

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

AMERICAN GENERAL LIFE)
INSURANCE COMPANY,)
)
Plaintiff,)
)
v.) 2:16-cv-00268-JAW
)
DRUE NICKERSON and NICOLE)
STEPANEK,)
)
Defendants.)

ORDER ON MOTION TO FILE SUR-REPLY

On May 31, 2016, American General Life Insurance Company (American General) filed a complaint with this Court against the sister, Nicole Stepanek, and business partner, Drue Nickerson, who are the listed beneficiaries of an American General life insurance policy on the life of the late Matthew J. Fitzgerald. *Compl.* at 1-6 (ECF No. 1). In the Complaint, American General asserts that Mr. Fitzgerald failed to disclose material information concerning his medical condition, which—if disclosed—would have caused American General not to issue a life insurance policy to him. *Id.* at 4-5. American General seeks a court-ordered rescission of the policy and a declaratory judgment against the beneficiaries. *Id.* at 4-6.

On July 29, 2016, Ms. Stepanek moved to dismiss American General's Complaint for failure to join an indispensable party, namely the Estate of Matthew John Fitzgerald. *Def. Nicole Stepanek's Mot. to Dismiss for Failure to Join an Indispensable Party* (ECF No. 12). On August 16, 2016, Mr. Nickerson filed a similar

motion, adopting Ms. Stepanek's arguments. *Def. Drue Nickerson's Mot. to Dismiss for Failure to Join an Indispensable Party* (ECF No. 17). On August 19, 2016, American General filed a response to Ms. Stepanek's motion. *Pl.'s Opp'n to Def. Nicole Stepanek's Mot. to Dismiss* (ECF No. 18). On September 2, 2016, Ms. Stepanek filed a reply to American General's response. *Def. Nicole Stepanek's Reply to Pl.'s Opp'n to her Mot. to Dismiss for Failure to Join an Indispensable Party* (ECF No. 19). On September 6, 2016, American General filed a response to Mr. Nickerson's motion to dismiss. *Pl.'s Mem. in Opp'n to Def. Drue Nickerson's Mot. to Dismiss* (ECF No. 20). Also on September 6, 2016, American General moved for leave to file a sur-reply to Ms. Stepanek's motion to dismiss. *Pl.'s Mot. for Leave to File Sur-Reply* (ECF No. 21) (*Pl.'s Sur-Reply Mot.*). Ms. Stepanek objects to American General's motion for leave to file sur-reply. *Email from Att'y John Lambert to Clerk of Ct* (Sept. 8, 2016) (ECF No. 22) (*Stepanek Sur-Reply Opp'n*).

In its motion to file sur-reply, American General says that Ms. Stepanek argued for the first time in her reply "that the underlying legislative purposes of contestability requirements supports her claim that the Probate Code applies to this action." *Pl.'s Sur-Reply Mot.* at 1. In addition, American General states that Ms. Stepanek cited "three additional cases, all of which could have been cited in her moving brief, but none of which stand for the proposition Stepanek cites them for." *Id.* at 1-2. Finally, American General maintains that Ms. Stepanek's "Reply conflates two distinct concepts at issue: 1) application of the Probate Code; and 2) whether the Estate is an indispensable party." *Id.* at 2. American General submitted a

memorandum addressing these issues. *Id.* Attach. 1, *Pl.'s Sur-Reply to Def. Nicole Stepanek's Mot. to Dismiss* at 1-8. In her opposition, Ms. Stepanek points out that American General already filed an identical argument in its response to Mr. Nickerson's motion so that its motion for leave to file is probably moot. *Stepanek Sur-Reply Opp'n* at 1.

In the Court's view, as American General by right filed a response to Mr. Nickerson's motion that is a verbatim recitation of its proposed sur-reply, the dispute about whether American General may file an identical sur-reply seems unnecessary. However, to clear the air, the Court grants American General's motion for four reasons: (1) the American General sur-reply addresses some arguments first raised in Ms. Stepanek's reply; (2) if the American General motion to file sur-reply is granted, it will obviate any argument that the Court may consider its sur-reply argument only as to Mr. Nickerson and not as to Ms. Stepanek; (3) the Court would benefit from the additional argument of counsel on these points of law in arriving at its decisions; and (4) the Court will allow Ms. Stepanek, if she wishes to do so, to file a reply to American General's sur-reply so that she has an opportunity to respond to American General's sur-reply.

The Court GRANTS American General Life Insurance Company's Motion for Leave to File Sur-Reply (ECF No. 21). In addition, the Court allows Nicole Stepanek, if she chooses, to file a response to American General's sur-reply. Ms. Stepanek's response is due on or before September 20, 2016, the same date as Mr. Nickerson's reply to American General's response is due.

SO ORDERED.

/s/ John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
UNITED STATES DISTRICT JUDGE

Dated this 12th day of September, 2016