INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

NO. 25-ICA-213

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HOMESITE INSURANCE COMPANY OF FLORIDA,
Plaintiff Below, Petitioner

v.

ZURICH AMERICAN INSURANCE COMPANY
And
J.F. ALLEN COMPANY, INC.
Defendants Below, Respondents

PETITIONER'S REPLY BRIEF

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Assignment of Error Number 2: The Circuit Court erred by finding that the auto exclusion contained in the Homesite Policy is ambiguous, and therefore must be interpreted against Homesite.

CORRECTION TO ZURICH'S STATEMENT OF THE CASE

Respondent Homesite Insurance Company of Florida ("Homesite") hereby corrects the following inaccuracies of the Statement of the Case included in the Respondent's Brief filed by Zurich American Insurance Company ("Zurich").

AXIS DID NOT DETERMINE THAT ITS POLICY'S AUTO EXCLUSION DOES NOT APPLY; IT PARTICIPATED IN SETTLING A DISPUTED CLAIM AFTER ISSUING, BUT NEVER RETRACTING, A RESERVATION OF RIGHTS

On pages 7 and 8 of Zurich's Respondent's Brief, Zurich's Statement of the Case asserts that Axis Surplus Insurance Company ("Axis"), which had issued an excess liability insurance policy (the "Axis Excess Policy")[1] to J.F. Allen Company, Inc. ("J.F. Allen"), determined that an auto exclusion contained in the Axis Excess Policy does not apply to the underlying lawsuit by Debra D. Green in the Circuit Court of Harrison County, West Virginia (the "Green Lawsuit"). This is simply not true.

On December 14, 2023, Axis issued a Reservation of Rights to J.F. Allen.[2] In its Reservation of Rights, Axis clearly outlines two reasons why there may not be liability insurance coverage for J.F. Allen under the Axis Excess Policy regarding the Green Lawsuit, the first of

[1] The Axis Excess Policy (**AR0513-0553**).
[2] **AR1111-1118**.

which is the operation of the auto exclusion in question.[3] Axis never retracted its Reservation of Rights.

Later, in April of 2024, Axis (along with various other insurers and J.F. Allen) financially participated in a Confidential Settlement of the Green Lawsuit.[4]

There is no factual basis for Zurich's assertion that Axis determined that the auto exclusion contained in the Axis Excess Policy does not apply to the Green Lawsuit.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary in this matter because the criteria outlined in Rule 18(a) of the West Virginia Rules of Appellate Procedure do not render oral argument unnecessary: No party has waived oral argument, this appeal is not frivolous, the parties disagree as to whether the dispositive issues have been authoritatively decided, and this Court's decisional process would benefit from oral argument.

Oral argument should take place pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure, as opposed to Rule 19, because this case involves an issue of first impression.

[3] **AR1114**, **AR1116**.
[4] **AR 1243-1255**.

ARGUMENT

I. ZURICH AND J.F. ALLEN FAIL TO ACKNOWLEDGE THAT THE TERMS "CLAIM, SUIT, LOSS" IN THE HOMESITE AUTO EXCLUSION ARE ALTERNATIVE CHOICES, DUE TO THE USE OF THE DISJUNCTIVE "OR"; THEREFORE, ANY ONE OF THE THREE CAN TRIGGER THE AUTO EXCLUSION

The Homesite Policy's auto exclusion states:

> The policy does not apply to any claim, **suit**, **loss** or any other cost or expense arising out of the ownership, maintenance, operation, use, entrustment to others or **loading or unloading** of any **auto**. [5]

On pages 7 and 9 of J.F. Allen's Respondent's Brief, and pages 18, 19, 23, 24, and 26 of Zurich's Respondent's Brief, J.F. Allen and Zurich both attempt to paint the words "claim, **suit**, **loss**" contained in the Homesite Policy's auto exclusion as collectively only referring to a filed lawsuit, and nothing more. This is meant to bolster their arguments that the Homesite Policy's auto exclusion is not triggered by a lawsuit for negligent hiring/retention of a contractor (such as the Green Lawsuit), and/or that the case law interpreting similar exclusions, but with different language (i.e., "bodily injury" or "property damage") is not relevant.

