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NO. 62852-6-I

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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LAKEWEST CONDOMINIUM OWNERS ASSOCIATION,

Plaintiff/Appellant,

v.

TOKIO MARINE & NICHIDO FIRE INSURANCE COMPANY, LTD.

Respondent/Appellee.

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REPLY BRIEF OF APPELLANT

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Todd C. Hayes, WSBA No. 26361  
Charles K. Davis, WSBA No. 38231

HARPER | HAYES PLLC  
One Union Square  
600 University Street, Suite 2420  
Seattle, Washington 98101  
Telephone: 206.340.8010  
Facsimile: 206.260.2852  
Attorneys for Appellant

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## I. INTRODUCTION

The trial court had no authority to vacate the Association's judgment under CR 60(b), and Tokio's opposition establishes no evidence or authority otherwise. As Tokio's admissions in other cases confirm, Tokio and its branch office are not distinct entities. Consistent with that, Tokio has repeatedly stated under oath that it *is* licensed to transact business in the United States – statements that directly contradict what Tokio has told both this Court and the trial judge who vacated the Association's judgment. Moreover, CR 60(b) precludes Tokio from arguing its failure to answer the Association's complaint was excusable, and Tokio has presented no evidence to that effect anyway. Finally, entry of the Association's judgment was not "inequitable" because Tokio assumed the liability under a policy that independently obligated it to pay the Association's damages, regardless of what other insurance the Association may or may not have had. And Judge McCarthy properly determined after reviewing the evidence that the Association incurred the damages set forth in the judgment.

The Association served Tokio and Tokio failed to appear. Judge McCarthy properly entered a default judgment. Tokio has established no basis under CR 60(b) or any other law to support a separate trial judge's decision to vacate that judgment. Accordingly, the Association

respectfully requests that this Court reverse the order vacating the Association's judgment, and reinstate the judgment.

## II. ARGUMENT

### A. TOKIO'S BRANCH IS NOT A DISTINCT ENTITY

Tokio first argues in its opposition brief that the Association's judgment is "void" for lack of personal jurisdiction because the Association served its complaint on Tokio's "branch," which Tokio claims is a distinct entity.<sup>1</sup> In support of that argument, Tokio first tries to distinguish its admissions in Smoot v. Mazda<sup>2</sup>, claiming "service in Smoot was effected via a registered agent" and "[n]either party in that case raised jurisdiction or service as an issue."<sup>3</sup>

But the manner of service in these cases is irrelevant because Tokio admits that the Association's complaint arrived at the registered agent of Tokio's branch. *How* the complaint got there is irrelevant; the question is whether its delivery effected service on Tokio because the branch is not a distinct entity. If Tokio and its branch are one and the

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<sup>1</sup> Tokio concedes that its branch office was actually served, in that the Association's complaint physically arrived at the offices of the registered agent, "Tokio Marine Management," CP 378, so the only issue here is whether Tokio and its branch are distinct entities. If not, then service on Tokio's branch office constituted service on Tokio.

<sup>2</sup> Smoot v. Mazda Motors of America, Inc., 469 F.3d 675 (7<sup>th</sup> Cir. 2006).

<sup>3</sup> *Respondent's Brief*, at 13.

same, then service on the registered agent for the branch equaled service on the registered agent for Tokio.

And according to what Tokio itself said to the court in Smoot, its branch is *not* a distinct entity.<sup>4</sup> More importantly, Tokio stated in its brief in Smoot that service on Tokio's branch effects service on Tokio – precisely the issue in this case:

The Tokio Marine & Fire Insurance Company, Ltd. is a Japanese corporation. It has its principal place of business in Tokyo, Japan. It has a branch in the U.S. with offices in New York, but the branch is not separately incorporated. ***It is that branch through which it was served with the Summons and Complaint.***<sup>5</sup>

*Why* Tokio said these things is immaterial. The statements were made in court filings, and are therefore admissions that estop Tokio from taking a different position in this case.<sup>6</sup>

Tokio also claims that the Association obtained its judgment against a distinct entity because Tokio itself “does not do any business in the United States,” and only the branch is “licensed to transact the

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<sup>4</sup> See Smoot, 469 F.3d at 677 (“The fact that ‘Branch’ is capitalized and its principal place of business alleged suggests that it might be a corporation, but at argument the appellees’ lawyer said no, it’s just a branch.”).

<sup>5</sup> CP 514 (emphasis added). “The Tokio Marine & Fire Insurance Company, Ltd.” is Tokio’s former name. See CP 853.

<sup>6</sup> See Ashmore v. Estate of Duff, 165 Wn.2d 948, 950, 205 P.3d 111 (2009) (“The gravamen of judicial estoppel is the intentional assertion of an inconsistent position that erodes respect for the judicial process and the courts.”). Note that the elements of traditional estoppel – such as “privity of the parties, reliance, and prejudice” – do not apply to judicial estoppel. See Johnson v. Si-Cor Inc., 107 Wn. App. 902, 908-09, 28 P.3d 832 (2001).

business of insurance in the United States.”<sup>7</sup> But as the Association pointed out in its opening brief, Tokio itself identified the entity that agreed to service through the Insurance Commissioner as organized under the laws of *Japan*.<sup>8</sup> This can only be a reference to Respondent.

Consistent with that, Tokio has on at least five occasions represented to United States courts *that Tokio is licensed to do business in the United States*:

This defendant admits that [TOKIO MARINE AND FIRE INSURANCE COMPANY, LIMITED] is an alien corporation with its domestic office at 230 Park Avenue, New York, New York; that it is licensed to transact business in the State of Illinois, and furthermore that it is organized under the laws of Japan.<sup>9</sup>

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<sup>7</sup> See *Respondent's Brief*, at 1 (“Respondent does not do any business in the United States . . . .”); at 13 (“Only Tokio U.S. is licensed to transact the business of insurance in the United States.”).

<sup>8</sup> CP 391-94 (“Uniform Consent to Service of Process”) (“The entity named above [is] *organized under the laws of Japan* . . . .”) (emphasis added).

<sup>9</sup> APPENDIX A (pleading in *Liberty Mut. Ins. Co. v. Tokio Marine and Fire Ins. Co., Ltd.*, Northern Dist. Illinois Case No. 03 CC 4765); see also APPENDIX B (pleading in *Tokio Marine and Nichido Fire Ins. Co., Ltd. v. Macready*, E.D.N.Y. Case No. CV 08 2793) (“At all times relevant, [TOKIO MARINE AND NICHIDO FIRE INSURANCE CO., LTD.] was, and still is, a foreign corporation authorized to conduct business in the State of New York, and maintains its principal place of business in Tokyo, Japan.”); APPENDIX C (pleading in *Tokio Marine and Fire Ins. Co., Ltd. v. Rosner*, E.D.N.Y. Case No. CV 02 5065) (“At all times relevant, [TOKIO MARINE AND FIRE INSURANCE CO., LTD.] was, and still is, a foreign corporation authorized to conduct business in the State of New York, and maintains its principal place of business in Tokyo, Japan.”); APPENDIX D (pleading in *Tokio Marine and Fire Ins. Co., Ltd. v. Zurita*, E.D.N.Y. Case No. CV 02 1751) (“At all times relevant, [TOKIO MARINE AND FIRE INSURANCE CO., LTD.] was, and still is, a foreign corporation authorized to conduct business in the State of New York, and maintains, its principal place of business in Tokyo, Japan.”); APPENDIX E (pleading in *Tokio Marine and Fire Ins. Co., Ltd. v. Giffels*, S.D. Ind. Case No. 3:04-CV-00013-RLY-WGH) (“At all times herein mentioned, Plaintiff

This is critical. The trial judge who vacated the Association's default judgment did so largely based on Tokio's misrepresentation that it was not licensed to do business in the United States, and must therefore be a distinct entity from its U.S. branch.<sup>10</sup> That misrepresentation was in turn based on a series of conclusory statements in the declaration of the general counsel for Tokio's U.S. "manager" – statements that directly contradict what Tokio has stated under oath to other U.S. courts.<sup>11</sup>

The fact is, Tokio *is* licensed to do business in the U.S. because its branch is simply the "business unit" through which the Japanese corporation does business here.<sup>12</sup> Tokio's branch is therefore not a distinct juristic entity, the Association effectively served Tokio when the Association served Tokio's branch office, and the Association's judgment is not void under CR 60(b)(5).<sup>13</sup>

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Tokio Marine and Fire Insurance Company, Ltd., ("Tokio Marine") was and is a corporation duly organized and existing under and by virtue of the laws of Japan and authorized to transact insurance business in the State of Indiana.").

<sup>10</sup> See CP 336-338 (Tokio's motion to vacate, arguing Tokio is not licensed to do business in the United States).

<sup>11</sup> See CP 678, line 12-14 (Second Goldstein Declaration) ("An alien insurer cannot be directly licensed to transact the business of insurance in the United States. Rather, it must establish a U.S. branch, which is then independently licensed under its own name.").

<sup>12</sup> See N.Y. INS. LAW § 107(a)(44) (Consol. 2009) (APPENDIX A to Opening Brief) ("United States branch' means . . . the business unit through which business is transacted within the United States *by an alien insurer . . .*") (emphasis added).

<sup>13</sup> Citing Zurich Insurance Co. v. New York State Tax Commission, 534 N.Y.S.2d 515, 516 (App. Div. 1988), *appeal denied*, 541 N.Y.S.2d 985 (1989), Tokio also points out that its branch is treated separately for tax purposes. But as the court already

**B. THE JUDGMENT IS NOT “INEQUITABLE,” AND TOKIO FAILED TO ESTABLISH A BASIS TO VACATE UNDER CR 60(b)**

Tokio next argues that this case presents but one other issue: whether vacating the Association’s judgment was proper under the catch-all language of CR(b)(11).<sup>14</sup> Mis-quoting that rule, Tokio claims that a judgment may be vacated “for any ‘reason justifying relief from the operation of the judgment’” (the rule actually says “any *other* reason”). CR 60(b)(11) is applicable, Tokio claims, because (1) the Association moved to amend “without providing notice” to Tokio, (2) the Association sued multiple defendants; and (3) the Association “sat on the judgment” for a year before demanding that Tokio pay.<sup>15</sup>

In addressing these arguments, this Court should bear in mind that “[t]he use of CR 60(b)(11) ‘should be confined to situations involving extraordinary circumstances *not covered by any other section of the rule.*’”<sup>16</sup> Thus, although Tokio tries to conflate the actual issues in this

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recognized in Colonia Ins., A.G. v. D.B.G. Property Corp., 1992 U.S. Dist. LEXIS 12265 (S.D.N.Y. Aug. 7, 1992), how an alien insurer and its branch are taxed is irrelevant in determining whether the alien and branch are distinct juristic entities. See Colonia, 1992 U.S. Dist. LEXIS at \*18-19 (rejecting argument that branch was distinct U.S. entity on grounds “[t]he Zurich court’s decision, based upon New York State Tax Law, does not bear on this Court’s assertion of jurisdiction over an alien insurer that operates a United States branch in accordance with New York law”).

<sup>14</sup> See *Respondent’s Brief*, at 14.

<sup>15</sup> See *Respondent’s Brief*, at 15.

<sup>16</sup> Yearout v. Yearout, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985) (emphasis added).

case (and thereby avoid the case law that rejects its arguments under CR 60(b)(1) through (10)), this Court should examine Tokio's arguments in light of the applicable subparts of CR 60(b). If such a subpart applies and Tokio cannot prove that the trial court was entitled to vacate the Association's judgment under that subpart, then according to Yearout, CR 60(b)(11) is irrelevant.<sup>17</sup>

### **1. Moving to Amend Was Not Inequitable**

Tokio argues that the Association acted inequitably in moving to amend "without providing notice" because the amendments changed "the name of the Defendant" and "the policy numbers."<sup>18</sup> This argument is both legally and factually flawed.

First, although the Association did move to add one word to the lawsuit's caption, that change was immaterial. Tokio simply changed its name.<sup>19</sup> Thus, when the Association originally sued "Tokio Marine and Fire Insurance Company Ltd.," it *in effect* sued "Tokio Marine & Nichido

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<sup>17</sup> Neither the relevant facts nor the terms of the Tokio reinsurance agreement are in dispute, so whether the standard of review is *de novo* or abuse of discretion is really irrelevant. The second trial judge had no "tenable grounds" under CR 60(b) to vacate the Association's judgment, so that decision was reversible error under either standard. See Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (trial court abuses its discretion when it bases its decision on "untenable grounds" or "untenable reasons," which occurs when a court "relies on unsupported facts" or "applies the wrong legal standard").

<sup>18</sup> *Respondent's Brief*, at 16 (emphasis added).

<sup>19</sup> See CP 853 (referring to "Articles of Incorporation of TOKIO MARINE & NICHIDO FIRE INSURANCE CO., LTD. (formerly known as The Tokio Marine and Fire insurance Company, Ltd.)" (emphasis added).

Fire Insurance Company, Ltd.”<sup>20</sup> The defendant never changed; the amendment simply updated the pleadings to reflect the non-substantive change in Tokio’s name.

Moreover, Professional Marine,<sup>21</sup> and Entranco<sup>22</sup> demonstrate that the Association could have obtained an effective judgment against Tokio without amending anything.<sup>23</sup> If the change was unnecessary in the first place, then how could making it have been “inequitable”? Tokio does not even address this point in its opposition brief, thus conceding it.<sup>24</sup>

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<sup>20</sup> See, e.g., Labonite v. Cannery Workers’ & Farm Laborers’ Union, 197 Wash. 543, 548-49, 86 P.2d 189 (1938) (acknowledging “speciousness” of argument that name change corporation’s status); 18 CORPUS JURIS SECUNDUM § 140, at 439 (2007) (“[A] change of corporate name does not make a new corporation, but only gives the corporation a new name. . . .”); Alley v. Miramon, 614 F.2d 1372, 1384 (5<sup>th</sup> Cir. 1980) (“The change of a corporation’s name is not a change of the identity of a corporation and has no effect on the corporation’s property, rights, or liabilities.”).

<sup>21</sup> Professional Marine Co. v. Certain Underwriters at Lloyd’s, 118 Wn. App. 694, 77 P.3d 658 (2003).

<sup>22</sup> Entranco Engineers v. Envirodyne, Inc., 34 Wn. App. 503, 662 P.2d 73 (1983).

<sup>23</sup> Entranco, 34 Wn. App. at 505-06 (holding judgment against incorrectly named judgment debtor “is as conclusive against such a party as it would be if the party were described by its correct name”); Professional Marine, 118 Wn. App. at 705 (trial court properly denied motion to vacate judgment against misnamed insurer because policy identified “policy number, type of policy, policy dates, and the insured”); see also United States v. A. H. Fischer Lumber Co., 162 F.2d 872, 874-75 (4<sup>th</sup> Cir. 1947) (“Without amendment the process in both cases adequately named the defendant and was sufficient to bring it into court.”).

<sup>24</sup> See, e.g., State v. Ward, 125 Wn. App. 138, 143-44, 104 P.3d 61 (2005) (“The State does not respond and thus, concedes this point.”). Tokio does attempt to rebut the argument that it failed to submit the requisite “clear and convincing” evidence of a connection between the amendment and Tokio’s failure to appear, claiming Peoples State Bank v. Hickey, 55 Wn. App. 367, 777 P.2d 1056 (1989), was a fraud case, and Tokio does not allege fraud. See *Respondent’s Brief*, at 16. But this is false. Peoples State Bank held that an alleged misstatement in a complaint is not a reason to vacate a judgment *under CR 60(b)(4)* (which also encompasses “misconduct of an adverse party,” not just “fraud”) unless the judgment debtor can first prove by clear

Tokio's argument also contradicts the Civil Rules. CR 55(a) plainly states that a defendant in default is not entitled to notice of a motion for a default judgment,<sup>25</sup> and CR 5(a) says a defaulting defendant is not entitled to notice of further proceedings unless a pleading seeks to add "new or additional claims."<sup>26</sup> Tokio does not allege in its opposition that the Association moved to add "new or additional claims" (or even address CR 55 and 5).

Finally, the Association did not in fact "change[] . . . the policy numbers of the policies under which coverage was alleged."<sup>27</sup> The Association corrected one digit in one of two policy numbers.<sup>28</sup> The other policy number remained unchanged, and was alone a basis for the Association's judgment (the limits of the second policy were \$10 million,<sup>29</sup> and Tokio has never argued that the policy did not afford coverage for the Association's loss).

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and convincing evidence that the misstatement led the debtor not to respond. Tokio cannot evade that holding by claiming that CR 60(b)(11) is applicable instead. *See Yearout*, 41 Wn. App. at 902.

<sup>25</sup> CR 55(a)(3) ("Any party who has not appeared before the motion for default and supporting affidavit are filed is not entitled to a notice of the motion, except as provided in rule 55(f)(2)(A).").

<sup>26</sup> CR 5(a) ("No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in rule 4.").

<sup>27</sup> *Respondent's Brief*, at 16.

<sup>28</sup> *See* CP 363.

<sup>29</sup> *See* CP 194.

## 2. Frow Is Irrelevant

Citing a one-page federal case from 1872, Frow v. De La Vega,<sup>30</sup> Tokio next contends that the trial court should not have entered a default judgment against Tokio because the Association sued other defendants in the same lawsuit.<sup>31</sup> That argument fails for at least four reasons.

First, Tokio failed to make its Frow argument below, so this Court should not consider it.<sup>32</sup> And while Tokio claims the pleadings establish “grounds supporting application of the [Frow] doctrine,”<sup>33</sup> the court in Schwindt v. Commonwealth Ins. Co.<sup>34</sup> has already rejected that claim.<sup>35</sup> The *argument* must be in the pleadings below.

Second, no Washington case has ever applied Frow or its *reasoning*. Conversely, our Supreme Court has affirmed at least one case in which a trial court entered a default judgment against one of multiple

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<sup>30</sup> Frow v. De La Vega, 82 U.S. 552, 21 L. Ed. 60 (1872).

<sup>31</sup> *See Respondent's Brief*, at 16-19.

<sup>32</sup> *See, e.g., Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483 (1992) (“An appellate court will generally not consider arguments raised for the first time on appeal, and we decline to do so here.”).

<sup>33</sup> *Respondent's Brief*, at 19 n.8 (emphasis added).

<sup>34</sup> Schwindt v. Commonwealth Ins. Co., 140 Wn.2d 348, 997 P.2d 353 (2000).

<sup>35</sup> Schwindt, 140 Wn.2d at 361 (acknowledging “a reviewing court may sustain a trial court’s summary judgment ruling on any grounds established by the pleadings and supported by the record,” but refusing to consider petitioner’s argument because it “did not *argue* this position in its pleadings”).

defendants.<sup>36</sup> Put simply, Frow is not the law in Washington, and the trial court could not have vacated the Association's judgment based upon Frow even if Tokio had timely argued the issue.

Third, Frow applies only when the plaintiff alleges that multiple defendants are *jointly* liable.<sup>37</sup> Conversely, where the plaintiff is not alleging joint liability – or claims the defendants are *severally* liable – the reasoning of Frow does not apply:

[T]o apply Frow to a claim of joint and *several liability* is to apply that venerable case to a context for which it was never intended, and ignores the several or independent aspects of the claim set forth in this complaint.<sup>38</sup>

Even the treatise that Tokio relies upon acknowledges this:

[W]hen one party defaults while the action is still pending as to the others and the liability is several, relief may be available against each defendant ***and a judgment may be entered against the defaulting party***. The liability of one

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<sup>36</sup> See Kittilson v. Ford, 93 Wn.2d 223, 225, 608 P.2d 264 (1980) (“Although a default judgment was entered for plaintiff against defendant Ford, the court granted the motion of defendant Kirkingburg for summary judgment on all three causes of action.”).

<sup>37</sup> See, e.g., Frow, 82 U.S. at 554 (“[T]here might be one decree of the court sustaining the charge of *joint fraud* committed by the defendants; and another decree disaffirming the said charge, and declaring it to be entirely unfounded, and dismissing the complainant’s bill.”) (emphasis added); Nichiro Gyogyo Kaisha, Ltd. v. Norman, 606 P.2d 401, 404 (Alaska 1980) (applying Frow where complaint “alleged *joint liability*” of two defendants, and citing rule applicable where “alleged liability is *joint*”) (emphasis added).

<sup>38</sup> In re Uranium Antitrust Litigation, 617 F.2d 1248, 1257-58 (7<sup>th</sup> Cir. 1980). (emphasis added); see also McMillian/McMillian, Inc. v. Monticello Ins. Co., 116 F.3d 319, 321 (8<sup>th</sup> Cir. 1997) (“Frow has no bearing on this case, however. Although McMillian and M/M share closely related interests, ***they were not codefendants facing lawsuit on a theory of joint liability***, where ‘no one defendant may be liable unless all defendants are liable.’”) (emphasis added).

defendant can be adjudicated without affecting the rights of others and a final and appealable decree may be entered against the one found to be liable.<sup>39</sup>

It follows that Frow does not apply where, like here, a plaintiff is suing multiple defendants based on distinct contracts.<sup>40</sup>

Fourth, several courts have held that Frow is not even good law.<sup>41</sup> In Fred Chenoweth Equipment Co. v. Oculus Corp.,<sup>42</sup> for example, the court explained that “[t]he continuing force of Frow under the Federal Rules of Civil Procedure has been questioned.”<sup>43</sup> The court then explained that it would not have applied Frow anyway because a default

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<sup>39</sup> 10A WRIGHT, MILLER & KANE, FEDERAL PRAC. & PROCEDURE: CIVIL 3D § 2690, at 27193 (2008).

<sup>40</sup> See, e.g., Shanghai Automation, 194 F. Supp. 2d at 999, 1009-10 (refusing to apply Frow on grounds that claim for “breach of contract can stand against the other defendants without necessarily finding [the non-defaulting] defendant individually liable as well”); Hewlett-Packard Co. v. Capital City Micro, Inc., Civ. No. 3-04-0779, 2006 U.S. Dist. LEXIS 61254 \*5 (M.D. Tenn. Aug. 28, 2006) (Frow not applicable because claim against defaulting defendant involved “contracts to which none of the other defendants are parties”). Gulf Coast Fans, Inc. v. Midwest Electronics Importers, Inc., 740 F.2d 1499, 1512 (11<sup>th</sup> Cir. 1984), is distinguishable in that a jury in a related case *had already determined* as of the date the plaintiff moved for a default judgment that the plaintiff could not recover *on the very same contract* at issue in the default judgment case. In re First T.D. & Investment, Inc., 253 F.3d 520 (9<sup>th</sup> Cir. 2001), is likewise distinguishable because the court *had already* rendered a logically inconsistent ruling at the time it entered a default judgment against some of the defendants.

