FILED
United States Court of Appeals
Tenth Circuit

August 1, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

THE CINCINNATI INSURANCE COMPANY,

Plaintiff Counter Defendant - Appellant,

v.

BLUE CROSS AND BLUE SHIELD OF KANSAS,

Defendant Counterclaimant - Appellee,

and

ORCHESTRATE HR, INC.; VIVATURE, INC.,

Defendants - Appellees.

No. 22-3154
(D.C. No. 6:20-CV-01367-HLT-TJJ)
(D. Kan.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BACHARACH**, and **ROSSMAN**, Circuit Judges.

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* The parties haven't requested oral argument, and it would not help us decide the appeal. So we have decided the appeal based on the record and the parties' briefs. *See* Fed. R. App. P. 34(a)(2)(C); 10th Cir. R. 34.1(G).

This order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

This appeal involves the enforceability of a settlement agreement between two insurers. In the settlement, the two insurers agreed that one insurer would pay some of the other's defense costs in a different lawsuit. As the insurers worked on memorializing their agreement, however, a disagreement arose. One insurer sought a chance to argue later that its duty to defend would stop if a court later found no coverage for indemnity. The other insurer objected, arguing that reservation of that argument would conflict with the agreement to permanently resolve their dispute over the duty to defend. The district court agreed with this argument, and we affirm.

1. When sued, one insurer demands a defense from the other.

The settlement agreement served to resolve litigation between The Cincinnati Insurance Company and Blue Cross Blue Shield of Kansas. The litigation grew out of another suit against Blue Cross for its handling of health insurance claims. When Blue Cross was sued for mishandling these claims, it demanded

- a defense from Cincinnati under an insurance policy for liability coverage and
- indemnity if the underlying claim were to result in a judgment against Blue Cross.

Cincinnati responded by providing a defense to Blue Cross with a reservation of rights.

2. Cincinnati and Blue Cross agree to settle the suit, but the parties disagree on the enforceability of the settlement.

While providing that defense, Cincinnati concluded that the underlying claims against Blue Cross had not triggered a duty to defend. So Cincinnati sued Blue Cross for a declaratory judgment stating that no duty to defend existed. Appellant's App'x vol. I at 21 (Cincinnati seeking "[a] declaration . . . that plaintiff Cincinnati has no duty to defend . . . [Blue Cross] in the underlying lawsuit"). The insurers settled and signed a term sheet, which (1) resolved how they would pay defense costs and (2) stated that they would defer issues involving indemnity. But Cincinnati refused to sign the final settlement document unless it allowed Cincinnati to argue that it could discontinue paying Blue Cross's defense costs if a court later found no duty of indemnity. Blue Cross objected to that language and moved to enforce the settlement based on the term sheet.

3. The district court didn't err in interpreting the settlement agreement.

As a contract, the settlement agreement was enforceable only if Cincinnati and Blue Cross had a meeting of the minds. *O'Neill v. Herrington*, 317 P.3d 139, 145 (Kan. App. 2014).[1] In district court, Cincinnati didn't deny a meeting of the minds. So the court approached the issue as one involving interpretation.

[1] The parties agree that Kansas law applies.

On appeal, Cincinnati argues that the parties lacked a meeting of the minds on the material terms. The district court said that Cincinnati hadn't questioned the existence of a meeting of the minds, and Cincinnati doesn't say why it thinks the court was wrong. Cincinnati admittedly signed the term sheet stating that its terms were material, and the district court had no reason to question the existence of a binding agreement.

The only disagreement involved the meaning of that agreement. Blue Cross interpreted the settlement to end any dispute over Cincinnati's duty to defend in the underlying litigation; Cincinnati argued that the agreement left open the possibility that it could deny a duty to defend if a court later found no duty to indemnify Blue Cross. The district court agreed with Blue Cross's interpretation and concluded that the term sheet prevented Cincinnati from challenging its duty to defend after a future ruling on indemnity.

We ordinarily consider the enforcement and interpretation of a settlement agreement under the abuse-of-discretion standard. *Shoels v. Klebold*, 375 F.3d 1054, 1060 (10th Cir. 2004). But here the district court had to exercise its discretion based on a factual disagreement over the parties' intent. We thus review the district court's factual determinations under the narrow standard of clear error. *See United States v. McCall*, 235 F.3d 1211, 1215 (10th Cir. 2000) (applying the clear-error standard when

the enforceability of a settlement agreement turned on factual determinations regarding the parties' intent).

