IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARY LOU DOHERTY, JAMES DOHERTY, and JOHN DOHERTY,

Plaintiffs,

v.

ALLSTATE INDEMNITY COMPANY,

Defendant.

CIVIL ACTION
NO. 15-05165

PAPPERT, J. **April 6, 2017**

MEMORANDUM

Plaintiffs Mary Lou Doherty and her sons James and John own numerous properties which they rent, primarily to college students.[1] This case pertains to two of them, halves of a twin dwelling unit with a shared wall located at 949 and 951 Glenbrook Avenue, Bryn Mawr, Pennsylvania. Bryn Mawr is located in Radnor Township. Doherty acquired title to the properties from her mother and has been responsible for managing and maintaining them since 1975 or 1976. *See* (Doherty Dep., ECF No. 132, Ex. LL, at 15:1–18:7).

Doherty insured the properties with Allstate in 2005. In 2014, tenants complained about their condition and Radnor Township cited Doherty for numerous violations of the Township's Rental Housing Code. The Township subsequently revoked

[1] While all three Dohertys are the named insureds on the insurance policies at issue, neither James nor John were in any way involved in this case. Moreover, neither of them played a role in the events giving rise to Plaintiffs' purported claims; all of Plaintiffs' interactions with relevant entities (tenants, township officials, insurance agents, etc.) were carried out by Mrs. Doherty. *See* (ECF No. 92-1, ¶¶ 9, 27, 63, 65, 73); (Tr. of Hr'g 2, at 87:1–10, ECF No. 172). Plaintiffs will therefore be referred to, where appropriate throughout this opinion, as "Doherty," with the understanding that the specific reference is to Mary Lou Doherty.

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the Dohertys' rental licenses for the properties and then sued the Dohertys for, among other things, refusing to allow inspections of the units.

Doherty thereafter sued Allstate claiming that the insurer was required to compensate her for the damage which precipitated the notices of violations and revocations. She also contends that Allstate is obligated to defend her family against the Township's lawsuit. Doherty claims as well that in its dealings with her, Allstate violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201–1, –9.2(a), and the Commonwealth's bad faith statute, 42 Pa. Cons. Stat. § 8371.

After an extensive procedural history, Allstate filed a motion for summary judgment as to all of Doherty's claims. The Court grants the motion and dismisses the case for the reasons which follow.

I.

A.

In November 2005, Doherty began researching online for landlord property insurance policies. (ECF No. 92-1, ¶¶ 27–28.) She found a brochure for Allstate's Landlords Package Insurance Policy ("the Landlords Policy" or "the Policy"). (*Id.* ¶ 29); (ECF No. 144-11.) On December 1, 2005, Doherty met with Thomas McKeon ("Mr. McKeon") of the McKeon Agency and Lynn Fredricks, the McKeon office manager, to discuss her insurance needs. (ECF No. 92-1, ¶ 30); (McKeon Dep., ECF No. 132, Ex. V, at 16:15–18.) The McKeon Agency ("McKeon") is a small office of sales agents who are licensed to sell Allstate insurance policies and, to a limited extent, provide customer

service on those accounts.[2] *See* (McKeon Dep., at 18:8–9, 27:11–14, 42:8–13, 53:2–7). McKeon does not, however, handle claims or have any role in the claims adjusting process. *See* (*id.* at 42:8–13, 53:2–7). If a customer purports to have a claim, McKeon's role is to help connect them to Allstate's claims department. *See* (*id.*). This can take the form of directly transferring a customer who is on the telephone to the claims department, informing the customer of the different ways in which he can open a claim or opening a claim for the customer themselves. *See* (*id.* at 42:8–44:3). In sum, Mr. McKeon testified that "claims is a whole different animal. So however the claims department handles that -- we are sales and service. So we are geared more toward selling the thing, taking care of the customer, and if they have a claim situation handing them off to claims." (*Id.* at 53:2–7.)

Doherty alleges that at her December 1 meeting with Mr. McKeon and Fredricks, she was seeking the "best possible landlord-related property insurance." (ECF No. 92-1, ¶ 27.) Though it is unclear from her Second Amended Complaint exactly what Doherty communicated to Mr. McKeon and Fredricks, Doherty claims she "explained to Defendant's Agents the concerns and needs of the Plaintiffs as identified in the foregoing paragraphs," informed them that she wanted to insure ten or more properties and stated that if Allstate was unable to provide such assurances of coverage, she would be leaving to continue her search. (*Id.* ¶ 31.) Doherty contends that in response, "Defendant's Agents assured [her] that its [Landlords Policy] was the best possible coverage" for the properties, (ECF No. 92-1, ¶ 32), and "made

[2] Though the McKeon agents are independent contractors, they are licensed by Allstate and exclusively sell and service Allstate policies. *See* (McKeon Dep., at 27:11–14, 40:21–23, 54:9–14). Allstate acknowledges that any acts or omissions by McKeon are attributable to Allstate. (Tr. of Hr'g 1, at 37:8–13, ECF No. 173.)

representations that its [Landlords Policy] had better benefits, advantages, and conditions" than those offered by other insurers, (*id.* ¶ 40).

On or around December 19, 2005, McKeon employees inspected the properties and executed individual declaration pages for the policies covering each. (*Id.* ¶¶ 37–38); (ECF No. 144-12.) According to Doherty, McKeon provided these initial declaration pages to Doherty in a folder "to support and confirm the representations being made to Plaintiffs." (ECF No. 92-1, ¶ 39.) Doherty accepted the documentation, left McKeon, stopped looking for other insurance providers and cancelled all of Plaintiffs' existing policies. (*Id.* ¶¶ 43–45.) Doherty claims she "justifiably relied on the representations of Defendants that the desired coverages would be expressed in and through the contracts." (*Id.* ¶ 47.) Doherty also claims that McKeon "failed to advise [her] of any exclusions which were applicable" and "failed to give [her] a copy of the insurance contracts, or give [her] the opportunity to review the insurance contract." (*Id.* ¶¶ 46, 48.) Doherty received a copy of the policy in the mail a few weeks later. *See* (Doherty Dep., at 46:6–20); (McKeon Dep., at 47:12–48:2). Thereafter, Doherty renewed the Policy annually, each time receiving renewal declaration pages[3] and a copy of the same Policy. *See* (Doherty Dep., at 101:16–102:1); (Tr. of Hr'g 2, at 8:3–15, ECF No. 172); (ECF No. 1, at 3).

[3] These renewal declaration pages differed materially from the initial declaration pages Doherty received in December 2005 and on which she allegedly relied when purchasing the policy. *Compare* (ECF No. 144-12) *with* (ECF No. 144-15). The relevant differences will be discussed further below.

B.

The Landlords Package Insurance Policy, Policy Number 908879295, covers the Glenbrook properties.[4] The "Landlord Package Policy Declarations" contains an overview of the "Policy Coverages and Limits of Liability." (ECF No. 132-4.) Page 3 of the declarations states: "Your Landlords Package policy consists of this Policy Declarations and the documents listed below. Please keep these together." (*Id.*) It then lists four documents: Landlords Package Policy Form AS84, Notice of Terrorism Insurance Cov. Form AP3337-2, Pennsylvania LPP Amendatory End. AS122-2, and Standard Fire Policy Provisions form AS277-2. (*Id.*) The Policy thus consists of five separate documents, two of which are relevant here: the declaration pages, which contain the Policy Declarations, and the Landlords Package Policy Form AS84, which contains the policy terms, conditions and exclusions.

i.

The Landlords Policy offers myriad "coverages," three of which—coverages A, B and D—are at issue in this case. *See* (ECF No. 132-5, at 7). Coverage A is titled "Dwelling Protection." It covers property damage to an insured's dwelling and attached structures at the residence premises. (*Id.* at 6.) Coverage B is titled "Other Structures Protection" and covers property that is separated from an insured's dwelling by a clear space. (*Id.*) The Policy enumerates what losses are insured under each of the various coverages. It states:

> We will cover sudden and accidental direct physical loss to property described in **Coverage A—Dwelling Protection** and **Coverage B—**

[4] A copy of the Policy is contained in three separate filings: ECF Nos. 132-4, 132-5 and 132-6. The Court will cite to the Policy using the proper ECF No. and, where applicable, the page numbers contained in the Policy itself.

> **Other Structures Protection** except as limited or excluded in this policy.

(*Id.* (emphasis in original).)

The Policy then sets forth various limitations and exclusions. Under the heading "Losses We Do Not Cover Under Coverages A and B," the Policy explains that Allstate does not cover losses to the property caused by, among other things:

> Water or any other substance on or below the surface of the ground, regardless of its source. This includes water or any other substance which exerts pressure on, or flows, seeps or leaks through, any part of the **residence premises**. (*Id.* at 7, ¶ 4.)
>
> . . . .
>
> Enforcement of any building codes, ordinances or laws regulating the construction, reconstruction, maintenance, repair, placement or demolition of any **building structure**, other structure or land at the **residence premises**. (*Id.* at 7, ¶ 6.)
>
> . . . .
>
> Wear and tear, aging, marring, scratching, deterioration, inherent vice, or latent defect . . . mechanical breakdown . . . Growth of trees, shrubs, plants or lawns whether or not such growth is above or below the surface of the ground . . . Settling, cracking, shrinking, bulging or expansion of pavements, patios, foundations, walls, floors, roofs or ceilings . . . Insects, rodents, birds or domestic animals. (*Id.* at 8, ¶ 13.)
>
> . . . .
>
> Seepage, meaning continuous or repeated seepage or leaking over a period of weeks, months, or years, of water, steam or fuel . . . from a plumbing, heating, air conditioning or automatic fire protection system or from within a domestic appliance; or . . . from within or around any plumbing fixtures, including, but not limited to, shower stalls, shower baths, tub installations, sinks or other fixtures designed for the use of water or steam. (*Id.* at 9, ¶ 16.)

(*Id.* at 7–9 (emphasis in original).)

The Policy also excludes from coverage losses caused by vandalism, defined in the Policy as "willful or malicious conduct resulting in damage or destruction of

property. **Vandalism** does not include theft of property."[5] (*Id.* at 3, ¶ 12; *id.* at 9, ¶ 18.)

Similarly excluded from coverage are losses caused by "[a]ny act of a tenant, or guests of a tenant, unless the act results in sudden and accidental physical damage" caused by specifically enumerated sources.[6] (*Id.* at 9, ¶ 19.)

Losses caused by "faulty, inadequate or defective . . . maintenance" are not covered. (*Id.* at 10, ¶ 21.) Nor are losses "[c]onsisting or caused by mold, fungus, wet rot, dry rot or bacteria," including "any loss which, in whole or in part, arises out of, is aggravated by or results from mold, fungus, wet rot, dry rot or bacteria." (*Id.*)

ii.

Coverage D covers specified losses of fair rental income and will be discussed in more detail *infra* in subsection III.A.vi. (*Id.* at 14.) Section III of the Policy, titled "Optional Protection," provides, as its title suggests, optional coverage which the insured can purchase at an additional cost:

> The following optional coverages may supplement coverages found in Section I or Section II and apply only when they are indicated on the Policy Declarations. The Provisions of this policy apply to each Optional

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5 The Policy contains one exception, inapplicable here, to the vandalism exclusion:

> However, we do cover sudden and accidental direct physical loss caused by fire resulting from **vandalism** unless **your dwelling** has been vacant or unoccupied for more than 90 consecutive days immediately prior to the **vandalism**. (*Id.* at 9, ¶ 18.)

6 The Policy lists the following causes:

> [F]ire, explosion, vehicles, or smoke. However, we do not cover loss caused by smoke from the manufacturing of controlled substances, agricultural smudging or industrial operations . . . increase or decrease of artificially generated electrical current to electrical appliances, fixtures and wiring . . . bulging, burning, cracking or rupture of a steam or hot water heating system, an air conditioning system or an appliance for heating water . . . water or steam that escapes, due to accidental discharge or overflow, from a plumbing, heating or air conditioning system, an automatic fire protection system, or a household appliance; or . . . freezing of a plumbing, heating or air conditioning system or a household appliance. (*Id.* at 9, ¶ 19.)

> Coverage in this section unless modified by the terms of the specific Optional Coverage.

(ECF No. 132-6, at 27.)

On December 20, 2005, Doherty's Policy was amended to include, for an additional premium, the optional Building Code Coverage. *See* (ECF No. 92-1, ¶ 49); (ECF No. 144-15); (Tr. of Hr'g 2, at 77:15–85:25). This provision will be discussed in more detail *infra* in subsection III.A.vi.

C.

On or around October 21, 2013, Doherty leased 949 and 951 Glenbrook Avenue to two groups of tenants, Villanova University students Scott DiSciullo, Patrick O'Brien and others.[7] (ECF No. 92-1, ¶ 54); (ECF No. 93-2.) The leases were to run from June 1, 2014 to May 31, 2015, though the tenants did not plan to move in until late August. (ECF No. 92-1, ¶ 55); (ECF No. 93-2.) On August 22, 2014, the incoming tenants alerted Radnor Township Police to extensive damage to the properties,[8] including but not limited to broken windows, buckled hardwood floors, water stains and ceiling damage, removed and damaged fixtures and doors, detached ceiling lights and smoke

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[7] DiSciullo and two other students signed a lease for the property at 949 Glenbrook. O'Brien and two more students signed a lease for 951 Glenbrook. (ECF No. 93-2.)

[8] Doherty claims that the tenants had already moved into the properties at the time they reported the damage. *See* (Doherty Dep., at 136:13–137:22). According to tenants' statements contained in August 22, 2014 Radnor Police incident reports, however, the tenants discovered the damage upon arriving to move in on August 20, were unable to do so due to the condition of the properties and notified the Dohertys about the conditions on August 22. *See* (ECF No. 93-3). In his statement, DiSciullo wrote: "the home was not in living condition when I attempted to move in and I have not slept here the last two nights as a result." (*Id.*)

DiSciullo and O'Brien both describe the "deplorable" condition of the properties upon their arrival and detail the tenants' efforts to bring the damage to the Dohertys' attention on August 22. O'Brien stated that the tenants saw the Dohertys on August 22 and attempted to discuss with them "issues with the safety of the building and the health implications" but that they "were very rude and short and did not give us a chance to fully show the faults in the property" and "left without addressing any of the issues." (ECF No. 93-3.)

alarms, water damage in the basement, peeling paint, an overgrown lawn, dirty floors and surfaces, a broken stove and refrigerator and trash and mice droppings. *See* (ECF No. 92-1, ¶ 65); (Daly Dep., ECF No. 132, Ex. V, at 15:12–16, 18:13–17); (ECF Nos. 93-3, 93-4, 93-17, 93-18). The police came to the units and completed two incident reports, which included the written statements from DiSciullo and O'Brien.[9] (ECF No. 93-3.) The police also notified the Radnor Township Department of Community Development. (ECF No. 92-1, ¶ 59); (Daly. Dep., at 18:18–19:3.) Radnor Township Code Official Ray Daly then inspected and photographed the properties and began preparing a list of property damage and code violations. *See* (ECF No. 92-1, ¶ 60); (ECF No. 93-4); (Daly Dep., at 12:19–22, 20:6–15); (ECF Nos. 132-21–132:42). Daly testified that the descriptions of the properties' damaged conditions contained in the tenants' written statements to the police comported with his recollection of what he observed at the properties on August 22. (*Id.* at 15:12–16, 18:13–17); (ECF No. 93-3.)

On August 27, 2014, Daly returned to the premises to post notifications of violation which listed, and directed Doherty to correct, various code infractions. *See* (ECF No. 92-1, ¶¶ 61–62); (ECF No. 93-4); (Daly Dep., at 20:16–22). Doherty claims she did not see any posted notifications. *See* (Doherty Dep., at 183:10–11). In an August 31 letter, the tenants told Doherty that they were breaking their leases because the premises were uninhabitable. (ECF No. 92-1, ¶ 63); (ECF No. 96-1.) The tenants also sent Doherty an e-mail to this effect on the same day. (ECF No. 132-19.) In a September 5, 2014 letter, the law firm representing Radnor Township notified Doherty

[9] While several documents referenced here arguably contain hearsay and may not be considered in deciding whether or not to grant summary judgment on Doherty's breach of contract claim, they are relevant and appropriately considered when assessing her bad faith claim as they were part of Allstate's investigation and coverage decision.

that her student rental licenses for the 949 and 951 Glenbrook Avenue homes were being revoked due to building code violations and the Dohertys' failure to permit the Township to perform mandated inspections for several years.[10] (ECF No. 132-43.) Doherty claims she received the tenants' August 31 letter on September 6 and immediately went to the properties, at which time she discovered the damage. (ECF No. 92-1, ¶ 64).

D.

i.

On September 6, Doherty faxed and sent by certified mail a letter to McKeon and to Allstate's corporate office in Northbrook, Illinois. (ECF No. 92-1, ¶¶ 73–74); (ECF No. 93-6.) The subject line read: "RE: notice of claim under policies (908 879295) for 949–51 Glenbrook Avenue, Bryn Mawr Pa." The letter states:

> Dear Allstate and Allstate McKeon Agency:
>
> Please be advised of a claim being made for property damage which has occurred at the above properties. In addition, the properties have been vacated by the tenants so that there is also claim being made by your insured, James and John Doherty and Mary Lou Doherty for loss of rent.

(*Id.*)

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[10] The letter states:

> Dear Mr. and Mrs. Doherty: This letter is to advise you that the student rental licenses for the above two properties are revoked. The licenses are being revoked based on recently received information by the Township which reveals that both properties are uninhabitable under the Township's building and property maintenance codes. As you may recall, the Township has repeatedly attempted to schedule inspections and you have failed and refused to provide access over the past year.

(ECF No. 132-43.) At her deposition, Doherty did not dispute receiving the letter. She did, however, suggest that the Solicitor did not have the authority to revoke the rental licenses. *See* (Doherty Dep., at 60:4–18; 157:20–158:5).

Allstate put the letter in the file of a pre-existing claim involving the Dohertys ("the Chester file").[11] *See* (ECF No. 132-2, at 18); (ECF Nos. 132-55, 132-56); (Erskine Dep., ECF No. 132, Ex. W, at 25:15–24, 39:16–43:1).

However, the record shows that McKeon employee Kathy Wagner received Doherty's letter on September 9 and on the same day left a voicemail for Doherty seeking more information about the alleged loss. (ECF No. 132, at 15.) Specifically, McKeon's files include a copy of Doherty's September 6 letter on which Wagner wrote: "9/9 - Rec'd - no claim recorded. L/M for Mary Lou Doherty."[12] (ECF No. 132-44.) At her deposition, Doherty testified that she does not know whether she received a voicemail from McKeon on September 9, 2014. *See* (Doherty Dep., at 211:24–213:13). In any event, no claim was opened at that time.

ii.

On September 24, 2014, Radnor Township sued the Dohertys in the Delaware County Court of Common Pleas based upon the properties' condition and the Dohertys' alleged failure, for several years, to permit the Township to inspect the premises in accordance with the Township's Rental Housing Code. (ECF No. 93-5.) The Complaint,

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[11] Joanne Chester lived near one of the Dohertys' unrelated rental properties. At some point, Chester reported problems with the Dohertys' property to the Narberth Police Department. *See* (Doherty Dep., at 296:20–310:9). In response, Doherty sued her for libel and slander. (*Id.* at 297:11–20.) Chester spent a considerable amount of money defending the lawsuit, which was ultimately dismissed in 2013. *See* (*id.* at 304:20–308:4). Chester then brought a *Dragonetti* action against Doherty seeking to recoup her defense costs, among other things. (*Id.*) Doherty opened a claim with Allstate in an attempt to have Allstate defend her in the *Dragonetti* action. *See* (ECF No. 132-56). Allstate refused to do so but the "Chester file" was apparently still open at the time Allstate received Doherty's letters relevant to the Glenbrook properties. (*Id.*) Allstate misfiled Doherty's letters (which lacked specific information such as the alleged date of loss, facts describing the loss, etc.) in the Chester file.

[12] At his deposition, Thomas McKeon identified the handwriting as Wagner's. *See* (McKeon Dep., at 62:1–63:1, 65:1–11).

a copy of which is attached as Exhibit G to Doherty's Second Amended Complaint, details the Township's efforts to inspect the Glenbrook Avenue units going back to 2008 and the fact that in 2009 the court ordered the Dohertys to permit the inspections. (*Id.* ¶¶ 14–32.) According to the Complaint, however, all of the Township's letters to the Dohertys seeking to schedule inspections went either challenged or unanswered and the Township did not succeed in inspecting the properties.[13] (*Id.*)

The Township's Complaint details the August 2014 communications Township officials had with the tenants of the Glenbrook properties. (*Id.* ¶¶ 33–36.) It states that after contacting the Township with their complaints, the tenants allowed the Township to inspect the properties and that, upon inspection, the Township discovered numerous violations of the Township's Property Maintenance Code and ultimately found both units to be "unfit for human habitation." (*Id.* ¶¶ 37–43.) Finally, the Complaint states that "[o]n September 5, 2014, the Township Solicitor forwarded a letter to the Dohertys stating that their rental licenses for the Properties for the 2014-2015 year have been revoked." (*Id.* ¶ 44.)

E.

