No. 21-1016

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioners,

vs.

WESTLAKE CHEMICAL CORPORATION, et al.,

Respondents.

From the Circuit Court of Marshall County, West Virginia, Business Court Division
No. 19-C-59, the Honorable Judge Christopher Wilkes

PETITIONERS' BRIEF

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ASSIGNMENTS OF ERROR

1. The Business Court erred in granting Respondents' Motion for Partial Summary Judgment as to the "Corrosion" Exclusion Defense and in denying Petitioners' Motion for Summary Judgment on the same exclusion.

2. The Business Court erred in granting Respondents' Motion for Partial Summary Judgment as to the "Faulty Workmanship" Exclusion Defense and in denying Petitioners' Motion for Summary Judgment on the same exclusion.

3. The Business Court erred in granting Respondents' Motion for Partial Summary Judgment as to the "Contamination" Exclusion Defense and in denying Petitioners' Motion for Summary Judgment on the same exclusion.

4. The Business Court erred in striking affirmative defenses related to the relevant exclusions despite recognizing two of the exclusions may apply to portions of Respondents' claim.

STATEMENT OF CASE

I. STATEMENT OF FACTS

This is an appeal from three separate Orders entered by the Business Court granting motions for partial summary judgment filed by Respondents on insurance coverage issues and denying Petitioners' competing motions for summary judgment on the same issues. The Orders are: (1) *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*; (2) *Order Granting Plaintiffs' Motion for Partial Summary Judgment Regarding Defendants' "Faulty Workmanship" Exclusion Defense and Denying Defendants' Motion for Summary Judgment Concerning Enforcement of Faulty Workmanship Exclusion*; and (3) *Order Granting Plaintiffs' Motion for*

Partial Summary Judgment Regarding Defendants' "Contamination" Exclusion Defense and Denying Defendants' Motion for Summary Judgment Concerning Enforcement of Endorsement No. 1 and National Union Endorsement No. 19 (sometimes collectively the "Orders"). [J.A. 011902-33].[1] Petitioners seek reversal of the Orders with direction to the Business Court to enter summary judgment in their favor.

A. The Underlying Incident

On August 27, 2016, an old railroad tank car at Respondents' chlorine manufacturing plant in Natrium, Marshall County, West Virginia ("Natrium Plant")[2] experienced a 42-inch long crack in its tank shell, releasing approximately 178,400 pounds of liquified chlorine. [J.A. 000182]. The release prompted a temporary shutdown of the Natrium Plant, with the facility and all units returning to full operation within a few days of the release, on September 2, 2016, and it has continuously operated without notable interruption for the past five-plus years on a 24/7/365 basis. [J.A. 000228].

The chlorine release occurred minutes after the railroad tank car was loaded for the first time after having been taken out of service for corrosion repairs and other maintenance work. The repairs were made in the area of the tank car where the crack formed. [J.A. 000184; 000196]. Following the release, the National Transportation Safety Board ("NTSB") conducted an investigation and issued a report which noted that during tank car repairs performed by third parties, there was a "significantly overheated region and uncontrolled heat treatment processes." [J.A. 000183]. The "Probable Cause" section of the NTSB report further noted "the presence of residual stresses associated with Rescar Companies' tank wall corrosion repairs and uncontrolled local post-weld heat treatment" during the same repairs. *Id.*

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[1] Petitioners' citations to the record herein refer to the page number designated in the top right corner of the Joint Appendix ("J.A.").

[2] The Natrium Plant began chlorine manufacturing operations in 1943.

B. The Lawsuits Against Third-Party Contractors

The chlorine release spawned two civil actions initiated by Respondent Axiall Corporation[3] ("Respondent Axiall") against the third-party contractors involved with the inspection, maintenance, and repair work performed on the railroad tank car just prior to the release. One case was filed in the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division No. GD-18-010944 ("Pennsylvania Action")[4], and the other was filed in the Circuit Court of Marshall County, West Virginia, Civil Action No. 18-C-203. [J.A. 000976]. In these actions, Respondent Axiall claimed the following negligent acts and omissions in the third-party contractors' work on the railroad tank car caused the rupture and chlorine release:

> a. In failing to use ordinary care in the fulfillment of their work on or in connection with the railroad tank car;
> b. In failing to comply with the standard of care in the industry in performing their work on or in connection with the railroad tank car;
> c. In the case of Rescar, in failing to perform repair work with the minimal level of care required in order to prevent the railroad tank car's shell rupturing upon first post-repair use;
> d. In the case of AllTranstek, in failing to employ the reasonable care required to recognize that Rescar's repairs were faulty, and that the railroad tank car was not fit for return to chlorine service; [and]
> e. In the case of Superheat, in failing to adhere to the standard of care required in monitoring heat treating during the course of the railroad tank car repairs.

[J.A. 000409].

In pursuing these actions, Respondent Axiall has acknowledged that faulty work of third parties in failing to properly conduct post-weld heat treatment, among other things, caused the

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[3] Respondent Westlake Chemical Corporation acquired Respondent Axiall Corporation through a hostile takeover on August 31, 2016—four days after the chlorine release—and is not a plaintiff in either of these actions. [J.A. 008971; 009060-61]. Respondent Axiall Corporation is a wholly-owned subsidiary of Respondent Westlake Chemical Corporation and the Business Court has found that Westlake Chemical Corporation is in privity with Axiall Corporation for purposes of these actions. [J.A. 011949-50].

[4] The Pennsylvania Action involves the same damages to the Natrium Plant that are being sought in the instant matter from Petitioners. That case was tried to a jury and a verdict was reached that the damage to the Natrium Plant was $5.9 million. By Order of the Business Court dated March 3, 2022, Respondents are collaterally estopped from re-litigating the issue of damage to the Natrium Plant on the basis of the jury verdict in the Pennsylvania Action. [J.A. 011948-49].

rupture of the railroad tank car and the chlorine release. [J.A. 000410]. Respondent Axiall has also taken the position that the alleged damage to the Natrium Plant was a "direct and proximate result of the [third parties'] negligent acts and omissions" and is comprised entirely of corrosion or the risk of future corrosion to equipment and other plant property. [J.A. 000409; 000764-65; 000766-67; 000770-71; 000674].

C. The Insurance Policy

Petitioners[5] collectively issued a total of thirteen (13) separate policies of commercial property insurance to Respondent Axiall for the 2015-2016 policy period which covered, subject to applicable terms and conditions, the Natrium Plant. Each Petitioner, in issuing the policies, subscribed to certain "quota-shares" of the insurance for the Natrium Plant. The policies (hereinafter collectively "Policy") each contain identical exclusions relating to corrosion, faulty workmanship, and contamination that Petitioners maintain bar coverage for Respondents' claims that form the basis of the Business Court action. [J.A. 000230].

The corrosion and faulty workmanship exclusions are contained in Section B.3.C and B.3.D which provide, respectively:

> 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;
>
> D. Loss or damage from inherent vice, faulty methods of construction, errors or omissions in plan or specification design or errors in processing, latent

[5] Petitioners are the following twelve insurance companies who are defendants in the Business Court action: 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. f/k/a Talbot Underwriting Services (US) Ltd.; and HDI-Gerling America Insurance Company n/k/a HDI Global Insurance Company.

defect, **faulty** materials, or **workmanship**. This exclusion does not apply to resultant physical loss or damage not otherwise excluded[.]

***

[J.A. 000249] (emphasis added).

The Policy contains a contamination exclusion in Endorsement No. 1 which provides:

SEEPAGE AND/OR POLLUTION AND/OR CONTAMINATION EXCLUSION

Notwithstanding any provision in the Policy to which this Endorsement is attached, this Policy does not insure against loss, damage, costs or expenses in connection with any kind or description of seepage and/or pollution and/or contamination, direct or indirect, arising from any cause whatsoever.

Nevertheless if a peril not excluded from this Policy arises directly or indirectly from seepage and/or pollution and/or contamination any loss or damage insured under this Policy arising directly from that peril shall (subject to the terms, conditions and limitations of the Policy) be covered.

However, if the insured property is the subject of direct physical loss or damage for which this company has paid or agreed to pay then this Policy (subject to its terms, conditions and limitations) insures against direct physical loss or damage to the property insured hereunder caused by resulting seepage and/or pollution and/or contamination.

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[J.A. 000268].

