No. 12-2008

United States Court of Appeals

for the

First Circuit

W. HOLDING COMPANY, INC. ET AL.,
Plaintiffs — Appellees,

V.

AIG INSURANCE COMPANY – PUERTO RICO,
Defendant — Appellant.

On Appeal from the United States District Court for the District of Puerto Rico

APPELLEES' ANSWER BRIEF

ANDRÉS RIVERO
ALAN H. ROLNICK
CHARLES E. WHORTON
M. PAULA AGUILA
RIVERO MESTRE LLP
Counsel for Appellees
2525 Ponce de León Boulevard
Suite 1000
Miami, Florida 33134

Corporate Disclosure Statement

Appellee, W Holding Company, Inc., is a Puerto Rico corporation. It has no parent corporation, and no other publicly-held corporation owns 10% or more of its shares.

The remaining appellees, Frank Stipes Garcia, Juan C. Frontera Garcia, Hector Del Rio Torres, William Vidal Carvajal, Cesar Ruiz, and Pedro R. Dominguez Zayas, are natural persons.

DEFINITIONS

The following definitions apply throughout this Response:

A. "**Add.__**" will refer to addendum record cites.

B. **"Bank"** is Westernbank of Puerto Rico.

C. **"Brief"** is Principal Brief of Appellant.

D. **"Chartis"** is the appellant AIG Insurance Company – Puerto Rico.

E. **"D&Os"** are former directors and officers of the Bank and appellees herein—Frank C. Stipes, Juan C. Frontera García, Héctor Del Río Torres, William Vidal Carvajal, César Ruiz, and Pedro R. Dominguez.

F. **"D&OA__"** refers to supplemental appendix record cites.

G. **"D&O Policies"** or **"Policies"** are director and officer insurance policies at issue here.

H. **"FDIC"** is the Federal Deposit Insurance Corporation.

I. **"FDIC Claim"** is the FDIC's lawsuit "on behalf of" and "in the right of" (a) itself as a creditor, (b) third party creditors, and (c) depositors to (d) replenish alleged losses to the Deposit Insurance Fund (the **"DIF"**).

J. **"IvI"** or **"IvI exclusion"** means the Policies' exclusion of coverage for claims by one insured against another.

K. **"OCFI"** is the Office of the Commissioner of Financial Institutions of the Commonwealth of Puerto Rico.

L. **"Order"** is the district court's July 3d Order (D.E. # 211) at issue here, which granted the D&Os' motion to advance defense costs. The district court denied Chartis' motion for reconsideration by order dated July 19, 2012 (D.E. # 227).

M. **"W Holding"** is the Bank's parent/holding company, W Holding, Inc.

TABLE OF CONTENTS

Page

DEFINITIONS iii

TABLE OF AUTHORITIES vii

RESPONSE TO CHARTIS' REQUEST FOR ORAL ARGUMENT 1

STATEMENT OF THE ISSUES 3

STATEMENT OF THE CASE 5

STATEMENT OF THE FACTS 7

A. In the beginning—the FDIC closes Puerto Rico's "home town" bank and demands that the D&Os pay $367 million 7

B. Chartis collected millions promising to insure against regulatory lawsuits 8

C. Chartis wholly denies any coverage obligation, claiming that it can substitute the IvI exclusion for a regulatory exclusion, forcing the D&Os to bring a declaratory judgment action 10

D. Chartis moves to dismiss the Coverage Complaint; the D&Os oppose it, separately requesting an order declaring Chartis' advancement obligations, which the district court grants 14

E. The District Court explains its reasoning, in addressing the D&Os' subsequent motion for sanctions 15

(1) Chartis itself had moved to advance defense costs for directors and officers of a failed insurer who were sued by a regulator-appointed receiver 15

(2) Chartis finally had admitted that its position was "reasonably debatable," "novel," and never had "been addressed" by courts of this Circuit 16

(3) The IvI exclusion could not negate all possibility of coverage 17

(4) The conflicting jurisprudence demonstrated a possibility of coverage 21

SUMMARY OF THE ARGUMENT 24

JURISDICTIONAL ARGUMENT 29

MERITS ARGUMENT 32

A. Clear error is the standard for reviewing the district court's finding of a remote possibility that the FDIC has sued on behalf of non-insureds, while de novo review applies to its ineluctable legal conclusion of a remote possibility that the IvI exclusion would not apply to the FDIC Claim 32

B. "Duty to advance" Policies and the "remote possibility" test 33

C. The Order correctly found a "remote possibility" that the Policies' plain and unambiguous language covers the FDIC Claim 36

D. The district court correctly concluded that there was a remote possibility the IvI exclusion would not apply 36

(1) The district court's finding of a remote possibility the FDIC has sued on behalf of non-insureds was not clearly erroneous 38

(2) The district court correctly concluded that the IvI exclusion could not negate coverage, because there is at least a "mere possibility" that the FDIC has sued on behalf of non-insureds 41

(a) Chartis admitted it was remotely possible that the IvI exclusion could not apply 41

(b) Chartis admitted that the IvI exclusion could not preclude advancement of defense costs 43

(c) A remote possibility of coverage was demonstrated by conflicting jurisprudence on the IvI exclusion 45

i. *Decisions rejecting "on behalf of" in FDIC actions* 47

ii. *Decisions rejecting "on behalf of" as to insurance regulators* 48

iii. *Decisions rejecting "on behalf of" as to bankruptcy trustees* 54

(d) Chartis could not show "no possibility" of coverage based on non-recent decisions that are outnumbered and inapposite 57

(e) If a regulatory exclusion excludes regulatory claims, why sell a policy to a regulated bank without one? 60

(f) There was a remote possibility that the Policies' bankruptcy exception would preserve coverage, even if the IvI exclusion could apply 63

(g) There is a "remote possibility" of coverage because the IvI exclusion might be ambiguous 66

E. The "remote possibility" of coverage cannot be trumped by reference to the word "covered" in the Policies 67

CONCLUSION 74

CERTIFICATE OF COMPLIANCE 75

TABLE OF AUTHORITIES

CASES

PAGE(S)

Alt. Sys. Concepts, Inc. v. Synopsys, Inc.,
374 F.3d 23 (1st Cir. 2004) 44

Am. Best Food, Inc. v. Alea London, Ltd.,
168 Wash. 2d 398 (Wash. 2010) 42

Am. Cas. Co. of Reading, Pa. v. FDIC,
713 F. Supp. 311 (N.D. Iowa 1988) 56

Am. Cas. Co. of Reading, Pa. v. Sentry Fed. Sav. Bank,
867 F. Supp. 50 (D. Mass. 1994)..... passim

Apana v. TIG Ins. Co.,
504 F. Supp. 2d 998 (D. Haw. 2007) 42, 53

Aspen Ins. UK, Ltd. v. Fiserv, Inc.,
2010 WL 5129529 (D. Colo. 2010) 68

Auto Europe, LLC v. Conn. Indem. Co.,
321 F.3d 60 (1st Cir. 2003) 36

Axis Reinsurance Co. v. Bennett,
2008 WL 2600034 (S.D.N.Y. 2008) ..... passim

Biltmore Assoc., LLC v. Twin City Fire Ins. Co.,
572 F.3d 663 (9th Cir. 2009)..... 19

Bradford v. Gibraltar Nat'l Insur. Co.,
No. CV2010-1145 (Ark. Cir. Ct. 13th Div. Jan. 6, 2012)..... passim

Branning v. CNA Ins. Companies,
721 F. Supp. 1180 (W.D. Wash. 1989) 52, 56

Brown v. AIG,
339 F. Supp. 2d 336 (D. Mass. 2004)..... 35, 69
Bucci v. Essex Ins. Co.,
393 F.3d 285 (1st Cir. 2005) 37, 42
Carson v. Am. Brands, Inc.,
450 U.S. 79 (1981) 30
Cirka v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.,
2004 WL 1813283 (Del. Ch. 2004)..... 54
Com. of Mass. v. FDIC,
102 F.3d 615 (1st Cir. 1996) 50, 51
Cordial v. Ernst & Young,
199 W. Va. 119 (W. Va. 1996) 47
Cuadrado Rodriguez v. Fernandez Rodriguez,
2007 WL 1577940 (T.C.A. Mar. 30, 2007) ..... passim
D'Oench, Duhme & Co. v. FDIC,
315 U.S. 447 (1942) 56
Evanston Ins. Co. v. FDIC, No. 88-cv-0407,
1988 LEXIS 16263 (C.D. Cal. 1988), *vacated*, (July 1, 1988).... 41, 57
FDIC v. Booth,
824 F. Supp. 76 (M.D. La. 1993) 66
FDIC v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.,
630 F. Supp. 1149 (W.D. La. 1986)..... 56
Fed. Ins. Co. v. Hawaiian Elec. Indust., Inc.,
1995 WL 1916123 (D. Haw. 1995)..... 48, 49, 52, 66
Fed. Ins. Co. v. Kozlowski,
792 N.Y.S.2d 397 (N.Y. App. Div. 2005)..... 70, 71

Fernandez v. Royal Indem. Co.,
87 D.P.R. 859, 863 (P.R. 1963) 34
Fidelity and Deposit Co. of Maryland v. Zandstra,
756 F. Supp. 429 (N.D. Cal. 1990) 52, 58
Fleming Fitzgerald & Assoc. Ltd. v. U.S. Specialty Ins. Co.,
2008 WL 4425845 (W.D. Pa. 2008) 70, 71
Florida DFS v. Nat'l Union Fire Ins. Co. of Pitt., Pa,
No. 11-cv-242 (N.D. Fla. May 10, 2012 63
Gamble v. Daniel,
39 F.2d 447 (8th Cir. 1930) 63
Gon v. First State Ins. Co.,
871 F.2d 863 (9th Cir. 1989) 36
Grant Thornton, LLP v. FDIC,
435 Fed. Appx. 188 (4th Cir. 2011) 48, 49
Gray v. Zurich Ins. Co.,
65 Cal. 2d 263 (Cal. 1966) 40
Hugo Boss Fashions, Inc. v. Fed. Ins. Co.,
252 F.3d 608 (2d Cir. 2001) 41
Hyde v. Fidelity & Deposit Co. of Maryland,
23 F. Supp. 2d 630 (D. Md. 1998) 58, 59
In re Buckeye Countrymark, Inc.,
251 B.R. 835 (Bankr. S.D. Ohio 2000) 54, 64
In re Cent. Louisiana Grain Co-op., Inc.,
467 B.R. 390 (W.D. La. 2013) 54, 55, 56, 59
In re County Seat Stores, Inc.,
280 B.R. 319 (Bankr. S.D.N.Y. 2002) 52, 53, 54, 55

In re Diet Drugs Products Liab. Litig.,
401 F.3d 143 (3d Cir. 2005) 31
In re Kenai Corp.,
136 B.R. 59 (S.D.N.Y. 1992) 70, 72
In re Laminate Kingdom, LLC d/b/a Floors Today,
2008 WL 704396 (S.D. Fla. 2008) 52, 54, 60, 66
In re Molten Metal Tech., Inc.,
271 B.R. 711 (D. Mass. 2002) 53, 54, 55, 56
In re Spillane,
884 F.2d 642 (1st Cir. 1989) 29
In re WorldCom, Inc. Sec. Litig.,
354 F. Supp. 2d 455 (S.D.N.Y. 2005) 34, 72
In re Zurich Am. Ins. Co. v. Boyes,
2001 U.S. Dist. LEXIS 15123 (N.D. Tex. 2001) 54, 66
Kartell v. Blue Shield of Mass., Inc.,
687 F.2d 543 (1st Cir. 1982) 30
Lowry v. Travelers Prop. and Cas. Co.,
2000 WL 526702 (S.D.N.Y. 2000) 34
Mt. Hawley Ins. Co. v. Fed. Sav. & Loan Ins. Corp.,
695 F. Supp. 469 (C.D. Cal. 1987) ..... passim
Narath v. Exec. Risk Indem., Inc.,
2002 WL 924231 (D. Mass. 2002) 54
Nat'l Union Fire Ins. v. Seafirst Corp.,
662 F. Supp. 36 (W.D. Wash. 1986) 18
Niemuller v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.,
1993 WL 546678 (S.D.N.Y. 1993) 56

Nu-Way Envtl., Inc. v. Planet Ins. Co.,
1997 WL 462010 (S.D.N.Y. 1997) 66
Okada v. MGIC Indem. Corp.,
823 F.2d 276 (9th Cir. 1986) 66
Oxford Aviation, Inc. v. Global Aerospace, Inc.,
680 F.3d 85 (1st Cir. 2012) 2, 35
Pagan Caraballo v. Silva, Ortiz,
1988 WL 580770, 22 P.R. Offic. Trans. 96 (P.R. 1998)..... 35, 38
Progressive Cas. Ins. Co. v. FDIC,
No. 11-cv-14816, Dkt. No. 33 (E.D. Mich., Sept. 24, 2012)..... 47, 66
Progressive Cas. Ins. Co. v. FDIC,
2013 WL 599794 (N.D. Ga. 2013)..... passim
Rivera v. Ins. Co. of P.R.,
103 D.P.R. 91, 93(P.R. 1974)..... 66
Rosenfeld v. U.S.,
859 F.2d 717 (9th Cir. 1988)..... 29
St. Paul Fire and Marine Ins. Co. v. FDIC,
765 F. Supp. 538 (D. Minn. 1991) 60, 66
Systemized of New England, Inc. v. SCM, Inc.,
732 F.2d 1030 (1st Cir. 1984) 61
U.S. Liability Ins. Co. v. Selman,
70 F.3d 684 (1st Cir. 1995) 33
Valentin v. Hosp. Bella Vista,
254 F.3d 358 (1st Cir. 2001) 33
W Holding Co., Inc. v. Chartis Ins. Co. - Puerto Rico,
2012 WL 5334115 (D.P.R. Oct. 23, 2012) 22

W Holding Co., Inc. v. Chartis Ins. Co. - Puerto Rico,
2012 WL 5379039 (D.P.R. Oct. 31, 2012) ..... passim
Warfle ex rel. Guffey v. Sec'y of Health and Human Services,
92 Fed. Cl. 361 (Fed. Cl. 2010)..... 30, 31
Westpoint Intern., Inc. v. Am. Intern. S. Ins. Co.,
899 N.Y.S.2d 8 (N.Y. App. Div. 2010)..... 37
Yessenow v. Exec. Risk Indem., Inc.,
953 N.E.2d 433 (Ill. App Div. 2011)..... 54, 66

STATUTES

12 U.S.C. § 1811..... 46
12 U.S.C. § 1821..... 38, 46, 55, 63

OTHER AUTHORITIES

After the S&L Crisis: The Future of Regulatory Exclusions in Bank Directors' and Officers' Insurance Policies,
15 ANN. REV. BANKING L. 537, 570 (1996) 20, 21

RESPONSE TO CHARTIS' REQUEST FOR ORAL ARGUMENT

Oral argument is unnecessary, and two points require clarification:

1. The jurisdictional issue is not one of "first impression," and a "contrary finding" (of no jurisdiction) would not "create a national circuit split." The district court declared interim rights under an insurance policy and issued an order *pendent lite* holding that the policy obligated the insurer to pay its insureds' costs of defense, subject to recoupment. The non-final Order at issue was not an interim fee award, or a fee award at all. Even when district courts *do* issue interim fee awards, most Circuits hold them non-appealable on any basis, including theories that they are injunctions, "de facto" injunctions, or appealable collateral orders.

