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Supreme Court of New Jersey

Docket No.

AMERICAN HOME ASSURANCE
COMPANY,

Plaintiff-Respondent,

vs.

HERMANN WAREHOUSE CORPO-
RATION,

Defendant-Petitioner.

Civil Action

On Petition for
Certification to the
Superior Court of New
Jersey, Appellate
Division

Sat Below:
Greenberg, Cohen
and Gruccio, J.J.A.D.

APPENDIX FOR DEFENDANT-PETITIONER

THOMAS J. SHAMY
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APPENDIX

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FILED

FEB 18 1986

ROSEMARY K. REAVEY
J.S.C.

1
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4 New Brunswick, N.J. 08901
5 (201) 247-1133
6 ATTORNEY FOR Defendant

SUPERIOR COURT OF NEW JERSEY

7 *Plaintiff*

8 AMERICAN HOME ASSURANCE COMPANY, INC.

LAW DIVISION

MIDDLESEX COUNTY

9 *vs.*

Docket No. L-37214-84

10 *Defendant*

11 HERMANN'S WAREHOUSE CORPORATION

CIVIL ACTION

ORDER

12 This matter being presented to the Court by DeGonge, Garrity &
13 Fitzpatrick, P.A., attorneys for plaintiff, AMERICAN HOME
14 ASSURANCE COMPANY, INC., for an Order granting Summary Judgment
15 in favor of plaintiff, AMERICAN HOME ASSURANCE COMPANY, INC., and
16 by Thomas J. Shamy, Esq., attorney for defendant, HERMANN'S
17 WAREHOUSE CORPORATION, for an Order granting Summary Judgment in
18 favor of defendant, HERMANN'S WAREHOUSE CORPORATION, on the First
19 and Second Counts of plaintiff's complaint, and the Court having
20 reviewed the matter, together with the moving papers in this
21 matter and being of the opinion that good cause exists,

IT IS on this 18th day of February, 1986;

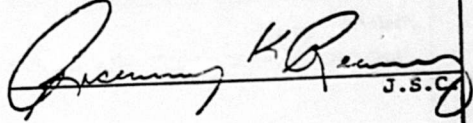
ORDERED, that plaintiff, AMERICAN HOME ASSURANCE COMPANY,

Da-1

1 INC.'s Motion for Summary Judgment is denied.

2 IT IS FURTHER ORDERED, that defendant, HERMANN'S WAREHOUSE
3 CORPORATION's Cross Motion for Summary Judgment as to the First
4 and Second Counts of plaintiff's complaint, is hereby granted.

5 IT IS FURTHER ORDERED, that a true copy of this Order
6 shall be served on counsel for the plaintiff within seven (7)
7 days of receipt of a filed copy from the motions clerk's office.

8  J.S.C.

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Dg-a

SUPERIOR COURT NEW JERSEY
LAW DIVISION - MIDDLESEX COUNTY
DOCKET NO. L-37214-84

AMERICAN HOME ASSURANCE COMPANY, INC., :

Plaintiff, :

vs. :

HERMANN'S WAREHOUSE CORPORATION, :

Defendant. :

Place: Middlesex County Courthouse
New Brunswick, New Jersey

Date: February 14, 1986

B E F O R E :

HONORABLE ROSEMARY K. REAVEY, J.S.C.

LUNDA LOPES STEIN, C.S.R.
OFFICIAL COURT REPORTER
MIDDLESEX COUNTY COURTHOUSE
NEW BRUNSWICK, NEW JERSEY

Da-3

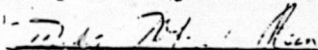
1 THE COURT: As to American Home
2 Assurance Company versus Hermann's Warehouse
3 Corporation, there are motions for summary
4 judgment.

5 The plaintiff, American Home
6 Assurance Company, settled the case and seeks
7 recovery of the deductible. Defendant opposes
8 the motion for summary judgment and seeks
9 motion for summary judgment in its own behalf
10 arguing that it did not participate in the
11 settlement, did not approve the settlement
12 and should not be required to pay the
13 deductible.

14 I am satisfied from the arguments
15 of counsel that the defendant's position is
16 the sound one. In fact, it did not approve
17 the settlement and should not be required to
18 pay the deductible. I am going to grant
19 summary judgment for the defendant.
20 Accordingly, I will deny summary judgment
21 on behalf of the plaintiff.

22 C E R T I F I C A T E

23 I, LINDA LOPES STEIN, a Certified
24 Shorthand Reporter of the State of New Jersey,
25 certify the foregoing to be true and accurate
to the best of my knowledge and ability.


LINDA LOPES/STEIN, C.S.R.

Dq-4

Superior Court of New Jersey

Appellate Division

Docket No. A-4005-85-T1

AMERICAN HOME ASSURANCE
COMPANY, INC.,

Plaintiff-Appellant,

vs.

HERMANN'S WAREHOUSE CORPORA-
TION,

Defendant-Respondent.

Civil Action

On Appeal from Oral
Opinion Granting
Summary Judgment,
Dated February 14,
1986, in the Superior
Court of New Jersey,
Law Division, Middle-
sex County, Docket
No. L-37214-84

Sat Below:
Hon. Rosemary K.
Reavey, J.S.C.

**BRIEF AND APPENDIX FOR
PLAINTIFF-APPELLANT**

DeGONGE, GARRITY &
FITZPATRICK, P.A.

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STATEMENT OF FACTS

This lawsuit was instituted by American Home Assurance Company ("American Home") against Hermann's Warehouse Corporation ("Hermann's") for recovery of a deductible due under an insurance contract between the parties. Hermann's operates a warehouse located in North Brunswick, New Jersey. In August 1980, Hermann's was to receive delivery and store a shipment of various Christmas ornaments. Hermann's, due to a heavy work schedule, was unable to unload the cargo received in three container trailers from All Freight Trucking Company ("All Freight"). All Freight left the trailers so that Hermann's would be able to unload these goods on the following morning.

The following morning, two of the three trailers had mysteriously disappeared and an investigation ensued. Some of the missing goods were later recovered.

Kurt Adler, Inc., the owner of the goods transported to Hermann's, filed suit against Hermann's for the value of their lost cargo. This lawsuit exposed Hermann's to possible liability of \$100,000; \$76,382.80 in damages plus interest. Based upon various facts, American Home was able to negotiate a settlement with Kurt Adler, Inc. for \$67,000, pursuant to the insurance contract (1a). In August 1983, the defendant Hermann's refused to pay the deductible amount as required by the insurance agreement: \$40,000 for inventory losses or unexplained disappearances or \$20,000 for all other losses. (1a).

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LEGAL ARGUMENT

POINT I

THE TRIAL COURT IMPROPERLY GRANTED SUMMARY
JUDGMENT IN FAVOR OF THE DEFENDANT-RESPONDENT.

It is well settled that Summary Judgment should only be granted with extreme caution. Ruvolo v. American Casualty Co., 39 NJ 490, 499, 189 A.2d 204 (1963). All facts and inferences presented must be accepted in a light most favorable to the party opposing such motion -- in this case the plaintiff American Home Assurance. Judson v. Peoples Bank & Trust Co. of Westfield, 17 NJ 67, 74, 110 A.2d 24 (1954). In this regard, the Judson Court stated:

"[Summary Judgment] is designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows not to present any genuine issue of material fact requiring disposition at trial... At the same time, the standards are to be applied with discriminating care so as not to defeat a summary judgment if the movant is justly entitled to it." Id. at 74.

We do not dispute the lack of issues of fact below. There was no dispute as to the existence of an insurance agreement between the parties. There was no dispute that three cargo trailers were left at the defendant's premises on August 4, 1980 for the purpose of having their cargo unloaded and stored at the defendant's warehouse. There was no dispute that because of a full work schedule, the defendant's employees did not have the opportunity to unload the cargo on August 4, 1980 and as a result planned to unload the cargo the following morning. There was no dispute that during the night

1 of August 4, 1980 or early morning of August 5, 1980, two of the three cargo
2 trailers disappeared from the defendant's premises. The issues presented
3 by these facts are elementary issues of law regarding an insurance company's
4 ability to settle claims against an insured and the obligation of the insured
5 to pay a deductible pursuant to their contractual obligations.

6 The trial court, in granting the defendant's Motion for Summary Judgment,
7 did not cite statutory or other legal authority to support the proposition that
8 in the absence of an insured's consent to settle a claim, the insurer is not
9 entitled to reimbursement of the deductible. (33a). New Jersey case
10 law does not support such a proposition and in the absence of such authority
11 the trial court's decision constitutes reversible error. In the case of Kavanaugh
12 v. Quigley, 63 NJ Super 153, 164 A2d 179 (App. Div. 1960) the Court stated
13 the following:

14 "It is well settled that discretion means legal discretion, in
15 the exercise of which the trial judge must take account of
16 the law applicable to the particular circumstances of the case
17 and be governed accordingly... (citations omitted). Consequently,
18 if the trial judge misconceives the applicable law or misapplies it
19 to the factual complex, in total effect, the exercise of legal
20 discretion lacks a foundation and becomes an arbitrary act,
21 however conscientious may have been the judge in the performance
22 of it. When this occurs it is the duty of the reviewing court to
23 adjudicate the controversy in light of the applicable law in order
24 that a manifest denial of justice be avoided.

25 Id. at 128; State v. Steele, 92 NJ Super. 498, 507, 224 A.2d 132 (App. Div.
1966). In the case at bar, reversal would be in order to avoid manifest
injustice to the plaintiff.

A. It is Within the Power of an Insurance Carrier
to Settle Any Claims Against Its Insured Without
the Consent of Its Insured.

American Home retained an absolute right to settle claims against Hermann's
irrespective of Hermann's consent or lack thereof. The policy states in pertinent
part (2a):

1 "8.... the company reserves the right to settle any claim,
2 suitor other proceedings as it may deem expedient."

3 From this provision it is clear that the Company had absolute authority
4 to settle the claim of its insured, subject only to considerations of good faith
5 and fair dealing. Fireman's Fund Insurance Co. v. Security Insurance Co.
6 of Hartford, 72 NJ 63, 367 A.2d 864 (1976). In deciding whether to settle a
7 claim, a liability insurer may properly consider its own interest, but must
8 give at least equal consideration to the interest of the insured. Board of
9 Education of Chatham v. Lumbermens Mutual Casualty Co., 293 F. Supp 541
10 (D. NJ. 1968). Lieberman v. Employers Insurance of Wausau, 84 NJ 325
11 (1980). There is no evidence to support a claim of a lack of good faith in
12 the case at bar. American Home made the decision to settle by considering
13 all the factors involved including their interests in defending the case at
14 trial, the potential legal liability for Hermann's under the circumstances, and
15 the probability of success at trial.

16 B. American Home Acted Reasonably and in Good Faith In
17 Settling the Claim Against Its Insured, Hermann's Warehouse.

18 The law in this state provides that in deciding whether to accept an offer
19 to settle a claim within the policy limits of an insured, the insurer must consider
20 the interests of the insured at least equally with their own. Lieberman, supra.
21 Case law also applies a strict standard of good faith and fair dealing when
22 insurance companies consider settling cases within the policy limits that could
23 otherwise expose the insured to liability in excess of the policy coverage.
24 Bowers v. Camden Fire Insurance Asso., 51 NJ 62, 71, 237 A.2d 857 (1968).
25

1 Bowers, while relied on by the Respondent below to support its argument
2 of bad faith, is not applicable to the case at bar because it deals primarily
3 with decisions by insurance carriers to not settle a claim for an amount within
4 the policy limit when the potential liability for the insured is greater than
5 the policy limit. In the case at bar, there were no considerations to be made
6 regarding excess judgments. The total potential liability fell clearly within
7 the policy limits. American Home had to weigh the likelihood of the plaintiff's
8 success in its lawsuit against Hermann's. In this regard, it was the trial
9 court's obligation to weigh the facts in favor of the plaintiff-American Home.
10 Judson, 17 NJ at 74.

11 In denying that it was liable to the plaintiff, Kurt Adler, Inc., Hermann's
12 relied upon Hy-Grade Oil v. New Jersey Bank, 138 NJ Super. 112, 350 A.2d
13 279. (App. Div. 1975). This case clearly is not applicable here because in
14 dealing with a lost bank deposit, the Court stated that no bailment is created
15 where the reputed bailee does not know of the article or that it has been
16 delivered to him. Id. at 116. Hermann's has acknowledged that they knew
17 the trailers filled with a cargo of Christmas ornaments was left on their
18 premises. They cannot now use Hy-Grade to claim that no bailment existed.
19 The Respondent argued further that even if a bailment existed, it was strictly
20 gratuitous, and thus would only be liable for bad faith or gross negligence.
21 Capezzaro v. Winfrey, 153 NJ Super. 267, 379 A.2d 493 (App. Div. 1977).
22 This is not at all the case from the facts presented by the Respondent. The
23 trailers were left on the Respondent's premises to allow Respondent's employees
24 to complete other work before unloading them. The mere fact that a storage
25

1 fee was not being charged does not create a gratuitous bailment. At the very
2 least this was a bailment that would benefit both the bailor and bailee and
3 thus Hermann's, who knew of the cargo, had a duty of reasonable care in
4 safeguarding these goods. Parnell v. Rohrer Chevrolet Co., 95 NJ Super.
5 471, 231 A2d 824 (App. Div. 1967). There was no evidence that any steps
6 had been taken to safeguard the cargo, except for securing a padlock, and
7 thus American Home, in considering this fact in conjunction with possible
8 testimony of a former employee whose testimony would have been severely
9 damaging, acted reasonably and in good faith.

POINT II

AN INSURANCE CARRIER IS ENTITLED TO RECEIVE REIMBURSEMENT OF A DEDUCTIBLE PURSUANT TO AN INSURANCE AGREEMENT EVEN IN THE ABSENCE OF CONSENT OF THE INSURED.

The trial court's holding that in the absence of an insured's consent the insurer is not entitled to receive payment of a deductible is wholly unsupported by case law or statutory law in this jurisdiction. The trial court's grant of Summary Judgment in favor of the defendant-respondent was inappropriate and should be reversed and granted in favor of the petitioner, American Home Assurance Company.

Travelers Insurance v. Hitchner, 61 NJ Super. 283, 160 A.2d 521 (1960) is the operative case which provides that where the terms of the insurance agreement are clear it

"[is] unnecessary for the insurer to obtain consent of the insured to the settlement... It [is] the duty of the insured not only to pay, on behalf of the insured, all sums for which the latter might become obligated... within policy limits, less the \$500 deductible, but also, insofar as it could do so by a reasonable performance of its services, to settle all claims without interference by the insured." Id. at 290.

There is no authority in this jurisdiction to support a contrary position. The respondent requested that the court below re-examine this rule of law in accordance with recent New Jersey Supreme Court decisions. The cases cited, however, did not support the proposition that a deductible would not be due to American Home Assurance in this case. Bowers v. Camden Fire Insurance Assoc., 51 NJ. 62 (1968), is not applicable because it does not deal with payment of deductibles under similar circumstances. Bowers focuses on a carrier's obligation to settle claims where an excess claim exists. Similarly,

1 Rova Farms Resort v. Investors Insurance Co., 65 NJ 474, 323 A.2d 495
2 (1974), deals with a carrier's good faith considerations in refusing to accept
3 a settlement. Fireman's Fund Ins. Co. v. Security Ins. of Hartford, 72 NJ
4 63 (1976); deals with an insurance carrier's obligations to settle in light of
5 a possible excess judgment. Board of Education of Chatham v. Lumberman's
6 Mutual Cas. Co., 293 F. Supp. 541 (D. N.J. 1968), again deals with a carrier's
7 refusal to settle. These cases do not address the issue of consent to settle
8 nor payment of a deductible and thus could not be construed as influencing
9 the law on this particular point. Moreover, the only case cited by the
10 defendant below which dealt with consent to settle a claim is clearly inapplicable
11 because the insurance policy at issue contained a clause requiring written
12 consent of the insured to settle a claim. Lieberman v. Employers Ins. of
13 Wausau, 84 NJ 325 (1980).

14 New York Courts have adopted the approach taken in Hitchner. Orion
15 Ins. Co. v. General Electric Co., 493 N.Y.S. 2d 397 (Sup. 1985), allowed
16 recovery of a \$5,000,000 deductible over the objection of the insured.

17 In the case at bar, there was no threat of excess liability for the
18 insured. A verdict substantially higher than the settlement offer which was
19 accepted by American Home. In either case, the cost for Hermann's would
20 be the same, the amount of the deductible. It was not in bad faith to settle
21 the claim for a lesser amount within the policy limits. Moreover, from a public
22 policy standpoint, if insureds were not obligated to reimburse insurance carriers
23 who settle claims in good faith whenever the insureds did not consent to such
24 settlements, there would be no motivation to consent to settle these cases.

25 It would allow insureds to limit their contractual obligations to pay and require
more cases to ultimately go to trial that would be appropriate for settlement.

This would be an unduly harsh and burdensome result.

CONCLUSION

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Wherefore, for the reasons stated herein, the Petitioner, American Home Assurance Company, respectfully requests this Court to reverse the grant of Summary Judgment of the trial court and grant Summary Judgment in favor of American Home Assurance Company.

Respectfully submitted,
DeGONGE, GARRITY & FITZPATRICK, P.A.
By: *Daniel C. Nowell*
DANIEL C. NOWELL

DATED:

Dq-18

1a
APPENDIX A - INSURANCE CONTRACT BETWEEN AMERICAN HOME ASSURANCE
AND HERRMANN'S WAREHOUSE
AMERICAN WAREHOUSEMEN'S ASSOCIATION
MEMBER'S "WAREHOUSEMAN OR BAILEE LIABILITY" FORM
(MERCHANDISE)

(Part One of Two Parts)

1. In consideration of premium charges hereinafter provided and subject to the following conditions and limitations, this Company agrees:
- (a) To pay on behalf of the Assured all sums which the Assured shall become legally obligated to pay by reason of liability imposed upon him as a warehouseman or bailee, for loss or destruction of or damage to personal property of others contained in the premises hereinafter specified, occurring while this Policy remains in full force and effect.
- (b) (1) To investigate all claims for such loss, destruction or damage of which the Company shall have notice as hereinafter required;
- (2) To defend in the Assured's name and behalf, any suits or other proceedings which may be brought against the Assured to enforce such claims even if such suits are groundless, false or fraudulent;
- (3) To pay, irrespective of the Company's limit of liability otherwise specified herein, the expense of adjusting all such claims or suits which may be settled at the option of the Company without litigation; all expenses of litigation and all costs taxed against the Assured in proceedings defended by the Company, including all premiums for appeal bonds, but without any obligation to apply for or furnish such bonds, and if bond be required to release attachment of the Assured's property, the premium on that portion thereof which secures payment of an amount not in excess of the Company's applicable limit of liability hereunder; all interest accruing after entry of judgment until the Company has paid, tendered, or deposited in court such part of such a judgment as does not exceed the Company's applicable limit of liability thereon.
2. Insurance provided under this Policy shall not apply as respects any liability for:
- (a) Any loss, destruction or damage for which the Assured has assumed liability under written or oral contract in excess of liability imposed upon him by law as a warehouseman or bailee;
- (b) Any loss, or destruction of, or damage caused by the infidelity and dishonesty, either or both, of the Assured, or any person or persons in the employ or service of the Assured whether or not such act or acts occurred during the regular hours of employment or service, or any person or persons to whom the said articles may be entrusted (carriers for hire excepted);
- (c) Any loss or destruction of or damage to accounts, bills, currency, deeds, evidence of debt, money, notes or securities;
- (d) Any loss, or destruction of, or damage to property due to change of temperature resulting from the failure, or total or partial destruction of any refrigerating or cooling apparatus;
- (e) Any loss, damage or destruction resulting from forged warehouse receipts;
- (f) War Risks as set forth in the War Risk Exclusion Clause in the printed "CONDITIONS" of this Policy;
- (g) Nuclear Exclusion Clause. The Company shall not be liable for loss by nuclear reaction or nuclear radiation or radioactive contamination, all whether controlled or uncontrolled, and whether such loss be direct or indirect, proximate or remote, or be in whole or in part caused by, contributed to, or aggravated by the perils insured against in this policy; however, subject to the foregoing and all provisions of this policy, direct loss by fire resulting from nuclear reaction or nuclear radiation or radioactive contamination is insured against by this policy.
- (h) Any occurrence or claim of which written notice has not been given the Company, as hereinafter required, within one year from the date of such occurrence or claim.
3. Limit(s) of Liability.
- (a) Insurance provided by this Policy applies only as respects the premises scheduled in Part II and for amount(s) not in excess of those stipulated, as respects coverage under Paragraph 1.(a) of this Form for loss, destruction or damage arising from any one occurrence.
- (b) The inclusion herein of more than one Assured shall not operate to increase the limit of the Company's liability hereunder.
4. DEDUCTIBLE:
- From the total of all claims arising out of any one occurrence, the sum shown in Part II, paragraph 2(a) shall be deducted and this Company shall only be liable for the excess of this amount. As respects any such claim resulting from inventory shortage or other unexplained disappearance of property, the amount of said deductible shall be the sum shown in Part II, paragraph 2(b) for each 90 day period (or fraction thereof) that such unexplained disappearance could have occurred. If the Company shall have paid such deductible amount, the Assured shall promptly reimburse the Company therefor.

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7. PREMIUM & REPORTS:

- (a) The Assured agrees to keep an accurate record of the charges accruing from their warehouse business on respects property for which the Assured's liability is insured hereunder.
- (b) (1) The Assured agrees to pay a Deposit Premium as specified in Part II, paragraph 3.
 (2) The Assured agrees to report to the Company within 30 days after the close of each annual period the full amount of such charges accruing (collected or uncollected) for (i) Storage of Goods, and (ii) Handling of Goods during the preceding annual period or during such time as is within the period of this insurance.
- (c) The Assured agrees to pay to the Company an earned premium of rate(a) per \$100.00 of such charges accruing as specified in Part II, paragraph 1.

6. DEFINITIONS:

- (a) The term "Premises", wherever employed in this Policy, is defined as that portion of the building(s) located at the address(es) shown in Part 2, which is (are) occupied by the Assured as a public warehouse, including loading platforms, side-tracks, and areas immediately adjacent thereto.
- (b) The term "Occurrence", wherever employed in this Policy, is defined as (1) an accident that takes place during the period of insurance under this Policy, or (2) in the absence thereof, a continuous or repeated exposure to conditions which unexpectedly cause loss or destruction of or damage to physical property during the period of insurance under this Policy, and all such exposure to substantially the same general conditions existing at or emanating from any one location specified in Part 2 of this Form shall be deemed one occurrence.
- (c) The unqualified word "ASSURED" includes the Named Assured and also includes any executive officer, director or stockholder thereof while acting within the scope of his duties as such, and if the Named Assured is a partnership, the unqualified "ASSURED" also includes any partner therein but only with respect to his liability as such.
7. The Assured, upon knowledge of a claim or of any occurrence which may give rise to a claim, shall give written notice thereof, with the fullest information obtainable, to the Company or its authorized agent as soon as practicable, and if such occurrence involves a violation of law, immediate notice thereof shall be given by the Assured to the public police or other peace authority having jurisdiction. If claim is made or suit is brought against the Assured, the Assured shall immediately forward to the Company every demand, notice, summons, or other process received by him or his representative.

8. The Assured shall take all reasonable means to protect, safeguard and salvage the property and shall cooperate with the Company in facilitating the investigation and disposition of claims and suits and, upon the Company's request, shall attend hearings and trials and shall assist in effecting settlement, securing and giving evidence, obtaining the attendance of witnesses, and in the conduct of suit; but the Assured shall not, except at his own cost, voluntarily assume any liability nor incur any expense, nor settle any claim without the written consent of the Company previously given. The Company reserves the right to settle any claim, suit or other proceedings as it may deem expedient.

9. DEBRIS REMOVAL CLAUSE

10. In the event of loss or damage to property, the Assured's liability for which is insured under Paragraph 1.(a) of this form, this Company will pay such expenses which may be incurred in the removal of all debris of such property which may be occasioned by such loss. However, total liability under this policy shall not exceed the amount of insurance specified in Part II of this form.

10. SUE AND LABOR CLAUSE

- In the event of loss or damage to property, the Assured's liability for which is insured under Paragraph 1.(a) of this Form, or to the building(s) in which such property may be located, it shall be lawful and necessary for the Assured, his or their factors, servants and assigns, to use, labor, and travel for, in and about the defense, safeguard, and recovery of the property insured hereunder, or any part thereof without prejudice to the insurance; nor shall the acts of the Assured or this Company in recovering, saving and preserving such property in case of loss or damage, be considered a waiver or an acceptance of abandonment, to the charges whereof this Company will contribute according to the rate and quantity of the sum herein insured.

11. (a) No action shall lie against the Company unless, as a condition precedent thereto, the Assured shall have fully complied with all the terms of this Policy, nor until the amount of the Assured's obligation to pay shall have been finally determined either by judgment against the Assured after actual trial or by written agreement of the Assured, the claimant and the Company.
- (b) Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this Policy to the extent of the insurance afforded by this Policy.

Dg-20

- (c) Nothing contained in this Policy shall give any person or organization any right to join the Company as a co-defendant in any action against the Assured to determine the Assured's liability.
- (d) Bankruptcy or insolvency of the Assured or of the Assured's estate shall not relieve the Company of any of its obligations hereunder.
12. The insurance afforded under this Policy shall be excess insurance over any other valid and collectible insurance available to the Assured against loss covered hereunder.
13. The Company shall be permitted at any reasonable time to inspect the premises and equipment used in connection with the Assured's operations and to examine and audit the Assured's books during the currency of this Policy and within one year after its termination, for the purpose of determining the actual premium earned under this Policy, in force; but the Company waives its rights and undertakes no responsibility by reason of such inspection or examination or the opinion thereof.
14. In the event of any payment under this Policy, this Company shall be subrogated to all the Assured's rights of recovery, whether against any person or organization and the Assured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The Assured shall do nothing after loss to prejudice such rights.
- 100 15. TERRITORIAL LIMITS.
This Policy in an event shall cover beyond the Continental limits of the United States, Canada and the States of Alaska and Hawaii.
16. It is specifically agreed that Condition 12 (Protection of Property after loss) of the printed policy, to which this form is attached, is hereby deleted.
17. The Amount of insurance and the applicable limit of liability shall not be reduced by the amount of any loss covered hereunder.
- 200 18. This Policy may be cancelled by the Assured by surrender thereof to the Company or its authorized agent or by mailing to the Company written notice stating when the same such cancellation shall be effective. This Policy may be cancelled by the Company by mailing to the Assured at the address specified in this Policy written notice stating when not less than thirty days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The time of surrender or the effective date of cancellation stated in the notice shall become the end of the Policy period. Delivery of such written notice either by the Assured or by the Company or its authorized agent shall be equivalent to mailing.
- 300 19. Assignment of interest under this Policy shall not bind the Company until its consent is obtained hereon. If, however, the Assured shall die, or shall be adjudged bankrupt or insolvent and written notice is given to the Company within sixty days after the date of such adjudication, this Policy shall cover the Assured's legal representative as insured, provided that notice of cancellation mailed to the Assured named in the declaration shall be sufficient notice.
20. Notice to the agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this Policy nor shall the Company be asserting any right under the terms of this Policy or shall the terms of this Policy be waived or changed, except by endorsement issued in form a part of this Policy.
21. The terms and conditions of this form are to be regarded as substituted for those of the Policy to which it is attached, the latter being hereby waived.

4a
 No. **4509315**

COVERAGE IS PROVIDED IN THE COMPANY DESIGNATED BY NUMBER A STOCK INSURANCE COMPANY WHICH IS CALLED THE COMPANY

2 THE AMERICAN HOME ASSURANCE COMPANY
 3 THE ASSURANCE COMPANY OF THE STATE OF PENNSYLVANIA
 MEMBERS OF THE AMERICAN INTERNATIONAL GROUP
 EXECUTIVE OFFICES
 102 MAIDEN LANE
 NEW YORK, N.Y.

INSURED'S NAME AND MAILING ADDRESS
Hermann Warehousing Corporation
P.O. Box 344
North Brunswick, New Jersey

POLICY PERIOD FROM **1/1/77** TO **12/31/77**
 AT PLACE OF ISSUANCE Year **Continuous**

AMOUNT	RATE	TOTAL PREMIUM		PREMIUM PAYABLE		
		PER ANNUUM	IF PAID ANNUALLY	AT INCEPTION	AT FIRST ANNIVERSARY	AT SECOND ANNIVERSARY
\$	\$	\$	\$	\$	\$	\$
		PER ATTACHED	ENDORSEMENTS			

In consideration of the stipulations hereinafter stated and of the premium above specified, the Company does insure the Insured named at hereinafter called the Insured, whose address is shown above from the inception date shown above at noon (Standard time), to the expiration date shown above, at noon (standard time) at place of issuance to an amount not exceeding the amount(s) above specified, or as described herein and/or endorsements attached hereto.

100-110 UNIT	111-112 FORM OR PROB	113-114 796 OCC CLASS CODE	COVERAGE					316-317 S&L
			1 BUILDINGS	2 CONTENTS	3 SLKT PROP DAM	4 USE AND OCC	5 PROP DAM & UGD	

Courtesy of
 Put in R.R.B.

