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MARYLAND'S CONTRACTUAL CONCEPTION OF INSURANCE: THE IMPROVIDENT GRANT OF CERTIORARI IN *PICD v. STATE FARM*

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On January 24, 2014, the Court of Appeals of Maryland granted certiorari in *People's Insurance Counsel Division v. State Farm Fire & Casualty Co.* ("PICD v. State Farm").[1] Question one of the petition was whether the Court of Appeals should "reexamine Maryland common law on construing insurance contracts and, recognizing that such contracts are not the product of equal bargaining, hold that terms contained in an insurance policy must be strictly construed against the insurer?"[2] This question is provocative but misguided. First, the appeal is from an administrative proceeding where the Maryland Insurance Administration ("MIA") lacked jurisdiction to apply such principles of contract construction. Second, the record indicates that the petitioner failed to press more apt remedies for the facts of the case. On the substance, the petitioner advocates a rule that at best adds nothing to the analysis and at worst destabilizes Maryland insurance law.

I. BACKGROUND

PICD v. State Farm turns on bad facts with the potential to make even worse law. Moira and Gregory Taylor filed an administrative complaint with the MIA when State Farm denied coverage for the collapse of their carport during a February 2010 blizzard.[3] The Taylors alleged, and the commissioner found, that, when they "decided to erect a detached carport" in 2007, "Ms. Taylor called Angela Yancey, her State Farm insurance

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1. 214 Md. App. 438, 76 A.3d 517 (2013), *cert. granted*, 436 Md. 501, 83 A.3d 779 (2014).

2. Pet. for Writ of Cert. at 4, PICD v. State Farm, 436 Md. 501, 83 A.3d 779 (2014) (No. 21, Sept. Term 2014) [hereinafter Pet. Writ Cert.].

3. PICD v. State Farm, 214 Md. App. at 440–41, 76 A.3d at 519.

agent, to ask whether a carport would be 'covered' under the Policy. Ms. Yancey replied that it would be 'covered.'"[4]

When the Taylors reported the claim in February 2010, Ms. Yancey cut the Taylors a $1,250 check from her discretionary funds to remove the carport.[5] But when State Farm dispatched a catastrophe team from Alabama to adjust the losses, the field representatives "were verbally instructed by their on-site team managers that under the standard policy language losses due to collapse only were covered for buildings and that a building is a structure with a roof and at least three walls."[6] Upon seeing a picture of the Taylors' unwalled carport, Jeanie Havens, a State Farm catastrophe team representative, informed the Taylors that the loss was not covered.[7]

The MIA, following a seven-month investigation into the Taylors' complaint, "determined that State Farm's action in denying the claim 'ha[d] not been shown to be arbitrary, capricious, or lacking in good faith.'"[8] Thereafter, at the Taylors' request, the MIA held a hearing. Over State Farm's objection, the Administration permitted the People's Insurance Counsel Division ("PICD") to intervene. A unit of the Office of the Attorney General, PICD "evaluates each complaint filed with the MIA by a consumer arising under a homeowners insurance policy," and, "[i]f it determines that 'the interests of insurance consumers [may be] affected' by the resolution of the complaint, it may intervene and appear on behalf of insurance consumers before the MIA and the courts."[9] PICD introduced expert testimony from a public adjuster that the carport was a "building" within the policy's collapse coverage.[10]

The MIA found that State Farm had not engaged in an unfair claim settlement practice "because 'the only reasonable interpretation of [the policy] is that [the Taylors'] permanent carport is a building,'" and "'Maryland appellate cases make plain that the language of an insurance policy is determinative of coverage and contrary representations by insurance agents have no impact on whether a loss is covered.'"[11] The Circuit Court affirmed the MIA's decision.[12]

On appeal, the Court of Special Appeals found that, under the narrow scope of judicial review of administrative orders, there was "substantial evidence to support [the MIA's] ultimate determination that State Farm de-

4. *Id.* at 443, 76 A.3d at 520.

5. *Id.* at 443–44, 76 A.3d at 520.

6. *Id.* at 444, 76 A.3d at 521 (emphasis omitted).

