An in depth analysis of SABA, its lineal descendants & offspring.

CHAPTER ONE

THE APPRAISER'S HANDBOOK

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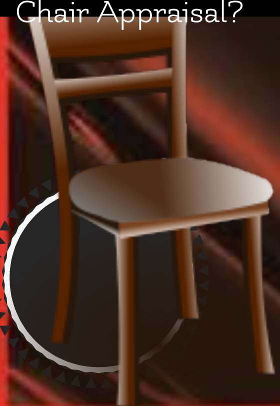
Appraisal | COURSE #102

Analysis, Interpretation & Application

The original Emty Chair Appraisal?



"SABA VS HOMELAND INS CO." & "PALMA VS. WATSON SURP. LN. AG." as discussed in Chapter One

Course eBook

No. 33217
Supreme Court of Ohio

Saba v. Homeland Ins. Co. of America

159 Ohio St. 237 (Ohio 1953) · 112 N.E.2d 1
Decided Apr 22, 1953

WEYGANDT, C.J.

Each of the four policies contains the following provisions:

"Appraisal. In case the insured and this company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in
239 writing, so itemized, of any two when filed with this company shall determine *239 the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally. * * *

"Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss."

The parties were unable to agree on the amount of the loss. Acting under the appraisal clause, the plaintiff made a written demand on the defendants for an appraisal, and he notified them of the appraiser he had selected. The defendants ignored the notice. After waiting the stipulated period of twenty days, the plaintiff asked the defendants the name of the appraiser they had chosen. They informed the plaintiff that they had selected none and would take no such action. The plaintiff then waited the further required period of fifteen days before filing his motion for the appointment of an umpire by the Court of Probate. After the umpire was appointed, he and the plaintiff's appraiser duly made an award. Subsequently an action thereon was instituted in the Court of Common Pleas and later removed to the federal trial court.

The defendants in the instant case contend that the appraisal provisions are *binding* on the *plaintiff* insured but *not* on *themselves* as insurers. They urge that the provisions are revocable by themselves but not by the plaintiff insured.

The above quoted language of the policies is in part that "in case the insured and this company shall fail to agree as to the actual cash value or the amount of the loss, then, on the written demand of *either, each shall*
240 select a competent and disinterested appraiser and notify the other of the appraiser selected within *240 twenty days of such demand." (Italics supplied.) This provision is not an involved one, the words are simple, and the

meaning is clear. Appraisers are to be selected on the demand of *either* party. In none of the policies is there the slightest intimation that the selection is to be made on the demand of the insurer and not on the demand of the insured. If this were the import of the provision, there could be no excuse for the use of the word "either."

This view is sustained by the succeeding word "each." There is no suggestion that the insured alone shall select an appraiser on demand. As indicated by Ballentine's Law Dictionary, the obvious meaning of the word "each" is "every one of the two or more comprising the whole."

Nor is there doubt about the use of the next succeeding word "shall." It clearly is employed in its ordinary mandatory sense. Furthermore, there is nothing in the context to warrant an inference that the word is used in a mandatory sense as to the insured alone and not as to the insurer. The provisions are not revocable by either.

Hence, unless these words are held to signify the exact opposite of their obvious meaning, the appraisers must be selected when demanded by the insured or by the insurer.

Many decisions are cited in the briefs for the purpose of assisting in the interpretation of these appraisal provisions. However, it is not necessary to interpret language that is simple and unambiguous. The rule with reference to such appraisal provisions is summarized as follows in 45 Corpus Juris Secundum, 1353, Section 1110:

"Their purpose is to provide a plain, speedy, inexpensive and just determination of the extent of the loss, and
241 insured has the right to have the amount of *241 the loss settled as provided in the arbitration clause of his
policy even though insurer denies liability or refuses to participate in the arbitration. The clause does not require the parties to do anything but appoint their appraisers, notify them and hand them the policy."

In the case of *Fire Association of Philadelphia* v. *Agresta*, 115 Ohio St. 426, 154 N.E. 723, a different question was involved but the policy contained provisions similar to those in the present policies. In the discussion in the opinion, it was observed that the provisions were applicable alike to both the insurer and the insured.

The defendants insist further that if they refuse to select an appraiser, the plaintiff has no recourse except to file suits on his policies.

This is equivalent to telling the plaintiff that, although he paid a premium for policies containing the advantage of the appraisal provisions, he in fact received nothing therefor, and that the sole result of the insertion of the appraisal provisions in the policies was that the defendants gave themselves the advantageous right to compel the plaintiff to select an appraiser before he could sue on the policies. Hence, under this theory the appraisal provisions were a detriment instead of a benefit to the plaintiff, inasmuch as even without the appraisal provisions he, of course, had the right to sue. The plaintiff was led to believe that he was purchasing policies giving him the right to an appraisal and a prompt settlement of his loss so he would have the insurance money with which to reconstruct his building without the expense and delay incident to litigation. Obviously this is a valuable right which he should not be denied. The failure and refusal of the defendants to select an appraiser as
242 required by the provisions of the policies *242 constituted a failure to agree on an umpire just as effectively as if
they had selected an appraiser and instructed him not to agree on an umpire. Under these circumstances the plaintiff was authorized to request the court to select such umpire.

That this view of the policy provisions is consistent with the legislative policy of this state is demonstrated by the provisions of Section 12148-1 *et seq.*, General Code, to the effect that such arbitration provisions in a written contract "shall be valid, irrevocable and enforceable." Section 12148-4, General Code, reads as follows:

"If, in the agreement, provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or an umpire, or in filling a vacancy, then upon the application of either party to the controversy the Court of Common Pleas in and for the county in which the arbitration is to be held shall, within fifteen (15) days after such application is made, designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and, unless otherwise provided in the agreement, the arbitration shall be by a single arbitrator."

It is a further contention of the defendants that the appraisal provisions are separate and not a part of the insurance policies. A study of the policies discloses no basis whatsoever for this view. The appraisal provisions
243 are an integral part of the body of each policy precisely the same as every other paragraph. *243 Were there doubt as to this, the elementary rule of construction would require that the ambiguity be resolved in favor of the plaintiff and against the defendants, since the language is that of the defendant insurers.

Like the lower courts, this court can discover no reason for holding the plaintiff to the agreement but excusing the defendants from their obligations under the plain, inescapable language they themselves chose to use when they sold the policies to the plaintiff. The Court of Probate was not in error in appointing an umpire to serve in conformity with the provisions of the policies.

Judgment affirmed.

MIDDLETON, TAFT, ZIMMERMAN and STEWART, JJ., concur.

MATTHIAS and HART, JJ., dissent.

MATTHIAS, J., dissenting.

The insurers, desiring that the amount of the loss in question be determined by a jury in an action on the policies, refused to appoint an appraiser or participate in an appraisal. The only question of law presented is the consequence of such negative action of the insurers.

In the situation disclosed, was the order of the Probate Court appointing an umpire valid, and are the insurers precluded by the appraisal and award made by the appraiser selected by the insured and the umpire appointed by the Probate Court?

It is the contention of the insurers that the insured's demand for an appraisal does not make such proceeding mandatory and thus deprive the insurers of the option of having the amount of the fire loss determined by a jury in an action on the policies.

244 The provision of the policies, giving rise to the controversy, *244 is contained in the so-called standard form policy long used throughout the United States, but diligence of counsel has failed to disclose a decision of any court of last resort of the question clearly presented in the instant case.

Notwithstanding the mandatory language employed, which is emphasized in the majority opinion, the fact must be recognized that, although it is expressely provided that no suit on the policies may be sustained unless all requirements thereof shall have been complied with, such condition is applicable only to the insured, and there is no express provision authorizing an action based on the appraisal and award as made herein, such proceeding being predicated upon the refusal of the insurers to participate in such appraisal.

With the exception of a Minnesota Supreme Court decision, applying a specific statutory provision of that state which prescribes the procedure to be followed, we find no authority contrary to the principle, generally adopted and applied, that the waiver of the appraisal provision of a policy by the insurer, whether resulting from inaction or by express refusal to participate in such appraisement, should be accorded no effect or consequence other than the authorization of immediate suit on the policy by the insured.

The judgment should be reversed.

HART, J., dissenting.

I dissent because, in my opinion, the remedy afforded to the plaintiff by the Probate Court and now finally approved by the majority opinion in this court is not legally available to him.

"At common law the authority of an arbitrator is, in its nature, revocable, and the general rule is that a naked
245 executory agreement, not under authority of *245 statute or rule of court, to submit *to arbitration* existing or prospective matters of difference is revocable by express act of either party or by implication of law at any time before the submission is consummated by a valid award." (Italics supplied.) 3 American Jurisprudence, 891, Section 59; 29 American Jurisprudence, 926, Section 1240; 45 Corpus Juris Secundum, 1375, Section 1131; *Lewis, Admr.*, v. *Brotherhood Accident Co.*, 194 Mass. 1, 79 N.E. 802, 17 L.R.A. (N.S.), 714; *State, Knaus, Pros.*, v. *Jenkins*, 40 N.J. Law, 288, 29 Am. Rep., 237; *Williams* v. *Branning Mfg. Co.*, 153 N.C. 7, 68 S.E. 902, 31 L.R.A. (N.S.), 679, 138 Am. St. Rep., 637; annotations, 42 A.L.R., 732, and 69 A.L.R., 817.

Again, it is stated as follows in 29 American Jurisprudence, 926, Section 1240:

"In accordance with general principles applicable to all contracts, it is the rule that a provision in an insurance policy *that all disputes arising under the policy shall be submitted to arbitrators*, or a provision similar in substance and effect, is not binding." (Italics supplied.) *Lewis, Admr.*, v. *Brotherhood Accident Co., supra; Niagara Fire Ins. Co.* v. *Bishop*, 154 Ill. 9, 39 N.E. 1102, 45 Am. St. Rep., 105; annotation, 47 L.R.A. (N.S.), 354.

The position of the courts is that, although a contract to arbitrate is valid, it is not binding and irrevocable so long as it remains executory and has not been carried through to an award or decision. *First Ecclesiastical Society* v. *Besse*, 98 Conn. 616, 119 A. 903; *Martin* v. *Vansant*, 99 Wn. 106, 168 P. 990, Ann. Cas., 1918D, 1147.

The reason for this rule is that courts of law refuse to enforce any contract which tends to oust the jurisdiction
246 of the court. "On the other hand, the view prevailing in nearly all jurisdictions is that a *246 stipulation not ousting the jurisdiction of the courts, but *leaving the general question of liability for a loss to be judicially determined*, and simply providing a reasonable method of estimating and ascertaining *the amount of the loss, is valid*." (Italics supplied.) 29 American Jurisprudence, 926, Section 1240; *Royal Ins. Co.* v. *Ries*, 80 Ohio St. 272, 283 to 289, 88 N.E. 638; *Hamilton* v. *Liverpool, London Globe Ins. Co.*, 136 U.S. 242, 34 L. Ed., 419, 10 S. Ct., 945; *Norwich Union Fire Ins. Soc.* v. *Cohn*, 68 F.2d 42, 94 A.L.R., 494, certiorari denied, 291 U.S. 665, 78 L. Ed., 1056, 54 S. Ct., 440; *Niagara Fire Ins. Co.* v. *Bishop, supra; Second Society of Universalists* v. *Royal Ins. Co.*, 221 Mass. 518, 109 N.E. 384, Ann. Cas., 1917E, 491; *Chapman* v. *Rockford Ins. Co.*, 89 Wis. 572, 62 N.W. 422, 28 L.R.A., 405.

