

*State of Minnesota, by its
Attorney General, Mike Hatch,*

~~HENNEPIN DISTRICT
COURT ADMINISTRATOR~~

File No. MC 99-3907

Plaintiff,

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER**

vs.

American Family Mutual Insurance Company,

Defendant.

This matter came before the Court for a hearing on September 14, 2000, upon both parties' Motions for Partial Summary Judgment, and the State's Motion to Appoint a Special Master. Assistant Attorney General David Woodward and Assistant Attorney General Alan Gilbert appeared on behalf of the State of Minnesota. Corey J. Ayling, Esq., and Vicki Risollo, Esq., appeared on behalf of Defendant, American Family Mutual Insurance Company (hereinafter American Family).

BACKGROUND AND PROCEDURAL HISTORY

1. Devastating tornadoes, hail and wind storms swept through Minnesota in May and July of 1998, directly causing damage to the homes of consumers who had purchased homeowners' insurance policies from American Family that provide for full replacement cost coverage in the event of storm damages.

2. In settling claims after the storms of 1998, as a matter of practice and policy, Defendant, American Family, offered to pay under the replacement value provisions of its homeowners' policies only in amounts necessary to replace siding or roofing on an insured's home that Defendant maintains has been directly physically damaged by the storm.

3. Minnesota policyholders of American Family complained to the State of Minnesota that American Family's practices in limiting payment under the terms of its homeowners' insurance policies to replacement of only the directly damaged portion of the policyholder's home results in mismatched materials in situations where the siding and/or roofing on the policyholder's home is no longer manufactured or is otherwise unavailable.

4. On March 22, 1999, the State, by its Attorney General, filed a summons and complaint in the above captioned action, alleging that Defendant, American Family, violated Minnesota consumer laws prohibiting false advertising, deceptive trade practices and consumer fraud, and State laws prohibiting unfair or deceptive acts or practices in the business of insurance when offering to settle the 1998 storm damage claims of its insureds. Minn. Stat. {{325F.67, 325D.44, Subd. 1(5), (13), 325F.69, 72A.19, 72A.20, and 72A.201, Subd. 5(8) (1998).

5. On April 4, 2000, the Minnesota Court of Appeals unanimously upheld this Court's ruling that it has subject matter jurisdiction to decide this matter and that the Attorney General has the authority to sue an insurance company for alleged violations of consumer protection laws, including the Unfair Claims Practices Act pursuant to Minn. Stat. {72A.20 and 72A.201. On June 13, 2000, the Minnesota Supreme Court, by Order of Chief Justice Kathleen A. Blatz, denied Defendant's petition for further review.

6. The case is now before this Court upon the parties' cross-motions for partial summary judgment on the question of law concerning the extent of American Family's obligation to pay claims under the replacement value provisions of its homeowners' insurance policies under Minnesota Stat. {72A.201, Subd. 5(8) 1998, and upon the State's motion for appointment of a special master, pursuant to Minn.R.Civ.P. 53.

Based upon all of the pleadings, records and proceedings herein, the arguments of counsel and the parties' memoranda of law, the Court hereby finds and concludes as follows:

FINDINGS OF FACT

1. Mike Hatch is the Attorney General of the State of Minnesota.
2. Defendant, American Family Mutual Insurance Company, is a corporation organized under the laws of Wisconsin, having its principal place of business at 6000 American Parkway, Madison, Wisconsin 53783-0001, and having a regional office located at 6131 Blue Circle Drive, Eden Prairie, Minnesota 55344.
3. Defendant, American Family, transacts, has transacted, and is engaged in the business of insurance in Minnesota, including the advertising and sale of, and processing of claims for coverage under various insurance products, including homeowners' insurance policies. Defendant, American Family, has advertised, offered and sold homeowners' insurance policies to the public in Minnesota.

4. Defendant, American Family, has disseminated to the public in Minnesota advertisements for its homeowners' insurance policies in various media, including radio, television, newspapers, brochures, pamphlets, and other promotional materials provided to the public, as well as through Defendant's internet World Wide Web site and through sales agents.

5. American Family's homeowners' policies provide for full replacement costs, without deduction for depreciation, and insure the policyholder's dwelling for all loss or damage unless the loss is excluded in the policy. Under the "Replacement Cost" section of American Family's policies, American Family undertakes the following obligation:

[W]e will pay the full cost to repair or replace the damaged building without deducting for depreciation, but not exceeding the smallest of...ii. the cost to replace the damaged building with like construction for similar use on the same premises; or iii. the amount actually and necessarily spent for repair or replacement of the damaged building.

