2-7-2023

Houston Casualty Co v. Truist Financial Corp

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 22-1273

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HOUSTON CASUALTY COMPANY,
Appellant

WSFS FINANCIAL CORPORATION;
WILMINGTON SAVINGS FUND SOCIETY, FSB (Intervenor Plaintiffs)

v.

TRUIST FINANCIAL CORPORATION

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On Appeal from the United States District Court
for the District of Delaware
(District Court No. 1-18-cv-01472)
District Judge: Honorable Stephanos Bibas[*], U.S.C.J., by designation

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Submitted Under Third Circuit L.A.R. 34.1(a)
on January 25, 2023

Before: HARDIMAN, KRAUSE, and MATEY, *Circuit Judges*

(Filed: February 7, 2023)

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OPINION[†]

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[*] The Honorable Stephanos Bibas, Circuit Judge sitting by designation pursuant to 28 U.S.C. § 291(b).

[†] This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

KRAUSE, *Circuit Judge*.

Appellant Houston Casualty Company (HCC) seeks to recoup its $5 million insurance payout to policyholder WSFS Financial Corporation (WSFS) from Appellee Truist Financial Corporation (Truist). HCC asserts that Truist promised to indemnify WSFS for the losses underlying the insurance payout and that HCC, as WSFS's insurer, has a subrogation right to indemnification for that payout. But the terms of the indemnification agreement between Truist and WSFS unambiguously state that Truist's obligations are "net of any insurance proceeds received by [WSFS]," App. 212, and that plain text precludes WSFS from recovering the $5 million from Truist, which necessarily precludes HCC—as WSFS's subrogee—from recovering it as well. Accordingly, we will affirm the District Court's grant of summary judgment in favor of Truist.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 2010, WSFS purchased Christiana Bank & Trust Company (Christiana) from Truist's predecessor-in-interest. The Stock Purchase Agreement (SPA) governing this purchase set forth each party's indemnification obligations and all applicable "[l]imitations on [i]ndemnification." App. 212. In relevant part, that provision states: "All payments for Damages . . . by [Truist] to [WSFS] shall be paid by [Truist] . . . *net of any insurance proceeds received by [WSFS] with respect to such Damages*." *Id.* (emphasis added).

In 2014, a trust managed by Christiana was scammed. The beneficiary of that trust immediately threatened litigation and, in 2015, ultimately instigated arbitration proceedings. WSFS requested coverage for these legal proceedings; first from HCC as

its insurer, and then from Truist as its indemnitor. For years, Truist refused to concede liability, maintaining that the damages at issue were not covered by the SPA. Likewise, HCC repeatedly denied coverage for the dispute, claiming that its policy only covered wrongful conduct that had occurred well before the scam here. WSFS eventually settled its dispute without assistance from HCC or Truist, paying $12 million out of pocket.

WSFS then brought suit against HCC, seeking reimbursement for this $12 million payout. Without admitting liability, HCC settled for $5 million.

Following that settlement, HCC initiated the current suit against Truist, seeking to recover the $5 million that it had just paid out. WSFS intervened, alleging that Truist, as WSFS's indemnitor, was further liable for the remaining portion of its $12 million payout to the injured beneficiary. The case proceeded through discovery, and all parties moved for summary judgment. The District Court granted both WSFS's and Truist's motions, finding that (1) Truist was liable to WSFS for the remaining portion of WSFS's $12 million payout, but that (2) HCC could not recover from Truist its $5 million payout to WSFS. Of particular relevance on appeal, the District Court found that the SPA unambiguously required Truist to indemnify WSFS for damages "net of *any* insurance proceeds," and that "[HCC's] $5 million payment to [WSFS]—which it *itself* styled as insurance proceeds," was exactly that. App. 22 (emphasis in original). As such, the District Court held that HCC was "not entitled to anything from [Truist]," as "[the SPA] expressly forbid[] it." *Id.* It is that decision that HCC now appeals.

II. DISCUSSION[1]

Under Delaware law, which governs this dispute, we review the SPA *de novo* and we must read the agreement as an objective, reasonable third party would. *Exelon Generation Acquisitions, LLC v. Deere & Co.*, 176 A.3d 1262, 1266–67 (Del. 2017). In so doing, we may not consider "extrinsic evidence . . . to interpret the intent of the parties, to vary the terms, . . . or to create an ambiguity," unless the agreement is ambiguous on its face. *Id.* at 1267.

Here, there is no such ambiguity. The SPA requires Truist to indemnify WSFS for certain litigation-related damages—including those suffered by WSFS here—"net of any insurance proceeds received by [WSFS] with respect to such Damages." App. 211–12. The phrase "net of," as used here, plainly means that Truist's indemnity obligation excludes any insurance proceeds that WSFS receives. *See*, *e.g.*, Black's Law Dictionary (9th ed. 2009) (defining the term "net" as "[a]n amount of money remaining . . . minus any deductions"). This clause, embedded within the "[l]imitations on [i]ndemnification" section of the SPA, places a clear and unqualified restriction on that which WSFS can recover from Truist. App. 212.

The upshot is that, when an insurer covers a given WSFS loss that would otherwise be indemnifiable by Truist, Truist is exempt from liability for that loss, and Delaware law makes clear in this situation that WSFS's subrogee HCC is likewise

[1] The District Court had subject-matter jurisdiction under 28 U.S.C. § 1332. We have appellate jurisdiction under 28 U.S.C. § 1291.

precluded from recovering. *See e.g.*, *Great Am. Assur. Co. v. Fisher Controls Int'l, Inc.*, No. Civ. A. 02C-05-168 JR, 2003 WL 21901094, at *4 (Del. Super. Ct. Aug. 4, 2003). That is because HCC, as WSFS's subrogee, "can take nothing by subrogation but the rights of the insured." *Id*. (citation omitted). Rather, by "step[ping] into the shoes of its insured," HCC becomes bound by the same indemnification limitations as WSFS. *In re Frescati Shipping Co., Ltd.*, 886 F.3d 291, 309 (3d Cir. 2018). So because the SPA expressly carves out Truist's liability for the very payout that HCC now seeks to recoup, that payout cannot be recouped by HCC either.

In an attempt to circumvent this clear contractual limitation, HCC asserts that the background principles of subrogation dictate a different outcome. But as the District Court correctly observed, "background principles . . . cannot overcome explicit contractual terms." App. 21; *see also Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009); *GMG Cap. Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 780 (Del. 2012). And the terms of the SPA negate the need to draw upon any such principles here. For instance, HCC contends that Truist is "primarily liable," meaning that Truist is required to indemnify WSFS before HCC provides insurance coverage. Even if that were correct, however, HCC fails to grapple with the fact the SPA's indemnification limitations impose no similar corresponding deadline. To the contrary, the SPA ropes in "any insurance proceeds received," without limitation. Thus, under the SPA, an HCC payment reduces Truist's liability for a given loss, regardless of whether Truist is primarily liable.

HCC fights the unqualified nature of the "net of any insurance proceeds" language by drawing our attention to a parallel SPA provision that addresses third-party indemnitor payouts. For these payouts, the SPA provides that Truist's obligations are to be reduced "regardless of whether the payments under [a third-party indemnity agreement are] received before or after payment made by [Truist]." App. 213. True, this parallel provision is distinguishable from the insurance proceeds provision, given that the latter lacks a "before or after" clause. But HCC misconstrues the key point of differentiation. The absence of a similar clause for insurance proceeds does not suggest, as HCC hopes it might, that the insurance proceeds provision is somehow devoid of meaning or frozen in time at the moment WSFS became entitled to indemnification. It simply means that Truist is not entitled to a liability reduction if it has already indemnified WSFS for a loss. Indeed, when we read the insurance and third-party indemnity provisions in tandem, as HCC implores us to do, it becomes clear that timing of *payment*, rather than timing of breach, is the crucial determinant for both.

Thus, we find that the SPA unambiguously requires all "insurance proceeds received" to be subtracted from Truist's indemnifications obligations, provided that such proceeds are received prior to Truist's indemnification payout. And here, HCC's settlement payout to WSFS occurred in 2018, well before any corresponding Truist payment. Because that settlement wiped out Truist's liability to indemnify WSFS (and HCC by extension) for insurance proceeds, we will affirm the District Court's grant of summary judgment.