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

REPLY BRIEF OF APPELLANT ATLANTIC BUSINESS CORPORATION D/B/A ABO PHARMACEUTICALS

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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;

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I. RLI's Misguided Claim That Bennett Was Not RLI's Agent That Issued The Certificate Of Insurance To ABO.

On p. 4 of its brief, RLI Insurance Company ("RLI") incorrectly claims that Bennett International Transport LLC ("Bennett") did not act as RLI's agent when it issued the subject Certificate of Insurance ("COI") to Atlantic Business Corporation d/b/a ABO Pharmaceuticals ("ABO"). RLI ignores two (2) critical facts. First, Bennett is designated as the "Assured" in RLI's Open Policy as follows:

> **"NAMED INSURED" AND ADDRESS:**
>
> Bennett International Transport LLC
> 230-79 International Airport Ctr. Blvd.
> Jamaica, NY 11413
>
> and/or any subsidiary or affiliated company as now or as may hereafter become constitute (Hereinafter referred to as the Assured).

(Doc. 38-3, top left of p.3). Second, RLI's Open Policy specifically gives the Assured, *i.e.*, Bennett, the authority to issue the COI on RLI's behalf in this text:

> **DECLARATION OF RISKS/CERTIFICATES OF INSURANCE**
>
> Authority is hereby given the Assured and/or their duly authorized representatives to issue this Company's certificates and/or special policies and/or endorsements on any or all risks applying hereunder. Such certificates, special policies and endorsements are to be issued in accordance with the terms and conditions of this insurance and are not to be valid unless countersigned by a representative of the Assured. If the printed terms and/or conditions of this Company's certificates and/or special policies are less favorable to the Assured than the terms and/or conditions of this Policy the terms and conditions of this Policy shall prevail unless, in consideration of a rate adjustment, less favorable terms and/or conditions have been specifically agreed.

(Doc. 38-3, bottom of p. 18). Then, in footnote 2 on p. 4 of its brief, RLI attempts to support its flawed position by claiming that ABO acted in a "backhanded"

fashion when it said Bennett took a "commission" when it issued the COI to ABO on RLI's behalf. The undisputed facts show RLI is wrong. Bennett issued RLI's COI to ABO for a charge of $4,200, which ABO paid to Bennett. (Doc. 38-4, p. 1). Then, of the $4,200 premium paid by ABO, Bennett paid RLI $2,050.37 and kept the rest as Bennett's fee. (Doc. 38-2, p. 3). The term "commission" means "a fee paid to an agent or employee for transacting a piece of business or performing a service" per Merriam-Webster. https://www.merriam-webster.com/dictionary/commission. That is exactly what happened here.

The reason RLI advanced the untenable position that Bennett was not acting on behalf of RLI is simple – Bennett, RLI's agent, declared that the COI was intended to provide coverage for ABO's loss (Doc. 48-20, par. 3-10 on p. 3-4) which completely undermines RLI's position based upon the fact that the cardinal rule of policy interpretation in Georgia is to effectuate the intent of the parties. Barrs v. Auto-Owners Ins., 564 F. Supp. 3d 1362, 1373 (M.D. Ga. 2021).

II. The Endorsement Language Clearly Conflicts With The Paramount Warranties And Reversal Is Warranted.

The COI was specifically endorsed by RLI to expand 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 middle, Doc. 38-3, p. 40) (emphasis added). It is patently obvious that the phrase "any cause" in the endorsement language can reasonably be

interpreted to include the cause of "delay." Indeed, "any cause" means any cause. Bennett, RLI's agent, certainly believed "any cause" included delay. (Doc. 48-20, par. 10 on p. 3-4). Further, this is one point the District Court got right when it 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). RLI ignores the District Court's holding and claims on p. 19 of its brief that "ABO also nonsensically argues that "the phrase 'any cause' literally means any cause which would necessarily include 'delay.'" RLI is simply wrong. A reasonable person could conclude, as the District Court and Bennett did, that "any cause" would include "delay."[1] This is particularly true given the fact that the endorsement language covering "deterioration….from any cause" must be interpreted broadly under Georgia law, Barrett v. National Union, 304 Ga. App.