D9-22

ENDORSEMENT

ATTACHED to and forming part of Policy No. AWA-250 9315of the American Home Assurance Companyissued to Hermann Warehouse Corporation

BAYLY, MARTIN & FAY, INC.
 INTERNATIONAL INSURANCE BROKERS
 300 WEST WASHINGTON STREET
 CHICAGO, ILLINOIS 60606

1312 561-2121

May 9, 1973

Effective May 3, 1973, it is agreed that the Named Assured
 and mailing address is hereby amended to read as follows:

Hermann Warehouse Corp., and Milltown Warehouse Corp.

P. O. Box 1

North Brunswick, N.J. 08902

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

D4-23

BAYLY, MARTIN & FAY, INC.
INTERNATIONAL INSURANCE BROKERS
200 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60606

ATTACHED to and forming part of Policy No. 353-450 9315

of the American Home Assurance Company

issued to Berkman Warehouse Corp., and Milltown Warehouse Corp. November 18, 1981

Effective November 11, 1981, it is agreed the following is added as an additional insured:

J. Herbert Fisher, Jr.
2601 Old Orchard Rd.,
Lancaster, PA. 17601

OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

D9-24

AMERICAN WAREHOUSEMEN'S ASSOCIATION
 WAREHOUSEMAN OR BAILEE LIABILITY - PART II
 (Part II of Two Parts)

REVISED

Effective: November 11, 1961

1. LIMITS OF LIABILITY & PREMIUM RATES

LOCATION OF PREMISES (Address, City and State)	LIMIT OF LIABILITY	PREMIUM RATES (PER 100)	
		Warehouse Liability	Storage - Handling
121 NJ.	2,000,000.	.25	.25
923 NJ.	2,000,000.	"	"
14 NJ.	2,000,000.	"	"
38 NJ.	2,000,000.	"	"
Route 120 & Old NJ.	2,000,000.	"	"
Road Ave., NJ.	2,000,000.	"	"
Old NJ.	2,000,000.	"	"
Port Authority of NJ and NJ.	2,000,000.	"	"
Corson Ave., NJ.	2,000,000.	"	"
Highway 12, Road NJ.	2,000,000.	"	"
River Bridge Industrial Complex 2nd St., Chester, PA.	2,000,000.	"	"
W. King St., PA.	2,000,000.	"	"

2. DEDUCTIBLES:


(a) \$ 20,000.00 on all losses, except (b) \$ 40,000.00 on Inventory Shortage and/or unexplained disappearances.

3. DEPOSIT PREMIUM:

\$ 3,000.00 payable

(in amounts of \$ 3,000.00 on January 1st of each year.

Attached to and forming part of Policy No. 150 9315 of the American Home Assurance Company.



 AMERICAN
 WAREHOUSE

Effective October 5, 1931

1. LIMITS OF LIABILITY & PREMIUM RATES

LOCATION OF PREMISES
(Address, City and State)

131 Jersey Ave., S. Brunswick, N.J.

9225 River Road, Pennsylvania,

35 Clyde Rd., Franklin Township, N.J.

40 Clyde Rd., Franklin Township, N.J.

Route 130 & Old Georges Rd., S. Brunswick, N.J.

Ford Ave., Milltown, N.J.

Old Georges Rd., S. Brunswick, N.J.

Port Authority of N.Y. and N.J., N.J.

Doramus Ave., Newark, N.J.

Bldg. 12, Ford Ave., Milltown, N.J.

River Bridge Industrial Complex, Chester, PA.

W. KING, JR., EPHRATE, PA.

2. DEDUCTIBLES:

(a) \$ 20,000.00 on all losses

DEPOSIT PREMIUM:

\$ 8,800.00 payable

in amounts of \$ 3,300.00

Attached to and forming part of Policy No. AWA 1234

Da-24

ENDORSEMENT

BAYLY, MARTIN & FAY, INC.
INTERNATIONAL INSURANCE BROKERS
300 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60606
(312) 661-2121

ATTACHED to and forming part of Policy No. _____
the American Home Assurance Company
issued to _____

June 11 19__

Adjustment of Annual Deposit Premium for the Period _____ 19__ to
_____ 19__

	<u>REVENUE</u>	<u>RATE</u>	<u>PREMIUM</u>
Storage	1,000,000.00	.000	\$ 10,000.00
Handling	1,000,000.00	.000	\$ 10,000.00
			<u>\$ 20,000.00</u>
			Less Deposit
			<u>\$ 20,000.00</u>
			(cc) Additional Premium Due
			() Return Premium Due

OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

D9-27

ENDORSEMENT

BAYLY, MARTIN & FAY, INC.
 INTERNATIONAL INSURANCE BROKERS
 300 WEST WASHINGTON STREET
 CHICAGO, ILLINOIS 60606

(312) 641-2121

ATTACHED to and forming part of Policy No. AWA-250 3315

of the American Home Assurance Company

issued to Hermann Warehouse Corporation

June 26, 1981

Effective June 23, 1981, it is agreed that the Schedule of Locations under Paragraph I, Part II of this Policy is amended as follows:

<u>DELETED</u>	<u>LIMIT OF LIABILITY</u>	<u>RATES</u>
<u>LOCATION</u>		<u>STGE HDLO</u>
Deeks Corner Rd., Dayton, NJ	2,000,000.	.925 .05

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

Da-28

11a
AMERICAN WAREHOUSEMEN'S ASSOCIATION
WAREHOUSEMAN OR BAILEE LIABILITY - PART II
 (Part II of Two Parts)

October 5, 1981

Effective September 3, 1981

1. LIMITS OF LIABILITY & PREMIUM RATES

LOCATION OF PREMISES (Address, City and State)	LIMIT OF LIABILITY		PREMIUM RATES (PER \$100)	
	Warehouse Liability	Storage	Storage	Handling
1209 Scotch Ave., Horse Lake, North Brunswick, N.J.	2,000,000.00	2,000,000.00	.925	.00
131 Jersey Ave., New Brunswick, N.J.	2,000,000.00		.	.
3225 River Road, Pennsauken, N.J.	2,000,000.00		.	.
45 Clyde Rd., Franklin Township, N.J.	2,000,000.00		.	.
88 Clyde Rd., Franklin Township, N.J.	2,000,000.00		.	.
Route 130 & Old Georges Rd., Dayton, N.J.	2,000,000.00		.	.
Ford Ave., Milltown, N.J.	2,000,000.00		.	.
Triangle Rd., & Scam News Rd., New Brunswick, N.J.	2,000,000.00			
2-1 Warehouse, 7100 Westfield Ave., Pennsauken, N.J.	2,000,000.00		.	.
Old Georges Rd., S. Brunswick, N.J.	2,000,000.00		.	.
Route 28, Bridgewater, Bridgewater Industrial Park, Bridgewater, N.J.	2,000,000.00			
Port Authority of NY And NJ, Bldg. 261, Doremus Ave., Newark, N.J.	2,000,000.00		.	.
Bldg. 12, Ford Ave., Milltown, N.J.	2,000,000.00		.	.
River Bridge Industrial Complex 2nd St., Chester, PA.	2,000,000.00		.	.

2. DEPOSIT PREMIUM:

\$ 8,800.00 payable

(in amounts of \$ 8,800.00 on January 1st of each)

Attached to and forming part of Policy No. AWA-450 9315 of the American Home Assurance Company.

A 11

D9-29

ENDORSEMENT

BAYLY, MARTIN & FAY, INC.
 INTERNATIONAL INSURANCE BROKERS
 200 WEST WASHINGTON STREET
 CHICAGO, ILLINOIS 60604
 (312) 661-5121

ATTACHED to and forming part of Policy No. AWA-450 9315
 of the American Home Assurance Company
 issued to Hermann Warehouse Corporation

May 5, 1981

Adjustment of Annual Deposit Premium for the Period Jan. 1, 1980 to Jan. 1, 1981

	<u>REVENUE</u>	<u>RATE</u>	<u>PREMIUM</u>
Storage	1,913,982.00	.925	\$ 17,704.33
Handling	1,110,878.00	.05	\$ 535.44
			<u>18,260.00</u>
		Less Deposit	<u>\$ 8,800.00</u>
		(X) Additional Premium Due	
		() Return Premium Due	<u>\$ 9,460.00</u>

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

D 9-30

BAYLY, MARTIN & EAY, I.
 INTERNATIONAL INSURANCE BROKERS
 300 WEST WASHINGTON STREET
 CHICAGO, ILLINOIS 60606
 (312) 641-3191

ATTACHED is and forming part of Policy No. 141-450 9315
 of the American Home Assurance Company

issued to Hermann Warehouse & Corporation

April 21 1930

Adjustment of Annual Deposit Premium for the Period January 1, 1929 to
January 1, 1930

	<u>REVENUE</u>	<u>RATE</u>	<u>PREMIUM</u>
Storage	\$ 1,803,716.48	.925	\$ 16,684.00
Handling	948,626.46	.05	\$ 474.00
			<u>17,158.00</u>
		Earned Premium	17,158.00
		Less 10% Credit '79-'80	<u>1,715.80</u>
		Adjusted Premium	15,442.20
		Less Deposit	<u>8,300.00</u>
		() Additional Premium Due	
		() Return Premium Due	<u>6,632.20</u>

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED.

129-31

AMERICAN WAREHOUSEMEN'S ASSOCIATION
 WAREHOUSEMAN OR BAILEE LIABILITY - PART II
 (Part II of Two Parts)

Effective September 23, 1980

1. LIMITS OF LIABILITY & PREMIUM RATES

Location of Premises Address, City and State	Limit of Liability		Annual Rate per \$100	
	Warehouse Liability	Other	Warehouse	Other
1201 Jersey Ave., & Scoville Lane, North Brunswick, N.J.	2,000,000.00		.925	
131 Jersey Ave., New Brunswick, N.J.	2,000,000.00			
9225 River Road, Pennsauken N.J.	2,000,000.00			
Docks Corner Rd., Dayton, N.J.	2,000,000.00			
45 Clyde Rd., Franklin Township, N.J.	2,000,000.00			
48 Clyde Rd., Franklin Township, N.J.	2,000,000.00			
Route 130 & Old Georges Rd., Dayton, N.J.	2,000,000.00			
Ford Ave., Milltown, N.J.	2,000,000.00			
Triangle Rd., & Home News Rd., New Brunswick, N.J.	2,000,000.00			
A-1 Warehouse, 7100 Westfield Ave., Pennsauken, N.J.	2,000,000.00			
Old Georges Rd., S. Brunswick, N.J.	2,000,000.00			
Route 28, Bridgewater, Bridgewater Industrial Park, Bridgewater, N.J.	2,000,000.00			
Port Authority of NY and NJ, Bldg. 261, Doremus Ave., Newark, N.J.	2,000,000.00			
Bldg. 12, Ford Ave., Milltown, N.J.	2,000,000.00			

unexplained disappearance

3. DEPOSIT PREMIUM:

\$ 8,800.00 payable

(in amounts of \$ 8,800.00 on 1/1 of each year)

Attached to and forming part of Policy No. AWA-450 9315 of the American Home Assurance Company.

BAYLY, MARTIN & FAY, INC.

INTERNATIONAL INSURANCE BROKERS
300 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60606

(312) 641-2121

ATTACHED to and forming part of Policy No. AYA-150 9315of the American Home Assurance Companyissued to Hermann Warehousing Corp.December 9, 19 80An Annual Deposit Premium of \$ 8,800.00 is Payable in
Amounts specified below:

<u>DUE DATE</u>	<u>AMOUNT</u>
January 1, 1981	\$ <u>8,800.00</u>
_____	\$ _____
_____	\$ _____
_____	\$ _____

Premium due herewith: \$ 8,800.00

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

Dq-33

ATTACHED to and forming part of Policy No. ANA 450 9315
of the American Home Assurance Company
issued to Hermann Warehousing Corp

BAYLY, MARTIN & FAY, I
INTERNATIONAL INSURANCE BROKERS
200 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60606
1912 661-1131

January 7 1980

An Annual Deposit Premium of \$ 8,800.00 is Payable in
Amounts specified below:

<u>DUE DATE</u>	<u>AMOUNT</u>
<u>January 1, 1980</u>	<u>\$ 8,800.00</u>
<u>_____</u>	<u>\$ _____</u>
<u>_____</u>	<u>\$ _____</u>
<u>_____</u>	<u>\$ _____</u>

Premium due herewith: \$ 8,800.00

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

100 70

D9-34

AMERICAN WAREHOUSEMEN'S ASSOCIATION
 WAREHOUSEMAN OR BAILEE LIABILITY - PART II
 (Part II of Two Parts)

1. LIMITS OF LIABILITY & PREMIUM RATES

LOCATION OF PREMISES (Address, City and State)	LIMIT OF LIABILITY		PREMIUM RATES PER	
	Warehouse Liability	Inventory	Inventory	Warehouse
131 Jersey Ave., New Brunswick, N.J.	\$2,000,000		92.5	
925 River Road, Pennsauken, N.J.	"	"	"	"
Chippewa & Huyler Sts., S. Hackensack, N.J.	"	"	"	"
140 Jackson Ave., Edison, N.J.	"	"	"	"
Old George's Rd., S. Brunswick, N.J.	"	"	"	"
Clyde Road (J&J), Franklin, N.J.	"	"	"	"
Old George's Rd., Dayton, N.J.	"	"	"	"
400 Huyler St., South Hackensack, N.J.	"	"	"	"

2. DEDUCTIBLES:

(a) \$ 20,000.00 on all losses, except (b) \$ 40,000.00 on Inventory Shortage and/or unexplained disappearance.

3. DEPOSIT PREMIUM:

\$ 8,800.00 payable

(in amounts of \$ 8,800.00 on 1/1 of each year)

Attached to and forming part of Policy No. AHA-450 9315 of the American Home Assurance Company.

ATTACHED to and forming part of Policy No. AAA-952 915

of the American Home Assurance Company

issued to Hermann Warehousing Corporation

BAYLY, MARTIN & FAY
INTERNATIONAL INSURANCE BROK
200 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60606

(312) 641-5121

February 19, 19__

Effective January 31, 1979, it is agreed that the schedule of locations under Part II, Paragraph I of this Policy is amended to include the following locations:

<u>LOCATION</u>	<u>LIMIT OF LIABILITY</u>	<u>RATE PER \$100</u>
1201 Jersey Avenue and Howe Lane, North Brunswick, New Jersey	2,000,000.00	.925 .0

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

30

Dg-36

ENDORSEMENT

BAYLY, MARTIN & FAY, INC.

INTERNATIONAL INSURANCE BROKERS
300 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60606

(312) 641-2121

ATTACHED to and forming part of Policy No. AWA-850 9315of the American Home Assurance Companyissued to Hermann Warehouse Corp.August 17, 1979

Effective July 17, 1979, it is agreed that the schedule of locations under Part II, Paragraph I of this Policy is amended to include the following location:

<u>LOCATION</u>	<u>LIMIT OF LIABILITY</u>	<u>RATE</u> <u>STGE. HDLG.</u>
Building #12 Ford Avenue Milltown, NJ 08850	2,000,000.00	.925 .05

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

D9-37

ATTACHED to and forming part of Policy No. AWA-450 9315
 of the American Home Assurance Company
 issued to Hermann Warehousing Corporation

BAYLY, MARTIN & FAY, I.
 INTERNATIONAL INSURANCE BROKERS
 300 WEST WASHINGTON STREET
 CHICAGO, ILLINOIS 60604

(812) 641-2121

April 24 19 79

Adjustment of Annual Deposit Premium for the Period Jan. 1, 1978 to
Jan. 1, 1979

	<u>REVENUE</u>	<u>RATE</u>	<u>PREMIUM</u>
Storage	1,554,000.	.925	\$ 14,375.00
Handling	824,000.	.05	\$ 412.00
			<u>\$ 14,787.00</u>
		Less Deposit	
		(<input checked="" type="checkbox"/>) Additional Premium Due	\$ 5,987.00
		() Return Premium Due	

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

D9-38

ENDORSEMENT

ATTACHED to and forming part of Policy No. AWA-450 9315
 of the American Home Assurance Company
 issued to Hermann Warehouse Corp.

BAYLY, MARTIN & FAY, I
 INTERNATIONAL INSURANCE BROKERS
 200 WEST WASHINGTON STREET
 CHICAGO, ILLINOIS 60606

(312) 661-2121

April 4 1977

The following Deposit Premium is due and payable for
 the period January 1, 1979 to January 1, 1980:

	\$8,800.00
Payable to the Company as follows:	
January 1, 1979	\$8,800.00

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

Da-39

ENDORSEMENT

BAYLY, MARTIN & FAY, INC.
INTERNATIONAL INSURANCE BROKERS
200 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60604
(312) 541-2121

ATTACHED to and forming part of Policy No. Ann 400 9215
of the American Home Assurance Company
issued to Harold Warehousing Corporation

February 6, 1971

Effective January 22, 1971, it is agreed that the following
location under Part II, Paragraph 1 of this policy is hereby
deleted:

~~1000
S.W. Corner of Jersey Ave., 1st Ave. E. Bldg.,
North Brunswick, N.J.~~

~~2,000,000.00~~

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

D9-40

BAYLY, MARTIN & FAY, INC.
INTERNATIONAL INSURANCE BROKERS
300 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60606
(312) 661-2121

ATTACHED to and forming part of Policy No. _____

of the _____

issued to _____ 19__

Effective May 17, 1970, it is agreed that the schedule of locations under Part II, Paragraph 1 of this Policy is amended to include the following location:

LOCATION	LIMIT OF LIABILITY	RATE	CLASS
Plant Assembly of IBM and NS 275 Avenue Newark, NJ	\$,000,000.00	.005	.05

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

D9-41

AMERICAN WAREHOUSEMEN'S ASSOCIATION
WAREHOUSEMAN OR BAILEE LIABILITY - PART II

September 23, 1970 (Part II of Two Parts)
Effective May 18, 1975

1. LIMITS OF LIABILITY & PREMIUM RATES

LOCATION OF PREMISES	LIABILITY	PREMIUM RATES PER \$1000
131 Jersey Ave., New Brunswick, N.J.	2,000,000.00	.325 .05
9225 River Road, Pennsauken, N.J.	2,000,000.00	" "
Docks Corner Rd., Dayton, N.J.	2,000,000.00	" "
#5 Clyde Rd., Franklin Township, N.J.	2,000,000.00	" "
#8 " " " " " "	2,000,000.00	" "
400 Huyler St., S. Hackensack, N.J.	2,000,000.00	" "
Route 130 & Old Georges Rd., Dayton, N.J.	2,000,000.00	" "
Ford Ave., Milltown, N.J.	2,000,000.00	" "
Triangle Rd., & Home News Rd., New Brunswick, N.J.	2,000,000.00	" "
A-1 Warehouse, 7100 Westfield Ave., Pennsauken, N.J.	2,000,000.00	" "
Old Georges Rd., S. Brunswick, N.J.	2,000,000.00	" "
Route 28, Bridgewater, Bridgewater	2,000,000.00	" "
Industrial Park, Bridgewater, N.J.	2,000,000.00	" "
Corner of Jersey Ave., & How Lane, North Brunswick, N.J.	2,000,000.00	" "
Port Authority of NY and NJ, Bldg. 261, Doremus Ave., Newark, N.J.	2,000,000.00	" "
Bldg 12 Ford Ave. Milltown, NJ	2,000,000.00	" "
(a) \$ 20,000.00 on all losses, except (b) \$ 40,000.00 on Inventory Shortage and/or unexplained disappearance:		

2. DEPOSIT PREMIUM:

\$ 6,000.00 payable

(in amounts of \$ 2,500.00 on 1/1 of each year)

Attached to and forming part of Policy No. A-1450-9315 of the American Home Assurance Company.

ATTACHED to and forming part of Policy No. AWA-450 9315
 of the American Home Assurance Company
 issued to Hermann Warehouse Corp.

BAYLY, MARTIN & FAY, INC.
 INTERNATIONAL INSURANCE BROKERS
 300 WEST WASHINGTON STREET
 CHICAGO, ILLINOIS 60606
 (312) 641-2121
 Feb. 28, 1978

The Assured reports revenue for the period January 1, 1977,
 to December 31, 1977, as follows:

Storage Revenue	\$879,657.	¢ .925	\$8,137.00
Handling Revenue	\$491,703.	¢ .05	<u>246.00</u>
		Earned Premium	\$8,383.00
		Less Deposit	<u>\$8,800.00</u>
		Return Premium	\$ 417.00

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

ATTACHED to and forming part of Policy No. AWA-450 93 15
of the American Home Assurance Company
issued to Hermann Warehouse Corp.

BAYLY, MARTIN & FAY, I
INTERNATIONAL INSURANCE BROKERS
200 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60606
(312) 641-2121
Feb. 28, 19 78

Effective December 15, 1977, it is agreed that the schedule of locations under Part II, Paragraph 1 of this Policy is amended to include the following location:

LOCATION	LIMIT OF LIABILITY	RATES	
		STGE.	HDLG.
S/E Corner of Jersey Ave. & How Lane, North Brunswick, N.J.	2,000,000.00	.925	.05

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

D9-44

AMERICAN WAREHOUSEMEN'S ASSOCIATION
 WAREHOUSEMAN OR LARGE LIABILITY - PART II
 (Part II of Two Parts)

Effective Dec. 15, 1977

1. LIMITS OF LIABILITY & PREMIUM RATES

LOCATION OF PREMISES	LIMIT OF LIABILITY	PREMIUM RATE	COVERAGE
11 Valley Ave., New Brunswick, N.J.	2,000,000	"	"
723 1/2 River Road, Farmington, N.J.	"	"	"
Chapman & Huyler Sts., Hackensack, N.J.	"	"	"
1100 1/2 Center Road, Dayton, N.J.	"	"	"
Clyde Road, Franklin Township, N.J.	"	"	"
300 Huyler St., So. Hackensack, N.J.	"	"	"
Route 130 & Old Georges Rd., Dayton, NJ	"	"	"
Ford Ave., Milltown, N.J.	"	"	"
Triangle Rd. & Home News Rd., New Brunswick, N.J.	"	"	"
A-1 Whse., 7100 West 4th Ave., Pennsauken, N.J.	"	"	"
Old Georges Rd., So. Brunswick, N.J.	"	"	"
Route 28, Bridgewater, Bridgewater Industrial Park, Bridgewater, N.J.	"	"	"

2. DEDUCTIBLES:

(a) \$ 20,000.00 on all losses, except (b) \$ 50,000.00 on Inventory Shortage and/or unexplained disappearance.

3. DEPOSIT PREMIUM:

\$ 8,800.00 payable

(in amounts of \$ 8,800.00 on 1/1 of each year)

Attached to and forming part of Policy No. AWA-450 9315 of the American Home Assurance Company.

ATTACHED to and forming part of Policy No. AWA-450 9315

of the American Home Assurance Company

issued to Hermann Warehouse Corporation

BAY MARTIN & FAY, INC.
INTERNATIONAL INSURANCE BROKERS
200 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60604

(312) 641-2121

November 15, 1977

The following Deposit Premium is due and payable for the period January 1, 1978, to January 1, 1979:

\$8,800.00

Payable to the Company as follows:

January 1, 1978 \$8,800.00

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

D9-46

BAYL J. MARTIN & FAY, INC.
INTERNATIONAL INSURANCE BROKERS
300 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60606

ATTACHED to and forming part of Policy No. AHA-450 9315

of the American Home Assurance Company

issued to Hermann Warehousing Corporation

(312) 661-6121

March 9, 19 77

Effective from inception, it is hereby agreed that the Named Assured hereunder is amended to read as follows:

HERMANN WAREHOUSE CORPORATION

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

D9-47

ATTACHED to and forming part of Policy No. ANA-450 9315

of the American Home Assurance Company
issued to Hermann Warehouse Corporation

BAYLY, MARTIN & FAY, I
INTERNATIONAL INSURANCE BROKERS
360 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60606

(312) 641-2121

May 26 19 7

It is agreed that the schedule of locations under Paragraph I, Part II of this Policy is hereby amended to include the following locations:

Effective April 25, 1977.

LOCATION	LIMIT OF LIABILITY	RATE STGE.	HDLG.
Corner Triangle Rd. & Home News Rd., New Brunswick, N.J.	2,000,000.00	.925	.05

Effective May 20, 1977.
Portline of the Phelps Dodge Bldg.,
Docks Corner Rd., Dayton, N.J.

	2,000,000.00	.925	.05
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ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

Dq-48

31a
AMERICAN WAREHOUSEMEN'S ASSOCIATION
THE COSEMAN FIDELITY LIABILITY - PART B
 (Part II of the Contract)

Amended Effective January 1, 1977

1. LIMITS OF LIABILITY & PREMIUM RATES

Address	Limit of Liability	Premium Rate	Other
131 George Ave., Brunswick, N.J.	200,000		
9224 Myran Road, Union, N.J.			
Chippewa & Mylar Sts., Hackensack, N.J.			
Old George's Rd., 30, Brunswick, N.J.	"	"	"
Clyde Road (I & J), Franklin, N.J.	"	"	"
Old George's Road, Dayton, N.J.	"	"	"
400 Mylar St., So. Hackensack, N.J.	"	"	"
Route 130, South Brunswick, N.J.	"	"	"

2. DEDUCTIBLES

(a) \$ 20,000.00 on all losses, except (b) \$ 40,000.00 on Inventory Shortage and/or unexplained disappearance

3. DEPOSIT PREMIUM

\$ 8,800.00 payable

(in amounts of \$ 8,800.00 on 1/1 of each year)

Attached to and forming part of Policy No. AWA-460 9315 of the American Home Assurance Company.

D9-49

ATTACHED to and forming part of Policy No. AHA-450 9315

the American Home Assurance Company

and to Hermann Warehousing Corporation

BAYLY, MARTIN & FAY, INC.

INTERNATIONAL INSURANCE BROKERS

300 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60606

(312) 641-2121

February 7, 19 77

Effective January 28, 1977, it is hereby agreed that the
Named Insured hereunder is amended to include the following:

MILTOWN WAREHOUSE CORPORATION

It is further agreed that the schedule of locations under Part
II, Paragraph 1 is amended to include the following location:

LOCATION	LIMIT OF LIABILITY	RATE STGE.	HDLG.
South Side of Ford Ave., Milltown, N.J.	2,000,000.00	.925	.05

1 OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

D9-50

APPENDIX B - TRANSCRIPT OF ORAL OPINION OF TRIAL COURT GRANTING DEFENDANT-
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MIDDLESEX COUNTY
DOCKET NO. L-37214-84

AMERICAN HOME ASSURANCE COMPANY, INC., :

Plaintiff, :

vs. :

HERMANN'S WAREHOUSE CORPORATION, :

Defendant. :

Place: Middlesex County Courthouse
New Brunswick, New Jersey
Date: February 14, 1986

B E F O R E:

HONORABLE ROSEMARY K. REAVEY, J.S.C.

LINDA LOPES STEIN, C.S.R.
OFFICIAL COURT REPORTER
MIDDLESEX COUNTY COURTHOUSE
NEW BRUNSWICK, NEW JERSEY

Dg-51

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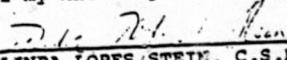
THE COURT: As to American Home Assurance Company versus Hermann's Warehouse Corporation, there are motions for summary judgment.

The plaintiff, American Home Assurance Company, settled the case and seeks recovery of the deductible. Defendant opposes the motion for summary judgment and seeks motion for summary judgment in its own behalf arguing that it did not participate in the settlement, did not approve the settlement and should not be required to pay the deductible.

I am satisfied from the arguments of counsel that the defendant's position is the sound one. In fact, it did not approve the settlement and should not be required to pay the deductible. I am going to grant summary judgment for the defendant. Accordingly, I will deny summary judgment on behalf of the plaintiff.

C E R T I F I C A T E

I, LINDA LOPES STEIN, a Certified Shorthand Reporter of the State of New Jersey, certify the foregoing to be true and accurate to the best of my knowledge and ability.


LINDA LOPES/STEIN, C.S.R.

D9-52

H-4005-8571

APPENDIX C - NOTICE OF APPEAL, SUPERIOR COURT OF NEW JERSEY
MIDDLESEX COUNTY BY PLAINTIFF

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DE GONGE, GARRITY & FITZPATRICK
A PROFESSIONAL CORPORATION
XXXXXXXXXXXXXXXXXXXX 430 Broad Street
P. O. BOX 1560
BLOOMFIELD, N. J. 07003
(201) 748-7400
ATTORNEYS FOR Plaintiff-Appellant

ORIGINAL FILED

APR 15 1986

ELIZABETH MIDDLESEX COUNTY

Plaintiff(s)
AMERICAN HOME ASSURANCE COMPANY, INC.,

vs.

Defendant(s)
HERMANN'S WAREHOUSE CORPORATION

SUPERIOR COURT
OF NEW JERSEY
APPELLATE DIVISION

Docket No. L-37214-84

CIVIL ACTION
NOTICE OF APPEAL
(from Superior Court of New
Jersey, Law Division:
Middlesex County, Sat Judge
Rosemary K. Reavey).
Superior Court
Docket No. L-37214-84

NOTICE IS HEREBY GIVEN that plaintiff, American Home Assurance
Company, Inc., hereby appeals to the Superior Court of New Jersey, Appellate
Division from a Final Order for Summary Judgment entered in this action on
February 18, 1986, in favor of the defendant. The issue being appealed is a
question of law which would preclude Summary Judgment on behalf of the
defendant, and require entry of Judgment on behalf of plaintiff-appellant.

Dg-53

1. Notice of Appeal has been served on:

<u>NAME</u>	<u>DATE OF SERVICE</u>	<u>TYPE OF SERVICE</u>
Trial Court Judge Reavey	4/15/86	Flash Messenger Service
Trial Court Clerk	4/15/86	Flash Messenger Service

<u>NAME AND DESIGNATION</u>	<u>ATTORNEY NAME, ADDRESS AND TELEPHONE NUMBER</u>	<u>DATE OF SERVICE</u>	<u>TYPE OF SERVICE</u>
Defendant's Attorney	William J. Shipers, Esq. Thomas J. Shamy, Esq. 146 Livingston Avenue New Brunswick, NJ 08901 (201-247-1133)	4/15/86	Flash Messenger Serv.

I hereby certify that I have served a copy of this Notice of Appeal on each of the persons required as indicated above.

DeGONGE, GARRITY & FITZPATRICK, P.A.
Attorneys for Appellant

By: *Daniel C. Nowell*
DANIEL C. NOWELL

DATED: April 15, 1986.

2. The prescribed Transcript Request Form has not been served as the transcript which is one page in length is enclosed.

I hereby certify that a copy of this transcript has been served on defendant's attorney.

DeGONGE, GARRITY & FITZPATRICK, P.A.
Attorneys for Appellant

By: *Daniel C. Nowell*
DANIEL C. NOWELL

DATED: April 15, 1986.

FILED

FEB 18 1986

ROSEMARY K. REAVEY
J.S.C.

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3 **THOMAS J. SHAMY**
4 146 Livingston Avenue
5 New Brunswick, N.J. 08901
6 (201) 247-1133
7 ATTORNEY FOR Defendant

SUPERIOR COURT OF NEW JERSEY

8 *Plaintiff*
9 AMERICAN HOME ASSURANCE COMPANY, INC.

LAW DIVISION
MIDDLESEX COUNTY

10 vs.

Docket No. L-37214-84

11 *Defendant*
12 HERMANN'S WAREHOUSE CORPORATION

CIVIL ACTION
ORDER

13 This matter being presented to the Court by DeGonge, Garrity &
14 Fitzpatrick, P.A., attorneys for plaintiff, AMERICAN HOME
15 ASSURANCE COMPANY, INC., for an Order granting Summary Judgment
16 in favor of plaintiff, AMERICAN HOME ASSURANCE COMPANY, INC., and
17 by Thomas J. Shamy, Esq., attorney for defendant, HERMANN'S
18 WAREHOUSE CORPORATION, for an Order granting Summary Judgment in
19 favor of defendant, HERMANN'S WAREHOUSE CORPORATION, on the First
20 and Second Counts of plaintiff's complaint, and the Court having
21 reviewed the matter, together with the moving papers in this
22 matter and being of the opinion that good cause exists,

23 IT IS on this 18th day of February, 1986;

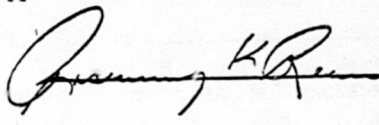
24 ORDERED, that plaintiff, AMERICAN HOME ASSURANCE COMPANY,
25

Da-55

INC.'s Motion for Summary Judgment is denied.

IT IS FURTHER ORDERED, that defendant, HERMANN'S WAREHOUSE CORPORATION's Cross Motion for Summary Judgment as to the First and Second Counts of plaintiff's complaint, is hereby granted.

IT IS FURTHER ORDERED, that a true copy of this Order shall be served on counsel for the plaintiff within seven (7) days of receipt of a filed copy from the motions clerk's office.

 J.S.C.

D9-54

TRIAL COURT BRIEF ON BEHALF OF AMERICAN HOME ASSURANCE COMPANY

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY
DOCKET NO. L-37214-84

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5 AMERICAN HOME ASSURANCE COMPANY, :
INC., :

6 Plaintiff, :

Civil Action

7 vs. :

8 HERMANN'S WAREHOUSE CORPORATION, :

9 Defendant. :

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15 BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON BEHALF
OF PLAINTIFF AMERICAN HOME ASSURANCE COMPANY, INC.
16 -----

17 DeGONGE, GARRITY & FITZPATRICK, P.A.
18 430 Broad Street
19 P. O. Box 1560
20 Bloomfield, NJ 07003-1560
Attorneys for Plaintiff

21 ON THE BRIEF:

22 Daniel C. Nowell, Esq.
23
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Da-57

STATEMENT OF FACTS

1
2 This is a lawsuit instituted by American Home Assurance Company
3 against Hermann's Warehouse Corporation for recovery of a deductible.
4 The basis for the lawsuit is a settlement by plaintiff, American Home
5 Assurance Company, of a claim made by a third party, Kurt Adler, Inc.,
6 against defendant, Hermann's Warehouse Corporation. The settlement was
7 in the amount of \$67,500.00 and was made pursuant to a policy of insurance.
8 (Exhibit A). Defendant, Hermann's Warehouse Corporation, has refused
9 to reimburse plaintiff, American Home Assurance Company, for the deductible
10 amount. The claim which formed the basis for the settlement involved the
11 mysterious disappearance of certain property, Christmas tree ornaments,
12 left at the warehouse of defendant, Hermann's Warehouse Corporation.
13 The potential maximum exposure was approximately \$110,000; \$76,382.80
14 in damages plus interest. Based upon various facts, a settlement was
15 negotiated by American Home Assurance Company. The insured, Hermann's
16 Warehouse Corporation, thereafter refused reimbursement. (Exhibit B).
17 Movant, American Home Assurance Company, seeks Summary Judgment
18 based upon the policy of insurance which provides deductibles of \$20,000
19 on all losses, except \$40,000 on inventory shortages and/or unexplained
20 disappearances. (Exhibit A).
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Dg-58

LEGAL ARGUMENT

INSUROR MAY AT ITS OPTION SETTLE CLAIMS AGAINST THE INSURED.

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4 It is established that an insurer may at its option settle claims against
5 an insured without any interference on the part of the insured. Travelers
6 Insurance Company v. Hitchner, 61 N.J. Super. 203 (1960). The Court
7 specifically distinguished between instances where the settlement is in excess
8 of the policy limits and where a deductible applies, holding that an insured
9 having contracted to hold itself liable to pay the deductible is obligated to do
10 so. Id., at 286.

11 It is uncontroverted by defendant, Hermann's Warehouse Corporation,
12 that the policy, Exhibit A, was the complete agreement between the parties.
13 Exhibit C, defendant answer to Interrogatory No. 2. The policy reads in rele-
14 vant part:

15 The Assured shall take all reasonable means to protect,
16 safeguard and salvage the property and shall cooperate
17 with the Company in facilitating the investigation and
18 disposition of claims and suits and, upon the Company's
19 request, shall attend hearings and trials and shall assist
20 in effecting settlement, securing and giving evidence,
21 obtaining the attendance of witnesses, and in the conduct
22 of suit; but the Assured shall not, except at his own cost,
23 voluntarily assume any liability nor incur any expense, nor
24 settle any claim without the written consent of the Company
25 previously given. The Company reserves the right to
settle any claim, suit or other proceedings as it may deem
expedient.

22 This clause of the contract explicitly reserved to American Home Assurance
23 Company the right to settle the claim made by Kurt Adler, Inc. against
24 Hermann's Warehouse Corporation.
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The defendant has alleged in its pleadings and answers to Interrogatories that plaintiff failed to adequately represent its interests and desires.

Nevertheless, defendant's letter of August 31, 1983 (Exhibit B) refusing to refund the deductible acknowledges factors which adversely affected the insured's case, i.e.: prior thefts at the location and the adverse testimony of a former employee.

The Court in Travelers Insurance Company v. Hitchner, 287, specifically rejected the insured's claim based on failure to provide the defense the insured desired stating that:

Under the defendant's theory, the Company would be barred from making any settlement without his consent. This is not so expressed in the policy. Our Courts have held that when a policy is clear and unambiguous is governed by its own terms and must be enforced as it is found.

Da-60

CONCLUSION

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2 The policy in question being clear and unambiguous as to the right of
3 the carrier to settle and the obligation of the insured to refund the deductible
4 amount, it is therefore respectfully urged that Summary Judgment be granted
5 on behalf of plaintiff, American Home Assurance Company.
6

7 Respectfully submitted,

8 DeGONGE, GARRITY & FITZPATRICK, P.A.
9 Attorneys for Plaintiff

10 By: [Signature]
11 DANIEL C. NOWELL

12 DATED: January 2, 1986.
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Da-wl

AMERICAN WAREHOUSEMEN'S ASSOCIATION
MEMBER'S "WAREHOUSEMAN OR BAILEE LIABILITY" FORM
(MERCHANDISE)
(Part One of Two Parts)

1. In consideration of premium charges hereinafter provided and subject to the following conditions and limitations, this Company agrees:

(a) To pay on behalf of the Assured all sums which the Assured shall become legally obligated to pay by reason of liability imposed upon him as a warehouseman or bailee, for loss or destruction of or damage to personal property of others contained in the premises hereinafter specified, occurring while this Policy remains in full force and effect.

(b) (1) To investigate all claims for such loss, destruction or damage of which the Company shall have notice as hereinafter required;

(2) To defend in the Assured's name and behalf, any suits or other proceedings which may be brought against the Assured to enforce such claims even if such suits are groundless, false or fraudulent;

(3) To pay, irrespective of the Company's limit of liability otherwise specified herein: the expense of adjusting all such claims or suits which may be settled at the option of the Company without litigation; all expenses of litigation and all costs taxed against the Assured in proceedings defended by the Company, including all premiums for appeal bonds, but without any obligation to apply for or furnish such bonds, and if bond be required to release attachment of the Assured's property, the premium on that portion thereof which secures payment of an amount not in excess of the Company's applicable limit of liability hereunder; all interest accruing after entry of judgment until the Company has paid, tendered, or deposited in court such part of such a judgment as does not exceed the Company's applicable limit of liability thereon.

2. Insurance provided under this Policy shall not apply in respects any liability for:

(a) Any loss, destruction or damage for which the Assured has assumed liability under written or oral contract in excess of liability imposed upon him by law as a warehouseman or bailee;

(b) Any loss, or destruction of, or damage caused by the infidelity and dishonesty, either or both, of the Assured, or any person or persons in the employ or service of the Assured whether or not such act or acts occurred during the regular hours of employment or service, or any person or persons to whom the said articles may be entrusted (carriers for hire excepted);

(c) Any loss or destruction of or damage to accounts, bills, currency, deeds, evidence of debt, money, notes or securities;

(d) Any loss, or destruction of, or damage to property due to change of temperature resulting from the failure, or total or partial destruction of any refrigerating or cooling apparatus;

(e) Any loss, damage or destruction resulting from forged warehouse receipts;

(f) War risks as set forth in the War Risk Exclusion Clause in the printed "CONDITIONS" of this Policy;

(g) Nuclear Exclusion Clause. The Company shall not be liable for loss by nuclear reaction or nuclear radiation or radioactive contamination, all whether controlled or uncontrolled, and whether such loss be direct or indirect, proximate or remote, or be in whole or in part caused by, contributed to, or aggravated by the perils insured against in this policy; however, subject to the foregoing and all provisions of this policy, direct loss by fire resulting from nuclear reaction or nuclear radiation or radioactive contamination is insured against by this policy.

(h) Any occurrence or claim of which written notice has not been given the Company, as hereinafter required, within one year from the date of such occurrence or claim.

3. Limit(s) of Liability.

(a) Insurance provided by this Policy applies only as respects the premises scheduled in Part II and for amount(s) not in excess of those stipulated, as respects coverage under Paragraph 1.(a) of this Form for loss, destruction or damage arising from any one occurrence.

(b) The inclusion herein of more than one Assured shall not operate to increase the limit of the Company's liability hereunder.

4. DEDUCTIBLE:

From the total of all claims arising out of any one occurrence, the sum shown in Part II, paragraph 2(a) shall be deducted and this Company shall only be liable for the excess of this amount. As respects any such claim resulting from inventory shortage or other unexplained disappearance of property, the amount of said deductible shall be the sum shown in Part II, paragraph 2(b) for each 90 day period (or fraction thereof) that such unexplained disappearance could have occurred. If the Company shall have paid such deductible amount, the Assured shall promptly reimburse the Company therefor.

7. PREMIUM & REPORTS:

- (a) The Assured agrees to keep an accurate record of the charges accruing from their warehouse business as respects property for which the Assured's liability is insured hereunder.
- (b) (1) The Assured agrees to pay a Deposit Premium as specified in Part II, paragraph 3.
(2) The Assured agrees to report to the Company within 30 days after the close of each annual period the full amount of such charges accruing (collected or uncollected) for (i) Storage of Goods, and (ii) Handling of Goods during the preceding annual period or during such time as is within the period of this insurance.
- (c) The Assured agrees to pay to the Company an earned premium at rate(s) per \$100.00 of such charges accruing as specified in Part II, paragraph 1.

86. DEFINITIONS:

- (a) The term "Premises", wherever employed in this Policy, is defined as that portion of the building(s) located at the address(es) shown in Part 2, which is (are) occupied by the Assured as a public warehouse, including loading platforms, side-tracks, and areas immediately adjacent thereto.
- (b) The term "Occurrence", wherever employed in this Policy is defined as (1) an accident that takes place during the period of insurance under this Policy, or (2) in the absence thereof, a continuous or repeated exposure to conditions which unexpectedly cause loss or destruction of or damage to physical property during the period of insurance under this Policy, and all such exposure to substantially the same general conditions existing at or emanating from any one location specified in Part 2 of this Form shall be deemed one occurrence.
- (c) The unqualified word "ASSURED" includes the Named Assured and also includes any executive officer, director or stockholder thereof while acting within the scope of his duties as such, and if the Named Assured is a partnership, the unqualified "ASSURED" also includes any partner therein but only with respect to his liability as such.

77. The Assured, upon knowledge of a claim or of any occurrence which may give rise to a claim, shall give written notice thereof, with the fullest information obtainable, to the Company or its authorized agent as soon as practicable, and if such occurrence involves a violation of law, immediate notice thereof shall be given by the Assured to the public police or other peace authorities having jurisdiction. If claim is made or suit is brought against the Assured, the Assured shall immediately forward to the Company every demand, notice, summons, or other process received by him or his representative.

88. The Assured shall take all reasonable means to protect, safeguard and salvage the property and shall cooperate with the Company in facilitating the investigation and disposition of claims and suits and, upon the Company's request, shall attend hearings and trials and shall assist in effecting settlement, securing and giving evidence, obtaining the attendance of witnesses, and in the conduct of suit; but the Assured shall not, except at his own cost, voluntarily assume any liability nor incur any expense, nor settle any claim without the written consent of the Company previously given. The Company reserves the right to settle any claim, suit or other proceedings as it may deem expedient.

99. DEBRIS REMOVAL CLAUSE

In the event of loss or damage to property, the Assured's liability for which is insured under Paragraph 1.(a) of this form, this Company will pay such expenses which may be incurred in the removal of all debris of such property which may be occasioned by such loss. However, total liability under this policy shall not exceed the amount of insurance specified in Part II of this form.

00. SUE AND LABOR CLAUSE

In the event of loss or damage to property, the Assured's liability for which is insured under Paragraph 1.(a) of this Form, or to the building(s) in which such property may be located, it shall be lawful and necessary for the Assured, his or their factors, servants and assigns, to sue, labor, and travel for, in and about the defense, safeguard, and recovery of the property insured hereunder, or any part thereof without prejudice to the insurance; nor shall the acts of the Assured or this Company in recovering, saving and preserving such property in case of loss or damage, be considered a waiver or an acceptance of abandonment, to the charges whereof this Company will contribute according to the rate and quantity of the sum herein insured.

112. (a) No action shall lie against the Company unless, as a condition precedent thereto, the Assured shall have fully complied with all the terms of this Policy, not until the amount of the Assured's obligation to pay shall have been finally determined either by judgment against the Assured after actual trial or by written agreement of the Assured, the claimant and the Company;
- (b) Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this Policy to the extent of the insurance afforded by this Policy.

D9-63

- (c) Nothing contained in this Policy shall give any person or organization any right to join the Company as a co-defendant in any action against the Assured to determine the Assured's liability.
- (d) Bankruptcy or insolvency of the Assured or of the Assured's estate shall not relieve the Company of any of its obligations hereunder.
12. The insurance afforded under this Policy shall be excess insurance over any other valid and collectible insurance available to the Assured against loss covered hereunder.
 13. The Company shall be permitted at any reasonable time to inspect the premises and equipment used in connection with the Assured's operations and to examine and audit the Assured's books during the currency of this insurance and within one year after its termination, for the purpose of determining the actual premium earned while this Policy was in force; but the Company waives all rights and undertakes no responsibility by reason of such inspection or examination or the omission thereof.
 14. In the event of any payment under this Policy, this Company shall be subrogated to all the Assured's rights of recovery therefor against any person or organization and the Assured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The Assured shall do nothing after loss to prejudice such rights.
 15. TERRITORIAL LIMITS:
This Policy is no event shall cover beyond the Continental limits of the United States, Canada and the States of Alaska and Hawaii.
 16. It is specifically agreed that Condition 12 (Protection of Property after loss) of the printed policy, to which this form is attached, is hereby deleted.
 17. The Amount of insurance and the applicable limit of liability shall not be reduced by the amount of any loss covered hereunder.
 18. This Policy may be cancelled by the Assured by surrender thereof to the Company or its authorized agent or by mailing to the Company written notice stating when thereafter such cancellation shall be effective. This Policy may be cancelled by the Company by mailing to the Assured at the address specified in this Policy written notice stating when not less than thirty days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The time of surrender or the effective date of cancellation stated in the notice shall become the end of the Policy period. Delivery of such written notice either by the named Assured or by the Company or its authorized agent shall be equivalent to filing notice either by the named Assured or by the Company or its authorized agent shall be equivalent to filing.
 19. Assignment of interest under this Policy shall not bind the Company until its consent is endorsed hereon. If, however, the Assured shall die, or shall be adjudged bankrupt or insolvent and written notice is given to the Company within sixty days after the date of such adjudication, this Policy shall cover the Assured's legal representative as insured, provided that notice of cancellation mailed to the Assured named in the declaration shall be sufficient notice.
 20. Notice to any agent or knowledge possessed by any agent or by any other person shall not affect a waiver or a change in any part of this Policy nor entitle the Company from asserting any right under the terms of this Policy nor shall the terms of this Policy be waived or changed, except by endorsement issued to form a part of this Policy.
 21. The terms and conditions of this Form are to be regarded as substituted for those of the Policy to which it is attached, the latter being hereby waived.

LEADER PRODUCER PRODUCER'S CITY
 No. 4509315
 COVERAGE IS PROVIDED IN THE COMPANY DESIGNATED BY NUMBER A STOCK INSURANCE COMPANY HEREIN CALLED THE COMPANY

ANY OF PITTSBURGH, PA.
 4 AMERICAN HOME ASSURANCE COMPANY
 3 THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA
 MEMBERS OF THE AMERICAN INTERNATIONAL GROUP
 EXECUTIVE OFFICES
 102 MAIDEN LANE
 NEW YORK, N.Y.

GENERAL OF NUMBER
 Insured's Name and Mailing Address
Hermann Warehousing Corporation
P.O. Box 144
North Brunswick, New Jersey
 POLICY PERIOD FROM 1/1/77 TO Until cancelled
 AT PLACE OF ISSUANCE Year Continuous

AMOUNT	RATE	TOTAL PREMIUM		PREMIUM PAYABLE		
		PREMIUMS PAID IN FULL AT INCEPTION	TOTAL PREMIUM IF PAID ANNUALLY	AT INCEPTION	AT FIRST ANNIVERSARY	AT SECOND ANNIVERSARY
\$	\$	\$	\$	\$	\$	\$
		PSR ATTACHED	ENDORSEMENTS			

In consideration of the stipulations herein named and of the premium above specified, the Company does insure the Insured named at hereinafter called the Insured, whose address is shown above from the inception date shown above, at noon (Standard time), to the expiration date shown above, at noon (standard time), at place of issuance to an amount not exceeding the amount(s) above specified, or as described forms and/or endorsements attached hereto.

109-119 UNIT	111-112 FORM OR PROG	11-114 118 OCC. CLASS CODE	COVERAGE					116-117-118 GR.				
			BUILDINGS	1	CONTENTS	2	BUILT PROP DAM		3	USE AND OCC.	4	PROP DAM & U

Countersigned by _____
 Auth. Sec. _____
 Pat. in U.S.A.

Dg-65

ENDORSEMENT

BAYLY, MARTIN & FAY, INC.
INTERNATIONAL INSURANCE BROKERS
200 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60606
(312) 661-2121

ATTACHED to and forming part of Policy No. AWA-450 9315

of the American Home Assurance Company

issued to Hermann Warehouse Corporation

May 9, 1978

Effective May 3, 1978, it is agreed that the Named Assured and mailing address is hereby amended to read as follows:

Hermann Warehouse Corp., and Milltown Warehouse Corp.
P. O. Box 1
North Brunswick, N.J. 08902

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

D9-66

BAYLY, MARTIN & FAY, INC.

INTERNATIONAL INSURANCE BROKERS

300 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60606

(312) 661-2121

ATTACHED to and forming part of Policy No. BR-450 9315

of the American Home Assurance Company

issued to Bermann Warehouse Corp., and Milltown Warehouse Corp. November 18, 19 81

Effective November 11, 1981, it is agreed the following is added as an additional insured:

J. Herbert Fisher, Jr.
2601 Old Orchard Rd.,
Lancaster, PA. 17601

OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

D9-67

AMERICAN WAREHOUSEMEN'S ASSOCIATION
WAREHOUSEMAN OR BAILEE LIABILITY - PART II
(Part II of Two Parts)

AMENDED
Effective: November 11, 1981

1. LIMITS OF LIABILITY & PREMIUM RATES

LOCATION OF PREMISES (Address, City and State)	LIMIT OF LIABILITY		
	Warehouse Liability	Storage	Handling
131 Jersey Ave., New Brunswick, NJ.	2,000,000.	.025	.05
9225 River Road, Pennsauken, NJ.	2,000,000.	"	"
35 Clyde Rd., Franklin Township, NJ.	2,000,000.	"	"
48 Clyde Rd., Franklin Township, NJ.	2,000,000.	"	"
Route 130 & Old Georges Rd., Dayton, NJ.	2,000,000.	"	"
Ford Ave., Milltown, NJ.	2,000,000.	"	"
Old Georges Rd., S. Brunswick, NJ.	2,000,000.	"	"
Port Authority of NY and NJ, Bldg. 261, Dressens Ave., Newark, NJ.	2,000,000.	"	"
Bldg. 12, Ford Ave., Milltown, NJ.	2,000,000.	"	"
River Bridge Industrial Complex 2nd St., Chester, PA.	2,000,000.	"	"
W. King St., Ephrate, PA.	2,000,000.	"	"

2. DEDUCTIBLES:

(a) \$ 20,000.00 on all losses, except (b) \$ 40,000.00 on inventory Shortage and/or unexplained disappearance

3. DEPOSIT PREMIUM:

\$ 8,300.00 payable

(in amounts of \$ 8,300.00 on January 1st of each year)

Attached to and forming part of Policy No. 33A-450 9315 of the American Home Assurance Company.

Da-68

AMERICAN
WAREHOUSE

Effective October 5, 1981

1. LIMITS OF LIABILITY & PREMIUM RATES

LOCATION OF PREMISES
(Address, City and State)

131 Jersey Ave., New Brunswick,

9225 River Road, Pennsauken, NJ

#5 Clyde Rd., Franklin Township

#8 Clyde Rd., Franklin Township

Route 130 & Old Georges Rd., Da

Ford Ave., Milltown, NJ.

Old Georges Rd., S. Brunswick, 1

Port Authority of NY and NJ, 31

Doremus Ave., Newark, NJ.

Bldg. 12, Ford Ave., Milltown, 1

River Bridge Industrial Complex

Chester, PA.

11 W. KING ST., EPHRATA, PA.

2. DEDUCTIBLES:

(a) \$ 20,000.00 on all losses

3. DEPOSIT PREMIUM:

\$ 8,800.00 payable

(in amounts of \$ 8,800.00

attached to and forming part of Policy No. AWA-151

Dg-69

ENDORSEMENT

BAYLY, MARTIN & FAY, INC

INTERNATIONAL INSURANCE BROKERS
300 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60606

(312) 641-2121

ATTACHED to and forming part of Policy No. _____

the American Home Assurance Company

issued to _____

June 10, 19__

Adjustment of Annual Deposit Premium for the Period January 1, 19__ to June 10, 19__

	<u>REVENUE</u>	<u>RATE</u>	<u>PREMIUM</u>
Storage	1,100,000.00	.015	\$ 16,500.00
Handling	1,100,000.00	.010	\$ 11,000.00
			<u>\$ 27,500.00</u>
			Less Deposit
			<u>\$ 27,500.00</u>
			(c) Additional Premium Due
			() Return Premium Due
			<u>\$ _____</u>

OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

D9-70

ENDORSEMENT

BAYLY, MARTIN & FAY, INC.

INTERNATIONAL INSURANCE BROKERS

300 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60606

(312) 641-2121

ATTACHED to and forming part of Policy No. AVA-850 9315

of the American Home Assurance Company

issued to Hermann Warehouse Corporation

June 20, 1981

Effective June 23, 1981, it is agreed that the Schedule of Locations under Paragraph I, Part II of this Policy is amended as follows:

<u>DELETED</u> <u>LOCATION</u>	<u>LIMIT OF</u> <u>LIABILITY</u>	<u>RATES</u> <u>STATE HDLG</u>
Deeks Corner Rd., Dayton, NJ	2,000,000.	.925 .05

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

Dg-71

AMERICAN WAREHOUSEMEN'S ASSOCIATION
 WAREHOUSEMAN OR BAILEE LIABILITY - PART II
 (Part II of Two Parts)

October 5, 1981

Effective September 2, 1981

1. LIMITS OF LIABILITY & PREMIUM RATES

LOCATION OF PREMISES (Address, City and State)	LIMIT OF LIABILITY		PREMIUM RATES (PER \$100)	
	Warehouse Liability		Storage	Handling
1201 Jersey Ave., & Howe Lane, North Brunswick, N.J.	2,000,000.00		.925	.05
131 Jersey Ave., New Brunswick, N.J.	2,000,000.00		"	"
9225 River Road, Pennsauken, N.J.	2,000,000.00		"	"
#5 Clyde Rd., Franklin Township, N.J.	2,000,000.00		"	"
#8 Clyde Rd., Franklin Township, N.J.	2,000,000.00		"	"
Route 130 & Old Georges Rd., Dayton, N.J.	2,000,000.00		"	"
Ford Ave., Milltown, N.J.	2,000,000.00		"	"
Triangle Rd., & Home News Rd., New Brunswick, N.J.	2,000,000.00		"	"
A-1 Warehouse, 7100 Westfield Ave., Pennsauken, N.J.	2,000,000.00		"	"
Old Georges Rd., S. Brunswick, N.J.	2,000,000.00		"	"
Route 28, Bridgewater, Bridgewater Industrial Park, Bridgewater, N.J.	2,000,000.00		"	"
Port Authority of NY And NJ, Bldg. 261, Doremus Ave., Newark, N.J.	2,000,000.00		"	"
Bldg. 12, Ford Ave., Milltown, N.J.	2,000,000.00		"	"
River Bridge Industrial Complex 2nd St., Chester, PA.	2,000,000.00		"	"

3. DEPOSIT PREMIUM:

\$ 8,800.00 payable

(in amounts of \$ 8,800.00 on January 1st of each)

Attached to and forming part of Policy No. AWA-450 9315 of the American Home Assurance Company.

Dg-72

ENDORSEMENT

BAYLY, MARTIN & FAY, I

INTERNATIONAL INSURANCE BROKERS

300 WEST WASHINGTON STREET

CHICAGO, ILLINOIS 60606

(312) 641-2101

ATTACHED to and forming part of Policy No. AWA-450 9315

of the American Home Assurance Company

issued to Hermann Warehouse & Corporation

April 21 1980

Adjustment of Annual Deposit Premium for the Period January 1, 1979 to January 1, 1980

	<u>REVENUE</u>	<u>RATE</u>	<u>PREMIUM</u>
Storage	\$ 1,803,716.48	.925	\$ 16,684.00
Handling	948,626.46	.05	\$ 474.00
			<u>Earned Premium</u> 17,158.00
			<u>Less 10% Credit '79-'80</u> 1,715.80
			<u>Adjusted Premium</u> 15,442.20
			<u>Less Deposit</u> 8,800.00
(x) Additional Premium Due			<u>6,642.20</u>
() Return Premium Due			

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

D9-74

AMERICAN WAREHOUSEMEN'S ASSOCIATION
 WAREHOUSEMAN OR BAILEE LIABILITY - PART II
 (Part II of Two Parts)

Effective September 23, 1980

1. LIMITS OF LIABILITY & PREMIUM RATES

LOCATION OF PREMISES (Address, City and State)	LIMIT OF LIABILITY Warehouse Liability	PREMIUM RATES (PER \$100)	
		Storage	Handling
1201 Jersey Ave., & Howe Lane, North Brunswick, N.J.	2,000,000.00	.925	.00
131 Jersey Ave., New Brunswick, N.J.	2,000,000.00	"	"
9225 River Road, Pennsauken N.J.	2,000,000.00	"	"
Docks-Corner Rd., Dayton, N.J.	2,000,000.00	"	"
#5 Clyde Rd., Franklin Township, N.J.	2,000,000.00	"	"
#8 Clyde Rd., Franklin Township, N.J.	2,000,000.00	"	"
Route 130 & Old Georges Rd., Dayton, N.J.	2,000,000.00	"	"
Ford Ave., Milltown, N.J.	2,000,000.00	"	"
Triangle Rd., & Home News Rd., New Brunswick, N.J.	2,000,000.00	"	"
A-1 Warehouse, 7100 Westfield Ave., Pennsauken, N.J.	2,000,000.00	"	"
Old Georges Rd., S. Brunswick, N.J.	2,000,000.00	"	"
Route 28, Bridgewater, Bridgewater Industrial Park, Bridgewater, N.J.	2,000,000.00	"	"
Port Authority of NY and NJ, Bldg. 261, Doremus Ave., Newark, N.J.	2,000,000.00	"	"
Bldg. 12, Ford Ave., Milltown, N.J.	2,000,000.00	"	"
	2,000,000.00		

unexplained disappearance

2. DEPOSIT PREMIUM:

\$ 8,800.00 payable

(in amounts of \$ 8,800.00 on 1/1 of each year)

Attached to and forming part of Policy No. AWA-450 9315 of the American Home Assurance Company.

D9-75

ATTACHED to and forming part of Policy No. AWA-450 9315

of the American Home Assurance Company

issued to Hermann Warehousing Corp.

BAYLY, MARTIN & FAY, INC.
INTERNATIONAL INSURANCE BROKERS
200 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60606
(312) 641-2131

December 9, 19 80

An Annual Deposit Premium of \$ 8,800.00 is Payable in
Amounts specified below:

<u>DUE DATE</u>	<u>AMOUNT</u>
<u>January 1, 1981</u>	<u>\$ 8,800.00</u>
<u> </u>	<u>\$ _____</u>
<u> </u>	<u>\$ _____</u>
<u> </u>	<u>\$ _____</u>

Premium due herewith: \$ 8,800.00

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

D9-76

ENDORSEMENTS

BAYLY, MARTIN & FAY, I.
INTERNATIONAL INSURANCE BROKERS
300 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60606
(312) 631-2121

ATTACHED to and forming part of Policy No. AWA 450 9315
of the American Home Assurance Company
issued to Hermann Warehousing Corp

January 7, 1980

An Annual Deposit Premium of \$ 8,800.00 is Payable in
Amounts specified below:

<u>DUE DATE</u>	<u>AMOUNT</u>
<u>January 1, 1980</u>	<u>\$ 8,800.00</u>
<u> </u>	<u>\$ _____</u>
<u> </u>	<u>\$ _____</u>
<u> </u>	<u>\$ _____</u>

Premium due herewith: \$ 8,800.00

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

Dg-77

**AMERICAN WAREHOUSEMEN'S ASSOCIATION
WAREHOUSEMAN OR BAILEE LIABILITY - PART II
(Part II of Two Parts)**

1. LIMITS OF LIABILITY & PREMIUM RATES

LOCATION OF PREMISES (Address, City and State)	LIMIT OF LIABILITY Warehouse Liability	PREMIUM RATES (PER \$100)	
		Storage	Handling
131 Jersey Ave., New Brunswick, N.J.	\$2,000,000.	92.5	05
9225 River Road, Pennsauken, N.J.	"	"	"
Chippewa & Huyler Sts., S. Hackensack, N.J.	"	"	"
140 Jackson Ave., Edison, N.J.	"	"	"
Old George's Rd., S. Brunswick, N.J.	"	"	"
Clyde Road (J&J), Franklin, N.J.	"	"	"
Old George's Rd., Dayton, N.J.	"	"	"
400 Huyler St., South Hackensack, N.J.	"	"	"

2. DEDUCTIBLES:

(a) \$ 20,000.00 on all losses, except (b) \$ 40,000.00 on Inventory Shortage and/or unexplained disappearance.

3. DEPOSIT PREMIUM:

\$ 8,800.00 payable

(in amounts of \$ 8,800.00 on 1/1 of each year

Attached to and forming part of Policy No. AWA-450 9315 of the American Home Assurance Company.

ATTACHED to and forming part of Policy No. AAA-450 9315

of the American Home Assurance Company

issued to Hermann Warehousing Corporation

BAYLY, MARTIN & FAY

INTERNATIONAL INSURANCE BROKER

300 WEST WASHINGTON STREET

CHICAGO, ILLINOIS 60606

(312) 641-2121

February 19, 19__

Effective January 31, 1979, it is agreed that the schedule of locations under Part II, Paragraph I of this Policy is amended to include the following locations:

<u>LOCATION</u>	<u>LIMIT OF LIABILITY</u>	<u>RATE</u> <u>STGE. PER</u>
1201 Jersey Avenue and Howe Lane, North Brunswick, New Jersey	2,000,000.00	.925 ..

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

Da-79

ENDORSEMENT

BAYLY, MARTIN & FAY, INC.
INTERNATIONAL INSURANCE BROKERS
300 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60606

(312) 641-2121

ATTACHED to and forming part of Policy No. AWA-450 9315
of the American Home Assurance Company
issued to Hermann Warehouse Corp.

August 17, 1979

Effective July 17, 1979, it is agreed that the schedule of locations under Part II, Paragraph I of this Policy is amended to include the following location:

<u>LOCATION</u>	<u>LIMIT OF LIABILITY</u>	<u>RATE</u>	<u>STGE. HDLG.</u>
Building #12 Ford Avenue Milltown, NJ 08850	2,000,000.00	.925	.05

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

D9-80

ENDORSEMENT

ATTACHED to and forming part of Policy No. AWA-450 9315
of the American Home Assurance Company
issued to Hermann Warehousing Corporation

BAYLY, MARTIN & FAY, INC.
INTERNATIONAL INSURANCE BROKERS
200 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60606

(312) 661-2121

April 24 19 79

Adjustment of Annual Deposit Premium for the Period Jan. 1, 1978 to Jan. 1, 1979

	<u>REVENUE</u>	<u>RATE</u>	<u>PREMIUM</u>
Storage	1,554,000.	.925	\$ 14,375.00
Handling	824,000.	.05	\$ 412.00
			<u>\$ 14,787.00</u>
			\$ 5,987.00

Less Deposit

(X) Additional Premium Due
() Return Premium Due

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

Dg-81

ENDORSEMENT

BAYLY, MARTIN & FAY, I.

INTERNATIONAL INSURANCE BROKERS
300 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60606

(312) 641-2121

April 4 19 79

ATTACHED to and forming part of Policy No. AWA-450 9315
of the American Home Assurance Company
issued to Hermann Warehouse Corp.

The following Deposit Premium is due and payable for
the period January 1, 1979 to January 1, 1980:

\$8,800.00.

Payable to the Company as follows:

January 1, 1979

\$8,800.00

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

Dq-82

ENDORSEMENT

BAYLY, MARTIN & FAY, INC.
INTERNATIONAL INSURANCE BROKERS
300 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60606

ATTACHED is and forming part of Policy No. Am 450 9315

of the American Home Assurance Company

issued to Inter-Link Warehousing Corporation

(312) 641-2121

February 6, 1973

Effective January 25, 1973, it is agreed that the following location under Part II, Paragraph 1 of this policy is hereby deleted:

~~2000 S. ...
S.W. Corner of Jersey Ave., 1 mile east,
North Brunswick, N.J.~~

2,000,000.00

2,000,000.00

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

Dg-83

BAYLY, MARTIN & FAY, INC.

INTERNATIONAL INSURANCE BROKERS
300 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60606

(312) 641-2131

ATTACHED to and forming part of Policy No.

of the

issued to on 19 70

Effective May 17, 1970, it is agreed that the schedule of locations under Part II, Paragraph 1 of this Policy is amended to include the following location:

LOCATION	LIMIT OF LIABILITY	RATE
Port Authority of NY and NJ 277 1st Dorset Avenue Newark, NJ	2,000,000.00	1.25

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

Dg-84

AMERICAN WAREHOUSEMEN'S ASSOCIATION
 WAREHOUSEMAN OR BAILEE LIABILITY - PART II
 (Part II of Two Parts)

September 23, 1970
 Effective May 10, 1970

1. LIMITS OF LIABILITY & PREMIUM RATES

LOCATION OF PREMISES (Address, City, State)	LIMIT OF LIABILITY	PREMIUM RATES (PER \$100)
201 131 Jersey Ave., New Brunswick, N.J.	2,000,000.00	.925 .05
9225 River Road, Pennsauken, N.J.	2,000,000.00	" "
Docks Corner Rd., Dayton, N.J.	2,000,000.00	" "
#5 Clyde Rd., Franklin Township, N.J.	2,000,000.00	" "
#8 " " " " " "	2,000,000.00	" "
400 Huyler St., S. Hackensack, N.J.	2,000,000.00	" "
Route 130 & Old Georges Rd., Dayton, N.J.	2,000,000.00	" "
Ford Ave., Milltown, N.J.	2,000,000.00	" "
Triangle Rd., & Home News Rd., New Brunswick, N.J.	2,000,000.00	" "
A-1 Warehouse, 7100 Westfield Ave., Pennsauken, N.J.	2,000,000.00	" "
Old Georges Rd., S. Brunswick, N.J.	2,000,000.00	" "
Route 28, Bridgewater, Bridgewater Industrial Park, Bridgewater, N.J.	2,000,000.00	" "
S/E Corner of Jersey Ave., & How Lane, North Brunswick, N.J.	2,000,000.00	" "
Port Authority of NY and NJ, Bldg. 261, Doremus Ave., Newark, N.J.	2,000,000.00	" "
Bldg 12 Ford Ave. Milltown, NJ	2,000,000.00	" "

(a) \$ 20,000.00 on all losses, except (b) \$ 40,000.00 on Inventory Shortage and/or unexplained disappearance

~~Port Authority of NY & NJ Bldg 261~~

3. DEPOSIT PREMIUM:

\$ 6,800.00 payable

(in amounts of \$ 6,800.00 on _____ of each year

Attached to and forming part of Policy No. 450-9515 of the American Home Assurance Company.

Dg-85

ATTACHED to and forming part of Policy No. AWA-450 9315
of the American Home Assurance Company
issued to Hermann Warehouse Corp.

BAYLY, MARTIN & FAY, INC.
INTERNATIONAL INSURANCE BROKERS
300 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60606

Feb. 28, 1978

The Assured reports revenue for the period January 1, 1977,
to December 31, 1977, as follows:

Storage Revenue	\$879,657.	@ .925	\$8,137.00
Handling Revenue	\$491,703.	@ .05	<u>246.00</u>
		Earned Premium	\$8,383.00
		Less Deposit	<u>\$8,800.00</u>
		Return Premium	\$ 417.00

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

Dg-86

ENDORSEMENT

BAYLY, MARTIN & FAY, I.
INTERNATIONAL INSURANCE BROKERS
306 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60606

ATTACHED to and forming part of Policy No. AWA-450 93 15
of the American Home Assurance Company
issued to Hermann Warehouse Corp.

Feb. 26, 19 78

Effective December 15, 1977, it is agreed that the schedule of locations under Part II, Paragraph I of this Policy is amended to include the following location:

LOCATION	LIMIT OF LIABILITY	RATES	
		STGE.	HDLG.
S/E Corner of Jersey Ave. & How Lane, North Brunswick, N.J.	2,000,000.00	.925	.05

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

D9-87

**AMERICAN WAREHOUSEMEN'S ASSOCIATION
WAREHOUSEMAN OR BAILEE LIABILITY - PART II
(Part II of Two Parts)**

Effective Dec. 15, 1977

1. LIMITS OF LIABILITY & PREMIUM RATES

LOCATION OF PREMISES (Address, City and State)	LIMIT OF LIABILITY	PREMIUM RATES (PER \$100)	
		Storage	Handling
131 Jersey Ave., New Brunswick, N.J.	2,000,000	.925	.05
9225 River Road, Pennsauken, N.J.	"	"	"
Chippewa & Huyler Sts., So. Hackensack, NJ	"	"	"
Docks Corner Road, Dayton, N.J.	"	"	"
Clyde Road, Franklin Township, N.J.	"	"	"
400 Huyler St., So. Hackensack, N.J.	"	"	"
Route 130 & Old Georges Rd., Dayton, NJ	"	"	"
Ford Ave., Milltown, N.J.	"	"	"
Triangle Rd. & Home News Rd., New Bruns- wick, N.J.	"	"	"
A-1 Whse., 7100 Westfield Ave., Pennsauken, N.J.	"	"	"
Old Georges Rd., So. Brunswick, N.J.	"	"	"
Route 28, Bridgewater, Bridgewater Industrial Park, Bridgewater, N.J.	"	"	"

2. DEDUCTIBLES:

(a) \$ 20,000.00 on all losses, except (b) \$ 50,000.00 on Inventory Shortage and/or unexplained disappearance

3. DEPOSIT PREMIUM:

\$ 8,800.00 payable

(in amounts of \$ 8,800.00 on 1/1 of each year)

Attached to and forming part of Policy No. AWA-450 9315 of the American Home Assurance Company.

AWA:

D9-88

ATTACHED to and forming part of Policy No. AWA-450 9315

of the American Home Assurance Company

issued to Hermann Warehouse Corporation

BAY **MARTIN & FAY, INC.**
INTERNATIONAL INSURANCE BROKERS =
300 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60604

(312) 641-2171

November 15, 1977

The following Deposit Premium is due and payable for the period January 1, 1978, to January 1, 1979:

\$8,800.00

Payable to the Company as follows:

January 1, 1978 \$8,800.00

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

Dg-89

ATTACHED to and forming part of Policy No. AWA-450 9315

of the American Home Assurance Company

issued to Hermann Warehousing Corporation

BAY J. MARTIN & FAY, INC.
INTERNATIONAL INSURANCE BROKERS
300 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60606

15121 071-2121

March 9, 19 77

Effective from inception, it is hereby agreed that the Named Assured hereunder is amended to read as follows:

HERMANN WAREHOUSE CORPORATION

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

D9-90

ATTACHED to and forming part of Policy No. AWA-450 9315

of the American Home Assurance Company

issued to Hermann Warehouse Corporation

BAYLY, MARTIN & FAY, INC.

INTERNATIONAL INSURANCE BROKERS =
300 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60606

(312) 541-2131

May 26, 19 77

It is agreed that the schedule of locations under Paragraph I, Part II of this Policy is hereby amended to include the following locations:

Effective April 25, 1977.

LOCATION
Corner Triangle Rd. & Home News Rd.,
New Brunswick, N.J.

LIMIT OF LIABILITY	RATE	
	STGE.	HDLG.
2,000,000.00	.925	.05

Effective May 20, 1977.
Portion of the Phelps Dodge Bldg.,
Docks Corner Rd., Dayton, N.J.

2,000,000.00	.925	.05
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ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

D 9-91

AMERICAN WAREHOUSEMEN'S ASSOCIATION
WAREHOUSEMAN OR BAILEE LIABILITY - PART II
 (Part II of Two Parts)

Amended Effective January 1, 1977

1. LIMITS OF LIABILITY & PREMIUM RATES

LOCATION OF PREMISES (Address, City and State)	LIMIT OF LIABILITY Warehouse Liability	PREMIUM RATES (PER \$100)	
		Storage	Handling
131 Jersey Ave., New Brunswick, N.J.	2,000,000	.925	.05
9225 River Road, Pennsauken, N.J.	"	"	"
Chipewa & Huyler Sts., S. Hackensack, N.J.	"	"	"
014 George's Rd., So. Brunswick, N.J.	"	"	"
Clyde Road (I & J), Franklin, N.J.	"	"	"
Old George's Road, Dayton, N.J.	"	"	"
400 Huyler St., So. Hackensack, N.J.	"	"	"
Route 130, South Brunswick, N.J.	"	"	"

22. DEDUCTIBLES:

(a) \$ 20,000.00 on all losses, except (b) \$ 40,000.00 on Inventory Shortage and/or unexplained disappearance

33. DEPOSIT PREMIUM:

\$ 8,800.00 payable

(in amounts of \$ 8,800.00 on 1/1 of each year

Attached to and forming part of Policy No. AWA-450 9315 of the American Home Assurance Company.

BAYLY, MARTIN & FAY, INC.

INTERNATIONAL INSURANCE BROKERS

300 WEST WASHINGTON STREET
CHICAGO, ILLINOIS 60606

(312) 641-2121

ATTACHED to and forming part of Policy No. AWA-450 9315

the American Home Assurance Company

and to Hermann Warehousing Corporation

February 7, 19 77

Effective January 28, 1977, it is hereby agreed that the Named Insured hereunder is amended to include the following:

MILLTOWN WAREHOUSE CORPORATION

It is further agreed that the schedule of locations under Part II, Paragraph I is amended to include the following location:

LOCATION	LIMIT OF LIABILITY	RATE STGE.	HDLG.
South Side of Ford Ave., Milltown, N.J.	2,000,000.00	.925	.05

1 OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

Dq-93

THOMAS J. SHAMY
ATTORNEY AT LAW

PHILIP L. MAIER
N.J. & N.Y. BARS

146 LIVINGSTON AVENUE
NEW BRUNSWICK, N. J. 08901

GDH 247-1133

August 31, 1983

American International Adjustment Company, Inc.
4002-A Greentree Executive Campus
Route 73/Box 999
Marlton, New Jersey 08053

Attention: Bruce W. Smith

Re: Hermann's Warehouse Corporation vs. Kurt Adler

Dear Mr. Smith:

I have your letter of July 27, 1983, sent to Mr. Dunn, President of Hermann Warehouse Corporation regarding the above matter. You should be aware that I represent Hermann Warehouse Corporation and that my client has expressed his displeasure with the settlement of the Kurt Adler claim. My client has, as you know, refused to consent to the settlement and urged that the claim be denied and the matter tried by a jury.

We have repeatedly given what we feel are reasonable grounds to deny negligence on our part in this matter to your trial counsel, Mr. Dreger, and we believe you were advised of same. Those facts reflecting the claim of negligence on the part of Hermann Warehouse Corporation are as follows:

- (1) The trailer that was stolen had been dropped at the warehouse site for the convenience of the carrier.
- (2) Our employee made no acknowledgement of the contents of the vehicle other than to sign the delivery receipt "Shippers Load and Count". This type of signature, in this instance meant that we could not take responsibility for the amount of merchandise said to be contained in the trailer. This responsibility would have commenced after we had unloaded the trailer, counted the merchandise and issued a warehouse receipt for the goods.
- (3) Since we would not accept custody of the goods, until they were unloaded and counted, we could not charge

RECEIVED
AUG 31 1983
FBI - MARLTON

09-94

for storage of same. Accordingly, the trailer and the merchandise were on our premises free of charge.

- (4) We have been operating this warehouse since 1963 and have never had a trailer stolen from the premises. In the light of our past experience we could not have anticipated the hi-jacking of a vehicle. In fact, our only experience at this location involving vehicles parked outside the building has been some minor pilferage. In order to avoid this peril, I understand that our personnel applied a padlock to the trailer that was later stolen.

Furthermore, it was my client's original advice to Mr. Dreger that there was the possibility of negligence on the part of the delivering carrier and that they be joined in the suit.

It seems that the decision to settle against our wishes was primarily based upon anticipated adverse testimony from a disgruntled former employee, a Mr. Frank Brown. We feel that his testimony would have been neutralized due to his status and that the truth of the situation would have prevailed. Furthermore, there was a serious question as to whether Mr. Brown would have even been available to plaintiff for trial.

In conclusion, we take the position, based upon the above, that Hermann Warehouse Corporation is not responsible to pay the sum claimed and therefore refuse to pay same.

Very truly yours,


THOMAS J. SHAMY

TJS/fac
cc: E.V. Dunn
A.W. Hermann

Da-95

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DE GONGE, GARRITY & FITZPATRICK
A PROFESSIONAL CORPORATION
430 BROAD STREET
P. O. BOX 1560
BLOOMFIELD, N. J. 07003
(201) 748-7400
ATTORNEYS FOR

Plaintiff (s)

American Home Assurance Co.

Defendant

Hermann's Warehouse Corporation

TO:

Thomas J. Shamy, Esq.
146 Livingston Avenue
New Brunswick, N.J. 08901

SUPERIOR COURT OF
NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY

Docket No. L37214-84

CIVIL ACTION
INTERROGATORIES

DEMAND is hereby made of certified answers to the following
Interrogatories within the time prescribed by the rules of this
Court:

1. Set forth your full name, present address and employment
title:
HERMANN WAREHOUSE CORPORATION, P. O. Box 1, North Brunswick,
New Jersey, Ed Dunn, President.
2. Does the defendant deny that the document, attached to the
Complaint and hereto marked Exhibit "A" for purpose of

DG-96

1 identification, is a copy of the agreement entered into
2 between the plaintiff and the defendant and that such document
3 is the written evidence of the agreement which is the subject of
4 this action.

5 NO.

6
7 3. If so, state:

8 N/A.

(a) the facts on which he relies to support such denial:

9
10 (b) the names and addresses of each person you claim
11 has knowledge of such facts:

12
13 (c) what you contend Exhibit "A" is:

14
15
16
17 4. Did the defendant fail to pay the deductible amount as
18 requested by the plaintiff pursuant to the contract?

19 Yes.

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21
22 5. Does the defendant claim it was excused from payment of
23 the deductible amount?

24 Yes.

25 6. If so, for each excuse or reason, state the facts con-
stituting the excuse or reason:

Plaintiff breached the insurance contract by failing to adequately
and diligently represent the interests of the defendant. Plaintiff
settled a claim solely for its own interest and failed to consider
defendants direct monetary involvement under the terms of the
policy. A meritorious defense to the claim was available and
made known to plaintiff.

D9-97

1 7. Does the defendant contend that the plaintiff failed to
2 perform each obligation under the contract?

3 Yes.

4 8. If so state:

5 (a) when such failure took place:

6 (a&b) The plaintiff owed a contractual duty to represent defendant
7 in actions arising under the policy. The plaintiff failed to
8 properly and adequately represent those interests and settled the

9 (b) the nature and extent of such failure:

10 claim contrary to the desires and interests of the defendant and
11 solely for its own gain. Additionally, the plaintiff, if
12 adequately representing the defense of the claim, would have sued
13 other parties, (e.g. the truck driver, the owner of the truck...) for
14 indemnification and/or liability so as to limit defendant's exposure.

15 9. Do you contend that the plaintiff did anything to prevent

16 your performance in accordance with the terms of the

17 contract?

18 No.

19 10. If so state:

20 N/A.

21 (a) the acts done by the plaintiff which prevented your
22 performance:

23 (b) the name of each person who has knowledge of such
24 acts:

25 11. Do you rely on any other contention which has not been
referred to above?

No.

D 9-98

1 12. If so, for each contention, state:

2 N/A.

3 (a) what the contention is:

4
5
6 (b) facts on which you relied to support such
7 contention:

8
9
10 13. Did you inform the plaintiff of any reason for your
11 failure to pay the deductible amount:

12 Yes.

13 14. If so, state:

14 (a) when you informed the plaintiff:

15 Plaintiff was informed throughout the pendency of the claim that
16 the defendant would not pay any part of the claim because it did
17 not perform any negligent act so as to give rise to liability.

18 (b) the manner in which you informed the plaintiff:

19 Plaintiff was advised of defendant's position by various telephone
20 conversations throughout the pendency of the claim, said communi-
21 cations were memorialized by the attached letter dated, August 31,
22 1983.

23 (c) the names and addresses of each person having
24 knowledge of your communication:

25 Thomas J. Shamy, Esq., 146 Livingston Avenue, New Brunswick, N.J.;
Albert W. Hermann, P. O. Box 1, North Brunswick, New Jersey;
Ed V. Dunn, P. O. Box 1, North Brunswick, New Jersey; Bruce Smith,
American International Adjustment Co., Inc., 4002-A Greentree
Executive Campus, Route 73, Box 999, Marlton, New Jersey 08053.

(d) substance of the communication:

The communications and letter stated that the plaintiff should
not settle the matter for the reasons outlined in the attached
letter.

15. Is there is any written record made of the communication
to the plaintiff? If so, attach copy of each record to
your answers to these Interrogatories:

Yes.

D9-99

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16. State the names and addresses and title of the agent through which you procured this policy of insurance:
The Clark Group, P. O. Box C, 147 Union Avenue, Middlesex, New Jersey 08846.

17. If you have not done so in response to any of the above Interrogatories, set forth fully and completely the factual basis for each and every separate defense to the plaintiff's action.

N/A.

D9-100

August 31, 1983

American International Adjustment Company, Inc.
4002-A Greentree Executive Campus
Route 73/Box 999
Marlton, New Jersey 08053

attention: Bruce W. Smith

Re: Hermann's Warehouse Corporation vs. Kurt Adler

Dear Mr. Smith:

I have your letter of July 27, 1983, sent to Mr. Dunn, President of Hermann Warehouse Corporation regarding the above matter. You should be aware that I represent Hermann Warehouse Corporation and that my client has expressed his displeasure with the settlement of the Kurt Adler claim. My client has, as you know, refused to consent to the settlement and urged that the claim be denied and the matter tried by a jury.

We have repeatedly given what we feel are reasonable grounds to deny negligence on our part in this matter to your trial counsel, Mr. Dragar, and we believe you were advised of same. Those facts reflecting the claim of negligence on the part of Hermann Warehouse Corporation are as follows:

- (1) The trailer that was stolen had been dropped at the warehouse site for the convenience of the carrier.
- (2) Our employees made no acknowledgement of the contents of the vehicle other than to sign the delivery receipt "Shippers Load and Count". This type of signature, in this instance meant that we could not take responsibility for the amount of merchandise said to be contained in the trailer. This responsibility would have commenced after we had unloaded the trailer, counted the merchandise and issued a warehouse receipt for the goods.
- (3) Since we would not accept custody of the goods until they were unloaded and counted, we would not charge

D9-101

for storage of same. Accordingly, the trailer and the merchandise were on our premises free of charge.

- (4) We have been operating this warehouse since 1963 and have never had a trailer stolen from the premises. In the light of our past experience we could not have anticipated the hi-jacking of a vehicle. In fact, our only experience at this location involving vehicles parked outside the building has been some minor pilferage. In order to avoid this peril, I understand that our personnel applied a padlock to the trailer that was later stolen.

Furthermore, it was my client's original advice to Mr. Orger that there was the possibility of negligence on the part of the delivering carrier and that they be joined in the suit.

It seems that the decision to settle against our wishes was primarily based upon anticipated adverse testimony from a disgruntled former employee, a Mr. Frank Brown. We feel that his testimony would have been neutralized due to his status and that the truth of the situation would have prevailed. Furthermore, there was a serious question as to whether Mr. Brown could have been available to plaintiff for trial.

In conclusion, we take the position, based upon the above, that Hermann Warehouse Corporation is not responsible to pay the sum claimed and therefore refuse to pay same.

Very truly yours,

THOMAS J. SHANN

TJS/lac

cc: E.V. Dunn
A.W. Hermann

(2)

D9-102

TRIAL COURT BRIEF ON BEHALF OF HERMANN WAREHOUSE CORPORATION

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THOMAS J. SHAMY
146 Livingston Avenue
New Brunswick, N.J. 08901
(201) 247-1133
ATTORNEY FOR Defendant

SUPERIOR COURT OF NEW JERSEY

Plaintiff

AMERICAN HOME ASSURANCE COMPANY, INC.

LAW DIVISION

MIDDLESEX COUNTY

vs.

Docket No. L-37214-84

Defendant

HERMANN'S WAREHOUSE CORPORATION

CIVIL ACTION

BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT,
AND IN SUPPORT OF DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

ON THE BRIEF:

WILLIAM J. SHIPERS, ESQ.

D9-103

STATEMENT OF FACTS

1 Defendant, HERMANN'S WAREHOUSE CORPORATION, hereinafter
2 Hermann's, operates a warehouse located in North Brunswick, New
3 Jersey. On or about August 4, 1980, All Freight Trucking Co.,
4 contacted defendant, Hermann's, with respect to the delivery
5 and storage of four (4) inbound containers to be stored, by
6 Hermann's for Kurt S. Adler Co. Said containers contained various
7 decorative Christmas ornaments. Defendant, Hermann's informed
8 All Freight Trucking Co., that they could not unload and take
9 possession of the trailers that day due to a full work schedule.
10 All Freight Trucking Co. acknowledged the situation, but in any
11 event, dropped three (3) container trailers in the yard of
12 defendant, Hermann's, and requested that Hermann's unload same
13 the following morning of August 5, 1980. The trailers were
14 dropped at defendant Hermann's, by All Freight, a carrier, solely
15 for their convenience.

16 Hermann's made no formal acknowledgement of the contents of
17 the vehicles, did not unload same, nor did they issue a
18 warehouse receipt for the goods. Since Hermann's would not
19 accept custody of the goods until they were unloaded and counted,
20 no fee could be charged for storage of same. The three trailers
21 of All Freight were parked on Hermann's premises, for the
22 convenience of the carrier, free of charge. (Appendix E)

23 On or about August 5, 1980, an employee of Hermann's noticed
24 that two of the three trailers dropped by All Freight were
25 missing. Hermann's immediately contacted the New Brunswick

D9-104

1 Police (see Appendix A) and the F.B.I. On or about August 11,
2 1980, Hermann's was notified that the F.B.I. had discovered one
3 trailer in the parking lot of Techcor Co., Carteret, New Jersey,
4 contents empty. On the same day, the second trailer was
5 discovered within a quarter of a mile of the first. Remaining
6 in the second trailer were ninety-seven cases of Christmas
7 ornaments. Subsequently, the F.B.I. discovered an additional
8 three hundred and two carton of the stolen merchandise for sale
9 in a discount store in Brooklyn, New York. Same were returned
10 to Hermann's for storage. (See Appexdis B.)

11 Subsequently, Kurt Adler, Co., brought an action against
12 Hermann's regarding the theft of the two trailers and contents
13 thereof. Said complaint was turned over to the American Home
14 Assurance Company, hereinafter American Home, plaintiff herein,
15 insurer of Hermann's Warehouse Corporation, for defense of the
16 matter. Plaintiff, American Home, retained the services of
17 Conklin and Adler, Ltd., Chicago, Illinois, as attorneys for
18 Hermann's. Conklin and Adler, Ltd., appeared to retain control
19 of Hermann's defense, and additionally retained the services of
20 Kalmen Harris Geist, Paterson, New Jersey, as local counsel on
21 behalf of Hermann's.

22 At all times, defendant, Hermann's, denied liability under
23 the law of the State of New Jersey. (Appendix C) Hermann's
24 consistently provided defense counsel with significant reasonable
25 defenses to the claim of Kurt Adler Co. Additionally, Hermann's
inquired why the carrier, All Freight Trucking Co. and their
driver, individually, were not joined in the suit.

D9-105

1 At some point in time, the plaintiff, American Home,
2 through its adjusters, American International Adjustment Company,
3 Inc., determined that they desired to settle the claim
4 irrespective of the defenses or desires stated by defendant,
5 Hermann's. (See Appendis D & E.) Without the written or oral
6 consent of the Insured, and on its own initiative. plaintiff,
7 American Home, settled the Kurt Adler Company lawsuit for
8 \$67,500.00. By letter dated July 27, 1983, plaintiff, American
9 Home, requested payment of a \$20,000.00 deductible of defendant,
10 Hermann's, pursuant to the policy allegedly applicable to the
11 aforementioned loss. (Appendix E)

12 By Amended Complaint, Docket No. L-37214-84, (Appendix G)
13 the plaintiff now seeks reimbursement of a \$40,000.00 deductible,
14 by Count One, alleging a mysterious disappearance of the
15 ornaments inquestion. In the alternative, plaintiff contends
16 \$20,000.00 is due, as a deductable. (Appendix H)
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09-106

POINT I

1 THE THEFT AT ISSUE IS NEITHER AN
2 UNEXPLAINED (MYSTERIOUS) DISAPPEARANCE
3 NOR AN INVENTORY SHORTAGE, AND THEREFORE
4 THE \$40,000.00 DEDUCTIBLE IS INAPPLICABLE.

5 An unexplained or mysterious disappearance implies a
6 disappearance which is unexplainable, unaccountable or in an
7 unknown manner, and has been interpreted to cover disappearances
8 under unknown, puzzling or baffling circumstances which arouse
9 wonder, curiosity or speculation or circumstances which are
10 difficult to understand or explain. See, Appleman, Insurance
11 Law and Practice, Vol. 5, p. 506 (1970). See also, Black's Law
12 Dictionary 921 (5th ed. 1979). The unexplained disappearance
13 and inventory shortage provision of the policy at issue is not
14 a part of the definition of a theft, but is a separate risk
15 covered by the policy.

16 Clearly, the facts of the matter, as it relates to the loss,
17 are not in dispute. On or about the night of August 4, 1980, or
18 morning of August 5, 1980, two container trailers were stolen,
19 while parked on the premises of defendant, Hermann's. Said
20 trailers were discovered one week later in Carteret, New Jersey.
21 The contents of one had been removed, while another remained
22 partially full. Thereafter, additional amount of the stolen
23 cargo were recovered by the F.B.I. Although, at the present
24 time, the defendant does not know of the actual perpetrator of
25 the crime, it is clear what occurred. Two trailers were stolen,
cargos appropriated and then left in Carteret, New Jersey. The
loss of the goods in question is not mysterious nor unexplained.

D9-107

1 It is not puzzling, nor baffling. Although the theft may arouse
2 speculation or wonder as to the actual perpetrator, the crime is
3 documented.

4 Neither does the instant facts amount to an inventory
5 shortage. Classically, inventory shortage provisions apply to
6 matters such as employee pilferage and the like. Unquestionably,
7 the \$40,000.00 deductible in this incident does not apply. It
8 should be noted that plaintiff American Home agreed that this
9 incident was not one of inventory shortage or unexplained
10 disappearance, (See Appendix F) wherein plaintiff informed
11 defendant, Hermann's, of it's demand for payment of the allegedly
12 applicable \$20,000.00 deductible. The instant loss is no
13 different than one by fire, water damage, storm, etc. It is
14 explainable and therefore not within the \$40,000.00 deductible.
15 To date, plaintiff has failed to come forward with any evidence
16 which would tend to support the theory of an unexplained
17 disappearance or inventory shortage. Hence, defendant's motion
18 for summary judgment as to the first count of plaintiff's
19 Complaint should be granted.

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Da-108

POINT II

DEFENDANT HERMANN'S IS NOT RESPONSIBLE FOR THE
PAYMENT OF A DEDUCTIBLE, SUBSEQUENT TO SETTLEMENT
OF A CLAIM WITHOUT THEIR CONSENT.

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3 To determine the legal rights and obligations of the parties,
4 the court must direct its attention to the boundaries of the
5 policy at issue. (See Exhibit H). Section 1(A) of the contract
6 states, "this Company agrees:

7 (A) To pay on behalf of the Assured all sums which the
8 Assured shall become legally obligated to pay..."
9 Additionally, Section 11(A) enunciates the liability of the
10 company. "No action shall lie against the company unless, as a
11 condition precedent thereto,... the amount of the Assured's
12 obligation to pay shall have been finally determined either
13 by judgment against the Assured after actual trial or by written
14 agreement of the Assured, the claimant and the Company.
15 (emphasis supplied). The aforementioned sections clearly state
16 that the company does not become liable until either judgment
17 or consent of all the parties.

18 Admittedly, the policy reserves the right to the company
19 "to settle suits at the option of the Company without litigation"
20 Part I, sec. 1(B)(3) and "as it may deem expedient" Part I,
21 sec. 8. (See Appendix H). These provisions vest the insurer
22 with the absolute authority to settle claims within the limits
23 of the policy with the insured having no power to compel the
24 insurer to make settlements or to prevent it from doing so.
25 Appleman, Insurance Law and Practice, 4711 (1970). Accordingly,

Dg-109

1 American Home was authorized to settle the claims against the
2 defendant within the limits of the policy without the necessity
3 of obtaining defendants' consent to the settlement agreement.

4 However, with respect to American Homes' right to
5 reimbursement the policy simply provides, "Deductibles, (A)
6 \$20,000.00 on all losses except (B) \$40,000.00 on Inventory
7 Shortage and/or unexplained disappearance". Part II, sec. 2.
8 The policy is silent as to whether these deductibles apply
9 automatically or apply to an insured, when the insured becomes
10 'legally obligated' to pay, as stated in Part I, sec. 1(A) and
11 11(a).

12 The more reasoned approach would conclude that the insurer's
13 right to reimbursement is conditioned upon insured becoming
14 'legally obligated' to pay. An insured becomes legally
15 obligated to pay under the policy only as a result of a final
16 judgment of court, or consent to settle by the insured, claimant
17 and the company. When an insurer settles the claims of third
18 persons against the insured, as in the instant case, the insurer
19 is entitled to reimbursement from the insured provided the
20 insured consented to the settlement agreement. This approach
21 has been accepted by other states as well. See, National Service
22 Industries v. Hartford Accident & Indemnity Company, 661 F. 2d.
23 458 (5th Cir. 1981); Employer's Surplus Line Ins. Co. v. City of
24 Baton, 362 So. 2nd. 561 (1978).

25 Plaintiff, American Home, places its sole reliance in
support of its motion for summary judgment on the case of
Travelers Ins. Co. v. Hitchner, 61 N.J. Super. 283 (Law Div. 1960).

09-110

1 In Hitchner, the court dealt with a liability policy for bodily
2 injury, as applicable to a roller rink. The court relied on
3 three provisions of the policy to establish that the defendant
4 had no right to refuse to pay the deductible. Paragraph (2) of
5 the Hitchner policy stated,

6 "the terms of the policy, including those with respect
7 to notice of accident and the company's right to
8 investigate, negotiate and settle any claim or suit,
9 apply irrespective of the application of the deductible
10 amount." Id at 286.

11 This very important waiver of defendant's rights regarding
12 settlement and the deductible is absent in the policy at issue.
13 The American Home policy is silent regarding the insured,
14 settlement and the deductible. As stated in Part I, sec. 1(A)
15 and Part I, sec. 11(A), the insurer only becomes liable upon
16 judgment, or settlement by consent of the claimant, insured and
17 the insurer. Mutuality of contract and strict construction
18 against the drafter of an ambiguous policy requires the same
19 considerations to be given to the defendant herein.

20 Furthermore, under the American Home policy, plaintiff
21 allegedly undertakes a duty to defend. Part I, sec. 1(B)(2)
22 states: "This Company agrees: (2) To defend in the Assured's
23 name and behalf, any suits or other proceedings which may
24 be brought against the Assured to enforce such claims even if
25 such suits are groundless, false or fraudulent". By allowing an
insurer the unbridled discretion to settle matters, even those
which may be groundless, false or fraudulent, without the
consent of the insured, and then seek reimbursement from the
insured, the deductible, for all intent and purposes, eliminates

1 and nullifies any right to an adequate defense, contracted by
2 the insurer. The helpless insured has no options, no say in
3 settlement, and for no fault of its own may be held accountable
4 for a \$20,000.00 deductible.

5 To the extent the court feels Travelers is applicable,
6 defendant urges a re-examination of the Law Division holding
7 of twenty-six years ago, allowing unilateral settlement and
8 reimbursement, in light of subsequent New Jersey Supreme Court
9 cases on settlement by an insurer. See, Bowers v. Camden Fire Ins.
10 Assoc., 51 N.J. 62 (1968); Rova Farms Resort v. Investors Ins.
11 Co., 65 N.J. 474 (1974); Fireman's Fund Ins. Co. vs. Security
12 Ins. Co. of Hartford, 72 N.J. 63 (1976); Lieberman v. Employers
13 Ins. of Wausau, 84 N.J. 325 (1980). See also, Board of Ed. of
14 Bor. of Chatham v. Lumbermens Mut. Cas. Co., 293 F. Supp. 541
15 (D. N.J. 1968).

16 It appears to be the national trend that an insurer may
17 settle a matter strictly within policy limits, where no
18 deductibles apply, without the insureds consent. The rationale
19 is that if the insured is not exposed to any out of pocket
20 expenditures, there is no reason to allow an insured imput as
21 to settlement by his insurer on his behalf. Although, in the
22 event the proposed settlement exceeds the policy limits, so that
23 the insured would have to pay the excess, or where the insured
24 is subject to out of pocket expenditures due to a deductible,
25 their consent is to be acquired before the company may so act.
See, Appleman, Insurance Law and Practice, § 4711 (1970). Of
course an insurer is protected, in that an insured's refusal to

D9-112

1 consent to settlement must be reasonable, based upon a review of
2 all the objective issues of fact. As such, the modern trend
3 should be adopted in the within matter.

4 Without plaintiff, American Home, acquiring the consent of
5 defendant, Hermann's, prior to settlement, plaintiff is without
6 recourse to collect a deductible under the facts of the case.
7 Therefore, plaintiff's motion for summary judgment on counts
8 one and two should be denied, and defendant's cross motion for
9 summary judgment on each count should be granted.

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D9-113

POINT III

1 PLAINTIFF, AMERICAN HOME, FAILED TO ADEQUATELY
2 REPRESENT THE DEFENDANT, AND ADDITIONALLY ACTED
3 IN BAD FAITH WITH REGARD TO DEFENDANT, HERMANN'S INTERESTS.

4 The uncontroverted facts regarding the theft of the ornaments
5 at issue, reveal that All Freight Trucking, Co., a common carrier,
6 left three container trailers on the premises of defendant,
7 Hermann's, on August 4, 1980, solely for the convenience of the
8 carrier. On the night of the 4th or morning of the 5th, two of
9 the three trailers were stolen. Under the Law of New Jersey,
10 the potential liability of defendant, Hermann's was tenuous, at
11 best. At no time did Hermann's accept the goods in a warehouseman
12 capacity. A warehouse receipt for the goods was never issued.
13 At best a bailment may have been created, and this is doubtful.
14 It is essential to the creation of a bailment that the property
15 be turned over to the possession and control of the bailee.
16 See, Hy-Grade Oil Co. v. New Jersey Bank, 138 N.J. Super. 112
17 (App. Div. 1975); McFarland v. C.A.R. Corp., 58 N.J. Super. 449
18 (App. Div. 1960). Defendant, Hermann's, never acquired
19 possession and control.

20 Assuming the claimant could establish that defendant,
21 Hermann's, took possession of the goods, no fee for storage
22 or warehousing was to be charged since the containers remained
23 sealed and contents, unknown. At best, claimant may have
24 established a gratuitous bailment. Under the Law of New Jersey,
25 a gratuitous bailee is liable only for bad faith or gross
 negligence, since he receives nothing from the possessor of the

DG-114

1 property, nor does he have the right to recover for what he
2 does in caring for the property. Capezzaro v. Winfrey, 153 N.J.
3 Super. 267 (App. Div. 1977); see also, In re National Molding Co.,
4 230 F. 2d. 69 (3rd Cir. 1956). Under no circumstances could one
5 imply defendant, Hermann's, either acted in bad faith or with
6 gross negligence in regard to the goods of claimant. Kurt Adler
7 Co. Finally, All Freight Trucking Co. should have been signifi-
8 cantly involved in any litigation. Defense counsel for defendant,
9 Hermann's, refused to join same. Clearly, All Freight, was a
10 common carrier for hire, and a bailee of the goods. Where the
11 bailment was one of mutual benefit, All Freight had the duty to
12 exercise reasonable care for the goods bailed, and could have
13 been held liable for ordinary negligence. See, Nopco Chemical
14 Division v. Blaw-Knox Co., 59 N.J. 274 (1971); Parnell v.
15 Rohrer Chevrolet Co., 95 N.J. Super. 471 (App. Div. 1967).

16 By virtue of the aforementioned insurance policy, which
17 proscribed the insured from settling the matter on his own
18 behalf, American Home has made themselves the agent of the
19 insured in this respect. Therefore, case law has held that the
20 relationship of the insurer to its insured regarding settlement
21 is one of an inherent fiduciary obligation. See, Lieberman vs.
22 Employers Ins. Of Wausau, 84 N.J. 325 (1980); Rova Farms Resort v.
23 Investors Ins. Co., 65 N.J. 474 (1974). Embodied in the
24 liability insurance contract, and in the fundamental principles
25 of fiduciary obligations, is an implied covenant of good faith
and fair dealing to which an insurer must comply. Fireman's
Fund Ins. Co. vs. Security Ins. Co. of Hartford, 72 N.J. 63

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1 (1976). For an insurer to act in 'good faith' regarding
2 settlement, any decision must be thoroughly honest, intelligent,
3 objective, and realistic, based upon a weighing in a fair
4 manner the probabilities of a favorable or adverse verdict
5 against the insured. Bowers vs. Camden Fire Ins. Assoc., 51
6 N.J. 62 (1968).

7 Defendant, Hermann's, recognizes that an insurer is not
8 compelled to disregard its own interests in representing or
9 defending an insured, but as a fiduciary, the insured's interests
10 must necessarily come first. Lieberman v. Employers Ins. of
11 Wausau, supra., 84 N.J. at 336. A liability insurer will not
12 be permitted to frustrate the purpose of liability insurance by
13 a selfish decision regarding settlement, where an insured is
14 exposed to and suffers monetary liability. Borad of Ed. of Bor.
15 of Chatham v. Lumbermens Mut. Cas. Co., 293 F. Supp. 541
16 (D. N.J. 1968). Where an insurer alone can profit from a
17 settlement, any settlement entered into by the insurer, by its
18 own initiative, without the consent of the insured is suspect
19 to questions of good faith. See, Bowers, supra.

20 Throughout the claimant, Kurt Adler Company's litigation,
21 plaintiff, American Home, demonstrated an indifference towards
22 the interests of the insured, Hermann's. They subordinated
23 Hermann's interests to their own, and consequently acted in bad
24 faith. The only real concern expressed by American Home was
25 the mere possibility of a verdict exposing American Home to an
alleged \$80,000.00 liability as opposed to a \$47,000.00 liability.
American Home acted solely on behalf of their own self interest

D9-114

1 and gave little to no concern for defendant's, Hermann's,
2 potential \$20,000.00 deductible liability. By giving only
3 perfunctory consideration to insured, Hermann's interest, and
4 choosing not to make a honest, intelligent and good faith
5 evaluation of the case, by weighing the probabilities and
6 liabilities in a fair manner, plaintiff, American Home,
7 repudiated its obligations owed to the insured under the policy.
8 See Fireman's Fund, supra., 72 N.J. at 68-70. Therefore,
9 defendant, Hermann's, should not be held liable for any
10 deductible under the policy at issue.

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Da-117

POINT IV

SUMMARY JUDGMENT MOTIONS SHOULD BE
GRANTED ONLY WITH EXTREME CAUTION, AND
ONLY WHERE THE RECORD SHOWS PALPABLY THAT
THERE ARE NO ISSUES AS TO MATERIAL FACTS.

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3 In addition to its other defenses to enforcement of the
4 policy, defendant, Hermann's, throughout this litigation has
5 maintained that plaintiff, American Home, individually, and by
6 and through its agents failed to act in good faith with regard
7 to the defense and settlement of the Kurt Adler Co. claim
8 which forms the basis of this suit. See, (Exhibit I, question
9 6, 8 and 14). Furthermore, plaintiff has acknowledged the
10 defendants' contentions regarding the issue. See, (Plaintiff's
11 brief p. 3).

12 On a motion for summary judgment, where the good faith
13 actions of an insurer are at issue, the law is uncontroverted.
14 The question of the good faith of an insurer is for the jury
15 or the fact finder, if there exists evidence creating any
16 reasonable basis for disagreement among reasonable minds about
17 whether an insurer discharged its duty of good faith with regard
18 to an insured. Bowers vs. Camden Fire Ins. Assoc., 51 N.J. 62,
19 73 (1968); Radio Taxi Service, Inc. v. Lincoln Mutual Ins. Co.,
20 31 N.J. 299 (1960). In the instant matter, the issue of good
21 faith has not only been raised, but is strenuously contested
22 by defendant, Hermann's.

23 A motion for summary judgment is designed to provide a
24 prompt, businesslike and inexpensive method of disposing of any
25 cause which a discriminating search of the merits in the

1 pleadings, depositions and admissions on file, together with
2 the affidavits submitted, show that there is no genuine issue
3 as to any material fact challenged, and that the moving party
4 is entitled to a judgment or order as a matter of law. Judson v.
5 People's Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954);
6 R. 4:46-2. Summary judgment motions are to be granted only
7 with much caution, and where there are genuine disputed issues
8 of fact, they must be resolved at a plenary hearing. See,
9 Friedman v. Friendly Ice Cream Co., 133 N.J. Super. 333, 337
10 (App. Div. 1975); Blum v. Prudential Ins. Co. of America, 125
11 N.J. Super. 195 (Law Div. 1973).

12 As to burden of proof, it is the moving party's burden to
13 exclude any reasonable doubt as to the existence of any genuine
14 issue of material fact. All inferences of doubt are drawn
15 against the moving party in favor of the opponent of the motion.
16 Thus, the papers supporting the motion are to be closely
17 scrutinized and the opposing papers indulgently treated. Judson,
18 supra., Garley v. Waddington, 177 N.J. Super. 173, 179 (App. Div.
19 1981); Brenner and Co. v. Perl, 72 N.J. Super. 160, 166 (App. Div.
20 1962). If there is the slightest doubt as to the existence of a
21 material issue of fact, the motion should be denied. Linn v.
22 Rand, 140 N.J. Super. 212, 216 (App. Div. 1976); See also,
23 United Advertising Corp. v. Metuchen, 35 N.J. 193 (1961); Ruvolo
24 v. American Cas. Co., 39 N.J. 490 (1963). Based upon the
25 aforesaid, plaintiff, American Home's motion for summary
judgment on each count should be denied.

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CONCLUSION

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2 For the aforementioned reasons, it is respectfully
3 requested that defendant, Hermann's Warehouse Corporation's
4 Cross-Motion for Summary Judgment as to the First and Second
5 Counts of the Amended Complaint be granted, and that plaintiff,
6 American Home's Motion for Summary Judgment on all Counts be
7 denied.

8 Respectfully submitted,
9 THOMAS J. SHAMY, ESQ.

10
11 Dated: January 17, 1986

12 By: William J. Shifers
13 WILLIAM J. SHIFERS
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D 9-120

CRIMINAL INVESTIGATION REPORT

STATION New Brunswick		DATE 8 15 80	TOTAL VALUE 1214 80-24742	JCR	CHARGE	FILE NO.	CASE NO.
16. VALUE OF STOLEN PROPERTY	17. CURR.	18. JEWELRY	19. FURS	20. CLOTHING	21. AUTO	22. MISC.	23. OTHER
							5,000.00
24. CRIME Theft		25. R.I.L.		26. VICTIM 1. Kirt S. Addler Co. 2. Hermann Warehouse		27. AGENT	28. S.A. / D.S.A.
29. DATE AND TIME AT	30. HOUR	31. DAY	32. YEAR	33. HOME ADDRESS-CITY STATE		PHONE	
8:00AM	Tue	8	80	1.1107 Broadway N.Y. 2. Hermann Warehouse 131 Jersey Ave.		545-7500	
34. LOCATION 131 Jersey Ave. N. B. J.		35. EMPLOYER-SCHOOL S&B		36. BUS. PHONE 545-7500		37. PERSON REPORTING CRIME Frank Brown	
38. TYPE OF PREMISES Warehouse		39. WEAPONS/TOOLS		40. ADDRESS		41. DATE & TIME 8/5/80 8:28AM	
42. HOW ATTACKED		43. HOW TAKEN FROM REAR OF WAREHOUSE					

44. VEHICLE STOLEN / SUSPECT	45. MAKE	46. BODY TYPE	47. COLOR	48. REGISTRATION & STATE	49. SERIAL #
1. Polish Ocean Lines	Rust	POLU	402926-9	Silver	2051
50. GETAWAY TIME	51. ARRIVAL TIME	52. CLEARING TIME AND DATE			
8:30	8:56	8/5/80			
53. WITNESS/SUSPECT	54. ADDRESS	55. PHONE	56. SEX	57. RACE	58. D.O.B.

Mr. Brown stated that the two trailers were parked in the rear behind the warehouse between the above time and dates. They were dropped earlier on 8/4/80 and both were fully loaded with ~~breakable~~ glass Christmas ornaments. Trailer #1 contained 523 cases approx. value: 20,000.00. Trailer #2 contained 571 cases approx. value: 525,000.00. Attached is a list of the stock numbers of the items.

Appendix A

59. TYPE NAME Boy E. Williams #68	60. S.A.G.E. NO. 68	61. MUNICIPALITY New Brunswick
62. REVIEWED BY S. W. M.	63. DATE OF REPORT 8/5/80	

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SUPPLEMENTARY INVESTIGATION REPORT

1. FILE		2. NUMBER		3.		4.		5.		6.		7.	
STATION		DATE		TOP OF PAGE		VCS		CHARGE		C-FILE CODE		CASE NO.	
New Brunswick		8-6-80								1214		80-24742	
SPECIES		14. CURR.		17. JEWELRY		18. ARM.		19. CLOTHING		20. AUTO		21. OTHER	
1.		A. 2.		B. 3.		C. 4.		D. 5.		E. 6.		F. 7.	
PROPERTY		23. CRIME		24. P.L.S.		27. VICTIM		28. RACE		29. SEX		30. D.O.B.	
Theft													
NARRATIVE: Additional information on trailers:										31. DIVISION NO.		Patrol #1	

1 Polish Ocean Lines: Chassi # 440259 1074, Phawer Ser. # 382260

Maine Reg 719-435 Trailer # Polu 402025-9

2 Trailer: trailer # 2051 make Gindy, 1969, Serial # 56844

V. J. Reg # TU-6477

TYPE NAME Roy E. Williams SIGNATURE <i>Roy E. Williams</i>	32 BADGE NO. 68	34 MUNICIPALITY New Brunswick
	33 REVIEWED BY <i>Sgt H</i>	36 DATE OF REPORT 8/6/80

04-127



KURT S. ADLER, INC.

1107 BROADWAY, NEW YORK, N.Y. 10010 • TELEPHONE (212) 924-0900

Cable Address: EAGLEKAY

Telex: ITT 424251

September 19, 1980

HERMANN Warehouse Corporation
Box 1
North Brunswick, N.J. 08902

Attention: Mr. William Hermann

Theft of 2 Containers (533 + 671 Cartons) containing
Christmas Glass Ornaments (various style numbers)
at Hermann Warehouse, North Brunswick, N.J. on
August 5, 1980
Our Files: B-214 and D-55

Gentlemen:

We refer to our conversation concerning above theft, during your recent visit to our office, when we advised you that as recommended by our insurance adjusters, we will send you our claim for actual loss as determined after taking into account all the merchandise received ex s.s. F. Zubrzycki (our file ref. B-214) and from the airport shipment per air waybill #134-04576305 (our file ref. D-55). The last 23 cartons were picked up from the airport on 9/10/1980.

We herebelow give you details of all the merchandise lost as resulted from above theft, and hereby file our formal claim with you for the entire loss:

Details of 671 Cartons picked up from the airport:

178 Ctns	#GC 113	534 dz	@ \$36.00/dz	...	\$ 19,224.00
19 "	GC 602	5 dz	@ 27.60/dz	...	1,573.20
12 "	GC 611	36 dz	@ 24.00/dz	...	864.00
120 "	GC 611	360 dz	@ 24.00/dz	...	8,640.00
107 "	GC 612	321 dz	@ 36.00/dz	...	11,556.00
17 "	GC 231	51 dz	@ 24.00/dz	...	1,224.00
38 "	GC 603	114 dz	@ 30.00/dz	...	3,420.00
120 "	P 10	360 dz	@ 30.00/dz	...	10,800.00
60 "	P 11	360 dz	@ 16.80/dz	...	6,048.00
					<u>\$ 63,349.20</u>

Less merchandise found in the container subsequently located:

30 Ctns	#GC 113	90 dz	@ \$35.00/dz	= \$ 3,240.00
1 "	GC 611	3 dz	@ 24.00/dz	72.00
41 "	GC 612	123 dz	@ 36.00/dz	4,428.00
9 "	GT 231	27 dz	@ 24.00/dz	648.00

Cont'd.....2

IMPORTERS OF CHRISTMAS PARTY AND YEAR ROUND DECORATIONS

OFFICES IN PRINCIPAL CITIES OF THE WORLD

APPENDIX B

D9-123

HERMANN Warehouse Corporation
North Brunswick, N.J. 08902

Page - 2 - B/F \$ 63,349.20

3 Ctns	#GC 603	9 dz	@ \$30.00/dz	= 270.00	
7 "	# P 10	21 dz	30.00/dz	= 630.00	
5 "	# P 11	30 dz	16.80/dz	= 504.00	
96 Ctns					\$ 9,792.00 (-)

Net loss on merchandise from airport shipment \$ 53,557.20

Details of 533 Cartons in container #POLU 402926-9
ex s.s. F. Zubrzycki

70 Ctns	#GT 220/5	280 dz	@ \$27.00/dz	= \$ 7,560.00	
1 "	GT 220/6	3 dz	27.00/dz	= 81.00	
25 "	GT 300/B	75 dz	33.00/dz	= 2,475.00	
71 "	GT 300/G0	213 dz	33.00/dz	= 7,029.00	
36 "	GT 324	108 dz	30.00/dz	= 3,240.00	
60 "	GT 335	180 dz	28.00/dz	= 5,040.00	
30 "	GT 381	360 dz	7.20/dz	= 2,592.00	
1 "	GT 412	6 dz	39.60/dz	= 237.60	
60 "	GT 414	120 dz	33.00/dz	= 3,960.00	
50 "	GT 417	600 dz	12.00/dz	= 7,200.00	
59 "	GT 420	297 dz	33.00/dz	= 9,801.00	
30 "	GT 425	60 dz	54.00/dz	= 3,240.00	\$ 52,455.60

Total loss of Mdse \$ 106,012.80

Please be advised that we hold you fully responsible for this entire loss and request you to forward this claim to your insurance company.

Please acknowledge receipt of this claim. Thank you.

Very truly yours,
KURT S. ADLER, Inc.

R. Taneja
Import Department

cc: Mr. Joseph G. Giordano
General Adjustment Bureau, Inc.
123 William Street, New York, N.Y. 10038
cc: Calvin-Miller International, Inc.
1140 Avenue of the Americas
New York, N.Y. 10036
Attn: Micki Scheier -- Your Claim Ref. 7246

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KURT S. ADLER, INC.

1107 BROADWAY, NEW YORK, N.Y. 10010 • TELEPHONE (212) 924-0900

Cable Address: EAGLEKA
Telex: ITT 424251

November 24, 1980

General Adjustment Bureau, Inc.
123 William Street
New York, N.Y. 10038

Attention: Mr. Joseph G. Giordano
General Adjuster

Theft of 2 Containers (533 + 671 Cartons) Christmas Glass
Ornaments at Hermann Warehouse, No. Brunswick, N.J. - 8/5/80
Reliance Insurance Co. Policy # MO06-00022
Kelvin-Miller International - Claim No. 7246
Our Files: B214 and D55

Dear Mr. Giordano:

I refer to our recent discussion over the telephone, when I advised you that 302 cartons of above-stolen merchandise, were found by the F.B.I. in a discount store in Brooklyn, which have since been received back in our No. Brunswick warehouse. We give herebelow details of the merchandise received by us:

19 Ctns	#GT 381	228 dz	@ \$ 7.20/dz	= \$ 1,641.60
24 "	#GC 603	72 dz	@ 30.00	= 2,160.00
17 "	#GT 414	34 dz	@ 33.00	= 1,122.00
10 "	#GT 425	20 dz	@ 54.00	= 1,080.00
8 "	#GT 220/5	32 dz	@ 27.00	= 864.00
8 "	#GC 602	24 dz	@ 27.60	= 664.40
23 "	#GT 417	276 dz	@ 12.00	= 3,312.00
20 "	#GT 420	60 dz	@ 33.00	= 1,980.00
69 "	#GC 113	207 dz	@ 36.00	= 7,452.00
3 "	#GT 231	9 dz	@ 24.00	= 216.00
2 "	#GT 300B	6 dz	@ 33.00	= 198.00
44 "	#GT 300G0	132 dz	@ 33.00	= 4,356.00
35 "	#GC 611	105 dz	@ 24.00	= 2,520.00
1 "	#GT 335	3 dz	@ 28.00	= 84.00
15 "	#GC 612	45 dz	@ 36.00	= 1,620.00
4 "	#GT 324	12 dz	@ 30.00	= 360.00
Total				\$29,630.00

Cont'd.....2

IMPORTERS OF CHRISTMAS · PARTY · AND YEAR ROUND DECORATIONS OFFICES IN PRINCIPAL CITIES OF THE WORLD

DG-125

General Adjustment Bureau, Inc.
New York, N.Y. 10038

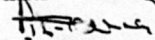
Page - 2 -

Please note that we have included the above merchandise in our inventory, and we hereby amend our claim or file with you as follows:

Amount of our original claim	-	\$ 106,012.80
Less amount of merchandise found and returned to our warehouse	-	\$ 29,630.00
		<hr/>
Amended Claim Amount :		\$ 76,382.80

In view that all formalities concerning this claim have been completed, we will appreciate it if you will process our claim for immediate payment.

Thank you for your cooperation.

Very truly yours,
KURT S. ADLER, Inc.

R. Taneja
Import Department

cc: Calvin-Miller International, Inc.
1140 Avenue of the Americas
New York, N.Y. 10036
Attn: Ms Micki Scheier -- ref. Calvin Miller
Claim No. 7246

cc: Hermann Warehouse Corporation
Box 1,
North Brunswick, N.J. 08902
Attn: Mr. Frank Brown, Manager

09-126



Hermann Warehouse Corporation

A MEMBER OF THE HERMANN SERVICES ORGANIZATION

Box 1 - North Brunswick, N. J. 08902 - Phone (201) 297-4400

September 8, 1980

Kurt S. Adler, Inc.
1107 Broadway
New York, NY 10010

RE: Theft Loss
Date/Loss: August 5, 1980

Dear Mr. Adler:

This letter will confirm our earlier telephone conferences wherein we advised you that on or about August 5, 1980, two trailers containing goods shipped on your order to us for storage by All Freight Trucking, bills of lading numbers 86436 and 37119, were stolen. Shortly after the theft, the trailer containing your company's goods were recovered, along with approximately 97 cartons found in one of the trailers. We returned the recovered goods to our warehouse for storage.

This theft is being investigated by local authorities, and occurred through no fault of Hermann Warehouse Corporation.

We await your further instructions concerning the recovered goods.

Very truly yours,

HERMANN WAREHOUSE CORPORATION

William A. Hermann
William A. Hermann
President, Central Division

/wac

Appendix C
09-127

July 14, 1983

Mr. Thomas J. Shamy
699 Georges Road
North Brunswick, NJ 08902

Re: Adler vs. Hermann
Warehouse Corporation
Our File No. 20344

Dear Mr. Shamy:

This will confirm our telephone conversation with your secretary, Barbara, on July 14, 1983 in which we discussed the above captioned matter.

As you will recall, we advised your secretary that the Legal Liability Insurance Company of Hermann Warehouse Corporation, American Home Assurance Company had reviewed the facts of the above captioned lawsuit and had concluded that it was in the best interest of all parties to settle this lawsuit rather than to proceed to trial. The president of Hermann Warehouse Corporation, Edward Dunn, does not, however, concur in this conclusion of American Home Assurance Company.

Consequently, this law firm shall not become involved in any settlement negotiations with Plaintiff in this matter, as we have been advised by American Home Assurance Home Company that settlement of this matter will be undertaken by their representatives.

Very truly yours,

CONKLIN & ADLER, LTD.

Robert Dreger

By: Robert H. Dreger

dp/RMD

ATTORNEYS AND
COUNSELORS AT LAW
100 WEST GRAND AVENUE
CHICAGO, ILLINOIS 60610

312/670-0220

TELEX 21-0228

ROLLING MEADOWS
ILLINOIS OFFICE
TWO CROSSROADS
OF COMMERCE DRIVE
SUITE 740
ROLLING MEADOWS
ILLINOIS 60008
312/978-1700

DENVER OFFICE
1801 EAST FLORIDA
SUITE 200
DENVER, COLORADO 80210
303/738-1053

OAKBROOK OFFICE
600 COMMERCE DRIVE
SUITE 200
OAK BROOK, ILLINOIS 60521
312/978-1737

Appendix D

109-128

August 31, 1983

American International Adjustment Company, Inc.
4002-A Greentree Executive Campus
Route 73/Box 999
Marlton, New Jersey 08052

Attention: Bruce W. Smith

Re: Hermann's Warehouse Corporation vs. Kurt Adler

Dear Mr. Smith:

I have your letter of July 27, 1983, sent to Mr. Dunn, President of Hermann Warehouse Corporation regarding the above matter. You should be aware that I represent Hermann Warehouse Corporation and that my client has expressed its displeasure with the settlement of the Kurt Adler claim. My client has, as you know, refused to consent to the settlement and urged that the claim be denied and the matter tried by a jury.

We have repeatedly given that we feel are reasonable grounds to deny negligence on our part in this matter to your trial counsel, Mr. Berger, and we believe you were advised of same. These facts reflecting the claim of negligence on the part of Hermann Warehouse Corporation are as follows:

- (1) The trailer that was stolen had been dropped at the warehouse site for the convenience of the carrier.
- (2) Our employee made no acknowledgement of the contents of the vehicle other than to sign the delivery receipt "Shippers Load and Count". This type of signature, in this instance meant that we could not take responsibility for the amount of merchandise said to be contained in the trailer. This responsibility would have commenced after we had unloaded the trailer, counted the merchandise and issued a warehouse receipt for the goods.
- (3) Since we would not accept custody of the goods until they were unloaded and counted, we could not charge

Appendix E

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for storage of same. Accordingly, the trailer and the merchandise were on our premises free of charge.

- (4) We have been operating this warehouse since 1963 and have never had a trailer stolen from the premises. In the light of our past experience we could not have anticipated the hi-jacking of a vehicle. In fact, our only experience at this location involving vehicles parked outside the building has been same minor pilferage. In order to avoid this peril, I understand that our personnel applied a padlock to the trailer that was later stolen.

Furthermore, it was my client's original advice to Mr. Drager that there was the possibility of negligence on the part of the delivering carrier, and that they be joined in the suit.

It seems that the decision to settle against our witness was primarily based upon anticipated adverse testimony from a disgruntled former employee, a Mr. Frank Brown. We feel that his testimony would have been neutralized due to his status and that the truth of the situation would have prevailed. Furthermore, there was a serious question as to whether Mr. Brown could have been available to plaintiff for trial.

In conclusion, we take the position, based upon the above, that Hermann Warehouse Corporation is not responsible to pay the sum claimed and therefore refuse to pay same.

q

Very truly yours,

THOMAS J. SHAWY

TJS/fac

cc: E.V. Dunn

A.W. Hermann

09-130

American International Adjustment Company, Inc.

4032 A Greentree Executive Campus

Route 73/Box 999

Marlton, New Jersey 08053

BBW983-7000

ON ALL FUTURE CORRESPONDENCE
PLEASE INCLUDE THE FOLLOWING
FILE NUMBER

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

85-7144 AWA 450-93-15 21

July 27, 1983

Hermann's Warehouse Corporation
P.O. Box 1
North Brunswick, NJ 08902

Attention: E. V. Dunn, President

Re: Insured: Hermann's Warehousing Corporation
Claimant: Kurt S. Adler Company
Loss Date: August 5, 1980


Dear Mr. Dunn:

We are the adjustment company handling claims on behalf of American Home Assurance Companies. As you know, that company is the insurer of your warehouse legal liability coverages. I'm sure you are aware that a provision in that insurance policy is a \$20,000.00 deductible. You are further aware of the law suit filed in Middlesex Superior Court by Mr. Adler. Also, you are further aware that the law firm of Conklin and Adler from Chicago has represented your interests.

You may be advised that recently the above matter was settled for a total of \$67,500.00. We feel this is a beneficial settlement on your behalf since the total exposure could have been \$110,000.00 if the case were tried and a verdict rendered. We are reimbursing Mr. Adler and his attorney the entire amount of \$67,500.00. We now request that you issue your check made payable to American Home Assurance Companies for the entire \$20,000.00 deductible. As you further are aware, the terms and conditions of your policy give the carrier the sole right to settle these matters as we see fit and then seek reimbursement for the deductible amounts.

We look forward to your prompt consideration of this payment.

Very truly yours,


Bruce W. Smith
Claims Supervisor

BWS/mlt (CH/RRR #P-306-934-366)

cc: Bayly, Martin and Fay
(Attn: William Schmidt, Account Executive)

Conklin and Adler, Ltd.
(Attn: Robert Dreyer)

Appendix F
09-131

1 DE GONGE, GARRITY & FITZPATRICK
2 A PROFESSIONAL CORPORATION
3 230 MONTGOMERY STREET
4 P. O. BOX 1560
5 BLOOMFIELD, N. J. 07003
6 (201) 748-7400
7 ATTORNEYS FOR
8 Plaintiff

SUPERIOR COURT
OF NEW JERSEY

LAW DIVISION

MIDDLESEX COUNTY

9 Plaintiff(s)
10 AMERICAN HOME ASSURANCE COMPANY, INC.

Docket No. L-37214-84

11 Defendant(s)
12 vs.
13 HERMANN'S WAREHOUSE CORPORATION.

CIVIL ACTION

AMENDED COMPLAINT

14 Plaintiff, AMERICAN HOME ASSURANCE COMPANY, INC. (hereinafter
15 referred to as "AHAC"), a Corporation licensed to do business in
16 the State of New Jersey, by way of Complaint against the defendant
17 says:

18 COUNT I

19 1. On January 1, 1977, plaintiff, AHAC, issued to the
20 defendant herein a policy of insurance known as "Warehousemen or
21 Bailee Liability" Form (Merchandise), Policy No. AWA-450 9315,
22 which was valid and in force on all dates relevant hereto.

23 2. Pursuant to that policy of insurance, the plaintiff
24
25

Appendix G

Dg-132

1 agreed to assume liability up to and including Two Million
2 (\$2,000,000.00) Dollars, with a deductible of the amount of
3 Twenty Thousand (\$20,000.00) Dollars on all losses, except Forty
4 Thousand (\$40,000.00) Dollars on inventory shortage and/or unex-
5 plained disappearance. (Policy No. AWA-450-9315 Part I, para. 4;
6 Part II, Para. 2(b).)

7 3. The premises known as 131 Jersey Avenue, New Brunswick,
8 New Jersey, was among the premises covered in the above policy.

9 4. On or about August 4, 1980, certain trailers belonging
10 to Adler, Inc. and occupying the premises at 131 Jersey Avenue,
11 New Brunswick, New Jersey, inexplicably disappeared. The contents
12 of said trailers were the subject of Policy No. AWA-450-9315.

13 5. As a result of this occurrence, a lawsuit was instituted
14 entitled Adler, Inc. v. Hermann Warehouse Corporation, N.J. Super-
15 ior Court Docket No. L-70026-80, Middlesex County, Law Division.

16 6. Pursuant to Paragraph 1(a,b) of Policy No. AWA-450-9315,
17 plaintiff AHAC provided Hermann Warehouse Corporation with a
18 defense in the above litigation.

19 7. Said litigation was settled in July of 1983 for \$67,500.
20 00, the entire amount of which was paid by plaintiff herein.
21 Under the terms of Insurance Policy No. AWA-450-9315, defendant
22 Hermann Warehouse Corporation was obligated to reimburse its
23 insurer in the amount of the specified deductible, \$40,000.00.

24 8. On July 27, 1983, timely demand was made by plaintiff
25 to defendant for payment of this amount, which demand was reject-
ed by plaintiff in its letter dated August 31, 1983.

WHEREFORE, plaintiff demands judgment against the defendant

D9-133

1 in the amount of \$40,000.00, together with interest, costs of
2 suit, counsel fees, and such other and further relief as the
3 Court may deem equitable, proper and just.

4
5 SECOND COUNT

6 Plaintiff repeats and realleges the allegations set forth
7 in Count One.

8 WHEREFORE, the plaintiff demands judgment against the
9 defendant in the amount of \$20,000.00, together with interest,
10 costs of suit, counsel fees and such other and further relief
11 as the Court may deem equitable, proper and just.

12
13 DE GONGE, GARRITY & FITZPATRICK, P.A.

14
15 By: 
16 Samuel A. DeGonge
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25

Dg-134

AMERICAN WAREHOUSEMEN'S ASSOCIATION
MEMBER'S "WAREHOUSEMAN OR BAILEE LIABILITY" FORM
(MERCHANDISE)

(Part One of Two Parts)

1. In consideration of premium charges hereinafter provided and subject to the following conditions and limitations, this Company agrees:
- (a) To pay on behalf of the Assured all sums which the Assured shall become legally obligated to pay by reason of liability imposed upon him as a warehouseman or bailee, for loss or destruction of or damage to personal property of others contained in the premises hereinafter specified, occurring while this Policy remains in full force and effect.
- (b) (1) To investigate all claims for such loss, destruction or damage of which the Company shall have notice as hereinafter required;
- (2) To defend in the Assured's name and behalf, any suits or other proceedings which may be brought against the Assured to enforce such claims even if such suits are groundless, false or fraudulent;
- (3) To pay, irrespective of the Company's limit of liability otherwise specified herein: the expense of adjusting all such claims or suits which may be settled at the option of the Company without litigation; all expenses of litigation and all costs taxed against the Assured in proceedings defended by the Company, including all premiums for appeal bonds, but without any obligation to apply for or furnish such bonds, and if bond be required to release attachment of the Assured's property, the premium on that portion thereof which secures payment of an amount not in excess of the Company's applicable limit of liability hereunder; all interest accruing after entry of judgment until the Company has paid, tendered, or deposited in court such part of such a judgment as does not exceed the Company's applicable limit of liability thereon.
2. Insurance provided under this Policy shall not apply as respects any liability for:
- (a) Any loss, destruction or damage for which the Assured has assumed liability under written or oral contract in excess of liability imposed upon him by law as a warehouseman or bailee;
- (b) Any loss, or destruction of, or damage caused by the infidelity and dishonesty, either or both, of the Assured, or any person or persons in the employ or service of the Assured whether or not such act or acts occurred during the regular hours of employment or service, or any person or persons to whom the said articles may be entrusted (carriers for hire excepted);
- (c) Any loss or destruction of or damage to accounts, bills, currency, deeds, evidence of debt, money, notes or securities;
- (d) Any loss, or destruction of, or damage to property due to change of temperature resulting from the failure, or total or partial destruction of any refrigerating or cooling apparatus;
- (e) Any loss, damage or destruction resulting from forged warehouse receipts.
- (f) War Risks as set forth in the War Risk Exclusion Clause in the printed "CONDITIONS" of this Policy;
- (g) Nuclear Exclusion Clause. The Company shall not be liable for loss by nuclear reaction or nuclear radiation or radioactive contamination, all whether controlled or uncontrolled, and whether such loss be direct or indirect, proximate or remote, or be in whole or in part caused by, contributed to, or aggravated by the perils insured against in this policy; however, subject to the foregoing and all provisions of this policy, direct loss by fire resulting from nuclear reaction or nuclear radiation or radioactive contamination is insured against by this policy.
- (h) Any occurrence or claim of which written notice has not been given the Company, as hereinafter required, within one year from the date of such occurrence or claim.
3. Limit(s) of Liability.
- (a) Insurance provided by this Policy applies only as respects the premises scheduled in Part II and for amount(s) not in excess of those stipulated, as respects coverage under Paragraph 1.(a) of this Form for loss, destruction or damage arising from any one occurrence.
- (b) The inclusion herein of more than one Assured shall not operate to increase the limit of the Company's liability hereunder.
4. DEDUCTIBLE:
From the total of all claims arising out of any one occurrence, the sum shown in Part II, paragraph 2(a) shall be deducted and this Company shall only be liable for the excess of this amount. As respects any such claim resulting from inventory shortage or other unexplained disappearance of property, the amount of said deductible shall be the sum shown in Part II, paragraph 2(b) for each 90 day period (or fraction thereof) that such unexplained disappearance could have occurred. If the Company shall have paid such deductible amount, the Assured shall promptly reimburse the Company therefor.

Exhibit H

DG-135

75. DEBIT REPORTS:

- (a) The Assured agrees to keep an accurate record of the charges accruing from their warehouse business as respects property for which the Assured's liability is insured hereunder.
- (b) (1) The Assured agrees to pay a Deposit Premium as specified in Part II, paragraph 3.
- (2) The Assured agrees to report to the Company within 30 days after the close of each annual period the full amount of such charges accruing (collected or uncollected) for (i) Storage of Goods, and (ii) Handling of Goods during the preceding annual period or during such time as is within the period of this insurance.
- (c) The Assured agrees to pay to the Company an earned premium at rate(s) per \$100.00 of such charges accruing as specified in Part II, paragraph 1.

66. DEFINITIONS:

- (a) The term "Premises", wherever employed in this Policy, is defined as that portion of the building(s) located at the address(es) shown in Part 2, which is (are) occupied by the Assured as a public warehouse, including loading platforms, side-tracks, and areas immediately adjacent thereto.
- (b) The term "Occurrence", wherever employed in this Policy is defined as (1) an accident that takes place during the period of insurance under this Policy, or (2) in the absence thereof, a continuous or repeated exposure to conditions which unexpectedly cause loss or destruction of or damage to physical property during the period of insurance under this Policy, and all such exposure to substantially the same general conditions existing at or emanating from any one location specified in Part 2 of this Form shall be deemed one occurrence.
- (c) The unqualified word "ASSURED" includes the Named Assured and also includes any executive officer, director or stockholder thereof while acting within the scope of his duties as such, and if the Named Assured is a partnership, the unqualified "ASSURED" also includes any partner therein but only with respect to his liability as such.

77. The Assured, upon knowledge of a claim or of any occurrence which may give rise to a claim, shall give written notice thereof, with the fullest information obtainable, to the Company or its authorized agent as soon as practicable, and if such occurrence involves a violation of law, immediate notice thereof shall be given by the Assured to the public police or other peace authorities having jurisdiction. If claim is made against it brought against the Assured, the Assured shall immediately forward to the Company every demand, notice, summons, or other process received by him or his representative.

88. The Assured shall take all reasonable means to protect, safeguard and salvage the property and shall cooperate with the Company in facilitating the investigation and disposition of claims and suits and, upon the Company's request, shall attend hearings and trials and shall assist in effecting settlement, securing and giving evidence, obtaining the attendance of witnesses, and in the conduct of suit; but the Assured shall not, except at his own cost, voluntarily assume any liability nor incur any expense, nor settle any claim without the written consent of the Company previously given. The Company reserves the right to settle any claim, suit or other proceedings as it may deem expedient.

99. DEBRIS REMOVAL CLAUSE

In the event of loss or damage to property, the Assured's liability for which is insured under Paragraph 1(a) of this Form, this Company will pay such expenses which may be incurred in the removal of all debris of such property which may be occasioned by such loss. However, total liability under this policy shall not exceed the amount of insurance specified in Part II of this form.

100. SEEK AND LAHOB CLAUSE

In the event of loss or damage to property, the Assured's liability for which is insured under Paragraph 1(a) of this Form, or to the building(s) in which such property may be located, it shall be lawful and necessary for the Assured, his or their factors, servants and assigns, to sue, labor, and travel for, in and about the defense, safeguard, and recovery of the property insured hereunder, or any part thereof without prejudice to the insurance; nor shall the acts of the Assured or this Company in recovering, saving and preserving such property in case of loss or damage, be considered a waiver or an acceptance of abandonment, to the charges whereof this Company will contribute according to the rate and quantity of the sum herein insured.

- (a) No action shall lie against the Company unless, as a condition precedent thereto, the Assured shall have fully complied with all the terms of this Policy, nor until the amount of the Assured's obligation to pay shall have been finally determined either by judgment against the Assured after actual trial or by written agreement of the Assured, the claimant and the Company.
- (b) Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this Policy to the extent of the insurance afforded by this Policy.

Dg-136

- (c) Nothing contained in this Policy shall give any person or organization any right to join the Company as a co-defendant in any action against the Assured to determine the Assured's liability.
- (d) Bankruptcy or insolvency of the Assured or of the Assured's estate shall not relieve the Company of any of its obligations hereunder.
12. The insurance afforded under this Policy shall be excess insurance over any other valid and collectible insurance available to the Assured against loss covered hereunder.
13. The Company shall be permitted at any reasonable time to inspect the premises and equipment used in connection with the Assured's operations and to examine and audit the Assured's books during the currency of this insurance and within one year after its termination, for the purpose of determining the actual premium earned while this Policy was in force; but the Company waives no rights and undertakes no responsibility by reason of such inspection or examination or the omission thereof.
- 100 14. In the event of any payment under this Policy, this Company shall be subrogated to all the Assured's rights of recovery therefor against any person or organization and the Assured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The Assured shall do nothing after loss to prejudice such rights.
15. TERRITORIAL LIMITS:
This Policy in no event shall cover beyond the Continental limits of the United States, Canada and the States of Alaska and Hawaii.
16. It is specifically agreed that Condition 12 (Protection of Property after loss) of the printed policy, to which this form is attached, is hereby deleted.
- 200 17. The Amount of insurance and the applicable limit of liability shall not be reduced by the amount of any loss covered hereunder.
18. This Policy may be cancelled by the Assured by surrender thereof to the Company or its authorized agent or by mailing to the Company written notice stating when thereafter such cancellation shall be effective. This Policy may be cancelled by the Company by mailing to the Assured at the address specified in this Policy written notice stating when not less than thirty days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The time of surrender or the effective date of cancellation stated in the notice shall become the end of the Policy period. Delivery of such written notice either by the named Assured or by the Company or its authorized agent shall be equivalent to mailing.
- 300 19. Assignment of interest under this Policy shall not bind the Company until its consent is endorsed hereon. If, however, the Assured shall die, or shall be adjudged bankrupt or insolvent and written notice is given to the Company within sixty days after the date of such adjudication, this Policy shall cover the Assured's legal representative as insured, provided that notice of cancellation mailed to the Assured named in the declaration shall be sufficient notice.
20. Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this Policy nor estop the Company from asserting any right under the terms of this Policy; nor shall the terms of this Policy be waived or changed, except by endorsement issued to form a part of this Policy.
21. The terms and conditions of this Form are to be regarded as substituted for those of the Policy to which it is attached, the latter being hereby waived.

DA-137

NO. 4509315

2

COVERAGE IS PROVIDED IN THE COMPANY DESIGNATED BY NUMBER A STOCK INSURANCE COMPANY THEREIN CALLED THE COMPANY

RENEWAL OF NUMBER

Insured's Name and Mailing Address
Hermann Warehousing Corporation
P.O. Box 144
North Brunswick, New Jersey

PERIOD OF INSURANCE FROM **1/1/77** TO **Until Canceled**
PLACE OF ISSUANCE Years **Continuous**

ANY OF PITTSBURGH, PA.
 AN HOME ASSURANCE COMPANY
 THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA
MEMBERS OF THE AMERICAN INTERNATIONAL GROUP
EXECUTIVE OFFICES
102 MAIDEN LANE
NEW YORK, N.Y.

TOTAL PREMIUM				PREMIUM PAYABLE		
AMOUNT	RATE	PREMIUM IF PAID IN FULL AT INCEPTION	TOTAL PREMIUM IF PAID ANNUALLY	AT INCEPTION	AT FIRST ANNIVERSARY	AT SECOND ANNIVERSARY
\$	\$	\$	\$	\$	\$	\$
		PER ATTACHED ENDORSEMENTS				

In consideration of the stipulations herein named and of the premium above specified the Company does insure the Insured named as hereinafter called the Insured, whose address is shown above from the inception date shown above, at noon (Standard time), to the expiration date shown above, at noon (standard time), at place of issuance to an amount not exceeding the amount(s) above specified, or as described herein and/or endorsements attached hereto.

109-110 UNDET	111-112 FORM OR PROG	113-114 115 OCC. CLASS CODE	COVERAGE							116-117 HAZ. GR.	
			BUILDINGS	1	CONTENTS	2	SILKT PROP DAM	3	USE AND OCC.		4

Countersigned by _____
 Authorized Representative

09 138

ENDORSEMENT

BAYLY, MARTIN & FAY, INC.

INTERNATIONAL INSURANCE BROKERS

300 WEST WASHINGTON STREET

CHICAGO, ILLINOIS 60606

(312) 641-2131

ATTACHED to and forming part of Policy No. AWA-450 9315

of the American Home Assurance Company

issued to Hermann Warehouse Corporation

May 9, 19 76

Effective May 3, 1976, it is agreed that the Named Assured and mailing address is hereby amended to read as follows:

Hermann Warehouse Corp., and Milltown Warehouse Corp.

P. O. Box 1

North Brunswick, N.J. 08902

ALL OTHER TERMS AND CONDITIONS REMAINING UNCHANGED

D4-139

AMERICAN WAREHOUSEMEN'S ASSOCIATION
 WAREHOUSEMAN OR BAILEE LIABILITY - PART II
 (Part II of Two Parts)

AMENDED

Effective: November 11, 1981

1. LIMITS OF LIABILITY & PREMIUM RATES

LOCATION OF PREMISES (Address, City and State)	LIMIT OF LIABILITY		
	Warehouse Liability	Storage	Handling
131 Jersey Ave., New Brunswick, NJ.	2,000,000.	.925	.05
9225 River Road, Pennsauken, NJ.	2,000,000.	"	"
15 Clyde Rd., Franklin Township, NJ.	2,000,000.	"	"
18 Clyde Rd., Franklin Township, NJ.	2,000,000.	"	"
Routs 130 & Old Georges Rd., Dayton, NJ.	2,000,000.	"	"
Ford Ave., Milltown, NJ.	2,000,000.	"	"
Old Georges Rd., S. Brunswick, NJ.	2,000,000.	"	"
Port Authority of NY and NJ, Bldg. 261, Doremus Ave., Newark, NJ.	2,000,000.	"	"
Bldg. 12, Ford Ave., Milltown, NJ.	2,000,000.	"	"
River Bridge Industrial Complex 2nd St., Chester, PA.	2,000,000.	"	"
W. King St., Ephrata, PA.	2,000,000.	"	"

2. DEDUCTIBLES:

(a) \$ 20,000.00 on all losses, except (b) \$ 40,000.00 on Inventory Shortage and/or unexplained disappearance

3. DEPOSIT PREMIUM:

\$ 8,800.00 payable

(in amounts of \$ 8,800.00 on January 1st of each year)

Attached to and forming part of Policy No. 300-450 9315 of the American Home Assurance Company.

DC-140

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2
3 **DE GONGE, GARRITY & FITZPATRICK**

4 **A PROFESSIONAL CORPORATION**
5 **430 BROAD STREET**
6 **P. O. BOX 1560**
7 **BLOOMFIELD, N. J. 07003**
8 **(201) 748-7400**
9 **ATTORNEYS FOR**

10 **Plaintiff (s)**

11 **American Home Assurance Co.**

12 **Defendant**

13 **Hermann's Warehouse Corporation**

14 **TO:**

15 **Thomas J. Shamy, Esq.**
16 **146 Livingston Avenue**
17 **New Brunswick, N.J. 08901**

SUPERIOR COURT OF
NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY

Docket No. L37214-84

CIVIL ACTION
INTERROGATORIES

18 **DEMAND is hereby made of certified answers to the following**
19 **Interrogatories within the time prescribed by the rules of this**
20 **Court:**

- 21 1. Set forth your full name, present address and employment
22 title:
23 **HERMANN WAREHOUSE CORPORATION, P. O. Box 1, North Brunswick,**
24 **New Jersey, Ed Dunn, President.**
- 25 2. Does the defendant deny that the document, attached to the
Complaint and hereto marked Exhibit "A" for purpose of

Exhibit I

09-411

identification, is a copy of the agreement entered into between the plaintiff and the defendant and that such document is the written evidence of the agreement which is the subject of this action.

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No.

3. If so, state:

N/A.

(a) the facts on which he relies to support such denial:

(b) the names and addresses of each person you claim has knowledge of such facts:

(c) what you contend Exhibit "A" is:

4. Did the defendant fail to pay the deductible amount as requested by the plaintiff pursuant to the contract?

Yes.

5. Does the defendant claim it was excused from payment of the deductible amount?

Yes.

6. If so, for each excuse or reason, state the facts constituting the excuse or reason:

Plaintiff breached the insurance contract by failing to adequately and diligently represent the interests of the defendant. Plaintiff settled a claim solely for its own interest and failed to consider defendant's direct monetary involvement under the terms of the policy. A meritorious defense to the claim was available and made known to plaintiff.

Da-142

1 7. Does the defendant contend that the plaintiff failed to
2 perform each obligation under the contract?

3 Yes.

4 8. If so state:

5 (a) when such failure took place:

6 (a&b) The plaintiff owed a contractual duty to represent defende
7 in actions arising under the policy. The plaintiff failed to
8 properly and adequately represent those interests and settled t:

9 (b) the nature and extent of such failure:

10 claim contrary to the desires and interests of the defendant and
11 solely for its own gain. Additionally, the plaintiff, if
12 adequately representing the defense of the claim, would have sue
13 other parties, (e.g. the truck driver, the owner of the truck...
14 for indemnification and/or liability so as to limit defendant's exposure.

15 9. Do you contend that the plaintiff did anything to prevent
16 your performance in accordance with the terms of the
17 contract?

18 No.

19 10. If so state:

20 N/A.

21 (a) the acts done by the plaintiff which prevented your
22 performance:

23 (b) the name of each person who has knowledge of such
24 acts:

25 11. Do you rely on any other contention which has not been
referred to above?

No.

Dg-143

12. If so, for each contention, state:
N/A.

(a) what the contention is:

(b) facts on which you relied to support such
contention:

13. Did you inform the plaintiff of any reason for your
failure to pay the deductible amount:

Yes.

14. If so, state:

(a) when you informed the plaintiff:
Plaintiff was informed throughout the pendency of the claim that
the defendant would not pay any part of the claim because it did
not perform any negligent act so as to give rise to liability.

(b) the manner in which you informed the plaintiff:
Plaintiff was advised of defendant's position by various telephon
conversations throughout the pendency of the claim, said communi-
cations were memorialized by the attached letter dated, August 31
1983.

(c) the names and addresses of each person having
knowledge of your communication:

Thomas J. Shamy, Esq., 146 Livingston Avenue, New Brunswick, N.J.
Albert W. Hermann, P. O. Box 1, North Brunswick, New Jersey;
Ed V. Dunn, P. O. Box 1, North Brunswick, New Jersey; Bruce Smith
American International Adjustment Co., Inc., 4002-A Greentree
Executive Campus, Route 73, Box 999, Marlton, New Jersey 08053.

(d) substance of the communication:
The communications and letter stated that the plaintiff should
not settle the matter for the reasons outlined in the attached
letter.

15. Is there is any written record made of the communication
to the plaintiff? If so, attach copy of each record to
your answers to these Interrogatories:

Yes.

DG-144

1 16. State the names and addresses and title of the agent
2 through which you procured this policy of insurance:

3 The Clark Group, P. O. Box C, 147 Union Avenue, Middlesex,
4 New Jersey 08846.
5

6
7 17. If you have not done so in response to any of the
8 above Interrogatories, set forth fully and completely
9 the factual basis for each and every separate defense
10 to the plaintiff's action.

11 N/A.
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D9-145

SUPERIOR COURT OF N. J.
FILED

APR 23 1985

R-17
JOHN M. HAYSON
CLERK

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DE GONGE, GARRITY & FITZPATRICK
A PROFESSIONAL CORPORATION
230 MONTGOMERY STREET
P. O. BOX 1560
BLOOMFIELD, N. J. 07003
(201) 748-7400
ATTORNEYS FOR
Plaintiff

SUPERIOR COURT
OF NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY

Plaintiff(s)
AMERICAN HOME ASSURANCE COMPANY, INC.

Docket No. L-37214-84

vs.

Defendant(s)
HERMANN'S WAREHOUSE CORPORATION.

CIVIL ACTION

AMENDED COMPLAINT

Plaintiff, AMERICAN HOME ASSURANCE COMPANY, INC. (hereinafter referred to as "AHAC"), a Corporation licensed to do business in the State of New Jersey, by way of Complaint against the defendant says:

COUNT I

1. On January 1, 1977, plaintiff, AHAC, issued to the defendant herein a policy of insurance known as "Warehousemen or Bailee Liability" Form (Merchandise), Policy No. AWA-450 9315, which was valid and in force on all dates relevant hereto.
2. Pursuant to that policy of insurance, the plaintiff

D9-146

1 agreed to assume liability up to and including Two Million
2 (\$2,000,000.00) Dollars, with a deductible in the amount of
3 Twenty Thousand (\$20,000.00) Dollars on all losses, except Forty
4 Thousand (\$40,000.00) Dollars on inventory shortage and/or unex-
5 plained disappearance. (Policy No. AWA-450-9315 Part I, para. 4;
6 Part II, Para. 2(b).)

7 3. The premises known as 131 Jersey Avenue, New Brunswick,
8 New Jersey, was among the premises covered in the above policy.

9 4. On or about August 4, 1980, certain trailers belonging
10 to Adler, Inc. and occupying the premises at 131 Jersey Avenue,
11 New Brunswick, New Jersey, inexplicably disappeared. The contents
12 of said trailers were the subject of Policy No. AWA-450-9315.

13 5. As a result of this occurrence, a lawsuit was instituted
14 entitled Adler, Inc. v. Hermann Warehouse Corporation, N.J. Super-
15 ior Court Docket No. L-70026-80, Middlesex County, Law Division.

16 6. Pursuant to Paragraph 1(a,b) of Policy No. AWA-450-9315,
17 plaintiff AHAC provided Hermann Warehouse Corporation with a
18 defense in the above litigation.

19 7. Said litigation was settled in July of 1983 for \$67,500.
20 00, the entire amount of which was paid by plaintiff herein.
21 Under the terms of Insurance Policy No. AWA-450-9315, defendant
22 Hermann Warehouse Corporation was obligated to reimburse its
23 insurer in the amount of the specified deductible, \$40,000.00.

24 8. On July 27, 1983, timely demand was made by plaintiff
25 to defendant for payment of this amount, which demand was reject-
ed by plaintiff in its letter dated August 31, 1983.

WHEREFORE, plaintiff demands judgment against the defendant

DG-147

1 in the amount of \$40,000.00, together with interest, costs of
2 suit, counsel fees, and such other and further relief as the
3 Court may deem equitable, proper and just.

4 SECOND COUNT

5 Plaintiff repeats and realleges the allegations set forth
6 in Count One.

7 WHEREFORE, the plaintiff demands judgment against the
8 defendant in the amount of \$20,000.00, together with interest,
9 costs of suit, counsel fees and such other and further relief
10 as the Court may deem equitable, proper and just.

11
12 DE GONGE, GARRITY & FITZPATRICK, P.A.

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14 By: 

15 Samuel A. DeGonge
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Dg-148

ANSWER TO AMENDED COMPLAINT AND JURY DEMAND

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3 THOMAS J. SHAMY
4 146 Livingston Avenue
5 New Brunswick, N.J. 08901
6 (201) 247-1133
7 ATTORNEY FOR Defendant

SUPERIOR COURT OF NEW JERSEY

8 *Plaintiff*
9 AMERICAN HOME ASSURANCE COMPANY, INC.

LAW DIVISION
MIDDLESEX COUNTY

10 vs.

Docket No. L-37214-84

11 *Defendant*
12 HERMANN'S WAREHOUSE CORPORATION

CIVIL ACTION
ANSWER TO AMENDED
COMPLAINT AND JURY DEMAND

13 Defendant, HERMANN'S WAREHOUSE CORPORATION, by way of answer
14 to the Amended Complaint of plaintiff, says:

15 FIRST COUNT

- 16 1. Admitted.
- 17 2. Plaintiff is left to it's proofs as to the allegations
18 of paragraph 2.
- 19 3. Admitted.
- 20 4. Denied.
- 21 5. Denied.
- 22 6. It is admitted that plaintiff provided a defense attorney
23 in the lawsuit by Adler.
- 24 7. Denied.
- 25

DG-149

1 8. Denied.

2 WHEREFORE, defendant, HERMANN'S WAREHOUSE CORPORATION, demands
3 dismissal of plaintiff's complaint.

4 SECOND COUNT

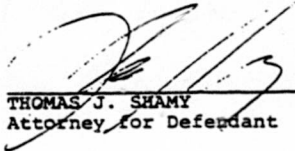
5 1. Denied.

6 WHEREFORE, defendant, HERMANN'S WAREHOUSE CORPORATION, demands
7 dismissal of plaintiff's complaint.

8 JURY DEMAND

9 Defendant hereby demands a trial by jury on all issues in the
10 within matter.

11
12 Dated: April 24, 1985



THOMAS J. SHAMY
Attorney for Defendant

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L-5229 *Re: [unclear]*

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DE GONGE, GARRITY & FITZPATRICK
A PROFESSIONAL CORPORATION
230 MONTGOMERY STREET
P. O. BOX 1560
BLOOMFIELD, N. J. 07003
(201) 748-7400
ATTORNEYS FOR Plaintiff

Plaintiff

AMERICAN INTERNATIONAL
ADJUSTMENT COMPANY, INC.

vs.

Defendant

HERMANN WAREHOUSE CORPORATION.

SUPERIOR COURT
OF NEW JERSEY

LAW DIVISION

MIDDLESEX COUNTY

Docket No.

CIVIL ACTION

COMPLAINT

Plaintiff, AMERICAN INTERNATIONAL ADJUSTMENT COMPANY, INC. (hereinafter referred to as "AIAC"), a Corporation licensed to do business in the State of New Jersey, by way of Complaint against the defendants, says:

1. On January 1, 1977, plaintiff, AIAC, issued to the defendants herein a policy of insurance known as "Warehousemen or Bailee Liability" Form (Merchandise), Policy No. AWA-450 9315, which was valid and in force on all dates relevant hereto.

2. Pursuant to that policy of insurance, the plaintiff agreed to assume liability up to and including Two Million

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1 (\$2,000,000.00) Dollars , with a deductible in the amount of
2 Twenty Thousand (\$20,000.00) Dollars on all losses, except
3 Forty Thousand (\$40,000.00) Dollars on Inventory Shortage and/or
4 unexplained disappearance. (Policy No. AWA-450-9315 Part I,
5 para. 4; Part II, Para. 2(b).)

6 3. The premises known as 131 Jersey Avenue, New Brunswick,
7 New Jersey, was among the premises covered in the above policy.

8 4. On or about August 4, 1980, certain trailers belonging
9 to Adler, Inc. and occupying the premises at 131 Jersey Avenue,
10 New Brunswick, New Jersey, inexplicably disappeared. The con-
11 tents of said trailers were the subject of Policy No. AWA-450-
12 9315.

13 5. As a result of this occurrence, a lawsuit was instituted
14 entitled Adler, Inc. vs. Hermann Warehouse Corporation, N.J.
15 Superior Court Docket No. L-70026-80, Middlesex County, Law
16 Division.

17 6. Pursuant to Paragraph 1(a,b) of Policy No. AWA-450-9315,
18 plaintiff AIAC provided Hermann Warehouse Corporation with a
19 defense in the above litigation.

20 7. Said litigation was settled in July of 1983 for
21 \$67,500.00, the entire amount of which was paid by plaintiff
22 herein. Under the terms of Insurance Policy No. AWA-450-9315,
23 defendant Hermann Warehouse Corporation was obligated to reimburse
24 its insurer in the amount of the specified deductible, \$40,000.00.

25 8. On July 27, 1983, timely demand was made by plaintiff
to defendant for payment of this amount, which demand was rejected
by plaintiff in its letter dated August 31, 1983.

WHEREFORE, plaintiff demands judgment against the defend-

DA-152

1 ants in the amount of \$40,000.00, together with interest, costs
2 of suit, counsel fees, and such other and further relief as the
3 Court may deem equitable, proper and just.
4

5 DE GONGE, GARRITY AND FITZPATRICK, P.A.
6

7 By: *Patrick F. X. Fitzpatrick*
8 Patrick F. X. Fitzpatrick
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10 Dated: May 24, 1964
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D9-153

ORIGINAL ANSWER TO COMPLAINT AND JURY DEMAND OF
HERMANN WAREHOUSE CORPORATION

1
2
3 **THOMAS J. SHAMY**
4 146 Livingston Avenue
5 New Brunswick, N.J. 08901
6 (201) 247-1133
7 **ATTORNEY FOR Defendant**

SUPERIOR COURT OF NEW JERSEY

8 *Plaintiff*
9 AMERICAN INTERNATIONAL ADJUSTMENT
10 COMPANY, INC.,

LAW DIVISION
MIDDLESEX COUNTY

11 *vs.*

*Docket No.*L-37214-84

12 *Defendant*
13 HERMANN WAREHOUSE CORPORATION

CIVIL ACTION
ANSWER AND
JURY DEMAND

14 Defendant, HERMANN WAREHOUSE CORPORATION, by way of answer to
15 the complaint of plaintiff, says:

- 16 1. Admitted.
17 2. Plaintiff is left to it's proofs as to the allegations of
18 number 2.
19 3. Admitted.
20 4. Denied.
21 5. Denied.
22 6. It is admitted that plaintiff provided a defense attorney
23 in the lawsuit by Adler.
24 7. Denied.
25 8. Denied.

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1 WHEREFORE defendant, HERMANN WAREHOUSE CORPORATION, demands
2 dismissal of plaintiff's complaint.

3 JURY DEMAND

4 Defendant hereby demands a trial by jury on all issues in
5 the within matter.

6 Dated: June 27, 1984

7 _____
8 THOMAS J. SHAMY
9 Attorney for Defendant
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DG-155

TRIAL COURT BRIEF ON BEHALF OF AMERICAN HOME ASSURANCE COMPANY

THOMAS J. SHAMY, ESQ.
146 Livingston Avenue
New Brunswick, New Jersey 08901
(201) 247-1133
Attorney for Defendant-Respondent,
HERMANN'S WAREHOUSE CORPORATION

SUPERIOR COURT OF NEW JERSEY

AMERICAN HOME ASSURANCE COMPANY,
INC.,

APPELLATE DIVISION

Plaintiff-Appellant,

Docket No. A-4005-85-T1

vs.

HERMANN'S WAREHOUSE CORPORATION,

CIVIL ACTION

Defendant-Respondent.

On Appeal from Oral Opinion Granting
Summary Judgment, Dated September 14,
1986, in the Superior Court of New
Jersey, Law Division, Middlesex
County, Docket No. L-37214-84

Sat Below:

Honorable Rosemary K. Reavey, J.S.C.

BRIEF ON BEHALF OF DEFENDANT-RESPONDENT,
HERMANN'S WAREHOUSE CORPORATION

On the Brief,
WILLIAM J. SHIPERS, ESQ.

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11. Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474 (1974).....	8,12
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13. State v. Pittman, 124 N.J. Sup. 334 (Law Div. 1973).....	8
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TREATISES

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Appleman, Insurance Law and Practice (1970)

10,13

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1 Hermann's immediately contacted the New Brunswick Police and the
2 F.B.I. On or about August 11, 1980, Hermann's was notified that
3 the F.B.I. had discovered one trailer in the parking lot of
4 Techcor Co., Carteret, New Jersey, contents empty. On the same
5 day, the second trailer was discovered within a quarter of a mile
6 of the first. Remaining in the second trailer were ninety-seven
7 cases of Christmas ornaments. Subsequently, the F.B.I. discovered
8 an additional three hundred and two cartons of the stolen merchandise
9 for sale in a discount store in Brooklyn, New York. Same
10 were returned to Hermann's for storage.

11 Thereafter, Kurt Adler, Co., brought an action against
12 Hermann's regarding the theft of the two trailers and contents
13 thereof. Said complaint was turned over to the American Home
14 Assurance Company, hereinafter American Home, plaintiff-appellant
15 herein, insurer of Hermann's Warehouse Corporation, for defense of
16 the matter. American Home retained the services of Conklin and
17 Adler, Ltd., Chicago, Illinois, as attorneys for Hermann's.
18 Conklin and Adler, Ltd., appeared to retain control of Hermann's
19 defense, and additionally retained the services of Kalmen Harris
20 Geist, Esq., Paterson, New Jersey, as local counsel on behalf of
21 Hermann's.

22 At all times, defendant-respondent, Hermann's, denied
23 liability under the law of the State of New Jersey. Hermann's
24 consistently provided defense counsel with significant reasonable
25 defenses to the claim of Kurt Adler, Co. Additionally, Hermann's
inquired why the carrier, All Freight Trucking Co. and their

1 driver, individually, were not joined in the suit.

2 At some point in time, the plaintiff-appellant, American
3 Home, through its adjusters, American International Adjustment
4 Company, Inc., determined that they desired to settle the claim
5 irrespective of the defenses or desires stated by defendant-
6 respondent, Hermann's. Without the written or oral consent of the
7 insured, and on its own initiative, plaintiff-appellant, American
8 Home, settled the Kurt Adler, Co. lawsuit for \$67,500.00. By
9 letter dated July 27, 1983, American Home, requested payment of
10 a \$20,000.00 deductible of Hermann's, pursuant to the policy
11 allegedly applicable to the aforementioned loss.

12 By Amended Complaint, Docket No. L-37214-84, the plaintiff-
13 appellant has sought reimbursement of a \$40,000.00 deductible,
14 by Count One, alleging a mysterious disappearance of the ornaments
15 in question. In the alternative, plaintiff contends \$20,000.00 is
16 due, as a deductible. In January 1986, plaintiff-appellant,
17 American Home, moved for summary judgment on the insurance
18 contract for the aforementioned sums. Defendant-respondent,
19 Hermann's, cross moved for summary judgment on several issues.
20 On February 14, 1986, the Honorable Rosemary K. Reavey granted
21 summary judgment on behalf of defendant-respondent, Hermann's,
22 dismissing the claims of plaintiff-appellant, American Home.
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PROCEDURAL HISTORY

Appellant's recitation of the Procedural History in this matter is substantially accurate. In addition, the record of events as presented by appellant in their Appendix is complete and respondent will rely solely on the matters contained therein.

ISSUES PRESENTED

The plaintiff-appellant, American Home, has brought the herein appeal based solely upon the issue of the right to settle by an insurer, and subsequent reimbursement by an assured. In the matter below defendant-respondent, Hermann's, argued several additional points including: the definition of an unexplained (mysterious) disappearance and inventory shortage; the duty of an insurer to adequately represent an insured; the obligation of good faith by an insurer; and the law of summary judgment relative to issues of bad faith and an insurer. Defendant-respondent, Hermann's, does not hereby waive these arguments in the matter at bar, but incorporates same by reference to defendant-respondent, Hermann's, trial brief contained within appellant's appendix. In response to plaintiff-appellants appellate brief, defendant-respondent, Hermann's, shall address the below issues:

1. Whether the Trial Court acted properly in granting summary judgment in favor of the defendant-respondent?

2. Whether under the contract of insurance at issue, defendant-respondent, Hermann's, is responsible for the payment of a deductible, subsequent to the settlement of a claim by plaintiff-appellant, American Home, without their consent?

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LEGAL ARGUMENT

POINT I

THE TRIAL COURT BELOW ACTED PROPERLY
IN GRANTING SUMMARY JUDGMENT IN FAVOR
OF THE DEFENDANT-RESPONDENT

In the matter below, several issues of fact, and questions of law were raised by the respective parties. Disputed issues included (1) the definition of an unexplained (mysterious) disappearance and inventory shortage under the policy at issue; (2) the extent of the duty of an insurer to adequately defend, represent and protect the interests of an insured, when the insured may be subject to the payment of a deductible; (3) whether under the contract of insurance at issue, the defendant was responsible for the payment of a deductible, subsequent to the settlement of a claim by the plaintiff, insurer, without the insured's consent; (4) the obligation to act in good faith by an insurer under the facts of the matter herein; and (5) the law of summary judgment relative to issues of disputed fact in the within matter.

It appears clear from the transcript of the Court below that Judge Reavey, after a consideration of extensive briefs by both parties, agreed with the arguments of defendant-respondent, Hermann's. The Judge concluded that under the contract at issue, Hermann's would not be responsible for the payment of a deductible arising from a claim settled by the insurer without Hermann's

1 consent. This was evident from the following statement of the
2 court, "In fact, it (Hermann's) did not approve the settlement
3 and should not be required to pay the deductible." (Appellant's
4 Appendix 34A). Judge Reavey clearly decided the motions solely
5 as a matter of law. The judge did not attempt to decide issues of
6 controverted fact nor was she required to do so under the circum-
7 stances of the respective motions. Said ruling was made solely
8 as a matter of law.

9 Plaintiff-appellant has further argued the trial court "did
10 not cite statutory or other legal authority to support the pro-
11 position that in the absence of an insured's consent to settle
12 a claim, the insurer is not entitled to reimbursement of the
13 deductible" (Appellant's brief, p. 4). In point of fact, within
14 the lower court's ruling, Judge Reavey held "I am satisfied from
15 the arguments of counsel that the defendant's position is the
16 sound one..." (emphasis supplied) (Appellant's Appendix 34A).
17 The lower court adopted the legal argument of defense counsel,
18 relative to the deductible, by reference. The court chose to
19 adopt by reference the defendant's argument, as opposed to
20 reading the entire brief relative thereto into the record. Such
21 actions are permissible, and the trial court ruling herein was
22 not made without a foundation in law or fact.

23 Appellant cites Kavanaugh v. Quigley, 63 N.J. Super. 153,
24 164 A.2d. 179 (App. Div. 1960) and its progeny to support its
25 argument that the decision below did not cite statutory or legal
authority, and therefore the decision lacks a foundation and

1 should be reversed. Appellant has misread the ruling of Kavanaugh
2 The determination in the matter centered upon the contention that
3 the trial judge misinterpreted or misapplied the relative law.
4 In such a circumstance, the rule of Kavanaugh is appropriate. In
5 the matter at bar, appellant contends that a legal basis for the
6 decision was not expressly set forth by the trial judge on the
7 record. As such, appellant's reliance upon the rationale and
8 holding of Kavanaugh is misplaced. It is the contention of
9 respondent that the court below properly evaluated the matter
10 below and ruled accordingly. In the event this court feels an
11 inadequate recitation of facts and conclusions of law occurred at
12 the trial level, a remand for same would be appropriate and within
13 the power of the Appellate Division.

14 Finally, appellant contends that the trial court's ruling
15 was "wholly unsupported by case law or statutory law in this
16 jurisdiction." (Appellant's brief, p. 8). In support of this
17 proposition, appellant relies solely upon its conviction that
18 Travelers Insurance v. Hitchner, 61 N.J. Super. 283, 160 A. 2d.
19 521 (Law Div. 1960) was dispositive of the issue and must
20 necessarily be adopted by the court below, irrespective of sub-
21 sequent New Jersey Appellate Division and Supreme Court decisions
22 decided since 1960. It is beyond contention, within the State of
23 New Jersey, that while a trial court precedent is not to be
24 considered lightly, in the absence of an Appellate authority,
25 another Superior Court is not compelled to follow the trial court
precedent. See, Mazza v. Ins. Co. of North America, 149 N.J.

1 Super. 60, 372 A. 2d. 1374 (Law Div. 1977); Lackovic v. New
2 England Paper Tube Co., 127 N.J. Super. 394, 317 A. 2d. 426
3 (Law Div. 1974); State v. Pittman, 124 N.J. Super. 334, 306 A. 2d.
4 500 (Law Div. 1973); Smith v. Smith, 150 N.J. Super. 194, 375 A.
5 2d. 290 (Chan. Div. 1977); Goldberg v. Traver, 99 N.J. Super. 103,
6 238 A. 2d. 695 (Chan. Div. 1968).

7 In addition, the holding of Travelers, supra was based upon
8 a contract of insurance dissimilar from the contract involved
9 in the present matter. Any interpretation of Travelers beyond
10 its own policy at issue would be dicta. In the issue at bar, the
11 trial court reviewed extensive legal arguments and briefs of
12 counsel relative to the issue of the deductible. Of particular
13 significance were several appellate decisions published since the
14 date of Travelers, (1960). See, Bowers v. Camden Fire Ins. Assoc.,
15 51 N.J. 62 (1968); Rova Farms Resort v. Investors Ins. Co., 65
16 N.J. 474 (1974); Fireman's Fund Ins. Co. v. Security Ins. Co. of
17 Hartford, 72 N.J. 63 (1976); Lieberman v. Employers Ins. of Wausau,
18 84 N.J. 325 (1980). See also, Board of Ed. of Bor. of Chatham v.
19 Lumbermens Mut. Cas. Co., 293 F. Supp. 541 (D. N.J. 1968). The
20 trial court properly concluded that defendant-respondent's
21 position was correct and entered judgment according. The trial
22 court did not err in its actions nor were there insufficient
23 basis for said action. As such, the judgment below should be
24 affirmed.
25

1 the limits of the policy with the insured having no power to
2 compel the insurer to make settlements or to prevent it from doing
3 so. Appleman, Insurance Law and Practice, 4711 (1970). Accord-
4 ingly, American Home was authorized to settle the claims against
5 the defendant-respondent within the limits of the policy without
6 the necessity of obtaining defendant-respondent's consent to the
7 settlement agreement.

8 However, with respect to American Home's right to reimburse-
9 ment the policy simply provides, "Deductibles, (A) \$20,000.00 on
10 all losses except (B) \$40,000.00 on Inventory Shortage and/or
11 unexplained disappearance". Part II, sec. 2. (Appendix 7A).
12 The policy is silent as to whether these deductibles apply auto-
13 matically or apply to an insured, when the insured becomes
14 'legally obligated' to pay, as stated in Part I, sec. 9(A) and
15 11(A).

16 The more reasoned approach would conclude that the insurer's
17 right to reimbursement is conditioned upon the insured becoming
18 'legally obligated' to pay. An insured becomes legally obligated
19 to pay under the policy only as a result of a final judgment of
20 Court, or consent to settle by the insured, claimant and the
21 company. When an insurer settles the claims of third persons
22 against the insured, as in the instant case, the insurer is
23 entitled to reimbursement from the insured provided the insured
24 consented to the settlement agreement. This approach has been
25 accepted by other states as well. See, National Service Indus-
tries v. Hartford Accident & Indemnity Company, 661 F. 2d. 458

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1 (5th Cir. 1981); Employer's Surplus Line Ins. Co. v. City of Baton
2 Rouge, 362 So. 2nd. 561 (1978).

3 Plaintiff-appellant, American Home, places its sole reliance
4 in support of its motion for summary judgment on the case of
5 Travelers Ins. Co. v. Hitchner, 61 N.J. Super. 283 (Law Div. 1960).

6 In Hitchner, the Court dealt with a liability policy for bodily
7 injury, as applicable to a roller rink. The Court relied on
8 three provisions of the policy to establish that the defendant-
9 respondent had no right to refuse to pay the deductible. Para-
10 graph (2) of the Hitchner policy stated,

11 "the terms of the policy, including those with
12 respect to notice of accident and the company's
13 right to investigate, negotiate and settle any
14 claim or suit, apply irrespective of the appli-
15 cation of the deductible amount." Id at 286.

16 This very important waiver of defendant-appellant's rights re-
17 garding settlement and the deductible is absent in the policy at
18 issue. The American Home policy is silent regarding the insured,
19 settlement and the deductible. As stated in Part I, sec. 1(A) and
20 Part I, sec. 11(A), the insurer only becomes liable upon judgment,
21 or settlement by consent of the claimant, insured and the insurer.
22 Mutuality of contract and strict construction against the drafter
23 of an ambiguous policy requires the same consideration to be
24 given to the defendant herein.

25 Furthermore, under the American Home policy, plaintiff-
appellant allegedly undertakes a duty to defend. Part I, sec.
1(B) (2) states: "This Company agrees: (2) To defend in the
Assured's name and behalf, any suits or other proceedings which

1 may be brought against the Assured to enforce such claims even
2 if such suits are groundless, false or fraudulent". By allowing
3 an insurer the unbridled discretion to settle matters, even those
4 which may be groundless, false or fraudulent, without the consent
5 of the insured, and then seek reimbursement from the insured for the
6 deductible, for all intent and purposes, eliminates and nullifies
7 any right to an adequate defense, contracted by the insurer. The
8 helpless insured has no options, no say in settlement, and for
9 no fault of its own may be held accountable for a \$20,000.00
deductible.

10 To the extent the Court feels Travelers is applicable,
11 defendant urges a re-examination of the Law Division holding of
12 twenty-six years ago, allowing unilateral settlement and reim-
13 bursement, in light of subsequent New Jersey Supreme Court cases
14 on settlement by an insurer. See, Bowers v. Camden Fire Ins.
15 Assoc., 51 N.J. 62 (1968); Rova Farms Resort v. Investors Ins. Co.
16 65 N.J. 474 (1974); Fireman's Fund Ins. Co. v. Security Ins. Co.
17 of Hartford, 72 N.J. 63 (1976); Lieberman v. Employers Ins. of
18 Wausau, 84 N.J. 325 (1980). See also, Board of Ed. of Bor. of
19 Chatham v. Lumbermens Mut. Cas. Co., 293 F. Supp. 541 (D. N.J.
20 1968).

21 It appears to be the national trend that an insurer may
22 settle a matter strictly within policy limits, where no deduct-
23 ibles apply, without the insureds consent. The rationale is that
24 if the insured is not exposed to any out of pocket expenditures,
25 there is no reason to allow an insured imput as to settlement by

D9-171

1 his insurer on his behalf. Although, in the event the proposed
2 settlement exceeds the policy limits, so that the insured would
3 have to pay the excess, or where the insured is subject to out of
4 pocket expenditures due to a deductible, their consent is to be
5 acquired before the company may so act. See, Appleman, Insurance
6 Law and Practice, § 4711 (1970). Of course an insurer is pro-
7 tected, in that an insured's refusal to consent to settlement must
8 be reasonable, based upon a review of all the objective issues of
9 fact. As such, the modern trend should be adopted in the within
10 matter. Without plaintiff-appellant, American Home, acquiring the
11 consent of defendant-respondent, Hermann's, prior to settlement,
12 plaintiff-appellant is without recourse to collect a deductible
13 under the facts of the case.
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CONCLUSION

For the foregoing reasons, it is respectfully requested
that the judgment of the Court below be affirmed.

Respectfully submitted,

THOMAS J. SHAMY, ESQ.
Attorney for Defendant-Respondent,
HERMANN'S WAREHOUSE CORPORATION

Dated: September 25, 1986

By: William J. Shyers
WILLIAM J. SHYERS

1 THOMAS J. SHAMY, ESQ.
146 Livingston Avenue
2 New Brunswick, New Jersey 08901
(201) 247-1133
3 Attorney for Defendant-Respondent,
HERMANN'S WAREHOUSE CORPORATION

SUPERIOR COURT OF NEW JERSEY

4 _____
5 AMERICAN HOME ASSURANCE COMPANY, :
INC. :

APPELLATE DIVISION

6 Plaintiff-Appellant, :

7 vs. :

Docket No. A-4005-85-T1

8 HERMANN'S WAREHOUSE CORPORATION, :

CIVIL ACTION

9 Defendant-Respondent. :

PROOF OF MAILING

10 I, WILLIAM J. SHIPERS, of full age, upon his oath, deposed
11 and says:

12 1. I am an Attorney at Law of the State of New Jersey, and
13 I am an associate with the Law Office of Thomas J. Shamy.

14 2. On this date, I hand delivered an original and four copies
15 of Brief on Behalf of Defendant-Respondent, Hermann's Warehouse
16 Corporation, to the Office of the Clerk, Superior Court of New
17 Jersey, Appellate Division, CN 006, Trenton, New Jersey 08625.
18 Two copies of the same were also mailed on this date to DeGonge,
19 Garrity & Fitzpatrick, P.A. at 430 Broad Street, P. O. Box 1560,
Bloomfield, New Jersey 07003.

20 Dated: September 26, 1986

21 _____
WILLIAM J. SHIPERS

22
23 Dg-174

1 NOT FOR PUBLICATION WITHOUT THE
2 APPROVAL OF THE COMMITTEE ON OPINIONS

3 SUPERIOR COURT OF NEW JERSEY
4 APPELLATE DIVISION
A-4005-85T1

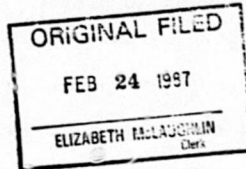
5 AMERICAN HOME ASSURANCE
6 COMPANY, INC.,

7 Plaintiff-Appellant,

8 v.

9 HERMANN'S WAREHOUSE
10 CORPORATION,

11 Defendant-Respondent.



12 Submitted February 2, 1987 - Decided FEB 24 1987.

13 Before Judges Morton I. Greenberg,
14 R. S. Cohen and Gruccio

15 On appeal from the Superior Court,
16 Law Division, Middlesex County.

17 DeGonge, Garrity & Fitzpatrick,
18 attorneys for appellant (Daniel C.
19 Nowell, on the brief).

20 Thomas J. Shamv, attorney for
21 respondent (William J. Shipers, on
22 the brief).

23 The opinion of the court was delivered by

GREENBERG, P.J.A.D.

This matter comes on before this court on appeal by
plaintiff American Home Assurance Company from an order of

D9-175

1 February 18, 1986 denying plaintiff's motion for summary
2 judgment and granting defendant Hermann's Warehouse
3 Corporation's cross-motion for summary judgment dismissing
4 this action. Plaintiff, which had issued a liability
5 insurance policy with a \$2,000,000 limit of coverage to
6 defendant to protect its warehouse business, settled a claim
7 by a third party against defendant and brought this action to
8 recover the deductible provided in the policy. The
9 deductible was for \$20,000 on all losses except for inventory
10 shortages or unexplained disappearances in which cases it was
for \$40,000.

11 The basic facts are not in dispute. On August 4,
12 1980, All Freight Trucking Company contacted defendant to
13 make arrangements for the delivery to defendant for storage
14 of a number of cargo trailers containing Christmas ornaments
15 for Kurt S. Adler, Inc. According to defendant, it advised
16 All Freight that because of a full work schedule it could not
17 unload and take possession of the trailers that day.
18 Nevertheless, All Freight dropped off three trailers in
19 defendant's yard and requested it to unload them the next
20 morning. While defendant permitted the trailers to be left
21 in its yard, it did so without charge solely for the
22 convenience of All Freight. Consequently, defendant did not
23 unload the vehicles or formally acknowledge the receipt of

1 their contents or issue a warehouse receipt for them. The
2 following morning two of the three trailers were missing
3 leading Adler to make a claim against defendant for
4 \$76,382.80 for lost merchandise.

5 Inasmuch as Adler's claim was not paid, it
6 instituted an action against defendant for the loss. While
7 we do not have the pleadings from that action, plaintiff
8 asserts that Adler's possible recovery was \$100,000,
9 calculated as \$76,382.80 damages with the balance as
10 interest. Defendant does not deny that representation. As
11 provided in the insurance policy, defendant turned the case
12 over to plaintiff for defense. Thereafter, pursuant to a
13 provision in the policy that reserved to it "the right to
14 settle any claim, suit or other proceedings as it may deem
15 expedient," plaintiff settled Adler's claim for \$67,500
16 without defendant's consent.

17 Following the settlement, plaintiff requested
18 defendant to reimburse it for the \$20,000 deductible in
19 accordance with a provision in the policy specifying that:
20 "If the Company shall have paid such deductible amount, the
21 Assured shall promptly reimburse the Company therefor."
22 Defendant refused to reimburse plaintiff claiming that it
23 could not have been liable to Adler, had not consented to the
settlement, had urged Adler's claim be rejected and had

1 requested a jury trial. Consequently, plaintiff instituted
2 this action to recover the deductible. Evidently, plaintiff
3 is in doubt as to whether the \$20,000 or \$40,000 figure is
4 applicable as it seeks either amount alternatively.

5 After an answer was filed, the parties served
6 cross-motions for summary judgment. The motion judge
7 disposed of the case with the following opinion:

8 As to American Home Assurance
9 Company versus Hermann's Warehouse
10 Corporation, there are motions for
11 summary judgment.

12 The plaintiff, American Home
13 Assurance Company, settled the case
14 and seeks recovery of the deductible.
15 Defendant opposes the motion for
16 summary judgment and seeks motion for
17 summary judgment in its own behalf
18 arguing that it did not participate in
19 the settlement, did not approve the
20 settlement and should not be required
21 to pay the deductible.

22 I am satisfied from the arguments
23 of counsel that the defendant's
position is the sound one. In fact,
it did not approve the settlement and
should not be required to pay the
deductible. I am going to grant
summary judgment for the defendant.
Accordingly, I will deny summary
judgment on behalf of the plaintiff.

18 The order of February 18, 1986 was then entered and this
19 appeal followed.

20 On this appeal, plaintiff contends that it was
21 empowered to settle Adler's claim without defendant's
22

1 consent, it acted reasonably and in good faith in doing so
2 and it is entitled to recover the deductible. Defendant
3 contends plaintiff acted in bad faith, did not adequately
4 represent it and may not recover the deductible as it settled
5 Adler's claim without its consent. Defendant further
6 contends that plaintiff cannot recover because the policy
7 provides that no action shall lie against the company unless,
8 as a condition precedent thereto, defendant's obligation to
9 pay is established by judgment against it or by written
10 agreement among plaintiff, defendant and the claimant.

11 There is, of course, no doubt but that the policy
12 empowered plaintiff to settle Adler's claim. While some
13 insurance policies provide that a settlement may be made only
14 with the consent of the insured, this policy did not.
15 Further, the provision that plaintiff cannot be liable until
16 defendant's liability is established by judgment or agreement
17 is not intended to bar voluntary settlements. It simply
18 attempts to establish when an action will lie against
19 plaintiff as the insurance carrier. Thus, absent some
20 overriding principle of law, plaintiff should have been
21 granted summary judgment.

22 Defendant finds that principle in decisions
emphasizing an insurance company's duty to act in good faith
toward its insured in settlement of claims and urges that

1 plaintiff breached this obligation, thereby barring it from
2 recovery. See, e.g., Fireman's Fund Ins. Co. v. Security
3 Ins. Co. of Hartford, 72 N.J. 63 (1976); Rova Farms Resort v.
4 Investors Ins. Co., 65 N.J. 474 (1974). Though we do not
5 doubt that insurance companies must act in good faith in
6 settling claims, the case law defining this duty has
7 developed when companies have refused to settle following
8 which judgments are obtained against insureds in excess of
9 the policy limits. We are aware of no case in New Jersey,
10 however, which indicates that a company may be held to have
11 acted in bad faith in settling a claim within the policy
12 limits when its power to do so is not conditioned upon
13 obtaining the consent of the insured. The Supreme Court's
14 decision in Lieberman v. Employers Ins. of Wausau, 84 N.J.
15 325 (1980), though indicating that a carrier may be liable
16 for settling a claim within the policy limits, is not
17 contrary as the policy there had a provision that any
18 settlement required the consent of the insured which, though
19 originally obtained, had been revoked before the settlement.

20 We are convinced that an insurance company may not
21 be held liable or be held to lose its rights to recover a
22 deductible on a claim of bad faith to its insured when it
23 settles a case within the policy limits. A contrary ruling
would encourage a carrier proposing a settlement to consult

1 with its insured before agreeing to it. While this in itself
2 would not be unreasonable, in practice if a carrier settling
3 without the insured's consent could be held to have acted in
4 bad faith, there would be a loss of potential settlements.
5 Persons subject to claims frequently consider their own
6 actions to have been faultless in situations where juries,
7 judges and professional claims evaluators view them as
8 having been negligent. Thus, some insureds would tend to
9 object to objectively prudent settlements requiring
10 contribution from them, particularly in cases such as this
11 one where the insured runs no risk that a failure to settle
12 could result in a verdict in excess of the policy limits.
13 Such an objection might cause a carrier to decline to settle
14 a case even though it considered a settlement desirable.
15 Inasmuch as the law gives a high priority to settlement of
16 lawsuits, we should not adopt a rule of law which discourages
17 them. See Kramer v. Sony Corp. of America, 201 N.J. Super.
18 314, 320 (App. Div. 1985).¹

17 A second reason to avoid incorporation of the
18 requirement that a carrier act in good faith in settling a
19 case within a policy limit is that the good faith requirement

20 1 While the underlying claim of Adler was asserted in a
21 lawsuit, obviously our opinion would also apply in cases in
22 which the carrier settled the third-party claim without
litigation.

1 is ordinarily imposed to protect an insured from an insurance
2 carrier's refusal to settle within the policy limit thereby
3 putting the insured's personal assets at peril. See
4 Rova Farms Resort v. Investors Ins. Co., supra, 65 N.J.
5 496-502. Here, the insured did get the benefit of a
6 settlement within the policy limits and thus the reason for
7 the imposition of a duty of good faith is absent.

8 We also point out that liability insurance policies
9 with deductibles are written for commercial risks. Consumers
10 purchasing homeowners', tenants' and automobile liability
11 protection receive policies without deductibles. We think
12 that business persons should recognize that when they accept
13 a liability policy with a deductible they may be called upon
14 to pay it. We also point out that at least in some
15 situations a commercial insured may be able to negotiate for
16 the terms of a policy and thereby obtain a policy according
17 to the right to approve a liability claim settlement. See
18 Casualty Ins. v. Town & Country Pre-School, ___ Ill. App.3d
19 ___, 498 N.E.2d 1177, 1179 (App. Ct. 1986).

20 Another consideration leading to our result is that
21 defendant could have had the jury trial it sought by
22 defending Adler's action itself. We are certain that
23 plaintiff would not have objected if defendant had waived its
insurance protection, defended Adler's action at its own

1 expense and, if Adler obtained a judgment, satisfied it. It
2 is obvious, however, that defendant did not want to run the
3 risk of a judgment as it called on plaintiff for a defense.
4 In reality, defendant contends that it should have the most
5 favorable aspects of two inconsistent positions. It wanted
6 to control the litigation by rejecting the settlement but it
7 claimed the advantage of its insurance, thereby receiving a
8 defense at plaintiff's expense and protection from Adler's
9 claim. Inasmuch as defendant sought the protection of its
10 insurance, it had to accept the burdens that went with it.

11 Finally, we note that the result we reach finds
12 support in the case law. In Travelers Ins. Co. v. Hitchner,
13 61 N.J. Super. 283 (Law Div. 1960), the plaintiff insurance
14 company had issued a liability policy with a \$500 deductible
15 to a roller skating rink. The policy had a provision
16 permitting the carrier to settle any claim without the
17 defendant insured's consent. The plaintiff settled a claim
18 for \$1,000. When the defendant would not pay the deductible,
19 the plaintiff sued for reimbursement. The insured defended
20 on a theory that his defense to the underlying liability
21 claim was sufficient and, thus, the case should not have been
22 settled as the claimant could not have recovered. The court
23 rejected the insured's claim and entered judgment for the
24 plaintiff as the policy granted the plaintiff the right to

1 settle the case. While we recognize that almost 27 years
2 have elapsed since the decision in Travelers Ins. Co. v.
3 Hitchner, we find nothing in the cases since then to lead us
4 to question the result in that case. See also Marginian v.
5 Allstate Ins. Co., 18 Ohio St.3d 345, 481 N.E.2d 600 (Sup.
6 Ct. 1985); Casualty Ins. Co. v. Town & Country Pre-School
7 Nursery, Inc., supra, ___ Ill. App.3d at ___, 498 N.E.2d at
8 1177; Orion Ins. Co., Ltd. v. General Electric Co., 129
9 Misc.2d 466, 493 N.Y.S.2d 397 (Sup. Ct. 1985).

10 In reaching our result, we have not overlooked the
11 fact that an insurance company might act unreasonably in
12 settling a case for less than the policy limits. For
13 example, a carrier might settle a doubtful claim for the
14 amount of the deductible or some lesser amount to save
15 attorney's fees. Nevertheless, we think that for the
16 practical considerations we have stated and because of the
17 agreement between the insured and the company, our result
18 should be reached. In the event that a carrier does act
19 unreasonably in settling within the policy limits, the
20 insured's remedy will be to look elsewhere for coverage in
21 the future.

22 The order of February 18, 1986 is reversed and the
23 matter is remanded to the Superior Court, Law Division,
Middlesex County, for entry of an order for partial summary

1 judgment for liability in favor of plaintiff and for further
2 proceedings. Inasmuch as the parties have not briefed the
3 issue of which deductible is applicable, that issue shall be
4 determined on the remand. We do not retain jurisdiction.

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I hereby certify that the foregoing
is a true copy of the original on file
in my office.

Richard W. Rayburn
Clerk

COPY FILED WITH COUNTY CLERK

FILED

MAY 21 1987

ROSEMARY K. REAVEY
J.S.C.

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DE GONGE, GARRITY & FITZPATRICK

A PROFESSIONAL CORPORATION

430 BROAD STREET

P. O. BOX 1560

BLOOMFIELD, N. J. 07003

201.748-7400

ATTORNEYS FOR Plaintiff, American Home Assurance Co., Inc.

Plaintiff

AMERICAN HOME ASSURANCE COMPANY, INC.,

vs.

Defendant

MURMANN'S WAREHOUSE CORPORATION,

SUPERIOR COURT
OF NEW JERSEY

LAW DIVISION: MIDDLESEX
COUNTY

Docket No. L-37215-84

CIVIL ACTION
ORDER

This matter being presented to the Court by DeGonge, Garrity & Fitzpatrick, P.A., attorneys for plaintiff, American Home Assurance Company, for an Order granting Summary Judgment in favor of American Home Assurance Company, and the Court having heard oral argument and reviewed the matter, together with moving papers in this matter, and being of the opinion that good cause exists,

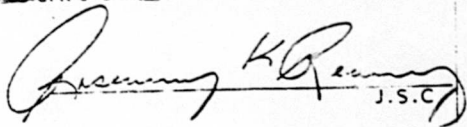
IT IS on this 21st day of May, 1987,

ORDERED, that Judgment in favor of plaintiff, American Home Assurance Company, Inc., in the amount of \$20,000 be and hereby is granted.

DG-186

1 IT IS FURTHER ORDERED, that a true copy of this Order shall be
2 served upon all counsel of record by counsel for the movant within 7 days of

3 ~~the date of filing of this Order.~~
4 *the date herein.*

5 
6 J.S.C.

7 PAPERS CONSIDERED:

- 8 Notice of Motion
9 Movant's Affidavits
10 Movant's Briefs
11 Answering Affidavits
12 Answering Brief
13 Cross Motion
14 Movant's Reply
15 Other

~~0100 SEP 1987~~

~~A168 SEP 1987~~

~~A27 SEP 1988~~

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JUL 9 1987

Supreme Court of New Jersey

SUPREME COURT
OF NEW JERSEY

FILED
JUL 9 1987

Docket No. *27,544*

AMERICAN HOME ASSURANCE
COMPANY, INC.,

Plaintiff-Respondent,

vs.

HERMANN'S WAREHOUSE CORPO-
RATION,

Defendant-Petitioner.

Civil Action *Stephen Robinson*
CLERK

On Cross-Petition
for Certification to the
Superior Court of New
Jersey, Appellate
Division

Sat Below:
Greenberg, Cohen
and Gruccio, J.J.A.D.

CROSS-PETITION FOR CERTIFICATION

2 DE GONCE, GARRITY & FITZPATRICK, P.A.
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430 Broad Street
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Bloomfield, New Jersey 07003-1560
(201) 748-7400

ATTN DANIEL C. NOWELL, Esq.

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Appellate
prim/eva,inc.

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TABLE OF CITATIONS

Cases Cited:

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Rule Cited:	
R. 4:42:11(b)	8

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2 On April 14, 1987, plaintiff-respondent moved for Summary
3 Judgment on remand from the Appellate Division to determine the
4 deductible amount and applicable interest. Briefs were submitted
5 and oral argument was heard on May 8, 1987. By Order dated May
6 21, 1987, the trial court, the Honorable Rosemary K. Reavey
7 presiding, entered an Order granting final judgment in favor of
8 plaintiff-respondent in the amount of \$20,000. without interest.
9 (See defendant-petitioner's appendix Da 186)
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QUESTIONS PRESENTED

1. Whether pre-judgment interest on the policy deductible amount is payable to the plaintiff-cross-petitioner.

2. Did the Appellate Division err in its conclusion that Traveler's Insurance Company v. Hitcher, 61 N.J. Super. 283 (Law Div. 1960) is good law and that pursuant to the policy in question, the plaintiff was empowered to settle the outstanding claim and be reimbursed for the deductible amount in accordance with the policy.

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2 ERRORS COMPLAINED OF

3 1. The Trial Court erred in its denial of pre-judgement
4 interest on the policy deductible amount payable to the
5 plaintiff.
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ARGUMENT

POINT I

PREJUDGMENT INTEREST ON THE POLICY DEDUC-
TIBLE AMOUNT IS PAYABLE TO THE PLAINTIFF

The defendant's liability for the insurance deductible amount having been decided in this case the Court is empowered to grant pre-judgment interest on the insurance deductible amount, \$20,000. due and owing to the plaintiff under the provisions of the insurance contract between the parties.

At least in the case of a liquidated sum, prejudgment interest has been regarded by our Courts as compensatory to indemnify the plaintiff for the loss of what the monies due him would possibly have earned if payment had not been refused. See Busik, supra 63 N.J. at 356, 358. The issue is not whether the plaintiff can prove a loss by virtue of having had to pay interest to get money or by having lost interest from a bank account or investment through removal of the sum therefrom. The loss, rather, is assumed. See Jersey City v. O'Callahan, 41 N.J.L. 319, 354 (E & A 1879); Kumens v. Fortugno, 108 N.J. Super. 544, 554 (Ch. Div., 1970). The basic consideration is that the defendant has had the use, and the plaintiff has not, of the amount in question and the interest factor simply covers the value of the sum awarded for the prejudgment period during which the defendant had the benefit of the monies to which the plaintiff is found to have been earlier entitled. See Small v. Schuncke, 42 N.J. at 359, 360. This consideration has controlled, and the interest has been imposed even where, as here, the defendant had in good faith contested the validity of the claim. Thus, in Kumens v. Fortugno, supra, 108 N.J. Super. at 552-553, it was held that pre-judgment interest on a claim, the amount of which is ascertained, is not avoided by honest disputation over legal liability. The

1
2 Court observed that "defendants had the use
3 of the money and presumably earned such in-
4 terest, dividends or other benefits therefrom
5 as were available," whereas the plaintiff was
6 deprived of any such enjoyment. 108 N.J. Super.
7 at 554.

8 Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 506 (1974)
9 (emphasis in original).

10 It is well settled in New Jersey that generally, the awarding
11 of pre-judgment interest is in the discretion of the trial court
12 in accordance with the principles of equity. A.J. Tenwood v.
13 Orange Sr. Citizens Housing, 200 N.J. Super. 515, 525 (App. Div.
14 1985); Fasolo v. Division of Pensions, 190 N.J. Super. 573, 585
15 (App. Div. 1983); Bak-A-Lum Corp. v. Alcoa Building Products, 69
16 N.J. 123, 131 (1976). In the case at bar, the defendant refused
17 to reimburse the plaintiff for the insurance deductible which was
18 due and owing to the plaintiff under the provisions of the
19 insurance policy. The defendant received the benefit of not
20 paying the liquidated sum, thus, as a matter of equity recovery
21 of pre-judgment interest by the plaintiff is clearly appropriate.

22 In an earlier decision, the Supreme Court held that equities
23 weighed in favor of the ultimate obligee after establishing
24 simply that the obligor had the use of the liquidation amount,
25 the obligee had been deprived of the use of it and had been "put
to the expense and inconvenience of ... litigating this action to

1
2
3 establish ... liability..." Small v. Schunck, 42 N.J. 407, 416
4 (1964).

5 Interest began to accrue in this matter on the date that the
6 deductible amount became due and owing. A.J. Tenwood, supra, 200
7 N.J. Super. at 526. This occurred when the plaintiff made its
8 first demand for the deductible from the defendant on July 27,
9 1983. The defendant subsequently refused to pay the deductible
10 by letter dated August 31, 1983. Accordingly, prejudgment
11 interest should be calculated in accordance with R. 4:42:11(b) at
12 the rate of 12% simple interest, from July 27, 1983 through the
13 date of the entry of this Court's Judgment.
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2 POINT II

3 THERE ARE NO GROUNDS FOR CERTIFICATION
4 OF DEFENDANT-PETITIONER PETITION FOR
5 CERTIFICATION

6 There is no question of general public importance which has
7 not been settled nor is there conflict with other applicable case
8 law. The interest of justice does not require further hearing of
9 this matter and Certification should not be allowed as no special
10 reason exists.

11 Not wishing to reiterate the arguments made in its prior
12 brief and by the Appellate Court in its decision this party will
13 rely upon those arguments set forth in its Appellate Brief. (See
14 defendant-petitioner's appendix Da 5) and the decision of the
15 Appellate Division dated 2/24/87 (See defendant-petitioner's
16 appendix Da 175)
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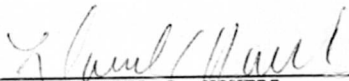
CONCLUSION

For the foregoing reasons, it is respectfully requested that defendant-petitioner's Petition for Certification be denied.

CERTIFICATION

I certify that this Cross-Petition presents substantial questions and is filed in good faith and not for purposes of delay.

Respectfully submitted,
DE GONGE, GARRITY & FITZPATRICK, P.A.

By: 
DANIEL C. NOWELL

Dated: July 6, 1987

A - A-4005-8577

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~~ALCS SEP 1987~~

A 27 SEP 1988

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MIDDLESEX COUNTY
DOCKET NO. L-37214-84

AMERICAN HOME ASSURANCE COMPANY, INC.:

Plaintiff, :

vs. :

HERMANN'S WAREHOUSE CORPORATION, :

Defendant. :

Place: Middlesex County Courthouse
New Brunswick, New Jersey
Date: February 14, 1986

3-C
APR 15 4 21 PM '88
SUPERIOR COURT
OF NEW JERSEY

B E F O R E:

HONORABLE ROSEMARY K. REAVEY, J.S.C.

FILED
APPELLATE DIVISION
APR 15 1988
Elizabeth M. Laughlin

LINDA LOPES STEIN, C.R.S.R.
OFFICIAL COURT REPORTER
MIDDLESEX COUNTY COURTHOUSE
NEW BRUNSWICK, NEW JERSEY

PERGAS CO., BAYONNE, N.J. 07002 FORM 2848

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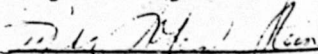
1 THE COURT: As to American Home
2 Assurance Company versus Hermann's Warehouse
3 Corporation, there are motions for summary
4 judgment.

5 The plaintiff, American Home
6 Assurance Company, settled the case and seeks
7 recovery of the deductible. Defendant opposes
8 the motion for summary judgment and seeks
9 motion for summary judgment in its own behalf
10 arguing that it did not participate in the
11 settlement, did not approve the settlement
12 and should not be required to pay the
13 deductible.

14 I am satisfied from the arguments
15 of counsel that the defendant's position is
16 the sound one. In fact, it did not approve
17 the settlement and should not be required to
18 pay the deductible. I am going to grant
19 summary judgment for the defendant.
20 Accordingly, I will deny summary judgment
21 on behalf of the plaintiff.

22 C E R T I F I C A T E

23 I, LINDA LOPES STEIN, a Certified
24 Shorthand Reporter of the State of New Jersey,
25 certify the foregoing to be true and accurate
to the best of my knowledge and ability.


LINDA LOPES/STEIN, C.S.R.

C495 SEP 1987

A168 SEP 1987

A27 SEP 1988

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-MIDDLESEX COUNTY
Docket No. L 37214-84
Appellate No. -----

AMERICAN HOME ASSURANCE :
COMPANY, INC., :

Plaintiff, :

-vs- :

HERMANN'S WAREHOUSE CORP., :
Defendant. :

Transcript Of
Judge's Decision

RECEIVED
AUG 7 1987

SUPREME COURT
OF NEW JERSEY
Friday, May 6, 1987
Middlesex County Courthouse
New Brunswick, New Jersey

B E F O R E :

THE HONORABLE ROSEMARY K. REAVEY, J.S.C.

Transcript Ordered By: Daniel C. Nowell, Esq.

A P P E A R A N C E S :

DeGONGE, GARRITY & FITZPATRICK
BY: DANIEL C. NOEWLL, ESQ.
For the Plaintiff

THOMAS J. SHAMY, ESQ.
BY: WILLIAM J. SHIPERS, ESQ.
For the Defendant

IKE CITTONE, C.S.R.
Official Court Reporter
Middlesex County Courthouse
New Brunswick, New Jersey

COMPUTER AIDED - TRANSCRIPT

1 (Legal argument deleted.)

2 THE COURT: Thank you. I think the
3 issues have been very adequately briefed
4 and covered in the papers that have been
5 filed.

6 I am not sure anything was quite as
7 clear when the original summary judgment
8 motion was made. However, we now have the
9 benefit of the Appellate Division opinion
10 clearly indicating that there is an
11 obligation to pay the deductible, unless it
12 is very clearly enunciated in the policy
13 that the insured can become involved in the
14 decision as to whether to litigate or not.

15 The only issue that is before this
16 Court on the summary judgment motion is
17 whether the deductible amount is \$20,000 or
18 \$40,000, and that does turn on the language
19 of the policy as to whether this was an
20 unexplained loss or not, in which instance
21 it would be the \$40,000 deductible.

22 I agree with Mr. Shipers, it is not
23 unexplained. I don't think Mr. Nowell
24 argues too strenuously that what happened
25 to the two truck loads of merchandise

1 overnight was that they were stolen.

2 They were in fact located in some
3 discount or some of them were located in
4 some discount store at some later date,
5 and I think clearly that is not an
6 unexplained loss, but rather a theft of a
7 product, and the \$20,000 will apply.

8 The interest, as the prejudgment
9 interest, is a more difficult thing to
10 decide, because it is in the discretion of
11 the Court, and because of the very
12 substantial amount of time that has passed
13 from the time that the demand was made up
14 until the present time, as somebody
15 indicated it was from 1983 that the
16 original demand was made by the insurance
17 company to Hermann's to pay the deductible,
18 and I don't think truly, until today, that
19 amount has been determined as to whether it
20 was \$20,000 or \$40,000.

21 Along those lines, it seems
22 reasonable to me not to impose any
23 requirement of prejudgment interest.

24 The judgment will be entered in the
25 amount of \$20,000.

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I suppose you won, Mr. Nowell, so
you will submit the order.

MR. NOWELL: Yes, your Honor.

THE COURT: All right.

MR. SHIPERS: Thank you, your
Honor.

MR. NOWELL: Thank you.

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C E R T I F I C A T E

I, IKE CITTONE, C.S.R., a Certified Shorthand Reporter of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of my original stenographic notes taken in the above matter, to the best of my knowledge and ability.



IKE CITTONE, C.S.R.
Cert. No. XI0484

Dated: July 27, 1987