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

OPIOID MASTER DISBURSEMENT TRUST II, A/KA/ OPIOID MTD II,	)	
	)	Case No. 22SL-CC02974
Plaintiff,	)	
	)	Division No. 2
ACE AMERICAN INSURANCE COMPANY, *et al.*,	)	
Defendants.	)	

ASPEN INSURANCE UK, LTD.'S CONSOLIDATED REPLY IN SUPPORT OF ITS JOINDER IN CERTAIN UK INSURERS' MOTION TO DISMISS & JOINDER IN CERTAIN UK INSURERS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

ASPEN'S REPLY IN SUPPORT OF ITS JOINDER IN CERTAIN UK INSURERS' MOTION TO DISMISS FIRST AMENDED PETITION FOR DECLARATORY RELIEF

As set forth in Aspen's joinder, courts from around the country have recognized that the language of a follow-form excess policy incorporating the followed policy's "warranties, terms, conditions, exclusions and limitations" includes both choice-of-law clauses and provisions analogous to forum-selection clauses, such as arbitration clauses. *See* Joinder at 4-5. The Trust has not cited any cases—from Missouri or elsewhere—holding otherwise. Accordingly, the 2011–2013 Aspen Following Policies incorporate the HDI Followed Policies' forum-selection and choice-of-law clauses, and for the reasons set forth in Certain UK Insurers' motion to dismiss and supporting reply, Certain UK Insurers' motion and Aspen's joinder thereto should be granted.

A. The plain language of the 2011–2013 Aspen Following Policies incorporates the HDI Followed Policies' forum-selection and choice-of-law clauses.

The 2011–2013 Aspen Following Policies provide "excess coverage in accordance with the same warranties, terms, conditions, exclusions and limitations" as the HDI Followed Policies, except to the extent that the 2011–2013 Aspen Following Policies contain "inconsistent"

"warranties, exclusions, limitations and any other terms and conditions[.]"[1] The Trust places great emphasis on the word "coverage" in this language, speculating that the "insured" would have understood the provision to apply solely to "substantive coverage or the insurance provided by the policies, not the process of dispute resolution with respect to the policies." *See* Opp. at 7. The Trust's interpretation of the follow-form language and its myopic focus on the term "coverage" is a strained reading that does not support a rejection of Aspen's joinder. *See Haggard Hauling & Rigging Co. v. Stonewall Ins. Co.*, 852 S.W.2d 396, 401 (Mo. Ct. App. 1993) ("The rule requiring that an insurance policy be construed favorably to an insured in cases of ambiguity does not permit a strained interpretation of the language of the policy in order to create an ambiguity where none exists."); *Ritchie v. Allied Prop. & Cas. Ins. Co.*, 307 S.W.3d 132, 135 (Mo. 2009) ("Courts should not interpret policy provisions in isolation but rather evaluate policies as a whole.").[2]

Moreover, in procuring the HDI Followed Policies, the relevant insured, Covidien plc (former parent of the Mallinckrodt debtors headquartered in Ireland), specifically agreed—by way of a standalone endorsement prominently titled "**CHOICE OF LAW AND JURISDICTION ENDORSEMENT**" (bold/caps in original)—that "any dispute concerning the interpretation of the terms, conditions, limitations and/or exclusions" of the HDI Followed Policies "is understood and agreed by both the Insured and Insurers to be subject to the laws of England and Wales," that "[e] ach party agrees to submit to the jurisdiction of any court of competent jurisdiction within

[1] Policy language quoted in this reply is cited to the record in Aspen's motion.

[2] The Trust tries to support this argument (*see* Opp. at 8) by pointing to the exception in Aspen's follow-form language ("subject always to the premium, limits of liability, policy period, warranties, exclusions, limitations and other terms and conditions of this Policy"), claiming that the exception applies only to substantive coverage issues, so the rest of the follow-form language must too. But an exception is always narrower than the broader category to which it applies. As the cases cited by Aspen make clear (*C.B. Fleet, et al.*), the entire provision also encompasses procedural issues, such as forum selection and choice of law.

England and Wales and to comply with all requirements necessary to give such court jurisdiction," and that "[a]ll matters arising hereunder shall be determined in accordance with the law and practice of such court."

Covidien—a sophisticated multinational corporation—also specifically procured follow-form insurance coverage in the form of the 2011–2013 Aspen Following Policies. Even assuming that Covidien's expectations are relevant to the issue before the Court (they are not), it cannot be inferred that the insureds misunderstood the choice-of-law endorsement and follow-form language in their policies. *See, e.g.*, *AT & T v. Clarendon Am. Ins. Co.*, No. CIV.A.04C-11-167JRJ, 2008 WL 2583007, at *6 (Del. Super. Ct. Feb. 11, 2008) (finding insured and insurers were "concededly sophisticated parties that understood the meaning and effect of including the…choice of law provision in the…excess policy and the ramifications it would have on the excess policies that 'follow form.'").

