IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDWARD A. KLINE and
JOYCE E. KLINE,

Plaintiffs,

YPSILANTI SAVINGS BANK,

Involuntary Plaintiff,

No. 86-CV-75307-DT

v.

Hon. Julian A. Cook, Jr.

ALLSTATE INSURANCE COMPANY,

Defendant.

MEMORANDUM OPINION AND ORDER

This is a claim for the loss of a 1985 Ford F250 diesel pickup truck which was allegedly insured by the Defendant, Allstate Insurance Company ("Allstate"). The Plaintiffs are the vehicle's owners, Edward and Joyce Kline ("the Klines"), both residents of Michigan, and the Ypsilanti Savings Bank ("Bank"), which holds a security interest in the lost vehicle.

The Complaint in this case was originally filed in Washtenaw County (Michigan) Circuit Court on November 20, 1986. Allstate petitioned this Court for removal on December 22, 1986. The parties have declined to litigate this cause by means of a conventional trial, and have chosen to submit their dispute to

this Court for a final judgment upon written arguments and a written record.

I.

On the basis of the record, this Court makes the following findings of fact pursuant to Fed. R. Civ. P. 52(a):

1. On July 20, 1985, the Klines purchased a six-month renewal policy of insurance from Allstate for their three (3) motor vehicles.

2. On or about September 30, 1985, Allstate mailed a notice of cancellation of this policy (for nonpayment of premiums) to the Klines, effective October 14, 1985.

3. A copy of this notice of cancellation was mailed to the Bank as lienholder.

4. The Klines and the Bank received the notice of cancellation.

5. On or about October 22, 1985, Joyce Kline delivered a payment of $150.00 to John Casey ("Casey"), an agent of Allstate, in Ypsilanti, Michigan.

6. Allstate did not cancel the Klines' insurance coverage at this time.

7. On or about October 28, 1985, Allstate mailed a notice of cancellation (for nonpayment of premiums) to the Klines, effective November 11, 1985.

8. A copy of this second notice was also mailed to the Bank as lienholder.

9. Neither the Klines nor the Bank received this second notice.

10. On or about November 4, 1985, Joyce Kline mailed a payment of $100.00 to Casey.

11. Casey did not receive the payment.

12. On Saturday, November 23, 1985, the Kline's Ford truck disappeared from a Detroit area parking lot, and was presumed by them to have been stolen.

13. On the same day, Joyce Kline notified Casey of the theft. Casey advised her to contact the Allstate claims office.

14. Joyce Kline contacted the Allstate claims office on Monday, November 25, 1985, received a claim number, and was advised that claim forms would be forthcoming.

15. On November 27, 1985, Joyce Kline contacted Casey's office for assistance in completing the claim forms. However, she was advised that her insurance coverage was not in effect.

16. The Klines, who met with Casey and other representatives of Allstate on December 6, 1985, were advised to pay the balance due on their policy in order to maintain coverage on their remaining vehicles.

17. The Klines thereupon tendered to Allstate a check for $265.20.

18. Allstate issued a refund for the "lapse period" of November 11, 1985 through December 6, 1985 and took the position

that the Klines' coverage was not in effect at the time of the truck's disappearance.

II.

The Court first considers the Klines' contention that Allstate had a continuing practice of accepting late payments, or payments which the insureds had remitted after the nominal date of cancellation of the policy. The Klines maintain that this practice establishes a course of dealing which amounts to a waiver by Allstate of its right to cancel for nonpayment in this instance.

In support of this argument, the Klines cite Wallace v. Fraternal Mystic Circle, 121 Mich. 263, 80 N.W. 6 (1899), in which the Court stated:

> In determining whether there has been a . . . waiver of the forfeiture incurred by the nonpayment of the premium . . . , the test is whether the insurer, by his course of dealing with the insured, or by the acts and declarations of his authorized agents, has induced in the mind of the insured an honest belief that the terms . . . of the policy . . . will not be enforced . . .

Id. at 269, 80 N.W. at 8.

In Wallace, twelve of seventeen premium payments were accepted after their due dates. In the instant case, three paymemts were made during the policy period at issue. Only the first of these payments, which was made after the nominal cancellation date of October 14, 1985, resulted even arguably in

the reinstatement of the policy.[1] The second payment, in the amount of $100.00, which the Klines claim to have mailed to Allstate on or about November 4, 1985 was never received. No check, negotiated or otherwise, has been produced to correspond to that payment.

The Klines' third payment, in the sum of $265.20, was made after the loss of their vehicle (i.e., the truck which is the subject of this suit). At the time of that payment, they were aware that their insurance had been cancelled. This chain of events is slim evidence upon which to rest a claim that Allstate habitually accepted late payments as a part of its course of dealing with the Klines.

Moreover, any claim by the Klines that Allstate waived its claim of lapse when it accepted their payment of the outstanding premium balance is without merit. In Pastucha v. Ross, 290 Mich. 1, 287 N.W. 355 (1939), the Court held that where an insurer had unconditionally accepted the payment of a premium after a loss had occurred, it was obligated to pay the claim. However, in the instant case, Allstate vigorously asserted to the Klines at a meeting on December 6, 1985 that (1) their insurance had lapsed and (2) the loss would "probably not be covered."[2] Because the

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[1] Allstate contends that reinstatement did not occur as a result of the late payment alone. It avers that the Klines deleted one vehicle from the desired coverage, thereby reducing the size of their required payments and nullifying the necessity of the October 14, 1985 cancellation. Allstate's reply brief at 2.

[2] Allstate's brief in lieu of trial at 4.

content of the December 6th meeting evidences a far from unconditional acceptance of the Klines' post-loss premium payment, the rationale of Pastucha is inapplicable to effect a waiver of the insurer's lapse defense.

III.

The Klines' chief contention is that Allstate did not effectively cancel their insurance policy under M.C.L. 500.3020. The Court notes that section 3020 is only one of a number of statutory provisions which govern notice of the cancellation of insurance policies in Michigan.[3]

M.C.L. 500.3224(2) requires only that in order to be effective, a notice of cancellation must be mailed by certified mail, return receipt requested, to the insured's last known address. However, it is undisputed that Allstate sought to cancel the Klines' insurance policy for nonpayment of premiums. This fact removes the instant case from the ambit of section 3224(2) because M.C.L. 500.3212 expressly states that "[t]he provisions of [chapter 32] are not applicable to cancellations occasioned by nonpayment of premiums . . ."

M.C.L. 500.2123(3) provides that a "notice of termination for nonpayment of premium shall be effective as provided in the policy." The policy issued to the Klines provides that "mailing of notice is sufficient proof of notice." Allstate cites this

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[3] See M.C.L. 500.2123; M.C.L. 500.3224(2).

provision as support for its argument that the instant case is on all fours with Grable v. Farmers Insurance Exchange, 129 Mich. App. 370, 341 N.W.2d 147 (1983), in which an insurer's cancellation was held effective in accordance with the automatic termination provisions of the contract of insurance.

However, unlike the automatic termination provision in Grable, the nonpayment cancellation term of the Klines' policy stated that "cancellation is subject to compliance with applicable provisions of Chapters 30 and 32 of the Michigan Insurance Code." Chapter 32 is inapplicable to cancellations for nonpayment, but chapter 30 is quite applicable. Phillips v. Detroit Automobile Inter-Insurance Exchange, 69 Mich. App. 512, 245 N.W.2d 114 (1976).

The Court in Phillips invoked M.C.L. 500.3020 to require an actual receipt of notice by the insured in order to effectuate cancellation of insurance for nonpayment of premiums. The notice provision in the Phillips policy stated, "This policy may be cancelled by the Exchange by mailing or delivering to the insured . . . at the address last known to the Exchange . . . 10 days' written notice of such cancellation."

Section 3020 provides that "the mailing of notice shall be prima facie proof of notice." Mailing is not intended by this section to be conclusive proof that the notice reached the insured. Ultimately, the trier of fact must determine whether the evidence that the notice was not received is sufficient to

overcome the statutory presumption of receipt which arises from a proof of mailing.

In the instant case, Allstate offers the affidavit of one of its employees, who sets forth the company procedure for cancellation in the event of nonpayment. Allstate's evidence is that notice of cancellation is invariably mailed to the insured and to any lienholder of record. Allstate has also produced a purported photocopy of the Record of Mailing which was printed for the Klines' October 28, 1985 cancellation notice. The Klines testified that they did not receive the October 28th notice. The Bank, through its officer Marianna C. Gross, testified that it had no record of a receipt of the notice. This Court is persuaded that the Bank, which has routine business practices and procedures just as an insurance company does, was no more likely to fail to document the receipt of notice than Allstate was to fail to mail it. When the Bank received a previous cancellation notice, it immediately telephoned the Klines to inform them of the event in an effort to forestall cancellation. No such call was made after the October 28th notice was allegedly mailed.

Thus, even though the Klines' evidence of nonreceipt might not be sufficient by itself to overcome the presumption of section 3020, this Court concludes, by a preponderance of the evidence of record, that Allstate's October 28, 1985 notice of cancellation was never received by the Klines or the Bank. It follows from this fact, and from the actual receipt requirement of section 2123, that the policy was in effect by its terms until

the Klines received actual notice of its cancellation on November 27, 1985, *i.e.*, after the loss.

IV.

The Klines have adduced no proof of damages other than the purchase price of the lost truck, and a statement that the vehicle was only five months old at the time of the loss. Allstate has countered with the affidavit of its employee, Anthony Caccamo, who estimated the value of "a 1985 Ford F250 diesel, four wheel drive, pickup truck, as of October 13, 1985, to be $12,269.00." As this valuation appears to be the only evidence of record concerning the actual value of the Klines' vehicle at the time of its loss, and because neither party makes any other arguments from the policy language concerning damages, this Court adopts the figure $12,269.00 as the value of the Klines' insurance claim.

The Klines urge this Court to award "penalty interest" to them under section 6(4) of the Michigan Uniform Trade Practices Act, M.C.L. 500.2006(4). To warrant the imposition of penalty interest, section 6(4) requires that the claim be beyond reasonable dispute. As suggested by the discussion *supra*, this Court believes that there was a reasonable dispute as to the validity of the Klines' claim of coverage.

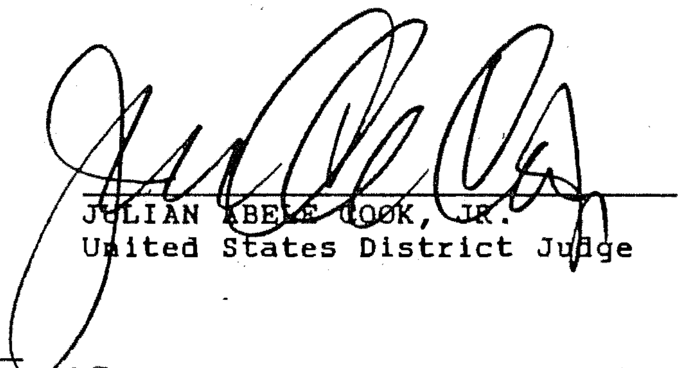
Section 6(4) also requires bad faith by the seller of a product or service as a prerequisite to penalty interest

liability. The Court in Medley v. Canady, 126 Mich. App. 739, 337 N.W.2d 909 (1983), held that the bad faith of an insurer under the Act must be determined from proof of conduct. "Bad faith . . . is not simply negligence or bad judgment but rather the conscious doing of a wrong because of dishonest purpose or moral obliquity. It is not merely the lack of good faith, but the opposite of good faith." Id. at 748, 337 N.W.2d at 913.

If there was no reasonable dispute as to the claim in this case, bad faith under the statute might be more easily discerned. However, this Court finds no "dishonest purpose or moral obliquity" in Allstate's actions with respect to the Klines' insurance claim. Penalty interest under section 6(4) is therefore unwarranted.

Accordingly, this Court concludes that judgment must be rendered in favor of the Klines in the amount of $12,269.00, exclusive of interest and costs.

IT IS SO ORDERED.



JULIAN ABELE COOK, JR.
United States District Judge

Dated: AUG - 9 1988