<sup>41</sup> See, e.g., Int’l Controls Corp. v. Vesco, 535 F.2d 742, 746 n.4 (2<sup>nd</sup> Cir. 1976) (“We think it is most unlikely that Frow retains any force subsequent to the adoption of Rule 54(b).”); In re Uranium Antitrust Litigation, 617 F.2d 1248, 1258 (7<sup>th</sup> Cir. 1980) (“Once Frow is placed in proper perspective, the entry of default judgment can be viewed as a simple exercise in the procedures set out in Rules 54 and 55 of the Federal Rules of Civil Procedure.”).

<sup>42</sup> Fred Chenoweth Equipment Co. v. Oculus Corp., 328 S.E.2d 539 (Ga. 1985).

<sup>43</sup> Fred Chenoweth, 328 S.E.2d at 541 n.1 (citing Vesco, 535 F.2d at 746 n.4).

judgment does not reach the merits of the various defendants' cases, and therefore could not render the verdicts against the non-defaulting defendants illogical:

We view the matter differently and decline to follow [Frow]. Considering the case before us, the default judgment against Oculus did not reach the merits of the claim on the contract. The default judgment merely determined that Oculus failed to follow the procedural requirement that a timely answer be filed. The consequence of this failure was that judgment was entered against Oculus. . . . Oculus suffered judgment because of its failure to answer the complaint and was therefore denied an opportunity to litigate the merits. This is no less than and no greater than the harshness existing in a default judgment against a single defendant. *The merits are not reached because of the default. It may be the other defendants will go on to prevail on the merits but we do not think this should relieve Oculus of its default.*<sup>44</sup>

Here, the Association sued several property insurers for independently breaching what are distinct contracts with different terms. Each policy is a separate contract with no connection to any other,<sup>45</sup> and

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<sup>44</sup> Fred Chenoweth, 328 S.E.2d at 541 (emphasis added). This Georgia case discloses yet another misstatement in Tokio's opposition brief – the Frow rule has not in fact “been accepted by state courts to consider the issue,” *Respondent's Brief*, at 17. Courts have similarly rejected Tokio's “closely related defenses” argument (for which Tokio cites only a treatise). See Shanghai Automation, 194 F. Supp. 2d at 1009 (“To hold that the mere possibility of inconsistent judgment divests the Court of its discretion under Rule 54(b) would imply that whenever there are multiple defendants *who raise similar defenses*, the court could never enter a default judgment until conclusion of the entire case regardless of the substantial prejudice likely to be suffered by the plaintiff as a result of the delay. *Such a rule would contravene the purpose of the 1961 amendment to Rule 54(b).*”) (emphasis added).

<sup>45</sup> See, e.g., Scottish Union & Nat'l Ins. Co. v. Warren-Gee Lumber Co., 103 Miss. 816, 60 So. 1010, 1011 (1913) (“[E]ach of these policies . . . are independent contracts, the liability of one company not being affected by that of any other

the Association did not in fact “file[] identical claims against multiple defendants.”<sup>46</sup> Accordingly, the Association has never alleged that the defendants are *jointly* liable, and Frow would be inapplicable even if that were the law in Washington.

**3. Waiting a Year to Execute Was Not Inequitable, and Tokio Had No Viable CR 60(b)(1) Argument Anyway**

Tokio next argues that the Association acted inequitably under CR 60(b)(11) by waiting for a year before seeking to execute on its judgment.<sup>47</sup> This argument is based solely on Tokio’s inability to move to vacate under CR 60(b)(1). Tokio does not claim, for example, that it would suffer some financial harm from having to pay the Association’s judgment now, as opposed to a year ago; the only alleged “inequity” is that Tokio cannot make arguments in this appeal that it would have otherwise been entitled to. It follows that if Tokio had no viable CR 60(b)(1) argument anyway, then the playing field is unchanged, and Tokio’s “lying in the weeds” argument is groundless.

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company . . . . What one company may be compelled to pay under its contract is of no concern to any of the other companies; . . . .”).

<sup>46</sup> *Respondent’s Brief*, at 18.

<sup>47</sup> *Respondent’s Brief*, at 19.

Tokio should lose on both counts. As Allison v. Boondock's<sup>48</sup> plainly states, a judgment creditor does *not* act unfairly or deceptively by waiting a year to execute on its judgment.<sup>49</sup> The debtor in Allison made the identical argument Tokio makes here – also citing CR 60(b)(11) – and this court already rejected it.

Moreover, CR 60(b) plainly states that a court cannot consider a “mistake” argument after a year, and “CR 6 specifically excludes CR 60(b)’s time provisions from enlargement by the court.”<sup>50</sup> “No enlargement” means “no enlargement.” Tokio’s attempt to circumvent that rule by citing CR 60(b)(11) violates both the plain language of that rule and Yearout.<sup>51</sup>

Moreover, because Tokio’s time-bar argument is substantively baseless, the year delay is by definition irrelevant. The case Tokio relies upon, Showalter v. Wild Oats,<sup>52</sup> is not on point. Among other things, Tokio failed to carry *its* burden of producing *evidence* about the type of

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<sup>48</sup> Allison v. Boondock's, Sundecker's & Greenthumb's Inc., 36 Wn. App. 280, 673 P.2d 634 (1983).

<sup>49</sup> See Allison, 36 Wn. App. at 285-86 (“Although Allison’s counsel used the civil rules to her advantage, e.g., in waiting more than a year to execute the judgment, we decline to characterize such an action as unfair or deceptive.”).

<sup>50</sup> Suburban Janitorial Servs. v. Clarke Am., 72 Wn. App. 302, 307, 863 P.2d 1377 (1993).

<sup>51</sup> See Yearout, 41 Wn. App. at 902 (“The use of CR 60(b)(11) ‘should be confined to situations involving extraordinary circumstances not covered by any other section of the rule.’”) (emphasis added).

<sup>52</sup> Showalter v. Wild Oats, 124 Wn. App. 506, 101 P.3d 867 (2004).

“miscommunication” at issue in Showalter. Tokio has simply said Mr. Goldstein did not get the lawsuit, not that this occurred because of a “miscommunication” (as opposed to simply neglect).

Boss Logger, Inc., v. Aetna Cas. and Sur. Co.,<sup>53</sup> is similarly distinguishable. The court in that case held that because the defendant *proved* it had a procedure in place for responding to lawsuits, the trial court did not abuse its discretion in finding a “mistake,” as opposed to “inexcusable neglect.” The court in Boss Logger considered a “litigation manual” and other *evidence* of the defendant’s system for handling lawsuits, and concluded that the “system itself was not flawed.”<sup>54</sup>

Here, by contrast, Tokio has offered no evidence of *any* system. With no evidence a system even exists, no one could say Tokio’s error was not *systemic*. Moreover, to the extent that Tokio has a system, that system allowed a person to accept the Association’s lawsuit who was not able to respond to it. This is exactly what the court in Johnson v. Cash Store<sup>55</sup> said was *inexcusable* neglect: “If a company fails to respond to a complaint because someone other than general counsel accepted service of

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<sup>53</sup> Boss Logger, Inc., v. Aetna Cas. and Sur. Co., 93 Wn. App. 682, 970 P.2d 755 (1998),

<sup>54</sup> Boss Logger, 93 Wn. App. at 689.

<sup>55</sup> Johnson v. Cash Store, 116 Wn. App. 833, 68 P.3d 1099 (2003).

process and then neglected to forward the complaint, the company's failure to respond is deemed due to inexcusable neglect."<sup>56</sup>

#### 4. Tokio's Status as a Reinsurer Does not Create a Prima Facie Defense

Tokio next argues that it has a "prima facie" defense<sup>57</sup> to liability because it was "merely a reinsurer."<sup>58</sup> Although Tokio acknowledges the rule set forth in Estate of Osborn<sup>59</sup> (and the numerous other authorities cited in the Association's opening brief), Tokio claims the rule is inapplicable here because it did not assume the "liability" of the ceding insurers. Oddly, Tokio then tries to support that argument by quoting a provision from its reinsurance agreement that says exactly the opposite: "By this Agreement . . . the Reinsurer . . . obligates itself to accept 100% quota share reinsurance of the Reinsured's net *liability*."<sup>60</sup> Thus, Tokio's

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<sup>56</sup> Johnson, 116 Wn. App. at 848.

<sup>57</sup> Note that this "prima facie" argument derives from the four "factors" set forth in White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581 (1968), a pre-CR 60(b) case. This Court should therefore consider the allegation of a "prima facie" defense only in evaluating whether a basis exists *under CR 60(b)* to vacate the Association's judgment; the allegations of a prima facie defense is alone not a basis to vacate a judgment. See Griggs v. Averbeck Realty, 92 Wn.2d 576, 581-82, 599 P.2d 1289 (1979) ("Relief from a judgment is governed by the above stated [equitable] principles, *but the grounds and procedures are set forth in CR 60.*") (emphasis added).

<sup>58</sup> *Respondent's Brief*, at 25.

<sup>59</sup> Estate of Osborn v. Gerling Global Life Ins. Co., 529 So.2d 169 (1988).

<sup>60</sup> *Respondent's Brief*, at 25-26.

reinsurance agreement is entirely consistent with the Association's Osborn argument.

Tokio also attempts to distinguish the rule in Osborn by misquoting Venetsanos v. Zucker,<sup>61</sup> jumbling quotations to make it sound like the case says a reinsurer is liable *only* if it "takes charge of" suits against the ceding insurer.<sup>62</sup> In fact, the Venetsanos court drew the same distinction as the court in Osborn: "It is settled that an ordinary treaty of reinsurance merely indemnifies the primary insurer against loss *rather than against liability*."<sup>63</sup> But the reinsurance agreement in Venetsanos was not part of the record,<sup>64</sup> so the Venetsanos court had to focus on the reinsurer's conduct instead of this loss/liability distinction.<sup>65</sup> The Venetsanos court ultimately concluded that the reinsurer there was subject to a direct action because it did control the claims against the ceding

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<sup>61</sup> Venetsanos v. Zucker, Facher & Zucher, 271 N.J. Super. 459, 638 A.2d 1333 (1994).

<sup>62</sup> *See Respondent's Brief*, at 26.

<sup>63</sup> Venetsanos, 638 A.2d at 1339. The court also confirmed that a "bulk reinsurer" like Tokio is directly liable to the policyholder: "When a company reinsures all the risks and agrees that all losses ensuing under the policies shall be borne, paid and satisfied by the reinsuring company . . . a policyholder in the first company might maintain an action against the reinsuring company to recover a loss on property covered by a policy of the first company." Venetsanos, 638 A.2d at 1339.

<sup>64</sup> Venetsanos, 638 A.2d at 1339 ("Here, the inexplicable absence of the actual reinsurance agreement from the files of both Mutual and Homestead precludes our examination of the terms of that agreement.").

<sup>65</sup> Venetsanos, 638 A.2d at 1339 ("[W]e must consider the role of Homestead, its officers and affiliates, in the entire insuring process ranging from initial acceptance of this risk and its nominal allocation to Mutual, to its assumption of insuring responsibility for 100 percent of the risk and absolute control of the final claim adjustment.").

insurer. But nothing in Venetsanos says that a reinsurer is liable directly to the policyholder *only* if it controls the ceding insurer's cases (and the *accurate* quotation above expressly states otherwise).

Here, the Tokio reinsurance agreement *is* part of the record, and the Association has shown that it is not "an ordinary treaty of reinsurance" in that it *does* provide for indemnity against "liability" (as opposed to "loss").<sup>66</sup> Thus, Tokio has presented neither evidence nor authority to rebut the Association's argument that because Tokio was a "bulk reinsurer" that accepted 100% of the "liability" under the Traders & Pacific policies, the Association was entitled to sue Tokio directly.

**C. THERE IS NO EVIDENCE THAT THE AMOUNT OF THE JUDGMENT IS INEQUITABLE**

Tokio last claims that vacating the Association's judgment was appropriate because Judge McCarthy's damage award was "unreasonable" and the attorney's fees are "outrageous." Again misquoting from a case, Tokio also claims that under Smith v. Behr,<sup>67</sup> a default *judgment* does not resolve the amount of damages to which the plaintiff is entitled, and this Court should therefore remand for a hearing on that issue.

But Behr was a case in which the defendant *did* appear, and the case simply says that upon entry of an *order* of default, the court must take

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<sup>66</sup> CP 806-07.

<sup>67</sup> Smith v. Behr Process Corp., 113 Wn. App. 306, 54 P.3d 665 (2002).

evidence on damages before entering a *judgment* based on that default.<sup>68</sup> Once the court conducts that hearing and enters judgment, however, that judgment is no different than any other – both the defendant’s liability and the plaintiff’s damages are fixed.

Consistent with Behr, Judge McCarthy did take evidence and conduct a hearing regarding the Association’s damages before entering judgment.<sup>69</sup> Moreover, Rule 55 is clear – because Tokio was in default, it was not entitled to notice of that hearing. Nothing authorizes a further reconsideration of the Association’s damages.

Nor would there be any basis for that. The policies at issue here have multi-million dollar limits, and *independently* cover the damage to the Association’s buildings – without regard to what other carriers may have separately promised. Tokio has never challenged the scope of this coverage. And because Tokio assumed the “liability” for policies that insure the Association’s damages without regard to what other insurance

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<sup>68</sup> See Behr, 113 Wn. App. at 333 (“The *default* does not, however, admit any conclusions of law contained within the complaint or the amount of damages.”) (emphasis added); see also Conner v. Universal Utils., 105 Wn.2d 168, 172, 712 P.2d 849 (1986) (“When the amount of a claim is uncertain, the court may conduct hearings to determine the amount of damages *before* entering a default *judgment*.”) (emphasis added). Tokio misquotes Behr, trying to imply that the sentence fragment Tokio uses modifies the phrase “default *judgment*.” See *Respondent’s Brief*, at 27 (“A default judgment ‘does not, however, admit any conclusions . . .’”).

<sup>69</sup> See CP 78-86 and CP 87-127 (expert declarations); CP 325-326 (acknowledging hearing). The court need only take *evidence* of the damages; whether to also conduct a “hearing” is discretionary. See CR 55(b)(2) (“[T]he court *may* conduct such hearings . . . .”); Behr, 113 Wn. App. at 333 (trial court must conduct a “reasonable inquiry” to determine the amount of damages).

the Association may have, there is nothing inequitable about Tokio having to pay the Association's entire loss. The policies say "Pay X" – not "Pay X, unless another insurance company *might* also have agreed to pay."

Also significant is Tokio's lack of *evidence* about the Association's damages. This case is about a severely damaged 45-unit condominium. An engineer and a contractor signed sworn declarations about the nature of the damage and the fact that it would cost over \$4.8 million to repair the Association's buildings.<sup>70</sup> Judge McCarthy considered that evidence before issuing his judgment. Simply labeling the Association's damages "outrageous" does not make it so.

Moreover, the fact that the Association's judgment is substantial should not alone affect the validity of the judgment. The corollary would be that the more significant a claim, the more an insurance company is allowed to ignore it.

Tokio's attorney's fee argument is similarly distorted. The Association has a contractual obligation to pay its attorneys a percentage of the Association's total recovery. That agreement reflects in part the risk that the Association's counsel assumed *when they originally took the case*, not knowing how it would evolve. But under Tokio's logic, the

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<sup>70</sup> This is a multi-story, three-building complex on the shore of Lake Union. CP 93. To say the loss at issue here is significant is an understatement.

Association should recover less – and thus not be made whole after paying its legal fees – simply because Tokio ended up ignoring the Association’s lawsuit, as opposed to defending against it.

Tokio also misconstrues Allard,<sup>71</sup> quoting from another case (without notation)<sup>72</sup> that Allard in turn quotes. Allard makes clear that the only question is whether the trial court’s fee award is “reasonable,” and that a trial court has broad discretion in making that determination.<sup>73</sup> An award is *unreasonable* only if “no reasonable person” would issue it.<sup>74</sup> Moreover, a trial court is not *required* to consider the factors in RPC 1.5(a) (much less any particular factor).<sup>75</sup> Thus, notwithstanding the language Tokio quotes, the Allard court ultimately concluded that the trial court in that case did not err when it *considered* (a) the plaintiff’s contingent fee agreement, and (b) the goal of making the plaintiff whole –

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<sup>71</sup> Allard v. First Interstate Bank, 112 Wn.2d 145, 768 P.2d 998 (1989).

<sup>72</sup> *See Respondent’s Brief*, at 29 (quoting without notation language from Key v. Cascade Packing, Inc., 19 Wn. App. 579, 586, 576 P.2d 929 (1978), which is in turn quoted in Allard, 112 Wn.2d at 151).

<sup>73</sup> *See Allard*, 112 Wn.2d at 148 (“However, the issue should be framed as to whether the trial court’s award of attorneys’ fees, as a whole, was reasonable.”).

<sup>74</sup> *See Allard*, 112 Wn.2d at 148-49 (noting “trial court’s determination of what constitutes a reasonable award will not be reversed absent an abuse of discretion,” which exists “exists only where no reasonable person would take the position adopted by the trial court”) (quoting Singleton v. Frost, 108 Wn.2d 723, 727, 742 P.2d 1224 (1987)).

<sup>75</sup> *See Allard*, 112 Wn.2d at 150 (“We have recognized that the factors set forth in CPR DR 2-106(B), the predecessor to RPC 1.5(a), *may* be used as a guideline for determining reasonable attorneys’ fees.”) (emphasis added).

two of the same factors that Judge McCarthy considered here.<sup>76</sup> The fee award, and the rest of the judgment, was proper.<sup>77</sup>

### III. CONCLUSION

“There must be some potential cost to encourage parties to acknowledge the court’s jurisdiction.”<sup>78</sup> The Association served its lawsuit on Tokio, and Tokio failed to appear. CR 60(b) precludes Tokio from now arguing that its failure was excusable, and Tokio has presented no evidence to that effect anyway. Moreover, nothing is inequitable about requiring Tokio to pay the Association’s judgment, which represents a liability that Tokio agreed to assume, based on policies that afford coverage independent of what other insurers may or may not have promised. The judgment amount is reasonable based on the size of the Association’s loss, and Tokio has presented no evidence to the contrary.

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<sup>76</sup> See Allard, 112 Wn.2d at 152 (“The trial court did not abuse its discretion by considering . . . the contingent fee agreement, and making plaintiffs whole in making its award of attorneys’ fees.”); CP 322 (noting fee award is intended to “leave the Association fully compensated” after deducting fee owed to counsel).

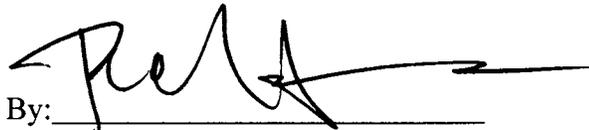
<sup>77</sup> Regardless, this case is about the harm that the Association has suffered, not its lawyers. If this Court wishes to alter the fee award, it should remand to the trial court to recalculate only that portion of the judgment, leaving unchanged the portion of the judgment that reflects the Association’s damages.

<sup>78</sup> Morin v. Burris, 160 Wn.2d 745, 759, 161 P.3d 956 (2007).

For these reasons, the Association respectfully requests that this Court reverse the trial court and reinstate the Association's judgment.

Respectfully submitted this 3<sup>rd</sup> day of September, 2009.

HARPER | HAYES PLLC

By: 

Todd C. Hayes, WSBA No. 26361  
Charles K. Davis, WSBA No. 38231  
Attorneys for Appellant

**CERTIFICATE OF SERVICE**

The undersigned certifies that on *Thursday, September 03, 2009*, I caused and true and correct copy of this document to be delivered in the manner indicated to the following parties:

**BY MESSENGER**  
James T. Derrig  
Eklund Rockey Stratton  
521 Second Avenue West  
Seattle, WA 98119-3927  
Attorneys for Defendant  
Farmington Casualty Company  
and St. Paul Fire & Marine  
Insurance Company

**BY MESSENGER**  
Thomas Lether  
Cole Lether Wathen & Leid PC  
1000 Second Avenue, Suite 1300  
Seattle, WA 98104-1082  
Attorneys for Defendant Truck  
Insurance Exchange

**BY MESSENGER**  
Dennis Smith  
Robert F. Riede  
Wilson Smith Cochran &  
Dickerson  
1215 Fourth Avenue, Suite 1700  
Seattle, WA 98161-1010  
Attorneys for Defendant Safeco  
Insurance Co. of America

**BY MESSENGER**  
Steven W. Fogg  
Seann P. Colgan  
Corr Cronin Michelson  
Baumgardner & Preece, LLP  
1001 Fourth Avenue, Suite 3900  
Seattle, WA 98154-1051  
Attorneys for Defendant Tokio  
Marine & Nichido Fire Insurance  
Company, Ltd.

DATED this 3<sup>rd</sup> day of September, 2009.

  
\_\_\_\_\_  
Jessica A. Gardner, Paralegal

# APPENDIX A

153-7919-2

RCM/djk

#01952234

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

LIBERTY MUTUAL INSURANCE COMPANY, )

Plaintiff, )

v. )

TOKIO MARINE AND FIRE INSURANCE )  
COMPANY, LIMITED, )

Defendant. )

No. 03 CC 4765

Judge Ronald Guzman

Magistrate Judge Mason

**DOCKETED**

OCT 27 2003

FILED  
OCT 24 2003

**NOTICE OF FILING**

TO: Michael J. Duffy, Tressler, Soderstrom, Maloney & Preiss  
233 S. Wacker Drive, Suite 2200, Chicago, IL 60606

PLEASE TAKE NOTICE that on the 15th day of September, 2003, we filed with the Clerk of the United States District Court, Northern District of Illinois, 219 South Dearborn Street, Chicago, Illinois, the attached Defendant Tokio Marine and Fire Insurance Company, Limited's Amended Answer to Plaintiff's Complaint for Declaratory Judgment.

STONE & MOORE, CHARTERED  
30 North LaSalle Street, Suite 4300  
Chicago, IL 60602  
Telephone: (312) 332-5656

STONE & MOORE, CHARTERED

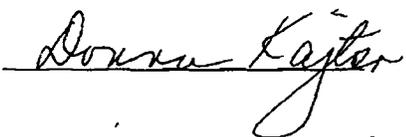
By:   
Robert C. Moore

**CERTIFICATE OF SERVICE**

I, Maureen Feeney Schleyer, an non-attorney, certify that I served a copy of the foregoing Notice and attached documents by mailing copies to the above listed attorney at the address indicated and by depositing same in the U.S. Mail located at 30 North LaSalle Street, Chicago, Illinois 60602, at approximately 5:00 p.m. on October 24, 2003, with proper postage prepaid.

