

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DAVID GREENLY,)	
)	
<i>Plaintiff</i>)	
)	
v.)	<i>Civil No. 98-130-P-H</i>
)	
MARINER MANAGEMENT)	
GROUP, INC., et al.,)	
)	
<i>Defendants</i>)	

RECOMMENDED DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

David Greenly, former owner of the trawler F/V MISS PENELOPE, brings this action in admiralty to force payment of \$34,370.52 in proceeds allegedly wrongly withheld by his marine insurer, Clarendon America Insurance Co. (“Clarendon”), and its agent, Mariner Management Group, Inc. (“Mariner”), following the sinking of the MISS PENELOPE in January 1998. Amended Complaint (Docket No. 2) ¶¶ 2-7. He seeks compensatory and punitive damages as well as attorney fees, interest and costs. *Id.* at 3-4. Greenly and the defendants cross-move for summary judgment. Plaintiff’s Combined Motion and Memorandum for Summary Judgment (“Plaintiff’s Motion”) (Docket No. 5); Defendants’ Objection to the Plaintiff’s Motion for Summary Judgment, etc. (“Defendants’ Motion”) (Docket No. 10). For the reasons that follow, I recommend that Greenly’s motion be granted and that of Mariner and Clarendon be denied.

I. Summary Judgment Standards

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997).

II. Factual Context

David Greenly owned the F/V MISS PENELOPE, a sixty-five-foot-long offshore trawler that he purchased in March 1984. Affidavit of David Greenly in Support of his Motion for Summary Judgment (“Greenly Aff.”) (Docket No. 6) ¶ 2. Greenly, a Delaware resident, fished the MISS PENELOPE out of Portland Harbor for four to five years. *Id.* ¶ 3. He docked the vessel at either the Portland Fish Exchange or the Portland Fish Pier, where he paid dockage fees, and hired an agent to represent him at the Portland Fish Exchange. *Id.* He continuously did business out of Portland, Maine for six months a year. *Id.*

Approximately five years ago, Rob Wells, an insurance agent for Island Wide Marine Agency (“Island Wide”), approached Greenly in Portland to solicit his marine insurance business. *Id.* ¶ 4. Island Wide is an insurance broker with offices in New York. Affidavit of Claudio Crivici in Opposition to the Plaintiff’s Motion for Summary Judgment (“Crivici Aff.”) (Docket No. 11) ¶ 9. Wells initially placed Greenly’s insurance with Royal Insurance Company and his excess insurance with Mariner. Greenly Aff. ¶ 5. About three years later, one of Greenly’s crew members suffered a severe injury to his arm. *Id.* ¶ 6. Greenly reported the accident, and Mariner sent Claudio Crivici to investigate. *Id.* As part of the investigation, Crivici came aboard the vessel and discussed its operation. *Id.* Greenly informed Crivici that he was the captain and that he had, in addition, three crew members. *Id.* Crivici admits that the 1996 meeting occurred, but explains that its purpose and focus was to investigate a personal injury claim, not to make an underwriting decision. Crivici Aff. ¶¶ 27-28. Following the accident, Wells advised Greenly at insurance renewal time to give all of his business to Mariner and Clarendon. Greenly Aff. ¶ 7. Greenly agreed. *Id.*

Mariner is a New Jersey corporation with a principal place of business in Allendale, New Jersey. Crivici Aff. ¶ 3. It functions, among other things, as managing general agent for Clarendon but is not itself an underwriter and does not write policies of insurance. *Id.* Clarendon is a New Jersey corporation with a principal place of business in New York. *Id.* ¶ 4. In exchange for premiums paid by vessel owners, Clarendon undertakes to indemnify the insured in the manner and to the extent agreed in the marine-insurance contract. *Id.* The contract of marine insurance is memorialized in an express policy of insurance. *Id.* Neither Mariner nor Clarendon sells policies of insurance directly to the public. *Id.* ¶ 6. Instead, prospective buyers must contact an insurance

broker who acts as their agent in negotiations.¹ *Id.* Prospective purchasers must first advise their agent, the insurance broker, of the desired policies' details. *Id.* ¶ 7. The broker then informs Mariner of the requested coverages. *Id.* Mariner, on behalf of Clarendon, prepares a quote indicating the cost of the policy. *Id.* If the quote is acceptable to the prospective purchaser, the broker prepares an application for insurance referred to as a "binder." *Id.* The binder is then presented to the underwriter and may be accepted or rejected. *Id.* The underwriter's signing of the binder signifies its acceptance of the risk pursuant to the terms set forth in the binder. *Id.* The broker is compensated by the insured by retaining a commission based on the amount of premium paid. *Id.* ¶ 8.

