



Lafollette et al v. Liberty Mutual Fire Insurance Company

2017 | Cited 0 times | W.D. Missouri | March 16, 2017

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI

CENTRAL DIVISION ERIC LAFOLLETTE and CAMILLE) LAFOLLETTE, individually and on)
behalf of others similarly situated,) Plaintiffs,) v.) No. 2:14-CV-04147-NKL LIBERTY MUTUAL
FIRE INSURANCE) COMPANY,) Defendant.)

ORDER Pending before the Court are the cross motions for summary judgment of Plaintiffs Eric and Camille Lafollette and Defendant Liberty Mutual Fire Insurance Company. [Docs. 198 and 194]. As set forth below, motions are granted in part and denied in part.

I. Undisputed Facts 1

Plaintiffs Eric and Camille Lafollette purchased a LibertyGuard Deluxe Homeowners Insurance Policy, Form HO 00 03 (Edition 04 91), from Defendant Liberty Mutual Fire iberty Mutual s an endorsement for wind and hail damage. In January 2008, the Lafollettes home was damaged by hail, and they sought payment from Liberty Mutual for that hail damage.

1 or interpretation each prefers, some facts are clearly undisputed.

A. Liberty Mutual When a homeowner sustains damage to his or her property that is covered by a LibertyGuard Deluxe Homeowners Policy, the claim is handled and paid in two phases: (1) the After the policyowner makes his or her claim, an adjustor goes to the location of the insured property to ascertain the damage. [Doc. 199-5, p. 141-45 (Depo. of Ricky Summerlin)]. The adjustor then uses Id. The total amount of the loss is referred Id. at p. 145. After the total amount of the loss is calculated, the adjustor inputs factors for depreciation, and the amount of depreciation is subtracted from the replacement cost to give the ACV loss. Id. at 145-46.

Following this calculation, the policyowner is paid the ACV of the loss, minus the deductible. 2

No further payment on the claim is made unless the insured decides to repair or replace the damage to the property. Id. at p. 155-56. The insured is not required to undertake this repair. Id. at p. 148-50. Nor is the insured required to come back and submit a replacement cost claim for payment of the withheld depreciation. Id. at p. 150-51. Instead, the insured may take the ACV payment in



Lafollette et al v. Liberty Mutual Fire Insurance Company

2017 | Cited 0 times | W.D. Missouri | March 16, 2017

satisfaction of their claim to do with whatever he or she chooses. Id. at p. 148-50. To recover the RCV, the insured must repair or replace the damage and submit proof of the repairs to Liberty Mutual. Id. at p. 155-56.

B. The In January 2008, the , and they submitted a claim for coverage. This claim constituted a loss that was covered under the terms of the policy. Liberty Mutual estimated the ACV of the loss and paid the Lafollettes the ACV minus a \$1000

2 The propriety of the assessment of this deductible is what is disputed in this lawsuit. deductible. On April 8, 2014, the Lafollettes filed a putative class action against Liberty Mutual alleging that Liberty Mutual unlawfully applied a deductible to the ACV payment for their hail damage claim.

On October 19, 2015, the Court denied Liberty [Doc. 115]. On August 1, 2016, the Court certified a Rule 23(b)(3) class and four subclasses. [Doc. 177]. The Court appointed the Lafollettes as representatives of the plaintiff class, which is defined as:

All persons who received an ACV payment, directly or indirectly, from Liberty Mutual Fire Insurance Company for physical loss or damage to their dwelling or other structures located in the state of Missouri arising under policy Form HO 03 (Edition 04 91) and endorsements, such payments arising from losses that occurred from April 8, 2004 to August 1, 2016, where a deductible was applied to the ACV payment for the

Excluded from the Class are: (1) All persons who submitted a claim for and received a replacement cost payment from Liberty Mutual Fire Insurance Company under Coverage A and/or B; (2) All persons whose payment(s) plus the amount of any deductible applied was less than \$2,500; (3) All persons whose claim(s) were caused by earthquake; (4) Liberty Mutual Fire Insurance Company and its affiliates, officers, and directors; (5) Members of the judiciary and their staff to whom this action is assigned; and (6) Pla There are three certified subclasses, defined as:

(1) All parties who received an ACV payment for loss arising solely under the base

policy and/or Home Protector Plus Endorsement; (2) All parties who received an ACV payment for loss arising under the Wind/Hail

Endorsement; and (3) All parties who received an ACV payment for loss arising under the Functional Replacement Cost Loss Settlement Endorsement. 3

3 following its decertification of the Earthquake Endorsement Subclass. See [Doc. 227 (Order

C. Deductible Information for Purposes of Damages manager of business systems, Jeffrey Gabriel,



Lafollette et al v. Liberty Mutual Fire Insurance Company

2017 | Cited 0 times | W.D. Missouri | March 16, 2017

testified that Defendant could determine the amount of a deductible applied to a claim. [Doc. 215, p. 18; Doc. 199-8, p. 137 and 180-81]. Liberty Mutual has produced two spreadsheets containing data identifying the ,

eductible withheld from each claim. [Doc. 215, p. 18; Doc. 199-6 and 199-7 (Spreadsheets)].

D. The three relevant sections: the Declarations, the base policy language, and the endorsements. These sections work together to define the parameters of their coverage. The Declarations set out the limits on recovery under the policy, list the endorsements included in the policy, and note the deductibles that may be assessed under the policy. The base policy language contains the standard terms of the policy. The endorsements are additions to the policy which customize the coverage and terms of the base policy language to create the specific coverage purchased by the policyowner. The terms of the endorsements control over conflicting provisions in the base policy language or Declarations. *Grable v. Atlantic Cas. Ins. Co.*, 280 S.W.3d 104, 108 (Mo. Ct. App. 2009).

1. The Base Policy 91) includes, among others, the following: Section I Property Coverages; Section I Perils Insured Against; Section I Exclusions; and Section I Conditions.

SECTION I PROPERTY COVERAGES
COVERAGE A Dwelling We cover: 1. structures attached to the dwelling; and 2.

construct, alter or repair the This coverage does not apply to land, including land on which the dwelling is located. COVERAGE B Other Structures dwelling by clear space. This includes structures connected to the dwelling by only a fence, utility line, or similar connections. . . . The limit of liability for this coverage will not be more than 10% of the limit of liability that applies to Coverage A. Use of this coverage does not reduce the Coverage A limit of liability. COVERAGE C Personal Property world. . . . Special Limits of Liability. These limits do not increase the Coverage C limit of liability. COVERAGE D Loss of Use The limit of liability for Coverage D is the total limit for all the coverages that follow. 1. where you reside not fit to live in, we cover, at your choice, either

place of residence, we will not provide the option under paragraph b. below.

a. Additional Living Expense, meaning any necessary increase in living

expenses incurred by you so that your household can maintain its normal standard of living; or b. Fair Rental Value, meaning the fair rental value of that part of the

ses that do not continue while the premises is not fit to live in. Payment under a. or b. will be for the shortest time required to repair or replace the damage or, if you permanently relocate, the shortest time required for your household to settle elsewhere. . . .