In 45 Corpus Juris Secundum, 1352, Section 1110, it is likewise stated:

"Although a general arbitration clause requiring submission to arbitrators of the liability of the insurer is invalid, a clause requiring submission of disagreement as to amount of loss is valid, such clause being construed as requiring appraisal of the amount of loss, but not determination of other matters, as a condition precedent to recovery."

The provisions in the policies in the instant case do not call for the determination of the liabilities of the parties to the contracts, but only for the determination of a single question of fact — the amount of the loss sustained. The provisions, therefore, are an appraisal clause and not an arbitration clause, and this difference is significant in the determination of the rights of the parties as to the remedy which they may pursue upon the breach of the agreement by any party to appraise the loss. 29 American Jurisprudence, 935, Section 1252. Where the amount
247 of loss is involved, *247 an appraisal is involved. *Second Society of Universalists* v. *Royal Ins. Co., supra; Omaha Water Co.* v. *City of Omaha*, 162 F., 225; *Sebree* v. *Board of Edn.*, 254 Ill. 438, 98 N.E. 931.

In 47 L.R.A. (N.S.), 382, the rule supported by many authorities is stated as follows:

"All agreements to submit to the judgment and decision of third persons, as prerequisites to litigations, questions that relate merely to prices, values, sums recoverable, amounts of losses or damages payable, quantities, or quality — all of which come under the category of auxiliary, collateral and incidental issues — are considered not to oust the courts of their jurisdiction, and when not waived or abrogated, are respected and enforced judicially as valid and effectual." See *Royal Ins. Co.* v. *Ries, supra; Myers* v. *Jenkins, Admr.*, 63 Ohio St. 101 to 120, 57 N.E. 1089, 81 Am. St. Rep., 613.

The issue involved in this proceeding, as I see it, is mainly one of procedure. Assuming that the contracts to appoint appraisers to determine the amount of loss under the insurance contracts, as distinguished from a contract to arbitrate the controversy, are valid and binding, what are the remedies of the insured in case the insurers breach their contracts by refusing to appoint an appraiser? May the insured, in the absence of a controlling statute, have specific performance of the contracts? Does he have an action for damages for the breach, or does he have the remedy sought to be enforced in this action?

Clearly, a court will not compel specific performance of a contract to submit a matter to arbitration or to an appraisal. In the early case of *Conner* v. *Drake*, 1 Ohio St. 166, 168, wherein there was a failure of one of the
248 parties to a contract for arbitration to appoint an arbitrator, this court held that "a court *248 of equity will not force the specific performance of an agreement to refer any matter in controversy between adverse parties to arbitrators. Nor will they compel arbitrators to make an award."

On the other hand, damages for a breach of contract to appraise is an appropriate remedy. The capacity to breach a contract exists whenever the circumstances are such that courts will not decree specific performance, but the right to do so depends upon some justification recognized in the law. 12 American Jurisprudence, 961, Section 385.

At common law, the revocation of, or the failure or refusal to perform, a valid arbitration agreement by a party thereto ordinarily leaves the opposite party the sole remedy of an action for a breach of the agreement to arbitrate, wherein he may recover whatever actual loss he may prove, just as he could do for the breach of any other contract. *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U.S. 109, 68 L. Ed., 582, 44 S. Ct., 274; *Hamilton* v. *Home Ins. Co.*, 137 U.S. 370, 34 L. Ed., 708, 11 S. Ct., 133; *Atkieselskabet Korn-Og* v. *Rederiaktiebolaget Atlanten*, 250 F., 935, Ann. Cas. 1918E, 491, affirmed, *The Atlanten*, 252 U.S. 313, 64 L. Ed., 586, 40 S. Ct., 332; *Read* v. *State Ins. Co.*, 103 Iowa 307, 72 N.W. 665, 64 Am. St. Rep., 180; *Hartford Fire Ins. Co.* v. *Hon*, 66 Neb. 555, 92 N.W. 746, 103 Am. St. Rep., 725, 60 L.R.A., 436; *Goerke Kirch Co.* v. *Goerke Kirch Holding*

Co., 118 N.J. Eq. 1, 176 A. 902; *Haggart* v. *Morgan*, 5 N.Y., 422, 55 Am. Dec., 350; *Grady* v. *Home Fire Marine Ins. Co.*, 27 R.I. 435, 63 A. 173; *Martin* v. *Vansant, supra; Kinney* v. *Balt. Ohio Emp. Rel. Assn.*, 35 W. Va. 385, 14 S.E. 8, 15 L.R.A., 142; *Kahn* v. *Traders Ins. Co.*, 4 Wyo. 419, 34 P. 1059, 62 Am. St. Rep., 47;
249 *Wynne* v. *Greenleaf-Johnson Lumber Co.*, 179 N.C. 320, 102 S.E. 403, 8 A.L.R., 1081, annotations, *249 15 L.R.A., 142; 47 L.R.A. (N.S.), 408, 409, 447. Damages may be recovered for such breach. See *Union Ins. Co.* v. *Central Trust Co.*, 157 N.Y. 633, 52 N.E. 671, 44 L.R.A., 227; annotation, 47 L.R.A. (N.S.), 409, 410.

A party wrongfully revoking an agreement for submission to an appraisal renders himself liable to the other party in an action for damages. *Dolman* v. *Board of County Commrs.*, 116 Kan. 201, 206, 226 P. 240; *Goerke Kirch Co.* v. *Goerke Kirch Holding Co., supra.* A party is entitled to such damages as he may directly and proximately suffer as a consequence of such a breach. *Bullock* v. *Mason*, 194 Ala. 663, 69 So. 882. He is entitled at least to nominal damages. *Atkieselskabet Korn-Og* v. *Rederiaktiebolaget Atlanten, supra; Electrical Research Products, Inc.*, v. *Vitaphone Corp.*, 20 Del. Ch. 417, 171 A. 738. Doubtless, such damages for breach of contract to appraise, aside from the right to sue on the policy, would be measured by the cost or additional expense, if any, incurred in establishing the issue of loss under the policy in an action at law (See *Union Ins. Co.* v. *Central Trust Co., supra;* annotation, 47 L.R.A. [N.S.], 409, 410) and any expense of appraisal, prior to revocation.

In the instant case, does the insured have any other remedy. In my opinion, there is no warrant for the procedure adopted in this case. A court, upon which a private contract bestows authority to appoint an appraiser or umpire for the parties in case of their inability to agree on some question of fact concerning their contractual relationship, acts purely as an agent of the parties. The person designated in the insurance contracts here involved to appoint an umpire might well have been a county officer, a banker, a lawyer, or any other private
250 individual, who in such instance would have been clothed with exactly the same *250 power and authority as the court in the instant case. In the absence of statute, the court in the exercise of such function has no jurisdiction to perform any act other than that specifically authorized and set out in the contract. It can not render judgments or decrees affecting the rights of the parties. The utmost that the Probate Court could do in the instant case was to "select" an umpire *under and in accordance with the terms of the contract*, whereupon the authority of appointment ceased. Apparently, the Probate Court in the instant case, appreciating that its contractual authority to represent the parties to the insurance policies in appointing an umpire had been curtailed and thwarted by the failure of the insurers to name an appraiser, conceived the idea that since it was a court it could judicially expand the scope of its authority to make the appointment. Otherwise, there was no occasion, as a substitute for its authority to "select" an umpire at "the request" of the parties, for the court to take judicial jurisdiction of a motion to appoint, issue summons on the motion directed to the parties defendant, hear the motion and make the appointment of the umpire by a court order duly journalized. There was no necessity, occasion or authority for the court to issue a summons upon the motion for such appointment and to undertake to exercise judicial jurisdiction in naming an umpire outside the terms of the contracts. The rights of the parties beyond the mere appointment of an umpire, when authorized, were wholly within the authority of a court of general jurisdiction.

Under the terms of the contracts there was no authority whatever for the appointment of an umpire until each party had appointed his or its appraiser. These two were first charged with the appointment of the umpire. Only
251 after they had failed to make an *251 appointment did the designated agent have the power to do so. The failure of the insurers to appoint their appraiser resulted in the breach of the contracts, but the designated agent was without authority to appoint an umpire until such appraiser was first appointed. Where failure of appraisers appointed by the parties to agree is the occasion for the appointment of an umpire, the court or other party

designated to appoint such umpire is not authorized to do so because of the insurer's failure to appoint. In other words, the insurer's failure to appoint an appraiser will not warrant a court in appointing an umpire to act solely with the appraiser appointed by the insured. (*National Fire Ins. Co.* v. *Shuman*, 44 Ga. App. 819, 163 S.E. 306, and 50 Ga. App. 846, 178 S.E. 758.) This situation or possibility was apparently overlooked in the preparation of the contracts but because of the omission the appraisal clause became ineffective and inoperative. Neither the insured nor the designated agent could rewrite the contracts.

In Ohio, as well as in many other states, there exists an arbitration act or arbitration code which gives some court of general jurisdiction authority to require compulsory performance of a *pure arbitration agreement as distinguished from an appraisal.* In this state, a written contract *to arbitrate*, with certain exceptions, may be enforced by compulsory orders of *the Common Pleas Court* having jurisdiction over a party failing to perform the agreement, and such court *may require him* to appoint his appraiser in accordance with the procedure provided in the contract, if so provided, or otherwise if not so provided, and the court may then confirm, modify, or vacate the award of the arbitrators when made, and enter judgment thereon. See Sections 12148-1 to 12148-16, inclusive, General Code. Although there is a similar statute in at least one state relating to
252 "appraisals" (see *Glidden Co.* v. *Retail Hardware* *252 *Mut. Fire Ins. Co.*, 181 Minn. 518, 233 N.W. 310, 77 A.L.R., 616, affirmed, 284 U.S. 151, 76 L. Ed., 214, 52 S. Ct., 68), there is no such statute in Ohio, and in my opinion this arbitration act can have no application here. The writer of this dissent has made search of the authorities on this subject and is unable to find any case in which the procedure adopted in this case, namely, the appointment of an umpire before the two appraisers were appointed, has been attempted or remotely followed.

Even if the arbitration statute is invoked as to the basis for action, the court in this case failed to proceed in accordance therewith. Section 12148-4, General Code, provides that, if for any reason there is a lapse in the naming of an *arbitrator or an umpire*, or in filling a vacancy, then upon the application of either party to the controversy, the *Court of Common Pleas* of the county in which the arbitration is to be held shall, within 15 days after such application, appoint an arbitrator or umpire. Although I am of the opinion that this statute has no application to the instant case, nevertheless no attempt was made in appointing the umpire to proceed under it.

The judgment of the Court of Appeals should be reversed and the action dismissed.

Appellate Division of the Supreme Court of New York, First Department

Happy Hank Auction Co. v. American Eagle Fire Insurance

286 App. Div. 505 (N.Y. App. Div. 1955) · 145 N.Y.S.2d 206
Decided Oct 25, 1955

BOTEIN, J.

Plaintiff is a corporation engaged in the retail furniture business. On December 7, 1953, a fire occurred on its premises which damaged plaintiff's property. Plaintiff was insured with defendant insurance companies in a substantial amount against loss by fire.

Following inability to adjust its claim plaintiff commenced an action upon the policies. In the first cause of action it seeks a direction for an appraisal to determine the amount of the loss. The second cause of action seeks a money judgment in the amount determined on appraisal, or in the alternative, the face amount of the policies. As affirmative defenses defendants assert fraud, false swearing, concealment and noncompliance with the requirements of the policies. Upon proof presently available in support of these defenses defendants moved for summary judgment, which motion has been denied.

