

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

AIT HOLDING COMPANY and MICHAEL)	
A. EVANS,)	
)	
<i>Plaintiffs,</i>)	
)	
v.)	Cause No. 1:15-cv-541
)	
ACE AMERICAN INSURANCE)	
COMPANY,)	
)	
<i>Defendant.</i>)	
)	

COMPLAINT

Plaintiffs AIT Holding Company (“AIT Holding”) and Dr. Michael A. Evans (“Dr. Evans”) seek a declaration that defendant ACE American Insurance Company (“ACE”), an excess-liability insurer, must abide by the terms of the underlying insurance policy and provide excess-liability coverage for loss incurred as a result of claims made against Dr. Evans and other AIT Insureds by the Department of Labor in a related suit in this District—*Perez v. PBI Bank, Inc. et al.*, Cause No. 1:14-cv-01429-SEB-MJD. For their complaint against ACE, AIT and Dr. Evans state:

THE PARTIES

1. AIT Holding is an Indiana corporation with its principal place of business in Indianapolis. American Institute of Toxicology, Inc. d/b/a AIT Laboratories (“AIT Labs”) is a wholly-owned subsidiary of AIT Holding (together AIT Holding and AIT Labs, “AIT”).
2. Dr. Evans is a citizen of Indiana and is a member of AIT’s Board of Directors.
3. ACE is a Pennsylvania corporation with its principal place of business in Philadelphia.

JURISDICTION & VENUE

4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332 because there is diversity of citizenship between the parties and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

5. This Court may declare the rights and other legal relations to the parties pursuant to the provisions of the Declaratory Judgment Act, 28 U.S.C. § 2201 *et. seq.*, because this is a case of actual controversy within this Court's jurisdiction seeking a declaratory judgment that ACE is obligated to abide by the terms of the underlying insurance policy and provide excess-liability coverage for the defense of claims made against AIT and Dr. Evans by the Department of Labor.

6. Venue in this District is proper pursuant to 28 U.S.C. § 1391(b)(2) and (3) because the events giving rise to the claims in this action occurred in and ACE is subject to personal jurisdiction in this District.

THE INSURANCE POLICIES

7. In 2013, AIT purchased from Federal Insurance Company ("Federal") a "Forefront Portfolio 3.0" insurance policy, Policy No. 8235-1492 (the "Federal Policy"), that provides claims-made liability insurance for the period July 1, 2013 to July 1, 2014. The limits of the Federal Policy are \$5 million. A true and accurate copy of the Federal Policy is attached hereto as **Exhibit 1**.

8. To insure against loss in excess of the Federal Policy's limits, AIT purchased an Excess-Liability Policy, Policy No. DOX G25575866 001 (the "ACE Policy"), from ACE that covers the same period and the same risks as the Federal Policy. A true and accurate copy of the ACE Policy is attached hereto as **Exhibit 2**.

9. Section I of the Fiduciary Liability Coverage Part of the Federal Policy provides, in part:

Insuring Clause (A): Fiduciary Liability Coverage

(A) The Company shall pay, on behalf of an **Insured**, **Loss** on account of a **Claim** first made against the **Insured** during the **Policy Period**, or the Extended Reporting Period if applicable, for a **Wrongful Act** by the **Insured** or by any natural person for whose **Wrongful Acts** the **Insured** is legally liable.

10. Section II of the Fiduciary Liability Coverage Part of the Federal Policy defines “**Insured**” as “any **Organization**, any **Plan**, any **Committee** and any **Insured Person**.” It further defines an “**Insured Person**” to mean any:

- (A) **Executive** or **Employee** of an **Organization**;
- (B) employee of a **Sponsored Plan**;
- (C) past, present or future natural person trustee of an **Organization** or of the **Sponsored Plan**; and
- (D) past, present or future natural person trustee or fiduciary, when such natural person is added as an **Insured Person** by specific written endorsement to this Coverage Part.

11. AIT and Dr. Evans are both “Insureds” under the Fiduciary Liability Coverage Part of the Federal Policy and therefore are Insureds under the ACE Policy.

12. Section II of the Fiduciary Liability Coverage Part of the Federal Policy defines “**Loss**” to include judgment, settlement, and “**Defense Costs**,” including costs, charges, fees, and expenses incurred in investigating, defending, opposing or appealing any “**Claim**.”

