UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2835

NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH, PA.,

Plaintiff-Counter Defendant,
Appellee,

v.

RESOLUTION TRUST CORPORATION, ET AL.,

Defendants,

RESOLUTION TRUST CORPORATION, LEE HOGAN, EDGAR A. SMITH, WELDON H. SMITH, HOWARD TELLEPSEN, JR., LARRY M. STREET, HARRY J. GLAUSER, GEORGE S. HARRIS, SR., JOHN EIKENBURG, S. DON NORRIS, JOE LYNCH, ESTATE OF WILLIAM E. DANIELS,

Defendants-Counter Plaintiffs,
Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-92-1157)

(February 21, 1994)

Before WISDOM, HIGGINBOTHAM, and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:[*]

On March 8, 1989, the Federal Home Loan Bank Board ("FHLBB") declared Commonwealth Savings insolvent and appointed the

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Federal Savings and Loan Insurance Corporation ("FSLIC") as conservator.[1] Shortly thereafter, the FHLBB appointed the FSLIC as receiver for Commonwealth and as conservator for Commonwealth Federal, an institution chartered by the FHLBB and to which certain of Commonwealth's assets had been sold -- including Commonwealth's claims against its former directors and officers.

Pursuant to the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), the Resolution Trust Corporation ("RTC") succeeded the FSLIC as conservator for Commonwealth Federal. In June 1991, the Office of Thrift Supervision appointed the RTC as receiver for Commonwealth Federal; later that month, the RTC in its *corporate* capacity purchased the claims against the former Commonwealth directors and officers from the RTC as receiver for Commonwealth Federal.

The RTC filed suit on March 6, 1992 against the former Commonwealth directors and officers. On April 14, 1992, National Union filed this action seeking a declaratory judgment that it has no duty to provide coverage under Commonwealth's Directors & Officers Liability Policy for claims asserted against the former directors and officers by the RTC.[2] National Union successfully argued below that the regulatory and "insured v. insured" exclusions in the D & O policy precluded coverage for the RTC's

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[1]Commonwealth Savings was a federally insured thrift chartered by the Texas Savings and Loan Department.

[2]National Union issued a D & O policy to Commonwealth Savings for a term of one year commencing March 25, 1987; the policy was subsequently extended for another year.

claims. In his order, the district court granted National Union's cross-motion for judgment on the pleadings finding the RTC's claims barred by the two exclusions.[3]

The RTC and former Commonwealth directors and officers appeal from this final judgment raising arguments quite familiar to this court. In brief, the defendant/appellants argue that the regulatory and insured v. insured exclusions do not unambiguously exclude coverage for claims asserted by the RTC. Further, they argue that the district court's conclusion that the exclusions bar coverage violates *state* public policy because it deprives the RTC of its rights as representative of Commonwealth's shareholders under Texas law. Devoted readers of F.2d will recall that a very similar set of arguments was made by the FDIC unsuccessfully in Fidelity & Deposit Co. v. Conner, 973 F.2d 1236 (5th Cir. 1992). Guided in part by Conner in the disposition of this case, we AFFIRM the district court's judgment on the scope of policy coverage but remand for further development, if appropriate, of appellants' affirmative defenses and counterclaims.

I.

As a preliminary matter, we note that a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c) "is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts."

[3]The district court simultaneously denied the defendant/appellants' motion for judgment on the pleadings.

Hebert Abstract v. Touchstone Properties, Ltd., 914 F.2d 74, 77 (5th Cir. 1990). If factual issues emerge, the district court should treat the motion as one for summary judgment. Fed. R. Civ. P. 12(c). Thus, our review of a district court's granting of a motion for judgment on the pleadings is -- as with summary judgment -- de novo.

II.

The regulatory exclusion contained in the D & O policy purchased by Commonwealth Savings provides as follows:

> [T]he insurer shall NOT be liable to make any payment for loss in connection with any claim based upon or attributable to any action or proceeding brought by or on behalf of the Federal Deposit Insurance Corporation, the Federal Savings & Loan Insurance Corporation, any other depository insurance organization, the Comptroller of the Currency, the Federal Home Loan Bank Board, or any other national or state Bank regulatory agency (all of said organizations and agencies hereinafter referred to as "Agencies"), including any type of legal action which such Agencies have the legal right to bring as receiver, conservator, liquidator or otherwise; whether such action or proceeding is brought in the name of such Agencies or by or on behalf of such Agencies in the name of any other entity or solely in the name of any Third Party.

In construing the regulatory exclusion under Texas law, ambiguity in the policy language is construed in favor of the insured. See Conner, 973 F.2d at 1244 & n.22 (citing Texas cases). However, the rule requiring construction in favor of coverage applies only if the exclusion is ambiguous. See Glover v. National Ins. Underwriters, 545 S.W.2d 755, 761 (Tex. 1977). Furthermore, we should not strain to find ambiguity in language of the D & O policy

exclusion. See Yancey v. Floyd West & Co., 755 S.W.2d 914, 918 (Tex.App--Fort Worth 1988, writ denied).

The RTC and former Commonwealth directors and officers urge us to find ambiguity in the regulatory exclusion where none exists. This we decline to do. The defendant/appellants maintain that the exclusion does not unambiguously bar coverage for three reasons: the RTC is not a *bank* regulatory agency; the RTC is not a *regulatory* agency; and the exclusion only covers "secondary suits" -- namely third-party actions "based upon or attributable to" an action filed by a bank regulatory agency. Each of these contentions is meritless.

