IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE

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DONALD ARMON, SR.,	)	
	)	
Plaintiff,	)	
	)	Case No. 1016-CV38265
vs.	)	
	)	
UNITED FINANCIAL CAUSALTY COMPANY d/b/a PROGRESSIVE INSURANCE COMPANY,	)	
	)	
Defendant.	)	

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

Plaintiff, by and through his attorneys, submits the following in opposition to Defendant's Motion for Summary Judgment:

INTRODUCTION

This case is brought by Dennis Armon, Sr., on behalf himself and others similarly situated against United Financial Casualty Company d/b/a Progressive Insurance Company (hereinafter "Progressive").[1] The facts of Plaintiff's case are simple: Mr. Armon went to Progressive to purchase commercial auto insurance; Mr. Armon was required to state the value of the vehicles he wished to insure and he did so; Progressive agreed to the values declared by Mr. Armon and charged Mr. Armon a premium based on each vehicle's stated amount (each a "Stated Amount"); Mr. Armon suffered the total loss of one of the vehicles insured by Progressive for a Stated Amount; and, after the loss, Progressive denied that the vehicle was worth the Stated Amount.

[1] Plaintiff conceded to Defendant's Motion to Dismiss Dennis Lagares as a named plaintiff and class representative.

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In support of its Motion for Summary Judgment, Defendant relies almost exclusively on the argument that its Missouri Commercial Auto Policy is unambiguous. Defendant is wrong. Progressive's policy is patently ambiguous with regards to the amount that will be paid to insureds in the event of a total loss, and, being that it is an adhesion insurance contract, the ambiguity must be resolved in favor of the insureds, requiring that Progressive pay to all insureds, in the event of a total loss, the Stated Amount. *See* Part C, infra. Not only that, Plaintiff submits that the for the following additional reasons, summary judgment should cannot be entered in favor of progressive: (1) Progressive's Missouri Commercial Auto Policy insures against loss or damage by fire and is therefore a stated value policy pursuant to section 379.160, Mo.Ann.Stat., which prohibits an insurer from denying that the value of the Plaintiff's property is equal to the Stated Amount; (2) Progressive's Missouri Commercial Auto Policy is, by its own terms, a valued policy, requiring that Progressive pay, in the event of a total loss, the Stated Amount; and (3) Progressive's Missouri Commercial Auto Policy must be construed so as to protect the reasonable expectations of all insureds, thus requiring that Progressive pay to all insureds, in the event of a total loss, the Stated Amount.

By whichever route the Court takes, the end result is the same—in the event of a total loss, Progressive must pay the Stated Amount. Accordingly, Plaintiff, on behalf of himself and all others similarly situated, requests that the Court deny Defendant's Motion for Summary Judgment.

ARGUMENT

I. Progressive's Missouri Commercial Auto Policy is a Stated Value Policy.

First, Progressive's Missouri Commercial Auto Policy insures against loss or damage by fire and is therefore a stated value policy pursuant to section 379.160, Mo.Ann.Stat. Second,

even if Missouri's valued policy statute did not apply, Progressive intended that is Missouri Commercial Auto Policy be a valued policy. Third and finally, even if Progressive did not intend that its Missouri Commercial Auto Policy be a valued policy, the ambiguity created by conflicting valuation clauses should be resolved in favor of Plaintiff, with the result that the actual-cash-value clause be disregarded.

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

In Missouri there are three (3) valued policy statutes: Mo.Ann.Stat. §§ 379.140, 379.145, & 379.160. "Sections 379.140 and 379.145 apply only to real property, and § 379.160 applies to both real and personal property." *Polytech, Inc. v. Affiliated FM Ins. Co.*, 21 F.3d 271, 273 (8th Cir. 1994) (*citing Wells v. Missouri Property Ins. Placement Facility,* 653 S.W.2d 207, 210 (Mo.1983) (en banc); *Duckworth v. United States Fidelity & Guar. Co.,* 452 S.W.2d 280, 282–85 (Mo.Ct.App.1970)). "When any of these valued policy statutes apply, the insurer is estopped from denying that the value of the insured property at the time the policy was written is equal to the amount of insurance for which the policy was written. *Polytech, Inc.*, 21 F.3d at 273; *Wells,* 653 S.W.2d at 210.

Section 379.160(3), RSMo, provides in relevant part:

> that in all suits brought upon policies of insurance against loss or damage by fire hereafter issued or renewed, the defendant shall not be permitted to deny that the property insured thereby was worth at the time of the issuing of the policy the full amount insured therein on said property covering both real and personal property;
> . . .

Mo. Ann. Stat. § 379.160(3).

In *Gamel v. Continental Insurance Co.,* 463 S.W.2d 590 (Mo.App.1971), the court reviewed the history and purpose behind the valued policy statutes and noted:

> Section 379.140, V.A.M.S., was first enacted in 1879. It was construed and held constitutional in *Daggs v. Orient Ins. Co.,* 136 Mo. 382, 38 S.W. 85, where at l.c. the court points out the purpose of the 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 policy was issued; that while *no company is required to insure property without first examining the premises*—and may even refuse full coverage thereafter—after having the *opportunity to inspect,* fixing the amount of the risk, and receiving the premium for such amount it was estopped from denying the valuation stated in the policy; that the purpose of the act was wise and wholesome but, if not, its change was for the legislative not judicial authority; and that such valued policies were in use as a result of contract long before enactment of statutes of this nature. The court then held that under such statutes the face value of the policy '... was conclusive, both at law and in equity, save in cases of fraud.'

Id. at 593 (emphasis in original). "In a valued policy, the value of the property insured is *agreed* upon by the parties. If a total loss of the insured property occurs, then the insurance company pays the stipulated value; the actual value is irrelevant." *Polytech, Inc. v. Affiliated FM Ins. Co.*, 21 F.3d 271, 273 (8th Cir. 1994) (emphasis in the original) (*citing Clark v. Aetna Cas. & Sur. Co.,* 778 F.2d 242, 247 (5th Cir.1985); *see also Runny Meade Estates, Inc. v. Datapage Technologies Int'l, Inc.*, 926 S.W.2d 167, 170 (Mo. Ct. App. 1996) ("Missouri is a valued policy state in which the value of the property insured is agreed upon by the parties. If a total loss of the insured property occurs, then the insurance company is not permitted to deny that the insured property was worth, at the time the policy was issued, the full amount for which it was insured." (internal citations omitted)). "The purpose of the valued policy statute is to place upon the insurers the burden and responsibility for an evaluation of the insured's interest and of the property insured at the date of the insurance contract." *DeWitt v. Am. Family Mut. Ins. Co.*, 667 S.W.2d 700, 707-08 (Mo. 1984).

In its Suggestions in Support of Defendant's Motion for Summary Judgment, Progressive argues that Missouri's valued policy statute applies only to *total losses by fire.* (*See* Defendant's Suggestions at pg. 9). Defendant is wrong. 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.

Indeed, not one of the Missouri cases cited by Defendant in support of its assertion that Missouri valued policy statutes do not apply unless fire was the peril causing the total loss, actually stand for the proposition being offered by Progressive. For example, *Cox v. Home Ins. Co. of New York*, is cited by Defendant as having established that Missouri's valued policy statutes are applicable only to losses caused by fire. (*See* Defendant's Suggestions at pg. 9). *Cox*, however, says nothing of the applicability of Missouri's valued policy statutes in suits brought upon policies of insurance that protect against loss or damage by fire along with other perils, where the losses actually sustained were caused by a peril other than fire. In *Cox*, itself, the policy at issueinsured against losses or damages caused only by the peril of tornado. 19 S.W.2d 297 (Mo. Ct. App. 1929) rev'd, 331 Mo. 10, 52 S.W.2d 872 (1932). Nothing in *Cox* suggests that if fire had been an insured peril, the valued policy statutes would not apply to a loss sustained other than by fire. In fact, contrary to position taken by Progressive in this case, in *Cox*, the Missouri Supreme Court opined that "[i]t is no injustice to an insurance company to have to pay, in case of loss, the amount of insurance for which it has collected premium..." In

any event, since *Cox* involved a suit upon a policy that *did not* insure against loss or damage by fire, Missouri's valued policy statute, by its plain language, did not apply.

Nalley v. Home Ins. Co., 157 S.W. 769 (Mo. 1913), also cited by Defendant, likewise involved a suit upon a policy insuring *only* against loss or damage by *tornado*. 157 S.W. at 774. As in *Cox,* because the tornado policy did not insure against loss or damage caused by fire, Missouri's value policy statutes were inapplicable. *Id.* In concluding that the valued policy statutes do not apply to tornado insurance policies, the court in *Nalley* noted, as Defendant points out, that "[s]tatutes which could be made applicable to one of sundry classes could not be made applicable to each and all of them. In such case the law, if intended to cover all, must state so explicitly or by an inference so strong as to leave no doubt of the legislative intent." *Id.* By its plain language, section 379.160(3), RSMo, explicitly applies in all suits brought upon the class of policies that insure against loss or damage by fire. This being the case, there is no question that the Progressive policy at issue, which insures against, *inter alia*, losses or damage caused by fire, belongs to class of policies covered by Missouri's valued policy statutes.

