IN THE COURT OF APPEALS OF IOWA

No. 3-671 / 12-1527
Filed November 6, 2013

HOUSEHOLD FINANCE INDUSTRIAL LOAN COMPANY OF IOWA,
Plaintiff-Appellee,

vs.

JUDY LYNN RASMUS, a/k/a JUDY LYNN DREES, DOUGLAS F. DREES, SR., and PARTIES IN POSSESSION,
Defendants-Appellants.

JUDY LYNN RASMUS a/k/a JUDY LYNN DREES and DOUGLAS F. DREES, SR.,
Counterclaimant,

vs.

HOUSEHOLD FINANCE INDUSTRIAL LOAN COMPANY OF IOWA,
Third-Party Defendant.

Appeal from the Iowa District Court for Linn County, Paul D. Miller, Judge.

The debtors appeal the summary judgment awarded to the creditor in this foreclosure action. **REVERSED AND REMANDED.**

Dennis J. Naughton, Marion, for appellants.

Robert N. Siddens of Siddens Law Office, Des Moines, William J. Miller of Dorsey & Whitney, L.L.P., Des Moines, and Lucy R. Dollens and Michael A.

Rogers of Frost, Brown Todd, L.L.C., Indianapolis, Indiana, for appellee Household Finance.

Heard by Vogel, P.J., and Danilson and Tabor, JJ.

TABOR, J.

Judy and Douglas Drees appeal from the entry of summary judgment in favor of Household Finance Industrial Loan Company of Iowa (Household) in this mortgage foreclosure proceeding. Because genuine issues of material fact exist as to the conduct of Household in charging the Drees for insurance on the property, the creditor failed to show it was entitled to judgment as a matter of law. We conclude the district court improperly granted summary judgment on the affirmative defenses of waiver, estoppel by acquiescence, and impossibility of performance. We reverse the district court decision on those grounds and remand for further proceedings consistent with this opinion.

I. Background Facts and Proceedings

In 1998 the Drees obtained a $74,021.74 residential loan at 10.9% interest from the lender, Household. The loan was secured by a mortgage on the Drees' home, stating:

> **Hazard Insurance.** Borrowers shall keep the improvements . . . on the Property insured against loss by fire, hazards included within the term "extended coverage," and such other hazards as Lender may require.
>
> . . . .
>
> **Protection of Lender's Security.** *If Borrower fails to perform* the covenants and agreements contained in this Mortgage . . . *then Lender*, at Lender's option, *upon notice to Borrower*, *may . . . disperse such sums*, including reasonable attorneys' fees, *and take such action as is necessary to protect Lender's interest* . . . .
>
> Any amounts disbursed . . . shall become additional indebtedness of Borrower secured by this Mortgage. Unless Borrower and Lender agree to other terms of payment, such amounts shall be payable upon notice from Lender to Borrower requesting payment thereof.

(Emphasis added.)

In 2006 Household sued for foreclosure. The Drees resisted and filed counterclaims. According to the Drees, during this time and for approximately three years, Household refused to accept the Drees' loan payments.[1] In May 2009 the litigation was settled. The settlement agreement states the original note and mortgage shall be modified and amended, and concurrently the parties "shall execute a Modification of Note and Mortgage reflecting these amended terms."

The settlement agreement requires the parties to pay their own "costs and attorney fees." Household agreed to make a lump sum $5000 payment to the Drees, to "mark as paid any previous notes" that Household has "yet to mark as paid and which have been in fact paid in full," to reduce the mortgage loan's principal balance to $60,000, to report the mortgage loan "out of default," to delete negative credit reporting, and to file a dismissal without prejudice.

The settlement agreement requires the Drees to release Household from liability, to pay Household under modified loan terms ($60,000 at 0% interest in $1000 monthly installments for five years, "beginning with the first payment on May 5, 2009"), and to deliver a dismissal with prejudice to Household attorney B.J. Miller.

Both the settlement and the modification agreement state, in the event of a default, including Household not receiving the Drees' payment "within ten days of the [5th of the month] due date, 5% interest shall begin to accrue." But both agreements also provide Household will not assess "any late charges resulting from receipt of the first payment after May 15, 2009," if the first payment is late

[1] The Drees' November 4, 2011 interrogatory answers state Household "had been refusing all our payments for almost three years."

"due to delay in completion and delivery" of the settlement documents and Household's $5000 payment.[2]

The loan modification agreement, "effective May 4, 2009,"[3] reiterates the payment terms for the $60,000 "no interest" loan. According to Douglas Drees, several payments they made on the original loan were not recorded and credited in Household's records.[4] Therefore, on the modified loan the Drees used online banking wire transfers to make payments "because we wanted to make sure the payments arrived on time and there was a record of payment to protect us."[5] The modification agreement states:

> 5. Except as otherwise modified herein, the Borrower will comply with all [other requirements] including without limitation, the Borrower's . . . agreement to make all payments of taxes, insurance premiums . . . and all other payments that the Borrower is obligated to make under the Security Instrument.
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> 6. Nothing in this Modification shall be understood or construed to be a satisfaction or release in whole or in part of the Note and Security Instrument. Except as otherwise specifically provided in this Modification, the Note and Security Instrument will remain unchanged and in full effect, and the Borrower and Lender will be bound by, and comply with, all of the terms and provisions thereof, as amended by this Modification.

On May 27, 2009, attorney Miller sent Household's settlement check to Drees attorney Naughton with instructions to hold the check in trust. Miller also

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[2] The Drees and Household Assistant Vice President Phyllis Johnston signed the settlement agreement, but no date appears by the signatures. Drees attorney Dennis Naughton signed the settlement agreement on May 11, 2009 and Household attorney B.J. Miller signed on May 12, 2009.

[3] The Drees signed the modification agreement on May 4, 2009, and subsequently on May 12, Household Assistant Vice President Johnston signed.

[4] *See* Douglas Drees November 28, 2011 affidavit.

[5] The modification agreement requires Household to "provide a receipt for each payment received showing the balance due" before payment, "the amount of the payment received, the remaining balance due, and the due date of the next payment."

advised the Drees' May 2009 payment should be made under the original account number (XX0105) and sent to Household's legal department. "Upon receipt that payment will be posted and any late interest waived." Finally, when Miller received Naughton's instruction to file the Drees' dismissal, Miller would tell Household "to undertake the agreed upon action with respect to [the Drees] credit record."

