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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

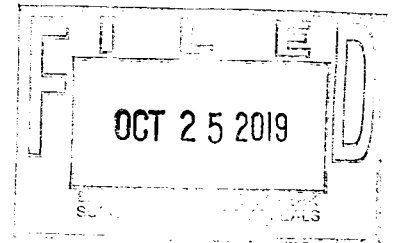
STATE OF WEST VIRGINIA, *ex rel.*)
NATIONAL UNION FIRE INSURANCE)
COMPANY OF PITTSBURGH, PA.; ALLIANZ)
GLOBAL RISKS US INSURANCE COMPANY;)
ACE AMERICAN INSURANCE COMPANY;)
ZURICH AMERICAN INSURANCE COMPANY;)
GREAT LAKES INSURANCE SE; XL)
INSURANCE AMERICA, INC.; GENERAL)
SECURITY INDEMNITY COMPANY OF)
ARIZONA; ASPEN INSURANCE UK LIMITED;)
NAVIGATORS MANAGEMENT)
COMPANY, INC.; IRONSHORE SPECIALTY)
INSURANCE COMPANY; VALIDUS)
SPECIALTY UNDERWRITING SERVICES,)
INC.; and HDI-GERLING AMERICA)
INSURANCE COMPANY,)

Petitioners,

v.)

THE HONORABLE DAVID W. HUMMEL, JR.)
JUDGE OF THE SECOND JUDICIAL)
CIRCUIT, AND AXIAL CORPORATION,)
AND WESTLAKE CHEMICAL)
CORPORATION,)

Respondents.)



From the Circuit Court of Marshall County, West Virginia
No. 19-C-59, The Honorable Judge David W. Hummel, Jr.

PETITION FOR WRIT OF PROHIBITION

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PETITION FOR WRIT OF PROHIBITION

Pursuant to Rule 16 of the West Virginia Rules of Appellate Procedure, the State of West Virginia, upon the relation of National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union"); Allianz Global Risks US Insurance Company ("Allianz"); ACE American Insurance Company ("ACE"); Zurich American Insurance Company ("Zurich"); Great Lakes Insurance SE ("Great Lakes"); XL Insurance America, Inc. ("XL"); General Security Indemnity Company of Arizona ("GSINDA"); Aspen Insurance UK Limited ("Aspen"); Navigators Management Company, Inc. ("Navigators"); Ironshore Specialty Insurance Company ("Ironshore"); Validus Specialty Underwriting Services, Inc. ("Validus"); and HDI-Gerling America Insurance Company ("HDI") (collectively "Insurers"), seeks a writ of prohibition pursuant to the original jurisdiction of this Court. In support of this petition for relief against the actions of Respondent The Honorable David W. Hummel, Jr., Judge of the Second Judicial Circuit ("Respondent" or the "Circuit Court"), Insurers submit the following verified statements of the case and the facts, pertinent argument showing why relief should be granted, and an appendix of documentary proof.¹

I. QUESTION PRESENTED

A. Whether the extra-contractual bad faith claims brought against Insurers in the underlying matter are governed by Georgia law, as agreed in the subject insurance contract.

II. STATEMENT OF THE CASE

Insurers, as a quota share Market, issued 13 separate policies (collectively "Policy")² of commercial property insurance to Axiall Corporation ("Axiall") insuring its various properties

¹ All references to the Appendix filed with this Court will be: [APP ____].

² "Policy" means: National Union Nos. 020786808 and 27015349; Allianz No. CLP3016295; ACE No. PGL N09175325; Zurich No. OGR 8342756-19; Great Lakes No. B080110429J15; XL No.

throughout the United States, including the Natrium, Marshall County, West Virginia chlorine and chemical manufacturing plant (“Plant”). [APP 000216-000288] The Policy insures Axiall for all risks of direct physical loss or damage to property insured, subject to its terms, conditions, endorsements, and exclusions, for the term of November 19, 2015 to November 19, 2016.

The Policy is a manuscript form policy. Axiall procured coverage through its sophisticated broker, Willis of New York, Inc., who actively participated in procuring the Policy and involved wording. The Policy includes a broad choice-of-law provision ostensibly reflecting Axiall’s selection of Georgia law to govern its disputes with Insurers: “Any dispute concerning or related to this insurance will be determined in accordance with the laws of the State of Georgia.” [APP 000252] When the Policy was issued, and when the chlorine release (discussed below) occurred, Axiall was headquartered in Georgia. This was presumably Axiall’s basis for selecting Georgia law. Axiall did not select, nor does the Policy provide for, the application of West Virginia law to any dispute. [APP 000252]

A. The Chlorine Release

On August 27, 2016, a fully-loaded railroad tank car at the Plant ruptured and released approximately 178,400 pounds of liquefied chlorine (the “chlorine release”). The released chlorine formed a plume that, for a short period of time, allegedly travelled downwind through certain areas of the Plant. Despite the Plant being a 70-plus year old chlorine and caustic chemicals manufacturing facility, Axiall and Westlake Chemical Corporation (collectively

US00011825PR15A; GSINDA No. 10F149909-2015-1; Aspen No. OGADFE315; Navigators No. 15NMNY1422-01; Ironshore No. 1843502; Validus No. AJC096910G15; and HDI No. XPD12642-02. The policies contain the same relevant provisions, except National Union Policy No. 020786808 contains an additional exclusion by endorsement for pollution and contamination. Otherwise, National Union Policy No. 020786808, [APP 000216-000288], is representative of the policies.

“Axiall/Westlake”)³ have alleged the Plant suffered corrosion and/or contamination damage as a result of the chlorine release. The Policy, however, broadly excludes coverage for corrosion and/or contamination damage – a fact which underlies the current insurance coverage dispute with respect to the chlorine release.

