


**NOTICE OF AGENCY'S FINAL DECISION**

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Case Name:  US - Progressive Insurance

ALJ: Kehinde Decision Date: 12/12/17

Case No.: MJA-CC-33-17-31434

Agency Case No. (if applicable): \_\_\_\_\_

Document Name (CRS): \_\_\_\_\_

Please check one:

- AFFIRMED
- AFFIRMED w/ comment
- MODIFIED
- REVERSED
- OTHER \_\_\_\_\_

If not affirmed in its entirety, please append a copy of the Agency's Final Decision.

01/24/2018  
Date

**Signature Appears on Original**



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MARYLAND INSURANCE

ADMINISTRATION,

EX REL. [REDACTED]

COMPLAINANT

v.

PROGRESSIVE DIRECT

INSURANCE COMPANY,

LICENSEE

\* BEFORE ANN C. KEHINDE,

\* AN ADMINISTRATIVE LAW JUDGE

\* OF THE MARYLAND OFFICE

\* OF ADMINISTRATIVE HEARINGS

\* OAH No.: MIA-CC-33-17-31434

\* MIA No.: MIA-2017-09-009

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**PROPOSED DECISION<sup>1</sup>**

STATEMENT OF THE CASE  
ISSUES  
SUMMARY OF THE EVIDENCE  
FINDINGS OF FACT  
DISCUSSION  
CONCLUSIONS OF LAW  
PROPOSED ORDER

**STATEMENT OF THE CASE**

On January 24, 2017, the Maryland Insurance Administration (MIA) received a complaint from [REDACTED] (Complainant) alleging unfair claims settlement practices by Progressive Direct Insurance Company (Licensee). Specifically, the Complainant alleged that the Licensee should have paid his claim for the damage to his boat.

<sup>1</sup> Under the relevant statute and regulations, the Insurance Commissioner may, on a case-by-case basis, delegate to the Office of Administrative Hearings (OAH) the authority to issue: (a) proposed or final findings of fact; (b) proposed or final conclusions of law; (c) proposed or final findings of fact and conclusions of law; or (d) a proposed or final order. Md. Code Ann., State Gov't § 10-205 (2014); Code of Maryland Regulations (COMAR) 31.02.01.04-1A(2). Here, the Commissioner has delegated to OAH the authority to issue a Proposed Order.

After an investigation, the MIA found that the Licensee did not violate section 27-303(1), (2), or (6) of the Maryland Insurance Article and notified the Complainant of its finding by a letter dated April 17, 2017. On May 16, 2017, the Complainant requested a hearing.

On November 14, 2017, I held a hearing at the OAH in Hunt Valley, Maryland. Md. Code Ann., Ins. §§ 2-210, 2-213 (2011 & Supp. 2017); COMAR 31.15.07. The Complainant represented himself. Jeff Moffet, Esquire, represented the Licensee.

The contested case provisions of the Administrative Procedure Act, the MIA's hearing regulations, and the OAH's Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2017); COMAR 31.02.01; and COMAR 28.02.01.

### ISSUES

1. Did the Licensee misrepresent pertinent facts or policy provisions that relate to the Complainant's claim?
2. Did the Licensee refuse to pay the claim for an arbitrary or capricious reason?
3. Did the Licensee fail to promptly provide a reasonable explanation for its decision?

### SUMMARY OF THE EVIDENCE

#### Exhibits

I incorporated the entire MIA file, into the record as follows:

MIA 1: Complaint to MIA, dated January 24, 2017

MIA 2: Letter from MIA to Licensee, dated January 31, 2017

MIA 3: Licensee's Claim Log; letter from Licensee to MIA, dated February 16, 2017

with attachments

MIA 4: Letter from MIA to Complainant, dated April 17, 2017

MIA 5: Request for Hearing, dated May 16, 2017

MIA 6: Letter from MIA to Complainant, dated May 18, 2017

The Complainant offered the following documents which were admitted into evidence:

