No. 15-611

In the Supreme Court of the United States

FIRST AMERICAN TITLE INSURANCE COMPANY,
PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

After it became the receiver for a failed bank, the Federal Deposit Insurance Corporation (FDIC) entered into a purchase-and-assumption agreement (Agreement) through which it transferred most, but not all, of the failed bank's assets to a second bank. The FDIC subsequently filed suit against petitioner, alleging that petitioner had breached duties to the failed bank and that the failed bank had suffered losses as a result. Petitioner asserted in defense that the FDIC could not pursue those legal claims because the Agreement had transferred ownership of the claims to the second bank. The question presented is as follows:

Whether the court of appeals correctly held that the failed bank's legal claims against petitioner were not among the assets transferred through the Agreement, and that the FDIC as receiver therefore was entitled to prosecute those claims.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is not published in the *Federal Reporter* but is reprinted at 611 Fed. Appx. 522. The opinion of the district court (Pet. App. 29a-71a) is not published but is available at 2013 WL 5535561.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 2015. A petition for rehearing was denied on June 9, 2015 (Pet. App. 95a). On August 10, 2015, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including November 6, 2015, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, in response to the savings and loan crisis of the 1980s. The statute establishes a framework for resolving the assets and liabilities of failed banks. Under Section 212 of FIRREA, when a bank insured by respondent Federal Deposit Insurance Corporation (FDIC) becomes insolvent, the FDIC may be appointed the receiver for the bank and may take control of its assets and liabilities. See 12 U.S.C. 1813(c)(2), 1821(c)(1), (d)(2)(A) and (B). As relevant here, the FDIC as receiver is authorized to enter into a purchase-and-assumption agreement with an assuming institution under which certain assets and liabilities of the failed bank are transferred to the assuming institution. 12 U.S.C. 1821(d)(2)(G)(i)(II).

In May 2009, BankUnited, F.S.B. (Old Bank) was closed by the Office of Thrift Supervision of the United States Department of the Treasury. See Pet. App. 4a, 122a. After being appointed receiver for Old Bank under FIRREA, the FDIC immediately transferred most of Old Bank's assets and liabilities to a newly chartered national bank, BankUnited, N.A. (New Bank). *Id.* at 4a. That assignment was accomplished through a purchase-and-assumption agreement (Agreement) between the FDIC and New Bank. The Agreement recites that it is generally governed by federal law. *Id.* at 145a (Section 13.4).

Section 3.1 of the Agreement provides for the transfer of "all of the assets" of Old Bank to New Bank, "[w]ith the exception of certain assets expressly excluded in Sections 3.5 and 3.6" of the Agreement.

Pet. App. 138a-139a. As relevant here, Section 3.5 states that New Bank "does not purchase, acquire or assume," *inter alia*, legal claims against persons who caused losses to Old Bank, including claims against the bank's directors and officers, professionals (such as accountants, appraisers, and attorneys), and insurance and bond companies. *Id.* at 142a-144a. The practical effect of that exclusion was that the FDIC retained the assets that were not transferred to New Bank.

2. In May 2007, before Old Bank was declared insolvent, it approved and funded two loans to Nathaniel Ray to purchase condominium units. Pet. App. 31a. Petitioner issued a title-insurance policy to Old Bank, and petitioner's local agent was designated as the title, escrow, and closing agent for the loans. *Ibid.* Petitioner also issued two closing protection letters (CPLs) to Old Bank and its successors. *Id.* at 31a-32a. The CPLs protected Old Bank from losses that might occur if the local agent either did not follow the bank's closing instructions or acted dishonestly. *Ibid.*

In connection with the sale of the units, Ray committed fraud by misrepresenting his income and the source of down payments and by relying on an inflated appraisal. See Pet. App. 3a-4a, 31a-36a. Petitioner's local agent, who was familiar with a number of individuals who had participated in the fraudulent scheme, failed to follow Old Bank's closing instruction to verify the down payments, see *id.* at 4a, and generally "turned a blind eye" to the scheme, *id.* at 32a. Ray defaulted on both loans. *Id.* at 35a. Old Bank foreclosed on the units, and New Bank ultimately sold them for losses. *Id.* at 35a, 70a.

3. The FDIC sued petitioner for breach of the CPLs, alleging that petitioner's local agent had failed to follow Old Bank's instructions and had acted dishonestly. Pet. App. 36a-37a, 51a, 57a-58a. As relevant here, petitioner defended by asserting that the FDIC was not entitled to prosecute the suit because the Agreement had transferred Old Bank's legal claims for breach of the CPLs to New Bank. *Id.* at 38a, 44a. Following a bench trial, the district court rejected that argument, *id.* at 44a-48a, and entered judgment for the FDIC in the amount of the net loss on each loan plus interest, *id.* at 70a-71a.

4. The court of appeals affirmed. Pet. App. 1a-26a. The court rejected petitioner's argument that the Agreement had transferred the legal claims for breach of the CPLs to New Bank. *Id.* at 9a-16a. The court explained that "Section 3.1 [of the Agreement] accomplishes the agreed sale by identifying the assets sold, including the claims sold." *Id.* at 13a. The court determined that, under definitional provisions of the Agreement, the CPL claims qualify as "assets" within the meaning of Section 3.1. *Id.* at 9a-10a. The court further explained, however, that "Section 3.1 expressly and unconditionally defers to Section 3.5 by selling assets '[w]ith the exception of certain assets expressly excluded in Sections 3.5 and 3.6.'" *Id.* at 13a. "Section 3.5," the court continued, "reserves claims to the FDIC by identifying certain persons against whom the FDIC retained 'any interest, right, action, claim, or judgment,' provided that the events 'giving rise to' the 'interest, right, action, claim, or judgment' occurred before Old Bank failed." *Ibid.*

The court of appeals concluded that the CPL claims asserted in this suit fall within three different subsec-

tions of Section 3.5(b) and therefore were retained by the FDIC. See Pet. App. 10a-13a. In light of that conclusion, the court stated that it "need not determine whether the closing protection letters themselves were expressly reserved to the FDIC because, under the terms of the [Agreement], the right to sue was reserved." *Id.* at 14a.

ARGUMENT

Petitioner seeks review of the question "[w]hether the well-settled rule of contract interpretation—that specific provisions control over conflicting general provisions—applies when interpreting contracts governed by federal law." Pet i. The decision below does not implicate that question, however, because the court of appeals did not dispute the applicability of the established interpretive principle that specific contractual provisions control over general ones to contracts governed by federal law. Rather, the court applied the express proviso in Section 3.1 of the Agreement, which states that assets listed in Section 3.5 are not transferred to New Bank. The court of appeals' interpretation and application of that specific contractual language does not conflict with any decision of this Court or another court of appeals, nor does it present any legal issue of general applicability. Further review is not warranted.

1. In holding that the FDIC retained the CPL claims, the court of appeals correctly construed the Agreement. Section 3.1 of the Agreement provides:

> *With the exception of certain assets expressly excluded in Sections 3.5 and 3.6*, [New] Bank hereby purchases from the [FDIC], and the [FDIC] hereby sells, assigns, transfers, conveys, and delivers to [New] Bank, all right, title, and interest of the

> [FDIC] in and to all of the assets (real, personal and mixed, wherever located and however acquired) of [Old] Bank * * * .

Pet. App. 138a (emphasis added). The parties agree (see Pet. 12), and the court of appeals held, that the CPL claims qualify as "assets" under Section 3.1. See Pet. App. 9a-10a; see also *id.* at 127a-128a, 132a-133a (relevant definitional provisions of Agreement); *id.* at 147a (schedule listing "Loans" as an asset). Accordingly, under the plain terms of Section 3.1, the FDIC's authority to prosecute the CPL claims depends on whether those claims are "assets expressly excluded in Section[] 3.5 [or] 3.6," *id.* at 138a. If the claims were among the assets covered by Section 3.5 or 3.6, they were not transferred to New Bank and therefore were retained by the FDIC.

Section 3.5(b) of the Agreement provides that New Bank "does not purchase, acquire or assume":

> any interest, right, action, claim, or judgment against (i) * * * any * * * Person * * * retained by [Old] Bank * * * on or prior to Bank Closing arising out of any act or omission of such Person in such capacity, (ii) any underwriter of * * * any * * * insurance policy of [Old] Bank, * * * or (iv) any other Person whose action or inaction may be related to any loss * * * incurred by [Old] Bank; *provided*, *that* for the purposes hereof, the acts, omissions or other events giving rise to any such claim shall have occurred on or before Bank Closing * * * .

Pet. App. 142a-143a. The court of appeals held, and petitioner does not dispute in its certiorari petition (see Pet. 13), that the CPL claims are encompassed by

Subsections (i), (ii), and (iv) of Section 3.5(b). See Pet. App. 10a-13a. Thus, under the plain language of the Agreement, the CPL claims are among the assets that Section 3.5 carves out from the general transfer of assets effected by Section 3.1. The court of appeals' determination that the FDIC retained those assets therefore was correct.

Petitioner contends (Pet. 2, 12-14) that the court of appeals "ignored" the principle of contract interpretation that "specific provisions control over conflicting general provisions," and it asks the Court to summarily reverse the decision below on that basis. Pet. 2. But the specific-governs-the-general principle of contract interpretation has no application here because there is no conflict between Sections 3.1 and 3.5. See, *e.g.*, *Aeroground, Inc.* v. *CenterPoint Props. Trust*, 738 F.3d 810, 813 (7th Cir. 2013) ("The more specific provision of a contract governs where it arguably conflicts with a more general provision."). Rather, as the court of appeals explained, "Section 3.1 expressly and unconditionally defers to Section 3.5 by selling assets '[w]ith the exception of certain assets expressly excluded in Sections 3.5 and 3.6.'" Pet. App. 13a (quoting Section 3.1).

Petitioner does not acknowledge that key proviso in its certiorari petition, even though it formed the basis for the court of appeals' decision. Petitioner instead simply describes Section 3.5 as a "general exclusionary provision[]" while labeling Section 3.1 a "specific inclusionary provision[]." Pet. 13 (emphasis omitted). Even if those characterizations were apt, there would be no conflict between the two provisions, and therefore no basis for declining to enforce Section

3.5 according to its terms, because Section 3.1 explicitly excludes assets listed in Section 3.5.

In any event, Section 3.5 is the more specific provision because it carves out certain assets from Section 3.1, which otherwise transfers all of Old Bank's assets to New Bank. Petitioner emphasizes the court of appeals' description of Subsection (iv) of Section 3.5(b) as "a contractual 'catchall.'" Pet. 13 (quoting Pet. App. 12a). The court's overarching point, however, was that Subsection (iv) encompasses assets similar to those identified in the other subsections of Section 3.5(b), *i.e.*, legal claims against persons whose actions resulted in a loss to Old Bank. See Pet. App. 12a-13a. It is farfetched to suppose that a provision referring to legal claims, which are a (narrow) subset of the assets that Old Bank held at the time it failed, is more general than a provision (Section 3.1) that refers to "all of the assets (real, personal and mixed, wherever located and however acquired) of [Old] Bank." *Id.* at 138a.

The court of appeals' use of the term "catchall" appears simply to reflect the fact that Subsection (iv) of Section 3.5(b), which refers to claims against "any other Person whose action or inaction may be related to any loss * * * incurred by [Old] Bank," is more general than are Subsections (i) and (ii), which refer to legal claims against particular classes of potential defendants. See Pet. App. 10a-12a; p. 6, *supra* (quoting respective subsections). The court did not purport to assess the relative specificity of Sections 3.1 and 3.5 taken as a whole. In any event, the court of appeals held that the CPL claims fall under Subsections (i) and (ii) as well as under Subsection (iv), see Pet. App.

10a-12a, and it did not characterize Subsections (i) and (ii) as "catchalls."

Petitioner posits a hypothetical contract (Pet. 17) in which a transfer-of-assets provision akin to Section 3.1 identifies with specificity certain assets (*e.g.*, "CPL claims arising out of loans for Florida condominiums") that fall within the general terms of a cross-referenced exclusionary provision. In construing such a contract, a court might be required to decide which of the two conflicting provisions should be given precedence, because applying the exclusionary provision according to its terms would render a phrase in the transfer-of-assets provision superfluous. Here, by contrast, applying Section 3.5 as written will not render superfluous any phrase in Section 3.1.

2. Petitioner asserts (Pet. 3, 14-17) that the court of appeals' decision "creates a circuit split" over whether "the basic rule of contract interpretation that specific provisions control over general ones" applies to contracts governed by federal law. Pet. 3. As explained above, however, the court of appeals did not discuss that principle, much less hold that it does not apply to federal contracts. The court's decision is consistent with the interpretive rule on which petitioner relies, both because there is no conflict between Sections 3.1 and 3.5 (since Section 3.1 expressly contemplates that certain of Old Bank's assets would *not* be transferred under the Agreement) and because Section 3.5 is the more specific of the two provisions.

The court of appeals correctly applied the plain text of the Agreement, under which assets listed in Section 3.5 are expressly carved out from the transfer effected by Section 3.1, to the particular assets at issue here (CPL claims). The court's case-specific

construction of the Agreement does not implicate any disagreement among the circuits or otherwise warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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