2. The merits issue also is not "one of first impression." The district court decided a single issue, and found the requisite "remote possibility" that the Policy's "Insured v. Insured" ("IvI") exclusion might not apply to the FDIC's Claim. In other words, the Order found a "remote possibility" that the FDIC could be a non-insured, or could be suing "on behalf of" non-insureds. This is all the district court decided. It was not asked to, and did not decide any ultimate questions, including the question whether coverage of the FDIC's Claim is barred by any policy exclusions,

including the IvI exclusion (the only exclusion Chartis asserted below). Moreover, this Court previously has reviewed application of the "remote possibility" test, and to do so now would not be a review "of first impression." *E.g.*, *Oxford Aviation, Inc. v. Global Aerospace, Inc.*, 680 F.3d 85, 87 (1st Cir. 2012) (vacating and remanding order finding no possibility of coverage).

STATEMENT OF THE ISSUES

1. No jurisdiction exists over this appeal from the interlocutory Order, which merely declared one of Chartis' obligations under the Policies, unless the district court entered an injunction or a "de facto" injunction. But the D&Os did not seek an injunction, Chartis agreed that an injunction was not sought, and the district court did not enter an injunction. Nor is the Order a "de facto injunction," because (a) Chartis can ask the district court to order recoupment at any time, or the court may do so without being asked, and require repayment of any advancements by the D&Os, whom Chartis has argued are far from "destitute" and "earned substantial salaries and bonuses," and (b) Chartis' *pendent lite* obligation to advance defense costs could end for at least three different reasons, discussed below.[1] How, then, could this interlocutory Order be immediately appealable?

2. Even if appellate jurisdiction existed, Puerto Rico law requires Chartis to advance defense costs if there is a "remote possibility" that the Policies could cover the FDIC Claim. The district court made a factual finding of a remote possibility that the FDIC had sued the D&Os on behalf of non-insureds, which compelled a legal conclusion of a remote possibility

[1] Those events include decisions on a Chartis motion for judgment on the pleadings, a motion for summary judgment, or at trial.

that the IvI exclusion would not apply and coverage would exist. Thus, where (a) Chartis disregarded numerous decisions rejecting its position (including one in which *Chartis itself* urged advancement on identical policy language),[2] and (b) eventually admitted to legal uncertainty regarding its position, (c) the Policies' bankruptcy exception preserved coverage for trustee or liquidator actions, and (d) the exclusion, at most, was ambiguous, did the district court commit clear error in finding a remote possibility that the FDIC sued on behalf of non-insureds, and erroneously conclude that there was a remote possibility the IvI exclusion would not apply?

[2] *Bradford v. Gibraltar Nat'l Insur. Co.*, No. CV2010-1145 (Ark. Cir. Ct. 13th Div. Jan. 6, 2012), attached as D&OA97-99.

STATEMENT OF THE CASE

Chartis sold D&O Policies that promised to advance the costs, including legal fees, of defending a lawsuit. Those Policies did not exclude coverage for suits by banking regulators, a painfully obvious risk in this highly regulated industry. The D&Os purchased the Policies and paid millions of dollars in premiums. Year after year, the D&Os renewed the Policies to protect against the risk of being sued by banking regulators. That risk materialized after world economic markets collapsed in 2008. The FDIC closed the Bank in 2010, threatened suit in 2011, and sued the D&Os in 2012. When the FDIC threatened suit and the D&Os asked Chartis to make good on its promise to advance defense costs, Chartis' response was "what promise?" Chartis refused all requests, despite Puerto Rico's requirement that it advance defense costs, subject to recoupment, if there was a "remote possibility" the Policies could provide coverage for the FDIC action.

Chartis claimed the Policies' IvI exclusion negated all possibility of coverage, arguing that the FDIC was an insured, or was suing "on behalf of" insureds, as a matter of law. Chartis argued that no court could or would

contradict its position, even though a majority already had,[3] including one that had ordered advancement on *a motion Chartis itself had filed*.[4] After this Appeal was docketed, we discovered that *Chartis previously opposed the position it takes here*, and moved to advance defense costs for directors and officers of a failed insurer, under a policy with *an identical IvI exclusion*. In that case, when regulators sued, Chartis requested and obtained permission to advance the directors' and officers' defense costs.

In the instant case, after the Order at issue was rendered, Chartis eventually admitted its IvI argument was "novel" and "reasonably debatable."[5] As a matter of law and logic, this admission, *standing alone*, would compel affirming the Order's factual finding of a "remote possibility" the FDIC sued on behalf of non-insureds, and the necessary legal conclusion

---

[3] The most recent contrary decision came three months ago, before Chartis filed its Brief (which doesn't mention it). *Progressive Cas. Ins. Co. v. FDIC*, 2013 WL 599794, at *2 (N.D. Ga. Jan 4, 2013). That court held, like many others, that the FDIC in an action like this, does not sue "on behalf of" an insured, but "on behalf of" (a) itself, (b) third party creditors, and (c) depositors, to (d) replenish the DIF.

[4] *See* D&OA79-85; 97-99. After this appeal was docketed, we discovered *Bradford* and learned how effectively Chartis advanced the D&Os' position in that case. Although the relevant pleadings and orders are now part of the record below, Chartis failed to mention *Bradford* in its Brief and omitted the pleadings and orders from its appendix, which this Court allowed us to supplement.

[5] D&OA127.

of a "remote possibility" that the IvI exclusion does not preclude coverage. But there's more. The district court has since found that "through [Chartis'] own filings or those presented by the D&O's, Chartis certainly knew of the conflicting jurisprudence" and "[b]y Chartis's own admission, therefore, there exists a 'remote possibility' that a court may find the [IvI] Exclusion inapplicable."[6] This Court should affirm.

STATEMENT OF THE FACTS

A. In the beginning—the FDIC closes Puerto Rico's "home town" bank and demands the D&Os pay $367 million

We begin at the beginning—Westernbank's fifty-two year run as one of the most successful and stable banks in Puerto Rico.[7] Like many other successful community banks across the United States, the Bank (and the FDIC) could not reasonably predict an unprecedented meltdown of financial markets in 2008.[8] And it certainly could not predict that real estate values would tumble to lows unseen for a hundred years.[9] After a worldwide panic

[6] *W Holding Co., Inc. v. Chartis Ins. Co.-Puerto Rico*, 2012 WL 5379039, at *3 (D.P.R. Oct. 31, 2012) (the "Fee Entitlement Order").
[7] *See* The D&Os' Motion to Dismiss the FDIC's Second Amended and Restated Complaint in Intervention (D.E. #198 at 1).
[8] *Id.*
[9] *Id*. at 3.

ensued, the regulators decided to consolidate Puerto Rico's banking business. Their plan included seizing and eliminating Westernbank.[10]

Next came (a) the OCFI's appointment of the FDIC as receiver, (b) Banco Popular's purchase of the Bank's loans and assumption of its non-brokered deposits (the "consolidation"), and finally, (c) the FDIC's investigation.[11] That investigation resulted in the FDIC's December 17, 2010 demand that the D&Os pay $367 million.[12]

B. Chartis collected millions promising to insure against regulatory lawsuits

Facing a potential lawsuit from the deepest-pocketed plaintiff in the world, the D&Os looked to their insurer—Chartis.[13] Over the years, Chartis had been paid millions of dollars for promising to insure against the risk a regulator might someday sue.[14] This promise attracted talented officers and directors to serve the Bank, service that would have seemed somewhat less

[10] *Id*. at 1-2.
[11] *Id*.
[12] A61. Thirteen months later, the FDIC filed a "slimmed-down" suit, for $176 million.
[13] A185.
[14] A187.

attractive if they'd thought their business judgments could expose them to uninsured regulator lawsuits.[15]

Chartis made its promise clear by selling Policies that *do not even mention* banking regulators.[16] They discuss the Securities and Exchange Commission deep in Endorsement No. 6, but not banking regulators.[17] They define "Organization" to include "the debtor, debtor's estate or debtor-in-possession" but conspicuously omit post-takeover entities like the FDIC.[18] Needless to say, the Policies *do not contain any regulatory exclusion*.[19]

Such an exclusion bars coverage for regulator lawsuits. It wasn't left out because Chartis didn't know about it or sell policies that contained it. Chartis did (and does), in a "Broad Form" policy that it sold (and sells) to banks. The Broad Form policy expressly excludes claims "brought by or on behalf of . . . any State or Federal regulatory or administrative agency . . . in its capacity as receiver, conservator, liquidator, securities holder or assignee of [the Bank's] depositors or creditors . . . ."[20] The very existence of the

---

[15] A199.
[16] A195.
[17] A274.
[18] A249-250.
[19] Add. ¶16.
[20] D&OA20 §4(i).

Broad Form policy and its regulatory exclusion demonstrates Chartis' awareness of regulator lawsuits as a prime risk that D&Os face in the highly regulated banking industry.[21] We need not speculate why Chartis didn't sell (or even attempt to sell) the D&Os a policy with a regulatory exclusion. All we need to know is that it didn't.[22]

C. Chartis wholly denies any coverage obligation, claiming that it can substitute the IvI exclusion for a regulatory exclusion, forcing the D&Os to bring a declaratory judgment action

Fully aware that the D&Os were depleting their own resources to resist the express threat from the FDIC, Chartis let five months pass after the D&Os gave timely notice of the claim, and then abandoned them.[23] Despite having sold Policies with no regulatory exclusion, Chartis denied coverage, asserting that the IvI exclusion barred coverage for regulator lawsuits. Chartis claimed the power even to deny advancement subject to recoupment, on the theory that no court ever could find coverage, based on two decisions of district courts (in other Circuits), from 20 and 14 years ago. Chartis made this non-binding authority the shaky foundation for its position, a radical

---

[21] *See* The D&Os' Opposition to Insurer Defendants' Joint Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) (D.E. #148 at 16) ("Opp. Insurer MTD").

[22] *Id.*

[23] A86.

deviation from standard industry practice, to advance defense costs under a reservation of rights.

Chartis' position was unprecedented. Neither Puerto Rico nor this Court had ever adopted it, and many courts elsewhere had rejected it.[24] The latest rejection was three months ago, by a Georgia district court.[25] But even if Chartis' two cases had been binding or authoritative, it had collected millions of dollars in premiums on Policies that promised, in bold print, on the first page, to advance defense costs:

> **The Insurer Must Advance Defense Costs, Excess Of The Applicable Retention, Pursuant To The Terms Herein Prior To The Final Disposition Of A Claim**.[26]

The Policies built into this promise a right to recoup money advanced on claims a court might later decide were not covered.[27] Well-settled Puerto Rico law required Chartis to advance defense costs if a liberal interpretation of the FDIC's Claim, and a strict construction of the Policies' exclusions,

---

[24] A237-38.

[25] *Progressive*, 2013 WL 599794, at *2.

[26] A244.

[27] A255 §8(a).

rendered coverage "remotely possible."[28] It also required that any legal uncertainty in the interpretation of an exclusion be resolved in favor of coverage and advancement.[29]

Applying this standard to a legal landscape including numerous decisions contradicting Chartis' position, it was obvious that a "remote possibility" of coverage existed.[30] But Chartis had made a business decision to go down with the ship, and it claimed that "pursuant to the terms herein" made *it* the arbiter of coverage.[31] Chartis refused even to admit (until it later faced a motion for sanctions) that any court *ever* had rejected its position, although many had, particularly in recent cases (as we discuss *infra* at Section D(2)(c)). Refusing to reason, Chartis forced the D&Os to sue.[32]

On October 6, 2012, the D&Os filed their "Coverage Complaint" in the Bank's home town of Mayagüez, Puerto Rico, issued the Policies.[33] Because the D&Os needed immediate relief, they invoked Puerto Rico's

---

[28] *Cuadrado Rodríguez v. Fernández Rodríguez*, 2007 WL 1577940 (T.C.A. Mar. 30, 2007). A certified translation is attached at D&OA32-38.

[29] *See* MERITS ARGUMENT at Section D.1, *infra*.

[30] Fee Entitlement Order, at *3.

[31] A229-37.

[32] Add. ¶1.

[33] *W Holding Co. v. Chartis Ins. Co.*, Tribunal de Primera Instancia del Centro Judicial de San Juan, Puerto Rico, Sala Superior, Caso Núm. KAC2011-1370 (Oct. 6, 2011).

summary procedure for declaratory judgments. It requires a "speedy hearing for declaratory judgment actions, giving them preference on the calendar."[34] The D&Os' Coverage Complaint requested a declaration that "the Policies in controversy provide coverage" and "such coverage includes all expenses and costs . . . until the end of the FDIC Claim."[35] The Coverage Complaint alleged a claim had been made by the FDIC—a non-insured—"on behalf of third party depositors and creditors"—also non-insureds.[36]

Chartis delayed answering, transferring the "Coverage Action" to San Juan's Commonwealth Court, then asking for multiple extensions. Almost three months later, when the action finally got on track, the FDIC derailed it, moving to intervene and removing it to the Puerto Rico district court on December 30, 2011.[37] The FDIC filed its complaint on January 20, 2012, naming the D&Os, other Bank directors and officers, their spouses, conjugal partnerships, and the trustees of certain family trusts.[38]

The FDIC subsequently amended its complaint to address arguments the D&Os made in their motion to dismiss. In its amended complaint, the

---

[34] Add. ¶20.
[35] *Id*. at "Prayer for Relief."
[36] *Id* ¶20.
[37] A106.
[38] A116.

FDIC sought $176 million in damages "on behalf of" non-insureds, as the D&Os had predicted in the Coverage Complaint.[39] The FDIC also alleged it was suing to recover a portion of an alleged $4.25 billion paid out from the DIF to, among other things, honor the insured amount of the Bank's brokered (and non-assumed) deposits.[40] The D&Os moved to remand the Coverage Action and stay the FDIC lawsuit until a coverage determination.[41] The district court denied both motions.[42] The D&Os thus faced an uninsured defense of a $176 million dollar claim.

D. Chartis moves to dismiss the Coverage Complaint; the D&Os oppose it, separately requesting an order declaring Chartis' advancement obligations, which the district court grants

Because Chartis refused to advance defense costs, the D&Os asked the district court to declare it "remotely possible" that the Policies covered the FDIC Claim.[43] While simultaneously opposing Chartis' motion to dismiss the Coverage Action (where Chartis' relied *solely* on the IvI

---

[39] *Compare* A152 ¶21 *with* Add. ¶20.

[40] A148 ¶1.

[41] *See* D&Os' Motion for Remand (D.E. #16) and D&Os' Motion for Expedited Treatment of Remand Motion and to Otherwise Stay This Case (D.E. #20).

[42] *See* Order Denying Motion to Stay (D.E. #21) and Order Denying Motion for Remand (D.E. #47).

[43] A181.

exclusion), the D&Os filed their advancement motion, which the court granted, in the Order at issue.[44] The Order also held that Chartis would be entitled to recoup any advances if coverage ultimately were found lacking.

E. The District Court explains its reasoning, in addressing the D&Os' subsequent motion for sanctions

Having adopted the D&Os' arguments in granting the advancement motion, the court later explained its reasoning, on the D&Os' motion for sanctions[45] under Puerto Rico Civ. Pro. R. 44.1(d).[46] The district court made four observations that illuminate its reasoning on the Order at issue:

(1) Chartis itself had moved to advance defense costs for directors and officers of a failed insurer who were sued by a regulator-appointed receiver

In responding to the D&Os' advancement motion, Chartis had argued that advancement was "extraordinary," while disputing and deriding Puerto Rico's "remote possibility" test.[47] It was ironic when we later learned that

[44] *See* July 3d Order (D.E. #211).

[45] *See* Fee Entitlement Order, at *3.

[46] Rule 44.1(d) grants a party the substantive right to recover fees from another party that acted "obstinately" or "frivolously." *See Top Enter., Inc. v. Torrejon*, 351 F.3d 531, 533 (1st Cir. 2003).

[47] A205.

