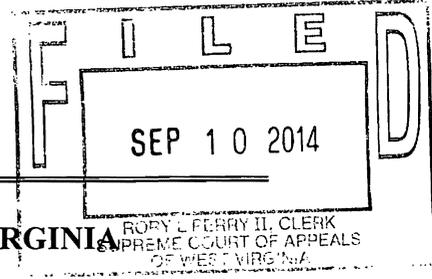


BRIEF FILED
WITH MOTION

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

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TABLE OF CONTENTS

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. U.S. SILICA HAS NOT REBUTTED TRAVELERS ENTITLEMENT TO JUDGMENT THROUGH ENFORCEMENT OF THE ASSISTANCE AND COOPERATION PROVISION IN THE TRAVELERS POLICIES 2

II. U.S. SILICA HAS NOT REBUTTED TRAVELERS SHOWING THAT TRAVELERS IS ENTITLED TO JUDGMENT AS A MATTER OF LAW DUE TO U.S. SILICA’S LATE NOTICE..... 7

 A. U.S. Silica Cannot Rebut The Fact That It Did Not Provide Timely Notice To Travelers..... 7

 B. U.S. Silica Has No Reasonable Explanation For Its Delay In Providing Notice..... 12

 C. Although Travelers Is Not Required To Show Prejudice, The Undisputed Evidence Demonstrates That Travelers Was Prejudiced By U.S. Silica’s Late Notice..... 16

 D. Travelers Did Not Waive Its Late Notice Defense 17

 E. U.S. Silica Has Failed To Rebut Travelers Showing That The Circuit Court’s Conflicting Waiver Instructions Were Contrary To West Virginia Law 19

III. U.S. SILICA HAS NOT REBUTTED TRAVELERS SHOWING THAT THE CIRCUIT COURT ERRED IN RULING THAT “JOINT AND SEVERAL” ALLOCATION INSTEAD OF *PRO RATA* ALLOCATION APPLIED TO THE UNDERLYING SILICA CLAIMS 20

 A. The Travelers Policies Require *Pro Rata* Allocation 20

 B. U.S. Silica Cannot Disprove That ITT Reimbursed U.S. Silica For Defense And Settlement Costs Attributable To Silica Claims Or Portions Of Silica Claims That Could Trigger The Travelers Policies..... 21

IV. U.S. SILICA WAIVED ITS RIGHT TO PREJUDGMENT INTEREST 24

V. U.S. SILICA HAS FAILED TO REBUT TRAVELERS SHOWING THAT THE CIRCUIT COURT ERRED IN AWARDING PREJUDGMENT INTEREST ON U.S. SILICA’S ATTORNEYS’ FEES 27

VI. U.S. SILICA HAS FAILED TO REBUT TRAVELERS SHOWING THAT THE CIRCUIT COURT’S AWARD OF ATTORNEYS’ FEES AND COSTS WAS IMPROPER 28

 A. U.S. Silica Has Failed To Rebut Travelers Showing That It Has Not Met Its Burden Of Proving That Its Attorneys’ Fees And Costs Were Incurred For Its Claim Against Travelers 28

1.	U.S. Silica has failed to rebut Travelers showing that it is not entitled to the Circuit Court’s award of attorneys’ fees and costs that were incurred in the New York and California suits	29
2.	U.S. Silica has failed to rebut Travelers showing that it has not met its burden of proving that its vague and block-billed invoices for attorneys’ fees and costs are insufficient to justify the Circuit Court’s award.....	32
VII.	THE EVIDENCE DEMONSTRATES THAT TRAVELERS IS ENTITLED TO A REMITTITUR OR NEW TRIAL ON DAMAGES	33
A.	Travelers Is Entitled To <i>Remittitur</i> Of \$523,249 For Settlement Payments To Silica Claimants With No Known Dates Of Exposure Because U.S. Silica Introduced No Evidence To Support Its Claim That Such Payments Triggered The Travelers Policies.....	33
B.	U.S. Silica Has Failed To Rebut Travelers Showing That Travelers Is Entitled To <i>Remittitur</i> Or Verdict Credit To Account For The Ace And Arrowood Settlements	35
	CONCLUSION.....	38

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Aetna Cas. & Sur. Co. v. Dow Chem. Co.</i> , 10 F. Supp. 2d 800 (E.D. Mich. 1998)	6
<i>Aetna Cas. & Sur. Co. v. Pitrolo</i> , 176 W. Va. 190, 342 S.E.2d 156 (1986).....	passim
<i>AIG Domestic Claims, Inc. v. Hess Oil Co.</i> , 232 W. Va. 145, 751 S.E.2d 31 (2013).....	19, 20
<i>Arch Specialty Insurance Co. v. Go-Mart, Inc.</i> , Civ.A No. 2:08-0285, 2009 WL 5214916 (S.D. W. Va. Dec. 28, 2009)	12, 13, 16, 17
<i>Augat, Inc. v. Liberty Mut. Ins. Co.</i> , 571 N.E.2d 357 (Mass. 1991).....	4
<i>Berkeley Homes, Inc. v. Radosh</i> , 172 W. Va. 683, 310 S.E.2d 201 (1983).....	25
<i>Board of Education of McDowell County v. Zando Martin & Milstead, Inc.</i> , 182 W. Va. 597, 390 S.E.2d 796 (1990).....	36, 37, 38
<i>Bowyer v. Thomas</i> , 188 W. Va. 297, 423 S.E.2d 906 (1992).....	6
<i>Brandt v. Super. Ct. (Standard Ins. Co.)</i> , 693 P.2d 796 (Cal. 1985).....	31
<i>Buckeye Union Cas. Co. v. Perry</i> , 406 F.2d 1270 (4th Cir. 1969)	10, 18, 19
<i>Cassim v. Allstate Ins. Co.</i> , 94 P.3d 513 (Cal. 2004).....	31
<i>Charles v. State Farm Mut. Auto. Ins. Co.</i> , 192 W. Va. 293, 452 S.E.2d 384 (1994).....	6
<i>City of Chicago v. U.S. Fire Ins. Co.</i> , 260 N.E.2d 276 (Ill. App. Ct. 1970)	15
<i>City Nat'l Bank of Charleston v. Wells</i> , 181 W. Va. 763, 384 S.E.2d 374 (1989).....	25

<i>Colonial Ins. Co. v. Barrett</i> , 208 W. Va. 706, 542 S.E.2d 869 (2000).....	passim
<i>Dairyland Ins. Co. v. Voshel</i> , 189 W. Va. 121, 428 S.E.2d 542 (1993).....	9, 10, 16, 17
<i>Deiter Engineering Services, Inc. v. Parkland Development, Inc.</i> , 199 W. Va. 48, 483 S.E.2d 48 (1996).....	26, 27
<i>Domtar, Inc. v. Niagara Fire Ins. Co.</i> , 563 N.W.2d 724 (Minn. 1987)	20
<i>Dreaded, Inc. v. St. Paul Guardian Ins. Co.</i> , 904 N.E.2d 1267 (Ind. 2009)	11
<i>Emp'rs Ins. of Wausau v. Ehlco Liquidating Trust</i> , 708 N.E.2d 1122 (Ill. 1999).....	35
<i>Faust v. Travelers</i> , 55 F.3d 471 (9th Cir. 1995)	5, 7
<i>Fireman's Fund Ins. Co. v. ACC Chem. Co.</i> , 538 N.W.2d 259 (Iowa 1995).....	15
<i>Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp.</i> , 790 F. Supp. 1318 (E.D. Mich. 1991)	5
<i>Fortner v. Napier</i> , 153 W. Va. 143, 168 S.E.2d 737 (1969).....	35
<i>Graham v. Nat'l Union Fire Ins. Co.</i> , No. 13-1517, 2014 U.S. App. LEXIS 2041 (4th Cir. Feb. 3, 2014).....	28
<i>Hospital Underwriting Group, Inc. v. Summit Health Ltd.</i> , 63 F.3d 486 (6th Cir. 1995)	14
<i>Ingalls Shipbuilding v. Fed. Ins. Co.</i> , 410 F.3d 214 (5th Cir. 2005)	11
<i>Keffer v. Prudential Ins. Co. of Am.</i> , 153 W. Va. 813, 172 S.E.2d 714 (1970).....	3
<i>Kronjaeger v. Buckeye Union Ins. Co.</i> , 200 W. Va. 570, 490 S.E.2d 657 (1997).....	6
<i>Maynard v. National Fire Insurance Co.</i> , 147 W. Va. 539, 129 S.E.2d 443 (1963) <i>overruled by Smithson v. U.S. Fid. & Guar.</i> <i>Co.</i> , 186 W. Va. 195, 411 S.E.2d 850 (1991).....	18

<i>McAllister v. Weirton Hosp. Co.</i> , 173 W. Va. 75, 312 S.E.2d 738 (1983).....	25
<i>Miller v. Fluharty</i> , 201 W. Va. 685, 500 S.E.2d 310 (1997).....	28
<i>O'Brien Family Trust v. Glen Falls Ins. Co.</i> , 461 S.E.2d 311 (Ga. Ct. App. 1995).....	5
<i>Olin Corp. v. Insurance Co. of North America</i> , 966 F.2d 718 (2d Cir. 1992)	15
<i>Payne v. Weston</i> , 195 W. Va. 502, 466 S.E.2d 161 (1995).....	34
<i>Perini/Tompkins Joint Venture v. ACE Am. Ins. Co.</i> , 738 F.3d 95 (4th Cir. 2013)	4, 6
<i>Potesta v. U.S. Fid. & Guar. Co.</i> , 202 W. Va. 308, 504 S.E.2d 135 (1998).....	17, 20
<i>Ragland v. Nationwide Mut. Ins. Co.</i> , 146 W. Va. 403, 120 S.E.2d 482 (1961).....	9, 10
<i>Republic Mutual Insurance Co. v. State Farm Mutual Automobile Insurance Co.</i> , 413 F. Supp. 649 (S.D. W. Va. 1976).....	18
<i>Rice v. Rose & Atkinson</i> , 176 F. Supp. 2d 585 (S.D. W. Va. 2001) <i>aff'd</i> , 36 F. App'x 37 (4th Cir. 2002).....	25
<i>Ringer v. John</i> , 742 S.E.2d 103 (W. Va. 2013).....	25
<i>Rolyn Cos. v. R&J Sales of Tex., Inc.</i> , 671 F. Supp. 2d 1314 (S.D. Fla. 2009) <i>aff'd</i> , 412 F. App'x 252 (11th Cir. 2011)	5
<i>Russell v. State Auto Mut. Ins. Co.</i> , 188 W. Va. 81, 422 S.E.2d 803 (1992).....	3
<i>SCSC Corp. v. Allied Mut. Ins. Co.</i> , 536 N.W.2d 305 (Minn. 1995)	4
<i>State ex rel. Chafin v. Mingo Cnty. Comm'n</i> , 189 W. Va. 680, 434 S.E.2d 40 (1993).....	28
<i>State Rd. Comm'n v. Darrah</i> , 151 W. Va. 509 153 S.E.2d 408 (1967).....	19