On October 4, 2014, Doherty faxed and sent by certified mail another letter to McKeon asking the company why it had failed to respond to her September letter and

[13] At her deposition, Doherty claimed that the Township inspected her properties on "[n]umerous occasions post-2009." (Doherty Dep., at 68:1.) When Allstate's counsel inquired into why the September 5, 2014 and July 2, 2015 notifications from the Township indicated that the officials had never been able to inspect the properties, she said, "I can't help it if they say that kind of stuff." (*Id.* at 68:10–15.) When pushed for a specific date, Doherty testified that the Township inspected her properties on July 18, 2013 and issued a rental license in June 2014 premised on having inspected the property to their satisfaction. (*Id.* at 68:19–69:23; 289:22–290:5.) The Township's Complaint, however, states: "On July 18, 2013 a representative of the Township stopped by all three properties seeking to conduct an inspection of these properties; however, no one was available at any of these properties to let the representative in to conduct the legally mandated inspections of these properties." (ECF No. 93-5.)

how the claim could be adjusted. (ECF No. 92-1, ¶¶ 80–81); (ECF No. 93-8.) She also sent a copy of the letter by certified mail to Allstate, which Allstate claims was again misfiled in the Chester file.[14] (ECF No. 92-1, ¶ 83); (ECF No. 93-8); (ECF No. 133, at 18); (ECF No. 132-55). In her Second Amended Complaint, Doherty claimed that McKeon received the letter the same day and did not respond to the follow-up request. (ECF No. 92-1, ¶¶ 82, 85.) The record shows, however, that McKeon received Doherty's letter on October 8, 2014 and that Wagner called and spoke with Doherty the same day. (ECF No. 133, at 15.) Allstate produced, from McKeon's files, a copy of Doherty's October 4 letter with a handwritten note by Wagner stating that she spoke with Doherty and told her that she could set up a claim by calling 1-800-ALLSTATE.[15] (ECF No. 132-45.) Wagner also followed up the conversation with an e-mail to Doherty, again instructing Doherty to file a claim by calling the hotline and following the prompts. (ECF No. 132-46.) Though Doherty repeatedly claimed that her letters went unanswered altogether, *see, e.g.*, (ECF No. 92-1, ¶ 101); (Pls.' Am. Compl., ¶ 66, ECF

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[14] An entry in the Claim History Report ("claim log") in the Chester file indicates that on October 15, 2014, Lisa Handlovic, a third party loss adjuster in the corporate office, realized that Doherty's letter was referencing a different policy than the one involved in the Chester case and that it may have been attached to the Chester file in error. *See* (ECF No. 132-55, at 17). Handlovic wrote:

> letter attached to this claim not address [sic] to this office, my attention or for this policy no., I called insd's agent's office since it was addressed to them and she mentions prior letters which I have not seen, talked to lynn, told her letter rec'd what do they have etc, she did say she mentioned she was going to set up a claim but apparently based on that letter she hasn't she will f/u with her, thinks Kathy in her office talked to her recently as well, told her if there is a claim set it up and would need date of loss and some facts, she does list a policy in the letter so I would think it has something to do w/ that policy and that is not this one, I will not respond since this was apparently attached to this claim in error, she will follow up with her.

[15] The October 8, 2014 note states: "Sp. w/ Mary Lou — gave her info to call to file a claim - nothing was established. Also e-mailed a copy of policy to her." (ECF No. 132-45.) At his deposition, Thomas McKeon identified the handwriting as Wagner's. *See* (McKeon Dep., at 62:1–63:1, 65:1–11).

No. 66), her story changed after Allstate produced evidence of the phone call and e-mail from Wagner. At her deposition, Doherty conceded that she spoke with someone from McKeon on October 8. (Doherty Dep., at 218:21–219:17.) Though she only "sort of" recalled the details of the conversation, she stated that her notes from that conversation, which she accidentally placed in her file related to the Chester case,[16] said: Tom McKeon, call 1-800-ALLSTATE, prompts. *See* (*id.* at 218:21–220:14). When asked whether she followed Wagner's instructions, Doherty claimed that she attempted to utilize the 1-800-ALLSTATE hotline but was unable to get through and concluded that it was a non-functioning number.[17] In any event, a claim was not opened at this time and Doherty made no further attempts to contact Allstate or McKeon until July of 2015.

F.

In the interim, Doherty hired John Rush, a home repair contractor, to assess the damage, prepare an "Estimate of Repairs" and fix the properties. (ECF No. 92-1, ¶ 87); (ECF Nos. 93-17, 93-18.) Rush worked for Doherty from October 2014 through May of 2015 and allegedly performed $32,252.00 worth of repairs. (ECF No. 92-1, ¶¶ 87–88); (ECF Nos. 93-17, 93-18.) Doherty testified that Wayne Bevilaqua and Mike Gormley

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[16] In one of this case's greater ironies, Doherty misfiled at least some of her own materials pertaining to the Glenbrook properties claim in her Joanne Chester file—the same mistake the record reveals Allstate to have made.

[17] Doherty testified that she tried to call 1-800-ALLSTATE but it did not work from her phone. She initially attributed this to the fact that ALLSTATE is comprised of 8 letters whereas proper telephone numbers have only 7 numbers after the area code. However, after Allstate's lawyer, in front of Doherty at her deposition, used his phone to dial numbers corresponding to ALLSTATE (1-800-255-78283) and ALLSTAT (1-800-255-7828), and successfully got through to the hotline both times, Doherty posited that perhaps the problem was unique to her phone carrier. In any event, Doherty claims she concluded that 1-800-ALLSTATE was a non-functioning number. She further stated that she did not have time to call or e-mail Wagner to inform her that she was having trouble with the hotline or needed a different number. *See* (Doherty Dep., at 222:18–229:22).

also did work on the property during this time.[18] (Doherty Dep., at 237:11–15.) Though the house was not "the same as it was pre-loss," Doherty testified that the properties had been repaired and "Rush had done what he could to mitigate it." (*Id.* at 162:14–19, 233:1–10.)

In November 2014, Doherty received inquiries about leasing 951 Glenbrook from a group of prospective tenants, among them Devin Good. (ECF No. 92-1, ¶ 90.) Undeterred by the Township's prior revocation of her rental licenses, Doherty leased the unit to Good and two other Villanova students, with the lease to run from June 1, 2015 to May 31, 2016. (ECF Nos. 93-19, 93-20.) According to Doherty, the prospective tenants "inspected the property on several occasions, expressed their satisfaction with the premises, and between February and June 2015, paid their respective portions of the security deposits, accepted the keys, and commenced moving into the properties." (ECF No. 92-1, ¶ 91); (ECF Nos. 93-19, 93-20.) A written statement provided by Devin Good to the Radnor Police tells a different account:[19]

> Mary Lou and James Doherty of Havertown, PA owning/representing the property at 951 Glenbrook Avenue, Bryn Mawr, PA entered into a lease agreement with me and (my father as a signatory) early in the year of 2015. Three months of rent were paid plus a full month of security deposit whereas the lease agreement should have commenced on June 1, 2015 and ending on May 31, 2016. Mary Lou and James Doherty failed to supply the keys to said premises until late June thereby denying me access and living accommodations that I paid for most of June. After receiving the keys in late June I attempted to move in during the second

[18] Doherty stated that Bevilaqua performs work related to plumbing, furnaces and "mechanical stuff" and Gormley is an electrician. (Doherty Dep., at 237:16–138:17.)

[19] Again, while this statement may constitute hearsay, it is included here because it is relevant to Doherty's bad faith claim. The Court considers it not for its purported truth but for its effect on Allstate since information gleaned from the police reports and other subpoenaed documents ultimately formed the basis of Allstate's decision to deny Doherty's insurance claim and the reasonable basis Allstate had for that decision. Allstate, in deciding to grant or deny coverage, is obviously under no obligation to make all reasonable inferences in Doherty's favor or abide by evidentiary rules.

> week of July. Upon entering the premises, the conditions were deplorable. Active leaking septic pipes in the basement, black mold throughout, exposed wiring, overflowed and nonfunctioning toilet, missing or smoke detectors five plus years past expiration to name a few of the conditions. We also discovered shortly after that Radnor Township had denied application for said property to be used as a rental prior to the commencement of my lease arrangement — the Dohertys were aware of this Town order, the deplorable and unsafe conditions but continued to take and cash rental checks and hide both facts from me. When speaking with the Town shortly after my attempt to move in they also said we can't live in the house due to the aforementioned conditions and our safety as we described.

(ECF No. 132-48.)

According to Doherty, "[o]n July 2nd, 2015, Plaintiffs unexpectedly received notification and lock-out of the premises at issue from the Local Municipality, being the Township of Radnor, alleging that the premises at issue was in violation of Local Building Codes and had not been inspected." (ECF No. 92-1, ¶ 103); (ECF No. 132-47.) Then, on July 11, Doherty contends that "the tenants of Plaintiffs, through Devin Good, claimed to have problems with the premises at issue which were untrue and not even possible."[20] (ECF No. 92-1, ¶ 105.)

On July 30, 2015, Doherty faxed and sent by certified mail another letter to McKeon, complaining about Allstate's refusal to acknowledge the claim. (ECF No. 92-1, ¶ 108); (ECF No. 93-11.) She also sent a copy of the letter by certified mail to Allstate's corporate office. (ECF No. 92-1, ¶ 109); (ECF No. 93-11.) She informed Allstate that her damages were now almost $400,000.00 and, for the first time, that Radnor

[20] At Doherty's deposition, Allstate's counsel asked: "What did you mean by that these problems were untrue and not even possible; was that because the house had already been fixed?" Doherty responded: "Well, partly – I don't – you can't say you're having a problem at the property when you're standing in front of me causing a problem with the property. You have a problem with yourself. All right. And not even possible because he's describing things that are supposedly not to his satisfaction that don't exist, so good luck." (Doherty Dep., at 161:14–162:2.) Regardless, the properties were vacated and the non-renewal status of the Dohertys' rental licenses remains in effect. (*Id.* at 43:16–19); (ECF No. 92, ¶ 106.)

Township's September 2014 lawsuit against her had triggered Allstate's duty to defend. (ECF No. 92-1, ¶ 110); (ECF No. 93-11.)

Allstate opened its claim file for the Glenbrook properties on August 7, 2015. (ECF No. 132-73.) The first entry in the claim log is dated that day and states that the insured sent "a very large package of legal documents stating claim was filed in September and Allstate never responded." (*Id.* at 5.) An entry by an Allstate employee reflects that Allstate contacted Doherty on August 7 and noted that she was "very upset and would like to speak to another customer service rep." (*Id.* at 4.)

On August 8, 2015, Tiara Myrick, an Allstate claims adjuster, called Doherty. (*Id.*) She did not reach Doherty so she left a voicemail message. (*Id.*); (Myrick Dep., ECF No. 132, Ex. AA, at 79:14–19, 85:23–86:21.) In the message, Myrick provided Doherty with her First Party Claim Number, 0379581976. (ECF No. 92-1, ¶ 112); (ECF No. 132-73); (Myrick Dep., at 85:23–86:21.) That day, Myrick wrote in the claim log: "Called insured left a vm/m regarding the claim that was submitted. Left my name, #, and office hours for insured to contact me." (ECF No. 132-73, at 3.) Myrick left Doherty another voicemail to this effect on August 11. (*Id.*) (Myrick Dep., at 86:2–87:5.) Doherty did not call Myrick back. She instead sent a letter on August 11 to McKeon (by fax) and Allstate (by certified mail). (ECF No. 132-74); (Myrick Dep., at 76:22–87:5.) In her letter, Doherty stated that Myrick left her a message regarding her claim and gave her a callback number that was different from a prior number she had been given. (ECF No. 132-74.) She then writes: "[t]here seems to be some confusion in Allstate's claims handling process" and requests that someone "look into this by August 17, 2015 and get back to [her]." (*Id.*)

Myrick testified that she then contacted McKeon to see if they could assist her in contacting the insured or provide her with an alternate phone number for Doherty. (Myrick Dep., at 89:4–90:10.) The claim log shows that on August 12 Myrick spoke to Lynn Fredricks from McKeon, who told Myrick that Doherty "will not respond to anyone's phone call." *See* (ECF No. 132-73, at 3); (Myrick Dep., at 89:3–90:10, 106:8–107:16). According to the entry, Fredricks told Myrick that "she [had] tried to call the insured and get a feel for what the claim is being filed for, but the insured only responds with numerous legal documents." (ECF No. 132-73, at 3.) According to the claim log, Myrick called Doherty again on August 12 and left another voicemail: "Called the insured explained that I did receive the docs that were sent to her agent for me. I explained that I have been trying to reach her for the last few days .. left a vm/m with my name, #, and office hours." (*Id.*); *see also* (Myrick Dep., at 90:11–22). On August 13, 2015, Myrick sent Doherty a letter confirming that she had been assigned to handle the claim, stating that she had tried and been unable to reach Doherty by phone and requesting that Doherty return her call. *See* (ECF No. 132-75); (ECF No. 132-73, at 3); (Myrick Dep., at 90:23–92:7). Doherty nevertheless repeatedly claimed that neither Allstate nor McKeon ever responded to her August 11 letter. *See* (ECF No. 92-1, ¶¶ 115–116); (ECF No. 66, ¶¶ 96–97).

Having heard nothing from Doherty and unaware that Doherty sued Allstate in the Delaware County Court of Common Pleas the day before, Myrick again called and left a message for Doherty on August 19. *See* (ECF No. 132-73, at 3); (Myrick Dep., at 92:8–21). On August 21, 2015, Myrick emailed Doherty stating that she was the claims adjuster and had "attempted to contact [Doherty] on several occasions via phone and

letter correspondence to discuss the details of your claim in depth." (ECF No. 132-76.) The e-mail states: "[i]t is imperative that I make voice to voice contact with you to get accurate loss facts regarding the claim that you submitted" since "[t]he claims process is reliant on the information that is shared between 'you' the insured and 'me' the claims adjuster." (*Id.*) She provided her contact information and asked Doherty to contact her. (*Id.*) Again, Doherty did not do so. *See* (Myrick Dep., at 92:22–94:7).

On August 26, 2015, Myrick called Doherty yet again. *See* (*id.* at 94:8–95:15); (ECF No. 132-73, at 2). The log states: "Called the insured. Mrs. Insured answered the phone, explained that she could not speak with me because she was in pending litigation and hung up the phone – at this time we'll get a manager involved for the appropriate steps." (ECF No. 132-73, at 2.) The file was then given to Clare Erskine, an Allstate litigation representative. (Myrick Dep., at 44:22–47:24, 64:8–23). Erskine reviewed the file and wrote a note in the claim log on August 27, 2015 stating: "Apparently litigation has been filed against Allstate in this matter as stated by the insured." *See* (ECF No. 132-73, at 2). She then reviewed the Chester file to make sure it had nothing to do with the property claim, at which point she found the letters Doherty had previously sent. *See* (Erskine Dep., at 25:15–24, 39:16–43:1); (ECF Nos. 132-55, 132-56).

G.

Doherty herself represented the Plaintiffs when she filed their initial Complaint in this case in Delaware County.[21] The Complaint alleged that Allstate breached the

[21] Doherty is an attorney. She obtained a Bachelor of Science in Economics and a Master of Business Administration from the University of Pennsylvania and a Juris Doctor from the University of Virginia Law School. *See* (Tr. of R. 16 Conf., ECF No. 132-81, at 2:3–21); (Doherty Dep., at 8:11–10:19).

insurance contract by failing to pay for covered losses. (Pls.' Compl., ECF No. 1.) Though the Complaint was vague with respect to the factual circumstances surrounding the alleged losses, it did include two purported dates of loss, August 27, 2014 and July 2, 2015. (Pls.' Compl., ¶¶ 9, 15.) With respect to both dates, the Complaint states:

> On [date], while Allstate's [] Renewal Policy was in full force and effect, the owners suffered physical loss and damage to the insured property, believed to be the result of a peril insured against under the policy issued by Allstate resulting in damage to the insured premises Glenbrook as well as loss of rent totaling in excess of [amount].

(*Id.*) Again, August 27, 2014 was the date on which Daly posted his notifications of violations at the premises and July 2, 2015 is the date Doherty "unexpectedly received" notification from Radnor Township "locking her out" of the properties for code violations. (ECF No. 92-1, ¶¶ 61–62, 103); (ECF No. 93-4); (Daly Dep., at 20:16–22); (ECF No. 132-47.)

Allstate removed the case on September 16, 2015. (ECF No. 1.) At some point, Allstate's counsel contacted Doherty requesting clarification on the basis of the lawsuit. On October 15, 2015, Doherty sent counsel a letter purporting to explain her claim and provide "an overview of the loss that may be helpful to you — which spans over five years." (ECF No. 132-80.) The overview, however, merely recounted the history of disputes between Doherty and Radnor Township, culminating in the revocation of Doherty's rental licenses. *See* (*id.*). The letter did not contain any information about the alleged property damage, the alleged cause of the losses or the factual circumstances forming the basis of her suit against Allstate. *See* (*id.*).

The Court held a Rule 16 conference on October 26, 2015. (ECF No. 18.) In her capacity as Plaintiffs' counsel, Doherty was questioned by the Court and provided responses on the record.[22] (ECF No. 132-81.) Doherty explained that there was friction between her and Radnor Township concerning the properties and posited that the damage to the properties may have been caused by Radnor Township officials in retaliation for prior decisions by the Delaware County Court of Common Pleas, stating: "I think Radnor had a key to the property and they shook it apart or whatever you want to call it." *See* (*id.* at 11:19–13:10, 18:19–19:2). She identified August 27, 2014 as the date when the supposedly sudden and accidental loss occurred and repeated her belief that Radnor Township officials were responsible for "negligence and/or just shaking things apart so that you could say that the place was in violation of maintenance codes of Radnor Township." (*Id.* at 12:21–25, 16:12–17:12.) When asked if she was contending that Radnor Township was responsible for the damage to the properties, Doherty said: "They were the last ones in there, had access to it, and testified in a court proceeding in Delaware County that they were in the properties through mid-September 2014." (*Id.* at 13:11–16.) Allstate's counsel pointed out that the policy expressly excluded from coverage losses caused by vandalism, to which Doherty responded: "Okay, I consider that to have been vandalism, in my personal opinion." (*Id.* at 18:14–19:7.) Though the Court repeatedly probed Doherty as to why she was suing Allstate for damage allegedly caused by Radnor Township or her tenants, since such perils were expressly excluded from coverage under the Policy, Doherty was unable to

[22] Though Doherty is an attorney, since she is a named plaintiff, the Court conducted the Rule 16 conference on the record in the courtroom, something the Court does as a matter of practice in *pro se* matters. Doherty was not under oath and her statements that day are not record evidence. Some of her statements are recounted here because they show what Allstate, through its counsel, learned about Doherty's allegations regarding the property damage.

articulate an explanation. *See* (*id.* at 13:11–14:13, 16:3–19:7, 19:20–20:23, 22:4–8, 26:22–28:10, 31:7–32:14).[23]

The day after the Rule 16 conference, Allstate's counsel, citing Doherty's description of the circumstances surrounding the alleged losses and information Allstate had learned when it received the Radnor Township Police incident reports, asked her to withdraw the lawsuit. *See* (ECF No. 29-11). He followed up with a similar e-mail on October 28, 2015. (*Id.*) On November 12, 2015, Allstate's lawyer sent Doherty another letter indicating that her ongoing issues with Radnor Township did not constitute a legally cognizable claim under the Landlords Policy. *See* (ECF No. 29-13).

H.

Allstate subpoenaed records related to the Dohertys' properties from various entities and individuals, including Radnor Township, the Radnor Township Police Department, Villanova University, Philadelphia Electric Company, Haverford Township and Devin Good. Allstate received, *inter alia*, a package of documents from Good, including his written statement to the police, various letters sent by his father to Doherty and the photographs he took of the property in July 2015; the Radnor Township Complaint; the 2009 Common Pleas Court Order compelling the Dohertys to allow the Township to inspect the properties; the September 5, 2014 and July 2, 2015 notices from Radnor Township revoking Doherty's rental licenses; various complaints about Doherty submitted to Villanova by students and parents alleging poor

[23] In her November 2, 2015 answers to interrogatories, Doherty again appeared to place the blame for the damage to the properties on the tenants or Radnor Township officials, consistent with the explanation she gave at the Rule 16 conference. *See* (ECF No. 29-12, ¶¶ 15–19).

maintenance of rental properties and misconduct as a landlord[24] (in renting the properties at issue and others); pictures of the damage taken by Daly on August 22, 2014; the August 27, 2014 notifications of violation letters; and four incident reports filed with the Radnor Police—two by DiSciullo and O'Brien in August 2014, one by Good in July 2015 and one by the parent of a previous tenant of 951 Glenbrook in 2006.[25] *See* (ECF No. 29, at 4–5); (ECF Nos. 132-10–132-12, 132-14–132-54).

On December 10, 2015, counsel for Allstate wrote Doherty a letter enclosing the subpoenaed records from Villanova. *See* (ECF No. 29-14). The letter states that the "records show that the properties were uninhabitable prior to the dates of loss listed in the complaint." (*Id.*) On December 17, 2015, after receiving additional subpoenaed documents from the Radnor Police, counsel again wrote Doherty. (ECF No. 29-15.) He enclosed the four police reports and stated that the records showed that the tenants had been unable to move in to the properties in August 2014 and July 2015, that Doherty had been informed of the property damage five days before the purported date of loss and that there had been complaints about maintenance issues dating back to 2006. (*Id.*)

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[24] The Villanova materials included, among other things, a notation from July 2010 entitled "Bad recommendations of local landlord" pertaining to a property owned by the Dohertys (which appears to refer to one of the properties at issue) stating: "July 2010. Jim Dogherty (sp?) and Marylu. Glenbrook, Duplex, water in basement, leaky faucets, pealing [sic] paint on bathroom ceiling/fear of mildew = LL [Landlord] not responsive." (ECF No. 132-14); (ECF No. 29-52, at 21–22.)