In addition, the National Union United States Policy[6] includes a separate, additional endorsement entitled "**POLLUTION, CONTAMINATION, DEBRIS REMOVAL EXCLUSION ENDORSEMENT**" ("Endorsement No. 19"). Endorsement No. 19 provides, in relevant part:

2. Pollution and Contamination Exclusion.

This policy does not cover loss or damage caused by, resulting from, contributed to or made worse by actual, alleged or threatened release, discharge, escape or

[6] Petitioner National Union issued two policies to Respondent Axiall for the 2015 – 2016 policy period. Policy No. 020786808 was issued out of the United States and Policy No. 27015349 was issued out of the United Kingdom. Policy No. 020786808 is the only Policy that contains an additional contamination exclusion in Endorsement No. 19.

> dispersal of CONTAMINANTS or POLLUTANTS, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy.
>
> ***
>
> CONTAMINANTS or POLLUTANTS means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, which after its release can cause or threaten damage to human health or human welfare or causes or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder, including, but not limited to, bacteria, virus, or hazardous substances as listed in the Federal Water, Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and Toxic Substances Control Act or as designated by the U.S. Environmental Protection Agency. Waste includes materials to be recycled, reconditioned or reclaimed.
>
> This exclusion shall not apply when loss or damage is directly caused by fire, lightning, aircraft impact, explosion, riot, civil commotion, smoke, vehicle impact, windstorm, hail, vandalism, malicious mischief. This exclusion shall also not apply when loss or damage is directly caused by leakage or accidental discharge from automatic fire protective systems.
>
> ***

[J.A. 000293].

Respondent Westlake Chemical Corporation's ("Respondent Westlake") first act with respect to the Policy, after acquiring Respondent Axiall days after the release, was to immediately terminate it effective midnight on August 30, 2016, and secure $2,349,669 from Petitioners in return premiums. [J.A. 008450-51; 009065-67; 009070-71]. On August 31, 2016, per Respondent Westlake's instruction, the Policy was cancelled effective August 31, 2016. [J.A. 008450; 008903-04].

D. Respondents' Insurance Claim

Respondents submitted a claim for coverage under the Policy issued by Petitioners. Respondent Westlake has claimed that restarting the Natrium Plant required it to replace certain items of equipment that allegedly failed as a result of the chlorine release. One year after the release, Respondent Westlake provided a list of costs incurred to repair the allegedly damaged

equipment. These costs were approximately $1 million—well below the Policy's $3.75 million property damage deductible. [J.A. 000060; 000332-34].

On May 22, 2018, Westlake first submitted a claim purportedly above the Policy's property damage deductible for $5,764,231. [J.A. 009511-15]. This claim submission came four months after Petitioners issued a reservation of rights letter identifying, *inter alia*, the potential application of the corrosion, faulty workmanship, and contamination exclusions. [J.A. 009516-24]. Despite numerous prior requests for pre-release photographs and after the passage of more than two years after the chlorine release, Respondent Westlake finally provided more than 40,000 photographs of the Natrium Plant, including thousands of pre-release photographs which showed extensive pre-release corrosion throughout the aged plant and equipment. [J.A. 008463].

On January 28, 2019, after Petitioners' technical consultants had completed their review of the photographs that had only been provided a few months earlier and their investigation of the cause of the railroad tank car rupture and the nature and extent of any alleged damage, Petitioners denied the May 22, 2018, claim. Petitioners' denial was based upon the application of multiple policy exclusions, including the corrosion and faulty workmanship exclusions, and the contamination exclusions found in Endorsement No. 1 and Endorsement No. 19. [J.A. 009622-28]. The response of Respondents to the January 28, 2019, denial was to submit an updated claim for $278,505,078 on March 20, 2019. [J.A. 009566-70]. While the updated claim substantially increased the size of the claim, it sought coverage for the same type of excluded damages as the claim originally submitted on May 22, 2018, though Respondents' incurred costs remained nearly unchanged from the original claim submission. The updated claim simply added more than $250 million in estimates for the replacement of all of the instrumentation, electronics, and metal lagging and banding located downstream of the chlorine release point, as well as additional estimated contingency costs that **may** be incurred if and when any work was ever

done at the Natrium Plant. Petitioners denied the updated claim on April 9, 2019, again on multiple grounds, including the corrosion and faulty workmanship exclusions, the asbestos exclusions, and the contamination exclusions in Endorsement No. 1 and Endorsement No. 19. [J.A. 009571-78].

II. PROCEDURAL HISTORY

On April 9, 2019, Petitioners denied coverage for the updated claim and initiated an action in Delaware State Court. The next day, April 10, 2019, Respondents filed the underlying action in the Circuit Court of Marshall County asserting five causes of action: (1) Declaratory Judgment; (2) Breach of Contract; (3) Bad Faith Under Georgia Law; (4) Bad Faith Under West Virginia Law; and (5) Statutory Bad Faith Under the West Virginia Unfair Trade Practices Act. [J.A. 000001-19].

Respondents moved to dismiss the Delaware action filed by Petitioners. Petitioners, in turn, moved to dismiss or stay the Marshall County Circuit Court action in favor of the first-filed Delaware action. The Delaware Court stayed Petitioners' action in favor of the Marshall County action, and the Marshall County Circuit Court denied Petitioners' motion to dismiss or stay. During oral argument on Petitioners' motion to dismiss or stay, the Circuit Court, *sua sponte*, dismissed Count III of Respondents' Complaint—Bad Faith Claims Under Georgia Law—and held that West Virginia law applied to all of the bad faith claims. *See State ex rel. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Hummel*, 243 W. Va. 681, 683, 850 S.E.2d 680, 682 (2020). The Circuit Court then transferred the case to the Business Court Division.

On October 25, 2019, Petitioners filed a petition for writ of prohibition before this Court challenging the Circuit Court's *sua sponte* dismissal of Count III of the Complaint and its corresponding finding that West Virginia law applied to all of the bad faith claims. Petitioners also requested that this Court issue a ruling that the Georgia choice-of-law provision in the

Policy applied to the entire dispute. Respondents agreed with Petitioners that the Circuit Court exceeded its lawful authority in dismissing Count III of the Complaint, but argued that a writ of prohibition was not the appropriate vehicle for a choice-of-law ruling. This Court granted the writ, *as moulded*, and vacated the Circuit Court's Order dismissing Count III of the Complaint and its finding that West Virginia law applied to the bad faith claims. This Court, however, declined to extend its ruling to a finding that the Policy's Georgia choice-of-law provision governed the action, leaving such a determination to be made by the Business Court. *See State ex rel. Nat'l Union Fire Ins. Co. v. Hummel*, 243 W. Va. 681, 850 S.E.2d 680 (2020).

Upon remand to the Business Court, Petitioners moved for a declaration that Georgia law governed the dispute of the parties and to dismiss Counts IV and V of the Complaint which asserted bad faith under West Virginia common law and statutory bad faith under the West Virginia Unfair Trade Practices Act as well as Respondents' request for damages pursuant to *Hayseeds v. State Farm Fire & Cas. Co.*, 177 W. Va. 323, 352 S.E.2d 73 (1986). Thereafter, the Business Court granted Petitioners' motion and dismissed all claims and causes of action which were not based on Georgia law. [J.A. 000046-53].

The parties proceeded with litigating the remaining causes of action in Count I, Count II, and Count III and engaged in substantial discovery. On September 16, 2021, the parties filed motions for summary judgment on coverage issues pertaining to the applicability of the corrosion, faulty workmanship, asbestos, and contamination exclusions. [J.A. 000054-175].[7]

On November 19, 2021, the Business Court entered the Orders granting Respondents' motions for partial summary judgment as to the corrosion, faulty workmanship, and contamination exclusions and denying Petitioners' summary judgment motions as to those same exclusions. [J.A. 011902-33]. As to the corrosion exclusion, the Business Court found that

[7] The Business Court granted summary judgment in favor of Petitioners as to the asbestos exclusions. The application of the asbestos exclusions is not at issue in this appeal.

Section B.3.C of the Policy did not exclude "resultant physical loss or damage from a covered peril" and that the railroad tank car rupture/chlorine release was the subject covered peril which caused resultant corrosion damage which was covered under the ensuing loss exception to the exclusion. [J.A. 011919-20]. In making this holding, the Business Court concluded that upon review of Section 3 of the Policy, the exclusions refer only to causes of loss and not to both causes of loss and types of damages resulting from other causes. [J.A. 011921].

