IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

DENNIS ARMON, SR.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	Case No. 1016-CV38265
UNITED FINANCIAL CASUALTY	)	
COMPANY d/b/a	)	Division No. 2
PROGRESSIVE INSURANCE	)	
COMPANY,	)	
	)	
Defendant.	)	

PLAINTIFF'S REPLY TO DEFENDANT'S SUGGESTIONS IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendant's Suggestions in Opposition to Plaintiff's Motion for Summary Judgment ("Def. Sugg.") is an almost verbatim combination of its Motion for Summary Judgment ("Def. MSJ") and its Reply to Plaintiff's Suggestions in Opposition to Def. MSJ ("Def. Reply"). As Plaintiff's Suggestions in Opposition to Def. MSJ wholly responded to the arguments raised in Def. MSJ and re-raised in Def. Sugg., plaintiff will focus on the issues first raised in Def. Reply.

I. Missouri's Stated Value Statute Applies to Progressive's Missouri Commercial Auto Policy

In its Suggestions in Opposition to Plaintiff's Motion for Summary Judgment ("Def. Sugg."), Defendant United Financial Casualty Company d/b/a Progressive Insurance Company ("Progressive") insists that Missouri's valued policy statute, RSMo § 379.160, does not apply where losses are caused other than by fire. Def. Sugg. at pp. 7-8. Defendant is wrong.

A. The Plain Language of § 379.160 Supports Plaintiff's Argument

By its plain language, Missouri's valued policy statute applies to "all suits brought upon *policies of insurance against loss or damage by fire* hereafter issued or renewed." Mo. Ann. Stat.

§ 379.160(3) (emphasis added). The phrase "against loss or damage by fire" as used in the statute necessarily modifies "policies of insurance," rather than "suits brought." Indeed, there is "logical inconsistency in contending that the same property covered by the same policy has a fixed value if totally destroyed by fire and a different value if totally destroyed by wind" or by collision. *See Huth v. Gen. Acc. & Life Assur. Corp., Ltd.*, 536 S.W.2d 177, 180 (Mo. Ct. App. 1976). Since Plaintiff has brought suit upon a policy that insured against loss or damage by fire, section 379.160(3) unquestionably applies.

B. The Cases Cited by Defendant do not Stand for the Propositions for which They are Cited

As noted in Plaintiff's Response to Defendant's Motion for Summary Judgment, Defendant has not cited a single Missouri case in support of its assertion that Missouri's valued policy statute does not apply unless fire was the peril causing the total loss. Defendant cites *Cox v. Home Ins. Co. of New York*, 19 S.W.2d 297 (Mo. Ct. App. 1929) rev'd, 331 Mo. 10, 52 S.W.2d 872 (1932), *Nalley v. Home Ins. Co.*, 157 S.W. 769 (Mo. 1913), *Duckworth v. U. S. Fid. & Guar. Co.*, 452 S.W.2d 280, 287 (Mo. Ct. App. 1970), and *Riccardi v. U. S. Fid. & Guar. Co.*, 434 S.W.2d 737, 743 (Mo. Ct. App. 1968), as having established that Missouri's valued policy statutes are applicable only to losses caused by fire. *See* Def. Sugg. at pp. 5-9. In each of the cases cited by Progressive, the policy at issue insured (1) only against losses or damages caused by a peril *other than fire* or (2) the losses were *caused by fire*, relieving the court of having to decide whether the statute applies. None of the cases cited by defendant are of assistance to Progressive.

Defendant also cites to *Gorman v. Farm Bureau Town & Country Ins. Co.*, 977 S.W.2d 519 (Mo. App. W.D. 1998), in support of its assertion that in suits seeking application of

Missouri's valued policy statutes, one of the essential elements that must be proven by the plaintiff is that the covered property *was damaged by fire*. *See* Def. Sugg. at p. 10. However, neither *Gorman* nor MAI 31.09, which is cited there, impose such a requirement. *Gorman*, which involved the loss of property by fire, and not by causes other than fire, the court stated the following:

> To recover under the policy of insurance for loss by fire, the respondents were required to prove that: (1) the "[appellant] issued its policy to [the respondents] on [the house] covering loss due to [fire]"; (2) "such property was damaged by [fire]"; and, (3) "the policy was in force on the date of such loss.

