Court of Appeal File No. COA-24-OM-0342
Superior Court File No. CV-21-00658423-00CL

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 14487893 CANADA INC.

Respondent
Moving Party

ABBREVIATED REPLY BOOK OF AUTHORITIES OF THE PROPOSED APPELLANT, HAIDAR OMARALI (Motion for Leave to Appeal, Returnable in Writing)

December 18, 2024

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Carolina Cas. Ins. Co. v. McGhan

United States District Court for the District of Nevada

March 12, 2008, Decided; March 12, 2008, Filed

2:07-CV-00949-PMP-GWF

Reporter
2008 U.S. Dist. LEXIS 143800 *

CAROLINA CASUALTY INSURANCE COMPANY, Plaintiff, v. DONALD K. MCGHAN, et al., Defendants.

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Judges: PHILIP M. PRO, United States District Judge.

Opinion by: PHILIP M. PRO

Opinion

ORDER

Presently before the Court is Defendants Thomas R. Moyes, Samuel Clay Rogers, Paul R. Kimmel, **[*4]** Eugene I. Davis, Mark E. Brown, Thomas Y. Hartley, Robert Forbuss, and Ikram Khan's Motion for Summary Judgment (Doc. #64), filed on November 19, 2007. Plaintiff Carolina Casualty Insurance Company filed an Opposition (Doc. #74) and Cross-Motion for Summary Judgment (Doc. #75) on December 21, 2007. Defendants filed a Reply (Doc. #84) on January 14, 2008. Defendants filed an Opposition (Doc. #87) to Carolina's cross-motion on January 15, 2008. Plaintiff filed a Reply (Doc. #99) on January 28, 2008.

Also before the Court is Plaintiff Carolina Casualty Insurance Company's Motion for Summary Judgment as to Donald K. McGhan, James J. McGhan, Marc S. Sperberg, and Theodore R. Maloney (Doc. #85), filed on January 14, 2008. Defendant Marc S. Sperberg filed an Opposition (Doc. #103) on February 1, 2008. Defendants Donald and James McGhan filed an Opposition (Doc. #105) on February 8, 2008. Defendant Theodore Maloney filed an Opposition (Doc. #107) on February 11, 2008. Plaintiff filed a Reply (Doc. #109) on February 22, 2008.

Also before the Court is Plaintiff Carolina Casualty Insurance Company's Motion to Dismiss Counterclaimants' Counterclaim for Breach of *NRS 686A.310* and Counterclaimants' Claims for **[*5]** Punitive and Special Damages (Doc. #65), filed on November 26, 2007. Defendants filed an Opposition (Doc. #73) on December 14, 2007. Plaintiff filed a Reply (Doc. #78) on December 28, 2007. The Court held a hearing on these motions on February 25, 2008. (Mins. of Proceedings [Doc. #110].)

I. BACKGROUND

This is a declaratory judgment action filed by Plaintiff Carolina Casualty Insurance Company ("Carolina") against Medicor Ltd. ("Medicor") and its officers and directors seeking a declaration that Carolina owes no coverage under a policy Carolina issued to Medicor. Carolina issued a Directors' and Officers' and Corporate Liability Insurance Policy ("Policy") effective from June 30, 2006 to June 30, 2007. (Decl. of Serge J. Adam [Doc. #76], Ex. A.) Defendants made a claim for coverage under the Policy after being named in a group of lawsuits the parties refer to as the "SWX Lawsuits." Carolina denied the claim under various exclusions in the Policy. Particularly at issue here is the "Past Acts Exclusion," which excludes coverage for what the Policy deems Wrongful Acts that occurred prior to June 30, 2004, as well as Wrongful Acts occurring after June 30, 2004 which are related to Wrongful **[*6]** Acts that occurred before June 30, 2004. Carolina contends the SWX Lawsuits allege Wrongful Acts occurred prior to June 30, 2004, that Defendants' alleged post-June 30, 2004 Wrongful Acts are related to the pre-June 30, 2004 Wrongful Acts, and therefore are not covered by the Policy.

The SWX Lawsuits allege that beginning as early as February 2003, Defendants Donald McGhan ("McGhan"), James McGhan, and Theodore Maloney ("Maloney") conspired with other individuals to steal the assets of Southwest Exchange, Inc.'s ("SWX") clients, who placed funds in trust with SWX as a Section 1031 intermediary for proceeds of real estate transactions. (Pl.'s Mot. for Summ. J., Exs. B-1 to B-4 [Doc. #88], Ex. B-1 ["Third Master Compl."] at 1; Ex. B-2 ["Selakovic Compl."] at 7-14; Ex. B-3 ["Schott Compl."] at 6, 9-10; Ex. B-4 ["Sorrell Compl."] at 9, 19, 25-28, 38-39.) According to the SWX Plaintiffs, on June 15, 2004, McGhan and Maloney formed a new entity, Capital Reef, which purchased SWX from its prior owner, Betty Kincaid ("Kincaid") on June 24, 2004. (Third Master Compl. at 20; Selakovic Compl. at 29; Schott Compl. at 10-11, 28; Sorrell Compl. at 10-11.) On June 28, 2004, Capital Reef used loans from several **[*7]** individuals, including Defendants Maloney and Sperberg, to pay Kincaid $3,000,000 for her interest in SWX. (Third Master Compl. at 20; Sorrell Compl. at 34.) The SWX Plaintiffs allege these loans immediately were repaid to the lenders at exorbitant interest rates out of SWX funds. (Third Master Compl. at 20; Sorrell Compl. at 13, 38.)

The SWX Lawsuits allege that upon acquiring SWX, McGhan and his co-conspirators diverted funds from SWX for their personal use and to fund Medicor's operations. (Third Master Compl. at 3-7, 12-13; Selakovic Compl. at 16, 33; Schott Compl. at 15-16, 32; Sorrell Compl. at 19.) In addition to suing Medicor and its officers and directors who allegedly actively participated in the scheme (Donald and James McGhan, Maloney, and Sperberg), the SWX Plaintiffs also sued the other directors of Medicor, claiming they knew or should have known about the allegedly improper diversion of SWX client funds for Medicor's benefit. (Third Master Compl. at 12-13, 26;

Selakovic Compl. at 19; Schott Compl. at 19.)[1] The SWX Lawsuits assert claims such as breach of contract, breach of the implied covenant of good faith and fair dealing, negligence, breach of fiduciary duty, conversion, **[*8]** civil Racketeer Influenced and Corrupt Organizations Act violations, negligence per se, unjust enrichment, elder abuse, fraud, and negligent misrepresentation. (Third Master Compl. at 34-50; Selakovic Compl. at 40-82; Schott Compl. at 39-73; Sorrell Compl. at 47-58.)

The parties in this action now cross move for summary judgment regarding whether the Policy covers the officers and directors for the claims asserted against them in the SWX Lawsuits. Additionally, Carolina moves to dismiss certain counterclaims.

II. MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" demonstrate "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. The substantive law defines which facts are material. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. All justifiable inferences must be viewed in the light most favorable to the non-moving party. *County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1154 (9th Cir. 2001)*.

The party moving for summary judgment bears the initial burden of showing the absence of a genuine issue of material fact. *Fairbank v. Wunderman Cato Johnson, 212 F.3d 528, 531 (9th Cir. 2000)*. The burden then shifts to the non-moving party to go beyond the pleadings and set forth **[*9]** specific facts demonstrating there is a genuine issue for trial. Id.; *Far Out Prods., Inc. v. Oskar, 247 F.3d 986, 997 (9th Cir. 2001)*.

A. Board of Director Defendants

Defendants Samuel Rogers, Paul Kimmell, Eugene Davis, Mark Brown, Thomas Hartley, Robert Forbuss, Ikram Khan, and Thomas Moyes were members of the Medicor Board of Directors who the SWX Plaintiffs do not allege to have been involved directly in the scheme, but who allegedly knew or should have known of McGhan's scheme. These Defendants ("BOD Defendants") move for summary judgment, arguing the Policy's Past Acts Exclusion does not apply to the BOD Defendants because the SWX Lawsuits do not allege they committed a Wrongful Act prior to June 30, 2004. The BOD Defendants argue that under the Policy, Carolina cannot impute one director's pre-June 30, 2004 Wrongful Acts to other directors. Consequently, the BOD Defendants argue Carolina cannot impute McGhan, Maloney, and Sperberg's Wrongful Acts that occurred prior to June 30, 2004 to the BOD Defendants. The BOD Defendants further argue that at a minimum, the Policy is ambiguous and must be read in favor of the insureds. Finally, the BOD Defendants argue allowing the Past Acts Exclusion to apply to every director based on one director's **[*10]** Wrongful Acts creates illusory coverage for the other directors.

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[1] The Sorrell Complaint does not assert claims against Medicor officers and directors beyond those alleged to have participated in the scheme.

Carolina responds that because the SWX Lawsuits allege Wrongful Acts occurred before June 30, 2004, and allege the BOD Defendants engaged in Wrongful Acts related to the pre-June 30, 2004 Wrongful Acts, the Past Acts Exclusion precludes coverage. Carolina argues it is undisputed that the SWX Lawsuits allege the corporate looting commenced prior to June 30, 2004, and that the SWX Lawsuits allege the BOD Defendants knew or should have known about this looting. Carolina thus contends the SWX Lawsuits allege the BOD Defendants engaged in Wrongful Acts related to Wrongful Acts that occurred before June 30, 2004. Carolina argues this does not constitute imputing a Wrongful Act of another director to the BOD Defendants. Rather, Carolina argues it is each BOD Director's alleged Related Wrongful Act that precludes coverage. Further, Carolina argues the Past Acts Exclusion does not refer to the insured's Wrongful Acts, but Wrongful Acts generally. Carolina thus contends the exclusion is not particular to each insured. Carolina asserts the Policy is unambiguous. Finally, Carolina argues the illusory coverage doctrine does not apply **[*11]** because the Policy covers Wrongful Acts occurring after June 30, 2004 and throughout the policy period, so long as they are not related to a Wrongful Act which occurred prior to June 30, 2004.

