

**OFFICE OF THE INSURANCE COMMISSIONER
MARYLAND INSURANCE ADMINISTRATION**

MARYLAND INSURANCE ADMINISTRATION <i>EX REL</i> D.L.S. ¹ ,	*	REVIEW OF A RECOMMENDED
Complainant,	*	DECISION ISSUED BY
v.	*	NICOLAS ORECHWA
STATE FARM FIRE AND CASUALTY COMPANY,	*	AN ADMINISTRATIVE LAW JUDGE
Licensee.	*	OF THE MARYLAND OFFICE OF
	*	ADMINISTRATIVE HEARINGS
	*	OAH No.: MIA-CC-33-22-13002
	*	MIA No.: MIA 2022-05-019

* * * * *

FINAL ORDER

Pursuant to Md. Code Ann., Ins. § 2-210(d)² and Code of Maryland Regulations (COMAR) 31.02.01.10-2D, the Undersigned hereby issues this summary affirmance of the Proposed Decision below.

On August 19, 2021, the MIA received a complaint from D.L.S. (hereinafter “Complainant”) alleging that State Farm Fire and Casualty Company (hereinafter “Licensee”) erred in handling a claim concerning a rental property Complainant owns (“Complaint”). The MIA investigated the Complaint, and on May 3, 2022, it issued a determination letter concluding that the Licensee did not violate Maryland’s insurance laws in its handling of Complainant’s claim; this letter specifically referenced Sections 4-113(b)(5) and Sections 27-303(1), (2), and (6). The

Complainant requested a hearing, which was granted on May 19, 2022. This matter was then transmitted to the Office of Administrative Hearings (“OAH”) to conduct a contested case hearing and to issue a Proposed Decision pursuant to COMAR 31.02.01.04-1A. In its referral to the OAH, the MIA noted that specific attention at the hearing will be directed to the Annotated Code of Maryland, Insurance Article, Sections 4-113 and 27-303.

On September 7, 2022, a hearing was held before Administrative Law Judge (“ALJ”) Orechwa. On October 6, 2022, ALJ Orechwa issued a Proposed Decision setting forth factual and legal findings with respect to Section 27-303(2), but did not make Conclusions of Law with respect to Sections 4-113(b)(5), 27-303(1) or 27-303(6). On the same date, OAH mailed the Proposed Decision to the Parties in this case. Attached to the Proposed Decision was the notice regarding the Right to File Exceptions which advised the Parties that, pursuant to COMAR 31.02.01.10-1, they had the right to file written exceptions with the Undersigned within twenty (20) days from receipt of the Proposed Decision. Neither Party filed exceptions in this case.

I have carefully evaluated the documentary record in this case and the Proposed Decision by ALJ Orechwa. Based on this review, I am persuaded that ALJ Orechwa’s Conclusion of Law that Licensee did not violate Section 27-303(2) is correct, and, pursuant to COMAR 31.02.01.10-2D, hereby affirm this finding.

I further find, pursuant to COMAR 31.02.01.10-2(C)(2), that ALJ Orechwa’s Findings of Fact clearly support a finding that Licensee did not violate Section 4-113. Here Complainant did not show that Licensee refused payment without just cause in violation of Section 4-113. Specifically,

¹ The MIA uses initials to protect the identity of the Parties.

² Unless otherwise noted, all statutory references are to the Insurance Article of the Annotated Code of Maryland.

the Licensee has made several payments under the terms of this policy, including a payment up to the limits on the lost rental income portion of the policy and therefore no evidence has been provided that any additional payments were due in this case.

I also find that Complainant did not prove by a preponderance of the evidence that Licensee misrepresented pertinent facts or policy provisions in violation of Section 27-303(1). ALJ Orechwa, observed that the policy covered damage to the property as well as loss of rent as a result of damage from a loss. ALJ Orechwa's Findings of Fact note that Licensee retained Rimkus Consulting Group ("Rimkus") to determine if the leak caused structural damage to the property and that Rimkus observed age related cracks in the foundation, but concluded there was no structural damage to the property as a result of this loss. Therefore, based on ALJ Orechwa's findings, the cracks to the foundation do not appear to have been caused by the subject loss and therefore coverage would not be afforded under the policy, as the policy covers damage as a result of a loss. I, therefore, find that Complainant has not shown that Licensee misrepresented pertinent facts or policy provisions that relate to the claim in violation of Section 27-303(1).

