U.S.C.A. CASE NO. 24-13244-F
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

ATLANTIC BUSINESS CORPORATION D/B/A
ABO PHARMACEUTICALS,

PLAINTIFF/APPELLANT.

VS.

RLI INSURANCE COMPANY

DEFENDANT/APPELLEE.

---

APPEAL FROM
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
CASE NO. 1:23-CV-02645-SCJ

---

# APPELLANT ATLANTIC BUSINESS CORPORATION D/B/A ABO PHARMACEUTICALS' BRIEF

---

Scott W. McMickle
Chandler L. Smith
McMickle, Kurey & Branch, LLP
217 Roswell Street, Suite 200, Alpharetta, Georgia 30009
Telephone: (678) 824-7800
Facsimile: (678) 824-7801
Email: swm@mkblawfirm.com and csmith@mkblawfirm.com
*Attorneys for Appellant* Atlantic Business Corp. d/b/a ABO Pharmaceuticals

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT**
**(Atlantic Business Corporation d/b/a ABO Pharmaceuticals v. RLI Insurance Company - U.S.C.A. CASE NO. 24-13244-F)**

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.2 and 28-1, the undersigned counsel certifies that the following named persons are parties interested in the outcome of this case:

1. Atlantic Business Corporation, a CA Corp. d/b/a ABO Pharmaceuticals; Plaintiff/Appellant. Atlantic Business Corporation, a CA Corp. d/b/a ABO Pharmaceuticals has no subsidiary corporations and there are no parent corporations or publicly held corporations that own 10% or more of the stock of Appellant;
2. Hill Rivkins, LLP; Law Firm for Appellee;
3. Honorable Jones, Steve C., United States District Judge for the Northern District of Georgia, Atlanta Division
4. McMickle, Kurey & Branch, LLP; Law Firm for Appellant;
5. McMickle, Scott W.; Counsel for Plaintiff/Appellant;
6. RLI Insurance Company Inc.; Defendant/Appellees;
7. Saville, James A., Jr.; Counsel for Defendant/Appellee;
8. Smith, Chandler L.; Counsel for Plaintiff/Appellant; and
9. Staph, Joseph B.; Counsel for Defendant/Appellee;

## STATEMENT REGARDING ORAL ARGUMENT

Appellant Atlantic Business Corp. d/b/a ABO Pharmaceuticals, (hereinafter "ABO") requests oral argument. ABO believes oral argument would be beneficial to walk the Court through the policy documents and policy terms, the details of the claim, the context in which the policy terms should be interpreted and the reasonableness of the parties' expectations regarding such interpretations.

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Cases** **Page No.**

**Statutes, Rules, and Code Provisions**

## STATEMENT OF JURISDICTION

(A) The District Court had jurisdiction pursuant to 28 U.S.C. § 1332, as the parties were completely diverse and the amount in controversy exceeded $75,000.

(B) The Eleventh Circuit Court of Appeals has jurisdiction, pursuant to 28 U.S.C. § 1291, to adjudicate ABO's appeal from the final judgment of the United States District Court for the Northern District of Georgia, which was entered on September 23, 2024.

(C) The District Court entered final judgment in this case on September 23, 2024 (Doc. 51). ABO timely filed its Notice of Appeal (Doc. 52) on October 1, 2024.

(D) ABO's appeal is from a final judgment that disposed of all claims.

## STATEMENT OF THE ISSUES

The District Court erred in holding that the Delay Warranty in the policy issued by RLI Insurance Company ("RLI") excluded coverage for the spoiled blood plasma at issue despite the fact that RLI's Policy was specifically endorsed to cover "deterioration…including spoilage from any cause…"

Although the District Court's grant of summary judgment was restricted to the Delay Warranty and RLI did not move for summary judgment on the issue of its Temperature Warranty, the District Court further erred in its conclusion that

RLI's Temperature Warranty excluded coverage. Finally, the District Court erred in its interpretation of the "irrespective of percentages" coverage provided by RLI.

## STATEMENT OF THE CASE

### I. Course of Proceedings

This case arises from a spoiled shipment of blood plasma from Mexico City to New York with an "insured value" of $820,147.36. (Doc. 38-2, p. 1). ABO filed suit against RLI alleging that RLI wrongly denied coverage under an insurance policy RLI issued to ABO that covered the shipment of blood plasma. ABO also alleged that RLI was stubbornly litigious under O.C.G.A. § 13-6-11 and committed bad faith under O.C.G.A. § 33-4-6. (Doc. 1). ABO filed a motion for partial summary judgment on December 19, 2023, asking the District Court to conclude that RLI covered the spoiled shipment of blood plasma. (Doc. 38.) RLI filed a motion for summary judgment on February 2, 2024 asking the District Court to grant summary judgment to RLI. (Doc. 46).

After the motions were briefed, the District Court granted RLI's motion and denied ABO's motion on September 20, 2024. (Doc. 50.) The District Court entered final judgment in this case on September 23, 2024 (Doc. 51). ABO timely filed its Notice of Appeal on October 1, 2024. (Doc. 52).

## II. Statement of Facts

### A. The Spoiled Load Of Blood Plasma.

The shipment of blood plasma experienced temperature variation in transit and was deemed by RLI's surveyor to be a "total loss" due to the fact the cargo was spoiled and unfit for its intended purposes. (Doc. 38-5, bottom of p. 9-10).

### B. The Certificate Of Insurance And Bennett International Transport As RLI's Authorized Agent.

RLI issued a Certificate of Insurance ("COI") to ABO to cover this single shipment of blood plasma from Mexico City to New York with an "insured value" of $820,147.36. (Doc. 38-2, p. 1). The COI indicates that it is subject to the conditions of the "Open Policy." (Doc. 38-2, top of p.1) The "Open Policy" is a policy issued by RLI to Bennett International Transport LLC ("Bennett") with Bennett identified as the "Assured." (Doc. 38-3, p.1, p.3). The "Open Policy" gives Bennett, as RLI's "duly authorized representative," the authority to issue certificates of insurance such as the COI at issue here. (Doc. 38-3, bottom of p. 18). ABO paid a premium of $4,200 to Bennett (Doc. 38-4, p. 1). Of the $4,200 premium paid by ABO, Bennett paid RLI $2,050.37 and kept the rest as Bennett's commission. (Doc. 38-2, p. 3).

### C. The Terms Of The COI Issued To ABO.

For the Court's ease of reference, the relevant portions of the COI are as follows:

RLI®

| | |
|---|---|
| Policy Number: CAR0100371 | Certificate Number: 950910 |
| Issued Date: 15-Jun-2021 | Shipment Date: 15-Jun-2021 |
| Place of Issuance: MEXICO CITY, MEXICO | Client Reference #: 101021-00063 |

This certifies that the Assured is insured under and subject to the conditions of the Open Policy and in this Certificate.

Assured:

ABO PHARMACEUTICALS

Loss payable at/to: Assured or order

Upon surrender of this Certificate, which conveys the right of collecting any such loss as fully as if the property were covered by a special policy direct to the holder hereof, and free from any liability for unpaid premiums. This Certificate is subject to all the terms of the Open Policy, provided, however, that the right of a bona fide holder of this Certificate for value shall not be prejudiced by any terms of the Open Policy which are in conflict with the terms of this Certificate.

***RLI Insurance Company***
***9025 N. Lindbergh Drive,***
***Peoria, IL 61615-1499***

Conveyance: FEDEX

Additional Carrier Information:

Insured Value:

820147.36 USD

EIGHT HUNDRED AND TWENTY THOUSAND ONE HUNDRED AND FORTY SEVEN AND 36/100 United States Dollars

| | |
|---|---|
| Place of Origin: MEXICO CITY | Final Destination: QUEENS, NY |
| Country of Origin: Mexico | Destination Country: United States |
| Port of Loading: MEXICO CITY | Port of Discharge: QUEENS |
| Country of Loading: Mexico | Country of Discharge: United States |



Description of Goods:

BLOOD PLASMA

Marks & Numbers:

Pieces and Weights:

4 PALLET // 3400 KGS

**Average Terms and Conditions:** Insured property while shipped on deck of an ocean vessel, subject to an ON DECK bill of lading is warranted Free from Particular Average unless caused by the vessel being stranded, sunk, or burnt, but notwithstanding this Warranty the Company is to pay any physical loss of or damage to the insured property which may reasonably be attributed to fire, collision or contact of the vessel and/or craft and/or conveyance with any external substance (ice included) other than water, or to discharge of cargo at port of distress, but including jettison and/or washing overboard. Except while subject to an ON DECK bill of lading, and unless otherwise indicated in this box:

This insurance covers against "All Risks" of physical loss or damage from any external cause irrespective of percentage, but excluding nevertheless the risks of War, Strikes, Riots, Seizure, Detention and other risks excluded by the Nuclear/Radioactive Contamination Exclusions clause, the F.C. & S. (Free of Capture and Seizure) Warranty and the S.R.&C.C. (Strikes, Riots and Civil Commotions) Warranty of this policy, except to the extent that such risks are specifically covered by endorsement.

Coverage specifically includes deterioration/decay of or damage to the goods insured, including spoilage, from any cause which shall arise during the insured voyage.
Warranted: must be properly packed and in sound condition at the time of attachment of the insurance.
Each and every loss is subject to a deductible of ½ of 1% of the total insured value of the shipment.
Warranted all carrier(s) are to be instructed that temperature to be maintained throughout transit.
Excluding claims arising as a result of fault in preparation.
Excluding loss of market.

Including the risk of War, Strikes, Riots and Civil Commotions in accordance with American Institute Clauses current on date of issuance of this certificate.

**CONDITIONS :** This insurance, in addition to the foregoing, is also subject to the following American Institute Cargo Clauses, current on date of shipment:

| | | | | | |
|---|---|---|---|---|---|
| Accumulation | Chemical, Biological, Bio-Chemical, Electromagnetic Exclusion | Economic & Trade Sanctions | Labels | Partial Loss | South American Clause |
| Basic Exclusions | | Explosion | Landing, Warehousing & Forwarding | Pollution Hazard/Deliberate Damage | Sue & Labor |
| Basic Perils | Consolidation/Deconsolidation | Extended Radioactive Contamination Exclusion Warranty | Machinery | Refused or Returned | U.S. Economic and Trade Sanctions |
| Bill of Lading, Etc | Constructive Total Loss | General Average/Salvage | Marine Extension Clauses | Seaworthiness | Warehouse to Warehouse |
| Both to Blame | Craft, Etc. | Inchmaree | Packages Totally Lost | Shore Perils | |
| Brands & Trademarks | Deviation | | | | |

PARAMOUNT WARRANTIES: The following warranties shall be paramount and shall not be modified or superseded by any other provision included herein or stamped or endorsed hereon unless such other provision refers specifically to the risk excluded by these warranties and expressly assumes the said risks.

F.C.&S. Warranty S.R.&C.C. Warranty Delay Warranty Nuclear/Radioactive Contamination Exclusion Warranty

(Doc. 38-2).

**D. Facts Relevant To The Delay Warranty.**

The Delay Warranty is referenced at the bottom of the COI, but it is not defined in the COI. The Delay Warranty is defined in the Open Policy as follows:

> Warranted free of claim for loss of market or for loss, damage or **deterioration** arising from delay, whether such delay be caused by a peril insured against or otherwise.

(Doc. 38-3, p. 14) (emphasis added). The COI and the Open Policy were endorsed to specifically cover deterioration, including spoilage from any cause. Specifically, the endorsement language amended RLI's grant of coverage as follows:

> Coverage specifically includes **deterioration**/decay of or damage to the goods insured, **including spoilage, from any cause** which shall arise during the insured voyage.

(Doc. 38-2, p. 1; Doc. 38-3, p. 40) (emphasis added). The District Court acknowledged in its Order that "coverage for loss due to 'any cause' is reasonably read to include loss caused by delay…" (Doc. 50, bottom of p. 16). Consistent with this, Del De Marino, the Director of Sales-Cold Chain Solutions for Bennett and RLI's "duly authorized representative" that issued the COI to ABO, confirmed via declaration that the spoilage of the subject cargo "from any cause, including delay, would be covered by the endorsed language." (Doc. 48-20, par. 10 on p. 2-3). There is also evidence indicating that RLI's representative previously concluded that the Delay Warranty did not apply due to the endorsed language.

Specifically, on August 23, 2021, RLI's Stephanie Meyers told Lawrence Arnold that the "Delay" was excluded by the "Delay Warranty. (Doc. 38-5, top half of page 1). In response, on August 24, 2021, Arnold told RLI's Meyers that the policy was endorsed to cover "deterioration/decay … including spoilage, from any cause…" (Doc. 38-5, top half of page 3). Thereafter, in RLI's March 11, 2022, letter providing RLI's "formal coverage position," there was no mention of a "Delay Warranty." (Doc. 38-6).

**E. Facts Relevant To The Temperature Warranty.**

The sole basis for RLI's motion for summary judgment was the Delay Warranty. Since RLI did not move for summary judgment on the application of the Temperature Warranty, the District Court indicated in Footnote 20 of its Order at Doc. 50 that its grant of summary judgment to RLI was "restricted" to the application of the Delay Warranty. Nevertheless, the District Court analyzed the Temperature Warranty in the COI and erroneously concluded that it precluded coverage.

The Temperature Warranty in the COI found at Doc. 38-2 provides as follows:

> Warranted all carrier(s) are to be instructed that temperature to be maintained throughout transit.

(Doc. 38-2). It is undisputed that FedEx possessed the commercial invoice and packing list. (Doc. 43-8, no. 24 on p. 14). Further, it is undisputed that the

invoice and packing list were required to be reviewed by all carriers, which included FedEx. (Doc. 43-8, no. 33 on p. 18). The invoice FedEx was required to review is found at Doc. 43-4, p. 21 and clearly says:

**TEMPERATURE** TO BE MANAGED – 25 ℃ below.

Also, it is undisputed that, when FedEx received the cargo, it had a large sticker on the outside of the packaging clearly indicating the temperature had to be maintained at -15 degrees Celsius to -20 degrees Celsius. The sticker provided:

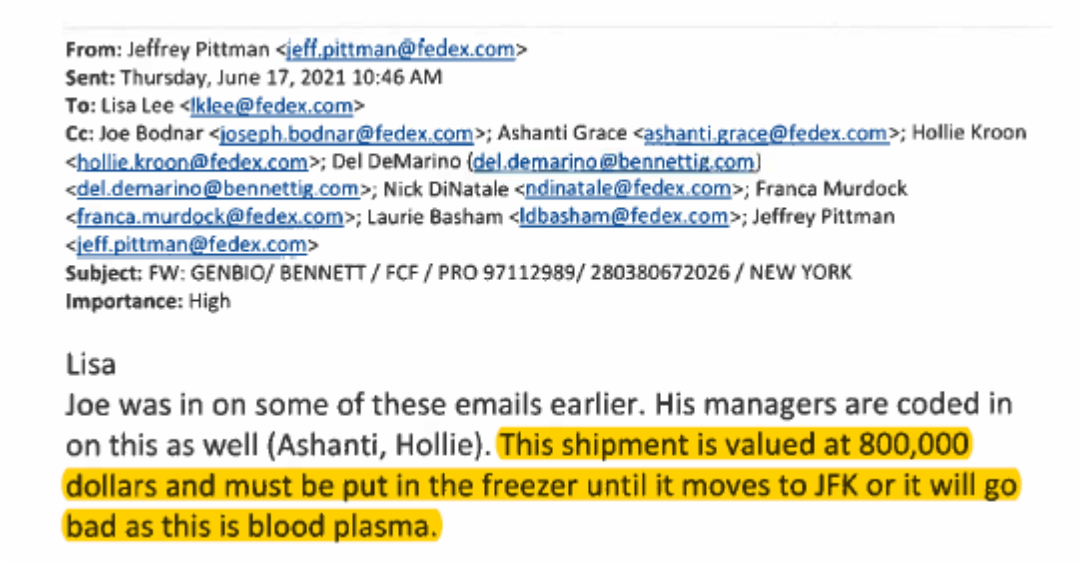

(Doc. 43-8, no. 38 on p. 20-21).

Further, RLI's expert's report includes a translated email from FedEx wherein FedEx acknowledged that, upon FedEx's initial receipt of the cargo, it re-configured the dry-ice in the shipment and put the shipment in a "refrigerant chamber" as of June 15, 2021 at 7:40 pm. (Doc. 43-6, p. 22). Thus, FedEx knew the temperature of the shipment needed to be maintained, FedEx had actually

reconfigured the dry ice in the palletized cargo, and FedEx took action to maintain the temperature of the cargo by putting the cargo in a "refrigerant chamber" almost three (3) days before the cargo was damaged on June 18, 2021. (Doc. 43-6, p. 22; Doc. 43-8, p. 17-18, nos. 29-30; Doc. 50, p.10). It is also notable that, in his discussion of FedEx's initial handling of the shipment, RLI adjuster Jurgen Shulze noted in a report that "…[u]pon pickup by FedEx, **instructed** by GenBio but on behalf of ABO, FedEx rejected the positioning of the dry ice……" (Doc. 38-14, p. 30, 2nd sentence in 1st full paragraph – emphasis added).

In addition, Del De Marino, the Director of Sales-Cold Chain Solutions for Bennett and RLI's "duly authorized representative" for the issuance of the COI, booked FedEx as the carrier for this shipment. (Doc. 48-20, par 3 on p. 2). FedEx was informed of both the sensitive nature of the cargo and the requirement for next day delivery to New York. (Doc. 48-20, par 6 on p. 3). In response, FedEx did not communicate any problems with providing the "next day" shipment for this sensitive, perishable cargo. (Doc. 48-20, par 3 on p. 2). Thus, it is undisputed that this shipment of blood plasma was supposed to be, and expected by all parties to be, a 1-day shipment. (Doc. 43-8, no. 28 on p. 17). Further, it is undisputed that Bennett "routinely worked with RLI" to insure this type of shipment and that Bennett had hired FedEx to transport similar shipments of blood plasma without incident. (Doc. 48-20, pars. 5 and 8 on p. 3). It is also undisputed that Bennett's

partner, Able Freight, informed FedEx of both the sensitive nature of the cargo and the requirement for next day delivery of these items to JFK airport. (Doc. 48-16, par. 6 on p. 3). It is also undisputed that the shipment was packaged in a manner that required no action to preserve or maintain the temperate for "several days," meaning that it did not require any action by Fed-Ex or any other carrier within the expected one-day transit. This is evidenced by the fact that the cargo was not temperature-damaged until June 18, 2021 at 2:11 pm, almost three (3) days after it left GenBio's facility in Mexico. (Doc. 43-8, no. 29-30 on p. 17-18; Doc. 48-16, par. 7 on p. 3). The shipment was delayed in transit due to a "screwup" that was "100% FedEx" according to De Marino. (Doc. 43-4, top of p. 6). When De Marino learned that the shipment was delayed, De Marino "reached out to FedEx and instructed them that the temperature must be maintained…" (Doc. 48-20, par 9 on p. 3). On June 17, 2021 at 7:01 am, De Marino told FedEx the cargo "must be kept at -20 [degrees]," which was consistent with what FedEx already knew per both the commercial invoice and sticker on the shipment noted above. (Doc. 43-4, p. 16). FedEx's intra-office email on June 17, 2021, at 10:46 am (more than a full day before the shipment was considered damaged on June 18, 2021 at 2:11 pm) provides as follows:



**From:** Jeffrey Pittman <jeff.pittman@fedex.com>
**Sent:** Thursday, June 17, 2021 10:46 AM
**To:** Lisa Lee <lklee@fedex.com>
**Cc:** Joe Bodnar <joseph.bodnar@fedex.com>; Ashanti Grace <ashanti.grace@fedex.com>; Hollie Kroon <hollie.kroon@fedex.com>; Del DeMarino (del.demarino@bennettig.com) <del.demarino@bennettig.com>; Nick DiNatale <ndinatale@fedex.com>; Franca Murdock <franca.murdock@fedex.com>; Laurie Basham <ldbasham@fedex.com>; Jeffrey Pittman <jeff.pittman@fedex.com>
**Subject:** FW: GENBIO/ BENNETT / FCF / PRO 97112989/ 280380672026 / NEW YORK
**Importance:** High

Lisa
Joe was in on some of these emails earlier. His managers are coded in on this as well (Ashanti, Hollie). This shipment is valued at 800,000 dollars and must be put in the freezer until it moves to JFK or it will go bad as this is blood plasma.

(Doc. 43-4, p. 8.). The District Court agreed that, in this email, "Bennett **instructed** FedEx to maintain the temperature of the Blood Plasma shipment…" (Doc. 50, p. 9 – emphasis added). Thus, once FedEx breached the agreement to deliver the shipment in one (1) day, Bennett promptly instructed FedEx again to maintain the temperature of the shipment.[1] The shipment was not considered damaged or spoiled until at least a full day after FedEx was again instructed to maintain the temperature. (Doc. 43-8, p. 17, no. 30).

### F. "Irrespective of Percentages" Coverage Provided by RLI.

The COI contains the following text (emphasis added):

> **This insurance covers against "All Risks" of physical loss or damage from any external cause irrespective of percentage**, but excluding nevertheless the risks of War, Strikes, Riots, Seizure, Detention and other risks excluded by the Nuclear/Radioactive Contamination Exclusions clause, the F.C. & S. (Free of Capture and

[1] See emails at Doc. 43-8, p. 5 for further requests by Bennett for FedEx to take action to protect the cargo.

> Seizure) Warranty and the S.R.&C.C. (Strikes, Riots and Civil Commotions) Warranty of this policy, except to the extent that such risks are specifically covered by endorsement.

(DOC. 38-2, p. 1).

## III. Standard of Review

The District Court's grant of RLI's motion for partial summary judgment and denial of ABO's motion for summary judgment are subject to *de novo* review. Cagle v. Bruner, 112 F.3d 1510, 1514 (11th Cir. 1997).

