
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)

REPLY BRIEF OF APPELLANT, AMERUS LIFE INSURANCE COMPANY

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TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF CITATIONS iii

INTRODUCTION 1

ARGUMENT 1

 A. The Policy Lapsed On April 23, 2004, Pursuant To The
 Express And Unmodified Policy Terms Governing
 Continuation Of Coverage, Grace Period, And Lapse 1

 B. AmerUs Never Possessed The Trust Agreement And
 Knowledge Of Its Terms Cannot Be Imputed To AmerUs9

 C. The District Court Did Not Find That AmerUs Promised
 To Send The Late Payment Offer To The Fulmers 12

 D. The District Court Decision Cannot Be Affirmed Based On
 The Doctrine Of Equitable Estoppel 14

 1. The District Court’s Decision Was Not Based On
 The Doctrine Of Equitable Estoppel..... 14

 2. The Adjudication Cannot Be Affirmed On The
 Basis Of Factual Findings Not Made By The
 District Court..... 15

 3. PNC Could Not Prove Reasonable Reliance As
 A Matter Of Law 17

 E. PNC Failed To Provide Any Legal Basis For Sustaining The
 District Court’s Defective Causation Analysis20

CONCLUSION27

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32
AND 3D CIR. LAR 32.1(c).....29

CERTIFICATE OF IDENTICAL COMPLIANCE OF BRIEFS.....30

CERTIFICATE OF VIRUS CHECK31

CERTIFICATE OF SERVICE32

TABLE OF CITATIONS

<u>Cases</u>	<u>Page</u>
<i>Aetna Cas. and Surety Co. v. Netz</i> , Civ. No. 91-6944, 1993 WL 89766 (E.D. Pa. Mar. 29, 1993).....	20
<i>Amrovcik v. Metro. Life Ins. Co.</i> , 180 A.727 (Pa. Super. Ct. 1935).....	20
<i>Baxter v. Baxter</i> , 423 F.3d 363 (3d Cir. 2005)	11
<i>Blofson v. Cutaiar</i> , 333 A.2d 841 (Pa. 1975)	16
<i>DeMarco v. United States</i> , 415 U.S. 449 (1974)	16
<i>Dercoli v. Penn. Nat’l Mut. Ins. Co.</i> , 554 A.2d 906 (Pa. 1989)	23
<i>Dilworth v. Metro. Life Ins. Co.</i> , 418 F.3d 345 (3d Cir. 2005)	16
<i>Drelles v. Manufacturers Life Ins. Co.</i> , 881 A.2d 822 (Pa. Super. Ct. 2005).....	23
<i>Fedorczyk v. Caribbean Cruise Lines</i> , 82 F.3d 69 (3d Cir. 1996)	20
<i>Gottlieb v. Abraham Lincoln Mut. Life Ins. Co.</i> , 73 A. 1057 (Pa. 1909)	6
<i>Guardian Life Ins. Co. of Am. v. Goduti-Moore</i> , 229 F.3d 212 (3d Cir. 2000).....	5-6
<i>In re Fed. Mogul-Global Inc.</i> , 348 F.3d 390 (3d Cir. 2003)	10
<i>In re Upset Sale Tax Claim</i> , 37 Pa. D. & C.3d 509 (1984)	17
<i>Jefferson Bank v. Progressive Cas. Ins. Co.</i> , 965 F.2d 1274 (3d Cir. 1992).....	26
<i>Kaplan v. Kaplan</i> , 171 A.2d 166 (Pa. 1961).....	26
<i>Lame v. Dep’t of Justice</i> , 767 F.2d 66 (3d Cir. 1985)	27

<i>McGowan v. Prudential Ins. Co. of Am.</i> , 372 F.2d 39 (3d Cir. 1967).....	17, 18, 19
<i>Nanty-Glo Borough v. American Surety Co.</i> , 175 A. 536 (Pa. 1934).....	19
<i>Nat’l Controls Corp. v. Nat’l Semiconductor Corp.</i> , 833 F.2d 491 (3d Cir. 1987).....	20, 21
<i>Novelty Knitting Mills v. Siskind</i> , 457 A.2d 502 (Pa. 1983).....	15-16
<i>PEPI, Inc. v. Helcar Corp.</i> , 458 F.2d 1062 (3d Cir. 1972)	17
<i>Pullman-Standard, Div. of Pullman v. Swint</i> , 456 U.S. 273 (1982).....	16
<i>Rochez Bros., Inc. v. Rhoades</i> , 527 F.2d 880 (3d Cir. 1975).....	11
<i>Scalea v. Scalea’s Airport Serv., Inc.</i> , 833 F.2d 500 (3d Cir. 1987)	16, 17
<i>Semper v. Santos</i> , 845 F.2d 1233 (3d Cir. 1988).....	11
<i>Tran v. Metro. Life Ins. Co.</i> , 408 F.3d 130 (3d Cir. 2005)	16
<i>United States v. Sandini</i> , 888 F.2d 300 (3d Cir. 1989).....	11
<i>United States v. Stansfield</i> , 101 F.3d 909 (3d Cir. 1996)	11
<i>Wathen v. Brown</i> , 189 A.2d 900 (Pa. Super. Ct. 1963).....	13

Rules

Fed. R. Civ. P. 52(a).....	16
Pa. R. Prof’l Conduct 3.3(a)(1).....	10

INTRODUCTION

Desperately seeking sustenance for the unsustainable, PNC Bank (“PNC”) (i) misstates the record concerning the date the Policy lapsed, (ii) references findings of fact not found by the district court, and (iii) cites oral argument as “evidence.” PNC further fails to provide any legal basis for sustaining the district court’s defective causation analysis. PNC’s misleading assertions are a thinly-disguised attempt to avoid the legal consequences of the Late Payment Offer. The Late Payment Offer, which PNC received and ignored before the lapse of the Policy, cannot be reconciled with the district court’s conclusion that AmerUs Life Insurance Company (“AmerUs”) caused the Policy to lapse. Indeed, AmerUs fully complied with the express and unmodified terms of the Policy and the implied covenant of good faith and fair dealing cannot override or supplant those express terms. As a matter of law, there is no factual or legal basis for finding a breach of the implied covenant of good faith and fair dealing. Accordingly, the district court’s judgment should be reversed and judgment entered in favor of AmerUs.

