IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3675
Summary Calendar

HOMESTEAD INSURANCE COMPANY,

Plaintiff-Appellee,

versus

ALVIN ZAR,

Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Louisiana
(CA-93-1367-D)

(February 25, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:[*]

The district court granted summary judgment to the defendant insurance company on the plaintiff's claim for the cost of repairs to his boat because the plaintiff failed to notify the insurance company within the time provided for in the policy. Because we find that the notice provision in the insurance policy was not an express "condition precedent," we reverse the district court and remand for further proceedings that will include the determination

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

of whether the plaintiff's breach of the notice provision prejudiced the defendant.

I

In 1992, Alvin Zar, the plaintiff, purchased a policy of "hull and protection and indemnity" insurance issued by the Homestead Insurance Company ("Homestead"), the defendant. The policy provided coverage for damage to Zar's shrimp boat, the F/V RODNEY CANDY, and was in force from June 12, 1992 until June 12, 1993. The policy included the following clause:

> NOTICE OF LOSS, LATE REPORTING PENALTY
>
> In the event of loss or casualty resulting in a claim it is warranted that prompt notice of such an event shall be given to these underwriters. Such notice shall not exceed seventy-two hours from first knowledge of the event by owners and/or operators of the vessel. Therefore, if notice of loss exceeds seventy-two hours, the Assured will have breached this warranty and all deductibles will automatically be increased by three times the scheduled amount(s).

Under the policy, the deductible for repairs to the boat necessitated by damage to machinery was $7,500.

Zar alleged that his boat sustained damage to its shaft and clutch on November 13, 1992. At this point, Zar estimated the cost of repairs at approximately $2,500. A mechanic made these repairs. The bill, however, grew to $8,479 for which Zar received an invoice on November 19. After these initial repairs, the boat would still not function properly, and Zar ordered further repairs. Ultimately, the total cost for all repairs reached $20,461. On

December 23, Zar notified Homestead's agent for the first time that he had a claim on the insurance policy.

Homestead refused to pay Zar's claim because it asserted that Zar did not comply with the seventy-two hour notice of loss provision and, thus, the $7,500 deductible automatically tripled to $22,500. Consequently, asserted Homestead, the total repair bill of $20,461 was less than the deductible of $22,500 and no payment was due under the policy. Zar disagreed.

II

On April 23, 1993, Homestead filed an action for declaratory judgment on a maritime claim pursuant to 28 U.S.C. § 2201. Homestead then moved for summary judgment. The district court held that Zar's delay in giving notice to Homestead's agent until December 23, 1992, constituted a breach of the notice provision and, thus, automatically tripled the $7,500 deductible. The district court reasoned that Zar should have given notice within seventy-two hours of either the original November 13 loss or Zar's November 19 knowledge that the loss exceeded the claim. Thus, in granting summary judgment to Homestead, the district court concluded that the wording of the notice provision "is clear and express and must be given effect, regardless of whether prejudice is shown."

III

Our review of the district court's granting of summary judgment is de novo. Amoco Prod. Co. v. Lujan, 877 F.2d 1243, 1248

(5th Cir.), cert. denied, 493 U.S. 1002, 110 S.Ct. 561, 107 L.Ed.2d 556 (1989). We must determine whether the evidence viewed in the light most favorable to Homestead shows that there is not a genuine issue of material fact and that Homestead is entitled to judgment as a matter of law. Brock v. Republic Airlines, Inc., 776 F.2d 523, 527 (5th Cir. 1985).

A

On appeal, Zar argues that the wording of the notice provision is ambiguous because it does not provide for the circumstances in the instant case in which the amount of loss was uncertain immediately after the accident occurs. Zar argues that the notice provision could be interpreted to require notice within seventy-two hours of the accident or within seventy-two hours of obtaining knowledge that the accident was large enough to exceed the $7,500 deductible. Given this ambiguity, Zar argues, that Louisiana law requires Homestead to show prejudice from the delay of notice in order to avoid an interpretation of the policy that is favorable to Zar. See Gulf Island IV v. Blue Streak Marine, Inc., 940 F.2d 948, 953 (5th Cir. 1991).

We find the words of the notice provision unambiguous. The provision provides:

> In the event of loss or casualty resulting in a claim it is warranted that prompt notice of such an event shall be given to these underwriters.

(Emphases added.)

An "event of loss resulting in a claim" means, unambiguously, a covered loss in excess of the $7,500 deductible provided in the policy. We agree with the district court that no ambiguity in the policy language exists, and we will not create such ambiguity under the guise of contract interpretation. See Gulf Island, 940 F.2d at 953. Accordingly, when Zar did not notify Homestead within seventy-two hours after his November 19, 1992 receipt of the $8,479 invoice for repairs, he breached the notice provision.

B

We do not agree with the district court, however, that Zar's breach of the unambiguous notice provision, standing alone, entitles Homestead judgment as a matter of law. Under Louisiana law, the general rule is that breach of a notice provision in an insurance policy will not allow an insurance company to avoid liability under the policy unless it can show that it was prejudiced by the delay in receiving notice. Barnes v. Lumbermen's Mutual Casualty Co., 308 So. 2d 326, 330 (La. Ct. App. 1975). In MGIC Indem. Corp. v. Central Bank of Monroe, 838 F.2d 1382, 1386 (5th Cir. 1988), and Auster Oil & Gas v. Stream, 891 F.2d 570, 576 (5th Cir. 1990), we held that Louisiana law provides an exception to the general rule under which an insurance company may avoid liability without showing prejudice, to wit, if the insured breaches a notice provision of the policy that is an express "condition precedent" of that policy. In Gulf Island, 940 F.2d at 956, we emphasized the necessity of the "express condition

precedent language" for the exception to apply, when we held that a notice provision without the words "condition precedent" did not allow the insurance company to avoid coverage without showing prejudice. In the instant case, the notice provision does not contain the express "condition precedent" words found in MGIC, 838 F.2d at 1385, and Auster Oil, 891 F.2d at 576 n.7.[1] Consequently, we hold that the district court erred in granting summary judgment to Homestead without a showing of prejudice, and we remand for further proceedings that will include a determination of whether Homestead was prejudiced by Zar's delay from November 19 to December 23, 1992, in reporting the loss that resulted in a claim.

IV

For the reasons stated above, the district court's judgment is REVERSED and REMANDED for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

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[1]We note that in MGIC, 838 F.2d at 1385, and Auster Oil, 891 F.2d at 576 n.7, the notice provision provided for the insurance company's total avoidance of the policy if the insured failed to provide timely notice. Although the notice provision in the instant case triples the deductible instead of eliminating all coverage, the policy reasons driving Louisiana law in this area require the same result as if all coverage was avoided. Here, all payment is still avoided through the deductible tripling mechanism. The Louisiana policy reasons requiring an insurance company to show prejudice are still compelling. Under Louisiana law, notice provisions serve to protect the insurer from prejudice, not to trap the insured. Barnes, 308 So. 2d at 330.