On June 1, 2009, the 2006 litigation was dismissed, and the Drees made their May 2009 payment, the first installment on the modified loan. Also in June, the Drees contacted American Family to obtain insurance.[6] On June 4, attorney Miller e-mailed attorney Naughton a new account number (XX6361) for the modified loan, and the address for subsequent payments. Household's June 5 letter mistakenly notifies the Drees they defaulted on the May 5 payment. Despite Household's error, on June 10 the Drees made their June 2009 payment. Household's June 26 letter advises it did "not have an up-to-date record of [the Drees] homeowners/hazard policy," and instructs the Drees to send proof of insurance showing Household as mortgagee and coverage equal to the outstanding loan balance.

Household's July 10, 2009 letter to the Drees states:

> This is our second notice to you. As of today, we have not yet received verification that you have maintained continued insurance coverage on your property. The terms of your loan agreement require appropriate insurance coverage to be in force for your mortgaged property at all times. We must receive proof of homeowner's/hazard insurance coverage or we may elect to purchase insurance coverage to protect our interest in the property."

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[6] *See* Douglas Drees November 28, 2011 affidavit.

In that letter, Household estimates $576 as the annual cost to the Drees and states the Drees would be required to pay the annual cost "in 12 monthly installments" ($48/month). Also,

> This coverage is not intended to replace homeowner's insurance. The [Household] insurance does not provide coverage for contents of the property or provide liability coverage . . . . Also, the amount and terms of this coverage may be different, less comprehensive, and more expensive than an insurance policy you can purchase on your own. We, or an affiliate company, might receive some benefit from the placement of this coverage.

Household's July 14, 2009 letter acknowledges the June 5 default letter was mailed "in error," reminds the Drees "your July 5 payment is currently due," and explains:

> [The June 5] letter was generated because your new loan was boarded on June 4, 2009; with a fund dated of April 5, 2009, with the first payment showing due as of May 5, 2009. Because we had yet to post your first payment which was received on June 4, 2009, the account appeared as a first payment default.

The Drees point out although "no agreement was signed until May 2009, Household stated the loan occurred April 5, 2009." We note this is the first post-settlement document referencing April 5, 2009. The Drees timely submitted their $1000 July payment.

The Drees procured $125,000 of insurance on their "dwelling,"[7] effective August 10, 2009 to August 10, 2010, for $1275 from American Family Insurance. On the policy Household is listed as mortgagee and the insurance coverage clearly exceeds the mortgage's outstanding balance. American Family's agent,

[7] The American Family insurance also includes: $94,500 for personal property, $300,000 for personal liability, and $25,000 for medical expense. The "Authorized Representative" section of the policy is signed.

Jacob Roetman, states the office policy is to send Household, as mortgagee, the insurance declaration page.[8]

Douglas Drees explains the reason for the June to August 2009 insurance delay. "[Unbenownst to the Drees,] American Family did a credit check and found the foreclosure still on our record." Because "our house was still shown to be in foreclosure," we "had to wait for [American Family] to send someone out to inspect the house before they would issue insurance." Due to "the failure of [Household] to remove the bad credit reports within a reasonable time," American Family also "required us to pay cash up front before binding coverage. So [American Family] executed the automatic withdrawal from our account on August 1, 2009, and then implemented coverage."[9]

Household accepted the Drees' $1000 monthly payment for August 2009 and six additional $1000 monthly payments thereafter. It is undisputed Household accepted ten monthly payments of $1000 from the Drees for a $10,000 reduction in principal on their 0% interest loan. It is also undisputed that at some point in early 2010, Household rejected the Drees' $1000 monthly payment.[10]

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[8] *See* Jacob Roetman November 18, 2011 affidavit.
[9] *See* Douglas Drees November 28, 2011 affidavit.
[10] While the parties agree the Drees paid $1000 per month for ten months, they disagree on the timing of the monthly payments. Household's records credit the Drees with ten monthly payments from May 2009 up to and including February 2010. We note the calculations in Household's later demand letters are consistent with Household not crediting the Drees for a March 2010 payment.

In contrast, the Drees state Household accepted the payment they made on March 15, 2010 and rejected their April 2010 payment for $1000. The chart in the Drees' interrogatory answers shows the Drees did not make a payment in December 2009, due to a change in banks their first January 15, 2010 payment was unsuccessful

On March 9, 2010, eight months after Household's July 2009 "second notice" encouraging the Drees to purchase their own insurance, Household advises the Drees the monthly payment on loan XX6361 will increase with your payment "due on 04/05/2010." "This increase is a result of hazard insurance that [Household] acquired and paid on your behalf." Further, the *annual premium of $248* "will be spread over 12 months and collected with each monthly mortgage payment," for a "New Monthly Payment" of $1020.67. Household did not provide the period covered by this insurance, a policy, or a policy declaration page, but did state the Drees may be eligible for a refund "once you provide us with proof of hazard insurance coverage." When Douglas Drees called the customer service number provided and told the Household representative the Drees had already purchased insurance, Household "denied that I had insurance and insisted I had to pay for theirs."

On March 21, 2010, Household sent two *inconsistent* letters to the Drees regarding insurance. One letter encloses the insurance policy and states the Drees did not provide "acceptable evidence of homeowners/hazard insurance coverage" on loan XX6361, and as a result Household purchased insurance with an effective date of April 5, 2009, expiration date April 5, 2010. This letter is the first time Household tells the Drees (1) the coverage dates, and (2) the new monthly charge is for *retroactive insurance expiring* on the date of the Drees' first payment for the insurance. Household also states it will collect $48 in "each monthly mortgage payment" for twelve months. This computes to $576 annually,

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and was paid on February 13, 2010, and they thereafter wired payments on February 15, 2010, and March 15, 2010, that Household accepted.

double the $248 annual charge Household quoted twelve days earlier on March 9, but matching its estimate one year earlier in July 2009. Finally:

> The coverage provides structural coverage only. The insurance does not provide coverage for contents of the property or provide liability coverage . . . . The amount of this insurance may not be sufficient to completely restore the property in the event of loss. Supplemental coverages for earthquake, flood, or injury to persons or property for which you may be liable are not provided. We, or an affiliate company, might receive some benefit from the placement of this coverage.

The enclosed "$60,000 policy lists the named insured as Household, the additional insured as the Drees, and states: "Countersignature Date 03/21/2010." The Drees point out the "Authorized Representative" line is not signed and that Household's March 21 purchase is inconsistent with its March 9 letter stating Household "acquired and paid" for insurance.