B. The Coverage Dispute

The involved coverage issues center on the application of the Policy provisions, including, *inter alia*, the faulty workmanship, corrosion, and contamination exclusions. On January 28, 2019, following more than a year of correspondence concerning the involved coverage issues, Insurers advised Axiall/Westlake that there was no coverage for the chlorine release based on the Policy’s faulty workmanship, corrosion, and contamination exclusions. [APP 001097-001104] At that time, Axiall/Westlake had submitted a single claim for coverage on May 22, 2018 of approximately \$2M (net of the applicable \$3.75M property damage deductible). [APP 001092-001096] After Insurers’ January 28, 2019 coverage position letter, Axiall/Westlake submitted a second claim on March 20, 2019 for \$278M, the majority of which had not been incurred and consisted of estimates to replace property at the Plant at some point in the future. [APP 001144-001149] Insurers denied this second claim on April 9, 2019 because it requested coverage for the same type of excluded damages. [APP 001150-001158] Insurers also filed a declaratory judgment action in Delaware on April 9, 2019 in order to resolve this coverage dispute. [APP 000137-000173] The following day, on April 10, 2019, Axiall/Westlake filed suit in West Virginia in the Marshall County Circuit Court. [APP 000001-000021]

³ Axiall owned the Plant at the time the Policy was issued and at the time of the chlorine release. Upon information and belief, days later, Westlake closed on the acquisition of Axiall, effective on or about September 1, 2016. Thus, Axiall owns and operates the Plant and is the named insured in the Policy, and Westlake may therefore lack an insurable interest in this matter. Nonetheless, for purposes of this petition (and for ease of reference), Insurers refer to Axiall and Westlake collectively as “Axiall/Westlake”.

Axiall/Westlake's Complaint asserts five separate counts: (I) Declaratory Judgment, (II) Breach of Contract, (III) Bad Faith under Georgia Code Section 33-4-6, (IV) Common Law Bad Faith under West Virginia Law, and (V) Statutory Bad Faith under the West Virginia Unfair Trade Practices Act ("WVUTPA") Section 33-11-4. [APP 000014-000020] The determination of coverage and Policy response is the threshold issue to be decided in this action.⁴

C. Procedural Posture of Case

Insurers filed a declaratory judgment action in Delaware on April 9, 2019 requesting an adjudication that the Policy excludes Axiall/Westlake's claimed losses caused by the chlorine release. [APP 000137-000173]. On April 10, 2019, Axiall/Westlake commenced the underlying action. Axiall/Westlake filed their Motion to Dismiss or Stay the Delaware action on May 17, 2019, and the Delaware Superior Court granted Axiall/Westlake's Motion to Stay on August 1, 2019. [APP 000484-000510] and [APP 001481-001483] Insurers filed their Answer and Defenses on May 23, 2019, and filed their Motion to Dismiss or Stay on June 28, 2019. [APP 000022-000047] and [APP 000048-000136] The Circuit Court denied Insurers' Motion to Dismiss or Stay on September 5, 2019. [APP 001646-001648] On October 11, 2019, this Court granted the referral of the underlying action to the Business Court Division. [APP 001644-001645]

At the hearing on Insurers' Motion to Dismiss or Stay, the Circuit Court *sua sponte* ruled that West Virginia law applied to Axiall/Westlake's bad faith claims. The Circuit Court also *sua sponte* bifurcated and stayed Axiall/Westlake's bad faith claims, and continued the stay of

⁴ Georgia law, which governs this entire dispute, provides that coverage is a threshold issue that must be decided before turning to bad faith claims. *See, e.g., Bank of Camilla v. St. Paul Mercury Ins. Co.*, 939 F. Supp. 2d 1299, 1310 (M.D. Ga. 2013).

discovery in the underlying matter to allow the parties to file a Petition for Writ of Prohibition. [APP 001647]

On October 22, 2019, the Circuit Court entered its Order Following September 5, 2019 Hearing (the “Order”). [APP 001646-001648] The Order provides that Count II of Axiall/Westlake’s Complaint, alleging breach of contract, is governed by Georgia law. [APP 001647] The Order further provides that Axiall/Westlake’s bad faith claims in Counts IV and V in the Complaint are governed by West Virginia law and states that “this issue has not been briefed or argued before the Court.” [APP 001647] Insurers file this Petition for Writ of Prohibition to prohibit the Circuit Court⁵ from applying West Virginia law to Axiall/Westlake’s bad faith claims because Georgia law governs the entire dispute, and request this Court to vacate that portion of the Order finding that Axiall/Westlake’s bad faith claims are governed by West Virginia law.

III. SUMMARY OF ARGUMENT

As an initial matter, Insurers deny Axiall/Westlake’s allegations and claims for bad faith in their totality. However, since bad faith has been asserted, this petition is being filed to ensure that the Policy’s Georgia choice-of-law provision is applied to all claims – including those for bad faith. The Circuit Court’s *sua sponte* finding that Axiall/Westlake’s bad faith claims should be governed by West Virginia law was erroneous, and Insurers are petitioning this Court to issue a writ of prohibition to prevent the Circuit Court from applying West Virginia law to the bad faith claims.

Axiall/Westlake’s bad faith claims against Insurers are governed by Georgia law. First, the Policy’s broad Georgia choice-of-law provision applies to “[a]ny dispute concerning or related to this insurance” and therefore specifically encompasses all of Axiall/Westlake’s claims against

⁵ Because the underlying matter was referred to the Business Court Division on October 11, 2019, the term “Circuit Court” as used herein also refers to the Business Court Division. [APP 001644-001645]

Insurers. [APP 000252] Alternatively, the bad faith claims arise out of the contractual relationship between Insurers and Axiall and should also be governed by Georgia law. Georgia law governs the contractual relationship between Insurers and Axiall/Westlake and the attendant coverage issues in the underlying matter. The Order correctly finds that Axiall/Westlake's breach of contract claim is governed by Georgia law. [APP 001647] Axiall/Westlake's bad faith claims (which arise from their breach of contract claim) must likewise be governed by Georgia law.