The Policy is a "claims made" policy applying only to claims first made against the insureds during the policy period. (Compl., Ex. A ("Policy") at 1.) The Policy will pay the "Loss of each and every Director or Officer of the Company arising from any Claim first made against the Directors or Officers during the Policy Period or the Extended Reporting Period (if applicable) for any actual or alleged Wrongful Act, except and to the extent that the Company has indemnified the Directors or Officers." (Policy at 1, Section 1.) Insureds under the Policy include any Directors and Officers and the Company. (Policy at 2, Section III.G.) A "Loss" means "damages, judgments, settlements and Costs of Defense." (Policy at 3, Section III.I.) A Claim means:

> 1. a written demand for monetary or non-monetary relief, or
> 2. a civil, criminal, administrative or arbitration proceeding for monetary or non-monetary relief which is commenced by:
> a. service of a complaint or similar pleading, or
> b. return of an indictment (in the case of a criminal proceeding), or
> c. receipt or filing of a notice of charges. **[*12]**

(Policy at 2, Section III.A.)

Section IV of the Policy sets forth exclusions from coverage. Endorsement 214310 adds to Section IV the Past Acts Exclusion. (Policy, Endorsement 214310.) The Past Acts Exclusion excludes from coverage "any Loss in connection with a Claim made against an Insured"—

> based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving:
> 1. any Wrongful Act which occurred on or before June 30, 2004, or
> 2. any Wrongful Act occurring on or subsequent to June 30, 2004 which, together with a Wrongful Act occurring prior to such date, would constitute a Related Wrongful Act.

(Id.; Policy at 3, Section IV.) A Wrongful Act means:

> with respect to individual Directors or Officers, any breach of duty, neglect, error, misstatement, misleading statement, omission or act by the Directors or Officers of the Company in their respective capacities as such, or any matter claimed against them by

> reason of their status as Directors or Officers of the Company, or any matter claimed against them arising out of their serving as a director, officer, trustee or governor of an Outside Entity in such capacities, but only if such service is at the specific written request **[*13]** or direction of the Company.

(Policy at 4, Section III.Q.) A Related Wrongful Act is a Wrongful Act which is "logically or causally connected by reason of any common fact, circumstance, situation, transaction, casualty, event or decision." (Policy at 3, Section III.N.) The Policy also contains an endorsement which states "The Wrongful Act of a Director or Officer shall not be imputed to any other Director or Officer for the purpose of determining the applicability of any Exclusion." (Policy, Endorsement 214012, "Imputation Endorsement.") Although Carolina owes a duty to indemnify the insured and will advance costs of defense under the Policy, Carolina owes no duty to defend. (Policy at 6, Section VI.A & B.)

Under Nevada law, an insurance policy is a contract the Court must enforce according to its terms to accomplish the parties' intent.[2] *Farmers Ins. Exch. v. Neal, 119 Nev. 62, 64 P.3d 472, 473 (Nev. 2003)*. The Court gives policy terms their plain and ordinary meaning and views the language from the perspective of "one not trained in law." Id. (quotations omitted). Because an insurance policy is a contract of adhesion, the Court must interpret the policy language broadly "to afford the greatest possible coverage to the insured." *United Nat'l Ins. Co. v. Frontier Ins. Co., Inc., 99 P.3d 1153, 1156 (Nev. 2004)* (quotation omitted). Restrictions on coverage must "clearly **[*14]** and distinctly communicate[] to the insured the nature of the limitation." Id. (quotation omitted). The Court may not rewrite unambiguous provisions, but the Court resolves any ambiguities in favor of the insured. *Id. at 1156-57*; see also *Keener v. Cal. Auto. Ass'n Inter-Ins. Bureau, 107 Nev. 504, 814 P.2d 87, 88 (Nev. 1991)* ("Where, as here, an insurance policy is subject to more than one interpretation, doubts must be resolved in favor of the insured."). "The question of whether an insurance policy is ambiguous turns on whether it creates reasonable expectations of coverage as drafted." *United Nat'l Ins. Co., 99 P.3d at 1156-57*. Additionally, "[w]hen a policy has been issued which purportedly provides coverage but whose exclusionary provisions as interpreted by the insurer would narrow the coverage to defeat the purpose of the insurance, the policy must be construed against the insurer." *Nat'l Union Fire Ins. Co. of State of Pa., Inc. v. Reno's Executive Air, Inc., 100 Nev. 360, 682 P.2d 1380, 1384 (Nev. 1984)*. Interpretation of an insurance policy is a question of law for the Court. *Farmers Ins. Exch., 64 P.3d at 473*.

Nevada has not interpreted similar policy language. Where a state has not addressed a particular issue, a federal court must use its best judgment to predict how the highest state court would resolve it "using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance." *Strother v. S. Cal. Permanente Med. Group, 79 F.3d 859, 865 (9th Cir. 1996)* (quotation omitted); *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., Inc., 306 F.3d 806, 812 (9th Cir. 2002)*. **[*15]** In making that prediction, federal courts look to existing state law without predicting potential changes in that law. *Orkin v. Taylor, 487 F.3d 734, 741 (9th Cir. 2007)*. Although federal courts should not predict changes in a state's law, they "are not precluded from affording relief simply because neither the state Supreme Court nor the state legislature has enunciated a clear rule governing a particular type

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[2] The parties agree Nevada law governs the Policy.

of controversy." *Air-Sea Forwarders, Inc. v. Air Asia Co., Ltd., 880 F.2d 176, 186 (9th Cir. 1989)* (quotation omitted).

The BOD Defendants liken the Imputation Endorsement to a severability clause and rely on a line of cases interpreting policy language which held the relevant insurance policy applied separately to each insured. For example, in Worcester Mutual Insurance Co. v. Marnell, the underlying action involved a negligent supervision claim against parents who allowed their son to throw a party at their house, drink alcohol, and then drive his friends home. *398 Mass. 240, 496 N.E.2d 158, 159 (Mass. 1986)*. The son crashed the car and killed a person. Id. The parents sought coverage under their homeowners policy. Id. The insurance company asserted the policy did not cover the parents based on an exclusion for bodily injury arising out of the use of a motor vehicle owned or operated by "any insured." Id. The policy contained a severability clause **[*16]** that stated the policy applied "separately to each insured." Id. The court held this clause required the insurer to treat each insured as having a separate insurance policy. *Id. at 161*. As a result, the court concluded the term "insured" as used in the motor vehicle exclusion referred only to the person claiming coverage under the policy. Id. Because the insured parents did not own or operate the motor vehicle their son drove, the provision excluding coverage for bodily injury arising out of the insured's ownership or use of a motor vehicle did not preclude the parents from being covered.[3] Id.

Worcester and the other cases upon which Defendants rely are distinguishable from the present case because the Policy here does not contain a severability clause stating that the Policy applies separately to each insured. Rather, the Imputation Endorsement states that the Wrongful Acts of one director may not be imputed to another director for purposes of determining the applicability of any exclusion. No Policy language states the Policy separately applies to each insured or treats the insured seeking coverage as the only named insured.

Further, many courts hold that even where a severability clause **[*17]** exists, if the policy refers to "an" or "any" insured's conduct, another insured's conduct can work to exclude coverage for the insured claiming coverage. For example, in American Family Mutual Insurance Co. v. Corrigan, the relevant insurance policy excluded coverage for bodily injury or property damage arising out of "violation of any criminal law for which any insured is convicted." *697 N.W.2d 108, 112 (Iowa 2005)*. The policy also contained a severability clause stating that the policy "'applies separately to each insured.'" Id. The Iowa Supreme Court held the exclusion's plain language applied to the criminal activity of "any" insured, despite the severability clause. *Id. at 116-17*.

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[3] See also *St. Katherine Ins. Co. Ltd. v. Insurance Co. of N. Am., Inc., 11 F.3d 707, 710 (7th Cir. 1993)* (insurance afforded applies separately to each insured against whom claim is made or suit is brought); *FDIC v. Interdonato, 988 F. Supp. 1, 13 (D. D.C. 1997)* (stating policy's severability clause created a policy with each insured such that one insured's prior wrongful acts could not be used to deny coverage to another insured); *Shapiro v. American Home Assur. Co., 616 F. Supp. 900, 902 (D.C. Mass. 1984)* (policy contained language that insurance shall be construed as a separate contract with each insured so that "as to each Insured, the reference in this Insurance to the Insured shall be construed as referring only to that particular Insured, and the liability of the Insurer to such Insured shall be independent of its liability to any other Insured"); *Tri-S Corp. v. Western World Ins. Co., 110 Haw. 473, 135 P.3d 82, 90 (Haw. 2006)* (containing policy language that the insurance applies "[a]s if each Named Insured were the only Named Insured; and . . . Separately to each insured against whom a claim is made or 'suit' is brought"); *Travelers Indem. Co. v. Bloomington Steel & Supply Co., 2006 Minn. LEXIS 517, 718 N.W.2d 888,894 (Minn. 2006)* (same); *L.C.S., Inc. v. Lexington Ins. Co., 371 N.J. Super. 482, 853 A.2d 974, 982 (N.J. Super. A.D. 2004)* (same).

Consequently, the policy did not cover one insured for liability arising out of another insured's criminal violation. Id.

