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FILED

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS T. HAWKER; et al.,

Plaintiffs,

and

FEDERAL DEPOSIT INSURANCE CORPORATION, As Receiver for County Bank; As Assignee of Certain Claims,

Plaintiff-Appellant,

v.

JOHN D. DOAK, FKA BancInsure, Inc., Insurance Commissioner as Receiver for Red Rock Insurance Company,

Defendant-Appellee.

No. 15-16013

D.C. No. 1:12-cv-01261-SAB

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Stanley Albert Boone, Magistrate Judge, Presiding

Argued and Submitted March 13, 2017
San Francisco, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: WARDLAW and GOULD, Circuit Judges, and HUFF,** District Judge.

Plaintiff-Appellant Federal Deposit Insurance Corporation ("FDIC") appeals from the district court's summary judgment in favor of Defendant-Appellee BancInsure, Inc. ("BancInsure")[1] and against FDIC in an insurance coverage dispute between the parties. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

The FDIC argues that the district court erred when it determined that the "insured v. insured" exclusion in the relevant BancInsure policy bars coverage for claims brought by the FDIC in its capacity as receiver. The FDIC argues that the term "receiver" contained in that exclusion is ambiguous. It asserts that, under the context of the policy as a whole and the surrounding circumstances, the term "receiver" does not include the FDIC as receiver. We disagree. The "insured v. insured" exclusion bars any claims brought by any receiver of County Bank, including the FDIC as receiver of County Bank. *See FDIC v. BancInsure, Inc.*, __ Fed. App'x __, 2017 WL 83489, at *3–4 (9th Cir. Jan. 10, 2017); *BancInsure, Inc.*

** The Honorable Marilyn L. Huff, United States District Judge for the Southern District of California, sitting by designation.

[1] Defendant-Appellee for this appeal is technically John D. Doak, Insurance Commissioner as Receiver for Red Rock Insurance Company, formerly known as BancInsure, Inc. Because the parties refer to Defendant-Appellee as BancInsure in their briefing, and the district court referred to Defendant as BancInsure in its summary judgment order, we will refer to Defendant-Appellee as "BancInsure."

v. FDIC, 796 F.3d 1226, 1234–39 (10th Cir. 2015), *cert. denied* 136 S. Ct. 2462 (2016).

Section IV.A.21 of the relevant policy, referred to by the parties as the "insured v. insured" exclusion, provides:

> A. The Insurer shall not be liable to make any payment for loss in connection with any claim based upon, arising out of, relating to, in consequence of, or in any way involving: . . .
>
> > 21. a claim by, or on behalf of, or at the behest of, any other insured person, the company, or any successor, trustee, assignee or receiver of the company except for:
> >
> > > a. a shareholder's derivative action brought on behalf of the company by one or more shareholders who are not insured persons and make a claim without the cooperation or solicitation of any insured person or the company.

Under the plain language of the "insured v. insured" exclusion, the policy states that the insurer, BancInsure, is not liable to make any payments for any claims brought by any receiver of the company, County Bank. Here, the FDIC concedes that it is "undeniably" acting in its capacity as County Bank's receiver. Thus, under the plain meaning of the "insured v. insured" exclusion, the policy bars coverage for the FDIC's claims in the underlying action. *Cf. Cal. State Auto. Ass'n Inter-Ins. Bureau v. Warwick*, 550 P.2d 1056, 1059 (Cal. 1976) ("From the earliest days of statehood we have interpreted 'any' to be broad, general and all

embracing."). In addition, the exception for shareholders' derivative actions contained in the "insured v. insured" exclusion does not apply here because the underlying action was not a shareholders' derivative action.

The FDIC argues that the scope of the "insured v. insured" exclusion is ambiguous in light of a separate regulatory exclusion contained in an earlier policy between BancInsure and County Bank. The regulatory exclusion was omitted from the prior policy through an endorsement and was omitted entirely from the policy at issue. The deletion of an exclusion in an insurance policy "may be considered" in interpreting "the scope and extent of coverage under a policy." *Am. Alt. Ins. Corp. v. Superior Court*, 37 Cal. Rptr. 3d 918, 924 n.2 (Ct. App. 2006). But the fact that an exclusion is deleted from a policy does not necessarily mean that everything that was included in the exclusion is now covered under the policy. *See, e.g.*, *Hervey v. Mercury Cas. Co.*, 110 Cal. Rptr. 3d 890, 897–98 (Ct. App. 2010) (finding that a medical expense endorsement that deleted a provision dealing with reimbursements of medical payments did not alter a different provision in the policy dealing with reimbursements in connection with uninsured motorist coverage). This is particularly true where the endorsement deleting the exclusion expressly provides that the other terms in the policy remain unchanged. *See id.*

Here, the regulatory exclusion endorsement at issue expressly states that it

does not "vary, waive or extend" any of the other "terms, conditions, provisions, agreements or limitations" in the prior policy. One of the other provisions in the prior policy is the "insured v. insured" exclusion, which expressly bars from coverage any claims brought by any receiver of County Bank. Because the regulatory exclusion endorsement did not vary the terms of the "insured v. insured" exclusion, the "insured v. insured" exclusion bars coverage for claims by the FDIC in its capacity as receiver of County Bank.[2]

In addition, the FDIC argues that the "insured v. insured" exclusion is ambiguous in light of certain extrinsic evidence. Under California law, a court may consider extrinsic evidence in determining whether language in a contract is ambiguous. *See Pac. Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 645 (Cal. 1968); *Wolf v. Superior Court*, 8 Cal. Rptr. 3d 649, 656 (Ct. App. 2004); *see also Dore v. Arnold Worldwide, Inc.*, 139 P.3d 56, 60 (Cal. 2006) ("'Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible

[2] We do not find persuasive the FDIC's reliance on *Safeco Insurance Company of America v. Robert S.*, 28 P.3d 889 (Cal. 2001), and *American Alternative*, 37 Cal. Rptr. 3d 918, as both of those cases are distinguishable from the present case. *Safeco* and *American Alternative* both involved a situation where the relevant term was ambiguous on its face and where the adoption of the insurer's proposed interpretation would render the omission of a different exclusion meaningless. *See Safeco*, 28 P.3d at 893–94; *Am. Alt.*, 37 Cal. Rptr. 3d at 924. Those circumstances are not present here.

meaning to which the language of the contract is yet reasonably susceptible.'"). Nevertheless, the district court correctly concluded that the extrinsic evidence offered by the FDIC does not render the "insured v. insured" exclusion reasonably susceptible to the FDIC's proposed interpretation. The district court properly concluded that the extrinsic evidence offered by the FDIC supports BancInsure's interpretation of the "insured v. insured" exclusion, not the FDIC's interpretation.

Finally, the FDIC argues that several federal courts have refused to interpret "insured v. insured" exclusions to bar claims by the FDIC as receiver. But, as the district court correctly noted, all of the cases cited by the FDIC are distinguishable from the policy in this case because none of the policies in those cases expressly excluded coverage for claims brought by a "receiver" of the company.

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs .....***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk