

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
*Northern Division***

**BOHEMIA BAY YACHT HARBOUR
CONDOMINIUM ASSOCIATION, INC.
1026 Old Town Point Road
Chesapeake City, Harford Co., Maryland 21915**

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Case No. _____

Plaintiff

v.

**ACE AMERICAN INSURANCE COMPANY
436 Walnut Street
Philadelphia, Pennsylvania 19106**

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Defendant.

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COMPLAINT FOR DECLARATORY JUDGMENT

COMES NOW, Plaintiff Bohemia Bay Yacht Harbour Condominium Association, Inc. ("Bohemia Bay"), by and through its undersigned counsel, and respectfully files this Complaint for Declaratory Judgment against Defendant ACE American Insurance Company ("ACE"), and states:

NATURE OF THE CASE

1. This is an action for declaratory judgment brought pursuant to Rule 57 of the Federal Rules of Civil Procedure and Section 2201 of Title 28 of the United States Code to declare the rights and other legal relations surrounding questions of actual controversy that presently exist between ACE and Bohemia Bay.

2. ACE issued two policies of insurance to Bohemia Bay both with an effective period July 1, 2009 through July 1, 2010. The first is a Boat Dealers/Repairers and Marina Operations Policy bearing the

policy number YD Y05721738 (the “MOP policy”), with a stated policy limit of \$1,000,000, and the second is a Commercial General Liability Policy bearing the policy number SVR D35453738 (the “CGL policy”), also with a stated policy limit of \$1,000,000.

3. The actual controversy in this matter pertains to coverage limits available under both policies of insurance for damages resulting from a loss that occurred in or about February 2010.

PARTIES AND JURISDICTION

4. Bohemia Bay is a corporation duly organized under the laws of the State of Maryland with a principal place of business at 1026 Old Town Point Road, Chesapeake City, Maryland 21915.

5. ACE is a corporation duly organized under the laws of the State of Pennsylvania with a principal place of business at 436 Walnut Street, Philadelphia, Pennsylvania 19106.

6. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332(a), (c) based on the diversity of citizenship between the parties and the amount in controversy.

7. Venue is proper in this judicial district under 28 U.S.C. § 1391(b)(2).

CHOICE OF LAW

8. Because this case is brought pursuant to diversity jurisdiction, 28 U.S.C. § 1332, this Court must apply state substantive law and federal procedural law. *See Gasperini v. Ctr. For Humanities*, 518 U.S. 415, 427, 116 S.Ct. 2211, 135 L. Ed. 2d 659 (1996) (“Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law.”).

9. This Court should apply the substantive law of Maryland to this case because (1) both policies of insurance were executed by Bohemia Bay in Maryland; (2) both policies were delivered to Bohemia Bay, which is located in Cecil County, Maryland; and (3) both policies insured property that is located in Maryland.

FACTUAL ALLEGATIONS

10. At all times relevant hereto, Bohemia Bay owned and operated a condominium marina and dockyard for berthing and storing vessels owned by its unit owners and vessels owned by others in vacant slips and in slips on behalf of its unit owners. Bohemia Bay is located in the northern Chesapeake Bay (the “Premises”) in Cecil County, Maryland.

11. On or about February 5-6, 2010, and again on or about February 9-10, 2010, the Premises experienced substantial snowfall accumulations. The weather event has been commonly referred to as “Snowmageddon.”

12. On or about February 11, 2010, the roof structure over individual dock slips collapsed under the weight of the snow, resulting in damage to certain vessels and personal property.

13. Pursuant to policies of insurance obtained by owners of certain of the damaged vessels, Standard Fire Insurance Company (“Standard”) made payments to its insureds to compensate them for damages to their vessels and other personal property caused by the roof collapse.

14. Standard made total payments to said individuals in the amount of \$1,831,032.76, plus \$1,250.00 in deductibles.

15. On or about January 11, 2012, Standard filed a subrogation complaint against Bohemia Bay (the “Standard suit”) seeking judgment against Bohemia Bay in the amount of \$1,832,282.76 in

compensatory damages, among other requested relief. A copy of this complaint is attached hereto as Exhibit C.

16. By letter dated February 10, 2012, Bohemia Bay formally requested coverage and defense pursuant to its MOP and CGL policies in connection with the Standard suit. The MOP and CGL policies are attached hereto as Exhibit A and Exhibit B, respectively.

