



**December 17, 2012**

## **FEDERAL DISTRICT COURT GRANTS SUMMARY JUDGMENT IN FAVOR OF INSURER AND ORDERS INSURANCE AGENT TO REPAY UNEARNED COMMISSIONS**

Recently, Federal Judge Keith P. Ellison of the Houston Division of the Southern District of Texas granted summary judgment in favor of American General Life Insurance Company (“American General”) in *American General Life Insurance Company v. Mickelson*, C.A. No. H-11-3421, 2012 WL 6020339 (S.D. Tex. Dec. 3, 2012).

The dispute arose out of an agent contract between American General and insurance agent David Mickelson, in which Mickelson agreed to solicit applications for American General’s insurance plans. The contract required Mickelson to repay any “unearned commissions” he received from American General for obtaining policy applications if American General had to return the premiums or payments to a policy owner, obtained through Mickelson, for any reason.

Mickelson marketed American General life insurance to a customer named Adele Ciccatti, who ultimately applied for and was issued a policy. American General paid Mickelson \$83,329.20 in commissions when the policy was issued to Ciccatti in 2007. Thereafter, in 2011, American General rescinded the Ciccatti policy and returned all premiums to Ciccatti. American General then demanded Mickelson to return the commission of \$83,329.20 because, under the agent contract, once American General returned the premiums to Ciccatti, Mickelson’s commission became unearned. When Mickelson refused to return the commission amount requested, American General filed suit seeking return of the unearned commission.

Mickelson argued that the commission he received for selling life insurance to Ciccatti was not “unearned” and therefore outside the scope of the agent contract. American General moved for partial summary judgment, arguing that there was no genuine issue of material fact that Mickelson breached the contract. After reviewing the agent contract, the Court agreed with American General that the term “unearned commissions” was not ambiguous and that there was only one reasonable interpretation of the term “unearned commissions”, that is, commissions that were paid to an agent in connection with premiums that were subsequently returned to the policyholder for any reason. Because no genuine issue of material fact remained as to the meaning of the agent contract or any of the elements of a breach of contract claim, the court granted American General’s motion for summary judgment as to its cause of action for breach of contract.

## **EASTLAND COURT OF APPEALS UPHOLDS TRIAL COURT JUDGMENT AGAINST EMPLOYER BECAUSE EVIDENCE DID NOT CONCLUSIVELY ESTABLISH EMPLOYER’S EXCLUSIVE REMEDY DEFENSE**

Recently, on December 6, 2012, the Eastland Court of Appeals upheld entry of a trial court's judgment in favor of an injured worker, holding that trial court did not err when it ruled that the exclusive remedy provision in the Texas Worker's Compensation Act did not bar the injured employee's claims. *Synergy Management Group LLC, v. Thompson*, C.A. No. 11-11-00229-CV, 2012 WL 6050554 (Tex. App.—Eastland Dec. 6, 2012)

Kenneth Thompson sued Synergy Management Group, L.L.C. ("Synergy") and Alliance Savings Co., Inc. ("Alliance Savings") for injuries he sustained in an accident at Synergy's facility. At the time of the accident, Thompson was employed by Alliance. In its answer, Synergy alleged an affirmative defense that Thompson's claims against it were barred by the exclusive remedy provision of the Texas Workers' Compensation Act (TWCA). Synergy filed a traditional motion for summary judgment based on its exclusive remedy defense, which the trial court denied. At the time of the trial, Synergy was the only remaining defendant.

At the conclusion of trial, the jury found in Thompson's favor on his negligence and gross negligence claims against Synergy and awarded him actual and exemplary damages. The trial court entered a judgment in accordance with the jury's verdict. Synergy appealed the judgment, arguing that the trial court erred when it ruled that the exclusive remedy provision in the TWCA did not bar Thompson's claims against it.

Synergy's exclusive remedy defense was based on the provisions of the Staff Leasing Services Act (SLSA). Synergy argued that it proved facts to establish its exclusive remedy defense: (1) that Alliance Savings Co., Inc. was a licensed staff leasing services provider; (2) that Thompson was employed by Alliance Savings Co., Inc. and assigned to work at Synergy; and (3) that Alliance Savings Co., Inc. obtained workers' compensation insurance that covered Thompson. Synergy argued that Thompson's claims against it were thus barred by the exclusive remedy provision of the TWCA.

In its appeal brief, Synergy relied on evidence it had presented to the trial court in support of its motion for summary judgment as well as some exhibits that Synergy had attached to its motion for JNOV but which were not admitted at trial. The appellate court refused to consider any evidence that had not been admitted during the trial on the merits.

After analyzing the evidence, the court concluded that the evidence did not conclusively establish Synergy's exclusive remedy defense. First, Synergy did not offer any evidence that Alliance Savings was a licensed staff leasing services company. Synergy could not, therefore, claim the benefit of Alliance Savings' workers' compensation insurance.

Second, Synergy failed to establish that Alliance Savings was a license holder under the SLSA. During trial, Synergy introduced into evidence a copy of a Staff Leasing Services License that was issued to "Alliance Staffing Solutions, Inc." However, Synergy did not present evidence explaining the relationship, if any, between Alliance Savings and Alliance Staffing Solutions, Inc. The SLSA prohibits a person from engaging in staff leasing services without a license. In this case, Alliance Staffing Solutions, Inc. was the license holder. The SLSA prohibits a license holder from conducting business "under any name other than that specified in the license" or "under any fictitious or assumed name without prior written authorization from the department." It also provides that licenses issued under the SLSA are not assignable. Therefore, Alliance Staffing Solutions, Inc. could not conduct business under any other name, such as Alliance Savings. Therefore, Synergy failed to meet its burden of showing that Alliance Savings Co., Inc. was a license holder under the SLSA.

The Court ultimately concluded that the evidence did not conclusively establish Synergy's exclusive remedy defense and the trial court did not err when it denied Synergy's motion for JNOV.

**MDJ&W WISHES ALL A VERY MERRY CHRISTMAS AND A HAPPY NEW YEAR!**

Our offices will be closed next Monday, December 24<sup>th</sup> and Tuesday, December 25<sup>th</sup> for the Christmas Holiday, as well as Monday, December 31, 2012 and Tuesday, January 1, 2013 for the New Year's Holiday. Our Texas Insurance Law Newsbrief research and writing staff will also be taking those days off to spend time with family and friends. The Newsbrief will resume publication January 7, 2012 and will continue weekly as we have for the past 13 years. Until then, we want to offer our special thanks to our clients and friends in the insurance industry with whom we have shared many triumphs this past year. And, we look forward to many more successes in 2013. Until then, we wish all of our readers a very Merry Christmas and a Happy and Prosperous New Year!

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