Plaintiff submitted a proof of loss to defendants for the alleged damage to merchandise, fixtures and leasehold improvements. A substantial portion of this claim was represented as consisting of merchandise burned "out-of-sight". On an examination under oath of plaintiff, conducted by defendant companies pursuant to the policy provisions, plaintiff claimed that except for some looseleaf pages covering a period commencing a little less
507 than one year before the date of the fire, all *507 of its books of account had been lost in the fire. One of the pages so providentially preserved purported to be the current inventory account from plaintiff's general ledger. This page contained one lone entry, showing a merchandise inventory figure as of January 1, 1953 — eleven months before the fire occurred. Therefore, the accuracy of the inventory figures claimed as of the date of the fire, December 7, 1953, obviously hinged on the integrity of the January 1, 1953 inventory figure.

This figure was a balance purportedly copied from the closing entry on the inventory account page for the year 1952, one of the records which plaintiff claimed had been destroyed in the fire. Plaintiff's Federal income tax and State franchise tax returns for 1952 would contain a closing inventory figure which should have been identical with the closing entry on the missing inventory account page. There were also other sizeable portions of plaintiff's claim that lacked impressive substantiation because their bookkeeping credentials had been lost in the fire; but which could be reconstructed from the tax returns. Since presumably not a vestige of the out-of-sight merchandise survived the fire, the inventory figures assumed especial significance in establishing that aspect of plaintiff's claim. After first refusing to furnish copies of its tax returns, then agreeing, and then equivocating, plaintiff finally maintained at the closing session of the original examination that the copies had not yet been received. More to the point here, at the conclusion of this examination plaintiff had also not responded to certain questions and demands touching upon its claims for the merchandise burned out-of-sight, but had promised to obtain and submit such information to defendants.

Several months after the minutes of the examination had been signed plaintiff demanded an opportunity "to answer all questions and to produce all records and papers in its possession or under its control" which defendants maintained had not been answered or produced. Defendants acceded to this demand.

At the opening of the re-examination plaintiff, through its counsel, announced that it was amending its proof of loss by withdrawing therefrom its claim for the merchandise allegedly burned out-of-sight. Plaintiff then refused to answer any questions or produce any bills relating to the claimed out-of-sight loss or to produce the copies of its tax returns. The basis of these refusals was that by amending its proof of loss so as to withdraw its
508 out-of-sight claim plaintiff had rendered defendants' questions and demands immaterial. Defendants *508 charge plaintiff with concealments and noncompliance which under the terms of the policies render them void and warrant dismissal of the claim.

In denying defendants' motion for summary judgment Special Term sustained plaintiff's contention that it had the right to amend its proof of loss and thereby withdraw part of its claim, and that such amendment rendered the questions and demands relating to the withdrawn portion immaterial.

An insured undeniably has the right to amend or withdraw part of his proof of loss (*McMaster* v. *President Directors of Ins. Co. of North America*, 55 N.Y. 222; *Hirsch* v. *New York Life Ins. Co.*, 267 App. Div. 404, 407); but by so doing he does not foreclose the insurance company from attempting to prove that the withdrawn part of the original claim was false or fraudulent. The standard fire insurance policies involved here all provide that they are voided by material misrepresentations made before or after a loss. "The contract of insurance being entire and indivisible, a cause of avoidance or forfeiture in respect to a part of the property insured affects the whole contract." (*Fitzgerald* v. *Atlanta Home Ins. Co.*, 61 App. Div. 350, 356.) This follows without regard to whether or not the insurance company has actually been deceived or injured by the false swearing (*Domagalski* v. *Springfield Fire Marine Ins. Co.*, 218 App. Div. 187, 189-190). In *Werber Leather Coat Co.* v. *Niagara Fire Ins. Co.*, (254 App. Div. 298) it was specifically held that fraudulent inflation of the out-of-sight portion of the insured's claim voided the entire policy and precluded recovery. (See also *Claflin* v. *Commonwealth Ins. Co.*, 110 U.S. 81; *Wicklow* v. *United States Fidelity Guar. Co.*, 220 App. Div. 199, and *Corn Novelty Co.*, v. *Norwich Union Fire Ins. Soc.*, 176 App. Div. 261.)

If defendants could prove that the original out-of-sight claim, although withdrawn, was fraudulent, they could defeat plaintiff's claim in its entirety. The statutory purpose is clear in the policy provision that the "entire policy shall be void if, * * * the insured has wilfully concealed or misrepresented * * * or in case of any fraud or false swearing" (Policy lines 1-6; Insurance Law, § 168, subd. 6). Certainly the Legislature never intended that a policyholder could file a swollen claim and thereafter adroitly preserve his legitimate claim by casting off the fraudulent portion if the insurance company came upon the spoor of the fraud. On that basis there would be
509 little risk and no penalty. *509

Therefore, questions and documents legitimately tending to resolve the *bona fides* of the out-of-sight claim were material. Each of the standard form policies provides in sweeping terms that plaintiff must submit to examinations under oath and produce certain indicated records and documents (Policy lines, 113-122; Insurance Law, § 168, subd. 6). "The object of the provisions in the policies of insurance, requiring the assured to submit himself to an examination under oath, to be reduced to writing, was to enable the company to possess itself of all knowledge, and all information as to other sources and means of knowledge, in regard to the facts, material to their rights, to enable them to decide upon their obligations, and to protect them against false claims. And every interrogatory that was relevant and pertinent in such an examination was material, in the sense that a true answer to it was of the substance of the obligation of the assured." (*Claflin* v. *Commonwealth Ins. Co.*, 110 U.S. 81, 94-95, *supra.*)

Defendants have no license to harass plaintiff with aimless questions and demands for documents, or with random shots in the dark. But where, as here, there were circumstances tending to excite suspicion, and there was some basis for probing the *bona fides* of the claim, and where the questions asked and the documents sought had point and direction, they must be held to be material. In *Gipps Brewing Corp.* v. *Central Mfrs'. Mut. Ins. Co.*, (147 F.2d 6), where the facts were quite similar to those presented here, the court said (p. 12) "That the questions were proper and material, we think there can be no doubt".

Furthermore, the merchandise burned out-of-sight was covered by the policies. Whether or not a claim was ultimately made for the loss of such merchandise, the policies required plaintiff "to furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed" (Policy lines, 94-97; Insurance Law, § 168, subd. 6). Thus the policies themselves made material an inquiry into all the property covered by insurance, including property for which no claim was made (*Gipps Brewing Corp.* v. *Central Mfrs.' Mut. Ins. Co., supra*, p. 10).

The standard policies provide that "[N]o suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with (Policy lines, 157-161; Insurance Law, § 168, subd. 6). The policy provisions applicable here should be
510 construed liberally in favor of the assured *510 (*McNally* v. *Phoenix Ins. Co.*, 137 N.Y. 389). This harsh penalty of nullification of the policies should not be invoked for technical or unimportant omissions in performance or where an insured has complied substantially with the terms of the policy (*Porter* v. *Traders' Ins. Co.*, 164 N.Y. 504). And if there is any question of fact that survives a study of the motion papers as to whether plaintiff willfully refused to answer material questions or produce material documents, that question should be reserved for the trial court (*Sebring* v. *Fidelity-Phenix Fire Ins. Co.*, 255 N.Y. 382).

However, it is clear that plaintiff has willfully and designedly refused to answer questions and produce documents that are indisputably material to its claim. There has been a fully informed refusal to comply substantially with the terms of the policies. Time and again counsel for the companies advised plaintiff's president and its counsel, in most explict language, that he regarded the questions asked and the documents sought as material, that the insured had a duty to comply and that the consequences of noncompliance would be vitiation of the policies. The repeated refusals of plaintiff to comply are such as to render the policies void and this action not sustainable.

This court has previously had occasion to say: "We think a further ground requiring dismissal of the complaint was plaintiff's willful refusal to answer relevant questions on his examination by defendants. That refusal was a breach of one of the substantial conditions of the policies" (*Hallas* v. *North Riv. Ins. Co. of N.Y.*, 279 App. Div. 15, 16, affd. 304 N.Y. 671, 672).

There is no need to discuss extensively the other points raised by defendants. Plaintiff argues that it had basis for maintaining that its tax returns were not "vouchers" within the meaning attaching to that word in the policy context, and that it therefore was not required to produce them (see, however, *Paramount Pictures* v. *Brandt*, 276 App. Div. 1002). But plaintiff refused, pointblank, to state whether the closing inventory figure reported on the 1952 tax return coincided with the closing 1952 figure shown on the current inventory account — an answer that did not require production of the tax return. In view of the destruction of all records that could support this figure, some corroboration was highly important in fixing the extent of the damage to the in-sight as well as the out-of-sight merchandise. It appears to us that under the special circumstances surrounding the
511 presentation of this claim, the plaintiff should have answered the question. *511

The first cause of action, which prays for a direction requiring the companies to determine the amount of the loss by appraisal, pursuant to the policy provisions, must be dismissed on the authority of *Matter of Delmar Box Co.* (*AEtna Ins. Co.*), (309 N.Y. 60).

The order appealed from should be reversed, and defendants' motion for summary judgment dismissing both causes of action in the complaint should be granted.

BREITEL, J.P., BASTOW, RABIN and COX, JJ., concur.

Order unanimously reversed, with $20 costs and disbursements to the appellants and the motion for summary judgment granted, and judgment is directed to be entered in favor of the defendants dismissing both causes of action, against each of the defendants, alleged in the complaint, with costs.

Moreover, when the provision is enforceable in one respect in the name of *irrevocability*, why should it not be enforceable by plenary suit looking either to a general injunctional order to proceed or to court appointment of an appraiser or umpire, or both, against either party that neglects or refuses to perform his part of the appraisal provision? Current practice under modern arbitration statutes verifies that such suits and orders are feasible.[9] Under these statutes applications (motions) by one party to an arbitration agreement against the other will bring injunctional orders to proceed with arbitration and court appointment of arbitrators to fill any vacancy in the arbitral board. It is clear, moreover, that those proceedings and orders are understood to be part and parcel of traditional *equity jurisdiction*.[10]

Accordingly, it is difficult to appreciate either the ruling (or the rationale therefor) in *Happy Hank Auction Co. v. Eagle Fire Ins. Co.*[11] decided by the New York Court of Appeals in 1956. Insured demanded appraisal; insurers refused; insurers also denied liability on the policies. Insured sued to obtain a general order against insurers to proceed with appraisal. The petition was denied. "Despite the mandatory language of the standard policy," said the court of appeals, "the New York courts have no power to require an insurer to take part in an appraisal demanded by an insured but refused by his insurer."[12] The court took note of what

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9. Instances are wanting of an impasse or of requirements of supervision accruing in carrying out the order which seem to have embarrassed the court ordering the enforcement. See *e.g.*, cases cited note 10 *infra*, see also Lincoln Mills of Ala. v. Textile Workers Union, 230 F.2d 81 (5th Cir. 1956), *as reversed*, 353 U.S. 448 (1957); In the matter of Gantt, Hurtado & Cia, 397 N.Y. 433, 79 N.E.2d 815 (1948); Western Union Tel. Co. v. American Communications Ass'n. C.I.O., 295 N.Y. 395, 68 N.E.2d 183 (1946); Marchant v. Mead-Morrison Mfg. Co., 252 N.Y. 284, 169 N.E. 386 (1929); *In re* Amtorg Trading Corp., 277 App. Div. 531, 100 N.Y.S.2d 747 (1950); Nippon-Ki-Ito Kaisha, Ltd. v. Ewing-Thomas Corp., 313 Pa. 442, 170 Atl. 286 (1934). Also note, 46 Col. L. Rev. 845, 847 n. 11 (1946). Also Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); Textile Workers v. American Thread Co., 113 F. Supp. 137 (D. Mass. 1953).

