No. 15-___

IN THE

Supreme Court of the United States

CARL MCCAFFREE, SAM MCCAFFREE, AND JIM HELVEY,

Petitioners,

v.

BANCINSURE, INC,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 1, 2016

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether judicial estoppel applies to inconsistent positions with respect to issues of law?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Carl McCaffree, Sam McCaffree, and Jim Helvey respectfully petition for a writ of certiorari directed to the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *BancInsure, Inc. v. F.D.I.C.,* 796 F.3d 1226 (10th Cir. 2015). App. 1a. The opinion of the District Court is reported at *BancInsure, Inc. v. McCaffree,* 3 F.Supp. 3d 904 (D.Kan. 2014). App. 25a.

JURISDICTION

This Court has jurisdiction of this petition pursuant to 28 U.S.C. § 1254(1), in that Petitioners seek review of an opinion and order of a federal court of appeals.

The Petition is timely, in that the Court of Appeals issued its opinion on August 6, 2015, App. 1a, and Petitioners filed a petition for rehearing or rehearing en banc on September 21, 2015. The petition was timely pursuant to FRAP 40(a), in that a federal agency – the Federal Deposit Insurance Corporation (FDIC) – was a party to the appeal. The Court of Appeals denied the petition for rehearing on November 6, 2015, and this petition is being filed within 90 days of that date.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no constitutional and statutory provisions involved.

INTRODUCTION

In prior litigation between Petitioner Carl McCaffree and Respondent BancInsure, BancInsure twice stated under oath that its insurance policy would provide coverage to Petitioners for any claims against them by the FDIC, provided only that timely notice was given. In light of that sworn statement, the Court of Appeals vacated a judgment in favor of Petitioner Carl McCaffree on the ground that the case was moot. *Columbian Fin. Corp. v. BancInsure, Inc.*, 650 F.3d 1372 (10th Cir. 2011).

BancInsure has never disputed that Petitioners gave timely notice of the FDIC's claims against them. Instead, it argued that the policy did not provide coverage for those claims, directly contrary to its sworn statements in the first lawsuit.

The Tenth Circuit refused to apply the doctrine of judicial estoppel to BancInsure's inconsistent statement, solely because those statements related to law – interpretation of a contract – rather than fact. The Court of Appeals acknowledged, App. 23a-24a & nn. 10-11, that this result was inconsistent with the holdings of other circuit courts and even an unpublished opinion in the Tenth Circuit.

STATEMENT OF THE CASE

Petitioners were directors and officers of Columbian Bank & Trust Co. (the Bank). On August 22, 2008, the Kansas State Bank Commissioner declared the Bank insolvent and appointed the FDIC a receiver. Both Petitioners and the FDIC notified BancInsure of the FDIC's potential claims against Petitioners less than a month later.

BancInsure had issued a Directors & Officers (D&O) Liability Insurance policy to the Bank and its parent corporation, Columbian Financial Corporation. The policy covered the period May 11, 2007 to May 11, 2010.

The base policy contained an exclusion (the "regulatory exclusion") that purported to exclude coverage for any claims by a deposit insurance organization such as the FDIC. For an additional premium, the Bank purchased an endorsement that deleted the regulatory exclusion and replaced it with the following:

> Notwithstanding the Limit of Liability provided by the Policy to which this endorsement is attached, the Insurer's maximum aggregate liability for all Loss (including defense

> costs) arising out of all Claims made during the Policy Year as a result of any action or proceeding brought by or on behalf of any federal or state regulatory or supervisory agency or deposit insurance organization shall be $5,000,000.

In marketing this policy to the Bank, BancInsure represented in writing that the policy would provide "full regulatory coverage." BancInsure had to offer this endorsement in order to remain competitive in the marketplace, because, as its adjuster testified, its customers demanded coverage to protect themselves against the FDIC. When BancInsure learned of the FDIC's claims, its internal documents repeatedly referred to the existence of regulatory coverage for Petitioners. BancInsure reported to its reinsurers that it had regulatory coverage for such claims.

Shortly after learning of the FDIC's claims, BancInsure took the position that the appointment of a receiver automatically terminated the policy. Carl McCaffree and the Bank's parent filed a declaratory judgment action in the United States District Court for the District of Kansas. *Columbian Fin. Corp. v. BancInsure, Inc.*, 2009 WL 4508576 (D.Kan. 2009), *rev'd*, 650 F.3d 1372 (10th Cir. 2011) ("the *Columbian* lawsuit").

In the *Columbian* lawsuit, Mr. McCaffree argued that the deletion of the regulatory exclusion, and its replacement with $5,000,000 in coverage, would be meaningless if a receivership automatically terminated the D&O policy. To that end, he served two interrogatories on BancInsure. The first inquired:

> Is coverage currently available under the Policy for any claims brought against Insured

> Persons by a deposit insurance organization acting as a receiver of Columbian Bank and Trust Company? Please state all facts and identify all documents which support your response.

Without objection, BancInsure responded: "Yes, provided notice of a potential claim was provided to BancInsure within thirty (30) days following the end of the Policy Period. . . ."

Mr. McCaffree also asked BancInsure to "state whether and under what circumstances a claim filed by a regulatory authority acting as a receiver of Columbian Bank and Trust Company is covered under the Policy." Without objection, BancInsure responded as follows:

> In accordance with the provisions of Endorsement No. BI-DO-00316, the Regulatory Exclusion Endorsement, a claim filed by a regulatory authority could have been covered under the Policy had it been brought before Columbian Bank and Trust Company ceased to engage in an active banking business or the date it ceased to accept deposits for any reason. In addition, a claim filed by a regulatory authority acting as a receiver of Columbian Bank and Trust Company could be covered under the Policy provided notice of a potential claim was provided to BancInsure within (30) days following the end of the Policy Period.

The District Court in the *Columbian* lawsuit agreed with plaintiffs that the policy did not automatically cancel upon the appointment of a receiver, in no small part because the policy "provides coverage for actions brought by deposit insurance organizations as receivers." 2009 WL 4508576 at *5.

On appeal, the Court of Appeals *sua sponte* vacated the judgment. It concluded that the case was moot because, *based on the interrogatory answers*, "there is no real dispute that BancInsure would provide coverage for any foreseeable claim," 650 F.3d at 1385, including claims by the FDIC.

BancInsure then filed an action against Petitioners in the district court of Johnson County, Kansas, seeking a declaratory judgment that another provision of the policy – the "insured vs. insured" clause – excluded coverage. The FDIC intervened in that action and removed it to the United States District Court for the District of Kansas. That Court agreed with BancInsure that the insured vs. insured clause did exclude coverage for the FDIC's claims and the Court of Appeals affirmed. While Petitioners respectfully disagree with that conclusion, they do not ask this Court to review these state law issues.

Wholly apart from those issues, Petitioners argued that BancInsure's sworn answers to interrogatories in the *Columbian* lawsuit judicially estopped it from contesting coverage in the instant case. The Court of Appeals did not dispute that the case satisfied each of the elements of judicial estoppel: a prior inconsistent position, successfully urged, that would give BancInsure an unfair advantage. Instead, the Court of Appeals held that "judicial estoppel only applies when the position to be estopped is one of fact, not one of law." App. 22a.

The Court of Appeals acknowledged that "other courts have applied the doctrine of judicial estoppel to positions of law, not merely positions of fact." App. 23a n.9. It also acknowledged an unpublished Tenth Circuit opinion had reached the same result. App. 24a n.10. It ultimately concluded, however, that the doctrine should be applied "both narrowly and cautiously," and hence could not apply to statements of law. App. 22a.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' OPINION DIRECTLY CONTRADICTS THIS COURT'S OPINION IN NEW HAMPSHIRE V. MAINE.

This Court's leading authority on judicial estoppel is *New Hampshire v. Maine*, 532 U.S. 742 (2001). The Piscataqua River is the dividing line between the borders of New Hampshire and Maine. A royal decree in 1740 established that the boundary was the "Middle of the River." 532 U.S. at 746. The decree did not define the meaning of "Middle of the River."

In 1977, New Hampshire joined with Maine in requesting that this Court enter a consent decree providing that the phrase meant the middle of the main channel for navigation – *i.e,* the thalweg – in the harbor. This Court agreed and entered the requested judgment. The consent decree addressed only the harbor and approaches, not the inland river boundary.

Twenty years later, New Hampshire alleged that the inland river boundary runs along the Maine shore, such that the entire river and all of Portsmouth Harbor (including the Portsmouth Naval Shipyard) belong to New Hampshire. This Court held that the 1977 consent decree judicially estopped New Hampshire from asserting that the middle of the river really meant its northern boundary.

The Court identified three elements of judicial estoppel. First, the party's "later position must be 'clearly inconsistent' with its earlier position." 532 U.S. at 750. Second, the party must have succeeded in persuading the first court of the validity of its position, "so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled." *Id.* Third, the party would "derive an unfair advantage or impose an unfair detriment." *Id.* at 750.

In no part of the opinion did the Court draw a distinction between law and fact. To the contrary, the Court broadly endorsed the doctrine:

> Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . .

532 U.S. at 749, *quoting Davis v. Wakelee*, 156 U.S. 680, 689 (1895).

The Court did not limit that language to "factual positions," nor could it; the issues in *New Hampshire* ***were*** issues of law. The location of an interstate boundary is a pure question of law. *Hinderlider v. La Plata River and Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) ("[j]urisdiction over controversies concerning rights in interstate streams is not different from those concerning boundaries" inasmuch as both "have been recognized as presenting federal questions"). Determining the meaning of a consent decree is no different than determining the meaning of an insurance policy.

Indeed, the *Wakelee* case on which *New Hampshire* relied itself presented a pure question of law. Plaintiff sued to enforce several promissory notes and secured a default judgment against Davis. Plaintiff then opposed a discharge in Davis' pending bankruptcy case. Davis told the bankruptcy judge that the judgment was valid and enforceable, and would not be discharged; hence, he argued, plaintiff had no standing to object to the discharge. The court agreed.

When Wakelee attempted to collect the judgment, however, Davis claimed that it was void because he had never been personally served with summons. While that legal argument was correct, Davis was estopped to assert it, "even if Davis had been mistaken as to his ***legal rights*** with respect to this judgment." 156 U.S. at 689 (emphasis added). The mistake was irrelevant because Davis was "conclusively presumed to know the law." *Id.* at 691.

The final proof that *New Hampshire* applies to law as well as fact is the Court's quotation from the first edition of 18 Wright, Miller & Cooper, *Federal Practice & Procedure* § 4477 (1981) with approval. 532 U.S. at 749. The treatise clearly states that "[j]udicial estoppel may properly apply even when the facts are clear and only legal positions have changed." 18B Wright, Miller, Cooper, *Federal Practice & Procedure* § 4477 at 596 (2nd. Ed. 2002).

There can be no serious policy argument against applying judicial estoppel on the facts of the instant case. BancInsure's position in the *Columbian* lawsuit – that there was coverage for the FDIC's claims subject only to timely notice – is the polar opposite of its position in the instant action that the insured vs. insured clause excludes coverage. BancInsure benefited from its prior position; the Court of Appeals held the case was moot precisely because the "parties provided no reason to believe BancInsure would deny coverage with respect to any claim." 650 F.3d at 1385. Allowing it to reverse course creates a clear perception that it misled one of the two courts. In dragging the litigation out over the better part of a decade, BancInsure has imposed massive litigation costs on Carl McCaffree.

The Tenth Circuit has always been an outlier on judicial estoppel. Before *New Hampshire*, it did not even recognize the doctrine. *Johnson v. Linden City Corp.*, 405 F.3d 1065, 1068-69 (10th Cir. 2005). Since then, it has applied the doctrine "narrowly and cautiously." App. 22a. In refusing to apply the doctrine to issues of law, the Tenth Circuit has directly contradicted *New Hampshire* and *Wakelee*.