Under penalties as provided by law pursuant to Ill. Rev. Stat., Ch. 110, Sec. 1-109, I certify that the statements set forth herein are true and correct.

Dated: October 24, 2003



14/

153-7919-2

RCM/djk

#01952234

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

Liberty Mutual Insurance Company, )

Plaintiff, )

v. )

Tokio Marine and Fire Insurance  
Company, Limited, )

Defendant. )

No. 03 C 4765

Judge Ronald Guzman

Magistrate Judge Mason

**DOCKETED**

OCT 27 2003

FILED  
OCT 24 2003  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

**AMENDED ANSWER**

NOW COMES the defendant, TOKIO MARINE AND FIRE INSURANCE COMPANY, LIMITED (TOKIO), by and through its attorneys, STONE & MOORE, CHARTERED, and for its answer to plaintiff's Complaint for Declaratory Judgment, states as follows:

1. The defendant admits the allegations of paragraph 1.
2. The defendant admits the allegations of paragraph 2.
3. This defendant admits that TOKIO is an alien corporation with its domestic office at 230 Park Avenue, New York, New York; that it is licensed to transact business in the State of Illinois, and furthermore that it is organized under the laws of Japan.
4. The defendant does not have sufficient information and belief as to the truth or falsity of these allegations.
5. The defendant admits the allegations of paragraph 5.
6. The defendant admits the allegations of paragraph 6.
7. The defendant denies the allegations of paragraph 7.

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8. The defendant admits that Mr. Adamczewski's accident and his lawsuit, which has been dismissed, is geographically within the Northern District of Illinois. The remaining allegations of paragraph 8 are denied.

9. The defendant admits the allegations of paragraph 9.

10. The defendant does not have sufficient information and belief as to the truth or falsity of these allegations.

11. The defendant does not have sufficient information and belief as to the truth or falsity of these allegations.

12. The defendant admits that it issued a Commercial General Liability policy of insurance to Howell, but denies that it is a primary policy for the purposes of this litigation since it was neither valid nor collectible insurance.

13. The defendant admits the allegations of paragraph 13.

14. The defendant admits the allegations of paragraph 14.

15. The defendant admits the allegations of paragraph 15.

16. The defendant admits the allegations of paragraph 16.

17. The defendant admits the allegations of paragraph 17.

18. The defendant admits the allegations of paragraph 18.

19. The defendant admits the allegations of paragraph 19.

20. The defendant admits the allegations of paragraph 20.

21. The defendant admits the allegations of paragraph 21.

22. The defendant admits the allegations of paragraph 22.

23. The defendant admits the allegations of paragraph 23.

24. The defendant does not have sufficient information and belief as to the truth or falsity of the date that E. W. Howell was served in the Adamczewski lawsuit. However, the defendant admits that its defense was tendered to Liberty Mutual Insurance Company on both the primary and the excess policy.

25. The defendant admits that Liberty Mutual accepted Howell's tender of defense under the Liberty Mutual primary and excess policy of insurance, but does not have sufficient information or belief as to the truth or falsity of the remaining allegations of paragraph 25.

26. The defendant does not have sufficient information and belief as to the truth or falsity of the date that Sanyo was served in the Adamczewski lawsuit. However, the defendant admits that its defense was tendered to Liberty Mutual Insurance Company on both the primary and the excess policy.

27. The defendant admits that prior to July 16, 2001, Howell tendered its defense to Liberty Mutual in the Adamczewski lawsuit under the Liberty Mutual primary and excess policy, and demanded that Liberty Mutual indemnify Howell under both policies.

28. The defendant does not have sufficient information and belief as to the truth or falsity of these allegations.

29. The defendant admits the allegations of paragraph 29.

30. The defendant admits the allegations of paragraph 30.

31. The defendant does not have sufficient information and belief as to the truth or falsity of these allegations.

32. The defendant does not have sufficient information and belief as to the truth or falsity of these allegations.

33. The defendant denies the allegations contained in paragraph 33.

WHEREFORE, the defendant, TOKIO MARINE AND FIRE INSURANCE COMPANY, LIMITED, by its attorneys, denies that plaintiff is entitled to judgment against it, in any amount whatsoever, and this defendant asks that judgment be entered in favor of this defendant and against plaintiff, and that plaintiff shall take nothing by its action, with costs assessed against the plaintiff.

STONE & MOORE, CHARTERED

By:   
Robert C. Moore

STONE & MOORE, CHARTERED  
30 North LaSalle Street, Suite 4300  
Chicago, Illinois 60602  
Telephone: (312) 332-5656

# APPENDIX B

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
TOKIO MARINE AND NICHIDO FIRE  
INSURANCE CO., LTD., as Subrogee, and  
NILT, INC., as Subrogor

Plaintiffs,

-against-

DONALD H. MACREADY, JOANN  
DELUCIE, and DANIELLE MACREADY,

Defendants.  
-----X

**FILED**  
IN CLERK'S OFFICE  
U.S. DISTRICT COURT E.D.N.Y.

★ JUL 14 2008 ★

BROOKLYN OFFICE

COMPLAINT

Civil Case No.:

2793

B.H.  
SI

DEARIE, CH. J.

POHORELSKY, M.J.

Plaintiffs TOKIO MARINE AND NICHIDO FIRE INSURANCE CO., LTD.  
("TOKIO MARINE") and NILT, INC. ("NILT"), by their attorneys, LONDON FISCHER LLP,  
complaining of the Defendants, respectfully allege the following:

THE PARTIES

1. At all times relevant, TOKIO MARINE was, and still is, a foreign corporation authorized to conduct business in the State of New York, and maintains its principal place of business in Tokyo, Japan.

2. At all times relevant, NILT was, and still is, a foreign corporation authorized to conduct business under and by virtue of the laws of the State of New York, and maintains its principal place of business in Chicago, Illinois.

3. At all times relevant, NILT was, and still is, a subsidiary corporation of a U.S. Bank specially formed for Nissan that acts as trustee of Nissan-Infiniti, LT.

4. At all times relevant, Nissan-Infiniti is a Delaware statutory trust and NILT is a Delaware corporation.

5. At all times relevant, NILT has its principal place of business in Chicago, Illinois.

6. Upon information and belief, at all times relevant, DONALD H. MACREADY resided, and still resides, in Kings County, New York.

7. Upon information and belief, at all times relevant, JOANN DELUCIE resided, and still resides, in Kings County, New York.

8. Upon information and belief, at all times relevant, DANIELLE MACREADY resided, and still resides, in Kings County, New York.

#### JURISDICTION AND VENUE

9. This action is of a civil nature involving, exclusive of interest and costs, a sum in excess of \$75,000. Every issue of law and fact is wholly between TOKIO MARINE, a citizen of Japan, NILT, a citizen of the State of Delaware, and DONALD H. MACREADY, JOANN DELUCIE, and DANIELLE MACREADY, citizens of the State of New York. Accordingly, this Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332.

10. Venue in the Eastern District of New York is based on defendants' residence, pursuant to 28 U.S.C. § 1391.

11. Personal jurisdiction exists over DONALD H. MACREADY and JOANN DELUCIE because they are residents of the State of New York and because they entered into a contract with NILT within the State of New York. Furthermore, the acts giving rise to plaintiffs' right to common law indemnification were committed within the State of New York.

12. Personal jurisdiction exists over DANIELLE MACREADY because she is a resident of the State of New York. Furthermore, the acts giving rise to plaintiffs' right to common law indemnification were committed within the State of New York.

13. TOKIO MARINE and NILT bring this action on their own behalf and, as agent, on behalf of and for the interests of all parties who are, or may become interested in the suit, as their respective interests may ultimately appear, and plaintiffs are entitled to maintain this action.

THE FACTS

14. This is an action for indemnity at common law, to recover from DONALD H. MACREADY, JOANN DELUCIE, and DANIELLE MACREADY, payment of amounts made by TOKIO MARINE, as insurer for NILT, towards the settlement of a personal injury claim brought by Mikhail Kaplan ("Kaplan") against NILT.

15. On September 1, 2004, DONALD H. MACREADY and JOANN DELUCIE entered into a Lease Agreement with Bay Ridge Nissan Inc. for a 2004 model year Nissan Pathfinder, bearing Vehicle Identification Number JN8DR09Y64W915121 ("NILT Vehicle").

16. A copy of the Lease Agreement entered by DONALD H. MACREADY and JOANN DELUCIE is annexed hereto as Exhibit "A."

17. The Lease Agreement annexed hereto as Exhibit "A" contains the signatures of both DONALD H. MACREADY and JOANN DELUCIE.

18. Pursuant to the Lease Agreement, Bay Ridge Nissan Inc., as lessor, accepted the Lease and assigned Nissan Motor Acceptance Corporation all rights, title and interest in the Lease and in the leased vehicle and lessor's rights under the guarantee executed in connection with the Lease with full power to NILT to collect and discharge obligations related to the Lease.

19. On or about October 18, 2004, at approximately 4:35 p.m., DANIELLE MACREADY was operating the NILT Vehicle at the intersection of 73<sup>rd</sup> Street and Colonial Road in Brooklyn, New York.

20. At said date and time, DANIELLE MACREADY was operating the NILT vehicle with the express permission of DONALD H. MACREADY.

21. At said date and time, DANIELLE MACREADY was operating the NILT vehicle with the express permission of JOANN DELUCIE.

22. At said date and time, DANIELLE MACREADY was operating the NILT vehicle with an implied permission of DONALD H. MACREADY.

23. At said date and time, DANIELLE MACREADY was operating the NILT vehicle with an implied permission of DONALD H. MACREADY.

24. At said date and time, the NILT Vehicle, operated by DANIELLE MACREADY, came into contact with Kaplan, who was riding his bicycle.

25. The impact caused Kaplan to fall to the ground, causing him to sustain serious and permanent personal injuries.

26. On or about July 29, 2005, Kaplan commenced a personal injury action against NILT, Bay Ridge Nissan Inc., and DONALD H. MACREADY by filing a Summons and Verified Complaint in the Supreme Court of the State of New York, County of Kings, which was assigned Index No. 23360/05. Subsequently, Kaplan commenced a personal injury action against JOANN DELUCIE and DANIELLE MACREADY by filing a Summons and Verified Complaint in the Supreme Court of the State of New York, County of Kings, which was assigned Index No. 1331/05. Both Verified Complaints sounded in negligence, and sought money damages for personal injuries sustained by Kaplan in the aforesaid accident.

27. On or about August 10, 2006, the parties in the aforementioned personal injury actions commenced by Kaplan stipulated to consolidate the two cases under the caption, MIKHAIL KAPLAN, PLAINTIFF, v. JOANN DELUCIE, DANIELLE MACREADY, BAY RIDGE NISSAN, INC., NILT, INC., and DONALD H. MACREADY, DEFENDANTS, which was assigned the Index No. 1331/05.

28. The aforesaid personal injury action sought damages from NILT, as the owner/lessor of the NILT Vehicle, on a theory of vicarious liability for the negligent use and operation of the NILT Vehicle by DONALD H. MACREADY, JOANN DELUCIE, and DANIELLE MACREADY.

29. On or about May 8, 2008, the lawsuit commenced by Kaplan settled for the total sum of \$350,000, with \$100,000 paid by Nationwide Mutual Insurance Company, the primary insurer for DONALD H. MACREADY and JOANN DELUCIE, and \$250,000 paid by TOKIO MARINE, NILT's insurer.

30. As a result of the foregoing, plaintiffs have incurred a total loss in the amount of \$250,000 arising out of the negligent use and operation of the NILT vehicle during the lease period.

AS AND FOR A FIRST CAUSE OF ACTION

31. Plaintiffs repeat, reiterate and reallege each and every allegation contained in paragraphs 1 through 30 of the Complaint, inclusive with the same force and effect as though said paragraphs were fully set forth at length herein.

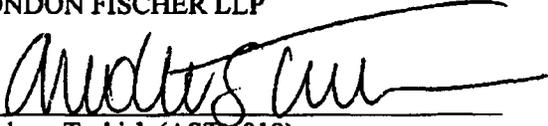
32. Plaintiff NILT, the passive tortfeasor in the Kaplan action, and plaintiff TOKIO MARINE, as subrogee, are entitled to recover \$250,000 from DONALD H.

MACREADY, JOANN DELUCIE, and DANIELLE MACREADY, the active tortfeasors and negligent parties in the Kaplan action, on a theory of common-law indemnification.

WHEREFORE, Plaintiffs TOKIO MARINE and NILT demand judgment against defendants DONALD H. MACREADY, JOANN DELUCIE, and DANIELLE MACREADY in the amount of \$250,000, together with the interest, costs and disbursements of this action.

Dated: New York, New York  
July 14, 2008

LONDON FISCHER LLP

By: 

Andrew Turkish (AST 6019)  
Attorneys for Plaintiffs TOKIO MARINE AND  
NICHIDO FIRE INSURANCE CO., LTD., and  
NILT, INC.  
59 Maiden Lane  
New York, New York 10038  
(212) 972-1000  
File No. 116.0567036

116036Complaint



Additional Terms and Conditions

Vehicle Return

At the expiration of the term of this lease, you will return the Vehicle to the lessor at the address set forth in Section 1.1. You must return the Vehicle in good condition, with all accessories and equipment as described in Section 1.1. You must also return the Vehicle with a full tank of fuel.

Scheduled Termination

The scheduled term of this lease is for a period of 36 months, commencing on the date of delivery of the Vehicle to you. You may terminate this lease at any time after the first 12 months of the term of this lease by paying the early termination fee set forth in Section 1.1. You must also return the Vehicle to the lessor at the address set forth in Section 1.1.

Early Termination

1.1. Questions for 2002 only: If you terminate this lease before the end of the term of this lease, you must pay the early termination fee set forth in Section 1.1. You must also return the Vehicle to the lessor at the address set forth in Section 1.1.

Insurance

You are responsible for obtaining and maintaining the minimum required liability insurance coverage for the Vehicle. You must also obtain and maintain collision and comprehensive coverage for the Vehicle. You must also obtain and maintain theft coverage for the Vehicle. You must also obtain and maintain fire coverage for the Vehicle.

Lease Charges, Renewal, Check Change, and Fees

1.2. You are responsible for paying the monthly lease payments for the Vehicle. You must also pay the late fee set forth in Section 1.1 if you do not pay your monthly lease payments on time. You must also pay the check change fee set forth in Section 1.1 if you do not pay your monthly lease payments with a check.

Official Fees and Taxes

1.3. You are responsible for paying the official fees and taxes for the Vehicle. You must also pay the title fee set forth in Section 1.1. You must also pay the registration fee set forth in Section 1.1. You must also pay the sales tax set forth in Section 1.1.

Vehicle Maintenance and Use

1.4. You are responsible for maintaining the Vehicle in good condition. You must also keep the Vehicle clean and free of dirt and grime. You must also keep the Vehicle free of damage. You must also keep the Vehicle free of unauthorized modifications.

Warranty

1.5. The lessor warrants that the Vehicle is free of defects at the time of delivery. The lessor also warrants that the Vehicle is free of damage at the time of delivery. The lessor also warrants that the Vehicle is free of unauthorized modifications at the time of delivery.

Security Deposit

1.6. You must pay a security deposit for the Vehicle. The security deposit is set forth in Section 1.1. You must also pay the security deposit to the lessor at the time of delivery of the Vehicle.

Security Interest

1.7. The lessor retains a security interest in the Vehicle. The lessor also retains a security interest in the Vehicle until you have paid all of the lease payments for the Vehicle.

Assignment

1.8. You may not assign this lease to another person without the prior written consent of the lessor. You must also pay the assignment fee set forth in Section 1.1 if you do assign this lease to another person.

Default and Payments

1.9. You are responsible for paying the monthly lease payments for the Vehicle. You must also pay the late fee set forth in Section 1.1 if you do not pay your monthly lease payments on time. You must also pay the check change fee set forth in Section 1.1 if you do not pay your monthly lease payments with a check.

Purchase Option

1.10. You may purchase the Vehicle at the end of the term of this lease. You must pay the purchase price set forth in Section 1.1. You must also pay the purchase price to the lessor at the time of delivery of the Vehicle.

Excess Wear and Use

1.11. You are responsible for paying the excess wear and use fee set forth in Section 1.1 if you do not return the Vehicle in good condition. You must also pay the excess wear and use fee to the lessor at the time of delivery of the Vehicle.

Damage Loss or Partial Loss of the Vehicle

1.12. You are responsible for paying the damage loss or partial loss fee set forth in Section 1.1 if you do not return the Vehicle in good condition. You must also pay the damage loss or partial loss fee to the lessor at the time of delivery of the Vehicle.

Warranty Regarding Assignments

1.13. The lessor warrants that the Vehicle is free of defects at the time of delivery. The lessor also warrants that the Vehicle is free of damage at the time of delivery. The lessor also warrants that the Vehicle is free of unauthorized modifications at the time of delivery.

The Lessor and the lessee agree to the terms and conditions of this lease. The Lessor and the lessee agree to the terms and conditions of this lease. The Lessor and the lessee agree to the terms and conditions of this lease.

Signature of Lessee: [Signature] Signature of Lessor: [Signature]

Date: [Date] Date: [Date]

# APPENDIX C

LONDON FISCHER LLP  
Attorneys for Plaintiffs TOKIO MARINE  
and FIRE INSURANCE CO., LTD. and  
TOYOTA MOTOR CREDIT CORPORATION  
59 Maiden Lane  
New York, New York 10038  
Phone: (212) 972-1000  
Fax: (212) 972-1030

CV 02 5065

DEARIE, J. 

Matthew K. Finkelstein

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

MANN, M.J.

-----X  
TOKIO MARINE AND FIRE INSURANCE CO.,  
LTD., as Subrogee, and TOYOTA MOTOR  
CREDIT CORPORATION, as Subrogor,

COMPLAINT

Plaintiffs,

Civil Case No.:

-against-

INGRID K. ROSNER,

Defendants.  
-----X

Plaintiffs TOKIO MARINE AND FIRE INSURANCE CO., LTD. ("TOKIO MARINE") and TOYOTA MOTOR CREDIT CORPORATION ("TMCC"), by their attorneys, LONDON FISCHER LLP, complaining of the Defendant, INGRID K. ROSNER ("ROSNER"), respectfully allege the following:

THE PARTIES

1. At all times relevant, TOKIO MARINE was, and still is, a foreign corporation authorized to conduct business in the State of New York, and maintains its principal place of business in Tokyo, Japan.

2. At all times relevant, TMCC was, and still is, a corporation duly incorporated under the laws of the State of California, and is a resident of the State of California. TMCC has its principal place of business in Torrance, California.

3. Upon information and belief, at all times relevant, ROSNER resided, and still resides, in Kings County, New York.

#### JURISDICTION AND VENUE

4. This action is of a civil nature involving, exclusive of interest and costs, a sum in excess of \$75,000. Every issue of law and fact is wholly between TOKIO MARINE, a citizen of Japan, TMCC, a citizen of the State of California, and ROSNER, a citizen of the State of New York. Accordingly, this Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332.

5. Venue in the Eastern District of New York is based on Defendant's residence, pursuant to 28 U.S.C. § 1391.

6. Personal jurisdiction exists over ROSNER because she is a resident of the State of New York and because she entered into a contract with TMCC within the State of New York. Furthermore, the acts giving rise to Plaintiffs' right to contractual indemnification were committed within the State of New York.

7. TOKIO MARINE and TMCC bring this action on their own behalf and, as agent, on behalf of and for the interests of all parties who are, or may become interested in the suit, as their respective interests may ultimately appear, and plaintiffs are entitled to maintain this action.

# APPENDIX D

LONDON FISCHER LLP  
*Attorneys for Plaintiff*  
MITSUBISHI MOTORS CREDIT OF AMERICA, INC.  
59 Maiden Lane  
New York, New York 10038  
Phone: (212) 972-1000  
Fax: (212) 972-1030

**GARAUFIS, J.**  
**AZNACK**

FILED  
IN CLERK'S OFFICE  
U.S. DISTRICT COURT  
\*  
BROOKLYN OFFICE

MATTHEW K. FINKELSTEIN

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

**CV 02 1751**

TOKIO MARINE AND FIRE INSURANCE CO.,  
LTD., as Subrogee, and MITSUBISHI MOTORS  
CREDIT OF AMERICA, INC., as Subrogor,

COMPLAINT

The -against- Plaintiffs,

JORGE ZURITA and VICTOR ZURITA,

Defendants.

-----X-----  
Plaintiffs TOKIO MARINE AND FIRE INSURANCE CO., LTD. ("TOKIO  
MARINE") and MITSUBISHI MOTORS CREDIT OF AMERICA, INC. ("MMCA"), by their  
attorneys, LONDON FISCHER LLP, complaining of the Defendants, respectfully allege the  
following:

THE PARTIES

1. At all times relevant, TOKIO MARINE was, and still is, a foreign  
corporation authorized to conduct business in the State of New York, and maintains its principal  
place of business in Tokyo, Japan.

2. At all time relevant, MMCA was, and still is, a corporation duly incorporated under the laws of the State of Delaware and is a resident of the State of California. MMCA has its principal place of business in Cypress, California.

3. Upon information and belief, at all times relevant, JORGE ZURITA resided, and still resides, in Queens County, New York.

4. Upon information and belief, at all times relevant, VICTOR ZURITA resided, and still resides, in Queens County, New York.

#### JURISDICTION AND VENUE

5. This action is of a civil nature involving, exclusive of interest and costs, a sum in excess of \$75,000. Every issue of law and fact is wholly between TOKIO MARINE, a citizen of Japan, MMCA, a citizen of the State of California, and JORGE ZURITA and VICTOR ZURITA, citizens of the State of New York. Accordingly, this Court has jurisdiction of this action pursuant to 28 U.S.C. 1332.

6. Venue in the Eastern District of New York is founded on 28 U.S.C. 1391. The acts which are the subject matter of this lawsuit were committed in this District and Defendants JORGE ZURITA and VICTOR ZURITA reside in the District.

7. Personal jurisdiction exists over Defendants JORGE ZURITA and VICTOR ZURITA since they entered into a contract with MMCA within the State of New York. Furthermore, the acts giving rise to TOKIO MARINE's and MMCA's right to contractual and common law indemnification were committed within the State of New York.

