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In Reply Refer to File No. [redacted]

January 30, 2023

[redacted]

VIA EMAIL (doconnor@oconnorllc.com)
AND CERTIFIED MAIL – RETURN RECEIPT REQUESTED

David M. O'Connor, Esquire
O'Connor & Associates, LLC
325 Boston Post Road
Sudbury, MA 01776

Re: My Client: Awilda M. Pimentel
Policy No.: [redacted]
Claim No.: [redacted]
Date of Loss: July 22, 2022

DEMAND FOR RELIEF PURSUANT TO G.L. c. 93A

Dear Mr. O'Connor:

As you know, I represent Awilda M. Pimentel ("Pimentel") in this matter. This letter constitutes a demand for relief pursuant to G.L. c. 93A, §§ 2 and 9 and c. 176D, §3(9) against your client, AmGUARD Insurance Company ("AmGUARD"). For all of the following reasons, AmGUARD has violated G.L. c. 93A and c. 176D in this matter.

Pimentel purchased the single-family home located at [redacted] (the "Property") on June 28, 2022. Following a fire loss at the Property 24 days later, AmGUARD investigated the availability of coverage. Its investigation included a review of documents produced by Pimentel as well as performance of her examination under oath. Following completion of its investigation, AmGUARD denied coverage for the fire loss on the basis that Pimentel purportedly "did not reside on [sic] the premises at the time of the fire." According to AmGUARD, Pimentel's residency at her home on the date of the loss was a "requirement for coverage to attach, particularly under the Residence Premises Definition Endorsement (HO 120 01 04 22)" (the "Residence Premises Endorsement"). AmGUARD subsequently concluded that the Property was "unoccupied" and allegedly did not qualify as an "insured location" or "residence premises."[1] This coverage denial, for the reasons discussed below, is unsustainable.

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[1] AmGUARD also cited the drawing of "construction plans" for the Property as a basis for denying coverage. As has been repeatedly mentioned, the "construction plans" to which AmGUARD refers were prepared **after** the fire in order to repair the fire-related damage to the Property. The plans depict

The policy provided for fire insurance. Fire insurance in Massachusetts have long been governed by the standard policy statute codified at G.L. c. 175, § 99 (Twelfth) (the "Standard Fire Policy"). *See, Ideal Fin. Servs., Inc. v. Zichelle,* 52 Mass. App. Ct. 50, 53 (2001) (the Massachusetts standard fire insurance policy is defined by G.L. c. 175, § 99 (Twelfth)). In pertinent part, Section 99 provides that "[n]o company shall issue policies or contracts which . . . insure against loss or damage by fire or by fire and lightning to property or interests in the commonwealth, other than those of the standard forms herein set forth . . ." As this language makes unmistakably clear, Massachusetts law provides mandated language required to be included in every fire insurance policy issued in this Commonwealth, including language for a vacancy clause. Specifically, the 60-day vacancy provision found in fire insurance policies (namely, that the insurance company is not liable for losses occurring "while the described premises, whether intended for occupancy by owner or tenant, are vacant or unoccupied beyond a period of sixty consecutive days") is prescribed by G.L. c. 175, § 99 (Twelfth).[2]

Here, the policy's "Special Provisions – Massachusetts" form (Form HO 120 01 04 22) tracked the aforesaid vacancy language required by G.L. c. 175, § 99 (Twelfth). However, as noted above, the policy also includes the Residence Premises Endorsement, which redefines the term "residence premises." Through this endorsement, AmGUARD redefined that term to mean, as relevant here, the "one-family dwelling **where you reside** . . . on the inception date of the policy period shown in the Declarations and which is shown as the 'residence premises' in the Declarations" (emphasis added).[3] This endorsement's redefinition of the term "residence premises", as discussed above, served as the basis on which AmGUARD denied coverage under the policy.