On or about March 11, 1997 Island Wide contacted Clarendon on Greenly's behalf and requested a quote for insurance coverage for the F/V MISS PENELOPE. *Id.* ¶ 10. Island Wide advised that "P&I" (protection and indemnity) coverage was to be limited to "3 crew, excluding all owners." *Id.* and Exh. A thereto. Based on this information, Mariner prepared a quote for P&I coverage for "3 crew, excluding all owners." Crivici Aff. ¶ 11 and Exh. B thereto. On March 13, 1997 Island Wide confirmed to Clarendon that it would proceed to "bind coverage." Crivici Aff. ¶ 12 and Exh. C thereto. Its correspondence stated that P&I coverage was to include "3 full time crew, 0 part time crew, [e]xcluding all owners." *Id.*

On March 13, 1997 Island Wide prepared and forwarded insurance binder number 2052 to Clarendon. Crivici Aff. ¶ 13. The binder stated that P&I coverage included three full-time crew members and no part-time crew members and excluded all owners. *Id.* and Exh. D thereto. The binder was signed by Clarendon, indicating its acceptance of the risk pursuant to the terms set forth

¹According to Crivici, it is well-established through custom and practice in the marine insurance industry that insurance brokers act as agents on behalf of the insured when employed by the insured to procure insurance. Crivici Aff. ¶ 6.

in the insurance binder. *Id.* The policy itself then issued, identified as number 97C6530119 (the “Policy”), effective from March 15, 1997 through March 15, 1998. Crivici Aff. ¶ 14 and Exh. E thereto. The commercial fishing vessel endorsement to the Policy contained the following language:

CREW WARRANTY: In consideration of the premium charged, it is warranted that coverage hereunder is provided for not more than **three (3)** crew members aboard the insured vessel at any one time. Also, warranted that in the event additional crew are to be covered hereunder, the Assured shall give prior notice to this Company and pay such additional premium as is required. If the Assured shall fail to give such prior notice and at the time of loss with respect to crew there are more crew on board, this insurance shall respond only in the proportion that the stated number of crew bears to the number on board at the time of the accident.

NAMED CAPTAIN CLAUSE: It is a provision of this coverage that the Assured shall disclose the name(s) of all captain(s) which are operating the vessel(s) as of the effective date of this policy and these captain(s) shall be named hereunder as follows:

Captain: David Greenly

In the event that the Assured hires additional or replacement full-time captains (with the exception of existing qualified crew members working onboard), the Company will require that the Assured provide the Company with information concerning their experience, qualifications and general reputation within the industry as soon as possible.

Exh. E to Crivici Aff. (emphasis in original).

On August 3, 1997, almost five months after issuance of the Policy, Greenly completed and signed a commercial fishing vessel insurance application that he understood was from Mariner.² Greenly Aff. ¶ 8 and Exh. B thereto. The application asked, among other things, for the name of the captain and “Number of Crew (Ex. Captain).” *Id.* In response to this question, Greenly filled in his

²The record sheds no further light on whether the application was in fact provided by Mariner. Greenly explains that he did not fill out the application supporting the Policy until August because he was fishing offshore and unable to complete paperwork until he commenced vacation in late July. Plaintiff’s Response to Defendant’s [sic] Objections, etc. (“Plaintiff’s Response”) (Docket No. 14) at 3-4. Inasmuch as these factual assertions are not included in Greenly’s statement of material facts, however, they cannot form part of the summary-judgment record.

name as captain and advised that the “Number of Crew (Ex. Captain)” was three full-time and one part-time crew. *Id.* The application stated that it would form “the basis of the contract should a policy be issued.” Exh. B to Greenly Aff. The Policy likewise stated, in its general conditions section, that “[t]he application of insurance you filed with these insurers, together with the survey (if any) and your representation of compliance with recommendations, is the basis on which this policy has been issued.” Affidavit of Michael X. Savasuk in Support of Plaintiff’s Motion for Summary Judgment (“Savasuk Aff.”) (Docket No. 7) ¶ 5 and Exh. E thereto. The application was not provided to either Clarendon or Mariner until August 4, 1997. Crivici Aff. ¶ 25.