8. TOKIO MARINE and MMCA bring this action on their own behalf and, as agent, on behalf of and for the interests of all parties who may be or become interested in the

# APPENDIX E

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
EVANSVILLE DIVISION

TOKIO MARINE AND FIRE )  
INSURANCE CO., LTD., MITSUI )  
SUMITOMO INSURANCE USA, )  
INC., as successor to GREAT )  
AMERICAN INSURANCE CO., )  
AIOI INSURANCE CO., LTD., as )  
successor to CNA GLOBAL, )  
)  
Plaintiffs, ) CASE NO. 3:04-CV-00013-RLY-WGH  
)  
vs. )  
)  
GIFFELS ASSOCIATES, YORK )  
INTERNATIONAL, and DOES 1 )  
THROUGH 50, INCLUSIVE, )  
)  
Defendants. )

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**FIRST AMENDED COMPLAINT IN SUBROGATION FOR NEGLIGENCE,  
STRICT PRODUCTS LIABILITY AND BREACH OF CONTRACT**

---

COMES NOW Plaintiffs Tokio Marine and Fire Insurance Company, Ltd., Mitsui Sumitomo Insurance USA, as successor in interest to a policy issued to Toyota by Great American Insurance Company and Aioi Insurance Co., Ltd., as successor in interest to a policy issued to Toyota by CNA Global (hereinafter collectively referred to as "Plaintiffs") and alleges as follows:

**GENERAL ALLEGATIONS**

1. At all times herein mentioned, Plaintiff Tokio Marine and Fire Insurance Company, Ltd., ("Tokio Marine") was and is a corporation duly organized and existing under and by virtue of the laws of Japan and authorized to transact insurance business in the State of Indiana.

2. At all times herein mentioned, Plaintiff Mitsui Sumitomo Insurance USA, Inc., as successor to Great American Insurance Co. ("Misui") was and is a corporation duly organized and existing under and by virtue of the laws of New York and authorized to transact insurance business in the State of Indiana.

3. At all times herein mentioned, Plaintiff Aioi Insurance Co., Ltd., as successor to CNA Global ("Aioi") was and is a corporation duly organized and existing under and by virtue of the laws of Japan and authorized to transact insurance business in the State of Indiana.

4. The true names and capacities of defendants sued as DOES are unknown to Plaintiffs. Plaintiffs will seek leave to amend this complaint to show the DOE defendants' true names and capacities when they are discovered. Plaintiffs are informed and believe, and based thereon allege, that each of the DOE defendants was and is legally responsible in some manner for the events, happenings and damages referred to in this complaint, and that each of the DOE defendants' wrongdoing proximately caused damages to Plaintiffs, as set forth in this complaint.

5. At all times mentioned herein, Plaintiffs are informed and believe and based thereon allege that each of the defendants is and was the agent, representative, employee and/or servant of the other defendants and in engaging in the acts and omissions herein alleged was acting within the scope of said agency, representation, employment and/or servitude with the knowledge, consent, ratification, authorization and permission of the other defendants.

6. Plaintiffs participated in writing a property insurance policy naming Toyota North America, Inc. as the insured and paid an insurance claim for damages as alleged below. One of the insured locations under that policy is a manufacturing plant in Princeton, Indiana.

7. Plaintiffs are informed and believe and based thereon allege that Defendant Giffels Associates ("Giffels") is a business entity of unknown form that is based in Michigan. Giffels provides mechanical design for air handling units in buildings.

8. Plaintiffs are informed and believe and based thereon allege that Defendant York International, Inc. ("York") is in the business of supplying and installing air handling systems in buildings.

9. Plaintiffs are informed and believe and based thereon allege that Defendant Premier Manufacturing Support Services, Inc., (“Premier”) is a corporation organized under the laws of Michigan. Premier is in the business of providing facilities and maintenance support services to automotive manufacturers.

10. York, Giffels, Premier and DOES 1 through 50, inclusive, participated in the design, manufacture, supply, installation, operation and maintenance of air handling equipment at Toyota’s Princeton, Indiana manufacturing facility. The Toyota facility has five roof mounted air handling units, all of which operate independently to condition individual spaces within the building.

11. The roof mounted units are controlled by a York temperature control system, consisting of space sensors, a York LDC control panel, dampers and damper actuators, water and steam piping valves, air stream temperature sensors and air stream freezestats located at the chilled water coil. The LDC control panel, along with a sub-panel inside the roof mounted units, provide control of all functions.

12. The system is programmed to provide both “occupied” and “unoccupied” periods of operation each day. During the “occupied” period, the unit’s supply fan operates continuously with the outside air damper opened to admit up to 20% outside air and 80% return air. The room temperature was maintained by modulating the chilled water and steam valves to provide either cooled or heated air to the building. During “unoccupied” periods, the supply fan cycles on and off with steam and chilled water valve modulation and the outside air damper was closed to allow in no outside air.

13. On or about December 30, 2001, the air handling system at the Princeton, Indiana, facility failed in that the water coil froze, causing water pipes to break. When the water thawed, the facility was flooded, causing damages to the building and equipment as well as lost income.

#### **FIRST CAUSE OF ACTION**

#### **(For Negligence Against All Defendants)**

14. Plaintiffs refer to, reallege, and incorporate herein by this reference each and

every allegation contained in paragraphs 1 through 13, inclusive, as if fully set forth herein.

15. Defendants, and each of them, negligently designed, manufactured, supplied, installed, operated and maintained the air handling system, and its component parts, in such a way that it failed and caused damage to Toyota's facility. In addition, Defendants, and each of them, failed to warn Toyota that an unsafe and dangerous condition existed as a result of the faulty and defective condition, creating a danger to Toyota's plant.

16. As a proximate result of the negligence of Defendants, and each of them, Plaintiffs were damaged as alleged in this Complaint.

### **SECOND CAUSE OF ACTION**

#### **(For Strict Products Liability Against Giffels and York)**

17. Plaintiffs refer to, reallege, and incorporate herein by this reference each and every allegation contained in paragraphs 1 through 15, inclusive, as if fully set forth herein.

18. On or about December 30, 2001, Plaintiffs' insured was damaged by the design and component parts of the air handling system. Defendants, and each of them, knew that the design and the products would be purchased and used without inspection for defects. The product was defective when it left the control of each defendant. At the time it failed and caused damage, the product was being used in the manner that Defendants intended, and in a manner that was reasonably foreseeable. Adequate warnings of the product's and the design's danger were not given.

19. As a proximate result of the defective design, manufacture and installation of the air handling system, as well as the failure to warn of the dangers, Plaintiffs were damaged as alleged in this Complaint.

### **THIRD CAUSE OF ACTION**

#### **(For Breach of Contract Against Giffels and Premier)**

20. Plaintiffs refer to, reallege, and incorporate herein by this reference each and every allegation contained in paragraphs 1 through 19, inclusive, as if fully set forth herein.

21. Contracts were entered into by, and for the benefit of, Toyota, with Defendants,

and each of them, for the design, construction, supply, installation, operation and maintenance of the air handling system at the Toyota facility. By the terms of those agreements, Defendants agreed to design, build, supply, install, operate and maintain the air handling system in a manner that was safe and effective for the use intended.

23. Defendants, and each of them, breached those contracts by improperly and defectively designing, building, installing, operating and maintaining the air handling system and its component parts.

24. Plaintiffs' insured performed all obligations required of it under the contracts.

25. As a proximate result of the breaches of contract, Plaintiffs were damaged as alleged in this complaint.

WHEREFORE, Plaintiffs pray for damages against Defendants, and each of them, as follows:

1. For damages including property damage, according to proof;
2. For costs of suit incurred herein;
3. For prejudgment interest; and
4. For such other and further relief as the Court may deem just and proper.

Dated: July 5, 2005

/s/Alex Y. Wong

Gene A. Weisberg, Cal. SBN 91544  
Alex Y. Wong, Cal. SBN 217667  
Berger Kahn, A Law Corporation  
4215 Glencoe Avenue, 2<sup>nd</sup> Floor  
Marina del Rey, CA 90292-5634  
Telephone: (310)821-9000  
Facsimile: (310)578-6178

J. Robert Kinkle  
Hall, Partenheimer & Kinkle  
219 N. Hart Street, P.O.Box 13  
Princeton, Indiana 47670  
Telephone: (812)386-0050  
Facsimile: (812)385-2575

**Counsel for Plaintiffs Tokio Marine and  
Fire Insurance Co., Ltd., Mitsui  
Sumitomo Insurance USA, Inc., as  
successor in interest to Great American  
Insurance Co., AIOI Insurance Co., Ltd.,  
as successor to CNA Global**

NO. 62852-6-I

**COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON**

---

LAKEWEST CONDOMINIUM HOME OWNERS ASSOCIATION,

Appellant,

v.

TOKIO MARINE & NICHIDO FIRE INSURANCE COMPANY,

Respondent.

---

**APPENDIX OF UNPUBLISHED NON-WASHINGTON  
AUTHORITIES SUPPORTING REPLY BRIEF OF APPELLANT**

---

Gregory L. Harper, WSBA No. 27311  
Todd C. Hayes, WSBA No. 26361  
Charles K. Davis, WSBA No. 38231

HARPER | HAYES PLLC  
One Union Square  
600 University Street, Suite 2420  
Seattle, Washington 98101  
Telephone: 206.340.8010  
Facsimile: 206.260.2852

Attorneys for Appellant

 ORIGINAL

Pursuant to GR 14.1(b), Appellant respectfully submits the following unpublished authorities in support of its Reply Brief:

**I. CASES**

1. Colonia Ins., A.G. v. D.B.G. Property Corp., 1992 U.S. Dist. LEXIS 12265 (S.D.N.Y. Aug. 7, 1992);
2. Hewlett-Packard Co. v. Capital City Micro, Inc., Civ. No. 3-04-0779, 2006 U.S. Dist. LEXIS 61254; and
3. 10A Wright, Miller & Kane, Federal Prac. & Procedure: Civil 3d § 2690 (2008).

DATED this 3<sup>rd</sup> day of September, 2009.

HARPER | HAYES PLLC



By: \_\_\_\_\_  
Gregory L. Harper, WSBA No. 27311  
Todd C. Hayes, WSBA No. 26361  
Charles K. Davis, WSBA No. 38231  
Attorneys for Appellant

**CERTIFICATE OF SERVICE**

The undersigned certifies that on *Thursday, September 03, 2009*, I caused and true and correct copy of this document to be delivered in the manner indicated to the following parties:

**BY MESSENGER**

James T. Derrig  
Eklund Rockey Stratton  
521 Second Avenue West  
Seattle, WA 98119-3927  
Attorneys for Defendant Farmington  
Casualty Company and St. Paul Fire  
& Marine Insurance Company

**BY MESSENGER**

Thomas Lether  
Cole Lether Wathen & Leid PC  
1000 Second Avenue, Suite 1300  
Seattle, WA 98104-1082  
Attorneys for Defendant Truck  
Insurance Exchange

**BY MESSENGER**

Dennis Smith  
Robert F. Riede  
Wilson Smith Cochran & Dickerson  
1215 Fourth Avenue, Suite 1700  
Seattle, WA 98161-1010  
Attorneys for Defendant Safeco  
Insurance Co. of America

**BY MESSENGER**

Steven W. Fogg  
Seann P. Colgan  
Corr Cronin Michelson Baumgardner  
& Preece, LLP  
1001 Fourth Avenue, Suite 3900  
Seattle, WA 98154-1051  
Attorneys for Defendant Tokio  
Marine & Nichido Fire Insurance  
Company, Ltd.

DATED this 3<sup>rd</sup> day of September, 2009.

  
\_\_\_\_\_  
Jessica A. Gardner, Paralegal





LEXSEE 1992 U.S. DIST. LEXIS 12265

COLONIA INSURANCE, A.G., Plaintiff, v. D.B.G. PROPERTY CORPORATION;  
D.B.G. PROPERTY INVESTORS, INC.; D.B.G. MANAGEMENT  
CORPORATION; D.B.G. EQUITIES CORPORATION; D.B.G. BROKERAGE  
CORPORATION; D.B.G. MANAGING SERVICES, INC.; BERRY HILL  
REALTY, CORP.; DANIEL R. FRUITBINE; GARY H. HERMAN; BARRY ROSS  
WEINER; BOWES & COMPANY, INC.; ROGER METZGER ASSOCIATES,  
INC.; FRENKEL & COMPANY, INC.; D.B.G. PROPERTY INVESTORS, INC.  
AND GARY H. HERMAN, GENERAL PARTNERS, D/B/A STONERIDGE  
ASSOCIATES, A LIMITED PARTNERSHIP; D.B.G. PROPERTY INVESTORS,  
INC. AND BARRY ROSS WEINER, GENERAL PARTNERS, D/B/A PARKWOOD  
ASSOCIATES, A LIMITED PARTNERSHIP; JOHN DOE #1, JOHN DOE #2,  
GENERAL PARTNERS, D/B/A SQUIRE VILLAGE ASSOCIATES, A LIMITED  
PARTNERSHIP; JOHN DOE #1, JOHN DOE #2, GENERAL PARTNERS, D/B/A  
HORIZON ASSOCIATES &/OR HORIZON HILL ASSOCIATES, A LIMITED  
PARTNERSHIP; D.B.G. PROPERTY INVESTORS, INC., BARRY ROSS  
WEINER, REALQUEST CORPORATION, GENERAL PARTNERS, D/B/A  
HARTSDALE ASSOCIATES, A LIMITED PARTNERSHIP; JOHN DOE #1,  
JOHN DOE #2, GENERAL PARTNERS, D/B/A DIPLOMAT ASSOCIATES, A  
LIMITED PARTNERSHIP; JOHN DOE #1, JOHN DOE #2, GENERAL  
PARTNERS, D/B/A BAYPORT ASSOCIATES, A LIMITED PARTNERSHIP;  
JOHN DOE #1, JOHN DOE #2, GENERAL PARTNERS, D/B/A BRISTOL  
ASSOCIATES, A LIMITED PARTNERSHIP; JOHN DOE #1, JOHN DOE #2,  
GENERAL PARTNERS, D/B/A DUTCH GARDEN ASSOCIATES, A LIMITED  
PARTNERSHIP, D.B.G. PROPERTY INVESTORS INC., DANIEL R.  
FRUITBINE, GENERAL PARTNERS, D/B/A WATERSIDE ASSOCIATES, A  
LIMITED PARTNERSHIP; JEROME RUBIN, D.B.G. PROPERTY INVESTORS,  
INC., ARRANDALE MANAGEMENT CORP., PRODUCTIVE CONSULTANTS,  
INC., GENERAL PARTNERS, D/B/A ALLEY POND ASSOCIATES, A LIMITED  
PARTNERSHIP; F.W.R. REALTY CORP., GENERAL PARTNERS, D/B/A  
DEEPWOOD ASSOCIATES, A LIMITED PARTNERSHIP; NUTMEG STATE  
REALTY, INC., GENERAL PARTNER, D/B/A GLEN OAKS ASSOCIATES, A  
LIMITED PARTNERSHIP; JOHN DOE #1, JOHN DOE #2, GENERAL  
PARTNERS, D/B/A IVY CIRCLE ASSOCIATES, A LIMITED PARTNERSHIP;  
JOHN DOE #1, JOHN DOE #2, GENERAL PARTNERS, D/B/A TERRACE  
COURT ASSOCIATES, A LIMITED PARTNERSHIP; JOHN DOE #1, JOHN  
DOE #2, GENERAL PARTNERS, D/B/A LONGFIELD MEADOW ASSOCIATES,  
A LIMITED PARTNERSHIP; JOHN DOE #1, JOHN DOE #2, GENERAL  
PARTNERS, D/B/A HILLTOP TOWER ASSOCIATES, A LIMITED  
PARTNERSHIP; BARRING REALTY, INC., GENERAL PARTNER, D/B/A  
GREAT BARR ASSOCIATES, A LIMITED PARTNERSHIP; D.B.G. PROPERTY  
INVESTORS, INC., GARY H. HERMAN, GENERAL PARTNERS, D/B/A  
LAKEVIEW VILLAGE ASSOCIATES, A LIMITED PARTNERSHIP; JOHN DOE  
#1, JOHN DOE #2, GENERAL PARTNERS, D/B/A FIRST PATRIOT CORP.  
&/OR BEACON VILLAGE ASSOCIATES, A LIMITED PARTNERSHIP; JOHN

DOE #1, JOHN DOE #2, GENERAL PARTNERS, D/B/A TAMPA WAY ASSOCIATES, A LIMITED PARTNERSHIP; JOHN DOE #1, JOHN DOE #2, GENERAL PARTNERS, D/B/A BIRD BAY ASSOCIATES, A LIMITED PARTNERSHIP; JOHN DOE #1, JOHN DOE #2, GENERAL PARTNERS, D/B/A CUMBERLAND ASSOCIATES, CUMBERLAND ASSOCIATES LIMITED PARTNERSHIP 1981, A LIMITED PARTNERSHIP; JOHN DOE #1, JOHN DOE #2, GENERAL PARTNERS, D/B/A VILLA MADRID ASSOCIATES LIMITED PARTNERSHIP, A LIMITED PARTNERSHIP; JOHN DOE #1, JOHN DOE #2, GENERAL PARTNERS, D/B/A TREEHOUSE ASSOCIATES, TREEHOUSE ASSOCIATES LIMITED PARTNERSHIP, A LIMITED PARTNERSHIP; JOHN DOE #1, JOHN DOE #2, GENERAL PARTNERS, D/B/A TERRACE HOUSE ASSOCIATES, TERRACE HOUSE ASSOCIATES LIMITED PARTNERSHIP, A LIMITED PARTNERSHIP; GARY H. HERMAN, JEROME RUBIN, D.B.G. PROPERTY INVESTORS, INC., ARRANDALE MANAGEMENT CORP., GENERAL PARTNERS, D/B/A EAST FIFTY SEVENTH ASSOCIATES, A LIMITED PARTNERSHIP; D.B.G. HOTEL INVESTORS, INC., REALQUEST CORP. OF AMERICA, DANIEL R. FRUITBINE, GENERAL PARTNERS, D/B/A RIVIERA RESORT HOTEL ASSOCIATES LIMITED PARTNERSHIP, A LIMITED PARTNERSHIP; D.B.G. PROPERTY INVESTORS, INC., BARRY ROSS WEINER, GENERAL PARTNERS, D/B/A VINEYARD ASSOCIATES, A LIMITED PARTNERSHIP; JOHN DOE #1, JOHN DOE #2, GENERAL PARTNERS, D/B/A HERITAGE ASSOCIATES LIMITED PARTNERSHIP OF 1982, A LIMITED PARTNERSHIP; D.B.G. PROPERTY INVESTORS, INC., YORKGATE ENTERPRISES, LTD., DANIEL R. FRUITBINE, GENERAL PARTNERS, D/B/A RIDGECREST ASSOCIATES, A LIMITED PARTNERSHIP; D.B.G. PROPERTY INVESTORS, INC., BEAUMONT REALTY CORP., DJ PROPERTIES, INC., GARY H. HERMAN, MARC A. SEEHERMAN, JOHN STAHL, GENERAL PARTNERS, D/B/A COUNTRYSIDE ASSOCIATES, A LIMITED PARTNERSHIP; JOHN DOE #1, JOHN DOE #2, GENERAL PARTNERS, D/B/A BRANDYWINE ASSOCIATES LIMITED PARTNERSHIP, A LIMITED PARTNERSHIP; D.B.G. PROPERTY INVESTORS, INC., GARY H. HERMAN, GENERAL PARTNERS, D/B/A RIDGE HOLLOW ASSOCIATES, A LIMITED PARTNERSHIP; D.B.G. PROPERTY INVESTORS, INC., QUELER PROPERTIES, INC., BARRY ROSS WEINER, GENERAL PARTNERS, D/B/A PEBBLE CREEK ASSOCIATES, A LIMITED PARTNERSHIP; JOHN DOE #1, JOHN DOE #2, GENERAL PARTNERS, D/B/A VALLEY SQUARE ASSOCIATES LIMITED PARTNERSHIP OF 1982, A LIMITED PARTNERSHIP; JOHN DOE #1, JOHN DOE #2, GENERAL PARTNERS, D/B/A ABRAMS SQUARE ASSOCIATES, ABRAMS SQUARE ASSOCIATES LIMITED PARTNERSHIP, A LIMITED PARTNERSHIP; D.B.G. PROPERTY INVESTORS, INC., GARY H. HERMAN, ATRIUM PARTNERS. LTD., GENERAL PARTNERS, D/B/A DREXEL ASSOCIATES, A LIMITED PARTNERSHIP; JOHN DOE #1, JOHN DOE #2, GENERAL PARTNERS, D/B/A ANDOVER ASSOCIATES, ANDOVER ASSOCIATES LIMITED PARTNERSHIP, A LIMITED PARTNERSHIP; JOHN DOE #1, JOHN DOE #2, GENERAL PARTNERS, D/B/A ENGLISH AIRE ASSOCIATES, ENGLISH AIRE ASSOCIATES LIMITED PARTNERSHIP, A LIMITED PARTNERSHIP; D.B.G. PROPERTY INVESTORS, INC., HOWARD M. LORBER, GENERAL PARTNERS, D/B/A VILLAGER ASSOCIATES, A LIMITED PARTNERSHIP; D.B.G. PROPERTY INVESTORS, INC., BARRY ROSS WEINER, QUELER PROPERTIES, INC., GENERAL PARTNERS, D/B/A DESSERT LIFE ASSOCIATES, A LIMITED PARTNERSHIP, D.B.G. PROPERTY

