

FILED

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

AXIALL CORPORATION and  
WESTLAKE CHEMICAL  
CORPORATION,

JOSEPH M. RUCKI

**Plaintiffs,**

vs.

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

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

**Defendants.**

**ORDER DENYING DEFENDANTS' LIMITED MOTION FOR  
CLARIFICATION REGARDING ORDER GRANTING PLAINTIFFS' MOTION  
TO COMPEL**

This matter came before the Court this 10<sup>th</sup> day of February 2021. The 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, by counsel, have filed Defendants' Limited Motion for Clarification Regarding Order Granting Plaintiffs' Motion to Compel Discovery From the Defendants entered by the Court on November 5, 2020. The Plaintiffs, Axiall 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, Debra Tedeschi Varner, 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 Resp., p. 2. The instant civil action involves claims by Plaintiffs that Defendants breached their insurance contracts, and also engaged in bad-faith claims handling. *See* Pl’s Resp., p. 2.

2. On or about June 28, 2019, Defendants filed a motion to dismiss before Judge Hummel<sup>1</sup>. On October 22, 2019, Judge Hummel issued an Order<sup>2</sup> denying the motion to dismiss. *See* Pl’s Resp., p. 4. In this Order, Judge Hummel also *sua sponte* ruled to bifurcate

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<sup>1</sup> The instant civil action was later referred to the Business Court Division and assigned to the undersigned.

<sup>2</sup> The Court notes Judge Hummel’s October 2019 Order was attached to the Response to the instant motion as Exhibit C.

and stay Plaintiff's bad faith claims (Counts IV and V) and to dismiss Plaintiff's Georgia bad faith claim (Count III), holding that only West Virginia law applied. *Id.* Further, this Order stayed all discovery to allow for the filing of a writ of prohibition. *Id.* at 5.

3. Subsequently, on October 25, 2019, Defendants filed a Petition for Writ of Prohibition, challenging Judge Hummel's ruling that West Virginia, and not Georgia law, applied and governed Plaintiffs' bad faith claims. *See* Pl's Resp., p. 5.

4. While the writ of prohibition was pending, Plaintiffs filed a Motion for Partial Lifting of Discovery Stay with the undersigned, "to ensure that discovery in this matter was not fully delayed and to allow discovery to proceed on Westlake's Declaratory Judgment and Breach of Contract claims". *See* Pl's Resp., p. 5.

5. 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. Notably, this Order found "[t]he current October 22, 2019 Order staying discovery will remain in place as to Plaintiff's bad faith and Unfair Trade Practices causes of action (Counts III-V) and shall apply to Interrogatory Nos. 5 and 8-9 and RFP Nos. 18-20, pending further action by this Court". *See* Pl's Resp., p. 5-6.

6. Shortly after this Court's January 27, 2020 Order, the Supreme Court of Appeals entered a Rule to Show Cause on the Defendants' Petition, which stayed all proceedings in this Court pursuant to Rule 16(j) of the West Virginia Rules for Appellate Procedure. *Id.* at 6. On February 26, 2020, in response to an agreed motion filed by the parties, the Supreme Court of Appeals entered an order partially lifting the Rule 16(j) stay to allow discovery to proceed as to

Counts I and II of Plaintiff's Complaint, while leaving the stay in place as to the bad faith claims that were the subject of Defendants' Petition. *Id.*

7. On October 19, 2020, the West Virginia Supreme Court of Appeals granted the Defendant's Petition for Writ of Prohibition, and vacated Judge Hummel's dismissal of Count III and choice-of-law rulings regarding bad faith claims, remanding the issue to this Court for further proceedings consistent with its opinion. *Id.*

8. Meanwhile, Westlake had 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., Mot. to Compel, p. 3. Following this Court's January 27, 2020 Order partially lifting stay, Defendants served their responses on February 6, 2020 and on dates subsequent to that date. *See* Pl's Mem., Mot. to Compel, p. 3. However, Plaintiffs contended such responses are still deficient in some respects and subsequently filed Plaintiffs' Motion to Compel Discovery From the Defendants. The motion was fully briefed. On November 5, 2020, the Court entered an Order granting Plaintiffs' Motion to Compel. It is from this Order that Defendants' seek clarification via the instant motion.

9. On a prior day, Defendants filed the instant Defendants' Limited Motion and Incorporated Memorandum of Law for Clarification Regarding Order Granting Plaintiffs' Motion to Compel, requesting the Court clarify the portion of the November 5, 2020 Order relating to bad faith and extra-contractual discovery. *See* Defs' Mem., p. 2.

10. On a prior day, Plaintiffs filed their Plaintiffs' Brief in Opposition to Defendants' Motion for Clarification Regarding Order Granting Plaintiffs' Motion to Compel, arguing the instant motion should be denied because the November 5, 2020 Order clearly found that no bifurcation and stay of bad faith and extracontractual issues existed, at least as to discovery, and

because Defendants are now asking for a bifurcation and stay of discovery without filing a motion or arguing the legal burden to do so. *See* Pl's Resp., p. 3.

11. On a prior day, Defendants filed their Reply, titled "Defendants' Rebuttal Memorandum in Support of Limited Motion for Clarification Regarding Order Granting Plaintiffs' Motion to Compel", arguing Plaintiffs never challenged Judge Hummel's October 2019 Order, and therefore a bifurcation and stay contained within that Order should be deemed to still exist. *See* Def's Reply, p. 2.

12. On a prior day, Plaintiffs filed Plaintiffs' Motion for Leave to File Sur-Reply in Opposition to Defendants' Motion for Clarification, seeking to respond to the Reply to the instant motion, along with a proposed Sur-Reply. Thereafter, Defendants' filed a Response in Opposition to Plaintiffs' Motion for Leave to File Sur-Reply.

13. The Court finds the issue ripe for adjudication.

### **CONCLUSIONS OF LAW**

As an initial matter, the Court considers Plaintiffs' Motion for Leave to File Sur-Reply in Opposition to Defendants' Motion for Clarification, and finds and orders it shall be DENIED. The briefing order issued by the Court contemplated a response and reply, and the Court will not consider any Sur-Reply in making its decision.

Next, Defendants filed the instant motion for limited clarification of this Court's November 5, 2020 Order granting motion to compel. The issue before the Court is whether a bifurcation and stay of the bad faith and extra-contractual claims in this matter exists. *See* Defs' Mem., p. 2.

As an initial matter, the Court notes Judge Hummel's October 2019 Order only stayed discovery in this action, pending further order of a court of competent jurisdiction – the bifurcation-and-stay portion of this Order did not mention discovery at all. *See* Pl's Resp., p. 8. The Court must differentiate between bifurcation and stay of a bad faith *claim*, and bifurcation and stay of bad faith *discovery*.

The West Virginia Supreme Court of Appeals has held that a circuit court has discretion when determining whether to bifurcate and stay proceedings in a first-party bad faith action against an insurer. *See* Syl. Pt. 2, *Light v. Allstate Ins. Co.*, 203 W.Va. 27, 506 S.E.2d 64 (1998) (“In a first-party bad faith action against an insurer, bifurcation and stay of the bad faith claim from the underlying action are not mandatory. Under Rule 42(c) of the West Virginia Rules of Civil Procedure a trial court, in furtherance of convenience, economy, or to avoid prejudice, may bifurcate and stay a first-party bad faith cause of action against an insurer.”).

Factors trial courts should consider in determining whether to stay discovery when bifurcation has been ordered in a bad faith action include: (1) the number of parties in the case, (2) the complexity of the underlying case against the insurer, (3) whether undue prejudice would result to the insured if discovery is stayed, (4) whether a single jury will ultimately hear both bifurcated cases, (5) whether partial discovery is feasible on the bad faith claim and (6) the burden placed on the trial court by imposing a stay on discovery. The party seeking to stay discovery on the bad faith claim has the burden of proof on the issue. Syl. Pt. 3, *Light v. Allstate Ins. Co.*, 203 W. Va. 27, 28, 506 S.E.2d 64, 65 (1998).

The Court finds bifurcation and stay is not appropriate in this instance. Here, the causes of action alleged by Plaintiff in the Complaint involve the same facts. All claims surround an

insurance claim pursued after an August 2016 chlorine rupture which caused property damage at Plaintiff's plant.

As the causes of action surround the same facts and involve at least some of the same witnesses, the Court finds judicial economy would best be served by not bifurcating discovery. To bifurcate and stay would invite two phases of written discovery, involve multiple depositions of the same witnesses and other adverse effects which would frustrate not only the parties' time, but the Court's resources as well. The Court notes if discovery were bifurcated, the second phase would not even start until after the March 2022 trial date in this matter, prolonging this civil action for years.

Turning to the factors set forth in *Light*, first, with regard to the number of parties involved in the case (*See Light*, at 28), there are few Plaintiffs and counsels, and while the Court admits there are twelve Defendant insurers, they are all represented by the same counsel, they are proceeding pursuant to a common interest, and they have asserted the same positions and defenses jointly. For this reason, the Court does not find that the parties involved are an inordinate or unusual number of parties to support a stay. *See Blankenship v. Jordan*, 3:19-0372, 2019 WL 4197115, at \*3 (S.D. W.Va. Sept. 3, 2019)(denying insurer's motion to stay bad faith discovery and noting that the lack of an "unusual number of parties" does not support a stay).

Second, with regard to the second factor, the complexity of the underlying case against the insurer (*See Light*, at 28), the Court notes that while the case is referred to the Business Court Division which is designed for complex cases between businesses, the Court also finds that here, the instant claims all stem from one singular coverage event. The case involves only Plaintiffs against its insurance companies. This case does not involve counterclaims or cross-claims. The Complaint in this matter is a straightforward Complaint.

Third, the Court examines whether undue prejudice would result to the insured if discovery is stayed. *See Light*, at 28. The Court finds the delay and increased costs associated with the piecemeal litigation surrounding two phases of this litigation would be prejudicial to Plaintiffs. As stated, many of the witnesses are the same, and if discovery were stayed and then resumed after March 2022, much of it would be duplicious and more costly to Plaintiffs. By then, memories of those deposed may have faded over time. The Court finds unnecessarily causing duplicious and more expensive discovery in this case would be prejudicial to Plaintiffs.

Fourth, the Court considers whether a single jury will ultimately hear both bifurcated cases. *See Light*, at 28. In first party insurance claims like this one, it is possible that a single jury will hear both claims if the proceedings end up being bifurcated. *See Blankenship*, 2019 WL 4197115, at \*4. The Court concludes that here, the Court finds a single jury most certainly could hear both claims. However, if the Court were to agree with Defendants, as Defendants are seeking the second phase of discovery not even begin until the first phase has come to a verdict after March of 2022, two juries would be required. The Court considers this would impose an additional and unnecessary burden on the Court's resources, as well as increased litigation costs for the parties. Thus, this factor weighs in favor of Plaintiffs.

Fifth, the Court analyzes whether partial discovery is feasible on the bad faith claim. *See Light*, at 28. Here, the practical advantages of unified discovery, and the potential burden on Plaintiffs in staying discovery, weighs in Plaintiffs' favor. As stated, if the matter were to be stayed and discovery were to continue on the first phase, much of it would have to be repeated and duplicated when the second phase is reached. For that reason, partial discovery is not effective in this particular matter. The Court also notes that Plaintiffs have proffered that no claims-handling depositions have begun in this case. *See Pl's Resp.*, p. 13. Thus, the parties can



still realize the efficiency of deposing each of the witnesses only once with respect to both breach of contract and bad faith claims. *Id.*

Finally, sixth, the Court considers the burden placed on the Court by imposing a stay on discovery. *See Light*, at 28. As stated above, the Court's resources would be better spent trying this matter as a single case, necessitating a single phase of discovery. If the parties were to bifurcate discovery, two juries would then be needed to resolve the claims surrounding one particular event, the insurance claim surrounding a 2016 chemical rupture and alleged resulting damage to Plaintiffs' plant. The Court would also be called upon to resolve discovery disputes in two stages of the case, rather than just one. The Court finds judicial economy would best be served by denying any request to stay discovery of bad faith claims.

In sum, in consideration of the preceding, and in analyzing the *Light* factors, the Court finds discovery on all claims should continue. As such, the Court DENIES the instant Motion.

As to any aspects of Judge Hummel's October 2019 Order holding otherwise, Judge Hummel's Order is so VACATED.

The Court notes that it has now analyzed the issue of bifurcation and stay of bad faith discovery, which was the issue in the instant motion and the Court's November 5, 2020 Order, and can address whether bifurcated for the purposes of trial at a later stage, if necessary.

### **CONCLUSION**

Accordingly, it is hereby ADJUDGED and ORDERED that Defendants' Limited Motion for Clarification Regarding Order Granting Plaintiffs' Motion to Compel Discovery From the Defendants is hereby DENIED. It is further hereby ADJUDGED and ORDERED that as to any aspects of Judge Hummel's October 2019 Order holding otherwise, Judge Hummel's Order is so

VACATED. 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

A Copy Teste:

Joseph M. Rucki, Clerk

By Donna Crow Deputy