The second Household March 21 communication, "CANCELLATION NOTICE," states the new coverage period is April 5 to September 9, 2009, "CHARGE: $248." Also: "*The proof of replacement coverage provided* did not have an effective date that was on or before the effective date of the insurance *coverage* we purchased on your behalf. Therefore, there will be a charge for the period for which the property was covered under the [Household] policy." (Emphasis added.)

Household does not explain what document it is relying upon as "proof of replacement coverage," nor does it explain how this unknown "proof" requires Household to cancel the coverage on September 9, 2009. We note $248 for five months of insurance is again inconsistent with Household's March 9 letter stating Household will bill $248 for *annual* coverage.

Viewing the facts in the light most favorable to the Drees, on April 15, 2010, the Drees sent Household a $1000 monthly payment and Household rejected the payment. Also on April 15, Household issued an "ACCOUNT UPDATE" stating the current amount the Drees owe is $2020.67.[11] In April Douglas Drees again called Household, stating: We "purchased insurance and would not pay for theirs." Household replied the Drees "didn't have coverage back in April of 2009." Douglas replied the Drees did not have any agreement with Household then. "In April of 2009 [Household] had not agreed to [a settlement] yet." Household's employee "stated it was not their problem and hung up."

Household's May 30, 2010 "Notice of Right to Cure Default" states Household will accept payment from the Drees if made within the next thirty days *but* "only the full amount due" of $3041.34 "will be accepted,"[12] otherwise Household will accelerate the loan.

On June 18, 2010, Drees' attorney Naughton wrote Household attorney Miller. Naughton states the Drees "ordered and purchased insurance on their home not long after the settlement was reached on the lawsuit [and] their insurance company provided notice of coverage to" Household. "I am indeed bewildered why the effective policy commencement date for which [Household] demands payment from my clients precedes the date of our May [2009] settlement." Naughton also informs Miller the Drees recently asked their bank to

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[11] Based on Household's letters, the total is for $1000 for March 5 and $1020.67 for April 5, 2010.

[12] Based on Household's letters the $3041.34 total is for $1000 for March 5 and $1020.67 for both April 5 and May 5.

pull credit reports and learned the original loan is still being reported by Equifax credit agency in contravention of the settlement agreement.[13] Miller eventually forwarded the letter and Household received it on July 30, 2010.

On August 9, 2010, S. Mohammed in Household's Customer Resolution Department responded to attorney Naughton. This letter states Household's "review with Experian and Transunion reveals" the old loan "is not reporting on the Drees' credit files. However, the account is reporting with Equifax and a request was submitted to remove this account. We sincerely apologize for any inconvenience."

Mohammed also explains the "new loan was boarded on June 4, 2009 with a fund date of April 5, 2009 and a first payment due date of May 5, 2009." Original loan account XX0105 "was closed as agreed, effective May 18, 2009," and Household posted payments to new "account XX6361 since receipt of the May 2009 payment. Please note that account XX6361 is currently in foreclosure status," and the Drees owe "$6103.35."[14] Also, Household "obtained a lender-placed hazard insurance policy . . . when the required proof of hazard insurance coverage was not received for the period of April 5, 2009 through September 9, 2009," at a cost of $248.00.

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[13] Specifically, "joint loan account—shows payment on $59,988 loan of $1000 and payment on $74,021 loan of $699. Second loan showed closed and foreclosure process started."

[14] We note $103.35 equals Household billing the Drees for five months of insurance in Household's April 2010 to August 2010 bills, the month the insurance expired and several subsequent months.

On August 30, 2010, Household attorney Robert Siddens advises Household "has accelerated the balance" and $56,351.35 "is now due." The next day Household filed this foreclosure action.

In September 2010 the Drees answered, noting Household's refusal of their $1000 monthly payment in April 2010 and stating they declined to pay for insurance coverage predating the settlement agreement. As an affirmative defense, the Drees allege Household's claim for $56,351.35 is an "improper increase of yield to lender" and ignores their payments "totaling $10,000." Additional affirmative defenses include impossibility of performance and no right of acceleration.[15]

The Drees also counterclaimed for specific performance, noting their ten months of payments. The Drees state:

> 4. Plaintiff is currently owed $6000 as of the time of service of this suit, but has refused to accept same.
>
> 5. Instead, when such offer was made to its representative, the response was that it was too late, the note had been accelerated and the full amount (albeit an incorrect amount stated in the Petition herein) was due.
>
> 6. The failure of [the Drees] to pay has been solely caused by the intransigent actions and inept business practices of [Household].
>
> 7. But for such actions, [the Drees] would have continued to make timely payments on the loan in question and they continue to stand ready to do so.
>
> . . . .
>
> 9. [The Drees] hereby tender full payment of the unpaid payments of $6000 and to continue making payments for the full term of the loan.

[15] The Drees do not appeal the district court's grant of summary judgment to Household on the issues of truth in lending act violations, state consumer credit code violations, and fraud.

Additional Drees' counterclaims include Household's (1) abuse of process and (2) breach of the settlement agreement term requiring Household to delete negative credit reporting on the original loan.[16]

On October 14, 2010, Drees' attorney Naughton wrote attorney Siddens enclosing proof of the American Family insurance and suggesting Household drop its foreclosure if the Drees "make all the payments on their note." Naughton suggested Household cover "some" of the Drees' attorney fees caused by the foreclosure filing and stated: "I look forward to a proposal from you." Attorney Siddens forwarded the information to Household, who received it after October 18, 2010.

Thereafter, on November 11, 2010, Household took several actions. It issued two cancellation notices to the Drees adjusting the amount owed for insurance and changing the date Household's retroactive coverage ended. Continuing its pattern of inconsistent communications to the Drees, Household's two November 11 cancellation notices provide *slightly* different amounts and dates. One states the Drees owe $199 for Household's provision of hazard insurance from April 5, 2009 to August 9, 2009. The other states the Drees owed $200 for hazard insurance from April 5, 2009 to August 10, 2009.

Also on November 11, 2010, Household replied to the Drees' answer, affirmative defenses, and counterclaims. Household admitted the Drees made ten payments and the "Amendment to Petition corrects the balance due to $50,000 plus the disputed insurance." Household affirmatively stated: (1)

[16] The Drees do not appeal the district court's grant of summary judgment to Household on their counterclaim for violation of the fair debt collection practices act.

