

**OFFICE OF THE INSURANCE COMMISSIONER
MARYLAND INSURANCE ADMINISTRATION**

**MARYLAND INSURANCE
ADMINISTRATION
EX REL. P.J.**

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Complainant,

Case No. MIA 2023-02-001

v.

**AMERICAN ZURICH
INSURANCE COMPANY,**

*

Licensee.

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* * * * *

MEMORANDUM AND FINAL ORDER

Pursuant to §§ 2-204 and 2-214 of the Insurance Article of the Annotated Code of Maryland,¹ the Undersigned concludes that American Zurich Insurance Company (“Licensee”) did not commit an unfair claim settlement practice in violation of § 27-303 or refuse or delay payment of amounts due without just cause in violation of § 4-113 in its handling and denial of P.J.’s (“Complainant”) insurance claim under the builders risk insurance policy.

STATEMENT OF THE CASE

This matter arose from an administrative complaint (“Complaint”) filed by Complainant with the Maryland Insurance Administration (“MIA”) on October 14, 2022. In her Complaint to the MIA, Complainant alleged that the Licensee erred in denying her claim under the builders risk policy for damage to the foundation of her home located in Capitol Heights, Maryland with a reported loss date of August 19, 2022. (MIA Ex. 1.) After investigating the Complaint, the

¹Unless otherwise noted, all statutory citations are to the Insurance Article of the Annotated Code of Maryland.

MIA's Property and Casualty Complaints Unit determined that Licensee had not violated the Insurance Article, and notified the Parties of its findings by letter dated January 17, 2023. (MIA Ex. 4.) The determination letter gave the Parties the right to request a hearing. (*Id.*) The Complainant disagreed with the MIA's determination and timely requested a hearing, which was granted on February 3, 2023. (MIA Ex. 6.)

ISSUE

The issue presented in this case is whether Licensee violated the Insurance Article in its denial of Complainant's insurance claim under the builder's risk policy.

SUMMARY OF THE EVIDENCE

A. Testimony

A virtual hearing was held on June 6, 2023. Complainant provided sworn testimony on her own behalf. Licensee was represented by Jessica Port, Esquire, of Zelle, LLP. Licensee did not call any witnesses at the Hearing.

B. Exhibits

MIA Exhibits² (In Record)

1. Complaint from Complainant to MIA, received on October 14, 2022
2. Correspondence from MIA to Licensee, dated October 18, 2022
3. Response from Licensee to MIA, received on November 3, 2023
4. Determination Letter from MIA to Complainant, dated January 17, 2023
5. Hearing Request of the Complainant to MIA, received February 1, 2023
6. Letter Granting Hearing Request from MIA to Parties, dated February 3, 2023

Complainant's Exhibits³ (In Record)

²The Parties stipulated to the admission of the MIA Exhibits at the evidentiary hearing.

³At the evidentiary hearing, twelve photographs were marked for identification and moved into evidence. Following the evidentiary hearing, the twelve photographs were filed with the Clerk – Office of Hearings. Each of the photographs depict images of the Complainant's residence. As Licensee's attorney raised no objection to the admissibility of the photographs at the Hearing, the exhibits have been re-numbered to include the twelve photographs submitted to the Clerk- Office of Hearings. Further, as Licensee's attorney raised no objection to the admissibility of the Complainant's email correspondence, the email has been renumbered as MIA Exhibit 13.

1. Photograph 1
2. Photograph 2
3. Photograph 3
4. Photograph 4
5. Photograph 5
6. Photograph 6
7. Photograph 7
8. Photograph 8
9. Photograph 9
10. Photograph 10
11. Photograph 11
12. Photograph 12
13. Email Correspondence from Complainant to MIA, received June 14, 2023

Licensee's Exhibits⁴ (In Record)

1. RAC Photo Sheet
2. RAC Report
3. Engineer Report
4. Denial Letter, dated September 12, 2022
5. Denial Letter, dated October 25, 2022

FINDINGS OF FACT

The findings of fact contained herein are based upon a complete and thorough review of the entire record in this case. The record includes the above-referenced exhibits and the transcript of the June 6, 2023 hearing. To the extent that there are any facts in dispute, the following facts are found to be true by a preponderance of the evidence. Citations to particular parts of the record are for ease of reference and are not intended to exclude, and do not exclude, reliance on the entire record.

1. At all relevant times, Licensee held, and currently holds, a Certificate of Authority from the State of Maryland to act as a property and casualty insurer.

2. Complainant purchased a builders risk insurance policy from Licensee under policy number 74****28 ("Policy"). (MIA Ex. 3.) This Policy covered specific damages or losses

⁴The Parties stipulated to the admission of the Licensee's Exhibits at the evidentiary hearing.

occurring during the course of construction at Complainant's property in Capitol Heights, Maryland ("Dwelling"), and was in force on August 19, 2022. (MIA Ex. 3) The Policy contained exclusions for damage resulting from faulty or defective design, workmanship, or construction (*Id.*) Specifically, the Policy provided, in pertinent part:

3. We will not pay for loss or damage caused by or resulting from any of the following. But if loss or damage by a Covered Cause of Loss results, we will pay for the resulting loss or damage caused by that Covered Cause of Loss.

c. Faulty, inadequate or defective:

- (1) Planning, zoning, development, surveying, siting;
- (2) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
- (3) Material used in repair, construction, renovation or remodeling[.]

* * * *

(MIA Ex. 3.)

3. On August 31, 2022, Complainant filed a claim with Licensee for damage to the Dwelling during the course of construction, with a reported loss date of August 19, 2022 ("Claim"). (MIA Ex. 3.) Complainant informed Licensee that she noticed a crack in the concrete slab between the old and new foundation at her dwelling. (*Id.*)

4. On September 1, 2022, Licensee retained RAC Adjustments, Inc. ("RAC"), an independent claims adjusting vendor, to perform an inspection of the Dwelling. (MIA Ex. 3.)

5. On September 2, 2022, RAC Adjuster Mark C. Ruiz ("Adjuster Ruiz") performed an inspection of the Dwelling while Complainant was present, and observed a crack in the foundation where the new and old foundations met. (MIA Ex. 3.)

6. On September 7, 2022, Adjuster Ruiz submitted a report of his findings to Licensee and concluded that the cause of loss was improper installation of new slab on grade foundation. (MIA Ex. 3.) Specifically, RAC observed two areas where the concrete slab had been previously

cut open. Further, Adjuster Ruiz reported that insured hired, “another contractor to cut open the slab and jack hammer down to reveal that there was no rebar installed tying the new foundation to the old foundation. The blueprints did not indicate this requirement.” (*Id.*) Additionally, Adjuster Ruiz observed that, “the slab had a drop of ¼ inch over 32 feet from the right to left elevation.” (*Id.*) Adjuster Ruiz also recommended in his report that an engineer should be retained to prepare a report outlining the necessary repairs. (*Id.*)

7. Licensee’s Adjuster, Jessica Allen (“Adjuster Allen”), sent a denial letter dated September 12, 2022 (“September Denial Letter”) on behalf of Licensee denying coverage. She also spoke with the Complainant, advising that the Policy would not provide coverage for the damage. (MIA Ex. 3) Specifically, as noted in the September 7, 2022 report prepared by Adjuster Ruiz, there was a crack in the slab foundation where the new foundation meets the old one due to her contractor’s failure to install rebar tying the foundations together. (Lic. Ex. 2)

8. On October 14, 2022, Complainant filed a Complaint with the MIA. In her Complaint, Complainant alleged that she hired a contractor to do renovations to her Dwelling and that she later noticed the slab of concrete that was added to the old slab had cracked after being installed. (MIA Ex. 1.)

9. On October 18, 2022, at Complainant’s request, Mir Emad Mousavi of Licensed Structural Engineers (“Complainant’s Engineer”) performed a structural and foundational assessment of the Dwelling at Complainant’s request. (Licensee’s Exhibit (“Lic. Ex.”) 3.) On October 25, 2022, the Complainant’s Engineer issued his report (“Complainant’s Engineer’s Report”). The Complainant’s Engineer’s Report, reported:

[a]ccording to the client, new concrete slab was placed on August 9th, 2022, by the contractor in order to extend the basement floor from the north side (towards the backyard). On August 21st, the client noticed some cracks on the old slab next to which the new slab on the north side was placed.

* * *

Findings

1. The maximum level difference measured on the basement floor was 0.75 inches over a 10-foot span.
2. Two rectangular holes are cut on the boundary of the old and the new slabs, having caused some rebars to break too.
3. There is a crack between the new slab drawn in August 2022 next to the north wall and the old slab next to it.
4. There is a crack, about 5 feet long, branched out diagonally from the boundary of the new slab (northernmost) in the basement with the old slab next to it, all the way to the edge of the slab under the garage.

(*Id.*)

10. Licensee issued a second denial letter on October 25, 2022 (“October Denial Letter”), the same day that Complainant’s Engineer issued its report. This letter cited to the following language from the Policy, which contains exclusions for damage resulting from faulty or defective design, workmanship, or construction:

3. We will not pay for loss or damage caused by or resulting from any of the following. But if loss or damage by a Covered Cause of Loss results, we will pay for the resulting loss or damage caused by that Covered Cause of Loss.

c. Faulty, inadequate or defective:

- (1) Planning, zoning, development, surveying, siting;
- (2) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
- (3) Material used in repair, construction, renovation or remodeling[.]

* * * *

(MIA Ex. 3.)

11. On January 17, 2023, the MIA completed its investigation and issued a determination letter to Complainant finding that the Licensee had not violated Maryland insurance law in its denial of Complainant’s Claim. (MIA Ex. 4.)

12. The Complainant was not satisfied with the MIA's determination and requested the immediate hearing. (MIA Ex. 5.) The Hearing was granted by letter dated February 3, 2023. (MIA Ex. 6.)

13. At the Hearing, Complainant offered photographs demonstrating the damage to the Dwelling. Specifically, Complainant testified that the floor slab installed by her contractor had cracks in it. She also explained in an email correspondence, that since her contractor installed the floor slab, everything is starting to crack with the old and new foundation, stating "all the work is damaged and causing the house to be unsafe to move forward until work is done correctly see the attachments..." (Compl. Ex. 13.)

14. During the Hearing, Complainant testified that she believed the builders risk policy would cover her for anything that went wrong with the project. (Tr. at 24.)

15. The Complainant testified under cross-examination that the contractor made mistakes and that she is pursuing a claim against the contractor's insurance carrier. (Tr. at 26-28 & 28-29.)

16. During her closing statement, Complainant stated that Licensee was supposed to cover her living expenses. The Hearing Officer stated that there was no reference to alternative living expenses in the hearing request. Attorney for Licensee stated that the Complainant never made a claim to Zurich for living expenses, there was no triggering event that would require payment of those expenses and this was a builder's risk policy that is specific for a project being done. (Tr. 40-42.)

DISCUSSION

A. Positions of the Parties.

Complainant contends that Licensee improperly denied her Claim. Complainant asserts

that the foundation damage to her home should have been covered by Licensee. Specifically, she argues that she purchased a builders risk policy for situations like this,, and the Licensee had a responsibility to pay for the repairs. She also avers that Licensee should pay for her alternative living expenses.

Licensee argues that it properly handled and denied Complainant's claim. Specifically, Licensee avers that there is no evidence that its handling of the Claim was arbitrary, capricious, lacking in good faith, or otherwise in violation of Maryland's insurance laws. Licensee maintains that it denied the claim after conducting a thorough investigation of the Claim and discovering faulty workmanship by Complainant's contractor, which was not covered under the builders risk policy. Licensee contends that, by the Complainant's own admission, the contractor was responsible for the faulty work at her property.

B. Statutory Framework

The Parties were notified in the March 28, 2023 Notice of Virtual Hearing that specific attention at the Hearing would be directed to §§ 4-113 and 27-303 of the Insurance Article.

Section 4-113 states, in pertinent part:

- (b) The Commissioner may deny a certificate of authority to an applicant or, subject to the hearing provisions of Title 2 of this article, refuse to renew, suspend, or revoke a certificate of authority if the applicant or holder of the certificate of authority:

* * *

- (5) refuses or delays payment of amounts due claimants without just cause [.]

* * * *

(LexisNexis 2022.)

Section 27-303 states, in pertinent part:

It is an unfair claim settlement practice and a violation of this subtitle for an insurer, nonprofit health service plan, or health maintenance organization to:

- (1) misrepresent pertinent facts or policy provisions that relate to the claim

or coverage at issue;

(2) refuse to pay a claim for an arbitrary or capricious reason based on all available information;

* * *

(6) fail to provide promptly on request a reasonable explanation of the basis for a denial of a claim [.]

* * * *

(LexisNexis 2022.)

In *Berkshire Life Insurance Co. v. Maryland Insurance Administration*, the Court of Special Appeals adopted the Insurance Commissioner's interpretation of the "arbitrary and capricious" standard as articulated in an earlier case. *See* 142 Md. App. 628 (2002). As the Court explained:

The Commissioner has previously construed [Section] 27-303(2) as requiring a licensee insurer to show that it refused to pay the claim at issue based on: (1) an otherwise lawful principle or standard which the insurer applies across the board to all claimants; and (2) reasonable consideration of "all available information."

Id. at 671. (*internal citations omitted*).

The Complainant has the burden of proof to demonstrate by a preponderance of the evidence that Licensee violated the Insurance Article in its handling and denial of the Claim. Md. Code Ann., State Gov't § 10-217 (LexisNexis 2022); *Berkshire*, 142 Md. App at 672. To satisfy its burden of persuasion in this case by a preponderance of the evidence, Complainant must "prove that something is more likely so than not so" when all of the evidence is considered. *Coleman v. Anne Arundel County Police Dep't*, 369 Md. 108, 125 n. 16 (2002) (*quoting* the Maryland Pattern Jury Instructions) (*internal citations omitted*). Under this Standard, if the supporting and opposing evidence is evenly balanced on an issue, the finding on that issue must be against the party who bears the burden of proof. (*Id.*)

C. Licensee did not violate § 27-303(1), (2) or (6) or § 4-113(b)(5) in the handling of Complainant's Claim.

After investigating the Complaint concerning Licensee's handling of Complainant's claim, the MIA determined that Licensee did not violate the Insurance Article. For the reasons set forth below, I affirm.

As a threshold matter, Complainant raised an issue regarding payment of alternate living expenses for the first time at the evidentiary hearing. As this issue was not raised in Complainant's Complaint, or the hearing request, I find that the issue is outside the scope of the instant hearing.

I find that Licensee did not act arbitrarily or capriciously in violation of § 27-303(2) in denying Complainant's Claim. The record in this matter demonstrates that Complainant purchased a builders risk insurance policy with Licensee. (MIA Ex. 3.) The insurance policy was in effect on the date of the loss, August 19, 2022. The Policy stated that Licensee will not pay for loss or damage caused by or resulting from faulty, inadequate or defective "design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction." (*Id.*)

The record further shows that on August 31, 2022 Complainant submitted a claim to Licensee under her builders risk insurance policy for the damage to the foundation of the Dwelling. The Complainant reported seeing a crack in the concrete slab between the old and new foundations at her dwelling. (*Id.*) On September 2, 2022, three days after the Claim was reported to Licensee, Adjuster Ruiz conducted an inspection of the Dwelling. (*Id.*) In the inspection report findings, Adjuster Ruiz noted that there was a crack in the slab where the new and old foundation meet. Adjuster Ruiz also found areas where the concrete was cut open showing no rebar tying the new foundation to the old foundation. (*Id.*) The adjuster determined that the cause of loss was due to improper installation of the new slab. (*Id.*) Subsequent to this inspection, Complainant hired an

engineering firm to complete an inspection of the Dwelling. The Complainant's Engineer's Report stated that Complainant reported that she found cracks on the old slab next to the new slab after her contractor installed new concrete flooring. (Lic. Ex. 3.)

During the Hearing in this matter, Complainant conceded during cross-examination that the contractor performing renovations at the Dwelling made mistakes. In an exhibit offered during the Hearing, the Complainant stated that since her contractor installed the floor slab, everything is starting to crack with the old and new foundation. (Compl. Ex. 13.)

On September 12, 2002 and October 25, 2022, Licensee sent denial letters to the Complainant explaining that the claimed loss was not covered under the Policy, as the loss was excluded under the faulty workmanship exclusion. (MIA Ex. 3.) In the October Denial Letter, Adjuster Allen specifically referenced the following Policy provision:

3. We will not pay for loss or damage caused by or resulting from any of the following. But if loss or damage by a Covered Cause of Loss results, we will pay for the resulting loss or damage caused by that Covered Cause of Loss.

c. Faulty, inadequate or defective:

- (1) Planning, zoning, development, surveying, siting;
- (2) Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
- (3) Material used in repair, construction, renovation or remodeling[.]

* * * *

(MIA Ex. 3.)

Based on my review of the record, I find that Licensee's denial was reasonable, as the Licensee relied on the RAC report prepared by Adjuster Ruiz and the Complainant's Engineer's Report, and both reports indicated that the cause of loss was due to improper installation of the new slab at Complainant's Dwelling. Further, the Policy language specifically provides an exclusion for loss caused by faulty, inadequate, or defective materials used in repair, construction,

renovation or remodeling. Accordingly, I find that the loss was excluded under the terms of the Policy with the Licensee. I, therefore, find that Licensee's handling and denial of the Claim was not arbitrary or capricious, and thus, not in violation of § 27-303(2).

I also find that Licensee did not misrepresent pertinent facts or policy provisions that relate to the Claim in violation of § 27-303(1). Specifically, the relevant Policy language at issue in this case states:

3. We will not pay for loss or damage caused by or resulting from any of the following. But if loss or damage by a Covered Cause of Loss results, we will pay for the resulting loss or damage caused by that Covered Cause of Loss.

c. Faulty, inadequate or defective:

- (1) Planning, zoning, development, surveying, siting;
- (2) Design, specifications, workmanship, repair, construction, renovation, remodeling, Grading, compaction;
- (3) Materials used in repair, construction, renovation or remodeling[.]

* * * *

(MIA Ex. 3.)

Even though the Complainant seemed perplexed about the coverage provided under the Policy, I do not find that the Licensee misrepresented any facts or policy clauses that relate to the Claim or coverage at issue. Instead the record reflects that, after a thorough investigation of the loss by RAC and Complainant's Engineer, as well as subsequent statements made by the Complainant at the Hearing indicating mistakes by her contractor, Licensee based its decision on the policy language and report findings. Complainant testified during the Hearing that she believed she would be protected against any project-related problems if she purchased the builders risk insurance. However, it is not sufficient to establish misrepresentation merely because the Complainant did not comprehend the wording of the Policy. Therefore, I find that Licensee did not

misrepresent pertinent facts or policy provisions that relate to the claim or coverage at issue.

I further find that Licensee provided prompt and reasonable explanations for the denial of coverage of the Claim, and therefore, did not violate § 27-303(6) of the Insurance Article. The record demonstrates that Complainant filed her Claim with Licensee on August 31, 2022. On September 2, 2022, two days later, an inspection was performed by Adjuster Ruiz. An inspection report was prepared and dated September 7, 2022. On September 12, 2022, the Licensee sent a letter and spoke with the Complainant, explaining that the Policy would not provide coverage for the crack in the slab foundation where the new foundation meets the old due to faulty workmanship by her contractor. Then, on October 25, 2022, the Licensee sent another letter clarifying its coverage position and referencing the specific policy language in support of its denial of coverage. Since the record provides ample evidence of communication between the Parties providing prompt, reasonable explanations for the denial of coverage to Complainant, I find that Licensee did not violate § 27-303(6).

Finally, I find that Licensee did not refuse or delay payment of amounts due to the Claimant without just cause in violation of § 4-113(b)(5). Complainant reported the claim on August 31, 2022. Three days later, on September 2, 2022, the Complainant and an inspector from RAC, Licensee's vendor, conducted an inspection of the Dwelling. The inspection report was prepared and dated September 7, 2022. According to the inspection, the new slab's faulty installation was the cause of the loss sustained by Complainant at the Dwelling. As a result of its investigation, Licensee spoke with the Complainant and sent out a letter on September 12, 2022. After receiving a copy of Complainant's Engineer's Report on October 25, 2022, it issued a second letter that same day denying coverage for the loss under the terms of the Policy. I, therefore, find that Licensee had just cause for denying coverage based on the Policy language excluding faulty workmanship.

Therefore, I further find that Licensee did not violate § 4-113(b)(5).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, it is found as a matter of law that Licensee has not committed an unfair claim settlement practice in violation of § 27-303 or delayed or denied payment of amounts due without just cause in violation of § 4-113, or otherwise violated the Insurance Article.

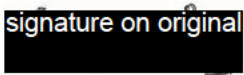
FINAL ORDER

IT IS HEREBY ORDERED that the determination issued by the Maryland Insurance Administration is **AFFIRMED**; and it is further

ORDERED that the records and publications of the Maryland Insurance Administration reflect this decision.

It is so **ORDERED** this 19th day of September, 2023.

KATHLEEN A. BIRRANE
Insurance Commissioner

signature on original


Erica J. Bailey
Associate Commissioner
Office of Hearings