Georgia law clearly governs the Policy, and, by extension, the breadth of the Policy's choice-of-law provision. Georgia law distinguishes between narrow choice-of-law provisions that apply only to the terms of the contract itself, and broad choice-of-law provisions that also encompass tort and statutory claims that grow out of the contractual relationship. Under Georgia law, choice-of-law provisions that apply to all claims or disputes arising out of the contractual relationship between the parties will encompass related tort and statutory claims. *See Young v. W.S. Badcock Corp.*, 474 S.E.2d 87, 88 (Ga. Ct. App. 1996). Conversely, where the choice-of-law provision is limited only to the terms of the agreement, Georgia courts will not extend the provision beyond contractual claims. *See Baxter v. Fairfield Fin. Servs., Inc.*, 704 S.E.2d 423, 428 (Ga. Ct. App. 2010).⁶ The distinction between narrow and broad choice-of-law provisions under Georgia law is consistent with numerous other jurisdictions. *See, e.g., Krock v. Lipsay*, 97 F.3d 640, 645 (2d Cir. 1996) (applying New York law); *Turtur v. Rothschild Registry Int'l, Inc.*, 26 F.3d 304, 309-10 (2d Cir. 1994) (applying Texas law); *Work While U-Wait, Inc. v. Teleasy Corp.*, No. 2:07-00266, 2007 WL 3125269, at *6 (S.D. W. Va. Oct. 24, 2007) (applying West Virginia law). Under these authorities, the Policy's broad Georgia choice-of-law provision encompasses all claims between

⁶ However, under Georgia law even narrow choice-of-law provisions encompass bad faith claims under section 33-4-6 because such claims only arise from the contractual relationship between the parties. *See Deep Sea Fin., LLC v. British Marine Luxembourg, S.A.*, No. CV 409-022, 2010 WL 3463591, at *3 (S.D. Ga. Sept. 1, 2010) (applying Georgia law).

the parties. This result is further mandated here because the parties are sophisticated entities who specifically agreed that Georgia law should apply to *any dispute* related to insurance. This language clearly contemplates disputes beyond interpretation of the Policy itself, which necessarily would include an alleged bad faith claim.

Alternatively, the claims should also be governed by Georgia law because Axiall/Westlake's bad faith claims arise out of the Policy. In *Pen Coal Corp. v. William H. McGee & Co.*, the federal district court held that both breach of the duty of good faith and fair dealing and WVUTPA claims sound in contract in the first-party insurance context. 903 F. Supp. 980, 983 (S.D. W. Va. 1995) (applying West Virginia law). Because they arise out of the contract, Axiall/Westlake's bad faith claims (which are largely identical to those asserted in *Pen Coal*) should be governed by Georgia law.

Axiall/Westlake's common law bad faith claim for breach of the implied duty of good faith and fair dealing cannot exist independent of a breach of contract claim and should be governed by Georgia law. *See, e.g., Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W. Va. 430, 434, 504 S.E.2d 893, 898 (1998) ("[T]he common law duty of good faith and fair dealing in insurance cases under [West Virginia] law runs between insurers and insureds and is based on the existence of a contractual relationship. In the absence of such a relationship there is simply nothing to support a common law duty of good faith and fair dealing on the part of insurance carriers"). Again, the Order correctly finds that Axiall/Westlake's breach of contract claim is governed by Georgia law. [APP 001647] Axiall/Westlake's claim for breach of the implied duty of good faith and fair dealing should therefore be governed by the same state's law. Also, under *Pen Coal*, WVUTPA claims are contractual in the first-party insurance context. *See Pen Coal*, 903 F. Supp. at 983. Thus,

Georgia law should apply to and preclude Axiall/Westlake's bad faith claims under West Virginia law.

For these reasons, this Court should vacate the portion of the Circuit Court's Order finding that West Virginia law applies to Axiall/Westlake's bad faith claims.

IV. STATEMENT REGARDING ORAL ARGUMENT

This case is appropriate for oral argument under Rule 19(a) because it involves an assignment of error in the application of settled law and a narrow issue of law that has significant implications in the underlying matter. This case is also appropriate for oral argument under Rule 20(a) because it involves an issue of first impression – the scope of a contractual choice-of-law provision in the context of a first-party insurance coverage dispute involving extra-contractual claims. This specific issue has not been addressed by this Court, and application of the aforementioned principles of settled law to this type of contractual choice-of-law provision would provide certainty to parties to insurance contracts. Further, the parties were not afforded an opportunity to brief or argue the relevant issues to the Circuit Court. Therefore, the decisional process would be significantly aided by oral argument.

V. ARGUMENT

A. Jurisdiction and Standard of Review

This Court has jurisdiction to hear this Petition for Writ of Prohibition under Article VIII, Section 3 of the West Virginia Constitution and pursuant to West Virginia Code sections 51-1-3 and 53-1-2. *See also* W. VA. R. APP. P. 16 (West 2019).

West Virginia Code section 53-1-1 provides that a right to a writ of prohibition shall lie, in part, where a Circuit Court "exceeds its legitimate powers." W. VA. CODE ANN. § 53-1-1 (West 2019); *see also James M.B. v. Carolyn M.*, 193 W. Va. 289, 292 n.3, 456 S.E.2d 16, 19 n.3 (1995).

In determining whether to issue the writ of prohibition for cases where the Circuit Court exceeds its legitimate powers, this Court examines the following factors:

(1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

Syl. Pt. 1, *State ex rel. Med. Assur. of W. Va., Inc. v. Recht*, 213 W. Va. 457, 583 S.E.2d 80 (2003) (quoting Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996)); *see also In re W. Va. Rezulin Litig.*, 214 W. Va. 52, 585 S.E.2d 52 (2003). All five factors need not be satisfied for the writ to issue, and the third factor – clear error of law – is given the most weight. *See Berger*, 199 W. Va. at 21 (“[I]t is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.”).

B. The Circuit Court's ruling that Axiall/Westlake's bad faith claims are governed by West Virginia law is clearly erroneous as a matter of law.