Compl. 1: [REDACTED] invoice, dated June 29, 2016

Compl. 2: Weather for [REDACTED] during September 2016

Compl 3: [REDACTED] invoice, dated December 20, 2016

I admitted the following exhibit on behalf of the Licensee:

Lic. 1: Picture of engine area of Complainant's boat

Lic. 2: Picture of engine area of Complainant's boat

Lic. 3: Picture of engine area of Complainant's boat showing water lines

Lic. 4: Picture of engine area of Complainant's boat showing rust on belt wheels

Lic. 5: Picture of engine area of Complainant's boat showing water lines that covered engine

Lic. 6: Picture of battery in Complainant's boat

Lic. 7: Picture of measurement of the depth of the bilge in the Complainant's boat

### Testimony

The Complainant testified on his own behalf and also presented testimony from his daughter, [REDACTED]

Yolanda Jackson, Senior Multi-lines Representative, Licensee, testified for the Licensee.

### **FINDINGS OF FACT**

I find the following facts by a preponderance of the evidence:

1. The Complainant owns a [REDACTED] boat. He applied for insurance with the Licensee on or about October 12, 2007. The Licensee issued its Maryland Boat and Personal Watercraft Policy to the Complainant under policy number [REDACTED] (Policy). The Complainant paid his premium for comprehensive coverage under the Policy.

2. The Policy provides that if the Complainant paid his premium for comprehensive coverage, the Licensee would pay for "sudden, direct and accidental loss to a covered watercraft that is not caused by collision." (MIA Ex. 3, Policy, p. 14).

3. The Complainant owns a condominium in [REDACTED] Maryland, and maintains a separate residence outside of Maryland. The Complainant's daughter lives in [REDACTED] near the Complainant's condominium.

4. In mid-August, 2016, the Complainant took his boat out for the last time in calendar year 2016 and placed it on the lift behind his condominium afterwards. The Complainant did not remove the plug from the drain in the bilge prior to putting it on the lift. The Complainant placed a boat cover on the boat. The boat cover is not waterproof; when it becomes saturated with water, water will permeate the boat cover.

5. The Complainant returned to his out-of-state residence and did not come back to [REDACTED] for the remainder of 2016. While he was away, the Complainant asked his daughter to periodically check on his condominium and boat. The Complainant's daughter looked to see that the cover was on the boat but she did not take the cover off or look under the cover.

6. The Complainant's wife became very ill in the late summer or fall of 2016, and passed away in November 2016.

7. On November 14, 2016, [REDACTED] owner of [REDACTED] went to winterize the Complainant's boat. Mr. [REDACTED] found water covering the carburetor and battery. The drain plug was secure and left in the boat. The boat was not connected to shore power and the battery was dead.

8. To assist the Complainant, Mr. [REDACTED] reported the damage to the Licensee on November 30, 2016. Mr. [REDACTED] towed the boat to his shop to prevent further damage.

9. On December 2, 2016, Ms. Jackson inspected the boat for the Licensee. There were multiple water lines inside the bilge area of the boat. There was rust on the engine and the battery looked clean.

10. On December 5, 2016, a representative of the Licensee spoke with the Complainant and explained the coverage denial to the Complainant.

11. On December 7, 2016, the Licensee sent a denial letter to the Complainant. The Licensee stated in the denial letter a reasonable explanation for its denial: the damage to the boat was not "sudden, direct and accidental" under the terms of the insurance policy.

12. On December 30, 2016, the Complainant or someone on his behalf requested a re-inspection of the boat and stated that he wanted to be present for the re-inspection.

13. On January 13, 2017, a Licensee representative scheduled a re-inspection of the boat for January 17, 2017.

14. On January 16, 2017, the Complainant cancelled the re-inspection appointment.

### DISCUSSION

When the MIA referred this case to the OAH, it directed the Administrative Law Judge conducting the hearing to pay close attention to sections 4-113 and 27-303 of the Maryland Insurance Article.