<i>Stone v. United Eng'g</i> , 197 W. Va. 347, 475 S.E.2d 439 (1996).....	35
<i>Taylor v. Elkins Home Show, Inc.</i> , 210 W. Va. 612, 558 S.E.2d 611 (2001).....	29, 32, 33
<i>Tennant v. Marion Health Care Found.</i> , 194 W. Va. 97, 459 S.E.2d 374 (1995).....	20
<i>Tenneco Inc. v. Amerisure Mut. Ins. Co.</i> , 761 N.W.2d 846 (Mich. Ct. App. 2008).....	5, 7
<i>Travelers Prop. Cas. Co. of Am. v. Hillerich & Bradsby Co.</i> , 598 F.3d 257 (6th Cir. 2010).....	6
<i>United Nat'l Ins. Co. v. Lee</i> , 51 F. App'x 407 (4th Cir. 2002).....	10, 13
<i>Wheeling Pittsburgh Corp. v. Am. Ins. Co.</i> , No. Civ. A 93-C-340, 2003 WL 23652106 (W. Va. Cir. Ct. Oct. 18, 2003).....	21, 22

STATUTES

West Virginia Code § 56-6-27 (2012).....	24, 26, 27
West Virginia Code § 56-6-31.....	25, 27
West Virginia Code § 56-6-31(a).....	28

BOOKS AND ARTICLES

1 Allan D. Windt, <i>Insurance Claims and Disputes</i> § 1:4 (6th ed. 2013).....	17
1 Allan D. Windt, <i>Insurance Claims and Disputes</i> § 1:2 (6th ed. 2013).....	15
14 Lee R. Russ & Thomas F. Segalla, <i>Couch on Insurance 3d</i> § 200:3 (3d ed. 2007).....	34
14 Lee R. Russ & Thomas G. Segalla, <i>Couch on Insurance 3d</i> § 200.34 (3d ed. 2007).....	7

OTHER AUTHORITIES

West Virginia Rule of Civil Procedure 50(b).....	38, 39, 40
West Virginia Rule of Civil Procedure 46.....	19

SUMMARY OF ARGUMENT

U.S. Silica argues that it is entitled to litigate thousands of underlying lawsuits to judgment or settlement without ever informing Travelers of any claims for coverage, and then, years later and after spending millions of dollars, obtain full reimbursement from Travelers. However, the Travelers Policies contain an Assistance and Cooperation provision that *bars reimbursement* of all payments made by U.S. Silica prior to tendering its claims for coverage to Travelers, and, separately, a Notice provision that requires U.S. Silica to provide “immediate” notice to Travelers of any claim for which it seeks defense and indemnity.

U.S. Silica breached both the Assistance and Cooperation provision and the Notice provision of the Travelers Policies when it incurred millions of dollars defending and settling Silica Claims in the years prior to September 12, 2005, but never notified Travelers of its desire to have Travelers cover these costs until long after it had already paid them. The Circuit Court’s failure to acknowledge this breach and apply the terms of the Travelers Policies to the undisputed facts at issue was clear error, as it violated established West Virginia law holding that contract terms be given their plain meaning and straightforward application. U.S. Silica’s Opposition Brief fails to offer any basis for upholding the Circuit Court’s abandonment of well-established rules of contract law -- in fact, U.S. Silica’s brief does nothing more than argue, contrary to law, fact and logic, that Travelers somehow breached a duty that Travelers never knew it had until long after the fact, and years after the substantial, material and *admitted* breaches committed by U.S. Silica.

Moreover, U.S. Silica has failed to justify a number of other reversible errors the Circuit Court committed including:

- erroneous and conflicting jury instructions on late notice;

- adoption of an “all sums” allocation in direct contravention of the Travelers Policies’ limitation of coverage to damages due to accidents taking place during the policy periods, and contrary to the majority rule of and modern trend toward *pro rata* allocation;
- awarding U.S. Silica interest on its jury award under the wrong statute even though U.S. Silica had waived its right to interest;
- awarding U.S. Silica prejudgment interest on its attorneys’ fees in clear contravention of West Virginia law;
- awarding U.S. Silica attorneys’ fees and costs incurred in other cases in other jurisdictions, as well as awarding fees and costs incurred against insurer-defendants other than Travelers;
- failing to deduct \$523,249 from U.S. Silica’s damages award when U.S. Silica never proved that this amount could actually be applied to any potential Travelers indemnity obligation; and
- failing to provide a set-off or verdict credit reflecting that U.S. Silica received millions of dollars in settlement payments from other defendant-insurers in this action.

The Circuit Court therefore should be reversed on any and all of these grounds.

ARGUMENT

I. U.S. SILICA HAS NOT REBUTTED TRAVELERS ENTITLEMENT TO JUDGMENT THROUGH ENFORCEMENT OF THE ASSISTANCE AND COOPERATION PROVISION IN THE TRAVELERS POLICIES

As U.S. Silica concedes, the Travelers Policies explicitly state that the policyholder “may not, except at [its] 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 Assistance and Cooperation provision expressly bars coverage for any payments made by the policyholder prior to tendering claims to its insurers. Indeed, it is self-evident that if the insured makes no demand for a defense, there is no duty to defend, and pre-tender defense costs are thus lawfully precluded

by this provision. Accordingly, when a policyholder like U.S. Silica unilaterally defends and settles cases prior to providing any notice to its insurer, those costs are not within the scope of the insurer's coverage obligations, and thus are not reimbursable under the policies.¹

In the face of Travelers showing that the Circuit Court failed to give this plain policy provision its straightforward application, U.S. Silica attempts to divert the Court's attention from this reality and offers a host of excuses as to why the Assistance and Cooperation provision should not apply -- all of which would require this Court to ignore its own well-established rule that contract terms be given their plain meaning. *Russell v. State Auto Mut. Ins. Co.*, 188 W. Va. 81, 83, 422 S.E.2d 803, 805 (1992); *Keffer v. Prudential Ins. Co. of Am.*, 153 W. Va. 813, 815-16, 172 S.E.2d 714, 715 (1970). U.S. Silica first asserts that the term "tender" does not appear in the Travelers Policies, and thus, "the Travelers policies do not require tender of claims." USS Opp'n at 35-36. In fact, however, the Travelers Policies plainly state that "[i]f claim is made or suit is brought against the insured, the insured shall immediately forward to [Travelers] every demand, notice, summons or other process received by him or his representative." (JA 1032; JA 1047; JA 1062.) The presence or absence of the word "tender" has no impact on this requirement, notwithstanding U.S. Silica's attempt to impart some dispositive impact to the presence or absence of this commonly used and well-understood word.

U.S. Silica next claims that the Assistance and Cooperation provision is "inapplicable" on its face because it only applies to instances where an insurer is actively participating in the

¹ U.S. Silica went to great lengths in its brief to show that a policyholder may *initially* incur costs between receiving a claim and having its insurer respond to its tender that are not voluntary, *see* USS Opp'n at 41-42, but such costs are addressed by the Defense, Settlement, Supplementary Payments Section of the Travelers Policies (JA 1029), and have no application here, where U.S. Silica sought reimbursement years after making such payments.

policyholder's defense and the policyholder incurs expenses or makes payments without the insurer's consent. USS Opp'n at 37.² As an initial matter, this is nonsensical. The very point here is that Travelers could *not* actively participate in U.S. Silica's defense because U.S. Silica never tendered the claims to Travelers. If U.S. Silica's reading were correct, a policyholder could always avoid application of the Assistance and Cooperation provision by simply never providing notice to an insurer until after it had resolved a claim. In any event, the plain language of the provision contains no such limitation, and a voluminous body of case law and legal commentary likewise holds that it applies to bar reimbursement of all payments made by a policyholder prior to tender of its claims to its insurer. *See, e.g., Perini/Tompkins Joint Venture v. ACE Am. Ins. Co.*, 738 F.3d 95, 104 (4th Cir. 2013) (Maryland and Tennessee law) (holding that voluntary payment clause identical to the language at issue here barred coverage for settlement made without insurer's knowledge or consent, as policyholder nullified all the insurer's rights and insurer was presented with a "*fait accompli*"); *Augat, Inc. v. Liberty Mut. Ins. Co.*, 571 N.E.2d 357, 361 (Mass. 1991) (coverage excluded by Assistance and Cooperation provision language for environmental clean-up costs and related expenses incurred two years before the policyholder requested reimbursement of such costs from its insurer, as "[a]fter 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."); *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 316 (Minn. 1995) ("formal tender of a defense

² The three cases that U.S. Silica cites in support of this argument have nothing to do with reimbursement of pre-tender payments; they all address whether and to what extent a policyholder must cooperate with its insurer in ongoing litigation through location and production of documents and appearing at depositions. *See* USS Opp'n at 41 n. 33 and cases cited therein.

request is a condition precedent to the recovery of attorneys' fees that a party incurs defending claims that a third party is contractually obligated to pay"), *overruled on other grounds by Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910 (Minn. 2005); *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").

