S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

HUNTINGTON NATIONAL BANK, Plaintiff-Appellant,	UNPUBLISHED May 24, 2012
v FIRST AMERICAN TITLE INSURANCE CO., Defendant-Appellee.	No. 303496 Kent Circuit Court LC No. 10-012227-CK

Before: WHITBECK, P.J., and SAWYER and HOEKSTRA, JJ.

HOEKSTRA, J., *(dissenting)*.

I respectfully dissent.

In this case there is no dispute that, contrary to the notification provision of the title insurance policy between the parties, plaintiff, Huntington National Bank, failed to give defendant, First American Title Insurance Co., timely notice of the underlying lien enforcement action. There is also no dispute that during the period of delay in giving notice to First American, the underlying lien action was being actively litigated without First American's knowledge or participation, and that without written consent from First American, Huntington stipulated that the liens at issue were filed in compliance with the Michigan Construction Lien Act, MCL 570.1101 *et seq*. (MCLA), and had a higher priority than Huntington's mortgage.

Based on these undisputed facts, the trial court granted summary disposition in favor of First American because it determined that First American suffered actual prejudice from Huntington's failure to timely provide notice and because it determined Huntington breached the settlement clause contained in the insurance policy. Huntington appeals the trial court's ruling and maintains that First American did not demonstrate actual prejudice, and that stipulation to certain facts during the litigation did not constitute settlement in violation of the insurance policy.

In response, First American's primary argument is that the trial court properly granted summary disposition in this case because the stipulations constituted a breach of the settlement clause of the title insurance contract. In particular, First American argues that by so stipulating, Huntington "voluntarily assumed liability" for the underlying liens and released it from liability. First American alternatively maintains that it suffered actual prejudice as a result of Huntington's failure to provide timely notice.

Accordingly, the first issue is whether the stipulations agreed to by Huntington settled the underlying litigation in violation of the insurance policy's settlement clause.

The settlement clause in the title insurance policy issued to Huntington states: "The Company shall not be liable for loss or damage to any insured for liability voluntarily assumed by the insured in settling any claim or suit without the prior written consent of the Company."

"[A]n insurance contract should be read as a whole and meaning should be given to all terms." *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 715; 706 NW2d 426 (2005). Words in a contract such as the title insurance policy at issue in this case are to be given their plain and ordinary meaning. *Id.* A dictionary may be used to determine the ordinary meaning of a word or phrase. *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 515-516; 773 NW2d 758 (2009).

In this context, "settle" is defined as "to conclude and resolve;" "suit" is defined as "an act or instance of suing in a court of law," and "claim" is defined as "a request or demand for payment in accordance with an insurance policy, a workers' compensation law, etc." *Random House Webster's College Dictionary* (1991). Accordingly, the underlying lien action could be characterized as a "suit" in which a "claim" was made for payment under the MCLA, and "settling" it would be a breach of the title insurance policy relieving First American of liability in this case. But the title insurance contract would be "settled" only if the stipulations resulted in the lien action being concluded and resolved.

Here, the stipulation clearly did not conclude and resolve the underlying lien action because the stipulation that Huntington agreed to specifically stated that two issues remained: (1) whether the lien was recorded within 90 days of the last provided lienable labor, materials or services; and (2) whether the lien amounts claimed could be deemed invalid. At most, the stipulation appears to have been a strategic decision to concede elements of the lien case that were indisputable and focus on the two remaining aspects of the case that were indeed vigorously contested, but ultimately resolved against Huntington. Consequently, I would find that Huntington did not breach the settlement clause of the title insurance policy.

First American's alternative argument is that Huntington's failure to give timely notice of the underlying lien action relieves it of liability under the notice clause of the title insurance contract.

"[A]n insurer who seeks to cut off responsibility on the ground that its insured did not comply with a contract provision requiring notice immediately or within a reasonable time must establish actual prejudice to its position." *Koski v Allstate Ins Co*, 456 Mich 439, 444; 572 NW2d 636 (1998).

