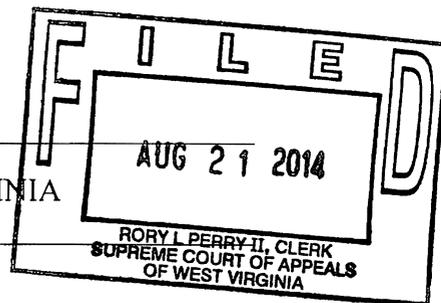


No. 14-0343

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



THE TRAVELERS INDEMNITY COMPANY, on behalf of THE TRAVELERS INSURANCE COMPANY,

Petitioner,

v.

U.S. SILICA COMPANY, f/k/a PENNSYLVANIA GLASS SAND CORPORATION,

Respondent.

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

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INTRODUCTION

This appeal arises from a jury verdict in favor of policyholder U.S. Silica Company (“U.S. Silica”), formerly known as Pennsylvania Glass Sand Corporation (“PGS”), and against The Travelers Indemnity Company, on behalf of The Travelers Insurance Company (“Travelers”). After years of protracted litigation, the jury correctly found that Travelers breached its obligations to provide insurance coverage to U.S. Silica and awarded the company a little over \$8 million in damages.

U.S. Silica incurred over \$110 million defending and settling thousands of underlying lawsuits alleging bodily injury resulting from exposure to its silica-related products (the “Silica Claims” or the “Claims”). U.S. Silica sought to recover unreimbursed amounts under three policies issued by Travelers to PGS (the “Travelers Policies” or the “Policies”).

For more than five years after Travelers admits it received notice in 2005 of the Silica Claims, Travelers failed to defend the Claims, pay any money to U.S. Silica for the costs it incurred and continued to incur – or even take a coverage position on the Silica Claims. Finally, in 2010, Travelers denied coverage for the Silica Claims on numerous bases – including that the Policies were supposedly “not authentic,” that U.S. Silica was not the successor to PGS’s rights under the Policies, and that the Silica Claims did not allege “accidents” under the terms of the Policies and thus were not covered. Travelers also asserted: (1) that U.S. Silica had not provided timely notice of the Silica Claims (Travelers’ “Late Notice” defense); and (2) that U.S. Silica had paid defense costs and settled Silica Claims before “tendering” those Claims to Travelers (Travelers’ “Assistance and Cooperation” defense).¹ While U.S. Silica always tried to

¹ Over the course of this litigation, Travelers has variously characterized its defense based on the Assistance and Cooperation condition in the Travelers Policies as a “Pre-Tender Payments” defense or a “Voluntary Payments” defense. In this brief, U.S. Silica will refer to this defense simply as Travelers’ “Assistance and Cooperation” defense.

litigate this dispute in the West Virginia Circuit Court, it was also litigated – at Travelers’ insistence – in California and New York courts.

The Circuit Court ruled against Travelers on certain of its coverage defenses in summary judgment and pretrial rulings, and the case went to trial. Following a three-day trial, during which Travelers raised its Late Notice and Assistance and Cooperation defenses and challenged the amount of U.S. Silica’s damages, the jury unanimously found that Travelers had breached its obligations to U.S. Silica and awarded \$8,047,745 in damages. The Circuit Court denied Travelers’ post-trial motions and awarded U.S. Silica prejudgment interest under West Virginia Code § 56-6-27 as well as reasonable attorneys’ fees and costs under *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986) (“*Pitrolo*”).

In this appeal, Travelers takes the same scorched-earth approach it did when denying U.S. Silica’s claim for coverage – raising seven assignments of error that attack the Circuit Court’s pretrial ruling on allocation, the jury instructions given at trial, the jury’s award of contractual damages, the Circuit Court’s denial of Travelers’ post-trial motions for judgment as a matter of law or a new trial, the amount of attorneys’ fees and expenses awarded by the Circuit Court under *Pitrolo*, the Circuit’s Court’s award of prejudgment interest, and the application of prejudgment interest to *Pitrolo* damages. For the reasons set forth herein, this Court should reject each of Travelers’ assignments of error and affirm the jury’s considered verdict and the Circuit Court’s rulings.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

A. The Travelers Policies

Travelers issued at least three primary comprehensive general liability insurance policies to PGS, U.S. Silica’s predecessor, with effective dates from April 1, 1949 to April 1, 1958.

(JA 1029; JA 1044; JA 1059.) The Policies contain a comprehensive general liability coverage part that obligates Travelers:

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person and caused by accident.

(JA 1031; JA 1046; JA 1061.) The Policies further provide that Travelers shall “defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent.” (*Id.*)

The Policies also contain the following “Notice” condition:

Notice of Claim or Suit. If a 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 Policies further contain the following “Assistance and Cooperation” condition:

Assistance and Cooperation of the Insured. The insured shall cooperate with the company, and upon the company’s request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining attendance of witnesses and in the conduct of suits. 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 the accident.

(*Id.*)

B. Relevant Corporate History of U.S. Silica

Travelers sold and delivered the Policies to PGS in the 1940s and 1950s, when PGS was a stand-alone corporation headquartered in Lewistown, Pennsylvania. (JA 1030; JA 1045; JA 1060; JA 384-85.) In 1968, PGS was acquired by, and became a wholly-owned subsidiary of, International Telephone and Telegraph (“ITT”) – approximately a decade after the end of the

policy period of the final Travelers Policy. (JA 385; JA 1082.) Around the time ITT acquired PGS, PGS's corporate headquarters moved from Lewistown, Pennsylvania to Berkeley Springs, West Virginia. (JA 386-87.) Following the ITT acquisition, ITT's risk management department, not PGS, became responsible for PGS's insurance function and for submitting any insurance claims. (JA 387.)

In 1985, PGS was sold again – this time by ITT to Pacific Coast Resources (n/k/a U.S. Borax) (“Borax”). (JA 387-88.) In connection with the 1985 purchase, Borax specifically conducted due diligence regarding the Silica Claims and assets available to indemnify it for such Claims, and the Travelers Policies were not known about at that time. (JA 1082 (“ITT purchased PGS in 1968. Prior to that time PGS carried no product liability insurance.”); JA 416-19.) Both Borax, as the buyer of PGS, and ITT, as its seller, had every incentive to locate any and all potentially applicable insurance policies at the time of the transaction, yet none of the parties involved was aware of the Travelers Policies. (JA 420-22.) In 1986, PGS's name was changed to U.S. Silica Company. (JA 388.)

C. The ITT Indemnity

U.S. Silica historically received partial indemnification from its former parent ITT for certain costs of defense and indemnity in the Silica Claims. (JA 410-11; JA 434-36.) At the time of the September 1985 sale of PGS to Borax, ITT agreed to indemnify Borax with respect to certain lung disease claims filed during a ten-year period after the closing (the “ITT Indemnity”). (JA 1268.) In 1995, the ITT Indemnity was assigned to U.S. Silica and was extended for another ten years to September 2005. (JA 1316-23.)

At the time of that extension in 1995, an internal U.S. Silica memo confirmed the company's continued belief (per its general counsel at the time, Richard Day) that PGS had no product liability coverage prior to 1974. (JA 1085 (“[P]er R.E. Day [PGS] coverage is for the

period 4/1/1974-9/12/85”); JA 422-24.) As further discussed below (Section I.E *infra*), despite having every incentive to locate relevant insurance policies, there is no evidence that U.S. Silica ever discovered the Travelers Policies after their expiration in 1958 through 2005.

D. The Silica Claims

The first Silica Claims were filed against PGS in or around 1975 – when PGS was a subsidiary of ITT, and seventeen years after the final policy period of the Travelers Policies expired in 1958. (JA 385; JA 391-93; JA 1060.) Claims continued to be filed over the ensuing years, and U.S. Silica ultimately incurred over \$110 million to investigate, defend against and pay damages as a result of the Silica Claims.² (JA 754-55; JA 406.)

Although Travelers repeatedly has characterized the Silica Claims as “thirty-year-old” claims, it is undisputed that the vast majority of the Silica Claims were filed against U.S. Silica between 2003 and 2004 – when there was a huge spike of approximately 20,000 claims filed in a one-year period. (JA 392-406.) Consistent with the spike in filings that occurred in the early 2000s, over 70% of U.S. Silica’s damages for the Silica Claims – about \$5.7 million of the approximately \$8 million sought by U.S. Silica at trial – was incurred between 2001 and 2005, not thirty years ago. (JA 768-69.)

E. Travelers’ Notice of the Silica Claims Against U.S. Silica

In 2002 – before the spike in underlying claims and before U.S. Silica incurred the majority of the cost at issue – PGS’s former parent company, ITT, wrote to Travelers’ complex claims handling unit regarding the Silica Claims against PGS. Thus, Travelers received notice of the Claims against PGS directly from PGS’s former parent company, ITT, no later than 2002. (JA 1090; JA 412-16; JA 606-15.) In addition, Travelers admitted that it timely received silica

² The Silica Claims typically asserted liability against U.S. Silica on account of both its PGS business and a separate “Ottawa Silica” business. The Ottawa Silica claims are not at issue in this appeal.

complaints for the Silica Claims from dozens of other policyholders – many of whom were co-defendants of U.S. Silica in its Silica Claims. (JA 631-34.)

In approximately 2005, in connection with the expiration of the ITT Indemnity, U.S. Silica conducted a search and discovered the existence of the Travelers Policies in its files. (JA 412; JA 481.) Upon locating copies of the Policies, U.S. Silica immediately notified Travelers that it was seeking coverage for the Silica Claims, including for the past costs for which U.S. Silica was out of pocket – its damages in this case. (JA 1158; JA 1093; JA 425-34.)

While U.S. Silica had lost but eventually discovered the Policies in 2005, Travelers by comparison has either permanently lost or destroyed the Policies – never locating them despite multiple searches. (JA 531-35.)

F. Travelers' Deficient Investigation and Denial of Coverage

1. Travelers Fails to Investigate and Adjust the Silica Claims

In letters dated September 20, 2005 and November 22, 2005, U.S. Silica requested that Travelers provide a defense of the Silica Claims and cover U.S. Silica's past out-of-pocket damages. (JA 1158; JA 1093.) On January 23, 2006, in response to a request by Travelers, U.S. Silica provided over 500 pages of detailed claim-by-claim data regarding thousands of pending and closed Silica Claims. (JA 1687; JA 437-38.)³ In response, Travelers ignored these claims for several months. (JA 438-39.)

On May 11, 2006, Travelers' counsel expressly acknowledged that U.S. Silica's 2005 requests for coverage and January 2006 submission of claims data constituted "tenders" of the Silica Claims by U.S. Silica to Travelers. (JA 1096-98; JA 603-08.)

³ To reduce volume, only an excerpt of the claims data provided to Travelers on January 23, 2006 is included in the Joint Appendix.

Beginning in early 2007, U.S. Silica provided copies of numerous complaints to Travelers. (*See, e.g.*, JA 1099; JA 1141.) On July 25, 2007, U.S. Silica again sent to Travelers voluminous claim-by-claim data regarding all of its thousands of pending and closed Silica Claims, and reiterated its request for defense and coverage. (JA 1143-1202; JA 443-46.)⁴ Travelers never responded to this letter. (JA 445.)

In addition to the Claims that were closed or pending as of September 2005, U.S. Silica continued to be named in new silica bodily injury claims filed after September 2005. U.S. Silica submitted such claims (with copies of the complaints) to Travelers on an ongoing basis, including on April 30, 2007, May 3, 2007, July 20, 2007, September 19, 2007, January 29, 2008, April 28, 2008 and September 23, 2008. (*See, e.g.*, JA 1099; JA 1141.) Although Travelers acknowledged receipt of certain of these letters, Travelers continuously failed to take a position on whether it would provide U.S. Silica with a defense, and, despite its representations that it would do so, Travelers did not follow up with a coverage determination. (JA 1203-09.)

On July 17, 2008 – having received not a single dime from Travelers or even Travelers’ coverage determination – U.S. Silica wrote to complain about Travelers’ inaction. (JA 1210; JA 449-52.) Travelers never responded with respect to the Travelers Policies issued to PGS. On September 24, 2008, having received no money or coverage position from Travelers, U.S. Silica – out of an abundance of caution – sent to Travelers a copy of all complaints filed in the pending Silica Claims. (JA 1324-29; JA 452-55.) On December 15, 2008, Travelers wrote in response to say that it was reviewing the complaints and U.S. Silica’s corporate history – and yet Travelers still never followed up with any coverage position. (JA 1330-56; JA 455-57.)

⁴ Again, to reduce volume of the Joint Appendix, only an excerpt of the claims data provided on July 25, 2007 is included.

2. Travelers Denies Coverage for All Silica Claims

In the five years between 2005, when Travelers contends that it first received notice of the Silica Claims (despite the earlier notices that it received in 2002 from ITT and throughout the years from U.S. Silica's co-defendants), and 2010, Travelers did not tell U.S. Silica what its coverage position was with respect to any Silica Claims, regardless of when those Claims were noticed and/or "tendered" to Travelers. (*See* JA 457-64.)

After five years of inaction, Travelers denied coverage in an August 2010 letter. (JA 1357-77; JA 457-64.) In that letter, Travelers denied coverage for all of the Silica Claims, on multiple grounds that were entirely independent from the timing of notice or "tender." (JA 1357-60; JA 567-81.) Among other defenses, Travelers (1) refused to accept that the Policies were authentic, (2) refused to accept that U.S. Silica was the successor to PGS, and (3) denied that the Silica Claims constituted an "accident" under the Policies. (JA 1357-58.) At trial, Amanda Gruenthal, Travelers' corporate representative for the Silica Claims, admitted that Travelers would have asserted these independent coverage defenses regardless of whether it received notice and/or "tender" on a timely or untimely basis. (JA 570-81.)

Travelers steadfastly pursued its defenses to coverage independently from its Late Notice and Assistance and Cooperation defenses, and asserted them even as to Claims for which it admits it received timely notice and "tender." (JA 636-41.) And Travelers aggressively litigated each of its independent coverage defenses for years, until each of them was ultimately rejected by the Circuit Court (*see* JA 551-52; JA 562-65; JA 574-75) except Travelers' Late Notice and Assistance and Cooperation defenses, the coverage defenses that Travelers relied upon at trial.⁵

⁵ While Travelers' Late Notice and Assistance and Cooperation defenses were Travelers' main defenses at trial, they barely registered in Travelers' August 2010 coverage position letter, in which they were relegated to the fifth and sixth boilerplate "reservations" on pages 3 and 4 of the letter. (JA 1359-60.)

Finally, Travelers' corporate witness admitted at trial that, when Travelers denies coverage for a claim – as it did for all the Silica Claims at issue in this case – Travelers ends all participation in the matter. (JA 641-42.) In other words, even if Travelers had received notice and “tender” in a manner that it admitted was timely, Travelers still would have denied coverage for the Claims and would have taken no action in response to them. As a result, because Travelers would have done nothing different if it had received notice and “tender” earlier, Travelers had zero evidence at trial that it was prejudiced in any way by the timing of U.S. Silica's notice and “tender.”

II. PROCEDURAL HISTORY

A. Coverage Litigation

U.S. Silica filed this suit against Travelers and other insurers on January 6, 2006. (JA 1.) Although the dispute has involved multiple insurer-defendants, it has been focused on obtaining coverage for unreimbursed costs from three primary insurers: (1) Travelers, (2) the ACE family of insurers (“ACE”), and (3) Arrowood Indemnity Company (“Arrowood”). (JA 3905.) After U.S. Silica filed this West Virginia action, ACE filed its own action in New York state court. (JA 3905.) Subsequently, U.S. Silica's former parent, ITT, named U.S. Silica as a defendant in ITT's California action and sought to have insurance disputes over the U.S. Silica claims litigated there. (*Id.*) Travelers (and other insurers) argued that U.S. Silica's West Virginia action should be dismissed or stayed in deference to the New York or California action. (*Id.*) In seeking dismissal or stay of this action, Travelers *falsely represented* to the Circuit Court *for years* that it was a party to the New York action (and now argues the opposite to avoid the fees incurred by U.S. Silica in the New York action; *see* Argument Section V.A *infra.*) In 2007, the Circuit Court (Groh, J.) granted Travelers' motion to stay this case in deference to the New York and California actions (the New York action was subsequently stayed in deference to the

California action). (*Id.* at 3905-06.) U.S. Silica settled with ACE in 2008. (JA 3906; JA 1707.) In 2012, the Circuit Court lifted the stay with respect to all insurers. (JA 3906.) In or about November 2012, Arrowood and U.S. Silica settled. (JA 3906; JA 1735.) About a month prior, U.S. Silica had also settled with ITT, and hence the many ITT insurers in the case were dismissed. (JA 3906.) Thus, since November 2012, this case has been litigated exclusively against Travelers, the lone non-settling insurer. (*Id.*)

B. Summary Judgment Motions

In a November 27, 2012 order, the Circuit Court ruled, among other things, that (i) U.S. Silica was the successor to PGS's rights under the Travelers Policies, (ii) the Travelers Policies were complete and authentic, (iii) the Silica Claims fall within the meaning of "accident" under the Travelers Policies, and (iv) a "continuous trigger of coverage" theory applies to determine which liability policies are implicated by the Silica Claims – rejecting Travelers' arguments to the contrary on each point. (JA 57.)⁶ On November 29, 2012, the Circuit Court denied U.S. Silica's motion for partial summary judgment regarding Travelers' Late Notice and Assistance and Cooperation defenses, finding that there were material issues of fact regarding whether U.S. Silica had a reasonable explanation for any delay in notice, and if so, whether Travelers was prejudiced thereby – the same factual questions that would go to the jury at trial. (JA 118-19.)