Gorman, 977 S.W.2d at 520 (citing MAI 31.09). Because the respondents in *Gorman* alleged that the loss was caused by *fire*, respondents were required to prove that the loss was, in fact, caused by fire. Had respondents alleged that the loss was caused by some other applicable coverage, such as by collision, respondents would have had to prove that the loss was caused by collision. Indeed, MAI 31.09 says exactly that:

> 31.09 [1978 New] Insurance Policy on Property
>
> Your verdict must be for plaintiff if you believe:
>
> First, defendant issued its policy to plaintiff on *(here describe property)* covering loss due to *(here describe applicable coverage, e.g., fire, collision, or windstorm)*, and
>
> Second, such property was damaged by *(here insert applicable coverage)*, and
>
> Third, the policy was in force on the date of such loss.
>
> * [unless you believe plaintiff is not entitled to recover by reason of Instruction Number *(here insert number of affirmative defense instruction)*].

Mo. Approved Jury Instr. (Civil) 31.09 (7th ed) (underline added for emphasis). Thus, rather than supporting the strained interpretation of Missouri law being offered by Progressive, MAI

31.09 actually supports the more reasoned interpretation offered by Plaintiff on behalf of the class.

Finally, Defendant cites and attaches a federal court case that rejected application of Missouri's valued policy statutes in the event of a loss other than by fire. *See Garvin v. Acuity*, 2012 WL 5197223. While observing that Missouri appellate courts have stated that Missouri's valued policy statutes might apply to losses other than those caused by fire, the district court, relying on a case from the Eighth Circuit Court of Appeals interpreting another statute altogether, predicted that the Missouri Supreme Court would rule that Missouri's valued policy statutes do not apply to a policy providing fire coverage where the loss is caused other than by fire. *Id.* In arriving at this conclusion, the district court acknowledged, but otherwise ignored, the contrary conclusion arrived at by Missouri's court of appeals. Unlike federal judges who are free to ignore the holdings of a state's intermediate appellate court in favor of a "prediction" of how the state's court of last resort would rule the question, this court is bound by the decisions of the Missouri Court of Appeals, which, as discussed by plaintiff in his briefings to this Court, clearly uphold the proposition that § 379.160 applies to Progressive's Commercial Auto Policy.

C. Missouri Court Decisions have Correctly Interpreted the Public Policy of § 379.160 and Plaintiff Asks this Court to Adhere to that Policy

In *Huth*, the Missouri court of appeals reasoned as follows:

> While we have found no case in this state which squarely rules that this provision applies to a policy providing fire coverage where the loss is other than by fire, the statutory language would warrant that conclusion. The policy here was one which covered against loss by fire, as well as any other form of loss. It is certainly arguable that the words 'against loss or damage by fire' modifies 'policies of insurance' rather than 'suits brought,' particularly when the later words 'property insured thereby' are considered. And, there is a certain logical inconsistency in contending that the same property covered by the same policy has a fixed value if totally destroyed by fire and a different value if totally destroyed by wind or lost by burglary.

Huth, 536 S.W.2d at 180. Thus, although the court in *Huth* ultimately determined that it need not resolve the question of statutory interpretation, it reasoned that logical consistency would not support the interpretation suggested by Progressive in this case; nor does the "wise and wholesome" purpose of the policy.

As the Supreme Court of Missouri observed in *Daggs*, the manifest purpose of the valued policy statute is "to prevent insurance companies from taking reckless risks in order to obtain large premiums by advising them in advance that they would be held to the value agreed upon when the insurance was written." *Daggs v. Orient Ins. Co. of Hartford, Conn.*, 136 Mo. 382 (1896). By insisting that the Court interpret the statute to apply only to losses caused by fire, Progressive is requesting that it be permitted to promise to the assured in their Missouri policies a delusion and a snare. *See Havens v. Germania Fire Ins. Co.*, 123 Mo. 403, 27 S.W. 718, 721 (1894). In the simplest terms, Progressive is seeking permission to agree with its insured to a fixed value of their property, receive a premium for such amount, and then to deny the insured, in the event of a total loss, that the property was ever worth the amount it agreed to and upon which it received a premium. No Missouri court has agreed to give insurers in the State of Missouri this permission and nor should this Court be the first to do so.

II. Progressive's Missouri Commercial Auto Policy is, by its Own Terms, a Valued Policy

As much as logic and statutory interpretation require application of RSMo § 379.160(3) to Progressive's Missouri Commercial Auto Policy, it is not necessary for this Court to resolve the question on the basis of statutory interpretation, because the same result is reached as a matter of contract interpretation. Progressive's Missouri Commercial Auto Policy is, by contract, a valued policy. Indeed, in this case, there is no disputing that Progressive and the insured agreed

upon a specific value for each auto upon which premiums were based. Not only that, the Court need not look to extrinsic evidence in order to determine that within the four corners of the policy it is clearly expressed that both Progressive and the insured have arrived at an agreed upon value for each insured auto. Thus, having fixed the amount of each insured auto, and having received a premium for such amount, Progressive is estopped from denying the valuation stated in the policy. *Gamel,* 463 S.W.2d at 593.