The Trust also suggests (*see* Opp. at 5) that the Court should not dismiss the 2011–2013 Aspen Following Policies because Aspen issued other policies (the 2008-2011 Aspen Following Policies) that do ***not*** incorporate a forum-selection clause, but this is irrelevant. Each policy must be construed by its own terms; they cannot be treated as a monolith just because they were issued by the same insurer. The fact that some policies in the Covidien/Mallinckrodt coverage program have certain terms, while other policies for other years in the same program have other terms, simply underscores the inference that different outcomes were intended in those years. Regardless of the practical implications of dismissing certain policies but not others, whether the 2011–2013 Aspen Following Policies incorporate the HDI Followed Policies' forum-selection clause is an issue of policy interpretation and therefore a question of law, *see Siddens v. Philadelphia Indem.*

Ins. Co., 631 S.W.3d 675, 679 (Mo. Ct. App. 2021), and therefore the Court's analysis should be confined to the policies actually at issue here.[3]

Contrary to the Trust's assertion, each case cited by Aspen addressed similar or identical policy language, and many even involved similar references to the word "coverage" (which, as mentioned above, the Trust contends is fatal to Aspen's joinder here). The courts in those cases did ***not*** hold, as the Trust suggests, that the follow-form policies incorporated solely the underlying policy's coverage terms. *See C.B. Fleet Co. v. Aspen Ins. UK Ltd.*, 743 F. Supp. 2d 575, 583-85 (W.D. Va. 2010) (Aspen excess binder containing identical follow-form language, including word "***coverage***," incorporated underlying policy's arbitration provision, the functional equivalent of a forum-selection clause) (emphasis added);[4] *Boeing Co. v. Agric. Ins. Co.*, No. C05-921C, 2005 WL 2276770, at *7 (W.D. Wash. Sept. 19, 2005) (holding that excess policies incorporated arbitration provision, even where clause provided that "***coverages*** provided by this policy shall be the same as that provided by" followed policy) (emphasis added); *Home Ins. Co. of Ill. (N.H.) v. Spectrum Info. Techs., Inc.*, 930 F. Supp. 825, 835 n.9 (E.D.N.Y. 1996) (excess policy incorporated underlying policy's choice-of-law provision, where policy provided that "***[c]overage*** hereunder" would "apply in conformance with the terms, conditions and limitations" of followed policy)

[3] According to the Trust, "[i]t simply makes no sense for…Aspen to contend that some of their policies must be litigated in England or Wales, but other policies covering the same risks may be litigated in any other appropriate forum." *See* Opp. at 9. But—as the Trust knows—different policies issued across different policy periods routinely contain different terms, conditions, and limits based on whatever changing business concerns and risks were at play at the time of underwriting. What makes no sense is to suggest that follow-form policies within the same policy year should be litigated in a different forum than the underlying policy to which they follow form.

[4] Contrary to the Trust's suggestion (*see* Opp. at 11), nothing in *C.B. Fleet* purports to mandate underwriting discovery to determine whether a policy incorporates the terms of another policy.

(emphasis added);[5] *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F.3d 587, 589 (7th Cir. 2001) (reinsurance contract incorporated arbitration provision of underlying policy by stating that "[t]his ***Reinsurance*** [analogous to "insurance" or "coverage"] is to…follow all terms[,] clauses[,] and conditions") (emphasis added); *AT&T v. Clarendon Am. Ins. Co.*, No. CIV.A.04C-11-167JRJ, 2008 WL 2583007, at *5 (Del. Super. Ct. Feb. 11, 2008) (holding that the "***policies***" were "subject to the same warranties, terms, conditions, definitions, exclusions and endorsements" and "all terms, conditions, agreements and limitations" of followed policy and thus incorporated choice-of-law clause) (emphasis added). Outside the insurance context, Missouri law is in agreement. *See Sabatino v. LaSalle Bank, N.A.*, 96 S.W.3d 113, 118 (Mo. Ct. App. 2003) (deed of trust incorporating "terms and conditions" of separate loan agreement operated to incorporate loan agreement's forum-selection clause).

The Trust points out that Aspen has not cited any English law in support of its argument regarding incorporation of the UK forum-selection and choice-of-law clauses (*see* Opp. at 2), devoting substantial footnote space to the unsupported claim that English law contradicts Aspen's position (*see id.* at 13 n.8). However, "[p]rocedural questions," *i.e.*, "those that relate to the machinery for processing the cause of action," such as the follow-form language at issue, are generally "determined by the state law where the action is brought"—here, Missouri. *See Peoples Bank v. Carter*, 132 S.W.3d 302, 305 (Mo. Ct. App. 2004) (citations and quotations omitted). "Whether a court has subject matter jurisdiction to adjudicate a given controversy is, therefore, a question of procedure," and forum-selection clauses are also typically "procedural, not substantive, in nature." *Id.* (citations omitted). *See also Thieret Fam., LLC v. Delta Plains Servs., LLC*, 637

[5] The specific follow-form language is not specifically quoted in this opinion, but is referenced in Aetna's complaint in intervention, 1995 WL 17801356, ¶ 42 (E.D.N.Y. Jan. 22, 1995).