I further find that Complainant has not shown that Licensee violated Section 27-303(6). Based on ALJ Orechwa's Findings of Fact and the evidence incorporated by ALJ Orechwa into the record, including the MIA file, the Licensee paid out damages based on its initial inspection and a follow up inspection performed by Becht Engineering. It was not until several months later that Complainant reported structural damage to the property based on the loss. Based on the report of structural damage, Licensee hired Rimkus to investigate the loss and issued a letter denying

coverage for the structural damages based on Rimkus' findings and the policy language.

Specifically, the letter stated in part:

[t]he engineer hired to inspect your property determined the water intrusion from the pipe break did not cause structural damage to the home. The engineer noted the structure had cracks in the southern foundation walls attributable to long-term settlement and deterioration.

Please refer to your Rental Dwelling policy FP-8103.3 and amended Endorsement FE-8220.4 for the following language:

SECTION I – LOSSES INSURED

COVERAGE A – DWELLING

We insure for accidental direct physical loss to the property described in Coverage A, except as provided in SECTION I – LOSSES NOT INSURED

SECTION I – LOSSES NOT INSURED

1. We do not insure for any loss to the property described in Coverage A which consists of, or is directly and immediately caused by, one or more of the perils listed in items a. through n. below, regardless of whether the loss occurs suddenly or gradually, involves isolated or widespread damage, arises from natural or external forces, or occurs as a result of any combination of these:

* * *

G. wear, tear, marring, scratching, deterioration, inherent vice, latent defect or mechanical breakdown;

H. corrosion, electrolysis or rust;

I. mold, fungus or wet or dry rot;

L. settling, cracking, shrinking, bulging, or expansion of pavements, patios, foundation, walls, floors, roofs or ceilings [.]

* * * *

(MIA Ex. 3.)

As Licensee clearly identified the basis for the denial, supported by the relevant provisions of the policy, I find that Complainant has not shown that Licensee failed to provide a reasonable explanation for the denial of the claim.

THEREFORE, it is hereby

ORDERED that the Proposed Decision of ALJ Orechwa is affirmed, and

ORDERED that, as a matter of law, it be found that Licensee did not violate Sections 4-113, 27-303(1) or 27-303(6);

ORDERED that the records and publications of the Maryland Insurance Administration reflect this decision.

It is so **ORDERED** this 18th day of January, 2023.

KATHLEEN A. BIRRANE
Commissioner

/S/ Lisa Larson
Lisa Larson
Director of Hearings

MARYLAND INSURANCE	* BEFORE NICOLAS ORECHWA,
ADMINISTRATION	* ADMINISTRATIVE LAW JUDGE
<i>EX REL.</i>	* THE MARYLAND OFFICE
D.L.S.,	* OF ADMINISTRATIVE HEARINGS
COMPLAINANT	*
v.	*
STATE FARM FIRE AND	* OAH No.: MIA-CC-33-22-13002
CAUSUALTY COMPANY,	* MIA No.: 2022-05-019
LICENSEE	*

* * * * *

PROPOSED DECISION

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSION OF LAW
PROPOSED ORDER

STATEMENT OF THE CASE

On August 19, 2021, the Maryland Insurance Administration (MIA) received a complaint from the Complainant alleging unfair claim settlement practices by State Farm Fire and Casualty Company (Licensee). Specifically, the Complainant alleges that the Licensee erred in handling a claim concerning a rental property he owns.

After an investigation, the MIA found that the Licensee did not violate sections 4-113 and 27-303 of the Insurance Article and notified the Complainant of its finding by a letter dated May 3, 2022. On May 16, 2022, the Complainant requested a hearing. On or about June 1, 2022, the MIA transmitted the matter to the Office of Administrative Hearings (OAH) to conduct a

contested case hearing. In its transmittal, the MIA delegated to the OAH authority to issue a proposed decision.¹

On September 7, 2022, I held a hearing at the Office of Administrative Hearings in Rockville, Maryland. Md. Code Ann., Ins. §§ 2-210, 2-213 (2017). The Complainant appeared without representation. Craig Roswell, Esquire, represented the Licensee.²

The contested case provisions of the Administrative Procedure Act, the MIA's hearing regulations, and the OAH's Rules of Procedure govern procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2021); COMAR 31.02.01; and COMAR 28.02.01.

