COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. DAR-____

Appeals Court Case No. 19-P-0096

WENDA AQUINO,
PLAINTIFF-APPELLANT/CROSS-APPELLEE

v.

UNITED PROPERTY & CASUALTY INSURANCE COMPANY,
DEFENDANT-APPELLEE/CROSS-APPELLANT

Appeal from the Memorandum of Decision and Order on Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment entered by the Superior Court for Suffolk County (Wilson, J.) on September 28, 2018

APPLICATION OF PLAINTIFF-APPELLANT/CROSS-APPELLEE, WENDA AQUINO, FOR DIRECT APPELLATE REVIEW

For the Plaintiff-
Appellant/Cross-Appellee,

Seth H. Hochbaum, BBO NO. 568118
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Dated: February 5, 2019

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I. REQUEST FOR DIRECT APPELLATE REVIEW

The appellant/cross-appellee, Wenda Aquino ("Aquino"), applies for direct appellate review pursuant to Mass. R. App. P. 11(a) and G.L. c. 211A, § 10 on the basis that this case presents questions of law that are both novel and of such public interest that justice requires immediate and final determination by this Court.

II. STATEMENT OF PRIOR PROCEEDINGS[1]

Aquino brought this action against the appellee/cross-appellant, United Property & Casualty Insurance Company ("UPC") in Suffolk Superior Court (Civil Action No. 1884CV00366) following UPC's denial of Aquino's claim for a fire loss under a homeowner's insurance policy (the "Policy") issued by UPC to Aquino and her fiancée, Kelly Pastrana ("Pastrana"). Aquino and Pastrana owned the two-family residential dwelling located at 80 Warren Avenue, Chelsea, Massachusetts (the "Property"). The Property was destroyed by fire on May 22, 2017. It is undisputed

[1] The Statement of Prior Proceedings was gathered from the docket sheet generated by the Suffolk Superior Court, a certified copy of which is attached as Exhibit 1, and from the pleadings filed in the case.

that the fire was intentionally set by Pastrana, who died in the fire, and that Aquino was innocent of any involvement. UPC denied coverage for Aquino's fire loss claim on the basis of the Policy exclusion for "any loss arising out of any act an 'insured' commits or conspires to commit with the intent to cause a loss" (the "Intentional Loss Exclusion").

The Complaint alleges that the Intentional Loss Exclusion is void and unenforceable because its exclusion of coverage for a loss caused by "an insured," instead of "the insured," violates the minimum coverage protections required by G.L. c. 175, § 99. The Complaint contains counts for declaratory judgment (Count I), breach of contract (Count II), breach of the implied covenant of good faith and fair dealing (Count III), promissory estoppel (Count IV), equitable estoppel (Count V), waiver (Count VI), reformation of the Policy (Count VII) and unfair and deceptive trade practices (Count VIII).

On March 21, 2018 and May 22, 2018, UPC filed its Answer and Amended Answer, respectively, to the Complaint. Aquino filed a Motion for Summary Judgment on Counts I, II and VII of the Complaint on May 9,

2018. UPC opposed the motion and cross-moved for summary judgment on all counts of the Complaint.

A hearing on the summary judgment motions was held on July 24, 2018 before the Honorable Paul D. Wilson. By Memorandum of Decision and Order dated September 25, 2018 (the "Memorandum of Decision", Exhibit 2), the Court allowed in part and denied in part the parties' motions. The Court held:

A. On Aquino's motion:

1. Count I: The Plaintiff is granted declaratory judgment that the Intentional Loss provision of the Policy is unenforceable as written, and must be reformed in accordance with G.L. c. 175, §99 to provide coverage to the Plaintiff as described above. The Plaintiff is granted declaratory judgment that the driveway constitutes an "Other Structure" covered under Coverage B of the Policy.

2. Count II: UPC has breached the terms of the Policy, as reformed, by failing to provide coverage to the Plaintiff as described above.

3. Count VII: The Policy must be reformed in accordance with G.L. c. 175, §99 to provide coverage to the Plaintiff as described above.

4. The Plaintiff's motion is denied in all other respects.

B. On UPC's motion:

1. Count I is allowed insofar as it seeks dismissal of Aquino's claims to coverage under Coverage B of the Policy of the walkway, retaining wall and stairs/railings.

2. Count VIII is dismissed.

3. The Defendant's motion is denied in all other respects.

Although the Court found that UPC breached the Policy, as reformed, it held that Aquino was entitled to recover only 50% of the loss. Final Judgment entered on October 24, 2018 (Exhibit 3). An Amended Final Judgment in favor of Aquino was entered on October 31, 2018 in the total sum of $483,580.83 (Exhibit 4). Aquino and UPC filed Notices of Appeal on October 31, 2018 and November 13, 2018, respectively. The cross appeals were docketed with the Appeals Court on January 18, 2019.

III. STATEMENT OF FACTS

In 2014, Aquino and Pastrana purchased the two-family residential dwelling located at 80 Warren Avenue in Chelsea, Massachusetts (the "Property"). Aquino and Pastrana held title to the Property as tenants-in-common and were joint mortgagors on the

mortgage for the Property. Both Aquino and Pastrana are named insureds on the Policy.

On May 22, 2017, a fire caused extensive damage to the Property. The fire was caused by an intentional act of Pastrana, who died in the fire. Aquino was innocent of any involvement in the fire.

Aquino filed the following claims with UPC for the damages sustained as a result of the fire: (a) destruction of the building, (b) destruction of the driveway, walkway, patio, retaining wall and stairs/railings, (c) loss of personal property, (d) loss of rental income and additional living expenses, (e) costs associated with enforcement of "ordinance or law" against Aquino as owner of a Property containing a fire-damaged and unsafe structure, (f) destruction to landscaping, trees and shrubs, and (g) debris removal.

On August 18, 2017, UPC denied liability for Aquino's claims, citing the Intentional Loss Exclusion in the Policy, which provides as follows:

> **SECTION I — EXCLUSIONS**
>
> **A.** We do not insure for loss caused directly or indirectly by any of the following . . .

> **8. Intentional Loss**
>
> Intentional Loss means any loss arising out of any act an 'insured' commits or conspires to commit with the intent to cause a loss.
>
> In the event of such loss, no 'insured' is entitled to coverage, even 'insureds' who did not commit or conspire to commit the act causing the loss.

Subject to their respective coverage positions, Aquino and UPC agreed on the amount of Aquino's damages under each applicable provision of the Policy.

IV. STATEMENT OF ISSUES OF LAW

1. Whether the trial court erred in cutting in half the recovery to Aquino, an innocent coinsured with an insurable interest in the Property.

2. Whether the trial court erred in ruling that UPC did not violate G.L. c. 176D § 3(9) and G.L. c. 93A, § 9 by issuing a policy of insurance which precluded coverage expressly required by G.L. c. 175, § 99 and by then denying coverage on that basis.

3. Whether the damages to the subject walkway, patio, retaining wall, stairs/railings and platforms fall under Coverage A ("Dwelling") or under Coverage B ("Other Structures").

These issues were raised and properly preserved in the Superior Court.

V. ARGUMENT

A. Aquino is an Innocent Coinsured With an Insurable Interest in the Property Who is Entitled to Full Recovery.

G.L. c. 175, § 99 provides that "[n]o company shall issue policies . . ., other than those of the standard forms herein set forth . . ." This statute sets forth the "substantive language required in a standard policy insuring against loss or damage by fire", Ben Elfman & Sons, Inc. v. Home Indem. Co., 411 Mass. 13, 15 (1991) and "mandates the form of fire insurance policies." Ideal Fin. Servs., Inc. v. Zichelle, 52 Mass. App. Ct. 50, 66 (2001). G.L. c. 175, § 99 bars coverage where "the insured" intentionally engages in various forms of misconduct; it does not bar coverage for losses arising out of any act "an insured" commits.

The Policy conflicts with the statute by denying coverage to an innocent coinsured. The trial court correctly ordered reformation of the Policy to provide the statutorily-required coverage to Aquino. See, Church of Christ in Lexington v. St. Paul Surplus Lines Ins. Co., 22 Mass. App. Ct. 407, 408 (1986);

Drude vs. Narragansett Bay Ins. Co., Suffolk Superior Ct., No. 1684CV02866 (Dec. 19, 2018)[2]; Hall v. Preferred Mut. Ins. Co., 32 Mass. L. Rptr. 682 (Mass. Super. Ct. 2015); Liberty Mut. Ins. Co. v. Gonzalez, 34 Mass. L. Rptr. 290 (Mass. Super. Ct. 2017); Shepperson v. Metropolitan Prop. and Cas. Ins. Co., 312 F. Supp. 3d 183 (D. Mass. 2018).

The trial court erred, however, by reducing Aquino's right of recovery under the reformed policy. Because Aquino had an insurable interest in the Property, UPC is required to pay her for the damages covered by the Policy.

A contract of fire insurance is a contract of indemnity, Hewins v. London Assurance Corp., 184 Mass. 177, 179 (1903), which requires UPC to "save [Aquino] harmless or put [her] in as good a condition . . . as [she] would have been in if no fire had occurred." Kingsley v. Spofford, 298 Mass. 469, 490 (1937). The principle of indemnity requires fully restoring Aquino to the position she would have been in without the fire. Wall v. Platt, 169 Mass. 398, 405 (1897).

[2] A copy of Drude is attached as Exhibit 5.

The language of the Policy nowhere provides that the interests of two named insureds are severable for purposes of determining the amount each is entitled to recover in the event of a loss. UPC could easily have included the same severability clause in the property coverage of the Policy that is found in its liability coverage. Because UPC did not do so and there is no other provision in the Policy stating that Aquino's and Pastrana's interests are severable based on their ownership interest, Aquino is entitled to indemnity for her full loss.

The Policy's "Insurable Interest and Limit of Liability" condition does not act as a severability provision. It states that UPC "will not be liable in any one loss . . . [t]o an 'insured' for more than the amount of such 'insured's' interest at the time of loss" if "more than one person has an insurable interest in the [Property]." The purposes of this condition are to prevent gambling on losses through the acquisition of insurance policies, to eliminate the potential of rewarding and incentivizing the destruction of property and to confine insurance contracts to indemnity for losses actually sustained.

Delk v. Markel American Ins. Co., 81 P.3d 629, 637 (Okla. 2003).[3]

Here, none of those purposes are implicated. Aquino did not obtain the Policy in bad faith or for speculative purposes, she was wholly uninvolved in causing the loss and she seeks coverage only for the losses sustained. "The insurable interest requirement should not be extended beyond the reasons for its existence by an overly technical construction that frustrates the legitimate expectations of the insured or that permits an insurer to avoid the very risk it intended to insure." Ibid.

Aquino's fractional ownership interest in the Property as a tenant in common does not equate to a fractional recovery under the Policy. Aquino had an insurable interest in the Property. Quigley v. Bay State Graphics, Inc., 427 Mass. 455, 463 (1998) ("[p]ersons have an insurable interest if they receive a benefit from the property or will suffer a loss by reason of its destruction"), quoting, Queen v. Vermont Mut. Ins. Co., 32 Mass. App. Ct. 343, 345 (1992). In

[3] Another purpose of this condition is to limit the insurer's duty to pay twice for the same loss. Nationwide Ins. Co. vs. Clark, U.S. Dist. Ct., No. 3:05CV615 (S.D. Miss. 2006) (Exhibit 6).

Queen, the insurer denied coverage on the basis that the named insureds, who had conveyed title to the property to a trust for the benefit of their children, no longer had an insurable interest in the property. The Queen Court held that the plaintiffs had a contingent interest in the property under the trust and that their recovery was not limited to the percentage of their insurable interest. The Queen Court concluded as follows:

> **We do not think that the [policyholders] were required to quantify their insurable interest. If they had an insurable interest,** as we have held they did, **[the insurer] was bound under its contract to pay the proceeds of the policy,** which were less than the loss.

Queen, 32 Mass. App. Ct. at 347 (emphasis added), citing, Jenks v. Liverpool & London & Globe Ins. Co., 206 Mass. 591, 596-598 (1910).

Aquino's right of recovery for the damages insured by the Policy is based on her insurable interest, not on her percentage ownership interest in the insured property. See, American Economy Ins. Co. v. Liggett, 426 N.E.2d. 136, 142-145 (Ind. Ct. App. 1981); Safeco Ins. Co. v. Kartsone, 510 F. Supp. 856, 858-859 (C.D. Cal. 1981); Felder v. North River Ins.

