

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

FILED

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AXIALL CORPORATION and
WESTLAKE CHEMICAL CORPORATION,

Plaintiffs,

vs.

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,

Defendants.

Civil Action No. 19-C-59

**Presiding Judge Christopher C.
Wilkes**

**Discovery Commissioner:
Russell M. Clawges, Jr.**

ORDER GRANTING PLAINTIFFS' SECOND MOTION TO COMPEL

This matter came before the Discovery Commissioner this 12th day of April 2021. The Plaintiffs Axiall Corporation ("Axiall") and Westlake Chemical Corporation (collectively, "Westlake"), by counsel, have filed Plaintiffs' Second Motion to Compel the production of all documents relating to the origin, negotiation, drafting, placement, interpretation, and underwriting of the property policies issued by the Insurer Defendants (the "Insurers") to Axiall, or its predecessor Georgia Gulf, for each policy period from the date that each Insurer first issued a property policy to Axiall (or Georgia Gulf), until the 2015-2016 policy period. Westlake and the Insurers have fully briefed the issues necessary, and a hearing was held before the Discovery

Commissioner. Upon full consideration of the issues, the record, and the pertinent legal authorities, the Discovery Commissioner enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. This litigation arises out of the Insurers' refusal to provide coverage to Westlake under all-risk commercial property insurance policies that they issued to Axiall (which was later acquired by Westlake) with a Period of Insurance of November 19, 2015 to November 19, 2016 (hereinafter, the "Policies"). *See* Plaintiffs' Brief at 1.

2. On August 27, 2016, a railroad tank car containing pressurized liquid chlorine ruptured at the Plant, releasing a large chlorine gas cloud that moved across the Plant, allegedly causing or resulting in direct physical loss or damage to property at the Plant insured under the Policies.

3. In their Answer to Plaintiffs' Complaint, the Insurers have asserted the application of certain provisions, conditions and exclusions in the Policies as affirmative defenses to Westlake's breach-of-contract and declaratory-judgment causes of action. *See id.* Therefore, a central question in this litigation is the proper meaning, interpretation, and application of these provisions, conditions and exclusions.

4. Westlake served its First Requests for the Production of Documents Directed to All Defendants ("RFPs") on June 28, 2019. *See id.* at 5. These RFPs specifically included requests for the Insurers' underwriting files and underwriting manuals, as well as any documents related to "the existence, terms, conditions, interpretation or scope of coverage of each such POLICY." *See id.*

5. Throughout November and December 2020, Westlake took depositions of the Insurers' Rule 30(b)(7) corporate representatives on topics related to the Insurers' underwriting and issuance of the Policies. Each of the Insurers' 30(b)(7) corporate representatives designated on underwriting topics testified that the 2015-2016 Policies were renewals of prior years' policies issued to Axiall. *Id.*

6. Insurer witnesses testified that, in order to understand the origins of the terms in the 2015-2016 Policies, one would need to look to the underwriting documents related to issuance of policies to Axiall (including its predecessor, Georgia Gulf Corporation) in prior policy years, and that the underwriting process for the 2015-2016 Policies was "truncated" as a result. *Id.* at 5-6.

7. The lead claims handler, who handled the claim on behalf of National Union Fire Insurance of Pittsburgh, Pa. admitted that a series of uninterrupted renewal policies constitutes a single "active policy." Plaintiffs' Reply at 2.

8. Further demonstrating the relevance of underwriting records pertaining to the preceding years' policies that each Insurer issued to Axiall (or its predecessor, Georgia Gulf), as opposed to just the 2015-2016 renewal Policies, the Insurers themselves have sought this information in this litigation in their subpoena and notice of deposition to the insurance broker Willis Towers Watson ("Willis") and have demanded that Westlake produce all documents formerly in the possession of Axiall's Risk Management Department, without limiting that request to just the 2015-2016 renewal policy. Plaintiffs' Brief at 6; Plaintiffs' Reply at 13; Exhibit I to Plaintiffs' Reply.

9. In addition to Westlake's RFPs, following each Rule 30(b)(7) deposition on underwriting topics, Westlake requested that each Insurer produce documents, which were

identified by their respective corporate-designee, and which relate to the origin, negotiation, drafting, placement, interpretation, and underwriting of the relevant policies dating back to whenever each Insurer first issued a policy to Axiall (or its predecessor, Georgia Gulf). The Insurers have continued to object and have refused to produce such documents, contending that pre-2015 underwriting documents are irrelevant. *Id.*

10. On February 16, 2021, Westlake filed the instant Motion to Compel (the “Motion”) the production of all documents relating to the origin, negotiation, drafting, placement, interpretation, and underwriting of the property policies issued by the Insurers to Axiall, or its predecessor Georgia Gulf, for each policy period from the date that each Insurer first issued a property policy to Axiall (or Georgia Gulf), until the 2015-2016 policy period. *See generally* Plaintiffs’ Brief.