ISSUE

Did the Licensee engage in any unfair claim settlement practice under the Insurance Article?

SUMMARY OF THE EVIDENCE

Exhibits

I incorporated the entire MIA file, consisting of six exhibits, into the record as follows:

1. Complaint, August 19, 2021;
2. Letter from the MIA to the Licensee, March 7, 2022;
3. Letter from the Licensee to the MIA with attachments, March 14, 2022;
4. Letter from the MIA to the Complainant, May 3, 2022;
5. The Complainant's Hearing Request, May 16, 2022;

¹ The Insurance Commissioner may delegate to the 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. Code of Maryland Regulations (COMAR) 31.02.01.04-1A.

² I originally heard this matter on July 20, 2022. On that date, the Complainant appeared, however no one appeared on the Licensee's behalf. After determining the Licensee's representative received notice from the OAH and after waiting fifteen minutes, I proceeded to hear the case and closed the record on that date. On July 25, 2022, the Licensee's Counsel contacted the OAH by letter. Counsel advised that the MIA neglected to inform the OAH of the timely entry of his appearance with the MIA. Thus, he did not receive notice of the July 20, 2022 hearing. I convened a telephone conference on August 12, 2022, at which counsel for the Licensee and the Complainant participated. The parties agreed to reopen the record and have this matter heard de novo on September 7, 2022, at the OAH in Rockville. On August 18, 2022, I issued an order to that effect.

6. Letter from the MIA to the Complainant and Licensee, May 19, 2022.

I admitted the following exhibits offered by the Complainant:

Compl. Ex. 1 -Email from Jennifer Smigal to the Complainant, May 17, 2021;

Compl. Ex. 2 - Architectural Sketch of the Main Level of Unit 2, undated.

I admitted no exhibits on behalf of the Licensee.

Testimony

The Complainant testified and presented the following witnesses: Zola Heshington (Heshington), Ian Anderson and James Anderson, whom I accepted as an expert in general engineering.³

The Licensee called no witnesses.

FINDINGS OF FACT

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

1. The Complainant owns property located at 909 Prospect Street in Takoma Park, Maryland (Prospect Street or the residence). The Complainant divided Prospect Street into two parts: unit one and unit two. The Complainant rents unit one and unit two to third parties. At all times relevant, the Licensee covered Prospect Street under rental dwelling policy number 90-BS-Q225-1 (policy). The policy covers damage to Prospect Street as well as loss of rent as a result of damage.

2. Prospect Street is ninety-six years old.

3. In late April or early May of 2020, a hot water handle valve failed in one of the bathrooms at Prospect Street causing water to pour throughout the residence. Water ponded in

³ Ian and James Anderson are unrelated.

the bathroom and hall of unit two directly below the leak. Prospect Street sustained a variety of water damage as a result of the leak.

4. The Complainant did not discover the damage until December of 2020.⁴ He did not report the loss to the Licensee until February 22, 2021. The Complainant repaired much of the damage prior to reporting the loss.

5. An adjuster inspected Prospect Street on March 2, 2021. After the inspection, the Licensee issued the Complainant a payment of \$6,820.05.⁵ This payment did not cover damage to the lower-level bathroom, the sloping of the upper level bedroom floor, water stains on the basement ceiling joists and exterior damage around the basement window trim and siding.

6. When the Complainant challenged the Licensee's conclusions, the Licensee retained Becht Engineering (Becht). Becht inspected Prospect Street on June 28, 2021. Becht determined the failure of a wax ring⁶ in the bathroom of unit two caused the water damage to the joists.

7. The Complainant did not request Becht to inspect damage to Prospect Street's south foundation wall.

8. However, Becht concluded as a result of the leak, water which ponded in the upstairs bathroom damaged the floors and lower portion of the wall paneling located in the upstairs bedroom of unit one. Water from the leak also entered the bathroom of unit two. This caused damage to the tile floor and subfloor. It also stained the basement ceiling joists below the unit two bathroom.

9. After reviewing Becht's conclusions, on August 13, 2021, the Licensee issued the Complainant an additional payment of \$1,777.49. In addition, the Licensee issued the

⁴ The Claimant testified he avoided Prospect Street in the months prior due to the pandemic.

⁵ This is less the policy's \$3,019.00 deductible.

