

Responsive Statement of Material Facts, etc. (“Motion to Strike”) (Docket No. 26) at 1 nn. 1-3. It contends that certain of these paragraphs are based on an affidavit that impermissibly contradicts the affiant’s prior statements, that others are immaterial and that the remainder are not supported by the references provided. *Id.* at 1. Without citation to authority, the plaintiff opposes all of the defendant’s requests. Plaintiff’s Response to Defendant’s Objection and Motion to Strike, etc. (“Strike Opposition”) (Docket No. 28) at [1]-[4].²

A. Inconsistent Statements

The defendant contends that the following paragraphs of the plaintiff’s responsive statement of material facts, based on her affidavit (Docket No. 22), impermissibly contradict her prior sworn statements, representations and declarations: 4-5, 7-11, 16-17, 23, 26, 29, 31, 33, 35, 46-47, 49 and 55-57.³ Motion to Strike at 3-4.

It is settled that when an interested witness has given clear answers to unambiguous questions, he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a satisfactory explanation of why the testimony is changed.

Torres v. E.I. DuPont de Nemours & Co., 219 F.3d 13, 20 (1st Cir. 2000) (citation and internal punctuation omitted) (comparing affidavits with deposition testimony). The available case law on this issue, both in the First Circuit and elsewhere, deals exclusively with conflicts between a party’s deposition testimony and statements in his or her later affidavit. Here, the defendant identifies the conflicts as being between the plaintiff’s affidavit and her deposition testimony for paragraphs 46-47 and 49, and as between

¹ The parties have stipulated to the dismissal of Counts III and V of the complaint with prejudice. Docket No. 19.

² Counsel for the plaintiff is reminded that Local Rule 7(e) requires that all pages be numbered at the bottom.

³ The plaintiff’s responses to paragraphs 55-57 simply incorporate her responses to other paragraphs, including but not limited to paragraphs challenged by the defendant. Plaintiff’s Responsive Statement of Material Facts (“Plaintiff’s Responsive SMF”) (Docket No. 23) ¶¶ 55-57.

the plaintiff's affidavit and her application for the insurance policy at issue for the other challenged paragraphs, other than 55-57. Motion to Strike at 3-4.

With respect to the latter alleged source of contradictions, the defendant relies on a statement apparently included in the plaintiff's insurance application form, directly above her signature. *Id.* at 2. However, that statement is not included in the defendant's statement of material facts.⁴ This lack of cognizable evidence in support of the motion to strike is dispositive. Without any admissible evidence that the plaintiff did in fact sign an application that included such a statement, the court cannot proceed to construe its legal significance. Even if that were not the case, however, the rationale supporting exclusion of statements made in a party's affidavit submitted in connection with a motion for summary judgment when those statements contradict, without sufficient explanation, statements made by the party at deposition in the same action does not apply to contradictions between such an affidavit and statements made in an application for insurance well before litigation was initiated. The motion to strike the plaintiff's responses to paragraphs 4-5, 7-11, 16-17, 23, 26, 31, 33 and 35 of the defendant's statement of material facts is denied.

With respect to the statements in paragraphs 46-47 and 49, the plaintiff's responses are based on paragraphs 12-15 of her affidavit. Plaintiff's Responsive SMF ¶¶ 46-47, 49. In each of those paragraphs, the plaintiff offers an explanation for any apparent contradiction. Affidavit of Nancy Esancy ("Plaintiff's Aff.") (Docket No. 22) ¶¶ 12-15. Under *Torres*, the explanation need only be "satisfactory." 219 F.3d at 20. The explanations offered here, which may or may not convince a jury, are satisfactory for purposes of

⁴ A copy of the application is attached to the affidavit of Tina Manning (Docket No. 15) as Exhibit C. The first citation to that document by the defendant is found in the body of its motion for summary judgment. Defendant's Memorandum of Law in Support of Motions for Judgment on the Pleadings and for Summary Judgment ("Memorandum") (Docket No. 17) at 19.

summary judgment. Further evaluation of those explanations would require the court to judge the plaintiff's credibility, an exercise that may not be undertaken in connection with a motion for summary judgment. The motion to strike paragraphs 46-47 and 49 of the plaintiff's response to the defendant's statement of material facts is denied. Because the motion to strike paragraphs 55-57 is based on the arguments made with respect to paragraphs already discussed, the motion to strike those paragraphs must be denied as well.