II. THERE IS A DEEP AND LONGSTANDING CIRCUIT SPLIT ON THE ISSUE.

Since *New Hampshire* forced the Tenth Circuit to accept the doctrine of judicial estoppel, that Court has consistently restricted it to matters of fact. In its first post-*New Hampshire* opinion, the Tenth Circuit held that the "position to be estopped must ***generally*** be one of fact rather than of law." *Johnson v. Lindon City Corp.*, 405 F.3d 1065, 1069 (10th Cir. 2005) (emphasis added). Subsequent opinions, however, have deleted the qualification. *Kaiser v. Bowlen*, 455 F.3d 1197, 1204 (10th Cir. 2006) (legal position "***cannot*** give rise to judicial estoppel") (emphasis added); *United States v. Villigrana-Flores*, 467 F.3d 1269 (10th Cir. 2006) (issue of violation "is a legal position, not a factual one, and therefore the first judicial estoppel factor has not been satisfied"). In the instant case, the Tenth Circuit held that judicial estoppel "***only*** applies when the position to be estopped is one of fact." App. 22a (emphasis added). Apart from its desire to apply the doctrine narrowly, the Tenth Circuit has never offered an explanation as to why this should be the law.

Ironically, the one time the Tenth Circuit did consider the "language and substance" of *New Hampshire*, it did apply judicial estoppel to a pure issue of law. *Hicks v. Cadle*, 436 Fed. Appx. 874 (10th Cir. 2011). Hicks sued Cadle on a variety of theories. Cadle invoked an arbitration clause in the promissory note in question. When the arbitration did not go well for Cadle, he claimed that the arbitrator lacked jurisdiction.

The *Cadle* panel recognized that the "material point" of *New Hampshire* was that the State "sought a litigation advantage by taking incompatible *legal positions* in the cases." 436 Fed. Appx. at 878 (emphasis original). The "focus of the estoppel analysis is not on the particular claims at issue . . . , but on the litigant's tactical about face in legal position (as to the effect of the 1740 decree in *New Hampshire* and the effect of the arbitration provision here."[1]

There is no reason to expect the Tenth Circuit to voluntarily change its views, especially in view of the evolution of the rule from a "general" one – clearly implying exceptions – to the hard and fast rule announced in the instant case. The panel here brushed off *Cadle* as a non-precedential unpublished opinion. App.24a. Not a single active judge voted to hear Petitioners' motion for rehearing en banc, App. 49a, despite the motion's clear presentation of the circuit conflict that it perpetuates.

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[1] In an earlier unpublished opinion in the same case, the Tenth Circuit followed *New Hampshire* in holding that Cadle was judicially estopped from challenging arbitrability. *Hicks v. Cadle Co*, 355 Fed. Appx. 186, 194 (10th Cir. 2009).

The Fourth Circuit generally agrees with the Tenth Circuit that judicial estoppel does not apply to pure issues of law. *Lowery v. Stovall*, 92 F.3d 219, 224 (4th Cir. 1996) ("position sought to be estopped must be one of fact rather than law"); *Folio v. City of Clarksburg*, 134 F.3d 1211, 1217-18 (4th Cir. 1998) ("position must be one of fact rather than law"); *Emergency One, Inc. v. Am. Fire Eagle Engine Co.*, 332 F.3d 264, 274 (4th Cir. 2003) (doctrine applies "if the party to be estopped intentionally asserts a position of fact that is inconsistent with a factual position taken during previous litigation"); *Zinkand v. Brown*, 478 F.3d 634, 638 (4th Cir. 2007) (position "must be one of fact as opposed to one of law"). Again, the Fourth Circuit has declined to explain why the doctrine should be so limited.

The Second Circuit has repeatedly held that judicial estoppel "'prevents a party from asserting a factual position in a legal proceeding that is contrary to a position previously taken by [that party] in a prior legal proceeding.'" *Robinson v. Concentra Health Services, Inc.*, 781 F.3d 42, 45 (2nd Cir. 2015) *quoting Bates v. Long Island R.R.*, 997 F.2d 1028, 1037 (2nd Cir. 1993). *Accord*, *Rodel v. Anesthesia Group of Onondaga, P.C.*, 369 F.3d 113, 118 (2nd Cir. 2004); *Mitchell v. Washingtonville Central S.D.*, 190 F.3d 1, 9 (2nd Cir. 1999).

To Petitioners' knowledge, the Second Circuit has never held that judicial estoppel applies to pure issues of law and it has clearly hinted at the contrary proposition. In *Vermont Right to Life Committee v. Sorrell*, 221 F.3d 376 (2nd Cir. 2000), the State argued that plaintiff had no standing because the State did not intend to enforce the challenged statute in the way plaintiff feared. The Second Circuit held that the

State "is not forever bound, by estoppel or otherwise, to the view of the law that it asserts in this litigation." 221 F.3d at 383. It cited *Mitchell* for the proposition that judicial estoppel "under some circumstances applies to assertions of factual positions." *Id.* At least two district courts in the Second Circuit have flatly "decline[d] to extend the doctrine of judicial estoppel to include seemingly inconsistent legal positions." *Seneca Nation of Indians v. State of New York*, 26 F.Supp. 2d 555, 565 (W.D.N.Y. 1998). *Accord*, *O'Dette v. Fischer*, 2014 WL 6632470 (E.D.N.Y. 2104) at *7 ("in the Second Circuit, judicial estoppel applies exclusively to inconsistent *factual* positions") (emphasis original).

The Sixth Circuit's position is unclear. In *Law Office of John B. Eggertsen, P.C. v. CIR*¸ 800 F.3d 758 (6th Cir. 2015), a divided panel of the Sixth Circuit refused to apply judicial estoppel when the IRS reversed its position on the applicable statute of limitations. The majority opinion had three rationales: (1) IRS had simply made an innocent mistake; (2) judicial estoppel "does not ***usually*** apply to shifting legal arguments"; and (3) estoppel does not generally apply to the government. 800 F.3d at 766 (emphasis added). Whether the second factor alone would suffice is not clear.

Other circuits have explicitly rejected the theory that judicial estoppel cannot apply to matters of law. A leading case is the Seventh Circuit's opinion in *Matter of Cassidy*, 892 F.2d 637 (7th Cir.), *cert. denied*, 498 U.S. 812 (1990). The IRS served Cassidy with a notice of tax deficiency. Cassidy filed for bankruptcy and was granted a discharge. Thereafter the Tax Court entered a judgment against him and Cassidy appealed to the Seventh Circuit.

On appeal, he argued, *inter alia*, that the bankruptcy discharge discharged the IRS debt. The Seventh Circuit disagreed and affirmed the judgment. Cassidy then went to the Bankruptcy Court seeking a ruling that the IRS debt had been discharged. Back in the Seventh Circuit, Cassidy argued that the prior ruling was pure dicta because the Tax Court had no jurisdiction to determine discharge.

The Seventh Circuit reluctantly agreed. But it also held that Cassidy was judicially estopped from challenging the ruling because he had asked the Seventh Circuit to address the issue. The Seventh Circuit recognized that some courts had held that "judicial estoppel applies only to positions on questions of fact." 892 F.2d at 641. "We disagree." *Id.*:

> He has found it expedient to change a position which he successfully maintained in this court, but this court is under no obligation, either legal or moral, to allow itself to be used in this manner. . . . It would be unjust to require the Commissioner to relitigate a question that was originally raised by Cassidy himself, . . . that the court has already resolved against him.

Id. at 642.

Similarly, in *Grochocinski v. Mayer, Brown, Rowe & Maw*, 719 F.3d 785 (7th Cir. 2013), a bankrupt company allowed a $17 million default judgment to be taken against it. At the behest of the judgment creditor, the trustee then sued the bankrupt company's law firm for malpractice claiming that, but for its negligence, the default judgment would not have been entered.

The Seventh Circuit affirmed summary judgment for the law firm on the basis of judicial estoppel. Given the judgment creditor's involvement with the trustee, its actions were attributable to the trustee. It "would be inconsistent for the trustee to prevail in the malpractice case, for the benefit of [the judgment creditor], on the theory that [the judgment creditor] should never have obtained the judgment." 719 F.3d at 796. *Accord*, *In re Airadigm Communications, Inc.*, 616 F.3d 642, 662-63 (7th Cir. 2010) ("rather than helping the bankruptcy court interpret the plan, TDS hoodwinked that court" because its current "position is diametrically opposed to the position that it took before the bankruptcy court").

The Ninth Circuit likewise rejects the artificial distinction between issues of fact and issues of law. In *Helfand v. Gerson*, 105 F.3d 530 (9th Cir. 1997), the defendants prepared a will and a living trust for plaintiffs' decedent. The will and the trust contained inconsistent provisions with respect to decedent's residence, and after he died, the trustee sought instructions from the state court. Plaintiffs told the state court that they wanted the residence to remain in trust until the widow died or was permanently institutionalized.

Plaintiffs then sued the lawyers, alleging that decedent intended that the residence be distributed to the widow free and clear. The District Court granted summary judgment to defendants on the basis of judicial estoppel and the Ninth Circuit affirmed.

On appeal, plaintiffs argued that "judicial estoppel applies only to factual positions," not to the legal arguments they had made to the state court. 105 F.3d at 535. The Ninth Circuit acknowledged that there is "some support for this view." *Id.* Following *Cassidy* and several other cases, however, the Ninth Circuit held that the "greater weight" of authority "supports the position that judicial estoppel applies to a party's stated position, regardless of whether it is an expression of intention, a statement of fact, or a legal assertion." *Id. Accord, Wagner v. Professional Engineers in California Government*, 354 F.3d 1036, 1044, 1049 (9th Cir. 2004) (judicial estoppel applies "whether it is an expression of intention, a statement of fact, or a legal assertion," and the District Court abused its discretion in failing to apply it to inconsistent legal positions).

The Third Circuit also recognizes that judicial estoppel applies to inconsistent legal positions. In *Murray v. Silverstein*, 882 F.2d 61 (3rd Cir. 1989), plaintiff was appointed as bail commissioner on condition that neither he nor his wife serve as a ward leader during his term in office. When his wife ran for and won such election a year into his term, defendants voted to remove plaintiff for cause. Plaintiff obtained a temporary restraining order and a preliminary injunction preventing defendants from removing him. In motions seeking this relief, plaintiff represented that he had no adequate remedy at law, because the Eleventh Amendment immunized defendants from damage claims.

A few weeks before plaintiff's term expired, the District Court granted judgment on the pleadings to defendants and plaintiff appealed. On appeal, when the Third Circuit asked why the expiration of his term did not moot the appeal, plaintiff claimed that he was entitled to back pay for the few weeks remaining in his term. The Third Circuit held he was judicially estopped from making that claim:

> [I]nasmuch as Murray contended, correctly or not, that damages, including back pay, were not available in this action as they were

> barred by the Eleventh Amendment so that he was entitled to preliminary injunctive relief, he may not now, when injunctive relief is no longer possible, reverse his position and argue that damages are available.

882 F.2d at 66-67. *Accord*, *Hardwick v. Cuomo*, 891 F.2d 1097, 1109 n.14 (3rd Cir. 1989) ("court has recognized the doctrine of judicial estoppel to bind parties to factual ***and legal*** positions taken in litigation") (emphasis added).

The Fifth Circuit and the Federal Circuit, applying Eighth Circuit law, agree. *Republic of Ecuador v. Connor*, 708 F.3d 651, 656-657 (5th Cir. 2013), rejected Chevron's argument that "judicial estoppel may never be applied to issues of law," because "a change of legal position can be just as abusive of court processes and an opposing party as deliberate factual flipflopping." *Accord*, *Karaha Bodas Co. v. Perusahaan Pertembangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 294 (5th Cir. 2004) (applying judicial estoppel when "Pertamina repeatedly represented to the Tribunal and to the district court that Swiss procedural law controlled"). *Transclean Corp. v. Jiffy Lube Int'l, Inc.*, 474 F.3d 1298 (Fed. Cir. 2007), held that "judicial estoppel may be applied to the question of privity, whether considered a legal conclusion or a question of fact." 474 F.3d at 1307.

There is a clear, deep and longstanding disagreement among the circuit courts on whether judicial estoppel applies to legal questions or only to factual ones. Only this Court can resolve the conflict.

CONCLUSION

The Court will never see a stronger factual case for the application of judicial estoppel. From the beginning, BancInsure told the Bank, its own adjusters, and its own reinsurers that the D&O policy covered the FDIC's claims, subject only to timely notice. It twice repeated that statement under oath. It is simply unfair – to both Petitioners and the courts – to allow BancInsure to reverse course years after the fact.

The Court should grant the petition for certiorari and reverse the judgment.

Respectfully Submitted,

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February 1, 2016

APPENDIX

APPENDIX TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed August 6, 2015]

No. 14-3063

BANCINSURE, INC.,

Plaintiff Counter Defendant-Appellee,

KANSAS INSURANCE GUARANTY ASSOCIATION,

Intervenor-Appellee,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver of The Columbian Bank and Trust Company,

Defendant-Appellant,

and

CARL L. MCCAFFREE, former director and officer of The Columbian Bank and Trust Company; JIMMY D. HELVEY; SAM MCCAFFREE, former director and officer of The Columbian Bank and Trust Company,

Defendants Counterclaimants.

BANCINSURE, INC.,

Plaintiff Counter Defendant-Appellee,

No. 14-3064

KANSAS INSURANCE GUARANTY ASSOCIATION,

Intevenor-Appellee,

v.

CARL L. MCCAFFREE, former director and officer of The Columbian Bank and Trust Company; JIMMY D. HELVEY, former director and officer of The Columbian Bank and Trust Company; SAM MCCAFFREE, former director and officer of The Columbian Bank and Trust Company,

Defendants Counterclaimants-Appellants,

and

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver of The Columbian Bank and Trust Company,

Defendant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS
(D.C. No. 2:12-CV-02110-KHV-GLR)

Joseph Brooks (Colleen J. Boles, Assistant General Counsel, Kathryn R.

Norcross, Senior Counsel, and Michelle Ognibene, Counsel, with him on the briefs) Federal Deposit Insurance Corporation, Arlington, Virginia, for Defendant-Appellant FDIC.

Ryan Gill, Lewis, Brisbois, Bisgaard & Smith, L.L.P., Denver, Colorado, for Appellee Kansas Insurance Guaranty Association.

Mark G. Arnold of Husch, Blackwell, L.L.P., St. Louis, Missouri; and Lyndsey J. Conrad and Stacey Bowman of Husch, Blackwell, L.L.P., Kansas City, Missouri, filed a brief for Defendants-Appellants Carl McCaffree, Jim Helvey, and Sam McCaffree.

Before KELLY, HOLMES, and McHUGH, Circuit Judges.

KELLY, Circuit Judge.

This case presents the question whether claims by the FDIC as receiver (FDIC-R) of Columbian Bank & Trust (Columbian) against three ex-directors of Columbian are covered under a Directors and Officers Liability Insurance Policy (the policy). Defendant-Appellants Carl McCaffree, Jimmy D. Helvey, and Sam McCaffree (director-defendants) and the Federal Deposit Insurance Corporation (FDIC) appeal the district court's grant of summary judgment to BancInsure, Inc. (BancInsure). *BancInsure, Inc. v. McCaffree*, 3 F. Supp. 3d 904, 910–16 (D. Kan. 2014). The district court held that claims by the FDIC-R were unambiguously excluded by the policy's "insured v. insured" exclusion and that BancInsure was not judicially estopped from denying coverage. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Background

BancInsure issued the policy to Columbian and its parent Columbian Financial Corporation (CFC) for the period of May 11, 2007 to May 11, 2010. App. 81.[1] Under the policy, BancInsure agreed to pay "Loss which the Insured Persons shall be legally obligated to pay." *Id.* at 74. "Insured Person" was defined as "all persons who were, now are or shall be the directors and officers [of CFC and Columbian]." *Id.* The policy provided an aggregate liability limit of $5,000,000 per year. *Id.* at 81.

The original policy contained two exclusions pertinent here: an "insured v. insured" exclusion and a "regulatory" exclusion. The insured v. insured exclusion provides:

> The Insurer shall not be liable to make any payment for Loss in connection with any Claim made against the Insured Persons based upon, arising out of, relating to, in consequence of, or in any way involving . . . a Claim by, or on behalf of, or at the behest of, any other Insured Person, the Company, or any successor, trustee, assignee *or receiver of the Company* . . . .

Id. at 75–76 (emphasis added). The exclusion makes exception for "a shareholder's derivative action brought on behalf of the Company by one or more shareholders who are not Insured Persons and make a Claim without the cooperation or solicitation of any Insured Person or the Company." *Id.* at 76.

The regulatory exclusion, on the other hand, excluded coverage for "any action or proceeding brought by or on behalf of any federal or state

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[1] Both appellants have filed appendices, and we identify the FDIC's appendix as "App." and the director-defendants' appendix as "Aplt. App."

regulatory or supervisory agency or deposit insurance organization," including "any type of legal action which any such Agency may bring as receiver." *Id*. However, the insured purchased a "regulatory exclusion endorsement" to the policy, which amended the policy "by the deletion of" the regulatory exclusion. *Id.* at 89. The endorsement further set a maximum aggregate liability cap of $5,000,000 for claims brought by "any federal or state regulatory or supervisory agency or deposit insurance organization," and stated that any such payments would reduce the liability limit of the policy as a whole. *Id.* Notably, the endorsement also stated: "Nothing herein contained shall be held to vary, waive or extend any of the terms, conditions, provisions, agreements or limitations of the above mentioned policy other than as above stated." *Id.* According to materials BancInsure provided to Columbian before it purchased the policy, under the regulatory endorsement, "[t]here is full coverage for actions by regulatory agencies." *Id.* at 418. BancInsure's own marketing materials described the endorsement as a "broadening feature." *Id.* at 427. Other BancInsure internal documents also characterized the FDIC-R's claims as "regulatory" in nature. *Id.* at 437, 438, 439, 442, 444.

On August 22, 2008, the Kansas State Bank Commissioner declared Columbian insolvent and appointed the FDIC as receiver. By operation of law, the FDIC-R succeeded to "all rights, titles, powers, and privileges of [Columbian], and of any stockholder, member, accountholder, depositor, officer, or director" of Columbian. 12 U.S.C. § 1821(d)(2)(A). In early September 2008, BancInsure received notice of potential claims the FDIC-R intended to file against the bank's officers and directors. Aplt. App. 456–57, 680–89.

In anticipation of such a suit, CFC and director-defendant Carl McCaffree brought suit against BancInsure seeking a declaratory judgment that the policy covered claims made after August 22, 2008—the date Columbian was declared insolvent—but before the expiration of the policy. As part of this litigation (the *Columbian* litigation), CFC issued a series of interrogatories to BancInsure regarding coverage of certain claims, including claims by deposit insurance organizations acting as receiver of Columbian. BancInsure indicated that such claims would be covered under the policy so long as BancInsure was given proper notice. App. 409, 411. These responses were purely hypothetical, as the FDIC-R had not yet brought any such claims and did not bring them until over two years later. Aplee. Supp. App. 38.

The district court ultimately held that the policy remained in effect until May 11, 2010, relying in part on its finding that the regulatory endorsement "provides coverage for actions brought by deposit insurance organizations as receivers during the policy year," which would be meaningless if the policy terminated upon appointment of a receiver. *Columbian Fin. Corp. v. BancInsure, Inc.*, No. 08–2642–CM, 2009 WL 4508576 (D. Kan. Nov. 30, 2009). On appeal, we *sua sponte* determined that no case or controversy existed at the time of the district court's judgment and remanded with instructions to vacate the judgment for lack of subject matter jurisdiction. *Columbian Fin. Corp. v. BancInsure, Inc.*, 650 F.3d 1372, 1385 (10th Cir. 2011).

BancInsure filed the instant action against the director-defendants in Kansas state court in August 2011, seeking a declaratory judgment that it owes no duty of coverage to the director-defendants for claims brought against them by the FDIC-R. The FDIC-R joined and removed the action to the federal district court in Kansas. At approximately the same time, the FDIC-R brought claims against several of Columbian's former directors and officers alleging negligence, gross negligence, and breach of fiduciary duty. The FDIC-R explicitly stated that it brought suit "in its capacity as Receiver of The Columbian Bank and Trust Company." Aplee. Supp. App. 38. BancInsure, the director-defendants, and the FDIC-R reached a settlement in February 2013 pursuant to which the director-defendants confessed judgment in favor of the FDIC-R for $5,000,000, and both BancInsure and the director-defendants have made payments in partial satisfaction of this judgment. The settlement allows BancInsure to seek reimbursement if it succeeds in this litigation.

The parties filed cross-motions for summary judgment on the issue of coverage. On February 27, 2014, the district court granted BancInsure's motion, finding that the insured v. insured exclusion unambiguously excluded from coverage claims by the FDIC-R against director-defendants. *BancInsure*, 3 F. Supp. 3d at 910–15. Further, the district court held that BancInsure was not judicially estopped from denying coverage based on its answers to CFC's interrogatories in earlier litigation. *Id.* at 915–16. The FDIC-R and director- defendants (collectively, Appellants) timely appealed. In the interim, BancInsure was placed into receivership and liquidated, and the Kansas Insurance Guaranty Association (KIGA) intervened to defend BancInsure's rights pursuant to Kan. Stat. Ann. § 40-2906(a)(2).

<u>Discussion</u>

Appellants raise two arguments on appeal. First, they contend the district court erred in granting

BancInsure summary judgment because the policy does not unambiguously exclude coverage of the FDIC-R's claims against the director-defendants. Second, they argue the district court abused its discretion in declining to apply the doctrine of judicial estoppel. We address these arguments in turn.

A. Coverage Under the Policy

We review a grant of summary judgment de novo, applying the same standard as the district court. *Yousuf v. Cohlmia*, 741 F.3d 31, 37 (10th Cir.2014). Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In applying this standard, we view the factual record in the light most favorable to the non-moving party. *Duvall v. Ga.-Pac. Consumer Prods., L.P.*, 607 F.3d 1255, 1259 (10th Cir. 2010). The parties agree Kansas law applies to interpretation of the policy. Thus, we apply decisions of the Kansas Supreme Court and, where no controlling decision exists, consult other sources, including decisions of the Kansas Court of Appeals. *See Wade v.EMCASCO Ins. Co.*, 483 F.3d 657, 665–66 (10th Cir. 2007).

Under Kansas law, an insurance policy constitutes a contract, and the interpretation of a contract is a question of law. *AMCO Ins. Co. v. Beck*, 929 P.2d 162, 165 (Kan. 1996). "The primary rule in interpreting written contracts is to ascertain the intent of the parties." *Liggatt v. Emp'rs Mut. Cas. Co.*, 46 P.3d 1120, 1125 (Kan. 2002). In ascertaining the intent of the parties, Kansas courts consider the policy as a whole, rather than viewing provisions in isolation. *Long St. Paul Fire & Marine Ins. Co.*, 589 F.3d 1075, 1082 (10th Cir. 2009). Kansas courts interpret policy terms based on how a reasonably prudent insured would understand them. *O'Bryan v. Columbia Ins. Grp.*, 56 P.3d 789, 793 (Kan. 2002).

Where the language of an insurance policy is clear and unambiguous, we must apply it in its plain and ordinary sense. *Warner v. Stover*, 153 P.3d 1245, 1247 (Kan. 2007). Thus, "[i]f the terms of the contract are clear, there is no room for rules of construction, and the intent of the parties is determined from the contract itself." *Liggatt*, 46 P.3d at 1125; *see also Marquis v. State Farm Fire & Cas. Co.*, 961 P.2d 1213, 1219 (Kan. 1998). When an insurance contract is unambiguous, a court may not rewrite the contract for the parties; "[i]ts function is to enforce the contract as made." *Catholic Diocese of Dodge City v. Raymer*, 840 P.2d 456, 459 (Kan. 1992).

Where an insurance policy's plain language is ambiguous, Kansas courts adopt the construction most favorable to the insured. *O'Bryan*, 56 P.3d at 792. A contract is ambiguous if it "contain[s] provisions or language of doubtful or conflicting meaning, as gleaned from a natural and reasonable interpretation of its language." *Id.* (citation omitted). Put otherwise, ambiguity arises when application of the rules of construction "leaves it genuinely uncertain which one of two or more meanings is the proper meaning." *Liggatt*, 46 P.3d at 1125 (citation omitted). Courts "should not strain to create an ambiguity where, in common sense, there is none." *First Fin. Ins. Co. v. Bugg*, 962 P.2d 515, 519 (Kan. 1998).

Finally, although an insured has the burden to show coverage under the policy, an insurer has the duty to show that a specific provision of the policy excludes coverage. *Baugher v. Hartford Fire Ins. Co.,* 522 P.2d 401, 409 (Kan. 1974). Exclusions, when ambiguous, are interpreted narrowly against the drafter and in favor of coverage. *O'Bryan*, 56 P.3d at 792. Bearing these principles in mind, we turn to the policy at issue and its relevant exclusions.

1. The Plain Meaning of the Insured v. Insured Exclusion Bars Coverage of Claims by the FDIC-R

The insured v. insured exclusion provides that the insurer "shall not be liable" for loss in connection with "a Claim by . . . any other Insured Person, the Company, or any successor, trustee, assignee or receiver of the Company." App. 75–76. Thus, claims by "any . . . receiver of the Company" are excluded from coverage. The term "receiver" is not defined under the contract; thus, we interpret the provision as it is commonly and ordinarily understood. *Warner*, 153 P.3d at 1247. Black's Law Dictionary defines "receiver" as:

> A disinterested person appointed by a court, or by a corporation or other person, for the protection or collection of property that is the subject of diverse claims (for example, because it belongs to a bankrupt or is otherwise being litigated).

Black's Law Dictionary (10th ed. 2014). Relatedly, the Federal Deposit Insurance Act, pursuant to which the FDIC was appointed as receiver, *see* 12 U.S.C. § 1821, defines "receiver" to "include[] a receiver, liquidating agent, conservator, commission, person, or other agency charged by law with the duty of winding up the affairs of a bank or savings association." *Id.* § 1813(j).

Appellants do not dispute that the FDIC was the "receiver" of Columbian. Upon the Kansas State Bank Commissioner's determination that Columbian was insolvent, the FDIC was appointed as receiver of the bank pursuant to Kansas and federal law. See Kan. Stat. Ann. § 9-1907; 12 U.S.C. § 1821(d)(2)(A). Nor do they dispute that the FDIC brought the claims at issue in its capacity as receiver of Columbian. *See* Aplt. FDIC Reply Br. 7; Aplee. Supp. App. 38.

Thus, the plain language of the insured v. insured exclusion appears to unambiguously bar coverage of claims by the FDIC-R against director-defendants. Other courts interpreting identical insured v. insured exclusions have reached the same conclusion. *See Hawker v. BancInsure, Inc.*, No. 1:12–cv–01261–SAB, 2014 WL 1366201, at *5 (E.D. Cal. Apr. 7, 2014); *Davis v.BancInsure, Inc.*, No. 3:12–cv–113–TCB, 2013 WL 1223696, at *9 (N.D. Ga. Mar. 20, 2013); *see also FDIC v. BancInsure, Inc.*, No. CV 12–09882 DMG (MRWx), 2014 WL 8583832, at *7 (C.D. Cal. June 16, 2014) (noting that "[t]he FDIC does not dispute that the [insured v. insured] Exclusion language, when considered alone, appears to apply to it").

Of course, we do not read the insured v. insured exclusion in isolation, but as part of the policy as a whole. *See Long*, 589 F.3d at 1082. Appellants argue that when the language of the insured v. insured exclusion is read in light of other policy provisions, and BancInsure's prior statements, it is at least ambiguous whether it bars claims by the FDIC-R, and thus must be construed in favor of the insured. First, they contend that the shareholder derivative action exception renders the insured v. insured exclusion ambiguous as applied to claims by the FDIC-R. Second, they assert that the endorsement to the regulatory exclusion renders the insured v. insured ambiguous as applied to claims by the FDIC-R.

And finally, they argue that BancInsure's prior statements support coverage under the policy. We address these arguments in turn, ultimately concluding that none of them are persuasive.

2. The Shareholder Derivative Action Exception Does Not Render the Insured v. Insured Exclusion Ambiguous

First, Appellants argue that the shareholder derivative action exception to the insured v. insured exclusion renders the exclusion ambiguous as applied to claims by the FDIC-R. Aplt. FDIC Br. 22–24; Aplt. McCaffree Br. 43–46. The shareholder derivative action exception removes from the scope of the insured v. insured exclusion "a shareholder's derivative action brought on behalf of the Company by one or more shareholders who are not Insured Persons and make a Claim without the cooperation or solicitation of any Insured Person or the Company." App. 76.

Appellants do not argue that the shareholder derivative action exception applies, but instead contend that its presence "shows intent to cover actions similar to those brought by the FDIC-R." Aplt. FDIC Reply Br. 11; *see* Aplt. McCaffree Reply Br. 20. By statute, the FDIC-R succeeds to "all rights, titles, powers, and privileges" of not only a failed bank, but also "any stockholder, . . . accountholder, [and] depositor" of the institution. 12 U.S.C. § 1821(d)(2)(A).

Appellants argue that, because actions by the FDIC-R against directors "share certain common characteristics with a shareholder derivative action," the insured v. insured exclusion is inapplicable, or at least ambiguous, as applied to such claims. Aplt. FDIC Br. 23.

Appellants cite a number of cases that have held that shareholder derivative action exceptions at least render ambiguous insured v. insured exclusions as applied to claims by the FDIC-R. *See* Aplt. FDIC Br. 23–24 & n.10 (citing *Am. Cas. Co. v. Sentry Fed. Sav. Bank*, 867 F. Supp. 50, 59 (D. Mass. 1994); *Am. Cas. Co. v. FDIC*, 791 F. Supp. 276, 278 (W.D. Okla. 1992); *Am. Cas. Co. v. Baker*, 758 F. Supp. 1340, 1349–50 (C.D. Cal. 1991); *FDIC v. Nat'l Union Fire Ins. Co.*, 630 F. Supp. 1149, 1157 (W.D. La. 1986); *FDIC v. BancInsure, Inc.*, 2014 WL 8583832, at *7–9; *Progressive Cas. Ins. Co. v. FDIC*, No. 11-CV-14816, 2012 WL 8437693, at *3 (E.D. Mich. Sept. 24, 2012)).

However, all of these cases, save one,[2] dealt with insured v. insured exclusions that did not explicitly apply to claims by a receiver of the company. The insured v. insured exclusions at issue in these cases applied to, for instance, "any claim made . . . by any other Director or Officer or by the Institution . . . except for a shareholders derivative action." *Am. Cas. Co.*, 791 F. Supp. at 277; *see also Sentry Fed. Sav. Bank*, 867 F. Supp. at 59 (same language); *Baker*, 758 F. Supp. at 1343 (same language); *Nat'l Union Fire Ins. Co.*, 630 F. Supp. at 1152 (essentially same language). Thus, courts had to grapple with the question whether the receiver "stepped into the shoes" of the institution, such that claims by the receiver were excluded as would be claims by the institution

[2] The only case concluding that a shareholder derivative action exception rendered an insured v. insured provision that encompasses suits by a "receiver" ambiguous as applied to a claim by the FDIC-R is *FDIC v. BancInsure, Inc.*, 2014 WL 8583832, at *7–9. We find the Central District of California's decision unpersuasive and inconsistent with principles of Kansas contractual interpretation for reasons discussed below.

itself. *Am. Cas. Co.*, 791 F. Supp. at 277; *see Sentry Fed. Sav. Bank*, 867 F. Supp. at 59.

Unsurprisingly, in the absence of clear language stating that claims by a receiver of the company were excluded, these courts found the exclusions at least ambiguous as to claims by a receiver, given the similarity of such claims to shareholder derivative actions. But, as latter decisions have recognized, these cases shed little light on whether an exclusion explicitly barring coverage for claims by a "receiver" of the company are ambiguous. *See Hawker*, 2014 WL 1366201, at *8–9 ("The insured versus insured exclusions in the cases cited by the FDIC did not include language expressly excluding claims brought by 'receivers.'"); *Davis*, 2013 WL 1223696, at *9 (rejecting this line of authority because "none of the cases making up the . . . view involved policy language expressly providing that the exclusion applied to successors, receivers, assignees and trustees").

In fact, decisions finding insured v. insured provisions ambiguous as to claims by a receiver relied on the absence of policy language present here. *See,e.g., Am. Cas. Co. v. Fed. Sav. & Loan Ins. Corp.*, 704 F. Supp. 898, 901 (E.D. Ark. 1989) (concluding that policy at issue was ambiguous in part because there was no "reference in the endorsement to successors, assigns, trustees or receivers"). For instance, the Western District of Oklahoma found that claims by the FDIC-R were not excluded based on the fact that "the exclusion provision contains no expressed reference to the FDIC or to any successors, assigns or receivers." *Am. Cas. Co.*, 791 F. Supp. at 278. "Such language," the court explained, "could easily have been made a part of the policy exclusion if it was so intended." *Id.*

The insuring agreement between BancInsure and Columbian has done precisely that here, providing that claims by "any . . . receiver of the Company" are excluded. While the presence of a shareholder derivative action exception may contribute to a finding of ambiguity absent such clear language, it cannot overcome the plain language of the policy. *See Marquis*, 961 P.2d at 1219 ("[I]f the language of the written instrument is clear, there is no room for rules of construction."). A contract is ambiguous under Kansas law, and thus interpreted in the manner most favorable to the insured, only when the court is left "genuinely uncertain" as to which of multiple meanings is the appropriate one.

Liggatt, 46 P.3d at 1125. Here, we have no such uncertainty, and thus will not "strain to create an ambiguity where, in common sense, there is none." *Bugg*, 962 P.2d at 519.[3]

[3] In its reply briefing, the FDIC asserts that the fact courts interpreting such insured v. insured exclusions have interpreted them differently supports a finding of ambiguity. Aplt. FDIC Reply Br. 13 (citing *Crawford v. Prudential Ins. Co.*, 783 P.2d 900, 908 (Kan. 1989); *Alliance Life Ins. Co. v. Ulysses Volunteer Fireman's Relief Ass'n*, 529 P.2d 171, 180 (Kan. 1974) (finding ambiguity based on "such a contrariety of judicial opinion" regarding the terms at issue)). Neither the FDIC nor director-defendants raised this argument in their opening briefing, and we decline to consider it. *See United States v. Williamson*, 746 F.3d 987, 993 (10th Cir. 2014). Even if we were to consider it, we question whether the Kansas Supreme Court would allow Appellants to bootstrap a showing of ambiguity on a sole decision—hardly a "contrariety of judicial opinion"—finding the language at issue here ambiguous.

3. The Regulatory Endorsement Does Not Render the Insured v. Insured Exclusion Ambiguous

Next, Appellants argue that the endorsement to the regulatory exclusion renders the insured v. insured exclusion ambiguous as applied to claims by the FDIC-R. The endorsement amended the policy "by the deletion of" the regulatory exclusion, which had previously excluded coverage for "any action or proceeding brought by or on behalf of any federal or state regulatory or supervisory agency or deposit insurance organization," including actions "which any such Agency may bring as receiver." App. 89. The endorsement further set an aggregate liability cap of $5,000,000 for claims brought by "any federal or state regulatory or supervisory agency or deposit insurance organization." *Id.* Appellants offer several arguments why this endorsement at least created an ambiguity as to whether claims by the FDIC-R were covered under the policy.

First, Appellants contend that the maximum aggregate liability cap affirmatively provided coverage over claims previously excluded under the regulatory exclusion. Thus, they argue, under Kansas law, the endorsement prevails over the original printed provisions. Aplt. FDIC Br. 19–20; Aplt. McCaffree Br. 27–28 (citing *Lindesmith v. Republic Mut. Fire Ins. Co.*, 368 P.2d 35, 38 (Kan. 1962); *Wise v. Westchester Fire Ins. Co.*, 463 F.2d 386, 389 (10th Cir. 1972)). But we see no language in the endorsement that affirmatively grants coverage over all of those claims previously excluded by the regulatory exclusion.

The removal of the regulatory exclusion permits such coverage, but does not require it, as removing an exclusion is not the same thing as affirmatively providing coverage. And the liability cap, like others within the policy, *see* Aplee. Supp. App. 2, simply sets a sub-limit of liability for certain claims—it does not suggest that all claims of such nature are covered notwithstanding other applicable exclusions.

The Kansas Court of Appeals has held that an endorsement only alters a policy "to the extent specifically called for in the explicit language of the endorsement." *Thornburg v. Schweitzer*, 240 P.3d 969, 977 (Kan. Ct. App. 2010). Here, there is no language—let alone explicit language—in the endorsement's liability cap affirmatively providing coverage over those claims previously excluded. To the contrary, the endorsement's explicit language suggests the opposite, as it makes clear that "[n]othing herein contained shall be held to vary, waive or extend any of the terms, conditions, provisions, agreements or limitations of the above mentioned policy other than as above stated."[4] App. 89. In short, "[n]othing in the . . . endorsement indicates that it replaces or supercedes the general provisions and exclusions" of the policy. *Thornburg*, 240 P.3d at 977.

Next, Appellants argue that the endorsement at least shows "a clear intent to provide coverage" over actions previously excluded under the regulatory exclusion, creating a least an ambiguity as to coverage.

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[4] We are unpersuaded by Appellants' contention that, because two other endorsements to the policy more explicitly provide that they remain subject to other policy exclusions, we should interpret the regulatory endorsement to supercede other exclusions. Aplt. FDIC Br. 19–20 (citing App. 91, 100). The plain implication of the regulatory endorsement's language that "[n]othing herein contained" shall "vary, waive, or extend *any of the terms*" of the policy is that the policy's other exclusions still apply to the endorsement.

Aplt. FDIC Br. 17; Aplt McCaffree Br. 23. Appellants cite no authority from Kansas courts suggesting the deletion of an exclusion gives rise to an inference of coverage,[5] and courts in different states disagree on whether such an inference is appropriate.[6]

We doubt the Kansas Supreme Court would endorse an inference of coverage based on the deletion of an exclusion.[7] But even assuming *arguendo* that it would under some circumstances, we do not think it would do so here, where the endorsement clearly evinces the parties' intent not to "vary" or "waive" any other

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[5] Appellants cite only *Empire Underground Storage, Inc. v. Protective Nat'l Ins. Co.*, 685 F. Supp. 1187, 1191 (D. Kan. 1988), a federal district court case that cites no Kansas authority for this proposition.

[6] *Compare Valassis Commc'ns, Inc. v. Aetna Cas. & Sur. Co.*, 97 F.3d 870, 873 (6th Cir. 1996) ("Insurance contract law also dictates that when an endorsement deletes language from a policy, a court must not consider the deleted language in its interpretation of the remaining agreement."), *with Stubbe v. Guidant Mut. Ins. Co.*, 651 N.W.2d 318, 324 (Wis. Ct. App. 2002) ("An insured may reasonably expect that when an insurance company deletes limiting language in the policy, the purported limitations no longer apply.").

[7] *Thornburg*'s teaching that an endorsement only alters a policy "to the extent specifically called for in the explicit language of the endorsement" seems to indicate that Kansas courts would not find coverage to be implicit based on the removal of policy language. 240 P.3d at 977. Furthermore, in *Owings v. Gifford*, the Kansas Supreme Court rejected the argument that a policy was ambiguous as to a claim that fell within an exception to one exclusion but was excluded by another. 697 P.2d 865, 869–70 (Kan. 1985). The court emphasized that coverage must be "determined by resort to the contract as a whole, including *all* exclusionary provisions." *Id.* (emphasis added). Likewise, here, we think the Kansas Supreme Court would be hesitant to infer coverage from the deletion of an exclusion in the face of a separate exclusion whose plain language bars coverage.

limitations of the policy. *Cf. Essex Ins. Co. v. Vincent*, 52 F.3d 894, 897–98 (10th Cir. 1995) (rejecting an inference of coverage from the deletion of an exclusion under Colorado law based on a similar endorsement provision). There is simply no indication in the endorsement that, by removing the regulatory exclusion, the parties sought to provide coverage over all regulatory actions, even those for which coverage was unambiguously barred by other exclusions.

Finally, Appellants assert that interpreting the insured v. insured exclusion to bar claims by the FDIC-R yields two impractical results. First, they assert this construction renders the regulatory endorsement meaningless. Aplt. McCaffree Br. 30. We disagree. The endorsement still permitted (subject to other exclusions) coverage over claims brought by regulatory agencies other than the FDIC as receiver, such as claims by the Securities and Exchange Commission, Equal Employment Opportunity Commission, or other federal or state agencies.[8] *See Davis*, 2013 WL 1223696, at *11.

Relatedly, they assert this construction renders the language of the original regulatory exclusion—that claims by a "deposit insurance organization" and agency "as receiver" are excluded—superfluous, as such claims would already be excluded by the insured v. insured

[8] KIGA also asserts that the regulatory endorsement would permit coverage of claims by the FDIC outside of its role as receiver of the bank, such as civil money penalties. Aplee. Br. 35. But it is illegal for a bank to purchase insurance for its directors and officers against civil money penalties by the FDIC. *See* 12 U.S.C. § 1828(k)(5)–(6); 12 C.F.R. § 359.1(l)(2)(i). Likewise, under Kansas law, the Kansas Commissioner may assess civil money penalties against directors and officers, but no bank may purchase insurance for officers or directors against such suits. *See* Kan. Stat. Ann. § 9-1809(f).

exclusion. They contend this violates the fundamental canon of construction that courts must strive to give meaning to every word in a contract. Aplt. McCaffree Br. 32 (citing *Dillard Dep't Stores, Inc. v. State Dep't of Human Res.,* 13 P.3d 358, 364 (Kan. Ct. App. 2000)). But this canon of construction is not absolute. *See Dillard*, 13 P.3d at 364 (treating the canon as a preference); *see also King v. Burwell*, 135 S. Ct. 2480, 2492 (2015) ("[O]ur preference for avoiding surplusage constructions is not absolute." (citation omitted)). Notably, the Kansas Supreme Court has suggested that this canon cannot overcome the plain meaning of words. *See State v. Sedillos*, 112 P.3d 854, 858–59 (Kan. 2005). This is especially so in the context of insurance policies, as they "are notorious for their simultaneous use of both belts and suspenders, and some overlap is to be expected." *Certain Interested Underwriters at Lloyd's, London v. Stolberg*, 680 F.3d 61, 68 (1st Cir. 2012); *see also United Nat'l Ins. Co. v. Waterfront N.Y. Realty Corp.*, 994 F.2d 105, 108–09 (2d Cir. 1993) (rejecting the argument that overlap in insurance policy exclusions renders ambiguous otherwise unambiguous language). Here, the mere fact of overlap between the two exclusions does not introduce ambiguity into the plain language of the insured v. insured exclusion barring coverage of claims by "any . . . receiver of the Company."

4. <u>BancInsure's Prior Statements Cannot Overcome the Plain Language of the Insured v. Insured Exclusion</u>

Lastly, Appellants assert that we should consider internal and external statements made by BancInsure suggesting coverage of claims by the FDIC-R under the regulatory endorsement. Aplt. FDIC Br. 27–33; Aplt. McCaffree Br. 32–35. But a finding of ambiguity is a prerequisite to considering such extrinsic evidence under Kansas law. *See Thoroughbred Assocs., L.L.C. v. Kansas City Royalty Co., L.L.C.*, 308 P.3d 1238, 1247 (Kan. 2013) (absent contractual silence or ambiguity, "extrinsic evidence is not admissible to contradict, alter, or vary the terms of a written instrument"). Because we conclude the insured v. insured exclusion unambiguously bars coverage of claims by the FDIC-R against director- defendants, we reject this argument.

B. Judicial Estoppel

Appellants next argue that the district court erred in concluding that BancInsure was not judicially estopped from denying coverage of the FDIC-R's claims against the director-defendants based on its answers to interrogatories in the *Columbian* litigation. Aplt. FDIC Br. 32 n.12; Aplt. McCaffree Bar. 35–43.

The district court declined to apply the doctrine of judicial estoppel, and we review its determination for an abuse of discretion. *Queen v. TA Operating, LLC*, 734 F.3d 1081, 1086 (10th Cir. 2013). A district court abuses its discretion "when it makes a clear error of judgment, exceeds the bounds of permissible choice, or when its decision is arbitrary, capricious or whimsical, or results in a manifestly unreasonable judgment." *Id*. (internal quotation marks omitted).

The doctrine of judicial estoppel is designed "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 749–50 (2001) (internal quotation marks and citation omitted). The circumstances in which judicial estoppel applies are "not reducible to any general formulation of principle," *id*. at 750; nevertheless, the Supreme Court has identified three relevant factors. First, courts ask whether a party's later position is "clearly inconsistent" with its former position. *Id*. Second, courts ask whether the party "succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled." *Id*. (internal quotation marks omitted). And third, courts consider "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id*. at 751; see also Eastman v. Union Pac. R.R. Co., 493 F.3d 1151, 1156 (10th Cir. 2007).

This circuit applies the doctrine of judicial estoppel "both narrowly and cautiously." *Hansen v. Harper Excavating, Inc*., 641 F.3d 1216, 1227 (10th Cir. 2011) (quoting *Bradford v. Wiggins*, 516 F.3d 1189, 1194 n.3 (10th Cir. 2008)). We do so because "judicial estoppel is a powerful weapon . . . and there are often lesser weapons that can keep alleged inconsistent statements in check while preserving a party's option to have its day in court." *Vehicle Mkt. Research, Inc. v. Mitchell Int'l, Inc*., 767 F.3d 987, 993 (10th Cir. 2014). Notably, we have held that judicial estoppel only applies when the position to be estopped is one of fact, not one of law. *See United States v. Villagrana-Flores*, 467 F.3d 1269, 1279 (10th Cir. 2006) ("[T]he existence of a Fourth Amendment violation is a legal position, not a factual one, and therefore the first judicial estoppel factor has not been satisfied."); *Kaiser v. Bowlen*, 455 F.3d 1197, 1204 (10th Cir. 2006) ("The stance taken in the tax return cannot give rise to judicial estoppel: in it, the Partnership is taking a legal position, not a factual one."); *Johnson v. Lindon*

City Corp., 405 F.3d 1065, 1069 (10th Cir. 2005) ("The requirement that a previous court has accepted the prior inconsistent factual position ensures that judicial estoppel is applied in the narrowest of circumstances." (internal quotation marks and citation omitted)); *see also Emergency One, Inc. v. Am. Fire Eagle Engine Co*., 332 F.3d 264, 274 (4th Cir. 2003) ("Judicial estoppel applies if the party to be estopped intentionally asserts a position of fact that is inconsistent with a factual position taken during previous litigation.").[9]

Appellants seek to have BancInsure judicially estopped from asserting that claims by the FDIC-R against the director-defendants are not covered under

[9] Despite failing to acknowledge any of the above-cited Tenth Circuit decisions in their briefing, Appellants at oral argument demonstrated great familiarity with the cases and argued that the Tenth Circuit's approach to judicial estoppel is inconsistent with *New Hampshire v. Maine*. We acknowledge that other courts have applied the doctrine of judicial estoppel to positions of law, not merely positions of fact. *See Helfand v. Gerson*, 105 F.3d 530, 535 (9th Cir. 1997) (noting that "[t]he greater weight of federal authority, however, supports the position that judicial estoppel applies to a party's stated position, regardless of whether it is an expression of intention, a statement of fact, or a legal assertion" and citing cases from several federal circuits); Charles Alan Wright & Arthur R. Miller, 18B Federal Practice & Procedure Jurisdiction § 4477 (2d ed. 2015) ("Little would be left of judicial estoppel if any trace of law were to defeat preclusion. Judicial estoppel may properly apply even when the facts are clear and only legal positions have changed, so long as the underlying facts are constant."). Nevertheless, the above-cited decisions from this court post-date *New Hampshire*, and "[o]ne panel of this court cannot overrule the judgment of another panel absent en banc consideration or an intervening Supreme Court decision that is contrary to or invalidates our previous analysis." *United States v. White*, 782 F.3d 1118, 1126–27 (10th Cir. 2015) (quoting *United States v. Nichols*, 775 F.3d 1225, 1230 (10th Cir. 2014)).

the policy. But whether such claims are covered under the policy is a question of law, not fact. *See AMCO Ins. Co.*, 929 P.2d at 165. Thus, under this court's precedent, the doctrine of judicial estoppel is inapplicable,[10] and the district court did not abuse its discretion in declining to apply it.

