

IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

PUTNAM BANCSHARES, INC.,
a West Virginia corporation
d/b/a PUTNAM COUNTY BANK and
T.C.'s Used Cars, LLC, a West Virginia
limited liability company ,

Plaintiffs,

v.

Civil Action Number 07-C-497
O.C. Spaulding, Judge

FILED
2008 SEP 19 PM 2:38
PUTNAM CO. CIRCUIT COURT

PROGRESSIVE CLASSIC INSURANCE
COMPANY, a corporation,

Defendant.

**ORDER GRANTING PUTNAM BANCSHARES INC.'S MOTION FOR
SUMMARY JUDGMENT AND GRANTING IN PART AND DENYING IN
PART DEFENDANT PROGRESSIVE CLASSIC INSURANCE
COMPANY'S MOTION FOR SUMMARY JUDGEMENT**

This matter comes before the Court this day pursuant to the *Plaintiffs' Motion for Summary Judgment and Brief in Support of their Motion for Summary Judgment and Defendant's Motion for Summary Judgment and Memorandum of Law in Support of Defendant's Motion for Summary Judgment.*

The Plaintiffs in this action, Putnam Bancshares, Inc., and T.C.'s Used Cars, LLC, appear by and through counsel, Christopher S. Smith. The Defendant in this action, Progressive Classic Insurance Company (hereinafter Progressive), appears

by and through its counsel, R. Carter Elkins. The Plaintiffs filed a Response to Defendant's Motion for Summary Judgment and Defendant filed a Response to Plaintiffs' Motion for Summary Judgment. The parties have also filed reply briefs responding to each party's Response. Hearing was held on these two motions on the 21st day of August, 2008.

Upon due consideration of the parties' motions, the parties' responses, the parties' reply briefs, the arguments of counsel, the record in this action, and all relevant legal precedent this Court **FINDS** as follows:

FACTUAL FINDINGS

The following facts are not in dispute: (1) On August 24, 2006, Putnam Bancshares, Inc., (hereinafter the Bank) loaned Terry R. Daniel money to purchase a 2004 Chevrolet Silverado from T.C's Used Cars, LLC (hereinafter T.C.'s). (2) Mr. Daniel signed an agreement with the Bank to provide insurance on the vehicle with the Bank as the loss payee. (3) T.C.'s guaranteed the loan from the Bank. (4) Mr. Daniel obtained automobile insurance from Progressive for a policy period of August 23, 2006 through February 23, 2007. Mr. Daniel chose to pay through periodic payments during the policy period.¹ (5) On January 29, 2007, Progressive provided Mr. Daniel with a renewal bill for the next policy period of February 23, 2007 through August 23, 2007. The mailing contained a renewal bill,

¹ During the August 23, 2006, through February 23, 2007, policy period, Progressive sent Mr. Daniel a bill on December 7, 2006 advising him that he owed \$729.71 on his current policy and payment was due on December 23, 2007. Progressive did not receive payment by December 23, 2007 and on December 24, 2006, Progressive sent a "Payment Reminder" to Mr. Daniel, advising him that his payment was past due. Mr. Daniel failed to pay the premium amount due, and on January 4, 2007, a Cancel Notice was mailed to him, informing him that due to his failure to pay the premium, the policy would be canceled on February 4, 2007. Progressive also sent the January 4, 2007, Cancel Notice to the Bank. The policy was canceled on February 4, 2007, but was reinstated on February 8, 2007, when Mr. Daniel paid the amount due.

renewal declarations page, proof of insurance cards, and a certificate of insurance. (6) Progressive did not provide a copy of the renewal bill to the Bank. (7) On February 9, 2007, Progressive sent Mr. Daniel a "renewal reminder" stating that payment was required by February 25, 2007, in order to renew the policy for the next term and ensure continuous coverage. The renewal reminder further stated that nonpayment would result in coverage terminating on February 23, 2007. It appears from the evidence that the new policy period was to commence on February 23, 2007, however, Progressive did not require payment until two days after the new policy period began. (8) Mr. Daniel did not pay the renewal premium by February 25, 2007. (9) On February 27, 2007, Mr. Daniel was involved in an accident, rendering his automobile a total loss. (10) On February 28, 2007, the day after the accident, Mr. Daniel paid the policy premium. (11) The Bank requested coverage for the loss but was denied coverage by Progressive because it claimed the policy terminated on February 23, 2007, due to nonpayment of premium, and was not reinstated until February 28, 2007, when Mr. Daniel made the delinquent premium payment in person immediately after his accident. On June 13, 2007, T.C.'s Used Cars, LLC, which guaranteed the loan to Mr. Daniel, paid \$14,390.43 to the Bank and the Bank assigned the Note to T.C.'s.

ARGUMENTS OF THE PARTIES

-Putnam Bancshares filed the instant action on December 6, 2007, asserting primarily that:

- (1) Putnam Bancshares financed a vehicle purchase by Mr. Daniel,
- (2) pursuant to the finance agreement, Mr. Daniel promised to provide insurance coverage on the vehicle,
- (3) T.C.'s Used Cars, LLC, guaranteed the obligations of Mr. Daniel under the note,

- (4) West Virginia Code § 33-6A-1(a) requires the insurer to give any notice of cancellation or non-renewal to the loss payee,
- (5) West Virginia Code 33-6A-4 requires the insurer to give at least forty-five days advance notice of the insurer's election not to renew an insurance policy, and
- (6) Progressive failed to give notice to Putnam Bancshares as required by West Virginia law and thus caused Putnam Bancshares and T.C. Used Cars, LLC, to incur the loss of the vehicle.

Both the Plaintiffs and Defendant have filed Motions for Summary Judgment. The Plaintiffs asserts that West Virginia Code § 33-6A-1a requires Progressive to give the loss payee ten days notice before the policy can be canceled. The Defendant maintains (1) that it did not cancel the policy and that the policy lapsed for nonpayment of premium, and (2) that the Bank does not have standing to pursue this action. On August 21, 2008, this Court held a hearing on the motions. Discovery was completed on August 15, 2008, and trial is scheduled in this matter on January 12, 2009.

STANDARD OF REVIEW

Pursuant to Rule 56(c) of the West Virginia Rules of Civil Procedure, a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." The West Virginia Supreme Court of Appeals has opined that "a 'genuine issue' for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party." Syl. Pt. 5,

Jividen v. Law, 194 W.Va. 705, 461 S.E.2d 451 (1995). A “material fact” is one that “has the capacity to sway the outcome of the litigation under the applicable law . . . factual disputes that are irrelevant or unnecessary will not be counted.

Williams v. Precision Coil, Inc., 194 W.Va. 52, 60, 459 S.E.2d 329, 337 n. 13 (1995).

It is well-settled that “[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. pt. 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963). Furthermore, “[a] motion by each of two parties for summary judgment does not constitute a determination that there is no issue of fact to be tried; and both motions should be denied if there is actually a genuine issue as to a material fact. When both parties move for summary judgment each party concedes only that there is no issue of fact with respect to his particular motion.” Syl. pt. 9, *Aetna Casualty & Surety Co.*, 148 W.Va. at 161, 133 S.E.2d at 772. “A party who moves for summary judgment had the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment.” Syl. pt. 6, *Aetna Casualty & Surety Co.*, 148 W.Va. 160.

CONCLUSIONS OF LAW

- This matter comes before the Court pursuant to dueling motions for summary judgment. In the interests of efficiency, this Court first considers the Plaintiffs’ Motion for Summary Judgment. After consideration of the Plaintiffs’ motion, this Court finds that T.C.’s Used Cars, LLC, is entitled to Summary Judgment in light of the West Virginia Supreme Court of Appeals’s interpretation

of the requirements of W. Va. Code 33-6A-1.

Thereafter the Court will consider the Defendant's Motion for Summary Judgment. This Court finds that the Defendant is not entitled to Summary Judgment on the issue of the applicability of W. Va. Code 33-6A-1(e)(7) because the statute, as interpreted by the West Virginia Supreme Court of Appeals in *Dairyland Ins. Co. v. Conley*, 218 W.Va. 252, 624 S.E.2d 599 (2005), requires insurers to give ten days notice before cancelling an automobile liability insurance policy for failure to give consideration. Furthermore, W. Va. Code 33-6A-1(a) requires the insurance company to notify the loss payee of the insured's failure to pay the renewal premium. This Court also finds that Defendant is entitled to Summary Judgment on the issue of standing as to Putnam Bancshares because Putnam Bancshares was reimbursed for the loan it made to Mr. Daniel and has not shown that it has an "injury-in-fact."

This Court finds that *Dairyland Ins. Co. v. Conley*, controls in the instant case and that West Virginia Code § 33-6A-1 applies to automobile liability insurance renewal situations where the insurance company provides a declarations page, certificate of insurance, and proof of insurance cards covering a policy period for which the insured has not paid the renewal premium due. The act of sending a declarations page, certificate of insurance, and proof of insurance cards creates an obligation to provide ten (10) days written notice of cancellation under the statute.

I. Plaintiffs' Motion for Summary Judgment and Memorandum of Law in Support of their Motion for Summary Judgment

The Plaintiffs' argument for summary judgment rests upon the proposition that West Virginia Code § 33-6A-1(e)(7), as interpreted in *Dairyland Ins. Co. v.*

Conley, requires the insurance company to give ten (10) days notice before cancellation of an insurance policy for failure of consideration. The Plaintiffs also assert that West Virginia Code § 33-6A-1a requires the insurance company to notify the loss payee of its intent to cancel an automobile liability insurance policy.

West Virginia Code § 33-6A-1(e)(7) requires insurers to give, “ten days’ notice of cancellation to the insured” before a policy can be terminated for “failure of consideration to be paid” upon initial issuance of the insurance policy. The West Virginia Supreme Court of Appeals recently examined W. Va. § 33-6A-1(e)(7) in *Dairyland Ins. Co.*, and interpreted the phrase “failure of consideration to be paid” as a failure to pay premiums. *Dairyland Ins. Co.*, 218 W. Va. at 265, 624 S.E.2d at 612.

In *Dairyland*, the insured completed an application for a new policy and tendered a check in payment of the premium. *Dairyland Ins. Co.*, 218 W. Va. at 254, 624 S.E.2d at 601. The insured was then provided with a declarations page, certificate of insurance, and proof of insurance cards showing the dates of coverage. Thereafter, the insured was involved in an automobile accident. *Id.* When the insured applied to the insurance company for coverage, the insurance company informed her that she had no policy coverage because her check had been returned due to insufficient funds resulting in revocation of her insurance coverage retroactively to the date of application. *Id.* at 255, 624 S.E.2d at 602. The insurance company asserted that no insurance contract was formed due to the non-payment of premium. *Id.* The West Virginia Supreme Court of Appeals held that W. Va. Code § 33-6A-1(e)(7) requires an insurance company to give an insured ten days notice prior to the cancellation of an insurance policy for failure of

consideration to be paid upon the initial issuance of a policy. Specifically, the Court relied on the fact that the insurance company provided the insured with a declarations page, certificate of insurance, and proof of insurance cards showing coverage for the policy period. *Id.* at 266, 624 S.E.2d at 613.

Under *Dairyland*, where an insurance company sends the insured a declarations page or some other documents expressing insurance coverage for a specified policy period West Virginia Code § 33-6A-1(e)(7) requires the insurance company which issued the insurance policy to provide the insured with ten (10) days notice prior to cancellation for non-payment of premium. The coverage is sealed when the insurance company provides a declarations page, certificate of insurance, and proof of insurance cards covering a policy period for which the insurance company has not yet received payment.

In *Dairyland*, the Court dealt with the initial issuance of an insurance policy and in this case, the renewal of an insurance policy is at issue. Despite the fact that this case involves the renewal of a policy, as opposed to the initial issuance of a policy, the public policy issues that exist at the initial issuance of an insurance policy also exist in a policy renewal situation. As the West Virginia Supreme Court of Appeals stated in *Dairyland*:

[c]ertainly, '[t]he purpose of statutory and policy provisions requiring notice to the insured prior to cancellation is to enable the insured to obtain insurance elsewhere before he or she is subjected to risk without protection.' 2 Couch on Insurance, § 32:1 at 32-6 (3d. Ed. 2005). But our holding today also recognizes that motorists carry insurance not only for their own protection, but also for the benefit of third parties who may suffer through the negligence of the motorist.

Dairyland, 218 W.Va. at 265, 624 S.E.2d at 612.

The Court also addressed the practical application of the policy issues examined in *Dairyland*, noting that if an insurance company:

...still chose to issue documentation evidencing that liability coverage existed on the date the application was completed... [the Department of Motor Vehicles and the general public] were entitled to presume that the insurance customer was insured up to the limits of the policy. Even though the insured had never paid a dime in premiums, the policy could not be properly cancelled until thirty days [now ten days] after the insurance company gave notice that the policy was being cancelled.

Dairyland, 218 W.Va. at 263, 624 S.E.2d at 610.

The Defendant argues that it is required by law to provide proof of insurance to its insureds and, as a practical matter, if the insured did not pay the policy premium until the final due date the insurance company would not have time to prepare and deliver the required proof of insurance documents to the insured. However, the Defendant failed to cite any West Virginia law to support the proposition that insurers are required to provide insureds with proof of insurance *before renewal payment is made*.² Rather, it appears that providing proof of insurance before the renewal payment is due is a choice made by the insurance company. In order to avoid this situation, the insurance company could require that the renewal payment be due ten

² In light of the West Virginia Supreme Court of Appeals holding in *Dairyland*, the Defendant's argument that W. Va. Code § 17D-2A-4 should be interpreted as requiring the insurer to provide proof of insurance documents before renewal payment is made is unpersuasive. West Virginia Code § 17D-2A-4 states that insurers "transacting business in this state shall supply a certificate to the insured ... certifying that there is in effect a motor vehicle liability policy upon such motor vehicle." The statute makes no mention of a requirement that insurers provide such documentation prior to receiving payment on the policy.

days before the end of the policy period and provide documents covering the next policy period when payment is made. Alternatively, it could provide the documents in advance and issue a cancellation notice when the premium is not received ten days before the effective date of the renewal period. Requiring payment for a renewal ten days before the end of the previous policy period would give the insurance company sufficient time to comply with W. Va Code § 33-6A-1(e)(7) and send the proper notice of cancellation. This practice would put the onus on the insured to make premium payments on time or risk losing insurance coverage.

For example, in this case, on January 29, 2007, Progressive provided Mr. Daniel with documents showing insurance coverage for the policy period of February 23, 2007, through August 23, 2007. It then sent a reminder of payment stating that the payment was due on February 25, 2007, two days after the renewal policy period commenced. Progressive could have avoided this problem by requiring the payment to be due at least ten days before the renewal policy went into effect, to wit: February 13, 2007. If payment was not received by February 13, 2007, then Progressive could have timely sent the ten day notice of cancellation. Instead, Progressive chose to issue the renewal policy, but not require the premium payment until after the policy became effective.

The Defendant also argues that the holding in *Farmer's and Merchant's Bank v. Balboa Ins.*, 171 W.Va. 390, 299 S.E.2d 1 (1982), does not require the insurance company to give the Plaintiffs notice of the insurance policy's lapse for nonpayment of premium. In *Balboa*, the West Virginia Supreme

Court of Appeals recognized the distinction between the expiration of a policy and cancellation of a policy. The Court observed that no statute nor policy provision required the insurer to notify the lien holder when the policy expired as a result of the insured's failure to pay the renewal premium. *Id.* at 392, 299 S.E.2d at 3. The Defendant is correct in noting that insurance companies are not required to give notice to lien-holders when a policy expires, however, the Defendant's reliance on *Balboa* is misplaced. The issue in the instant case is not whether the previous policy period had expired, it undisputedly expired on February 23, 2007, but whether Mr. Daniel had policy coverage for the February 23, 2007 through August 23, 2007 policy period.

Therefore, because *Dairyland* governs the present case, West Virginia Code § 33-6A-1(e)(7) requires the insurance company to give ten (10) days notice prior to cancelling an insurance policy for non-payment of premium. The Defendant, pursuant to West Virginia Code § 33-6A-1a, is also required to notify the loss payee of its intent to cancel. Thus, this Court GRANTS Plaintiffs' Motion for Summary Judgment.

II. Defendant's Motion for Summary Judgment and Memorandum of Law in Support of Defendant's Motion for Summary Judgment

The Defendant's Motion for Summary Judgment contained three main arguments. First, the Defendant maintained that *Dairyland* did not apply to the present case and no notice was required because the policy expired on February 23, 2007. The Defendant also argued that a new policy period did not begin because of non-payment of premium. As indicated

above, the Court found that *Dairyland* was controlling and that the insurance company was required by statute to provide the insured with ten (10) days notice prior to cancellation for non-payment of premium. The Court will now address the Defendant's remaining claims.

First, the Defendant claims that the Bank does not have standing to pursue this action because it was fully compensated for the amount of the loan made to Mr. Daniel.³ The Bank did not choose to address the standing issue in their Response to Defendant's Motion for Summary Judgment. During the hearing, the standing issue was briefly mentioned, but no evidence was offered to show that the Bank has standing to pursue this action.⁴ Moreover, in their Motion for Summary Judgment, Plaintiff requests judgment for T.C.'s Used Cars, LLC, reinforcing the claim that the Bank has no interest in this action.

The West Virginia Supreme Court of Appeals has opined that:

Standing is comprised of three elements: First, the party attempting to establish standing must have suffered an 'injury-in-fact' -an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second,

³ T.C.'s Used Cars, LLC, guaranteed Mr. Daniel's obligation under the loan made by Putnam Bancshares, and on June 13, 2007, paid Putnam Bancshares the amount owed on the loan after Progressive denied coverage. Putnam Bancshares assigned their rights under the Note owed by Mr. Daniel to T.C.'s Used Cars, LLC. See Affidavit of Daniel Roberts, ¶ 8. As an assignee of the Note, T.C.'s Used Cars, LLC, stands in the shoes of Putnam Bancshares as a loss payee under the insurance policy. See *Cook v. Eastern Gas & Fuel Associates*, 129 W. Va. 146, 156-57, 39 S.E.2d 321, 326-27 (1946).

⁴ Defendant's attorney mentioned an assignment, but Plaintiffs' counsel did not elaborate on the statement or present any evidence to contradict Defendant's claim that Putnam Bancshares lacked standing.

there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court.

Syl. pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002). In this case, the Bank has not established that it has standing to pursue this action against Progressive. It cannot meet the first element of the *Findley* test, as it has not sustained an "injury-in-fact." Both parties have acknowledged that T.C.'s Used Cars, LLC, was a guarantor of the loan the Bank made to Mr. Daniel, and both parties agree that T.C.'s reimbursed the Bank for the loan in the amount of \$14,390.43. Therefore, this Court finds that the Bank does not have an "injury-in-fact," and, thus, does not have standing to pursue this action against Progressive.

Secondly, the Defendant correctly maintains that W. Va. Code § 33-6A-4(1) requires advance notice of insurer's intent not to renew. The Defendant also correctly asserts that the statute is inapplicable in the instant case because the insurer was willing to renew the policy. Therefore, because the insurance company was willing to renew the policy for the next policy period, W. Va. Code § 33-6A-4(a) is inapplicable.

Therefore, for the reasons discussed above, This Court **DENIES** Defendant's Motion for Summary Judgment on the issue of the applicability of W. Va. Code § 33-6A-1 and **GRANTS** Defendant's Motion for Summary Judgment on the issue of standing as to Putnam Bancshares, Inc. Therefore, Putnam Bancshares, Inc., is hereby **DISMISSED** from this action because it does not have standing to pursue this action.

CONCLUSION

This Court **FINDS** that West Virginia Code § 33-6A-1(e)(7), as interpreted by *Dairyland Ins. Co. v. Conley*, requires the Defendant to provide the insured with ten (10) days notice prior to cancellation of the insurance policy for non-payment of premium. This Court also **FINDS** that W. Va. Code § 33-6A-1a applies and requires the Defendant to notify the loss payee of its intent to cancel. This Court **GRANTS** Plaintiffs' Motion for Summary Judgment and **GRANTS** in part and **DENIES** in part Defendant's Motion for Summary Judgment. This Court **FINDS** that Plaintiff, Putnam Bancshares, does not have standing to pursue this action and is hereby **DISMISSED** from this action. This Court **DENIES** Defendant's Motion for Summary Judgment on the issue of the applicability of W. Va. Code § 33-6A-1. Therefore, for the reasons stated above, it is hereby **ORDERED** that Judgment be entered in favor of T.C.'s Used Cars, LLC, and against Defendant, Progressive Classic Insurance Company, in the sum of \$14,390.43, together with pre-judgment interest from June 13, 2007, the date T.C.'s Used Cars, LLC paid Putnam Bancshares, Inc. under the Commercial Guarantee, plus statutory costs and post-judgment interest at the statutory rate. It is hereby **ORDERED** that **FINAL JUDGMENT** be entered in favor of T.C.'s Used Cars, LLC and against the Defendant. The Clerk may remove this action from the Court's docket.

The Court notes the objections and exceptions of the Defendant to the Court's ruling granting summary judgment in favor of T.C.'s Used Cars, LLC.

It is ORDERED that the Circuit Clerk shall send copies of this Order granting to the following parties:

Christopher S. Smith
Hoyer, Hoyer, & Smith, PLLC
22 Capital Street
Charleston, West Virginia 25301

R. Carter Elkins
Campbell Woods, PLLC
P.O. Box 1835
Huntington West Virginia 25719

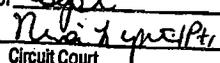
ENTERED this 19th day of September, 2008.



O.C. Spaulding, Judge

STATE OF WEST VIRGINIA
COUNTY OF PUTNAM, SS:

I, Nina L. Wright, Clerk of the Circuit Court of said County and in said State, do hereby certify that the foregoing is a true copy from the records of said Court. Given under my hand and the seal of said Court

this 24 day of Sept, 2008


Circuit Court
Putnam County, W. Va.