

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

EVEREST NATIONAL INSURANCE)
COMPANY, a Delaware company,)

Plaintiff,)

v.)

FIRST BUSINESS BANCORP CO., an)
Illinois corporation, SOUTH CENTRAL)
BANK, N.A., a nationally chartered bank,)
MARC B. GRAYSON, an individual,)
TODD E. GRAYSON, an individual, and)
CHARLES RUDY, an individual; VERVE,)
A Credit Union, Wisconsin state)
chartered credit union.)

Defendants.)

Case No. 1:21-cv-01940

COMPLAINT FOR DECLARATORY JUDGMENT

The Plaintiff, EVEREST NATIONAL INSURANCE COMPANY, a Delaware company, by and through its attorneys, Skarzynski Marick & Black LLP, and for its Complaint for Declaratory Judgment against Defendants, First Business Bancorp Co., an Illinois corporation; South Central Bank, N.A., a nationally chartered bank; Marc B. Grayson, an individual; Todd E. Grayson, an individual; Charles Rudy, an individual; and Verve, A Credit Union, a Wisconsin state chartered credit union (collectively “Defendants”), and in support thereof states as follows:

NATURE OF THE CASE

1. Everest National Insurance Company (“Everest”) brings this Complaint for Declaratory Judgment seeking a declaration that there is no coverage for the lawsuit, captioned *Verve, A Credit Union v. First Business Bancorp. Co., South Central Bank N.A., Marc B. Grayson, Todd E. Grayson, and Charles Rudy* (Case No. 2020L006113) seeking damages from certain Defendants for alleged accounting irregularities pending in Cook County, Illinois, under the

claims-made Directors and Officers Liability Policy issued by Everest National Insurance Company to Defendant-First Business Bancorp Co. effective for the Policy Period May 1, 2019 to May 1, 2020 (“Policy”).

2. There is no duty to defend for the *Verve* Action under the Policy because the Policy language expressly places the duty to defend on the “**Insured**” not the “**Insurer.**” In addition, there is no defense or indemnity coverage based on the “**Insured vs. Insured**” Exclusion because *Verve* is considered the “**Company**” under the Policy and therefore, the *Verve* Action constitutes a “**Claim**” brought by the “**Company**” for which the Policy bars coverage. Accordingly, Everest seeks a declaratory judgment that it has no duty to defend and no obligation to pay any defense costs or indemnity under the Policy for the *Verve* Action.

PARTIES

3. Plaintiff, Everest National Insurance Company, is a Delaware Corporation engaged in the insurance business with its principal place of business located at 100 Everest Way, Warren, New Jersey 07059. It has authorized to transact business and has transacted business in the State of Illinois.

4. Defendant, First Business Bancorp Co. (“First Business”) is an Illinois corporation.

5. Defendant South Central Bank, N.A. (“South Central”), is a nationally chartered bank with its main office located in Chicago, Illinois prior to its acquisition by *Verve*.

6. Defendant Marc B. Grayson (“M. Grayson”) is an Illinois citizen and, on information and belief, is the president of First Business and a director of South Central Bank.

7. Defendant Todd E. Grayson (“T. Grayson”) is an Illinois citizen and, on information and belief, is a director of First Business and a director of South Central Bank.

8. Defendant Charles Rudy (“Rudy”) is an Illinois citizen and, on information and belief, is a director of First Business and a former officer of South Central Bank.

9. Defendant Verve is Wisconsin credit union with its principal place of business in Oshkosh, Wisconsin. Verve has multiple locations in Chicago, Illinois. Verve is named as a nominal defendant pursuant to Illinois law as the plaintiff in the underlying action.

JURISDICTION AND VENUE

10. This Court has jurisdiction over this matter under 28 U.S.C. §1332(a)(1) because there is complete diversity of citizenship between Plaintiff, a Delaware and New Jersey resident, and defendants, Wisconsin and Illinois residents.

11. The amount in controversy exceeds \$75,000, the jurisdictional threshold, exclusive of interest and cost. Defendants currently seek over \$100,000 from Plaintiff.

12. Venue is proper under 28 U.S.C. §1391(b)(2) because the insurance contract at issue was issued in the Northern District of Illinois to the named insured First Business Bancorp Co., which also maintains its place of business in the Northern District of Illinois.

