

## First-Party Newsletter

September 2010

### NO HARM, NO FOUL: BROKER NOT LIABLE FOR PROCURING WRONG POLICY BECAUSE THERE WOULD NOT HAVE BEEN COVERAGE FOR THE LOSS ANYWAY

*Milgrim v. Royal Sunalliance Ins. Co.*, Docket No. 2009-09391  
(2d Dep't July 20, 2010)

The following case deals with a broker's liability for negligently assisting an individual in the procurement of an insurance policy. In *Milgrim v. Royal & Sunalliance Ins. Co.*, Docket No. 2009-09391 (2d Dep't July 20, 2010), the insured premises had been purchased by a religious group to serve as the home of a rabbi and his family. Seeking to procure a homeowner's policy for the property, the rabbi approached an insurance broker who informed him that because the religious group would own the property, it would have to purchase the insurance at corporate rates that were considerably more expensive than individual homeowner's insurance. The property was initially insured

under the organization's name, but due to increasing premiums, the broker suggested that the rabbi obtain insurance coverage for the property by listing himself on the insurance application as the owner of the premises and the organization as the mortgagee, even though no mortgage actually existed. Eventually, the rabbi and his family moved out of the insured premises, and approximately one year later, while a sale of the property was pending, it was damaged by fire. The insurer disclaimed coverage based on the misrepresentations on the application for insurance, based on the policy's residency provision, and because the rabbi did not have an insurable interest in the property at the

time of the fire. After the insurance claim was denied, the rabbi and the organization commenced an action against the insurer and the broker. The insurer settled, and the broker was granted summary judgment in its favor. The court found that while a broker that is negligent in procuring a policy can be held liable to the extent that an insurer would have been if the policy had been properly procured, even if the defendant broker had been negligent it could not be held liable for the plaintiffs' damages because their claim was denied based on the residency provision of the policy. Thus, the negligence of the broker was not the proximate cause of the plaintiffs' damages.

### THAT SETTLES IT: ABSENT RESERVATION OF RIGHTS, ACCEPTANCE OF SETTLEMENT EXTINGUISHED CLAIM FOR DISPUTED ITEMS

*Rose Inn of Ithaca, Inc. v. Great American Ins. Co.*  
Docket No. 508972, 2010 NY Slip Op. 5852  
(3d Dep't July 1, 2010)

*Rose Inn of Ithaca, Inc., v. Great American Ins. Co.* Docket No. 508972, 2010 NY Slip Op. 5852 (3d Dep't July 1, 2010), involved a claim for fire damage to a "country inn." A representative of the inn engaged in extensive negotiations with the defendant insurer over the settlement of the claim. Eventually the parties reached an agreement to settle the claim for the actual cash value of the fire-damaged portion of the inn, leaving open only whether or not the plaintiffs would become entitled to replacement costs. The plaintiffs then commenced suit against the insurer asserting a cause of action for breach of contract, alleging that the insurer had omitted items from its calculation of replacement cost, and therefore the actual cash value of the loss, including engineering fees, sales tax, and tear-out costs, and seeking to recover the difference in actual cash value that including the omitted items would have made. The plaintiffs also alleged that the insurer should have declared the surviving portion of the inn a total loss and awarded the plaintiffs its actual cash value, as well. Because the plaintiffs' representative had raised those issues with the insurance company's adjuster and then accepted a settlement of its claim despite the fact that the issues were never formally

resolved, the court found that plaintiffs were barred from seeking further proceeds under the policy by the principles of accord and satisfaction.

**Practice Pointer:** This case somewhat revives the doctrine of accord and satisfaction in first party insurance claims. Insurers are cautioned against reading too far into the case, however, because even a *pro forma* reservation of rights letter from the insured's representative, nearly always sent by public adjusters, likely would have defeated the insurer's defense.



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In *FHJ 86 Partners and Town and Country Discount Liquors, Inc. v. Charter Oak Fire Insurance Company*, Docket No. 09 Civ.1742, (S.D.N.Y. July 12, 2010) the United States District Court for the Southern District of New York held that an insured partnership and its innocent general partners are not entitled to coverage under an insurance policy as innocent co-insureds. In 2007, Charter Oak issued an insurance policy to the plaintiff. The plaintiff was a partnership that had three general partners, each of whom had a one-third interest in the partnership. The named insured under the insurance policy was the partnership. Following a fire loss, the insurer denied coverage for the loss on the basis that one of the partners of the insured business intentionally concealed and misrepresented material facts concerning the claim and cause of the fire. However, both the plaintiff and defendant agreed that there was no evidence to establish that the other two partners of the insured business played any

role in causing the fire at the insured premises.

