

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 94-50754
Summary Calendar

GREAT HILLS BANCSHARES, INC.
and CAROL B. SILVERTHORNE,

Plaintiffs-Appellants,

versus

HILLHOUSE ASSOCIATES INSURANCE, INC.
and NEW YORK LIFE INSURANCE CO.,

Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Texas
(92 CV 482)

(August 16, 1995)

Before DAVIS, JONES and BENAVIDES, Circuit Judges.

BENAVIDES, Circuit Judge*:

This appeal of the magistrate judge's granting of Defendants-Appellees' motion for summary judgment arises from a Participation Agreement executed on October 23, 1987 by Carol B. Silverthorne ("Silverthorne"), President of Great Hills Bancshares, Inc. ("Great Hills"), whereby Great Hills became a participating employer in the Texas Employer's Security Trust's group health insurance policy

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

underwritten by New York Life Insurance, Inc. ("New York Life") and administered by Hillhouse Associates Insurance, Inc. ("Hillhouse"). The magistrate judge determined that participation in the Trust and coverage under the insurance policy terminated pursuant to the terms of the Participation and Trust Agreements because the required premium payment was not made within the thirty-one day grace period allowed from the date the payment was due. We agree and affirm.

It is undisputed that on April 24, 1991, Hillhouse mailed to Great Hills a monthly statement for Great Hills' May 1991 group health insurance premium. It is also undisputed that Great Hills failed to make the May 1991 premium payment within the thirty-one day grace period provided in the Participation Agreement.¹

Plaintiffs-Appellants Great Hills and Silverthorne dispute Hillhouse's claim that it mailed a past due notice to Great Hills on June 19, 1991 stating that "to avoid automatic termination, payment in full must be received by June 30, 1991." Plaintiffs-Appellants also dispute the termination statement allegedly sent out by Hillhouse to Great Hills on July 4, 1991.

Plaintiffs-Appellants contend that specific provisions of the Trust Agreement, establishing the Trust of which Great Hills became

¹ The automatic termination provision of the Participation Agreement states in pertinent part:

It is understood and agreed that the undersigned's participation in the Fund shall terminate when the undersigned...(e) fails to remit the required contribution within thirty-one (31) days of the due date shown on the monthly statement.

a participating employer when it executed the Participation Agreement, mandate notice be given to the participants prior to termination. They argue that the language of the Participation Agreement providing for automatic termination in the event that the participating employer fails to pay the required premium payment within thirty-one days of the date on the monthly statement is trumped by the provisions of the Trust Agreement.

In the alternative, Plaintiffs-Appellants argue that the notice requirement language contained in the Trust Agreement is ambiguous. They contend that the argument that notice must be given prior to termination of a participating employer is a reasonable interpretation of the Trust Agreement. Therefore, in accordance with the rules of construction of contracts under Texas law, notice was required prior to the termination of Great Hill as a participating employer and Silverthorne's insurance coverage.

Section 2.01 of the Trust Agreement contains a specific provision directed to the obligation of each participating employer, including Great Hills, to make the required premium payments in order to maintain coverage for its eligible employees:

If a Participant fails to pay required contributions, its failure shall constitute grounds for its disqualification as a Participant and for termination of the coverage of its Eligible Persons under the Policy.

Section 2.03 is a general provision allowing for removal of a Participant at the Trustee's discretion:

The Trustee may, in its discretion, terminate participation in the Trust of any Participant and its Eligible Persons by giving that Participant written notice of such termination at least thirty days in advance.

The specific provision in Section 2.01 relating to termination of coverage for nonpayment of premiums contains no special notification requirement. Under Texas law, this specific provision controls the more general, discretionary termination provision in Section 2.03 that does not apply to the specific facts of this case. See *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133-34 (Tex. 1994).

We find that the specific provision of the Trust Agreement, when administered in conjunction with the automatic termination provision of the Participation Agreement executed by Great Hills, unambiguously provides for the disqualification of Great Hills as a participant in the Trust and the termination Silverthorne's health insurance coverage for nonpayment of its May 1991 premium without requiring prior notice. We further find that the general provision of the Trust Agreement providing for discretionary termination with written notice is not inconsistent with the other provisions of the Trust and Participation Agreements. The summary judgment evidence supports the magistrate judge's conclusion that under Texas law and the plain language of the relevant documents, Defendants-Appellees had no duty to provide Great Hills and/or Silverthorne with special notice before their coverage terminated due to Great Hills' failure to pay the amounts due under the May 1991 premium statement they received on April 30, 1991. Therefore, we find that the magistrate judge did not err in granting Defendants-Appellees' motion for summary judgment.

AFFIRMED.