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Attorneys for Plaintiff, AXIS Surplus Insurance Company

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH**

AXIS SURPLUS INSURANCE COMPANY,

Plaintiff,

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.

Civil Case No. 2:14-cv-00244-DAK

MOTION TO SUPPLEMENT THE
RECORD ON AXIS' SUMMARY
JUDGMENT MOTION AND AXIS'
OPPOSITION TO THE TRUSTEE'S RULE
56(D) MOTION FOR DISCOVERY

Plaintiff, AXIS Surplus Insurance Company (“AXIS”), by and through its undersigned counsel, hereby moves to supplement the summary judgment record to add recently-discovered undisputed facts and evidence that further demonstrate that AXIS is entitled to summary judgment and that the Trustee’s Rule 56(d) Motion for Discovery should be denied. In support hereof, AXIS states the following:

INTRODUCTION

1. New facts and evidence have come to light that squarely refute the Trustee’s contention that discovery is necessary to resolve a purported question of fact regarding the limit of liability of the AXIS policy that is the subject of this interpleader. After arguing in this interpleader that it is possible that the AXIS policy’s limit of liability is \$5 million instead of \$1 million, the proposed intervenor, D. Ray Strong (the “Trustee”), subsequently filed a malpractice suit against Castle Arch Real Estate Investment Company, LLC’s (“CAREIC”) former counsel for allowing the same \$5 million policy limit to expire without ensuring that any actual or potential claims under the policy were reported to AXIS. As a result of the Trustee’s sworn declaration and allegations in the malpractice suit, which constitute admissions against the Trustee, and which persuaded the Bankruptcy Court to recently enter findings of fact and conclusions of law that no actual or potential claims were reported to AXIS before the \$5 million limit expired, the Trustee should now be estopped from contending that discovery is necessary to determine whether the AXIS policy limit is \$5 million.

BACKGROUND

2. AXIS filed the instant action for interpleader pursuant to 28 U.S.C. § 1335 as a result of competing claims to the remaining proceeds of a \$1 million claims-made-and-reported

insurance policy (the “Policy”) issued by AXIS to CAREIC. The Defendants, who are Insureds under the Policy, each assert that they are entitled to some or all of the remaining proceeds in order to defend or settle claims (the “Underlying Claim”) brought against them by the Trustee, who is the Liquidating Trustee for the Consolidated Legacy Debtors Liquidating Trust as appointed in CAREIC’s bankruptcy case.

3. On June 12, 2014, AXIS filed its Motion for Summary Judgment asking the Court to determine that AXIS properly filed the interpleader pursuant to 28 U.S.C. § 1335, discharge AXIS from further liability under the Policy, and dismiss AXIS from the interpleader.¹

4. On July 10, 2014, the Trustee filed his opposition to AXIS’ Motion for Summary Judgment, disputing that the Policy contains a \$1 million limit of liability on the basis that there is a question of fact as to whether AXIS received notice of a claim or potential claim prior to January 20, 2012—i.e., when the Policy’s limit of liability was reduced from \$5 million to \$1 million—such that the Policy’s limit of liability could be \$5 million.² On the same day, in conjunction with his opposition, the Trustee filed a Rule 56(d) motion seeking discovery on this purported issue.³

5. On August 21, 2014, AXIS filed its omnibus reply in support of its Motion for Summary Judgment, which closed briefing on AXIS’ motion.⁴ AXIS also filed its response in

¹ See Dkt. No. 41.

² See Dkt. No. 60, Response to AXIS’ Statement Elements and Undisputed Material Facts, Section III.A.1., at p. 13.

³ See Dkt. No. 63.

⁴ See Dkt. No. 76.

opposition to the Trustee's Rule 56(d) motion for discovery on the same day.⁵ The Trustee has not yet filed his reply brief which is due fourteen (14) days after the Court rules on the Trustee's Motion to Intervene, which is scheduled to be heard by the Court on July 2, 2015.

NEW FACTS AND EVIDENCE

6. On December 16, 2014, the Trustee filed a malpractice suit in the Third Judicial District Court of Salt Lake County, Utah against Prince, Yeates & Geldzahler, PC and Adam S. Affleck (collectively, "Prince Yeates"), who were retained as counsel for CAREIC as debtor-in-possession after it filed for bankruptcy.⁶

7. The Trustee alleged in his amended complaint in the malpractice suit that Prince Yeates failed to ensure that any actual or potential claims were reported to AXIS before the Policy's \$5 million limit of liability expired. Specifically, the Trustee alleged in paragraphs 17 and 20 of his amended complaint:

Affleck knew well before March 20, 2012 that during both the Policy Period and the 60-day post-Policy Period for submission of claims to AXIS, CAREIC had received, and was otherwise the object of, numerous written demands for both monetary and non-monetary relief, as well as legal actions, on account of multiple "Wrongful Act[s]" within the meaning of the Policy. These written demands and actions—both individually and cumulatively—constituted (a) actual claims within the meaning of Endorsement No. 7 to the Policy (collectively "Claims"), and/or (b) potential claims, i.e., "circumstances which could give rise to a Claim," under the Awareness Provision of the Policy.