The plaintiff moved for summary judgment seeking to apply the innocent co-insured doctrine to the two business partners who were not involved in causing the fire. The crux of plaintiff's argument was that the innocent general partners of the partnership are entitled to coverage for the loss regardless of whether one of the other partners intentionally caused the loss.

The court rejected plaintiff's argument that the innocent co-insured doctrine applied. The court concluded that the only insured under the policy of insurance at issue was the partnership (i.e., the named insured). Because the policy specifically excluded coverage for the dishonest or criminal acts of the insured or its partners, there can be no innocent co-insured who was entitled to coverage for the losses caused by the alleged

intentional acts of one of the general partners. In reaching its conclusion, the court stated that "neither the partnership nor its two innocent general partners are entitled to coverage under the policy as innocent co-insureds, and accordingly, the insurer's affirmative defense seeking to bar coverage based on the dishonest or criminal acts exclusion could not be dismissed."

**Practice Pointer:** As this decision demonstrates, the named insured on a policy, as well as the policy definition of who an insured is, is critical to an evaluation of whether or not there is coverage for a particular loss. In situations where a corporation or partnership is the named insured, the dishonest acts of any of the corporate officers, directors, or partners is fatal to the entire claim and the innocent co-insurance doctrine does not apply.

## SECOND CIRCUIT SAYS "DATE OF LOSS" NOT NECESSARILY THE DATE THE LOSS OCCURRED

*Fabozzi v. Lexington Ins. Co.*  
601 F.3d 88 (2d Cir. 2010)

The United States Court of Appeals for the Second Circuit dealt a serious blow to the enforcement of the two-year limitations period found in the standard fire insurance policy of this state in *Fabozzi v. Lexington Ins. Co.*, 601 F.3d 88 (2d Cir. 2010). In that case, the plaintiff homeowners filed a claim for the damage to their home after it began to collapse as a result of structural damage. After an investigation that took over two years, the insurer denied coverage for the loss, and the plaintiffs commenced a lawsuit seeking to recover insurance proceeds. The district court granted the insurer's motion for summary judgment based on the plaintiffs' failure to commence the action within the limitations period, finding that the "date of loss" was the date the damage to the plaintiffs' home occurred. On appeal, the plaintiffs argued to the Second Circuit that New York law distinguishes between policy provisions that require bringing suit "within two years after the date of loss," like plaintiffs' policy required, and provisions that require suit within a certain period of time after "the inception of the loss." Relying on New York Court of Appeals cases decided between 1882 to 1966, the court found in favor of the plaintiffs, finding that the language in plaintiffs' policy was ambiguous and tied the limitations period to the moment in time when the cause of action accrues – that is, when the dispute over the policy arose – as opposed to the date of the property loss incident. Because the old Court of Appeals decisions the court cited have never

specifically been overruled by that court, the Second Circuit declined to follow the modern precedent established by a legion of lower-court cases that interpret the "date of loss" to be the date of the incident.

**Practice Pointer:** As the *Villa* case, also discussed in this edition, indicates, *Fabozzi* may be the beginning of a trend where denying a claim that does not have a distinct accrual date based solely on a failure to comply with the contractual limitations period becomes an iffy proposition for the insurer.



## FOR REPLACEMENT COST CLAIM, INSURED REQUIRED TO ACTUALLY EXPEND FUNDS IN EXCESS OF ACV, NOT MERELY CONTRACT TO DO SO

*Biniszkiewicz v. New York Central Mutual Fire Ins. Co.*, Docket No. 2010/167,  
(Sup. Ct. Erie Cty. July 20, 2010)

*Biniszkiewicz v. New York Central Mut. Fire Ins. Co.*, Docket No. 2010/167, (Sup. Ct. Erie Cty. July 20, 2010) involved a claim by an insured that contracted to purchase a replacement home in another location after her residence was destroyed by fire. The insured sought to recover replacement costs based on having entered into the contract, even though actual construction of the replacement home had not begun within two years of the date of loss. The insurer successfully argued that because the repair or replacement of the home had not been completed within two years of the date of loss, and because the insured had not actually expended funds in excess of the actual cash value payment she received, she was not entitled to replacement cost proceeds.

**Practice Pointer:** This case confirmed that insureds are not entitled to replacement cost proceeds until they actually have expended funds toward repair or replacement in excess of any actual cash value payment they already have received. The court in *Biniszkiewicz* strictly adhered to the two-year contractual limitations period and found that an insured incurring a liability to pay was not the same as having actually expended funds toward repair or replacement within two years of the date of loss.

## LANDLORD CANNOT SUBMIT A CLAIM UNDER TENANT'S INSURANCE POLICY

*SUS, Inc. v. St. Paul Travelers Group*,  
2010 NY Slip Op 5853, 2010 N.Y. App. Div. LEXIS 5585  
(3d Dep't July 1, 2010)

The owner of a building and the owner of a restaurant that operated inside of the building commenced a lawsuit against Charter Oak Fire Insurance Company and its parent companies as a result of a fire that completely destroyed the restaurant in 2008. At the time of the fire, the restaurant had obtained businessowners' property insurance coverage and commercial general liability coverage. The owner of the property was listed as an additional insured with respect to the liability coverage, but not with respect to the property coverage. In addition, although the policy referenced property coverage for the building, it was limited to the amount identified in the declarations.

The defendants moved to dismiss the complaint (1) with respect to claims that were asserted against defendants other than Charter Oak, (2) with respect to claims that were asserted by the landlord of the property, and (3) with respect to the claims seeking coverage for damage to the building. The appellate court dismissed plaintiffs' complaint against all defendants except as against Charter Oak because the insurance policy unambiguously identified Charter Oak as the only insuring company and because liability never can be predicated solely on the fact of a parent corporation's ownership of a controlling interest in the shares of its subsidiary. In order for the parent companies to be liable, there must be direct intervention by the parent in the management of the subsidiary to such an extent that the subsidiary's paraphernalia of incorporation, directors, and officers are completely ignored.

The appellate court also dismissed the claims of the landlord because it was not a named

insured with respect to the property coverage part. The court held that the landlord was an insured only with respect to the liability coverage; therefore, it was not entitled to recover under the business property coverage part.

Finally, the appellate court dismissed the claims related to coverage for the building. The policy limited coverage for the building to the amount identified in the declarations, and the declarations page did not identify any coverage amount for the building, despite containing coverage amounts for personal property and other coverage extensions. In addition, the court noted that coverage also is not available through the provision related to "Damage to Premises Rented to You," because that provision requires that the insured be legally obligated to pay, and plaintiffs did not allege that the insured ever was legally obligated to pay for the damage to the building.

**Practice Pointer:** This case re-enforces the long-standing principle that a plaintiff can commence a breach of contract action against only parties that are privy to the contract. Plaintiffs often try to sue the parent companies of an insurer, but the existence of a parent company is not relevant to an alleged breach of contract case unless the parent company is actively managing the subsidiary. More importantly, this case is a good example of a court correctly interpreting an insurance policy. The landlord was not a named insured under the policy, and the court properly enforced the policy terms to deny the claim made by the landlord under his tenant's policy.

## DOMINO EFFECT: CITING *FABOZZI*, ANOTHER COURT FINDS "DATE OF LOSS" AMBIGUOUS

*Villa v. Sterling Ins. Co.*  
Docket No. 2009-1352 N.C., 2010 NY Slip  
Op. 20284  
(2d Dep't July 16, 2010)

*Villa v. Sterling Ins. Co.*, Docket No. 2009-1352 N.C., 2010 NY Slip Op. 20284 (2d Dep't July 16, 2010) represents another case where the two-year contractual limitation period was found to be ambiguous, this time with respect to the payment of additional living expenses. In *Villa*, the plaintiff's home was rendered uninhabitable by a fire on April 12, 2006. "After some delay," the plaintiff's claim for damage to her home was settled, and the plaintiff was able to move back into her home in April 2007. Some, but not all, of the additional living expenses the plaintiff claimed to have incurred were reimbursed by the insurance company. Plaintiff demanded payment of her additional living expenses and filed complaints with the New York State Insurance Department over the defendant's failure to pay the claims, but she did not commence a lawsuit to recover the amounts she claimed were due to her until April 14, 2008, two days after the statute of limitations had expired. The Appellate Division, Second Department found that a lower court properly denied the insurer's motion for summary judgment based on the two-year limitations period. That limitations period required an insured to bring an action within two years "after the loss," but did not define "loss." The policy also provided for open-ended payment of additional living expenses, "not limited by the policy period." The court, citing *Fabozzi* and one other case, stated that "[i]n the absence of a specific provision regarding accrual in a contract of insurance, the statute of limitations generally begins to run upon the insurer's breach of contract by its failure to pay." The court affirmed the denial of the insurer's motion for summary judgment, finding that the policy language with respect to the limitations period was ambiguous and that it had not begun to run until defendant's breach of contract in failing to pay the plaintiff's claim for additional living expenses.

**Practice Pointer:** The court in *Villa* found ambiguity in the policy language in order to prevent a somewhat harsh result for the insured. If the trend started by *Fabozzi* continues, insurers may be wise to amend their policies either to clearly define "loss" more clearly or use the "inception of the loss" language favored by the *Fabozzi* court.



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