable to the Travelers Policy periods, and should not have been awarded to U.S. Silica as damages. This Court therefore should reverse.

IV. THE CIRCUIT COURT ERRED IN AWARDING U.S. SILICA PREJUDGMENT INTEREST

A. Prejudgment Interest Is Not Available Under W. Va. Code § 56-6-31

The Circuit Court's award of over \$4.3 million in prejudgment interest on the jury's verdict was erroneous because, under controlling West Virginia law, U.S. Silica waived its right

to seek prejudgment interest by failing to request a jury instruction on applicable interest. W. Va. Code § 56-6-27 provides as follows:

The jury, in any action founded on contract, may allow interest on the principal due, or any part thereof, and in all cases they shall find the aggregate of principal and interest due at the time of trial, after allowing all proper credits, payments and set-offs; and judgment shall be entered for such aggregate with interest from the date of the verdict.

W. Va. Code § 56-6-27 thus leaves the question of whether and to what extent prejudgment interest may be awarded on the principal due in contract actions solely up to the jury. *City Nat'l Bank of Charleston v. Toyota Motor Sales*, 181 W. Va. 763, 778, 384 S.E.2d 374, 389 (1989) (“CNB”). See also *Ringer v. John*, 230 W. Va. 687, 689, 742 S.E.2d 103, 106 (2013) (W. Va. Code § 56-6-27 “provides for prejudgment interest in actions founded on contract”); *First Nat'l Bank of Bluefield v. Clark*, 191 W. Va. 623, 625, 447 S.E.2d 558, 560 (1994) (“General authority for awarding prejudgment interest in a contract action in West Virginia is contained in W. Va. Code § 56-6-27.”); *CMC Enter., Inc. v. Ken Lowe Mgmt. Co.*, 206 W. Va. 414, 415, 525 S.E.2d 295, 296 (1999) (same).

A plaintiff who fails to request a jury instruction regarding prejudgment interest, as U.S. Silica did here, waives any right to prejudgment interest. *CNB*, 181 W. Va. 763, 742 S.E.2d 374. In *CNB*, the prevailing plaintiff in a breach of contract jury trial filed a post-trial motion for prejudgment interest under W. Va. Code § 56-6-31, which the trial court denied. *CNB*, 181 W. Va. at 768, 384 S.E.2d at 379. On appeal, this Court held that “in contract claims, the right to prejudgment interest is dependent on the provisions of W. Va. Code § 56-6-27 (1923), which leaves the determination to the jury.” *CNB*, 181 W. Va. at 778, 384 S.E.2d 389. Quoting from Syllabus Point 4 in *Thompson v. Stuckey*, 171 W. Va. 483, 300 S.E.2d 295 (1983), this Court noted:

In an action founded on contract, a claimant is entitled to have the jury instructed that interest may be allowed on the principal due, W. Va. Code, 56-6-27 [1923], but is not entitled to the mandatory award of interest contemplated by W. Va. Code, 56-6-31 [1981], since this statute does not apply where the rule concerning interest is otherwise provided by law.

CNB, 181 W. Va. at 778, 384 S.E.2d at 389 (alterations in original).¹² This Court further noted that the plaintiff was “not entitled to an award of prejudgment interest after trial, although he could have demanded an instruction to that effect in order to submit the issue to the jury.” *Id.* Affirming the trial court’s denial of the plaintiff’s post-trial motion to add prejudgment interest to the jury’s breach of contract damages award, this Court ruled that the plaintiff’s failure to request a prejudgment interest jury instruction “must be deemed a waiver of that right.” *Id.* (citing *McAllister v. Weirton Hosp. Co.*, 173 W. Va. 75, 312 S.E.2d 738 (1983) and *Berkeley Homes, Inc. v. Radosh*, 172 W. Va. 683, 310 S.E.2d 201 (1983)).¹³

W. Va. Code § 56-6-27 and the controlling precedent of *CNB* mandated that U.S. Silica not be awarded prejudgment interest. The only issue that was tried to the jury was U.S. Silica’s

¹² When this Court decided *Stuckey*, W. Va. Code § 56-6-31 began as follows: “Except where otherwise provided by law, every judgment or decree for the payment of money, entered by any court of this State shall bear interest from the date thereof . . .” W. Va. Code Ann. (West 2006). In 2006, W. Va. Code § 56-6-31 was amended by the insertion of the phrase “whether in an action sounding in tort, contract or otherwise.” W. Va. Code Ann. (West 2013). Because the amended statute retained the introductory phrase “[e]xcept as otherwise provided by law,” this Court specifically stated in *Ringer* that “we do not find that this statutory amendment provides any basis to revisit our holding in *Stuckey*” that W. Va. Code § 56-6-27 requires the jury to determine the amount of prejudgment interest, if any, awarded in contract claims. 742 S.E.2d at 107 n.6 (alteration in original). Accordingly, it is well-settled that W. Va. Code § 56-6-27 applies to prejudgment interest claims in breach of contract actions, and U.S. Silica’s reliance on W. Va. Code § 56-6-31 was improper.

