

Mark A. Nickel (14082)
Tyler J. Moss (15685)
GORDON REES SCULLY MANSUKHANI, LLP
460 W. 50 N., 5th Floor
Salt Lake City, UT 84101
Telephone: (801) 204-9990
Facsimile: (385) 282-7590
mnickel@grsm.com
tmoss@grsm.com

John M. Palmeri, *Pro Hac Vice*
Gregory S. Hearing II, *Pro Hac Vice*
GORDON REES SCULLY MANSUKHANI, LLP
555 Seventeenth Street, Ste. 3400
Denver, Colorado 80202
Telephone: (303) 534-5160
Facsimile: (303) 534-5161
jpalmeri@grsm.com
ghearing@grsm.com

IN THE UNITED STATES DISTRICT COURT DISTRICT OF UTAH, NORTHERN DIVISION	
JOHN CHAD ANDREW, an individual, Plaintiff, vs. THE TRAVELERS HOME AND MARINE INSURANCE COMPANY, Defendant.	MOTION FOR SUMMARY JUDGMENT Civil No 1:20-cv-00179-DBB-JCB Judge David Barlow Magistrate Judge Jared C. Bennett

Defendant The Travelers Home and Marine Insurance Company (“Travelers”), by and through its counsel, Gordon & Rees LLP, submits the following Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56.

INTRODUCTION AND RELIEF REQUESTED

Travelers seeks summary judgment and the dismissal of Plaintiff's claims for breach of contract and breach of the duty of good faith and fair dealing as the operative policy does not provide coverage for the damages sought in this action and the underlying claims are, at a minimum, fairly debatable.

This insurance coverage dispute arises from a homeowner's claim for deteriorating and defective concrete work. Plaintiff presented a claim to Travelers concerning damage to exterior concrete surfaces. The damage arises from deteriorating concrete including cracking, marring, wear, and other deterioration. Travelers evaluated the claim presented by Plaintiff and presented a denial based upon multiple policy exclusions. Plaintiff requested reconsideration, Travelers reviewed the claim again, and issued a second denial. Plaintiff then filed the present lawsuit.

Summary judgment in Travelers' favor is now appropriate. The evidence presented by Plaintiff demonstrates that the alleged damages are the result of wear and tear, latent defects, and "settling, shrinking, bulging or expansion...of pavement [or] patios" all of which are excluded under the plain language of the Policy. As Plaintiff cannot demonstrate that the alleged damages arise because of a covered cause of loss, summary judgment in Travelers' favor is appropriate on all claim. Further, the claims are, at a minimum, fairly debatable and as a result, summary judgment on Plaintiff's claim for bad faith is also appropriate.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Travelers issued Policy Number 984157772 633 1 ("the Policy") to John C. Andrew. *See* Exhibit A at p. 1.
2. The Policy applies to a home located at 1527 Homestead Circle, Centerville, Utah 84014. *Id.*

3. The Travelers Policy provides:

COVERAGE A – DWELLING AND COVERAGE B OTHER STRUCTURES

1. We insure against risk of direct physical loss to property described in Coverages A and B.

2. We do not insure, however, for loss:

a. Excluded under Section I – Exclusions;

c. Caused by:

(2) Freezing, thawing, pressure or weight of water or ice, whether driven by wind or not, to a:

(a) Fence, pavement, patio or swimming pool;

(5) Constant or repeated seepage or leakage of water or steam, or the presence or condensation of humidity, moisture or vapor, that occurs over a period of 14 days or more; or

(6) Any of the following:

(a) Wear and tear, marring, deterioration;

(b) Mechanical breakdown, latent defect, inherent vice, or any quality in property that causes it to damage or destroy itself;

(f) Settling, shrinking, bulging or expansion, including resultant cracking, of bulkheads, pavements, patios, footings, foundations, walls, floors, roofs or ceilings

Id. at pp. 28-29.