AFFIRMED.

[10] Appellants cite *Hicks v. Cadle*, 436 F. App'x 874, 877–78 (10th Cir. 2011) (unpublished), which held that an individual was judicially estopped from denying an arbitration clause covered particular claims after earlier asserting that the arbitration clause "clearly encompasses all issues and claims." *Hicks* suggested that the Supreme Court's articulation of the doctrine of judicial estoppel in *New Hampshire* "reflects [a] focus on change of legal position." 436 F. App'x at 878. However, unlike *Villagrana-Flores, Kaiser,* and *Johnson*, Hicks is an unpublished decision and thus not binding precedent. See 10th Cir. R. 32.1. Moreover, the *Hicks* court's conclusion relied on the fact that the appellant "has not cited any authority undercutting the guidance we have drawn from the language and substance of the *New Hampshire* decision," 436 F. App'x at 879, and it is apparent from the appellant's briefing that the above-cited, binding Tenth Circuit authority was not brought to the court's attention. *See* Aplt. Br. & Aplt. Reply Br., Hicks, 436 F. App'x 874 (No. 10–1575).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Civil Action No. 12-2110-KHV

BANCINSURE, INC.,

Plaintiff,

v.

CARL L. MCCAFFREE, et al.,

Defendants.

MEMORANDUM AND ORDER

In this removed action, BancInsure, Inc. seeks a declaratory judgment that it owes no duty of coverage under a directors and officers insurance policy which it issued to the Columbian Bank and Trust Company and its directors and officers for claims which the Federal Deposit Insurance Corporation ("FDIC") asserted against former bank directors. Defendants in this case are former bank directors Carl L. McCaffree, Jimmy D. Helvey and Sam McCaffree ("individual defendants") and FDIC.[1] The individual defendants bring counterclaims for declaratory judgment. This

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[1] BancInsure also sued three other former bank directors, all of whom have settled with FDIC and have been dismissed from this suit and the underlying litigation.

While the case was pending in the District Court of Johnson County, Kansas, FDIC moved to intervene as a necessary party. The state court granted FDIC's motion and joined FDIC as a party defendant.

matter is before the Court on the following cross-motions for summary judgment: (1) *Plaintiff's Motion For Summary Judgment* (Doc. #127) filed May 6, 2013; (2) *Defendants Carl McCaffree's, Sam McCaffree's, And Jim Helvey's Motion For Summary Judgment* (Doc. #147) filed June 10, 2013; and (3) the *Motion For Summary Judgment Of Defendant Federal Deposit Insurance Corporation As Receiver Of The Columbian Bank And Trust Company* (Doc. #151) filed June 10, 2013. For reasons set forth below, the Court finds that BancInsure's motion should be sustained and that the motions of the individual defendants and FDIC should be overruled.

Legal Standards

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1538-39 (10th Cir. 1993). A "genuine" factual dispute is one "on which the jury could reasonably find for the plaintiff," and requires more than a mere scintilla of evidence. *Liberty Lobby*, 477 U.S. at 252. A factual dispute is "material" only if it "might affect the outcome of the suit under the governing law." *Id.* at 248.

The moving party bears the initial burden of showing that there are no genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Justice v. Crown Cork & Seal Co.*, 527 F.3d 1080, 1085 (10th Cir. 2008). Once the moving party meets this burden, the burden shifts to the nonmoving party to show that a genuine issue remains for trial with respect to the dispositive matters for which the nonmoving party carries the burden of proof. *Nat'l Am. Ins. Co. v. Am. Re-Ins. Co.*, 358 F.3d 736, 739 (10th Cir. 2004); *see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). As to these matters, the nonmoving party may not rest on the pleadings but must set forth specific facts. Fed. R. Civ. P. 56(e)(2); *Matsushita*, 475 U.S. at 586-87; *Justice*, 527 F.3d at 1085. Conclusory allegations not supported by evidence are insufficient to establish a genuine issue of material fact. *Jarvis v. Potter*, 500 F.3d 1113, 1120 (10th Cir. 2007); *see Kidd v. Taos Ski Valley, Inc.*, 88 F.3d 848, 853 (10th Cir. 1996).

When applying this standard, the Court must view the factual record in the light most favorable to the party opposing the motion for summary judgment. *Duvall v. Ga.-Pac. Consumer Prods., L.P.*, 607 F.3d 1255, 1260 (10th Cir. 2010); *see Ricci v. DeStefano*, 557 U.S. 557, 586 (2009). Summary judgment may be granted if the nonmoving party's evidence is merely colorable or is not significantly probative. *Liberty Lobby*, 477 U.S. at 250-51. Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

Facts

The following facts are stipulated or uncontroverted:

BancInsure issued Directors and Officers Liability Insurance Policy No. 15DO00163-2 ("the Policy") to Columbian Bank and Trust Company effective May 11, 2007 to May 11, 2010, subject to an annual renewal process. On August 22, 2008, the Kansas State Bank Commissioner declared the bank insolvent and appointed FDIC as receiver. Three years later, FDIC filed suit in this Court against former Columbian officers and directors, including the individual defendants. *FDIC v. McCaffree*, Civil Action No. 11-2447-JAR/KGS (filed Aug. 9, 2011) ("the underlying D&O action"). In that case, FDIC alleged that defendants had breached their fiduciary duties and acted negligently in originating and/or approving risky commercial real estate loans from November of 2004 through May of 2008 and failing to properly supervise bank lending functions. FDIC claimed damages of $52 million.

Before FDIC had filed suit but after it asserted claims against the individual defendants and other bank officers and directors (collectively "the insured officers and directors"), the insured officers and directors requested coverage under the Policy. After agreeing to advance defense costs under a reservation of rights, BancInsure filed this action against the insured officers and directors in the District Court of Johnson County, Kansas, seeking a declaration that the Policy provides no coverage for any claims that FDIC might assert against them.

By way of a settlement between BancInsure, the individual defendants and FDIC in February of 2013, the parties resolved the underlying D&O action. Specifically, the individual defendants agreed to confess judgment in favor of FDIC for $5 million (the amount of the Policy limits). The parties agree that the amount of the confessed judgment is reasonable in light of the FDIC claims and the likelihood of a jury verdict substantially in excess of policy limits if the case had proceeded to trial. To date, the individual defendants have paid $750,000 and BancInsure has paid $250,000 in partial satisfaction of the judgment.[2]

The Policy

The Policy is a claims-made policy in which BancInsure, in relevant part, agrees to pay "on behalf of the Insured Persons, Loss which the Insured Persons shall be legally obligated to pay." Policy § I.A. (Doc. #128-3). The individual defendants are "Insured Persons" under the Policy. *Id.* § IV.A-B, Decl. Item 1. The Policy contains a so-called "insured v. insured" exclusion which provides that "[t]he Insurer shall not be liable . . . for Loss in connection with any Claim made against the Insured Persons based upon, arising out of, relating to, in consequence of, or in any way involving . . . a Claim by, or on behalf, or at the behest of, any other Insured Person, the Company, or any successor, trustee, assignee or receiver of the Company." *Id.* § V.11. The Policy defines "the Company" to include the bank. *Id.* § IV.A, Decl. Item 1.

The Policy also contains a regulatory exclusion which relieves BancInsure of liability for "any action . . . brought by or on behalf of any federal or state regulatory or supervisory agency or deposit insurance organization ("Agency"), . . . [including] any type of legal action which any such Agency may bring as receiver." *Id.* § V.12. The insureds purchased an endorsement to the Policy which negates that

[2] The Policy limits of $5 million have been reduced by the following: (1) payments on other claims, totaling $258,929.15; (2) attorney's fees/litigation expenses paid to the individual defendants in defense of the underlying D&O action, totaling $679,340.15; and (3) BancInsure's payment of $250,000 to FDIC in partial satisfaction of the judgment in the D&O action. The individual defendants have unpaid defense costs of $1,052,810.

exclusion. Specifically, the endorsement stipulates that the Policy "is hereby amended by the deletion of the [Regulatory] Exclusion." *Id.* at Endorsement No. BI-DO-00316, Regulatory Exclusion Endorsement. The endorsement further provides as follows: "Nothing herein contained shall be held to vary, waive or extend any of the terms, conditions, provisions, agreements, or limitations of the above mentioned policy other than as above stated." *Id.*

Events Following Bank Closing

On July 15, 2008, FDIC and the Kansas Office of the State Bank Commissioner ("OSBC") jointly entered a cease and desist order to which the Bank consented. On Friday, August 22, 2008, OSBC closed the Bank and appointed FDIC as receiver. BancInsure learned of the closure no later than the following Monday. On September 2, 2008, BancInsure received from FDIC a letter dated August 28, 2008, which gave notice of potential claims that FDIC intended to file against Bank directors and officers. BancInsure received the same notice from the individual defendants.

The Bank holding company (Columbian Financial Corporation) and Carl McCaffree filed a declaratory judgment action against BancInsure on December 18, 2008, several months after the Bank closed but more than a year before FDIC filed the underlying D&O action. *Columbian Fin. Corp. v. BancInsure, Inc.*, Case No. 08-cv-2642-CM (D. Kan.). Columbian and McCaffree sought a declaratory judgment that the Policy would cover a particular claim if they were to make it beforeMay 10, 2010, the end of the original policy period. BancInsure took the position that the Policy covered only claims made before August 22, 2008, when the Kansas State Bank Commissioner declared the Bank insolvent and appointed FDIC as receiver. Columbian and McCaffree brought the declaratory judgment action in response to a lawsuit filed by the Laborers Fund against a former Columbian officer for which BancInsure had denied coverage because it had not received notice during the policy period. During the course of the lawsuit, the parties stipulated that the Laborers Fund action was covered under the Policy and the parties filed cross-motions for summary judgment. *See Columbian Fin. Corp. v. BancInsure, Inc.*, 650 F.3d 1372, 1373-75 (10th Cir. 2011).

The district court granted the motion for summary judgment of Columbian and McCaffree, ruling that the policy period continued until May 10, 2010. *See id.* at 1375. BancInsure appealed, arguing that the receivership effectively terminated the policy period. Although neither party raised the issue, the Tenth Circuit held that the district court lacked jurisdiction because the parties stipulated during the litigation that the Policy covered the Laborers Fund claim. The stipulation stripped the case of actual controversy, and the Tenth Circuit reversed and remanded with instructions that the district court vacate its judgment. *Id.* at 1381-85.

By letter dated May 5, 2010, FDIC demanded civil damages from Bank officers and directors for losses incurred as a result of their alleged wrongful acts. Counsel sent a copy of the letter to BancInsure and recommended that the officers and directors also report the claim to BancInsure. In April of 2011, BancInsure received a copy of the FDIC's draft complaint in the underlying D&O action. FDIC filed the complaint in this court on August 9, 2011 (Case No. 11-CV-2447 JAR/KGS).

As noted, BancInsure, FDIC and the individual defendants resolved the underlying D&O action by way settlement in February of 2013. The individual defendants confessed judgment in the amount of $5 million entered February 26, 2013.

In this declaratory judgment action, BancInsure alleges that the individual defendants made misrepresentations which voided the Policy, gave it the right to rescind and would have caused it to cancel the Policy if the individual defendants had disclosed the true facts (Count I); that the individual defendants' failure to disclose material information voided the Policy, gave BancInsure the right to rescind and constituted a material breach of the contract (Count II); and that the Policy's "insured v. insured" exclusion excludes coverage (Count III). *See Pretrial Order* (Doc. #160) filed June 27, 2013 at 16 at 18-20.[3] The individual defendants filed a joint counterclaim alleging that they are entitled to a declaration that the Policy is valid and enforceable, *i.e.* that BancInsure has no right to rescind, cancel or terminate the Policy (Counts I through III) and that the FDIC claims are covered under the Policy (Counts IV and V). *See id*. at 20-21.

Analysis

BancInsure seeks summary judgment, arguing that (1) the Policy is void and may be rescinded due to the individual defendants' fraudulent misrepresentation, (2) the Policy may be cancelled due to the individual defendants' material breach of contract and (3) the "insured v. insured" exclusion bars coverage of the

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[3] BancInsure asserted a fourth count based on having received inadequate notice of the claim but the parties have since stipulated that the individual defendants provided timely and adequate notice of FDIC's lawsuit. *See Amended Petition For Declaratory Judgment* (Doc. #9-2) filed March 8, 2012 at 21-22; *Pretrial Order* (Doc. #160) filed June 27, 2013 at 6.