The Villanova materials also included an e-mail from the mother of a prospective tenant of Doherty's property at 961 Glenbrook Avenue from August 22, 2014, the same day DiSciullo and O'Brien contacted Radnor Police about the other Glenbrook properties. The e-mail states: "Our son and two other Villanova seniors have had the terrible misfortune of dealing with the Dohertys. We as parents are also under distress because of these landlords. . . . The Dohertys have not removed debris left from previous tenants, will not remove broken appliances, will not clean the house from tenant to tenant, they have not repaired a leaky pipe in the kitchen." (ECF No. 29-52, at 8–9.)

[25] In 2006, Jerry Anders, the father of previous tenant Doug Anders, complained to the Radnor Police that necessary repairs were not being made at 951 Glenbrook. *See* (ECF No. 132-10).

On April 4, 2016, after receiving the documents from Devin Good, defense counsel wrote Doherty again, stating: "We recently received these documents from Devin Good and the Radnor Police Department. It is clear that the damages alleged in the Complaint pre-exist the purported date of loss." (ECF No. 29-16.) Doherty then retained counsel who entered his appearance on May 18, 2016. (ECF No. 36.) On June 13, 2016, Doherty filed a motion for leave to file an amended complaint, seeking to add claims under the bad faith statute, 42 Pa. Cons. Stat. § 8371, as well as the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 P.S. § 201–1, –9.2(a). (ECF No. 41.) The Court granted the motion and in her Amended Complaint, Doherty alleged that Allstate violated the bad faith statute by failing to open a claim in a timely manner, failing to investigate the claim and refusing to pay for covered losses without a reasonable basis. She also alleged that Allstate, through McKeon, violated the UTPCPL by misrepresenting to Doherty the terms and benefits of the Landlords Policy. Though the Amended Complaint remained vague about the types and causes of losses Doherty allegedly sustained, Doherty claimed that "Defendant misrepresented the benefits, advantages, conditions, and terms of its policy so as to make Plaintiffs believe that they would be covered for losses which are the basis of their Complaint." (ECF No. 41, ¶ 118.)

On August 10, Allstate filed a motion to dismiss Doherty's UTPCPL claim, Count III of the Amended Complaint. (ECF No. 67.) On September 27, 2016, the Court granted Allstate's motion and gave Doherty leave to file a Second Amended Complaint with more specific allegations as to the alleged misrepresentations and the manner in which they were made. (ECF No. 90.) Doherty filed her Second Amended Complaint

on October 11. (ECF No. 92-1.) Allstate filed another motion to dismiss Count III on November 1. (ECF No. 99.)

ii.

Doherty was deposed on November 15, 2016. Allstate's counsel asked Doherty about the circumstances surrounding the alleged August 27, 2014 loss:

> **Counsel**: All right. So the date of August 27, 2014, the date that you said that on August 27, 2014 the owner suffered physical loss and damage to the property, the physical loss and damage to the property you're referring to was the inspection by Ray Daly of Radnor Township Code Enforcement?
>
> **Doherty**: No. It wasn't the inspection, it was the information as to the condition.
>
> **Counsel**: Okay. What caused the condition?
>
> **Doherty**: I would assume somebody damaged the property. It was human.
>
> **Counsel**: All right. What date did that occur?
>
> **Doherty**: Some time on or about August 27th. I would assume it would have been before Ray Daly would have written his report. Maybe they damaged it after. I don't want to be sarcastic but you never know.
>
> **Counsel**: Who caused the loss to your property?
>
> **Doherty**: The only people that I know were the tenants and Ray Daly and possibly whomever else they had with them, family.
>
> . . . .
>
> **Counsel**: Okay. What is the cause of the damage to the property?
>
> **Doherty**: Tenant abuse I would assume is about the best way to describe it. Not unless Ray Daly did it, you know, I wouldn't rule it out. Because I've had inspectors knock a hole in the wall to check the insulation supposedly.

(Doherty Dep., at 32:11–33:8, 34:3–9.) The parties returned to this topic later in the deposition:

> **Counsel**: And what caused those conditions was it vandalism?

> **Doherty**: Okay. I consider it to have been abuse of the property by a [sic] either the tenants, their guests, or possibly code officials, but somebody was there. I believe it was human.
>
> **Counsel**: The conditions as --
>
> **Doherty**: It wasn't the wind and it wasn't the rain.
>
> **Counsel**: Okay. The conditions as described by Ray Daly and photographed by Ray Daly and the letters dated August 27, 2014, you believe that to be the result of tenant abuse from either the tenants or Radnor Township?
>
> **Doherty**: I believe it occurred while they had custody and control of the property, that's the only way I can put it.
>
> . . . .
>
> **Counsel**: All right. And on August 27, 2014 there wasn't any weather-related event that caused damage to the property, right?
>
> **Doherty**: Not to my knowledge.

(*Id.* at 81:18–83:7.)

Counsel also attempted to discern the circumstances surrounding the alleged loss on July 2, 2015, the same date that Radnor Township notified Doherty (for the second time) that her rental licenses were not being renewed:

> **Counsel**: So what's the physical loss and damage of the insured property that you suffered as the owner on July 2, 2015?
>
> **Doherty**: I went over there and I believe the tenants were in there. Somebody was in there.
>
> **Counsel**: Somebody was in there on July 2, 2015?
>
> **Doherty**: Yeah. Yes. Excuse me.
>
> **Counsel**: Your license to rent had been revoked by Solicitor Rice in September of 2014, correct?
>
> **Doherty**: No. He just thought he had. Unfortunately he doesn't have the authority to do it. So let's just not get overboard.

(*Id.* at 57:21–58:9.)

iii.

On December 6, 2016, Doherty filed a response in opposition to the motion to dismiss Count III, (ECF No. 116); Allstate replied on December 14, (ECF No. 125). On January 13, 2017, before the Court could rule on the motion to dismiss, Allstate filed its motion for summary judgment. (ECF No. 132.) On January 19, 2017, Doherty purported to "verify" the allegations in her Second Amended Complaint. (ECF No. 135.) Doherty responded to the summary judgment motion on February 4, 2017, (ECF No. 144), and Allstate filed its reply on February 24, 2017, (ECF No. 152). The Court heard oral argument on March 7 and March 15, 2017.[26] (ECF Nos. 153, 172.) With leave of Court, Doherty filed her surreply brief in opposition to summary judgment on March 8, 2017. (ECF No. 162.) The Court has reviewed the parties' submissions and the record extensively.

II.

Summary judgment is proper if there is no genuine issue of material fact and if, viewing the facts in the light most favorable to the non-moving party, the moving party is entitled to judgment as a matter of law. *Smathers v. Multi-Tool, Inc./Multi-Plastics, Inc. Emp. Health & Welfare Plan*, 298 F.3d 191, 194 (3d Cir. 2002); *see also* FED. R. CIV. P. 56(c). A genuine issue of material fact exists when "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). A mere scintilla of evidence in support of the non-moving party will not suffice; there must be evidence by which a jury could reasonably find for the non-moving party.

[26] Though the hearing on March 7 related primarily to Doherty's motion for leave to file a third amended complaint, (ECF No. 102), the parties also made arguments relevant to the motion for summary judgment. The Court denied as moot that day Allstate's motion to dismiss Count III. (ECF No. 161.)

Id. at 252. The Court's role at the summary judgment stage "is not . . . to weigh the evidence and determine the truth of the matter but to determine whether . . . there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.* at 249. In making this determination, "the court is required to examine the evidence of record in the light most favorable to the party opposing summary judgment, and resolve all reasonable inferences in that party's favor." *Wishkin v. Potter*, 476 F.3d 180, 184 (3d Cir. 2007). However, the party opposing summary judgment must identify evidence that supports each element on which it has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

III.

In Count I of the Second Amended Complaint, Doherty contends that Allstate breached the insurance contract by both refusing to pay for covered losses and failing to defend her in the lawsuit brought by Radnor Township. (ECF No. 92-1, ¶¶ 125, 126.) Where federal jurisdiction is based on diversity of citizenship, as it is here, the Court applies the choice-of-law rules of the state in which the Court sits. *Canal Ins. Co. v. Underwriters at Lloyd's London*, 435 F.3d 431, 434 (3d Cir. 2006) (citations and quotations omitted). Under Pennsylvania choice-of-law rules, an insurance contract is governed by the law of the state in which the contract was made. *Id.* "An insurance contract is made in the state in which the last act legally necessary to bring the contract into force takes place." *Id.* Here, the parties agree that the insurance contract was made in Pennsylvania and, consequently, Pennsylvania substantive law applies.[27] (Tr. of Hr'g 2, at 16:25–17:7.)

[27] Moreover, the Policy states: "the laws of the state in which the residence premises is located shall govern any and all claims or disputes in any way related to this policy." (ECF No. 132-5, at 5.)

A.

Doherty contends initially that Allstate breached the contract by refusing to pay for covered losses.[28] To prove a breach of contract under Pennsylvania law, a plaintiff must establish "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages." *Ware v. Rodale Press, Inc.*, 322 F.3d 218, 225 (3d Cir. 2003) (citation omitted). Plaintiffs have proven the existence of a contract between them and Allstate—the Landlord Package Insurance Policy.[29]

With respect to proving a breach, the general rule in Pennsylvania is that the insured has the burden "to establish coverage under an insurance policy." *Nationwide Mut. Ins. Co. v. Cosenza*, 258 F.3d 197, 206 (3d Cir. 2001). Put differently, "the insured bears the burden of proving facts that bring its claim within the policy's affirmative grant of coverage." *Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1446 (3d Cir. 1996). If (and only if) the insured does so, the burden shifts to the insurer to establish an applicable exclusion to coverage. *Cosenza*, 258 F.3d at 206; *see also Koppers*, 98 F.3d at 1446 ("[T]he insurer bears the burden of proving the applicability of any exclusions or limitations on coverage, since disclaiming coverage on the basis of an exclusion is an

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[28] Allstate arguably never officially denied Doherty's claim. When Allstate learned that Doherty filed suit, it transferred responsibility for Doherty's claim from its claims department to its litigation department. Because this occurred almost immediately after Doherty's claim was opened, the claim was removed from the normal claims handling process before an investigation was conducted and a decision to pay or deny the claim issued. *See* (Tr. of Hr'g 2, at 34:18–37:6); (Erskine Dep., at 23:4–14). Allstate nevertheless obtained information about the alleged losses from Doherty and other entities through discovery as well as its own subpoena practice and determined that the losses are not covered. The Court will therefore analyze Doherty's breach of contract claim as if Allstate formally denied the insurance claim.

[29] Though technically this claim involves two policies—one that was effective from 2013-2014, (ECF Nos. 132-4–132-6), and another that was effective from 2014-2015, (ECF Nos. 132-7–132-9)—they are identical for purposes of the Court's analysis. The Court will refer to both policies collectively as "the Landlords Policy."

affirmative defense."). Exclusions are "strictly construed against the insurer and in favor of the insured." *Cosenza*, 258 F.3d at 206–7. If the insurer demonstrates that an exclusion is triggered, the burden shifts back to the insured to show either that the exclusion does not apply or that an exception to the exclusion applies. *Spector v. Fireman's Fund Ins. Co.*, 451 F. App'x 130, 136 (3d Cir. 2011) (citing *Air Prods. & Chems., Inc. v. Hartford Accident & Indem. Co.*, 25 F.3d 177, 180 (3d Cir. 1994); *see also Northern Ins. Co. v. Aardvark Assocs., Inc.*, 942 F.2d 189, 195 (3d Cir. 1991).

Doherty makes four arguments as to why the alleged losses are covered under the Policy: (1) the Policy is an "all-risk" policy and therefore she need only prove that losses occurred in order for them to be covered; (2) even if she is required to prove that the losses were sudden and accidental to trigger coverage, she has done so through her testimony and that of her proposed expert; (3) the losses are covered under the Policy's provisions relating to building codes and lost rental income; and (4) under the reasonable expectations doctrine, her expectation that the Policy would include coverage for losses caused by tenant abuse, vandalism and building code violations defeats even the unambiguous language of the Policy. The Court examines each argument in turn.

i.

Doherty's lawsuit is predicated, first and foremost, on the assertion that the Landlords Policy is an "all-risk" policy. An "all-risk" policy is a special kind of insurance policy that "covers every kind of insurable loss except what is specifically excluded." *Betz v. Erie Ins. Exch.*, 957 A.2d 1244, 1255–57 (Pa. Super. Ct. 2008) (quoting Black's Law Dictionary 815 (8th ed. 2004)); *see also* § 148:50 Nature and scope

of coverage, 10 Couch on Ins. § 148:50 ("A property insurance policy which covers 'physical loss or damage to property insured from any external cause' is properly construed to be an 'all-risk' policy.").

In other words, a typical "all-risk" policy, by its terms, states that it covers any kind of loss from any external cause as long as it is not specifically excluded. *See PECO Energy Co. v. Boden*, 64 F.3d 852, 856–57 (3d Cir. 1995) (policy insured "against all risks of physical losses or damage however caused" unless excluded); *Intermetal Mexicana, S.A. v. Ins. Co. of N. Am.*, 866 F.2d 71, 74–75 (3d Cir. 1989) (policy covered "all risks of direct physical loss or damage from any external cause" except those causes specifically excluded); *Easy Corner, Inc. v. State Nat'l Ins. Co., Inc.*, 154 F. Supp. 3d 151, 154–55 (E.D. Pa. 2016) (policy insured against "direct physical loss of or damage to Covered Property . . . caused by or resulting from any Covered Cause of Loss" where any cause of loss was covered unless excluded).

The benefit to a plaintiff-insured with an "all-risk" policy is that in order to carry her initial burden of "proving facts that bring its claim within the policy's affirmative grant of coverage," *Koppers Co.*, 98 F.3d at 1446, she need only prove that she suffered a loss to the insured property. *See Easy Corner, Inc.*, 154 F. Supp. 3d at 154 ("In other words, all losses are covered unless specifically excluded, so Plaintiff need only show that a loss occurred to meet its burden."); *see also Miller v. Boston Ins. Co.*, 218 A.2d 275, 279 (Pa. 1966) ("It is axiomatic that plaintiff must show that the loss falls within the risks insured against, but it is also axiomatic, that it is for the defendant to show that the loss was not due to one of the risks insured against but rather to an excepted cause. It would seem that all plaintiff need show in such a case is a loss, since losses

from all causes are covered."). Doherty thus argues that since the Landlords Policy is an "all-risk" policy, she need only prove a loss occurred in order to shift the burden to Allstate to prove an applicable exclusion. Doherty supports her assertion that the Policy is an "all-risk" policy with two arguments.

1.

Doherty first contends, citing *Easy Corner*, 154 F. Supp. 3d at 154–55, that the Landlords Policy's language is identical to insurance contracts that have been deemed "all-risk" policies by other courts. *See* (Tr. Of Hr'g 1, at 12:10–16:8); (ECF No. 144-2, at 6–7). This is incorrect. Unlike other "all-risk" policies, the Landlords Policy does not purport to cover all physical losses from any cause unless excluded; rather, it unambiguously narrows its coverage to "*sudden and accidental* direct physical loss to property . . . except as limited or excluded in this policy." (ECF No. 132-5, at 7); *Cf. Boden*, 64 F.3d at 856–57 (above); *Intermetal Mexicana, S.A.*, 866 F.2d at 74–75 (above); *Easy Corner, Inc.*, 154 F. Supp. 3d at 154–55 (above). Thus, to fall within the Landlords Policy's grant of coverage, the insured's losses must, at a minimum, be sudden and accidental. The language contained in the Landlords Policy is materially different from and not as broad as that contained in typical "all-risk" policies. At oral argument, Plaintiffs' counsel acknowledged that by the Policy's own terms, it does not cover all losses from all causes not specifically excluded: "And I stand corrected that it doesn't cover everything -- but it covers a very good bit amount of the circumstances." (Tr. Of Hr'g 1, at 15:9–13.)

Though the Landlords Policy is not a typical "all-risk" policy because it does not cover "*all* losses unless excluded," it does provide "all-risk" coverage with respect to

"sudden and accidental losses," all of which are covered unless excluded. Thus, whereas a plaintiff with a standard "all-risk" policy can shift the burden to the insured to prove an exclusion by merely proving a loss to insured property, Doherty can only do so by showing a sudden and accidental loss to insured property. *See, e.g.*, *Wehrenberg v. Metro. Prop. & Cas. Ins. Co.*, No. 2:14-01477, 2017 WL 90380, at *4 (W.D. Pa. Jan. 10, 2017) (granting summary judgment where plaintiff subject to identical policy language failed to show that the loss was sudden and accidental); *Hamm v. Allstate Prop. & Cas. Ins. Co.*, 908 F. Supp. 2d 656, 667 (W.D. Pa. 2012) (requiring plaintiffs subject to identical policy language to show that the losses were sudden and accidental in the first instance); *see also Raschkovsky v. Allstate Ins. Co.*, No. 15-0021, 2015 WL 9463882, at *5 (C.D. Cal. Dec. 21, 2015) (same); *Garrison Prop. & Cas. Co. v. Silva*, No. 1:15-8, 2015 WL 13081330, at *3 (S.D. Miss. Sept. 24, 2015), *aff'd*, 652 F. App'x 240 (5th Cir. 2016); *Babai v. Allstate Ins. Co.*, No. 12-1518, 2014 WL 12029279, at *1 (W.D. Wash. Oct. 8, 2014); *Nicholson v. Allstate Ins. Co.*, 979 F. Supp. 2d 1054, 1061 (E.D. Cal. 2013); *Capriotti v. Allstate Prop. & Cas. Ins. Co.*, No. 11-7779, 2012 WL 3887043, at *3 (E.D. Pa. Sept. 6, 2012); *Schaber v. Allstate Ins. Co.*, No. 06-6007, 2007 WL 4531707, at *8 (N.D. Cal. Dec. 18, 2007); *Tinucci v. Allstate Ins. Co.*, 487 F. Supp. 2d 1058, 1059 (D. Minn. 2007). Doherty nevertheless contends that she has a typical "all-risk" policy and thus need only prove that a loss occurred.

2.

Doherty also argues that reading the Policy as a whole, the phrase "$500 All Peril Deductible" in the Policy Declarations transforms the Policy into the typical "all-risk" policy. *See* (Doherty Dep., at 26:7–30:3, 35:12–38:5, 106:19–107:14); (Tr. of Hr'g 1,

at 8:9–23). The Policy Declarations are contained in the renewal declaration pages, a separate document from the "Landlord Package Insurance Policy Form AS84," which outlines the terms and conditions of coverage. *See* (ECF No. 132-5). A section in the Policy Declarations labeled "Policy Coverages and Limits of Liability" lists the various types of coverage Plaintiffs purchased—among them "Dwelling Protection," "Other Structures Protection," and "Personal Property Protection"—as well as the limits of liability with respect to each. *See* (*id.*). Underneath each of these three headings is a bulletpoint that reads: "$500 All Peril Deductible Applies." (*Id.*) According to Allstate, this phrase references the fact that a $500 deductible will apply to any and all perils that are covered under the Policy. Put differently, the $500 deductible does not vary depending on which covered peril causes the loss. *See* (Tr. of Hr'g 2, at 40:21–41:20); (ECF No. 125, at 6–7). Doherty contends that the reference to a "$500 All Peril Deductible" signals that she has purchased "all-peril," or "all-risk," coverage. *See* (ECF No. 144-2, at 6–7); (Doherty Dep., at 26:7–30:3, 35:12–38:5, 106:19–107:14); (Tr. of Hr'g 1, at 8:9–23).

Doherty then uses the supposed "all-risk" nature of the Policy to assert that regardless of the types of losses she suffered or what perils caused them, they are covered. *See* (ECF No. 144-2, at 6–14); (Doherty Dep., at 26:7–30:3, 35:2–37:18, 42:3–45:14, 48:1–52:14, 80:17–81:17, 106:19–108:10, 189:21–192:5, 197:18–198:9). For instance, Doherty testified to her belief that that the properties were damaged by the tenants, possibly at the suggestion of Radnor Township officials, several times. *See* (Doherty Dep., at 31:13–34:14, 38:6–39:17, 78:3–83:11, 108:2–110:1, 193:3–195:4, 197:18–200:24). Since neither tenant abuse nor vandalism is a covered peril (both are

expressly excluded), Allstate's counsel repeatedly asked Doherty to identify which covered peril would entitle her to coverage for those alleged losses. Doherty responded, "I have an all perils policy so it basically covered the gamut." (*Id.* at 35:12–15.) When pushed further, the following exchange ensued:

> **Counsel**: It says right here, ma'am, believed to be the result of a peril insured against. So what was the peril that –
>
> **Doherty**: I have all perils.
>
> **Counsel**: Okay. So what does that mean?
>
> **Doherty**: It means I lucked out.
>
> **Counsel**: Okay. That means all perils means you – Allstate wrote you a policy that would give you coverage for anything that would happen to the property?
>
> **Doherty**: That's where we got into I was – I was laughing because I could remember contract law first year law school and some professor asked about that and a kid was saying it was a quasi-contract, it was implied contract, blah blah. Anyway so --
>
> . . . .
>
> **Counsel**: I'm just confused. You said the cause of loss before was the fact that you received information on the 27th of August 2014 from Ray Daly indicating that he was shuttering your property because it was uninhabitable?
>
> **Doherty**: No. The conditions. I received information about the conditions. And the conditions indicated to me there was a diminution in value. It's that simple.
>
> **Counsel**: So is the cause of loss a diminution in value?
>
> **Doherty**: You're worse off.
>
> **Counsel**: All right. You think Allstate insured against you being worse off?
>
> **Doherty**: Correct.
>
> **Counsel**: All right.
>
> **Doherty**: Under certain conditions but I'm not going to get into all of that.

