

FILED

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

AXIALL CORPORATION and  
WESTLAKE CHEMICAL  
CORPORATION,

JOSEPH L. TUCK

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 GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY  
JUDGMENT REGARDING DEFENDANTS' "CORROSION" EXCLUSION DEFENSE  
AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT  
CONCERNING ENFORCEMENT OF CORROSION EXCLUSION**

This matter came before the Court this 19th day of November 2021, upon Plaintiffs' Motion for Partial Summary Judgment Regarding Defendants' "Corrosion" Exclusion Defense and Defendants' Motion for Summary Judgment Concerning Enforcement of Corrosion Exclusion. The Plaintiffs, Axiall Corporation and Westlake Chemical Corporation (hereinafter "Plaintiffs" or "Westlake"), by counsel, David R. Osipovich, 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 (referred to by the parties as the Natrium 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. 2, 9; Def's Mem., p. 1-2. 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. 4. The Policies contain multiple endorsements. At issue in the instant motion is Section 3.C of the Policies, which reads as follows:

C. Loss or damage from wear and tear, rust, corrosion, erosion, depletion or gradual deterioration, but not excluding resultant physical loss or damage from a covered peril.

*Id.* at 13.

3. In the instant motion, Westlake seeks partial summary judgment in its favor on the Insurers' "corrosion" exclusion defense, arguing the exclusion at issue in this motion is not absolute corrosion exclusion, but is part of a general wear-and-tear exclusion designed to exclude gradual deterioration. *Id.* at 4, 7. Specifically, Westlake argues that because the wear-and-tear

exclusion applies only to losses caused by non-fortuitous, gradually-operating types of wear-and-tear, such as rust, corrosion, erosion, etc., it has no application to Westlake's loss related to the tank car rupture, given that there is no dispute that the rupture was sudden, accidental, fortuitous, and unexpected. *Id.* at 3. Westlake argues corrosion is the type of property damage for which it seeks to recover, not the separate and distinct cause of that damage. *Id.*

4. On or about October 7, 2021, Defendants filed Defendants' Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment Regarding Defendants' "Corrosion" Exclusion Defense, arguing the motion should be denied because the Plaintiffs cannot avoid the policy's clear and broad corrosion exclusion, and that Plaintiffs improperly seek to modify and limit the application of the corrosion exclusion to only gradually occurring causes of loss because the exclusion excludes corrosion without any modifying or temporal limitation. *See* Defs' Resp., p. 2, 5. In fact, Defendants aver that the type of damage Plaintiffs are seeking coverage for are expenses associated with replacing corroded equipment, and if they constitute "expense caused by or resulting from" the action, process, or effect of corroding, then Defendants, and not Plaintiffs, are entitled to summary judgment<sup>1</sup>. *Id.* at 7.

5. On or about October 21, 2021, Plaintiffs filed their Reply Brief in Support of Plaintiffs' Motion for Partial Summary Judgment Regarding Defendants' "Corrosion Exclusion" Defense, arguing the Response failed to adequately rebut any of Westlake's arguments in the motion. *See* Reply, p. 4.

6. Meanwhile, on or about September 16, 2021, Defendants filed Defendants' Motion for Summary Judgment Concerning Enforcement of Corrosion Exclusion, arguing the Policy should not cover the replacement of certain equipment at the Natrium Plant that chlorine

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<sup>1</sup> The Court notes Defendants have filed their own coverage motion for summary judgment on the issue of corrosion.

contamination has caused or will cause corrosion because corrosion is explicitly excluded from the Policies. *See* Def's Mem., p. 2.

7. On a prior day, Plaintiffs submitted Responses, and the Court notes it entered an Order granting leave for Plaintiffs to file amended responses to correct citations and references to the record. On or about October 21, 2021, Plaintiffs filed Plaintiffs' Amended Brief in Opposition to Defendants' Motion for Summary Judgment Concerning Enforcement of Corrosion Exclusion, requesting that Defendants' motion for summary judgment be denied, and reiterating its arguments from its own motion for partial summary judgment on the issue of corrosion. *See* Pl's Resp.