[1] On the bottom of p. 18 of its brief, RLI engages in more misguided name-calling when it says ABO is "quite disingenuous" to take the position that, before the loss occurred, it reasonably expected the phrase "from any cause" to include the cause of "delay." ABO never claimed that it read the specific "from any cause" language prior to the loss because neither Bennett nor RLI gave ABO a copy of the COI prior to the loss. ABO's position is that, if Bennett, RLI's agent, expected and intended that the "any cause" language in the endorsement would cover the cause of "delay," it would be reasonable for ABO or any insured to expect coverage to apply. This is particularly true where the District Court also concluded that the phrase "from any cause" could be reasonably read to include the cause of "delay." Also, RLI's suggestion, without legal support, that the fact that RLI did not provide the COI to ABO before the loss somehow benefits RLI or changes ABO's reasonable expectations is not a serious argument.

314, 320–321, 696 S.E.2d 326, 331–332 (2010), a principle of policy interpretation that RLI ignores.

The reason RLI takes the implausible position that "any cause" cannot include the cause of "delay" is that RLI recognizes that, if the endorsement covers a loss caused by delay, it obviously conflicts with the Delay Warranty. In that event, then, under binding Georgia Supreme Court precedent, the District Court must be reversed as the endorsement language takes precedence over the pre-printed Delay Warranty. Ross v. Stephens, 269 Ga. 266, 268–269, 496 S.E.2d 705, 708 (1998).

RLI wrongly claims that the endorsement language and the pre-printed Delay Warranty do not conflict because the pre-printed Delay Warranty somehow limits the meaning of the phrase "deterioration …from any cause" in the endorsement. This is where RLI is obviously wrong. Basic logic dictates that, to determine if a conflict is present, the different provisions have to be read apart, and if the provisions conflict, the endorsement language takes precedence under Ross, supra. Since the endorsement language covering "deterioration …from any cause" would cover this loss caused by delay, it is obvious that the Delay Warranty conflicts with the endorsement language and reversal is warranted under Ross, supra.

What RLI and the District Court also ignored is the fact that endorsement language is interpreted broadly under Barrett, supra, while the limiting language in the pre-printed Delay Warranty is interpreted narrowly. Cox Commc'ns, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 708 F. Supp. 2d 1322, 1328 (N.D. Ga. 2010). Through the prism of those basic rules of construction, the narrowly construed language in the pre-printed Delay Warranty cannot and does not change or restrict the broadly interpreted endorsement language covering "deterioration …from any cause." RLI has it backwards. Thus, since it is reasonable to interpret the phrase "deterioration …from any cause" to include loss caused by delay, the endorsement language conflicts with the Delay Warranty and the District Court must be reversed under Ross, supra.

III. The Term "Risk" In The Paramount Warranties Reasonably Refers To "Deterioration…Including Spoilage" Of The Cargo And Reversal Is Warranted.

Even if the Delay Warranty could take precedence over the endorsement language at issue (which is not the case as noted in the preceding section), the District Court erred in its interpretation of the "Paramount Warranties," which include the Delay Warranty. The "Paramount Warranties" text provides 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) (emphasis added). Based on this wording, the question is whether the endorsement, i.e., the "other provision" noted in the Paramount Warranties, specifically refers to the "risk" excluded by the Delay Warranty. The answer is clearly yes based upon the plain and simple wording of the provisions. The Delay Warranty covers the risk of "deterioration" (Doc. 38-3, p. 14) and the COI states that the coverage provided by the endorsement "specifically includes deterioration/decay of or damage to the goods insured, including spoilage, from any cause…" (Doc. 38-2, p. 1; Doc. 38-3, p. 40) (emphasis added). Thus, the endorsement language refers specifically to the risk, i.e., deterioration, excluded by the Delay Warranty. Therefore, under the plain text of the Paramount Warranties, the Delay Warranty is superceded by the endorsement language.

On p. 21-25 of its initial brief, ABO asserted that the "risk" addressed in the endorsement was "deterioration." ABO did this by: (1) defining "risk" and "cause" based upon dictionary definitions to demonstrate the distinction between the terms (that are undefined in the policy), (2) demonstrating that "risk" and "cause" mean different things generally and in RLI's policy language and (3) referencing the District Court's acknowledgment of the distinction between "risk" and "cause" while recognizing the "risk" is "deterioration….including spoilage" of the cargo and the "cause" of the loss was delay.