(*Id.* at 48:5–52:14.) Doherty later repeated this belief:

> **Counsel**: So is that your premise, that you paid a premium so therefore you're insured against anything?

> **Doherty**: I have an all perils policy. I had a loss. I had damages.
>
> . . . .
>
> **Counsel**: Now, with respect to this testimony about an all perils policy, is it your testimony that if you pay a premium and you receive a policy, you're covered for any damage you have to your property?
>
> **Doherty**: If I pay a premium to Allstate for the Allstate Landlord's Package Policy, which has all perils coverage, then I have coverage for a peril that occurs during the policy period.

(*Id.* at 190:2–6, 191:16–23); *see also* (*id.* at 26:7–30:3, 35:2–37:18, 42:3–45:14, 48:1–52:14, 80:17–81:17, 106:19–108:10, 189:21–192:5, 197:18–198:9); (Tr. of Hr'g 1, at 11:11–13:13, 16:5–21:22).

Doherty's belief that an "all-risk" policy covers all losses is inaccurate. *See Intermetal Mexicana*, 866 F.2d at 74–75 ("The term 'all-risk' has been said to be 'somewhat misleading.' 'All-risk' is not synonymous with 'all loss.' Indeed, the questions of 'loss' and 'risk' are separate and distinct." (citations omitted)); *see also* § 148:50 Nature and scope of coverage, 10 Couch on Ins. § 148:50 ("To a lay person, 'all-risk' could be interpreted to mean 'every risk.' It is important for practitioners not only to understand but also to communicate to the factfinders that the risks covered by a particular policy still must be ascertained by the terms and conditions of the policy at issue, not by the descriptive phrase 'All-Risk.'").

In any event, Doherty's musings about the coverage under a typical "all-risk" policy are irrelevant because the Landlords Policy only contemplates "all-risk" coverage for "sudden and accidental losses." The interpretation of the language of an insurance contract is a question of law properly decided by the Court. *Scottsdale Ins. Co. v. City of Easton*, 379 F. App'x 139, 143 (3d Cir. 2010); *Reliance Ins. Co. v. Moessner*, 121 F.3d 895, 900 (3d Cir. 1997). Where "the language of the contract is clear and unambiguous,

a court is required to give effect to that language." *Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100, 106 (Pa. 1999). An ambiguity in contract language exists "when the questionable term or language, viewed in the context of the entire policy, is 'reasonably susceptible of different constructions and capable of being understood in more than one sense.'" *J.C. Penney Life Ins. Co. v. Pilosi*, 393 F.3d 356, 363 (3d Cir. 2004). "A contract is not rendered ambiguous merely because the parties disagree about its construction," and "courts should not distort the meaning of the language or strain to find an ambiguity." *Meyer v. CUNA Mut. Ins. Soc.*, 648 F.3d 154, 164 (3d Cir. 2011) (citing *Williams v. Nationwide Mut. Ins. Co.*, 750 A.2d 881, 885 (Pa. Super. Ct. 2000); *Madison Constr. Co.*, 735 A.2d at 106); *see also Spezialetti v. Pac. Employers Ins. Co.*, 759 F.2d 1139, 1142 (3d Cir. 1985) ("a court should read policy provisions to avoid ambiguities if possible and should not torture the language to create them").

The Landlords Policy is not a standard "all-risk" policy because it does not purport to cover *all* losses from all causes except those specifically excluded. Rather, the 28-page policy states in detail the kinds of losses that are covered and excluded. Reading the Policy as a whole and construing it according to its plain terms, the phrase "$500 All Peril Deductible" on the declarations page does not create ambiguity as to whether the Landlords Policy is a classic "all-risk" policy or affords more coverage than that contemplated by its terms. As commonly used, the word "deductible" refers to the amount an insured pays out of pocket when he files a claim for a covered loss. In fact, "deductible" is specifically defined as such in Allstate's online brochure. *See* (ECF No. 144-11, at 3, 9).

The Policy's coverage is unambiguously specified in sections labeled "Losses We Cover Under Coverages A and B" and "Losses We Do Not Cover Under Coverages A and B." *See* (ECF No. 132-5, at 7). Directly above the references to the "$500 All Peril Deductible" in the Policy Declarations, a parenthetical states: "See Policy for Applicable Terms, Conditions and Exclusions." *See* (*id.*). Moreover, "a construction which neutralizes any provision of a contract should never be adopted if the contract can be so construed as to give effect to all the provisions." *Contrans, Inc. v. Ryder Truck Rental, Inc.*, 836 F.2d 163, 169 (3d Cir. 1987) (quoting 13 Appleman, Insurance Law and Practice, § 7383 at 34-37 (1976)). Doherty's construction would render meaningless the words "sudden and accidental" by reading them out of the Policy. The Policy is not "reasonably susceptible" to the construction Doherty wishes to give it. The Landlords Policy is not a typical "all-risk" policy, and the coverage it affords is governed by its specific terms.[30]

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[30] In fact, Clare Erskine, Allstate's litigation representative, testified that the Landlords Policy is not an "all-risk" policy:

> **Counsel**: Okay. And what do you understand the policy to be?
> **Erskine**: It's a landlord package policy which means that it would be a tenant occupied -- usually a tenant occupied dwelling.
> **Counsel**: Do you know the differences between a specified perils policy and All-Perils policy?
> **Erskine**: Yes, but this is landlord package policy and what that means is that is has a very specific policy. This is the landlords package policy. So it's going to cover everything -- it's going to cover everything that would be sudden and accidental that's not excluded in the policy.
> **Counsel**: Correct. That's what I understand. And in that same respect is that not what an All-Perils policy is as defined by Allstate?
> **Erskine**: We don't define all risk or All-Peril policy because that's not what it is. It's a landlord package policy. It covers sudden and accidental occurrences except for the exclusions in the policy.

(Erskine Dep., at 10:7–11:2.) Ms. Erskine's conclusions are of course not dispositive as the Court interprets the policy as a matter of law.

ii.

Doherty must therefore adduce evidence that the losses were sudden and accidental in order to satisfy "the burden of proving facts that bring [her] claim within the policy's affirmative grant of coverage." *Koppers Co.*, 98 F.3d 1440. Pennsylvania courts have held that "accidental" means something that is unexpected and unintended (as opposed to foreseeable or certain to occur) while "sudden" connotes an additional temporal element of abruptness or brevity. *See Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 781 A.2d 1189, 1194 (Pa. 2001); *Lower Paxton Twp. v. U.S. Fid. & Guar. Co.*, 557 A.2d 393, 402 (Pa. Super. Ct. 1989) (affirming that the term "sudden" connotes an event that occurs abruptly and implies a distinct happening at a particular time). The requirement that losses be "sudden and accidental" thus contains both an accidental element and a temporal, sudden element, each of which must be established independently.[31] *See Sunbeam*, 781 A.2d at 1194; *Lower Paxton Twp.*, 557 A.2d at 402.

A fundamental flaw in Doherty's case is that she never coherently describes what she is claiming to be covered. Doherty based her lawsuit on the conditions contained in Daly's notifications of violation (which, according to her, were not present at the properties the week before).[32] Indeed, Doherty's Second Amended Complaint notes many of the same conditions:

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[31] In the cases cited, the courts were defining the terms "sudden" and "accidental" in the context of construing a pollution clause covering damage caused by a discharge of contaminants only "if such discharge, dispersal, escape or release is sudden and accidental." *Lower Paxton Twp.*, 557 A.2d at 397. Though these terms are not used identically in the Landlords Policy, the same construction is appropriate and commonly applied by other courts in this context as well.

[32] The Township's notifications of violation list a damaged sidewalk and curb; overgrown weeds; broken and missing windows and window screens; broken and unhinged doors and handrails; poorly maintained and peeling walls and ceilings; wet, black markings on the basement walls; garbage accumulated inside and outside the house; mouse droppings; unsanitary bathrooms, tubs, bathroom sinks, kitchen sinks and dishwashers; detached and non-functioning smoke alarms; and

> Mary Lou Doherty observed damages to each dwelling unit at 949 and 951 Glenbrook Avenue that were new which did not previously exist in the property. These damages include but are not limited to: broken windows; broken swing-out windows; buckled hardwood floors; water stains and plaster damage to ceilings; doors, woodwork, and fixtures, damaged, removed and torn off walls and trims, ceiling lights ripped down and detached; smoke alarms ripped down and detached; dirt found in dishwasher and appliances; broken stove and refrigerator.

(ECF No. 92-1, ¶ 65.) When deposed, Doherty testified that this was the property damage on which her claim was based.[33]

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unsafe mechanical and electrical equipment. *See* (ECF No. 93-4); *see also* (ECF Nos. 132-21–132-42). The Township determined that the properties were "unfit for human occupancy," which, according to the notifications, occurs:

> whenever the code official finds such structure is unsafe, unlawful or, because of the degree to which the structure is in disrepair or lacks maintenance, is unsanitary, vermin or rat infested, contains filth and contamination, or lacks ventilation, illumination, sanitary facilities or other essential equipment required by this code, or because the location of the structure constituted a hazard to the occupants of the structure or to the public.

(ECF No. 93-4.) Township Code Official Ray Daly testified that he personally observed all of these conditions when he inspected and photographed the properties on August 22, 2014. *See* (Daly Dep., at 12:19–25, 18:13–17, 20:6–22); (ECF Nos. 132-21–132-42).

[33] From Doherty's deposition:

> **Counsel**: And the language of Paragraph 9 says the owner suffered physical loss and damage on August 27, 2014.
> **Doherty**: Assuming Ray Daly's statement as to the conditions he observed on August 27th is correct, then that's what I'm going by.
> **Counsel**: All right. So the physical loss and damage that you referenced as occurring on August 28, 2014 is a quote, unquote, diminution in value?
> **Doherty**: And the property is a loss, um-hmm.
> **Counsel**: Okay.
> **Doherty**: Because of the conditions described by Ray Daly, the cause those conditions. [sic]
> . . . .
> **Counsel**: What was the sudden and accidental direct physical loss to your property, Ms. Doherty?
> **Doherty**: The property had a loss in value. It was damaged between -- sometime between August I believe 22nd and if I remember the right date, September 6th when I got over there and said, geez.
> . . . .
> **Counsel**: Okay. What was the sudden, accidental loss that occurred on the 27th --
> **Doherty**: These conditions --
> **Counsel**: Okay.

In her response to Allstate's motion and at oral argument, however, Doherty shifted gears. She now disputes the descriptions of the property damage contained in the notifications of violation and purports to base her claim exclusively on the damage described in the report of her proposed expert, James Wagner, a public insurance adjuster who previously worked as a general contractor. Wagner was retained by Doherty to estimate the damage sustained and the total cost of necessary repairs. *See* (ECF No. 144-8, at 1). Doherty claims that the damage described in Wagner's report is different from, and excludes some of, the damage she previously described in her various complaints. *See* (ECF No. 144-2, at 11–12); (Tr. of Hr'g 2, at 96:6–98:11, 102:20–103:18, 107:2–110:9, 151:16–152:8); (Tr. of Hr'g 1, at 16:5–17:8, 23:16–27:1).

Wagner's report, however, contains no meaningful description of the damage or conditions that allegedly constitute covered losses. *See* (ECF Nos. 144-8, 144-9). It contains only an itemized list of allegedly necessary repairs and their estimated costs. *See* (*id.*). The necessary repairs, broken down by property and room, are described in a general manner ("Ceramic Tile in Mastic," "Remove Tile," "Cement Backerboard 1/2" Flr," "Shoe Molding Pine," "Remove Subflooring," "3/4" Plywood Subflooring," "Seal Walls & Ceiling," etc.). *See* (*id.*). This punchlist is not an adequate substitute for a description of the damage or conditions that supposedly necessitated the proposed repairs.

> **Doherty**: -- suddenly appeared out of magic.
> **Counsel**: Okay. So you're saying that there was a sudden and accidental loss to the property which was -- which has been documented in that letter by Ray Daly?
> **Doherty**: These are the sudden and -- these are the sudden and accidental, quote, loss, damages, things that cost me money to repair.

(Doherty Dep., at 81:5–17, 108:4–10, 197:18–198:5.)

Moreover, the 17-page list in Wagner's report seems to suggest that virtually every type of repair possible is necessary with respect to every room in both properties. To Wagner, covered losses in every room necessitate: modifying the structural support; removing and replacing the floor (whether wood, carpet or tile); sealing and painting the ceiling and all of the walls; painting all doors and windows; removing and resetting all doors, blinds, light fixtures, bath accessories, faucets, drains and toilets; removing and resetting all appliances, such as the dryer, washer, gas, refrigerator, radiators, etc.; and more. *See* (*id.*). In total, the estimate states that repairing the covered losses will require, *inter alia*: $1,887.30 for Demolition; $8,026.85 for Lumber and Millwork; $1,222.74 for Cabinets; $2,130.90 for HVAC; $3,087.31 for Plumbing; $1,417.50 for Dry Wall; $30,210 for Hardwood Flooring; $2,466.18 for Carpeting; $20,854.92 for Painting/Wallpapering; $2,301.23 for Electrical; $8,119.44 for Ceramic Tile; $1,678.48 for Sidings & Cappings; $1,265.28 for Miscellaneous & Hardware; $2,592.10 for Scaffolding; and $517.98 for Building Cleaning. Not only is there no description of the damage, but nothing about the proposed repairs suggests that the underlying damage was sudden and accidental. Rather, many of these repairs are of the kind typically associated with general maintenance of property.

Doherty contends that "it is clear" that Wagner's list of the damage differs from, and excludes some of, the previously identified damage. *See* (ECF No. 144-2, at 11–12); Tr. of Hr'g 2, at 102:20–103:18, 107:2–110:9). That is not the case; Wagner's report contains no description of the damage, no discussion of the damage he included or excluded or the supposed discrepancies between the damage contained in this list and that previously discussed, and no discussion of how or why Wagner determined which

damage would be covered and excluded. Earlier in this litigation, Doherty submitted an "Estimate of Repairs" prepared by John Rush, which allegedly contained a list of all the repairs Rush had performed to return the properties to their pre-loss state. *See* (ECF No. 93-18). Rush's estimate, submitted before Doherty changed her mind as to what is covered under the Policy, put the total cost of repairs at $32,252.00. (ECF No. 92-1, ¶ 88.) By contrast, the total estimated cost of necessary repairs proposed in Wagner's report (after allegedly *excluding* losses Wagner did not deem covered) is $110,453.[34]

In sum, the record contains little to no information regarding the alleged damaged conditions or the characteristics of those conditions that suggest they occurred suddenly and accidentally. Rather, consistent with Doherty's (incorrect) theory that she need only assert that losses occurred to carry her burden, she has repeatedly refused to provide such details. When given several opportunities to do so at her deposition, Doherty repeated various iterations of the following:

> **Counsel**: But what is the peril that's believed to be insured against under the Policy?
>
> **Doherty**: Loss.
>
> **Counsel**: Okay. Loss.
>
> **Doherty**: A risk. You have something that's one day and it's different the next.
>
> . . . .
>
> **Counsel**: The peril is a loss. All right. What kind of a loss?
>
> **Doherty**: A loss that causes a diminution of value.
>
> . . . .

[34] At Doherty's deposition, Allstate's counsel inquired about the substantial increase in the estimated cost of the allegedly necessary repairs from the estimate of repairs that Rush performed to what Wagner (and Doherty) now contend are necessary to repair all covered losses. She responded: "You know how it is, when you're a slumlord anything passes." (Doherty Dep., at 241:1–5.)

> **Counsel**: What was the sudden and accidental direct physical loss to your property, Ms. Doherty?
>
> **Doherty**: The property had a loss in value.
>
> . . . .
>
> What was the sudden and accidental direct physical loss of the property and you said diminution in value?
>
> **Doherty**: Yeah. The place looked worse. It was worse.

(Doherty Dep., at 48:6–49:3, 108:4–7, 110:7–11); *see also* (*id.* at 26:7–30:3, 35:2–37:18, 42:3–45:14, 48:1–52:14, 80:17–81:17, 106:19–108:10, 189:21–192:5, 197:18–198:9).

iii.

Doherty nevertheless believes that her own testimony and Mr. Wagner's report prove that the losses were sudden, accidental and within the risks insured against. (ECF No. 144-2, at 9–11); (ECF No. 152, at 6); (Tr. of Hr'g 2, at 96:6–98:11, 102:20–103:18, 107:2–110:9, 135:16–142:4, 152:9–22).

1.

With respect to the requirement that the losses be "accidental," or fortuitous, "[s]uch an event may be beyond the power of any human being to bring the event to pass; it may be within the control of third persons; it may even be a past event. . . provided that the fact is unknown to the parties." *Compagnie des Bauxites de Guinee v. Ins. Co. of N. Am.*, 724 F.2d 369, 372 (3d Cir. 1983) (quotations omitted). Taking as true Doherty's testimony that the tenants damaged the properties, the "event" that caused the losses was within the control of third persons and neither intended nor expected by Doherty.

With respect to the requirement that the losses be "sudden," Doherty claims she "confirmed that she discovered damages near immediately upon notification, and that the same did not exist before August 22nd, 2014" and that her "testimony is unrefuted."

(ECF No. 144-2, at 11.) Doherty testified that she was at the properties a week before August 22 and that at that time, the properties were "in good repair" and the damage at issue did not exist. *See* (Doherty Dep., at 84:7–85:7, 119:9–22). Taken as true, this testimony would suggest that the damage occurred over a shorter period of time, perhaps in an abrupt manner, as required. Other courts have deemed similar testimony sufficient to create a genuine dispute as to whether the losses were sudden. *See Capriotti v. Allstate Prop. & Cas. Ins. Co.*, No. 11-7779, 2012 WL 3887043, at *3 (E.D. Pa. Sept. 6, 2012) (plaintiffs' testimony that they observed the relevant area daily and had not noticed any water infiltration the previous day was sufficient to create genuine dispute as to whether the damage was sudden); *see also Dickens v. Castle Key Ins. Co.*, No. 13-20300, 2014 WL 11878437, at *2–3 (S.D. Fla. Dec. 18, 2014) (plaintiff's evidence that a repairman worked in the relevant area the previous day and had not noticed any wet carpet was sufficient to create genuine dispute as to suddenness); *Burgess v. Allstate Ins. Co.*, 334 F. Supp. 2d 1351, 1362–63 (N.D. Ga. 2003) (plaintiff's testimony that she observed the relevant area of the house a few days before and did not notice any of the damage at that time was sufficient to create genuine issue of fact).

2.

Doherty also contends that Wagner's report is sufficient to carry her burden. *See* (ECF No. 144-2, at 9–11); (ECF No. 152, at 6); (Tr. of Hr'g 2, at 107:2–111:1, 135:16–142:4). As discussed above, Wagner's "Estimate of Loss" is an itemized list of general descriptions of necessary repairs and a breakdown of their respective costs. *See* (ECF Nos. 144-8, 144-9). Wagner also purports to opine on whether the damage was of a type

that would be covered under the Landlords Policy.[35] On page 2, Wagner states that he personally inspected the property on multiple occasions and that, based on his review of photographs taken after the loss event, his inspection of the repairs already performed and his recognition of additional repairs to be completed, he "fully and clearly understand[s] the four corners of the damages to be included in [his] estimate." (ECF No. 144-8, at 2.) He then states in conclusory fashion that "[t]he damages sustained were consistent with damage covered under the insured's policy." (*Id.*) On page 5 of his report, Wagner again concludes that the losses were covered. He states:

> Based on my examination and analysis, and within a reasonable degree of estimating and adjusting certainty, it is my professional opinion that the damage identified in my estimate and photographs, was covered under the policy, and should have been paid for under the claim, which occurred on or about September 2014. As stated previously, under this 'All-Risks' policy, it is the obligation of the insurance company to pay for the damage, unless it can prove an exclusion applies that would limit or prevent coverage. Allstate, given the opportunity to do so, chose not to adjust or investigate the loss properly at the time it was reported. Unfortunately, by failing to adjust the loss, the insured was unable to make the appropriate repairs required to secure and/or maintain tenants in the properties.

(*Id.* at 5.)

Wagner's conclusion with respect to whether certain losses would be covered under the Policy is not properly the subject of expert testimony since coverage is a legal question reserved for the Court. *Cont'l Cas. Co. v. Cty. of Chester*, 244 F. Supp. 2d 403, 407 (E.D. Pa. 2003) ("In Pennsylvania, the interpretation of insurance contracts is a

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[35] Though Wagner's report stated "Type of Loss: Vandalism," *see* (ECF No. 144-8, at 12), he later submitted a supplemental report explaining that this designation had appeared in the report by accident and he had in fact never concluded that vandalism was the cause of the losses. *See* (ECF No. 152-2). Notwithstanding conflicting (and untimely) testimony about whether or why Wagner ever designated "vandalism" as the type of loss and whether it was included in the report by accident, *see* (Doherty Dep., at 39:23–40:21; ECF No. 152-2; Tr. of Hr'g 1, at 25:8–26:23), the Court accepts for purposes of summary judgment Plaintiffs' assertion that Wagner did not conclude the type of loss to be vandalism.

question of law for the courts to decide. Whether a particular loss is within the coverage of an insurance policy is such a question of law and may be decided on a motion for summary judgment." (internal citations and quotations omitted)); *Nationwide Life Ins. Co. v. Commonwealth Land Title Ins. Co.*, No. 05-281, 2011 WL 204619, at *3 (E.D. Pa. Jan. 20, 2011) ("It is well-settled that expert testimony regarding the interpretation of an insurance policy is impermissible."); *see also GallatinFuels, Inc. v. Westchester Fire Ins. Co.*, 410 F. Supp. 2d 417, 420–21 (E.D. Pa. 2006). Thus, the Court need not credit his conclusion. *See United States v. Pecora*, 798 F.2d 614, 620 n.2 (3d Cir. 1986) ("Of course, the opinions of [expert] witnesses on matters of law or on questions of ultimate fact, to the extent they depend on legal issues, are binding neither on this court, nor the district court."); *Casper v. SMG*, 389 F. Supp. 2d 618, 621 (D. N.J. 2005) (refusing to consider expert's report at summary judgment because his application of case law and statutes to the facts and evidence of the case constituted inadmissible legal conclusions).

More fundamentally, even if the Court fully credits Wagner's report and his conclusion, the evidence remains insufficient to show that the alleged losses were sudden and accidental and thus covered. Nowhere in Wagner's report does he describe the damage in any meaningful way, discuss the sudden and accidental requirement, conclude that the damage was sudden and accidental or explain his basis for concluding that the damage was of the kind that would be covered under the Landlords Policy. His report contains nothing about the cause of the losses and, notwithstanding the all-encompassing nature of the proposed repairs, nowhere does he explain in what manner virtually every single structure, floor, wall, ceiling, door, window, toilet, tub, sink,

faucet, cabinet, light fixture and appliance was damaged as part of a "sudden and accidental direct physical loss" in August 2014. *See Fazio v. State Farm Fire & Cas. Co.*, No. 16-1987, 2017 WL 1102713, at *4 (E.D. Pa. Mar. 22, 2017) (holding that plaintiffs failed to adduce evidence that the losses were covered by the policy where plaintiffs' estimate of loss conclusorily stated that all of the damage was caused by "ice and water" and contemplated the replacement of all windows in the property but did not explain how all of the windows had been damaged in this manner or how he reached that conclusion).

The closest Wagner comes to providing a reasoned basis for his conclusion that the damage was covered is his (mistaken) suggestion that because the Policy is a classic "all-risk" policy, all losses are covered unless the insurer proves an exclusion, which, according to Wagner, Allstate failed to do when given the chance. *See* (ECF No. 144-8, at 5). Wagner obviously cannot make the legal determination as to whether or not an insurance policy is an "all-risk" policy. Moreover, he is wrong to say it is. As discussed above, the Landlords Policy is not as broad as a typical "all-risk" policy and Doherty must make a *prima facie* showing that the losses were sudden and accidental in order to trigger coverage.

Doherty seizes upon Wagner's conclusion that the losses were covered to argue that she has made such a *prima facie* showing. In her response to Allstate's motion, Doherty asserts: "In the professional opinion of Licensed Public Adjuster, James Wagner, Respondents' damages from August 27, 2014, are covered. That means the damages are sudden, direct, and accidental." (ECF No. 144, at 11.) To the contrary, Wagner's report allows no such conclusion.

Doherty has failed to adduce any evidence describing the specific property damage or conditions, in what ways those conditions appeared to have been the result of a sudden and accidental external cause or how the extensive list of allegedly necessary property repairs can all be traced back to covered losses. A plaintiff cannot make the claim that she discovered extensive damage to her properties that was not previously there and then, without any further explanation of the myriad conditions apparently requiring repair or how they could have occurred suddenly and accidentally, submit an all-encompassing list of repairs and expect the insurer (or the Court) to assume that all of those repairs constitute covered losses. *See Fazio*, 2017 WL 1102713, at *4–8, 8 n.5; *see also Schaber v. Allstate Ins. Co.*, No. 06-6007, 2008 WL 787173, at *5–8 (N.D. Cal. Mar. 21, 2008) (granting summary judgment where plaintiffs failed to present expert testimony to support their claim that their losses were the result of severe damage as opposed to wear and tear and failed to explain how the extensive list of damage claimed could have occurred in the manner described).

Doherty has not met her burden to show that the losses were sudden, accidental and within the Policy's coverage, and summary judgment is warranted on her breach of contract claim. *See, e.g.*, *Wehrenberg*, 2017 WL 90380, at *4 (granting summary judgment where plaintiffs could not meet burden of proving that the loss was sudden, accidental and covered by the policy in the first instance); *Raschkovsky*, 2015 WL 9463882, at *8 (granting summary judgment where plaintiffs failed to show that the losses were sudden and accidental); *Garrison Prop. & Cas. Co.*, 2015 WL 13081330, at *3 (same); *Tinucci*, 487 F. Supp. 2d at 1062 (same); *Cf. Betz*, 957 A.2d at 1256–57 ("So long as reasonable people could conclude that the claimed loss is covered by language

anywhere in the policy or the amendatory endorsements, the insured has carried his burden as concerns an 'all-risks' policy.").

Finally, Doherty makes a last-ditch effort to change, yet again, her story as to how the alleged losses are sudden, accidental and covered. (ECF No. 152, at 6); (Tr. of Hr'g 2, at 103:1–18, 107:2–111:1, 135:16–142:19, 145:14–146:8, 149:25–152:8); (Tr. of Hr'g 1, at 23:13–26:12). Though it is not entirely clear, she appears most recently to be claiming that most if not all of the losses are covered under an exception to the acts of tenants exclusion, which contemplates coverage for acts of tenants caused by "water or steam that escapes, due to accidental discharge or overflow, from a plumbing, heating or air conditioning system, an automatic fire protection system, or a household appliance." (ECF No. 132-5, at 9.)

In her reply to Allstate's motion, Doherty states, for the first time: "If questioned on the matter, Mr. Wagner shall testify in accordance with his Reports produced and attest to the fact that most, if not all of the damage, falls within the subsection 'g' of the Tenant Acts exclusions—being a water Exception to the exclusions—thereby allowing for coverage of the loss." (ECF No. 152, at 6). Wagner's report contained no such assertion. *See* (ECF Nos. 144-8, 144-9). Attached to the reply is a "supplemental report" from Wagner dated February 21, more than ten weeks after the date on which Plaintiffs' expert reports were due. *See* (ECF No. 81). In his purported supplement, Wagner clarifies that he never determined the cause of loss to be vandalism and then states his conclusion, without any mention of purported water damage, that the "damage identified in [his] estimate and photographs, was sudden and accidental and therefore, was covered under the policy, and should have been paid for under the claim,

which occurred on or about September 2014." (ECF No. 152-2.) In other words, even given an (untimely) post-hoc opportunity to elaborate on the alleged losses and provide evidence that they were sudden and accidental and covered under some provision of the Policy, subsection (g) or otherwise, Wagner fails to do so.

The argument that the losses were covered under the subsection (g) water exception to the acts of tenants exclusion was not asserted by Doherty at any time before summary judgment or even in her response to summary judgment. *See* (ECF No. 144-2, at 11–12). In fact, in her response, Doherty expressly maintained that the acts of tenants exclusion was not applicable to the damage. (*Id.* at 15.) Thus, because this argument was asserted for the first time in Doherty's reply and at oral argument, it is waived. *See United States v. Heilman*, 377 F. App'x 157, 198 (3d Cir. 2010) ("A party's argument is waived if it is raised for the first time in a reply brief." (citing *Harvey v. Plains Twp. Police Dep't*, 421 F.3d 185, 192 (3d Cir. 2005)); *Heri Krupa, Inc.*, 2013 WL 1124401, at *4 (holding that arguments raised for the first time during oral argument are deemed waived (citing *Pichler v. UNITE*, 542 F.3d 380, 396 n.19 (3d Cir. 2008))). Moreover, even if the Court were to consider Doherty's new argument, there is no record evidence, in Wagner's reports or otherwise, to support the contention that subsection (g) of the acts of tenants exclusion applies. *See Heri Krupa, Inc.*, 2013 WL 1124401, at *4. *See generally* (ECF Nos. 144-8, 144-9, 152-2).

iv.

Even if Doherty's testimony created a genuine dispute of material fact as to whether the losses were sudden and accidental, there is sufficient record evidence demonstrating that the losses fall within one of several exclusions.

Accepting Doherty's testimony that these conditions occurred suddenly (and apparently simultaneously) in the short amount of time that the tenants had possession of the properties, the only reasonable conclusion is that the damage was the result of human action, as Doherty herself believes. *See* (Doherty Dep., at 81:18–82:15); *see also* (*id.* at 31:13–34:14, 38:6–39:17, 78:3–83:11, 108:2–110:1, 193:3–195:4, 197:18–200:24). Floors do not suddenly buckle, windows do not break themselves, guardrails, fixtures and smoke alarms do not detach themselves and dirt does not put itself in the dishwasher. Thus, if one credits Doherty's testimony regarding the timing of the alleged damage, the only plausible explanation as to the cause of the losses is the one proffered by Doherty—that the tenants or the Township officials caused the damage. However, as Doherty's attorney conceded at oral argument, *see* (Tr. of Hr'g 2, at 152:9–14), if the losses occurred in this manner, they would be excluded from coverage. The Policy plainly excludes losses caused by "[a]ny act of a tenant, or guests of a tenant." (ECF No. 132-5, at 9, ¶ 19.) The Policy also excludes losses resulting from vandalism, or "willful or malicious conduct resulting in damage or destruction of property." (*Id.* at 3, ¶ 12; *id.* at 9, ¶ 18.)

Thus, if the damage was caused by the tenants or their guests, the losses would be excluded. If the damage was intentionally caused by Township officials for the purpose of burdening Doherty with code violations or retaliating against her, the losses would be excluded. If a factfinder were to disbelieve Doherty's explanation, the record evidence could also reasonably support the conclusion that the conditions resulted from wear and tear or a general lack of maintenance. In either situation, however, the losses would be excluded. *See* (*id.* at 8, ¶ 13; *id.* at 10, ¶ 21).

Typically, if a genuine dispute of material fact exists as to how the alleged losses were caused, causation is a question for the jury. Logically, however, this can only be the case if one or more of the conclusions that the factfinder could reasonably draw from the record evidence would, in fact, render the losses covered. *See El Bor Corp. v. Fireman's Fund Ins. Co.*, 787 F. Supp. 2d 341 (E.D. Pa. 2011) (denying summary judgment even where insurer had adduced evidence from which juror could conclude that various exclusions applied because the plaintiff had also adduced evidence from which a juror could reasonably conclude that the damage was caused by water, a covered peril); *Easy Sportswear, Inc. v. Am. Econ. Ins. Co.*, No. 05-1183, 2007 WL 4190767, at *9 (W.D. Pa. Nov. 21, 2007) (same). Here, a reasonable juror could draw different conclusions about how the damage was caused, but under each theory, the losses would be excluded. This is sufficient to satisfy Allstate's burden. *See, e.g.*, *White v. Metro. Direct Prop. & Cas. Ins. Co.*, No. 13-434, 2014 WL 3732135, at *11 (E.D. Pa. July 29, 2014) (granting summary judgment where plaintiffs subject to identical policy language proffered theories of causation that would render the losses excluded and failed to offer any evidence that the losses resulted from covered, rather than excluded, perils); *Gold v. State Farm Fire & Cas. Co.*, 880 F. Supp. 2d 587, 596 (E.D. Pa. 2012) (though it was unclear from the evidence whether surface water or subsurface water caused the alleged damage, defendant insurer met its burden by showing that in either case, an exclusion would apply); *see also Dougherty v. Allstate Prop. & Cas. Ins. Co.*, No. 16-2680, 2017 WL 888218, at *3 (3d Cir. Mar. 6, 2017) (though the insurer lacked definitive evidence as to whether the insured's furnace malfunctioned due to a lack of maintenance, frozen pipes or a combination of both, summary judgment was proper

because the record did not support any conclusion other than that the malfunction resulted from an excluded cause).

v.

If the insurer proves an applicable exclusion, the burden shifts back to the insured to establish coverage by showing either that the exclusion does not apply or that an exception to the exclusion applies. *Spector*, 451 F. App'x at 136 (citing *Air Prods. & Chems., Inc.*, 25 F.3d at 180); *see also Northern Ins. Co.*, 942 F.2d at 195. Doherty has failed to do so; she has neither adduced any theory of causation that, if proven, would render the losses covered nor adduced evidence showing that the various exclusions relied on by Allstate are inapplicable. *See Dougherty*, 2017 WL 888218, at *3 (nonmovant must offer "more than a 'mere scintilla of evidence' to rebut [the insurer's] credible showing that the maintenance exclusion barred coverage for his claim" (quoting *Williams v. Borough of West Chester. Pa.*, 891 F.2d 458, 460 (3d Cir. 1989))). Finally, Doherty has not adduced evidence showing that an exception to an exclusion applies. Her only argument to this effect, based on the exception contained in subsection (g) of the acts of tenants exclusion, fails for the reasons discussed *supra* in subsection III.A.iii.

In conclusion, summary judgment is warranted on Doherty's breach of contract claim because she failed to make a *prima facie* showing that the losses were sudden and accidental and, even if she did, there is no record evidence from which a factfinder could reasonably conclude that the losses were covered rather than excluded from coverage.

vi.

Doherty also argues that the losses are covered under the Policy's provisions relating to building code violations and loss of rental income. *See* (ECF No. 144-3, at 15–18). In the section labeled "Losses We Do Not Cover Under Coverages A and B," however, the Landlords Policy states:

> We do not cover loss to the property described in **Coverage A — Dwelling Protection** or **Coverage B — Other Structures Protection** consisting of or caused by: . . .
>
> 6. Enforcement of any building codes, ordinances or laws regulating the construction, reconstruction, maintenance, repair, placement or demolition of any building structure, other structure or land at the residence premises.

(ECF No. 132-5, at 7, ¶ 6.)

> The Policy also includes the following relevant condition:
>
> Payment under a, b, or c above will not include any increased cost due to the enforcement of building codes, ordinances or laws regulating the construction, reconstruction, maintenance, repair, relocation or demolition of **building structures** or other structures.

(ECF No. 132-6, at 18.)

Doherty, however, purchased additional optional protection relating to building codes. The relevant provision states:

> **Coverage BC**
> **Building Codes**
> We will pay up to 10% of the amount of insurance on the Policy Declarations under **Coverage A — Dwelling Protection** *to comply with local building codes after covered loss to your dwelling* or when repair or replacement results in increased cost due to the enforcement of any building codes, ordinances or laws regulating the construction, reconstruction, maintenance, repair or demolition of your dwelling.

(ECF No. 132-6, at 27, ¶ 1 (emphasis added).)

This provision provides coverage for increased costs incurred in complying with local building codes, but only after a covered loss occurs. The second clause beginning with "or when repair. . ." contemplates coverage if, after a covered loss, the cost to repair or replace the damaged portion of the property is increased due to the need to comply with current building codes. For instance, building codes or local ordinances often require older homes to be repaired or rebuilt with upgraded electrical equipment, roofing materials, plumbing systems and the like. An insured whose pre-loss property was equipped with an outdated but grandfathered-in electrical system is not going to be permitted to rebuild it with the same (now non-compliant) feature. *See* (McKeon Dep., at 50:3–23). In that situation, the optional protection provides coverage for the difference between what it would have cost to rebuild the old infrastructure and what it will cost instead to incorporate the updates necessary to comply with the code, but only if the underlying loss necessitating the repairs was covered. *See* (*id.*); (ECF No. 149, at 13); (ECF No. 144-11, at 13).

The Policy does not contemplate coverage for the costs incurred by Doherty in achieving compliance with the Township's building code because, as established above, Doherty has failed to adduce evidence that the losses necessitating the repairs were covered in the first instance. *See supra* subsections III.A.i–v. Doherty essentially construes the Policy to provide blanket coverage for any costs incurred in response to the enforcement of building codes, such as the cost of defending a legal action brought to enforce the code or of repairing conditions that constitute code violations. The Policy's unambiguous terms preclude such a construction. *See* (ECF No. 132-5, at 7; ECF No. 132-6, at 27). Moreover, such blanket coverage relating to building code

violations, without regard to whether they arose from covered perils, would render meaningless most if not all of the Policy's exclusions. For instance, an insured could perform no maintenance to her property, wait until the property's condition was in violation of local ordinances or codes and then submit a claim for the cost of the maintenance work necessary to achieve code compliance, effectively negating the Policy's exclusion for maintenance costs. The Policy is not susceptible to such a construction; giving effect to its plain and unambiguous terms, Doherty's losses are not covered.

The Policy does not cover Doherty's loss of fair rental income for the same reason. The Policy states:

> We Will Cover Under Coverage D:
>
> 1. Your lost fair rental income resulting from a covered loss, less charges and expenses which do not continue, when a loss we cover under **COVERAGE A — Dwelling Protection** makes a **rental unit** uninhabitable. We will pay for lost fair rental income for the shortest time required to either repair or replace the rental unit, but not to exceed 12 months from the date of loss which made the rental unit uninhabitable.

(ECF No. 132-5, at 14.)

Thus, the Policy covers only "lost rent due to untenantability arising from *covered losses*." *Windowizards, Inc. v. Charter Oak Fire Ins. Co.*, No. 13-7444, 2015 WL 1400726, at *3 (E.D. Pa. Mar. 27, 2015) (construing coverage under a similar provision for lost rental income). Doherty's loss of rental income is not covered because it is not the result of covered losses.

vii.

Finally, Doherty argues that applying the unambiguous terms of the Policy would frustrate her reasonable expectations of coverage. "Pennsylvania case law dictates that the proper focus for determining issues of insurance coverage is the reasonable expectations of the insured." *Reliance Ins. Co.*, 121 F.3d at 903 (quotations and citations omitted). "In most cases, the language of the insurance policy will provide the best indication of the content of the parties' reasonable expectations." *Id.* Thus, "[i]n the absence of an affirmative misrepresentation by the insurer or its agent about the contents of the policy, the plain and unambiguous terms of a policy demonstrate the parties' intent and they control the rights and obligations of the insurer and the insured." *West v. Lincoln Benefit Life Co.*, 509 F.3d 160, 168–69 (3d Cir. 2007).

However, "[a]n analysis of the reasonable expectations of the insured is rightly employed when a claimant alleges that the insurer engaged in deceptive practices toward the insured, either to misrepresent the terms of the policy or to issue a policy different than the one requested by the insured and promised by the insurer." *Id.* at 169; *see also Reliance Ins. Co.*, 121 F.3d at 90 ("Courts, however, must examine the totality of the insurance transaction involved to ascertain the reasonable expectations of the insured."). "As a result, even the most clearly written exclusion will not bind the insured where the insurer or its agent has created in the insured a reasonable expectation of coverage." *Reliance Ins. Co.*, 121 F.3d at 903. This doctrine, however, requires an "an affirmative misrepresentation by the insurer or its agent about the contents of the policy," *West*, 509 F.3d at168–69, and is applied "in very limited circumstances" to protect non-commercial insureds from policy terms not readily

apparent and from insurer deception, *Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 418 F.3d 330, 344 (3d Cir. 2005). Moreover, "unreasonable expectations will never control." *Smith v. Cont'l Cas. Co.*, 347 F. App'x 812, 814 (3d Cir. 2009).

With respect to this doctrine, courts have found "a crucial distinction between cases where one applies for a specific type of coverage and the insurer unilaterally limits that coverage, resulting in a policy quite different from what the insured requested, and cases where the insured received precisely the coverage that he requested but failed to read the policy to discover clauses that are the usual incident of the coverage applied for." *Tonkovic v. State Farm Mut. Auto. Ins. Co.*, 521 A.2d 920 (Pa. 1987); *see also Standard Venetian Blind Co. v. American Empire Ins. Co.*, 469 A.2d 563 (Pa. 1983).

Doherty contends that she purchased the Policy to obtain "protection [ ] from the most common causes of property loss and damages which occur when real properties are leased to tenants." (ECF No. 92-1, ¶ 34.) She claims that based on McKeon's representations that the Policy had better benefits than other policies and would provide the best possible protection, she believed the Policy would provide her with fire, storm, and water damage coverage; burglary, vandalism, and tenant abuse coverage; and building code related coverage. (*Id.* ¶¶ 40, 41.)