Chartis itself had moved to advance defense costs in another, recent, regulatory lawsuit, where its policy contained an *identical* IvI exclusion.[48]

In *Bradford*, Chartis moved to advance the defense costs of (1) former directors and officers of a failed insurer, (2) who had been sued by a regulator (the state insurance commissioner), and (3) were insured by a Chartis D&O insurance policy with an identical IvI exclusion.[49] There, unlike here, Chartis (a) did not claim advancement was "extraordinary," (b) ignored an identical IvI exclusion, despite facts that mirror this case, and (c) made the same arguments the D&Os made below.[50] Chartis' actions in *Bradford* compelled finding a remote possibility of coverage.[51]

(2) Chartis finally had admitted that its position was "reasonably debatable," "novel," and never had "been addressed" by courts of this Circuit

When legal ambiguity exists over the interpretation of an exclusion, a remote possibility of coverage must exist, as a matter of law and logic.[52] Thus, one would think it obvious that a "reasonably debatable" and "novel" argument could not negate *all possibility of coverage*. But that's what

---

[48] D&OA79-85.

[49] D&OA79-85 (motion); 90-91 (policy); 97-99 (order).

[50] *Id*.

[51] *See* Fee Entitlement Order, at *3.

[52] *See* MERITS ARGUMENT at Section D.2, *infra*.

Chartis had argued, despite its later admissions.[53] As the district court put it, "Chartis's own admission" that "differing opinions on the subject 'raise[ ] an issue of first impression or a reasonably debatable question of law or fact'" render "a 'remote possibility' that a court may find the Exclusion inapplicable."[54] The advancement obligation was obvious on "the face of the liability policy" and Chartis' decision to stonewall, then litigate the issue, "was unnecessary, resolved no genuine issue, and" was obstinate.[55]

(3) The IvI exclusion could not negate all possibility of coverage

In addressing the sanctions motion, the district court stated that a regulatory exclusion might "appropriately exemplify impossibility," but the IvI exclusion could not.[56] A slight detour, to review the IvI exclusion's history is instructive.

The IvI exclusion was a reaction to two instances of collusive litigation from the 1980s, which arguably amounted to insurance fraud—*Bank of America v. Powers and National*[57], and *Nat'l Union Fire Ins. v.*

---

[53] D&OA127.
[54] Fee Entitlement Order at *3.
[55] *Id.*
[56] *Id.*
[57] No. C 536-776 (Cal. Super. Ct. filed Mar. 1, 1985).

Seafirst Corp.[58] In those cases, directors and officers "converted" D&O policies to first-party insurance by having their companies sue them—i.e., insureds v. insureds—to backstop corporate losses.[59]

Backstopping corporate losses is not what D&O policies were meant to insure. "The reasonable expectations of the parties were that they were protecting against claims by outsiders, not intracompany claims, not intra-corporate suits."[60] Recognizing a loophole, insurers scrambled to close it by amending their policies. Thus, the IvI exclusion arose from, and was intended to prevent, collusive or "friendly" lawsuits. Unable to resist the allure of belts and suspenders, however, insurers drafted exclusions purporting to apply "whether or not [an IvI claim was] collusive."[61]

Shortly thereafter, in the late 1980s, came the Savings and Loan crisis. Regulators, including the FDIC, the Federal Savings & Loan Insurance Corporation ("FSLIC"), and the Resolution Trust Corporation ("RTC"),

---

[58] 662 F. Supp. 36, 37 (W.D. Wash. 1986).

[59] *See Bank of America* complaint, *reprinted in* D. Ichel & S. Thompson, DIRECTORS' AND OFFICERS' INSURANCE COVERAGE: AN OVERVIEW AND CURRENT ISSUES, 1 Sec. Litig. 257, 349-85 (Sept.-Oct. 1987); *see also Seafirst*, 662 F. Supp. at 37.

[60] *Biltmore Assoc., LLC v. Twin City Fire Ins. Co.*, 572 F.3d 663, 668 (9th Cir. 2009).

[61] *E.g.*, A252.

began suing bank directors and officers. D&O Policies at the time seldom contained regulatory exclusions, and bankers looked to insurers for coverage. Insurers responded by stretching the IvI exclusion beyond its purpose in efforts to exclude coverage for regulatory claims.

A majority of courts saw through this "exclusion creep" and rejected insurer attempts to treat adverse bank regulators as if they were collusive insureds.[62] The regulatory agencies were acting pursuant to statutory mandates, to bring claims on behalf of third-party creditors and replenish insurance funds. The Massachusetts district court's chief judge stated that: "[t]he weight of opinions concerning 'insured vs. insured' exclusions in the receivership context side with the [cases finding coverage] . . . ."[63]

After a number of adverse decisions, insurers decided to be more forthright and began selling policies with express regulatory exclusions (like the one discussed above). Insurers generally won the cases that challenged such exclusions on public policy grounds.[64] The marketplace soon processed

---

[62] *Am. Cas. Co. of Reading, Pa. v. Sentry Fed. Sav. Bank*, 867 F. Supp. 50, 59 (D. Mass. 1994).

[63] *Sentry*, 867 F. Supp. at 59.

[64] *E.g.*, *FDIC v. Am. Cas. Co. of Reading, Pa.*, 998 F.2d 404, 410 (7th Cir. 1993) ("[E]nforcement of the regulatory agency exclusion does not violate public policy.").

the industry's success at barring coverage with regulatory exclusions, and its failure to do so with IvI exclusions, which caused premiums for policies *without* regulatory exclusions to skyrocket.[65]

During two decades of relative calm between the S&L crisis and the current banking crisis, insurers generally were content to accept the far-higher premiums for D&O policies with IvI exclusions but no regulatory exclusions.[66] Consequently, the current wave of regulator lawsuits finds many of them, including Chartis, being called on to provide coverage under policies without regulatory exclusions, prompting them to recycle largely rejected arguments from twenty years ago. Thus, the language, context and history of the IvI exclusion also supported finding a possibility of coverage.

---

[65] *E.g.*, D. Rhynhart, *After the S&L Crisis: The Future of Regulatory Exclusions in Bank Directors' and Officers' Insurance and Professional Liability Insurance Policies*, 15 ANN. REV. BANKING L. 537, 570 (1996) (citing an article's discussion that in 1991 D&O insurance premiums without regulatory exclusions were five to ten times higher than they had been in 1986).

[66] *Id*. at 562-63 ("regulatory exclusions have all but faded away [since the S&L crisis] thanks to an insurance buyer's market that reflects a sound banking industry").

(4) The conflicting jurisprudence demonstrated a possibility of coverage

On the sanctions motion, in explaining why it previously had found a possibility of coverage, the district court noted "conflicting jurisprudence" in applying IvI exclusions to cases like this one.[67] The D&Os had cited numerous decisions rejecting identical exclusions in analogous contexts, all of which were more recent than the two principal cases Chartis relied on.[68] The mere existence of "conflicting jurisprudence" was itself *prima facie* evidence of a remote possibility that the IvI exclusion would not apply.[69]

Recent cases suggest that the jurisprudence is getting less conflicting. During the current wave of regulator lawsuits, only two district courts have addressed an insurer's attempt to apply the IvI exclusion to FDIC lawsuits, and both have rejected it.

One is the court below. Four months after rendering the Order on appeal, the district court denied Chartis' motion to dismiss the D&Os' Coverage Complaint based solely on the IvI exclusion.[70] The court held that

---

[67] Fee Entitlement Order, at *3.

[68] Opp. Insurer MTD at 11-12.

[69] Fee Entitlement Order, at *3.

[70] *W Holding Co., Inc. v. Chartis Ins. Co.-Puerto Rico*, 2012 WL 5334115, at *11 (D.P.R. Oct. 23, 2012).

"the obvious intent behind the Exclusion" was "to protect insurance companies from collusive suits among insured parties," stated that "the FDIC reaps no benefits comparable to those enjoyed by collusive actors who seek to swindle insurance companies,"[71] and concluded that "[t]he FDIC's role as a regulator sufficiently distinguishes it from those whom the parties intended to prevent from bringing claims under the [IvI] Exclusion."[72]

The only other recent decision came two months before Chartis filed its brief (which fails to mention it). Former chief judge for the Northern District of Georgia ruled that an IvI exclusion, excluding coverage for claims brought "by," "on behalf of," or "at the behest of" the bank, was ambiguous (and thus inapplicable) to an FDIC suit against bank D&Os.[73] The court denied Progressive's motion for summary judgment, found that the FDIC "differs from other receivers or conservators that might step into the shoes of a failed or insolvent bank,"[74] and held that the FDIC is "tasked, under [FIRREA] with bringing claims to recover losses suffered by the

[71] *Id*.
[72] *Id*.
[73] *Progressive*, 2013 WL 599794, at *2.
[74] *Id*.

federal Deposit Insurance Fund and a bank's depositors, creditors, and shareholders."[75]

Defying reality, Chartis still claims that "[o]nly two courts" (20 and 14 years ago) have ever addressed insurer attempts to apply IvI exclusions to regulatory lawsuits.[76] At bottom, even if jurisdiction over this appeal exists, unless the district court's necessary factual finding that the FDIC could be suing on behalf of non-insureds was clearly erroneous, its legal conclusion of a possibility of coverage was correct, and affirmance is warranted.

[75] *Id*.

[76] Brief at 50.

SUMMARY OF THE ARGUMENT

1. The Court lacks jurisdiction

The Order at issue is not an injunction, does not have the practical effect of an injunction, and is simply a declaration of parties' rights under a contract. The D&Os didn't seek an injunction, Chartis agreed they were not seeking an injunction, and the district did not issue an injunction. The Order at issue did not command Chartis to do anything, and did not provide that noncompliance would be punishable by contempt. Such orders are not immediately appealable.

2. Chartis failed to show that the IvI Exclusion negates any possibility of coverage for the FDIC Claim

Even if the Court were to find jurisdiction, it need not address whether the IvI exclusion is *inapplicable* to the FDIC Claim. It need only decide whether the district court committed clear error as to the necessary factual finding of a remote possibility that the FDIC is a non-insured, or is suing on behalf of non-insureds, as the logical predicate for its legal conclusion of a remote possibility that the IvI exclusion will not preclude coverage for the FDIC Claim. The district court ruled correctly, because:

First, Chartis effectively conceded a "remote possibility" of coverage by admitting "legal uncertainty" regarding its position. Legal uncertainty

equals a remote possibility of coverage, because the D&Os are entitled to the benefit of any doubt. A "reasonably debatable" and "novel" position, which no Puerto Rico or First Circuit court ever has addressed, much less endorsed, cannot possibly be so "certain" as to compel a court's approval as a matter of law. Thus "[b]y Chartis's own admission . . . there exists a 'remote possibility' that a court may find the [IvI] Exclusion inapplicable."[77]

Second, Chartis successfully persuaded another court that the same IvI exclusion *could not* negate any possibility of coverage. In *Bradford*, Chartis sought advancement for directors and officers of an insolvent insurance company, on an identical policy with an identical IvI exclusion. Chartis' successful efforts in *Bradford* should estop it from contradicting itself here.

Third, looking deeper than Chartis' admissions, the heart of its IvI exclusion argument stopped beating a long time ago. Chartis relied (and relies) on two easily distinguished, non-binding decisions from 20 and 14 years ago, which are contradicted by numerous more recent decisions rejecting IvI exclusions either in the same context, or a closely analogous one. Two decades of decisions have crushed the hope that seven ambiguous words ("on behalf of" and "in the right of"), in an exclusion aimed at

[77] Fee Entitlement Order, at *3.

collusive suits by insiders, can bar coverage *as a matter of law* for claims of adverse regulators, brought pursuant to statutory mandates. It should be no surprise that the most recent decisions have rejected IvI exclusions.

Fourth, even a cursory examination of Chartis' two cases reveals that placing all bets on them was a losing proposition. In each, the regulator was not suing (or could not sue) on behalf of third parties. Here, the FDIC is required to sue, and has alleged it has sued, on behalf of third-party creditors and depositors, and to replenish payments from the DIF. This critical difference alone is enough to find a remote possibility of coverage, because the FDIC Claim could not have been brought *only* "on behalf of" or "in the right of" insureds.

Fifth, the IvI exclusion could not negate any possibility of coverage because Chartis has an express regulatory exclusion that it did not even try to sell as part of the Policies (presumably, for a lower premium). What was that regulatory exclusion's purpose, if not to exclude coverage for regulator lawsuits because coverage otherwise would exist?

Sixth, even if the IvI exclusion were able to negate all possibility of coverage, there would remain a "remote possibility" it could be trumped by the Policies' bankruptcy exception, as decisions have held. The FDIC is the

equivalent of a bankruptcy trustee, bringing suit in the banking equivalent of a bankruptcy. The Policies carve out such claims from the IvI exclusion. Chartis is estopped to dispute this proposition, which it successfully advanced in another district court two months before the decision at issue.

Seventh, if the IvI exclusion is not *inapplicable* as a matter of law, it is at most "hopelessly ambiguous," as the court to most recently address the issue found.[78] Ambiguity must be construed against Chartis and in favor of coverage. Thus, the IvI exclusion could not negate all possibility of coverage, because courts may (and do) find the exclusion ambiguous.

Finally, Chartis has no unilateral power to refuse advancement. It must advance defense costs if there is a remote possibility of coverage. The Policies it wrote promise advancement, subject to recoupment, "prior to a final determination of a claim." If Chartis could unilaterally decide coverage, that would render its advancement promise illusory, because its denial of coverage would be "a final determination of a claim." It also would render the right of recoupment worthless, because no advancement ever would be required. This is why Courts addressing the issue have held that "if

[78] *Progressive*, 2013 WL 599794, at *2.

an insurer 'wants the unilateral right to refuse a payment called for in the policy, the policy should clearly state that right.'"[79]

[79] *Axis Reinsur. Co. v. Bennett*, 2008 WL 2600034, at *4 (S.D.N.Y. 2008).

JURISDICTIONAL ARGUMENT

The district court's declaration that the Policies obligate Chartis to advance defense costs is not a final order, an injunction, or an order that has the practical effect of an injunction. It is a non-final, interlocutory order *pendent lite* declaring rights under an insurance policy. The D&Os demonstrated in their pending motion to dismiss that jurisdiction is lacking. We urge the court to grant that motion, before this ill-founded appeal squanders even more judicial and party resources than it already has.

That said, we must make some additional observations. The Order at issue, which did not command Chartis to do anything or threaten any consequences if it did nothing, is even less finite than an interim fee award that orders one party to pay a sum certain to the other. This Court and others have refused to allow immediate appeals of interim fee awards, because (1) they are not final,[80] (2) they are not injunctions or have the practical effect of injunctions,[81] and (3) they are not immediately appealable collateral orders.[82]

---

[80] *In re Spillane*, 884 F.2d 642, 644 (1st Cir. 1989) ("It is generally held that an interim award of attorney's fees under 11 U.S.C. §§ 330(a)(1) and 331 is not final.").

[81] *Rosenfeld v. United States*, 859 F.2d 717, 722 (9th Cir. 1988) (interim fee order did not have "serious, perhaps irreparable, consequence," nor could it only be "effectually challenged" by immediate appeal).

Chartis concedes that the Order is non-final, and it never claimed the Order could satisfy the rarely-used collateral order doctrine. Thus, Chartis must convince the Court that the Order either is an injunction or has the practical effect of an injunction. It must show that this interlocutory order (1) could have "serious, perhaps irreparable, consequence," and that (2) it can be "effectually challenged" only by an immediate appeal.[83]

As to the first requirement, Chartis now claims the D&Os are impoverished (the opposite of its position below), which would prevent it from being able to recoup advancements if coverage ultimately were found lacking. This is not only pure conjecture, but contradicts what Chartis told the district court, that the D&Os don't need advancement and can pay for their own defense because they "are most certainly not destitute," and "earned substantial salaries and bonuses."[84] If the D&Os could afford to pay for their own defense, they necessarily could afford to repay "improvident" advances. Moreover, even if the D&Os were impoverished, Chartis did not

---

[82] *Warfle ex rel. Guffey v. Sec'y of Health & Human Servs.*, 92 Fed. Cl. 361, 366 (Fed. Cl. 2010) (noting that "interim orders fail the third *Cohen* criteria").

[83] *Kartell v. Blue Shield of Mass.*, 687 F.2d 543 (1st Cir. 1982) (applying test from *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981)).

[84] A220.

(and could not) demonstrate that a hypothetical inability to recoup improvident advances would amount to an "irreparable consequence" for a company that wrote thirty-four billion, four hundred million dollars ($34,400,000,000) in property and casualty insurance premiums in 2012.[85]

As to the second requirement, there are at least three ways Chartis could "effectively challenge" the Order in the district court and make its advancement obligation disappear during the pendency of the action: (1) through a motion for judgment on the pleadings; (2) through a motion for summary judgment; or (3) at trial. Moreover, like an interim fee award, the Order may effectively be challenged on appeal after final judgment.[86]

---

[85] *See* http://www.aig.com/key-facts-and-figures_3171_437852.html. Chartis readopted the name AIG after the heat died down from its role in the worldwide economic collapse. It was the world's 29th largest public company in 2011, according to *Forbes* magazine. *See* http://www.forbes.com/lists/2012/18/global2000_2011.html.

[86] *E.g.*, *In re Diet Drugs Prods. Liab. Litig.*, 401 F.3d 143, 159 (3d Cir. 2005) (Interim fee awards are not "conclusive" under the collateral order doctrine, because they can be reviewed at the end of litigation); *see Warfle*, 92 Fed. Cl. at 366.

MERITS ARGUMENT

We shall explain below (a) the standard of review, (b) the Policies, (c) the "remote possibility" test, (d) why the Order correctly held that the FDIC Claim satisfied that test, and (e) why the Policies did not give Chartis an absolute power to refuse advancement.

We also shall decode Chartis' Brief, which amounts to a lengthy and improper (second) motion for reconsideration. Throwing the kitchen sink at the Order, Chartis not only makes arguments it never made on the advancement motion, but goes one better (or worse), by making arguments it never made in the district court at all. None of them support reversal of the Order, because the district court correctly ordered advancement based on the existence of a remote possibility of coverage. The necessary factual finding of a remote possibility the FDIC sued on behalf of non-insureds was not clearly erroneous, and the ineluctable legal conclusion of a remote possibility that the IvI exclusion would not apply was correct.

A. Clear error is the standard for reviewing the district court's finding of a remote possibility that the FDIC has sued on behalf of non-insureds, while de novo review applies to its ineluctable legal conclusion of a remote possibility that the IvI exclusion would not apply to the FDIC Claim

If the Court were to reach the merits, it would apply the standard of

review for injunctions and other mixed questions of law and fact, which include insurance policy coverage decisions. *E.g.*, *U.S. Liab. Ins. Co. v. Selman*, 70 F.3d 684, 688 (1st Cir. 1995). Such review requires affirmance of a district court's factual findings, unless clearly erroneous, and *de novo* review of a district court's application of legal principals to those factual findings. *Id.*

Here, the district court determined that the IvI exclusion could not negate all possibility of coverage, because of its necessary factual finding that there was a remote possibility the FDIC had sued or could sue on behalf of non-insureds. This Court should therefore accept those findings, unless this Court has "a strong, unyielding belief that a mistake has been made." *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 365 (1st Cir. 2001). The Court should then determine "whether the facts, *as supportably found*, justify the court's ultimate legal conclusion" of a remote possibility the IvI exclusion would not apply. *Id.* at 365-66 (emphasis in original).

B. "Duty to advance" Policies and the "remote possibility" test

The Policies are "duty to advance" policies. Their duty to advance is a "heavy one" that exists whenever there is a "remote possibility" a complaint

against an insured alleges claims that may be covered.[87] "[T]here need not be a probability of recovery," only a possibility.[88]

The "remote possibility" test originated in decisions interpreting policies promising a "duty to defend."[89] This explains why Puerto Rico's Court of Appeals in *Cuadrado*,[90] a "duty to advance" case, resolved the advancement question by looking to *Fernández v. Royal Indemnity*,[91] a "duty to defend" case.[92] Chartis also concedes that "[m]any courts have held that cases analyzing an insurer's duty to defend may be used to determine whether a duty to advance defense costs to insured exists."[93]

---

[87] *Axis*, 2008 WL 2600034, at *4 (emphasis added); *In re WorldCom, Inc. Sec. Litig.*, 354 F. Supp. 2d 455, 464 (S.D.N.Y. 2005).

[88] C J.A. Appleman, Insurance Law and Practice, § 4683.01, at 67 (rev. ed. 1979).

[89] *E.g.*, *Lowry v. Travelers Prop. & Cas. Co.*, 2000 WL 526702, at *2, n.1 (S.D.N.Y. 2000) ("no relevant difference between" test for duty to defend and obligation to advance).

[90] *Cuadrado*, 2007 WL 1577940, at *8.

[91] *Fernández v. Royal Indemnity Co*, 87 D.P.R. 859, 863 (P.R. 1963).

[92] New York, a jurisdiction Puerto Rico looks to for guidance on insurance law, also applies the duty to defend test to advancement. *Compare Cuadrado*, 2007 WL 1577940, at *8, *with Axis*, 2008 WL 2600034, at *4, *and Lowry*, 2000 WL 526702, at *2, n.1.

[93] D&OA72; *see also* Brief at 41 (citing Puerto Rico duty to defend decisions).

This court is also familiar with the "remote possibility" test, applying it in *Oxford Aviation*, and finding an obligation to defend where "the claims in the complaint create even a *remote possibility* of coverage."[94] Chartis opines that the test "appropriately 'giv[es] effect' to both the duty [to pay] and the consent provisions" of the Policies.[95] We agree.

On this appeal, Puerto Rico's "remote possibility" test triggered Chartis' advancement duty when (1) the FDIC sued, and (2) a liberal interpretation of that claim (3) "establish[ed] facts that place [or could place] the harm within the [coverage] of the policy . . . ."[96] A liberal interpretation includes "any reasonable intendment" of a claim.[97] The potential for "[a]ny legal or factual basis" that could support coverage satisfies the remote possibility test.[98]

---

[94] *Oxford Aviation, Inc. v. Global Aerospace, Inc.*, 680 F.3d 85, 87 (1st Cir. 2012) (applying Maine law) (emphasis added).

[95] *Brown v. AIG*, 339 F. Supp. 2d 336, 346 (D. Mass. 2004).

[96] *Cuadrado*, 2007 WL 1577940, at *5 (emphasis omitted).

[97] *Pagan Caraballo v. Silva, Ortiz*, 1988 WL 580770, 22 P.R. Offic. Trans. 96 at 103 (P.R. 1988).

[98] *E.g.*, *Auto Europe, LLC v. Connecticut Indem. Co.*, 321 F.3d 60, 66 (1st Cir. 2003).

C. The Order correctly found a "remote possibility" that the Policies' plain and unambiguous language covers the FDIC Claim

The FDIC Claim indisputably falls within the coverage the Policies provide. They promise coverage for any "Claim made against such Insured Person for any Wrongful Act of such Insured Person."[99] The D&Os are "Insured Persons," and the FDIC Claim alleges they committed "Wrongful Acts."[100] The Policies contain no regulatory exclusion, do not mention the FDIC, preserve coverage for trustee or liquidator claims, and for non-collusive, shareholder derivative claims brought "on behalf of" insureds.[101] The D&Os satisfied any conditions precedent to advancement.[102] It was and is correct to conclude that the Policies, on their face, provide at least a remote possibility of coverage for the FDIC Claim.

D. The district court correctly concluded that there was a remote possibility the IvI exclusion would not apply

Chartis could avoid advancement only by establishing that "no legal or factual basis exists that would *potentially* obligate [it] to indemnify the

---

[99] A246 §1.

[100] A250 §2(cc) ("Wrongful Act" includes alleged breaches of fiduciary duty).

[101] A252 §4(i).

[102] A238-39.

[D&Os]."[103] In other words, Chartis had to dispositively demonstrate "no possibility of coverage."[104] Exclusions had to be strictly interpreted, with any doubts resolved in favor of coverage.[105] Thus, legal or factual uncertainty doomed Chartis' position, because uncertainty demonstrates a remote possibility, which alone compelled the conclusion that advancement is required, until and unless coverage is dispositively negated.[106]

Chartis failed to carry its burden below, compelling the district court to conclude that the IvI exclusion could not negate all possibility of coverage. Chartis attacks the Order in two ways, first disputing the court's factual findings, then its application of the IvI exclusion to those findings. Although this sounds like the right procedure, Chartis ignores the plain meaning of the words "remote possibility," as we shall see.

---

[103] *Axis*, 2008 WL 2600034, at *4 (emphasis in original); *see also Cuadrado*, 2007 WL 1577940, at *8.

[104] *E.g., Westpoint Intern., Inc. v. Am. Intern. S. Ins. Co.*, 899 N.Y.S.2d 8, 9-10 (N.Y. App. Div. 2010) (failure to show "no possibility" required advancement).

[105] *Caraballo*, 22 P.R. Offic. Trans. 96 at 103.

[106] *See, e.g., Bucci v. Essex Ins. Co.*, 393 F.3d 285, 291 (1st Cir. 2005) ("lack of legal clarity" activates insurer's duty to defend).

(1) The district court's finding of a remote possibility the FDIC has sued on behalf of non-insureds was not clearly erroneous

Applying the remote possibility test, the district court liberally interpreted the FDIC Claim, including "any reasonable intendment" of the claim.[107] It found that the FDIC threatened to sue on December 17, 2010, pursuant to broad rights granted by Congress.[108] Those rights required the FDIC to sue "on behalf of" and "in the right of" *non-insureds*. The non-insureds include (1) the FDIC as a creditor, (2) the Bank's creditors, (3) the Bank's depositors, and (4) the Bank's shareholders. The district court found that a recovery by the FDIC would repay alleged losses of the non-insureds, including the FDIC's alleged losses from paying out $4.25 billion from the DIF. The court thus found it at least remotely possible that the FDIC is suing on behalf of non-insureds, a finding that is not clearly erroneous.

Chartis offers no basis to disturb this finding, and feigns ignorance of the FDIC's rights and duties, as if it had never heard of the FDIC. Chartis persists in arguing that the FDIC acts only as a state-court style receiver, myopically focusing on boilerplate phrases typically used to demonstrate

[107] *Caraballo*, 22 P.R. Offic. Trans. 96 at 103.
[108] *See* 12 U.S.C. §1821(d).

standing in demand letters and complaints.[109] But it's been decades since Congress empowered the FDIC to sue on behalf of third parties and Chartis began hiding behind IvI exclusions. The law is well developed by now, and magic words in pleadings (or the lack thereof) do not determine on whose behalf the FDIC sues. Congress made that determination in statutes giving the FDIC broad power to recover alleged losses of creditors, depositors and the DIF, all non-insureds, in fulfilling its statutory mandate to protect the interstate banking system.

Even if Chartis actually had been ignorant of the FDIC's statutory duties, rights and mandate, the D&Os' Coverage Complaint made Chartis aware of them,[110] and so did the FDIC's second amended complaint, as Chartis admits.[111] As Puerto Rico's Supreme Court put it, "[t]he insurer's duty to defend . . . is not discharged by the fact that the plaintiff's pleading is

[109] *E.g.*, Brief at 54-55; 63-65. Not only is this argument incorrect, but it is also new, which is improper for Chartis to raise for the first time here. *Iverson v. City of Boston*, 452 F.3d 94, 102 (1st Cir. 2006) ("We have held, with echolalic regularity, that theories not squarely and timely raised in the trial court cannot be pursued for the first time on appeal.").

[110] Add. ¶20.

[111] A152 ¶21.

not perfect . . . ."[112] In fact, Chartis admits that "the third party complainant . . . should not be the arbiter of the policy's coverage."[113]

In this, Chartis is correct, contradicting its lengthy excursus on the purported importance of magic words, and demonstrating the irreconcilable cognitive dissonance of its position. The FDIC's allegations were (and are) "malleable, changeable and amendable."[114] Restricting coverage to the "precise language" of underlying pleadings would "create an anomaly for the insured," and allow insurers to "construct a formal fortress" and hide behind an inartfully pleaded letter and complaint.[115] The duty to advance is triggered by any reasonable interpretation of the facts and law.[116] And the district court correctly found it a reasonable interpretation of the FDIC Claim to conclude that the FDIC has sued on behalf of non-insureds. This finding is supported by the record and was not clearly erroneous.

---

[112] *Id*.

[113] Brief at 61 (citing *Gon v. First State Ins. Co.*, 871 F.2d 863, 869 (9th Cir. 1989) (quoting *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 276 (Cal. 1966)).

[114] *Id*.

[115] *Gray*, 65 Cal. 2d at 276.

[116] *Caraballo*, 22 P.R. Offic. Trans. 96 at 103.

(2) The district court correctly concluded that the IvI exclusion could not negate coverage, because there is at least a "mere possibility" that the FDIC has sued on behalf of non-insureds

The district court also correctly concluded that there was a remote possibility the IvI exclusion would not apply, because it had found at least a remote possibility that the FDIC had sued on behalf of non-insureds. Despite Chartis' necessary obeisance to the actual standard, its promptly disregards it and recycles the "magic words" argument it made below, relying on two cases, as if the last 20 years of decisions hadn't been reported.[117]

(a) Chartis admitted it was remotely possible that the IvI exclusion could not apply

As a matter of law, legal uncertainty regarding a disputed issue demonstrates at least a remote possibility that either side is correct. For example, in *Hugo Boss,* the Second Circuit held that the insurer had a duty to defend because there was "legal uncertainty" as to the meaning of an exclusion's use of the term "trademarked slogan" and whether the term was clear enough to avoid interpretation against the insurer and in favor of

[117] *Evanston Ins. Co. v. FDIC*, No. 88-cv-0407, 1988 LEXIS 16263, at *4 (C.D. Cal. May 13, 1988), *vacated*, (July 1, 1988); *Hyde v. Fid. Dep. Co. of Maryland*, 23 F. Supp. 2d 630 (D. Md. 1998).

coverage.[118] Similarly, this Court held in *Bucci v. Essex Ins. Co.* that the "lack of legal clarity" in an exclusion for claims "arising out of assault and/or battery" required an insurer to defend, even though there were "cases from elsewhere . . . which support[ed] [the insurer's] reading."[119]

Legal uncertainty is particularly obvious when an insurer's legal theory has not been adopted by the state whose law governs interpretation of an insurance policy, which is the situation here. For example, in *Apana v. TIG Ins. Co.*, the state's courts had never considered the insurer's argument, and it was an "open," "heavily-disputed question nationally."[120] The Washington Supreme Court likewise rejected the notion that an insurer "may rely upon its own interpretation of case law," because an insurer is required "to give the insured the benefit of the doubt when determining whether the insurance policy covers the allegations in the complaint."[121]

Here, Chartis "did the opposite—it relied on an equivocal interpretation of case law to give *itself* the benefit of the doubt rather than its

---

[118] *Hugo Boss Fashions, Inc. v. Fed. Ins. Co.*, 252 F.3d 608, 622 (2d Cir. 2001).

[119] 393 F.3d at 290-91.

[120] *Apana v. TIG Ins. Co.*, 504 F. Supp. 2d 998, 1003-4 (D. Haw. 2007).