¹³ Other decisions are in accord. In *Rice v. Community Health Ass’n*, 40 F. Supp. 2d 788, 799 (S.D. W. Va. 1999), the court held that the plaintiff’s request for prejudgment interest was controlled by W. Va. Code § 56-6-27 and, because the plaintiff did not request a jury instruction on prejudgment interest, it had waived its right to such interest on the jury’s breach of contract damages award. The court’s ruling on this issue spawned a legal malpractice suit by Rice against his lawyers. Ruling on the lawyers’ motion for summary judgment in the legal malpractice case, the court noted that to try to determine whether the jury would have awarded prejudgment interest if the proper jury instruction had been requested was too speculative. *Rice v. Rose & Atkinson*, 176 F. Supp. 2d 585, 595 (S.D. W. Va. 2001).

breach of contract claim against Travelers, and the damages that the jury awarded to U.S. Silica were based solely on the jury's conclusion that Travelers breached its contract with U.S. Silica. (JA 1754.) Accordingly, and as in *CNB* and *Rice*, any rights that U.S. Silica might have had to seek prejudgment interest from Travelers on its breach of contract damages are governed exclusively by W. Va. Code § 56-6-27. In order to exercise those rights, however, U.S. Silica was required to request that the Court instruct the jury on the potential availability of prejudgment interest, and ask the jury to award such interest as part of its verdict. *CNB*, 181 W. Va. at 778, 384 S.E.2d at 389. U.S. Silica did not do so, and therefore waived its right to seek prejudgment interest. *Id.*

The Circuit Court avoided ruling that U.S. Silica waived its prejudgment interest by finding that Travelers "affirmatively proposed that the Court, not the jury, should determine prejudgment interest, and the Court and the parties agreed to proceed in that fashion." (JA 3914.) The record demonstrates otherwise. Travelers did initially propose a jury instruction that would have the Circuit Court, as opposed to the jury, set the applicable interest, but the Circuit Court *rejected* Travelers proposed instruction, and stated that it was not going to tell the jury *anything* about prejudgment interest. (JA 275.) U.S. Silica did not object or otherwise protect its rights by requesting an instruction on prejudgment interest under W. Va. Code § 56-6-27. (JA 253-81.) At the jury charge conference on the last day of the trial, Travelers stated that "Your Honor already told us we didn't need to consider [Travelers proposed instructions] 28 and 29. So those are both withdrawn." (JA 953.) U.S. Silica again failed to propose an instruction regarding prejudgment interest under W. Va. Code § 56-6-27 at that point or at any other time thereafter. In essence, U.S. Silica never took any action to comply with W. Va. Code § 56-6-27 and affirmatively preserve its right to seek prejudgment interest, and therefore should not be allowed

to reference a proposed jury instruction that the Court *rejected* and that Travelers withdrew as an excuse for sitting on its rights.¹⁴ It was incumbent upon U.S. Silica, if it wanted to recover prejudgment interest, to protect its rights pursuant to W. Va. Code § 56-6-27. U.S. Silica failed to do so, and therefore waived its right to recover prejudgment interest. *CNB*, 181 W. Va. at 778, 384 S.E.2d at 389. The Circuit Court’s failure to rule otherwise is reversible error.

Moreover, the Circuit Court’s award of prejudgment interest can and should be rejected on a separate ground. When U.S. Silica filed its Post-Trial Motion, it sought prejudgment interest under W. Va. Code § 56-6-31, not under W. Va. Code § 56-6-27 as it should have done. U.S. Silica never corrected its erroneous reliance upon the wrong statute, and never offered *any* evidence to the Circuit Court on what the appropriate rate of interest should be. (JA 1867.) The Circuit Court thus erred by finding, without the benefit of any supporting evidence from U.S. Silica, that a 7 percent interest rate was applicable. Having determined in its March 5, 2014 order that W. Va. Code § 56-6-27 governed prejudgment interest in this case, the Circuit Court nonetheless stated that it was “guided, but not controlled, by West Virginia Code §56-6-31,” and awarded interest at an annual rate of 7 percent. (JA 3915.) In effect, the Circuit Court improperly awarded U.S. Silica prejudgment interest under the wrong statute without the benefit of any evidence from U.S. Silica in support of its request. This Court therefore should reverse the Circuit Court’s award of prejudgment interest in light of U.S. Silica’s failure to offer supporting evidence and the Court’s reliance upon the wrong statute.

¹⁴ The Circuit Court’s reliance upon *Dieter* was completely misplaced. In that case, the parties and the court explicitly agreed in chambers during the jury’s deliberations, in response to a question from the jury, that the circuit court would award interest. *Id.* at 199 W. Va. 61-62, 483 S.E.2d at 61-62. Here, in contrast, the Circuit Court *rejected* Travelers proposed jury instruction on prejudgment interest and stated that it would tell the jury nothing on prejudgment interest. U.S. Silica failed to take any action to comply with W. Va. Code § 56-6-27 in response.

B. The Circuit Court Erred In Awarding Prejudgment Interest On U.S. Silica's Claimed Attorneys' Fees

As discussed in Section V below, the Circuit Court erred in awarding attorneys' fees and costs to U.S. Silica. Even assuming the award of attorneys' fees was appropriate, however, the Circuit Court erred in awarding \$893,414.86 in prejudgment interest on those fees and costs. (JA 3904; JA 3963.) This Court on multiple occasions has rejected plaintiffs' attempts to obtain prejudgment interest on attorneys' fees and costs. *State ex rel. Chafin v. Mingo Cnty. Comm'n*, 189 W. Va. 680, 684, 434 S.E.2d 40, 44 (1993); *Miller v. Fluharty*, 201 W. Va. 685, 700, 500 S.E.2d 310, 325 (1997). The Circuit Court's award therefore should be reversed.

In *Chafin*, this Court affirmed the trial court's refusal to award prejudgment interest on a \$91,000 attorneys' fees award. In so ruling, this Court stated that "[w]e are not convinced that the lower court erred in determining that the Appellee's expenditures did not constitute 'similar out-of-pocket expenditures' [within the statutory definition of "special damages" in Section 56-6-31(a)] and therefore do not qualify as an award entitling the Appellee to prejudgment interest." *Chafin*, 189 W. Va. at 684, 434 S.E.2d at 44. This Court therefore concluded that "[w]e do not perceive the Appellee's situation as one in which we are compelled to further expand the availability of prejudgment interest." *Id.*

Likewise, in *Miller*, the Court again rejected the allowance of prejudgment interest to awards of attorneys' fees. In reversing the trial court's grant of prejudgment interest on attorneys' fees and costs, this Court ruled that "we do not perceive the plaintiff's attorney's fees and litigation expenses to be ascertainable, pecuniary, out-of-pocket expenditures to the plaintiff that would support an award of prejudgment interest." *Miller*, 201 W. Va. at 700, 500 S.E.2d at 325 (citation omitted).

Most recently, in *Graham v. National Union Fire Insurance Co.*, No. 13-1517, 2014 U.S. App. LEXIS 2041 (4th Cir. Feb. 13, 2014), the United States Court of Appeals for the Fourth Circuit, applying West Virginia law, likewise held that West Virginia law does not permit an award of interest on attorneys' fees. 2014 U.S. App. LEXIS 2041 at *18. In so ruling, the Court noted that, in accordance with *Miller*, the "absence of liquidation is enough to exclude attorney fees -- even those sustained as direct damages -- from the reach of the West Virginia prejudgment interest statute." *Id.* at *18-19.

In accordance with *Chafin* and *Miller*, this Court should reverse the Circuit Court's March 5, 2014 and May 6, 2014 orders and hold instead that U.S. Silica is not entitled to prejudgment interest on its attorneys' fees and costs.

V. THE CIRCUIT COURT ERRED IN AWARDING U.S. SILICA ITS CLAIMED ATTORNEYS' FEES AND COSTS

U.S. Silica failed to meet its burden of demonstrating that its request for over \$4.6 million in attorneys' fees and costs were "reasonable attorney's fees arising from [U.S. Silica's] declaratory judgment litigation" against Travelers in West Virginia. An award of attorneys' fees and costs is limited to reasonable fees that the prevailing policyholder incurs "as a result of the insurer's breach of contract." *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 194-95, 342 S.E.2d 156, 160-61 (1986). U.S. Silica bears the burden of proving its entitlement to such an award. See Syl. Pt. 4, *Taylor v. Elkins Home Show, Inc.*, 210 W. Va. 612, 558 S.E.2d 611 (2001) ("the burden of proving damages by a preponderance of the evidence rests upon the claimant") (citations and internal quotation marks omitted); Syl. Pt. 4, *Sammons Bros. Constr. Co. v. Elk Creek Coal Co.*, 135 W. Va. 656, 65 S.E.2d 94 (1951) (same).

U.S. Silica requested and received millions of dollars in original attorneys' fees and costs incurred in three suits, in three different states, involving dozens of parties other than Travelers. (JA 3427.) Travelers consultant Bernd Heinze reviewed all 1,205 pages of attorney invoices and cost accountings that U.S. Silica submitted in support of its request, and his unrebutted analysis demonstrated that U.S. Silica's reimbursement requests should have been eliminated or reduced as set forth below.

A. U.S. Silica Should Not Have Been Awarded Attorneys' Fees And Costs Incurred In Still-Pending Litigation In California, A Jurisdiction That Does Not Permit Such Recovery By Prevailing Litigants

The Circuit Court erroneously allowed U.S. Silica to recover from Travelers \$2,002,647 in fees and costs that U.S. Silica incurred not in this action, but in the still pending California suit. (JA 2106.) The Circuit Court's grant of these fees and costs was erroneous for two separate reasons. First, a prevailing policyholder only may "recover reasonable attorney's fees arising from *the* declaratory judgment litigation." Syl. Pt. 2, *Pitrolo*, 176 W. Va. at 191, 342 S.E.2d at 157 (emphasis added). Thus, any recovery of attorneys' fees is limited to fees incurred in the West Virginia declaratory judgment action. *Id.*

Second, the California Supreme Court has held that "California adheres to the American rule, 'which provides that each party to a suit must ordinarily pay his own attorney fees.'" *Cassim v. Allstate Ins. Co.*, 94 P.3d 513, 528 (Cal. 2004) (citation omitted). Accordingly, even if it prevails on its coverage claims against Travelers in the California suit -- which has yet to be determined -- U.S. Silica would not be entitled to recover its attorneys' fees and costs from Travelers under California law. As such, this Court should put a stop to U.S. Silica's attempt to bypass California law by requesting to recover its \$2,002,647 of California suit attorneys' fees and costs in West Virginia.

It also bears noting that, even if this Court did somehow determine that some of U.S. Silica's attorneys' fees and costs incurred in connection with the California suit may be recoverable, which Travelers disputes, then any such fees and costs still must satisfy *Pitrolo*'s requirement of being reasonably incurred for litigating its breach of contract claims against Travelers. 176 W. Va. at 194, 342 S.E.2d at 159-60. The vast majority of the entries in the 465 pages of invoices U.S. Silica submitted from the California suit make no reference whatsoever to U.S. Silica's claim against Travelers, and instead, relate to U.S. Silica's claims against other parties. For example, on July 21, 2008, Mr. Waldron billed U.S. Silica \$3,250 to "Review correspondence from **OneBeacon America Insurance Company**; review insurance policies; review insurance policy register; draft letter to B. Mortenson regarding **One Beacon America Insurance Company**." (JA 2265 (emphasis added).) Similarly, on February 8, 2010, Mr. Waldron billed U.S. Silica \$4,060 to:

Revise responses and objections to **Royal** interrogatories, document requests; revise verifications draft correspondence regarding verifications, discovery responses; review responses of **Liberty Mutual** to interrogatories, document requests; draft correspondence to S. Erigero regarding **Liberty Mutual**, settlement conference; draft correspondence to Judge West regarding **Liberty Mutual**, settlement conference; draft letter to J. Fog regarding coverage for outstanding defense costs; review file regarding **ACE**, coverage issues.

(JA 2431 (emphasis added).)

Likewise, on March 13, 2010, Mr. Stanton billed U.S. Silica \$1,912.50 to "Draft objections/responses to **Liberty** interrogatories and document requests." (JA 2451 (emphasis added).) These entries, like hundreds of others for which U.S. Silica seeks reimbursement from Travelers, do not mention Travelers, and plainly have nothing to do with U.S. Silica's claim against Travelers.

In contrast, there are only a few entries that even mention Travelers among the hundreds of pages of bills from the California suit. Of those entries, only 87 entries for a total of \$161,818 appear to relate in any way to discovery with Travelers. (JA 3432-33.) Of those amounts, U.S. Silica has not established which fees involved discovery that U.S. Silica actually used in this West Virginia suit, and therefore U.S. Silica did not meet its burden of proving its entitlement to these fees and costs even if this Court were to hold that recovery of such California suit expenditures was permissible. *See* Syl. Pt. 4, *Taylor*, 210 W. Va. at 614, 558 S.E.2d at 613; Syl. Pt. 4, *Sammons*, 135 W. Va. at 658, 655 S.E.2d at 96. Accordingly, this Court should reverse the Circuit Court's award of \$2,002,647 in attorneys' fees and costs incurred in the California suit.

