

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

**JEFFERSON INSURANCE COMPANY)
OF NEW YORK,)**

Plaintiff)

v.)

MAINE OFFSHORE BOATS, INC.,¹)

Docket No. 01-44-P-H

Defendant/Third-Party)

Plaintiff)

v.)

PERFORMANCE MARINE)

ASSOCIATES INSURANCE SERVICES,)

INC.,)

Third-Party Defendant)

**RECOMMENDED DECISION ON PLAINTIFF’S MOTION FOR
SUMMARY JUDGMENT AND THIRD-PARTY DEFENDANT’S MOTION
FOR PARTIAL SUMMARY JUDGMENT**

The plaintiff, Jefferson Insurance Company of New York (“Jefferson”), moves for summary judgment in this action arising out of a marine insurance coverage dispute. The third-party defendant, Performance Marine Associates Insurance Services, Inc. (“Performance”), moves for partial summary judgment on the defendant’s complaint against it. I recommend that the court grant the plaintiff’s motion in part and deny the third-party defendant’s motion.

¹ Daniel G. Lilley, originally named as a defendant, has been dismissed by agreement of the parties. Report of Pretrial Conference and Order (“R&FPTO”) (Docket No. 50) at 2 n.1.

I. Summary Judgment 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’” *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). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The summary judgment record includes the following material undisputed facts appropriately supported by citations in the parties’ respective statements of material fact as required by this court’s Local Rule 56.

Daniel G. Lilley is the principal in defendant Maine Offshore Boats, Inc., which is the sole owner of the 1989 cigarette boat “Defender II,” the subject of this litigation. Plaintiff’s Statement of Undisputed Material Facts in Support of Motion for Summary Judgment (“Plaintiff’s SMF”) (Docket No. 34) ¶ 1;² Third Party Defendant’s Reply to Plaintiff’s Statement of Material Facts in Support of Motion for Summary Judgment (“Performance’s Responsive SMF”) (Docket No. 41) ¶ 1; R&FPTO at 2 n.1. Raymond Fyhrie is the president of Performance, a company based in Fort Lauderdale, Florida, that deals specifically with marine insurance for clients throughout the United States primarily involving high-performance boats. Plaintiff’s SMF ¶ 2;³ Performance’s Responsive SMF ¶ 2. Fyhrie is licensed by the state of Florida to sell insurance. *Id.*

In mid-1996 or 1997 Lilley contacted Fyhrie regarding marine insurance for a racing boat that he owned (not Defender II), and Fyhrie obtained insurance for the boat with a company other than Jefferson. *Id.* ¶ 3. In December 1998 Lilley contacted Fyhrie in order to obtain marine insurance for Defender II. *Id.* ¶ 4; Third Party Defendant Performance Marine Associates Insurance Services, Inc.’s Statement of Material Facts in Support of Motion for Partial Summary Judgment (“Performance’s SMF”) (Docket No. 36) ¶ 4.⁴ Lilley expressed concern that there would be coverage for the boat’s mechanicals such as engines and outdrives. Plaintiff’s SMF ¶ 4; Performance’s Responsive SMF ¶ 4.

² Defendants/Counterclaimants’ Statement of Disputed Material Facts (“Defendant’s Responsive SMF”) (Docket No. 38) includes no reference to this or several other paragraphs of the plaintiff’s statement of material facts. In accordance with Local Rule 56(e), the defendant is deemed to have admitted the substance of each such paragraph. This footnote will not be repeated each time such an admission has been made; the absence of a reference to the defendant’s responsive statement of material facts will indicate that the defendant is deemed to have admitted the stated fact and that the court has determined that the citation to the summary judgment record given by the plaintiff appropriately supports the factual assertion.

³ The defendant lists five paragraphs of its responsive statement of material facts as “directly controvert[ing]” this paragraph of the plaintiff’s statement of material facts. Defendant’s Responsive SMF ¶¶ 5, 13, 23, 47, 48. This response must be deemed a denial rather than a qualification, as must all of the defendant’s responses because they are so presented. None of the paragraphs identified by the defendant supports a denial of the information stated in this sentence of my recommended decision.

⁴ Defendants/Third Party Plaintiffs’ Statement of Disputed Material Facts (“Defendant’s Second Responsive SMF”) (Docket No. 43) includes no reference to this or several other paragraphs of Performance’s statement of material facts. These paragraphs will be deemed to be admitted on the same basis described in footnote 2 above with respect to Defendant’s Responsive SMF.

On December 23, 1998 Lilley received documents from Fyhrie via fax. *Id.* ¶ 5.⁵ These documents included a “quote letter” showing coverages, pricing and options. *Id.* ¶ 6. Also included was a “highlight sheet,” created by Fyhrie. *Id.* ¶ 7. This highlight sheet included the following language: “Underwater damage to the vessel’s machinery (props, shafts, drives, et cetera) is covered, subject to the boat’s age, the policy’s wording and the hull deductible.” Performance’s SMF ¶ 7.⁶ Lilley’s signature appears on the highlight sheet and an application for marine insurance coverage dated December 23, 1998. Plaintiff’s SMF ¶ 9; Performance’s Responsive SMF ¶ 9. Performance admits that the application submitted by the plaintiff with its statement of material facts is a correct copy of the application signed by Lilley, Performance’s Responsive SMF ¶¶ 8-9, but the defendant contends that it is “not accurate,” offering a different application with its statement of material facts, Defendant’s Responsive SMF ¶ 1.

Fyhrie obtained a quote and then a policy of marine insurance from Jefferson with an effective date of December 24, 1998. Plaintiffs’ SMF ¶ 11; Performance’s Responsive SMF ¶ 11.⁷ In December 1998 Jefferson had a contractual relationship with a managing general agent, the Monitor Company, which was authorized to bind and issue policies of marine insurance on behalf of Jefferson. Plaintiff’s SMF ¶ 12; Performance’s Responsive SMF ¶ 12.⁸ Monitor issued quotes to insurance brokers and agents such as Fyhrie and Performance. *Id.* ¶ 13.⁹ Monitor, now known as Extreme Marine Specialties, works through a network of brokers to generate business for Jefferson. Third

⁵ The defendant denies this paragraph of the plaintiff’s statement of material facts, but neither of the two paragraphs cited in its response supports the denial. Defendant’s Responsive SMF ¶¶ 8-9.

⁶ The defendant denies this paragraph of Performance’s statement of material facts, but none of the eleven paragraphs cited in its response supports the denial. Defendant’s Second Responsive SMF ¶¶ 2-8, 14-16, 19.

⁷ The defendant denies this paragraph of the plaintiff’s statement of material facts, but none of the six paragraphs of the defendant’s responsive statement identified for this purpose actually supports a denial. Defendant’s Responsive SMF ¶¶ 7-9, 13, 19, 46.

⁸ The defendant denies this paragraph of the plaintiff’s statement of material facts, but none of the nine paragraphs of the defendant’s responsive statement identified for this purpose actually supports a denial. Defendant’s Responsive SMF ¶¶ 8-9, 13, 19, 23, 43-46.

⁹ The defendant denies this paragraph of the plaintiff’s statement of material facts, but none of the eleven paragraphs of the defendant’s responsive statement identified for this purpose actually supports a denial. Defendant’s Responsive SMF ¶¶ 8-9, 13, 19, 23, 43-48.

Party Defendant's Statement of Material Facts in Support of its Objection to Plaintiff's Motion for Summary Judgment ("Performance's Opposing SMF") (Docket No. 40) ¶¶ 1-2.¹⁰ According to the written "producer's agreement" between Monitor and Performance, Monitor makes its facilities available to brokers such as Performance to place insurance. Plaintiff's SMF ¶¶ 15-16; Performance's Responsive SMF ¶¶ 15-16.¹¹ Performance may not give out quotations on marine insurance coverage until it receives written notice from Monitor of the terms and conditions of each such presentation. *Id.* at 16. The agreement also states that the broker has no authority to bind or quote business on behalf of Monitor. *Id.* at 17. Fyhrie testified that his authority on behalf of Jefferson was to ask them to issue him a quote through Monitor. *Id.* ¶ 18 [first].¹² Jefferson does not have direct dealings with its insureds; it relies on brokers, or producers, to do so and to gather necessary information from prospective insureds. Performance's Opposing SMF ¶ 4.

Fyhrie and Performance had access to and could have sought marine insurance coverage for Lilley with insurance companies other than Jefferson. Plaintiff's SMF ¶ 18 [second]; Performance's Responsive SMF ¶ 18 [sic].¹³ Lilley made out his checks for the insurance premiums to Performance. Performance's Opposing SMF ¶ 6.

¹⁰ Neither the plaintiff nor the defendant filed a response to this statement of material facts. Pursuant to Local Rule 56(e), therefore, each paragraph is deemed admitted to the extent supported by the citation given.

¹¹ The defendant denies these paragraphs of the plaintiff's statement of material facts, but none of the eleven paragraphs of the defendant's responsive statement identified for this purpose actually supports a denial. Defendant's Responsive SMF ¶¶ 8-9, 13, 19, 23, 43-48.

¹² The defendant denies this paragraph of the plaintiff's statement of material facts, but none of the twelve paragraphs of the defendant's responsive statement identified for this purpose actually supports a denial. Defendant's Responsive SMF ¶¶ 8-9, 13, 19, 23, 35, 43-48.

¹³ The defendant denies this paragraph of the plaintiff's statement of material facts, but none of the twelve paragraphs of the defendant's responsive statement identified for this purpose actually supports a denial. Defendant's Responsive SMF ¶¶ 8-9, 13, 19, 23, 35, 43-48.

Lilley received the declarations page and policy language for Jefferson's policy number JW293458. Plaintiff's SMF ¶ 21; Performance's Responsive SMF ¶ 21.¹⁴ Policy No. JW293458 included the following provision:

EXCLUSIONS — The following losses and consequences thereof are not covered by this policy.

* * *

e). With regard to vessels over 10 years of age, damage to electrical and/or mechanical equipment including but not restricted to engine, shaft, propeller, rudder, skeg and outdrive, unless caused by:

- i. Fire or lightning;
- ii. Explosion from outside such equipment;
- iii. Collision with another vessel; or
- iv. Sinking of the insured vessel due to a peril insured against.

Id. ¶ 20.¹⁵ On or about December 24, 1999 Jefferson's policy number JW293458 was renewed, to provide coverage through December 24, 2000. *Id.* ¶ 22.¹⁶ At the time of renewal, Fyhrie sent Lilley a letter dated December 16, 1999 offering to renew the policy, along with another highlight sheet. *Id.* ¶¶ 22-23. Both the renewal letter and the highlight sheet were signed and returned by Lilley. *Id.* ¶¶ 24-25.¹⁷

The highlight sheet sent in 1999 differs from the highlight sheet sent in 1998 in several respects. *Id.* ¶ 27.¹⁸ Fyhrie decided to add a provision to the highlight sheet that did not appear in the document that was sent to Lilley the previous year. *Id.* ¶ 28.¹⁹ This provision read:

¹⁴ The defendant denies this paragraph of the plaintiff's statement of material facts, but neither of the two paragraphs of the defendant's responsive statement identified for this purpose actually supports a denial. Indeed, one of the paragraphs actually supports a portion of the plaintiff's statement not material for purposes of the motion and accordingly not quoted here. Defendant's Responsive SMF ¶¶ 21, 23.

¹⁵ The defendant denies this paragraph of the plaintiff's statement of material facts, but none of the twenty paragraphs of the defendant's responsive statement identified for this purpose actually supports a denial. Defendant's Responsive SMF ¶¶ 7-9, 13, 23-30, 32-39.

¹⁶ The defendant denies this paragraph of the plaintiff's statement of material facts, but none of the four paragraphs of the defendant's responsive statement identified for this purpose actually supports a denial. Defendant's Responsive SMF ¶¶ 8-9, 13, 23.

¹⁷ The defendant denies these paragraphs of the plaintiff's statement of material facts, but none of the three paragraphs of the defendant's responsive statement identified for this purpose actually supports a denial. Defendant's Responsive SMF ¶¶ 21, 23, 42.

¹⁸ The defendant denies this paragraph of the plaintiff's statement of material facts, but none of the twenty-two paragraphs of the defendant's responsive statement identified for this purpose actually supports a denial. Defendant's Responsive SMF ¶¶ 7-8, 11-12, (continued on next page)

8. Vessels and equipment over 10 years of age are subject to restricted coverage on mechanical and electrical systems. See policy for exact wording and specific details.

Id. Fyhrie was familiar with the restrictive language in Jefferson's policy pertaining to coverage for engines, outdrives, propellers and electrical equipment when the vessel was more than ten years old, and he was aware that this provision focused on the age of the vessel and was not related to the age of the equipment. *Id.* ¶ 30.²⁰ Lilley maintains that he failed to take note of the added provision in the 1999 highlight sheet. *Id.* ¶ 31.²¹

On December 23, 1998 Jefferson's policy number JW293458 would have provided coverage for an incident in which Lilley's vessel suffered damage to its engine, outdrives or propellers because the vessel was at that time less than ten years old. *Id.* ¶ 32.²² After a vessel passes the age of ten years there is no longer any coverage under the policy for damage to engine, outdrives or propellers unless the damage is attributable to one or more of the causes set forth in the policy, *i.e.*, fire, lightning, explosion, collision or sinking. *Id.* ¶ 33.²³ Performance could not procure an insurance policy covering the machinery on any boat with a hull over ten years old even if the machinery itself had been new. Performance's Opposing SMF ¶ 11.

18-21, 23-30, 32-34, 38-39, 42.

¹⁹ The defendant denies this paragraph of the plaintiff's statement of material facts, but none of the sixteen paragraphs of the defendant's responsive statement identified for this purpose actually supports a denial. Defendant's Responsive SMF ¶¶ 7-8, 11-12, 18-20, 23-30, 32

²⁰ The defendant denies this paragraph of the plaintiff's statement of material facts, but none of the sixteen paragraphs of the defendant's responsive statement identified for this purpose actually supports a denial. Defendant's Responsive SMF ¶¶ 7-8, 11-12, 18-20, 23-30, 32.

²¹ The defendant denies this paragraph of the plaintiff's statement of material facts, but none of the eighteen paragraphs of the defendant's responsive statement identified for this purpose actually supports a denial. Defendant's Responsive SMF ¶¶ 7-8, 11-13, 18-21, 23-30, 32.

²² The defendant denies this paragraph of the plaintiff's statement of material facts, but the paragraph of the defendant's responsive statement identified for this purpose does not support the denial. Defendant's Responsive SMF ¶ 42.

²³ The defendant denies this paragraph of the plaintiff's statement of material facts, but none of the sixteen paragraphs of the defendant's responsive statement identified for this purpose actually supports a denial. Defendant's Responsive SMF ¶¶ 7-8, 12-13, 19, 21, 25-30, 32-34, 36-39, 42.

Lilley testified that he was operating his vessel in a cove near Cape Elizabeth, Maine on July 17, 2000, at approximately 4:00 p.m., when it struck a rock or rocks, damaging both outdrives. Plaintiff's SMF ¶ 41; Performance's Responsive SMF ¶ 41. He subsequently submitted a claim to Performance for the costs of repairing the outdrives and engines. *Id.*; Performance's Opposing SMF ¶ 12. The vessel insured under Jefferson's policy number JW293458 was more than ten years old on July 17, 2000. Plaintiff's SMF ¶ 42; Performance's Responsive SMF ¶ 42.²⁴

III. Discussion

Jefferson seeks a declaratory judgment to the effect that its policy does not provide coverage for the damage caused to Lilley's boat on July 17, 2000. Complaint (Docket No. 1) at 7-8. It seeks summary judgment primarily on the grounds that Fyhrie was Lilley's agent, not Jefferson's agent, and that any assurances given to Lilley about coverage that contradict the policy language accordingly cannot provide the basis for coverage in spite of the policy language. Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment ("Jefferson's Motion"), submitted with Plaintiff's Motion for Summary Judgment (Docket No. 33), at 5-7. Performance seeks partial summary judgment, Third Party Defendant Performance Marine Associates Insurance Services Inc.'s Motion and [sic] for Partial Summary Judgment, etc. ("Performance Motion") (Docket No. 35) at 1-2, on Count III of the third-party complaint, which alleges fraud, Defendant's Answers [sic]; Counterclaims; Third-Party Complaint; and Request for Jury Trial (Docket No. 3) at 21-22.

A. Jefferson's Motion

Jefferson contends that the policy at issue clearly excludes coverage for the damage sustained by Lilley on July 17, 2000, and that it cannot be bound by any representations to the contrary alleged to have been made by Performance or Fyhrie. Jefferson's Motion at 10-17. The defendant argues briefly

²⁴ The defendant denies this paragraph of the plaintiff's statement of material facts, but none of the three paragraphs of the defendant's (continued on next page)

that the policy is ambiguous and thus must be interpreted to provide coverage, Defendant/Counterclaimant's Opposition to Plaintiff's Motion for Summary Judgment, etc. ("Defendant's Jefferson Opposition") (Docket No. 37) at 14-15, but devotes most of its memorandum of law to its assertion that Fyhrie and Performance were Jefferson's agents and accordingly bound Jefferson to provide coverage for this loss, *id.* at 6-14. Performance argues only that it had implied or apparent authority to act as Jefferson's agent. Third Party Defendant's Objection to Third Party Plaintiffs' [sic] Motion for Summary Judgment ("Performance's Opposition") (Docket No. 39) at 2.

I. Ambiguity. Insurance policy language that is ambiguous will be construed by the court in favor of the insured. *Foundation for Blood Research v. St. Paul Marine & Fire Ins. Co.*, 730 A.2d 175, 180 (Me. 1999). Whether a policy is ambiguous is a question of law. *Royal Ins. Co. v. Pinette*, 756 A.2d 520, 523 (Me. 2000). The defendants do not point to any specific language in the policy at issue here as being ambiguous, however. Instead, they argue that the circumstances under which the policy was obtained and the arguments presented by the parties about whether the exclusion upon which Jefferson relies should apply to Lilley's claim render the policy ambiguous. Defendant's Jefferson Opposition at 14-15. This argument evidences a fundamental misunderstanding of the nature of the ambiguity that allows a court to look beyond the language on the face of an insurance policy. It is that language itself, not extrinsic circumstances or legal arguments, which must be ambiguous in order for the court to find that coverage exists. *E.g., Pine Ridge Realty, Inc. v. Massachusetts Bay Ins. Co.*, 752 A.2d 595, 599-601 (Me. 2000). In this case, the language of the exclusion on which Jefferson relies, quoted above, is not reasonably susceptible of different interpretations, *Pinette*, 756 A.2d at 523; *see also Greenly v. Mariner Mgmt. Group, Inc.*, 192 F.3d 22, 26 (1st Cir. 1999) (construing Maine law), and accordingly coverage for Lilley's claim is clearly excluded by the policy.

responsive statement identified for this purpose actually supports a denial. Defendant's Responsive SMF ¶¶7, 12, 25.

2. *Agency*. The parties agree that Maine law determines whether Fyhrie and Performance were Jefferson's agents under the circumstances of this case. Jefferson's Motion at 10; Defendant's Jefferson Opposition at 4-5; Performance's Opposition at 5; *Greenly*, 192 F.3d at 26. The issue, of course, is whether Jefferson may be bound to provide coverage based on Fyhrie's alleged statements and agreements notwithstanding the language of the policy. Citing case law from other jurisdictions, *see, e.g., Certain Underwriters at Lloyds, London v. Giroire*, 27 F.Supp.2d 1306, 1313 (S.D. Fla. 1998), Jefferson contends that an independent insurance agent or broker that seeks insurance for clients in national or international marine insurance acts solely as the agent of the insured. Jefferson's Motion at 12. The defendant and Performance respond that Fyhrie and Performance had actual authority to act as Jefferson's agent as well as apparent authority and that they must be considered to have been Jefferson's agent by virtue of state statute. Defendant's Jefferson Opposition at 6-11; Performance's Opposition at 4-9.

a. Actual Authority

Under Maine law,

[a]gency is the fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. The relationship of agency, however, may be either "actual" or "apparent" in its derivation. Moreover, there are two types of *actual* authority — express authority or implied authority; both are to be distinguished from apparent authority.

Libby v. Concord Gen. Mut. Ins. Co., 452 A.2d 979, 981 (Me. 1982) (citations and some internal quotation marks omitted; emphasis in original). Here, the defendant and Performance have offered no evidence that would allow a factfinder to determine that Fyhrie or Performance had Jefferson's express authority to act as its agent. "Express authority is that authority which is directly granted to or conferred upon the agent in express terms by the principal." *Id.* (citation and internal quotation marks omitted). The defendant does not argue that Performance had express authority from Jefferson.

Performance contends that Jefferson's placing of Performance's name on the cover page of the policy at issue after the designation "Producer," Declarations Renewal, Jefferson Insurance Company of New York (effective 12/24/99), Exh. H to Plaintiff's SMF, is evidence of such an express authorization, Performance Opposition at 6, but it clearly is not. That designation merely recognizes that Performance generated the business represented by the policy and, perhaps, is entitled to a commission. It cannot reasonably be stretched to be considered evidence of an express granting of authority to Performance to bind Jefferson.

Implied authority

is actual authority circumstantially proven from the facts and circumstances attending the transaction in question. Such power may be implied or inferred from the words used, from customs and from the relations of the parties. Implied authority, therefore, like express authority, depends on a manifestation of consent *by the principal*, and goes to the perceptions of the *agent* not the third party.

Id. at 982 (citations and internal quotation marks omitted; emphasis in original). As evidence of the existence of implied authority, the defendant offers paragraphs 5, 7-12, 16, 18-20, 25, 27, 30 and 48 of its statement of material facts. Defendant's Jefferson Opposition at 9. None of these paragraphs goes to any manifestation of consent by Jefferson that could reasonably have been perceived by Performance as a grant of authority. It is particularly important to note that, contrary to the defendant's characterization, Performance does *not* "claim[] to be Jefferson's agent in its Answer to Maine Offshore's Complaint." *Id.* Even if the unsworn answer could serve as material of evidentiary quality for purposes of summary judgment, a dubious proposition at best, Performance's answer actually says that it "admit[s] that Performance Marine Associates Insurance Services, Inc. acted as an agent to provide Maine Offshore Boats, Inc. with a policy of marine insurance issued by Jefferson Insurance Company." Answer to Third Party Complaint (Docket No. 15) ¶ 7. There is a large and critical difference between acting as *an* insurance agent to procure insurance for a client and acting as an

insurer's agent in the sense of the legal theory of agency. The response could just as easily be interpreted to mean that Performance acted as the defendant's agent.

Performance contends that the producer agreement, Exhibit E to the plaintiff's statement of material facts, is evidence of its "understanding that at times it was serving as Jefferson's agent." Performance's Opposition at 7. To the contrary, that document, an agreement between Performance and Monitor (in its earlier incarnation as Merrimac Group of Florida) does not even mention Jefferson. While Performance has offered testimony that Monitor "works only with the Jefferson Insurance Company," Performance's Opposing SMF ¶ 2, that fact is not enough to make the agreement into evidence of a manifestation by Jefferson to Performance of consent to be bound by Performance as its agent. Indeed, the agreement specifically provides that Performance "has no authority to bind or quote business on behalf of MERRIMAC or it's [sic] Companies." Producer's Agreement, Exh. E to Plaintiff's SMF, ¶ 2.

Performance argues in the alternative, without citation to the record or to authority, that it had implied authority to act as Jefferson's agent because "Jefferson relied on [Performance] to obtain information from insureds, to request renewals, to process invoices and premium payments and to receive claims." Performance's Opposition at 7. Its statement of material facts states that Jefferson "relies on its brokers, or producers, to [have direct dealings with its insureds] and to gather necessary information from prospective insureds" and that "[w]ith regard to a claim, [Performance] serves as the initial contact on the claim." Performance's Opposing SMF ¶¶ 4, 13. There is thus no evidence in the summary judgment record to support Performance's assertion that Jefferson relied on it to request renewals or to process invoices and premium payments. In any event, such activities are not sufficient under Maine law to establish implied authority. *See Libby*, 452 A.2d at 981, 983.

b. Agency Created by Statute

The defendant contends, and Performance appears to suggest, that Maine insurance statutes applicable to the facts presented here make Performance Jefferson's agent for purposes of providing coverage. Defendant's Jefferson Opposition at 9-10; Performance's Opposition at 6. The statute at issue provides:

1. An agent authorized by an insurer, if the name of such agent is borne on the policy, is the insurer's agent in all matters of insurance. Any notice required to be given by the insured to the insurer or any of its officers may be given in writing to such agent.

2. The authorized agent of an insurer shall be regarded as in the place of the insurer in all respects regarding any insurance effected by him. The insurer is bound by his knowledge of the risk and all matters connected therewith. Omissions and misdescriptions known to the agent shall be regarded as known to the insurer and waived by it as if noted in the policy.

24-A M.R.S.A. § 2422. Essentially, the defendant and Performance contend that, because Performance's name appears on the declarations page of the policy at issue, this statute makes Performance Jefferson's agent and therefore, if Performance promised coverage beyond that provided by the policy, as the defendant contends, Jefferson may not rely on the policy exclusion and must pay the claim. Defendant's Jefferson Opposition at 10; Performance's Opposition at 6. This argument ignores the statutory language requiring the agent to be authorized by the insurer. If placing the name of the alleged agent on the face of the policy alone is enough to make the terms of the statute applicable, the requirement of authorization by the insurer is superfluous. It is a basic tenet of Maine law, and indeed of American law in general, that statutory language will not be read to be superfluous if a different reading is possible and reasonable. *Labbe v. Nissen Corp.*, 404 A.2d 564, 567 (Me. 1979). This is the situation here.

Jefferson's policy lists Performance as the "producer" of the policy. The parties do not cite any definition of the word "agent" in the Maine insurance code. The definition of "producer," 24-A M.R.S.A. § 1402(5) & (6), does not suggest that a producer is, merely by virtue of that status, an

authorized agent of an insurer. Language in *Blanchet v. Assurance Co. of Am.*, 766 A.2d 71, 74 (Me. 2001), suggests at first glance a broader interpretation of the statute: “When the name of the agent and the insurer is on the policy, the agent shall be regarded as in the place of the insurer in all respects.” However, the issue in that case was the insurer’s knowledge of its insured’s address, not whether the insurance agent was the insurer’s agent in the legal sense. In the case cited by the *Blanchet* opinion, the Law Court did hold that, because the names of the insurer and the insurance agency were both on the covering page of the policy, the agency was the insurer’s agent for purposes of section 2422, *County Forest Prods., Inc. v. Green Mountain Agency, Inc.*, 758 A.2d 59, 65 (Me. 2000), but the opinion does not reveal whether the agent was identified on the policy as such or as an authorized agent, rather than as a “producer.” Maine case law interpreting this statute and its earlier versions did acknowledge the requirement that the agent be authorized. *See, e.g., LeBlanc v. Standard Ins. Co.*, 114 Me. 6, 12 (1915) (“Good public policy then requires that the companies that appoint these agents and hold them out as their representatives shall be bound by what they do, and that if an agent acts without authority, or in excess of authority, his principal should bear the consequences, rather than the insured, who trusted him.”); *Sinclair v. Home Indem. Co.*, 159 Me. 367, 371 (1963) (agent was “acknowledged agent of the defendant” insurer). Significantly, the First Circuit, interpreting Maine law, has held that a broker, listed on the insurance application as the “non-licensed producer,” has “no duty toward the insurer.” *Carolina Cas. Ins. Co. v. Cummings Agency, Inc.*, 110 F.3d 1, 2 (1st Cir. 1997). Here, Jefferson contends that it did not authorize Performance to act as its agent, and the defendant and Performance have offered no evidence that would allow a factfinder to draw a reasonable inference to the contrary. Accordingly, 24-A M.R.S.A. § 2422 does not prevent the declaratory judgment sought by Jefferson.

c. Apparent Authority

The defendant and Performance contend that Jefferson created apparent authority in Performance and Fyhrie so that Jefferson must be bound by Fyhrie's alleged representations concerning coverage. Defendant's Jefferson Opposition at 6-8; Performance's Opposition at 7-9.

Under Maine law,

[a]pparent authority is authority which, though not actually granted, the principal knowingly permits the agent to exercise or which he holds himself out as possessing. Apparent authority exists only when the *conduct of the principal* leads a third party to believe that a given party is his agent. Apparent authority can arise if the principal knowingly or negligently holds someone out as possessing authority to act for him or her or it. A principal, therefore, creates apparent authority by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.

Steelstone Indus., Inc. v. North Ridge Ltd. P'ship, 735 A.2d 980, 983 (Me. 1999) (citations and internal quotation marks omitted; emphasis in original). Thus, it is Jefferson's conduct, not that of Performance or Fyhrie, that determines this issue. Fyhrie's belief on this point, which forms the basis for much of Performance's argument, Performance's Opposition at 7, is accordingly irrelevant. Similarly, it is not Lilley's subjective belief that is determinative. The question is whether Jefferson's conduct reasonably led Lilley to believe that Fyhrie or Performance was acting as its legal agent with respect to the scope of coverage being offered. With respect to this question, Performance primarily relies on what Jefferson did *not* do:

Mr. Lilley had no direct contact with Jefferson. He received no correspondence from Jefferson. He received no invoices from Jefferson. He received no renewal notices from Jefferson. All of that information came instead directly from [Performance]. When Mr. Lilley made his premium payments, he made his checks out to [Performance] directly and not to Jefferson. This course of dealing would certainly create in Mr. Lilley the apparent authority of [Performance] to act as Jefferson's agent.

[Jefferson] allowed [Performance] to serve as the sole liaison between Daniel Lilley and Jefferson. All claims brought under the policy went through [Performance]. . . . If Jefferson needed information from an insured,

all requests for that information came through [Performance] and not Jefferson.

Performance's Opposition at 8-9. Under certain circumstances, the principal's failure to act may constitute the conduct which causes the third party reasonably to believe that the principal consents to the act done on its behalf by the purported agent. *See* Restatement (Second) of Agency § 27 & cmts. a & c (1958).²⁵ The defendant relies on the following:

It is undisputed that all the written and verbal communications surrounding this insurance contract, prior to the denial of the claim at issue, were between [Performance] and Maine Offshore. [Performance] concedes that the insureds, like Maine Offshore, do not have any knowledge of the agreement between [Performance] and Jefferson, purportedly memorialized in a "Producer Agreement."²⁶ Most telling is the fact that insureds have no way of contacting Jefferson if they wanted to and do not know who Jefferson is. All the communication, payments, claims submission, inquires [sic] and correspondence surrounding the contract are between the insured and [Performance].

. . . "Highlight" sheets were sent to Maine Offshore for Mr. Lilley's signature from [Performance]. They are captioned, "Jefferson Insurance Company A.M. Best's rating 'A+ VIII.'" [Performance's] name is on the bottom of the document and figures much less prominently. The Declarations pages that were sent to Maine Offshore employ the same name format of listing Jefferson's name on the document in prominent lettering and having [Performance's] title in a subordinate positions. The December 24, 1998 Maine Insurance Binder sent to Maine Offshore from [Performance] is even more telling. [Performance's] president signs the document as an "Authorized Agent" and it makes no distinction between [Performance] and Jefferson, but refers to the entities as "the Company".

Defendant's Jefferson Opposition at 7 (citations omitted; emphasis in original). Much of this material deals with the actions of Performance, not the actions of Jefferson, and the defendant fails to provide any evidence that Jefferson was aware, or should have been aware, of these actions by Performance. Indeed, the paragraphs of the defendant's responsive statement of material facts cited by it in support

²⁵ The Maine Law Court adopted section 27 of the Restatement in *Steelstone*, 735 A.2d at 983.

²⁶ In fact, the only "producer agreement" in the summary judgment record, Exhibit E to the plaintiff's statement of material facts, "purports" only to "memorialize" an agreement between Merrimac, Monitor's predecessor, and Performance. Jefferson is not even *(continued on next page)*

of the listed evidence on this point do not support the following assertions, which therefore will be disregarded:

1. “[I]nsureds have no way of contacting Jefferson is they wanted to and do not know who Jefferson is. SDMF, ¶ 45.”
2. “[Performance’s] name is on the bottom of the [highlight sheet] and figures much less prominently. [SDMF, ¶ 48, Plaintiff’s Exhibits A, B, D, 6, H].”
3. “[Performance’s] president signs the [insurance binder] as an ‘Authorized Agent’ and it makes no distinction between [Performance] and Jefferson, but refers to the entities as ‘the Company.’ SDNF, ¶ 48. *Defendant’s* [sic] *Exhibit B*.”²⁷

Id. (underscoring omitted).

With the exception of the first sentence quoted above, the remainder of the defendant’s factual assertions would not allow a reasonable factfinder to infer that Jefferson created apparent authority in Performance with respect to the defendant. However, the first sentence, coupled with the factual assertions made by Performance, would allow such a reasonable inference to be drawn. Jefferson could not have operated as an insurer without the knowledge that someone was performing the functions performed by Fyhrie or Performance, and a lay person in Lilley’s position could reasonably conclude that Fyhrie was acting as Jefferson’s agent with its approval. The evidence in the summary judgment record certainly does not compel the conclusion that Fyhrie or Performance was endowed with apparent authority by Jefferson, but there is sufficient dispute about the facts relevant to this conclusion that summary judgment on this basis is not appropriate.

The inquiry does not stop here, however. A party relying on alleged apparent authority must also show not only that he or she reasonably believed that the individual was acting as the principal’s agent, but also that he or she justifiably relied on the manifestation of agency. *Williams v. Inverness*

mentioned in the document.

²⁷ Fyhrie clearly signed the binder, which is defendant’s Exhibit C, as the “authorized agent” of Performance; the document clearly defines “the Company” as Jefferson. *See generally Libby*, 452 A.2d at 982 (listing of broker as “agent” on various forms sent to *(continued on next page)*)

Corp., 664 A.2d 1244, 1247 (Me. 1995). Jefferson points out, Jefferson Motion at 11, the longstanding provision of Maine law that insurance “policyholders must continue to be presumed by the ordinary rules of law to know the contents of their policies whether the policies are read or not,” *American Fidelity Co. v. Mahoney*, 157 Me. 507, 515 (1961). The defendant offers evidence that Lilley did not read the policy at issue “because he was relying on [Performance] to fairly and accurately represent the material aspects of the coverage.” Defendant’s Responsive SMF ¶ 21. Jefferson does not offer any argument based on *Mahoney*, but, to the extent that it might be construed to have offered the citation as evidence that the defendant’s reliance on Fyhrie’s alleged assertions was not justified, that is a question that cannot be decided as a matter of law. For example, even if the defendant must be deemed to have been aware of the language of the exclusion in the policy, its argument that Fyhrie had the authority to waive any such restriction remains valid as a potential basis for recovery.

Jefferson also refers to the highlight sheet generated at the time of the renewal of the policy at issue, which was signed by Lilley. Jefferson’s Motion at 11. That highlight sheet contained a paragraph not present in the highlight sheet prepared by Fyhrie a year earlier, when the policy was first issued, that provides: “Vessels and equipment over 10 years of age are subject to restricted coverage on mechanical and electrical systems. See policy for exact wording and specific details.” Highlight Sheet (Exh. 6 to Plaintiff’s SMF) ¶ 8. To the extent that Fyhrie had apparent authority to act for Jefferson, this document must be considered as presenting Jefferson’s position. If Jefferson means to suggest that this paragraph renders the defendant’s reliance on Fyhrie’s representations concerning the scope of coverage unjustified, that argument also raises a question that cannot be decided as a matter of law in the context of summary judgment. The quoted language is not necessarily inconsistent

insured by insurer insufficient to find apparent authority).

with Fyhrie's alleged assurances to Lilley that the coverage in the renewed policy remained the same, Defendant's Responsive SMF ¶ 19, when he had stated with respect to the policy covering the previous year that damage to the mechanical parts of the boat would be covered and that new parts would be replaced while damage to aged parts would be provided on the basis of depreciated replacement value, *id.* ¶¶ 7-8. Accordingly, the question whether the defendant was justified in its reliance on Fyhrie's alleged representations, if he was acting with apparent authority as Jefferson's agent, must be resolved by a factfinder.

B. Performance's Motion

Performance contends that it is entitled to summary judgment on Count III of the third-party complaint, which alleges fraud, because the defendant (and third-party plaintiff) does not contend that the alleged statements of Fyhrie were knowingly false and because it could not have reasonably relied on any such statements. Performance Motion at 1-2. The defendant responds that Performance has focused on the wrong alleged statements and that evidence tending to show that the statements alleged to form the basis of the fraud claim were known to be false is in the record, and that there is also evidence in the summary judgment record from which a reasonable factfinder could conclude that the defendant reasonably relied on those statements. Defendant/Third Party Plaintiff's Opposition to Third Party Defendant's Motion for Partial Summary Judgment, etc. ("Defendant's Opposition") (Docket No. 42) at 2-5.

Under Maine law, a person is liable for fraud if the person

(1) makes a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act or to refrain from acting in reliance on it, and (5) the other person justifiably relies on the representation as true and acts upon it to the damage of the plaintiff.

Fitzgerald v. Gamester, 658 A.2d 1065, 1069 (Me. 1995). A misrepresentation of opinion is not actionable under Maine law. *Weaver v. New England Mut. Life Ins. Co.*, 52 F.Supp.2d 127, 133 (D. Me. 1999).

As the basis for its first argument, Performance relies on Lilley's deposition testimony that "it was apparent to him that Raymond Fyhrie believed that the policy issued by Jefferson contained . . . coverage" for the engines and outdrives of the boat regardless of the age of that machinery. Performance's Motion at 4. This testimony, it contends, is inconsistent with an allegation that Fyhrie falsely represented to Lilley that such coverage was available. *Id.* However, the scienter element of fraud does not require actual knowledge of the falsity of a representation. A plaintiff may also prove his case by showing that the speaker recklessly disregarded the truth or falsity of the representation. Performance does not address this alternative at all. Accordingly, it cannot be entitled to summary judgment on the basis of its first argument.

Performance's second argument rests on the highlight sheets provided to Lilley. *Id.* at 5. Paragraph 2 of both the 1998 and the 1999 highlight sheets, Exh. B & 6 to Jefferson's statement of material facts, provide: "UNDERWATER DAMAGE to vessel's machinery (props, shafts, drives, etc.) is covered, subject to the boat's age, the policy's wording and the hull deductible." Paragraph 8 of the 1999 highlight sheet is quoted above. Performance contends that these paragraphs "clearly alerted the reader, the insured, to the limitations contained within the Jefferson policy, or at least advised the insured to explore the policy further," and accordingly rendered any reliance on Fyhrie's alleged misrepresentations unreasonable as a matter of law. Performance's Motion at 5. As discussed above, Paragraph 8 of the 1999 highlight sheet is not necessarily inconsistent with the alleged misrepresentations made by Fyhrie. Accordingly, it cannot serve to render the defendant's alleged reliance on those misrepresentations unreasonable as a matter of law. The same is true of

paragraph 2 of both highlight sheets. It is possible that a factfinder could conclude that this language did not render the defendant's alleged reliance unreasonable.

On the showing made, Performance is not entitled to summary judgment on Count III of the third-party complaint.

IV. Conclusion

For the foregoing reasons, I recommend that the plaintiff's motion for summary judgment be **GRANTED** as to all claims except the defense of apparent authority and otherwise **DENIED** and that the motion of Performance Marine Associates Insurance Services, Inc. for partial summary judgment 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 13th day of December, 2001.

David M. Cohen
United States Magistrate Judge

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