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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Henry J. Wojtunik,  
Plaintiff/Judgment Creditor,  
vs.  
Joseph P. Kealy, et al.,  
Defendants/Judgment Debtors,  
and  
TIG Insurance Company of Michigan,  
Garnishee.

No. CV-03-02161-PHX-PGR

ORDER

Pending before the Court is TIG’s Motion for Clarification of Order Re: Burden of Proof (Doc. 333), wherein garnishee TIG Insurance Company of Michigan argues that plaintiff Henry Wojtunik should bear the burden at the bench trial of the remaining matters in this action of proving that TIG breached a duty to the defendant Insureds that justified their entry into the Damron/Morris agreement with Wojtunik. This issue arises because TIG contends that there is no insurance coverage for the amount of the stipulated judgment because the Insureds breached the cooperation clause in their policy by settling without TIG’s approval.

1 Even assuming that TIG's motion should not be denied as an unduly delayed  
2 motion for reconsideration, as Wojtunik argues, the Court agrees with Wojtunik that  
3 the motion should be denied because TIG has failed to establish that any  
4 clarification regarding the burden of proof is necessary. TIG concedes that the  
5 Court, in its opinion entered on March 31, 2011, correctly stated that under Arizona  
6 law TIG bears the burden of proving its defense premised on a breach of the  
7 cooperation clause. See Carpenter v. Superior Court, 422 P.2d 129, 132 (Ariz.1966)  
8 ("The insurer has the burden of proving the insured's breach of the non-cooperation  
9 clause in order to defend successfully on that ground.") That burden requires not  
10 only that TIG prove that the cooperation clause was breached, but also that the  
11 breach substantially prejudiced it. Holt v. Utica Mutual Ins. Co., 759 P.2d 623, 630  
12 (Ariz.1988) ("Even if an insured breaches a cooperation clause, the insurer may not  
13 use that fact as a defense unless the breach has caused substantial prejudice. ... It  
14 is the insurer's burden to show actual prejudice before it can avoid liability under the  
15 insurance policy.")

16 While the Court understands TIG's concern that it is in effect having to prove  
17 a negative, *i.e.*, that it did not breach a duty to the Insureds sufficient to permit the  
18 Insureds to enter into a settlement agreement with Wojtunik, the Court agrees with  
19 Wojtunik that the cases cited by TIG do not actually support its position that the  
20 burden in a breach of cooperation clause defense in a Damron/Morris situation is  
21 initially on the insured. TIG's position is unpersuasive because an insured's mere  
22 entry into a Damron/Morris agreement does not by itself amount to a breach of a  
23 cooperation clause, United States Automobile Ass'n v. Morris, 741 P.2d 246, 254  
24 (Ariz.1987), and such a stipulated judgment may be entered into under the  
25 appropriate circumstances prior to the insurer breaching any of its policy obligations  
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1 to its insured. Associated Aviation Underwriters v. Wood, 98 P.3d 572, 616  
2 (Ariz.App.2004) (In rejecting the insurer's contention in a coverage action that the  
3 assignment of rights in the Morris agreement that terminated the underlying tort  
4 action was invalid because at the time the assignment of rights was made the  
5 insurer had not breached the insurance contract, the court, relying on Morris, stated:  
6 "But [the insurer] provides no authority for the proposition that an insurer must  
7 breach an insurance contract in order for an assignment of rights under that contract  
8 by an insured to an injured claimant to be valid.") The Court concludes that the initial  
9 burden of proof in TIG's cooperation clause defense properly remains with TIG.<sup>1</sup>

10 Also pending before the Court is TIG's Motion to Re-Open Discovery (Doc.  
11 334). Having reviewed the parties' arguments and the relevant record, the Court will  
12 permit discovery to be re-opened on a limited basis for a limited time period. While  
13 the Court appreciates that the garnishment portion of this action has been litigated  
14 for an extended time, the Court believes that TIG has at least minimally shown that  
15 some additional discovery would be beneficial to the Court in resolving the remaining  
16 issues in light of the Court's summary judgment rulings. To that end, the Court will  
17 grant TIG's motion to the extent that it will permit TIG to disclose Geoffrey Heineman  
18 as a witness who will testify at the bench trial regarding the Insureds' potential  
19 breach of the cooperation clause, and to depose Wojtunik, Terry Beiriger, Stanley  
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23 To the extent that there is some unresolved abstract question about shifting  
24 burdens of proof applicable to TIG's cooperation clause defense, the Court  
25 concludes it need not resolve it now because the decisive issue regarding whether  
26 the Insureds breached the cooperation clause will be decided by the evidence  
presented during the bench trial, irrespective of which party presents it to the Court.

1 Feldman, and Colleen Reilly.<sup>2</sup> This additional discovery, and any other additional  
2 discovery that the parties agree may be taken, must all be completed by January 31,  
3 2013. To accomplish that, the Court expects the parties to extend the utmost  
4 cooperation to each other and to the deponents so as to minimize any potential  
5 discovery-related conflicts.

6 Therefore,

7 IT IS ORDERED that TIG's Motion for Clarification of Order re: Burden of  
8 Proof (Doc. 333) is denied.

9 IT IS FURTHER ORDERED that TIG's Motion to Re-Open Discovery (Doc.  
10 334) is granted as follows:

11 (1) TIG may disclose Geoffrey Heineman as a witness;

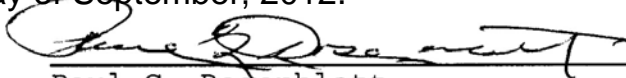
12 (2) TIG may depose Henry Wojtunik, Terry Beiriger, Stanley Feldman, and  
13 Colleen Reilly;

14 (3) TIG may take any additional discovery that the parties agree may be taken;

15 (4) All additional discovery must be completed no later than **January 31,**  
16 **2013;**

17 (5) The parties, within ten business days of the completion of all additional  
18 discovery, shall notify the Court through a joint statement that discovery has been  
19 completed and that the Court may enter a scheduling order related to the bench trial  
20 of this action.

21 DATED this 28<sup>th</sup> day of September, 2012.

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23 Paul G. Rosenblatt  
United States District Judge

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25 The Court notes that Wojtunik has not stated that he needs any additional  
26 discovery. If he does wish to take some additional limited discovery in light of the  
granting of TIG's motion, he may do so during the same extended discovery period.