B. Allegedly Immaterial Responses

The defendant contends that the plaintiff's qualifications, offered in response to the following paragraphs of its statement of material facts, are immaterial and therefore should be stricken: 14-15, 24-25, 34, 39, 47 and 55-57. Motion to Strike at 5. The defendant's argument is (i) that these qualifications — with the exception of the responses to paragraphs 55-57, where the motion is again based on the incorporation into those responses of the plaintiff's responses to the other paragraphs at issue — are immaterial because they assert that the plaintiff did not know or remember additional information that was omitted from her insurance application, (ii) that the omission of such information from the application constituted a misrepresentation or falsity because it rendered the application incomplete, and (iii) that even unintentional misrepresentations in an application allow the insurer deny coverage, as a matter of law. *Id.* at 5-7. This essentially legal argument goes to the merits of the motion for summary judgment; it does not provide an appropriate ground for striking the qualifications presented in these paragraphs of the plaintiff's response to the defendant's statement of material facts. Whether the omissions in the plaintiff's application were "[m]aterial . . . to the acceptance of the risk, or to the hazard assumed by the insurer," 24-A M.R.S.A. § 2411(2), is a question to be decided in this action and not one that may be avoided by the simple expedient of striking from the record any factual assertions made with respect to the issue before the

substance of the question is considered. Nothing in the case law cited by the defendant requires a different outcome. The motion to strike the plaintiff's qualification responses to paragraphs 14-14, 24-25, 34, 39, 47 and 55-57 on the ground of materiality is denied.

C. Allegedly Unsupported Responses

The defendant contends that the plaintiff's denials of the following paragraphs of its statement of material facts are not supported by a proper reference to the summary judgment record and accordingly should be stricken under this court's Local Rule 56: 27, 32-35, 39 and 55-57. Motion to Strike at 8-10. Again, the motion to strike paragraphs 55-57 is based solely on the assertion that the other listed denials, incorporated into the denials of paragraphs 55-57 by reference, should be stricken.

With the exception of the phrase "including the information not provided by Plaintiff," paragraph 27 of the defendant's statement of material facts is not controverted by the plaintiff's purported denial. Defendant's Statement of Uncontested Material Facts In Support of Motion for Summary Judgment ("Defendant's SMF") (Docket No. 14) ¶ 27; Plaintiff's Responsive SMF ¶ 27. The plaintiff's denial of all other portions of the paragraph is accordingly stricken. The defendant does not challenge that portion of the plaintiff's response that is presented as a qualification, however, and I accordingly will not strike that portion of the response.

The defendant contends that the plaintiff's denial of its assertion that all of the information requested in the application for the insurance policy at issue is material to the defendant's decision to issue a policy, Defendant's SMF ¶ 32,⁵ Plaintiff's Responsive SMF ¶ 32, is not properly supported, Motion to Strike at 9. Because this is an issue of law not appropriate for inclusion in a statement of material facts, as noted by the

⁵ Mistakenly identified in the motion as paragraph 31. Motion to Strike at 9.

plaintiff in her response, Plaintiff's Responsive SMF ¶ 32, the motion to strike the plaintiff's response is denied.

The defendant characterizes paragraphs 33-35 of its statement of material facts as assertions that if the plaintiff had provided certain information on the application for the insurance policy at issue it would not have approved coverage. Motion to Strike at 9. However, each of these assertions is predicated on an assumption that the plaintiff did not provide this information. That characterization is accurate only if the application form, which is not part of the record on which the

motion to strike is based, does not include this information and if the plaintiff's assertion that she provided most of this information to the agent who failed to include it in the application, Plaintiff's Responsive SMF ¶¶ 33-35, is deemed irrelevant. The defendant does not base its motion to strike on the alleged irrelevance of this assertion. The implied characterization of the application form cannot be substantiated on the record currently before the court. Under these circumstances the motion to strike the plaintiff's responses to paragraphs 33-35 must be denied.

Paragraph 39 of the defendant's statement of material facts asserts that the employee who decided to cancel the plaintiff's policy did not rely on the information not included in her application in making that decision. Were the statement to stop there, the defendant would be correct in its assertion that the plaintiff's denial is non-responsive. However, paragraph 39 goes on to assert that this employee was unaware of that information "as a result of Plaintiff's failure to provide that information to" the agent who filled out the application. Defendant's SMF ¶ 39. The plaintiff's denial does respond to this portion of the paragraph. Plaintiff's Responsive SMF ¶ 39. The plaintiff's denial of the initial portion of the assertion is not supported by any record citations and will be disregarded to that extent, but the motion to strike the entire response is denied.

II. Motion for Judgment on the Pleadings

The defendant seeks judgment on the pleadings on Counts IV and VI of the complaint. Defendant's Motion for Judgment on the Pleadings and for Summary Judgment ("Motion") (Docket No. 13) at 1. These counts assert claims for negligent infliction of emotional distress and punitive damages, respectively. Complaint (Docket No. 1-2) ¶¶ 27-30, 34-38. The defendant contends that this is an action for breach of contract, in which damages for emotional distress are not available, and that punitive damages are not available because (i) the claim for negligent infliction of emotional distress will not lie, (ii) punitive

damages may not be recovered based on a claim of negligent (as distinct from intentional) infliction of emotional distress, and (iii) such damages are not available in connection with a cause of action based on denial of an insurance claim. Memorandum at 11-15. The plaintiff responds, without citation to authority, that her claim for negligent infliction of emotional distress arises not out of the defendant's alleged breach of the insurance contract but rather out of its breach of its statutory duties set forth at 24-A M.R.S.A. § 2436-A.⁶ Plaintiff's Memorandum of Law in Opposition to Defendant's Motions for Judgment on the Pleadings and for Summary Judgment ("Opposition"), filed with Plaintiff's Response to Defendant's Motion for Judgment on the Pleadings and for Summary Judgment (Docket No. 21), at [4]-[5]. The plaintiff does not respond to the defendant's arguments concerning her demand for punitive damages.⁷

A. Applicable Legal Standard

A motion for judgment on the pleadings is governed by Fed. R. Civ. P. 12(c). The First Circuit has articulated the applicable standard for evaluating such a motion as follows:

[B]ecause rendition of judgment in such an abrupt fashion represents an extremely early assessment of the merits of the case, the trial court must accept all of the nonmovant's well-pleaded factual averments as true and draw all reasonable inferences in [its] favor. . . . [T]he court may not grant a defendant's Rule 12(c) motion "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief."

Rivera-Gomez v. de Castro, 843 F.2d 631, 635 (1st Cir. 1988) (citations omitted). *See also Lovell v. One Bancorp*, 690 F. Supp. 1090, 1096 (D. Me. 1988) (on motion for judgment on pleadings, factual allegations in complaint must be taken as true and legal claims assessed in light most favorable to plaintiff;

⁶ Incorrectly cited in the plaintiff's memorandum of law as 24-A M.R.S.A. § 2436(a). Opposition at [4].

⁷ The plaintiff's entire discussion of the motion to dismiss Count VI follows: "[F]or the same reasons the negligent infliction of emotional distress claim should not be thrown out, it is the Plaintiff's position that Defendant's Motion for Judgment on the Pleadings on Count VI should also not be thrown out." Memorandum at [5]. Whether a negligence claim may be based on violation of a statute has nothing to do with the question whether punitive damages are available (*continued on next page*)

judgment warranted only if there are no genuine issues of material fact and moving party establishes that it is entitled to judgment as matter of law).

When a party seeking judgment on the pleadings submits materials in addition to the pleadings, it is within the court's discretion whether to consider those materials, thereby transforming the motion into one for summary judgment by operation of Fed. R. Civ. P. 12(c). *Snyder v. Talbot*, 836 F. Supp. 19, 21 n.3 (D. Me. 1993) (motion to dismiss under Rule 12(b)(6); language in rule concerning conversion to summary judgment identical); *see also Collier v. City of Chicopee*, 158 F.3d 601, 602-03 (1st Cir. 1998). The court may choose to ignore the supplementary materials and determine the motion under Rule 12. *Garita Hotel Ltd. Partnership v. Ponce Fed. Bank, F.S.B.*, 958 F.2d 15, 18-19 (1st Cir. 1992). Neither party has invited the court in this case to consult the summary judgment materials in connection with the motion for judgment on the pleadings and I therefore will not do so.

B. Factual Background

The complaint includes the following factual allegations relevant to consideration of Counts IV and VI. The parties entered into a contract whereby the defendant provided homeowner's insurance for the plaintiff's residence and property in Washington, Maine, effective from September 25, 2001 to September 25, 2002. Complaint ¶¶ 5-7. On or about December 12, 2001 the plaintiff's residence and property were damaged by fire, a covered occurrence under the insurance policy. *Id.* ¶ 8. The defendant has failed to pay the plaintiff monies owed under the insurance contract. *Id.* ¶¶ 11-12. The defendant has certain statutory duties as the plaintiff's insurer, which it has breached. *Id.* ¶¶ 18-20. These failures to act "constituted

on such a claim. The plaintiff can only be deemed to have waived opposition to the motion with respect to Count VI.

negligent behavior” which caused the plaintiff severe emotional distress. *Id.* ¶¶ 28-30. The defendant acted deliberately, with malice and ill will toward the plaintiff. *Id.* ¶¶ 35-38.

C. Discussion

In *Marquis v. Farm Family Mut. Ins. Co.*, 628 A.2d 644 (Me. 1993), the Maine Law Court held that damages for emotional distress are not available in an action for breach of an insurance contract. *Id.* at 651; *see also Gayer v. Bath Iron Works Corp.*, 687 A.2d 617, 621 n.3 (Me. 1996). In order to state a claim for infliction of emotional distress, the plaintiff must allege tortious conduct independent of and beyond the denial of her insurance claim. *Colford v. Chubb Life Ins. Co. of Am.*, 687 A.2d 609, 616 (Me. 1996). None of the factual allegations in the complaint can reasonably be construed to allege actions by the defendant that “arose independently of its denial of the [insurance] claim[and] were . . . recklessly inflicted.” *Id.* at 617.

Each of the acts of an insurer set forth in 24-A M.R.S.A. § 2436-A as giving rise to a cause of action by an insured that might be applicable to the facts alleged in the complaint arises from the defendant’s denial of the plaintiff’s claim for coverage. Even if that were not the case, to allow an insured to avoid the impact of *Marquis* merely by alleging violation of section 2436-A would be to deprive *Marquis* of any practical effect because any insured whose claim was denied could allege a violation of the statute. The Law Court has not held that violation of section 2436-A constitutes negligence, nor is it likely to do so. *See Binette v. Dyer Library Ass’n*, 688 A.2d 898, 904 (Me. 1996) (“Maine does not recognize the doctrine of negligence *per se* . . .”). The defendant’s motion for judgment on the pleadings on Count IV should be granted.

In the unlikely event that the plaintiff is deemed to have adequately presented her opposition to the motion for judgment on the pleadings with respect to Count VI, I note that punitive damages are not

available for breach of contract. *Drinkwater v. Patten Realty Corp.*, 563 A.2d 772, 776-77 (Me. 1989). If the court adopts my recommendation with respect to Count IV, no cause of action sounding in tort remains in this action, and the defendant accordingly is entitled to judgment on the pleadings on Count VI as well.

III. Motion for Summary Judgment

The defendant moves for summary judgment on the remaining counts of the complaint (Counts I and II) and Count II of its counterclaim. Motion at 1.

A. Applicable Legal Standard

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.’” *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

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. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must “produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue.” *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir.

1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). “As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party.” *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

B. Factual Background

The following material facts are appropriately presented in the summary judgment record.

The plaintiff met with insurance agent Debbie Heal at the Allen Agency in September 2001 in order to obtain an insurance policy. Defendant’s SMF ¶¶ 2-3; Plaintiff’s Responsive SMF ¶¶ 2-3. Heal met with the plaintiff and completed an application. *Id.* ¶ 4. Tina Manning, an underwriter employed by the defendant, was personally involved in underwriting the plaintiff’s application. *Id.* ¶ 19. It was necessary for the defendant to give its prior approval to the agency before it could bind coverage in favor of the plaintiff. *Id.* On September 18, 2001 Manning received a telephone call from Heal inquiring whether the defendant would issue a homeowner’s insurance policy to the plaintiff. *Id.* ¶ 22. During this conversation, Heal told Manning that the plaintiff had said that (i) she did not have any dogs; (ii) her previous homeowner’s policy had been canceled because she did not replace certain shingles on her residence; and (iii) she had not had any bankruptcies, foreclosures or repossessions within the prior five years. *Id.* ¶¶ 23-24, 26.

At the time Manning granted authorization for the issuance of a binder in favor of the plaintiff, she informed Heal that the defendant would require a signed and completed application verifying the information that had been furnished over the telephone. *Id.* ¶ 28. The plaintiff signed the application on September 25, 2001. *Id.* ¶ 29. The written application confirmed the information reported to Manning by Heal during the September 18 telephone call. *Id.* ¶ 31. The defendant issued its policy numbered HO 1 2 18 50 44 (“the

policy”) to the plaintiff effective September 25, 2001, providing coverage for the residence premises and contents located at 86 Mountain Road, Washington, Maine. *Id.* ¶ 1.

On October 17, 2001 Manning authorized the issuance of a notice of cancellation of the policy. *Id.* ¶ 36. She made this authorization based on photographs of the property that revealed that the general condition of the property did not meet underwriting criteria in that the building lacked a full masonry foundation and there was insufficient upkeep of the property. *Id.* ¶ 37. In making this authorization Manning did not rely on the absence of any information from the plaintiff’s application for the insurance policy. *Id.* ¶ 38.

Elaine Bedard is the supervisor who handled the plaintiff’s claim for coverage as a result of a fire at the Mountain Road property on December 12, 2001. *Id.* ¶ 40. As part of the claims adjustment process, the defendant asked the plaintiff to submit her claim in the form of a document entitled Sworn Statement in Proof of Loss and an inventory of all items of personal property for which she wished to make a claim. *Id.* ¶¶ 41-42. The inventory was to include a description of each item of personal property, the date on which it was acquired, its cost and the method by which payment was made for it. *Id.* ¶ 42. The plaintiff submitted an inventory containing some of the requested information. *Id.* ¶ 43.

In connection with the adjustment of this claim, Bedard reviewed the plaintiff’s application for the insurance policy and requested that the plaintiff be examined under oath, after which she reviewed the transcript of that examination. *Id.* ¶¶ 44-45. The defendant denied the plaintiff’s claim for benefits under the policy by way of a letter signed by Bedard. *Id.* ¶ 54. The defendant denied the claim in part because the plaintiff made false statements at the time she procured the policy and at the time she made her claim. *Id.* ¶ 55. At the plaintiff’s request, the defendant made advance payments to the plaintiff while her claim was being investigated in the total amount of \$8,350. *Id.* ¶¶ 58-59.

C. Discussion

1. *Counts I and II.* Count I of the complaint alleges breach of the insurance contract. Complaint ¶¶ 4-14. Count II alleges violation of 24-A M.R.S.A. § 2436-A. *Id.* ¶¶ 15-21. The plaintiff does not contest, Opposition at [5]-[9], the defendant's assertion, Memorandum at 16 n.2, that, as pleaded, the two counts should be analyzed under the same legal standard. I will therefore proceed on that basis.

The defendant contends that the plaintiff made false statements in her application for the insurance policy and in her claim under the policy that were material to the insurance and that it is accordingly relieved of liability under the policy. *Id.* at 15-22. Maine law provides that

[a]ll statements and descriptions in any application for insurance . . . , by or in behalf of the insured . . . , are deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts and incorrect statements may not prevent a recovery under the policy or contract unless either:

1. Fraudulent; or

2. Material either to the acceptance of the risk, or to the hazard assumed by the insurer, such that the insurer in good faith would either not have issued the insurance or contract, or would not have issued it at the same premium rate, or would not have issued insurance in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.

24-A M.R.S.A. § 2411. The defendant relies, Motion at 16, on a provision of the insurance contract that excludes coverage when the insured "before or after a loss . . . made false statements[] relating to this insurance," Defendant's SMF ¶ 1. However, that disclaimer cannot override the statutory provision, which is part of the contract under Maine law. *Marchiori v. American Republic Ins. Co.*, 662 A.2d 932, 935 (Me. 1995).

The defendant does not contend that the misrepresentations and omissions at issue were fraudulent.

It relies on the following alleged misrepresentations and omissions:

- (i) the application form falsely stated that the plaintiff did not own dogs;
- (ii) the plaintiff falsely stated to the agent who filled out the application that she had not suffered any repossessions within the prior five years;
- (iii) the plaintiff “supplied false information, by omission” by failing to tell the agent that a prior policy was cancelled due to information in her credit report, as well as her failure to complete certain repair work in a timely fashion, which she did report to the agent;
- (iv) in the claim she submitted under the policy, the plaintiff falsely stated that she had bought a gun cabinet, water bed, box spring mattress, electric blanket and rifle in 2001. Memorandum at 17-21.⁸

The defendant offers Manning’s affidavit as evidence of the materiality of these alleged misrepresentations. Defendant’s SMF ¶¶ 32-35. Manning states that she would not have “granted prior approval to . . . bind coverage in favor of Plaintiff” if the plaintiff had “provided accurate information regarding her ownership of dogs,” if the plaintiff had “provided accurate information regarding all of the reasons for her prior cancellation of insurance,” or if the plaintiff had “provided accurate information regarding the repossession of her vehicle within five years prior to the date of the application.” *Id.* ¶¶ 33-35; Affidavit of Tina Manning (Docket No. 15) ¶ 24.

Assuming *arguendo* that not granting prior approval to bind coverage is the equivalent of not issuing the insurance, which is the statutory criterion, the plaintiff has effectively disputed two of these three assertions. The paragraph of the defendant’s statement of material facts on which it relies with respect to

⁸ The defendant initially relied as well on an assertion that the plaintiff falsely stated in her claim under the policy that she
(continued on next page)