B. U.S. Silica Should Not Have Been Awarded Attorneys' Fees and Costs Incurred In Litigation In New York State To Which Travelers Was Not A Party

The Circuit Court also erred in allowing U.S. Silica to recover from Travelers \$607,522 in attorneys' fees and costs that it incurred in the New York suit. (JA 2106.) Travelers is not and never has been a party to the New York suit. There was no basis whatsoever under *Pitrolo* -- or any other West Virginia authority -- for the Circuit Court to require Travelers to reimburse U.S. Silica for fees and costs that it incurred in the New York suit where Travelers was not a party. *See Pitrolo*, 176 W. Va. at 194, 342 S.E.2d at 159-60 (prevailing policyholder may only recover reasonable fees incurred in declaratory judgment against *insurer*). Accordingly, the Circuit Court's award of attorneys' fees and costs should be reduced by \$607,522 in attorneys' fees and costs that U.S. Silica incurred in the New York suit. (JA 3432.)

C. U.S. Silica Should Not Have Been Awarded Attorneys' Fees Incurred With Respect To Its Claims Against Other Insurers Because Those Were Not Amounts Incurred "As A Result Of [Travelers] Breach Of Contract"

The Circuit Court again erred in allowing U.S. Silica to recoup costs incurred in litigating against defendants other than Travelers in this case. Mr. Heinze identified \$49,957 in attorneys' fees that U.S. Silica incurred in connection with its claims against insurance companies other than Travelers. (JA 3432.) As a result, none of these attorneys' fees are recoverable from Travelers under *Pitrolo*. See 176 W. Va. at 194, 342 S.E.2d at 160. Accordingly, \$49,957 should be deducted from U.S. Silica's claim to account for its attorneys' fees and costs incurred with respect to its claims against other insurers in this West Virginia suit. *Id.*

D. **U.S. Silica Should Not Have Been Awarded Attorneys' Fees Incurred Under Block-Billed And/Or Vague Time Descriptions Because It Did Not Meet Its Burden Of Showing That Such Fees Were Reasonable Under *Pitrolo***

Block-billed and/or vague work descriptions that make it impossible to determine if the fees were incurred as a result of U.S. Silica's claim against Travelers account for \$896,743 of the attorneys' fees and \$43,920 in costs that the Circuit Court awarded U.S. Silica in the West Virginia action. (JA 3433-36; JA 3442.) For example, on February 14, 2006, Mr. Waldron billed U.S. Silica \$1,476 for 3.6 hours of block-billed work:

Conference with Travelers claims handler regarding silica claims; conferences with M. Shuster regarding ACE Fire Underwriters, response to complaints in New York and West Virginia; conferences with J. Diakos regarding stipulation; conference with D. Luttinger regarding motion to dismiss; conferences with V. Acri regarding insurance policy production; review insurance policies for production.

(JA 3433; JA 3452.)

Similarly, on July 3, 2012, Mr. Waldron billed U.S. Silica \$4,160 for 6.4 hours of block-billed work that he vaguely described as: "Conference with M. Pichini regarding defense costs, rates; draft brief in support of motion on breach of contract, duty to defend; review files regarding Arrowood, Travelers; review, respond to correspondence regarding Lumbermens;

review, respond to correspondence from Arrowood’s counsel.” (JA 3434; JA 3455.) Both of these examples, among hundreds of other block-billed, vague entries in the invoices, show that it is impossible to determine what portion of the block-billed and vague entries are reasonable fees that U.S. Silica incurred in connection with its claim against Travelers. (JA 3433-36; JA 3442.)

Likewise, several vague cost entries totaling \$43,920 are included in U.S. Silica’s West Virginia invoices. (JA 3436.) Because of the lack of specificity in the block-billed and/or vague cost descriptions, U.S. Silica did not carry its burden of proving that those claimed costs were “incurred as a result of [Travelers] breach of contract.” *Pitrolo*, 176 W. Va. at 194, 342 S.E.2d at 160; Syl. Pt. 4, *Taylor*, 210 W. Va. at 614, 558 S.E.2d at 613; Syl. Pt. 4, *Sammons*, 135 W. Va. at 658, 655 S.E.2d at 96.