See, e.g., Minnesota Homeowner Policy, Gold Star Special Deluxe Form, attached to Plaintiff's complaint, Exhibit 10, pg.8; Minnesota Homeowners Policy, Basic Form 1, pg. 7; Minnesota Homeowners Policy, Broad Form 2, pg. 8; Minnesota Homeowners Policy, Special Form 3, pg.8.

6. American Family's policies also specifically provide for settlement to replace all or part of the damaged property:

Our Settlement Option. In the event of a covered loss, we have the option to: a. make a cash settlement for all or part of the damaged, destroyed or stolen property; or b) pay the cost to repair, rebuild or replace all or the necessary part(s) of the damaged, destroyed or stolen property with like property, as of the time of loss, less an allowance for depreciation when replacement cost coverage doesn't apply.

Exhibit 10, p.9, paragraph 15; Basic Form 1, pg. 8, paragraph 15; Broad Form 2, pg. 8, paragraph 15; Special Form 3, pg. 9, paragraph 15.

7. After the storm damage occurred in 1998, in many instances, materials of like kind and quality necessary to repair damages to the siding or roofing existing on consumers' homes were no longer manufactured or were otherwise unavailable; consequently, materials reasonably matching those on consumers' homes were not available. As a result, consumers have had to incur substantial out-of-pocket costs in order to obtain matching materials or live in mismatched homes.

8. Minn. Stat. {72A.201, Subd. 5(8) (1998) prohibits as an unfair settlement practice:

[E]xcept where limited by policy provisions, settling or offering to settle a claim or part of a claim with an insured under replacement value provisions for less than the sum necessary to replace the damaged items with one of like kind and quality, including all applicable taxes, license and transfer fees. [Emphasis added.]

9. Nothing in American Family's policies limits the insurer's obligation, excludes coverage or otherwise supports American Family's practice of limiting payment under replacement value provisions of its policies to sums necessary to replace only the portion of the policyholder's dwelling that is directly damaged by a covered peril, including a hail or wind storm, where replacement materials that reasonably match (i.e., that are, under the policies' language, "of like construction for similar use" to) the existing materials on the dwelling are no longer manufactured or are otherwise not available.

10. In advertising and selling its homeowners' insurance policies, American Family has not affirmatively disclosed or informed consumers of the material fact that Defendant, as a matter of practice, limits the amount it pays for storm damages to the cost of replacing only those portions of the consumer's home that American Family maintains are directly damaged even if its failure to do so would result in a mismatch.

11. Defendant does not disclose or inform consumers, prior to their purchase of homeowners' insurance policies from Defendant or at any time prior to the consumer's filing of a claim, that Defendant limits the amount that it pays for storm damages to the cost of replacing only those portions of the consumer's home that Defendant maintains are directly damaged, even if repairs result in a mismatch.

12. As a matter of practice and policy, American Family routinely settles claims under its automobile insurance policies and Minnesota law with parts of 'like kind and quality' that match or are painted to match the undamaged parts of the vehicle. At oral argument, American Family explained this discrepancy in its interpretation of 'like kind and quality' between its homeowners and automobile insurance as one strictly of cost.

CONCLUSIONS OF LAW

1. Summary judgment is proper where there is no genuine issue of material fact in dispute and where the determination of the question of law in dispute will resolve the controversy. Minn.R.Civ.Proc. 52.02. In the instant case, both parties, in moving for partial summary judgment for a determination on the question of law as to what Defendant insurer's obligations are under Minn. Stat. {72A.201, Subd. 5(8) for losses incurred by an insured under the replacement value provisions of their homeowner's insurance policy, have conceded that no genuine issue of material fact to the making of such a determination is in dispute.

2. In construing and interpreting the text of an insurance policy, the Court must consider the interaction of the policy clauses, the insured causes of loss and any limitations or exclusions on the insurer's liability for the consequences of an otherwise insured event. Witcher Construction Company v. St. Paul Fire & Marine Insurance Co., 550 NW2d 1 (Minn. App. 1996), *rev. denied* (Minn. 1996). Pursuant to American Family's policies, hail damage to a dwelling is a covered loss with the amount of monetary loss subject to the limitations as set out in the replacement value provisions and the exclusions contained within the different policies.