the first assertion, Memorandum at 17, asserts that the plaintiff told the agent that she did not have any pets, Defendant's SMF ¶ 9. The plaintiff's denial, properly supported, states that she in fact told the agent "that she had pets and what those pets were." Plaintiff's Responsive SMF ¶ 9. Accordingly, the defendant cannot rely on this alleged misrepresentation to avoid liability.⁹ The third assertion is apparently based on paragraphs 13 and 14 of the defendant's statement of material facts, which assert that the plaintiff told the agent that her prior policy had been cancelled because she failed to complete some repair work in a timely fashion and that she did not tell the agent that another reason for the cancellation was information in her credit report. Defendant's SMF ¶¶ 13-14. However, the plaintiff has offered evidence, appropriately supported, that she "did not know nor remember that there were any other reasons for the cancellation" at the time the agent asked her the relevant application question. Plaintiff's Responsive SMF ¶ 14. If the defendant did not know about any other reason, she could not possibly have knowingly failed to report that information to the agent. Reading this response as required by the legal standard for summary judgment, I can only conclude that the basic material fact on which the defendant relies in this regard is disputed.

The second assertion, and the last assertion arising in connection with the issuance of the policy on which the defendant relies, is that the plaintiff failed to inform the agent that a vehicle had been repossessed from her within the previous five years. The plaintiff denies, with appropriate evidentiary support, that the

purchased ten compact discs in 2000 and a VCR and stereo with CD player in 2001. The defendant withdrew its reliance on these assertions in its reply memorandum. Defendant's Reply Memorandum, etc. (Docket No. 27) at 6 n.3.

⁹ To the extent that the defendant relies instead on the plaintiff's signature on the application form and the printed statement immediately preceding it, Memorandum at 17, I have previously noted that this portion of the application form is not included in the defendant's statement of material facts. In addition, the Law Court has held that an agent's knowledge is imputed to the insurer, even when an insured has signed an application containing language sufficiently similar to that on which the defendant relies in this case to require the same result here. *Marchiori*, 662 A.2d at 933-35.

agent ever asked her this question. Plaintiff's Responsive SMF ¶ 11. This is sufficient to create a dispute of material fact.¹⁰

Having determined that the defendant has failed to establish as a matter of law that any of the alleged misrepresentations made in connection with the insurance application entitles it to avoid liability, I turn to the specific assertions made by the defendant in connection with the plaintiff's claim for benefits under the policy. Section 2411 applies only to statements made in an application for insurance and is not relevant to consideration of this argument. The "misrepresentation" at issue is apparently only the year in which the plaintiff stated the five items were acquired. The plaintiff stated that each was acquired in 2001 on the sworn claim form, Exh. B to Affidavit of Elaine Bedard ("Bedard Aff."), Defendant's SMF ¶ 41, and reaffirms that date in her responsive statement of material facts and supporting affidavit, Plaintiff's Responsive SMF ¶¶ 46-49; Plaintiff's Aff. ¶¶ 12-15. The only evidence in the summary judgment record that the date was "false" is the plaintiff's testimony at an examination under oath requested by the defendant, Defendant's SMF ¶ 45, Plaintiff's Responsive SMF ¶ 45, at which she "admitted" that "she did not purchase any furniture, bedroom furniture or bedding in the year 2001," and "admitted that she did not purchase any guns in the year 2001," *id.* ¶¶ 47, 49. For all that appears in the summary judgment record, the dates stated in the claim were not false at all; the only "misrepresentation" occurred during the plaintiff's testimony during the examination under oath. The plaintiff avers that she "simply got the years mixed up" and "thought that [the gun] had been purchased previous to that" at the time of the examination under oath. Plaintiff's Responsive SMF ¶¶ 47, 49. At best, the record presents a dispute of material fact concerning whether the plaintiff made "false statements" relating to the insurance that should allow the defendant to

¹⁰ Again, to the extent that the defendant contends that either the second or third alleged misrepresentations on which it
(*continued on next page*)

avoid any liability under the cited special provision of the insurance contract, Defendant's SMF ¶ 1, particularly when she had previously made statements with respect to the same items that were not false and the "false statements" were subsequently elicited by the insurer.

