PEARSON, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

15-1252

WELLS FARGO BANK, N.A.,	)	
	)	CASE NO. 4:15CV0239
Plaintiff,	)	
	)	
v.	)	JUDGE BENITA Y. PEARSON
	)	
ALLSTATE INSURANCE COMPANY,	)	
	)	
Defendant.	)	

ORDER OF CERTIFICATION TO THE SUPREME COURT OF OHIO

Pursuant to Section 9 of the Rules of Practice of the Supreme Court of Ohio, the United States District Court for the Northern District of Ohio, Eastern Division, hereby certifies a question of state law, *sua sponte*, to the Supreme Court of Ohio. No controlling precedent of the Supreme Court of Ohio answers this question. For reasons explained in more detail below, this Court requests that the Supreme Court of Ohio answer the certified question of state law asked in this Certification Order.

I. Name of the Case

The name of the case is *Wells Fargo Bank, N.A. v. Allstate Insurance Company*, No. 4:15CV0239 (N.D. Ohio filed Feb. 5, 2015).

RECEIVED
JUL 30 2015
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
JUL 30 2015
CLERK OF COURT
SUPREME COURT OF OHIO

I hereby certify that this instrument is a true and correct copy of the original on file in my office.
Attest: Geri M. Smith, Clerk
U.S. District Court
Northern District of Ohio
By: _____
Deputy Clerk

II. The Certified Question of Law

Is "arson" a subset of "fire" or an act of "malicious mischief or vandalism" when neither the "fire" nor "malicious mischief or vandalism" provisions in an insurance contract expressly include "arson"?

III. Statement of Facts

A. The Facts and Procedural History of *Wells Fargo v. Allstate*

In or around September 2010, Antoniano Delsignore executed a mortgage for a 2,010 square foot, single-family home located at 7376 Yellow Creek Drive in Poland, Ohio (the "Property"). The mortgage required Mr. Delsignore to maintain property insurance for loss by fire and gave Plaintiff Wells Fargo Bank, N.A. ("Wells Fargo"), as the insured mortgagee, the exclusive right to hold any insurance proceeds under the policy for restoration and repair of the Property or repayment of the mortgage debt. Mr. Delsignore executed an insurance contract with Defendant Allstate Insurance Company ("Allstate"), Policy No. 9 80 584930 09/20 (the "Insurance Policy"), which was renewed in September 2013 for another yearly term.

Mr. Delsignore defaulted on his mortgage payments and in 2013, Wells Fargo initiated foreclosure proceedings in the Mahoning County, Ohio Court of Common Pleas. *Wells Fargo Bank, N.A. v. Antoniano G. Delsignore, et al.*, No. 2013 CV 00188 (Mahoning Cty. Ct. Common Pleas filed Jan. 23, 2013). Judgment was entered in Wells Fargo's favor and, by the end of 2013, the Property was vacant.

On February 6, 2014, a fire caused damage to the Property. *The Boardman News* reported on February 20, 2014 that the fire was the result of arson. Wells Fargo, through its

agent MSI, LLC, filed an insurance claim with Allstate for the fire damage. Allstate hired an independent origin and cause company which determined that the fire had been deliberately set. There was no dispute by Wells Fargo that the cause of the fire loss was arson. On April 22, 2014, Allstate denied coverage stating that the Insurance Policy's exclusion provision for vandalism or malicious mischief when a property is abandoned for more than 30 consecutive days immediately before the loss applied. Wells Fargo believes that the exclusion is not applicable because "vandalism" and "malicious mischief" is not defined in the Insurance Policy to specifically include arson, and because the Insurance Policy's provision for "fire" includes the damage caused by the February 6, 2014 fire, regardless of its cause. Allstate's position is that arson by its commonly known definition clearly falls under the vandalism and malicious mischief exclusion.

Wells Fargo initiated a lawsuit against Allstate on February 5, 2015 asserting claims for breach of contract, declaratory judgment, specific performance, and unjust enrichment. On April 22, 2015, this Court conducted a Case Management Conference wherein the parties (1) agreed that a threshold issue is whether the Insurance Policy provides coverage for the arson, and (2) acknowledged that there is a conflict of decisions across the United States as to whether arson is considered vandalism and that there is no law in Ohio regarding that specific question.

B. State Courts Across The Country Have Taken Differing Views Of This Question

There are no Ohio legal precedents on whether "malicious mischief" and "vandalism" exceptions in insurance contracts include "arson." Indeed, the courts that have considered the issue have taken differing views on the subject.