"[n]othing in the settlement documents relieved the [Drees] of the duty to maintain insurance coverage at any time"; (2) "[a]t the very least, [the Drees] had the duty to provide coverage from the [loan modification's] 'effective date' of May 4, 2009"; and (*for the first time*) (3) Household "affirmatively acknowledges" the Drees "are entitled to credit" for their insurance coverage "commencing August 10, 2009."

In Household's November 11, 2010 reply to all counterclaims (except specific performance), it "affirmatively states [this] conflict arises out of a bona fide dispute as to responsibility for insurance coverage and *a bona fide error notwithstanding procedures to avoid error.*" (Emphasis added.) Household's reply to the Drees' specific performance counterclaim states the exact amount due "would depend on the resolution of the insurance coverage issue," and Household "has no duty to accept less than full payment and did not because [it] affirmatively asserts it is entitled to recover advances for insurance coverage." Household "is prepared at this time to de-accelerate the note *upon resolution of the insurance coverage dispute* and appropriate payment." (Emphasis added.)

Household's November 11 motion to amend petition states $56,351.35 was requested in error "because of the very unusual fact that the account accrued no interest. The correct amount for the suit would be $50,248 and the amount in default would be $6,103.35." We note this November 11 motion's claim for $248 conflicts with Household's two November 11 cancellation notices stating either $199 or $200 is owed for insurance. The court allowed Household's amendment.

On November 23, 2011, Household sought summary judgment on its foreclosure action and on the Drees' counterclaims, stating the Drees "are now $21,000 behind on payments" and owe "$199 for insurance premiums incurred by Household." (Household apparently settled on one of its three inconsistent November 11 insurance claims: $199, $200, or $248.) Household also "does not oppose Drees' request to bring the loan current," and upon the Drees' payment of $21,000 *and attorney fees*, it "will waive the past-due insurance charges."

Household attached the November 22, 2011 affidavit of Dana J. St. Clair-Hougham, vice president and assistant secretary, Household administrative services division. We note St. Clair-Hougham had no personal involvement in the Household-Drees loan and mortgage. After her review of Household's business records, St. Clair-Hougham states on May 4, 2009, Household entered into a "Confidential Settlement Agreement and Modification of Note and Mortgage" with the Drees. *Regarding "Credit Reporting*":

> In May 2009, Household requested that the three credit bureaus . . . delete the tradeline associated with the Original Loan. A true and accurate copy of Household's account notes evidencing this request is [Exhibit 5]. Credit bureau requests are made electronically, so no additional documentation of this request exists.

Exhibit 5 provides: "05 09 . . . Approved to remove credit bureau delinquencies due to legal account." Also, "06 09 . . . 06/04-Account MCA'D New Account XX6361." In response to attorney Naughton's June 2010 letter stating Equifax is still reporting the original loan, "Household investigated the credit reporting issues" and in August 2010 learned the "Original Loan was still reporting with Equifax. Household submitted another request to Equifax to remove the Original

Loan . . . . Household can only submit requests to credit bureaus but has no control over the action taken by the credit bureaus after receipt of Household's requests."

Regarding "Hazard Insurance," St. Clair-Hougham states in June 2009, "Household determined that it did not have an up-to-date record of Drees' homeowners/hazard policy," and sent the June 26 and July 10, 2009 letters. "By March 2010, Household still had not received records of homeowners/hazard insurance from Drees.[17] Household obtained insurance[18] and on March 9, 2010," informed the Drees. On March 21, 2010, Household sent the Drees a copy of the insurance policy. "To the best of Household's knowledge, the Drees did not insure the property at issue from April 5, 2009–August 9, 2009. Household initially incurred $248 in insurance premiums to insure the property from April 5, 2009-September 9, 2009, but after receiving proof of insurance from Drees and cancelling the policy effective August 9, 2009, Household incurred" $199 due to the Drees' failure to obtain insurance.

We note this affidavit does not address what "proof" Household relied upon in March 2010 when it issued its cancellation notice to the Drees and changed the coverage ending date to September 9, 2010 instead of April 5, 2010.

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[17] We note this statement is disputed by the August 2009 American Family office policy regarding mortgagees listed on its insurance policies.

[18] Viewing the facts in the light most favorable to the Drees, the insurance policy shows Household made the purchase on March 21, 2010 and not before the March 9 letter as asserted in the affidavit.

Regarding "Drees Non-Payment Under the Modified Loan," St. Clair-Hougham states the Drees have not made a payment since February 2010. We note this affidavit does not address or explain Household's rejection of one Drees 2010 monthly payment for $1000.

On November 28, 2011, the Drees sought summary judgment, alleging Household wrongfully failed to accept their monthly payment in the amount of $1000, "demanding instead $1020.67 per month," and by its acts Household "caused the failure of [the Drees] to continue their loan payments." The Drees asserted Household by its acts waived its right to foreclose and also is estopped from foreclosing.

The attached November 18, 2011 affidavit of Jacob Roetman states American Family issued coverage on the Drees home effective August 10, 2009 and the Declaration Page showed Household to be the mortgagee. "In 2009, it was standard policy of our company, as is the case today, to send proof of insurance to any lender or mortgagee having an interest in a property."

The attached November 28, 2011 affidavit of Douglas Drees states Household accepted his March 2010 payment, but rejected his April 2010 payment for $1000. In the spring of 2010, the Drees kept setting aside the money to make the $1000 loan payments. Douglas continues: Household "was sending me letters, but . . . [t]here was no consistency in their demands, which is why we objected to paying for any insurance coverage they wanted to charge . . . since I had already purchased coverage in 2009." Douglas included a spread sheet showing the inconsistent demands in Household's letters. Douglas states

Household "ignored the fact that we had provided them with insurance coverage and told them numerous times about it." Finally, Douglas asserts the negative credit reports were not removed by July 2010, "even though our [settlement] agreement went back to May [2009], and the dismissal of [Household's] first foreclosure was filed in June" 2009.

The district court held a hearing on the parties' summary judgment motions on April 11, 2012. In May the court issued a ruling granting summary judgment to Household and denying the Drees' motion for summary judgment. The district court denied the Drees' motion to reconsider and they now appeal.

II. Scope and Standards of Review

While courts generally try foreclosure proceedings in equity, we review appeals from orders granting summary judgment for the correction of legal error. *Freedom Fin. Bank v. Estate of Boesen*, 805 N.W.2d 802, 806 (Iowa 2011). Summary judgment is appropriate only when the entire record demonstrates that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827 (Iowa 2007); *see* Iowa R. Civ. P. 1.981(3).