13. On information and belief, Defendant South Central Bank N.A. has its main office in Chicago, Illinois as set forth in its articles of association, is a resident of Illinois and conducts business in the Chicago area.

14. Defendant Verve, A Credit Union, is a resident of Wisconsin and conducts business within the Northern District of Illinois through several different locations in the Chicago area.

15. Defendants M. Grayson, T. Grayson and Rudy are residents of the State of Illinois and, on information and belief, reside within the Northern District of Illinois.

FACTS COMMON TO ALL COUNTS

The Claims-Made Everest Policy

16. Everest issued a Directors & Officers Liability Policy (“the Policy”) to Defendant First Business Bancorp Co. as the named insured, written on a claims-made basis: policy number 8100015212-191 (effective May 1, 2019 to May 1, 2020). A true and correct copy of the Policy is attached as **Exhibit 1**.

17. The Policy provided an **IMPORTANT NOTICE** at the top of the Declarations Page which stated:

This is a claims-made policy. **Defense Costs** are included within the Limit of Liability. Amounts incurred as **Defense Costs** will reduce the Limit of Liability available to pay judgments or settlements. Please read this **Policy** carefully.

18. Item 3b on the Declarations Page states the Policy has a “D&O Policy Limit: \$1,000,000.”

19. Item 6 - Defense Options on the Declarations Page provides:

It shall be the duty of the **Insured** and not the duty of the **Insurer** to defend **Claims** unless the ‘Insurer’s Duty to Defend’ is designated ‘yes’ below:

<u>Insuring Agreement</u>	Insurer’s Duty
D&O Liability	<u>To Defend</u>
	No

20. Under Item 6 – Defense Options, Defendant, First Business, by not designating “yes,” did not elect to have coverage for “Insurer’s Duty to Defend.”

21. Section VIII. of the Policy provides, in part, as follows:

A. **NO DUTY TO DEFEND**

- (1) Amounts incurred as covered **Defense Costs** will reduce, and shall be part of and not in addition to, the applicable Limit of Liability. It shall be the duty of the **Insured** and not the duty of the **Insurer** to defend **Claims**. The **Insured** shall

only retain counsel approved in writing by the **Insurer**, whose consent for which shall not be unreasonably withheld.

* * *

- (3) The **Insurer** shall have the right but not the duty to associate with the **Insured** in the settlement and defense of any **Claim** that appears reasonably likely to involve the **Insurer**. Such association shall include, but not be limited to, participation in the formation of litigation strategy, review of pleadings and other pertinent papers prior to filing, and participation in the settlement negotiations.

22. Section XII.C. of the Policy provides, in part, as follows:

C. **TERMINATION**

- (1) Upon the occurrence of any of the following events, this Policy shall be deemed terminated:
 - (a) Financial Impairment of the Company or any Subsidiary comprising more than fifty percent (50%) of the Company's total assets;
 - (b) acquisition of the Company by another entity or the merger or consolidation of the Company into another entity such that the Company is not the surviving entity or acquisition of substantially all of the assets of the Company by another entity; or
 - (c) the Company ceasing to engage actively in its primary business.
- (2) Pursuant to Subsection (C)(1) above, the **Insurer** shall refund the unearned premium, calculated on a pro-rata basis. The return of any unearned premium shall not be a condition precedent to the effectiveness of termination but such payment shall be returned as soon as practicable. The occurrence of any of the foregoing events shall not affect the **Insured's** right to purchase the Extended Reporting Period pursuant to Section III.
- (3) In the event of **Financial Impairment** or sale of a **Subsidiary** comprising less than fifty percent (50%) of the **Company's** total assets, this termination provision shall apply only to the **Subsidiary** and its **Insured Persons** and

the **Policy** shall continue in full force with respect to all other **Insureds**.

23. Section XII.C.(2) provides that an occurrence under (C)(1) “shall not affect the **Insured**’s right to purchase the Extended Reporting Period pursuant to Section III.”

24. Section III.A. states “**Insured** shall have the right to purchase an optional extended reporting period (herein called the Extended Reporting Period) for the period set forth in Item 4 of the Declarations, but in no event less than 365 days.”

