

**In The**  
***Court of Appeals***  
***Ninth District of Texas at Beaumont***

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**NO. 09-11-00349-CV**

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**IN RE PRIME INSURANCE COMPANY**

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**Original Proceeding**

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**MEMORANDUM OPINION**

Jacob Oliver, a flight instructor, purchased an insurance policy from Prime Insurance Company. Oliver alleges that Prime represented that the policy he purchased would cover the \$14,000 property-damage deductible on a separate insurance policy purchased by Oliver's employer. After a flock of birds flew into the flight path of a helicopter and damaged the helicopter's blades, Oliver submitted a claim to Prime. When Prime refused to pay the full amount of the claim, Oliver sued Prime in Montgomery County, Texas, for insurance code violations, deceptive trade practices, negligent misrepresentation and fraudulent inducement. Prime filed a motion to dismiss the lawsuit for improper forum based on a mandatory forum selection clause in the

parties' contract, which the trial court denied. Recent cases from this Court control the disposition of the issue of law presented here. *See Ranchers & Farmers Mut. Ins. Co. v. Stahlecker*, No. 09-10-00286-CV, 2010 WL 4354020, at \*3-4 (Tex. App.—Beaumont Nov. 4, 2010, no pet.) (mem. op.); *In re eBay, Inc.*, No. 09-10-00265-CV, 2010 WL 2695803, at \*2 (Tex. App.—Beaumont July 8, 2010, orig. proceeding) (mem. op.). We conditionally grant mandamus relief.

“A trial court abuses its discretion when it fails to properly interpret or apply a forum-selection clause.” *In re Lisa Laser USA, Inc.*, 310 S.W.3d 880, 883 (Tex. 2010). Because an improper refusal to enforce a contractual selection of a forum vitiates the right to a trial in the proper forum, mandamus relief is available to enforce a forum-selection clause. *Id.* Determining whether the plaintiff's claims fall within the scope of the forum-selection clause requires a common-sense examination of the claims and the clause. *In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 677 (Tex. 2009).

The Policy contains the following forum-selection provision:

## **SECTION XII – CONSENT TO EXCLUSIVE JURISDICTION**

The Insured understands and acknowledges that the Insurer conducts its business activities, including underwriting, risk management and claims services within the State of Utah. The Insured represents and acknowledges that the Insured has purposefully directed its actions to procure the insurance services of the Insurer within the State of Utah and, for that purpose, will make continuous and systematic requests for the Insurer's services in the State of Utah. The Insured acknowledges that, by entering into this policy of insurance, the Insured is deemed to be transacting business within the State of Utah such that the courts of Utah may exercise jurisdiction over it regarding any issues arising out of this

Policy. In addition, the Insured hereby understands and consents to the jurisdiction of the courts in the State of Utah and agrees that those courts shall be the exclusive forum for the resolution of any claims or disputes arising between the parties related to any insurance coverage issues and any payments due the Insured under the Policy, unless both the Insurer and Insured agree otherwise in writing.

Oliver argues that his deceptive trade practices and fraudulent inducement claims are not “related to any insurance coverage issues and any payments due to the Insured under the Policy” as described in the forum-selection clause. According to Oliver, the forum-selection clause applies only to disputes that relate both to coverage issues and to payments due under the policy. Thus, he argues, breach of contract claims and prompt payment violations would be subject to the forum-selection clause, but his claims relate to pre-contractual misrepresentations that fall outside the scope of the forum-selection clause.

A fraudulent inducement claim arises solely in the context of a contract and requires the existence of a contract as part of its proof. *Haase v. Glazner*, 62 S.W.3d 795, 798 (Tex. 2001). The issue of whether a contract was induced by fraud is a dispute involving the parties’ agreement. *In re J.D. Edwards World Solutions Co.*, 87 S.W.3d 546, 550 (Tex. 2002). Prime allegedly represented that it would provide the requested coverage of \$14,000 for non-owned aircraft to cover the \$14,000 deductible on the policy held by Oliver’s employer. Oliver made a claim and Prime paid only part of that claim pursuant to the policy’s “other insurance” clause. According to Oliver, he suffered damages as a result of Prime’s pre-contractual misrepresentations. Specifically, Oliver

did not receive the coverage represented by Prime and as a result did not receive the payment he would have received had he had the represented coverage at the time he made the claim. The parties' dispute relates to Prime's coverage and payment of a policy that Oliver contends Prime induced him to enter into through fraudulent misrepresentations. The factual allegations relate to coverage and payment under the insurance policy. *See Stahlecker*, 2010 WL 4354020, at \*4. Accordingly, Oliver's claims fall within the scope of the forum-selection clause.

"Forum-selection clauses are generally enforceable and presumptively valid." *In re Laibe Corp.*, 307 S.W.3d 314, 316 (Tex. 2010). Oliver argues that the forum-selection clause in his case is not enforceable because Prime failed to provide Oliver with a copy of the policy. Oliver signed a "Policy Receipt Form and Coverage Conditions Summary" that included statements, as follows:

**You understand, acknowledge, and agree as follows:**

1. You received a copy of the Policy and all Endorsements listed on the Declaration Certificate. (We sent the Policy to your broker or agent who is responsible for providing the Policy to you. If you have not received the Policy, please contact your broker or agent immediately and request it.)

. . . .

14. . . . In addition, the Insured hereby understands and consents to the jurisdiction of the courts in the State of Utah and agrees that those courts shall be the exclusive forum for the resolution of any claims or disputes arising between the parties related to any insurance coverage issues and any payments due the Insured under the Policy, unless both the Insurer and Insured agree otherwise in writing.

The insured is charged with knowledge of the policy's terms. *Stahlecker*, 2010 WL 4354020, at \*5. A party who seeks to avoid a forum-selection clause bears the burden to establish that enforcement would be unreasonable and unjust. *In re eBay*, 2010 WL 2695803, at \*2. Although Oliver claims he was not given a copy of the policy, he signed an acknowledgement of his receipt of the policy. That document explained where his copy of the policy could be obtained if he had not received it. The same document also notified Oliver that the policy had a Utah forum-selection clause. Oliver undoubtedly received the disclosure because he signed it. Oliver failed to meet his burden of proving that the enforcement of the forum-selection clause would be unreasonable and unjust. *Id.*

Oliver brought claims that were related to the coverage and payment under an insurance policy. Prime established that the policy contained a forum-selection clause that required the suit to be brought in Utah. Oliver signed an acknowledgement of receipt of the policy that disclosed the policy's forum-selection clause. Under the circumstances, Oliver failed to establish that enforcement of the forum-selection clause would be unreasonable and unjust. We hold that the trial court abused its discretion when it denied Prime's motion to dismiss. Accordingly, we conditionally grant mandamus relief. We are confident that the trial court will promptly vacate its order of May 12, 2011, and that the trial court will proceed to enforce the policy's forum-selection clause in accordance with this opinion. The writ of mandamus shall issue only if the trial court fails to comply within a reasonable time.

PETITION CONDITIONALLY GRANTED.

PER CURIAM

Submitted on July 7, 2011  
Opinion Delivered August 11, 2011

Before McKeithen, C.J., Gaultney and Kreger, JJ.