INVESTORS, INC., BARRY ROSS WEINER, YORKGATE ENTERPRISES, LTD., GENERAL PARTNERS, D/B/A SKYLINE BEL AIRE ASSOCIATES, A LIMITED PARTNERSHIP; D.B.G. PROPERTY INVESTORS, INC., DANIEL R. FRUITBINE, GENERAL PARTNERS, D/B/A ROSALIND GARDEN ASSOCIATES, A LIMITED PARTNERSHIP; JOHN DOE #1, JOHN DOE #2, GENERAL PARTNERS, D/B/A PRESIDENTS CORNER ASSOCIATES, PRESIDENTS CORNER ASSOCIATES LIMITED PARTNERSHIP, A LIMITED PARTNERSHIP, D.B.G. PROPERTY INVESTORS, INC., GARY H. HERMAN, CALIBRE MANAGEMENT COMPANY, INC., SUMMERFIELD REALTY CORP., ATRIUM PARTNERS, LTD., GENERAL PARTNERS, D/B/A WOODWINDS ASSOCIATES, A LIMITED PARTNERSHIP; CRESCENT REALTY CORP., IRA S. ORSHAN, D.B.G. PROPERTY INVESTORS, INC., GENERAL PARTNERS, D/B/A EAST FIFTY SIXTH ST. ASSOCIATES, A LIMITED PARTNERSHIP; D.B.G. PROPERTY INVESTORS, INC., HOWARD LORBER, GENERAL PARTNERS, D/B/A SAND COVE ASSOCIATES, A LIMITED PARTNERSHIP, D.B.G. PROPERTY INVESTORS, INC., IRA D. ORSHAN, AEGIS PLANNING, INC., ARRANDALE MANAGEMENT CORP., GENERAL PARTNERS, D/B/A TIERRA ASSOCIATES NY LIMITED PARTNERSHIP, A LIMITED PARTNERSHIP; D.B.G. PROPERTY INVESTORS, INC., JEROME RUBIN, ARRANDALE MANAGEMENT CORP., GENERAL PARTNERS, D/B/A EAST SEVENTY SECOND STREET ASSOCIATES, A LIMITED PARTNERSHIP; JOHN DOE #1, JOHN DOE #2, GENERAL PARTNERS, D/B/A SHOWPLACE FARMS ASSOCIATES, A LIMITED PARTNERSHIP; D.B.G. PROPERTY INVESTORS, INC., DANIEL R. FRUITBINE, KAUFMAN PROPERTY CORP., GENERAL PARTNERS. D/B/A CHARTER SQUARE ASSOCIATES, A LIMITED PARTNERSHIP; D.B.G. PROPERTY INVESTORS, INC., DANIEL R. FRUITBINE, GENERAL PARTNERS, D/B/A BRIARGATE ASSOCIATES, A LIMITED PARTNERSHIP; CRC WESTSIDE, INC., JEROME RUBIN, D.B.G. PROPERTY INVESTORS, INC., ARRANDALE MANAGEMENT CORP., GREENBERG BROTHERS REALTY CORP., GENERAL PARTNERS, D/B/A WEST SEVENTY-NINTH ST. ASSOCIATES, A LIMITED PARTNERSHIP; D.B.G. PROPERTY INVESTORS, INC., GARY H. HERMAN, ARRANDALE MANAGEMENT CORP., HOWARD M. LORBER, CRALIN 57 CORP., GENERAL PARTNERS, D/B/A HARRIDGE HOUSE ASSOCIATES OF 1984, A LIMITED PARTNERSHIP; BARRY WEINER, DANIEL FRUITBINE, RICHARD HARWIN, GARY HERMAN, CUSTODIAN FOR TODD LAURENCE HERMAN UNDER THE NEW YORK UNIFORM GIFT TO MINORS ACT, GARY HERMAN, CUSTODIAN FOR TRACEY MICHELLE HERMAN UNDER THE NEW YORK UNIFORM GIFT TO MINORS ACT, RONALD SYLVESTRI, GENERAL PARTNERS, D/B/A SALTEN POINT ASSOCIATES; CHATWELL ASSOC., INC., &/OR ARNOLD & ANN GUMOWITZ, D.B.G. PROPERTY CORP. &/OR ANY AFFILIATE OF D.B.G. PROPERTY CORP. AIMA 401 EAST 74TH STREET, NEW YORK, NY; JOHN DOE #1, JOHN DOE #2, GENERAL PARTNERS, D/B/A CHARLESTON INN ASSOCIATES, A LIMITED PARTNERSHIP; D.B.G. PROPERTY INVESTORS, INC., DANIEL R. FRUITBINE, GENERAL PARTNERS, D/B/A TRI TOWERS ASSOCIATES, A LIMITED PARTNERSHIP; D.B.G. PROPERTY INVESTORS, INC., DANIEL R. FRUITBINE, ATRIUM PARTNERS, LTD., BEAUMONT REALTY CORP., GENERAL PARTNERS, D/B/A WOODBRIDGE VILLAGE ASSOCIATES, A LIMITED PARTNERSHIP; D.B.G. PROPERTY INVESTORS, INC., DANIEL R. FRUITBINE, ARRANDALE MANAGEMENT, INC., AEGIS

PLANNING INC., SAB ASSOCIATES, GENERAL PARTNERS, D/B/S GRACIE ASSOCIATES, A LIMITED PARTNERSHIP, D.B.G. PROPERTY INVESTORS, INC., GARY H. HERMAN, ARRANDALE MANAGEMENT CORP., BEAUMONT REALTY CORP., AEGIS PLANNING, INC., GENERAL PARTNERS, D/B/A MANOR HOUSE ASSOCIATES, A LIMITED PARTNERSHIP; D.B.G. PROPERTY INVESTORS, INC., GARY H. HERMAN, SEYMOUR RUBINSTEIN, RUBINSTEIN PLANNING CORP., GENERAL PARTNERS, D/B/A CLARIDGE COURT ASSOCIATES, A LIMITED PARTNERSHIP; D.B.G. PROPERTY INVESTORS, INC., GARY H. HERMAN, ARRANDALE MANAGEMENT CORP., AEGIS PLANNING, INC., GENERAL PARTNERS, D/B/A AMHERST ASSOCIATES, A LIMITED PARTNERSHIP; D.B.G. PROPERTY INVESTORS, INC., GARY H. HERMAN, MARK TANNER, GENERAL PARTNERS, D/B/A NORTHCROSS TOWERS ASSOCIATES, A LIMITED PARTNERSHIP; D.B.G. PROPERTY INVESTORS, INC., GARY H. HERMAN, BEAUMONT REALTY CORP., GENERAL PARTNERS, D/B/A HERMITAGE ASSOCIATES, A LIMITED PARTNERSHIP; MANHATTAN EQUITIES, INC.; D.B.G. PROPERTY INVESTORS, INC., GARY H. HERMAN, AEGIS PLANNING, INC., ARRANDALE MANAGEMENT, CORP., GENERAL PARTNERS, D/B/A COLONNADE ASSOCIATES, A LIMITED PARTNERSHIP; D.B.G. PROPERTY INVESTORS, INC., GARY H. HERMAN, STEPHEN B. WECHSLER, INC., AEGIS PLANNING, INC., ARRANDALE MANAGEMENT CORP., ARRANDALE ASSOCIATES, LTD., GENERAL PARTNERS, D/B/A 562 WEST END ASSOCIATES, A LIMITED PARTNERSHIP; DANIEL R. FRUITBINE, BARRY R. WEINER, GARY H. HERMAN, RICHARD A. HARWIN, GENERAL PARTNERS, D/B/A D.B.G. PROPERTY COMPANY, Defendants.

89 Civ. 8640 (RPP)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF  
NEW YORK

1992 U.S. Dist. LEXIS 12265

August 7, 1992, Decided

August 10, 1992, Filed

**COUNSEL:** [\*1] For Plaintiff Colonia Insurance, A.G.: Murray & Kelleher, 36 West 44th Street, Suite 1400, New York, New York 10036, (212) 921-9500, By: William J. Kelleher, Jr., Esq.

For Bowes & Co., Inc. of New York Dechert Price & Rhoads, Defendant: 477 Madison Ave., New York, N.Y. 10022, (212) 326-3500, By: James E. Tolan, Esq., Rodney M. Zerbe, Esq. For Roger Metzger & Associates, Inc., Defendant: Palmeri, Gaven & Soberman, 55 John Street, New York, New York 10038, (212) 608-1717, By: Daniel F. Gaven, Esq. For Frenkel & Company, Inc., Defendant: Siff Rosen P.C., 233 Broadway, New York,

N.Y. 10279, (212) 238-8400, By: David M. Pollack, Esq., Ann Marie Forte, Esq. For Gary Herman, et al., Defendant: Calinoff & Katz, 555 Madison Ave., 22nd Floor, New York, New York 10022, (212) 826-8800, By: Robert A. Calinoff, Esq.

**JUDGES:** Patterson, Jr.

**OPINION BY:** ROBERT P. PATTERSON, JR.

**OPINION**

**OPINION AND ORDER**

**ROBERT P. PATTERSON, JR., U.S.D.J.**

This is an action by Plaintiff Colonia Insurance, A.G. ("Colonia") for the recovery of unpaid premiums on two comprehensive general insurance policies issued through its agent, Defendant Bowes & Co., Inc. ("Bowes") at the specific request of two brokers, Defendants Roger Metzger [\*2] Associates ("Metzger") and Frenkel & Co., Inc. ("Frenkel"), to Defendant D.B.G. Property Corp., Inc. ("DBG") and to partnership entities in which DBG had an interest (collectively, the "Insureds"). The first policy was issued for the period December 1, 1984 through November 30, 1985 (the "1984 DBG Policy"). The second policy was issued for the period December 1, 1985 through November 30, 1986, and was subsequently extended through January 22, 1987 (the "1985 DBG Policy"). It is undisputed that unpaid premiums remain on both the 1984 and 1985 Policies.

The following motions have been made:

Defendant Gary Herman, et al.,<sup>1</sup> on behalf of a group of the Insureds, move to dismiss Colonia's complaint based upon: (1) lack of complete diversity among the parties, and (2) Colonia's failure to join Colonia (United States Branch) ("Colonia US") as an indispensable party plaintiff. Metzger joins in the Insureds' motion to dismiss.

1 The Insureds are a group of corporations and limited partnerships. At all relevant times with respect to this litigation, Defendant Gary Herman was a partner in the law firms of Fruitbine, Weiner, Harwin and Herman, P.C., and Fruitbine, Weiner & Herman, as well as general partner of a number of the limited partnerships insured. These law firms represented "DBG Companies," described in n.4 *infra*, in matters concerning the Insureds.

[\*3] Defendant Bowes moves for summary judgment dismissing Colonia's claims against Bowes based upon: (1) the alleged unenforceability under the New York Statute of Frauds of a 1984 Casualty Agency Agreement (the "1984 Agency Agreement") requiring Bowes to pay to Colonia all premiums on insurance policies placed by Bowes as Colonia's agent, (2) the alleged non-applicability of the 1986 Casualty Agency Agreement (the "1986 Agency Agreement") to any payment of premiums calculated on a retrospective basis, and (3) the claim that the 1986 Agency Agreement

applies only to Colonia US.

Colonia cross-moves for summary judgment on its claims against Bowes on the grounds that: (1) the 1984 Agency Agreement is enforceable notwithstanding the New York Statute of Frauds because (a) Bowes performed under that Agreement and (b) the Agreement was not an agreement to pay the debt of another, and (2) Bowes is primarily liable for payment to Colonia of all premiums on insurance policies placed by Bowes, including premiums that Bowes failed to collect and premiums calculated on a retrospective basis.

Defendants Metzger and Frenkel move for summary judgment dismissing Colonia's claims against them on the [\*4] grounds that (1) Colonia lacks standing to enforce the Agreements entered into by Metzger and Frenkel with Bowes because Colonia is an "incidental" rather than an "intended" beneficiary of said agreements and (2) the Metzger and Frenkel Agreements apply only to premiums for each item of coverage effected by Bowes at the request of Metzger or Frenkel.

Colonia cross-moves for summary judgment on its claims against Defendants Metzger and Frenkel on the grounds that Colonia is an "intended" beneficiary of the Metzger/Frenkel Agreements and, therefore, has standing to enforce them.

Defendant Frenkel moves for summary judgment dismissing Defendant Insureds' cross-claims against Frenkel on the grounds that Frenkel adequately performed the duty of "reasonable care" that it owed to the Insureds as clients and that the Insureds knew and assented to the terms of the insurance contract.<sup>2</sup>

2 Defendant Insureds have asserted cross-claims against Defendant Frenkel on the grounds that Frenkel negligently performed its professional duty as broker.

[\*5] **BACKGROUND****PARTIES**

Plaintiff Colonia is a foreign corporation established under the laws of the Federal Republic of Germany, with its worldwide principal place of business in Cologne, Germany. In July 1976, Colonia became licensed as an "alien insurer" and established Colonia US as a "United States branch" under the insurance laws of the State of

New York. *See N.Y. Ins. Law § 107* (McKinney 1985). Since its establishment in 1976, and prior to the commencement of this action in 1989, Colonia US was not incorporated under the laws of New York or anywhere else in the United States.<sup>3</sup>

3 On January 1, 1991, Colonia US became domesticated and incorporated under the laws of the State of New York.

Defendant Insureds are a collectivity of corporations and limited partnerships, most of which are authorized and existing under the laws of the State of New York.<sup>4</sup>

4 Attached to the Complaint is a list of all the limited partnership defendants, other insureds, and the respective general partner defendants of each limited partnership, all of which were named insureds under the policies issued by Colonia and at issue in this litigation. Complaint, Schedule A. At all relevant times, DBG Property Investors, Inc. ("DBG Investors") was the managing general partner for each of the limited partnerships listed in Schedule A, Complaint PP9, 10, DBG Property Corporation ("DBG") was the sole owner of all the issued and outstanding stock of DBG Investors, DBG Equities Corporation ("DBG Equities"), DBG Management Corporation ("DBG Management"), and DBG Managing Services, Inc. ("DBG Services"), Complaint P11; DBG Management was the managing partner for each of the properties owned by the limited partnerships, Complaint P12; DBG Equities was a placement agent for each of the Private Placement offerings of the interests of the limited partnerships. Complaint P13. Defendants DBG Investors, DBG Management, DBG Property, DBG Services, and DBG Equities are all corporations duly authorized and existing under the laws of the State of New York and each maintains its principal place of business in New York. Complaint P7. Defendant Herman was a director, executive vice president and treasurer of DBG Investors, a director and executive vice president of DBG Management prior to 1986 and a director and president of DBG Management since 1986 and the vice chairman of the Executive Committee of DBG.

[\*6] Defendant Bowes is an insurance managing general agent, insurance broker, and special risk

underwriter involved in the placement of insurance coverage on behalf of various insurers and insureds, organized and existing under the laws of the State of New York with its principal place of business in New York. Complaint PP39, 40.

Defendant Metzger is an insurance broker organized and existing under the laws of the State of New York, with its principal place of business in New York. Complaint PP41, 42

Defendant Frenkel is a general insurance broker organized and existing under the laws of the State of New York, with its principal place of business in New York. Complaint PP43, 44.

#### **THE 1984 AGENCY AGREEMENT**

In connection with its United States insurance business, Colonia executed several agency agreements with managing general agents, including Bowes. On March 12, 1984 Bowes and Colonia co-executed an application to the New York State Insurance Department for Bowes's agent's license, which was issued to Bowes on March 21, 1984. Subsequently, Colonia forwarded to Bowes a Casualty Agency Agreement (the "1984 Agency Agreement"), dated April 19, 1984. The Agreement had been [\*7] signed by Claus Dannasch, director and officer of Colonia and president of Colonia US. Thurston J. Millett, former executive vice president of Bowes in New York who became a vice president of Colonia in February 1985, received the 1984 Agency Agreement in New York and forwarded it to Raymond J. White, president of Bowes and Bowes Holdings, Inc. in Chicago. The 1984 Agency Agreement was returned to Colonia unsigned, apparently because it required the personal guarantee of Raymond White. In addition to the policies at issue in this litigation, Bowes, as agent of Colonia, issued over fifty insurance policies after receiving the 1984 Agency Agreement.

#### **THE 1984 DBG POLICY**

##### **1. THE METZGER AND FRENKEL AGREEMENTS**

DBG Management was responsible for the purchasing of insurance to cover the properties owned by the Insureds. Pasquale Antonacci, a senior vice president in charge of underwriting at Frenkel, handled the Insureds' account, which was originally insured by the

Crum & Foster Group. Antonacci Dep. at 17-18, 27-28 (Forte Aff., Exh. 13) (hereinafter "Antonacci Dep."). Due to significant losses incurred on the risk, Crum & Foster cancelled its contract with the Insureds [\*8] in August 1984. Antonacci Dep. at 30-31. Frenkel sought to acquire replacement coverage on behalf of the Insureds. After reviewing numerous proposals solicited by Frenkel, the Insureds decided on the Colonia proposal for liability insurance. Antonacci Dep. at 34, 39, 54-55.

In November 1984, Defendant Metzger, on behalf of the Insureds and Defendant Frenkel, sought to place through Bowes a comprehensive general liability policy for numerous real properties owned by the Insureds. Bowes, which had not previously conducted any business with Metzger, requested that Metzger execute a correspondent agreement (the "Metzger Agreement"). On November 30, 1984, Metzger forwarded to Bowes a binder pertaining to the 1984 DBG Policy for the signature of Thurston J. Millett, who refused to execute it without the signed Metzger Agreement. Exh. 19 to Pl. Mem. in Supp.<sup>5</sup> On December 26, 1984, Metzger forwarded to Bowes a copy of the Metzger Agreement dated November 26, 1984 which was executed by Bowes on January 3, 1985. Bowes subsequently issued the 1984 DBG Policy covering the period December 1, 1984 through November 30, 1985.

5 The authenticity of the documents attached as exhibits to Plaintiff's memoranda are not challenged.

[\*9] On June 5, 1985, Colonia invoiced Bowes for premiums accruing under the 1984 DBG Policy totalling \$ 120,777. In July 1985, Colonia invoiced Bowes for additional premiums due under the 1984 DBG Policy totalling \$ 92,890. Colonia advised Bowes that the 1984 DBG Policy would be cancelled if the premiums were not paid by July 8, 1985. On August 28, 1985 a Notice of Cancellation for nonpayment of premiums was sent to the Insureds by Geoffrey Bennett, executive vice president of Bowes. Exh. 23 to Pl. Mem. in Supp. The following day the premiums were paid and the coverage reinstated.

Subsequent to the reinstatement of the 1984 DBG Policy, Bennett, by letter dated September 19, 1985, requested that both Metzger and Frenkel sign correspondent agreements with Bowes if Bowes were to continue providing coverage to the Insureds.<sup>6</sup> By letter dated September 24, 1985, Frenkel forwarded to Bowes an executed correspondent agreement (the "Frenkel

Agreement"). Exh. 22 to Pl. Mem. in Supp. The Frenkel and Metzger Agreements are identical, with the exception that the Frenkel Agreement contains the personal guarantee of Harold Goldsmith, executive vice president and treasurer of Frenkel. Exhs. [\*10] 19, 22 to Pl. Mem. in Supp.

6 By letter dated September 25, 1985 Metzger replied to Bennett's letter by forwarding a copy of the Metzger Agreement previously executed by Bowes and Metzger on January 3, 1985. Exh. 24 to Pl. Mem. in Supp.

## 2. RETROSPECTIVE RATING PLAN

As a result of a substantial number of claims received by Colonia against the Insureds' properties during the period December 1984 to March 1985, Colonia threatened to cancel the policy unless an endorsement to the 1984 DBG Policy was added requiring the calculation of premiums on a retrospective rating plan effective December 1, 1984. See Exh. 34 to Pl. Reply Mem. On March 12, 1985, Bowes issued a Notice of Cancellation addressed to DBG. Exh. 33 to Pl. Reply Mem. Sometime between March 12 and April 13, 1985, Antonacci and other Frenkel executives met with representatives of the Insureds to discuss the retrospective rating plan.<sup>7</sup> Antonacci Dep. at 160-62. Under this plan, the Insureds were to pay \$ 300,000 initially as a base premium [\*11] and, depending upon actual loss experience, either pay additional premiums up to a potential total of \$ 1,000,000 or receive a rebate if no losses were experienced. Antonacci Dep. at 161-62. The Insureds agreed to the new terms. Thereafter, on April 15, 1985, Bowes notified the Insureds that coverage had been reinstated, and Frenkel forwarded to the Insureds a formal confirmation. Pl. Exh. 34 to Reply Mem.; Antonacci Aff., Exhs. D & E. Frenkel requested that DBG provide notice of any questions it had or changes to be made. Antonacci Aff., Exh. E. The Insureds did not request that any changes be made. Subsequently, on May 31, 1985, Frenkel forwarded to the Insureds "Endorsement #15," entitled "Retrospective Premium Endorsement." An accompanying letter from Antonacci explained that the endorsement was for "attachment to the Colonia policy amending the contract to a retrospective rating program as previously advised" and added that "at my next meeting with your office I will explain it in further detail." Antonacci Aff., Exhs. F & G. Antonacci thereafter again met with the Insureds to

confirm their understanding of the endorsement and to answer additional questions.

7 Antonacci met specifically with Ed Coviello, president of DBG Management who, together with Gary Herman was responsible for the placement of insurance on behalf of the Insureds, and Steve Funsch, a representative of DBG Management. Antonacci Dep. at 162.

#### [\*12] THE 1985 DBG POLICY

When the 1984 DBG Policy, as amended to a retrospective rating plan, neared expiration, Frenkel discussed with the Insureds the option to renew the Colonia policy under the same retrospective rating plan or to pursue other options. The Insureds chose to remain with Colonia because other available policies contained higher fixed premiums. Frenkel sent confirmation to the Insureds that the policy had been renewed. Frenkel requested that the Insureds "advise if any changes are to be made." Antonacci Aff. P17 & Exhs. H & I. The Insureds did not request that any changes be made. Thereafter Colonia issued the 1985 DBG policy covering the period December 1, 1985 through December 1, 1986, subsequently extended to January 1, 1987.

On February 20, 1986 "Endorsement #10," entitled "Retrospective Premium Endorsement," was added to the 1985 DBG Policy, reflecting the additional premiums due to Colonia under the retrospective rating plan. The first premium calculated on a retrospective basis was paid, but no subsequent premiums billed have been paid. *See* Dannasch Aff. PP12, 15; Pl. Mem. in Supp. at 17. It is these unpaid premiums that are the subject of [\*13] this lawsuit.

#### THE 1986 AGENCY AGREEMENT

In 1986, Colonia US realized that it did not have a copy of the 1984 Agency Agreement with Bowes on file. In a letter dated October 7, 1986, Charlotte Hildebrandt of Colonia US wrote to Ken Russo of Bowes, "We recently discovered that we have no written contract on file for Bowes & Company of New York. Therefore, we have prepared the attached Casualty Agency Agreement." Exh. 17 to Pl. Mem. in Supp. That Casualty Agency Agreement (the "1986 Agency Agreement") was signed by Claus Dannasch of Colonia and subsequently executed by Ken Russo of Bowes on December 12, 1986. The 1984 and 1986 Agency Agreements both provide: "The

agent agrees to pay to the Company all premiums accruing on insurance written under this Agreement, whether or not collected by the Agent from the insured." Exhs. 12, 17 to Pl. Mem. in Supp.