10. Shanferoke Co. v. Westchester Co., 293 U.S. 449 (1935); Reconstruction Fin. Corp. v. Harrisons & Crosfield, 204 F.2d 366 (2d Cir. 1953); Catliff Coal Co. v. Cox, 142 Fed. 876, 879 (6th Cir. 1944); Marchant v. Mead-Morrison Co., 29 *In re* Feuer Transp., 295 N.Y. 87, 65 N.E.2d 178 (1946); Finsilver, Still & Moss v. Goldberg & Co., 253 N.Y. 382, 171 N.E. 579 (1930); Matter of Lipschutz, 304 N.Y. 58, 106 N.E.2d 8 (1952). See also Sturges & Murphy, *supra* note 5, at 601-602, n. 43, and Jones, *The Nature of the Court's Jurisdiction In Statutory Post-Award Motions*, 46 Cal. L. Rev. 411 (1958).

11. 1 N.Y. 2d 534, 136 N.E.2d 842 (1956).

12. Even more dubious is the ruling of the Alabama court that the courts will not restrain one party (the insured in the given case) from interfering with the appraisers and preventing them from carrying on the appraisal. *Ex parte* Birmingham Fire Ins. Co., 233 Ala. 370, 172 So. 99 (1937). It is suspected that this court was influenced to its decision by assuming that its alleged equity rule of denying specific enforcement of *revocable* common law arbitration agreements was applicable to the *irrevocable* appraisal provision before the court. Said the court: "The courts are almost unanimous that equity will not decree specific performance of a contract to submit a course to arbitration." As is pointed out above, the rationale for this alleged near-unanimity is not significant in connection with a consideration of the specific enforcement of *irrevocable* appraisal provisions.

it conceded to be a contrary ruling in Ohio. Said the court: "There is a contrary rule in Ohio, *Saba v. Homeland Ins. Co.*, 159 Ohio St. 237, 112 N.E.2d 1, 44 A.L.R. 841, but this court *is so far committed* on the question that remedial action must come from the Legislature, if at all." (Emphasis added.) The court cited no authorities whereby it became so committed.[13]

In *Saba v. Homeland Ins. Co.*,[14] the insured moved the Ohio Court of Probate to appoint an "umpire." The court did so. The supreme court sustained the action (as had the court of appeals below).

The insured and insurers failed to agree upon the amount of loss and damage; the insured duly designated his appraiser; the insurers refused his demand to select an appraiser. The "umpire" appointed by the court and the appraiser selected by the insured did an appraisal and returned their award. This appeal concerned only the validity of the appointment of the "umpire."[15]

The policies contained the New York type of standard appraisal provision providing that upon failure of the parties to agree upon the amount of loss, "each shall select an appraiser" and the two "shall first select" an "umpire"; and if the two fail to select an umpire for a period stated "then on the request of the insured or this company, such umpire shall be selected by a judge of a court of record."

The majority opinion[16] by Chief Justice Weygandt took account of the foregoing language of the appraisal provision to point out that *either* party (insured as well as insurer) is entitled to demand that the other select an appraiser and that each party (insurer as well as insured) *shall* select an appraiser. "Hence," said the court "unless these words are held to signify the exact opposite of their obvious meaning, the appraisers must be selected when demanded by the insured or by the insurer."

The court gave principal attention to defendants' contention that when they refused to select an appraiser, the insured had no other recourse than that of suing to collect on the policies. The court rejected this con-

13. The court below [286 App. Div. 505, 145 N.Y.S.2d 206 (1955)] relied upon Matter of Delmar Box Co., 309 N.Y. 60, 127 N.E.2d 808 (1955). "The first cause of action," said the court, "which prays for a direction requiring the companies to determine the amount of the loss by appraisal, pursuant to the policy provisions, must be dismissed on the authority of Matter of Delmar Box Co., 309 N.Y. 60, 127 N.E.2d 808." This case is reviewed in notes *infra*. It is difficult to appreciate its relevancy to the foregoing ruling in the *Happy Hank Auction Co.* case.

14. 159 Ohio St. 237, 112 N.E.2d 1 (1953).

15. An action brought by the insured to collect the award had been removed to a United States District Court.

16. Two of the seven judges dissented and each rendered a separate opinion. Matthias, J., (dissenting) commented that "diligence of counsel has failed to disclose a decision of any court of last resort on the question clearly presented in the instant case." Hart, J., (dissenting) said that he had made a search of the authorities "and is unable to find any case in which the procedure adopted in this case, namely, the appointment of an umpire before the two appraisers were appointed, has been attempted or remotely followed."

tention on the ground that the insured by paying his premiums for the policy had bought and paid for the right to appraisal as set out in the appraisal provision; that it was a valuable right; and he should have the enforcement which the probate court granted. Said the court:

> This [defendants' contention] is equivalent to telling the plaintiff that, although he paid a premium for policies containing the advantage of the appraisal provisions, he in fact received nothing therefor, and that the sole result of the insertion of the appraisal provisions in the policies was that the defendants gave themselves the advantageous right to compel the plaintiff to select an appraiser before he could sue on the policies. Hence, under this theory the appraisal provisions were a detriment instead of a benefit to the plaintiff, inasmuch as even without the appraisal provisions he, of course, had the right to sue. The plaintiff was led to believe that he was purchasing policies giving him the right to an appraisal and a prompt settlement of his loss so he would have the insurance money with which to reconstruct his building without the expense and delay incident to litigation. Obviously this is a valuable right which he should not be denied.

Apparently in order to meet an argument by the insurers that there was no authority in the appraisal provision for any court to appoint an "umpire" when only one of the two appraisers had been selected, the chief justice took this position:

> The failure and refusal of the defendants to select an appraiser as required by the provisions of the policies constituted a failure to agree on an umpire just as effectively as if they had selected an appraiser and instructed him not to agree on an umpire. Under these circumstances the plaintiff was authorized to request the court to select such impire.

The chief justice concluded:

> Like the lower courts, this court can discover no reason for holding the plaintiff to the agreement but excusing the defendants from their obligations under the plain, inescapable language they themselves chose to use when they sold the policies to the plaintiff.[17]

17. Matthias J., seemed to base his dissent upon the ground that, notwithstanding the mandatory language of the appraisal provision relied upon by the chief justice, the court below just could not do what it had done for the insured under the provision; that the provision bound the insured but not the insurer.

Hart J., contended that the remedy as accorded the insured by the majority was not "legally available to him." After considerable review of seemingly remote propositions re *common law arbitration* agreements it was concluded that "there was no authority whatever for the appointment of an umpire until each party had appointed his or its appraiser. These two were first charged with the appointment of the umpire," also that "the insurer's failure to appoint an appraiser will not warrant a court in appointing an umpire to act solely with the appraiser appointed by the insured." (In this connection the judge relied upon National Fire Ins. Co. v. Shuman, 44 Ga. App. 819; 163 S.S. 306 (1932) reviewed in notes *infra*. Compare the Minnesota cases reviewed *infra*.

In Palma v. Watson Surplus Lines Agency, 148 Cal. App. 2d 879, 307 P.2d 689 (1957) the trial judge, in a declaratory judgment proceeding, ordered insurers to

It seems quite clear that the chief justice and majority of the court in the *Saba* case gave much more careful consideration to the question at hand than appears in connection with the unanimous action of the New York Court of Appeals in the *Happy Hank Auction Co.* case. The unanimity in the Ohio *Saba* case of the trial court, the intermediate court and supreme court majority in finding good reason for enforcing the provision and in finding no substantial reason for not doing so is impressive. The *Saba* decision gives a new judicial leadership within traditional equity jurisdiction in the judicial enforcement of these irrevocable appraisal provisions.

3. *Enforcement at Common Law (i.e., Non-Statutory)— By Action for Damages.*

No American decision has been discovered determining whether or not an action for damages will lie for breach of one of these irrevocable appraisal provisions.[18] Speculation upon the feasibility of having any such indirect enforcement probably should be reckoned of little practical value.[19]

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select an appraiser on condition that if they neglected to do so for 10 days he (the judge) would make the appraisal after hearing the parties. The insurers did not select an appraiser during the time; the judge, after such hearing, made the "appraisal." The judge's award was sustained; and it was sustained although the judge did not comply with the appraisal provision, at least as to its requirement of itemization. Referring to the *Saba* case, the court commented "In the Saba case the court appointed an umpire to work with the appraiser appointed by the insured. In the instant case the court substituted itself for both the appraisers and the umpire. Either procedure was proper, *under the general equity powers of the court.*" (Emphasis added.)

Concerning the itemization prescribed in the provision which was held not applicable to the judge's appraisal and award, the court observed as follows: "A trial court generally is not required to make minute evidentiary findings, and no reason exists why such court, when making an appraisal, should depart from customary procedures. Because the insurers have made it necessary to adopt a substitute procedure, they must accept it with its burdens as well as its benefits."

18. It has been stated that "it is recognized that the non-breaching party may institute an action for damages for the breach of the agreement." 44 A.L.R.2d 851 (1935). See also Hart, J., dissenting in the *Saba* case, citing annot., 47 L.R.A. (n.s.) 409,410. None of the authorities cited seems so to decide.

19. It is difficult to imagine just how a cause of action for damages might be deemed to accrue to either the insured or insurer in connection with these irrevocable appraisal provisions.

Clearly the insurer is provileged to invoke the provision (*i.e.*, plead it to defeat insurer's action to collect on the policy); it would incur no liability as for breach of the appraisal provision or insurance policy in so doing and, equally obvious, it seems, the insurer should incur no liability for waiving the provision and right to appraisal.

It also seems that the insured should not be held in damages for bringing his action in disregard of the provision to collect on the policy. This is true because under the present posture of the law of the cases on irrevocability by action the efficacy and validity of the plea of the provision is not finally determined until the adjudication of no "waiver" by the insurer. The action by the insured looks to a declaratory judgment of either "waiver" or continuing vitality of the provision. Pro-tanto, it seems the insured is privileged to sue. Conceivably, of course, when there is the adjudication of no "waiver" the insured could be made liable in damages for wrong done the insurers by initiating the action—but with what justice is not apparent.

It seems that a situation would not occur like that wherein a party to a general arbitration provision at common law revokes by instituting an action or by

Civ. A. No. 738-59
United States District Court, D. New Jersey

Drescher v. Excelsior Insurance Co. of New York

188 F. Supp. 158 (D.N.J. 1960)
Decided Nov 4, 1960

HARTSHORNE, District Judge.

This is an action for fire losses based on various fire policies. Under the appropriate clause in the policies, plaintiffs sought to have an appraisal of the loss. Defendants have refused to appoint an appraiser and assert that an appraisal would here be inappropriate.

Plaintiffs thereupon moved for partial summary judgment on the sixth count of their complaint wherein they seek appointment of an appraiser for
159 the *159 defendants. Under the appropriate statutory clause in New Jersey, N.J.Stat. 17:36-5.20, this Court, sitting in this diversity case, can appoint a disinterested umpire where the appraisers for both sides cannot agree on one. The refusal of the defendants to appoint an appraiser in effect amounts to the failure of the parties to select the disinterested umpire which is essential to the appraisal proceedings and it is the appointment of this individual that the Court would order. See Saba v. Homeland Ins. Co. of America, 1953, 159 Ohio St. 237, 112 N.E.2d 1. The defendants, of course, would still have the right to name an appraiser to protect their interest.

