10-2239-cv

United States Court of Appeals
for the
Second Circuit

ASSOCIATED COMMUNITY BANCORP, INC., CONNECTICUT COMMUNITY BANK N.A., WESTPORT NATIONAL BANK, DENNIS D. CLARK,
Plaintiffs-Appellants,

v.

THE TRAVELERS COMPANIES, INC., ST. PAUL MERCURY INS. CO.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT (NO. 3:09-CV-013570JCH)
(HONORABLE JANET C. HALL, JUDGE)

BRIEF OF APPELLEES
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CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee St. Paul Mercury Insurance Company is wholly owned by St. Paul Fire & Marine Insurance Company, which is wholly owned by Defendant-Appellee The Travelers Companies, Inc. ("Travelers"). Travelers is the only publicly held company in the corporate family. No publicly held company owns ten percent or more of the stock of Travelers.

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PRELIMINARY STATEMENT

This case arises out of an insurance dispute between Appellants Associated Community Bancorp ("ACB"), Connecticut Community Bank, N.A. ("CCB"), Westport National Bank ("Westport"), and Dennis P. Clark (collectively, the "Bank"), and Appellees St. Paul Mercury Insurance Company and The Travelers Companies, Inc. (collectively "St. Paul").[1] Westport accepted funds from investors and transferred those funds to the now-bankrupt Bernard L. Madoff Investment Securities, LLC. ("BLMIS"). The investors allegedly directed Westport to give Madoff "'full discretionary authority' to invest their funds," allege that they lost money when BLMIS failed, and have sued the Bank for their losses. Special Appendix ("SA") 490. The Bank has sued St. Paul, alleging that the investors' claims are covered under a policy St. Paul issued (the "Policy") and that St. Paul has an obligation to pay defense costs and other amounts. SA-7-8.

The Bank's suit is without merit because the Policy contains two exclusions that clearly bar coverage for the investors' claims against the Bank. Therefore, the district court correctly determined that St. Paul had no duty to advance defense costs or indemnify the Bank and properly dismissed the Bank's suit against St. Paul.

The Policy provides coverage for two distinct and separate categories of

[1] Travelers is the holding company for St. Paul, which is the actual issuer of the subject insurance policy. *See supra ii.*

losses: (1) losses arising from errors in rendering banking services to customers ("Professional Services Coverage") and (2) losses arising from breach of an employee's duties to the Bank or its shareholders ("Management Liability Coverage"). The Professional Services Coverage was not intended to insure against losses associated with funds the Bank transferred to other firms that become bankrupt; accordingly, the Policy broadly excludes from coverage all claims "arising out of . . . the insolvency, . . . bankruptcy, or liquidation of, or financial inability to pay . . . by, any . . . investment company, investment bank, or any broker or dealer in securities or commodities . . . " (the "Insolvency Exclusion"). Joint Appendix ("JA") 146. As the district court properly determined, this exclusion plainly applies to losses arising out of the Bank's transfer of investors' funds to the failed BLMIS.

In turn, the Policy's Management Liability Coverage was not intended to apply to customer claims; therefore, the Policy broadly excludes from the scope of Management Liability Coverage claims "arising out of, or attributable to the rendering, or failure to render, any service to a customer of the Company" (the "Customer Services Exclusion"). JA-138. Accordingly, the district court correctly determined the Bank could not invoke Management Liability Coverage to recover losses arising from the investors' claims.

Faced with these insurmountable obstacles, the Bank resorts to an exception

(the "carveback") to the Insolvency Exclusion to attempt to create coverage. The Bank, however, never briefed or developed its carveback argument below. Its sole reference to the carveback was in passing as an afterthought at oral argument. JA-644. The Bank also ignored it in subsequent briefing and therefore abandoned it in the district court. In any event, the Bank's carveback argument is legally unsound because the carveback language does not apply to funds transferred to investment firms such as BLMIS for investment in the securities of other entities.

Because the district court properly held that the Insolvency and Customer Service Exclusions apply, it also correctly ruled that St. Paul has no obligation to advance defense costs. As the district court stated, "there is no duty to defend a case for which, as a matter of law, there is no coverage." SA-10. Moreover, because the exclusions preclude coverage, dismissal of the claim for indemnity was also proper.

Finally, the Bank's request for certification to the Connecticut Supreme Court is without merit. This request for a "second bite at the apple" betrays a basic misunderstanding of the criteria for requesting certification. Certification is appropriate only when existing state law is so uncertain that this Court can make *no reasonable prediction* as to how the Connecticut Supreme Court would resolve the relevant question. Where, as here, the district court's decision rests solidly on settled Connecticut precedent, certification is unwarranted.

STATEMENT OF ISSUES

1. Whether the district court correctly held that the Insolvency Exclusion bars any potential Professional Services Coverage under the Policy for the investors' claims against the Bank?

2. Whether the district court correctly held that the Customer Services Exclusion bars any potential Management Liability Coverage under the Policy for the investors' claims against the Bank?

3. Whether the district court correctly held that St. Paul has no obligation to advance the Bank's defense costs as a matter of law?

4. Whether the district court correctly held that St. Paul has no duty to indemnify the Bank as a matter of law?

5. Whether questions regarding the interpretation of the Insolvency Exclusion and the Customer Services Exclusion should be certified to the Connecticut Supreme Court?

STATEMENT OF THE CASE

The Bank was a named defendant in lawsuits by investors seeking to recover their lost investments following the Bank's transfer of their funds to BLMIS. The Bank sued St. Paul, alleging breach of contract for failure to provide coverage for these claims/lawsuits under the Policy, JA-85, and seeks declaratory judgments as to its alleged entitlement to defense costs and indemnity under the Policy. JA-86-

88. St. Paul filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), which the district court granted. SA-30. The Bank filed a motion to reopen in order to amend the complaint, which the district court denied. JA-551-52. This appeal followed.

STATEMENT OF FACTS

I. The Investors' Claims Against the Bank

In several lawsuits, various investors allege they retained Westport to serve as a custodian for accounts established for them with BLMIS. JA-79-81, 170, 173-74, 178-83, 205-06, 214-21, 252-54, 266-67, 271-79. The investors assert that Westport established and managed custodial accounts on their behalf. JA-79-81, 173-74, 178-83, 214-21, 252-54, 271-79. They also allege that Westport opened "omnibus" accounts with BLMIS to receive all funds deposited into the custodial accounts. *Id*.

According to the investors, Westport received the customers' funds with directions to transfer them to the omnibus accounts at BLMIS. *Id.* Consistent with these instructions, Westport transferred funds to BLMIS, and BLMIS had full discretionary authority to invest the funds. JA-79-82, 178-83, 214-21, 252-54, 271-79. A broker-dealer firm associated with BLMIS thereafter purportedly used the funds to make securities transactions. JA-170, 178, 254-56, 272-75. From time to time, Westport received funds withdrawn from the omnibus accounts at

BLMIS and deposited those funds into the investors' custodial accounts based on instructions from the investors' investment adviser, PSCC Services, Inc. ("PSCC"). The funds were subsequently distributed to the investors.

The investors contend that they received an allocation of shares in the omnibus accounts, and that Westport tracked the value of each investor's shares and issued periodic statements regarding the omnibus accounts and the value of these shares. JA-178-83, 214-21, 271-79. Westport also performed certain tax reporting functions. JA-79-81. No funds or securities were actually held in the custodial accounts, which simply served as conduits for transfers to and from the omnibus accounts at BLMIS. JA-191, 205-06. BLMIS provided Westport and PSCC with confirmations of all purported securities transactions and account statements. JA-182, 213-221, 271-79. The investors paid Westport fees for its custodial services. *Id.*

The investors allege that BLMIS misappropriated their funds. JA-79-81, 177-78, 220-21, 254, 271-79. They further allege that, although they demanded that Westport return their funds, their accounts "held no assets and were worthless." JA-170, 205-06, 254, 279. Both BLMIS and its principal, Bernie Madoff, are the subject of chapter 7 bankruptcy proceedings, with trustees appointed to oversee the liquidation of their bankruptcy estates. JA-303-10, 312-17. Because of BLMIS's insolvency, the Securities Investor Protection

Corporation (the "SIPC") has recognized that the investors are in need of protection under the Securities Investor Protection Act of 1970, as amended, 15 U.S.C. § 78aaa, *et seq.* JA-303-10, 312-17.[2] Westport received a notice "from the SIPC Trustee setting forth the requirements for filing claims with the Bankruptcy Court, together with a customer claim form and related instructions." JA-184.

The investors' claims against the Bank fall into three categories with the following allegations:

> (1) Although Westport was paid significant annual fees to act as the custodian for the investment accounts, Westport never actually maintained possession of any securities BLMIS had purportedly purchased on the investors' behalf. Instead, Westport permitted BLMIS to hold the securities and forwarded to investors statements reflecting BLMIS's supposed purchase and sale of securities on their behalf. The investors contend that if Westport had properly performed its custodial duties and taken possession of the securities BLMIS had supposedly purchased on their behalf, Madoff could not have hidden his Ponzi scheme and could not have misappropriated their funds. JA-178, 184, 191, 193, 205-06, 218-20, 253-54, 257, 266-67, 276-78.
>
> (2) In providing periodic statements to the investors showing acceptable investment performance, Westport lulled the investors into believing their funds were actually invested in performing securities. JA-171, 181-82, 187, 198, 218-20, 252, 255, 277-78.
>
> (3) Westport improperly received excessive custodial fees from the investors' accounts, particularly since Westport did not actually have possession of any securities. The investors complain

[2] The SIPC is designed to provide assurance to investors who suffer financial loss due to their stockbrokers' bankruptcy – the intent of Congress being to protect customers of financially distressed securities dealers. *See SEC v. Aberdeen Sec. Co.*, 526 F.2d 603, 605 (3d Cir. 1975).

> that the excessive fees created a conflict of interest that deterred Westport from diligently protecting their interests against Madoff's misappropriation of their investments. JA-171-72, 180-81, 187, 198-99, 216, 218-20, 223, 225, 253, 256, 274-75, 277-78, 280. Some of the investors also contend that Westport made misrepresentations in its reports to investors "as a deceptive basis for charging [the investors] unjustified fees." JA-219-20, 224-25, 278, 281.

The investors allege various causes of action against the Bank (negligence, breach of contract, theft, fraud, violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962, *et seq*., violations of the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. §42-110a, *et seq.*, aiding and abetting conversion, violations of 15 U.S.C. § 78 and Rule 10b-5 promulgated under the Securities and Exchange Act, violations of Florida Securities Statutes §§ 517.07, 517.12(1), and 517.301, statutory theft, unjust enrichment, money had and received, imposition of a constructive trust, and breach of fiduciary duty). JA-79-82, 189-200, 223-28, 255-61, 279-84. The investors, *inter alia*, seek return of (1) their lost investments and (2) fees paid to Westport. JA-198-200, 224-27, 299-300.

II. The Policy

The Policy applies to claims made between June 1, 2008 and June 1, 2009. JA-163. Appellants are insureds under the Policy. JA-161. Their directors, officers, and employees, such as Appellant Clark, are also insureds under the Policy. JA-106-07.

The Policy does not require that St. Paul defend the Bank against covered claims. The Bank retains the duty to defend, but may seek advancement of defense costs for covered claims. JA-115-16, 163-64. Advancement of defense costs reduces the Policy's liability limits. JA-113.

The Policy contains four separate insuring agreements applicable to (1) Management Liability Coverage, (2) employment practices liability coverage, (3) fiduciary liability coverage, and (4) bankers professional liability coverage (including lender liability coverage and Professional Services Coverage). JA-162. The Bank seeks coverage for losses under the Professional Services Coverage and Management Liability Coverage portions of the Policy.

A. Professional Services Coverage

Professional Services Coverage is intended to insure professionals (such as bankers) against liability arising out of mistakes inherent in the practice of the profession or business in which they are engaged (such as banking). The Policy's Professional Services Coverage has a $3 million limit for each Policy year and applies generally to claims involving services the Bank performs for its banking customers. JA-110, 144, 162.

The Professional Services Coverage is subject to the Insolvency Exclusion, which expressly bars coverage "for Loss [including Defense Costs][3] on account of any Claim made against the Insureds":

> 3. based upon, arising out of or attributable to the insolvency, conservatorship, receivership, bankruptcy, or liquidation of, or financial inability to pay, or suspension of payment by, any bank or banking firm, investment company, investment bank, or any broker or dealer in securities or commodities, any insurance or reinsurance entity, or other organizations of a similar nature (other than the Company); provided, that this exclusion shall not apply to the extent such Claim alleges a covered Professional Services Act solely in connection with an Insured's investment on behalf of a customer in the stock of any of the foregoing entities.

JA-145-46.[4] By its plain terms, the Insolvency Exclusion excludes coverage for losses associated with the insolvency of another firm to which the Bank transferred customer funds for investment. This makes sense. When a bank transfers a customer's funds to another firm to invest, there is no way for the bank's insurer to underwrite the risk of the investment company's or broker-dealer's financial failure and consequent inability to pay investors. That is precisely the type of risk for which the Bank seeks coverage – the Bank transferred funds to BLMIS, and

[3] The Policy's definition of "Loss" expressly includes defense costs. JA-108.

[4] Professional Services Coverage is also limited by exclusions barring coverage for claims arising out of fee disputes; representations regarding past performance of investment products; or conflicts of interest known by an insured at the time the Professional Services Act was committed. JA-146-47.

BLMIS, which was supposed to invest the funds, cannot repay the funds because it is insolvent.

B. Management Liability Coverage

Management Liability Coverage is intended to insure corporate managers with respect to claims they breached their duties to the corporation they manage, or to the corporation's shareholders. *See* ROWLAND H. LONG, THE LAW OF LIABILITY INSURANCE § 12A.01 (2004). The Management Liability Coverage has a $6 million limit for each Policy year. JA-162. This coverage applies to claims "for a Management Practices Act," defined to include "any error, misstatement, misleading statement, act, omission, neglect, or breach of duty actually or allegedly committed or attempted by any Insured . . . ." JA-108-09, 135. Consistent, however, with the notion that Management Liability Coverage is primarily intended to respond to claims that managers breached duties to their corporations or shareholders, Management Liability Coverage is subject to the Customer Services Exclusion that expressly provides that this Coverage does *not* extend to:

> . . . Loss [including Defense Costs] on account of any Claim made against the Company . . . based upon, arising out of, or attributable to the rendering of, or failure to render, any service to a customer of the Company. . .

JA-137-38, 155.

III. The Bank's Second Amended Complaint and Proposed Third Amended Complaint.

In its Second Amended Complaint (the operative complaint), the Bank claims it is entitled to coverage under the Policy for the investors' lawsuits. Count I asserts that St. Paul breached the Policy by declining to advance defense costs for the investors' claims. JA-85. Count II seeks a declaration that St. Paul has a duty to advance defense costs under the Policy. JA-88. Count III seeks a declaration that St. Paul must indemnify the Bank for "all judgments or settlements or other payments for resolution of the [investors'] claim[s]" in response to the investors' claims. JA-88.

IV. The District Court's Rulings

After the Bank twice amended its complaint, St. Paul moved to dismiss on several grounds, arguing that the Insolvency Exclusion precludes any potential Professional Services Coverage for the investors' claims, and the Customer Services Exclusion precludes any potential Management Liability Coverage for the investors' claims.[5] Following briefing and oral argument, the district court granted St. Paul's motion to dismiss. SA-30. Comparing the investors' allegations to the Policy's express terms, the district court concluded that the Insolvency Exclusion unambiguously bars any potential Professional Services Coverage for the

[5] Another basis for St. Paul's motion to dismiss, not reached by the district court, was that the fee exclusion and the representations of prior performance exclusion also bar Professional Services Coverage. JA-92.

investors' claims and that the Customer Services Exclusion precludes any potential Management Liability Coverage. SA-11-28. Accordingly, the district court ruled that St. Paul has no duty to advance defense costs or to indemnify the Bank for the investors' claims. SA-28.[6]

The Bank filed a motion to reopen and for leave to file a Third Amended Complaint. JA-515. After briefing, the district court denied the motion to reopen, holding that the Bank essentially repeated contentions the court had already rejected in granting the motion to dismiss. JA-551-60.

SUMMARY OF ARGUMENT

This Court should affirm the district court's orders granting St. Paul's motion to dismiss and denying the Bank's motion to reopen. First, the district court's holding that the Insolvency Exclusion bars coverage for the investors' claims is correct. The Bank argues that the Exclusion is ambiguous and should be construed in its favor, but the terms of the Insolvency Exclusion are clear and unambiguous. Under settled Connecticut law, language set forth in an exclusion to insurance coverage must be accorded its natural and ordinary meaning, and a court should not "torture words to import ambiguity" where there is none. *Isham v. Isham*, 972 A.2d 228, 236 (Conn. 2009); *see also Hansen v. Ohio Cas. Ins. Co.*, 687 A.2d 1262, 1264-65 (Conn. 1996); *Hermitage Ins. Co. v. Sportsmen's Athletic*

[6] The district court did not address St. Paul's other grounds for dismissal.

Club, 578 F. Supp. 2d 399, 403 (D. Conn. 2008).

Both the plain language of the Insolvency Exclusion and the relevant precedents compel the district court's holding. In Connecticut, the phrase "arising out of" found in the Insolvency Exclusion at issue is accorded a very broad meaning. *Hogle v. Hogle*, 356 A.2d 172, 174 (Conn. 1975); *see also Holy Trinity Church of God in Christ v. Aetna Cas. & Sur. Co.*, 571 A.2d 107, 112 n.5 (Conn. 1990). Moreover, under Connecticut law, proximate cause is not required for an exclusionary clause containing the words "arising out of" to apply. *Board of Educ. v. St. Paul Fire & Marine Ins. Co.*, 801 A.2d 752, 758-59 (Conn. 2002). Rather, a "minimal causal relationship," including "but-for" causation, is enough. *Town of Manchester v. Vermont Mut. Ins. Co.*, No. CV044004859, 2006 WL 164886, at *2 (Conn. Super. Ct. Jan. 3, 2006). And where, as here, the plain meaning of the exclusion "unambiguously includes the actual situation for which coverage is sought," a finding of ambiguity is inappropriate. *Coregis Ins. Co. v. Am. Health Found., Inc.*, 241 F.3d 123, 129 (2d Cir. 2001) (applying Connecticut law).

Accordingly, the district court properly held that the plain language of the Insolvency Exclusion bars coverage for the investors' claims because they clearly fall within the Connecticut Supreme Court's definition of "arising out of." SA-12, 22-24. Moreover, the district court's "but-for" causation analysis was also compelled by relevant precedent. SA-12-13.

To avoid this outcome, the Bank offers an argument it never briefed or developed below, but merely mentioned in passing at the hearing on St. Paul's motion to dismiss. The Bank argues that certain carveback language in the Insolvency Exclusion precludes application of the Exclusion here. First, this Court should not consider the carveback argument because the Bank failed to brief or develop it below. *See Halpert Enters., Inc. v. Harrison*, No. 07-1144, 2008 WL 4585466, at *3 & n.1 (2d Cir. Oct. 15, 2008); *United States v. Higgins*, 995 F.2d 1, 4 n.6 (1st Cir. 1993); JA-644. Second, a plain reading of the carveback demonstrates that it is not applicable. By its terms, the carveback applies "solely in connection with [the Bank's] investment . . . in the stock of" a "bank or banking firm, investment company, investment bank, or any broker or dealer in securities or commodities . . . or other organizations of a similar nature." JA-146. Here, the investors did not invest in the stock of BLMIS or in any BLMIS-related entity; nor did the Bank make any such stock investment on their behalf. Instead, the investors' funds were aggregated and transferred to BLMIS for further investment. Indeed, the investors consistently describe the relationships with BLMIS and BLMIS-related entities as involving the creation of investment *accounts* – not investments in the shares of those entities or any particular "organizations" or "companies." *E.g.*, JA-218.

Moreover, contrary to the Bank's assertions, the fact that insolvency

exclusions are sometimes found in insurance broker policies does not render the Insolvency Exclusion ambiguous here. *See, e.g.*, *Coregis*, 241 F.3d at 123. Where, as here, the Insolvency Exclusion is clear, the fact that it may be found in other contexts does not justify ignoring it. *See Isham*, 972 A.2d at 236; *Hammer v. Lumberman's Mut. Cas. Co.*, 573 A.2d 699, 707-08 (Conn. 1990); *accord St. Paul Fire & Marine Ins. Co. v. Cohen-Walker, Inc.*, 320 S.E.2d 385, 388 (Ga. App. 1984).

Nor is the Insolvency Exclusion rendered ambiguous merely because third-party claims for negligence are not expressly precluded from coverage, as the Bank urges. The Insolvency Exclusion is broad and applies to "any Claim," JA-145, including third-party claims of negligence. *See, e.g.*, *New London County Mut. Ins. v. Riddick*, No. CV030177973S, 2004 WL 2284207, at *5 (Conn. Super. Ct. Sept. 16, 2004); *Mount Vernon Fire Ins. v. Morris*, No. CV020173643S, 2004 WL 1730133, at *6, 9-10 (Conn. Super. Ct. July 1, 2004), *aff'd*, 877 A.2d 910 (Conn. App. 2005). The language of the Insolvency Exclusion is unambiguous, and under Connecticut law, the district court correctly gave it its full effect. *Isham*, 972 A.2d at 236; *State Farm Fire & Cas. Ins. Co. v. Sayles*, 289 F.3d 181, 185-86 (2d Cir. 2002).

The district court likewise correctly held that the Customer Services Exclusion bars Management Liability Coverage of the investors' claims against the

Bank. The investors are former bank customers, complaining about services that were or should have been rendered to them by the Bank, bringing their claims well within the Customer Services Exclusion. *See, e.g., MDL Capital Mgmt., Inc. v. Fed. Ins. Co.*, 274 F.App'x 169, 173-74 (3d Cir. 2008).

The district court also correctly applied Connecticut law in concluding that St. Paul has no obligation to advance defense costs based on the application of the Insolvency Exclusion and the Customer Services Exclusion. As the district court stated, "there is no duty to defend a case for which, as a matter of law, there is no coverage." SA-10. Moreover, as the Bank concedes in its brief, Bank Br. at 43, if this Court agrees, as it should, that the Exclusions bar coverage, it must conclude that dismissal of the Bank's claim for indemnity was also proper.

Finally, the Bank's contention that this Court should certify questions to the Connecticut Supreme Court is without merit. The Bank essentially requests that, if this Court is inclined to rule against it, the entire matter should be sent off to the state tribunal. That is not a valid basis for certification. To be a viable candidate for certification, existing state law would have to be "so uncertain" that this Court could "make no reasonable prediction as to how [the Connecticut Supreme Court] would resolve the question." *Rivkin v. Century 21 Teran Realty LLC*, 494 F.3d 99, 106 (2d Cir. 2007) (internal quotations omitted). The district court's decision is based upon well established Connecticut precedent relating to insurance contract

construction. Such routine questions of law are not properly certifiable.

ARGUMENT

I. The Proper Standard of Review is *De Novo*

This Court reviews *de novo* the district court's dismissal for failure to state a claim under Rule 12(b)(6). *Kuck v. Danaher*, 600 F.3d 159, 162 (2d Cir. 2010). To survive a motion to dismiss, a complaint must contain sufficient factual allegations, accepted as true, to "state a claim to relief that is plausible on its face." *Id.* (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007))). The Supreme Court has held that "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal*, 129 S. Ct. at 1949 (citations omitted).

Moreover, this Court reviews *de novo* "questions as to the ambiguity and meaning of the language of [an insurance] contract." *State Farm Fire & Cas. Ins. Co. v. Sayles*, 289 F.3d 181, 185-86 (2d Cir. 2002); *see also Board of Educ. v. St. Paul Fire & Marine Ins. Co.*, 801 A.2d 752, 754 (Conn. 2002) ("[C]onstruction of a contract of insurance presents a question of law for the court which this court reviews *de novo*.") (internal quotation marks and citation omitted) (quoting *Hansen v. Ohio Cas. Ins. Co.*, 687 A.2d 1262, 1265 (Conn. 1996)).

II. The District Court Correctly Held that the Insolvency Exclusion Bars Coverage Under the Professional Services Coverage Provision.

A. The District Court Properly Applied Connecticut Rules of Construction.

Under Connecticut law, an insurance contract must be viewed in its entirety. *QSP, Inc. v. Aetna Cas. & Surety Co.*, 773 A.2d 906, 913-14 (Conn. 2001). Further, where the terms of the policy are unambiguous, "the policy language must be given its natural and ordinary meaning." *State Farm Fire & Cas. Ins. Co. v. Sayles*, 289 F.3d 181, 185 (2d Cir. 2002). Under settled Connecticut precedent, this Court should interpret the Policy "by the same general rules that govern the construction of any written contract and enforce[] [it] in accordance with the real intent of the parties as expressed in the language employed in the policy." *Hansen v. Ohio Cas. Ins. Co.*, 687 A.2d 1262, 1264 (Conn. 1996). Only when the terms of a policy are, in fact, ambiguous – that is, susceptible to more than one reasonable interpretation – may a court construe an ambiguous provision against the insurer as the drafter of the policy. *Id.* at 1264-65; *Hammer v. Lumberman's Mut. Cas. Co.*, 573 A.2d 699, 707-08 (Conn. 1990) ("A court cannot rewrite the policy. . . . [T]he liability of the insurer is not to be extended beyond the express terms of the contract."); *see also Sayles*, 289 F.3d at 185; *St. Paul Fire & Marine Ins. Co. v. Cohen-Walker, Inc.*, 320 S.E.2d 385, 388 (Ga. App. 1984). Moreover, "[a] court will not torture words to import ambiguity where the ordinary meaning leaves no

room for ambiguity . . . ." *Isham v. Isham*, 972 A.2d 228, 236 (Conn. 2009). Simply because parties "advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous." *Stephan v. Pa. Gen. Ins. Co.*, 621 A.2d 258, 261 (Conn. 1993).

The same rules apply to insurance contract exclusions. The Connecticut Supreme Court has held that "[a]s with the body of an insurance contract, the words comprising a contract exclusion must be accorded their natural and ordinary meaning." *Hermitage Ins. Co. v. Sportsmen's Athletic Club*, 578 F. Supp. 2d 399, 404 (D. Conn. 2008) (citing *Kelly v. Figueiredo*, 610 A.2d 1296, 1298 (Conn. 1992) ("[C]ourts cannot indulge in a forced construction ignoring provisions or so distorting them as to accord a meaning other than that evidently intended by the parties.")).

B. The Plain Language of the Insolvency Exclusion Bars Coverage for the Investors' Claims.

As discussed above, the purpose of professional liability coverage is to insure a member of a profession against liability arising out of mistakes inherent in the practice of that profession. To that end, the Policy provides:

> [T]he Insurer shall pay on behalf of the Insureds Loss for which the Insureds become legally obligated to pay on account of any Claim first made against them . . . during the Policy Period . . . for a Professional Services Act taking place before or during the Policy Period.

JA-144.[7] This, of course, is not the end of the inquiry. The Policy also contains the Insolvency Exclusion.

The Insolvency Exclusion's general purpose is evident from its terms: to exclude from coverage claims that occur when, for example, an investment company or a broker-dealer is financially unable to pay money owed to investors. To this end, the Insolvency Exclusion expressly provides:

> [t]he Insurer shall not be liable under the Professional Services Liability Coverage for Loss on account of any Claim made against the Insureds . . . based upon, arising out of or attributable to the insolvency, conservatorship, receivership, bankruptcy, or liquidation of, or financial inability to pay, or suspension of payment by, any bank or banking firm, investment company, investment bank, or any broker or dealer in securities or commodities . . . or other organizations of a similar nature (other than the Company) . . . ."

JA-145-46.

The district court correctly concluded that the plain language of the Insolvency Exclusion precludes coverage for the investors' claims. JA-496. As the district court reasoned, it is obvious that the investors' claims "arise out of" the insolvency of BLMIS because, but for the insolvency, the investors would not have suffered the damages they seek to recover in their claims against the Bank. Critically, this is not a case where the Bank negligently misplaced investors'

[7] A "Professional Services Act" is "any error, misstatement, misleading statement, act, omission, neglect, or breach of duty actually or allegedly committed or attempted by any Insured in the rendering or failure to render Professional Services." JA-110.

money, or, contrary to the investors' instructions, negligently transferred it to a party other than BLMIS. Rather, this is a case where, following the investors' instructions, the Bank transferred the money to BLMIS for *BLMIS* to invest. The Insolvency Exclusion makes explicit what should be self-evident: in providing insurance to the Bank for its errors, St. Paul did not insure the investors' return from BLMIS; likewise, it did not insure the expenses of litigation arising when investors discover losses upon learning of an investment company's or broker-dealer's insolvency or inability to pay. The exclusion is intentionally broad and categorical.

Under Connecticut law, the phrase "arising out of" in an exclusionary clause in an insurance policy is interpreted broadly. For example, in *Hogle v. Hogle*, a case discussing an exclusionary clause in a homeowner's policy, the Connecticut Supreme Court held that the phrase "arise out of" includes "'was connected with,' 'had its origins in,' 'grew out of,' 'flowed from,' and 'was incident to.'" 356 A.2d 172, 174 (Conn. 1975); *see also Holy Trinity Church of God in Christ v. Aetna Cas. & Sur. Co.*, 571 A.2d 107, 112 n.5 (Conn. 1990); *Town of Manchester v. Vermont Mut. Ins. Co.*, No. CV044004859, 2006 WL 164886, at *2 (Conn. Super. Ct. Jan. 3, 2006) ("Thus, the term 'arising out of' in Connecticut law is to be given a very broad interpretation.") (citing *QSP, Inc. v. Aetna Cas. & Surety Co.*, 773 A.2d 906, 926 (Conn. 2001)); *Hermitage Ins. Co. v. Sportsmen's Athletic Club*,

578 F. Supp. 2d 399, 404 (D. Conn. 2008) ("The term 'arising out of' is construed broadly under Connecticut law.").

Moreover, the phrase "arising out of," "when properly understood under Connecticut law, is not ambiguous." *Manchester*, 2006 WL 164886, at *3 n.2. Further, in Connecticut, "it need not be shown that the incident in question was proximately caused" for the exclusion to apply. *Board of Educ. v. St. Paul Fire & Marine Ins. Co.*, 801 A.2d 752, 758-59 (Conn. 2002). A "minimal causal relationship," such as "but-for" causation, is sufficient. *Manchester*, 2006 WL 164886, at *3.

C. The District Court's Decision Conforms to the Holdings of This and Other Courts in Insolvency Exclusion Cases.

Prior to the Connecticut Supreme Court's decision in *Board of Education*, this Court, applying Connecticut law, interpreted and enforced an insolvency exclusion in a corporate liability policy. *See Coregis Ins. Co. v. Am. Health Found., Inc.*, 241 F.3d 123 (2d Cir. 2001). In that case, Coregis disclaimed coverage in accordance with the terms of an insolvency exclusion, which applied to any claim "[a]rising out of, based upon or related to . . . the insolvency of the company named in the Declarations." *Id.* at 126. Analyzing the "related to" language in the exclusion (rather than the "arising out of" phrase), *id.* at 128-29, this Court held that a finding of ambiguity was not appropriate, "even assuming that a broad term might be ambiguous with respect to its application to a

hypothetical set of facts where, as here, *the plain meaning of the phrase unambiguously includes the actual situation for which coverage is sought*," *id.* at 129 (emphasis added).[8] Likewise, in this case, the breadth of the Insolvency Exclusion does not render it ambiguous. On the contrary, its breadth simply establishes with clarity that the investors' claims are excluded.

Nor does it matter that the Bank's alleged wrongdoing occurred prior to the discovery of BLMIS's insolvency. Addressing cases in which insurance brokers sought coverage under "errors and omissions" policies for claims involving the wrongful placement of a customer's insurance with an insurer that subsequently became insolvent, this Court noted that "most courts have held that insolvency exclusions in such policies apply *despite the fact that liability for such claims is premised on mistakes made prior to the insolvency by persons independent of the insolvent entity*." *Id.* at 130-31 (emphasis added). In conducting its analysis, the Court quoted the following language: "The claim that [the broker] intentionally failed to inform its insured of the insolvency of [the insurance company] by its very wording is related to the insolvency of the insurance company, as without the insolvency of [the insurance company], there would be no claim." *Id.* at 131

[8] In discussing the meaning of "arising out of," the Court, in dicta, did not reference all of the broad associations *later* assigned to that term by the Connecticut Supreme Court in *Board of Education*. *See* 241 F.3d at 128. As noted, the Connecticut Supreme Court's decision in *Board of Education* illustrates the breadth of the phrase as a definitive explication of Connecticut law.

(quoting *Barron v. Scaife*, 535 So.2d 830, 832-33 (La. Ct. App. 1988)). Indeed, as here, the "[l]awsuits [in *Coregis*] [we]re related to the Companies' financial failure by the very wording of the complaints, which explicitly refer to, discuss, and seek redress for that failure." *Coregis*, 241 F.3d at 131; *see e.g.*, JA-170 ("BLMIS had liabilities of approximately $50 billion").

Critically, in support of that conclusion, the Court quoted three cases involving suits against insurance brokers/investment advisers who obtained coverage or make investments for clients with subsequently failed insurance companies that were unable to pay the clients. In each instance, the courts held that an insolvency exclusion barred coverage based on the phrase "arising out of." *See Coregis*, 241 F.3d at 131 (quoting *Transamerica Ins. Co. v. South*, 975 F.2d 321, 328 (7th Cir. 1992); *Transamerica Ins. Co. v. Snell*, 627 So.2d 1275, 1276-77 (Fla. Dist. Ct. App. 1993); *Kleneic v. White Lake Marine Corp.*, 533 N.Y.S.2d 909, 910-11 (N.Y.A.D. 2 Dep't 1988) (per curiam)). Inasmuch as this Court found these cases to support its holding with respect to the "related to" language at issue in *Coregis*, it should find those cases even more persuasive here, where the phrase "arising out of" is at issue.

In *Transamerica Insurance Co. v. South*, an investment adviser purchased an errors and omissions policy with an exclusion precluding coverage for claims

"arising out of . . . (directly or indirectly)"[9] the insolvency of any organization in which the investment adviser placed the funds of a client. 975 F.2d at 322, 328. The organization became insolvent, and the investment adviser's clients sued him for negligence and negligent misrepresentation. *Id.* at 323. The investment advisor's insurer filed a declaratory judgment action seeking a determination that, *inter alia*, it had no duty to defend the investment adviser in those lawsuits. *Id.* The Seventh Circuit held that it was "convinced that it is clear and free from doubt that the claims do fall within the exclusion: they arise out of the insolvency of an organization (directly or indirectly) in which the insured placed the funds of a client." *Id.* at 328. Tellingly, the Seventh Circuit relied on "but-for" causation to reason that the requisite causal link existed: "[The investment adviser's] negligence depends upon the insolvency of [the organization]. If [the organization] were healthy and solvent, [the investment adviser] would not be

[9] The Bank attaches significance to the phrase "directly or indirectly," arguing that its existence in the *South* insolvency exclusion distinguishes *South*. Bank Br. at 31 n.18. In *South*, however, the Seventh Circuit noted that "Illinois courts have held that the phrase ['arising out of'] by itself is 'both broad and vague, and must be liberally construed in favor of the insured,'" and thus that the addition of the phrase "directly or indirectly" clarified the scope of coverage in the exclusion. 975 F.2d at 329. Unlike Illinois law, Connecticut law has found "arising out of" to be unambiguously broad, making unnecessary the addition of clarifying phrases, such as "directly or indirectly." The *South* court also specifically found that the underlying claims arose "directly" out of the insolvency using a "but-for" causal analysis. *Id.* at 328-29. As discussed, the Connecticut Supreme Court has held that "but-for" causation, rather than proximate causation, is sufficient for the exclusion to apply, *Board of Educ.*, 801 A.2d at 758-59. Thus, *South*'s reasoning is applicable here.

liable for negligence; even if he breached a duty owed to his clients, that breach would have caused no injury and thus would not support a claim for recovery." *Id.* at 330-31. Accordingly, the Seventh Circuit concluded that the insurer had no duty to defend under the terms of the policy. *Id.* at 331.

In *Transamerica Insurance Co. v. Snell*, also cited in *Coregis*, Transamerica issued an errors and omissions policy to Tison, who provided Snell's employer with a group health policy through the Florida Homebuilders Health Benefits Trust ("FHBHBT"). 627 So.2d 1275, 1276 (Fl. Dist. App. 1993). Snell sought health coverage for medical treatment, but discovered FHBHBT had become financially insolvent. *Id.* Snell sued Tison and sought a declaratory judgment regarding Transamerica's liability as Tison's errors and omissions insurer. *Id.* The insolvency exclusion in *Snell* precluded "[a]ny claim arising out of insolvency . . . of any organization (directly or indirectly) in which the 'insured' has placed or obtained coverage or in which an 'insured' has placed the funds of a client or account." *Id.* The court held that the insolvency exclusion applied because the "arising out of" standard is "a much more encompassing standard than mere causation." *Id.* The court continued: "Since Snell's asserted loss is ultimately

predicated on FHBHBT's insolvency, any actionable negligence by Tison . . . is necessarily related to such insolvency . . . ." *Id.*[10]

Two other decisions the district court cited below are also supportive of its holding. First, in *Smith v. Continental Casualty Co.*, investors (Smiths) sued their financial planner, Sprecher, alleging that he invested their money in highly speculative mortgage derivatives through Evergreen (which went bankrupt) in a trust "later described as a Ponzi scheme." No. 07-CV-1214, 2008 WL 4462120, at *3 (M.D. Pa. Sept. 30, 2008), *aff'd*, 347 F.App'x 812 (3d Cir. 2009). In the subsequent coverage action, the insurer argued that an insolvency exclusion barred coverage for any "[c]laim arising out of insolvency, receivership, bankruptcy or inability to pay of any organization in which the Insured has, directly or indirectly . . . placed the funds of a client or account." *Id.* at *11.[11] The court applied Pennsylvania cases that, like Connecticut law, "broadly construe the phrase 'arising out of' in similar policy exclusions," *id.* at *11 n.11, and found "but-for" causal connection sufficient: "[E]ach of [the Smiths'] claims is premised on the

[10] The phrase "directly or indirectly" was not a factor in the court's analysis, which was based on the interpretation required by the relevant state law (Florida) of the phrase "arising out of," even though the governing Florida case "involved a different kind of insurance policy." *Id.*

[11] As the district court below also noted, in *Smith* (and also in *American Automobile Insurance Co. v. Valentine*, discussed below), "the 'arising out of' phrase is unmodified by the term 'directly or indirectly' – instead, that phrase modifies whether the insured party placed the funds (directly or indirectly) with the insolvent entity." SA-20.

fact that Sprecher, directly or indirectly, placed their funds in Evergreen, which then went bankrupt and was unable to pay any return on their investment. The [investors'] claims thus 'arise out of' Evergreen's bankruptcy and inability to pay; were it not for these circumstances, the Smiths would not have filed suit against Sprecher. *See McCabe [v. Old Republic Ins. Co.]*, 228 A.2d 901, 903 (Pa. 1967) (holding that phrase 'arising out of' in policy exclusion requires only 'but-for' causation)." *Id.* at 12 (citation omitted).

Second, the district court also relied on *American Automobile Insurance Co. v. Valentine*, 131 F.App'x 406 (4th Cir. 2005) (*per curiam*) (unpublished). In *Valentine*, the court held that an insolvency exclusion similar to the one at issue here precluded coverage. There, an insurer ("AAIC") argued that an insolvency exclusion barred professional liability coverage for suits brought against insured brokers by former clients. *Id.* at 407. The insolvency exclusion applied to "[a]ny claim arising out of the insolvency . . . of any organization in which the INSURED has (directly or indirectly) placed or obtained coverage or in which an INSURED has (directly or indirectly) placed the funds of a client or account or in which any person has invested as a result of consultation with the INSURED." *Id.* at 407-08. The brokers sold and marketed a health insurance and dental plan to participants, and premiums were paid to a fund. *Id.* at 408. When the fund later became

insolvent, the participants sued the brokers, and AAIC filed its declaratory judgment action, relying on the insolvency exclusion. *Id.*

Like the other courts mentioned above, the Fourth Circuit held that "[t]he plain terms of this exclusionary clause make it clear that AAIC and the brokers intended that insurance coverage should not extend to suits against the brokers premised on their placement of client funds with an insurance company that is unable to pay the participants' claims for coverage. And that is exactly the basis for the underlying suits against the brokers." *Id.* at 409. Also like the other courts, the Fourth Circuit used "but-for" causation analysis to conclude that the exclusion applied: "Because a causal connection exists between the excluded risk (the placement of client funds with an insolvent organization) and the underlying suits, we conclude that the brokers' claims for coverage fit squarely within the exclusionary clause relating to insolvency." *Id.* at 409-10. The Fourth Circuit held that, like Connecticut law, "South Carolina law does not require an insurance company to establish that a specifically excluded risk was the proximate cause of the loss suffered by the insured in order for an exclusionary clause to apply." *Id.* at 410.

The district court's resolution of this case is in complete accord with these precedents. The court properly discussed the broad interpretation Connecticut courts afford the phrase "arising out of" and properly noted that proximate cause is

not required for the exclusion to apply. SA-12. The court then correctly held "any reading of the plain language of the insolvency exclusion excludes coverage of the investors' claims. The underlying lawsuits are certainly connected with, incident to, or flow out of Madoff's insolvency" or its "financial inability to pay." SA-12-13, 23. Using a "but-for" causation analysis, in accordance with Connecticut precedents, the district court further reasoned that "[h]ad Madoff not become insolvent and lost the investors' money, the investors would have had no damage and thus no reason to file suit against Westport. Therefore, there is a causal connection between the insolvency and the claims." SA-13.

Further, the district court properly described the language of the exclusion as "broad – it covers 'any claim' arising out of the insolvency of 'any investment firm.'" SA-13. Concluding that "[a] plain reading of the exclusion gives it a 'definite and precise meaning,' which excludes coverage of just these sorts of claims," the court correctly refused to "torture the language of the exclusion in order to find an ambiguity where none exists." SA-13. Accordingly, the court correctly analyzed the precedents discussed above, as well as others. SA-13-16 (citing *St. Paul Fire & Marine Ins. Co. v. Cohen-Walker, Inc.*, 320 S.E.2d 385 (Ga. Ct. App. 1984); *Barron*, 535 So.2d at 830; *Kleneic*, 533 N.Y.S.2d at 909).

As the district court stated, "[a]lthough the underlying facts are different [in those three cases], the general structure of claims. . . is quite similar." SA-15. The

Bank performed a service for the investors analogous to the service performed by the parties in those cases that recommended a particular insurance company. SA-15-16. Once the recommendees discovered the recommended insurer had become insolvent, they sued. SA-15. The district court noted that "[a]ll three courts read similar policies to be clear and unambiguous, and to exclude coverage of the underlying claims; this court has come to the same conclusion in the present action." SA-16.

D. The Cases that the Bank Cites Are Inapposite, and Its Causation Arguments Are Contrary to Established Connecticut Precedent.

The Bank's claims of error all miss the mark. First, the Bank relies on a case outside the insurance context, *Phillips v. Audio Active, Ltd.*, 494 F.3d 378 (2d Cir. 2007), to argue for a narrow reading of the phrase "arising out of." Bank Br. 29-30. *Philips* concerned the scope of the phrase in a forum selection clause in a recording contract between a recording artist and a music company under New York and federal law, not an exclusionary clause in an insurance contract under Connecticut law. *Id.* at 381, 388.[12]

[12] Neither *Phillips* nor another non-insurance case applying a forum selection clause, *Boehringer Ingelheim Vetmedica, Inc. v. Merial, Ltd.*, No. 3:09-CV-212, 2010 WL 174078, at *11-12 (D. Conn. Jan. 14, 2010), supports the Bank's theory that there can only be one cause of the investors' claims for insurance coverage purposes. Moreover, to the extent that those cases do not ascribe broader associations such as "connected with" or "incident to" to the phrase "arising out of," they are inconsistent with established Connecticut law. *See supra* pp. 14, 22.

Second, although the Bank argues against "but-for" causation, Bank Br. 30, settled Connecticut precedent, discussed above, defeats its position. *See supra* pp. 14, 23. Third, the Bank's citations to Kentucky law and opinions resting thereon are unavailing because Kentucky law is entirely dissimilar to Connecticut law. Bank Br. 36-37 & n.20 (citing *St. Paul Fire & Marine Ins. Co. v. Powell-Walton-Milward, Inc.*, 870 S.W.2d 223 (Ky. 1994); *Westport Ins. Corp. v. Energy Fin. Servs., LLC*, 318 F.App'x 377 (6th Cir. 2009) (applying Kentucky law)). In *Powell-Walton-Milward*, the Kentucky Supreme Court took a novel approach in interpreting the following exclusionary language: "We won't cover claims that *result from* the inability of an insurance company . . . to pay all or part of insured claims." 870 S.W.2d at 226 (emphasis added). The court held that coverage would be excluded only if the recommending party did something that caused or contributed to the recommended-insurer's inability to pay. *Id.* at 226-27. This is not the law in Connecticut. Likewise, the Kentucky court's analysis is an outlier, as it appears that not a single court outside of Kentucky has followed *Powell-Walton-Milward*'s novel interpretation.[13]

[13] In *Coregis*, this Court noted that "courts have reached differing conclusions" from *Powell-Walton-Milward*. *Coregis Ins. Co. v. American Health Found., Inc.*, 241 F.3d 123, 131 n.9 (2d Cir. 2001). In addition, as noted above, this Court also recognized that most courts have applied insolvency exclusions even when liability is claimed for the insured's independent mistakes prior to insolvency. *Id*. at 130-31.

The Sixth Circuit's unpublished opinion in *Westport, applying Kentucky law* to an exclusion involving the phrase "arising out of," read the exclusion as "excluding coverage only if the recommending party . . . did something to cause or contribute to the recommended insurer's . . . insolvency." 318 F.App'x at 379 (noting that it was obligated to follow Kentucky law). Again, this approach is directly contrary to Connecticut law, which gives the phrase "arising out of" a "very broad interpretation." *Town of Manchester v. Vermont Mut. Ins. Co.*, No. CV044004859, 2006 WL 164886, at *2-3 (Conn. Super. Ct. Jan. 3, 2006) (citing *QSP, Inc. v. Aetna Cas. & Surety Co.*, 773 A.2d 906, 926 (Conn. 2001)); *see supra* pp. 14, 22-23. Accordingly, neither the Kentucky Supreme Court's holding, nor the Sixth Circuit's decision applying Kentucky law, has any relevance here.[14]

Although the Bank argues against "but-for" causation, Bank Br. 30, it concedes, as it must, that application of the Insolvency Exclusion does not turn on whether BLMIS's insolvency or financial inability to pay the investors was the "proximate cause" of the investors' claims. Bank Br. 29-30. Still, it argues that the coverage determination is dependent on a future factual determination of whether the investors' claims were caused by Madoff's fraud or by BLMIS's

[14] Although the Bank appears to offer *Westport* as independent authority for its position, it is clear that the Sixth Circuit followed *Powell-Walton-Milward* because it was bound to do so in applying Kentucky law. *See Westport*, 318 F. App'x at 379 ("If we are to follow the Kentucky Supreme Court's [*Powell-Walton-Milward*] reasoning – as we are obligated to do in this diversity case – then we must read the exclusion clauses [as directed by *Powell-Walton-Milward*].").

inability to pay the investors. Bank Br. 31. Contrary to the Bank's assertion, under Connecticut law, it is not necessary to identify any single or primary cause for the investors' losses. The fact remains that the investors will not be paid because BLMIS is insolvent, and the terms of the Insolvency Exclusion plainly apply. *See, e.g.*, *Board of Educ. v. St. Paul Fire & Marine Ins. Co.*, 801 A.2d 752, 758-59 (Conn. 2002) ("plaintiff . . . need not allege that the school bus itself was the locus of the injury in order to prove causation under the [arising out of] language of the policy. The plaintiff must allege only that the injury originated in, grew out of, or flowed from the use of the vehicle."); *Hogle v. Hogle*, 356 A.2d 172, 174-75 (Conn. 1975) (for "arise out of" liability to attach, "it is sufficient to show only that the accident or injury 'was connected with,' 'had its origins in,' 'grew out of,' 'flowed from,' or 'was incident to' the use of the automobile, in order to meet the requirement that there be a causal relationship between the accident or injury and the use of the automobile.").

E. The Carveback Does Not Provide Coverage.

The Bank tries to evade this outcome by arguing that the following language at the end of the Insolvency Exclusion (carveback) precludes application of the Exclusion here: "this exclusion shall not apply to the extent such Claim alleges a covered Professional Services Act solely in connection with an Insured's investment on behalf of a customer in the stock of any of the foregoing entities

[including 'any . . . investment company . . . or any broker or dealer in securities or commodities']." JA-146. First, the Court should not consider this argument because the Bank failed to brief it below and later abandoned it. Second, the argument has no merit.

1. The Bank's Carveback Argument Should Not Be Considered.

The Bank argues that the district court "ignored" the carveback to the Insolvency Exclusion. In reality, however, the Bank never raised the carveback as an issue in the briefing below. The Bank submitted three briefs, none of which included any argument that the carveback applied. Rather, the Bank's contentions were effectively to the contrary: the Insolvency Exclusion's reference to an "investment company" should be interpreted narrowly to exempt an investment company/broker-dealer engaged in illegal activities, such as BLMIS. SA-21-22.

Only near the end of oral argument on the motion to dismiss approximately four months later did the Bank raise in passing a cursory version of its carveback argument, suggesting it "may have some relevance here." JA-644. Moreover, that argument was not the same as the present one the Bank now makes. At oral argument, the Bank simply stated (incorrectly) that the investors bought stock in BLMIS (referred to as "Madoff" or "Madoff enterprise" at the hearing). JA-644. Now, the Bank argues (also erroneously) that the investment accounts at BLMIS, BLM1 and BLM2, were entirely separate from BLMIS, and that these accounts

were themselves "investment companies" their funds were invested in. Developing this kind of argument for the first time on appeal is inappropriate. *E.g.*, *Halpert Enters., Inc. v. Harrison*, No. 07-1144, 2008 WL 4585466, at *3 & n.1 (2d Cir. Oct. 15, 2008) (citing *In re Monster Worldwide, Inc. Secs. Litig.*, 251 F.R.D. 132, 137 (S.D.N.Y. 2008) ("[T]his argument was raised for the first time at oral argument and so was waived in terms of this motion.")); *accord United States v. Higgins*, 995 F.2d 1, 4 n.6 (1st Cir. 1993) (citation omitted) ("[t]o the extent that [the Bank] raised this issue below, [it] did so in a perfunctory manner. 'A party is not at liberty to articulate specific arguments for the first time on appeal simply because the general issue was before the district court.'").

After oral argument, the Bank filed two more briefs arguing for coverage and a proposed third amended complaint, which simply reiterated arguments from its earlier opposition brief and did not assert its carveback theory. The Bank thus abandoned this argument. More important, the district court clearly did not have an opportunity to truly consider the Bank's late-blooming theory, and this Court should not consider it on appeal. *E.g.*, *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006).

2. <u>The Carveback Is Inapplicable.</u>

Even if the Bank had not waived its carveback argument, its assertion that the carveback somehow applies is wrong. By its plain terms, the carveback applies

only to "an Insured's investment . . . in the stock of" a "bank or banking firm, investment company, investment bank, or any broker or dealer in securities or commodities . . . or other organizations of a similar nature." JA-146. For example, the carveback would apply if the Bank used the investors' funds to purchase for their benefit stock of Charles Schwab, but not if the Bank had transferred the funds to a Schwab account for Schwab to invest in the stock of other entities, such as General Motors. Here, the allegations in the underlying lawsuits make clear that this case is like the latter situation, which does not implicate the carveback.

Specifically, the investors do not allege that they invested in the stock of BLMIS or in any BLMIS-related entity. Rather, their funds were aggregated and provided to BLMIS for investment by BLMIS and its advisers. JA-177-78, 217, 253, 273. The *Backus* decision the Bank repeatedly cites confirms this point. Bank Br. 6, 27. The *Backus* court explained that the investors "established accounts with [Westport] for the purpose of pooling their retirement funds together in a collective investment account . . . to be placed under BLMIS' investment management and 'used for the purpose and sale of securities by Madoff for the benefit of account holders.'" *Backus v. Connecticut Cmty. Bank, N.A.*, No. 3:09-CV-1256, 2009 WL 5184360, at *1 (D. Conn. Dec. 23, 2009). Accordingly, the Bank did not invest funds in the stock of an investment company on behalf of the investors. Instead, the Bank transferred their funds to an investment company

account for investment in securities of other entities.

Furthermore, contrary to the Bank's contentions, the investment accounts themselves (BLM1 and BLM2) cannot reasonably be considered "organizations" within the meaning of the carveback – i.e., investment companies or organizations of a similar nature. The allegations in the underlying complaints consistently describe BLM1 and BLM2 as investment *accounts* – not "organizations" or "companies," let alone "investment companies." *E.g.*, JA-218. Further, the investors effectively allege that BLM1 and BLM2 were fictitious accounts – not even real. *E.g.*, JA-218 (describing BLM1 and BLM2 as "purported investments"). Despite the Bank's arguments, Bank Br. 35, no ambiguity exists as to this point.[15] Even if this argument had not been waived, the carveback is simply

[15] The Bank separately argues "it is ambiguous if it was the inability of the putative BML entities to pay – or even Madoff himself – (as opposed to BLMIS) that is the predicate for the claims asserted in the Underlying Lawsuits." Bank Br. 35. It cites *Aks v. Southgate Trust Co.*, No. 92-2193-JWL, 1994 WL 171537 (D. Kan. March 31, 1994), as "holding that the undefined term 'investment company' was ambiguous as used in an insolvency exclusion," but that holding was made in the context of an incorporated real estate investment trust ("REIT"). *Id.* at *8; Bankr. Br. 35. The issue was whether the REIT was an "investment company," and the parties' experts disagreed – hence, the finding of ambiguity. *Id.* Here, as the district court found, BLMIS "was registered as a broker-dealer with the Securities and Exchange Commission. *See Secs. Investor Prot. Corp. v. Bernard L. Madoff Inv. Secs. LLC*, 401 B.R. 629, 632 (Bankr. S.D.N.Y. 2009), *aff'd sub nom Rosenman Family, LLC v. Picard*, 420 B.R. 108 (S.D.N.Y. 2009), *aff'd*, No. 09-5296-bk, 2010 WL 3911370 (2d Cir. Oct. 7, 2010). Thus, [BLMIS] certainly falls within the plain meaning of 'any' investment company or broker or dealer in securities." JA-505. There is no ambiguity. Moreover, the Bank's citation to *Massachusetts Mutual Life Ins. Co. v. Certain Underwriters at Lloyd's of London*

not applicable here.

F. The Insolvency Exclusion is Not Rendered Ambiguous Merely Because Insolvency Exclusions Are Also Found in Insurance Broker Policies.

Raising another argument it never briefed (or discussed) below, the Bank contends that the Insolvency Exclusion is ambiguous because "the exclusion has been used exclusively to protect insurance companies from providing coverage for certain lawsuits brought against insurance brokers, not entities such as Associated." Bank Br. 36. The Bank argues that there is a "sharp distinction" between the traditional insurance broker scenario and the circumstances here, but fails to identify any meaningful distinction, much less explain its legal significance.

Although insolvency exclusions are found in insurance broker policies, *e.g.*, *Transamerica Ins. Co. v. South*, 975 F.2d 321, 328 (7th Cir. 1992), that precedent supports rather than detracts from St. Paul's argument, *see supra* pp. 25-27. Moreover, it is illogical to argue, and not the law, that a type of clause is ambiguous because it is used in multiple contexts. Insolvency exclusions are not used solely to protect insurance companies from risks associated with insurance

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is off point. Although that case involves the Madoff scandal, it applied the term "Independent Broker" in an "Independent Broker Exclusion" to a limited partnership. No. 4791-VCL, 2010 WL 2929552, at *5-6 (Del. Ch. July 23, 2010). The Chancery Court later determined it did not have jurisdiction over that dispute. *Massachusetts Mutual Life Ins. Co. v. Certain Underwriters at Lloyd's of London*, 2010 WL 3724745 (Sept. 24, 2010).

broker policies. *See, e.g.*, *Coregis Ins. Co. v. Am. Health Found., Inc.*, 241 F.3d 231 (2d Cir. 2001) (holding that insolvency exclusion precluded coverage under non-profit organization liability policy). Moreover, the Bank's approach is impermissible because it would write a clear, bargained-for insolvency exclusion out of the contract. *Hammer v. Lumberman's Mut. Cas. Co.*, 573 A.2d 699, 707-08 (Conn. 1990) ("A court cannot rewrite the policy of insurance or read into the insurance contract that which is not there."); *accord St. Paul Fire & Marine Ins. Co. v. Cohen-Walker, Inc.*, 320 S.E.2d 385, 388 (Ga. App. 1984) ("As noted by the Supreme Court in *Crosby*, courts have no more right by strained construction to make an insurance policy more beneficial by extending the coverage contracted for than by increasing the amount of the insurance.").

As the district court recognized, the Insolvency Exclusion expressly and unambiguously applies to "*any* Claim," JA-145 (emphasis added), arising out of the insolvency or financial inability to pay of any investment company or broker-dealer. The fact that the investors' claims against the Bank are premised on the Bank's custodial services rather than some investment adviser or insurance broker services is irrelevant. The investors' claim against the Bank are still "Claim[s] . . . arising out of . . . the insolvency . . . or financial inability to pay" of BLMIS, which is an investment company and a broker-dealer. JA-145-46.

G. The Insolvency Exclusion Applies to "Any Claim," Including Third-Party Claims for Negligence.

The Bank argues that the Insolvency Exclusion "is ambiguous because third party claims for negligence are not expressly precluded from coverage." Bank Br. 32. It further insists that "liability insurance policies should be read to provide coverage for claims of negligence even where the negligence may be related to some circumstance excluded from coverage." *Id.* Not so; both the plain language of the Exclusion and the clear weight of authority are to the contrary.

To support its proposition, the Bank relies heavily on a Connecticut Superior Court case, *Amica Mut. Ins. Co. v. Wetmore*, No. CV084010532S, 2009 WL 2961410 (Conn. Super. Ct. Aug. 13, 2009), which addressed an inapposite fact pattern involving a child sexual assault. In *Amica*, the court, with little or no analysis of Connecticut case law applying the phrase "arising out of," held that a negligent hiring/supervision claim against an insured day care provider was not barred by a sexual molestation exclusion even though the injury underlying the claim was caused by sexual molestation by the insured's minor son. *Id.* at *4.

This is nothing more than a repackaging of the Bank's arguments urging a "proximate cause" standard, which is not Connecticut law. *See supra* 14, 23; *see also Board of Educ. v. St. Paul Fire & Marine Ins. Co.*, 801 A.2d 752, 758-59 (Conn. 2002) (holding that "under [the 'arise out of'] standard of causation, it need not be shown that the incident in question was proximately caused" for the

exclusion to apply); JA-556. Moreover, the Bank's argument fails in the face of the plain terms of the exclusion at issue here, which, unlike the exclusion in *Amica*, applies to "any Claim," JA-145, including a third-party claim of negligence.

The Bank first raised its *Amica* argument in its motion to reopen. The district court was not persuaded and cited multiple cases to the contrary in addition to *Board of Education*. JA-555 (citing *New London County Mut. Ins. v. Riddick*, No. CV030177973S, 2004 WL 2284207, at *5 (Conn. Super. Ct. Sept. 16, 2005) ("because the claims against [the daycare owner] are causally connected to the alleged sexual molestation [by the owner's grandson], the exclusion in the policy applies . . . . Said another way, but for the alleged sexual molestation of [the victim], [the owner] would not have been sued.") (citation omitted); *Mount Vernon Fire Ins. v. Morris*, No. CV0201736-43S, 2004 WL 1730133, at *6, 9-10 (Conn. Super. Ct. July 1, 2004) (minor victim of sexual assault sued day care center for negligent supervision of employee who committed assault) ("Here, 'but for' [the employee's] sexual assault and battery upon John Doe, the [negligence] claims against . . . [the day care center] . . . would not exist. The exclusion, therefore, precludes coverage."), *aff'd*, 877 A.2d 910 (Conn. App. 2005); *Elec. Ins. Co. v.*

Castrovinci, No. 3-02-CV-1706 (WWE), 2003 WL 23109149, at *3 (D. Conn. Dec. 10, 2003)).[16]

Attempting to cobble together support in Connecticut law for its position, the Bank suggests that this Court ignore the Exclusions and rely instead on the title of the policy, citing *Imperial Cas. & Indem. Co. v. Connecticut*, 714 A.2d 1230 (Conn. 1998). This suggestion is facially absurd. Writing *clear* exclusions out of an insurance policy merely by reference to the title of a policy is patently impermissible.

Moreover, a critical difference exists between the circumstances here and those in *Imperial*. In *Imperial*, the policy's attempt to limit coverage to an unintentional "accident" created an "internal inconsistency" with the policy's coverage for intentional personal injury torts. *Id.* at 1237. The court determined that, "[i]n light of this inconsistency, it is impossible to determine solely on the basis of the policy's express language whether the conduct at issue is covered." *Id.*

[16] In a footnote, the Bank seeks refuge in a case decided under New York law, not Connecticut law: *Watkins Glen Centr. Sch. v. Nat'l Union Fire Ins. Co.*, 732 N.Y.S.2d 70, 74 (N.Y.A.D. 2001). Bank Br. 32 n.19. In *Watkins*, the court refused to apply the plain terms of an exclusion and the associated causal connection test mandated under New York law because it concluded that enforcement of the exclusion would have eviscerated coverage. *Watkins*, 732 N.Y.S.2d at 74. In contrast, enforcing the Insolvency Exclusion as written here would not eradicate the primary coverage extended. Moreover, numerous courts have effectively rejected the *Watkins* approach. *See, e.g., Continental Cas. Co. v. H.S.I. Fin. Serv., Inc.*, 466 S.E.2d 4, 5 (Ga. 1996); *St. Paul Fire & Marine Ins. Co. v. Aragona*, 365 A.2d 309, 313 (Md. App. 1976), *aff'd*, 378 A.2d 1346 (Md. 1977); *Stouffer & Knight v. Continental Cas. Co.*, 982 P.2d 105, 110 (Wash. App. 1999).

Only because of this glaring ambiguity did the court consider the title of the policy in its analysis.

Here, the plain, unambiguous language of the Insolvency Exclusion must be given its full effect in accordance with Connecticut law. *State Farm Fire & Cas. Co. v. Sayles*, 289 F.3d 181, 185 (2d Cir. 2002); *see also Isham v. Isham*, 972 A.2d 228, 236 (Conn. 2009); *Hermitage Ins. Co. v. Sportsmen's Athletic Club*, 578 F. Supp. 2d 399, 404 (D. Conn. 2008) (citing *Kelly v. Figueiredo*, 610 A.2d 1296, 1298 (Conn. 1992)); *see also supra* pp. 13-14, 22-23. The district court's holding that the Insolvency Exclusion precluded coverage was correct and should be affirmed.

III. The District Court Correctly Held that the Customer Services Exclusion Bars Coverage Under the Management Liability Section of the Policy.

The Bank argues that even if the Insolvency Exclusion precludes coverage of the investors' claims under the Professional Services Agreement, their claims are covered under the Management Liability Coverage provisions of the Policy. Bank Br. 38-39. As discussed above, Management Liability Coverage is primarily intended to protect corporate managers against claims they breached duties owed to their corporations or shareholders. Here, the Policy effectively limits the scope of Management Liability Coverage to its primary purpose through a number of exclusions, including the Customer Services Exclusion, which precludes Management Liability Coverage for:

> . . . Loss on account of any Claim made against the [Bank] based upon, arising out of, or attributable to the rendering, or failure to render, any service to a customer of the Company. . .

JA-137-38.

For purposes of Professional Services Coverage, the Bank frames the investors' claims as those of Westport's "customers" who are complaining that the Bank did not properly perform duties the Bank owed to them as the custodian of their investment accounts. Bank Br. 14, 23. Conversely, for purposes of Management Liability Coverage, the Bank argues that the investors' allegations that the Bank failed to maintain adequate records, conduct adequate due diligence, and monitor the flow of funds to BLMIS constitute errors in the Bank's "managerial capacity" that do not implicate the Customer Services Exclusion. Bank Br. 7, 19, 38, 41.

The Bank's arguments are plainly wrong, and the district court properly rejected them, describing them in ruling on the motion to reopen as "[the Bank's] conclusory recasting of [its] actions as purely 'managerial.'" JA-559. The district court noted that, "even, within the proposed Third Amended Complaint, [the Bank] admit[s] to providing services to the investors: namely 'maintaining adequate records' and 'rendering at least annually statements reflecting the property held by it as a custodian.' *See, e.g.*, Third Am. Compl. at ¶ 40." JA-559. The district court reasoned, "[j]ust because [the Bank] choose[s] to call such actions

'managerial' does not mean that those are not services that customers of a bank expect to have provided to them." JA-559. The court also noted that "it rested its conclusion in the Ruling [on the Motion to Dismiss] on the claims as described by the investors themselves in their complaints – and [the Bank's] description of [its] actions as 'managerial' cannot change the underlying descriptions of the services that the investors allege [the Bank] provided to them, as customers." JA-559.[17]

The district court's reasoning was right on the mark. The Bank repeatedly acknowledges that the investors are its "customers," who complain that the Bank failed to properly perform its custodial responsibilities on their behalf. Bank Br. 2, 7, 14. Whether the investors complain about inadequate bookkeeping, inadequate due diligence, or inadequate review of BLMIS's statements, they are still customers complaining that the Bank did not properly perform expected services. Whether those complaints are the basis for counts of negligence, fraud, or breach of fiduciary duty, the gravamen of those counts is the Bank's rendering of services (or the failure to render expected services) to customers. *See, e.g., Hermitage Ins. Co. v. Sportsmen's Athletic Club*, 578 F. Supp. 2d 399, 404 (D. Conn. 2008) ("Disguising claims arising out of an assault and/or battery as claims of negligence

[17] The Bank has abandoned its primary argument below that enforcement of the Customer Services Exclusion would eviscerate Management Liability Coverage. The district court made quick work of that argument, recognizing that a lack of coverage for customer claims would not eviscerate the coverage primarily intended for shareholder and derivative mismanagement suits. SA-26.

does not defeat the exclusion. While the underlying complaints may be cloaked in negligence, they indisputably arise out of the assault and/or battery, namely the shooting incident" (citation omitted)); *Mount Vernon Fire Ins. v. Morris*, No. CV020173643S, 2004 WL 1730133, at *9 (Conn. Super. Ct. July 1, 2004) ("where a sexual assault is alleged in a Complaint in terms of negligence, the Court has dismissed it as a masquerade of the true claim, recognizing that the gravamen of the action was for sexual assault.") (citing cases). Accordingly, the Customer Services Exclusion necessarily precludes Management Liability Coverage here.[18]

The Bank's reliance on *Federal Insurance Co. v. Hawaiian Electric Industries, Inc.*, No. 94-00125 HG, 1997 U.S. Dist. LEXIS 24129 (D. Haw. Dec. 23, 1997), is misplaced.[19] There, the district court held that a professional services exclusion in a director and officers' policy for an insurance company would bar coverage for a claim that arose out of "the rendering of or failure to render professional insurance services to [the insured's] actual or potential . . . policy

[18] The same is true with respect to the prior allegations against Clark. As the district court explained, "the investors claim that Clark 'was the individual at Westport who handled [the investors'] accounts and communicated with [the investors] . . . regarding them.' . . . This court understands that description, under its plainest meaning, to include services rendered to customers." SA-28. The one complaint that included Mr. Clark as a named defendant was voluntarily dismissed. Bank Br. 16 n.12.

[19] The Bank also relies on *St. Paul Fire & Marine Ins. Co. v. Holland Realty, Inc.*, No. CV 07-390-S-EJL, 2008 WL 3255645, at *5-6 (D. Idaho Aug. 6, 2008), but that case addresses a "loss of commission" exclusion rather than any exclusion even vaguely resembling a customer services exclusion.

holders and clients," but would not bar a claim arising out of the insured's management and actions with respect to one of its subsidiaries. *Id.* at *36, 41.

In contrast, the investors here, as bank customers, complain about services that were/should have been rendered to them by the Bank. Consequently, the Customer Services Exclusion plainly applies. *See, e.g., MDL Capital Mgmt., Inc. v. Fed. Ins. Co.*, 274 F.App'x 169, 173-74 (3d Cir. 2008) (affirming that professional services exclusion barred coverage under a directors and officers' liability policy for claims that arose out of the allegedly improper performance of investment adviser and investment manager services).

IV. The District Court Correctly Held that St. Paul Has No Obligation to Advance Defense Costs.

Under Connecticut law, an insurer's duty to defend turns on whether, in light of the policy language, the underlying complaint against the insured states facts which bring the injury within the scope of coverage. *DaCruz v. State Farm Fire & Cas. Co.*, 846 A.2d 849, 858 (Conn. 2004); *Imperial Cas. & Indem. Co. v. Connecticut*, 714 A.2d 1230, 1236 (Conn. 1998) ("[A]n insurer's duty to defend . . . is determined by reference to the allegations contained in the [injured party's] complaint.") (internal quotation marks and citation omitted).[20] When a complaint alleges facts that potentially could fall within the scope of coverage, the duty to

[20] The Policy requires St. Paul to advance defense costs but did not impose a duty to defend. SA-9. The parties agree that the standard that applies to the duty to defend also applies to the duty to advance defense costs. SA-9.

defend is triggered. *Id.*[21] However, "[i]f a claim against the insured falls within the policy's coverage, then a policy exclusion will relieve an insurer of the duty to defend for claims falling within the exclusion." *Hermitage Ins. Co. v. Sportsmen's Athletic Club*, 578 F. Supp. 2d 399, 404 (D. Conn. 2008) (citing *Kelly*, 610 A.2d 1296, 1298 (Conn. 1992)). Because the Insolvency and Customer Services Exclusions apply, St. Paul has no duty to defend or advance defense costs.

The Bank argues that the district court "failed to apply 'the classic inquiry associated with the duty to defend: whether the claims [asserted against the insured] may rationally be said to fall within policy coverage.'" Bank Br. 24 (citing *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 117 (2d Cir. 2005)). In *Allianz*, this Court applied New York law (not Connecticut law),[22] so it is not surprising that the district court did not rely on that case. Instead, the district court properly applied Connecticut law:

> [B]oth parties agree that the duty to advance defense costs is analyzed under the same standard as that for a duty to defend. . . An insurer has a duty to defend any claim against its insured "unless it can establish as a matter of law, that there is no possible factual or legal basis on

[21] The Bank argues that "the issue of causation generally is a question for the trier of fact," Bank Br. 32, quoting an inapposite, non-insurance case considering "proximate causation" in the tort context: *Abrahams v. Young & Rubicam, Inc.*, 692 A.2d 709, 712 (Conn. 1997). The Bank overlooks binding Connecticut cases holding that the application of "arising out of" to claims is regularly determined by referring to the allegations asserted in the underlying claims. *E.g.*, *DaCruz*, 846 A.2d at 858.

[22] The parties do not dispute that, in this diversity action, Connecticut law applies.

> which [the insurer] might eventually be obligated to indemnify [the] insured under any policy provision." *R.T. Vanderbilt Co. v. Cont'l Cas. Co.*, 273 Conn. 448, 473 n.28, [870 A.2d 1048] (Conn. 2005). The duty is determined by referring to the allegations contained in the underlying complaint. *See DaCruz v. State Farm Fire & Cas. Co.*, 268 Conn. 675, 687, [846 A.2d 849] (Conn. 2004). The underlying complaint need only "allege facts that *potentially* could fall within the scope of coverage" in order to trigger the duty. *See id.* at 688, [846 A.2d 849] (emphasis in original). *However, there is no duty to defend a case for which, as a matter of law, there is no coverage. See R.T. Vanderbilt Co.*, 273 Conn. at 473 n.28, [870 A.2d 1048].

SA-9-10 (emphasis in original). This is an entirely correct statement of the law under Connecticut precedents. Indeed, the Bank itself cites *Imperial Cas. & Indemn Co. v. State*, Bank Br. 21, an opinion by the Connecticut Supreme Court which contains the same standards. 714 A.2d 1230, 1236 (Conn. 1998).

In pages 23-25 of its brief, the Bank urges the erroneous proposition that St. Paul is obligated to advance defense costs *regardless of whether any exclusions bar coverage*. However, the Bank concedes that "[g]iven the Policy's broad grant of coverage, [St. Paul's] express obligation to advance defense costs, the wide breadth of the claims asserted in the Underlying Lawsuits, and the body of case law support, [St. Paul] had a duty to advance here *unless the Policy's exclusions unambiguously precluded coverage*." Bank Br. 25 (emphasis added). This is precisely the point the district court made: "*there is no duty to defend a case for which, as a matter of law, there is no coverage*." SA-10 (emphasis added).

As discussed above, *see supra* pp. 22-49, the district court correctly

analyzed the application of the Exclusions to this case. Even the New York case on which the Bank depends, *Allianz*, states that "[h]ad [the insurer] wished to restrict its duty to defend to the standard range of covered, or possibly covered, claims, it could have done so with plainer language." 416 F.3d at 117. That is precisely what St. Paul did by virtue of the exclusionary language here.

V. The District Court Correctly Held that the Insurers Had No Duty to Indemnify.

As the Bank concedes, if this Court agrees (as it should) that the Exclusions discussed above preclude coverage, *see supra* pp. 22-49, it must conclude that dismissal of the Bank's claim for indemnity was proper. Bank Br. at 43.

VI. The Questions Presented Regarding the Interpretation of the Insolvency Exclusion and the Customer Services Exclusion Should Not Be Certified to the Connecticut Supreme Court.

The Bank argues that if this Court does not reverse the decision below, it should certify to the Connecticut Supreme Court the issues the Bank raises on appeal. In other words, the Bank seeks to repackage all of its arguments and asserts that, if this Court is inclined to rule against it, then it should send the entire dispute to the state tribunal. But that is not how the certification process works.

Cases worthy of certification are those where the answer to the questions presented "may be determinative" and involve matters where "there is no controlling [Connecticut] appellate decision, constitutional provision or statute." Conn. Gen. Stat. § 51-199b(d). Under this standard, this case is not a candidate for

certification. The district court's rulings properly apply Connecticut precedent regarding settled principles of contract construction applicable to insurance policies.

Certification is only proper where "existing state law is so uncertain that [the Court] can make *no reasonable prediction* as to how the [highest court of the state] would resolve the question." *Rivkin v. Century 21 Teran Realty LLC*, 494 F.3d 99, 106 (2d Cir. 2007) (internal quotation and citation omitted) (emphasis added). "[I]ssues of state law are not to be routinely certified to the highest court[] of . . . Connecticut simply because a certification procedure is available." *Kidney v. Kolmar Labs., Inc.*, 808 F.2d 955, 957 (2d Cir. 1987). This Court has held repeatedly that "it is [this Court's] job to predict how the forum state's highest court would decide the issues . . .," and that this Court "will not certify questions of law where sufficient precedents exist for [the Court] to make this determination." *McCarthy v. Olin Corp.*, 119 F.3d 148, 154 (2d Cir. 1997); *see also Olin Corp. v. Ins. Co. of N. Am.*, 929 F.2d 62, 64 (2d Cir. 1991) (declining to certify an insurance coverage question where a "well established principle of [state] law" was determinative).

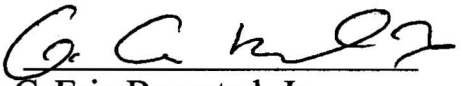
This case does not present novel legal questions. A novel legal question does not exist merely because a court has not previously considered the exact same policy provision. The district court's judgment is founded upon application of

well-settled principles of insurance contract construction under Connecticut law, such as interpretation of the phrase "arising out of," for which there is ample precedent. *See, e.g., QSP, Inc. v. Aetna Cas. & Sur. Co.*, 773 A.2d 906, 926 (Conn. 2001); *see also supra* pp. 22-23. Indeed, this Court has previously applied an insurance policy insolvency exclusion without any suggestion that the coverage issue presented a novel legal question worthy of certification. *See Coregis Ins. Co. v. Am. Health Found., Inc.*, 241 F.3d 123, 128 (2d Cir. 2001). Because this case involves only routine questions of law in construing an insurance contract, certification is unwarranted.

CONCLUSION

For the foregoing reasons, Defendants-Appellees respectfully request that the district court's orders granting their motion to dismiss and denying Plaintiffs-Appellants' motion to reopen be affirmed.

Respectfully submitted,



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I hereby certify that on February 11, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

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