

**SUMMER LAW UPDATE:****BROKER LIABILITY:**

*Potential Negligent Misrepresentation Claims for Facially Truthful Certificates of Insurance*

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In Witkowski v. Richard W. Endlar Ins. Agency, Inc., 81 Mass. App. Ct. 785 (2012), the Appeals Court of Massachusetts held that genuine issues of material fact existed concerning whether a certificate of insurance, containing no outwardly false assertions, could amount to negligent misrepresentation. In so doing, the Court reversed an earlier decision granting summary judgment in favor of the issuing broker.

The lawsuit derived from the Plaintiff's 2005 purchase of one of four basement units in the Balmoral Condominium complex. Since the unit was located in a special flood hazard, the plaintiff's mortgage lender required evidence of flood insurance as a condition of closing. In pursuit of such evidence, a paralegal working for the lender's attorney contacted the condominium management company and was referred to Richard W. Endlar Insurance

Agency, Inc. The paralegal subsequently faxed Endlar a request for proof of flood insurance and disclosed that the lender required such proof as a condition for closing. In response, Endlar issued a one-page statement declaring the "[a]bove unit is insured under the Master Policy issued to Balmoral Condominium Trust Its Trustees and All Unit Owners, A.T.I.M.A \*as follows.\*" The document proceeded to list "2500000" in flood insurance issued by "Clarendon National Ins.," and flood insurance issued by "The Hartford" covering the "Building" in the amount of "9800000." Relying on the certificate of insurance, the parties closed the deal and the Plaintiff purchased the unit.

Unfortunately for the Plaintiff, the Shawsheen River later flooded and destroyed the unit, and a trustee of the condominium association informed him that all basement units were excluded from flood coverage under the association's master policy. After learning of the exclusion, the Plaintiff filed a negligent misrepresentation claim against Endlar (Plaintiff filed an additional claim not discussed in this piece against its title insurer). Endlar responded with a motion for summary judgment arguing that the certificate of insurance contained no outwardly false statements and the claim therefore failed as a matter of law.

In rendering its decision, the court acknowledged that the certificate accurately stated that the unit was insured under the Master Policy and made no blatantly false assertions. The court further noted that the certificate made no false representations regarding specific coverage/exclusions under the Master Policy. However, the Court ultimately concluded that sufficient issues of material fact existed to deny the motion because: "(i) [the certificate] was delivered in direct response to a request for verification of flood insurance coverage for

the unit, (ii) on the summary judgment record it appears that all the units in the condominium other than the four basement units were covered by the master policy of flood insurance, and (iii) the certificate contains no indication or warning that the Plaintiff's unit was excluded entirely from such coverage." *Id.* at 791.

In so holding, the Court determined that the circumstances surrounding the issuance of the certificate created sufficient triable questions of fact concerning whether the certificate falsely represented coverage for flood damage and whether the Plaintiff reasonably relied on these representations to his detriment. The Court placed great emphasis on Endlar's knowledge that the Plaintiff required, and would rely on, the certificate as proof of flood coverage. The Court noted that since flood coverage was the essential purpose of the Plaintiff's dealing with Endlar, and because the flood exclusion in the master policy so dramatically altered flood coverage, a reasonable trier of fact could conclude that Endlar negligently misrepresented flood coverage. The Court even suggested that the circumstances of this case might not warrant summary judgment even if the certificate of insurance had included express terms of limitation (i.e. that the listed policies were "subject to any other conditions or limitations, or that the recipient should review the policies themselves in order to ascertain the scope or existence of coverage."). *Id.* at 790.

In sum, even though the certificate of insurance was technically accurate, the Court held that the circumstances and purpose for which the Plaintiff requested the certificate could lead a reasonable fact finder to declare the Plaintiff "relied to his detriment on materially false information furnished by Endlar." *Id.* at 790-91.

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