## SUMMARY OF THE ARGUMENT

The District Court erred in its interpretation of the Delay Warranty. First, the District Court violated the clear rule that the endorsement language takes precedence over pre-printed policy text when it concluded that the "Paramount Warranties" in the policy took precedence over the endorsement language extending coverage for "deterioration …including spoilage from any cause." Second, the District Court improperly ignored reasonable interpretations of the endorsement language that afforded coverage, and adopted a narrow interpretation of the endorsement that was inconsistent with the reasonable expectations of both ABO and RLI's agent, Bennett. Third, the District Court unreasonably confused the term "risk" in the "Paramount Warranties" to include both the "risk" and the "cause" of the loss. Here, the "risk" was deterioration/spoilage of the cargo and

the "cause" of the damage was delay. Any and all of these errors by the District Court mandate a reversal.

The District Court also erred in its interpretation of the Temperature Warranty. First, the District Court improperly ignored the dictionary definition of the term "instructed" and the reasonableness of that definition in violation of the rule that any reasonable definition must be enforced in ABO's favor. Second, the District Court improperly created its own definition of "instructed" that was based upon what the District Court believed RLI intended the term to mean – both violations of Georgia's rules of policy interpretation. Those rules provide, among other things, that policy terms should be interpreted based upon what a reasonable person in the shoes of the insured would understand them to mean, not what the insurer intended by the words it used. The District Court wrongly concluded that the word "instructed" in the Temperature Warranty could only be reasonably interpreted to mean "to impose a legal duty upon." That interpretation is clearly inconsistent with the expectations of both ABO and Bennett, RLI's agent that issued the RLI policy for this shipment and other substantially similar shipments. Indeed, the District Court's interpretation renders the bargained-for coverage ostensibly provided under this single shipment policy to be illusory. Also, it is unreasonable in the context of this single shipment policy to interpret the RLI policy to require FedEx to maintain the temperature of the cargo if there was

nothing for FedEx to do to maintain the temperature so long as it honored its duty to deliver the shipment in one (1) day. The unreasonableness of the District Court's interpretation is further demonstrated, for example, by the facts that: (1) the District Court could not apply its interpretation consistently; and (2) RLI's own adjuster applied an interpretation that was inconsistent with the District Court's interpretation.

Finally, the "Irrespective of Percentages" coverage provided by the COI extends coverage to ABO unless an excluded cause of loss is the sole cause of the loss. As discussed below, this presents a question of fact that makes summary judgment improper in this case.

## ARGUMENT AND CITATIONS OF AUTHORITY

### I. The District Court Erred In Its Interpretation Of The Endorsement Language Specifically Covering "Deterioration…Including Spoilage From Any Cause…"

In erroneously concluding that the Delay Warranty precluded coverage for ABO's loss, the District Court failed to follow several fundamental rules of policy interpretation in Georgia and wrongly interpreted the meaning of the term "risk" in the Policy.

**A. Relevant Policy Provisions.**

The COI and the Open Policy were specifically endorsed to cover the risk of deterioration, including spoilage, "from any cause." The endorsement language provided:

> Coverage specifically includes **deterioration**/decay of or damage to the goods insured, **including spoilage, from any cause** which shall arise during the insured voyage.

(Doc. 38-2, p.1 middle, Doc. 38-3, p. 40) (emphasis added). The Delay Warranty is referred to generally in the pre-printed portion of the COI and defined in the Open Policy as follows:

> Warranted free of claim for loss of market or for loss, damage or **deterioration** arising from delay, whether such delay be caused by a peril insured against or otherwise.

(Doc. 38-2, p.1 bottom, Doc. 38-3, p. 14) (emphasis added).

**B. Georgia Rules of Policy Interpretation.**

Under Georgia law, "[t]he cardinal rule of contractual construction is to ascertain the intent of the parties." Barrs v. Auto-Owners Ins. Co., 564 F. Supp. 3d 1362, 1373 (M.D. Ga. 2021) (citations omitted). In doing so, the Court must determine whether the policy at issue is clear and unambiguous. Id. Policy provisions are ambiguous when they are susceptible to more than one meaning, even if each meaning is logical and reasonable, and where there is an ambiguity, the following rules of construction apply:

- Any ambiguities are construed against the insurer,
- Exclusions from coverage are strictly construed, and
- Insurance contracts are to be read in accordance with the reasonable expectations of the insured where possible.

Auto-Owners Ins. Co. v. Neisler, 334 Ga. App. 284, 286–287, 779 S.E.2d 55, 59–60 (2015). Thus, when interpreting insurance policies under Georgia law, any exceptions, limitations and/or exclusions to coverage such as the Delay Warranty or Temperature Warranty are construed narrowly, favoring coverage for the insured. Cox Commc'ns, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 708 F. Supp. 2d 1322, 1328 (N.D. Ga. 2010). On the other hand, endorsement language expanding coverage such as the subject endorsement language covering the risk of "deterioration/decay of or damage to the goods insured, including spoilage, from any cause" is interpreted broadly. Barrett v. National Union Ins. Co. of Pitt., 304 Ga. App. 314, 320–321, 696 S.E.2d 326, 331–332 (2010). Further, the language in the policy is interpreted based upon "what a reasonable person in the shoes of the insured would understand them to mean," not "what the insurer intended by the words it used." Georgia Farm Bureau Mut. Ins. Co. v. Jackson, 240 Ga. App. 127, 129, 522 S.E.2d 716, 718 (1999) (citing Georgia Farm Bureau Mut. Ins. Co. v. Washington, 145 Ga. App. 216, 217, 243 S.E.2d 639 (1978)). Finally, Georgia law clearly dictates that the terms of this endorsement take precedence over the

portions of the policy in conflict therewith. Ross v. Stephens, 269 Ga. 266, 268–269, 496 S.E.2d 705, 708 (1998).

### C. The Endorsement Language Specifically Covers Loss From Deterioration/ Spoilage From Any Cause.

It is undisputed that the shipment of blood plasma experienced temperature variation in transit and was deemed by RLI's surveyor to be a "total loss" due to the fact the cargo was spoiled and unfit for its intended purposes. (Doc. 38-5, bottom of p. 9-10). It is also undisputed that the COI and Open Policy were endorsed to specifically cover "deterioration…including spoilage, from any cause." (Doc. 38-2, p.1 bottom - COI, Doc. 38-3, p. 14 - Open Policy). The phrase "any cause" literally means any cause, which would necessarily include delay. In fact, the District Court acknowledged that "coverage for loss due to 'any cause' [in the endorsement language] is reasonably read to include loss caused by delay…" (Doc. 50, bottom of p. 16). This is clearly why Bennett, RLI's "duly authorized representative" that issued the COI to ABO, confirmed via declaration that its expectation was that the deterioration/spoilage of the subject blood plasma cargo would be covered by the endorsement covering "deterioration…including spoilage, from any cause" (Doc. 48-20, par. 10 on p. 2-3). Thus, the endorsement language plainly extends coverage for the subject deterioration/spoilage loss caused by delay. From there, the analysis is simple. Under established Georgia Supreme Court precedent in Ross v. Stephens, 269 Ga. 266, 268–269, 496 S.E.2d

705, 708 (1998), the endorsement language takes precedence over any other portion of the policy, such as the Delay Warranty, that purportedly conflicts with it.

### D. The District Court Failed To Follow Georgia's Rules of Policy Interpretation.

The District Court erred three (3) ways, any one of which requires a reversal. First, the District Court did not follow the fundamental rule in Georgia that endorsement language takes precedence over pre-printed policy terms. Further, the District Court did not follow basic rules of policy interpretation in its analysis of the endorsement language and the Delay Warranty. Finally, the District Court erred in its interpretation of the term "risk" in the "Paramount Warranties."

#### i. The District Court Failed To Follow Rule That Coverage Provided By Endorsement Takes Precedence Over Pre-Printed Policy Terms In Conflict Therewith.

Although the District Court acknowledged the endorsement language could be "… reasonably read to include loss caused by delay…" (Doc. 50, bottom of p. 16), the District Court wrongly concluded that, based upon the "Paramount Warranties" section of the COI and the Open Policy (a "Delay Warranty" is one of the "Paramount Warranties"), the Delay Warranty took precedence over the endorsement language. The pre-printed text in the COI and Open Policy that was relied upon by the District Court provided as follows:

> PARAMOUNT WARRANTIES: The following warranties shall be paramount and shall not be modified or superseded by any other provision included hereon or stamped or endorsed hereon unless such other provision refers specifically to the risk excluded by these warranties and expressly assumes the said risks.

(Doc. 38-2, bottom of p.1 – COI; Doc 38-3, p. 13 – Open Policy). Relying on this text, the Court wrongly concluded as follows:

> The Policy provides that the Delay Warranty may be modified or superceded only through a provision that 'specifically' refers to the excluded risk (i.e., loss due to delay) and expressly assumes that risk. Although the COI Endorsement provides that coverage extends to "deterioration/decay of or damage to the goods insured, including spoilage, from any cause" during transit, it does not serve to extend coverage for deterioration/decay or damage caused by delay because, as required by the Policy, the COI Endorsement does not 'specifically' mention delay as a covered cause, and, thus, does not assume the risk of deterioration/decay or damage due to delay."

(Doc. 50, p. 17). This text demonstrates that the District Court held that the policy's pre-printed terms, *i.e.*, the Paramount Warranties, took precedence over the endorsement language that the District Court acknowledged could be reasonably interpreted to cover a deterioration/spoilage loss caused by delay (such as the instant loss). Thus, not only does the District Court's conclusion ignore this reasonable interpretation, it directly contradicts the rule that the terms of an endorsement take precedence over the conflicting portions of the policy. Ross v. Stephens, 269 Ga. 266, 268–269, 496 S.E.2d 705, 708 (1998). That is, if the endorsement language could be reasonably interpreted to extend coverage for this

loss, as the District Court acknowledged, then any provision in the policy, such as the Delay Warranty, that purportedly takes away the coverage provided by the endorsement is necessarily in conflict with the endorsement. Under Ross, the endorsement language controls, and coverage must be found. Thus, the District Court erred, and its grant of summary judgment to RLI must be reversed.

**ii. The District Court Failed To Adopt Reasonable Interpretations Of The Policy That Covered ABO's Loss.**

The District Court also erred in failing to conclude that the COI and Open Policy are ambiguous in terms of whether a deterioration/spoilage loss caused by delay would be covered. Again, the District Court acknowledged (rightly so) that it was reasonable to interpret the subject endorsement language covering "deterioration … from any cause" to cover a deterioration/spoilage loss caused by delay. (Doc. 50, bottom of p. 16). Also, it is reasonable under Ross, for an insured to view the COI and Open Policy with the expectation that the endorsement language takes precedence over pre-printed text such as the Delay Warranty. Given these two (2) points, it is reasonable to interpret the endorsement language to cover the subject loss involving deterioration/spoilage of the cargo from any cause, which includes delay. Even if there are other reasonable interpretations of the policy language, a reasonable interpretation of the policy that affords coverage to the insured must be enforced in ABO's favor by the Court. See Hurst v. Grange Mut. Cas. Co., 266 Ga. 712, 716, 470 S.E.2d 659, 663–64

(1996) (if there are multiple interpretations that are reasonable, the interpretation most favorable to the insured is followed).

Here, it is clear that ABO could reasonably expect or understand that the COI and Open Policy covered this deterioration/spoilage loss. Indeed, Del De Marino, the Director of Sales-Cold Chain Solutions for Bennett, RLI's "duly authorized representative" that issued the COI to ABO on RLI's behalf and who handled the subject shipment and similar shipments insured by RLI, confirmed via declaration that it was his understanding, *i.e.*, his expectation, that the deterioration/spoilage of the subject blood plasma cargo would be covered by the endorsement covering "deterioration…including spoilage, from any cause" (Doc. 48-20, par. 10 on p. 2-3). If RLI's agent believed it was reasonable to expect the endorsement language to cover the subject deterioration loss, then it was reasonable for an insured like ABO to expect coverage as well. See Georgia Farm Bureau Mut. Ins. Co. v. Jackson, 240 Ga. App. 127, 522 S.E.2d 716 (1999) (the language in the policy is interpreted based upon "what a reasonable person in the shoes of the insured would understand them to mean.,"). As the "[t]he cardinal rule of contractual construction is to ascertain the intent of the parties" under Barrs v. Auto-Owners Ins. Co., 564 F. Supp. 3d 1362, 1373 (M.D. Ga. 2021) (citations omitted), and it is undisputed that both ABO and Bennett, RLI's agent that sold/issued the policy to ABO, expected and intended for this

deterioration/spoilage loss to be covered, it is again clear that the District Court erred in its interpretation of the policy.

### iii. The District Court Erred In Its Interpretation Of The Term "Risk" In The "Paramount Warranties."

Even if the "Paramount Warranties" such as the Delay Warranty could take precedence over the endorsement language at issue (which is not the case as noted in the preceding sections), the District Court erred in its interpretation of the "Paramount Warranties." Again, the "Paramount Warranties" provide as follows:

> PARAMOUNT WARRANTIES: The following warranties shall be paramount and shall not be modified or superseded by any other provision included hereon or stamped or endorsed hereon **unless such other provision refers specifically to the risk excluded by these warranties and expressly assumes the said risks**.

(Doc. 38-2, bottom of p.1 – COI; Doc 38-3, p. 13 – Open Policy) (emphasis added). This text indicates that the "Paramount Warranties" (including the Delay Warranty) can be superseded by endorsement language that refers specifically to the "risk" or "risks" excluded by the warranties and assumes those "risks." Thus, the question for this Court is whether the endorsement language refers specifically to the "risk" excluded by the Delay Warranty and assumes such "risk." To answer this question, the Court must determine: (1) the meaning of the word "risk" in the "Paramount Warranties," and (2) whether the endorsement language refers specifically to, and assumes, the "risk."

The word "risk" is not defined in the COI or Open Policy. Where a term is undefined in the insurance policy, the Courts look to dictionaries to supply the commonly accepted meaning of the term. Pomerance v. Berkshire Life Ins. Co. of Am., 288 Ga. App. 491, 493, 654 S.E.2d 638, 640 (2007) (citations omitted). In the context of insurance, risk is defined as "the possibility of loss, damage, injury, etc. against which insurance is provided."[2] Under this definition, the specific "risk" at issue in this case was the potential deterioration/spoilage of the cargo. The "Delay Warranty" excludes coverage for "loss, damage or **deterioration** arising from delay." The endorsement language expressly assumes the risk of "**deterioration**…including spoilage" of the subject cargo "from any cause." Thus, the endorsement language specifically references the "risk" of deterioration/spoilage of the cargo. This is all that is required to satisfy the requirement in the "Paramount Warranties" that the "other provision [the endorsement] refers specifically to the risk…" At a minimum, this is one reasonable interpretation of the word "risk" in this context, and, once again, any ambiguity must be construed against RLI. Richards v. Hanover Ins. Co., 250 Ga. 613, 615, 299 S.E.2d 561, 563 (1983). This is particularly true given the rule that, unlike the expansive language found in the

[2] Cambridge Dictionary, "Insurance Risk," https://dictionary.cambridge.org/us/dictionary/english/insurance-risk (last visited Dec. 11, 2024); accord Risk, Black's Law Dictionary (12th ed. 2024) (defining risk as "the chance of injury, damage, or loss; esp., the existence and extent of the possibility of harm").

endorsement, the restrictive language in the "Paramount Warranties" must be narrowly construed. Cox Commc'ns, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 708 F. Supp. 2d 1322, 1328 (N.D. Ga. 2010).

In addition, the words "risk" and "cause" mean materially different things in the context of insurance, and RLI's policy uses those terms differently. For example, the COI provides as follows:

> This insurance covers against **"All Risks" of physical loss or damage** from **any external cause** irrespective of percentage…..

(Doc. 38-2, middle of p.1). This text clearly uses the words "risk" and "cause" to mean different things, and it is reasonable to treat the words "risk" and "cause" as different words with different meanings. See Tyson v. McPhail Properties, Inc., 223 Ga. App. 683, 689, 478 S.E.2d 467, 472 (1996) (resolving ambiguity in insurance contract under rule of construction that contract "would not have used two different terms in two sequential paragraphs to describe the same thing"). The terms "risk" and "cause" are not defined in the policy. Again, "risk" is defined in the dictionary as "the possibility of loss, damage, injury, etc. against which insurance is provided."[3] "Cause," on the other hand, is defined as "something

[3] Cambridge Dictionary, supra note 2.

that produces an effect or result."[4] Here, the "risk" was deterioration/spoilage of the cargo, and the "cause" of the damage was delay. Since the endorsement language refers specifically to the "risk" of deterioration/spoilage of the cargo, the limiting language in the "Paramount Warranties" is satisfied. At a minimum, since ABO's interpretation of the terms "risk" and "cause" in RLI's policy is reasonable, any ambiguity must be construed against RLI. Richards v. Hanover Ins. Co., 250 Ga. 613, 615, 299 S.E.2d 561, 563 (1983).

The District Court appeared to recognize the distinction between "risk" and "cause" when it referred to the "risk of product loss" that was "caused by delay." (Doc. 50, bottom of p. 14). Later, in the quoted text below, the District Court referred to "delay as a covered cause" but then improperly conflated the terms "risk" and "cause." It did this by first identifying the "excluded risk" as "loss due to delay," and then by referring to the "risk of deterioration/decay or damage due to delay." Specifically, the District Court stated:

> The Policy provides that the Delay Warranty may be modified or superceded only through a provision that 'specifically' refers to **the excluded risk (i.e., loss due to delay)** and expressly assumes that risk. Although the COI Endorsement provides that coverage extends to "deterioration/decay of or damage to the goods insured, including spoilage, from any cause" during transit, it does not serve to extend coverage for deterioration/decay or damage caused by delay because, as required by the Policy, **the COI Endorsement does not**

[4] Cause, Black's Law Dictionary (12th ed. 2024)

> **'specifically' mention delay as a covered cause**, and, thus, does not assume **the risk of deterioration/decay or damage due to delay**."

(Doc. 50, p. 17) (emphasis added). The District Court's analysis is flawed because it confuses the meaning of "risk" and "cause" in concluding that the "risk" that needed to be referenced in the endorsement language was "delay as a covered cause." As shown above, it is reasonable (and, in fact, correct,) to treat the terms "risk" and "cause" as different terms with different meanings. It is also reasonable (and, in fact, correct,) to state that the "risk" was deterioration/spoilage of the cargo, and the "cause" of the damage was delay. Thus, the District Court erred, and reversal is warranted.

## II. The District Court Erred In Its Interpretation Of The Temperature Warranty

Since RLI did not move for summary judgment on the application of the Temperature Warranty, the District Court indicated in Footnote 20 of its Order at Doc. 50 that its grant of summary judgment to RLI was "restricted" to the application of the Delay Warranty. Nevertheless, the District Court analyzed the Temperature Warranty in the COI and erroneously held that it precluded coverage. Thus, the District Court's analysis will be addressed herein out of an abundance of caution.

The Temperature Warranty in the COI provides as follows:

> Warranted all carrier(s) are to be instructed that temperature to be maintained throughout transit.

(Doc. 38-2). The dispute regarding the Temperature Warranty centers upon the meaning of the undefined term "instructed." The District Court improperly ignored the dictionary definition of the term "instructed" which was consistent with the reasonable expectations of both ABO and Bennett, RLI's agent. Instead, the District Court created its own definition of "instructed" that was improperly based upon what the District Court believed RLI intended the term to mean – both violations of Georgia's rules of policy interpretation.

### A. ABO's Proposed Definition of "Instructed" Is Reasonable And Should Have Been Enforced Under Georgia's Rules of Policy Interpretation.

The term "instructed" in the Temperature Warranty is not defined. Where a term is undefined in the insurance policy, the Courts look to dictionaries to supply the commonly accepted meaning of the term. Pomerance v. Berkshire Life Ins. Co. of Am, 288 Ga. App. 491, 493, 654 S.E.2d 638, 640 (2007) (citations omitted). The undefined term "instructed" in the Temperature Warranty is defined by the Merriam-Webster dictionary to mean "to give knowledge to."[5] At a minimum, interpreting the undefined term "instructed" to mean "to give knowledge to" as defined in the dictionary is a reasonable interpretation of the term, and any

[5] https://www.merriam-webster.com/dictionary/instruct#:~:text=transitive%20verb,with%20authoritative%20information%20or%20advice (last visited Dec. 12, 2024).

reasonable interpretation that affords coverage to ABO must be adopted under Georgia law. Auto-Owners Ins. Co. v. Neisler, 334 Ga. App. 284, 286–287, 779 S.E.2d 55, 59–60 (2015). If this interpretation is reasonable, the Temperature Warranty was clearly satisfied as it is undisputed that FedEx knew the cargo was temperature sensitive. Moreover, FedEx physically re-configured the dry ice in the shipment, and, at one point, put the shipment in a "refrigerant container" prior to the cargo being damaged.

ABO's proposed interpretation of the term "instructed" is particularly reasonable in the context of this single shipment policy given three (3) facts: (1) the policy was issued by Bennett to only cover this specific shipment, (2) Bennett contracted with FedEx to deliver the shipment in one (1) day, and (3) the cargo was packaged in a manner that it did not need any maintenance or other action to protect it from a temperature perspective for at least three (3) days. In this context, interpreting the term "instructed" to mean that the Temperature Warranty was satisfied when FedEx was informed that it was a temperature sensitive shipment is perfectly reasonable. Otherwise, the RLI policy issued by Bennett[6] for this shipment and similar shipments would never cover a loss. Thus, the interpretation of "instructed" offered by ABO is consistent with the expectations of both ABO

[6] As noted previously, Bennett, RLI's agent that issued this policy for the subject shipment and other substantially similar temperature sensitive shipments, was also the agent of ABO that booked this and other similar shipments with FedEx in the same manner. (Doc. 48-20, par 5 on p. 2).

and RLI's agent, Bennett, and should be followed by this Court based upon the principle that "insurance contracts are to be read in accordance with the reasonable expectations of the insured where possible." Auto-Owners Ins. Co. v. Neisler, 334 Ga. App. 284, 286–287, 779 S.E.2d 55, 59–60 (2015); see also Georgia Farm Bureau Mut. Ins. Co. v. Jackson, 240 Ga. App. 127, 522 S.E.2d 716 (1999) (the language in the policy is interpreted based upon "what a reasonable person in the shoes of the insured would understand them to mean," not "what the insurer intended by the words it used").

If ABO's interpretation of the term "instructed" is reasonable, the analysis ends here as any reasonable interpretation that affords coverage to ABO must be adopted under long standing Georgia law.

### B. The Definition of "Instructed" Applied By The District Court Is Unreasonable Under Georgia's Rules of Policy Interpretation.

The District Court wrongly concluded that the term "instructed" in the Temperature Warranty could only be satisfied if, before FedEx took possession of the shipment, FedEx had a legal duty to maintain the temperature of the cargo throughout the transit. (Doc. 50, p. 23-24 and 26). Specifically, the District Court required that a "duty" be "imparted" upon FedEx to maintain the temperature on p. 23-24 and on p. 26 of its Order for the Temperature Warranty to be satisfied. Thus, the District Court concluded that the only reasonable interpretation of the word "instructed" is "to impose a legal duty upon." The District Court did not

include the word "legal" to modify the word "duty," but it is fair to assume the District Court did not mean anything other than a "legal duty" in this context. Indeed, it seems fair to state that the District Court was not referring to a "moral duty" or a duty based upon someone's subjective belief that it would be a good thing if FedEx maintained the temperature without any actual legal obligation to do so. Intending to mean anything other than a legal duty would demonstrate the unworkable nature, i.e., unreasonableness, of the District Court's interpretation. Thus, under the District Court's interpretation of the term "instructed," the only time the Temperature Warranty would be satisfied is if FedEx contractually agreed to maintain the temperature in transit.

There is no dictionary definition of "instructed" that is as narrow or onerous as the one the District Court created. The three (3) definitions of "instruct" in the Merriam-Webster dictionary are, in the order set forth by Merriam-Webster, as follows[7]:

- To give knowledge to
- To provide with authoritative information or advice
- To give an order or command to.

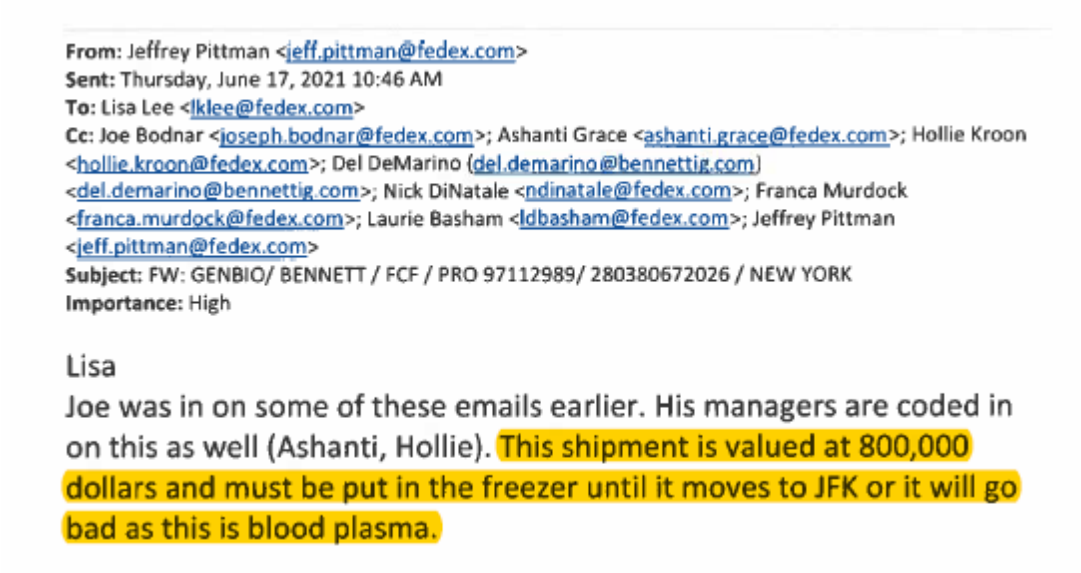
[7] https://www.merriam-webster.com/dictionary/instruct#:~:text=transitive%20verb,with%20authoritative%20information%20or%20advice (last visited Dec. 12, 2024)

Instead of adopting a dictionary definition of the undefined term "instructed" as required by Georgia law, the District Court crafted its own definition (not one from the dictionary) of the term "instructed" to essentially mean "to impose a legal duty upon" based upon the District Court's belief that this is what RLI must have intended it to mean. This approach by the District Court directly contradicted the rule that limiting language is to be construed narrowly, favoring coverage for the insured. Cox Commc'ns, Inc., v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 708 F. Supp. 2d 1322, 1328 (N.D. Ga. 2010). Further, the District Court's narrow definition of "instructed" based upon what the Court guessed that RLI intended directly contradicted the rule that the policy terms should be interpreted based upon "what a reasonable person in the shoes of the insured would understand them to mean," not "what the insurer intended by the words it used." Georgia Farm Bureau Mut. Ins. Co. v. Jackson, 240 Ga. App. 127, 522 S.E.2d 716 (1999).

The District Court's interpretation is clearly inconsistent with the expectations of both ABO and Bennett, RLI's agent that issued the policy. Bennett clearly did not believe the Temperature Warranty required that FedEx be contractually obligated to maintain the temperature of the cargo. Otherwise, the Court would have to assume that Bennett, as RLI's agent, knowingly issued a policy to ABO that would never provide coverage to ABO because Bennett also knew that FedEx was not contractually obligated to maintain the temperature of the

cargo. Such an interpretation is impractical and improper. See, e.g, Transportation Ins. Co. v. Piedmont Const. Grp., LLC., 301 Ga. App. 17, 21, 686 S.E.2d 824, 828 (2009) (affirming summary judgment to insured because the insurer's "proposed interpretation of the business-risk exclusion would make coverage for such actions merely illusory…"); Cynergy, LLC v. First Am. Title Ins. Co., 706 F.3d 1321, 1327 (11th Cir. 2013).

Additionally, the District Court inconsistently applied its definition of the term "instruct" in its Order. For example, the District Court agreed that, in the email below, "Bennett **instructed** FedEx to maintain the temperature of the Blood Plasma shipment…" even though there is no suggestion that the email imposed a legal duty upon FedEx to put the cargo in a freezer upon receipt of the email. (Doc. 50, p. 9 – emphasis added). The email provided:



**From:** Jeffrey Pittman <jeff.pittman@fedex.com>
**Sent:** Thursday, June 17, 2021 10:46 AM
**To:** Lisa Lee <lklee@fedex.com>
**Cc:** Joe Bodnar <joseph.bodnar@fedex.com>; Ashanti Grace <ashanti.grace@fedex.com>; Hollie Kroon <hollie.kroon@fedex.com>; Del DeMarino (del.demarino@bennettig.com) <del.demarino@bennettig.com>; Nick DiNatale <ndinatale@fedex.com>; Franca Murdock <franca.murdock@fedex.com>; Laurie Basham <ldbasham@fedex.com>; Jeffrey Pittman <jeff.pittman@fedex.com>
**Subject:** FW: GENBIO/ BENNETT / FCF / PRO 97112989/ 280380672026 / NEW YORK
**Importance:** High

Lisa
Joe was in on some of these emails earlier. His managers are coded in on this as well (Ashanti, Hollie). This shipment is valued at 800,000 dollars and must be put in the freezer until it moves to JFK or it will go bad as this is blood plasma.

(Doc. 43-4, p. 8.). This email simply informed FedEx that the cargo was temperature sensitive and needed attention due to FedEx's failure to honor its contractual agreement to deliver the shipment in one (1) day. There is nothing about this email that imposes a legal duty upon FedEx to do anything. Of course, the fact that the District Court was not consistent in its definition of "instructed" throughout its opinion further demonstrates the ambiguous nature of such term.

It is also notable that, in his discussion of FedEx's initial handling of the shipment, RLI adjuster Jurgen Shulze noted in a report that "…[u]pon pickup by FedEx, **instructed** by GenBio but on behalf of ABO, FedEx rejected the positioning of the dry ice……" (Doc. 38-14, p. 30, 2nd sentence in 1st full paragraph – emphasis added). Thus, according to RLI's adjuster, FedEx was "instructed" with regard to the dry ice in the shipment or at least in in some manner related to the positioning of the dry ice in the cargo (which obviously is relevant to efforts to maintain the temperature of the cargo). In any event, RLI's adjuster did not interpret the term "instructed" to mean "to impose a legal duty upon" as the District Court did which further demonstrates the ambiguity in such term.

### C. The Temperature Warranty Was Satisfied Even If The Term "Instructed" Means "To Impose A Legal Duty."

Even if the term "instructed" was interpreted to only mean "to impose a legal duty upon" as the District Court held (improperly so), FedEx did have a legal duty imposed upon it that, if honored, would have protected the cargo. Here, it is

undisputed that FedEx contractually agreed to deliver the shipment in one (1) day, and it is undisputed that the shipment was packaged in a manner that the cargo needed no actual attention by FedEx or anyone if delivered in one (1) day as FedEx promised. Thus, FedEx had a legal duty to deliver the shipment in one (1) day, and, if FedEx had honored that duty, the loss would not have occurred. If this is not enough to satisfy the Temperature Warranty under the District Court's interpretation, the only way to satisfy the District Court's interpretation of "instructed" would be if FedEx was contractually obligated to and legally responsible for maintaining the temperature of the cargo when it was unnecessary to do so if FedEx delivered the shipment in one (1) day as it promised. Such an interpretation is unreasonable and clearly violates the fundamental principles of policy interpretation regarding ambiguity, strict construction of limiting language against (not for) the insurer, etc.

Moreover, even if this Court agreed with the District Court that the only reasonable interpretation of "instructed" is to "to impose a legal duty upon," it is reasonable to conclude that ABO's duty to "instruct" FedEx to take action to maintain the temperature of the cargo was triggered once FedEx failed to honor its duty to deliver the shipment in one (1) day. That duty, if it existed, was clearly satisfied. As noted above, the District Court agreed that FedEx was "instructed" to maintain the temperature of the cargo when it became known there was a

"screwup" that was "100% FedEx" according to RLI's agent, Bennett. (Doc. 43-4, top of p. 6).

For these reasons, the District Court's interpretation of the undefined term "instructed" is unreasonable. If the District Court's interpretation is unreasonable and the Court also finds that ABO's interpretation was unreasonable, ascertaining the intent of the parties is an issue to be resolved by a jury. Auto-Owners Ins. Co. v. Neisler, 334 Ga. App. 284, 287, 779 S.E.2d 55, 60 (2015). Even if the District Court's interpretation is the only reasonable interpretation of the term "instructed," the Temperature Warranty was satisfied by FedEx's duty to deliver the shipment in one (1) day protected the cargo and/or the fact that FedEx was "instructed" to maintain the temperature of the cargo once FedEx failed to deliver the shipment in one (1) day (more than a full day before the cargo was damaged).

## III. The District Court Erred In Its Interpretation Of The "Irrespective of Percentages" Coverage Provided By RLI

The COI contains the following text (emphasis added):

> **This insurance covers against "All Risks" of physical loss or damage from any external cause irrespective of percentage**, but excluding nevertheless the risks of War, Strikes, Riots, Seizure, Detention and other risks excluded by the Nuclear/Radioactive Contamination Exclusions clause, the F.C. & S. (Free of Capture and Seizure) Warranty and the S.R.&C.C. (Strikes, Riots and Civil Commotions) Warranty of this policy, except to the extent that such risks are specifically covered by endorsement.

(DOC. 38-2, p. 1). This text covers all risks from any external cause and refers to all of the "Paramount Warranties" **other than** the Delay Warranty. Thus, this text creates at least an ambiguity in terms of whether the Delay Warranty is applicable, which must be construed against RLI. Moreover, the plain language of this text provides that RLI agreed to cover "all risks of physical loss or damage from any external cause irrespective of percentage." In other words, if any covered cause contributed to the loss, then RLI agreed to cover the entire loss irrespective of a contributory cause that is not covered.

Here, RLI has previously taken the position that there were numerous causes of the loss including delay, poor packaging and violation of the temperature warranty. (Doc. 48-7, p. 2-7; Doc.48-11, p.2-7). Under this provision, if any of those causes are covered (not all of which are addressed herein), then RLI must cover this loss. Stated differently, so long as any covered cause contributed in any way to the loss, RLI is obligated to provide coverage because it agreed to cover "all risks...irrespective of percentage." Thus, there is, at a minimum, a fact question as to whether RLI provides coverage for this loss, making summary judgment improper.

## CONCLUSION

For the reasons stated herein, ABO respectfully requests this Court reverse the Trial Court and conclude that RLI's policy provides coverage for ABO's loss.

Respectfully submitted this 12th day of December, 2024.

MCMICKLE, KUREY & BRANCH, LLP

*/s/ Scott W. McMickle*
Scott W. McMickle
Georgia Bar No. 497779

*/s/ Chandler L. Smith*
Chandler L. Smith
Georgia Bar No. 930368

217 Roswell Street, Suite 200
Alpharetta, GA 30009
(678) 824-7800 telephone
(678) 824-7801 fax
swm@mkblawfirm.com
csmith@mkblawfirm.com

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set for in Fed.R.App.P. 32(a)(7)(B). This brief contains 7,755 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(f). This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type-style requirements of Fed.R.App.P. 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 Point Times New Roman font.

*/s/ Scott W. McMickle*
For the firm

MCMICKLE, KUREY & BRANCH, LLP
217 Roswell Street, Suite 200
Alpharetta, GA 30009
Telephone; (678) 824-7800
Facsimile: (678) 824-7801
Email: SWM@mkblawfirm.com
Attorney for Appellant Atlantic Business Corp. d/b/a ABO Pharmaceuticals

## CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of December, 2024, I have served the foregoing APPELLANT ATLANTIC BUSINESS CORPORATION D/B/A ABO PHARMACEUTICALS' BRIEF upon all counsel of record by the United States Mail with sufficient postage affixed thereto and via the Court of Appeals' ECF system.

*/s/ Scott W. McMickle*
For the firm

MCMICKLE, KUREY & BRANCH, LLP
217 Roswell Street, Suite 200
Alpharetta, GA 30009
Telephone; (678) 824-7800
Facsimile: (678) 824-7801
Email: SWM@mkblawfirm.com
Attorney for Appellant Atlantic Business Corp. d/b/a ABO Pharmaceuticals