Section 4-113(b)(5) provides that the MIA shall refuse to renew, suspend, or revoke a certificate of authority if the insurer refuses or delays payment of amounts due claimants without just cause. Md. Code Ann., Ins. § 4-113(b)(5) (Supp. 2017).<sup>2</sup> For the reasons that will be discussed below, I conclude that the Licensee had just cause for refusing to pay the claim for damage to the Complainant's boat. Therefore, the Licensee did not violate this section of the statute.

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<sup>2</sup> Unless otherwise stated, all references are to the Insurance Article of the Maryland Annotated Code (Supp. 2016).

Section 27-303 provides that it is an unfair claim settlement practice and a violation of this subtitle for an insurer, nonprofit health service plan, or health maintenance organization to engage in ten prohibited acts. Although the Complainant did not specifically assert which subsection the Licensee allegedly violated, the MIA reviewed the claim under section 27-303(1), (2) and (6).

Section 27-303(1) prohibits misrepresenting pertinent facts or policy provisions that relate to the claim or coverage at issue. The Licensee sent the Complainant a letter of denial dated December 7, 2016. The letter informed the Complainant that his claim was being denied because the Licensee's "investigation revealed that the damages to your vehicle are not 'sudden, direct and accidental.' These damages do not meet the definition of the insuring agreement under Part IV-Physical Damage Coverage." (MIA Ex. 3, Letter dated December 7, 2016). There is nothing in this statement that misrepresents facts or the policy provision that is relevant to the Complainant's claim. Although the Complainant may not agree with the Licensee's interpretation that the damage was not "sudden, direct and accidental," his disagreement does not mean the Licensee misrepresented the facts or the policy provisions.

Section 27-303(2) prohibits an insurer from refusing to pay a claim for an arbitrary or capricious reason. Neither the statute nor any regulation promulgated by the MIA defines the "arbitrary or capricious" standard in the context of an administrative review of an insurer's refusal to pay a claim. In *Berkshire Life Insurance Co. v. Maryland Insurance Administration*, 142 Md. App. 628, 671 (2002), however, the Court of Special Appeals discussed the meaning of the "arbitrary or capricious" standard as clarified by the Maryland Insurance Commissioner. The Commissioner, in *Gabler v. American Manufacturers*, stated as follows:

[A] claimant must prove that the insurer acted based on "arbitrary and capricious reasons." The word "arbitrary" means a denial subject to individual judgment or discretion, and made without adequate determination of principle. The word "capricious" is used to describe a refusal to pay a claim based on an unpredictable

whim. Thus, under [Insurance Article] § 27-303, an insurer may properly deny a claim if the insurer has an otherwise lawful principle or standard which it applies across the board to all claimants and pursuant to which the insurer has acted reasonably or rationally based on "all available information."

Order of Remand at 6-7, MIA No. 60-7/97 (Mar. 11, 1998) (citing *Webster's II New Riverside University Dictionary* and *Black's Law Dictionary*). The *Berkshire* court adopted the Insurance Commissioner's interpretation of "arbitrary and capricious" as applied to the facts of the *Berkshire* case. *Berkshire*, 142 Md. App. at 672.

The Complainant, as the party asserting the affirmative on the issue of an unfair claim settlement practice, has the burden of proving by the preponderance of the evidence that the Licensee acted arbitrarily and capriciously in denying his claim. Md. Code Ann., State Gov't § 10-217 (2014); *Comm'r of Labor & Indus. v. Bethlehem Steel Corp.*, 344 Md. 17, 34 (1996); *Berkshire*, 142 Md. App. at 672.

In carefully reviewing all of the testimony and documents, I conclude that the Complainant has not met his burden to prove that the Licensee arbitrarily or capriciously refused to pay the claim for damages to his boat. A reasoning mind could have reached the same decision as the Licensee; therefore, the Licensee's denial of the Complainant's claim was not arbitrary and/or capricious.

On page fourteen of the Policy, it states that if the Complainant paid his premium for comprehensive coverage, the Licensee would pay for "sudden, direct and accidental loss to a covered watercraft that is not caused by collision." (MIA Ex. 3, Policy, p. 14). First, there is no dispute that the Complainant paid his premium for comprehensive coverage. The Licensee argued that the Complainant used his boat in mid-August 2016, and did not use the boat between that date and when Mr. [REDACTED] from [REDACTED] came to get the boat to winterize it on November 14, 2017. Therefore, the Licensee argued, the Complainant cannot point to a specific date in which the boat incurred a "sudden, direct and accidental loss."



Furthermore, the Licensee presented the testimony of Ms. Jackson who inspected the boat on December 2, 2016. Ms. Jackson testified that she has been in her current position with the Licensee for ten years and has inspected hundreds of boats. She testified that when she went to inspect the boat, she spoke first with the owner of the Marina. She further testified that Mr. [REDACTED] was very familiar with the Complainant's boat because he had worked on it in the past. Ms. Jackson asked Mr. [REDACTED] his opinion of what happened. Ms. Jackson testified that Mr. [REDACTED] told her that the battery was dead when he went to get the boat on November 14, 2016. He surmised that the bilge pump continued to work until the battery died and when the pump no longer pumped the water out of the bilge, everything in the bilge, the engine, battery, etc., became completely submerged in water.

Ms. Jackson testified that her inspection showed that all of the drains on the Complainant's boat drained directly into the bilge. She testified that she saw multiple water line marks in the bilge. Ms. Jackson also took pictures of the multiple water lines. Finally, Ms. Jackson explained that multiple water lines showed that it was not one major storm that caused the damage to the Complainant's boat, but that there were multiple storms where the water drained into the bilge, sat long enough to form a water line on the walls of the bilge, and was followed by additional storms in which the rain drained into the bilge and resulted in another water line.

The Complainant testified that the rainstorms in September 2016 were of historic proportion. He further testified that the amount of rain on September 29, 2016, which was 4.46 inches, could have been sufficient to kill the battery. Finally, the Complainant testified that his daughter checked on his boat on a regular basis. The Complainant's daughter testified that she lived near her father's condominium and boat and checked on it regularly. She further testified

that because the boat was up on a lift, she did not take it down and unsnap the cover to see if water was entering the boat or if the battery was still working.

Although the Complainant insisted that the multiple water lines on the walls of the bilge were irrelevant, they are very relevant to the Licensee's determination in this case. Neither the Complainant nor his daughter could testify as to when the battery died and the bilge pump stopped working, which resulted in the bilge filling with water to the level of the deck. Although the Complainant's daughter looked at the boat from the outside, she did not unsnap the cover and check to see if water was entering the bilge or if the battery was working. The bilge is two feet deep. The Complainant is unable to show that the 4.46 inches of rain on September 29, 2016, was sufficient to kill the battery on that date. It is more likely that the cumulative effect of the multiple rain storms in September and October 2016 resulted in the battery, engine, etc. becoming submerged in the water that eventually reached the level of the deck.<sup>3</sup>

The Licensee's representative spoke with the Complainant, the Complainant's son, as well as Mr. [REDACTED] who had worked on the boat in the past. The Licensee's representative also inspected the boat and took numerous pictures that clearly showed the multiple water lines, the rust on the engine, the clean battery (which demonstrated that it was dead), etc. This evidence along with the unrefuted evidence that there were multiple storms in September and October 2016, that the boat was not hooked up to shore power (to supplement the battery), and that the drain plug was left in the boat, supports the Licensee's conclusion that the damage to the Complainant's boat was not a "sudden, direct and accidental loss."

