2023 WL 4838493 (S.D.Ind.) (Trial Motion, Memorandum and Affidavit)
United States District Court, S.D. Indiana,
Indianapolis Division.

MESCO MANUFACTURING, LLC, Plaintiff,

v.

MOTORIST MUTUAL INSURANCE COMPANY, Defendant.

No. 1:19-cv-04875-JPH-MG.
April 5, 2023.

MMIC's Reply Brief in Support of its Motion to Reconsider Order on Cross-Motions for Partial Summary Judgment

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Defendant Motorist Mutual Insurance Company ("MMIC"), by counsel, under Rule 59(e) of the Federal Rules of Civil Procedure, files this *Reply Brief in Support of its Motion to Reconsider* (ECF 99) the *Order on Cross-Motions for Partial Summary Judgment* (ECF 94) ("Order").

I. The Order clashes with all of this Court's decisions recognizing an insurer's right to apply exclusions to an appraisal award.

Happy with the Order, Plaintiffs argue against reconsideration but offer no way to reconcile the Order with all of this Court's other decisions. In 2014, this Court recognized that a policy with the same "Appraisal" provision as MMIC's policy "expressly contemplate[d] that the insurer may deny coverage and assert defenses--including that the damage or a portion of it is outside the contractual scope of coverage--*after* an appraisal has taken place to determine the amount of loss." *Philadelphia Indem. Ins. Co. v. WE Pebble Point*, 44 F. Supp. 3d 813, 819 (S.D. Ind. 2014) (emphasis in original). In 2016, this Court confirmed its earlier decision agreeing with the insurer "based on the provision in the Policy that [the insurer] retains its 'right to deny the claim' even if there is an appraisal--that despite an appraisal award, [the insurer] presumably could still 'interpos[e] defenses from elsewhere in the contract, such as 'uncovered' causes of loss." *Philadelphia Indem. Ins. Co. v. WE Pebble Point*, No. 1:13-cv-1453-SEB-DML, 2016 WL 11458291, at *11 (S.D. Ind. Jan. 28, 2016) (quoting *Pebble Point*, 44 F. Supp. 3d at 819), *report and recommendation adopted sub nom. Philadelphia Indem. Ins. Co. v. We Pebble Point, LLC*, 2016 WL 6818516 (S.D. Ind. Nov. 18, 2016). In fact, this Court declined to order a second appraisal in *Pebble Point* because the insurer could presumably "insist on litigating causation issues if it were dissatisfied with the new appraisal award[.]" *Id.*

The Order mistakenly relied on the Seventh Circuit's decision in *Villas at Winding Ridge v. State Farm Fire & Cas. Co.*, 942 F.3d 824 (7th Cir. 2019). But as this Court recognized over two years ago in this case, "*Villas* did not hold that an appraisal award prevents parties from raising defenses outside the amount of loss." ECF 31 at 11. The Order acknowledges that *Villas* did not address the "right to deny" clause (ECF 31 at 10) but states, "the Seventh Circuit rejected the insured's position, finding the policy's appraisal provision as a whole--not just selected phrases or lines within the provision--binding and unambiguous." ECF 31 at 10. That the appraisal provision is binding and unambiguous does not affect MMIC's position, which is based on the unambiguous "right to deny" clause in the appraisal provision.

Contrary to Mesco's suggestion, the insurer in *Villas* did not invoke the "right to deny" clause, and the Seventh Circuit did not interpret that clause--in dicta or in holding that the insured failed to prove the appraisal award should be set aside. Put differently, the Seventh Circuit did not address the contractual "right to deny" clause; it addressed the common-law "exceptional-

circumstances" standard for setting aside an appraisal award altogether. *Villas*, 942 F.3d at 830 (noting that an appraisal award should be set aside only in "exceptional circumstances, which means manifest injustice, fraud, collusion, misfeasance, or unfairness"). That the insured in *Villas* could not satisfy that *common-law* standard for setting aside an appraisal award does not mean that insurers can no longer exercise their *contractual* rights under the unambiguous "right to deny" clause. Thus, the Seventh Circuit's decision in *Villas* provides no guidance here.

In contrast, this Court's underlying decision in *Villas* does. The insured in *Villas* argued that the appraisal provision was unenforceable because it gives the insurer "the sole discretion to refuse to abide by an appraisal award[.]" But, as this Court recognized, the insured's argument "misses the nuance of the appraisal provision, which binds both parties to the 'amount of loss' but does not require the insurer to pay out a claim for *that amount* if it has some other grounds, *such as causation*, to deny the claim." *Villas at Winding Ridge*, 2019 WL 1434220, at *7 (emphasis added); *see also Shifrin v. Liberty Mut. Ins.*, 991 F. Supp. 2d 1022, 1038 (S.D. Ind. 2014) (the insurer was "entitled to invoke the appraisal provision despite the fact that issues remained regarding which items of damage were caused by the tornado or [the insurer's] liability for that damage"). Accordingly, the Order should be amended to follow this Court's precedent.

II. The Order wrongly relies on a foreign federal court's prediction of how a foreign state court would interpret a law that is different from Indiana law.

Given the on-point decisions from within this district, there was no need consider what other courts have done when applying or interpreting the laws of other states. The Order cites *BonBeck Parker, LLC v. Travelers Indem. Co. of Am.*, 14 F.4th 1169 (10th Cir. 2021), a case in which the Tenth Circuit was tasked with trying to "predict" how the Colorado Supreme Court would rule. Ignoring that this case is not controlled by Colorado law, the Order cannot rely on *BonBeck* for three reasons. First, Indiana courts do not follow Colorado courts lockstep. *See, e.g., Allgood v. Meridian Sec. Ins. Co.*, 836 N.E.2d 243, 247 (Ind. 2005) (reversing Court of Appeals' decision that agreed with Colorado Court of Appeals' decision [*Hyden v. Farmers Ins. Exch.*, 20 P.3d 1222 (Colo. Ct. App. 2000)] and stating that "we are not obliged to agree that those courts that have reached different results have read the policy correctly"). Second, the MMIC Policy language disproves the assertion accepted in *BonBeck* that the term "loss" includes "a causation component." Unlike the policy at issue in *BonBeck*, the insuring agreement in Mesco's policy is clear: "loss" has no causation component. It says MMIC "will pay for direct physical loss of or damage...caused by or resulting from any *Covered Cause* of Loss." ECF 52-4 at 34: Policy, CP 0010 (04-02), p. 1 (emphasis added). That "loss" is covered only if it is caused by a covered cause means that the word "loss" by itself does not have "a causation component." Any remaining doubt that the word "loss" does not have a causation component is removed by the policy's loss payment provision limiting MMIC's payment obligation to "*covered* loss or damage." ECF 52-4 at 44 (Policy) (emphasis added). "Covered loss" must mean more than just "loss" if it is to be given any independent significance. Mesco ignores the fact that the Tenth Circuit's interpretation of "loss" in *BonBeck* nullifies the meaning of "covered," which is reason enough to reconsider the Order. *See, e.g., Indiana Repertory Theatre v. Cincinnati Cas. Co.*, 180 N.E.3d 403, 408 (Ind. Ct. App. 2022) ("If loss of use alone qualified as direct physical loss to the property, then the term 'physical' would have no meaning. The Court cannot interpret the Policy in a way that nullifies one of its terms."), *trans. denied sub nom. Indiana Repertory Theatre, Inc. v. Cincinnati Cas. Co.*, 193 N.E.3d 372 (Ind. 2022).

Third, interpreting "loss" to include "a causation component" conflicts with its common meaning and leads to results contrary to Indiana law. Indiana courts have cautioned against relying on dictionary definitions of a word without considering the context in which the word is used, as doing so can lead to a "semantic ambiguity." *100 Ctr. Dev. Co. v. Hacienda Mexican Rest., Inc.*, 546 N.E.2d 1256, 1258 n.1 (Ind. Ct. App. 1990). "The context in which the word appears can, however, resolve the ambiguity." *Id.* Indeed, this Court accepts this principle and considers "it as a fruitless exercise to attempt to ascertain the clear meaning of a word without resorting to the context and contours of the entire insurance policy in which it appears." *Heritage Mut. Ins. Co. v. Advanced Polymer Tech., Inc.*, 97 F. Supp. 2d 913, 923, (S.D. Ind. 2000).

The Tenth Circuit did not follow this principle in *BonBeck*. It cited three uncommon dictionary definitions that define "loss" to mean the amount of financial detriment to an insured or the amount of financial detriment caused by an insured's property

damage "that the insurer is liable for" or "for which the insurer becomes liable." [1] *Id.* at 1177-78. The Tenth Circuit, however, failed to consider that these definitions cannot be used in the context of the policy because they presuppose the insurer's liability and consequently make the word "loss" synonymous with "covered loss." If "loss" means the amount for which the insurer is liable, as the Tenth Circuit predicts Colorado law would do, then the appraisal panel would always determine coverage and liability. [2] But Indiana courts have held that the amount of loss is not synonymous with the amount of the insurer's liability, making the Tenth Circuit's decision in *BonBeck* irrelevant here. *Weidman v. Erie Ins. Grp.*, 745 N.E.2d 292, 297-98 (Ind. Ct. App. 2001) (noting that the phrase "amount of the loss" contains "no language designating this figure as the amount of [the insurer's] liability"); *Westfield Nat. Ins. Co. v. Nakoa*, 963 N.E.2d 1126, 1134 (Ind. Ct. App. 2012) (holding that insurer was not liable for additional-living-expense portion of "amount of loss" in appraisal award).

The Order and the Tenth Circuit's prediction of Colorado law conflict with all of this Court's prior decisions, which align with the view spelled out by Couch on Insurance, a treatise that "has been accepted as instructive for over fifteen years in Indiana." *Indiana Repertory Theatre v. Cincinnati Cas. Co.*, 180 N.E.3d 403, 410 (Ind. Ct. App.), *trans. denied sub nom. Indiana Repertory Theatre, Inc. v. Cincinnati Cas. Co.*, 193 N.E.3d 372 (Ind. 2022). As Couch explains, and as this Court's decisions did as well until the Order, the appraisal process is not meant to determine coverage for the loss: "Under a typical appraisal clause, the only issue to be determined by the appraiser is the amount of the loss." 15 Russ & Segalla, *Couch on Insurance,* § 212:3. "Consequently, questions concerning policy defenses or coverages are not to be addressed by the appraisers." *Id.* So to the extent the Order departs from this Court's earlier decisions, it did so in error.

III. That the appraisal process will not resolve all disputes is no reason to rewrite the policy and restrict the scope of the "right to deny" clause.

Mesco either ignores or fails to distinguish in any meaningful way the conflicts between the Order and all this Court's prior decisions. Mesco also does not acknowledge, much less address, that this Court recognized earlier here (and after *Villas*) that "[t]he policy expressly contemplates that the insurer may deny coverage and assert defenses--including that the damage or a portion of it is outside the contractual scope of coverage--*after* an appraisal has taken place to determine the amount of loss." *Id.* (emphasis in original). "In other words, as this Court has explained, "an insurer may deny the claim *notwithstanding the appraisal results*--presumably by interposing defenses derived from elsewhere in the contract, such as 'uncovered' causes of loss." ECF 31 at 9-10 (quoting *WE Pebble Point*, 44 F. Supp. 3d at 821) (emphasis added); *see also Legend's Creek Homeowners Assoc., Inc. v. The Travelers Indem. Co. of America*, No. 1:18-cv-02782-TWP-MPB, 2021 WL 2186437, at *3 (S.D. Ind. May 28, 2021) (citing *Villas at Winding Ridge*, 2019 WL 1434220, at *7, *aff'd sub nom. Villas at Winding Ridge v. State Farm Fire & Cas. Co.*, 942 F.3d 824 (7th Cir. 2019) (emphasis altered)).

The appraisal process is meant to help resolve disputes, but it is not guaranteed to do so. The Order overlooks this point and asserts that allowing an insurer to dispute the extent of hail damage after the appraisal process "would render the appraisal provision, and the process it creates, meaningless." ECF 94 at 9. No evidence supports that assertion, which hinges on the mistaken assumption that because an insurer has a contractual right to deny coverage when it disputes causation and coverage, it will do so no matter the merits. That is not so. Most appraisals are completed without court involvement or a causation dispute. That an insurer may dispute causation sometimes does not make the appraisal process meaningless. As this Court has recognized until the Order, even when the appraisal process does not "resolve [a] case completely," it still "could eliminate or substantially narrow the significant issue of loss value, which might also facilitate settlement discussions." *WE Pebble Point*, 44 F. Supp. 3d at 819 (quoting *Shree Hari Hotels, LLC v. Society Ins.,* Cause No. 1:11-cv-01324-JMS-DKL, 2013 WL 4777212, at *1 (S.D. Ind. Nov. 14, 2012)).

That the appraisal process did not resolve this dispute does not negate the fact that the appraisal provision gives MMIC the unambiguous right to deny coverage. Indeed, the appraisal provision does not limit its right to deny the claim to violations of policy conditions, and any contrary conclusion violates Indiana law that courts "cannot rewrite the policy nor make a new or different policy, but must enforce the terms of the policy as agreed upon by the parties." *Zeller v. AAA Ins. Co.*, 40 N.E.3d

958, 962 (Ind. Ct. App. 2015). As it stands, the Order changes the "right to deny" clause to say: "If there is an appraisal, we [Motorists] will still retain our right to deny the claim**. for failure to comply with the policy conditions.**"

Mesco fails to address the illogical results of allowing the Order to stand. Insureds could invoke the appraisal process to strip insurers of their right to dispute coverage by merely arguing that the "amount of loss" determines coverage. This would, in turn, require insurers to reject most appraisal demands outright and file declaratory judgment actions to avoid being bound by a non-legal determination of coverage. [3]

It is not as if MMIC demanded appraisal or agreed to appraisal without reservation until it received a result it did not like. *See Villas at Winding Ridge*, 942 F.3d 824 (insured sued because it was unhappy with the results of the appraisal it demanded). Indeed, when Mesco demanded appraisal, MMIC specifically informed Mesco that MMIC "will not be including the EPDM and modified bitumen roof coverings in the ongoing appraisal process" because it believed they sustained no covered damage. ECF 61-6 at 1-2. And the appraisal award says that it does not "alter the terms and conditions of the insurance policy...." ECF 54-1. Thus, the appraisal award, on its face, recognizes that the amount of loss is not synonymous with the amount that MMIC might owe. *LeBlanc v. Travelers Home & Marine Ins. Co.,* No. CIV-10-00503-HE, 2011 WL 1107126 at *5 (W.D. Okla. 2011) ("It has long been the prevailing view that the appraisal process, invoked under a policy such as that involved here, is directed to the question of the amount of loss rather than issues of coverage or causation."). Allowing the appraisal award to stand runs counter to what took place and was understood throughout the process.

IV. The Order should be reconsidered to match all this Court's earlier decisions consistent with Indiana law.

MMIC's position is that the claim involved wear and tear, which is not a covered loss, and this position predated Mesco's demand for appraisal. Despite this coverage dispute, MMIC followed the established law and prior rulings from this district and agreed to appraise both the covered and uncovered damage. [4] Under the well-settled law from Indiana and this Court, MMIC should now have a chance to litigate -- without breaching the policy -- its liability under its policy, which is limited to only those portions of the appraisal award that are covered. Not allowing an insurer to apply the plain language of its policy to an appraisal award would render entire sections of the policy meaningless and lead to illogical results. Insureds would be able to simply invoke appraisal, side-stepping any requirement to show that the loss is covered under the policy and precluding an insurer from disputing coverage. If MMIC has the right to apply coverage to the appraisal award or litigate that dispute, as this Court has long held, then MMIC cannot be found to have breached its contract with Mesco, and summary judgment for Mesco should be overturned. MMIC respectfully submits that the Order is a manifest error, contrary to established case law, and requests that its motion be granted, and the order be set aside.

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Footnotes

1 The common meaning of "loss" is reflected in the first definition offered in Merriam-Webster's dictionary: "destruction, ruin." *Loss,* Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/loss (last visited Apr. 4, 2023).

2 Neither the Colorado Supreme Court nor the Colorado Court of Appeals has cited *BonBeck*, so it is unclear whether the Tenth Circuit's prediction of Colorado law is correct.

3 "The courts, and not appraisers, must resolve coverage defenses and causation disputes." *WE Pebble Point*, 44 F. Supp. 3d at 817 (quoting *Mapleton Processing, Inc. v. Soc'y Ins. Co.,* 2013 WL 3467190, at *23 (N.D. Iowa 2013).

4 The appraisal award expressly states that it does not "alter the terms and conditions of the insurance policy nor does it address any policy issues prior to the execution of the appraisal process." ECF 54-1.

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