

January 11, 2024

Federal Magistrate Judge Recommends Rescission of Policies

BY: Craig Rokuson

In the recent case of *Union Mut. Fire Ins. Co. v. 142 Driggs LLC*, 2023 U.S. Dist. LEXIS 220393, Magistrate Judge Lois Bloom of the United States District Court for the Eastern District of New York recommended granting the insurer's default judgment and holding that of three policies issued to 142 Driggs LLC ("Driggs") be rescinded *ab initio*.

Driggs had represented on its insurance applications that it did not provide parking to anyone other than itself, tenants, and its guests at the subject insured premises. However, Union Mutual learned that Driggs had been renting out three garages to non-tenants. Second, Driggs represented that the mercantile square footage was around 1,000 square feet, when in actuality, it was larger than allowed under the policies.

Union Mutual provided underwriting guidelines in connection with its default motion, which state that "parking provided for anyone other than the insured, tenants and their guests," presents an "unacceptable risk." The guidelines also state that answering yes to any "preliminary application questions (which presumably included those regarding mercantile square footage and parking) is an "unacceptable risk." The court held that these guidelines supported a finding that Driggs made material misrepresentation and that Union Mutual relied on these misrepresentations in issuing the policies. The court, as such, recommended that the policies at issue be rescinded from inception.

This case illustrates the importance of underwriting guidelines to support a misrepresentation case. *Chicago Ins. Co. v. Kreitzer & Vogelman*, 2000 U.S. Dist. LEXIS 80, *22 ("It is well settled that the conclusory affidavit of an underwriter is not sufficient, standing alone, to establish materiality as a matter of law, and supporting documentation such as underwriting manuals, rules, or bulletins is typically required.").

One final note: the court also reviewed the terms of the policy and held that Union Mutual did not owe coverage for an underlying lawsuit due to the classifications and designated premises limitations in one of the Union Mutual policies. It appears that this review is unnecessary in light of the recommendation to void the policies from their inception, but this analysis may have been included in the event that the Article III judge does not adopt the Magistrate's recommendation in full.