This is true and is supported by *Huth* and *Grantham*, despite defendant's contention otherwise. Progressive draws three distinctions between these cases and the instant circumstances: (1) Progressive's policy states a "Limit of Liability" and not an "amount of insurance"; (2) Progressive's policy had no modifying attachments; and (3) the "Stated Value" of coverage was only a factor of the premium charged and not a percentage of the insured amount.

Progressive's first contention misreads *Huth*. The Court in *Huth* looked to the *scheduling* of items covered and stated that "[t]he policies do not simply provide a grand total of indemnity against which a loss for actual value of any of the items covered could by sought, but a specified limited amount for each weapon." *Huth*, 536 S.W.2d at 181. The Progressive "Auto coverage schedules" issued to plaintiff under Progressive's Missouri Commercial Auto Policy is the same as the schedules at issue in *Huth*.

Progressive's second contention that *Huth* and *Grantham* are distinguishable because Progressive's policy had no modifying attachments similarly misses the rationale of these decisions. The Court in *Huth* makes the statement that "[t]he provision of the attachment deletes any reference to actual cash value referred to in the basic policy and indicates to us that the company has agreed to pay the full amount of the insured value …" immediately after stating that terms such as "insured value" and "valued at" are indicative of valued policies and "are not

equivalent to the term 'maximum value' found in open policies." *Id.* The Court logic indicates that it looked to the entire policy to determine if a policy was intended as a valued policy or not and here, as argued at length in plaintiff's briefs to this Court, the intention of the parties was clearly to create a valued policy contract.

Progressive's final contention is that the "Stated Value" was only one of several factors used in determining the premium amounts. Although this may be true, it is a distinction without a difference. *Huth* and *Grantham* make clear that the use of the "Stated Value" in determining premiums is indicative of an intention on the part of the insurer to create a valued policy. That other factors may have been considered by Progressive is irrelevant. This is especially true when one considers that the "Stated Value" in this case was the predominate factor used to determine premiums. *See*, generally, deposition of Michael Miller.

III. If Progressive's Missouri Commercial Auto Policy is Not, on its Face a Valued Policy, it is Ambiguous and Consequently, a Valued Policy

Although Plaintiff maintains that the policy is unambiguously a valued policy as evidenced by the intent of the parties, the policy also consists of an ambiguity that, construed against the insurer, renders the policy a valued policy. In other words, while there is no question that the intent of the parties, as evidenced by the policy, was to create a valued policy, there is also an ambiguity within the policy that renders the policy a valued policy. Although Progressive feigns dismay at the idea that the policy can be unambiguously a valued policy while simultaneously containing an ambiguous term, there is nothing illogical or inconsistent in Plaintiff's position. It is quite clear that the policy, on the whole, reflects the intent of Progressive to create a valued policy. It is also quite clear that within the policy, there exists an ambiguity as to the meaning of "actual cash value."

At the outset, Progressive has misinterpreted Plaintiff's contention. The last sentence of the **"LIMIT OF LIABILITY"** section of the policy is not ambiguous. Rather, it is evidence that Progressive intended the "value of the insured auto" to be equivalent to the "Limit of Liability" and the "Stated Amount." These terms meaning the same thing renders the policy a valued policy. The term "actual cash value," on the other hand, *is* ambiguous.

Progressive insists that because the policy states: "the actual cash value is determined by the market value, age and condition of the auto at the time the loss occurs," the phrase is necessarily unambiguous. Def. Sugg. at p. 13. Defendant is simply wrong. Progressive uses the same language—"value", "age", "condition", etc.,—when instructing insureds on declaring a "stated amount" for each insured auto. Moreover, Progressive's policy is frequently renewed so that, at the time a total loss is suffered, a "stated amount" was agreed to by Progressive and the insured only days, weeks, or months prior. Thus, a consistent and arguably more logical interpretation of Progressive's policy is that, in the event of a total loss, Progressive agrees to pay the "stated amount" as shown on the declarations page in effect at the time the loss occurs, which amount was determined by the market value, age and condition of the auto. Plaintiffs contend that an ordinary person of average understanding would conclude that "actual cash value" means the "stated amount" in effect on the date of the total loss. Plaintiff's assertion is bolstered by the declarations page which makes no mention of "actual cash value." This"compel[s] the inescapable conclusion that reading the policy as a whole creates an ambiguity." *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 133 (Mo. 2007) (internal quotation omitted).