> "Courts construing similar [intentional acts exclusionary] policy language have concluded that, when a provision uses the article 'the, the [exclusion] applies only to claims brought against the particular insured named in the claim. Conversely, when the exclusionary language refers to intentional acts of 'an insured,' courts have uniformly concluded that the exclusion applies to all claims which arise from the intentional **[*18]** acts of any one insured, even though the claims are stated against another insured."

EMCASCO Ins. Co. v. Diedrich, 394 F.3d 1091, 1095 (8th Cir. 2005) (quoting *N. Sec. Ins. Co. v. Perron, 172 Vt. 204, 777 A.2d 151, 163 (2001)* (collecting cases) and citing *Am. Family Mut. Ins. Co. v. Mission Med. Group, 72 F.3d 645, 648 (8th Cir. 1995)* (collecting cases)).

The Nevada Supreme Court reached a similar conclusion, although whether the policy at issue contained a severability clause is unclear from the opinion. In *Fire Ins. Exchange v. Cornell*, the policy expressly excluded coverage for any actual or alleged injury related to child molestation by "any insured." *2004 Nev. LEXIS 40, 90 P.3d 978, 979 (Nev. 2004)*. The insureds sought coverage under their policy to help defend the claim they were negligent in failing to supervise their adult son who had sexual intercourse with his twelve-year-old neighbor. Id. The Nevada Supreme Court rejected the argument that because the parents did not commit the sexual abuse, the provision excluding coverage for molestation was ambiguous and should be interpreted in their favor. *Id. at 980*. The Nevada Supreme Court ruled the exclusion applied to "the actions of any insured that results in child molestation, not just the person who actually touches the child." Id. The Court therefore held the exclusion unambiguously applied to the parents and the insurance company rightfully could deny coverage. Id.

Because the Past Acts **[*19]** Exclusion does not refer to the Wrongful Acts of "the," "an," or "any" insured, these cases are not directly on point. To the extent these cases shed light on the Policy's language, they support Carolina's interpretation. If an exclusion which refers to the conduct of "any insured" would operate to preclude coverage even considering a severability clause, then the Past Acts Exclusion's exclusion of coverage for "any" Wrongful Act would appear to include any Wrongful Act, regardless of whether it was committed by the insured seeking coverage or one of the other officers or directors.

The Past Acts Exclusion excludes "any" Wrongful Act and "any" Wrongful Act which, together with "a" Wrongful Act, would constitute a Related Wrongful Act. The Past Acts Exclusion does not base the exclusion on who committed the Wrongful Act. Consequently, cases interpreting policy exclusion language based on an event or circumstances are more analogous to the Policy language than cases involving the identity of who committed certain acts. For example, in Ristine ex rel. Ristine v. Hartford Insurance Co. of Midwest, the underlying action alleged that a woman knew her husband was a convicted sex offender but **[*20]** permitted her husband access to a child and left the child alone with her husband. *195 Ore. App. 226, 97 P.3d 1206, 1207 (Or. App. 2004)*. He abused the child, and the child's parents sued the wife for negligently failing to disclose to them that her husband was a sex offender and for allowing him to be alone with the child. Id. The wife requested coverage under her homeowners' policy, but the insurance company denied coverage. Id.

The policy excluded from coverage a claim for bodily injury or property damage "'[a]rising out of sexual molestation, corporal punishment or physical or mental abuse[.]'" Id. The policy also contained a severability clause which stated the policy applied "'separately to each insured.'" Id. The Oregon Court of Appeals held that the policy referred to claims arising out of sexual molestation without reference to any limitation as to who committed the act of molestation, and thus the exclusion was "based on the nature of the act, not the identity of the actor." *Id. at 1208-09*. The court of appeals noted that elsewhere in the policy, it specified when coverages or exclusions applied to "the insured," but the sexual molestation exclusion applied without reference to who committed the act. *Id. at 1209*. The court also rejected the notion that **[*21]** the severability clause gave the wife coverage because she did not commit the sexual molestation: "the fact remains that the policy that separately applies to them contains an exclusion for bodily injury '[a]rising out of sexual molestation.' There is nothing in the wording of the severability provision itself that remotely suggests that it affects the substance of any provisions concerning coverage or exclusions." *Id. at 1209-10*; see also *Flores v. AMCO Ins. Co., 2007 U.S. Dist. LEXIS 86679, 2007 WL 3408255, at *7, No. CV F 07-1183 LJO DLB (E.D. Cal. Nov. 15, 2007)* (slip copy) ("The AMCO policy applies separately to Mr. and Mrs. Flores and contains a global sexual molestation exclusion which is not limited to an insured's conduct. As such, the exclusion applies to Ms. Flores, despite that she is not an alleged active participant in the sexual activity at issue here.").

The Past Acts Exclusion does not limit coverage based on the identity of who committed the Wrongful Acts or Related Wrongful Acts. Rather, it excludes coverage for "any" Wrongful Act. Moreover, the Past Acts Exclusion excludes coverage for "any" Wrongful Act occurring on or after June 30, 2004 which, together with "a" Wrongful Act occurring prior to June 30, 2004, would constitute a Related Wrongful Act. **[*22]** Consequently, so long as the particular insured seeking coverage committed any Wrongful Act that relates to "a" Wrongful Act occurring prior to June 30, 2004, the Past Acts Exclusion applies regardless of the identity of who committed the pre-June 30, 2004 Wrongful Act. The Imputation Endorsement does not alter the Past Acts Exclusion's language that a Related Wrongful Act constitutes "any" Wrongful Act related to "a" prior Wrongful Act without limitation as to the identity of the actor who committed the pre-June 30, 2004 Wrongful Act. Such an interpretation does not run afoul of the Imputation Endorsement because each officer and director must have committed either a pre-June 30, 2004 Wrongful Act or a post-June 30, 2004 Related Wrongful Act of his own to be excluded from coverage.

The BOD Defendants argue the Past Acts Exclusion's failure to indicate whose Wrongful Acts trigger the exclusion makes the exclusion ambiguous. The Past Acts Exclusion is not ambiguous. Rather, it unambiguously refers to any Wrongful Acts, not just the Wrongful Acts and Related Wrongful Acts of the insured seeking coverage. The Policy's other exclusions contain instances where the Policy refers to "any of **[*23]** the Insureds," "an Insured," or "the Insured," and thus the Policy specified when coverages or exclusions applied to an insured as opposed to when it defined exclusions based on events or conduct generally. (See Policy at 4, Section IV.A, C, J, Endorsement 214025.) The Court will not write into the Past Acts Exclusion words the parties chose not to include in the Policy.

This interpretation does not render coverage under the Policy illusory. The Past Acts Exclusion excludes only each director's own Wrongful Acts prior to June 30, 2004 as well as each

director's Wrongful Acts after June 30, 2004 if those acts are related to any other Wrongful Acts committed prior to June 30, 2004. The Policy still covers any Wrongful Acts a director may commit from July 1, 2004 through the policy period, so long as they are not related to a pre-June 30, 2004 Wrongful Act.

B. "Deal" Defendants

In opposition to Carolina's motion for summary judgment with respect to the defendants who allegedly engaged in the wrongdoing (the "Deal Defendants"), Defendants Marc S. Sperberg ("Sperberg"), Donald and James McGhan ("McGhans"), and Theodore Maloney ("Maloney") filed separate oppositions. The Deal Defendants join in the arguments **[*24]** above and raise three separate arguments. First, Defendant Maloney argues Carolina has failed to establish any of the acts which occurred prior to June 30, 2004 were wrongful. Maloney therefore argues his own acts are not related to any pre-June 30, 2004 Wrongful Acts. Specifically, Maloney argues that most of the pre-June 30, 2004 acts were innocuous, such as business meetings or buying SWX. According to Maloney, the Wrongful Acts, if any, are the alleged diversions of funds from SWX to Medicor. Maloney contends at least one SWX complaint alleges the sale for which Medicor used the diverted funds closed in July 2004, and therefore the first Wrongful Act occurred after June 30, 2004. Maloney argues Carolina must prove there was a pre-June 30, 2004 Wrongful Act to preclude coverage even under Carolina's interpretation of the Policy.

Second, the McGhans argue they could be liable in the SWX Lawsuits in some instances without the SWX plaintiffs presenting any evidence the McGhans committed Wrongful Acts prior to June 30, 2004. The McGhans therefore argue that unless and until a jury determines their liability, genuine issues of fact remain regarding whether they committed any pre-June **[*25]** 30, 2004 Wrongful Acts precluding coverage.

Finally, the Deal Defendants argue Carolina relies only on the contested pleadings in the SWX Lawsuits to assert Defendants engaged in Wrongful Acts. The Deal Defendants argue Carolina must show they actually engaged in such Wrongful Acts to preclude coverage, and Carolina cannot make that showing at the summary judgment stage based only the SWX Lawsuits' unproven allegations.

1. Allegations of Pre-June 30, 2004 Wrongful Acts

Even accepting Carolina's interpretation, Defendant Maloney argues the SWX Lawsuits do not allege pre-June 30, 2004 Wrongful Acts. Defendant Maloney argues the only Wrongful Act is the diversion of funds, and it is not clear from the SWX complaints the diversion of funds occurred before June 30, 2004. Carolina responds that the SWX Lawsuits allege a conspiracy beginning prior to June 30, 2004 which intentionally sought to acquire the SWX funds for improper purposes. Carolina thus argues the SWX Lawsuits allege pre-June 30, 2004 Wrongful Acts.