In addition, under Maine law, which is applicable in this case, "[i]nsurance contract conditions and exceptions are construed strictly against the insurer and liberally in favor of the insured." *Acadia Ins. Co. v. Mascis*, 776 A.2d 617, 620 (Me. 2001) (citation and internal quotation marks omitted). *See also National Sec. Fire & Cas. Co. v. Coshatt*, 690 So.2d 391, 394 (Ala. App. 1996) (insurance policy clause imposing forfeiture for misrepresentation to be strictly construed against drafter). Thus, despite the case law from other jurisdictions cited by the defendant, Memorandum at 17-18, it is not possible to conclude as a matter of law that Bedard's statements that the alleged false statements as to the years in which the five items were acquired were one of "two reasons for the denial of this claim," Defendant's SMF ¶¶ 55, 57, Bedard Aff. ¶¶ 11-12, establish that the defendant's interpretation of the exclusionary language in its policy is the only possible construction of that language, allowing the defendant to avoid all liability. *See generally Baker v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, 536 A.2d 1357, 1360 (Pa.Super. 1987) (accepting insured's explanation of apparent misrepresentations in claim submitted under homeowner's policy).

The defendant's motion for summary judgment on Counts I and II should be denied.

2. *Count II of the Counterclaim.* The defendant also seeks summary judgment on Count II of its counterclaim, which seeks recovery on a theory of unjust enrichment. Counterclaim (Docket No. 7) ¶¶ 31-36. The defendant argues that it is entitled to summary judgment on this claim, which concerns the payments it advanced to the plaintiff while it investigated her claim, because "[h]aving established that the

relies entitle it to avoid liability because they were included in the signed application, that contention must be rejected.
(continued on next page)

Plaintiff made numerous false statements relating to the insurance resulting in the denial of her claim, it would now be extraordinarily unfair and unjust to deny the Defendant the ability to recover payments that it made in good faith at a time when it did not know what the outcome of its investigation would be.” Memorandum at 26. The defendant offers no evidence of such allegedly false claims other than that discussed above in connection with its motion for summary judgment on the remaining counts in the complaint. I have concluded that the defendant is not entitled to summary judgment on those claims. Accordingly, the defendant is not entitled to summary judgment on Count II of its counterclaim based on the only argument it offers in support of its position.

IV. Conclusion

For the foregoing reasons,

(i) the defendant’s motion to strike is **GRANTED** with respect to (1) any purported denial of paragraph 27 of the defendant’s statement of material facts set forth in the plaintiff’s responsive statement of material facts other than a denial of the phrase “including information not provided by Plaintiff,” but not as to any qualification set forth in that response; and (2) any purported denial set forth by the plaintiff in her responsive statement of material facts to that portion of paragraph 39 of the defendant’s statement of material facts which asserts that the employee of the defendant who decided to cancel the plaintiff’s policy did not rely on the information not included in the plaintiff’s application in making that decision, and otherwise **DENIED**;

(ii) I recommend that the defendant’s motion for judgment on the pleadings on Counts IV and VI of the complaint be **GRANTED**; and

See n. 8 above.

(iii) I recommend that the defendant's motion for summary judgment on Counts I and II of the complaint and Count II of the counterclaim 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 2nd day of October, 2003.

David M. Cohen
United States Magistrate Judge

Plaintiff

NANCY ESANCY

represented by **SEAN M. FARRIS**
FARRIS, HESELTON, LADD &
BOBROWIECKI, P.A.
P.O. BOX 120
GARDINER, ME 04345
207-582-3650
Email: smfarris@farrislaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

**VERMONT MUTUAL
INSURANCE COMPANY**

represented by **PETER T. MARCHESI**
WHEELER & AREY, P.A.
27 TEMPLE STREET
P. O. BOX 376
WATERVILLE, ME 04901
873-7771
Email: pbear@wheelerlegal.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Counter Claimant

**VERMONT MUTUAL
INSURANCE COMPANY**

represented by **PETER T. MARCHESI**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Counter Defendant

NANCY ESANCY

represented by **SEAN M. FARRIS**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED