

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4840
Summary Calendar

PHILLIP DAVIS, JR.,
Plaintiff-Appellant,
v.
COMMERCIAL UNION INSURANCE CO.,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(5:91-CV-1341)

(November 3, 1993)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

The district court entered judgment for the defendant, Commercial Union Insurance Co. ("Commercial"), in a suit over the payment of settlement proceeds to the plaintiff, Phillip Davis, Jr. The court found that Commercial's failure to approve payment of the check within three days after Davis presented the check for collection at his bank did not render Commercial liable under La. Rev. Stat. Ann. § 22:658C(2) (Supp. 1993). We affirm.

*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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

On December 9, 1990, Davis received Commercial's check in settlement of a dispute between Davis and Commercial's insured. On December 10, Davis' attorney presented the check for collection, not deposit, at Davis' bank, which in turn sent it by Federal Express to a branch of Commercial's bank. However, Davis' bank sent the check to a branch other than the one that processes checks for collection. After sending the check to the correct branch, Commercial's bank sent Commercial the collection letter, which arrived after business hours on December 13. On December 14, a Friday, Commercial approved the payment and returned the collection letter via its bank's courier. On December 18, the following Monday, Commercial received a call from its bank notifying it that the bank had not received the approval letter. That day, Commercial sent its bank by fax machine a copy of the approval letter, and its bank wired the funds to Davis' bank. Evidently, Commercial did not require that its bank seek approval for any check of any amount. However, the bank's internal policy required approval of any check submitted for collection rather than deposit. The end result of this procedure and these events was that longer than three business days elapsed between Davis' presentation of the check and its payment.

Davis sued Commercial in district court based on diversity jurisdiction. He alleged Commercial violated a Louisiana statute that provides:

No insurer shall intentionally or unreasonably delay, for more than three calendar days, exclusive of Saturdays, Sundays, and legal holidays, after presentation for collection, the processing of any properly executed and endorsed check or draft issued in settlement of an insurance claim.

La. Rev. Stat. Ann. § 22:658C(2). Davis argued below that this statute imposes liability on the insurance company for any delay longer than three days. He also argued that, under this statute, when the plaintiff proves that an insurance company fails to approve a check within three days of the date it was submitted for collection, the burden shifts to the defendant to prove its actions were not unreasonable or intentional. One final argument that he made below was that an agency relationship existed between Commercial and its bank, rendering Commercial responsible for the bank's delay. Davis' main contention in this regard was that the procedure followed by the bank for collections, with the tacit agreement of Commercial, resulted in unreasonable delay.

The trial judge stated his findings of fact and conclusions of law orally in open court following the close of evidence. He held that the statute required that the plaintiff prove the insurer's actions in delaying payment of the check more than three business days after presentation were intentional or unreasonable. Although Commercial received the collection letter on December 13, it arrived after business hours. The judge thus used December 14 as the date on which Commercial received notification of the collection letter. Davis received full payment on December 18. The court entered judgment for Commercial because it found that Commercial's actions did not

delay payment for more than three days and because the plaintiff failed to prove Commercial's actions were unreasonable or intentional.

II.

We review the trial judge's findings of fact under the clearly erroneous standard. Fed. R. Civ. P. 52; see Byram v. United States, 705 F.2d 1418, 1421 (5th Cir. 1983). However, we are free to review his interpretation of the law, namely the Louisiana statute at issue in this case. Id.

Although no case has directly interpreted section 22:658C(2), the cases interpreting the section generally have held that it is penal in nature and subject to strict judicial construction. See Smith v. State Farm Fire & Casualty Co., 695 F.2d 202, 206 (5th Cir. 1983); Morgan v. Offshore Hammers, Inc., 439 So. 2d 491, 498 (La. Ct. App. 1983). In addition, the Louisiana cases interpreting this provision hold that the plaintiff retains the burden of proof. See Shatoska v. Internat'l Grain Transfer, Inc., 430 So. 2d 1255, 1262 (La. Ct. App. 1983) (interpreting this statute in the context of workmen's compensation benefits and listing cases with similar holdings).

The plain words of the statute provide the plaintiff with a remedy for intentional or unreasonable conduct by the insurance company delaying payment after presentment for more than three business days. La. Rev. Stat. Ann. § 22:658C(2). Thus, the statute provides a remedy if the plaintiff can establish both that the insurance company unreasonably or intentionally delayed

and that more than a three day delay resulted. Merely showing that the insurance company did not approve payment within three days of presenting the check to the bank for collection does not establish, as Davis seems to believe, an intentional or unreasonable delay by the insurance company. See La. Rev. Stat. Ann. § 22:658C(2) (providing a remedy for intentional or unreasonable actions by insurance companies). This is not a strict liability statute; it does not provide a remedy for all delays in the payment of settlement proceeds regardless of their cause. In addition, there is no language in the statute to support Davis' contention that the burden shifts to the defendant to prove its acts were not unreasonable or intentional.

Davis also challenges the district court's requirement of notice to the insurance company before it could be held liable. The district court held that Commercial was not liable for actions taken before it received notice that the check had been presented for collection.¹ To circumvent this notice requirement, Davis claims that an agency relationship existed between Commercial and its bank, which would make Commercial responsible for actions of the bank before Commercial itself received notice. However, even if the bank were considered the agent of the insurance company, which we do not decide, the district court found that the bank used its normal processing procedure. This finding, when coupled with the finding that

¹Davis contests this finding; however, it would be difficult for the insurance company to delay payment intentionally or unreasonably before it was aware that payment had been requested.

Davis failed to show intentional or unreasonable delay, is not clearly erroneous and is sufficient to support the judgment for Commercial.

III.

For the foregoing reasons, we affirm the judgment of the district court.