At the September 5, 2019 hearing on Insurers' Motion to Dismiss or Stay, the Circuit Court *sua sponte* ruled that Axiall/Westlake's bad faith claims were governed by West Virginia law and accordingly dismissed Axiall/Westlake's bad faith claim under Georgia law (asserted as Count III in their Complaint).⁷ The parties did not argue or brief the issue of which state law governs Axiall/Westlake's bad faith claims asserted in Counts III, IV, and V in their Complaint. The Circuit Court acknowledged:

⁷ Prior to ruling that West Virginia law applied to Axiall/Westlake's bad faith claims, the Circuit Court commented that insureds “get a whole whopping five thousand dollars [under the Georgia bad faith statute]. The max, isn't it?” [APP 001602:1-8] It is not clear whether it influenced the Circuit Court's decision, but that interpretation of Georgia Code section 33-4-6 is erroneous. *See* GA. CODE ANN. § 33-4-6(a) (West 2019).

Although not before the Court specifically, encompassed within the Motion to Dismiss is to dismiss all counts of the complaint filed by the plaintiff. ***And although not argued here today***, the Court is going to dismiss Count 3 of Plaintiff's Complaint and that is the Bad Faith Violation of Georgia Code 33-4-6. That's going to have to be decided anyway, so I am dismissing Count 3 entitled "Bad Faith Violation of Georgia Code 33-4-6." . . . And I know, Miss Varner, ***you didn't ask for that and your client[s] didn't ask for that specifically***, but that's what I'm doing.⁸

[APP 001623:6-17] (emphasis added). The Circuit Court later confirmed that its dismissal of Count III under Georgia law meant that it was specifically finding that West Virginia law applied to Axiall/Westlake's bad faith claims. [APP 001626:9 -001628:5]⁹ These findings were formalized in the Circuit Court's Order entered on October 22, 2019.

As noted above, Insurers did not have the opportunity to argue or brief this issue to the Circuit Court, but Axiall/Westlake's bad faith claims are governed by Georgia law for multiple reasons. First, Insurers and Axiall agreed to a Georgia choice-of-law provision that extends to "[a]ny dispute concerning or related to this insurance". [APP 000252] This broad language clearly encompasses Axiall/Westlake's bad faith claims because they are "dispute[s] concerning or related to this insurance." Alternatively, Axiall/Westlake's first-party bad faith claims arise out of the Policy (and Insurers' denial of coverage according to the terms, conditions, and exclusions of the Policy) and should also be governed by the law that governs the application of the Policy – Georgia law. The Order also correctly finds that Georgia law governs Axiall/Westlake's breach of contract claim. For these reasons, and as discussed more fully below, the Circuit Court's ruling that Axiall/Westlake's bad faith claims are governed by West Virginia law is clearly erroneous as a matter of law.

⁸ The Order further acknowledges that this issue not briefed or argued to the Circuit Court. [APP 0001647]

⁹ The Circuit Court confirmed, however, that Georgia law undisputedly governs the coverage issues under the Policy. [APP at 001627:8-17, 001628:6-12] ("The contract is governed by Georgia law. Nobody's questioning that."). This ruling was incorporated in the Order, wherein the Circuit Court found that Axiall/Westlake's breach of contract claim was governed by Georgia law. [APP 0001647]

1. The parties agreed to a Georgia choice-of-law provision that encompasses all of Axiall/Westlake's claims in the underlying dispute – including their bad faith claims.

The Policy's broad choice-of-law provision provides: "[a]ny dispute concerning or related to this insurance will be determined in accordance with the laws of the State of Georgia." [APP 000252] (emphasis added). Axiall presumably wanted Georgia law to govern any dispute because, at the time the Policy was issued and at the time of the chlorine release, Axiall was headquartered in Georgia. [APP 000217] (listing Axiall's address as 1000 Abernathy Road NE, Suite 1200, Atlanta, Georgia 30328). The choice-of-law provision is not limited in scope to the terms of the Policy, but extends to "any dispute . . . related to" insurance. Axiall/Westlake's bad faith claims are encompassed within the Policy's broad Georgia choice-of-law provision.

Georgia law governs the Policy and, by extension, the scope of the Policy's choice-of-law provision.¹⁰ Under Georgia law, the breadth of a choice-of-law provision is determined by the specific language used therein. *See Young*, 474 S.E.2d at 88. In *Young*, the Court of Appeals of Georgia decided whether a choice-of-law provision applied to the plaintiffs' fraud claim against the corporate defendant. *Id.* The relevant contract (a dealership agreement) included a choice-of-law provision that provided that the "[a]greement and the terms hereof shall be governed by and construed in accordance with the laws of the State of Florida." *Id.* The court held that this language was narrow and did not encompass the tort claim for fraud because it "[did] not state that any and all claims arising out of the relationship between the parties shall be governed by Florida law."

¹⁰ West Virginia courts recognize contractual choice-of-law provisions as presumptively valid. *Blackrock Capital Inv. Corp. v. Fish*, 239 W. Va. 89, 96, 799 S.E.2d 520, 527 (2017). There is no dispute as to the validity or enforceability of the Policy's choice-of-law provision. Axiall/Westlake affirmatively stated in paragraph 19 of their Complaint that "Defendants' policies include a 'Choice of Law' provision that provides '[a]ny dispute concerning or related to this insurance will be determined in accordance with the laws of the State of Georgia.'" [APP 000009] Insurers admitted this in their Answer and Defenses. [APP 000029]

*Id.*¹¹ However, in *Axis Specialty Insurance v. Doty-Moore Tower Services, LLC*, a federal district court decided whether negligence claims arising from contractual obligations were governed by the relevant choice-of-law provision. No. 1:06-CV-0261-JEC, 2008 WL 11335004, at *9 (N.D. Ga. Sept. 22, 2008) (applying Georgia law). In *Axis*, the choice-of-law provision applied North Carolina law to “all issues hereunder [the contract]”. *Id.* The court held that such language was sufficiently broad to encompass the tort claim for negligence. *Id.* Similarly, in the case *sub judice*, the Policy’s choice-of-law provision applies Georgia law to “[a]ny dispute concerning or related to this insurance.” [APP 000252] This broad language is similar in all material respects to the language that the Court of Appeals of Georgia stated would encompass all claims between the parties in *Young*. Thus, under Georgia law, the Policy’s choice-of-law provision should encompass all of Axiall/Westlake’s claims against Insurers – including the bad faith claims.