U.S. Silica also argues that the Assistance and Cooperation provision is inapplicable because "[n]one" of its incurred defense or settlement costs for which it seeks reimbursement constitute "voluntary payments." USS Opp'n at 38-39. This, too, is nonsensical; it would effectively mean that *no* payment by an insured would ever be voluntary because, of course, without fear of some adverse consequence an insured would not incur legal fees. Courts have readily understood this, and those that have considered this argument have uniformly rejected it. *See, e.g., Rolyne Cos. v. R&J Sales of Tex., Inc.*, 671 F. Supp. 2d 1314, 1329 (S.D. Fla. 2009) ("while creative," argument that never having to obtain consent from insurer before making legally obligated payments "would effectively delete the voluntary-payment provision from the policy") *aff'd*, 412 F. App'x 252 (11th Cir. 2011); *Faust v. Travelers*, 55 F.3d 471, 473 (9th Cir. 1995) (rejecting argument that incurred pre-tender costs were "not voluntary"); *Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp.*, 790 F. Supp. 1318 (E.D. Mich. 1991) (same). As these decisions recognize, a payment is not involuntary merely because it benefits the policyholder, or because the policyholder is "faced with the harsh reality of potentially worse alternatives." *Tenneco Inc. v. Amerisure Mut. Ins. Co.*, 761 N.W.2d 846, 868 (Mich. Ct. App. 2008). Such an interpretation stretches the provision beyond its plain meaning, and would leave the courts:

without a vehicle to ensure that the insurers' rights, which the voluntary payment clause is designed to protect, are not materially impaired. Once payments, expenses or assumed obligations are deemed 'involuntary,' there is no mechanism to screen for collusion, fraud or to examine whether the insurers' interests were adequately protected by the insured's unilateral decisions.

Aetna Cas. & Sur. Co. v. Dow Chem. Co., 10 F. Supp. 2d 800, 832 (E.D. Mich. 1998).

Finally, in a last-ditch effort to create coverage where none exists, U.S. Silica asserts that Travelers must show prejudice for the Assistance and Cooperation provision to apply by citing to *Bowyer v. Thomas*, 188 W. Va. 297, 423 S.E.2d 906 (1992) and *Charles v. State Farm Mut. Auto. Ins. Co.*, 192 W. Va. 293, 452 S.E.2d 384 (1994), two cases construing different policy language and in which reimbursement for pre-tender payments was not even at issue, but which involved policyholders' refusals to appear at depositions. USS Opp'n at 40-44. These cases thus have no application here, and prejudice is *not* required for the Assistance and Cooperation provision to apply.³ See, e.g., *Perini/Tompkins Joint Venture*; 738 F.3d at 104 (prejudice not required to be shown where policyholder settled without informing insurer, and even if it was, it is established as a matter of law where insurer is presented with a *fait accompli* and insurer cannot exercise any of its rights); *Faust v. The Travelers*, 55 F.3d 471, 472-73 (9th Cir. 1995)

³ U.S. Silica's reliance on *Kronjaeger v. Buckeye Union Ins. Co.*, 200 W. Va. 570, 490 S.E.2d 657 (1997), also is misplaced. In *Kronjaeger*, a case involving underinsured motorist coverage, this Court noted that the purpose of the consent-to-settle provision is to protect the insurer's *statutorily-mandated* right to subrogation by preventing the insured from settling with the tortfeasor for less than its full liability limits, but under the case's "unique factual situation," this Court remanded for consideration of whether prejudice was shown. In so ruling, this Court noted that its narrow holding and departure from the general rule of no-prejudice enforceability was justified because "the usual overriding concerns of protecting the insurer's subrogation rights do not dictate the enforcement of the consent-to-settle clause in this particular case" in light of the fact that the insured "settled with the driver's insurer for the full amount of his liability coverage," and thus "there [were] no additional untapped insurance funds for Buckeye to pursue as reimbursement for its underinsurance payments to the Kronjaegers." 200 W. Va. at 581, 490 S.E.2d at 668. *Kronjaeger* thus has no application here.

(no showing of prejudice required to enforce assistance and cooperation provision); *Tenneco Inc. v. Amerisure Mut. Ins. Co.*, 761 N.W.2d 846, 870 (Mich. Ct. App. 2008) (same). *See also* 14 Lee R. Russ & Thomas G. Segalla, *Couch on Insurance 3d* § 200.34 (3d ed. 2007) (“an insurer is not liable for the pre-tender costs of defense incurred by the insured irrespective of the existence of prejudice”).⁴

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, as U.S. Silica incurred every cent of the \$8,037,745 awarded at trial as damages prior to September 12, 2005, but did not provide Travelers with a single underlying silica complaint implicating such sums until September 24, 2008.

II. U.S. SILICA HAS NOT REBUTTED TRAVELERS SHOWING THAT TRAVELERS IS ENTITLED TO JUDGMENT AS A MATTER OF LAW DUE TO U.S. SILICA’S LATE NOTICE

A. U.S. Silica Cannot Rebut The Fact That It Did Not Provide Timely Notice To Travelers

U.S. Silica concedes, as it must, that the Travelers Policies require U.S. Silica to provide “immediate[]” notice to Travelers of any claim for which it seeks defense and indemnity. (JA 1032; JA 1047; JA 1062.) In West Virginia, “[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). “The [notice] provision gives the insurance company ‘an opportunity to investigate and marshal defenses at a time when events are fresh in the witnesses’ recollections[,]’” and it “also allows the insurance

⁴ Even if Travelers were required to demonstrate prejudice for the Assistance and Cooperation provision to apply -- and it is not -- the evidence conclusively demonstrates that Travelers was in fact prejudiced. *See* Section II.C., *infra*.

company ‘to acquire information upon which it can form an intelligent estimate of its liabilities.’” *Id.* at 711 (citations omitted).

U.S. Silica breached the notice provision in the Travelers Policies, and it offers no basis to uphold the Circuit Court’s erroneous conclusion to the contrary. It is undisputed that U.S. Silica sought recovery at trial only for costs incurred prior to September 12, 2005. (JA 496.) However, U.S. Silica did not provide Travelers with any complaints for which it sought pre-September 12, 2005 defense costs and settlement payments until three years later, on September 24, 2008. (JA 1324; JA 680-82.)

In response, U.S. Silica again attempts to avoid the salient facts and law and instead tries to focus the Court on a series of factually incorrect or irrelevant and legally meritless excuses for the egregiousness of its delay. First, U.S. Silica repeatedly -- and inaccurately -- asserts that it gave notice of the Silica Claims to Travelers in 2005. *See, e.g.*, USS Opp’n at 6, 18. In fact, however, U.S. Silica at that time simply informed Travelers that it was seeking reimbursement for its out-of-pocket and previously incurred past defense and settlement costs without identifying or providing any complaints for those Silica Claims. (JA 1158; JA 1093.) Then, *after* filing this coverage litigation against Travelers, U.S. Silica sent Travelers, in 2006 and in 2007, large spreadsheets regarding, by its own admission, “thousands of pending and closed Silica Claims.” USS Opp’n at 6-7; JA 1687; JA 437-38; JA 1143-1202; JA 443-46. U.S. Silica again made no effort to identify which of these claims were matters for which it sought reimbursement, nor were copies of complaints provided. *Id.*

Further, U.S. Silica’s repeated assertion that Travelers failed to take a coverage position between 2005 and 2010 (USS Opp’n at 1, 8) is plainly rebutted by the record. By U.S. Silica’s

own admission, its insurance program encompassed decades-long corporate history and multiple corporate ownership. USS Opp'n at 3-4. Even U.S. Silica must recognize that an insurer has no obligations until a party establishes that it is an insured under a particular policy. Travelers repeatedly requested this and relevant claim information from U.S. Silica throughout this time. (JA 1097; JA 1203; JA 1330; JA 1397.)

Finally, on July 7, 2008 -- three years after advising Travelers of its intent to seek reimbursement -- U.S. Silica finally provided Travelers with the actual complaints for which it sought coverage in this action.⁵ These complaints -- which U.S. Silica now says it only provided "out of an abundance of caution" (USS Opp'n at 7) -- consisted of "[h]undreds of lawsuits with thousands of plaintiffs." (JA 683.) Thus, it took U.S. Silica *three years* from the time it found its Travelers Policies until it actually provided Travelers with the lawsuits for which it sought coverage in this action. This delay constitutes late notice as a matter of law. *Dairyland Ins. Co. v. Voshel*, 189 W. Va. 121, 125, 428 S.E.2d 542, 546 (1993); *Ragland v. Nationwide Mut. Ins. Co.*, 146 W. Va. 403, 420, 120 S.E.2d 482, 490-91 (1961).

U.S. Silica also asserts that even though it had been defending and settling silica claims since the 1970s, "the great majority of the silica claims were filed against U.S. Silica in 2003 and 2004." USS Opp'n at 17-18. Incredibly, U.S. Silica then *admits* that \$2.3 million of the \$8 million it sought were incurred *more than* five years prior to giving notice and sloughs that \$2.3 million off as apparently immaterial. As to the remaining amounts incurred between 2001 and 2005, U.S. Silica's position apparently is that a four-to-five year delay before providing notice of an underlying claim is no big deal. This is simply wrong, as courts applying West Virginia law

⁵ U.S. Silica's brief notes that it "provided copies of numerous complaints" to Travelers "[b]eginning in early 2007," (*see* USS Opp'n at 7) but those were newly filed cases that are not at issue in this appeal.

on late notice repeatedly have made clear. *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); *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) ("[w]here the insured has suggested no justification for a delay of well over two months, notice was clearly not given 'as soon as practicable'"); *Ragland*, 146 W. Va. at 420, 120 S.E.2d at 490-91 (where no excuse for late notice is given, a five-month delay in providing notice of fatal auto accident "is not, under normal circumstances, a reasonable time").