In our view, the district court didn't clearly err. The court could reasonably interpret the agreement as it did based on the term sheet that the parties signed.[2]

When the insurers signed the term sheet, they were litigating a disagreement over Cincinnati's duty to defend Blue Cross in the underlying litigation. Cincinnati had asked the court to issue a declaratory judgment stating that it had no duty to defend. To resolve that request, Cincinnati agreed in the term sheet to dismissal with prejudice of the claim for a declaratory judgment. Given this designation of the dismissal ("with prejudice"), the district court could reasonably infer that Cincinnati had

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[2] The court can also consider underlying legal principles that the settling parties had presumably considered when negotiating the term sheet. *See Fla. E. Coast Ry. Co. v. CSX Transp., Inc.*, 42 F.3d 1125, 1129–30 (7th Cir. 1994) (stating that the settlement agreement must be interpreted against the applicable legal backdrop). Under Kansas law, the duty to defend is fixed when the underlying suit was filed. *Spruill Motors, Inc. v. Univ. Underwriters Ins. Co.*, 512 P.2d 403, 406 (Kan. 1973). On the other hand, a duty to indemnify frequently doesn't arise until the underlying suit has been decided. *Miller v. Westport Ins. Corp.*, 200 P.3d 419, 424 (Kan. 2009). Given this difference, "the duty to defend . . . may exist even where, in the long run, there proves to be no indemnity coverage." *Am. Fid. Ins. Co. v. Emps. Mut. Cas. Co.*, 593 P.2d 14, 19 (Kan. App. 1979). But the Kansas Supreme Court hasn't addressed the continued existence of a duty to defend once a court has found no duty of indemnity. Given the absence of a decision by the Kansas Supreme Court, the underlying legal principles wouldn't reflect a clear error in the district court's interpretation of the term sheet.

agreed to permanently give up its denial of a duty to defend Blue Cross in the underlying litigation. *See Hargis v. Robinson*, 79 P. 119, 119 (Kan. 1905) (Syllabus by the Court,[3] stating that dismissal of a case "with prejudice" would bar a future action).

* * *

Despite the agreed terms for dismissal with prejudice, Cincinnati argues that its agreement for "payment of defense costs" did not constitute an agreement to defend Blue Cross in perpetuity. The district court could reasonably reject this argument. Cincinnati agreed to dismissal with prejudice of its own claim for a declaration that it didn't owe a duty to defend Blue Cross. Given this term, the district court could reasonably find an agreement to permanently resolve the dispute over Cincinnati's duty to defend.

4. The parties are entitled to seal their appeal briefs, but Blue Cross's redactions are excessive and Cincinnati should publicly file a redacted version.

Cincinnati and Blue Cross seek leave to file their appeal briefs under seal. With that request, Blue Cross filed a redacted version of its appeal briefs; Cincinnati didn't file a redacted version. The Court grants leave to

[3] *See Bonanza, Inc. v. McLean*, 747 P.2d 792, 800 (Kan. 1987) (describing the syllabus of an earlier case as a holding); *see also* Bryan Garner, et al., *The Law of Judicial Precedent* 151 (2016) (describing the statutory context for Kansas courts' treatment of the court's syllabus as binding).

file the unredacted versions under seal, but Cincinnati should file a redacted version and Blue Cross should file a new version without some of the redactions.

A common-law right of public access exists for judicial records like appeal briefs.[4] *See McWilliams v. Dinapoli*, 40 F.4th 1118, 1130 (10th Cir. 2022) (stating that "a longstanding common-law right of public access" exists for "judicial records"); *MetLife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 675–76 (D.C. Cir. 2017) (stating that the appellate briefs were judicial records subject to "the common-law right of public access"). To overcome this common-law right, the movant bears a heavy burden to show a real and substantial interest in confidentiality. *McWilliams*, 40 F.4th at 1130–31.

Cincinnati and Blue Cross minimize the interest in access by the entities that had sued Blue Cross in the underlying litigation. But the right of access extends beyond those entities to the public. *Id.*

Despite the public's right to access, Cincinnati and Blue Cross argue that the terms of the settlement agreement were sealed in district court. But we're not bound by the district court's decision on what to seal. *Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1241 (10th Cir. 2012).

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[4] Because we conclude that the public has a right of access to the parties' briefs under the common law, we need not decide the applicability of a constitutional right to public access.

Cincinnati and Blue Cross rely most heavily, however, on the confidentiality of their settlement. We recognize the importance of preserving confidentiality of settlement agreements. *Id.* But the parties' interest in confidentiality of settlement agreements doesn't necessarily trump the public interest in access, "particularly in light of the centrality of these documents to the adjudication of this case." *Id.*

Though Cincinnati and Blue Cross urge confidentiality of the settlement terms, they placed those terms "at the center of this controversy." *Id.* To resolve that controversy, we must consider the terms of their settlement. Cincinnati and Blue Cross must therefore "articulate a real and substantial interest that justifies depriving the public of access to the records that inform our decision-making process." *Id.* (quoting *Helm v. Kansas*, 656 F.3d 1277, 1292 (10th Cir. 2011)).

In our view, Cincinnati and Blue Cross are entitled to redact at least some of the content in their briefs. The parties' interest in confidentiality stems from their settlement negotiations and the ongoing litigation by other entities against Blue Cross. But Cincinnati didn't publicly disclose *anything* in their appeal briefs or show why redactions would be infeasible. *See GeoMetWatch Corp. v. Behunin*, 38 F.4th 1183, 1234 (10th Cir. 2022) (denying motions to seal because the parties failed to show why redaction would be infeasible). Blue Cross did make redactions in its appeal brief, but these redactions are excessive. Given the common-law right of access,

we direct both parties to publicly file new versions of their appeal briefs with appropriate redactions. *See Luo v. Wang*, 71 F.4th 1289, 1304–05 (10th Cir. 2023) (requiring parties to refile documents with fewer redactions).

To aid the parties in what is appropriate for redaction, we provide four guideposts.

First, the parties can redact the provisions bearing directly on payment of defense costs, but this doesn't mean that every provision can be redacted. An example is the filing of a stipulation. That stipulation wasn't a secret; it was publicly filed in district court. So the parties shouldn't redact the terms bearing on the stipulation to be filed. *See, e.g.*, Appellee's Resp. Br. at 8–9 (before the block quote on page 8 and the bottom redaction on page 9), 12, 14, 16, 17–19.

Second, Blue Cross redacted discussion of its own interpretation of the term sheet that was signed. *See, e.g.*, *id.* at 3, 12, 14, 23. The district court agreed with this interpretation, and it's apparent from the stipulation that was later filed. There's no need to redact Blue Cross's interpretation of the term sheet.

Third, Blue Cross redacted reference to Cincinnati's position that it could withdraw a defense if a court later denied a duty to indemnify. *See, e.g.*, *id.* at 4. The public is entitled to know Cincinnati's position; otherwise the parties' filings wouldn't make sense. Nor is there a valid

interest in keeping Cincinnati's position confidential. The district court rejected that position, and we're affirming that ruling. Given the resolution of future defense costs, the insurers haven't identified any harm from disclosure of Cincinnati's position on the duty to defend.

Fourth, Blue Cross has redacted the provision in the term sheet stating that the agreement was binding and intended to memorialize the material terms pending the completion of a more formal agreement. *See, e.g.*, *id.* at 8. The parties haven't provided any reason to withhold this fact from the public. No one questions the binding nature of the term sheet, and settling parties would ordinarily prepare a more detailed agreement. In light of this practice, the parties haven't justified redaction of their plan to memorialize the agreement.

Within fourteen days of the filing of this order and judgment, Blue Cross must refile its public version of the appeal brief, revising the redactions in accordance with these four guideposts. Within this fourteen-day period, Cincinnati must publicly file redacted versions of its appeal briefs in accordance with these four guideposts.

5. Cincinnati must refile a new public version of volume II of the appendix.

Cincinnati also requests leave to seal volume II of the appendix. In our view, Cincinnati has justified redactions of this volume. So the sealing of an unredacted version is appropriate. But not everything in volume II is

confidential. So the Court directs Cincinnati to publicly file a redacted version of volume II. In making these redactions, Cincinnati should follow our four guideposts. The redacted version is due fourteen days from the filing of this order and judgment.

Entered for the Court

Robert E. Bacharach
Circuit Judge