

Court declare that the primary insurers had the obligation to defend and indemnify the insureds with respect to the underlying action and pay the premium to secure a bond to stay the execution of judgment for any appeal of the underlying action. A further declaration is sought finding that attorney's fees awarded as a part of the underlying verdict do not constitute covered damages as described fully herein.

II. PARTIES

2. ACE Property and Casualty Company ("ACE"), a member company of ACE Group of Insurance Companies, is a Pennsylvania corporation with its principal place of business in Philadelphia, Pennsylvania and is authorized to write liability insurance policies in Georgia.

3. Liberty Surplus Insurance Corporation ("Liberty") is a New Hampshire corporation with its principal place of business in Boston, Massachusetts and is authorized to write liability insurance policies in Georgia.

4. Axis Surplus Insurance Company ("Axis") is a Maryland company with its principal place of business in Glenview, Illinois and is authorized to write liability insurance policies in Georgia.

5. First Specialty Insurance Corporation ("First Specialty") is a Missouri company with its principal place of business in Overland Park, Kansas and is authorized to write liability insurance policies in Georgia.

6. American Guarantee & Liability Company (“American Guarantee”) is a New York company with its principal places of business in New York, New York and Schaumburg, Illinois and is authorized to write liability insurance policies in Georgia.

7. Aslan Commons, LLC (“Aslan”) is a Delaware limited liability company with its principal place of business in Irvine, California and is authorized to transact business in Georgia. Aslan is a nominal party from whom no relief is sought.

8. WSE, LLC (“WSE”) is a Georgia limited liability company with its principal place of business in Atlanta, Georgia and is authorized to transact business in Georgia. WSE is a nominal party from whom no relief is sought.

9. Stephen D. Wells (“Wells”) is an individual who, on information and belief, resides in Sandy Springs, Fulton County, Georgia. Wells is named herein as a nominal party from whom no relief is sought.

III. JURISDICTION AND VENUE

10. This declaratory judgment action is brought pursuant to 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure.

11. An actual justiciable controversy exists between ACE and the named defendants within the meaning of 28 U.S.C. § 2201 regarding the priority of insurance coverage provided to Aslan and WSE under the respective insurance policies at issue

in this action for the underlying judgment entered in favor of Wells and against Aslan and WSE.

12. This Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)(1), because the amount in controversy exceeds the sum of \$75,000, exclusive of interest and costs, and the suit is between citizens of different states. In particular, there is complete diversity of citizenship between ACE and the named defendants.

13. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a)(1), because the subject insurance policies issued covered a risk located in the Northern District of Georgia, where the underlying events giving rise to this action also occurred.

IV. FACTS COMMON TO ALL COUNTS

The Wells Action and Verdict

14. On May 29, 2010, Stephen D. Wells suffered injuries from an explosion at his apartment located in a complex owned by Aslan and managed by WSE.

15. Wells filed a tort action against Aslan and WSE seeking damages from his injuries in the suit captioned *Wells v. Aslan Commons, et al.*, which is pending in the State Court of Fulton County, Georgia under number 12EV014738F. A copy of the operative complaint filed in the *Wells* action is attached hereto as Ex. A.

16. The *Wells* action proceeded to trial and on January 15, 2015, a Fulton County, Georgia jury returned a general, non-apportioned verdict against Aslan and

WSE in the amount of \$73M in damages, including \$17.9M in compensatory, \$47.9M in punitive and \$7.16M in attorneys fees under O.C.G.A. § 13-6-11. The punitive damage award was reduced to the statutory cap of \$250,000.

17. On information and belief, Aslan and WSE intend to appeal the verdict.

18. Aslan and WSE had in place a Management Agreement, which among other things, provides that each party procure insurance for the other party. A true and correct copy of the Management Agreement is attached hereto as Ex. B.

The Primary Insurance Policies

19. Axis and First Specialty each issued a primary policy to WSE as a Named Insured, and Liberty issued a primary policy to Aslan Realty Group, LLC as a Named Insured. (These three insurers are collectively referred to as the “Primary Carriers” herein).

Insurer	Number/Type	Period	Limits	Insureds
Liberty Surplus Ins. Corp. (“Liberty”)	DGLSF209149100 Primary CGL	4/1/2010-11	\$1M/occ \$2M/agg	Aslan Realty Group, LLC as named insured
Axis Surplus Ins. Co. (“Axis”)	ECP751725-10 Primary CGL	4/1/2010-11	\$1M/occ \$2M/agg	WSE, LLC as named insured
First Specialty Ins. Corp. (“First Specialty”)	IRG98362 Primary CGL	4/1/2010-11	\$1M/occ \$2M/agg	WSE, LLC as named insured

20. The Axis and First Specialty primary insurance policies issued to WSE provide additional insured coverage to Aslan.

21. The Liberty primary insurance policy issued to Aslan Realty Group, LLC provides additional insured coverage to WSE.

22. Liberty assumed and controlled the defense of both Aslan and its property manager, WSE, which is a defined insured under its policy, in the *Wells* action from the outset of the claim. A true and correct copy of the Liberty Policy is attached hereto as Ex. C.