We review the record before the district court to determine whether a genuine issue of material fact existed and whether the district court correctly applied the law. *Sain v. Cedar Rapids Cmty. Sch. Dist.,* 626 N.W.2d 115, 121 (Iowa 2001). The record on summary judgment includes the pleadings, depositions, affidavits, and exhibits presented. *Stevens*, 728 N.W.2d at 827.

We review the evidence in the light most favorable to the nonmoving party. *Merriam v. Farm Bureau Ins*., 793 N.W.2d 520, 522 (Iowa 2011).

III. Analysis

A. Does a question of fact exist as to whether Household's actions constitute waiver of its right to foreclose and preclude summary judgment at this preliminary stage?

It is undisputed the Drees paid $10,000 total in monthly payments on the "0% interest" loan as required under the loan modification agreement "effective May 4, 2009." The Drees made no *additional* monthly payments for $1000 after "their April 2010 payment was refused by [Household,] apparently because it was for $1000 instead of the amount [Household] was at that time demanding of $1020.67." Viewing the facts in the light most favorable to the Drees, immediately after settlement in June 2009 they contacted American Family to buy hazard insurance but their purchase was delayed to August 2009 because Equifax was incorrectly reporting the prior foreclosure. After the Drees' August 2009 insurance purchase, American Family sent notice to mortgagee Household of the Drees' August 9, 2009 to August 9, 2010 insurance policy. It is undisputed the Drees did not have insurance on the property from April 5, 2009 to August 9, 2009.

During oral arguments, the Drees' counsel explained they were suspicious of Household due to their prior problems with the company, problems eventually resolved in the 2009 settlement, so the Drees repeatedly asked Household to explain the insurance coverage dates and amount owed. Counsel stated the

record shows Household's letters in response were confusing and provided conflicting information—"sometimes in the same week and sometimes on the same date."

Household's counsel during arguments confirmed the company's rejection of a $1000 payment by the Drees. Counsel agreed Household's rejection of the Drees' $1000 payment was "odd," and stated he had no explanation for it. Apparently Household would not accept less than the "new monthly payment" of $1020.67 discussed in its March 9, 2010 letter to the Drees. We believe a question of fact is created by the timing of Household's actions. Eight months *after* Household's July 2009 notice *encouraging* the Drees to buy insurance, Household announces the Drees are not insured and it has unilaterally added a monthly insurance charge for retroactive, annual insurance starting in April 2009, *three months before* the July 2009 notice encouraging the Drees to buy their own insurance. *See In re Marriage of Fields*, 508 N.W.2d 730, 731 (Iowa 1993) (recognizing a party can fail to enforce a right "for such time as would imply an intention to waive or abandon the right").

Household contends the question is not whether it demanded the correct insurance amount from the Drees, but when was a foreclosure triggered? Although Household acknowledged at oral argument its insurance purchase "may create a fact question," counsel argued it does not create "a material fact question" because the Drees "decided to stop paying and make an issue out of it."

During arguments Household's counsel also stated there was nothing suspicious about the timing of Household's March 2010 insurance purchase even though the retroactive insurance Household purchased in March 2010 ended the very next month in April 2010. Counsel argued the retroactive insurance was "necessary" in case a "slip and fall" occurred at the Drees residence during the coverage period and the statute of limitations had not run. But we note because Household's retroactive policy provides structural coverage only, the policy language itself rebuts counsel's "necessity" argument.

We find Household's insurance purchase creates "material fact" questions: Does Household's March 2010 purchase of retroactive insurance that provides only "structural coverage" for an event that already occurred months ago, in April to August 2009, contravene the very definition of insurance and provide only illusory coverage? *See Rutland v. State Farm Mut. Auto. Ins. Co.*, 426 F. App'x 771, 775 (11th Cir. 2011) ("Coverage for an event that has already occurred contravenes the very definition of insurance."). Also, is Household's retroactive insurance for April to August 9, 2009 illusory under the policy terms? Household's policy provides:

> 5. Your Duties After Loss: In case of a loss to which this insurance may apply, you shall see that the following duties are performed:
>
> a. give immediate notice to us or our agent;
>
> . . . .
>
> e. submit to us, *within 60 days* after we request, your signed, sworn statement of loss which sets forth, to the best of your knowledge and belief:
>
> (1) the time and cause of loss;
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> . . . .
>
> (3) other insurance with may cover the loss;
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> . . . .

> (5) specifications of any damaged building and detailed estimates for repair of the damage.

(Emphasis added.) Household's policy only covers structural damage and requires *immediate notice* of any structural damage claim. Thereafter, the Drees must file their claim within 60 days of Household's request. Accordingly, a fact question exists as to whether any Drees' claim for *structural damage* between April and August 9, 2009 is illusory in March 2010—how could the Drees submit the *immediate* notice required? How could the Drees provide a detailed claim within sixty days when the policy's timeline for the Drees' immediate notice and claim expires *before* Household's March 21, 2010 *purchase* of retroactive insurance coverage?

We turn to additional law on waiver. Waiver is the "voluntary or intentional relinquishment of a known right." *Scheetz v. IMT Ins. Co.*, 324 N.W.2d 302, 304 (Iowa 1982) (quoting *Travelers Indem. Co. v. Fields*, 317 N.W.2d 176, 186 (Iowa 1982)). Waiver "can be inferred from conduct that supports the conclusion waiver was intended." *Scheetz*, 324 N.W.2d at 304. "The issue of waiver is generally one of fact for the jury, in particular where acts and conduct are relied upon as the basis for the waiver." *Id*.[19]

Our review of the record shows the situation is more nuanced than portrayed by Household. Analyzing the facts in the light most favorable to the Drees as the nonmoving party, we conclude genuine questions of material fact

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[19] We recognize notice of termination of a course of dealing might result in a waiver of *future* duties imposed upon a contracting party. *Scheetz*, 324 N.W.2d at 304 n.2. But Household cannot withdraw any "waiver with respect to past obligations" because a waiver once given cannot be retracted. *See id*.

exist as to whether Household waived its right to proceed with the foreclosure by refusing the Drees' monthly payment of $1000 and insisting on payment for disputed insurance amounts and coverage. The undisputed facts show Household unilaterally asserted inconsistent charges for retroactive insurance that Household itself stated may provide a benefit to Household "or an affiliate company."

Also, the facts show the Drees' insurance agent, under office policy, sent Household notice of the Drees' insurance in August 2009. After Household's first March 2010 letter, the Drees made numerous phone calls stating they had insurance and Household had been sent proof of insurance. Later in March 2010, Household—without identification or explanation of the "proof" it relied upon—unilaterally reduces the expiration of Household's insurance to September 2009. When the facts are viewed in the light most favorable to the Drees, the timing of these events creates a fact question as to what "proof" formed the basis for Household's cancellation notice and a fact question as to whether the interplay of Household's "proof"/basis and Household's subsequent conduct amounts to a waiver on its part.

Additionally, a question of fact exists as to whether Household waived its right to proceed with an August 2010 foreclosure when Household refused a $1000 payment with knowledge the Drees had consistently made monthly payments totaling $10,000. The Drees questioned only the unilaterally imposed insurance amount and coverage dates, and Household failed *until November*

2011 to calculate and inform the Drees they *owed $199* for coverage *expiring in August 2009*.

We note Household's June and July 2009 letters asking the Drees to provide proof of insurance are sent in the months *immediately after* the May 2009 settlement, *specifically reference new loan xx6361*, and make no reference whatsoever to the pre-settlement loan account. Household's July 14, 2009 letter (apologizing for the May 2009 default assertion) and August 9, 2010 letter (requesting payment for retroactive insurance) *specifically reference new loan xx6361* while stating Household assigned new loan xx6361 a loan-funded date of April 5, 2009. Therefore, a fact questions exists as to whether Household unilaterally and arbitrarily selected April 5, 2009—a date prior to the May 2009 *creation* of the new loan. A fact question also exists as to whether Household waived its right to proceed with foreclosure by its conduct of refusing the Drees' payment for $1000 in April 2010 while insisting the Drees pay for Household's March 2010 purchase of retroactive insurance on new loan XX6361 starting on April 5, 2009, a date before the May 2009 settlement *created* the new loan.

Household argues the modification and settlement did not change the continuous and ongoing duty of the Drees to provide insurance, including a duty during April 2009 under the old loan. We agree it is now undisputed the Drees did not have insurance from April 5, 2009 to August 9, 2009. But the Drees' April 2010 phone calls to Household and June 18, 2010 correspondence to Household's attorney show the Drees questioned "why the effective policy commencement date," April 5, 2009, "precedes the date of our May [4, 2009]

settlement." In other words, the Drees disputed their obligation to pay for insurance purchased in March 2010 and retroactive to include pre-settlement coverage dates. The record also shows Household's post-settlement June and July 2009 letters giving notice to the Drees, as contractually required before Household purchases insurance and charges the Drees, reference the new loan and make *no* r*eference* to the old loan and duties under the old loan account. Accordingly, the "notice" letters create a fact question as to whether the Drees were given the required contractual notice before Household's March 21, 2010 insurance purchase that Household would seek insurance reimbursement for some weeks of the parties' old, pre-settlement loan.[20]

Our discussion of some of the fact questions generated on the issue of waiver is not an exclusive list. We conclude the affirmative defense of waiver based on Household's conduct raises fact questions for the jury and Household was not entitled to summary judgment.

B. Does a question of fact exist as to whether Household's actions constitute estoppel by acquiesce precluding summary judgment in favor of Household at this preliminary stage?

The Drees assert the doctrine of estoppel by acquiescence also applies to Household's conduct. Viewing the facts in the light most favorable to the Drees shows in April 2010 the Drees tendered the regular $1000 monthly payment and Household refused to accept it because an additional $20.67 insurance charge

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[20] It is not until November 11, 2010, well after Household's August 2010 foreclosure filing, that Household admits: "[a]t the very least, [the Drees] had the duty to provide coverage from the 'effective date' [of the modification agreement] of May 4, 2009."

Household unilaterally added for its March 21, 2010 purchase of retroactive insurance was not included. The Drees argue Household's unilateral decision to block their monthly payments of $1000 bars Household's pursuit of this foreclosure action under the doctrine of estoppel by acquiescence.

In response, Household argues it is undisputed Household "promptly commenced foreclosure proceedings when the Drees refused to reimburse Household" for the insurance payments "but, instead, stopped making payments altogether."

Our supreme court has recognized a "somewhat elusive distinction between waiver and estoppel." *Scheetz*, 324 N.W.2d at 304. Estoppel "by acquiescence" applies where a person knows of an entitlement to enforce a right and "neglects to do so for such time as would imply an intention to waive or abandon the right." *Fields*, 508 N.W.2d at 731; *see Davidson v. Van Lengen*, 266 N.W.2d 436, 439 (Iowa 1978) (stating while prejudice is "an element of laches, prejudice is not discussed in acquiescence cases") (citations omitted). "Estoppel by acquiescence is based on an examination of" the actions of the party "who holds the right [in this case Household] in order to determine whether that right has been waived. It advances a policy of stability and conclusiveness." *Davidson*, 266 N.W.2d at 439 (finding estoppel by acquiescence when "[b]y words and actions, [the mother] led [the father] to believe she intended to waive and abandon her right" to child support); *see Markey v. Carney*, 705 N.W.2d 13,

21 (Iowa 2005) (distinguishing the doctrines of equitable estoppel[21] and estoppel by acquiescence). The "ban of an estoppel may be lifted by the" party who has been banned by that party "giving . . . proper notice." *Scheetz*, 324 N.W.2d at 305.

In March 2010 Household purchased retroactive insurance coverage. As noted above, during oral argument Household's counsel agreed Household's rejection of $1000 is "odd," and he could not explain it. Under "estoppel by acquiesce" principles, we conclude a fact question exists as to whether Household's *affirmative act* of rejecting the Drees' $1000 regular monthly payment implies Household's abandonment of its right to receive subsequent $1000 monthly payments until the insurance dispute (amount owed and dates of coverage) was resolved.

Household's May 30, 2010 "Notice of Right to Cure Default" informed the Drees that Household "will only accept" (1) the stated insurance *reimbursement plus* (2) the regular monthly payments owed. Under "estoppel by acquiesce" principles, a fact question exists as to whether Household could reasonably believe the Drees were defaulting on their monthly payments when the Drees disputed the insurance amount/coverage dates but despite the insurance dispute paid Household their regular April 2010 monthly payment for $1000, which Household *affirmatively rejected,* and *one month later*, on May 30 2010,

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[21] The party asserting an equitable estoppel defense must prove: "(1) a false representation or concealment of material facts; (2) lack of knowledge of the true facts on the part of the actor; (3) the intention that it be acted upon; and (4) reliance thereon by the party to whom made, to his prejudice and injury." *Markey*, 705 N.W.2d at 21 (quoting *ABC Disposal Sys., Inc. v. Dep't of Natural Res.*, 681 N.W.2d 596, 606 (Iowa 2004)).

Household insisted on the insurance reimbursement plus monthly payments to cure default.

On September 24, 2010, the Drees answered Household's foreclosure suit and in a counterclaim for specific performance tendered full payment of the unpaid $6000 in monthly payments and offered to continue payments for the full term of the modified loan. On November 11, 2010, Household's reply admitted $6000 is the approximate amount of the monthly arrearage but asserted the exact amount owed "would depend on the resolution of the insurance coverage issue" and Household "has no duty to accept less." Under "estoppel by acquiescence" principles, we conclude a fact question exists as to whether Household's November 2010 *demand* rejecting the Drees' $6000 monthly arrearage payment implies Household's waiver of subsequent $1000 monthly payments *until* the insurance dispute (amount owed and dates of coverage) is resolved.

One year later, Household's November 2011 motion for summary judgment asserts the Drees are now $21,000 behind on monthly payments and, *for the first time*, $199 is the amount the Drees owe for insurance. Household also states it will waive the insurance fees if the Drees pay the $21,000 monthly arrearage *and Household's attorney fees*. Following its prior pattern, once again Household demands conditions (attorney fees) before it will accept the Drees regular monthly payments. Under "estoppel by acquiesce" principles, we conclude a fact question exists as to whether (1) Household's April 2010 *affirmative act* rejecting the Drees' $1000 regular monthly payment, *coupled with*

(2) Household's November 2010 *demand* rejecting the Drees' offer to pay the $6000 monthly arrearage unless insurance is also paid; *and* (3) Household's November 2011 *demand* asserting the Drees' owe $21,000 in monthly payments *plus* Household's attorney fees implies Household's waiver of subsequent $1000 monthly payments until the insurance dispute or Household's attorney fee demand is resolved.

The facts reveal Household had ample opportunity to accept the monthly payments owed by the Drees, but it consistently refused to do so unless Household's additional payment conditions (disputed insurance or Household's attorney fees) were concurrently paid. Overall, many unresolved fact questions exist regarding the interplay of the doctrine of estoppel by acquiescence and Household's conduct. We conclude the defense of estoppel by acquiescence raises fact questions for the jury, and Household was not entitled to summary judgment on this issue.

C. Does a question of fact exist as to whether the Drees' performance of the note was made impossible by the actions of Household thereby precluding summary judgment in favor of Household at this preliminary stage?

The Drees also assert the district court erred in granting summary judgment on their affirmative defense of impossibility of performance. They allege a jury should be allowed to consider whether Household's refusal to accept their April 2010 payment made it impossible for them to perform their obligations under the modified note and mortgage.

Iowa law recognizes the doctrine of impossibility of performance as an excuse for nonperformance of a contract when the promised performance becomes "objectively impossible" due to "no fault of the nonperforming party." *Nora Springs Co-op. Co. v. Brandau*, 247 N.W.2d 744, 747 (Iowa 1976). The Restatement (Second) of Contracts labels the concept as "impracticability of performance and frustration of purpose" and explains generally it is the occurrence of a supervening event which renders a party's performance impracticable. *See* Restatement Second (Contracts) § 261, cmt d ("Events that come within the rule stated in this Section are generally due either to "acts of God" or to "acts of third parties."). If the event that prevents the obligor's performance is caused by the obligee, it will ordinarily be considered a breach by the obligee and fall outside the impracticability doctrine. *Id*.

Under Iowa law, the impossibility of performance may be sparked by the nonperformance of the other party. *See Salinger v. General Exch. Ins. Corp.*, 250 N.W. 13, 15 (Iowa 1933). But *Salinger* is to be read narrowly. *See Union Story Trust & Sav. Bank v. Sayer*, 332 N.W.2d 316, 322 (Iowa 1983). "[T]o predicate the discharge of one of the contracting parties upon breach of condition by the other, the party claiming discharge must show the condition breached constituted the entire agreed exchange by the other party, or was expressly recognized in the bargain as a condition for the other's performance. Otherwise, the nonperformance of the other party is a mere breach of contract for which the remedy is damages." *Id*. (citations omitted).

The Drees contend the condition breached by Household, failure to accept their $1000 monthly payment, gave "rise to the whole foreclosure, when the actual dispute was over $199." They assert: "A lender should not be entitled to the 'usual' summary judgment in a mortgage foreclosure case when a dispute of fact actually exists." As fact questions, the Drees point to Household's varying cost estimates and the fact they "received no less than eight communications from [Household] stating differing amounts due for insurance." Because the Drees had, in fact, purchased insurance, they contend it was proper for them to "question how the amount was arrived at, what it actually covered, and, indeed, whether it was actually correct." The Drees do not dispute their failure to maintain insurance on the property for several months in 2010, but contend Household's improper actions leading to the May 2009 settlement made it reasonable for the Drees "to be suspicious of" Household's claim it purchased insurance on their home. The Drees maintain they could not reasonably expect Household would (1) refuse their monthly payment and (2) seek foreclosure over such a small amount.

The Drees also argue Household's April 2010 rejection of their $1000 monthly payment after Household asserted its claim for insurance reimbursement shows the "Drees were not attempting to escape their responsibility under the agreement," a conclusion also supported by their "timely loan payments under the new, interest free note, until the lender arbitrarily raised the payment amount it would accept." *See Beck v. Trovato*, 150 N.W.2d 657, 659 (Iowa 1967) (stating many complaints "were of alleged breaches of the lease too minor to warrant its

cancellation"). The Drees note their September 2010 counterclaim seeking specific performance included their payment of $6000 in monthly payment arrears and was rejected in Household's subsequent reply. In contrast, Household's November 2011 summary judgment motion asked the Drees to pay $21,000 in monthly payment arrears *and* pay its attorney fees in exchange for Household's waiver of insurance reimbursement, which Household had once again reduced in November 2011.

In its ruling granting summary judgment to Household, the district court cited our supreme court's discussion of the Restatement (Second) of Contracts:

> According to the Restatement,
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> > [c]ontract liability is strict liability . . . . The obligor is therefore liable in damages for breach of contract even if he is without fault and even if circumstances have made the contract more burdensome or less desirable than he had anticipated . . . . The obligor who does not wish to undertake so extensive an obligation may contract for a lesser one by using one of a variety of common clauses: . . . he may reserve a right to cancel the contract . . . . The extent of his obligation then depends on the application of the rules of interpretation . . . .

Mel Frank Tool & Supply, Inc. v. Di-Chem Co., 580 N.W.2d 802, 805–06 (Iowa 1998) (quoting Restatement (Second) of Contracts ch. 11, at 309 (1981)).

Mel Frank Tool also recognizes an avenue for relief in cases where an "extraordinary circumstance may make performance so vitally different from what was reasonably to be expected as to alter the essential nature of that performance." *Id*. at 806. "Impossibility of performance refers to extraordinary circumstances which could not have been anticipated and which arise without fault on the part of the one seeking to avoid performance." *Associated Grocers*

of Iowa Co-op., Inc. v. West, 297 N.W.2d 103, 108 (Iowa 1980); *see In re Estate of Serovy*, 711 N.W.2d 290, 295 (Iowa 2006) ("A promisor is not discharged from a contractual duty on the theory of impossibility if the promisor brought about the occurrence that has prevented performance.").

The district court found no extraordinary circumstances that would make the Drees' performance so vitally different from what was reasonable expected as to alter the essential nature of the contract. The court faulted the Drees for breaching the agreement "by failing to make payments when due and by failing to secure insurance on the home for a period of time."

In seeking to uphold the district court ruling, Household argues the impossibility-of-performance defense does not apply because the Drees' "unjustified refusal to honor their contractual obligations is a far cry from being 'objectively impossible' to honor them." Household also asserts, "the Drees' lapse in insurance was not unanticipated" due to "the contract provisions at issue expressly [defining] the Drees' insurance obligations and explicitly [addressing] the Drees' reimbursement obligations if Household incurs insurance premiums on behalf of the Drees." Finally, Household contends the situation did not "arise without fault" on the Drees' part because they "chose to, and did, refuse to reimburse Household for insurance premiums and stop making payments altogether, with no contractual justification."

We start with the mortgage contract. The paragraph—"protection of lender's security"—allows Household, if the Drees fail to insure the property, to "disperse such sums" and "take such action as is necessary to protect"

Household's "interest." The amounts Household disburses then "become additional indebtedness" secured by the mortgage.

We believe this contract language creates a genuine issue of material fact as to whether Household's actions were reasonably necessary to protect its interest in the Drees' property. We also find the summary judgment record discloses genuine issues of fact material to the question of impossibility of performance by the Drees after Household rejected their monthly payment of $1000 in April 2010 and rejected their offer of a $6000 payment in September 2010, claiming it was entitled to the full amount of insurance reimbursement—despite the fact it reduced that amount in November 2011. We conclude the district court improperly granted summary judgment on this affirmative defense.

D. Does a question of fact exist as to whether Household had a sufficient basis under the Uniform Commercial Code to accelerate the modified loan debt precluding summary judgment in favor of Household?

The Drees, citing the "good faith" requirement under Iowa's Uniform Commercial Code, assert "a genuine dispute of fact existed as to whether [Household] had a good faith belief that the prospect of payment or performance is impaired." *See Jackson v. State Bank*, 488 N.W.2d 151, 156 (Iowa 1992); Iowa Code § 554.1309 (2009) (requiring "good faith" and entitled "option to accelerate at will"). Because the Drees provide no Iowa authority applying the Uniform Commercial Code to real estate mortgage transactions, we are not persuaded and conclude the district court correctly granted summary judgment on this claim. *See Breitbach v. Christenson*, 541 N.W.2d 840, 844 (Iowa 1995)

("Although [plaintiff] argues we should apply the U.C.C. here, he has supplied us with not one single Iowa decision establishing we should do so."); *see also Burritt Mut. Sav. Bank v. Tucker*, 439 A.2d 396, 399 (Conn 1981) (noting restriction on exercise of a right to accelerate payment in Uniform Commercial Code was "plainly inapplicable" to "real estate mortgage transactions").

E. Drees' Counterclaim[22] for Breach of Contract: Does a question of fact exist as to whether Household breached the 2009 settlement agreement?

The Drees' breach-of-contract counterclaim is based on Household's credit reporting obligations under the May 2009 settlement agreement, stating: "Household agrees to begin reporting the loan evidenced by the old Note as satisfied and paid in full and to delete negative credit reporting concerning this loan by Household."

The Drees assert Household's failure to check with Equifax to make sure the credit agency had acted upon Household's undisputed submission requesting Equifax to delete negative reporting resulted in the Drees' insurance company denying them credit, "which in turn, caused a delay in timely issuance of their insurance policy on their home until they paid cash." Specifically, "Household simply sent in one request but ignored it for a year, until the Drees in the spring of 2010 brought it to Household's attention." The Drees acknowledge Household submitted a second request in the spring of 2010 but argue "the fact legitimately

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[22] We agree with Household's assertion that under our rules, the Drees waived their argument the district court improperly granted summary judgment on their abuse of process counterclaim. *See* Iowa R. App. P. 6.903(2)(g) ("Failure to cite authority in support of an issue may be deemed a waiver of that issue.").

in dispute was whether the failure of [Household] *to get the credit reports"* caused the Drees' two-month delay in obtaining insurance. (Emphasis added.)

Household responds its only duty under the contract is to take the "necessary steps to report to the credit bureaus to have negative credit reporting concerning the Original Loan deleted." Second, the undisputed facts in Household's summary judgment affidavit establish that Household has no control over the actions taken by the credit bureaus after Household submits a request to them.

Viewing the evidence in the light most favorable to the Drees and assuming error is not waived, we agree with the district court: Household "met the requirements of the settlement agreement concerning communications to be made to the credit bureaus" regarding the original loan. The Drees do not contend Household failed to send a notice to the credit agencies to delete the Drees' negative credit information. Based on the undisputed St. Clair-Hougham affidavit's description of the credit process, we decline the Drees' invitation to expand Household's duty under the settlement agreement to include actions beyond communicating with the credit bureaus. Accordingly, the Drees are unable to show a genuine issue of material fact on their claim Household breached the settlement agreement term requiring Housenold to notify the credit reporting agencies.

IV. Conclusion

We conclude the district court erred in granting summary judgment to Household on three of the Drees' affirmative defenses in this foreclosure action—waiver, estoppel by acquiescence, and impossibility of performance. Additionally, we conclude the district court properly granted summary judgment to Household on the Drees' affirmative defense of acceleration under the Uniform Commercial Code, and their counterclaim that Household breached a term of the settlement agreement requiring notification of credit reporting companies. We remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.