The first hurdle to be surmounted is the propriety of this Court's enforcing the appraisal clause in the policy as against the insurer. Ohio favors such enforcement, while New York does not. See *Saba,* supra, and Happy Hank Auction Co. v. American Eagle Fire Ins. Co., 1946, 1 N.Y.2d 534, 154 N.Y.S.2d 870, 872, 136 N.E.2d 842. This Court finds the Ohio rule preferable. The companies, having drawn the clause and being in a position to derive benefits therefrom, must reciprocally have such clause enforced against them. Indeed, in *Happy Hank,* Judge Desmond, in stating

> "* * * but this Court is so far committed on the question that remedial action must come from the Legislature * * *."

implies that the New York rule, while long established, is not ardently supported.

The defendants at oral argument raised two further objections to an appraisal proceeding in this case, (1) that there was a total loss, and (2) that, since an appraisal is not an arbitration, there is nothing to require that notice be given of the appraisal hearings, that the testimony be under oath, etc., so defendants might be prejudiced thereby. But none of these objections has validity.

That an appraisal will lie where there is a total loss, see Stout v. Phoenix Assurance Co. of London, 1904, 65 N.J. Eq. 566, 56 A. 691. From the common sense angle it is further clear that, regardless of whether any chattels remain to be inspected, that does not affect the giving of evidence by witnesses as to their knowledge of the value of what was destroyed. Apart from the issue as to the quantum of damage, all liability issues and questions can be raised by the insurance companies for determination by this Court. This is quite in addition to the fact that the Board of Appraisers will include a representative selected by the defendants if they adhere to this Court's decision. Certainly, as in the *Stout* case, the appraisers in a total destruction case should give notice to the parties and let them, in each other's presence, present their respective positions, and this Court will insist that the proceedings be conducted in such a manner. Thus the defendants' fears as to the propriety of the appraisal are unwarranted. The very purpose of the appraisal clause is to avoid delay and confusion at trial on the issue as to the amount of damage, as distinguished from the issue of whether defendants are liable for such damage. Since both sides thus have the right to the appraisal, defendants have no right to prevent plaintiffs, the insured, from obtaining the appraisal which they have demanded.

Plaintiffs' motion for partial summary judgment requesting the appointment of an appraiser for the defendants will be considered, as noted earlier, as a request for the appointment of a disinterested umpire and such will be granted. The action will be stayed pending the completion of the appraisal proceedings.

160 An order may be entered accordingly. *160

state of Kansas, allowed binding appraisal only if both parties agreed to it, the policy was deemed ambiguous in this regard and the court applied the interpretation favorable to the insured.[12]

Fora time in New York, an insured's ability to compel the insurer to appraise a loss and to have judgment entered upon an award wavered.[13] In 1949 the Appellate Division, Third Department held that an appraisal under a fire insurance policy was in the same nature of any arbitration agreement and could be enforced by the courts.[14]

New York State, as with all states, has a strong public policy in favor of arbitration. In fact, courts are statutorily pre-empted from deciding cases that fall within the scope of a valid arbitration clause.

However, in 1954, in a decidedly anti-consumer decision, the New York Court of Appeals in Happy Hank Auction Co. v. American Eagle Fire Ins. Co., [15] held that despite the mandatory language of the Standard Fire Policy, the New York courts had no power to require an insurer to take part in an appraisal demanded by an insured. This had the effect of making the appraisal clause almost irrelevant in the processing of insurance claims within the state. Few claims went to appraisal after this decision and New York became one of the few states in the nation to leave its consumers unprotected in this manner. Litigation became the only alternative to resolve disputes as to the amount of loss and damage. In countless cases, consumers accepted less than they merited under the policy due to the anticipated delay and expense involved in litigation. Others incurred extensive legal fees litigating the value of loss and damage, often negating any hard won monetary victory.

In 1990, the New York legislature appeared to have restored to the insured the power to compel compliance with the appraisal clause, originally taken away by the Court of Appeals in the Happy Hank[16] decision. This was accomplished by the legislature's enactment of an amendment to §3404 of the New York State Insurance Law. The amendment provided that the appraisal provision shall be binding on all parties.

It states:

> § 3404(g). Notwithstanding any other provision of law to the contrary, the provisions of the appraisal clause set out on the second page of the standard fire policy and the provisions of section three thousand four hundred eight of this chapter, including determination as to the amount of loss or damage rendered thereunder, shall be binding on all parties to the contract of fire insurance evidenced by the policy.[17]

The great majority of states reject the Happy Hank line of cases.[18] In fact, in Standard Fire Insurance Company v. Fraiman, [19] the Texas Court of Appeals, while discussing other similarly minded decisions stated:

the property damaged and insured.

This provision of the policy clearly and unequivocally manifests the intent and agreement of the parties to the contract of insurance that any difference arising between them as to the amount of loss or value of the property insured shall, at the request of either party, be submitted to the appraisal process. The appraisal is to be by an umpire and two appraisers to be chosen as therein provided, whose award shall be conclusive as to the amount of such a loss and value only but shall not determine the question of liability of the company.[23]

In Connecticut it has been held that where an appraisal provision exists within a policy of insurance, the Connecticut courts are empowered to direct compliance with its provisions.[24]

The same rule exists in the state of Texas.[25]

In the state of Pennsylvania, the law requires that the appraisal provision be included in all fire insurance policies.[26]

Some states currently have reduced the importance and effectiveness of the appraisal provision by making it voluntary, thus precluding any successful attempt at enforcement by litigation. These states, such as Arkansas, California, Nebraska, Oklahoma, Oregon, Puerto Rico, South Dakota and West Virginia have left their insureds substantially unprotected by requiring the insured to retain counsel and

DUANE READE INC v. ST PAUL FIRE AND MARINE INSURANCE COMPANY

United States Court of Appeals,Second Circuit.

DUANE READE INC., Plaintiff-Counter-Defendant-Appellee, v. ST. PAUL FIRE AND MARINE INSURANCE COMPANY, Defendant-Counter-Claimant-Appellant.

Docket No. 03-9064.

Decided: June 22, 2005

Before: WALKER, Chief Judge, B.D. PARKER and WESLEY, Circuit Judges. Charles Fried (Shaw Pittman LLP, Lon A. Berk, Edward J. Grass, Charles A. Cowan, and Stephanie P. Manson, McLean, VA, on the brief), Cambridge, MA, for Appellant. James W.B. Benkard, Davis Polk & Wardwell (Carolina C. De Onis, Michael Farbiarz, and Jeffrey Brown, on the brief), New York, NY, for Appellee.

This case involves an insurance dispute arising from the destruction of the World Trade Center by terrorists on September 11, 2001 (“9/11”). Plaintiff-appellee Duane Reade, Inc. (“Duane Reade”), which up until that day had operated its most profitable drugstore in the main concourse of the World Trade Center (“WTC”), filed this action against its insurer defendant-appellant St. Paul Fire & Marine Insurance Co. (“St.Paul”), seeking, inter alia, a declaratory judgment that its recovery for business interruption losses caused by the store's destruction will continue until the entire WTC complex is rebuilt. St. Paul countered that Duane Reade's business interruption coverage terminated 21 months after 9/11, the time St. Paul claims was reasonably necessary for Duane Reade to relocate its store to a new location and resume operations.

The United States District Court for the Southern District of New York (Jed S. Rakoff, Judge), issued a decision declaring, in part, that Duane Reade's recovery of business interruption losses would continue for the hypothesized time it would take for Duane Reade to rebuild its store and that “[o]nce Duane Reade could resume functionally equivalent operations in the location where its WTC store once stood, the [recovery for business interruption losses] would be at an end.” Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co., 279 F.Supp.2d 235, 239 (S.D.N.Y.2003) (“Duane Reade II ”). For the following reasons, we modify the district court's judgment to, inter alia, (1) eliminate any reference to “the location where [the] WTC store once stood,” and (2) change “functionally equivalent operations” to “operations.” Id. The judgment of the district court, as modified, is Affirmed.

BACKGROUND

The relevant facts are straightforward and undisputed. Duane Reade owns and operates more than 200 drugstores in and around New York City, including 124 in Manhattan. Prior to 9/11, its single most profitable store occupied leased premises on the main concourse of the WTC. On 9/11, Duane Reade was insured under a $150 million property insurance policy written by St. Paul that covered (1) losses caused by damage or destruction to “Real and Personal Property,” defined as all of Duane Reade's own property as well as any other property in Duane Reade's “care, custody, or control” or for which Duane Reade was legally liable; (2) several specified coverages, referred to as "Time Element" coverages, that indemnify Duane Reade for losses that arise initially from damage or destruction to Real and Personal Property, but which increase with the passage of time; and (3) certain "Extensions of Coverage" and supplemental coverages.

At issue in this appeal is the Time Element coverage for business interruption ("BI"), which indemnifies Duane Reade for lost earnings and expenses if Duane Reade's business is partially or totally interrupted as a result of a covered property damage. The parties dispute the measure of time during which Duane Reade may recover for BI losses stemming from the destruction of the WTC store. The relevant valuation provision, entitled "PERIOD OF RESTORATION AND/OR INDEMNITY," provides that recovery of BI losses "shall not exceed such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair, or replace such property that has been destroyed or damaged" (the "Restoration Period").

St. Paul asserts that it began to adjust Duane Reade's claim soon after 9/11 and has already paid Duane Reade for all of its property damage and business interruption losses. As to the latter, it paid $9.8 million to cover 9 months of lost profits "to locate, furnish and open a new drug store," and an additional 12 months of profits to compensate for the lowered profits Duane Reade is likely to receive once its store reopens.

Duane Reade, not surprisingly, takes a different position: it rejects the premise underlying St. Paul's calculations that coverage for business interruption losses extended only until Duane Reade could relocate its WTC store to an alternative location. Duane Reade therefore filed an action for breach of contract and a declaratory judgment in which it asserted that

the Restoration Period consists of the actual time period that would, or will, be required to restore Duane Reade's operations to the kind, quality, and level which existed at the WTC Store prior to the terrorist attacks and that such Restoration Period is coterminous with the time necessary to rebuild the complex which will replace the World Trade Center.

As an initial matter, the district court dismissed Duane Reade's breach of contract claim as premature and denied St. Paul's motion to either dismiss the action or compel appraisal in accordance with the policy. Duane Reade, Inc. v. St. Paul Fire & Marine Ins. Co., 261 F.Supp.2d 293 (S.D.N.Y.2003) ("Duane Reade I "). It then issued a declaratory judgment construing the policy's business interruption coverage. Duane Reade II, 279 F.Supp.2d at 235. The district court rejected as overly restrictive St. Paul's position that the "the period of restoration should last only so long as it would take Duane Reade to build a 'replacement' store somewhere in the vicinity of the former World Trade Center." Id. at 238 n. 4. In the district court's view, "such an interpretation would . be unreasonable, [because] it finds no support in the plain language of the Policy and . it would render superfluous the other clauses requiring mitigation of damages." Id.

But the district court also rejected as "untenable" Duane Reade's expansive reading "that the Restoration Period must be coterminous with the time actually required to rebuild the entire complex that will replace the World Trade Center." Id. at 239. Instead, the district court held, the proper reading of the policy fell somewhere in between the parties' views, such that the Restoration Period was to be measured by the "hypothetical or constructive (as opposed to actual) time frame for rebuilding . the WTC store itself, not the entire complex that once surrounded it," and that the Restoration Period would end "[o]nce Duane Reade could resume functionally equivalent operations in the location where its WTC store once stood." Id. (internal citation omitted).

Following a bench trial to resolve other issues and the entry of final judgment, St. Paul filed this appeal challenging the district court's declaration.

DISCUSSION

St. Paul's primary contentions on appeal are that (1) the district court erred in tying the "hypothesized time" of the Restoration Period to the time required to rebuild Duane Reade's store "at the location where its WTC store stood"; and (2) the Restoration Period continues until Duane Reade resumes "functionally equivalent" operations. We agree and modify the district court's declaration accordingly.

St. Paul also argues that (3) the district court lacked jurisdiction over this declaratory judgment action; (4) Duane Reade's action was barred because it failed to submit a proof-of-loss statement or submit to an appraisal; (5) the district court erred in denying St. Paul's motion to compel appraisal; (5) the district court's declaration was internally inconsistent because it tied the duration of the BI coverage to both the rebuilding of Duane Reade's store and Duane Reade's resumption of operations; and (6) Duane Reade's asserted BI losses are barred in any event because they result from the elimination of a consumer market in the area of the World Trade Center, a peril expressly excluded under the policy. Each of these arguments is meritless.

I. Standards of Review

We review a district court's decision of whether to exercise jurisdiction over a declaratory judgment action deferentially, for abuse of discretion. See Wilton v. Seven Falls Co., 515 U.S. 277, 289, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995); see also Dow Jones & Co. v. Harrods Ltd., 346 F.3d 357, 359 (2d Cir.2003) (per curiam) (district courts have “a broad grant of discretion to . refuse to exercise jurisdiction over a declaratory action that they would otherwise be empowered to hear”). Such abuse will be found only if the district court “ ‘bases its ruling on a mistaken application of the law or a clearly erroneous finding of fact.’ ” United States v. Couto, 311 F.3d 179, 185 (2d Cir.2002) (quoting Milanese v. Rust-Oleum Corp., 244 F.3d 104, 110 (2d Cir.2001)). The standard for ripeness in a declaratory judgment action is that “there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” Maryland Cas. Co. v. Pac. Coal & Oil Co., 312 U.S. 270, 273, 61 S.Ct. 510, 85 L.Ed. 826 (1941).

The district court's decision on the merits of the parties' insurance dispute presents pure questions of law-construction of the St. Paul policy to determine the contractual rights and responsibilities of the parties-that we review de novo. See Comm'l Union Ins. Co. v. Flagship. Marine Servs., Inc., 190 F.3d 26, 30 (2d Cir.1999).

II. Case or Controversy

As an initial matter, St. Paul asserts that the district court lacked jurisdiction to issue any ruling because there was no certainty that the case presented an actual “case or controversy.” This argument is easily rejected.

The Declaratory Judgment Act, by its express terms, vests a district court with discretion to exercise jurisdiction over a declaratory action: “In a case of actual controversy within its jurisdiction . any court of the United States . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a) (emphasis added). In order to decide whether to entertain an action for declaratory judgment, we have instructed district courts to ask: (1) whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved; and (2) whether a judgment would finalize the controversy and offer relief from uncertainty. See Broadview Chem. Corp. v. Loctite Corp., 417 F.2d 998, 1001 (2d Cir.1969).

St. Paul's jurisdictional challenge is based on its claim that the appraisal proceeding to which the parties must ultimately submit this dispute may show that any BI losses in excess of the sums already paid by St. Paul were offset by the migration of business from the WTC store to other Duane Reade stores in the area, even if the covered losses are found to extend until the WTC complex is rebuilt. The flaw in St. Paul's argument is that no appraisal can occur until the legal parameters for valuating Duane Reade's losses have been set. It is well established that the scope of coverage provided by an insurance policy is a purely legal issue that cannot be determined by an appraisal, which is limited to factual disputes over the amount of loss for which an insurer is liable. See, e.g., Indian Chef, Inc. v. Fire & Cas. Ins. Co., 2003 WL 329054, at *3 (S.D.N.Y. Feb. 13, 2003) (“A dispute between the parties that ‘goes to coverage under the policy and can only be resolved by analysis and application of the policy’ is not appropriate for appraisal.”) (quoting Kawa v. Nationwide Mut. Fire Ins. Co., 174 Misc.2d 407, 664 N.Y.S.2d 430, 431 (N.Y.Sup.Ct.1997)); see also Zar Realty Mgmt. Corp. v. Allianz Ins. Co., No. 02 Civ. 6741, 2003 WL 1744288, at *4 (S.D.N.Y. Mar. 31, 2003).

Because the issue presented to the district court concerned the scope of coverage, the standard for ripeness, that “there is a substantial controversy . between [the] parties,” Maryland Cas. Co., 312 U.S. at 273, 61 S.Ct. 510, was plainly satisfied. Indeed, as noted by the district court St. Paul itself “concede[d] that there exists ‘an actual and continuing controversy’ between the parties” in its amended answer. Duane Reade I, 261 F.Supp.2d at 296. The district court, therefore, properly exercised jurisdiction over this case.

III. The No Action Clause

St. Paul next contends that Duane Reade's action was barred by the policy's “No Action Clause” because Duane Reade failed to file a proof-of-loss statement and submit to an appraisal before filing its suit. In construing insurance policies, “words should be given the meanings ordinarily ascribed to them and absurd results should be avoided.” World Trade Ctr. Props., L.L.C. v. Hartford Fire Ins. Co., 345 F.3d 154, 166 (2d Cir.2003) (internal quotation marks omitted). Whether a contract is ambiguous is a threshold question of law to be determined by the court. We have held that

[a]n ambiguity exists where the terms of an insurance contract could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.

Morgan Stanley Group Inc. v. New England Ins. Co., 225 F.3d 270, 275 (2d Cir.2000) (internal quotation marks omitted). Under New York law, moreover, a “policy must . be construed in favor of the insured, and ambiguities, if any, are to be resolved in the insured's favor and against the insurer.” U.S. Fid. & Guar. Co. v. Annunziata, 67 N.Y.2d 229, 232, 501 N.Y.S.2d 790, 492 N.E.2d 1206 (1986). Employing these guiding principles, we conclude that the policy language does not support St. Paul's claims.

The No Action Clause of the policy before us provides:

No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless [Duane Reade] shall have fully complied with all of the requirements of this policy.

We find this language to be ambiguous with respect to the conditions for suit. While the clause may plausibly be read as precluding suit until Duane Reade satisfies every contractual obligation, as St. Paul asserts, it is equally amenable to being read as precluding suit only if Duane Reade has failed to satisfy those obligations that have accrued before the suit is filed. Because the latter reading is more favorable to Duane Reade, the insured, id., we adopt it, and hold that the No Action Clause would bar Duane Reade's suit only if Duane Reade's obligation to file a proof-of-loss statement or to submit to an appraisal had accrued as of the date it filed this suit.

The policy's proof-of-loss clause provides:

In the event of loss covered by this policy, it shall be necessary for [Duane Reade] to render a proof of loss, signed and sworn to, stating the place, time, and cause of the loss, damage, or expense; the interest of [Duane Reade] and of all others; the value thereof; and the amount of loss, damage, or expense.

The clause does not specify a time period within which the proof of loss must be submitted. In addition, another policy clause, this one entitled “REPAIRS,” provides:

In case of loss, [Duane Reade] is hereby permitted to make immediately all necessary repairs or replacement. Due notice of such loss, when it appear[s] that the amount thereof will exceed the amount of the initial net loss provided herein, shall be given to [St. Paul] without delay; however, [Duane Reade] shall not be required to render proof of loss until such loss has been repaired or replaced at which time proof of loss and statements shall be rendered for settlements.

(emphasis added). Because Duane Reade had not yet rebuilt or replaced its WTC store as of the date suit was filed, its obligation to file a proof-of-loss statement had not yet accrued pursuant to the Repairs clause. This conclusion finds further support in a clause entitled “Partial Payment,” which provides:

In the event of a loss occurring which has been ascertained to be a valid claim under this policy and estimated by [St. Paul]'s representatives to be in excess of the deductible, [St. Paul] hereon agrees on the submission of a partial proof of loss to advance to [Duane Reade] a mutually agreed upon amount of the estimated loss prior to production of final proof.

As St. Paul asserted in its brief, it paid Duane Reade $9.8 million for Duane Reade's BI losses before this lawsuit was filed, even though Duane Reade had not yet submitted a proof-of-loss statement. In fact, St. Paul did not demand a proof-of-loss statement until February 4, 2003, the day after it filed its answer to Duane Reade's complaint and more than five months after this action began. Duane Reade subsequently complied with that demand, which St. Paul has acknowledged. See Duane Reade II, 279 F.Supp.2d at 236 n. 1. When the foregoing policy terms and St. Paul's actions are considered together, it becomes clear that Duane Reade was not yet obligated to file a proof-of-loss statement when it filed suit.

St. Paul's related argument that an appraisal was required before suit could be brought is similarly unavailing. The policy's appraisal clause provides:

If [Duane Reade] and [St. Paul] fail to agree on the amount of loss, each, upon the written demand either of [Duane Reade] or of [St. Paul] made within 60 days after receipt of proof of loss by [St. Paul], shall select a competent and disinterested appraiser.

Joint App. at 1324 (emphasis added). Under the plain language of this provision, neither party was required to submit to an appraisal unless and until Duane Reade had filed a proof of loss and either party had issued a written demand for appraisal. Although St. Paul demanded an appraisal in the same letter in which it first demanded a proof of loss, this demand had no effect on the viability of Duane Reade's suit filed five months earlier. Cf. Lynch v. Am. Family Mut. Ins. Co., 163 Wis.2d 1003, 473 N.W.2d 515 (Ct.App.1991) (while proper demand for appraisal prior to commencement of action transforms appraisal into condition precedent to lawsuit, post-lawsuit demand for appraisal does not stop litigation unless policy specifically makes appraisal precondition to suit). Moreover, in its demand, St. Paul stated that the issues it sought to have submitted to appraisal were “independent of any questions regarding . the appropriate period of restoration, the delay and market loss exclusion as well as other coverage issues,” and that it was “leaving for the Court coverage questions such as the appropriate period of restoration.” It is apparent from the foregoing that, in this case at least, it was the lawsuit that had to precede the appraisal, not the other way around.

In sum, we hold that Duane Reade satisfied all of the policy's requirements for filing suit and, therefore, that the district court did not err in denying St. Paul's motion to either dismiss or compel appraisal.

IV. The Period of Restoration

With the underbrush thus cleared, we turn to the subject of the principle dispute on this appeal: the district court's declaration of the scope of Duane Reade's BI coverage,[1] which it determined primarily by construing the policy's Restoration Period clause. The district court held, in relevant part,

On their face, the Restoration Period clauses envision a hypothetical or constructive (as opposed to actual) time frame for rebuilding, as evidenced, for example, by their use of the subjunctive “would.” Moreover, what is to be hypothesized is the time it would take to rebuild, repair, or replace the WTC store itself, not the entire complex that once surrounded it. Once Duane Reade could resume functionally equivalent operations in the location where its WTC store once stood, the [Restoration Period] would be at an end. Any losses continuing beyond that point would be addressed by the “Extended Recovery Period” provision in the Policy, not by the [Restoration Period] clause.