The SWX Lawsuits allege wrongful conduct prior to June 30, 2004. For example, the Fourth Amended Master Complaint alleges "Don McGhan, Sperberg, Maloney, and Pomeroy, upon information **[*26]** and belief, took control of Southwest in 2004 . . . as part of a premeditated plan to gain access to the exchange funds entrusted to Southwest and then divert those funds to

other business in which they hold ownership and/or pecuniary interests." (Def. & Counterclaimant Theodore R. Maloney's Opp'n to Carolina Casualty Ins. Co.'s Mot. for Summ. J. [Doc. #107], Ex. 1 ["Fourth Master Compl."] at ¶¶ 5-7, 391-96; see also Selakovic Compl. at ¶¶ 1, 19, 80-87, 119-30; Schott Compl. at ¶¶ 1, 19, 80-87, 121-31; Sorrell Compl. at ¶¶ 1, 25, 83-91.) Therefore, even the asserted "innocuous" acts of planning to take over SWX and effecting that takeover allegedly were part of a premeditated plan to divert the funds and thus are Wrongful Acts. Each of the SWX Complaints allege money started flowing out of SWX by June 30, 2004. (Fourth Master Compl. at ¶¶ 116, 128-31, 134; Selakovic Compl. at ¶¶ 87, 125; Schott Compl. at ¶¶ 87, 126; Sorrell Compl. at ¶¶ 26, 31, 58-60, 63, 90.) Consequently, the SWX Lawsuits allege Wrongful Acts occurred prior to June 30, 2004.

2. Necessity of Reference to Pre-June 30, 2004 Conduct

The Fourth Amended Master Complaint in one of the SWX Lawsuits alleges the plaintiffs entrusted **[*27]** money with SWX in September 2006. (Fourth Master Compl. at ¶ 224.) The Fourth Amended Master Complaint asserts claims for breach of contract (SWX and McGhan), breach of the implied covenant of good faith and fair dealing (Southwest and McGhan), negligence (SWX and McGhan), breach of fiduciary duties (all Defendants), conversion (all Defendants), civil RICO (all Defendants), negligence per se (SWX and McGhan), unjust enrichment (all Defendants), civil conspiracy (all Defendants), and fraud (SWX and McGhan). Because these plaintiffs did not entrust funds with SWX until after June 30, 2004, it is possible the plaintiffs could prove a breach of contract without reference to pre-June 30, 2004 misconduct. These plaintiffs allege they entrusted money to SWX in September 2006 and SWX failed to return those funds, thereby breaching the parties' agreement.

However, the Policy excludes coverage for any Claim "based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving" any pre-June 30, 2004 Wrongful Act or a Related Wrongful Act. The Fourth Amended Master Complaint alleges a pre-June 30, 2004 conspiracy and also alleges the conspirators thereafter **[*28]** engaged in a ponzi scheme to draw in new investors to conceal the fact that they had diverted funds from SWX. (Fourth Master Compl. at ¶¶ 166-73; see also Selakovic Compl. at ¶ 95; Schott Compl. at ¶¶ 19, 29-30, 32-45, 47, 95; Sorrell Compl. at ¶¶ 25, 53, 72, 85, 90.) The SWX plaintiffs contend the reason SWX was unable to fulfill its contractual obligations was because of the alleged corporate looting. The plaintiffs' claims therefore are based upon, arise out of, directly or indirectly result from, or in some way involve the alleged pre-June 30, 2004 intentional conspiracy to pillage SWX funds, and the Past Acts Exclusion therefore applies.

3. Actual Versus Alleged Wrongdoing

The Policy covers Loss from any Claim against the Directors or Officers for any "actual or alleged" Wrongful Act. (Policy at 1, Section 1.) The Past Acts Exclusion excludes from coverage "any Loss in connection with a Claim made against an Insured"—

> based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving:
> 1. any Wrongful Act which occurred on or before June 30, 2004, or

2. any Wrongful Act occurring on or subsequent to June 30, 2004 which, together with a Wrongful Act occurring prior to such **[*29]** date, would constitute a Related Wrongful Act.

(Id.; Policy at 3, Section IV.)

An insurer's duty to indemnify is narrower than the duty to defend, and is determined differently. *United Nat'l Ins. Co., 99 P.3d at 1157-58*. The duty to defend arises where there is potential coverage under the relevant insurance policy, as determined by comparing the underlying complaint's allegations with the insurance policy's terms. *Id. at 1158*. In contrast, the duty to indemnify arises "when an insured 'becomes legally obligated to pay damages in the underlying action that gives rise to a claim under the policy.'" *Id. at 1157* (quoting *Zurich Ins. Co. v. Raymark Indus., 118 Ill. 2d 23, 514 N.E.2d 150, 163, 112 Ill. Dec. 684 (Ill. 1987)*). Consequently, an insurer is obligated to indemnify an insured when "'the insured's activity and the resulting loss or damage . . . actually fall[s] within the . . . policy's coverage.'" Id. (quoting *Outboard Marine v. Liberty Mut. Ins., 154 Ill. 2d 90, 607 N.E.2d 1204, 1221, 180 Ill. Dec. 691 (Ill. 1992)* (emphasis in original)).

Because Carolina owes a duty to indemnify under the Policy, but owes no duty to defend, the relevant inquiry is whether Defendants' conduct actually falls within the Past Acts Exclusion, unless Policy language demonstrates Carolina excluded coverage for both actual and alleged Wrongful Acts. The Past Acts Exclusion itself does not indicate expressly whether it applies to both actual and alleged Wrongful Acts. However, it **[*30]** refers to Wrongful Acts "which occurred" prior to June 30, 2004 or "occurring" subsequent to that date. This language suggests that the exclusion is based on when Wrongful Acts actually occurred rather than on allegations alone.

Viewing the Policy as a whole, the Past Acts Exclusion is ambiguous regarding whether it applies to both actual and alleged Wrongful Acts. One endorsement, the Final Adjudication for Exclusions A., B. and C., provides certain exclusions "shall not apply unless a judgment or other final adjudication adverse to any of the Insureds in such Claim shall establish" that the Insured gained certain profits or committed a criminal or fraudulent act. (Policy, Endorsement 214025.) This endorsement arguably suggests that when the parties intended for a final judgment to be required, they indicated that intent expressly. This endorsement does not apply to the Past Acts Exclusion.

However, several other exclusions indicate they will apply to Claims "based upon, arising out of, directly or indirectly resulting from or in consequence of, or in any way involving any actual or alleged" acts or omissions by the officers or directors in their capacities at other corporations, or **[*31]** for "any actual or alleged" pollution. (Policy at 5, Section IV.I & K.) The parties' express reference to "actual or alleged" conditions excluding coverage suggests that when the parties intended the Policy to exclude both actual and alleged conduct they indicated that intent expressly in the specific exclusion. The Past Acts Exclusion does not refer to both "actual and alleged" Wrongful Acts. The definition of Wrongful Act does not clarify the matter. The definition of Wrongful Act includes "any matter claimed against [the officers and directors] by reason of their status as Directors or Officers of the Company." (Policy at 4, Section III.Q.) An insured reasonably could expect this language to be descriptive of a general category or type of matter which actually must fall within the exclusion's language for Carolina to deny coverage.

The Policy does not specify expressly whether the Past Acts Exclusion applies to both actual and alleged Wrongful Acts. The Policy is ambiguous with respect to similar worded exclusions, sometimes expressly indicating a final judgment is required for the exclusion to apply, and other times expressly stating the exclusion applies to both actual and alleged circumstances. Because **[*32]** the Court construes all ambiguities in favor of the insureds, the Court concludes the Past Acts Exclusion applies only to actual Wrongful Acts and actual Related Wrongful Acts. Because neither party has presented evidence demonstrating no genuine issue of material fact remains regarding whether Defendants in fact engaged in Wrongful Acts or Related Wrongful Acts, the Court will deny the BOD Defendants' motion for summary judgment, Carolina's cross-motion for summary judgment, and Carolina's motion for summary judgment with respect to the Deal Defendants.

III. MOTION TO DISMISS

Also before the Court is Plaintiff Carolina's motion to dismiss (Doc. #65) the BOD Defendants' counterclaim for breach of *Nevada Revised Statute § 686A.310*, request for punitive damages, and request for special damages. Carolina moves to dismiss the BOD Defendants' claim for breach of *§ 686A.310*, Nevada's unfair claims practices statute, arguing the BOD Defendants make no factual allegations regarding how Carolina breached the statute. As to punitive damages, Carolina argues the BOD Defendants do not allege any conduct supporting punitive damages. Finally, Carolina argues the BOD Defendants do not plead special damages with specificity.

The BOD Defendants **[*33]** respond that they meet the pleading standard under Rule 8. As to punitive damages, the BOD Defendants contend their allegation is sufficient and "Carolina Casualty will have the opportunity during discovery to learn the factual and legal basis for the claim, and evaluate the merits of this claim." (Opp'n at 7.) Alternatively, the BOD Defendants argue Carolina's refusal to indemnify based on the Past Acts Exclusion was in conscious disregard of their rights, which supports punitive damages. The BOD Defendants do not respond to the argument regarding special damages.

In considering a motion to dismiss, "all well-pleaded allegations of material fact are taken as true and construed in a light most favorable to the non-moving party." *Wyler Summit P'ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998)* (citation omitted). However, the Court does not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations in the plaintiff's complaint. See *Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994)*. There is a strong presumption against dismissing an action for failure to state a claim. See *Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997)* (citation omitted). The issue is not whether the plaintiff ultimately will prevail, but whether she may offer evidence in support of her claims. See id. (quoting *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)*). A plaintiff **[*34]** must make sufficient factual allegations to establish a plausible entitlement to relief. *Bell Atlantic Corp. v Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929 (2007)*. Such allegations must amount to "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Id. at 1964-65*.