Accordingly, the Court should deduct these vague West Virginia fees and costs -- totaling \$940,663 -- from the Circuit Court’s award to U.S. Silica, because the descriptions do not indicate that the fees and costs were incurred for U.S. Silica’s claim against Travelers.¹⁵

VI. THE CIRCUIT COURT ERRED IN FAILING TO REDUCE THE JURY AWARD

The Circuit Court also erred in failing to correct the jury’s excessive award of damages through *remittitur*. Under West Virginia law:

[t]he remittitur in its broadest sense is the procedural process by which the verdict of a jury is diminished by subtraction. The typical situation in which it is employed is where, on a motion by the defendant for a new trial, the verdict is considered excessive and the plaintiff is given an election to remit a portion of the verdict or submit to a new trial.” Syl. Pt. 1, *Earl T. Browder, Inc.*

¹⁵ On the same basis, even if this Court were to award U.S. Silica any attorneys’ fees incurred in the California suit in direct contravention of *Pitrolo*, the Court still should reduce such award by \$472,730 because, as Mr. Heinze’s unbutted analysis demonstrates, those amounts were incurred solely in U.S. Silica’s pursuit of claims in the California suit against parties other than Travelers. (JA 3432.) Likewise, if this Court were to award U.S. Silica any attorneys’ fees incurred in the California suit, which it should not, then the Court likewise should reduce any such award by \$1,540,078, which is the amount corresponding to block-billed and/or vague time entries for the California suit. (JA 3436.)

v. Cnty. Ct. of Webster Cnty., 145 W. Va. 696, 116 S.E.2d 867 (1960). Thus, “where the amount in excess in an excessive verdict is definitely ascertainable, a remittitur may be properly employed.

Syl. Pt. 3, *Fortner v. Napier*, 153 W. Va. 143, 168 S.E.2d 737 (1969), overruled on other grounds, *Roberts v. Stevens Clinic Hosp., Inc.*, 176 W. Va. 492, 345 S.E.2d 791 (1986); *Stone v. United Eng'g*, 197 W. Va. 347, 475 S.E.2d 439 (1996) (same). The Circuit Court ignored these standards in refusing to apply *remittitur* to \$523,249 in indemnity damages that U.S. Silica failed to prove triggered the Travelers Policies, and also to \$6.024 million in settlement payments that U.S. Silica received in this litigation but did not apply to its damages claim against Travelers.

A. The Circuit Court Erred In Failing To Deduct \$523,249 From U.S. Silica’s Damages Award Because U.S. Silica Failed To Prove That These Damages Triggered The Travelers Policies

The jury’s award of \$8,037,745 to U.S. Silica included \$523,249 paid by U.S. Silica to settle Silica Claims in which no known date of exposure to its silica products was ever established. As the plaintiff and as a policyholder, U.S. Silica had the burden of demonstrating that its claims for indemnity specifically trigger the Travelers Policies. *See Payne*, 195 W. Va. at 506, 466 S.E.2d at 165 (“It is only when the policyholder has established a prima facie case of coverage that the burden of production shifts to the [insurer].”). Thus, “the duty to indemnify arises only once liability has been conclusively determined.” 14 Lee R. Russ & Thomas G. Segalla, *Couch on Insurance* § 200:3 (3d ed. 2005). U.S. Silica provided no evidence to support its claim for reimbursement of these settlement payments under the Travelers Policies, and therefore provided no basis for the jury to find that U.S. Silica was entitled to reimbursement for those amounts. This \$523,249 was “definitely ascertainable,” and was determined by Travelers expert Dr. Charles Mullin. (JA 840-42.) U.S. Silica did not challenge Dr. Mullin’s calculations on cross-examination, nor did its own expert, Ross Mishkin, rebut Dr. Mullin’s testimony. The

Circuit Court thus erred in failing to deduct this amount from the amount of damages that U.S. Silica was awarded at trial. *E.g., Fortner*, 153 W. Va. at 152, 168 S.E.2d at 743.

B. Travelers Was Entitled To A Set-Off Or Verdict Credit Based On \$6.024 Million In Settlement Payments That U.S. Silica Received From Other Defendants In This Action

The Circuit Court also erred by failing to set off a \$4,400,000 settlement payment from certain ACE insurers (“ACE”) and a \$1,624,000 settlement payment from Arrowood Indemnity Company, resulting in a windfall recovery to U.S. Silica. (JA 1735.) *See* Syl. Pt. 7, *Bd. of Educ. of McDowell Cnty. v. Zando, Martin & Milstead, Inc.*, 182 W. Va. 597, 390 S.E.2d 796 (1990) (“Defendants in a civil action against whom a verdict is rendered are entitled to have the verdict reduced by the amount of any good faith settlements previously made with the plaintiff by other jointly liable parties.”).