7. *Id.*

8. *Id.* at 445, 76 A.3d at 521 (alteration in original).

9. *Id.* at 441 n.1, 76 A.3d at 519 n.1 (alteration in original) (quoting MD. CODE ANN., STATE GOV'T § 6-306(a) (LexisNexis 2009)).

10. *Id.* at 445, 76 A.3d at 521.

11. *Id.* at 448–49, 76 A.3d at 523 (alterations in original).

12. *Id.* at 449, 76 A.3d at 523.

nied the Taylors' claim based upon a 'lawful principle or standard' that the insurer applied consistently to all claims" and that "[o]n this basis alone, we would affirm the decision of the MIA."[13]

If only the Court of Special Appeals had stopped there. Instead, it proceeded to hold that "we agree with State Farm's interpretation of its Policy language, as did the MIA, and also would affirm on that basis."[14] That unnecessary holding paved the way for the grant of certiorari by the Court of Appeals.

II. MISAPPREHENSION OF THE NATURE OF THE PROCEEDINGS BEFORE THE MIA

The MIA, PICD, and State Farm were laboring under a shared misconception of the MIA's scope of review of the Taylors' complaint under Section 27-303 of the Insurance Article. Under that statute, "[i]t is an unfair claim settlement practice . . . for an insurer" to "refuse to pay a claim for an arbitrary or capricious reason based on all available information" or to "fail to act in good faith . . . in settling a first-party claim under a policy of property and casualty insurance."[15] "Good faith" is defined as "an informed judgment based on honesty and diligence supported by evidence the insurer knew or should have known at the time the insurer made a decision on a claim."[16]

Under that standard, the MIA's Section 27-303 analysis could have and should have stopped once it determined that State Farm's coverage determination was reasonable. It was completely unnecessary for the MIA to proceed to find that State Farm's interpretation of "building" was the *only* reasonable interpretation. Under Maryland law, agency determinations that are "not essential to [a] decision to deny [a] claim . . . can have no preclusive effect" between the parties.[17] "Such determinations have the characteristics of dicta, and may not ordinarily be the subject of an appeal by the party against whom they were made."[18]

A traditional administrative complaint under Section 27-303 stands in stark contrast with a civil complaint under Section 27-1001 of the Insurance Article. The latter statute, enacted in 2007, authorizes the MIA to determine "whether the insurer is obligated under the applicable policy to cover the underlying first-party claim" and, if the insurer breached such an obliga-

13. *Id.* at 452, 76 A.3d at 525–26.

14. *Id.* at 453, 76 A.3d at 526.

15. MD. CODE ANN., INS. § 27-303(2), (9) (LexisNexis 2011).

16. *Id.* § 27-1001(a).

17. Murray Int'l Freight Corp. v. Graham, 315 Md. 543, 552, 555 A.2d 502, 506 (1989).

18. *Id.* at 551, 555 A.2d at 505–06 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. h (1982)) (internal quotation marks omitted).

tion, whether the insurer "failed to act in good faith."[19] The MIA decision against the Taylors expressly noted that their complaint was not under Section 27-1001.[20] Because the cost of rebuilding the carport was approximately $1,706.00,[21] the proper forum for the Taylors to initiate such a civil action under the "good faith" statute would have been small claims court.[22]

Nothing in the MIA's Section 27-303 decision against the Taylors would have prevented them from going to court and filing a claim for breach of contract or a claim in equity.[23] Because it was not necessary for the MIA to find that only State Farm's interpretation was reasonable, the Taylors would have been entitled to advocate that their interpretation was also reasonable and, if so, to introduce their 2007 conversations with their agent as extrinsic evidence of the parties' intent.[24]

The limited nature of the Taylors' Section 27-303 complaint compels three conclusions. First, the MIA should not have opined that State Farm's interpretation was the only reasonable reading of "building." Second, the Court of Special Appeals should not have affirmed the MIA's ruling on that alternative ground, which was not properly a subject of the Taylors' appeal.[25] Third, the Court of Appeals improvidently granted certiorari on the questions that PICD's petition presented.

Question 1 of the petition improperly asks the Court of Appeals to "reexamine Maryland common law on construing insurance contracts" in an appeal from a proceeding that asks only whether the insurer's coverage determination is "arbitrary or capricious" or lacking in good faith—not whether the insurer's determination is actually correct. PICD's second Question Presented is equally misguided:

> Did the Commissioner err in allowing State Farm to deny coverage for damage to a collapsed carport under a policy that insured against "the sudden, entire collapse of a building" based on a restrictive definition of the term "building" that does not appear in the insurance policy or any other written document, and is based only on oral instructions given to a catastrophe claims ad-

19. MD. CODE ANN., INS. § 27-1001(e)(1)(i)(1), (4).

20. Md. Ins. Admin. *ex rel* G.T. & M.T. v. State Farm Fire & Cas. Co., Case No. MIA-2011-01-007 at 14 n.15 (Md. Ins. Admin. Mar. 23, 2012).

21. *Id.* at 6 n.8.

22. MD. CODE ANN., INS. § 27-1001(c)(1), (2) (stating that the requirement of first filing "good faith" civil action with MIA "does not apply to an action . . . within the small claim jurisdiction of the District Court under § 4-405 of the Courts Article").

23. *Id.* § 27-301(b)(3) ("This subtitle does not impair the right of a person to seek redress in law or equity for conduct that otherwise is actionable.").

24. *See* Sullins v. Allstate Ins. Co., 340 Md. 503, 508–09, 667 A.2d 617, 619 (1995) (explaining analysis for adjudicating claims of ambiguity); Murray Int'l Freight Corp. v. Graham, 315 Md. 543, 550–51, 555 A.2d 502, 506 (1989) (describing non-binding nature of unnecessary administrative rulings).

25. *Murray*, 315 Md. at 550–51, 555 A.2d at 505–06.

juster when she was dispatched to handle claims following a severe snowstorm?[26]

As the Court of Special Appeals opinion establishes in detail, State Farm's reading of the policy is clearly at least reasonable.[27] And it is simply inaccurate for PICD to assert that the interpretation of the policy was ad hoc. Just as the MIA credited the Taylors' testimony regarding their conversations with their agent, the MIA also found that State Farm's instructions to its adjuster "were consistent with instructions she had received in the past concerning the meaning of the term 'building.'"[28] The adjuster's "testimony on this point was clear. She stated that she had been 'advised before [*i.e.*, prior to the 2010 blizzard] that a building for policy purposes would constitute a roofing structure with at least three walls.'"[29] PICD disputes the inferences to be drawn from the adjuster's testimony that she used a similar definition of "building" in adjusting flood losses,[30] but the Court of Appeals will need to "review the record in the light most favorable to the agency and 'defer to [its] fact-finding and drawing of inferences' if supported by any evidence in the record."[31] Even if PICD clears this hurdle, it remains unclear how State Farm could be held to have acted arbitrarily or capriciously, or without good faith, if the controversy turned on a pure question of policy interpretation that the MIA and three Court of Special Appeals judges found to be reasonable. Given the limitations of administrative proceeding below, PICD's petition raises no questions appropriate for review by the Court of Appeals.

III. THE LIMITED THEORY THAT PICD CHOSE TO PRESS

If the Court of Appeals does proceed to the merits of *PICD v. State Farm*, I fear that the facts of the case will make bad law. The record, as established by the MIA's findings, is that the Taylors, in building their carport, relied on their State Farm agent's representation that the carport would be covered. That fact-pattern is highly unusual, and I have never seen it in twelve years of litigating homeowners insurance claims. I can envision a majority of the Court of Appeals concluding that the situation is so unjust that it cries out for relief. Here again, it is important to remember the nature of the administrative proceeding below and how the parties framed the issues below.

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26. Pet. Writ Cert., *supra* note 2, at 4.

27. PICD v. State Farm, 214 Md. App. 438, 454–56 & nn.8–9, 76 A.3d 517, 526–28 & nn.8–9 (2013), *cert. granted*, 436 Md. 501, 83 A.3d 779 (2014).

28. *Id.* at 447–48, 76 A.3d at 523.