Co., 435 N.W.2d 263 (Wis. Ct. App. 1988). UPC should not be allowed to issue the Policy, collect the premiums and then argue that the value of Aquino's interest is less than the coverage provided. See, e.g., Schubert v. Auto Owners Ins. Co., 649 F.3d 817, 829 (8th Cir. 2011).[4]

Aquino, as a named insured and owner of an undivided one-half interest in the entire property with the right to possess and use the entire property, reasonably expected the full protection of the Policy. Bond Bros., Inc. v. Robinson, 393 Mass. 546, 551 (1984). After Pastrana's unforeseeable and fortuitous conduct, UPC should not be allowed to partially abrogate the coverage it contractually agreed to provide and penalize Aquino for conduct of her coinsured for which she is completely innocent.[5]

Even if Aquino's recovery under Coverage A (Dwelling) was properly reduced in half, the rationale

[4] Schubert and similar cases were decided based upon the valued policy statute of the subject state. As the agreed-upon damages in this case exceed the limits of the Policy, the same result applies here.

[5] There is no possibility that Pastrana will be rewarded for the arson as he died in the fire. See, e.g., Liggett, 426 N.E.2d. at 142-145; Kartsone, 510 F. Supp. at 858-859; Felder, 435 N.W.2d at 263.

for that reduction does not extend to the additional living expenses she alone was caused to incur because of the loss of her home. Indemnifying Aquino for these costs does not in any manner inure to the benefit of the culpable coinsured. See, e.g., Fittje v. Calhoun County Mut. County Fire Ins. Co., 552 N.E.2d 353, 357 (Ill. App. Ct. 1990). The ordinance or law and debris removal coverages are similarly distinct from the building coverage. They indemnify the insured for expenses actually incurred to comply with current building codes and ordinances and for the removal and disposal of fire debris. The scope of these coverages should not have been reduced by the trial court.

B. An Insurer Violates G.L. c. 176D § 3(9) and G.L. c. 93A by Issuing a Policy Which Violates G.L. c. 175, § 99 and by Denying Coverage Based on the Illegal Exclusion

The trial court concluded that the Intentional Loss Exclusion was unenforceable and required reformation in order to provide coverage to Aquino in accordance with G.L. c. 175, § 99 and that UPC breached the terms of the Policy, as reformed. Nonetheless, the Court dismissed Aquino's count for unfair and deceptive trade acts and practices on the

basis that UPC plausibly interpreted and applied the Intentional Loss Exclusion as it was written.

The trial court's reasoning begs the question of UPC's culpability for restricting its coverage in direct violation of state law and using that restriction to deny coverage. Surely, it cannot be the law or policy of the Commonwealth to absolve an insurer for shirking its statutory coverage obligations simply because the insurer wrote the illegal provision in an unambiguous manner and thereafter plausibly interpreted and applied the offending provision. This would result in no consequences whatsoever to the insurer for violating state law and impose the sole burden upon the insured to bring suit, and incur the accompanying attorneys' fees and costs, in order to reform the policy to ensure its compliance with the law. UPC's issuance and enforcement of a policy which violates G.L. c. 175, § 99 constitutes a per se violation of Chapter 93A. See, e.g., Hopkins v. Liberty Mut. Ins. Co., 434 Mass. 556, 564 (2001) (G.L. c. 175, § 2B, which is incorporated into G.L. c. 93A, § 2(a), precludes use of a policy form that provides coverage less favorable than that required by statute).

Massachusetts courts should give G.L. c. 175, § 99 the "same treatment that is given to identical language in policies issued in other States." Pappas Enters. v. Commerce & Indus. Ins. Co., 422 Mass. 80, 83 (1996). Based on "the overwhelming weight of appellate authority in other states", an innocent coinsured is entitled to coverage under G.L. c. 175, § 99. Gonzalez, 34 Mass. L. Rptr. 290 at *6 (Mass. Super. Ct. 2017). Rather than heed the clear admonition in G.L. c. 175, § 99 against issuing "policies . . ., other than those of the standard forms herein set forth . . .", UPC instead unlawfully issued and enforced a policy which deviated in coverage required by that statute. In-Towne Restaurant Corp. v. Aetna Cas. and Sur. Co., 9 Mass. App. Ct. 534, 541 (1980).[6] These circumstances demonstrate that UPC committed a per se violation of Chapter 93A.

[6] This Court's decision in Kosior v. Continental Ins. Co., 299 Mass. 601 (1938) is inapposite. Kosior was decided on the basis that an innocent coinsured may not recover after the blamable coinsured committed arson if the co-insureds' interests in the insurance policy are joint and non-severable. Ibid. Aquino's argument was neither raised nor decided in Kosior.

C. The Walkway, Patio, Retaining Wall, Stairs/ Railings and Platforms Are Covered Under Coverage B.

The parties agree that the limit of insurance available under Coverage A ($622,000.00) was applied towards damages to the house. Coverage B provides $50,000.00 in additional coverage for "Other Structures." UPC's denial of coverage for damage to the walkway, patio, retaining wall, stairs/railings and platforms was improper. These items were "Other Structures" under Coverage B, not, as UPC claimed, part of the dwelling (Coverage A).

Coverage A applies to "structures attached to the dwelling", whereas Coverage B applies to structures "set apart from the dwelling by clear space." Here, the railings surrounding the driveway and the tenants' steps and patio are not "attached" to the dwelling. It is not enough for these structures to be spatially proximate to each other for them to be "attached to the dwelling." Porco v. Lexington Ins. Co., 679 F. Supp. 2d 432, 438 (S.D.N.Y. 2009) ("Some form of connection is required beyond mere spatial proximity" for the structures to be "attached to the dwelling"). The patio, retaining wall, steps, platforms and

railings lack such a connection and do not fall under Coverage A.

VI. STATEMENT OF REASONS JUSTIFYING DIRECT APPELLATE REVIEW

There is no case law in Massachusetts addressing whether an innocent co-insured's recovery can be limited to one-half of the damages based on the terms of the policy and the statutory requirements for coverage or whether an insurer's issuance and enforcement of an insurance policy which precludes coverage expressly required by G.L. c. 175, § 99, and the denial of coverage on that basis, constitutes a per se violation of G.L. c. 93A. These important and novel issues warrant consideration and determination by this Court.

VII. CONCLUSION

For all of these reasons, the appellant/cross-appellee, Wenda Aquino, requests that this Court grant her Application for Direct Appellate Review.

WENDA AQUINO,
By her attorney,

/s/ Seth H. Hochbaum

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Dated: February 5, 2019

CERTIFICATION OF COUNSEL

I, Seth H. Hochbaum, counsel for the appellant/ cross-appellee, Wenda Aquino, hereby certify that this Application for Direct Appellate Review complies with the rules of court that pertain to the filing of such applications, including Mass. R. App. P. 11 and 20.

WENDA AQUINO,
By her attorney,

/s/ Seth H. Hochbaum

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CERTIFICATE OF SERVICE

I hereby certify, under the penalties of perjury, that two (2) true and accurate copies of the within document were served electronically on February 5, 2019 and via first-class mail, postage prepaid on February 6, 2019, upon Andrew A. Labbe, Esq., Groelle & Salmon, P.A., 99 Derby Street, Suite 200, Hingham, MA 02043, alabbe@gpsalaw.com and Michael S. Melville, Esq., Hassett & Donnelly, P.C., 446 Main Street, 12th Floor, Worcester, MA 01608, mmelville@hassettanddonnelly.com.

/s/ Seth H. Hochbaum

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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. DAR-____

Appeals Court Case No. 19-P-0096

WENDA AQUINO,
PLAINTIFF-APPELLANT/CROSS-APPELLEE

v.

UNITED PROPERTY & CASUALTY INSURANCE COMPANY,
DEFENDANT-APPELLEE/CROSS-APPELLANT

Appeal from the Memorandum of Decision and Order on Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment entered by the Superior Court for Suffolk County (Wilson, J.) on September 28, 2018

ADDENDUM

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

1884CV00366 Aquino, Wenda vs. United Property & Casualty Insurance Company

CASE TYPE:	Contract / Business Cases	**FILE DATE:**	02/01/2018
ACTION CODE:	A06	**CASE TRACK:**	F - Fast Track
DESCRIPTION:	Insurance Contract		
CASE DISPOSITION DATE	10/31/2018	**CASE STATUS:**	Closed
CASE DISPOSITION:	Dismissed	**STATUS DATE:**	10/31/2018
CASE JUDGE:		**CASE SESSION:**	Civil G

PARTIES

Plaintiff	**Attorney** **568118**
Aquino, Wenda	Seth H Hochbaum Regnante Sterio LLP Regnante Sterio LLP 401 Edgewater Place Suite 630 Wakefield, MA 01880 Work Phone (781) 246-2525 Added Date: 02/01/2018

COMMONWEALTH OF MASSACHUSETTS
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Docket Report

Defendant	
United Property & Casualty Insurance Company	**Attorney** **567666** Scott T Ober Hassett & Donnelly, P.C. Hassett & Donnelly, P.C. 446 Main St 12th Floor Worcester, MA 01608 Work Phone (508) 791-6287 Added Date: 11/13/2018
	Attorney **544443** David F Hassett Hassett & Donnelly, P.C. Hassett & Donnelly, P.C. 446 Main St 12th Floor Worcester, MA 01608 Work Phone (508) 791-6287 Added Date: 11/13/2018
	Attorney **681595** Michael Melville Hassett & Donnelly, P.C. Hassett & Donnelly, P.C. 446 Main St 12th Floor Worcester, MA 01608 Work Phone (508) 791-6287 Added Date: 11/13/2018
	Attorney **684790** Joseph Nett GROELLE & SALMON, P.A. GROELLE & SALMON, P.A. 99 Derby St Suite 200 Hingham, MA 02043 Work Phone (617) 322-8201 Added Date: 03/22/2018
	Attorney **692655** Andrew DeGennaro-Labbe Groelle & Salmon, P.A. Groelle & Salmon, P.A. 99 Derby St Suite 200 Hingham, MA 02043 Work Phone (617) 322-8201 Added Date: 03/22/2018

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

INFORMATIONAL DOCKET ENTRIES

Date	Ref	Description	Judge
02/01/2018		Attorney appearance On this date Seth H Hochbaum, Esq. added for Plaintiff Wenda Aquino	
02/01/2018		Case assigned to: DCM Track F - Fast Track was added on 02/01/2018	
02/01/2018	1	Original civil complaint filed. TRK	
02/01/2018	2	Civil action cover sheet filed. $622,000.00	
02/01/2018		Demand for jury trial entered.	
02/06/2018		Notice of 93A complaint sent to Attorney General	
02/12/2018	3	Service Returned for Defendant United Property & Casualty Insurance Company: Service made via regular mail;	
03/21/2018	4	Received from Defendant United Property & Casualty Insurance Company: Answered;	
03/21/2018		Attorney appearance On this date Andrew DeGennaro-Labbe, Esq. added for Defendant United Property & Casualty Insurance Company	
03/21/2018		Attorney appearance On this date Joseph Nett, Esq. added for Defendant United Property & Casualty Insurance Company	
04/30/2018	5	Defendant United Property & Casualty Insurance Company's Motion to amend answer to original complaint	
05/04/2018		Endorsement on Motion to amend it's answer (#5.0): ALLOWED Notice Sent: 05/03/2018 Dated: 05/02/2018 ALLOWED without opposition Judge: Connolly, Hon. Rosemary	Connolly
05/09/2018	6	Plaintiff Wenda Aquino's Motion for Summary Judgment on counts 1 11 & V11 of the complaint (w/opposition)	
05/09/2018	7	Opposition to Deft's opposition and cross-motion for Summary Judgment on all counts of the complaint filed by United Property & Casualty Insurance Company	
05/09/2018	8	Opposition to to deft's cross-motion for Summary Judgment on all counts of the complaint filed by Wenda Aquino	
05/11/2018		The following form was generated: Notice to Appear Sent On: 05/11/2018 10:37:36	
05/22/2018	9	Received from Defendant United Property & Casualty Insurance Company: Amended Answer	

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

07/24/2018		Event Result:: Rule 56 Hearing scheduled on: 07/24/2018 02:00 PM Has been: Held as Scheduled Hon. Rosemary Connolly, Presiding Appeared: Staff: Timothy C Walsh, Assistant Clerk Magistrate	Connolly
09/28/2018	10	MEMORANDUM & ORDER: OF DECISION ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT: For the reasons stated below, the Plaintiff's motion is ALLOWED IN PART and DENIED IN PART, and the Defendant's motion is ALLOWED IN PART and DENIED IN PART. Dated: September 25, 2018 Notice sent 9/27/18 (See P#10 for complete decision and order) Judge: Wilson, Hon. Paul D Judge: Wilson, Hon. Paul D Judge: Wilson, Hon. Paul D	Wilson
10/02/2018		The following form was generated: Notice to Appear Sent On: 10/02/2018 11:30:06	
10/22/2018	11	Plaintiff Wenda Aquino's Motion for Reconsideration of or relief from decision and order on plff's Motion for Summary Judgment and deft's Cross-Motion for Summary Judgment (w/opposition)	
10/24/2018	12	JOINT PROPOSED FINAL JUDGMENT After hearing APPROVED BY AGREEMENT Final Judgment may enter entered on docket pursuant to Mass R Civ P 58(a) and notice sent to parties pursuant to Mass R Civ P 77(d) Judge: Wilson, Hon. Paul D Judge: Wilson, Hon. Paul D Applies To: Aquino, Wenda (Plaintiff); United Property & Casualty Insurance Company (Defendant) Judge: Wilson, Hon. Paul D	Wilson
10/24/2018		Event Result:: Conference to Review Status scheduled on: 10/24/2018 02:00 PM Has been: Held as Scheduled Hon. Paul D Wilson, Presiding Appeared: Staff: Timothy C Walsh, Assistant Clerk Magistrate	Wilson