13. Section II of the Federal Policy actually defines “**Claim**” as any:

- (A) written demand first received by an **Insured** for monetary or non-monetary relief, including injunctive relief;
- (B) civil proceeding commenced by the service of a complaint or similar pleading;

- (C) criminal proceeding commenced by: (1) an arrest, or (2) return of an indictment, information or similar document;
- (D) formal administrative or formal regulatory proceeding commenced by the filing of a notice of charges, formal investigative order or similar document;
- (E) arbitration or mediation proceeding commenced by the receipt of a demand for arbitration, demand for mediation, or similar document;
- (F) written notice of commencement of a fact-finding investigation by the U.S. Department of Labor, the U.S. Pension Benefit Guaranty Corporation, or any similar governmental authority located outside the United States, including, the Pensions Ombudsman appointed by the United Kingdom Secretary of State for Work and Pensions or by the United Kingdom Occupational Pensions Regulatory Authority or any successor thereto; or
- (G) official request for **Extradition** of an **Insured Person**,
against an **Insured** for a **Wrongful Act**, including any appeal therefrom;
or
- (H) a written request first received by an **Insured** to toll or waive a statute of limitations relating to a potential **Claim** as described in Subsections (A) through (G) above.

14. Section II of the Fiduciary Liability Coverage Part of the Federal Policy also defines “Wrongful Act” as any actual or alleged:

- (A) breach of the responsibilities, obligations or duties imposed by **ERISA** upon fiduciaries of the **Sponsored Plan** committed, attempted or allegedly committed or attempted by an **Insured** while acting in the **Insured’s** capacity as a fiduciary;
- (B) negligent act, error or omission in the **Administration** of any **Plan** committed, attempted or allegedly committed or attempted by an **Insured**; or
- (C) matter, other than as set forth in (A) or (B) above, claimed against an **Insured** solely by reason of the **Insured’s** service as a fiduciary of any **Sponsored Plan**.

15. Thus the ACE Policy provides coverage for the “AIT Insureds”—Dr. Evans, AIT, and other persons described above in subsections (A) through (D)—for any “Loss” on account of a “Claim” first made between July 1, 2013 and July 1, 2014.

16. Because AIT has certain obligations to indemnify Dr. Evans and others for losses they incur as a result of certain claims, such as those at issue here, AIT is also entitled to coverage for “Losses” that it incurs on account of its indemnity obligations.

THE AIT ESOP PLAN

17. AIT executed an Employee Stock Ownership Plan and Trust Agreement (the “Plan Agreement”) effective January 1, 2009 that established an Employee Stock Ownership Plan (the “Plan”) for the benefit of eligible employees.

18. AIT was the Plan sponsor under the Plan Agreement, and Dr. Evans was a member of the “Committee,” as defined in Section 1.7 of the Plan Agreement, charged with administering the Plan. Under Section 10.12 of the Plan Agreement, AIT is thus obligated to indemnify Dr. Evans “from any and all claims, loss, damage, expense and liability” that arise from “any act or omission” by Dr. Evans that a court does not find was fraudulent or was committed in bad faith.

19. The Plan Agreement also designated PBI Bank, Inc. (the “Trustee”) as the Plan’s trustee. AIT’s Board of Directors confirmed Trustee’s appointment on June 30, 2009. Dr. Evans was a member of AIT’s Board of Directors at this time.

20. Also on June 30, 2009, the Trustee caused the Plan to purchase from Dr. Evans and four other shareholders of AIT, all of the outstanding shares of AIT (the “2009 Transaction”).

**THE DOL'S WRITTEN NOTICE OF CLAIM,
FEDERAL'S CONFIRMATION OF COVERAGE, AND ACE'S DENIAL**

21. In September 2013, the DOL made a written request that AIT, Dr. Evans, and other AIT Insureds execute a tolling agreement in order to toll the statute of limitations set forth in ERISA to preserve the time in which the DOL Secretary could assert a claim under ERISA. Then in November, the DOL faxed a letter to Trustee asserting that Trustee may have violated provisions of ERISA.

22. On November 19, 2013, AIT, through its insurance broker Hays Companies, notified Federal and ACE of the allegations made in the DOL letter to the Trustee and that the letter alleged Wrongful Acts that could arise from activities of the Insureds.

23. On December 11, 2013, ACE responded to AIT's November 19 notice with a letter (i) acknowledging receipt of notice, (ii) affirming that the ACE Policy follows the form of the Federal Policy, and (iii) requesting a copy of Federal's position regarding coverage.

24. On December 20, 2013, Federal agreed to provide coverage for the defense of the matter, subject to the terms of the Federal Policy.

25. On March 7, 2014, the DOL sent a letter to AIT alleging for the first time that AIT, Dr. Evans, and other AIT Insureds had violated provisions of ERISA in connection with the 2009 Transaction (the "DOL Claims").

26. Following receipt of the DOL Claims, Dr. Evans' counsel wrote separately to Federal and ACE to confirm Dr. Evans' status as an Insured under the Federal, and thus the ACE, Policy.

27. Federal responded to Dr. Evans' counsel and confirmed that its December 20 letter applied to Dr. Evans and that his rights under the Federal Policy were secure. Federal has since followed through on its commitment to AIT Insureds and has continued to provide

coverage for various AIT Insureds' defense and settlement of the DOL Claims, including for AIT's indemnity obligations, as contemplated by the Federal Policy.

28. In stark contrast to Federal and despite Federal's continued provision of coverage under the Federal Policy, ACE refused to issue a coverage position in response to Dr. Evans' counsel's inquiry, despite reiterating that the ACE Policy follows the form of the Federal Policy. Then on June 2, 2014, ACE flatly denied coverage for the DOL Claims and asserted that the DOL Claims are not covered because they were not first made during the ACE Policy coverage period. A true and accurate copy of the ACE Policy is attached hereto as **Exhibit 3**.

29. In its June 2 letter, ACE asserted that it was denying coverage on two grounds. First, ACE claimed that the DOL Claims were not first made during the policy period. Second, and based on the same theory, ACE claimed that the DOL Claims should have been disclosed in the June 2013 application for the policy.

30. ACE's denial is specifically based on its contention that the DOL Claims were first made in January 2011, when the DOL initiated an audit of the AIT ERISA plan.

31. The DOL audit was initiated by a letter dated January 4, 2011, from its Regional Director Paul C. Baumann to Mr. Edvin Xhabo, Controller and Director of Finance of AIT Labs, requesting cooperation with the DOL's "examination of the Plan to determine compliance with provisions of ERISA" (the "DOL Audit Notice"). The DOL Audit Notice did not assert that anyone had committed violation of ERISA or that such a violation was threatened. The DOL Audit Notice clearly indicated that the purpose of the review was to determine the Plan's *compliance* with ERISA. It did not indicate that it was commencing an investigation of any alleged wrongful act by any Insured. A true and accurate copy of the DOL Audit Notice is attached as **Exhibit 4**.

32. In support of its June 2 denial of coverage, ACE's counsel purports to quote the Federal Policy's definition of "Claim." His letter states:

Based on the information submitted to ACE to date, there does not appear to be any coverage for this matter under the ACE Excess Policy for the following reasons:

1. The ACE Excess Policy is a claims made policy that covers only claims that are first made against the Insureds during the policy period from July 1, 2013 to July 1, 2014. The term "Claim" is defined in section II of the Fiduciary Coverage Part of the Federal Policy, to which the ACE Excess Policy follows form, as follows:

Claim means any:

- (A) written demand first received by an **Insured** for monetary or non-monetary relief, including injunctive relief;
- (B) civil proceeding commenced by the service of a complaint or similar pleading;
- (C) criminal proceeding commenced by: (1) an arrest, or (2) return of an indictment, information or similar document;
- (D) formal administrative or formal regulatory proceeding commenced by the filing of a notice of charges, formal investigative order or similar document;
- (E) arbitration or mediation proceeding commenced by the receipt of a demand for arbitration, demand for mediation, or similar document;
- (F) written notice of commencement of a fact-finding investigation by the U.S. Department of Labor, the U.S. Pension Benefit Guaranty Corporation, or any similar governmental authority located outside the United States, including, the Pensions Ombudsman appointed by the United Kingdom Secretary of State for Work and Pensions or by the United Kingdom Occupational Pensions regulatory Authority or any successor thereto; or
- (G) official request for **Extradition** of an **Insured Person**, against an **Insured** for a **Wrongful Act**, including any appeal therefrom; or

- (H) a written request first received by an **Insured** to toll or waive a statute of limitations relating to a potential **Claim** as described in Subsections (A) through (G) above.

As noted above, the DOL initiated an investigation of AIT on January 4, 2011 that included an investigation regarding the Transaction, which constitutes a Claim as defined in subparagraph F of the definition. This was 2 1/2 years before the inception of the ACE Policy Period. Moreover, defense counsel for AIT met with and produced documents to the DOL in connection with its Investigation of the Transaction in June 2013, prior to the July 1, 2013 inception of the ACE Excess Policy. This also comes within the definition of Claim in subparagraph F.

Accordingly, the DOL Investigation is not a Claim that was first made during the Policy Period of the ACE Excess Policy and coverage is not afforded for this matter.

33. ACE's June 2 letter moves the phrase "against an **Insured** for a **Wrongful Act**, including any appeal therefrom," to modify only subparagraph (G) and then exploits this erroneous definition of "Claim" to incorrectly assert that AIT's receipt of the DOL's Audit Notice in January 2011 constituted a "Claim" first made against AIT in 2011—and therefore not covered by the ACE policy and required to be disclosed in AIT's June 2013 Application.

34. Despite requests to reevaluate its coverage position, ACE refused to do so, and on July 7, 2014, ACE reiterated its position that the ACE Policy provides no coverage for the DOL Claims.

35. In the meantime, Federal continued to adhere to its commitment to provide coverage under the Federal Policy for the ongoing defense of AIT, Dr. Evans, and other AIT Insureds, as well as for AIT's indemnity obligations, as contemplated by the Federal Policy.

36. In August 2014, the DOL agreed to settle its claims against AIT and others who the DOL had claimed had committed Wrongful Acts, with the exception of Trustee and Dr. Evans.

37. On August 29, 2014, the DOL, filed an action in this District against Trustee, Dr. Evans, and the Plan, Cause No. 1:14-cv-01429-SEB-MJD and asserted allegations first made in the DOL's November 2013 letter (the "ERISA Action").

38. On September 4, 2014, ACE sent another letter to AIT reaffirming its denial of coverage.

39. Despite AIT's persistent assertion—and ACE's own acknowledgement—that the ACE Policy requires ACE to follow the coverage terms of the Federal Policy, ACE continues to deny its obligation to do so.

40. As a result of Federal's payment of settlement and defense costs, the coverage limits of the Federal Policy have been substantially exhausted, but the ERISA Action continues.

41. A present and actionable controversy exists between AIT and Dr. Evans, on the one hand, and ACE regarding ACE's obligation under the ACE Policy to adhere to the terms of the Federal Policy and to provide coverage for the AIT Insureds' defense of the DOL Claims and the ERISA Action, including AIT's indemnity obligations covered by the Federal Policy.

42. ACE's proffered reason for denying coverage is without basis in law or fact.

43. This Court's declaration of the parties' respective rights and obligations will resolve the present controversy between AIT and Dr. Evans and ACE.

44. Pursuant to Federal Rule of Civil Procedure 57, AIT and Dr. Evans request a speedy hearing of this action and that the hearing be advanced on the Court's calendar.

WHEREFORE, plaintiffs AIT and Dr. Evans pray that judgment be entered in their favor and against the defendant ACE:

1. Declaring that ACE is obligated to:
 - (a) Defend Dr. Evans in the ERISA Action upon exhaustion of the underlying Federal Policy, and
 - (b) Pay on behalf of Dr. Evans, AIT, and other AIT Insureds, all covered Losses incurred in the ERISA action subject only to the ACE Policy's limit of liability; and
2. Awarding AIT and Dr. Evans their costs of this action; and
3. Awarding AIT and Dr. Evans such other relief as is just and equitable.

Dated: April 6, 2015

FAEGRE BAKER DANIELS LLP

/s/ Christopher G. Scanlon

Christopher G. Scanlon (No. 1583-49)
Stephanie L. Boxell (No. 31234-49)
300 North Meridian Street, Suite 2700
Indianapolis, IN 46204-1782
Telephone: (317) 237-0300
Facsimile: (317) 237-1000
chris.scanlon@faegrebd.com
stephanie.boxell@faegrebd.com

Attorneys for Plaintiff AIT Holding Company

BOSE McKINNEY & EVANS LLP

/s/ Andrew M. McNeil

Andrew M. McNeil (No. 19140-49)
Donald M. Meyer (No. 10196-49)
111 Monument Circle, Suite 2700
Indianapolis, IN 46204
Telephone: (317) 684-5000
Facsimile: (317) 223-0260
amcneil@boselaw.com
dmeyer@boselaw.com

Attorneys for Plaintiff Dr. Michael Evans