[121] *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wash. 2d 398, 412-13 (Wash. 2010).

insured."[122] Relying on its own interpretation, Chartis ignored plain, obvious and indisputable evidence of legal uncertainty. Neither Puerto Rico, nor this Court had ever addressed the IvI exclusion. And there were numerous decisions rejecting Chartis' position, which the D&Os presented to the district court and to Chartis (as if it didn't know already).[123] Even Chartis eventually admitted that its interpretation was "reasonably debatable," "novel," and had never "been addressed by" any court in Puerto Rico or the First Circuit.[124] On this record, the district court committed no error, because "[b]y Chartis's own admission, therefore, there exists a 'remote possibility' that a court may find the [IvI] Exclusion inapplicable."[125]

(b) Chartis admitted that the IvI exclusion could not preclude advancement of defense costs

Chartis' admissions extend beyond the legal uncertainty it eventually conceded below. It affirmatively and dispositively admitted that this IvI exclusion does not preclude advancement in *Bradford v. Gibraltar Nat'l Insur. Co.*[126] There, the Arkansas state insurance commissioner sued

[122] *Id*. (emphasis in original).
[123] *E.g.*, Opp. Insurer MTD at 17-24.
[124] Fee Entitlement Order, at *3.
[125] *Id*.
[126] D&OA97-99.

directors and officer for breaches of fiduciary duty in connection with the demise of an insurance company it had taken into receivership, much as the FDIC has sued the D&Os here. Chartis had sold a D&O policy that was in all material respects identical to the one at issue here, with an identical IvI exclusion[127] and advancement provision.[128]

When the directors asked for advancement, Chartis went to great lengths to provide it. For reasons known only to Chartis, it did not abandon those directors and officers, but instead itself moved for advancement on their behalf, requesting that the policies be excluded from a liquidation order. Chartis argued that the directors and officers "may suffer substantial and irreparable harm if prevented from exercising their rights to defense payments," and are "in need *now* of their contractual right to payment of defense costs . . . ."[129] Chartis prevailed, and advanced defense costs for the directors and officers of an insurer in receivership. Its success in *Bradford* estops it from denying its duty to advance here.[130]

---

[127] D&OA90-91 §3(i)).
[128] *Id*. at 87 §1.
[129] *Id.* at 82 ¶11 (emphasis in original).
[130] *See Alt. Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 32 (1st Cir. 2004).

(c) A remote possibility of coverage was demonstrated by conflicting jurisprudence on the IvI exclusion

If Chartis' admission that the IvI exclusion is legally uncertain were not alone enough (it was and is), further support for the Order's conclusion of at least "remote possibility" of coverage arises from the fact that *no court* of Puerto Rico, nor this Court, had ever before addressed an IvI exclusion in a case brought by an adverse regulator with a statutory mandate to sue on behalf of non-insureds. Chartis argued that the exclusion's stated application to claims "by," "on behalf of," and "in the right of" the "Organization" negated coverage. The D&Os presented case after case holding otherwise, as discussed below. Those decisions showed, at a minimum, that the IvI exclusion's application was uncertain, despite the alleged power of these "magic words," demonstrating at least a remote possibility of coverage.

1. "By"—Most courts, including one within this Circuit, have concluded that regulator lawsuits are not brought "by the Organization." The district of Massachusetts' former chief judge held that the RTC did not merely "stand in the shoes" of the bank for which it was appointed receiver.[131] The RTC was "an adverse party, not in collusion with the

[131] *Sentry*, 867 F. Supp. at 59

directors and officers of [the bank]."[132] Therefore, because "[t]he weight of opinions . . . in the receivership context side with" coverage, and "[t]he obvious intent behind the 'insured v. insured' exclusion is to protect [the insurer] from collusive suits among [the bank] and its directors and officers," the IvI exclusion did not apply.[133] There is no magic in the word "by."

2. "On Behalf Of"—These words have no magic, either. They plainly ask: "who will benefit from the claim?"[134] The answer cannot be a non-existent bank. It must instead be the non-insureds, including (1) the FDIC as a creditor, (2) third-party creditors, (3) depositors, (4) the Bank's shareholders, and (5) the DIF. These non-insureds purportedly suffered damages when the Bank was seized. Congress empowered the FDIC to sue the D&Os "on behalf of" these non-insureds to recover those damages.[135] In fact §1821(k) expressly requires the FDIC Claim to be brought "*on behalf of*, or at the request or direction of the [FDIC]" and that the "action is

---

[132] *Id*.

[133] *Id*.

[134] Webster's Third New Int'l Dictionary defines "on behalf of" as "in the interest of".

[135] A152 ¶21; 12 U.S.C. §1821(k) & (g).

prosecuted *wholly or partially* for the benefit of the [FDIC]."[136] Thus, the plain meaning of the phrase "on behalf of" could not negate coverage.

Moreover, courts have rejected any interpretation of this phrase that would exclude coverage for (i) FDIC claims, (ii) analogous state insurance regulatory claims, and (iii) analogous bankruptcy trustee claims. Those decisions relied on the regulator's unique role to marshal assets and wind up regulated institutions, the purpose of the IvI exclusion, and the inherent ambiguity of the phrase "on behalf of." They are discussed next.

i. Decisions rejecting "on behalf of" in FDIC actions

Progressive is the most recent. As discussed above, the Northern District of Georgia's former chief judge found no magic in the words "on behalf of" or "at the behest of."[137] He held that those phrases could not negate coverage because the FDIC is no ordinary receiver. It is "tasked, under [FIRREA] with bringing claims to recover losses suffered by the federal Deposit Insurance Fund and a bank's depositors, creditors, and shareholders."[138]

---

[136] §1821(k); §1811(a) ("Corporation" is the "FDIC").

[137] *Progressive*, 2013 WL 599794, at *2.

[138] *Id*. A Michigan district court found the same exclusion in a Progressive policy subject to ambiguity a few months earlier. *Progressive Cas. Ins. Co.*

ii. Decisions rejecting "on behalf of" as to insurance regulators

As in *Bradford, supra*, state insurance commissioners sometimes act as receivers of insolvent insurance companies and sue former directors and officers. Decisions interpreting IvI exclusions in such cases are persuasive, because there is "no principled difference between the [insurance] Commissioner's role as receiver . . . and that of the FDIC."[139] Insurers have lost attempts to stretch IvI exclusions in these analogous cases, which are brought on behalf of "policyholders, creditors, shareholders or the public."[140]

This fact helps explain Chartis' success in *Bradford, supra*, where it overcame an IvI exclusion identical to the one here, even if it fails to explain Chartis' lack of candor about *its own successful arguments against* the IvI exclusion in that case. It also explains why the Hawaii district court (in *Hawaiian Electric*) rejected an insurer's attempt to extend the same IvI exclusion at issue here to claims by Hawaii's insurance commission,[141]

---

v. FDIC, No. 11-cv-14816, Dkt. No. 33, at 5 (E.D. Mich., Sept. 24, 2012) ("*Progressive II*").

[139] *E.g., Grant Thornton, LLP v. FDIC*, 435 Fed. Appx. 188, 201 (4th Cir. 2011) (citing *Cordial v. Ernst & Young*, 199 W. Va. 119, 128, (W. Va. 1996)).

[140] *Grant Thornton*, 435 Fed. Appx. at 200-1.

[141] *Fed. Ins. Corp. v. Hawaiian Electric Indus., Inc.*, 1995 WL 1916123 (D. Haw. 1995).

which regulates insurers in much the same way the FDIC regulates banks.[142] There, claims for damage from Hurricane Iniki overwhelmed the insurer's reserves, causing the commissioner to seize it and sue its directors and officers.[143] The parties later settled.[144]

The directors and officers then asked their insurer to cover the settlement. The insurer refused, invoking an IvI exclusion barring coverage for claims "on behalf of" insureds.[145] The court refused to stretch the words "on behalf of" to the commissioner's claims because "[u]nder the facts presented here, the Commissioner asserted interests other than [the company's] . . . therefore, the Commissioner is not an 'Insured' within the meaning of the Insured v. Insured Exclusion."[146]

Chartis claims the insurance commissioner in *Hawaiian Electric* is different from the FDIC, because Hawaii law required the commissioner to sue on behalf of third parties, so it did not "simply step into the shoes" of the failed insurance company.[147] Turning the blindest of blind eyes to FIRREA,

---

[142] *See id*. at *2.
[143] *Id*. at *2-3.
[144] *Id*.
[145] *Id*. at *5.
[146] *Id*. at *7.
[147] Brief at 62.

Chartis claims the FDIC is not *really* "asserting any cause of action" on behalf of third parties, and *Hawaiian Electric* is distinguishable.[148] Not so.

First, there is "no principled difference" between an insurance commissioner and the FDIC as receiver.[149] The FDIC's statutory duties, rights, and mandate compel the conclusion that it *always* sues, at least in part, to advance the interests of non-insureds, as a matter of law.

Second, to order advancement, the district court was not required to find that the FDIC "actually" has sued on behalf of non-insureds. It needed only find a "remote possibility" that the FDIC has sued on behalf of non-insureds. As demonstrated above, the court's remote possibility of coverage finding is correct and should not be disturbed.

Third, even if we were here on review of a summary or final judgment of coverage, where "actuality" might be the test, Chartis' argument fundamentally distorts the FDIC's role in winding up the affairs of banks placed in receivership. The FDIC's statutory role as receiver is to "wind up the affairs of [the Bank] and distribute any remaining assets pro rata to the

[148] *Id*. at 55, 61-62 (citing *Mt. Hawley*, 695 F. Supp. at 483, n. 2).
[149] *Grant Thornton*, 435 Fed. Appx. at 201.

bank's creditors," which include itself, because one of its statutory duties is to reimburse depositors for deposits that were insured by the DIF.[150]

To illustrate, after the OCFI closed Westernbank and appointed the FDIC as receiver, the FDIC transferred certain assets (loans) and liabilities (deposits) to Banco Popular. Popular assumed only retail deposits, not brokered deposits.[151] This left billions in FDIC-insured brokered deposits that the FDIC alleges were paid directly from the DIF. It claims that this payout, among other things, caused a loss to the DIF "currently estimated at $4.25 billion."[152] Having paid the brokered deposits' insured amount, the FDIC became subrogated to the depositors' rights against the Bank. Thus, the FDIC "actually" sues either "on behalf of" depositors as a successor in interest, or "on behalf of" itself as subrogee.[153] The depositors and FDIC are not, and never were, "insureds" under the Policies.

But the Order did not require deciding on whose behalf the FDIC "actually" has sued, only a "remote possibility" that the FDIC has sued on

---

[150] *Com. of Mass.*, 102 F.3d at 617.

[151] *See* http://www.fdic.gov/bank/individual/failed/westernbank-puertorico.html, last visited April 3, 2013 at Section "III. Acquiring Financial Institution."

[152] A152 ¶1.

[153] *E.g.*, *Com. of Mass. v. FDIC*, 102 F.3d 615, 617 (1st Cir. 1996).

behalf of non-insureds. Thus, there was no error, let alone clear error, in the Order's necessary factual finding of a "remote possibility" the FDIC has sued on behalf of depositors as a successor in interest, or on its own behalf as a subrogee, because the largest alleged losses are payments from the DIF.

Finally, even if "actuality" were the test, which it isn't, courts have rejected this argument. Insurers claimed the FDIC was not "in fact" suing "on behalf of" non-insureds in *Fidelity & Deposit Co. of Maryland v. Zandstra*.[154] That court rejected the insurers' "strict and formalistic" view, which overlooked FSLIC's allegations that it paid "over $5 million" to make good on insured deposits, finding that "[a]ny recovery by FDIC in the underlying actions . . . is properly understood as a reimbursement for its loss incurred on behalf of the third parties, whose claims it holds."[155]

One last thing is noteworthy. *Hawaiian Electric* also found the IvI exclusion's carve out for derivative claims important. This carve-out (also in the Policies here) "indicate[d] that [the insurer] intended to put itself at risk for the malfeasance of the insured officers and directors," which it held

[154] 756 F. Supp. 429, 432 (N.D. Cal. 1990).

[155] *Id*. at 433; *accord Branning v. CNA Ins. Co.*, 721 F. Supp. 1180, 1185 (W.D. Wash. 1989) (The "loss to the insurance fund is in truth the once potential loss to the class of parties FSLIC represents.").

included claims by adverse regulators.[156] Other decisions agree, including *Zandstra*,[157] *Laminate Kingdom*,[158] *County Seat*,[159] and *Molten Metal*.[160] Even the *Mt. Hawley*[161] decision Chartis relies on agrees. There, the policies actually *excluded* coverage for shareholder derivative claims and class actions.[162] The court thought this "strange," because "ordinarily, shareholders' suits are the *primary* source of covered claims against directors and officers."[163] It concluded that the exclusion must have "received attention from the insureds in the purchase of the policy," and "did not lurk undiscovered in the fine print."[164]

---

[156] *Hawaiian Electric*, 1995 WL 1916123, at *9.
[157] *Zandstra*, 756 F. Supp. at 431.
[158] *In re Laminate Kingdom, LLC*, 2008 WL 704396, at *3 (Bankr. S.D. Fla. 2008).
[159] *In re County Seat Stores, Inc.*, 280 B.R. 319, 325-26 (Bankr. S.D.N.Y. 2002).
[160] *Molten Metal*, 271 B.R. at 725.
[161] *Mt. Hawley*, 695 F. Supp. at 484
[162] *Id.*
[163] *Id.* (emphasis in original).
[164] *Id.*

iii. Decisions rejecting "on behalf of" as to bankruptcy trustees

A bankruptcy trustee "is a statutory creature whose role is analogous to that of the FDIC."[165] Courts from the First, Second, Third, Fifth and Sixth Circuits have interpreted IvI exclusions with the words "on behalf of" and have rejected their application to bankruptcy trustees. Even contrary decisions in three other circuits support the Order's finding of a "remote possibility," which exists if a question is "heavily-disputed."[166]

In this Circuit, the former chief judge of Massachusetts' bankruptcy court rejected stretching "on behalf of" to apply to trustee claims, because "[t]he claims belong to the estate and are being brought on the estate's behalf; the Debtor is no longer the real party in interest. The Trustee is."[167] Shortly thereafter, a Massachusetts district court found that "[t]he trustee has indicated that he represents the shareholders and creditors of [the

[165] *County Seat*, 280 B.R. at 325-26.
[166] *Apana*, 504 F. Supp. 2d at 1003-4.
[167] *Molten Metal*, 271 B.R. 711, 725.

company]," which defeated "the purpose of the exclusion."[168] Courts in the Second, Third, Fifth, and Sixth Circuits agree.[169]

These courts also found it "inconsequential" that the trustee's claims "belonged" to the debtor or had "arisen" pre-petition, which contradicts Chartis' theory that it matters if the FDIC's claims arose pre-takeover (*see* Brief at 54).[170] The trustee does not "merely stand[] in the shoes of the Debtor" or "assume[]the identity of the Debtor."[171] Like the FDIC, a trustee sues "on behalf of the estate in furtherance of his duty as defined by Congress."[172]

3. "In The Right Of"—This phrase asks: "whose claim is it?" The claims cannot be the Bank's, which no longer exists. They are the FDIC's (a non-insured), which sues on its own behalf and obtained the right

---

[168] *Narath v. Executive Risk Indem., Inc.*, 2002 WL 924231, at *2 (D. Mass. 2002).

[169] *Louisiana Grain*, 467 B.R. 390, 394 (W.D. La. 2012); *Laminate Kingdom*, 2008 WL 704396, at *3; *In re Buckeye Countrymark, Inc.*, 251 B.R. 835, 840 (Bankr. S.D. Ohio 2000); *Accord Zurich Am. Ins. Co. v. Boyes*, No. 3:99-CV-2350-X, 2001 U.S. Dist. LEXIS 15123, at *6 (N.D. Tex. 2001); *Cirka v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2004 WL 1813283, at *7 (Del. Ch. 2004); *accord Yessenow v. Executive Risk Indem., Inc.*, 953 N.E.2d 433, 444 (Ill. App Div. 2011).

[170] *County Seat*, 280 B.R. at 325.

[171] *Id*.