Although *Young* and *Axis* involved independent tort claims, claims under Georgia Code section 33-4-6 may even be encompassed by “narrow” choice-of-law provisions. In *Deep Sea Financing*, the court addressed whether a narrow choice-of-law provision that provided that the “policy shall be governed by and construed in accordance with Mexican law” encompassed a bad faith claim under section 33-4-6. 2010 WL 3463591, at *3. The court noted that although the provision was not “broad” as contemplated in *Young*, the insured’s “claim under O.C.G.A. § 33-4-6 arises solely out of the alleged contractual relationship between the parties . . . [and that] [u]nder Georgia law, an insurer’s bad faith refusal to pay an insurance claim amounts to no more than a breach of contract.” *Id.* Accordingly, the Policy’s choice-of-law provision encompasses Axiall/Westlake’s bad faith claims arising from the contractual relationship created by the Policy.

¹¹ See also *Work While U-Wait, Inc.*, 2007 WL 3125269, at *6.

Further, Georgia law is consistent with the law of numerous other jurisdictions that have addressed the breadth of choice-of-law provisions to determine whether such provisions encompass tort and statutory claims related to the contract.

Courts routinely define choice-of-law provisions limited in scope to the terms of the contract itself as “narrow”. *See, e.g., Krock*, 97 F.3d at 645. For example, in *Smith v. Lincoln Benefit Life Co.*, a federal district court in Pennsylvania found that an insurance policy’s choice-of-law provision was narrow because it provided: “This policy is subject to the laws of the state where the [application] was signed.” No. 08-01324, 2009 WL 789900, at *7 (W.D. Pa. Mar. 23, 2009) (applying Pennsylvania law). Similarly, in *Gloucester Holding Corp. v. U.S. Tape and Sticky Products, LLC*, the Delaware Chancery Court found a choice-of-law provision narrow because it provided that the relevant agreement “shall be construed, interpreted and the rights of the parties determined in accordance with the laws of the State of Delaware (without regard to any conflict of law provisions thereof).” 832 A.2d 116, 123-24 (Del. Ch. 2003).¹² In holding that the choice-of-law provision did not extend to related tort claims, the court noted that the provision did not include broad language such as “*arises out of or relates to.*” *Id.* (emphasis added). Numerous courts have reached similar conclusions.¹³ A federal district court applying West Virginia law also noted that

¹² However, the Ninth Circuit Court of Appeals has interpreted similar provisions to be broad enough to encompass tort and similar extra contractual claims. *See Hatfield v. Halifax PLC*, 564 F.3d 1177, 1182-84 (9th Cir. 2009) (applying California law); *Gen. Signal Corp. v. MCI Telecomms. Corp.*, 66 F.3d 1500, 1505-06 (9th Cir. 1995) (applying California law).

¹³ *See, e.g., Towantic Energy, L.L.C. v. Gen. Elec. Co.*, No. C 04-00446 JF, 2004 WL 1737254, at *5 (N.D. Cal. Aug. 2, 2004) (applying California law) (finding provision narrow where it stated that the “[c]ontract of sale shall be construed and interpreted in accordance with the Laws of the State of New York”); *Dorsey v. N. Life Ins. Co.*, No. Civ.A. 04-0342, 2005 WL 2036738, at *4-6 (E.D. La. Aug. 15, 2005) (applying Louisiana law) (finding provision narrow where it stated “[t]his Agreement is governed by the laws of the State of Washington”). Federal courts in New York have construed similarly worded choice-of-law provisions and found them to be “narrow” in scope. *See, e.g., Fin. One Pub. Co. Ltd. v. Lehman Brothers Special Fin., Inc.*, 414 F.3d 325, 335 (2d Cir. 2005) (applying New York law) (finding provision narrow where it stated “[t]his Agreement will be governed and construed in accordance with the laws of the State of New York”); *Ramiro Aviles v. S & P Global, Inc.*, 380 F. Supp. 3d 221, 270-71 (S.D.N.Y. 2019)

a choice-of-law provision that stated the agreement “shall be governed by and construed in accordance with the laws of the State of New York” was narrow and did not encompass tort claims because it did not “purport to govern all disputes arising under the contract or between the parties.” *Work While U-Wait, Inc.*, 2007 WL 3125269, at *6.

Conversely, broad choice-of-law provisions that apply to disputes “related to” the relevant agreement are often construed to encompass tort and/or statutory claims related to the contractual relationship. *See Turtur*, 26 F.3d at 309-10. In *Turtur*, the Second Circuit Court of Appeals read a joint choice-of-law and forum selection clause together to be broad enough to encompass all tort claims related to the relevant contract. *Id.*¹⁴ The court focused specifically on the inclusion of the language “arising out of or relating to” and stated the plaintiff’s common law fraud claim “relate[d] to” the contractual agreement between the parties. *Id.* Likewise, in *Grey Mountain Partners, LLC v. Insurity, Inc.*, the Connecticut Superior Court found the choice-of-law provision broad enough to encompass tort claims where it provided “[a]ll disputes, claims or controversies **arising out of or relating to** this Note, or the negotiation, validity or performance of this Note, or the transactions contemplated hereby shall governed by and construed in accordance with the laws of the State of Delaware.” No. X03HHDCV166067644S, 2017 WL 5641378, at *6-7 (Conn. Super. Ct. Oct. 18, 2017) (emphasis added). The court further held that the plaintiff’s Connecticut Unfair Trade Practices Act claim was precluded by operation of the broad Delaware choice-of-law provision. *Id.*

(applying New York law) (same and further noting the general “rule of thumb” that provisions including “relating to” language are broad enough to encompass related tort claims).

