

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CA 0924

LAURA E. SIBLEY

VERSUS

BLUE CROSS BLUE SHIELD OF LOUISIANA

ME

CONSOLIDATED WITH

NO. 2013 CA 0925

LANE MEMORIAL HOSPITAL

VERSUS

LAURA E. SIBLEY

Judgment Rendered: MAR 20 2014

KUHN, J CONCURS & ASSIGNS REASONS
Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. 562805 c/w 580638

The Honorable R. Michael Caldwell, Judge Presiding

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Higginbotham, J. concurs in the result for reasons assigned by
BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ. *J. Kuhn.*

THERIOT, J.

The plaintiff, Laura E. Sibley, appeals the dismissal of her suit for peremption. Finding that La. R.S. 9:5606 is not applicable to the facts of this case, we reverse.

FACTS AND PROCEDURAL HISTORY

Laura Sibley applied for a policy of health insurance with Blue Cross Blue Shield of Louisiana (BCBS) through agent Ray Arthur¹ in June 2006. She obtained a health insurance policy from BCBS in July 2006 and began paying premiums and receiving medical services. On December 15, 2006, BCBS retroactively cancelled Ms. Sibley's policy on the grounds that Ms. Sibley failed to disclose her pre-existing conditions in her application. Although Ms. Sibley contends that she verbally disclosed the pre-existing conditions via phone to Mr. Arthur when she applied for the policy, the conditions are not disclosed on the application for health insurance that Mr. Arthur prepared and submitted to BCBS.

Ms. Sibley filed a petition for breach of contract against BCBS on January 15, 2008, alleging that BCBS breached its contract with her by "wrongfully cancelling her insurance policy retroactively, since she had previously disclosed all information required to [BCBS's] insurance agent in order to obtain this policy." Ms. Sibley amended her petition on March 31, 2009 to add Mr. Arthur as a defendant, alleging that at the time of her application he was acting as an agent for BCBS, and as such, had a duty to provide all relevant information he received from Ms. Sibley to BCBS for her health insurance policy. Mr. Arthur filed an exception raising the objection of peremption alleging that Ms. Sibley's claims were time barred under La. R.S. 9:5606, which provides that suits against an insurance agent

¹ We note that BCBS disputes that Mr. Arthur is their agent.

must be filed within one year from the date of the alleged act, omission, or neglect, or within one year from the date of discovery of the alleged act, omission, or neglect, but in all events must be filed within three years from the date of the alleged act, omission, or neglect. The trial court sustained the exception and dismissed Ms. Sibley's claims against Mr. Arthur with prejudice. This ruling has not been appealed.

BCBS subsequently filed an exception raising the objection of peremption. BCBS alleged that Ms. Sibley's claims against it were also time barred under La. R.S. 9:5606. Although La. R.S. 9:5606 states that it applies to claims against "any insurance agent, broker, solicitor, or other similar licensee," BCBS argued that the one-year and three-year preemptive periods provided by La. R.S. 9:5606 applied to Ms. Sibley's claims against them because those claims are derivative of the claims against Mr. Arthur. The trial court agreed with BCBS that La. R.S. 9:5606 applied to Ms. Sibley's claims against BCBS, and sustained BCBS's exception of peremption and dismissed Ms. Sibley's claims against BCBS with prejudice. Ms. Sibley appealed.

DISCUSSION

Peremption is a period of time fixed by law for the existence of a right. Unless timely exercised, the right is extinguished upon the expiration of the preemptive period. La. C.C. art. 3458.

An exception of peremption is considered a preemptory exception. *Rando v. Anco Insulations, Inc.*, 08-1163, p. 20 (La. 5/22/09), 16 So.3d 1065, 1082. The party who files the exception bears the burden of proof, unless the matter is facially barred. *Id.* In the event that peremption is evident from the face of the pleadings, the burden of proof shifts to the plaintiff. *Id.* If evidence is introduced, the trial court's conclusions are

reviewed under the manifest error/clearly wrong standard. *Id.* Further, “[p]reemptive statutes are strictly construed against preemption and in favor of the claim. Of the possible constructions, the one that maintains the enforcement of the claim or action, rather than the one that bars enforcement should be adopted.” *Id.* at p. 21, 16 So.3d at 1083. *Bijoux v. Broyles*, 2011-830, pp. 3-4 (La.App. 3 Cir. 2/8/12), 88 So.3d 523, 526-27, *reh’g denied* (3/28/12), *writ denied*, 2012-0970 (La. 6/22/12), 91 So.3d 971.

The sole issue on appeal is whether the preemptive periods established by La. R.S. 9:5606 are applicable to Ms. Sibley’s claims against BCBS.

Louisiana Revised Statutes 9:5606 states, in pertinent part:

A. No action for damages against any insurance agent, broker, solicitor, or other similar licensee under this state, whether based upon tort, or breach of contract, or otherwise, arising out of an engagement to provide insurance services shall be brought unless filed in a court of competent jurisdiction and proper venue within one year from the date of the alleged act, omission, or neglect, or within one year from the date that the alleged act, omission, or neglect is discovered or should have been discovered. However, even as to actions filed within one year from the date of such discovery, in all events such actions shall be filed at the latest within three years from the date of the alleged act, omission, or neglect.

By its terms, La. R.S. 9:5606 applies only to actions for damages against an “insurance agent, broker, solicitor, or other similar licensee[.]” Louisiana Revised Statutes 9:5606 does not extend to claims against an insurer merely because those claims rely on imputing the conduct of an agent to the insurer. The language of the statute itself supports this interpretation. It is undisputed that an insurance company is neither an insurance agent, broker, solicitor, nor other similar licensee. The Louisiana Insurance Code makes a clear distinction between insurance agents and insurance companies (insurers). See *Bernhard Mech. Contractors, Inc. v. St. Paul Companies*, 2008 WL 3244145, *5 (5th Cir. La. 2008). Given this

distinction, if it was the Louisiana Legislature's intent for the preemptive periods established by La. R.S. 9:5606 to apply to insurance companies, the legislature could have easily included them in the statute.

Louisiana Revised Statutes 9:5606's preemptive periods can arguably be extended to insurers in cases where the insurer's liability arises solely from the wrongful act of their agent toward an insured. See *Klein v. American Life & Cas. Co.*, 01-2336 (La.App. 1 Cir. 6/27/03), 858 So.2d 527, 531, *writs denied*, 03-2073 and 03-2101 (La. 11/07/03), 857 So.2d 497, 499, and *Halmekangas v. ANPAC Louisiana Ins. Co.*, 11-1293 (La.App. 4 Cir. 6/8/12), 95 So.3d 1192, 1196-97, *writ denied*, 12-1542 (La. 10/12/12), 98 So.3d 873. To find otherwise would suggest that a plaintiff can avoid the preemptive bar of La. R.S. 9:5606 by declining to sue the insurer's agent and simply sue the insurer. However, the case before us is distinguishable from *Klein* and *Halmekangas* in one significant aspect. In this case, the alleged wrongful act committed by the insurance agent, Mr. Arthur, was not a wrongful act committed against the insured, Ms. Sibley. Mr. Arthur's alleged failure to include the health information disclosed to him by Ms. Sibley on the application for insurance was a wrong committed against the insurer, BCBS. In *Klein*, plaintiff/insured's claims were predicated on the investment advice and representations made to plaintiff/insured by the insurance agent. In *Halmekangas*, the plaintiff's claims were predicated on the insurance agent's failure to properly inspect plaintiff/insured's premises, resulting in plaintiff being underinsured at the time his property was damaged.

The wrongful acts of the agents in *Klein* and *Halmekangas* were to the respective plaintiff/insured's detriment. In the case at hand, the alleged wrongful act of the agent was to the insurer's detriment. It was BCBS, and

not Ms. Sibley, who detrimentally relied on the insurance agent's alleged misrepresentations. Louisiana Revised Statutes 9:5606 does not bar claims by an insured against an insurer where the wrongful act committed by the insurance agent was against the insurer and not the insured. Louisiana Revised Statutes 9:5606 may bar claims against an insurer where the wrongful act committed by an insurance agent was against the insured. See *Klein and Halmekangas*. Since Mr. Arthur's alleged wrongful act was to the detriment of the insurer and not the insured, we find that the preemptive periods of La. R.S. 9:5606 do not apply to BCBS.

CONCLUSION

For the foregoing reasons, the judgment of the trial court sustaining BCBS's exception raising the objection of preemption is reversed. The case is remanded for further proceedings consistent with this opinion. Costs of this appeal are assessed to defendant-appellee, Blue Cross and Blue Shield of Louisiana.

REVERSED AND REMANDED.

LAURA E. SIBLEY

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KUHN, J., concurs with the result.

Although I agree with the result reached in this appeal, I disagree with the majority's position that the preemptive periods provided in La. R. S. 9:5606 can arguably be extended to apply to insurers. This statute by its specific terms does not provide that claims against an insurer are derivative through the insurer's agents. It's preemption provisions are explicit and clear, therefore, not subject to expansion of its well stated terms. Suggestion that the statutes terms could arguably be expanded lacks both statutory and/or jurisprudential support. Cases suggesting otherwise propose judicial expansion of the legislative pronouncement contained in La. R.S. 9:5606 and should be rejected (See *Klein v. American Life & Cas. Co.*, 01-2336 (La.App. 1 Cir.6/27/03), 858 So.2d 527, and *Halmekangas v. ANPAC Louisiana Ins. Co.*, 11-1293 (La.App.4 Cir. 6/8/12), 95 So.3d 1192.

By its express terms, the application of La. R.S. 9:5606 is limited to actions against insurance agents, brokers, solicitors, or other similar licensees only. When a statute is clear and unambiguous and its application does not lead to absurd consequences, the statute should be applied as written, and no further interpretation

should be made in search of the intent of the legislature. La. C.C. art 9; La. R. S. 1:4; *Dejoie v. Medley*, 08-2223 (La. 5/5/09), 9 So.2d 826, 829. Unequivocal provisions are not subject to judicial construction and should be applied by giving words their generally understood meaning. See *Snowton v. Sewerage and Water Board*, 08-399 (La. 3/17/09) 6 So.2d 164, 168. Therefore, under the plain terms of La. R.S. 9:5606, insurers are not entitled to assert the preemptive periods set forth in that provision.

For these reasons, I concur in the result reached.