[172] *Id*. (citing 11 U.S.C. §323).

to sue on behalf of other non-insureds by operation of law, after statutory transfer under 12 U.S.C. §1821(d)(2). Thus, the FDIC Claim is not "in the right of" any insured.[173]

Four cases—*Bradford*, *Narath*, *Louisiana Grain*, and *Laminate Kingdom*—all interpreted policies containing the phrase "in the right of." Chartis itself disregarded these alleged "magic words" in *Bradford*, and convinced that court to do the same. Furthermore, *Louisiana Grain* held that the pre-petition entity "had no rights to or ownership interest in any of the claims asserted by the Trustee."[174] "[A]ll [of] the Debtor's rights with respect to these claims (along with all other estate property under 11 U.S.C. §541) vested in the bankruptcy estate upon the filing of the petition."

Louisiana Grain also refused to apply "in the right of" to successor entities such as trustees (or an FDIC receivership), because the policies did not include successor entities in the "Insured Entity" definition and, as a matter of law, trustees do not "strictly" step into the shoes of the debtor.[175] So it is here. Chartis omitted successor entities from the "Insured" definition, and courts have long held that the FDIC is not an "ordinary successor[]-in-

[173] *Cf. Molten Metal*, 271 B.R. at 726.
[174] 467 B.R. at *398.
[175] *Id*.

interest" because of the unique role Congress gave it to "represent the bank as well as the creditors, depositors and shareholders of the bank."[176]

In sum, many recent decisions have held that the IvI exclusion does not exclude coverage for adverse regulator claims. Those decisions demonstrate, at a minimum, the requisite "remote possibility" that the IvI exclusion would not apply here. There is no avoiding this ineluctable conclusion, because a legally uncertain exclusion cannot negate all possibility of coverage.

(d) Chartis could not show "no possibility" of coverage based on non-recent decisions that are outnumbered and inapposite

Even if Chartis could had shown "no possibility" of coverage based on two non-binding cases, and had not refuted that position by admitting it was "legally uncertain" and "novel," its two cases—*Evanston* and *Hyde*—are distinguishable outliers that should be limited to their facts. They could not negate all possibility of coverage, even if they were binding.

---

[176] *Niemuller v. Nat'l Union*, 1993 WL 546678, at *4 (S.D.N.Y. 1993) (Sotomayor, J.); *see also Am. Cas. Co. of Reading, PA v. FDIC*, 713 F. Supp. 311, 316 (N.D. Iowa 1988) (citing *D'Oench, Duhme & Co., Inc. v. FDIC*, 315 U.S. 447, 472-73 (1942); *Branning*, 721 F. Supp. at 1184 (W.D. Wash. 1989); *FDIC v. Nat'l Union Fire Ins. Co.*, 630 F. Supp. 1149, 1157 (W.D. La. 1986).

Evanston is an unpublished decision that the court vacated to allow the parties to conduct discovery.[177] In the unpublished, vacated order, it had applied an IvI exclusion to an FDIC suit in its corporate capacity.[178] The claims were "limited to the rights of the Bank acquired by assignment," precluding it from suing on behalf of creditors or depositors.[179] Unlike this case, the FDIC specifically said it was "not attempting to enforce whatever rights the creditors may have against the directors."[180] Further, unlike the IvI exclusion at issue here, that exclusion did not carve out derivative claims, suggesting that it could bar coverage for adverse regulator claims.

A similar situation existed in *Mt. Hawley*, a case Chartis likes, but not enough to include in its mantra that "only two cases have decided the question." Lack of confidence in *Mt. Hawley* is well-placed. In *Mt. Hawley*, the FSLIC, like the FDIC in *Evanston*, "chose[] *not* to assert its own claims against the directors and officers acquired as subrogee of the insured depositors; the only claims remaining to it are those of [the bank] itself."[181] The court suggested that the IvI exclusion would not apply to a situation like

[177] *Evanston*, 1988 LEXIS 16263, at *4, *vacated*, (July 1, 1988).
[178] *Id*.
[179] *Id*.
[180] *Id*.
[181] *Mt. Hawley*, 695 F. Supp. at 482, n. 2 (emphasis added).

this one, where the regulator was "*not* suing on behalf of [the bank] . . . ."[182] *Mt. Hawley*'s sister court later confirmed this to be true in *Zandstra*.[183]

Chartis finally retreats behind *Hyde*, which suffers from the same infirmities as *Evanston* and *Mt. Hawley*, plus another. The RTC *never sued* any of the former directors.[184] It only investigated their approval of one loan, eventually settling a potential claim.[185] The insurer *covered* the settlement, but refused to pay the directors' attorneys' fees incurred in defending the RTC's investigation.[186] Thus, *Hyde* never addressed whether the IvI exclusion would have been inapplicable if the insurer had denied coverage of the settlement, or the RTC had filed a complaint. The opinion's cramped reasoning was likely influenced by the insurer's payment of the entire settlement amount, which Chartis fails to mention.[187]

The distinguishable facts of *Evanston*, *Mt. Hawley*, and *Hyde* might explain why insurers have succeeded in leading other courts to incorrectly interpret IvI exclusions. *Louisiana Grain* summed up the important

---

[182] *Id*. at 484 (emphasis in original).
[183] *Zandstra*, 756 F. Supp. at 431.
[184] *See Hyde*, 23 F. Supp. 2d at 631.
[185] *Id*.
[186] *Id*. ("Fidelity paid the $150,000.00 settlement but has refused to pay the Directors' attorneys fees.").
[187] *Id*. at 633.

differences between Chartis' key cases and this one: "[t]he cases holding that the [IvI] exclusion applies to [FDIC claims] typically involve actions where the FDIC or FSLIC is acting in its corporate capacity and is not acting for the benefit of a failed institution's creditors and depositors."[188] These differences support the Order's finding of a "remote possibility of coverage.

(e) If a regulatory exclusion excludes regulatory claims, why sell a policy to a regulated bank without one?

If, as *Mt. Hawley* said, "suits brought by governmental agencies *not* suing on behalf of [the bank] would [be] covered," despite an IvI exclusion, why didn't Chartis sell the D&Os a policy with a regulatory exclusion? The fact that Chartis sells policies with an exclusion that expressly excludes coverage it hopes to bar with an IvI exclusion, renders the two exclusions duplicative and Chartis' argument implausible. The *Sentry* court asked "[i]f the parties had intended to exclude coverage" for FDIC lawsuits "why was that language not specifically used [in the IvI Exclusion] as [was used] in the

[188] 467 B.R. at 396, n.2 (citing *Mt. Hawley* as an example).

Regulatory Exclusion?"[189] Other Circuit's courts have asked the same question.[190]

One of Chartis' responses below was an analogy to a regulatory exclusion as "suspenders" and the IvI exclusion as a "belt." If the IvI exclusion were the same thing as a regulatory exclusion, however, the Policies would be wearing two overlapping, redundant "belts." All words in insurance policies should have meaning, interpreting them should not "reduce words to mere surplusage."[191]

Chartis also makes a new argument, that *Mt. Hawley* explains why the absence of a regulatory exclusion is immaterial. But *Mt. Hawley* described *two* scenarios. In Scenario 1, FSLIC is a creditor suing "on its own behalf."[192] In Scenario 2, it "chooses *not* to assert its own claims against the directors and officers acquired as subrogee," and assumes control of the

---

[189] 867 F. Supp. at 60, n. 14.

[190] *St. Paul Fire & Marine Ins. Co. v. FDIC*, 765 F. Supp. 538, 548 (D. Minn. 1991) (insurer "knew what language to use to explicitly preclude such suits"); *Laminate Kingdom*, 2008 WL 704396, at *5 (same but for trustee exclusion).

[191] *Systemized of New England, Inc. v. SCM, Inc.*, 732 F.2d 1030, 1034 (1st Cir. 1984).

[192] *Mt. Hawley*, 695 F. Supp. at 482.

bank with "full power to carry on the business of the bank."[193] In Scenario 2, "the only claims remaining to [FSLIC] are those of [the bank] itself" and it "stands in the shoes" of the bank, so the "absence of the regulatory endorsement" wouldn't matter, because the IvI exclusion would apply.[194]

Chartis understandably strips from its block quote (and its entire discussion in pages 52-53), *Mt. Hawley*'s thoughtful analysis of Scenario 1. Absence of a regulatory exclusion in Scenario 1 would be dispositive, because FSLIC would be suing "on behalf of" itself as an "assignee or subrogated insurer of the depositors, creditors or shareholders of [the bank]," none of which are insureds.[195] Only a regulatory exclusion could bar coverage in Scenario 1 because "suits brought by governmental agencies *not* suing on behalf of [the bank] would have been covered."[196]

This case *is* Scenario 1—a covered claim according to *Mt. Hawley*. The FDIC sold off the Bank's assets, kept allegedly un-saleable assets, and sued to recoup what it allegedly paid out from the DIF, as well as on behalf

---

[193] *Id*.
[194] *Id*. at 482-83; *see also* n. 2.
[195] *Id*. at 482.
[196] *Id*. at 484-85 (emphasis in original).

of the bank's creditors. There is, therefore, a "remote possibility" that the absence of a regulatory exclusion renders the IvI exclusion inapplicable.

(f) There was a remote possibility that the Policies' bankruptcy exception would preserve coverage, even if the IvI exclusion could apply

Even if all the recent decisions did not exist, and Chartis had not conceded that the IvI exclusion could not negate the remote possibility of coverage, the bankruptcy exception would preserve coverage the IvI exclusion took away. Chartis bore the burden of proving this exception's inapplicability, but failed to do so. In fact, it failed altogether to discuss the importance of this exception.

The Policies' bankruptcy exception preserves coverage for:

> (3) any Claim brought on behalf of an **Organization in bankruptcy**, by the examiner, trustee, receiver, liquidator or rehabilitator (or any assignee thereof) of such Organization, if any.[197]

The FDIC is the Bank's statutory receiver asserting a claim in the Bank's bankruptcy. The term "bankruptcy" includes equivalents, which for banks is a receivership following insolvency. [198] When banks become insolvent, regulators declare them insolvent, shut them down, and appoint the FDIC as

[197] A252 §4(i)(3).

[198] *E.g.*, *Gamble v. Daniel*, 39 F.2d 447, 450 (8th Cir. 1930).

receiver.[199] Thus, when the FDIC sues as a receiver, it does so as a receiver in a bankruptcy.

Chartis is estopped to deny that "bankruptcy" applies to equivalents because it recently convinced a Florida district court that this is the proper interpretation of its policies, in the *National Union* case.[200] There, an insolvent insurance company, like the Bank, could not declare bankruptcy as a matter of law.[201] The receiver brought claims against former directors and officers.[202] But unlike this case, the policies there *excluded* (instead of preserving) coverage for claims brought by a receiver in bankruptcy.[203] Predictably, Chartis' affiliate argued that, in order to give meaning to the policies it wrote, the term "bankruptcy," must include receiverships.[204]

Chartis argued that the dictionary definition of bankruptcy "supports the contention that the ordinary and legal meaning of bankruptcy is not exclusive to those filed under [the] Federal Code."[205] Chartis argued that the

---

[199] *See* 7 P.R.L.A. §201; *see also* 12 U.S.C. §1821(c).
[200] D&OA101-116 (*Florida DFS v. Nat'l Union Fire Ins. Co. of Pitt., Pa*, No. 11-cv-242 (N.D. Fla. May 10, 2012) ("*Nat'l Union*").
[201] D&OA103.
[202] *Id*.
[203] D&OA107.
[204] D&OA 109.
[205] D&OA107.

policies' references elsewhere to "United States bankruptcy law" were not intended to infect the undefined "bankruptcy" term.[206] Chartis argued that it means what it says in policies, and if it wanted to limit "bankruptcy" to actions under the federal bankruptcy code, it would have said so.[207] The *National Union* court agreed, finding that "where the drafters of the policy wanted to refer to the Federal Bankruptcy Code, they could. And, as here, where they did not wish to refer to the Federal Code, they did not."[208]

Chartis is correct. Any contrary interpretation would have been inconsistent and rendered the bankruptcy exclusion meaningless. Further, that exclusion would not have been rendered meaningful because the insurer could not declare bankruptcy—"it does not change the conclusion that the policy could not insist on something [the failed insurance company] could not do."[209] Thus, there is at least a remote possibility the Policies' bankruptcy exception would preserve coverage, even if the IvI exclusion could otherwise have dispositively negated it (which it could not).

---

[206] *Id*. at 108-109.
[207] *Id*.
[208] *Id*.
[209] *Id*. at 110.

(g) There is a "remote possibility" of coverage because the IvI exclusion might be ambiguous

If the IvI exclusion is not inapplicable altogether, there is at least a remote possibility that it is ambiguous for two reasons.

*Firs*t, Chartis is estopped from arguing that the D&Os' interpretation of the bankruptcy exception is unreasonable.[210] Thus, even assuming *arguendo* that the IvI exclusion could have negated coverage, and that Chartis would be allowed to proffer a different interpretation of the bankruptcy exception, ambiguity would exist, requiring the district court to find a "remote possibility" of coverage.

Second, the phrases "on behalf of" and "in the right of" are themselves ambiguous. The district court reviewed six decisions to that effect, in cases brought by insurance commissioners and bankruptcy trustees.[211] The most recent FDIC cases found ambiguity in the phrases "on

---

[210] D&OA107-10.

[211] *Hawaiian Electric*, 1995 WL 1916123, at *7 ("on behalf of" held ambiguous); *Molten Metal*, 271 B.R. at 725 (same); *Laminate Kingdom*, 2008 WL 704396, at *5 (same; "in right of" held ambiguous); *Buckeye*, 251 B.R. at 840-41 (same); *Yessenow*, 953 N.E.2d at 443-44 (same); *Boyes*, 2001 U.S. Dist. LEXIS 15123, at *6 (same).

behalf of" and "at the behest of."[212] Finally, it is indisputable that "a number of courts . . . have concluded that" the word "by" is "ambiguous as to whether claims by the FDIC are precluded."[213]

E. The "remote possibility" of coverage cannot be trumped by reference to the word "covered" in the Policies

Insurance policies may make advancement optional and may be silent as to when an insurer must advance.[214] Not here. The Policies' first page is loud and clear: Chartis must "**Advance Defense Costs . . . Prior To The Final Disposition Of A Claim**." Reviewing policies like these, "most courts [including *Mt. Hawley*] have required the insurer to pay defense costs when they are incurred by the insured."[215] Chartis claims the Policies at issue are uniquely different, because it buried the word "covered" in references to payment obligations. Apart from unintentionally suggesting that the Policies are ambiguous for this reason, this argument cannot be correct. Chartis may

---

[212] *Progressive*, 2013 WL 599794, at *2; *Progressive II*, No. 11-cv-14816, Dkt. No. 33.

[213] *St. Paul Fire*, 765 F. Supp. at 548 (collecting cases).

[214] *See, e.g., Okada v. MGIC Indem. Corp.*, 823 F.2d 276, 279 (9th Cir. 1986) (optional); *Nu-Way Envtl., Inc. v. Planet Ins. Co.*, 1997 WL 462010, at *1 (S.D.N.Y. 1997) (silent).

[215] *FDIC v. Booth*, 824 F. Supp. 76, 81 & n.19 (M.D. La. 1993) (collecting cases).

not contract away fundamental duties or give itself a secret power to be the arbiter of coverage and make the "final disposition of a claim."

First, if Chartis had absolute discretion, the Policies' advancement promise would be rendered illusory, and their recoupment right rendered meaningless. Chartis never would be required to advance defense costs if it possessed the power to make the "final disposition of a claim," by deciding whether or not coverage exists. As such, the promise to advance would be illusory, because advancement would be entirely at Chartis' discretion, i.e., optional. Its recoupment right would be rendered meaningless, because Chartis alone would decide whether it wanted to advance one cent. This interpretation, if not unreasonable and absurd as a matter of law, cannot do more than demonstrate ambiguity, which must be construed against Chartis.