Duane Reade II, 279 F.Supp.2d at 239 (internal citations omitted). St. Paul argues that the district court erred by (1) extending the Restoration Period to when Duane Reade resumes operations that are “functionally equivalent” to its pre-9/11 operations; and (2) declaring that the length of the Restoration Period is tied to rebuilding a store at the specific WTC site where Duane Reade's store was located.[2] We discuss each of these issues in turn.

A. “Functionally Equivalent Operations”

St. Paul contends that the district court's declaration that the Restoration Period ends at the point Duane Reade “could resume functionally equivalent operations” effectively rewrites the policy by superseding and enlarging upon the more limited coverage provided by the policy's Extended Recovery Period clause. We agree.[3]

The Restoration Period clause establishes that BI coverage lasts only for the reasonable amount of time it would take Duane Reade “exercis[ing] . due diligence and dispatch to rebuild, repair, or replace such property that has been destroyed or damaged.” Courts have consistently construed this or similar language as entitling the insured to continue to recover its lost profits until it can build a reasonably equivalent store in a reasonably equivalent location. See, e.g., Lee R. Russ, 12 Couch on Insurance §§ 183:55, 185:7 (3d ed. 1998 & Supp.2003); Beautytuft, Inc. v. Factory Ins. Ass'n, 431 F.2d 1122, 1128 (6th Cir.1970) (holding that insured's resumption of partial operations in inferior, temporary premises did not terminate business interruption coverage); see also Anchor Toy Corp. v. Am. Eagle Fire Ins. Co., 4 Misc.2d 364, 155 N.Y.S.2d 600, 603 (N.Y.Sup.Ct.1956) (holding that insured was entitled to modernize premises upon rebuilding). The rationale behind such holdings has generally been that insureds would lack any incentive to resume partial operations in temporary locations or under other inferior circumstances in order to mitigate damages if such actions would terminate their BI coverage. See Couch on Insurance §§ 183:55, 185:7. By contrast, we have found no case ruling that an insured is entitled to BI coverage until it can resume “functionally equivalent operations.”

The fact that the district court incorporated novel terminology in order to determine the scope of coverage under such unusual circumstances is not, in and of itself, what proves fatal. Rather, it is that the novel terminology the district court chose conflicts with the coverage provided by the Extended Recovery Period clause, which provides:

This policy is extended to cover the Actual Loss Sustained by [Duane Reade] resulting from interruption of business for such additional length of time as would be required with the exercise of due diligence and dispatch to restore [Duane Reade]'s business to the condition that would have existed had no loss occurred, commencing with the [later] of the following dates:

a) the date on which liability of [St. Paul] of loss resulting from interruption of business would terminate if the [Extended Recovery Period] clause had not been attached to this policy or

b) the date on which repair, replacement, or rebuilding of such part of the property as has been damaged is actually replaced, but in no event for more than twelve months from said later commencement date.

The purpose of the Extended Recovery Period is to provide additional coverage for the likely event that Duane Reade will continue to suffer losses due to its business interruption after it reopens the WTC store. The Extended Recovery Period guarantees Duane Reade its pre-9/11 profits until the earlier of when Duane Reade can restore business at its WTC store to the condition it would have been in had the WTC not been destroyed or twelve months after the Restoration Period ends.[4]

Although the district court plainly recognized the relationship between the Restoration Period and the Extended Recovery Period, see Duane Reade II, 279 F.Supp.2d at 239 (“Any losses continuing beyond th[e] point [that Duane Reade could resume functionally equivalent operations] would be addressed by the ‘Extended Recovery Period’ provision in the Policy, not by the Restoration Period clause.”) (internal citation omitted), its use of “functionally equivalent” to enhance the level of operations that will terminate the Restoration Period leaves no room for the Extended Recovery Period to operate. If Duane Reade achieves functionally equivalent operations within twelve months of resuming operations, the Restoration Period will terminate, but the Extended Recovery Period will not be triggered because Duane Reade will already have met the criteria for terminating that coverage. More important, if Duane Reade requires more than twelve months to achieve functionally equivalent operations, it will continue to receive business interruption coverage after the Extended Recovery Period coverage expires. As a result, the district court not only rendered the Extended Recovery Period provision superfluous, it nullified the express time constraints the parties agreed to place on such recovery, thereby effectively rewriting the policy to increase Duane Reade's coverage.

Because the district court's interpretation of the Restoration Period cannot be reconciled with the policy's other provisions, particularly the Extended Recovery Period, it must be modified to eliminate “functionally equivalent” to define the type of operations that will terminate the Restoration Period.

B. Tying Restoration to the Site of the WTC Store

The district court held that the Restoration Period was necessarily tied to a hypothesized rebuilding of Duane Reade's store at its former site at the WTC. Both parties construe this ruling as extending the Restoration Period to include, at a minimum, the time it would take to build the WTC building in which Duane Reade's store would be located. We need not decide whether this interpretation is correct because, in any event, we conclude that the district court erred in tying the Restoration Period to the specific site of Duane Reade's former store at the WTC.

Duane Reade defends the district court's site-specific reading of the Restoration Period by asserting that the parties intended to protect Duane Reade's interest in the specific location of its valuable WTC store. As evidence of this intent, Duane Reade points to the BI clause's coverage for damage to "Real or Personal Property whether insured or not, including . property of others." Duane Reade characterizes this language as creating "Contingent Business Interruption" coverage that reimburses Duane Reade for BI losses that are caused by damage to property that is not owned by Duane Reade but upon which its business depends, i.e., the WTC building in which Duane Reade's store was located. Duane Reade also relies on a policy provision entitled "Attraction Properties," which provides:

This policy is extended to cover the Actual Loss Sustained by [Duane Reade] directly resulting from the interruption of [Duane Reade]'s operation caused by damage to or destruction of Real or Personal property at Attraction Properties.

Attraction Properties are defined as properties within on[e] statute mile of [Duane Reade]'s location, not operated by [Duane Reade], which attract potential customers to [Duane Reade]'s location.

Duane Reade contends that the inclusion in the policy of these two coverages establishes site-specific coverage for BI losses Duane Reade suffers as a result of damage to property owned by third parties. We disagree with Duane Reade's reasoning.

Even if we assume that the St. Paul policy provides coverage for business interruption losses caused by damage to properties owned by others but upon which Duane Reade's business depends, Duane Reade did not file a claim for losses under either of these coverages following the destruction of the WTC. In addition, neither coverage alters or affects the critical language of the Restoration Period setting forth the mechanism for determining the duration of coverage. We conclude, therefore, that neither of these two coverages has any bearing on this case.

The primary flaw in Duane Reade's claim that the parties specifically intended to provide BI coverage until Duane Reade could resume operations at the site of its former WTC store, however, is that the St. Paul policy is a general one covering all 200 Duane Reade stores. It makes no reference to the WTC store or, for that matter, any specific property other than Duane Reade's main headquarters, which is listed on the policy's declarations page. This omission distinguishes this case from those cases, relied upon by Duane Reade, in which the court tied the length of business interruption coverage to the rebuilding and/or replacing of the specific property that was the subject of the insurance policy.

The BI clauses at issue in those cases specifically referred to the subject property, which typically was identified by address. For example, Anchor Toy Corp., a case relied upon by the district court, involved the destruction of a toy manufacturer's factory. The policy's BI clause provided coverage " 'if the building . situate[d at] 784 Main Street, Coudersport, Potter County, Pa. be destroyed . by [a covered] peril[ ] . so as to necessitate a total or partial suspension of business.' " 155 N.Y.S.2d at 602. In turn, the policy's valuation provision (i.e., restoration period) provided coverage " 'not exceeding such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair or replace such part of the above described property as has been destroyed or damaged.' " Id. at 603 (emphasis added); see also Omaha Paper Stock Co. v. Harbor Ins. Co., 596 F.2d 283, 285 (8th Cir.1979) (policy tied length of restoration to " 'time . it would take . to repair and/or replace the property herein described,' " referring to the property identified in the declarations page as " 'the premises . situated at 1401 Laird Street" ') (emphasis added); Beautytuft, Inc., 431 F.2d at 1123 (policy tied restoration period to theoretical time to rebuild " 'described property' "); Steel Prods. Co. v. Millers Nat. Ins. Co., 209 N.W.2d 32, 33-34 (Iowa 1973) (policy tied restoration period to rebuilding " 'the property herein described" '); Hawkinson Tread Tire Serv. Co. v. Ind. Lumbermens Mut. Ins. Co., 362 Mo. 823, 245 S.W.2d 24, 25-26 (1951) (policy tied restoration period to rebuilding of " 'the described building, and machinery and equipment contained therein, situated at 1119-23 North Twelfth Street' ").

By contrast, the physical premises of the WTC building in which Duane Reade's store was located was not the subject of the St. Paul policy. Nor was the WTC even mentioned by name, as might be expected had the parties intended to single out the WTC store in a policy that covered all of Duane Reade's 200 stores. Instead, the declarations page lists only Duane Reade's corporate address, and no specific property is referred to in the BI clause, which omits even generic terms for location, such as "premises," "site," or "building." Thus nothing in the BI clause supports Duane Reade's claim that it provides site-specific coverage for its WTC store.

Our interpretation of the Restoration Period is consistent with the only case we have found that addresses the length of a restoration period in the context of leased premises that are contained within a larger building, Streamline Capital, L.L.C. v. Hartford Casualty Insurance Co., No. 02 CIV. 8123(NRB), 2003 WL 22004888 (S.D.N.Y. Aug 25, 2003). In Streamline, offices that the insured, a computer facilities management company, had leased in the WTC were destroyed on 9/11. Judge Buchwald rejected the insured's argument that the restoration period for its BI coverage extended until the WTC was rebuilt. Distinguishing cases like Anchor Toy, the district court held,

Given that "premises" in the phrase "property at the described premises" [in the policy's restoration period clause] means plaintiff's office suite, the only reasonable construction of the word "property" [in that same phrase] is [that it means] the plaintiff's own personal property-computers, desks, chairs, etc. This interpretation is logical, given that the Policy's Business Income coverage states: "We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your 'operations' during the 'period of restoration.' " That the business income coverage only applies to the suspension of the plaintiff's "operations" indicates that it is dependent only on replacing what is necessary to resume those operations-namely, the plaintiff's personal property, not a specific office at a specific location.

Id. at *9.

We agree with Judge Buchwald's reasoning and find it equally applicable to the present case. As in Streamline, the St. Paul policy says nothing about the specific location of the interrupted business. It simply provides coverage until Duane Reade can "repair, rebuild, or replace" the property that was damaged and resume operations. Also in line with Streamline, the damaged property is the property Duane Reade had located in the premises it leased from the WTC.

Doubtless, if awaiting the rebuilding of the WTC and moving Duane Reade's WTC store to a new location were roughly equivalent tasks, the BI coverage would extend to whichever task Duane Reade, in its discretion, chose to do. The rebuilding of the WTC, however, will be a herculean undertaking far exceeding the rebuilding of a Duane Reade store in an existing building, or even in an as-yet-to-be built Manhattan office building, and involving numerous and complex contingencies over which neither Duane Reade nor St. Paul has any control. Under these circumstances, it would be entirely unreasonable to interpret the Restoration Period to include the time it would take for Duane Reade to resume operations in a store located at its former site where that site was neither the subject of the insurance policy nor expressly provided for in the calculus set forth in the Restoration Period. See Streamline, 2003 WL 22004888, at *9-*10 ("It is wholly unreasonable to think that the period of restoration should be tied to the rebuilding of real property over which neither the insured nor the insurer had any control, instead of tying it to a process that the plaintiff controlled: the acquisition of replacement office space and the installation of the plaintiff's personal property in that space."); Roundabout Theatre Co., 751 N.Y.S.2d at 7-8 (rejecting plaintiff's claim that the Restoration Period extended until damage that occurred on the street and prevented access to theater was repaired because "the insured obviously has no duty to repair a third party's property"); Anchor Toy, 155 N.Y.S.2d at 603 (holding that while insured was entitled to modernize its new building, "[d]oubtless if an extraordinary additional time would be required to include improvements or innovations these would not be included."); see also Cong. Bar & Res., Inc. v. Transamerica Ins. Co., 42 Wis.2d 56, 165 N.W.2d 409 (1969) (holding that restoration beyond what is reasonably necessary to restore the premises to its previous condition, such as demolition or reconstruction, are irrelevant and cannot be used to extend the period of compensation). In light of the foregoing, we conclude that the district court erred in holding that the St. Paul policy indemnifies Duane Reade for BI losses until the interrupted business can be resumed at the same location.