Defendant also cites *Duckworth v. U. S. Fid. & Guar. Co.*, 452 S.W.2d 280, 287 (Mo. Ct. App. 1970), for the proposition that Missouri's valued policy statutes apply only in circumstances where the losses are caused by fire. (*See* Defendant's Suggestions at pg. 9). Like *Cox* and *Nalley*, *Duckworth* says nothing of the applicability of Missouri's valued policy statutes in suits brought upon policies of insurance against loss or damage by fire where the loss is caused by a peril other than fire. The same is true of *Riccardi v. U. S. Fid. & Guar. Co.*, 434 S.W.2d 737, 743 (Mo. Ct. App. 1968), also cited by Defendant. In both *Duckworth* and *Riccardi*, the losses were caused by fire, so that the courts were not required to passon whether Missouri's valued policy statutes are applicable in suits brought upon policies of insurance

against loss or damage by fire where the loss is caused by a peril other than fire. Thus, these cases are of no more assistance to Progressive than are *Nalley* and *Cox*.

Defendant cites *Gorman v. Farm Bureau Town & Country Ins. Co.*, 977 S.W.2d 519 (Mo. App. W.D. 1998), and to MAI 31.09, which is cited to therein, 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* Defendant's Suggestions at pg. 10). However, neither *Gorman* nor MAI 31.09 impose such a requirement. *Gorman*, which involved the loss of property by fire, and not by causes other than fire, states 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.

At page 11 of its brief, Defendant cites a federal court case that rejected application of Missouri's valued policy statutes to losses 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 situations other than losses due to 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.

In *Huth v. Gen. Acc. & Life Assur. Corp., Ltd.*, for example, 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.

536 S.W.2d 177, 180 (Mo. Ct. App. 1976). 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; nor does the "wise and wholesome" purpose of the policy.

As the Supreme Court of Missouri observed in *Daggs*, the manifest purpose of the stated value 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." 136 Mo. 382. By insisting that the Court interpret the statute to apply only to losses occurring as a result of 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 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.

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

Although logic and statutory interpretation require application of section 379.160(3), RSMo, 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 a contract

and, as with any contract, the Court must look to the intent of the parties as expressed in that contract. *Huth*, 536 S.W.2d at 180-81. The Progressive policy at issue in this case is unambiguously a "valued policy" contract.

> Valued policies are not created alone by statute. They can also be created by contract.
>
> > Long prior to the enactment of this statute "valued policies" were in use as the result of contracts. By a "valued policy" a valuation was fixed in advance by way of liquidated damages to avoid making a valuation after the loss had occurred. Such agreements have been uniformly upheld against the claim that they were wagering contracts; the construction put upon a "valued policy" being that the sum agreed upon was conclusive, both at law and in equity, save in cases of fraud.

Daggs v. Orient Ins. Co. of Hartford, Conn., 38 S.W. at 87 (internal citation omitted). Indeed, in *Huth*, the reason court did not ultimately resolve the question of statutory interpretation is because it found that the policies at issue were themselves valued policies. *Id.* The Court's reasoning in this regard is as applicable in this case as it was in *Huth*, and therefore, merits quoting at length:

> 'In a valued policy the value of the subject matter is agreed upon beforehand. If there is anything in the policy which clearly indicates an intention on the part of the insurer to value the risk and loss, in whatever words expressed, the policy is valued.' *American Ins. Co. v. Gentile Bros. Co.*, 109 F.2d 732 (5 Cir. 1940) l.c. 735, cert. den. 310 U.S. 633, 60 S.Ct. 1075, 84 L.Ed. 1403.
>
> We find several indications of intention to value the risk here. First: the scheduling of the items covered with an 'amount of insurance' listed for each. The sum of the parts is exactly equal to the total insurance provided on the face of the policy. The policies do not simply provide a grand total of indemnity against which a loss for actual value of any of the items covered could be sought, but a specified limited amount for each weapon. We are confident that neither party would contend that a loss of less than all the insured guns would allow a recovery up to the face amount of the policy upon a showing that the actual cash value exceeded the scheduled amount for the guns lost. *See Ball v. Aetna Casualty & Surety Co.*, 58 F.R.D. 362 (E.D.Ky.1973). Second: the premium charged is based upon a percentage of the total insurance provided. This has been held to be indicative of a valued policy. *See Ball v. Aetna Casualty & Surety Co.*, supra; *American Ins. Co. v. Gentile Bros. Co.*, supra; *Palatine Ins. Co. v. E. K. Hardison Seed Co.*, 42 Tenn.App. 388, 303 S.W.2d 742 (1957). Third: the use of the term 'amount of insurance' listed in the schedule indicates a specific value. Terms such

> as 'insured value' have been equated to language such as 'valued at' and are not equivalent to the term 'maximum value' found in open policies. *See Gerhard v. Boston Ins. Co.*, 99 F.Supp. 247 (D.C.Pa.1951). Fourth: the insuring clause of the attachment (which supersedes the basis policy) deletes the reference in the basic policy 'to an amount not exceeding the amount(s) specified.' The attachment reads: 'This policy insures property of the Insured as described or scheduled below' thereby referring to the dollar amounts set forth in the schedule. Fifth: the obligation of the insurer under the attachment is to make it 'liable for the full repair and replacement cost of the property insured without deduction for depreciation but in no event to exceed the amount of insurance applying thereto.' The 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 of the guns or the replacement cost whichever is less. Such an undertaking is not inconsistent with the nature of the property insured. Guns, whether collector's or shooting, are frequently unique items, sometimes specially crafted or modified and difficult to duplicate. They do not lend themselves to valuation in the same sence (sic) that other species of property do. This is apparent from the use of a special gun form which varies considerably from the basic inland floater policy. If the guns are capable of repair or in this case replacement, the insurance company may invoke that option, otherwise it agrees to pay the insured the amount the insurance company has agreed is the value and for which it has charged a premium.

Huth, 536 S.W.2d at 180-81.

In this case, the basic policy contract states under the heading, "Limit of Liability," the following:

> 1. The most we will pay for loss to your insured auto is the least of:
>   a. the actual cash value of the stolen or damaged property at the time of the loss;
>   b. the amount necessary to replace the stolen or damaged property with other of like kind and quality:
>   c. the amount necessary to repair the damaged property to its pre-loss physical condition, however if we determine that the insured auto is a total loss, we may, at our option, pay the lesser of the actual cash value, Stated Amount, or the cost to replace, rather than repair the insured auto; or
>   d. the applicable Limit of Liability or Stated Amount of the property as shown on the Declarations Page.
>
> Permanently attached equipment is included in the value of the insured auto, but only to the extent the value of the equipment has been included in the Limit of Liability or Stated Amount shown on the Declarations Page.

(Defedant's Exhibit A-3, pg. 16).

The Declarations Page, titled "Auto coverage schedule," lists the insured autos and, significantly, a "Stated Amount" for each auto; opposite the listing for the "1992 International," the figure $28,000 was listed as the "Stated Amount." On a separate page accompanying the "Auto coverage schedule," a chart titled "Outline of coverage" includes the headings: "Description," "Limits," and Premium." Opposite "Collision," the chart describes the "limit" as "Limit of liability less deductible." On neither the declarations page nor its cover is there any reference to actual cash value. (*See* Deposition of Patricia Corwin, 91:18-22). Moreover, the premiums charged for each auto are based upon the each autos corresponding stated amount. Thus, even more so here than in *Huth*, there is every indication in the policy of an intention on the part of the insurer, Progressive, to value the risk and loss. *See Huth*, 536 S.W.2d at 180.

Indeed, in the case at bar, the Court need not speculate whether the parties intended a stated value policy; there is no disputing that Progressive and the insured agreed upon a specific value for each auto upon which premiums were based. (*See* Deposition of Michael Miller, 95:13-20). The basic policy, itself, under the heading "Limit of Liability," states that the value of equipment attached to the commercial auto is included *in the value of the insured auto . . . to the extent the value of the equipment has been included in the Limit of Liability or Stated Amount shown on the Declarations Page.* (Defedant's Exhibit A-3, pg. 16). Having fixed the amount of each insured auto, and receiving the premium for such amount, Progressive is estopped from denying the valuation stated in the policy. *Gamel,* 463 S.W.2d at 593.