Second, the advancement and recoupment provisions demonstrate "that the parties specifically contemplated a scenario in which [the insurer] would advance defense costs and [the insureds] would later be deemed unentitled to such monies, pursuant to the Policy's terms and conditions."[216]

[216] *Aspen Ins. UK, Ltd v. Fiserv, Inc.*, 2010 WL 5129529, at *2-4 (D. Colo. Dec. 9, 2010) (policy stated that insurer "shall advance, at the written request of the Insured, Defense Costs prior to the final disposition of the Claim.").

The *Aspen* court rejected the insurer's claim of "sole discretion," because the policy's "use of 'shall' creates an obligation and denotes mandatory compliance."[217]

Third, Chartis' claimed secret, absolute power to determine coverage would violate public policy by turning the "remote possibility" test on its head. It also contradicts the testimony of its affiliate National Union's Complex Claims Director, in *Brown v. AIG*, that its advancement obligation is not purely discretionary, but triggered by a claim's "'reasonable potential for coverage.'"[218] He testified that the insurer could not unilaterally withhold advancement on claims "not covered under the terms of this policy,"[219] and would advance when a "reasonable potential for coverage" exists.[220] Applying the law of Kentucky (not Puerto Rico), the *Brown* court accepted this argument and held that the "reasonable potential" test "better accommodates" and "'give[s] effect' to both the [advancement] duty" and the provision limiting that duty to covered claims.[221] Puerto Rico law requires no more than a possibility of coverage, but even if it had required a

[217] *Id*. at *6.
[218] *Brown*, 339 F. Supp. 2d at 344-46.
[219] *Id*.
[220] *Id*. at 346.
[221] *Id*.

"reasonable potential," such was demonstrated below, and confirmed by the district court's denial of Chartis' motion to dismiss the Coverage Complaint.

Fourth, Chartis' newly minted, secret power to contract its way out of the "remote possibility" test not only contradicts its affiliate's testimony in *Brown*, but was soundly rejected in *Axis Reinsurance Co. v. Bennett*.[222] The court there found that burying "covered" in an advancement provision "seem[ed], at best, an unusual way to effectuate such a fundamental change in the parties' expectations."[223] These policies are governed by Puerto Rico law, which required the parties to expect that its "remote possibility" test would apply. Chartis' proffered interpretation would "effectively render the advancement obligation worthless."[224] If an insurer "wants the unilateral right to refuse a payment called for in the policy, the policy should *clearly* state that right."[225] "Insurance carriers do not function as courts of law."[226]

Fifth, Chartis ignores *Aspen* and *Axis*, which we raised below, perhaps (improperly) saving their discussion for a reply. Instead, Chartis continues to

---

[222] *Axis*, 2008 WL 2600034, at *4.
[223] *Id*.
[224] *Id*.
[225] *Id*. (quoting *Assoc. Elec. & Gas Ins. Serv., Ltd. v. Rigas*, 382 F. Supp. 2d 685, 701 (E.D. Pa. 2004) (emphasis added).
[226] *Rigas*, 382 F. Supp. 2d at 701.

rely on three decisions it claims give it absolute power.[227] We distinguished them below and will here too. The first is *Kowlowski*, a New York state court decision, in which Chartis claims the court held that an "insurer is entitled to differentiate between covered and noncovered claims," and can make a unilateral determination.[228] *Kowlowski* actually held that *allocation* was *premature*, that "the duty to defend is broader than the duty to indemnify," and required the insurer to "pay all defense costs as incurred, subject to recoupment when Kozlowski's liabilities, if any, are determined."[229]

Next, Chartis cites the internally inconsistent *Fleming* opinion, which applied Pennsylvania law. Initially, it states that an insurer cannot "deny coverage until a court or jury determines which, if any, claims are covered," because such unilateral determination would "obviate the [advancement's] 'as-incurred' language of the policy."[230] As if forgetting what it just said, with no citation of authority, the court then states that an insurer can make

---

[227] *Fed. Ins. Co. v. Kozlowski*, 792 N.Y.S.2d 397 (N.Y. App. Div. 2005); *Fleming Fitzgerald & Assocs. Ltd. v. U.S. Specialty Ins. Co.*, 2008 WL 4425845, at *10 (W.D. Pa. Sept. 30, 2008); and *In re Kenai Corp.*, 136 B.R. 59 (S.D.N.Y. 1992).

[228] Brief at 43.

[229] *Kozlowski*, 792 N.Y.S.2d at 403.

[230] 2008 WL 4425845, at *10.

an "initial determination as to what claims are covered and what claims are not covered."[231] There is no logical way to reconcile this contradiction and, in any event, *Fleming* does not control. The Court should not "obviate" the Policies' provisions requiring the advancement of costs "as incurred."

Chartis concludes with *In re Kenai Corp.*, which interpreted policies that were silent as to when the insurer should pay defense costs, unlike the Policies here, which scream out: "**Advance Defense Costs . . . Prior To The Final Disposition Of A Claim**."[232] The words "advance" and "prior to" the disposition of a claim caused the *In re WorldCom* court to distinguish and reject *Kenai*.[233] Chartis claims the Policies here are identical to those in *WorldCom*, therefore Chartis must accept *WorldCom*'s rejection of *Kenai*.[234]

Finally, even if Chartis could have had some secret unilateral right to make an "initial determination" of no coverage, and refuse advancement *solely* on the basis of the IvI exclusion (the only basis argued below), the

---

[231] *Id*.

[232] 136 B.R. 59.

[233] *WorldCom*, 354 F. Supp. 2d at 467 (finding *Kenai* "readily distinguishable").

[234] D&OA72, n. 2.

district court extinguished any right to refuse advancement by denying Chartis' motion to dismiss, which also was based solely on the IvI exclusion.

CONCLUSION

The Policies require Chartis to advance defense costs. Puerto Rico law activates that duty when a remote possibility of coverage exists. The Order found at least a remote possibility that the FDIC has sued on behalf of non-insureds, and concluded that there is at least a remote possibility the IvI exclusion will not apply and coverage will exist. The necessary factual finding was not clearly erroneous, and the legal conclusion of a remote possibility of coverage was correct. This Court should affirm.

Respectfully submitted,

RIVERO MESTRE LLP

Attorneys for Frank C. Stipes, Juan C. Frontera-Garcia, Hector del Rio, William Vidal-Carvajal, Cesar Ruiz, Pedro R. Dominguez,
2525 Ponce de León Boulevard
Suite 1000
Miami, Florida 33134
Telephone: (305) 445-2500
Fax: (305) 445-2505
Email: arivero@riveromestre.com

By: s/ Andrés Rivero
ANDRÉS RIVERO
1st Cir. Bar No. 1154315

CERTIFICATE OF COMPLIANCE

This answer brief complies with Fed. R. App. P. 32(a)(7)(B)(i) because it contains 13,922 words, excluding those parts that Fed. R. App. P. 32(a)(7)(B)(iii) exempts. This brief also complies with the Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Office Version 2003 and 14-point Times New Roman type style.

s/ Andrés Rivero
Andrés Rivero

CERTIFICATE OF SERVICE

I CERTIFY that on April 22, 2013, I electronically filed this document with the Clerk of the Court using CM/ECF. I also certify that this document is being served today on all counsel of record either by transmission of Notices of Electronic Filing generated by CM/ECF or by U.S. Mail.

s/ Andrés Rivero
Andrés Rivero

ADDENDUM

1. The D&Os' Complaint, filed October 5, 2011 (certified English translation)	ADDENDUM 1

COMMONWEALTH OF PUERTO RICO
COURT OF FIRST INSTANCE
JUDICIAL CENTER OF MAYAGÜEZ
SUPERIOR COURT

W HOLDING COMPANY, INC., FRANK STIPES GARCIA, JUAN C. FRONTERA GARCIA, HÉCTOR DEL RÍO TORRES, WILLIAM VIDAL CARVAJAL, CESAR RUIZ, and PEDRO R. DOMINGUEZ ZAYAS	CIVIL NO. *ISCI201101646 206*
	[Ink stamp:] [Illegible] [:] OCT 6 2011 11:51 AM
PLAINTIFFS	
V.	MATTER:
CHARTIS INSURANCE COMPANY OF PUERTO RICO	
	DECLARATORY JUDGMENT
DEFENDANTS	

COMPLAINT

TO THE HONORABLE COURT:

Plaintiff W Holding Company Inc., represented by Harry N. Padilla Martínez, and the other plaintiffs represented by José M. Toro Iturrino, appear and hereby respectfully STATE, ASSERT AND PETITION that:

The Parties

1. In the case of record, W Holding Company, Inc., Frank Stipes García, Juan C. Frontera García, Héctor Del Río Torres, William Vidal Carvajal, Cesar Ruiz Rodríguez, and Pedro R. Domínguez Zayas, are the plaintiffs.

2. In compliance with the Rules for the Administration of the Court of First Instance, it is noted that the addresses and telephone numbers of the plaintiffs are as follow: W Holding Company, Inc., P.O. Box 2045, Mayagüez, Puerto Rico 00681; Ph. 787-833-1656; Frank Stipes García, P.O. Box 2045, Mayagüez, Puerto Rico 00681; Ph. 787-

383-9378; Juan C. Frontera García, P.O. Box 3133, Mayagüez, Puerto Rico 00681, Ph. 787-832-4645; Héctor Del Río Torres, P.O. Box 455, Mayagüez, Puerto Rico 00681, Ph. 787-365-2135; William Vidal Carvajal, 255 Ave. Ponce de León, M.C.S. Plaza, *Oficina* 801, San Juan, Puerto Rico 00917, Ph. 787-399-6415; Cesar Ruiz Rodríguez, Avenida Los Maestros *Número* 13, Urbanización Hostos, Mayagüez, Puerto Rico 00682, Ph. 787-614-5678; and Pedro R. Domínguez Zayas, Calle Marquesa Número 1706, Urbanización Valle Real, Ponce, Puerto Rico 00716, Ph. 787-385-1820.

3. Plaintiff W Holding Company, Inc., is a corporate entity with capacity to sue and be sued, incorporated and operating under the laws of the Commonwealth of Puerto Rico. This plaintiff is the stockholder company and the previous owner of the banking entity known in Puerto Rico as Westernbank.

4. Plaintiffs Frank Stipes García, Juan C. Frontera García, Héctor Del Río Torres, William Vidal Carvajal, Cesar Ruiz Rodríguez, and Pedro R. Domínguez Zayas were members of the Board of Directors and/or officers of Westernbank.

5. Defendant Chartis Insurance Company of Puerto Rico, formerly known as American International Insurance Company of Puerto Rico, is an insurance company with capacity to sue and be sued, and is incorporated and/or operates under the laws of the Commonwealth of Puerto Rico.

Nature of the Action

6. This is a claim for a declaratory judgment granting coverage under an insurance policy against Chartis Insurance Company of Puerto Rico, which sold Directors and Officers insurance policies ("D&O") to each of the plaintiffs. The defendant has denied coverage under any of said D&O policies for claims and/or actions that the Federal Deposit Insurance Corporation ("FDIC") is bringing or intends to bring against the plaintiffs. Therefore, the plaintiffs request that their right to coverage under these insurance policies be affirmed along with any additional compensation that this Honorable Court deems fair and adequate. As a matter of fact and law, the clauses of the policies that this Honorable Court should interpret are the following: 1(coverage A); 2(b); 2(g); 2(k); 2(p); 2(q); 2(s); and 2(v).

7. Civil Procedure Rule 59 governs the procedure for declaratory judgment in our jurisdiction. The origin of this Rule can be found in the Uniform Declaratory Judgment Law which was approved in Puerto Rico by Law number 47 of April 25, 1931, and which was published on 32 L.P.R.A. sections 2991 to 3006. It is acknowledged as a statute that created new remedies with the purpose of dispelling uncertainty and contributing to the achievement of social peace. It provides the opportunity to pre-empt the future exercise of certain causes of action by means of a prior declaration of rights. It is indeed a remedy prior to the effective exercise of a conventional cause of action, but which must present an actionable controversy. *See Moscoso v. Rivera*, 76 D.P.R. 481, 489 (1954) and *Asoc. Alcaldes v. Contralor*, 176 D.P.R. 150, 158 (2009). This procedure is frequently used in Puerto Rico and has been endorsed by our Supreme Court. *See* Fernando Sierra Verdecía*, Sentencias y Decretos Declaratorios* [*Declaratory Judgments and Decrees*], I Rev. Jur. U.P.R. 193 (1932); José Ramírez Santibañez, *Sentencias Declaratorias* [*Declaratory Judgments*], I Rev. Col. Abog. P.R. 56 (1935); Dennis Martínez Irizarry, *Sentencias Declaratorias – Procedencia de este Remedio para Establecer la no Paternidad* [*Declaratory Judgments – Legitimacy of this Remedy to Establish the lack of Paternity*], XV Rev. Col. Abog., P.R. 90 (1954); Vicente Ortiz Colon, *Las Sentencias Declaratorias en la Determinación de los Derechos de Filiación* [*Declaratory Judgments in the Determination of Parentage Rights*], XXV Rev. Jur. U.P.R. 154 (1955-1956); *Charana v. Pueblo*, 109 D.P.R. 641 (1980); C.I.A. P.R. v. A.A.A. 131 D.P.R. 735 (1992); and *Asoc. Vecinos de Villa Caparra v. Iglesia Católica*, 117 D.P.R. 346, 355, N.8 (1986).

8. Our Supreme Court has stated that the purpose of Civil Procedure Rule 59 is to provide citizens with a remedial procedural mechanism to clarify before the courts the merits of any latent claim that may entail a potential risk to them. Furthermore, it should be used when it allows putting an end to situations of uncertainty or insecurity with respect to rights. *See Suárez v. C.E.E.*, 163 D.P.R. 347 (2004) and *Sánchez v. Sec. de Justicia*, 157 D.P.R. 360 (2002).

9. Civil Procedure Rule 59.1 establishes when a declaratory judgment is appropriate. It states to this effect that "[t]he Court of First Instance, shall have

authority to declare rights, status and other legal relations even though another remedy is or might be sought." In addition, it establishes that "[t]he declaration may be in its form and effect, affirmative or negative, and shall have the effectiveness and validity of judgments or final rulings." Furthermore, it also declares that "[n]otwithstanding the provisions of Rule 37, the Court may order a speedy hearing for a lawsuit involving a declaratory judgment, giving it preference on the calendar."

10. Civil Procedure Rule 59.2 establishes who can pursue a declaratory judgment, the power to interpret and the exercise of the powers. In regards to the first issue, subsection (a) provides that "every interested person in . . . a written contract or other documents that constitute a contract, or whose rights, status or other legal relations were encumbered by a . . . contract or franchise, may seek a ruling on any disagreement on the interpretation or validity of [said] . . . contract . . . and also that a declaration of rights, status or other legal relations derived from these, be issued." Rule 59 specifically provides that "[a] contract may be interpreted before or after it has been breached." In the present case, the interpretation of an insurance contract is precisely what is at issue. *See Delgado Rodríguez v. Rivera Silverio,* 173 D.P.R. 150, 162 (2008), where the mechanism of declaratory judgment was accepted for the examination of the contractual relationship between the parties. Regarding the authority of this Honorable Court to interpret a written contract where a disagreement about its interpretation exists, *see Llopis v. Arburúa*, 72 D.P.R. 531, 535-536 (1951); *Gual v. Pérez*, 72 D.P.R. 609 (1951); and *Quiñones v. Rodríguez*, 58 D.P.R. 217 (1941).