The Supreme Judicial Court has noted that "[t]he main lesson to be drawn from our cases interpreting the meaning of the word 'residence' is that it is a word 'of flexible meaning'." *Shepard v. Finance Associates of Auburn, Inc.*, 366 Mass. 182, 190 (1974); *Krakow v. Department of Pub. Welfare*, 326 Mass. 452, 454 (1950) ("[r]esidence is a term of flexible meaning"). "'Residence'" is not a word of uniform significance but is used in different senses." *Wachusett Natl. Bank v. Fairbrother*, 148 Mass. 181, 184 (1889). It is for this reason that Massachusetts Courts have broadly defined the word "residence." *See, e.g., Entwistle v. Safety Indem. Ins. Co.*, 32 Mass. L. Rptr. 561, * 5 (Mass. Super. Ct., March 31, 2015, Krupp, J.) (a 10% sublimit did not require an insured to live at the "insured's residence" at the time of the loss, temporarily or otherwise). While it was certainly open to AmGUARD to draft the Residence Premises Endorsement in such a way so as to impose a minimum number of days per week, month

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the fire-damaged home and postdate the fire loss. Insofar as AmGUARD premises its coverage denial on the "construction plans", it is a frivolous position.

[2] In its coverage denial, AmGUARD nowhere mentions or analyzes G.L. c. 175, § 99 (Twelfth) or the 60-day vacancy provision required by that statute to be included in every fire insurance policy issued in the Commonwealth.

[3] The policy does not define "reside."

or year physical presence at the Property was needed in order to satisfy the residency requirement, it tellingly did not do so. That AmGUARD did not include such a requirement counsels against interpreting the word "residence" restrictively. *See, Green Mountain Ins. Co. v. Wakelin*, 484 Mass. 222, 234 (2020) ("where the insurer had the ability to include . . . language in its policy" that clearly would have excluded disputed loss from coverage and "failed to do so," court will not interpret policy to exclude coverage for such loss); *Vermont Mut. Ins. Co. v. Zamsky*, 732 F.3d 37, 44 (1st Cir. 2013) (applying Massachusetts law) (interpreting policy to cover specific liabilities where, had insurer wanted to exclude these risks from coverage, "it would have been child's play to say so," yet insurer had not).

Further, if "where you reside" were to mean only a place where an insured is living and/or occupying, the statutorily-required vacancy language found in the "Special Provisions – Massachusetts" form (namely, AmGUARD is not liable for losses occurring "while the described premises, whether intended for occupancy by owner or tenant, are vacant or unoccupied beyond a period of sixty consecutive days") would be contradicted or rendered meaningless as the Supreme Judicial Court long ago concluded that the language mandated by G.L. c. 175, § 99 (Twelfth) does not apply when a loss occurs within sixty days of the effective date of a policy. *Pappas Enterprises, Inc. v. Commerce and Industry Ins. Co.*, 422 Mass. 80, 84 (1996). "It is a standard rule of construction that interpretations which result in meaningless words are to be avoided." *Gibraltar Fin. Corp. v. Lumbermens Mut. Cas. Co.*, 400 Mass. 870, 872 (1987). *See, Deutsche Natl Assn v. First American Title Ins. Co.*, 465 Mass. 741, 748 (2013) (court must give every word in insurance policy "meaning and effect whenever practicable").

The 60-day vacancy provision found in fire insurance policies, including the subject policy, notably refers only to the "described premises", **not** to the "residence premises." Similarly, the 60-day vacancy provision conspicuously fails to mention, let alone require, residency "on the inception date of the policy period." Under these circumstances, reference to the "residence premises", as redefined by the Residence Premises Endorsement, does nothing to undercut the meaning or import of the 60-day vacancy provision found in the policy. Had the Legislature saw fit to use the words "residence premises" rather than "described premises" when it drafted the 60-day vacancy provision, it could and should have so stated. Where the Legislature failed to do so, it is inappropriate to add or read such language into the policy. *Prudential Ins. Co. v. Boston*, 369 Mass. 542, 547 (1976).

Where, as here, language in a statutorily defined insurance policy is in conflict with the statute, that language is unenforceable. *Aquino v. United Property & Cas. Co.*, 483 Mass. 820, 826 (2020). As a matter of law, AmGUARD cannot limit coverage to a scope narrower than what the Legislature envisioned. *Id.* The policy language here conflicts with the mandatory insurance coverage provided for in G.L. c. 175, § 99 (Twelfth) and must be reformed. *Id.*

AmGUARD had an opportunity to determine whether a vacancy existed at the inception of the policy and, after so determining, it could have chosen not to underwrite the risk or to cancel the policy. *See, Pappas,* 422 Mass. at 83. If (without conceding) a

vacancy existed at the inception of coverage, it is hardly reasonable to believe that the coverage should or did terminate earlier than sixty days later when, for the premium paid and accepted, AmGUARD agreed to assume for sixty days the increased risk of loss that the allegedly vacant premises presented. *Id.* at 83-84. Under the circumstances here presented, AmGUARD cannot now deny coverage on the basis that Pimentel did not reside at the Property at the inception of the policy period where it neither took nor sought to take any steps to discover whether the subject building was vacant.

AmGUARD's denial of liability under the policy is unsustainable and is advanced in bad faith and in violation of G.L. c. 93A and G.L. c. 176D, § 3(9). G.L. c. 93A makes unlawful any unfair methods of competition and unfair or deceptive acts or practices within any trade or commerce. "[A] practice or act will be unfair under G.L. c. 93A, § 2 if it is (1) within the penumbra of a common law, statutory, or other established concept of fairness; (2) immoral, unethical, oppressive, or unscrupulous; or (3) causes substantial injury to competitors or other business people." *Morrison v. Toys-R-Us, Inc. Massachusetts*, 441 Mass. 451, 457 (2004). "The purpose of [Chapter 93A] is to improve the commercial relationship between consumers and business persons and to encourage more equitable behavior in the marketplace." *Ibid.*

Regarding insurance contracts, "[a] policyholder may have a claim under G.L. c. 93A, § 9 . . . for unfair or deceptive acts or practices in the handling of claims for the payment of insurance benefits." *Swanson v. Bankers Life Co.*, 389 Mass. 345, 348 (1983). An insurer violates Chapters 93A and 176D when its denial of coverage is not based on a good faith interpretation of the policy. *Gulezian v. Lincoln Ins. Co.*, 399 Mass. 606, 613 (1987); *Van Dyke v. St. Paul Fire & Marine Ins. Co.*, 388 Mass. 671, 675-678 (1983). Whether an insurance company acted in good faith or in bad faith in dealing with the insured is left to the trier of fact. *Swanson*, 389 Mass. at 348 ("[w]hat a defendant knew or should have known may be relevant in determining unfairness . . . and plaintiff's conduct, [her] knowledge, and what [s]he reasonably should have known may be factors in determining [fairness]").

Here, AmGUARD intentionally drafted and/or interpreted its policy in bad faith in an effort to avoid paying Pimentel monies she is due thereunder. As the cases cited above make clear, the Residence Premises Endorsement contained within the policy conflicts with the minimum protections afforded by statute under the Standard Fire Policy, thereby rendering void and unenforceable the Residence Premises Endorsement upon which AmGUARD premises its denial of coverage. Given the statutory requirements set forth in the Standard Fire Policy coupled with the applicable case law interpreting same (cited above and incorporated herein), AmGUARD's interpretation of the policy was and remains implausible and was not, and continues not to be, advanced in good faith. *Compare, Gonzales*, 34 Mass. L. Rptr. 290, at *6 (in a case involving a conflict between an intentional loss exclusion and the protections afforded an innocent co-insured under the Standard Policy, there was a sufficient dispute of fact regarding the propriety of the insurer's denial of coverage so as to merit denial of its motion for summary judgment as to a Chapter 93A counterclaim).

For all of the foregoing reasons, demand is hereby made upon AmGUARD to issue payment forthwith in the total sum of $327,755.99. This sum represents $318,767.03 (the replacement cost value of the damages to the building) plus $8,988.96 for attorney's fees and costs (through and including January 26, 2023).[4] If the foregoing sum is not tendered or a reasonable offer of settlement is not forthcoming within thirty (30) days of AmGUARD's receipt of this letter, my client reserves her right to commence a civil action in order to assert several counts, including but not limited to those sounding in violations of G.L. c. 93A and c. 176D, against AmGUARD. In that event, my client will seek to recover her attorney's fees, costs and multiple damages as a result of AmGUARD's willful violation of G.L. c. 93A and c. 176D.

Nothing herein is intended to waive, release or relinquish any of my client's rights, remedies or causes of action, all of which are fully and unconditionally reserved. I shall await AmGUARD's response.

Very truly yours,

REGNANTE STERIO LLP

By: _____
SETH H. HOCHBAUM

SHH/cm

cc: Awilda M. Pimentel (via email only)

[4] This sum excludes, among other things, additional living expenses and accruing attorney's fees and costs incurred from and after January 27, 2023.