

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA  
BUSINESS COURT DIVISION

AXIAL CORPORATION and  
WESTLAKE CHEMICAL  
CORPORATION,

Plaintiffs,

vs.

NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH, PA., *et al.*,

Defendants.

Civil Action No.: 19-C-59  
Presiding Judge Wilkes  
Resolution Judges Carl and Nines

ORDER GRANTING PLAINTIFFS' MOTION TO COMPEL

This matter came before the Court this 5<sup>th</sup> day of November 2020. The Plaintiffs, Axial Corporation and Westlake Chemical Corporation, by counsel, have filed Plaintiffs' Motion to Compel Discovery From the Defendants. The Plaintiffs, Axial Corporation and Westlake Chemical Corporation (hereinafter "Plaintiffs"), by counsel, Paul C. Fuener, Esq., and Jeffrey V. Kessler, Esq., and Defendants, National Union Fire Insurance Company of Pittsburgh, Pa., Allianz Global Risks US Insurance Company, ACE American Insurance Company, Zurich American Insurance Company, Great Lakes Insurance SE, XL Insurance America, Inc., General Security Indemnity Company of Arizona, Aspen Insurance UK Limited, Navigators Management Company, Inc., Ironshore Specialty Insurance Company, Validus Specialty Underwriting Services, Inc., and HDI-Gerling America Insurance Company (hereinafter "Defendants" or "Insurers"), by counsel, James A. Varner, Sr., Esq., have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional

process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

### **FINDINGS OF FACT**

1. This matter surrounds an insurance coverage dispute involving Defendants' alleged failure to cover Plaintiff Westlake Chemical Corporation (hereinafter "Plaintiff" or "Westlake") for property damage at its Marshall County, West Virginia plant caused by a railroad tank car rupture and resulting chlorine release that occurred in August 2016. *See* Compl; *see also* Pl's Mem., p. 1-2.

2. Westlake served Plaintiffs' First Set of Interrogatories Directed to All Defendants and Plaintiffs' First Request for the Production of Documents Directed to All Defendants on June 28, 2019. *See* Pl's Mem., p. 3.

3. On January 27, 2020, this Court entered an Order partially lifting the stay of discovery and requiring Defendants to serve written responses and produce documents in response to Interrogatories 1-4, 6-7, and 10-11 of the Interrogatories and Requests for Production 21-13. *See* Ord., 1/27/20, p. 1-2; *see also* Pl's Mem., p. 3.

4. Defendants served their responses on February 6, 2020 and on dates subsequent to that date. *See* Pl's Mem., p. 3. However, Plaintiffs contend such responses are still deficient in some respects and the instant motion was subsequently filed. *Id.*

5. On a prior day, the instant Plaintiffs' Motion to Compel Discovery From the Defendants was filed.

6. Thereafter, Defendants filed Defendants' Response in Opposition to Plaintiffs' Motion to Compel Discovery.

7. Finally, Plaintiffs filed Plaintiffs' Reply in Support of Motion to Compel Discovery.

8. The Court finds the issue ripe for adjudication.

### CONCLUSIONS OF LAW

Plaintiffs filed the instant Motion to Compel, seeking an Order from the undersigned compelling Defendants to provide a full response to different categories of disputed discovery. The Court will address the categories in turn.

Generally,

Civil discovery is governed by the West Virginia Rules of Civil Procedure, Rules 26 through 37. The Rules of Civil Procedure generally provide for broad discovery to ferret out evidence which is in some degree relevant to the contested issue.

Syl. Pt. 1, in part, *Evans v. Mutual Min.*, 199 W.Va. 526, 485 S.E.2d 695 (1997) (internal quotations and citations omitted).

Rule 33 provides, in pertinent part, that "any party may serve upon any other party written interrogatories ... to be answered by the party served". W.Va. R. Civ. P. 33 (a). The Rule goes on to require that "[e]ach interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable. *Id.*

Requests for Production are governed by Rule 34 of the West Virginia Rules of Civil Procedure which provides, inter alia, "[a]ny party may serve on any other party a request (1) to produce ... any designated documents..." This Rule requires the request to be "describe[d]...with reasonable particularity." W.Va. R. Civ. P. 34 (b).

Further, Rule 37 of the West Virginia Rules of Civil Procedure provides, in pertinent part:

(2) *Motion*. If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(7) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant in good faith has conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or action without court action.

W. Va. R. Civ. P. 37.

*I. Document Collection Efforts*

First, the Court considers the parties' arguments with regard to information regarding document collection efforts. *See* Pl's Mem., p. 7; *see also* Defs' Resp., p. 4. Plaintiffs contend in their memorandum that they seek documents not yet produced regarding Defendants' "document collection, review, and production efforts." *See* Pl's Mem., p. 7. Specifically, Plaintiffs seek corporate designee testimony regarding Defendants' retention, collection, review, and production of documents potentially responsive to Westlake's discovery requests. *Id.*

Relevance in the context of discovery means that the information sought is admissible evidence or is "reasonably calculated to lead to the discovery of admissible evidence." *State ex rel. Erie Ins. Prop. & Cas. Co. v. Mazzone*, 218 W. Va. 593, 597, 625 S.E.2d 355, 359 (2005); citing W.Va. R.Civ.P. 26(b)(1); *see also* Syl. Pt. 4., in part, *Keplinger v. Virginia Elec. and Power Co.*, 208 W.Va. 11, 537 S.E.2d 632 (2000); Syl. Pt. 4, in part, *State Farm Mut. Auto. Ins. Co. v. Stephens*, 188 W.Va. 622, 425 S.E.2d 577 (1992).

The Court finds that such information related to document collection efforts could be very relevant when it has been pled that the Insurers are using the same technical investigative consultants for this ?incident as well as another, and the question of bad faith still remains at play.

It is not commercially unreasonable to respond to the requested discovery wherein it entails the investigation of large-scale destruction, the August 2016 chlorine release incident. The mere fact that more supplementation or document productions may occur does not preclude a party from seeking basic information about another party's document repositories, electronically stored information systems, document retention/destruction policies, search terms and identities of custodians. *See* Pl's Mem., p. 8. The Court notes Plaintiffs have averred that Westlake has promptly responded to Defendants when they posed similar questions to Westlake. *Id.* at 7.

For these reasons, the Court finds the instant motion should be granted as to information regarding Defendants' document collection, review, and production efforts. Westlake's requests shall be granted, including its request for Defendants provide witnesses for its Rule 30(b)(7) deposition topics.

## *II. Prior Loss Information*

Next, the Court considers the parties' arguments with regard to documents involving a recent, prior insurance claim at the Natrium plant. *See* Pl's Mem., p. 9. Specifically, this argument pertains to Request for Production No. 11. *Id.* Request for Production No. 11 seeks "documents relating the Defendants' understanding of the operations and condition of the Natrium Plant and all real and personal property therein at the time of the issuance of each of the Policies you issued, sold, or subscribed to in Westlake's favor, and between that time and the time of the Chlorine Release". *Id.* at 9-10.

Plaintiffs argue Defendants' response was inadequate because it stated it would produce documents from its underwriting files, and the underwriting files would not encompass all documents demonstrating Defendants' knowledge of the operations and condition of the Natrium Plant during the relevant period. *Id.* at 10. Additionally, Plaintiffs contend that Defendants have

not produced documents pertaining to prior coverage claims under the policies, including one that involved a loss at the Natrium Plant in December 2015.

Relevance in the context of discovery means that the information sought is admissible evidence or is “reasonably calculated to lead to the discovery of admissible evidence.” *State ex rel. Erie Ins. Prop. & Cas. Co. v. Mazzone*, 218 W. Va. 593, 597, 625 S.E.2d 355, 359 (2005); citing W.Va. R.Civ.P. 26(b)(1); *see also* Syl. Pt. 4., in part, *Keplinger v. Virginia Elec. and Power Co.*, 208 W.Va. 11, 537 S.E.2d 632 (2000); Syl. Pt. 4, in part, *State Farm Mut. Auto. Ins. Co. v. Stephens*, 188 W.Va. 622, 425 S.E.2d 577 (1992).

The Court finds information related to a prior loss at the Natrium Plant would be very relevant to the instant litigation. Plaintiffs have proffered that the Defendants’ consultants considered their observations from prior visits to evaluate the claim that they ultimately denied at issue in this litigation. *See* Pl’s Mem., p. 11. Further, it undisputed that the pre-loss condition of the plant is relevant. *Id.*

The Court notes that Defendants admit Plaintiffs have agreed to limit the scope of this discovery request to the aforementioned December 2015 incident at Natrium, reducing the scope of this request. *See* Def’s Resp., p. 10. The Court also notes this incident’s relation in time to the incident at the heart of this litigation, which occurred in August 2016.

For these reasons, the Court finds the instant motion should be granted as to information regarding documents involving the recent, prior insurance claim at the Natrium plant which occurred in December 2015. Westlake’s requests shall be granted, including its request for photographs depicting the condition of the Natrium Plant during Defendants’ December 2015 investigation, as well as all documents and emails in Defendants’ possession that are responsive to Request for Production No. 11.

### *III. Insurance Coverage Defenses*

Next, the Court considers the parties' arguments with regard to Defendants' coverage defenses. *See* Pl's Mem., p. 12; *see also* Def's Resp., p. 12. Specifically, this category relates to Interrogatory No. 10 and Request for Production Nos. 22 and 23. *See* Pl's Mem., p. 12. The Court notes Defendants proffered in their Response that they have supplemented their response to Request for Production No. 22 after the filing of the instant motion. *See* Def's Resp., p. 12. The Court also notes that as of the filing of the Reply, Plaintiffs aver they have not received said supplemented production. *See* Reply, p. 9-10.

Interrogatory No. 10 requests: "With respect to each affirmative defense in the ANSWER, set forth in detail the factual and legal basis that YOU [the Insurers] rely on to support each affirmative defense". *See* Def's Resp., p. 13; *see also* Def's Resp., Ex. A, Pl's Mem., p. 13; Pl's Mem., Ex. B.

Request for Production No. 22 requests the following:

All DOCUMENTS that RELATE TO each affirmative defense asserted by YOU in the ANSWER, including DOCUMENTS that tend to support or rebut such affirmative defense.

*See* Def's Resp., Ex. A.

Request for Production No. 23 requests the following:

All DOCUMENTS that RELATE TO any other coverage defenses to coverage or affirmative defenses that YOU are planning to assert that YOU have not yet asserted, including DOCUMENTS that tend to either support or rebut such defenses to coverage.

*Id.*

While Defendants aver in the Response that they have responded adequately to these discovery requests (*See* Def's Resp., p. 14), Plaintiffs contend Defendants have failed to provide a meaningful response to Interrogatory No. 10. *See* Pl's Mem., p. 13. Defendants also allege in

their Response that they have objected on the grounds that the bad faith claims are currently stayed. *See* Def's Resp., p. 13. Since these claims are no longer stayed, the Court finds this objection to be moot. The Court finds that Plaintiffs are entitled to responses regarding the Insurers' coverage positions. *See* Pl's Mem., p. 13.

With regard to Request for Production Nos. 22 and 23, the Court finds the documents related to coverage defenses and affirmative defenses would be relevant at this stage of the litigation. The Court notes that if Defendants have an argument related to extrinsic evidence or course of performance, those may be brought at the appropriate time. But at this time, the Court finds such answers to Request for Production Nos. 22 and 23 are reasonably calculated to lead to the discovery of admissible evidence. The Court notes Request for Production Nos. 22 and 23 are almost identical to Defendants' corresponding requests on Westlake. *See* Pl's Mem., p. 12. Plaintiffs aver that Westlake has agreed to and started producing responsive responses to these corresponding requests. *Id.* at 13.

For all of these reasons, the Court finds the instant motion should be granted as to information regarding Defendants' insurance coverage defenses, as described above. Defendants are directed to provide a response to Interrogatory No. 10. Further, Defendants are directed to produce all documents pertaining to their defenses, as described in Request for Production Nos. 22 and 23.

#### *IV. Reinsurer Communications*

Next, the Court considers the parties' arguments with regard to "communications between the Insurers and any person – including the Insurers' own insurers (i.e. 'reinsurers') – regarding Westlake's claim for coverage". *See* Pl's Mem., p. 15; *see also* Def's Resp., p. 14. Specifically, this category encompasses Request for Production No. 15. *See* Pl's Mem., p. 15.

Rule 26(b)(2) of the West Virginia Rules of Civil Procedure provides, in pertinent part:

A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial.

W. Va. R. Civ. P. 26.

Although the case is an unpublished opinion, the Court notes that the West Virginia Supreme Court of Appeals has specified that this includes reinsurance agreements. *See Morton Int'l Inc. v. Liberty Mut. Ins. Co.*, No. CIV. A. 93-C-2126, 1995 WL 868455, at \*2 (W. Va. Cir. Ct. Sept. 5, 1995).

Defendants contend in their response that such documents are irrelevant. *See* Def's Resp., p. 16. However, the Court finds and concludes that reinsurer communication documents may reference relevant information, including which entity is next in line to pay. The Court notes it has been proffered reinsurer communication documents may also reference admissions regarding disputes with policyholders since insurance companies and claims handlers may be inclined to speak more candidly with reinsurers about whether a policyholder's claim is covered and the value of that claim. *See* Pl's Mem., p. 16. Further, it has been proffered to the Court that reinsurer communication documents may also be relevant to the interpretation and application of disputed policy provisions. *Id.* As a result, Plaintiffs' request for reinsurance communications has been reasonably made. The Court notes Plaintiffs' request is limited to the issue in this claim – Westlake's claim for coverage.

The Court finds that, except for those that are privileged, such documents that relate to Defendants' affirmative defenses and coverage defenses are indeed relevant. For all of these

reasons, the Court finds the instant motion should be granted as to “communications between the Insurers and any person – including the Insurers’ own insurers (i.e. ‘reinsurers’) – regarding Westlake’s claim for coverage”. *See* Pl’s Mem., p. 15. Defendants are directed to provide a response to Request for Production No. 15 and produce the reinsurance documents and information they have withheld or redacted.

*V. Reserves Information*

Next, the Court considers the parties’ arguments with regard to “any analysis of the potential financial implications” to Defendants presented by Westlake’s claim for coverage, “including any reserves that [the Insurers] have established for such claim. *See* Pl’s Mem., p. 17; *see also* Def’s Resp., p. 16. Specifically, this category encompasses Request for Production No. 17. *See* Pl’s Mem., p. 17. Defendants contend they have objected and not offered to produce any documents in response to this request. *See* Def’s Resp., p. 16. Defendants further contend this information is not relevant. *Id.* at 16-19.

The West Virginia Supreme Court of Appeals has noted that insurance companies are required by law to establish reserves. Every claim presumably has some reserve amount attached to it, regardless of whether the claim ends in litigation or is resolved through other means. *State ex rel. Erie Ins. Prop. & Cas. Co. v. Mazzone*, 220 W. Va. 525, 530, 648 S.E.2d 31, 36 (2007). Reserves calculations are essentially an insurance company’s internal valuation of a claim and represent an amount the insurance company is comfortable spending to settle the claim. *See State ex rel. Erie Ins. Prop. & Cas. Co. v. Mazzone*, 625 S.E.2d 355, 358–59 (W. Va. 2005)(“[R]eserves are value approximations made by an insurance company regarding what will be sufficient to pay all obligations for which the insurer may be responsible under the policy with respect to a particular claim.” (internal quotation marks omitted)).

Further, the West Virginia Supreme Court of Appeals has held as follows:

Based upon all of the above considerations, we hold that when presented with a challenge to discovery of insurance reserves information, the trial court is required under the provisions of Rule 26(b)(1) of the West Virginia Rules of Civil Procedure to make a preliminary determination of whether the requested information is relevant in that it is admissible or is reasonably calculated to lead to the discovery of admissible evidence. In making a determination in the context of discovery about the relevancy of insurance reserves information, the trial court should take into account the nature of the case, the methods used by the insurer to set the reserves and the purpose for which the information is sought, and only grant requests for disclosure when its findings of fact and conclusions of law support a determination that the specific facts of the claim in the case before it directly and primarily influenced the setting of the reserves in question.

*Id.* at 598, 360.

The reserves information is relevant to Plaintiffs' claims in the case at bar, including whether or not the sale of this insurance policy can be funded. Plaintiffs have proffered that it is relevant to its breach of contract and declaratory judgment claims involving Westlake's coverage claim. *See* Pl's Mem., p. 18. Plaintiffs proffer that existence and amount of reserves may provide information relevant to how the Insurers themselves interpret and apply their own policies and value the claim at issue. *Id.* Further, Plaintiffs have demonstrated that reserves information may evidence the fact that the Insurers understood Westlake's claim to be covered under the terms and conditions of the insurance policies at issue. *Id.* at 18-19. The Court considers this could provide evidence on key issues in this case – the disputed meaning and interpretation of the policy at issue in this litigation and whether or not the loss is barred by certain exclusions. *Id.* at 19.

Because of the Court's relevance analysis under *Mazzone*, and for the reasons set forth above, the Court finds and concludes that the instant motion should be granted as to "any analysis of the potential financial implications" to Defendants presented by Westlake's claim for coverage,

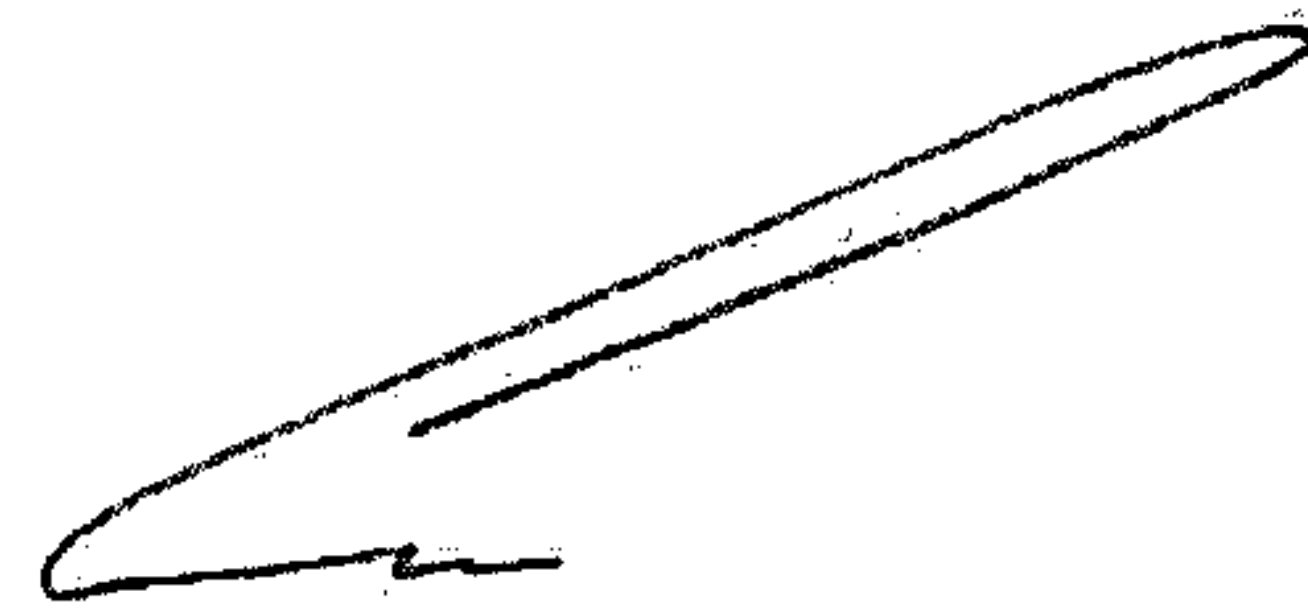
“including any reserves that [the Insurers] have established for such claim. *See* Pl’s Mem., p. 17. Defendants are directed to provide a response to Request for Production No. 17 and produce documents and information regarding their reserves, including documents and information they have withheld or redacted.

For all of these reasons, the Court finds the instant motion to compel must be GRANTED.

### CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Plaintiffs’ Motion to Compel Discovery From the Defendants is hereby GRANTED. The Court notes the objections and exceptions of the parties to any adverse ruling herein.

The Court directs the Circuit Clerk to distribute attested copies of this order to all counsel of record, and to the Business Court Central Office at West Virginia Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.



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JUDGE CHRISTOPHER C. WILKES  
JUDGE OF THE WEST VIRGINIA  
BUSINESS COURT DIVISION