2017 IL App (1st) 160413-U

SIXTH DIVISION
March 31, 2017

No. 1-16-0413

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

A.R. THANE RITCHIE, RITCHIE RISK-LINKED STRATEGIES, LLC, RITCHIE CAPITAL PARTNERS LLC, and RITCHIE CAPITAL MANAGEMENT LLC,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellees,	)	
v.	)	No. 15 CH 13480
ARCH SPECIALTY INSURANCE COMPANY and CONTINENTAL CASUALTY COMPANY,	)	Honorable David B. Atkins, Judge Presiding.
Defendants-Appellants.	)	

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 ***Held:*** We reverse the circuit court's orders granting the insureds' motions for judgment on the pleadings and enforcement of an order requiring the excess insurers to provide the costs for an appeal bond in an underlying case. We also reverse the court's decision to deny the excess insurers' motion to reconsider the order granting the insureds' motion for judgment on the pleadings, finding that the excess insurers' exhaustion provisions were unambiguous and must be enforced as written, resulting in the preclusion of the excess insurers' coverage for the appeal bond. We remand for further proceedings.

¶ 2 This dispute concerns the obligation of defendants, Arch Specialty Insurance Company (Arch) and Continental Casualty Company (CNA) (collectively, the Excess Insurers), to provide plaintiffs, A.R. Thane Ritchie, Ritchie Risk-Linked Strategies, LLC, Ritchie Capital Partners LLC, and Ritchie Capital Management LLC (collectively, the Ritchie Insureds), the costs for collateral or other security for an appeal bond in the appeal of a lawsuit, which this Court heard as *Huizenga Managers Fund, LLC v. Ritchie*, No. 1-15-2733 (unpublished order under Supreme Court Rule 23), filed on December 29, 2016. The circuit court granted the Ritchie Insureds' motion for judgment on the pleadings, finding that the Excess Insurers' policies provide coverage for the costs of an appeal bond, including the premium and the collateral, subject to the policies' requirement that the Ritchie Insureds submit a written undertaking to the Excess Insurers guaranteeing repayment of any amounts not covered under the excess policies.

¶ 3 Following that ruling, the Ritchie Insureds moved to enforce the circuit court's order to provide the cost of the appeal bond. The court granted the Ritchie Insureds' motion and denied the Excess Insurers' motions to reconsider the order granting the Ritchie Insureds' motion for judgment on the pleadings and stay enforcement of the order. The Excess Insurers appeal these rulings. The Excess Insurers agreed to provide the security or collateral for the bond, subject to a reservation of rights to appeal the circuit court's rulings in this coverage case. We reverse and remand.

¶ 4 BACKGROUND

¶ 5 On August 1 and October 1, 2005, the plaintiff in the underlying lawsuit, Huizenga Managers Fund, LLC (Huizenga), made two separate investments in a hedge fund operated by the Ritchie Insureds totaling $11 million. The fund collapsed in October 2006, causing Huizenga to suffer losses. Huizenga sued the Ritchie Insureds seeking, among other things, rescission and

a return of its investments. Huizenga's third amended complaint alleged the Ritchie Insureds breached their fiduciary duty and violated section 7323 of the Delaware Securities Act (DSA) (6 Del. C. § 73-605 (West 2012)).

¶ 6 The circuit court entered judgment in favor of Huizenga and against the Ritchie Insureds, jointly and severally, on the counts alleging violations of the DSA relating to the October 1, 2005 investment of approximately $4.6 million with the Ritchie Insureds. The court found the Ritchie Insureds strictly liable under the DSA for failing to disclose certain information to Huizenga in connection with its second investment in the Ritchie Insureds' hedge fund.

¶ 7 The circuit court later entered judgment in the total amount of $9,174,199.63, awarding Huizenga $4,664,542.00 to effect rescission of the second investment and $4,509,657.63 in prejudgment interest. The Ritchie Insureds appealed the judgment to this Court.

¶ 8 When Huizenga filed the underlying action, the Ritchie Insureds had a $20 million tower of insurance coverage, provided by a primary insurer and three excess insurers. Executive Risk Indemnity Inc. (Executive Risk) issued the Ritchie Insureds a $5 million primary policy covering "Loss" including "damages, judgments, awards, settlements and Defense Expenses which an Insured is legally obligated to pay as a result of a Claim." The primary policy specifically states that Executive Risk has no duty to defend any claim, but also provides that the insurer "will, upon written request, pay on a current basis Defense Expenses for which this Policy provides coverage." The primary policy defines "Defense Expenses" as "reasonable legal fees and expenses incurred by or on behalf of any Insured in the defense or appeal of any Claim, including costs of appeal, attachment or similar bonds, provided that the Underwriter shall have no obligation to procure or furnish any bond."