* * *

Neither Affleck nor anyone else at Prince Yeates took any action to notify or recommend that CAREIC notify AXIS of (a) any actual claims pursuant to the Policy's Notice of Claim Provision, or (b) any potential claims pursuant to the

⁵ See Dkt. No. 77.

⁶ See Bankr. No. 15-2007, Dkt. No. 1, Exhibit A to Prince Yeates' Notice of Removal, at p. 6.

Policy's Awareness Provision.⁷

8. On January 14, 2015, Prince Yeates removed the malpractice suit to the U.S. Bankruptcy Court for the District of Utah.⁸ On March 30, 2015, Prince Yeates filed a motion for summary judgment on grounds that the Trustee could not prove any damages as a result of Prince Yeates' alleged malpractice.⁹

9. On April 24, 2015, the Trustee filed his opposition to Prince Yeates' summary judgment motion. In his opposition, in which the Trustee represented to the Bankruptcy Court that no actual or potential claims were reported to AXIS before the \$5 million Policy limit expired, the Trustee submitted the following undisputed material fact to the Court:

Had Prince Yeates properly discharged its duties as CAREIC's counsel to protect its interests in the Policy by, among other things, timely (by March 21, 2012) reporting to, and facilitating payment at or close to the Policy limits by AXIS of actual claims and/or timely (by January 20, 2012) notifying AXIS of circumstances which could give rise to a claim, the Trustee's claims against former management would be far easier to settle.¹⁰

10. Additionally, the Trustee filed a declaration under oath in opposition to Prince Yeates' summary judgment motion, stating in Paragraphs 6-7:

Had coverage been preserved and carrier payments at or close to the limits of the \$5 million Policy for actual or potential claims been available, I believe I could have settled claims against CAREIC management early, and without substantial expense. I could have avoided the substantial expense of pursuing, in court, a lawsuit against management (most of whom are claiming poverty now). The additional funds would have changed my calculus (and former management's calculus) in approaching the claims and settlement of the claims. In other words, had Prince Yeates properly protected CAREIC's apparent rights to have claims

⁷ See Bankr. No. 15-2007, Dkt. No. 1, Exhibit B to Prince Yeates' Notice of Removal, at p. 85-86.

⁸ See Bankr. No. 15-2007, Dkt. No. 1.

⁹ See Bankr. No. 15-2007, Dkt. No. 20.

¹⁰ See Bankr. No. 15-2007, Dkt. No. 28, Additional Legal Elements and Undisputed Facts, ¶16, at p. 33.

preserved and covered under the Policy, and had the carrier made payments close to the Policy limits, much expense would have been avoided, and concurrently the amount I could reasonably accept to settle claims against management would be far less than what I require now.

An indication of the significance of Prince Yeates' conduct is that in global settlement negotiations with AXIS, management and their legal counsel, I was prepared to accept an amount close to the limits of the \$5 million Policy in total settlement of all claims. Since there was only \$1 million available in insurance proceeds, a global settlement failed.¹¹

11. On June 18, 2015, the Bankruptcy Court granted Prince Yeates' motion for summary judgment against the Trustee. In the Bankruptcy Court's memorandum decision, the Court made findings of fact and conclusions of law under FRCP Rule 52(a)(1), which are binding upon the Trustee. Importantly, based on the material facts submitted by the Trustee in opposition to Prince Yeates' motion, including the Trustee's affidavit referenced above, the Bankruptcy Court made the following finding of fact:

The Policy lapsed on January 20, 2012, and CAREIC did not renew the Policy, report any actual or potential Claims to AXIS during the reporting period, or purchase an extension of the reporting period.¹²

ARGUMENT

12. The allegations made by the Trustee in the malpractice suit, the Trustee's declaration in opposition to Prince Yeates' summary judgment motion, and the Bankruptcy Court's findings of fact and conclusions of law are undisputed facts and evidence, which have only recently become available to AXIS, that are relevant to AXIS' Motion for Summary Judgment and the Trustee's Rule 56(d) Motion for Discovery.

13. The decision to supplement the record on AXIS' pending Motion for Summary

¹¹ See Bankr. No. 15-2007, Dkt. No. 29.