23. The Axis primary policy issued to WSE, includes a defense obligation and further includes an additional insured endorsement. The additional insured endorsement operates for the benefit of Aslan per the parties' Management Agreement providing that:

It is further agreed that such insurance as is afforded by this policy for the benefit of the above [Aslan] shall be primary insurance as respects to any claim, loss or liability arising out of [WSE's] operations and any other insurance maintained by [Aslan's] shall be excess and non-contributory with the insurance provided hereunder.

A true and correct copy of the Axis Policy is attached hereto as Ex. D.

24. On December 16, 2014, Axis denied a defense obligation in the *Wells* action, claiming that it was not a primary insurer.

25. The First Specialty primary policy issued to WSE, includes a defense obligation, and further includes two endorsements for the benefit of Aslan per the parties' Management Agreement providing that:

With respect to the Third Party shown below, the insurance provided by this policy shall be primary and non-contributing insurance. Any and all other valid and collectible insurance available to such Third Party in respect of work performed by you under written contractual agreements with said Third Party for a loss covered by this policy, shall in no instance be considered as primary, co-insurance, or contributing insurance. Rather, any such other insurance shall be considered excess over and above the insurance provided by this policy. (First Specialty Policy, "Primary and Non-Contributing Insurance (Third-Party), Endorsement Serial No. FSIC-33513 (01/03)).

Name of Person or Organization: Any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. (First Specialty Policy, "Additional Insured-Owner, Lessors or Contractors – (Form B)" Endorsement No. CG 2010 11 85).

A true and correct copy of the First Specialty Policy is attached hereto as Ex. E.

The Excess Insurance Policies

26. The ACE Excess Policy was issued to Aslan Realty Group LLC and the American Guarantee Excess Policy was issued to WSE, LLC as follows:

Insurer	Number/Type	Period	Limits	Insureds
ACE Property and Casualty	M00418463 001	4/1/2010- 11	\$10M/occ \$10M/agg	Aslan Realty Group, LLC as named insured and

Ins. Co. ("ACE")	Excess CGL over Liberty primary policy			follows form of underlying policy as to other insureds
American Guarantee & Liability Ins. Co. ("Zurich")	AUC 930410207 Excess CGL over Axis primary policy	4/1/2010- 11	\$20M/occ \$20M/agg	WSE, LLC as named insured and follows form of underlying policy as to other insureds

27. The ACE Excess Policy includes as an insured "[a]ny person or organization, if insured under 'underlying insurance', provided that coverage provided by this policy for any such insured will be no broader than coverage provided by 'underlying insurance.'"

28. The ACE Excess Policy defines "Underlying Insurance" to include that listed on the "Schedule of Underlying Insurance", which lists the Liberty Policy. A true and correct copy of the ACE Policy is attached hereto as Ex. F.

29. The ACE Excess Policy imposes no defense obligation and provides indemnity only after exhaustion of the underlying insurance as follows:

I. INSURING AGREEMENT

- A. We will pay on behalf of the 'insured' those sums in excess of the 'retained limit' that the 'insured' becomes legally obligated to pay as damages because of 'bodily injury', 'property damage' or 'personal and advertising injury' to which this insurance applies.

30. The ACE Excess Policy defines “Retained limit”, pertinent to this action as the “total applicable limits of ‘underlying insurance’ and any applicable limit of ‘other insurance’ providing coverage to the ‘insured’.”

31. The ACE Excess Policy’s Other Insurance clause provides:

If valid and collectible ‘other insurance’ applies to damages that are also covered by this policy, this policy will apply excess of the ‘other insurance’ and will not contribute with such ‘other insurance’. This provision will not apply if the ‘other insurance’ is written to be excess of this policy.

32. The ACE Excess Policy defines “other insurance” as “a policy of insurance providing coverage for damages covered in whole by this policy. ‘Other insurance’ does not include ‘underlying insurance’, the amount shown in the Declarations as the Self-Insured Retention or any policy of insurance specifically purchased to be excess of this policy and providing coverage that this policy also provides.”

33. The American Guarantee Policy follows the form of the Axis Policy but also contains its own provisions. A true and correct copy of the American Guarantee Policy is attached hereto as Ex. G.

34. The American Guarantee Policy has a separate “Other Insurance” clause, which provides, as follows:

If other insurance applies to damages that are also covered by this policy, this policy will apply excess of other insurance. Nothing herein will be

construed to make this policy subject to the terms, conditions and limitations of such other insurance. However, this provision will not apply if the other insurance is written to be excess of this policy.

35. The American Guarantee Policy defines “other insurance”, in pertinent part, as “a policy of insurance providing coverage that this policy also provides. Other insurance includes any type of self-insurance or other mechanisms by which an insured arranges for funding of legal liabilities.

V. CAUSES OF ACTION

COUNT ONE

Priority of Coverage

36. Paragraphs 1-35 set forth *supra* are hereby incorporated by reference.

37. As a primary carrier, Liberty accepted its defense obligation and provided a joint defense to Aslan and WSE in the *Wells* action. At all relevant times, Liberty controlled the defense.

38. The remaining Primary Carriers, Axis and First Liberty, did not participate in the defense of Aslan and/or WSE in the *Wells* action.

39. On December 16, 2014, Axis denied a defense obligation in the *Wells* action, claiming that although its policy was written as primary coverage, it was excess to ACE, a true excess carrier.

40. Pursuant to the terms and conditions of the Primary Carriers' policies, their respective defense obligation is only exhausted upon the payment of the per occurrence liability limits on a settlement or judgment.

41. The Primary Carriers have not made any payments in connection with the judgment entered in the *Wells* action notwithstanding Plaintiff's counsel's pretrial demand of \$5M, \$2M of which he sought from Liberty and Axis. See Ex. H, Plaintiff's Motion for Pre-Judgment Interest and Exhibits Thereto.

42. Liberty's tender of its limits to ACE immediately before trial does not exhaust its recognized and continuing defense obligation.

43. Following the verdict, the Primary Carriers have failed to meet their ongoing defense obligations in paying for the premium to secure the bond for appeal, which they are obligated to do.

44. The provisions of the ACE Excess Policy, quoted above, demonstrates that it is a true excess insurer, which, as a matter of law, makes it excess over all primary policies, including the primary policies issued by the Primary Carriers regardless of the "other insurance" clauses contained in the primary policies.

45. The priority of coverage for the *Wells* action is exhaustion of all primary coverage before the ACE Excess Policy, a true excess policy, and the American Guarantee Excess Policy, also a true excess policy, are triggered.

46. Following the exhaustion of the Primary Carriers' coverage, that the true excess insurers – ACE and American Guarantee – share the remaining indemnity obligations.

47. The indemnity obligations of the true excess insurers, ACE and American Guarantee, will be shared equally, as the “other insurance” clauses contained in those policies are mutually repugnant in that they contain the same excess language, thereby canceling each other out.

48. The insurers had notice of this priority of coverage as early as March 19, 2013 when Plaintiffs made a \$5M demand seeking \$1M each from Liberty and Axis and \$3M jointly from ACE and Zurich. See Exs. B and H Attached Thereto.

49. Despite notice prior to the underlying verdict, ACE has no knowledge that Axis or Zurich took any action.

WHEREFORE, ACE respectfully requests this Court enter a judgment determining and declaring the rights, duties and obligations of ACE under the ACE Excess Policy, award costs, and grant such further and supplemental relief as it deems necessary and proper, including the following:

- A. That the Management Agreement entered into between Aslan and WSE was a valid and effective agreement on the date of Wells incident;
- B. That the Liberty, Axis and First Specialty Policies provide primary coverage to WSE and Aslan for the *Wells* Action;

- C. That the defense obligation provided by the Liberty, Axis and First Specialty Policies has not been exhausted as the per occurrence liability limits on each of these policies remain unpaid;
- D. That the ACE Excess Policy is an excess policy over the primary policies issued by Liberty, Axis and First Specialty;
- E. That the ACE Excess Policy has no duty to pay any sums on behalf of WSE and/or Aslan until all primary per occurrence limits of liability coverage is exhausted by the payment of settlement or judgment;
- F. That upon exhaustion of the Primary Carriers' liability limits that the ACE Excess Policy and the American Guarantee Excess Policy pay in equal shares for the entry of settlement or judgment up to the exhaustion of their respective liability limits; and
- G. Any further determinations, declarations and relief as the Court deems proper and necessary.

COUNT TWO
Payment of Premium for Appeal Bond

50. Paragraphs 1-49 set forth *supra* are hereby incorporated by reference.

51. The Liberty, Axis and First Specialty Policies each include coverage for

the payment of appeal bonds as follows:

SUPPLEMENTARY PAYMENTS – COVERAGES

- 1. We will pay, with respect to any claim we investigate or settle, or any 'suit' against an insured we defend: ***
 - c. The cost of bonds to release attachments, but only for bond amounts within the applicable limits of insurance. We do not have to furnish these bonds.

