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R. POSTELL
COMMERCE PROGRAM

IN THE COURT OF COMMON PLEAS
COUNTY OF PHILADELPHIA
CIVIL TRIAL DIVISION

Konrad Kurach, <i>Plaintiff</i>	:	
	:	July Term, 2015
	:	
v.	:	No. 339
	:	
Truck Insurance Exchange <i>Defendant</i>	:	Control Nos. 16021224 & 16010767

ORDER

And now, this 20th day of April, 2017, upon consideration of defendant Truck Insurance Exchange's Motion for Partial Summary Judgment, plaintiff Konrad Kurach's Cross-Motion for Summary Judgment, the respective memoranda of law, reply briefs, and supplemental briefs of both parties, and following oral argument, it is hereby ORDERED and DECREED as follows:

1. Defendant Truck Insurance Exchange's Motion for Partial Summary Judgment is DENIED; and
2. Plaintiff Konrad Kurach's Cross-Motion for Summary Judgment is GRANTED.¹

BY THE COURT


RAMY I. DJERASSI, J.

Kurach Vs Truck Insuran-ORDOP



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¹ Pennsylvania law requires estimated general contractor overhead and profit to be included in "actual cash value" payments when the use of a general contractor is reasonably likely to be necessary to repair the damage to a home. See accompanying Memorandum Opinion.

**IN THE COURT OF COMMON PLEAS
COUNTY OF PHILADELPHIA
CIVIL TRIAL DIVISION**

Konrad Kurach,	:	
<i>Plaintiff</i>	:	July Term, 2015
v.	:	No. 339
Truck Insurance Exchange	:	Control Nos. 16021224 & 16010767
<i>Defendant</i>	:	
Mark Wintersteen, Individually and On behalf of all others similarly situated,	:	
<i>Plaintiff</i>	:	July Term, 2015
v.	:	No. 03543
Truck Insurance Exchange	:	Control Nos. 16010766 & 16020939
<i>Defendant</i>	:	

MEMORANDUM OPINION

Before the Court are cross-motions for summary judgment in two similar putative class actions involving identical “Farmers Next Generation” homeowner’s insurance policies issued by defendant Truck Insurance Exchange (“Truck”). At issue is whether Truck may withhold general contractor overhead and profit from an “actual cash value” settlement, where “actual cash value” is defined expressly in the policy as replacement cost less depreciation, and the use of a general contractor is found to be reasonably likely. For reasons explained here, we grant Plaintiffs’ motions for summary judgment and deny those of defendant.

Plaintiffs Konrad Kurach and Mark Wintersteen both purchased “Farmers Next Generation” homeowners insurance policies issued by Truck to insure houses in Pennsylvania.

(“Policies”). Each policy provides “replacement cost coverage” and includes identical language defining “actual cash value” and describing the sequence by which covered losses are to be paid.

The Farmers Next Generation Policies insure what is called “replacement cost coverage.” Our Superior Court has defined replacement cost insurance coverage as follows:

Replacement cost coverage was devised to remedy the shortfall in coverage which results under a property insurance policy compensating the insured for actual cash value alone. That is, while a standard policy compensating an insured for the actual cash value of damaged or destroyed property makes the insured responsible for bearing the cash difference necessary to replace old property with new property, *replacement cost insurance allows recovery for the actual value of property at the time of loss, without deduction for deterioration, obsolescence, and similar depreciation of the property's value.*¹ (Italics added).

The Farmers Next Generation Policies at issue fall within the 2-step payment process approved in *Gilderman*. 2-step insurance policies are therefore lawful under *Gilderman* so “the insured may reap the benefit of his depreciation coverage only if he actually repairs or replaces the covered loss.”²

Under a 2-step policy, when an insured goes ahead, files a claim and then makes the repair, the insured is entitled to replacement cost (Step 2). This replacement cost coverage is more expensive than standard homeowner’s insurance which pays only for “actual cash value”--- meaning replacement cost minus depreciation with no repairs performed (Step 1).