RLI ignored the foregoing points made by ABO. Instead, RLI attempted to make two (2) short points that are easily refuted in its very limited response on p. 20-21 of its brief. First, RLI wrongly claims (predictably so at this point) that ABO attempted to mispresent the wording of the endorsement. This is obviously false and deserves no further comment. Second, RLI summarily states that the "risk" in the endorsement language must be interpreted to mean "delay." Importantly, RLI does not refute ABO's point that the words "risk" and "cause" mean materially different things in the policy. Rather, on pp. 20-21 of its brief, RLI simply says, without any reasoning or analysis, that the "risk" in the endorsement language can only mean "delay," necessarily implying that the "cause" in the endorsement language can only mean "deterioration/decay…..including spoilage." This is simply backwards. Basic logic and common sense demonstrates that the "risk" in the endorsement language is the "deterioration/decay of or damage to the goods insured, including spoilage," and the "cause" of the loss is "delay."

The endorsement language plainly identifies the "risk" of "deterioration/decay of or damage to the goods insured, including spoilage" and then addresses the "cause" which is "any cause" in this text:

> 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). Even the District Court, in its flawed analysis, recognized the "risk of product loss" that was "caused by delay" (Doc. 50, bottom of p. 14), specifically referred to "delay as a covered cause" (Doc. 50, p. 17), and acknowledged that the "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). Given this, it is inescapable that the endorsement language specifically refers to and assumes the "risk" (*i.e.,* "loss, damage or deterioration") excluded in the Delay Warranty. At a minimum, this is one reasonable interpretation of the COI/policy that must be construed in ABO's favor. Auto-Owners Ins. Co. v. Neisler, 334 Ga. App. 284, 286–287, 779 S.E.2d 55, 59–60 (2015). So construed, then, under the plain language of the Paramount Warranties, the endorsement supercedes the Delay Warranty and the District Court must be reversed.

On p. 21 of its brief, RLI also asserts, without discussion, that treating the "risk" in the endorsement language as "deterioration ….. including spoilage" of the cargo would render all of the Paramount Warranties "meaningless." But this is not a substantive argument. To the contrary, RLI is asking the Court to turn the law in Georgia that "endorsement(s) take precedence over printed portions of the policy in conflict therewith" on its head, and to violate multiple rules of contract construction in the process. First, as the Georgia Supreme Court in Ross made clear, "an endorsement is '[a] provision added to an insurance contract whereby the scope of

its coverage is restricted or enlarged.'" Ross, 269 Ga. at 268, 496 S.E.2d at 708 (1998). RLI cites no rule, because there is none, that an endorsement may not trump more than one pre-printed policy provision. Such a rule would be nonsensical, in any event, because it ignores the very purpose of an endorsement, which is to "restrict or enlarge coverage." Further, it would require the Court to read and apply the endorsement narrowly, rather than broadly, thus violating a principal rule of construction, in order to ultimately render the endorsement itself meaningless.

Here, RLI enlarged or expanded coverage by endorsing its policy to cover "deterioration …. including spoilage" from "any cause." If the endorsement language covering the "risk" of "spoilage" from "any cause" does not obligate RLI to cover this spoilage loss caused by delay (a cause excluded by the pre-printed policy provision), then what would be the purpose of the endorsement? The answer is none. That is, if the endorsement is read so narrowly such that "any cause" does not include delay, then the endorsement has not fulfilled its purpose of enlarging coverage through this specific reference to an otherwise excluded risk and has been rendered meaningless. This would be an improper result reached through improper methods, and simply cannot be. RLI's argument should be rejected and the District Court should be reversed.

IV. The Temperature Warranty Is Satisfied Even If The Term "Instructed" Is Interpreted To Mean "Affirmatively Told" As RLI Posits.