On July 15, 2013, Travelers moved for summary judgment on its Late Notice and Assistance and Cooperation defenses, which the Circuit Court denied, concluding that: "[C]omplex issues of material fact remain, including, but not limited to, whether the Plaintiff's delay in tendering the claims at issue was reasonable under the circumstances here, and if so, whether Defendant was prejudiced by the delay." (JA 200-02.) The Circuit Court's decision

⁶ Travelers does not assign error to any of these rulings by the Circuit Court in this appeal.

was thus consistent with its earlier denial of U.S. Silica's summary judgment motion, finding fact disputes that must be resolved by the jury.

C. Trial and Verdict

At trial, the parties introduced evidence regarding the timing and reasonableness of U.S. Silica's notice to Travelers, U.S. Silica's explanation for any delay in notice, the alleged prejudice that Travelers sustained as a result, and U.S. Silica's damages. (JA 292-1028.) The jury returned a verdict in favor of U.S. Silica, finding that Travelers breached the Policies when it refused to provide coverage, rejecting Travelers' defenses, and awarding U.S. Silica \$8,037,745 in damages, the full amount sought by U.S. Silica from Travelers. (JA 1023-24; JA 1754.)⁷ Pursuant to the procedure agreed to by the parties and the Circuit Court (*see* Argument Section IV.A *infra*), U.S. Silica immediately moved for prejudgment interest and attorneys' fees. (JA 1024-25.)

D. Post-Trial Motions

On October 15, 2013, the Circuit Court entered an Order of Judgment in favor of U.S. Silica in the amount of the jury-awarded damages of \$8,037,745, with post-judgment interest at the rate of 7% per annum. (JA 1754-55.)⁸ On October 29, 2013, Travelers filed a Rule 50(b) motion for judgment as a matter of law and, in the alternative, for a new trial under Rule 59(a). (JA 1760.) Travelers' motion argued that the evidence at trial was insufficient to support the jury's verdict rejecting Travelers' Late Notice and Assistance and Cooperation defenses.

⁷ Of the over \$110 million U.S. Silica has incurred in defending and paying damages as a result of Silica Claims, U.S. Silica determined, through expert analysis of U.S. Silica's database of settlement amounts and defense costs, that the out-of-pocket costs incurred prior to September 12, 2005 that were covered under the Travelers Policies were \$8,037,745. (JA 754-71.)

⁸ With respect to U.S. Silica's claim for declaratory relief, the Order of Judgment incorporated by reference the Circuit Court's prior orders and rulings in this action, which ruled that Travelers has a duty to defend U.S. Silica in the Silica Claims that allege exposure to silica prior to or during any of the policy periods of the Travelers Policies, or that allege exposure to silica but are silent or vague as to the dates of such exposure (so-called "No DOFE" claims – i.e., no "Date of First Exposure"). (JA 1755.)

(JA 1760-61.) Alternatively, Travelers argued that the Circuit Court should set aside the jury's verdict and require remittitur of \$4,130,207 out of the total jury verdict of \$8,037,745, on the grounds of certain alleged reductions and set-offs. (JA 1762-63.) In turn, U.S. Silica submitted its brief in support of its motion for attorneys' fees and expenses and prejudgment interest. (JA 1867-3261; JA 3561-3840.) On March 5, 2014, the Circuit Court denied Travelers' motions for post-trial relief and granted in part U.S. Silica's motion for attorneys' fees and expenses and prejudgment interest, awarding U.S. Silica (i) \$4,679,962 in *Pitrolo* attorneys' fees and expenses, and (ii) prejudgment interest at 7% per annum under West Virginia Code § 56-6-27. (JA 3904-20.)⁹

SUMMARY OF ARGUMENT

Contrary to Travelers' assertion that U.S. Silica obtained a "windfall," the jury's verdict and the attorneys' fees and interest awarded by the Circuit Court correctly put U.S. Silica back in the position it would have been if Travelers had not breached its duty to defend and then spent years forcing U.S. Silica to litigate its claims to trial. Each of Travelers' arguments challenging the result below is without merit and does not support Travelers' request for reversal.

First, the Circuit Court correctly denied Travelers' motion for judgment as a matter of law on its Late Notice defense. The evidence supported a jury finding that U.S. Silica provided reasonable (i.e., not untimely) notice with respect to all, or at least a very large number, of the underlying Silica Claims. Even if the jury found that U.S. Silica's notice was late, under the Travelers-favorable burden-shifting standard applied by the Circuit Court at trial, the evidence

⁹ The Circuit Court further ruled that U.S. Silica was also entitled to 7% prejudgment interest on its out-of-pocket attorneys' fees and expenses and ordered U.S. Silica to submit a calculation of such interest. (JA 3919.) U.S. Silica submitted its supplemental calculation of interest, which Travelers did not contest. (JA 3921-60.) On May 6, 2014, the Circuit Court issued an order awarding 7% interest on its prior award of attorneys' fees and expenses. (JA 3963-65.)

clearly established both that (i) U.S. Silica's explanation for any delay in notice was reasonable, and that (ii) Travelers was not prejudiced by any delay.

Second, under clear West Virginia law, the Circuit Court properly instructed the jury on the issue of waiver, and the evidence at trial supported a jury finding that Travelers waived its Late Notice and Assistance and Cooperation defenses because it would have denied coverage on other grounds regardless of when it received notice or "tender" of the Silica Claims.

Third, the Circuit Court correctly denied Travelers' motion for judgment as a matter of law on its Assistance and Cooperation defense. The evidence established that U.S. Silica did not breach the Assistance and Cooperation condition because the condition does not contain any "tender" obligation and U.S. Silica did not make "voluntary" payments. Even if the evidence, despite being viewed in the light most favorable to U.S. Silica, could establish a breach of the Assistance and Cooperation condition, Travelers' defense would still fail. While West Virginia law supports a prejudice requirement for an insurer's Assistance and Cooperation defense without requiring the policyholder to meet any initial threshold burden of showing "reasonableness," even under the burden-shifting standard applied by the Circuit Court, the evidence supports findings that U.S. Silica acted reasonably and that Travelers was not prejudiced. Indeed, Travelers does not dispute that it loses under the burden-shifting standard and instead contends that, if U.S. Silica breached the Assistance and Cooperation condition, coverage is barred even if U.S. Silica's conduct was reasonable and Travelers was not prejudiced. Travelers' strict approach, which ignores reasonableness and prejudice and simply results in forfeiture of coverage, is contrary to West Virginia law.

Fourth, Travelers has waived its argument that the Circuit Court's pretrial ruling adopting "all sums" allocation (also known as "joint and several" allocation) was in error,

because this appeal is the first time Travelers has raised that argument. Even if Travelers' argument was not waived, the Circuit Court's pretrial ruling should be affirmed as it is supported by the policy language and West Virginia law. Travelers' argument that U.S. Silica's damages must be reduced or eliminated based on the ITT Indemnity is a meritless attempt to re-litigate damages on appeal because (i) Travelers has waived that argument, and (ii) the evidence conclusively proved that U.S. Silica was not fully reimbursed under the ITT Indemnity, as Travelers now contends.

Fifth, the Circuit Court properly awarded U.S. Silica 7% prejudgment interest under West Virginia Code § 56-6-27. The Circuit Court properly recognized that Travelers requested – and the parties and the Circuit Court agreed – that the Circuit Court, not the jury, would determine prejudgment interest following trial. Accordingly, under clear West Virginia law, Travelers waived its subsequent objection that the jury should have determined interest. The Circuit Court also properly applied prejudgment interest to U.S. Silica's attorneys' fees and expenses, which in this case were out-of-pocket expenditures caused by Travelers' breach of contract.

Sixth, the Circuit Court did not abuse its discretion in awarding U.S. Silica attorneys' fees and expenses pursuant to *Pitrolo*. The Circuit Court properly awarded fees and expenses incurred by U.S. Silica in the West Virginia and related California and New York coverage actions, because U.S. Silica was forced to incur fees in California and New York when Travelers (and other insurers) insisted that the West Virginia case be stayed in deference to those actions. Nor is there any support in West Virginia law or the record for Travelers' claim that the Circuit Court abused its discretion by declining to eliminate (i) amounts related to any time entry or cost description that does not specifically name Travelers – and only Travelers, or (ii) fees that Travelers contends are related to supposedly “block-billed” or “vague” time entries.

Seventh, the Circuit Court properly denied Travelers’ post-trial motions seeking remittitur. Under well-established law, where an insurer breaches its duty to defend, it cannot later deny coverage for a reasonable settlement entered into by the insured. Accordingly, given Travelers’ breach, the Circuit Court properly rejected Travelers’ request for remittitur relating to settlements of “No DOFE” claims (i.e., “No Date of First Exposure” claims – claims that are silent or vague with respect to the claimant’s dates of exposure and thus are to be read broadly to potentially allege claims covered by the Travelers Policies). The Circuit Court also correctly denied Travelers’ request for a set-off for settlements paid to U.S. Silica by other insurers, because the jury properly resolved the contested question of how to calculate U.S. Silica’s damages, and the evidence at trial fully supported a jury determination that (i) such settlements were commercial settlements not subject to allocating specific dollars to specific Silica Claims (as Travelers attempted to argue to the jury), and (ii) U.S. Silica’s damages claim did not seek a “double recovery,” as it would have been left with unreimbursed losses if the “set-off” sought by Travelers were applied.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is appropriate in this appeal pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure. Oral argument under Rule 20, rather than Rule 19, is necessary because Travelers has raised seven assignments of error.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY DENIED TRAVELERS’ MOTION FOR JUDGMENT AS A MATTER OF LAW ON ITS LATE NOTICE DEFENSE

Travelers contends that the Circuit Court erred in denying its Rule 50(b) motion for judgment as a matter of law on its Late Notice defense, arguing that the evidence at trial did not support the jury’s rejection of that defense. To the contrary, Travelers’ Late Notice defense

presented a classic question of fact for the jury, and the evidence at trial provided the jury with three alternative and independent bases to find in favor of U.S. Silica.¹⁰

First, the trial evidence supported a jury finding that notice was reasonable (in other words, not untimely) with respect to all, or at least a very large number, of the Silica Claims – the costs for which were incurred after or in close proximity to the date that the evidence shows Travelers received notice of the claims.

Second, even assuming *arguendo* that the jury found that U.S. Silica’s notice was late, under the burden-shifting standard applied by the Circuit Court at trial, the evidence clearly established both that (i) U.S. Silica’s explanation for any delay in notice was reasonable, and that (ii) Travelers was not prejudiced by any delay.

Third, based upon the evidence at trial, the jury easily could have found in U.S. Silica’s favor on the basis that Travelers waived its Late Notice defense. The Circuit Court properly instructed the jury on the issue of waiver. While, as discussed below, Travelers incorrectly claims that there was an “inconsistency” in the jury instructions on waiver, any such inconsistency was caused by, and could only have benefitted, Travelers and thus does not support reversal.

¹⁰ In reviewing a circuit court’s denial of a motion for judgment as a matter of law, “it is not the task of this Court to review the facts to determine how it would have ruled on the evidence presented. Instead, its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below. Thus, when considering a ruling on a renewed motion for judgment as a matter of law after trial, the evidence must be viewed in the light most favorable to the nonmoving party.” Syl. pt. 2, *Fredeking v. Tyler*, 224 W. Va. 1, 680 S.E.2d 16 (2009). “When a case involving conflicting testimony and circumstances has been fairly tried, under proper instructions, the verdict of the jury will not be set aside unless plainly contrary to the weight of the evidence or without sufficient evidence to support it.” Syl. pt. 4, *Laslo v. Griffith*, 143 W. Va. 469, 102 S.E.2d 894 (1958).

A. The Evidence Supports a Finding That Travelers Received Reasonable Notice of the Silica Claims

Under West Virginia law, notice provisions in insurance policies are “to be liberally construed in favor of the insured” and not “as a series of technical hurdles.” *Colonial Ins. Co. v. Barrett*, 208 W. Va. 706, 711, 542 S.E.2d 869, 874 (2000) (“*Barrett*”). Under that standard, the trial evidence supports a jury finding that Travelers received reasonable notice with respect to all or a substantial majority of the Silica Claims, and hence that the Notice provision in the Policies was not breached.

The “Notice” provision in the Travelers Policies at issue provides that the insured shall “immediately forward” to Travelers any “demand, notice, summons or other process” that the insured receives. (JA 1032; JA 1047; JA 1062.) Travelers calls this the “Immediate Notice” provision. However, under well-established West Virginia law, “regardless of the language used [in the notice provision of a policy], whether ‘immediate,’ ‘prompt,’ ‘forthwith,’ ‘as soon as practicable’ or words of similar import, the courts are generally in agreement that reasonable notice is sufficient.” *State Auto. Mut. Ins. Co. v. Youler*, 183 W. Va. 556, 561, 396 S.E.2d 737, 742 (1990) (citation omitted) (emphasis added).

Travelers repeatedly suggests that U.S. Silica’s notice occurred thirty years after each Claim was filed. This is false. While the very first Silica Claim was filed in 1975, the vast majority of Silica Claims were filed in the early 2000s, especially in 2003 to 2004 when there was a huge spike of approximately 20,000 claims filed in a one-year period. (JA 392-406.) Consistent with the spike in filings that occurred in the early 2000s, U.S. Silica’s damages expert, Ross Mishkin, testified that over 70% of U.S. Silica’s damages for the Silica Claims – about \$5.7 million of the approximately \$8 million sought by U.S. Silica – was incurred between 2001 and 2005. (JA 768-69.)

Sufficient evidence was presented to the jury to support any finding by it that Travelers received reasonable notice from U.S. Silica or other sources:¹¹

- The evidence showed that, before the spike in underlying claims and before U.S. Silica incurred the majority of the costs at issue, Travelers received notice of the claims against U.S. Silica directly from its former parent company ITT no later than 2002. (JA 1090; JA 412-16; JA 606-15.)
- Travelers' corporate representative responsible for handling the Silica Claims against U.S. Silica admitted that Travelers timely received silica complaints from dozens of other policyholders – many of whom were co-defendants of U.S. Silica in its Silica Claims. (JA 631-34.) Thus, Travelers undoubtedly received immediately from its other policyholders the very same complaints against U.S. Silica that Travelers contends it did not get directly from U.S. Silica.
- In 2005, at the time or soon after U.S. Silica was incurring the costs in question, U.S. Silica provided multiple notices to Travelers that it owed coverage for the Silica Claims. (JA 1158; JA 1093; JA 425-34.)

In sum, in light of West Virginia's liberal construction of notice conditions and the above evidence, the jury may reasonably have found that Travelers failed to carry its burden of proving that U.S. Silica failed to provide reasonable notice of the Silica Claims, and hence that the Notice condition was satisfied and not breached.

B. The Evidence Overwhelmingly Supported a Finding in Favor of U.S. Silica Under the Burden-Shifting Standard Applied at Trial

Even assuming *arguendo* that Travelers carried its burden of proving that U.S. Silica's notice of the Silica Claims was late in violation of the Notice provision, such a showing is insufficient for Travelers to succeed on its Late Notice defense. Under the pro-insurer "burden-shifting" standard applied by the Circuit Court, if U.S. Silica's notice was not timely, then it

¹¹ "[T]he notice requirements of an insurance policy may be satisfied when notice of a claim is provided to the insurance company from any source" *Barrett*, 208 W. Va. at 708, 542 S.E.2d at 871 (emphasis added). "It is a widely accepted rule that '[i]n those states that require prejudice before coverage can be denied because of a breach of the notice provision, such third party notice will, as a general rule, be deemed to satisfy the insured's notice requirement.'" 208 W. Va. at 711, 542 S.E.2d at 874 (quoting A. WINDT, 1 INSURANCE CLAIMS & DISPUTES: REPRESENTATION OF INSURANCE COMPANIES AND INSURED 21 (3d ed. 1995)).

carried an initial burden of showing that its delay in notice was reasonable; the burden then shifted to Travelers to prove that it was prejudiced by the lateness of notice. (JA 969-70.)¹²

The evidence at trial proved that: (1) U.S. Silica’s explanation for any delay in notice was reasonable and (2) Travelers was not prejudiced in its investigation and defense of the Silica Claims by any late notice. Thus, there was more than sufficient evidence for the jury to have found in U.S. Silica’s favor under the “burden shifting” standard applied by the Circuit Court.

