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United States District Court, D. Hawai'i.

Mary DEGUCHI and Ermanno Scalas, Plaintiffs,
v.
ALLSTATE INSURANCE COMPANY
and Alan Oda Agency, Inc., Defendants.

Civil No. 07–00144 JMS/LEK.
|
April 9, 2008.

Attorneys and Law Firms

George W. Ashford, Jr., Ashford & Associates, Kailua, HI, for Plaintiffs.

Anthony L. Wong, Kevin P.H. Sumida, Lance S. Au, Sumida & Tsuchiyama, LLLC, Honolulu, HI, Keith K. Hiraoka, Roeca, Louie & Hiraoka LLP, for Defendants.

ORDER (1) GRANTING ALLSTATE INSURANCE COMPANY'S RENEWED MOTION FOR SUMMARY JUDGMENT; (2) GRANTING ALLSTATE INSURANCE COMPANY'S MOTION FOR PARTIAL SUMMARY JUDGMENT; AND (3) DENYING ALAN ODA AGENCY, INC.'S MOTION FOR SUMMARY JUDGMENT

J. MICHAEL SEABRIGHT, District Judge.

I. *INTRODUCTION*

***1** On February 22, 2006, Plaintiffs Mary Deguchi and Ermanno Scalas' (collectively "Plaintiffs") boat, the PRINCESS NATASHA, sank while en route from Hilo to Honolulu. After Plaintiffs' insurer, Defendant Allstate Insurance Company ("Allstate"), failed to either deny or confirm coverage, Plaintiffs filed this action. Plaintiffs allege claims against Allstate for unfair and deceptive trade practices in violation of Hawaii Revised Statutes ("HRS") § 480–2(a), breach of insurance contract, and bad faith, and claims against their insurance agent, Alan Oda Agency, Inc. ("Oda") for violation of HRS § 480–2(a) and breach of fiduciary duty.

Currently before the court are: (1) Allstate's Renewed Motion for Summary Judgment on all claims; (2) Allstate's Motion for Partial Summary Judgment on Plaintiffs' bad faith/non-contractual claims; and (3) Oda's Motion for Summary Judgment. For the reasons discussed below, the court GRANTS Allstate's Motion for Summary Judgment on all claims, GRANTS Allstate's Motion for Partial Summary Judgment on Plaintiffs' non-contractual claims, and DENIES Oda's Motion for Summary Judgment.

II. *BACKGROUND*

A. Factual Background

1. The PRINCESS NATASHA and Insurance Policy

On July 20, 2005, Plaintiffs purchased the PRINCESS NATASHA, a 48′ power boat, for $195,000 from Lava Island Express, Inc. ("Lava"). Deguchi Decl. ¶ 9. Plaintiffs paid Lava $55,000 up front, and agreed to pay the balance through a two-year installment contract secured by the boat at 6% interest with monthly payments of $3,500. *Id.*

On July 21, 2005, Deguchi applied for an Allstate marine insurance policy for the PRINCESS NATASHA through Oda, and requested that Lava be insured to protect its and Plaintiffs' interests. *Id.* ¶¶ 11–12. Allstate issued Plaintiffs Policy Number 917650458 (the "Policy"), covering the PRINCESS NATASHA for losses up to $195,000, and $19,500 for boat equipment. Allstate Ex. A at 2. [1] Under the title "SECTION I—COVERAGE TT," the Policy describes its coverage:

> **Losses We Cover:**
>
> We will pay for physical loss to the property described in Coverage TT, except as limited or excluded in this Policy.
>
> **Losses We Do Not Cover:**
>
> We do not cover loss to the property described in Coverage TT resulting in any manner from:
>
> ...
>
> 8. intentional or criminal acts of an insured person, if the loss that occurs:
>
> a) may be reasonably expected to result from such acts; or

b) is in fact the intended result of such acts.

Id. at 4.

The Policy lists Lava as lienholder, *id.* at 2, and under the title "Section I Conditions," includes the following clause:

15. Loss Payable Clause

If a loss payee is named on the declarations page, any loss payable under Section I shall be paid to you and the loss payee, as interests appear. Loss covered under Section I will be adjusted with you only.

Id. at 7.

The Policy also outlines Plaintiffs' obligations after a loss:

***2 What You Must Do After a Loss**

In the event of a loss to any property that may be covered by this policy, you must:

...

c) give us a detailed list of the damages, destroyed or stolen property, showing the quantity, description, actual cash value and the amount of loss claimed.

d) produce available bills, receipts and related documents, or certified copies, that substantiate the loss claimed.

e) as often as we reasonably require:

1) show us the damaged property.

2) submit to examinations under oath and sign a transcript of the same.

Id. at 6.

2. Loss of the PRINCESS NATASHA

A few months after their purchase, Plaintiffs decided to sell the PRINCESS NATASHA because they were not using it on a regular basis, and planned to move back to the mainland. Deguchi Decl. ¶¶ 18–20; Dukesherer Decl. ¶ 6. Plaintiffs listed the PRINCESS NATASHA for sale on October 5, 2005. Scalas Decl. ¶ 8; Pls.' Ex. 20. After the boat failed to sell in Hilo and on the belief that it could more easily be shown to prospective buyers in Honolulu, Plaintiffs arranged for Robert McCracken and a crew member of his choice to take the boat to Honolulu. Deguchi Decl. ¶ 25; Dukesherer Decl. ¶¶ 7–8. Deguchi paid McCracken $800, and he and his crew, Ernie Falk, left Hilo on February 22, 2006. Deguchi Decl. ¶ 25; Pls.' Ex. 21.

On or around February 22, 2006, the PRINCESS NATASHA sank while en-route to Honolulu. Allstate Ex. C. A news article reported that the crew told the Coast Guard that the PRINCESS NATASHA sank three to six miles south of Molokini Island after hitting a reef off Kahoolawe. *Id.* Deguchi later described that the accident was reported to her as follows:

1) Lost Navigation/Utilized Auto Pilot

2) Was hit or hit something

3) Electric Pumps started and were doing O.K.

4) Pumps got swamped

5) Started hand bailing

6) Had to abandon via dinghy

7) Lit Flares

8) Tug with Barge rescued the 2 Crew

Allstate Ex. F. By the time the Coast Guard arrived, "there was no debris, no spilled fuel; only a few life jackets were found and/or visible." *Id.* The PRINCESS NATASHA has never been recovered. Chang Decl. ¶ 4.