We find further support for this conclusion in the fact that the policy does, in fact, address the kind of site-specific losses Duane Reade seeks under the BI coverage in its provisions for the real-property coverage entitled “Leasehold Interest.” [5] The Leasehold Interest coverage substantiates Duane Reade's contention that the parties intended to protect Duane Reade's profit-generating store locations. As we explain, however, the precise coverage provided by the Leasehold Interest clause is decidedly different than the one Duane Reade seeks under the policy's BI clause.

Under the Leasehold Interest clause, coverage is extended for the “Actual Loss Sustained” in the event that a lease is terminated due to necessary untenantability arising from destruction of leased premises by a covered peril. That is precisely the circumstance here. Although some leases require the landlord to rebuild the leased premises if they are destroyed, see, e.g., Hotel des Artistes, Inc. v. Gen. Acc. Ins. Co., 9 A.D.3d 181, 775 N.Y.S.2d 262, 264 (App. Div. 1st Dep't 2004) (duty-to-defend case where underlying suit brought by lessee against landlord for breach of duty to repair that caused denial of lessee's business interruption claim), Duane Reade's lease for the WTC store did not. Instead, it gave Duane Reade's landlord, the Port Authority of New York and New Jersey (“Port Authority”), discretion to either rebuild destroyed property or terminate the lease if the necessary repairs would take more than 90 days to complete. At oral argument, the parties informed us that the Port Authority chose the latter option and terminated Duane Reade's lease shortly after 9/11 on the grounds of necessary untenantability. Under the valuation provision of the Leasehold Interest clause,[6] the cancellation of the WTC leasehold entitled Duane Reade to reimbursement for the loss of the WTC site's actual rental value (i.e., its intrinsic value) less the rents and expenses Duane Reade would have had to pay, but only until the lease would have expired of its own accord.

That it is the Leasehold Interest clause, and not the BI clause, that protects Duane Reade's interest in the WTC site is also a matter of common sense. A leasehold is a property interest; its cancellation deprives the owner of the right to inhabit or make use of that particular location, with all its attendant benefits. When such cancellation also interrupts a business, the losses caused specifically by the interruption will end shortly after the business resumes, whether at the original site or a new one. A company may, however, experience additional losses that are caused, not by the interruption, but by the relocation of a business and the concurrent loss of benefits of the original site, such as increased foot traffic, entrenched customer base, or superior location. While this is the type of loss that was targeted by Duane Reade's demand for BI coverage until the entire WTC complex is reopened, and was partially accommodated by the district court's declaration, the BI clause does not address such loss. Rather, it is addressed exclusively by the Leasehold Interest clause.

In sum, we hold that the St. Paul policy does not provide BI coverage until Duane Reade can resume operations in a store located at its former WTC site. Instead, coverage extends only for the hypothetical time it would reasonably take Duane Reade to “repair, rebuild, or replace” its WTC store at a suitable location. To be sure, there are few if any locations in New York City comparable to the WTC, and Duane Reade will most likely not be able to recreate the profit stream it once enjoyed there. But any discrepancies between the new building and the WTC in terms of benefits and advantages are exclusively accounted for under the Leasehold Interest clause.

We therefore modify the district court's construction of the Restoration Period in order to effectuate the policy's separate treatment of loss due to business interruption and losses due to the cancellation of a leasehold. To that end, we eliminate the district court's restriction of location, i.e., rebuilding the WTC store at its former site, as well as its emphasis on “rebuilding,” despite the BI clause's broader reference to “repair[ing], rebuild[ing], or replac[ing],” which together impermissibly extended Duane Reade's BI coverage to include injury caused by Duane Reade's loss of the WTC leasehold.

IV. The “Loss of Market” Exclusion

Finally, St. Paul renews the argument it made in the district court that Duane Reade's losses are excluded under the policy because they would have occurred in any event as a result of the disappearance of the local consumer market that ensued from the destruction of the WTC. The provision relied on by St. Paul excludes “loss or damage caused by . delay or loss of market.”

The district court held that St. Paul had “foregone” the issue because it had expressly acknowledged that Duane Reade had suffered both property loss and BI losses as a result of the destruction of its store in the WTC as a result of a covered peril. Duane Reade II, 279 F.Supp.2d at 239-40. If, by the term “foregone,” the district court meant that St. Paul had “waived” its right to claim an exclusion, the basis for the district court's holding is not apparent from the record. But we need not resolve this issue because the district court's rejection of St. Paul's argument can be affirmed on another basis. See Boy Scouts of Am. v. Wyman, 335 F.3d 80, 90 (2d Cir.2003) (court of appeals may affirm on any ground supported by the record).

Put simply, whether Duane Reade's BI losses can be attributed in whole or in part to a loss of market in the WTC vicinity has no bearing in this case. In filing for a declaratory judgment, Duane Reade presented the district court with a purely legal question concerning the scope of coverage provided by the St. Paul policy for BI losses. As the district court noted, St. Paul has already acknowledged that Duane Reade has suffered a loss due to BI and has paid Duane Reade some $9.8 million for these losses. Because there is no dispute that Duane Reade suffered a BI loss, St. Paul's assertion that the “loss of market” exclusion applies to Duane Reade's claim creates, at most, a factual issue concerning the amount of loss Duane Reade may recover. Such factual issues are properly the subject of the appraisal proceeding.

CONCLUSION

For the foregoing reasons, we modify the district court's declaration to read as follows:

On their face, the Restoration Period clauses envision a hypothetical or constructive (as opposed to actual) time frame for rebuilding, repairing, or replacing, as evidenced, for example, by their use of the subjunctive “would.” Moreover, what is to be hypothesized is the time it would take to rebuild, repair, or replace the functional equivalent of the store Duane Reade lost, not the WTC complex that once surrounded it. Once Duane Reade could resume operations in a permanent location reasonably equivalent to the site of its former store at the WTC, the Restoration Period would be at an end. Any losses continuing beyond that point would be addressed by the “Extended Recovery Period” provision in the Policy, not by the Restoration Period clause.

(Modifications italicized).

The judgment of the district court as modified by this opinion is Affirmed.

FOOTNOTES

1. The policy's business interruption clause provides coverage for:The interest of [Duane Reade] in loss of earning (business interruption), including ordinary payroll, continuing expenses, loss of royalties and bonus programs as a result of an interruption of [Duane Reade]'s business (either partial or total) if such interruption is a result of a peril, not excluded under this policy, causing direct physical loss or damage to any Real or Personal Property whether insured or not . including but not limited to loss or damage to . property of [Duane Reade], . and property of customers .

2. St. Paul also argues, albeit unpersuasively, that the standard set forth by the district court is incapable of being implemented because it is internally inconsistent. The gist of this claim seems to be that the district court's standard combines incompatible components-the physical act of rebuilding Duane Reade's WTC store and the intangible act of resuming operations-to measure the Restoration Period. This argument makes little sense. The coverage at issue is for business interruption, not property damage. Logically, coverage under the Restoration Period must continue for at least the reasonable time necessary to end the interruption, which-at least in this case-necessarily involves more than just “rebuild[ing], repair[ing], or replac[ing]” the relevant real property. If coverage terminated at the conclusion of physical reconstruction, Duane Reade would not be indemnified for the time necessary to prepare for reopening. See e.g., Anchor Toy Corp. v. Am. Eagle Fire Ins., 4 Misc.2d 364, 155 N.Y.S.2d 600, 603 (1956) (calculating separate period of time after completion of rebuilding for plaintiff to prepare for resumption of operations).

3. It is possible that the district court's use of the phrase “functionally equivalent operations” was just an inadvertent transposition of the wording contained in a prior letter ruling issued by the district court, which held that the Restoration Period would continue until Duane Reade could build “the functional equivalent of the WTC premises Duane Reade occupied,”

and that the Restoration Period would ultimately terminate “once Duane Reade could resume operations in the location where its WTC store once stood.” Letter Ruling dated July 8, 2003, at 2 (internal citation omitted). There would seem to be little daylight between this letter ruling and St. Paul's position on this issue.

4. As we noted earlier, the $9.8 million that St. Paul paid Duane Reade when it first settled Duane Reade's claim included 12 months of full profits pursuant to the Extended Recovery Period.

5. Coverage D of the policy, entitled “Leasehold Interest,” provides coverage forThe ACTUAL LOSS SUSTAINED by [Duane Reade] resulting from necessary untenantability due to the cancellation of a lease by any party other than [Duane Reade] . when such untenantability results from direct physical loss or damage to or destruction of leased premises, by the perils insured against.

6. The valuation provision related to the Leasehold Interest clause explains that the “actual loss” will becomputed as . [t]he excess of Actual Rental Value of the premises over the Actual Rental Payable . by [Duane Reade], during the unexpired term of the lease, whether the premises are occupied in whole or in part by [Duane Reade] or whether the premises are sub-let to other tenants.

JOHN M. WALKER, JR., Chief Judge.

A Summary of Saba v. Homeland Insurance Company of America

By Thomas V. Sieno

In or around 1953, in Ohio, Patrick G. Saba sustained a loss by fire and made claim against his Insurance company. They were unable to agree on the amount of loss.

Saba then made written demand invoking the policys appraisal provision and notified them of the appraiser he had selected. For whatever reason, the carrier ignored the notice.

After waiting twenty days, Saba asked the Insurance Company the name of the appraiser they had chosen. They then informed him that they had not, and refuse to, select an appraiser.

Saba seems to have known what he was doing, and waited another fifteen days...and on that 15th day, that Ohio Court received a motion from him to appoint an Umpire.

The court complied, and appointed the umpire. Eventually an award was executed.

The insurers tried to have the award vacated, but the Court refused. The insurer argued the only option Saba had was to sue, as they refused to participate In the appraisal. They cited a 1932 decision out of Georgia, National Fire Insurance Company v. Shaman. In that case the question of a court's power to appoint an umpire where an insurer refused to appoint an appraiser on demand was squarely posed. The Georgia court decided in favor of the insurers.

The insured in Saba argued that once a demand for an appraisal is made, the appraisal, by virtue of the clear language of the policy, becomes mandatory and is the only method for determining the amount of loss under the policy.

The Supreme Court of Ohio, in a split decision, sustained the position of the insured and held the appraisal provisions to be binding upon both the insured and the insurer.

Now regarding the question of the Courts power to, (as it has been referred to in both myth and legend)...appoint an "empty chair appraisal" The court simply stated:

"***The failure and refusal of the defendants to select an appraiser as required by the provisions of the policies constituted a failure to agree on an umpire just as effectively as if they had selected an appraiser and instructed him not to agree on an umpire. Under these circumstances the plaintiff was authorized to request the court to select such umpire.".***