Many courts have held that arson is a type of vandalism and malicious mischief and is, therefore, excluded from coverage. *See* *Bear River Mut. Ins. Co. v. Williams*, 153 P.3d 798, 567 Utah Adv. Rep. 3, 2006 UT App. 500 (2006); *Battishill v. Farmers Alliance Ins. Co.*, 127 P.3d 1111, 139 NM 24, 2006-NMSC-004 (2006); *Barlow v. Allstate Texas Lloyds*, No. Civ.A. 1:05-CV-131, 2006 WL 1133878 (E.D. Tex. April 24, 2006); *Government Employees Ins. Co. v. Medley*, No. Civ.A. 96-0964-R, 1998 WL 320392 (W.D. Va. Jan. 14, 1998); *Frazier v. State Farm Fire and Cas. Co.*, 957 F.Supp. 816 (W.D. Va. 1997); *Potomac Ins. Co. of Illinois v. NCUA a/k/a Nat. Credit Union Ass.*, No. 96 C 1044, 1996 WL 396100 (N.D. Ill. July 12, 1996); *American Mut. Fire Ins. Co. v. Durrence*, 872 F.2d 378, 379 (11th Cir. 1989); *Brinker v. Guiffrida*, 629 F.Supp. 130, 135 (E.D. Pa. 1985).

On the other hand, neighboring states have drawn a distinction between "arson" and "vandalism." In Michigan, courts have defined arson as a specific kind of fire, not a form of vandalism for purposes of insurance contracts. *Bates v. Hartford Ins. Co. of Midwest*, 787 F. Supp.2d 657, 662 (E.D. Mich. 2011) (holding that arson was covered by the fire and lightning loss provision and not included within the vandalism and malicious mischief provision); *Johnson v. State Farm Fire & Cas.*, No. 278267, 2008 WL 4724322, at *4 (Mich. Ct. App. Oct. 28, 2008)

("Because arson is a specific kind of fire-as contrasted to a form of vandalism-we conclude that arson coverage is not precluded by the vandalism exclusion."). In Pennsylvania, a vacancy exclusion for loss caused by vandalism does not apply to fires set by vandals because fire is a separate peril. *Nationwide Mut. Fire Ins. Co. v. Nationwide Furniture, Inc.*, 932 F. Supp. 655, 657 (E.D. Pa. 1996) ("If [the insurer] had wished the result to be otherwise, it could easily have defined vandalism to include non-accidental fires."). And in Kentucky, when an insurance policy lists "fire" and "vandalism" separately, arson is deemed an "act contained within the class of damages caused by 'fire'—not 'vandalism.'" *R & J Development Co., LLC v. Travelers Property Cas. Co. of America*, No. 11-47-ART, 2012 WL 1598088, at *3 (E.D. Ky. May 7, 2012).

Several states beyond the Midwest have also reached similar conclusions. *See United Capital Corp. v. Travelers Indem. Co. of Illinois*, 237 F. Supp.2d 270, 274 (E.D.N.Y. 2002) (finding in favor of coverage when vandalism exclusion did not expressly include arson); *American States Ins. Co. v. Rancho San Marcos Properties, LLC*, 97 P.3d 775, 780, 123 Wash. App. 205, 213 (Wash. Ct. App. 2004) (holding that arson was not "vandalism" under the vandalism exclusion in a property insurance policy); *Tillman v. South State Ins. Co.*, 325 S.E.2d 585, 284 S.C. 273, 274 (S.C. Ct. App. 1985) (noting that when a policy distinguishes between "fire" and "vandalism," the insurer is liable for fire loss even if the fire was set by unknown persons; "If the drafters of the policy intended to exclude a fire loss to a dwelling vacant for over thirty days, it could have easily done so with [express] language[.]").

C. The Supreme Court of Ohio Should Have The First Opportunity To Decide This Question Of State Law

Pursuant to Ohio S.Ct.Prac.R. 9.01(A), the Rule may be "invoked if the certifying court, in a proceeding before it, issues a certification order finding there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of this Supreme Court." The decision to certify is within the sound discretion of this federal court, and is most beneficial when there is a novel question of state law and no guidance from state courts. *Gascho v. Global Fitness Holdings, LLC*, 918 F. Supp.2d 708, 713 (S.D. Ohio 2013). The Supreme Courts of Ohio and the United States have each instructed on the virtues of certification. "The state's sovereignty is unquestionably implicated when federal courts construe state law." *Scott v. Bank One Trust Co., N.A.*, 62 Ohio St.3d 39, 42 (1991). "[C]ertification of novel or unsettled questions of state law for authoritative answers by a State's highest court . . . may save 'time, energy, and resources and hel[p] build a cooperative judicial federalism.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997) (quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)).

Millions of Ohioans have homeowners insurance policies. Even if less than 1% of these homeowners file arson-related insurance claims, the interpretation of this question could potentially affect tens of thousands of properties. Rather than speculate as to whether arson is considered vandalism or malicious mischief, the best course is to provide the Supreme Court of Ohio with the opportunity to decide this issue and create precedence in the State of Ohio.

Accordingly, this Federal Court defers the opportunity to address this unresolved question of Ohio law to the Supreme Court of Ohio.

IV. The Parties

Wells Fargo Bank, N.A. — Plaintiff
420 Montgomery Street
San Francisco, California 94163

Allstate Insurance Company — Defendant
2775 Sanders Road
Northbrook, Illinois 60062

V. Counsel for the Parties

Plaintiff is represented by:

Philip B. Sineneng (0083406)
Anthony C. White (0062146)
THOMPSON HINE LLP
41 South High Street, Suite 1700
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(614) 469-3200

Defendant is represented by:

Margo S. Meola (0065555)
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Governor Insurance Building, Suite G
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(330) 539-6111

VI. Designation of Moving Party

This court designates Defendant Allstate Insurance Company as the moving party. This designation is made because Allstate desired certification.

(4:15CV0239)

INSTRUCTIONS TO THE CLERK

In accordance with Ohio S.Ct.Prac.R. 9.03(A), the Clerk of the United States District Court for the Northern District of Ohio is directed to serve copies of this Certification Order upon counsel for the parties and to file this Certification Order under the seal of this Court with the Supreme Court of Ohio, along with appropriate proof of service.

IT IS SO ORDERED.

July 28, 2015
Date

/s/ Benita Y. Pearson
Benita Y. Pearson
United States District Judge

Cat04,LC1,Limbert,Standard,Stay

U.S. District Court
Northern District of Ohio (Youngstown)
CIVIL DOCKET FOR CASE #: 4:15-cv-00239-BYP

Wells Fargo Bank, N.A. v. Allstate Insurance Company
Assigned to: Judge Benita Y. Pearson
Demand: $166,000
Cause: 28:1332 Diversity-Contract Dispute

Date Filed: 02/05/2015
Jury Demand: Both
Nature of Suit: 110 Insurance
Jurisdiction: Diversity

Plaintiff

Wells Fargo Bank, N.A. represented by **Anthony C. White**
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ATTORNEY TO BE NOTICED
Bar Status: Active

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ATTORNEY TO BE NOTICED
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V.

Defendant

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ATTORNEY TO BE NOTICED

Bar Status: Active

Email All Attorneys

Email All Attorneys and Additional Recipients

Date Filed	#	Docket Text
02/05/2015	1	**Complaint** with jury demand against Allstate Insurance Company. Filing fee paid $ 400, Receipt number 0647-6946243. Filed by Wells Fargo Bank, N.A.. (Attachments: # 1 Exhibit A: Insurance Policy, # 2 Exhibit B: Mortgage, # 3 Civil Cover Sheet, # 4 Summons) (Sineneng, Philip) (Entered: 02/05/2015)
02/06/2015		Judge Benita Y. Pearson assigned to case. (S,CK) (Entered: 02/06/2015)
02/06/2015		Random Assignment of Magistrate Judge pursuant to Local Rule 3.1. In the event of a referral, case will be assigned to Magistrate Judge George J. Limbert. (S,CK) (Entered: 02/06/2015)
02/06/2015	2	Original Summons and Magistrate Consent Form issued to counsel for service upon Allstate Insurance Company. (Attachments: # 1 Magistrate Consent Form) (S,CK) (Entered: 02/06/2015)
02/25/2015	3	Attorney Appearance by Margo Stoffel Meola filed by on behalf of Allstate Insurance Company. (Meola, Margo) (Entered: 02/25/2015)
02/25/2015	4	Return of Service by personal service executed upon Allstate Insurance Company on 2/12/2015, filed on behalf of Wells Fargo Bank, N.A. Related document(s) 1 . (Sineneng, Philip) (Entered: 02/25/2015)
03/04/2015	5	**Motion** for leave *to plead* filed by Defendant Allstate Insurance Company. (Meola, Margo) (Entered: 03/04/2015)
03/05/2015	6	**Case Management Conference Scheduling Order** with Case Management Conference to be held on 4/22/2015 at 10:00 a.m. at Chambers 313 before Judge Benita Y. Pearson. Judge Benita Y. Pearson on 3/5/2015. (Attachments: # 1 Attachment No. 1, # 2 Attachment No. 2, # 3 Attachment No. 3, # 4 Attachment No. 4) (JLG) (Entered: 03/05/2015)
03/26/2015	7	Unopposed **Motion** to attend *Case Management Conference* by telephone filed by Plaintiff Wells Fargo Bank, N.A.. (Sineneng, Philip) (Entered: 03/26/2015)
04/02/2015	8	**Motion** for leave *to plead* until 4/20/2015 filed by Defendant Allstate Insurance Company. (Meola, Margo) Modified text on 4/6/2015 (S,L). (Entered: 04/02/2015)
04/03/2015		**Order** [non-document] granting 8 Motion for Leave to Plead until 4/20/2015. Judge Benita Y. Pearson on 4/3/2015. (JLG) (Entered: 04/03/2015)
04/03/2015		**Order** [non-document] denying as moot 5 Motion for Leave to Plead. Judge Benita Y. Pearson on 4/3/2015. (JLG) (Entered: 04/03/2015)

04/03/2015		**Order** [non-document] granting 7 Unopposed Motion to Attend Case Management Conference by Telephone. Plaintiff's representative may participate by telephone at no cost to the Court. Judge Benita Y. Pearson on 4/3/2015. (JLG) (Entered: 04/03/2015)
04/08/2015	9	**Motion** for extension of Time to Exchange Initial Disclosures until April 30, 2015 filed by Plaintiff Wells Fargo Bank, N.A.. Related document(s) 6 . (Sineneng, Philip) (Entered: 04/08/2015)
04/09/2015		**Order** [non-document] granting 9 Motion for Extension of Time to Exchange Initial Disclosures until 4/30/2015. Judge Benita Y. Pearson on 4/9/2015. (JLG) (Entered: 04/09/2015)
04/17/2015	10	Joint Report of Parties' Planning Meeting , parties do not consent to this case being assigned to the magistrate judge, filed by Wells Fargo Bank, N.A.. (Sineneng, Philip) (Entered: 04/17/2015)
04/20/2015	11	**Answer** to Complaint with Jury Demand filed by Allstate Insurance Company. (Meola, Margo) (Entered: 04/20/2015)
04/22/2015		**Minutes of proceedings** [non-document] before Judge Benita Y. Pearson. Case Management Conference held on 4/22/2015. Present were Attorney Philip B. Sineneng as counsel for Plaintiff; Attorney Margo S. Meola as counsel for Defendant; Amber N. Ott (by phone) as representative for Plaintiff; and Mandy DeLoss as representative of Defendant. (Court Reporter: None); Time: 1 Hour 5 Minutes. (JLG) (Entered: 04/22/2015)
04/22/2015	12	**Case Management Conference Plan/Order.** Case is assigned to the standard track, and is not suitable for Alternative Dispute Resolution (ADR) at this time. The parties do not consent to the jurisdiction of the U.S. Magistrate Judge. On or before 4/29/2015, the parties shall file a Joint Notice advising whether the Court should certify a question of state law to the Supreme Court of Ohio. No later than 5/1/2015, each party must serve on an opposing party the initial disclosures required by Fed. R. Civ. P. 26(a)(1), and must certify such service in writing to the Court by the same date. Non-damages Related Discovery shall be completed on or before 7/13/2015. Damages Related Discovery shall be completed on or before 1/15/2016. The cutoff to amend pleadings and add parties is May 6, 2015. Plaintiff shall serve and file its motion for summary judgment and memorandum in support on or before 7/13/2015. Defendant shall serve and file its motion for summary judgment, memorandum in support, and memorandum in opposition to Plaintiff's motion on or before 8/12/2015. Written stipulations as to all uncontested facts to be presented by the dispositive motions shall be filed with the Court on or before 7/13/2015. The cutoff for filing dispositive motions related to damages is 2/29/2016. A Telephonic Status Conference is set for 6/10/2015 at 12:00 p.m. Attorney Sineneng is to set up the conference call. Parties' attendance is welcome, but not mandatory. Counsel should notify the Court in advance of a Status Conference if the matter has settled. *See* Order for additional information and requirements. Judge Benita Y. Pearson on 4/22/2015. (JLG) (Entered: 04/22/2015)
04/29/2015	13	**Motion** for extension of time until May 7, 2015 to Provide Notice Regarding