⁶ Per the testimony of James Anderson, a wax ring is a gasket which seals around the base of the toilet and flooring.

Complainant a payment of \$4,200.00 for lost rental income. The Licensee paid the Complainant the policy limit for lost rental income.

10. On August 25, 2021, the Licensee issued an additional \$1,502.76 payment to the Complainant based upon Becht's conclusions.

11. On November 23, 2021, the Complainant reported to the Licensee that the leak caused structural damage to Prospect Street. The Licensee retained Rimkus Consulting Group (Rimkus) an engineering firm to determine if the leak caused structural damage to Prospect Street.

12. Rimkus inspected Prospect Street on January 11, 2022. Rimkus inspected the south foundation wall on this date. Rimkus observed age related cracks in the foundation of Prospect Street, but concluded the leak caused no structural damage to the residence.

DISCUSSION

The Complainant's case⁷

Heshington rented unit two at the time of the leak. One day while at work she received a call of water leaking from a second floor bathroom into unit two. After the leak she noticed cracks in the tile floor and the toilet started to "sink." Heshington never interacted with the Licensee during its investigation of the claim.

Ian Anderson lived with Heshington and was in unit two on the date of the leak. While there, he observed water flow through an overhead fixture in the bathroom. The water then pooled from the kitchen to the front room. Ian Anderson noticed cracks in the bathroom floor and sunken tile after the leak and assumed the tenant in unit one where the leak originated would

⁷ The Complainant requested the OAH issue subpoenas for several witnesses. Only the witnesses listed above appeared at the hearing. The United States Postal Service did not return any of the subpoenas as undeliverable. The Complainant did not request the OAH seek enforcement action against the witnesses who did not appear. However, even if the Complainant had made that request, the OAH would have declined to seek enforcement action because the Complainant did not provide proof of service by certified mail or personal delivery. COMAR 28.02.01.14C(3).

notify the Complainant. Ian Anderson never interacted with the Licensee during its investigation of the claim.

James Anderson (Anderson) works for Becht as a licensed engineer. The Licensee hired Becht to inspect Prospect Street and Becht assigned Anderson to perform the inspection. Anderson inspected all of unit one and areas of unit two. Anderson noticed water damage to the floor of unit one mostly in the nature of staining. He also noticed some “minor buckling” and some cracking in the floor and tile, and damage to the subfloor below the tile. Anderson did not recall “specifically seeing or looking at the south foundation wall” or anyone raising issues about the south foundation wall. Anderson did not mention the south foundation wall in Becht’s report.⁸ At the hearing, Anderson viewed a picture of the south foundation wall but could not opine as to the cause of cracks in the wall.

Anderson did not recall seeing the ceiling sag but testified a ceiling could sag due to a lack of fasteners or excessive weight. If hot water infiltrated the ceiling, Anderson opined the ceiling could experience “some form of distress.” Anderson opined that the amount of damage he observed was “likely indicative of a long term water intrusion or exposure.”

The Complainant testified he has “never seen such biased and wrong goings on as I have with State Farm during [the claim process].” In the Complainant’s estimate, the leak caused most of the damage to Prospect Street. As an example, the tile separating from the base of the floor was caused by the flood. In addition, the residence uses radiant heat which causes a dry environment. This dryness causes natural cracks in the plaster. However, the Complainant noticed “different cracks” caused by moisture which causes the plaster to come off when painted.⁹ The Complainant took particular umbrage with the adjustor’s handling of the claim.

⁸ The Becht report is part of MIA Ex. 3.

⁹ The Complainant showed an example of the plaster at the hearing. He did not move it into evidence, and I did not keep it as part of the record. I did describe it on the record to the satisfaction of the Licensee’s counsel.

The adjuster claimed when wood gets wet it sags and then “can go back up.” The Complainant “couldn’t believe” the adjuster’s assessment. The Complainant and the adjuster argued over the direction of the rafters and the location of a dormer. The adjuster also considered the tile in the bathroom to be of inferior quality. The Complainant contended that the Licensee provided estimates, based upon the adjuster’s inspection with the wrong dimensions. Compl. Ex. 2. The Complainant then argued the Licensee delayed the claim process and testified “I don’t understand why it takes six weeks to review a three-page report.” The Complainant claimed the Licensee shorted him on the rent claim.