First, the regulatory exclusion unquestionably classifies the FSLIC and the FHLBB as "*Bank* regulatory agenc[ies]" notwithstanding the fact that these pre-FIRREA agencies regulated thrifts, not banks. Thus, the absence of RTC regulatory authority over banks -- as opposed to thrifts -- is of no consequence; the policy unambiguously considers the RTC a "Bank regulatory agency."

Second, the proposition that the RTC is not a regulatory agency is squarely contradicted by the agency's express duties under FIRREA. For example, under 12 U.S.C. §1441a(b)(3)(A) (Supp. III 1991), the RTC is charged with managing and resolving cases involving failed thrifts. FIRREA further provides the RTC with the authority to promulgate rules and regulations "necessary or appropriate to carry out its duties." 12 U.S.C. §1441a(b)(11)(A)

(Supp. III 1991).[4] Counsel for the former Commonwealth directors and officers admitted at oral argument that the RTC does have regulatory power, but posited that because the RTC's regulatory power was limited to failed thrifts the policy's "regulatory agency" language did not encompass it. This position is untenable, however. The regulatory exclusion unquestionably would bar these *same* claims if brought by the FSLIC, the RTC's predecessor in interest here. FIRREA has merely allocated a portion of the FSLIC's regulatory authority to the RTC, see 12 U.S.C. §1441a(b)(3)(A), so it is incorrect to suggest that the exclusion's "regulatory agency" language does not apply to the RTC.

Finally, the defendant/appellants strain to find ambiguity by focusing on language in the exclusion barring claims "based upon or attributable to" any action brought by a bank regulatory agency. We join the overwhelming majority of courts to have considered this question in concluding that such an interpretation is "strained." See F.D.I.C. v. American Casualty

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[4]A number of other FIRREA provisions expressly confirm the unsurprising conclusion that the RTC is a regulatory agency. For example, §1441a(b)(10) confers certain "special powers" on the RTC, including: (1) the power to require a merger or consolidation "of an institution or institutions over which the Corporation has jurisdiction," provided that the merger or consolidation is consistent with §13(c)(4) of the Federal Deposit Insurance Act, see 12 U.S.C. §1441a(b)(10)(A)(iii) (Supp. III 1991); and (2) the authority to organize federal savings associations and bridge banks that are to operate in accordance with 12 U.S.C. §1441a(e). See 12 U.S.C. §§1441a(b)(10)(A)(iv) and (v) (Supp. III 1991). Section 1441a(e), in turn, authorizes the RTC to restrict, condition, and limit asset growth, lending activities, capital standards and certain other aspects of those entities during the period that those entities are "within" the control of the Corporation." 12 U.S.C. §1441a(e)(2).

Co., 975 F.2d 677, 680 (10th Cir. 1992) (citing cases). This "secondary suit" reading of the regulatory exclusion would bar only third party suits that arose as a result of earlier agency action, but *not* the agency action itself. Such a reading would be unreasonable, and would be an impermissible means of finding ambiguity in an otherwise unambiguous exclusion. In sum, there is only one sensible interpretation of the regulatory exclusion as it applies to the claims of the RTC: the plain language of the exclusion bars such claims.

III.

Because we conclude that the regulatory exclusion unambiguously bars the claims of the RTC, we find it unnecessary to determine whether the "insured v. insured" exclusion would similarly bar coverage. The RTC further argues that even if the exclusions bar coverage for its claims, such an interpretation would violate *state* public policy because it deprives the RTC of its rights as representative of Commonwealth's shareholders under Texas law. However, we decline to address this argument because it was presented for the first time on appeal and no "miscarriage of justice" would result from our refusal to consider this question. See F.D.I.C. v. Castle, 781 F.2d 1101, 1105 (5th Cir. 1986) (quoting Martinez v. Matthews, 544 F.2d 1233, 1237 (5th Cir. 1976)).

IV.

The defendant/appellants also urge that dismissal on the pleadings was inappropriate since their affirmative defenses and

counterclaims created fact issues. An affirmative defense or new matters appearing in the answer *may* create a material issue of fact and therefore prevent a successful motion under Rule 12(c). See 5A **Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure** §1368 at 529 (1990). Certain affirmative defenses and counterclaims raised by the RTC and former directors and officers here make dismissal on the pleadings inappropriate, see Hebert Abstract, 914 F.2d at 77. Moreover, the status of the affirmative defenses and counterclaims in light of the motion to dismiss on the pleadings was never explicitly evaluated by the district court. While some of these matters might fully overlap the issues we have here decided, it is not clear that all of them do. Consequently, we remand for further appropriate development of these defenses and counterclaims.[5]

V.

For the foregoing reasons, the judgment of the district court is **AFFIRMED** in part, **VACATED** and **REMANDED** in part.

[5]Appellants make much of the absence of the actual policy in the record. As we conclude supra, the exclusions to the policy are unambiguous, thereby obviating reference to the underlying policy. Further, the defendants could have attached the policy to their pleadings under Fed. R. Civ. P. 10(c). In short, this argument leaves us unconvinced.