¶ 9 The Executive Risk policy also states:

> "As a condition of any payment of Defense Expenses *** the Underwriter may, at its sole option, require a written undertaking on terms and conditions satisfactory to the Underwriter guaranteeing repayment of any Defense Expenses paid to or on behalf of any Insured if it is finally determined that Loss incurred by such Insured would not be covered."

¶ 10 All three excess insurance policies incorporate the terms and conditions of the Executive Risk primary policy. Indian Harbor Insurance Company (Indian Harbor) issued a first layer excess policy providing $5 million in coverage above the $5 million primary policy. After Executive Risk paid its $5 million policy limits in defense expenses for the underlying lawsuit, Indian Harbor began paying the defense expenses. Indian Harbor agreed to advance the Ritchie Insureds defense costs as to the appeal from the *Huizenga* judgment and to file its policy in lieu of an appeal bond to stay execution of the *Huizenga* judgment pursuant to Illinois Supreme Court Rule 305(j) (eff. July 1, 2004) and section 392.1 of the Illinois Insurance Code (215 ILCS 5/392.1 (West 2014)). However, the remaining limits of the Indian Harbor policy, approximately $2 million, did not cover the full amount of the security necessary to stay the $9.2 million judgment in the underlying case.

¶ 11 Arch issued a second layer excess policy with a $5 million limit of liability, excess of the $10 million provided by the Executive Risk and Indian Harbor policies. The Arch policy states that it "shall apply only after exhaustion of the Underlying Limit solely as a result of actual payment in legal currency, under the Underlying Insurance in connection with Claim(s) and after the Insureds shall have paid the full amount of any applicable deductible or self insured retentions." The Arch policy also states:

> "Except with respect to premium and Limit of Liability and as provided in this Policy, the insurance coverage afforded by this Policy shall apply in conformance with the terms and conditions of the Followed Policy [Executive Risk primary policy] and in conformance with any terms and conditions further limiting or restricting coverage in this Policy or in any other Underlying Insurance. In no event shall this Policy grant broader coverage than that provided by the most restrictive policy included in the Underlying Insurance."

¶ 12 CNA issued a third layer excess policy, with a $5 million limit of liability, excess of the $15 million provided by Executive Risk, Indian Harbor, and Arch (hereinafter, the Arch and CNA policies will be collectively referred to as the excess policies). The CNA policy also incorporated the terms and conditions of the primary policy. Similar to the Arch policy, the CNA policy contains an exhaustion provision:

> "In the event of the depletion of the limit(s) of liability of the Underlying Insurance solely as the result of actual payment of losses thereunder by the applicable insurers, this Policy shall, subject to the Insurer's Limit of Liability and to the other terms of this Policy, continue to apply to losses as Excess Insurance over the amount of insurance remaining under such Underlying Insurance."

¶ 13 The Ritchie Insureds requested that the Excess Insurers fund the collateral for the appeal bond in connection with the appeal of the underlying lawsuit. The Excess Insurers informed the Ritchie Insureds that they would not provide collateral for the appeal bond because: (1) the policy limits of the underlying insurers had not been exhausted; (2) the definition of "Defense Expenses" in the primary policy provided that the insurers had "no obligation to procure or

furnish any bond" for the appeal; and (3) a monetary award for rescission is uninsurable under Illinois law.

¶ 14 The Ritchie Insureds then filed the complaint at issue in this case. The complaint seeks, in part: (1) specific performance and injunctive relief requiring the Excess Insurers to provide collateral or other security for an appeal bond for the underlying case (count I); and (2) a declaration that the Excess Insurers are legally obligated to provide collateral or other security for such an appeal bond (count II). The circuit court denied the Ritchie Insureds' motion for preliminary injunctive relief.

¶ 15 The Excess Insurers each answered the complaint and admitted that they adopted the coverage position and reservation of rights issued on behalf of Executive Risk.

¶ 16 Huizenga served a citation to discover assets upon the Ritchie Insureds and Indian Harbor in the underlying lawsuit. Huizenga's counsel sent a letter to the Ritchie Insureds stating that it had "no assurance whether or when an appropriate appeal bond will be posted sufficient to stay enforcement of the judgment," and "[u]ntil such bond is posted, we will proceed with our collection efforts."