The case at bar is also similar to *Grantham v. Shelter Mutual Ins. Co.*, 721 S.W.2d 242 (Mo. App. W.D. 1986), in which the Missouri Court of Appeals for the Western District relied

upon *Huth* in finding that the insurance policy at issue was a stated value policy.[2] In *Grantham*, the plaintiffs had purchased an insurance policy which contained the following two paragraphs:

> 10. VALUATION. The Company shall not be liable beyond the actual cash value of the property at the time any loss occurs. The loss shall be ascertained or estimated according to such actual cash value with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost to repair or replace the same with material of like kind and quality.
>
> ---
>
> 12. COMPANY'S OPTIONS. It shall be optional with the Company to take all, or any part, of the property at the agreed or appraised value, or to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention to do so within sixty (60) days after the receipt of the proof of loss herein required.

Grantham, 721 S.W.2d at 243-44. Attached to the basic policy was a sheet entitled "Property Covered." *Id.* at 243. The "Property Covered" sheet listed the property insured and the "Amount of Insurance" for each. *Id.* Listed next to the silverware was the figure $11,714.00. *Id.* The sheet also stated: "This Company shall not be liable for more than the amount set opposite the respective articles covered hereunder, which amounts are agreed to be the value of said articles for the purpose of this insurance." *Id.* at 244. A second sheet listed the insured property with headings "Item No.," "Description," and "Limit of Liability." *Id.* The silverware was listed as Item No. 2 and under the "Limit of Liability" heading was the figure $11,714.00. *Id.*

After the plaintiff's home was burgled and the silverware stolen, Shelter Insurance sought to limit its liability on the silverware by arguing that it was liable only for the actual cash value of the silverware at the time of the loss, rather than the amount listed on the sheet entitled "Property Covered." *Id.* at 244. Shelter pointed to the valuation language in the basic policy

[2] The parties did not brief the question of whether the policy was governed by § 379.160(3) RSMo 1978, and therefore the court did not consider the question. *Grantham v. Shelter Mut. Ins. Co.*, 721 S.W.2d 242, 244, fn. 1 (Mo. Ct. App. 1986).

which provided that it "shall not be liable beyond the actual cash value of the property at the time any loss occurs," in arguing that the plain language of the basic policy rendered the policy an "open" policy. *Id.* at 244. The plaintiffs maintained that the value stated in the declaration page opposite the silverware was evidence that the policy was a stated value policy and that Shelter was estopped from denying the value listed. *Id.* at 244. The Court of Appeals sided with the plaintiffs.

Writing for the Court, Judge Turnage held that the case was governed by *Huth,* 536 S.W.2d 177, discussed above, and that, consequently, the policy must be held to be a valued policy. *Id.* at 245. This case is likewise governed by *Huth.* In this case , the Auto coverage schedule lists opposite each insured auto a "Stated Amount" and no reference in made in the Declarations Page to "actual cash value." Consequently, Progressive's Missouri Commercial Auto policy is a valued policy and Progressive is estopped from denying the valuation stated in the policy.

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

In deciding *Grantham*, the Missouri Court of Appeals reasoned that even if the case were not governed by *Huth*, the Shelter insurance policy was nevertheless a valued policy. The Court held that the schedule of covered property which identified the "Limit of Liability" for the silverware as $11,714.00, conflicted with the actual-cash-value language in the basic policy rendering the policy ambiguous. *Id.* Noting that "[a]mbiguities in insurance contracts are properly resolved in favor of the insured," the Court reasoned that the ambiguity created by the conflicting valuations should be resolved in favor of the Granthams, with the result that the actual-cash-value clause would be disregarded. *Id.* (citing *Shelter Mutual Insurance Co. v. Brooks*, 693 S.W.2d 810, 812[2] (Mo. banc 1985)).

Like *Grantham*, this case is governed not only by *Huth*, *supra*, but also by the tenants of contract interpretation. In insurance adhesion contracts, ambiguities are always resolved in favor of the insured. *Shelter Mutual Insurance Co. v. Brooks*, 693 S.W.2d at 812[2]. In this case, just as in *Grantham*, the basic policy purports to limit liability to the lesser of "the actual cash value, Stated Amount, or the cost to replace, rather than repair the insured auto" in the event the auto is un-repairable; or "the applicable Limit of Liability or Stated Amount of the property as shown on the Declarations Page." The phrase "actual cash value," however, is not defined in the policy. (*See* Deposition of Patricia Corwin, 137:25-138:2). The most logically consistent interpretation of the policy is that the actual cash value is equal to the Stated Amount of the insured auto which is equal to the "Limit of Liability." Indeed, the Declarations Page describes the limit of liability in the event of a collision as the "Limit of Liability less deductible," while the basic policy refers to the "value of the insured auto" as the "Limit of Liability or Stated Amount shown on the Declarations Page," while the schedule of insured autos on the Declarations Page refers only to a "Stated Amount." (Defendant's Exhibits A-1 and A-3, pg. 16). Thus, "value of the insured auto," "Limit of Liability" and "Stated Amount," each refers to the same value – the stated amount listed opposite each insured auto in the auto coverage schedule. This interpretation comports not only with logic, but also with the reasonable expectations of the insureds and with the mandate that ambiguities be resolved in favor of the insured.