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
Docket Report

10/30/2018		Endorsement on Motion for reconsideration of, or relief from, decision and order on plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment; (#11.0): No Action Taken because plaintiff withdrew their motion at today's status conference; dated(10/24/18) notice sent 10/29/18 Judge: Wilson, Hon. Paul D	Wilson
10/31/2018	13	AMENDED FINAL JUDGMENT Joint request ALLOWED An amended Final Judgment shall enter in favor of plff in the total amount of $483,580.83 entered on docket pursuant to Mass R Civ P 58(a) and notice sent to parties pursuant to Mass R Civ P 77(d) Judge: Wilson, Hon. Paul D Judge: Wilson, Hon. Paul D Judge: Wilson, Hon. Paul D	Wilson
10/31/2018		Disp for statistical purposes	
10/31/2018	14	Notice of appeal filed. Notice sent 11/1/18 Applies To: Aquino, Wenda (Plaintiff)	
11/13/2018	15	Court received Plaintiff's Certification Pursuant to Mass. R. App. 9(c)(2). related to appeal Plaintiff Wenda Aquino, who, pursuant to Mass. R. App. P. 9(c)(2) hereby certifies that she has ordered the transcript of the hearing on the Cross Motions for Summary Judgment.	
11/13/2018	16	Cross-Notice of appeal filed. Notice sent 11/14/18 Applies To: United Property & Casualty Insurance Company (Defendant)	
11/13/2018		Attorney appearance On this date Michael Melville, Esq. added for Defendant United Property & Casualty Insurance Company	
11/13/2018		Attorney appearance On this date Scott T Ober, Esq. added for Defendant United Property & Casualty Insurance Company	
11/13/2018		Attorney appearance On this date David F Hassett, Esq. added for Defendant United Property & Casualty Insurance Company	
11/21/2018	17	Court received Affidavit of Michael S. Melville, Esq. Transcript of 7/24/18 ordered. related to appeal	
11/29/2018	18	Court received Plaintiff's Certification Pursuant to Mass. R. App. P. 18(b) related to appeal	
12/06/2018	19	CD containing PDF Transcript of 7/24/18 received from Susan Lobie, CET.	

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK COUNTY CIVIL
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01/09/2019	20	Party(s) file Stipulation Correcting Record Applies To: Aquino, Wenda (Plaintiff); United Property & Casualty Insurance Company (Defendant)
01/15/2019		Appeal: notice of assembly of record sent to Counsel

I HEREBY ATTEST AND CERTIFY ON
Jan. 16, 2019, THAT THE FOREGOING DOCUMENT IS A FULL, TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE, AND IN MY LEGAL CUSTODY.

MICHAEL JOSEPH DONOVAN
CLERK / MAGISTRATE
SUFFOLK SUPERIOR CIVIL COURT
DEPARTMENT OF THE TRIAL COURT

BY: _____
Asst. Clerk

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 18-00366-G

Notice sent
9/27/2018
S. H. H.
R.,S. & O.
J. N.
G. & S.
A. D.

WENDA AQUINO

vs.

UNITED PROPERTY & CASUALTY INSURANCE COMPANY

(sc)

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

This suit arises out of a 2017 fire at the home of Plaintiff Wenda Aquino, for which Aquino sought payments under her homeowner's insurance policy. That policy was issued to her by Defendant United Property & Casualty Insurance Company ("UPC"). UPC denied payment to Aquino on the ground that the damage was intentionally caused by Aquino's fiancé, who was a named co-insured on the policy, and that the homeowner's policy excludes recovery by any insured in such a circumstance.

Aquino filed this suit seeking declaratory and other relief to reform the homeowner's policy to provide for coverage of her claimed damages, and she seeks damages for unfair and deceptive trade acts and practices by UPC under G. L. c. 93A and G. L. c. 176D. In the present motion, Aquino seeks summary judgment on Count I (declaratory judgment), Count II (breach of contract), and Count VII (reformation of the policy). UPC has cross-moved for summary judgment on all counts in the Plaintiff's complaint. For the reasons stated below, the Plaintiff's motion is **ALLOWED IN PART** and **DENIED IN PART**, and the Defendant's motion is **ALLOWED IN PART** and **DENIED IN PART**.

BACKGROUND

The following facts, drawn from the summary judgment record, are uncontested. Some facts are reserved for discussion below.

In 2014, Aquino and her fiancé, Kelly Pastrana, purchased a two-family residential dwelling located at 80 Warren Avenue in Chelsea, Massachusetts (the "Property"). Both Aquino and Pastrana are listed on the deed and mortgage for the Property. UPC issued a homeowner's insurance policy to Aquino and Pastrana covering the Property ("the Policy") that was effective at the time of the events at issue in this case.

On May 22, 2017, a fire caused extensive damage to the Property. For purposes of the present motions, the parties do not contest that the fire was caused by an intentional act of Pastrana, and that Aquino was innocent of any involvement. Pastrana died in the fire.

After the fire, Aquino asserted several claims under the Policy for the damages she sustained, including claims for (a) destruction of the building situated on the Property, (b) destruction of the driveway, walkway, patio, retaining wall and stairs/railings on the Property, (c) loss of personal property contained in the building situated on the Property, (d) loss of rental income and additional living expenses, (e) costs associated with enforcement of "ordinance or law" against Aquino as owner of a Property containing a fire-damaged and unsafe structure, (f) destruction to landscaping, trees and shrubs, and (g) debris removal.[1]

On August 18, 2017, UPC denied its liability for Aquino's claims, citing the Intentional Loss Exclusion provision in the Policy.[2] That provision states, in relevant part:

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[1] The parties have submitted an itemized summary of Aquino's damages, categorized by Policy coverage provision. The parties agree, subject to their respective coverage positions, that these are Aquino's damages.

[2] In the letter denying coverage, UPC also stated that the fire was not an "occurrence" under the terms of the Policy. UPC does not advance that position in its briefing on the present motions.

SECTION I – EXCLUSIONS

A. We do not insure for loss caused directly or indirectly by any of the following. . . .

8. Intentional Loss

Intentional Loss means any loss arising out of any act an 'insured' commits or conspires to commit with the intent to cause a loss.

In the event of such loss, no 'insured' is entitled to coverage, even "insureds" who did not commit or conspire to commit the act causing the loss.

Aquino and Pastrana are both named insureds on the Policy.

Aquino brought the present suit against UPC to recover the damages she sustained in the fire. There are eight counts in the complaint: Count I is for declaratory judgment; Count II is for breach of contract; Count III is for breach of the implied covenant of good faith and fair dealing; Count IV is for promissory estoppel; Count V is for equitable estoppel; Count VI is for waiver; Count VII is for reformation of the policy; and Count VIII is for unfair and deceptive trade acts and practices. In the first seven counts, Aquino seeks payment of all of her claimed damages under the Policy, as well as attorney's fees, costs, and interest. In Count VIII, Aquino seeks relief under G. L. c. 93A and G. L. c. 176D for alleged unfair and deceptive trade acts and practices by UPC, for which she seeks double or treble the amount of her actual damages, as well as attorneys' fees, costs, and interest.

DISCUSSION

I. Legal Standard

Summary judgment is properly entered "if the pleadings, depositions, answers to interrogatories, and responses to requests for admission under Rule 36, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Mass. R. Civ. P. 56(c); see Miramar Park

Ass'n, Inc. v. Dennis, 480 Mass. 366, 376 (2018). "The moving party bears the burden of affirmatively demonstrating that there is no triable issue of fact." Ng Bros. Constr. v. Cranney, 436 Mass. 638, 644 (2002). The interpretation of an insurance policy raises a question of law that is appropriately resolved on summary judgment. See Massachusetts Bay Transp. Auth. v. Allianz Ins. Co., 413 Mass. 473, 476 (1992).

II. Analysis

A. Whether Aquino can recover under the policy

Aquino moves for summary judgment on Count I (declaratory judgment), Count II (breach of contract), and Count VII (reformation), arguing that the Policy must be reformed to comport with certain statutory requirements, and that UPC is in breach of the Policy as reformed. UPC cross-moves for summary judgment on the same Counts.

The parties do not dispute that the provision of the Policy governing intentional loss is unambiguous. That provision, if enforced as written, would impose a joint obligation on insureds not to cause intentional loss, and would thus preclude any recovery by Aquino as a consequence of the intentional act of Pastrana.

Aquino's argument is rather that the Policy is not enforceable as written and must be reformed pursuant to G. L. c. 175, § 99 to allow for payments to her as an innocent co-insured party. That statute, entitled "Standard Form of Fire Policy," mandates the form of fire insurance policies in Massachusetts. Ideal Fin. Servs., Inc. v. Zichelle, 52 Mass. App. Ct. 50, 66 (2001). The statute provides that "[n]o company shall issue policies or contracts which . . . insure against loss or damage by fire . . . to property or interests in the commonwealth, other than those of the standard forms herein set forth," subject to certain exceptions not raised here. G. L. c. 175, § 99. Aquino argues that the Intentional Loss provision provides for a broader exclusion of coverage

of insureds than the provisions of the statutory standard policy, and must be reformed in conformity with the mandate of G. L. c. 175, § 99.

The statutory standard policy contains a provision stating that the insurer "shall not be liable for loss occurring . . . while the hazard is increased by any means within the control or knowledge of the insured." G. L. c. 175, § 99. The standard policy also contains a provision stating that the insurer "shall not be liable for loss by fire . . . caused . . . by . . . neglect of the insured to use all reasonable means to save and preserve the property at and after a loss . . . ." Id. I agree with Aquino that these provisions govern a scenario in which the insured intentionally causes a loss by burning the insured property. Such an act increases the hazard to the property and evidences neglect to "preserve the property at . . . a loss." I also agree that, if the Intentional Loss provision in the Policy provides a broader exclusion of coverage than these provisions mandated by G. L. c. 175, § 99, the Policy provision cannot prevail.

Aquino argues that because these statutory provisions refer to acts by "the" insured that would absolve the insurer of liability, rather than referring to acts of "an" insured as the Policy does, the statute mandates a several obligation not to cause a loss, rather than a joint obligation among the insureds not to do so. She argues that UPC, in limiting its liability in the Policy by excluding coverage on the basis of intentional acts of "an" insured, and in making clear that an intentional loss caused by one insured will preclude coverage by any other insured, imposes a joint obligation that impermissibly conflicts with the prescribed statutory form. This is correct. UPC's Policy substitutes the use of "an" in place of the consistent use of "the" in the statutory policy, and adds a sentence making clear that the language of the Policy means that "no 'insured' is entitled to coverage, even 'insureds' who did not commit or conspire to commit the act

causing the loss." Such variance from the statutory language impermissibly narrows the statutorily-required coverage afforded to insureds.

The argument raised by Aquino with respect to G. L. c. 175, § 99, has now been addressed on three prior occasions by judges of the Superior Court of Massachusetts, and on one occasion by a judge of the United States District Court for the District of Massachusetts. The rulings have been consistently in favor of the innocent insured. In two of the prior Superior Court matters, and in the case before the federal court, the courts ruled that the intentional loss provision in the insurer's policy referring to "an" or "any" insured -- or similar language denying coverage for all insureds for an intentional loss caused by any insured -- conflicted with the Legislature's use of "the" insured in G. L. c. 175, § 99. Liberty Mut. Ins. Co. v. Gonzalez, No. ESCV20151794B, 2017 WL 3080565, at *6 (Mass. Super. Ct. June 12, 2017); Hall v. Preferred Mut. Ins. Co., No. HDCV201400781, 2015 WL 4511760, at *6-7 (Mass. Super. Ct. May 1, 2015); Shepperson v. Metropolitan Prop. & Cas. Ins. Co., 312 F. Supp. 3d 183, 198 (D. Mass. 2018). A third Superior Court ruling on the issue strongly suggested the same result. Barnstable County Mut. Ins. Co. v. Dezotell, No. 200500361, 2006 WL 2423570, at *2, 5-6 (Mass. Super. Ct. July 20, 2006) (where there was evidence insured defendant's husband conspired with third party to have home burned, plaintiff insurer nonetheless had no "reasonable likelihood of . . . recovering judgment" against defendant where there was no evidence defendant intentionally caused loss, and where "[t]he Intentional Act exclusion in the policy issued by the plaintiff may very well be construed as diminishing or diluting the coverage required under [G. L. c. 175,] § 99.").

Additionally, the Supreme Judicial Court has stated that one factor to consider in construing the statute is the interest in "giving [G. L. c. 175,] § 99 the same treatment that is

given to identical language policies issued in other States." Pappas Enters., Inc. v. Commerce & Indus. Ins. Co., 422 Mass. 80, 83 (1996). Accordingly, Massachusetts state and federal courts have commonly surveyed decisions of courts outside Massachusetts on the matter.

Here, too, the decisions strongly favor the innocent co-insured. See Gonzalez, 2017 WL 3080565, at *6, and cases cited (surveying cases and concluding that "the overwhelming weight of appellate authority in other states addressing the very issue presented herein supports [the innocent co-insured's] position. This court adopts the reasoning of those other courts."); Shepperson, 312 F. Supp. 3d at 196-197, and cases cited, quoting Pappas Enters., Inc., 422 Mass. at 83 (surveying cases analyzing the distinction between "a(ny) insured" and "the insured" as it regards the statutory standard policy and concluding, "I see no reason why the Supreme Judicial Court would not join in the reasoning of its sister jurisdictions, especially when it has expressed an interest 'in giving § 99 the same treatment that is given to identical language policies issued in other States.'").

Like the Gonzalez and Shepperson courts, I find persuasive the rulings of those courts of other jurisdictions that allowed recovery to the innocent co-insured.[3] See, e.g., Streit v. Metropolitan Cas. Ins. Co., 863 F.3d 770, 773-774 (7th Cir. 2017) ("The term 'the insured' is not defined in the Standard Fire Policy. But as noted by many states interpreting identical language,

[3] UPC argues that "[t]o the extent this court relies on out-of-state case law, there are numerous jurisdictions which bar coverage for 'innocent co-insureds' under exclusions nearly identical to the one contained in the Policy." Several cases UPC cites in that regard are inapposite. See Postell v. American Family Mut. Ins. Co., 823 N.W.2d 35, 48-49 (Iowa 2012) (innocent co-insured could not recover based on intentional loss exclusion in issued policy because Iowa legislature had amended standard policy statute to change relevant language from "the insured" to "an insured"); Tuturea v. Tennessee Farmers Mut. Ins. Co., No. W2009-01866-COA-R3-CV, 2010 WL 2593627, at *19 (Tenn. Ct. App. June 29, 2010) ("While courts in other jurisdictions have reformed or held unenforceable policies excluding recovery by an innocent co-insured where the policies did not comply with legislative limitations on liability exclusions . . . [the plaintiff] has not argued that similar limitations govern the enforcement of insurance agreements in Tennessee."); Noland v. Farmers Ins. Co., 319 Ark. 449, 453 (1995) (holding that insured could not recover, but not discussing any standard policy statute, and noting that insured had offer[ed] "no Arkansas law" in support of contention that policy exclusion was contrary to public policy). The weight of out-of-state authority favors Aquino.

the inclusion of the word 'the' as opposed to 'an' serves as a limitation."); Watson v. United Servs. Auto. Ass'n, 566 N.W.2d 683, 691 (Minn. 1997) ("[W]e conclude that the legislature's use of 'the insured' in the Minnesota standard fire insurance policy evinces a general intent to compensate an innocent co-insured spouse despite the intentional acts of the other insured spouse."). The Intentional Loss provision of the Policy must be reformed to provide a several obligation, such that Aquino may recover under the Policy as an innocent co-insured party.

UPC argues that the Policy is consistent with G. L. c. 175, § 99, citing the Supreme Judicial Court's 1938 decision in Kosior v. Continental Ins. Co. in support of its position. 299 Mass. 601 (1938). In that case, a husband and wife were named insureds on a policy, and the husband intentionally set fire to the home in an attempt to defraud the insurance company. Id. at 602. The policy in question provided that "if the insured shall make any attempt to defraud the Company" the policy would be void. Id. The court ruled that the policy was joint and that the wife -- the plaintiff in that case -- could not recover as a consequence of her husband's actions. Id. at 604. However, while the Court acknowledged the existence of the standard form insurance policy of G. L. c. 175, § 99, id. at 603, the Court did not review the statutory text or address whether the statute required broader coverage of an innocent co-insured. As a result, Kosior did not address the question at the heart of these motions, and does not require a ruling in UPC's favor.

B. How much Aquino can recover under the Policy

Given that Aquino can recover for damages under the Policy, the next question presented is whether Aquino is entitled to full recovery on the Policy, or whether her recovery should be less than that amount in light of Pastrana's intentional act of arson. UPC argues that if Aquino recovers under the Policy, she should only be entitled to recover half of the damages caused by

the loss, within the limits of the policy. The argument raised by UPC in favor of a limited recovery was not addressed by the Massachusetts courts in the Hall, Gonzalez, Dezotell, or Shepperson cases discussed above.

I conclude that Aquino should recover for half of the losses caused by fire, up to half of the applicable coverage limits. Having determined that the intentional loss provision of the contract must be reformed to treat Aquino and Pastrana severally for purposes of assessing Aquino's ability to recover, I will also treat them severally in assessing any forfeiture of coverage by arson under that provision. Here, Pastrana's act of purposefully burning the property will forfeit his share of recovery under the Policy.

I look to the contract to determine the extent of Pastrana's share. Courts construe the words of an insurance policy "in their usual and ordinary sense," absent any ambiguity. Citation Ins. Co. v. Gomez, 426 Mass. 379, 381 (1998) (internal quotation marks omitted), quoting Hakim v. Massachusetts Insurers' Insolvency Fund, 424 Mass. 275, 280 (1997). Here, as Pastrana is listed as one of two named insureds on the Policy who had an interest in the contract, I construe his share in the Policy damages as one-half. Neither party points to any other language in the Policy, and I find none, that would suggest that Aquino and Pastrana's respective interests in the Policy were anything other than equal.[4] Limiting Aquino's recovery to one-half of the losses is also in keeping with the provisions of G. L. c. 175, § 99, discussed above, which evidence an intent to prevent a person who intentionally causes a loss from recovering for that

[4] In support of its argument that Aquino is only due half of the damages, UPC cites the "Insurable Interest And Limit Of Liability" provision in the Policy. That provision states that UPC "will not be liable in any one loss . . . [t]o an 'insured' for more than the amount of such 'insured's' interest at the time of loss." UPC argues that Pastrana and Aquino owned the property as tenants in common, and as such, Aquino only had a one-half insurable interest in the Property. Aquino responds that the way in which the Property was owned should not determine recovery under the Policy. However, Aquino does not point to anything in the Policy suggesting that Pastrana and Aquino's interests in recovery under the Policy were anything other than equal.

loss. Aquino's recovery will be half of the damages sustained, up to half of the coverage limits provided in the Policy.

Aquino acknowledges "the law's legitimate concern that a wrongdoer not reap any benefit from his malfeasance" as the "predominant public policy concern," but argues that because Pastrana perished in the fire, no such concern is present here, and she should be awarded full recovery. But a person who intentionally burns a property and dies in the fire may well have intended to deliver the insurance proceeds to his family; if so, then a full recovery would reward the arson, albeit posthumously. More fundamentally, I decline to impose a rule that, by conditioning insurance awards on the survival or non-survival of the arsonist, would have the effect of providing a larger payout in an arson scheme if the arsonist takes his own life in the process.

My ruling in this regard is in keeping with the decisions of courts in other jurisdictions. See, e.g., Brunk v. Amica Mut. Ins. Co., No. 06-15160, 2007 WL 3244874, *2 (E.D. Mich., Nov. 2, 2007) ("Michigan has followed the majority of jurisdictions in limiting an innocent coinsured's recovery to one-half in most circumstances."); id. at *6 ("Michael Brunk forfeited his interest by igniting a fire within the home as prohibited by the insurance policy's exclusion for intentional loss. This forfeited interest was not resurrected by virtue of his death."); Texas Farmers Ins. Co. v. Murphy, 996 S.W. 2d 873, 881 (Tex. 1999) (concluding, as matter of public policy, that policy against allowing an arsonist to benefit from fraud "does not overcome an innocent spouse's contractual right to recover her or his one-half interest in the policy benefits"); Maravich v. Aetna Life & Casualty Co., 504 A.2d 896, 907-908 (Pa. Super. Ct. Jan. 24, 1986)

("By allowing [the insurer] to retain one-half of the loss, we give effect to the common law principle that [the arsonist] should not be permitted to profit from his own wrong.").[5]

Aquino argues that even if her recovery is limited to one-half of the recovery of the value of the destroyed property, her recovery should not be so limited for her additional living expenses, costs she incurs in order to comply with applicable ordinances or laws, or costs she incurs to remove the fire-damaged debris. She argues that she is entitled to full coverage as to these items because "[t]he basic focus of additional living expense coverage is on the deprivation of Aquino's use of her home as a dwelling by reason of fire." However, neither the Policy provisions that Aquino alludes to nor the standard policy of G. L. c. 175, § 99 provides for such a parsing of the coverages in the Policy, and I decline to fashion that relief without such a basis.

In sum, I allow Aquino's motion for summary judgment as to Counts I, II, and VII to the extent provided above, concluding that the Intentional Loss provision of the policy is unenforceable as written, that the Policy must be reformed as described in this Order, and that UPC is in breach of the Policy as reformed. I deny UPC's cross-motion for summary judgment as to Counts I and II to the extent described above.

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[5] In the cases cited by Aquino that involved arson by a spouse and in which the court granted full recovery, the court premised such recovery, at least in part, on the fact that the arsonist died in the fire -- a position I reject. See American Economy Ins. Co. v. Liggett, 426 N.E.2d 136, 142-145 (Ind. Ct. App. 1981) ("The law's legitimate concern that a wrongdoer not profit by his wrong is not a factor in this case and there is no reason to deny the innocent plaintiff a full recovery, (a different rule may need to be fashioned where the guilty spouse survives)"); id. at 140 ("This public policy [of denying wrongdoer insurance recovery] is easily vindicated by denying any recovery to the living guilty spouse and permitting the innocent spouse recovery of one-half of the insured loss within policy limits."); Safeco Ins. Co. of America v. Kartsone, 510 F. Supp. 856, 859 (C.D. Cal. 1981) ("[A]ny effect of [a statute providing that an insurer is not liable for loss caused by willful act of the insured] upon [the innocent co-insured's] right to recovery for the fire loss is negated by the fact that the wrongdoer in this case died before the claim was paid, and cannot, under any circumstances, stand to benefit from it."); Felder v. North River Ins. Co., 435 N.W.2d 263, 266 (Wis. Ct. App. 1988) ("The trial court should tailor the recovery given to the innocent insured to guard against the possibility that the arsonist will receive financial benefit. Unlike the wrongdoer in [a Wisconsin Supreme Court case], [the arsonist] did not survive the fire and there is no possibility that he will profit from his criminal act.") (citation omitted).

C. Structures covered under Coverage B in the Policy

Aquino also moves for summary judgment in Counts I and II of the complaint on the ground that UPC failed to appropriately pay for damage to certain structures on the Property, and UPC cross-moves on the same issue as to Count I.[6] Specifically, the parties dispute whether certain structures on the Property are covered under Coverage A of the policy ("Dwelling") or Coverage B ("Other Structures"). Resolving that issue requires me to construe the language of the Policy. As noted, where there is no ambiguity in an insurance contract, courts "construe the words of the policy in their usual and ordinary sense." Citation Ins. Co., 426 Mass. at 381 (internal quotation marks omitted), quoting Hakim, 424 Mass. at 280. "When the language of an insurance contract is ambiguous, we interpret it in the way most favorable to the insured." Id. "[A]n ambiguity is not created simply because a controversy exists between the parties, each favoring an interpretation contrary to the other." Id. (internal quotation marks omitted), quoting Lumbermens Mut. Cas. Co. v. Offices Unlimited, Inc., 419 Mass. 462, 466 (1995).

The Policy provides, in relevant part, as follows:

A. Coverage A – Dwelling

1. We cover:

    a. The dwelling on the "residence premises" shown in the Declarations, including structures attached to the dwelling . . .

B. Coverage B – Other Structures

1. We cover other structures on the "residence premises" set apart from the dwelling by clear space. This includes structures connected to the dwelling by only a fence, utility line, or similar connection.

[6] UPC's cross-motion for summary judgment as to Count II is based on the Intentional Loss exclusion provision in the policy.

Thus, to be included within Coverage A, a structure must be "attached" to the dwelling, a term that is not defined in the Policy. To be included within Coverage B, a structure must be "set apart from the dwelling by clear space," a phrase that also does not include any terms defined in the Policy. I apply the usual and ordinary meaning of those terms.