¹⁴ A federal district court followed *Turtur* in a case involving similar language in a choice-of-law and forum selection clause and relied on the “relating to” language in the forum selection clause to find that English law applied. *P.T. Adimitra Rayapratama v. Bankers Tr. Co.*, No. 95 Civ. 0786 (JSM), 1995 WL 495634, at *2-4 (S.D.N.Y. Aug. 21, 1995) (applying New York law). The court therefore dismissed plaintiff’s statutory RICO and commodities claims under United States laws. *Id.*

A similar result was reached in the insurance context in *Great Lakes Reinsurance (UK) PLC v. Tico Time Marine LLC*, where the court held that the applicable choice-of-law provision, which provided that “any dispute arising hereunder shall be adjudicated . . . subject to the substantive laws of the state of New York,” was broad enough to encompass alleged violations of the Texas Insurance Code. No. 4:10-CV-2060, 2011 WL 1044154, at *1, *4 (S.D. Tex. Mar. 16, 2011) (applying New York law). The court stated that, despite the fact the phrase “relating to” was not present in the choice-of-law provision, the “arising under” language was broad enough to encompass violations of the Texas Insurance Code and such claims were precluded (and should therefore be dismissed) by operation of the New York choice-of-law provision. *Id.* at *4; *see also Axis Specialty Ins. Co.*, 2008 WL 11335004, at *9. Finally, the Fourth Circuit Court of Appeals has also broadly applied a choice-of-law provision to encompass related tort claims under a provision that applied Virginia law to the “[a]greement and the rights and obligations of the parties hereunder . . . including all matters of construction, validity and performance.” *Hitachi Credit Am. Corp. v. Signet Bank*, 166 F.3d 614, 624, 628-29 (4th Cir. 1999) (applying Virginia law).

Again, under Georgia law and the other authorities discussed above, the Policy’s Georgia choice-of-law provision broadly encompasses *any* dispute related to insurance. The provision encompasses all of Axiall/Westlake’s claims related to Insurers’ denial of coverage under the Policy and should be given its full effect.

This result is further mandated by the fact that Insurers and Axiall are sophisticated entities who specifically agreed to the broad Georgia choice-of-law provision. The Fourth Circuit Court of Appeals has stated (in the context of an arbitration provision):

Both parties to this agreement were represented throughout the negotiations of the contract by able and experienced counsel. Further, the officers of both parties who engaged in the contract negotiations were sophisticated business men who negotiated at arm’s length. We are unwilling to disregard what we discern to be

clear language in favor of a claim of overreaching by one of the parties in a case such as this. Neither do we think it proper to disregard plain and unequivocal language simply because it does not follow slavishly the language of a form.

Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 814 (4th Cir. 1989). The Supreme Court of California, sitting en banc, took the same position in the context of a choice-of-law provision, stating:

We seriously doubt that any rational businessperson, attempting to provide by contract for an efficient and businesslike resolution of possible future disputes, would intend that the laws of multiple jurisdictions would apply to a single controversy having its origin in a single, contract-based relationship. . . . ***Indeed, the manifest purpose of a choice-of-law clause is precisely to avoid such a battle.***

Nedlloyd Lines B.V. v. Superior Court, 834 P.2d 1148, 1154 (Cal. 1992) (en banc) (emphasis added). The same reasoning applies in this case. The broad Georgia choice-of-law provision was included in the Policy to establish at the outset that Georgia law would govern “[a]ny dispute concerning or related to this insurance.” The language clearly contemplates disputes beyond the four corners of the Policy itself, which necessarily would include an alleged bad faith claim. Thus, the clear and unambiguous language of the broad Georgia choice-of-law provision should control.

2. Alternatively, the bad faith claims arise out of the Policy and Insurers’ denial of coverage under the Policy and should be governed by Georgia law.

The bad faith claims should be governed by Georgia law because they arise out of the Policy and implicate Insurers’ denial of coverage under the Policy. The Order correctly finds that Axiall/Westlake’s breach of contract claim is governed by Georgia law. [APP 001647]. Because Georgia law governs the contractual issues, it should also govern Axiall/Westlake’s related bad faith claims, which arise out of the contractual relationship between Insurers and Axiall.

In *Pen Coal Corp.*, a federal district court noted that when conducting a choice-of-law analysis under West Virginia law the first step is to properly characterize the involved issues as

either contractual or tort claims. 903 F. Supp. at 983. *Pen Coal* involved a suit by an insured against its commercial industrial insurer for breach of contract, breach of implied contract of good faith, and unfair trade practices under the West Virginia Unfair Trade Practices Act. *Id.* The insurance policy did not include a choice-of-law provision, and the court therefore analyzed which law should apply to the claims. *Id.* The court explained that breach of the duty of good faith and fair dealing is clearly a contractual claim, and although WVUTPA claims are part-tort and part-contract, “[f]or the purpose of choice-of-law analysis . . . unfair trade practices claims properly should be characterized as contract, not tort, claims.” *Id.* In *Pen Coal*, the lack of a choice-of-law provision in the policy meant that the court then had to analyze the applicable law under the contract standard – but in the instant case the Policy includes a broad choice-of-law provision. Thus, Axiall/Westlake’s bad faith claims (which are largely identical to those asserted in *Pen Coal*) should be governed by Georgia law.