¶ 17 The Ritchie Insureds later moved for judgment on the pleadings on count II, seeking a declaration that the Excess Insurers were obligated under their policies to provide collateral to secure the appeal bond.

¶ 18 On December 7, 2015, the circuit court granted the Ritchie Insureds' motion for judgment on the pleadings as to count II and declared that the Excess Insurers' policies provided insurance coverage for the premium and collateral for the appeal bond, subject to a written undertaking by the Ritchie Insureds guaranteeing repayment of any amounts finally determined to be uncovered under the Excess Insurers' policies. The court also found that the Excess

Insurers had a right to recoupment of defense expenses. In addition, the circuit court declined to consider the Excess Insurers' argument that the Ritchie Insureds' coverage claims were uninsurable as a matter of law because it related to the issue of indemnification rather than payment of defense expenses.

¶ 19 On December 8, 2015, the Ritchie Insureds provided a written undertaking to the Excess Insurers promising to repay all amounts in connection to the appeal bond in the event the loss was found not to covered by the excess policies. The Ritchie Insureds moved to enforce the December 7 order on December 16, 2015, arguing they had satisfied the written undertaking requirement. They also sought an injunction requiring the Excess Insurers to provide collateral for the appeal bond.

¶ 20 On December 18, 2015, the Excess Insurers moved to reconsider the December 7 order, arguing that their policies require the circuit court to apply the exhaustion provisions in the event of a conflict with the primary policy. The Excess Insurers also filed a response in opposition to the motion to enforce the December 7 order and a motion to stay, arguing the Ritchie Insureds failed to comply with section 2-701(c) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-701(c) (West 2014)). Section 2-701(c) provides that "[if] further relief based upon a declaration of right becomes necessary or proper after the declaration has been made, application may be made by petition to any court having jurisdiction for an order directed to any party or parties whose rights have been determined by the declaration to show cause why the further relief should not be granted." Additionally, the Excess Insurers argued that the Ritchie Insureds' written undertakings were unsatisfactory because they did not have the financial resources to repay the Excess Insurers.

¶ 21 On January 15, 2016, the circuit court: (1) denied the Excess Insurers' motion to reconsider the December 7 order; (2) granted the Ritchie Insureds' motion to enforce the December 7 order; and (3) denied the Excess Insurers' motion to stay enforcement of the order. This appeal followed.

¶ 22 While this appeal was pending, the First Division of this court issued its order in *Huizenga*, affirming the circuit court's liability findings against the Ritchie Insureds, which included a judgment of over $9,000,000. The *Huizenga* court also held that the Ritchie Insureds were liable for an additional $6 million, with prejudgment interest to be determined on remand. In light of *Huizenga*, we asked the parties to file supplemental memoranda addressing the issue of whether the Ritchie Insureds are entitled to insurance coverage from the Excess Insurers for the cost of the appeal bond in *Huizenga*, is moot. The parties filed supplemental memoranda for our consideration. On March 8, 2017, the Ritchie Insureds filed a petition for leave to appeal to the Illinois Supreme Court in the *Huizenga* action (No. 121989). As the appeal in the underlying case remains pending, we therefore consider the merits of this appeal.

¶ 23 ANALYSIS

¶ 24 The Excess Insurers seek reversal of the circuit court decisions denying their motion to reconsider and granting the Ritchie Insureds' motions for judgment on the pleadings and to enforce the declaratory judgment order. They argue coverage under their policies for defense expenses have yet to be triggered because the Indian Harbor policy has not been exhausted. The Excess Insurers contend the primary policy's definition of Defense Expenses does not include coverage for appeal bond collateral. In addition, they argue the judgment in the underlying case is uninsurable. Finally, the Excess Insurers assert the circuit court's order granting the Ritchie

Insureds' motion to enforce was procedurally improper under section 2-701(c) of the Code and violated the terms of the excess policies.

¶ 25 Standard of Review

¶ 26 In the December 7 order, the circuit court granted the Ritchie Insureds' motion for judgment on the pleadings, finding, among other things, that the Excess Insurers were required under their policies to pay the premium and post collateral for an appeal bond in the appeal of the underlying case. A court properly enters a judgment on the pleadings when no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. *H&M Commercial Driver Leasing, Inc. v. Fox Valley Containers, Inc.*, 209 Ill. 2d 52, 56 (2004). We review the entry of a judgment on the pleadings *de novo*. *Id*.