3. Allstate's Initial Investigation and Questions Regarding Coverage

Upon learning of the loss, Plaintiffs notified Allstate, who enlisted marine surveyor Dennis Smith to determine the location, time, and cause of the loss. Smith collected information from Deguchi, including a Report of Vessel Accident Form, Allstate Ex. F, a description of her understanding how the PRINCESS NATASHA sank (described above), *id.,* and ten pages of documents regarding the boat's registration, work performed on the boat, and equipment purchases. Deguchi Decl. ¶¶ 36–37; Pls.' Ex. 13.

Smith also contacted the Coast Guard, who informed him that McCracken had described that he had struck a reef off the southwest end of Kahoolawe, backed off the reef, and headed to Maui before sinking. Smith Decl. ¶¶ 5, 10. Through Deguchi's help, Smith interviewed McCracken, who had relocated to Idaho. *Id.* ¶ 7; *see also* Pls.' Ex. 8. McCracken

told Smith that the PRINCESS NATASHA was in open water near Kahoolawe when it sank, but did not describe striking and/or backing off a reef. Smith Decl. ¶ 11. McCracken did describe, however, multiple systems failures and that he was unable to call for help until they boarded an inflatable raft and had repaired his cell-phone using extra batteries. *Id.* ¶¶ 13–14. Smith also attempted to locate McCracken's crew member, Ernie Falk, but has been unable to locate any individual by this name. [2] *Id.* ¶ 16. Smith asserts that these conflicting versions of the sinking, along with the fact that Plaintiffs had recently put the boat up for sale, created some suspicions requiring further investigation. *Id.* ¶ 8; *see generally* Chang Decl.

4. Allstate's Attempts to Collect Additional Information From Plaintiffs

3** Beyond the information Deguchi initially provided to Smith, Allstate requested additional assistance from Plaintiffs. On March 17, 2006, an Allstate representative, Silei Sataua, requested that Deguchi complete a Sworn Statement in Proof of Loss, notarize it, and return it as soon as possible, along with "any and all documentation that you have to support ownership and value for the items on your claim." Allstate Ex. E. On March 28, 2006, Plaintiffs completed the Sworn Statement in Proof of Loss, and listed the actual cash value of the PRINCESS NATASHA and equipment as $201,733.44. Allstate Ex. F. On April 6, 2006, Sataua notified Deguchi that her Proof of Loss was still under investigation, and requested that Deguchi provide "any and all documentation (including original receipts, invoices, cancelled checks, photographs, manuals, etc.***) to substantiate [the] claim." [3] Allstate Ex. G. In response, Deguchi provided twelve pages of documents regarding equipment purchased for the PRINCESS NATASHA. Deguchi Decl. ¶ 40; Pls.' Ex. 30.

On May 10, 2006, Plaintiffs met Smith and Allstate representative Thomas Tabor for separate interviews. Deguchi Decl. ¶ 42. Scalas asserts that he was sworn under oath, tape recorded, and asked questions about his personal finances. Scalas Decl. ¶ 12. Like Scalas, Deguchi was sworn in and agreed to be tape recorded on the condition that she receive a copy. [4] *Id.* ¶ 43. During her four hours of testimony, Deguchi was asked a series of questions about Plaintiffs' finances, *id.* ¶¶ 44–45, and testified that Plaintiffs had no financial difficulties. Tabor Decl. ¶ 10. Both Plaintiffs refused to answer questions about their finances. *See* Pls.' Ex. 93 at 39; Tabor Decl. ¶ 10.

On May 15, 2006, Tabor advised Plaintiffs that their claim had been referred to Kevin Sumida, who would contact them to schedule examinations under oath ("EUO"). Allstate Ex. H. Tabor further advised Plaintiffs that "[y]our failure to comply with this request may lead to a denial of your claim." *Id.* Tabor asserts that he referred this case to Sumida because he believed that Plaintiffs were not being cooperative with the investigation by refusing to answer questions regarding their finances. *See* Pls.' Exs. 92, 36; 93, 39–41. Further, Deguchi had "waffled back and forth" on whether she paid McCracken $800 in cash or by check, *see* Pls.' Ex. 96 at 45–46, and had told Tabor that they were planning to sell the boat, but had previously told Sataua that they were merely moving the boat to Honolulu so it would be used more often. Tabor Decl. ¶¶ 5, 9.

On August 4, 2006, Sumida confirmed with Plaintiffs' attorney, Dennis Nishimura, that Deguchi's EUO would take place on August 8, 2006, [5] and "will continue from day to day until completed." Allstate Ex. I. Sumida further requested that Deguchi bring the following to her EUO:

1. All documents pertaining to the purchase of the subject boat, including but not limited to: bills of lading, invoices, receipts, deeds of trusts, and cancelled checks.

***4** 2. All documents and communications, whether by email or otherwise, with the persons who were on board the subject boat at the time of the loss, including but not limited to Robert McCracken and Ernie Falk.

3. All correspondence and documents received from any financial institutions which provided financing for the purchase of the subject boat, including but not limited to: monthly statements, billings, past due notices, foreclosure notices, and payment receipts.

4. All correspondence and documents received from any financial institutions regarding any debt or obligations, whether related to the subject boat or not, including but not limited to: monthly statements, billings, past due notices, collection notices, foreclosure notices, and payment receipts.

5. Your clients' federal and state income tax returns for the years 2001 to the present.

6. W–2 forms, 1099 forms, financial statements, and any other documents which may show sources of your clients' income for the years 2001 to the present.

7. Documents showing monthly expenses from the years 2001 to the present.

8. Documents which show the cost, type, quality and value of any other times which were lost as a result of the boat sinking.

9. All documents and materials which you believe will be supportive of your clients' claim.

We understand that your clients have provided certain receipts and documents to Allstate. They need not send us those materials again, as we will obtain them from Allstate.

Allstate Ex. I.

Deguchi sat for her EUO on August 8, 2006. Deguchi was told that there was a problem with her claim, but given no further explanation. Deguchi Decl. ¶ 49. Sumida then proceeded to ask Deguchi questions focusing on her personal affairs and finances, as opposed to the loss of the PRINCESS NATASHA. *Id.* Deguchi testified that near the time of the loss: (1) Scalas had received checks for work he performed in Mexico totaling $80,000, which bounced; Allstate Ex. AA at 30–31; (2) Scalas had expressed concerns to her about their financial future, *id.* at 61; (3) Deguchi's monthly income from her pension of just over $3,000 was insufficient to pay their monthly bills of $8,000 to $9,000, *id.* at 63, 73–74; and (4) Deguchi had recently sold mutual funds to pay bills. *Id.* at 64. Deguchi nonetheless stated that Plaintiffs were able to pay their bills without difficulty. [6] Deguchi Decl. ¶ 51. The parties suspended Deguchi's EUO after approximately 4–½ hours of questioning, Deguchi Decl. ¶ 49, because Nishimura had a scheduling conflict. Sumida Decl. ¶ 3.

After Deguchi's EUO, Allstate repeatedly requested that Plaintiffs provide additional dates for EUOs. Allstate Exs. K–M. On October 3, 2006, and after Nishimura no longer represented Plaintiffs, Sumida wrote to Deguchi to confirm that Allstate would take Plaintiffs' EUOs in Las Vegas (where Plaintiffs now lived), but required, at minimum, two full days per person. Allstate Ex. N. Sumida reiterated his request for the nine categories of documents he had previously requested, and also requested:

***5** a) At her recent examination, Mrs. Deguchi brought with her what she represented was her complete file with respect to the purchase of the subject vessel. After first agreeing to turn it over to the court reporter to make copies, she changed her mind and refused to do so. We believe this information is important to our investigation and request that she provide it to us as soon as possible.

b) Bank statements, including checking account statements, savings account statements, and credit union account statements, for both Mr. Scalas and Ms. Deguchi, whether individual accounts or joint accounts, for the period starting six months before the purchase of the subject vessel, and ending six months after the subject loss of the vessel.

c) Cellular phone records for all phones used by either of your clients, for the period covering one month before and one month after the date of loss.

d) All records showing the liquid assets of your clients, including mutual fund statements, stock account statements, and the like, for the period starting six months before the purchase of the subject vessel, and ending six months after the subject loss of the vessel.

e) Records pertaining to the bounced checks received from the Mexican developer, as discussed in your client's examination.

f) Records pertaining to all expenditures made by your clients in connection with the development in Mexico, as discussed by your client in her recent examination.

Allstate Ex. N.

In October 2006, Sumida began negotiating with Plaintiffs' new counsel, George Ashford, to reschedule Plaintiffs' EUOs and receive documents.

Allstate Ex. P. Ashford ultimately agreed to provide Scalas for 5–½ hours to answer questions regarding the PRINCESS NATASHA, its loss, and proof of loss, but no questions regarding Plaintiffs' finances. Allstate Ex. Q. Ashford further refused to make Deguchi available for additional questioning on the basis that she had already been made reasonably available. Allstate Ex. T.

Scalas sat for his EUO on October 23, 2006. Allstate Ex. BB. During the first few minutes of Scalas' EUO, Ashford

instructed Scalas not to answer several questions, including (1) "When did you start looking for a boat?" (2) "How many boats did you look at before you bought this boat?" and (3) "Why did you pick this boat to buy?" *Id.* at 8–9. Ashford asserted that these questions did not fall within the scope of permissible questions, because Allstate's "interview should be limited to the proof of loss showing that this gentleman has an interest in the boat; that the boat was, in fact, lost; that she was insured and what her value was along with the other equipment on the boat." *Id.* at 9. Given Ashford's restrictions, Sumida refused to go forward with the EUO. *Id.* at 10–11. To date, Allstate's investigation remains incomplete and inconclusive. Smith Decl. ¶ 16; *see also* Pls.' Ex. 90 at 31.

5. Plaintiffs' Attempts for Lava, as Loss Payee, to be Paid

***6** While Allstate investigated the loss, Plaintiffs continued payments under their mortgage to Lava. Pls.' Ex. 60. Plaintiffs and/or Lava have, however, repeatedly requested that Allstate pay Lava. *Id.; see generally* Longacre Decl. Allstate has refused due to "the many unanswered questions and the failure of [Plaintiffs] to cooperate with the investigation." Allstate Ex. X. Plaintiffs have since paid Lava the full balance. Deguchi Decl. ¶ 56.

B. Procedural History

On February 21, 2007, Plaintiffs filed their Complaint in Hawaii state court. The Complaint alleges claims against Allstate for breach of insurance contract, violation of HRS § 480–2(a), and bad faith, and claims against Oda for violation of HRS § 480–2(a) and breach of fiduciary duty. On March 19, 2007, Allstate removed the action to this court.

On August 9, 2007, Allstate filed a Motion for Summary Judgment on all claims. On September 11, 2007, Plaintiffs filed a Motion to Continue Hearing Date on Allstate's Motion for Summary Judgment, which Allstate did not oppose. Accordingly, on September 14, 2007, the court denied Allstate's Motion for Summary Judgment without prejudice. The court further notified Allstate that it could later refile the exact same motion, or supplement and refile the motion based upon further discovery.

On February 1, 2008, Allstate renewed its Motion for Summary Judgment, and on February 5, 2008, filed a Motion for Partial Summary Judgment on Plaintiffs' non-contractual claims. On February 4, 2008, Oda filed its Motion for Summary Judgment. On March 12, 2008, Plaintiffs filed Oppositions to Allstate's Motion for Partial Summary Judgment and Oda's Motion for Summary Judgment; Plaintiffs failed, however, to respond to Allstate's renewed Motion for Summary Judgment on all claims. On March 20, 2008, Allstate and Oda filed Replies on the motions to which Plaintiffs responded.

A hearing was held on April 1, 2008. During the hearing, the court agreed with the parties' consent to treat Plaintiffs' Opposition to Allstate's Motion for Partial Summary Judgment as opposing both of Allstate's Motions for Summary Judgment, and Allstate's Reply as applying to both of its Motions.

III. *STANDARD OF REVIEW*

Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Rule 56(c) mandates summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 316, 321 (1986); *see also* *Broussard v. Univ. of Cal. at Berkeley,* 192 F.3d 1252, 1258 (9th Cir.1999). "In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex,* 477 U.S. at 321 (internal quotations omitted).

***7** The burden initially lies with the moving party to show that there is no genuine issue of material fact. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir.1987). The moving party may discharge its burden by showing that there is "an absence of evidence to support the nonmoving party's case." *Celotex,* 477 U.S. at 325. "When the moving party has carried its burden under Rule 56(c) its opponent must do more than simply show that there is some metaphysical doubt as to the material facts .... [and] come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio,* 475 U.S. 574, 586–87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (citation and internal quotation signals omitted).

An issue of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue is material if the resolution of the factual dispute affects the outcome of the claim or defense under substantive law governing the case. *See* *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir.2001). When considering the evidence on a motion for summary judgment, the court must draw all reasonable inferences on behalf of the nonmoving party. *Matsushita Elec. Indus. Co.*, 475 U.S. at 587.

IV. *DISCUSSION*

A. Allstate's Motions for Summary Judgment

Allstate argues that Plaintiffs have failed to meet their obligations set forth in the Policy to cooperate with Allstate's investigation into the loss of the PRINCESS NATASHA such that summary judgment should be granted on all of counts of the Complaint. In response, Plaintiffs argue, among other things, that questions of fact exist regarding Plaintiffs' compliance with the Policy, the reasonableness of Allstate's investigation, and Allstate's own compliance with the Policy. The court addresses these arguments as they apply to each count of the Complaint.

1. Breach of Insurance Contract

The court first interprets the relevant terms of the Policy, and then determines whether Plaintiffs have breached any duties under the Policy and the effect of such breach.

a. Interpretation of Policy

Under Hawaii law,[7] the following rules for interpreting provisions of insurance policies apply:

> [I]nsurance policies are subject to the general rules of contract construction; the terms of the policy should be interpreted according to their plain, ordinary, and accepted sense in common speech unless it appears from the policy that a different meaning is intended. Moreover, every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy.
>
> Nevertheless, adherence to the plain language and literal meaning of the insurance contract provisions is not without limitation. We have acknowledged that because insurance policies are contracts of adhesion and are premised on standard forms prepared by the insurer's attorneys, we have long subscribed to the principle that they must be construed liberally in favor of the insured and any ambiguities must be resolved against the insurer. Put another way, the rule is that policies are to be construed in accord with the reasonable expectations of a layperson.

***8** *Dairy Rd. Partners v. Island Ins. Co.*, 92 Hawai'i 398, 411–12, 992 P.2d 93, 106–07 (2000) (internal citations, quotation marks, brackets, and ellipses omitted); *Haw. Ins. & Guar. Co. v. Fin. Sec. Ins. Co.*, 72 Haw. 80, 87–88, 807 P.2d 1256, 1260 (1991) ("[W]e shall construe insurance policies according to their plain, ordinary, and accepted sense in common speech unless it appears that a different meaning was intended. Moreover, this court has stated that it is committed to enforce 'the objectively reasonable expectations' of parties claiming coverage under insurance contracts which are 'construed in accord with the reasonable expectations of a layperson.' " (citations omitted)); *see also* *Burlington Ins. Co. v. Oceanic Design & Constr., Inc.*, 383 F.3d 940, 945 (9th Cir.2004) ("In Hawaii, the terms of an insurance policy are to be interpreted according to their plain, ordinary, and accepted sense in common speech.").

When reviewing an insurance contract, a court applying Hawaii law "should look no further than the four corners of the document to determine whether an ambiguity exists." *State Farm Fire & Cas. Co. v. Pac. Rent–All, Inc.*, 90 Hawai'i 315, 324, 978 P.2d 753, 762 (1999). A contract term is ambiguous only if it is capable of being reasonably understood in more than one way. *Cho Mark Oriental Food, Ltd. v. K & K Int'l*, 73 Haw. 509, 520, 836 P.2d 1057, 1063–64 (1992). "[T]he parties' disagreement as to the meaning of a contract or its terms does not render clear language ambiguous." *Pac. Rent–All*, 90 Hawai'i at 324, 978 P.2d at 762.

The relevant terms of the Policy state that after a loss, the insured must:

> d) produce available bills, receipts and related documents, or certified copies, that substantiate the loss claimed.
>
> e) as often as we reasonably require:

1) show us the damaged property.

2) submit to examinations under oath and sign a transcript of the same.

Allstate Ex. A.

The parties do not argue that the terms of the Policy are ambiguous, and the court finds no ambiguity either. *See Barabin v. AIG Hawai'i Ins. Co.,* 82 Haw. 258, 263, 921 P.2d 732, 737 (1996) (finding that a similar EUO clause was clear and unambiguous). According to its plain terms, the Policy required Plaintiffs, after learning of a loss, to produce to Allstate available documents that substantiate their loss, and as often as Allstate reasonably required, submit to EUOs.

b. Plaintiffs' Failure to Submit to EUOs and/or Answer Questions During Their EUOs

The purpose of an EUO provision is to enable the insurer "to possess itself of all knowledge, and all information as to other sources and means of knowledge, in regard to the facts, material to [its] rights, to enable [it] to decide upon [its] obligations, and to protect [itself] against false claims." *Claflin v. Commonwealth Ins. Co.,* 110 U.S. 81, 94–95, 3 S.Ct. 507, 28 L.Ed. 76 (1884); *see also Schmidt v. Allstate Ins. Co.,* 2007 WL 1430341, at *5 (D.Haw. May 11, 2007) (stating that a cooperation clause is generally "deemed valid since the 'insurer has a right as a matter of law to know from the [insured] the facts upon which the insured asserts his claim, in order to determine for itself whether it should contest or attempt to settle the claim.' " (*quoting Yuen Shee v. London Guar. & Acc. Co. & Gen. Accident, Fire & Life Ins. Corp.,* 40 Haw. 213, 1953 WL 7558, at *8 (Haw. Terr. June 2, 1953))).

***9** Under Hawaii law, an insurance policy's requirement that the insured submit to an EUO is a condition precedent to the insurer's obligation to pay benefits. *See Barabin,* 82 Hawai'i at 264, 921 P.2d at 738 ("[B]y failing to submit to AIG's request for an EUO, Barabin breached his duty to cooperate under the policy, a condition precedent to AIG's obligation to pay benefits."). Accordingly, a failure to submit to an EUO may warrant summary judgment in favor of the insurer. *See id.* at 263, 921 P.2d at 737; *see also Sarkisyants v. State Farm Mut. Auto. Ins. Co.,* 2007 WL 4195729, at *1 (9th Cir. Nov.19, 2007) (affirming summary judgment for insurer where insured did not attend a reasonably requested second EUO); *West v. State Farm Fire & Cas. Co.,* 868 F.2d 348, 351 (9th Cir.1989) (finding that where insured failed to answer questions during his EUO, it was reasonable as a matter of law for the insurer to request EUOs of his family); *Brizuela v. Calfarm Ins. Co.,* 116 Cal.App.4th 578, 10 Cal.Rptr.3d 661, 668 (Cal.App.4th 2004) (affirming summary judgment and finding that after the insured failed to comply with the insurer's initial demand for an EUO, it "became incumbent upon [the insured] to fulfill the requirement of being examined by offering to submit to such an examination at a later time" (citation and quotation signals omitted)).

The Hawaii Supreme Court has not yet addressed the permissible scope of an EUO, and whether failure to answer certain categories of questions breaches an insured's duty to submit to an EUO. However, other courts have found that an EUO may include investigation into possible motives for fraud and the insured's financial position. *See, e.g., Powell v. U.S. Fid. & Guar.,* 88 F.3d 271, 273 (4th Cir.1996) (collecting cases and finding that an EUO clause is broad enough to encompass financial information); *Phillips v. Allstate Indem. Co.,* 156 Md.App. 729, 848 A.2d 681, 691–92 (Md.App.2004) (affirming summary judgment for the insurer where the insured refused to answer questions at an EUO about his finances); *Wright v. Farmers Mut. of Neb.,* 266 Neb. 802, 669 N.W.2d 462, 466 (Neb.2003) (finding that insured's failure to answer questions regarding finances at an EUO is a material breach of the contract); *Halcome v. Cincinnati Ins. Co.,* 254 Ga. 742, 334 S.E.2d 155 (Ga.1985) (answering Eleventh Circuit's question on certification that an insured would breach the contract by failing to provide any material information (such as financial information) during an EUO where evidence of possible fraud existed); *see also Nichols v. Aetna Life & Cas. Co.,* 1995 WL 102801, at *2 (S.D.N.Y. Mar.9, 1995) ("When the alleged breach is based on the insured's failure to answer questions about his financial situation, summary judgment is only appropriate when the circumstances surrounding the claim are suspicious.").

The court finds this caselaw persuasive, and believes that the Hawaii Supreme Court would hold that an insured breaches an insurance policy's requirement to submit to an EUO by failing to answer material questions during an EUO. The court further believes that under the circumstances presented in this case, the Hawaii Supreme Court would hold that questions regarding an insured's finances are material where there is an objectively good-faith open question regarding whether the loss is fraudulent.

***10** Applying these principles and construing the facts in a light most favorable to Plaintiffs, the court finds that no genuine issue of material fact exists that there was an objectively good-faith open question whether the loss of the PRINCESS NATASHA was fraudulent. Specifically, the facts surrounding the loss of the PRINCESS NATASHA reasonably raised questions of coverage, making the initial and subsequent requests for EUOs reasonable. It is undisputed that at the time Allstate initially requested that Plaintiffs submit to EUOs it knew, among other things, that (1) Plaintiffs had placed the PRINCESS NATASHA for sale shortly after buying the boat, and the loss occurred while it was still for sale, Smith Decl. ¶ 8; (2) the PRINCESS NATASHA had not been located, Chang Decl. ¶ 4; (3) the captain provided potentially differing stories on how the loss occurred and left Hawaii shortly after the loss, Smith Decl. ¶¶ 8, 13–14; (4) Deguchi provided different names of the crew than were reported by the Coast Guard, *see* Pls.' Ex. 122 at 101–02; and (5) Allstate could not even identify and locate the second crew member. Smith Decl. ¶ 16.

Plaintiffs' interviews further raised questions of coverage. During their May 10, 2006 interviews, Deguchi "waffled back and forth" on whether she paid McCracken $800 in cash or by check, *see* Pls.' Ex. 96 at 45–46, and Plaintiffs refused to answer questions about their finances despite testifying that they had no difficulty paying their bills. *See* Pls.' Ex. 93 at 39; Tabor Decl. ¶ 10. During her August 8, 2006 EUO, however, Deguchi provided testimony portraying a very different financial situation than the one described on May 10, 2006. *See* Pls.'s Ex. 99 at 51. Deguchi testified that near the time of the loss: (1) Scalas had received checks in the amount of $80,000 that bounced, Allstate Ex. AA at 30–31; (2) Scalas had expressed concerns to her about their financial future, *id.* at 61; (3) Deguchi's monthly income from her pension of just over $3,000 was insufficient to pay the monthly bills of $8,000 to $9,000, *id.* at 63, 73–74; and (4) Deguchi had sold mutual funds to pay bills. *Id.* at 64.

Even though Plaintiffs' testimony raised even more questions of possible motive, Plaintiffs prevented Allstate from further investigating and determining coverage under the Policy. Specifically, Deguchi refused to submit to a further EUO, and Plaintiffs' attorney limited Scalas' EUO to questions on the PRINCESS NATASHA, her loss, the two crew aboard her at the time of the loss, and her value. Allstate Ex. BB at 5–6. During his EUO, Scalas and his attorney still refused, however, to answer several basic questions, such as (1) "When did you start looking for a boat?" (2) "How many boats did you look at before you bought this boat?" and (3) "Why did you pick this boat to buy?" *Id.* at 8–9.

Under the specific circumstances of this case, the court finds that Allstate's requests for EUOs were reasonable as a matter of law. Deguchi, by refusing to allow a second EUO, and Scalas, by refusing to answer even basic questions, breached Plaintiffs' duty under the Policy to "submit to examinations under oath" as reasonably required by Allstate. Because Plaintiffs' refusal prevented Allstate from determining coverage under the Policy, Allstate had no duty to pay Plaintiffs under the Policy.

***11** None of Plaintiffs' arguments raises a genuine issue of material fact that Plaintiffs' refusal to submit to EUOs nonetheless allows recovery under the Policy. Plaintiffs first argue that it is a fact question whether Allstate had a reasonable basis to conclude that the PRINCESS NATASHA intentionally sank and/or that Plaintiffs had any involvement in the loss. Pls.' Opp'n to Allstate Mot. 13–14. Plaintiffs' argument misses the mark—the relevant inquiry is not whether there is sufficient evidence that the PRINCESS NATASHA sank to preclude recovery under the Policy, but whether Allstate was entitled to investigate whether the Policy covered the loss. Given that the facts surrounding the loss raised good-faith open questions, Allstate had a right to inquire into potential exclusions under the Policy. Plaintiffs' failure to provide full EUOs obfuscated that investigation and Allstate's ability to confirm or rule out whether an exclusion applied.

Plaintiffs also argue that Allstate breached the Policy by not determining coverage in a reasonable amount of time, and delaying its requests for documents and EUOs from Plaintiffs.[8] Pls.' Opp'n to Allstate Mot. 19–20. The court rejects this argument. Allstate's delay in collecting information from Plaintiffs is not unexplained—Allstate attempted to develop facts from other sources (*i.e.,* the Coast Guard) before questioning Plaintiffs, and the parties had scheduling conflicts preventing the EUOs from going forward when first requested. Further, to the extent Plaintiffs argue that Allstate had a duty to either affirm or deny coverage, Allstate could not reasonably make this decision where Plaintiffs refused to cooperate with the investigation.[9]

Plaintiffs further argue that Allstate's notice for requesting EUOs was legally deficient. Contrary to Plaintiffs' assertion, there is no requirement that a notice for an EUO provide

the date, time, place of the EUO, as well as the individual before whom the insured is to appear to be sworn. Each of the cases cited by Plaintiffs involves a specific state statute or insurance policy language setting forth these requirements. *See* *Brookins v. State Farm Fire & Cas. Co.,* 529 F.Supp. 386, 392 (S.D.Ga.1982) (interpreting policy which specified that insured agreed to "submit to examinations under oath by any person named by this Company"); *Weber v. Gen. Accident Fire & Life Assur. Corp.,* 10 Ohio App.3d 305, 462 N.E.2d 422, 424 (Ohio App.1983) (finding that notice of demand by insurer that insured submit to examination under oath was defective where only insured's attorney received letter); *Saft Am., Inc. v. Ins. Co. of N. Am.,* 155 Ga.App. 500, 271 S.E.2d 641, 642 (Ga.App.1980) (interpreting specific policy language); *Krauss v. Brooklyn Fire Ins. Co.,* 130 N.J.L. 300, 33 A.2d 100 (N.J.Err. & App.1943) (interpreting specific policy language). Neither Hawaii law nor the language of the Policy requires such detailed notice.

Finally, Plaintiffs argue that Allstate has failed to show prejudice, and/or that the court should allow Plaintiffs to comply with further EUOs as opposed to forfeiting their rights under the Policy. While the Hawaii Supreme Court has not determined whether an insurer must show prejudice through an insured's failure to comply with an EUO request, the majority of courts have found that no such requirement exists. *See* *Employers Mut. Cas. Co. v. Skoutaris,* 453 F.3d 915, 924 (7th Cir.2006) (discussing that the rule in Indiana is that prejudice is not a necessary condition); *Krigsman v. Progressive N. Ins. Co.,* 151 N.H. 643, 864 A.2d 330, 334 (N.H.2005) ("Courts that construe submission to an EUO as a condition precedent to recovery generally do not require the insurer to prove that it suffered actual prejudice from an insured's unexcused refusal to submit to an examination."); *Phillips,* 848 A.2d at 689–90 (finding that failure to answer material questions during an EUO was a breach of policy and that insurer need not prove prejudice); *Lorenzo–Martinez v. Safety Ins. Co.,* 58 Mass.App.Ct. 359, 790 N.E.2d 692, 695–96 (Mass.App.Ct.2003). *But see* *Wright v. Farmers Mut. of Neb.,* 266 Neb. 802, 669 N.W.2d 462, 466 (Neb.2003) (finding that a breach of an insurance policy may be raised by the insurer as a defense when the insurer shows prejudice).

***12** Even if prejudice were required,[10] however, the undisputed facts of this case establish prejudice. By refusing to submit to EUOs and answer questions, Plaintiffs prejudiced Allstate by preventing it from completing its investigation. Plaintiffs cannot now ask for a do-over when it is their own conduct that prevented Allstate from determining coverage.

Accordingly, the court GRANTS Allstate's Motion for Summary Judgment on Plaintiffs' breach of insurance contract claim.[11]

2. Plaintiffs' "Non–Contractual" Claims

Allstate argues that summary judgment should be granted on Plaintiffs' non-contractual claims—*i.e.,* Plaintiffs' claims for violation of HRS § 480–2 and bad faith—because Allstate could not reasonably determine coverage where Plaintiffs refused to cooperate. The court agrees.

As to Plaintiffs' claims for violation of HRS § 480–2(a), Plaintiffs must prove that Allstate utilized "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Hawaii courts have defined "unfair practice" as a practice that "offends established public policy and ... is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Hawai'i Cmty.* *Fed. Credit Union v. Keka,* 94 Haw. 213, 228, 11 P.3d 1, 16 (2000) (*quoting* *Rosa v. Johnston,* 3 Haw. 420, 427, 651 P.2d 1228, 1234 (1982)).

As to Plaintiffs' bad faith claim, "there is a legal duty, implied in a first-and thirdparty insurance contract, that the insurer must act in good faith in dealing with its insured, and a breach of that duty of good faith gives rise to an independent tort cause of action." *Best Place, Inc. v. Penn Am. Ins. Co.,* 82 Hawai'i 120, 132, 920 P.2d 334, 347 (1996). As explained in *Best Place, Inc.,* to prove bad faith:

> [T]he insured need not show a conscious awareness of wrongdoing or unjustifiable conduct, nor an evil motive or intent to harm the insured. An unreasonable delay in payment of benefits will warrant recovery for compensatory damages.... However, conduct based on an interpretation of the insurance contract that is reasonable does not constitute bad faith. In addition, an erroneous

> decision not a pay a claim for benefits due under a policy does not by itself justify an award of compensatory damages. Rather, the decision not to pay a claim must be in "bad faith."

Id. at 133, 920 P.2d at 347 (citations omitted). "While questions of the 'reasonableness' of a party's action are usually inappropriate for adjudication on summary judgment, a trial court is 'under a duty' to decide this question as a matter of law where the facts are undisputed or are susceptible of only one reasonable interpretation." *Apana v. TIG Ins. Co.*, 504 F.Supp.2d 998, 1007 (D.Haw.2007) (citations and quotations signals omitted); *see also* *Gov't Employees Ins. Co. v. Dizol,* 176 F.Supp.2d 1005, 1035 (D.Haw.2001) (granting an insurance company's motion for summary judgment after finding that the insurance company acted reasonably and did not act in bad faith when denying coverage).

***13** As discussed above, the facts surrounding the loss of the PRINCESS NATASHA reasonably raised questions of coverage under the Policy. Accordingly, Allstate's questions regarding Plaintiffs' financial status during their EUOs were reasonable as a matter of law. Plaintiffs, by refusing to answer questions, prevented Allstate from continuing its investigation and determining whether the loss was covered. Due to the good-faith open questions of coverage, as a matter of law Allstate cannot be said to have violated HRS § 480–2 or acted in bad faith by requesting additional information and not paying Plaintiffs under the Policy.

Plaintiffs' arguments against summary judgment fail to raise a fact question on these claims for the same reasons discussed above regarding Plaintiffs' breach of contract claim. [12] The court therefore GRANTS Allstate's Motion for Summary Judgment on Plaintiffs' claims against Allstate for violation of HRS § 480–2 and bad faith.

B. Plaintiffs' Claims Against Oda

Oda states that Plaintiffs' claims against it are based on Oda's alleged failure to procure insurance that would pay off the mortgage of the PRINCESS NATASHA, and that it is entitled to summary judgment "because Plaintiffs' insurance policy *does* provide coverage for their mortgagee's lien." Oda Mot. 1. Plaintiffs respond that Oda misconstrues their claims—their claims are based on the allegation that Oda knew, but failed to tell Plaintiffs, that the Policy would not pay Lava where the loss was caused by any act or neglect of Plaintiffs. Pls.' Opp'n to Oda Mot. 2. The court agrees with Plaintiffs.

In *Fred v. Pacific Indemnity Co.,* 53 Haw. 384, 494 P.2d 783 (1972), the Hawaii Supreme Court discussed two different types of loss-payee provisions in an insurance policy. In the first type of provision, the loss-payee may recover under the policy only where the insured may recover:

> The open loss payable clause simply states that "loss, if any, is payable to B. as his interest shall appear", or uses other equivalent words, merely identifying the person who may collect the proceeds....
>
> Under an open loss payable clause the mortgagee is merely an appointee and such a clause does not specifically protect him (payee) against the acts and omissions of the mortgagor[.][T]he effect is to place the mortgagee's indemnity at the risk of any act and omission of the mortgagor that would void, terminate, or affect the insurance of the latter's interest under the policy, and the mortgagee cannot recover if the mortgagor cannot.

Fred, 53 Haw. at 390, 494 P.2d at 787 (citation and quotation signals omitted).

In the second type of provision, the loss-payee may recover even where the insured could not:

> [T]here is another type variously known as the New York, standard, or union form which [ ] goes on to state that "this insurance, as to the interest of the mortgagee only, shall not be invalidated by any act or neglect of the mortgagor or the owner of the within described property ..."
>
> ***14** ...
>
> [Such clause] will specify in some form of language that the insurance with respect to the mortgagee shall not be invalidated by the mortgagor's acts or neglect.

Id. (citations omitted). The language of this second type of provision provides that a "loss payable mortgagee's interest is not subject to *wrongful or unlawful acts* of the insured which would invalidate coverage." *Id.* (emphasis added); *see also* Couch on Ins. § 65:48 (3d ed.2007) (observing that " '[a]ny act' may refer to any act of the insured/mortgagor under the mortgage which could adversely effect the insurance policy").

The Policy appears to have the first type of loss-payee provision, allowing Lava to recover only where Plaintiffs could otherwise recover:

> 15. Loss Payable Clause
>
> If a loss payee is named on the declarations page, any loss payable under Section I shall be paid to you and the loss payee, as interests appear. Loss covered under Section I will be adjusted with you only.

Allstate Ex. A at 7.

Plaintiffs allege that Oda failed to disclose to them that to protect their interests, Plaintiffs would need a policy that would pay out regardless of any acts of Plaintiffs. *See* Compl. ¶ 15. Basically, Plaintiffs claim that Oda should have, but did not, advise them to seek a policy with this second type of loss-payee provision. Oda, by merely arguing that the Policy includes a loss-payee provision, does not actually address Plaintiffs' claim. [13] Accordingly, Oda has not carried its initial burden to show that there is no genuine issue of material fact. The court therefore DENIES Oda's Motion for Summary Judgment.

V. *CONCLUSION*

For the reasons discussed above, the court GRANTS Allstate's Motion for Summary Judgment on all claims, GRANTS Allstate's Motion for Summary Judgment on Plaintiffs' non-contractual claims, and DENIES Oda's Motion for Summary Judgment. As a result of this Order, Plaintiffs' claims against Oda for violation of HRS § 480–2(a) and breach of fiduciary duty remain.

IT IS SO ORDERED.

J. MICHAEL SEABRIGHT, District Judge.

All Citations

Not Reported in F.Supp.2d, 2008 WL 1780271

Footnotes

1 Allstate submitted largely the same exhibits in support of each of its Motions for Summary Judgment, and Oda's exhibits are duplicative of Allstate's exhibits. The court therefore cites to Allstate's exhibits submitted in support of its Motion for Partial Summary Judgment.

2 McCracken's crew member may have instead been named Ernie Jones. Deguchi provided to Allstate different names of both crew than were reported by the Coast Guard, Pls.' Ex. 122 at 101–02, and Allstate was unable to locate an individual by either “Ernie Falk” or “Ernie Jones.” *See id.* at 101–06, 494 P.2d 783.

3 Sataua further informed Deguchi that Allstate “insists upon full and complete compliance with all the terms and conditions” of the Policy, and that “presenting a fraudulent claim for payment of a loss or benefit is a crime punishable by fines or imprisonment, or both.” Allstate Ex. G.

4 A copy of the tape was never provided. Deguchi Decl. ¶¶ 46–47.

5 After the May 10, 2006 interviews, Allstate waited to take Plaintiffs' EUOs so that it could first receive the Coast Guard Report on the incident. Sumida Decl. ¶¶ 4–5. After waiting some time for the Report, on June 30, 2006, Allstate started working with Plaintiffs' attorney to schedule Plaintiffs' EUOs. *Id.* ¶ 6, 494 P.2d 783. Plaintiffs agreed to appear for their EUOs on July 17, 2006, but were notified on that date that they would need to be rescheduled. Scalas Decl. ¶ 13. Due to scheduling conflicts of all the parties, Deguchi's EUO could not be scheduled until August 8, 2006 for Deguchi, and October for Scalas. Sumida Decl. ¶¶ 7–8.

6 Deguchi also brought a file on the PRINCESS NATASHA and other boats they had considered purchasing, but refused to turn it over after Sumida told her that he wanted the entire file to copy in Honolulu, as opposed to only the "relevant" documents. Deguchi Decl. ¶ 52.

7 Because the PRINCESS NATASHA and Plaintiffs were located in Hawaii from the time the Policy was purchased through the loss, the court applies Hawaii law.

8 Plaintiffs cite numerous cases from other jurisdictions in support of their argument. These cases are distinguishable, inapplicable, and/or otherwise unpersuasive. *See, e.g., Abraham v. Farmers Home Mut. Ins. Co.,* 439 N.W.2d 48, 49 (Minn.App.1989) (noting that summary judgment may be appropriate where the insured clearly showed an unwillingness to submit to examination by express refusal or through a pattern of non-cooperation, but no such facts existed in this case); *L.D. Jennings Co. v. N. River Ins. Co.,* 171 S.C. 548, 172 S.E. 700, 701 (S.C.1934) ("In its investigation the insurance company could have, if it so desired, required the insured to produce its books of accounts, and to be examined under oath, etc., for the purpose of determining whether the proofs of loss filed were correct, and whether the claim was a just one and should be paid."); *N. Assur. Co. of Am. v. Karp,* 257 Ga. 40, 354 S.E.2d 129, 130 (Ga.1987) (finding that an "injunction prohibiting the insurance company from taking the plaintiff's examination under oath until a determination of the reasonableness of the company's request to take the examination, in light of the facts surrounding this claim, is not clearly erroneous").

9 Plaintiffs argue that Allstate breached the Policy by failing to notify Plaintiffs of what settlement option it intended to exercise within 30 days of receipt of Plaintiffs' signed, sworn proof of loss. The Policy provides that:

> 6. Our Settlement Options
>
> In the event of a covered loss, we have the option to:
>
> a) repair, rebuild, or replace all or any part of the damaged, destroyed or stolen property with property of like kind and quality within a reasonable time; or
>
> b) pay for all or any part of the damaged, destroyed or stolen property; or
>
> c) take all or part of the covered property at the agreed or appraised value.
>
> We will notify you of the option or options we intend to exercise within 30 days after we receive your signed, sworn, proof of loss.

Allstate Ex. A at 5. At no time had Allstate determined that the loss of the PRINCESS NATASHA was indeed a "covered loss." Accordingly, Allstate had no obligation to settle the loss within 30 days of receiving the proof of loss statement.

10 The court is aware that *Yuen Shee v. London Guar. & Accident Co. & Gen. Accident, Fire & Life Ins. Corp.,* 40 Haw. 213, 1953 WL 7558, at *8 (Haw. Terr. June 2, 1953), states that a showing of prejudice is necessary for a breach of a co-operation clause:

> In circumstances where a violation of the co-operation clause is urged, there must be a lack of co-operation in some substantial and material respect. Any formal, inconsequential, or collusive lack of co-operation is immaterial. To defend upon the ground that a breach of the co-operation clause has occurred, the insurer is required to establish that the insured failed to co-operate with it in such way as to prejudice it.

(citation and quotation signals omitted); *see also Schmidt v. Allstate Ins. Co.,* 2007 WL 1430341, at *5 (D.Haw. May 11, 2007) (discussing *Yuen Shee*). Courts have distinguished, however, between cooperation clauses

generally, and the specific requirement that an insured submit to an EUO. *See, e.g.,* *Employers Mut. Cas. Co. v. Skoutaris,* 453 F.3d 915, 925 (7th Cir.2006) (discussing Indiana Supreme Court's decision that an EUO provision is separate from a cooperation clause, and does not require a showing of prejudice).

11 Because the court finds that Plaintiffs breached the Policy by failing to provide EUOs as reasonably requested by Allstate, the court need not determine whether Plaintiffs breached the Policy by failing to produce requested documents.

12 Plaintiffs make several assertions in their Concise Statement of Facts in Opposition to Allstate's Motion for Partial Summary Judgment ("Pls.' SMF"), including that (1) "Allstate knew that, prior to 5/10/06, that, except for its claim of non-cooperation, Plaintiffs' claims for the loss of 'Princess Natasha' were covered under its policy in the full amount of the $195,000 policy limits," Pls.' SMF No. 8; (2) "In demanding examinations under oath and documents after 5/10/06, Allstate was primarily motivated by the expectation that the insureds would likely not answer questions and not turn over documents related to their finances and thus create an arguable non-cooperation defense under the policy," *id.* at No. 13; (3) "Allstate failed to affirm or deny coverage of the insureds' claims within a reasonable time after submission of their proof of loss," *id.* at No. 15; and (4) Allstate failed to attempt in good faith a prompt, fair and equitable resolution of the insureds' claim when its liability was reasonably clear." *Id.* at No. 17.

The evidence cited by Plaintiffs does not support these assertions. Allstate explained its strategy was to complete Plaintiffs' interviews, collect documents to validate Plaintiffs' statements, and determine coverage under the Policy. *See* Pls.'s Ex. 93 at 38.

13 Oda argues that "Plaintiffs cannot as a matter of law obtain insurance to pay off their mortgage if they scuttled their boat," and cites *Allstate Ins. Co. v. Kim,* 121 F.Supp.2d 1301, 1306 (D.Haw.2000) to support its proposition. In *Kim,* the court rejected the insured's argument that the policy's exclusion of coverage for intentional acts was void as contrary to public policy. *Kim,* 121 F.Supp.2d at 1306. *Kim* does not address whether an insured can contract for the insurer to pay its loss payee under any circumstance. Indeed, it appears that such clauses do exist. *See* Couch on Ins. § 65:48 (3d ed.2007) (discussing the "standard or union mortgage clause").

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