

Heidi G. Goebel, 10343
CHRISTENSEN & JENSEN, P.C.
15 West South Temple, Suite 800
Salt Lake City, Utah 84101
Telephone: (801) 323-5000
Facsimile: (801) 355-3472
Email: heidi.goebel@chrisjen.com

Ommid C. Farashahi (*admitted pro hac vice*)
Jason P. Minkin (*admitted pro hac vice*)
Brian J. Watson (*admitted pro hac vice*)
BATESCAREY LLP
191 N. Wacker, Suite 2400
Chicago, IL 60606
Telephone: (312) 762-3100
Facsimile: (312) 762-3200
Email: ofarashahi@batescarey.com
jminkin@batescarey.com
bwatson@batescarey.com

Attorneys for Plaintiff
AXIS Surplus Insurance Company

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

AXIS SURPLUS INSURANCE COMPANY,

Plaintiff,

v.

ROBERT D. GERINGER; KIRBY D.
COCHRAN; ROBERT CLAWSON;
DOUGLAS W. CHILD; JEFF AUSTIN;
WILLIAM H. DAVIDSON; WILLIAM J.
WARWICK; WILLIAM GRUNDY; and
KEITH GREEN,

Defendants.

**AXIS' OPPOSITION TO THE JOINT
MOTION FOR SUMMARY
JUDGMENT AND DISTRIBUTION OF
INTERPLEADED FUNDS**

Civil Case No. 2:14-cv-000244-DAK

Judge Dale A. Kimball

Plaintiff, AXIS Surplus Insurance Company (“AXIS”), by and through its undersigned counsel, hereby opposes the Joint Motion for Summary Judgment and for Distribution of Interpleaded Funds (Dkt. No. 37) filed by Defendant William Warwick and D. Ray Strong (the “Trustee”).

As to the Trustee, the Joint Motion should be stricken because the Trustee is not a current party to this case and has no present interest in the interpleader. In any event, the Joint Motion should be denied as premature. The Settlement Agreement is contingent upon Bankruptcy Court approval which has not been given, and the parties can only speculate as to whether such approval will be forthcoming. In addition, the Court has not yet resolved the first phase of this interpleader—whether the interpleader has been properly brought by AXIS—which must be resolved before the second phase of the interpleader—which is to determine how to distribute the interpleaded policy proceeds.

BACKGROUND

On April 2, 2014, AXIS filed this action for interpleader to resolve competing claims to the remaining proceeds of AXIS Policy No. EAN756858/01/2010 (the “Policy”) asserted by the nine Defendants named in this action.¹ The Defendants, including Mr. Warwick, are Insureds under the Policy. On May 6, 2014, the Trustee executed the Settlement Agreement pursuant to which Mr. Warwick purportedly assigned his rights under the Policy to the Trustee.² The Settlement Agreement, however, is conditioned upon approval by the U.S. Bankruptcy Court for the District of Utah pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure and the entry of a bar

¹ Dkt. No. 1.

² Dkt. No.36, Strong Declaration at ¶ 8; Settlement Agreement ¶ 1.b.

order to prevent certain claims from being asserted against Mr. Warwick.³ On May 30, 2014, the Trustee filed a motion to approve the Settlement Agreement under Rule 9019.⁴

On June 4, 2014, the Trustee and Mr. Warwick filed the Joint Motion, and the Trustee separately filed a Motion to Intervene in the interpleader to assert the rights of Mr. Warwick under the Policy.⁵ On June 18, 2014, AXIS and certain of the other Defendants filed oppositions to the Trustee's Motion to Intervene on grounds that the Trustee has no present interest in the interpleader, and the interest which the Trustee seeks to assert is adequately represented by Mr. Warwick.⁶ On June 12, 2014, AXIS filed a Motion for Summary Judgment asking the Court to resolve the first phase of the interpleader by determining that the interpleader is properly brought pursuant to 28 U.S.C. § 1335.⁷

ARGUMENT

As to the Trustee, the Court should strike the Joint Motion because the Trustee is not currently a party to this interpleader and has no direct, substantial and legally protectable interest in the funds which are the subject of the interpleader. The Trustee has filed a Motion to Intervene, which AXIS and certain of the Defendants have opposed. Because the Trustee's Motion to Intervene should be denied for the reasons set forth in the oppositions filed by AXIS and certain Defendants, the Court should strike the Joint Motion to the extent it is brought by the Trustee.

In any event, the Joint Motion should be denied as premature because the Settlement Agreement has not been approved by the Bankruptcy Court and, and may never be approved.

³ Settlement Agreement ¶ 2.

⁴ Bankruptcy Case No. 11-35082, Dkt. No. 925.

⁵ Dkt. Nos. 36 and 37.

⁶ Dkt. Nos. 44 and 45.

Unless and until the Bankruptcy Court approves the Settlement Agreement, it is not effective.

Consequently, there is not presently a settlement to be funded.

Moreover, even if the Settlement Agreement had been approved by the Bankruptcy Court, the Joint Motion is premature because the Court has not yet determined that the interpleader is properly brought by AXIS, which is the subject of AXIS' Motion for Summary Judgment. Such a determination is necessary before the Court can turn to the second phase of the interpleader to determine the respective rights of the claimants, including Mr. Warwick, to the interpleaded funds. *See Prudential Ins. Co. of Am. v. Hovis*, 553 F.3d 258, 262 (3rd Cir. 2009) (explaining that interpleaders typically proceed in two stages—the first stage where the court determines whether the interpleader is properly brought, followed by the second phase where the court determines the respective rights to the interpleaded funds).

WHEREFORE, for the foregoing reasons, AXIS requests that the Court strike the Joint Motion for Summary Judgment and for Distribution of Interpleaded Funds to the extent it is brought by the Trustee, and deny the Joint Motion as premature or stay it pending the outcome of AXIS' Motion for Summary Judgment.

RESPECTFULLY SUBMITTED this 2nd day of July, 2014.

BATESCAREY LLP

/s/ Ommid C. Farashahi

Ommid C. Farashahi

Jason P. Minkin

Brian J. Watson

Attorneys for AXIS Surplus Insurance Company

⁷ Dkt. No. 41.

CERTIFICATE OF SERVICE

I hereby certify that, on July 2, 2014, **AXIS' OPPOSITION TO THE JOINT MOTION FOR SUMMARY JUDGMENT AND FOR DISTRIBUTION OF INTERPLEADED FUNDS** was filed with the United States District Court for the District of Utah via the CM/ECF system, and that a copy of the foregoing is similarly being served via electronic mail on counsel designated to accept service on behalf of the named Defendants who have not entered an appearance in this action.

/s/ Brian J. Watson
Brian J. Watson