

**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
REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF
JOINDER IN MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED PETITION**

Defendants ACE American Insurance Company (“ACE American”) and ACE Property & Casualty Insurance Company (“ACE P&C,” and collectively, the “ACE Entities”) hereby submit this reply in further support of their joinder in Certain UK Insurers’ Motion to Dismiss Plaintiff’s First Amended Petition for Declaratory Relief. As set forth in Certain UK Insurers’ opening and reply submissions, which the ACE Entities join, defendant HDI-Gerling Industrial Insurance Company’s (“HDI”) policies contain an exclusive forum selection clause designating the courts of England and Wales for the resolution of disputes. ACE American’s 2011 policy and ACE P&C’s 2012 policy (together, the “ACE Policies”) “follow form” to HDI’s policies containing the forum selection clause, so the First Amended Petition must be dismissed as to the two ACE Policies as

well. And because the ACE P&C 2012 policy is the only ACE P&C policy identified in the First Amended Petition, ACE P&C should be dismissed from this action entirely.¹

ARGUMENT

I. THE ACE POLICIES' FOLLOW-FORM PROVISIONS INCORPORATE THE ENGLISH FORUM SELECTION CLAUSE

A. The ACE Policies Follow the “Terms” and “Conditions” of the HDI Policies, and the HDI Forum Selection Clause Is Therefore Incorporated.

Plaintiff concedes, as it must, that the ACE Policies “do contain follow-form provisions” that “incorporate by reference” the provisions of HDI’s underlying policies. Opposition to ACE and Aspen Joinders (“Opp.”) at 1–2. Specifically, endorsements to the ACE Policies provide:

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

Joinder, Ex. A at Endorsement No. 9; Ex. B at Endorsement No. 10 (emphasis added). Thus, the plain language of the ACE Policies specifies what aspects of the HDI policies carry over—including the “terms” and “conditions” of the HDI policies. The plain language of the ACE Policies also specifies those aspects of the HDI policies that are carved out—provisions related to premium, subrogation, any obligation to defend, the payment of expenses, amounts of limits of insurance, cancellation or any renewal agreement, and provisions inconsistent with the ACE Policies themselves. No other exceptions are listed. Missouri courts are well familiar with clear contractual provisions like these, which are common in insurance policies. *See Selimanovic v. Finney*, 337 S.W.3d 30, 39 (Mo. Ct. App. E.D. 2011) (“A following form policy has the same

¹ Plaintiff strangely suggests that because ACE American issued other policies at issue in the complaint, ACE P&C is not seeking to be dismissed from this case. Opp. at 1, 5. But as set forth in the ACE Entities’ joinder, ACE P&C is a separate company that has issued only one policy, and therefore should be dismissed from this action as a result of the forum selection clause. Joinder at 2 & n.1.

terms and conditions as the primary policy, but has a different liability limit.”) (quoting *Planet Ins. Co. v. Ertz*, 920 S.W.2d 591, 593-94 (Mo. Ct. App. W.D. 1996)).

The forum selection clause is plainly a “term” and “condition” of the underlying HDI policies. It provides 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” and that the parties have agreed to adjudicate such disputes before “any court of competent jurisdiction within England and Wales.” *See* Exhibit 1 to HDI’s Motion to Dismiss ¶ 21 (Decl. of Gavin Kealey K.C., reciting choice of law and jurisdiction endorsement in HDI’s primary policies); *id.* ¶ 18 (reciting “Risk Details” in HDI’s primary policies specifying “CHOICE OF LAW AND JURISDICTION: England and Wales”). The provision further states that “[a]ll matters arising hereunder shall be determined in accordance with the law and practice of such court.” *Id.* ¶ 21.

In opposing ACE’s joinder, Plaintiff does not dispute that the forum selection clause is a “term” and “condition” of the HDI policies. Plaintiff also acknowledges that the forum selection clause is not included in the list of carve-outs from the ACE follow-form provision, including the carve-out for terms “inconsistent with provisions of this [ACE] policy.” *See* Opp. at 8 (admitting the “exceptions [in the ACE follow-form provision] do not relate to the HDI Policies’ procedural terms”). Indeed, Plaintiff agrees that the ACE Policies do not contain any forum selection clauses of their own that would conflict with HDI’s policies. *See* Opp. at 7–8 (the ACE Policies are “silen[t]” on forum selection). Plaintiff’s concessions are dispositive. Because the forum selection clause is a “term” and “condition” of the followed policies, and because it is not carved out by the listed exceptions to the ACE follow-form provision, it is incorporated into the ACE Policies.

