

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**WO**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Rosemary Guadiana,  
Plaintiff,  
vs.  
State Farm Fire and Casualty Company,  
Defendant.

No. CIV 07-326 TUC FRZ (GEE)  
**REPORT AND RECOMMENDATION**

Pending before the court is the plaintiff's motion for summary judgment pursuant to Rule 56, FED.R.CIV.P. (Doc. 176)

The plaintiff, Rosemary Guadiana, claims the defendant breached her homeowner's insurance policy by failing to pay the costs of tearing out and replacing part of the structure when she replaced her polybutylene plumbing. Guadiana moves that this court grant partial summary judgment in her favor pursuant to Fed. R. Civ. P. 56. Specifically, she asks that the court issue a ruling on the construction of the insurance contract.

The case has been referred to Magistrate Judge Edmonds for all pretrial matters pursuant to Local Civil Rule 72.2. Rules of Practice of the U.S. District Court for the District of Arizona.

The court finds the motion suitable for decision without a hearing. The issues presented are not new. They were previously raised in State Farm's motion to dismiss and motion for summary judgment. The motion should be granted in part.



1 On September 14, 2007, State Farm filed a motion to dismiss for failure to state a claim  
2 upon which relief can be granted pursuant to Rule 12(b)(6). FED.R.CIV.P. This court denied  
3 the motion on September 2, 2008. (Doc. 29) In construing the tear-out provision, the court  
4 concluded as follows: “If Guadiana can establish as a matter of fact that the system that caused  
5 the covered loss includes all the pipes in her house and it was necessary to replace all the pipes  
6 to repair that system, State Farm is obligated to pay the tear-out costs necessary to replace all  
7 the pipes, even those not leaking.” (Doc. 25, pp. 4-5, 29) The court rejected State Farm’s  
8 argument that the tear out provision did not apply to the non-leaking pipes either because they  
9 did not cause the covered loss or because the policy does not cover defective materials and  
10 therefore the pipes are not a covered loss themselves.

11 On July 31, 2009, State Farm filed a motion for summary judgment pursuant to Rule 56,  
12 FED.R.CIV.P. (Doc. 63) State Farm argued, among other things, that the tear-out provision did  
13 not apply to the non-leaking pipes because the tear-out provision only applied to “repair” not  
14 “replace” the system that caused the covered leak. State Farm argued again that the tear-out  
15 provision did not apply to the non-leaking pipes either because the policy does not cover  
16 defective materials and therefore the pipes are not a covered loss themselves. The court granted  
17 the defendant’s motion for summary judgment on the issues of bad faith, punitive damages, and  
18 prospective injunctive relief. (Doc. 96, 109) The court denied the defendant’s motion on  
19 Guadiana’s breach of contract claim. *Id.*

20 On March 31, 2011, this court certified Guadiana’s motion for class certification limited  
21 to Arizona plaintiffs. (Doc. 139, 145) Notice was distributed to the class on September 27,  
22 2011. (Doc. 176, p. 4) The opt-out deadline, set for November 28, 2011, has passed. *Id.*

23 On December 7, 2011, Guadiana filed the instant motion for partial summary judgment.  
24 (Doc. 176) She moves that this court find as a matter of law that (1) the policy “covers tear-out  
25 costs necessary to adequately repair the plumbing system, even if an adequate repair requires  
26 replacing all or part of the system; and (2) there are no policy “exclusions that limit the coverage  
27 of the tear-out provision.” (Doc. 176, p. 5); *see also Smith v. Califano*, 597 F.2d 152, 155 (9<sup>th</sup>  
28

1 Cir. 1979) (“Because the case could thus be resolved as a matter of law, summary judgment was  
2 the proper procedural device.”), *cert. Denied*, 444 U.S. 980 (1979).

3  
4 Standard of Review: Summary Judgment

5 Summary judgment is appropriate only “if the movant shows that there is no genuine  
6 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.  
7 R. Civ. P. 56(a). There is a genuine issue of material fact “if the evidence is such that a  
8 reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby,*  
9 *Inc.*, 477 U.S. 242, 248 (1986).

10 The initial burden rests on the moving party to point out the absence of any genuine issue  
11 of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party has  
12 the burden of proof at trial, that party carries its initial burden by presenting evidence showing  
13 no reasonable trier of fact could find for the nonmoving party. *Calderone v. United States*, 799  
14 F.2d 254, 259 (6<sup>th</sup> Cir. 1986); *United States v. Four Parcels of Real Property*, 941 F.2d 1428,  
15 1438 (11<sup>th</sup> Cir. 1991). If the moving party does not have the burden of proof at trial, that party  
16 carries its initial burden either by presenting evidence negating an essential element of the  
17 nonmoving party’s claim or demonstrating the nonmoving party cannot meet its burden at trial.  
18 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Nissan Fire & Marine Insurance v. Fritz*,  
19 210 F.3d 1099, 1102 (9<sup>th</sup> Cir. 2000).

20 Once satisfied, the burden shifts to the opponent to demonstrate through production of  
21 probative evidence that an issue of fact remains to be tried. *Celotex*, 477 U.S. at 324. Summary  
22 judgment is appropriate “against a party who fails to make a showing sufficient to establish the  
23 existence of an element essential to the party’s case, and on which that party will bear the  
24 burden of proof at trial.” *Thomas v. Douglas*, 877 F.2d 1428, 1430 (9<sup>th</sup> Cir. 1989).

25 When considering a motion for summary judgment, the court is not to make credibility  
26 determinations or weigh conflicting evidence. *Musick v. Burke*, 913 F.2d 1390, 1394 (9<sup>th</sup> Cir.  
27 1990). Instead, the court should draw all inferences in the light most favorable to the  
28 nonmoving party. *Id.*

1            DISCUSSION

2            As the court previously observed, “An insurance policy is a contract between the insurer  
3 and its insured.” *Liberty Ins. Underwriters, Inc. v. Weitz Co., LLC*, 215 Ariz. 80, 83, 158 P.3d  
4 209, 212 (App. 2007). “Courts construe the written terms of insurance contracts to effectuate  
5 the parties’ intent and to protect the reasonable expectations of the insured.” *Id.* (internal  
6 punctuation omitted). “If the contractual language is clear, we will afford it its plain and  
7 ordinary meaning and apply it as written.” *Id.*

8            Where the policy is “susceptible to different constructions,” the court should begin by  
9 “examining the purpose of the clause in question, the public policy considerations involved and  
10 the transaction as a whole.” *California Cas. Ins. Co. v. American Family Mut. Ins.*, 208 Ariz.  
11 416, 418, 94 P.3d 616, 618 (App. 2004). If, after this inquiry, the court still finds ambiguity,  
12 the clause should be construed against the insurer. *Id.*

13            In this case, Guadiana suffered a covered loss when her pipes sprang a leak. (Doc 180,  
14 ¶ 2) This covered loss triggered the tear-out provision of the insurance contract under which  
15 State Farm is obligated to pay the tear-out costs “necessary to repair the system or appliance.”  
16 (Doc. 177, ¶ 5) The system in this case is the plumbing system that caused the covered leak.  
17 If Guadiana can establish as a matter of fact that her plumbing system caused the covered loss  
18 and in order to repair that system it was necessary to replace all the PB pipes, State Farm is  
19 obligated to pay the tear-out costs necessary to replace all those pipes, even those not leaking.  
20 *See Schumacher v. Lumbermens Mut. Cas. Co.*, 154 So.2d 637, 639 (La.App. 1963) (Whether  
21 gutters and drainpipe were part of the plumbing system was an issue of fact.).

22            State Farm maintains it is only required to pay the tear-out costs necessary to replace the  
23 particular pipes that burst. It argues a more expansive interpretation of the tear-out provision  
24 runs counter to those sections of the policy that exclude coverage for loss consisting of defective  
25 construction materials. (Doc. 179, p. 14)

26            The policy states in a separate section that it does not cover loss due to “wear, tear, . . .  
27 deterioration, inherent vice, latent defect or mechanical breakdown.” (Doc. 179, p. 14) (Doc.  
28 62-1, p. 13) In another section, the policy states that “[w]e do not insure under any coverage

1 for any loss consisting of . . . defect, weakness, inadequacy, fault or unsoundness in . . .  
2 materials used in construction or repair.” (Doc. 180, p. 4); (Doc. 62-1, pp. 14-15) These  
3 exclusions, State Farm argues, preclude the reimbursement of tear-out costs necessitated by  
4 defective materials used in the home construction. The court does not agree.

5         These provisions exclude any loss consisting of defective construction materials. Here,  
6 they preclude the homeowner from claiming that the defective pipe is a covered loss. Guadiana,  
7 however, is not making that claim. She is claiming the water damage is a covered loss and she  
8 is entitled to the tear-out costs necessary to repair the plumbing system that caused that covered  
9 loss. The water damage is the covered loss, not the defective plumbing system. *See, e.g.,*  
10 *Keenan v. Wausau Lloyds Ins. Co.*, 1998 WL 652332, \*3 (Tex.App 1998) (not designated for  
11 publication) (“[O]nce covered property is damaged by steam or water from one of the listed  
12 sources, the insured is covered for the cost of accessing the problem, without regard to the  
13 nature of the problem, which could include defective construction.”); *but see, Murray v. State*  
14 *Farm Fire & Casualty Co.*, 219 Cal.App.3d 58, \*65 (Cal.App.4.Dist.1990) (“Because there  
15 was no covered loss under the policy, paragraph 1(e) did not obligate State Farm to pay the cost  
16 of tearing out the cement slab in order to repair the damaged pipe.”).

17         State Farm further argues that summary judgment is not appropriate because Guadiana  
18 cannot prove that her interpretation of the policy protects the reasonable expectations of the  
19 insured without submitting evidence of the expectations of each member of the class. State  
20 Farm, however, misconstrues Guadiana’s argument.

21         Guadiana does not argue that her interpretation of the tear-out provision is correct based  
22 on her subjective expectations. She argues her interpretation is correct based on the policy  
23 language. Accordingly, it is not necessary for her to produce evidence of each class member’s  
24 subjective expectations as a prerequisite to summary judgment. Put another way, the subjective  
25 expectations of each class member is not a genuine issue of material fact that must be resolved  
26 before ruling on her proposed construction of the policy. *But see Averett v. Farmers Insurance*  
27 *Co. Of Arizona*, 177 Ariz. 531, 869 P.2d 505 (1994) (Where the plaintiff offered testimony in  
28 support of his subjective expectations, summary judgment was not appropriate because there

1 remained issues of fact that needed to be resolved before the plaintiff's reasonable expectations  
2 could be assessed.).

3 State Farm further argues that the tear-out provision does not apply because it only  
4 applies to tear-out necessary to *repair* the system that caused the covered loss, not tear-out  
5 necessary to *replace* the system.

6 The court agrees that the words repair and replace are not ordinarily synonymous.  
7 Usually, a system can be repaired short of complete replacement. Nevertheless, Guadiana  
8 intends to prove at trial that this is an unusual case where repair of her plumbing system requires  
9 replacement of all the PB piping. The following question is thus presented: Where repair of a  
10 piping system requires complete replacement, does the tear-out provision apply? The court will  
11 begin by "examining the purpose of the clause in question, the public policy considerations  
12 involved and the transaction as a whole." *See California Cas. Ins. Co.*, 208 Ariz. at 418, 94  
13 P.3d at 618.

14 State Farm has previously asserted that the purpose of the tear-out provision is to  
15 "facilitate repair of the leak in order to stop the influx of water that is causing the covered loss."  
16 (Doc. 12, p. 10). This is a sensible goal that conserves money for both State Farm and its  
17 insured. With this purpose in mind, the court concludes the tear-out provision should cover  
18 those unusual cases where repair of a system requires total replacement.

19 There is no reason why a system that requires complete replacement should be treated  
20 any differently than a system that can be repaired short of complete replacement. Both systems  
21 need to be fixed in a timely and competent manner in order to limit the covered loss and prevent  
22 losses in the future. The court concludes State Farm's construction of the tear-out provision  
23 does not facilitate the purpose of the clause in question.

24 Moreover, State Farm's construction does not comport with considerations of public  
25 policy. Guadiana intends to prove that the only way to repair her system was to replace all the  
26 existing PB piping. While this relatively drastic method of repair is no doubt unusual, there  
27 must be some occasions when replacement is the appropriate, standard, or most cost-effective  
28 method for repairing a plumbing system. Nevertheless, under State Farm's construction of the

1 policy, tear-out costs would be paid if a plumbing system is repaired but would not be paid if  
2 the system is replaced, regardless of which method was most appropriate or cost-effective.  
3 State Farm's construction would discourage replacement even if the resulting cost to both the  
4 homeowner and State Farm was less than it would be if the plumbing system were repaired.  
5 This policy construction could result in wasteful spending contrary to public policy.

6 Finally, the court concludes State Farm's construction does not facilitate the purpose of  
7 the insurance policy as a whole. This provision, like most insurance provisions, is designed to  
8 make the homeowner whole after an unforeseen loss. There is no reason why a homeowner with  
9 a system that can only be repaired by replacement would have any less desire or need for  
10 recompense after suffering a covered loss. State Farm's construction, however, makes a  
11 homeowner whole (at least as far as tear-out costs) if her piping system can be repaired but not  
12 if the appropriate, cost-effective solution is replacement. This construction does not support the  
13 purpose of the policy as a whole.

14 After "examining the purpose of the clause in question, the public policy considerations  
15 involved and the transaction as a whole," the court concludes that State Farm's construction of  
16 the tear-out provision does not "effectuate the parties' intent" or "protect the reasonable  
17 expectations of the insured." *See California Cas. Ins. Co.*, 208 Ariz. at 418, 94 P.3d at 618;  
18 *Liberty Ins. Underwriters, Inc.*, 215 Ariz. at 83, 158 P.3d at 212. The tear-out provision applies  
19 even if repair of the system that caused the covered loss requires complete replacement.

20 State Farm maintains the "pertinent dictionary definition of 'repair' is 'to restore by  
21 *replacing a part* or putting together what is torn or broken'" (Doc. 179, p. 13) (emphasis in  
22 original) (citing *Merriam Webster's Collegiate Dictionary*, 1055 (11<sup>th</sup> ed. 2004)). Accordingly,  
23 State Farm argues that replacing *all* parts cannot be considered a "repair" and would not fall  
24 within the explicit terms of the tear-out clause. State Farm concedes, however, that the same  
25 dictionary gives an alternate definition for repair – "to restore to a sound or health state." *Id.*  
26 The court finds this alternate definition to be applicable in the facts in the instant case.  
27 Accordingly, this court's interpretation of the tear-out provision is not contrary to the dictionary  
28 meaning of the term, "repair."



1 State Farm cites a number of cases for the proposition that the words repair and replace  
2 are not synonymous. The court finds these cases to be of limited value, however, because none  
3 of them analyze facts similar to those presented in the instant case. *See, e.g., Schiernbeck v.*  
4 *Davis*, 143 F.3d 434, 440 (8<sup>th</sup> Cir. 1998) (“[I]t is impracticable, as well as unwise to attempt to  
5 lay down any rule on what constitutes a repair, but each case must be decided in the light of all  
6 the facts and circumstances presented.”) (internal quotation marks and citation omitted).

7 State Farm further argues the word “repair” is separate and distinct from the word  
8 “replace” and should be treated as such because the phrase “repair or replace” is used elsewhere  
9 many times in the policy. State Farm seems to suggest that if the tear-out provision were meant  
10 to apply where the leaking system is replaced then the tear-out provision would have included  
11 the phrase “repair or replace” instead of the word “repair.” The court does not agree.

12 If the hypothetical change were made, the tear-out provision would read as follows: “If  
13 loss to covered property is caused by water or steam not otherwise excluded, we will cover the  
14 cost of tearing out and replacing any part of the building necessary to *repair or replace* the  
15 system or appliance.” Written this way, State Farm would be obligated to pay the tear-out costs  
16 necessary to repair the system *or* necessary to replace the system after a covered loss. State  
17 Farm would have to pay tear-out costs when a system is replaced even if replacement were not  
18 necessary to “restore the system to a sound or health state.” Replacing the word “repair” with  
19 the phrase “repair or replace” could lead to waste contrary to the expectations of the parties and  
20 contrary to public policy. Accordingly, the fact that the tear-out provision contains the word  
21 “repair” and not the phrase “repair or replace” does not convince the court that the tear-out  
22 provision should not apply if repair requires total replacement.

23 At best, State Farm has established that the wording of the tear-out provision is  
24 ambiguous. Assuming arguendo that it is, the clause should be construed against the insurer,  
25 State Farm. *See California Cas. Ins. Co. v. American Family Mut. Ins.*, 208 Ariz. 416, 418, 94  
26 P.3d 616, 618 (App. 2004).

27 Guadiana moves that this court find as a matter of law that (1) the policy “covers tear-out  
28 costs necessary to adequately repair the plumbing system, even if an adequate repair requires



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28