Again, Axiall/Westlake asserted bad faith claims under West Virginia common law (breach of the implied duty of good faith and fair dealing) and the WVUTPA. Axiall/Westlake’s common law bad faith claim for breach of the implied duty of good faith and fair dealing cannot exist independent of a breach of contract claim. *See Elmore*, 202 W. Va. at 434 (“[T]he common law duty of good faith and fair dealing in insurance cases under [West Virginia] law runs between insurers and insureds and is based on the existence of a contractual relationship. In the absence of such a relationship there is simply nothing to support a common law duty of good faith and fair dealing on the part of insurance carriers”); *Delbert v. Gorby*, No. 5:11CV83, 2011 WL 4527351, at *8 (N.D. W. Va. Sept. 28, 2011) (applying West Virginia law) (noting that the duty to act in good faith “is derived in insurance claims from the contractual relationship that an insurer has with an insured”); *Trenton Energy, LLC v. EQT Prod. Co.*, No. 2:10-cv-00699, 2011 WL

3321479, at *4 (S.D. W. Va. Aug. 2, 2011) (applying West Virginia law) (granting summary judgment on breach of implied duty of good faith and fair dealing where it was not brought alongside a breach of contract claim); *Grubbs v. Westfield Ins. Co.*, 430 F. Supp. 2d 563, 567-69 (N.D. W. Va. 2006) (applying West Virginia law) (noting that a breach of the implied duty of good faith and fair dealing is unlike other tort claims because it cannot be maintained absent a contractual relationship between the parties). The Circuit Court correctly found that Axiall/Westlake's breach of contract claim is governed by Georgia law. [APP 001647] Thus, Axiall/Westlake's common law bad faith claim, which is entirely dependent on the related breach of contract claim, should also be governed by Georgia law.

Further, as noted in *Pen Coal*, WVUTPA claims are also contractual in the first-party insurance context. *See Pen Coal*, 903 F. Supp. at 983. Therefore, the Fourth Circuit's characterization in *Kenney v. Independent Order of Foresters* of the claimant's WVUTPA claim as a tort claim is distinguishable. 744 F.3d 901, 906-07 (4th Cir. 2014) (applying West Virginia law despite narrow contractual choice-of-law provision stating the "rights or obligations of . . . anyone rightfully claiming under this certificate" were governed by Virginia law). In *Kenney*, the claimant was the beneficiary of a life insurance policy who filed a WVUTPA claim against the insurer – the claimant was not a first-party insured in a contractual relationship with the insurer. *Id.* at 903-04. Further, the claimant did not raise any coverage issues or directly invoke any policy terms in her complaint. *Id.* These facts are inapposite to the instant case, where Axiall is in a direct contractual relationship with Insurers and has predicated its claims against Insurers based on their denial of coverage under the Policy. This case is more similar to *Pen Coal*, and the reasoning in *Kenney* is inapplicable in this coverage matter. *See Lee v. Saliga*, 179 W.Va. 762, 766, 373 S.E.2d 345, 349 (1988) (noting that questions of coverage sound in contract and questions of liability

sound in tort); *Howe v. Howe*, 218 W. Va. 638, 643-44, 625 S.E.2d 716, 721 (2005) (same); *Plumley v. May*, 189 W. Va. 734, 737-39, 434 S.E.2d 406, 409-411 (1993) (stating that direct actions by insureds against their insurance carriers for coverage under an insurance policy sound in contract). Like their common law bad faith claims, Axiall/Westlake's WVUTPA claims, which are predicated on Insurers' denial of coverage under the Policy, should be subject to the Policy's Georgia choice-of-law provision.

Almost all of Axiall/Westlake's conclusory allegations that the Insurers have violated the WVUTPA implicate questions of insurance coverage under the Policy. Although Axiall/Westlake merely recite the statutory language instead of alleging specific facts to support their claims, they do repeatedly allege Insurers failed to provide coverage *under the Policy* in support of their WVUTPA claim. [APP 000019 at ¶¶ 87-89] For example, one of Axiall/Westlake's assertions is that Insurers violated the WVUTPA by "failing to provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement." [APP 000018-000019 at ¶ 85 (5)] Indeed, their entire claim appears to be based on Insurers' denial of Axiall/Westlake's claim. [APP 000019 at ¶ 87] (alleging that Insurers "utilized unfair business practices to fail or *refuse to provide coverage to Westlake*") (emphasis added). Axiall/Westlake then alleged that "as a direct and proximate result of the unfair business practices of Defendants, Westlake was forced to retain attorneys and file this Complaint in *order to obtain the insurance coverage* to which it is entitled." [APP 000019 at ¶ 89] (emphasis added). Axiall/Westlake's WVUTPA claim is based on Insurers' denial of coverage and should be governed by the same law as their breach of contract claim – Georgia law. This is further supported by Axiall/Westlake's own allegations, as Axiall/Westlake affirmatively pled the language of the Policy's choice-of-law provision in paragraph 19 of their Complaint, and then incorporated

paragraph 19 into Count IV (paragraph 73) and Count V (paragraph 82). [APP 000017-000018 at ¶¶ 73 and 82]

Because Axiall/Westlake's bad faith claims implicate the insurance contract, they should be interpreted under the same law as the Policy – Georgia law. Aside from the reasons articulated above, this result simply makes the most sense. Courts applying West Virginia law have noted the vexatious problems associated with determining the law applicable to insurance that covers risks in multiple states. In *Liberty Mutual Insurance Co. v. Triangle Industries, Inc.*, this Court underscored the need for predictability when determining the law applicable to policies covering risks in numerous states and where the places of contract and the insured risks are different. 182 W. Va. 580, 584-85, 390 S.E.2d 562, 567 (1990). This Court then endeavored to provide a predictable rule in cases “when the law *is not otherwise chosen by the parties.*” *Id.* (emphasis added). Following *Triangle*, a federal district court addressed a similar issue in *Scottsdale Insurance Co. v. Harleysville Insurance Co.*, where the insured argued that the law of location of the insured risk should control (rather than the state of formation). No. 1:11CV33, 2013 WL 6813905, at *8 (N.D. W. Va. Dec. 24, 2013). The court disagreed and noted that under such a rule, “the laws of as many as fifty different states might apply” to policies issued to large companies. *Id.* at *8. In order to avoid these types of issues, the parties here contracted on the front-end of their relationship to have Georgia law apply to *any dispute related to or concerning* insurance.