8. On or about October 21, 2021, Defendants filed their Defendants' Reply Memorandum in Support of Motion for Summary Judgment Concerning Enforcement of Corrosion Exclusion, reiterating its position that the corrosion referenced in Section 3.C was not modified by words indicating it is gradual. *See* Reply, p. 2-3, 4.

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

10. 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**

In deciding both the motion for partial summary judgment filed by Plaintiffs and the motion for summary judgment filed by Defendants, the Court is tasked with deciding whether a

policy exclusion for corrosion contained in Section 3.C of the Policies applies to Plaintiffs' claimed damages.

Plaintiffs contend said policy exclusion for corrosion is actually an industry standard "wear-and-tear" exclusion that excludes coverage for non-fortuitous, non-sudden-and-accidental, "gradually-operating causes", including rust, corrosion, erosion, depletion, and gradual deterioration which does not apply to catastrophic, sudden, and accidental events like the tank car rupture at the heart of this litigation. *See* Pl's Mem., p. 2-3. Defendants, on the other hand, contend that the policy is clear and excludes corrosion without any modifying or temporal limitation. *See* Def's Resp., p. 5. Specifically, Defendants point out that the policy did not use the word "gradual" before it like it did before the word "deterioration" in Paragraph 3.C. *Id.* at 10.

Here, the Court examines the relevant section, Section 3 of the Policies. Section 3 of the Policies is a section titled "Perils Excluded". The relevant portion of Section 3, focusing on Section 3.C, contained in that section, reads as follows:

### 3. Perils Excluded

This policy does not insure against loss, damage or expense caused by or resulting from:

...

- C. Loss or damage from wear and tear, rust, corrosion, erosion, depletion or gradual deterioration, *but not excluding resultant physical loss or damage from a covered peril.*

*See* Def's Mot., Ex. A (emphasis added).

As Defendants aver, there is no dispute about the type of alleged damage Plaintiffs are seeking coverage for: expenses associated with replacing allegedly corroded equipment. *See* Def's Resp., p. 7. The cause of the corrosion damage to the equipment at the plant was the tank

car rupture and chlorine spill. *See* Pl’s Mem., p. 3. As Plaintiffs point out, corrosion is the type of property damage for which Plaintiffs seek recovery, not the separate and distinct cause of that damage. *Id.*

The Defendants’ Policies are “all risk” property policies, that cover “All Risks of Direct physical loss or damage,” unless a risk – or “peril” – is specifically excluded. *Id.* at 4, 5. The Policies do not contain exclusions for either the peril of a tank car rupture or the peril of a chemical spill. *Id.* at 4. These causative events are therefore covered perils – i.e., covered causes of loss – and Plaintiffs are entitled to recover for the corrosion damage it sustained as a result of these covered causes of loss. *Id.* Section 3 lists specifically excluded perils. It is explicitly titled, “Perils Excluded”. The Court finds and concludes that by the plain language of Section 3.C, which states that corrosion is a listed excluded peril, “but not excluding resultant physical loss or damage from a covered peril”, the resultant corrosion damage from the covered chlorine release peril would not be excluded.

Further, each of the lettered paragraphs in Section 3 describes specific excluded causes of loss, and not types of excluded damage. *See* Pl’s Mem., p. 6. The first sentence of the “Perils Excluded” section expressly uses the phrase “caused by or resulting from,” making it clear that what follows in the lettered paragraphs are *causes of loss or damage*, and not types of damage resulting from another cause. *Id.* The Court notes that other types of specific loss excluded in Section 3 are war, hostile, or warlike action in time of peace or war (3.A), nuclear reaction, radiation or radioactive contamination (3.B), loss or damage from inherent vice, faulty methods of construction, errors or omissions in plan or specification design or errors in processing, latent defect, faulty materials, or workmanship (3.D), and mysterious disappearance loss or shortage disclosed on making inventory. *See* Def’s Mot., Ex. A.

Whether or not Section 3.C constitutes an “absolute corrosion exclusion” (*See* Pl’s Mem., p. 7, 14), or if gradual corrosion is to be treated differently, is a question that this Court need not answer at this time because the Court finds that Section 3.C does not exclude “resultant physical loss or damage from a covered peril”, and the corrosion at issue has resulted from a covered peril (the chlorine release).

Under Georgia law<sup>2</sup>, “[i]n construing an insurance contract, a court must consider it as a whole, give effect to each provision, and interpret each provision to harmonize with each other. The policy should be read as a layman would read it. Additionally, exclusions will be strictly construed against the insurer and in favor of coverage.” *York Ins. Co. v. Williams Seafood of Albany, Inc.*, 544 S.E.2d 156, 157 (Ga. 2001). Moreover, not only are exclusions strictly construed against insurers, but an insurer “[who] seeks to invoke an exclusion contained within its policy ... has the burden of showing that the facts came within the exclusion.” *Nationwide Mut. Fire Ins. Co. v. Erwin*, 525 S.E.2d 393, 395 (Ga. App. Ct.1999) (internal punctuation and citation omitted).

Because the Court finds that Section 3.C does not exclude “resultant physical loss or damage from a covered peril”, the Court concludes that Defendants have not met their burden of showing that the facts come within the exclusion. Since Section 3.C does not exclude “resultant physical loss or damage from a covered peril”, and the tank car rupture/chlorine release was the subject covered peril which caused the resultant corrosion damage, Defendants have not met their burden to show that the facts of this loss fall within the exclusion of Section 3.C.

The Court further finds and notes that the other itemized exclusions in Section 3 are all causative events, and not types of resulting damage (war, nuclear reaction, radiation or

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<sup>2</sup> The parties agree that Georgia law governs policy interpretation issues in this case. *See* Pl’s Mem., p. 12.



radioactive contamination, etc.). *See* Pl’s Mem., p. 16-17. Upon the Court’s review of Section 3 as a whole, it is clear that each of the paragraphs (3.A, 3.B, 3.C, etc.) refers only to causes of loss and not to both causes of loss and types of damages resulting from other causes. *See* Pl’s Resp., p. 4

Stated another way, “corrosion” describes the damage resulting from the tank car rupture and consequent chlorine release, which are perils that are not expressly excluded under the Policies and are therefore covered. *Id.* at 18.

For all of these reasons, the Court finds that summary judgment must be granted in Plaintiffs’ favor, and against Defendants, on the Defendants’ corrosion exclusion defense. The Court finds that Defendants’ motion for summary judgment must be denied. Further, the Court finds that Plaintiffs’ motion for partial summary judgment must be granted. The Court further hereby grants Plaintiffs’ request for a declaration that Section 3.C of the “Perils Excluded” section of the Policies has no applicability to Westlake’s claim for coverage at issue in this case. The Court notes that whether corrosion to equipment at the Natrium plant was pre-existing or a result of the August 2016 tank car rupture would be an entirely separate issue, and the Court’s ruling is limited to the fact that corrosion damage caused by the August 2016 tank car rupture is not an excluded loss under Section 3.C of the Policies.

Further, the Court also grants Plaintiffs’ request that the Court dismiss the Defendants’ affirmative defense that cites the “corrosion” exclusion, as set forth in the Seventeenth Defense in Defendants’ Answer and Defenses to Complaint, and finds said Seventeenth Defense shall be stricken.

### **CONCLUSION**

Accordingly, it is hereby ADJUDGED and ORDERED that Plaintiffs' Motion for Partial Summary Judgment Regarding Defendants' "Corrosion" Exclusion Defense is hereby GRANTED. It is further hereby ADJUDGED and ORDERED that Defendants' "corrosion" exclusion, as set forth in the Seventeenth Defense in Defendants' Answer and Defenses to Complaint, is hereby STRICKEN.

It is further hereby ADJUDGED and ORDERED that Defendants' Motion for Summary Judgment Concerning Enforcement of Corrosion Exclusion is hereby DENIED. The Court notes the objections and exceptions of the parties to any adverse ruling herein.

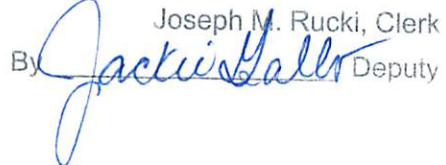
The Court directs the Circuit Clerk to distribute attested copies of this order to all counsel of record, and to the Business Court Central Office at West Virginia Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.



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

A Copy Teste:

Joseph M. Rucki, Clerk  
By  Deputy