Incredibly, U.S. Silica further attempts to excuse the fact that its notice was late by claiming that Travelers actually was on notice of the claims against PGS by virtue of Travelers handling other policyholders' Silica Claims as well as a June 12, 2002 letter from ITT Corporation to a Travelers-related company, The Aetna Casualty and Surety Company ("Aetna C&S"). USS Opp'n at 18. That June 12, 2002 letter advised Aetna C&S, under a series of excess policies, of a settlement with three claimants in a single silica lawsuit. *Those excess policies were not even issued to PGS or U.S. Silica, but to ITT by Aetna C&S.* Those unrelated policies covered periods between June 24, 1968 and January 1, 1986 -- well after the expiration of the Travelers Policies.⁶ (JA 1090; JA 412-16; JA 606-15.) In support of its assertion that this letter regarding unrelated policies somehow constitutes "notice," U.S. Silica cites to *Colonial Insurance Co. v. Barrett*, 208 W. Va. 706, 542 S.E.2d 869 (2000), which U.S. Silica contends

⁶ The June 12, 2002 letter did not request that Aetna defend U.S. Silica against any non-settling claimants in the referenced lawsuit, or in any other silica lawsuits. *See* JA 1090.

stands for the proposition that “the notice requirements of an insurance policy may be satisfied when notice of a claim is provided to the insurance company *from any source*.” U.S. Opp’n at 18 n.11 (citation and internal quotation marks omitted). What the *Colonial* case *actually* holds, however, is that the notice requirement may be satisfied when an insurer receives timely notice of a claim *against its known policyholder under known insurance policies* from a source other than the known policyholder. *Colonial*, 208 W. Va. at 708, 711-13, 542 S.E.2d at 871, 874-76. Thus, *Colonial* does not support U.S. Silica’s position here.

Moreover, Travelers had no reason or basis to know, during the course of its involvement with other policyholders with different products and different policies covering different years in underlying silica cases prior to 2005, that U.S. Silica might some day in the future seek reimbursement from Travelers for its costs incurred in those cases under policies issued to PGS between April 1, 1949 and April 1, 1958. Nor did Travelers have any reason or basis to analyze, comment upon or involve itself in any aspect of U.S. Silica’s defense or settlement of those Silica Claims. *See, e.g., Dreaded, Inc. v. St. Paul Guardian Ins. Co.*, 904 N.E.2d 1267, 1273 (Ind. 2009) (“an insurer cannot defend a claim of which it has no knowledge”); *Ingalls Shipbuilding v. Fed. Ins. Co.*, 410 F.3d 214, 233-34 (5th Cir. 2005) (insurer’s duty to defend first arose on the date it became aware of insured’s desire for a defense under the insurance policy). The aforementioned 2002 letter from ITT to Aetna C&S and claims involving other policyholders could not form a basis for Travelers to “investigate and marshal its defenses” under the Travelers Policies with respect to any of the Silica Claims that U.S. Silica was facing at that point, nor was it possible for Travelers to “acquire information upon which it [could] form

an intelligent estimate of its liabilities” with respect to those lawsuits. *Colonial*, 208 W. Va. at 711, 542 S.E.2d at 874.

B. U.S. Silica Has No Reasonable Explanation For Its Delay In Providing Notice

U.S. Silica also has failed, as a matter of law, to provide a reasonable explanation for its delay in notifying Travelers. In this regard, U.S. Silica is wrong to state that “whether U.S. Silica’s explanation for any delay is ‘reasonable’ is a classic fact question to be decided by a jury *and not as a matter of law.*” USS Opp’n at 19 (*emphasis added*) (citation omitted). To the contrary, courts applying West Virginia law can rule, and have ruled, that explanations proffered by policyholders to justify late notice were unreasonable as a matter of law.

For example, in *Arch Specialty Insurance Co. v. Go-Mart, Inc.*, Civ.A No. 2:08-0285, 2009 WL 5214916 (S.D. W. Va. Dec. 28, 2009), the policyholder delayed for three years before notifying its insurer of an underlying lawsuit, by which time a judgment had been entered against it and another insurer that provided a defense under a reservation of rights withdrew its defense and indemnification. *Id.* at *2. The policyholder’s claims administrator attempted “to explain its delay in notifying [the insurer] by justifying its reliance on [the other insurer’s] initial assumption of Go-Mart’s defense.” *Id.* at *9 (citation omitted). The court held this excuse to be insufficient as a matter of law. In so ruling, the Court stated:

Virtually all concern and responsibility on Go-Mart’s part could have been avoided simply by giving Arch timely notice. Instead, Arch was given no notice for nearly three years during which the verdict against Go-Mart became a *fait accompli*. It was inexcusable and entirely unreasonable as a matter of law that [the claims administrator], as the agent of Go-Mart, failed to notify Arch immediately of the [underlying] claim.

*Id.*⁷

The facts here are similar to those in *Go-Mart*. U.S. Silica's witness John Ulizio testified that U.S. Silica waited until 2005 to locate the Travelers Policies because it relied on the ITT Indemnity, and that the only reason U.S. Silica decided to search for the Travelers Policies was because of the expiration of the indemnity. (*See* JA 478-85.) Like so many of its excuses as to why it did not comply with its contractual obligations, this, too, is nonsensical. The costs that U.S. Silica seeks here are *not* costs incurred *after* expiration of the indemnity, but rather \$8 million in costs incurred during the pendency of the indemnity. U.S. Silica has *no* explanation as to why it did not search for Travelers Policies while it was incurring those costs. Instead, U.S. Silica talks about searches that were allegedly done by *others*, not *itself* prior to 1995, and nothing about any searches from 2002 through 2005 when it allegedly incurred "70% of the costs at issue."⁸ USS Opp'n at 17. Therefore, U.S. Silica should have exercised the diligence necessary to find the Travelers Policies sooner than it did in order to remove "[v]irtually all concern and responsibility" on its part. *Go-Mart*, 2009 WL 5214916, at *9. Instead, U.S. Silica chose not to do so until the ITT Indemnity expired, and after U.S. Silica already had incurred millions in unreimbursed costs. (JA 480.)

U.S. Silica's excuse that the Travelers Policies were "lost at some point during the course of a decades-long corporate history," (USS Opp'n at 21), fails on multiple grounds. First and foremost, the evidence demonstrates that the Travelers Policies were not "lost" at all, but never

⁷ *See also United Nat'l Ins. Co. v. Lee*, 51 F. App'x 407 (4th Cir. 2002) (affirming summary judgment in insurer's favor on late notice and finding policyholder's proffered excuse of being unaware of underlying lawsuit unreasonable as a matter of law).

⁸ Moreover, at all times while it was incurring these costs prior to 2005, U.S. Silica was well aware that eventually it would not be able to rely on the ITT Indemnity because, by its own terms, that indemnity only lasted for a limited time.

even looked for. (JA 478.) It goes without saying that something cannot be considered “lost” if it is never sought in the first place. U.S. Silica’s corporate representative testified that when U.S. Silica finally did search for policies, the Travelers Policies were found exactly where they were supposed to be: in a filing cabinet at U.S. Silica’s corporate headquarters where U.S. Silica kept its other insurance policies. (See JA 482-83; JA 485.) Karrie Loucks, the person who actually performed insurance policy searches for U.S. Silica, testified that there are “approximately five cabinets” with “four drawers per cabinet.” (JA 909-10.) Ms. Loucks testified that, based on her experience performing insurance policy searches over a decade, a search for the Travelers Policies would take “[l]ess than an hour.” (JA 913.) In short, both U.S. Silica’s reliance on the ITT Indemnity and the ease with which it ultimately located the Travelers Policies demonstrate that U.S. Silica’s asserted belief that the policies were “lost” is unreasonable.

Moreover, U.S. Silica’s professed ignorance of the Travelers Policies is *not* a reasonable explanation for its delay, as corporations are fully responsible for maintaining their own business records.⁹ As noted in *Hospital Underwriting Group, Inc. v. Summit Health Ltd.*, 63 F.3d 486, 493 (6th Cir. 1995), a policyholder’s “asserted ignorance of the policy and good faith belief that the . . . claim would not exceed the limits of the primary insurance coverage” cannot excuse a policyholder’s failure to notify its insurer. Similarly, in *Olin Corp. v. Insurance Co. of North America*, 966 F.2d 718, 724 (2d Cir. 1992), the United States Court of Appeals for the Second Circuit correctly held that a policyholder’s “lack of knowledge of an insurance policy does not

⁹ U.S. Silica makes much of the fact that Travelers does not cite any West Virginia cases that have held that a policyholder’s lack of knowledge of a policy’s existence is not a reasonable excuse for delay. (USS Opp’n at 22.) However, given that U.S. Silica has the burden of showing that its delay was reasonable, it is telling that U.S. Silica has failed to cite a single West Virginia case holding that such an explanation *is* reasonable.

excuse a delay in notification of an occurrence.” *See also* 1 Allan D. Windt, *Insurance Claims and Disputes* § 1:2 (6th ed. 2013) (“Delay [in providing notice to an insurer] also cannot be excused because the insured forgot about the policy.”) (collecting cases). Thus, U.S. Silica’s alleged ignorance of the Travelers Policies that were included on its insurance list and stored right where they should have been with U.S. Silica’s other insurance policies is not a reasonable explanation for its delay as a matter of law.

U.S. Silica also asserts the irrelevant, red herring argument that Travelers inability to locate the Travelers Policies in its own files somehow justifies U.S. Silica’s own failure to exercise due diligence in searching for them. (USS Opp’n at 21-22.) This contention is meritless. U.S. Silica does not cite a single decision, in West Virginia or any other jurisdiction, to support its contention that an insurer’s inability to locate decades-old insurance policies bears any relation to a policyholder’s duty to provide timely notice. Instead, courts uniformly place the burden on policyholders to exercise due diligence in maintaining their insurance policies and in providing timely notice under those policies. *See, e.g., Olin*, 966 F.2d at 724; *City of Chicago v. U.S. Fire Ins. Co.*, 260 N.E.2d 276, 279 (Ill. App. Ct. 1970) (“If the [insurance] policy [issued to the City] was merely filed with the wrong department and if no search was made for it beyond a routine inquiry with the Comptroller’s Office, the fault, if any, lies with the City”). *Fireman’s Fund Ins. Co. v. ACC Chem. Co.*, 538 N.W.2d 259, 265 (Iowa 1995) (ruling that a policyholder’s claim that its business was in the process of being sold during EPA investigation, and location of its insurance policies was uncertain did not excuse its five-year delay in providing notice to its insurer).