11. On March 11, 2021, the Insurers filed their Response in Opposition to Plaintiffs’ Second Motion to Compel (the “Response”) arguing that they should not be compelled to produce responsive, non-privileged underwriting documents relating to the policy periods predating the 2015-2016 policy renewal period because: (1) documents pertaining to the underwriting of the original policies are not reasonably calculated to lead to the discovery of admissible evidence, because Westlake has not declared any policy language to be ambiguous, and extrinsic evidence is not admissible if policy language is unambiguous; (2) these documents are unreasonably cumulative and obtainable from a less burdensome and less expensive source; (3) the Insurers have not themselves opened the door to documents pertaining to the earlier policies; and (4) Westlake has the burden of specifying what year each policy was first underwritten. *See generally* the Response.

12. On March 18, 2021, Westlake filed its Reply In Support of Plaintiffs' Second Motion to Compel Discovery (the "Reply") asserting that: (1) evidence relating to the circumstances surrounding the drafting of the policies is relevant to determining the parties' intent and aiding the interpretation of the 2015-2016 policy; (2) the Insurers have not carried their burden of showing any burden in searching for and producing these relevant documents; (3) the Insurers themselves opened the door to this discovery with their own discovery requests; and (4) the Insurers' request for a "limitation" is not made in good faith. *See generally* Plaintiffs' Reply.

13. Furthermore, at the hearing before the Discovery Commissioner the Defendants' counsel asserted, for the first time, that the Plaintiff's request is oppressive on its face, thus relieving the Defendants of the need to provide affidavits in support of their claim that the request is overly burdensome.

14. The Discovery Commissioner has received, but not considered submissions by counsel made after the hearing.

15. The Discovery Commissioner finds that the issues in Plaintiffs' Motion to Compel have been fully briefed and argued and are now ripe for decision.

CONCLUSIONS OF LAW

"As a general rule, the scope of discovery under Rule 26 of the West Virginia Rules of Civil Procedure is quite broad and encompasses 'any matter, not privileged, which is relevant to the subject matter involved in the pending action.'" *State ex rel. Jaguar Land Rover Ltd. v. King*, No. 19-0222, 2019 WL 5681486, at *4 (W. Va. Nov. 1, 2019) (quoting W. Va. R. Civ. P. 26(b)(1)); Feb. 10, 2021 Order at 3 ("Generally speaking, the discovery process allows litigants to obtain materials that are critical to the proof of their case. As such, materials that are relevant

and probative to the asserted claim, or any defense thereto, usually are discoverable.”).

Discovery is not limited to admissible evidence, it also “applies to information reasonably calculated to lead to the discovery of admissible evidence.” *State ex rel. State Farm Mut. Auto. Ins. Co. v. Cramer*, 785 S.E.2d 257, 264 (W. Va. 2016).

The court should only limit discovery if it finds the requests “unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake in the litigation.” W. Va. R. Civ. P. 26(b)(1)(C) (“Rule 26”). This language is similar to the Federal Rules of Civil Procedure, and, historically, West Virginia courts have found federal case law persuasive when assessing whether discovery is “burdensome or oppressive.” *Truman v. Farmers & Merchs. Bank*, 375 S.E.2d 765, 768 (W. Va. 1988).

When a court reviews a party’s claim that the discovery sought is burdensome or oppressive in nature, the court must consider several factors: (1) the requesting party’s need to obtain the information versus the burden placed on the producing party; (2) whether the opposing party has adequately demonstrated why the discovery is a burden (unless the discovery request is oppressive on its face); and (3) the relevancy and materiality of the information sought by the requesting party. *State Farm Mut. Auto Ins. Co. v. Stephens*, 425 S.E.2d 577, 583 (W. Va. 1992).

The issue before this Discovery Commissioner is whether the documents sought by Westlake are relevant, non-privileged, and not unduly burdensome to produce. Westlake seeks the following documents from the Insurers’ underwriting files that the Insurers’ 30(b)(7) witnesses themselves have testified as being relevant to the meaning, interpretation, and/or application of the at-issue language:

- Any broker submissions, including presentations and brochures provided by the broker;
- Underwriting manuals, including any updates thereto;
- Lists of standard exclusions;
- Draft/standard-form endorsements;
- Policy forms, including those used by the Insurer and those provided by the broker;
- The policy and binder issued to Axiall (or its predecessor);
- Notes from any underwriting meetings;
- Email communications with the broker;
- Email communications with any other Insurer related to the foregoing; and
- Engineering reports.