S.W.3d 595, 606 n.6 (Mo. Ct. App. 2021) (applying Missouri law to determine enforceability of forum-selection clause, notwithstanding Texas choice-of-law clause) (citing *Reed v. Reilly Co., LLC*, 534 S.W.3d 809, 813 (Mo. 2017) (same, where there was Kansas choice-of-law clause)). Therefore, whether the Aspen follow-form language incorporates the UK forum-selection and choice-of-law clauses must be determined with reference to Missouri law or, in the absence of Missouri law, the analogous law of its sister states.[6]

In sum, while the Trust places much emphasis on the lack of any Missouri case in support of Aspen's position, the Trust has failed to present even a single case—from Missouri or anywhere else—in support of the contrary.

B. The HDI Followed Policies' forum-selection and choice-of-law clauses are unambiguous.

Under Missouri law, for contract language to be ambiguous, there must be "duplicity, indistinctness, or uncertainty in the meaning of words," and the language must be "reasonably open to different constructions[.]" *See Franklin v. Lexington Ins. Co.*, 652 S.W.3d 286, 295 (Mo. Ct. App. 2022) (quoting *Krombach v. Mayflower Ins. Co., Ltd.*, 827 S.W.2d 208, 210 (Mo. 1992)). As evidenced by the cases cited above, nothing in the follow-form language of the 2011–2013 Aspen Following Policies is ambiguous. While creative, the Trust has not offered any other reasonable interpretation of the Aspen follow-form language, nor has it cited any case finding similar language ambiguous. *See Denny v. Duran*, 254 S.W.3d 85, 87 (Mo. Ct. App. 2008) ("Ambiguity is not created just because the parties disagree on the interpretation of a term."). Accordingly, there is no ambiguity to be resolved against Aspen.

[6] The Trust neither disputes nor concedes the fact that the 2011–2013 Aspen Following Policies incorporate the HDI Followed Policies' England/Wales choice-of-law clause. Aspen submits that issues of English and Welsh law are best put to a court in the parties' intended forum, rather than intermixing English/Welsh law and U.S. law in the event that the litigation in this forum proceeds to summary judgment.

In an effort to circumvent the plain language of the 2011–2013 Aspen Following Policies, the Trust submits two additional arguments: (1) that the Court should compare the language of the 2011–2013 Aspen Following Policies with the language of separate policies issued by ACE (*see* Opp. at 8); and (2) that the 2011–2013 Aspen Following Policies cannot be found to incorporate the forum-selection clause because "there is no indication here that the insurers or the insureds had knowledge of…the forum selection provision under which the insurers now seek refuge" (*see* Opp. at 12). But "[e]xtrinsic evidence of the expectations and intent of the parties as to coverage is only to be considered if the policy language is ambiguous," and "the parties' subjective intent cannot be used to create an ambiguity." *See Haggard Hauling & Rigging Co. v. Stonewall Ins. Co.*, 852 S.W.2d 396, 400 (Mo. Ct. App. 1993). Instead, "[t]he intent of the parties to a contract is presumed to be expressed by the ordinary meaning of the contract's terms." *See Triarch Indus., Inc. v. Crabtree*, 158 S.W.3d 772, 776 (Mo. 2005).

Since there is no ambiguity, any purported evidence of intent contained in the ACE policies (to which Aspen is a stranger, and which do not govern Aspen's coverage obligations) or in any evidence regarding the parties' knowledge at the time of contracting are inapposite and irrelevant to the issues before the Court.

ASPEN'S JOINDER IN CERTAIN UK INSURERS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS FIRST AMENDED PETITION FOR DECLARATORY RELIEF

Apart from its opposition to Aspen's joinder, the Trust has filed a separate opposition to Certain UK Insurers' motion to dismiss in which it argues, *inter alia*, that the forum-selection clause at issue is permissive, not mandatory. The Trust is wrong. While Missouri courts do not appear to have addressed the specific language of this forum clause, at least one other court held that a materially identical clause was mandatory, not permissive. *See Nat'l Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. Xl Ins. Co., Ltd.*, No. A130878, 2012 WL 1141053, at *2 (Cal. Ct.

App. Apr. 5, 2012) (unpublished) ("Although the parties' agreement 'to submit to the jurisdiction of' English courts, in itself, is permissive and not mandatory, the language requiring the parties to 'comply with all requirements necessary to give [the English court] jurisdiction,' and requiring that 'all matters arising [under the policy] shall be determined in accordance with' English law and practice, has sufficient *indicia* to make such jurisdiction mandatory.").

Aspen joins in Certain UK Insurers' reply in support of their motion to dismiss, filed concurrently herewith, for this reason and those discussed in detail therein.

Dated: December 14, 2022

Respectfully submitted,

/s/ *Justin K. Seigler*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Consolidated Reply in Support of Aspen's Joinder in Certain UK Insurers' Motion to Dismiss and Joinder in Certain UK Insurers' Reply in Support of Their Motion to Dismiss was electronically filed with the Court with a copy served via email on all counsel of record on December 14, 2022.

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