(Exs. B, C, D).

52. Liberty defended the *Wells* action.

53. As part of the ongoing defense obligation, the Primary Carriers each are legally obligated to pay for the premium to secure the appeal bond for the *Wells* action.

54. The ACE Excess Policy covers payments associated with a bond only where it assumes the defense per the following language:

DEFENSE AND SUPPLEMENTARY PAYMENTS

D. If we assume the defense of any 'suit' against the 'insured, we will pay in addition to the applicable Limit of insurance:

3. The cost of bonds to release attachments, but only for bond amounts within the applicable Limit of Insurance. We do not have to furnish these bonds.
4. The cost of appeal bonds required by law to appeal any suit we defend but only for bond amounts within the application Limit of insurance. We do not have to apply for or furnish such bond.

(Ex. E, Form XS-20835 (08/06), pgs. 3-4).

55. At no time did ACE assume the defense of Aslan and/or WSE in the *Wells* action.

56. Absent its assumption of the defense in the *Wells* action, ACE has no duty to pay for the premium to secure the appeal bond.

WHEREFORE, ACE respectfully requests this Court enter a judgment determining and declaring the rights, duties and obligations of ACE under the ACE Excess Policy, award costs, and grant such further and supplemental relief as it deems necessary and proper, including the following:

- A. That the Liberty, Axis and First Specialty Policies, as Primary Carriers, are obligated to pay all premiums and any other costs associated with securing a bond to stay the Wells judgment on appeal;
- B. That ACE did not assume the defense of the Wells action, thereby eliminating any obligation to pay the premium or costs associated with an appeal bond; and
- C. Any further determinations, declarations and relief as the Court deems proper and necessary.

COUNT THREE

Attorneys Fees Awarded Not Covered Under ACE Excess Policy

57. Paragraphs 1-56 set forth *supra* are hereby incorporated by reference.

58. The jury awarded \$7,160,000 to Wells in attorney's fees under O.C.G.A.

§ 13-6-11, which provides that:

The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.

59. The O.C.G.A. § 13-6-11 award resulted because of the defense provided, which at all times was controlled and provided by Liberty.

60. ACE did not control the defense and any award of attorneys fees pursuant to O.C.G.A. § 13-6-11 should be attributed to the Primary Carriers that assigned defense counsel and controlled the defense.

61. In the alternative, the ACE Excess Policy insuring agreement provides that:

I. INSURING AGREEMENT

A. We will pay on behalf of the ‘insured’ those sums in excess of the ‘retained limit’ that the ‘insured’ becomes legally obligated to pay as damages **because of ‘bodily injury’, ‘property damage’ or ‘personal and advertising injury’** to which this insurance applies.(emphasis added).

62. The attorney’s fees awarded in the *Wells* action are not “damages “because of” of any bodily injury or property damage that Wells suffered.

63. The ACE Excess Policy also provides as follows:

DEFENSE AND SUPPLEMENTARY PAYMENTS

D. If we assume the defense of any ‘suit’ against the ‘insured, we will pay in addition to the applicable Limit of insurance:

6. All costs taxed against the ‘insured’ in the ‘suit’.

(Ex., E, Form XS-20835 (08/06), pgs. 3-4).

64. The attorneys fees awarded in the *Wells* action under O.C.G.A. § 13-6-11 are not taxable costs contemplated for coverage under the ACE Excess Policy.

65. ACE did not assume the defense in the *Wells* action, so it has no obligation to pay for taxable costs.

WHEREFORE, ACE respectfully requests this Court enter a judgment determining and declaring the rights, duties and obligations of ACE under the ACE Excess Policy, award costs, and grant such further and supplemental relief as it deems necessary and proper, including the following:

- A. That the attorney's fees awarded in the *Wells* action under O.C.G.A. § 13-6-11 are should be covered by the Primary Carriers, which appointed defense counsel and controlled the defense at all times;
- B. That the attorney's fees awarded in the *Wells* action under O.C.G.A. § 13-6-11 are not covered damages under the ACE Excess Policy;
- C. That the attorney's fees awarded in the *Wells* action under O.C.G.A. § 13-6-11 are not covered taxable costs under the ACE Excess Policy;
- D. That ACE has no obligation to pay the attorney's fees awarded the *Wells* action under the ACE Excess Policy;
- E. Any further determinations, declarations and relief as the Court deems proper and necessary.

Respectfully submitted,

This 1st Day of April 2015.

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