As to the faulty workmanship exclusion, the Business Court found the exclusion only bars recovery for the defective condition and the cost incurred in remedying the negligent repair work and rendering the railroad tank car safe for continued use. The Business Court further found that the exclusion did not apply to resultant physical loss or damage not otherwise excluded and that because the tank car rupture/chlorine release was a covered peril that ensued, or resulted from any alleged faulty workmanship, the ensuing loss exception to Section B.3.D of the Policy preserved coverage for any damages those covered perils caused. [J.A. 011923-33].

Finally, the Business Court concluded that the contamination exclusions were designed to address environmental pollution and contamination and were limited only to environmental impairments, which were not at issue in this case. [J.A. 011902-12]. The Business Court further concluded that even if the rupture of the tank car did result in "'seepage and/or pollution and/or contamination,' within the meaning of Endorsement No. 1, which the Court did not find, any physical loss or damage caused thereby is not excluded – but rather is expressly covered – under the unambiguous, plain language of this exception to the exclusion in Endorsement No. 1." [J.A. 011909].

On December 17, 2021, Petitioners filed their Notice of Appeal pursuant to Rule 5 of the West Virginia Rules of Appellate Procedure. Subsequent to the filing of the Notice of Appeal, the Business Court entered an "Order Denying Defendants' Expedited Motion to Stay

Proceedings." [J.A. 011934-38]. In this Order, the Business Court recognized that a reversal of the Orders on the exclusions could create a finding of no coverage and eliminate the bad faith claims. [J.A. 011937]. Though denying Petitioners' motion to stay, the Business Court subsequently entered a separate order on January 27, 2022, generally continuing the action until such time that the Business Court enters an Amended Scheduling Order.

Of note, Respondent Axiall's Pennsylvania Action against the third-party contractors was tried to conclusion and the jury entered its verdict in October, 2021. The verdict slip in that action included a specific line item for "Damage to Natrium plant and equipment." [J.A. 011941]. The Pennsylvania Action jury awarded a total of $5,900,000 to Respondent Axiall for such Natrium Plant damage. *Id.*

Following the verdict in the Pennsylvania Action, on March 3, 2022, the Business Court entered an "Order Granting Defendants' Motion for Partial Summary Judgment to Enforce the Pennsylvania Jury's Natrium Plant Damages Verdict and Apply Natrium Plant Property Damage Deductible." The Business Court found, as a matter of law, that pursuant to the doctrine of collateral estoppel, Respondents' claim for damage to the Natrium Plant and equipment has been determined to be $5.9 million, prior to the application of the appropriate $3.75 million deductible. [J.A. 011951-52].

SUMMARY OF ARGUMENT

The Business Court committed several errors in its rulings on the competing motions for summary judgment. It improperly limited the application of exclusions which were clear and unambiguous, and in doing so violated the cardinal rule of insurance contract application that the plain language of the policy should be applied and not construed. It made its rulings in contravention of applicable case authority supporting the position of Petitioners. Indeed, the Business Court relied upon virtually no authority regarding the application of the exclusions in

issuing its rulings. The Business Court further erred in that it considered extrinsic evidence despite no finding of ambiguity and it made no affirmative finding that Respondents met their burden of demonstrating exceptions to the exclusions. These errors require reversal of the Orders with a direction that the Business Court grant summary judgment in favor of Petitioners.

The corrosion exclusion in the Policy is broad and free of ambiguity. Courts have routinely applied such exclusions like the one in the Policy in accordance with the plain wording to exclude the type of damages alleged by Respondents. Numerous courts have rejected the cause of loss and type of damage distinction drawn by the Business Court and recognize that the exclusion broadly precludes recovery for any corrosion. By drawing the artificial distinction, the Business Court then improperly held that the ensuing loss exception to the exclusion was triggered, thereby permitting the exclusion to be effectively written out of the Policy.

The Business Court's ruling on the faulty workmanship exclusion is similarly infirm. Like the corrosion exclusion, it is clear and unambiguous. The Business Court made no finding of ambiguity and yet impermissibly narrowed the exclusion to the defective condition introduced by the faulty workmanship. The Business Court also erroneously determined that the ensuing loss exception to the exclusion applied. Ensuing loss exceptions are not applicable if the ensuing loss was directly related to the original excluded risk. The Business Court made this ruling by, again, considering extrinsic evidence despite never concluding that the exclusion was ambiguous. It also did so without finding that Respondents carried their burden of demonstrating the application of the exception to the exclusion.

The Business Court likewise erred in its ruling on the Policy's contamination exclusions. It limited the exclusions to environmental pollution and forms of environmental impairment in contravention of the exclusions' plain and unambiguous wording. Its ruling was also at odds with several Georgia cases which have recognized that contamination exclusions are absolute and

preclude coverage for all contamination. It also improperly found that an exception to the contamination exclusion in Endorsement No. 1 applied. Again, the Business Court improperly considered extrinsic evidence and cited no supporting authority for its rulings.

Finally, the Business Court erred by striking Petitioners' affirmative defenses related to the relevant exclusions. That decision was erroneous because the Business Court recognized that two of the exclusions, corrosion and contamination, may apply to portions of Respondents' claim. As a result, the decision to strike the affirmative defenses should be reversed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary pursuant to the criteria in West Virginia Rule of Appellate Procedure 18(a). Petitioners respectfully request that the case be set for Rule 19 oral argument since this appeal involves assignments of error in the application of settled Georgia and other case law.

STANDARD OF REVIEW

This appeal is before the Court for the review of the Business Court's granting and denying of competing motions for summary judgment. A circuit court's entry of summary judgment is subject to *de novo* review. *Gray v. Boyd*, 233 W. Va. 243, 757 S.E.2d 773 (2014). Similarly, this Court reviews *de novo* the denial of a motion for summary judgment. *Maston v. Wagner*, 236 W. Va. 488, 781 S.E.2d 936 (2015). In conducting a *de novo* review, this Court applies the same standard that the Circuit Court applied in examining the summary judgment motions. *Nicholas Loan & Mortg., Inc. v. W.Va. Coal Co-Op, Inc.*, 209 W. Va. 296, 547 S.E.2d 234 (2001).

ARGUMENT

The Business Court previously determined that Georgia substantive law applies to all claims in this matter, including the insurance coverage dispute, pursuant to a valid and

enforceable choice-of-law provision in the Policy. [J.A. 000052]. Georgia insurance contract principles, like those in West Virginia, provide that the "[c]onstruction and the interpretation of a contract are matters of law for the court." *ALEA London Ltd. v. Woodcock*, 286 Ga. App. 572, 576, 649 S.E.2d 740, 744 (2007) (quoting *Sewell v. Hull/Storey Dev.*, 241 Ga. App. 365, 366, 526 S.E.2d 878 (1999)). Georgia law further provides that "insurance is a matter of contract 'and the parties to the contract of insurance are bound by its plain and unambiguous terms.'" *Club Libra, Inc. v. R. L. King Props., LLC*, 324 Ga. App. 547, 548, 751 S.E.2d 418, 419 (2013) (quoting *Michna v. Blue Cross & Blue Shield of Ga.*, 288 Ga. App. 112, 113, 653 S.E.2d 377, 379 (2007)). When the insurance policy is clear and unambiguous, "the contract must be enforced as written." *Ryan v. State Farm Mut. Auto. Ins. Co.*, 261 Ga. 869, 872, 413 S.E.2d 705, 707 (1992). In those instances, "the court's job is simply to apply the terms of the contract as written, regardless of whether doing so benefits the carrier or the insured." *Ga. Farm Bureau Mut. Ins. Co. v. Smith*, 298 Ga. 716, 719, 784 S.E.2d 422, 424 (2016) (citations omitted). Further, unambiguous policy exclusions "must be given effect, even if beneficial to the insurer and detrimental to the insured." *Jefferson Ins. Co. of New York v. Dunn*, 269 Ga. 213, 215, 496 S.E.2d 696, 699 (1998) (internal citation and quotations omitted). Ambiguity is not created simply because the parties may disagree as to the meaning of a term. *Sumitomo Marine & Fire Ins. Co. of Am. v. S. Guar. Ins. Co. of Georgia*, 337 F. Supp. 2d 1339 (N.D. Ga. 2004). Consequently "[Georgia courts] will not strain to extend coverage where none was contracted or intended." *Jefferson Ins. Co. of New York*, 269 Ga. at 215, 496 S.E.2d at 699. Finally, if the insured relies on an exception to an exclusion, such as an ensuing loss provision, the insured bears the burden of establishing that the exception applies. *Mock v. Central Mut. Ins. Co.*, 158 F. Supp. 3d 1332 (S.D. Ga. 2016). Application of these established principles to the Orders demonstrates that the Orders are in error and must be reversed.