		Certification filed by Defendant Allstate Insurance Company. Related document(s) 12 . (Meola, Margo) (Entered: 04/29/2015)
04/29/2015	14	Wells Fargo Bank, N.A.'s Notice Regarding Certification of Question to the Ohio Supreme Court filed by Wells Fargo Bank, N.A.. (Sineneng, Philip) (Entered: 04/29/2015)
04/30/2015		**Order** [non-document] granting as requested 13 Motion for Extension of Time until 5/7/2015 to Provide Notice Regarding Certification. Judge Benita Y. Pearson on 4/30/2015. (JLG) (Entered: 04/30/2015)
05/01/2015	15	Notice of Service of Initial Disclosures filed by Wells Fargo Bank, N.A.. (Sineneng, Philip) (Entered: 05/01/2015)
05/06/2015	16	*Amended* **Answer** to Complaint with Jury Demand filed by Allstate Insurance Company. (Meola, Margo) (Entered: 05/06/2015)
05/07/2015	17	**Motion** for extension of time until May 21, 2015 to Provide Allstate's Position Regarding Certification of Question filed by Defendant Allstate Insurance Company. (Meola, Margo) (Entered: 05/07/2015)
05/11/2015		**Order** [non-document] granting as requested 17 Motion for Extension of Time until 5/21/2015 to Provide Allstate's Position Regarding Certification of Question. Judge Benita Y. Pearson on 5/11/2015. (JLG) (Entered: 05/11/2015)
05/21/2015	18	Position memorandum regarding certification of question to the Supreme Court of Ohio filed by Allstate Insurance Company. (Meola, Margo) (Entered: 05/21/2015)
06/10/2015		**Minutes of proceedings** [non-document] before Judge Benita Y. Pearson. Telephonic Status Conference held on 6/10/2015. Present were Attorney Philip B. Sineneng as counsel for Plaintiff and Attorney Margo S. Meola as counsel for Defendant. (Court Reporter: None); Time: 20 Minutes. (JLG) (Entered: 06/10/2015)
06/10/2015	19	**Order** For the reasons set forth herein, the Court concludes the primary question driving resolution of this case is a question of state law that has not yet been decided by the Supreme Court of Ohio. The Court directs counsel to confer in good faith and to propose a draft order certifying the appropriate question to the Supreme Court of Ohio, taking care to frame the issues in a balanced and neutral way, and to conform the draft order to the directives of Rule 9. The order, in WordPerfect format, shall be emailed to the Court, c/o Judy Guyer (judy_guyer@ohnd.uscourts.gov) by no later than 4:00 p.m. on Wednesday, 7/1/2015. The Court will then work with counsel to finalize the order and thereafter issue a final certifying order. The Court hereby stays all proceedings in this case until further order. Judge Benita Y. Pearson on 6/10/2015. (JLG) (Entered: 06/10/2015)
07/01/2015	20	**Motion** for extension of time until 7/8/2015 to provide the joint proposed order of certification filed by Defendant Allstate Insurance Company. (Meola, Margo) Modified text on 7/6/2015 (S,L). (Entered: 07/01/2015)
07/02/2015		**Order** [non-document] granting 20 Motion for Extension of Joint Proposed

		Order of Certification until 7/8/2015. The proposed order shall be submitted to the Court in WordPerfect format. Judge Benita Y. Pearson on 7/2/2015. (JLG) (Entered: 07/02/2015)
07/28/2015	21	**Order of Certification to The Supreme Court of Ohio**. In accordance with Ohio S.Ct.Prac.R. 9.03(A), the Clerk of the United States District Court for the Northern District of Ohio is directed to serve copies of this Certification Order upon counsel for the parties and to file this Certification Order under the seal of this Court with the Supreme Court of Ohio, along with appropriate proof of service. Judge Benita Y. Pearson on 7/28/2015. (JLG) (Entered: 07/28/2015)