

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

THE TRAVELERS PROPERTY CASUALTY  
COMPANY OF AMERICA,

Plaintiff,

v

Case No. 14-139843-CB  
Hon. Wendy Potts

XL INSURANCE AMERICA, INC, et al,

Defendants.

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OPINION AND ORDER RE:  
JOINT MOTION FOR SUMMARY DISPOSITION REGARDING THE PRIORITY OF  
COVERAGE AS BETWEEN THE EXCESS POLICIES AT ISSUE  
AND  
DEFENDANT/THIRD-PARTY DEFENDANT IRONSHORE SPECIALTY INSURANCE  
COMPANY'S MOTION FOR SUMMARY DISPOSITION

At a session of Court  
Held in Pontiac, Michigan

**FEB 11 2015**

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On August 10, 2012, Anthony Prainito, an employee of Defendant CBS Radio Inc. of Detroit, was driving a vehicle when he collided with a vehicle driven by James Cram. Prainito's vehicle was owned by Defendant Volkswagen Group of America, who gave it to Defendant Robert Bosch, LLC, who then loaned to CBS Radio. The collision severely injured Cram and his passenger L. Brooks Patterson, both of whom sued Prainito and CBS Radio in the underlying cases, *Patterson v Prainito*, 2013-132742-NI and *Cram v Prainito*, 2013-132751-NI. Plaintiff Travelers Property Casualty Company, who was the primary insurer for CBS Radio and Prainito, filed this action to determine the respective liability of the Defendant primary and excess insurers to cover damages in Cram and Patterson's underlying lawsuits. Patterson and Cram settled their

claims in the underlying cases, and all of the primary insurers paid their policy limits to partially satisfy the settlement and resolved their disputes in this case. The key issue remaining in this case is the priority of coverage for the three excess insurers: Defendant Ironshore Specialty Insurance Company, who insured Volkswagen under a policy that was excess to its primary policy, XL Insurance America, Inc.; Defendant Allianz Global Risks US Insurance Company, who insured Robert Bosch under an umbrella excess policy, and Third-Party Defendant ACE Property and Casualty Insurance Company, who insured CBS Radio and Prainito under an umbrella excess policy. The current posture of the case pits Ironshore against the two umbrella insurers, Allianz and ACE who have agreed to share payment of the excess liability they owe.

Ironshore, Ace, and Allianz now move for summary disposition of the excess coverage priority issue under MCR 2.116(C)(10), which tests the factual support for the claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Interpretation of insurance policy provisions is generally a question of law. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469; 663 NW2d 447 (2003). Insurance policies are subject to the same construction principles as any other contract, and the Court must construe and apply unambiguous contract provisions as written. *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005).

The first step in the analysis is determining whether the three policies at issue here are all at the same tier or layer of coverage. Policies that are at the same tier of coverage have prorated liability unless the policy language gives one of the policies priority over the others. See *State Farm Fire & Casualty Co v Liberty Ins Underwriters, Inc*, 398 Fed Appx 128, 132 (CA 6, 2010). Although this case initially involved varying coverage tiers, the sole remaining dispute is between three policies that are all “true excess” policies and, thus, occupy the same coverage tier. True excess coverage occurs where an insured has a two policies covering the same loss, but

one of the policies is written with the expectation that it will be the primary policy to investigate and defend claims to the limits of its coverage and the other policy's coverage will not be triggered until the primary policy is exhausted. *Bosco v Bauermeister*, 456 Mich 279, 295; 571 NW2d 509 (1997). The Ironshore, ACE, and Allianz policies are all true excess insurers because they were all written with the intention that their coverage would be excess to one or more underlying primary policies.

If all three of these excess policies were of the same nature and employed the same or equivalent policy language, the Court's decision would be very simple because their liability would be prorated. *State Farm, supra*. However, the ACE and Allianz umbrella excess policies are a distinct type of excess insurance, with distinct policy language, from the Ironshore policy. An umbrella policy is intended to provide general catastrophic coverage to an insurer after all underlying primary coverage is exhausted. *Bosco, supra* at 294. The Ironshore policy, by contrast, provided excess coverage for the same risks insured by XL's primary insurance policy according to the terms and conditions of the XL policy that are not inconsistent with Ironshore's terms. That is where the dispute arises. Because the Ironshore policy adopts the general terms and conditions of the XL policy, a primary coverage policy, the Ironshore policy's language differs significantly from the umbrella policies' language, especially with regard to their "other insurance" clauses. The two umbrella insurers have nearly identical "other insurance" clauses.

The ACE policy states that

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.

The Allianz policy states:

If valid and collectible insurance applies to damages that are also covered by this policy, this policy will apply as excess of the “other insurance” and will not contribute with the “other insurance.” However, this provision will not apply if the “other insurance” is written to be excess of this policy.

Ironshore/XL policy has two “other insurance” provisions:

For any covered “auto” you own, this coverage form provides primary insurance; however, if there is other collectible insurance the insurance provided by this coverage form is excess over such other collectible insurance.

When this Coverage Form and any other Coverage Form or policy covers on the same basis, either excess or primary, we will pay only our share. Our share is the proportion that the Limit of Insurance of our Coverage Form bears to the total of the limits of all the Coverage Forms and policies covering on the same basis.

ACE and Allianz assert that because the Ironshore/XL policy has a prorata other insurance provision, its coverage takes priority over the excess-only other insurance provisions of the umbrella policies. As a general rule, a policy with an other insurance provision providing for prorata coverage has higher priority over and must be exhausted before coverage under an excess other insurance provision. *St. Paul Fire & Marine Ins Co v American Home Assurance Co*, 444 Mich 560, 564; 514 NW2d 113 (1994). Although there is prorata other insurance language in the Ironshore/XL policy, there is also excess other insurance language in that policy. ACE and Allianz essentially ask the Court to ignore the excess language and focus solely on the prorata language. However, the Court must read the insurance contract as a whole to determine its intent. *Tenneco Inc v Amerisure Mutual Ins Co*, 281 Mich App 429, 444; 761 NW2d 846 (2008). Because the Ironshore/XL policy has both prorata and excess language, the Court cannot conclude as a matter of law that the intent of the Ironshore/XL policy was to mandate prorata other insurance coverage only. To the contrary, the language stating that the Ironshore/XL policy is excess to other collectible insurance demonstrates the intent that its coverage is excess only to other applicable coverage.

Even if the Court agreed with ACE and Allianz that the Ironshore/XL policy was only prorata and not excess, the holding of *St. Paul* is not controlling because that decision did not allocate liability among competing true excess insurers. The policies at issue in *St. Paul* were all primary insurers who became “coincidental” excess insurers only by virtue of other insurance language in their policies. See *Bosco, supra* at 293. Thus, the Supreme Court in *St. Paul* was faced with reconciling the effect of other insurance clauses in primary policies and adopted the majority view that coverage for a primary policy with an excess other insurance clause is secondary to coverage from a separate primary policy with a prorata other insurance clause. *St. Paul, supra* at 564. ACE and Allianz cite no published Michigan case holding that a true excess insurer with prorata other insurance policy language has priority for excess coverage over another true excess insurer with excess other insurance language. The Court thus concludes that the prorata language in Ironshore’s policy is not controlling and does not mandate that its coverage has priority over the other excess insurers’ coverage.

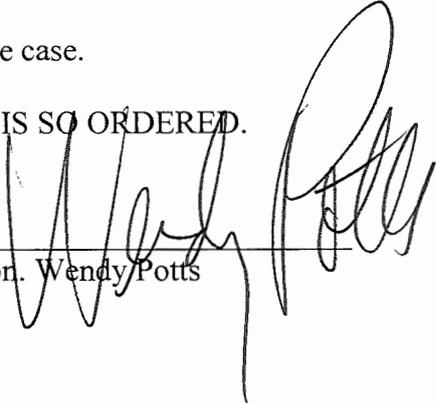
Determining which of the three excess insurers has primary coverage requires the Court to examine the policies’ language and attempt to reconcile the policies to give effect to the reasonable expectations of the parties. *St. Paul, supra* at 577. The other insurance clauses of the ACE and Allianz policies indicate an intent that their coverage would be excess only, and not prorata, to any other valid and collectible insurance unless the other insurance “is written to be excess of this policy.” Review of the Ironshore language confirms that it, in fact, was written to be excess of other collectible insurance, which would include the ACE and Allianz policies. Because the Ironshore policy was written to be excess of the ACE and Allianz coverage, the ACE and Allianz other insurance clauses are inapplicable. Thus, the ACE and Allianz policies

are higher in priority than the Ironshore policies, and the ACE and Allianz coverage must be exhausted before Ironshore's coverage is triggered.

For all of these reasons, the Court denies ACE and Allianz's motion for summary disposition and grants Ironshore's motion for summary disposition.

This order resolves the last pending claim and closes the case.

IT IS SO ORDERED.



Dated: FEB 11 2015

Hon. Wendy Potts