I. THE BUSINESS COURT ERRED IN RULING THAT THE CORROSION EXCLUSION DID NOT BAR RESPONDENTS' DAMAGE CLAIMS.

A. The Corrosion Exclusion Is Plain and Unambiguous

The corrosion exclusion in the Policy is broad and, more importantly, its provisions are unambiguous. It clearly applies to Respondents' claim because there is no dispute that their entire claim is for alleged corrosion damage. The exclusion, found at Section B.3.C of the Policy, provides:

> 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[.]
>
> ***

[J.A. 000249].

Courts, including the United States District Court for the Southern District of West Virginia, have had little difficulty finding that similar exclusions precluding coverage for loss or damage caused by or resulting from corrosion are unambiguous. *See Ramaco Res., LLC v. Fed. Ins. Co.*, No. 2:19-cv-00703, 2021 WL 2582823, at *9 (S.D. W. Va. June 23, 2021) (citations omitted); *Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co.*, 255 F. Supp. 3d 443, 446, 462 (S.D. N.Y. 2015) (considering an "excluded peril" in an all-risk policy providing that the insurer "will not pay for loss or damage resulting from . . . corrosion" and finding such exclusion unambiguous); *Pioneer Chlor Alkali Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 863 F. Supp. 1226, 1228, 1235-36 (D. Nev. 1994) (finding the term "corrosion" in an exclusion for "loss, damage or expense caused by or resulting from . . . corrosion" to be unambiguous).

Courts apply corrosion exclusions like the Policy's corrosion exclusion according to their plain wording. In *Lantheus*, the U.S. District Court for the Southern District of New York

applied an exclusion for "loss or damage resulting from . . . corrosion" to exclude damage to a reactor caused by corrosion. 255 F. Supp. 3d at 443, 446-47, 465 (applying the exclusion in the context of an all-risk property insurance policy). The court found that the corrosion damage to the reactor fell "squarely within [the] corrosion exclusion" and rejected the insured's arguments that would "effectively read the corrosion exclusion out of the policy." *Id.* at 462, 465. In the current matter, the Business Court's decision effectively reads the corrosion exclusion out of the Policy by finding that the Policy covers corrosion damage despite the broad exclusion for "loss, damage or expense caused by or resulting from . . . corrosion[.]"

Courts have applied similarly worded exclusions to exclude damage in the form of corrosion to metallic surfaces. *See, e.g., TRAVCO Ins. Co. v. Ward,* 715 F. Supp. 2d 699, 714-15 (E.D. Va. 2010); *Gilbane Building Co. v. Altman Co.*, No. 04AP–664, 2005 WL 534906, at *5 (Ohio Ct. App. March 8, 2005). In *TRAVCO*, the court explained that the general rule applied in most jurisdictions is that "[e]xclusions for damages caused by 'corrosion' precludes recovery for any damage caused to property because of contact with any corrosive agent." *See TRAVCO*, 715 F. Supp. 2d at 714 (quoting 11 COUCH ON INSURANCE §153.80). The court applied the exclusion for loss "caused by" corrosion to exclude from coverage all the insured's "claimed losses to the structural, mechanical, and plumbing components of [the insured's residence]" corroded due to gasses emitted from drywall. *Id.* at 715 (noting the insured's claim was for "damage to the corroded material itself"). Similarly, in *Gilbane*, the court determined that corrosion damage to equipment and piping following exposure to a corrosive "acid vapor" was excluded by the applicable all-risk policy's exclusion for "loss caused by or resulting from . . . corrosion." *Gilbane*, 2005 WL 534906, at *5. Both *TRAVCO* and *Gilbane* involve similar exclusionary language and similar types of alleged damage—and in both cases the courts applied the exclusions according to their plain wording.

Significantly, the Business Court in its Order made no finding that the corrosion exclusion was ambiguous. Because it did not find ambiguity, the Business Court was required to apply the plain terms of the exclusion. *Ryan v. State Farm Mut. Auto. Ins. Co.*, 261 Ga. 869, 413 S.E.2d 705 (1992). It failed to do so. Instead, it undertook to construe and interpret the exclusion resulting in the adoption of an artificial distinction between "cause of loss" and "type of damage", concluding the exclusion was only applicable to causes of loss. This conclusion, however, is not supported by the wording of the exclusion or the substantial case authority rejecting the distinction.

B. The Corrosion Exclusion Does Not Draw Any Distinction Between "Cause of Loss" and "Type of Damage" and Courts Have Rejected Such a Distinction

As a preliminary point, the distinction between "cause of loss" and "type of damage" does not matter because the Policy also excludes "expense caused by or resulting from . . . corrosion." Under Georgia law, words in an insurance contract must be given their usual and common meaning. *See Ga. Farm Bureau Mut. Ins. Co. v. Smith*, 298 Ga. 716, 719, 784 S.E.2d 422, 424 (2016). The Merriam-Webster Dictionary defines "corrosion" as "the action, process, or effect of corroding".[8] Therefore, the Policy plainly excludes "expense caused by or resulting from" the action, process, or effect of corroding. The Business Court noted in its Order, "there is no dispute about the type of alleged damage Plaintiffs are seeking coverage for: expenses associated with replacing allegedly corroded equipment." [J.A. 011918]. Therefore, the Policy unambiguously excludes Respondents' claim and the Business Court's finding that the Policy's corrosion exclusion does not apply should be reversed.

Nonetheless, there is no basis to support the distinction drawn by the Business Court between "cause of loss" and "type of damage." In the first instance, the Policy does not draw any

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[8] *See Corrosion*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/corrosion?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last visited March 18, 2022).

distinction between "cause of loss" and "type of damage." It excludes, *inter alia*, "loss, damage or expense caused by or resulting from" corrosion. This plain language, which was not deemed ambiguous by the Business Court, excludes not only corrosion as the cause of loss but also as the type of damage. The Business Court's analysis should have ended with the application of this clear language and a finding that Respondents' corrosion damage claim was excluded.[9]

A review of case law reveals that other courts have rejected the "cause of loss" and "type of damage" distinction specifically in the context of a corrosion exclusion. *See TravCo Ins. Co. v. Ward*, 284 Va. 547, 558-59, 736 S.E.2d 321, 328 (2012) (explaining that arbitrarily distinguishing between damage "caused by" corrosion and corrosion itself "would render this and similar corrosion exclusions meaningless[.]"); *Bishop v. Alfa Mut. Ins. Co.*, 796 F. Supp. 2d 814, 822-23 (S.D. Miss. 2011) (applying corrosion exclusion despite insured's argument "that the corrosion exclusion is inapplicable since their loss is not 'caused by corrosion' but rather *is* the corrosion"); *In re: Chinese Manuf. Drywall Prod. Liab. Litig.*, 759 F. Supp. 2d 822, 846, 848 (E.D. La. 2010) (declining to "create a distinction between corrosion as a loss and corrosion as a cause of loss for purposes of the corrosion exclusion" that excluded "loss . . . caused by . . . [c]orrosion"). These authorities, which were cited in Respondents' briefing, support drawing no distinction between corrosion as a "cause of loss" or a "type of damage." This is particularly true given the plain meaning of the policy language which, again, was not deemed ambiguous by the Business Court. Simply stated, corrosion is excluded whether it is the cause of the loss or the resulting damage. Here, as the Business Court noted in its Order, "there is no dispute about the

[9] The Business Court found that "Defendants have not met their burden to show that the facts of this loss fall within the exclusion of Section B.3.C", but this is at odds with the Business Court's recognition that "[a]s Defendants aver, there is no dispute about the type of alleged damage Plaintiffs are seeking coverage for: expenses associated with replacing allegedly corroded equipment." [J.A. 011918; 011920]. The Policy unambiguously excludes "loss, damage, or expense caused by or resulting from . . . corrosion." Petitioners have therefore demonstrated, as a matter of undisputed fact, that the damages for which Respondents seek coverage are excluded under Section B.3.C.

type of alleged damage Plaintiffs are seeking coverage for: expenses associated with replacing allegedly corroded equipment." [J.A. 011918]. The Business Court's finding that the Policy's corrosion exclusion does not exclude Respondents' claim was therefore in error and should be reversed.