Missouri courts agree that a forum selection clause in an underlying agreement is incorporated by reference to that underlying agreement’s “terms.” *See Sabatino v. LaSalle Bank, N.A.*, 96 S.W.3d 113, 119 (Mo. Ct. App. W.D. 2003). The court in *Sabatino* considered whether language stating that “[t]he terms and provisions of the Note and the Loan Agreement are hereby incorporated by reference in this Deed of Trust” was sufficient to carry a forum selection clause over from the loan agreement. *Id.* at 114. The court looked to other jurisdictions that had enforced forum selection clauses incorporated by such references to the terms of other agreements,² and also observed that—like here—the contract at issue did not contain a separate forum selection clause of its own that was at odds with the one in the referenced agreement. Accordingly, the court concluded that the forum selection clause was indeed incorporated by reference: “The forum selection clause and definitions in the referenced Loan Agreement . . . clearly indicate that any action brought on the deed of trust must proceed in the courts of Cook County, Illinois. . . . We find the deed of trust does incorporate a forum selection clause.” *Id.* at 118-19.

The ACE Policies’ follow-form provisions are clear, and so is Missouri law. The HDI forum selection clause is a “term” and a “condition” of the HDI policies, and it is not on the list of terms and conditions carved out from the ACE Policies’ follow-form provisions. Therefore, the forum selection clause is incorporated in the two ACE Policies.³

² *See Rokeby-Johnson v. Ky. Agric. Energy Corp.*, 108 A.D.2d 336, 342-43 (N.Y. App. Div. 1985) (forum selection clause was incorporated from primary into excess policy), *abrogated on other grounds, Columbia Cas. Co. v. Bristol-Myers Squibb Co.*, 635 N.Y.S.2d 173, 178 (N.Y. App. Div. 1995); *Black & Veatch Constr. Inc. v. ABB Power Generation, Inc.*, 123 F. Supp. 2d 569, 579 (D. Kan. 2000) (forum selection clause was incorporated by reference); *Kessman & Assoc., Inc. v. Barton-Aschman Assoc., Inc.*, 10 F. Supp. 2d 682, 691-92 (S.D. Tex. 1997) (forum selection clause incorporated into a sub-contract from another contract); *Movado Group, Inc. v. Mozaffarian*, 92 A.D.3d 431, 432 (N.Y. App. Div. 2012) (forum selection clause was a “term[] and condition” incorporated by reference into contract); *Pritchett v. Gold’s Gym Franchising, LLC*, No. 05-13-004640CV, 2014 WL 465450, at *5 (Ct. App. Tx. Mar. 12, 2014) (forum selection clause incorporated by reference).

³ Plaintiff does not appear to dispute that Missouri law applies to determining the scope of the follow-form provision. *See* Opp. at 12 (suggesting Missouri law applies). The ACE Entities agree. *See State ex rel. Pinkerton v. Fahnestock*, 531 S.W.3d 36, 45 (Mo. 2017) (en banc) (applying Missouri law to determine scope of incorporation by

B. Plaintiff’s Attempts to Re-Write the Follow-Form Provisions Are Unavailing.

1. The Follow-Form Provisions Are Not Limited to “Substantive” Terms and Conditions.

Faced with unambiguous follow-form provisions, Plaintiff asks this Court to rewrite the ACE Policies to add terms that appear nowhere in the policies and would render the ACE Policies hopelessly vague if adopted. Plaintiff’s theory is that although the ACE Policies plainly state that “[t]he definitions, terms, conditions, limitations and exclusions of the [HDI] policy . . . apply to this coverage,” except as expressly carved out, this Court should find there is also an additional *unexpressed and unstated* carve-out.

According to Plaintiff, the phrase “apply to this coverage” indicates that the terms and conditions incorporated from the HDI policies are only those that “deal with *substantive* coverage or the insurance provided by the policies, not the process of dispute resolution with respect to the policies.” Opp. at 7 (emphasis added). But the word “substantive” does not appear in the ACE

reference provision in contract), *abrogated on other grounds, Theroff v. Dollar Tree Stores, Inc.*, 591 S.W.3d 432, 432 (Mo. 2020) (en banc). While Missouri law governs the interpretation of the follow-form endorsement in the ACE Policies, the UK Insurers’ submissions address the separate issue of what law governs the interpretation of the combined forum selection and choice-of-law provision in their policies, which expressly references the law and practice of England and Wales.