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) (emphasis added). On page 29 of its brief, RLI's states that "the only reasonable interpretation" of the Temperature Warranty is that the carrier "must be **affirmatively told** to maintain the temperature throughout transit." Thus, RLI claims that the only reasonable interpretation of the term "instructed" means "affirmatively told."[2] What RLI does not note is that, in its "only reasonable interpretation" of the Temperature Warranty, RLI reversed the wording of the warranty from its actual wording: "[affirmatively told] that temperature to be maintained…. to "[affirmatively told] to maintain the temperature…." The reason RLI did this is clear – RLI recognizes that FedEx being "[affirmatively told] that

[2] As noted on p. 26-28 of ABO's initial brief, there are other interpretations that are reasonable that result in coverage being afforded to ABO based upon the same rules of constructions and facts discussed herein. It is also notable that, on p. 28-29 of its brief, RLI chastised ABO for suggesting that the District Court said that FedEx had to have a "legal duty to maintain the temperature of the cargo throughout the transit" for the Temperature Warranty to be satisfied. Thus, it is clear that RLI believes the formal imposition of a legal duty upon FedEx is not reasonably required by the Temperature Warranty (ABO agrees with this point). This is undoubtedly why FedEx is now claiming that "the only reasonable interpretation" of the Temperature Warranty is that the carrier "must be affirmatively told to maintain the temperature throughout transit" (ABO disagrees with this point).

temperature to be maintained" could be construed to be passive whereas being "[affirmatively told] to maintain the temperature…" could be construed to be active. The former suggests FedEx's notice of temperature sensitivity is sufficient to satisfy the warranty while the latter suggests some type of affirmative action like monitoring might be required. It is interesting that RLI's reverses the wording in its "only reasonable interpretation" while claiming in its brief that ABO engaged in "linguistic slight of hand" (see bottom of p. 28 of RLI's brief). In any event, as demonstrated below, if the Court uses the words "affirmatively told" in place of the word "instructed" and applies Georgia's rules of policy construction to the relevant facts that RLI ignores, coverage is clearly present for ABO's loss under either the actual wording of the Temperature Warranty or with the operative words reversed in RLI's misguided "only reasonable interpretation." Of course, any interpretation of the warranty that results in coverage for ABO must be adopted under Georgia law.

RLI fails to acknowledge several facts demonstrating that FedEx was affirmatively told that the temperature of the cargo was to be maintained in transit. First, it is undisputed that FedEx's representatives were affirmatively told that the shipment was temperature sensitive and would need to be re-iced if delayed in transport. (Doc. 48-2, p. 8, no. 25). This is why, as shown in the email below, FedEx was actively monitoring the shipment for delay. In particular, FedEx employee Lisa Lee (with other representatives of FedEx and Bennett copied) was

told by FedEx employee Franca Murdock, at or before the time FedEx received the shipment, to "monitor this shipment to ensure clearance and transfer happens" as it is a "critical haz shipment (blood plasma plates)" requiring "dry ice:"

From: Franca Murdock <franca.murdock@fedex.com>
Sent: Tuesday, June 15, 2021 4:26 PM
To: Lisa Lee <lklee@fedex.com>; Del Demarino <del.demarino@bennettig.com>; import_export_jfk@mail.fedex.com <import_export_jfk@mail.fedex.com>
Cc: Jeffrey Pittman <jeff.pittman@fedex.com>; Leanne Cappuccino <leanne.cappuccino@bennettig.com>; bitexport <bitexport@bennettig.com>
Subject: [E] RE: RESERVACION MEX - JFK

Hey Lisa
Can you please do me a favor and monitor this shipment to ensure clearance and transfer happens without issues.

This is critical haz shipment (blood plasma plates)

Notification to the broker is critical as the shipment has dry ice. Should be in JFK in the morning .

I will be with my new manager and wont have access to any systems

Appreciate you

Franca Murdock | Sr. Account Executive-International | Cell: 770.312.2535

(Doc. 38-13, p. 5). In addition, when FedEx received the cargo, the invoice FedEx was required to review specifically stated: "**TEMPERATURE** TO BE MANAGED – 25 ℃" (Doc. 43-4, p. 21), and the cargo had a large sticker on it indicating that the temperature must be maintained at -15 degrees to -20 degrees Celsius. (Doc. 43-8, no. 38 on p. 20-21).[3] Also, 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 before the shipment was tendered to FedEx. (Doc. 48-16, par. 6

[3] RLI claims the fact that the temperatures in the invoice and on the sticker were 5 degrees off is somehow relevant. There is no evidence that the 5 degree difference was material in any way and is irrelevant to this discussion. The point is that FedEx was affirmatively told that the temperature was to be maintained satisfying even RLI's interpretation of the Temperature Warranty.