### DISCUSSION

#### I. THE INSUREDS' AND METZGER'S MOTIONS TO DISMISS

##### A. DIVERSITY

The complaint alleges that this Court has diversity jurisdiction over this action, alleging that Plaintiff Colonia is a foreign corporation and all of the Defendants are citizens of New York State. The Insureds, joined by Metzger, [\*14] move to dismiss for lack of subject matter jurisdiction on the grounds that the status of Colonia US, the domestic branch of Colonia organized and existing under the laws of New York, renders Colonia a citizen of the State of New York, thereby defeating complete diversity among the parties. The question is thus whether, for purposes of diversity, an alien insurer is considered a citizen of the state in which it has established a United States branch pursuant to the insurance laws of that state. The Insureds argue that the citizenship of Colonia should be determined based upon "either the actual residence of *Colonia Insurance Company, (U.S. Branch)* or its principal place of business." Insureds Mem. in Supp. at 14 (emphasis added).

28 U.S.C. § 1332(c) provides that, "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." For purposes of diversity jurisdiction a corporation may have only one principal place of business. *Bailey v. Grand Trunk Lines New England*, 805 F.2d 1097, 1100 (2d Cir. 1986), cert. denied, 484 U.S. 826 (1987). Where [\*15] a foreign corporation has both a worldwide principal place of business as well as a principal place of business within the domestic arena, courts "consistently have held that an alien corporation's *worldwide* principal place of business and not its principal place of business within the United States is controlling." *Id.* at 1100-01 (emphasis in original).

In the context of analyzing whether or not a claim could be brought under the Foreign Service Immunities Act against the Canadian National Railway ("CNR"), the

court in *Bailey* looked to 28 U.S.C. § 1332(c) to determine the citizenship of CNR. While it was undisputed that CNR maintained its worldwide principal place of business in Canada, appellant urged the court to look to CNR's principal place of business within the United States to determine its place of citizenship. 805 F.2d at 1100. The Court, however, citing *Arab International Bank & Trust Co. v. National Westminster Bank, Ltd.*, 463 F. Supp. 1145, 1147 (S.D.N.Y. 1979), looked to CNR's worldwide principal place of business and found that CNR was a citizen of Canada and not of the United States. 805 F.2d at 1101. [\*16]

In *Arab International*, plaintiff, a corporation organized under the laws of St. Vincent, the West Indies, and with its principal place of business in Kingstown, St. Vincent, brought an action against a British corporation whose principal place of business was in London and which had a branch office in New York. Plaintiff contended that defendant's New York office was its principal place of business within the United States and thus argued that defendant was a citizen of New York for purposes of federal diversity jurisdiction. 463 F. Supp. at 1147. The *Arab International* court found that diversity did not exist because both plaintiff and defendant were citizens of foreign states. *Id.* at 1148. The court noted: "The general rule is that if the corporation merely is licensed to do business in the second state, but the relevant legislation of that state requires less than local incorporation, it does not become a citizen of the second state for diversity purposes." *Id.* (quoting 13 Wright & Miller, *Federal Practice and Procedure* § 3623).

Colonia is a corporation organized and existing under the laws of the Federal Republic of [\*17] Germany with its worldwide principal place of business in Cologne. In July 1976, Colonia obtained its license as an "alien insurer." In accordance with New York State Insurance Law, and for the purpose of transacting insurance business in New York, Colonia established Colonia US as a "United States branch." From the date of its inception, and prior to the commencement of this action in 1989, Colonia US was not incorporated under the laws of New York, but conducted business as a domestic branch office of Colonia. <sup>8</sup> Pursuant to section 1507(b) of New York State Insurance Law, Colonia appointed North American Managers, Inc. ("NAM") to represent Colonia in the United States. *See* Exh. 7 to Pl. Mem. in Supp. Effective March 1984, Colonia terminated its management agreement with NAM, and entered into a

management agreement with Associated Insurance Management Corp. ("AIM"), Exh. 9 to Pl. Mem. in Supp., which remained in effect until January 1, 1991 when Colonia US became domesticated. AIM's administration of the affairs of Colonia US remained subject to the control and direction of the Board of Directors of Colonia in Cologne. Accordingly, pursuant to the reasoning in *Bailey* [\*18] and *Arab International*, Colonia is a citizen of Germany for purposes of diversity jurisdiction.

8 Effective January 1, 1991, Colonia US became domesticated as a United States Stock Corporation. *Dannasch Aff. P3*. That Colonia US eventually incorporated under New York law is irrelevant to this Court's determination of whether diversity jurisdiction exists. "Citizenship, for purposes of diversity, is measured from the date that suit is commenced." *Atlanta Shipping Corp. v. Chemical Bank*, 631 F. Supp. 335, 342 n.4 (S.D.N.Y. 1986), *aff'd*, 818 F.2d 240 (2d Cir. 1987).

Defendant Insureds' reliance on the case of *Zurich Insurance Co. v. New York State Tax Commission*, 534 N.Y.S.2d 515, 516 (App. Div. 1988), *appeal denied*, 541 N.Y.S.2d 985 (1989), in which the court held that the United States branch of a Swiss corporation "is treated as a separate entity for tax purposes," is misplaced. The *Zurich* court's decision, based upon New York [\*19] State Tax Law, does not bear on this Court's assertion of jurisdiction over an alien insurer that operates a United States branch in accordance with New York law. The issue of federal diversity jurisdiction was not an issue in *Zurich*, and the Insureds cite no case in which the *Zurich* analysis was applied in the context of determining whether diversity exists.

Accordingly, the Insureds' and Metzger's motions to dismiss for lack of diversity jurisdiction are denied.

## B. INDISPENSABLE PARTY

Defendant Insureds contend that this action should be dismissed under *Rule 19 of the Federal Rules of Civil Procedure* for the failure to join Colonia US as an indispensable party plaintiff. The Insureds argue that failure to include Colonia US in the lawsuit could create the possibility of duplicative liability for the Insureds in the event that Colonia US were to bring a separate action.

*Rule 19* sets forth a two-step inquiry for determining whether an action must be dismissed for failure to join an indispensable party. *Associated Dry Goods Corp. v. Towers Financial Corp.*, 920 F.2d 1121, 1123 (2d Cir. 1990). The Court must consider: (1) whether the party should [\*20] be joined if feasible, *Fed. R. Civ. P. 19(a)*, and if so (2) whether or not, in equity and good conscience, the action should proceed in the necessary party's absence, *Fed. R. Civ. P. 19(b)*. See 920 F.2d at 1123-24. Unless the threshold standard of *Rule 19(a)* is met, the Court need not consider whether dismissal under *Rule 19(b)* is warranted. *Id.* at 1123. In conducting its *Rule 19(a)* inquiry, the Court "must base its decision on the pleadings as they appear at the time of the proposed joinder." *Id.* at 1124 (quoting 7 Wright & Miller, *Federal Practice & Procedure* § 1604, at 40 (1986)).

*Rule 19(a)* provides in pertinent part:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's [\*21] ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Defendant Insureds cite no case law and submit no evidence establishing that Colonia US is a separate legal entity, such as a subsidiary, for purposes of *Rule 19*. As discussed above, Colonia US was not incorporated in New York prior to the initiation of this action, and *Zurich* does not provide support for the proposition that Colonia US is a separate legal entity for purposes of *Rule 19*.

In their reply memorandum, the Insureds argue that the evidence shows that Colonia US was a separate entity, primarily by showing that the name of Colonia US

appeared on the insurance policies at issue, and that Colonia US had its own New York office, referred to on its stationery as the "home office," and its own officers separate and apart from those of Colonia. See Insureds Reply Mem. at 3-4 (and exhibits cited). The Insureds also argue that "the terminology employed by the Court of Appeals [in *Stoddard v. Norske Lloyd Insurance Co.*, 242 N.Y. 148 (1926), [\*22] and *Moscow Fire Insurance Co. v. Bank of New York & Trust Co.*, 280 N.Y. 286 (1939), *aff'd*, 309 U.S. 624 (1940)] indicates, most clearly, that the Court of Appeals considers a United States Branch [of an insurance company] to be a subsidiary not a division." Insureds Reply Mem. at 6. It is not clear what the Insureds mean by "subsidiary" in this context. *Moscow Fire* and *Stoddard* cannot be used for the proposition that Colonia US is a separate legal entity for purposes of *Rule 19*. *Moscow Fire*, for example, concerned a Russian insurance company that had been terminated by the newly established Soviet government, and the rights to the surplus capital of that company's United States branch after the branch was liquidated. The *Moscow Fire* court found that New York insurance law requires that "before a foreign insurance corporation is permitted to do business here there must be a definite separation and division of its property and even its juristic personality." 280 N.Y. at 310. On these grounds, the court found that the Soviet confiscatory decree did not affect the property of the United States branch claimed, [\*23] which remained subject to the laws of New York State and was "immune from the control of any foreign power." *Id.* at 309-14; see also *Stoddard*, 242 N.Y. at 158-59 (concerning distribution of assets of an insolvent foreign insurance company). At most, *Moscow Fire* and *Stoddard* establish that domestic branches of foreign corporations are considered separate organizations for purposes of distribution of the property of the domestic branches; the cases do not address whether such branches are considered separate parties to a lawsuit for purposes of *Fed. R. Civ. P. 19*.

Moreover, while the Insureds cite cases showing that a court may dismiss an action for failure to join a subsidiary found to be an indispensable party, the "subsidiary" in each of the cases cited by the Insureds was a separately incorporated entity.<sup>9</sup> See *McCowan v. Sears, Roebuck & Co.*, 722 F. Supp. 1069, 1070-71 (S.D.N.Y. 1989) (cited by the Insureds); *Johnson & Johnson v. Coopervision, Inc.*, 720 F. Supp. 1116, 1117 (D. Del. 1989) (cited by the Insureds), *appeal dismissed*, 889 F.2d 451 (2d Cir. 1989); *Lopez v. Shearson Am.*

*Express, Inc.*, 684 F. Supp. 1144 (D.P.R. 1988) [\*24] (cited by the Insureds); see also, e.g., *Freeman v. Northwest Acceptance Corp.*, 754 F.2d 553, 556 (5th Cir. 1985) ("It is . . . undisputed that the [parent and subsidiary] corporations were not formally merged; rather, each retained its status as an incorporated entity."), cited in *McCowan*, 722 F. Supp. at 1073. Since subsidiaries are separate legal entities, they are capable of being sued in their own right, and therefore must be joined in an action if they are found to be indispensable parties. Here, the Insureds and Metzger do not dispute that Colonia US was not incorporated prior to the commencement of this action.

9 "Subsidiary" usually refers to a corporation, the voting stock of which is more than 50% owned or controlled by a parent company.

Accordingly, the Insureds and Metzger have not shown that Colonia US, the unincorporated, domestic branch of an alien insurer, is a separate legal entity and, as such, an indispensable party in the present litigation. The [\*25] motions to dismiss on this ground are denied.

## II. BOWES'S AND COLONIA'S MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is appropriate if the evidence offered demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The burden rests on the moving party to demonstrate the absence of a genuine issue of material fact, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970), and the Court must view the facts in the light most favorable to the non-moving party, *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

Defendant Bowes moves for summary judgment dismissing Colonia's claims against Bowes arguing that (1) the 1984 Agency Agreement requiring Bowes to pay all premiums on policies placed by Bowes to Colonia is unenforceable under the New York Statute of Frauds, (2) the 1986 Agency Agreement is not applicable to any premiums calculated on a retrospective basis, and (3) that the 1986 Agency Agreement is enforceable only by Colonia US. Colonia cross-moves for summary judgment on its claims [\*26] against Bowes on the grounds that the 1984 Agency Agreement is enforceable notwithstanding the Statute of Frauds and that, as a matter of law, Bowes is independently responsible to pay all premiums to

Colonia on policies placed by Bowes.

### A. STATUTE OF FRAUDS

The New York Statute of Frauds provides, in relevant part:

Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

. . . Is a special promise to answer for the debt, default or miscarriage of another person.

*N.Y. Gen. Oblig. Law § 5-701* (McKinney 1989). Bowes argues that the 1984 Agency Agreement is unenforceable (1) based upon the undisputed fact that it never executed the 1984 Agency Agreement that Colonia sent to it, and (2) on the ground that the 1984 Agency Agreement is a promise by Bowes to answer for the debt of another.

### 1. ENFORCEABILITY OF UNSIGNED AGREEMENT

Bowes argues that the 1984 Agency Agreement is unenforceable because Bowes "declined" to execute the 1984 Agency Agreement. Under New York law, the failure of one [\*27] party to sign an agreement does not immediately render the agreement void and unenforceable. "One who accepts and acts under a written agreement is bound by it even though he fails to sign it." *Steinberg v. Goldstein*, 116 N.Y.S.2d 6, 7 (Sup. Ct. 1952). In *Allen v. National Video, Inc.*, 610 F. Supp. 612, 631 (S.D.N.Y. 1985), the court stated, "A written contract need not be signed to be binding against a party, so long as the party indicates through performance of its terms or other unequivocal acts that it intends to adopt the contract." Thus an unsigned written agreement may be enforceable notwithstanding the applicable provision of the New York Statute of Frauds if the party attempting to enforce the contract shows (1) that there was part performance under the contract, and (2) that the performance was "unequivocally referable" to the alleged agreement. *American Bartenders Sch., Inc. v. 105 Madison Co.*, 463 N.Y.S.2d 424, 424 (1983).

Colonia argues that although Bowes did not sign the

1984 Agency Agreement, it is enforceable because Bowes operated under the agreement. The 1984 Agency Agreement provided, in pertinent part:

(1) Agent [\*28] has full power and authority to receive and accept proposals for insurance covering such classes of risks as the Company may, from time to time, authorize to be insured; to collect, receive and receipt for premiums on insurance tendered by the Agent to and accepted by the Company and to retain out of premiums so collected, as full compensation on business so placed with the Company, commissions at rates from time to time agreed upon between the Company and the Agent.

(2) The Agent is authorized to effect cancellation of insurance written by such Agent . . . for any non-payment of premium. . . .

(3) The Agent shall promptly forward to the Company all daily reports, endorsements and other evidences of agreements to insure or modifications of existing insurance.

(4) The Agent shall promptly comply with all instructions which he may from time to time receive from the Company with respect to the categories of risk to be insured, and with respect to any other matters relating to this Agreement.

Exh. 12 to Pl. Mem. in Supp. Colonia points to the following as evidence of Bowes's performance under the 1984 Agency Agreement: Bowes received numbered pre-printed blank insurance [\*29] policies from Colonia, which Bowes issued to its clients. *See* Exh. 14 to Pl. Mem. in Supp. Bowes collected and received premiums on the casualty insurance program for the Insureds' properties and retained commissions out of those premiums. Exh. 15 to Pl. Mem. in Supp. Bowes effected cancellation of the Insureds' policy for non-payment of premiums and reinstated the policy of the Defendant Insureds. Exhs. 33, 34 to Pl. Reply Mem. Bowes prepared and forwarded to Colonia daily reports, endorsements, and other evidences of agreements to insure or

modifications of existing insurance. Exh. 25 to Pl. Mem. in Supp., Exh. 29 to Pl. Reply Mem. Bowes received, accepted, and acknowledged in writing, instructions issued by Colonia to its Agents. Exh. 16 to Pl. Mem. in Supp. Thurston J. Millett, executive vice president and branch manager of Bowes at the time Bowes received the 1984 Agency Agreement, testified that Bowes was operating pursuant to the 1984 Agency Agreement. Millett Dep. at 103 (Exh. 13 to Pl. Mem. in Supp.).

Bowes has presented no evidence to contradict Millett's testimony or otherwise to show that Bowes did not operate under the 1984 Agency Agreement. Moreover, Bowes [\*30] makes no showing of specific reasons for declining to sign the 1984 Agency Agreement. The only indication of Bowes's dissatisfaction with the 1984 Agency Agreement was the objection of Raymond White, president of Bowes and Bowes Holdings, Inc. of Chicago, to authorizing a personal guarantee. Exh. 17 to Pl. Mem. in Supp. The personal guarantee, however, was embodied in a separate document from the 1984 Agency Agreement and thus White's refusal to authorize that guarantee does not support Bowes's contention that it was dissatisfied with the 1984 Agency Agreement. Millett Dep. at 103-13 (Exh. 13 to Pl. Mem. in Supp.). Moreover, Millett testified that White "said he would do a corporate guarantee without any problem." Millett Dep. at 106.

Bowes's performance as agent of Colonia is sufficient to constitute "part performance" of its obligations under the 1984 Agency Agreement, and such performance is "unequivocally referable" to the 1984 Agency Agreement. Accordingly, Bowes performed under the 1984 Agency Agreement, and that Agreement is enforceable by Colonia notwithstanding the New York Statute of Frauds.

## 2. INDEPENDENT PROMISE

Even if there was performance under the 1984 [\*31] Agency Agreement, Bowes argues that the New York Statute of Frauds precludes liability for outstanding premiums owed to Colonia. Under the 1984 Agency Agreement, Bowes contends, it is a guarantor of the debt, default, or miscarriage of another, namely the Insureds, and therefore the 1984 Agency Agreement must be signed in order to satisfy the Statute of Frauds. Colonia responds that it was agreed that Bowes was primarily and independently liable for all premiums on policies placed by Bowes as agent of Colonia and thus that the Statute of

Frauds does not apply.

Pursuant to New York law, a guarantee to answer for the debt of another person is unenforceable under the Statute of Frauds unless it is embodied in a written note or memorandum subscribed by the party sought to be charged. *Walker v. Roth*, 456 N.Y.S.2d 95, 95 (App. Div. 1982). It is undisputed that Bowes, the party to be charged, did not sign the 1984 Agency Agreement. Accordingly, the question is whether Bowes's obligation to pay all premiums to Colonia is an independent promise running from Bowes to Colonia, or whether Bowes guaranteed to pay debt of another (the Insureds) which, to be enforceable [\*32] under the Statute of Frauds, must be signed. Bowes's promise to Colonia is to be regarded as "original," and therefore beyond the purview of the Statute of Frauds, "only when the party sought to be charged clearly becomes, within the intention of the parties, a principal debtor primarily liable." *Culkin v. Smith*, 293 N.Y.S.2d 913, 915 (App. Div. 1968). "Whether the agreement is in fact an original and absolute one to pay the debt or merely collateral is to be determined from the surrounding facts in order to ascertain the intention of the parties." *Id. at 916*.

The undisputed facts indicate that Colonia looked to Bowes as the primary obligor for outstanding premiums and that Bowes acted as though it were independently and primarily liable. With respect to the invoicing and collection of premiums during the terms of the policies issued to the Insureds, Colonia invoiced Bowes, who in turn invoiced Metzger, who in turn invoiced Frenkel, who then billed the Insureds. Under this arrangement, the Insureds paid Frenkel, who paid Metzger, who paid Bowes, who paid Colonia. *See Exhs. 13, 20 to Pl. Mem. in Supp. Paragraph B(1) of the 1984 Agency [\*33] Agreement provides that,*

The Agent agrees to pay to the Company all premiums accruing on insurance written under this Agreement, whether or not collected by the Agent from the insured.

Exh. 12 to Pl. Mem. in Supp.

Paragraph B(3) of the 1984 Agency Agreement provides, in relevant part:

Accounts of money due the Company on

the business placed by the Agent with the Company are to be rendered monthly so as to reach the Company's Office not later than the 10th day of the following month; the balance therein shown to be due to the Company shall be paid not later than 60 days after the end of the month for which the account is rendered.

Exh. 12 to Pl. Mem. in Supp. Pursuant to this provision, Bowes, as agent, could write the policies on credit and remit payment to Colonia up as late as sixty days later. Such a relationship was construed to embody an "original undertaking" on the part of the agent, rather than a guarantee to pay the debt of another, in *Hershey v. Kennedy & Ely Insurance, Inc.*, 294 F. Supp. 554 (S.D. Fla. 1967). In *Hershey*, a liquidator of an insurer sought recovery of insurance premiums allegedly owed to the insurer by its [\*34] agent. A provision of the agency contract in *Hershey*, similar to paragraph B(3) of the 1984 Agency Agreement, provided that the entire balance of all premiums due on business conducted by the agent on behalf of the company be paid within sixty days of the month in which such premiums became due. *Id. at 558*. The court found that, pursuant to such an agreement, "any policies written by the agent upon credit were written at the agent's own risk as to whether or not the agent could or could not collect such premiums." *Id.* Accordingly, the court found, "the agent's liability is not that of a guarantor but is an original undertaking." *Id.* Paragraph B(3) of the 1984 Agency Agreement creates a similar relationship between Bowes and Colonia, and therefore Bowes's obligation to pay all premiums to Colonia is an original undertaking and not that of a guarantor.<sup>10</sup>

10 Were the understanding of the parties otherwise, the insurer would be taking credit risks on insureds with whom only the brokers or agents have personal relationships and are in a position to judge the insureds' ability to pay, and the brokers and agents would not have an incentive to obtain good business.

[\*35] Accordingly, the 1984 Agency Agreement is not rendered unenforceable by operation of the New York Statute of Frauds.

## B. RETROSPECTIVE PREMIUMS

Bowes and Colonia dispute the scope of Bowes's obligations pursuant to the 1984 and 1986 Agency

Agreements. Colonia relies on paragraph B(1) of both the 1984 and 1986 Agency Agreements, which states that Bowes is responsible to pay to Colonia "all premiums," as language that would include those premiums calculated on a retrospective rating plan. Bowes argues that its obligations under the 1984 and 1986 Agency Agreements do not extend to any premiums calculated on a retrospective basis because neither Agreement makes mention of retrospective premiums.

Both the 1984 and 1986 Agency Agreements unequivocally state that Bowes is obligated to pay "all premiums" to Colonia. Exhs. 12, 17 to Pl. Mem. in Supp. As a result of a substantial number of claims received by Colonia under the 1984 DBG Policy, the policy was subject to cancellation. An endorsement was subsequently added to the policy requiring the calculation of premiums according to a retrospective rating plan. Exh. 25 to Pl. Mem. in Supp. With the exception of the premium for [\*36] the first interim adjustment policy for the term December 1, 1984 through August 31, 1985, all of the premiums billed under the retrospective rating plan remain unpaid. Bowes presents no affidavits supporting its contention that premiums calculated on a retrospective basis are not included under its obligation to pay "all premiums" to Colonia. At most the affidavits state that payment of "retrospective premiums" is not specified in the Agency Agreements or any other agreement. Nor has Bowes presented any documentary evidence to corroborate its contentions.<sup>11</sup> This opposition is not sufficient under *Fed. R. Civ. P. 56(e)*.

11 As noted above, Raymond White's refusal to authorize a separate personal guarantee does not establish that "the *reason* Bowes did not sign the 1984 document was that Bowes disagreed with the wording of the guarantee provision" in that Agreement. Bowes Reply Mem. at 11 (citing Millett Dep.) (original emphasis).

Accordingly, Colonia's motion for summary judgment is granted and Bowes's motion [\*37] for summary judgment is denied with respect to Bowes's obligation to Colonia for the payment of premiums calculated on a retrospective rating plan.

### C. NAMED OBLIGEE

Bowes argues that Colonia is not a party to the 1986 Agency Agreement and therefore cannot sue to enforce that Agreement. Bowes points out that only the named

obligee is entitled to enforce a special guarantee and asserts that in this case Colonia US and not Colonia is the named obligee, since only the name of Colonia US appeared on the Agreement, Colonia US was designated as the signing party, and the guarantee provision in the 1986 Agency Agreement obligated Bowes (in certain instances) to pay Colonia US. Bowes Mem. in Supp. at 15-17.

*Ariel Maritime Group, Inc. v. Zust Bachmeier*, 762 F. Supp. 55, 61 (S.D.N.Y. 1991), and *Federal Deposit Insurance Corp. v. Schuhmacher*, 660 F. Supp. 6, 8 (E.D.N.Y. 1984), cited by Bowes, state that where a document specifically names the obligee it is a "special" guarantee upon which only the named obligee may rely. However, in *Ariel*, the two entities at issue were clearly separate entities, only one of which was named as the obligee. [\*38] See 762 F. Supp. at 56.<sup>12</sup> Bowes, citing *Zurich*, 534 N.Y.S.2d at 516, argues that Colonia US was "treated as a separate business entity from Colonia Insurance, A.G. under New York law." Bowes Mem. in Supp. at 18. As discussed above, *Zurich* states that a United States branch of an insurance company is treated as a separate entity for tax purposes and must keep certain assets in trust for the protection of its policyholders. *Zurich* does not hold, however, that a domestic branch is a separate legal entity for purposes of enforcing a special guarantee. Colonia points out that in order to do insurance business in New York it had to form a "United States branch" to hold assets in New York for the protection of its policyholders here, and that Colonia US "is *not* a separate legal entity" for other purposes. Pl. Mem. in Supp. at 19 (original emphasis). Accordingly, Bowes's motion for summary judgment on the ground that Colonia is not a party to the 1986 Agency Agreement is denied.

12 *Schuhmacher* did not address the question of who was entitled to rely on the special guarantee at issue there. In *Schuhmacher*, the court denied plaintiff's motion for summary judgment because a question of fact had been raised as to whether the note at issue was covered by the special guarantee. See 660 F. Supp. at 9.

[\*39] III. METZGER'S AND FRENKEL'S MOTIONS FOR SUMMARY JUDGMENT AGAINST COLONIA; COLONIA'S CROSS-MOTION FOR SUMMARY JUDGMENT AGAINST METZGER AND FRENKEL

Defendants Metzger and Frenkel move for summary judgment against Colonia on the grounds that Colonia is merely an "incidental" rather than an "intended" beneficiary of the Metzger and Frenkel Agreements and therefore does not have standing to enforce those Agreements. Colonia cross-moves for summary judgment against Metzger and Frenkel on the grounds that Colonia is an "intended" beneficiary of the Metzger and Frenkel Agreements and therefore has standing to enforce them.

It is well-settled that the obligation to perform to the third-party beneficiary need not be expressly stated in the contract. *Trans-Orient Marine Corp. v. Star Trading & Marine Inc.*, 925 F.2d 566, 573 (2d Cir. 1991). The court in *Fourth Ocean Putnam v. Interstate Wrecking*, 495 N.Y.S.2d 1 (1985), set forth New York law with respect to third-party beneficiaries. There the court adopted the distinction drawn in the Restatement (Second) of Contracts between "intended beneficiaries," those who have the right to enforce [\*40] contracts inuring to their benefit, and "incidental beneficiaries," those without rights to enforce contracts. *See id.* at 4-5. According to the Restatement, a beneficiary of a promise is an intended beneficiary

if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promise will satisfy an obligation of the promise to pay money to the beneficiary; or

(b) the circumstances indicate that the promise intends to give the beneficiary the benefit of the promised performance.

*Septembertide Publishing, B.V. v. Stein & Day, Inc.*, 884 F.2d 675, 679 (2d Cir. 1989) (quoting *Restatement (Second) of Contracts* § 302). The *Fourth Ocean Putnam* court noted, "The third-party beneficiary concept arises from the notion that 'it is just and practical to permit the person for whose benefit the contract is made to enforce it against one whose duty it is to pay' or perform." 495 N.Y.S.2d at 4 (citation omitted).

In November 1984, Metzger sought to place through Bowes the 1984 DBG policy. Bowes requested that Metzger execute a correspondent [\*41] agreement. On December 26, 1984 Metzger forwarded to Bowes a typed copy of the Metzger Agreement containing changes made by Metzger's attorneys, including the deletion of a personal guarantee. *See* Exh. 19 to Pl. Mem. in Supp. On January 3, 1985 Bowes forwarded to Metzger its copy of the signed Metzger Agreement. The Metzger Agreement provides, in pertinent part:

3) Correspondent agrees to make payment to Bowes of the net premium of each item of coverage effected by Bowes at the request of the Correspondent within 30 days from the invoice date of such item whether or not the premium therefor has been collected by Correspondent from the assured.

...

7) Upon the execution of this agreement by Correspondent, the terms hereof shall apply to all coverages then in effect or which may thereafter be effected by Bowes.

Exh. 19 to Pl. Mem. in Supp. According to Geoffrey J. Bennett, the former vice president of Bowes, in September 1985 Bennett "became concerned over the poor payment history on the DBG Risk." Bennett Aff. P5 (Exh. 31 to Pl. Reply Mem.). Bennett contacted Metzger and Frenkel and requested that they execute correspondent agreements with Bowes "for the [\*42] purpose of making certain that Bowes was paid the premiums due on the risk, and that Bowes' obligation to pay such premiums to Colonia was met." Bennett Aff. P5. Metzger advised that it had already executed such an agreement with Bowes. Bennett Aff. P6. Frenkel returned a signed copy of the Frenkel Agreement. Exh. 22 to Pl. Mem. in Supp.

Metzger and Frenkel have presented no substantive evidence to support the proposition that, with respect to the Insureds's policies, Colonia was merely the incidental beneficiary of their obligation "to make payment to Bowes of the net premium of each item of coverage effected by Bowes" whether or not the insured paid the premium to Metzger or Frenkel. Exh. 19, 22 to Pl. Mem.

in Supp. As Colonia points out, "anyone in the insurance business knows that premiums are paid to the insurance carrier, in this case, Colonia." Pl. Mem. in Supp. at 53. Metzger and Frenkel argue that Colonia is not an intended third-party beneficiary because (1) there is no evidence that Bowes intended to give Colonia the benefit of the Metzger Agreement, and (2) there is no obligation on the part of Bowes to pay to Colonia the retrospective premiums which are at issue. [\*43] As discussed *supra*, Bowes, as agent of Colonia, did intend to pay to Colonia the premiums received under the Metzger Agreement, and Bowes is obligated to pay retrospective premiums to Colonia as well.

Metzger's argument that the Metzger Agreement was not necessarily for the benefit of Colonia because Bowes had contracts with various carriers does not accord with the evidence. Regardless of whether Bowes was the agent for carriers in addition to Colonia, it is clear that the Metzger Agreement was signed as a condition to the issuance of the 1984 DBG Policy, *see* Exh. 19 to Pl. Mem. in Supp., and Colonia was clearly the insurance carrier and intended beneficiary of that policy. Colonia invoiced Bowes for premiums accruing under that policy, and Colonia was identified as the insurance company on the policy and on documents received by DBG on behalf of the Insureds, such as the Notices of Cancellation of March 1985 and July 1985 issued by Bowes and addressed to DBG. *See* Exh. 23 to Pl. Mem. in Supp.; Exh. 33 to Pl. Reply Mem.

In its reply memorandum, Metzger argues that the Metzger Agreement was not intended to apply to the payment of retrospective premiums, because the [\*44] 1984 DBG Policy was not originally written on a retrospective premium basis and Metzger was not involved in the negotiations between the Insureds and Colonia pursuant to which the policy was rewritten and reinstated on a retrospective premium basis. Metzger Reply Mem. at 1-4. Metzger contends that the retrospective premiums therefore did not relate to coverage "effected by Bowes at the request of the Correspondent [Metzger]" under the Metzger Agreement. 13 Exh. 19 to Pl. Mem. in Supp.

13 Frenkel similarly argues: "It is undisputed that Frenkel never requested Bowes to effect any coverage for the D.B.G. defendants. Rather, at all times, Metzger made all requests to Bowes for D.B.G. coverage." Frenkel Mem. in Supp. at 8.

Thus Frenkel contends that "none of the D.B.G. coverage was 'effected by Bowes at the request of the correspondent [Frenkel]." Frenkel Mem. in Supp. at 9-10.

The deposition testimony Frenkel cites demonstrates that the Insureds submitted claims to Frenkel, who submitted claims to Metzger, who submitted claims to Bowes. The fact that Frenkel had no contact with Bowes and Metzger had no contact with the Insureds by virtue of this chain of communication cannot excuse both Frenkel and Metzger from liability on the unpaid premiums. The Metzger and Frenkel Agreements do not provide that such direct communications were necessary to trigger the duty of either Metzger or Frenkel to pay. Moreover, it was Frenkel who was directly involved in the negotiations leading to the change to a retrospective premium basis. *See* Antonacci Dep. at 160-62; Antonacci Aff., Exh. F.

[\*45] The endorsement providing for the change to a retrospective premium basis states: "This endorsement . . . forms a part of Policy No. GLA100556 [the 1984 DBG Policy] of the Colonia Insurance Company issued to D.B.G. Management Corp., Et al. by Colonia Insurance Company." Exh. 25 to Pl. Mem. in Supp. Frenkel forwarded the Endorsement to the Insureds by letter dated May 31, 1985. Antonacci Aff., Exh. F. The endorsement was effective December 1, 1984. Exh. 25 to Pl. Mem. in Supp. Thus, coverage under the 1984 DBG policy had been changed to a retrospective premium basis at the time Bennett sent his letter, dated September 19, 1985, to Metzger requesting that correspondent agreement be signed if Bowes were to continue providing coverage to the Insureds. Exh. 24 to Pl. Mem. in Supp. Bennett's letter stated, "We would bring your attention specifically to Clause 3. In the present difficult time, it is imperative that premium payments are due on time." Exh. 24 to Pl. Mem. in Supp. Metzger responded by forwarding a copy of the Metzger Agreement that had already been executed. Metzger did not object to the change to a retrospective premium basis or indicate that it did not consider [\*46] itself responsible for premiums calculated on a retrospective basis. *See* Exh. 24 to Pl. Mem. in Supp.

Accordingly, Metzger's and Frenkel's motions for summary judgment dismissing the complaint are denied, and Colonia's motion for summary judgment on its

claims against Metzger and Frenkel is granted.

#### **IV. FRENKEL'S MOTION FOR SUMMARY JUDGMENT DISMISSING INSUREDS' CROSS-CLAIMS**

The Insureds have asserted cross-claims against Frenkel, alleging that Frenkel negligently performed its duties as broker. The Insureds argue that (1) Frenkel did not explain adequately the retrospective nature of insurance policies, and (2) Frenkel did not provide notice to the Insureds that they were jointly and severally liable under the policies. Frenkel moves for summary judgment dismissing the cross-claims by the Insureds on the ground that Frenkel adequately performed its professional duty as the Insureds' broker.

##### **A. DUTY OF CARE AND RETROSPECTIVE PREMIUMS**

Under New York law, a broker owes to his or her client a duty of reasonable care and is "required to exercise good faith, reasonable diligence and such skill as is ordinarily possessed by persons of common capacity engaged in the [\*47] same business." *Blonsky v. Allstate Ins. Co.*, 491 N.Y.S.2d 895, 897 (Sup. Ct. 1985) (citing *Heinemann v. Heard*, 50 N.Y. 27, 35; *MacDonald v. Carpenter & Pelton, Inc.*, 298 N.Y.S.2d 780). The following, undisputed facts show that Frenkel adequately performed under the required standard of reasonable care with respect to the Insureds: (1) DBG, on behalf of the Insureds, received all Colonia policies from Frenkel, Forte Aff., Exh. 7; (2) DBG received all retrospective rating plan endorsements, retrospective billing adjustments, and premium notices, Antonacci Aff., Exh. J; Forte Aff., Exh. 7; (3) DBG received correspondence from Frenkel regarding the Colonia policies and the endorsements, Forte Aff., Exh. 7; and (4) Frenkel met with the Insureds to discuss the policies at issue and presented the Insureds with the opportunity to ask questions about the policies and to request that changes be made. The Insureds neither questioned nor sought clarification concerning their obligations under the retrospective premium billings.<sup>14</sup>

<sup>14</sup> In this connection it is noted that DBG was controlled by principals who were lawyers and businessmen heavily engaged in real estate investment and consequently familiar with property insurance coverage.

[\*48] The Insureds have presented no substantive evidence indicating that Frenkel did not perform its duties reasonably and with due diligence as required by law with respect to the retrospective rating plan.

##### **B. JOINT AND SEVERAL LIABILITY**

In their memorandum in opposition, the Insureds argue that Frenkel was negligent in failing to provide adequate notice or explanation that the Insureds were jointly and severally liable for premium payments under the policies issued on a retrospective basis. The Insureds argue (1) that the policies issued by Colonia were "non-conforming" to the binders issued by Frenkel, in that the binders did not specifically state that there was joint and several liability for each of the Insureds, while the subsequent endorsements did provide for joint and several liability, and (2) that the joint and several liability clause is vague and ambiguous.

The Insureds do not show that an insurance policy or endorsement must conform exactly to the preliminary binder. Commentators have noted that "a binder does not contain the provisions nor the formalities of a policy. . . . The terms and provisions which control in the construction of the coverage afforded by [\*49] a binder are those contained in the ordinary form of policy usually issued by the company." 12A Appleman, *Insurance Law & Practice* § 7232 (1981) (revised volume). The binder issued to Frenkel is merely a one-page summary outlining the basic financial terms of the policy.

Moreover, the Insureds do not support their assertion that the joint and several liability clause is vague and ambiguous. Endorsement #15 states, "After each calculation of retrospective premium, you will pay promptly the amount due us or we will refund the amount due you. *Each insured is responsible for the payment of all standard premium and the retrospective premium calculated under this endorsement.*" Antonacci Aff., Exh. G (emphasis added). It is undisputed that the Insureds received a copy of this endorsement, that Frenkel met with the Insureds subsequent to the transmission and receipt of policy endorsements, and that the Insureds, on more than one occasion, were offered the opportunity to raise questions and recommend changes. The language of the endorsement is plain. Moreover, as a matter of common sense, it could not have been intended that the individual members of a conglomeration of business [\*50] entities and limited partnerships, whose holdings were covered under one comprehensive policy, would not

each be liable for payment of the overall premium. Under such a policy, if any entity went bankrupt, the other entities would be relieved of their obligation to pay the bankrupt entity's portion of the premium.

The Insureds argue that the fact that each Insured was separately billed under the policies indicates that the Insureds were not intended to be jointly and severally liable. Frenkel contends that this billing and payment arrangement "was devised at D.B.G.'s request for D.B.G.'s own internal accounting purposes," a contention supported by the statement in the Stipulation and Admission of Facts of Gary Herman of DBG and general partner of certain Insureds: "At D.B.G.'s request, Frenkel . . . forwarded to each insured, individual premium invoices reflecting the insured's allocated share of the entire policy premium." Forte Aff., Exh. 7. This method of billing does not establish an agreement between Frenkel and the Insureds that each Insured would only be liable for its pro-rata share.

Accordingly, Frenkel's motion for summary judgment dismissing the cross-claims of [\*51] the Insureds is granted.

### **CONCLUSION**

For the foregoing reasons, the Insureds' and Metzger's motions to dismiss the complaint are denied. Bowes's motion for summary judgment dismissing Colonia's claims against Bowes is denied. Colonia's motions for summary judgment as to its claims against Bowes, Metzger, and Frenkel are granted. Metzger's and Frenkel's motions for summary judgment dismissing Colonia's claims against them are denied. Frenkel's motion for summary judgment dismissing the cross-claims by the Insureds is granted.

All counsel are to attend a pre-trial conference on September 3, 1992 at 9:00 a.m. in Courtroom 302.

IT IS SO ORDERED.

Dated: New York, New York, August 7, 1992

Robert P. Patterson, Jr.

U.S.D.J.





LEXSEE 2006 U.S. DIST. LEXIS 61254

**HEWLETT-PACKARD COMPANY, Plaintiff, v. CAPITAL CITY MICRO, INC.,  
MARTIN MEEKS, D.E.W. DISTRIBUTING CO., INC. d/b/a P & E  
DISTRIBUTING CO. and DAVID E. WELKER, Defendants.**

**Civil No. 3-04-0779**

**UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF  
TENNESSEE, NASHVILLE DIVISION**

**2006 U.S. Dist. LEXIS 61254**

**August 28, 2006, Filed**

**PRIOR HISTORY:** *Hewlett-Packard Co. v. Capital City Micro, Inc.*, 2006 U.S. Dist. LEXIS 3162 (M.D. Tenn., Jan. 18, 2006)

**COUNSEL:** [\*1] For Hewlett-Packard Co., Inc., Plaintiff: Adam E. Lyons, Brownstein Hyatt & Farber, P.C., Albuquerque, NM, US; John R. Wingo, Frost, Brown & Todd, LLC, Nashville, TN; David J. Antczak, Drinker, Biddle & Reath, Philadelphia, PA.

For D.E.W. Distributing Company, Inc., doing business as P&E Distributing Company, David E. Welker, Defendant: Ben S. Fletcher, III, Fletcher, Cotthoff & Willen, Hopkinsville, KY; Philip D. Irwin, Kendra E. Samson, Neal & Harwell, Nashville, TN.

**JUDGES:** ROBERT L. ECHOLS, UNITED STATES DISTRICT JUDGE.

**OPINION BY:** ROBERT L. ECHOLS

**OPINION**

**MEMORANDUM**

Pending before the Court is Plaintiff Hewlett-Packard's ("HP") Motion for Entry of Judgment by Default against Defendant Capital City Micro, Inc. (CCM) on Count I and II of the Complaint (Docket Entry No. 124). By way of that Motion, HP seeks specified

damages against CCM in relation to Counts I and II of HP's Complaint, as well as dismissal of Counts III and IV of the Complaint as those counts relate to CCM. CCM has not responded to the Motion.

**I. FACTUAL BACKGROUND**

HP commenced this action to recover the damages that it and its predecessor-in-interest, Compaq Computer Corporation ("Compaq"), allegedly [\*2] incurred as a consequence of their sales of products to CCM, a former reseller for both HP and Compaq. According to the Complaint, a contractual relationship existed with CCM, whereby CCM was authorized to resell HP and Compaq products only to "end-users," that is, persons or entities that use the products themselves and do not resell them. However, in 2001 and 2002, after CCM purchased products from HP and Compaq at significantly-discounted prices on the express condition that the products would be resold to the designated end-user, Defendant D.E.W. Distributing Co., Inc. d/b/a P&E Distributing Co. ("P&E") and CCM resold the items instead to computer dealers that were not end-users. HP then filed a four-count Complaint in this Court.

In Counts I and II of the Complaint, HP claims that CCM breached its contractual obligations to HP and Compaq by selling to computer dealers which were not end users. Counts III and IV allege fraud and civil conspiracy against not only CCM, but also three non-defaulting defendants, P&E, David Welker

("Welker") and Martin Meeks ("Meeks").

CCM has not answered or otherwise responded to the Complaint. Accordingly, HP requested the entry of a default against [\*3] CCM which the Clerk granted on November 10, 2004 (Docket Entry No. 37). In doing so, the Clerk noted that if HP were subsequently to seek a default judgment against CCM, any such judgment would have to take into consideration the rule announced in *Frow v. De La Vega*, 82 U.S. 552, 21 L. Ed. 60 (1872) relating to the entry of a default judgment in multi-defendant cases.

With respect to the remaining Defendants, the record reflects that HP has compromised and settled all of its claims against Defendants P&E and its principal, Welker, and an Agreed Order of Dismissal of those claims was entered by the Court on February 17, 2006. (Docket Entry No. 123). On June 6, 2006, this Court entered an Order granting HP's request that the claims against Martin be dismissed with prejudice pursuant to *Rule 41(a) of the Federal Rules of Civil Procedure*. (Docket Entry No. 127). Consequently, the only remaining claims are those against Defendant CCM.

## II. APPLICATION OF LAW

As indicated, HP has moved for judgment by default with respect to Counts I and II. It also requests that the claims against CCM set forth in Counts III and IV be dismissed.

*Rule 41(a)(1)* [\*4] provides that a Plaintiff may dismiss a claim against a party before service of an answer. *Rule 41(a)(2)* in turn provides that an action can be dismissed at Plaintiff's instance, even after the filing of an answer, upon such terms and conditions as the Court deems appropriate. In this case, CCM has failed to answer or enter an appearance and hence voluntary dismissal of claims against it is warranted. Moreover, given CCM's failure to participate in this action, the Court finds that dismissal of Counts III and IV against it is proper.

With the conclusion that dismissal of Counts III and IV is appropriate, the rule expressed in *Frow v. De La Vega*, 82 U.S. 552, 21 L. Ed. 60 (1872) relating to default judgments in cases involving multiple defendants is not an issue. In *Frow*, the Supreme Court held that a default judgment in multiple defendant cases is inappropriate where there is the possibility of inconsistent verdicts.

Unlike *Frow*, this is not a situation where other, non-defaulting defendants may prevail on the merits of the claim (even forgetting that the claims against the remaining Defendants have been dismissed) because Counts I and II of the Complaint are against [\*5] CCM only and involve contracts to which none of the other defendants are parties.

Because CCM has failed to answer or otherwise defend, the well-pleaded allegations in the Complaint are accepted as true. *Boonville Convalescent Ctr., Inc. v. Sherwood Healthcare Corp.*, 2004 U.S. Dist. LEXIS 13969, 2004 WL 162512 \*3 (S.D. Ind. 2004); *Kelley v. Carr*, 567 F.Supp. 831, 840 (W.D. Mich. 1984). In this case, the Complaint sets forth allegations indicating that CCM breached its contracts with HP and Compaq. There remains the question of damages.

*Rule 55(b)(2) of the Federal Rules of Civil Procedure* "states only that a court may conduct a hearing to determine the amount of damages." *Olive v. Lyttle*, 48 Fed. Appx. 591, 593 (7th Cir. 2001) (italics in original). "It is, of course, well settled that a court, in lieu of a hearing, may rely on detailed affidavits and documentary evidence, along with its own personal knowledge of the record." *Szatkowski v. Maxwell's Bar & Grill/Rid Enters.*, 2006 U.S. Dist. LEXIS 31969, 2006 WL 1389772 \*1 (W.D.N.Y. 2006). Thus, a hearing is not necessary to establish damages where the court is "ensured that [\*6] there [i]s a basis for the damages specified in the default judgment." *Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp.*, 109 F.3d 105, 111 (2d Cir. 1997)(collecting cases).

HP has presented the Affidavit of Robert Colesberry who was the Rebate Manager for HP's Big Deal Program when HP maintained the special pricing program known as the "Big Deal" Program. After HP merged with Compaq in 2002, Colesberry's job duties included oversight of Compaq's special pricing program called TOSS. (Colesberry Aff. PP 2-5).

Attached to Colesberry's Affidavit are HP Claim Reconciliation Statements which he indicates are true and correct copies of computer records setting forth, on a line-by-line basis, product and pricing information for sales to resellers under the "Big Deal Program." (*Id.* 7). Under the "Big Deal Program," CCM obtained a "Big Deal" discount off of HP's standard reseller discount and HP's distributors passed the "Big Deal" discount to CCM on HP's behalf. (*Id.*) From the "Extended Rebate

Amount" column on the Claim Reconciliation Statements which sets forth the amount that HP paid its distributors to reimburse the distributors for extending the [\*7] "Big Deal" discounts to CCM, Colesberry indicates that the total amount of "Big Deal" discounts that HP extended to CCM was \$ 2,935,222.00. *Id.*

With regard to the "TOSS" discounts that Compaq provided to CCM in 2002, Colesberry states that though computer records relating to the TOSS rebates were not found after the merger, employees obtained a record which contained a summary of rebate reports for CCM's purchases of Compaq products in 2002 for resale to P&E. (*Id.* PP 9-10). That report identifies the categories of products that CCM purchased from Compaq, the quantities involved per product category, and the total "TOSS" discount (identified as "Total Rebate") that Compaq provided to CCM per product category. *Id.* Colesberry states that the "TOSS" discounts given to CCM totaled \$ 5,738,966.00. (*Id.* P 11).

Based upon the evidence presented by HP, the Court finds that HP gave CCM \$ 2,935,222.00 in "Big Deal" discounts to which CCM was not entitled. The Court further finds that CCM received from Compaq, HP's predecessor-in-interest, \$ 5,738,966.00 in discounts to which CCM was not entitled. HP will be awarded those amounts.

In its Motion, HP also seeks post-judgment interest [\*8] at the rate of 10% per annum. However, no basis is given for that figure and the Complaint only seeks interest "at the legal rate[.]" (Docket Entry No. 1 at 25, 204). Accordingly, HP will be awarded post-judgment interest at the prevailing federal legal rate.

#### IV. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Entry of Default Judgment against Defendant CCM on Counts I and II of the Complaint (Docket Entry No. 124) will be granted. Judgment will be entered in favor of Plaintiff and against CCM on Count I of the Complaint in the amount of \$ 2,935,222.00, together with annual post-judgment interest at the prevailing federal legal rate. Judgment will also be entered in favor of Plaintiff and against CCM on Count II of the Complaint in the amount

of \$ 5,738,966.00, together with annual post-judgment interest at the prevailing federal legal rate. Counts III and IV of the Complaint will be dismissed as against CCM.

An appropriate Order will be entered.

ROBERT L. ECHOLS

UNITED STATES DISTRICT JUDGE

#### ORDER

For the reasons set forth in the Memorandum issued contemporaneously herewith, the Court hereby rules as follows:

1. Plaintiff's Motion for Entry [\*9] of Default Judgment against Defendant Capital City Micro, Inc. on Count I and II of the Complaint (Docket Entry No. 124) is hereby GRANTED;

2. Judgment is entered in favor of Plaintiff and against Capital City Micro, Inc. on Count I of the Complaint in the amount of \$ 2,935,222.00, together with annual post-judgment interest at the prevailing federal legal rate;

3. Judgment is entered in favor of Plaintiff and against Capital City Micro, Inc. on Count II of the Complaint in the amount of \$ 5,738,966.00, together with annual post-judgment interest at the prevailing federal legal rate;

4. Pursuant to *Rule 41 of the Federal Rules of Civil Procedure*, Counts III and IV of the Complaint are DISMISSED AS AGAINST Capital City Micro.

This case is hereby DISMISSED WITH PREJUDICE subject to Plaintiff's right to pursue supplemental proceedings pursuant to the Judgment entered in its favor.

It is so ORDERED.

ROBERT L. ECHOLS

UNITED STATES DISTRICT JUDGE



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CP Sec. 2690 Default Judgments in Actions Involving Several Defendants

**\*27191 FEDERAL PRACTICE & PROCEDURE**  
VOLUME 10A. FEDERAL RULES OF CIVIL PROCEDURE  
CURRENT THROUGH THE 2008 UPDATE  
CHAPTER 8. JUDGMENT  
RULE 55. DEFAULT  
C. DEFAULT JUDGMENTS

**Sec. 2690 Default Judgments in Actions Involving Several Defendants**

**Primary Authority**

Fed. R. Civ. P. 55

**Forms**

West's Federal Forms ss 4661 to 4665

When an action is brought against several defendants, charging them with joint liability, a question may arise as to the effect of a default by fewer than all defendants. The leading Supreme Court decision on the subject is *Frow v. De La Vega*. [FN1] In that case, appellant was one of fourteen defendants to a bill filed by appellee charging eight of them, including appellant, with conspiracy to defraud. All defendants answered on the merits, except appellant who defaulted. The trial court entered a decree *pro confesso* followed by a final decree absolute against him. The Supreme Court reversed on the issue whether a court could enter a final decree on the merits against one defendant before the cause was fully adjudicated as to the others. In its opinion the Court said:

The true mode of proceeding where a bill makes a joint charge against several defendants, and one of them makes default, is simply to enter a default and a formal decree *pro confesso* against him, and proceed with the cause upon the answers of the other defendants. The defaulting defendant has merely lost his standing in court. He will not be entitled to service of notices in the cause, nor to appear in it in any way. He can adduce no evidence; he cannot be heard at the final hearing. [FN2]

As a general rule then, when one of several defendants who is alleged to be jointly liable defaults, judgment should not be entered against that defendant until the matter has been

adjudicated with regard to all defendants, or all defendants have defaulted. [FN3] The court in Frow stated that:

[I]f the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike -- the defaulter as well as the others. If it be decided in the complainant's favor, he will then be entitled to a final decree against all. But a final decree on the merits against the defaulting defendant alone, pending the continuance of the cause, would be incongruous and illegal. [FN4]

**\*27192** The Court previously had said that if a final judgment could be entered, then this absurdity might follow: "there might be one decree of the court sustaining the charge of joint fraud committed by the defendants, and another decree disaffirming the said charge, declaring it to be entirely unfounded and dismissing the complainant's bill. And such an incongruity, it seems, did actually occur in this case." As the Court noted, "after this final decree against the appellant, the court proceeded to try the issues made by the answers of the other defendants, and decided the merits of the cause adversely to the complainant and dismissed his bill." [FN5]

Thus, a plaintiff who prevails on liability against the nondefaulting defendants is entitled to a judgment against both the defaulting and nondefaulting parties. [FN6] On the other hand, if the action is dismissed, it should be dismissed as to the defaulting party as well as the remaining defendants. [FN7] Similarly, a summary judgment in favor of the answering defendants will accrue to the benefit of the defaulting defendant. [FN8] The Frow approach also applies when the claim for relief fails for lack of proof. In *Davis v. National Mortgagee Corporation*, [FN9] the court said, when the liability of defendants would have been joint had any been found, dismissal of the complaint for lack of proof disposed of the case against all defendants, including those who had defaulted.

On the other hand, if the nondefaulting defendant's defense is a personal one -- infancy; for example -- and would not be available to the defaulting defendant, a decision in favor of the former defendant on the basis of that defense would not inure to the benefit of the latter defendant. A judgment may be entered against the defaulting party subject to the limitations of Rule 54(b), [FN10] which governs judgments on multiple claims or involving multiple parties.

Although the rule developed in the Frow case applies when the liability is joint and several, it probably can be extended to situations in which several defendants have closely related defenses. [FN11] When that is the case, entry of judgment also

should await an adjudication of the liability of the nondefaulting defendants. In Baker v. Old National Bank of Providence, Rhode Island, [FN12] a suit was brought by the receiver of a national bank against stockholders to recover an assessment imposed by the comptroller. Although the case did not involve a default and thus is applicable only by analogy, the court said:

**\*27193** as all the defendants are interested in the same underlying questions, there are serious objections to having a case of this kind come up by several successive appeals, on one of which different phases might be presented from those presented on another, leading to inconsistent results. The proper way is to hold the suit for one ultimate decree \* \* \*.  
[FN13]

In the previously discussed cases an entry of default against one jointly liable defendant among several is not a final judgment, and hence, is not appealable. The claim must be disposed of as to all defendants before a final appealable judgment can be entered. [FN14] However, when one party defaults while the action is still pending as to the others and the liability is several, relief may be available against each defendant and a judgment may be entered against the defaulting party. The liability of one defendant can be adjudicated without affecting the rights of others and a final and appealable decree may be entered against the one found to be liable. [FN15]

The key in deciding whether to extend Frow outside situations in which liability is joint and several is to recognize that the Frow principle is designed to apply only when it is necessary that the relief against the defendants be consistent. If that is not the case, then a default against one defendant may stand, even though the remaining defendants are found not liable. [FN16]

[FN1] **Frow case**

1872, 15 Wall. (82 U.S.) 552, 21 L.Ed. 60.

**See also**

Champlin v. Tilley, C.C.D.Conn.1809, 5 Fed.Cas. 436 (No. 2586).

[FN2] **Standing lost**

15 Wall. (82 U.S.) at 554 (per Bradley, J.).

**See also**

U.S. for Use of Hudson v. Peerless Ins. Co., C.A.4th, 1967, 374 F.2d 942.

[FN3] **Against all defendants**

Frow v. De La Vega, 1872, 15 Wall. (82 U.S.) 552, 21 L.Ed. 60.

Pfanenstiel Architects, Inc. v. Chouteau Petroleum Co., C.A.8th, 1992, 978 F.2d 430.

Default judgment should not have been entered against one defendant who was allegedly jointly and severally liable with answering defendants for securities law violations in that consistent damage awards on the same claim were essential among joint and several tort-feasors. Hunt v. Inter-Globe Energy, Inc., C.A.10th, 1985, 770 F.2d 145.

**\*27194** In re Uranium Antitrust Litigation, C.A.7th, 1980, 617 F.2d 1248, 1257, **citing Wright & Miller.**

U.S. for Use of Hudson v. Peerless Ins. Co., C.A.4th, 1967, 374 F.2d 942.

Frow analysis, by which a judgment should not be entered against a defaulting party who is alleged to be jointly liable, until the matter has been adjudicated with regard to all defendants, applied to a civil rights action brought by a prison inmate, who sued a state official and the defaulting president of a communications company, to enjoin "call blocking" practice on calls under the "call home" program to persons who did not pass a credit check or have \$100 on deposit, when defendants were alleged to be jointly liable; inconsistent adjudications between the president of the company and the state official were possible, and the inmate made no showing of prejudice from the default. Martin v. Coughlin, D.C.N.Y.1995, 895 F.Supp. 39.

FDIC v. Manatt, D.C.Ark.1989, 723 F.Supp. 99, 106, **quoting Wright, Miller & Kane.**

Nelson v. Nationwide Mortgage Corp., D.C.D.C.1987, 659 F.Supp. 611, 615, **citing Wright, Miller & Kane.**

Warrington U.S.A., Inc. v. Allen, D.C.Wis.1986, 631 F.Supp. 1456, 1458, **citing Wright, Miller & Kane.**

Even though the clerk had entered a default against several of over 100 defendants named in pro se complaints, the granting of the motions of the other defendants to dismiss for failure to comply with a requirement of a short and plain statement of the claim, prior to the entry of judgment on the defaults, was

sufficient cause for the court, sua sponte, to set aside the defaults and dismiss the complaints as to those defendants against whom the defaults had been entered. U. S. ex rel. Dattola v. National Treasury Employees Union, D.C.Pa.1980, 86 F.R.D. 496.

Exquisite Form Indus., Inc. v. Exquisite Fabrics of London, D.C.N.Y.1974, 378 F.Supp. 403.

In a former state inmate's sec. 1983 action seeking damages against the superintendent of the correctional facility, the inspector general of the State Department of Correctional Services, and a correction officer, no damage award would be entered against the officer, against whom a default judgment had been entered, until the claims against the superintendent and inspector general had been resolved. Kidd v. Andrews, D.C.N.Y.2004, 340 F.Supp.2d 333.

The entry of a default judgment as to defaulting defendants was not proper in an action by an insurer seeking a declaration of noncoverage, when there remained nondefaulting defendants, and the coverage issues raised by the insurer against all the defendants were related; rather, the allegations of the complaint would be taken as true as to the defaulting defendants who would not be heard to later complain that they were not heard in defense of the action. Northland Ins. Co. v. Cailu Title Corp., D.C.Mich.2000, 204 F.R.D. 327.

**\*27195 See also**

Georgia Farm Bldgs., Inc. v. Willard, 1984, 317 S.E.2d 229, 233, 170 Ga.App. 327, **citing Wright & Miller.**

Clugston v. Moore, 1982, 655 P.2d 29, 31, 134 Ariz. 205, **citing Wright & Miller.**

Parsons v. Consolidated Gas Supply Corp., 1979, 256 S.E.2d 758, 760, 163 W.Va. 464, **citing Wright & Miller.**

Whitehead v. Baranco Color Labs, Inc., Ala.1977, 353 So.2d 793, 794, **quoting Wright & Miller.**

**Compare**

Damages judgment against defaulting defendants would be premature since they allegedly were jointly and severally liable with nondefaulting defendant; proper procedure was to consolidate inquest to determine level of damages as to defaulting defendants with damages aspect of trial against

nondefaulting defendants. *Montcalm Pub. Corp. v. Ryan*,  
D.C.N.Y.1992, 807 F.Supp. 975.

In *Broder v. Charles Pfizer & Co.*, D.C.N.Y.1971, 54 F.R.D. 583, a conspiracy case under the Sherman Act, a default was opened and defendant allowed to file an answer when summary judgment already had been entered in favor of a codefendant for lack of merit in plaintiff's complaint.

The fact that a number of defendants had defaulted on a motion for an injunction pendente lite restraining defendants from the distribution, sale, use, or manufacture of counterfeit products bearing plaintiff's trademarks and trade name did not prevent issuance of the injunction against the defaulting parties as well as the appearing parties. *Estee Lauder, Inc. v. Watsky*, D.C.N.Y.1970, 323 F.Supp. 1064, 1068 n. 4.

[FN4] **Incongruous**

15 Wall. (82 U.S.) at 554.

[FN5] **Court proceeded**

15 Wall. (82 U.S.) at 553.

[FN6] **Judgment against both**

*Frow v. De La Vega*, 1872, 15 Wall. (82 U.S.) 552, 21 L.Ed. 60.

In *Hanock v. Eck*, C.A.7th, 1950, 183 F.2d 632, both defendants defaulted and after an ex parte hearing the court entered a default judgment against one of them. That defendant moved to vacate the judgment, which the court granted. The other defendant did not move to set aside her default. At trial the court, after hearing evidence, entered judgments against both defendants. The court said the defendant who did not ask to be relieved of her default could not later complain that she had not been heard in defense of the action.

**See also**

*Mandeville v. Riggs*, 1829, 2 Pet. (27 U.S.) 482, 7 L.Ed. 493.

\*27196 *Fred Chenoweth Equip. Co. v. Oculus Corp.*, 1985, 328 S.E.2d 539, 540, 254 Ga. 321, citing **Wright & Miller**.

[FN7] **Dismiss all defendants**

Gulf Coast Fans, Inc. v. Midwest Elec. Importers, Inc.,  
C.A.11th, 1984, 740 F.2d 1499, 1512, **citing Wright & Miller.**

U.S. for Use of Hudson v. Peerless Ins. Co., C.A.4th, 1967, 374  
F.2d 942.

Davis v. National Mortgagee Corp., C.A.2d, 1965, 349 F.2d 175.

Bastien v. R. Rowland & Co., D.C.Mo.1986, 631 F.Supp. 1554, 1561,  
citing Wright, Miller & Kane, affirmed without opinion C.A.8th,  
1987, 815 F.2d 713.

Exquisite Form Indus., Inc. v. Exquisite Fabrics of London,  
D.C.N.Y.1974, 378 F.Supp. 403.

Barnes v. Boyd, D.C.W.Va.1934, 8 F.Supp. 584, affirmed on other  
grounds C.C.A.4th, 1934, 73 F.2d 910, certiorari denied 55 S.Ct.  
550, 294 U.S. 723, 79 L.Ed. 1254.

When the complaint alleges that defendants are jointly liable and  
one of them defaults, judgment should not be entered against the  
defaulting defendant until the matter has been adjudicated with  
regard to all defendants, and if action against the answering  
defendants is decided in their favor, then the action should be  
dismissed against both the answering and defaulting defendants.  
In re First T.D. & Investment, Inc., C.A.9th, 2001, 253 F.3d 520,  
532, **citing Wright, Miller & Kane.**

Antitrust defendant who neither joined in codefendants' dismissal  
motion nor answered the complaint would nevertheless have the  
complaint against them dismissed upon the determination that the  
complaint failed to state a claim; there was no point in entering  
a default judgment which could promptly be set aside.  
Floors-N-More, Inc. v. Freight Liquidators, D.C.N.Y.2001, 142  
F.Supp.2d 496.

**See also**

Cuebas y Arredondo v. Cuebas y Arredondo, 1912, 32 S.Ct. 277,  
223 U.S. 376, 56 L.Ed. 476 (bill defective for want of  
jurisdiction).

Nichiro Gyogyo Kaisha, Ltd. v. Norman, Alaska 1980, 606 P.2d 401,  
404 n. 6, **citing Wright & Miller.**

[FN8] **Summary judgment benefit**

Bastien v. R. Rowland & Co., D.C.Mo.1986, 631 F.Supp. 1554,  
affirmed without opinion C.A.8th, 1987, 815 F.2d 713.

Former corrections officials who did not answer an inmate's sec. 1983 action alleging cruel and unusual punishment, or join in a successful summary-judgment motion filed by the current officials also named as defendants, nevertheless were entitled to the benefit of summary judgment. *Lewis v. Lynn*, C.A.5th, 2001, 236 F.3d 766.

**\*27197 [FN9] Davis case**

C.A.2d, 1965, 349 F.2d 175.

**[FN10] Rule 54(b)**

See vol. 10, ss 2653 to 2661.

**[FN11] Related defenses**

*Cuebas y Arredondo v. Cuebas y Arredondo*, 1912, 32 S.Ct. 277, 223 U.S. 376, 56 L.Ed. 476.

**See also**

*U.S. for Use of Hudson v. Peerless Ins. Co.*, C.A.4th, 1967, 374 F.2d 942 (case of joint and/or several liability).

*Ackron Contracting Co. v. Oakland County*, 1981, 310 N.W.2d 874, 877, 108 Mich.App. 767, **quoting Wright & Miller**.

**Compare**

*Baker v. Old Nat. Bank of Providence*, Rhode Island, C.C.A.1st, 1899, 91 Fed. 449.

**But compare**

Court is not precluded from entering default judgment against one defendant until case has been litigated in full as to other defendants. *Weft, Inc. v. G.C. Investment Assocs.*, D.C.N.C.1986, 630 F.Supp. 1138.

**[FN12] Baker case**

C.C.A.1st, 1899, 91 Fed. 449.

**[FN13] Avoid successive appeals**

91 Fed. at 450 (per Putnam, J.).

**[FN14] Appeal**

U.S. for Use of Hudson v. Peerless Ins. Co., C.A.4th, 1967, 374 F.2d 942 (dismissing appeal as not final under Rule 54(b)).

Davis v. National Mortgagee Corp., C.A.2d, 1965, 349 F.2d 175.

In Ferguson v. Bartels Brewing Co., C.A.2d, 1960, 284 F.2d 855, the court said obvious issues for appeal were presented including the fact the unliquidated damages were fixed without the hearing contemplated by Rule 55(b)(2). However, the court said the judgment was interlocutory, not going against all codefendants, and thus was not appealable under Rule 54(b).

[FN15] **Not affecting others**

See vol. 10, sec. 2656.

[FN16] **Default stands**

District court did not abuse its discretion in entering default judgment against two asbestos suppliers after they declined to defend tort action, even though jury found that employee had assumed risk vis-a-vis asbestos supplier which did defend action, when there was no finding by the jury that the nondefending suppliers supplied asbestos simultaneously with the one which defended so that the assumption of risk defense need not be resolved identically. Farzetta v. Turner & Newall, Ltd., C.A.3d, 1986, 797 F.2d 151.

**\*27198** Carter v. District of Columbia, C.A.D.C.1986, 795 F.2d 116, 137 (action asserting constitutional and common law tort claims against five police officers, the police chief and the city).

Borrower was entitled to a default judgment against the mortgage brokerage that did not answer the Truth in Lending Act claim, since the judgment against the brokerage would not have been inconsistent with the court's prior decision respecting the same claim against the answering defendant; the answering defendant did not act as a lender in the relevant transaction, and was not the entity to whom the borrower would have been indebted had the loan application been approved. Jefferson v. Briner, Inc., D.C.Va.2006, 461 F.Supp.2d 430.

No just reason existed for delaying the entry of a default judgment against one of two joint venture participants being sued by their partner for conversion and breach of contract; although the second participant had answered the complaint, defendants' liability turned on their individual conduct, and so a judgment against the first participant would not be inconsistent with a

judgment in favor of the second participant. Shanghai Automation  
Instrument Co. v. Kuei, D.C.Cal.2001, 194 F.Supp.2d 995.