

IN THE SUPREME COURT OF OHIO

WELLS FARGO BANK, N.A.,)	CASE NO. 2015-1252
)	
Respondent)	
)	
vs.)	Certified Question From The
)	United States District
)	Court, Northern District
ALLSTATE INSURANCE COMPANY,)	Of Ohio, Eastern Division,
)	Case No. 4:15-CV-0239
Petitioner)	

**REPLY BRIEF OF PETITIONER ALLSTATE INSURANCE COMPANY WITH
RESPECT TO CERTIFICATION OF A STATE LAW QUESTION**

MARGO S. MEOLA – 0065555
BONEZZI SWITZER POLITO &
HUPP CO., L.P.A.
4137 Boardman-Canfield Road
Suite 101
Canfield, Ohio 44406
330-286-3701
FAX 330-286-3745
mmeola@bsphlaw.com
Counsel for Petitioner

PHILIP B. SINENENG - 0083406
ANTHONY C. WHITE - 0062146
THOMPSON HINE
Suite 1700
41 South High Street
Columbus, Ohio 43215
614-469-3200
FAX 614-469-3361
philip.sineneng@thompsonhine.com
tony.white@thompsonhine.com
Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIESii

ARGUMENT IN REPLY TO WELLS FARGO’S RESPONSE BRIEF..... 1

I. Wells Fargo’s Proposition of Law is contrary to applicable case law and general principles of contract interpretation.....1

 A. Wells Fargo fails to appreciate and analyze the distinction between all-risk dwelling and named peril coverages..... 1

 B. The Arson Reward portion of the policy has no relevance or bearing on the issue Before this Court..... 3

 C. Wells Fargo’s claim that public policy considerations and criminal statutes should come into play when analyzing the issue before this Court is an unsupported attempt to overcome the logical interpretation of the policy..... 4

CONCLUSION..... 5

CERTIFICATE OF SERVICE..... 6

TABLE OF AUTHORITIES

Battishill v. Farmers Alliance Ins. Co., 139 N.M. 24, 127 P.3d 1111, 2006-NMSC-004 (2006)..... 4

Botee v. Southern Fidelity Ins. Co., 162 So.3d 183, 40 Fla. L Weekly D368 (Fla. App. 2015)..... 2, 4

Cipriano v. Patrons Mut. Ins. Co., No. 4100708, 2005 Conn. Super. LEXIS 3577 (Dec. 23, 2005), *reh'g denied*, 2006 Conn. Super. LEXIS 1176 (Apr. 18,2006)..... 2

Costabile v. Metropolitan Property and Casualty Ins. Co., 193 Fed.Supp.2d 465 (D. Connecticut 2002)..... 2

Dealers Dairy Products Co. v. Royal Ins. Co., 170 Ohio St. 336, 164 N.E. 2d 745 (1960)..... 2

R.J. Development Company, LLC v. Travelers Property Cas. Co. of America, No. 11-47, 2012 WL 1598088 (E.D. Ky, May 7, 2012)..... 2

ARGUMENT IN REPLY TO WELLS FARGO'S RESPONSE

I. Wells Fargo's Proposition of Law is contrary to applicable case law and general principles of contract interpretation.

A. Wells Fargo fails to appreciate and analyze the distinction between all-risk dwelling and named peril coverages.

Wells Fargo claims that unless otherwise stated in a homeowner's insurance contract, an act of "arson" must be considered "fire," and, therefore, be covered under the policy.

Throughout its brief in response to Allstate's position relating to the certified question before this court, it fails to address or even mention the most crucial fact with respect to the policy at issue – that the coverage being analyzed is the all-risk, dwelling portion of the policy. Its Counterstatement of Facts shows the misunderstanding with respect to the denial of its claim. In that portion of its brief, Wells Fargo states that Allstate denied its claim for "fire damage" despite the policy's "express coverage of damage caused by 'Fire'." (Wells Fargo brief, p. 1). There is no "express" coverage of damage by fire, as the portion of the policy at issue is all-risk and perils are not specifically enumerated.