Replacement cost includes depreciation as the insurance company promises to pay for the necessary total cost of replacing a damaged property. Understood another way, if a homeowner were to try to totally repair a damaged property but were required to deduct

¹ *Gilderman v. State Farm Ins. Co.*, 649 A.2d 941, 942–43 (Pa. Super. 1994) (citing Brief of Amicus Curiae at 8, quoting, Annot., Construction and Effect of Property Insurance Provision Permitting Recovery of Replacement Cost of Property, 1 A.L.R. 5th 817, 827-28 (1992)).

² The validity of the 2-step process is not at issue here. Compare *Brown v. Everett Cash Mut. Ins. Co.* 2017 Pa. Super. LEXIS 161 (Pa. Super. Mar. 10, 2017).

depreciation costs, the homeowner would usually not have enough funds to do so. Actual cash value is usually not enough to pay for complete repairs unless the depreciation is minimal as in a brand new house.

Under its 2-step Policies, Truck's insurance customer pays a premium for Replacement Cost coverage. Typically, general contractor costs are included within the meaning of "replacement costs" when the job itself requires a general contractor. Plaintiffs allege, however, that Truck's insurance Policies wrongfully exclude general contractor costs from the true meaning and value of "replacement cost". They say Truck does so by excluding general contractor costs from its definition of Step 1 actual cash value which end up meaning replacement cost, *minus* depreciation, *minus* general contractor costs. Plaintiffs argue this formulation is contrary to Pennsylvania insurance law.

Factual Background

Plaintiff Konrad Kurach purchased a Farmers Next Generation Homeowners policy to insure his house in Bensalem, Pennsylvania for the period May 22, 2014 through May 22, 2015. His 2-step policy provides "replacement cost coverage," and he paid a premium for it.³ On October 14, 2014, Kurach's house sustained water related damage.⁴ Kurach hired a public adjustor, Alliance Adjustment Group, Inc. ("Alliance") to prepare an estimate of the cost to repair. Alliance provided its estimate to Truck. Thereafter, Truck sent Kurach a letter dated November 6, 2014 enclosing an "actual cash value" payment and an explanation of how Truck calculated this "actual cash value" amount.⁵ This explanation letter includes a detailed value estimate for the "replacement cost" of the loss with individual cost estimates for each needed

³ Kurach Motion for Summary Judgment, Ex. 1.

⁴ Truck Motion for Summary Judgment, ¶ 20.

⁵ Truck Motion for Summary Judgment, Ex. 10.

repair (for example, individual line item estimates for removing carpet, removing and replacing light fixtures, etc.). The line item estimates are followed by a summary page which shows a “subtotal” of the sum of the costs of the individual line item repairs--plus material sales tax and storage rental tax. General Contractor “Overhead” and “Profit” (“GCOP”) are calculated at twenty percent of this subtotal and appear as “Overhead and Profit” on the summary page.⁶ “Replacement cost” in the summary page is calculated as the sum of all the line items plus “overhead” and “profit.”⁷ The numerical value for “actual cash value” is calculated by subtracting depreciation from the “replacement cost value.”

Despite Overhead and Profit being included as a basis for calculating both “replacement cost” and “actual cash value” on the summary page issued by Truck, Kurach alleges the company did not pay the true cost of GCOP in its Step 1 actual cash value payment to him.⁸

Dr. Mark Wintersteen, like Kurach, purchased a 2-step Farmers Next Generation Homeowners Policy issued by Truck Insurance Exchange. This policy covered the period November 13, 2013 through November 13, 2014.⁹ Wintersteen’s house, located in Pottstown, Pennsylvania, experienced water damage on September 1, 2014, and this loss was reported to Truck for claims adjustment.¹⁰ Wintersteen hired Joe Markham, a representative from the Young Adjustment Company, to assist with his claim.¹¹ Truck sent a letter to Young Adjustment Company dated November 3, 2014 enclosing “actual cash value” payment for Wintersteen with an explanation how this value was calculated.¹² After Wintersteen disputed the amount of the

⁶ Truck Motion for Summary Judgment, Ex. 10. The twenty percent calculation is the standard for estimates of general contractor overhead and profit in the insurance industry. *See Gilderman v. State Farm Ins. Co.*, 649 A.2d 941, 945 (Pa. Super. 1994).

