

FEB 25 2014

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>U.S. SPECIALTY INSURANCE CO.,</p> <p style="text-align: center;">Plaintiff - counter-defendant -</p> <p>Appellant,</p> <p style="text-align: center;">v.</p> <p>XL SPECIALTY INSURANCE COMPANY,</p> <p style="text-align: center;">Defendant - counter-claimant</p> <p>- Appellee.</p>

No. 12-56164

D.C. No. 5:11-cv-00617-RGK-OP

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
R. Gary Klausner, District Judge, Presiding

Argued and Submitted February 13, 2014
Pasadena, California

Before: FARRIS, N.R. SMITH, and WATFORD, Circuit Judges.

The district court correctly granted summary judgment to XL Specialty Insurance Co. because exclusion 2(g) of the XL insurance policy applies to the aircraft accident here. Exclusion 2(g) excludes from coverage bodily injury or

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

property damage “arising out of the . . . use . . . of any aircraft . . . operated by . . . any insured.” Thus, the exclusion applies here if, at the time of the accident, the aircraft was operated by the insured, Championship Aviation, Inc. (CAI).

U.S. Specialty Insurance Co. obtained a default judgment against CAI based in part on U.S. Specialty’s allegation that the aircraft was operated by CAI at the time of the accident. In its underlying action against CAI, U.S. Specialty alleged that “[a]t all times herein relevant, the Aircraft was . . . operated by defendant[] CAI.” It then reincorporated that allegation throughout its complaint. Having obtained the default judgment it seeks to enforce in this action based in part on the allegation that CAI *did* operate the aircraft, U.S. Specialty cannot now claim that CAI *did not* operate the aircraft in order to avoid the application of exclusion 2(g). *See Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782–83 (9th Cir. 2001). That remains true even though U.S. Specialty took its original position in a different action. *Id.*

AFFIRMED.