As established in Allstate's brief, the distinction between all-risk dwelling and named peril policies is critical, and a fact that was important in the cases relied upon by both parties. The Wells Fargo claim involved a hybrid policy. The claim was for coverage under the all-risk, Coverage A, Dwelling Coverage part of the policy, not Coverage C, which is named peril, Personal Property Coverage. *All* of the cases that Wells Fargo claims support its position that arson should not fall within the vacancy exclusion found in the all-risk, dwelling coverage section of the policy addressed named peril policies or analyzed policy language that is not applicable to this dispute, i.e., Coverage A versus Coverage C. Accordingly, those cases are distinguishable from this matter, and Wells Fargo failed to establish that this Court should not

consider the cases cited by Allstate which held that coverage was excluded through a vacancy exclusion in an all-risk policy since arson is a form of vandalism.

Wells Fargo further contends that the Court must look to the policy as a whole. While the court should review the four corners of the policy to determine the parties' intentions, that is primarily when there is an ambiguity. There is no ambiguity with respect to the primary issue in this case. The coverage is all-risk, meaning losses are covered as long as not specifically excluded. While Wells Fargo wants to confuse the issue by lumping the Coverage C, named peril provisions in with the all-risk, Coverage A language, the analysis of these sections is different because the coverages are separate and distinct. See *Costabile v. Metropolitan Property and Casualty Ins. Co.*, 193 Fed. Supp.2d 465 (D. Connecticut 2002)¹. One of the cases Wells Fargo relies heavily on, *R.J. Development Company, LLC v. Travelers Property Cas. Co. of America*, No. 11-47, 2012 WL 1598088 (E.D. Ky, May 7, 2012), actually recognizes that the majority of the courts that analyze all-risk policies have found that arson is an act of vandalism and is properly excluded from dwelling coverage.

Wells Fargo also ignores the on point analysis conducted by the court in *Botee v. Southern Fid. Ins. Co.*, 162 So.3d 183, 40 Fla. L. Weekly D368 (Fla. App. 2015), which specifically states that there is a different analysis for all-risk policies. As this court is aware, a reasonable construction of the terms of an insurance contract must be given. *Dealers Dairy Products Co. v. Royal Insurance Co.*, 170 Ohio St. 336, 164 N.E.2d 745 (1960). It is logical that an insurance company would contemplate arson being excluded when a home is vacant in an all-

¹ While Wells Fargo claims that *Costabile* was misconstrued by Allstate because a later court decided differently, that statement is unsupported by a careful review of *Cipriano v. Patrons Mut. Ins. Co.*, No. 4100708, 2005 Conn. Super. LEXIS 3577 (Dec. 23, 2005), *reh'g denied*, 2006 Conn. Super. LEXIS 1176 (Apr. 18, 2006). Quite simply, in *Cipriano*, a Connecticut State court declined to follow the federal court's analysis in *Costabile*. In *Costabile*, the federal court properly relied on rules of construction assessing the separate provisions of the insurance policy, whereas in *Cipriano*, the State court examined the entire policy, including inapplicable policy provisions, to determine that an ambiguity existed in the policy language. *Cipriano* in no way overruled the federal court's *Costabile* decision.

risk policy as empty dwellings are much more susceptible to acts of vandalism, including arson. In the Personal Protection portion of the policy, the risk of loss by arson of items in a home is less likely because vacant homes are usually devoid of personal property.

B. The Arson Reward portion of the policy has no relevance or bearing on the issue before this Court.

Wells Fargo cites to the Arson Reward provision of the policy, but that part of the policy has no bearing on whether arson is to be considered vandalism for purposes of excluding dwelling coverage in an all-risk policy. The Arson Reward section is not found in the Coverage A or Coverage C sections but is located in the Additional Protection portion, and states as follows:

10. Arson Reward

We will pay up to \$5,000 for information leading to an arson conviction in connection with a fire loss to property covered under Section I of this policy. The \$5,000 limit applies regardless of the number of persons providing information.