29. *Id.* at 451 n.6, 76 A.3d at 525 n.6.

30. Pet. Writ Cert., *supra* note 2, at 14-16.

31. *PICD*, 214 Md. App. at 449, 76 A.3d at 524 (alteration in original) (quoting Bd. of Physician Quality Assurance v. Banks, 354 Md. 59, 68, 729 A.2d 376, 380–81 (1999)).

When the PICD intervened in the Taylors' MIA hearing, it pursued a very specific theory—that "building" was synonymous with "structure" and therefore included carports with fewer than three walls.[32] This strategy fits with PICD's statutory authorization to evaluate individual complaints to determine "whether the interests of insurance consumers are affected" and to intervene only in such proceedings of general interest.[33] PICD did not present an alternative claim that State Farm's interpretation of "building" was correct and therefore that State Farm had violated Section 27-303's separate prohibition on insurers "misrepresent[ing] pertinent . . . policy provisions that relate to the . . . coverage at issue."[34] State Farm, which employs a network of "captive agents," is responsible for any actionable misrepresentations by its agents, like Ms. Yancey.[35] Or, indeed, the Taylors simply could have filed an MIA complaint directly against their agent.[36] I do not know whether such alternative claims would have been viable, but the failure even to allege such a violation is conspicuous, given the degree to which the Taylors' contentions turned on the agent's representations.

Such alternative claims would have turned on the Taylors' idiosyncratic circumstances, and therefore would not affect insurance consumers generally. PICD's petition for certiorari makes its mission clear:

> Tens of thousands of Marylanders own carports or other "buildings" on their property with fewer than "three enclosed walls," such as gazebos and pavilions. The intermediate appellate court's reported opinion, if left standing, will prove devastating to those consumers who have homeowner's insurance and suddenly find that they are not eligible for collapse coverage under their policies for those buildings.[37]

This passage illustrates not only that PICD had no interest in pursuing a claim that State Farm misrepresented its coverage, but also that PICD misunderstands the likely consequences of any potential reversal by the Court of Appeals. As the Court of Special Appeals noted, "It is logical that collapse coverage would exclude un-walled (or partially walled) structures because such structures likely would be less sturdy and more susceptible to collapse."[38] PICD's expert, reviewing Maryland homeowners policies is-

32. *Id.* at 445–46, 76 A.3d at 521–22.

33. MD. CODE ANN., STATE GOV'T § 6-306(a) (LexisNexis 2009).

34. MD. CODE ANN., INS. § 27-303(1) (LexisNexis 2011).

35. *See* Popham v. State Farm Mut. Ins. Co., 333 Md. 136, 156–57, 634 A.2d 28, 38 (1993).

36. *See* MARYLAND INSURANCE ADMINISTRATION COMPLAINT FORM: COMPLAINT AGAINST INSURANCE PROFESSIONALS OR AUTHORIZED INSURANCE ASSISTANCE PERSONNEL, *available at* http://www.mdinsurance.state.md.us/sa/docs/documents/consumer/publicnew/insurance-professionals-complaint-form-final.pdf.

37. Pet. Writ Cert., *supra* note 2, at 2.

38. PICD v. State Farm, 214 Md. App. 438, 455 n.8, 76 A.3d 517, 527 n.8 (2014).

sued by ten different insurers, found that "[o]ne of those policies, issued by Allstate, defined the term 'building structure' to mean a 'building with a roof and four walls'" but that the "other nine policies," like State Farm's policy, "did not define the term 'building.'"[39]

PICD essentially seeks to penalize State Farm for failing to employ Allstate's definition, which the Court of Special Appeals found unnecessary in this case. Given the increased risk of susceptibility of collapse for structures with fewer than three walls, the most likely result would be that insurers would include, in their Maryland homeowners endorsements, a provision specifically defining "building" to require at least three walls.[40] Going forward, only the General Assembly could impose the coverage requirement that PICD seeks.[41] PICD pursued a limited, flawed theory that it found to be of general interest, not a strategy calculated to benefit the Taylors on the specific facts of their case.

IV. FLAWS IN PICD'S PROPOSED RULE

I have written previously to challenge arguments that insurance contracts are categorically the product of unequal bargaining power and should be subject to different rules of construction.[42] Two powerful market forces aid policyholders in expanding the scope of homeowners policies: (1) the ability of independent insurance brokers, by advising homeowners of the range of coverage available on the insurance market, to collectively broaden coverage, or at least to resist narrowing of coverage;[43] and (2) the influence of mortgage companies, who own the majority of equity in homes nationwide, in shaping the scope of coverage under a standard "all-risk" homeowners policy special form 3 ("HO3").[44]

At first blush, *PICD v. State Farm* appears a poor test-case for this hypothesis. As noted previously, State Farm sells its homeowners policies through a network of captive agents. One study of variations among homeowners policy forms suggests that "the carriers who employ the least generous policy forms disproportionately use captive agents to distribute their policies, whereas the companies with unusually generous policies tend to

39. *Id.* at 445–46, 76 A.3d at 521–22.

40. In my experience, Maryland homeowners policies typically contain endorsements contracting around the broad interpretation of "collapse" in *Government Employees Insurance Co. v. DeJames*, 256 Md. 717, 725, 261 A.2d 747, 752 (1970).

41. *See* MD. CODE ANN., INS. §§ 19-201 to 19-215 (LexisNexis 2011 & Supp. 2013) (setting requirements for homeowners policies).

42. Steven M. Klepper, Response, *Whose Conception of Insurance?*, 162 U. PA. L. REV. ONLINE 83 (2013).

43. *Id.* at 85.

44. *Id.* at 87–89.

rely on independent agents."[45] But the policy language at issue in *PICD v. State Farm* is in fact standard HO3 language.[46] As the Court of Special Appeals noted, a review of the policy as a whole showed that it unmistakably—and with good reason—used the terms "building" and "structure" to mean different things.[47]

Further, reviewing the state of Maryland law, I do not see anything constructive to be achieved by the PICD's proposed rule "that terms contained in an insurance policy must be strictly construed against the insurer." Maryland courts currently engage in a three-stage analysis of policy language. First, if a reasonably prudent layperson would understand the plain and ordinary meaning of the insurance policy language as susceptible to only one meaning, then the language is unambiguous, and the court applies the policy language as written.[48] Second, if a reasonably prudent person would understand the language as susceptible to two or more meanings, then the language is ambiguous, and the court will consider extrinsic and parol evidence in an attempt to resolve that ambiguity.[49] Third, if, after considering extrinsic evidence, an ambiguity still exists, the court construes the ambiguous language against the drafter of the policy.[50]

There are only two points in the analysis where PICD's proposed rule could change the result. Perhaps PICD would propose that, at the first stage, the policyholder could create an ambiguity by presenting an unreasonable reading of the policy. But why would a court want to apply an interpretation that a reasonably prudent layperson would reject? Or perhaps PICD would propose to eliminate the second step, such that ambiguous policy language would be construed against the insurer, even if extrinsic and parol evidence showed that both parties intended the insurer's interpretation. But such a ruling would give a windfall to the policyholders, who would receive coverage where the facts establish that they knew they did not purchase such coverage.

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45. Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. CHI. L. REV. 1263, 1277 (2011).

46. *See Homeowners Composite Form: Section I—Perils Insured Against*, *in* SUSAN J. MILLER, MILLER'S STANDARD INSURANCE POLICIES ANNOTATED (6th ed. 2011) (presenting a modern composite HO3 form and stating collapse coverage applies only to "building," which is not a defined term).

47. PICD v. State Farm, 214 Md. App. 438, 454–55 & nn.8–9, 76 A.3d 517, 526–27 & nn.8–9 (2014). "It is logical that collapse coverage would exclude un-walled (or partially walled) structures because such structures likely would be less sturdy and more susceptible to collapse." *Id.* at 455 n.8, 76 A.3d at 527 n.8.

48. Sullins v. Allstate Ins. Co., 340 Md. 503, 508, 667 A.2d 617, 619 (1995). The Maryland cases do not phrase the analysis as involving three stages. But I find these three stages to be the best way to describe the application of cases like *Sullins*.