¶ 27 In the January 15, 2016 order, the circuit court denied the Excess Insurers' motion to reconsider the December 7 order. Generally, a circuit court's ruling on a motion to reconsider is reviewed under the abuse of discretion standard. *Id*. However, as here, where a motion to reconsider only asks the court to reevaluate its application of the law to the case as it existed at the time of judgment, the standard of review is *de novo*. *Id*.

¶ 28 Finally, the circuit court's decisions to grant the Ritchie Insureds' motion for enforcement and deny the Excess Insurers' motion to stay enforcement involved purely legal determinations based on the language of the applicable insurance policies, an analysis of the written undertaking the Ritchie Insureds submitted to the Excess Insurers, and the application of section 2-701(c) of the Code. Thus, the sole basis for the court's findings was the legal arguments raised by the parties. No factual determinations were involved. Accordingly, we review the court's decisions *de novo*. *Pekin Insurance Co. v. Hallmark Homes, LLC*, 392 Ill. App. 3d 589, 592 (2009). Moreover, the interpretation of a contract such as an insurance policy

is a purely legal matter subject to *de novo* review. *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 129 (2005).

¶ 29 Exhaustion of the Excess Policies

¶ 30 The Excess Insurers argue that their duty to pay defense expenses for the *Huizenga* appeal did not arise because the underlying insurance limits had not been exhausted in accordance with their policies' terms. The circuit court specifically noted in its December 7, 2015 order that $2.4 million had not been paid under the Indian Harbor policy and a "strict reading" of the excess policies "would require Indian Harbor to completely pay out its $5 million policy limit in legal currency before the Arch Policy would become effective." The Excess Insurers contend the court recognized that Indian Harbor's proposed "pledge" of its policy as collateral for the appeal bond is not the "actual payment, in legal currency" required to exhaust the underlying limits and trigger the excess policies. However, the court also found that the exhaustion provisions contradicted the primary policy's "Defense Expenses" provision, rendering the excess policies ambiguous. The Excess Insurers argue that the court erred by refusing to apply their policies' exhaustion provisions as written.

¶ 31 The threshold issue is whether the underlying policies were exhausted, thereby precluding coverage by the Excess Insurers for the cost of an appeal bond in the *Huizenga* case. In construing an insurance policy, the court determines the intent of the parties to the contract by construing the policy as a whole, with due regard to the risk undertaken, the subject matter that is insured and the purposes of the entire contract. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 108 (1992). Where the words in the policy are clear and unambiguous, "a court must afford them their *plain, ordinary, and popular meaning*." (Emphasis in original.) *Id.* However, if the words in the policy are susceptible to more than one

reasonable interpretation, they will be considered ambiguous and will be strictly construed in favor of the insured and against the insurer that drafted the policy. *Id*. Nonetheless, courts will not strain to find an ambiguity where none exists. *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 17 (2005). "The construction of an insurance policy and a determination of the rights and obligations thereunder are questions of law ***." *Konami (America), Inc. v. Hartford Insurance Co. of Illinois*, 326 Ill. App. 3d 874, 877 (2002).

¶ 32 We first determine whether the language of the exhaustion provisions is ambiguous. Illinois courts have consistently held that if an insurance policy provision is clear and unambiguous, it is interpreted as written without further need for construction. *American States Insurance Co. v. Koloms*, 177 Ill. 2d 473, 479 (1997). Indeed, where the provisions of an insurance policy are clear and unambiguous, courts do not hesitate to enforce those provisions. *Kirk v. Financial Security Life Insurance Co.*, 75 Ill. 2d 367, 370-71 (1978).

¶ 33 Generally, an excess insurance policy defines exhaustion of an underlying policy by declaring the conditions precedent to coverage that must be satisfied prior to liability for covered claims passing from an underlying insurance policy to an excess insurance policy. A "condition precedent" is defined as an event which must occur or an act which must be performed by one party to an existing contract before the other party is required to perform. *Beal Bank Nevada v. Northshore Center THC, LLC*, 2016 IL App (1st) 151697, ¶ 18. Once liability has been passed to the excess policy and the underlying policies no longer have any obligations to make payment for covered claims, the underlying policies are considered exhausted.

¶ 34 Our supreme court has held that excess insurance coverage " ' "attaches only after a predetermined amount of primary insurance or self-insured retention has been exhausted." ' " *Kajima Construction Services, Inc. v. St. Paul Fire and Marine Insurance Co.*, 227 Ill. 2d 102,

114 (2007) (quoting *Roberts v. Northland Insurance Co.*, 185 Ill. 2d 262, 277 (1998) (Freeman, C.J., concurring in part and dissenting in part, joined by Miller and McMorrow, JJ.), quoting S. Seaman & C. Kittredge, *Excess Liability Insurance: Law and Litigation*, 32 Tort & Ins. L.J. 653, 656 (1996)). "Consequently, until the limits of primary insurance coverage are exhausted, secondary coverage does not provide any collectible insurance." (Internal quotation marks omitted.) *Kajima*, 227 Ill. 2d at 114. Thus, exhaustion of the underlying insurance is a threshold issue before determining whether an excess insurer has a duty to defend. *Id*. at 114-15; see also *Sinclair Oil Corp. v. Allianz Underwriters Insurance Co.*, 2015 IL App (5th) 140069, ¶ 50.

¶ 35 The Arch policy states that exhaustion of the underlying policy occurs "solely as a result of actual payment in legal currency." The CNA policy similarly requires exhaustion "solely as the result of actual payment of losses thereunder by the applicable insurers." We find the plain, ordinary, and popular meaning of these provisions unambiguously requires actual payment of losses in order to exhaust the underlying policies and trigger excess coverage.

¶ 36 The circuit court agreed that "[a] strict reading of the Exhaustion Provision would require Indian Harbor to completely pay out its $5 million policy limit in legal currency before the Arch Policy would become effective." The court, however, decided to construe the exhaustion provision with the "Defense Expenses" provision in the primary policy, which it construed as including the costs of an appeal bond, and found an ambiguity that created a conflict between the two provisions. The court concluded that strictly applying the exhaustion provisions in the excess policies "would for all practical purposes alleviate the Excess Insurers of their obligation to provide for the costs of an appeal bond."

¶ 37 Although policy terms that limit an insurer's liability are liberally construed in favor of coverage, this rule of construction applies only when the policy is ambiguous. *Hobbs v.*

Hartford Insurance Co. of the Midwest, 214 Ill. 2d 11, 17 (2005). A term is ambiguous when it is subject to more than one reasonable interpretation. *Id*. We "are not authorized to exercise our inventive powers and pervert the plain language of the policy in order to create an ambiguity where none exists." *Oakley Transport, Inc. v. Zurich Insurance Co.*, 271 Ill. App. 3d 716, 722 (1995).

¶ 38 In this case, the circuit court identified an ambiguity where none existed. The court prematurely interpreted the primary and excess policies as a whole and found an ambiguity between the "Defense Expenses" provision in the primary policy and the exhaustion provisions in the excess policies before determining the threshold issue of whether the exhaustion provisions triggered coverage. Here, the record shows Indian Harbor agreed to "advance" defense costs as to the appeal in the underlying case and file its insurance policy as collateral. The record does not show that Indian Harbor exhausted its policy limits by "actual payment in legal currency," and, therefore, the underlying limit below the Arch policy had not been exhausted. Thus, the excess policies had not been triggered, precluding coverage for the cost of collateral or security for an appeal bond.

¶ 39 In the alternative, the Ritchie Insureds argue that "notice" to an excess insurer that a primary insurer "agreed to pay" its limits for an ongoing suit constituted primary policy exhaustion sufficient to trigger excess insurer defense cost obligations, citing *Elas v. State Farm Mutual Automobile Insurance Co.*, 39 Ill. App. 3d 944 (1976). There, the plaintiff suffered injuries in an accident while riding as a passenger in a car driven by the defendant, Nancy Smith. The automobile involved in the accident belonged to Smith's father, Francis Peterson. Farmers Automobile Insurance Association (Farmers) insured the Peterson vehicle while State Farm Mutual Automobile Insurance Company (State Farm) insured Smith. The circuit court

approved a settlement with Smith, Peterson, and Farmers, whereby Farmers agreed to pay out its policy limit of $20,000, and the plaintiff agreed to hold the settling parties harmless against recovery above that amount, reserving all rights against State Farm. After the settlement, the case proceeded to a bench trial where the court awarded the plaintiff $100,000 in damages. The plaintiff sought a declaratory judgment against State Farm that it was liable for his injuries under the terms of its insurance policy covering Smith. The court granted summary judgment in favor of State Farm.

¶ 40 The *Elas* court reversed summary judgment, finding that once Farmers informed State Farm that it had agreed to pay its full policy limit and requested that it participate in any further defense, "State Farm had effectively become a primary insurer" with the duty to defend. *Elas,* 39 Ill. App. 3d at 947-48. The court held that "[o]nce State Farm again refused to defend or participate in the defense, even after notice that [Farmers] intended to settle for the full amount of the policy, it had apparently breached its duty to participate in the defense as set forth in the policy itself." *Id.* at 948.

