

**IN THE CIRCUIT COURT FOR THE COUNTY OF ST. LOUIS
STATE OF MISSOURI**

OPIOID MASTER DISBURSEMENT
TRUST II, A/K/A OPIOID MDT II,

Plaintiff,

v.

ACE AMERICAN INSURANCE
COMPANY, et al.,

Defendants.

Case No. 22SL-CC02974

Division No. 2

**ACE AMERICAN INSURANCE COMPANY AND ACE PROPERTY & CASUALTY
INSURANCE COMPANY'S JOINDER TO CERTAIN UK INSURERS' MOTION TO
DISMISS PLAINTIFF'S FIRST AMENDED PETITION FOR DECLARATORY RELIEF**

Defendants ACE American Insurance Company and ACE Property & Casualty Insurance Company (together, "ACE") hereby join defendant HDI-Gerling Industrial Insurance Company's ("HDI") motion to dismiss Plaintiff's First Amended Petition for Declaratory Relief ("FAP") pursuant to an exclusive forum selection clause designating the courts of England and Wales for the resolution of any disputes concerning HDI's policies. For the same reasons stated in HDI's motion, ACE moves to dismiss the FAP insofar as it seeks a declaration of rights regarding two ACE policies that are excess to and "follow form" to HDI's policies—ACE American Insurance Company's 2011 Catastrophe Liability Plus Policy and ACE Property & Casualty Insurance Company's 2012 Catastrophe Liability Plus Policy.

1. As set forth in HDI's motion to dismiss, each of HDI's primary policies contains a "Choice of Law and Jurisdiction Endorsement" specifying that "any dispute concerning the interpretation of the terms, conditions, limitations and/or exclusions" in the policies shall be "subject to the laws of England and Wales," that the parties have agreed to submit such disputes to "any court of competent jurisdiction in England and Wales," and that "[a]ll matters arising

hereunder shall be determined in accordance with the law and practice of such court.” *See* Ex. 1 to HDI’s Mot. to Dismiss, Decl. of Gavin Kealey K.C., at ¶ 21 (reciting choice of law and jurisdiction endorsement in HDI’s primary policies); *id.* at ¶ 18 (reciting “Risk Details” in HDI’s primary policies specifying “CHOICE OF LAW AND JURISDICTION: England and Wales”). For the reasons set forth in HDI’s motion to dismiss, the forum selection clauses contained in HDI’s primary policies plainly require resolution of the coverage dispute under English law and in an English forum, such that this Court should dismiss the FAP as to the HDI policies.

2. In 2011 and 2012, ACE issued two “excess” policies that “follow form” to HDI’s primary policies. *See* Ex. A at PDF p. 1, 24 (ACE American Insurance Company 2011 Catastrophe Liability Plus Policy, Endorsement #9, “follow[ing] form” to HDI’s 2011 primary policy); Ex. B at PDF p. 1, 21 (ACE Property & Casualty Insurance Company 2012 Catastrophe Liability Plus Policy, Endorsement #10, “follow[ing] form” to HDI’s 2012 primary policy).¹ As courts in Missouri have held, “[a] following form policy has the same terms and conditions as the primary policy, but has a different liability limit.” *Selimanovic v. Finney*, 337 S.W.3d 30, 39 (Mo. Ct. App. E.D. 2011) (quoting *Planet Ins. Co. v. Ertz*, 920 S.W.2d 591, 593–94 (Mo. Ct. App. W.D. 1996)). Accordingly, courts “look to the specific provisions of an excess policy to determine whether and to what extent its terms and conditions vary from the primary policy.” *Id.* at 40.

3. Here, in their “Follow Form Endorsement[s],” both the 2011 and 2012 ACE policies incorporate all “terms, conditions, limitations, and exclusions” of the respective HDI primary policies except for specific provisions pertaining to policy premiums, liability limits, and other subjects irrelevant to the parties’ choice of forum. Each of the ACE policies states, in pertinent part:

The definitions, terms, conditions, limitations, and exclusions of the policy listed in the SCHEDULE OF CLAIMS-MADE

¹ Specifically, ACE’s 2011 excess policy (Ex. A., Policy Number G25834537) follows form to HDI’s 2011 primary policy (Policy Number B0509DY062911), and ACE’s 2012 excess policy (Ex. B, Policy Number G27048183) follows form to HDI’s 2012 primary policy (Policy Number B0509DR539912). *See* Ex. A at PDF p. 1; Ex. B at PDF p. 1.

“UNDERLYING INSURANCE” apply to this coverage unless they are inconsistent with provisions of this policy or relate to premium, subrogation, any obligation to defend, the payment of expenses, amounts of limits of insurance, cancellation or any renewal agreement.

Ex. A (ACE American 2011 Catastrophe Liability Plus Policy, Endorsement #9); Ex. B (ACE P&C 2012 Catastrophe Liability Plus Policy, Endorsement #10).

4. Construing the ACE policy language according to the plain meaning of its terms, the 2011 and 2012 ACE policies unambiguously incorporate the terms of the HDI primary policies selecting England and Wales as the exclusive choice of forum. *See, e.g., AT&T v. Clarendon Am. Ins. Co.*, 2008 WL 2583007, at *4, 6 (Del. Super. Ct. Feb. 11, 2008) (“AT&T and the insurers are concededly sophisticated parties that understood the meaning and effect of including the New York choice of law provision in the [underlying] policy and the ramifications it would have on the excess policies that ‘follow form.’ . . . The Court is convinced that the choice of law provision in the [underlying] policy is dispositive of the choice of law issue [for the excess policies that follow form].”). Moreover, because the 2011 and 2012 ACE policies “follow form” to the 2011 and 2012 HDI policies, litigating all claims under both sets of policies in the same, agreed-upon forum preserves judicial resources and avoids the unnecessary risk of inconsistent judgments.

5. In summary, because the 2011 and 2012 ACE policies “follow form” to the 2011 and 2012 HDI policies, including with respect to mandatory forum selection clauses they contain designating the courts of England and Wales, this Court should dismiss the FAP for lack of personal jurisdiction as to both the 2011 and 2012 ACE policies for the same reasons set forth in HDI’s motion to dismiss.²

² ACE has only moved to dismiss the 2011 and 2012 policies described in this motion and attached as Exhibits A and B. Because ACE does not move to dismiss all ACE American Insurance Company policies at issue in this case, ACE American Insurance Company has also filed an answer in response to the FAP. By contrast, the only ACE Property & Casualty Insurance Company policy at issue in the FAP is the subject of this motion to dismiss, and accordingly ACE Property & Casualty Insurance Company has not filed an answer.

Dated: October 11, 2022

By: /s/ Stephen W. Carman

Aaron D. French, # 50759

Stephen W. Carman, # 70910

SANDBERG PHOENIX & von GONTARD P.C.

600 Washington Avenue - 15th Floor

St. Louis, MO 63101-1313

Telephone: (314) 231-3332

Fax: (314) 241-7604

Email: afrench@sandbergphoenix.com

Email: scarman@sandbergphoenix.com

HOLWELL SHUSTER & GOLDBERG LLP

Michael S. Shuster (*pro hac vice*)

Blair E. Kaminsky (*pro hac vice*)

Daniel M. Sullivan (*pro hac vice*)

Matthew Gurgel (*pro hac vice* application
forthcoming)

425 Lexington Avenue

New York, New York 10017

Telephone: (646) 837-5151

Facsimile: (646) 837-5150

Email: mshuster@hsgllp.com

Email: bkaminsky@hsgllp.com

Email: dsullivan@hsgllp.com

Email: mgurgel@hsgllp.com

CLYDE & CO US LLP

Robert Mangino (*pro hac vice* application
forthcoming)

340 Mt. Kemble Avenue, Suite 300

Morristown, NJ 07960

Telephone: (973) 210-6700

Facsimile: (973) 210-6701

Email: robert.mangino@clydeco.us

Susan Koehler Sullivan (*pro hac vice* application
forthcoming)

355 S. Grand Avenue, Suite 1400

Los Angeles, CA 90071

Telephone: (213) 358-7600

Facsimile: (213) 358-7650

Email: susan.sullivan@clydeco.us

COZEN O'CONNOR
Deborah M. Minkoff (*pro hac vice*)
1650 Market Street
Philadelphia, PA 19103
Telephone: (215) 665-2170
Facsimile: (215) 701-2170 Email:
DMinkoff@cozen.com

*Attorneys for Defendant ACE American Insurance
Company and ACE Property & Casualty Insurance
Company*

Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing document was filed via the Court's electronic filing system on this 11th day of October, 2022, which system shall send notice of same to all counsel of record.

/s/ Stephen W. Carman