¹² See Bankr. No. 15-2007, Dkt. No. 53, at p. 2.

Judgment to consider new information relevant to the motions lies within the discretion of the trial court.¹³

14. The allegations in the Trustee's amended complaint in the malpractice suit, and the Trustee's declaration in opposition to Prince Yeates' motion for summary judgment constitute admissions by the Trustee that the AXIS Policy's limit of liability is \$1 million.¹⁴ The Trustee's admissions in the malpractice suit are admissible against the Trustee here pursuant to Rule 801(d) of the Federal Rules of Evidence.¹⁵ If there were a question of fact as to whether potential coverage under the \$5 million limit had been preserved by reporting actual or potential claims to AXIS prior to January 20, 2012, the Trustee would have no good faith basis to file a malpractice suit against Prince Yeates affirmatively alleging a failure to ensure that actual or potential claims were reported to AXIS under the \$5 million limit, thereby making it harder for the Trustee to settle the Underlying Claim against the Defendants in the interpleader (due to a lack of available insurance proceeds).

15. Not only did the Trustee make the admissions referenced above, but he succeeded in persuading the Bankruptcy Court to accept those admissions as undisputed material facts in the Bankruptcy Court's findings of fact and conclusions of law. As a result, the Trustee should be judicially estopped from arguing in this interpleader that there is a question of fact as to whether the AXIS Policy's limit of liability is \$5 million or \$1 million.

16. Judicial estoppel is an equitable doctrine that lies within the discretion of the trial

¹³ See *Turner v. Reynolds Ford, Inc.*, 145 F.3d 1346 (10th Cir. 1998) (unpublished).

¹⁴ See *Dugan v. EMS Helicopters, Inc.*, 915 F.2d 1428 (10th Cir. 1990).

¹⁵ See *LWT, Inc. v. Childers*, 19 F.3d 539, 542 (10th Cir. 1994).

court.¹⁶ Judicial estoppel is based upon protecting the integrity of the judicial system by prohibiting parties from deliberately changing positions according to the exigencies of the moment. Though there is no precise formula, in order to determine whether to apply judicial estoppel, courts typically inquire as to whether: (1) a party's later position is clearly inconsistent with its earlier position; (2) a party has persuaded a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled; and (3) the party seeking to assert the inconsistent position would derive an unfair advantage if not estopped.¹⁷

17. Here, all three criteria are met. First, the Trustee's position in the interpleader that there is a question of fact whether AXIS received notice of claims or potential claims when the Policy's limit was \$5 million is clearly inconsistent with the Trustee's position in the malpractice suit that actual and potential claims were not timely reported to AXIS before the \$5 million limit was reduced to \$1 million. Second, the Trustee succeeded in persuading the Bankruptcy Court to find that CAREIC did not report any actual or potential claims to AXIS during the reporting period for the \$5 million limit, based on the material facts submitted by the Trustee in opposition to Prince Yeates' motion, including the Trustee's declaration. Third, the Trustee would derive an unfair advantage if he were permitted to contend that the AXIS Policy's limit of liability is potentially \$5 million in opposition to AXIS' Motion for Summary Judgment, despite the fact that the Trustee took the position that the limit of liability is \$1 million for purposes of settling the Underlying Claim against the Defendants when it suited his pursuit of

¹⁶ See *Smith v. United Parcel Service*, 578 Fed. Appx. 755, 759 (10th Cir. 2014).

¹⁷ See *Bradford v. Wiggins*, 56 F.3d 1189, 1194 (10th Cir. 2008).

malpractice claims against Prince Yeates.

18. The admissions made by the Trustee in the malpractice suit, and the Bankruptcy Court's findings of fact which are binding upon the Trustee further confirm AXIS' position as stated in its Motion for Summary Judgment that it is an undisputed fact that the AXIS Policy's limit of liability is \$1 million, as well as its position that the additional discovery requested by the Trustee pursuant to FRCP Rule 56(d) is unwarranted.

WHEREFORE, for the foregoing reasons, AXIS' Motion should be granted, and the Court should consider the facts and evidence cited herein as additional facts and evidence relied upon by AXIS in support of its Motion for Summary Judgment and in opposition to the Trustee' Rule 56(d) Motion for Discovery.

RESPECTFULLY SUBMITTED this 1st day of July, 2015.

BATESCAREY LLP

/s/ Michael T. Skoglund

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Brian J. Watson

Attorneys for AXIS Surplus Insurance Company

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2015 the foregoing Motion was filed with the Court via the CM/ECF System, and that a copy of the foregoing is similarly being served via certified mail and electronic mail on the named defendants or their counsel designated to accept service on their behalf.

/s/ Brian J. Watson
Brian J. Watson