
IN THE
**United States Court of Appeals
for the Third Circuit**

No. 06-3743

PNC BANK, NATIONAL ASSOCIATION, Trustee
of the Harold G. Fulmer, III
Irrevocable Deed of Trust Dated August 21, 1987,

Appellee,

v.

AMERUS LIFE INSURANCE COMPANY,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(Honorable John P. Fullam, Senior Judge)

OPENING BRIEF OF APPELLANT
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**STATEMENT OF SUBJECT-MATTER
AND APPELLATE JURISDICTION**

The United States District Court for the Eastern District of Pennsylvania had jurisdiction over this matter under 28 U.S.C. §§ 1332, 1441, and 1446. This Court has jurisdiction under 28 U.S.C. § 1291. The district court entered judgment on July 17, 2006. (*See* Docket No. 76; Joint Appendix (“JA”) 12-21 (Adjudication).) Defendant filed a timely notice of appeal on August 14, 2006. (*See* Docket No. 78; JA 22 (Notice of Appeal).) This appeal is from a final judgment disposing of all claims.

STATEMENT OF ISSUES

1. Whether the district court erred, as a matter of law, by finding a breach of an implied duty in a life insurance policy, when the court conceded the policy terms were not modified, the insurer fully complied with the policy’s express terms, and the implied term would nullify the policy’s express provisions.

This issue was raised by AmerUs Life Insurance Company (“AmerUs”) in its proposed findings of fact and conclusions of law. (*See* JA 563-64.) The district court’s decision appears in the district court’s Adjudication and Order (“Adjudication”). (*See* JA 18.)

2. Whether the district court erred, as a matter of law, by concluding that a telephone conversation caused a life insurance policy to lapse for non-payment of premiums when the policy did not enter the 60-day grace period until after that

conversation, and the policy owner subsequently received a contractually required written notice warning that the policy would lapse if premiums were not paid and, in response, the policy owner took no action.

AmerUs argued in its proposed findings of facts and conclusions of law that the telephone conversation did not cause the policy to lapse. (*See* JA 564, 565-66.) The district court's decision on this issue appears in the Adjudication. (*See* JA 18.)

STATEMENT OF THE CASE

On September 24, 2004, PNC Bank, National Association ("PNC"), filed a complaint against AmerUs, two insurance agents, and a life insurance agency in the Court of Common Pleas of Lehigh County, Pennsylvania (the "State Court"). The complaint alleged that AmerUs breached its contract with PNC because AmerUs failed to continue coverage under life insurance policy number 2535113 (the "Policy") in accordance with the Policy's terms. The complaint purported to assert tort claims against the non-diverse insurance agency and agents.

On March 11, 2005, PNC filed an amended complaint. (*See* JA 24-103 (amended complaint with exhibits).) PNC again alleged that AmerUs had breached the Policy's express terms. (*See* JA 29-32.) Specifically, PNC alleged that AmerUs failed to continue coverage under the Policy after accepting a premium payment during the Policy's grace period and failed to apply the Policy's

cash value toward the cost of insurance. (*See* JA 32.) The amended complaint again purported to assert tort claims against the insurance agency and agents.

On June 21, 2005, following the State Court's dismissal of the non-diverse insurance agency and agents, AmerUs removed this action to the United States District Court for the Eastern District of Pennsylvania based on diversity of citizenship. (*See* Docket No. 1.)

On June 27 and 28, 2006, the matter was tried non-jury before the Honorable John P. Fullam. (*See* Docket Nos. 67-68 (minute entries for trial proceedings).) At trial, PNC presented no evidence of a breach of the Policy's express terms and abandoned its allegation that AmerUs failed to apply the Policy's cash value to the payment of premiums. Instead, PNC argued that AmerUs had breached the implied covenant of good faith and fair dealing because incorrect information was supplied during a telephone call by an AmerUs customer service representative.

On July 17, 2006, the district court entered an "Adjudication and Order" declaring the Policy had been improperly canceled by AmerUs, ordering AmerUs to provide PNC and Harold G. Fulmer III ("Mr. Fulmer") with information about the amount of premium payments necessary to sustain the Policy in force, and ordering Mr. Fulmer to pay the overdue premiums. (*See* JA 20-21.)

**STATEMENT OF
RELATED CASES AND PROCEEDINGS**

The factual issues in this case are substantially identical to a related action filed by Christopher Fulmer, Lara Fulmer, Judith Fulmer, and Harold G. Fulmer, III, against AmerUs and PNC in the Court of Common Pleas of Lehigh County (Case No. 2006-C-0269). That matter is stayed pending the outcome of this appeal.

STATEMENT OF FACTS

A. The Policy And The Fulmer Trust

On August 21, 1987, Harold G. Fulmer, III (“Mr. Fulmer”) entered into an Irrevocable Trust Agreement (the “Trust Agreement”) with Meridian Trust Company. (*See* JA 733-60.) Pursuant to the Trust Agreement, an irrevocable life insurance trust (the “Fulmer Trust”) was created with Meridian Trust Company as the original trustee. (*See* JA 733.)

Two days later, on August 23, 1987, AmerUs issued policy number 2535113, a \$10 million “Flexible Premium Adjustable Life Insurance Policy.” (*See* JA 1421-57 (Policy).) Mr. Fulmer immediately transferred ownership of the Policy to Meridian Trust Company as trustee of the Fulmer Trust. (*See* JA 12 (Adjudication); JA 734-35 (Trust Agreement provisions concerning Policy transfer); JA 762-63 (transfer of ownership form).) Pursuant to the Trust Agreement, Mr. Fulmer expressly relinquished all of his rights and powers under

the Policy to the trustee of the Fulmer Trust. (*See* JA 734-35.) Although the Trust Agreement established that “Mr. Fulmer was solely responsible for paying premiums on the [P]olicy” (*see* JA 13), no evidence exists to support the district court’s conclusion that AmerUs “had a copy of the [T]rust [A]greement in its files.” (JA 13.) In fact, when this issue arose during oral argument on the motion for summary judgment filed by AmerUs, counsel for AmerUs, shortly after the hearing, advised the district court that AmerUs did not have a copy of the Trust Agreement in its files. (*See* JA 115 (Letter from Stephen Weaver, Esq., to Hon. John P. Fullam).)

In 1999, PNC became the trustee of the Fulmer Trust and, as trustee, the owner of the Policy. (*See* JA 782-83 (letter accepting appointment as trustee); JA 1852 (PNC Transaction Log showing date of opening account).) Two years later, a group within PNC called the “Irrevocable Life Insurance Trust Unit” (“Trust Unit”) became responsible for managing the Policy. (*See* JA 1458 (J. Fisher letter of April 25, 2001).)

The Trust Unit was responsible for the administration of approximately 1,000 life insurance trusts. (*See* JA 2123 at 18, 2127 at 35, 2172 at 11 (J. Fisher testimony).) The Trust Unit possessed a copy of every life insurance policy it administered, including the Policy. (*See* JA 2127 at 35, 2182 at 51-52 (J. Fisher testimony).)

As administrator of the Fulmer Trust, the Trust Unit was responsible for forwarding to Mr. Fulmer and his wife, Judith Fulmer (collectively, the “Fulmers”), all notices concerning the Policy, including annual statements, premium notices, and late payment offers. (*See* JA 2131 at 51, 2181-82 at 49-50 (J. Fisher testimony).) The Fulmers, however, preferred to make premium payments themselves. (*See* JA 2174 at 20-21, 2197-98 at 113-14 (J. Fisher testimony).)

The Trust Unit employed two trust officers, Jeanne Fisher, a lawyer and vice president of PNC, and Ann Bricking. (*See* JA 2181 at 46-49 (J. Fisher testimony).) The only two persons assigned to and responsible for the management of trusts were Ms. Fisher and Ms. Bricking. (*See* JA 2181 at 49.)

The Policy initially provided for planned annual premiums of \$80,000 to be paid quarterly. (*See* JA 1423 (Policy).) Quarterly premium payments were to be paid on March 23, June 23, September 23, and December 23. (*See id.*; JA 2195 at 103 (J. Fisher testimony).) Payments were deposited into an account guaranteed to earn at least 4.5% annually. (*See* JA 1423, 1428-29 (Policy).) The value of this account was called the Policy’s “account value.” (*See id.*)

The Policy’s “cash value” was the “account value” (total premiums paid, plus interest, minus the cost of insurance) less a contractually established “surrender fee.” (*See* JA 1429.) The “cash value” could be used in a number of

ways, including paying the monthly cost of insurance. (*See* JA 1430.) The “cost of insurance” was limited according to the “Table of Guaranteed Maximum Insurance Rates” on page 3 of the Policy. (*See* JA 1424, 1429.)

A monthly deduction was made from the Policy’s cash value each policy month. (*See* JA 1429.) According to the Policy, the monthly deduction “is determined by adding the cost of insurance and the cost of additional benefits provided by rider.” (*Id.*)

From August 2003 through April 23, 2004, the monthly deduction was approximately \$7,800. (*See* JA 2071 col. 8 (transactional history chart).) Between August 2003 and April 2004, AmerUs could have charged as much as \$16,117.60 for the monthly cost of insurance. (*See* JA 1424, 1429 (Policy, provisions concerning maximum cost of insurance).) The actual cost of insurance was less than half the guaranteed maximum rate stated in the Policy. (*See* JA 1424 (Policy, chart providing guaranteed maximum cost of insurance); JA 2071 col. 8 (transactional history chart).)

The Policy provision concerning “Continuation of Coverage” stated that, “[i]f planned premium payments are not made, this policy and any riders will remain in force as long as the cash value covers the monthly deduction. ... On a monthly due date, if the cash value is not sufficient to cover the monthly deduction, the Grace Period provision will apply.” (*See* JA 1430 (Policy).)

The grace period provision in the Policy provided that the “policy will stay in force for 60 days after the monthly due date on which the cash value is not sufficient to cover the monthly deduction then due.” (*See* JA 1426.) Under the heading “Lapse,” the Policy provided that “[i]f sufficient premium is not paid by the end of the grace period, the policy and any additional benefit riders will end without value.” (*Id.*) The Policy’s “Lapse” provision required AmerUs to mail PNC “notice of the amount of premium that will be sufficient to continue the policy in force at least 30 days before the end of the grace period.” (*See id.*)

Under the heading “General Provisions,” the Policy provided:

This policy, application(s) and any riders make up the entire contract. The contract may not be changed, nor may any of our rights or requirements be waived, except in writing signed by our President or one of our Vice Presidents or our Secretary. No agent has authority to change the policy or to waive any of its provisions.

(*Id.* at 1432.) The district court found the Policy was not modified. (*See* JA 19 (Adjudication).)

B. Premium Payments After August 2003

On September 4, 2003, PNC forwarded a planned premium notice from AmerUs to the Fulmers stating that a premium payment of \$22,045.70 would be due on September 23, 2003. (*See* JA 1493-95 (letter from PNC and premium notice).) In response, on November 19, 2003, the Fulmers sent a payment to

AmerUs in the amount of \$22,045.70. (*See* JA 1497-98 (premium payment check and premium notice).)

On November 23, 2003, the Policy briefly entered the grace period because it had insufficient cash value to cover the monthly deduction due that day. (*See* JA 514-15 (B. Clark testimony); JA 2071 ln. I (transactional history chart).) The November 19, 2003, premium payment was credited on November 24, 2003, covering the monthly deduction of November 23, 2003, and bringing the Policy out of the grace period, also referred to as the “pending lapse” state. (*See* JA 515 (B. Clark Testimony); JA 2071 ln. J (transactional history chart).)¹ Under the Policy, it was not necessary to send PNC a notice concerning this brief shortfall in the Policy’s cash value because the shortage ended before a late payment offer was required. (*See* JA 1426 (Policy provision requiring notice of an impending lapse to be sent 30 days before the end of the 60-day grace period).)

On November 21, 2003, AmerUs sent notice to PNC of the quarterly planned premium of \$22,045.70 due on December 23, 2003. (*See* JA 1503-04 (premium notice); JA 2084 (register showing mailing date).) PNC forwarded this premium notice to the Fulmers on November 28, 2003. (*See* JA 1502-04 (PNC

¹ The transactional history chart shows a payment of only \$21,384.33 because, pursuant to the Policy, AmerUs deducted a three percent “premium expense charge” from each premium payment before adding the balance of the payment to the Policy’s account value. (*See* JA 515 (B. Clark testimony); JA 1423, 1429 (Policy).)

letter and premium notice).) The Fulmers, however, did not pay the premium by December 23, 2003 (the due date) and never paid that premium in full. (*See* JA 2071 col. 9 (transactional history chart).) The Policy again entered its grace period on January 23, 2004, when its cash value fell to a value of negative \$511.04. (*See* JA 517 (B. Clark testimony); JA 2071 ln. N (transactional history chart).)

On February 3, 2004, Mrs. Fulmer contacted AmerUs by telephone and was told that the Policy had exhausted its cash value and a payment of \$511.04 would be needed to keep the Policy in force until March 2004. (*See* JA 448; *see also* JA 1505 (premium notice with handwritten notes from conversation).) By check dated February 3, 2004, Mrs. Fulmer paid the \$511.04. (*See* JA 450, 517 (J. Fulmer and B. Clark testimony); JA 1507 (check for \$511.04); JA 2071 ln. O (transactional history chart).)²

Ms. Allen testified that she and Mrs. Fulmer spoke on February 11, 2004, and, at Mrs. Fulmer's request, Ms. Allen called AmerUs's customer service line to inquire about the status of the Policy. (*See* JA 317-18 (T. Allen testimony).) Ms. Allen spoke with an AmerUs customer service representative named

² The transactional history chart shows a payment of \$495.71 rather than \$511.04 because of the 3% premium expense charge deducted from all premium payments made under the Policy. (*See* JA 517-18 (B. Clark testimony); JA 2071 ln. O (transactional history chart).) This payment was adequate to remedy the shortfall in the Policy's cash value because an interest payment of \$35.75 was credited to the Policy at the same time as the payment of \$511.04. (*See* JA 517-18 (B. Clark testimony); JA 2071 ln. O (transactional history chart).)

“Brenda.” (*See id.*) Ms. Allen asked “Brenda” whether they could skip a premium payment. (*See* JA 318.) “Brenda” told Ms. Allen that the Policy would be “okay” if a premium payment was not made for “about” three months. (*See* JA 1508 (T. Allen notes).) Ms. Allen did not clarify when the three-month period began or ended, but assumed “Brenda” meant a premium payment was not required for three months from the next premium due date, March 23, 2004. (*See* JA 318-19.)³

Although omitted from the Adjudication, it was undisputed at trial that on February 21, 2004, AmerUs sent PNC a premium notice for the quarterly planned premium payment of \$22,045.70 that would be due on March 23, 2004. (*See* JA 2085 (register showing mailing date for planned premium notice).) Again omitted from the Adjudication, but admitted at trial, was that PNC received the March 2004 premium notice from AmerUs. (*See* JA 1467 (March 2004 premium notice); JA 2198-99 at 117-18 (J. Fisher testimony).) The precise date of receipt of the March 2004 premium notice is unknown because PNC conceded it did not keep track of when premium notices were received. (*See* JA 2198-99 at 119.) Further omitted from the Adjudication was the undisputed fact that PNC never forwarded the March 2004 premium notice to the Fulmers. (*See* JA 445 (J. Fulmer testimony).)