Lafollette et al v. Liberty Mutual Fire Insurance Company

2017 | Cited 0 times | W.D. Missouri | March 16, 2017

ADDITIONAL COVERAGES . . . 4. Fire Department Service Charge. We will pay up to \$500 for your liability assumed by contract or agreement for fire department charges incurred when the fire department is called to save or protect covered property from a Peril Insured Against. . . . This coverage is additional insurance. No deductible applies to this coverage. . . . s settlement provisions for Coverages A, B, and C are included within Section I Conditions, as follows:

SECTION I CONDITIONS . . . 3. Loss Settlement. Covered property losses are settled as follows:

a. Property of the following types: (1) Personal property; (2) Awnings, carpeting, household appliances, outdoor

antennas and outdoor equipment, whether or not attached to buildings; and (3) Structures that are not buildings; at actual cash value at the time of loss but not more than the

amount required to repair or replace. b. Buildings under Coverage A or B at replacement cost without deduction for depreciation, subject to the following:

(1) If, at the time of loss, the amount of insurance in this policy on the damaged building is 80% or more of the full replacement cost of the building immediately before the loss, we will pay the cost to repair or replace, after application of deductible and without deduction for depreciation, but not more than the least of the following amounts: (a) The limit of liability under this policy that

applies to the building; (b) The replacement cost of that part of the building

damaged for like construction and use on the same premises; or (c) The necessary amount actually spent to repair

or replace the damaged building. (2) If, at the time of loss, the amount of insurance in this

policy on the damaged building is less than 80% of the full replacement cost of the building immediately before the loss, we will pay the greater of the following amounts, but not more than the limit of liability under this policy that applies to the building:

(a) The actual cash value of that part of the building damaged; or (b) That proportion of the cost to repair or replace, after application of deductible and without deduction for depreciation, that part of the building damaged, which the total amount of insurance in this policy on the damaged building bears to 80% of the replacement cost of the building. . . .

(4) We will pay no more than the actual cash value of the damage until actual repair or replacement is complete. Once actual repair or replacement is complete, we will settle the loss according to the provisions of b.(1) and b.(2) above. . . . (5) You may disregard the replacement cost loss settlement



Lafollette et al v. Liberty Mutual Fire Insurance Company

2017 | Cited 0 times | W.D. Missouri | March 16, 2017

provisions and make claim under this policy for loss or damage to buildings on an actual cash value basis. You may then make claim within 180 days after loss for any additional liability according to the provisions of this Condition 3. Loss Settlement. [Doc. 214-1, p. 6-15 (Lafollette Policy, Bates LMFIC000066-75)].

2. The Endorsements insurance policies include a Home Protector Plus Endorsement. If certain conditions are met, 4

the Home Protector Plus Endorsement has a slightly different loss settlement provision, as follows:

HOMEPROTECTOR PLUS ENDORSEMENT . . . B. REPLACEMENT COST PROVISION DWELLING AND PERSONAL

PROPERTY . . . 3. Loss Settlement. Covered property losses are settled as follows: a. The applicable limit of liability for Buildings under Coverage A or B is the replacement cost, after application of deductible and without deduction for depreciation, subject to the following:

(1) We will pay the cost of repair or replacement, but not exceeding:

(a) The replacement cost of the part of the building damaged

using like construction on the same premises and intended for the same occupancy and use;

4 Both parties agree that these conditions have been met, and therefore, they are not relevant to the analysis.

(b) With respect to Coverage A, an amount not exceeding

20% greater than the limit of liability stated in the declarations, as modified by the Inflation Protection Provision of the policy; (c) With respect to Coverage B, the limit of liability stated in

the declarations, as modified by the Inflation Protection Provision of the policy; (d) The amount actually and necessarily spent to repair or

replace the damage. (2) We will pay no more than the actual cash value of the damage

until actual repair or replacement is complete. Once actual repair or replacement is complete, we will settle the loss according to the provisions of a.(1) above. . . . c. Personal property, carpeting and domestic appliances: at

replacement cost but not exceeding the amount needed to repair or replace subject to the following:



Lafollette et al v. Liberty Mutual Fire Insurance Company

2017 | Cited 0 times | W.D. Missouri | March 16, 2017

(1) Our limit of liability for loss to Personal Property shall not

exceed the smallest of the following:

(a) Replacement cost with a similar item of like kind and

quality at the time of loss; (b) The full cost of repair; (c) Any special limit of liability described in the policy or

stated in this endorsement; or (d) The Coverage C limit of liability stated in the

declarations, as modified by the Inflation Protection Provision of the policy. (2) This endorsement shall not apply to: (a) Fine arts and items which, by their nature cannot be

replaced with new items. (b) Articles whose age or history contribute substantially (c) Property that is unusable for the purpose for which it

was originally intended due to age or historic condition. (3) We will not pay for any loss to personal property under this

endorsement until actual repair or replacement is complete. d. You may disregard the replacement cost provision and make a

claim for loss of or damage to property on an actual cash value basis and then make claim within 180 days after loss for additional liability under this endorsement. . . .

D. ADDITIONAL COVERAGES

Lock Replacement Coverage We will pay up to \$250 for replacing the locks or cylinders on the exterior doors of the residence premises when your keys have been stolen. The theft of the keys must be reported to the police for this coverage to apply. This coverage is additional insurance. No deductible applies to this coverage. [Doc. 214-1, p. 23-24 (Lafollette Policy), Bates LMFIC000083-84].

insurance policies also contain a Windstorm or

WINDSTORM OR HAIL DEDUCTIBLE The following special deductible is added to the policy: With respect to the peril of Windstorm Or Hail, we will pay only that part of the total of all loss payable under Section I that exceeds the windstorm or hail deductible. The dollar or percentage amount of the windstorm or hail deductible is shown on the policy declaration. . . . No other deductible in the policy applies to loss caused by windstorm or hail. [Doc. 214-1, p. 34 (Lafollette Policy), Bates LMFIC000094]. ent also contains its own loss settlement



Lafollette et al v. Liberty Mutual Fire Insurance Company

2017 | Cited 0 times | W.D. Missouri | March 16, 2017

provision, which provides: FUNCTIONAL REPLACEMENT COST LOSS SETTLEMENT . . .

SECTION I CONDITIONS The following definition is added when this endorsement is attached to the policy: Functional Replacement Cost means the amount which it would cost to repair or

replace the damaged building with less costly common construction materials and methods which are functionally equivalent to obsolete, antique or custom construction materials used in the original construction of the building. . . .

For the premium charges, item 3.b. Loss Settlement is deleted and replaced by the following: b. Buildings under Coverage A or B: (1) If, at the time of loss,

(a) The amount of insurance in this policy on the damaged building is 80% or more of the functional replacement cost of the building immediately before the loss; and (b) You contract for repair or replacement of the damaged

building for the same use, within 180 days of the damage unless we and you otherwise agree;

we will pay, after application of deductible, the lesser of the following amounts: (a) The limit of liability under this policy that applies to the

building; or (b) The necessary amount actually spent to repair or replace the

damaged building on a functional replacement cost basis. (2) If you do not make claim under Paragraph (1) above, we will pay, after application of deductible, the least of the following amounts:

(a) The limit of liability under this policy that applies to the

building; (b) The actual cash value of the damaged part of the building; or (c) The amount which it would cost to repair or replace the

damaged building on a functional replacement cost basis. (3) If, at the time of loss, the amount of insurance in this policy on the

damaged building is less than 80% of the functional replacement cost of the building immediately before the loss, we will pay that proportion of the cost to repair or replace that part of the building damaged:

(a) After application of deductible; and (b) Without deduction for depreciation: which the total amount of insurance in this policy on the damaged building bears to 80% of the functional replacement cost of the building, but not more than the limit of liability under this policy that applies to the building. . . . (5) If the actual cash value of the damage is less than the functional



Lafollette et al v. Liberty Mutual Fire Insurance Company

2017 | Cited 0 times | W.D. Missouri | March 16, 2017

replacement cost: (a) We will pay no more than the actual cash value of the damage

until replacement is complete. Once replacement is complete, we will settle the loss according to the provisions b.(1) and b.(3) above. However, if the cost to functionally repair the damage is both: (i) Less than 5% of the amount of insurance in this policy

on the building; and (ii) Less than \$2,500; we will settle the loss according to the provisions of b.(1)

and b.(3) above whether or not replacement is complete. (b) You may disregard the functional replacement cost loss settlement provisions and make claim under this policy for loss or damage to buildings on an actual cash value basis. You may then make claim for any additional liability according to the provisions of this Condition 3. Loss Settlement, provided we are notified of your intent to do so within 180 days of the date of loss. [Doc. 199-4, p. 2-3 (FRCE Endorsement), Bates LMFIC031162]. 3. The Declarations

The first two pages of the policy contain the Declarations In relevant part, the Declarations provide:

SECTION I AND II: COVERAGES AND LIMITS UNDER YOUR LIBERTYGUARD HOMEOWNERS POLICY

I: COVERAGE A YOUR DWELLING WITH EXPANDED REPLACEMENT COST \$158,300
COVERAGE B OTHER STRUCTURES ON RESIDENCE PREMISES \$15,830 COVERAGE C
PERSONAL PROPERTY WITH REPLACEMENT COST \$118,725 COVERAGE D LOSS OF USE OF
YOUR RESIDENCE PREMISES ACTUAL LOSS SUSTAINED II: COVERAGE E PERSONAL
LIABILITY (EACH OCCURRENCE) \$300,000 COVERAGE F MEDICAL PAYMENTS TO OTHERS
(EACH PERSON) \$1,000 DEDUCTIBLE: LOSSES COVERED UNDER SECTION I ARE SUBJECT
TO A DEDUCTIBLE OF \$1000 OTHER DEDUCTIBLES: \$1000 WINDSTORM OR HAIL [Doc.
214-1, p. 2-3 (Declarations), Bates LMFIC000062-63].

II. Discussion The primary issue in this lawsuit is whether Liberty covered under the base policy, Home Protector Plus Endorsement, Wind/Hail Endorsement,

and/or Functional Cost Replacement Loss Settl Dwelling; Coverage B Other Structures; Coverage C Personal Property; Coverage D Loss of Use; and Additional Coverage. The dispute in this lawsuit is whether a deductible should be applied to a claim under Coverage A and/or B, regardless of whether the insured opts for an discussed, Coverage A and B claims are paid out in two phases: (1) the ACV phase and (2) the

RCV phase. After the ACV payment is made to the insured, the claim is complete, and Liberty Mutual does not provide any additional payment unless the insured decides to repair or replace the damage to the property and submits proof to Liberty Mutual. Liberty Mutual moves for summary



Lafollette et al v. Liberty Mutual Fire Insurance Company

2017 | Cited 0 times | W.D. Missouri | March 16, 2017

judgment for a second time and again argues that its policy requires the payment of a deductible, regardless of whether the insured opts for an ACV or RCV payment for Coverage A and/or B losses covered by the policy. In doing so, Liberty Mutual includes new arguments, as well as arguments it already briefed in its previous motion

policy and relevant endorsements as allowing a deductible to be taken only when an RCV

payment is made to the insured. Plaintiffs move for judgment on the issues of liability and

damages. Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In this case, there is no dispute of material fact. policy requires a deductible to be paid when an ACV payment is made for Coverage A and B claims, and if so, how class damages are to be determined. This question requires the Court to determine whether a deductible must be applied to an ACV payment for Coverage A and B claims made under the base policy, Home Protector Plus Endorsement, Wind/Hail Endorsement, and/or Functional Replacement Cost Loss Settlement Endorsement. A. Interpretation of Insurance Contracts in Missouri

The interpretation of an insurance policy is a question of law to be determined by the Court. *Mendota Ins. Co. v. Lawson*, 456 S.W.3d 898, 903 (Mo. Ct. App. 2015). Missouri courts

int *Thiemann v. Columbia Pub. Sch. Dist.*, 338 S.W.3d 835, 840 (Mo. Ct. App. 2011). To determine the intent of the parties, the language in the contract is to be read according to its plain and ordinary meaning. *Mendota*, 456 S.W.3d at 903. If an ambiguity exists the policy language will be construed against the insurer. *Id.* ambiguity exists when there is duplicity, indistinctness, or uncertainty in the meaning of the

Fanning v. Progressive Northwestern Ins. Co., 412 S.W.3d 360, 364 (Mo. Ct. App. 2013) (quoting *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc

considered in the light in which it would normally be understood by the lay person who bought *Blumer*, 340 S.W.3d at 219 (quoting *Heringer v. Am. Family Mut. Ins. Co.*, 140 S.W.3d 100, 102 (Mo. Ct. App. 2004)).

As previously explained, an insurance policy consists of the policy, the declarations, and any endorsements and definitions. *Grable v. Atlantic Cas. Ins. Co.*, 280 S.W.3d 104, 107-08

extent called for by the endorsement. . . . If the language of the endorsement and the general provisions of the policy conflict, the endorsement will prevail, and the policy remains in effect as *Id.* at 108 (quotation omitted). B. Standing



Lafollette et al v. Liberty Mutual Fire Insurance Company

2017 | Cited 0 times | W.D. Missouri | March 16, 2017

First, t standing. In order to bring a class action, the Lafollettes Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). The injury must be both concrete and

Spokeo, Inc. v. Robins, 2016 WL 2842447, at *6-7 (S. Ct. May 16, 2016).

With some slight modificatio same as those already rejected by the Court in its class certification Order. See [Doc. 177, p. 6-

liabil , and thus, they did not suffer any injury. Liberty Mutual points to the

provision in the Home Protector Plus Endorsement, which provides, liability for Buildings under Coverage A or B is the replacement cost, after application of

-24 (Lafollette Policy), Section B.3.a.]. According to Liberty Mutual, because the Lafollettes could have replaced their loss for an amount less than the ACV they received and because Liberty Mutual is entitled to

a deductible at the ACV stage because their ACV payment was sufficient to replace their damaged property. ACV payment because they actually repaired their damage for an amount that was less than the

ACV they received, and the maximum amount they were entitled to under the policy was the amount actually and necessarily spent to repair the damage.

standing argument fails because its own policy language and the process it uses for paying RCV and ACV claims reveal that these two types of payments are different. This Court has already recognized the distinction between the RCV and ACV provisions of the policy, and the same logic applies here. See [Doc. 177, p. 7-8 (Order granting class certification)]. obligated to seek an RCV payment upon actually repairing or replacing damage to their home

and that the limitations applicable to the RCV payment are equally applicable to an ACV payment. However, this obligation is explicitly disclaimed in the policy, which notes,

d. You may disregard the replacement cost loss settlement provisions and make a claim under this policy for loss or damage to buildings on an actual cash value basis. You may then make claim within 180 days after the loss for any additional liability according to the provisions of this Condition 3 Loss Settlement. [Doc. 214-1, p. 23-24 (Lafollette Policy), Section B.3.d., Bates LMFIC000083-84 (emphasis added)]. Under this provision, it is the choice of the policyholder whether to pursue an ACV or RCV payment. Nothing in this provision requires a policyholder to make a claim for RCV payment at any point in the process. [See Doc. 199-5, p. 150-51 (Depo. of Ricky Summerlin)]. Further, the ACV payment is not transformed into an RCV payment simply because the policyholder chooses to use her



Lafollette et al v. Liberty Mutual Fire Insurance Company

2017 | Cited 0 times | W.D. Missouri | March 16, 2017

ACV payment to repair damage to her home, much less because the ACV payment was sufficient to cover the cost of repairs. If the policyholder chose not to seek the RCV payment under these circumstances, as the policy permitted her to do, the ACV payment is not effectively transformed into an RCV payment and subject to limitations only applicable to RCV payments. See also *Tritschler v. Allstate Ins. Co.*, 144 P.3d 519, 529 (Ariz. Ct. A actually pays to repair or replace the damaged property. Therefore, the amount an insured

ultimately spends to make needed repairs, if any

Accordingly, because the Lafollettes did not seek payment under the replacement cost provisions, these provisions with their applicable limits of liability do not

apply. The amount the Lafollettes actually spent to repair the damage is wholly irrelevant to whether they were injured. This is because, as already discussed, the ACV payment belongs to the insured, does not have to be used for repairs, and is not tied to repair costs.

In an extension of this standing argument, Liberty Mutual also contends that the Lafollettes cannot establish damages because their ACV payment was allegedly sufficient to cover their repairs. As discussed above limitation that relates only to payments made under the RCV provisions of the policy, and ACV

payments do not implicate the RCV provisions Liberty Mutual attempts to apply.

C. The Base Policy & Home Protector Plus Endorsement Form HO 03 (Edition 04 91) contains various loss settlement provisions dictating the process by which claims are paid. The base policy contains a loss settlement provision, which can be modified by three relevant endorsements that offer their own loss settlement provisions: the Home Protector Plus Endorsement, the Wind/Hail Endorsement, and the Functional Replacement Cost Loss Settlement Endorsement.

As previously described, the base policy contains the following loss settlement provision, which dictates how RCV and ACV claims will be paid under the policy:

SECTION I CONDITIONS . . . 3. Loss Settlement. Covered property losses are settled as follows:

a. Property of the following types: (1) Personal property; (2) Awnings, carpeting, household appliances, outdoor

antennas and outdoor equipment, whether or not attached to buildings; and (3) Structures that are not buildings; at actual cash value at the time of loss but not more than the

amount required to repair or replace b. Buildings under Coverage A or B at replacement cost without



Lafollette et al v. Liberty Mutual Fire Insurance Company

2017 | Cited 0 times | W.D. Missouri | March 16, 2017

deduction for depreciation, subject to the following:

(1) If, at the time of loss, the amount of insurance in this policy on the damaged building is 80% or more of the full replacement cost of the building immediately before the loss, we will pay the cost to repair or replace, after application of deductible and without deduction for depreciation, but not more than the least of the following amounts: (a) The limit of liability under this policy that

applies to the building; (b) The replacement cost of that part of the building

damaged for like construction and use on the same premises; or (c) The necessary amount actually spent to repair

or replace the damaged building. (2) If, at the time of loss, the amount of insurance in this

policy on the damaged building is less than 80% of the full replacement cost of the building immediately before the loss, we will pay the greater of the following amounts, but not more than the limit of liability under this policy that applies to the building:

(a) The actual cash value of that part of the building damaged; or (b) That proportion of the cost to repair or replace, after application of deductible and without deduction for depreciation, that part of the building damaged, which the total amount of insurance in this policy on the damaged building bears to 80% of the replacement cost of the building. . . .

(4) We will pay no more than the actual cash value of the damage until actual repair or replacement is complete. Once actual repair or replacement is complete, we will settle the loss according to the provisions of b.(1) and b.(2) above. . . . (5) You may disregard the replacement cost loss settlement provisions and make claim under this policy for loss or damage to buildings on an actual cash value basis. You may then make claim within 180 days after loss for any additional liability according to the provisions of this Condition 3. Loss Settlement. [Doc. 214-1, p. 13-15 (Lafollette Policy, Bates LMFIC000073-75)].

The Home Protector Plus Endorsement contains its own loss settlement provision, which the parties agree is the controlling loss settlement provision when it is added to the base policy and certain conditions are met. 5

The loss settlement provision in the base policy is substantially the same as that in the Home Protector Plus Endorsement, and as discussed below, it results in the same interpretation. The Home Protector Plus Endorsement loss settlement provision provides:

HOMEPROTECTOR PLUS ENDORSEMENT . . . B. REPLACEMENT COST PROVISION
DWELLING AND PERSONAL



Lafollette et al v. Liberty Mutual Fire Insurance Company

2017 | Cited 0 times | W.D. Missouri | March 16, 2017

PROPERTY . . . 3. Loss Settlement. Covered property losses are settled as follows: a. The applicable limit of liability for Buildings under Coverage A or B is the replacement cost, after application of deductible and without deduction for depreciation, subject to the following:

(1) We will pay the cost of repair or replacement, but not exceeding:

(a) The replacement cost of the part of the building damaged

using like construction on the same premises and intended for the same occupancy and use; (b) With respect to Coverage A, an amount not exceeding

20% greater than the limit of liability stated in the declarations, as modified by the Inflation Protection Provision of the policy; (c) With respect to Coverage B, the limit of liability stated in

the declarations, as modified by the Inflation Protection Provision of the policy; (d) The amount actually and necessarily spent to repair or

replace the damage. (2) We will pay no more than the actual cash value of the damage

until actual repair or replacement is complete. Once actual

5 For the Home Protector Plus Endorsement loss settlement provision to replace the base policy provision, the insured must meet the following Section 1 Condition:

17. Additions or Changes to Dwelling Notice to Company. You must inform us within 90 days of the start of any additions, alterations or improvements to the dwelling that will increase the replacement cost of the dwelling by \$5000 or more. [Doc. 214-1, p. 23 (Lafollette Policy, Bates LMFIC 000083)].

repair or replacement is complete, we will settle the loss according to the provisions of a.(1) above. . . .

c. Personal property, carpeting and domestic appliances: at

replacement cost but not exceeding the amount needed to repair or replace subject to the following:

(1) Our limit of liability for loss to Personal Property shall not

exceed the smallest of the following:

(a) Replacement cost with a similar item of like kind and

quality at the time of loss; (b) The full cost of repair; (c) Any special limit of liability described in the policy or



Lafollette et al v. Liberty Mutual Fire Insurance Company

2017 | Cited 0 times | W.D. Missouri | March 16, 2017

stated in this endorsement; or (d) The Coverage C limit of liability stated in the declarations, as modified by the Inflation Protection Provision of the policy. . . .

(3) We will not pay for any loss to personal property under this

endorsement until actual repair or replacement is complete. d. You may disregard the replacement cost provision and make a

claim for loss of or damage to property on an actual cash value basis and then make claim within 180 days after loss for additional liability under this endorsement. [Doc. 214-1, p. 23-24 (Lafollette Policy), Bates LMFIC000083-84].

Plaintiffs contend that the base policy and the Home Protector Plus Endorsement both preclude application of a deductible to ACV payments for Coverage A and B claims. In its previous Order, the Court already considered these arguments and interpreted the Home Protector Plus Endorsement as follows. 6

First, the e contains separate provisions for RCV and ACV losses. For RCV payments, the endorsement

after application of deductible and without deduction for depreciation Section B.3.a. (emphasis added). Section B.3.d. of the loss settlement provision provides:

6 ous Order denying Liberty Mutual summary judgment, see [Doc. 115, p. 7-8].

d. You may disregard the replacement cost provision [i.e. Section

B.3.a.] and make a claim for loss of or damage to property on an actual cash value basis and then make claim within 180 days after loss for additional liability under this endorsement. Thus, tion in the loss settlement provision that mentions a deductible.

Although the loss settlement language of the Home Protector Plus Endorsement replaces the loss settlement language of the base policy in cases in which it applies, these provisions are funct after application of, they state, damage[s] to [property] on an actual cash value basis [and] then make claim within 180 days

Just as in the Home Protector Plus Endorsement, the base p provision contains separate provisions for RCV and ACV losses. For RCV payments, the base p If, at the time of loss, the amount of insurance in this policy on the damaged building is 80% or more of the full replacement cost of the building immediately before the loss, we will pay the cost to repair or replace, after application of



Lafollette et al v. Liberty Mutual Fire Insurance Company

2017 | Cited 0 times | W.D. Missouri | March 16, 2017

deductible and without deduction for depreciation I Conditions, 3.b.(1). Section I Conditions, 3.b.(5) states:

(5) You may disregard the replacement cost loss settlement provisions [i.e. Section I Conditions, 3.b.(1)] and make claim under this policy for loss or damage to buildings on an actual cash value basis. You may then make claim within 180 days after loss for any additional liability according to the provisions of this Condition 3. Loss Settlement. Thus, just as under the Home Protector Plus Endorsement, the insured who is willing to accept the ACV payment under the base policy a deductible.

The general rule of contract interpretation, *expressio unius est exclusio alterius*, is instructive here. Both the Home Protector Plus Endorsement and base p loss settlement provisions are silent regarding an ACV deductible in the face of their explicit references to an RCV deductible. This silence suggests the parties did not intend to make the deductible applicable to ACV payments. See *Smith v. Missouri Local Gov. Employees Retirement System*, 235 S.W.3d 578, 582 (Mo. Ct. App. 2007). Therefore, if, like Plaintiffs, an insured accepts an ACV payment under Section B.3.d of the Home Protector Plus Endorsement or Section I Conditions, 3.b.(5) of the base policy, and the insured does not submit a replacement cost claim, Section B.3.a. of the endorsement (or Section I Conditions, 3.b.(1). of the base policy) is not implicated. As discussed above, this language establishes that Liberty will not apply a deductible when making ACV payments under the e B.3.d. or the base p I Conditions, 3.b.(5).

Liberty Mutual, however, contends that this construction of the language in Section B.3.a. for dwelling and other structures claims (Coverages A and B) conflicts with the Home (Coverage C). 7

Liberty argues that this interpretation is unreasonable because it ignores Section B.3.c., which concerns settling a personal property loss at replacement cost and does not reference a deductible. In relevant part, Section B.3.c. provides:

7 Liberty Mutual notes that its arguments about the Home Protector Plus Endorsement apply equally to the base policy language. [Doc. 215, p. 31, n. 6]. Because Liberty Mutual presents its arguments with respect to the Home Protector Plus Endorsement provisions, the Court addresses its arguments in the same way, recognizing that the same analysis applies to the base policy language, unless otherwise indicated.

HOMEPROTECTOR PLUS ENDORSEMENT . . . B. REPLACEMENT COST PROVISION DWELLING AND PERSONAL

PROPERTY . . . 3. Loss Settlement. Covered property losses are settled as follows: . . .

c. Personal property, carpeting and domestic appliances: at



Lafollette et al v. Liberty Mutual Fire Insurance Company

2017 | Cited 0 times | W.D. Missouri | March 16, 2017

replacement cost but not exceeding the amount needed to repair or replace subject to the following:

(1) Our limit of liability for loss to Personal Property shall not

exceed the smallest of the following:

(a) Replacement cost with a similar item of like kind and

quality at the time of loss; (b) The full cost of repair; (c) Any special limit of liability described in the policy or

stated in this endorsement; or (d) The Coverage C limit of liability stated in the

declarations, as modified by the Inflation Protection Provision of the policy. . . .

(3) We will not pay for any loss to personal property under this

endorsement until actual repair or replacement is complete. d. You may disregard the replacement cost provision and make a

claim for loss of or damage to property on an actual cash value basis and then make claim within 180 days after loss for additional liability under this endorsement. [Doc. 214-1, p. 23-24 (Lafollette Policy), Bates LMFIC000083-84]. According to Liberty Mutual, the interpretation applied to Section B.3.c. would mean that a deductible is never applied to personal property loss claims, de reference to settling replacement cost, does encompass a

presents a conflict within the endorsement. Liberty Mutual suasive because Section B.3.d. apply to Section B.3.c., and thus, there is no conflict. Liberty Mutual

interpretation of Section B.3.a., which applies to Coverages A and B, and which the Court interpreted in conjunction with Section B.3.d. cost provision and make a claim for loss of or damage to property on an actual cash value basis and then make claim within 180 days after loss for additional liability under this e Unlike Section B.3.a., Section B.3.c.(3) for Coverage C personal property claims does not

provide for ACV payments and specifically dictates that no payment will be made for any loss to personal property under this endorsement until actual repair or replacement is complete Section B.3.c.(3) (emphasis added). Therefore, the ACV provision in Section B.3.d. cannot be

read to apply to Coverage C personal property claims under B.3.c., which may only be paid out after actual repair or replacement is completed. Accordingly, Liberty Mutual Section B.3.c. are irrelevant to Section B.3.d.



Lafollette et al v. Liberty Mutual Fire Insurance Company

2017 | Cited 0 times | W.D. Missouri | March 16, 2017

Liberty Mutual also identifies two other portions of the policy as relevant and posing alleged interpretation: (1) section. Located within Section I

Service Cha provides:

SECTION I PROPERTY COVERAGES COVERAGE A Dwelling . . . COVERAGE B Other Structures . . . COVERAGE C Personal Property . . . COVERAGE D Loss of Use . . .

ADDITIONAL COVERAGES . . . 4. Fire Department Service Charge. We will pay up to \$500 for your liability assumed by contract or agreement for fire department charges incurred when the fire department is called to save or protect covered property from a Peril Insured Against. . . . This coverage is additional insurance. No deductible applies to this coverage. . . . [Doc. 214-1, p. 6-9 (Lafollette Policy, Bates LMFIC000066-69) (emphasis added)]. Located in Section D Additional Coverages, t provides:

HOMEPROTECTOR PLUS ENDORSEMENT . . . B. REPLACEMENT COST PROVISION
DWELLING AND PERSONAL

PROPERTY . . .

3. Loss Settlement. Covered property losses are settled as follows: a. The applicable limit of liability for Buildings under Coverage A or B is the replacement cost, after application of deductible and without deduction for depreciation, subject to the following:

. . . c. Personal property, carpeting and domestic appliances: at

replacement cost but not exceeding the amount needed to repair or replace subject to the following: .

. . d. You may disregard the replacement cost provision and make a

claim for loss of or damage to property on an actual cash value basis and then make claim within 180 days after loss for additional liability under this endorsement. . . .

D. ADDITIONAL COVERAGES

Lock Replacement Coverage We will pay up to \$250 for replacing the locks or cylinders on the exterior doors of the residence premises when your keys have been stolen. The theft of the keys must be reported to the police for this coverage to apply. This coverage is additional insurance. No deductible applies to this coverage. [Doc. 214-1, p. 23-24 (Lafollette Policy), Bates LMFIC000083-84 (emphasis added)]. Liberty Mutual points to the inclusion of , within [Doc. 214-1, p. 9 and p. 24]. Liberty Mutual contends that this policy must mean that a deductible does apply to ACV claims interpretation.



Lafollette et al v. Liberty Mutual Fire Insurance Company

2017 | Cited 0 times | W.D. Missouri | March 16, 2017

The Court rejects this argument because policy language related to lock replacement and fire department service charges, both of which sections, do not impact the loss settlement provisions of the policy related to ACV payments for Coverage A and B claims. Furthermore, Liberty Mutual Id. The fact that Liberty Mutual decided to include these additional insurance coverages and not charge a deductible does for Coverage A Conditions, 3.b.) do not allow a deductible to be subtracted from ACV payments. provisions identified by Liberty Mutual apply to a type of coverage independent from coverage

for A and B claims type of claims. As evidenced by the policy language, these claims are settled differently than Coverage A and B claims and have their own requirements and limits, e.g., replacing the locks or cylinders on the exterior doors of the residence premises when your keys have been stolen. The theft of the keys must be reported to the police for this coverage to

As a separate argument, Liberty Mutual cites *Labrier v. State Farm and Casualty Co.*, 2015 WL 7738362, at *5 (W.D. Mo. Nov. 30, 2015). Liberty Mutual argues that because the Court noted that means replacement cost minus depreciation the Court cannot interpret the ACV provisions in

Liberty Mutual to replacement cost, which as the Court has found, incorporates application of a deductible. Id. at *5. This argument does not change the policy. First, in addition to involving contract provisions different from those in *Labrier* did not involve any dispute about whether deductibles were to be applied to ACV payments. Id. Furthermore, calculating the ACV as replacement cost minus depreciation does not somehow transform an ACV payment into an RCV payment, as Liberty Mutual appears to argue; this is merely the formula that the insurance company uses to calculate what amount it will pay out for an ACV claim. The Court has already discussed the clear difference between an ACV and RCV payment under Liberty Mutual *Labrier* does not impact this finding.

Additionally, Liberty Mutual repeats several other arguments that the Court already rejected in its previous Order, Doc. 115. 8

The Court reiterates its earlier analysis of these arguments regarding general principles of insurance law and the policy justifications behind its interpretation of the policy, this interpretation does not threaten to upend the insurance industry or permit the insured to determine when he or she pays the deductible under normal circumstances. First, Liberty Mutual Plaintiffs are required to pay a deductible on both RCV and ACV claims. As noted by the insurance company, the Western portion of the loss to be borne by the

8 L -21; Doc. 215, p. 33-34]. addressed previously in Section II.B., and fails for the same reasons. As discussed in Section II.B., the limitations related to relied on by Liberty Mutual *ag Western Heritage Ins. Co. v. Love*, 24

outline the circumstances under which a policyholder must pay the deductible. The circumstances



Lafollette et al v. Liberty Mutual Fire Insurance Company

2017 | Cited 0 times | W.D. Missouri | March 16, 2017

under which a deductible must be paid are contained in the applicable insurance contract.

deductible may be applied or otherwise alters general insurance principles

interpret the insurance policy at issue. As already discussed, this policy does not require Plaintiffs to pay a deductible if they elect to receive an ACV payment for claims arising under the base policy or Home Protector Plus Endorsement. That is not to say that Liberty Mutual could not have included a policy provision requiring Plaintiffs to pay such a deductible. However, the terms of the contract between Liberty Mutual and Plaintiffs did not impose any such requirement with respect to ACV claims, despite explicitly setting forth such a requirement with respect to RCV claims. How other insurance companies wrote their policies does not

page requires Plaintiffs to pay a deductible on all claims, without regard to whether the claims are for ACV or RCV. [Docs. 195, p.19-20; 215, p. 20-21]. Liberty Mutual contends that, in

Declarations. [Doc. 195, p.19- Liberty Mutual does not offer any new theories related to this argument. Furthermore, contrary prior analysis and expressly rejected this argument. See [Doc. 115, p. 12-13].

Liberty Mutual again contends that the Declarations page, which includes reference to the general Section I deductible, is enough to require Plaintiffs to pay a deductible on all claims. ce contract, and the other policy provisions neither expressly change coverage nor reflect a different

Christensen v. Farmers Ins. Co., Inc., 307 S.W.3d 654, 658 (Mo. Ct. App. 2010) (quotation omitted). The Declarations in the policy read as follows:

SECTION I AND II: COVERAGES AND LIMITS UNDER YOUR LIBERTYGUARD HOMEOWNERS POLICY

I: COVERAGE A YOUR DWELLING WITH EXPANDED REPLACEMENT COST \$158,300
COVERAGE B OTHER STRUCTURES ON RESIDENCE PREMISES \$15,830 COVERAGE C
PERSONAL PROPERTY WITH REPLACEMENT COST \$118,725 COVERAGE D LOSS OF USE OF
YOUR RESIDENCE PREMISES ACTUAL LOSS SUSTAINED . . . DEDUCTIBLE: LOSSES
COVERED UNDER SECTION I ARE SUBJECT TO A DEDUCTIBLE OF \$1000 OTHER
DEDUCTIBLES: \$1000 WINDSTORM OR HAIL [Doc. 214-1, p. 2-3 (Declarations), Bates
LMFIC000062-63]. subject to is provision does not state that the class member s are subject to a
deductible regardless of the compensation style selected. to a deductible does the to a policy holde
because on its face, nothing in the Declarations references under what circumstances the Section I
deductible will be applied. Instead, the conditions governing when this deductible is applied are set
out in the remainder of the policy. Therefore, because the Declarations are not clear standing alone
as to when a deductible applies, the Court must turn to the terms laid out in the remainder of the



Lafollette et al v. Liberty Mutual Fire Insurance Company

2017 | Cited 0 times | W.D. Missouri | March 16, 2017

policy. And, as described above, the terms of the base policy and Home Protector Plus Endorsement do not require the payment of a deductible on ACV claims.

Finally, as it did in its first motion for summary judgment, Liberty Mutual again contends that the filed rate doctrine precludes consideration of this case. However, Liberty Mutual fails to sue and has not made any conclusions

regarding the propriety of the content of the Policy or the overarching rate scheme, the filed rate 9

[Doc. 115, p. 16]. For the previous reasons, class members who have claims under the Home Protector Plus Endorsement or base policy are entitled to summary judgment.

D. Wind/Hail Endorsement The parties also move for summary judgment on the Wind/Hail Endorsement subclass, which includes the Lafollettes. Plaintiffs contend that this endorsement does not alter when the deductible is applied but rather, affirms that a deductible is not applied to ACV claims. The relevant language from the Wind/Hail Endorsement is as follows:

WINDSTORM OR HAIL DEDUCTIBLE The following special deductible is added to the policy: With respect to the peril of Windstorm Or Hail, we will pay only that part of the total of all loss payable under Section I that exceeds the windstorm or hail deductible. The dollar or percentage amount of the windstorm or hail deductible is shown on the policy declaration. . . .

9 -16].

No other deductible in the policy applies to loss caused by windstorm or hail. [Doc. 214-1, p. 34 (Lafollette Policy), Bates LMFIC000094].

I rst motion for summary judgment on the wind hail endorsement I, B.3.a. for Coverages A and B of the loss settlement

provision was relevant. Indeed, Liberty Mutual even argued that Section I, B.3.c., which dealt with personal property, could not be considered when interpreting Section I, B.3.a., which deals only with structures and other dwellings. [Doc. 109, p. 4]. Based solely on Section I, B.3.a. for Coverages A and B, the Court found as follows:

The Wind/Hail Endorsement says that an insured can get no more than the total loss payable under Section I minus a deductible. Again, for purposes of this case, Section I refers to the Home Protector Plus Endorsement loss settlement provision, . . . [which] has two parts. A homeowner may elect to take the ACV or make repairs and get the RCV. While a loss payable under the Home Protector Plus loss settlement provision could refer to either an ACV or RCV payment, the Court must give meaning to the complete phrase, total of all Therefore, it must consider Protector Plus Endorsement.



Lafollette et al v. Liberty Mutual Fire Insurance Company

2017 | Cited 0 times | W.D. Missouri | March 16, 2017

The total of all loss payable under the loss settlement provision of the Home Protector Plus Endorsement is the replacement cost after application of a deductible. This is referred to as the replacement cost value. Since the RCV is the most payable under the Home Protector Plus loss of all loss

Hail, we will pay only that part of the total of all loss payable under Section I that to the peril of Windstorm or Hail, we will pay only that part of the replacement cost value payable under the loss settlement provision that exceeds the windstorm interpretation of Section [B.3.] of the [] loss settlement provision as limiting the deductible to [Section B.3.a.] and excluding it from [Section B.3.d.] pursuant to the doctrine of *expressio unius est exclusio alterius*. [Doc. 115, p. 9-10]. This interpretation is consistent with the binary choice presented by the parties when the issue was first briefed. With only logically refer to replacement cost, the greatest amount payable. However,

Liberty Mutual in its current motion for summary judgment has changed its argument. Liberty Mutual argues for the first interpretation of the Wind/Hail Endorsement is inconsistent with other applicable provisions within the base policy and by implication, the Home Protector Plus Endorsement. Specifically, Liberty Mutual points to Coverage C and D provisions of Section I Property Coverages and Section I Conditions. In light of these newly raised arguments and policy provisions, the Court reconsiders its original interpretation.

First, the Court concludes that the Section I referred to by the Wind/Hail Endorsement includes Section I Property Coverages; Section I Conditions; Section I Perils Insured Against; and Section I Exclusions, all contained in the base policy/Home Protector Plus Endorsement. Effectively, these are subparts of Section I, not separate sections. Second, the Court [es] not interpret insurance policy provisions in isolation but rather evaluate[s] *Mendota Ins. Co. v. Lawson*, 456 S.W.3d 898, 903 (Mo. Ct. App. 2015) (citing *Durbin v. Deitrick*, 323 S.W.3d 122, 125 (Mo. App. W.D. 2010)). Therefore, it must consider not just Coverages A and B of Section I but must also consider payable under Section I. Third, because the Wind/Hail Endorsement refers to Section I of the base policy, including multiple ways in which losses will be paid, not just losses under Coverage A and B for ail Endorsement does not mean replacement cost, as argued by Plaintiffs and initially found by the Court. Instead, an ordinary insured would understand that under Section I refers to the sum total of any losses payable which includes losses for Coverage A, B, C, or D. Because it is no longer a binary choice, the reference to Section I in the Wind/Hail Endorsement cannot just be referring to ACV and replacement cost losses. Therefore, a deductible would be due for an ACV payment under Coverage A or B by the terms of the Wind/Hail Endorsement, even though the base policy and Home Protector Plus Endorsement do not require a deductible for ACV payments. Thus, the Court finds that one windstorm/hail deductible applies, even if the insured takes only an ACV payment and does not elect to submit a replacement cost claim. motion for summary judgment as to the Wind/Hail Endorsement subclass is therefore granted.

Because the Lafollettes, the only named plaintiffs, are included in the category of class members who



Lafollette et al v. Liberty Mutual Fire Insurance Company

2017 | Cited 0 times | W.D. Missouri | March 16, 2017

can no longer assert their claims under the Wind/Hail Endorsement, the Lafollettes are no longer adequate representatives of the class. See Fed. R. Civ. P 23(a)(4). is not viable

claims under the Functional Replacement Cost Loss Endorsement or the Home Protector Plus Endorsement/Base Policy.

moot or necessarily undermine the claims of the remaining class members. Because a designated

class has a status apart from that of the class representatives, dismissal of the class *Smook v. Minnehaha County*, 457 F.3d 806, 815 (8 th

Cir. 2006). Therefore, rather than decertifying the class on the ground that the named plaintiffs are no longer adequate representatives, the better intervention of a new class representative. As such, the Court will afford Plaintiffs an

opportunity to submit a motion for the substitution or intervention of new named plaintiffs in this action within 30 days of the date of this Order.

E. The Functional Replacement Cost Lost Settlement Endorsement Plaintiffs also move for summary judgment on the Functional Replacement Cost Lost Settlement Endorsement subclass. They contend that like the other policy provisions already interpreted by the Court, this endorsement similarly prohibits Liberty Mutual from taking a deductible from an ACV payment made under the FRCE. Although Liberty Mutual argues

endorsement subclass, Liberty Mutual does not, itself, move for summary judgment on the FRCE subclass.

When attached to the base policy and when applicable, the FRCE replaces the base p with the following:

FUNCTIONAL REPLACEMENT COST LOSS SETTLEMENT . . . SECTION I CONDITIONS The following definition is added when this endorsement is attached to the policy: Functional Replacement Cost means the amount which it would cost to repair or

replace the damaged building with less costly common construction materials and methods which are functionally equivalent to obsolete, antique or custom construction materials used in the original construction of the building. . . .

For the premium charges, item 3.b. Loss Settlement is deleted and replaced by the following: b. Buildings under Coverage A or B: (1) If, at the time of loss,



Lafollette et al v. Liberty Mutual Fire Insurance Company

2017 | Cited 0 times | W.D. Missouri | March 16, 2017

(a) The amount of insurance in this policy on the damaged building is 80% or more of the functional replacement cost of the building immediately before the loss; and (b) You contract for repair or replacement of the damaged

building for the same use, within 180 days of the damage unless we and you otherwise agree;

we will pay, after application of deductible, the lesser of the following amounts: (a) The limit of liability under this policy that applies to the

building; or (b) The necessary amount actually spent to repair or replace the

damaged building on a functional replacement cost basis. (2) If you do not make claim under Paragraph (1) above, we will pay, after application of deductible, the least of the following amounts:

(a) The limit of liability under this policy that applies to the

building; (b) The actual cash value of the damaged part of the building; or (c) The amount which it would cost to repair or replace the

damaged building on a functional replacement cost basis. (3) If, at the time of loss, the amount of insurance in this policy on the damaged building is less than 80% of the functional replacement cost of the building immediately before the loss, we will pay that proportion of the cost to repair or replace that part of the building damaged: (a) After application of deductible; and (b) With deduction for depreciation: which the total amount of insurance in this policy on the damaged

building bears to 80% of the functional replacement cost of the building, but not more than the limit of liability under this policy that applies to the building. . . . (5) If the actual cash value of the damage is less than the functional replacement cost: (a) We will pay no more than the actual cash value of the damage

until replacement is complete. Once replacement is complete, we will settle the loss according to the provisions b.(1) and b.(3) above. However, if the cost to functionally repair the damage is both: (i) Less than 5% of the amount of insurance in this policy

on the building; and (ii) Less than \$2,500; we will settle the loss according to the provisions of b.(1)

and b.(3) above whether or not replacement is complete. (b) You may disregard the functional replacement cost loss settlement provisions and make claim under this policy for loss or damage to buildings on an actual cash value basis. You may then make claim for any additional liability according to the provisions of this Condition 3. Loss Settlement, provided we are notified of your intent to do so within 180 days of the date of loss. [Doc. 199-4, p. 2-3 (FRCE Endorsement), Bates



Lafollette et al v. Liberty Mutual Fire Insurance Company

2017 | Cited 0 times | W.D. Missouri | March 16, 2017

LMFIC031162) (emphasis added)].

Section b.(1) specifically states that Liberty Mutual under the policy or the necessary amount actually spent to repair or replace the building on a functional replacement cost basis. Section b.(2) then Mutual will

Section b.(3) addresses

how which it specifies to be b.(3)(a).

Unlike the other endorsements this Court has analyzed, the FRCE clearly applies a deductible regardless of whether an FRCE claim is made for RCV or ACV. Again, an insurance policy is ambiguous only where there are competing reasonable policy interpretations. *Western Heritage Ins. Co. v. Asphalt Wizards*, 795 F.3d 832, 838 (8 th

Cir. 2015). It would be unreasonable to interpret the FRCE provisions applying to ACV payments as prohibiting application of a deductible when they

Plaintiffs contend that Section b.(5)(b) controls the interpretation of the FRCE endorsement, is ambiguous, and would reasonably be read to mean that a deductible does not apply to an ACV payment. In relevant part, this provision states:

FUNCTIONAL REPLACEMENT COST LOSS SETTLEMENT . . . SECTION I CONDITIONS . . .

b. Buildings under Coverage A or B: . . .

(5) If the actual cash value of the damage is less than the functional replacement cost: (a) We will pay no more than the actual cash value of the damage

until replacement is complete. Once replacement is complete, we will settle the loss according to the provisions b.(1) and b.(3) above. However, if the cost to functionally repair the damage is both: (i) Less than 5% of the amount of insurance in this policy

on the building; and (ii) Less than \$2,500; we will settle the loss according to the provisions of b.(1)

and b.(3) above whether or not replacement is complete. (b) You may disregard the functional replacement cost loss settlement provisions and make claim under this policy for loss or damage to buildings on an actual cash value basis. You may then make claim for any additional liability according to the provisions of this Condition 3. Loss Settlement, provided we are notified of your intent to do so within 180 days of the date of loss. Pointing to b.(b.(b)(5) is



Lafollette et al v. Liberty Mutual Fire Insurance Company

2017 | Cited 0 times | W.D. Missouri | March 16, 2017

the only relevant provision in the FRCE, and no other provisions are implicated. Plaintiffs argue that because this provision fails to include any mention of a deductible, a reasonable insured would read it to mean that making an ACV claim under this endorsement would not include application of a deductible. However, the general rule of contract interpretation, *expressio unius est exclusio alterius*, does not permit reading

Section b.(5)(b) in isolation, but rather, requires reading it in conjunction with the previous paragraphs. When read together, Section b.(5)(b) does not reference a deductible for ACV or RCV because the preceding paragraphs clearly state that a deductible is applied, regardless of the loss settlement method. Therefore, the policy permits Liberty Mutual to apply a deductible to an ACV claim made under this endorsement. For these reasons, judgment on the FRCE subclass is denied. that the FRCE does apply a deductible to ACV claims made under this endorsement does not impact its previous findings that a deductible may not be applied to ACV claims brought under the base policy or Home Protector Plus Endorsement. As evidenced by the previous analysis -contained and was interpreted based solely on its own terms. does not conflict with its previous interpretations.

F. Damages As damages for breach of contract, Plaintiffs seek payment of the amount of each class deductible withheld by Liberty Mutual. However, Liberty Mutual argues that genuine issues of material fact about damages preclude granting summary judgment in Plaintiff First, Liberty Mutual argues that genuine issues of material fact exist as to whether the initial

payments Liberty Mutual made to certain class members were high and constitute the limit of . Alternatively, Liberty Mutual argues that certain class ACV payments constitute . In other words, Liberty Mutual contends that certain class members received all that they were owed under the policy.

Although Liberty Mutual characterizes these arguments as precluding summary judgment, they are not. Instead, these are legal arguments that Liberty Mutual alleged lack of standing. The Court has already rejected these very arguments above in Part II.B., .

As the Court already reaso shows that the ACV payment belongs to the insured and is unrelated to the amount actually spent to complete repairs. Likewise, because the class members received only an ACV payment, the RCV provisions and limits of liability do not impact their ability to recover damages.

Because the Court has found that Liberty Mutual breached its policy by applying deductibles to ACV claims made under the base policy and Home Protector Plus Endorsement, each of these affected class members has been damaged by the amount of the withheld deductible. Liberty Mutual has produced documentation specifying the amount of the deductible with testified that Liberty Mutual is capable of determining the amount of deductible applied to a claim. See [Doc. 199-6 and 199-7 (Spreadsheets); Doc. 199-8, p. 137 and 180-81 (Depo. of Jeffrey Gabriel)]. Therefore, calculation of



Lafollette et al v. Liberty Mutual Fire Insurance Company

2017 | Cited 0 times | W.D. Missouri | March 16, 2017

damages simply requires application of Liberty Mutual member.

III. Conclusion

For the reasons set forth above, motions for summary judgment are granted in part and denied in part. Summary judgment is granted in favor of Defendant as to the Wind/Hail Endorsement subclass. Summary judgment is granted in favor of Plaintiffs for their claims under the base policy/Home Protector Plus Endorsement and for damages. Cost Loss Settlement class.

Rather than decertifying the class on the ground that the named plaintiffs are no longer adequate representatives of the class, the Court affords Plaintiffs an opportunity to submit a motion for the substitution or intervention of new named plaintiffs in this action within 30 days of the date of this Order.

/s/ Nanette K. Laughrey NANETTE K. LAUGHREY United States District Judge Dated: March 16, 2017 Jefferson City, Missouri