Despite receiving settlement payments totaling \$6,024,000, U.S. Silica admitted in sworn testimony that it did *not* allocate or apply the ACE and Arrowood settlement payments *in any way* to U.S. Silica’s damages claim in this case. (JA 504-05; JA 507.) U.S. Silica expert Ross Mishkin likewise testified that, pursuant to instructions from U.S. Silica counsel, he did not consider the ACE and Arrowood payments in his damages calculation. (JA 780-83.)

Travelers damages expert Dr. Charles Mullin, relying on U.S. Silica’s own database, testified how these settlement amounts should have been applied to U.S. Silica’s damages claim. U.S. Silica had \$13,037,096 in unreimbursed pre-September 12, 2005 defense and settlement payments for claims alleging some exposure prior to 1986. (JA 840-52.) Under the Circuit Court’s continuous trigger and “all sums” allocation rulings, all of these amounts triggered the ACE and Arrowood policies, which were in effect until January 1, 1986,. (JA 842-50.)

The \$523,249 for unreimbursed settlement payments to silica claimants with no known dates of exposure that are not allocable to the Travelers Policies likewise would not be allocable to the ACE or Arrowood policies, for the same reasons as set forth in Section VI.A., *supra*. (JA 849-52.) Thus the total amount of U.S. Silica's unreimbursed defense and indemnity costs allocable to ACE and Arrowood would be reduced to \$12,513,847 (\$13,037,096 minus \$523,249).

Also under the Circuit Court's trigger and allocation rulings, and according to U.S. Silica's own database, \$8,037,745 of U.S. Silica's unreimbursed defense and indemnity costs trigger the Travelers Policies. (Again, deducting the \$523,249 in settlement payments for which U.S. Silica never established coverage should reduce this amount to \$7,514,496. *See* Section VI.A.) (JA 849-50.) However, *all* of the \$8,037,745 that U.S. Silica was awarded as damages against Travelers is part of and included within the \$13,037,096 in unreimbursed defense and settlement payments for claims that trigger the settled ACE and Arrowood policies. (JA 57; JA 844-45.)

ACE and Arrowood's combined \$6,024,000 settlement payments constitute 48 percent of the overall \$12,513,847 in unreimbursed defense and indemnity payments triggering the ACE and Arrowood policies. Since the ACE and Arrowood policies were, under the Court's continuous trigger ruling, triggered by all the claims, some portion of those settlements should have been allocated and the \$7,514,496 that also triggered (under the Court's erroneous rulings) the Travelers Policies. Instead, U.S. Silica simply chose not to apply *any* of those settlement payments to those amounts. The Court erroneously allowed U.S. Silica to do so.

Travelers expert, Charles Mullin, testified that the appropriate method of accounting for the settlements would be to apply the percentage total the settlements bear to the overall

unreimbursed costs equally to the amount that triggered (under the Court's erroneous ruling) all three insurers and to the amounts triggering only the ACE and Arrowood policies. Accordingly, the ACE and Arrowood settlements -- if properly allocated -- also would account for 48 percent of the \$7,514,496 (\$8,037,745 minus \$523,249 in unproven indemnity payments) that U.S. Silica could seek from Travelers under the Circuit Court's rulings. (JA 851-52.) Thus, Travelers should have been awarded a 48 percent set-off from \$7,514,492.22 (\$8,037,745 minus \$523,248.78). Travelers liability therefore should be reduced to a verdict of \$3,907,538. (*Id.*) See Syl. Pt. 7, *Zando*, 182 W. Va. 597, 390 S.E.2d 796. This amount is "definitely ascertainable," and therefore a *remitter* is proper. See Syl. Pt. 3, *Fortner*, 153 W. Va. 143, 168 S.E.2d 737; Syl. Pt. 7, *Stone*, 197 W. Va. 347, 475 S.E.2d 439. The Circuit Court erred in failing to make this setoff.

This Court therefore should reverse the Circuit Court's March 5, 2014 order to the extent that it denied Travelers a *remitter* of \$4,130,207 and award Travelers such *remitter* or, in the alternative, order a new trial on these issues.

CONCLUSION

For all of the foregoing reasons, Travelers respectfully requests that this Court:

1. Reverse the Circuit Court's March 5, 2014 order denying Travelers Rule 50(b) Motion for Judgment as a Matter of Law and grant judgment as a matter of law to Travelers holding that the Assistance and Cooperation provision of the Travelers Policies precludes coverage of U.S. Silica's demands for reimbursement of the \$8,037,745 that it incurred in defending and settling Silica Claims prior to ever giving notice of those claims to Travelers; and/or

2. Reverse the Circuit Court's March 5, 2014 order denying Travelers Rule 50(b) Motion for Judgment as a Matter of Law and grant a judgment as a matter of law to Travelers holding that the Immediate Notice provision of the Travelers Policies precludes coverage of U.S. Silica's demands for reimbursement of the \$8,037,745 that it incurred in defending and settling Silica Claims prior to ever giving notice of those claims to Travelers, or, in the alternative, grant Travelers a new trial due to the incorrect, conflicting and prejudicial jury instructions given by the Circuit Court on the standard for waiver of Travelers late notice defense under West Virginia law; and/or

3. Reverse the Circuit Court's September 11, 2013 Order applying "joint and several" allocation and issue a ruling holding that *pro rata* allocation applies to the Silica Claims; or alternatively, reverse the Circuit Court's judgment and find that U.S. Silica was fully reimbursed for all amounts that triggered Travelers Policies under either an all sums or *pro rata* theory; and/or

4. Reverse the Circuit Court's March 5, 2014 order to the extent that it granted U.S. Silica's request for prejudgment interest on the jury's verdict in the amount of \$6,205,733; and/or

5. Reverse the Circuit Court's March 5, 2014 and May 6, 2014 orders to the extent that they granted U.S. Silica's request for \$4,676,488 in attorneys' fees and reduce and/or limit the amount of the award to only such amount that U.S. Silica proves it actually incurred as reasonable fees for its breach of contract claim against Travelers in this West Virginia suit; and/or

6. Reverse the Circuit Court's March 5, 2014 and May 6, 2014 orders to the extent that they granted U.S. Silica's request for \$893,414.86 in prejudgment interest on its attorneys' fees and costs; and/or

7. Reverse the Circuit Court's March 5, 2014 order denying Travelers Rule 50(b) Motion for Judgment as a Matter of Law and either require a *remitter* of \$4,130,207 so that the judgment against Travelers is \$3,907,538 in accordance with the undisputed evidence at trial or order a new trial on the issue of the amount of set-offs to which Travelers is entitled, based on U.S. Silica's \$6.024 million in settlements with other defendants and U.S. Silica's failure to meet its burden of demonstrating that \$523,249 in settlement payments triggered the Travelers Policies.

Respectfully submitted,



Flaherty Sensabaugh Bonasso PLLC
Jeffrey M. Wakefield (WV Bar No. 3894)
Erica M. Baumgras (WV Bar No. 6862)
200 Capitol Street
Charleston, WV 25301
(P) 304-345-0200
(F) 304-345-0260

Steptoe & Johnson LLP
Frank Winston, Jr. (*pro hac vice*)
John R. Casciano (*pro hac vice*)
Christopher M. Dougherty (*pro hac vice*)
1330 Connecticut Ave., N.W.
Washington, DC 20036
(P) 202-429-3000
(F) 202-429-3902

No. 14-0343

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

THE TRAVELERS INDEMNITY COMPANY, ON BEHALF OF
THE TRAVELERS INSURANCE COMPANY

Petitioner,

v.

U.S. SILICA COMPANY, F/K/A PENNSYLVANIA GLASS SAND COMPANY

Respondent.

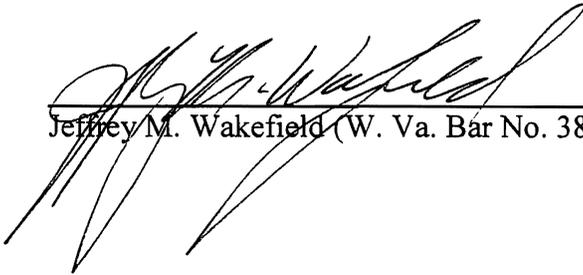
From the Circuit Court of Morgan County, West Virginia
Civil Action No. 06-C-2

CERTIFICATE OF SERVICE

I, Jeffrey M. Wakefield, counsel for The Travelers Indemnity Company, on behalf of The Travelers Insurance Company, hereby certify that I served a true copy of the foregoing *Petitioners' Brief* upon the following individuals, via regular U.S. mail, postage prepaid, on this the 7th day of July 2014:

Charles F. Printz, Jr.
J. Tyler Mayhew
BOWLES RICE LLP
Post Office Drawer 1419
Martinsburg, WV 25402-1419

John T. Waldron, III
Andrew R. Stanton
Paul C. Fuener
K&L GATES LLP
K&L Gates Center
210 Sixth Avenue
Pittsburgh, PA 15222



Jeffrey M. Wakefield (W. Va. Bar No. 3894)