UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 11-02078-RGK (JCGx)	Date	November 30, 2011
Title	**XL SPECIALTY INSURANCE CO. et al. v. PERRY et al.**		

Present: The Honorable	R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE	
Sharon L. Williams	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (IN CHAMBERS) Order Re: FDIC's Motion to Intervene (DE 168)

I. INTRODUCTION

On March 10, 2011 four insurance companies (collectively "Side-A insurers") filed the present action against former Officers & Directors of IndyMac Bank, F.S.B. and/or its holding company IndyMac Bancorp, Inc (collectively "Insured Defendants"). In the present action the Side-A insurers seek declaratory relief that they will not be responsible for providing coverage on certain underlying actions against the Insured Defendants as those actions are exempted from coverage under the terms of the various insurance contracts. The Side-A insurers allege that the Insured Defendants already have sought coverage for the underlying actions. (Compl. ¶ 2.)

On July 20, 2011 and July 25, 2011, three different sets of counterclaims were filed by various groups of Insured Defendants against the Side-A insurers adding as counter-defendants four ABC insurers who also provide coverage for the Insured Defendants.

On August 25, 2011, the Court granted a Motion to Intervene by Certain Underwriters at Lloyd's London as the only remaining insurance provider for 2008-2009 policy year that was not yet part of the present action.

Presently before the Court is the October 20, 2011 Motion to Intervene by the Federal Deposit Insurance Company ("FDIC") as receiver for IndyMac Bank, F.S.B.

For the reasons discussed below, the Court **DENIES** the FDIC's Motion to Intervene.

II. FACTUAL BACKGROUND

The present action is one of many in this Court stemming from the bankruptcy filing of IndyMac Bancorp, Inc.

In July 2008 the Office of Thrift Supervision seized IndyMac Bank, F.S.B. ("IndyMac") and appointed the FDIC as receiver to manage IndyMac's assets and secured liabilities. Shortly thereafter IndyMac Bancorp the holding company for IndyMac, of which IndyMac was its only asset, filed for bankruptcy in the United States Bankruptcy Court for the Central District of California.

The former Officers and Directors of both IndyMac and IndyMac Bancorp have subsequently been sued in several different state and district courts for various violations of corporate fiduciary duties and securities laws. These lawsuits are collectively referred to as "underlying actions." The FDIC stands as plaintiff in two of these underlying actions with the potential to recover against the Officers and Directors.

Prior to its fall, IndyMac and IndyMac Bancorp had obtained substantial insurance coverage for the Officers and Directors and the Cank itself. The insurance coverage is broken up into two different policy periods, 2007-2008 ("Tower 1") and 2008-2009 ("Tower 2"). Within each policy period there are eight different layers of coverage, with each provider covering $10 million in claims, for a total of $80 million of coverage in each policy year.

The first four providers in each tower provide ABC coverage for the following losses: (1) losses resulting from claims against directors and officers of Bancorp for individual acts, also known as "Side-A" coverage; (2) losses resulting from Bancorp's indemnification of its directors and officers, also known as "Side-B" coverage; and (3) losses sustained by Bancorp and its subsidiaries as a result of securities law violations, also known as "Side-C" coverage. The second four providers in each tower provide Side-A coverage only.

The Tower 2 policies contain a clause specifically exempting certain types of litigation from coverage under the policies. The Tower 2 Side-A insurers brought the present declaratory relief action against the Insured Defendants seeking a judgment that the underlying actions are within this exemption and that they will not be required to provide coverage on those actions. The Insured Defendants subsequently counterclaimed adding as counter-defendants the ABC insurers from Tower 2.

III. JUDICIAL STANDARD

Intervention is governed by Federal Rule of Civil Procedure ("Rule") 24, which permits two types of intervention: intervention of right and permissive intervention. Fed. R. Civ. P. 24(a), (b).

Intervention of right is governed by Rule 24(a), which states:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the . . . subject of the action and the . . . disposition of the action may . . . impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a). The Ninth Circuit has outlined four requirements for intervention of right under Rule 24(a)(2).

> An applicant seeking intervention as of right must show that: (1) it has a "significant protectable interest" relating to the property or transaction that is the subject of the action; (2) the disposition

> of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest.

Donnelly v. Glickman, 159 F.3d 405, 409 (9th Cir. 1998); *accord Canatella v. State of California*, 404 F.3d 1106, 1112 (9th Cir. 2005). Rule 24(a)(2) intervention is to be liberally construed in favor of intervention. *Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003) (*citing Donnelly*, 159 F.3d at 409).

Permissive intervention is governed by Rule 24(b), which states:

> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(b). The Ninth Circuit outlines three requirements for permissive intervention under Rule 24(b)(2). The applicant for intervention must show:

> (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common.

Northwest Forest Res. Council v. Glickman, 82 F.3d 825, 839 (9th Cir. 1996). These are just threshold requirements after which a court has discretion to deny permissive intervention. *Donnelly*, 159 F.3d at 412.

IV. DISCUSSION

The FDIC has moved to intervene as a matter or right or alternatively under permissive intervention. The threshold question for both types of intervention is whether the motion is timely. Therefore the Court will discuss timeliness first and then turn to the remaining requirements of both mandatory and permissive intervention.

A. Timeliness

The timeliness of a motion to intervene is evaluated under a three factor test. Court consider "1) the stage of the proceeding at which an applicant seeks to intervene; 2) the prejudice to other parties; and 3) the reason for and length of the delay." *U.S. v. Washington*, 86 F.3d 1499, 1503 (9th Cir. 1996) (quoting *United States ex rel. McGough v. Covington Technologies Co.*, 967 F.2d 1391, 1394 (9th Cir. 1992)). The extent of any delay on behalf of the proposed intervenor "is measured by when the proposed intervenor should have been aware that its interests would no longer be protected adequately by the parties, not the date it learned of the litigation." *Washington*, 86 F.3d at 1503.

These factors tend to indicate that the FDIC's motion is timely filed. The litigation is currently at its early stages. The scheduling conference was held on October 24, 2011 and the present Motion was filed on October 20, 2011. Trial is set for July 2012. Prejudice to the remaining parties from the intervention will be minimal; a partially dispositive motion was filed on November 23, 2011 but the FDIC states in its moving papers that it will be able to comply with all previously set court dates and schedules. Lastly, the FDIC filed the present motion within two months of the dismissal of another similar action brought by IndyMac Bank, for whom FDIC is the receiver. The dismissal of that action prompted the FDIC to seek relief in this action. Therefore, the FDIC acted quickly upon dismissal of the

other action.

Based on the three factors used to evaluate the timeliness of a motion to intervene, the Court finds that the FDIC's motion was timely filed.

B. <u>Intervention as a Matter of Right</u>

Because the FDIC's motion was timely filed, there are three remaining elements that must be met in order for the FDIC to be granted intervention as a matter of right. The FDIC must demonstrate that it has a significant protected interest in the subject matter of the suit, that the present suit may impair or impede its interests, and that the existing parties may not adequately protect its interests. *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004).

The first part of the test, the existence of a significant protected interest, has two parts; the proposed intervenor must have an actual interest protected by law and that interest must be related to the subject matter of the present suit. *Id.* The FDIC cannot meet this element as it fails to establish a legally protected interest and its proposed interest does not relate to the underlying subject matter of the present suit.

The FDIC moves to intervene on the grounds that it is a plaintiff against the Insured Defendants in two of the underlying actions that form the basis for the present action. The FDIC argues that because it stands to recover in either or both of these actions it has an interest in making sure that the insurance coverage issues are properly resolved such that it may be able to recover any eventual judgment out of these insurance proceeds. However, the FDIC has not identified any legally protected interest. The underlying actions are still ongoing. The FDIC has not obtained a judgment against the Insured Defendants and may never do so. It has no judgment that it seeks to be able to enforce, but rather the hope of an eventual judgment. As such, the FDIC has no legally protected interest in the present action.

Even if the FDIC did have a legally protected interest in being able to recover a possible future judgment, that interest is not related to the subject matter of the present suit. The underlying actions in which the FDIC is a plaintiff refer to possible breaches of corporate fiduciary duties by the Insured Defendants. The outcome of those lawsuits will turn on the existence of any legal wrongdoing by the Insured Defendants. The present suit involves the interpretation of insurance contracts. Both lawsuits involve different legal issues and are therefore not related for the purposes of mandatory intervention. *See e.g.*, *Alisal Water Corp.*, 370 F.3d at 920; *Greene v. United States*, 996 F.2d 973, 976-77 (9th Cir. 1993).

Because the FDIC does not have a "significant protectable interest relating to the property or transaction that is the subject of the action" it is unnecessary for the Court to evaluate whether the present suit may impair or impede that interest or whether the present parties may adequately protect the FDIC's interests.

The FDIC's Motion to Intervene as a matter of right is therefore **denied.**

C. <u>Permissive Intervention</u>

A timely motion for permissive intervention requires a showing of two elements. The proposed intervenor must have an independent grounds for jurisdiction and present common questions or law or fact to the main action. *United States v. City of Los Angeles*, 288 F.3d 391, 403 (9th Cir. 2002).

The FDIC's motion for permissive intervention fails because it does not present common questions or law or fact to the main action. As described above, the current action involves

interpretation of insurance contracts, whereas the undelying actions (and the FDIC's interest in the current action) involve potential breaches of corporate fiduciary law. *See City of Los Angeles*, 288 F.3d at 403-04; *Greene*, 996 F.2d at 978.

Although the FDIC's motion for permissive intervention could be denied on the above grounds alone, the Court also has concerns that the FDIC may not be able to present an independent grounds for jurisdiction. Specifically, because the FDIC has not yet obtained a judgment against the Insured Defendants and does not yet have an interest that it needs to protect, it would appear that the FDIC's claims are not yet ripe for adjudication and that it would not have standing as a permissive intervenor.

The FDIC's Motion for Permissive Intervention is therefore **denied.**

V. <u>CONCLUSION</u>

In light of the foregoing, the Court **DENIES** the FDIC's Motion for Intervention.

IT IS SO ORDERED.

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