³ AmerUs was able to determine that “Brenda” was Brenda Mincks because Ms. Mincks was the only person named “Brenda” working in the customer service department in February 2004.

Another fact omitted from the Adjudication was that, if the March 2004 premium notice had been forwarded to the Fulmers, then, according to the Fulmers, they would have paid the premium due on that date. (*See* JA 446 (J. Fulmer testimony).) If the March 23, 2004, premiums had been paid, then it is undisputed the Policy would not have lapsed on April 23, 2004. (*See* JA 2057 (history chart showing cash value shortfall and monthly deductions).) Since the Fulmers never received the March 2004 premium notice from PNC, they did not know a premium was due and never paid the March 23, 2004, planned premium. (*See* JA 452, 520 (J. Fulmer and B. Clark testimony); JA 2071 col. 9 (transactional history chart).)

C. The Late Payment Offer And Lapse Of The Policy

On February 23, 2004, approximately two weeks after the telephone calls to AmerUs, the Policy, pursuant to its unmodified terms, entered the grace period. (*See* JA 520 (B. Clark testimony); JA 2071 ln. Q (transactional history chart).) On that day, the Policy's cash value was \$78.28. (*See* JA 2071 ln. Q.) This was far less than the monthly deduction (approximately \$7,872.91) due on that date. (*See* JA 2057 (chart showing February 23, 2004, monthly deduction and resulting negative cash value).)

AmerUs, pursuant to the express terms of the Policy, was required to send a late payment offer to PNC at least 30 days before the end of the grace period. (*See*

JA 1426 (Policy, lapse provision).) In the prior year, 2003, AmerUs sent two late payment offers to PNC. (See JA 1462-63, 1466 (late payment offers).) In both instances, PNC forwarded the late payment offers to the Fulmers and warned the Fulmers of the possible lapse of the Policy if the premiums were not paid. (See JA 1461-66 (letters forwarding late payment offers).) Indeed, PNC wrote to the Fulmers advising them that “[t]his policy is in danger of lapsing if payment is not received.” (JA 1461, 1465 (emphasis in original).)

On March 17, 2004, as required by the express terms of the Policy, AmerUs sent a late payment offer to PNC (the “Late Payment Offer”), so that it would arrive at least 30 days before the end of the grace period. (See JA 1459-60 (Late Payment Offer); JA 2086 (register showing date Late Payment Offer was mailed).) The Late Payment Offer stated that the “amount due” was \$24,268.51 and informed PNC that the “AMOUNT DUE must be paid by the end of the grace period to keep your policy from lapsing.” (JA 1459.) It further explained that, “[i]f the AMOUNT DUE is not received by the end of the grace period, your policy’s coverage will terminate.” (*Id.*) The Late Payment Offer stated that the “Grace Period and Offer Expires On: April 23, 2004.” (*Id.*) The Late Payment Offer also listed a toll free telephone number for PNC to call with any questions. (See JA 1460.)

Although omitted from the Adjudication, Ms. Fisher, PNC's vice president, testified that PNC received the Late Payment Offer from AmerUs some time in March 2004. (*See* JA 2176 at 27-28 (J. Fisher testimony).) She could not testify to the exact date of receipt because PNC did not date-stamp or otherwise keep track of when late payment notices were received. (*See* JA 2185 at 62-63 (J. Fisher testimony).) In March 2004, PNC departed from its prior practice and failed to forward the Late Payment Offer to the Fulmers. (*See* JA 2176 at 28-29, 2186 at 69, 2189 at 79-80, 2206 at 148-49 (J. Fisher testimony).) Thus, the Fulmers did not know PNC received the Late Payment Offer from AmerUs in March 2004. (*See* JA 2176 at 28-29, 2186 at 69, 2189 at 79-80, 2198 at 114-15, 2201 at 128-29, 2206 at 148-49 (J. Fisher testimony).) Neither Ms. Fisher (PNC's vice president), nor Ms. Allen (PNC's administrative assistant), nor anyone from PNC contacted AmerUs through its toll free telephone number (printed on the Late Payment Offer (*see* JA 1460)) to inquire whether the "amount due" needed to be paid as the Late Payment Offer warned. (*See* JA 2186 at 67-69, 2190 at 84-85 (J. Fisher testimony).) In sum, PNC failed to contact AmerUs or the Fulmers in response to the Late Payment Offer. (*See* JA 2186 at 67-69, 2190 at 84-85, 2198 at 114-15, 2199 at 120 (J. Fisher testimony).)

According to the Fulmers, if PNC had sent them the Late Payment Offer, then they would have paid the amount due as stated on the Late Payment Offer on

or before April 23, 2004. (*See* JA 376, 457-58 (H. Fulmer and J. Fulmer testimony).) Although undisputed, this fact is omitted from the Adjudication.

Jeanne Fisher, a lawyer and vice president of PNC, testified she made the decision not to forward the Late Payment Offer to the Fulmers. (*See* JA 2176 at 28-29, 2186 at 69, 2189 at 79-80.) Although Ms. Fisher admitted the Policy was in PNC's file at the time she reviewed the Late Payment Offer (*see* JA 2182 at 51-52), she also admitted she failed to review the Policy or ascertain any of the Policy obligations when she received the Late Payment Offer. (*See* JA 2185 at 64-65 (J. Fisher testimony).) Ms. Fisher further she made the decision not to send the Late Payment Offer without contacting AmerUs in March or April 2004 to inquire about the Late Payment Offer, the cash value of the Policy, the Policy's current status, or whether the Policy was in danger of lapsing. (*See* JA 2186 at 67-69, 2190 at 84-85.) No payment was sent to AmerUs in response to the Late Payment Offer. (*See* JA 520 (B. Clark testimony); JA 2071 col. 9 (transactional history chart).) As a result, the Policy ended "without value" on April 23, 2004. (*See* JA 520 (B. Clark testimony); JA 1426 (Policy, lapse provision); JA 2071 ln. U (transactional history chart).)

The Adjudication states that PNC contacted AmerUs after the Policy lapsed. (*See* JA 17.) Although not entirely clear from this statement, it is undisputed that PNC did not contact AmerUs at any time between the date it received the Late

Payment Offer in March 2004 and the day it received the Reinstatement Offer advising that the Policy had now lapsed. (See JA 324 (T. Allen testimony); JA 2178 at 35-36 (J. Fisher testimony); *see also* JA 1469-70 (Reinstatement Offer).) The reference in the Adjudication, therefore, must refer to contact that PNC initiated after receiving the Reinstatement Offer from AmerUs.

SUMMARY OF ARGUMENT

AmerUs is not legally or factually responsible for the lapse of the Policy because, after the telephone conversations in early February 2004, AmerUs, pursuant to the express and unmodified terms of the Policy, was obligated to (i) continue applying the cash value to pay premiums until the cash value became insufficient to sustain the Policy on February 23, 2004; (ii) continue coverage during the Policy's 60-day grace period beginning February 23, 2004; (iii) send the Late Payment Offer to PNC at least 30 days before the end of the grace period; and (iv) determine the Policy ended "without value" on April 23, 2004, when no premium payment was received by the end of the grace period. AmerUs's continued compliance with its contractual duties and obligations as expressly stated in the Policy, even after the telephone calls, is not, as a matter of law, grounds for imposing liability upon AmerUs based on the implied duty of good faith and fair dealing. Indeed, the only party that failed to follow its unmodified

contractual obligations was PNC, because PNC failed to take any action in response to the Late Payment Offer.

The district court's legal conclusion that a telephone conversation between two staff people caused the Policy to lapse was legally and factually erroneous. AmerUs was not the proximate cause of the loss because PNC subsequently received the Late Payment Offer that warned the Policy would lapse unless the "amount due" was paid. *See McGowan v. Prudential Ins. Co. of Am.*, 372 F.2d 39, 42 (3d Cir. 1967). PNC failed to forward the Late Payment Offer to the Fulmers, who were identified by the district court as "solely responsible for paying premiums on the policy." PNC's inaction in response to the Late Payment Offer, therefore, was the proximate and factual cause of the lapse.

ARGUMENT

A. AmerUs Did Not Breach Any Express Or Implied Term Of The Policy

1. The District Court's Interpretation Of The Policy Receives Plenary Review, Whereas The District Court's Findings Of Fact Are Reviewed For Clear Error

Whether the Policy imposed an implied duty separate and apart from the express terms of the Policy is a question of law to be given plenary review by this Court. *See Colliers Lanard & Axilbund v. Lloyds of London*, 458 F.3d 231, 236 (3d Cir. 2006) ("The construction of an unambiguous contract is a matter of law

and subject to plenary review.”); *Martin v. Monumental Life Ins. Co.*, 240 F.3d 223, 232 (3d Cir. 2001) (exercising plenary review of district court’s interpretation of contract law). The district court’s findings of fact, however, are reviewed for clear error. *See United States v. 6.45 Acres of Land*, 409 F.3d 139, 145 (3d Cir. 2005). A finding of fact that is wholly lacking in evidentiary support is clearly erroneous and should be overturned. *See, e.g., Baxter v. Baxter*, 423 F.3d 363, 368-69 (3d Cir. 2005) (setting aside factual finding as clearly erroneous because it was unsupported by record).

2. The District Court Erred As A Matter Of Law By Finding A Breach Of The Implied Covenant Of Good Faith And Fair Dealing Where The Implied Obligation Nullified The Policy’s Express Terms

The Adjudication concedes the Policy was not modified. (*See* JA 19.) This conclusion is outcome-determinative because the Policy governed all aspects of AmerUs’s conduct. By its express terms, the Policy described how AmerUs was to apply the cash value of the Policy toward the monthly cost of insurance in order to continue coverage. (*See* JA 1430 (Policy, continuation of coverage provision).) AmerUs complied with this requirement by applying the Policy’s cash value to the payment of the monthly cost of insurance through February 23, 2004. (*See* JA 2071 (transactional history chart).)

The Policy further expressly provided that, when the cash value became insufficient to pay the monthly cost of insurance, the Policy would enter a 60-day

grace period. (See JA 1426, 1430 (Policy, grace period and continuation of coverage provisions).) AmerUs complied with this Policy requirement by allowing the Policy to enter the grace period on February 23, 2004, and continuing the grace period through April 23, 2004. (See JA 520 (B. Clark testimony); JA 2071 (transactional history chart).)

The Policy further provided that, at least 30 days before the end of the grace period, AmerUs would provide notice to the Policy owner of the premium amount that must be paid to sustain the Policy. (See JA 1426 (Policy, lapse provision).) AmerUs complied with this Policy provision by sending the Late Payment Offer to PNC on March 17, 2004. (See JA 1459-60 (Late Payment Offer); JA 2086 (mailing register showing date of mailing Late Payment Offer).) Finally, when sufficient premiums were not paid by the end of the grace period (April 23, 2004), then the Policy ended “without value.” (See JA 1426 (Policy, lapse provision).)

In sum, the Policy specified how AmerUs was to apply the cash value to pay the monthly cost of insurance, the Policy specified a grace period when the cash value became insufficient to sustain the monthly deduction, the Policy specified the notice that AmerUs was to send at least 30 days before the end of the grace period, and the Policy specified what would happen at the end of the grace period if the premiums were not paid. AmerUs complied with all of these express Policy provisions.

Although the district court did not find that AmerUs breached any of its express contractual obligations, the district court still found in favor of PNC, based on a purported breach of the implied duty of good faith and fair dealing. (*See* JA 18.) The duty of good faith and fair dealing, however, does not authorize judicial nullification of continuing and unmodified express contract terms. *See John B. Conomos, Inc. v. Sun Co.*, 831 A.2d 696, 706 (Pa. Super. Ct. 2003) (“Implied duties cannot trump the express provisions in the contract.”). Moreover, AmerUs did not breach the implied duty of good faith and fair dealing by complying with the Policy’s express terms. *See Baker v. Lafayette Coll.*, 532 A.2d 399, 403 (Pa. 1986) (stating court would be hard-pressed to find failure to act in good faith where college followed procedures in employment contract); *Creeger Brick & Bldg. Supply, Inc. v. Mid-State Bank & Trust Co.*, 560 A.2d 151, 154 (Pa. Super. Ct. 1989) (finding no violation of duty of good faith where lender enforced its contractual rights).

Unlike the cases relied upon by the district court, AmerUs did not prevent performance by PNC, but rather, through the Late Payment Offer, notified PNC of the contractual obligation to perform by paying the premiums necessary to sustain the Policy. Indeed, the contractually required Late Payment Offer that AmerUs sent to PNC is a critical distinguishing factor from the cases cited and relied upon in the Adjudication. (*See* JA 18 (Adjudication).)

In *Dercoli v. Pennsylvania National Mutual Insurance Co.*, 554 A.2d 906 (Pa. 1989), for example, the insurance company advised the insured when a claim was asserted under a policy that she need not hire a lawyer because the company would inform her about whatever benefits she was entitled to receive under the policy. *See id.* at 908. Based on a change in the law, the insured became entitled to additional policy benefits, but was not informed of those benefits by the insurance company. *See id.* at 906. When she later sought legal counsel and brought an action seeking to obtain the additional benefits, the insurer argued that it had no duty to inform the insured of the change in the law or the right to seek additional benefits. *See id.* at 909-10. The Court refused to permit this defense, finding the insurer had breached the covenant of good faith and fair dealing by advising the plaintiff it would inform her of her contractual rights, but then failing to do so. *See id.* at 909.

The facts of the case *sub judice* are not similar to *Dercoli*. The AmerUs customer service representative did not prevent performance by PNC. After the telephone calls with the customer service representative, AmerUs continued complying with the Policy by deducting the cost of insurance from the cash value and by sending the contractually required Late Payment Offer to PNC more than 30 days before the Policy's grace period ended. AmerUs's compliance with these

terms is undisputed and PNC's failure to pay the amount due to sustain the Policy is equally undisputed.

The only way *Dercoli* would be analogous is if, for example, PNC had received the Late Payment Offer from AmerUs, called AmerUs, and been told that no payment was necessary. If those were the facts, then by analogy *Dercoli* would support the district court's decision. The problem here, of course, is those are not the facts. PNC did nothing in response to the Late Payment Offer.

Similarly, in *Huang v. BP Amoco Corp.*, 271 F.3d 560 (3d Cir. 2001), BP Amoco entered into a lease under which it had no obligation to pay rent until it began to sell gasoline from the property. *See id.* at 562. The lease allowed BP Amoco 180 days to obtain regulatory approvals from certain governmental authorities. *See id.* BP Amoco, however, occupied the property without making any effort to obtain the necessary approvals. *See id.* at 563. The Court determined that the covenant of good faith and fair dealing required BP Amoco to "make a diligent and good faith effort to obtain the required approvals." *Id.* at 565.

This case presents a sharp contrast to *Huang*. AmerUs had an express contractual right to continue deducting the monthly cost of insurance from the Policy's cash value, even after the telephone conversations, which the district court found did not modify the Policy. (*See* JA 1429-30 (Policy, monthly deduction and continuation of coverage provisions).) When the cash value became insufficient,

AmerUs had a contractual duty to continue coverage during a 60-day grace period, which AmerUs fulfilled. (*See* JA 520 (B. Clark testimony); JA 1426 (Policy, grace period provision).) Further, AmerUs had a contractual duty to notify PNC of the premiums necessary to keep the Policy in force at least 30 days before the grace period ended. (*See* JA 1426 (Policy, lapse provision).) AmerUs provided the required notice. (*See* JA 1459-60 (Late Payment Offer).) When the premiums were not paid by the end of the grace period, the Policy provided that it would “end without value.” (JA 1426 (Policy, lapse provision).) Thus, not only did AmerUs not breach any implied contractual duty, but it was contractually impossible for AmerUs to breach any such alleged duty because AmerUs was acting pursuant to and consistent with the unmodified express Policy terms.

Aetna Casualty & Surety Co. v. Netz, Civ. No. 91-6944, 1993 WL 89766 (E.D. Pa. Mar. 29, 1993), another case relied upon by the district court, involved the question of whether an insurer should be estopped from denying coverage for a motor vehicle accident where the insurer had issued insurance cards, pursuant to the policies, which misled the insureds into believing their vehicle was covered. *See id.* at *11 (describing crucial inquiry). Here, no estoppel argument was asserted by PNC and the district court did not find AmerUs issued a misleading

policy notice.⁴ Indeed, the Late Payment Offer notified PNC of the “amount due” and the consequences of not paying the amount due, i.e., lapse of the Policy. (*See* JA 1459-60 (Late Payment Offer).) PNC opted to take no action in response to the contractually required Late Payment Offer. The district court’s decision attempts to improperly shift responsibility for PNC’s failure to respond to the Late Payment Offer to AmerUs. As a matter of law, AmerUs cannot be liable for breach of contract based on contractual compliance.

The last case relied upon by the district court, *Amrovcik v. Metropolitan Life Insurance Co.*, 180 A. 727 (Pa. Super. Ct. 1935), involved an insurer seeking to deny liability under a disability policy because the insured had failed to submit proof of disability. *See id.* at 730. The Court refused to accept this defense because the insurance company’s agent had refused to provide the necessary proof of disability forms to the insured. *See id.* at 730-31. In direct contrast to *Amrovcik*, AmerUs sent the policy forms, namely the Late Payment Offer, to PNC, in accordance with the Policy obligation to send such notice. (*See* JA 1426 (Policy, lapse provision); JA 1459-60 (Late Payment Offer); JA 2176 at 27-28

⁴ Indeed, the district court refused to permit PNC to file an amended complaint asserting claims for negligent misrepresentation, fraud, and negligence. (*See* Docket No. 28.) The action went to trial as a simple breach of contract action. (*See* JA 32-35 (Amended Complaint, counts for declaratory judgment and breach of contract).)

(J. Fisher testimony.) *Amrovcik*, therefore, provides absolutely no support for the district court's decision.

The district court's conclusion is further flawed because, under Pennsylvania law, the implied covenant of good faith and fair dealing cannot alter or override the express terms of a contract. *See Northview Motors, Inc. v. Chrysler Motors Corp.*, 227 F.3d 78, 91 (3d Cir. 2000) (noting duty of good faith is "not divorced from the specific clauses of the contract"); *Baker*, 532 A.2d at 403 (finding no failure to act in good faith where college followed procedures in employment contract); *Creeger Brick & Bldg. Supply, Inc.*, 560 A.2d at 154 ("[A] lending institution does not violate a separate duty of good faith by adhering to its agreement with the borrower or by enforcing its legal and contractual rights as a creditor."). Instead, the covenant of good faith and fair dealing generally is treated as a rule of construction that illuminates the reasonable expectations of the parties to a contract. *See Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 618 (3d Cir. 1995) ("In the absence of a dispute about the parties' reasonable expectations under a particular term of the contract, an 'independent duty of good faith has been recognized [only] in limited situations.'") (quoting *Creeger Brick & Bldg. Supply, Inc.*, 560 A.2d at 153 (alteration in original); *John B. Conomos, Inc.*, 831 A.2d at 706-07 (describing the duty of good faith and fair dealing as a

principle for courts to harmonize the expectations of parties to a contract with the intent of the parties and the terms of the contract).

The district court found the Policy was not modified. (*See* JA 19.) As such, the express Policy terms governing continuation of coverage, the grace period, and lapse remained intact and controlling even after the telephone calls with the AmerUs customer service representative. (*See* JA 1426 (Policy, grace period and lapse provision).) The future of the Policy, therefore, was governed by the continuing unmodified Policy terms. The district court, however, applied the covenant of good faith and fair dealing in a manner contrary to Pennsylvania law by overriding the Policy's terms regarding continuation of coverage, the grace period, and lapse.

In the present case, the only breach of the Policy was the failure to pay sufficient premiums to sustain the Policy. The obligation to pay premiums was an essential obligation to keep the Policy in force. (*See* JA 1425-26 (Policy provisions concerning payment of premiums and lapse).) *See also Bergholm v. Peoria Life Ins. Co.*, 284 U.S. 489, 492 (1932) (“[T]he condition in a policy of life insurance that the policy shall cease if the stipulated premium shall not be paid on or before the day fixed is of the very essence and substance of the contract, against which even a court of equity cannot grant relief.”); *Kelly v. Allstate Ins. Co.*, 138 F. Supp. 2d 657, 662 (E.D. Pa. 2001) (noting premium payments are condition

precedent to insurance company's assumption of liability); *Stewart v. Metro. Life Ins. Co.*, 30 A.2d 314, 316 (Pa. 1943) (denying recovery under life insurance policy where policyholder failed to make premium payment during grace period and policy lapsed).

Under the terms of the Policy, it was irrelevant who paid the premiums as long as the premiums were paid. (*See* JA 1425 (Policy).) When the Policy's cash value fell below the level necessary to pay the monthly deduction under the Policy, AmerUs was obligated to inform the Policy's owner of the need to make a premium payment and the amount that needed to be paid. (*See* JA 1426 (Policy, lapse provision).) AmerUs fulfilled this duty by sending the Late Payment Offer to PNC. (*See* JA 1459-60 (Late Payment Offer).) It is undisputed that no payment was made in response to the Late Payment Offer. Once the grace period ended without payment of premiums, the Policy ended "without value." (*See* JA 1426 (Policy, lapse provision); JA 2071 ln. U (transactional history chart).)

It is wholly irrelevant that PNC may have made arrangements with the Fulmers or any other third party to pay the premiums. PNC's arrangement with a third party cannot, as a matter of law, alter the contract between PNC and AmerUs. Indeed, the district court found the Policy was not modified. For this reason, it is irrelevant whether the Trust Agreement excused PNC from the duty to pay premiums. (*See* JA 735-36 (Trust Agreement).) The Trust Agreement was a

contract between PNC and the Fulmers. (*See* JA 733, 760 (Trust Agreement); JA 782 (PNC's acceptance of Trust).) As between AmerUs and PNC, the provisions of the Policy governed and required payment of sufficient premiums to keep the Policy in force.

3. AmerUs Had No Express Or Implied Contractual Obligation To Forward The Late Payment Offer To The Fulmers And No Such Duty Was Created By The Trust Agreement

The district court's analysis appears to suggest that the district court believed AmerUs had an implied obligation to send Policy notices to the Fulmers. The Fulmers were not parties to the Policy (*see* JA 762-63 (transfer of ownership forms)) and had no rights under the Policy. *See Hicks v. Saboe*, 555 A.2d 1241, 1243-44 (Pa. 1989) (finding no duty owed by title insurance company to non-party to title insurance policy).

Although the Policy was purchased by Mr. Fulmer, ownership was transferred immediately to the trustee of the Fulmer Trust and all rights of ownership under the Policy were assigned to the trustee. (*See* JA 734-35 (Trust Agreement); JA 762-63 (transfer of ownership form).) After PNC became trustee of the Fulmer Trust, the Policy became a contract between AmerUs and PNC. (*See* JA 1421 (Policy, stating Policy owner is provided with all rights and benefits of Policy).) Indeed, the Trust Agreement between the Fulmers and PNC specifically provided that the Fulmers surrendered all rights of ownership under the Policy to

the trustee. (*See* JA 734-35 (Trust Agreement).) As trustee of the Fulmer Trust, therefore, PNC is the owner of the Policy, and enjoys all rights of ownership. (*See* JA 1421 (Policy).)

The Policy contained no provision that would entitle any person other than PNC, as the Policy owner, to receive a copy of the Late Payment Offer. Indeed, the Policy's "lapse" provision specifically provided as follows: "We will mail you notice of the amount of premium that will be sufficient to continue the policy in force at least 30 days before the end of the grace period." (JA 1426.) "We" was defined as "AmerUs Life Insurance Company," and "you" was defined as "the Owner of this Policy." (JA 1422.) PNC, therefore, was the only entity entitled to receive the Late Payment Offer.

The district court found no modification of the Policy (*see* JA 19), but nonetheless appeared to believe that the Trust Agreement somehow applied to AmerUs. (*See* JA 13 (Adjudication).) The district court's belief is in error for two reasons. First, the Policy was not modified and, pursuant to the express Policy terms, AmerUs was required to continue deducting from the cash value to pay the cost of insurance and to send the Late Payment Offer to PNC more than 30 days before the end of the grace period. *See Ist Solutions v. Newsnet, Inc.*, Civ. No. 87-0793, 1987 U.S. Dist. LEXIS 9225, at *6 (E.D. Pa. Oct. 8, 1987) (finding terms of original contract controlled where terms of contract were not modified). Second,

no evidence was presented at trial to show that AmerUs was aware of the terms of the Trust Agreement or had a copy of it.

The district court committed clear error by concluding that AmerUs possessed a copy of the Trust Agreement and, therefore, was on notice that PNC might not be forwarding notices to the Fulmers. (*See* JA 13 (Adjudication).) This finding and conclusion are clearly erroneous because the record contains no evidence that AmerUs possessed a copy of the Trust Agreement. *See Baxter*, 423 F.3d at 368-69 (reversing finding of fact unsupported by evidence). Indeed, prior to trial, the district court was advised that AmerUs's files did not contain a copy of the Trust Agreement. (*See* JA 115 (letter from Stephen Weaver, Esq. to Hon. John P. Fullam).)

If the parties' contractual obligations were not modified, and the district court found they were not, then it is axiomatic that the original Policy terms continued in full effect. *See Ist Solutions*, 1987 U.S. Dist. LEXIS 9225, at *6. Thus, AmerUs cannot be liable for a breach of the Policy because it sent the Late Payment Offer, and all other notices, to PNC (the Policy owner) and not to the Fulmers.

B. The Policy Ended Without Value Because Premiums Were Not Paid After PNC Received The Contractually Required Late Payment Offer

1. The District Court's Determination Of Causation As A Matter Of Law Receives Plenary Review

The district court decided the cause of the Policy's lapse as a matter of law. (See JA 18 ("My conclusions of law are straightforward: but for the incorrect information supplied to plaintiff by the defendant's customer service representatives, the premiums would have been paid and the [P]olicy would not have lapsed.")) This Court exercises plenary review over conclusions of law. See, e.g., *United States v. Hull*, 456 F.3d 133, 137 (3d Cir. 2006).

2. The District Court Erred By Applying A Factual, Rather Than Legal, Standard Of Causation

In order to carry its burden of proof in a claim for breach of contract, Pennsylvania law requires that a plaintiff prove that the defendant's breach was the proximate, or legal, cause of the injuries suffered. See *Nat'l Controls Corp. v. Nat'l Semiconductor Corp.*, 833 F.2d 491, 496 (3d Cir. 1987) (noting damages sought in breach of contract action must be proximately caused by breach); *Zemenco, Inc. v. Developers Diversified Realty Corp.*, Civ. No. 03-175, 2005 U.S. Dist. LEXIS 23011, at *23 (W.D. Pa. Oct. 7, 2005) ("Under Pennsylvania law, a plaintiff asserting a claim of breach of contract ... is required to demonstrate that

the damages suffered were proximately caused by the defendant.”), *aff’d*, No. 05-4896, 2006 U.S. App. LEXIS 27747 (3d Cir. Nov. 9, 2006).

“A determination of legal causation ‘depends on whether the conduct has been so significant and important a cause that the defendants should be legally responsible [T]hey depend essentially on whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred.’” *Novak v. Jeannette Dist. Mem. Hosp.*, 600 A.2d 616, 618 (Pa. Super. Ct. 1991) (citation omitted, alterations in original). A defendant’s action is not the legal cause of harm when “it appears to the court *highly extraordinary* that [the actor’s conduct] should have brought about the harm At the point in the casual chain when the consequence of the negligent act is no longer *reasonably* foreseeable, ‘the passage of time and the span of distance mandate a cut-off point for liability.’” *Bell v. Irace*, 619 A.2d 365, 367 (Pa. Super. Ct. 1993) (emphasis in original, citations omitted). This is a higher standard than mere factual (or “but for”) causation, because it requires a substantial connection between the defendant’s conduct and the harm suffered. *See Nat’l Controls Corp.*, 833 F.2d at 496 (“The element of causation defines the range of socially and economically desirable recovery and requires not only but-for causation in fact but also that the conduct be a substantial factor in bringing about the harm.”) (internal quotation marks and citation omitted); *Mazzagatti v. Everingham*, 516 A.2d 672, 676 (Pa.

1986) (“The term proximate cause or legal cause is applied by courts to those more or less undefined considerations which limit liability even where the fact of causation can be demonstrated.”).

In concluding that AmerUs was “responsible for the default” (*see* JA 18 (Adjudication)), the district court only considered the question of factual causation, but failed to consider whether AmerUs’s conduct was the proximate cause of the Policy’s lapse. (*See id.* (“*but for* the incorrect information supplied to plaintiff by the defendant’s customer service representatives, the premiums would have been paid and the policy would not have lapsed”) (emphasis added).) Thus, the lower court erred by conducting an incomplete causation analysis and ultimately applying the wrong legal standard of causation.

3. The Policy’s Lapse Was Proximately Caused By PNC’s Failure To Respond To The Late Payment Offer, Not By An Alleged Telephone Conversation Between Tonya Allen And Brenda Mincks

Assuming *arguendo* the district court correctly applied the legal standard of proximate causation, and further assuming the facts were otherwise sufficient to prove a breach of the duty of good faith and fair dealing, the district court still erred by concluding that the telephone conversation caused the Policy to lapse. (*See* JA 18.) The district court’s legal conclusion is erroneous because it is undisputed that PNC failed to forward the Late Payment Offer to the Fulmers, PNC failed to contact AmerUs to inquire about the Late Payment Offer, PNC

failed to consult the Policy to ascertain the legal significance of the Late Payment Offer, and PNC failed to remit sufficient premiums to sustain the Policy. (*See* JA 2071 col. 9 (transactional history chart); JA 2176-77 at 28-30, 2186 at 67-69, 2189 at 79-81, 2196 at 107 (J. Fisher testimony).) PNC’s failure to send the Fulmers a copy of the Late Payment Offer was critically important because the district court recognized that the Fulmers would have paid the premiums if they had received the Late Payment Offer. (*See* JA 457-458 (Trial Tr.).)

The Late Payment Offer was sent by AmerUs to PNC five weeks after the conversation between Brenda Mincks and Tonya Allen and more than 30 days before the Policy lapsed for non-payment of premiums. The Late Payment Offer specifically warned PNC that “YOUR POLICY IS NOW IN THE GRACE PERIOD.” (JA 1459 (emphasis in original).) It further provided that “The AMOUNT DUE must be paid by the end of the grace period to keep your policy from lapsing. If the AMOUNT DUE is not received by the end of the grace period, your policy’s coverage will terminate.” (*Id.* (emphasis in original).)

PNC unquestionably understood the importance of late payment offers received from AmerUs because, in 2003, PNC received two late payment offers from AmerUs. (*See* JA 1462-63, 1466.) In February 2003, PNC forwarded a late payment offer to the Fulmers along with a cover letter explaining “**This policy is in danger of lapsing if payment is not received.**” (JA 1461 (emphasis in

original).) PNC's February 2003 letter instructed the Fulmers as follows: "In order to pay the premiums, and to avoid lapsing for policy no. 10-0025351130, please send me a check in the amount of \$40,603.22, that amount covers the late payment offer and the premium due March 23, 2003." (*Id.* (emphasis in original).) Similarly, in August 2003, PNC received another late payment offer from AmerUs and sent that late payment offer to the Fulmers with a cover letter containing an almost identical warning and nearly identical instructions warning that payment must be made to prevent the Policy from lapsing. (*See* JA 1465-66.)

Jeanne Fisher, the person at PNC responsible for administering the Fulmer Trust and the Policy, received the Late Payment Offer in March 2004. Ms. Fisher, having reviewed the cover letter forwarding the Late Payment Offer in February 2003, knew that the Policy would lapse if the premium payment called for in the Late Payment Offer was not made. (*See* JA 1461 (cover letter); JA 2192 at 91-93 (J. Fisher testimony).) Ms. Fisher knew that failing to forward the Late Payment Offer could result in the loss of the Policy, the sole trust asset. (*See* JA 2189 at 79-80 (J. Fisher testimony acknowledging Late Payment Offer warned Policy was in danger of lapsing).) Nevertheless, Ms. Fisher departed from PNC's past practices by making a conscious and intentional decision not to forward the Late Payment Offer to the Fulmers. (*See* JA 2189 at 79-80 (J. Fisher testimony).) Notwithstanding her departure from PNC's past practices, Ms. Fisher failed to

document any aspect of her alleged review of the Late Payment Offer in March 2004 and made no record of her decision not to send the Late Payment Offer. (*See* JA 2186-87 at 69-70 (J. Fisher testimony).) Ms. Fisher has since acknowledged that failing to send the Late Payment Offer to the Fulmers was a mistake. (*See* JA 2156 at 150.)

The district court further found that, under the Trust Agreement, Mr. Fulmer “was solely responsible for paying premiums on the” Policy. (JA 13 (Adjudication).) According to the district court, if PNC had provided the Fulmers with a copy of the Late Payment Offer, then the Fulmers would have paid the amount due, \$24,268.51. (*See* JA 457-58 (J. Fulmer testimony).) Indeed, Mr. and Mrs. Fulmer did not testify that any telephone calls between PNC and AmerUs would have caused them not to remit payment in response to the Late Payment Offer. The proximate cause of the loss, therefore, was PNC’s failure to send the Late Payment Offer to Mr. Fulmer, who was “solely responsible for paying premiums” for the Policy. (*See* JA 13 (Adjudication).)

It is undisputed that PNC received the Late Payment Offer from AmerUs after the alleged conversation between Ms. Mincks and Ms. Allen. (*See* JA 1459-60 (Late Payment Offer); JA 2086 (AmerUs business record showing Late Payment Offer mailed on March 17, 2004); JA 2176 at 27-28 (J. Fisher testimony).) Assuming *arguendo* PNC read the Late Payment Offer and thought it

provided contradictory information from the prior telephone call between the two staff people, then PNC could not legitimately do nothing and simply assume the express Policy terms no longer applied. Indeed, as a matter of law, PNC could not rely on the prior telephone conversation in the face of the contractually mandated notice warning of an impending lapse of the Policy. *See McGowan v. Prudential Ins. Co. of Am.*, 372 F.2d 39, 42 (3d Cir. 1967) (finding no reasonable basis for reliance on misstatement by insurance agent where a subsequent letter correcting the misstatement was received); *In re Upset Sale Tax Claim*, 37 Pa. D. & C.3d 509, 515 (1984) (holding owner of properties not entitled to rely on prior oral misrepresentation that amount of tax payment would be sufficient to pay taxes on all properties after receiving receipts for payments for less than all properties). Indeed, based on the district court's finding that the Policy was not modified, the Policy provisions, including continuation of coverage, grace period, and lapse, remained in force even after the telephone conversations. (*See* JA 1421 (Policy).)

This Court's decision in *McGowan v. Prudential Insurance Company of America* is particularly instructive and should have been determinative in the present case. In *McGowan*, the insured was advised by an insurance agent employed by Prudential Insurance Company of America ("Prudential") that there was no need for him to make premium payments on his life insurance policy. *See McGowan*, 372 F.2d at 41. The agent explained that an "automatic loan provision"

had been added to each of the several policies owned by the insured and his family so that if a payment was missed, the insurance company would “merely borrow your cash equity to make the payment.” *Id.*

Prudential proved unable to add the automatic loan provision to the policy owned by the insured. *See id.* Before the policy lapsed, the agent wrote to the plaintiff requesting that loan forms be completed and returned to him so that alternate arrangements could be made to assure that payments were paid from a regular premium loan. *See id.* Subsequently, the insurance company provided a lapse notice which was received by the plaintiff. *See id.* Neither the plaintiff nor the insured made any attempt to pay the overdue premiums on the policy or to reinstate the policy after it lapsed. *See id.*

The Third Circuit rejected plaintiff’s argument that Prudential should be estopped from raising the fact of nonpayment of premiums as a defense to liability against the policy. *See id.* at 43. This Court held that the subsequent letter and the lapse notice destroyed any reasonable reliance upon the prior representation that an automatic policy loan had been established. *See id.* at 42.

The Third Circuit’s holding that subsequent notice destroys reasonable reliance upon prior contrary representations is controlling. It is irrelevant whether Tonya Allen was, in fact, told that a premium payment could be skipped. Once PNC received the Late Payment Offer, it was on notice that the Policy was in

danger of lapsing if no premium payment was made. There was no basis for relying solely on a prior oral representation by an AmerUs customer service agent and ignoring a subsequent written notice that corrected the misinformation. *See id.* (letter requesting alternate premium loan arrangements be made “destroyed any possible reasonable basis for continued reliance” on prior representation and subsequent lapse notice was “an important indication that premium payments had not been made by means of loans”).

In its proposed findings of fact and conclusions of law, AmerUs cited *McGowan* to demonstrate that PNC’s claimed reliance on Brenda Mincks’ alleged statement that a premium payment could be “skipped for three months” was unreasonable as a matter of law. (*See* JA 565-66.) The district court did not cite *McGowan* or attempt to distinguish it any way. (*See* JA 12-21 (Adjudication).)

Moreover, AmerUs did not prevent PNC or the Fulmers from making the necessary premium payments.⁵ Indeed, AmerUs specifically called the Policy owner’s attention to the need to pay the amount due. Responsibility for the subsequent lapse, therefore, lies with PNC, the Policy owner.

⁵ Had PNC contacted AmerUs after receiving the Late Payment Offer, and had AmerUs advised PNC that there was no need to pay the amount due, then this would be a very different case. That, however, is not what happened. PNC did not contact AmerUs until after receiving the Reinstatement Offer, which notified PNC that the Policy already had lapsed. (*See* JA 324 (T. Allen testimony); JA 1469-70 (Reinstatement Offer); JA 2178 at 35-37 (J. Fisher testimony).)

Although the district court also comments that a payment of “approximately \$16,000 should have been sufficient” to sustain the Policy (*see* JA 17), this comment evidences a fundamental failure to appreciate the terms of the Policy and the duration of the Late Payment Offer. Per the express terms of the Policy, as well as the express terms of the Late Payment Offer, the Late Payment Offer was to remain open to acceptance through April 23, 2004. (*See* JA 1426 (Policy, grace period provision).) By April 23, 2004, the cash value of the Policy was a negative \$23,462.12. (*See* JA 2057.) Thus, the “amount due” stated on the Late Payment Offer (\$24,268.51) was correct because of the time during which the Late Payment Offer remained open. (*See id.* (showing surrender value as of April 23, 2004).)

Not only is the district court’s comment contrary to the pertinent Policy provisions and the terms of the Late Payment Offer, it is irrelevant for two additional reasons. First, no premiums were paid during the grace period. (*See* JA 520 (B. Clark testimony); JA 2071 col. 9 (transactional history chart).) Second, the Fulmers testified they would have paid the \$24,268.51 if they had been informed of the Late Payment Offer. (*See* JA 376, 457-58 (H. Fulmer and J. Fulmer testimony).) In sum, the district court’s comment cannot alter the immutable fact that the amount due as stated in the Late Payment Offer was accurate through the end of the grace period and that the amount due remained

unpaid at the end of the grace period. (*See* JA 2057, 2071 In. U (transactional history charts).)

4. To The Extent The District Court’s Evaluation of Causation Is A Factual Question, It Is Reviewed For Clear Error

To the extent the district court’s factual findings on causation are factual in nature, they are reviewed for clear error. *See Daniel S. v. Scranton Sch. Dist.*, 230 F.3d 90, 95 (3d Cir. 2000) (reviewing factual finding of causation for clear error).

5. The District Court Committed Clear Error By Failing To Consider Evidence Of PNC’s Failure To Respond To The Late Payment Offer

To the extent the district court’s determination of causation was a finding of fact, the finding was erroneous because the district court disregarded PNC’s failure to respond to the Late Payment Offer. “A finding [of fact] is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

“Finding facts requires the exercise by an impartial tribunal of its functions of weighing and appraising evidence offered, not by one party to the controversy alone, but by both.” *Sims v. Greene*, 161 F.2d 87, 89 (3d Cir. 1947). The district court’s Adjudication failed to consider the fact that PNC took no action after

receiving the Late Payment Offer from AmerUs. (*See* JA 2176 at 28-29; 2186 at 67-69; 2197-98 at 111-15 (J. Fisher testimony).)

The district court noted that AmerUs sent the Late Payment Offer (*see* JA 17), but disregarded PNC's receipt of the Late Payment Offer and failure to act in response to the Late Payment Offer. (*See* JA 12-21 (J. Fisher testimony).) Indeed, it is undisputed that after receiving the Late Payment Offer, PNC did not (1) contact AmerUs to ask whether a premium payment needed to be made (*see* JA 2186 at 68-69 (J. Fisher testimony)); (2) forward the Late Payment Offer to the Fulmers (*see* JA 2138 at 78-79; 2176 at 28-29; 2186 at 69, 2189 at 79-80 (J. Fisher testimony)); (3) advise the Fulmers that the Late Payment Offer had been received (*see* JA 2198 at 114-15 (J. Fisher testimony)); or (4) review the Policy to ascertain the legal significance of the Late Payment Offer or determine what action should be taken in response. (*See* JA 2185 at 64-65 (J. Fisher testimony).) Moreover, it is undisputed that the Fulmers would have paid the premium and prevented the Policy from lapsing if PNC had only forwarded the Late Payment Offer to them. (*See* JA 457-58 (J. Fulmer testimony).)

PNC forwarded two Late Payment Offers to the Fulmers in 2003. (*See* JA 1461-66 (Late Payment Offers with cover letters).) Indeed, the district court noted that, when AmerUs issued late payment offers in the past, PNC caused Mr. Fulmer to pay the premiums due. (*See* JA 15 (Adjudication).) Yet the district

court omits mention of the undisputed fact that PNC did not forward the Late Payment Offer to the Fulmers. (*See* JA 2176 at 27-29; 2186 at 67-69, 2189 at 79-80 (J. Fisher testimony).) Moreover, the district court observed that AmerUs provided a listed telephone number to PNC at which PNC could contact AmerUs's customer service representatives. (*See* JA 15.) The district court omitted mention of the fact that, when PNC received the Late Payment Offer containing that same telephone number for contacting AmerUs's customer service representative, PNC chose not to contact AmerUs to inquire about the need to pay the amount due. (*See* JA 12-21 (Adjudication); JA 2186 at 67-69 (J. Fisher testimony).)

These undisputed facts are of paramount importance because they demonstrate that PNC's inaction caused the Policy to lapse. Indeed, this was the core of the defense AmerUs presented at trial. Despite the importance of these facts, the district court disregarded PNC's failure to respond to the Late Payment Offer and failed to reconcile this evidence with its conclusion that a prior telephone call caused the Policy to lapse. (*See generally* JA 12-21 (Adjudication).) This evidence critically undermines the district court's causation analysis.

The evidence concerning PNC's failure to respond to the Late Payment Offer is undisputed. As such, this court should grant judgment for AmerUs without remanding the matter for additional factual findings because the Policy's lapse was caused by PNC's decision to ignore the Late Payment Offer. *See*

Travelers Ins. Co. v. H.K. Porter Co., 45 F.3d 737, 742 (3d Cir. 1995) (reversing district court and bankruptcy court without remanding for additional fact findings where key facts were undisputed); *In re Dykes*, 10 F.3d 184, 188 (3d Cir. 1993) (reversing decision below on basis of factual issue not considered by lower court where evidence was clear and undisputed); *King v. Comm’r of Internal Revenue*, 458 F.2d 245, 249-50 (6th Cir. 1972) (determining factual issues without remand where lower court did not determine relevant factual issues but evidence was undisputed); 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2577, at 522-26 (2d ed. 1994) (noting appellate court should enter judgment without remand where facts not considered by district court are undisputed).

CONCLUSION

For all the foregoing reasons, this Court should reverse the judgment of the district court and direct the entry of judgment for AmerUs Life Insurance Company.

Respectfully submitted,

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Dated: December 13, 2006

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CERTIFICATE OF ADMISSION TO THE BAR

BRYAN D. BOLTON certifies as follows:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit. Michael P. Cunningham and M. David Maloney also are members in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Date: December 13, 2006

/s/ Bryan D. Bolton
Bryan D. Bolton

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CERTIFICATE OF SERVICE

I hereby certify that, on December 13, 2006, two copies of the foregoing Opening Brief of Appellant AmerUs Life Insurance Company, bound with Volume I of the Joint Appendix, and one copy of Volumes II–V of the Joint Appendix were sent by Federal Express overnight delivery to:

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On the same date, an electronic copy of the Opening Brief of Appellant was electronically transmitted to the Clerk of the United States Court of Appeals for the Third Circuit and simultaneously to Ronald L. Williams, Esquire.

An additional ten copies of the Opening Brief of Appellant, bound with Volume I of the Joint Appendix, and four copies of Volumes II-V of the Joint Appendix were sent by Federal Express overnight delivery to:

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