Plaintiffs' Brief at 9. Not only do these documents fall squarely within the scope of Westlake's RFP No. 8, but the Insurers' own 30(b)(7) corporate representatives on underwriting topics testified that they relied on these very documents during the process of underwriting Axiall's policies. *Id.* Moreover, the Insurers have produced – or have agreed to produce – these documents from the underwriting files for the 2015-2016 policy period, thereby conceding the relevance of these types of documents to the issues in this litigation. *Id.* at 9-10.

Documents relating to the origin of the language are potentially relevant to the meaning and application of insurance policy language. *Id.* at 11. Here, the parties dispute the meaning and application of certain exclusions, and the origin and history with respect to the drafting and incorporation of those provisions into the policies, or revisions thereto, in prior years could provide important evidence regarding the parties' intent behind the language. *Id.* The Insurers' 30(b)(7) corporate representatives on underwriting topics testified that their 2015-2016 policy issued to Axiall was a renewal of prior years' policies. *Id.* Because the 2015-2016 policy is a

renewal and each uninterrupted renewal is part of a single “active policy”, the negotiations and drafting of the language for the prior policy years is indisputably relevant. *Id.*; Plaintiffs’ Reply at 2.

The Insurers have conceded the relevance of such documents by indicating their intent to seek testimony from Willis – the insurance broker involved in the subject policies – regarding the length of their relationship with Axiall, the “origin, meaning, and application” of the exclusions, and the “drafting, selection, use, adoption, and/or approval” of that language. Plaintiffs’ Brief at 12.

Because the relevance of the documents sought by Westlake has been established, the question then becomes whether the Insurers can show that production is unduly burdensome. The Insurers present no evidence of any kind – no affidavits, no deposition testimony, no documentary evidence – to substantiate their claim that the requested discovery would be unduly burdensome (Response at 6-8), but argued for the first time at the hearing that the request is oppressive on its face. The Discovery Commissioner is not convinced that the request is oppressive on its face given Plaintiffs’ willingness to meet and confer on burdensomeness issues. The Supreme Court of West Virginia has explained that such an objection cannot be sustained on the basis of “unsubstantiated or conclusory statement that a discovery request is overly broad and burdensome.” *State ex rel. Allstate Ins. Co. v. Gaughan*, 640 S.E.2d 176, 183 (W. Va. 2006) (“an objection that discovery is overly broad and unduly burdensome must be supported by affidavits or evidence revealing the nature of the burden and why the discovery is objectionable” and a “[s]tatement that discovery request would require party to expend considerable time and effort analyzing huge volumes of documents and information’ [is] insufficient....”) (internal citations and punctuation omitted).

In light of the foregoing, the Discovery Commissioner concludes that the underwriting documents sought by Westlake are relevant to this Action and would not impose any substantial burden on the Insurers to produce. As such, the Discovery Commissioner orders the Insurers to produce documents regarding the underwriting of each property policy issued to Axiall (or its predecessor Georgia Gulf) from whenever each Insurer first issued a policy to Axiall (or Georgia Gulf) containing the relevant language through 2015. Such production should include, but is not necessarily limited to, the following:


- Any broker submissions, including presentations and brochures provided by the broker;
- Underwriting manuals, including any updates thereto;
- Lists of standard exclusions;
- Draft/standard-form endorsements;
- Policy forms, including those used by the Insurer and those provided by the broker;
- The policy and binder issued to Axiall (or its predecessor);
- Notes from any underwriting meetings;
- Email communications with the broker;
- Email communications with any other Insurer related to the foregoing; and
- Engineering reports.

CONCLUSION

Upon consideration of Plaintiffs' Second Motion to Compel Discovery, and the briefs and arguments in support thereof and in opposition thereto, the Discovery Commissioner hereby Orders that the Insurers to produce to Westlake, within thirty (30) days hereof, all documents in their possession, custody, or control, relating to the origin, negotiation, drafting, placement, interpretation, and underwriting of the property policies they issued to Axiall, or its predecessor

Georgia Gulf Corporation, for each policy period, beginning with the period that each Insurer first issued a property policy to Axiall (or Georgia Gulf), until the 2015-2016 policy period, including but not limited to the categories of documents discussed in this Order.

The Discovery Commissioner directs the Circuit Clerk to distribute attested copies of this Order to all counsel of record, to Judge Christopher C. Wilkes at the Business Court Central Office at West Virginia Business Court Division, 380 West South Street, Suite 2100, Martinsburg, WV 25401 and to Judge Russell M. Clawges, Jr., Discovery Commissioner, at 9 Stewart Farm Lane, Morgantown, WV 26508.


RUSSELL M. CLAWGES, JR.
DISCOVERY COMMISSIONER

A Copy Teste:

Joseph M. Rucki, Clerk

By  Deputy