1. The Evidence Supports a Finding That U.S. Silica’s Explanation for Any Delay in Notice Was Reasonable

The Circuit Court applied a burden-shifting standard to Travelers’ Late Notice defense, which required U.S. Silica to provide a reasonable explanation for any delay in notice, with the burden then shifting to Travelers to prove prejudice resulting from any delay. (JA 969-70.) As the Circuit Court repeatedly recognized, the question of whether U.S. Silica’s explanation for any delay in notice is “reasonable” is a classic fact question to be decided by a jury and not as a matter of law. (JA 202 (“[T]he conclusions to be drawn from the underlying circumstances are in dispute and therefore not issues of law properly decided by the Court, but rather genuine issues of material fact sufficient to survive a motion for summary judgment.”); JA 813 (“Whether or not the delay was reasonable ... is for the jury.”); JA 919 (“The evidence is sufficient that the Court will not direct a verdict in favor of Travelers or in favor of [U.S.] Silica,

¹² The Circuit Court’s application of the burden-shifting approach to Travelers’ Late Notice defense was the most Travelers-favorable legal standard the Circuit Court could have applied under West Virginia law, and nevertheless U.S. Silica’s evidence satisfied that standard. As urged by *amicus curiae*, however, this case presents the opportunity to clarify that West Virginia intends to follow the modern trend and require an insurer to prove prejudice to defeat coverage based on late notice, with no initial or other burden of proof imposed on the policyholder to show the reasonableness of its conduct. *See* Amicus Brief of West Virginia Manufacturers Association, filed on August 20, 2014. Under such an approach, the support for affirming the jury’s verdict is even stronger because, as discussed in detail below, Travelers presented no evidence of actual prejudice resulting from any late notice of the Silica Claims. *See* Argument Section I.B.2.

and the issue will go to the jury to determine damages, if any, and how much, and whether or not there is liability.”).

In this appeal, the evidence must be viewed in the light most favorable to U.S. Silica and all reasonable inferences from the facts must be drawn in its favor. Syl. pt. 2, *Fredeking*, 224 W. Va. 1, 680 S.E.2d 16. Seen properly through that lens, the evidence at trial overwhelmingly established that U.S. Silica’s explanation for any delay in notice was reasonable:

- Travelers issued the Policies to PGS in the 1940s and 1950s when PGS was a stand-alone corporation headquartered in Lewistown, Pennsylvania. (JA 1030; JA 1045; JA 1060; JA 384-85.)
- PGS subsequently was acquired by, and became a wholly-owned subsidiary of, ITT in 1968. (JA 385; JA 1082.)
- Around the time ITT acquired PGS, PGS’s corporate headquarters moved from Lewistown, Pennsylvania – where the Policies were originally delivered – to Berkeley Springs, West Virginia – where the Policies ultimately were located in 2005. (JA 386-87.)
- Following the ITT acquisition in 1968, ITT’s risk management department, not PGS, became responsible for PGS’s insurance function and for submitting claims. (JA 387.)
- The first Silica Claims were not filed against PGS until in or around 1975 – seventeen years after the final policy period of the Travelers Policies expired in 1958. (JA 385; JA 391-93; JA 1060.)
- In 1985, PGS was sold again – this time by ITT to Pacific Coast Resources (n/k/a U.S. Borax) (“Borax”). (JA 387-88.)
- In connection with the 1985 purchase, Borax specifically conducted due diligence regarding the Silica Claims and assets available to indemnify it for such Claims, and the Policies were not located at that time. (JA 1082 (“ITT purchased PGS in 1968. Prior to that time PGS carried no product liability insurance.”); JA 416-19.)
- Both Borax, as the buyer of PGS, and ITT, as its seller, had every incentive to locate any and all potentially applicable insurance policies at the time of the transaction. (JA 420-22.)
- In 1995, when U.S. Silica was seeking an extension of the ITT Indemnity, an internal U.S. Silica memo confirmed the company’s continued belief (per its general counsel at the time, Richard Day) that PGS had no product liability coverage prior to 1974.

(JA 1085 (“[P]er R.E. Day [PGS] coverage is for the period 4/1/1974-9/12/85”); JA 422-24.)

- In 2002, when ITT wrote to Travelers’ complex claims handling unit regarding the Silica Claims against PGS, ITT’s letter (which was copied to John Ulizio at U.S. Silica) did not identify the Travelers Policies at issue – as ITT and U.S. Silica had no knowledge at that time that such Policies existed. (JA 1090-923; JA 412-16.)
- In sum, corporate knowledge of the Policies had been lost until approximately 2005, when U.S. Silica undertook a further search and found the Policies. (JA 412.)
- As soon as U.S. Silica located copies of the Policies in 2005, it immediately notified Travelers multiple times that it was seeking coverage for the Silica Claims thereunder. (JA 1158; JA 1093; JA 425-34.) When Travelers did not acknowledge its coverage obligations, U.S. Silica promptly commenced this action in January 2006 to obtain a declaration regarding its rights.

Put simply, the evidence at trial was undisputed that PGS/U.S. Silica’s corporate knowledge of the existence of the Policies was lost at some point during the course of a decades-long corporate history, which involved multiple changes of corporate ownership, relocation of headquarters after the Policies were first delivered to Lewistown, Pennsylvania, and several shifts of responsibility between multiple corporate risk management departments in charge of PGS/U.S. Silica’s insurance functions. Upon discovery of the Travelers Policies, U.S. Silica acted promptly to seek coverage and pursue its rights. The substantial evidence presented at trial – viewed in the light most favorable to U.S. Silica and with all reasonable inferences drawn in its favor – easily supported a jury finding that U.S. Silica’s explanation for any delay was reasonable under the circumstances (assuming the jury found there was a delay).

The reasonableness of U.S. Silica’s conduct is further supported by comparing it to Travelers’ conduct. The undisputed evidence at trial established that Travelers – which (unlike U.S. Silica) is in the business of selling insurance policies, collecting premiums and administering claims –permanently lost or destroyed its own copies of the Policies. (JA 531-35.) Although Travelers maintains a worldwide index of insurance policies, the Policies at issue are

not listed on it. (JA 532.) In fact, Travelers never located any evidence whatsoever of having sold the Policies. (JA 532-33.) In short, Travelers asked the jury to find that it was reasonable for Travelers, a corporation in the business of insurance, to permanently lose its own policies but unreasonable for U.S. Silica, a sand company, to temporarily lose them. The jury sided with U.S. Silica, and there was more than sufficient evidence in the record to support that any delay in the provision of notice was reasonable under the circumstances.

In sum, the Circuit Court properly allowed the jury to decide the fact-specific question of the “reasonableness” of U.S. Silica’s explanation for any delay in notice, and the evidence overwhelmingly supported the jury’s verdict.

a. Travelers’ Position Relies on Inapposite Cases from Jurisdictions Involving Completely Different Standards to Evaluate a Late Notice Defense

Even though a “reasonableness” inquiry presents a classic, case-specific question of fact, Travelers contends that U.S. Silica’s explanation for delay must be unreasonable as a matter of law because “lack of knowledge of an insurance policy does not excuse delay in notification of an occurrence.” Petitioner’s Br. at 22 (quoting *Olin Corp. v. Ins. Co. of N. Am.*, 966 F.2d 718, 724 (2d Cir. 1992)).

Travelers cannot cite to a single case applying West Virginia law that holds that a corporation’s lost knowledge of decades-old insurance policies issued in another state to a predecessor cannot provide a “reasonable” explanation for the successor corporation’s delayed notice as a matter of law, because none exists. Nor is there any case cited in Travelers’ brief from any jurisdiction that so holds.

First, as noted above, the determination of reasonableness is a question for the fact finder. *See, e.g., Barrett*, 208 W. Va. at 712, 542 S.E.2d at 875 (“The question of whether an insurance company was notified within a reasonable time period is, generally, a question for the

finder of fact.”); *see also N. Am. Precast, Inc. v. Gen. Cas. Co. of Wis.*, No. 3:04-1307, 2008 WL 906327, at *2 n.3 (S.D.W. Va. Mar. 31, 2008) (“As one might expect, the question of reasonable notice is reserved to the fact finder, at least where the insured offers some explanation for the length of delay.”) (citations omitted) (emphasis added).¹³ There is no dispute that U.S. Silica offered well beyond “some explanation” for any delay in notice, and thus it was proper for the jury to decide the classic fact question of whether that explanation was “reasonable.”

Second, the out-of-state cases cited by Travelers were decided under significantly different, decidedly pro-insurer legal standards applicable to late notice that did not involve any burden-shifting standard. In fact, the question addressed in each case was whether, under such strict standards, an insured’s lack of knowledge of a policy could excuse noncompliance with a notice provision, not whether lack of knowledge was a reasonable explanation for the purpose of a burden-shifting analysis.¹⁴ Travelers’ authorities are thus wholly inapposite here, where the touchstone of the Court’s burden-shifting standard is an inherently context-specific, fact-driven inquiry, and where notice provisions are “to be liberally construed in favor of the insured” and not “as a series of technical hurdles.” *Barrett*, 208 W. Va. at 711, 542 S.E.2d at 874.

¹³ By the same token, the reasonableness of an insurer’s conduct in investigating and defending claims is also usually a question of fact for the jury. *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 641, 600 S.E.2d 346, 353 (2004) (“[T]he reasonableness of an insurer’s investigation is a jury question because jurors can often draw different conclusions from the evidence.”) (citations omitted); *see also Am. Safety Indem. Co. v. Stollings Trucking Co.*, No. 2:04-0752, 2007 WL 2220589, at *6 (S.D.W. Va. Jul. 30, 2007) (“[T]he reasonableness of an insurance company’s conduct ‘ordinarily [is a] question [] of fact for the jury’ that should not be determined as a matter of law by a trial court.”) (quotations omitted).

¹⁴ *See, e.g., Olin Corp.*, 966 F.2d at 724-25; *City of Chi. v. U.S. Fire Ins. Co.*, 260 N.E.2d 276, 280 (Ill. App. Ct. 1970).

b. *Travelers Mischaracterizes the Record Regarding U.S. Silica's Search for the Policies*

Travelers simply ignores the evidence that supports a finding that U.S. Silica's explanation for any delay in notice was reasonable, and mischaracterizes the limited portions of the record that it does choose to acknowledge.

First, Travelers incorrectly asserts that U.S. Silica "never bothered to search" for potentially applicable insurance policies until 2005. To the contrary, although the Travelers Policies were located in a 2005 search prompted in large part by the pending expiration of the ITT Indemnity (*see* Statement of the Case, Section I.C *supra*), the evidence at trial demonstrated that U.S. Silica and its predecessor (as well as its parents) repeatedly searched for and assessed insurance potentially available for the Silica Claims. (JA 416-24; JA 1082.) Indeed, in 1995, an internal U.S. Silica memo examined potentially applicable coverage and concluded (incorrectly, as it turns out) that PGS had no products liability coverage until 1974, reflecting that the examination did not reveal the existence of the Travelers Policies. (JA 1085; JA 422-24.) Further, as noted above, in connection with its 1985 purchase of PGS, Borax specifically conducted due diligence regarding the Silica Claims and assets available to indemnify it for such Claims, and neither Borax nor ITT located the Travelers Policies at that time, even though both were incentivized to find all available insurance. (JA 1082; JA 416-22.)

Second, Travelers falsely asserts that, "when U.S. Silica did finally conduct its policy search in 2005, it easily and immediately located the Travelers Policies" and that it "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 a search that would take '[l]ess than an hour.'" Petitioner's Br. at 23. In fact, there was no testimony at trial indicating that the Travelers Policies were listed in U.S. Silica's database before those Policies were located in

2005. Rather, the testimony was simply that the Policies were located in U.S. Silica's files in 2005, that the database was updated as new policies were located, that the Travelers Policies were probably now listed in the database, and that, if a search were conducted for policies listed in the database, such a search could be completed in "[l]ess than an hour." (JA 510-11; JA 913.)

Third, Travelers wrongly contends that there was an "unexplained" three-year delay between when U.S. Silica located the Travelers Policies and when Travelers contends U.S. Silica "submitt[ed] an actual pre-paid claim for which it was seeking reimbursement." Petitioner's Br. at 23. There was no "delay." Immediately after locating the Travelers Policies in 2005, U.S. Silica requested that Travelers provide a defense of the Silica Claims and cover U.S. Silica's past out-of-pocket damages in letters dated September 20, 2005 and November 22, 2005. (JA 1158; JA 1093.) Shortly thereafter, on January 23, 2006, U.S. Silica provided more than 500 pages of detailed claim-by-claim data regarding thousands of pending and closed Silica Claims. (JA 1687; JA 437-38.) On May 11, 2006, Travelers, in a letter from its then-coverage counsel, expressly acknowledged that U.S. Silica's 2005 requests for coverage and January 2006 submission of claims data constituted "tenders" of the Silica Claims by U.S. Silica to Travelers. (JA 1096-98; JA 603-08.) Hence, Travelers' contention that there was a "three-year delay" is incorrect.

Travelers' strategy of ignoring and mischaracterizing the record in equal measure is contrary to the applicable standard of review, under which this Court views the entire trial record and construes the facts presented not in favor of Travelers, but in the light most favorable to the nonmoving party, U.S. Silica. *See* Syl. pt. 2, *Fredeking*, 224 W. Va. 1, 680 S.E.2d 16.

2. The Evidence Supports a Jury Determination That Travelers Was Not Prejudiced by Any Late Notice or Tender

The evidence at trial also proved (and certainly was sufficient to support a jury determination) that Travelers was not prejudiced by any delay in notice or tender. At trial, Travelers' corporate witness testified in conclusory fashion that Travelers was prejudiced because it was not "able to participate in engaging defense counsel [and] negotiating rates"; "could not requir[e] regular reports from defense counsel so we could assess the insured's liability on an ongoing basis"; was impeded from making coverage determinations "in real time"; would not "have recommendations from defense counsel that was defending the insured"; lost the chance to be "involved in settlement discussions" and "attend mediations"; and did not have a chance to assess the reasonableness of defense and settlement payments. (JA 653-57; JA 665-71.) Thus, Travelers' assertions of prejudice amount to nothing more than a laundry list of things it purportedly was denied the opportunity to do in connection with the defense and indemnity of the underlying Silica Claims.

Travelers ignores the undisputed trial evidence that Travelers did none of those things – and practically nothing at all – after it indisputably received notice in 2005. After Travelers acknowledged having received notice of the claims and copies of the complaints, several years elapsed before Travelers even took a position with respect to coverage. (JA 430-57.) Most importantly, when Travelers finally set forth its coverage position in writing to U.S. Silica in August 2010 – five years after notice indisputably was given – it specifically stated that it had no duty to defend or indemnify any of the Silica Claims, on multiple grounds that were entirely independent from the timing of notice or "tender." (JA 1357-77; JA 457-68.) Ms. Gruenthal unequivocally admitted that Travelers would have asserted these independent coverage defenses regardless of when it received notice of the claims and copies of the complaints. (JA 570-81.)

Specifically, in its August 2010 coverage letter, Travelers:

- took the position that the Policies were not authentic (JA 1357; JA 537-53);
- asserted that U.S. Silica was not the successor to PGS and had not established rights to coverage under the Policies (JA 1357; JA 555-67);
- denied any obligation to defend or indemnify any claims on the grounds that silica exposure did not constitute an “accident” under the Policies (JA 1358; JA 567-75); and
- denied any duty to defend or indemnify any so-called “No DOFE” claims – claims that alleged exposure to silica products, but which were silent or vague as to the dates of that exposure (JA 1358; JA 567-81).

The evidence strongly supported a finding by the jury that Travelers never would have done any of the things it contended it was deprived of the chance to do, no matter when notice or “tender” occurred. Specifically, Ms. Gruenthal testified that when Travelers denies coverage for a claim – as it did for all the Silica Claims at issue – Travelers ends all participation in the matter. (JA 641-42.) After denying a claim, Travelers does not “coordinate with defense counsel,” or “ask how the cases are going,” or do anything at all “as far as investigating the claim.” (*Id.*) Accordingly, Travelers was not prejudiced – it only “lost the opportunity” to do things that it would never have done anyway.¹⁵

Further, the actions that Travelers claims it was denied the chance to take are all steps that an insurer might take to ensure that the defense and settlement costs being incurred are

¹⁵ Courts across the country agree that an insurer has suffered no prejudice from its insured’s late notice if the insurer was going to deny coverage anyway, even if notice had been given earlier. *See, e.g., Strickler v. Huffine*, 618 A.2d 430, 434-35 (Pa. Super. Ct. 1992) (insurer was not prejudiced by any late notice because, even if notice had been timely, insurer would have denied coverage anyway); *Clemmer v. Hartford Ins. Co.*, 587 P.2d 1098, 1106-08 (Cal. 1978) (no prejudice because insurer failed to prove that, had it received timely notice, it would have defended the claim); *In re Idleaire Techs. Corp.*, No. 08-51227(KG), 2010 WL 582361, at *17-19 (Bankr. D. Del. Feb. 17, 2010) (insurer not prejudiced by alleged breaches of notice and “pre-tender” conditions because it would not have defended claim even if notice had been given earlier); *Hatco Corp. v. W.R. Grace & Co.--Conn.*, 801 F. Supp. 1334, 1371-73 (D.N.J. 1992) (denying insurer’s motion for summary judgment on late notice defense because “there is no reason to believe that [the insurer] would have taken any action had it been given [timely] notice.”).

reasonable. Yet Travelers has never once challenged the reasonableness of U.S. Silica's defense and settlement costs, let alone introduced evidence of unreasonableness to the jury. Furthermore, Travelers presented no evidence that U.S. Silica did not defend and resolve the Silica Claims properly and reasonably, and never suggested that it would have handled the Claims differently. Thus, given that the evidence clearly supports that U.S. Silica's defense of the Claims was reasonable, Travelers cannot seriously contend that, had it been involved in the day-to-day defense of the Claims as it now claims it wanted, the defense and settlement costs of the Silica Claims would have been even less than they were. *See, e.g., Pittston Co. v. Allianz Ins. Co.*, 905 F. Supp. 1279, 1293-95 (D.N.J. 1995) (insurer could not establish prejudiced where insured's settlement of underlying claim was reasonable), *rev'd in part on other grounds, Pittston Co. Ultramar Am. Ltd. v. Allianz Ins. Co.*, 124 F.3d 508 (3d Cir. 1997); *Smith & Nephew, Inc. v. Fed. Ins. Co.*, No. 02-2455B, 2005 WL 3134053, at *5-8 (W.D. Tenn. Nov. 23, 2005) (no prejudice to insurer where insured's defense costs were reasonable).

Thus, Travelers proffered zero evidence of prejudice at trial. But even if Travelers had presented any such evidence, there was more than enough evidence for the jury to conclude that Travelers did not suffer prejudice sufficient to sustain Travelers' Late Notice and Assistance and Cooperation defenses.

C. The Evidence Supports a Jury Determination That Travelers Waived Its Late Notice and Assistance and Cooperation Defenses Under West Virginia Law and the Circuit Court Properly Instructed the Jury on Waiver

The evidence at trial also supported a finding by the jury that Travelers waived its Late Notice and Assistance and Cooperation defenses under West Virginia law, on which the Circuit

Court properly instructed the jury.¹⁶

As discussed above, the evidence at trial proved that Travelers was going to deny coverage no matter when U.S. Silica gave notice or “tendered” the defense of the Silica Claims. Having denied coverage for the Silica Claims on the basis of completely independent defenses, Travelers waived the argument that notice or tender should have been provided earlier, because earlier notice or tender would not have changed its denial of coverage.

West Virginia courts have long held that an insurer who denies any liability under a policy on independent grounds waives the right to assert defenses based on alleged non-compliance with conditions in a policy, including proof of loss and notice conditions, and the Circuit Court was correct to instruct the jury on this well-established law. *See, e.g., Maynard v. Nat'l Fire Ins. Co. of Hartford*, 147 W. Va. 539, 544, 129 S.E.2d 443, 448 (1963) (“The policy requirement of proof of loss may be waived by the insurance company; and denial of all liability for a loss claimed under such policy operates as such waiver.”) (emphasis added; citations omitted), *overruled on other grounds by Smithson v. U.S. Fid. & Guar. Co.*, 186 W. Va. 195, 411 S.E.2d 850 (1991); *Republic Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 413 F. Supp. 649, 653-54 (S.D.W. Va. 1976) (“In the instant case, the record does not reveal that State Farm at any time relied upon the lack of notice of [the underlying suit] as a reason for not defending the death claim State Farm asserted only that the Plymouth vehicle was not covered under the policy and then retired from the matter altogether. The Court is of the opinion therefore that State Farm waived the notice requirement.”) (emphasis added).

¹⁶ As Travelers acknowledges (Petitioner’s Br. at 26 n.7), an appeal of Circuit Court’s formulation of the jury instructions is reviewed under an abuse of discretion standard. *See Kessel v. Leavitt*, 204 W. Va. 95, 144, 511 S.E.2d 720, 769 (1998).

Courts throughout the country recognize that an insurer may waive a late notice defense where the record shows the insurer denied coverage on independent grounds and regardless of the timing of notice. *See, e.g., Bay Elec. Supply, Inc. v. Travelers Lloyds Ins. Co.*, 61 F. Supp. 2d 611, 620 (S.D. Tex. 1999) (“Travelers denial of coverage was not premised on late notice, but rather on its review of [the underlying claimant’s] Complaint [against the policyholders] and its conclusion that the claims brought against [the policyholders] did not fall within the policy coverage. Thus, regardless of the timing of notice, Travelers would have denied coverage and was therefore not prejudiced by the timing of Plaintiffs’ notice. Where, as here, the insurer would not have adjusted or defended the action regardless of the timing of notice there is no reason to require a forfeiture of coverage merely upon a technicality.”) (emphasis added); *Tracy v. Travelers Ins. Cos.*, 594 So. 2d 541, 545-46 (La. Ct. App. 1992) (even though there were fact questions as to whether insurer received notice and whether it was prejudiced, court entered judgment for policyholder because “notice would be a vain and useless action” since insurer would have denied coverage based on exclusion regardless of when notice was given).¹⁷

¹⁷ *See also Fireman’s Fund Ins. Co. v. Bradley Corp.*, 660 N.W.2d 666, 684 (Wis. 2003) (even though, under Wisconsin law, prejudice to insurer is presumed and burden is on policyholder to prove otherwise, court granted summary judgment to policyholder on the lack of prejudice because “[t]he Insurance Company has consistently maintained no coverage existed. Even if the lack of timely notice placed the Insurance Company in a difficult litigation position, the clear and uncontroverted evidence in the record is that the timing of [the policyholder’s] notice would not have changed the Insurance Company’s decision to deny its duty to defend. Thus we conclude as a matter of law that the Insurance Company suffered no prejudice.”); *Clemmer*, 587 P.2d at 1106-08 (rejecting insurer’s defense based on failure to tender because the insurer had waived this requirement by denying coverage); *Eichler Homes, Inc. v. Underwriters at Lloyd’s, London*, 238 Cal. App. 2d 532, 539 (Cal. Dist. Ct. App. 1965) (“It is the rule that when the insurer denies coverage it may not insist upon strict compliance with the notice provisions of its policy.”); *CNA Cas. of Cal. v. Seaboard Sur. Co.*, 176 Cal. App. 3d 598, 617 (Cal. Ct. App. 1986) (same); *Comunale v. Traders & Gen. Ins. Co.*, 116 Cal. App. 2d 198, 202-03 (Cal. Dist. Ct. App. 1953) (same); *Nationwide Mut. Fire Ins. Co. v. Beville*, 825 So. 2d 999, 1004 (Fla. Dist. Ct. App. 2002) (insurer waived any defect based on untimely notice because the insurer’s provision of defense was made subject to its reservation of rights, not an unconditional defense); *see also Shell Oil Co. v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, 44 Cal. App. 4th 1633, 1650 n.8 (Cal. Ct. App. 1996) (“[the insured]’s alleged failure to tender the cases to [the insurer] was excused by [the insurer’s] repudiation [of its duty to defend]”); *see generally Grant v. Sun Indem. Co. of N.Y.*, 80 P.2d 996, 997 (Cal. 1938) (“It is a well-recognized

This approach is sensible, because notice conditions are designed to protect an insurer that will actually honor its coverage obligations from being prejudiced. An insurer that denies coverage – and that would have denied coverage no matter what – is at no risk of such prejudice.

The sole case cited by Travelers in support of its contention that a denial of coverage on independent grounds does not result in waiver of a coverage defense is inapposite. In *Buckeye Union Casualty Co. v. Perry*, 406 F.2d 1270 (4th Cir. 1969), the issue was not, as Travelers contends, whether an insurer was estopped from denying coverage on late notice grounds “because the insurer also denied coverage on other grounds.” Petitioner’s Br. at 27. Rather, the question in *Buckeye Union* was whether the insurer was estopped from relying on a late notice defense because it failed to raise a defense of late notice in its original disclaimer letter, and “did not raise the question of late notice until it filed the declaratory judgment suit in January 1966.” *Id.* at 1272. Here, U.S. Silica has not asserted detrimental reliance or a defense of estoppel, though it is true that Travelers failed to raise its defenses in a timely fashion. (JA 430-68.) Rather, the issue here is whether Travelers waived the right to rely on the Notice and Assistance and Cooperation conditions in the Policies by denying that coverage existed.

Accordingly, the Circuit Court’s instruction to the jury – “If you find, by a preponderance of the evidence, that Travelers would have denied U.S. Silica’s claims regardless of when it received notice, then you must find that Travelers waived its late notice [and] tender defense” (JA 970-71) – was correct under West Virginia law.

Finally, Travelers incorrectly alleges that the Circuit Court issued two “conflicting” jury instructions on waiver. After giving the correct instruction on waiver quoted above, the Circuit Court went on to instruct the jury that, “if you find that Travelers raised a defense of untimely

rule ... that the insurer may not repudiate the policy, deny all liability, and at the same time be permitted to stand on a provision inserted in the policy for its benefit.”).

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.” This was an instruction expressly requested by Travelers in its proposed jury instructions.¹⁸ Accordingly, to the extent this instruction is inconsistent with the Circuit Court’s prior instruction on waiver (and it is not),¹⁹ such inconsistency did not prejudice Travelers, but rather had the potential to benefit Travelers. Accordingly, Travelers’ request for a new trial on the basis that the Court gave the very instruction that it requested should be denied. *See, e.g., State Rd. Comm’n v. Darrah*, 151 W. Va. 509, 515, 153 S.E.2d 408, 412 (1967) (reversal of jury verdict unwarranted where party could not have been prejudiced by giving of instruction).

II. THE CIRCUIT COURT CORRECTLY DENIED TRAVELERS’ MOTION FOR JUDGMENT AS A MATTER OF LAW ON ITS ASSISTANCE AND COOPERATION DEFENSE

Similar to its Late Notice defense, Travelers appeals the Circuit Court’s denial of its Rule 50(b) motion regarding its Assistance and Cooperation defense, contending that the Circuit Court erred by applying the same burden-shifting standard to that defense that it applied to the Late Notice defense. According to Travelers, any payments made by U.S. Silica to defend or settle Silica Claims prior to “tender” were made in breach of the Policies’ Assistance and Cooperation clause, and are barred from coverage irrespective of why those costs were paid or whether Travelers suffered any prejudice. Petitioner’s Br. at 11-12; 15-20.

As an initial matter, contrary to Travelers’ attempt to present these as “distinct” defenses for the purposes of this appeal, its Late Notice and Assistance and Cooperation defenses are so

¹⁸ Travelers’ August 28, 2013 Pretrial Conference Memorandum, Exhibit A, Travelers’ Proposed Jury Instruction No. 25 (“Waiver of Untimely Notice”).

¹⁹ The Circuit Court’s instructions on waiver, taken together, permitted the jury to find that Travelers did not waive its Late Notice defense, unless the jury found that Travelers would have denied coverage regardless of the timing of notice, in which case it did thereby waive.

related that Travelers itself repeatedly conflated them throughout the proceedings below. For instance, even though Travelers now argues that U.S. Silica did not “tender” until 2008, Petitioner’s Br. at 16, Travelers conceded in 2006 that U.S. Silica’s 2005 and 2006 notices also were “tenders” of all such claims. (JA 1096-98; JA 603-08.) Likewise, Travelers’ corporate witness, Ms. Gruenthal, was unable to identify definitively whether the purported tender requirement was based on the Policies’ Notice condition or the Assistance and Cooperation condition, pointing first at one and then at the other provision. (Gruenthal Dep. Tr. at 302-09, attached as Ex. F to U.S. Silica’s August 15, 2013 Memorandum in Opposition to Travelers’ Motion for Summary Judgment.)

Travelers’ own difficulty in distinguishing the specific language that grounds these supposedly distinct defenses undoubtedly stems from the fact, discussed in more detail below, that the Policies nowhere state that a tender is required – indeed, the word “tender” is not used in the Assistance and Cooperation condition or anywhere else in the Policies. Unsurprisingly, Travelers’ assertion that the Circuit Court erred in denying its motion for judgment as a matter of law on its Assistance and Cooperation defense finds no support in West Virginia law, and the Circuit Court can be affirmed for at least two independent reasons.

First, Travelers’ Assistance and Cooperation defense fails because it presumes that U.S. Silica breached the Policies’ Assistance and Cooperation condition, despite Travelers’ failure to prove that breach at trial. The policy language and undisputed evidence at trial prove unequivocally that U.S. Silica did not breach any “tender” requirement, because there is none. Further, Travelers’ interpretation of the Policies’ Assistance and Cooperation condition is contrary the policy language and applicable principles of contract interpretation, and hence this Court also can affirm the Circuit Court for that reason. *See* Syl. pt. 3, *Barnett v. Wolfolk*, 149 W.

Va. 246, 140 S.E.2d 466 (1965) (“This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment.”).

Second, Travelers’ position – that coverage for “pre-tender” costs is excluded notwithstanding the fact that Travelers suffered no prejudice as a result of such costs – is legally incorrect. While the Circuit Court applied the same burden-shifting prejudice standard articulated in *Barrett*, 208 W. Va. at 711, 542 S.E.2d at 874, to Travelers’ Assistance and Cooperation defense and Late Notice defense (*see* JA 969-71), West Virginia law supports the application of a prejudice requirement to Travelers’ Assistance and Cooperation defense without the burden-shifting prerequisite that U.S. Silica first establish reasonableness. At best, the Circuit Court’s application of *Barrett* to Travelers’ Assistance and Cooperation defense was the most Travelers-favorable legal standard the Circuit Court could have applied under West Virginia law. At trial, under the Travelers-friendly standard applied by the Circuit Court, the evidence overwhelmingly supported the jury’s verdict. The Circuit Court properly denied Travelers’ Rule 50(b) motion after trial. Importantly, Travelers does not argue on this appeal that U.S. Silica’s alleged breach of the Assistance and Cooperation clause caused it prejudice, and has thus placed all of its eggs on appeal in the basket of arguing that both the reasonableness of U.S. Silica’s conduct and its lack of prejudice are irrelevant to this defense. Travelers does not and cannot cite any West Virginia authority to support its position.

A. The Jury Could Reasonably Find That U.S. Silica Did Not Breach the Assistance and Cooperation Condition of the Policies

1. There Is No “Tender” Requirement

Travelers simply assumes on appeal that U.S. Silica breached the Policies’ Assistance and Cooperation condition by failing to “tender” copies of pleadings to Travelers. Petitioner’s Br. at 15-16. However, the jury easily could have found that U.S. Silica never breached any “tender” obligation in the Policies, given that Travelers never showed the jury or Circuit Court any evidence that such a requirement exists in the first instance. The Assistance and Cooperation condition actually states:

Assistance and Cooperation of the Insured. The insured shall cooperate with the company and, upon the company’s request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. 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 the accident.

(JA 1032; JA 1047; JA 1062.) Travelers contends that this provision “expressly bars” coverage for any payments made by U.S. Silica before it “tendered” copies of complaints to Travelers, notwithstanding the clear fact that the Policies say no such thing. Petitioner’s Br. at 15.

Under West Virginia law, the terms of an insurance policy are to be construed consistent with their “plain, ordinary and popular sense.” *Cherrington v. Erie Ins. Prop. & Cas. Co.*, 231 W. Va. 470, 489, 745 S.E.2d 508, 527 (2013) (quotation omitted). In interpreting policies, a court is “bound to afford the construction that avoids ‘an absurd result ... [and is] consistent with the intent of the parties.’” *Id.* (citations omitted). Where the terms of an insurance policy are unclear, the ambiguity must be resolved in favor of the insured and against the insurer under the doctrine of *contra proferentum*. *Pitrolo*, 176 W. Va. at 194, 342 S.E.2d at 160. Policy language is ambiguous if it “is reasonably susceptible of two different meanings or is of such doubtful

meaning that reasonable minds might be uncertain or disagree as to its meaning.” Syl. pt. 1, *Prete v. Merchs. Prop. Ins. Co. of Ind.*, 159 W. Va. 508, 223 S.E.2d 441 (1976). “Where the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated. An insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion.” Syl. pts. 5, 7, *Nat’l Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987), *overruled on other grounds by Potesta v. U.S. Fid. & Guar. Co.*, 202 W. Va. 308, 504 S.E.2d 135 (1998).