STATEMENT OF THE CLAIM

17. Shortly after Bohemia Bay tendered the Standard suit to ACE for coverage and defense, ACE rendered an opinion regarding coverage limits available under both the MOP and CGL policies.

18. In that opinion letter, ACE concluded that a “non-pyramid” provision in the MOP policy, i.e., “Multiple Coverage Parts or Policies,” reduces the primary limit to \$1,000,000 for liability claims under *both* of the policies.

19. Pursuant to the MOP policy Declarations (*see* Exhibit A), the limit of liability under Part E Liability is \$1,000,000. The MOP policy provides, in pertinent part as follows:

OTHER INSURANCE: If any covered person has any other insurance against a property damage loss covered under this policy, we will not pay for any greater proportion of the loss than our applicable amount of insurance stated on the Declarations Page bears to the total amount of insurance covering the loss. With respect to liability, any insurance provided by this contract shall be deemed excess over all other valid and collectible insurance.

MULTIPLE COVERAGE PARTS OR POLICIES: If two or more Coverage Parts of this policy or any other policy issued to you by us or any company affiliated with us apply to the same “accident” or “occurrence,” the maximum available under all the coverage forms or policies shall not be the total of the per “accident” or “occurrence” limits of insurance for those Coverage Parts or policies, but rather shall not exceed the highest applicable per “accident” or “occurrence” limits of insurance under any one Coverage Part or policy issued by us or an

affiliated company, specifically to apply as excess insurance over this policy.

20. Pursuant to the CGL Supplemental Declarations (*see* Exhibit B), the limit of liability under Coverage A – Bodily Injury and Property Damage Liability is \$1,000,000. The GCL policy provides, in pertinent part as follows:

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when Paragraph b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph c. below.

b. Excess Insurance

(1) This insurance is excess over:

(a) Any of the other insurance, whether primary, excess, contingent or on any other basis:

(i) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";

(ii) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;

(iii) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or

(iv) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Section I – Coverage A – Bodily Injury And Property Damage Liability.

(b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement. [emphasis added]

21. Specifically, ACE contends that the Standard suit seeks “damages in the amount of \$1,832,282.76, which is above the limit of liability . . . which is \$1,000,000.”

22. Moreover, ACE claims that the CGL policy limit of \$1,000,000 would not apply to the loss because of the “non-pyramid” language included in the MOP policy as provided above. In other words, ACE concluded that the MOP policy is primary and exclusive.

23. For that reason, ACE concluded that the “primary limit for the liability claims presented in this matter remains \$1,000,000.”

24. Bohemia Bay, however, asserts that the non-pyramid provision does not apply.

25. First, the MOP non-pyramid provision provides that “the maximum available under all the coverage forms or policies shall not be the total of the per ‘accident’ or ‘occurrence’ limits of insurance for those Coverage Parts or policies, but rather shall not exceed the highest applicable per ‘accident’ or ‘occurrence’ limits of insurance under any one Coverage Part or policy issued by us or an affiliated company, *specifically to apply as excess insurance over this policy.*” (emphasis added). The MOP policy, however, *is* the excess policy. The CGL’s “Other Insurance” provision provides, “This insurance is primary except when Paragraph **b.** below applies.” But paragraph **b.** of that section does not apply to this case, thereby rendering the CGL policy as the primary insurance. Moreover, Bohemia Bay has no other policy of insurance issued by ACE or an affiliated company that specifically applies as excess over the MOP policy. ACE’s contention that this limitation on coverage would apply as excess over the excess policy is nonsensical. Thus, the non-pyramid provision does not apply to restrict the coverages available under the CGL and MOP policies.

26. Second, the anti-pyramid provision states: “If two or more Coverage Parts of this policy or any other policy issued to you by us . . . apply to the same ‘accident’ or ‘occurrence’” But Bohemia

Bay does not contend that two Coverage Parts from the *same* policy apply to this occurrence. Rather, one Coverage Part from the CGL policy and one Coverage part from the MOP policy apply. Because two different Coverage Parts from two *different* policies apply to this occurrence, the anti-pyramid provision in the MOP policy is inapplicable.

