IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

MARTIN RESOURCE MANAGEMENT CORPORATION,	§	
	§	**CIVIL ACTION NO. 6:12-CV-758**
vs.	§	
	§	
ZURICH AMERICAN INSURANCE COMPANY, *et al*.	§	

ORDER

Before the Court is Defendant AXIS Insurance Company's Motion for Summary Judgment ("the Motion"). Docket No. 83. Having reviewed the Motion and record herein, it is **GRANTED**.

BACKGROUND

This is an insurance case where Plaintiff Martin Resource Management Company seeks coverage for costs incurred to defend an underlying litigation. Docket No. 1 at ¶¶ 8–13. In 2008, Plaintiff purchased insurance policies from Zurich American Insurance Company ("Zurich"), AXIS Insurance Company ("AXIS"), and Arch Insurance Company ("Arch") (collectively "the Insurers"). Docket No. 104 at 4. Each policy had a policy period from February 1, 2008 to February 1, 2009 and a limit of liability of $10 million. *Id.* Zurich issued the primary policy, and the AXIS and Arch policies provided excess coverage. *Id.* The provisions in the Zurich policy controlled coverage for all policies, and the AXIS and Arch policies each contained additional conditions and terms. *Id.*

Plaintiff sought coverage from the Insurers relating to an action filed the 215th Harris County Judicial District of Texas, entitled *Scott D. Martin v. Martin Resources Management Corp., et al.*, No. 2008-53948 ("the Harris County Action"). Docket No. 83 at 6. On September

10, 2008, Plaintiff notified the Insurers of the Harris County Action. Docket No. 104 at 8. In 2009, Zurich sent Plaintiff a letter denying coverage. *Id.* at 8. AXIS acknowledged Plaintiff's notice, noting the "matter is currently under review." *Id.* at 9 (quoting September 25, 2008 letter from Francess J. Almanzar, Docket No. 90-33 at 1). Arch did not respond to Plaintiff's notice. *Id.* (citing Docket No. 90-14 at 39:22–41:6).

On October 8, 2012, Plaintiff filed the above-styled action seeking insurance coverage from the Insurers. Docket No. 1 at ¶¶ 8–13. On January 23, 2014, Plaintiff and Zurich filed a Joint Motion to Dismiss with Prejudice. Docket No. 78. Zurich was dismissed from this action on January 27, 2014. Docket No.79. On February 28, 2014, AXIS filed its Motion for Summary Judgment (Docket No. 83); Arch filed its Motion for Summary Judgment (Docket No. 86); Plaintiff filed its Motion for Summary Judgment on Certain Affirmative Defenses (Docket No. 87), and two Motions to Exclude Certain Opinions of Defendants' Experts (Docket Nos. 88 and 89). On May 2, 2014, Plaintiff and Arch filed a Joint Motion to Dismiss with Prejudice. Docket No. 135. Arch was dismissed from this action on May 5, 2014. On April 30, 2014, Plaintiff and AXIS each filed Motions in Limine (Docket Nos. 134 and 133, respectively).

APPLICABLE LAW

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). The moving party bears the initial burden of "informing the district court of the basis for its motion" and identifying the matter that "it believes demonstrate[s] the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). An issue of material fact is genuine if the evidence could lead a reasonable jury to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether a genuine

issue for trial exists, courts view all inferences drawn from the factual record in the light most favorable to the nonmoving party. *Id.*; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Except where federal law governs, a federal district court in a diversity case has the obligation to apply the law of the forum state. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Here, the forum state is Texas. "Under Texas law, insurance policies are interpreted according to the rules of contract construction." *Delta Seaboard Well Serv's, Inc. v. Am. Int'l Specialty Lines Ins. Co.*, 602 F.3d 340, 343 (5th Cir. 2010). Courts construe unambiguous contracts as a matter of law. *Id.* Courts examine the document in its entirety to understand the parties' intent. *Gilbane Bldg. Co. v. Admiral Ins. Co.*, 664 F.3d 589, 597 (5th Cir. 2011) (citing *Utica Nat'l Ins. Co. of Texas v. Am. Indem. Co.*, 141 S.W.3d 198, 203 (Tex. 2004)). A contract is not ambiguous "[i]f a policy provision has only one reasonable interpretation." *Id.* (see *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747 (Tex. 2006)). If a contract is ambiguous, courts adopt "a construction that favors the insured as long as that construction is not unreasonable." *Id.* (see *Fiess*, 202 S.W.3d at 746 (citing *Nat'l Union Fire Ins. Co. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991))).

ANALYSIS

AXIS argues its policy cannot be triggered because the underlying limit in the Zurich policy was not exhausted. Docket No. 83 at 9. AXIS contends the AXIS policy applies "only after all applicable Underlying Insurance with respect to an Insurance Product has been exhausted by actual payment under such Underlying Insurance." *Id.* at 9–10 (quoting the AXIS policy, Docket No. 84-2 at 2). AXIS argues that Plaintiff settling with Zurich for less than the Zurich policy limit of $10 million bars its ability to seek coverage under the AXIS policy because the Zurich policy cannot be "exhausted." *Id.* at 10. AXIS further argues that the AXIS

policy Section IV, Subsections A and B; and Section V, Subsection C, are consistent with its position that the AXIS policy only provides coverage once the Underlying Insurance is exhausted through "actual payment." *Id.* at 10–11, 14. Finally, AXIS contends that the Fifth Circuit disfavors functional exhaustion because it has held "that an excess policy cannot be triggered after an insured settles his claim with the primary insurer for less than the full limits of that primary policy." *Id.* at 11 (citing *Citigroup Inc. v. Fed. Ins. Co.*, 649 F.3d 367 (5th Cir. 2011)).

Plaintiff responds that the AXIS policy language is ambiguous. Docket No.104 at 11–13. Plaintiff argues the AXIS policy does not clearly state that "'actual payment' requires payment of the *full limit* of the underlying Zurich policy" by Zurich alone. *Id.* at 13 (emphasis in the original). Plaintiff further argues the AXIS policy fails to "preclude exhaustion of the underlying insurance by actual payment by [Plaintiff]." *Id.* Plaintiff points to an opinion from the Eastern District of Virginia, which held that the AXIS policy language is ambiguous. *Id.* at 11–13 (citing *Maximus, Inc. v. Twin City Fire Ins. Co., et al.*, 856 F.Supp.2d 797 (E.D. Va. 2012)). Plaintiff contends the *Maximus* Court (applying Virginia law) found the policy language ambiguous because it "does not clearly require all underlying insurance carriers themselves to pay the full amounts of their policy limits in order to trigger the [AXIS] Policy's coverage and does not clearly provide that settling for less than the policy limit, even if the insured fills the gap, fails to satisfy the exhaustion requirement." *Id.* at 11–12 (quoting *Maximus* at 799). Plaintiff further contends the *Maximus* Court distinguished the AXIS policy language from the policies construed by the *Citigroup* Court because the AXIS policy does not "explicitly requir[e] payment by the insurers of the full limit of the underlying polic[y]." *Id.* at 12 (quoting *Maximus* at 803). In light

of *Maximus*, Plaintiff argues that the language in Section V, Subsection C, of the AXIS policy allows for Plaintiff to "fill the gap." *Id.* at 14.

Plaintiff further contends that Defendant's argument that an insured party forfeits coverage from its excess carriers by entering into a settlement agreement with the underlying insurance provider is inconsistent with Texas public policy. *Id.* at 15 (citing *Transport Ins. Co. v. Faircloth*, 898 S.W.2d 269, 280 (Tex. 1995) ("Public policy favors amicable settlement of controversies)). Plaintiff argues if courts allow excess insurers "to escape their coverage obligations based solely on settlements with underlying insurers for less than total policy limits, policyholders will have no choice but to fight every coverage case to the bitter end to avoid forfeiture of their excess coverage." *Id.* at 15. Plaintiff again points to *Maximus* and Section V, Subsection C, of the AXIS policy arguing that the AXIS policy encourages settlements and allows Plaintiff to fill the gap to avoid forfeiture of its excess coverage. *Id.*

In *Citigroup*, the Fifth Circuit (applying Texas law) affirmed the District Court's conclusion that the excess carriers were not liable, holding that an insured's settlement with its underlying insurance carrier "did not satisfy the requirements necessary to trigger the excess insurers' coverage." *Citigroup*, 649 F.3d at 373. The Court examined the plain meaning of the policy language in four insurance policies for excess coverage — the Federal policy, the St. Paul policy, the SR policy, and the Steadfast policy. *Id.* at 372–373. The Court held each policy unambiguously explained exhaustion of the underlying policy occurred when the underlying carrier paid the insured the full amount of the underlying insurer's liability "before excess coverage attaches." *Id.* at 373.

Conversely, the *Maximus* Court held the AXIS policy language was ambiguous for its failure to clearly explain that coverage only attached once the underlying insurance carrier paid

its full liability. *Maximus*, 856 F.Supp.2d at 804. The *Maximus* Court distinguished the AXIS policy language from only two of the four insurance policies in *Citigroup* — the St. Paul policy and the SR Policy. *Id.* at 803. The *Maximus* Court held that the two policies contained much clearer language, which required the underlying insurer to pay the "total amount" or the "full amount." *Id.* (quoting S.D. Tex. Case No. 4:06-cv-03666, Docket Nos. 93-9 at 3 (the St. Paul policy); 93-10 at 4 (the SR policy)).

After examining the entire AXIS policy, the policy language clearly requires that the underlying insurer (*i.e.*, Zurich) must actually pay out its full liability limit (*i.e.*, $10 million) to Plaintiff to trigger coverage from AXIS. Docket No. 84-2. The Insuring Agreement section of the AXIS policy states in relevant part:

> The Insurance afforded under this Policy shall apply only after *all applicable Underlying Insurance with respect to an Insurance Product has been exhausted by actual payment under such Underlying Insurance*, and shall only pay excess of any retention or deductible amounts provided in the Primary Policy and other exhausted Underlying Insurance.

Id. at 2 (emphasis added). This section explains that exhaustion requires "actual payment" of "all applicable Underlying Insurance" (*i.e.*, the Zurich policy). *Id.* Additionally, Subsections A and B of Section IV entitled "Reduction or Exhaustion of Underlying Limits" in the AXIS policy supports this reading and that Zurich must be the payor. *Id.* at 3. Subsections A and B state:

> (A) If the Underlying Limits are *partially reduced solely due to actual payment under the Underlying Insurance*, this Policy shall continue to apply as excess insurance over the remaining Underlying Limits.
> (B) If the Underlying Limits are *wholly exhausted solely due to actual payment under the Underlying Insurance*, this Policy shall continue to apply as primary insurance with respect to the applicable Insurance Product(s) and the retention or deductible, if any, applicable under the Primary Policy(ies) shall apply under this Policy.

Id. (emphasis added). Subsections A and B clarify that "actual payment" conveys the understanding that only payment from the insurer can "reduce" or "exhaust" the underlying

policy's limits of liability. These subsections do not take into account Plaintiff "filling in the gap."

Moreover, Plaintiff's reliance on Section V, Subsection C, is misplaced. Subsection C in Section V, entitled Limits of Liability states:

> *This Policy does not provide coverage for any Claim not covered by the Underlying Insurance, and shall drop down only to the extent that payment is not made under the Underlying Insurance solely by reason of exhaustion of the Underlying Insurance through payments thereunder, and shall not drop down for any other reason.* If any Underlying Insurer fails to make payments under such Underlying Insurance for any reason whatsoever, including without limitation the insolvency of such Underlying Insurer, then the Insureds shall be deemed to have retained any such amounts which are not so paid. If the Underlying Insurance is not so maintained, the Insurer shall not be liable under this Policy to a greater extent than it would have been had such Underlying Insurance been so maintained.

Docket No. 84-2 at 4 (emphasis added to highlight language quoted by Plaintiff). If the emphasized portion were read in isolation, then Plaintiff's interpretation that Zurich policy is exhausted by settlement with Plaintiff "filling in the gap" may be correct. However, when read in the context of the entire subsection, Section V, Subsection C, reads as the AXIS policy is only triggered in the event there is a claim under the Zurich policy and Zurich does not pay — at no fault to Plaintiff. Plaintiff and Zurich mutually chose to end their agreement by settlement; with Zurich paying less than its limit of liability. Entering into a settlement with Zurich, at Plaintiff's own choosing, is outside the scope of the AXIS policy's Section V, Subsection C, and public policy favoring settlement cannot circumvent such an agreement.

Furthermore, case law supports reading that the AXIS policy is not triggered until the underlying insurer pays its full limit of liability. The AXIS policy is most analogous to the language in the Steadfast policy from *Citigroup*, not addressed in *Maximus*. *See* S.D. Tex. Case No. 4:06-cv-03666, Docket No. 93-11 (the Steadfast policy). The "Insuring Agreement" of the Steadfast Policy states coverage attaches:

> [O]nly after all such "Underlying Insurance" has been reduced or exhausted by payments for losses and shall then apply in conformance with the same provisions, limitations, conditions and warranties of the "Primary Policy" at inception, except for premium, limit of liability and as otherwise specifically set forth in the provisions of this Policy.

Id. at 3. The "Depletion of Underlying Limit(s)" section in the Steadfast policy reads in relevant part:

> *In the event of the exhaustion of all the limit(s) of liability of such "Underlying Insurance" solely as result of payment of loss thereunder*, the remaining limits available under this Policy shall, subject to the "Insurer's" Limit of Liability and to the other provisions of this Policy, continue for subsequent loss as primary insurance, and any retention specified in the "Primary Policy" shall be imposed under this Policy as to each claim made; otherwise no retention shall be imposed under this Policy.

Id. at 4 (emphasis added to highlight language quoted by *Citigroup*). The *Citigroup* Court held this provision means "settlement for less than the underlying insurer's limits of liability does not exhaust the underlying policy." *Citigroup*, 649 F.3d 373. The *Citigroup* Court reasoned that it is the underlying insurer that must make "*actual* payment to the insured to exhaust the underlying policy." *Id.* (emphasis in original). Here, the policy language unambiguously states that the excess coverage is applicable "only after *all* applicable Underlying Insurance … has been exhausted by actual payment." Docket No. 84-2 at 2. Indeed, the Axis policy uses the very phrase — "actual payment" of all Underlying Insurance — contemplated by the Fifth Circuit in *Citigroup*. Accordingly, in light of the AXIS policy language and the *Citigroup* opinion, it is clear that in order to trigger the AXIS policy, Zurich must have paid the full amount of its limit of liability as specified in the Zurich policy.

CONCLUSION

For the above-mentioned reasons, the Court hereby **GRANTS** Defendant AXIS's Motion for Summary Judgment. Docket No. 83. Having found the AXIS policy was not triggered, the

Court does not reach the remaining issues in AXIS's Motion for Summary Judgment. Further, all remaining motions not previously ruled on are **DENED AS MOOT**.

So ORDERED and SIGNED this 12th day of May, 2014.

K. Nicole Mitchell

K. NICOLE MITCHELL
UNITED STATES MAGISTRATE JUDGE