For the reasons discussed *infra* in Sections IV.B and IV.D, there is no record evidence of any affirmative misrepresentations made to Doherty. Moreover, even if the allegations in the Second Amended Complaint were considered record evidence by virtue of Doherty's purported "verification," Doherty would still not have adduced sufficient evidence of specific acts or omissions on the part of Allstate that created in

her reasonable expectations of certain coverage. The Second Amended Complaint states: "Defendant's misrepresentations that its 'All Perils' Landlords Package AS84 Insurance Policy covers such occurrences as 'Tenant Abuse', 'Vandalism', and 'Building Codes' -- when the Policy provides specific exclusions for the same -- amounts to a material misrepresentation of fact made by Defendant." (ECF No. 92-1, ¶ 141.) Though she identifies a specific misrepresentation that was allegedly made to her, there is no evidence in the record of specific acts or omissions by which the alleged misrepresentation was made.

There is no record evidence that McKeon specifically told her that the Policy would include coverage for vandalism, tenant abuse and building code violations. And though she does contend that McKeon failed to inform her of any exclusions, (*id.* ¶ 48), such an omission would only rise to the level of an affirmative misrepresentation if Doherty herself had specifically requested coverage for vandalism, tenant abuse and building code violations (as opposed to more generally requesting the best landlord coverage, coverage for all risks or coverage for the most common tenant-related losses). *See Heri Krupa, Inc. v. Tower Grp. Companies*, No. 12-4386, 2013 WL 1124401, at *6 (E.D. Pa. Mar. 18, 2013). Doherty's Second Amended Complaint is ambiguous as to what precisely she communicated to McKeon, *see* (ECF No. 92-1, ¶¶ 27–28, 30–31), and the record is devoid of any evidence that Doherty communicated such a specific request.

While Doherty has certainly made clear that she was subjectively seeking such coverage and subjectively believed that she was obtaining it, *see* (*id.* ¶¶ 28, 34, 41–42, 47, 148), this is not sufficient. *See West*, 509 F.3d at 167–68 ("This subjective belief is not pertinent to our evaluation of their expectations of insurance coverage, however.

Pennsylvania courts look only to whether the insurer created in the insured a reasonable expectation of coverage, not whether the insured came to an independent conclusion that coverage existed or would exist."); *id.* at 169 ("[M]ere assertions that a party expected coverage will not ordinarily defeat unambiguous policy language excluding coverage." (quoting *Matcon Diamond, Inc. v. Penn Nat. Ins. Co.*, 815 A.2d 1109, 1115 (Pa. Super. Ct. 2003))). Rather, the record must contain evidence which could allow a reasonable factfinder to conclude that, based on Allstate's conduct, Doherty had an objectively reasonable basis for her subjective expectations of coverage. *See Bensalem Twp. v. Int'l Surplus Lines Ins. Co.*, 38 F.3d 1303, 1312 (3d Cir. 1994) (reasonable expectations doctrine only applied where insured receives something other than what she thought she purchased "as a result of the insurer's either actively providing misinformation about the scope of coverage provided by the policy or passively failing to notify the insured of changes in the policy").

There is no evidence in the record upon which a reasonable juror could conclude that McKeon made specific representations or material omissions that created in Doherty reasonable expectations that she would receive coverage different than that provided for in the Landlords Policy. *See* (ECF No. 92-1, at ¶¶ 27–49, 139–148). Doherty's attorney stated that Doherty's deposition testimony contained evidence that she specifically requested certain types of coverage. *See* (Tr. of Hr'g 2, 87:11–89:5). It does not. *See generally* (Doherty Dep.). Doherty was given several opportunities to clarify what was said by her and McKeon, respectively; in fact, the Court specifically instructed her to "identify the specific act, omission or representations 'in order to demonstrate that such confusion or misunderstanding was caused by certain acts or

omissions in the part of Defendants.'" *Doherty v. Allstate Indemnity Co.*, No. 15-05165, 2016 WL 5390638, *9 (E.D. Pa. Sept. 27, 2016) (quoting *Farmerie v. Kramer*, No. 2071 WDA 2014, 2015 WL 6507844, at *9 (Pa. Super. Ct. Oct. 27, 2015)). She failed to do so and the record contains nothing that helps her in this regard. *USX Corp. v. Adriatic Ins. Co.*, 99 F. Supp. 2d 593, 609 (W.D. Pa. 2000), *aff'd*, 345 F.3d 190 (3d Cir. 2003) ("Absent sufficient justification, however, an insured may not complain that his or her reasonable expectations were frustrated by policy limitations which are clear and unambiguous." (citation and quotation omitted)).

B.

Doherty also contends that Allstate breached the contract by refusing to defend the Dohertys in the lawsuit filed against them by Radnor Township. Because the Complaint filed by Radnor Township does not come within the scope of the insurance coverage, Allstate is entitled to summary judgment on this claim.

i.

A court determines whether an insurer has a duty to defend by comparing the complaint to the policy. *See United Servs. Auto Ass'n v. Elitzky*, 517 A.2d 982, 985 (Pa. Super. Ct. 1986) (citations omitted); *see also Gene's Rest., Inc. v. Nationwide Ins. Co.*, 548 A.2d 246, 246–47 (Pa. 1988). The duty to defend arises whenever the underlying complaint "potentially" comes within the scope of the insurance coverage. *Frog, Switch & Mfg. Col, Inc. v. Travelers Ins. Co.*, 193 F.3d 742, 746 (3d Cir. 1999) (citing *Erie Ins. Exch. v. Claypoole*, 673 A.2d 348, 355 (Pa. Super. Ct. 1996)); *see also State Farm Fire & Cas. Co. v. Dalrymple*, 153 F. Supp. 2d 624, 627 (E.D. Pa. 2001). This rule applies even when the lawsuit is "groundless, false, or fraudulent." *Britamco Underwriters, Inc. v.*

Weiner, 636 A.2d 649, 651 (Pa. Super. 1994). "It is the face of the complaint and not the truth of the facts alleged therein which determines whether there is a duty to defend." *D'Auria v. Zurich Ins. Co.*, 507 A.2d 857, 859 (Pa. Super. Ct. 1986). A court is to examine the facts contained in the complaint, not the particular legal theories advanced in it. *Donegal Mut. Ins. Co. v. Baumhammers*, 893 A.2d 797, 811 (Pa. Super. Ct. 2006) (citing *Mut. Benefit Ins. Co. v. Haver*, 725 A.2d 743, 745 (Pa. 1999)). The factual allegations in the underlying complaint must be taken as true and liberally construed with all doubts as to whether the claims may fall within the policy coverage resolved in favor of the insured. *Frog*, 193 F.3d at 746.

ii.

Radnor Township sued the Dohertys on September 24, 2014, alleging that the Dohertys violated the Township's Rental Housing Code by refusing to allow Township officials to inspect their rental properties. (ECF No. 93-5, ¶¶ 52–63.) The Radnor Township Complaint details the Township's efforts to inspect the Dohertys' properties which, according to the Complaint, date back to 2008. (*Id.* ¶¶ 14–32.)

The Complaint explains that the code requires that "each rental unit shall be subject to a minimum of at least one inspection every three years based upon a schedule established by the Department." (*Id.* ¶ 15.) In 2008, the Township filed an enforcement action against James Doherty in the Delaware County Court of Common Pleas due to his refusal to allow inspections of the Dohertys' rental properties. (*Id.* ¶ 17.) The court issued an order on November 16, 2009 directing James Doherty to inform the Township as soon as any of his properties became vacant and to allow the Township to inspect the vacant property. (*Id.* ¶ 18.)

Despite this court order, the Township was unable to arrange inspections of the Dohertys' properties. (*Id.* ¶ 19.) From February to June 2013, the Township sent six letters to the Dohertys explaining the Township's right to inspect their rental properties. (*Id.* ¶¶ 21–27.) In July 2013, the Township sent a representative to the Dohertys' properties in a failed attempt to conduct an inspection. (*Id.* ¶ 28.) On August 8, 2013, the Township sent a letter to the Dohertys explaining that if they did not schedule inspections by October 1, 2013, the Township would not issue them the annual housing license for their properties. (*Id.* ¶ 29.) The Dohertys failed to comply with this request. (*Id.* ¶ 30.) The Township sent additional letters in November 2013 and January 2014 but was still unable to schedule a time to inspect the properties. (*Id.* ¶¶ 30–31.)

On August 22, 2014, the parent of a tenant in one of the Doherty's properties contacted the Township. (*Id.* ¶ 33.) After communications with this tenant and others, the Township was able to inspect the Dohertys' Glenbrook Avenue properties. (*Id.* ¶ 37.) The Township discovered numerous violations of the Township's Property Maintenance Code. (*Id.* ¶ 39.) The Township also discovered similar issues at another one of the Dohertys' rental properties at 961 Glenbrook Avenue. (*Id.* ¶¶ 40, 42.) On September 5, 2014, the Township Solicitor sent a letter to the Dohertys explaining that it had revoked their rental licenses for 2014–2015. (*Id.* ¶ 44.)

The Township's Complaint seeks relief under three counts. In Count I, the Township asks the court to enforce its prior 2009 order requiring the Dohertys to submit their properties to Township inspection. (*Id.* ¶¶ 45–51.) In Count II, the Township requests that the court fine the Dohertys for violating the Township Rental

Housing Code by failing to allow the Township to inspect their properties. (*Id.* ¶¶ 52–63.) Count III seeks injunctive relief against the Dohertys, specifically a new court order directing the Dohertys to allow Township inspection of properties and correct any ordinance deficiencies and violations found by the Township. (*Id.* ¶ 72.) Additionally, the Township seeks an order enjoining the Dohertys from renting any of the three properties specified in the complaint (949, 951 and 961 Glenbrook Avenue). (*Id.*)

iii.

Doherty bases her claim that Allstate has a duty to defend her in the Radnor Township litigation on Section II of her Landlords Policy, titled "Liability Protection and Premises Medical Protection."[36] (ECF No. 132-6, at 21); (ECF No. 92-1, ¶¶ 108, 110.) Directly underneath this title is the following:

> ***Coverage X***
> ***Liability Protection***
>
> ***Losses We Cover Under Coverage X:***
>
> Subject to the terms, conditions and limitations of this policy, we will pay compensatory damages which an **insured person** becomes legally obligated to pay because of **bodily injury, personal injury,** or **property damage** arising from a covered **occurrence**. We will not pay any punitive or exemplary damages, fines or penalties.
>
> We may investigate or settle any claim or suit for covered damages against an **insured person**. If an **insured person** is sued for these damages, we will provide a defense with counsel of our choice, even if the allegations are groundless, false or fraudulent. We are not obligated to defend any suit or pay any claim or judgment after **we** have exhausted our limit of liability.

[36] In the alternative, Doherty premises Allstate's duty to defend on the optional Coverage BC she purchased relating to building code compliance, discussed *supra* in subsection III.A.vi. *See* (Tr. of Hr'g 1, at 7:5–22, 10:6–11:15). This claim fails for the same reasons discussed above—the underlying losses were not covered.

(ECF No. 132-6, at 21 (emphasis in original).) Thus, Allstate's duty to defend arises when an "insured person" is sued for any "bodily injury, person injury, or property damage arising from a *covered occurrence*." (*Id.* (emphasis added).) Allstate has a duty to defend Doherty in the Radnor Township suit if the allegations by Radnor "potentially" come within the scope of the insurance coverage, *i.e.*, if the suit "potentially" comes within the scope of a covered occurrence. *Frog*, 193 F.3d at 746.

Allstate does not have a duty to defend Doherty. The Radnor Township suit concerns the Dohertys' failure to allow Township officials to inspect their properties. This is not a covered occurrence under Allstate's Landlords Policy. To the extent the Radnor Township suit could be read to implicate "property damage" or code violations at the Dohertys' properties, Allstate has no duty to defend because, as explained above, the property damage did not arise from a covered occurrence and nothing about the conditions described in the Township's Complaint suggested otherwise. *See supra* Section III.A.

Doherty quotes out of context one sentence of Section II for the proposition that Allstate must pay "all costs" incurred in the "defense of any suit against" the Dohertys. (ECF No. 144-3, at 17 (quoting ECF No. 132-6, at 25).) Doherty's argument that the Policy covers "any suit" against her is contrary to the plain language of the Policy. As quoted above, the Policy provides for a duty to defend against covered occurrences. (ECF No. 132-6, at 21.) The next two pages of the Policy explain what losses are not covered under "Coverage X." (*Id.* at 22–24.) After this, Coverage Y, "Premises Medical Protection," is discussed, followed by losses specifically not covered by Coverage Y. (*Id.*

24–25.) After this explanation there is a section titled "Section II—Additional Protections." (*Id.* at 26.) It states:

> We will pay, in addition to the applicable limits of liability:
>
> 1. **Claim Expense**
>
> We will pay:
>
> a) all costs **we** incur in the settlement of any claim or the defense of any suit against an **insured person**;

(*Id.* (emphasis in original).) From this single sentence, Doherty argues that Allstate must pay "all costs" for the "defense of any suit." This argument is meritless. Section II explains in detail the scope of the Policy's duty to defend. Doherty's reading of the provision would render meaningless all of terms of the section which specifically provide what is and is not covered by the Policy.

Because Radnor Township's lawsuit against the Dohertys does not "potentially" come within the scope of Allstate's Landlord Policy, Allstate does not have a duty to defend Doherty and is entitled to summary judgment on this claim.

IV.

In Count III of her Second Amended Complaint, Doherty contends that Allstate violated a number of the UTPCPL's provisions. (ECF No. 92-1, ¶¶ 138–49.) Because there is no record evidence of any specific misrepresentations made by Allstate or McKeon, Allstate is entitled to summary judgment on Count III.

A.

The purpose of the UTPCPL is to protect consumers from "fraud and unfair or deceptive business practices." *Commonwealth ex rel. Corbett v. Peoples Benefit Servs., Inc.*, 923 A.2d 1230, 1236 (Pa. Commw. Ct. 2007) (citing *Commonwealth ex rel. Creamer*

v. Monumental Prop., Inc., 329 A.2d 812 (Pa. 1974)). The law "attempts to place in more equal terms seller and consumer [and is] predicated on a legislative recognition of the unequal bargaining power of opposing forces in the marketplace." *Creamer*, 329 A.2d at 816 (footnote omitted). The UTPCPL prohibits "unfair methods of competition or unfair or deceptive acts or practices in the conduct of any trade or commerce" and provides a private right of action to any person who "purchases or leases goods or services primarily for personal, family, or household purposes and thereby suffers any ascertainable loss of money or property." 73 P.S. § 201–1, –9.2(a). The statute "applies to the sale of an insurance policy" and "conduct surrounding the insurer's pre-formation conduct." *Kelly v. Progressive Advanced Ins. Co.*, 159 F. Supp. 3d 562, 564 (E.D. Pa. 2016).

A plaintiff may state a cause of action under the UTPCPL by satisfying the elements of common-law fraud or by otherwise alleging deceptive conduct. *Vassalotti v. Wells Fargo Bank, N.A.*, 732 F. Supp. 2d 503, 510 (E.D. Pa. 2010) (citing *Hunt v. U.S. Tobacco Co.*, 538 F.3d 217, 219 (3d Cir. 2010)). As Doherty has not alleged that Allstate engaged in fraudulent behavior, *see infra* section IV.B, the Court analyzes the claim under the deceptive conduct prong.

A plaintiff alleging deceptive conduct must satisfy three elements: First, allege facts showing a deceptive act, *i.e.*, conduct that is likely to deceive a consumer acting reasonably under similar circumstances. Next, the plaintiff must allege justifiable reliance, in other words, that she justifiably bought the product in the first place (or engaged in some other detrimental activity) because of the defendant's misrepresentation or deceptive conduct. Finally, the plaintiff must allege that this

justifiable reliance caused ascertainable loss. *Vassalotti*, 732 F. Supp. 2d at 510 (citing *Seldon v. Home Loan Servs., Inc.*, 647 F. Supp. 2d 451, 470 (E.D. Pa. 2009)); *see also Santana Prods., Inc. v. Bobrick Washroom Equipment, Inc.*, 401 F.3d 123,136 (3d Cir. 2005); *Slapikas v. First Am. Title Ins. Co.*, 298 F.R.D. 285, 294 (W.D. Pa. 2014).

A deceptive act is one that is "likely to deceive a consumer acting reasonably under similar circumstances." *Seldon*, 647 F. Supp. 2d at 470 (citing *Hunt*, 538 F.3d at 223). The UTPCPL has enumerated twenty practices which constitute actionable "unfair methods of competition" or "unfair or deceptive acts or practices" and contains a catch-all provision prohibiting "fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding." 73 P.S. § 201–2(4). In *Belmont v. MB Inv. Partners, Inc.*, 708 F.3d 470, 498 (3d Cir. 2013), the Third Circuit Court of Appeals predicted how the Pennsylvania Supreme Court would interpret "deceptive conduct." The court examined the Pennsylvania Superior Court's decision in *Fazio v. Guardian Life Ins. Co.*, 62 A.3d 396 (Pa. Super. Ct. 2012), and noted that the "district court decisions on which Fazio relied suggest that deceptive conduct does not require proof of the elements of common law fraud, but that knowledge of the falsity of one's statements or the misleading quality of one's conduct is still required." *Belmont*, 708 F.3d at 498. The Third Circuit also explained that a deceptive act is "the act of intentionally giving a false impression or a tort arising from a false representation made knowingly or recklessly with the intent that another person should detrimentally rely on it." *Id.* (internal quotations omitted). *But see Santana Prods., Inc.*, 401 F.3d at 137 ("An action for fraud always requires the plaintiff to prove scienter, whereas the Lanham Act does not. The UTPCPL is in the middle. It encompasses causes of action in which the

plaintiff must prove intent and causes of action in which the plaintiff need not prove intent.")

Plaintiffs must also plead the traditional common law elements of justifiable reliance and causation. *See, e.g.*, *Toy v. Metropolitan Life Ins. Co.*, 928 A.2d 186, 202–03 (Pa. 2007), *Hunt*, 538 F.3d at 221; *Bennett v. A.T. Masterpiece Homes at Broadsprings, LLC*, 40 A.3d 145, 154 (Pa. Super. Ct. 2012). A plaintiff must show that "he justifiably bought the product in the first place (or engaged in some other detrimental activity) because of the [defendant's] misrepresentation." *Hunt*, 538 F.3d at 223 n.14; *cf. Levine v. First American Title Ins. Co.*, 682 F. Supp. 2d 442, 467 (E.D. Pa. 2010) (holding plaintiffs successfully alleged justifiable reliance where plaintiffs stated they would not have paid a higher premium for title insurance if they had known the actual rate). Finally, a plaintiff must show "that his or her justifiable reliance caused ascertainable loss," *Laidley*, WL 2784807, at *2, *i.e.*, that she suffered "an ascertainable loss as a result of the defendant's prohibited action." *Weinberg v. Sun Co., Inc.*, 777 A.2d 442, 446 (Pa. 2001).

B.

Doherty contends generally that Allstate misrepresented the benefits, advantages, conditions and terms of its Landlords Policy and induced her to believe that the Policy would cover the types of losses that are at issue in this case. These allegations, which have evolved considerably over the course of this litigation, find no support in the record evidence.

i.

Doherty did not allege a violation of the UTPCPL in her first Complaint. *See* (ECF No. 1). In her Amended Complaint, (ECF No. 66), she brought a claim under the UTPCPL, alleging Allstate "published and issued written documentation" that misrepresented the "benefits, advantages, conditions, and terms of its policy." (*Id.* ¶¶ 117, 118(a).) Doherty also alleged that Allstate "advertised its insurance goods and services as an 'All Perils' insurer within [sic] the intent to not sell those services as advertised." (*Id.* ¶ 118(e).) In so doing, Allstate "induced Plaintiffs to rely upon its representations so Plaintiffs believed that Allstate's 'All-Perils' Landlord Package Insurance Policy covered losses such as those which Defendant is now disputing." (*Id.* ¶ 118(b).)

Allstate moved to dismiss the UTPCPL claim in Doherty's Amended Complaint and the Court granted the motion with leave to amend. *See Doherty*, 2016 WL 5390638, at *9. The Court stated that "[g]eneral allegations that defendant engaged in deceptive conduct without specifying what that deceptive conduct actually was are insufficient; a plaintiff must identify the specific act, omission or misrepresentation 'in order to demonstrate that such confusion or misunderstanding was caused by certain acts or omissions on the part of the Defendants.'" *Id.* (quoting *Farmerie*, 2015 WL 6507844, at *9). Moreover, the Court explained that Doherty had failed to plead justifiable reliance because she had not alleged specifically what misrepresentations Allstate made, the acts or omissions by which Allstate made such misrepresentations and how she relied on such misrepresentations to her detriment. *Id.*

ii.

Prior to the Court's ruling on Allstate's motion to dismiss, Doherty submitted a lengthy affidavit attached to her response to an unrelated motion. *See* (Mary Lou Doherty Aff., ECF No. 43-1.) In relevant part, the affidavit sought to expand on Allstate's alleged misrepresentations: Doherty asserted that "[w]hen the Agent of Allstate presented [her] with the options of insurance, their Agent advised [her] and assured [her] that Allstate's 'All-Perils', Landlord Package Insurance Policy had better benefits, advantages, and conditions, which no other insurer could provide to protect [Doherty's] property." (*Id.* ¶ 6.) She further explained that "Allstate's Agent also provided [her] with written pamphlets and papers as part of his presentation to convince [her] that coverage was the best available for [her]." (*Id.* ¶ 7.)

iii.

With leave of Court, Doherty filed her Second Amended Complaint, adding seven paragraphs to her original UTPCPL claim. (ECF No. 92-1, ¶¶ 139–145.) Doherty alleged that Allstate misrepresented to her that the Landlords Policy covered tenant abuse, vandalism, and "building codes" when, in reality, Allstate knew such coverage was specifically excluded by the policy. (*Id.* ¶¶ 141–42.) However, she again failed to specify the manner by which Allstate made such representations. Aside from this allegation, the remaining new paragraphs stated conclusions unsupported by factual allegations. *See, e.g.*, (*id.* ¶ 139 ("Defendant's conduct . . . was deceptive or fraudulent."); *id.* ¶ 140 (same); *id.* ¶ 143 ("Plaintiffs allege that their reliance was, and still is, reasonable."); *id.* ¶ 144 ("All damages alleged by Plaintiffs was caused, and still are accruing, as a direct and proximate result of Defendant's misrepresentations.")).

Allstate filed a motion to dismiss the Second Amended Complaint's UTPCPL claim. Before the Court could decide this motion, Allstate filed its motion for summary judgment. Doherty's UTPCPL claim may not have even survived Allstate's motion to dismiss; it certainly cannot survive summary judgment.

C.

Doherty contends that Allstate violated the UTPCPL in two ways: (1) McKeon misrepresented the terms and benefits of the Policy before she purchased it and (2) Allstate's published materials, including its policy declaration pages and online brochure, were misleading. To succeed on her UTPCPL claim, Doherty must allege facts showing a deceptive act, justifiable reliance and causation. *See supra* Section IV.A; *Vassalotti*, 732 F. Supp. 2d at 510. Doherty's UTPCPL claim fails at the first step: there is no record evidence showing a deceptive act on the part of Allstate or McKeon to succeed under either theory.

i.

There is no evidence in the record that anyone at McKeon made any misrepresentations to Doherty before she purchased the Policy in 2005. Doherty's deposition testimony fails to support the allegations of misrepresentation against Allstate made in the Second Amended Complaint. *See generally* (Doherty Dep., ECF Nos. 132-83–132-86). Her testimony nowhere explains what misrepresentations Allstate or its agent made, the acts or omissions by which the misrepresentations were made or how she relied on these misrepresentations. (*Id.*)

The most specific misrepresentation Doherty testified to in her deposition concerned those purportedly made to her by Allstate in pamphlets that told her that

she "was in good hands." (Doherty Dep., at 146:1–2.) This allegation fails as a matter of law because this statement—that she was in good hands—constitutes mere puffery. *See Gidley v. Allstate Ins. Co.*, No. 09-3701, 2009 WL 4893567, *4 (E.D. Pa. Dec. 17, 2009); *see also Davis v. Allstate Ins. Co.*, No. 07-4572, 2009 WL 122761, at *6 (E.D. La. Jan. 15, 2009) (dismissing claim under Louisiana Unfair Trade Practices Act because the statement "'You're in good hands with Allstate' is nothing more than puffery"); *Rodio v. Smith*, 587 A.2d 621, 624 (N.J. 1991) (same); *cf. Bologna v. Allstate Ins. Co.*, 138 F. Supp. 2d 310, 322–23 (E.D.N.Y. 2001) (same).

Moreover, the allegation in Doherty's affidavit that Allstate promised her "better benefits, advantages, and conditions" is a general allegation insufficient to allege deceptive conduct by Allstate and therefore cannot support a claim under the UTPCPL. *See Farmerie*, 2015 WL 6507844, at *9.

ii.

No reasonable juror could conclude that the Policy's declaration pages and Allstate's online brochure were misleading. Doherty claims that the policy declaration pages are misleading because they contain references to a "$500 All Peril Deductible." *See* (ECF No. 92-1, ¶¶ 38–39; Doherty Dep., at 144:10–146:2). She contends that as part of their sales pitch, the McKeon agents provided her with individual declaration pages "to support and confirm the representations being made to Plaintiffs." *See* (ECF No. 92-1, ¶¶ 38–39); (Tr. of Hr'g 2, at 79:2–13). The declaration pages Doherty initially received, however, do not contain any reference to an "All Peril Deductible," *see generally* (ECF No. 144-12), and therefore she could not have relied upon this phrase in purchasing the Policy. While the "All Peril Deductible" language does appear on the

renewal declaration pages, *see* (ECF No. 144-15), Doherty obviously did not rely on the renewal declarations when she first bought the Policy. Moreover, even if the initial declaration pages or the Policy itself had referenced an "All Peril Deductible," it would not have been misleading for the reasons discussed *supra* in subsection III.A.i.2.

Doherty also contends that Allstate's online brochure for its Landlords Policy is misleading and that she justifiably relied on it to her detriment. *See* (ECF No. 144-11). The brochure is sixteen pages long and is intended as either a guide for current Allstate customers that can be read alongside the policy declaration pages and the Policy itself or as a general guide for non-customers who wish to better understand landlord insurance policies. (*Id.* at 3.[37])

The second page of the brochure describes how to read the Policy. It explains that policy declarations serve to "declare[]" the choices an insured has included in their policy, including the "deductibles for some coverages as well as optional protection [the insured] may have purchased." (*Id.* at 2.) The brochure then provides an example of a declaration page. (*Id.* at 3.)

Doherty contends that page seven of the online brochure, discussing the "range of perils" covered under these policies, is misleading. Page seven explains that "Allstate Landlords Package Policy Insurance typically covers a range of perils." (*Id.* at 7.) The brochure then lists five examples, among them—and marked with asterisks—are burglary and vandalism. The asterisks immediately below the list state: "Your landlords insurance includes limited coverage for damage to your rental property due to vandalism and burglary. You can purchase additional vandalism and burglary

[37] Because the page containing this information is not numbered, this citation refers to the ECF page number.

coverage to better protect your rental property . . . See page [thirteen] for more about Vandalism and Burglary coverage." (*Id.*)

Page thirteen lists "optional coverages" that insureds "may be able to purchase either as add-ons to [a] current policy or as a separate policy." (*Id.* at 13.) The add-ons include vandalism, burglary and building code options.[38] The brochure explains that the vandalism add-on "[p]rovides more coverage to help pay for repairs or replacement to [a] dwelling due to vandalism and provides coverage for belongings used for the rental property." (*Id.*) The burglary add-on "[p]rovides more coverage to help pay for repairs or replacement to your dwelling due to burglary and provides coverage for belongings used for the rental property." (*Id.*) Finally, the building code add-on offers "[a]dditional coverage when repair or replacement from a covered loss results in increased cost due to enforcement of any building codes, ordinances or laws regulating construction, reconstruction, maintenance, repair or demolition of your dwelling." (*Id.*)

Immediately preceding page thirteen is a page labeled in large font: "Landlords insurance doesn't cover everything." (*Id.* at 12.) The page explains that "Landlords insurance protects a rental property from accidental and sudden losses. However, there are some losses that aren't covered." (*Id.*) On the same page it provides examples,

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[38] In fact, shortly after her first meeting with McKeon, Doherty purchased the separate building code add-on. (ECF No. 92-1, ¶ 49.) At oral argument, Doherty's counsel conceded that she *knew* that building code coverage was an additional purchase:

> **The Court:** Okay. So she understood—my only point—I'm not trying to trick you.
> **Counsel:** I know.
> **The Court:** My only point is she understood that to get the additional protection in this document for building code, she had to pay in addition to it.
> **Counsel:** Yes.
> **The Court:** She had to pay extra for it.
> **Counsel:** Yes.

(Tr. of Hr'g 2, at 69:3–12.) Doherty's purchase of separate coverage for building codes at an additional price undercuts her argument, *see supra* subsection IV.B.i, that this is a typical "all-risk" policy and that she was led to believe it was such.

including the following: "damage due to vandalism caused by a tenant is not typically covered by the landlords package policy, unless you purchase additional Vandalism coverage, and the damage is within the policy limit." (*Id.*)

To recap: page seven—which Doherty contends is misleading—explains that a range of perils are covered by Allstate, but it qualifies that statement, explaining that there is limited coverage for burglary and vandalism. It then directs the reader to a different page of the brochure which outlines, in detail, "add-ons" to landlord policies that are available for purchase.

When pressed at oral argument to point to a specific part of the online brochure that was misleading, Doherty's counsel cited a drawing of a broken step on page ten. (*Id.* at 13; Tr. of Hr'g 2, at 70:22–71:1.) Counsel contended that this picture "actually shows, in essence, a form of building code violation, a broken step. And in the picture and in the explanation it represents that coverages would be provided for you, representation would be provided to you, in circumstances where, in fact, a building code violation does, in fact, exist." (Tr. of Hr'g 2, at 71:15–21.)

This argument is meritless. The page in question is labeled, "Your Landlords Package Policy can help in the case of an accident." (*Id.* at 10.) The page explains that the Landlords Policy "includes Liability Protection and Premises Medical Protection to help protect [the landlord]" in the event someone injures themselves on the landlord's rental property. No reasonable juror could conclude that this has anything to do with building code violations, nor could they conclude that the picture is misleading. Counsel thereafter conceded that no other part of the online brochure was misleading. (Tr. of Hr'g 2, at 74:2–8.)

D.

On January 19, 2017, after the close of discovery and after Allstate moved for summary judgment, Doherty filed a "Praecipe to attach certification/verification" to her Second Amended Complaint. (ECF No. 135.) In so doing, Doherty presumably sought to convert the final iteration of her pleading, filed on October 11, 2016, (ECF No. 92-1), into a "verified complaint." Courts consider a verified complaint to be the equivalent of an affidavit for purposes of summary judgment.[39] *See, e.g.*, *Wright v. City of Philadelphia*, No. 13-5589, 2016 WL 1241775, *1 n.4 (E.D. Pa. Mar. 30, 2016).

Federal Rule of Civil Procedure 56(c) allows the use of affidavits in connection with a summary judgment motion when an affidavit is "made on personal knowledge, set[s] out facts that would be admissible in evidence, and show[s] that the affiant is competent to testify on the matters stated." FED. R. CIV. P. 56(c)(4). While a party may supplement the record at summary judgment with affidavits, the Court may disregard affidavits that contradict the record or materially alter the story told by discovery. *Jiminez v. All Am. Rathskeller, Inc.*, 503 F.3d 247, 253 (3d Cir. 2007). "The . . . affidavit need not directly contradict the earlier deposition testimony if there are other reasons to doubt its veracity, such as its inclusion of eleventh-hour revelations that could have easily been discovered earlier." *Cellucci v. RBS Citizens, N.A.*, 987 F. Supp. 2d 578, 582 n.2 (E.D. Pa. 2013). This type of sham affidavit indicates "that the affiant cannot maintain a consistent story or is willing to offer a statement solely for the purpose of

[39] Wright & Miller explain that "[v]erification is now the exception rather than the rule in federal practice." 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1339 (3d ed.). According to Wright & Miller, only Rule 23.1, 27(a), 65(b) and 66 of the Federal Rules of Civil Procedure and four statutory provisions, 28 U.S.C. § 1734(b) (lost or destroyed court records), § 1915 (proceeding *in forma pauperis*), § 1924 (bill of costs) and § 2242 (writ of habeas corpus) require verification. *Id.*

defeating summary judgment." *Jiminez*, 503 F.3d at 253. Because sham affidavits vary from earlier deposition testimony, "no reasonable jury could rely on [them] to find for the nonmovant." *Id.*

Not every contradictory affidavit is a sham, however. *See Baer v. Chase*, 392 F.3d 609, 624 (3d Cir. 2004). In determining whether a contradictory affidavit is a sham, the Court will consider whether the record establishes that the affiant was "understandably mistaken, confused, or not in possession of all the facts during the previous deposition." *Jiminez*, 503 F.3d at 254 (internal quotations omitted). If a party fails to explain the contradiction between the affidavit and prior deposition, the Court will disregard the affidavit. *Id.*

Doherty's second-amended-complaint-turned-affidavit is a sham. As explained above, Doherty's UTPCPL claim has evolved over the course of this litigation. In the final version of her pleading, she alleged that McKeon misrepresented that the Policy would include very specific types of coverage (the very same types of coverage that were specifically *excluded* from the policy and are the precise categories of coverage which would have covered the kinds of losses Doherty has allegedly sustained). These allegations, however, still failed to specify *how* Allstate made the alleged misrepresentations. *See Doherty*, 2016 WL 5390638, at *6.[40] Moreover, there is no record evidence to support them. At her deposition, Doherty never testified about a specific representation, nor did she testify to specifically requesting these types of

[40] Thus, even if the Court did not strike her verified complaint as a sham affidavit, her UTPCPL claim—premised on an in-person misrepresentation by McKeon—would fail because she has failed to proffer evidence of the acts or omissions by which McKeon made the alleged misrepresentations. *See also supra* subsection III.A.vii.

coverage.[41] After Doherty's deposition (in November of 2016) there was ample time to supplement the record by submitting an affidavit clarifying or expanding on her testimony—summary judgment motions were not due until January 13, 2017. Doherty did not do this. Instead, she only sought to "verify" the allegations in her complaint on January 19, 2017—after Allstate had filed its motion for summary judgment.

Doherty's tactic serves as an "eleventh-hour revelation[ ] that could have easily been discovered earlier." *Cellucci*, 987 F. Supp. 2d at 582 n.2. Moreover, nothing in the record suggests that Doherty was "understandably mistaken, confused, or not in possession of all the facts during the previous deposition." *Jiminez*, 503 F.3d at 254. Indeed, it is hard to see how she could have been—the events surrounding the alleged misrepresentation took place in 2005.

Doherty's last minute "verification" attempts to subvert the letter and spirit of Rule 56 which "requires the nonmoving party to go beyond the pleadings." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *see also* FED. R. CIV. P. 56(e). "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." FED. R. CIV. P. 56(e) advisory notes on the 1963 Amendment.

The Court is not holding Doherty's incomplete deposition testimony against her. *See Celotex Corp.*, 477 U.S. at 324 ("Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses."). While a nonmoving party need not depose her own witnesses, she nevertheless has a duty to produce evidence beyond the pleadings to

[41] At oral argument, the Court asked counsel multiple times to point to evidence in the record to support the UTPCPL allegations in the Complaint and each time counsel was unable to direct the Court to such evidence. *See, e.g.*, (Tr. of Hr'g, at 87:11–89:5); *cf. Perkins v. City of Elizabeth*, 412 F. App'x. 554, 555 (3d Cir. 2011). At this stage of the proceedings, Doherty cannot rely on her pleadings alone, but instead must point to record evidence to support her claims.

survive summary judgment. Doherty could have accomplished this with a more detailed affidavit (as her June affidavit was insufficiently specific). To consider Doherty's allegations in her now "affidavit" as record evidence would tell future litigants facing tough summary judgment hurdles that they needn't worry—simply file a last minute "verification" of your complaint. Rule 56 cannot allow this.

V.

Allstate also moves for summary judgment on Count II of the Second Amended Complaint, which alleges that Allstate acted in bad faith in violation of 42 Pa. C.S.A. § 8371 in two ways.[42] Doherty claims that Allstate intentionally delayed opening a claim and commencing its investigation. Doherty also contends that Allstate failed to conduct an adequate investigation and lacked a reasonable basis for refusing to pay her benefits under the Policy. There is no clear and convincing record evidence to support Doherty's contentions and Allstate is entitled to summary judgment on Count II.

A.

"The only tort remedy against insurers for bad faith available under Pennsylvania law is the statutory remedy provided in [42 Pa. C.S.A. § 8371]." *Emp.'s Mut. Cas. Co. v. Loos*, 476 F. Supp. 2d 478, 489 n.8 (W.D. Pa. 2007) (citing *Birth Center v. St. Paul Cos., Inc.*, 787 A.2d 376, 390 (Pa. 2001) (Nigro, J., concurring)). The statute states:

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[42] Both parties submitted expert reports opining on whether Allstate acted in bad faith in delaying the opening of, investigating and refusing to pay Doherty's claim. *See* (ECF Nos. 134-1, 134-2, 134-3); (ECF Nos. 144-6, 144-7). Both experts recount the facts and then purport to apply Pennsylvania law to those facts to draw legal conclusions about whether Allstate's conduct rose to the level of statutory bad faith. This, however, is the province of the Court. *Gallatin Fuels, Inc.*, 410 F. Supp. 2d at 422 ("Although expert testimony may be helpful to the fact-finder in a bad faith case, an expert may not give an opinion as to the ultimate legal conclusion that an insurer acted in 'bad faith' in violation of applicable law."). At oral argument, Doherty's counsel acknowledged the Court's authority to decide the motion with or without giving weight to the experts' opinions. (Tr. of Hr'g 2, at 120:6–12.)

> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
>
> > (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
> >
> > (2) Award punitive damages against the insurer.
> >
> > (3) Assess court costs and attorney fees against the insurer.

42 PA. C.S.A. § 8371.

"Bad faith" is not defined in the statute, though courts have held that a Section 8371 claim contains two elements: (1) the insurer lacked a reasonable basis for denying benefits under the applicable policy; and (2) the insurer knew or recklessly disregarded the lack of a reasonable basis for refusing the claim. *Loos*, 476 F. Supp. 2d at 490 (citing *Terletsky v. Prudential Prop.*, 649 A.2d 680, 688 (Pa. Super. 1994)); *see also Horowitz v. Fed. Kemper Life Assur. Co.*, 57 F.3d 300, 307–08 (3d Cir. 1995) (citing *D'Ambrosio v. Pa. Nat'l Mut. Cas. Ins. Co.*, 431 A.2d 966, 971 (Pa. 1981)). Further, the plaintiff must show that the insurer acted in bad faith based on some motive of self-interest or ill will. *Terletsky*, 649 A.2d at 688. In so doing, the plaintiff need not show that the insurer's conduct was fraudulent, but mere negligence or bad judgment is insufficient to make out a claim for bad faith. *Id.*

An insured must demonstrate bad faith by clear and convincing evidence. *Loos*, 476 F. Supp. 2d at 491 (citing *Terletsky*, 649 A.2d at 688). "The 'clear and convincing' standard requires that the plaintiff show 'that the evidence is so clear, direct, weighty and convincing as to enable a clear conviction, without hesitation, about whether . . . the defendants acted in bad faith." *J.C. Penney Life Ins. Co. v. Pilosi*, 393 F.3d 356, 367

(3d Cir. 2004); *see also Nw. Mut. Life Ins. Co. v. Babayan*, 430 F.3d 121, 137 (3d Cir. 2005) ("[T]he insured's burden in opposing a summary judgment motion brought by the insurer is 'commensurately high because the court must view the evidence presented in light of the substantive evidentiary burden at trial.'").

Courts in this circuit have held that the "[r]esolution of a coverage claim on the merits in favor of the insurer requires dismissal of a bad faith claim premised on the denial of coverage." *Gold*, 880 F. Supp. 2d at 597; *see also Pittas v. Hartford Life Ins. Co.*, 513 F. Supp. 2d 493, 504 (W.D. Pa. 2007) ("A plaintiff cannot prevail on a bad faith claim [for a refusal to pay benefits] . . . where there is no breach of an underlying contractual obligation." (citing *Younis Bros. & Co. v. Cigna Worldwide Ins. Co.,* 899 F. Supp. 1385, 1396–97 (E.D. Pa. 1995); *Pizzini v. Am. Int'l Specialty Lines Ins. Co.,* 249 F. Supp. 2d 569, 570–71 (E.D. Pa. 2003)). A bad faith claim survives, however, to the extent that it alleges behavior beyond the refusal to pay for covered losses.

B.

Doherty contends that Allstate acted in bad faith by failing to timely open a claim and begin its investigation.[43] (ECF No. 92-1, ¶ 135.) Various actions by an insurer can constitute bad faith, including "a failure to communicate with the insured." *Hamm*, 908 F. Supp. 2d at 668–69; *see also Frog*, 193 F.3d at 751 n.9; *Terletsky*, 649 A.2d at 688. Delays in paying a claim are also relevant in determining whether bad

[43] Doherty asserts that Allstate violated the Pennsylvania Unfair Insurance Practices Act ("UIPA") by failing to respond to Doherty's letters, by acknowledging her amended claim more than 10 days after being notified and by not completing its investigation within 30 days after notification. However, since the Pennsylvania Superior Court's decision in *Terletsky*, 649 A.2d at 688, which defined 'bad faith' in the context of Section 8371, courts in this circuit have "refused to consider UIPA violations as evidence of bad faith." *Weinberg v. Nationwide Cas. & Ins. Co.*, 949 F. Supp. 2d 588, 595–98 (E.D. Pa. 2013) (citing *Watson v. Nationwide Mut. Ins. Co.,* No. 11–1762, 2011 WL 4894073, at *4 (E.D. Pa. Oct. 12, 2011) (citation omitted); *Dinner v. United Services Auto. Ass'n Cas. Ins. Co.*, 29 F. App'x 823, 827 (3d Cir. 2002)).

faith has occurred. *Cher–D, Inc. v. Great Am. Alliance Ins. Co.*, 2009 WL 943530, at *10 (E.D. Pa. Apr. 7, 2009) (citing *Kosierowski v. Allstate Ins. Co.*, 51 F. Supp. 2d 583, 589 (E.D. Pa. 1999). Even a long delay between demand and settlement, however, does not automatically constitute bad faith. *Kosierowski*, 51 F. Supp. 2d at 589, *aff'd*, 234 F.3d 1265 (3d Cir. 2000). Rather, "if delay is attributable to the need to investigate further or even to simple negligence, no bad faith has occurred." *Williams v. Hartford Cas. Ins. Co.*, 83 F. Supp. 2d 567, 572 (E.D. Pa. 2000) (quoting *Kosierowski*, 51 F. Supp. 2d at 589); *see also El Bor Corp.*, 787 F. Supp. 2d at 349–50; *3039 B St. Assocs., Inc. v. Lexington Ins. Co.*, 740 F. Supp. 2d 671, 677 (E.D. Pa. 2010).

i.