Starting in July 1997 Greenly had several meetings with Wells in Portland. Greenly Aff. ¶ 9. At that time Greenly advised Wells that he was looking for another captain to take the vessel out. *Id.* Toward the end of the summer, Greenly hired Brian Morse of Kennebunk, Maine as captain. *Id.* Morse had been fishing on Greenly’s vessel since early spring and had served as a captain on other fishing vessels. *Id.* Greenly felt, based on his observations of Morse as a crew member, that he was sufficiently qualified to assume the role of captain. *Id.* Greenly informed Wells of this selection. *Id.* Morse began captaining the vessel, with three other crew members, in October 1997. *Id.* At no time did Greenly or any of his agents identify to Mariner or Clarendon any individual other than Greenly as captain of the MISS PENELOPE. Crivici Aff. ¶ 21. The underwriter materially relied on the named-captain clause in determining whether to accept the risk and in calculating premiums. *Id.* Had the underwriter known that Greenly had been replaced by a non-owner aboard the vessel, it would have either discontinued the coverage or increased the premium. *Id.* ¶ 24.

On or about January 28, 1998 the Coast Guard advised Greenly that his vessel had sunk during a heavy storm and was a total loss. Greenly Aff. ¶ 10. One crew member was lost and

another injured. *Id.* Greenly immediately notified Wells, who served as his contact regarding notices, payments of premiums and other matters relating to insurance.³ *Id.* The parties dispute whether Mariner initially orally advised Wells that it was going to deny the claim completely on the ground that the accident occurred outside a 100-mile geographical limit. *Id.*; Crivici Aff. ¶ 30. In any event, Greenly filled out documents to make a claim for the full \$500,000 value of the vessel under the hull and machinery portion of the Policy. Greenly Aff. ¶ 10 and Exh. A thereto (reciting limit of insurance for hull and machinery).

On January 30, 1998 an investigator for Mariner took Morse's statement regarding the sinking of the MISS PENELOPE. Savasuk Aff. ¶ 5 and Exh. F thereto. Morse stated that he had been fishing for 20 years, had captained other vessels and had served as a crew member for the MISS PENELOPE since spring 1997, taking over as its captain in October 1997. *Id.* Morse also stated, in response to a question as to the "normal crew aboard the boat," that there were "[f]our (4) people." Crivici Aff. ¶ 18 and Exh. F thereto. Asked how many people he had aboard the MISS PENELOPE at the time of the accident, he responded, "I had the four (4) people including myself." *Id.*

By letter dated February 12, 1998 Mariner advised Greenly that, in accordance with the crew-warranty clause of the commercial fishing vessel endorsement to the Policy, Greenly would be assessed a penalty of 25 percent of the total value of personal-injury claims covered by the P&I portion of the Policy. Greenly Aff. ¶ 11 and Exh. C thereto. This was so, Mariner stated, because the MISS PENELOPE had four rather than three crew onboard at the time of the disaster and the company was never notified of the existence of a fourth crew member. *Id.* Had the underwriter been

³Most, if not all, of Greenly's face-to-face contacts with Wells were in Maine. Greenly Aff. ¶ 4.

informed that additional crew members were working aboard the vessel, it may have declined to accept the risk or at the very least would have charged a higher premium. Crivici Aff. ¶ 19.

Crivici avers that, at all times material hereto, Mariner and Clarendon intended to limit insurance coverage for the insured vessel to three individuals. *Id.* ¶ 29. Greenly was to be excluded from coverage on the basis of his status as vessel owner, rather than on that of his status as captain. *Id.* ¶ 28. The common meaning of the word “crew” includes all individuals working aboard a vessel and contributing to the vessel’s mission, without reference to the arrangement under which they are on board. *Id.* ¶ 16. As such, the word “crew” encompasses deckhands, cooks, engineers, mates and captains working aboard a vessel. *Id.* To interpret the word “crew” as excluding the captain would lead to the nonsensical and unintended result that Morse as substitute captain would not have been covered for injury or death that occurred while working aboard the vessel. *Id.* ¶ 17. Greenly contends that he has always had insurance coverage for a captain plus three to four crew members. Greenly Aff. ¶ 6.

Following receipt of the February 12 letter, Greenly retained attorney Michael X. Savasuk to represent him. *Id.* ¶¶ 11-12. Mariner advised Savasuk that it would retain \$100,000 of the \$500,000 in hull-policy proceeds toward Greenly’s payment of the 25 percent P&I penalty. Savasuk Aff. ¶ 2. On or about March 10, 1998 it mailed a check payable to Greenly in the amount of \$400,000. *Id.* ¶ 2 and Exh. D thereto. Savasuk advised Mariner that Greenly had committed no breach of the insurance contract; however, Mariner continued to disagree and alleged, for the first time, that Greenly had in addition failed to notify it that Morse had taken over as captain. Savasuk Aff. ¶¶ 2-3. Savasuk informed Crivici, a Mariner vice president, that Greenly had notified Wells of the change. *Id.* ¶ 3. Mariner was not persuaded to alter its position. *Id.*

Upon settlement of the personal injury claims arising from the sinking of the MISS PENELOPE, Clarendon remitted an additional \$65,629.43 to Greenly, retaining the balance of \$34,370.57 toward payment of the P&I claims. *Id.* ¶ 4.

III. Discussion

Resolution of this case hinges on interpretation of the two Policy clauses upon which Mariner and Clarendon base retention of a portion of the insurance proceeds that otherwise would have been payable to Greenly following the loss of his vessel: the named-captain and crew-warranty clauses.

The framework for that analysis, in turn, depends upon which body of decisional law applies. A court in an admiralty case must apply such federal rules as squarely address the issue at hand. *Windsor Mount Joy Mut. Ins. Co. v. Giragosian*, 57 F.3d 50, 54 (1st Cir. 1995). In their absence, state law may fill the vacuum — at least to the extent that it comports with the principles of admiralty law. *Id.* The parties have identified no controlling federal statute, and the Supreme Court has expressly declined to fashion federal common law regarding interpretation of policy language in a marine insurance case. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 319-21 (1955). *See also Windsor*, 57 F.3d at 54; *Pace v. Insurance Co. of N. Am.*, 838 F.2d 572, 579 (1st Cir. 1988) (permitting application of Rhode Island cause of action against marine insurer for bad faith). I must therefore determine which state's law applies. Greenly presses for the application of Maine law on the basis of contacts among himself, his vessel and the state of Maine. Plaintiff's Motion at 6. The defendants do not expressly address the subject. Defendants' Motion at 10-16.

Inasmuch as appears, neither the First Circuit nor this court has had occasion to delineate a process for choosing among conflicting state bodies of law in the context of interpretation of marine insurance policy language. The Ninth Circuit has, however, outlined a sensible approach based upon

section 188 of the Restatement (Second) of Conflict of Laws. *Aqua-Marine Constructors, Inc. v. Banks*, 110 F.3d 663, 674 (9th Cir. 1997). Per this approach, a court must determine the state with the most significant relationship to the transaction and the parties in view of the following factors: (i) place of contracting, (ii) place of negotiation of the contract, (iii) place of performance, (iv) location of the subject matter of the contract, and (v) domicil, residence, nationality, place of incorporation and place of business of the parties. *Id.*

The record does not disclose the location in which Clarendon signed the binder prepared by Island Wide; however, Clarendon's principal place of business is in New York. Negotiations between Wells of Island Wide and Greenly took place in Maine, and letterhead for correspondence between Island Wide and Mariner reflects a New York address for Island Wide and a New Jersey address for Mariner. Greenly was to perform his covenants in part in Maine, his home port for six months a year, while Clarendon performed its covenants through its principal place of business (New York) and its agent Mariner (based in New Jersey). The vessel and its crew — the subject matter of the contract — fished out of Portland harbor six months a year. Greenly is a Delaware resident, Clarendon a New Jersey corporation with a principal place of business in New York, and Mariner a New Jersey corporation with a principal place of business in New Jersey.

In this case, contacts with three states (Maine, New Jersey and New York) were significant; however, the fact that the vessel and its crew were the subject matter of the insurance contract tips the scales in favor of their frequent home port of Maine. As explained in commentary to section 188 of the Restatement:

When the contract deals with a specific physical thing, such as land or a chattel, or affords protection against a localized risk, such as the dishonesty of an employee in a fixed place of employment, the location of the thing or of the risk is significant.

The state where the thing or the risk is located will have a natural interest in transactions affecting it. Also the parties will regard the location of the thing or of the risk as important. Indeed, when the thing or the risk is the principal subject of the contract, it can often be assumed that the parties, to the extent that they thought about the matter at all, would expect that the local law of the state where the thing or risk was located would be applied to determine many of the issues arising under the contract.

Restatement (Second) of Conflicts § 188 cmt. e. (citation omitted). I shall therefore apply the law of the state of Maine.

In the context of the interpretation of insurance-policy language, the Law Court has observed that the “paramount principle in the construction of contracts is to give effect to the intention of the parties as gathered from the language of the agreement viewed in the light of all of the circumstances under which it was made.” *Whit Shaw Assocs. v. Wardwell*, 494 A.2d 1385, 1387 (Me. 1985) (citation and internal quotation marks omitted). The “interpretation of the terms of an unambiguous insurance contract is a question of law.” *Mack v. Acadia Ins. Co.*, 709 A.2d 1187, 1188 (Me. 1998). If, however, the policy is ambiguous on its face, a court may admit extrinsic evidence bearing on the parties’ intent — even though such evidence otherwise might have been excluded by the parol evidence rule. *Wardwell*, 494 A.2d at 1387. An insurance policy is considered ambiguous “only if an ordinary person would not understand that the policy did not cover certain claims.” *Craig v. Barnes*, 710 A.2d 258, 261 (Me. 1998) (citation and internal quotation marks omitted). Although a court may not rewrite the terms of an unambiguous policy, ambiguous language is to be construed against the insurer. *Johnson v. Allstate Ins. Co.*, 687 A.2d 642, 645 (Me. 1997).

Mariner and Clarendon base their withholding of some of Greenly’s insurance proceeds in part on the failure of Greenly or his agent to notify them that Morse had taken over as captain. Defendants’ Motion at 13-15. The language at issue is unambiguous. The named-captain clause

required Greenly to provide certain information “[i]n the event that the Assured hires additional or replacement full-time captains (with the exception of existing qualified crew members working onboard).” Exh. E to Crivici Aff. There is no dispute that (i) Morse was working as a crew member aboard the MISS PENELOPE commencing in spring 1997, (ii) he substituted as a full-time captain commencing in October 1997, and (iii) having skippered other vessels, he was qualified to substitute as captain. It is thus clear on the face of the Policy that Greenly was under no obligation to provide any notice regarding the substitution of Morse. That Mariner and Clarendon were unaware that Morse had taken over, or even relied to their detriment upon their belief that Greenly continued as captain, is immaterial.

Mariner and Clarendon rely heavily upon their second and primary grounds for the withholding: that the crew-warranty clause of the Policy limited coverage to only three crew members. Defendants’ Motion at 11-13. The word “crew,” they assert, commonly is understood to encompass the captain as well as other members of the crew. *Id.* Thus, on its face, the clause limits coverage to three of the total members of the crew (including the captain). *Id.* To the extent the word “crew” is deemed ambiguous, they offer extrinsic evidence of (i) their intent to limit personal-injury coverage to only three individuals, and (ii) the parties’ intent to exclude “all owners” (Greenly) from coverage.⁴ *Id.* at 11.

Even assuming *arguendo* that the defendants are correct, it does not necessarily follow that

⁴Greenly asserts that the Policy itself nowhere expressly excludes personal-injury coverage for the vessel owner. Plaintiff’s Response at 2-3 n.1, 5-6. Mariner and Clarendon identify no such language, nor do I find any. Under Maine law, such an asserted exclusion is not enforceable against the insured. *Union Mut. Fire Ins. Co. v. Commercial Union Ins. Co.*, 521 A.2d 308, 311 (Me. 1987) (coverage excluded “*only where* such separately stated ‘exclusions,’ when viewed as a whole, unambiguously and unequivocally negate coverage”) (citation and internal quotation marks omitted) (emphasis in original).

the 25 percent penalty was properly invoked. The crew-warranty clause provides, in relevant part:

Also, warranted that in the event additional crew are to be covered hereunder, the Assured shall give prior notice to this Company and pay such additional premium as is required. If the Assured shall fail to give such prior notice and at the time of loss with respect to crew there are more crew on board, this insurance shall respond only in the proportion that the stated number of crew bears to the number on board at the time of the accident.

Exh. E to Crivici Aff. Greenly submitted his insurance application approximately five months after issuance of the Policy. The defendants admit that they received it on August 4, 1997 — several months prior to the accident in which the MISS PENELOPE sank. That document identified members of the MISS PENELOPE crew as the captain plus one part-time and three full-time crew members. The defendants having thus been put on notice, it was incumbent upon them to perceive any discrepancy and to request payment of such additional premiums as may have been warranted.⁵ At the time of the accident, the MISS PENELOPE actually had fewer, not more, crew on board than Greenly had disclosed in his insurance application. Thus, Greenly neither failed to give prior notice nor harbored a larger complement of crew on board at the time of the accident than he had previously revealed existed. Neither of the two preconditions to assessment of the crew-warranty penalty having been met, Mariner and Clarendon lacked legitimate grounds upon which to withhold the balance of payment of Greenly's hull-insurance proceeds.⁶

⁵Although Greenly's application was not technically a notice pursuant to the crew-warranty clause, it served that purpose under the circumstances. Both the crew-warranty notice requirement and the application form exist to notify the insurer of the scope of coverage sought. Inasmuch as the application postdated the Policy, it became the functional equivalent of a post-Policy notice. The application form, moreover, is identified both in the form itself and in the Policy as the basis for the contract of insurance. Its contents thus were of critical importance if not — as Greenly suggests — actually incorporated by reference into the contract itself. *See* Plaintiff's Response at 1.

⁶In cases relied upon by Mariner and Clarendon in which insurers prevailed, wording of the
(continued...)

I turn finally to the issue of the remedy available in this case. In addition to the withheld proceeds, Greenly seeks interest and attorney fees based upon the defendants' asserted bad-faith handling of his claim. Plaintiff's Motion at 11-12. Assuming *arguendo* that Mariner and Clarendon did breach the implied covenant of good faith and fair dealing, Greenly's remedies are limited to those traditionally provided for breach of contract as supplemented by statutory penalties available under the Maine insurance code. *Greenvall v. Maine Mut. Fire Ins. Co.*, 715 A.2d 949, 955 (Me. 1998). The Law Court has declined to recognize a separate tort of bad faith arising from breach of the implied covenant of good faith and fair dealing. *Id.* Applicable insurance-code provisions, in turn, are 24-A M.R.S.A. §§ 2436 (addressing late payment) and 2436-A (addressing unfair claims practices).⁷ *See, e.g., Marquis v. Farm Family Mut. Ins. Co.*, 628 A.2d 644, 652 (Me. 1993). Inasmuch as these statutes are penal in nature, they are to be strictly construed. *Id.* at 651 (insurer's general bad faith insufficient to invoke penalties under insurance code).

Section 2436(1) provides in relevant part that an insurance claim "which is neither disputed nor paid within 30 days is overdue." In accordance with section 2436(2), "[a]n insurer may dispute a claim by furnishing to the insured, or his representative, a written statement that the claim is disputed with a statement of the grounds upon which it is disputed." In the instant case, payment

⁶(...continued)
relevant clauses differs materially from that at issue here. *See, e.g., Mutual Fire, Marine & Inland Ins. Co. v. Costa*, 789 F.2d 83, 85-86 (1st Cir. 1986) (coverage expressly "limited to the description of hazards as above"; thus, presence of extra passengers voided coverage) (internal quotation marks omitted); *Fireman's Fund Ins. Co. v. Cox*, 742 F. Supp. 609, 610 (M.D. Fla.), *aff'd*, 892 F.2d 87 (11th Cir. 1989) (policy provided that coverage would be void if number of crew members on board vessel exceeded three).

⁷Greenly also cites 24-A M.R.S.A. § 2164-D. Plaintiff's Motion at 10. This statute does not confer a private right of action. 24-A M.R.S.A. § 2164-D(8).

never has become “overdue.” The defendants promptly advised Greenly in writing that they intended to invoke the crew-warranty penalty, and the withholding of the hull proceeds on that basis has been disputed ever since. This sufficed to stop the late-payment clock from running pending resolution of the matter.⁸ *See, e.g., Maine Mut. Fire Ins. Co. v. Watson*, 532 A.2d 686, 690-91 (Me. 1987) (payment not due until one month after arbitrator’s decision ended dispute).

Section 2436-A, the final Maine insurance-code provision that affords an insured a private right of action, prohibits insurers from:

- A.** Knowingly misrepresenting to an insured pertinent facts of policy provisions relating to coverage at issue;
- B.** Failing to acknowledge and review claims, which may include payment or denial of a claim, within a reasonable time following receipt of written notice by the insurer of a claim by an insured arising under a policy;
- C.** Threatening to appeal from an arbitration award in favor of an insured for the sole purpose of compelling the insured to accept a settlement less than the arbitration award; or
- D.** Failing to affirm coverage, reserving any appropriate defenses, or deny coverage within a reasonable time after completed proof of loss forms have been received by the insurer.⁹

Greenly offers no specific argument as to the manner in which Mariner and Clarendon may have breached any of these provisions, nor do I discern any. With respect to subsection (A), there

⁸While the defendants did not, in their initial correspondence, set forth their alternate ground for the withholding of proceeds, that is not fatal for purposes of section 2436. They timely notified Greenly in writing of the pendency of a dispute, stopping the late-payment clock from running at least until the dispute on the ground given was resolved.

⁹Section 2436-A recently was amended by the Legislature. S.P. 281, L.D. 889, 118th Leg., 2d Reg. Sess. (Me. 1998). The amendments may not, however, be applied retroactively to the actions of Mariner and Clarendon inasmuch as the statute is penal in nature. 1 M.R.S.A. § 302; *Reagan v. Racal Mortgage, Inc.*, 715 A.2d 925, 929 (Me. 1998).

is no evidence of a knowing misrepresentation of pertinent facts of policy provisions. Mariner and Clarendon accurately cited or quoted the policy provisions upon which they relied to justify their withholding of proceeds. Their erroneous interpretations were not “facts” of those provisions, but rather constructions of those underlying facts. Nor did the defendants fail to acknowledge and review Greenly’s claim within a reasonable time, as required by subsection (B). Subsection (C) is inapposite. Finally, with respect to subsection (D), by letter dated February 12, 1998 Mariner and Clarendon did promptly deny coverage for 25 percent of the total amount of the P&I claims.

Having fallen short of making out a claim under the Maine insurance code, Greenly is left to traditional remedies available to the prevailing party in an action for breach of contract under Maine law. These include, in addition to return of the improperly held proceeds, prejudgment interest at the rate of 8 percent per annum in accordance with 14 M.R.S.A. § 1602 and costs in accordance with 14 M.R.S.A. § 1502-B. *See, e.g., Boudreau v. Manufacturers & Merchants Mut. Ins. Co.*, 588 A.2d 286, 289 (Me. 1991) (awarding certain costs, prejudgment interest to prevailing party in action against insurer).

IV. Conclusion

For the foregoing reasons, I recommend that Greenly’s summary judgment motion be **GRANTED** but that his prayer for attorney fees and punitive damages be **DENIED**, and that the cross-motion of Mariner and Clarendon be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 5th day of November, 1998.

*David M. Cohen
United States Magistrate Judge*