IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ACE AMERICAN INSURANCE COMPANY, a Pennsylvania corporation,

Plaintiff,

v.

EXIDE TECHNOLOGIES, INC., also known as Exide Technologies, formerly known as the Exide Corporation, a Delaware corporation; and THE WATTLES COMPANY, a Washington corporation,

Defendants.

CIVIL ACTION FILE

NO. 1:16-CV-1600-MHC

ORDER

This case comes before the Court on Defendant The Wattles Company's Motion for Partial Summary Judgment [Doc. 39], Second Motion for Partial Summary Judgment [Doc. 51], and Third Motion for Summary Judgment [Doc. 52], as well as Plaintiff Ace American Insurance Company's Motion for Summary Judgment [Doc. 54] and Motion to Strike [Doc. 55].

I. BACKGROUND[1]

This case arises from an insurance coverage dispute between Plaintiff ACE American Insurance Company ("ACE") and Defendants Exide Technologies, Inc. ("Exide") and The Wattles Company ("Wattles").

Exide is a Georgia corporation that, between 1981 and 2009, leased real property in Sumner, Washington ("the Premises"), from Wattles. Compl. [Doc. 1] ¶¶ 8-9. From about 1984 through 2009, Exide used the Premises for "battery forming operations," a process that included "lead battery filling" and "charging" as well as the use of sulfuric acid. Id. ¶¶ 12-13. As part of its business, Exide took out insurance policies with a variety of companies, including ACE. Id. ¶ 11.

In March 2013, Wattles filed a lawsuit against Exide in Pierce County, Washington (the "Pierce County lawsuit"). Id. ¶ 16. In that lawsuit, Wattles

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[1] At the outset, the Court notes that as this case is before the Court on the parties' motions for summary judgment, the Court views the evidence presented by the parties in the light most favorable to the non-movant and has drawn all justifiable inferences in favor of the non-movant. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Sunbeam TV Corp. v. Nielsen Media Research, Inc., 711 F.3d 1264, 1270 (11th Cir. 2013). In addition, the Court has excluded assertions of facts that are immaterial or presented as arguments or legal conclusions or any fact not supported by citation to evidence (including page or paragraph number). LR 56.1B(1), NDGa. Further, the Court accepts as admitted those facts in the statements that have not been specifically controverted with citation to the relevant portions of the record by the opposing parties. LR 56.1B(2), NDGa.

alleged that Exide was liable for negligence and had breached its obligations under the lease because it allowed sulfuric acid mist to circulate in the Premises' warehouse space and condense onto various parts of the building (including its floors, walls, and overhead roof structural components), causing structural damage to the building's roof trusses and other components. Id. ¶¶ 13-16. Three months later, in June 2015, Exide filed for bankruptcy protection in the U.S. Bankruptcy Court for the District of Delaware, resulting in a stay of Wattles's claims against Exide in the Pierce County lawsuit. Id. ¶ 17.

On March 27, 2015, the Bankruptcy Court issued an order approving a stipulation between Exide and Wattles to lift the stay in the Pierce County lawsuit. Id. In relevant part, the stipulation specified that the parties' goal in lifting the stay was to allow Wattles to attempt to recover a final judgment in the Pierce County lawsuit from Exide's insurance coverage without impacting Exide's assets or bankruptcy estate. Id. ¶ 19. Specifically, it stated that Wattles was entitled to

> prosecute the [Pierce County lawsuit] to final judgment or settlement and to engage in one or more legal actions with [Exide]'s insurers to collect against [Exide]'s insurance coverage; *provided, however*, that Wattles may attempt to recover any liquidated final judgment or settlement with respect to the [Pierce County lawsuit] solely from the insurance coverage, if any, available under one or more insurance policies issued to [Exide] that cover the [Pierce County lawsuit] . . . and *provided further* that [Exide]'s insurers reserve their rights, defenses, and arguments they may have in any action with Wattles.

Id. (quoting Order Approving Stipulation Between Exide and Wattles [Doc. 1-3] ("Bankruptcy Stipulation") at 7-8) (emphasis in original). The stipulation also listed six insurers/insurance policies issued to Exide against which Wattles could attempt a recovery, among which is the policy that is the subject of this lawsuit: an ACE policy (hereafter the "ACE Policy") in effect from September 1, 2006, to September 1, 2007, affording 20% of Exide's overall coverage.[2] Compl. ¶ 22; Bankruptcy Stipulation at 8; see All Risks Property Damage and Business Interruption Policy, No. PGLN1928247 [Doc. 1-2] (the "ACE Policy").

On April 3, 2015, Exide gave ACE formal notice of Wattles's claims against Exide, as well as the existence of the Pierce County lawsuit. Compl. ¶ 23. On May 4, 2015, ACE, through its managing general agent Starr Technical Risks Agency, Inc. ("Starr"),[3] sent a letter to Marsh USA Inc. ("Marsh"), Exide's broker, reserving its rights under the ACE Policy, stating in part that it was "currently unable to confirm that the ACE Policy afforded any Pollution Liability Coverage," and inquiring whether Exide sought a defense in the Pierce County lawsuit under the ACE Policy's "Defense Costs" provision. See May 4, 2015, Reservation of

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[2] The other insurers' policies afforded the 80% balance of the total.

[3] As ACE's managing general agent, Starr had authority to write policies on its behalf. See Dep. of Grand D. Saunders [Doc. 53-1] ("Saunders Dep.") at 10-11.

Rights Letter, attached as Ex. B to Aff. of T. Daniel Heffernan [Doc. 39-5] ("Heffernan Aff.") at 31-32; Compl ¶ 24. Exide subsequently advised ACE that it sought both a defense and a general coverage/indemnity determination under the ACE Policy. Compl. ¶ 25.

ACE provided its preliminary coverage analysis in a March 4, 2016, letter to Marsh, in which it set forth a variety of concerns about Exide's insurable interest in the damage to the Premises alleged in the Pierce County lawsuit. Id. ¶ 26. Around the same time, two other insurance companies that also had issued commercial lines policies to Exide—Allianz Global Risks US Insurance Company ("Allianz") and American International Group, Inc. ("AIG")—submitted their own coverage analyses and reservation of rights letters to Marsh.[4] Id. ¶¶ 6-7, 25, 27-28. Although both letters contained concerns and analyses similar to those in ACE's letter, they also concluded that the underlying policies' materially similar "Seepage and/or Pollution and/or Contamination Exclusion" clauses applied generally to bar coverage in the Pierce County lawsuit. Id. ¶¶ 27-28. The ACE Policy contains no such exclusion.

[4] Allianz and AIG submitted these letters on March 4, 2016, and November 6, 2015, respectively. Id. ¶¶ 25.