ARGUMENT

- A. The Policy Lapsed On April 23, 2004, Pursuant To The Express And Unmodified Policy Terms Governing Continuation Of Coverage, Grace Period, And Lapse

Finding no breach of the express Policy terms, and finding no modification of the express Policy terms, the district court nevertheless ruled in favor of PNC

based on a purported breach of the implied covenant of good faith and fair dealing. (See JA 18.) As AmerUs explained in its opening brief, however, the district court applied the covenant of good faith and fair dealing in a manner contrary to Pennsylvania law. The implied covenant of good faith and fair dealing cannot alter or override the express terms of a contract (*see* Appellant Br. at 25-26) and does not authorize judicial nullification of continuing and unmodified express contract terms (*see id.* at 20). PNC does not contest these legal principles and does not contest the district court's finding that the Policy was not modified. Instead, PNC seeks to mislead the Court by mischaracterizing the chronology of events leading to the Policy's lapse and suggesting to the Court that AmerUs did not comply with the express terms of the Policy.

The Policy was not modified. (*See* JA 19 (Adjudication).) As such, the express Policy terms governing continuation of coverage, grace period, and lapse controlled the relationship between AmerUs and PNC even after PNC's telephone call with AmerUs's customer service representative on February 11, 2004. (*See* JA 1426, 1429 (Policy, "Monthly Deduction," "Grace Period," and "Lapse" provisions.) AmerUs fully complied with all of these Policy provisions.

On February 23, 2004, the Policy's cash value was insufficient to fund the monthly deduction. (*See* JA 520 (B. Clark testimony); JA 2071 ln. Q (transactional history chart).) Pursuant to the express terms of the Policy, it

entered a grace period on that date. (See JA 1426 (Policy, “Grace Period” provision).) In accordance with the terms of the Policy, on March 17, 2004, AmerUs sent a written late payment offer (the “Late Payment Offer”) to PNC more than thirty days before the grace period expired. (See JA 520-21 (B. Clark testimony); JA 1426 (Policy, “Lapse” provision); JA 1459 (Late Payment Offer); JA 2086 (register of late payment offer mailing dates).) The Late Payment Offer warned that the Policy had entered a grace period and would lapse on April 23, 2004, unless the necessary payment was made. (See JA 1459 (Late Payment Offer).) The Late Payment Offer contained the following explicit warning:

YOUR POLICY IS NOW IN THE GRACE PERIOD

BUT IT’S NOT TOO LATE

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 concedes it did not forward the Late Payment Offer to Harold Fulmer (“Mr. Fulmer”) or Mrs. Fulmer (together, the “Fulmers”). (See Appellee Br. at 10.) No payment was made after the Policy entered the grace period on February 23, 2004. (See JA 520 (B. Clark testimony); JA 2071 col. 8 (transactional history chart).) Pursuant to the express terms of the Policy, the Policy lapsed on April 23, 2004, because its cash value was exhausted and no

payment was made in response to the Late Payment Offer. (*See* JA 520 (B. Clark testimony); *see also* JA 1426 (Policy, “Lapse” provision); JA 1459 (Late Payment Offer); JA 1469 (Reinstatement Offer dated April 25, 2004).)

PNC now asserts, for the first time, that “[t]he Policy lapsed in late February 2004.” (Appellee Br. at 8.) PNC’s sole support for this false assertion is Mrs. Fulmer’s trial testimony. PNC’s citation to Mrs. Fulmer’s testimony is disingenuous and intended to confuse and mislead the Court. Mrs. Fulmer testified that (i) she does not remember exactly when the Policy lapsed (JA 456 ln. 13); (ii) she was told the Policy lapsed on February 4, 2004 (not “late February 2004”) (JA 456 ln. 22-25, 457 ln. 1); and (iii) she did not know the Policy entered a 60-day grace period beginning on February 23, 2004, because she never received the Late Payment Offer (JA 457 ln. 16-21). Thus, Mrs. Fulmer’s testimony provides absolutely no support for the false assertion that the Policy lapsed in “late February 2004.”

Until now, PNC did not dispute that the Policy’s grace period began on February 23, 2004, and the Policy lapsed on April 23, 2004. Indeed, in PNC’s proposed findings of fact and conclusions of law, PNC represented to the district court that, “on February 23, 2004, AmerUs placed the Policy into a pending lapse state ...,” and that after the grace period expired, “on April 23, 2004, AmerUs terminated the Policy ...” (*See* JA 583 ¶ 126; JA 586 ¶ 150.) Moreover, PNC’s

amended complaint alleged that, on or about April 23, 2004, AmerUs canceled the Policy. (*See* JA 30 ¶ 19.)

The district court did not find that the Policy lapsed on February 23, 2004. Rather, the district court found that AmerUs calculated that the Policy entered a “lapse period” as of February 23, 2004. (*See* JA 17.) Although the term “lapse period” was not used by any of the parties in the litigation, AmerUs did indeed calculate that the grace period (also referred to as the “pending lapse period”) began on February 23, 2004, because the cash value on that date was insufficient to fund the monthly deduction. (*See* JA 520 (B. Clark testimony); JA 2071 ln. Q (transactional history chart, showing insufficient cash value to fund monthly deduction on February 23, 2004).) Although the Policy had insufficient cash value as of February 23, 2004, the Policy remained “in force” for sixty days (until April 23, 2004), in accordance with the Policy’s Grace Period provision. (*See* JA 520 (B. Clark testimony); JA 1426 (Policy, “Grace Period” provision); JA 1469 (Reinstatement Offer).)

Indeed, had Mr. Fulmer died during the Policy’s grace period, AmerUs would have been obligated to pay the death benefit under the Policy, less a deduction for the overdue premium. (*See* JA 1426 (“If the Insured dies during the grace period, the amount of [the] overdue monthly deduction will be deducted from the insurance benefits.”)); *see also* *Guardian Life Ins. Co. of Am. v. Goduti-*

Moore, 229 F.3d 212, 220 (3d Cir. 2000) (holding life insurance coverage was in force and benefits were payable when insured died during grace period); *Gottlieb v. Abraham Lincoln Mut. Life Ins. Co.*, 73 A. 1057, 1058 (Pa. 1909) (same).

Recognizing that the timeline in this case does not support the district court's defective causation analysis, PNC misstates the date the Policy lapsed in an effort to nullify the significance of the Late Payment Offer and to justify the district court's failure to reconcile the fact that PNC ignored the Late Payment Offer. Indeed, the Late Payment Offer was sent by AmerUs to PNC five weeks after the telephone conversation between Tonya Allen and Brenda Mincks and more than 30 days before the Policy lapsed for non-payment of premium on April 23, 2004. (*See* JA 521-22 (B. Clark testimony); JA 2086 (register showing Late Payment Offer mailed March 17, 2004).) PNC acknowledges receiving the Late Payment Offer, but filed it away without forwarding it to the Fulmers, without contacting AmerUs to inquire about the Late Payment Offer, without consulting the Policy to ascertain the legal significance of the Late Payment Offer, and without remitting sufficient premiums to sustain the Policy. (*See* Appellee Br. at 10; *see also* JA 2176 at 28-29, 2186 at 67-69, 2198 at 114-15 (J. Fisher testimony).) In short, PNC did nothing in response to the Late Payment Offer to prevent the Policy from lapsing. As the district court recognized at trial, had PNC

forwarded the Late Payment Offer to Mrs. Fulmer, she would have made the necessary payment to keep the Policy in force. (*See* JA 457-58 (Trial Tr.).)

By asserting that the Policy lapsed in “late February 2004,” PNC is attempting to persuade this Court to disregard the Late Payment Offer as untimely and irrelevant. Indeed, PNC goes so far as to mischaracterize the Late Payment Offer as an offer to “reinstate” the lapsed Policy. (*See* Appellee Br. at 8-9.) This is absolutely false. The Late Payment Offer was sent by AmerUs to PNC more than 30 days before the end of the grace period, warning that the Policy would lapse on April 23, 2004, if the necessary payment was not made. (*See* JA 520-22 (B. Clark testimony); JA 1459 (Late Payment Offer); JA 2086 (register showing Late Payment Offer mailed March 17, 2004).) The Late Payment Offer was not an offer to “reinstate” a lapsed Policy.¹

Moreover, based on the same false premise that the Policy lapsed in “late February 2004,” PNC repeatedly asserts that AmerUs misled Mrs. Fulmer when its representatives told her that the Policy would remain in force through March 23, 2004, after her February 3, 2004, payment in the amount of \$511.04. (*See*

¹ By way of comparison, after the Policy lapsed on April 23, 2004, AmerUs sent PNC a Reinstatement Offer notifying PNC that the Policy had lapsed and inviting PNC to apply for reinstatement. (*See* JA 1469 (Reinstatement Offer).) PNC’s application for reinstatement, however, was denied because Mr. Fulmer was uninsurable. (*See* JA 1480 (denial letter).) The district court determined that the denial of reinstatement was not actionable, and PNC has not cross-appealed that determination. (*See* JA 487, 495 (Trial Tr.).)

Appellee Br. at 7-8, 16-18). PNC claims the district court found that AmerUs “communicated misrepresentations to Mrs. Fulmer” concerning the effect of this \$511.04 payment. (*See* Appellee Br. at 13, 15.) The district court made no such findings. (*See* JA 17-18.) Rather, the district court found only that “Ms. Allen was given incorrect information” and that AmerUs supplied incorrect information to PNC – not to Mrs. Fulmer. (*See id.*) Moreover, the Policy remained in force beyond March 23, 2004. (*See* JA 520 (B. Clark testimony that Policy terminated after grace period); JA 1469 (Reinstatement Offer, dated April 25, 2004); *see also* JA 1426 (Policy, “Grace Period” provision).) Thus, AmerUs made no misrepresentation to Mrs. Fulmer concerning her payment of \$511.04. PNC’s attempt to expand the district court’s findings of fact to include purported “misrepresentations to Mrs. Fulmer” should be categorically rejected.

PNC also purports to provide support for the district court’s comment that the payment of \$24,268.51 called for by the Late Payment Offer was incorrect because a payment of “approximately \$16,000 should have been sufficient” to sustain the Policy. (*See* JA 17; Appellee Br. at 9 (citing JA 508-09, 769).) The Joint Appendix pages cited by PNC, however, provide no support for the district court’s incorrect and irrelevant assertion. As previously explained in AmerUs’s opening brief (*see* Appellant’s Br. at 40), the “amount due” stated in the Late Payment Offer was accurate because by April 23, 2004, the last day of the grace

period, the Policy would have had a negative cash value of \$23,462.12. (*See* JA 2057 (chart showing negative cash values).)²

Moreover, the Policy lapsed because no payment of any amount was made in response to the Late Payment Offer. (*See* JA 518, 520 (B. Clark testimony); JA 2071 col. 9 (transactional history chart showing no payments made after February 4, 2004).) Indeed, PNC concedes no premium payment was made after February 2004. (*See* Appellee Br. at 8.) Thus, the district court’s comment that a payment of “approximately \$16,000 should have been sufficient” was both inaccurate and irrelevant.

B. AmerUs Never Possessed The Trust Agreement And Knowledge Of Its Terms Cannot Be Imputed To AmerUs

Attempting to pass the blame for its own failure to advise the Fulmers that the Policy had entered the grace period, PNC argues that AmerUs “knew” PNC had “no obligation” to forward the Late Payment Offer to the Fulmers. (*See* Appellee Br. at 18.) PNC’s argument is based on the district court’s erroneous factual finding that AmerUs “had a copy of the trust agreement in its files,” and

² A “premium expense charge” of three percent was deducted from each premium payment and the balance was credited to the Policy. (*See* JA 517-18 (B. Clark testimony); JA 1423, 1429 (Policy).) If the full amount requested by the Late Payment Offer had been paid, a total of \$23,540.45 would have been credited to the Policy, leaving it with a positive cash value of \$78.33 on the last day of the grace period.

“was presumably chargeable with notice that the bank might not be notifying Mr. Fulmer about the premiums due.” (*See* JA 13.)

Recognizing there was no evidence presented at trial to support the district court’s erroneous fact finding, PNC cites to a misstatement made by counsel during oral argument on AmerUs’s motion for summary judgment – a hearing at which arguments of counsel were heard, but no evidence was presented. (*See* Appellee Br. at 3.)³ Further, PNC ignores the fact that counsel for AmerUs immediately corrected the misstatement, as he was ethically obligated to do, by writing to the district court and advising it 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 (May 24, 2006)); *see also* Pa. R. Prof’l Conduct 3.3(a)(1) (providing that a lawyer shall not knowingly “fail to correct a false statement of material fact ... previously made to the tribunal by the lawyer”).

As a matter of law, the alleged misstatement made by counsel at oral argument cannot provide the evidentiary support for the district court’s finding. *See In re Fed. Mogul-Global Inc.*, 348 F.3d 390, 406 (3d Cir. 2003) (“[I]t is well settled that arguments by counsel cannot provide factual support for a trial court’s

³Notably, this appeal is the first time PNC has argued that AmerUs possessed a copy of the Trust Agreement. PNC did not argue that AmerUs had a copy of the Trust Agreement in its trial brief (*see* JA 265-307), nor did it request this finding from the district court in its proposed findings of fact and conclusions of law (*see* JA 569-608).

findings.”); *see also United States v. Stansfield*, 101 F.3d 909, 922 (3d Cir. 1996) (“[A]rguments of counsel are not evidence but are merely comments on evidence.”); *United States v. Sandini*, 888 F.2d 300, 310-11 (3d Cir. 1989) (“[T]he arguments of counsel are simply not evidence.”); *Semper v. Santos*, 845 F.2d 1233, 1237 (3d Cir. 1988) (“The arguments of counsel are not evidence[.]”).

Indeed, there is not a scintilla of evidence supporting the district court’s finding that AmerUs possessed a copy of the Trust Agreement. Accordingly, there is no factual basis for imputing knowledge of the terms of the Trust Agreement to AmerUs. Thus, the district court’s finding was clearly erroneous and must be rejected. *See Baxter v. Baxter*, 423 F.3d 363, 368-69 (3d Cir. 2005) (overturning finding of fact unsupported by evidence); *Rochez Bros., Inc. v. Rhoades*, 527 F.2d 880, 887 (3d Cir. 1975).

Moreover, the Trust Agreement, which was a contract between PNC and the Fulmers, cannot impose additional contractual obligations upon AmerUs under the Policy. Indeed, the district court found AmerUs had no obligation to send any Policy notices to the Fulmers. (*See* JA 13 (“[T]he defendant insurance company did not have any stated obligation to communicate with Mr. Fulmer either; it was required to send notices to the owner of the policy, the plaintiff bank.”).)

C. The District Court Did Not Find That AmerUs Promised To Send The Late Payment Offer To The Fulmers

The district court found that AmerUs was not obligated under the Policy to “communicate with Mr. Fulmer,” but was required to send notices to PNC, the owner of the policy. (*See* JA 13.) Indeed, the unmodified terms of the Policy required AmerUs to send notice of a pending lapse to the Policy owner, PNC. (*See* JA 1426 (Policy, “Lapse” provision).) Despite this factual finding by the district court, PNC argues, based on an exchange of letters in 1993 between Mr. Fulmer and AmerUs, that AmerUs “promised” to inform Mr. Fulmer when the Policy required additional funding. (*See* Appellee Br. 4, 8; JA 1415 (letter from AmerUs).)

Contrary to PNC’s assertion, AmerUs did not promise to inform Mr. Fulmer when the Policy required additional funding. In its September 23, 1993, response to Mr. Fulmer’s letter, AmerUs simply agreed that regular billing statements would no longer be sent and the cost of insurance would be deducted from the Policy’s cash value “as long as the policy values are sufficient.” (*See* JA 1415 (letter from AmerUs).) AmerUs further stated, “If the policy ever needs additional funding, a pending lapse notice will be generated.” (*See id.*) This, of course, was consistent with the Policy’s lapse provision. (*See* JA 1426.) AmerUs never agreed to modify the Policy terms to send pending lapse notices (*i.e.*, late payment offers) directly to the Fulmers, and the district court never made such a finding.

In fact, the district court found that, after the exchange of letters in 1993, PNC learned from AmerUs whenever the Policy required additional funding, and PNC – not AmerUs – would “cause Mr. Fulmer to make the necessary payments.” (See JA 14-15.) The district court further found that, since the time PNC became trustee in 1999, AmerUs “sent all premium notices, annual statements, and other documentation relating to the policy to [PNC].” (See JA 13.) Thus, PNC’s suggestion that AmerUs promised to notify Mr. Fulmer when the Policy required additional funding was not a basis for the district court’s finding a breach of the implied duty of good faith and fair dealing and provides no support for the erroneous legal conclusion ultimately reached by the district court.

Furthermore, the 1993 agreement not to send regular billing statements for the Policy had expired by the time PNC became the trustee. Since at least 2002, regular billing statements were sent to PNC on a quarterly basis, regardless of whether the Policy’s cash value was sufficient to cover the monthly deduction for the cost of insurance. (See, e.g., JA 808, 813, 818, 820, 824, 829, 1467, 1487, 1489, 1491, 1498, 1500, 1503, 1505, 1823, 1828, 1833, 1835, 2049-51 (copies of premium notices sent to PNC during the years 2002 through 2004).) See also *Wathen v. Brown*, 189 A.2d 900, 902 (Pa. Super. Ct. 1963) (holding mutual intent to abandon agreement can be inferred from circumstances and conduct of parties). Moreover, every one of the late payment offers in the record were sent by AmerUs

to PNC only. (*See, e.g.*, JA 803, 827, 1459, 1462, 1466, 1818, 2053 (copies of late payment offers sent during the years 2003 and 2004).)

D. The District Court Decision Cannot Be Affirmed Based On The Doctrine Of Equitable Estoppel

PNC falsely and repeatedly asserts that the district court found that PNC “reasonably relied” on the information supplied by Brenda Mincks that the Policy “would be okay” without the payment of premiums for “about three months.” (*See* Appellee Br. at 13, 15, 17.) Based on this purported finding of “reasonable reliance,” PNC contends the district court correctly concluded that AmerUs was “estopped” from terminating the Policy. (*See* Appellee Br. at 13, 23.) In fact, the district court made no such findings of “reasonable reliance” or “estoppel.” Although “reasonable reliance” is necessary to prove equitable estoppel, the district court’s decision was based solely on an alleged breach of the implied covenant of good faith and fair dealing.

1. The District Court’s Decision Was Not Based On The Doctrine Of Equitable Estoppel

This case proceeded to trial solely as a breach of contract claim against AmerUs. (*See* JA 32-35 (Plaintiff’s Amended Complaint).) PNC’s amended complaint contained no mention of reasonable reliance or equitable estoppel. (*See* JA 24-103.) Although prior to trial PNC sought to amend its amended complaint to include allegations of “justifiable reliance,” the district court denied PNC’s

motion for leave to amend. (*See* Motion for Leave to File Second Amended Complaint, Docket No. 25, Ex. A at ¶¶ 76, 84.) In denying the motion for leave to amend, the district court did not permit PNC to bring additional tort claims alleging “justifiable reliance,” but acknowledged that PNC’s contract claim encompassed a claim for breach of the implied duty of good faith and fair dealing. (*See* Order that Plaintiff’s Motion for Leave to File a Second Amended Complaint is Denied, Docket No. 28.)

The Adjudication contains no findings on the elements of equitable estoppel and does not conclude that AmerUs should be “estopped from terminating” the Policy. Rather, the district court concluded there was a breach of the implied covenant of good faith and fair dealing that resulted in the lapse of the Policy. (*See* JA 18 (“[B]ut for the incorrect information supplied to plaintiff by the defendant’s customer service representatives ... the policy would not have lapsed. ... The defendant was legally obliged to act in good faith.”).) Indeed, in the last sentence of the Adjudication, the district court noted that PNC sought “merely to enforce [the Policy] according to its terms, and with the implied covenant of good faith and fair dealing.” (*See* JA 19.)

2. The Adjudication Cannot Be Affirmed On The Basis Of Factual Findings Not Made By The District Court

Under Pennsylvania law, “[t]he two essential elements of equitable estoppel are inducement and justifiable reliance on that inducement.” *Novelty Knitting*

Mills v. Siskind, 457 A.2d 502, 503 (Pa. 1983). Moreover, equitable estoppel must be shown by “clear, precise and unequivocal evidence.” *Id.* at 504 (quoting *Blofson v. Cutaiar*, 333 A.2d 841, 844 (Pa. 1975)).

Justifiable reliance is a question of fact. *See Dilworth v. Metro. Life Ins. Co.*, 418 F.3d 345, 354 (3d Cir. 2005) (quoting *Tran v. Metro. Life Ins. Co.*, 408 F.3d 130, 139 (3d Cir. 2005)). Notably, the district court found neither justifiable reliance nor equitable estoppel. This Court cannot affirm the district court’s judgment based on a legal theory that necessarily depends on findings of fact not made by the district court. *See Scalea v. Scalea’s Airport Serv., Inc.*, 833 F.2d 500, 502-03 (3d Cir. 1987) (per curiam) (declining to review theories of liability not addressed by district court).

Rule 52(a) of the Federal Rules of Civil Procedure requires that “[i]n all actions tried upon the facts without a jury ..., the court shall find the facts specially and state separately its conclusions of law thereon ...” Fed. R. Civ. P. 52(a). It is not the function of the appellate court to make factual findings for the first time on appellate review. *See Pullman-Standard, Div. of Pullman v. Swint*, 456 U.S. 273, 291 (1982) (“[Factfinding] is the basic responsibility of district courts, rather than appellate courts, and ... the Court of Appeals should not have resolved in the first instance this factual dispute that had not been considered by the District Court.”) (quoting *DeMarco v. United States*, 415 U.S. 449, 450 (1974) (alterations in

original)); *see also* *PEPI, Inc. v. Helcar Corp.*, 458 F.2d 1062, 1064-65 (3d Cir. 1972). The district court did not make the factual findings necessary to establish equitable estoppel, therefore, this Court cannot affirm the district court's decision based on the doctrine of equitable estoppel. *See Scalea*, 833 F.2d at 502-03; *PEPI*, 458 F.2d at 1064-65.

3. PNC Could Not Prove Reasonable Reliance As A Matter Of Law

The district court did not rely and could not have relied on equitable estoppel as a basis for granting judgment in favor of PNC. As a matter of law, PNC could not reasonably rely on the telephone conversation with Brenda Mincks because five weeks after the telephone conversation with Brenda Mincks, and more than thirty days before the Policy lapsed, AmerUs sent written notice to PNC warning that the Policy was in danger of lapsing. (*See* JA 1459 (Late Payment Offer)); *see also* *McGowan v. Prudential Ins. Co. of Am.*, 372 F.2d 39, 42 (3d Cir. 1967) (holding neither plaintiff nor insured could reasonably rely on insurance agent's prior statement that premium payments would be covered by an automatic policy loan after receiving letter advising that automatic policy loan would not be approved); *In re Upset Sale Tax Claim*, 37 Pa. D. & C.3d 509, 515 (1984) (holding owner of properties could not justifiably 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, there could be no basis for a finding of estoppel against AmerUs because, despite a prior representation by AmerUs's agent, PNC was put on notice that the Policy was in danger of lapsing when it received the Late Payment Offer from AmerUs. *See McGowan*, 372 F.2d at 43.

PNC's effort to distinguish *McGowan* on the basis of an irrelevant factual dissimilarity fails. (*See* Appellee Br. at 24.) The relevant legal analysis in *McGowan* did not turn on the fact that the case involved an attempt to change the policy terms. In *McGowan*, the plaintiff claimed the insurance company should be estopped from denying benefits under a policy that had lapsed for non-payment of premium because the insurance agent had advised the plaintiff that an automatic loan provision would cover any missed premium payments. *See McGowan*, 372 F.2d at 40-41. The Third Circuit agreed that had the "evidence on the reliance issue stopped" there, the plaintiff may have created a jury question on the issue of estoppel. *See id.* at 42. The evidence, however, did not stop with the misrepresentation by the insurance agent because the agent subsequently advised the plaintiff that the automatic loan provision would not be approved and that a different loan would be required to make the premium payments. *See id.* at 41-42. Despite this notice, the plaintiff took no action to ensure that the premium payments were being made, and the policy lapsed. *See id.* at 42. Based on these facts, the Third Circuit held "there was no issue of fact for the jury as to reasonable

reliance by the plaintiff and the insured.” *Id.* Judgment was entered in favor of the insurer. *See id.* at 43.

Similarly, PNC had no reasonable basis for continuing to rely on Ms. Minck’s statement that the Policy would “be okay for three months” (*see* JA 319 (T. Allen testimony)) after it received the contractually-required Late Payment Offer advising that the Policy would lapse on April 23, 2004, if the amount due was not paid. (*See* JA 1459 (Late Payment Offer).)

The cases PNC relies upon in support of its equitable estoppel argument are inapposite. PNC cites *Nanty-Glo Borough v. American Surety Co.*, 175 A. 536, 537 (Pa. 1934), for the proposition that “an insurer who has misled the insured as to the necessity for performing a condition in the policy cannot thereafter take advantage of its nonperformance.” (Appellee Br. at 20 (quoting *Nanty-Glo*, 175 A. at 537).) This principal of law has no application here. AmerUs did not prevent PNC from performing under the Policy. Indeed, AmerUs provided PNC with the contractually-mandated Late Payment Offer more than thirty days before the grace period expired and explicitly warned PNC that the Policy was in danger of lapsing. (*See* JA 520-22 (B. Clark testimony); JA 1426 (Policy, “Lapse” provision); JA 1459 (Late Payment Offer); JA 2086 (register showing mailing date Late Payment Offer).) The Late Payment Offer advised PNC of the amount due under the Policy and the date on which the payment must be received to avoid the lapse

of the Policy. (*See* JA 1459.) PNC acknowledges receipt of the Late Payment Offer and concedes it took no action in response to the Late Payment Offer. PNC's decision to ignore the Late Payment Offer cannot be attributed to AmerUs.

The other two cases relied upon by PNC, *Amrovcik v. Metropolitan Life Insurance Co.*, 180 A. 727 (Pa. Super. Ct. 1935), and *Aetna Casualty and Surety Co. v. Netz*, Civ. No. 91-6944, 1993 WL 89766 (E.D. Pa. Mar. 29, 1993), are distinguishable for the reasons discussed in AmerUs's Opening Brief. (*See* Appellant's Br. at 23-25.) As previously explained, the contractually required Late Payment Offer that AmerUs sent to PNC is a critical distinguishing factor from the cases cited and relied on by PNC and the district court. (*See id.*)

E. PNC Failed To Provide Any Legal Basis For Sustaining The District Court's Defective Causation Analysis

Causation requires a finding of both proximate (*i.e.*, legal) and factual (*i.e.*, "but for") causation. *See Fedorczyk v. Caribbean Cruise Lines*, 82 F.3d 69, 73 (3d Cir. 1996) (noting legal analysis of causation requires analysis of both proximate and factual causation). Indeed, to obtain relief in a breach of contract action, the plaintiff must prove the defendant's breach was the proximate and factual cause of the alleged injury. *See Nat'l Controls Corp. v. Nat'l Semiconductor Corp.*, 833 F.2d 491, 496 (3d Cir. 1987).

Here, the district court determined the issue of causation as a matter of law but applied the wrong legal standard. The district court concluded that a

misstatement by an AmerUs customer service representative during a telephone conversation with a representative of PNC was the “but for” cause of the Policy’s lapse for non-payment of premiums. (*See* JA 18.) Thus, the district court’s judgment was based solely on causation “in fact.” The district court erred by failing to make any finding regarding proximate cause. Having failed to conduct a complete causation analysis, the district court’s judgment should be reversed. *See Nat’l Controls*, 833 F.2d at 496 (holding that proof of proximate cause is a prerequisite to obtaining relief in a breach of contract action).

PNC does not dispute that causation requires a finding of both proximate and factual causation, but makes the conclusory assertion that the question of causation was satisfied because the district court concluded the telephone call with Brenda Mincks was the sole cause of the Policy’s lapse. (*See* Appellee Br. at 25 n.8.) PNC’s argument underscores the problem with the district court’s defective causation analysis.

Under this view of the law, any misstatement by a contracting party during the course of contractual performance is a breach of the implied duty of good faith and fair dealing whether or not the correct information was ultimately provided subsequent to the misstatement and before any harm was caused by the misstatement. The district court’s conclusion imposes a duty of absolute accuracy in all oral communications between contracting parties that essentially trumps the

express terms of a contract and would permit the recipient of the inaccurate communication to ignore any subsequent notice curing the alleged harm. This reasoning finds no support in law or logic. Indeed, based on this analysis, a misstatement, once made, can never be corrected. No case, statute, or rule supports PNC's position or the district court's conclusion.

In fact, PNC offers no legal basis for sustaining the district court's defective causation analysis. Instead, PNC attempts to marginalize the significance of its receipt of the Late Payment Offer. In a confusing analogy, PNC compares itself to a firefighter being blamed for the loss of a building. (*See* Appellee Br. at 19.) In fact, the burning building is the pending lapse of the Policy. The Late Payment Offer was a fire alarm, warning PNC that the Policy was in danger of lapsing and requiring immediate action to prevent the loss of the Policy. Despite the clear opportunity to put the fire out and prevent the loss of the Policy, PNC ignored the alarm. As a result, the Policy lapsed.

PNC further suggests AmerUs could have prevented the Policy's lapse if it "cured its misrepresentations" by notifying PNC of its prior misstatement. (*See* Appellee Br. at 18-19.) In fact, the subsequent Late Payment Offer expressly warned PNC that the Policy would lapse on April 23, 2004, unless the necessary premium payment was made. (*See* JA 1459.) Thus, AmerUs did exactly what PNC suggests should have been done to prevent the Policy from lapsing.

Once the Policy entered the grace period – which was *after* the telephone conversation with Brenda Mincks – AmerUs sent PNC written notice of the Policy’s pending lapse in accordance with the express terms of the Policy. Notwithstanding this undisputed fact, PNC argues it was entitled to ignore the Late Payment Offer because of the prior representation of Brenda Mincks. (*See* Appellee Br. at 9-10, 13, 17-18.) PNC relies heavily on *Drelles v. Manufacturers Life Insurance Co.*, 881 A.2d 822, 840-41 (Pa. Super. Ct. 2005), for the proposition that the implied covenant of good faith and fair dealing requires an insurer to provide correct policy information to its insured. (*See* Appellee Br. at 23.) In *Drelles*, however, the court also noted that “the recipient of a fraudulent misrepresentation ... cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent if he had used his opportunity to make a cursory examination or investigation.” *Id.* at 840. PNC conducted no such examination or investigation concerning the Late Payment Offer. (*See* JA 2186 at 67-69; 2190 at 84-85 (J. Fisher testimony).) PNC simply ignored the warning. Thus, *Drelles* offers no support for PNC.

PNC further relies on *Dercoli v. Pennsylvania National Mutual Insurance Co.*, 554 A.2d 906 (Pa. 1989), for the proposition that an insurer must truthfully disclose all requirements under the Policy. (*See* Appellee Br. at 22-23.) AmerUs,

however, fulfilled this duty by sending the Late Payment Offer to PNC as it was contractually obligated to do. (*See* JA 1459 (Late Payment Offer).)

Attempting to justify its failure to forward the Late Payment Offer to the Fulmers, PNC makes the remarkable argument that Jeanne Fisher, a lawyer, vice president of PNC, and trust officer with approximately eleven years of experience, did not know the significance of the Late Payment Offer. (*See* Appellee Br. at 9-10.) PNC claims Ms. Fisher regarded the Late Payment Offer as “nothing more than another unnecessary offer from AmerUs to pay a premium.” (*See id.*) PNC makes the equally absurd claim, wholly lacking in evidentiary support, that the usual form for a lapse notice was a letter concerning a returned check. (*See* Appellee Br. at 10 n.3; *see also* JA 793 (letter concerning returned check).) The record contains one letter warning of a pending lapse as a result of a returned check. (*See* JA 793.) In all other instances when the Policy’s cash value was insufficient to cover the monthly deduction, AmerUs sent PNC a late payment offer. (*See, e.g.*, JA 803, 827, 1459, 1462, 1466, 1818, 2053.)

Even Ms. Fisher acknowledged that, when she received late payment offers prior to 2004, she recognized them as a warning that the Policy would lapse unless a sufficient premium was paid. (*See* JA 2193 at 95, 2197 at 113 (J. Fisher testimony).) In fact, in the preceding year (2003), PNC twice received late payment offers from AmerUs. (*See* JA 1462, 1466 (late payment offers).) On both

occasions, PNC forwarded the late payment offers to the Fulmers with letters that warned: “**This policy is in danger of lapsing if payment is not received.**” (JA 1461, 1465 (emphasis in original).) Indeed, in every prior instance when the Policy entered a grace period, AmerUs sent a late payment offer to PNC, PNC forwarded the late payment offer to the Fulmers, the Fulmers paid the premium, and the Policy did not lapse. (See JA 15 (Adjudication).)

On this occasion, however, PNC departed from its prior practice and, for the first time, did not forward the Late Payment Offer to the Fulmers. (See Appellee Br. at 10; JA 399 (L. Valker testimony); JA 2176 at 28-29, 2186 at 69 (J. Fisher testimony).) Indeed, PNC did not even inform the Fulmers that the Late Payment Offer had been received. (See JA 2198 at 114-15, 2200-01 at 125-26 (J. Fisher testimony).) As a result, the Fulmers were not aware that a premium payment was necessary, and the Policy lapsed. (See JA 457 (J. Fulmer testimony).) Had PNC forwarded the Late Payment Offer to the Fulmers, the Fulmers would have paid the amount called for in the Late Payment Offer. (See JA 376, 457-58 (H. Fulmer and J. Fulmer testimony).)

Although PNC assigns great importance to the telephone call between Ms. Mincks and Ms. Allen, it is undisputed that PNC did not call AmerUs customer service at the toll free number in response to the Late Payment Offer. (See JA 1460 (Late Payment Offer); JA 2186 at 67-69, 2190 at 83-85 (J. Fisher

testimony).) The phone number on the Late Payment Offer was the same number that was printed on all other correspondence from AmerUs (*see, e.g.*, JA 1468 (March 23, 2004 premium notice), JA 1483 (2003 Annual Statement)) and the same number that Tonya Allen had called when she spoke with Brenda Mincks. (*See* JA 318 (T. Allen testimony).) On this occasion, however, PNC did not attempt to call AmerUs to inquire about the Late Payment Offer.

When the Policy entered the grace period on February 23, 2004, AmerUs followed the same procedure it had always followed: it sent a Late Payment Offer to PNC, as the Policy required. (*See* JA 1459 (Late Payment Offer).) PNC's departure from its usual practice by failing to forward the Late Payment Offer to the Fulmers was an intervening cause that makes PNC, rather than AmerUs, the cause of the Policy's lapse. *See, e.g., Jefferson Bank v. Progressive Cas. Ins. Co.*, 965 F.2d 1274, 1285 (3d Cir. 1992) (determining unrecordability of mortgage was not proximate cause of loss where plaintiff made no effort to record mortgage); *Kaplan v. Kaplan*, 171 A.2d 166, 168 (Pa. 1961) (determining illegally parked driver was not proximate cause of injury where plaintiff acted wrongfully by stepping into traveled portion of street) (citation omitted).

The district court failed to consider these undisputed facts in reaching its conclusion. Indeed, the district court ignored the undisputed fact that PNC disregarded the Late Payment Offer and failed to forward it to the Fulmers,

contrary to its prior practice. In sum, the district court applied the wrong legal standard by failing to consider proximate cause. Moreover, the district court's conclusion that AmerUs caused the Policy to lapse is "against the clear weight of the evidence." *See Lane v. Dep't of Justice*, 767 F.2d 66, 70 (3d Cir. 1985) (noting findings of fact that lack evidentiary support, go against clear weight of evidence, or misapprehend weight of evidence, are clearly erroneous). For all of these reasons, the district court's judgment should be reversed.

CONCLUSION

For the foregoing reasons, as well as those stated in the Opening Brief of Appellant, AmerUs Life Insurance Company, it is respectfully requested that this Court reverse the judgment of the district court and direct the entry of judgment for AmerUs Life Insurance Company.

Respectfully submitted,

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WITH FED. R. APP. P. 32 AND 3D CIR. LAR 32.1(c)

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

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CERTIFICATE OF SERVICE

I hereby certify that, on February 5, 2007, two copies of the foregoing Reply Brief of Appellant AmerUs Life Insurance Company were sent by Federal Express to:

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On the same date, an electronic copy of the Reply Brief of Appellant AmerUs Life Insurance Company 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 Reply Brief of Appellant AmerUs Life Insurance Company were sent by Federal Express to:

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