

FILED

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

NOV 19 2021

AXIALL CORPORATION and  
WESTLAKE CHEMICAL  
CORPORATION,

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 PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT  
REGARDING DEFENDANTS' ASBESTOS EXCLUSION DEFENSE AND GRANTING  
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT CONCERNING  
ENFORCEMENT OF ASBESTOS EXCLUSIONS**

This matter came before the Court this 19<sup>th</sup> day of November 2021, upon Plaintiffs' Motion for Partial Summary Judgment Regarding Defendants' Asbestos Exclusion Defense and Defendants' Motion for Summary Judgment Concerning Enforcement of Asbestos Exclusions. The Plaintiffs, Axiall Corporation and Westlake Chemical Corporation (hereinafter "Plaintiffs" or "Westlake"), by counsel, Travis L. Brannon, 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. 4; Defs' 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.

2. The thirteen insurance policies at issue in this matter (the "Policies") are all part of a commercial property insurance program that Axiall purchased from the Insurers for substantial premiums. *See* Pl's Mem., p. 3. The Policies also contain multiple endorsements, and at issue in the instant motion is Endorsement No. 5 titled "Asbestos Exclusion". *Id.*

3. Although there existed an investigation of the Tank Car Rupture and resulting damage, in April 2019, the Insurers denied coverage for the entirety of Westlake's claim on the basis, among other defenses, that the claimed damage involved asbestos excluded under Endorsement No. 5. *Id.* at 4.

4. The Policy's Asbestos Exclusion, Endorsement No. 5, states in relevant part:

#### **ASBESTOS EXCLUSION**

A. This policy only insures asbestos physically incorporated in an insured building or structure, and then only that part of the asbestos which has been *physically damaged* during the policy period by one of these *listed Perils*:

Fire; Smoke; Explosion; Lightning; Windstorm; Hail; Direct impact of vehicle, aircraft or vessel; Riot or civil commotion; Vandalism or malicious mischief; or accidental discharge of fire protective equipment; collapse; falling objects, weight of snow, ice or sleet; Earthquake; Flood; Accident to an Object.

This coverage is subject to all limitations in the policy to which this endorsement is attached and, in addition, to each of the following specific limitations:

1. The said building or structure must be insured under this policy for damage by that Listed Peril.
  2. The Listed Peril must be the immediate, sole cause of the damage to the. [sic]
  3. The Assured must report to the Company the existence and cost of the damage as soon as practicable after the Listed Peril first damaged the asbestos. However this policy does not insure any such damage first reported to the Company more than 12 (twelve) months after the expiration, or termination, of the policy period.
  4. Insurance under this policy in respect of asbestos shall not include any sum relating to:
    - (i) any faults in the design, manufacture or installation of the asbestos.
    - (ii) Asbestos not physically damaged by the Listed Peril including any governmental or regulatory authority direction or request of whatsoever nature relating to undamaged asbestos.
- B. Except as set forth in the foregoing Section A., this policy does not insure asbestos or any sum relating thereto.

All other terms, conditions and limitations remain unaltered.

*See Def's Resp., Ex. A, p. 40.*

5. Also at issue is Endorsement No. 19 of the National Union Policy, which contains an additional asbestos exclusion. Endorsement No. 19 of the National Union Policy, the

“Pollution, Contamination, Debris Removal Exclusion Endorsement”, excludes coverage for asbestos removal from any good, product, or structure.

6. Endorsement No. 19 provides in relevant part:

3. Asbestos, Dioxin or Polychlorinated Biphenols Exclusions

This policy does not cover—

a) **Asbestos**, dioxin or polychlorinated biphenols (hereinafter all referred to as “Materials”) **removal from any good, product or structure** unless the asbestos is itself damaged by fire, lightning, aircraft impact, explosion, riot, civil commotion, smoke, vehicle impact, windstorm or hail, vandalism, malicious mischief, leakage or accidental discharge from automatic fire protective system.

b) Demolition or increased cost of reconstruction, repair, debris removal or loss of use necessitated by the enforcement of any law or ordinance regulating such Materials;

c) Any governmental direction or request declaring that such Materials present in or part of or utilized on any undamaged portion of the insured’s property can no longer be used for the purpose for which it was intended or installed and must be removed or modified.

The exception to exclusion 3(a), above, does not apply to payment for the investigation or defense of any loss, damage or any undamaged portion of the insured’s property can no longer be used for the purpose for which it was intended[.]

\*\*\*

*See* Defs’ Mot., p. 15; *see also* Defs’ Mot., Ex. A.

7. With regard to asbestos, on March 20, 2019, Plaintiffs submitted a Proof of Loss in the amount of \$278,505,078, listing the “Cause of Loss/Damage” as “Chlorine escaped from cracked railcar.” *Id.* at 4-5. In support of their claim, Plaintiffs submitted an Excel workbook, setting forth estimates for the replacement of various categories of property, including lagging and banding. *See* Def’s Mot., p. 5. Defendants proffered that Josh Balcerek, Maintenance Superintendent for the Natrium Plant, testified during depositions regarding lagging and banding.

*Id.* He explained that “[l]agging is a protective covering that’s applied over insulation to keep the insulation intact . . . [and] covered from the environment”, and that “banding is the material that goes around the lagging to hold it all . . . in place.” *Id.* Further, he testified that some of the insulation under the lagging contained asbestos. *Id.*

8. Mr. Balcerek testified that estimated costs from various vendors represented his estimate of the potential costs of handling of any asbestos removal and abatement, including time delays associated with weather or contractor scheduling. *Id.* at 6.

9. On a prior day, Plaintiffs filed the instant Plaintiffs’ Motion for Partial Summary Judgment Regarding Defendants’ Asbestos Exclusion Defense, arguing they are “entitled to partial summary judgment on the Insurers’ asbestos exclusion defense” because Insurers have not met their burden of proving that Endorsement No. 5 applies to reduce coverage for the damage caused by the tank car rupture/chlorine release. *See* Pls’ Mem., p. 3. On a prior day, Defendants filed their Defendants’ Response in Opposition to Plaintiffs’ Motion for Partial Summary Judgment Regarding Defendants’ “Asbestos” Exclusion Defense. On a prior day, Plaintiffs filed their Reply Brief in Support of Plaintiffs’ Motion for Partial Summary Judgment Regarding Defendants’ Asbestos Exclusion Defense, averring the Response seeks to convince the Court that the scope of Endorsement No. 5 is much broader than its plain language provides. *See* Reply, p. 1.

10. Also on a prior day, Defendants filed the instant Defendants’ Motion for Summary Judgment Concerning Enforcement of Asbestos Exclusions, arguing they are entitled to summary judgment in their favor that the Policy does not insure asbestos or any sum relating thereto, including the asbestos removal and abatement and any increased costs to repair or replace other damaged equipment due to the presence of asbestos, because the exception to the

exclusion does not apply. *Id.* at 3, 7, 14. Further, Defendants argue they are entitled to summary judgment in their favor as to the application of Endorsement No. 19 because there is no genuine dispute as to whether the removal of asbestos from the insured plant is excluded, or that Plaintiffs are claiming costs for asbestos physically damaged by one of the perils listed in Paragraph 3(a) of the Endorsement. *Id.* at 3-4.

11. On or about October 7, 2021, Plaintiffs filed Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment Concerning Enforcement of Asbestos Exclusions, arguing that genuine issue of material fact exists. *See* Pls' Resp., p. 9. Specifically, with regard to Endorsement No. 5, Plaintiff argues the "outstanding issue of how much of the lagging and banding costs may or may not include the precautionary construction work for encountering asbestos is a genuine issue of material fact that precludes summary judgment for the Insurers". *Id.* Further, with regard to Endorsement No. 19, Plaintiffs argue the motion should be denied. *Id.* at 11. On or about October 21, 2021, Defendants filed Defendants' Reply Memorandum in Support of Defendants' Motion for Summary Judgment Concerning Enforcement of Asbestos Exclusions.

12. The Court also considered Statements of Material Facts submitted by both Plaintiffs and Defendants.

13. The Court finds the issue ripe for adjudication.

#### **STANDARD OF LAW**

This matter comes before the Court upon a motion for partial summary judgment filed by Plaintiffs and a motion for summary judgment filed by Defendants. Motions for summary judgment are governed by Rule 56, which states that "judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” W. Va. R. Civ. P. 56(c). West Virginia courts do “not favor the use of summary judgment, especially in complex cases, where issues involving motive and intent are present, or where factual development is necessary to clarify application of the law.” *Alpine Property Owners Ass’n, Inc. v. Mountaintop Dev. Co.*, 179 W.Va. 12, 17 (1987).

Therefore, “[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. Pt. 3, *Aetna Cas. and Surety Co. v. Fed. Ins. Co. of New York*, 148 W.Va. 160, 171 (1963); Syl. Pt. 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992); Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52 (1995). A motion for summary judgment should be denied “even where there is no dispute to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom.” *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59 (internal quotations and citations omitted).

However, if the moving party has properly supported their motion for summary judgment with affirmative evidence that there is no genuine issue of material fact, then “the burden of production shifts to the nonmoving party ‘who must either (1) rehabilitate the evidence attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f).’” *Id.* at 60.

### **CONCLUSIONS OF LAW**

At issue before the Court is whether Westlake’s claim involves claimed damage that involved asbestos excluded under Endorsement No. 5. *See* Pl’s Mem., p. 4. Defendants have

specified in their motion that this involves Plaintiffs' claim for costs for the removal and abatement of asbestos and/or ACM (asbestos containing materials) within their insurance claim. *See* Defs' Mem., p. 2.

Within the "Lagging and Banding" category of claimed damages, Plaintiffs included \$28 million for "Additional Expected T&M [time and material]." *Id.* Defendants proffered that the support provided with Plaintiffs' claim and in discovery was a single comment in the Westlake Estimate Workbook: "Due to expected change orders and conditions encountered during work – for example, asbestos." *Id.* Further, Defendants proffered that in depositions, it was discovered that the cost is an estimate by Axiall's Maintenance Superintendent of the potential costs that might be incurred for the handling of asbestos removal and abatement, including time delays associated with weather or contractor scheduling, if and when all of the allegedly damaged lagging and banding is actually replaced. *Id.*

The Court's review and reading of Endorsement No. 5 as a whole reveals that there is no genuine dispute that the Policy does not insure asbestos or any sum relating thereto and that "any sum relating thereto" would include the asbestos removal and abatement and any increased costs to repair or replace other damaged equipment due to the presence of asbestos. *See* Defs' Mem., p. 3. Because Plaintiffs are admittedly not seeking coverage for asbestos "physically incorporated in an insured building or structure" which has been physically damaged by one of the Listed Perils in Section A of Endorsement No. 5, no exceptions to the Asbestos Exclusion apply. *See* Defs' Reply, p. 2. The Court finds Plaintiffs' argument that the Asbestos Exclusion only applies to claims for damaged asbestos and not to "precautionary construction costs" relating to the potential future removal and abatement of undamaged asbestos is unconvincing. Further, it is contrary to the clear and unambiguous Policy language. *Id.* The Court finds it is



clear that the language of the Asbestos Exclusion excludes “asbestos or any sum relating thereto[,]” whether the asbestos is damaged or undamaged, unless one of the exceptions/Listed Perils in Section A of the exclusion applies.

In sum, because Plaintiffs, by their own admission, are not seeking coverage for asbestos removal or remediation for asbestos “physically incorporated in an insured building or structure” which has been physically damaged by one of the Listed Perils in Section A of Endorsement No. 5, Defendants are clearly entitled to summary judgment on this issue, and no genuine issue of material fact remains.

The Court notes that instead, Plaintiffs are seeking coverage for the costs associated with the handling of asbestos removal and abatement with regard to repair of lagging and banding. This clearly does not fall within the Listed Perils exclusion in Endorsement No. 5.

For all of these reasons, the Court finds summary judgment must be found in favor of Defendants and against Plaintiffs on this issue.

In addition, the Court addresses Endorsement No. 19 of the National Union Policy. Like in Endorsement No. 5, the Court considers that it is not claimed by Plaintiffs that the asbestos itself is damaged by a listed peril in Paragraph 3(a) (providing the policy does not cover asbestos “unless the asbestos is itself damaged by fire, lightning, aircraft impact, explosion, riot, civil commotion, smoke, vehicle impact, windstorm or hail, vandalism, malicious mischief, leakage or accidental discharge from automatic fire protective system.”) Like with Endorsement No. 5, the Plaintiffs are not claiming physical damage to asbestos physically incorporated in an insured building or structure by any of the perils listed in Paragraph 3(a). *See* Def’s Mot., p. 3. Accordingly, National Union’s Policy does not afford coverage for asbestos for this additional reason.

For all of the foregoing reasons, the Court finds summary judgment must be found in favor of Defendants and against Plaintiffs on the issue of asbestos. Accordingly, Defendants Motion for Summary Judgment Concerning Enforcement of Asbestos Exclusions must be granted, and Plaintiffs' Motion for Partial Summary Judgment Regarding Defendants' Asbestos Exclusion Defense must be denied.

### CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Plaintiffs' Motion for Partial Summary Judgment Regarding Defendants' Asbestos Exclusion Defense is hereby DENIED. It is further ADJUDGED and ORDERED that Defendants Motion for Summary Judgment Concerning Enforcement of Asbestos Exclusions is hereby GRANTED. The Court notes the objections and exceptions of the parties to any adverse ruling herein.

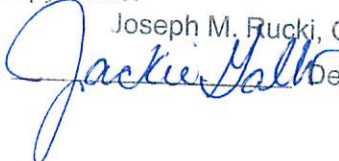
The Court directs the Circuit Clerk to distribute attested copies of this order to all counsel of record, and to the Business Court Central Office at West Virginia Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.



---

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

A Copy Teste:

By  Joseph M. Rucki, Clerk  
Deputy