As discussed in more detail below, ACE now alleges that the ACE Policy was intended by both parties to the contract—Exide and ACE—to contain a Seepage and/or Pollution and/or Contamination Exclusion Clause ("pollution exclusion") materially similar to those in the Allianz and AIG policies. Id. ¶ 29. Specifically, ACE alleges that the immediate predecessor policy issued to Exide (through Starr) by AIG/Birmingham Fire Insurance Company of Pennsylvania for the 2005-2006 policy year contained a similar pollution exclusion, that both ACE and Exide "intended, expected, and negotiated" for a policy that included such a clause, and that "[t]he only reason" the ACE Policy did not include a pollution exclusion was "due to mutual mistake of all the contracting parties." Id.

Trial in the Pierce County lawsuit began on April 26, 2016, and ultimately resulted in a judgment against Exide in the amount of $2,273,623.93 (the "Exide judgment"). See Heffernan Aff. ¶ 16.[5] On May 18, 2016—two days before the Pierce County trial concluded—ACE filed the above-styled Complaint, requesting that the Court (1) reform the Ace Policy to include the missing pollution exclusion

[5] Specifically, Wattles obtained a final judgment in the Pierce County lawsuit of $1,437,293.75 in damages and $836,330.18 in attorney's fees. See Judgment Summary, attached as Ex. E to Heffernan Aff. [Doc. 39-5] at 61-62. As discussed in more detail later in this Order, the ACE Policy includes a $2 million per-occurrence deductible.

(Count I), and (2) issue a declaration of no coverage based on the pollution exclusion and/or other policy exclusions and coverage restrictions that ACE alleges preclude recovery of the Exide judgment (Count II). Compl. ¶¶ 32-43; Heffernan Aff. ¶ 18.

Both ACE and Wattles have moved for summary judgment on these claims.

II. LEGAL STANDARD

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A party seeking summary judgment has the burden of informing the district court of the basis for its motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions," and cannot be made by the district court in considering whether to grant summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); see also Graham v. State Farm Mut. Ins. Co., 193 F.3d 1274, 1282 (11th Cir. 1999).

If a movant meets its burden, the party opposing summary judgment must present evidence that shows there is a genuine issue of material fact or that the

movant is not entitled to judgment as a matter of law. Celotex, 477 U.S. at 324. In determining whether a genuine issue of material fact exists to defeat a Motion for Summary Judgment, the evidence is viewed in the light most favorable to the party opposing summary judgment, "and all justifiable inferences are to be drawn" in favor of that opposing party. Anderson, 477 U.S. at 255; see also Herzog v. Castle Rock Entm't, 193 F.3d 1241, 1246 (11th Cir. 1999). A fact is "material" only if it can affect the outcome of the lawsuit under the governing legal principles. Anderson, 477 U.S. at 248. A factual dispute is "genuine" if the evidence would permit a reasonable jury to return a verdict for the nonmoving party. Id.

"If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial." Herzog, 193 F.3d at 1246. But, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party," summary judgment for the moving party is proper. Matsushita, 475 U.S. at 587.

III. DISCUSSION

The parties raise two basic issues in their pleadings. The first is whether ACE is entitled to reform the 2006-2007 ACE Policy to include a pollution exclusion based on what it alleges was a mutual mistake by the parties to that contract. The second is whether ACE is entitled to a declaration of no coverage—

or whether, conversely, Wattles is entitled to a declaration of coverage—pursuant not only to the pollution exclusion but also, alternatively, to other policy exclusions and/or coverage restrictions in the ACE Policy. Because both ACE and Wattles have moved for summary judgment on these issues, the Court will address their motions together.[6]

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[6] In addition to its Motion for Summary Judgment, ACE has also filed a Motion to Strike Wattles's second and third motions for summary judgment based on the allegation that Wattles has filed its three separate motions for summary judgment in a deliberate attempt to circumvent the page limitation contained in LR 7.1D, NDGa. Br. in Supp. of Pl.'s Mot. to Strike [Doc. 55-1] at 7-8; see LR 7.1D, NDGa. ("Absent prior permission of the court, briefs filed in support of a motion or in response to a motion are limited in length to twenty-five (25) pages."). "Whether good cause exists to permit such a filing, and if so on what terms, is within the sound discretion of the Court." Lawrence v. Am. Ira, LLC, No. 1:12-CV-2209-JSA, 2014 WL 11833264, at *2 (N.D. Ga. Sept. 3, 2014).

The Court finds that Wattles has not attempted to circumvent Local Rule 7.1D—which places no limit on the number of summary judgment motions a party may file—and that the interests of justice would be best served here by allowing Wattles' three timely-filed motions. Although there is a considerable amount of overlap between the motions, they nevertheless raise separate issues that the Court must address in this case. For that reason, it would "not further the interests of justice, judicial economy, or the Court's interest in the sound adjudication of this case to ignore important issues simply because they were raised in [a subsequent] summary judgment motion and not the first one." Lawrence, 2014 WL 11833264, at *2. ACE's Motion to Strike [Doc. 55] is **DENIED**.

A. Whether ACE is Entitled to Reformation of the Contract

In Count I, ACE seeks reformation of the ACE Policy, alleging that all parties to the policy—including ACE, Exide, Marsh, and Starr—"expected, intended, and negotiated" for it to include a pollution exclusion. Compl. ¶ 33. The parties agree that Georgia law applies. See Giddens v. Equitable Life Assur. Soc. of U.S., 445 F.3d 1286, 1297 n.9 (11th Cir. 2006) ("In diversity cases, the Court is bound by the applicable state law governing the contract, in this case Georgia law.").

Under Georgia law, "[a] petition for reformation of a written contract will lie where by mistake of the scrivener and by oversight of the parties, the writing does not embody or fully express the real contract of the parties." Curry v. Curry, 267 Ga. 66, 67 (1996) (citations omitted). "The cause of the defect is immaterial so long as the mistake is common to both parties to the transaction." Id.

> A "mutual mistake" means "a mistake shared by, or participated in by, both parties, or a mistake common to both parties, or reciprocal to both parties; both must have labored under the same misconception in respect of the terms and conditions of a written instrument, intending at the time of the execution of the instrument to say one thing and by mistake expressing another, so that the instrument as written does not express the contract or intent of either of the parties."

Yeazel v. Burger King Corp., 241 Ga. App. 90, 94 (1999) (quoting Hartford Accident & Indem. Co. v. Walka Mountain Camp No. 565, Woodmen of the

World, Inc., 224 Ga. 194, 194 (1968)). "[E]vidence of a mutual mistake must be clear, unequivocal and decisive." Am. Mfrs. Mut. Ins. Co. v. EA Tech. Servs., Inc., 270 Ga. App. 883, 886 (2004). "The remedy of reformation 'is not available for the purpose of making a new and different contract for the parties, but is confined to establishment of the actual agreement.'" Peerless Ins. Co. v. M.A.S.S. Servs., Inc., No. 806-CV-250T-27TGW, 2007 WL 2916386, at *10 (M.D. Fla. Oct. 5, 2007) (quoting Cotton States Mut. Ins. Co. v. Woodruff, 215 Ga. App. 511, 511-12 (1995)).

In support of its reformation request, ACE presents the following narrative of the events surrounding the ACE Policy's negotiation. In 2006, Exide asked Marsh to act as its soliciting broker in procuring primary layer first-party property insurance coverage with limits of $300 million for Exide's 2006-2007 insurance program. Pl.'s Statement of Additional Undisputed Facts [Doc. 57-7] ("Pl.'s Statement of Additional Facts") ¶ 1. As part of this process, March and Exide worked together to prepare an "underwriting submission" that contained information necessary for potential insurers to evaluate and quote the cost of

potential property insurance policies. Id. ¶ 2. ACE alleges that this underwriting submission contained a pollution exclusion.[7] Id. ¶ 3.

Among the potential insurers who received this underwriting submission was Starr, who at the time was empowered, as ACE's general managing agent, to negotiate and issue commercial insurance policies on ACE's behalf. Id. ¶ 4. Based on the submission, Starr prepared a quotation for insurance pricing that Exide subsequently approved. Id. ¶¶ 5-6. After Exide instructed Marsh to authorize Starr to bind the insurance policy, Starr sent March a binder of insurance ("the Binder") indicating that the ACE Policy would be issued "per the expiring form"—a phrase that, according to ACE, meant that that it was intended to be issued pursuant to the same terms found in ACE's expiring 2005-2006 policy with AIG-Birmingham (the "Birmingham Policy"), which included a pollution exclusion. Id. ¶¶ 6-8; Binder No. 0638, attached as Ex. B to Aff. of Grant Saunders [Doc. 54-5] at 8-11; see also Birmingham Policy [Doc. 54-3] at 46 (pollution exclusion). Although Starr sent a copy of the ACE Policy to Marsh for review and transmittal to Exide, ACE alleges that the pollution exclusion's absence

[7] As discussed in more detail below, although ACE maintains that the underwriting submission contained a pollution exclusion, it has failed to produce a copy of this document or to explain its absence from the record despite Wattles's discovery requests.

went unnoticed until May 2016—at which point it promptly sought reformation. Pl.'s Statement of Additional Facts ¶¶ 10, 15-32.

In its Motion for Summary Judgment, ACE maintains that the "undisputed evidence" in this case shows that the pollution exclusion was omitted from the ACE Policy as a result of mutual mistake. See Pl.'s Br. in Supp. of Mot. for Summ. J. [Doc. 54-11] at 13. In support of this claim, ACE relies on Exide's admission that it (1) instructed Marsh to obtain primary property insurance policies for a $300 million layer of primary insurance coverage—including the ACE Policy—for the period between September 1, 2006, and September 1, 2007, "*on the same or better terms and conditions as agreed upon* by the insurers and Exide in the prior September 1, 2005, to September 1, 2006, period [i.e., the Birmingham Policy];" and (2) was not aware that the ACE Policy failed to include a pollution exclusion. Exide's Resps. to ACE's First Reqs. for Admission [Doc. 54-2] at 5-6 (emphasis added). ACE also relies on testimony by several employees of Marsh and Starr that, by instructing Marsh to renew its coverage for the 2006-2007 year "on the same terms and conditions" as the previous year, Exide implicitly requested that all policies in the $300 million layer of coverage include a pollution exclusion—and that omission of this exclusion from the ACE Policy, given its inclusion in other polices in the same layer of coverage, was most likely a "simple

mistake." Pl.'s Br. in Supp. of Mot. for Summ. J. at 14. Jim Jezewski, a vice president at Starr, testified as follows:

> **Q:** What is the basis for your contention that omission of the pollution exclusion from the 2006 ACE policy was a mistake by Exide?
> **A:** Because when you look at the other policies that were issued, they all appear that they have a pollution exclusion, and the pollution exclusion even on the policies that we issue afterwards to my understanding has a pollution exclusion in the policy. So based on previous policies that were issued and based on future policies, it looks like only the . . . 2006 to 2007 policy year was the only policy where the pollution exclusion as missing.
> **Q:** What is your basis for your contention that omission of the pollution exclusion from the 2006 ACE policy was a mistake by Marsh?
> **A:** Basically looking at it, it's a manuscript policy that was issued by Marsh. The way that I looked at it and being a Marsh form, it looks like that there was a mutual mistake in not attaching the pollution exclusion.
> **Q:** And your basis for your contention that the 2006 ACE policy was missing a pollution exclusion and that this was a mutual mistake by Marsh is the same basis for your contention that it was a mutual mistake by Exide; is that fair?
> **A:** Fair statement.
> **Q:** That your review of the other participating insurers' policies showed that they included a pollution exclusion and that the policies issued by ACE after 2006 included a pollution exclusion; is that correct?
> **A:** That is correct. And our insurance binder that we issued also referred to the coverage would be per the expiring.
> . . .
> **Q:** What is the basis for your contention that omission of the pollution exclusion from the 2006 ACE policy was a mistake by ACE?
> . . .
> **A:** Because it looks like that it was overlooked by underwriting . . . when there was an issuance of the policy.

> **Q:** And is that the same basis for your contention that a mistake in omitting the pollution exclusion from the 2006 ACE policy was made by Starr as well?
> **A:** I think it was made by all parties as a mistake. They didn't catch it.

Dep. of Jim Jezewski [Doc. 53-2] ("Jezewski Dep.") at 80-83; see also Dep. of Ted Young [Doc. 53-4] ("Young Dep.") at 40-44 (offering substantially similar testimony).[8] Echoing Jezewski's testimony, Grant D. Saunders, a vice president at

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[8] Young, a senior vice present and client executive at Marsh, testified, in relevant part:

> **Q:** Did Exide instruct Marsh to renew its program for the 2006/2007 year on the same terms and conditions as the 2005/2006 policy year?
> **A:** Yes, with some potential improvements that we could potentially negotiate.
> **Q:** One of the terms and conditions in the 2005/2006 year is that all of the policies that were issued by the various insurers had a pollution exclusion; right?
> **A:** That's what I understand, yes.
> **Q:** And so then the 2006/2007 policy year, based on the instruction that you just testified to, was also to have a pollution exclusion attached to the various policies issued by the insurers that made up one hundred percent of the coverage?
> **A:** Yes.
> **Q:** And some of the other participants in the 2006/2007 year were Alliance?
> **A:** I believe that's correct, yes.
> **Q:** And there was a pollution exclusion attached to that policy; right?
> **A:** Yes.
> **Q:** And AIG?
> **A:** Yes.
> **Q:** And of course ACE is collaboration with Starr Tech?

Starr, also explained his belief that the exclusion's omission was a "mistake by all parties:"

> **Q:** So what is your basis for your contention that omission of the pollution exclusion in 2006 was a mistake by Starr?
> **A:** I think it was a mistake by all parties.
> **Q:** Why?
> **A:** Because it was in previous forms and somehow it was omitted from this form.

See Dep. of Grant D. Saunders [Doc. 53-1] ("Saunders Dep.") at 8, 35.

The problem with ACE's reformation claim is that, at best, ACE has produced evidence that the parties to the ACE Policy may have intended for it to include a pollution exclusion, but no evidence that they actually did so intend. Although ACE maintains that (1) Marsh "worked with Exide to prepare an 'Underwriting Submission'" that contained, among other things, the pollution exclusion, and (2) Starr subsequently "prepared a quotation for insurance pricing for the cost of Exide's desired policy, *including the pollution exclusion*," see Pl.'s

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> **A:** Yes.
> **Q:** And the AIG policy had a pollution exclusion as well; right?
> **A:** Yes.
> **Q:** And based on that instruction then, the ACE policy for 2006/2007 that was issued in collaboration with Starr Tech then also should have had a pollution exclusion attached to it; is that right?
> **A:** Yes.

Id. at 40-41.

Resp. to Def.'s Second Mot. for Summ. J. [Doc. 57] at 3 (emphasis added), it has failed to produce either of these documents despite Wattles's alleged discovery requests, and makes no attempt to explain their absence from the record.[9] See Def.'s Reply in Supp. of Second Mot. for Partial Summ. J. [Doc. 60] at 4; Aff. of MacKenzie Stout in Supp. of Wattles's Resp. to ACE's Mot. for Summ. J. [Doc. 59-2] ¶¶ 2-3. Furthermore, while ACE insists that Exide has "admitted" that it intended for the ACE Policy to include a pollution exclusion, the record does not support this claim. See Pl.'s Br. in Supp. of Mot. for Summ. J. at 13 ("Exide admits 'per expiring form' means that the ACE Policy should have contained the same Pollution Exclusion as the expiring form[.]"). As noted above, ACE has admitted that it intended for Marsh to obtain a layer of primary insurance "on the same or better terms" as agreed upon in the prior year (i.e., those found in the

[9] The only direct testimony ACE offers regarding the existence of these documents is not only cursory in nature, but impermissibly has been offered for the truth of the matter asserted. See Young Dep. at 41-44; Aff. of Grant Saunders [Doc. 54-5] ¶¶ 3, 6 (stating that Starr's quotation "was based on the terms and conditions in the Underwriting Submission, including the Pollution Exclusion[.]"). Under Federal Rule of Evidence 1002, "[a]n original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise." ACE makes no attempt to show that any exception to this rule should apply. See FED. R. EVID. 1004 (setting forth the circumstances under which other evidence regarding the content of an original writing, recording, or photograph may be admissible).

Birmingham Policy). Exide's Resps. to ACE's First Reqs. for Admission [Doc. 54-2] at 5-6. But the lack of a pollution exclusion in the ACE Policy would appear to provide more, rather than less, coverage to Exide—that is, an insurance policy with "better terms" than those found in the Birmingham Policy. Def.'s Reply in Supp. of Second Mot. for Partial Summ. J. at 3.

There are a number of other ways in which ACE's claim for reformation falls short. As Wattles points out, no Exide employees have been deposed or offered testimony in this action, and both Saunders and Jezewski (of Starr) admitted at their depositions that there is nothing in Starr's so-called "underwriting file" itself that led either to believe that the pollution exclusion's omission was due to mutual mistake; instead, both base their opinions exclusively on circumstantial evidence surrounding the ACE Policy's negotiation. See Saunders Dep. at 36 (stating that "nothing in the underwriting file" informed his belief that omission of the pollution exclusion was a mistake); Jezewski Dep. at 95 (same). Additionally, despite ACE's repeated emphasis on the fact that other insurers' policies contained pollution exclusions, there is no evidence that Starr was actually aware of this fact when the ACE Policy was negotiated.

ACE also fails to explain other evidence that casts doubt on its reformation claim. For instance, when asked whether Starr ever had become aware that that a

policy was issued without a certain exclusion after the end of a policy period, Saunders testified that he could "not recall it ever happening before." Saunders Dep. at 28. Furthermore, although the ACE Policy was amended to include a pollution exclusion for the 2007-2008 year, Saunders was unable to explain whether a Starr employee reviewed the ACE Policy and determined that it was missing an exclusion—or why, if that omission was due to mutual mistake, the ACE Policy was never amended:

> **Q:** So isn't it true that when the 2006 policy was being renewed into 2007, someone would have had to review the 2006 policy into 2007, someone would have had to review the 2006 policy to determine that there was not a pollution exclusion, in order to include one in the 2007 policy?
> **A:** I can't comment on that. I have no idea.
> **Q:** Would you agree that it wouldn't just be a blind renewal, that they would have had to have had reviewed the 2006 policy in order to issue the 2007 policy different?
> **A:** I can't even comment on that. I have no idea. Again, I'm not going to assume what somebody else did when they did that.

Id. at 46-47. Pressed on the same point, Jezewski offered similarly evasive answers:

> **Q:** What is Starr's procedure when it renews a policy?
> . . .
> **A:** I could not answer that. You would have to ask underwriting.
> . . .
> **Q:** So is it your understanding that someone at Starr in the underwriting department would have had to discover that the 2006 Ace policy did not include a pollution exclusion in order to renew [the ACE Policy] with a pollution exclusion?

A: I would not know. You would have to ask underwriting.

Jezewski Dep. at 99-100.

For all of the foregoing reasons, the Court concludes that ACE has not put forward the "clear, unequivocal and decisive" evidence necessary to prevail on its claim that the ACE Policy's omission of a pollution exclusion was due to mutual mistake. Accordingly, Wattles's motion for partial summary judgment as to ACE's reformation claim is **GRANTED**, and ACE's motion for summary judgment is **DENIED**.[10]

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[10] ACE also argues that Wattles lacks standing to challenge its reformation claim because it was not in privity with the parties who negotiated the ACE Policy, and because it is not a third-party beneficiary of that policy. See Pl.'s Resp. to Def.'s Second Mot. for Summ. J. at 12-16. However, the only two cases that ACE relies on for this proposition are inapplicable, as both address a party's right to bring a reformation claim. See Googe v. Fla. Int'l Indem. Co., 262 Ga. 546, 546 (1992) (holding that plaintiffs lacked standing to bring an action for reformation as liability claimants under a municipal insurance policy); Lee v. Am. Cent. Ins. Co., 241 Ga. App. 650, 652 (1999) (holding that plaintiff lacked standing to enforce contract where no evidence existed that it was made "for his individual benefit."). ACE does not cite any case in which a plaintiff has named a party as a defendant in a suit for reformation, then argued that the same party lacks standing to oppose its claims. The Court finds that Wattles is entitled to defend against ACE's reformation claim.

Furthermore, by virtue of the Court's ruling, Wattles' earlier-filed Motion for Partial Summary Judgment [Doc. 39]—in which it argues that ACE's reformation claim is barred as a matter of law by several equitable defenses—is **DENIED AS MOOT**.

B. Whether Either Party is Entitled to a Declaration Regarding the Scope of Coverage Under the ACE Policy

Next, the Court must determine whether either party is entitled to a declaration regarding the scope of coverage under the ACE Policy. In their cross-motions for summary judgment, ACE and Wattles dispute whether a number of exceptions in the policy should be construed to bar coverage and whether, assuming *arguendo* that no exceptions apply: (1) ACE is liable for the entire Exide judgment ($2,273,623.93), less the ACE Policy's $2 million per-occurrence deductible, under the so called "continuous trigger doctrine;" (2) ACE's liability for 20% of total primary coverage is properly construed to mean 20% of Exide's loss—in which case Wattles's claim would not satisfy the ACE Policy's deductible—or 20% of the total limit of liability (i.e., 20% of $300 million, or $60 million); and (3) whether the $836,330.18 in attorney's fees awarded to Wattles in the Pierce County lawsuit as part of the Exide judgment are properly considered "defense costs" under the ACE Policy.[11] In lieu of addressing the parties' motions separately, the Court will address these issues together.

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[11] In its opposition to Wattles's Third Motion for Summary Judgment, ACE also argues that Wattles has not shown that it is an "insured" under the ACE Policy. See Pl.'s Resp. to Def.'s Third Mot. for Summ. J. [Doc. 58] at 8-9. However, ACE subsequently conceded elsewhere in its pleadings that, under Georgia law, "[w]here a judgment has been obtained against the insured which fixes the liability of the insured, an action may be maintained directly against the insurer for the

1. Whether Any Exclusions Apply to Bar Coverage

a. The "Ordinary Wear and Tear," "Corrosion," "Gradual Deterioration," and "Cost of Making Good" Exclusions

In its Motion for Summary Judgment, ACE argues first that four so-called coverage "exclusions" in the ACE Policy should apply to bar coverage: exclusions for "ordinary wear and tear," "corrosion," "gradual deterioration," and "the cost of making good." ACE Policy at 27. According to ACE, the gradual damage done to the Premises by Exide's release of sulfuric acid mist is best characterized as falling into one (or all) of these categories and, therefore, is not insurable. See Pl.'s Br. in Supp. of Mot. for Summ. J. at 17-22.

Under Georgia law, "[t]he construction of a contract is a question of law for the court," O.C.G.A. § 13-2-1, and a court construing an insurance policy must attempt "to ascertain the intention of the parties by looking to the insurance contract as a whole." Ryan v. State Farm Mut. Auto. Ins. Co., 261 Ga. 869, 872 (1992) (citation omitted). "[W]hen a provision in a policy is susceptible to more

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proceeds of the policy." Pl.'s Reply in Supp. of its Mot. for Summ. J. [Doc. 62] at 6-7 (quoting Smith v. Gov't Emps. Ins. Co., 179 Ga. App. 654, 655 (1986)). As noted above, Wattles obtained a judgment against Exide in the amount of $2,273,623.93 in the Pierce County lawsuit. Accordingly, the Court finds that Wattles may maintain an action against ACE for the proceeds of this policy.

than one meaning, even if each meaning is logical and reasonable, that provision is ambiguous. Such contracts must be construed against the insurer and in favor of the insured." Blue Cross & Blue Shield of Ga., Inc. v. Shirley, 305 Ga. App. 434, 437 (2010) (citation omitted); see also SCI Liquidating Corp. v. Hartford Fire Ins. Co., 181 F.3d 1210, 1214 (11th Cir. 1999). However, "language which is unambiguous will not be construed as ambiguous based on extrinsic circumstances, and even though ambiguous exclusions may be construed liberally in favor of the insured and strictly construed against the insurer, this cannot be done when the exclusion is clear and unequivocal." Blue Cross, 305 Ga. App. at 437. "[E]xclusions from coverage sought to be invoked must be strictly construed." SCI Liquidating Corp., 181 F.3d at 1214 (citations and quotations omitted)

Wattles argues that the above four exceptions are rendered inapplicable by the efficient proximate cause doctrine, which "applies when two or more identifiable causes contribute to a single property loss—at least one of them covered under the policy and at least one of them excluded under the policy." Burgess v. Allstate Ins. Co., 334 F. Supp. 2d 1351, 1360 (N.D. Ga. 2003).

> The doctrine of efficient proximate cause governs situations where a risk specifically insured against sets other causes in motion in an unbroken sequence between the insured risk and the ultimate loss. In such situations, the insured risk is regarded as the proximate cause of the entire loss, even if the last step in the chain of causation was an excepted risk. TNT Speed & Sport Ctr., Inc. v. Am. States Ins. Co.,

> 114 F.3d 731, 733 (8th Cir. 1997). When an insured can identify an insured peril as the proximate cause, then there is coverage even if subsequent events are specifically excluded from coverage. Bowers v. Farmers Ins. Exch., 991 P.2d 734, 738 (Wash. App. 2000).

Id. Because Exide's sulfuric acid contamination of the Premises—i.e., its pollution of the building, an insured risk—was the efficient proximate cause of its loss, Wattles argues, this doctrine should apply here. See Br. in Supp. of Def.'s Third Mot. for Summ. J. [Doc. 52-1] at 14.

In response, ACE maintains that the release of sulfuric acid itself was not a "direct physical loss" within the meaning of the ACE Policy, which insures only against "all risks of direct physical loss or damage;" instead, ACE argues that any direct physical damage to the Premises occurred "only as a result of excluded corrosion, wear and tear and gradual deterioration." Pl.'s Resp. to Def.'s Third Mot. for Summ. J. at 14. But ACE's argument is circular: were the Court to accept this argument, the efficient proximate cause doctrine would lose its meaning.[12] See

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[12] ACE argues separately that, because it was the "defective design and specification of equipment that allowed the release of sulfuric acid," rather than the release of sulfuric acid itself, that damaged the Premises, Wattles' claims are barred by the ACE Policy's exclusion of "the cost of . . . defective design or specifications." Pl.'s Resp. to Def.'s Third Mot. for Summ. J at 14 (citing ACE Policy at 27). However, this argument fails by the policy's plain language, which provides in relevant part:

> This Policy does not insure . . . against the cost of . . . defective design or specifications[.] [H]owever, this exclusion shall not apply to

Burgess, 334 F. Supp. 2d at 1360 ("In such situations, the insured risk is regarded as the proximate cause of the entire loss, even if the last step in the chain of causation was an excepted risk.") (emphasis added). Here, the fact that Exide's contamination of the Premises—i.e., its pollution of the building—was an insured risk is dispositive. The Court finds that the efficient proximate cause doctrine applies.

ACE also argues, in the alternative, that that the "cost of making good" exclusion should apply here because the damages Wattles now seeks to recover are "the amounts associated with repairing—i.e., the 'cost of making good'" Exide's damage to the Premises. Pl.'s Br. in Supp. of Mot. for Summ. J. at 22-23. However, as Wattles points out, this provision applies only to the cost of making good "defective design or specifications, faulty material, or faulty workmanship"—costs Wattles does not seek as part of its insurance claim. See Def.'s Reply in Supp. of its Third Mot. for Summ. J. [Doc. 61] at 10 (citing ACE Policy at 27). Furthermore, even if Wattles's property damage was caused by a

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> physical loss or damage not otherwise excluded resulting from such defective design[.]"

ACE Policy at 27 (emphasis added). As explained above, pollution damage is not excluded from coverage under the ACE Policy.

"defective design or specification," the resulting loss would still be covered: the "cost of making good" exclusion provides that it "shall not apply to physical loss or damage not otherwise excluded resulting from such defective design or specifications, faulty material, or faulty workmanship[.]" ACE Policy at 27 (emphasis added).

For all of the foregoing reasons, the Court concludes that none of the exclusions discussed above bar Wattles's claim.

b. Whether the Ace Policy Extends Coverage for Tenant Liability

Next, the parties dispute whether Wattles's claim is barred by the ACE Policy's "Tenants and Neighbors Liability" provision, which extends coverage to include "[t]he liability which the Insured incurs as a tenant for damage to real and personal property by a peril insured against[.]" ACE Policy at 25. At issue is the meaning of the provision's limiting language, which provides: "This extension applies only to liability incurred in those countries in which a Napoleonic or other civil or commercial code applies due to loss or damage by a peril as defined by such code and as insured hereunder." Id. (emphasis added).

Although the underlying judgment against Exide in the Pierce County lawsuit was for breach of the lease, Wattles argues that (1) it was actually pursuant to two civil codes—Occupational Safety and Health Administration ("OSHA")

regulations and the International Building Code—which provided that the Premises were contaminated and structurally unsound, respectively, see Br. in Supp. of Def.'s Third Mot. for Summ. J. (citing Aff. of Craig Wattles [Doc. 52-3] ("Wattles Aff.") ¶¶ 4-10); and (2) Exide also has an "insurable interest" in the Premises under Georgia's civil code,[13] the measure of which extends to its liability for loss or damage to the Premises under its lease with Wattles, id. (citing O.C.G.A. § 33-24-4(a) ("The measure of an insurable interest in property is the extent to which the insured might be damnified by loss, injury, or impairment of such interest in such property."")). In response, ACE argues that, because Wattles's claims against Exide in the Pierce County lawsuit were based on property rights that "arose in common law and continue in common law today," it has failed to show that Exide's liability was incurred in a country in which a "civil or commercial code" applies, or that its liability arose out of that code. Pl.'s Resp. to Def.'s Third Mot. for Summ. J at 11 (citing Kennebec, Inc. v. Bank of the W., 565 P.2d 812, 815 (1977) ("The common law of England was the law of decision in Washington

[13] Although Wattles discusses Georgia law, it appears Exide has an "insurable interest" within the meaning of Washington law as well. See Wash. Rev. Code § 48.18.040 ("'Insurable interest' as used in this section means any lawful and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage.").

Territory as it is in the state today.")); see also Wash. Rev. Code § 4.04.010 ("The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state.").

The Court finds that the Tenants and Neighbors Liability provision is ambiguous. Most importantly, while the parties address their arguments to whether the provision applies based on the facts of this case, the disputed limiting language indicates that it was written to apply on a country-by-country (rather than jurisdiction-by-jurisdiction) basis. As noted above, the extension applies "only to liability incurred in those countries in which a Napoleonic or other civil or commercial code applies due to loss or damage by a peril as defined by such code and as insured hereunder"—language which suggests that, as a categorical matter, this provision either does or does not apply in the United States as a whole. Compounding this ambiguity, the provision also fails to define what constitutes a "civil or commercial code" for purposes of coverage, or the circumstances under which that code must "apply" for a country to fall within the provision's scope. Although the provision may have been written to exclude all claims for tenant and neighbor liability made in the United States, ACE has presented no evidence or

authority indicating that this is the intended meaning of the ACE Policy. Conversely, the reading of this provision that Wattles proposes is equally plausible: as noted above, Exide's liability for damage to the Premises arose in part from perils "defined" by OSHA regulations and the International Building Code (both civil codes), and it further appears that Exide has an "insurable interest" in the premises under both Georgia's and Washington's insurance codes.

Because it must liberally construe any ambiguity in the Tenants and Neighbors Liability provision in favor of Wattles, the Court finds that Wattles's claim is not barred by the provision's limiting language. Blue Cross, 305 Ga. App. at 437 (2010); see also U.S. Fire Ins. Co. v. Hilde, 172 Ga. App. 161, 163 (1984) ("Where a provision in a policy is susceptible to two or more constructions, the courts will adopt that construction which is most favorable to the insured.") (citing Greer v. IDS Life Ins. Co., 149 Ga. App. 61, 63 (1979)).

2. Whether ACE is Liable for the Entire Exide Judgment Under the "Continuous Trigger" Rule

Next, the parties dispute whether ACE is liable for the entire Exide judgment under the so-called "continuous trigger" rule, pursuant to which a policy is triggered, and provides coverage for, a continuous loss (in this case, the decades-long damage to the Premises by sulfuric acid mist) so long as any portion of continuous damage occurred during the policy period. See Arrow Exterminators,

Inc. v. Zurich Am. Ins. Co., 136 F. Supp. 2d 1340, 1346 (N.D. Ga. 2001) ("With a continuous trigger, all liability policies in effect from the exposure to manifestation provide coverage and are responsible for the loss.") (citation omitted). Wattles argues that this doctrine should be applied to trigger ACE's liability during the 2006-2007 period covered by the ACE Policy; ACE responds that a "manifestation trigger" should instead apply, pursuant to which coverage is triggered "only when damage occurs and is discovered; that is, 'manifests' itself as readily obvious, within the policy period." Id. In other words, ACE contends that the ACE Policy should not apply because damage to the Premises was not discovered until after the policy expired.

In Arrow, another court in this district considered whether a general liability insurance policy issued to the plaintiff, a termite extermination business, should be construed to cover claims for termite damage that were discovered after the policy had lapsed, but that allegedly occurred during the policy period. Id. at 1344-45. Although the defendant, like ACE, argued that a manifestation trigger should apply, the court found nothing in the plain language of the policy requiring that property damage actually be "discovered or manifested" during the policy period. Id. at 1349. Instead, the policy stated only that it covered "bodily injury" or "property damage" caused by an "occurrence" during the policy period, and

defined "occurrence" as "an active pest infestation of property, including continuous or repeated exposure to substantially the same general harmful conditions." Id. Thus, the court concluded that, "[a]bsent a specific provision in the insurance contract saying that an 'occurrence' requires discovery or manifestation," a manifestation trigger does not apply. Id.; see also Boardman Petroleum, Inc. v. Federated Mut. Ins. Co., 269 Ga. 326, 335 (1998) (Carley, J. dissenting) (arguing that, absent clearly-worded language establishing that a "manifestation trigger" should apply, courts should not read this limitation into insurance contracts).

The same is true here. The ACE Policy states only that it insures against "all risks of direct physical loss of or damage occurring during the Term of Insurance," and defines "occurrence" only as "all loss or damage arising out of the same event." ACE Policy at 26, 33. And, as in Arrow, the Policy does not state that an "occurrence" requires manifestation or discovery. Accordingly, the Court concludes that the continuous trigger rule applies to the ACE Policy.[14]

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[14] ACE also argues that the continuous trigger rule cannot apply here because the ACE Policy is a first-party property insurance policy; as other courts have noted, first-party property insurance policies generally are subject to the manifestation trigger rule, while the continuous trigger rule has been applied only to certain third-party liability insurance policies. Pl.'s Resp. to Def.'s Third Mot. for Summ. J. at 18-20; see, e.g., John Q. Hammons Hotels, Inc. v. Factory Mut. Ins. Co., No. 01-3654 CV S SOW, 2003 WL 24216814, at *7 (W.D. Mo. Aug. 14, 2003), aff'd,

ACE also argues that, even if a continuous trigger applied here, it should nevertheless be held liable only for that degree of risk insured during the 2006-2007 period during which the ACE Policy was active, rather than jointly and severally liable for the entirety of the Exide judgment. See Pl.'s Resp. to Def.'s Third Mot. for Summ. J. at 20-23. However, there is nothing in the ACE Policy that requires the *pro rata* allocation of a covered judgment; as noted above, the policy covers "all risks or direct physical loss of or damage occurring during the Term of Insurance," including "all loss or damage *arising out of the same event*." ACE Policy at 26, 33 (emphasis added). Furthermore, ACE has presented no authority for this position in Georgia law, under which the question of how a judgment should be allocated among various insurers—which has divided courts elsewhere—remains unsettled. See Ameristeel Corp. v. Emp'rs Mut. Cas. Co., No. 7:96 CV 85 HL, 2005 WL 1785283, at *8 (M.D. Ga. July 26, 2005) (concluding that, although insurance company's argument that it should be liable for a "*pro*

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109 F. App'x 844 (8th Cir. 2004) ("[T]here are no first-party property insurance cases adopting the continuous-injury-trigger rule used in certain third-party liability insurance cases. In first-party property insurance claims, the manifestation trigger rule applies."). However, ACE cites no authority for this position in Georgia law; accordingly, as in Arrow, the Court will afford the ACE Policy its plain meaning. Furthermore, given its inclusion of the Tenants and Neighbors Liability provision discussed above, it appears that the ACE Policy is both a first-party property insurance and third-party liability insurance policy.

rata share [of the entire loss] according to its time on the risk [among consecutive insurers]" had "intuitive appeal," there was "no authority for (or against) such allocation under Georgia law," and noting that "[a] review of authorities in other jurisdictions reveals courts around the country to be almost evenly split as to the matter.").

In the absence of binding authority on this question, the Court finds that the plain language of the ACE Policy controls.[15] If ACE had intended to limit its liability through a *pro rata* allocation of damages, it could have included this language in the ACE Policy.

3. Whether Exide Has Met its Deductible

Finally, the parties dispute whether Exide has met the ACE Policy's $2 million per-occurrence deductible provision, which states in relevant part: "All losses, damages, and expenses arising out of any one occurrence shall be adjusted

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[15] Furthermore, Wattles points out in its reply that both Washington, the state in which the Premises are located and in which Wattles has its principal place of business, and Pennsylvania, the state in which ACE has its principal place of businesses, apply the joint and several method of allocation. See generally Am. Nat. Fire Ins. Co. v. B & L Trucking & Const. Co., 951 P.2d 250, 254 (Wash. 1998) (holding that "all insurers on the risk during the time of ongoing damage have a joint and several obligation to provide full coverage for all damages" unless otherwise specified by contract); J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 502, 507-09 (Pa. 1993) (same).

as one loss, and from the amount of such adjusted loss shall be deducted the amounts stated in the Schedule as the Deductibles." ACE Policy at 6, 9. As noted above, Wattles obtained a final judgment in the Pierce County lawsuit of $1,437,293.75 in damages and $836,330.18 in attorney's fees, or a total of $2,273,623.93. See Judgment Summary at 61-62.

ACE argues that Exide fails to meet the deductible for two reasons. First, it maintains that the ACE Policy's coverage of 20% of the $300 million coverage limits is a so-called "quota share" of coverage, pursuant to which ACE is liable not simply for 20% of the coverage limit (or $60 million) but also for 20% of any covered loss—here, 20% of the Exide judgment.[16] Pl.'s Resp. to Def.'s Third Mot. for Summ. J. at 24-25. However, ACE cites no authority in support of this claim, nor does it identify any contractual language or evidence indicating the ACE Policy is (or was intended to be) a quota share policy.[17] Instead, the ACE Policy's

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[16] Because 20% of the Exide Judgment is only $454,724.79 (.2 x $2,273,623.93), application of the quota share rule ACE advocates would result in a denial of coverage to Wattles.

[17] Although ACE cites Citigroup Inc. v. Fed. Ins. Co., 649 F.3d 367, 369 (5th Cir. 2011), for the proposition that the ACE Policy covers only 20% of Wattles's loss, this case contains no discussion of the insured's "quota share" layer of coverage, nor does it reach the issue of whether the policies making up this layer covered only a portion of the insured's loss.

Declarations page states only that the policy's limit of liability is "$60,000,000 per occurrence being 20% part of $300,000,000 per occurrence excess of deductibles." ACE Policy Declarations [Doc. 54-9] at 2. Accordingly, the Court finds that ACE is responsible for the entirety of any coverage loss up to the coverage limit of $60 million.

Second, ACE argues that the ACE Policy's "Defense Costs" provision should not be construed to include the $836,330.18 in attorney's fees awarded to Wattles as part of the Exide judgment, and that Wattles's claim therefore falls well short of the $2 million deductible. In relevant part, the provision states:

> This Policy, subject to all of its provisions, also insures the costs and fees to defend any claim or suit against the Insured alleging physical loss or damage as insured against to property of others in the care, custody or control of the Insured to the extent of the Insured's liability therefore . . . .
>
> Coverage hereunder shall apply solely in respect of costs and fees incurred in connection with the defense of any suit(s) or part of any suit(s) which make claims for the value of physical damage to property and shall in no circumstances extend to cover cost[s] and fees incurred in connection with any further amounts.
>
> The maximum amount of expense incurred by the Underwriters in respect of such defense, which amount shall be included within and not additional to the total amount of the loss to which this policy's limits and deductibles shall be applied, shall not exceed the amount stated therefore in the schedule.
>
> Subject to a sublimit of USD $500,000.

ACE Policy at 23.

ACE contends that the policy should be read to insure only the costs and fees Exide incurred in defending the underlying suit, rather than Wattles's own attorney's fees for prosecuting its claims against Exide. Pl.'s Br. in Supp. of Mot. for Summ. J. at 54-11. However, it appears that ACE has misinterpreted Wattles's argument regarding this provision. In its reply, Wattles states that it does not seek to recover the $836,330.18 in attorney's fees awarded to it in the Pierce County lawsuit pursuant to the Defense Costs provision; instead, it seeks these fees pursuant to the Tenant Liability provision discussed above, which extends coverage to include "[t]he liability which the Insured incurs as a tenant for damage to real and personal property by a peril insured against[.]" See Def.'s Reply in Supp. of its Third Mot. for Summ. J. at 12 & n.6 (citing ACE Policy at 25). The Court agrees with Wattles that, because it was awarded attorney's fees in the Pierce County lawsuit pursuant to a prevailing party attorney's fees provision in its lease agreement with Exide, these fees are included as part of the liability Exide incurred as Wattles's tenant. See Lease Agreement Between Exide and Wattles, attached as Ex. A to Wattles Aff. [Doc. 52-3] at 13.

The confusion between the parties appears to stem from a different argument that Wattles makes in its briefing: Wattles argues that because Exide itself incurred

more than $500,000 in defense costs in the Pierce County lawsuit (i.e., defense costs in addition to the attorney's fee award discussed above[18]), this amount should also be included in Exide's "loss" under the ACE Policy—thus effectively reducing the deductible to $1.5 million. See Br. in Supp. of Def.'s Third Mot. for Summ. J. at 18-19. As noted above, the ACE Policy includes a $500,000 sublimit on coverage for defense costs, and further provides that this amount "shall be included with and not additional to the total amount of the loss to which this policy's limits and deductibles shall be applied[.]" ACE Policy at 23. Pursuant to the Bankruptcy Stipulation entered into by Wattles and Exide, "[a]ny final judgment or settlement in the State Court Action shall be reduced by the amount of any applicable deductible or self-insured retention under any applicable insurance policy[.]" Bankruptcy Stipulation at 8.[19]

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[18] Exide has admitted that it incurred more than $500,000 in defense costs in the Pierce County lawsuit. See Exide's Objs. and Resps. to Def.'s First Reqs. for Admission, attached as Ex. F to Stout Aff. [Doc. 52-2] ("Exide Resps. to Wattles") at 23-24.

[19] The Bankruptcy Stipulation further modified the automatic stay "to the limited extent necessary to permit [Exide's] insurers to pay defense costs related to, and any settlement of or judgment on the State Court Action in accordance with . . . the terms and conditions of any applicable insurance policy[.]" Id. at 9.

The Court further agrees with Wattles that, based on the ACE Policy's plain language, Exide's defense costs in the Pierce County lawsuit (up to the policy's $500,000 sublimit) should be included in any calculation of Exide's total loss under the policy.[20] However, because there is currently no evidence in the record to determine if Exide's admission that it incurred $500,000 in defense costs is true, the Court is unable to determine the amount of the unsatisfied judgment to which Wattles is entitled. Accordingly, Wattles is directed to file a supplementary evidentiary submission with fourteen (14) days documenting Exide's defense costs in the Pierce County lawsuit.[21]

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[20] ACE also argues in passing that the ACE Policy should be read to cover only defense costs "paid by ACE," and not those paid by Exide. See Pl.'s Resp. to Def.'s Third Mot. for Summ. J. at 15 n.3. However, this argument is contrary to the Policy's plain language, which states: "[c]overage hereunder shall apply solely in respect of costs and fees incurred in connection with the defense of any suit[.]" ACE Policy at 23 (emphasis added).

[21] ACE argues that because Exide has yet to present a claim to ACE with respect to Wattles's claims, including defense costs, the defense costs provision is not triggered and cannot be used to offset the $2 million deductible. Pl.'s Resp. to Def.'s Third Mot. for Summ. J. at 26. However, this appears to be due only to the fact that ACE has so far contended that Exide's defense costs are not covered by the ACE Policy. Exide states in its responses to Wattles's requests for admission that:

> **Request for Admission No. 2:** Admit that the Policy's Defense Costs sublimit has been satisfied by defense costs incurred by you in the underlying lawsuit.

IV. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED** that:

(1) Defendant The Wattles Company's Second Motion for Partial Summary Judgment [Doc. 51] is **GRANTED**, and Plaintiff ACE American Insurance Company's first cause of action for contract reformation is **DISMISSED**.

(2) Defendant The Wattles Company's Third Motion for Summary Judgment [Doc. 52] is **GRANTED IN PART.** To the extent that Wattles's motion seeks a declaration that it is entitled to any covered amount under the ACE Policy based on the $2,273,623.93 Exide judgment, the motion is **GRANTED**. However, the Court will reserve ruling on the amount of the unsatisfied judgment to which Wattles is entitled until it has received a supplemental evidentiary submission documenting Exide's defense costs in

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Response: Exide admits that it contends that the Policy's Defense Costs sublimit has been satisfied by defense costs incurred by Exide in the underlying lawsuit. ACE, however, has not paid or reimbursed Exide for any such defense costs. Upon information and belief, Exide understands that ACE contends that the defense costs incurred by Exide in the underlying lawsuit are not covered by the Policy and/or Exide has not exhausted its deductible.

Exide Resps. to Wattles at 24.

the Pierce County lawsuit, as well as any response to that submission by ACE.

(3) Defendant The Wattles Company's Motion for Partial Summary Judgment [Doc. 39] is **DENIED AS MOOT**.

(4) Plaintiff Ace American Insurance Company's Motion for Summary Judgment [Doc. 54] and Motion to Strike [Doc. 55] are **DENIED**.

It is further **ORDERED** that, within fourteen (14) days from the date of this Order, Wattles is directed to file a supplemental evidentiary submission documenting Exide's defense costs in the Pierce County lawsuit. ACE shall have seven (7) days from the date of the filing of the supplemental evidentiary submission to file any response.

IT IS SO ORDERED this 19th day of September, 2017.

MARK H. COHEN
United States District Judge