C. Resultant Corrosion Damage Is Not a Covered Ensuing Loss Under the Exception to the Corrosion Exclusion

In concluding that the corrosion exclusion only applied to "cause of loss," the Business Court further found that corrosion was not the cause of Respondents' loss. Instead, it concluded that the railroad tank car rupture/chlorine release was a covered peril which allegedly caused resultant corrosion damage. This determination was apparently based, at least in part, on the title of the Section B.3 being "Perils Excluded," but is contrary to the Policy's clear wording. [J.A. 011919].[10] This erroneous premise was then used by the Business Court to support its holding that "the resultant corrosion damage from the covered chlorine release peril would not be excluded." *Id.* This holding represented a conclusion that the ensuing loss exception that provides "but not excluding resultant physical loss or damage from a covered peril" was applicable.

The Business Court's conclusion that corrosion damage is a covered ensuing loss is erroneous. This interpretation of the ensuing loss provision completely swallows the Policy's corrosion exclusion. The Business Court held that "the tank car rupture/chlorine release was the subject covered peril which caused the resultant corrosion damage" and that the Policy does not exclude "the peril of a tank car rupture or the peril of a chemical spill." [J.A. 011919-20]. This

[10] Reliance upon the "Perils Excluded" title in the section of the Policy is misplaced because the Policy contains a General Condition providing: "Titles of Paragraphs: The several titles of the various paragraphs of this form (and of endorsements and supplemental contracts, if any, now or hereafter attached to this Policy) are inserted solely for convenience of reference and shall not be deemed in any way to limit or affect the provisions to which they relate." [J.A. 000618].

interpretation leaves no room for the Policy's exclusion for "loss, damage or expense caused by or resulting from . . . corrosion" to operate.

This Court has recognized that ensuing loss provisions cannot be allowed to restore coverage for excluded losses, but that is precisely what the Business Court's ruling accomplishes. *See Erie Ins. Prop. & Cas. Co. v. Chaber*, 239 W. Va. 329, 337, 801 S.E.2d 207, 215 (2017) ("[A]n unambiguous ensuing or resulting loss clause of an exclusion contained in an insurance policy provides a narrow exception to the exclusion but does not revive or reinstate coverage for losses otherwise unambiguously excluded by the policy."); *see also Rountree v. Encompass Home & Auto Ins. Co.*, 501 F. Supp. 3d 1351, 1358-59 (S.D. Ga. 2020) (stating that "if an ensuing loss is otherwise excluded, it remains excluded").[11] Here, corrosion damage is excluded and coverage cannot be restored for corrosion damage through use of the ensuing loss exception.

The case of *Bettigole v. Am. Employers Ins. Co.*, 567 N.E.2d 1259, 1260-62 (Mass. Ct. App. 1991) is particularly instructive. There, corrosion occurred when "chloride ions . . . penetrated the concrete, filtered through the cracks, and attacked the steel." *Id.* at 1260. The insured claimed the corrosion exclusion was not implicated because "the primary and effective cause . . . was the release of chloride ions, which was not named as an excluded risk, with the corrosion following as a consequence." *Id.* at 1261. The court rejected the insured's argument and found that "chloride ions are not a covered risk distinct from and anterior to the corrosion . . . the chloride is the very agent of the corrosion." *Id.* The same analysis equally applies here.

Finally, ensuing loss provisions only operate after an exclusion is triggered and applied. *See Erie*, 239 W. Va. at 337, 801 S.E.2d at 215 ("**Where an uncovered event occurs**, an

[11] It should be noted that the Business Court in its Order made no finding that Respondents had satisfied their burden to demonstrate that a covered ensuing loss existed. As noted, it is the insured which bears the burden of establishing that an exception to the exclusion applies under Georgia law. *Mock*, 158 F. Supp. 3d at 1347. No such finding was made by the Business Court here.

ensuing or resulting loss that is otherwise covered by the policy will remain covered, but the uncovered event itself is not covered.") (emphasis added). Relatedly, the ensuing loss provision only applies to "resultant physical loss or damage from a covered peril" that ensues **from corrosion.** There can be no ensuing loss **from corrosion** without first finding that excluded corrosion damage occurred in the first place. Here, the Business Court did not find that the exclusion in Section B.3.C applied, but the Business Court nonetheless found that the ensuing loss exception to Section B.3.C restored coverage for corrosion damage. This constitutes reversible error.

II. THE BUSINESS COURT ERRED IN NOT APPLYING THE CLEAR AND UNAMBIGUOUS FAULTY WORKMANSHIP EXCLUSION TO RESPONDENTS' CLAIMS

The Business Court similarly committed error in its ruling on the faulty workmanship exclusion. The faulty workmanship exclusion is unambiguous and clearly applies to Respondents' claims because all of the alleged damages were caused by or resulted from the faulty workmanship of third parties in making repairs to the railroad tank car and against whom Respondents have sought damages. The Business Court's interpretation of the Policy's faulty workmanship exclusion does not account for the phrase "caused by or resulting from" in the exclusionary wording of Section B.3.D. The failure to apply the unambiguous language of the faulty workmanship exclusion led to an impermissibly narrow interpretation of the exclusion that renders the phrase "caused by or resulting from" meaningless. This is contrary to Georgia law. *See Dunn*, 269 Ga. at 215, 496 S.E.2d at 699.

A. The Faulty Workmanship Exclusion Is Clear and Unambiguous

The faulty workmanship exclusion, found at Section B.3.D of the Policy, provides:

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

> D. 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. This exclusion does not apply to resultant physical loss or damage not otherwise excluded[.]
>
> ***

[J.A. 001025].

The term "faulty workmanship" is unambiguous as has been recognized by Georgia courts. In *Kroll Construction Co. v. Great American Ins. Co.*, 594 F. Supp. 304, 305 (N.D. Ga. 1984), a Georgia federal court applied a faulty workmanship exclusion to bar coverage in the context of an all-risk builder's policy that excluded the "cost of making good any faulty or defective workmanship . . . ." *Id.* at 305. The claim related to costs incurred due to a subcontractor's waterproofing job during construction. *Id.* The court refused to "strain to find [the] term ambiguous so as to justify a liberal construction in favor of . . . the insured" and held that poor or negligent execution of a job constitutes faulty workmanship:

> The term 'workmanship' is not ambiguous: It simply means 'the execution or manner of making or doing something'. Webster's Third New International Dictionary, 2635 (4th ed. 1976). 'Faulty or defective workmanship,' then, means the faulty or defective execution of making or doing something.

Id. at 307-08.

Kroll demonstrates that Georgia courts apply such exclusions according to their plain wording. However, the court in *Kroll* noted that the exclusionary language at issue excluded the "cost of making good any faulty or defective workmanship or materials" but did not exclude losses "stemming from faulty workmanship." *See Id.* at 308.[12] The faulty workmanship exclusion contained at Section B.3.D of the Policy **does exclude loss, damage or expense stemming from**

[12] The court in *Kroll* recognized *U.S. Industries, Inc. v. Aetna Cas. & Sur. Co.*, 690 F.2d 459 (5th Cir. 1982), as an example of a case where broader exclusionary language was employed in a faulty workmanship exclusion. In *U.S. Industries*, the Fifth Circuit broadly construed a faulty workmanship provision that excluded "[l]oss or damage caused by or resulting from faulty workmanship" to bar coverage for "the defective handling of a heat treatment" under an all-risk policy. *U.S. Indus.*, 690 F.2d at 462-63.

faulty workmanship. However, the Business Court applied the Policy's faulty workmanship exclusion as if it ***did not*** exclude loss, damage or expense stemming from faulty workmanship. This is in contrast to the clear, unambiguous language of the exclusion.

Significantly, the Order does not make any finding that the faulty workmanship exclusion is ambiguous. Finding no ambiguity, the Business Court should have simply applied the unambiguous policy provision to the applicable facts surrounding the subject claim. Instead, the Business Court chose not only to construe the exclusion, but also considered extrinsic evidence from testimony provided in a Rule 30(b)(7) deposition. Georgia law is clear that unambiguous policy provisions, including exclusions, require no construction and their plain terms must be given effect. *Auto Owners Ins. Co. v. Reed*, 649 S.E.2d 843 (Ga. Ct. App. 2007). The Business Court failed to heed this admonition and elected to construe the faulty workmanship exclusion in an impermissibly narrow manner that is in conflict with the plain language of the exclusion and authorities that have applied similar exclusions.

B. The Faulty Workmanship Exclusion Precludes Coverage for Respondents' Claims

There is no dispute that third parties performed negligent, defective, and faulty repairs to the subject railroad tank car and that there was a resulting rupture and leak. The Business Court did not find otherwise and the third-party actions initiated by Respondent Axiall conclusively establish this connection. [J.A. 000972-74; 000993-004]. Under these undisputed circumstances, the Policy's faulty workmanship exclusion bars coverage for the losses claimed by Respondents and this conclusion is supported by ample case authority.

In *TMW Enterprises, Inc. v. Federal Insurance Co.*, the Sixth Circuit broadly applied an exclusion for "loss or damage . . . caused by or resulting from . . . faulty . . . workmanship." 619 F.3d 574, 576 (6th Cir. 2010). This language is strikingly similar to the Policy's faulty workmanship exclusion because it includes the phrase "caused by or resulting from". The

plaintiff in *TMW* sought coverage for repair costs incurred from water infiltration to a building that had been improperly constructed. *Id.* at 575. The plaintiff spent $3.9 million making repairs to deterioration problems created by the water infiltration and the insurance company denied coverage for those costs under the faulty workmanship exclusion. *Id.* The plaintiff argued that the water infiltration and resulting damages were a separate peril from faulty workmanship involved in the construction of the building (similar to Respondents' arguments that the tank car rupture and/or chlorine release are separate from the faulty workmanship). *Id.* at 576. The Sixth Circuit rejected the plaintiff's argument and explained as follows:

> As an "all-risk" policy, this insurance policy basically covers everything unless specifically excluded. That means the number of possibilities for last-in-time "but for" causes of damage are limited only by the imagination of the reader. What if a roof contains a flawed design . . . and it leaks water into the house, which ruins one of the floors? But for the water, no damage to the floor would have occurred. Yet the contract does not exclude damages caused by "water." Coverage? What if faulty construction allows humid summer air to enter the building, which rusts metal fixtures? But for the exposure to the summer air, no damage to the fixtures would have occurred. Yet the contract does not exclude damages caused by "air." Coverage? What if a poorly constructed ceiling beam falls, smashing the floor below? But for the force of gravity, no damage to the floor would have occurred. Yet the contract does not exclude damages caused by "gravity." Coverage? As in each of these examples, so too here: the very risk raised by the flawed construction of a building came to pass. To say that the risk was not covered because other elements or natural forces were the last causative agents of the damage, though to be sure utterly foreseeable causes of the damages, is to eliminate the exclusion. It is exceedingly strange to think that a single phenomenon that is clearly an excluded risk under the policy was meant to become compensable because in a philosophical sense it can also be classified as water damage.

Id. at 576-77 (citations and quotations omitted). The court further explained that an exclusion for loss or damage "caused by or resulting from" faulty workmanship extends to all damages that occur "naturally and continuously from the faulty workmanship, unbroken by any new, independent cause." *Id.* at 579 (citations and quotations omitted).

The Sixth Circuit's reasoning is directly on point here. The Business Court found the Policy's failure to specifically exclude "tank car rupture" or "chlorine release" meant that both

are automatically covered—but this would require the parties to predict and account for every possible consequence of faulty workmanship. However, the Policy excludes "loss, damage or expense caused by or resulting from . . . faulty workmanship." The relevant inquiry is therefore **not** whether the Policy expressly excludes "tank car rupture", but rather whether the "tank car rupture" was **caused by or resulted from** faulty workmanship. As explained herein, there is no dispute that the tank car ruptured as a result of faulty workmanship.

The ruling in *TMW* is consistent with Georgia law because a federal district court applying Georgia law recently cited to *TMW* in support of its analysis of a faulty workmanship exclusion. *See Mock v. Cent. Mut. Ins. Co.*, 158 F. Supp. 3d 1332, 134-142 (S.D. Ga 2016). In contrast, the Business Court's Order is completely at odds with the above analysis, as it limited the faulty workmanship exclusion to the defective condition introduced by the faulty workmanship. This ruling is contrary to the plain language of the exclusion, one to which the Business Court did not find any ambiguity. It is also contrary to other cases which have broadly applied faulty workmanship exclusions.

Courts in other jurisdictions have broadly applied faulty workmanship exclusions to bar coverage for damage that resulted from faulty workmanship. *See, e.g., Taja Invs., LLC v. Peerless Ins. Co.*, 196 F. Supp. 3d 587 (E.D. Va. 2016); *HP Hood LLC v. Allianz Global Risks U.S. Ins. Co.*, 39 N.E.3d 769 (Mass. App. Ct. 2015). In *Taja*, the policy stated that "defects, errors, and omissions relating to . . . workmanship are not covered, but if loss by another covered peril results [the insurer] will pay for the resulting loss." *Taja*, 196 F. Supp 3d at 590. The loss at issue involved a collapse of a wall and damages to a building resulting from the collapse. *Id.* The plaintiff, similar to Respondents, argued the faulty workmanship exclusion should only apply to repairing the faulty work itself but that the resulting damages to the building caused by the

collapse should be covered as an ensuing loss from faulty workmanship. *Id.* at 594. The court declined to recognize such a distinction and explained:

> [S]uch a distinction is unavailing because Plaintiff merely attempts to separate cause and effect. By saying the collapse is a covered peril that caused the loss in question, Plaintiff wishes to either ignore or separate the cause of the collapse, which is Plaintiff's conduct expressly excluded in the Workmanship exclusion. Plaintiff is essentially asking the Court to write the Workmanship exclusion out of the Policy, because under Plaintiff's theory any losses that occur subsequent in time to the excluded workmanship are restored simply because of the passage of time.

Id. The court ruled that the faulty workmanship exclusion barred coverage for all damages caused by faulty workmanship—including the damage to the building caused by the collapse. *Id.*; *see also HP Hood*, 39 N.E.3d at 774-75 (applying a faulty workmanship exclusion to bar coverage for a faulty bottle cap and to the unsaleable contents of the bottles because the losses were all "directly caused by, and completely bound up in" faulty workmanship).

Here, the ruling of the Business Court is directly contrary to not only the plain language of the exclusion, but also to the above authorities, because it impermissibly writes the phrase "caused by or resulting from" out of the Policy entirely. This violates the principles of Georgia law concerning insurance contract application and constitutes reversible error. *See Dunn*, 269 Ga. at 215, 496 S.E.2d at 699.

C. The Business Court Erred In Determining That the Tank Car Rupture/Chlorine Release Was a Covered Peril and That the Ensuing Damage Exception to the Faulty Workmanship Exclusion Preserved Coverage

Similar to its ruling on the corrosion exclusion, the failure of the Business Court to apply the unambiguous provisions of the faulty workmanship exclusion led it to commit the additional error of finding coverage pursuant to the ensuing loss exception to the exclusion. The ensuing loss exception to the exclusion states: "[T]his exclusion does not apply to resultant physical loss

or damage not otherwise excluded." [J.A. 001025]. This exception does not apply to Respondents' claims.

Initially, the Business Court erred by failing to determine whether Respondents carried their burden to demonstrate their claim fell within the ensuing loss exception. *See Mock v. Cent. Mut. Ins. Co.*, 158 F. Supp. 3d 1332, 1347 (S.D. Ga. 2016) ("[the] burden of proving an exception to an exclusion lies with the insured"). The failure of the Business Court to acknowledge this burden and, more importantly, to find that the burden had been met, is clear error.