on p. 3). These facts and the email quoted above indisputably demonstrate that FedEx had been affirmatively told that the temperature of the cargo was to be maintained throughout transit. At a minimum, a jury could conclude that FedEx was actively monitoring the shipment for delay, as shown in that email, because it had been affirmatively told that the temperature was to be maintained throughout transit.[4]

RLI also ignores the fact that FedEx had an affirmative duty to transport this shipment in one (1) day (as expected by all parties), (Doc. 43-8, no. 28 on p. 17), and the fact the shipment was packaged in a manner that required no action to preserve or maintain the temperature for almost three (3) days. (Doc. 43-8, no. 29-30 on p. 17-18; Doc. 48-16, par. 7 on p. 3). In fact, FedEx had been affirmatively told by Bennett that this was a "passive shipment" that needed no actual maintenance or action by FedEx unless there was a delay in transit. (Id.; 48-6, p. 8, middle of page reference to "passive shipment"). Thus, until there was a delay in transit, there was simply nothing for FedEx to do other than monitor the shipment for a delay, which FedEx was clearly doing. In the context of these facts and the fact that the COI at issue only covered this shipment, interpreting the

[4] As noted previously, RLI did not move for summary judgment on the Temperature Warranty, but, since the District Court addressed the Temperature Warranty in its Order, it was addressed on appeal. ABO does not believe a jury trial is necessary as it is clear the Temperature Warranty was satisfied. However, if there is any question as to what FedEx was "affirmatively told," that issue is a fact question for a jury.

Temperature Warranty to require that FedEx do anything other than monitor the shipment until a delay occurred is obviously unreasonable on its face and inconsistent with the reasonable expectations of ABO.[5]

It is also important to note that Bennett, RLI's agent, clearly expected and intended that the Temperature Warranty would be satisfied here. In particular, Bennett's representative's uncontested declaration provided that:

> Bennett routinely worked with RLI to insure similar types of sensitive, perishable items that could be spoiled if not maintained at an adequate temperature;
>
> Due to the sensitive nature of the shipment, Bennett's partner, Able Freight, informed FedEx both of the sensitive nature of these items and requirement for next-day delivery of these items to JFK Airport; and
>
> Prior to the shipment, FedEx did not communicate any problems with providing its standard and previously provided "next day" shipment for sensitive, perishable items.

(Doc. 48-20, pars. 5-6, 8 on p. 3). Also, Bennett had a consistent course of dealing with FedEx whereby FedEx handled this same product packaged in the same manner for two (2) years before this shipment, (Doc. 48-2, p.7, no. 23), and

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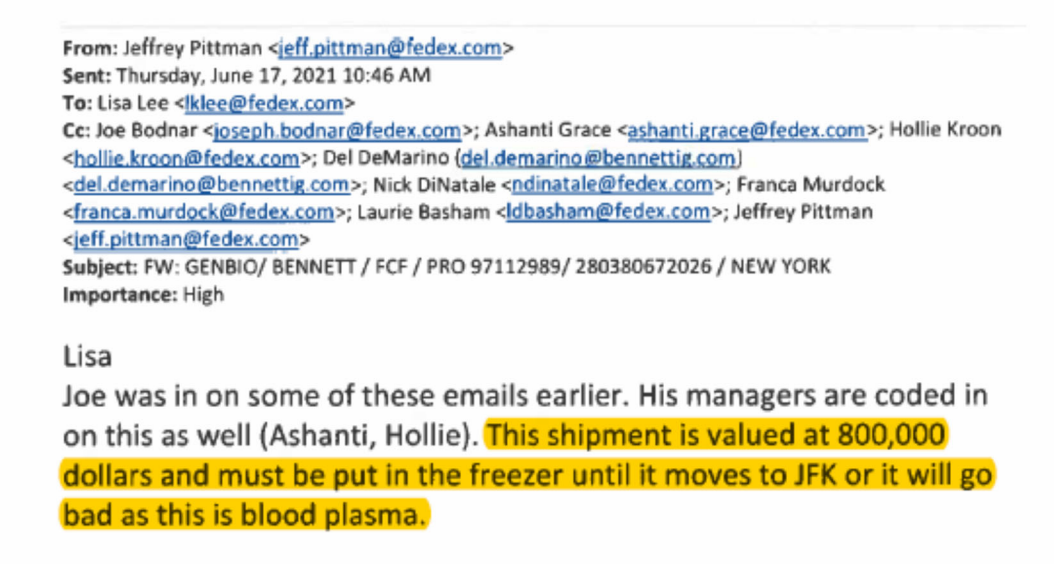
[5] The language in the policy is interpreted based upon "what a reasonable person in the shoes of the insured would understand them to mean," not "what the insurer intended by the words it used." Georgia Farm Bureau Mut. Ins. Co. v. Jackson, 240 Ga. App. 127, 129, 522 S.E.2d 716, 718 (1999) (citations omitted). Further, insurance contracts are to be read in accordance with the reasonable expectations of the insured where possible. Auto-Owners Ins., supra. Thus, the proper analysis is to determine what a reasonable person in the shoes of ABO would expect the "Temperature Warranty" to mean in the context of this single shipment.