Progressive's insistence that the Court focus solely on the limit of liability language as reflected in the base policy is "inconsistent with well-settled Missouri law requiring a court not to interpret policy provisions in isolation but rather to evaluate a policy as a whole." *Id.* As was

held in *Lutsky v. Blue Cross Hosp. Serv., Inc.*, 695 S.W.2d 870, 875 (Mo. banc 1985), "[i]f a contract promises something at one point and takes it away at another, there is an ambiguity."

IV. Progressive's Missouri Commercial Auto Policy is, as a Matter of Law, a Valued Policy, under the Objectively Reasonable Expectations Doctrine

Progressive decries the reasonable expectations doctrine as espoused in *Estrin Construction Co. v. Aetna Casualty & Surety Co.*, 612 S.W.2d 413 (Mo. App. W.D. 1981). Defendant insists that Missouri courts have overruled *Estrin* to the extent that they will apply the reasonable expectations doctrine only in cases of an ambiguity. Def. Sugg. at pp. 17-18. One need only look to the cases cited by Progressive to see that Defendant is wrong. In those cases, the finding of an ambiguity is the result of the application of the reasonable expectations doctrine, not as defendant suggests, a prerequisite to its application.

For example, in *Seeck*, although the Supreme Court stated that "[a]bsent an ambiguity, an insurance policy must be enforced according to its terms," the Court nevertheless applied the reasonable expectations doctrine *to find an ambiguity. Seeck*, 212 S.W.3d at 132 ("[each] clause must be construed in determining whether the policy would be interpreted by a person of average understanding to provide coverage."). Indeed, the Court cited approvingly to *Ware v. Geico General Ins. Co.*, 84 S.W.3d 99, 102–03 (Mo.App. E.D.2002), which concluded that an ambiguity existed in an auto insurance policy because "[a] reasonable layperson in the position of Appellants may have understood the [policy] to provide coverage [...]" *Seeck*, 212 S.W.3d at 133 (citing *Ware*, 84 S.W.3d at 102–03). In *Ware*, "[t]his compelled the inescapable conclusion that reading the policy as a whole *creates an ambiguity*." *Ware*, 84 S.W.3d at 103 (emphasis added).

The Missouri Supreme Court as well as the court in *Ware* applied the reasonable expectations doctrine to determine whether an ambiguity exists. *Id. See also*, *Kastendieck v. Millers Mut. Ins. Co. of Alton, Ill.*, 946 S.W.2d 35, 39 (Mo. Ct. App. 1997) ("When determining whether the language used in the policy is ambiguous, we test the words in light of the meaning which would normally be understood by the layperson who bought and paid for the policy."). This, of course, is entirely consistent with *Estrin* and, to the extent it is inconsistent with *Rodriguez v. Gen. Acc. Ins. Co. of Am.*, 808 S.W.2d 379, 382 (Mo. 1991) and its progeny, *Seeck* prevails. Accordingly, it is true only in non-adhesion insurance contracts that the court not take into account the reasonable expectations of the reasonable layperson in determining the meaning of the policy.

V. Conclusion

As defendant's argument against plaintiff's Motion for Summary Judgment is based *solely* on Def. MSJ and Def. Reply and plaintiff has demonstrated that all of these arguments are unfounded, Defendant's Motion for Summary Judgment must be denied. More to the point, as defendant has not raised a single novel argument in response to plaintiff's Motion for Summary Judgment and plaintiff has rebutted the arguments of Def. MSJ and Def. Reply, an Order granting plaintiff's Motion for Summary Judgment must be entered.

THE MEYERS LAW FIRM, LC

By: _____

Martin M. Meyers MO #29524
mmeyers@meyerslaw.com
Kevin A. Jones MO #62096
kjones@meyerslaw.com
Leonard A. Stephens MO #64183
lstephens@meyerslaw.com
503 One Main Plaza
4435 Main Street
Kansas City, MO 64111
(816) 444-8500
(816) 444-8508 *facsimile*

THE KLAMANN LAW FIRM, PA
John M. Klamann MO #29335
jklamann@klamannlaw.com
Andrew Schermerhorn MO #62101
aschermerhorn@klamannlaw.com
929 Walnut Street, Suite 800
Kansas City, MO 64106
(816) 421-2626
(816) 421-8686 *facsimile*

ATTORNEYS FOR PLAINTIFF
AND THE PUTATIVE CLASS

CERTIFICATE OF SERVICE

A true and accurate copy of the above and foregoing was e-mailed this 25th day of March, 2013 to:

Brian C. Fries, Esq.
bfries@lathropgage.com
James Moloney, Esq.
jmoloney@lathropgage.com
Rachel E. Stephens, Esq.
rstephens@lathropgage.com
Lathrop & Gage, LC
2345 Grand Blvd.
Suite 2200
Kansas City, Missouri 64108-2618

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