Moreover, Travelers has never located the Travelers Policies within its own files while U.S. Silica has always had them, and easily located them once it searched for them. It therefore is not reasonable for U.S. Silica to call the Travelers Policies “lost” when they were easily available at U.S. Silica headquarters, were included on U.S. Silica’s register of its insurance policies, and could be located in “[l]ess than an hour” by searching a computerized database. (JA 482-83; JA 909-913.)

Accordingly, the evidence introduced at trial allows only for the conclusion that U.S. Silica did not offer a reasonable explanation for its delay in providing notice, and therefore the Court should reverse the Circuit Court and rule that U.S. Silica’s claims were barred by its late notice as a matter of law without the need for Travelers to demonstrate prejudice. *E.g., Go-Mart*, 2009 WL 5214916, at *9; Syl. Pt. 2, *Dairyland*, 189 W. Va. at 125, 428 S.E.2d at 546.

C. Although Travelers Is Not Required To Show Prejudice, The Undisputed Evidence Demonstrates That Travelers Was Prejudiced By U.S. Silica’s Late Notice

U.S. Silica claims that Travelers has not shown that it was prejudiced by U.S. Silica’s delay in notice, (USS Opp’n at 26), even though U.S. Silica *never* provided Travelers with an opportunity to assess its defense obligation for the silica claims while they were pending. A notice provision is satisfied where “the insurance company is afforded an ability to investigate a claim and estimate its liabilities.” *Barrett*, 208 W. Va. at 711, 542 S.E.2d at 874. An insurer suffers prejudice when a policyholder’s late notice impairs -- or, as is the case here, eviscerates entirely -- the insurer’s ability to do these things. *E.g., Go-Mart*, 2009 WL 5214916, at *10.

This is exactly what U.S. Silica did by litigating the Silica Claims to judgment or settlement before providing notice to Travelers. Because U.S. Silica delayed its notice of the

Silica Claims to Travelers until long after they had been litigated and settled, and further failed to provide copies of the complaints in the Silica Claims for an additional three years after summarily advising Travelers that it would seek reimbursement for such payments, Travelers was denied any right to investigate, compromise, *defend or estimate its own potential liabilities stemming from such claims*. *Id.* Accordingly, Travelers was prejudiced as a matter of law. *See Go-Mart*, 2009 WL 5214916 at *10; *Dairyland*, 189 W. Va. at 125, 428 S.E.2d at 546. *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”).

D. Travelers Did Not Waive Its Late Notice and Assistance and Cooperation Defenses, Or Any Other Defenses

Littered haphazardly throughout U.S. Silica’s brief is the argument that Travelers has waived virtually all, if not all, of its appellate arguments. Such a scattershot approach does nothing to advance any of the issues now before this Court, but may be telling as to U.S. Silica’s concerns over the substance of each point addressed. U.S. Silica’s so-called waiver arguments are easily dispensed with upon review of the totality of the record and applicable case law. Indeed, U.S. Silica’s waiver arguments fail to address, much less rebut, Travelers showing that under West Virginia law, waiver requires an *intentional* relinquishment of a known right. *See* Syl. Pts. 1, 3, 5, 6, *Potesta v. U.S. Fid. & Guar. Co.*, 202 W. Va. 308, 504 S.E.2d 135 (1998). In this regard, U.S. Silica argues that, because Travelers initially asserted other coverage defenses which the Circuit Court rejected, Travelers somehow waived its late notice and Assistance and Cooperation provision arguments. USS Opp’n at 28-31. To the contrary, the evidence demonstrates that Travelers asserted late notice and application of the Assistance and Cooperation provision from the outset, when U.S. Silica brought this lawsuit before providing

any actual claims or lawsuits to Travelers. (JA 38.) Travelers has defended itself on these grounds, as well as asserting other defenses, and has likewise reserved its rights even while agreeing to participate in U.S. Silica's defense despite this coverage lawsuit against it. For example, Travelers reserved its rights with respect to late notice and the Assistance and Cooperation provision in Ms. Gruenthal's August 3, 2010 letter to Mr. Ulizio -- the very same letter in which Travelers raised the defenses that U.S. Silica claims constituted the waiver. (JA 1357.) U.S. Silica can point to no West Virginia case law holding that the assertion of independent coverage defenses operates as a waiver of the right to assert a late notice defense or any other defense *in the same letter*.¹⁰

Further, and contrary to U.S. Silica's assertions, *Buckeye Union Casualty Co. v. Perry*, 406 F.2d 1270 (4th Cir. 1969), is applicable here. The policyholder in that case, like U.S. Silica here, argued that the insurer should be precluded from denying coverage on late notice grounds because it also denied coverage on other grounds. The Fourth Circuit rejected that argument, and in so ruling, held that the policyholder "did not rely on the company's conduct when he delayed giving notice," as "all of the facts underlying the estoppel argument occurred after he had already given his untimely notice to the company." *Id.* at 1272. Here, likewise, U.S. Silica's

¹⁰ The two West Virginia cases that U.S. Silica cites in support of its so-called waiver argument have no application whatsoever here. In *Maynard v. National Fire Insurance Co.*, 147 W. Va. 539, 129 S.E.2d 443 (1963), *overruled by Smithson v. U.S. Fid. & Guar. Co.*, 186 W. Va. 195, 411 S.E.2d 850 (1991), the court found that one of the two insurer-defendants waived the policy's requirement that the policyholder submit a formal proof of loss because the insurer had actual notice of the claim and adjusted it without ever requesting a proof of loss. *Id.* at 554, 129 S.E.2d at 454. Similarly, in *Republic Mutual Insurance Co. v. State Farm Mutual Automobile Insurance Co.*, 413 F. Supp. 649 (S.D. W. Va. 1976), the court found that State Farm had waived its late notice defense because State Farm never relied upon the lack of notice as a reason for not defending the death claim and did not deny that it had received notice of the accident from another insurer on behalf of the driver of the car and from the estate of the accident victim. *Id.* at 653.

accusations regarding Travelers defenses against U.S. Silica's coverage litigation all relate to events that occurred *after* U.S. Silica gave untimely notice and spent millions in defense and settlement payments before notifying Travelers that it sought coverage for such payments. *Buckeye Union*, 406 F.2d at 1272. Accordingly, Travelers has not waived its late notice defense, its Assistance and Cooperation provision defense or any other defenses, and its assertion of other defenses, even though rejected by the Circuit Court, does not establish anything to the contrary.

*Id.*¹¹

E. U.S. Silica Has Failed To Rebut Travelers Showing That The Circuit Court's Conflicting Waiver Instructions Were Contrary To West Virginia Law

In response to Travelers showing in its opening brief that the Circuit Court gave conflicting, inconsistent and confusing jury instructions on waiver (*see* Tr. Br. at 27-28), U.S. Silica argues that, after giving what U.S. Silica terms "the correct instruction on waiver," the Circuit Court went on to issue the jury *another* waiver instruction "expressly requested by Travelers," which, in U.S. Silica's view, means that "such inconsistency did not prejudice Travelers, but rather had the potential to benefit Travelers." USS Opp'n at 31-32. This assertion is meritless on its face, as the issuance of conflicting instructions is presumptively prejudicial. Syl. Pt. 1, *State Rd. Comm'n v. Darrah*, 151 W. Va. 509, 503 153 S.E.2d 408, 410 (1967); *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, *Tenant v. Marion Health Care Found.*, 194 W. Va. 97, 459 S.E.2d 374 (1995)).

¹¹ Similarly, and contrary to U.S. Silica's assertions, Travelers also did not "waive" any arguments regarding *pro rata* allocation or application of the ITT Indemnity. USS Opp'n at 44. Travelers clearly set forth its position regarding application of the ITT Indemnity at trial, as U.S. Silica's brief concedes, as well as *pro rata* allocation in its August 28, 2013 Pretrial Memorandum and at the September 11, 2013 pretrial conference (JA 225-231.) Rule 46 of the West Virginia Rules of Civil Procedure provides that "[f]ormal exceptions to rulings or orders of the Court are unnecessary, . . . it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take."

In this regard, the Circuit Court’s conflicting instructions on waiver undercuts U.S. Silica’s assertion that the jury decided “the fact-specific question of the ‘reasonableness’ of U.S. Silica’s explanation for any delay in notice.” USS Opp’n at 22. To the contrary, the jury may have found U.S. Silica’s explanation unreasonable, but believed that Travelers had waived its late notice defense due to the Circuit Court’s erroneous instruction. As shown above, waiver requires the intentional relinquishment of a known right, *see Potesta, supra*, and the record shows that Travelers never relinquished its late notice defense. Thus, the Circuit Court’s first instruction on late notice was erroneous as a matter of law. *Id.*

III. U.S. SILICA HAS NOT REBUTTED TRAVELERS SHOWING THAT THE CIRCUIT COURT ERRED IN RULING THAT “JOINT AND SEVERAL” ALLOCATION INSTEAD OF *PRO RATA* ALLOCATION APPLIED TO THE UNDERLYING SILICA CLAIMS

A. The Travelers Policies Require *Pro Rata* Allocation

In opposing Travelers argument that the Travelers Policies require *pro rata* allocation, U.S. Silica has not rebutted and cannot rebut the fact that the Travelers Policies explicitly provide insurance coverage only for “bodily injury” caused by “accidents which occur *during the policy period.*” (JA 1031; JA 1046; JA 1061 (emphasis added).) This language thus mandates that damages 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 (April 1, 1949 to April 1, 1958). *See, e.g., Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 732 (Minn. 1987) (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”). The Circuit Court therefore erred in failing to apply *pro rata* allocation to U.S. Silica’s claims.