The reality, however, is that those three terms (claim, **suit**, **loss**) are not to be lumped together to mean just one thing. They are part of a list of alternative choices, as signified by the use of the disjunctive "or" following the word "**loss**". See Pajak v. Under Armor, Inc., 246 W. Va. 387, 395, 873 S.E. 2d 918, 926 (2022). Therefore, applying the plain and unambiguous language of the Homesite Policy's auto exclusion, any one of these four things can trigger the auto exclusion:

- Any claim arising out of the ownership, maintenance, operation, use, entrustment to others or **loading** or **unloading** of any **auto**.
- Any **suit** arising out of the ownership, maintenance, operation, use, entrustment to others or **loading** or **unloading** of any **auto**.

[5] **AR0553**.

- Any **loss** arising out of the ownership, maintenance, operation, use, entrustment to others or **loading** or **unloading** of any **auto**.

- Any other cost or expense arising out of the ownership, maintenance, operation, use, entrustment to others or **loading** or **unloading** of any **auto**.

"**Suit**" and "**loss**" are defined terms under the Axis Excess Policy, and those definitions are incorporated by reference into the Homesite Policy. The word "**suit**" is defined by the Axis Excess Policy as "a civil proceeding in which covered **loss** is alleged."[6] The word "**loss**" is defined by the Axis Excess Policy as "damages the Insured becomes legally obligated to pay as judgments or settlements."[7] Therefore, plugging the definitions of these defined terms into the four things that can trigger the Homesite Policy's auto exclusion, we see that the auto exclusion can be triggered by any <u>one</u> of the following:

- Any claim arising out of the ownership, maintenance, operation, use, entrustment to others or **loading** or **unloading** of any **auto**.

- Any **suit** (a civil proceeding in which covered damages the Insured becomes legally obligated to pay as judgments or settlements is alleged) arising out of the ownership, maintenance, operation, use, entrustment to others or **loading** or **unloading** of any **auto**.

- Any **loss** (damages the Insured becomes legally obligated to pay as judgments or settlements) arising out of the ownership, maintenance, operation, use, entrustment to others or **loading** or **unloading** of any **auto**.

- Any other cost or expense arising out of the ownership, maintenance, operation, use, entrustment to others or **loading** or **unloading** of any **auto**.

Rhetorically, J.F. Allen and Zurich are enamored with the words "claim" and "**suit**", but they avoid discussing the word "**loss**" in any detail. In fact, Zurich goes so far as to omit the word "loss" from its arguments in various parts of its Respondent's Brief. See Zurich Respondent's Brief, pages 13, 23, and 24.

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[6] **AR0538**.
[7] **AR0537**.

As argued in Homesite's Petitioner's Brief (page 20), all three of the above-referenced words that trigger the Homesite Policy's auto exclusion (claim, **suit**, **loss**) ultimately refer to the damages sought by the claimant in question, rather than the specific type of cause of action being pursued by the claimant. But even assuming (without conceding) that J.F. Allen and Zurich are correct about the words "claim" and "**suit**", and those words only refer to a filed lawsuit under a specific theory of liability, their arguments have absolutely no merit regarding the word "**loss**". Using the explicit definition of that term, and focusing only on that term (as opposed to the other alternative choices for triggering the auto exclusion), the "**loss**" portion of the Homesite Policy's auto exclusion should be read as follows:

> The policy does not apply to any damages the Insured becomes legally obligated to pay as judgments or settlements arising out of the ownership, maintenance, operation, use, entrustment to others or **loading or unloading** of any **auto**.

As a result of the Confidential Settlement in the Green Lawsuit, J.F. Allen became legally obligated to pay damages to Ms. Green as part of the Confidential Settlement. [8] Those damages arose out of Mr. Marple's use of the Nu Creek vehicle.

In the Green Lawsuit's Complaint, Ms. Green sought damages from all three defendants (Mr. Marple, Nu Creek, and J.F. Allen) for the wrongful death of her husband in the April 20, 2022 motor vehicle accident between the vehicles driven by Mr. Green and Mr. Marple. She alleged in Paragraph 27 of her Complaint:

> As a direct and proximate result of the negligence, recklessness, and other wrongful acts of Defendant Marple, Defendant Nu Creek, LLC, and Defendant J.F. Allen Company, Inc., Larry R. Green suffered serious injuries and ultimately died as a result of these injuries.[9]

She further alleged in Paragraph 28 of her Complaint:

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[8] **AR1241-1255**.
[9] **AR0317**.

> As a direct and proximate result of the negligence, recklessness, and other wrongful acts of Defendant Marple, Defendant Nu Creek, LLC, and Defendant J.F. Allen Company, Inc., Debra D. Green (Larry Green's wife), Jeremy Ray Green and Nathan Andrew Green (Larry Green's sons), Bernard "Chuck" Green and Stewart "David" Green (Larry Green's brothers), Sherry Green and Chrissy Bailes (Larry Green's sisters), and Barbara Green (Larry Green's mother), and the other heirs and statutory beneficiaries of Larry R. Green pursuant to W.Va. Code §55-7-6(b) suffered and will continue to suffer damages for which they are entitled to recover, including (without limitation) death, conscious pain and suffering, sorrow, mental anguish, and solace, which includes loss of society, companionship, comfort, guidance, kindly offices, and advice of the decedents; loss of services, protection, care and assistance by the decedents; lost wages; reasonable funeral expenses; and other damages which a jury in this matter deems fair and just.[10]

Ms. Green specifically sought to hold J.F. Allen partially responsible for causing the April 20, 2022 motor vehicle accident between the vehicles driven by Mr. Green and Mr. Marple. She did so by alleging that J.F. Allen had engaged in wrongful conduct through its retention and continued use of Mr. Marple and Nu Creek as contractors, despite issues with their background. In Paragraph 56, she alleged:

> Defendant J.F. Allen owed a duty to conduct a reasonable investigation into the background of Defendant Nu Creek and Defendant Marple as to their fitness to act as a motor carrier and/or operate commercial motor vehicles on the public roadways prior to retaining Defendant Nu Creek and/or Defendant Marple to operate commercial motor vehicles for-hire.[11]

She further alleged violations of that duty in Paragraph 57 of the Complaint in the Green Lawsuit:

> By retaining Defendant Nu Creek and/or Defendant Marple as contractors to haul cargo in commercial motor vehicles on the roadways when Defendant J.F. Allen knew or should have known that Defendant No Creek was an illegal chameleon carrier and Defendant Marple was unfit to safely operate a commercial motor vehicle, Defendant J.F. Allen was negligent and aided, abetted, and/or encouraged Defendant Nu Creek and Defendant Marple to violate the applicable trucking safety rules which are designed for the protection of the motoring public, including the decedent, Larry R. Green.[12]

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[10] **AR0317-0318**.
[11] **AR0323**.
[12] **AR0323-0324**.

In Paragraph 70 of the Complaint in the Green Lawsuit, Ms. Green alleged that the above-described misconduct by J.F. Allen partially caused the April 20, 2022 motor vehicle accident between the vehicles driven by Mr. Green and Mr. Marple, which caused Mr. Green's death:

> Notwithstanding having the aforementioned authority to haul cargo issued from the public authorities, Defendant J.F. Allen contracted with Defendant Nu Creek to perform such activity which resulted in the wrongful death of Larry R. Green; therefore, Defendant J.F. Allen is subject to liability for the injuries and wrongful death suffered by the decedent, Larry R. Green.[13]

It is unmistakable: The damages that J.F. Allen is legally obligated to pay to Ms. Green as part of the Confidential Settlement of the Green Lawsuit are wrongful death damages for the death of Mr. Green in the April 20, 2022 auto accident, which was caused by Mr. Marple's use of the Nu Creek vehicle. As such, the damages arose out of Mr. Marple's use of the Nu Creek vehicle. The Homesite Policy's auto exclusion applies to the damages in question.

II. THE CASE LAW THAT APPLIES THE TERM "BODILY INJURY" PROVIDES GUIDANCE TO THIS COURT REGARDING THE TERMS "CLAIM, SUIT, LOSS", BECAUSE "LOSS" EQUATES TO DAMAGES, AND THE WEST VIRGINIA SUPREME COURT HAS EQUATED "BODILY INJURY" TO DAMAGES

In its Petitioner's Brief, Homesite cites a number of cases from across the country that support the application of the Homesite Policy's auto exclusion to the damages in question here. See Petitioner's Brief, pages 24-30. On pages 10 of J.F. Allen's Respondent's Brief, and pages 25-26 and 32-36 of Zurich's Respondent's Brief, J.F. Allen and Zurich attempt to distinguish those cases on the basis that those cases apply auto exclusions that are triggered by "bodily injury" or "property damage" arising out of the use of an auto, rather than the "claim, **suit**, **loss**" language contained in the Homesite Policy's auto exclusion. These arguments by J.F. Allen and Zurich are without merit.

[13] **AR0326**.

As shown above, the proper application of the defined term "**loss**", using the explicit definition contained in the Axis Excess Policy, calls for the Homesite Policy's auto exclusion to be read as follows:

> The policy does not apply to any damages the Insured becomes legally obligated to pay as judgments or settlements arising out of the ownership, maintenance, operation, use, entrustment to others or **loading or unloading** of any **auto**.

In context, there is no functional difference between "bodily injury" or "property damage" on the one hand, and "damages" on the other hand. The clearest authority for this proposition under West Virginia law is American National Property and Casualty Company v. Clendenen, 238 W. Va. 249, 793 S.E. 2d 899 (2016).

In American National, two teenage girls had murdered a third teenage girl. The parents of the murder victim sued the two teenage girls, but also sued the mothers of the teenage girls for negligent supervision of their daughters and negligent entrustment to them of an auto used in the murder, which acts of negligence the victim's parents alleged were contributing factors in their daughter's murder.

The homeowner's insurance policies insuring the two mothers each contained both intentional acts and criminal acts exclusions. In one of the policies, a criminal acts exclusion stated that the liability insurance coverage did not apply to bodily injury "[a]rising out of any criminal act committed by or at the direction of **any insured**[.]" The other policy's criminal acts exclusion stated that the policy did not cover "**[p]ersonal injury** arising out of willful violation of a law or ordinance by **anyone we protect**[.]" American National, 238 W. Va. at 253, 793 S.E. 2d at 903.

The central question in American National was whether liability insurance coverage was excluded as to the two mothers, neither of whom were guilty of any intentional acts or criminal acts. Among their other arguments in favor of insurance coverage, the plaintiffs argued that their

claims against the two mothers were for negligent supervision, and that the exclusions should be interpreted as being triggered (or not) by their theory of recovery against the two mothers, not by the criminal acts of the daughters, consistent with the view that coverage for each insured should be examined independently of how other insureds may be treated.

The West Virginia Supreme Court rejected this argument, and found the exclusions to be clear and enforceable against the two mothers. In its opinion, the Supreme Court relied heavily on a decision from the Court of Appeals of Louisiana: Perkins v. Shaheen, 867 So. 2d 135 (La. App. 3rd Cir. 2004). In Perkins, the insurance policy at issue excluded coverage for bodily injury resulting from intentional acts by any insured. Id. at 137. The West Virginia Supreme Court included the following quote from Perkins in American National to explain the reasoning behind its interpretation of the above exclusions:

> The focus of the policy exclusion is on the *cause of the damages*, not the cause of action alleged. All damages caused by intentional acts are excluded, regardless of the classification of the cause of action against the individual defendants. [The plaintiff] cannot avoid the consequences of the policy language by attempting to couch her allegations against the [defendant parents] as negligent, rather than intentional.
>
> American National, 238 W. Va. at 259, 793 S.E. 2d at 909, quoting Perkins, 867 So. 2d at 139 (emphasis added by the Supreme Court).