This avoids the unnecessarily complicated situation that would arise if the laws of two different states were applied to the same operative facts and contractual relationship. *See, e.g., Engineered Structures, Inc. v. Travelers Prop. Cas. Co. of Am.*, 328 F. Supp. 3d 1092, 1115 (D. Idaho 2018) (applying Idaho law) (noting that it would be unnecessarily confusing to apply the law of one state to a breach of contract claim and the law of another state to a bad faith claim

stemming from the breach of contract), *appeal docketed*, No. 18-35588 (9th Cir. July 20, 2018); *see also Mortgage Plus, Inc. v. DocMagic, Inc.*, No. 03-2582-GTV-DJW, 2004 WL 2331918, at *7 (D. Kan. Aug. 23, 2004) (applying Kansas law) (noting that it is particularly appropriate to apply the same state law to breach of contract and related bad faith claims when the claims “involve the same operative facts”). Insurers file this petition to avoid such a circumstance. The Order erroneously finds that West Virginia law applies to Axiall/Westlake’s bad faith claims despite correctly finding that Axiall/Westlake’s breach of contract claim is governed by Georgia law. [APP 001647]

For these reasons, Georgia law should also be applied to the bad faith claims because they arise from the same operative facts as Axiall/Westlake’s breach of contract claim (which is governed by Georgia law).

C. Insurers have no other adequate means, such as direct appeal, to obtain their desired relief and will be damaged in a way that is not correctable on appeal if a writ is not issued.

A writ should be issued because Insurers “ha[ve] no other adequate means, such as direct appeal, to obtain the desired relief.” *Berger*, 199 W. Va. at 21, 483 S.E.2d at 21. Moreover, absent the requested writ, Insurers will be irreparably harmed in a manner that is uncorrectable on appeal. *See id.* (stating that another factor the West Virginia Supreme Court of Appeals relies upon to determine whether to issue a Writ of Prohibition is “whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal”).

Writs of Prohibition are “preventative remed[ies]. One seeking relief by prohibition in a proper case is not required . . . [to] wait until the inferior court or tribunal has taken final action in the matter in which it is proceeding or about to proceed.” Syl. Pt. 5, *State ex rel. City of Huntington v. Lombardo*, 149 W. Va. 671, 413 S.E.2d 535 (1965). As a preventative remedy, a writ should be

issued in a case such as this so that the parties can avoid substantial improper discovery or litigation expenses premised upon the lower court's ruling.

Initially, interlocutory appeal is unavailable to Insurers.¹⁵ Moreover, a direct appeal at the conclusion of this case would only exacerbate the harm to Insurers. The finding that West Virginia law applies to Axiall/Westlake's bad faith claims will likely subject Insurers to discovery, pre-trial motions, jury instructions, attorney fees and a multitude of lawyer hours preparing a case for trial under West Virginia common law and the WVUTPA. After days of testimony, the jury would be instructed on West Virginia law and the WVUTPA, its elements, and its remedies. After a verdict and at the time and expense of the Court, the lawyers, the parties, and the jurors, Insurers would then appeal the Order to this Court for relief. Then, this Court would have the opportunity to address the clear error of law contained in the Order finding that West Virginia law applies to Axiall/Westlake's bad faith claims. Given the broad language of the Policy's choice-of-law provision and guidance by West Virginia, other states, and the federal courts, the Order presents compelling evidence that this Court would rule that the Circuit Court's ruling was erroneous. Accordingly, a Writ of Prohibition should be issued to prevent this waste of judicial economy and resources and to avoid the harm to Insurers that would otherwise result.

VI. CONCLUSION

Axiall/Westlake's bad faith claims against Insurers must be governed by Georgia law because (i) the Policy's broad Georgia choice-of-law provision encompasses all claims in the underlying dispute, and (ii) alternatively, the bad faith claims arise out of the same contractual

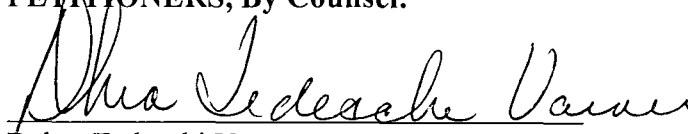
¹⁵ Further, Judge Hummel specifically contemplated the filing of a petition for writ of prohibition when making his *sua sponte* ruling regarding the law applicable to Axiall/Westlake's bad faith claims. [APP 001647] After explaining his rationale for finding that West Virginia law applied to Axiall/Westlake's bad faith claims, Judge Hummel commented "[i]t's going to have to be decided by some judge, and why not send it up to five justices?". [APP 001626: 5-8]. Further, the discovery stay was extended specifically to allow the parties an opportunity to petition for a writ of prohibition. [APP 001647]

relationship and should therefore be subject to Georgia law. Further, the Order already correctly provides that Axiall/Westlake's breach of contract claim is governed by Georgia law. Accordingly, the Petitioners request that this Court issue a rule to show cause why a Writ of Prohibition should not be issued and expeditiously order an automatic stay pursuant to Rule 16 of the West Virginia Rules of Appellate Procedure. After there has been an opportunity to show cause, a Writ of Prohibition should be issued prohibiting the Honorable David Hummel, Jr., Judge of the Circuit Court of Marshall County, or the Presiding Judge of the Business Court Division ultimately assigned to hear and decide this matter, from conducting any further proceedings until the Order finding that West Virginia law applies to Axiall/Westlake's bad faith claims has been vacated and it is ordered that Georgia law applies to these claims.

Therefore, this Court should vacate the portion of the Circuit Court's Order finding that Axiall/Westlake's bad faith claims are governed by West Virginia law.

Respectfully submitted the 25th day of October, 2019.

PETITIONERS, By Counsel:

A handwritten signature in cursive script, reading "Debra Tedeschi Varner", written over a horizontal line.

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