U.S. Silica, as did the Circuit Court, essentially relies 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 arguing for an “all sums” theory of allocation. In *Wheeling Pittsburgh*, which involved environmental property damage claims, the circuit court focused exclusively on the phrase “all sums” and either ignored or failed to consider the phrase “during the policy period” in concluding 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. The Travelers Policies explicitly provide such limiting language, as the Policies apply “only to accidents which occur during the policy period.” (JA 1031; JA 1046; JA 1061). Therefore, *Wheeling Pittsburgh* does not and should not apply here. Indeed, since *Wheeling Pittsburgh* was decided in 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.¹²

B. U.S. Silica Cannot Disprove That ITT Reimbursed U.S. Silica For Defense And Settlement Costs Attributable To Silica Claims Or Portions Of Silica Claims That Could Trigger The Travelers Policies

U.S. Silica cannot rebut Travelers showing that 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 Travelers Policies were in effect from April 1, 1949 to April 1, 1958, and as noted, only provide coverage for bodily injury caused by “accidents which occur during the policy period.” (JA

¹² See Tr. Br. at 30 n.10.

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.)

U.S. Silica admits that ITT fully complied with the ITT Indemnity, under which ITT reimbursed U.S. Silica for defense and settlement payments for Silica Claims or any portion of Silica Claims that alleged exposure to silica products prior to September 12, 1985. (JA 1268-69; JA 499.) As a result, any Silica Claim defense and indemnity costs that could be 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. *Id.*

In response, U.S. Silica asserts that "it is undisputed" that U.S. Silica was not fully reimbursed under the ITT Indemnity," and that U.S. Silica "is not seeking a double recovery." USS Opp'n at 51. In fact, however, the Circuit Court's "all sums" ruling 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 in fact been reimbursed by ITT in accordance with the terms of the ITT Indemnity. (JA 1268-69; JA 499.) Travelers thus was held liable for \$8.037 million in costs that were not allocable to its policy periods under any allocation.

In this regard, U.S. Silica undercuts its own argument when it asserts that "Travelers' approach implicitly is based on the idea that the costs associated with a silica claim can be

divided between those that relate to a claimant's pre-1985 exposure and those that relate to his post-1985 exposure." USS Opp'n at 54. Yet that is *exactly* what the terms of the ITT Indemnity did. The ITT Indemnity clearly delineated that ITT would pay defense and indemnity for those Silica Claims or portions of Silica Claims alleging exposure prior to September 12, 1985, and U.S. Silica would be responsible for those Silica Claims or portions of Silica Claims alleging exposure after September 12, 1985. (JA 1268-69.) U.S. Silica now seeks to recoup from Travelers those portions of post-September 12, 1985 payments -- the only payment for which it was *not* reimbursed, and which plainly fall outside of the Travelers Policies' periods -- from Travelers by virtue of the Circuit Court's erroneous "all sums" ruling. This erroneous ruling permitted 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. Thus, U.S. Silica's unreimbursed payments were only those costs which were outside the periods of the Travelers Policies. Contrary to its assertions, U.S. Silica did in fact get a double recovery for all Silica Claims or portions of Silica Claims that are actually allocable to Travelers Policies.

U.S. Silica also contends that its damages expert, Ross Mishkin, "used the proper analysis" in applying an all sums allocation that resulted in Travelers being liable for over \$8 million in damages. USS Opp'n at 52-53. Mr. Mishkin's "analysis," however, never even considered application of the ITT Indemnity *at all*. (JA 780-84.) 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 the ITT Indemnity reimbursed U.S. Silica for all Silica Claims alleging pre-September 12, 1985 exposures, and all such remaining unreimbursed sums were defense and settlement costs for the post-September 12, 1985 exposure portion of the Silica Claims, which fell outside of, and should never have been allocated to, the Travelers Policies.

IV. U.S. SILICA WAIVED ITS RIGHT TO PREJUDGMENT INTEREST

U.S. Silica's Opposition Brief finally acknowledges that West Virginia Code § 56-6-27 (2012) governs a plaintiff's claim for prejudgment interest in a breach of contract action, and that a plaintiff *waives* prejudgment interest in such an action "by not requesting an instruction for the jury's consideration." USS Opp'n at 54. Despite this concession, U.S. Silica asserts that it is Travelers who has waived any objection to U.S. Silica's incorrect and late request for interest. *Id.* The record and applicable case law and statutes demonstrate otherwise.

The Circuit Court's July 25, 2013 Supplemental Case Management Order required U.S. Silica to submit its proposed jury instructions at least two weeks before the September 11, 2013 Pretrial Conference. (July 25, 2013 Supplemental Case Management Order.) U.S. Silica's proposed jury instructions *did not* request any instruction regarding prejudgment interest. U.S. Silica squandered several opportunities to correct its failure, including during the September 11, 2013 pretrial conference and during the trial, but ultimately it never requested a prejudgment interest jury instruction or asked the jury to award interest to it at any time before the Circuit Court released the jury. When U.S. Silica finally got around to asking the Circuit Court to belatedly award it prejudgment interest, it did so under W. Va. Code § 56-6-31, a totally inapplicable statute.

The question of whether and to what extent prejudgment interest may be awarded in contract actions is up to the jury and not the judge. *City Nat'l Bank of Charleston v. Wells*, 181 W. Va. 763, 778, 384 S.E.2d 374, 389 (1989) (“CNB”); Syl. Pt. 3, *Ringer v. John*, 742 S.E.2d 103, 104 (W. Va. 2013). *See also Rice v. Rose & Atkinson*, 176 F. Supp. 2d 585, 595 (S.D. W. Va. 2001) (W. Va. Code § 56-6-27 “entitles a claimant to a jury instruction that interest may be allowed, but does not provide for mandatory prejudgment interest.”), *aff'd*, 36 F. App'x 37 (4th Cir. 2002). Accordingly, this Court has long held that a plaintiff that, like U.S. Silica, does not request a jury instruction regarding prejudgment interest *waives* any right to prejudgment interest. *See CNB*, 181 W. Va. at 778, 742 S.E.2d at 385 (plaintiff's failure to request a prejudgment interest jury instruction “must be deemed a waiver of that right”) (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)). U.S. Silica's undisputed repeated failure to request a prejudgment interest jury instruction on the deadline for submitting proposed jury instructions, during the pretrial conference, or at any time during trial clearly is a waiver of any right it may have once had to seek prejudgment interest in this case. *Id.* The Circuit Court's post-trial award of prejudgment interest, despite U.S. Silica's clear waiver, should therefore be reversed. *Ringer*, 742 S.E.2d at 107 (reversible error for a trial court judge to award prejudgment interest in a contract action tried to a jury).

U.S. Silica's assertion that Travelers initial submission of a jury instruction concerning interest does not change these undisputed facts or justify the Circuit Court's error. U.S. Silica incorrectly states that Travelers actually proposed that the Circuit Court decide the issue of prejudgment interest, and that Travelers, U.S. Silica, and the Circuit Court agreed to this

procedure. This simply is not correct. Although Travelers initially requested a jury instruction that the jury “not add interest” to any amount of damages and that the jury be advised that the Circuit Court would “determine how much, if any, interest should be added to any judgment,” (JA 3579), Travelers *withdrew* the jury instruction after the Circuit Court summarily decreed that it was “not going to tell them [the jury] anything about . . . interest.” (JA 275; JA 953.) At that point, U.S. Silica continued to sit on its rights, and did not request that the Circuit Court instruct the jury that it, not the Circuit Court, was empowered by W. Va. Code § 56-6-27 to decide whether to award prejudgment interest. At no time did the parties and the Circuit Court ever “agree” to a “procedure” for U.S. Silica to seek prejudgment interest.

U.S. Silica’s reliance on *Deiter Engineering Services, Inc. v. Parkland Development, Inc.*, 199 W. Va. 48, 483 S.E.2d 48 (1996) to argue that Travelers somehow waived its right to oppose U.S. Silica’s belated request that the Circuit Court award prejudgment interest is misplaced. In *Deiter*, the circuit court and the parties met during jury deliberations to discuss how to respond to the jury’s inquiry about whether the jury could include interest in its award. *Id.* at 61, 483 S.E.2d at 61. The circuit court and the parties specifically “agreed . . . that the circuit court would award interest on any principal sum returned by the jury,” and the circuit court so informed the jury. *Id.* Because of that actual agreement, this Court ruled that the defendants waived any objection to the Circuit Court’s post-trial prejudgment interest award, even though the plaintiff had not requested a prejudgment interest jury instruction. *Id.* at 61-62, 483 S.E.2d at 61-62.

Unlike in *Deiter*, and contrary to U.S. Silica’s revisionist history, here there never was any “agreement” among the parties and the Circuit Court about a “procedure” for determining if

U.S. Silica would receive prejudgment interest. U.S. Silica never raised the issue. The court and the parties did not discuss the issue at all. No agreement was reached. Travelers withdrew its proposed interest instruction. (JA 275; JA 953.) And the jury was told nothing.¹³ The two cases could not be more different. Accordingly, U.S. Silica's reliance on *Deiter* is misplaced and it does not restore any right to prejudgment interest that U.S. Silica clearly waived.

In addition, U.S. Silica has not rebutted Travelers showing that the Circuit Court's application of a seven percent prejudgment interest rate also is reversible error. As noted above, U.S. Silica submitted its request for 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 reliance upon the wrong statute, and never offered *any* evidence to the Circuit Court on the appropriate interest rate. (JA 1867.) Given this, the Circuit Court reflexively applied the seven percent interest rate provide for by the *wrong* statute -- W. Va. Code § 56-6-31. (JA 3915-16.) U.S. Silica's Brief does not cite any authority justifying the Circuit Court's improper award of seven percent interest, based on the wrong statute, and in the absence of any evidence from U.S. Silica as to the appropriate rate of interest. Accordingly, the ruling should not stand.