FDIC claims against the individual defendants. FDIC responds that BancInsure has made judicial admissions which compel coverage, that the regulatory exclusion endorsement negates the "insured v. insured" exclusion, and that BancInsure has no viable rescission or breach of contract defense to coverage. FDIC also claims that the "insured v. insured" exclusion is ambiguous and must be construed in favor of coverage.[4] In response to BancInsure's motion and in their own motion for summary judgment, the individual defendants assert that the policy is valid and enforceable and that the regulatory exclusion endorsement provides coverage for the FDIC claims.

I. "Insured v. Insured" Exclusion

Under the "insured v. insured" exclusion, BancInsure is not liable for loss in connection with any claim against the individual defendants that is "based upon, arising out of, relating to, in consequence of, or in any way involving . . . a Claim by, or on behalf, or at the behest of . . . any. . . receiver" of the Bank.[5] Although both FDIC and the individual defendants argue that this exclusion does not bar coverage, they admit that FDIC is the Bank's receiver. Accordingly, the underlying D&O action contains claims against the

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[4] FDIC also seeks summary judgment, arguing the inverse of BancInsure's grounds, *i.e.* that (1) BancInsure is not entitled to rescission, (2) BancInsure is not excused from performance by the acts or omissions of the individual defendants and (3) the Policy provides coverage for the claims in the underlying D&O action.

[5] The exclusion includes three exceptions, none of which apply in this case: (1) a shareholder's derivative action; (2) wrongful termination of employment action; and (3) unlawful discrimination such as sexual or other forms of harassment. Policy § V.11. (Doc. #128-3).

individual defendants by a Bank receiver.[6] On its face, the "insured v. insured" exclusion expressly defeats coverage of the FDIC claims in the underlying D&O action.

FDIC and the individual defendants claim that the "insured v. insured" exclusion does not bar coverage, however, because (1) under industry custom, practice and purpose, the exclusion does not apply; (2) the regulatory exclusion endorsement prevails over the "insured v. insured" exclusion; and (3) the exclusion is ambiguous. For reasons discussed below, these arguments are without merit.

A. Purpose, Industry Custom and Practice

According to defendants, "insured v. insured" exclusions first appeared in insurance policies to preclude collusive lawsuits by one insured against another. They argue that because the FDIC suit against malfaisant officers and directors is not collusive, the Court should not apply the exclusion in this case.

The Court agrees that the underlying D&O action is not collusive, but that is not a basis for rejecting the exclusion as written. Defendants cite cases which discuss the exclusion's anti-collusive purpose, but those cases do not hold that the exclusion does not apply where its purpose is not served.[7] Moreover, the

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[6] As a matter of law, FDIC succeeds to all of the rights, titles, powers and privileges of the Bank. *See* 12 U.S.C. § 1821(d)(2)(A)(I).

[7] *W Holding Co., Inc. v. Chartis Ins. Co.-P.R.*, 904 F. Supp. 2d 169, 183-84 (D.P.R. 2012) (exclusion not applicable because FDIC not an organization under policy definition); *Am. Cas. Co. of Reading, Pa. v. Sentry Fed. Sav. Bank*, 867 F. Supp. 50, 59 (D. Mass. 1994) (RTC not in collusion with directors and officers); *Slaughter v. Am. Cas. Co. of Reading, Pa.*, 842 F. Supp. 371, 374

purpose is not even relevant. *See Sphinx Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 412 F.3d 1224, 1229 (11th Cir. 2005) (collecting cases). This Court is bound to apply Kansas law, and to give the terms of an insurance policy their plain and ordinary meaning. *Hartford Fire Ins. Co. v. Vita Craft Corp.*, 911 F. Supp. 2d 1164, 1176 (D. Kan. 2012). The historical purpose of the exclusion holds no sway. *See Sphinx*, 412 F.3d at 1229 (exclusion's rationale does not trump text).

In *St. Paul Mercury Ins. Co. v. Miller*, No. 2:12-CV-0225-RWS, 2013 WL 4482520 (N. D. Ga. Aug. 19, 2013), the court summarily rejected defendants' argument that because the purpose of the "insured v. insured" exclusion is to prevent collusive suits, it should only apply in collusive suits. *See* 2013 WL 4482520, at *6. As that district court concluded under Georgia law, the Court should not refuse to give effect to unambiguous policy language based on assumptions as to why the language is included. *See Am. Family Mut. Ins. Co. v. Wilkins*, 285 Kan. 1054, 1059, 179 P.3d 1104, 1109 (2008) (if policy language unambiguous, court must enforce contract as made).[8]

(E.D. Ark. 1993) (exclusion not applicable because policy allowed RTC to bring action as creditor), rev'd, 37 F.3d 385 (8th Cir. 1994); *Am. Cas. Co. of Reading, Pa. v. Baker*, 758 F. Supp. 1340 (C.D. Cal. 1991) (noting that RTC/FDIC not in collusion with directors and officers). *But see Fid. & Deposit Co. of Md. v. Zandstra*, 756 F. Supp. 429, 433-34 (N.D. Cal. 1990) (although suit collusive at inception, not so when FDIC took over; alternative ground for holding that exclusion not applicable).

[8] FDIC also urges the Court to consider the historical context of the banking crisis of the late 1980s and early 1990s when several courts rejected "insured v. insured" exclusions where the policies did not specifically exclude coverage for actions by "receivers," thereby prompting insurers to add regulatory

B. Regulatory Exclusion Endorsement

Defendants argue that the regulatory exclusion endorsement, which deletes the regulatory exclusion, would be rendered meaningless if the Court were to find that the "insured v. insured" exclusion applies. They contend that deletion of an exclusion by endorsement leads an insured to reasonably believe that a claim previously excluded under the deleted exclusion is covered. That may be true in some instances, but it does not negate the effect of other independent exclusions which have not been deleted.

BancInsure argues that the "insured v. insured" exclusion and the regulatory exclusion endorsement can coexist without causing one or the other to be ineffective. BancInsure asserts that the plain language of the endorsement instructs the reader not to apply it to any policy language other than the regulatory exclusion. *See* Policy at Endorsement No. BI-DO-00316 ("Nothing herein contained shall be held to vary, waive or extend any of the terms, conditions, provisions, agreements, or limitations of the above mentioned policy other than as above stated."). BancInsure also notes that the endorsement permits coverage for FDIC claims of a regulatory nature, *e.g.*, removal and prohibition orders, civil money penalties and cease and desist orders, *see generally* 12 U.S.C. § 1818, and claims by other regulatory agencies such as the Securities and Exchange Commission and the Equal Employment Opportunity Commission.

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exclusions to their policies. FDIC argues that in light of this custom and practice, the Court should conclude that BancInsure intended to provide coverage in the underlying D&O action. The Court rejects this argument. The plain language of the policy excludes claims against insured persons by a Bank receiver, and FDIC's argument cannot trump the text of the Policy.

The Court agrees that the policy language allows the "insured v. insured" exclusion to bar coverage of the FDIC claims without rendering the regulatory exclusion endorsement meaningless. The "insured v. insured" exclusion specifically applies to claims brought by a receiver, and here, FDIC clearly asserted claims against the insured officers and directors in its capacity as receiver.[9] The regulatory exclusion endorsement extended the Policy to provide coverage for any number of regulatory actions by FDIC and other agencies. The endorsement applies exclusively to the regulatory exclusion and does not waive any other policy provision, including the "insured v. insured" exclusion.

The Court's conclusion is consistent with *Davis v. BancInsure, Inc.*, No. 3:12-cv-113-TCB, 2013 WL 1223696 (N.D. Ga. March 20, 2013). *Davis* examined whether coverage existed under a BancInsure D&O policy for FDIC claims against the former officers and directors of a closed bank. The policy contained the same "insured v. insured" exclusion as that in this case. Deciding the issue as a matter of law, the district court concluded that the exclusion expressly barred coverage of a claim by FDIC. *Davis*, 2013 WL 1223696, at *8. In *Davis*, the directors and officers contended that even if the "insured v. insured" exclusion applied, the policy when read as a whole provided coverage of regulatory claims. They too argued that the regulatory exclusion endorsement would be rendered meaningless if the FDIC claims were excluded from coverage. The endorsement is the same one that appears in the

[9] Defendants argue that FDIC is not a "typical" receiver, but their argument fails in the face of the common sense meaning of the word receiver and their admission that FDIC acted in that capacity.

policy in this case. In sum, the *Davis* facts are identical in relevant part to those in this case.

The *Davis* case is well reasoned and the Court agrees with its analysis and conclusions. The combination of the "insured v. insured" exclusion and the regulatory exclusion endorsement does not mean that the latter negates or supercedes the former.[10] As the *Davis* court points out, the endorsement language specifically addresses its relationship to other exclusions by stating that "[n]othing herein contained shall be held to vary, waive or extend any of the terms, conditions, provisions, agreements, or limitations of the above mentioned policy other than as above stated." *Id.* at *10. Deleting one exclusion did not change the effect of any other exclusion or, specifically, the "insured v. insured" exclusion. The language is clear. The regulatory exclusion endorsement does not delete or supersede the "insured v. insured" exclusion.

C. Ambiguity

Defendants also argue that the presence of both the "insured v. insured" exclusion and the regulatory exclusion endorsement create an ambiguity as to whether claims by FDIC as receiver are excluded.[11]

[10] Georgia and Kansas law are the same with respect to construing an endorsement. The Court is to read the endorsement and the policy together, leaving the policy in full force and effect except as altered by the words of the endorsement. The endorsement modifies the terms and conditions of the policy only to the extent specifically called for in the endorsement's explicit provisions. *See, e.g., Thornburg v. Schweitzer*, 44 Kan. App. 2d 611, 620, 240 P.3d 969, 976 (2011).

[11] Without elaboration, FDIC also argues that the Policy is ambiguous because it contains both a regulatory exclusion and a regulatory exclusion endorsement. The Bank purchased the

BancInsure contends that no such ambiguity exists and therefore the Court need not resort to extrinsic evidence or rules of construction to determine the Policy meaning. For reasons set forth below, the Court agrees.

The interpretation of an insurance policy, like other contracts, is a question of law. *AMCO Ins. Co. v. Beck*, 261 Kan. 266, 269, 929 P.2d 162, 165 (1996). Courts give the terms in an insurance policy their plain and ordinary meaning unless the parties have expressed a contrary intent. *Pink Cadillac Bar & Grill, Inc. v. U.S. Fid. & Guar. Co.*, 22 Kan. App. 2d 944, 948, 925 P.2d 452, 456 (1996). The test to determine whether an insurance contract is ambiguous is not what the insurer intends the language to mean, but what a reasonably prudent insured would understand the language to mean. *Id.* To be ambiguous, a contract must contain provisions or language of doubtful or conflicting meaning, as gleaned from a natural and reasonable interpretation of its language. *Farm Bureau Mut. Ins. Co. v. Old Hickory Cas. Ins. Co.*, 248 Kan. 657, 659, 810 P.2d 283, 285 (1991). Where the terms of a policy of insurance are ambiguous or uncertain, conflicting or susceptible of more than one construction, the construction most favorable to the insured must prevail. *Id.* If the policy is not ambiguous, the Court must enforce it according to its terms. *Am. Media, Inc. v. Home Indem. Co.*, 232 Kan. 737, 740, 658 P.2d 1015, 1019 (1983). While the insured has the burden to prove coverage under the policy, the insurance company has the duty to show that a specific provision of the policy excludes coverage. *Shelter Mut. Ins. Co. v. Williams*, 248 Kan. 17, 29-

endorsement to eliminate the exclusion, so the former cancels the latter. No ambiguity is present.

30, 804 P.2d 1374, 1383 (1991). Courts interpret exclusionary clauses narrowly against the drafter, in favor of coverage. *Dillon Co. v. Royal Indem. Co.*, 369 F. Supp. 2d 1277, 1284 (D. Kan. 2005).

In *Davis v. BancInsure, Inc.*, No. 3:12-cv-113-TCB, 2013 WL 1223696 (N.D. Ga. March 20, 2013), the court cited many of the cases the parties discuss in their briefs, reflecting the way in which courts are split on the issue of whether "insured v. insured" exclusions in D&O policies apply to claims by FDIC. The court notes that the majority view holds that coverage exists for FDIC claims even though it steps into the shoes of a failed bank. *Id.* at *8-9 (citations omitted). As *Davis* points out, however, the cases making up the majority view do not involve policies which expressly provide that the exclusion applies to receivers.[12] In contrast, the policy at issue in *Davis* and in this case specifically excludes coverage for claims by entities acting as successors, receivers, assignees and trustees. Citing the same "plain meaning" rule of construction which Kansas courts apply, *Davis* concluded that the exclusion's plain language unambiguously bars coverage for FDIC claims. 2013 WL 1223696, at *9. Not only does the "insured v. insured" provision exclude claims brought by or on behalf of the Bank against the individual defendants, but it also expressly excludes claims brought by or on behalf of receivers of the Bank.

[12] "The doctrines often used to justify a finding of coverage when receivers sue directors and officers of a failed bank relate to ambiguities in the insurance contract, the insured's reasonable expectations of coverage, and the unconscionability of a finding of no coverage." *Davis*, 2013 WL 1223696, at *9 (quoting Melanie K. Palmore, *"Insured v. Insured" Exclusions in Director and Officer Liability Insurance Policies: Is Coverage Available When Chapter 11 Trustees and Debtors-in-Possession Sue Former Directors and Officers,* 9 Bankr. Dev. J. 101, 114 (1992)).

In its concluding summary, the *Davis* court noted that the "insured v. insured" exclusion and the regulatory exclusion overlap when a regulatory agency brings an action as a receiver, but that removing the regulatory exclusion did not affect the application of the "insured v. insured" exclusion. A reasonable person in the position of the insured would understand that the "insured v. insured" exclusion means that claims by FDIC as receiver are excluded. Finding no inconsistency between the "insured v. insured" exclusion and the regulatory exclusion endorsement, the court enforced the contract as written. 2013 WL 1223696, at *12. This ultimate passage recites the same principles governing the construction of insurance policies as Kansas law applies: (1) the test to determine whether an insurance contract is ambiguous is not what an insurer intends the language to mean, but what a reasonably prudent insured would understand it to mean; and (2) if an insurance policy's language is unambiguous, courts must enforce the contract as made. *See, e.g., Hartford Fire Ins. Co. v. Vita Craft Corp.*, 911 F. Supp. 2d 1164, 1176 (D. Kan. 2012) (internal citations omitted). *St. Paul Mercury Ins. Co. v. Miller*, No. 2:12-CV-0225-RWS, 2013 WL 4482520 (N. D. Ga. Aug. 19, 2013), is in accord. There, the court held that the "insured v. insured" provision in a D&O insurance policy barred coverage of an FDIC suit against former bank employees.[13] The exclusion barred coverage for claims "brought or maintained by

[13] The insurance policy at issue in the *St. Paul Mercury* case does not include a regulatory exclusion endorsement and is similar only insofar as it discusses an "insured v. insured" exclusion. The exclusion was not nearly so specific as the one in this case in identifying the capacity of those whose claims are barred (i.e. "any successor, trustee, assignee or receiver of the Company").

or on behalf of any Insured or Company in any capacity." 2013 WL 4482520, at *4. Because FDIC steps into the shoes of a failed financial institution, the court held that if the policy barred coverage for suit by the bank, it would likewise bar coverage for suit by FDIC. *Id.* at *4-5. The court appropriately focused on the language of the exclusion rather than on a supposed majority or minority rule. *Id.* at *5 (citing *Davis*, 2013 WL 1223696, at *8-9).[14]

The Court concludes as a matter of law that the policy is not ambiguous, and must therefore be enforced as written.

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[14] Other courts agree that claims by FDIC or other financial regulatory entities are barred by "insured v. insured" exclusions in various D&O policies. *See Hyde v. Fid. & Dep. Co. of Md.*, 23 F. Supp. 2d 630, 633-34 (D. Md. 1998) (RTC claims brought as bank receiver against directors and officers barred by exclusion because RTC stands in bank's shoes); *Gary v. Am. Cas. Co. of Reading, Pa.*, 753 F. Supp. 1547, 1554-55 (W.D. Okla. 1990) (FDIC claims against bank directors barred by exclusion because FDIC seeks recovery for injury to bank); *see also Powell v. Am. Cas. Co. of Reading, Pa.*, 772 F. Supp. 1188, 1191 (W.D. Okla. 1991) (FDIC claim barred by exclusion); *Mt. Hawley Ins. Co. v. FSLIC*, 695 F. Supp. 469, 481-83 (C.D. Cal. 1987) (exclusion bars FSLIC claim against directors and officers); *Am. Cas. Co. of Reading, PA v. FDIC*, 677 F. Supp. 600, 604 (N.D. Iowa 1987) (exclusion not ambiguous).

The Court is aware of contrary authority. *See Memorandum In Support Of The Federal Deposit Insurance Corporation As Receiver Of The Columbian Bank And Trust Company's Motion For Summary Judgment And In Opposition To Plaintiff's Motion For Summary Judgment* (Doc. #152-1) at 70-71 (listing cases). As already noted, however, the determining factor for most of those decisions was the absence of policy language which specifically stated that the exclusion applied to successors, trustees, assignees or receivers. Such cases are therefore inapposite.

D. Conclusion

In summary, the Court holds that the "insured v. insured" provision is not ambiguous, it is not negated by the regulatory exclusion endorsement and it bars coverage of the FDIC claims in the underlying D&O action.[15]

II. Other Arguments

FDIC raises an independent argument in favor of coverage, asserting that in the 2008 declaratory judgment action that Columbian Financial Corporation and Carl McCaffree brought against BancInsure, BancInsure admitted that the Policy applies to the claims in the underlying D&O action. *Columbian Fin. Corp. v. BancInsure, Inc.*, Case No. 08-cv-2642-CM (D. Kan. filed Dec. 10, 2008) ("the *Columbian* case").[16] FDIC argues that this Court should effectuate the binding nature of the admission by declaring that

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[15] Because the Court concludes that the Policy language bars coverage for the FDIC claims in the underlying D&O action, it need not consider BancInsure's alternative theories that the individual defendants caused rescission of the Policy or a material breach such that BancInsure had the right to cancel the Policy.

[16] FDIC points to the following BancInsure answer to an interrogatory from Columbian Bank and Trust in the *Columbian* case: Interrogatory 4. Is coverage currently available under the Policy for any claims brought against Insured Persons by a deposit insurance organization acting as a receiver of Columbian Bank and Trust Company? Please state all facts and identify all documents which support your response.

RESPONSE: Yes, provided notice of a potential claim was provided to BancInsure within thirty (30) days following the end of the Policy Period. See answer to Interrogatory no. 3, above.

See Defendant's Responses To Plaintiffs' Opening Interrogatories (Doc. #152-6) at 3.

BancInsure must indemnify the individual defendants. In essence, FDIC claims that BancInsure must be estopped from denying coverage in this case. The Court rejects FDIC's argument.[17]

Judicial estoppel is an equitable doctrine that prohibits a party from deliberately changing positions to suit its needs. *Eastman v. Union Pac. R.R.*, 493 F.3d 1151, 1156 (10th Cir. 2007). Generally, courts consider the following three factors to determine whether judicial estoppel should apply: (1) whether the party's later position was clearly inconsistent with its earlier position; (2) whether the party succeeded in persuading a court to accept the party's earlier position so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that one of the courts was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party. *Johnson v. Lindon City Corp.*, 405 F.3d 1065, 1069 (10th Cir. 2005). These factors are neither exhaustive nor exclusive, as matters in equity require a court to consider all of the equities of a particular case. *See New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001). Finally, judicial estoppel should be applied narrowly and cautiously. *Hansen v. Harper Excavating, Inc.*, 641 F.3d 1216, 1227 (10th Cir. 2011).

Turning to the first factor, BancInsure's denial of liability in this case may appear superficially inconsistent with its interrogatory answer in the *Columbian* case. Because judicial estoppel is an

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[17] Moreover, the interpretation of an insurance policy is a question of law for the Court to decide. *AMCO Ins. Co. v. Beck*, 261 Kan. 266, 269, 929 P.2d 162, 165 (1996).

equitable doctrine, however, the Court considers the context of the interrogatory. The *Columbian* case contained no issue with respect to the underlying D&O action, the "insured v. insured" exclusion or the regulatory exclusion endorsement. It was a declaratory judgment action seeking a determination as to when coverage ended under a claims-made policy and whether Columbian had the right to purchase extended coverage after a receivership. FDIC was not a party to the case nor was its future claim involved.

Second, the interrogatory answer had no bearing on the resolution of the *Columbian* case and the district court in no way relied on the information in the interrogatory answer. The *Columbian* case was decided on summary judgment and vacated on appeal by the Tenth Circuit before either the underlying D&O action or the present case existed. The Tenth Circuit vacated the judgment because the parties stipulated that coverage existed for the Laborers Fund claim, thereby removing any case or controversy and concomitantly stripping the district court of jurisdiction. *See Columbian Fin. Corp. v. BancInsure, Inc.*, 650 F.3d 1372, 1373 (10th Cir. 2011) ("Only one claim had been made for which the Policy might provide coverage, and during the litigation BancInsure had stipulated that the Policy covered the claim.") (explaining lack of actual controversy and describing Laborers Fund claim).

Third, FDIC suffers no unfair detriment if BancInsure is allowed to deny coverage in this case. FDIC was not a party to the *Columbian* case and could not have relied to its detriment on BancInsure's interrogatory answer in that case. Neither does BancInsure obtain an unfair advantage, as the *Columbian* case (filed four years earlier) had nothing to do with the FDIC claims.[18] The interrogatory answer that BancInsure gave in 2009 in unrelated litigation with different parties will not stop BancInsure from denying coverage for the underlying D&O action or serve as an admission of the ultimate issue in this case.

Finally, FDIC argues that BancInsure has made other representations and statements that it would provide coverage for the underlying D&O action. This argument also fails; the Court interprets the Policy as a matter of law. When a policy is not ambiguous, as this one is not, the Court enforces it according to its terms and will not consider extraneous evidence. *See Mears v. Hartford Fire Ins. Co.*, 8 Kan. App. 2d 760, 762, 667 P.2d 902, 905 (1983).

IT IS THEREFORE ORDERED that *Plaintiff's Motion For Summary Judgment* (Doc. #127) filed May 6, 2013 be and hereby is SUSTAINED. Plaintiff is entitled to judgment on plaintiff's amended petition and against Carl McCaffree, Sam McCaffree and Jim Helvey on their first amended counterclaims. No claims remain in the case.

IT IS FURTHER ORDERED and the Court hereby declares that coverage for the FDIC claims in the underlying D&O action is excluded from the Policy**.**

IT IS FURTHER ORDERED that *Defendants Carl McCaffree's, Sam McCaffree's, And Jim Helvey's Motion For Summary Judgment* (Doc. #147) and *Motion For Summary Judgment Of Defendant Federal*

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[18] The Court is aware that BancInsure received from FDIC a letter dated August 28, 2008, which set forth potential claims against the directors and officers. This letter did not rise to the level of a claim, however, according to the quoted Tenth Circuit language in the text.

Deposit Insurance Corporation As Receiver Of The Columbian Bank And Trust Company (Doc. #151) both filed June 10, 2013 be and hereby are *OVERRULED*.

Dated this 27th day of February, 2014, at Kansas City, Kansas.

s/ Kathryn H. Vratil
KATHRYN H. VRATIL
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed November 6, 2015]

No. 14-3064

BANCINSURE, INC.,

Plaintiff Counter Defendant-Appellee,

KANSAS INSURANCE GUARANTY ASSOCIATION,

Intervenor-Appellee,

v.

CARL L. MCCAFFREE, former director and officer of The Columbian Bank and Trust Company, et al,

Defendants Counterclaimants-Appellants,

and

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver of The Columbian Bank and Trust Company,

Defendant.

ORDER

Before KELLY, HOLMES, and McHUGH, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk