

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<b>UNION MUTAL FIRE</b>	)	
<b>INSURANCE COMPANY,</b>	)	
	)	
<b>Plaintiff</b>	)	
	)	
v.	)	
	)	<b>No. 2:15-cv-405-NT</b>
<b>ALLSTATE INSURANCE COMPANY,</b>	)	
	)	
<b>Defendant/Third-Party Plaintiff</b>	)	
	)	
v.	)	
	)	
<b>CLIFFORD G. DOW,</b>	)	
	)	
<b>Third-Party Defendant/ Fourth-Party Plaintiff</b>	)	
	)	
v.	)	
	)	
<b>VARNEY AGENCY, INC.,</b>	)	
	)	
<b>Fourth-Party Defendant</b>	)	

**RECOMMENDED DECISION ON MOTION TO DISMISS**

Plaintiff Union Mutual Fire Insurance Company (“Union Mutual”) moves pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss all claims against it by third-party defendant/fourth-party plaintiff Clifford G. Dow for failure to state a claim upon which relief can be granted. See [Motion To Dismiss] (“Motion”) (ECF No. 26) at 1-3. Although Dow, who is proceeding *pro se*, has filed no response, see generally ECF, I nonetheless have weighed the merits of the motion, see, e.g., *Pomerleau v. West Springfield Pub. Sch.*, 362 F.3d 143, 145 (1st Cir. 2004) (“When deciding a 12(b)(6) motion, the mere fact that a motion to dismiss is unopposed does not relieve the district court of the obligation to examine the complaint itself to see whether it is

formally sufficient to state a claim.”) (citation and internal quotation marks omitted). For the reasons that follow, I recommend that the Motion be granted.

### **I. Applicable Legal Standards**

The Supreme Court has stated:

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level.

*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and internal punctuation omitted). This standard requires the pleading of “only enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In ruling on a motion to dismiss under Rule 12(b)(6), a court assumes the truth of all of the well-pleaded facts in the complaint and draws all reasonable inferences in favor of the plaintiff. *Román-Oliveras v. Puerto Rico Elec. Power Auth.*, 655 F.3d 43, 45 (1st Cir. 2011). Ordinarily, in weighing a Rule 12(b)(6) motion, “a court may not consider any documents that are outside of the complaint, or not expressly incorporated therein, unless the motion is converted into one for summary judgment.” *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001). “There is, however, a narrow exception for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs’ claim; or for documents sufficiently referred to in the complaint.” *Id.* (citation and internal quotation marks omitted).

Although a *pro se* plaintiff’s complaint is subject to “less stringent standards than formal pleadings drafted by lawyers,” *Haines v. Kerner*, 404 U.S. 519, 520 (1972), the complaint may not

consist entirely of “conclusory allegations that merely parrot the relevant legal standard[.]” *Young v. Wells Fargo Bank, N.A.*, 717 F.3d 224, 231 (1st Cir. 2013). *See also Ferranti v. Moran*, 618 F.2d 888, 890 (1st Cir. 1980) (explaining that the liberal standard applied to the pleadings of *pro se* plaintiffs “is not to say that *pro se* plaintiffs are not required to plead basic facts sufficient to state a claim”).

## II. Factual Background

Dow brings what he styles “counter claims” against both Union Mutual and Varney Agency, Inc. (“Varney Agency”), which sold him the Union Mutual policy at issue. Answer to Third Party Complaint, Counter Claims and Demand for Jury Trial (“Answer”) (ECF No. 22) at [1]. His claims are not counterclaims, as neither Union Mutual nor Varney Agency has sued him. *See* Fed. R. Civ. P. 13(a)-(c) (counterclaims are brought against an “opposing party”). Rather, he crossclaims against Union Mutual, *see* Fed. R. Civ. P. 13(g) (crossclaims are brought against a “coparty”), and brings a third-party claim against Varney Agency, *see* Fed. R. Civ. P. 14(a)(5) (“A third-party defendant may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of any claim against it.”).

Dow alleges, in pertinent part:<sup>1</sup>

He is the owner of a home located at 25 Main Street in Gray, Maine. Answer at [2]. The home was purchased at auction in October 2009 for \$140,000 and insured for \$140,000 through Union Mutual. *Id.* On or about September 25, 2013, he called Varney Agency to express his concern that the home could not be rebuilt for \$140,000. *Id.* Varney Agency advised that he

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<sup>1</sup> The First Circuit has instructed that, in reviewing a complaint for sufficiency pursuant to Rule 12(b)(6), a court “should begin by identifying and disregarding statements in the complaint that merely offer legal conclusions couched as fact or threadbare recitals of the elements of a cause of action.” *Ocasio-Hernández v. Fortuño-Burset*, 640 F.3d 1, 12 (1st Cir. 2011) (citation and internal punctuation omitted). “Non-conclusory factual allegations in the complaint must then be treated as true, even if seemingly incredible.” *Id.* “If that factual content, so taken, allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged, the claim has facial plausibility.” *Id.* (citation and internal quotation marks omitted).

should have \$260,000 in coverage, and a new Union Mutual policy was put in place. *Id.* & Dwelling Insurance Proposal (ECF No. 23-1), attached thereto. The new policy provided a coverage limit of \$260,000 for the dwelling, as well as \$1 million worth of personal liability coverage, for a total premium of \$541. *Id.* Dow was told that he should “have no worries now about the cost of new construction should there be a fire.” Answer at [2].

Dow rented the home to Chandra Ritchie on June 25, 2014. *Id.* When Ritchie was cooking, she went upstairs to check on her child and forgot things on the stove, and the house was engulfed in flames. *Id.* Firefighters from five towns responded to the fire, spraying 3,000 to 4,000 gallons of water and punching holes in the roof and walls. *Id.* Several firefighters were treated for heat exhaustion. *Id.*

After the fire, Dow contacted Union Mutual to start the claims process. *Id.* “The adjuster” met with Dow “and said it was extremely important that he hire a mitigation company they recommended.” *Id.* Not knowing anything about how to deal with a fire, Dow allowed them to proceed. *Id.* The process “wasted about \$7,000” that Dow might have otherwise put toward rebuilding the home. *Id.*

On July 10, 2014, Dow was informed by the Town of Gray code enforcement officer that, due to the extensive damage to the home, the entire home would need to be brought up to current code standards to obtain an occupancy permit. *Id.* Dow began working full-time on gutting the home. *Id.* at [3].

Union Mutual insurance adjuster Peter Thompson examined the home and met with a builder, Kevin Rideout. *Id.* They agreed that damages came to about \$189,000, including the code upgrades. *Id.* Union Mutual was willing to pay only \$93,557.74, stating that the policy was a “Cash Value” rather than “Guaranteed Replacement Cost” policy. *Id.* This was not specified

anywhere in the insurance proposal, and Varney Agency had explained to Dow that he would be “all set with this new coverage.” *Id.*

Dow also happened to obtain a Union Mutual policy on another property located at 86 Skips Way in New Gloucester. *Id.* That policy “is also apparently a crappy cash value policy[,]” although “nowhere on the renewal is there anything stating cash value.” *Id.* While that policy cost \$1,624 for \$467,000 in coverage for the New Gloucester dwelling plus \$1 million in liability coverage, Dow obtained a quote of \$1,422 from Liberty Mutual for \$490,000 in guaranteed replacement cost coverage for that dwelling plus \$1 million in liability coverage. *Id.* Dow complains, “if Union Mutual . . . and Varney Agency are going to go around selling coverage[,] it needs to be clearly stated to the consumer that it’s crappy cash value coverage[,] not the same as other companies who have guaranteed replacement cost.” *Id.*

When Dow met with “the adjuster[,]” the adjuster requested a copy of Dow’s lease with the tenant, in which Dow had a section stating that if the tenant is responsible for the fire, the tenant must pay damages. *Id.* The adjuster told Dow that if he received those funds, due to the wording of his lease, he could spend them on code upgrades. *Id.* His policy payout could then be spent on other items. *Id.*

Three or four months after the fire, Dow did receive a check from Allstate Insurance Company (“Allstate”) in the amount of \$100,000. *Id.* Since the fire, Dow has spent considerably more than \$189,000 in his own labor, hired labor, and materials in rebuilding the house. *Id.* As of January 12, 2016, the rebuilding project was still not completed. *Id.*

Dow states that he asserts claims against both Union Mutual and Varney Agency “for providing misleading information about coverage to be provided[,]” for which he seeks \$260,000 in damages plus \$10 million in punitive damages. *Id.* He also seeks a judgment that he “does not

have to pay back the \$93,557.74 requested by Plaintiffs” or the other parties’ attorney fees or costs. *Id.* at [3]-[4].

### **III. Discussion**

As Union Mutual observes, *see* Motion at 4, the first of Dow’s claims against it appears to be that Union Mutual urged him to hire a mitigation company and he did so, but this “wasted about \$7,000[,]” Answer at [2]. Yet, as Union Mutual notes, *see* Motion at 4, Dow provides no factual basis either for the claimed waste or any theory on which Union Mutual could be liable for it. He, therefore, fails to set forth “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570.

Dow next alleges that both Union Mutual and Varney Agency misled him about the coverage provided in the Union Mutual policy. *See* Answer at [3]. However, Union Mutual correctly notes that, while Dow provides specific factual allegations about the manner in which Varney Agency allegedly misled him, he provides no such detail regarding Union Mutual. *See* Motion at 3, 5; Answer at [2]-[3]. Further, to the extent that Dow relies on the Dwelling Insurance Proposal attached to his Answer for the proposition that Union Mutual misled him, he does not allege that Union Mutual had anything to do with its preparation, and that is not self-evident from the document. *See* Answer at [2]-[3]; Dwelling Insurance Proposal. Moreover, the document contains a footnote on every page stating that it is “a premium indication ONLY,” coverage descriptions are abbreviated, and the buyer “will need to refer to the policy(ies) for all terms, conditions, limitations and exclusions.” Dwelling Insurance Proposal. Dow, hence, fails to state a plausible claim to relief on the basis that Union Mutual misled him as to the scope of coverage of its policy.

Dow makes a third and final allegation that might pertain to Union Mutual, asserting that “the adjuster” told him that he could keep any payments made by the tenant. *See* Answer at [3].

However, even assuming that this was Union Mutual's adjuster, Dow fails to state a plausible claim for relief on the basis of this conversation. While Dow seeks to retain those funds, *see id.*, Union Mutual is not seeking to recover them from him. *See generally* Complaint for Declaratory Relief; Equitable Subrogation (ECF No. 1). Rather, *Allstate* has filed a third-party claim against Dow seeking reimbursement of any monies it must pay Union Mutual if Union Mutual prevails in its equitable subrogation claim against Allstate, plus interest, costs, and attorney fees. *See* Third-Party Complaint [by Allstate against Dow] and Demand for Jury Trial (ECF No. 9). In turn, Allstate's claim against Dow is predicated on an agreement to which Union Mutual was not a party: Dow agreed, in exchange for Allstate's payout to him of \$100,000, to indemnify and hold Allstate harmless from all claims arising out of the fire, including any subrogation claims. *See id.* ¶¶ 10-12. Dow, hence, fails to state any plausible claim against Union Mutual regarding the Allstate payment that he was told he could keep.<sup>2</sup>

#### **IV. Conclusion**

For the foregoing reasons, I recommend that the court **GRANT** Union Mutual's motion to dismiss all claims against it by Dow.

#### **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,***

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<sup>2</sup> As it happens, I have separately recommended that the court grant Allstate's motion for summary judgment as to Union Mutual's equitable subrogation claim against it. If the court agrees, Allstate's third-party claim against Dow will be moot. *See* Motion for Summary Judgment of Defendant Allstate Insurance Company (ECF No. 35) at 2 n.1.

*within fourteen (14) days after being served with a copy thereof. A responsive memorandum shall be filed within fourteen (14) 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 8<sup>th</sup> day of May, 2016.

/s/ John H. Rich III  
John H. Rich III  
United States Magistrate Judge