11. Civil Procedure Rule 59.2 (c) allows "any procedure in which a declaratory remedy is sought, as long as a judgment or decree ends the controversy or clears an uncertainty." In the case at issue, a declaratory judgment is sought precisely to end the existing controversy regarding policy coverage that exits between the plaintiffs and the defendant. Once the judgment is issued, it will put an end to this controversy and, furthermore, it will dissipate the uncertainty that now exists between the parties. In *Suárez v. C.E.E., supra*, at 354, it was stated that for a declaratory judgment to be issued, it is important that the factual allegations show that there is a material controversy

between the parties, that they have opposing legal interests, that prior injury to such interests is not necessary and that what is important is that it has the objective to dissipate political uncertainty and contribute to social peace. Along the same lines, *see* Rafael Hernández Colón, *Práctica Jurídica: Derecho Procesal Civil* [*Legal Exercise: Civil Procedural Law*], San Juan, Ed. Michie de Puerto Rico, 1997, at 448.

12. In the present case, there is no reason or motive for this Honorable Court to deny the issuing and entering of a declaratory judgment regarding the controversy between the parties. Once the judgment is issued, as indicated before, it will "end the uncertainty or controversy that caused the proceeding." *See* Civil Procedure Rule 59.3.

13. In the present case, all the persons that have or may allege to have an interest which may be affected by the declaration have been included as parties. That is, W Holding Company, Inc., which as has been stated is the stockholder company and previous owner of Westernbank, as well as the directors and/or officers who have been sued by the FDIC, have all been included as plaintiffs. The defendant is the insurance company that issued the policies. In this sense the requirements of Civil Procedure Rule 59.5 have been complied with.

14. In the present case, the validity of an ordinance or municipal franchise is not in question; therefore, it is not necessary to include any municipality or to notify the Secretary of Justice. *See* Civil Procedure Rules 21.3 and 59.5.

15. Under the rule of law in force, when the terms of a contract are clear and leave no doubt as to the parties' intentions, as is the case with this insurance policy, the parties must obey and comply with the literal meaning of the clauses. *See* Art. 1233 of the Civil Code, 31 L.P.R.A. section 3471. On the other hand, if any contract clause is subject to different interpretations, it must be construed in the manner most apt to give it effect. Art. 1236 of the Civil Code, 31 L.P.R.A. section 3474. Moreover, it cannot be forgotten that the insurance policy issued by the defendant for the plaintiffs' coverage is a typical adhesion contract and therefore, any clause that is slightly unclear shall be interpreted in the plaintiffs' favor and not the defendant's. Keep in mind that Art. 1240 of the Civil Code, 31 L.P.R.A. section 3478, establishes in a clear and simple way that

"[t]he interpretation of unclear clauses in a contract shall not favor the party which created such obscurity." Puerto Rico's legal doctrine is clear in that unclear or ambiguous clauses prepared by one of the parties, or printed in a document, that the parties sign shall be interpreted against the party who prepared them, -*Cooperativa La Sagrada Familia v. Castillo*, 107 D.P.R. 405 (1978); *Zequeira v. C.R.U.V.*, 83 D.P.R. 878 (1961)- or who produces the printed model, -*Prieto v. Hull Dobbs Co.*[,] 88 D.P.R. 420 (1963); *Torres v. P.R. Racing Corp.*, 40 D.P.R. 441 (1930)- especially in adhesion contracts -*Herrera v. First National City Bank*, 103 D.P.R. 724 (1975); *R.C. Leasing Corp. v. Williams Int. Ltd.*[,] 103 D.P.R. 163 (1974); and *C.R.U.V. v. Peña Ubiles*, 95 D.P.R. 311 (1967)- and even more so in insurance ones. In *Barreras v. Santana*, 87 D.P.R. 227, 231 (1963) our Supreme Court stated that "[i]t is a general rule in contract law that when there is unclear language in a contract, its interpretation shall not favor the party which caused it . . ." Immediately following this, [the Court] added that "[s]aid rule has even more weight in the insurance field." On page 232 it added that "[t]he general rule previously mentioned providing that unclear contract drafting shall not favor the party that caused it applies, as we said, more rigorously in the case of insurance contracts since these are adhesion contracts. They are considered as such under both civil law and common law." For a ratification of this doctrine *see BPPR v. Sucn. Talavera*, 174 D.P.R. 686 (2008); *González v. Cooperativa de Seguros de Vida de Puerto Rico*, 117 D.P.R. 659 (1986) and *León Ortíz v. Comisión Industrial*, 101 D.P.R. 781 (1973).

16. By way of example, we invite this Honorable Court to examine the insurance policies and it will notice that among the claims it covers there is no exclusion of those brought by the FDIC. It cannot be forgotten that this is the regulatory entity and that by its very nature it intervenes the banks, their officers and directors; and furthermore, supervises their daily operations and insures the deposits. Therefore, if one had wanted to exclude any investigation or claim by the FDIC from the insurance policies, it could easily be anticipated and have said exclusion included, since it is something very easy to foresee. To interpret the insurance policies as the defendant suggests would be to promote an absurdity. Remember that the law does not exist "to

demand impossible, absurd, useless or unnecessary things." *Pueblo v. Andreu González,* 105 D.P.R. 315, 321 (1976); *Pueblo v. Pagan Díaz,* 111 D.P.R. 608, 622 (1981); *Ramos Acosta y Otros v. Caparra Dairy,* 116 D.P.R. 60, 71 N.7 (1985); *Pueblo v. Acabá Raíces,* 118 D.P.R. 369, 374 (1987).

17. A comparison of the insurance policies shows that the coverage in favor of the plaintiffs is for a sum of 50 million dollars per year. This insurance policy was extremely expensive. To claim now, when the coverage is needed, that it does not exist, is absurd. Moreover, that position undermines the legal, economic and social purposes for which the insurance policies were acquired. *Soriano Tavárez v. Rivera Anaya,* 108 D.P.R. 663, 671 (1979).

Statement of Facts

18. W Holding is the stockholder company and previous owner of Westernbank, a bank legally incorporated in Puerto Rico. The FDIC regulated mainly the banking operations of Westernbank. Frank Stipes García, Juan C. Frontera García, Héctor Del Río Torres, William Vidal Carvajal, Cesar Ruiz Rodríguez, and Pedro R. Domínguez Zayas were officers and/or directors of Westernbank.

19. On April 30, 2010, the Office of the Commissioner of Financial Institutions of the Commonwealth of Puerto Rico ("OCFI") ordered the closing of and in fact closed Westernbank based on alleged breaches of certain provisions of a previously stipulated order between Westernbank and the FDIC. The OCFI appointed the FDIC as the receiver of Westernbank.

20. The Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989), gives the FDIC, as the receiver of Westernbank, broad authority to bring claims in its own interest as regulator and creditor, as well as claims on behalf of third party depositors and creditors, and claims to protect the public interest in the interstate banking system. In fact, as a regulating entity, legally created and appointed, the FDIC is not limited to taking possession of the bank, but it succeeds in every claim brought by "any shareholder, member, accountholder, depositor, officer, or director" of the bank. 12 U.S.C. section 1821(d).

21. On December 17, 2010, the FDIC, acting within its legal authority, initiated an investigation and gave notice of a claim against several ex-officials, officers and/or directors of Westernbank. The FDIC has stated that it intends to sue the plaintiffs, officials, officers and/or directors of Westernbank in the near future. The FDIC's investigation and its express intention to file suit against the plaintiffs is referred to as the "FDIC Claim."

22. The defendant issued the following Executive Liability and Organization Reimbursement Insurance Policies (hereinafter, the "Policies"):

(1) Policy No. 024-1000605, valid from November 15, 2006, until November 15, 2007 ("2006-2007 Policy"). A copy of Policy 2006-2007 is attached and marked as Exhibit 1.

(2) Policy No. 024-1000605-2, valid from November 30, 2007, until November 30, 2008 ("2007-2008 Policy"). A copy of Policy 2007-2008 is attached and marked as Exhibit 2.

(3) Policy No. 024-001001078, valid from December 31, 2008, until December 31, 2009 ("2008-2009 Policy"). A copy of Policy 2008-2009 is attached and marked as Exhibit 3.

(4) Policy No. 024-001001291, valid from December 31, 2009, until December 31, 2010 ("2009-2010 Policy"). A copy of Policy 2009-2010 is attached and marked as Exhibit 4.[1]

23. A reading of these Policies shows that they are D&O policies, which provide insurance coverage for claims based on acts allegedly attributable to the plaintiffs while they were acting in their capacity as directors, officers, officials or employees of W Holding, and its subsidiaries, including Westernbank.

24. Section 1 of each policy under "Coverage A: Executive Liability Insurance," provides coverage for each of the insured as follows:

> This policy shall pay the Non-Indemnifiable Loss of any Insured Person arising from a Claim made

[1] The 2006-2007, 2007-2008, 2008-2009, and 2009-2010 Policies will be collectively referred to as the "Policies."

> against such Insured Person for any Wrongful Act of such Insured Person.

25. Each one of the Policies defines "Insured Person" to refer to any "Executive of an Organization," which includes any "past, present and future duly elected or appointed director, officer, trustee (other than a bankruptcy trustee)." *See* Section 2(k) and (q) of Exhibits 1 to 4.

26. Each one of the Policies defines "Organization" to include "the Named Entity," which is W Holding, and "each Subsidiary," which is Westernbank. *See* Section 2(v) of Exhibits 1 to 4.

27. Each one of the Policies defines "Claim" as:

> (1) a written demand for monetary, non-monetary or injunctive relief;
> (2) a civil, criminal, administrative, regulatory or arbitration proceeding for monetary, non-monetary or injunctive relief which is commenced by: (i) service of a complaint or similar pleading; (ii) return of an indictment, information or similar document (in the case of a criminal proceeding); or (iii) receipt or filing of a notice of charges; or
> (3) an Investigation Claim.
>
> The term "Claim" shall include any Securities Claim and Employment Practices Claim.

See Section 2(b) of Exhibits 1 to 4. The Policies provide coverage and require payment of all losses resulting from any "Claim" against the directors, officers, officials or employees of Westernbank. The term "Loss" is defined in the Policies, in part, as follows: "Loss means damages . . . Defense Costs . . .." *See* Section 2(s) of Exhibits 1 to 4.

28. The Policies define the term "Defense Costs" as follows:

> [R]easonable and necessary fees, costs and expenses consented to by the Insurer (including premiums for any appeal bond, attachment bond or similar bond arising out of a covered judgment, but without any obligation to apply for or furnish any such bond) resulting solely from the

> investigation, adjustment, defense and/or appeal of a Claim against an Insured, but excluding any compensation of any Insured Person or any Employee of an Organization. Defense Costs shall not include any fees, costs or expenses incurred prior to the time that a Claim is first made against an Insured.

See Section 2(g) of Exhibits 1 to 4.

29. Therefore, the Policies require the defendant to pay any loss within the limits of the coverage, including defense costs, resulting from the claims based on conduct imputed to the directors, officers and/or officials of Westernbank.

30. The FDIC Claim is a claim covered under the Policies, based on alleged conduct imputed to the directors, officers and officials of Westernbank, as is defined in the Policies.

31. On December 27, 2010, the now plaintiffs notified the defendant of their request for coverage under the 2009-2010 Policy for the FDIC Claim. A copy and translation of the December 21, 2010 notification are attached and marked as Exhibit 5.

32. On May 2, 2011, the defendant answered the plaintiffs, informing them of its decision to deny coverage in the FDIC Claim.[2] A copy and translation of the May 2, 2011 letter are attached and marked as Exhibit 6.

33. The plaintiffs have at all times met all the terms and obligations of the Policies. This includes having paid all the corresponding premiums, as well as having met all the obligations and conditions required under the Policies to obtain coverage.

34. The Policies require that any controversy arising under the same shall be resolved by mediation or arbitration, as elected by the insured. The insured, now plaintiffs, duly notified the defendant of their decision to resolve this controversy via mediation, as required by the Policies. Remember, public policy in Puerto Rico

[2] The defendant alleges that the FDIC Claim falls under the time period of the 2006-2007 Policy instead of the 2009-2010 period. The defendant also reserved the right to deny coverage under the 2009-2010 Policy. Thus, the plaintiffs' rights to coverage under these two policies, as well as under the 2007-2008 and 2008-2009 policies, must be determined since the FDIC Claim could also fall within those coverage periods. Because there is no difference in the coverage or the material terms of the Policies, a single determination can suffice for all.

encourages such mechanisms. *See McGregor-Doniger v. Tribunal Superior,* 98 D.P.R. 864, 869 (1970); *U.C.P.R. v. Triangle Engineering Corp.,* 136 D.P.R. 133, 141(1994). Nevertheless, in the present case this policy cannot be followed since the defendant did not agree to resolve the controversy through such mechanism. *See* Exhibit 7, which constitutes a document acknowledging that the defendant with its acts refused expressly, freely and voluntarily to such mechanism [mediation]. This is a further indication that a declaratory judgment is the only mechanism currently available to the plaintiffs to resolve the controversy amongst the parties.

35. Since December 17, 2010, the plaintiffs have incurred the costs of legal representation due to the defendant's denial to provide coverage.

36. According to the terms and conditions of the Policies, the defendant shall not only pay for the FDIC Claim, but also for any other proceeding, including the present one, which is covered under the Policies.

37. The defendant has and continues to act recklessly, and therefore, according to Civil Procedure Rule 44, shall be ordered to pay the costs and legal fees of the present proceeding.

Prayer for Relief

WHEREFORE the plaintiffs request that this Honorable Court:

1. Immediately rule that the adequate remedy available to the plaintiffs to assert their rights under the insurance policy at stake in this controversy is a declaratory judgment, as provided by Civil Procedure Rule 59.

2. Rule that in this case, given the allegations of the claim, all indispensable parties are present in order to adjudicate the controversy according to Civil Procedure Rule 59.5.

3. Based on the nature of this case and in consideration of the fact that the FDIC has issued a notice of a claim against the plaintiffs, order a speedy hearing regarding the declaratory judgment, giving the case preference in the calendar, as provided by Civil Procedure Rule 59.1.

4. Set a term for the defendant to answer the complaint in the present case, taking into account the urgency of the controversy.

5. Once the hearing is held, issue a declaratory judgment stating that the Policies in controversy provide coverage in favor of the plaintiffs in the investigation and in the possible FDIC Claim, and that therefore the defendant is legally responsible for providing such coverage. Furthermore, that such coverage includes all the expenses and costs, as well as attorneys' fees incurred by the plaintiffs since December 17, 2010, and until the conclusion of the FDIC Claim.

6. Rule that the defendant has been reckless with regard to the present case and that therefore, is ordered to pay the costs, expenses and attorneys' fees of the present case.

In Mayagüez, Puerto Rico, today, October 5, 2011.

[Signed – illegible]
HARRY N. PADILLA MARTINEZ, Esq.
RUA NUMERO 7026
APARTADO 2131
MAYAGUEZ, PUERTO RICO 00681
TEL. 834-4140\FAX 265-6190

[Signed – illegible]
JOSE M. TORO ITURRINO, Esq.
COUNSEL FOR THE OTHER CO-PLAINTIFFS
RUA NUMERO 7383
20 CALLE DR. FELIX TIO
SUITE 5
SABANA GRANDE, PR 00637-1833
TEL 787-873-0555
toroiturrino@hotmail.com

STATE OF FLORIDA)
)
COUNTY OF MIAMI-DADE)
)

I, the undersigned, being duly sworn, hereby declare and state that I am fluent in the Spanish and English languages and have rendered a complete and accurate English translation of the attached document in the Spanish language titled "COMMONWEALTH OF PUERTO RICO – W Holding Company et al. Complaint for Declaratory Judgment."

Mario F. Pineda
April 18, 2013 Dl#P530-546-56-303-0

Sworn and subscribed before me on this 18th day of April, 2013 by Mario F. Pineda, who produced identification No.P530-546-56-303-0.

Phyllis Joan Kohn Exp 11/6/2013

NOTARY PUBLIC STATE OF FLORIDA

PHYLLIS JOAN KOHN
MY COMMISSION # DD 904837
EXPIRES: November 6, 2013
Bonded Thru Budget Notary Services