49. *Id.*

50. *Id.* at 508–09, 667 A.2d at 619.

Whatever effect PICD's proposed rule would have on Maryland law generally, there is no reason to believe that PICD's proposed rule would actually help the Taylors in this case. PICD asserts that forty-four jurisdictions follow its proposed rule.[51] That assertion is overbroad and inaccurate.[52] PICD relies almost exclusively on authorities holding that *exclusions* are construed strictly against insurers.[53] The Taylors' claim, however, turns on the collapse coverage's insuring agreement, not any exclusion to that coverage.[54] In any event, PICD identifies Georgia and New Hampshire as two states allegedly following its proposed rule.[55] Both those jurisdictions have rejected PICD's interpretation of the word "building."[56]

PICD's proposed rule depends on flawed premises and offers no meaningful aid to the Taylors or similarly situated homeowners. With surprising frequency, the Court of Appeals, following oral argument, dismisses certiorari as improvidently granted.[57] There is ample reason to believe that it will realize the improvidence of granting certiorari in *PICD v. State Farm*.

51. Pet. Writ Cert., *supra* note 2, at 8 & n.4.

52. *Compare, e.g.*, Pet. Writ Cert., *supra* note 2, at App'x A (citing Leski v. State Farm Mut. Auto. Ins. Co., 116 N.W.2d 718, 721 (Mich. 1962) ("[I]n case of reasonable uncertainty, doubt, or ambiguity, courts should construe policies of insurance which are not standard policies strictly or most strongly against the insurer.")), *with* Wilkie v. Auto-Owners Ins. Co., 664 N.W.2d 776, 788 (Mich. 2003) ("[T]he rule of reasonable expectations has no application in Michigan, and those cases that recognized this doctrine are to that extent overruled."). For a more illuminating overview, see RANDY J. MANILOFF & JEFFREY W. STEMPEL, GENERAL LIABILITY INSURANCE COVERAGE: KEY ISSUES IN EVERY STATE 577–601 (2d ed. 2012).

53. *See* Pet. Writ Cert., *supra* note 2, at 8–9, 13; *see also* ALLAN D. WINDT, 2 INSURANCE CLAIMS & DISPUTES: REPRESENTATION OF INSURANCE COMPANIES & INSUREDS § 9:1 (6th ed. 2013) (discussing differing burdens as to insuring agreement and exclusions).

54. PICD v. State Farm, 214 Md. App. 438, 442, 76 A.3d 517, 520 (2014).

55. Pet. Writ Cert., *supra* note 2, at App'x A (citing Clark v. United Ins. Co. of Am., 404 S.E.2d 149, 153 (Ga. Ct. App. 1991); Kelly v. Prudential Prop. & Cas. Ins. Co., 796 A.2d 156, 157 (N.H. 2002)).

56. *PICD*, 214 Md. App. at 456, 76 A.3d at 528 (citing Bergeron v. State Farm Fire & Cas. Co., 766 A.2d 256, 259 (N.H. 2000); Arkin v. Fireman's Fund Ins. Co., 492 S.E.2d 314, 316 (Ga. Ct. App. 1997)).

57. *See* Dodge v. State, 436 Md. 200, 80 A.3d 1118 (2013); Karanikas v. Cartwright, 436 Md. 73, 80 A.3d 1045 (2013); Price v. State, 435 Md. 321, 77 A.3d 1115 (2013); Aleman v. State, 435 Md. 145, 77 A.3d 486 (2013); Anthony v. Garrity, 431 Md. 389, 65 A.3d 690 (2013); Hunt v. Aberdeen Proving Ground Fed. Credit Union, 430 Md. 641, 62 A.3d 728 (2013). Alternatively, the Court of Appeals could, as it did in a recent insurance decision, affirm the decision of the Court of Special Appeals, with the exception of the holding that State Farm's coverage determination was actually correct. *See* TIG Ins. Co. v. Monongahela Power Co., 437 Md. 372, 373–74, 86 A.3d 1245, 1245–46 (2014).