The structures in question are the "driveway, walkway, patio, retaining wall and stairs/railings." The damage to the house exceeded the Coverage A policy limit, so, by agreement of the parties, the limit of insurance under Coverage A has been applied toward those damages. Thus the critical question is whether these structures can be included within Coverage B, where the policy limit has not been exhausted.

As Aquino conceded in her briefing and at oral argument, the summary judgment record establishes that "the walkway, retaining wall, steps and platforms touch or abut the dwelling." I conclude that no reasonable construction of the Policy would allow structures that touch or abut the dwelling to be "set apart from the dwelling by clear space." As a result, the walkway, retaining wall, steps and platforms do not fall under Coverage B.

Aquino also argues that the "railings surrounding the driveway and steps" do not touch or abut the dwelling and are thus set apart by clear space. I disagree. The summary judgment record contains an affidavit from a public insurance adjuster, attaching photographs of the dwelling and structures in question. As the photos demonstrate, the railings running down the right-hand side of the stairway and walkway (when facing the front of the property) form an integral part of the stairway and walkway. I do not think it reasonable to parse the Policy language to treat one portion of a unitary set of railings in one fashion while treating another portion differently, for example by ruling that the left-hand railing (which is fastened to the home) would fall within Coverage A, but the right-hand railing (which is not) would fall under

Coverage B. I conclude instead that the appropriate Policy construction is that the railing is a component of the stairway and walkway and therefore falls within Coverage A.[7]

With respect to the patio, a genuine issue of material fact remains about how the patio stands in relation to the dwelling. While a back portion of the home extends into the area of the patio, debris in the photos obscures the point at which a back portion of the home meets the patio. It is therefore unclear whether the patio is "attached" to the dwelling or "set apart from the dwelling by clear space." As a result, summary judgment as to the treatment of the patio is denied.

The driveway, however, is shown in the photos to be a structure set apart by clear space from the home. Indeed, counsel for UPC conceded at oral argument that the tenant's driveway is separated from the dwelling. Accordingly, the driveway falls within Coverage B.

I thus allow Aquino's motion for summary judgment as to Counts I and II to the extent that those counts seek a declaration of coverage for the driveway under Coverage B, and a determination of breach by UPC for failing to provide such coverage. I deny summary judgment to Aquino regarding the other structures to the extent discussed above. I deny summary judgment to UPC with regard to the driveway and patio as discussed above, but allow summary judgment as to the other structures, to the extent described above.

D. Unfair methods of competition and unfair or deceptive acts or practices

Aquino alleges in Count VIII of her complaint that UPC has violated G. L. c. 93A by denying her coverage under the Policy. That statute provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." G. L. c. 93A § 2(a). The basis for this claim is that UPC engaged in

[7] The same railing proceeds from the stairs along the exterior of the driveway. The entire railing is included within Coverage A.

various unfair claim settlement practices prohibited by G. L. c. 176D, § 3(9). An insurer who violates that insurance statute automatically violates Chapter 93A as well. Hopkins v. Liberty Mutual Ins. Co., 434 Mass. 556, 563-565 (2001).

UPC seeks entry of summary judgment dismissing all claims in Count VIII, arguing that UPC's denial of Aquino's claim was justified and proper. I now grant that relief.

As discussed above, in denying coverage, UPC was simply applying the Policy's Intentional Loss provision as written; the Policy language precluded any recovery by Aquino as a consequence of the intentional act of Pastrana. In light of the absence of controlling precedent in Massachusetts on the issues raised by Aquino as to the failure of the Policy to conform to the mandates of G. L. c. 175, § 99, UPC had a good faith basis for its position that the Policy conformed with G. L. c. 175, § 99. As a result, UPC has not committed any unfair or deceptive act or practice, and is entitled to judgment as a matter of law. See Gulezian v. Lincoln Ins. Co., 399 Mass. 606, 613 (1987) ("An insurance company which in good faith denies a claim of coverage on the basis of a plausible interpretation of its insurance policy is unlikely to have committed a violation of G. L. c. 93A"); Guity v. Commerce Ins. Co., 36 Mass. App. Ct. 339, 344 (1994) ("A plausible, reasoned legal position that may ultimately turn out to be mistaken -- or simply, as here, unsuccessful -- is outside the scope of the punitive aspects of the combined application of c. 93A and c. 176D.").

E. Summary Judgment as to Counts III, IV, V, VI of the complaint

UPC seeks summary judgment dismissing Counts III, IV, V and VI of the complaint. The basis for UPC's motion as to those counts is that "Plaintiff does not have a cause of action under any such counts once Counts I and II have been dismissed." Because this Order does not

entirely dismiss Counts I and II, UPC's motion for summary judgment is denied as to those counts.

CONCLUSION AND ORDER

For the reasons stated above, the Plaintiff's Motion for Summary Judgment (Docket No. 6) is **ALLOWED IN PART** as follows:

1. Count I: The Plaintiff is granted declaratory judgment that the Intentional Loss provision of the Policy is unenforceable as written, and must be reformed in accordance with G. L. c. 175, § 99 to provide coverage to the Plaintiff as described above. The Plaintiff is granted declaratory judgment that the driveway constitutes an "Other Structure" covered under Coverage B of the Policy.

2. Count II: UPC has breached the terms of the Policy, as reformed, by failing to provide coverage to the Plaintiff as described above.

3. Count VII: the Policy must be reformed in accordance with G. L. c. 175, § 99 to provide coverage to the Plaintiff as described above.

The Plaintiff's motion is denied in all other respects.

For the reasons stated herein, the Defendant's Cross-Motion for Summary Judgment (Docket No. 7) is **ALLOWED IN PART** as follows:

1. Count I is allowed insofar as it seeks dismissal of Aquino's claims to coverage under Coverage B of the Policy of the walkway, retaining wall and stairs/railings, as described above.

2. Count VIII is dismissed.

The Defendant's motion is denied in all other respects.

A status conference will be held at 2:00 P.M. on October 16, 2018 in Courtroom 1008. The parties shall confer beforehand, and shall be prepared to make proposals -- ideally a joint proposal -- about the next steps in this case.

Paul D. Wilson
Justice of the Superior Court

September 25, 2018

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NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK ss.

SUPERIOR COURT
CIVIL ACTION NO. 18-0366-G

WENDA AQUINO,
Plaintiff

v.

UNITED PROPERTY & CASUALTY INSURANCE COMPANY,
Defendant

JOINT PROPOSED FINAL JUDGMENT

The parties, Wenda Aquino ("Aquino) and United Property & Casualty Insurance Company ("UPC") (collectively, the "parties"), jointly submit the following Proposed Final Judgment in relation to this Honorable Court's September 25, 2018 Decision and Order:

1. The parties previously agreed that the total damages due and owing under the subject policy of insurance related to the subject fire at the property located at 80 Warren Avenue, Chelsea, Massachusetts (the "Property") are as follows:

Dwelling/Coverage A	$622,000.00[1]
Other Structures/Coverage B	$5,170.41[2]
Personal Property/Coverage C	$110,000.00
Loss of Use/Coverage D	$45,000.00
Debris Removal/Coverage E(1)	$25,000.00
Trees, Shrubs and Other Plants/Coverage E(3)	$7,500.00

[1] This figure represents the limit of insurance available for the "Dwelling" under Coverage A.

[2] This figure represents the agreed amount which it would cost to repair the Property's driveway. The parties agree that the total amount of damages for "other structures" under Coverage B, if those structures are covered by Coverage B, is $50,000.00.

Filed Wilson, D.S.C. Oct. 24, 2018
Final Judgment may enter.
Approved as agreement.
Attn: Nancy,
Notice sent in hand 10/24/18

Ordinance or Law/Coverage E(11)	$31,100.00
Total	**$845,770.41**

2. Pursuant to this Court's September 25, 2018 Decision and Order, Aquino is entitled to recover $422,885.21 from UPC under the applicable policy of insurance, a sum which Aquino disputes and on which she reserves her rights to challenge on appeal.

3. Therefore, the parties agree that a final judgment should enter in favor of Aquino and against UPC in the amount of $422,885.21, with costs and statutory interest accruing from August 18, 2017 (the date on which UPC issued its denial of Aquino's claim) through and including the date on which final judgment enters.

4. Both parties reserve their respective rights to appeal this Court's September 25, 2018 Decision and Order.

WENDA AQUINO,
By her attorney,

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REGNANTE, STERIO & OSBORNE LLP
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UNITED PROPERTY & CASUALTY INSURANCE COMPANY,
By its attorney,

ANDREW A. LABBE– BBO NO. 692655
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(617) 322-8201

Dated: October 24, 2018

NOTIFY

13

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK ss.

SUPERIOR COURT
CIVIL ACTION NO. 18-0366-G

WENDA AQUINO,
Plaintiff

v.

UNITED PROPERTY & CASUALTY INSURANCE COMPANY,
Defendant

AMENDED FINAL JUDGMENT

The parties, Wenda Aquino ("Aquino) and United Property & Casualty Insurance Company ("UPC") (collectively, the "parties"), jointly submit the following Amended Final Judgment in relation to this Honorable Court's September 25, 2018 Decision and Order:

1. The parties previously agreed that the total damages due and owing under the subject policy of insurance related to the subject fire at the property located at 80 Warren Avenue, Chelsea, Massachusetts (the "Property") are as follows:

Dwelling/Coverage A	$622,000.00[1]
Other Structures/Coverage B	$5,170.41[2]
Personal Property/Coverage C	$110,000.00
Loss of Use/Coverage D	$45,000.00
Debris Removal/Coverage E(1)	$25,000.00
Trees, Shrubs and Other Plants/Coverage E(3)	$7,500.00

[1] This figure represents the limit of insurance available for the "Dwelling" under Coverage A.

[2] This figure represents the agreed amount which it would cost to repair the Property's driveway. The parties agree that the total amount of damages for "other structures" under Coverage B, if those structures are covered by Coverage B, is $50,000.00.

JUDGMENT ENTERED ON DOCKET Oct-31 20 18
PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P.58(a)
AND NOTICE SENT TO PARTIES PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS

{00258383.1 }

Ordinance or Law/Coverage E(11)	$31,100.00
Total	**$845,770.41**

2. Pursuant to this Court's September 25, 2018 Decision and Order, Aquino is entitled to recover $422,885.21 from UPC under the applicable policy of insurance, a sum which Aquino disputes and on which she reserves her rights to challenge on appeal.

3. Therefore, the parties agree that a final judgment shall enter in favor of Aquino and against UPC in the total amount of $483,580.83, which is itemized as follows: $422,885.21 (one-half of $845,770.41), plus costs in the amount of $518.47 and statutory interest accruing from August 18, 2017 (the date on which UPC issued its denial of Aquino's claim) through and including October 25, 2018 in the sum of $60,177.15.

4. Both parties reserve their respective rights to appeal this Court's September 25, 2018 Decision and Order.

WENDA AQUINO,
By her attorney,

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UNITED PROPERTY & CASUALTY INSURANCE COMPANY,
By its attorney,

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Dated: October 25, 2018

12/28

38

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

NOTIFY

SUPERIOR COURT
CIVIL ACTION
No. 1684CV02866

MARGARET DRUDE

vs.

NARRAGANSETT BAY INSURANCE COMPANY

MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Margaret Drude ("Drude") filed this action after her home was destroyed in a fire and her insurer, Narragansett Bay Insurance Company ("NBIC"), issued a reservation of rights letter and attempted to examine Drude under oath. Drude sought a declaratory judgment that she was not obligated to appear for NBIC's examination (Count I), and asserted claims for violation of G.L. c. 93A (Count II); violation of G.L. c. 176D (Count III); breach of the covenant of good faith and fair dealing (Count IV); breach of contract / reformation (Count V), and unjust enrichment (Count VI).

Before the Court are the Defendant's Motion for Summary Judgment based on Drude's failure to appear at her examination, and Plaintiff's Cross-Motion for Summary Judgment on her declaratory judgment claim (Count I) and breach of contract / reformation claim (Count V). After hearing and review, and for the reasons stated below, Defendant's motion is **DENIED**. Plaintiff's motion is **ALLOWED**.

notice sent
12.2018
RFF
JWH
HTF
SGG
LOSGG
(MM)

BACKGROUND

This abbreviated summary of the undisputed facts and the disputed facts, viewed in the light most favorable to Drude, are as follows. See Attorney Gen. v. Bailey, 386 Mass. 367, 371, cert. denied, 459 US 970 (1982). Some facts are reserved for discussion below.

Drude and her husband, Robert Drude ("Robert"),[1] owned a single family home in Plymouth ("Property"). Both were insureds on a homeowner's policy issued by NBIC. The policy provided coverage for damage to the Property and personal property and contained certain exclusions, including an intentional loss exclusion. In particular the policy disclaimed coverage for "any loss arising out of any act an 'insured' commits or conspires to commit with the intent to cause a loss." The exclusion specifically excluded coverage even as to "'insureds' who did not commit or conspire to commit the act causing loss."

On February 17, 2016 there was a fire at the Property. At the time of the fire, Drude and Robert were separated and in the process of divorcing. Drude had left the Property in part because she had obtained a restraining order against her husband. Robert was found dead at the scene. The Plymouth fire department, at least initially, determined that the cause of the fire was intentional.[2] The next day, NBIC's fire investigator and large loss adjuster telephoned Drude and spoke to Drude's daughter who asked that NBIC call them later. Drude spoke to NBIC's adjuster on February 19, 2016 and told NBIC that Robert had been diagnosed with and was taking medication for depression.

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[1] Because they share a last name, the Court will refer to Drude's husband by his first name.

[2] Plaintiff has moved to strike the Fire Department Incident Report as hearsay. The Court notes the fire department's preliminary conclusion about the cause of the fire are not offered for the truth of the matter asserted, i.e. that Robert intentionally started the fire, but because the conclusion was relied upon by NBIC in connection with its reservation of rights and request for an examination under oath. Accordingly, Plaintiff's motion to strike the Fire Department Incident Report is **DENIED**.

On February 25, 2016, NBIC sought and received a coverage opinion from the law firm of Sloane and Walsh, LLP ("Law Firm"). The Law Firm opined that Drude may "qualify as an 'innocent spouse' under the specific facts and circumstances of this loss." The Law Firm wrote: "Drude likely has a strong argument that Robert Drude lacked the requisite intent to cause the loss due to his documented psychiatric/mental health issues." The Law Firm also noted that recent cases in state and federal courts in the Commonwealth had construed G.L. c. 175, § 99 as requiring payments to innocent co-insureds notwithstanding intentional loss provisions, such as the one in the NBIC policy, that would bar coverage.

On March 1, 2016, NBIC issued a reservation of rights letter stating "it appears as though [Robert] may have intentionally set the fire at issue in this claim. If that is the case, then the neglect and intentional loss exclusions [of the policy] would apply." NBIC asked Drude to cooperate in the investigation by preparing an inventory of property and providing information relating to the mortgage on the property. NBIC also sought Robert's medical records, some of which were provided by Drude's counsel on April 29 and May 20, 2016. On June 14, 2016, NBIC, through counsel, disclaimed coverage based on its conclusion that Robert intentionally burned the Property and the medical records did not indicate that Robert had the type of mental defect or condition that would have prevented him from "forming the intent necessary to trigger application of the [intentional loss] exclusion." In that letter, NBIC made an offer of settlement. Drude responded by asking that NBIC withdraw the reservation of rights and honor the claim.

NBIC then decided to seek an examination under oath. On July 5, 2016, NBIC formally requested an examination. After no response, NBIC sent another request for an examination on July 20, 2016 and proposed September 19 and 20, 2016 as convenient dates for the examination. NBIC sent another request on July 29, 2016, this time proposing September 19, 2016 as a

convenient date for the examination. Drude responded on August 2, 2016 with a G.L. c. 93A / 176D demand letter. In that letter, Drude argued that NBIC's requested examination was made in bad faith because, among other reasons, Drude had been interviewed by NBIC's adjuster, had provided all requested documentation, and the damage far exceeded the available coverage. Drude claimed the examination was sought only to pressure Drude into accepting NBIC's June 14, 2016 settlement offer. NBIC continued to try to seek an examination throughout August 2016. On September 8, 2016 NBIC sent a formal notice of examination for September 19, 2016. Drude filed her complaint on September 15, 2016.

DISCUSSION

I. Standard of Review

Summary judgment shall be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ P. 56(c). See Correia v. Fagan, 452 Mass. 120, 129 (2008). "[A] party moving for summary judgment in a case in which the opposing party will have the burden of proof at trial is entitled to summary judgment if he demonstrates, by reference to material described in Mass. R. Civ. P. 56(c), . . . unmet by countervailing materials, that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case." Alicea v. Commonwealth, 466 Mass. 228, 234 (2013), quoting Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). A dispute about the "proper interpretation" of an insurance policy raises a question of law appropriate for resolution at summary judgment. Massachusetts Bay Transp. Auth. v. Allianz Ins. Co., Inc., 413 Mass. 473, 476 (1992).

II. Failure to Appear at Examination Under Oath

NBIC moves for summary judgment based solely on Drude's alleged refusal to submit to an examination under oath. Here, there is no dispute that Drude had a statutory and contractual obligation to cooperate with NBIC. See G.L. c. 175, § 99. General laws c. 175, § 99 further contemplates that "the insurer, when it determines that an examination is reasonable, may require that the insured submit to such an examination under oath." Mello v. Hingham Mut. Fire Ins. Co., 421 Mass. 333, 337 (1995). Further, "if the request is reasonable," submission to an examination "is strictly construed as a condition precedent to the insurer's liability," id., and the "wilful, unexcused refusal to submit to an examination under oath" can result in forfeiture of coverage. Lorenzo-Martinez v. Safety Ins. Co., 58 Mass. App. Ct. 359, 363 (2003). The question for courts faced with an alleged refusal to submit to an examination is whether the insured "had an excuse that relieved [her] from submitting to an examination under oath." Id. at 364.

Drude argues that she did not willfully fail to attend the examination. Instead, she "appropriately filed a preemptive declaratory judgment action seeking clarification from the Court as to the rights and duties of the parties" in advance of the scheduled examination. "General Laws c. 231A, § 1, allows courts to 'make binding declarations of right, duty, status and other legal relations sought thereby, either *before* or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen and is specifically set forth in the pleadings.'" Sahli v. Bull HN Info. Sys., Inc., 437 Mass. 696, 705 (2002) (emphasis added), quoting G.L. 231A, § 1. "The purpose of this statute is to provide a plaintiff relief from uncertainty and insecurity with respect to rights, duties, status, and other legal relations." Id. Disputes about contractual obligations are the quintessential subjects of declaratory judgment

proceedings because parties to a contract can seek judicial resolution without potentially breaching the contract. See id. ("The determination of contractual rights is a proper subject of a declaratory judgment proceeding.").

Here, as a matter of law, Drude did not breach the policy or her statutory obligation of cooperation by seeking a declaratory judgment as to her obligation to sit for an examination under oath. Further, for the reasons stated below, Drude is entitled to coverage as an innocent co-insured so there is no need for an examination under oath to delve into Robert's mental health issues.[3] Drude is, therefore, entitled to summary judgment on her Declaratory Judgment claim.[4]

III. Innocent Co-Insured's Right to Coverage

Plaintiff seeks summary judgment on her breach of contract / reformation claim, arguing that, as an innocent co-insured, she is entitled to the full value of her insurance claim. The Court has reviewed Aquino v. United Prop. & Cas. Ins. Co., 2018 WL 5532541 (Mass. Super. 2018); Liberty Mut. Ins. Co. v. Gonzalez, 34 Mass. L. Rptr. 290 (Mass. Super. 2017); Hall v. Preferred Mut. Ins. Co., 32 Mass. L. Rptr. 682 (Mass. Super. 2015); and Shepperson v. Metropolitan Prop. & Cas. Ins. Co., 312 F. Supp. 3d 183 (D. Mass. 2018). After consideration, the Court agrees with the sound reasoning and conclusions in those cases, namely, that "the intentional loss provision in the insurer's policy referring to 'an' or 'any' insured – or similar language denying coverage for all insureds for an intentional loss caused by any insured – conflict[s] with the Legislature's use of 'the' insured in G.L. c. 175, § 99." Aquino, 2018 WL 5532541 at *3. That conclusion is bolstered by (i) the Supreme Judicial Court's mandate that, in giving effect to G.L.

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[3] The parties filed for arbitration under the policy regarding the amount of the loss.

[4] Given the Court's conclusion that seeking a declaratory judgment is good reason to fail to appear at an examination, the Court need not decide whether NBIC's request was reasonable or not or was sought in bad faith to force Drude to engage in settlement discussions as Drude argues.

c. 175, § 99, one factor is the "treatment that is given to identical language policies issued in other States," Pappas Enters., Inc. v. Commerce & Indus. Ins. Co., 422 Mass. 80, 83 (1996), and (ii) that the "overwhelming weight of appellate authority in other states" supports the conclusion that an innocent co-insured is entitled to coverage under the standard policy of insurance proscribed in G.L. c. 175, § 99. Gonzalez, 34 Mass. L. Rptr. 290, at *6 (discussing state court decisions considering innocent co-insured's rights under the standard policy language).

Although NBIC is correct that the Supreme Judicial Court has not overruled Kosior v. Continental Ins. Co., 299 Mass. 601 (1938), this Court joins the Hall, Gonzalez, and Acquino courts in concluding that the Supreme Judicial Court, when confronted with this question, will, like many other state supreme courts, hold that G.L. c. 175, § 99 permits recovery by innocent co-insureds.

Because the statute mandates the form of insurance policies in Massachusetts, and provides that "[n]o company shall issue policies or contracts which . . . insure against loss or damage by fire . . . to property or interest in the commonwealth other than those of the standard forms herein set forth," NBIC's policy must be reformed to provide coverage to an innocent co-insured who did not participate in the intentional conduct at issue. G.L. c. 175, § 99.

On the question of Drude's "innocence," there is no evidence that Drude committed, directed, or conspired in any intentional act to cause the fire. As such she is an innocent co-insured and the exclusion in the policy must be reformed to permit coverage.

ORDER

Defendant's Motion for Summary Judgment is **DENIED**. Plaintiff's Motion for Summary Judgment on Count I (Declaratory Judgment) and Count V (Breach of Contract / Reformation) is **ALLOWED**.

Debra A. Squires-Lee
Justice of the Superior Court

December 19, 2018

2006 WL 3694597
Only the Westlaw citation is currently available.
United States District Court,
S.D. Mississippi,
Jackson Division.

NATIONWIDE INSURANCE COMPANY, Plaintiff
v.
Michael CLARK and Nancy Clark, Defendants.

Civil Action No. 3:05CV615DPJ-JCS.
|
Dec. 13, 2006.

Attorneys and Law Firms

William C. Griffin, Allison P. Fry, Currie, Johnson, Griffin, Gaines & Myers, P.A., Franklin Keith Ball, Currie Johnson Et Al., Jackson, MS, for Plaintiff.

John Graham Holaday, Holaday & Johnson, PLLC, Jackson, MS, for Defendants.

MEMORANDUM OPINION AND ORDER

DANIEL P. JORDAN III, United States District Judge.

***1** This cause is before the Court on motion of Plaintiff Nationwide Insurance Company (Nationwide) for summary judgment pursuant to Federal Rule of Civil Procedure 56. Defendants Michael and Nancy Clark have responded in opposition. The Court, having considered the memoranda and submissions of the parties, along with the pertinent authorities, concludes that Plaintiff's motion should be granted.

I. PROCEDURAL HISTORY/FACTS

This tragic case stems from a dispute involving a homeowners insurance policy issued by Nationwide to Michael and Nancy Clark for their home located in Brandon, Mississippi. On February 14, 2005, a fire occurred at the residence, and the Clarks filed a claim with Nationwide for coverage under the policy. Defendants' son Adam Clark was subsequently indicted for felony arson related to this fire, pled guilty, and was convicted.

Nationwide takes the position that because Adam Clark resided at the home at the time of the fire and intentionally set the fire, coverage is excluded under the terms of the policy. Specifically, the subject policy provides the following relevant definitions:

Definitions

> 2. "YOU" and "YOUR" refer to the named insured shown on this policy who resides at the residence premises. These terms also mean your spouse who resides at the same residence premises.
>
> 4. "INSURED" means you and the following residents of your household at the residence premises:
>
> a) your relatives.
>
> b) any other person under age 21 and in the care of you or your relative.
>
> 7. "RESIDENCE PREMISES" means the one, two, three, or four-family dwelling, other structures and ground located at the mailing address shown on the Declarations unless otherwise indicated.

The policy further provides the following property coverage exclusion:

Property Exclusions

> 1. We do not cover loss to any property resulting directly or indirectly from any of the following. Such a loss is excluded even if another peril or event contributed concurrently or in any sequence to cause the loss.
>
> g) Intentional Acts, meaning loss resulting from an act committed by or at the direction of an insured that may reasonably be expected to result from such acts, or is the intended result from such acts,

> intentional acts include criminal acts. Such acts exclude coverage for all insureds.

On October 12, 2005, Nationwide filed this action against Michael and Nancy Clark seeking a declaration that there is no insurance coverage under the Clarks' homeowners policy for the fire. The Clarks then filed a counterclaim against Nationwide, asserting various causes of action stemming from the denial of coverage.