4. Mr. Andrew made a claim to Travelers and Travelers inspected the property on May 22, 2019. *See* Exhibit B.

5. A denial letter issued on June 3, 2019. *Id.*

6. Mr. Andrew later requested reconsideration of the denial. Exhibit C.

7. Following a June 1, 2020 coverage review, Travelers issued a second denial letter on June 24, 2020. *Id.*

8. Plaintiff retained Utah Public Adjusters. Exhibit D.

9. Utah Public Adjusters prepared its most recent estimate on July 21, 2021. *Id.*

10. The estimate contain numerous photos of the damage at issue. *Id.* at pp. 16-47.¹

11. The damage is concentrated on exterior paved surfaces and an exterior staircase.

Id.

12. Travelers retained a Structural Engineer to evaluate the materials provided by Utah Public Adjusters. Exhibit E.

13. The engineer concluded that the damage at issue was the result of age related deterioration and a number of other factors and that the damage in question occurred over a long period of time. *Id.*

LEGAL STANDARD

Summary judgment is proper if the moving party can demonstrate that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Clifton v. Craig*, 924 F.2d 182, 183 (10th Cir. 1991). In considering whether genuine issues of material fact exist, the Court determines whether a reasonable jury could return a verdict for the nonmoving party in the face of all the evidence presented. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Wright v. Sw. Bell Tel. Co.*, 925 F.2d 1288, 1292 (10th Cir. 1991).

ARGUMENT

The interpretation of an insurance contract is a question of law. *Bear River Mut. Ins. Co. v. Williams*, 153 P.3d 798, 800 (Utah Ct.App.2006). When interpreting an insurance contract, the court must read the policy as a whole in an attempt to harmonize and give effect to all of its

¹ Plaintiff identified Utah Public Adjusters as a non-retained expert in its Initial Expert Disclosures but did not disclose a report or provide a disclosure of testimony on the report deadline

provisions. *First Am. Title Ins. Co. v. J.B. Ranch*, 966 P.2d 834, 836 (Utah 1998). If the policy language at issue is ambiguous, the court must liberally construe the language in favor of the insured. *S.W. Energy Corp. v. Continental Ins. Co.*, 974 P.2d 1239, 1242 (Utah 1999). But if the language is not ambiguous, “the court must construe it according to its plain and ordinary meaning,” and no presumption in favor of coverage arises. *First Am. Title*, 966 P.2d at 836; *S.W. Energy*, 974 P.2d at 1242.

Utah law is clear that fairly debatable claims are not subject to damages for bad faith breach of insurance contract.

If an insurer acts reasonably in denying a claim, then the insurer did not contravene the covenant [of good faith and fair dealing]. The denial of a claim is reasonable if the insured's claim is fairly debatable. Under Utah law, if an insurer denies an “ ‘insured's claim that is fairly debatable, then the insurer is entitled to debate it and cannot be held to have breached the implied covenant if it chooses to do so.’ ”

Prince v. Bear River Mut. Ins. Co., 56 P.3d 524, 533–34 (Utah 2002) (internal citations and quotation marks omitted). Whether the denial is “fairly debatable” is a question of law for the court. *Young v. Fire Ins. Exch.*, 182 P.3d 911, 917 (Utah Ct.App.2008).

Summary judgment in Travelers’ favor is appropriate. The damages claimed by Plaintiff all arise from long-term wear and deterioration of the underlying concrete surfaces. The photographs provided by Plaintiff demonstrate that the concrete has deteriorated because of wear and tear as depicted below.



(Ex. D at p. 25). The Policy plainly excludes losses caused by “[w]ear and tear, marring, deterioration.” (Ex. A at p. 28). Further, the Policy also excludes “[s]ettling, shrinking, bulging or expansion, including resultant cracking, of bulkheads, pavements, patios, footings, foundations, walls, floors, roofs or ceilings. *Id.* (emphasis supplied). Lastly, the Policy also excludes “[m]echanical breakdown, latent defect, . . . or any quality in property that causes it to damage or destroy itself.” *Id.* The damage shown to the paved surfaces plainly falls within these exclusions. Indeed, the photos provided by Plaintiff and his public adjuster plainly demonstrate wear and tear, deterioration, cracking, mechanical breakdown, and resultant cracking.



Ex. D at p. 37. When the language of an exclusion is clear and unambiguous, “the court must construe it according to its plain and ordinary meaning,” and no presumption in favor of coverage arises. *First Am. Title*, 966 P.2d at 836; *S.W. Energy*, 974 P.2d at 1242. Here, the undisputed evidence plainly demonstrates the applicability of the exclusions.

In addition to the clear application of the unambiguous exclusions, Plaintiff has failed to demonstrate that the alleged damages fall within the Policy’s coverage grant. Plaintiff bears the burden of establishing that the claimed damages were caused by a covered cause of loss. Travelers communicated its coverage position in 2019 and 2020 in response to Plaintiff’s request for revaluation. Plaintiff has not substantively refuted Travelers’ position and in this matter, Plaintiff has not disclosed expert testimony or other evidence demonstrating the cause of the alleged damages. Such evidence is necessary for Plaintiff to demonstrate a genuine issue of material facts as to coverage under the Policy.

Finally, because there is no coverage available under the Policy, Plaintiff's claim for bad faith breach of insurance contract fails as a matter of law. In the absence of coverage there can be no claim for breach of the duty of good faith and fair dealing. Furthermore, even if a genuine issue of material facts existed as to coverage, and it does not, the claim is fairly debatable and as a result, summary judgment on the claim for breach of the duty of good faith and fair dealing would still be appropriate. *Prince v. Bear River Mut. Ins. Co.*, 56 P.3d 524, 533–34 (Utah 2002) (internal citations and quotation marks omitted). Indeed, whether the denial is “fairly debatable” is a question of law for the court. *Young v. Fire Ins. Exch.*, 182 P.3d 911, 917 (Utah Ct.App.2008). Here, the materials submitted by Plaintiff and the damages alleged fall within the Policy's exclusions. Even if they did not, the claim would remain fairly debatable and therefore, there can be no cause of action for bad faith breach of contract.

CONCLUSION

Based upon the foregoing, summary judgment in favor of Travelers is appropriate. The damages at issue in this matter fall within multiple, unambiguous exclusions set forth in the Policy and Plaintiff has failed to demonstrate a genuine issue of material fact as to coverage. Because there is no coverage available under the Policy, there can be no claim for bad faith breach of insurance contract. Finally, even if a question of material fact existed as to coverage, the claims is fairly debatable as a matter of law.

Wherefore, Defendant The Travelers Home and Marine Insurance Company requests that this Court enter summary judgment in its favor, dismiss Plaintiff's claims with prejudice, and for such further relief as this Court deems just and proper.

Dated this 20th day of January, 2022.

GORDON & REES LLP

/s/ Greg S. Hearing

John M. Palmeri, Esq., *Pro Hac Vice*
Greg S. Hearing II, Esq., *Pro Hac Vice*
555 Seventeenth Street, Suite 3400
Denver, Colorado 80202
Phone (303) 534-5160
Fax: (303) 534-5161
jpalmeri@grsm.com
ghearing@grsm.com

Mark A. Nickel (14082)
Tyler J. Moss (15685)
460 W. 50 N., 5th Floor
Salt Lake City, UT 84101
Telephone: (801) 204-9990
Facsimile: (385) 282-7590
mnickel@grsm.com
tmoss@grsm.com

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the above and foregoing was electronically filed with the Clerk of the United States District Court using the CM/ECF system which will send notification to all counsel referenced below, this 20th day of January, 2002.

Ryan M. Nord, Esq.
Sage Law partners, LLC
140 North Union Avenue, Suite 220
Farmington, Utah 84025
rnord@sagelawpartners.com

/s/ Linda J. Bustos