There is no relevance to this part of the policy and it has no effect because there is no coverage due to the vacancy exclusion for acts of vandalism in Coverage A. Wells Fargo is correct that this section mentions a fire loss but it, once again, tries to combine the all-risk provisions with the named peril provisions. Wells Fargo also fails to appreciate that the clause states that it applies to covered losses only, and arson would not be a covered loss under the dwelling coverage because it is an act of vandalism or malicious mischief and the house at issue was vacant for more than 30 consecutive days. Wells Fargo intimates that the use of the term "fire loss" rather than "vandalism loss" is determinative of the intention to preclude acts of arson from being considered vandalism. However, the Arson Reward provision patently is not definitional, nor is the use of the term "fire loss" in that part of the policy inconsistent with the Coverage A vacancy exclusion in the all-risk portion of the policy that applies in this case. Similarly, there is

absolutely no foundation for Wells Fargo's statements that the courts in *Botee*, supra, or *Battishill v. Farmers Alliance Ins. Co.*, 127 P.3d 1111 (N.M. 2006), would have decided differently had those policies included an Arson Reward provision, as that is pure speculation. In *Botee*, the court stated that arson was not mentioned but it was clearly addressing the specific section in the all-risk, dwelling coverage portion of the policy.

C. Wells Fargo's claim that public policy considerations and criminal statutes should come into play when analyzing the issue before this Court is an unsupported attempt to overcome the logical interpretation of the policy.

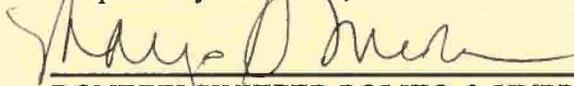
Wells Fargo's "public policy considerations" argument is that "neighboring" states have laws that are more favorable to homeowners and may cause migration from Ohio. It incorrectly states that the majority of cases have determined that arson is not a form of vandalism for purposes of a vacancy exclusion. As stated above, the overwhelming number of analogous cases state that in all risk policies, arson is considered vandalism by the common, and ordinary meaning of the words used. It is actually a more logical approach to consider the fact that insurance companies would not want to provide dwelling coverage for homes that have been vacant for a month or longer as they are more apt to be susceptible to arson.

Wells Fargo also inappropriately refers to criminal statutes as somehow lending credence to its position that the policy at issue does not exclude arson as an act of vandalism when a house is vacant. It is of no relevance that there are different penalties for criminal acts of arson, vandalism and mischief.

II. Conclusion

Wells Fargo has focused on attacking Allstate and made inaccurate and disingenuous statements that Allstate has misconstrued or misapplied existing law, instead of making substantive arguments in support of its position. It is clear that in an all-risk, dwelling coverage policy, the unequivocal, and common sense definition of the term "arson" would fall under the category of "vandalism or malicious mischief" and would be excluded if the home was vacant for more than 30 consecutive days before the loss.

Respectfully submitted,



BONEZZI SWITZER POLITO & HUPP CO., LPA

MARGO S. MEOLA (#0065555)

4137 Boardman-Canfield Rd., Suite 101

Canfield, Ohio 44406

Telephone: (330) 286-3701

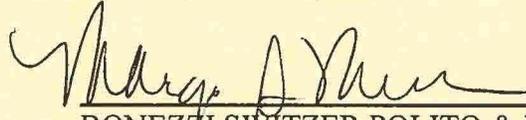
Facsimile: (330) 286-3745

Email: mmeola@bsphlaw.com

ATTORNEYS FOR PETITIONER ALLSTATE

CERTIFICATION

A copy of the foregoing has been served by electronic and regular U.S. Mail, this 28th day of December, 2015 to: **Anthony C. White, Esq., and Philip Sineneng, Esq.,** THOMPSON HINE LLP, 41 S. High Street, Suite 1700, Columbus, Ohio 43215, tony.white@thompsonhine.com, philip.sineneng@thompsonhine.com, Attorneys for Respondent.



BONEZZI SWITZER POLITO & HUPP CO., LPA
MARGO S. MEOLA (#0065555)
ATTORNEYS FOR PETITIONER ALLSTATE