Courts have declined to find coverage pursuant to ensuing loss exceptions under facts very similar to those in this case. In *Peek v. Am. Integrity Ins. Co. of Fla.*, 181 So. 3d 508 (D. Ct. App. Fla. 2015), the insured suffered damage, including damage to metal appliance components and electronic parts, when sulphur released from Chinese drywall was exposed to the atmosphere and subsequently caused corrosion. The applicable policy included exclusions for latent defects, corrosion, pollutants, and faulty, inadequate, or defective construction materials. Based on testimony that the claimed damages were caused by sulphur (a contaminant) and a latent defect, the court found the insurer satisfied its initial burden that the claimed loss was excluded. The insured argued an ensuing loss exception applied because it suffered "subsequent damage to metals and electronics separate from any defective materials, pollutants, or corrosion." *Peek*, 181 So. 3d at 512. The court determined that the insured did not meet its burden to bring its claimed loss within the ensuing loss exception and affirmed the trial court's judgment in favor of the insurer. In doing so, the court explained:

> Here, the damage to the Peeks' home and consequently the odors and corrosions of metals and electronics were directly related to the defective Chinese drywall and thus directly stem from an excluded risk.

Id. at 513.

The court added that "[t]o hold otherwise would be to allow the ensuing loss provision to completely eviscerate and consume the . . . exclusion." *Id.* (quoting *Swire Pac Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 167 (Fla. 2003)); *see also Erie Ins. Prop. & Cas. Co. v. Chaber*, 239 W. Va. 329, 337, 801 S.E.2d 207, 215 (2017) ("[A]n unambiguous ensuing or resulting loss clause of an exclusion contained in an insurance policy provides a narrow exception to the exclusion but does not revive or reinstate coverage for losses otherwise unambiguously excluded by the policy. Where an uncovered event occurs, an ensuing or resulting loss that is otherwise covered by the policy will remain covered, but the uncovered event itself is not covered."). The decisions in *TMW* and *Taja* discussed above are also instructive on this point, because the direct, foreseeable consequences of faulty workmanship cannot be recast as separate events to avoid the application of a clear faulty workmanship exclusion.

The Order of the Business Court does exactly what the court in *Peeks* cautioned against. It effectively allows the exception to consume the exclusion and does so in the face of clear language excluding "loss, damage or expense caused by or resulting from ... faulty ... workmanship." [J.A. 001024-25]. The ruling is clearly erroneous and should be reversed.

III. THE BUSINESS COURT ERRED IN FINDING THAT THE CONTAMINATION EXCLUSIONS IN ENDORSEMENT NO. 1 AND ENDORSEMENT NO. 19 DO NOT PRECLUDE COVERAGE

The Business Court's ruling on the contamination exclusions contains the same errors as its holdings on the corrosion and faulty workmanship exclusions. Again, there are two principal errors committed by the Business Court. First, the Business Court did not follow basic rules of insurance contract application by construing the provisions of Endorsement Nos. 1 and 19 and considering extrinsic evidence, as opposed to applying their plain language, which resulted in the exclusions being improperly limited to environmental impairment. This error is, again, noteworthy because there was no finding that these exclusions are ambiguous. Second, this error

was compounded by the Business Court's later determination that coverage existed under an exception to the exclusion despite no determination that Respondents had shouldered their burden of demonstrating the application of the exceptions and despite the clear language of the exception not being satisfied.

A. The Contamination Exclusions In Endorsement No. 1 and Endorsement No. 19 Are Unambiguous

Georgia law requires that when an insurance policy is clear and unambiguous, the contract must be enforced as written. *Ryan v. State Farm Mut. Auto. Ins. Co.*, 261 Ga. 869, 413 S.E.2d 705 (1992). The Business Court made no finding that the contamination exclusions in Endorsement Nos. 1 and 19 were ambiguous. Indeed, the Business Court used the language "clearly and unambiguously" in addressing the exclusions.[13] [J.A. 011908]. Accordingly, the Business Court was required to enforce the contamination exclusions as written. Contrary to Georgia law, the Business Court proceeded to construe the exclusions and limit their application in the face of the clear and unambiguous language.

B. Georgia Courts Enforce Exclusions Such As Endorsement No. 1 and Endorsement No. 19 According to Their Absolute and Unambiguous Terms

The language in both Endorsement No. 1 and Endorsement No. 19 is clear and applies to all types of pollution and/or contamination. Endorsement No. 1 provides:

> Notwithstanding any provision in the Policy to which this Endorsement is attached, this Policy does not insure against loss, damage, costs or expenses in connection with any kind or description of seepage and/or pollution and/or contamination, direct or indirect, arising from any cause whatsoever.
>
> ***
>
> However, if the insured property is the subject of direct physical loss or damage for which this company has paid or agreed to pay then this Policy (subject to its terms, conditions and limitations) insures against direct physical loss or damage to

[13] Moreover, Respondents conceded in discovery that they were not contending any of the terms or provisions of the Policy were ambiguous or unclear. [J.A. 000312].

> the property insured hereunder caused by resulting seepage and/or pollution and/or contamination.
>
> ***

[J.A. 000268].

Endorsement No. 19 of National Union – US Policy No. 020786808 states in pertinent part:

> This policy does not cover loss or damage caused by, resulting from, contributed to or made worse by actual, alleged or threatened release, discharge, escape or dispersal of CONTAMINANTS or POLLUTANTS, all whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any physical damage insured by this policy.
>
> ***

[J.A. 000293].

Not only are the above provisions unambiguous, they are also characterized as absolute pollution/contamination exclusions and have been enforced by Georgia courts. The Georgia Supreme Court has specifically held that such exclusions are not limited to the environmental context absent specific policy language creating such a limitation. *Georgia Farm Bureau Mut. Ins. Co. v. Smith*, 298 Ga. 716, 784 S.E.2d 422, 423 (2016). In *Georgia Farm Bureau*, the Georgia Supreme Court considered a policy that excluded "'property damage' arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' . . . ." *Id.* The court analyzed whether lead paint in a home was a pollutant that triggered the exclusion. The court found that "lead present in paint unambiguously qualifies as a pollutant and . . . the plain language of the policy's pollution exclusion clause thus excludes Smith's claims against Chupp from coverage." *Id.* at 426. The court further noted that "Georgia courts have repeatedly applied these clauses outside the context of traditional environmental pollution." *Id.* at 425.

Other Georgia courts have reached similar conclusions in reliance on *Georgia Farm Bureau*. In *Evanston Ins. Co. v. Sandersville R.R. Co.*, No. 5:15-CV-247, 2016 WL 5662040, at *4 (M.D. Ga. Sept. 29, 2016), a case decided approximately six months after *Georgia Farm Bureau*, the court analyzed a "pollution exclusion" that "exclude[d] coverage for injuries arising out of the . . . discharge, dispersal, seepage, migration, release or escape of pollutants." (quotation marks omitted). The court addressed whether welding fumes containing iron fell within the exclusion. *Id.* at *2. In applying the exclusion, the court reasoned that the Georgia Supreme Court's decision in *Georgia Farm Bureau* "ended any debate" over the scope of pollution exclusions under Georgia law and that such exclusions are "absolute" and applicable to all pollution. *Id.* at *5. Similarly, in *Owners Ins. Co. v. Farmer*, 173 F. Supp. 2d 1330 (N.D. Ga. 2001), the court ruled that personal injury and property damage caused by exposure to diesel fumes sprayed to kill termites were excluded by a pollution exclusion. The court considered and rejected the argument that the pollution exclusion applied only to environmental cleanup. *Id.* at 1333-34. In rejecting the argument, the court stated it was "satisfied that the unambiguous language of the policy excludes *all* pollutants and does not exclude pollutants based on their source or location." *Id.* (emphasis in original).

Not only is the exclusionary language in Endorsement Nos. 1 and 19 absolute and controlling, there is also no doubt that the tank car rupture/release of chlorine in this case falls within the exclusions. In the first instance, there is no question that the released chlorine is a pollutant/contaminant, and the Business Court's Order never determined or suggested otherwise. Moreover, several cases demonstrate that the rupture and release are excluded. In *United States Fidelity & Guar. Co. v. Jones Chemicals, Inc.*, No. 98-4018, 199 WL 801589, 194 F.3d 1315 (6th Cir. Sept. 27, 1999) (Table), the court considered whether injury following a liquid chlorine

release from a tank fell within a pollution exclusion. The court answered in the affirmative, discounting the very ruling made by the Business Court here. The court explained:

> Jones' first argument would require us to interpret or construe the already plain meaning of the contract to limit the pollution exclusion to lawsuits involving environmental harm. The second argument, that, in this case, the chlorine was not a pollutant, is remarkably far-fetched. There is no question that chlorine is a pollutant within the meaning of the policy . . . .