Following discovery, Nationwide filed this motion, arguing that under the clear and unambiguous terms of the policy no coverage exists for the fire, and consequently, it is entitled to summary judgment on both its claim for declaratory judgment and Defendants' counterclaims. In response, the Clarks do not dispute that Adam Clark lived in their home at the time of the fire or that he pled guilty to the crime of arson. They do, however, insist that they did not have any "role or foreknowledge of the subject arson nor did they have any knowledge of Adam Clark's predisposition to commit arson."

***2** The Clarks maintain that summary judgment should be denied for the following reasons: 1) Nationwide waived its right to rely on the intentional acts exclusion due to its payment of the Clarks' mortgages; 2) the policy language is vague and ambiguous and should be construed against Nationwide, the drafter; 3) as innocent insureds, the Clarks should be provided coverage under the intentional acts exclusion; and 4) Nationwide's intentional acts exclusion should be held void as against public policy. While the Court recognizes the significant misfortune that has befallen the Clarks, their arguments are legally insufficient and will be addressed in turn.

II. ANALYSIS

A. Waiver Based on Nationwide's Payment to the Mortgagee

Wells Fargo Bank (Wells Fargo) was the named mortgagee on a first and second mortgage on the Clarks' property, and it is undisputed that Nationwide paid Wells Fargo after the fire. The Clarks claim that Nationwide therefore waived its right to rely on the intentional acts exclusion as to the Clarks because Wells Fargo's right to recover was dependant upon the Clarks' right to recover.

A "waiver is a voluntary and intentional relinquishment of a known right or conduct that warrants an inference of such a relinquishment." *Chapman v. Safeco Ins. Co. of Am.*, 722 F.Supp. 285, 292 (N.D. Miss 1989) *(quoting Highlands Ins. Co. v. Allstate Ins. Co.*, 688 F.2d 398, 404 (5th Cir.1988)). "To establish a waiver, there must be shown an act or omission on the part of the one charged with the waiver fairly evidencing an intention permanently to surrender the right alleged to have been waived." *Titan Indem. Co. v. Hood,* 895 So.2d 138, 150-51 (Miss.2004) *(citing Ewing v. Adams,* 573 So.2d 1364, 1369 (Miss.1990)). Accordingly, the question is whether Nationwide voluntarily relinquished its right to rely on the intentional acts exclusion when it paid Wells Fargo.

Nationwide maintains that it had no choice but to pay Wells Fargo under the mortgage clause contained in the policy. That clause provides:

> Mortgage Clause. The word "mortgagee" includes trustee. If a mortgagee is named in this policy, a loss payable under Coverage A or B will be paid to the mortgagee and you, as interests appear. If more than one mortgagee is named, the order of payment will be the same as the order or precedence of the mortgages. If we deny your claim, that denial will not apply to a valid claim of the mortgagee, if the mortgagee:
>
> a) notifies us of a change in ownership, occupancy, or substantial change in risk of which the mortgagee is aware.
>
> b) pays premium due under this policy on our demand, if you neglected to pay the premium.
>
> c) submits a signed, sworn proof of loss within 60 days after receiving notice from us of your failure to do so. Policy conditions relating to Your Duties after Loss, Loss Payment, Appraisal, and Suit Against Us apply to the mortgagee.

The parties dispute whether this constitutes a "loss payable" or "open mortgage" clause versus a "standard" or "union" mortgage clause. According to the Clarks, this is nothing more than a "loss payable" clause whereby "the mortgagee is only entitled to receive the amount due him on his mortgage out of the funds recovered by or due to the insured." *Hartford Fire Ins. Co. v. Associates Capital Corp.*, 313 So.2d 404, 407 (Miss.1975).

***3** Nationwide of course disagrees claiming that its policy language constitutes a "standard" or "union" mortgage clause. Such clauses create independent contracts between the insurer and the mortgagee such that "the mortgagee's right to recover will not be invalidated by the act or negligence of the mortgagor of the insured's property." *Id.* Said differently, the mortgagee's right to recover

under a "standard" mortgage clause remains "unaffected by any conditions which invalidate[ ] the policy as to the mortgagor." *Necaise v. Oak Tree Sav. Bank,* 645 So.2d 1311, 1316 (Miss.1994).

The Clarks submit that "the phrase 'as interests appear' or 'as their interests appears' without any explanatory language is specific to 'loss payable' clauses." However, the Clarks' authority for this argument is taken out of context. "Interests" clauses such as those cited in the Clarks' memorandum generally refer to debts and appear in varying forms in both "standard" and "loss payable" mortgage clauses. *See, e.g., Hartford Fire Ins. Co.,* 313 So.2d at 405-08 (examining "standard" and "loss payable" clauses in subject policy, both of which contained "interests" clauses).[1]

In addition, the Clarks assert that this Court has already declared that Nationwide's mortgage clause is a "loss payable" clause in *Nationwide Mutual Fire Insurance Co. v. Dungan,* 634 F.Supp. 674, 680 n. 3 (S.D.Miss.1986). While dicta in *Dungan* stated that the clause "appear[ed]" to be a "loss payable" clause, the case does not provide the entire text of the mortgage clause in issue. Moreover, the quoted portions of the policy are slightly different from the subject clause. *Id.* Ultimately, it is impossible to know whether the *Dungan* clause is materially the same as the subject clause written some twenty years later. *Dungan* is further distinguishable from this case in that the mortgagee was not listed in the policy, and therefore Mississippi Code Annotated § 83-13-9 (2000) did not apply (discussed *infra*).

Finally, the Clarks argue that the separate rights of Wells Fargo are not triggered unless one of three contingencies occur. Nationwide responds by stating that Wells Fargo's rights as the mortgagee are secure unless it fails to perform one of those enumerated duties. Either way, the clause creates separate duties as to the mortgagee which distinguishes it from those "loss payable" clauses where the mortgagee merely stands in the shoes of the insureds. For example, compare the "loss payable" and "standard" mortgage clauses examined in *Hartford Fire Insurance Co.,* 313 So.2d at 405.

Furthermore, the Court notes that the subject policy is nearly identical to the one reviewed by the Mississippi Supreme Court in *Lumbermens Mutual Casualty Co. v. Thomas,* 555 So.2d 67, 69-70 (Miss.1989). In *Lumbermens,* the court observed, in dicta, that the policy contained a "typical standard union mortgage clause" and complied with Mississippi Code Section 83-13-9 (discussed *infra). Id.* at 69;[2] *see also Home Sav. of Am., F.S.B. v. Continental Ins. Co.,* 104 Cal.Rptr.2d 790, 797 (Cal.Ct.App.2d Dist.2001) (interpreting materially identical mortgage clause and finding that "[s]o far as we are aware, every court to consider the matter has found the ISO-type clause to be a standard loss payable clause").

***4** While this appears to be a "standard" mortgage clause, the parties' varying interpretations matter little in light of Mississippi Code Section 83-13-9.[3] Under this statute, a "standard" clause must be attached to fire insurance policies taken out in the State of Mississippi. *Id.; see Carter v. Allstate Indem. Co.,* 592 So.2d 66, 71 (Miss.1991) (observing that section 83-13-9 contains standard mortgage clause); Necaise, 645 So.2d at 1315 ("[S]ubject matter of Miss.Code Ann. § 83-13-9 (1991) is the standard union mortgage clause."); *Weems v. American Sec. Ins. Co .,* 450 So.2d 431, 436 (Miss.1984) (same).

According to the Fifth Circuit Court of Appeals: "The Mississippi Supreme Court has held that the mortgage clause contained in section 83-13-9 becomes part of every fire insurance policy 'irrespective of any mortgage clause inserted by the insurance company to the contrary; [section 83-13-9] constitutes the only mortgage clause that can be placed in the policy.' " *Nationwide Mut. Fire Ins. Co. v. Dungan,* 818 F.2d 1239, 1244 (5th Cir.1987) *(quoting Bacot v. Phenix Ins. Co.,* 50 So. 729, 732 (Miss.1909)); *see also Highlands Ins. Co. v. Allstate Ins. Co.,* 688 F.2d 398, 403 (5th Cir.1982) ("[T]his clause automatically becomes a part of a fire insurance policy insuring property on which there is a mortgage when the policy contains a loss payable clause for a mortgagee."); *Nat'l Sec. Fire & Cas. Co. v. Mid-State Homes, Inc.,* 370 So.2d 1351, 1353 (Miss.1979).[4]

Contrary to the Clarks' argument that Nationwide waived the intentional acts exclusion by treating the mortgagee differently than the mortgagor, Nationwide was required to treat Wells Fargo differently. Pursuant to the contract language and section 83-13-9, Nationwide had an independent contractual duty to Wells Fargo that could not be extinguished by the acts of the insureds. Paying Wells Fargo pursuant to that independent duty did not manifest an intent to waive the intentional acts exclusion as to the Clarks. *See Neises v. Solomon State Bank,* 696 P.2d 372, 380 (Kan.1985) (noting that payment by insurer to mortgagee under a standard mortgage clause "did not waive any defenses it might have had as to its liability to the party who appeared as the mortgagor in the policy"); *see also* 13 *Couch* § 194:54.

B. Policy Language

The Clarks submit that the policy language, including the intentional acts exclusion and the definition of an "insured," is confusing and ambiguous and should be interpreted by the Court as providing coverage to the Clarks for their loss. Nationwide, on the other hand, asserts that the policy language is clear and unambiguous and should be enforced as written.

The trial court, not the jury, must determine the meaning and effect of an insurance contract if the contract is clear and unambiguous. *Jackson v. Daley*, 739 So.2d 1031, 1041 (Miss.1999) *(citing Overstreet v. Allstate Ins. Co.*, 474 So.2d 572, 575 (Miss.1985)).

***5** Mississippi law recognizes the general rule that provisions of an insurance contract are to be construed strongly against the drafter. *J & W Foods Corp. v. State Farm Mut. Auto Ins. Co.*, 723 So.2d 550, 552 (Miss.1998) *(citing Nationwide Mut. Ins. Co. v. Garriga,* 636 So.2d 658, 662 (Miss.1994); *Williams v. Life Ins. Co. of Ga.*, 367 So.2d 922, 925 (Miss.1979)). An insurance policy is ambiguous "when the policy can be interpreted to have two or more *reasonable* meanings." *J & W Foods*, 723 So.2d at 552 (emphasis added). "When the language of a policy is subject to more than one reasonable interpretation, this Court will apply a construction permitting recovery." *Id.*

On the other hand,"[t]he mere fact that the parties disagree about the meaning of a provision of a contract does not make the contract ambiguous as a matter of law." *Burton v. Choctaw County,* 730 So.2d 1, 8 (Miss.1999). "A court must effect 'a determination of the meaning of the language used, not the ascertainment of some possible but unexpressed intent of the parties .' " *Delta Pride Catfish, Inc. v. Home Ins. Co.*, 697 So.2d 400, 404 (Miss.1997) *(quoting Cherry v. Anthony, Gibbs, Sage,* 501 So.2d 416, 419 (Miss.1987)). Moreover, an insurance policy is a contract between the insurer and the insured, " 'with the rights and duties set out by the provisions of the insurance policy.' " *Sennett v. U.S. Fidelity & Guar. Co.,* 757 So.2d 206, 212 (Miss .2000) (*quoting Hare v. State,* 733 So.2d 277, 281 (Miss.1999)). As such, "insurance policies which are clear and unambiguous are to be enforced according to their terms as written," and "the plain terms of the insurance contract should be binding and controlling." *Id.*

The Clarks turn to the language of the intentional acts exclusion and offer a number of alternative interpretations in the hopes of creating an ambiguity.[5] As review, the relevant policy provision reads as follows:

> g) Intentional Acts, meaning loss resulting from an act committed by or at the direction of an insured that may reasonably be expected to result from such acts, or is the intended result from such acts, intentional acts include criminal acts. Such acts exclude coverage for all insureds.

The Clarks first contend that this exclusion is ambiguous because it is not clear who constitutes "an insured." However, "insured" is a defined term in the Property Conditions portion of the contract:

> 4. "INSURED" means you and the following residents of your household at the residence premises:
>
> a) your relatives.
>
> b) any other person under age 21 and in the care of you or your relative.

This is a standard definition of "insured," and there is no reasonable interpretation of the clause that would exclude Adam Clark. He was indisputably a resident at the subject premises and was the Clarks' "relative[ ]." *See Hall v. State Farm Fire & Cas. Co.,* 937 F.2d 210, 214 (5th Cir.1991) (use of defined term "insured" in intentional acts exclusion not ambiguous).

***6** The Clarks observe, however, that the Liability Coverages section contained in Section II of the policy has a different definition of "insured." Even if the definition in Section II could somehow apply to Section **I**,[6] it would not create an alternative construction allowing recovery. Both Section I and Section II define "insured" to include relatives who reside at the subject property. Adam Clark satisfies both definitions.