¶ 41 *Elas* is inapplicable to this case. First, nothing in *Elas* suggests that the State Farm policy required exhaustion of the underlying policy by "actual payment." Indeed, although the reviewing court characterized the State Farm policy as "excess," in reality, it was a competing primary automobile insurance policy. Second, Farmers agreed to settle its policy limits of $20,000 in exchange for capping its liability at the same amount. The commitment to settle for the policy limits in *Elas* is entirely different than Indian Harbor's agreement to "advance" the defense costs of the appeal and to allow its policy to be filed with the court under section 392.1 of the Insurance Code. Construing the unambiguous terms of the exhaustion provisions in the

excess policies, Indian Harbor's agreement as to the remaining limits of its policy does not constitute "actual payment, in legal currency" sufficient to trigger excess insurance coverage.

¶ 42 The Excess Insurers cite two cases applying Illinois law which we find persuasive here. In *Great American Insurance Co. v. Bally Total Fitness Holding Corp.*, No. 06 C 4554, 2010 WL 2542191 (N.D. Ill. June 22, 2010), the United States District Court for the Northern District of Illinois interpreted the exhaustion clauses in third and fourth layer excess insurance policies. The third layer policy stated that "liability for any covered Loss shall attach to the Insurer only after the insurers of the Underlying Policies shall have paid, in the applicable legal currency, the full amount of the Underlying Limit." *Great American*, No. 06 C 4554, 2010 WL 2542191, at *7. The fourth layer policy required "exhaustion of all of the limits of insurance of the Underlying Insurance solely as a result of actual payment of loss or losses thereunder." *Id*. at *8. The *Great American* court found that the plain language of these policies unambiguously required that the first and second layer excess carriers make actual payments of $10 million in covered claims before the insureds could access the third and fourth layer excess policies. *Id*. at *12. The court held that the third and fourth layer excess policies' exhaustion provisions should be enforced as written. *Id*. at *17-18.

¶ 43 The New York Supreme Court, Appellate Division followed the holding of *Great American* in *J.P. Morgan Chase & Co. v. Indian Harbor Insurance Co.*, 947 N.Y.S.2d 17, 23 (N.Y. App. Div. 2012). In *JP Morgan*, the court analyzed a tower of follow-form excess insurance coverage, including one policy which stated that the excess insurance "shall apply only after all applicable Underlying Insurance *** has been exhausted by actual payment under such Underlying Insurance." *Id* at 21. The court found that the policies "unambiguously required the

insured to collect the full limits of the underlying polices before resorting to excess insurance." *Id.*

¶ 44 In this case, the excess insurance policies clearly defined exhaustion. The Excess Insurers and Ritchie Insureds entered into a clear, bargained-for exhaustion provision that the underlying policies must be exhausted by actual payment. If the Ritchie Insureds desired coverage for an anticipated event requiring future payment, *i.e.*, to cover the costs of an appeal bond, they could have included language in their tower of insurance coverage to that effect. Instead, the Arch policy specifically states, "[t]he risk of any gaps in coverage or uncollectibility for any reason is expressly retained by the Insured, and is not assumed or insured by the Excess Insurer." We must enforce the unambiguous terms of the Excess Insurers' exhaustion provisions as written. *Grzeszczak v. Illinois Farmers Insurance Co.*, 168 Ill. 2d 223-24 (1995).

¶ 45 The enforcement of the Excess Insurers' exhaustion provisions as written precludes coverage for the costs of the appeal bond in the underlying appeal until actual payment in legal currency of the full amount of the underlying limit of the Indian Harbor policy. As this issue is dispositive, we need not address the remaining issues raised by the Excess Insurers.

¶ 46 Accordingly, we reverse the orders of the circuit court granting the Ritchie Insureds' motion for judgment on the pleadings, and motion to enforce the court's order to provide the cost of the appeal bond, and denying the Excess Insurers' motion to reconsider. In light of our ruling, the Excess Insurers' motion to stay the enforcement of the December 7, 2015 order is moot. We remand this cause to the circuit court for further proceedings.

¶ 47 CONCLUSION

¶ 48 The judgment of the circuit court of Cook County is reversed and remanded for further proceedings consistent with our holding.

¶ 49 Reversed and remanded.