A. Counterclaim Two

Nevada Revised Statute § 686A.310(1) makes various activities unfair practices.[4] Section 686A.310 "address[es] the manner in which an insurer handles an insured's claim whether or not the claim is denied." Pioneer Chlor Alkali Co., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 863 F. Supp. 1237, 1243 (D. Nev. 1994). In contrast, an insurer is liable for the common law tort of violating the covenant of good faith and fair dealing (or "bad faith") if the insurer "denies a claim without any reasonable basis and with knowledge that no reasonable basis exists to deny the claim." Id. Consequently, a breach of the statute does not necessarily result in bad faith, and bad faith does not necessarily equate to a breach of statutory duties. Id. at 1242.

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[4] (a) Misrepresenting to insureds or claimants pertinent facts or insurance policy provisions relating to any coverage at issue.

(b) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies.

(c) Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies.

(d) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss requirements **[*35]** have been completed and submitted by the insured.

(e) Failing to effectuate prompt, fair and equitable settlements of claims in which liability of the insurer has become reasonably clear.

(f) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds, when the insureds have made claims for amounts reasonably similar to the amounts ultimately recovered.

(g) Attempting to settle a claim by an insured for less than the amount to which a reasonable person would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application.

(h) Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of, the insured, his representative, agent or broker.

(I) Failing, upon payment of a claim, to inform insureds or beneficiaries of the coverage under which payment is made.

(j) Making known to insureds or claimants a practice of the insurer of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to **[*36]** accept settlements or compromises less than the amount awarded in arbitration.

(k) Delaying the investigation or payment of claims by requiring an insured or a claimant, or the physician of either, to submit a preliminary claim report, and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information.

(l) Failing to settle claims promptly, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.

(m) Failing to comply with the provisions of NRS 687B.310 to 687B.390, inclusive, or 687B.410.

(n) Failing to provide promptly to an insured a reasonable explanation of the basis in the insurance policy, with respect to the facts of the insured's claim and the applicable law, for the denial of his claim or for an offer to settle or compromise his claim.

(o) Advising an insured or claimant not to seek legal counsel.

(p) Misleading an insured or claimant concerning any applicable statute of limitations.

The BOD Defendants' Counterclaim regarding Carolina's alleged breach of *§ 686A.310* states: "Counterdefendant Carolina Casualty is **[*37]** in violation of multiple sections of *NRS 686A.310*, all to the damage and detriment of Defendants, and Defendants are entitled to an award of general, special, compensatory, and punitive damages." Defendants recite no facts in support of this claim other than Carolina's denial of coverage. Mere denial of a claim by itself does not violate any of the enumerated provisions of the statute. Under Twombly, the claim is insufficiently pled, as Defendants do not allege any facts establishing a plausible entitlement to relief. The Court will dismiss this claim without prejudice. Defendants must file an amended counterclaim within thirty (30) days of the date of this Order if they wish to assert a claim under *§ 686A.310*.

B. Punitive Damages

Under Nevada law, "bad faith, by itself, does not establish liability for punitive damages." *United Fire Ins. Co. v. McClelland, 105 Nev. 504, 780 P.2d 193, 198 (Nev. 1989)*. To recover punitive damages, a plaintiff also must show "'oppression, fraud, or malice, express or implied.'" Id. (quoting *Nev. Rev. Stat. § 42.001*). Oppression means "despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person." *Nev. Rev. Stat. § 42.001(4)*. Malice means "conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious **[*38]** disregard of the rights or safety of others." Id. *§ 42.001(3)*. Fraud means "an intentional misrepresentation, deception or concealment of a material fact known to the person with the intent to deprive another person of his rights or property or to otherwise injure another person." Id. *§ 42.001(2)*.

The Counterclaim states no facts supporting a claim of oppression, malice, or fraud. All the Counterclaim alleges is that Carolina denied the claim. Mere bad faith denial of a claim does not support punitive damages. The Court will dismiss the request for punitive damages without prejudice. Defendants must file an amended counterclaim within thirty (30) days of the date of this Order if they wish to request punitive damages.

C. Special Damages

Pursuant to *Federal Rule of Civil Procedure 9(g)*, "[i]f an item of special damage is claimed, it must be specifically stated." The Counterclaim requests special damages but does not specifically state in factual terms what items are claimed or any basis therefor. Counterclaimants also do not respond to Carolina's arguments for dismissal of the request for special damages. The Court will dismiss the request for special damages without prejudice. Defendants must file an amended counterclaim within thirty (30) days **[*39]** of the date of this Order if they wish to request special damages.

IV. CONCLUSION

IT IS THEREFORE ORDERED that Defendants Thomas R. Moyes, Samuel Clay Rogers, Paul R. Kimmel, Eugene I. Davis, Mark E. Brown, Thomas Y. Hartley, Robert Forbuss, and Ikram Khan's Motion for Summary Judgment (Doc. #64) is hereby DENIED.

IT IS FURTHER ORDERED that Plaintiff Carolina Casualty Insurance Company's Cross-Motion for Summary Judgment (Doc. #75) is hereby DENIED.

IT IS FURTHER ORDERED that Plaintiff Carolina Casualty Insurance Company's Motion for Summary Judgment as to Donald K. McGhan, James J. McGhan, Marc S. Sperberg, and Theodore R. Maloney (Doc. #85) is hereby DENIED.

IT IS FURTHER ORDERED that Plaintiff Carolina Casualty Insurance Company's Motion to Dismiss Counterclaimants' Counterclaim for Breach of *NRS 686A.310* and Counterclaimants' Claims for Punitive and Special Damages (Doc. #65) is hereby GRANTED. The second count of Defendants' Counterclaim (Doc. #52) for breach of *Nevada Revised Statute § 686A.310*, Defendants' request for punitive damages, and Defendants' request for special damages are hereby dismissed without prejudice.

IT IS FURTHER ORDERED that Defendants shall have thirty (30) days from the date of this Order to amend their **[*40]** Counterclaim (Doc. #52).

DATED: March 12, 2008.

/s/ Philip M. Pro

PHILIP M. PRO

United States District Judge

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Zucker v. United States Specialty Ins. Co.

United States Court of Appeals for the Eleventh Circuit

May 16, 2017, Decided

No. 15-10987

Reporter
856 F.3d 1343 *; 2017 U.S. App. LEXIS 8585 **; 26 Fla. L. Weekly Fed. C 1533; 2017 WL 2115414

CLIFFORD A. ZUCKER, not individually, but as Plan Administrator for BankUnited Financial Corporation, and as assignee of Humberto L. Lopez and Ramiro A. Ortiz, Plaintiff-Appellant, versus U.S. SPECIALTY INSURANCE COMPANY, Defendant-Appellee.

Prior History: [1]** Appeal from the United States District Court for the Southern District of Florida. D.C. Docket No. 1:14-cv-20893-UU.

Disposition: AFFIRMED.

Counsel: For CLIFFORD A. ZUCKER, not individually, but as Plan Administrator for BankUnited Financial Corporation, and as assignee of Humberto L. Lopez and Ramiro A. Ortiz., Plaintiff - Appellant: Caroline W. Spangenberg, Alfred S. Lurey, Todd C. Meyers, Kilpatrick Townsend & Stockton, LLP, ATLANTA, GA; Corali Lopez-Castro, Kozyak Tropin & Throckmorton, PA, CORAL GABLES, FL.

For U.S. SPECIALTY INSURANCE COMPANY, Defendant - Appellee: Douglas M. Mangel, Joseph Anselm Bailey, III, Joshua P. Mayer, Shipman & Goodwin, LLP, WASHINGTON, DC; Ira Scott Bergman, Lionel F. Rivera, Mound Cotton Wollan & Greengrass, FORT LAUDERDALE, FL; Mark K. Ostrowski, Shipman & Goodwin, LLP, HARTFORD, CT.

Judges: Before ED CARNES, Chief Judge, FAY and PARKER,* Circuit Judges.

Opinion by: ED CARNES

Opinion

[*1344] ED CARNES, Chief Judge:

For want of good corporate officers, BankUnited Financial Corporation engaged in risky lending practices before November 2008. For want of good lending practices, BankUnited became insolvent. For want of solvency, BankUnited's transfers of money to its subsidiary were fraudulent.

Wanting their money back, **[**2]** BankUnited's creditors sued its officers for authorizing those transfers. Wanting protection from the resulting liability, the officers asked their insurer — U.S. Specialty—to indemnify them. Not wanting to do that, U.S. Specialty refused based in part on a

* Honorable Barrington D. Parker, Jr., United States Circuit Judge for the Second Circuit, sitting by designation.

policy exclusion that barred coverage for claims "arising out of" conduct that occurred before November 2008. The question is whether the fraudulent transfers "arose out of" the officers' pre-November 2008 misconduct.

I. FACTS & PROCEDURAL HISTORY

BankUnited (the Parent Bank) was a holding company headquartered in Florida. Its wholly-owned subsidiary, BankUnited FSB (the Subsidiary Bank), was a federally-chartered savings bank. By November 2008 both of them were in serious financial trouble.[1]

A. The Banks' Fiscal Difficulties

The Treasury Department's Office of Thrift Supervision (OTS) began investigating the Subsidiary Bank in January 2008. By August, news reports were circulating that the Subsidiary Bank had engaged in risky lending practices during the housing boom that preceded the 2008 recession. The Parent Bank reported in a regulatory filing that, unless the Subsidiary Bank raised $400 million, OTS would downgrade its capitalization **[**3]** rating. The Parent Bank also announced that it was contributing $80 million in fresh capital to the Subsidiary Bank. This left the Parent Bank itself with only $40 million dollars to service **[*1345]** $125 million in debt, not a good situation for any financial institution to be in.

In September 2008 the Parent Bank's investors filed a class action against several corporate officers of the Parent Bank and the Subsidiary Bank, alleging that those officers had violated federal securities laws by knowingly or recklessly making "false and misleading statements about [the Parent Bank]." The investor plaintiffs based their allegations on, among other things, the Parent Bank's regulatory filings from 2006, which touted its "conservative underwriting standards that include evaluation of a borrower's debt service ability" and internal underwriting process. They also pointed to a 2007 filing by the Parent Bank that boldly asserted: "We expect that our historically conservative credit standards and relatively low loan to values will keep our loss experience well below industry averages." Even more boldly, the Parent Bank issued an April 2007 press release that included this statement by the company's CEO, **[**4]** Alfred Camner: "[O]ur levels came in better than we projected last quarter. This is because of our conservative underwriting. We do not engage in subprime lending and, as a portfolio lender, we treat each loan as if it is our own." And so on.

As it turned out (we are beyond mere allegations now), the Subsidiary Bank did engage in risky lending practices. Around the same time that the Parent Bank was being sued by its shareholders, the banks entered into agreements with OTS stipulating in September 2008 that they had "engaged in unsafe and unsound practices that . . . resulted in [the Subsidiary Bank] being in an unsatisfactory condition." This was "primarily due to the rising delinquencies and defaults in its payment option [Adjustable Rate Mortgage] loan portfolio."

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[1] "We relate the facts — as we must at this stage of the litigation — in the light most favorable to" the plaintiff. *Goodman v. Kimbrough, 718 F.3d 1325, 1329 (11th Cir. 2013)*.

B. The Parent Bank's Search for a New Insurer

By September 2008 St. Paul Mercury Insurance Company (Travelers) had declined to renew the Parent Bank's directors and officers (D&O) insurance policy, which is not surprising given the banks' fiscal difficulties. The Parent Bank began searching for a new insurer.

It found one in U.S. Specialty.[2] At the time, U.S. Specialty was aware that "[b]ad loans were affecting [the banks'] financial **[**5]** performance," and that they were in a "distressed financial condition." It was also aware that OTS was threatening to downgrade the Subsidiary Bank's capitalization rating unless the Parent Bank raised $400 million. All of which made issuing a D&O policy covering the Parent Bank's officers a risky proposition.

Margaret Kingsley, an underwriter and U.S. Specialty's designee under *Rule 30(b)(6) of the Federal Rules of Civil Procedure*, testified at her deposition that around the time the policy was issued, she thought it was unlikely that the Parent Bank would survive. She noted in the underwriting file that U.S. Specialty might be able to make an "opportunistic play" if it agreed to provide D&O coverage to the Parent Bank. Kingsley later testified that note in the file meant that insuring the Parent Bank was "an opportunity for [U.S. Specialty] to write a very restrictive policy and get some premium for it." In considering whether to issue a D&O policy to the **[*1346]** Parent Bank, U.S. Specialty also considered that regulators would be watching the banks closely, which would "keep[ ] them honest."

U.S. Specialty offered the Parent Bank a choice between two policies: one with a Prior Acts Exclusion (barring coverage for losses attributable to conduct **[**6]** of the officers before November 10, 2008) and one without that exclusion. The policy with the exclusion would cost $350,000; the policy without it would cost $650,000. The policy without the Prior Acts Exclusion would provide coverage only after the Parent Bank's other insurance policies had been exhausted.

The Parent Bank decided to purchase the policy with the Prior Acts Exclusion, but asked U.S. Specialty to increase the coverage limit from $10 million to $20 million. The purchased policy included in addition to the Prior Acts Exclusion a Prior Notice Exclusion, which excluded coverage as to any losses reported to any insurers under earlier insurance policies. With those two exclusions, the one-year policy cost the Parent Bank $700,000. And, at U.S. Specialty's request, the Parent Bank purchased an extension of the discovery period on the pre-existing Traveler's policy, increasing the amount of time it had to report claims to Traveler's. The first day of coverage under the U.S. Specialty policy was November 10, 2008.

C. The Transfer of Two Tax Refunds to the Subsidiary Bank

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[2] The Parent Bank actually obtained the insurance through a broker's negotiations with HCC Global Financial Products. Both U.S. Specialty and HCC Global are subsidiaries of HCC Insurance Holdings. HCC Global underwrites policies for a number of insurance companies that are subsidiaries of HCC Insurance, including U.S. Specialty. For simplicity's sake, and because this corporate structure has no bearing on the outcome of this case, we will refer to all of these entities collectively as "U.S. Specialty."

While the Parent Bank and the Subsidiary Bank were struggling to come to terms with the 2008 financial crisis, **[**7]** the Parent Bank's officers approved two transfers of money to the Subsidiary Bank that are the subject of this lawsuit. In January 2009 the Parent Bank received a tax refund check from the U.S. Treasury for approximately $20 million. It transferred all of that refund to the Subsidiary Bank. In March 2009 an officer of the Parent Bank directed that a second tax refund check from the Treasury for approximately $26 million that was supposed to be issued to the Parent Bank be wired directly to the Subsidiary Bank. Those $46 million in transfers occurred after November 10, 2008 (the inception date for the U.S. Specialty policy).

D. The Bankruptcy Litigation

The Parent Bank's and the Subsidiary Bank's financial conditions did not improve. And in May 2009 OTS closed the Subsidiary Bank and appointed the FDIC as its receiver. One day later, the Parent Bank filed for bankruptcy under Chapter 11 of the Bankruptcy Code. And a few days after that, an official committee of unsecured creditors (the Committee) was appointed in the bankruptcy action and began investigating whether claims might exist against, among others, the Parent Bank's corporate officers — the idea being that those claims could **[**8]** be pursued for the benefit of the bankruptcy estate.

The Committee filed a derivative standing motion, seeking "an order granting the Committee standing to investigate, assert and prosecute any and all claims that [the Parent Bank might have] against [its] current and former officers and directors . . . ."[3] The motion asserted that:

> Based on [the Parent Bank's] financial collapse, the issues raised in the [September 2008] Securities Litigation, and information obtained by its professionals, the Committee believes that Claims on behalf of [the Parent Bank's bankruptcy estate] may exist against certain of [its] current and former officers and **[*1347]** directors . . . including without limitation Claims arising from breaches of duties owed by [those insiders] to [the Parent Bank] or [its] constituents, misrepresentations, failures to disclose and other wrongful acts . . . .

The bankruptcy court granted the Committee's derivative standing motion.

In November 2009, the Committee sent demand letters to three former Parent Bank executives — Alfred Camner, Ramiro Ortiz, and Humberto Lopez— stating that it believed the Parent Bank's estate had claims against the three of them, "including without limitation **[**9]** claims arising from the breach of [their] fiduciary duties of care and loyalty . . . and [their] failure to perform [their] duties . . . in good faith" and from their violations of federal securities laws. U.S. Specialty was notified of those claims and issued a letter denying coverage based on the Prior Acts Exclusion, because the "Committee Demand Letters allege numerous Wrongful Acts occurring prior to November 10, 2008."

In December 2011, the Committee filed an adversary proceeding against Camner and Lopez in the bankruptcy court. It later sought to amend the complaint by substituting Ortiz for Camner as a defendant as to one count. Meanwhile, in June 2012, the bankruptcy court substituted Clifford Zucker, who had been appointed as the bankruptcy Plan Administrator, for the Committee as

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[3] Besides the Parent Bank, there were two other debtors in the bankruptcy action, but that fact is not relevant to our decision.

the plaintiff in the bankruptcy action. After the district court granted Zucker leave to do so, he filed an amended complaint against Camner, Lopez, and Ortiz.

The amended complaint had four counts. Count I sought to recover from Lopez and Camner for breaching their fiduciary duties by "fail[ing] to implement and maintain effective risk management procedures and internal controls," which caused the Subsidiary **[**10]** Bank to be placed into receivership and the Parent Bank to declare bankruptcy. Count II sought to recover from Lopez and Camner for breaching their fiduciary duties by providing inaccurate and incomplete information to the Parent Bank's board of directors "concerning the lack of internal controls and unreasonably risky lending practices," which Zucker alleged caused the board to authorize expenditures and the issuance of debt and artificially prolonged the existence of the company, causing more losses. Count III sought to recover from Camner alone for causing the Parent Bank's board to approve the infusion of $80 million into the Subsidiary Bank without "investigating whether, or disclosing to [the Parent Bank's] board that, among other things, the capital infusion would not forestall regulatory seizure of the [Subsidiary Bank]." And Count IV sought to recover from Ortiz and Lopez based on the contention that approving the two tax refund transfers to the Subsidiary Bank in 2009 was a breach of their fiduciary duties because the transfers violated Florida's Uniform Fraudulent Transfers Act. The fraudulent transfer claims (Count IV) based on the 2009 tax refund transfers are the primary **[**11]** focus of this lawsuit.

In November 2012, Bankruptcy Plan Administrator Zucker sent a written settlement demand to Lopez and Oritz concerning the fraudulent transfer claims (Count IV). That demand was forwarded to U.S. Specialty, which again denied coverage.

Eventually, the fraudulent transfer claims settled for $15 million to be paid either by U.S. Specialty or by Lopez and Ortiz individually. The settlement agreement assigned Lopez's and Ortiz's rights under the U.S. Specialty policy to Zucker. The other claims were settled separately.

E. The Lawsuit against U.S. Specialty

After Zucker settled his fraudulent transfer claims against the banks' corporate **[*1348]** officers in the bankruptcy action, he filed this lawsuit in the district court against U.S. Specialty based on its denial of coverage as to those claims. In the complaint, he asserted claims for breach of contract, statutory bad faith, and common law bad faith. The district court bifurcated the proceedings so that it could decide whether denying coverage of the fraudulent transfer claims amounted to a breach of contract before considering whether U.S. Specialty acted in bad faith. The parties filed cross-motions for summary judgment, disagreeing **[**12]** primarily over whether the fraudulent transfer claims were covered by the U.S. Specialty policy.

The district court concluded that the Prior Acts Exclusion did bar coverage for the fraudulent transfer claims, and as a result, U.S. Specialty did not breach the insurance contract. On that basis it granted summary judgment in favor of U.S. Specialty. Because that decision also foreclosed Zucker's bad faith claims, the district court entered a final judgment against Zucker. This is his appeal.

II. ANALYSIS

We review de novo the district court's interpretation of the insurance policy and its grant of summary judgment in favor of U.S. Specialty. See *EmbroidMe.com, Inc. v. Travelers Prop. Cas. Co. of Am., 845 F.3d 1099, 1105 (11th Cir. 2017)*. In so doing, "we view all of the evidence in a light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor." *Procaps S.A. v. Patheon, Inc., 845 F.3d 1072, 1079 (11th Cir. 2016)* (quotation marks omitted).

The parties agree that Florida law applies to this case. "Under Florida law, insurance contracts are construed according to their plain meaning." *Taurus Holdings, Inc. v. U.S. Fidelity & Guar. Co., 913 So. 2d 528, 532 (Fla. 2005)*. "Ambiguities are construed against the insurer and in favor of coverage[,] . . . . [but] to allow for such a construction the provision must actually be ambiguous."[4] Id. While "insurance policies may be confusing to persons not **[**13]** trained or experienced in the form and language of insurance policies[,] . . . . that fact does not make such policies or language legally ambiguous." *Fla. Ins. Guar. Ass'n v. Sechler, 478 So. 2d 365, 367 (Fla. 5th DCA 1985)*. "[C]ourts may not rewrite contracts, add meaning that is not present, or otherwise reach results contrary to the intentions of the parties." *Taurus Holdings, Inc., 913 So. 2d at 532* (quotation marks omitted).

Zucker contends that the district court erred when it concluded that the fraudulent transfer claims in the bankruptcy complaint fell within the Prior Acts Exclusion in the U.S. Specialty policy. We disagree with him and agree with the district court.

A. Zucker's Claims Fall within the Prior Acts Exclusion

Zucker's claims against Lopez and Ortiz alleged that approving the 2009 tax refund transfers was a breach of their fiduciary duties because those transfers were fraudulent ones under Florida law.[5] **[*1349]** He alleged that they were fraudulent transfers because they "were made to the [Subsidiary Bank], an insider, for antecedent debt, . . . at a time when [the Parent Bank] was insolvent . . . . [and] the persons in control of [the Subsidiary Bank] had reasonable cause to believe [the Parent Bank] was insolvent."

As the district court explained: "This allegation parrots the language of **[**14]** Florida's Uniform Fraudulent Transfer Act . . . ." See *Fla. Stat. § 726.106(2)*. To sustain a fraudulent transfer claim under that statutory provision, a creditor must demonstrate that, among other things, the debtor was insolvent at the time of the transfer. Id.

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[4] U.S. Specialty contends that this rule of construction should not apply here because this was an insurance agreement between sophisticated parties. Because we conclude that the policy here was not ambiguous, we need not address that contention.

[5] Zucker has an alternative theory that, even if the district court were correct that his claim that transferring the entire $46 million in tax refunds arose out of pre-2008 conduct and was covered by the Prior Acts Exclusion, the transfer of $17.9 million of the amount did not and was not. We will not consider that alternative theory of coverage because Zucker did not adequately raise it in the district court. See *Reider v. Philip Morris USA, Inc., 793 F.3d 1254, 1258 (11th Cir. 2015)* ("[I]ssues raised for the first time on appeal are generally forfeited because the district court did not have the opportunity to consider them.") (quotation marks omitted); *Juris v. Inamed Corp., 685 F.3d 1294, 1325 (11th Cir. 2012)* ("[I]f a party hopes to preserve a claim, argument, theory, or defense on appeal, she must first clearly present it to the district court, that is, in such a way as to afford the district court an opportunity to recognize and rule on it.") (quotation marks omitted).

The U.S. Specialty policy's Prior Acts Exclusion reads:

> In consideration of the premium charged, it is agreed that the Insurer will not be liable to make any payment of Loss in connection with a Claim arising out of, based upon or attributable to any Wrongful Act committed or allegedly committed, in whole or in part, prior to [November 10, 2008].

And the policy defines a "wrongful act" as any:

> (1) actual or alleged act, error, misstatement, misleading statement, omission or breach of duty:
>
> (a) by an Insured Person in his or her capacity as such, including in an Outside Capacity, or
>
> (b) with respect only to Securities Claims, by the Company; or
>
> (2) matter claimed against an Insured Person solely by reason of his or her service in such capacity or in an Outside Capacity.

Zucker argues that because the tax refund transfers that form the basis of the fraudulent transfer claims occurred in 2009 and insolvency itself is not a wrongful act, those claims should **[**15]** not fall within the Prior Acts Exclusion of the policy.[6] U.S. Specialty responds that the claims do fall within the exclusion because what made the transfers wrongful was the Parent Bank's insolvency, which resulted from its officers' pre-November 2008 misdeeds, not their post-November 2008 conduct.

"When we address issues of state law, like the ones in this case, we are bound by the decisions of the state supreme court." *World Harvest Church, Inc. v. Guideone Mut. Ins. Co., 586 F.3d 950, 957 (11th Cir. 2009)*. The Supreme Court of Florida has concluded that the phrase "arising out of" is not ambiguous and has a broad meaning, even when used in a policy exclusion. *Taurus Holdings, Inc., 913 So. 2d at 539*. It "means 'originating from,' 'having its origin in,' 'growing out of,' 'flowing from,' 'incident to' or 'having a connection with.'" Id. While that standard "requires more than a mere coincidence between the conduct . . . and the injury[,] . . . . it does not require proximate caus[ation]." *Id. at 539-40*.

[*1350] Decisions of the Florida Supreme Court, the Florida Courts of Appeal, and this Court show that the "arising out of" standard is not difficult to meet. For instance, in *Hernandez v. Protective Casualty Insurance Co., 473 So. 2d 1241, 1242-43 (Fla. 1985)*, the court concluded that a driver's injuries did "aris[e] out of the ownership, maintenance or use of a motor vehicle" where he was injured by the police as they arrested **[**16]** him for a traffic violation. The Florida Supreme Court explained:

> It was the manner of petitioner's use of his vehicle which prompted the actions causing his injury. While the force exercised by the police may have been the direct cause of injury, under the circumstances of this case it was not such an intervening event so as to break the link between petitioner's use of the vehicle and his resultant injury.

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[6] Zucker also makes much of the fact that the U.S. Specialty underwriter changed the title of the Prior Acts Exclusion on the quotes she sent to the Parent Bank from "Prior Acts Exclusion (Broad Form)" to "Prior Acts Exclusion (Policy Inception)," although the exclusion in the final policy still contained the "broad form" language. Zucker does not explain in his briefs to us how that change in the title could modify or clarify the meaning of the exclusion or mislead an insured. We are not persuaded that it could or did.

Id. at 1243.[7]

Likewise, in *Acosta, Inc. v. National Union Fire Insurance Co., 39 So. 3d 565, 576-77 (Fla. 1st DCA 2010)*, the Florida First District Court of Appeal concluded that a lawsuit "arose out of" an earlier lawsuit and thus fell within a prior litigation exclusion.[8] The court explained that the later lawsuit "ha[d] a connection with" the earlier one because "all of the counts asserted against" the defendant in both the earlier and later lawsuits "center[ed] on its efforts to obtain contracts with [the plaintiffs'] clients." Id. Although the two lawsuits focused on different conduct, they shared a connection because the defendant's conduct giving rise to each lawsuit was part of the same "overall scheme." Id. And we have applied the Florida Supreme Court's definition of "arising out of" from Taurus Holdings in a similar fashion. *James River Ins. Co. v. Ground Down Eng'g, Inc., 540 F.3d 1270, 1276-77 (11th Cir. 2008)* (holding that a claim "arose out of" pollution, and therefore **[**17]** was covered by a pollution exclusion, where a negligent environmental site assessment that failed to detect the presence of pollution on the property led to lost profits, lost property value, and the need for environmental remediation).[9]

In light of the Florida courts' broad interpretation of the "arising out of" standard, we conclude that the Parent Bank's insolvency "arose out of" wrongful acts that occurred before November 10, 2008. After all, Zucker's complaint in the bankruptcy case alleged that the Parent Bank's corporate officers committed wrongful acts, some of which occurred before November 2008, that harmed the company financially. So Zucker has admitted that the wrongful conduct of the corporate officers contributed to the insolvency that made the 2009 tax refund transfers fraudulent under Florida law. And while Zucker is right to say that insolvency itself is not an inherently wrongful act, what matters here is that an essential element of his claim — the Parent Bank's insolvency — has **[*1351]** a connection to some prior wrongful acts of the Parent Bank's officers and directors that occurred before the policy's effective date. Given that, Zucker's fraudulent transfer claims do share **[**18]** "a connection with" wrongful acts covered by the Prior Acts Exclusion. *Taurus Holdings, Inc., 913 So. 2d at 539*.

Zucker attempts to get around that connection by emphasizing that he didn't incorporate the paragraphs describing the officers' misconduct into Count IV (the fraudulent transfer count) of his complaint. True, but irrelevant. The Parent Bank's insolvency is an element of his claim and that insolvency has a connection to misdeeds and misdealing of the Parent Bank's officers before November 2008.

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[7] Though Hernandez predates the Florida Supreme Court's effort in Taurus Holdings to define "arising out of," its decision in that case cited Hernandez — as well as several other older cases discussing the meaning of "arising out of" — approvingly. *Taurus Holdings, Inc., 913 So. 2d at 533-34*.

[8] "Federal courts sitting in diversity are bound to adhere to decisions of [Florida's] intermediate appellate courts, absent some persuasive indication that the state's highest court would decide the issue otherwise." *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC, 746 F.3d 1008, 1025 (11th Cir. 2014)* (quotation marks omitted) (alteration in original).

[9] Our prior panel precedent rule requires us to follow a prior panel's binding interpretation of state law unless and until the state supreme court or a state intermediate appellate court issues a decision suggesting that our interpretation of state law was incorrect. *EmbroidMe.com, Inc., 845 F.3d at 1105*; *Roboserve, Ltd. v. Tom's Foods, Inc., 940 F.2d 1441, 1450-51 (11th Cir. 1991)*. That has not happened in this instance.

Zucker also points out that he would not have had to prove that the officers engaged in misconduct in order to prevail on his fraudulent transfer claim. That does not, however, mean there was no causal connection between the officers' deeds and the demise of the Parent Bank. "[C]overage —and the accompanying duty to indemnify — is not determined by reference to the claimant's complaint, but rather by reference to the actual facts and circumstances of the injury." *Mid-Continent Cas. Co. v. Royal Crane, LLC, 169 So. 3d 174, 181 (Fla. 4th DCA 2015)* (quotation marks omitted). Zucker cannot plead himself around reality.

This is not a case where the causal connection between the prior wrongful acts and the loss was merely coincidental. See, e.g., *Race v. Nationwide Mut. Fire Ins. Co., 542 So. 2d 347, 351 (Fla. 1989)* (holding that a motorist's injuries did not arise out of the use of an automobile **[**19]** where he was attacked primarily because a fellow motorist, with whom he had collided, thought he was pulling a gun and the accident created, at most, "an atmosphere of hostility"); *Martinez v. Citizens Prop. Ins. Corp., 982 So. 2d 57, 59 (Fla. 3d DCA 2008)* (holding that an injury did not arise out of the "maintenance, use, loading or unloading of motor vehicles" where the insured was hurt when a driveway collapsed while he was changing the oil on his car because "it was pure chance that the object upon the driveway at the time of its collapse happened to be a car"); *Almayor v. State Farm Fire & Cas. Co., 613 So. 2d 526, 527 (Fla. 3d DCA 1993)* (holding that an injury did not arise out of the "ownership, maintenance or use of [a] motor vehicle" where plaintiff was injured in an explosion caused when a cigarette ignited gasoline fumes from gas that had been siphoned from a car, because the car "was merely the coincidental and legally remote source of a component, the gasoline, which was itself harmless until acted upon by the insured's negligence").

It is no coincidence that insolvency and misconduct converged on the Parent Bank. Instead, the misconduct was a significant contributing cause of the Parent Bank's vulnerability to the 2008 financial crisis. For that reason, it is plain that Zucker's fraudulent conveyance claims "arose from" **[**20]** wrongful acts that predate November 10, 2008 and therefore fell within the scope of the Prior Acts Exclusion.[10]

[*1352] B. The Policy's Terms are Unambiguous and Its Coverage is Not Illusory

Zucker's final effort to get around the Prior Acts Exclusion is his argument that if we adopt U.S. Specialty's construction of the Prior Acts Exclusion, the policy's coverage is illusory. We don't think so.

Zucker relies primarily on *Purrelli v. State Farm Fire & Casualty Co., 698 So. 2d 618, 620 (Fla. 2d DCA 1997)*, which held that when an exclusion or limitation to an insurance policy "swallow[s] up the insuring provision" it "creat[es] the grossest form of ambiguity." As we mentioned earlier,

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[10] At one point in his brief, Zucker suggests that "arising out of" does not mean in this policy what the Florida Supreme Court has said it means in other policies. He points to other exclusions in the policy that use the "arising out of" language and emphasizes that they also include relatedness terminology. But Zucker makes this argument only in passing, provides no authority for it, and does not adequately explain why the use of relatedness terminology in other exclusions matters in this case. As a result, he has not properly presented this argument and we do not consider it. *Sapuppo v. Allsatate Floridian Ins. Co., 739 F.3d 678, 681 (11th Cir. 2014)* ("We have long held that an appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority.").

when insurance policies are ambiguous, Florida courts construe them in favor of coverage. *Taurus Holdings, Inc., 913 So. 2d at 532*. So when a policy exclusion does swallow up an insuring provision, the Florida Courts conclude that the policy is ambiguous, *Purrelli, 698 So. 2d at 620*, and resolve that ambiguity by ignoring the exclusion, see *Tire Kingdom, Inc. v. First S. Ins. Co., 573 So. 2d 885, 887 (Fla. 3d DCA 1990)*. To quote Tire Kingdom, "[a]n insurance policy cannot grant [a] right[ ] in one paragraph and then retract the very same right in another paragraph called an 'exclusion.'" Id.

Zucker argues that Purelli is on all fours with this case, but it is not. The insurance policy in Purrelli had a provision explicitly providing coverage for invasion of privacy **[**21]** (an intentional tort), but also had an exclusion precluding coverage for "intended" injuries. *698 So. 2d at 619-20*. In that way the policy's exclusion expressly contradicted its coverage provisions, leaving the insured to wonder which provision correctly explained the scope of his coverage. Here, by contrast, the U.S. Specialty policy's Prior Acts Exclusion does not "grant [a] right[ ] in one paragraph and then retract the very same right" in a later one. See *Tire Kingdom, Inc., 573 So. 2d at 887*. Instead, it simply excludes coverage for a subset of claims that would ordinarily fall within the policy's insuring provisions. For the same reason, Tire Kingdom doesn't support Zucker's position. In that case, the policy "attempt[ed] to provide coverage for certain advertising activities and then exclude those same activities." Id. The U.S. Specialty policy doesn't do that.

This also is not a case that falls within the common law "illusory coverage" doctrine that other jurisdictions have recognized and that we have indicated is part of Florida's insurance law. See *Interline Brands, Inc. v. Chartis Specialty Ins. Co., 749 F.3d 962, 966-67 (11th Cir. 2014)* (applying Florida law). In order for an exclusion to render a policy's coverage illusory it must eliminate all —or at least virtually all —coverage in a policy. See id. ("According to Interline, **[**22]** the Exclusion's broad scope reduces the coverage Chartis sold to Interline to a 'façade' . . . . Interline overstates the extent to which the Exclusion limits coverage. Even with the broad Exclusion, the policy still contains extensive coverage.") (quotation marks omitted); cf. *Great Am. E & S Ins. Co. v. End Zone Pub & Grill of Narragansett, Inc., 45 A.3d 571, 576 (R.I. 2012)* ("We will deem an exclusion to an insurance policy illusory only when it would preclude coverage in almost any circumstance.") (quotation marks omitted); *McGregor v. Allamerica Ins. Co., 449 Mass. 400, 868 N.E.2d 1225, 1228 (Mass. 2007)* ("As long as an insurance policy provides coverage for some acts, it is not illusory simply because it contains a broad exclusion."); *Point of Rocks Ranch, LLC v. Sun Valley Title Ins. Co., 143 Idaho 411, 146 P.3d 677, 680 (Idaho 2006)* ("An insurance policy's coverage is illusory if it appears that if any actual coverage does exist it is extremely minimal and affords **[*1353]** no realistic protection to any group or class of injured persons.") (quotation marks omitted).

U.S. Specialty overstates the case when it says that the policy "still provides coverage for a wide variety of Claims." We need not agree with that statement. It is enough that the policy provided coverage for claims that arose exclusively from conduct that happened after the effective date of the policy. The Prior Acts Exclusion excludes a lot of coverage, but not all coverage. And regardless of what **[**23]** the result might have been had this exclusion been included in an adhesion policy issued to a layperson, it was not. The Parent Bank entered into this insurance contract with its eyes wide open and with its wallet on its mind. U.S. Specialty offered the Parent Bank a policy without a Prior Acts Exclusion. After weighing that offer the bank decided to reject

it, having calculated that its best interests would be served by using the money it would save by accepting the exclusion to buy an increased total coverage limit. In hindsight, that decision did not work out well, but it was the decision of a sophisticated, fully informed party.

Zucker believes the Parent Bank did not get a good deal and wishes that it had paid a higher premium for a policy without a Prior Acts Exclusion. But after the fact wishes are not enough to change before the fact choices. Prior acts exclusions serve valid purposes when agreed to by consenting parties. Cf. *Interline Brands, Inc., 749 F.3d at 967* ("[E]xclusions are not necessarily harmful. Exclusions . . . allow creation of a policy that provides the insured the coverage it needs at a price it can afford. Without such exclusions, coverage would undoubtedly be more expensive."). The Parent Bank chose to rely **[**24]** on its old policies to cover claims against its officers connected to wrongful acts that occurred before November 2008. It chose to buy the policy that it bought. It cannot change that choice now, nor can its former corporate officers, nor can Zucker.[11]

AFFIRMED.

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[11] U.S. Specialty also contends alternatively that the fraudulent conveyance claims are barred by the policy's Prior Notice Exclusion. The district court rejected that contention. Because we conclude that the fraudulent conveyance claims do fall within the Prior Acts Exclusion and that the exclusion does not render the policy's coverage illusory, we need not address whether we would reach the same result based on the Prior Notice Exclusion.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 14487893 CANADA INC.

Court of Appeal File No. COA-24-OM-0342
Superior Court File No. CV-21-00658423-00CL

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

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