Later, the West Virginia Supreme Court emphasized this point in its own words:

> Here, the Neeses seek the same wrongful death damages against both Sheila and Rachel and their mothers. **The focus of the intentional/criminal acts exclusions is on the cause of the damages**, not the negligent supervision and negligent entrustment causes of actions alleged against Tara Clendenen and Patricia Shoaf. *Perkins*, 867 So. 2d at 139. As all such bodily injury claims arise from the intentional and criminal conduct of Sheila Eddy and Rachel Shoaf, insureds under the policy, the exclusions preclude coverage for all of the claims.
>
> American National, 238 W. Va. at 261, 793 S.E. 2d at 911 (emphasis added).

In applying an insurance policy exclusion that explicitly excluded coverage for bodily injury caused by intentional acts, the Court of Appeals of Louisiana in Perkins stated that the focus of the exclusion was on the cause of the damages at issue. Perkins at 139. The West Virginia Supreme Court, when applying a similar insurance policy exclusion in American National that explicitly excluded coverage for bodily injury caused by intentional acts, mirrored the logic of the Court of Appeals of Louisiana and found that the focus of the exclusion was on the cause of the damages at issue. American National, 238 W. Va. at 261, 793 S.E. 2d at 911.

When the explicit definition of the term "**loss**" is inserted into the Homesite Policy's auto exclusion, it reads as follows:

> The policy does not apply to any damages the Insured becomes legally obligated to pay as judgments or settlements arising out of the ownership, maintenance, operation, use, entrustment to others or **loading or unloading** of any **auto**.

American National shows that there is no functional difference between the use of the term "bodily injury" (the term used in much of the case law cited by Homesite) and damages (the term used in the "**loss**" portion of the Homesite Policy's auto exclusion), in terms of the true focus of the exclusions. As Perkins and American National show, the focus of the exclusions (even across differences in language) is on what caused the damages at issue, rather than the specific causes of action the claimant pursues against the insured. As such, the case law cited by Homesite is persuasive authority on the proper application of the Homesite Policy's auto exclusion. The attempts by J.F. Allen and Zurich to distinguish those cases, based on their use of the term "bodily injury" rather than "claim, **suit**, **loss**", have no merit.

III. AMERICAN NATIONAL IS MORE RELEVANT TO THE INSTANT MATTER, AND A MORE RELIABLE REFLECTION OF THE CURRENT STATE OF WEST VIRGINIA LAW, THAN HUGGINS

Both J.F. Allen (in its Respondent's Brief, pages 6-9) and Zurich (in its Respondent's Brief, pages 16-18 and 20-26), attempt to argue that Huggins v. Tri-County Bonding Co., 175 W. Va. 643, 337 S.E. 2d 12 (1985), is more relevant authority in the instant matter than American National. This argument has no value.

The insurance policy exclusion at issue in Huggins was very different from the Homesite Policy's auto exclusion at issue here. Critically (as recognized by the West Virginia Supreme Court in Huggins), the Huggins exclusion does not contain the "arising out of" or "arises out of" language that is used in the Homesite Policy's auto exclusion. Id. at footnote 2, and 175 W. Va. at 649, 337 S.E. 2d at 17.

J.F. Allen and Zurich attempt to paint Huggins as standing for the proposition that insurance coverage for a negligent entrustment cause of action against an insured does not depend on whether the injuries in question were caused by an auto accident. However, a closer look at Huggins shows that the analysis in Huggins was limited by, and to, the nature and specific wording of the insurance policy at issue in that case.

Following the West Virginia Supreme Court's analysis in Huggins of the "arising out of" issue described above, the Court went on to explain why the specific policy exclusion at issue in Huggins did not exclude coverage for the negligent entrustment action at issue:

> The critical element of a negligent entrustment cause of action is the initial improper loaning of the vehicle . . . Thus, the driver's negligent operation is not the critical factor in a negligent entrustment action, although it is necessary to complete the causal connection between the original negligent act (the entrustment) and the ultimate injury . . . When the policy is viewed in these terms, **we believe an ambiguity exists** with regard to coverage for the negligent entrustment of a nonowned motor vehicle. The liability coverage which is cast in terms of "personal

> acts" is broad enough to cover negligent entrustment. The automobile exclusion does not by its plain terms exclude coverage on a nonowned vehicle.

Id., 175 W. Va. at 649, 337 S.E. 2d at 17-18 (emphasis added).

As shown, the Supreme Court's analysis in Huggins resulted in an ambiguity finding, due to the nature of the initial broad grant of coverage under the policy (which was for "loss from damages for negligent personal acts," Id., 175 W. Va. at 646, 337 S.E. 2d at 15), the narrow scope of the exclusion in question (which lacked the broad "arising out of" language addressed by much of the case law, Id., 175 W. Va. at 647, 337 S.E. 2d at 15-16), and the exclusion's lack of specificity regarding coverage for nonowned vehicles (Id., 175 W. Va. at 649, 337 S.E. 2d at 17-18). As noted by the West Virginia Supreme Court in Huggins, ambiguity in an insurance policy requires that it be construed liberally in favor of the insured. Id., 175 W. Va. at 649, 337 S.E. 2d at 18. Therefore, the Supreme Court found the exclusion at issue in Huggins to not be enforceable against the insured.

Contrary to J.F. Allen's and Zurich's arguments, Huggins does not stand for the proposition that insurance coverage for a negligent entrustment cause of action against an insured does not depend on whether the injuries in question were caused by an auto accident. The portion of Huggins relied upon by J.F. Allen and Zurich is much more modest in its scope and application. It applies to the specific insurance policy provision at issue in that case. Beyond that, the portion of Huggins relied upon by Zurich in this regard holds no precedential value.

In contrast to the ambiguity finding in Huggins, the West Virginia Supreme Court did not find the exclusions at issue in American National to be ambiguous; rather, it found them to be unambiguous. American National, 238 W. Va. at 257-258, 793 S.E. 2d at 907-908. And the exclusions at issue in American National used the "arising out of" language used in the Homesite

Policy's auto exclusion, which was notably missing from the exclusion at issue in Huggins. Id., 238 W. Va. at 253, 793 S.E. 2d at 903.

On these two bases alone, American National is significantly more relevant to the instant matter than Huggins. But this relevance is heightened by the fact that American National is a far more recent decision than Huggins. Huggins was decided in 1985, roughly 40 years ago. American National was decided in 2016, roughly 9 years ago. Considering all of the above factors, American National is a far more reliable statement of West Virginia law regarding these issues than Huggins.

IV. HUGGINS IS ONLY RELEVANT AS AUTHORITY FOR THE BREADTH AND IMPORTANCE OF THE TERM "ARISES OUT OF", FOR WHICH IT IS HAS BEEN CITED AS AUTHORITY BY SEVERAL COURTS

In its Respondent's Brief, J.F. Allen attempts to argue that Homesite has "changed its tune" about Huggins, first citing it as authority, then running away from it. See J.F. Allen's Respondent's Brief, page 6. J.F. Allen seems to not understand that Huggins only has limited relevance for a single issue: The breadth and importance of the term "arises out of" when used in an insurance policy exclusion. Homesite relied on Huggins for that point, but appropriately distinguishes it for any other purpose.