In a footnote, Plaintiff suggests that if English law applies, the follow-form provision would not incorporate a forum selection clause. See Opp. a 13 n.8. Plaintiff is wrong. The line of cases relied upon by Plaintiff involved circumstances where there were clear reasons to hold that general words of incorporation were not sufficient to bind a third party to arbitration or forum selection clauses. See, e.g., *The Athena (No 2)* [2007] 1 Lloyd’s Rep 280 (Langley, J.) (“[A] ‘stricter rule’ is applied in charterparty/bills of lading cases . . . [as] the other party may have no knowledge nor ready means of knowledge of the relevant terms.”), referring to *The Federal Bulker* [1989] 1 Lloyd’s Rep 103 (Bingham, L.J.) (“Generally speaking, the English law of contract has taken a benevolent view of the use of general words to incorporate by reference standard terms to be found elsewhere. But in the present field a different, and stricter, rule has developed, especially where the incorporation of arbitration clauses is concerned. The reason no doubt is that a bill of lading is a negotiable commercial instrument and may come into the hands of a foreign party with no knowledge and no ready means of knowledge of the terms of the charter-party.”).

English authority recognizes that in other circumstances, it may be entirely appropriate to hold that general words of incorporation are sufficient to include forum selection provisions. See, e.g., *Dornich Ltd v. Mauritius Union Assurance Co Ltd* [2006] 2 Lloyd’s Rep 475 (“*In the insurance context where the contracts concerned are back to back and cover the same subject matter and interest incorporation is more likely to have been intended than where the contracts are not so closely connected.*”) (emphasis added). That is precisely the case here, where HDI’s primary policies and excess policies such as the ACE Policies concern different layers of the same coverage, and the forum selection clause sensibly ensures that disputes concerning the scope of that coverage will be litigated in the same place.

follow-form provisions. *See Warden v. Shelter Mutual Ins. Co.*, 480 S.W.3d 403, 405-06 (Mo. Ct. App. W.D. 2015) (“Courts will not distort the language of an unambiguous insurance policy in order [to] create an ambiguity where none exists. If an insurance policy is unambiguous, we enforce the policy as written.”) (internal quotation marks and citations omitted). Plaintiff offers no reasoning or authority to support its conclusory argument, and courts considering follow-form provisions using the word “coverage” have not hesitated to find that provisions designating the forum for disputes *are* incorporated. *See C.B. Fleet Co. v. Aspen Ins. UK Ltd.*, 743 F. Supp. 2d 575, 583-85 (W.D. Va. 2010) (excess layer’s follow-form binder, which included the word “coverage,” incorporated underlying policy’s arbitration clause); *Boeing Co. v. Agric. Ins. Co.*, No. C05-921C, 2005 WL 2276770, at *7 (W.D. Wash. Sept. 19, 2005) (arbitration clause was incorporated into excess policies via provision stating that “*coverages* provided by this policy shall be the same as that provided by” underlying policy) (emphasis added). Indeed, Plaintiff’s unreasonable interpretation would result in the ACE Policies being vague and incomplete, since under Plaintiff’s interpretation other unidentified “procedural” terms and conditions would not be incorporated. *Burns v. Smith*, 303 S.W.3d 505, 509 (Mo. 2010) (en banc) (“Language is ambiguous if it is *reasonably* open to different constructions.”) (emphasis added) (citation omitted).

Plaintiff’s position flies in the face of the plain language of the policies. There is no ambiguity in the follow-form provision. Indeed, even Plaintiff is tripped up in its tortured reasoning: The same forum selection provision that Plaintiff says should not be incorporated is also a choice-of-law provision that Plaintiff recognizes *is* “substantive” and therefore incorporated by reference. *See Opp.* at 10. Thus, Plaintiff’s interpretation would require every contractual provision to be parsed and split into substantive and non-substantive parts, again demonstrating that it is unreasonable.

2. *The List of Carve Outs in the Follow-Form Provisions Confirms ACE's Position.*

Plaintiff's proposed interpretation also contravenes the *expressio unius est exclusio alterius* canon. Under the proper application of that rule of construction, "the express mention of one thing implies the exclusion of another." *Disalvo Properties, LLC v. Bluff View Commercial, LLC*, 464 S.W.3d 243, 245 (Mo. Ct. App. E.D. 2015) (internal quotation marks omitted). That means that because certain provisions from the HDI policies were expressly carved out from the follow-form provisions, the provisions that weren't carved out were necessarily incorporated into the ACE Policies.

By contrast, Plaintiff's convoluted logic asks the Court to infer that, because the specified list of carve-outs only references certain "substantive" terms, the "procedural" terms from the HDI policies did not need to be included in the carve-outs in the first place, because they were already excluded from the follow-form provisions by an unstated additional carve-out for procedural terms that appears nowhere in the policy's language. *See* Opp. at 8-9. That is not legal reasoning; it is wishful thinking. The forum selection clause was not carved out by the exceptions in the follow-form provision, and so it was therefore one of the terms incorporated into the ACE Policies.

3. *The "Legal Action Against Us" Provision Has No Bearing on the Incorporation of the Forum Selection Clause.*

Continuing to grasp at straws, Plaintiff asserts that because the ACE Policies have a separate provision concerning legal actions against ACE Entities, that a forum selection clause should have been included there, rather than being incorporated by reference via the follow-form endorsement. *See* Opp. at 7-8. Plaintiff cites no authority for this argument either, and no principle of either contract or insurance law specifies where in an insurance policy a forum

selection clause must appear, or prevents an insurer from incorporating one via a follow-form provision, as the Missouri Court of Appeals recognized in *Sabatino*.⁴

4. *The Absence of Forum Selection Clauses in Other ACE Policies Is Irrelevant.*

Plaintiff also makes the puzzling claim that because some of the *other* ACE American policies that are not at issue in this joinder do not contain or incorporate forum selection clauses, the ACE Policies at issue here also must not incorporate forum selection clauses. Opp. at 9. Plaintiff's reasoning appears to be based on the assumption that Mallinckrodt and the ACE Entities would have wanted all disputes *relating to ACE policies* adjudicated in the same forum. But this argument, like the others raised by Plaintiff, is also unreasonable and unsupported. The ACE policies at issue in this case do not mimic each other, but rather are excess policies that follow form to *different underlying policies* in each policy period.

Thus, incorporation of the underlying HDI policies' forum selection clauses ensures that disputes *relating to each tower of insurance* will be litigated in the same forum under the same rules. By contrast, under Plaintiff's interpretation, the parties' agreements would result in disputes concerning the HDI policies being litigated in England, while disputes concerning the ACE Policies and other following policies *that rely on the HDI terms and conditions* would be litigated elsewhere. This result would compromise judicial efficiency and increase the likelihood of inconsistent rulings on the meaning of the policies.

⁴ Plaintiff's complaints about the cases cited in ACE's Opening Brief, *see* Opp. at 10-13, are also unavailing. To begin with, Plaintiff's criticisms depend on its theory that there is a distinction between the incorporation of procedural terms and the incorporation of substantive terms. As explained above, the courts draw no such distinction. And if there were any doubt whether Missouri courts will incorporate a forum selection clause, *Sabatino* has eliminated any such doubt.

5. *The ACE Policies Are Unambiguous.*

Unable to point to any colorable basis for construing the follow-form provisions as it would like to, Plaintiff resorts to simply asserting that the provisions are ambiguous and must be construed against ACE Entities. *See* Opp. at 13. But as already discussed, Missouri “[c]ourts will not distort the language of an unambiguous insurance policy in order [to] create an ambiguity where none exists. If an insurance policy is unambiguous, [they] enforce the policy as written.” *Warden*, 480 S.W.3d at 405–06 (internal quotation marks and citations omitted). Plaintiff has pointed to no “duplicity, indistinctness, or uncertainty in the meaning of the language in the policy,” *Seeck v. Geico General Ins. Co.*, 212 S.W.3d 129, 132 (Mo. 2007) (en banc) (internal quotation marks omitted); rather, as set forth above, the follow-form provisions are unambiguous in incorporating all “terms” and “conditions” except those expressly carved out.

II. THE ENGLISH FORUM SELECTION CLAUSE IN THE HDI POLICIES IS MANDATORY

At the end of its Opposition, Plaintiff argues that even if the HDI forum selection provision is incorporated into the ACE Policies, it does not matter, because the forum selection provision is not mandatory. For the reasons set forth in the Certain UK Insurers’ Reply Memorandum of Law in Further Support of Their Motion to Dismiss, which is being filed today and which the ACE Entities join in its entirety, Plaintiff is incorrect.

CONCLUSION

Because the ACE Policies “follow form” to the HDI primary policies, including with respect to their mandatory forum selection clauses designating the courts of England and Wales for the resolution of any disputes, this Court should dismiss the First Amended Petition for lack of

personal jurisdiction as to the ACE Policies, and should dismiss the First Amended Petition as to ACE P&C in its entirety.

Dated: December 14, 2022

By: /s/ Stephen W. Carman

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of December 2022, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all counsel of record.

/s/ Stephen W. Carman _____