27. In the alternative, when the MOP anti-pyramid provision is read in its entirety, Bohemia Bay believes that it is ambiguous. The provision states that “the maximum available under all the . . . policies shall . . . not exceed the highest applicable per ‘accident’ or ‘occurrence’ limits of insurance under any one . . . policy issued by us . . . , specifically to apply as excess insurance over this policy.” That excerpt directly conflicts with the preceding “Other Insurance” paragraph. The “Other Insurance” paragraph provides that the MOP policy is excess over the CGL policy. Notably, the CGL policy states that it is primary. If the policies cannot be “stacked,” then the MOP policy is not in fact excess and the CGL policy is not primary. Such an interpretation ignores the plain language of the “Other Insurance” paragraphs of both policies. Accordingly, the anti-pyramid provision is ambiguous and should be construed against ACE and in favor of coverage.

COUNT I
Declaratory Judgment

28. Plaintiff hereby incorporates all of its statements in the preceding paragraphs as if fully set forth herein.

29. “The Declaratory Judgments Act, 28 U.S.C. § 2201(a) provides that ‘in a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.’ The exercise of jurisdiction under the Act is not compulsory. Thus, even if a ‘case or controversy’ within the meaning of Article III of the Constitution is presented, the district court, in its discretion, must

be satisfied that declaratory relief is appropriate.” *North East Ins. Co. v. Northern Brokerage Co.*, 780 F. Supp. 318, 320 (D. Md. 1991) (internal citations omitted).

30. “In determining whether declaratory relief is appropriate here, two questions must be asked: ‘(1) whether the judgment will serve a useful purpose in clarifying the legal relations in issue; or (2) whether the judgment will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.’” *North East Ins. Co.*, 780 F. Supp. at 320 (quoting *White v. National Union Fire Ins. Co.*, 913 F.2d 165, 168 (4th Cir. 1990)).

31. “A principal advantage of a prior determination of insurance coverage . . . is that it may allow for the more efficient settlement of tort claims.” *Id.* (citing *Allstate Ins. Co. v. Green*, 825 F.2d 1061, 1064 (6th Cir. 1987)).

32. As explained in greater detail above, there is an actual controversy between the parties concerning the anti-pyramid language of Bohemia Bay’s MOP policy and, as a result, the total coverage available under both the MOP and GCL policies.

33. A declaratory judgment addressing these issues will serve a useful purpose in clarifying whether the anti-pyramid provision of the MOP policy should apply and whether the language of that provision is ambiguous thereby rendering it unenforceable and requiring that it be construed against ACE.

34. Bohemia Bay asserts that the anti-pyramid provision does not apply, or in the alternative, that the provision is facially ambiguous. As a result, \$1,000,000 of coverage is available under the MOP policy and \$1,000,000 of coverage is available under the CGL policy, for a total of \$2,000,000 in available coverages under both policies.

35. ACE’s position, however, is that the anti-pyramid provision allows only \$1,000,000 in available coverage under the MOP policy and \$0 in available coverage under the CGL policy.

36. ACE also fails to consider that the CGL policy includes additional named insureds, namely, Bohemia Bay Condominium Unit Owners and Bohemia Bay Slip Owners. (See Exhibit B at DEF00683.) The MOP policy names Bohemia Bay as the only insured. Thus, ACE's position could potentially foreclose the additional named insureds' ability to make a claim under the CGL policy if, as ACE contends, the MOP's "anti-pyramid" provision restricts the coverage available under the CGL policy as well. Bohemia Bay contends that, with respect to the additional named insureds, ACE's position could result in unintended and unbargained-for consequences.

37. Bohemia Bay believes that a resolution of this dispute will permit a more efficient settlement of the underlying Standard suit.

WHEREFORE, Plaintiff Bohemia Bay respectfully requests that this Honorable Court grant Declaratory Judgment as to the following issues:

- (1) Declare that the MOP policy is excess over the CGL policy and, as a result, the anti-pyramid provision does not apply to limit coverage.
- (2) In the alternative, declare that the MOP policy's anti-pyramid provision does not apply because one Coverage Part from *two different policies* applies to the same "occurrence," that is, one Coverage Part from the CGL policy and one Coverage Part from the MOP policy. As such, two different Coverage Parts from two different policies apply to this "occurrence."
- (3) In the alternative, declare that the MOP policy's anti-pyramid provision is ambiguous, thereby rendering said provision unenforceable.
- (4) Declare that, under the MOP and CGL policies, \$2,000,000 of total coverage is available.
- (5) Determine an award of costs, expenses, attorney's fees, and interest (pre- and post-judgment) thereon, necessitated in the bringing of this action.

(6) Any and all further relief that this Honorable Court deems appropriate, just, and equitable under the circumstances.

Respectfully submitted,



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