McGrane, Greenfield,
Hannon & Harrington LLP
Attorneys at Law

Please respond to:
William McGrane
San Francisco

Direct E-mail:
WMCGRANE@MGHHSF.COM

Internet: www.mghh.com

SAN FRANCISCO OFFICE
One Ferry Building, Suite 220
San Francisco, CA 94111
(415) 283-1776
Fax (415) 283-1777

SAN JOSE OFFICE
40 So. Market Street, Second Floor
San Jose, CA 95113
(408) 995-5600
Fax (408) 995-0308

December 31, 2003

Via Hand Delivery
Hon. Robert Dossee, Justice Ret.
JAMS
Two Embarcadero Center, Suite 1100
San Francisco, CA 94111

Re: McRoskey v. Brown

Dear Justice Dossee:

Thank you for agreeing to mediate the referenced matter on Wednesday, January 7, 2004, beginning at 10:00 AM at JAMS' San Francisco, California office. A jury trial is scheduled in Department 206 of San Francisco Superior Court on Monday, March 1, 2004, at 9:30 AM.

QUICK REVIEW

McRoskey is a bed manufacturer which sells its product directly to the public through company owned retail stores.[1] It was building the Santana Row Location when the Fire occurred. The Fire destroyed not less than $569,310.36 worth of tenant improvements at the Santana Row Location that McRoskey had paid for out of its own pocket. Within a few days, McRoskey then learned it had only $20,000 worth of insurance.

This is a case for deceit brought by McRoskey against Brown on account of certain misleading oral and written statements made to Azevedo (McRoskey's President) by Zimmerman (Brown's agent). On May 24, 2002, several months before the Fire, Zimmerman handed Azevedo the Proposal, which was a written description of the insurance coverage Brown was then planning on placing for McRoskey's various locations. As matters turned out, the Proposal inaccurately described the coverage Brown

[1] This letter brief adopts all abbreviations previously employed in the "First Amended Complaint etc." filed December 24, 2003, a copy of which, with all internal exhibits, is attached hereto as Exhibit A.

sold to McRoskey. There should be no disputing this by Brown, in that, for example, the Proposal said that McRoskey was buying "$1,755,000 Blkt Bus Personal Prop.," while the Policy which Brown actually placed for McRoskey only provides for location specific personal property coverage, with only $20,000 in coverage for unscheduled locations.[2]

Azevedo has now testified that, when Zimmerman handed her the Proposal, she noticed that the Santana Row Location was not scheduled. She testified that when she asked Zimmerman why this was so, he told her "Don't worry, it's covered anyway." Zimmerman does not deny he said this. He merely claims a failure of recollection on this point. Brown attempts to narrow Zimmerman's "covered anyway" remark by asserting, based on her contemporaneous handwritten notes on her copy of the Proposal, that Azevedo actually understood Zimmerman was discussing liability insurance only when he made his "covered anyway" statement. While Azevedo denies Brown's contention, even if Brown's contention were upheld, it would not change the fact that the Proposal—the whole purpose of which was to accurately describe the insurance coverage being purchased by Brown for McRoskey—was independently misleading.

Had the Proposal accurately stated that only $20,000 worth of property insurance was going to be placed on the Santa Row Location by Brown, ***then, and only then,*** would McRoskey have been afforded adequate notice, prior to the Fire, that Santana Row was underinsured and that McRoskey had better do something about it. Instead, the entirely misleading recital in the Proposal of "$1,755,000 Blkt Bus Personal Prop." obviously lulled McRoskey into the unfortunate situation it now finds itself in, i.e., burned out by the Fire and without adequate property insurance under the Policy.

LEGAL ANALYSIS

1. LIABILITY

Brown is an independent insurance broker. Because it is independent, any deceit practiced by Brown on McRoskey does not make Chubb (which was the insurance company with whom Brown placed McRoskey's coverage) liable to McRoskey for anything Brown did here. (See Croskey, Hesseman & Johnson, *Cal. Prac. Guide: Insurance Litigation* (TRG 2001) §2:57.)[3]

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[2] Blanket coverage sets a single limit applicable to multiple locations. Location specific coverage specifies much smaller limits on a location by location basis.

[3] The tort of deceit includes negligent misrepresentation. 5 Witkin, *California Procedure* (4th ed. 1997), Pleading, §668. Negligent misrepresentation does not require proof of any intent to deceive. (See Witkin, *ibid.* at §684 citing *Gagne v. Bertrain* (1954)

Independent insurance brokers, however, are themselves liable for deceit when they misrepresent coverage to their client's detriment. Thus, in *Fitzpatrick v. Hays* (1997) 57 Cal.App.4th 916, 927, the court said:

> ...[A]n insurance agent does not have a duty to volunteer to an insured that the latter should procure additional or different insurance coverage .... **The rule changes, however, when ... the agent misrepresents the nature, extent or scope of the coverage being offered or provided ....**

(Emphasis in **bold** added; see also *Paper Savers, Inc. v. Nacsa* (1996) 51 Cal.App.4th 1090 [same holding].)

Since the Proposal constitutes the most blatant and undeniable type of "misrepresent[ion] of the nature, extent or scope of the coverage being offered," Brown's liability to McRoskey for deceit is a foregone conclusion in this case.

2. DAMAGES

McRoskey claims two types of damages here. First, it claims $569,310.36 for the value of its uninsured tenant improvements. Second, it claims not less than $200,000 for its uninsured loss of business income and extra expenses. The documentation for the uninsured tenant improvements is attached hereto as Exhibit B. The documentation for the uninsured loss of business income and extra expenses is attached hereto as Exhibit C. McRoskey recognizes that, in order to recover against Brown, it must show that it had an insurable interest in the tenant improvements. In this regard, the following:

Insurance Code section 281 reads, in pertinent part:

> Every interest in property ... of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest.

Insurance Code section 284 reads, in pertinent part:

> [T]he measure of an insurable interest in property is the extent to which the insured might be damnified by loss or injury thereof.

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43 Cal.2d 481.) McRoskey contends that, at a minimum, Zimmerman's Deceit constituted negligent misrepresentation respecting the insurance coverage being purchased for McRoskey by Brown. Brown has errors and omissions insurance for this type of deceit through Fireman's Fund Insurance Company.

In *California Food Service Corp. v. Great American Insurance Co.* (1982) 130 Cal.App.3d 892, 897 the court said:

> [A]n insurable interest exists when "the insured has a direct pecuniary interest in the preservation of the property and ... will suffer a pecuniary loss as an immediate and proximate result of this destruction ...[Citation]." (*Davis v. Phoenix Co.* (1896) 111 Cal. 409, 414.)

In *Davis*, *ibid.* at p. 414, the court said:

> Actual possession by consent of the owner, with the beneficial use of the property, has been held an insurable interest.

(See also, *Smith v. Royal Ins. Co. Limited* (9th Cir. 1940) 111 F.2d 667, cert. denied *Royal Ins. Co. v. Smith* (1940) 311 U.S. 676 [implied at will leasehold held to create insurable interest in leased structure]; *California Insurance Law & Practice* (Matthew Bender 2003) §35.09[5][c]; *Improvements and Betterments Insurance* (1964) 97 A.L.R.2d. 1243.)

And, not only did McRoskey have a generalized insurable interest in the tenant improvements, it also had an obligation to insure them on its own behalf under its lease dated March 6, 2002 with FRIT San Jose Town & Country Village, LLC ("FRIT" and the "FRIT Lease" respectively [a copy of the FRIT Lease is attached as Exhibit D]). Thus, the FRIT Lease reads, in pertinent part:

> Tenant shall cause any contractor ... to obtain, carry and maintain ... builder's risk insurance ... in the amount of the full replacement cost of the ... Leasehold Improvements .... If the contractor fails to acquire such insurance, Tenant shall provide such insurance ....[4]

(FRIT Lease at MC 0289.)

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[4] FRIT accepted a Certificate of Insurance from McRoskey's general contractor, McGuckin Construction Company ("McGuckin") that did not include the required builder's risk insurance called for by the FRIT Lease. Although McGuckin had by contract passed back the obligation to provide any necessary insurance to McRoskey, had FRIT enforced its own lease terms, then, despite Zimmerman's Deceit, there would very likely have been insurance purchased by McRoskey prior to the start of construction on June 27, 2002. FRIT, however, had no duty to McRoskey or anyone else to enforce the terms of the FRIT Lease. (See *Moreles v. Fansler* (1989) 209 Cal.App.3d 1581, 1588 [where landlord inserts provision in lease requiring tenant to obtain certain types of insurance, landlord has not thereby voluntarily assumed any responsibility with respect to tenants or third parties if required insurance coverage is not placed by tenant as agreed].)

On August 8, 2003 McRoskey entered into a "Lease Termination Agreement" with FRIT (the "Lease Termination"). A copy of the Lease Termination is attached as Exhibit E. Given that McRoskey was required to insure the tenant improvements by the FRIT Lease, it is clear that if Brown had placed the proper coverage for McRoskey with Chubb, Chubb would not have had any subrogation rights capable of being affected by the Lease Termination, due to a before the fact waiver of subrogation in favor of FRIT that is expressly permitted by the Policy. Thus, the Policy reads:

> You may waive your rights against another party in writing:
> A. prior to direct physical loss or damage to insured property ....

(Policy at MC 1406 [attached as part of Exhibit A hereto].)

The FRIT Lease reads:

> Landlord and Tenant (each, a "Waiving Party") ... each hereby waives and releases all rights of recovery against the other and the other's agents and employees (the "Released Parties") ... on account of loss or damage to the property of the Waiving Party to the extent that such loss or damage is required to be insured against under any property damage insurance policies required to be carried by this Lease. By this waiver it is the intent of the parties that the Released Parties shall not be liable to the Waiving Party or any insurance company (by way of subrogation or otherwise) insuring the Waiving Party for any loss or damage insured against ... under any property damage insurance required by this Article ....

(FRIT Lease at MC 0290.)

PRIOR SETTLEMENT DISCUSSIONS

In April 2003, McRoskey offered to settle for $200,000, which offer was declined by Brown's in-house general counsel, Robert Lloyd, Esq., of Miami, Florida. This $200,000 offer was made before McRoskey made the Lease Termination and thereby gave up its possible rights to have FRIT rebuild the Santana Row Location at FRIT's expense. In light of the Lease Termination, McRoskey's present demand is $600,000.

CONCLUSION

McRoskey's first words to the jury will be, "How would you feel if your home burned down and there was only $20,000 worth of insurance?" Given the indisputable facts of this case, McRoskey will likely have the jury's entire sympathy from the get go. The ultimate result of a jury trial will certainly be a jury verdict in McRoskey's favor for very substantial damages. This is a case Brown should settle, and settle fast.

Sincerely,

William McGrane

Cc: Robin Azevedo, Esq. (via e-mail w/encls.)
John Hook, Esq. (via e-mail w/encls.)
William Greenspan (via e-mail w/encls.)
Donald Way (via e-mail w/encls.)
Bruce Loper, Esq. (via e-mail w/encls.)