Consequently, Progressive's Missouri Commercial Auto policy is a valued policy and Progressive is estopped from denying the valuation stated in the policy on the date the policy was either written or renewed. Because Progressive was required to, but refused to pay the amount stated on the declaration page, Progressive breached its contract with Plaintiff and all members

of the class. Summary judgment on this point, if entered at all, must be entered in favor of Plaintiff.

II. If Progressive's Missouri Commercial Auto Policy is not, as a Matter of Law, a Valued Policy, the Objectively Reasonable Expectation of the Parties was that, in the Event of a Total Loss, Progressive Would Pay the Stated Amount.

"The basic purpose of contract law is to protect the reasonable expectations induced by agreements." *Estrin Const. Co., Inc. v. Aetna Cas. & Sur. Co.*, 612 S.W.2d 413, 418 (Mo. Ct. App. 1981). This is especially true when dealing with insurance policies. *Id.* "An insurance policy is a contract of a distinctive species." *Id.* It is also a contract of adhesion. *Id.* Thus, even when assent to the policy rests only on adherence, "the rules of construction subserve to give effect as nearly as possible to the expectations which induced agreement." *Id.* at 419 (citation omitted).

Unlike a negotiated contract, where the words of agreement "describe the terms of the bilateral assent and so when stated unambiguously are sufficient to disclose the reasonable expectations of the parties," in a contract of adhesion, "the terms are imposed by the proponent of the form: they are not expected to be read and even if read, the adherent has choice only to conform." *Id.*

> The printed words of contract alone, therefore, are not enough to disclose the expectations of the parties. The court must look for that purpose to the full circumstances of the transaction whether the written words of contract be ambiguous or unambiguous. Our decisions understand that reality and give effect to the substance over the form of such an agreement.

Id.

Progressive repeatedly states in its Motion that the insurance policy is unambiguous. However, even if the terms of the form policy are unambiguous, that "no more ends inquiry than to have found them ambiguous." *Id.* at 420. "In either case, the law protects the expectations of

agreements, and in a form contract, those expectations do not reside altogether in the words ambiguous or unambiguous but in the total transaction." *Id.*

In the case at bar, Plaintiff maintains that an insured's objectively reasonable expectation, in light of Missouri's valued policy statutes, *Huth* and its progeny, the covenant of good faith and fair dealing, and the form policy itself, is that in the event of a total loss, Progressive would pay the Stated Amount. Plaintiff further maintains that the insured class members' objectively reasonable expectation, arising as it does from statute, case law, an implied covenant of good faith and fair dealing and from the language of the Progressive policy, itself, is such that no reasonable juror could find otherwise. However, if the Court were reluctant to decide that, as a matter of law, Progressive's Missouri Commercial Auto Policy is a valued policy, or, alternatively, that it is not, or that an insured's expectation that s/he would be paid the Stated Amount in the event of a loss was objectively reasonable, then there remains the factual question of what was the objectively reasonable expectation of the party induced by agreement. *Id.* at 425. This factual question, so long as it remains, prevents entry of Summary Judgment.

III. Conclusion.

With the value of the automobile on February 11, 2010, conclusively fixed at $28,000.00, and no diminution on the value thereof allowed in the policy, Progressive must pay to Plaintiff the full Stated Amount. What Progressive cannot do is to issue a policy, collect the premiums, and then argue that the value of insured automobile is less than the coverage it underwrites. *See Schubert v. Auto Owners Ins. Co.*, 649 F.3d 817, 828 (8th Cir. 2011); *G.M. Battery & Boat Co. v. L.K.N. Corp.*, 747 S.W.2d 624, 628 (Mo. 1988)). Accordingly, Plaintiff, on behalf if himself and all others similarly situated, requests that the Court deny Defendant's Motion for Summary Judgment.

Respectfully Submitted,

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ATTORNEYS FOR PLAINTIFF AND THE PUTATIVE CLASS

CERTIFICATE OF SERVICE

A true and accurate copy of the above and foregoing was e-mailed and mailed, via regular U.S. Mail, this ~~18th~~ 19th day of February, 2013 to:

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