25. Section III.C. provides:

If the **Insured** elects to purchase the Extended Reporting Period, the premium will be calculated by multiplying the annual premium set forth in Item 11(a) of the Declarations by the percentage set forth in Item 4 of the Declarations. The Extended Reporting Period is non-cancellable and the entire premium shall be deemed fully earned at its commencement.

26. The Policy contains an Extended Reporting Period Activation (“ERP”) endorsement (EEO 40 687(03 17)).

27. The ERP endorsement provides:

In consideration of the premium paid to exercise the Extended Reporting Period option, and in reliance upon all statements made and information contained in the Declarations and **Application**, the **Insurer** and the **Insured** agree that the **Policy** is amended as follows:

1. Pursuant to Section XII, entitled "Cancellation/Nonrenewal/Termination", this **Policy** shall terminate or convert (if applicable) at 12:01 a.m. (local time at the address shown in Item 1 of the Declarations) on 01/10/2020.

* * *

4. The definition of **Company** is deleted and replaced as follows:

Company means:

- (1) the entity or entities set forth in Item 1 of the Declarations;
- (2) any **Subsidiary** created or acquired as of the inception date set forth in Item 2 of the Declarations;

(3) any **Subsidiary** created or acquired during the **Policy Period**; and

(4) the acquiring entity, but only for **Wrongful Acts** involving the entity or entities enumerated in (1) through (3) above,

but only for **Wrongful Acts** occurring prior to the termination date of this **Policy**.

5. Section XI, entitled “Mergers, Acquisitions and Changes in Business Activities”, is deleted in its entirety.

* * *

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements, or limitations of the **Policy** other than as above stated.

28. Section V. of the Policy, entitled “**Exclusions Applicable to All Insuring Agreements**” contains an “**Insured vs. Insured Exclusion**”

29. The “**Insured vs. Insured Exclusion**” states in its entirety:

Insured vs. Insured Exclusion - The **Insurer** shall not be liable to make any payment for **Loss** in connection with any **Claim** by, on behalf of, or at the behest of the **Company**, any affiliate of the **Company** or any **Insured Person** in any capacity except where such **Claim** is brought and maintained:

(1) in the form of a cross-claim or third-party claim for contribution or indemnity that is part of and results directly from a **Claim** that is not otherwise excluded by the terms of the **Policy**;

(2) by an **Insured Person** solely as a customer of the **Company**; provided such **Claim** is brought independently of, and totally without the direct or indirect solicitation, assistance, participation, or intervention of any other **Insured**; or

(3) by a security holder of the **Company** as a derivative action on behalf of the **Company** or such affiliate; provided such **Claim** is brought independently of, and totally without the direct or indirect solicitation, assistance, participation, or intervention of any **Insured** or any affiliate of the **Company** unless such participation arises solely out of the activities for which Section 806 of the Sarbanes-Oxley Act of 2002, or similar "whistle blower" protection provision

of an applicable federal, state, or local securities law affords protection to such **Insured**;

- (4) by an **Insured Person** who has not been an **Employee**, director, officer, member of the board of trustees, honorary or advisory director or advisory member of the board of trustees of the **Company** for four (4) years prior to the inception date of the **Policy**; or
- (5) by the FDIC or other governmental authority regulating the **Company** or any other party acting as receiver, conservator, liquidator, rehabilitator, or trustee of the **Company** or acting in a similar capacity.

The Underlying Verve Complaint & Tender Under the Policy

30. Pending in the Circuit Court of Cook County is *Verve, A Credit Union v. First Business Bancorp. Co., South Central Bank N.A., Marc B. Grayson, Todd E. Grayson, and Charles Rudy*, Case No. 2020 L 006113, (the “*Verve Action*”). A true and correct copy of the Complaint in the *Verve Action* is attached as **Exhibit 2**. The Defendants in this Action are the parties to the *Verve Action*.

31. Paragraph 1 of the *Verve Action* states:

Verve seeks to recover more than \$1 million in damages against Defendants as a result of Defendants’ fraudulent accounting practices, fraudulent misrepresentations of material facts, and fraudulent concealment of material facts, which induced Verve to enter into a Purchase and Assumption Agreement with FBBC and SCB under false pretenses to acquire substantially all of SCB’s assets.¹

32. On June 11, 2019, Verve entered into a Purchase and Assumption Agreement, as amended on January 8, 2020, pursuant to which Verve purchased “substantially all of the assets” of South Central Bank. See **Exhibit 2** – Complaint at ¶11. The Purchase and Assumption Agreement attached to the *Verve Action*, sets forth the terms for Verve’s acquisition of

¹ First Business is referred to as FBBC and South Central Bank is referred to as SBC in the *Verve* Complaint.

“substantially all of the assets” and assumption of “substantially all of the liabilities” of South Central Bank. See **Exhibit 2** – Complaint at ¶¶ 11, 12, 13.

33. The *Verve* Action alleges that the *Verve* Defendants committed several misrepresentations in order to induce Verve into completing the purchase of South Central Bank:

- a. “[K]nowingly and intentionally capitalized the services performed by RealNets in violation of GAAP” (**Exhibit 2** at ¶20).
- b. “[K]nowingly and intentionally included the improperly capitalized RealNets services in SCB’s fixed assets schedule in order to misrepresent and artificially inflate SCB’s assets schedule and Net Equity by approximately \$965,000.” (**Exhibit 2** at ¶21)
- c. “[C]oncealed their improper capitalization of RealNets services in SCB’s fixed assets schedule in an effort to deceive Verve and induce Verve to purchase substantially all of SCB’s assets without the agreed-upon minimum equity price adjustment.” (**Exhibit 2** at ¶22).
- d. “[K]nowingly and intentionally concealed the unpaid invoices in order to misrepresent and artificially inflate SCB’s balance sheet and Net Equity.” (**Exhibit 2** at ¶26).
- e. “[I]ntentionally provided Verve with SCB’s assets schedule and balance sheet contained false statements of material fact and overstated SCB’s assets and Net Equity.” (**Exhibit 2** at ¶27).

34. The *Verve* Action brings counts for Common Law Fraud (Count I) and Civil Conspiracy (Count II) against the *Verve* Defendants.

35. Defendants First Business, South Central Bank, Marc B. Grayson, Todd E. Grayson, and Charles Rudy tendered the *Verve* Action as a **Claim** under the Policy.

36. Everest concluded that there was no coverage available under the Policy in connection with the *Verve* Action based on the “**Insured vs. Insured Exclusion.**” Contemporaneously with the filing of this action, Everest declined coverage for the *Verve* Action under the Policy.

COUNT I
DECLARATORY JUDGMENT
NO DUTY TO DEFEND

(Defendants – First Business; South Central Bank; M. Grayson; T. Grayson; & C. Rudy)

37. Everest realleges all previous paragraphs and incorporate each herein as though fully restated.

38. Everest seeks a declaration that it has no duty to defend Defendants First Business, South Central Bank, Marc B. Grayson, Todd E. Grayson, and Charles Rudy under the Policy because First Business specifically declined to purchase Directors & Officers Liability Coverage containing an Insurer’s duty to defend.

39. As stated in Item 6 of the Declarations Page, “**Defense Option:** It shall be the duty of the **Insured** and not the duty of the **Insurer** to defense **Claims** unless the ‘Insurer’s Duty to Defend’ is designated ‘yes’ below.”

40. For the “D&O Liability Insuring Agreement - Insurer’s Duty to Defend,” the Policy is designated “No.”

41. Based on the “No” designation, the D&O Liability portion of the Policy does not obligate Everest to provide a duty to defend for a **Claim** made thereunder. The duty to defend is placed on Defendants First Business, South Central Bank, Marc B. Grayson, Todd E. Grayson, and Charles Rudy as the **Insureds** under the Policy.

42. On information and belief, the Defendants dispute Everest’s position that it owes no duty to defend Defendants for the *Verve* Action.

43. An actual controversy exists between Everest and Defendants First Business, South Central Bank, N.A., Marc B. Grayson, Todd E. Grayson, and Charles Rudy regarding the duty to defend them in the *Verve* Action under the Policy.

44. Pursuant to 28 U.S.C. §2201 and Rule 57 of the Federal Rules of Civil Procedure, this Court has the authority to declare the rights and obligations of the parties in relation to the terms of the insurance contract at issue.

45. Accordingly, Everest requests a declaration from this Court that it owes no duty to defend Defendants First Business, South Central Bank, N.A., Marc B. Grayson, Todd E. Grayson, and Charles Rudy for the *Verve* Action. A declaration by this Court of the parties' respective rights and obligations under the Policy will terminate some or all of the parties' controversies.

COUNT II
DECLARATORY JUDGMENT
NO DUTY TO DEFEND AND NO DUTY TO INDEMNIFY
INSURED VS. INSURED EXCLUSION
(All Defendants)

46. Everest realleges all previous paragraphs and incorporates each herein as though fully restated.

47. Everest seeks a declaration that it has no obligation to pay defense costs or indemnity under the “**Insured vs. Insured Exclusion**” of the Policy for the *Verve* Action.

48. Verve entered into a Purchase and Assumption Agreement, as amended on January 8, 2020, under which Verve acquired substantially all of the assets of South Central Bank.

49. Based on Verve's acquisition of substantially all of the assets of South Central Bank's assets, Section XII.C.(1) “Termination” of the Policy was triggered.

50. Defendants received notice that the Policy was deemed terminated as of January 10, 2020.

51. As permitted under the Section III. of the Policy, and in recognition of the termination of the Policy under Section XII.C.(1), an Extended Reporting Period was purchased

that provided coverage as described by the Policy's Extended Reporting Period Activation endorsement.

52. Pursuant to Section III.C. a new premium was "calculated by multiplying the annual premium set forth in Item 11(a) of the Declarations by the percentage set forth in Item 4 of the Declarations." This recalculated premium was paid in order to secure the Extended Reporting Period.

53. Verve falls within the definition of the "**Company**," as amended by the Extended Reporting Period Activation endorsement, based on its acquisition of substantially all of the assets of South Central Bank.

54. Section V. of the Policy contains an "**Insured vs. Insured**" exclusion applicable to the Policy. The "**Insured vs. Insured**" exclusion states:

The **Insurer** shall not be liable to make any payment for **Loss** in connection with any **Claim** by, on behalf of, or at the behest of the **Company**, any affiliate of the **Company** or any **Insured Person** in any capacity.

55. The *Verve* Action constitutes a **Claim** brought by the **Company** (*i.e.*, Verve, per the definition of the Extended Reporting Period Activation endorsement).

56. None of the five (5) exceptions to the "**Insured vs. Insured**" exclusion apply to the *Verve* Action.

57. Based on the Extended Reporting Period Activation endorsement and the "**Insured vs. Insured**" exclusion, Everest is not liable to make any payment for **Loss**, which as defined by the Policy includes "**Defense Costs**" in connection with the **Claim**. Accordingly, the Policy does not afford coverage for any **Defense Costs** incurred in connection with the defense of the *Verve* Action or possible indemnity obligation.

58. On information and belief, Defendants dispute Everest's position that Everest owes no coverage under the Policy for the *Verve* Action.

59. An actual controversy exists between Everest and Defendants regarding the duties and obligations of the parties under the Policy.

60. Pursuant to 28 U.S.C. §2201 and Rule 57 of the Federal Rules of Civil Procedure, this Court has the authority to declare the rights and obligations of the parties in relation to the terms of the insurance contract at issue.

61. Accordingly, Everest seeks a declaration from this Court that Everest owes no duty to defend and indemnify Defendants under the Policy for the *Verve* Action and otherwise has no obligation to pay defense costs or any indemnity for the *Verve* Action. A declaration by this Court of the parties' respective rights and obligations under the Policy will terminate some or all of the parties' controversies.

WHEREFORE, Plaintiff, Everest National Insurance Company, respectfully request judgment as follows:

- a) Under Count I, that this Court determine and declare that Everest has no duty to defend Defendants, First Business, South Central Bank, Marc B. Grayson, Todd E. Grayson, and Charles Rudy in the *Verve* Action because the Policy specifically states the Insured, not the Insurer, has the duty to defend Claims.
- b) Under Count II, that this Court determine and declare that Everest has no duty to defend or indemnify Defendants, and no obligation to pay defense costs and any indemnity for the *Verve* Claim because, pursuant to the Extended Reporting Period Activation endorsement and the "Insured vs. Insured" exclusion, Everest is not liable to make any payment for Loss in connection with the *Verve* Action.

c) That this Court award Everest such other and further relief as is just and proper.

DATE: April 12, 2021

Respectfully submitted,

SKARZYNSKI MARICK & BLACK LLP

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