Nothing in the record supports Doherty's contention that Allstate acted in bad faith by failing to timely open a claim and initiate an investigation. Rather, the record makes clear that Allstate's delays are attributable to mistake, possible confusion between Allstate and McKeon and Doherty's obfuscation and refusal to cooperate with McKeon and Allstate representatives.

When Allstate received Doherty's faxed letter regarding the property damage on September 6, 2014, it misfiled the letter in the Chester file. *See* (ECF No. 132-2, at 18); (Erskine Dep., at 25:15–24, 39:16–43:1); (ECF Nos. 132-55, 132-56). It did the same thing when Doherty faxed it the second letter on October 4, 2014 to ask why Allstate never responded to her first correspondence. *See* (ECF No. 92-1, ¶¶ 80–81); (ECF No. 93-8); (ECF Nos. 132-55, 132-56). The record evidence demonstrates that Allstate misfiled the letters inadvertently, not out of ill will. Third Party Loss Adjuster Lisa Handlovic's notes in the Chester file's claim log, for example, suggest she noticed a

possible discrepancy on October 15, 2014, contacted McKeon regarding Doherty's letter and concluded that McKeon was aware of the matter, was planning to follow-up with Doherty and would open a claim if appropriate. *See* (ECF No. 132-55, at 17); *see also supra* note 14. Handlovic's notes also show that Allstate believed McKeon told Doherty that a claim "would need [a] date of loss and some facts." (ECF No. 132-55, at 17.) Even if Handlovic, and thus Allstate, were mistaken in that regard, such a mistake, without more, is insufficient to establish bad faith. *Terletsky*, 649 A.2d at 688 (citing BLACK'S LAW DICTIONARY 139 (6th ed. 1990)); *see also El Bor Corp.*, 787 F. Supp. 2d at 349–50 (finding no evidence that delay was knowing or reckless where the plaintiff's claim "fell through the cracks"); *DeWalt v. Ohio Cas. Ins. Co.*, 513 F. Supp. 2d 287, 300 (E.D. Pa. 2007) ("[C]ourts to have considered the issue have held that delay alone cannot constitute bad faith under Pennsylvania law, unless there is evidence to show the insurer knows its delay to be baseless and unreasonable.").

To the extent McKeon or Allstate could have done things better, the record shows that their shortcomings were largely attributable to Doherty's own conduct. Doherty's first letter to McKeon merely stated that there was "a claim being made for property damage at [Doherty's] properties."[44] (ECF No. 92-1, ¶¶ 73–74); (ECF No. 93-6.) Without more information—including a date of loss—it was difficult for either McKeon or Allstate to determine what coverages were in place at the time of the loss.

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[44] This was the same letter Doherty faxed to Allstate. Doherty's complete "notice of claim" letter from September 6, 2016 reads:

> Please be advised of a claim being made for property damage which has occurred at the above properties. In addition, the properties have been vacated by the tenants so that there is also claim being made by your insured, James and John Doherty and Mary Lou Doherty for loss of rent.

(ECF No. 93-6.)

See (Erskine Dep., at 74:1–10); (McKeon Dep., at 61:15–23). For this reason, McKeon did not open a claim file regarding Doherty's alleged loss. *See* (*id.*). Even if, as Doherty contends, McKeon and Allstate could have opened a claim before receiving an alleged date of loss, *see* (Doherty Dep., at 309:9–310:4), nothing in the record indicates that the decision to wait was made in bad faith.

McKeon responded to Doherty's vague notices with repeated attempts to determine the nature of her claim, further undermining her argument that Allstate or McKeon intentionally delayed the claims process.[45] On September 9, the same day McKeon received Doherty's letter, McKeon employee Kathy Wagner called Doherty and left a voicemail requesting more information about the alleged loss. *See* (Doherty Dep., at 211:24–213:13); (ECF No. 132-44). Wagner again called Doherty when McKeon received her second letter. (ECF No. 132-45.) This time, the pair connected: Wagner's handwritten notes from the call show that she told Doherty to open a claim by calling 1-800-ALLSTATE, and followed up the call by emailing Doherty a copy of the Policy and again instructing her to call 1-800-ALLSTATE and follow the prompts. (*Id.*); *see also* (Doherty Dep., at 218:21–219:17). Doherty failed to do so and later claimed that "1-800-ALLSTATE" was a nonworking number. *See* (Doherty Dep., at 222:18–229:22); *see also supra* note 17.

Wagner, consistent with her purported role as a McKeon agent, *see* (McKeon Dep., at 42:8–13, 53:2–7), thus informed Doherty how to set up a claim in September 2014 and then heard nothing from Doherty until July 2015. Though Wagner could have followed up with Doherty to confirm she had been able to set up a claim through

[45] In fact, under the Policy, Doherty was required "within 60 days after the loss" to "give [Allstate] a signed, sworn proof of loss," including "the date, time, location and cause of the loss," among other things. (ECF No. 132-5, at 16, ¶ 3(d), (f), (g)). She did not do so.

Allstate's hotline, her failure to do so falls far short of bad faith. There is no clear and convincing evidence that Allstate's failure to contact Doherty or McKeon's failure to open a claim during the break in communication was attributable to a motive of self-interest or ill will. *Terletsky*, 649 A.2d at 688.[46]

On July 30, 2015, Doherty again wrote McKeon and Allstate letters regarding Allstate's failure to acknowledge her claim, leading Allstate to open a claim on August 7. *See* (ECF No. 132-73). Nevertheless, Doherty remained selectively uncommunicative throughout the entire claims process, preventing Allstate from gathering the necessary details to investigate her claim. *See supra* Section I.F, at 17–19.

While Allstate could have expedited the process had it not misfiled Doherty's initial letters, the record evidence is not "direct, weighty and convincing as to enable a

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[46] In fact, on June 26, 2015, Lisa Handlovic wrote another entry in the Chester file relating to Doherty's purported claim:

> I called insd's agent's office talked to Kathy Quigley, told her about letter that was attached to this file in error and last time I called their office was going to set up claim etc, not sure what happened with that didn't see one under the mary d. mentioned in this letter, she doesn't have dol or what happened for us to set this up, there are two Kathys's in office and other one wasn't there she may have been person handling this, they have no rec'd their copy yet it was sent to Chicago and to the agent, I faxed a copy to her attention per her request and told her to get in touch w/ me next week to confirm, I am in tues through Friday, her fax 610-642-9924

(ECF No. 132-55, at 17.)

This note again evidences Handlovic's efforts to communicate with McKeon about Doherty's claim and corroborates Allstate's account that, with respect to Allstate, the delay was attributable to confusion or mistake as opposed to bad faith. Doherty contends this entry demonstrates that Handlovic instructed McKeon to open a claim in October 2014 and thus shows bad faith on the part of McKeon. However, read in conjunction with Handlovic's entry from that time, *see supra* note 14, this is far from clear. Rather, the entries show that Handlovic believed McKeon was going to follow up with Doherty in October, assumed they would be able to acquire the requisite information to open a claim if appropriate and was thus confused to find out in June that no claim had yet been opened. This does not, however, suggest bad faith on the part of McKeon—though Handlovic was "not sure what happened" with respect to McKeon's efforts to help Doherty set up a claim, the record shows that McKeon did indeed respond to Doherty's communications and provide her with instructions to set up a claim.

clear conviction, without hesitation," that Allstate acted in bad faith. *See Pilosi*, 393 F.3d at 367 (quoting *Bostick v. ITT Hartford Group, Inc.,* 56 F. Supp. 2d 580, 587 (E.D. Pa. 1999)); *see also* (Tr. of Hr'g 2, at 123:20–124:1).[47] "Indeed, while delay may be a relevant factor in determining whether an insurer has acted in bad faith, 'if the delay is attributable to the need to investigate further or even to simple negligence, no bad faith has occurred.'" *Hayden v. Westfield Ins. Co.*, No. 12-0390, 2013 WL 5781121, at *13 (W.D. Pa. Oct 25, 2013), *aff'd*, 586 F. App'x 835 (3d Cir. 2014) (quoting *Kosierowski*, 51 F. Supp. 2d at 589). Nor do McKeon's delays—attributable largely to Doherty's repeated failures to provide the information necessary to open a claim—amount to bad faith.[48] *See, e.g.*, *Somerset Indus., Inc. v. Lexington Ins. Co.*, 639 F. Supp. 2d 532, 543–44 (E.D. Pa. 2009) (finding insufficient evidence to support a bad faith claim where an insurer repeatedly requested additional information from an insured without success); *Quaciari,* 998 F. Supp. at 582–83 (granting summary judgment for insurer in part because periods of delay were "equally attributable" to plaintiff and defendant; holding also that "even if all delay were attributable to Allstate, it would not, without more, be sufficient to establish bad faith").

The record establishes mistakes on Allstate's part and repeated, unsuccessful attempts by McKeon and Allstate to contact Doherty to learn the details of her purported loss and instruct her on how to set up a claim. *Cf. Kosierowski*, 51 F. Supp.

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[47] At oral argument, Doherty's counsel conceded that there was no evidence that Doherty's letters were misfiled intentionally or with ill will. (Tr. of Hr'g 2, at 123:20–124:1.)

[48] Allstate's online brochure describes in detail the four methods for filing a claim, including calling 1-888-664-5652; logging on to allstate.com; calling an Allstate agent; or downloading Allstate's mobile app. (ECF No. 144-11. at 17.) Despite her purported reliance on this brochure, Doherty never followed any of these steps during the claims process. Moreover, despite the fact that all of her personal interactions when she purchased the policies were with Mr. McKeon and his employees, Doherty never once called them.

2d at 588–89 (noting that where insurer had produced evidence indicating that much of the delay in handling a claim was due to scheduling issues or, at worst, negligence, there was insufficient evidence for plaintiff's bad faith claim to survive summary judgment). Nor is there evidence to support a finding that Allstate knowingly delayed or did so with reckless disregard. *Cf., e.g.*, *El Bor Corp.*, 787 F. Supp. 2d at 349–50 (finding no evidence that delay was knowing or reckless where the plaintiff's claim "fell through the cracks"); *Morrisville Pharm., Inc. v. Hartford Cas. Ins. Co.,* No. 09–2868, 2010 WL 4323202, at *5 n.40 (E.D. Pa. Oct. 29, 2010) (agreeing with cases holding that "spans of thirteen to fifteen months to process claims are reasonable" and do not automatically give rise to bad faith claims).

ii.

Doherty also contends that Allstate failed to conduct an adequate investigation and lacked a reasonable basis for denying the claim. A suit alleging bad faith under Section 8371 is not limited to the insurer's actual claim denial; it can extend to the insurer's investigation of the claim as well. *Condio*, 899 A.2d at 1142 (citing *O'Donnell v. Allstate Ins. Co.*, 734 A.2d 901, 906 (Pa. Super. Ct. 1999)). To the extent that Doherty's bad faith claim under Section 8371 is based on Allstate's ultimate refusal to pay her claim, the Court's conclusion that Doherty's losses are not covered under the Policy, *see infra* Part III, without more, would be sufficient to warrant summary judgment on the claim. *See Gold*, 880 F. Supp. 2d at 597 ("Resolution of a coverage claim on the merits in favor of the insurer requires dismissal of a bad faith claim premised on the denial of coverage."); *Pittas*, 513 F. Supp. 2d at 504 ("A plaintiff cannot prevail on a bad faith claim [for a refusal to pay benefits] . . . where there is no breach

of an underlying contractual obligation." (citing *Younis Bros. & Co.,* 899 F. Supp. at 1396–97; *Pizzini,* 249 F. Supp. 2d at 570–71).

However, even if Doherty's losses had been deemed covered under the Policy, her bad faith claim would still fail because the record shows that Allstate both conducted an adequate investigation and had a reasonable basis for concluding that the damage to Doherty's properties was not covered under the Policy. Bad faith may occur "when an insurance company makes an inadequate investigation or fails to perform adequate legal research concerning a coverage issue." *Corch Const. Co. v. Assurance Co. of Am.*, No 1250-C, 2003 WL 23473924 (Pa. Commw. Ct. 2003); *see also Gold*, 880 F. Supp. 2d at 597 (noting that an insurer must "properly investigate claims prior to refusing to pay the proceeds of the policy to its insured." (quoting *Bombar v. W. Am. Ins. Co.*, 932 A.2d 78, 92 (Pa. Super. Ct. 2007))). It is not, however, bad faith for an insurer to "aggressively investigate and protect its interests." *Condio*, 899 A.2d at 1143 (citing *Brown v. Progressive Ins. Co.*, 860 A.2d 493, 500–01 (Pa. Super. Ct. 2006)).

Whether an insurer lacked a reasonable basis for denying benefits under a policy is an objective test. Thus, "'if a reasonable basis exists for an insurer's decision, even if the insurer did not rely on that reason, there cannot' as a matter of law be bad faith." *Hamm*, 908 F. Supp. 2d at 668–69 (quoting *Wedemeyer v. U.S. Life Ins. Co. in City of New York*, No. 05–6263, 2007 WL 710290, at *9 (E.D. Pa. Mar. 6, 2007)); *see also Williams*, 83 F. Supp. 2d at 574; *cf. Douglas v. Discover Prop. & Cas. Ins. Co.*, No. 08-1607, 2015 WL 5764060, at *10 (M.D. Pa. Sep. 29, 2015) (citing *Williams* and noting that "[t]he weight of opinion among the District Courts of Pennsylvania supports the proposition in *Williams*"). To demonstrate a reasonable basis, an insurer need not

prove its investigation yielded the correct conclusion or even that its conclusion more likely than not was accurate. *Krisa v. Equitable Life Assur. Soc.*, 113 F. Supp. 2d 694, 704 (M.D. Pa. 2000). Nor is an insurer required to show that "the process by which it reached its conclusion was flawless or that the investigatory methods it employed eliminated possibilities at odds with its conclusion." *Id.* Instead, an insurer need only show it conducted a sufficiently thorough review or investigation to yield a reasonable foundation for its action. *Luse v. Liberty Mut. Fire Ins. Co.*, 411 F. App'x 462, 465 (3d Cir. 2011).

Moreover, while a court must make all reasonable inferences in a plaintiff's favor, an insurer, in deciding to grant or deny coverage, is under no such obligation. *Brinker v. Guiffrida*, 629 F. Supp. 130, 135 (E.D. Pa. 1985). "Rather, it [is] free, within the constraints of reason and good faith, to evaluate the evidence and draw its own conclusion about the source of the [damage]." *Id.*

For summary judgment purposes, the Court accepts Doherty's contention that Allstate, through its attorney, denied Doherty's claim on October 23, 2015. (ECF No 144-2, at 10.) The basis upon which Allstate gathered information and made its decision was necessarily complicated by Doherty's pending lawsuit against the company, filed on August 18, 2015. *See* (ECF No. 1); (Myrick Dep., at 44:22–47:24, 62:13–64:23, 94:8–95:15); (Erskine Dep., at 21:24–23:14); (Tr. of Hr'g 2, at 34:18–37:6). This meant that Allstate could not investigate the claim as it typically would, through direct communications with its insured, but rather had to do so through its counsel. *See* (*id.*). Continuing to investigate a claim during litigation is not indicative of bad faith. *See Condio*, 899 A.2d at 1143 (citing *Brown*, 860 A.2d at 500–01) (noting that it

is not bad faith for an insurer to take a stand with a reasonable basis or to "aggressively investigate and protect its interests"). Moreover, where the cause of the alleged damage remains debatable, it is not bad faith for an insurer to defend itself in litigation by asserting defenses to coverage. *Totty v. Chubb Corp.*, 455 F. Supp. 2d 376, 389–90 (W.D. Pa. 2006) (holding it was not bad faith for the insurer to assert and maintain defenses to coverage where the cause of the alleged damage "remain[ed] fairly debatable" and there was "no evidence that [the insurer] advanced this argument to evade its obligations under the policy as opposed to defend itself in the lawsuit plaintiff filed against it").

Compounding the difficulty of Allstate's investigation was the fact that Doherty's cooperation was a necessary predicate to Allstate determining the actual nature and value of the alleged loss. Yet Doherty failed to provide Allstate with the requisite information following her initial, unspecific letters. In the face of numerous phone calls and even written communications stressing the importance of speaking on the phone, Doherty failed to shed any light on her purported loss. *See supra* subsection I.F, at 17–19. This hindered Myrick's ability to initiate the claims adjusting process. *See* (Myrick Dep., at 102:5–19, 105:19–107:16). Finally, on October 15, 2015—months after Doherty sued Allstate—Doherty sent Allstate's counsel a letter offering an "overview of the loss." (ECF No. 132-80, at 2.) Doherty explained that "According to the Radnor Township's website, its officials use Property Maintenance as a 'tool' to prevent targeted Landlords from renting their properties." (*Id.*) Doherty further stated, among other things, that Radnor Township inspectors deliberately failed to follow "normal procedures" and had been in the properties by themselves after her tenants vacated. (*Id.*) This overview of

the loss—the first time Allstate received details regarding the cause of the damage to Doherty's property—wholly focuses on the actions of Radnor Township officials and implies that those officials damaged her property. *See generally* (*id.*) Thus after nearly a dozen telephone calls and multiple emails and letters, the sum total of information Allstate received from Doherty regarding the loss was a two-page narrative detailing apparent misdeeds by Radnor Township officials.

Given the information available to Allstate, the insurer had a reasonable basis upon which to deny Doherty's claim. In Allstate's response to Doherty's overview of the loss, its counsel attached a copy of the Township's September 24, 2014 Complaint against the Dohertys, which "details a litany of issues with the premises including dirty conditions, mouse droppings, broken doors, broken windows, mold, broken appliances and trash throughout the interior and exterior of the properties." (ECF No. 29-9, at 4.) Moreover, Allstate's counsel noted that the date of the inspections of Doherty's properties coincided with the dates of loss Doherty alleged in her letters to Allstate. (*Id.*) The information Allstate received from Doherty regarding her claim, coupled with Doherty's previous refusal to provide useful information to Allstate, gave the insurer a reasonable foundation to deny Doherty benefits under the Policy, which did not include coverage for either the vandalism or abuse that Doherty alleged or the neglect and lack of maintenance that many of the alleged conditions suggested.

In any event, Allstate's basis for denying Doherty's claim was borne out by discovery in this case. Allstate subpoenaed various third parties for records related to Doherty's properties. It received the Radnor Township Complaint; the 2009 court of common pleas order requiring the Dohertys to allow the Township to inspect the

properties; the September 5, 2014 and July 2, 2015 notices revoking Doherty's rental licenses; various complaints submitted to Villanova by students and parents regarding Doherty's poor maintenance of rental properties and misconduct as a landlord (*see supra* note 24); pictures of the damage taken by Daly on August 27, 2014; a package of documents from Good, including his written statement to the police, various letters sent by his father to Doherty and the photographs he took of the property in July 2015; and four incident reports filed with the Radnor Police—two filed by DiSciullo and O'Brien in August 2014, one filed by Good in July 2015 and one filed by the parent of a previous tenant of 951 Glenbrook in 2006. *See* (ECF No. 29, at 4–5); (ECF Nos. 132-10–132-12, 132-14–132-54).

The subpoenaed documents supported Allstate's belief that the losses Doherty claimed were likely attributable to wear and tear and a general failure to maintain her properties; they also showed that Doherty's properties were uninhabitable before the date of the losses alleged in her Complaint. *See* (ECF No. 29-11). Moreover, Allstate knew that even if Doherty's account of how the damage occurred was true (despite how unlikely that seemed given the documents Allstate had received), the losses would nevertheless be excluded from coverage. It was reasonable for Allstate to conclude that the losses were not sudden, accidental and covered by the Policy. *See Brinker*, 629 F. Supp. at 135. There is insufficient evidence in the record that could support a finding by clear and convincing evidence that Allstate acted in bad faith when it investigated and refused to pay Doherty's claim. *See Totty*, 455 F. Supp. 2d at 389–90; *Krisa*, 113 F. Supp. 2d at 704. Moreover, the opinion of David Cole, Doherty's proposed expert, that Allstate's conduct rose to the level of statutory bad faith does not preclude summary

judgment. *Kosierowski*, 51 F. Supp. 2d at 595 ("The mere presence of an expert opinion supporting the non-moving party's position does not necessarily defeat a summary judgment motion; rather, there must be sufficient facts in the record to validate that opinion." (citing *Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1198–99 (3d Cir. 1995))). Because Cole's opinion "includes no analysis or interpretation that would alter the court's conclusion as to the insufficiency of the evidence presented by plaintiff," *id.*, summary judgment is warranted. *See* (ECF Nos. 144-6, 144-7).

VI.

This unwieldy memorandum is the Court's best effort to bring a semblance of coherence to an inherently contradictory lawsuit. Doherty's unilateral definition, and redefinition, of the Policy's coverage and her shifting theories on the cause, nature and extent of the purported damage to her properties cannot circumvent the extensive record evidence which precludes any reasonable juror from finding in Doherty's favor on any of her claims.

An appropriate order follows.

/s/ Gerald J. Pappert