V. U.S. SILICA HAS FAILED TO REBUT TRAVELERS SHOWING THAT THE CIRCUIT COURT ERRED IN AWARDING PREJUDGMENT INTEREST ON U.S. SILICA'S ATTORNEYS' FEES

U.S. Silica cannot justify the Circuit Court's award of prejudgment interest on its attorneys' fees in light of this Court's repeated rejection of plaintiffs' attempts to obtain prejudgment interest on attorneys' fees and costs. *See State ex rel. Chafin v. Mingo Cnty.*

¹³ In this regard, U.S. Silica's Brief mistakenly states that the "Court indicated to the parties that the jury would not decide any award of interest." USS Opp'n at 56. The Circuit Court made no such statement to the parties or the jury, as proven by U.S. Silica's own citation to what the Circuit Court actually said. *See id.*

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 the face of controlling case law to the contrary, U.S. Silica asks this Court to ignore its prior decisions in which it has held that attorneys' fees do not qualify for an award of prejudgment interest under W. Va. Code § 56-6-31(a), in cases involving both contingent and non-contingent attorneys' fees. See *Chafin*, 189 W. Va. at 684, 434 S.E.2d at 44 (rejecting award of prejudgment interest on non-contingent attorneys' fees); *Miller*, 201 W. Va. at 700, 500 S.E.2d at 325 (plaintiff's contingent attorneys' fees and litigation expenses not "ascertainable, pecuniary, out-of-pocket expenditures to the plaintiff that would support an award of prejudgment interest"); *Graham v. Nat'l Union Fire Ins. Co.*, No. 13-1517, 2014 U.S. App. LEXIS 2041, at *18-19 (4th Cir. Feb. 3, 2014) (Under *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.").

This Court should decline to abandon this longstanding precedent and should reverse the Circuit Court's orders by holding instead that U.S. Silica is not entitled to prejudgment interest on its attorneys' fees and costs. *Id.*

VI. U.S. SILICA HAS FAILED TO REBUT TRAVELERS SHOWING THAT THE CIRCUIT COURT'S AWARD OF ATTORNEYS' FEES AND COSTS WAS IMPROPER

A. U.S. Silica Has Failed To Rebut Travelers Showing That It Has Not Met Its Burden Of Proving That Its Attorneys' Fees And Costs Were Incurred For Its Claim Against Travelers

At U.S. Silica's urging, the Circuit Court impermissibly expanded this Court's prior rulings that "[a]n insured is entitled to recover reasonable attorney's fees arising from the

declaratory judgment litigation” against its insurer. Syl. Pt. 2, *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 181, 194-95, 342 S.E.2d 156, 157, 160-61 (1986). The prevailing insured has the burden of showing that the attorneys’ fees and costs it seeks are reasonable fees that it incurred “as a result of the insurer’s breach of contract.” *Id.* at 194-95, 342 S.E.2d at 160-61; Syl. Pt. 4, *Taylor v. Elkins Home Show, Inc.*, 210 W. Va. 612, 613, 558 S.E.2d 611, 612 (2001). U.S. Silica glosses over the fact that *Pitrolo* limits amounts a prevailing insured may obtain from its insurer to only those attorneys’ fees and costs incurred as a result of “the insurer’s” alleged breach. (USS Opp’n at 59 (quoting *Pitrolo*, 176 W. Va. at 194, 342 S.E.2d at 160)). The Circuit Court, contrary to this Court’s binding precedent, essentially gave U.S. Silica a blank check and awarded it all of the attorneys’ fees and costs that it incurred not only in this case against Travelers, but also against other insurers, as well as in separate litigation in California and New York state courts that also involved dozens of parties other than Travelers. This ruling was clearly in error and should be reversed.

1. U.S. Silica has failed to rebut Travelers showing that it is not entitled to the Circuit Court’s award of attorneys’ fees and costs that were incurred in the New York and California suits

Other than pointing to the fact that Travelers joined in motions seeking to litigate U.S. Silica’s insurance coverage claims in more comprehensive state court actions in New York and California, which U.S. Silica repeatedly opposed, U.S. Silica has not made any effort to justify its claim against Travelers for *all* of the attorneys’ fees and costs it incurred in those two separate actions against *all* defendants. U.S. Silica baldly states that “Travelers forced U.S. Silica to incur attorneys’ fees litigating in California and New York.” USS Opp’n at 60. The true facts belie this unsupported accusation. Even though it already had sued Travelers in West Virginia, U.S.

Silica itself chose to later assert virtually identical claims against Travelers in the California suit. (JA 3358.) Accordingly, U.S. Silica forced Travelers to incur amounts in litigation in both California and West Virginia, not the other way around. Moreover, Travelers has never even been a party to the New York suit, so it cannot have forced anyone, including U.S. Silica, to incur any amounts in that case. (JA 3333.)

U.S. Silica has not refuted, and indeed it is beyond dispute, that Travelers has never been a party to the New York suit. Indeed, U.S. Silica has not come forward with any West Virginia authority, or authority from any other jurisdiction, that supports the Circuit Court's award of U.S. Silica's attorneys' fees and cost incurred in the New York suit against Travelers, a non-party. That Travelers joined motions in which it was argued that the New York suit was more comprehensive than the West Virginia suit, does not change that fact. Clearly, then, under *Pitrolo*, U.S. Silica is not entitled to recover its New York attorneys' fees and costs from Travelers, because U.S. Silica has not, and cannot, show that it incurred any of those amounts "as a result of [Travelers] breach of contract." *Pitrolo*, 176 W. Va. at 194, 342 S.E.2d at 160. Accordingly, this Court should reverse the Circuit Court's improper award of \$607,522 attorneys' fees and costs U.S. Silica incurred in the New York suit, a case in which Travelers was not a party. (JA 3432.)

The Circuit Court's order requiring Travelers to pay all of the attorneys' fees and costs U.S. Silica has incurred in the still pending California suit, which involves dozens of other parties and issues having nothing to do with Travelers, also should be reversed. First, U.S. Silica has not refuted the fact that California law will not permit it to recover its attorneys' fees against Travelers, even if it prevails against Travelers in the still-pending California suit, which

remains to be seen. *See Cassim v. Allstate Ins. Co.*, 94 P.3d 513, 528 (Cal. 2004) (in California each party to a suit must ordinarily pay his own attorney fees). Buried in footnote 37 of its Brief, U.S. Silica calls this argument a “red herring.” In support of that proclamation, U.S. Silica relies on California authority stating that “an insured may recover attorneys’ fees and expenses incurred to compel payment of insurance coverage benefits that were withheld in bad faith.” USS Opp’n at 62-63, n.37 (citing *Brandt v. Super. Ct. (Standard Ins. Co.)*, 693 P.2d 796 (Cal. 1985)). But U.S. Silica’s citation to *Brandt* is the real red herring here, given that the West Virginia Circuit Court *denied* U.S. Silica’s efforts to add bad faith claims against Travelers in this case. Thus, *Brandt* plainly has no application whatsoever here. This Court should not allow U.S. Silica to use West Virginia law to obtain amounts it has incurred in the California suit and where California law does not allow such recovery. *See Cassim*, 94 P.3d at 528.

Second, as it did in the Circuit Court proceedings, U.S. Silica has made no effort here to respond to the un rebutted testimony of Travelers expert, Bernd Heinze, Esq., that shows that the vast majority of the entries in the 465 pages of invoices U.S. Silica submitted from the California suit do not show any relationship to U.S. Silica’s claim *against Travelers*. Indeed, and as shown in Travelers Opening Brief, U.S. Silica’s California suit invoices are replete with entries that clearly *do not* relate in any way to any claim against Travelers. (Tr. Br. at 42-45 (citing JA 2265 (OneBeacon); JA 2431 (Royal, Liberty Mutual, ACE); JA 2451 (Liberty Mutual))). The paltry evidence that U.S. Silica relies on includes only 87 billing entries for a total of \$161,818.50 that appear to relate to its claims against Travelers. (Tr. Br. at 43-45 (citing JA 3432-33.)). Even then, U.S. Silica makes no effort to actually establish that any of

those California fees had anything to do with U.S. Silica’s breach of contract claim against Travelers in this West Virginia suit. Accordingly, U.S. Silica has not met its burden of proving it is entitled to any amounts incurred in the California suit. *See* Syl. Pt. 4, *Taylor*, 210 W. Va. at 614, 558 S.E.2d at 613; Syl. Pt. 4, *Sammons v. Bros. Const. Co. v. Elk Creek Coal Co.*, 135 W. Va. 656, 657, 655 S.E.2d 94, 96 (1951). This Court therefore should reverse the Circuit Court’s award of \$2,002,647 in attorneys’ fees and costs U.S. Silica incurred in the California suit.

2. U.S. Silica has failed to rebut Travelers showing that it has not met its burden of proving that its vague and block-billed invoices for attorneys’ fees and costs are insufficient to justify the Circuit Court’s award

As it did in the Circuit Court, U.S. Silica relies solely on *ipsi dixit* statements to support its claim for all of the attorneys’ fees and costs listed in its submitted invoices, regardless of whether or not those invoices actually show that the amounts were incurred “as a result of the [Travelers] breach of contract” as this Court’s prior decisions require. *Pitrolo*, 176 W. Va. at 194-95, 342 S.E.2d at 160-61; Syl. Pt. 4, *Taylor*, 210 W. Va. at 614, 558 S.E.2d at 613 (claimant has burden of proving damages). U.S. Silica thus has fallen far short of meeting its burden under *Pitrolo*. As detailed in Travelers Opening Brief, and unrebutted in U.S. Silica’s Brief, Mr. Heinze identified \$49,957 in attorneys’ fees that U.S. Silica incurred in this case for claims against insurance companies other than Travelers. (JA 3432.) None of those amounts are recoverable from Travelers under *Pitrolo* because they did not result from Travelers breach of contract. *See* 176 W. Va. at 194, 342 S.E.2d at 160. Similarly, Mr. Heinze identified \$896,743 of the attorneys’ fees and \$43,920 in costs listed in U.S. Silica’s invoices that are block-billed or so vague that it is impossible to determine if they are related to U.S. Silica’s claims against Travelers or not. (JA 3433-36; JA 3442.) Examples of these block-billed and vague entries are

set forth in Travelers Opening Brief, and will not be repeated here. (Tr. Br. at 43-45 (citing JA 3433-34; JA 3436; JA 3442; JA 3452; JA 3455)). Even a cursory review of these billing entries demonstrates that they do not carry U.S. Silica's burden of showing that they are amounts incurred for U.S. Silica's claim against Travelers. *Id.*

U.S. Silica asserts that it met its burden of proving that it is entitled to the amounts the Circuit Court awarded by simply providing "nearly 1,000 pages" of invoices. (USS Opp'n at 64.) However, as it did below, U.S. Silica has made no effort to actually satisfy its burden of proving that those claimed amounts actually 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 657, 655 S.E.2d at 96. As demonstrated by Travelers expert, those invoice entries fall far short. The Circuit Court's decision awarding U.S. Silica all of the amounts it claimed, despite the fact that the invoice descriptions plainly do not establish that the amounts were incurred by U.S. Silica "as a result of [Travelers] breach of contract," should therefore be reversed.

VII. THE EVIDENCE DEMONSTRATES THAT TRAVELERS IS ENTITLED TO A REMITTITUR OR NEW TRIAL ON DAMAGES

A. Travelers Is Entitled To *Remittitur* Of \$523,249 For Settlement Payments To Silica Claimants With No Known Dates Of Exposure Because U.S. Silica Introduced No Evidence To Support Its Claim That Such Payments Triggered The Travelers Policies

Despite having the burden of proving its entitlement to coverage under West Virginia law, U.S. Silica makes no effort in its Opposition brief to argue that any evidence put forward at trial supports the jury's award of \$523,249 in settlement payments to silica claimants with unknown dates of exposure. *See Payne v. Weston*, 195 W. Va. 502, 506, 466 S.E.2d 161, 165

(1995) (“It is only when the [policyholder has] established a prima facie case of coverage that the burden of production shifts to the [insurer]”); 14 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance 3d* § 200:3 (3d ed. 2007) (“duty to indemnify arises only once liability has been conclusively determined”). Instead, U.S. Silica argues that, because Travelers was found to have breached its duty to defend, Travelers cannot now argue that those settlement payments are not covered, and U.S. Silica is excused from meeting its burden of demonstrating its entitlement to coverage. *See* USS Opp’n at 64-65. This argument is without merit because *U.S. Silica never gave Travelers an opportunity to provide a defense against the Silica Claims.*

U.S. Silica is asking this Court to create coverage for these claims by estoppel. U.S. Silica tellingly fails to cite a single West Virginia case in support of this proposition, because no such case exists. Even the cases from other jurisdictions that U.S. Silica cites do not support its radical position, because all of those cases stand for the principle that, where an insurer is offered an opportunity to provide a defense to its policyholder and refuses to do so, under the laws of those jurisdictions the insurer may be estopped from contesting coverage after the underlying case proceeds to judgment or a reasonable settlement. USS Opp’n at 65 n.39. But as U.S. Silica itself argues, “where an insurer has breached its duty to defend, it cannot *later* deny coverage for a reasonable settlement entered into by the insured.” USS Opp’n at 65 (emphasis added) (citation omitted). That is not what happened in this case. Here, U.S. Silica never provided that opportunity to Travelers, but instead seeks reimbursement of defense and settlement costs after the fact. *See, e.g., Emp’rs Ins. of Wausau v. Ehlco Liquidating Trust*, 708 N.E.2d 1122 (Ill. 1999) (“[a]pplication of the estoppel doctrine is not appropriate if the insurer had no duty to defend, or if the insurer’s duty to defend was not properly triggered. *These circumstances*

include where the insurer was given no opportunity to defend.” Id. at 1135 (emphasis added).

Thus, U.S. Silica cannot claim that Travelers breached its duty to defend because U.S. Silica never requested a defense of the pre-September 12, 2005 claims from Travelers until *after* all such costs were incurred.

U.S. Silica does not challenge the accuracy of the \$523,249 amount of indemnity paid for Silica Claims with no known dates of exposure. Accordingly, this amount is undisputed and “definitely ascertainable,” and should be deducted from the amount of damages for which Travelers has been held liable. *See Fortner v. Napier*, 153 W. Va. 143, 152, 168 S.E.2d 737, 743 (1969) (*remittitur* is proper where amount in excess of verdict is definitely ascertainable); *Stone v. United Eng’g*, 197 W. Va. 347, 365, 475 S.E.2d 439, 457 (1996) (same).

B. U.S. Silica Has Failed To Rebut Travelers Showing That Travelers Is Entitled To *Remittitur* Or Verdict Credit To Account For The ACE And Arrowood Settlements

Travelers is entitled to a set-off from the ACE and Arrowood settlements, and U.S. Silica has offered nothing to rebut this fact.

The amount of the verdict credit is definitely ascertainable based on the information in the record. Travelers expert, Dr. Charles Mullin, testified that, utilizing U.S. Silica’s own ProLaw database, a 48 percent set-off should be applied to the judgment amount rendered against Travelers due to the \$6.024 million in settlement payments that U.S. Silica received from ACE and Arrowood settlements after deducting the \$523,249 for indemnity paid for Silica Claims with no known dates of exposure. *See* Section III.A., *supra*. (JA 840-852.) These deductions thus reduce the judgment against Travelers to \$3,907,538. (JA 840-852.)

U.S. Silica relies on the unsupported testimony of its expert, Ross Mishkin, to assert that “[b]ecause the ACE and Arrowood settlements were made in the context of resolving litigated claims . . . it is not customary for experts [to] consider or review or allocate such settlements.” USS Opp’n at 66 (citation omitted). West Virginia case law holds otherwise. In *Board of Education of McDowell County v. Zando Martin & Milstead, Inc.*, 182 W. Va. 597, 390 S.E.2d 796 (1990), the plaintiff brought a lawsuit against an architectural and engineering firm for negligence and breach of contract in failing to properly design and supervise the construction of a building. *Id.* at 601. The plaintiff subsequently obtained leave to file an alternative complaint against two contractors hired by the architect to do soil testing and construction. *Id.* The plaintiff settled with the two contractor-defendants for a total of \$630,000 in exchange for releases from liability, and then obtained a verdict of \$1,000,000 against the architect. *Id.* at 602. The trial court refused to grant a credit for the settlements and entered judgment on the full \$1,000,000. *Id.* This Court, in reversing the trial court, held that “the 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.” *Id.* at 607, 390 S.E.2d at 806. Accordingly, the court held that the non-settling defendant was entitled to a verdict credit in the amount of the settlement payments the plaintiff previously had received. *Id.* at 610, 390 S.E.2d at 809. The settlements made in *Zando*, like the ACE and Arrowood settlements here, were made in the context of resolving litigated claims. Both settling defendants in *Zando* were dismissed from the litigation, as also was the case here, with one settling before trial and obtaining a release from liability, and the other settling during the trial. *Zando*, 182 W. Va. at 602, 390 S.E.2d at 801. This did not prevent the Supreme Court of Appeals in *Zando*

from applying a verdict credit because of those settlements, and the same standard therefore should be applied here.

U.S. Silica also argues that if a settlement credit is applied, it “would not be made whole and would be left with ‘un-reimbursed losses.’” USS Opp’n at 66 (citation and emphasis omitted). Such a result simply recognizes that U.S. Silica seeks reimbursement for payments of claims that never triggered the Travelers policy periods. Moreover, to support its assertion, U.S. Silica selectively deletes part of Dr. Mullin’s testimony to make it seem as though he agrees with U.S. Silica’s position. *Id.* (citing JA 886.) The full quote from Dr. Mullin’s testimony shows that his testimony was entirely consistent with Travelers position:

Q. So let me ask you: If we give U.S. Silica 3.9 million, and we give them the money you say we have to apply from their litigation settlements, will they be whole or will they still have un-reimbursed costs?

A. They will have un-reimbursed cost. *They have losses that don't trigger anything.* They will have un-reimbursed losses.

(JA 886.) (emphasis added).

In another instance of selective misquoting, U.S. Silica contends Dr. Mullin’s testimony was “based on assumptions” and therefore lacking “the foundation that one would normally desire.” USS Opp’n at 66 (internal quotation marks omitted). However, the cited excerpts in U.S. Silica’s Opposition are simply quotes from Dr. Mullin’s deposition testimony. At trial, Dr. Mullin explained that his approximation at his deposition was because “I asked at times [during my deposition] to see my working papers but they were never presented to me. So I couldn’t do exact math because I didn’t have access to the exact numbers.” (JA 889.) Even then, Dr. Mullin’s deposition testimony was that the ACE and Arrowood settlement payments would give

rise to “something in the neighborhood of a 50 percent offset,” based on the same calculation that led him to the more precise 48 percent set-off at trial. (JA 888-89.)

Accordingly, U.S. Silica has not been able to refute that, under applicable West Virginia law, Travelers is entitled to a set-off that takes into account the ACE and Arrowood settlements, and reduces Travelers potential liability to \$3,907,538. *Zando*, 182 W. Va. at 607, 390 S.E.2d at 806.

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 Notice of Claim or Suit 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; and/or

4. Reverse the Circuit Court's judgment and find that whether *pro rata* or all sums applies, U.S. Silica was fully reimbursed for all amounts that triggered Travelers Policies under either an all sums or *pro rata* theory; and/or

5. 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

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 \$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

7. 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

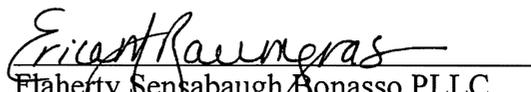
8. Reverse the Circuit Court's March 5, 2014 order denying Travelers Rule 50(b) Motion for Judgment as a Matter of Law and either require a *remittitur* of \$4,130,207 so that the judgment against Travelers is \$3,907,538 in accordance with the undisputed evidence at trial or order a new trial on the 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.

Dated: September 10, 2014

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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, Erica M. Baumgras, counsel for The Travelers Indemnity Company, on behalf of The Travelers Insurance Company, hereby certify that I served a true copy of the foregoing *Petitioner's Reply Brief* upon the following individuals, via regular U.S. mail, postage prepaid, on this the 10th day of September 2014:

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