The Clarks also argue that Adam Clark was not an insured because he did not have an insurable interest in the house or the damaged personal property. However, the Court cannot ignore the use of the defined term "insured" which covers Adam Clark. Had the parties intended to limit "an insured" to insureds with insurable interests, they could have easily added that language to the exclusion.

The Clarks also find ambiguity in the term "such acts," which begins the second sentence of the exclusion. However, "such acts" clearly refers to the acts described in the preceding sentence (which include "criminal acts" such as arson). Although there is no ambiguity and therefore no need to turn to the rules of construction, "modifying clauses generally modify the nearer, rather than the more remote, antecedent." 2 *Couch* § 22:5.[7]

Finally,"[s]uch acts will exclude coverage *for all insureds.*" (Emphasis added). The Clarks rhetorically ask:

"who are all insured?" More to the point, they argue that the policy is not clear as to whether coverage is "excluded for all insured who were involved in the incident or all people who were insured for the subject claim." What they suggest is that the sentence "[s]uch acts exclude coverage for all insureds" could be read in conjunction with the term "an insured" in the preceding sentence to mean "such acts exclude coverage for all insureds who were involved in the intentional act."

Unlike the Clarks' attempt to parse other portions of the policy, their interpretation of this sentence, if reasonable, would yield coverage and therefore create an ambiguity. However, the Court must strive to give each provision meaning as written and cannot add or subtract terms in order to achieve an unreasonable interpretation that was not anticipated by the parties. If the intent was to limit the exclusion to the insured who acted intentionally, the second sentence could have easily stated that coverage is excluded to the "insured who committed the intentional act." Instead, it reads that intentional acts "exclude coverage for all insureds." The common sense meaning of the sentence is that all insureds will be excluded if an insured commits an intentional act.

The Clarks have failed to demonstrate that the intentional acts exclusion is "subject to more than one reasonable interpretation." *J & W Foods*, 723 So.2d at 552. While the Clarks have strenuously argued that the policy, and the intentional acts exclusion in particular, are confusing, they have not articulated a reasonable alternative interpretation which would provide them coverage. The Court finds that the policy provisions at issue are unambiguous and preclude coverage.

C. Innocent Insureds

***7** According to the Clarks, Mississippi case law "suggests that innocent insureds will be given coverage in the context of an intentional acts exclusion if they are innocent unless the insurer provides specific, unambiguous provisions to the contrary." The Clarks seek support in cases from Mississippi federal and state courts. *McFarland v. Utica Fire Ins. Co. of Oneida County, N.Y.*, 814 F.Supp. 518, 526 (S.D.Miss.1992) (finding intentional acts exclusion was ambiguous and did not bar recovery of innocent insured for damage resulting from acts of co-insured); *Dunn v. State Farm Fire & Cas. Co.*, 711 F.Supp. 1362, 1369 (N.D.Miss.1988) (innocent spouse could recover interest in insured property despite her husband's arson); *McGory v. Allstate Ins. Co.*, 527 So.2d 632, 638 (Miss.1988) (innocent insured could recover).

As these cases observe, intentional acts exclusions will preclude coverage for an innocent co-insured if they include a non-severability clause. *See McFarland v. Utica Fire Ins. Co. of Oneida County, N.Y.*, No. 93-7936, 1994 WL 16464174, *5 (5th Cir. Jan. 6, 1994) (recognizing Mississippi law that absent a non-severability clause, an innocent insured spouse could recover under the insurance policy); *McFarland*, 814 F.Supp. at 526 ("[D]efendant Oneida could have cured this ambiguity through ... the addition of a non-severability clause."); *McGory*, 527 So.2d at 638 (noting that *absent* a non-severability clause "the innocent spouse or business partner insured can recover on the policy").

In *McGory*, the court described a non-severability clause as a "clause [ ] excluding coverage to both co-insureds because of the deliberate wrongful act of one co-insured." 527 So.2d at 638. Nationwide asserts that the intentional acts exclusion in the Clarks' policy contains a non-severability clause because it states: "*Such acts exclude coverage for all insureds.* " (Emphasis added). The Clarks maintain, without supporting authority, that this sentence is not a non-severability clause and is instead confusing and vague. Having already held that this sentence is not ambiguous, the Court further holds that it meets the definition of a nonseverability clause in *McGory.* 527 So.2d at 638.

The inclusion of a non-severability clause distinguishes *McFarland* where the court considered the following intentional acts exclusion: "Intentional Act. We do not pay for loss which results from an act committed by or at the direction of an insured and with the intent to cause a loss." 814 F.Supp. at 522. The court found this policy language ambiguous and subject to "more than one interpretation." *Id.* at 524-25. The *McFarland* clause did not include an equivalent to the sentence, "[s]uch acts exclude coverage for all insureds." The significance of this distinction becomes quickly apparent when viewed in light of the *McFarland* court's examination of an intentional acts exclusion in *Hall v. State Farm Fire and Casualty.* The policy in *Hall* read as follows:

> ***8** Intentional Acts. If you or any person insured under this policy causes or procures a loss to property covered under this policy for the purpose of obtaining insurance benefits, then this policy is void and we will not pay you or any other insured for this loss.

937 F.2d at 213. In its final analysis, the *McFarland* court explained that

> [t]he defendant Oneida could have cured this ambiguity through clearer or more precise language, as found in *Hall v. State Farm Fire & Casualty Co., supra,* or, alternatively, through the addition of a non-severability clause. *See McGory,* 527 So.2d at 638; 11 A.L.R. 4th 1228, 1231. But, defendant's policy contains no non-severability clause. Instead, on page 1 of the policy, there is found language which states that all insureds under the policy are "separate insureds."

McFarland, 814 F.Supp. at 526. Nationwide's intentional acts exclusion, and the non-severability clause contained therein, are comparable to the policy language in *Hall* and operate to preclude coverage to innocent insureds such as the Clarks.

The Clarks also claim that if the intentional acts exclusion includes a non-severability clause, then it is inconsistent with two other provisions in the policy and is therefore ambiguous. The Clarks first note that Section II of the policy covering "Liability Coverages" includes a severability clause which reads: "Severability of Insurance. This insurance applies separately to each insured. This condition does not increase our limit of liability for one occurrence."

Similarly, the Clarks contend that the "Insurable Interest and Limit of Liability" condition operates as a severability clause. That provision states:

Property Conditions

1. Insurable Interest and Limit of Liability. Even if more than one person has an insurable interest in the property covered, we will not be liable:

a) to the insured for more than the insured's interest.

b) for more than the limit of liability.

First, the Court does not agree that the "Insurable Interest and Limit of Liability" provision is a severability clause. Had Nationwide wished to include a severability clause in the property section of the policy, it would have replicated the severability clause used in the liability portion of the policy, referenced above. Second, it is apparent that the purpose of the "Insurable Interest and Limit of Liability" clause is just that, a limit on Nationwide's duty to pay twice for the same loss. Nowhere does this clause state that the insureds' interests are severed.

Even if the "Insurable Interest and Limit of Liability" clause could be viewed as a severability clause, neither it nor the "Severability Clause" found in the "Liability Conditions" would create an ambiguity because general provisions must fall to more specific provisions. *See Union Planters Bank, Nat'l Ass'n v. Rogers,* 912 So.2d 116, ¶ 10 (Miss.2005) ("[S]pecific language controls over general inconsistent language in a contract."). Here, the two severability clauses suggested by the Clarks are general in nature. In contrast, the non-severability clause in the relevant intentional acts exclusion is specific and narrow in that it is a part of, and applies only to, that specific exclusion.

***9** Finally, a contrary ruling would, as Nationwide states, turn *McFarland* on its head. In *McFarland,* the policy contained a general severability clause. To overcome the general severability clause, both this Court and the Fifth Circuit Court of Appeals noted that the insurer would be required to provide a specific non-severability clause. *McFarland,* 1994 WL 16464174 at *5; *McFarland,* 814 F.Supp. at 526. Nationwide provided such a clause, and the Clarks cannot now argue that the addition of the non-severability clause is ambiguous and confusing because it conflicts with the severability clause.

D. Public Policy of the State of Mississippi

Finally, the Clarks argue that the public policy of Mississippi is that "policyholders should be provided coverage for which they pay a premium." They maintain that because they suffered a catastrophic loss which was not in any way their fault, Nationwide's intentional acts exclusion should be held void as against public policy.

While there is no dispute that the Clarks' losses were severe and in no way their fault, public policy will not void their contract. The appellate courts of Mississippi have repeatedly applied intentional acts exclusions. *See Lewis v. Allstate Ins. Co.,* 730 So.2d 65 (Miss.1998) (applying an intentional acts exclusion); *Rogers v.*

Allstate, 2006 WL 399252 (Miss.Ct.App.2006) (same); *Thomas v. State Farm Fire & Cas. Co.*, 2003 WL 21448878 (Miss.Ct.App.2003) (same). Nationwide suggests that this Court should refrain from holding that Mississippi public policy would void this exclusion when the Mississippi Supreme has never seen fit to do so. The Court agrees.

III. CONCLUSION

The Court finds that Nationwide's motion for summary judgment should be granted. In addition, the Clarks' response focuses entirely on establishing coverage under the policy. The Clarks have not presented any record evidence to rebut Nationwide's motion with respect to the Clarks' counterclaims. Absent any attempt to rebut this portion of Nationwide's motion, the Clarks' counterclaims are likewise due to be dismissed.

A separate judgment will be entered in accordance with Federal Rule of Civil Procedure 58.

SO ORDERED AND ADJUDGED.

All Citations

Not Reported in F.Supp.2d, 2006 WL 3694597

Footnotes

1 Noting that the clause "as their interests may appear" has been interpreted as recognizing "a separate insurable interest of the mortgagee," one commentator nevertheless states that this is a false distinction. 4 Lee R. Russ & Thomas F. Segallia, *Couch on Insurance* § 65:9 (3d ed.2005)(hereinafter "Couch").

2 The subject policy differs from the *Lumbermans* policy in two ways. First, where the Nationwide clause states "*a* loss payable under Coverage A or B," the *Lumbermans* clause states "*any* loss payable under Coverage A or B." *Id.* Second, the Nationwide clause states "that denial *will* not apply," while the *Lumbermans* clause states "that denial *shall* not apply." *Id.* These two differences are legally insignificant with respect to the issues before the Court.

3 Each fire insurance policy on buildings taken out or renewed on or after July 1, 1989, by a mortgagor or grantor in a deed of trust shall have attached or shall contain substantially the following mortgagee clause, viz:

> Loss or damage, if any, under this policy, shall be payable to (here insert the name of the party), as _____ mortgagee (or trustee), as _____ interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; and in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same. The mortgagee (or trustee) shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void. This company reserves the right to cancel this policy at any time as provided by its terms, but in such case this policy shall continue in force for the benefit only of the mortgagee (or trustee) for thirty (30) days after notice to the mortgagee (or trustee) of such cancellation and shall then cease, and this company shall have the right on like notice to cancel this agreement. In case of any other insurance upon the within described property, this company shall not be liable under this policy for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on said property issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee, or otherwise. Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all security held as collateral to the mortgage debt, or may, at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of _____ claim. Nothing in the foregoing prescribed form shall be construed to in any manner modify the provisions of Section 83-13-5.

Miss.Code Ann. § 83-13-9.

4 The Court notes that some Mississippi cases have held that section 83-13-9 creates an equitable lien in favor of the mortgagee. However, unlike the present case, the policies at issue did not name the mortgagee as loss payee. *See, e.g., Lititz Mut. Ins. Co. v. Miller,* 50 So.2d 221, 225 (Miss.1951). The Fifth Circuit Court of Appeals shed light on this distinction when it construed the language of section 83-13-9 and determined that the mandatory provisions of the statute do not apply to unnamed mortgagees. *See Dungan,* 818 F.2d at 1245 *(citing Merchants Nat'l Bank v. Southeastern Fire Ins. Co.,* 751 F.2d 771, 780 n. 6 (5th Cir.1985)) ("[A]n unnamed mortgagee has the same rights as an ordinary equitable lien holder.").

5 The Clarks also assert that Nationwide's payment to Wells Fargo while denying coverage to them under the intentional acts exclusion proves that the policy is ambiguous as to the intentional acts exclusion. The Court has fully addressed the basis for the payment to Wells Fargo and declines to revisit the issue.

6 Section II of the policy contains "ADDITIONAL DEFINITIONS APPLICABLE TO THESE COVERAGES." By the express terms of this section, these definitions apply exclusively to Section II and cannot therefore create an ambiguity with respect to the definition of "insured" that applies to the Property Coverages section of the policy-Section I.

7 The Clarks also claim that the use of the term "act" in both the singular and plural is confusing and ambiguous. Read in the context of the exclusion, the use of "act" or "acts" creates no ambiguity and yields no reasonable alternative construction that would provide coverage to the Clarks.