there is no evidence FedEx treated this shipment differently than prior shipments in any way, however slight. Thus, the unmistakable intent of Bennett, RLI's agent, pursuant to an established course of dealing with RLI and FedEx, was that the Temperature Warranty would be satisfied with FedEx's express notice that the temperature was to be maintained and/or FedEx's active monitoring of the shipment.[6] Of course, as noted above, the intent of the parties is critical as the cardinal rule of policy interpretation in Georgia is to effectuate the intent of the parties. Barrs, supra.

Moreover, the District Court acknowledged (Doc. 50, p. 9 – emphasis added) that, once the shipment was delayed, "Bennett **instructed** FedEx to maintain the temperature of the Blood Plasma shipment…" in this email:

[6] Otherwise, this Court would have to assume that Bennett, RLI's agent, sold RLI's COI to ABO knowing or at least expecting that Bennett's communications to FedEx would not satisfy the Temperature Warranty. 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…").



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 from FedEx clearly shows that FedEx already knew that, if delayed, the shipment would need to be put in a freezer.[7] **Why else would FedEx be monitoring the shipment from the moment it came into FedEx's position as noted above?** Collectively, these facts show that, under either the actual wording of the Temperature Warranty or RLI's self-serving reversal of the words of the Temperature Warranty, the Temperature Warranty was satisfied and the District Court should be reversed.

[7] This is consistent with the fact that upon FedEx's initial receipt of the cargo, FedEx decided to re-configure the dry-ice in the shipment and put the shipment in a "refrigerant chamber" to protect it. (Doc. 43-6, p. 22). The fact that FedEx did not put the cargo in a freezer once the shipment was delayed due to a "screwup" that was "100% FedEx" according to RLI's agent, Bennett, (Doc. 43-4, top of p. 6) does not change the analysis of what FedEx was "affirmatively told."

V. 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 [all Paramount Warranties other than the Delay Warranty]…

(Doc. 38-2, p. 1). On p. 34-35 of its initial brief, ABO argued: (1) this text indicated the Delay Warranty was not applicable, and (2) RLI has claimed there were numerous causes of the loss such as delay, poor packaging, and violation of the Temperature Warranty, and, if any of those causes were covered, this text obligated RLI to cover the loss irrespective of the percentage of the loss attributed to any non-covered causes. On p. 21-22 of its brief, RLI responded by citing a dated marine treatise addressing peculiar wording, i.e., "warranted free from particular average under 3 percent…" that is not present here. In effect, RLI did not address ABO's arguments and the Court should, at a minimum, conclude that a fact question exists as to whether any covered cause of loss such as delay or poor packaging caused the loss. If so, RLI must provide coverage under this "Irrespective of Percentages" language and the District Court should be reversed.

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. Alternatively, ABO requests this Court remand this case to the District Court to address any jury questions presented.

Respectfully submitted this 3rd day of March, 2025.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed.R.App.P. 32(a)(7)(B). This brief contains 4,093 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

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CERTIFICATE OF SERVICE

I hereby certify that on the March 3, 2025, I have served the foregoing APPELLANT ATLANTIC BUSINESS CORPORATION D/B/A ABO PHARMACEUTICALS' REPLY BRIEF upon all counsel of record by the United States Mail with sufficient postage affixed thereto and via the Court of Appeals' ECF system.

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For the Firm

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