As a matter of both plain English and accepted rules of policy interpretation, the Assistance and Cooperation condition does not require U.S. Silica to “tender” claims to Travelers at all, let alone within a specific period of time. (See JA 1031-33; JA 1046-48; JA 1061-63.).²⁰ Hence, as a threshold matter, Travelers’ argument that the Assistance and Cooperation condition bars any coverage absent “tender” of a complaint fails as a matter of law because there is no support for it in the language of that provision. See, e.g., *Griffin v. Allstate Ins. Co.*, 29 P.3d 777, 782 (Wash. Ct. App. 2001), *review denied*, 45 P.3d 551 (Wash. 2002) (holding that policy before the court did not require tender as a condition precedent to the insurer’s duty to defend).

²⁰ Travelers contends that its defense premised on the Assistance and Cooperation condition is “separate and independent” from the Notice condition that Travelers relies upon for its Late Notice defense, and thus Travelers does not rely on the Notice condition as the basis for the Policies’ purported “tender” requirement. See Petitioner’s Br. at 20. If Travelers did rely on the Notice condition as a basis for its Assistance and Cooperation defense, that defense would be unquestionably be subject to the same burden-shifting prejudice standard that applies to Travelers’ Late Notice defense itself, and thus would fail for the same reasons that the Late Notice defense fails.

2. The Assistance and Cooperation Condition Is Inapplicable Here Because it Only Applies to Insurers, Unlike Travelers, Who Honor Their Duty to Defend

Even ignoring the absence of a “tender” requirement, the Assistance and Cooperation condition is inapplicable here. As is apparent from its title, text and context, the Assistance and Cooperation condition applies only when the insurer is defending the claim against the insured and requests its assistance and cooperation.²¹ An insurer discharging its duty to defend a policyholder understandably will want the assistance and cooperation of that policyholder in the defense (such as assisting in securing and giving evidence) and will not want the insured to take actions inconsistent with the insurer’s defense (such as admitting liability or incurring potentially duplicative defense costs). This condition is inapplicable here because Travelers denied coverage for the Silica Claims on multiple grounds, and would have so denied regardless of when it received either notice or “tender.” (JA 570-81.) Travelers’ interpretation makes no sense because it would dictate that an insured must cooperate with the insurer in “securing and giving evidence” and in “the conduct of suits” even where the insurer itself is not involved in the defense because it instead denied coverage (as Travelers did).

²¹ See, e.g., *Weschler v. Carroll*, 578 A.2d 13, 16 (Pa. Super. Ct. 1990) (purpose of “pre-tender payments” or “voluntary payments” condition is to require the insured to “aid the insurer in defending against the claim”), *appeal denied*, 528 Pa. 613 (1991); *In re Env'tl. Ins. Declaratory Judgment Actions*, 612 A.2d 1338, 1342 (N.J. Super. Ct. App. Div. 1992) (holding that insured’s “duty to cooperate should be limited to situations where insurers actually conduct or pay for the defense of underlying claims and actions”); *Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 730 A.2d 51, 63 (Conn. 1999) (insured’s duty under “assistance and co-operation” condition is invoked only if insurer participates in the defense of the underlying claim); *In re Idleaire Techs. Corp.*, 2010 WL 582361, at *18-19 (rejecting insurer’s argument that insured breached “pre-tender” clause based on the fact that insurer never engaged in any defense of the underlying claims); LEE R. RUSS AND THOMAS F. SEGALLA, *COUCH ON INSURANCE* § 199:20 (3d ed. 2010) (“Since an insured’s duty to cooperate is triggered only when the insurer demands such cooperation, an insured’s failure to cooperate cannot breach a policy where the insurer has not made a request for information or assistance.”) (citing cases; footnotes omitted).

3. None of U.S. Silica’s Defense or Settlement Costs Constitute “Voluntary Payments”

Even if the Assistance and Cooperation condition could apply despite Travelers’ breach of its duty to defend, Travelers’ defense still fails. Travelers argues that the Assistance and Cooperation condition excludes coverage for “voluntary” payments. However, there was more than sufficient evidence in the record for either the Court (as a matter of law) or the jury (as a matter of fact) to determine that U.S. Silica’s costs were not “voluntary.”

While “voluntary” is not defined in the Policies, ordinary and legal dictionaries both make clear that one reasonable definition of “voluntary” is an act done “[w]ithout valuable consideration; gratuitous <voluntary gift> [or] [h]aving merely nominal consideration <voluntary deed>.”²² Under these reasonable definitions, there can be no question that U.S. Silica’s costs were not “voluntary,” as U.S. Silica (and Travelers) received very valuable consideration for such costs – a defense in or settlement of the Silica Claims.

Further, even if the only reasonable definition of “voluntary” were restricted to acts that are “done without compulsion or persuasion”²³ (and such a narrow interpretation of “voluntary” would be contrary to the rules of policy language construction discussed above), U.S. Silica’s defense costs were still not “voluntary,” because U.S. Silica was compelled to incur them – if it did not defend itself, U.S. Silica would have been faced with default judgments against it in thousands of Silica Claims.²⁴ (JA 397-99.)

²² BLACK’S LAW DICTIONARY 1605-06 (8th ed. 2004); *see also* WEBSTER’S NEW WORLD DICTIONARY 1593 (2d College ed. 1986).

²³ *See* WEBSTER’S NEW WORLD DICTIONARY 1593 (2d College ed. 1986).

²⁴ *See Shell Oil Co. v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, 44 Cal. App. 4th 1633, 1648 (Cal. Ct. App. 1996) (construing an identical “voluntary payments” provision); *Fiorito v. Super. Ct.*, 226 Cal. App. 3d 433, 440 n.4 (Cal. Ct. App. 1990) (same); *Weschler*, 578 A.2d at 16 (cooperation/voluntary payments provision relates to whether insured can get *indemnity* for claim).

Indeed, Travelers' account executive responsible for the Silica Claims conceded that defense costs incurred by an insured are not "voluntary" because of the risk of default judgment – consistent with both common sense and any reasonable interpretation of that term:

Q. [W]hat would happen if U.S. Silica took a default judgment on 20,000 plaintiffs['] claims in one year, would that be good or bad?

A. Obviously, that would be bad.

Q. You wouldn't want them to do that, right?

A. Well, of course not, but U. S. Silica is a sophisticated insured. At the time ... U.S. Silica had counsel in place all over the country.

Q. Of course, they did?

A. Right.

Q. Because it's not voluntary whether or not you hire lawyers to defend yourself in suits, is it?

A. Voluntarily, no.

Q. It's not voluntary. You have to; correct?

A. To protect your interests, yes.

(JA 597-98.)

For all of the foregoing reasons, including Travelers' own witness' admission, the jury easily could have determined that U.S. Silica's costs defending and settling Silica Claims were not "voluntary." At best, the Assistance and Cooperation condition is ambiguous as to what "voluntary" means. Under the doctrine of *contra proferentum*, even if Travelers' interpretation of this condition were also reasonable (which it is not), U.S. Silica's reasonable interpretation must be adopted. *Pitrolo*, 176 W. Va. at 194, 342 S.E.2d at 160. For any and all of these reasons, Travelers' Assistance and Cooperation defense fails, and this Court should affirm the judgment on that independent basis.

B. There Is No Basis in the Policy Language or West Virginia Law to Apply a “No-Prejudice” Standard to Travelers’ Assistance and Cooperation Defense

Even if the Assistance and Cooperation condition were applicable (it is not) and U.S. Silica did not satisfy it (it did), Travelers’ Assistance and Cooperation defense still necessarily fails.

Travelers nowhere disputes that the jury could have found that U.S. Silica’s conduct was reasonable and that Travelers was not prejudiced under the *Barrett* “burden shifting” prejudice standard applied by the Circuit Court to Travelers’ Assistance and Cooperation defense. Instead, Travelers’ sole argument on appeal is that such determinations are legally irrelevant to its defense which, according to Travelers, bars coverage for voluntary payments even if the policyholder’s conduct was reasonable and even if the insurer suffered no prejudice. Travelers’ position is legally incorrect.

West Virginia law strongly disfavors insurers’ attempts to rely on conditions in insurance policies to create forfeitures of coverage. Accordingly, consistent with the modern trend in insurance law, this Court has repeatedly held that an insurer must demonstrate prejudice before it may defeat coverage on the basis of a policyholder’s alleged failure to comply with a condition to coverage. *See Willey v. Travelers Indem. Co.*, 156 W. Va. 398, 401-03, 193 S.E.2d 555, 557-59 (1972) (failure of insured to furnish a written proof of claim does not result in forfeiture of coverage if the insurer has not been prejudiced); *Youler*, 183 W. Va. at 563, 396 S.E.2d at 744 (in “determining the overall reasonableness in giving notice of an accident,” “prejudice to the investigative interests of the insured is a factor to be considered”); Syl. pt. 2, *Dairyland Ins. Co. v. Voshel*, 189 W. Va. 121, 428 S.E.2d 542 (1993) (“If ... the insurer cannot point to any prejudice caused by the delay in notification, then the claim is not barred by the insured’s failure to notify.”).

In fact, while Travelers relies on an Assistance and Cooperation condition, this Court has repeatedly held that in order to defeat coverage based on an alleged breach of a cooperation clause in an insurance policy, an insurer must establish prejudice. See Syl. pt. 1, *Bowyer by Bowyer v. Thomas*, 188 W. Va. 297, 423 S.E.2d 906 (1992) (“Before an insurance policy will be voided because of the insured’s failure to cooperate, such failure must be substantial and of such nature as to prejudice the insurer’s rights.”); Syl. pt. 5, *Charles v. State Farm Mut. Auto. Ins. Co.*, 192 W. Va. 293, 452 S.E.2d 384 (1994) (same).

Following *Bowyer by Bower* and *Charles*, in *Kronjaeger v. Buckeye Union Insurance Co.*, 200 W. Va. 570, 490 S.E.2d 657 (1997), this Court addressed an insurer’s defense that the insured had forfeited coverage under its underinsured motorist coverage by settling an underlying claim without its insurer’s consent in violation of the policy’s consent-to-settle provision. 200 W. Va. at 574-75, 490 S.E.2d at 661-62. The insurer in *Kronjaeger* argued that prejudice to the insurer was irrelevant to the insurer’s consent-to-settle defense. 200 W. Va. at 578, 490 S.E.2d at 665. After recognizing that a “vast array of persuasive authority from our sister jurisdictions” supported a prejudice requirement for an alleged breach of a consent-to-settle provision, the *Kronjaeger* Court ultimately found it “need look no further than our own prior decisional law in this field to resolve whether prejudice to the insurer is a necessary inquiry....” 200 W. Va. at 581, 490 S.E.2d at 668. Relying on *Bowyer by Bowyer* and *Charles*, as well as *Youler* (which “also recognized the importance of prejudice to the insurer” in the context of notice requirements), the Court held that an insurer must show that it was prejudiced by its insured’s failure to obtain its consent to settle. 200 W. Va. at 582 & n.19, 490 S.E.2d at 669 & n.19. Thus, West Virginia courts have required insurers relying on conditions like the Assistance and Cooperation clause of the Travelers Policies to prove actual prejudice – without requiring the

policyholder to meet any initial threshold burden of showing “reasonableness” in connection with any arguable breach of such conditions.

As it did in the proceedings below, Travelers ignores clear West Virginia law, and fails to cite a single West Virginia case supporting its position that any breach of the Assistance and Cooperation clause results in an automatic forfeiture of coverage, irrespective of prejudice. *See* Petitioner’s Br. at 16-20.²⁵ There is no authority for Travelers’ position in law or in logic.

The West Virginia law discussed above is supported by the majority of courts across the country to consider the issue. Those courts have held that an insurer’s “pre-tender payments” defense requires the insurer to establish actual and substantial prejudice. *See, e.g., Sherwood Brands, Inc. v. Hartford Accident & Indem. Co.*, 698 A.2d 1078 (Md. 1997) (“*Sherwood*”) (holding that, if a prejudice standard applies to the late notice defense, it should also apply to the so-called “pre-tender” defense). Numerous other courts have followed *Sherwood* or employed similar reasoning in concluding that a prejudice standard applies to an insurer’s defenses based on an assistance and cooperation condition or voluntary payments condition.²⁶

²⁵ Travelers cites a number of out-of-state cases that it contends support its position that prejudice need not be shown. *See* Petitioner’s Br. at 19-20.

²⁶ *See, e.g., Smith & Nephew, Inc. v. Fed. Ins. Co.*, No. 02-2455B, 2005 WL 3434819, at *3 (W.D. Tenn. Dec. 12, 2005) (following *Sherwood* and holding that, in states that follow modern trend of requiring insurer to prove prejudice in order to avoid coverage based on untimely notice, duty to defend arises at the time the claim is asserted against insured and insurer must show prejudice in order to avoid coverage for costs); *Griffin*, 29 P.3d at 781-82 (“[T]he duty to defend arises upon the filing of a covered complaint Even if [the insurer]’s policy required tender as a condition precedent to the duty to defend (which it does not), a showing of actual and substantial prejudice is required before an insured’s breach will release an insurer from its duty under the policy-including the duty to defend.”); *TPLC, Inc. v. United Nat’l Ins. Co.*, 44 F.3d 1484, 1493 (10th Cir. 1995) (“[I]n the absence of a showing of prejudice, the insurer’s duty to defend includes the duty to reimburse for reasonable costs of defense incurred prior to notice, as well as for subsequent defense costs.”); *Rite Aid Corp. v. Liberty Mut. Fire Ins. Co.*, No. 1:CV-03-1801, 2006 WL 2376238, at *5-7 (M.D. Pa. Aug. 14, 2006) (insurer was obligated to cover “pre-tender” costs unless it established actual prejudice caused by insured’s late notice); *Wyman-Gordon Co. v. Liberty Mut. Fire Ins. Co.*, No. Civ.A. 96-2208A, 2000 WL 34024139, at *6-7 (Mass. Super. Ct. July 14, 2000) (rejecting insurer’s reliance on both a notice condition and a voluntary payments condition because insurer failed to prove actual prejudice); *Solvents Recovery Serv. of New Eng. v. Midland Ins. Co.*, 526 A.2d 1112 (N.J.

Finally, it would be particularly inappropriate to apply a “no-prejudice” standard to Travelers’ defense based on the Assistance and Cooperation condition, given that West Virginia law clearly finds an insurer’s lack of prejudice to be relevant in examining defenses based on other, similar policy conditions. Indeed, given that Travelers itself routinely conflated its defenses based on the Notice and Assistance and Cooperation conditions, and given that these two defenses are interrelated, with both designed to protect insurance companies that are actually defending the policyholder from prejudice caused by the policyholder’s conduct, it would make no sense to apply a prejudice standard to the Notice condition but a “no-prejudice” standard to the Assistance and Cooperation condition.

In conclusion, under well-established West Virginia law, and supported by case law through the country, Travelers may not exclude coverage for purportedly voluntary payments

Super. Ct. App. Div. 1987) (prejudice standard applies to same assistance and “pre-tender”/“voluntary” payments provision as Travelers’ here); *Ohaus v. Cont’l Cas. Ins. Co.*, 679 A.2d 179, 184 (N.J. Super. Ct. App. Div. 1996) (holding that Travelers could not avoid coverage based on breach of a voluntary payments provision unless it proved that it was appreciably prejudiced); *see also Liberty Mut. Ins. Co. v. Black & Decker Corp.*, 383 F. Supp. 2d 200, 204-08 (D. Mass. 2004); *New Eng. Extrusion, Inc. v. Am. Alliance Ins. Co.*, 874 F. Supp. 467, 471 (D. Mass. 1995); *Peavey Co. v. M/V ANPA*, 971 F.2d 1168, 1178 (5th Cir. 1992); *Liberty Mut. Ins. Co. v. Jotun Paints, Inc.*, No. 07-3114, 2009 WL 86669, at *3-4 (E.D. La. Jan. 13, 2009); *Rovira v. LaGoDa, Inc.*, 551 So. 2d 790, 794-95 (La. Ct. App. 1989), *writ denied*, 556 So. 2d 36 (La. 1990); *Foote v. Sarafyan*, 432 So. 2d 877, 881-82 (La. Ct. App. 1982); *NYK Line v. P.B. Indus. Inc.*, No. TH02-0074-C-T/H, 2004 WL 1629613, at *5-7 (S.D. Ind. Apr. 20, 2004); *Roberts Oil Co. v. Transamerica Ins. Co.*, 833 P.2d 222, 230 (N.M. 1992); *Clark Equip. Co. v. Ariz. Prop. & Cas. Ins. Guar. Fund*, 943 P.2d 793, 801-02 (Ariz. Ct. App. 1997), *rev. denied*, (Sept. 16, 1997); *Cessna Aircraft Co. v. Hartford Accident & Indem. Co.*, 900 F. Supp. 1489, 1516-18 (D. Kan. 1995); *Pittston Co.*, 905 F. Supp. at 1293-95; *Costagliola v. Lawyers Title Ins. Corp.*, 560 A.2d 1285, 1289-90 (N.J. Super. Ct. Ch. Div. 1988); *Beville*, 825 So. 2d at 1004; *Campbell v. Allstate Ins. Co.*, 60 Cal. 2d 303, 305-06 (Cal. 1963); *see also Clemmer*, 587 P.2d at 1107; *BellSouth Telecomms., Inc. v. Church & Tower of Fla., Inc.*, 930 So. 2d 668 (Fla. Dist. Ct. App. 2006); *see generally, Costs and Fees Incurred in the Duty to Defend – Pre-Notice Costs*, 1 LAW AND PRAC. OF INS. COVERAGE LITIG. § 4:20 (July 2011) (“[T]hose jurisdictions applying the notice-prejudice rule [to an insurer’s late notice defense] will normally require the insurer to reimburse the insured for reasonable costs incurred prior to notice as long as the insurer was not prejudiced by the late notice.”); Stephen A. Klein, *Insurance Recovery of Prenotice Defense Costs*, 34 TORT & INS. L.J. 1103 (Summer 1999) (discussing the “powerful analytical foundation for recovering defense costs incurred prior to notice” provided by *Sherwood* and *Roberts Oil*).

without regard to the reasonableness of U.S. Silica’s conduct or the absence of any prejudice to Travelers. Hence, Travelers’ “no-prejudice” argument must be rejected.

Indeed, by applying the burden-shifting standard from *Barrett* to Travelers’ Assistance and Cooperation defense, the Circuit Court applied a more insurer-favorable standard than was justified under West Virginia law (which supports a requirement that an insurer demonstrate prejudice with no burden shifting). Yet the jury still found for U.S. Silica under the burden-shifting standard because there was more than sufficient evidence for it to conclude that U.S. Silica’s conduct was reasonable and that Travelers was not prejudiced.²⁷ Hence, either the Circuit Court properly applied a burden-shifting prejudice standard pursuant to *Barrett* (and U.S. Silica’s evidence satisfied that standard), or the Circuit Court should have applied a prejudice standard in which the policyholder need not satisfy any initial burden but instead the insurer must prove material prejudice (which Travelers failed to do).²⁸ Either way, the Circuit Court’s denial of Travelers’ Rule 50(b) motion for judgment as a matter of law was correct.

III. THE CIRCUIT COURT’S ADOPTION OF THE SO-CALLED “JOINT AND SEVERAL” OR “ALL SUMS” ALLOCATION APPROACH SHOULD BE AFFIRMED

A. Travelers Waived Its Ability to Appeal the Circuit Court’s Allocation Ruling

Travelers asserts for the first time on appeal that the Circuit Court erred in adopting the so-called “joint and several” allocation approach (also known as the “all sums” approach). This argument has been waived.

²⁷ As noted, Travelers does not contend on appeal that the evidence established that Travelers was prejudiced by any alleged breach of the Assistance and Cooperation condition (in contrast to its argument on its Late Notice defense, where Travelers does argue (incorrectly) that prejudice was established). See Petitioner’s Br. at 24-25. Nevertheless, for the same reasons set forth with respect to Travelers’ Late Notice defense, Travelers cannot establish that it was prejudiced by any allegedly late “tender” of the claims. See Argument Section I.B.2 *supra*.

²⁸ See Amicus Brief of West Virginia Manufacturers Association filed on August 20, 2014.

This Court “has repeatedly declined to hear issues on appeal that were not developed, although the opportunity existed, at the trial court level.” *State v. Legg*, 218 W. Va. 519, 529, 625 S.E.2d 281, 291 (2005); *see also State v. Salmons*, 203 W. Va. 561, 569, 509 S.E.2d 842, 850 (1995) (“This Court will not consider an error which is not properly preserved in the record nor apparent on the face of the record.”). “[T]rial judges must be given an opportunity to consider alleged errors so that corrections may be made, if warranted, at the trial level.” *Salmons*, 203 W. Va. at 571, 509 S.E.2d at 852.

Accordingly, “to preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect.” Syl. pt. 2, *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 470 S.E.2d 162 (1996). “[E]rrors assigned for the first time in an appellate court will not be regarded in any matter of which the trial court had jurisdiction or which might have been remedied in the trial court if objected to there.” *Legg*, 218 W. Va. at 529, 625 S.E.2d at 291 (quoting Syl. pt. 17, *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974)). This includes “issue[s] that could have been presented initially for review by the trial court on a post-trial motion.” *State v. White*, 228 W. Va. 530, 538 n.5, 722 S.E.2d 566, 574 n.5 (2011) (quoting Syl. pt. 2, *Salmons*, 203 W. Va. 561, 509 S.E.2d 842). This “‘raise or waive’ rule” is not to “be dismissed lightly as a mere technicality.” *Salmons*, 203 W. Va. at 569, 509 S.E.2d at 850 (quoting *State v. Miller*, 197 W. Va. 588, 597, 476 S.E.2d 535, 544 (1996)).

Travelers raised the issue of allocation in its August 28, 2013 Pretrial Conference Memorandum, which stated that the Circuit Court “will have to determine the appropriate method of allocating Travelers [sic] share of defense and indemnity costs.” (Travelers’ August 28, 2013 Pretrial Conference Memorandum at 12.) At the September 11, 2013 pretrial

conference, U.S. Silica argued that the joint and several/“all sums” allocation approach was appropriate under West Virginia law, citing to prior West Virginia case law on the issue. (JA 225-30.) Travelers’ counsel responded that the “Court has equal authority to apply a pro rata allocation,” but “[i]f it chooses not to and applies the all sums allocation, obviously, we will abide by the Court’s rule...” (JA 231 (emphasis added).) The Circuit Court then adopted the joint and several/“all sums” allocation approach (JA 233), subsequently entering a written order providing that “[j]oint and several allocation shall apply with respect to the Travelers policies at issue in this action.” (JA 290-91.)²⁹

Consistent with its equivocal “equal authority” position at the pretrial conference, Travelers never subsequently objected to the allocation methodology adopted by the Circuit Court. Travelers’ post-trial motions did not raise any error with the Circuit Court’s allocation ruling. (JA 1760-86.) This appeal is the first time Travelers has challenged the Circuit Court’s ruling on allocation. Under well-established West Virginia law, Travelers has waived this argument.

B. Putting Waiver Aside, the Circuit Court’s Ruling That “Joint and Several” Allocation Applies Is Supported by the Policy Language and Prior West Virginia Case Law

Assuming *arguendo* that Travelers may challenge the Court’s adoption of “all sums” allocation despite its failure to raise any objection below, the Circuit Court’s ruling should be affirmed as it is supported by the policy language and prior West Virginia case law.

Travelers all but ignores its own insuring agreement, which provides that Travelers agrees “[t]o pay on behalf of the insured all sums which the insured shall become legally

²⁹ Travelers mischaracterizes the Circuit Court’s application of joint and several allocation as a “grant of summary judgment.” *See* Petitioner’s Br. at 29 n.9. The allocation issue was not presented to the Circuit Court by summary judgment motions (*see* JA 230); rather, Travelers raised it in its Pretrial Conference Memorandum as a legal issue that the Circuit Court would need to determine, and, as Travelers requested, the Circuit Court did determine that issue at the pretrial conference. (JA 233.)

obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person and caused by accident.” (JA 1031; JA 1046; JA 1061 (emphasis added).) There is no dispute that the \$8 million verdict against Travelers all relates to claims alleging that U.S. Silica is liable because of bodily injury resulting from exposure to silica during Travelers’ policy periods. (See, e.g., JA 70-76.) Accordingly, the policy language requires that Travelers is liable for “all sums” arising from such claims.

Based on this “all sums” language, numerous courts, including in West Virginia, have adopted the all sums or “joint and several” allocation approach.³⁰ For instance, the court in *Wheeling Pittsburgh Corp. v. Am. Ins. Co.*, No. Civ.A 93-C-340, 2003 WL 23652106 (W. Va. Cir. Ct. Oct. 18, 2003), conducted an extensive analysis of the allocation question in the context

³⁰ Unable to cite a single case from West Virginia, Travelers contends that the “majority view and modern trend” outside of West Virginia is in favor of pro rata allocation, not all sums. Petitioner’s Br. at 30-31. In so asserting, Travelers simply ignores that a substantial number of state and federal courts have adopted the all sums approach – including most notably Pennsylvania, which is the law that Travelers repeatedly contended governed its Policies here. See *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 509 (Pa. 1993) (adopting all sums and rejecting pro rata allocation under Pennsylvania law); see also *Viacom, Inc. v. Transit Cas. Co.*, 138 S.W.3d 723, 726-27 (Mo. 2004) (*en banc; per curiam*) (applying Pennsylvania law); *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 998 P.2d 856, 883-84 (Wash. 2000) (applying Pennsylvania law); *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 769 N.E.2d 835, 841 (Ohio 2002) (“There is no language in the triggered policies that would serve to reduce an insurer’s liability if an injury occurs only in part during a given policy period. The policies covered Goodyear for ‘all sums’ incurred as damages for an injury to property occurring during the policy period. The plain language of this provision is inclusive of all damages resulting from a qualifying occurrence.”); *Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049, 1058 (Ind. 2001); *Hercules Inc. v. AIU Ins. Co.*, 784 A.2d 481, 491-92 (Del. 2001); *Monsanto Co. v. C.E. Heath Compensation & Liab. Ins. Co.*, 652 A.2d 30, 34-35 (Del. 1994) (applying Missouri law); *Plastics Eng’g Co. v. Liberty Mut. Ins. Co.*, 759 N.W.2d 613 (Wis. 2009); *State v. Cont’l Ins. Co.*, 281 P.3d 1000, 1004-08 (Cal. 2012); *Zurich Ins. Co. v. Raymark Indus., Inc.*, 514 N.E.2d 150 (Ill. 1987); *Am. Nat’l Fire Ins. Co. v. B&L Trucking & Constr. Co.*, 951 P.2d 250, 253-57 (Wash. 1998); *Keene Corp. v. Ins. Co. of N.A.*, 667 F.2d 1034, 1048-49 (D.C. Cir. 1981); *Cascade Corp. v. Am. Home Assur. Co.*, 135 P.3d 450 (Or. Ct. App. 2006); *OneBeacon Am. Ins. Co. v. Narragansett Elec. Co.*, No. SUCV2005-03086-BLS-1, 2010 Mass. Super. LEXIS 233, **13-17 (Mass. Super. Ct. Aug. 20, 2010) (applying “all sums” allocation under Rhode Island law based on the First Circuit’s prediction that the Rhode Island Supreme Court would adopt an “all sums” approach) (citing *Emhart Indus., Inc. v. Century Indem. Co.*, 559 F.3d 57, 71 (1st Cir. 2009)); *Doe Run Res. Corp. v. Certain Underwriters at Lloyd’s London*, 400 S.W.3d 462, 474-75 (Mo. Ct. App. 2013); *Texas Prop. & Cas. Ins. Guar. Ass’n v. Sw. Aggregates, Inc.*, 982 S.W.2d 600, 604-07 (Tex. Ct. App. 1998); *Murphy Oil USA, Inc. v. USF&G*, No. 91-439-2 (Ark. Cir. Ct. Feb. 21, 1995), *reprinted in* 9 Mealey’s Litig. Rep. Ins. No. 19 (Mar. 21, 1995).

of continuing and progressive environmental property damage, which, like the Silica Claims, triggered multiple years of coverage. *Id.* at *17-20. Based on its analysis, including its review of policy language that is substantially similar to Travelers' here, the *Wheeling Pittsburgh* court adopted the all sums approach. *Id.*

Trying to avoid its "all sums" language, Travelers instead focuses solely on the language that states that the Policies apply "to accidents which occur during the policy period," arguing that it requires a "pro rata" allocation that would substantially limit Travelers' obligations. Petitioner's Br. at 29. Travelers contends that, based solely on this provision, "the fundamental premise" of the Travelers Policies is "that damages should be allocated on the basis of the time Travelers provided coverage, and should be limited to injuries as a result of an accident sustained during that period." Travelers cites nothing else to support this "fundamental premise." One might expect that a "fundamental premise" requiring pro rata allocation would actually be in the Policy language somewhere. It is not. The Policies say nothing about "pro rata" shares or "allocation" or "apportionment" of Travelers' duty, or any other language that would change or undermine the Policies' express grant of coverage for "all sums." Indeed, the grant of coverage for "all sums" is precisely the opposite of what Travelers contends its limited obligations are – under Travelers' pro rata approach, Travelers would be liable for only a small fraction, not all, of the sums that trigger its Policies.

As the Circuit Court held in its ruling adopting a "continuous trigger of coverage" – a ruling not appealed by Travelers – the phrase "to accidents which occur during the policy period" simply relates to the issue of "trigger of coverage": what must happen during the policy period in order to implicate a policy. (JA 72-76.) As the Circuit Court held, all of the Silica Claims that gave rise to the \$8 million in damages that U.S. Silica sought from Travelers arose

from “accidents which occur during the policy period.” (JA 70-76.) Thus, the damages awarded against Travelers are wholly consistent with this policy language.

Travelers nevertheless wants to turn this “during the policy period” language into a requirement that a “pro rata” allocation approach be adopted. Faced with similar policy language, the circuit court in *Wheeling Pittsburgh* rejected the insurers’ contention that pro rata allocation was required:

[T]he Court can find nothing in the language of the Defendants’ policies which serve to limit an insurer[’]s liability when property damage occurs over the course of several policy periods. The Defendants’ policies 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.

2003 WL 2365210, at *19.

Trying to avoid *Wheeling Pittsburgh*, Travelers remarkably claims that the same “during the policy period” language was not at issue there. Petitioner’s Br. at 31 n.11. This is simply false. At least four different insurers’ policies at issue in *Wheeling Pittsburgh* used similar “during the policy period” language that the insurers argued required a pro-rata allocation. 2003 WL 2365210, at *3-4.³¹ Travelers’ attempt to distinguish *Wheeling Pittsburgh* based on the policy language is disingenuous.

³¹ For example, the Mt. McKinley policy at issue in *Wheeling Pittsburgh* provided that the insurer would “pay on behalf of the insured the ultimate net loss which the insured shall become legally obligated to pay ... resulting from an occurrence or occurrences during the period of this policy....” 2003 WL 23652106, at *4 (emphasis added). Also, the New Hampshire policy provided coverage for an “occurrence,” defined as an “accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in ... property damage ... during the policy period.” *Id.* at *3 (emphasis added). The Century Indemnity policy similarly defined “occurrence” as “either an accident happening during the policy period or repeated exposure to conditions which unexpectedly and unintentionally cause injury to or destruction of property during the policy period.” *Id.* Finally, the National Union policy defined “occurrence” as an “event, including continuous or repeated exposure to conditions, which results in ... property damage during the policy period” *Id.*

In sum, as the Circuit Court found, the same reasoning employed in *Wheeling Pittsburgh* applies here. There are no provisions in the Travelers Policies limiting Travelers' liability or providing a method of allocation when an accident and resulting bodily injury occur in more than one policy period. Rather, the Travelers Policies simply provide that, where an accident occurs during the policy period, Travelers agrees to pay "**all sums** which the insured shall become legally obligated to pay as damages because of bodily injury" caused by the accident. Travelers' attempt to distinguish *Wheeling Pittsburgh* is meritless.

C. Travelers' Reliance on the ITT Indemnity Is a Red Herring

Aware that it has scant support for a pro rata approach, Travelers shifts gears and asserts that, even if the all sums approach applies, U.S. Silica's damages must be reduced or eliminated based on the ITT Indemnity. This argument should be rejected as (1) Travelers waived it and (2) it is factually and legally without support.

1. Travelers Waived Any Argument Regarding the ITT Indemnity

The extent of U.S. Silica's reimbursement under the ITT Indemnity was a factual issue of damages that was resolved by the jury at trial. In its Pretrial Memorandum, Travelers argued that U.S. Silica had the burden to prove at trial that it was entitled to the damages it sought from Travelers, and that "the defense and indemnity costs that U.S. Silica seeks from Travelers in this case already have been paid by ITT." (Travelers' August 28, 2013 Pretrial Conference Memorandum at 5-6.) Travelers did not file a summary judgment motion based on the ITT Indemnity nor argue it when the Circuit Court addressed the allocation issue at the pretrial conference. (See JA 225-33.) Instead, at trial, Travelers attempted to argue to the jury that U.S. Silica was fully reimbursed under the ITT Indemnity for its damages claimed from Travelers. (See JA 487-90.) In awarding the full amount of damages sought by U.S. Silica, the jury necessarily rejected Travelers' argument.

Throughout the proceedings in the Circuit Court, Travelers never contended that the evidence on the ITT Indemnity entitled it to judgment as a matter of law or a reduction in the jury's damages by the Court by set-off or remittitur. Travelers did not raise the ITT Indemnity in either of its Rule 50(a) motions at trial. (JA 794-812; JA 918-19.) In its Rule 50(b) motion after trial, Travelers expressly sought reductions of the jury-awarded damages on the basis of settlement payments by two other insurers (which Travelers contended should have been partially applied as set-offs against U.S. Silica's claims against Travelers). (JA 1762-63; JA 1783-85.) Travelers did not, however, raise any argument that the ITT Indemnity fully, or even partially, reduced the damages that U.S. Silica could recover from Travelers or that it entitled Travelers to judgment as a matter of law. Thus, while Travelers contends the Circuit Court erred because it "fail[ed] to take into account the ITT Indemnity," it never asked the Circuit Court to do so in the first place. Travelers has waived this argument. Syl. pt. 17, *Thomas*, 157 W. Va. 640, 203 S.E.2d 445 ("[E]rrors assigned for the first time in an appellate court will not be regarded in any matter of which the trial court had jurisdiction or which might have been remedied in the trial court if objected to there.").

2. It Is Undisputed That U.S. Silica Was Not Fully Reimbursed Under the ITT Indemnity and Is Not Seeking a Double Recovery

More revealing, putting waiver aside, Travelers grossly mischaracterizes the record at trial, which makes clear the indisputable fact that U.S. Silica's costs were not fully indemnified by ITT – a fact that U.S. Silica has been explaining to Travelers since at least 2005. Specifically, Travelers curiously asserts that U.S. Silica would receive a "windfall" because, according to Travelers, "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." Petitioner's Br. at 32 (emphasis added). This is

simply wrong. Travelers’ “proof” is to cite the indemnity contract itself (and nothing else) and to assert that U.S. Silica “admits that ITT fully complied with the ITT Indemnity.” Petitioner’s Br. at 32 (citing JA 1268-69).

Travelers ignores the clear evidence that U.S. Silica was not fully reimbursed under the ITT Indemnity for the damages from Travelers at trial (and indeed other sums not sought from Travelers). Uncontradicted testimony by John Ulizio, former CEO of U.S. Silica, established that “[U.S. Silica] didn’t get the entire amount of the claim indemnified. In other words, they didn’t reimburse us for the entire amount of the claim.... We got the money from IT&T, so that reduced the amount of money we would ask for an insurance company to pay.... We are asking for reimbursement [from Travelers] for unrecovered money.” (JA 434-36.) Furthermore, U.S. Silica’s calculation of its damages excluded any amounts that U.S. Silica had received in reimbursement under the ITT Indemnity, directly refuting Travelers’ claim. (JA 406-10; JA 434-36; JA 511-12.) Indeed, Travelers itself admits elsewhere in its Brief that:

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.

Petitioner’s Br. at 47 (citing JA 840-52). In sum, as Travelers itself concedes, there is simply no basis in fact or evidence for Travelers to contend that any of the damages sought by U.S. Silica against Travelers were already indemnified by ITT such that U.S. Silica was getting a “windfall” or double recovery. Travelers’ baseless suggestion should be rejected.

3. U.S. Silica’s Damages Expert Used the Proper Analysis

U.S. Silica’s damages expert, Mr. Ross Mishkin, correctly (1) took the amounts that U.S. Silica was out of pocket (i.e., not reimbursed by ITT or other source)³² and (2) determined which

³² Travelers criticizes Mishkin for purportedly “not consider[ing] [the ITT indemnity] in any part of his damages analysis.” Petitioner’s Br. at 34. This is misleading. Mishkin’s testimony was based on U.S.

portion of those costs related to Silica Claims that triggered any of Travelers Policies (using the Circuit Court's ruling that a continuous trigger applied). From this analysis, even though U.S. Silica spent over \$110 million in defense and settlement costs on silica claims, U.S. Silica sought only slightly more than \$8 million from Travelers.

Travelers curiously criticizes this approach, repeating its erroneous contention that any amounts allocable to Travelers should have been paid for by ITT. But the fact that Travelers, which owes coverage to U.S. Silica for unreimbursed costs from claims that trigger its Policies, believes that some other entity might also owe indemnification to U.S. Silica does not provide Travelers a basis to reduce or eliminate its obligations. Indeed, the joint-and-several or all sums allocation approach is premised precisely on the position that each of the multiple insurers in question independently owes complete coverage to the policyholder – and each insurer is not permitted to point to the other insurers as a way of reducing their obligations to just a pro rata share. Travelers simply is trying to use the ITT indemnity to avoid the all sums allocation approach and turn it into a variant of pro rata allocation. Worse, Travelers is trying to argue that its obligations – even under a pro rata allocation – disappear simply because (according to Travelers) U.S. Silica purportedly could have obtained indemnification from ITT for the amounts that it seeks from Travelers. Travelers cites no legal basis in West Virginia law, and no factual basis in its Policies, for permitting its obligations to disappear in this fashion.

In sum, based on its erroneous conclusion that ITT indemnified U.S. Silica for all costs relating to pre-1985 exposures, Travelers wrongly concludes – and repeats a number of times – that the \$8 million verdict was therefore on account of post-1985 exposures that did not trigger Travelers' Policies. This is wrong for multiple reasons. Most notably, as discussed above, it is

Silica's costs for which it was out of pocket – and hence by definition already eliminated all of the amounts that U.S. Silica was indemnified by ITT. (See JA 767; JA 792.)

undisputed, and Travelers itself concedes, that U.S. Silica was not reimbursed for far more than \$8 million in costs relating to claims alleging pre-1985 exposures. Further, Travelers' analysis is simply an attempt to avoid the all sums allocation approach, under which Travelers is liable in full for all sums arising out of any claim that triggers its Policies (which were the only claims used by Mishkin in his analysis). Finally, 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. But a claimant's silica-related costs are indivisible – indeed, even the pro rata allocation cases admit that silica-related costs are indivisible and instead are only adopting a fiction that spreads those costs equally among the triggered years. Thus, Travelers' criticisms of U.S. Silica's damages analysis are a meritless attempt to re-litigate factual issues on appeal, and should be rejected.

IV. THE CIRCUIT COURT'S AWARD OF PREJUDGMENT INTEREST WAS PROPER

A. The Circuit Court Properly Awarded U.S. Silica 7% Prejudgment Interest Under West Virginia Code § 56-6-27

Travelers argues that U.S. Silica waived its right to prejudgment interest by failing to request a jury instruction regarding prejudgment interest pursuant to West Virginia Code § 56-6-27 (1923). To the contrary, as the Circuit Court recognized in its order awarding prejudgment interest, it was Travelers that waived any objection that the Court should not award prejudgment interest, because Travelers itself proposed the procedure for determining interest that the Court adopted.

As the Circuit Court recognized, West Virginia Code § 56-6-27 provides that the jury normally determines interest in a breach of contract action, and a plaintiff may waive prejudgment interest by not requesting an instruction for the jury's consideration. (JA 3914 (citing *City Nat'l Bank of Charleston v. Wells*, 181 W. Va. 763, 778, 384 S.E.2d 374, 389

(1989)).) However, under *Dieter Engineering Services, Inc. v. Parkland Development, Inc.*, 199 W. Va. 48, 483 S.E.2d 48 (1996), where a defendant agrees that the circuit court will determine prejudgment interest, the defendant has waived any subsequent objection that the jury should have determined interest. 199 W. Va. at 61-62, 483 S.E.2d at 61-62.

In *Dieter* – which the Supreme Court of Appeals decided after the *CNB* case on which Travelers relies – the defendants argued that the circuit court had improperly awarded prejudgment interest post-trial on the basis that Section 56-6-27 provides that the jury is to award interest in actions “founded on contract.” 199 W. Va. at 61, 483 S.E.2d at 61. Like *U.S. Silica*, the plaintiff in *Dieter* had not requested a jury instruction regarding prejudgment interest, and the verdict form did not provide for an award of interest by the jury. *Id.* During deliberations, however, the jury had submitted a written question to the circuit court, asking: “Can we consider awarding interest on settlement?” *Id.* The circuit court met with counsel for the parties in chambers, and “it was agreed by all to answer the jury’s question in the negative and that the circuit court would award interest on any principal sum returned by the jury.” *Id.* Therefore, the circuit court responded to the jury’s question: “No, the court will award interest based on your verdict.” *Id.* The defendants did not object to how the circuit court answered the jury’s question; rather, the defendants “agreed to the answer the circuit court provided to the jury.” *Id.* Accordingly, the Supreme Court found that the defendants had waived any objection to the circuit court’s determination that the court, and not the jury, would award prejudgment interest. *Dieter*, 199 W. Va. at 61-62, 483 S.E.2d at 61-62.

Like the defendants in *Dieter*, Travelers agreed that the Court, not the jury, should determine prejudgment interest. In fact, Travelers not only agreed to this process – Travelers

itself proposed it. During pretrial proceedings, Travelers submitted its proposed Jury Instruction No. 29, which stated:

In determining the amount of damages, do not add interest to any amount that you determine. It is up to the Court to determine how much, if any, interest should be added to any judgment that you may awarded [sic].

(JA 3579 (emphasis added).) At the September 11, 2013 pretrial conference, the Court considered the parties' proposed jury instructions, including Travelers' Instruction No. 29. The Court indicated to the parties that the jury would not decide any award of interest, and declined to adopt Travelers' proposed jury instruction on interest on the basis that it is not necessary to instruct the jury as to any category of damages (e.g., punitive damages and interest) that it was not going to be asked to consider:

We are not going to talk about punitive damages [in response to Travelers' Proposed Instruction No. 28]. This is not a punitive damages case and I'm not going to tell them [the jury] anything about punitive damages. And likewise with 29, damages and interest.

(JA 275 (emphasis added).)

U.S. Silica had no objection to litigating the question of prejudgment interest in post-trial motions before the Court.³³ Likewise, Travelers obviously had no objection to proceeding in this fashion, because Travelers affirmatively proposed doing so. Because it was clear that prejudgment interest would be determined by the Court following a verdict, neither party prepared any position on interest for presentation to the jury.³⁴

³³ In fact, had the issue not been summarily resolved at the September 11 pretrial conference, U.S. Silica would have sought clarification from both Travelers and the Court on the question of whether prejudgment interest should be put to the jury, or reserved for post-trial motions with the Court. Because Travelers took the position that the Court should resolve the question, there was no need to revisit the issue.

³⁴ Moreover, at the final charging conference on the last day of trial, Travelers' counsel specifically reaffirmed Travelers' understanding that the Court had determined the jury would not be addressing the issue of prejudgment interest: "And Your Honor already told us we didn't need to consider [Travelers' Proposed Jury Instruction Nos.] 28 and 29. So those are both withdrawn." (JA 953 (emphasis added).)

After the jury returned its verdict, U.S. Silica made an oral motion for an award of prejudgment interest and attorneys' fees:

Plaintiff U.S. Silica makes a motion to be awarded prejudgment interest on the verdict and makes a motion to recover attorney fees which in West Virginia are awardable in the event that judgment is entered on breach of contract claims on insurance policies. We would request the opportunity to file briefs on that, set a schedule for Travelers to respond, and get a ruling.

(JA 1024-25.) Travelers did not object or otherwise provide any indication that it believed U.S. Silica had "waived" its right to seek prejudgment interest. (JA 1025-27.)

Not until it submitted its brief in opposition to U.S. Silica's motion for prejudgment interest did Travelers raise its waiver argument. Recognizing that "the Court and the parties agreed" that the Circuit Court would determine interest, the Court properly found that Travelers had waived its after-the-fact objection that that agreed-to procedure under *Dieter*. (JA 3914-15.) On appeal, Travelers has utterly failed to demonstrate that the Circuit Court abused its discretion in its account of what the parties – and the Court itself – agreed to do at trial.

Nor did the Circuit Court abuse its discretion in awarding 7% prejudgment interest to U.S. Silica under West Virginia Code § 56-6-27. (JA 3913, JA 3915-16.) In its motion, U.S. Silica argued that the Court should award 10% prejudgment interest as provided pursuant to the 1981 version of § 56-6-31, which was the operative version of the statute at the time U.S. Silica filed this action in 2006. (JA 1881.) Although Travelers did not make any alternative proposed interest rate, the Circuit Court declined to award 10% interest as requested by U.S. Silica. Instead, "guided, but not controlled, by West Virginia Code § 56-6-31," the Circuit Court found that the current statutory interest rate of 7% was an appropriate rate to apply. (JA 3915-16.) It was not an abuse of discretion for the Circuit Court to look to the statutory interest rate established by the state legislature for guidance in awarding interest on U.S. Silica's contract damages under § 56-6-27.

B. The Circuit Court Correctly Applied Prejudgment Interest to U.S. Silica's Out-of-Pocket Attorneys' Fees and Expenses

West Virginia law supports the Circuit Court's award of prejudgment interest on U.S. Silica's reasonable attorneys' fees and costs, which are out-of-pocket expenditures and are therefore subject to interest under West Virginia law. In *Miller v. Fluharty*, 201 W. Va. 685, 500 S.E.2d 310 (1997), upon which Travelers relies, this Court recognized that the determination of whether litigation costs constitute "out-of-pocket expenditures" subject to interest is determined under the facts and circumstance of each case, and held that, "in most cases, [a policyholder's] litigation costs are not 'out-of-pocket expenditures' to the policyholder as is contemplated by W. Va. Code § 56-6-31, primarily because under a contingent fee agreement, the policyholder does not become responsible for these costs until after the insurance carrier pays the verdict or settlement. Accordingly, a policyholder usually may not recover prejudgment interest on litigation expenses incurred by his attorney." 201 W. Va. at 700-01, 500 S.E.2d at 325-26 (emphasis added). Thus, in *Miller v. Fluharty*, where the plaintiff's attorneys' fees and expenses were contingent, the Court found that there was "no evidence in the record that these fees and costs were 'out-of-pocket expenditures,'" and hence determined that prejudgment interest did not apply "[i]n this case." *Id.*

Here, U.S. Silica was responsible for paying – and did pay – its litigation costs out-of-pocket and on a monthly basis throughout the pendency of its claims against Travelers. No contingent fee arrangement applied. Accordingly, this Court's reasoning in *Miller v. Fluharty* plainly supports the Circuit Court's application of interest to U.S. Silica's litigation costs, which should be affirmed.³⁵

³⁵ The case of *State ex. Rel. Chafin v. Mingo Cnty. Comm'n*, 189 W. Va. 680, 434 S.E.2d 40 (1993) (per curiam), which was decided before *Fluharty* made it clear that non-contingent litigation costs could constitute "out-of-pocket expenditures," does not support a different result. In *Chafin*, the Supreme Court

V. THE CIRCUIT COURT'S AWARD OF ATTORNEYS' FEES AND EXPENSES WAS NOT AN ABUSE OF DISCRETION

West Virginia law is clear that, “[w]here a declaratory judgment action is filed to determine whether an insurer has a duty to defend its insured under its policy, if the insurer is found to have such a duty, its insured is entitled to recover reasonable attorney’s fees arising from the declaratory judgment litigation.” Syl. pt. 2, *Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156. “[W]hen an insured purchases a contract of insurance, he [or she] buys insurance – not a lot of vexatious, time-consuming, expensive litigation with his [or her] insurer.” See *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W. Va. 323, 329, 352 S.E.2d 73, 79 (1986). Thus, “where an insurer has violated its contractual obligation to defend its insured, the insured should be fully compensated for all expenses incurred as a result of the insurer’s breach of contract, including those expenses incurred in a declaratory judgment action. To hold otherwise would be unfair to the insured, who originally purchased the insurance policy to be protected from incurring attorney’s fees and expenses arising from litigation.” *Pitrolo*, 176 W. Va. at 194, 342 S.E.2d at 160 (emphasis added). Under this well-established law, the Circuit Court examined the multiple factors set forth in *Pitrolo* and awarded U.S. Silica its reasonable attorneys’ fees and expenses.³⁶

simply held that it was “not convinced that the lower court erred” in deciding not to award prejudgment interest on attorneys’ fees under the particular circumstances of that case (in which the trial court had ordered Mingo County to reimburse \$91,600 attorneys’ fees incurred by a county commissioner to defend himself against a criminal charge of bribery). 189 W. Va. at 684, 434 S.E.2d at 44. To the extent the Fourth Circuit’s recent unpublished decision in *Graham v. National Fire Insurance Co.*, 556 F. App’x 193 (4th Cir. 2014), held that West Virginia law precludes an award of interest on *Pitrolo* attorneys’ fees, it is in conflict with this Court’s reasoning in *Fluharty*.

