

**BEFORE THE COMMISSIONER OF INSURANCE
OF THE STATE OF KANSAS**

In the Matter of)
Auto Club Family Insurance Company) Docket No.: 3321-SO

FINAL ORDER

(Pursuant to K.S.A. 77-501 et, seq. of the Kansas Administrative Procedure Act)

COMES NOW on this 31st Day of May 2006, for Decision the Motions for Summary Judgment filed by the Kansas Insurance Department and the Auto Club Family Insurance Company and the Motion to Strike filed by the Interveners. The Kansas Insurance Department appears by and through counsel, Robert M. Hiatt and Zac Anchutz, Staff Attorneys. The Auto Club Family Insurance Company appears by and though David Bub of Brown and James, PC 1010 Market, 20th Floor, St. Louis MO 63101-2000 and Interveners, Phillip and Karen Hargrove, appear through Jonathan P. Kieffer of Wagstaff and Cartmell, 4740 Grand Av., Suite 300, Kansas City Missouri 641112 and Gene Anderson of Anderson, Kill & Olick of 1251 Avenue of the Americas, New York, New York 10020, and Mr. Phillip Hargove appears in person.

NATURE OF THE CASE

On May 05, 2004 the Kansas Insurance Department (hereinafter, “KID”) brought an administrative action against Auto Club Family Insurance Company (hereinafter “AAA”) for violation of K.S.A. 40-2404 and K.A.R. 40-1-34. KID alleged that AAA’s conduct, while adjusting a hail damage claim made by Phillip and Karen Hargrove of Olathe Park Kansas, under their homeowners’ policy, was unlawful. Some of the specific allegations made by KID were that AAA had not settled Phillip and Karen Hargoves

claims promptly under K.S.A. 40-2404(9)(f) and that AAA had issued certain check(s) to the Hargroves which contained release language in violation of K.A.R. 40-1-34.

On or about November 15, 2004, the AAA offered to enter into an agreement with the KID to resolve that action. AAA's offer provided in relevant part: "AAA *shall continue to work with the Hargroves to settle in full their hail damage claim*" and; "...Any checks or drafts that were previously not cashed will be reissued to the Hargroves at once, if such has not already been done prior to the date of this correspondence."

In exchange for the promises made to KID, by AAA, in that November 14, 2005 offer KID agreed to resolve the pending administrative action. KID dismissed the action on November 19, 2005 in accord with the agreement. On February 25, 2005, just over three months after the aforesaid agreement took effect, the Hargroves requested this action be reinstated for a determination whether AAA had materially breached its agreement with the KID.

FINDINGS OF FACT

1. On September 19, 2003 Auto Club Family Insurance Company agreed to replace the windows on the Hargrove's home because the windows had been damaged in a hail storm (Exhibit 1 KID Brief in Support of Motion for Summary Judgment).
2. On January 23, 2004 a representative of Auto Club Family Insurance Company, James J. Welch of the Kansas Insurance Department and Phillip Hargrove held a conference call to discuss the claim (Exhibit 2, page 12 of 16 KID Brief in Support of Motion for Summary Judgment)

3. On January 23, 2004 Auto Club Family Insurance Company agreed to pay full replacement cost for the windows to Hargroves (Exhibit 3 KID Brief in Support of Motion for Summary Judgment)
4. On or about February 06, 2004 Auto Club Family Insurance Company issued a check to the Hargroves in the amount of \$30,744.53 for window replacement (Exhibits 4 and 5 KID Brief in Support of Motion for Summary Judgment).
5. The check contained language which stated: “Endorsement constitutes full release of all claims known or unknown which the undersigned has or may have against the payor or any person or organization insured by payor under the policy and by reason of the occurrence....” (Exhibit 4 KID Brief in Support of Motion for Summary Judgment).
6. On March 22, 2004 Auto Club Insurance Company confirmed in writing it’s agreement to replace the windows (Exhibit 7 KID Brief in Support of Motion for Summary Judgment)
7. On or about October 15, 2004 the Hargrove’s attorney notified Auto Club Family Insurance Company that the Hargroves’ would file suit if Auto Club Family Insurance Company did not resolve the Hargrove’s claims (Exhibit 8 KID Brief in Support of Motion for Summary Judgment).
8. On or about November 15, 2004 Auto Club Family Insurance Company entered an agreement with the Kansas Insurance Department to attempt to resolve the Hargroves claim(s) (Exhibit 9 KID Brief in Support of Motion for Summary Judgment).

9. On that same date the attorney for Auto club Family Insurance represented to the Kansas Insurance Department that: “...*Any checks or drafts that were previously and not cashed will be reissued to the Hargroves at once, if such has not already been done prior to the date of this correspondence.*” (Exhibit 9 KID Brief in Support of Motion for Summary Judgment).
10. On December 09, 2004 the Hargroves filed suit against Auto Club Family Insurance Company (Exhibit 10 KID Brief in Support of Motion for Summary Judgment).
11. On February 01, 2005 Auto Club Family Insurance Company re-issued the check to Mr. and Mrs., Hargrove and their mortgage company in the amount of \$30,744.53 for window replacement (Exhibit 12 KID Brief in Support of Motion for Summary Judgment)

CONCLUSIONS OF LAW

The filing of a Motion for Summary Judgment is allowed under K.S.A. 77-519(a) of the Kansas Administrative Procedures Act. When ruling on a motion for Summary Judgment this Presiding Officer looks to the Code of Civil procedure under Chapter 60 of the Kansas Statutes annotated for guidance. The Code provides that Summary judgment is appropriate when the documents on file show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. K.S.A. 60-256(c); *See also, Boulanger v. Pol*, 258 Kan. 289, 295, 900 P.2d 823 (1995). The Presiding Officer is required to resolve all facts and inferences that may reasonably be drawn from the evidence in favor of the party opposing the motion. *Boulanger v. Pol*, 258 Kan. at 295, 900 P.2d 823.

In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, we apply the same rules and where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied. [Citation omitted.]" Bergstrom v. Noah, 266 Kan. 847, 871-72, 974 P.2d 531 (1999).

" 'An issue of fact is not genuine unless it has legal controlling force as to the controlling issue. The disputed question of fact which is immaterial to the issue does not preclude summary judgment. If the disputed fact, however resolved, could not affect the judgment, it does not present a genuine issue of material fact.' [Citations omitted.]" Mitchell v. City of Wichita, 270 Kan. 56, 59, 12 P.3d 402 (2000).

AAA breached the agreement it entered with the Kansas Insurance Department by failing to re-issue the check for almost three months after promising to reissue the check at once to the Hargroves.

On November 15, 2004 AAA offered in writing to resolve the administrative action pending between KID and AAA. That offer was drafted by AAA and reads, in part, as follows: "*Any Checks or drafts that were previously not cashed will be reissued to the Hargrove's at once, if such has not already been done prior to the date of this correspondence*" (Exhibit 9 KID Brief in Support of Motion for Summary Judgment). Clearly the re-issuance of those check(s) and the time frame in which the check(s) were to be re-issued were both terms of the offer which were material.

KID accepted AAA's offer to settle the administrative action and the administrative action was dismissed on November 19, 2004. By so doing a contract was formed.

“A settlement agreement is a type of contract and, therefore, governed by contract law. [Citation Omitted]....” *White v. Allied Mut. Ins. Co.* 29 Kan.App.2d 797, 31 P.3d 328 (2001).

The can be no dispute about the terms of the contract as they are in writing and are definite and certain (Exhibit 9 KID Brief in Support of Motion for Summary Judgment). When the settlement agreement was entered AAA assured KID, in writing, that it would the reissue check(s) for window replacement, “*at once, if it had not already done so*”.

"A breach of contract may be said to be a material failure of performance of a duty arising under or imposed by agreement... [Citation Omitted]". *Kansas Public Employees Retirement System v. Reimer & Koger Associates, Inc.* 262 Kan. 110, 936 P.2d 714 (1997).

KID lived up to its part of the bargain and dismissed the administrative action on November 19, 2004. AAA did not re-issue the check(s), *at once*. Instead AAA did not reissue the checks until February 01, 2005. . (Exhibit 12 attached to KID Brief in Support of Motion for Summary Judgment). "A breach is material if the promisee 'receiv[es] something "substantially less or different from that for which he bargained. [Citation omitted]" *Almena State Bank v. Enfield* 24 Kan.App.2d 834, 954 P.2d 724 (1998). . By failing to re-issue the check(s) for window replacement for nearly three months AAA materially breached the agreement with KID.

IT IS THEREFORE ORDERED ADJUDGMENT AND DECREED that the Findings of Fact (Facts 1 through 11, above.), the Conclusions of law (infra) and “Reasons for Ruling” (attached and marked Exhibit A) are all made a part of this Final Order by incorporation by reference. For the reasons set forth above, and in Exhibit A attached, the Motion for Summary Judgment filed by the Auto Club Family Insurance

Company is denied; the Motion to Strike filed by the Interveners is denied; and the Motion for Summary Judgment filed by the Kansas Insurance Department is granted. Pursuant to K.S.A. 40-2407 the Auto Club Family Insurance Company is fined in the amount of Five Hundred Dollars (\$500.00) for violation of K.S.A. 40-2404. The costs of this action, in the amount of One Thousand Four Hundred Twenty Four Dollars and Thirty Cents (\$1,424.30) are assessed against the Auto Club Family Insurance Company pursuant to K.S.A. 40-2406.

Notice of Final Agency Action and Judicial Review

The issuance of this Final Order constitutes final agency action in this matter. Accordingly, all administrative remedies available to the Petitioner are hereby deemed exhausted, and the filing of a petition for reconsideration is not a prerequisite for judicial review.

The Petitioner may, within thirty (30) days of service of this Final Order, file a petition for judicial review in the appropriate court, as provided for by K.S.A. 77-613. In the event the Petitioner files a petition for judicial review, the agency officer to be served on behalf of the Kansas Insurance Department is: John W. Campbell, General Counsel, Kansas Insurance Department, 420 S.W. 9th Street, Topeka, KS 66612-1678.

IT IS SO ORDERED THIS 13th DAY OF JULY, 2006, IN THE
CITY OF TOPEKA, COUNTY OF SHAWNEE, and STATE OF KANSAS.

IT IS SO ORDERED.



/s/ Robert M. Tomlinson
Robert M. Tomlinson
Assistant Commissioner of Insurance
Presiding Officer

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above and foregoing Notice of Final Agency Action and Judicial Review was served via the United States Postal Service, first class postage prepaid, on this 13th day of July , 2006, addressed to the following:

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