⁷ Truck Motion for Summary Judgment, Ex. 10.

⁸ Truck Motion for Summary Judgment, ¶ 26.

⁹ Truck Motion for Summary Judgment, ¶ 38.

¹⁰ Truck Motion for Summary Judgment, ¶ 40.

¹¹ Wintersteen Motion for Summary Judgment, ¶ 50; Truck Motion for Summary Judgment, ¶ 40.

¹² Wintersteen Amended Complaint, Ex. E.

“actual cash value” payment. Truck sent a revised estimate of “replacement cost” and “actual cash value” amount in a letter dated November 20, 2014.¹³ Like the explanation given to Kurach, Truck’s November 20, 2014 letter to Wintersteen presented various trade costs to repair Wintersteen’s house.¹⁴ Unlike the explanation issued to Kurach, the November 20 letter did not contain monetary figures outlining GCOP.¹⁵

In an e-mail dated December 9, 2014, Young Adjustment Company’s Joe Markham wrote to Truck and disagreed with Truck’s calculation of actual cash value and the amount of its payment to Wintersteen. Markham wrote Truck’s figures did not include the costs associated with hiring a general contractor.¹⁶ Truck sent another letter to Wintersteen, again revising estimates, but again failing to include GCOP, according to Wintersteen’s Complaint.¹⁷ As with Kurach, Wintersteen chose to exercise his Step 1 option under the Policy and he did not carry out repairs. The amount he received as actual cash value did not include GCOP.

Truck concedes that the use of a general contractor was reasonably necessary if repairs were made by either Kurach or Wintersteen.¹⁸ Truck also concedes that, had Wintersteen or

¹³ Truck Motion for Summary Judgment, Ex. 18.

¹⁴ Truck Motion for Summary Judgment, Ex. 18.

¹⁵ Truck Motion for Summary Judgment, ¶ 46.

¹⁶ Truck Motion for Summary Judgment, Ex. 20.

¹⁷ Wintersteen Amended Complaint, ¶ 25, ex. H.

¹⁸ Truck Motion for Summary Judgment, ¶ 34, 53. The record does not illustrate what factors Truck took into consideration to determine that the use of a general contractor is reasonably necessary in these two cases. Pennsylvania courts have employed an objective standard to determine whether a general contractor is reasonably necessary based on the “nature and extent of the damage and the number of trades needed to make repairs” and “the degree of coordination or supervision of trades required to make the repairs.” *Mee v. Safeco Ins. Co. of Am.*, 908 A.2d 344, 350 (Pa. Super. 2006). We believe adopting a bright line rule, where the services of a general contractor are reasonably likely if three or more trades are involved, will reduce any uncertainty faced by consumers as they undertake household repairs. *See Gilderman v. State Farm Ins. Co.*, 649 A.2d 941, 945 (Pa. Super. 1994) (“appellants implicitly concede that general contractors are not always needed, noting that “it is generally accepted in the building trade that if more than three trade categories of subcontractors are involved in the repairs, the owner is entitled to the services of a general contractor to obtain bids, hire the subcontractors and coordinate/supervise the work.”).

Kurach incurred the expense of a general contractor, both plaintiffs would have been entitled to recover those costs under their respective Policies at Step 2.¹⁹

To sum up, Kurach and Wintersteen each sustained homeowner damage that Truck agreed was reasonably likely to require the services of a general contractor. Each plaintiff received Step 1 “actual cash value” payments, but neither insured went to Step 2. In paying its version of Step 1 “actual cash value,” plaintiffs argue that Truck has not honored its own definition for “actual cash value”---“replacement cost less deduction for depreciation.” This is because when paying Step 1 “actual cash value” to plaintiffs, Truck awarded “replacement costs” without GCOP---while at Step 2, “replacement costs” include GCOP.

PROCEDURAL HISTORY

Kurach v. Truck Insurance Exchange (July Term, 2015, No. 339) was initiated by Complaint filed July 6, 2015. *Wintersteen v. Truck Insurance Exchange* (July Term, 2015, No. 543) was initiated by Complaint filed July 30, 2015. The parties in *Wintersteen* filed a stipulation to dismiss Farmers Group, Inc. and amend the caption accordingly. Plaintiff Wintersteen filed an Amended Complaint on October 2, 2015.

Kurach brings claims for breach of contract and bad faith against Truck. Wintersteen brings claims for declaratory judgment, breach of contract, and bad faith against Truck.

On October 2, 2015, we entered Case Management Orders for both the *Wintersteen* and *Kurach* cases and permitted the parties to engage in limited discovery on whether defendant Truck is required to pay GCOP in cases where it is reasonably likely that the services of a general contract would be necessary. The parties were permitted to file cross-motions for

¹⁹ Truck Motion for Summary Judgment, ¶ 34, 53.

summary judgment on the GCOP issue. Proceedings related to the parties' bad faith claims and to class certification were stayed until resolution of these summary judgment motions.

Thereafter, defendant Truck filed a Motion for Summary Judgment on January 5, 2016 in the *Wintersteen* case and on January 8, 2016 in the *Kurach* case. Plaintiff Kurach filed a Response and Cross-Motion for Summary Judgment on February 8, 2016. After oral argument, we requested supplemental briefing.

ANALYSIS

The parties request judicial determination whether Truck may lawfully contract to withhold general contractor Overhead and Profit from "actual cash value" payments under Step 1. The question arises because the Policies define "actual cash value" as "replacement cost" less depreciation but the calculation of "replacement cost" differs between Step 1 and Step 2. Both cases involve situations where the use of a general contractor would be reasonably necessary to make repairs.

A moving party is entitled to summary judgment when "there is no genuine issue of any material fact" or, "if after the completion of discovery . . . an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense."²⁰

"[T]he task of interpreting [an insurance] contract is frequently performed by a court rather than by a jury."²¹ The goal for any factfinder is to "ascertain the intent of the parties as manifested by the language of the written instrument."²²

²⁰ Pa. R.C.P. 1035.2.

²¹ *Madison Const. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100, 106 (Pa. 1999).

²² Id.

The Policies in this case define actual cash value as a function of “replacement cost” and set forth how insured claims are settled:

Actual cash value – means the reasonable replacement cost at time of loss less depreciation for both economic and functional obsolescence.²³

...

5. How We Settle Covered Loss.

...

(1) Settlement for covered loss or damage to the dwelling or separate structures will be settled at **replacement cost**, without deduction for depreciation, for an amount that is reasonably necessary, for the lesser of repair or replacement of the damaged property²⁴

...

When the cost to repair or replace damaged property is more than \$2,500, we will pay no more than the **actual cash value** of the loss until actual repair or replacement is completed.²⁵

...

e. General contractor fees and charges will only be included in the estimated reasonable replacement costs if it is reasonably likely that the services of a general contractor will be required to manage, supervise and coordinate the repairs. However, **actual cash value** settlements will not include estimated general contractor fees or charges for general contractor’s services unless and until you actually incur and pay such fees and charges, *unless the law of your state requires that such fees and charges be paid with the actual cash value settlement.*²⁶ (Emphasis added).²⁷

The parties disagree how, when and whether general contractor Overhead and Profit should be paid under the Policies. Kurach and Wintersteen argue that Truck breached the terms of the insurance contract by removing GCOP from its Step 1. Truck replies that Policy language requires the insured to actually incur general contractor costs before the insured is entitled to recover those costs.²⁸ Because Kurach and Wintersteen did not complete repair work on their

²³ Kurach Complaint, Ex. 1, p. 6.

²⁴ Kurach Complaint, Ex. 1, p. 34.

²⁵ Kurach Complaint, Ex. 1, p. 34.

²⁶ Kurach Complaint, Ex. 1, p. 35.

²⁷ A line of Superior Court decisions, most recently *Brown*, supra, have upheld two-payment replacement cost policies such as those in this case. *Brown* is not dispositive here because it does not address the issue of GCOP.

²⁸ The relevant policy language that Truck relies on is Section 5.e, which states that “actual cash value settlements will not include estimated general contractor fees or charges for general contractor’s services unless and until you

homes, Truck contends its Policy contract is not breached by withholding GCOP at Step 1. According to the company, its Policies are clear that Step 1 actual cash value will not include GCOP.

Kurach and Wintersteen disagree and argue Truck's Policy is ambiguous. They argue Truck's exclusion of GCOP and its unclear use of the term "replacement cost" as a component of "actual cash value" is contrary to Pennsylvania law and unenforceable.

Kurach and Wintersteen cite *Gilderman v. State Farm* for the rule that Pennsylvania courts require GCOP to be included in actual cash value payments.²⁹ *Gilderman* was a putative class action involving a 2 step premium replacement cost insurance policy that promised to pay actual cash value but in reality failed to do so. Under State Farm practice in *Gilderman*, "actual cash value" was paid as "replacement value" minus GCOP and depreciation. For convenience, State Farm had calculated this GCOP to be 20 percent of the total cost of "replacement value", defined as the cost an insured would need to pay to fully repair or replace covered damage to his house. *Gilderman* rejected State Farm's routine practice of deducting GCOP from its contractual definition of "actual cash value." The Court reasoned that since the insured had paid a premium over a standard contract in order to purchase replacement cost coverage, the insured in a replacement cost policy is entitled to Step 1 actual cash value coverage. *Gilderman* holds that actual cash value, while subtracting depreciation, necessarily includes "replacement cost" with GCOP, when repairs are reasonably likely to require a general contractor.

As stated by *Gilderman's* author, Judge John P. Hester, "[t]he issue is what State Farm agreed to pay to its insureds prior to actual repair or replacement."³⁰ The judge wrote, "State

actually incur and pay such fees and charges, *unless the law of your state requires that such fees and charges be paid with the actual cash value settlement.*" (Emphasis added).

²⁹ *Gilderman*, supra.

³⁰ Id.

Farm clearly agreed to pay to its insureds the ‘actual cash value’ of a covered loss whether or not repairs or replacement actually occur.”³¹ Because “actual cash value” is calculated using “repair or replacement costs,” “the real inquiry is what is included in ‘repair or replacement costs.’”³² The author’s conclusion is that “repair or replacement costs include any cost that an insured is reasonably likely to incur in repairing or replacing a covered loss.... includ[ing] use of a general contractor and his twenty percent overhead and profit.”³³

Following this seminal decision, the Superior Court reaffirmed *Gilderman* twelve years later in *Mee v. Safeco Ins. Co. of America*.³⁴ In *Mee*, the insured purchased replacement cost coverage from Safeco.³⁵ The policy in *Mee* offered to pay “actual cash value” for the initial Step 1 payment, but did not specify how and when general contractor fees would be paid to the insured. After filing a claim for a loss, the homeowner insured undertook certain repairs himself, rendering a general contractor unnecessary. Safeco then refused to include general contractor fees in its Step 1 actual cash value payment on grounds that using a general contractor was now unlikely because of the insured’s own home repairs. The trial court agreed, granting Safeco’s motion for summary judgment. On appeal, the Superior Court reversed and remanded. The Court held that the insured’s home repairs did not relieve Safeco from an obligation to include GCOP in its Step 1 “actual cash value” payment when use of a general contractor had been reasonably necessary at the time of the loss.³⁶

³¹ *Gilderman v. State Farm Ins. Co.*, 649 A.2d 941, 945 (Pa. Super. 1994)

³² *Id.*

³³ *Id.*

³⁴ *Mee v. Safeco Ins. Co. of Am.*, 908 A.2d 344 (Pa. Super. 2006).

³⁵ *Id.* at 345

³⁶ *Id.* at 350 (“From *Gilderman*, we take the following legal principles: (1) actual cash value includes repair and replacement costs; (2) repair and replacement costs include O & P (overhead and profit) where use of a general contractor would be reasonably likely; (3) because a homeowner pays higher premiums for repair and replacement coverage, he is entitled to O & P where use of a general contractor would be reasonably likely, even if no contractor is used or no repairs are made; (4) expert testimony about industry standards may be used to answer whether use of a general contractor is reasonably likely; and (5) whether use of a general contractor is reasonably likely depends on

The approach taken in *Gilderman* and *Mee* is the law today. Insurance companies are required in Pennsylvania to include general contractor overhead and profit in actual cash value payments for losses where repairs would be reasonably likely to require a general contractor. *Gilderman* and *Mee* reflect the majority approach across jurisdictions.³⁷

In the *Kurach* and *Wintersteen* cases here, the Policies expressly define “actual cash value” as in *Gilderman*. As before, “actual cash value” is the cost of replacement less depreciation. As in *Gilderman*, the question is what Truck “agreed to pay to its insureds prior to actual repair or replacement.”³⁸ The Policies’ language is clear that Truck promised to pay at Step 1 what it called “actual cash value” prior to actual repair.³⁹ And, the only way to figure “actual cash value” is to first determine replacement cost. Interestingly, “replacement cost” is not specifically defined in the Farmer’s Policy. But *Gilderman*, *Mee*, and the majority of courts in other jurisdictions include GCOP as necessary components of “replacement cost”. The reason is that higher premiums for Replacement Cost policies justify consumer expectations that actual cash value really means replacement value minus depreciation.

the nature and extent of the damage and the number of trades needed to make repairs. This last principle necessarily requires consideration of the degree of coordination or supervision of trades required to make the repairs”).

³⁷ *Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1306 (11th Cir. 2008) (“A majority of courts considering the question under similarly drafted insurance policies has determined that an actual cash value payment includes a general contractor’s overhead and profit charges in circumstances where the policyholder would be reasonably likely to need a general contractor in repairing or replacing the damaged property in issue”); *Goff v. State Farm Florida Ins. Co.*, 999 So. 2d 684, 689 (Fla. Dist. Ct. App. 2008) (“Actual cash value includes overhead and profit where the insured is reasonably likely to need a general contractor for repairs.”); *Salesin v. State Farm Fire & Cas. Co.*, 229 Mich. App. 346, 368–69, 581 N.W.2d 781, 791–92 (1998) (“it is also true Salesin has paid a premium for a full replacement cost policy. There is no logical reason, nor any reason based upon the insurance policy itself or the record below, for deducting estimated contractor’s overhead and profit”); *Tritschler v. Allstate Ins. Co.*, 213 Ariz. 505, 514, 144 P.3d 519, 528 (Ct. App. 2006), as corrected (Dec. 19, 2006) (“Several other jurisdictions have since followed the reasoning in *Gilderman* and *Salesin* and ruled that an insurer may not automatically deduct a contractor’s overhead and profit from an actual cash value payment.”); *Mazsocki v. State Farm Fire & Cas. Corp.*, 766 N.Y.S.2d 719, 721 (App. Div. 3d Dep’t 2003) (“we find that the term “replacement cost”—as opposed to “actual replacement cost”—in defendant’s policies can reasonably be interpreted to include profit and overhead whenever it is reasonably likely that a general contractor will be needed to repair or replace the damage”).

³⁸ *Gilderman*, *supra*. at 945

³⁹ *Kurach* Complaint, Ex. 1, p. 6, 34.

Truck argues Pennsylvania law should yield to Truck's Policy language excluding general contractor expenses from actual cash value. Truck points to specific Policy language they say is persuasive: "actual cash value settlements will not include estimated general contractor fees or charges for general contractor's services unless and until you actually incur and pay such fees or and charges, *unless the law of your state requires that such fees and charges be paid with the actual cash value settlement.*"⁴⁰ (Emphasis added).

On its face, however, the provisional language regarding state law is ambiguous. Does exclusion of GCOP apply in Pennsylvania; what about New Jersey? The idea that a lay purchaser of a homeowner insurance policy likely needs legal assistance to understand what he or she is paying for is troublesome.

As discussed, Pennsylvania requires general contractor overhead and profit to be included in actual cash value settlement where "actual cash value" is calculated using reasonable replacement cost as the starting point.⁴¹ Truck's policy language purporting to exclude GCOP from actual cash value require appears to be an end run.^{42/43}

Truck's position is insurance law's definition of "actual cash value" may be altered by contractual language. Often, the company is right but not here, when the Policy language itself is unclear. Truck cites *Kane v. State Farm Fire & Cas. Co.*⁴⁴ In *Kane* the Superior Court analyzed eleven different 2-step homeowners insurance policies and addressed whether an insurance company is permitted to "withhold depreciation from a policyholder's actual cash value payment

⁴⁰ Kurach Complaint, Ex. 1, p. 35.

⁴¹ *Gilderman*, *supra*; *Mee*, *supra* at 350.

⁴² *Madison Const. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100, 106 (Pa. 1999) (The goal of interpreting an insurance contract is to "ascertain the intent of the parties as manifested by the language of the written instrument.").

⁴³ We also note with raised eyebrow the section of the Next Generation Policy outlining the process by which an insured can arbitrate disputes regarding the value of the "actual cash value" payment. "How We Settle Covered Losses, Section 10, Appraisal." Kurach Complaint, Ex. 1, p. 36. This section prohibits arbitrators from interpreting a policy as to "*whether any amount is payable for overhead and profit.*" (Emphasis added).

⁴⁴ *Kane v. State Farm Fire & Cas. Co.*, 841 A.2d 1038 (Pa. Super. 2003).

from partial losses where the phrase ‘actual cash value’ is not defined in the insurance policy or where the insurance policy states that there may be a deduction for depreciation when determining actual cash value.”⁴⁵ The *Kane* court determined that all but one of the policies was permissible.

Plaintiffs in *Kane* had challenged the legality of the two step payment system. They argued insured homeowners should be entitled to replacement cost at Step 1 because “actual cash value” had originally been defined as “replacement cost.”⁴⁶

In its review, *Kane* discusses the history of the term “actual cash value” in Pennsylvania starting with *Fedas v. Insurance Co. of the State of Pennsylvania* which simply defined “actual cash value” as replacement cost without deduction for depreciation.⁴⁷ Then, in *Farber v. Perkiomen Mut. Ins. Co.*, insurance companies were permitted to write policies defining “actual cash value” differently than in *Fedas* but keeping replacement cost meaning full value of repair.⁴⁸ The *Kane* Court interpreted *Farber* as allowing insurance companies to change the definition of “actual cash value” established in *Fedas*, so long as there is clear, qualifying language redefining that phrase with precision.⁴⁹

Even more flexibility was awarded in *London v. Insurance Placement Facility of Pennsylvania*, which stands for the proposition that “although *Fedas* and *Farber* remain viable,

⁴⁵ *Id.*, at 1041

⁴⁶ *Id.*, at 1045 (2003) (“In *Fedas v. Insurance Co. of the State of Pennsylvania*, 300 Pa. 555, 151 A. 285 (1930), our Supreme Court first comprehensively addressed the meaning of this phrase [actual cash value] in an insurance policy.”).

⁴⁷ *Fedas v. Insurance Co. of Pa.*, 151 A.285, 286 (Pa. 1930) cited in *Kane*, *supra* at 1046 (“under *Fedas*, where an insured suffers a partial loss and is promised “actual cash value,” he is entitled to replacement cost, without deduction for depreciation”).

⁴⁸ *Farber v. Perkiomen Mut. Ins. Co.*, 88 A.2d 776 (Pa. 1952) cited in *Kane* *supra*, at 1046 (“insurance companies are, of course, conversant with the germane court decisions.... Any change in the defendants' policies in order to avoid in the future the impact of our prior decisions is for them to ponder.”).

⁴⁹ *Kane v. State Farm Fire & Cas. Co.*, 841 A.2d 1038, 1047 (Pa. Super. 2003)

explicit policy language may avoid their effects.”⁵⁰ Among the policy reasons supporting continued support for flexibility by the Superior Court was the reality of consumer demand for more homeowner’s insurance options. Ultimately, two step payout policies were approved in *Gilderman*.

The key to assessing how flexible courts can be according to *Kane* is the clarity of the contractual language defining “actual cash value.” Kane measured its flexibility according to the language and construction of three different categories of insurance contracts. The test is nothing other than clarity of the meaning of “actual cash value.”

The first category are policies that expressly define “actual cash value”. The second are those that do not expressly define “actual cash value”, but use clear language and explain that full replacement cost would be paid as part of Step 2. The third category of policies do not expressly define “actual cash value” either but, unlike the second group, contains contradictory provisions defining “actual cash value” or “replacement cost.”

Arguing in favor of two step policies, the insurance company in *Kane* claimed actual cash value means replacement cost minus depreciation, not replacement cost as defined in *Fedas*.

For insurance policies that fit within the first two categories, *Kane* agreed with the insurance companies. The Court found, “that the phrase ‘actual cash value’ as used in those types of policies cannot mean replacement value. . . as such an interpretation would make the remaining policy language [stating that full replacement cost would be paid once repairs were made] nonsensical.”⁵¹ As to the third category, policies with inconsistent or contradictory language about the meaning of actual cash value, *Kane* found that “the interrelation between the primary policy language and the endorsement language results in an ambiguity” and held the

⁵⁰ *London v. Insurance Placement Facility of Pennsylvania*, 703 A.2d 45, 50 (Pa. Super. 1997) (*en banc*).

⁵¹ *Kane v. State Farm Fire & Cas. Co.*, 841 A.2d 1038, 1049 (Pa. Super. 2003).

Fedus definition of actual cash value was applicable.⁵² Therefore, *Kane* stands for the narrow proposition that where there is clear, qualifying language, “actual cash value” may be redefined in an insurance contract to mean “replacement cost less depreciation.” But where the language is ambiguous, through inconsistency or contradiction, actual cash value means replacement cost.

Here, the Farmers Next Generation policy complies with *Kane* to the extent that “actual cash value” is expressly defined as replacement cost less depreciation. There is nothing wrong with this.

But then, Truck’s applies “actual cash value” inconsistently from its own definition of replacement cost less depreciation; and this is the problem.

By withholding GCOP from its “actual cash value” payments, Truck’s Policies mask its redefinition of “actual cash value” to be something other than routine replacement cost minus depreciation. Instead, Truck’s Policies are paid out as if actual cash value is replacement cost minus depreciation, **minus** general contractor overhead and profit. These premium Policies confuse Truck’s insureds, purposely or not, on what the insurance company really means by its terms “actual cash value” and “replacement cost.”

Possibly recognizing its exposure, Truck uses the contingency phrase, “unless the law of your state requires that such fees and charges be paid with the actual cash value settlement”. But this is contingent and ambiguous on its face. Truck’s Next Generation Policy formulations of actual cash value are unenforceable; Pennsylvania insurance law indeed requires these fees and charges including GCOP to be paid as part of Step 1 actual cash value.⁵³ Depreciation may then be deducted.⁵⁴

⁵² *Id.* at 1050.

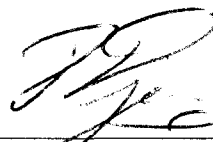
⁵³ Gilderman, *supra*.

⁵⁴ *Id.*

We declare Pennsylvania law requires estimated general contractor overhead and profit to be included in “actual cash value” payments when the use of a general contractor is reasonably likely to be necessary to repair damage to a home.

Summary Judgment is granted in favor of Plaintiffs.

BY THE COURT

A handwritten signature in black ink, appearing to read 'R. I. Djerrassi', written over a horizontal line.

RAMY I. DJERASSI, J.