Id. at *2.

Similarly, in *Atlantic Cas. Ins. Co. v. Zymblosky*, No. 1167 MDA 2016, 2017 WL 3017728, at *1-4 (Pa. Super. Ct. July 17, 2017), the court considered whether a total pollution exclusion endorsement applied to injury caused by exposure to a cloud of chlorine gas. The appellate court agreed with the trial court's application of the exclusion and its finding that federal statutes define chlorine gas as a pollutant, and noted the trial court statement that "it is undisputed that chlorine gas is a dangerous and potentially deadly chemical." *Id.* at *4; *see also Gulf Ins. Co. v. City of Holland*, No. 1:98-CV-774, 2000 WL 33679413, at *2-6 (W.D. Mich. April 3, 2000) (enforcing pollution exclusion following chlorine gas release and rejecting argument that exclusion applies only to "traditional environmental pollution").

Despite the clear language of the contamination exclusions and clear Georgia and other authority, the Business Court limited the application of the exclusions to environmental pollution or contamination, which it considered as not an issue in this case. [J.A. 011908-09]. This distinction is not supported by the plain language of the exclusions. Further, the Business Court made this distinction without acknowledging, distinguishing, or otherwise addressing in the Order the controlling Georgia authority reaching the exact opposite conclusion cited by Petitioners.

To reach the limitation it imposed on the exclusions, not only did the Business Court improperly construe as opposed to apply the Endorsements' provisions, it also referenced

extrinsic evidence and pointed to language in a separate exclusion contained within Endorsement No. 1 – the Authorities Exclusion. [J.A. 011908; 011910]. Both of these actions were erroneous, particularly given the lack of any finding of ambiguity.

The extrinsic evidence considered by the Business Court was self-serving testimony from Respondent Axiall's broker about his view as to the scope of Endorsement No. 19 in relation to Endorsement No. 1. [J.A. 011910; 001108-09; 002781]. Consideration of extrinsic evidence unquestionably runs afoul of the basic rule the courts are to apply unambiguous terms as written. *Ryan v. State Farm Mut. Auto. Ins. Co.*, 261 Ga. 869, 413 S.E.2d 705 (1992). Moreover, there was no need to refer to other unrelated provisions of the Policy when the language at issue is clear and unambiguous.

The term "environmental impairment", while contained within the separate Authorities Exclusion, is not included in the pollution/contamination exclusion in Endorsement No. 1. The Authorities Exclusion has a different title and different language than the pollution/contamination exclusion, is separated from the pollution/contamination exclusion by two other distinct exclusions and appears on a different page of the Policy. [J.A. 000269]. Reference to different exclusionary language violates a longstanding rule in Georgia that a court cannot "add words to the contract of insurance to either create or avoid liability." *Pilot Life Ins. Co. v. Morgan*, 94 Ga. App. 394, 94 S.E.2d 765, 768 (Ga. Ct. App. 1956). This Court need look no further than to the clear language of the pollution/contamination exclusions in Endorsement No. 1 and Endorsement No. 19 to find that the Business Court's conclusion that the exclusions were limited to "environmental impairment" was erroneous. The clear wording of the exclusions applies to all types of pollution or contamination and bars coverage for Respondents' claims.

C. The Exception to the Contamination Exclusion In Endorsement No. 1 Is Inapplicable

The Business Court also found that an exception to the contamination exclusion in Endorsement No. 1 applied even if it were determined that the chlorine cloud constituted "seepage and/or contamination." [J.A. 011908-09].[14] The language in Endorsement No. 1 upon which this finding was based is as follows:

> However, if the insured property is the subject of direct physical loss or damage for which this company has paid or agreed to pay then this Policy (subject to its terms, conditions and limitations) insures against direct physical loss or damage to the property insured hereunder caused by resulting seepage and/or pollution and/or contamination.
>
> ***

[J.A. 000268].

Initially, it should be noted that Respondents bear the burden of establishing that an exception to the exclusion applies. *Mock v. Cent. Mut. Ins. Co.*, 158 F. Supp. 3d 1332 (S.D. Ga. 2016) (applying Georgia law and noting "burden of proving an exception to an exclusion lies with the insured"). The Business Court Order, however, contains no finding that Respondents shouldered the necessary burden to establish the application of the exception language set forth above. Nevertheless, the exception language does not apply here.

The Business Court's decision to apply the exception language it cited was in error because one of the exception's requirements was ignored. The exception contains the requirement that the loss or damage has to be one "for which this company has paid or agreed to pay . . . ." There is no dispute that Petitioners have not paid or agreed to pay any of Respondents' claim. Indeed, it is because Petitioners rejected Respondents' claim that the present litigation was

[14] The Business Court found that the exclusion in Endorsement No. 19 did not apply, and thus, did not address the exceptions therein.

initiated. Because there has been no payment or agreement to pay, the exception is not triggered and, accordingly, the Business Court's reliance on the exception was misplaced and in error.

IV. THE BUSINESS COURT ERRED IN STRIKING PETITIONERS' AFFIRMATIVE DEFENSES RELATED TO THE EXCLUSIONS BECAUSE ISSUES TO WHICH THE EXCLUSIONS APPLY REMAIN OUTSTANDING

The Business Court undertook the unusual move in the Orders to not only grant summary judgment, but to also strike portions of Petitioners' Seventeenth Affirmative Defense which cited the exclusions as defenses. The Seventeenth Affirmative Defense provides:

> **SEVENTEENTH DEFENSE**
>
> Plaintiffs' claims are barred or limited by the terms, conditions, deductibles, limits, sublimits, provisions, exclusions, and/or endorsements of the Policy, including the following, all of which are incorporated herein by reference:
>
> a) Section A -Declarations, paragraph 5;
> b) Section B -Real and Personal Property and Time Element, paragraphs 1, 3(C), 3(D), 4(A)(l)-(5);
> c) Section C -General Conditions, paragraphs 7, 10, 11, 19;
> d) Endorsement No. 1;
> e) Endorsement No. 5;
> f) Endorsement No. 19 (National Union Policy No. 020786808);
> g) Any other Policy provision raised by Plaintiffs or that may become applicable as discovery in this action progresses.

[J.A. 000040].

The error committed by the Business Court in striking those portions of the Seventeenth Affirmative Defense rests in the fact that the Business Court also recognized that there were outstanding issues related to the corrosion and faulty workmanship exclusions which were not addressed in the Orders. For example, in the Order addressing the corrosion exclusion, the Business Court states: "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 [B.]3.C of the Policies." [J.A. 011921].

Despite recognizing that pre-existing corrosion was an issue not addressed by the Order, the Business Court nonetheless completely struck the corrosion exclusion affirmative defense. This was clearly in error.

Similarly, the faulty workmanship exclusion defense was struck even though the Business Court in the faulty workmanship Order recognized that the exclusion was applicable to certain claimed damages as reflected in the following language:

> In this case, even if it was the maintenance vendors' allegedly negligent maintenance or repair work which caused a defective condition in the tank car wall by weakening it and making it more susceptible to stress, Section [B.]3.D would bar Plaintiffs from recovering for this defective condition, the costs that Plaintiffs would have incurred to remedy the negligent repair work and render the tank care safe for continued use . . . .

[J.A. 011930].

Again, despite recognizing that the exclusion applied to certain claimed damages, the Business Court ordered the faulty workmanship exclusion defense stricken in its entirety. This ruling was also clearly in error and should be reversed. If the ruling is left undisturbed, Petitioners could be precluded from relying on Policy defenses the Business Court has recognized may bar some portion of Respondents' claim.

CONCLUSION

For the reasons set forth above, Petitioners pray that this Court reverse the Business Court Orders and remand this matter to the Business Court with direction to grant summary judgment in favor of Petitioners, together with such other and further relief as the Court may deem proper.

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

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No. 21-1016

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioners,

vs.

WESTLAKE CHEMICAL CORPORATION, et al.,

Respondents.

From the Circuit Court of Marshall County, West Virginia, Business Court Division
No. 19-C-59, the Honorable Judge Christopher Wilkes

CERTIFICATE OF SERVICE

I, the undersigned counsel for Petitioners, do hereby certify that I have served the foregoing **PETITIONERS' BRIEF** upon counsel of record this 21st day of March, 2022, by depositing a true and exact copy in the United States mail, postage prepaid, addressed as follows:

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