In support of its argument, First American claims that it suffered actual prejudice because the stipulations settled the underlying lien enforcement case. However, as previously discussed, the case was not settled by the stipulations. Further, First American makes absolutely no attempt

to explain how the issues to which Huntington stipulated were themselves prejudicial. Rather, First American merely assumes that the stipulations settled the case, and the settlement caused it actual prejudice.[1] Under these circumstances, where the issues stipulated to did not resolve the ultimate question of liability, I would conclude that First American has not met its burden of showing actual prejudice resulting from Huntington's failure to provide it timely notice.

First American also claims that Huntington's failure to provide it with timely notice resulted in it losing the opportunity to "engage a defense before liability was stipulated." Accordingly, First American maintains that the trial court correctly determined that it was prejudiced by the lost opportunity to engage in the deliberative litigation processes. I do not find this argument persuasive based on the facts of this case.

First American was given notice of the claim at a point in the litigation before the ultimate question of liability was resolved; this fact distinguishes this case from the primary cases relied on by the parties. In *Tenneco, Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 454; 761 NW2d 846 (2008), notice was not provided until after the insurer's liability "had been cemented by its own settlements, stipulations, and consent decrees." This Court concluded there was actual prejudice because the insurer "forever lost the opportunity to contest [the insured's] liability, engage in settlement negotiations, or seek a judicial determination of its liability to [the insured] under the policies." *Id.* at 451. In *Koski*, 456 Mich at 442, notice was not provided until after a default judgment was entered. As a result of the default judgment, the insurer was deprived of the "opportunity to engage in discovery, cross-examine witnesses at trial, or present its own evidence relative to liability and damages." *Id.* at 445. In this case, First American was provided notice before the trial regarding the ultimate issue of liability. First American could have chosen to participate in the litigation after it was provided notice. It could have engaged in settlement negotiations and discovery; it also could have participated in the trial.

On appeal, First American complains only that Huntington stipulated that the liens were filed in compliance with MCLA, and had a higher priority than Huntington's mortgage before it was provided notice of the litigation. These factual stipulations were apparently indisputable, and First American does not make any claim to the contrary on appeal. Rather, First American maintains only that it did not have notice, and was accordingly not able to participate in the proceedings at the time of entry into the stipulations. First American does not explain how its failure to participate amounted to actual prejudice, and none of the cases relied upon by First American stand for the proposition that any failure to participate in any part of the litigation automatically constitutes prejudice. The question regarding whether there is actual prejudice is fact specific and is not governed by any such bright line rule. Actual prejudice occurs "when the insured's delay in providing notice materially impairs the insurer's ability to contest its liability

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[1] Indeed, First American does not claim that the stipulated to facts could reasonably have been disputed, and the record supports the conclusion that the stipulations merely conceded indisputable facts; accordingly, Huntington's stipulation to indisputable facts cannot reasonably constitute actual prejudice.

to the insured or the liability of the insured to a third party." *Tenneco*, 281 Mich App at 448. This Court considers several factors when determining whether prejudice occurred, including:

> [W]hether the delay has materially impaired the insurer's ability: (1) to investigate liability and damage issues so as to protect its interests; (2) to evaluate, negotiate, defend, or settle a claim or suit; (3) to pursue claims against third parties; (4) to contest the liability of the insured to a third party; and (4)[sic] to contest its liability to its insured. *Id.* at 448-449.

First American does not explain how its inability to participate in the litigation compromised its position in this case other than to claim that the stipulations "settled" the case; however, as previously discussed, the stipulations did not constitute a settlement. Moreover, First American did not choose to become involved in the litigation after it was provided notice despite the fact that the ultimate question of liability was still unresolved, instead, First American denied coverage. Accordingly, First American's position was not affected in any way by whether Huntington admitted liability because First American maintained that the policy did not cover the situation. There is no indication that First American would have advanced a different position had it been timely notified of the lawsuit. Accordingly, under the circumstances of this case, I would conclude that First American failed to demonstrate actual prejudice from the lack of notice, and I would consequently reverse the trial court's grant of summary disposition and remand for determination of the insurance policy's coverage.

I would reverse.

/s/ Joel P. Hoekstra