

**REFERENCE ON DISPUTED CLAIMS:
COVERAGE ISSUES PRESERVED**

By: Michael P. Regan

In Audubon Hill South Condominium Association Vs. Community Association Underwriters Of America, Inc., No. 11-P-1546 (Mass. App. Ct. Sept. 20, 2012) the Massachusetts Appeals Court for Middlesex County held that a referee's valuation of damages under the statutory reference procedure, M.G.L. c. 175, s. 99, had no binding effect on future questions of coverage or liability. Id. at *3.¹ The decision affirmed the trial judge's grant of summary judgment in favor of Community Association Underwriters of America, Inc.'s ("CAU").¹

The case ultimately derived from CAU's decision to issue a comprehensive "Condominium Policy" to Audubon Hill South Condominium Association. The policy coverage included "risks, loss or damage to the association's buildings and grounds." Id. at *1. The damage at issue occurred in a unit owned by Marilyn Barstow, who in March of 2007 discovered that the flooring beneath her refrigerator was separating from the baseboard. Id. at *1. The parties ultimately disputed coverage, liability, and amount of loss. Id. at *1-2.

Since the parties could not agree as to the amount of loss, and pursuant to M.G.L. c. 175, s. 99, the parties submitted the issue to a panel of three referees. Id. at *2. Prior to the reference proceeding, CAU's counsel served each referee with a letter reserving the issues of coverage and liability. Id. at *2.² The hearing failed to

produce a settlement, and the subsequent lawsuit introduced, among other issues, the issue of whether the reference process embraces questions of coverage and liability. Id. at *2-3.

In appealing the grant of summary judgment in favor of CAU, Audubon relied on Augenstein v. Insurance Co. of N. Am., 372 Mass. 30, 36-38 (1977), arguing that CAU's failure to dispute the terms of the policy effectively conceded the issue of liability. Id. at *3.³ However, the Court explained that unlike the company in Augenstein, CAU had consistently disputed coverage and even issued a reservation of rights letter that:

stated seven times in five paragraphs that it was withholding all issues of liability from the referees and cited G. L. c. 175, § 101E, at its conclusion. It specifically referred to policy language: "In particular a claim of loss by peril such as collapse was not found as warranted. This is a loss that appears to be a result of settling and long term deterioration but in any event not covered under the issued policy. Id. at *3.

Furthermore, the referee's themselves had "abstained" from questions of coverage and liability throughout the process. Id. at *3. Between this abstention by the referees, and CAU's clear and consistent disputation of coverage, the Court held that the issues of coverage and liability had been preserved for future trial. Id. at *3. Thus, even though the referees determined the amount of loss with regard to their own interpretation of the policy's terms, that value determination did not

¹ The trial judge had granted summary judgment in favor of CAU on the issue of coverage by finding "(1) that the reference determination did not extend to the issue of coverage and liability; and (2) that Audubon's claim fell outside the coverage of the CAU policy." Id. at *6.

² The reservation, "expressly relied upon G. L. c. 175, § 101E, which preserves to an insurer 'any legal defense to the claim in respect to which the reference proceedings are held' unless the parties agree in

writing to empower the referees as arbitrators under the terms of the Uniform Arbitration Act, G. L. c. 251." Id. at *8.

³ In Augenstein, the court had held that a referee's decision on the amount of loss conclusively precluded the parties from revisiting the coverage issue because the company "had not raised or reserved any issue of interpretation or application of the policy for the courts, and had left the factual question of the occurrence of the loss to the referees." Audubon, at *3.

effectuate a binding answer as to the questions of coverage or liability. Id. at *8.

In sum, this case stands for the proposition that parties can proceed to a reference on disputed claims but still preserve the issues of coverage and liability. In other words, referees can determine the amount of loss without estopping the parties from further litigating disputes over coverage and liability. Thus, this decision reaffirms the right of insurers to proceed with reference and preserve their right to contest coverage, provided that the insurer expressly reserves the right to do so. It is critical for the insurer to reserve its rights in writing to all the parties involved in the reference.

ANTHONY J. ANTONELLIS, ESQ

SLOANE AND WALSH LLP

ATTORNEYS AT LAW

THREE CENTER PLAZA

BOSTON, MA 02108

T: 617-523-6010

F: 617-227-0927

WWW.SLOANEWALSH.COM

127 DORRANCE STREET, 4th Floor

PROVIDENCE, RI 02903-2828

T: 401-454-7700

F: 401-454-8855

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