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<sup>3</sup> I note that the Complainant's testimony and argument was very conflicted during the hearing. At times he was adamant that the damage had to have occurred on September 29, 2016, because of the 4.46 inches of rain that fell on that single day; at other times during the hearing, the Complainant seemed to concede that because there were multiple rain storms in September and October, 2016, the pump stopped working after the battery died as a result of the cumulative effect of the water entering the bilge from the multiple storms.

Section 27-303(6) prohibits an insurer from failing to promptly provide on request a reasonable explanation of the basis for a denial of a claim. In this case, the loss was reported to the Licensee on November 30, 2016, and Ms. Jackson inspected the boat on December 2, 2016. Although the Complainant disputed how and when he found out that the claim was denied, I do not find his testimony was as persuasive as the Licensee's documented letter, dated December 7, 2016, which denied the claim in writing. The Complainant was understandably upset and preoccupied with his wife's sudden fall and then death in November 2016. As a result, I conclude that his recollection of the dates and how he was informed of the denial was inaccurate. Moreover, the Complainant's son was apparently assisting him during this time but did not attend the hearing. Ms. Jackson testified that at one point she thought she was speaking with the Complainant but found out later that she was actually speaking with the Complainant's son. This may have also led to some confusion on the Complainant's part as to how he became aware of the denial of his claim. In any event, the Licensee timely sent a letter of denial and gave a reasonable basis for its decision to deny the claim. The Licensee cited to the investigation that showed the damage was not "sudden, direct, and accidental." The Licensee did not violate section 27-303(6).

#### **CONCLUSIONS OF LAW**

I conclude as a matter of law that the Licensee did not refuse to pay the claim for damages to the Complainant's boat without just cause. Therefore, the Licensee did not violate Md. Code Ann., Ins. § 4-113(b)(5) (Supp. 2017).

I further conclude as a matter of law that the Licensee did not misrepresent any pertinent facts or policy provisions that related to the Complainant's claim. Md. Code Ann., Ins. § 27-303(1)(Supp. 2017).

I further conclude as a matter of law that the Complainant did not show that the Licensee engaged in an unfair claim settlement practice by refusing to pay the claim for an arbitrary or capricious reason. Md. Code Ann., Ins. § 27-303(2) (Supp. 2017).

I further conclude as a matter of law that the Licensee did not fail to promptly provide a reasonable explanation for its denial of the Complainant's claim for damages to his boat. Md. Code Ann., Ins. § 27-303(6) (Supp. 2017).

**PROPOSED ORDER**

Based upon the above Findings of Fact, Discussion, and Conclusion of Law, I **PROPOSE** that the Licensee not be found in violation of sections 4-113(b)(5) and 27-303(1), (2) and (6) of the Maryland Insurance Article and that the charges made by the Complainant be **DENIED AND DISMISSED**.

I further **PROPOSE** that the records and publications of the Maryland Insurance Administration reflect this decision.

**Signature Appears on Original**

December 12, 2017  
Date Decision Issued

Ann C. Kehinde  
Administrative Law Judge

ACK/cj  
#171234

## RIGHT TO FILE EXCEPTIONS

Upon receipt of this proposed decision, affected parties have twenty (20) days to file exceptions with the Insurance Commissioner. COMAR 31.02.01.10-1B(1). If they wish to have a transcript of the hearing before filing exceptions, they have ten (10) days to file with the Insurance Commissioner a copy of their written request to a private stenographer for preparation of a transcript. COMAR 31.02.01.10-1B(2). If a transcript is requested, the transcript must be filed with the Commissioner within sixty (60) days of the request, and then the parties have thirty (30) days after the filing of the transcript to file exceptions with the Commissioner. COMAR 31.02.01.10-1D. Written exceptions and copies of requests for transcripts should be addressed to the Insurance Commissioner, Maryland Insurance Administration, 200 St. Paul Place, Suite 2700, Baltimore, MD 21202. The Office of Administrative Hearings is not a party to any review process.

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