Homesite is not alone in relying on Huggins as authority for the breadth and importance of the term "arises out of." The West Virginia Supreme Court has not directly addressed the breadth and importance of that term as used in insurance policies. However, the Supreme Court's discussion of the term in Huggins (due to its absence from the exclusion at issue in Huggins) has been interpreted by the federal courts in West Virginia as an indication that the West Virginia Supreme Court would broadly construe the phrase "arising out of". See Rich v. First Mercury Insurance Co., 482 F. Supp. 3d 511, 520 (S.D. W. Va. 2020); Norfolk Southern Ry. Co. v. National

Union Fire Ins. Co of Pittsburgh, PA, 999 F. Supp. 2d 906, 912-913 (S.D. W. Va. 2014); and Nutter v. St. Paul Fire & Marine Ins. Co., 780 F. Supp. 2d 480, 483 (N.D. W. Va. 2011).[14]

Zurich goes to the trouble of attempting to factually distinguish the above-cited federal cases from the instant matter. See Zurich's Respondent's Brief, pages 18-20. Zurich need not have gone to the trouble. Those cases were only cited for one purpose: to show that other courts rely on Huggins for the same proposition as Homesite does, to demonstrate the breadth and importance of the terms "arising out of" or "arises out of" when used in an insurance policy provision.

As shown above and in Homesite's Petitioner's Brief, Huggins has no relevance to this matter beyond its discussion of the breadth and importance of the term "arises out of." This Court should not rely on Huggins as applicable authority for any proposition of law other than this one.

V. THE "DAMAGES LEGALLY OBLIGATED TO PAY" LANGUAGE IN THE AUTO EXCLUSION DOES NOT INVOKE THE THEORY OF LIABILITY PLED AGAINST THE INSURED

As stated above, when the explicit definition of the term "**loss**" is inserted into the Homesite Policy's auto exclusion, it reads as follows:

> The policy does not apply to any damages the Insured becomes legally obligated to pay as judgments or settlements arising out of the ownership, maintenance, operation, use, entrustment to others or **loading or unloading** of any **auto**.

On page 29 of its Respondent's Brief, Zurich argues that the phrase "damages the Insured becomes legally obligated to pay" directly invokes the specific cause of action that the claimant has pursued against the insured.[15] However, this argument by Zurich has no merit.

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[14] Also cited by the federal courts as indications of the breadth of the phrase "arising out of": Baber v. Fortner by Poe, 186 W. Va. 413, 416-417, 412 S.E. 2d 814, 817-818 (1991), which in turn cites Dotts v. Taressa J.A., 182 W. Va. 586, 592, 390 S.E. 2d 568, 574 (1990), for the same proposition.

[15] Zurich makes a similar argument regarding its own Auto Policy insuring agreement in its separate appeal, 25-ICA-216. See Petitioner's Brief in that appeal, pages 17-18.

There is literally nothing in the "**loss**" portion of Homesite Policy's auto exclusion that differentiates between damages an insured becomes legally obligated to pay as judgments or settlements due to one specific theory of liability, versus any other specific theory of liability. Zurich argues that the "damages the Insured becomes legally obligated to pay" portion of the exclusion is premised on the specific theory of liability that has been asserted against the insured, but there is simply no textual basis for that argument. All that the exclusion requires is that the insured become legally obligated to pay damages as judgments or settlements. If that occurs (regardless of the theory of liability that led to such legal obligation), and if the damages in question arise out of the ownership, maintenance, operation, use, entrustment, loading, or unloading of any auto, the exclusion applies. Such legal obligation could arise from a direct negligence theory of liability; a vicarious liability theory of liability; or any other cause of action that can result in the legal obligation to pay damages. As long as the damages arise out of the ownership, maintenance, operation, use, entrustment, loading, or unloading of any auto, the "loss" portion of the Homesite Policy's auto exclusion applies.

VI. THERE IS NO NEGLIGENT ENTRUSTMENT EXCLUSION CONTAINED IN THE HOMESITE AUTO EXCLUSION, AND ZURICH'S INVOCATION OF THE DOCTRINE OF *EXPRESSIO UNIUS* IS A *NON SEQUITUR*

On pages 26-28 of Zurich's Respondent's Brief, Zurich argues that the Homesite Policy's auto exclusion contains a negligent entrustment exclusion, and that such exclusion's non-mention of negligent hiring/retention means claims based on such a theory are not excluded. This bizarre argument is completely without merit, and is the result of Zurich's Herculean efforts to misread the exclusion.

The Homesite Policy's auto exclusion states:

> The policy does not apply to any claim, **suit**, **loss** or any other cost or expense arising out of the ownership, maintenance, operation, use, entrustment to others or **loading or unloading** of any **auto**. [16]

First, as is obvious from the clear language of the exclusion, the word "negligent" does not appear anywhere in the exclusion. The "entrustment" at issue in the exclusion is any sort of entrustment to others of any auto, regardless of whether such entrustment is negligent or otherwise.

Second, the entrustment in question is one of several alternative choices, signified by the use of the disjunctive "or" prominent in the phrase in question. Such alternative choices, separated by "or," signify that any one of them, independent of the others, can trigger the exclusion. See Pajak v. Under Armor, Inc., supra.

In this context, the Homesite Policy's auto exclusion lists a number of actions pertaining to any auto that can trigger the exclusion, if a claim, **suit** or **loss** arises out of any one of these alternative choices:

- Ownership of any auto.
- Maintenance of any auto.
- Operation of any auto.
- Use of any auto.
- Entrustment to others of any auto.
- Loading of any auto.
- Unloading of any auto.

As has remained true, Zurich is fixated on misinterpreting the Homesite Policy's auto exclusion as being focused on specific causes of action. But the exclusion nowhere identifies any specific causes of action that are excluded. Instead, it simply states that, if a claim, **suit**, **loss**

[16] **AR0553**.

("**loss**" meaning damages the Insured becomes legally obligated to pay as judgments or settlements), or any other cost or expense, arises out of any one of the above-listed actions relative to any auto, then the Homesite Policy does not apply.

Are claims based on a negligent hiring/retention cause of action explicitly excluded by the Homesite Policy's auto exclusion? No. But neither are claims based on a negligent entrustment cause of action, or any other specific cause of action. Causes of action are not mentioned in the Homesite Policy's auto exclusion.

Zurich's invocation of the doctrine of *expression unius est exclusion alterius* is a *non sequitur*. That doctrine simply has no application here, and it certainly has nothing to do with the fact that the Homesite Policy's auto exclusion does not explicitly exclude claims based on a negligent hiring/retention cause of action.

According to the plain and unambiguous terms of the Homesite Policy's auto exclusion, the real question is whether the damages J.F. Allen is now legally obligated to pay to Ms. Green as part of the Confidential Settlement[17] arose out of the use of any auto. The answer is yes. The damages in question are wrongful death damages for the death of Mr. Green in the April 20, 2022 auto accident between Mr. Green's vehicle and the Nu Creek vehicle being driven by Mr. Marple. The damages in question arose out of Mr. Marple's use of the Nu Creek vehicle. Therefore, the Homesite Policy's auto exclusion applies.

CONCLUSION

For the reasons set forth above and it its original Petitioner's Brief, Homesite asks this Court to reverse the specific portions of the Circuit Court's April 25, 2025 Order which granted summary judgment to J.F. Allen and denied summary judgment to Homesite on the issue of

[17] **AR1241-1255**.

whether there is liability insurance coverage for J.F. Allen under the Homesite Policy for the Green Lawsuit. Homesite further asks this Court to enter judgment for Homesite on that same issue.

Respectfully submitted,

HOMESITE INSURANCE COMPANY OF FLORIDA

BY: SPILMAN THOMAS & BATTLE, PLLC

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INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

NO. 25-ICA-213

HOMESITE INSURANCE COMPANY OF FLORIDA,
Plaintiff Below, Petitioner

v.

ZURICH AMERICAN INSURANCE COMPANY
And
J.F. ALLEN COMPANY, INC.
Defendants Below, Respondents

CERTIFICATE OF SERVICE

I, Don C.A. Parker, hereby certify that on this 5th day of September, 2025, I electronically filed the foregoing **"PETITIONER'S REPLY BRIEF"** with the Clerk of Court using the West Virginia E-Filing system, which will serve a copy of the same upon the following counsel of record:

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