Analysis

When the MIA referred this case to the OAH, it directed the Administrative Law Judge conducting the hearing to pay specific attention to sections 4-113 and 27-303 of the Insurance Article. Section 4-113(b)(5) provides that the Insurance Commissioner may suspend, refuse to renew, or revoke an insurer’s certificate of authority if the insurer “refuses or delays payment of amounts due claimants without just cause.” Ins. § 4-113(b)(5) (2017).¹⁰ Section 27-303 lists ten unfair claim settlement practices. Section 27-303(2), in particular, prohibits an insurer or nonprofit health service plan from refusing to pay a claim for an “arbitrary or capricious reason.”

The Insurance Commissioner may impose a penalty not exceeding \$2,500.00 for each violation of section 27-303 and may require an insurer to make restitution, subject to the limits of any applicable insurance policy, to each claimant who has suffered actual economic damage because of the violation. *Id.* § 27-305(a)(1), (c)(1), (2).

Neither the statute nor any regulation promulgated by the MIA defines the “arbitrary or capricious” standard. In *Berkshire Life Insurance Co. v. Maryland Insurance Administration*, the

¹⁰ Unless otherwise noted, all references hereinafter to the Insurance Article are to the 2017 Replacement Volume of the Maryland Annotated Code.

Court of Special Appeals quoted from, and adopted, the Insurance Commissioner's interpretation of the "arbitrary and capricious" standard in an earlier MIA case:

"[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 section] 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.'"

142 Md. App. 628, 671 (2002) (citations omitted). As used in section 27-303 of the Insurance Article, "arbitrary or capricious" essentially means without reason or just cause.

When not otherwise provided by statute or regulation, the standard of proof in a contested case hearing before the OAH is a preponderance of the evidence, and the burden of proof rests on the party making an assertion or a claim. Md. Code Ann., State Gov't § 10-217 (2021); COMAR 28.02.01.21K. To prove an assertion or a claim by a preponderance of the evidence means to show that it is "more likely so than not so" when all the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002). In this case, 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 the claim.

While the Complainant advanced reasonable and good faith arguments, I do not find he met his burden with regard to the discrete issues before me. The Complainant questioned the competence of the adjuster the Licensee first sent to inspect Prospect Street. Assuming, for the sake of argument, the adjuster did lack competence, I find the Licensee made good faith efforts to resolve that issue. The Licensee hired Becht, considered Becht's report and provided an additional payout to the Complainant. When the Complainant raised the issue of cracks in the

south foundation wall thereafter, the Licensee hired Rimkus, which inspected the south foundation wall and concluded the leak did not cause the cracks. The Complainant presented no evidence to question the conclusions of Rimkus. Further, I had the opportunity to listen to Anderson's testimony and found him credible. He presented as a knowledgeable engineer as opposed to a charlatan. I found his conclusion that certain damage predated the leak reasonable. Prospect Street is almost a hundred years old.

Most of the Complainant's arguments concerned customer service issues as opposed to the good or bad faith of the Licensee. For example, I find delays in returning calls or untimely response to requests constitute customer service issues. I find typographical errors constitute customer service issues. The Licensee paid the Complainant the policy limit with regard to his claim for lost rent. Thus, the Complainant's argument on that issue lacks merit.

The Licensee submitted on the MIA's exhibits.

CONCLUSION OF LAW

I 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 a claim for an arbitrary or capricious reason. Md. Code Ann., Ins. § 27-303(2) (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 section 27-303(2) of the Insurance Article and that the charges made by the Complainant be **DENIED AND DISMISSED**.

October 6, 2022
Date Order Mailed

signature on original

Nicolas Orechwa
Administrative Law Judge

NO/at
#201191

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 a party wishes to receive a transcript of the hearing before filing exceptions, the party has ten (10) days from receipt of the decision to either: 1) file a written request for a transcript with the Insurance Commissioner, or 2) request a transcript of the hearing from a private stenographer and file a copy of their written request to a private stenographer with the Insurance Commissioner. 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 a party has thirty (30) days after the filing of the transcript to file exceptions. COMAR 31.02.01.10-1D. Written exceptions and requests for transcripts should be addressed to: Hearing and Appeals Coordinator, 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.

Copies Mailed To:

Complainant

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MARYLAND INSURANCE	* BEFORE NICOLAS ORECHWA,
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