3. A court is not to read an ambiguity into the plain language of a policy to ensure coverage. Farkas v. Hartford Acc. & Indem., 173 NW2d 21, 24 (Minn.). Instead, the Court must give the terms in a policy their plain, ordinary and popular meaning, Columbia Heights Motors v. Allstate Insurance, 275 NW2d 32, 34 (Minn. 1979) and construe the policy terms in conformance with applicable statutes. When policy language is ambiguous or confusing, it is public policy in Minnesota to extend coverage, rather than restrict it. Hennen v. St. Paul Mercury Insurance, 312 Minn. 131, 136, 250 NW2d 840, 844 (1977). The language in the Defendant's policy regarding replacement value for the repair of covered damages is not ambiguous and not subject to more than one interpretation. Estes v. State Farm & Casualty Co., 358 NW2d 123, 124 (Minn.App.1984); Columbia Heights Motors v. Allstate Insurance, 275 NW2d 32 (Minn.1979). In this case, any confusion as to the amount of a covered loss has resulted from Defendant's argument that their obligations under their policy provisions are met by only paying for new materials to replace the damaged areas of the home, without regard as to whether the new materials match in color, quality, texture or material the original siding or roofing on the home "at the time of the loss". At oral argument, Defendant conceded that pursuant to the same statutory language of "like kind and quality", Defendant repairs damaged automobiles with matching parts, both physically and "cosmetically." Defendant points out that the difference in their interpretation of their obligations under these two subdivisions of Minn. Stat. 72A.201 is based on the greater cost to Defendant to achieve a "matching" result on a damaged home. *Compare* Minn. Stat. 72A.201, Subd. 6 (2) and 72A.201, Subd. 5 (8).

4. Generally, given the discrepancy in the bargaining positions of the insured and insurer, when the meaning of insurance policy language is in dispute, the matter is to be resolved in favor of the insured. State Farm Insurance v. Seefeld, 481 NW2d 62 (Minn. 1992). Here, Defendant was in a position to add an exclusion or limitation in its replacement coverage under its homeowners' policies for what should be the common and easily anticipated event that matching housing materials would no longer be available for repairs over the entire useful life of a dwelling. Defendant's policies contain no such exclusion or limitation. Further, the greater cost to Defendant to achieve a matching result on a home versus an automobile is not a justification to interpret identical language in Minn. Stat. 72A.201 differently.

5. The State, pursuant to Minn.R.Civ.P.53, is also moving to have this matter referred to a referee or 'special master' for settlement of the cases between the insured and the insurer. However, the Rule states that such a referral should occur only in exceptional cases and only if the issues are complicated. In this case, Defendant's homeowners' policies provide an adequate and agreed upon method of dispute resolution when only the amount of loss is at issue. Minnesota Homeowners Policy, Gold Star Special Deluxe Form, Except 10, pg. 7; Minnesota Homeowners Policy, Basic Form 1, pg.6; Minnesota Homeowners Policy, Broad Form 2, pg. 7; and, Minnesota Homeowner's Policy, Special Form 3, pg. 7.

6. Based on the foregoing, there is no genuine issue as to any material fact concerning the legal issue of American Family's obligation to pay claims under replacement value provisions of its homeowner's insurance policies and under Minnesota law. Defendant's practice and policy of limiting the amount paid to settle claims under the replacement value provisions of its homeowner's policies to the cost to repair only the damaged areas, when the repairs result in mismatches in materials because of the unavailability of matching materials, violates the requirement under Minn. Stat. {72A.20, Subd. 5(8) 1988 that replacement materials be of "like kind and quality" and is contrary to its own policy provisions agreeing to replace damaged areas with materials of "like construction for similar use."

THE COURT HEREBY ORDERS:

1. The State is awarded partial summary judgment against American Family Mutual Insurance Company for declaratory relief that American Family's obligation to pay claims under replacement value provisions of its homeowners' insurance policies, based upon American Family's policies and Minn. Stat. {72A.201, Subd. 5(8) (1998):

- (a) requires American Family to pay for full replacement with materials of like kind and quality;
- (b) is not satisfied by the replacement of only those materials that are physically damaged by a storm, if the replacement materials do not or would not reasonably match in terms of color, quality, texture or type of material the existing materials on the policyholders' home; and
- (c) when the materials replacing the physically damaged materials do not or would not reasonably match the existing materials, American Family must also pay the sum necessary to replace the existing materials so there is a reasonable match, except where the mismatch is attributable to the natural weathering of the existing materials.

2. The State's Motion for Appointment of a Special Master is hereby *denied*. Any remaining loss disputes between Defendant and its insureds after compliance with this Order are to be resolved pursuant to homeowner policy provisions.

3. Defendant's Motion for Partial Summary Judgment and for a trial of disputed issues of fact is hereby *denied*.

4. This Order is made without prejudice to the right of either party to present any and all remaining issues to the Court for hearing prior to the entry of final judgment in this matter.

Dated: October 12, 2000

BY THE COURT



Patricia Kerr Karasov
Judge of District Court

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