³⁶ *Pitrolo* provides that the reasonableness of the attorneys’ fees is generally based on a broad array of factors, including: “(1) the time and labor required, (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.” Syl. pt. 4, 176 W. Va. 190, 342 S.E.2d 156. In opposing the award of attorneys’ fees, Travelers ignored the *Pitrolo* factors and did not challenge the reasonableness of the amount of any of the fees or

A. The Circuit Court Properly Rejected the “Deductions” Travelers Sought for Fees and Expenses That U.S. Silica Was Forced to Incur in the California and New York Actions

Travelers seeks to avoid any responsibility for attorneys’ fees and expenses incurred by U.S. Silica in connection with the related California and New York coverage actions, even though U.S. Silica only incurred those fees because Travelers (and other insurers) insisted that this West Virginia case be stayed in deference to those actions. Travelers forced U.S. Silica to incur attorneys’ fees litigating in California and New York, and hence Travelers should not be permitted to avoid its obligation to pay those fees under *Pitrolo*.

To avoid litigation in West Virginia, Travelers and another primary insurer, ACE, argued that, if U.S. Silica’s West Virginia action were not dismissed or stayed in deference to the New York action, it should be dismissed or stayed in deference to the California action. (JA 3905-06.)

Travelers initially succeeded in its effort to avoid this forum when the Circuit Court (Groh, J.) stayed the litigation in deference to the New York and California actions. (JA 3905.) By Travelers’ own admissions, the parties then engaged in 4.5 years of discovery and other pretrial preparation in those related actions. (JA 3597-3600.) Then, in April 2012, when the Circuit Court lifted the stay, the Court (in Travelers’ own words) “effectively transferr[ed]” the litigation to this forum. (JA 3619.) In other words, there was only ever one dispute between U.S. Silica and Travelers, but – as a result of Travelers’ own positions (and its misleading statements upon which Judge Groh relied, see below) – that dispute was adjudicated in different

expenses sought by U.S. Silica (for example, by challenging the rates charged by U.S. Silica’s counsel or the amount of time spent as to any particular task). (See JA 3264-80.) As such, apart from the “deductions” sought by Travelers on various categories of fees, Travelers did not contend that U.S. Silica’s fees and expenses were unreasonable under the *Pitrolo* factors.

jurisdictions at different times. U.S. Silica opposed this approach at all times, always seeking to litigate in West Virginia.

Moreover, in seeking dismissal or stay of this action in favor of the New York and California actions, Travelers falsely represented to the Circuit Court *for years* that it was a party to the New York action, and admitted that the California action addressed all the same issues and parties as this action (including U.S. Silica's claims against Travelers). (JA 3659; JA 3712-13; JA 3746; JA 3757; JA 3773-74; JA 3776; JA 3815; JA 3827; JA 3835-36.) For example, in February 2006, Travelers filed a motion to stay or dismiss this action, repeatedly arguing that the New York action was more comprehensive, and incorrectly represented to this Court that the New York action "names as defendants USS, ITT and all of the defendant insurers in the present [West Virginia] case." (JA 3659 (emphasis added).) In May 2007, Travelers and other insurers submitted Certain Defendants' Status Conference Memorandum to the Circuit Court. JA 3761. In that memo, Travelers argued, *inter alia*, that the New York and California actions had the same parties and claims. (*See, e.g.*, JA 3773 ("[t]he same allegations at issue in this [West Virginia] action are now pending in NY and in CA"); JA 3774 (stating that the parties to the New York action "includes same parties as Morgan County Action" such as "all of [the U.S. Silica and ITT] insurers"); JA 3776 ("[w]ith the filing of USS' Cross-Complaint, the same parties and issues as in the NY, PA and WV actions are now before the CA Court").)

In 2012, after the Circuit Court lifted the stay imposed by Judge Groh, Travelers' response was to continue its pattern of seeking to deny U.S. Silica the right to litigate its claims in West Virginia, and to repeatedly assert that the dispute between U.S. Silica and Travelers was being litigated in California, filing a Motion for Reconsideration, followed by a Verified Writ of Prohibition with this Court. (JA 3590; JA 3610.) In that Writ of Prohibition, Travelers argued

that the Court’s lifting of the stay “effectively transferr[ed] to West Virginia a complex, multi-party insurance coverage action which the parties have been actively litigating in California.” (JA 3619.) Travelers admitted that “[t]he parties have spent years [in the California action] litigating issues relevant to this [West Virginia] action in a structured manner” and argued that “an alternative forum exists in California, where the same parties are (and for over four years have been) actively litigating the same issues that have been stayed in this action.” (JA 3631; JA 3634.) This Court denied the insurers’ writ of prohibition. (JA 3906.)

In sum, Travelers argued from the beginning of this case in January 2006 that U.S. Silica’s claims against it should be litigated in New York and/or California. Travelers similarly argued from the outset that discovery should not proceed in West Virginia to avoid duplicating the effort that was taking place in the other actions. In support of these positions, Travelers repeatedly and deliberately glossed over the fact that Travelers Insurance Company was not yet a party to the New York action, and conceded that the California action addressed all the same issues and parties as this action (including U.S. Silica’s claims against Travelers). After succeeding in those efforts, Travelers sought to avoid this West Virginia forum, and argued repeatedly that this dispute had been litigated actively in California – and that the parties had made substantial progress in litigating the dispute in California.

In light of Travelers’ admission that the fees incurred by U.S. Silica outside of West Virginia were all in advancement of the litigation of the same dispute that the parties had here, the Circuit Court did not abuse its discretion in awarding U.S. Silica attorneys’ fees and expenses incurred not only in this West Virginia action, but in the related California and New York actions as well.³⁷

³⁷ Travelers’ argument that California law precludes an award of attorneys’ fees and expenses is a red herring: U.S. Silica’s motion for attorneys fees and costs in this case is premised on *Pitrolo*, not

B. U.S. Silica Is Not Required to Establish That Its Reasonable Fees and Costs Were Incurred “Solely” in Connection with U.S. Silica’s Claims Against Travelers to Recover Under *Pitrolo*

In addition to the unsupportable “deductions” Travelers seeks of fees and expenses that U.S. Silica incurred in the New York and California actions, Travelers also sought “deductions” with respect to time-entry or cost descriptions that Travelers characterizes as paid by U.S. Silica solely in connection with claims against other insurance companies (\$49,957) or supposed “block-billed” or “vague” time entries (\$896,743 in fees and \$43,920 in costs) in connection with this West Virginia action. Travelers’ requested “deductions” have no support under any West Virginia law and are contrary to *Pitrolo*, standard practices and common sense. The Circuit Court properly rejected them.

Travelers contends that if any time entry or cost description does not specifically name Travelers – and only Travelers – U.S. Silica cannot recover for those fees and expenses under *Pitrolo*. Unsurprisingly, Travelers cites to no West Virginia authority that supports this extraordinary contention – because there is none. Rather, Travelers points to *Pitrolo*’s holding that an insured may recover fees incurred “as a result of the insurer’s breach of contract.” 176 W. Va. at 194. Of course, *Pitrolo* was a single-insurer case, and no West Virginia court has ever endorsed Travelers’ position that a policyholder is not entitled to recover reasonable attorneys’ fees incurred litigating claims against one insurer on the sole basis that various fees were incurred litigating the case as a whole against all of the insurers (including Travelers), with such costs being indivisible and not insurer-specific. Travelers made the choice to litigate this

California law. In any case, contrary to Travelers’ assertion, an insured may recover attorneys’ fees and expenses reasonably incurred to compel payment of insurance coverage benefits that were withheld in bad faith. *Brandt v. Super. Ct. (Standard Ins. Co.)*, 693 P.2d 796, 798 (Cal. 1985).

case to verdict, and Travelers lost. Under *Pitrolo*, Travelers is now responsible for the consequences of its actions, including U.S. Silica’s reasonable attorneys’ fees and expenses.

Regarding allegedly “block-billed” or “vague” time entries, every invoice supporting U.S. Silica’s request for fees and expenses was submitted to the Circuit Court (JA 2194-2208; JA 2210-2673; JA 2675-2916; JA 2918-3146; JA 1914-2030), which was thus able to evaluate for itself that the time-entry descriptions provide substantial detail consistent with or exceeding common practice. Indeed, U.S. Silica’s invoices totaled nearly 1,000 pages, with exceedingly detailed descriptions of the work performed. (*Id.*) Even if such detail had not been provided (and it was), there is no requirement under West Virginia law that an insured’s attorneys’ invoices must separately itemize each individual task before the insured can recover its attorneys’ fees and expenses under *Pitrolo*. In sum, the Circuit Court’s award of U.S. Silica’s attorneys’ fees and expenses was not an abuse of discretion.

VI. THE CIRCUIT COURT’S REJECTION OF TRAVELERS’ REMITTITUR ARGUMENTS WAS NOT AN ABUSE OF DISCRETION

A. The Circuit Court Properly Rejected Travelers’ Requested \$523,249 Reduction Based on Settlements of “No DOFE” Claims

In its post-trial motion, Travelers sought a reduction in the judgment in the amount of \$523,249 – the amount Travelers’ damages expert, Charles Mullin, calculated at trial that U.S. Silica paid to settle “No DOFE” (i.e., no date of first exposure) claims – on the grounds that “U.S. Silica provided no evidence to support its claim for reimbursement of these payments....” (JA 1783.) In fact, substantial evidence was presented at trial to support Travelers’ obligation to pay these damages.

In its pretrial rulings, the Circuit Court held that the Policies impose on Travelers a duty to defend U.S. Silica with respect to the No DOFE claims, which are silent with respect to dates of exposure, and thus potentially fall within the scope of the Travelers Policies’ coverage (and

which Travelers did not contend were subject to any policy exclusion).³⁸ At trial, the jury found that Travelers breached that duty to defend. (JA 1754.)

Courts across the country agree that, where an insurer has breached its duty to defend, it cannot later deny coverage for a reasonable settlement entered into by the insured.³⁹ Having been found in breach of its duty to defend the No DOFE claims, Travelers cannot subsequently argue that the settlements paid by U.S. Silica to resolve those claims are not covered. Accordingly, the Circuit Court did not err in rejecting Travelers' request for remittitur of this amount.

B. The Circuit Court Also Correctly Denied Travelers' Request for Set-Off for Settlements Paid by Other Insurers

The evidence also supported the Circuit Court's rejection of Travelers' post-trial request for a set-off in connection with settlement payments that U.S. Silica received from two other insurer defendants in this action. Remittitur is available in West Virginia only where the amount at issue is "clearly distinguishable" and "definitely ascertainable." Syl. pt. 7, *Stone v. United Eng'g*, 197 W. Va. 347, 475 S.E.2d 439 (1996); Syl. pt. 3, *Fortner v. Napier*, 153 W. Va. 143, 168 S.E.2d 737 (1969), *overruled on other grounds by Roberts v. Stevens Clinic Hosp., Inc.*, 176 W. Va. 492, 345 S.E.2d 791 (1986). The evidence at trial did not, as Travelers contends,

³⁸ September 11, 2013 Order Granting Plaintiff's Motion *in Limine* to Preclude Travelers from Offering Evidence or Testimony on Damages That Violate West Virginia Law on the Duty to Defend; JA 224-25.

³⁹ *See, e.g., In re Abrams & Abrams, P.A.*, 605 F.3d 238, 241 (4th Cir. 2010) (North Carolina law) ("[I]f an insurer improperly refuses to defend a claim, it is estopped from denying coverage and must pay any reasonable settlement"); *Carney v. Vill. of Darien*, 60 F.3d 1273, 1277 (7th Cir. 1995) (Wisconsin law) ("An insurer that breaches its duty to defend waives its right to later challenge coverage"); *see also St. Louis Dressed Beef & Provision Co. v. Md. Cas. Co.*, 201 U.S. 173 (1906); *State Farm Fire & Cas. Co. v. Ruiz*, 36 F. Supp. 2d 1308, 1318 (D.N.M. 1999); *Emp'rs Ins. of Wausau v. Ehlco Liquidating Trust*, 708 N.E.2d 1122, 1133 (Ill. 1999); *Grindheim v. Safeco Ins. Co. of Am.*, 908 F. Supp. 794, 798 (D. Mont. 1995); *Galen Health Care, Inc. v. Am. Cas. Co. of Reading, Pa.*, 913 F. Supp. 1525, 1533 (M.D. Fla. 1996); *Sauer v. Home Indem. Co.*, 841 P.2d 176, 184 (Alaska 1992); *Camp Dresser & McKee, Inc. v. Home Ins. Co.*, 568 N.E.2d 631, 636 (Mass. App. Ct. 1991); *Beckwith Mach. Co. v. Travelers Indem. Co.*, 638 F. Supp. 1179, 1188-89 (W.D. Pa. 1986); *Rhodes v. Chicago Ins. Co.*, 719 F.2d 116, 120 n.5 (5th Cir. 1983) (Texas law); *Conanicut Marine Servs., Inc. v. Ins. Co. of N. Am.*, 511 A.2d 967, 971 (R.I. 1986).

demonstrate a “clearly distinguishable” and “definitely ascertainable” amount that could be identified for remittitur. Rather, the evidence at trial established the following:

- The ACE and Arrowood settlements were commercial settlements entered into to resolve not only claims in litigation but also other claims not at issue in the litigation. In addition, these settlements were not designed to allocate specific dollars to specific Silica Claims. (JA 1707; JA 1735.)
- As such, Mr. Mullin, Travelers’ damages expert who presented its set-off calculation, admitted that he did not “have the foundation that one would normally desire” to perform a set-off based on the ACE and Arrowood settlement agreements, and that he was making an “assumption.” (JA 886-87.) Thus, Travelers’ own expert acknowledged that the amount Travelers seeks as remittitur was not “definitely ascertainable,” as required by West Virginia law.
- Because the ACE and Arrowood settlements were made in the context of resolving claims in litigation, Mr. Mishkin, U.S. Silica’s damages expert, confirmed that it is not customary for experts to consider or review or allocate such settlements, and that he would have no basis to do so. (JA 760-62; JA 787-88.)
- John Ulizio, U.S. Silica’s former CEO, confirmed that U.S. Silica had approximately \$16 million in unreimbursed losses, that it was seeking only \$8 million of that amount from Travelers, that U.S. Silica was not seeking to recover from Travelers any amounts that it received from Arrowood or ACE (which amounts add up to \$6,025,000). In other words, U.S. Silica was not seeking a double recovery. (JA 406-10; JA 434-36; JA 511-12; JA 1707; JA 1735.) Indeed, Travelers concedes that U.S. Silica had more than \$13 million in unreimbursed damages. *See* Petitioner’s Br. at 47 (citing JA 840-52).
- Confirming Mr. Ulizio’s testimony, Mr. Mullin, Travelers’ damages expert, also conceded that, if the set-off sought by Travelers were applied, U.S. Silica would not be made whole and would be left with “un-reimbursed losses.” (JA 886.)⁴⁰

In sum, the parties each presented evidence to the jury, including expert testimony, regarding Travelers’ alleged entitlement to a set-off in their competing calculations of U.S. Silica’s damages. Considering the evidence as a whole and in favor of U.S. Silica, the jury had a more than sufficient basis (i) to reject Mr. Mullin’s set-off calculation – which he admitted was

⁴⁰ Given Travelers’ concession that U.S. Silica had more than \$13 million in unreimbursed damages prior to the jury’s verdict against Travelers, even if the Circuit Court had incorrectly set off the full \$6,025,000 of U.S. Silica’s prior settlements with ACE and Arrowood, U.S. Silica would still be left with nearly \$7 million in unreimbursed damages, even ignoring (i) the legal impropriety of such a set-off, (ii) the jury’s rejection of Travelers’ evidence supporting its set-off argument, and (iii) the evidence that U.S. Silica’s unreimbursed damages exceeded the \$13 million that Travelers concedes existed.

based on assumptions and lacked the “foundation one would normally desire” – and (ii) to credit the evidence that the settlements were not on account of the damages that U.S. Silica sought from Travelers, as they represented out-of-pocket expenses that were not reimbursed by other insurers.

As instructed, the jury properly determined “the amount of damages necessary to place [U.S. Silica] in the same position as if the contracts had been fully performed by Travelers” (JA 971.) Travelers cannot, through the guise of remittitur, substitute a new judgment in place of the verdict reached by the jury based on conflicting evidence. The Circuit Court properly denied Travelers’ motion for remittitur.

CONCLUSION

For all the foregoing reasons, U.S. Silica respectfully requests that this Court deny Travelers’ appeal and affirm the Judgment and Post-Trial Orders of the Circuit Court below.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charles F. Printz, Jr., counsel for Respondent, U.S. Silica Company, hereby certify that I served a true copy of the foregoing **Respondent's Brief** on the following counsel of record via first-class U.S. mail, postage prepaid, on this 21st day of August 2014:

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